IN THE SUPREME COURT OF MISSOURI

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| STATE OF MISSOURI ex rel. JEREMIAH W. (JAY) NIXON, | ) | |
| Appellant/Cross-Respondent, | ) | |
| v. | ) | Case No. SC95422 |
| THE AMERICAN TOBACCO COMPANY, INC., et al., | ) | |
| Respondents/Cross-Appellants. | ) | |

# SUBSTITUTE REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT STATE OF MISSOURI

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## INTRODUCTION

Under the original MSA, the Independent Auditor responsible for payment calculations needs only two pieces of information to apportion the NPM Adjustment among the States: (a) the amount of the available NPM Adjustment, and (b) the list of States that are exempt from the NPM Adjustment because they diligently enforced their qualifying statutes. The question of which States qualify for the diligent enforcement exemption is subject to binding arbitration under MSA §XI(c).

Separate from the MSA, all States except Montana agreed to a "nationwide" arbitration of the 2003 NPM Adjustment Dispute before a single panel that would, at the conclusion of all proceedings, tender the list of the exempt States to the Independent Auditor. There is no similar agreement to arbitrate the 2004 NPM Adjustment before a single panel for several reasons. First, a "nationwide" proceeding is no longer possible because, midway through the 2003 Arbitration, the PMs and 24 of the 52 MSA States signed a "Term Sheet" purporting to settle those States' liability for the 2004-2014 NPM Adjustments. Second, the PMs have since entered into a separate settlement agreement with New York under which any future NPM Adjustment disputes will be arbitrated in a single-state proceeding solely between New York and the PMs.

Third, the PMs have already initiated two separate (and overlapping) multistate 2004 NPM Adjustment arbitrations against two different groups of States because Phillip Morris and RJ Reynolds couldn't decide on the issues to be arbitrated, or who to designate as the PM arbitrator. Philip Morris entered into a multi-state arbitration with 17 (now 20) States, but "other PMs" opposed that action. A-21, A-26. The disputes between the PMs were eventually resolved and "[t]he 2004 NPM Adjustment proceeding is underway before two overlapping panels, with one panel hearing the issues with respect to five states and the other panel hearing the issues as to the remaining states that will be part of the arbitration." A-31, and also A-26.

Fourth, because Montana's Supreme Court ruled that its NPM Adjustment liability is not subject to arbitration, that State's diligence will be litigated in its state courts. Fifth, it is unknown (at least to Missouri) whether and how the PMs intend to determine if New Mexico and four of the U.S. Territories—American Samoa, Guam, North Marianas Islands, and the Virgin Islands—are entitled to the diligent enforcement exemption. To the best of Missouri's knowledge, none of those States is participating in either of the PMs' two pending multi-state arbitrations.

It is therefore undisputed that the 2004 NPM Adjustment liability of the 52 MSA States cannot and will not be resolved by a single arbitration panel. Indeed, the 2004 dispute is already in the hands of multiple different

decision-makers, all but one of which (Montana) has been necessitated by the PMs' own actions. Nonetheless, the PMs argued to the trial court—and the trial court erroneously concluded—that the MSA requires a "single decision maker" to determine which States are exempt from the NPM Adjustment in a "nationwide" arbitration involving all States, with all the PMs on one "side" and all States on the other.

But contrary to their position before the trial court, the PMs have since admitted to a Pennsylvania court that MSA § XI(c) permits multiple arbitrations related to the same NPM Adjustment but involving different configurations of less than all parties.[1] In addition to the two separate arbitrations Phillip Morris and RJ Reynolds have independently initiated against two groups of non-Term Sheet States, those two PMs are preparing to conduct a *third* arbitration against each other regarding the allocation of interest on the 2003 and 2004 NPM Adjustments, with RJ Reynolds on one

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[1] *Commonwealth of Pennsylvania by Kathleen G. Kane, in her official capacity as Attorney General of the Commonwealth of Pennsylvania v. Philip Morris USA, Inc., et al.*, No. 2443 (Pa. Ct. Common Pleas Philadelphia Cty. Feb. 23, 2015) The PMs have made the same representation to some of their shareholders as well. A-25 – A-27.

"side" of the dispute and Phillip Morris on the other and no States participating *at all*.[2]

If the MSA's arbitration clause permits the PMs to resolve these three facets of the 2004 NPM Adjustment dispute in separate arbitrations before three different panels (not to mention their separate proceedings against Montana, New York, New Mexico, and the four Territories), the MSA surely permits Missouri to arbitrate its own diligent enforcement during 2004 in an independent proceeding solely between itself and the PMs.

