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

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The State's response brief ("MO Br.") barely defends the Circuit Court's reasons for modifying the arbitration Panel's award, as the State has no meaningful response to the flaws that were identified in the OPMs' opening brief ("OPM Br.") and the Court of Appeals's opinion. Instead, the State advances a slew of alternative arguments, but they all are equally flawed.

Trying desperately to avoid the merits entirely, the State principally argues, for the first time, that the PMs are collaterally estopped in this litigation due to adverse decisions in parallel litigation in the Maryland and Pennsylvania courts. But collateral estoppel does not apply here, for two well-established reasons that the State essentially ignores. *First*, the issues are *not identical*. The Maryland and Pennsylvania courts modified the Panel's *pro rata* ruling under state-law standards of review that are different and broader than the FAA review standard that concededly governs this case. *Second*, the Maryland and Pennsylvania decisions are *inconsistent* with the decisions of the Court of Appeals below and the Colorado MSA court. It would be unfair and unprecedented to allow Missouri to collaterally estop the PMs by cherry-picking the decisions the PMs lost while ignoring those they won — especially since the MSA requires the PMs to litigate against each State separately in that State's courts, rather than in one single case where both the PMs *and* the States would be equally bound by the judgment.

Once it turns to the merits, the State does not try to defend the standard of review that the Circuit Court expressly applied. After admitting that *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), sets forth the controlling FAA review standard, the State concedes that the trial court's determination that the Panel's *pro rata* ruling was "clearly erroneous" is legally insufficient.

Instead, the State attempts to rewrite the court's order. *First*, the State claims that the court *implicitly* applied *Oxford Health* simply because it determined that the *pro rata* ruling "amended" the MSA. That determination, however, also is legally insufficient: *Any* erroneous interpretation "amends" the contract, but that does not mean the arbitrators "exceeded their powers." *Oxford Health* forbids *any review of the merits* of the arbitrators' interpretation, and authorizes relief only if the arbitrators acted without jurisdiction or dishonestly. *Second*, the State claims that the court held that the Panel lacked *jurisdiction* to enter the *pro rata* ruling. But the State errs in treating the court's holding that the *pro rata* ruling "amended" the MSA *on the merits* as a holding that the Panel lacked jurisdiction to adopt the *pro rata* interpretation of the MSA. To the contrary, the court itself correctly upheld the Panel's power to determine the proper post-settlement reallocation method — as have *all* the courts in the Settlement Award litigation, even though they have disagreed over the merits of the Panel's determination.

It is thus dispositive that the State does not and cannot dispute that the Panel's three former judges were conscientiously interpreting the MSA, rather than maliciously imposing their own notions of justice. Regardless of the merits of their *pro rata* ruling, that MSA interpretation cannot be vacated under the FAA. This alone requires reversing the trial court's order.

In addition, the State does not challenge most of the key steps in the Panel's MSA interpretation. It tacitly concedes that, *if* the MSA's text does not expressly resolve the post-settlement reallocation question, then the Panel properly employed standard interpretive tools to resolve that question: namely, the Panel considered the MSA's language, structure, and context in light of the relevant background law of post-settlement judgment reduction, and it concluded that the most appropriate interpretation was the "*pro rata*" method.

Accordingly, the State's sole argument is that the MSA's text *does* expressly resolve the post-settlement reallocation question, and that it clearly dictates that all contested Signatory States must be deemed non-diligent. But to support that argument, Missouri adopts an interpretation of MSA § IX(d)(2) and the Panel's Burden of Proof Order that appears nowhere in the trial court's opinion: namely, "every State's diligence has to be determined," and "States that have not been determined diligent" are subject to the NPM Adjustment reallocation.

Moreover, Missouri never meaningfully grapples with that interpretation's myriad flaws. *First*, the State's argument that the MSA compels the rule that "every State's diligence has to be determined" conflicts with the conclusion of the Panel, trial court, and Court of Appeals that the MSA "does not expressly address" the post-settlement reallocation question. *Second*, while § IX(d)(2) says that "diligent" States are "excepted" from the NPM Adjustment and that their shares are "reallocated" to the "other," non-diligent States, it does not say that a State's diligence must be "determined" even where it has settled and its diligence is no longer contested by any party. *Third*, the Burden of Proof Order does not say that either, and, regardless, it arose in a different context with different background law, as the Panel itself later explained. *Fourth*, even if there were a rule that "every State's diligence has to be determined," Missouri forfeited any right to have the Panel make diligence determinations for the contested Signatory States, because it failed to request such determinations — indeed, it affirmatively opposed them. In sum, the Panel's *pro rata* ruling was correct, and at a minimum reasonable. This too requires reversing the trial court's order.

I. The State's Collateral Estoppel Argument Fails

The State argues that the PMs are precluded from litigating whether the *pro rata* ruling should be vacated by Missouri courts, simply because Maryland and Pennsylvania courts have vacated that ruling for those States. MO Br. 16-26. The State raises this collateral-estoppel argument for the first time in this Court, after losing on the merits in the Court of Appeals: below, Missouri invoked out-of-state decisions only as persuasive authority, not for any alleged preclusive effect. It is thus unsurprising that the State's belated argument is baseless.

