IN THE SUPREME COURT OF MISSOURI

No. SC95422

STATE OF MISSOURI, ex rel. JEREMIAH W. (JAY) NIXON,
Appellant/Cross-Respondent,

v.

AMERICAN TOBACCO CO., *et al.*,

Respondents/Cross-Appellants.

Appeal from the Circuit Court of the City of St. Louis
The Honorable Jimmie M. Edwards, Circuit Judge

SUBSTITUTE RESPONSE BRIEF OF RESPONDENTS/CROSS-APPELLANTS R.J. REYNOLDS TOBACCO COMPANY AND PHILIP MORRIS USA INC.

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STATEMENT OF FACTS

This case involves the arbitration of disputes under the Master Settlement Agreement ("MSA") concerning the application and amount of, and responsibility for, the "Non-Participating Manufacturer Adjustment" (or "NPM Adjustment"). The NPM Adjustment is a potential reduction to the annual payment that the numerous cigarette manufacturers that are signatory to the MSA (the "Participating Manufacturers," or "PMs") make to 52 States and territories (the "MSA States"), including Missouri.

The parties concluded a multistate arbitration over the *2003* NPM Adjustment. This is discussed more fully in the Substitute Opening Brief of Respondents/Cross-Appellants R.J. Reynolds Tobacco Company and Philip Morris USA, Inc. (June 30, 2016) ("OPM Op. Br.") for their cross-appeal of the Circuit Court's modification of the 2003 arbitration Panel's Settlement Award giving effect to a partial settlement. That modification is the lone issue relating to the 2003 NPM Adjustment that is on appeal, since Missouri decided against appealing the Circuit Court's denial of its motion to vacate the 2003 Panel's Final Award finding Missouri responsible for the 2003 NPM Adjustment.

This appeal concerns arbitration over the *2004* NPM Adjustment. Missouri now concedes that the MSA requires disputes over an NPM Adjustment to be arbitrated. The State has refused, however, to join in a multistate arbitration with

the other MSA States disputing the PMs' entitlement to the 2004 Adjustment. Instead, Missouri moved to compel a "single state" arbitration of one aspect of the dispute over that Adjustment. The Circuit Court denied the motion, holding, in accordance with extensive, uniform authority in other States, including in the two other States whose courts have addressed the question for 2004, that the arbitration the MSA requires of such disputes must be nationwide. Missouri appeals the Circuit Court's denial of its motion to compel.

A. NPM Adjustments Under the MSA

Under the MSA, the PMs make a single, lump sum, annual payment, subject to various adjustments, that is apportioned among the MSA States according to each State's contractually specified "Allocable Share." Appx. A1 (CC Order at 1); LF 344, 1022-25 (MSA § IX(j), Exh. A).[1] One of these adjustments is the "NPM Adjustment." Appx. A2 (CC Order at 2); LF 1000-18 (MSA § IX(d)).

The NPM Adjustment is a payment reduction to address the PMs' concern that the Non-Participating Manufacturers ("NPMs"), who are not subject to the MSA's constraints, would gain "an advantage in the marketplace." Appx. A2 (CC Order at 2). For a given year, it is available if (1) the PMs lost market share to the

[1] Appendix citations are of the OPM Op. Br. appendix, except where noted.

NPMs above a certain level and (2) the MSA's disadvantages were a "significant factor" contributing to that loss. *See id.*; LF 1000-05 (MSA § IX(d)(1)).

When those conditions are satisfied, the MSA provides that the NPM Adjustment "shall apply to . . . all [MSA] States," subject to one exception. LF 1005-06 (MSA § IX(d)(2)). The exception is that a State may avoid its share of the Adjustment if it "diligently enforced" a "Qualifying Statute" during the year at issue. *See id.*; Appx. A2 (CC Order at 2). The MSA contains a Model Qualifying Statute, or "escrow statute," which generally requires each NPM to make escrow deposits based on the number of cigarettes it sells in the State. *See* LF 1007-08, 1142-46 (MSA § IX(d)(2)(E), Exh. T).

The MSA further provides, however, that the PMs do not forfeit the diligent States' shares of the Adjustment. Instead, those States' shares are "reallocated among all other [non-diligent MSA] States *pro rata* in proportion to their respective Allocable Shares," up to a maximum, for each non-diligent State, of its full allocated payment. LF 1006 (MSA § IX(d)(2)(C)-(D)); *see* Appx. A2 (CC Order at 2). That is, to incentivize the States to diligently enforce, the MSA makes the non-diligent States collectively responsible for the total available Adjustment, including what would have been the shares of the diligent States, with the prospect that they may lose as much as their entire MSA payment. The fewer the number of non-diligent States, the greater the amount of the Adjustment that each non-

diligent State bears. *See* Appx. A2 (CC Order at 2). Thus, a determination "of diligent enforcement" "for any [MSA] State affects all other [MSA] States." *Indiana ex rel. Carter v. Philip Morris Tobacco Co.*, 879 N.E.2d 1212, 1220 (Ind. Ct. App. 2008).

B. Compelled Arbitration of the 2003 NPM Adjustment Dispute, and the Subsequent Agreement Regarding Arbitration of that Dispute

Although the conditions for the 2003 NPM Adjustment were satisfied, the Independent Auditor, which administers MSA payments, decided not to apply it, because the States' diligent enforcement had not yet been determined. *See* Appx. A2-A3 (CC Order at 2-3); *id.* at A20 (COA Op. at 5); *see also* LF 431 (Auditor Authority Order at 8). The Auditor urged that the "dispute … be submitted to binding arbitration in accordance with subsection XI(c) of the MSA." LF 1149 (Notice at 2).

That subsection requires "binding arbitration" of "[a]ny dispute … arising out of or relating to … any determinations made by[ ] the Independent Auditor (including, without limitation, any dispute concerning … any of the adjustments … described in subsection IX(j) …)," one of which is the NPM Adjustment. LF 1554. Section XI(c) further requires that the arbitration be "before a panel of three neutral arbitrators, each of whom shall be a former Article III federal judge. Each of the two sides to the dispute shall select one arbitrator." *Id*.

The Respondents here, known as the "Original Participating Manufacturers," or "OPMs," gave notice of their intention "to initiate a binding nationwide arbitration before an arbitration panel of three former Article III federal judges" to resolve the dispute over the 2003 NPM Adjustment, including any claim of diligent enforcement. LF 1578-79 (Demand Letter). The States refused to arbitrate. Many, contending that the question of their diligence was not arbitrable under § XI(c) but rather was severable from the Auditor's decision not to apply the Adjustment, sued for a judicial declaration of diligent enforcement. *See, e.g.*, *Maryland v. Philip Morris, Inc.*, 944 A.2d 1167, 1173 n.10, 1181-82 (Md. Ct. Spec. App. 2008) ("*Maryland 2003*"). For its part, Missouri asked the Circuit Court to enter a declaration "construing the term 'diligently enforced.'" LF 1058 (2007 Arb. Order at 2). The PMs moved to compel a "binding nationwide arbitration" in 48 MSA States, including Missouri. LF 1577-78; LF 1481-83 (OPM Opp. at 6-8).

The Circuit Court in early 2007 granted the PMs' motion, ordering the parties "to submit their dispute to arbitration as provided for in § XI(c) of the MSA." LF 1064 (2007 Arb. Order at 8). It held that "the question of whether the qualifying statute is being diligently enforced" falls within the "clear" "language" of the MSA's arbitration provision, because the question "arises out of and relates to" the Auditor's NPM-Adjustment "calculations and determinations." *Id.* Missouri thus was, as it has conceded, "compelled into a multistate arbitration . . .

pursuant to Section XI(c) of the [MSA]." LF 105 (MO Mot.); *see* LF 109 (MO Suggestions) (compelled into "a single, nationwide arbitration").

Across several years, and particularly throughout 2007 and 2008, the courts of 47 MSA States also ordered arbitration. *McGraw v. Am. Tobacco Co.*, 681 S.E.2d 96, 103 n.7, 108-12 (W. Va. 2009) (collecting cases); *see* LF 1062, 1064 (2007 Arb. Order at 6 n.3, 8) (agreeing with the early decisions). Every such court to address whether the arbitration that the MSA requires must be nationwide held that it must. In *McGraw*, the last such case, the West Virginia Supreme Court collected decisions from around the nation; recognized that they had "consistently rejected arguments" for arbitration other than "before a single panel of three former federal judges"; and held that, "[a]lthough the specific term 'nationwide' does not appear in the MSA's arbitration provision, reading the MSA as a whole clearly demonstrates that it contemplates that a single panel of arbitrators resolve disputes regarding" diligent enforcement. 681 S.E.2d at 108-12.[2]

[2] Two months later, a divided Montana Supreme Court made Montana the only MSA State whose courts have held that the question of diligent enforcement was not arbitrable. That court, however, likewise viewed the question of arbitrability as binary—either "the individual state courts" or a "nationwide arbitration" would decide diligence. *Montana ex rel. Bullock v. Philip Morris, Inc.*, 217 P.3d 475, 483 (Mont. 2009).