Pursuant to this Court's precedent on compelling arbitration, the court of appeals correctly reversed the trial court's denial of Missouri's motion for single-state arbitration because there is a binding arbitration clause in the contract between Missouri and the PMs, and Missouri's 2004 NPM Adjustment dispute with the PMs falls squarely within that clause.[3] The fact that the PMs are already engaged in three *other* arbitrations concerning the

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[2] A-25 – A-27.

[3] *See, e.g., Ellis v. JF Enterprises, LLC*, 482 S.W.3d 417, 419 (Mo. banc 2016); *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. banc 2006); *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427-428 (Mo. banc 2003).

2004 NPM Adjustment is "a pickle of their own contriving"[4] and irrelevant to Missouri's right to compel arbitration of its state-specific dispute solely against the PMs.[5] This Court should reverse the trial court's denial of Missouri's motion to compel and order the PMs to arbitrate whether Missouri diligently enforced its qualifying statute throughout 2004 in a single-state proceeding solely between Missouri and the PMs.

## ARGUMENT

### I. Influenced by two erroneous factual findings regarding the MSA's arbitration clause, the trial court failed to apply the controlling law which required it to grant Missouri's motion to compel a PM-Missouri-only arbitration to determine whether Missouri diligently enforced its Qualifying Statute in 2004.

In denying Missouri's Motion to Compel Arbitration, the trial court erroneously declared and applied *Stolt-Nielsen S.A. v. Animal Feeds International Corporation,* 559 U.S. 662 (2010), but the court of appeals correctly applied that law to reverse the trial court. *State v. American*

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[4] *State ex rel. Black v. Taylor*, 106 S.W. 1023, 1026 (Mo. 1907).

[5] Only Missouri moved to compel the PMs into arbitration of the dispute specifically articulated in Missouri's motion. The PMs have not moved to compel arbitration of any other dispute or with any other parties.

*Tobacco Co.*, No. ED 101542, 2015 WL 5576135, at *17 (Mo. App. E.D. (Sept. 22, 2015)). The PMs attempt to trivialize *Stolt-Nielsen* as "irrelevant to the nationwide arbitration that the MSA requires" because the PM-proposed nationwide arbitration would not "adjudicate the rights of absent parties" so long as "each MSA State that has not settled [with the PMs] participates as a party." *See* PM Sub. R. Br. at 43.The self-serving nature of the PMs' argument is exposed by focusing on the PMs' Term Sheet Settlement with 24 States, which ensures the absence of those States from any arbitration of their obligations to Missouri and the other objecting States for the liability of the 2004 through 2014 NPM Adjustments. According to the PMs' construction of the law and the MSA's arbitration clause, 24 parties can be "absent" from any arbitration of their MSA obligations to Missouri because they have settled with the PMs; yet Missouri cannot absent itself from the PMs' desired multi-state arbitration because it declined to settle on the PMs' terms. This cannot be.

*Stolt-Nielsen* provides controlling precedent on much more than the question of class arbitration for absent parties. The U.S. Supreme Court has ruled that arbitrators and courts must tread very carefully when considering whether to compel the combination of issues or parties in an arbitration where the arbitration agreement or clause is silent on that combination. *Stolt-Nielsen, S.A.*, 559 U.S. at 666. Caution is advised because arbitration "is

a matter of consent, not coercion." *Id.*, at 681. The very purpose of the Federal Arbitration Act (which governs these parties' arbitrations under MSA §XI(c)) "is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Id.* at 682. Indeed, the PMs agree that the parties' intentions control and that the MSA must be "rigorously enforced" according to its terms. *See* PM Sub. R. Br. at 45.