A. As a threshold matter, the State fails to provide the governing law. "[T]he preclusive effect of a judgment is determined by the law of the jurisdiction in which the judgment was rendered." *Strobehn v. Mason*, 397 S.W.3d 487, 494 (Mo. App. W.D. 2013) (citing Restatement (Second) of Conflict of Laws § 95). Yet, despite recognizing that rule, the State cites no cases articulating Maryland or Pennsylvania preclusion law. MO Br. 17-19. This Court should thus reject the State's collateral-estoppel argument because the State has "fail[ed] to sufficiently develop the argument for this Court's review." *Cf. Piatt v. Indiana Lumbermen's Mut. Ins. Co.*, 461 S.W.3d 788, 794 n.4 (Mo. banc 2015).

B. More fundamentally, the laws of Maryland and Pennsylvania (and Missouri) would not give preclusive effect here to the Maryland and Pennsylvania decisions. The State fails to address, much less satisfy, two critical requirements.

1. Collateral estoppel applies only if the issue here is "identical" to the issue previously decided. *Batson v. Shiflett*, 602 A.2d 1191, 1202 (Md. 1992); *Office of Disciplinary Counsel v. Duffield*, 644 A.2d 1186, 1189 (Pa. 1994); *accord State v. Rodden*, 728 S.W.2d 212, 220 (Mo. banc 1987). Although the State acknowledges this rule (MO Br. 18-23), it ignores that "issues are not identical if the second action involves application of *a different legal standard*, even though the factual setting of both suits be the same." Charles Alan Wright et al., 18 Fed. Prac. & Proc. Juris. § 4417 (2d ed.) (emphasis added).

For example, collateral estoppel does not apply where the losing party had *a greater burden of proof* in the prior case. *Gibson v. State*, 616 A.2d 877, 881 (Md. 1992) (criminal acquittal does not preclude civil litigation against defendant); *Lyness v. State Bd. of Medicine*, 561 A.2d 362, 368-69 (Pa. Commw. Ct. 1989) (same), *rev'd on other grounds*, 605 A.2d 1204 (Pa. 1992); *accord State ex rel. Cooper v. Hutcherson*, 684 S.W.2d 857, 858 (Mo. App. W.D. 1984).

Likewise, collateral estoppel does not apply where a legal term has *different substantive meanings* in different contexts. *Thacker v. City of Hyattsville*, 762 A.2d 172, 183-84 (Md. Ct. Spec. App. 2000) (determination of "qualified immunity" under federal objective-reasonableness standard does not preclude litigation of "qualified immunity" under Maryland subjective-good-faith standard); *Odgers v. Unemployment Compensation Bd. of Review*, 525 A.2d 359, 385-90 (Pa.

1987) (determination that a work stoppage was a "strike" under labor law does not preclude litigation of whether the stoppage was a "strike" under unemployment-compensation law); *see also Shelton v. City of Springfield*, 130 S.W.3d 30, 34-36 (Mo. App. S.D. 2004) (pension determination that a disability was "the direct result of occupational duties" does not preclude workers-compensation litigation over whether the disability "ar[ose] out of and in the course of the employment").

Accordingly, here, collateral estoppel does not apply because the applicable standard of review is *different and narrower* than the standard applied by the Maryland and Pennsylvania courts. In this case, the FAA standard governs (as the State concedes); and it forbids *any review of the merits* of the arbitrators' good-faith decision, because it allows vacatur only if the arbitrators lacked jurisdiction or engaged in bad-faith misconduct. *See* pp. 14-17, below. In contrast, the Maryland and Pennsylvania appellate courts applied state-law standards that they interpreted to authorize the vacatur of an arbitration award on the merits so long as it is deemed objectively "irrational," regardless of the arbitrators' subjective honesty. *See State v. Philip Morris, Inc.*, 123 A.3d 660, 675-76, 680 (Md. Ct. Spec. App. 2015) ("In sum, the Panel exceeded its powers, *in violation of CJP § 3-224(b)(3)*" because "its decision *lacked rationality* in light of MSA § IX(d)(2)(B)." (emphasis added)); *Commw. ex rel. Kane v. Philip Morris USA, Inc.*, 114 A.3d 37, 57-58, 65 (Pa. Commw. Ct. 2015) ("In conclusion, the trial court properly applied essence

test review *pursuant to Section 7302(d)(2) of the UAA and decisional law*," because "the panel departed from the MSA's *clear and unambiguous language* regarding reallocation." (emphasis added)).[1]

Given the foregoing law, the State unsurprisingly makes no attempt to argue that the Maryland and Pennsylvania standards are *identical* to the FAA standard, or that the Maryland and Pennsylvania courts' application of their state-law standards preclude this Court from applying the *different* FAA standard. MO Br. 19-23.