Near the conclusion of this series of decisions, the PMs and almost every MSA State, including Missouri, entered into an Agreement Regarding Arbitration (the "ARA"). LF 763 (ARA); *see* Subst. Op. Br. of Appellant/Cross-Resp. State of Mo. 3 ("MO Op. Br.") (Missouri signed ARA "[i]n 2009."). To induce the States to participate in a structured arbitration in a timely fashion, the PMs agreed, among other things, to reimburse 20% of any NPM Adjustment of a State found non-diligent in 2003, if that State signed the ARA by January 30, 2009. LF 769 (ARA § 3). The PMs also obtained concessions from the States, such as the ability, in the event the Panel held that a State did not diligently enforce in 2003, to recover immediately certain funds previously paid, rather than having to await the outcome of state motions to vacate. LF 766-69 (*id.* § 2(j)). The parties committed the "2003 NPM Adjustment dispute" to the arbitration panel, while both specifying a non-exclusive list of issues to be included in the arbitration and expressly recognizing that others were likely to arise during it. LF 764, 775 (*id.* § 2(a) & Exh. A). The four MSA States that did not join the ARA nevertheless participated in the nationwide arbitration after having been ordered to arbitration by their state courts. LF 289 (MO Non-Diligence Award at 10).

C. The 2003 Multistate Arbitration Panel's Initial Rulings on Common Issues

An arbitration Panel of three retired federal judges was selected. The Panel convened in July 2010 and immediately began to address case management and discovery. Because the MSA does not "g[i]ve direction," it fell to the Panel to make innumerable decisions "as to the governing law, governing procedural rules, *e.g.*, rules of evidence, type of hearings required, dispositive motions, if any, burden of proof, priorities, and location of hearings, as well as other questions that arose as the Panel proceeded." LF 290 (*id.* at 11).

This "pre-hearing process was lengthy, as well as complex and significant," and the Panel issued many decisions and orders that were common to the parties. *Id.*; *see* OPM Op. Br. at 6-8 (summarizing common decisions regarding burden of proof, authority of Auditor, and "no contest" procedure). The Panel in one such order explained "that the question of *each* State's diligence ultimately . . . will be resolved in a hearing in which its own 'diligence' will be decided individually, based on the factual and legal determinations specific to that State." LF 1771 (Order Re: Dep. Procedures at 3). It emphasized that it was not presiding over a "class action," in which the States would be considered collectively. *Id.* It also recognized its jurisdiction was "for the year 2003." LF 450 (Auditor Authority Order at 27).

D. The Narrowing of the 2003 Arbitration

At the outset, 17 PMs and 52 MSA States were parties of record. LF 280-81 (MO Non-Diligence Award at 1-2). Along the way, however, the case narrowed substantially.

First, in late 2011, following discovery and according to a process the Panel had adopted, the PMs gave notice that they were no longer contesting the diligent enforcement of 16 States, in what is known as a "no contest" decision. *See id.* The Panel afforded each State the opportunity to contest the diligence of any other State before the individual state hearings began. *See* LF 500 (No-Contest Order at 1). But neither Missouri nor any other State availed itself of this opportunity. *See* LF 176 (MO Tr. Br. at 11).

Second, during the arbitration, the PMs and 22 States (the "Signatory States") agreed to a settlement. Generally, as among the settling parties, the settlement resolves the 2003-2014 NPM Adjustments and also streamlines any post-2014 NPM Adjustment disputes. For the 2003 Adjustment specifically, as well as 2004-14, the settlement provides for the Signatory States to give the PMs specified credits against future MSA payments for part of those Adjustments. LF 260, 270-73 (Term Sheet § I & Appx. A).

The settlement does not address how the 2003 Adjustment, or any other, should be allocated among the Non-Signatory States given that the PMs had settled

with the Signatory States and would no longer be contesting their diligence. That issue was left for arbitrators to decide under the MSA and governing law.

As the OPMs have detailed, the 2003 Panel, after briefing and argument, concluded that the "*pro rata*" method of reducing judgments against non-settling defendants after a partial settlement was most consistent with the MSA, and thus held that that method would govern this reallocation issue for the 2003 NPM Adjustment. That method reduced by $528 million the Adjustment amount to which the Non-Signatory States remained subject for 2003. OPM Op. Br. at 10-13.

The Panel recognized that its conclusion applied only to "the 2003 NPM Adjustment." LF 250-51, 253 (Settlement Award at 9-10, 13). The Panel thus did not purport to decide how to allocate the NPM Adjustment for 2004, or any of the partially settled years after 2003.

E. The Hearings for Missouri and Other States Contested for 2003

Throughout 2012 and early 2013, the Panel held 19 hearings on specific States' diligent enforcement. The Missouri hearing was first—by agreement. *See* Appx. A3 (CC Order at 3); MO Op. Br. at 24. (This was after the no-contest decisions but before the settlement.) The PMs introduced the testimony of two expert witnesses and one lay witness, while Missouri relied on testimony from five lay witnesses. LF 297-98 (MO Non-Diligence Award at 18-19).

Thereafter, the Panel held hearings regarding the diligent enforcement of the 18 other States. Although each side in the Missouri hearing had had 15 hours to present its case, in subsequent hearings each side was allotted 10.5 hours, again by agreement. LF 1775 (Agreed Order). Every State, including Missouri, had notice of each State's hearing. LF 1782 (Rev. Agreed Order). The Panel also ordered that every State, again including Missouri, could attend every other State's hearing, either in person or remotely. LF 1785-86 (Confid. Order at 2-3) (noting that any person authorized to access Confidential Material "may attend or receive video feeds of, or review the transcripts of" the proceedings).

F. The 2003 Non-Diligence Awards for Missouri and Other States

At the conclusion of the arbitration, the Panel entered final awards for the 15 States whose diligence for 2003 still remained contested. It held unanimously that Missouri and five other States were non-diligent, and that the remaining nine States were diligent. Appx. A4 (CC Order at 4); LF 187-88 (MO Tr. Br. at 22-23).

Although arbitrators "have no obligation to the court to give their reasons for an award," *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960), and the MSA imposes no such obligation, the Panel issued an opinion for every final award. In each, before addressing a State's diligence, the Panel included extensive, identical "Common Findings/Conclusions," because "the majority of defenses and issues raised by both the PMs and the [MSA] States were

common to all parties." LF 291 (MO Non-Diligence Award at 12). The Panel had, as noted above, resolved many common issues before the diligence hearings (such as the burden of proof in contested evidentiary hearings and the effect of a no-contest decision), and in its final awards it resolved eight more: This included generally defining "diligent enforcement," a definition on which the Panel elaborated by specifying relevant factors; and resolving three questions under the Qualifying Statute. LF 291-99 (*id.* at 12-20); *see* Appx. A9 (CC Order at 9).

The Panel unanimously concluded, under that common definition and those common factors, that Missouri failed to diligently enforce its escrow statute for 2003, because "[t]he record demonstrate[d] that NPM non-compliance was extensive and that it persisted throughout 2003, with NPMs continuing to sell large volumes of cigarettes without having paid the escrow due on them." LF 303 (MO Non-Diligence Award at 24). More specifically, the Panel found (1) that the State's collection rate of 24% "was the lowest collection rate among all the States whose diligent enforcement is now being decided"; (2) that the State "did not file any lawsuits in 2003" and "took no action on the pending suits filed in prior years"; (3) that the State's data-gathering efforts "were inefficient and not standardized"; (4) that the State "conducted no field audits despite th[e] knowledge" that distributors were "susp[ected] of underreporting" their NPM sales; (5) that the State's efforts to prevent non-compliant NPMs from making

future sales "were sporadic and insufficient," which allowed "[a]pproximately one hundred million units of contraband [to be] sold in direct violation of the contraband lists"; (6) that the State's implementation of an alleged substitute method of enforcement "was mediocre at best, due in part to understaffing"; (7) that the State "imposed few penalties on distributors selling contraband, revoked only one license, and sent very few notices of delinquency to NPMs"; and (8) that the State "fail[ed] to address an ongoing and recognized need for additional resources," despite "the Department of Revenue's repeated requests for more resources." *See* LF 299-302 (*id.* at 20-23). Based on its findings, the Panel concluded that these diligence factors "weigh[ed] decisively against Missouri." LF 303 (*id.* at 24); *see* Appx. A9-A10 (CC Order at 9-10).

G. Missouri's Refusal to Arbitrate the 2004 Adjustment as It Had the 2003 Dispute, and the Order and Judgment Under Review

Following the Panel's decisions on the 2003 NPM Adjustment, Missouri refused the PMs' request to agree to a timetable for selecting each side's arbitrator for the multistate arbitration of the 2004 NPM Adjustment, which the Auditor has likewise refused to apply (LF 1796 (Notice at 4)). Instead, Missouri requested that the PMs (1) arbitrate the "dispute over the 2004 NPM Adjustment" in a "Missouri-specific arbitration" and (2) "agree[ ] that the Missouri-specific arbitration not be

heard by any arbitrator involved in any other arbitration involving the PMs or any other States." LF 860 (Letter from Koster).

When the PMs did not agree, Missouri moved to compel arbitration of the 2004 dispute before a state-specific arbitration panel rather than a multistate panel, unlike the process used to arbitrate the 2003 dispute. Appx. A1 (CC Order at 1). The Circuit Court denied Missouri's motion.[3] Appx. A15 (*id.* at 15).

