

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOLT HAULING & WAREHOUSING, INC. : CIVIL ACTION
& HOLT CARGO SYSTEMS, INC. :
 :
v. :
 :
PORT OF PHILADELPHIA & CAMDEN, INC.:
& DELAWARE RIVER PORT AUTHORITY : NO. 98-30

MEMORANDUM and ORDER

Norma L. Shapiro, J.

August 17, 1998

Plaintiffs Holt Hauling & Warehousing, Inc. ("Holt Hauling") and Holt Cargo Systems, Inc. ("Holt Cargo"), alleging violation of an interstate compact approved by Congress and the President, filed this action under 42 U.S.C. § 1983 against defendants Port of Philadelphia & Camden, Inc. ("PPC") and Delaware River Port Authority ("DRPA"). Defendants have filed a joint motion to dismiss or for summary judgment; the joint motion for summary judgment will be granted.

BACKGROUND

Plaintiff Holt Hauling is a Pennsylvania corporation with its principal place of business in Gloucester City, New Jersey. (Compl. ¶ 5). Holt Hauling holds title to a marine terminal facility in Gloucester City (the "Gloucester Terminal") leased to third-party tenants who offer stevedoring, warehousing and other terminal services in the Port District of Philadelphia,

Pennsylvania and Camden, New Jersey.¹ (Id. ¶ 6).

Plaintiff Holt Cargo is a Delaware corporation with its principal place of business in Philadelphia, Pennsylvania. (Id. ¶ 7). On December 30, 1990, Holt Cargo entered into an Amended and Restated Lease and Operating Agreement (the "Amended Lease") with the Philadelphia Regional Port Authority ("PRPA") for the Packer Avenue Marine Terminal ("Packer") in the Port District. (Id. ¶ 8). Holt Cargo assigned its interests in the Amended Lease to Astro Holdings, Inc. ("Astro") on June 14, 1991; Astro thereafter subleased Packer back to Holt Cargo. Holt Cargo provides stevedoring, warehousing and other terminal services at Packer. (Id. ¶ 10).

Defendants are both state-created entities. Defendant DRPA is a public corporate instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey created under an amended interstate compact approved by Congress and the President under the Interstate Compact Clause, U.S. Const. art. I, § 10, cl. 3 (the "Amended Compact"). (Id. ¶ 12.). Defendant PPC is a public corporate entity of the Commonwealth of Pennsylvania and the State of New Jersey created in April, 1994 under the Amended

¹ "Port District shall mean all the territory within the counties of Bucks, Chester, Delaware, Montgomery and Philadelphia in Pennsylvania, and all the territory within the counties of Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Ocean and Salem in New Jersey." Pa. Stat. Ann. tit. 36 § 3503 (Amended Compact art. XII-B).

Compact as DRPA's subsidiary; its purpose is to implement unification of the Port District. (Id. ¶¶ 11, 18, 20).

I. Port Unification

Congress and the President approved the interstate compact creating DRPA in 1932.² See 47 Stat. 308 (1932). DRPA originally was responsible for operating toll bridges over the Delaware River. The compact was amended by Congress in 1952 and 1964 to expand DRPA's powers to create a rapid transit system between Philadelphia and Camden and provide commercial facilities needed for port development.

In years following enactment of the compact, as amended, port facilities were owned by competing private and government entities. PRPA owned port facilities on the Philadelphia side of the Delaware River and the South Jersey Port Corporation ("SJPC") owned facilities on the Camden side. Private entities, such as Holt Cargo and Holt Hauling, competed with PRPA and SJPC for port business. (Compl. ¶ 23).

In 1992, Pennsylvania and New Jersey enacted legislation revising the compact again to unify the Port District. (Compl. ¶ 14); see Pa. Stat. Ann. tit. 36 § 3503, et seq.; N.J. Stat. Ann. § 32:3-1, et seq. The purpose of port unification was to create a "common front" between government and private entities to draw

² Originally, DRPA was called the Delaware River Joint Commission. In 1952, its name was changed to DRPA.

business to this Port District from competing ports in Baltimore and Wilmington and to avoid needless "churning" of business from one local facility to another. (Compl. ¶ 24). Congress approved the amendments and the President signed the legislation on October 27, 1992. See 106 Stat. 3576 (1992); (Compl. ¶ 15).³

The 1992 amendments (the "Amended Compact") contemplated DRPA's adoption of a comprehensive master plan for Port District development:

The [DRPA] shall, not later than two years after the date of the coming into force of the supplemental compact or agreement authorized by this 1992 amendatory act, prepare a comprehensive master plan for the development of the Port District. The plan shall include, but not be limited to, plans for the construction, financing, development, reconstruction, purchase, lease, improvement and operation of any terminal, terminal facility, transportation facility or any other facility of commerce or economic development activity. The master plan shall include the general location of such projects⁴ and facilities⁵ as may be

³ Two identical bills approving the 1992 amendments to the compact as previously amended were enacted by the House of Representatives, H.R. 5452, and Senate, S. 2964. Because the bills contained the same language, President Bush signed S. 2964 and pocket vetoed H.R. 5452. See Statement by President George Bush Upon Signing S. 2964, 1992 U.S.C.C.A.N. 3102 (Oct. 27, 1992); H.R. Rep. 102-1085.

⁴ Projects are defined as "improvement, betterment, facility or structure authorized by or pursuant to this compact or agreement to be constructed, erected, acquired, owned or controlled or otherwise undertaken by [DRPA]." Amended Compact art. XII-B.

⁵ Facilities include "all works, buildings, structures, property, appliances, and equipment, together with appurtenances necessary and convenient for the proper construction, equipment, maintenance and operation of a facility or facilities or any one

included in the master plan and shall to the maximum extent practicable include, but not be limited to, a general description of each such projects and facilities, the land use requirements necessary therefor and estimates of project costs and of a schedule for commencement of each such project.

Amended Compact art. XII.

The 1992 amendments also provided for notice of planned port developments:

Prior to adopting such master plan, the commission shall give written notice to, afford a reasonable opportunity for comment, consult with and consider any recommendations from State, county and municipal government, as well as commissions, public corporations and authorities and the private sector. The commission may modify or change any part of the plan in the same form and manner as provided for the adoption of the original plan.

Id.

When DRPA authorizes any "project or facility," it must provide the governor and legislature of both states with a written report on the proposed development:

At the time the commission authorizes any project or facility, the commission shall promptly provide to the Governor and Legislature of each state a detailed report on the project, including its status within the master plan. The commission shall include within the authorization a status of the project or facility in the master plan and any amendment thereof, and no project shall be authorized if not included in the master plan or amendment thereof. Any project which has been commenced and approved by the commission prior to the adoption of the master plan shall be included, for informational purposes only, in the master plan. The commission shall provide notice of such ongoing projects to those State, county and municipal

or more of them." Amended Compact art. XII-B.

governments, as well as entities in the private sector who would be entitled to such notice had the project not been commenced in anticipation of adopting the master plan, but there shall be no requirement that the project be delayed or deferred due to those provisions.

