

NO. 33873

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

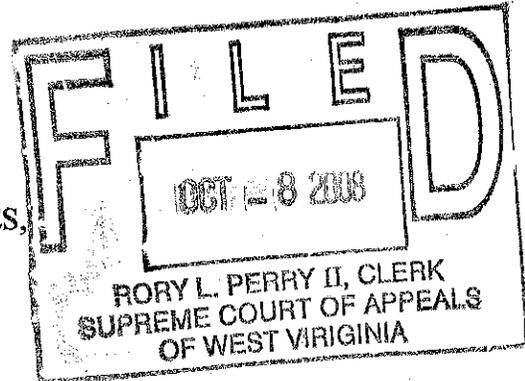
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GENERAL, ex rel. STATE OF WEST VIRGINIA;
THE WEST VIRGINIA PUBLIC EMPLOYEES
INSURANCE AGENCY; and THE WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Petitioners/Plaintiffs Below,

v.

THE AMERICAN TOBACCO COMPANY, et al.,

Respondents/Defendants Below.



APPELLEES SUBSEQUENT PARTICIPATING MANUFACTURERS'
BRIEF

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I. INTRODUCTION

This case arises out of a payment dispute under the Tobacco Litigation Master Settlement Agreement (“MSA”) to which the Appellees – all “Participating Manufacturers” (“PMs”) in the MSA – and the State of West Virginia are parties. The Independent Auditor assigned to calculate and determine payments under the MSA determined not to apply an adjustment – the Non-Participating Manufacturer Adjustment (“NPM Adjustment”) for 2003 – to the payments of the PMs on the basis of a presumption that West Virginia and every other Settling State had diligently enforced “Qualifying Statutes,” as defined in the MSA. The PMs dispute that determination; the Settling States, including West Virginia, defend it.

The issue on appeal is whether the dispute between the PMs and the Settling States, including West Virginia, must be arbitrated. The MSA’s arbitration clause requires arbitration of “[a]ny dispute ... arising out of or relating to” the Auditor’s determinations and calculations, including “without limitation[] any dispute concerning the operation or application” of the MSA’s “adjustments” and “allocations.” MSA § XI(c) (R. 79 at Ex. A, p. 88).¹ The Circuit Court (Berger, J.) held that the “MSA’s Arbitration Clause...clearly and unambiguously requires arbitration of this dispute,” including the “necessarily intertwined” claim, made by the State, that no NPM Adjustment may be applied to its payments because it diligently enforced a Qualifying Statute. Order at 3, 4 (R. 326 at 3-4). Courts in 47 other States, including 19 appellate courts, have unanimously reached this same result under the same MSA language.

West Virginia concedes that the Auditor’s determination not to apply the Adjustment must be arbitrated but argues that the subsidiary issue of diligent enforcement must be separately litigated in each of the 52 Settling States that signed the MSA, even though the *only* relevance of

¹ Citations to the record included herein identify to the initial line number of the referenced document based on the Index, followed by “at [page number]” to designate the relevant page within that document.

the diligent enforcement issue under the MSA concerns the “application” and “operation” of the NPM Adjustment and its “allocation” among the States. Further, despite conceding that the plain language of the MSA controls, West Virginia does not even quote the arbitration provision until page 15 of its brief and never addresses the “without limitation” clause in the arbitration provision that specifically provides for arbitration of the diligent enforcement issue that the State seeks to separately litigate. Moreover, while acknowledging the relevance of the reasoning provided by courts in the 47 other States that have found this dispute arbitrable, the State never even attempts to distinguish that reasoning.

Because the Circuit Court correctly rejected the State’s attempts to rewrite the MSA and properly held that the MSA requires arbitration of the parties’ entire dispute, this Court should affirm the ruling below.

II. STATEMENT OF FACTS

Appellee Subsequent Participating Manufacturers (“SPMs”) are a group of smaller tobacco manufacturers and importers who voluntarily joined the MSA – accepting its substantial annual payment obligations and agreeing to its advertising and marketing restrictions – even though most were not sued by West Virginia or any other State. The MSA’s arbitration provision is particularly important to the SPMs, given their relatively smaller resources. They did not join and would not have joined an agreement that requires them to litigate payment-related disputes, like this dispute regarding the 2003 NPM Adjustment, in 52 different courts or before 52 different arbitration panels.