To be sure, the State asserts in passing that the Maryland and Pennsylvania courts held that the "Panel exceeded its powers in violation of the FAA." *Id.* 16. But that is incorrect. The Maryland court said *nothing* about that issue, instead only deciding (erroneously) the distinct issue of whether the FAA preempted its state-law standard. *Philip Morris*, 123 A.3d at 675. And while the Pennsylvania court hypothesized (erroneously) that the Panel's *pro rata* ruling could have been modified under the FAA even if the state-law standard were preempted, *Philip Morris USA*, 114 A.3d at 58, issue preclusion does not apply to such *dicta*, which is "not essential to the judgment." *Matson v. Housing Auth.*, 473 A.2d 632, 634, 636 (Pa. Super. Ct. 1984) (citing *Schubach v. Silver*, 336 A.2d 328, 334 (Pa. 1975),

[1] Contrary to Missouri's assertions, the Maryland and Pennsylvania decisions are from *intermediate* courts, as the "highest courts" declined review. MO Br. 16-17.

and Restatement (Second) of Judgments § 27, cmt. h); *accord Murray Int'l Freight Corp. v. Graham*, 555 A.2d 502, 505-06 (Md. 1989); *King Gen. Contractors, Inc. v. Reorganized Church*, 821 S.W.2d 495, 501 (Mo. banc 1991).

Unable to seriously argue that the Maryland and Pennsylvania courts held that the *pro rata* ruling can be modified *under the FAA*, the State instead tries to satisfy the "identical"-issue requirement by emphasizing that those courts, in applying their distinct state-law standards, held that the *pro rata* ruling "amended the MSA." MO Br. 19-23. But that holding only concerns the *merits* of the Panel's MSA interpretation, and thus is *immaterial* under the FAA standard. Accordingly, the "identical"-issue requirement has not been satisfied.

2. Moreover, in cases, like this one, involving "non-mutual" collateral estoppel — *i.e.*, where the party requesting issue preclusion (Missouri) was not a party to the previous litigation — the doctrine does not apply if prior decisions on the issue are "inconsistent." Restatement (Second) of Judgments § 29(4), cmt. f; *accord Garrity v. Md. State Bd. of Plumbing*, 135 A.3d 452, 459-61 (Md. 2016); *Office of Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47, 51-52 (Pa. 2005); *Bi-State Dev. Agency v. Whelan Sec. Co.*, 679 S.W.2d 332, 335-37 (Mo. App. E.D. 1984). As the U.S. Supreme Court has explained, where a defendant has won an issue against some plaintiffs and lost against others, it would be "unfair to [the] defendant" if plaintiffs could manipulate collateral estoppel by cherry-

picking the defendant's losses while ignoring its wins. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-31 (1979).[2]

Ignoring this law, the State's "fairness" discussion focuses exclusively on whether the PMs had a full "opportunity to litigate" in Maryland and Pennsylvania court. MO Br. 25-26. But the precedent cited by the State was critically different from this case because it involved "mutual" collateral estoppel — *i.e.*, *both sides* had been parties to the prior litigation — and thus it did not present the situation of *inconsistent* prior decisions. *State ex rel. Johns v. Kays*, 181 S.W.3d 565, 566 (Mo. banc 2006) (per curiam). Indeed, *Kays* itself distinguished an earlier precedent recognizing the additional fairness concerns presented by "non-mutual" collateral estoppel. *State v. Lundy*, 829 S.W.2d 54, 56 (Mo. App. S.D. 1992).

Here, the state-by-state litigation over the *pro rata* ruling presents a perfect example of "inconsistent" decisions that make it "unfair" to apply non-mutual collateral estoppel against the PMs. This issue has been litigated in the courts of five different States, with seven judicial decisions so far, which have divided four to three while ping-ponging back and forth (and with more potentially to come):

[2] This potential for gamesmanship arises because plaintiffs cannot be collaterally estopped by the defendant's wins against other plaintiffs, since it would violate due process for a decision to bind non-parties. *Parklane Hosiery*, 439 U.S. at 327 n.7.

Applying FAA Standard And Upholding The *Pro Rata* Ruling As An Appropriate MSA Interpretation	**Applying Non-FAA Standard And Invalidating The *Pro Rata* Ruling As An Improper MSA Amendment**
1. CO trial court (LF 1136-40) (final judgment; not appealed) 4. MD trial court (*Philip Morris*, 123A.3d at 672) 6. MO appellate court (Appx. A28-A47 (COA Op. at 13-32))	2. PA trial court (*Philip Morris USA*, 114 A.3d at 47-49) 3. MO trial court (Appx A4-A8 (CC Order at 4-8)) 5. PA appellate court (*Philip Morris USA*, 114 A.3d at 52-65) 7. MD appellate court (*Philip Morris*, 123 A.3d at 673-80)[3]

Given this decisional conflict, it would be unfair to preclude the PMs from defending here their wins in the Court of Appeals below and in Colorado simply because they lost in the Pennsylvania and Maryland appellate courts. That is especially so since the latter courts applied an inapposite state-law review standard whereas the former courts applied the FAA review standard governing here.

[3] The PMs have pending certiorari petitions asking the U.S. Supreme Court to review the Maryland and Pennsylvania appellate decisions, MO Br. 17, and New Mexico has a motion pending before its trial court to vacate the *pro rata* ruling.

The unfairness of the State's position is exacerbated by its conflict with the structure and history of MSA adjudication. Unlike MSA § XI(c)'s arbitration provision, MSA § VII(a)'s litigation provision generally requires suits between PMs and a State to be brought only in that State's courts. LF 993-94. So even where the PMs and the States have a common dispute, the PMs must litigate against each State separately in that State's courts, rather than in one single case. And because each State is bound as a party only to its courts' decision, the PMs cannot obtain a favorable decision in one State's courts that will collaterally estop all States nationwide. It would be manifestly unfair if, by contrast, all States could invoke one State's favorable decision in its courts to collaterally estop the PMs nationwide.