Id. In the reports to the state governments, DRPA "shall include therein its findings which fully set forth that the facility or facilities operated by private enterprise within the Port District and which it is intended shall be supplanted or added to are not adequate." Amended Compact art. IV.

Both states reserved "the right to provide by law for the exercise of a veto power by the Governor of that State over any action of any [DRPA] commissioner from that State at any time within ten days (Saturdays, Sundays and public holidays in the particular state except) after receipt at the Governor's office of a certified copy of the minutes of a meeting at which such vote was taken." Amended Compact art. III. Because no action taken by DRPA is binding unless approved by a majority of the commissioners from both states, the veto power gives each state a check on DRPA's actions. To date, only New Jersey has enacted legislation granting the governor veto power over the actions of New Jersey's DRPA commissioners. See N.J. Stat. Ann. 32:3-4a.

Plaintiffs claim unification of the Port District was to occur by October 27, 1994, two years after the 1992 amendments were enacted, because DRPA was obliged to adopt a comprehensive master plan for port development within that time. The Amended

Compact gave DRPA the authority to oversee "any and all projects for the improvement and development of the Port District for port purposes, or directly related thereto." Amended Compact art. I(c). Plaintiffs claim PRPA and SJPC were to dissolve and transfer all independent authority for port development on their respective sides of the Delaware River to DRPA and its subsidiary PPC on October 27, 1994, the unification date. The Amended Compact envisions DRPA's "[c]ooperation with all other bodies interested or concerned with, or affected by the promotion, development or use of the Delaware River and the Port District." Id. art. I(d).

II. Civil Action No. 94-7778

Holt Cargo, Holt Hauling and Astro, alleging violations of due process, equal protection and the Amended Compact, filed Civil Action No. 94-7778 against DRPA, PPC and PRPA under 42 U.S.C. § 1983. In that action, plaintiffs claimed the three defendants conspired together and with third-parties to drive them out of business. In the revised Second Amended Complaint, plaintiffs alleged DRPA and PPC concealed numerous capital projects included in PPC's budget, failed to include the projects in a comprehensive master plan, and failed to notify plaintiffs prior to approving financing for the projects, all of which were required by the Amended Compact.

Defendants filed a motion to dismiss plaintiffs' revised

Second Amended Complaint. By Memorandum and Order dated November 13, 1997, the court granted in part and denied in part defendants' motion. The court held that plaintiffs did not state separate causes of action directly under the Amended Compact, Cort v. Ash, 422 U.S. 66, 78 (1975), or for violation of the Amended Compact as a federal statute under 42 U.S.C. § 1983. See Holt Cargo Systems, Inc. v. Delaware River Port Auth., No. 94-7778, 1997 WL 714843, at *7 (E.D. Pa. Nov. 13, 1997) [Holt I"]. Plaintiffs also stated claims for violation of due process and equal protection based on the alleged failure of DRPA and PPC to comply with the Amended Compact terms; the court held that the Amended Compact "does not create a private cause of action to enforce the terms of the Amended Compact," and the Amended Compact created no substantive rights enforceable by plaintiffs. See id. at *10.

Plaintiffs, arguing they had raised distinct claims for violation of the Amended Compact under 42 U.S.C. § 1983 and directly under the Amended Compact, moved for clarification of a "clerical error" in the court's November 13, 1997 Memorandum and Order. By Order dated December 23, 1997, the court denied plaintiffs' request to amend its decision that they had not stated meritorious claims for violations of the Amended Compact, directly or under 42 U.S.C. § 1983. See December 23, 1997 Order. The court did not change its holding that plaintiffs could not

recover for predatory acts based on violation of the Amended Compact because rights under the Amended Compact were not enforceable by private parties.

Plaintiffs' substantive due process and equal protection claims, based on predatory acts other than violation of the Amended Compact per se, survived defendants' motion to dismiss, but after the close of discovery, the court granted summary judgment in favor of defendants on those remaining claims. See Holt Cargo Systems, Inc. v. Delaware River Port Auth., No. 94-7778, 1998 WL 134317 (E.D. Pa. Mar. 23, 1998). Plaintiffs' appeal is pending.

III. Civil Action No. 98-30

Plaintiffs filed this action on January 5, 1998 ["Holt II"]. They claim certain projects DRPA has undertaken were invalid because DRPA failed to adopt a comprehensive master plan on or before October 27, 1994 as the Amended Compact required. Plaintiffs complain that DRPA spent \$200,000,000 through its subsidiary PPC, on improvements in the Port District without properly including them in a master plan or notifying plaintiffs as required by statute. In particular, plaintiffs allege DRPA, through PPC, financed a \$2,500,000 construction of refrigerated buildings at the Broadway Terminal leased by Del Monte. (Compl. ¶¶ 63-65). DRPA was authorized to finance the improvement of the Broadway Terminal, see Amended Compact art. I(n), but plaintiffs

claim DRPA failed to include the financing in any master plan adopted under Article XII of the Amended Compact. (Id. ¶ 66).

Plaintiffs argue DRPA was required by the Amended Compact to provide written notice and an opportunity to respond to every private company operating within the thirteen counties of Pennsylvania and New Jersey comprising the Port District before financing improvements or new developments anywhere within the Port District. Plaintiffs also claim that DRPA and its subsidiary PPC were prohibited from spending public money on port development without explicit findings that private facilities within the Port District were inadequate. Finally, plaintiffs claim they were prevented from exercising their right under the Amended Compact to petition the governors of both Pennsylvania and New Jersey to veto DRPA's action within ten days thereof.⁶ (Id. ¶ 67).

Plaintiffs seek to recover under 42 U.S.C. § 1983 for these alleged violations of the Amended Compact. Plaintiffs seek: 1) a declaration that all financing and development projects undertaken by DRPA and PPC in the Port District prior to adopting a master plan are invalid; 2) an injunction prohibiting DRPA and PPC from funding further developments without complying with the

⁶ While the Amended Compact permits both states to enact legislation providing for a gubernatorial veto of DRPA acts within ten days, Pennsylvania has not done so. Furthermore, plaintiffs do not allege they wrote to either governor within ten days after DRPA took action or were prevented from doing so.

Amended Compact by providing prior notice to all interested private businesses in the Port District; and 3) unspecified damages. (Compl. ¶ 75).