In joining the MSA, the SPMs also relied on the NPM Adjustment provision. As the State concedes, the MSA drafters designed the NPM Adjustment to compensate PMs for loss of market share attributable to the competitive disadvantage these companies may face as a result of their decision to join the MSA. State Pet. for App. at 9-10. The Adjustment is particularly

important to the SPMs because as smaller companies they typically face substantial competition from the “Non-Participating Manufacturers” that chose not to join the MSA (“NPMs”).

The NPM Adjustment provisions give the States a strong incentive to level the playing field between MSA participants and NPMs by enacting and diligently enforcing “Qualifying Statutes.” Under MSA § IX(d)(1) (R. 79 at Ex. A, p. 58), the Adjustment “shall apply” to the PMs’ payments when (1) the Independent Auditor determines that the PMs experienced a “Market Share Loss” to the NPMs and (2) an economic consulting firm determines that the MSA is a “significant factor contributing to” that Market Share Loss. *Id.* MSA § IX(d)(2), in turn, provides that States may avoid allocation of the Adjustment to reduce their payments if they demonstrate that they “diligently enforced” a Qualifying Statute. *Id.* § IX(d)(2)(A)-(B) (R. 79 at Ex. A, p. 63) (NPM Adjustment “shall apply to the Allocated Payments of all Settling States ... except ... if” States enact and “diligently enforce” Qualifying Statutes).

The Qualifying Statutes, which are based on a model statute appended to the MSA, impose on the NPMs escrow obligations in amounts roughly comparable to the PMs’ MSA payment obligations. *Id.* § IX(d)(2)(E) (R. 79 at Ex. A, p. 65). If one or more States demonstrate diligent enforcement, the NPM Adjustment that would have reduced their payments is reallocated to further reduce the payments of any State that has not demonstrated diligent enforcement. *Id.* § IX(d)(2)(C) (R. 79 at Ex. A, p. 64).

As the OPMs’ brief sets out in detail, the MSA’s “Independent Auditor” is required to “calculate” and “determine” all MSA “payments,” “adjustments,” and “allocations.” *Id.* § XI(a) (R. 79 at Ex. A, p. 86). The Auditor determined not to apply an NPM Adjustment for 2003 to reduce the SPMs’ and OPMs’ payments. It did so even though (as the State concedes) both requirements for application of the Adjustment had been met because it accepted the claim made

by the MSA Settling States, including West Virginia, that it should presume that all States had diligently enforced Qualifying Statutes. *See* State Br. at 6.² The SPMs, like the OPMs, disputed the Auditor's determination, including its decision to presume enforcement and the fact that it "ignore[d] substantial evidence" that the States had not diligently enforced. *E.g.*, Letter from Commonwealth Brands to Ind. Auditor (Mar. 16, 2006) (R. 60 at Ex. 1).

Section XI(c) of the MSA, entitled "Resolution of Disputes," requires mandatory arbitration of all disputes arising out of or relating to the Auditor's determinations before a panel of former Article III federal judges:

Any dispute, controversy or claim arising out of or relating to calculations performed by, or any determinations made by, the Independent Auditor (including, without limitation, any dispute concerning the operation or application of any of the adjustments, reductions, offsets, carry-forwards and allocations described in subsection IX(j) or subsection XI(i)) shall be submitted to binding arbitration 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. The two arbitrators so selected shall select the third arbitrator. The arbitration shall be governed by the ... Federal Arbitration Act.

MSA § XI(c) (R. 79 at Ex. A, p. 88).

The provision *broadly* requires arbitration of "any" disputes "arising out of or relating to" the Auditor's determinations. In its parenthetical "without limitation" clause it provides specific *examples* of arbitrable disputes, including "any dispute concerning the operation or application of any of the adjustments ... and allocations described in subsection IX(j)." *Id.* Subsection IX(j), in turn, specifically refers to the NPM Adjustment and the issue of diligent enforcement. Thus,

² Ind. Auditor's Notice of Preliminary Calculation at 2 n.1 (Mar. 5, 2004) (R. 79 at Ex. J) ("[a]ll Settling States have enacted Model Statutes and represent[ed] them to have been in full force and effect continuously, ... no NPM Adjustment can be allocated" to reduce payments); Ind. Auditor's Notice of Final Calculation at 5 (Mar. 29, 2006) (R. 79 at Ex. I) (Auditor's methodology remained unchanged); Letter from P. Levin (Nat'l Assoc. of Attorneys General ("NAAG")) to the Ind. Auditor (Mar. 6, 2006) (R. 79 at Ex. H); Letter from M. Greenwold (NAAG) to the Ind. Auditor (Feb. 27, 2004) (R. 79 at Ex. K); Letter from Attorney General Sorrell, NAAG, to the Ind. Auditor (June 10, 2002) (R. 215 at Ex. 6) (all requesting that Auditor presume diligent enforcement).

when subsection IX(j) “describes” the NPM Adjustment, it expressly provides that the Adjustment “shall be applied ... pursuant to” *both* the provision governing the Adjustment’s application (subsection IX(d)(1)) and the diligent enforcement provision governing its allocation among the Settling States (subsection IX(d)(2)). *Id.* § IX(j), cl. “Sixth,” (R. 79 at Ex. A, p. 81).