The Connecticut MSA court thus has specifically held that States cannot invoke non-mutual collateral estoppel to bind the PMs based on their litigation with other States, because "it would be inequitable" to give the States such a "considerable advantage" — and it would be even worse if the States also could cherry-pick a favorable decision despite its inconsistency with other decisions. *State v. Philip Morris, Inc.*, 2005 WL 2081763, at *32 (Conn. Super. Ct. Aug. 3, 2005). More generally, state courts, including in Pennsylvania, routinely decide MSA disputes on the merits, and in favor of the PMs, notwithstanding that other state courts have ruled against the PMs. *E.g.*, *Commw. ex rel. Fisher v. Philip*

Morris, Inc., 4 A.3d 749, 752, 753 n.3 (Pa. Commw. Ct. 2010) (detailing state-court split over whether an advertisement violated MSA marketing restrictions).

Finally, the unfairness of the State's position is well illustrated by the State's radically different position about adverse out-of-state precedent in its cross-appeal concerning whether there should be a single-state or multi-state arbitration for the 2004 NPM Adjustment. There, the Maryland and Pennsylvania appellate courts, as well as the courts of every other MSA State to consider the issue, have held that a multi-state arbitration is required. OPM Substitute Resp. Br. 34-38. Yet even that uniform body of decisions does not collaterally estop the State (as it was not a party to them), and thus it ignores them all as non-binding and defends the outlier holding of the Court of Appeals below that single-state arbitrations are required. *Id.* It would be intolerable if, in contrast, the Maryland and Pennsylvania courts' decisions invalidating the *pro rata* ruling were sufficient to collaterally estop the PMs here *notwithstanding* that the Court of Appeals below and the Colorado trial court have *upheld* the *pro rata* ruling. Such unfairness is precisely why "non-mutual" collateral estoppel does not apply where prior decisions are inconsistent.

C. In sum, the State's argument for collateral estoppel is indefensible. The State's belated and undeveloped invocation of this alternative ground can only be explained by its inability to defend the trial court's order on the merits, as the Court of Appeals held and as demonstrated below.

II. The Trial Court Improperly Exceeded The Scope Of FAA Review

A. The State Essentially Concedes Most Of The OPMs' Arguments

First, the State does not dispute that, as the Court of Appeals held, FAA § 10(a) governs here because the arbitration clause in MSA § XI(c) involves interstate commerce and incorporates the FAA review standard. MO Br. 27-29; OPM Br. 22-23. Though the State also mentions the Missouri arbitration statute, it does not disagree that the state standard would be preempted if it were different (which it is not). MO Br. 28 n.6; OPM Br. 32-33.

Second, the State does not dispute that, as the Court of Appeals held, the U.S. Supreme Court in *Oxford Health* and earlier cases has interpreted FAA § 10(a)(4)'s "exceeded their powers" clause as follows: where the arbitrators have jurisdiction to resolve an issue, their decision must stand so long as they were "even arguably construing or applying the contract," and thus can be set aside *only if* they were following their "own notions of economic justice." MO Br. 33-35; OPM Br. 24-29.

Third, the State does not dispute that, as the Court of Appeals held, *Oxford Health* forecloses the standard of review that the trial court *expressly applied* to justify modifying the Panel's *pro rata* ruling — *i.e.*, that the ruling was "clearly erroneous," Appx. A7 (CC Order at 7). MO Br. 31-32; OPM Br. 31.

B. The State's Two Counter-Arguments Are Wrong

The State tries to rehabilitate the trial court's order by arguing that the court: (1) *implicitly applied* the proper FAA standard when reviewing the merits of the *pro rata* ruling; and (2) held that the Panel *lacked jurisdiction* to enter the *pro rata* ruling. Each argument rewrites the court's order, and neither one saves it.

1. The State initially claims that the trial court did not actually apply a "clearly erroneous" standard. The State asserts: (i) that the "clearly erroneous" language appeared only in "a single sentence" that purportedly "was not attempting to articulate [the FAA] legal standard"; and (ii) that "[t]he salient point" is that the court concluded "that the Panel *amended* the MSA …, not that the specific way in which [the Panel] did so was 'clearly erroneous.'" MO Br. 29-32. This argument defeats itself, because it underscores that the trial court violated the FAA *Oxford Health* standard.

Contrary to the State's assertions, the FAA does not allow a court to vacate an arbitration award simply by holding that the arbitrators "amended" the contract by misinterpreting it ("clearly" or otherwise). *Every* erroneous interpretation "amends" the contract, but *Oxford Health* held that "[c]onvincing a court of an arbitrator's error — *even his grave error* — is not enough," because "[t]he arbitrator's construction holds, *however good, bad, or ugly*." 133 S. Ct. at 2070-71 (emphasis added). Under the FAA, the court is not reviewing the objective merits

of the arbitrators' decision, but instead the arbitrators' subjective honesty: The question is whether their erroneous "amendment" of the contract was *not merely* a good-faith "misinterpret[ation]," but a bad-faith "abandon[ment] [of] their interpretive role." *Id.* at 2070. *Only then* have they "exceeded their powers" under FAA § 10(a)(4), by imposing their "own notions of economic justice" rather than "even arguably construing or applying the contract" as the parties authorized. *Id.* at 2068; *see also United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987) (likewise holding that, since a court has "no authority to disagree with [the arbitrators'] *honest* judgment," the critical inquiry, even where the award is contrary to the contract's "plain language," is whether they subjectively "*ignore[d]*" that language, or just objectively "misread" it (emphasis added)).