DRPA and PPC move for summary judgment on the grounds of claim and issue preclusion. Alternatively, defendants move for summary judgment on the ground that there is no private cause of action under 42 U.S.C. § 1983 for violation of the Amended Compact.

DISCUSSION

I. Standard of Review

Defendants filed a motion to dismiss or, in the alternative, for summary judgment. Plaintiffs had knowledge the motion might be treated as a motion for summary judgment; they also had an opportunity to respond accordingly and present affidavits in opposition to summary judgment. The court will treat defendants' motion as a motion for summary judgment.

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific,

affirmative evidence there is a genuine issue for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Rule 56(e) requires the presentation of evidence "as would be admissible" at trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 327; see, e.g., J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1542 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991). The non-moving party cannot rest upon conclusory allegations and unsupported speculation. See Medina-Munoz v. R.J. Reynolds Tobacco, 896 F.2d 5, 8 (1st Cir. 1990); Barnes Foundation v. Township of Lower Merion, 982 F. Supp. 970, 982 (E.D. Pa. 1997). The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a

verdict for the non-moving party." Id. at 248.

II. Issue Preclusion

Plaintiffs seek to recover under 42 U.S.C. § 1983 for violation of a federal statute because DRPA and PPC have allegedly breached the Amended Compact terms.⁷ Defendants argue that this claim is barred by issue preclusion or collateral estoppel because the court has already determined the Amended Compact does not create any federal right enforceable under 42 U.S.C. § 1983.

The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

Southern Pacific R.R. Co. v. United States, 168 U.S. 1, 48-49 (1897). "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent

⁷ Plaintiffs do not seek the right to enforce a direct private cause of action under the Amended Compact according to the requirements of Cort v. Ash, 422 U.S. 66, 78 (1975). (Compl. ¶ 2).

decisions.” Montana v. United States, 440 U.S. 147, 153-54 (1979); see Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).

Four factors determine issue preclusion: 1) whether the identical issue was previously adjudicated; 2) whether the issue was actually litigated; 3) whether the previous determination was necessary to the decision; and 4) whether the party being precluded from re-litigating the issue was fully represented in the prior action. See Raytech Corp. v. White, 54 F.3d 187, 190 (3d Cir.), cert. denied, 516 U.S. 914 (1995); United Industrial Workers v. Virgin Islands, 987 F.2d 162, 169 (3d Cir. 1993).

A. Identical Issue

According to Holt Cargo and Holt Hauling, the gravamen of Holt II is that DRPA and PPC approved expenditure of funds for the Broadway Terminal, owned by SJPC and leased to Del Monte, and for other facilities without complying with the notice requirements of the Amended Compact or making explicit findings that existing private industry was incapable of fulfilling the needs of the port community. See Pltffs.’ Mem. Opp. Summ. Jgmnt. at 5. Plaintiffs argue they have a right to enforce the terms of the Amended Compact by this action under 42 U.S.C. § 1983.

In Holt I, plaintiffs did not state a separate count for violation of the Amended Compact under 42 U.S.C. § 1983. Plaintiffs in Holt I did refer to several alleged predatory

actions by defendants as part of some general government conspiracy to drive them out of business and deprive them of constitutional rights. They claimed: DRPA's master plan and capital budget failed to report numerous capital projects included in PPC's budget that were reportable under the Amended Compact, (94-7778 Compl. ¶¶ 95-101);⁸ and DRPA violated the Amended Compact by failing to offer an opportunity for notice and comment regarding DRPA's leases and other capital projects. (94-7778 Compl. ¶¶ 102-07). The court determined that, although plaintiffs had not stated a separate cause of action under 42 U.S.C. § 1983 for violation of the Amended Compact, they had alleged several predatory acts based on violation of the Amended Compact for which they were attempting to recover through due process and equal protection claims. The court, citing Blessing v. Freestone, 117 S. Ct. 1353, 1359 (1997) (setting forth the standard for finding an enforceable federal right under 42 U.S.C. § 1983), found the Amended Compact did not grant any enforceable rights to private plaintiffs. See Holt I, 1997 WL 714843, at *7.

In Holt II, plaintiffs claim DRPA and PPC violated the Amended Compact by: omitting proposed projects from the master plan; failing to provide adequate notice of all developments and an opportunity to be heard to private port businesses; and not

⁸ References to the Complaint in Civil Action No. 94-7778 are to the revised Second Amended Complaint.

making proper findings that private Port District industries were incapable of fulfilling commercial needs before authorizing the expenditure of any public funds on port development. (Compl. ¶ 46).

Plaintiffs argue the Amended Compact, as a federal statute, grants them rights enforceable under 42 U.S.C. § 1983. They argue the court decided in Holt I only that there is no private cause of action under the Amended Compact according to Cort v. Ash, 422 U.S. 66, 78 (1975). However, relying on the Blessing standard for creating rights enforceable under 42 U.S.C. § 1983, the court held there was "no private cause of action to enforce the terms of the Amended Compact" and refused to consider violation of the Amended Compact terms as predatory acts under 42 U.S.C. § 1983. The claims in Holt II for violation of the Amended Compact raise the same issue decided in Holt I: whether the Amended Compact creates federal rights enforceable by plaintiffs under 42 U.S.C. § 1983.⁹

⁹ Plaintiffs argue that they are not collaterally estopped by the November 13, 1997 dismissal of their claims for violating the Amended Compact because it was an interlocutory Order. When the court granted summary judgment in favor of defendants in Holt I, the November 13, 1997 Order became final and appealable. The pending appeal from the final Order in Holt I does not affect its preclusive effect. See Old Republic Ins. Co. v. Chuhak & Tecson, 84 F.3d 998, 1000-01 (7th Cir. 1996); National Post Office Mail Handlers v. American Postal Workers Union, 907 F.2d 190, 192 (D.C. Cir. 1990); see also Smith v. Spina, 477 F.2d 1140, 1148 (3d Cir. 1973) (criminal conviction considered final pending appeal).

B. Issue Actually Litigated

Plaintiffs raised the issue of the right to recover for violations of the Amended Compact under 42 U.S.C. § 1983 in Holt I in their petition for preliminary injunction in April, 1997. Plaintiffs argued DRPA, PPC and a third defendant were funding port development projects in violation of the terms of the Amended Compact. The petition for preliminary injunction was withdrawn and plaintiffs filed a Second Amended Complaint including Count XI labeled: "Plaintiffs' Right of Action for Violations of the Amended Compact Under § 1983." DRPA and PPC, arguing plaintiffs had no enforceable rights under the Amended Compact, moved to dismiss the Second Amended Complaint. The court struck plaintiffs' Second Amended Complaint on October 10, 1997 for failure to comply with the Federal Rules of Civil Procedure.