In its analysis, the trial court began by recognizing the parallel to the 2003 dispute: "For the sales year 2004, *the Independent Auditor again determined* not to apply an NPM Adjustment, and *the PMs again have disputed* the auditor's determination and have asked for arbitration." Appx. A11 (*id.* at 11) (emphasis added). In concluding that the 2004 dispute must be arbitrated in the same manner

[3] The State earlier had moved to vacate the Non-Diligence Award. Appx. A1 (CC Order at 1). The Circuit Court denied this motion too, in the same opinion and order. Appx. A15 (*id.* at 15). On the parties' joint motion, the court confirmed the Non-Diligence Award. LF 2388 (Jt. Mot.); *see* Appx. A15 (CC Order at 15). Missouri filed a notice of appeal. LF 2429 (Notice at 2). The State, however, abandoned its appeal of the non-diligence ruling before the Court of Appeals and "does not appeal that ruling here." MO Op. Br. at 75; *see* Appx. A56 (COA Op. at 41).

that the courts had required the 2003 dispute to be arbitrated, the Circuit Court looked to the MSA's text and structure.

After quoting the MSA's arbitration provision (§ XI(c)), the court emphasized its reference to each of the "'two sides' to the dispute" appointing an arbitrator. Appx. A13 (*id.* at 13). The court found it clear from the MSA that the "two groups"—of the PMs, on the one hand, and the MSA States, on the other—were "the 'two sides' envisioned by the arbitration provision" with respect to "the resolution of the dispute." Appx. A13-A14 (*id.* at 13-14). And because the MSA provides "only one agreement to arbitrate to which all states are a party," reading § XI(c) as requiring a nationwide arbitration of this dispute had nothing to do with "'consolidating'" arbitration. *Id.*

The trial court rejected Missouri's argument that it could not be on the same "side" of the dispute regarding the Auditor's determination as other States given that, "if shown to be non-diligent, each state has a vital and conflicting interest to show that other states are also non-diligent," due to the MSA's provision for reallocating NPM Adjustment amounts. Appx. A13 (*id.* at 13); *see* above, Pt. A. It was hardly uncommon, the court explained, to have a case in which numerous parties were, for example, all "'aligned' as party defendants, and in that sense, are 'one side'"—together in seeking to defeat the plaintiff notwithstanding having conflicting interests among themselves. Appx. A13 (CC Order at 13).

Indeed, the court added, Missouri's "conflict of interest" argument pointed toward an additional reason *for* nationwide arbitration: Due to reallocation, the NPM Adjustment is "a 'zero sum game'"; the resulting "interconnectedness of the states' diligent enforcement determinations" means that "a single decision maker has the best chance of producing consistent awards" and "is the most logical mechanism" under the MSA for resolving an NPM Adjustment dispute. Appx. A14 (*id.* at 14).

The Court of Appeals, Eastern District, reversed. Appx. A57-A58 (COA Op. at 42-43). Soon after, appeals courts in Maryland and then Pennsylvania reached the same conclusion as the Circuit Court, affirming trial-court decisions holding that arbitration of the 2004 dispute must be before a multistate rather than single-state panel. *See Maryland v. Philip Morris, Inc.*, 123 A.3d 660, 683-86 (Md. Ct. Spec. App. 2015) ("*Maryland 2004*"), *cert. denied*, 446 Md. 293 (2016); *Commonwealth ex rel. Kane v. Philip Morris, Inc.*, 128 A.3d 334, 348-55 (Pa. Commw. Ct. 2015). The Court of Appeals thereafter transferred this case to this Court.

ARGUMENT

The Circuit Court correctly rejected Missouri's effort to avoid its contractual obligation to arbitrate the 2004 NPM Adjustment dispute under the MSA. (I) The MSA's text, its structure, and extensive authority (which Missouri ignores) addressing the very question presented here all confirm this. (II) Missouri's arguments to the contrary based on (A) the partial settlement of the 2004 NPM Adjustment dispute and (B) alleged misconduct by the Panel for the prior dispute—allegations that the trial court rejected, in a ruling that Missouri declined to appeal—are irrelevant and wrong. Thus, on *de novo* review, *see Dunn Indus. Grp., Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. 2003) (per curiam), this court should affirm the Circuit Court's denial of Missouri's motion to compel a single-state arbitration.

I. Point I Should Be Denied Because The Circuit Court Correctly Held, In Accordance With Uniform Authority Of Other States, That The MSA's Text And Structure Require A Nationwide Arbitration Of All States Disputing The PMs' Right To Receive An NPM Adjustment To Their MSA Payment.

In denying Missouri's motion for a state-specific arbitration, the Circuit Court relied on the simple text of the MSA's arbitration provision in light of the dispute at issue, and on the "interconnectedness" of the States with respect to that

dispute due to the MSA's reallocation of responsibility for NPM Adjustments from diligent to non-diligent States. On both points, the court was correct, as abundant and uniform case law interpreting and applying the MSA further confirms, leaving the decision of the Court of Appeals here as a lone outlier. Tellingly, Missouri in its opening brief ignores *why* the MSA's text requires arbitration here—that the Auditor determined that the PMs were not entitled to an NPM Adjustment to their MSA payment to the States—which is also why it requires that arbitration to be multistate, with the PMs on one "side" and the MSA States on the other "side," "disput[ing]" the PMs' entitlement to the NPM Adjustment. The State also fails to grapple with the implications of reallocation for arbitrating the 2004 NPM Adjustment, including disregarding the numerous common questions affecting reallocation that the 2004 dispute, like its predecessor, presents. Moreover, the State mentions *none* of the uniform authority—across the country and for a decade—directly rejecting its position. Instead, the State offers a story of the parties' "course of conduct" that is belied by that same authority, as well as by Missouri's own words below acknowledging that it was "compelled" to participate "in a single, nationwide arbitration" of the prior dispute, LF 109; and it emphasizes an inapposite case concerning class arbitration, which is not at issue.

A. The MSA's plain language requires a single, multistate arbitration of the payment dispute over the 2004 NPM Adjustment.

1. Section XI(c) of the MSA expressly requires that any "dispute" "arising out of or relating to" the Auditor's payment determinations or calculations be arbitrated, and further specifies that "[e]ach of the two *sides* to the *dispute* shall select one arbitrator," with those two arbitrators then selecting a third. LF 1554 (emphases added). This arbitration requirement expressly encompasses "any dispute concerning" an Auditor determination of an NPM Adjustment. *Id.* *See* above, Facts, Pt. B. The "nature of the arbitration" required thus depends on "the nature of the dispute." *Kane*, 128 A.3d at 355 (internal quotation marks omitted).

Here, as the Circuit Court recognized at the outset, "[f]or the sales year 2004"—just as for 2003—the Auditor "again determined not to apply an NPM Adjustment, and the PMs again have disputed the auditor's determination." Appx. A11 (CC Order at 11). The overarching "dispute," then, is whether the Auditor should (as the PMs contend) or should not (as the Non-Signatory States contend) have reduced the PMs' MSA payments for 2004 by applying an NPM Adjustment to those payments (and, if so, by how much). *See Kane*, 128 A.3d at 355 ("The nature of the dispute is whether PMs are entitled to an NPM Adjustment for 2004. . . .").

Accordingly, the "dispute" here is again, just as for 2003, more than simply whether a particular State can successfully claim that it diligently enforced its Qualifying Statute. A particular State's diligent enforcement is an issue that is only one part of, and is inextricably linked with, the overall NPM Adjustment dispute. As the Maryland Court of Special Appeals put it: "'The diligent enforcement question, mentioned in the MSA only as part of the NPM Adjustment, is an indispensable underlying issue of the overall NPM Adjustment and, thus, the determination and calculations are inextricably linked.'" *Maryland 2003*, 944 A.2d at 1177. That appeals court so concluded in considering the 2003 dispute and, last year, reaffirmed that conclusion as equally applying to the 2004 dispute. *See Maryland 2004*, 123 A.3d at 683-85; *see also McGraw*, 681 S.E.2d at 109 (explaining that "'the dispute concerning the 2003 NPM Adjustment . . . includ[ed] the [MSA] States' claims of diligent enforcement'") (quoting *Indiana*, 879 N.E.2d at 1219-20); *Kane*, 128 A.3d at 351 ("The diligence dispute is just one part of the overall NPM Adjustment dispute" for 2004, and is "[i]ntertwined within this dispute.").

Indeed, the Auditor indisputably has made a determination denying the PMs an NPM Adjustment for 2004. That is why the NPM Adjustment must be arbitrated *at all*—as Missouri itself now recognizes it must be, not only by having moved to compel arbitration but also expressly in its brief. *See* MO Op. Br. at 13,

46, 54. Missouri thereby admits that the issue of diligent enforcement, on which it seeks arbitration, arises out of or relates to a determination made by the Auditor, as § XI(c) requires for it to be arbitrable.

But the State ignores what that Auditor determination was—a denial of the NPM Adjustment to the PMs for 2004 notwithstanding that the two conditions for it were satisfied. That is the fundamental dispute (just as in 2003), which (just as in 2003) encompasses (among other things) whether or not any particular State was diligent. As the Pennsylvania Commonwealth Court put it in 2015, the MSA's arbitration clause by its terms "encompass[es] any controversy arising out of or related to the Independent Auditor's determination and calculation of the NPM Adjustment," and "[w]hether a particular State diligently enforced its qualifying statute *arises from and relates to the Independent Auditor's NPM Adjustment determination . . . .*" *Kane*, 128 A.3d at 351 (emphasis added); *see also Maryland 2003*, 944 A.2d at 1178 (recognizing question of diligent enforcement as one that "'arises out of or relates to' the independent auditor's calculation and determination of the MSA payments" and as "'concerning the operation or application of any of the adjustments and allocations described in subsection IX(j)'") (quoting MSA § XI(c)).