Tellingly, the trial court cited no authority for the "amended the contract" FAA standard that the State concocts. Appx. A4-A8 (CC Order at 4-8). Nor does the State make any meaningful effort to reconcile that standard with the contrary language in FAA § 10(a)(4), *Oxford Health*, and earlier Supreme Court cases like *Misco*. *Compare* MO Br. 33-35, *with* OPM Br. 24-29. Instead, the State relies on a pair of pre-*Oxford Health* cases from the Eighth Circuit that arguably authorized reversal of arbitrators who "in any way" "disregard or modify," or "amend[ ] or alter[ ]," contract language that is deemed "unambiguous." MO Br. 27-28. But, insofar as those cases went beyond reversal of arbitrators who *dishonestly* ignore

the contract to impose "their own notions of economic justice," they have been abrogated by *Oxford Health*, which makes clear that *any* honest contract interpretation "must stand, regardless of … its (de)merits," "however good, bad, or ugly," and "even [if] grave error." 133 S. Ct. at 2068, 2070-71.

Notably, the State does not and cannot argue that the Panel's three former judges were guilty of intentional misconduct. Thus, as the Court of Appeals (and the Colorado trial court) correctly held, the *pro rata* ruling cannot be vacated on the merits under the FAA *Oxford Health* standard. Appx. A47; LF 1139.

2. Unable to satisfy that deferential standard, the State also claims that it is inapplicable because the trial court concluded that the Panel did not have jurisdiction to enter the *pro rata* ruling. This is a strange claim, because the State *concedes*, as it must, that "[t]he trial court found that … the Panel had authority … to construe the [NPM Adjustment] 'reallocation' provi[sion] in … MSA § IX(d)(2)[ ]" in light of the settlement. MO Br. 36; *accord* Appx. A6 (CC Order at 6) ("Because the partial settlement related to the NPM Adjustment, any disputes regarding the partial settlement were themselves subject to arbitration."). Despite that finding, the State asserts that the trial court purportedly *also* found: (i) that the Panel "did not have authority to construe … [MSA] § XVIII(j)," which prohibits "amendment[s]" to the MSA without the consent of all "affect[ed]" parties; and (ii) that the Panel nevertheless "construe[ed] § XVIII(j) to permit it to substitute [the

pro rata] common law judgment reduction method for the express terms [in § IX(d)(2)] for reallocation." MO Br. 36-37. This argument mischaracterizes both the Panel's award and the trial court's order.

Contrary to the State's assertions, the Panel concluded that its *pro rata* ruling was the *proper interpretation* of § IX(d)(2), *not* that it was an "amendment" to § IX(d)(2) that somehow could be justified only under § XVIII(j). The Panel's *pro rata* ruling is located in Settlement Award § IV ("Operation of MSA Reallocation Provisions"), and it plainly states the basis of the arbitrators' interpretation: after "[c]onstruing the parties' contract" in light of the "standard methods for reducing judgment against non-settling defendants after a partial settlement," "the Panel conclude[d] that the MSA reallocation provisions indicate that the *pro rata* method is appropriate." LF 250-52 (Settlement Award at 9-11). Nowhere in § IV does the Panel even address whether the *pro rata* method was an "amendment" to the MSA, much less suggest that the Panel so found. *Id.* To the contrary, the "amendment" discussion was included only *as a rebuttal point* in Settlement Award § V ("Objections of Objecting States"), and the Panel plainly stated why there was "no 'amendment' to the MSA" at all: arbitrators can "interpret the contract in light of governing law to determine what the appropriate

process … is" for post-settlement reallocation of the NPM Adjustment, as that is an issue "the MSA does not directly speak … to." LF 252, 255 (*id.* at 11, 14).[4]

Also contrary to the State's assertions, the trial court did *not* find that the Panel either *lacked jurisdiction to consider*, or *improperly relied upon*, § XVIII(j)'s restriction on MSA amendments in adopting the *pro rata* interpretation of § IX(d)(2). Exactly the opposite: the court found that the *pro rata* ruling allegedly "violate[d]" § XVIII(j), by "effectively amend[ing] § IX(d)(2)" without the "agree[ment]" of the Non-Signatory States. Appx. A7 (CC Order at 7). In other words, the court found that "the panel had the authority to determine the reallocation method," but that its "pro rata reallocation method [was] clearly erroneous" *on the merits*. *Id.* Indeed, *every* court has agreed that the Panel had *jurisdiction* to enter the *pro rata* ruling. Appx. A40-41(COA Op. 26-27); *Philip Morris USA*, 114 A.3d at 48, 61 (PA trial and appellate courts); *Philip Morris*, 123 A.3d at 672, 678 (MD trial and appellate courts); LF 1139 (CO trial court).