On April 19, 2006, the State moved for declaratory relief, requesting an order “that no NPM Adjustment shall be applied” to its payments for 2003 on the basis that it “diligently enforced” a Qualifying Statute. Apr. 19, 2006 State Mot. for Decl. Relief at 2 (R. 1). The OPMs moved to compel arbitration, and the SPMs joined the motion. The State stipulated that the dispute over the Auditor’s determination not to apply the Adjustment was arbitrable,³ but argued that its claim that no Adjustment “shall be applied” to it because it allegedly diligently enforced was unrelated to the concededly-arbitrable dispute.

The Circuit Court granted the motion to compel arbitration, applying the MSA’s “plain language,” and ordered arbitration before a “nationwide arbitration panel of three former federal judges.” Order at 3 (R. 326 at 3). It found that the MSA “clearly and unambiguously” requires arbitration of this dispute in “two separate ways.” *Id.* First, it held that the dispute is arbitrable under the “broad[]” language requiring arbitration of any dispute “arising out of or relating to” the Auditor’s determinations. The Court found that “[t]his dispute, including the State’s diligent enforcement defense, clearly arises out of, and relates to, determinations the MSA requires the Independent Auditor to make each year – whether to apply the NPM Adjustment and the diligent enforcement [issue].” *Id.* Moreover, the Auditor “made such determinations here” when it presumed diligent enforcement at the request of the Settling States. That was “the only basis” on

³ *See, e.g.*, State Br. at 10 (“West Virginia does not dispute that PWC’s determination regarding the provisional application of the total adjustment is arbitrable”); Tr. at 27-28 (“West Virginia is willing to arbitrate the dispute as to whether the Master Settlement Agreement required the Auditor to apply a provisional offset to the PMs’ 2006 MSA payment in an amount equal to the 2003 NPM Adjustment”).

which the Auditor could deny the Adjustment since both requirements for its application had been met. *Id.* at 3-4.

Second, the Circuit Court held the parenthetical “without limitation” clause in the arbitration agreement – which expressly requires arbitration of “any dispute” “concerning” the “operation or application” of the MSA’s “adjustments” and their “allocation” – includes the diligent enforcement issue in the “specific examples of disputes that are arbitrable.” *Id.* at 4. The MSA “expressly mandates” that this dispute, which “concerns the ‘application’ of the NPM Adjustment and the diligent enforcement exemption to that Adjustment and the ‘allocation’ of the NPM Adjustment among the Settling States, be arbitrated.” *Id.*

The Circuit Court rejected the State’s argument, repeated here on appeal, that its claim that no Adjustment may be allocated to it because it “diligently enforced” was “separate and distinct” from the issue the State concedes is arbitrable, the Auditor’s determination not to apply the Adjustment. Under the MSA, the Circuit Court found, “diligent enforcement determines whether the NPM Adjustment applies, and if so, how it is to be allocated among the States. The two are necessarily intertwined.” *Id.* at 5.

In directing arbitration, the Circuit Court joined unanimous authority from 47 other jurisdictions – every other State that has been asked to consider the issue – including 19 appellate courts.

III. STATEMENT MEETING ALLEGED ERRORS

- A. THE RULING OF THE CIRCUIT COURT SHOULD BE AFFIRMED BECAUSE THE CIRCUIT COURT CORRECTLY HELD THAT DILIGENT ENFORCEMENT IS ARBITRABLE UNDER THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE MSA
- B. THE CIRCUIT COURT CORRECTLY HELD THAT THE MSA’S PLAIN LANGUAGE AND ITS UNITARY PAYMENT STRUCTURE REQUIRE NATIONWIDE ARBITRATION