The resulting question to be decided in arbitration is whether the Auditor should or should not have made that determination. *See Kane*, 128 A.3d at 355

("The nature of the dispute is whether PMs are entitled to an NPM Adjustment for 2004, not merely one State's diligence enforcement defense for that year.").

And that "dispute" is certainly a nationwide one, in which "there are two sides—Settling States on one, PMs on the other." *Kane*, 128 A.3d at 355. Specifically, the Non-Signatory States are all "on the same side of the dispute over the Independent Auditor's determination and calculation of the 2004 NPM Adjustment." *Id.* at 351; *Maryland 2004*, 123 A.3d at 685 ("[T]he MSA States in opposition to the downward adjustment, and the PMs" are "the two sides to the dispute.") (internal quotation marks omitted); *see also, e.g.*, *McGraw*, 681 S.E.2d at 109 ("'[The] two sides are: (1) the PMs (which contend that they are entitled to an NPM Adjustment) and (2) the [MSA] States (which contend that no NPM Adjustment can be applied'")) (quoting *Indiana*, 879 N.E.2d at 1220); *Connecticut v. Philip Morris, Inc.*, 905 A.2d 42, 50 n.12 (Conn. 2006) ("[T]his language envisions that the [MSA] states would select one arbitrator and the participating manufacturers would select one arbitrator."). Thus, as the Circuit Court here recognized: "It is clear that those two groups are the 'two sides' envisioned by the arbitration provision." Appx. A13 (CC Order at 13).

The parties' respective positions confirm this: For 2004, as for 2003, *all* the MSA States asked the Auditor to deny the NPM Adjustment of the PMs' annual payments, *Kane*, 128 A.3d at 350 ("the dispute arose when the Independent

Auditor refused to apply the NPM Adjustment at the request of the Settling States"), and *all* the MSA States "that did not settle the 2004 NPM Adjustment dispute share the same interest in upholding" that denial, *id.* at 351. Those States "are squarely aligned" on that question. *Id.* Diligent-enforcement claims are part of that overall dispute, and inextricably linked with it, potentially affecting, among other things, the final resolution of both the *availability* and the *amount* of any NPM Adjustment for the PMs.[4] It follows that any diligent-enforcement claim is "[i]ntertwined" with, and must be arbitrated as part of, the "overall . . . dispute," within a nationwide proceeding. *Id.* at 351.

Moreover, the proceedings in the 2003 arbitration confirmed that even the issue of the diligent-enforcement claim is largely one between the PMs and the MSA States *as a whole*. Although (as discussed further below) the States may have different interests in the ultimate decisions on one another's diligent enforcement, they were squarely aligned on such overarching, common issues as

[4] If no States are found non-diligent for a year, the PMs receive no Adjustment. If only a few States are found non-diligent, the PMs may receive less than the full Adjustment, because a non-diligent State's responsibility for the NPM Adjustment (that is, its base allocable share plus amounts reallocated to it from other States) cannot exceed that State's yearly Allocated Payment. *See* above, Facts, Pt. A; LF 1532 (§ IX(d)(2)).

whether the States or the PMs bear the burden of proof on diligent enforcement in state-specific evidentiary hearings. *See* above, Facts, Pts. C, D, & F. As the 2003 Panel recognized in deciding such a common issue, the "sides" in the context of diligent-enforcement claims are the PMs "on one *side*," and the MSA States "on the other." LF 1770 (Order re Dep. Procedures at 2).

The 2004 arbitration will likewise present such overarching, common issues on which the States are squarely aligned, including those that the 2003 Panel decided for the 2003 arbitration. Indeed, the effect, if any, that the decisions of the 2003 Panel should have in the 2004 arbitration is an additional such issue for the 2004 Panel to consider. *See generally Lindblad v. U.S. of Am. Wrestling Ass'n*, 230 F.3d 1036, 1039 (7th Cir. 2000) ("Arbitrators need not follow judicial notions of issue and claim preclusion."). In sum, the "clear terms of the MSA" make multistate arbitration of NPM Adjustment disputes, including whether a State "diligently enforced its qualifying statute," "the only reasonable interpretation of the MSA." *Kane*, 128 A.3d at 355.

2. Though Missouri, like the Court of Appeals, does not seriously grapple with the MSA's text, including the nature of the overall dispute here, it does make two arguments that bear on that text. Both fail.

First, in its brief to the Court of Appeals, Missouri contended that the trial court relied on "the mere existence of an arbitration clause" rather than interpreting

that clause's text. MO Ct. App. Op. Br. at 31. A brief look at the court's opinion shows that is inaccurate. *See* above, Facts, Pt. G. So, now, the State inconsistently complains that the trial court *did interpret* the clause's text but got it wrong. Plucking out one sentence of the court's analysis, the State claims that the court read the clause as making "*all* States and *all* PMs" the "two sides to" *every* arbitration, thereby rendering the phrase "to the dispute" in § XI(c) superfluous. MO Op. Br. at 53 (font altered); *id.* at 46, 54-55.

Not only is this "alter[ed] . . . basis" for Missouri's appeal improper at this stage, *see* Mo. S. Ct. R. 83.08(b); *Barkley v. McKeever Enters., Inc.*, 456 S.W.3d 829, 839 (Mo. 2015) (en banc), but it also fails because the Circuit Court did no such thing. That court began its analysis by highlighting the arbitrable dispute at issue—that the Auditor "again determined not to apply an NPM Adjustment, and the PMs again have disputed the auditor's determination." Appx. A11 (CC Order at 11). And the court already had recognized, earlier in its opinion, that the 22 States had settled with the PMs with respect to that dispute. Appx. A3 (*id.* at 3). The question for the court to answer, then, was how the MSA provided "for the resolution of the dispute" between the PMs, which all wanted their MSA payments to the States reduced, on the one hand, and all the MSA States, which rejected the reduction, on the other. Appx. A14 (*id.* at 14). In the context of such a dispute, which ultimately concerns the amount of the annual MSA payment by the PMs to

the States (*see* Appx. A1-A2 (*id.* at 1-2)), of course "these two groups are the 'two sides' envisioned by the arbitration provision." Appx. A13 (CC Order at 13). The court hardly purported to decide how to arbitrate other disputes, which were not before it.

Indeed, Missouri knows it is attacking a straw man. As the State itself points out, it is an "obvious" truism that the nature of the required arbitration depends on the nature of the "dispute" over an Auditor determination (and who are the resulting "two sides"). *Id.* at 55-57; *cf. id.* at 40-41; LF 1497-98 (OPM Opp. at 22-23). Missouri's problem, as the Circuit Court recognized, is that it refuses to accept that its claim of diligent enforcement is inextricably part of *a single, multistate dispute over the Auditor's single determination* to deny all of the PMs the 2004 NPM Adjustment—a determination as to which all of the Non-Signatory States "are 'aligned'" against the PMs, "and, in that sense, are 'one side.'" Appx. A13 (CC Order at 13); *see* Appx. A11 (*id.* at 11). Again, the "plain text" of § XI(c) "makes the nature of the arbitration dependent on the nature of the dispute," and, here, "[t]he nature of the dispute is whether PMs are entitled to an NPM Adjustment for 2004, not merely one State's diligent enforcement defense for that year." *Kane*, 128 A.3d at 355 (internal quotation marks omitted).

Second, and apparently related, Missouri emphasizes that the two nationwide conditions for the 2004 NPM Adjustment have been satisfied, suggesting, as did

the Court of Appeals, that they had yet not been satisfied prior to the 2003 NPM Adjustment arbitration and thus that the 2004 dispute is narrower. MO Op. Br. at 58-59; Appx. A54 (COA Op. at 39); *see* Appx. A28 (*id.* at 13). The purported contrast is false, however, as those two conditions were not at issue in the prior nationwide arbitration either—indeed, they were satisfied as of March 2006, almost a year before the 2007 Arbitrability Order against Missouri, and four years before the nationwide arbitration panel was formed. *See* above, Facts, Pt. B; LF 287-88 (MO Non-Diligence Award at 8-9).

Missouri's disregard for the MSA's text is further underscored by its renewed request that its state-specific arbitration not include "any arbitrator involved in any other" arbitration over the 2004 NPM Adjustment. MO Op. Br. at 79. The MSA imposes no such constraint on the choice of arbitrators, and Missouri offers no support, textual or otherwise, for so restricting the choices by the PMs of their party-designated arbitrator or by the two party-designated arbitrators of a third arbitrator. Indeed, the constraint that § XI(c) *does* impose on the choice of arbitrators (that they be retired Article III federal judges) betrays the absurdity of Missouri's position: That constraint limits the field of potentially available candidates to a little more than 100—making it fanciful to expect that 84

would actually be available for some "28 individual States'" separate arbitrations (*id.* at 43), as the logic of Missouri's position would require.[5]

B. The structure of the MSA, which reallocates NPM Adjustments among the States, reinforces its text requiring a multistate arbitration of the payment dispute over the 2004 NPM Adjustment.

1. The structure of the MSA—specifically, its provisions for reallocating an NPM Adjustment from diligent to non-diligent States (*see* above, Facts, Pt. A)—reinforces the requirement of the MSA's text that any arbitration of diligent enforcement be nationwide. *See Dunn*, 112 S.W.3d at 429 ("[A] contract should be construed as a whole, that all provisions should be harmonized if possible."). Under the MSA's reallocation provision, "the application of the diligent enforcement defense for any [MSA] State *affects all other* [MSA] States."