[4] Although the Panel additionally analyzed whether the Non-Signatory States would be "affected" under § XVIII(j) "if an amendment were involved," that alternative analysis is irrelevant here given the Panel's primary determination that the *pro rata* ruling is "not an 'amendment' of the MSA at all." LF 255-56 (Settlement Award at 14-15).

Accordingly, the State's § XVIII(j)-based jurisdictional objection is doubly misguided. *First*, and most importantly, the Panel's jurisdiction to interpret § XVIII(j) in Settlement Award § V is irrelevant here. As the Court of Appeals correctly held, the Panel's *pro rata* interpretation of § IX(d)(2) in Settlement Award § IV — which is what the State seeks to vacate — did not depend in any way on the Panel's § XVIII(j) interpretation. Appx. A41-42 (COA Op. 26-27). *Second*, in any event, the Panel unquestionably had jurisdiction to interpret § XVIII(j)'s restriction on amendments to the MSA. The Panel's undisputed jurisdiction to determine the appropriate post-settlement reallocation method necessarily encompassed the power — indeed, the duty — to confirm that the method adopted was *not unlawful*. LF 243-44 (Settlement Award at 2-3) (citing cases). Indeed, the Panel was rejecting the State's express objection that adopting the *pro rata* method would be an unlawful amendment, LF 2100-01, 2109 (Obj. Br. at 11-12, 20), which means that the State *itself* "submitted that issue to the arbitrator[s]" for decision, *Oxford Health*, 133 S. Ct. at 2068 n.2.

3. In sum, neither of the State's attempts to rewrite the trial court's order succeed in justifying the modification of the *pro rata* ruling under the FAA's limited standard of review. Accordingly, the OPMs' first point of error is sufficient to reverse the court's order, wholly apart from the *pro rata* ruling's merits under the MSA.

III. The Trial Court Improperly Interpreted The MSA

A. The State Essentially Concedes Most Of The OPMs' Arguments

As the Panel explained, while MSA § IX(d)(2) provides that diligent States are exempt from the NPM Adjustment and that their share is reallocated to the other, non-diligent States, it does not expressly address how to reallocate the Adjustment when some States have settled, leaving unknown whether they were diligent or non-diligent. Thus, to resolve that question, the Panel considered the MSA's language, structure, and context in light of the relevant background law of post-settlement judgment reduction, and it concluded that the most appropriate interpretation was the "*pro rata*" method: none of the Signatory States' 46% allocable share was reallocated to the Non-Signatory States, and none of the Non-Signatory States' 54% allocable share was reallocated to the Signatory States. LF 250-52, 254-55 (Settlement Award at 9-11, 13-14). The Court of Appeals agreed with much of the Panel's reasoning, Appx. A42-47 (COA Op. 27-32), and the OPMs' opening brief defended it at length. Notably, the State's response brief all but concedes nearly every point.

First, the State never disputes that, *if* a contract's language does not expressly address an issue, then it is an established interpretive tool for arbitrators to "look[] to the law for help": namely, by "interpret[ing] [the contract] in light of existing law, the provisions of which are regarded as implied terms of the contract"

unless it provides otherwise. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960); 11 Williston on Contracts § 30:19 (4th ed.); *see also* OPM Br. 41-42.

Second, the State never disputes that, *if* a contract's language does not resolve how to allocate shared contractual liability after a partial settlement, then background judgment-reduction law exists to allocate such liability in an appropriate manner: namely, to ensure "fairness to [non-settling] defendants" without giving them with "a windfall" that would "discourage settlement" in contravention of public policy. *Eichenholtz v. Brennan*, 52 F.3d 478, 486 (3d Cir. 1995); *Jensen v. ARA Servs., Inc.*, 736 S.W.2d 374, 375-78 (Mo. banc 1987) (per curiam); *see also* OPM Br. 42-44, 48-49. Although Missouri contends that the Panel's adoption of such a "common law judgment reduction method[ ] abrogated [its] MSA right[ ] of contribution" from the Signatory States, MO Br. 51, that begs the question whether such a "right" exists under the MSA — *i.e.*, whether § IX(d)(2) requires that States remain subject to reallocation of the NPM Adjustment even after a partial settlement leaves their diligence unknown.

Third, the State never disputes that, among the three "standard" judgment-reduction methods, the *pro rata* method is most appropriate in light of the MSA's language and structure: namely, it is *consistent* with § IX(d)(2) because it complies with that provision's plain text by treating the Signatory States' diligence

as unknown, and it is *supported* by § IX(d)(2) because that provision expressly uses a "pro rata" methodology rather than a relative-fault methodology where the diligence of all States is known. OPM Br. 36-37. Nor does Missouri dispute that the Non-Signatory States refused to answer definitively when the Panel asked if they would prefer another method if their "all non-diligent" position was rejected, and that at least some of them indicated their preferred alternative was the *pro rata* method (perhaps because it benefits them compared to the *pro tanto* method that is the near-universal default contract rule, including in Missouri). *Id.* 45-46.