IV. ARGUMENT AND DISCUSSION OF LAW

Under established principles of contract construction, the Circuit Court correctly held (reaching the same result as appellate and trial courts from 47 other MSA jurisdictions) that the plain language of the MSA requires a nationwide arbitration of this dispute, including the issue of diligent enforcement. As the Circuit Court recognized, the language of the MSA compels arbitration of this dispute in at least two separate ways – the parties’ dispute clearly “aris[es] out of” and “relat[es] to” the “calculations” and “determinations” of the Auditor, *and* it falls expressly within the specific examples of arbitrable disputes in the MSA’s “without limitation” clause because it “concern[s] the application and operation” of the NPM Adjustment and its “allocation.” Order at 4 (R. 326 at 4). Both clauses encompass the diligent enforcement issue, the only relevance of which under the MSA is the Independent Auditor’s “application” and “allocation” of the NPM Adjustment and its “operation.” The State’s attempts to read limitations into this plain language that the MSA does not contain are contrary to established contract law principles and the liberal policy favoring arbitration under federal and state law.

The MSA’s structure – under which the Independent Auditor determines a single payment for each PM each year, and then allocates that payment among the Settling States – also compels arbitration. Through that arbitration, one panel of retired federal judges will decide all disputes related to the Auditor’s determinations, after a proceeding in which all interested parties may participate, thereby eliminating the prospect of conflicting decisions from 52 State courts.

Any possible doubt or ambiguity (there is none) should be resolved in favor of arbitration. The fact that every jurisdiction to have addressed this issue has now concluded that the unambiguous language of the MSA requires arbitration shows that the State cannot overcome the well-settled presumption in this case.

Finally, the Circuit Court correctly held that the plain language of the MSA and its structure require one nationwide arbitration of this dispute, not 52 separate ones. The MSA requires each of the “sides” to the “dispute” to choose an arbitrator, not each State or each manufacturer. Furthermore, as the decisions in the other 47 jurisdictions have found, a nationwide arbitration ensures that the dispute will be resolved by a neutral panel which will apply consistent standards in a fair and impartial proceeding in which all parties participate. Any other outcome would result in chaos and is inconsistent with both the plain language and the spirit of the MSA.⁴

A. The Circuit Court Correctly Held That The MSA’s Plain Language Requires Arbitration

Black letter principles of contract construction mandate that parties’ contractual obligations are controlled by the words of the contract they signed. West Virginia law requires courts to enforce contracts as they are written; a court may not use its own judgment to rewrite a contract that the parties have agreed to. *Wellington Power Corp. v. CNA Sur. Corp.*, 217 W. Va. 33, 37 (2005). Rather, “it is the safest and best mode of construction to give words, free from ambiguity, their plain and ordinary meaning.” *Waddy v. Riggelman*, 216 W. Va. 250, 261 (2004), quoting *Williams v. South Penn Oil Co.*, 52 W. Va. 181 (1902). The parties’ writing, not their post-facto interpretation of that writing, controls. See *Fraternal Order of Police, Lodge No.*

⁴ While this brief focuses on the substantive reasons why this Court should affirm the Circuit Court order, the State’s appeal is also procedurally flawed. In the proceedings below, the Circuit Court did not rule on the merits of the parties’ dispute, nor did it otherwise issue a *final* order. Rather, the Court *stayed* the State’s motion. Order at 5 (R. 326 at 5). Because there has been no final order in this case, the State does not have an appeal as of right. Rather, in West Virginia, a party seeking immediate review of an order compelling arbitration must do so by means of a writ of prohibition. See, e.g., *State ex rel. Saylor v. Wilkes*, 216 W. Va. 766, 772 (2005); *State ex rel. Dunlap v. Berger*, 211 W. Va. 549, 556 (2002). In order to obtain relief, the State was required to move for such a writ, and its failure to do so itself justifies dismissal of its appeal. Additionally, even if the State’s appeal is treated as a petition for a writ of prohibition, the State could not demonstrate that it meets the exacting standards for grant of such a writ.

69 v. *City of Fairmont*, 196 W. Va. 97, 101 (1996).

The State concedes on appeal, as it did before the Circuit Court, that the dispute over the Auditor's determination not to apply the 2003 NPM Adjustment must be arbitrated. State Br. at 10; Tr. at 27-28 (R. 341 at 27-28). As the Circuit Court and courts from 47 other MSA jurisdictions (including 19 appellate courts) have found, the "plain language" of the arbitration provision also requires arbitration of the inextricably-related diligent enforcement issue in at least two ways.⁵

First, the dispute is arbitrable under the general provision of the parties' arbitration agreement, which unambiguously provides that "[a]ny dispute, controversy or claim arising out of or relating to calculations performed by, or any determinations made by, the Independent Auditor ... shall be arbitrated." MSA § XI(c) (R. 79 at Ex. A, p. 88). The Independent Auditor decided not to reduce the SPMs' payments by an NPM Adjustment – a determination that resulted in a calculation of the SPMs' payments that was millions of dollars greater than if the Auditor had decided to apply the NPM Adjustment. State Br. at 7; State Pet. for App. at 9, 35. The State endorses this determination; the PMs dispute it. Moreover, in determining not to apply

Further discussion of these points can be found in the SPMs' Brief in Opposition to Petition for Appeal, which the SPMs incorporate by reference.