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[5] *See* Fed. Jud. Center, "Biographical Directory of Fed. Judges, 1789-present" (2016) (listing 279 judges, 113 living, in response to search limited to "Termination Reason: Retirement"), *available at* http://www.fjc.gov/history/home.nsf/page/research_categories.html; *State v. Spain*, 759 S.W.2d 871, 874 n.1 (Mo. Ct. App. E.D. 1988) (judicially noticing a fact "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned") (emphasis omitted).

Indiana, 879 N.E.2d at 1220 (emphasis added). This nationwide effect "creat[es] the need for a single-decision maker, and mak[es] it all the more important to resolve these disputes under a single set of rules that apply equally to each [MSA] State." *Id.* Reallocation makes having a "'single decision-maker . . . vitally important,'" *Maryland 2004*, 123 A.3d at 685 (quoting *Maryland 2003*, 944 A.2d at 1180), because a single panel can be "guided by one clearly articulated set of rules that apply universally in a process where all parties can fully and effectively participate," *New York v. Philip Morris, Inc.*, 8 N.Y.3d 574, 581 (2007) ("*NY II*"). Thus, "the structure of the MSA supports" the conclusion from the textual interpretation above, "that the diligence issue cannot be treated as a separate, stand-alone dispute." *Kane*, 128 A.3d at 351; *see Indiana*, 879 N.E.2d at 1220 ("[S]tructure" complements "language" in "requir[ing] disputes such as this to be determined by a single, national arbitration panel.").

For these reasons, courts have repeatedly held that the structure of the MSA's payment provisions, including the provisions reallocating the NPM Adjustment, requires that diligent enforcement be decided by a multistate panel. In connection with the 2003 NPM Adjustment, the Indiana Court of Appeals, for example, rejected Indiana's argument that state-specific arbitration was appropriate due to the MSA States' supposed "conflict" as to each other's diligent enforcement, explaining that the "nationwide repercussions" of the "defense of

diligent enforcement" were a reason *against* a localized decision-maker. *Indiana*, 879 N.E.2d at 1219-20. The Alabama Supreme Court similarly rejected that State's argument that the MSA States' "competing interests as to diligent enforcement" warranted a series of state-specific arbitrations; the court reasoned that "conducting 52 separate arbitration proceedings would likely be fraught with the same type of inequitable and inconsistent results that would arise were the individual state courts to resolve this dispute." *Alabama ex rel. Riley v. Lorillard Tobacco Co.*, 1 So. 3d 1, 14 (Ala. 2008). Such local, "'[i]ndependent resolution of diligent-enforcement disputes . . . would likely result in the development of fifty-two different sets of payment rules that would unfairly burden some states and benefit others and results in wave after costly wave of new litigation." *Id.* (internal quotation marks omitted). *See also, e.g.*, *New Mexico ex rel. King. v. Am. Tobacco Co.*, 194 P.3d 749, 754-55 (N.M. Ct. App. 2008) (explaining that reallocation of NPM Adjustments is a reason against having "multiple tribunals" and for "submitting disputes involving the decisions of the Independent Auditor to a neutral panel of competent arbitrators") (quoting *New York v. Philip Morris, Inc.*, 30 A.D.3d 26, 32 (N.Y. App. Div. 2006) ("*NY I*"), *aff'd*, *NY II*, 8 N.Y.3d 574).

The West Virginia Supreme Court in 2009, after setting out this reasoning in detail, adopted it. *McGraw*, 681 S.E.2d at 109-12. That court explained that "[b]oth the structure and plain meaning of the MSA require a uniform

determination" of diligent enforcement—"involving *all participants to the [MSA] having an interest* in the resolution of the issue"—"*due to the impact the determination relevant to one [MSA] state will have upon all other [MSA] states*." *Id.* at 112 (emphases added).

In considering the arbitration that the MSA requires of the 2004 NPM Adjustment dispute, the Maryland and Pennsylvania appeals courts have employed this same reasoning. *See Maryland 2004*, 123 A.3d at 683-86; *Kane*, 128 A.3d at 351-52. And so did the Circuit Court here. Appx. A14 (CC Order at 14). The text and structure of the MSA thus leave no doubt that the required arbitration of an NPM Adjustment dispute, including any dispute over diligent enforcement, must be nationwide.

2. This structure further shows Missouri's mistake in asserting that the question of its diligence is a "discrete" dispute, somehow severable from all other aspects of the 2004 NPM Adjustment—including other States' diligence. MO Op. Br. at 41 n.10; 66; *see id.* at 57-61. On the contrary, because of the reallocation provisions, "a diligent-enforcement determination as to one [MSA] state will have an adverse impact on the remaining nonexempt [MSA] states," which makes it essential that disputes regarding diligent enforcement "be resolved in a national arbitration proceeding," *Alabama*, 1 So. 3d at 13, by a single panel applying "one clearly articulated set of rules . . . in a process where all parties can fully and

effectively participate," *NY II*, 8 N.Y.3d at 581. Indeed, Missouri concedes that the MSA is structured to give the States an interest in one another's diligence, when the State highlights that "the reallocated portion of the NPM Adjustment," which non-diligent States bear from diligent States, "may be substantially greater than a Non-Diligent State's own allocable share." MO Op. Br. at 11; *see id.* at 12 (example regarding 2003). That is why Missouri also makes much of its asserted right under the MSA to seek "contribution" from other States by contesting their diligence. *Id.* at 4 n.1, 23, 25, 34-36, 44.

Moreover, even after a particular State's diligence is determined, nothing can happen as to that State until *every other* State's diligence is determined. If the State is *diligent*, it must await all diligence determinations before it can know the extent, if any, to which it will be compensated from the Dispute Payments Account ("DPA") under the MSA (which generates earnings) or be reimbursed by credits from the non-diligent States (without interest). It is "undisputed that, under the MSA, the PMs have the right of first recovery for NPM Adjustment funds in the DPA." LF 253 (Settlement Award at 12). And the amount of that first recovery is unknowable until all diligence determinations are complete. Likewise, if the State is *non-diligent*, its responsibility for the NPM Adjustment will depend on reallocation, which will depend on the diligence or not of other States.

This logic is confirmed by the course of the 2003 arbitration, in which the Panel, among its many rulings common to all States, adopted a single definition of diligent enforcement; specified a single set of factors illuminating that definition; and adopted a single rule for applying the MSA's reallocation provisions in light of the partial settlement. *See* above, Facts, Pts. D, F. That same logic applies for the 2004 arbitration, in which that year's Panel likewise must address such issues, as discussed above in Part I.A.1 and (as to the partial settlement) further below. [6]

[6] Due to the MSA's reallocation provisions, if a single-state arbitration were required for the 2004 dispute, then each State would require the right to intervene in every other State's proceeding, to protect its interests, which confirms that States' claims of diligence are not severable. *Kane*, 128 A.3d at 352; *Maryland 2004*, 123 A.3d at 685. Even intervention, however, would not address the need for a single decision-maker applying a single set of rules. *See, e.g.*, *Kane*, 128 A.3d at 352 ("The obvious disadvantage of separate, parallel proceedings is the risk of inconsistent results."). Missouri (briefly) admits that the interconnectedness of which it makes so much with respect the *2003* dispute remains for the 2004 dispute, yet now disclaims that it would intervene to protect its own interests. MO Op. Br. at 57 n.11, 60. That assertion does nothing to change the structure of the MSA or its implications here in requiring a multistate arbitration.

In sum, to treat each State's claim of diligent enforcement as its own severable dispute, requiring a separate arbitration for each State, would produce nothing short of "chaos," an "absurd result" under the MSA, *NY I*, 30 A.D.3d at 32; *North Dakota ex rel. Stenehjem v. Philip Morris, Inc.*, 732 N.W.2d 720, 729-30 (N.D. 2007) (same); *see Kane*, 128 A.3d at 352 ("'absurd result'"), precisely because of the structural "interconnectedness of the states' diligent enforcement determinations" under the MSA, Appx. A14 (CC Order at 14).

C. Uniform case law confirms that the MSA requires a multistate arbitration of NPM Adjustment disputes, including issues of diligence, and belies the State's and Court of Appeals' claim of a "course of conduct" at odds with the MSA's text and structure.

Every other court to consider the issue has, like the Circuit Court below, concluded that the MSA requires multistate arbitration of diligent-enforcement issues. The Court of Appeals here stands alone. The decisions are legion, yet Missouri cites none of them, and the appeals court in its analysis ignored them too. Instead, the State attempts a factual argument from the ARA, one that the Court of Appeals accepted but which that same uniform authority belies.

1. Specifically as to the 2004 NPM Adjustment, all courts to consider the question, other than the Court of Appeals here, have reached the same conclusion as did the Circuit Court here—the MSA courts for Maryland and Pennsylvania,

and then the Maryland Court of Special Appeals and the Pennsylvania Commonwealth Court. The Maryland appeals court affirmed that States' MSA court and "agree[d] with the PMs" that "the MSA's text, its structure, and extensive, uniform authority . . . all confirm" that the MSA requires a nationwide arbitration of the 2004 NPM Adjustment dispute. *Maryland 2004*, 123 A.3d at 683. It emphasized the importance of the MSA's structure; found "no merit" in Maryland's argument that it was "a single 'side' to the dispute"; and rejected Maryland's argument from policy, because its position would absurdly lead to dozens of separate arbitrations into which every State would need to intervene. *Id.* at 683-85.