Plaintiffs' revised Second Amended Complaint on October 17, 1997 did not state violation of the Amended Compact as a separate claim, but "still base[d] alleged predatory acts on violation of the terms of the Amended Compact by defendants' failure to make findings that private enterprise was 'inadequate' before authorizing port projects, failure to adopt a master plan by October 27, 1994, concealment of various leases and independent funding of port development projects by PRPA and SJPC rather than by DRPA and PPC having assumed total control." Holt I, 1997 WL

714843, at *7. After extensive briefing by all parties, the court held in Holt I that plaintiffs had no rights under the Amended Compact enforceable through 42 U.S.C. § 1983. See Holt I, 1997 WL 714843, at *7. Plaintiffs' right to enforce the terms of the Amended Compact was fully litigated in Holt I; plaintiffs do not argue otherwise in their brief in opposition to the present motion for summary judgment.

C. Previous Determination Necessary to the Decision

A "judgment of a court of competent jurisdiction is everywhere conclusive evidence of every fact upon which it must necessarily have been founded." Block v. Commissioners, 99 U.S. 686, 683 (1878). To dismiss plaintiffs' claims based on defendants' alleged violations of the Amended Compact terms in Holt I, the court had to decide plaintiffs had no private rights under the Amended Compact enforceable through 42 U.S.C. § 1983. The court expressly based striking plaintiffs' alleged predatory acts based on violations of the Amended Compact on the Blessing case defining the elements required for creating a federal right enforceable under 42 U.S.C. § 1983. See Holt I, 1997 WL 714843, at *7. The court dismissed plaintiffs' claims for recovery under the Equal Protection and Due Process Clauses for violation of the Amended Compact because they had no right to recover under 42 U.S.C. § 1983; that decision was necessary to the holding in Holt

I.¹⁰

D. Plaintiffs Represented in Prior Action

Holt Cargo and Holt Hauling, the plaintiffs in this action, were plaintiffs in Holt I (with Astro, not a party to Holt II). Holt Cargo and Holt Hauling admittedly were represented in Holt I by the same counsel now representing them in Holt II.

E. Changed Factual Circumstances

Although all factors for issue preclusion are present, it is still inappropriate if facts essential to the earlier litigated issue have changed. But where the changed circumstances are not material, issue preclusion remains appropriate. See Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 846 (3d Cir. 1974). "Carried to its extreme, the concept of changed factual circumstances could totally undermine the application of collateral estoppel. Rare would be the case in which counsel

¹⁰ In Holt I, the court also stated that even if there were a private cause of action under the Amended Compact, it would not "intervene to micro-manage the entire Port District because federal judicial interference would be 'disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern': the development and management of the Port District." Holt I, 1997 WL 714843, at *7 (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-16 (1976); Burford v. Sun Oil Co., 319 U.S. 315, 334 (1943)). If the court had abstained under Burford, the court would have had to retain jurisdiction and stay proceedings, rather than dismiss the action, because plaintiffs sought damages. See, e.g., Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 730 (1996); Feige v. Sechrest, 90 F.3d 846, 850-51 (3d Cir. 1996). The court's holding that plaintiffs had no cause of action under 42 U.S.C. § 1983 for violation of the Amended Compact was necessary to the dismissal of those claims.

could not conjure up some factual element that had changed between adjudications." Id. Plaintiffs claim to have new evidence of additional DRPA expenditures not properly disclosed to Holt Cargo and Holt Hauling, but have claimed no changed factual circumstances between the November 13, 1997 Memorandum and Order and January 5, 1998, the date on which they filed the present action. Whether Holt Hauling and Holt Cargo have any private rights under the Amended Compact enforceable through 42 U.S.C. § 1983 was decided in Holt I; Holt II is barred by issue preclusion.

III. Claim Preclusion

DRPA and PPC argue Holt II is also barred by claim preclusion or res judicata. "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94 (1980). Under claim preclusion, even if plaintiffs in Holt I did not specifically raise a claim under 42 U.S.C. § 1983 for violation of the Amended Compact, they could be barred from raising the claim in Holt II if the claim could have been raised in Holt I.

Claim preclusion is proper upon finding: 1) a final judgment on the merits in a prior suit; 2) involving the same parties or their privies; and 3) a subsequent suit based on the

same cause of action. See Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991); United States v. Athlone Indus., Inc., 746 F.2d 977, 983 (3d Cir. 1984). An erroneous conclusion reached by the court in the first action "does not deprive the defendants in the second action of their right to rely upon the plea of res judicata." Federated Dept. Stores v. Moitie, 452 U.S. 394, 398 (1981).

Plaintiffs argue the issue in Holt I was decided by interlocutory Order so claim preclusion is inappropriate. However, when the court subsequently granted summary judgment in favor of defendants in Holt I, the interlocutory Order became final and appealable. See, e.g., Tripati v. Henman, 857 F.2d 1366, 1367 (9th Cir. 1988) (per curiam); 18 Charles A. Wright, et al., Federal Practice and Procedure § 4433, at 308 (1981). Holt Cargo and Holt Hauling were both parties in Holt I.

The term "cause of action" has not been precisely defined, "nor can a simple test be cited for use in determining what constitutes a cause of action for res judicata purposes." Donegal Steel Foundry Co. v. Accurate Prods. Co., 516 F.2d 583, 588 n. 10 (3d Cir. 1975). Courts look to the "essential similarity of the underlying events giving rise to the various legal claims." Davis v. United States Steel Supply, 688 F.2d 166, 171 (3d Cir.1982) (in banc), cert. denied, 460 U.S. 1014 (1983). The issue is "whether the acts complained of were the

same, whether the material facts alleged in each suit were the same, and whether the witnesses and documentation required to prove such allegations were the same." Athlone, 746 F.2d at 984. If so, claim preclusion requires that "a plaintiff present in one suit all the claims for relief that he may have arising out of the same transaction or occurrence." Id.

Plaintiffs concede that Holt I and Holt II "unquestionably" involve "certain overlapping facts and legal issues," Pltffs.' Mem. Opp. Summ. Jgmnt. at 24, but they argue Holt I involved defendants' violations of the Amended Compact between March, 1996 and February, 1997, whereas Holt II involves defendants' violations of the Amended Compact after October 1, 1997. Plaintiffs complain in Holt II that DRPA, while giving plaintiffs notice on October 3, 1997 of proposed funding of the Del Monte improvements, requested comments by October 5, 1997. Plaintiffs claim DRPA knew that plaintiffs' lead and associate counsel "were not accessible for religious reasons" in early October, 1997, and the notice "was nothing more than a continuing part of the Defendants' effort to deny Plaintiffs their rights under the Amended Compact." Pltffs.' Mem. Opp. Summ. Jgmnt. at 31.