⁵ See, e.g., *New York v. Philip Morris Inc.*, 869 N.E.2d 636, 639 (N.Y. 2007) ("the plain language of the MSA compels arbitration"); *Massachusetts v. Philip Morris Inc.*, 864 N.E.2d 505, 512 (Mass. 2007) ("The language of the settlement arbitration clause thus plainly and unambiguously encompasses the present dispute."); *Connecticut v. Philip Morris, Inc.*, 905 A.2d 42, 50 (Conn. 2006) ("the plain language of the agreement's arbitration provision requires that the underlying dispute be referred to arbitration"); *State ex. rel. Stenehjem v. Philip Morris, Inc. ("North Dakota")*, 732 N.W.2d 720, 722 (N.D. 2007) ("the plain and unambiguous language of the settlement agreement requires arbitration"); *New Hampshire v. Philip Morris USA, Inc.*, 927 A.2d 503, 512 (N.H. 2007) ("the plain language of the arbitration provision evinces the parties' intent to arbitrate" this dispute); *Delaware v. Philip Morris USA, Inc.*, 925 A.2d 504, 504 (Del. 2007) ("plain language" compels arbitration); *Illinois v. Lorillard Tobacco Co.*, 865 N.E.2d 546, 554 (Ill. Ct App. 2007) ("plain and unambiguous language" requires arbitration), *pet. app. denied* (Ill. Sept. 26, 2007); *Michigan v. Philip Morris USA Inc.*, 2007 Mich. App. LEXIS 1490, *9 (Mich. Ct. App. June 7, 2007) ("[b]ased on the unambiguous language of the Agreement, ... arbitration of this

the Adjustment, the Independent Auditor accepted the States' position that no NPM Adjustment applied because the States were presumed to have diligently enforced their respective Qualifying Statutes. *See supra* at 3-4. Accordingly, as the Circuit Court found, the parties' dispute, including the diligent enforcement issue, is arbitrable because it constitutes a direct dispute with respect to a "determination" and a "calculation" by the Auditor. Order at 3 (R. 326 at 3).⁶

Moreover, even if this case did not involve a direct dispute about a determination by the Independent Auditor, the dispute – including the State's diligent enforcement claim – still would be arbitrable because it "aris[es] out of" and "relat[es] to" a determination or calculation of the Auditor. MSA § XI(c) (R. 79 at Ex. A, p. 88); *see North Dakota*, 732 N.W.2d at 730 ("Arbitration is the result under either formulation of the issue."). As the Circuit Court and other MSA courts have recognized, the language of the parties' arbitration agreement is extremely broad. Order at 4, (R. 326 at 4).⁷ Indeed, courts consistently have recognized that the terms "arising out of or relating to" constitute "the broadest language the parties could reasonably use."⁸ Under this broad and plain language, the diligent enforcement determination arises out of

dispute is plainly required") *pet. app. denied* 742 N.W.2d 118 (Mich. 2007). All the decisions from other MSA courts may be found at <http://www.hellerehrman.com/en/npm-adjustment.html>.

⁶ *Accord North Dakota*, 732 N.W.2d at 729 (the Auditor "made a 'calculation' or 'determination' of the diligent enforcement issue by its denial of the non-participating manufacturer adjustment"); *New Hampshire*, 927 A.2d at 510 ("the Independent Auditor did, in fact, make a determination regarding diligent enforcement").

⁷ *New York*, 869 N.E.2d at 639 ("[b]y using the expansive words 'any' and 'relating to,' the MSA makes explicit that all claims that have a connection with the Independent Auditor's calculations and determinations are arbitrable"); *New Hampshire*, 924 A.2d at 509 ("[t]he language used in section XI(c) is broad, encompassing '[a]ny dispute...arising out of relating to...'"); *North Dakota*, 732 N.W.2d at 727 ("Subsection XI(c), in broad language requires arbitration"); *Massachusetts*, 864 N.E.2d at 17 ("[t]hat language is broad"); *Arizona v. Ryan*, No. 1 CA-SA 07-0083, slip op. at 11 (Ariz. Ct. App. May 24, 2007) ("it is hard to imagine broader language"); *Louisiana v. Philip Morris, USA, Inc.*, 982 So.2d 296, 300 (La. App. 2008) ("The arbitration provision is a broad one."), *cert. denied* (La. Sept. 19, 2008).