Soon after, the Pennsylvania appeals court reached the same conclusion, also affirming the State's MSA court. The Commonwealth Court observed that "the dispute arose when the Independent Auditor refused to apply the NPM Adjustment at the request of the [MSA] States," from which it followed that the "'two sides' to the dispute" were the PMs, who "contend they are entitled to an NPM Adjustment," and the MSA States, who "oppose application of the NPM Adjustment." 128 A.3d at 350. The court rejected Pennsylvania's efforts to redefine the dispute as only involving its own diligence; found further support in the MSA's structure; and reasoned that, whatever challenges a multistate arbitration may present, "greater complications would occur by allowing fragmented single-state arbitration." *Id.* at

351-52. The court cited, but was unmoved by, the decision of the Court of Appeals here. *See id.* at 351 n.8. Instead, it concluded that "multistate arbitration of the NPM Adjustment dispute," including issues of diligence, was "*the only reasonable interpretation* of the MSA." *Id.* at 355 (emphasis added).

2. These courts also recognized, as persuasive with respect to arbitrating the 2004 NPM Adjustment dispute, the uniform decisions reaching the same conclusion as to the 2003 dispute, including the earlier decision of the Maryland Court of Special Appeals itself. *See Kane*, 128 A.3d at 351-52 & nn. 8, 9; *Maryland 2004*, 123 A.3d at 683-84, 685-86. Most starkly, in *McGraw*, whether the MSA required a multistate arbitration was the only question on appeal, the State having conceded arbitrability. 681 S.E.2d at 103. The West Virginia Supreme Court held that the MSA provides "for arbitration of a diligent enforcement determination in a single, unitary proceeding involving all participants to the [MSA] having an interest in the resolution of the issue." *Id.* at 112. It too did not consider the question close, concluding that the MSA "*unambiguously* provides for arbitration of a diligent enforcement determination before a single panel of three former federal judges." *Id.* at 108 (emphasis added).

Similarly, the New York Appellate Division reached the same conclusion when faced with that State's refusal to abide by prior decisions (quoted above in Part I.B) requiring nationwide arbitration of diligent-enforcement issues. *New*

York v. Philip Morris, Inc., 51 A.D.3d 523 (2008) ("*NY III*"). The court reversed the trial court's order and instead reaffirmed that the MSA mandates multistate arbitration because "the [MSA] States constitute one side" under MSA §XI(c). *Id.* at 524-25.

Other leading cases likewise squarely rejected the position Missouri advances here. *See, e.g.*, *Alabama*, 1 So.3d at 6, 14 (holding, where State argued that "'the arbitration should be a local proceeding involving only the State and the PMs,'" that the MSA "envision[s] a national, as opposed to a local, arbitration proceeding"); *Indiana*, 879 N.E.2d at 1214, 1220 (holding, where State challenged trial-court order requiring "arbitration by a single, national arbitration panel," that "[b]oth the language and the structure of the MSA require that the dispute concerning the 2003 NPM Adjustment, including the [MSA] States' claims of diligent enforcement of their Qualifying Statutes, must be submitted to a single, national arbitration panel").

And these appellate courts were four among many. *See Vermont v. Philip Morris USA, Inc.*, 945 A.2d 887, 894 (Vt. 2008) (agreeing with those courts that had found a "compelling logic in having disputes over diligent enforcement handled by one arbitration panel"); *NY II*, 8 N.Y.3d at 581 (noting that the MSA requires "a neutral panel of competent arbitrators, who are guided by one clearly articulated set of rules that apply universally in a process where all parties can fully

and effectively participate") (quotation marks and citation omitted); *Connecticut*, 905 A.2d at 50 n.12 (rejecting State's argument that "the arbitration provision does not provide for a single nationwide resolution of disputes, but would result in fifty-two separate arbitration proceedings"); *see also North Carolina v. Philip Morris USA, Inc.*, 666 S.E.2d 783, 787, 794 (N.C. Ct. App. 2008) (agreeing that diligent enforcement disputes "must be resolved under one clear set of rules that apply with equal force to every settling state," and affirming order "that the parties submit their dispute to the arbitration panel as provided in the MSA"); *New Mexico*, 194 P.3d at 754 ("We conclude that the text of the MSA supports the district court's order compelling arbitration of this dispute before a nationwide panel."); *Maryland 2003*, 944 A.2d at 1180 ("[A] single decision-maker is vitally important because the determination for one state affects every other [MSA] state pursuant to § IX(d)(2)(C)'s 'reallocation' provision."); *Illinois v. Lorillard Tobacco Co.*, 865 N.E.2d 546, 554 (Ill. App. Ct. 2007) (concluding that diligent-enforcement disputes are to be "handled by a single arbitration panel of three federal judges") (internal quotation marks omitted).[7]

[7] Numerous other decisions are cited in the OPMs' brief below (LF 1494-95 (OPM Opp. at 19-20 & n.4)), with copies collected at LF 1806-2012 (OPM Exhs.).

3. This litany gives the lie to Missouri's invocation of the ARA as somehow showing a "course of conduct" that nationwide arbitration was only required for 2003 because of that agreement. MO Op. Br. at 61-63. Although the Court of Appeals accepted that claim, *every decision* cited above requiring a multistate 2003 arbitration was decided *before* the ARA was first executed in December 2008, except for *McGraw*; and *McGraw* affirmed a March 2007 decision requiring a multistate arbitration. *See* 681 S.E.2d at 100. The Court of Appeals itself recognized, earlier in its opinion, that the ARA was not executed until December 2008, Appx. A22 (COA Op. at 7); and Missouri admits at the outset of its brief that it did not sign the ARA until 2009, MO Op. Br. at 3. The ARA is thus a testimony not to any lack of clarity in the unanimous decisions requiring multistate arbitration, but rather to the States' unrelenting recalcitrance. The ARA sought to, and did, induce the States, who still refused to cooperate in the arbitral process—notwithstanding clear direction from their courts—to participate in a structured arbitration in a timely fashion.

(continued…)

Comprehensive citations of all decisions on arbitrability of the 2003 dispute are at LF 897-900 (SPM Joinder at 9-12 & nn.3&4).

Specifically, even after the long string of decisions requiring multistate arbitration, the States refused to cooperate in selecting their arbitrator. For example, as noted above, New York had been squarely ordered by its highest court (affirming the Appellate Division) to participate in a nationwide arbitration. *See NY II*, 8 N.Y.3d at 581. That State nonetheless continued to resist, seeking and obtaining an order from a lower court relieving it of the obligation to arbitrate on a multistate basis. *See NY III*, 51 A.D.3d at 524. This tactic required yet another appeal, in which (as quoted above) the Appellate Division again unanimously ordered New York to submit to multistate arbitration. *Id.* at 524-25. Likewise, as quoted above, the Illinois Appellate Court had expressly ordered that State to a nationwide arbitration. *See Illinois*, 865 N.E.2d at 554. Instead of complying, Illinois purported to select an arbitrator for a separate, 12-state arbitration, forcing the PMs to return to the Illinois MSA court to obtain another order compelling compliance with the MSA. *See Illinois v. Philip Morris Inc.*, No. 96 L 13146, slip op. at 2 (Ill. Cir. Ct. Apr. 15, 2008) (OPM Subst. Resp. Appx. A2). All of this was half a year before the ARA was executed.

Rather than continue herding cats, the PMs negotiated an ARA, in which the States agreed to cooperate in selecting their arbitrator and gave further consideration to the PMs regarding the structure of the arbitration and the process for payment of awards. *See Kane*, 128 A.3d at 353 (explaining that parties to the

ARA chose not to "fully litigate the manner of arbitration"). In return, the PMs gave certain consideration, including the 20% liability reduction. Missouri's assertion that the ARA betrays doubt by the PMs as to what the MSA requires is thus contradicted by the facts. Indeed, the PMs offered the ARA, including the 20% reduction, to *all* MSA States, including those (like New York and Illinois) that were *twice* expressly ordered to multistate arbitration and the many other States that were subject to orders indisputably compelling them into the multistate arbitration before December 2008.

Missouri itself has repeatedly conceded that the ARA was not why it joined the nationwide arbitration. Rather, as it explained in the first sentence of its motion below to vacate the Settlement Award, it was "*compelled into a multistate arbitration* on January 22, 2007, pursuant to Section XI(c) of the Master Settlement Agreement." LF 105 (emphasis added). Missouri was similarly forthright in its Suggestions in support of that motion, again in the opening sentence: "In January 2007, this Court *compelled* Missouri's participation in *a single, nationwide arbitration* . . . under the landmark 1998 [MSA]." LF 109 (emphasis added). That was two years before the State signed the ARA.

D. Authority regarding "class" or "collective" arbitrations is irrelevant here, where the text and structure of a single agreement require an arbitration in which all disputant signatories to the agreement participate as parties.

Rather than engage with, or even acknowledge, the myriad on-point decisions interpreting and applying the MSA with respect to the precise question here, Missouri grasps for support from *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 559 U.S. 662 (2010). MO Op. Br. at 46-53. The Court of Appeals also apparently relied on *Stolt-Nielsen*, as vaguely "applicab[le] here," asserting that nationwide arbitration would be "class" or "collectiv[e]." Appx. A51-A52 (COA Op. at 36-37); *see also* Appx. A50, A53 (*id.* at 35, 38). Any "reliance on *Stolt-Nielsen* is misplaced" here, for several reasons. *Kane*, 128 A.3d at 352.