Further, parties to an arbitration agreement have the right to "limit the issues they choose to arbitrate." *Stolt-Nielsen, S.A.*, 559 U.S. at 683. They also have the right to "choose who will resolve specific disputes." *Id.* Moreover, parties to an arbitration agreement "may specify *with whom* they choose to arbitrate their disputes." *Id.* (emphasis in original). The *Stolt-Nielsen* Court ruled so clearly because a compelled combination of issues or parties in an arbitration "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* at 685.[6]

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[6] As detailed in Missouri's Substitute Opening Brief, the very size and nature of the 2003 nationwide arbitration permitted the PMs and other States repeated, prejudicial and fundamentally unfair *ex parte* contact with the arbitration Panel about Missouri's diligent enforcement, long after the conclusion of Missouri's hearing. Given the high bar for vacatur of arbitration

All but two of the out-of-state decisions ordering nationwide arbitration cited by the PMs pre-date the *Stolt-Nielsen* ruling and are thus irrelevant to this Court's ruling on Missouri's motion to compel a PM-Missouri-only arbitration of its 2004 diligent enforcement record because all of these cases were ruled prior to the Supreme Court's prohibition on combining issues or parties into arbitration when not expressly authorized by the parties' arbitration agreement. *See* PM Sub. R. Br. at 6, 20, 22, 29-30, 34, 36-40.

The PMs repeatedly refer this Court to the Maryland and Pennsylvania high courts' 2015 decisions denying those States' requests for single-state arbitrations of their 2004 diligent enforcement records. *See* PM Sub. R. Br. at 16, 20-22, 26, 29, 31, 33-36, 44, 46-47, 55. But, the PMs cite only to the bare

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awards, Missouri was unsuccessful in overturning this award which cost Missourians $20 million. The people of this State who no longer benefit from the programs that the $20 million would have funded object to the PMs' suggestion that Missouri's due process rights in another multistate arbitration can be sufficiently protected by the law of vacatur, and they further object to the PMs' argument that Missouri's choice to waste no further resources appealing that particular 2003 decision precludes Missouri from relying on the lessons learned to prevent similar injustice in a 2004 arbitration. *See* PM Sub. R. Br. at 50-56.

rulings of those two out-of-state courts and fail to acknowledge the distinguishing facts that render those rulings non-persuasive here. The high courts in both Maryland and Pennsylvania found the MSA to require a "single decision maker" but are significantly devoid of reference to the facts in the record before this Court of the existence of eleven different decision-makers (as opposed to a single decision maker) for the 2004 NPM Adjustment, ten of which have been commissioned by the PMs. The Maryland and Pennsylvania high courts both found the MSA to require all PMs on one side and all States on the other side of all NPM Adjustment disputes and thus appear to have no record of the PMs' admissions of MSA §XI(c) arbitrations between two PMs as the two sides of disputes over the 2003 and 2004 NPM Adjustments. *See State of Maryland v. Philip Morris, Inc., et al.*, 225 Md. App. 214, 256 (2015); *Com. ex rel. Kane v. Philip Morris, Inc.*, 128 A.3d 334, 350 (2015), and A-25 – A-27. The Maryland and Pennsylvania high courts both anchor their decisions to compel their states into multi-state 2004 arbitration on their trial courts' previous decisions to compel their states into national 2003 arbitration, *Maryland*, 225 Md. App. at 255; *Pennsylvania*, 128 A.3d at 340, whereas Missouri's trial court did *not* compel Missouri into either the 2003 or the 2004 national or multi-state arbitrations.[7] Unlike in

[7] The record is clear that Missouri voluntarily joined the 2003

Missouri where the PMs have made no motion, the PMs actually moved to compel Pennsylvania into 2004 arbitration of a much more broadly-described dispute than that articulated here by Missouri, and the Pennsylvania high court adopted the PMs' broad definition of the dispute to be arbitrated for 2004. *Pennsylvania,* 128 A.3d at 340, 346, 351. Similarly, the Maryland high court found the dispute between that State and the PMs to be much more broad than the dispute identified by Missouri for arbitration in a PM-Missouri-only arbitration. *Maryland*, 225 Md. App. at 256.

Neither of these out-of-state rulings should guide this Court's decision on Missouri's motion to compel an MSA-compliant 2004 PM-Missouri-only arbitration. Instead, this Court should follow *Stolt-Nielsen* and this Court's own clear precedent to compel the arbitration sought by Missouri because these parties agree that they have a valid arbitration clause, and they agree

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nationwide arbitration when it signed the Agreement Regarding Arbitration ("ARA") and that the PMs have never moved to compel Missouri into a 2004 multi-state arbitration. Thus, the PMs' citation to a lawyer's misstatement in the State's original motion for vacatur (which was superseded by its amended motion for vacatur), as evidence that Missouri has ever been compelled into national or multi-state arbitration is just silly. See PM Sub. R. Br. at 18 and 41.

that the only dispute for which either party has sought arbitration falls within the scope of their arbitration clause. *See, e.g., Ellis v. JF Enterprises, LLC*, 482 S.W.3d 417, 419 (Mo. banc 2016); *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339, 345 (Mo. banc 2006); *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 427-428 (Mo. banc 2003).