The court struck plaintiffs' Second Amended Complain in Holt I on October 10, 1997; plaintiffs filed their revised Second Amended Complaint on October 17, 1997. Plaintiffs could have raised the issue of DRPA's funding of Del Monte facility

improvements in their revised Second Amended Complain in Holt I. Furthermore, plaintiffs are claiming DRPA improperly concealed "five years of business plans, projects, leases and proposed funding of the PPC for the entire Port District," dating back to October, 1995. (Compl. ¶¶ 63, 69). These claims clearly could have been raised in Holt I because they occurred and were known to plaintiffs prior to filing their revised Second Amended Complaint in October, 1997.

Plaintiffs argue that "even if a plaintiff is aware of the factual basis for a suit at the filing of another suit, he or she is not obligated to bring all claims together if they do not arise out of the same transaction." Doe v. Allied Signal, Inc., 985 F.2d 908, 914 (7th Cir. 1993). But the Doe court limited this holding to cases where a claim did not arise out of the same nucleus of facts involved in the first action and could not have been raised in the first action because "a critical piece of the puzzle" was missing. Id. In Holt I, plaintiffs knew of DRPA's and PPC's proposed funding of the Del Monte improvements prior to filing their revised Second Amended Complaint and they did, in fact, raise the claim that DRPA concealed millions of dollars of port expenditures for several years prior to the filing of Holt I; they were not deprived of critical knowledge of the proposal until after they filed the revised Second Amended Complaint, as was the Doe plaintiff.

A party may not recover in a second action for acts occurring after entry of a decision in an initial lawsuit even if the acts did not occur until after the first action was decided where the acts arise from a "single core of operative facts." See Norman v. Niagra Mowhawk Power Corp., 873 F.2d 634, 638 (2d Cir. 1989). Holt Cargo and Holt Hauling argue in Holt II that DRPA and PPC violated the Amended Compact terms by failing to provide adequate notice of port funding projects or make explicit findings that private industry was incapable of handling port demands before expending public funds on port development. They rely on a different incident (the Del Monte development proposal in October, 1997) than the incidents described in Holt I, but the claim is the same in both actions: plaintiffs have a right to enforce the Amended Compact terms. Plaintiffs' Holt II claim that DRPA approved millions of dollars of funding without giving the notice required by the Amended Compact arises from the same core facts as the claim raised in Holt I; the same issue of private rights under the Amended Compact cannot be relitigated in Holt II.

"When a litigant files a lawsuit, the courts have a right to presume that he has done his legal and factual homework. It would undermine the basic policies protected by the doctrine of res judicata to permit the appellants to once again avail themselves of judicial time and energy while another litigant,

who has yet to be heard even once, waits in line behind them.”
Car Carriers, Inc. v. Ford Motor Co., 789 F.2d 589, 596 (7th Cir.
1986). Claim preclusion bars plaintiffs’ claim for recovery
under 42 U.S.C. § 1983 for violation of the Amended Compact.

IV. Rights Under the Amended Compact

Even if plaintiffs’ action in Holt II were not barred by
issue and claim preclusion and the court reached the merits of
their claim for breach of the Amended Compact under 42 U.S.C. §
1983, defendants’ motion for summary judgment would be granted.
Plaintiffs concede they do not have a private cause of action
directly under the Amended Compact according to Cort v. Ash, 422
U.S. 66, 78 (1975). Instead, they seek to recover for violation
of the Amended Compact terms as a federal statute under 42 U.S.C.
§ 1983.¹¹

Section 1983 encompasses violations of both federal
constitutional and statutory law. See Maine v. Thiboutot, 448
U.S. 1, 4 (1980). However, in order to recover under 42 U.S.C. §

¹¹ 42 U.S.C. § 1983 provides:

Every person who, under color of any statute,
ordinance, regulation, custom, or usage, of any State
or Territory or the District of Columbia, subjects, or
causes to be subjected, any citizen of the United
States or other person within the jurisdiction thereof
to the deprivation of any rights, privileges, or
immunities secured by the Constitution and laws, shall
be liable to the party injured in an action at law,
suit in equity, or other proper proceeding for
redress....

1983, a plaintiff must assert violation of a federal right, not merely a violation of federal law. See Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106 (1989); Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981). The issue is whether the Amended Compact, an interstate compact approved by Congress and the President, created any federal right enforceable by Holt Cargo and Holt Hauling.

A court must consider three factors in determining whether a federal statute creates a federal right enforceable under 42 U.S.C. § 1983: 1) "Congress must have intended that the provision in question benefit the plaintiff"; 2) "the plaintiff must demonstrate that the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence"; and 3) "the statute must unambiguously impose a binding obligation on the States." Blessing, 117 S. Ct. at 1359.

A. Notice & Comment Provisions

Plaintiffs claim they have a right to enforce the provisions of the Amended Compact requiring DRPA to include all port development projects and facilities in a master plan and offer private industry an opportunity for notice and comment on all proposed expenditures of public funds. Plaintiffs do not dispute they did receive notice of the proposed funding of improvements

at the Del Monte facility in early October, 1997, but claim the notice was insufficient because the brief comment period included a religious holiday when plaintiffs' attorneys were unavailable.¹² Plaintiffs also allege, as they did in Holt I, that DRPA approved millions of dollars of funding for port projects over a five year period without a master plan.

Article XII of the Amended Compact states that DRPA, in preparing a master plan for proposed port development, "shall give written notice to, afford a reasonable opportunity for comment, consult with and consider any recommendations from State, county and municipal government, as well as commissions, public corporations and authorities and the private sector."

1. Benefit for Plaintiffs

In determining whether a federal statute creates enforceable rights for private parties, a plaintiff must "identify with particularity" the rights claimed; it is insufficient to argue that an entire statute "as an undifferentiated whole gives rise to undefined 'rights.'" Id. at 1360; see Golden State Transit Corp., 493 U.S. at 106.

The ultimate issue is whether the federal statute was intended to create private benefits that can be privately

¹² It is unclear why officers or other officials of Holt Cargo and Holt Hauling were unable to respond to the Del Monte proposal, as plaintiffs make no allegation they were similarly unavailable.

enforced, or set benchmarks that are policed by a governmental entity. In Suter v. Artist M., 503 U.S. 347 (1992), private individuals sued officials of the Illinois Department of Children and Family Services under 42 U.S.C. § 1983 for failing to provide services to neglected, dependent or abused children. Plaintiffs argued the Adoption Assistance and Child Welfare Act of 1980 (the "Adoption Act"), 42 U.S.C. §§ 620-628, 670-679a, a federal reimbursement program for states administering foster care and adoption services, created rights enforceable by private parties. In order to receive federal funds, states had to submit a written plan to the Secretary of Health and Human Services showing that "reasonable efforts" were being made to prevent or eliminate the need for removing a child from his home and facilitating the return of children taken from their parents' custody. See 42 U.S.C. §§ 671(a)(3), (15). Plaintiffs sought injunctive and declaratory relief against state officials allegedly not making "reasonable efforts" to ensure that children were not unnecessarily removed from their homes. See Suter, 503 U.S. at 350-52.