Fourth, the State never disputes that, unlike the *pro rata* method and the other standard methods, deeming the contested Signatory States "all non-diligent" would guarantee that Missouri is better off than if there had been no settlement — potentially by tens of millions of dollars. *Id.* 49-52. While spending twenty-five pages and eight charts obscuring these facts, the State *concedes the accuracy* of the OPMs' chart showing that: (a) Missouri's liability absent the settlement would have ranged from $46 million to $146 million, depending on how many contested Signatory States would have been found diligent; (b) Missouri's liability under the "all non-diligent" approach is $46 million, which would provide the State a guaranteed windfall from the settlement, given the Panel's observation that at least some contested Signatory States would have been found diligent; and (c) Missouri's liability under the *pro rata* method is $96 million, which may be either

greater or lesser than (or the same as) it would have been absent the settlement, since the exact number of contested Signatory States that would have been found diligent is unknown. *Compare id.* 50-51, *with* MO Br. 56-57, 67-68, 75-76.

That said, the State cherry-picks hypotheticals where its liability would be greater under the *pro rata* method than it would have been absent the settlement, *id.* 69-74, and it insists that the "all non-diligent" approach is necessary to "shield" it from *any risk* that its liability would increase given the settlement, *id.* 79 n.14. But a partial settlement *always* creates uncertainty about the proper apportionment of the shared liability to the non-settling defendants; and yet judgment-reduction law *never* responds to that uncertainty by adopting the counter-factual and settlement-discouraging position that all settling defendants should be deemed liable. Rather, the law either uses their *pro rata* share or the *pro tanto* settlement payment as a proxy, or else requires proportionate-fault hearings to determine their actual liability. OPM Br. 43-44, 48-49.

In sum, the State has not challenged any of the Panel's interpretive methods for answering the post-settlement reallocation question *if* the MSA's text does not expressly resolve that question. Thus, as discussed below, the State's only defense of the trial court's order modifying the *pro rata* ruling is that the MSA's text *somehow does* expressly resolve the question, and does so by dictating that all contested Signatory States must be deemed non-diligent.

B. The State's Sole Counter-Argument Is Wrong

The State claims that "the MSA's language" and "the law of the case" under the Panel's Burden of Proof Order together "compelled" the following rule: "every State's diligence has [to] be[ ] determined," and "States that have not been determined diligent" must be subject to the NPM Adjustment reallocation. MO Br. 43-44; *see also id.* 41-43. Because the *pro rata* method does not satisfy this alleged rule, the State accuses the Panel of having "amended" the MSA, "exceeded its powers," and "so imperfectly executed [them] that a final and definite award upon the subject matter submitted" was not made. *Id.* 14-16; *see also id.* 40-41, 47-48. But the State's claim suffers from two fundamental flaws: (1) the alleged rule has no basis in MSA § IX(d)(2) or the Burden of Proof Order; and (2) in any event, the State forfeited any rights under the alleged rule before the Panel.

1. At the outset, it is noteworthy that the State has once again abandoned the trial court's articulated rationale in favor of an alternative argument. The court's order never mentions the alleged rule that "every State's diligence *has [to] be[ ] determined*." *Id.* 43 (emphasis added). Rather, the court announced a different purported rule: all States "*have to prove* their diligent enforcement" to avoid being "subject to the NPM Adjustment" reallocation. Appx. A7 (CC Order at 7) (emphasis added). The State presumably abandoned the trial court's rule because it could not rebut the OPMs' showing that neither MSA § IX(d)(2) nor the

Burden of Proof Order says that States must be treated as non-diligent unless and until their diligence is "proved." OPM Br. 38-41, 52-54.

But the State's alternative rule fares no better. The key points refuting the trial court's "have to prove diligence" rule likewise doom the State's "diligence has to be determined" rule. The State fails to rebut *any* of those points:

First, because "the MSA does not expressly address how to reallocate the NPM Adjustment … where the diligence of the signatory states is no longer contested due to a settlement" — as the Panel, trial court and Court of Appeals *all* held — the State's alleged rule was not "compelled" by the MSA's express text, and the Panel did not "amend" the MSA simply by *interpreting* it not to *implicitly* adopt that rule. *Id.* 36, 38. The State tries to evade this fundamental point by insisting that the key question here is not how "to fill in the gap[ ]" caused by the MSA's lack of express instruction on post-settlement reallocation; rather, "[t]he real issue" purportedly is what to do given that the Signatory States "collude[d] with the PMs to avoid the very inquiry [into their diligence] necessary to determine" the proper post-settlement reallocation. MO Br. 40-41. But that obviously begs the question whether diligence determinations are "necessary" under the MSA even after a partial settlement.

Second, while MSA § IX(d)(2) says that "diligent[]" States are "except[ed]" from the NPM Adjustment and that their shares are "reallocated" to the "other,"

non-diligent States (LF 1005-06), it does not say that a State's diligence must be "determined" even where it has settled and its diligence is no longer contested by any party, let alone that such a State must be treated as non-diligent just because the Panel did not determine its diligence. OPM Br. 38-39. Essentially conceding this point, the State relies on the Burden of Proof Order, rather than § IX(d)(2)'s text, for the alleged rule that "the diligence or non-diligence of all States must be determined." MO Br. 42-43. The State fixates on the Panel's statement that "no language in the MSA supports a finding that the States can by-pass an inquiry regarding whether they satisfied their contractual obligation for avoiding a payment adjustment through the NPM Adjustment." LF 462 (BOP Order at 11). But that statement merely "reject[ed] the States' contention" that *even States whose diligence was contested* should be deemed to have "presumptively satisfied" their diligent-enforcement obligation given the "presumption of regular and proper enforcement" by a "sovereign." *Id.* Rejecting that contention did not resolve the distinct question whether diligence determinations are required for *States whose diligence is no longer contested by any party after a partial settlement*.