### A. The trial court erroneously concluded that these parties intended that all NPM Adjustment disputes be arbitrated before a "single decision-maker;" yet, the current record evidences that the 2004 NPM Adjustment will be decided not by a single decision maker but instead by no fewer than eleven different decision-makers.

In its motion to compel arbitration, Missouri carefully identified the discreet dispute for which it sought arbitration and it specifically identified the parties with whom it sought arbitration before a panel of arbitrators formed for that purpose pursuant to MSA §XI(c). However, the trial court denied Missouri's motion to compel a PM-Missouri-only arbitration, stating that "the Court believes that a single decision maker has the best chance of producing consistent awards…[therefore] [t]he Court finds that a nationwide arbitration was envisioned by the parties in drafting the MSA, and it is the most logical mechanism for the resolution of the dispute." LF 2406.

But, there will not be a "single decision maker" or a "nationwide arbitration" regarding the 2004 NPM Adjustment. Not counting the order that will come from this Court, there are already at least *eleven* different decision-making bodies whose decisions or rulings will be considered by the Independent Auditor in calculating the 2004 NPM Adjustment. And, ten of those eleven different decision makers have already or yet will weigh-in at the behest of the PMs who must not be allowed to argue successfully here that it is only Missouri who has no right to choose the decision maker for its 2004 NPM Adjustment dispute.

The *first* decision maker to have already weighed-in on the 2004 NPM Adjustment was the 2003 Panel. In calculating the 2004 NPM Adjustment, the Independent Auditor will no doubt consult the PM-authored Term Sheet Settlement that was effectuated by the Panel's Partial Award because it expressly addresses the liability for the 24 States that signed up for that deal for NPM Adjustments from 2003 – 2014. LF 260-261. Indeed, the 2003 Panel stated "[t]hat the direction to the Independent Auditor includes implementation of the referenced settlement provisions as they pertain to years beyond 2003 does not necessarily take the Panel beyond its jurisdiction." LF 245.

The PMs and the State of New York have already presumed to act as the *second* decision maker regarding the 2004 NPM Adjustment. Subsequent

to the rulings of Missouri's trial and appellate courts, the PMs entered into a separate settlement agreement with New York that purports to cover their 2004-2014 NPM Adjustment disputes.[8] A-1 – A-3. Indeed, the PMs and New

[8] Missouri has consistently argued to the trial court, appellate court and this Court that the damage caused to Missouri by the side deal between the PMs and *24* other States must be remedied. But the PMs admitted at page 25 of their Substitute Response Brief that they have now settled with *25* States. The 25th State to cut a deal with the PMs is New York and that fact is now properly before this Court. The PMs have agreed with New York that 2004-2014 NPM Adjustment liability will be calculated by assuming *all* States are subject to the NPM Adjustment liability. A-2. This "*all non-diligent*" rule clearly includes the 24 Term Sheet States whose diligence will remain unknown from 2003-2014 and even the States who are determined by some court or arbitration panel to be actually diligent for purposes of those Adjustments. However, before this Court in Section II (A),(B) and (C) of their Substitute Opening Brief, the PMs vehemently oppose the trial court's modification of the Partial Award which they label an "*all non-diligent*" rule and then argue that it re-writes the text of the MSA, ignores the law and contradicts the facts. The PMs must not be permitted to have it both ways to Missouri's great detriment.

York have agreed that New York will not be expected to participate in any multi-state arbitrations because any disputes that arise between them regarding NPM Adjustment disputes "shall be resolved through binding arbitration between the interested PMs (as a side) and New York (as a side)." A-13.

The *third and fourth* decision makers regarding the 2004 NPM Adjustment will be the two multi-state Panels already in arbitration with those States that agreed to participate. The PMs couldn't decide on the issues to be arbitrated, or who to designate as the PM arbitrator, and so Philip Morris entered into a multi-state arbitration with 17 (now 20) States, but "other PMs" opposed that action. A-21, A-26. The disputes between the PMs were eventually resolved and "[t]he 2004 NPM Adjustment proceeding is underway before two overlapping panels, with one panel hearing the issues with respect to five states and the other panel hearing the issues as to the remaining states that will be part of the arbitration." A-31, and A26.