The Court held that the Adoption Act did not create any right to "reasonable efforts" enforceable by private individuals; rather, the Secretary was given authority to reduce or eliminate federal payments to non-complying states. Even though the statute bestowed limited benefits on private individuals, in

providing those benefits to individuals, Congress did not intend to create rights enforceable by private litigation. Private enforcement of the statutory language was not integral to the statutory purpose or necessary to ensure compliance by the states.

In Livadas v. Bradshaw, 512 U.S. 107 (1994), a private individual sued California's Commissioner of Labor under 42 U.S.C. § 1983 for violations of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151, et seq. State law required an employer to pay all wages due at the time of an employee's discharge; the state Commissioner of Labor had responsibility to enforce the provision. The plaintiff was discharged, but her employer refused to pay her wages at the time of discharge. Plaintiff filed a claim with the Labor Commissioner, who stated that he was barred from enforcing the state law wage requirements because her employment was governed by a collective bargaining agreement. Plaintiff, asserting collective bargaining rights under the NLRA, filed a 42 U.S.C. § 1983 action against the Labor Commissioner. See id. at 110-14.

The Court held that NLRA preempted the state rule that, in its application, predicated state benefits on an individual's refraining from collective bargaining activity protected by federal law. See id. at 132. The court also found a private right enforceable under 42 U.S.C. § 1983. Although "not every

instance of federal pre-emption gives rise to a 42 U.S.C. § 1983 cause of action," id. at 133, plaintiff's right to participate in collective bargaining "if not provided in so many words in the NLRA," was at least "immanent in its structure." Id. at 134. Therefore, the court found Congress intended to bestow an enforceable benefit on a private individual.

Then in Blessing, private individuals sued an Arizona governmental official under 42 U.S.C. § 1983; the state was allegedly failing to fulfill its obligations under the federal Aid to Families with Dependent Children ("AFDC"), 42 U.S.C. §§ 601-617, to establish a child support enforcement system conforming to requirements set forth in Title IV-D of the Social Security Act ("Title IV-D") by written plan approved by the Secretary of Health and Human Services (the "Secretary"). See 42 U.S.C. §§ 651-669b. Under Title IV-D, states receiving federal funds must "establish a comprehensive system to establish paternity, locate absent parents, and help families obtain support orders." Blessing, 117 S. Ct. at 1356. If a state fails to "substantially comply" with the statutory requirements of Title IV-D, the Secretary may penalize the state a portion of its AFDC grant. See 42 U.S.C. § 609(a)(8).

Individual AFDC recipients, arguing Arizona was failing to "substantially comply" with the Title IV-D requirements, sought injunctive and declaratory relief under 42 U.S.C. § 1983 to

require that the director of the Arizona child support agency bring the state's child support program into substantial compliance with Title IV-D. The Court held Title IV-D's requirement that a state receiving AFDC funds be in "substantial compliance" with federally-mandated requirements was "simply a yardstick for the Secretary to measure the systemwide performance of a State's Title IV-D program." Blessing, 117 S. Ct. at 1361.

The Court found the federal requirement that a state be in "substantial compliance" with Title IV-D "was not intended to benefit individual children and custodial parents, and therefore does not constitute a federal right." Id. The Court held the statutory program focus was on whether the services provided by the state were adequate in the aggregate, not on whether the needs of particular individuals were being met. Although Title IV-D's provisions "may ultimately benefit individuals who are eligible for Title IV-D services," id., the provisions more appropriately served as guidance for the state in structuring the child support system. Any link between the statutory requirements and individual benefits was too "tenuous" to find that Congress intended to confer a specific benefit on private individuals in enacting the statute. See id. at 1361-62.

A possible reading of Article XII of the Amended Compact is that it is intended to benefit the private sector by giving all private entities the right to offer comments on proposed port

projects. But the legislative history shows congressional emphasis on improving the Port District as a whole. The Amended Compact was enacted by Pennsylvania and New Jersey and approved by Congress because harmful intra-port competition and "churning" of business from one facility to another was damaging the long-term welfare of both the Philadelphia and Camden ports. Private enterprise was to be encouraged to improve the Port District, but even the House Judiciary Committee's Report on H.R. 5452 states DRPA was required to send notice only to "some private sector entities." H.R. Rep. No. 102-875. Neither the committee nor any individual legislators clarified the "private sector entities" DRPA should inform.

Senator Lautenberg, sponsor of S. 2964, stated the amendments would permit DRPA to "make important investments to help stimulate the regional economy." 138 Cong. Rec. S18251-01 (Oct. 8, 1992) (statement of Sen. Lautenberg). Congressman Hughes emphasized the 1992 amendments granted DRPA "broad economic powers" over the Port District. 138 Cong. Rec. H9072-02, H9075 (Sept. 22, 1992) (statement of Rep. Hughes). Congressman Foglietta, sponsor of H.R. 5452, stated, "By unifying the ports of the Delaware Valley region and granting broad new economic development powers to the Delaware River Port Authority, we can move forward and create hundreds of jobs on both sides of the river." 138 Cong. Rec. H9072-02, H9075 (Sept. 22, 1992)

(statement of Rep. Foglietta). The 1992 amendments were designed to permit "the Delaware River ports to engage in important economic development projects and enhance the economic vitality of the region." Id.

This legislative history shows Congress was primarily concerned with the welfare of the Port District as a whole. Congress desired to strengthen the power and authority of DRPA to acquire port facilities and expend public funds in a way that minimized intra-port competition and made the Port District more profitable. Congress did not intend to bestow any enforceable rights on individual private entities; the purpose of the 1992 amendments was to expand the authority of DRPA to foster development in the entire Port District. Congress intended to bestow benefits on the entire Port District, not individual private entities such as Holt Cargo and Holt Hauling. Plaintiffs have not established they are entitled to any benefit under the Amended Compact.

While the Amended Compact acknowledged the interest of "the private sector" in being heard on proposed port improvements, it is unclear what "private sector entities" were to receive notice of proposed expenditures. Plaintiffs argue they have a right to receive written, mailed notice of all proposed developments. The logical conclusion of their argument is that any private business within the thirteen-county Port District has a right to receive

personal, written notice of any planned port projects. The Amended Compact is not specific regarding the private entities with a right to receive written notice of proposed DRPA funding.