Stolt-Nielsen held "that a party may not be compelled under the FAA to submit to *class arbitration* unless there is *a contractual basis* for concluding that the party agreed to do so." 559 U.S. at 684 (emphasis altered). The parties had entered into "an unusual stipulation," *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2069 (2013), "that the arbitration clause was 'silent' with respect to class arbitration" and "that the term 'silent' did not simply mean that the clause made no express reference to class arbitration," but instead that "there[] [had] been no

agreement . . . reached on that issue," *Stolt-Nielsen*, 559 U.S. at 668-69. Because of this stipulation, and because an intention to authorize class arbitration cannot be "infer[red] solely from the fact of the parties' agreement to arbitrate," the U.S. Supreme Court held that the agreement did not require class arbitration, and so the parties could not "be compelled to submit their dispute to class arbitration." *Id.* at 685, 687. As that Court has since explained, it "overturned the arbitral decision in [*Stolt-Nielsen*] because it lacked *any* contractual basis for ordering class procedures, not because it lacked . . . a 'sufficient' one." *Oxford Health*, 133 S. Ct. at 2069.

A class action, in which a tribunal "adjudicates the rights of absent parties" based on evidence common to the class, is irrelevant to the nationwide arbitration that the MSA requires, in which each MSA State that has not settled participates as a party. *Stolt-Nielsen*, 559 U.S. at 686. "There are no absent or unnamed parties because each [MSA] State participates as a party." *Kane*, 128 A.3d at 353. Thus, as the 2003 Panel recognized, the "legal effects" of nationwide arbitration of NPM Adjustment disputes "could [not] be further from the legal effects of a class action." LF 1771 (Order re Dep. Procedures at 3).

And, in any event, the MSA, far from being devoid of any agreement on the nature of the arbitration, "clearly demonstrates," as detailed above in Parts I.A and I.B, "that it contemplates that a single panel of arbitrators resolve disputes"

regarding diligent enforcement—as courts around the nation have "consistently" held. *McGraw*, 681 S.E.2d at 108-12. Not only is there "no stipulation that the MSA precludes multistate arbitration," but it is, as the decisions recounted above in Part I.C confirm, an eminently "reasonable interpretation of the MSA . . . that the same arbitration panel selected to determine the parties' NPM Adjustment will determine all issues related thereto, including the [MSA] States' diligent enforcement." *Kane*, 128 A.3d at 352-53. Indeed, that is "the only reasonable interpretation," given the MSA's "clear terms" and structure. *Id.* at 355. Because the MSA, unlike the contract stipulated to be silent in *Stolt-Nielsen*, does contain a "contractual basis" for the conclusion that the parties to the MSA agreed to nationwide arbitration of diligent-enforcement disputes, *Stolt-Nielsen* has nothing to do with this case. *Stolt-Nielsen*, 559 U.S. at 677.[8]

[8] For the same reason, as well as because the MSA is a single contract with a single arbitration provision, there is no issue of a judicially "consolidated" arbitration, as the Circuit Court recognized. Appx. A13-14 (CC Order at 13-14); *see Kane*, 128 A.3d at 353 (affirming multistate-arbitration order as requiring MSA State to "'participate in a single arbitration, under a single contract, regarding a single dispute,'" and also holding that, even if such order were a consolidation, the MSA indicates that "the parties agreed to" such "arbitration of the NPM Adjustment disputes").

II. Points II And III Should Be Denied Because They Are Irrelevant To What The MSA's Text, Its Structure, And Uniform Authority Require And, In Any Event, Fail On Their Own Terms.

In the absence of support in the MSA's text, its structure, or on-point case law, Missouri retreats to asserted fairness, complaining about "inequities" and "prejudice" allegedly endured in the nationwide arbitration of the 2003 Adjustment and likely to be endured in a nationwide arbitration of the 2004 Adjustment. MO Op. Br. at 4-6, 70; *see id.* at 63. It contends that a nationwide arbitration "cannot be done fairly." *Id.* at 76. These arguments are both irrelevant and wrong.

A. "Fairness" cannot override a contract's text and structure.

The arguments are irrelevant because they do not involve the MSA's terms or structure. Arbitration is a creature of contract, and the Federal Arbitration Act, under which the parties in MSA § XI(c) agreed to arbitrate (LF 1554), is "motivated, first and foremost, by a congressional desire to enforce agreements into which parties ha[ve] entered," even when doing so creates alleged inefficiency or difficulty. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220 (1985). "[A]s with any other contract, the parties' intentions control," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985), and courts therefore "must 'rigorously enforce' arbitration agreements according to their terms," *Am.*

Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2309 (2013) (citation omitted). *See* Appx. A12 (CC Order at 12) (similar).

Indeed, Missouri itself—elsewhere in its brief—recognizes that the question is simply what "the parties have authorized." *Oxford Health*, 133 S. Ct. at 2066; *see* MO Op. Br. at 48 (quoting *Oxford*). Courts determine this by "[t]he usual rules and canons of contract interpretation," looking to "[t]he terms of a contract . . . as a whole." *Dunn*, 112 S.W.3d at 428; *see* MO Op. Br. at 43, 53 (invoking *Dunn*).

B. Contrary to Missouri's Point II, the settlement of the 2004 NPM Adjustment dispute with some States does nothing to alter the MSA's requirement that arbitration include all of the States that do dispute the PMs' right to receive that NPM Adjustment.

The PMs' settlement of the NPM Adjustment dispute for 2004 (as well as the disputes for 2003 and years after 2004) with 22 (now 25) of the MSA States altered neither the terms nor the structure of the MSA that require a nationwide arbitration, and particularly did not eliminate reallocation of the NPM Adjustment among the MSA States that remain in the 2004 dispute. For the reason just discussed, then, the settlement does not affect Missouri's contractual obligation to participate in an arbitration with those same MSA States. And there is nothing "unnecessary," "impossible," or unfair in holding the Non-Signatory States to that bargain. MO Op. Br. at 63. That is what the Pennsylvania Commonwealth Court

did, in recognizing that all Non-Signatory States "share the same interest in upholding the Independent Auditor's refusal to apply the 2004 NPM Adjustment" and affirming that a State's "sovereignty is respected when the courts follow the clear terms of the MSA." *Kane*, 128 A.3d at 351, 354; *cf. Maryland 2004*, 123 A.3d at 683-86 (requiring multistate 2004 arbitration even while claiming to find error that warranted modification of the 2003 Panel's Settlement Award).

Missouri's argument that, nevertheless, the settlement bars further nationwide arbitrations of NPM Adjustments appears to rest on the premise that, in the context of arbitration of disputes, "nationwide" means "every party to the MSA," rather than "every party to *a dispute* under the MSA." *See* MO Op. Br. at 55, 63, 67, 69; Appx. A54-55 (COA Op. at 39-40). But the multistate arbitration that the MSA requires is of "all participants to the [MSA] having an interest in the resolution of the issue." *McGraw*, 681 S.E.2d at 112; *see Kane*, 128 A.3d at 351 (similar; quoted above). Missouri admits as much elsewhere in its brief, when it acknowledges the common ground that the nature of the arbitration the MSA requires depends on the nature of the dispute. *See* above, Arg., Pt. I.A.2.

Missouri's argument also overlooks that it has yet to be determined how the MSA's reallocation provisions apply to the NPM Adjustment for 2004 in light of the partial settlement. The 2003 Panel did not decide that question for future years. *See* above, Facts, Pt. D. And the 2004 Panel will no doubt be asked to consider

subsequent judicial decisions in deciding it. Indeed, this critical, common question for the 2004 NPM Adjustment arbitration illustrates why a single, nationwide arbitration *is* needed. *See*, above, Arg., Pts. I.A.1 & I.B.2.

The Signatory States, having resolved through settlement their diligent-enforcement claims for 2004, will lack "an interest in the resolution of the issue." *McGraw*, 681 S.E.2d at 112; *see Kane*, 128 A.3d at 351. There is not to be any *separate* arbitration with the Signatory States for 2004. And all of the structural considerations requiring uniformity in the resolution of an NPM Adjustment dispute continue to apply. It is therefore quite inaccurate to assert that the PMs have somehow made an "[i]mplicit . . . concession that diligence determinations by a single arbitral body are not (or at least are no longer) required by the MSA." Appx. A55 (COA Op. at 40); *see* MO Op. Br. at 65 (similar).[9]

[9] Missouri is equally wrong to assert, with a bare string-citation, that a disagreement that affected only the choice of arbitrator for the PMs' side for 2004 shows that a nationwide arbitration has become impossible. *See* MO Op. Br. at 68 n.15. (A related disagreement over that arbitration's scope was settled. *E.g.*, OPM Subst. Resp. Appx. A5, A8, Mem. Decision & Order 3, 6 (Jan. 28, 2016), in *Vermont v. Philip Morris USA, Inc.*, No. S744-97 CnC (Vt. Sup. Ct.)). Even amid that disagreement, "all the parties . . . agree[d] that there should be only one nationwide arbitration," *id*. at 1 n.1; the States agreed on the arbitrator for their side, *id.* at 3; and all agreed on the choice of the

The MSA thus continues to "evince[ ] the parties' intention to have a single, national arbitration." *Indiana*, 879 N.E.2d at 1220. For the 2004 Adjustment, just as for the 2003 Adjustment, "[t]he question of diligent enforcement cannot be made in a vacuum," as each determination affects all States who are part of the dispute, *Maryland 2004*, 123 A.3d at 684 (internal quotation marks omitted), which confirms that, as the Circuit Court found, "a nationwide arbitration was envisioned by the parties in drafting the MSA, and . . . is the most logical mechanism for the resolution of the dispute," Appx. A14 (CC Order at 14).