The *fifth, sixth, seventh, eighth and ninth* decision makers who will inform the Independent Auditor's calculations of the 2004 NPM Adjustment are the PMs working with (or against) the five decision makers for New Mexico, the Virgin Islands, Guam, the Northern Marianas Islands, and American Samoa as none of these five MSA States are participating in either of the two ongoing multi-state arbitrations, no settlements have been

announced regarding any of these five MSA States and none are like Missouri with a case on appeal. A-32.

The *tenth* decision maker who will issue a directive or order that must be considered by the Independent Auditor when calculating the 2004 NPM Adjustment is Philip Morris and the other PMs (or their arbitration panel) who are engaged in a dispute regarding the allocation of the adjustment among themselves. A-27.

Thus, the PMs themselves are responsible for the existence of ten decision makers whose directives or orders will inform the Independent Auditor's calculations of the 2004 NPM Adjustment. And, although the PMs objected, there is an *eleventh* decision maker – the Montana court that decided to retain jurisdiction over the disputes concerning Montana's diligent enforcement rather than send those disputes to arbitration under MSA §XI(c). It is expected that the Independent Auditor will comply with an order from the Montana First Judicial District Court regarding Montana's 2004 diligent enforcement, just as it did regarding Montana's 2003 diligent enforcement. As for the 2003 NPM Adjustment, the Montana court entered a Consent Decree finding "[d]efendants do not contest Montana's claim that it diligently enforced the Qualifying Statute during 2003, and Montana will be deemed by the Independent Auditor for purposes of Section IX(d)(2)(B)(C) of the MSA as a Settling State that diligently enforced its Qualifying Statute for

that year only and is not therefore subject to the 2003 NPM Adjustment." A-36 – A-37.

There will not be any "single decision maker" for the 2004 NPM Adjustment – there will be ten decision makers at the behest of the PMs who maintain that their choices to involve these ten decision makers are compliant with the MSA. The court in Montana and this Court will issue their rulings as the eleventh and twelfth decision makers to inform the Independent Auditor's calculations of the 2004 NPM Adjustment. This Court should reverse the trial court, which erred in concluding that these parties intended a "single decision maker" or a "nationwide" arbitration for the dispute Missouri has moved to compel into a PM-Missouri-only arbitration.

### B. The trial court erroneously concluded these parties' arbitration clause required Missouri and all other States to be on the same "side" of an arbitration of the "dispute" over Missouri's 2004 diligent enforcement record.

If the trial court had followed this Court's long-standing precedent regarding motions to compel arbitration, it should have engaged in a straight-forward two-step analysis. First, the trial court should have determined that these parties agree that they have a valid arbitration clause in MSA §XI(c). Second, the trial court should have determined that the

specifically-defined dispute for which Missouri seeks arbitration falls within MSA §XI(c), and that no differently-described dispute is the subject of any motion to compel arbitration. *See Ellis*, 482 S.W.3d at 419 (Mo. banc 2016); *Nitro Distributing*, 194 S.W.3d at 345; *Dunn Indus. Group*, 112 S.W.3d at 427-428. The trial court should have then granted Missouri's motion. But, it erroneously proceeded to construe the entire MSA contract to create a one-size-fits-all definition for each "side" of all NPM Adjustment disputes. The trial court found that "the two 'parties' to the MSA are the 'Participating Manufacturers' and the 'Settling States'…[and]it is clear that these two groups are the 'two sides' envisioned by the arbitration provision, and all the Settling States collectively comprise a side." LF 2405. The trial court erred on the law by engaging in this analysis of the contract, and erred on the facts as the plain language of the MSA's arbitration clause (§XI(c)) as well as the parties' course of dealing proves that there is more than one possible type of "dispute" regarding the Independent Auditor's calculations of an NPM Adjustment, and that different MSA parties thus comprise the two "sides" of those different types of "disputes."