2. "Vague & Amorphous" Right

Plaintiffs must show that each of the claimed rights they are attempting to enforce under 42 U.S.C. § 1983 is not "so 'vague and amorphous' that its enforcement would strain judicial competence." Blessing, 117 S. Ct. at 1359. Article XII of the Amended Compact simply states that DRPA "shall give written notice to, afford a reasonable opportunity for comment, consult with and consider any recommendations from ... the private sector." Once DRPA has solicited comments from "the private sector," it has no obligation to alter the proposed funding according to the comments submitted. The Amended Compact does not state how or when written notice must be delivered to "the private sector" or the businesses within the thirteen county Port District included in "the private sector." Plaintiffs state that DRPA has given them notice of proposed port projects with two months, two weeks or two days for comment. See Pltffs.' Mem. Opp. Summ. Jgmnt. at 7. The shortest period mentioned, two days, is reasonable for some purposes under the Federal Rules of Civil Procedure and the Local Rules of this court.

Plaintiffs do not suggest any definite time for comment or that the court should set an arbitrary time limit for comment in

all situations; they simply argue that DRPA's request for comment on the Del Monte funding within a matter of days was insufficient. The Amended Compact provides no guidance on what would be a reasonable opportunity for comment and there seems to be no Port District custom allowing any specific time for comments. The notice and comment provision of Article XII is too "vague and amorphous" for the court to determine exactly how much notice is required. Plaintiffs may have a right to receive notice of proposed DRPA projects, but the court cannot determine that the notice provided was unreasonable. Holt Cargo and Holt Hauling have no enforceable right for a specific notice under Article XII.

3. Unambiguous & Binding Obligation on the States

To create an enforceable private right under 42 U.S.C. § 1983, "the statute must unambiguously impose a binding obligation on the States." Blessing, 117 S. Ct. at 1359. When determining whether a statute imposes a binding obligation on a state, a court must examine the context of the statute as a whole; statutory terms cannot be examined in isolation. See Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 18 (1981). "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); see United States v. Heirs of Boisdore, 49

U.S. (8 How.) 113, 122 (1849). If the statutory language is "intended to be hortatory, not mandatory," Pennhurst, 451 U.S. at 24, it has not imposed a binding obligation on the states. See Suter, 503 U.S. at 356.

Article XII states that DRPA "shall" give written notice and an opportunity to comment to "the private sector." This language is "cast in the imperative." Alexander v. Polk, 750 F.2d 250, 259 (3d Cir. 1984). "The language succinctly sets forth a congressional command, which is wholly uncharacteristic of a mere suggestion or nudge." West Virginia Univ. Hosp., Inc. v. Casey, 885 F.2d 11, 20 (3d Cir. 1989), aff'd, 499 U.S. 83 (1991); see Rosado v. Wyman, 397 U.S. 397, 413 (1970) (language must do more than "nudge" states "in the preferred directions"). The Amended Compact may command that some form of notice be given to certain elements of the private sector, but the Amended Compact is too vague and ambiguous regarding the amount and form of notice required and the entities to which notice must be given. It is impossible to say that any specific form or duration of notice is unambiguously compelled by the Amended Compact, as required by Blessing. Plaintiffs have failed to satisfy the third requirement in recognizing an enforceable right to notice under 42 U.S.C. § 1983.

B. Adequacy of Private Sector

Plaintiffs also claim they have an enforceable right to

prevent DRPA and PPC from engaging in the expenditure of any public funds for port development without a finding that private industry in the Port District is incapable of meeting the current needs of the port. Article IV states that DRPA must include in its written reports to the Pennsylvania and New Jersey governors and state legislatures "its findings which fully set forth that the facility or facilities operated by private enterprise within the Port District and which it is intended shall be supplanted or added to are not adequate."

1. Benefit for Plaintiffs

It is clear from both the language and context of Article IV that the provision describes DRPA's duties in reporting to the two state government parties to the Amended Compact. The Amended Compact gives both states the power to veto a decision by DRPA. The provision in Article IV requiring DRPA to include information on the adequacy of private port industry in its reports to the state governments is designed to further the states' abilities to decide political questions and control DRPA's expenditures either by direct veto of the actions or by selecting the individuals to serve on DRPA's board.

The Amended Compact makes clear that the state governors and legislators who have the right to appoint DRPA board members and veto DRPA actions are entrusted with ensuring that the goal of fostering private industry is met. There was no congressional

intent to bestow a benefit on Holt Cargo and Holt Hauling in approving the private industry provision of Article IV of the Amended Compact. Cf. Wood v. Tompkins, 33 F.3d 600, 607-08 (6th Cir. 1994) (finding 42 U.S.C. § 1983 cause of action for violation of Medicaid statutory provision because the provision "was designed to protect the health and welfare of home care Medicaid recipients"); Chan v. City of New York, 1 F.3d 96, 104 (2d Cir.) (finding 42 U.S.C. § 1983 cause of action for violation of Housing and Community Development Act provision requiring contractors to pay a minimum wage because plaintiff-laborers were "clearly specified" as beneficiaries of the minimum wage provision and received the "principal benefit" of the statute), cert. denied, 510 U.S. 978 (1993).

2. "Vague & Amorphous" Right

The provision in Article IV that DRPA must show existing private facilities "are not adequate" is also too "vague and amorphous" for enforcement under 42 U.S.C. § 1983. The Amended Compact does not define "adequate" or provide guidance on measuring the adequacy of existing facilities. In Blessing, plaintiffs attempted to enforce a statutory requirement of "substantial compliance" with "sufficient" levels of staffing. The statute provided no guidance on what level of staffing would be "sufficient." The Court found the standard vague and judicially unenforceable. "Enforcement of such an undefined

standard would certainly 'strain judicial competence.'"

Blessing, 117 S. Ct. at 1362; see Livadas, 512 U.S. at 132.

In Suter, plaintiffs attempted to create a federal right to enforce a statutory requirement to make "reasonable efforts" to keep children with their families. The Court found the statutory term too vague to create an enforceable right under 42 U.S.C. § 1983, because the statute did not define "reasonable efforts" or offer courts guidance on what efforts would be reasonable; the "meaning will obviously vary with each individual case." Suter, 503 U.S. at 359-60.

The Court contrasted the Suter statute to the statutes in Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) (Medicaid statute required states to make "reasonable and adequate" assurances to Secretary to meet the costs of "efficiently and economically operated facilities) and Wright v. Roanoke Redevelopment & Housing Auth., 479 U.S. 418 (1987) (Housing statute imposed ceiling on rental rates for low-income tenants including a "reasonable amount" for the use of utilities). In these cases, unlike Suter, the Court found statutory guidance on what Congress intended by the word "reasonable."