For these reasons, Missouri's invocation of unspecified principles of estoppel is frivolous. *See* MO Op. Br. at 67. The PMs, in simply *settling* NPM Adjustment disputes with some States, neither made any concession nor implied anything regarding arbitration of the 2004 NPM Adjustment dispute with States

(continued…)

third, presiding arbitrator, *id.* at 4. Ultimately, the parties also compromised regarding the PMs' arbitrator; they agreed to dismiss all of the litigation, and an integrated arbitration proceeding is underway. *See* Stipulation (entered May 13, 2016), in *In re: 2004 NPM Adjustment Proceedings*, JAMS Case Ref. No. 1260003649. If anything, the inconsistency among MSA courts on appointment of the PMs' arbitrator highlights the hazards of inconsistent decisions—the very problem that Missouri would *exacerbate*. *See* OPM Subst. Resp. Appx. A3 n.1, A6 (Vt. Mem. at 1 n.1, 4).

that *refused to settle* that dispute. They certainly took no position "clearly inconsistent" with the MSA's textual and structural requirement that any dispute over an NPM Adjustment, including issues of diligent enforcement, be resolved in a multistate arbitration. *Brock v. McClure*, 404 S.W.3d 416, 420 (Mo. Ct. App. W.D. 2013) ("[T]o apply judicial estoppel . . . a party's later position must be clearly inconsistent with its earlier position.").

C. Missouri's policy argument, attacking the 2003 Panel (Point III), is both irrelevant to the 2004 arbitration and unfounded—particularly given that Missouri accepts the Circuit Court's upholding of the 2003 Panel's Non-Diligence Award.

In objecting to multistate arbitration of the 2004 dispute due to the purported "lessons" and "experience" of the 2003 arbitration, Missouri does not even pretend to argue from the terms of the MSA—which the 2003 arbitration did nothing to change. MO Op. Br. at 3, 47, 71, 76; *see* Appx. A55-A57 (COA Op. at 40-42). The State instead says it disliked the 2003 arbitration, mainly because the Panel allegedly permitted "fundamentally unfair ex parte contact" about Missouri's diligence; asserts that it therefore would prefer not to participate in another nationwide NPM Adjustment arbitration; and contends that, *ipso facto*, it must be excused from doing so. MO Op. Br. at 76.

As explained below, Missouri's allegations of unfair ex parte communications are baseless. Missouri's argument also fails as irrelevant, because it *assumes* the absence of a contractual obligation. *See Maryland 2004*, 123 A.3d at 683. It would not matter if the multistate 2003 arbitration had been not perfect and not what Missouri may have expected, because courts cannot, and do not, compel state-specific arbitration in the face of "the clear terms of the MSA" to which the States "willingly agreed." *See Kane*, 128 A.3d at 354-55 (rejecting similar argument based on allegedly "unfair" and "prejudic[ial]" 2003 proceeding).

Even if a policy objection to a multistate 2004 arbitration were relevant, Missouri's argument fails, for four reasons.

1. Missouri's complaints about the 2003 Panel are baseless. The State laid the same charges of misconduct in its motion to vacate the Non-Diligence Award. The Circuit Court rejected them, because Missouri "*ha[d] not shown* that the arbitration panel was unduly influenced by any ex parte communications in other states' hearings" and there was "*abundant* evidence in the *Missouri* record to support the finding that Missouri failed to diligently enforce its escrow statute in 2003." Appx. A11 (CC Order at 11) (emphases added). The court thus denied the motion and confirmed the Non-Diligence Award. Appx. A11, A15 (*id.* at 11, 15).

The soundness of that ruling is not open to question here, because Missouri abandoned its appeal of it. *See* above, Facts, Pt. G; *Maskill v. Cummins*, 397

S.W.3d 27, 32 (Mo. Ct. App. W.D. 2013) (arguments against unappealed order may "not [be] address[ed]"; "[t]he appellate court is confined to review" the decision appealed from). Indeed, the effect of that abandonment is *affirmance*. *E.g.*, *Devitre v. Orthopedic Ctr. of St. Louis, LLC*, 349 S.W.3d 327, 329 n.2 (Mo. 2011) (failure to appeal portion of a judgment means, "[t]herefore," that "that portion of the judgment is affirmed"); *Mo. Retired Teachers Found. v. Estes*, 323 S.W.3d 100, 103 (Mo. Ct. App. W.D. 2010) ("[A] matter decided by the trial court but not raised as an issue on appeal is deemed abandoned. The Judgment is, therefore, affirmed as it relates to" the abandoned issue.).

Moreover, the record overwhelmingly supports that ruling. The "ex parte" communications were (as Missouri concedes, *see* MO Op. Br. at 28-33, 70-71) statements on the record, at formal hearings, of which Missouri had notice, and that it could have attended either in person or via an internet simulcast. *See* above, Facts, Pt. E; Appx. A8-A9 (CC Order at 8-9) (noting that "communications are not generally considered ex parte when they occur in open court, even if a party is not present") (internal quotation marks omitted). And on every point of the Non-Diligence Award about which Missouri complains (MO Op. Br. at 38-39, 70), (a) the evidence in the Missouri record amply supported the Panel's conclusion, and (b) the references to Missouri in other States' hearings were fleeting and made in the context of resolving *those* States' diligence—as the PMs detailed, among

other points, to the Circuit Court. LF 949-58, LF 1366-1443 (OPM Opp. at 27-36 & Exhs. BB to PP); *see* Appx. A10-A11 (CC Order at 10-11).

2. In any event, there is no reason to assume in advance that the 2004 multistate-arbitration Panel would deny Missouri a fair hearing. It may, if it deems it appropriate, institute measures that would alleviate that State's alleged concerns. In fact, as just discussed, the 2003 Panel sought to do that—including through notice to each State of every State's hearing, and an opportunity to attend all hearings, either remotely or in person. *See also* above, Facts, Pts. C, D, F (explaining other common procedural and substantive decisions).

3. And if the 2004 multistate Panel did engage in misconduct that Missouri truly believed "deprived [it] of a fair hearing," in violation of FAA § 10(a)(3), there would be a remedy. MO Op. Br. at 71. Missouri could move to vacate the resulting award for 2004, just as it once sought to do with the Non-Diligence Award for 2003—only this time seeing its challenge through to the end. *See, e.g.*, *Teamsters Local 312 v. Matlack, Inc.*, 118 F.3d 985, 995 (3d Cir. 1997) ("[A] court has the power to vacate an arbitration award where an arbitrator receives *ex parte* information to the prejudice of one of the parties."). Missouri admits this. MO Op. Br. at 71-74.

4. Finally, while seeking a state-specific arbitration based on the allegedly inherent flaws of multistate arbitration as revealed in 2003, Missouri fails

to explain how the myriad proceedings necessary to determine diligence of each of the other 26 States would function more equitably than a nationwide arbitration. *Cf. id.* at 57 n.11, 60, 67; Appx. A55 (COA Op. at 40). It necessarily is asking for 27 separate bodies to determine discovery; 27 separate bodies to variously rule on procedural and evidentiary questions, including such basic questions as the burden of proof; 27 separate interpretations of "diligent enforcement," the Qualifying Statute, and other common issues; and 27 separate fact-finders applying those separate interpretations of the same contract.

Nor does Missouri address the implications of the MSA's reallocation provision for each of those 26 separate, state-specific arbitrations (plus any litigation in Montana) that it necessarily is advocating: Namely, every State would have an interest in the decision on diligence for every other State. *See* Appx. A14 (CC Order at 14). Thus, in every one of the 27 proceedings—including Missouri's—up to 26 other States would need to intervene to protect their interests, which "would multiply exponentially the cost, complexity, and burden of resolving the 2004 NPM Adjustment dispute." *Maryland 2004*, 123 A.3d at 685 (internal quotation marks omitted). So the burdens and alleged inequities that Missouri laments would not disappear; they would become even more unwieldy than when a single tribunal can address them. *See Kane*, 128 A.3d at 352 (recognizing

multiplicity of arbitrations and need for intervention as creating "an absurdly complicated process") (internal quotation marks omitted).

These considerations are why every court to consider a State's policy arguments against a multistate arbitration of the 2003 NPM Adjustment dispute rejected them. *See McGraw*, 681 S.E.2d at 112 (pointing to "[e]fficiency" and "logic" as complementing text and structure in requiring that a single panel determine all claims of diligent enforcement). And why, subsequent to the 2003 arbitration, the appeals courts in *Maryland 2004* and *Kane* have done the same for the 2004 NPM Adjustment dispute, just as the Circuit Court did here in concluding that "a single decision maker has the best chance of producing consistent awards" for that dispute. Appx. A14 (CC Order at 14). Under Missouri's desired approach, the "'individual resolution of diligent-enforcement disputes,'" in 27 separate proceedings, "'would involve the application of different standards in determining what activities constitute diligent enforcement and could lead to inconsistent and conflicting determinations on the issue.'" *McGraw*, 681 S.E.2d at 110 (quoting *Alabama*, 1 So. 3d at 13). Such a result would work "great mischief" and "substantial unfairness"—the opposite of what Missouri claims to seek. *Id.* (internal quotation marks omitted).

CONCLUSION

This Court should affirm the order below denying Missouri's Motion to Compel a Single-State Arbitration of the dispute over the 2004 NPM Adjustment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

A copy of this document was served on counsel of record through the Court's electronic notice system on August 1, 2016.

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