Indeed, the PMs have admitted to this Court that "the nature of the dispute" is determinative of the "nature of the arbitration," and that admission alone should be sufficient under this Court's precedent to grant the

arbitration sought by Missouri for the dispute it articulated. [9] *See* PM Sub. R. Br. at 19 and 26. Further, the PMs admitted to a Pennsylvania court that the parties to the MSA always understood that not all of the NPM Adjustment disputes that would be arbitrated under §XI(c) would be "national" in scope or character, and thus would not involve either all PMs or all States on opposite sides. The PMs admitted to that Pennsylvania court (and also to some shareholders) that there are disputes between two PMs regarding interest payable on the 2003 NPM Adjustment and allocation of the 2004 NPM Adjustment, and that those disputes will be arbitrated under §XI(c) between only those 2 PMs. *See Commonwealth of Pennsylvania by Kathleen G. Kane, in her official capacity as Attorney General of the Commonwealth of Pennsylvania v. Philip Morris, USA, Inc., et al.*, No. 2443 (Pa. Ct. Common Pleas Philadelphia Cty. Feb. 23, 2015); and A-25 – A-27.

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[9] However desirous the PMs may be to expand the scope of any or all arbitrations related to the 2004 NPM Adjustment so that they might re-arbitrate issues decided against them by the 2003 Panel (PM Sub. R. Br. at 20-24), the fact remains that Missouri has articulated the narrow dispute for which it seeks PM-Missouri-only NPM Adjustment arbitration under MSA §XI(c).

Thus, as the PMs themselves admit in forums besides Missouri courtrooms, there is nothing in the plain language of MSA §XI(c) that prohibits two-party arbitration of NPM Adjustment disputes. Such is the case with the dispute before this Court, which involves only Missouri's 2004 diligent enforcement record. This dispute, between only Missouri on one side and the PMs on the other side, is not national in character and does not warrant the extraordinary resources required for Missouri to participate in another multi-state, multi-issue arbitration. Similarly, there is nothing in the plain language of MSA §XI(c) that requires a court to compel Missouri and its dispute with the PMs into any multi-state arbitration that might address similar issues.[10]

The PMs admit that the MSA permits the PMs to engage in two-party arbitrations of NPM Adjustment disputes. On the other hand, the PMs maintain that Missouri and all States that declined the PMs' Term Sheet

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[10] The PMs' alleged concern that a PM-Missouri-only arbitration regarding Missouri's 2004 diligent enforcement would necessitate intervention by all other States is belied by these parties' 2003 experience with Montana. No State moved to intervene in Montana's state court proceedings regarding its 2003 diligent enforcement record. *See* PM Sub. R. Br. at 33.

Settlement are required by the MSA to participate in a multi-state, multi-issue arbitration before a single Panel. *See* PM Sub. R. Br. at 46-50. The PMs successfully argued to the 2003 Panel that the MSA was "silent" regarding allocation and reallocation of NPM Adjustment liability for the 24 Term Sheet States permitted to absent themselves from any arbitration of their diligence from 2003-2014. On the other hand, the PMs maintain that Missouri and all States that declined their Term Sheet Settlement are required by the MSA to participate in a multi-state, multi-issue arbitration before a single Panel to prove their diligent enforcement or submit to allocation and reallocation of the 2004 NPM Adjustment liability. If the PMs are not estopped from their remarkably self-serving flip-flopping arguments, Missouri will not only be denied its rights under the controlling law and the MSA to define the dispute it chooses to arbitrate and with whom, it will also be punished for declining the PMs' Term Sheet Settlement.[11]

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[11] "Judicial estoppel will lie to prevent litigants from taking a position, under oath, in one judicial proceeding thereby obtaining benefits from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits…at that time." *State Board of Accountancy v. Integrated Financial Solutions, LLC*, 256 S.W.3d 48, 54 (Mo. banc 2008)(internal quotations omitted). The PMs agree that judicial estoppel

## II. The trial court's conclusion that the MSA requires all States' diligent enforcement to be determined by a single decision-maker is further belied by the Independent Auditor's fraught reallocation of the 2003 NPM Adjustment.

Under the original terms of the MSA, the Independent Auditor should have been able to calculate and apportion the 2003 NPM Adjustment by consulting the MSA itself and the 2003 arbitration Panel's determination of the diligence or non-diligence of every MSA State. But that didn't come to pass. Instead, the Independent Auditor must now consult no fewer than seven rulings to calculate the 2003 NPM Adjustment:

*First*, the Independent Auditor was instructed by the 2003 Panel's Partial Award to treat the [now 24] States that signed the Term Sheet Settlement (although their diligence is unknown) as "not subject" to reallocation of 2003 NPM Adjustment liability which would fall instead on any State eventually found not diligent. LF 250.