The Amended Compact offers no guidance on how DRPA should determine whether "facility or facilities operated by private enterprise within the Port District" are "adequate." Determining whether private port facilities are "adequate" for current or

future demands is similar to deciding whether an agency has "sufficient" levels of staffing, as in Blessing. The court has no meaningful way to determine whether existing businesses are "adequate" or not. Without statutory guidance, determining whether existing port businesses are "adequate" to meet current demands is a task best left to the legislative and executive branches of government. The federal courts are not qualified to make such determinations; to do so would impermissibly shift control of the Port District from DRPA, where Pennsylvania, New Jersey and Congress placed it, to the court.

3. Unambiguous & Binding Obligation on the States

Article IV states that DRPA "shall" include in its reports to the state governors and legislatures findings regarding the adequacy of facilities operated by private industry within the Port District for current demands.

The Amended Compact uses the word "shall," but it is possible Congress was only expressing a desired goal to further private enterprise. As long as DRPA considers the impact of public funding on existing private enterprise, and submits a finding that the expenditure of public funds would fulfill a need in the Port District, DRPA is permitted to expend public funds. In any event, there is no provision for a private industry challenge to the adequacy or inadequacy of DRPA findings.

The requirement that DRPA consider the ability of private

companies to perform needed services imposes "a rather generalized duty on the State." Suter, 503 U.S. at 363. The language "does no more than express a congressional preference" for permitting private industry to flourish in the Port District. To the extent that Congress was merely expressing a goal of fostering private industry, and was "nudging" DRPA to pursue that policy, DRPA has no binding obligation to find that all existing private industry is inadequate to meet a perceived public need before expending any public funds on port improvements.

C. Right to Seek Gubernatorial Veto

Plaintiffs argue they have a right under Article III to petition the governors of Pennsylvania and New Jersey to veto DRPA board actions within ten days of DRPA approval of an expenditure of public funds. Article III provides that each state reserves the right to provide by law for the exercise of a gubernatorial veto power over any action of its DRPA commissioners within ten days (excepting Saturdays, Sundays and public holidays) of receipt of a certified copy of the minutes of a meeting at which such vote was taken.

1. Benefit for Plaintiffs

Plaintiffs undoubtedly have a right to petition the governors of Pennsylvania and New Jersey for redress, although the Governor of Pennsylvania has not yet been granted veto power over the actions of DRPA commissioners. See, e.g., U.S. Const.

amend. I (preserving right to "petition the Government for a redress of Grievances"). Plaintiffs do not allege they were precluded by DRPA or PPC from petitioning either governor regarding DRPA's decision to fund Del Monte improvements. The veto provision of Article IV clearly grants power to the two states, not private individuals. The veto provision does not bestow on plaintiffs a right enforceable under 42 U.S.C. § 1983.

Plaintiffs themselves state the "raison d'être for the Interstate Compact Clause is to provide a check and balance through Congressional oversight on agreements between and among states in order to limit the powers of the states." Pltffs.' Mem. Opp. Summ. Jgmnt. at 16 (emphasis added). "By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." Cuyler v. Adams, 449 U.S. 433, 439-40 (1981). To the extent the Pennsylvania and New Jersey are unable to meet the goals of the Amended Compact, the power of correction lies with Congress not with the courts.

2. "Vague & Amorphous" Right

Although plaintiffs have an independent right to petition the governors for redress after DRPA takes any official action,

the Amended Compact veto provision was to preserve state rights, not the rights of private individuals or entities. Therefore, it is irrelevant whether the veto provision is too "vague and amorphous" for a court to enforce.

3. Unambiguous & Binding Obligation on the States

Article III, reserving for the states the right to enact legislation providing for gubernatorial vetoes of DRPA action, does not address an additional right of private individuals to petition the governors for redress. The language of Article III is clear that it is intended to benefit the states, not private individuals. Because no rights are granted to individuals in Article III, the statutory language does not unambiguously require the states to provide plaintiffs with any special or heightened level of access to the Pennsylvania and New Jersey governors.¹³

¹³ If plaintiffs first establish the Amended Compact created an individual right, there is a rebuttable presumption that the right is enforceable under 42 U.S.C. § 1983, unless there is evidence that Congress "specifically foreclosed a remedy under § 1983." Smith v. Robinson, 468 U.S. 992, 1005 n.9 (1984); see Blessing, 117 S. Ct. at 1360. Plaintiffs have not established the Amended Compact created any individual right, so the court need not consider whether Congress foreclosed a 42 U.S.C. § 1983 cause of action by providing an alternative remedy.

Defendants also argue the court should abstain from enforcing the terms of the Amended Compact because judicial intervention in port governance would intrude in a highly specialized area of paramount concern to Pennsylvania and New Jersey. See Defs.' Mem. Supp. Summ. Jgmnt. at 40-45. Plaintiffs have no enforceable rights under the Amended Compact, so whether the court should abstain from enforcing such rights need not be

CONCLUSION

The same issue was previously litigated and was necessary to the prior decision; plaintiffs' action is barred by both issue and claim preclusion. Plaintiffs filed this action in January, 1998, when they anticipated Holt I would go to trial and they would be unable immediately to appeal the interlocutory Order dismissing their claims under the Amended Compact. They may have filed this action so that if the court dismissed the Amended Compact claims, that dismissal could then be appealed prior to the trial in Holt I. However, this action burdened the court and all counsel with additional litigation involving claims already dismissed.

Holt Cargo and Holt Hauling have no enforceable rights under 42 U.S.C. § 1983 for alleged violations of the Amended Compact. The notice and comment provisions of Article XII do not bestow rights on plaintiffs. The provision of Article IV requiring a finding of the private sector inadequacy does not bestow any rights on plaintiffs, is too vague for enforcement and does not unambiguously require anything by DRPA. The right to request a gubernatorial veto does not bestow any enforceable rights on plaintiffs, is too vague for enforcement and does not unambiguously require action by states. Plaintiffs have no rights under the Amended Compact enforceable under 42 U.S.C. §

decided.

1983. The court will grant defendants' motion for summary judgment.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOLT HAULING & WAREHOUSING, INC. : CIVIL ACTION
& HOLT CARGO SYSTEMS, INC. :
 :
 :
 v. :
 :
 :
 PORT OF PHILADELPHIA & CAMDEN, INC.:
& DELAWARE RIVER PORT AUTHORITY : NO. 98-30

ORDER

AND NOW, this 17th day of August, 1998, upon consideration of defendants' joint motion for summary judgment, plaintiffs' response thereto, defendants' reply, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Defendants' joint motion for summary judgment is **GRANTED**. Judgment is **ENTERED** in favor of defendants.
2. The Clerk of Court is directed to mark this action **CLOSED**.

Norma L. Shapiro, J.