Third, because the Burden of Proof Order was based on background law particularly addressing the evidentiary burden where parties invoke a contract exception in litigation, the Panel had subsequently limited it to that narrow context, and the Panel thus acted consistently in the Settlement Award by relying instead on

the different background law addressing the appropriate judgment reduction where only some parties settle. OPM Br. 6-7, 39-40. Unable to answer this point, the State ignores the critical portions of the Burden of Proof Order showing that the Panel relied on a context-specific background legal principle rather than a general textual interpretation of the MSA. *Compare* MO Br. 42-43, *with* LF 455-57, 460 (BOP Order at 4-6, 9).

Fourth, even if the Settlement Award's *pro rata* ruling somehow conflicted with the Burden of Proof Order, that would not qualify as "amending" the MSA's plain language, let alone justify setting aside the *pro rata* ruling under the FAA review standard. OPM Br. 40. The State responds that the Burden of Proof Order bound the Panel as "law of the case," but it still has not cited any precedent granting relief under the FAA based solely on (perceived) inconsistency in the arbitrators' own interpretations of ambiguous contract language. MO Br. 43.[5]

[5] The State also objects to the Court of Appeals's characterization of the MSA as being "latently ambiguous" given the lack of "express" instruction on the post-settlement reallocation issue, but the State neither addresses the precedent that the court cited equating the two concepts nor explains why any theoretical difference between the two would be material here anyway. *Compare* MO Br. 40-41 n.10, *with Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330, 337 (Mo. banc 1996).

In sum, there is no basis in the MSA or the Burden of Proof Order for Missouri's alleged rule that "every State's diligence has [to] be[ ] determined" and "States that have not been determined diligent" must be subject to the NPM Adjustment reallocation. The Panel thus properly rejected that rule and adopted the *pro rata* ruling instead.

2. Moreover, wholly apart from the merits of the State's alleged rule, the Panel properly rejected it because the State forfeited it. In particular, the State *never asked* the Panel to determine the diligence of the contested Signatory States.

Notably, if the Panel had adopted the "proportionate fault" judgment-reduction method, it would have "determined" the Signatory States' diligence in order to calculate the Non-Signatory States' share of the NPM Adjustment. LF 251 (Settlement Award at 10) (that method "determines the relative culpability of all the defendants and the non-settling defendant[s] pay[ ] a commensurate percentage of the total judgment"). Of course, the Panel did not adopt the proportionate fault method because it interpreted the MSA to provide for the *pro rata* method instead. LF 251-52 (*id.* at 10-11).

Critically, though, the State did not ask the Panel to adopt the proportionate fault method or otherwise ask it to determine the Signatory States' diligence. To be sure, in May 2012 (*before* the settlement), Missouri "reserve[d] [the] right" to contest the diligence of any States that the PMs later stopped contesting. MO Br.

46; LF 560-61 (Tr. 13:15-14:8). And the State asserts here that, after the settlement was announced in December 2012, the Panel "reneged on its assurance" that the State could exercise that "right." MO Br. 46, 48. But, in actuality, the State did not ask the Panel *post*-settlement to exercise that "right" (which is why it cannot provide any record citation of such a request being made or denied). *Id.*

Quite the opposite. When objecting to the settlement in February and March 2013, Missouri and the other Objecting States specifically asked the Panel to deem the contested Signatory States non-diligent *without* holding hearings to determine their actual diligence, because such proportionate-fault hearings purportedly would be "inconsistent with the MSA" and would have "practical impacts that … adversely affect the [Objecting] States." LF 2109-11 (Obj. Br. at 20-22). Indeed, while "some" unidentified objectors at least grudgingly made an alternative request for proportionate-fault hearings, LF 2111 (*id.* at 22); SLF 79 (Tr. 266:19-267:13), other unidentified States *opposed* such hearings even in the alternative, SLF 111 (*id.* 390:4-22), because they *preferred* the *pro rata* alternative, SLF 144 (*id.* 521:9-522:9), or the *pro tanto* alternative, SLF 73 (*id.* 245:1-19). Yet Missouri did not inform the Panel which alternative *it* wanted, despite ample opportunity. SLF 108 (*id.* 378:14-379:5). Thus, even if Missouri had a "right" to request diligence determinations for the contested Signatory States, Missouri forfeited that right by failing to request them and, indeed, opposing them.

3. In all events, therefore, the Panel's *pro rata* interpretation was correct, and at least reasonable. The State cannot support the trial court's conclusion that the Panel's MSA interpretation was not just incorrect, but clearly erroneous. Accordingly, the OPMs' second point of error also suffices to reverse the court's order.

CONCLUSION

This Court should reverse the Circuit Court's order and reinstate the *pro rata* ruling.

Dated: August 31, 2016

Respectfully submitted,

/s/ Jeffery T. McPherson

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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 31, 2016.

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