*Second*, the Independent Auditor was instructed by the 2003 Panel's 15 Final Awards identifying the nine diligent States (along with the 16 No-

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should apply where "a party's later position [is] clearly inconsistent with its earlier position." PM Sub. R. Br. at 50.

Contest States) whose liability for the 2003 NPM Adjustment would be allocated and reallocated solely among the six States found non-diligent.

*Third*, the Independent Auditor will be instructed by the Order of the arbitration Panel that rules on the dispute between the two PMs over interest related to the 2003 NPM Adjustment. A-25.

Each of these above three Orders result from the PMs' choices, which they maintain are MSA-compliant. The remaining four orders which inform the Independent Auditor's calculations of the 2003 NPM Adjustment flowed as consequences of the PMs' choices. The *fourth* Order is the 2012 Consent Decree from the Montana First Judicial District Court, instructing that "Montana will be deemed by the Independent Auditor for purposes of Section IX(d)(2)(B)(C) of the MSA as a Settling State that diligently enforced its Qualifying Statute for that year only and is therefore not subject to the 2003 NPM Adjustment." A-36 – A-37.

The *fifth, sixth and seventh* Orders that instructed the Independent Auditor's calculations of the 2003 NPM Adjustment issued from the Maryland and Pennsylvania high courts, and from Missouri's trial court. All three courts found that the 2003 Panel had exceeded its powers through its Partial Award which amended the MSA. Specifically, Missouri's trial court properly found that "[t]here is no question that Missouri is materially affected by the Partial Settlement [Award] and the pro rata reallocation of

the NPM Adjustment. Missouri, and the other non-signatory states, did not agree to such amendment of the calculation of their annual payment." LF 2399. Thus, to void the prejudice to Missouri of the 2003 Panel's excess of its powers, the trial court ordered that "[t]he Independent Auditor shall treat each Settling State that has signed the Term Sheet referenced in the Stipulated Partial Settlement and Award as if such Settling State did not diligently enforce a Qualifying Statute for purposes of section IX(d) of the MSA when the Independent Auditor calculates the amounts owed to Missouri under the MSA for the sales year 2003…." LF 2406-2407.

The simple existence of the six additional now-controlling rulings surely evidences the fact that the MSA does not require every State's diligence to be determined as part of a single, nationwide arbitration. The trial court correctly found that the 2003 Panel did exceed its powers and amended the MSA over Missouri's objection and to its great prejudice, but the trial court lacked authority to undo the deal between the PMs and certain States not within the jurisdiction of any Missouri court. So, the trial court properly modified the effect of the Panel's Partial Award on the Independent Auditor's calculations of Missouri's liability to prevent the shifting of those other States' liability onto Missouri. For good or for ill, that Partial Award is the first of the now-many supplemental orders and agreements that must be viewed alongside the MSA when enforcing its rights and obligations

regarding NPM Adjustments, and only the PMs know how many more such side deals are forthcoming. Arbitration is a matter of consent, and while Missouri has consented to arbitrate its own NPM Adjustment liability with the PMs, it did not consent to do so in a multi-state proceeding with however many other States the PMs can agree amongst themselves to join. Missouri's motion to compel single-state arbitration should have been granted because the parties have a valid arbitration clause in their contract, and the present dispute falls within that clause.

## CONCLUSION

Missouri respectfully requests that this Court reverse the trial court's denial of Missouri's Motion to Compel a Single-State Arbitration to Determine Whether Missouri Diligently Enforced its Qualifying Statute in 2004.

Missouri further requests that this Court (1) compel arbitration of Missouri's diligent enforcement of its Qualifying Statute during 2004 in a proceeding solely between Missouri and the PMs; and (2) order that Missouri's arbitration shall not be consolidated with any other State's 2004 NPM Adjustment dispute, including a *de facto* consolidation which would arise from participation of any arbitrator involved in any other such dispute.

Missouri finally requests that this Court affirm the trial court's Amended Order and Judgment modifying the 2003 Panel's Stipulated Partial Settlement and Award as to how Missouri's award is calculated.

Respectfully submitted,

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## CERTIFICATES OF SERVICE AND COMPLIANCE

I hereby certify that I filed electronically and served via Missouri Case.Net this Substitute Reply Brief of Appellant/Cross-Respondent State of Missouri on this 31st day of August, 2016 upon Counsel of Record.

I hereby certify that this brief contains the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 5,692 words exclusive of cover, signature block, and certificates.

*/s/ J. Andrew Hirth*
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