⁸ *Fleet Tire Serv. of N. Little Rock v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997); *Ross Bros. Constr. Co. v. Int'l Steel Servs., Inc.*, 283 F.3d 867, 876 (7th Cir. 2002) (arbitration clause with phrase

and relates to the Independent Auditor's calculations and determinations because its only significance in the MSA (indeed, the only place it is mentioned) is the Independent Auditor's application and allocation of the NPM Adjustment among the States under section IX(d)(2). MSA § IX(d)(2) (R. 79 at Ex. A, p. 63). *See infra* at 14-15.⁹ Diligent enforcement is also related to the Auditor's determinations because the MSA requires the Auditor to address diligent enforcement as part of its required "determinations" each year. *See infra* at 15-16.

On an even more basic level, diligent enforcement arises out of and relates to the Auditor's calculations and determinations because it directly affects the amount of MSA payments the State, and all the other States (through the effect of the MSA's allocation and reallocation provision), receive. *See supra* at 3. The State has repeatedly conceded that diligent enforcement is related to the issue it stipulates is arbitrable – the Auditor's determination not to apply the Adjustment. In fact, the State's own motion for declaratory relief sought an order that no Adjustment could "be applied" to reduce its payments because it (allegedly) diligently enforced (State Mot. for Decl. Relief, at 2 (R. 1 at 2); *accord id.* at 6, 9, 21-22), and it argues to this Court that "whether and to what extent individual States will have to bear the [NPM] Adjustment depends on State-by-State diligent enforcement determinations" (State Br. at 8; *accord* Pet. for App. at 2-4). Other MSA courts have held, like the Circuit Court, that diligent

"arising out of or relating to" used "the broadest conceivable language" (internal quotation omitted); *Baker Mine Serv. v. Nutter*, 171 W. Va. 770, 772 (1983) (arbitration clause with language "arising out of, or relating to" is "broadly worded"); *Martek Biosciences Corp. v. Zuccaro*, No. 04 3349, 2004 WL 2980741, at *1 (D. Md. Dec. 23, 2004) (language "any dispute, controversy or claim arising out of or relating to Section 1.5 of this Agreement" was "a broad arbitration clause, despite the fact that it was limited to covering a particular section of the parties' contract).

⁹ *E.g.*, *New Hampshire*, 927 A.2d at 512 ("The parties do not point to, and the Court is not aware of, any provisions in the MSA other than those regarding the NPM Adjustment, where the diligent enforcement of a Qualifying Statute has any relevance."); *Alabama v. Lorillard Tobacco Co.*, 2008 WL 821054, at *5 (Ala. Mar. 28, 2008) ("diligent enforcement is significant only in determining whether the nonparticipating manufacturer adjustment applies, and, if so, how the adjustment is allocated among the settling States.").

enforcement is arbitrable under the broad “arising out of or relating to” clause.¹⁰

The *second* way in which the MSA requires arbitration of the dispute regarding the NPM Adjustment, including the State’s diligent enforcement claim, is the unambiguous inclusion of the dispute in the subset of specific arbitrable disputes identified in the parenthetical “without limitation” clause of the arbitration provision. That provision requires arbitration of “any dispute” concerning the “operation” or “application” of “any” of the “adjustments” or “allocations” “described in subsection IX(j).” MSA § XI(c) (R. 79 at Ex. A, p. 88).

Notwithstanding its recognition that the contract must be read in its entirety and every word given effect (State Br. at 24), *the State completely ignores this language, and does not even attempt to explain why it does not require arbitration of the diligent enforcement issue.* As the Circuit Court correctly recognized, by requiring arbitration of all “adjustments” “described in” section IX(j), the provision expressly and directly identifies the diligent enforcement issue, along with any other issue concerning the NPM Adjustment, for arbitration. The “Sixth” clause of subsection IX(j) “describe[s]” the NPM Adjustment, specifically requiring the Auditor to apply that Adjustment “pursuant to subsections IX(d)(1) and (d)(2).” *Id.* § IX(j), cl. “Sixth,” (R. 79 at Ex. A, p. 81). Subsection IX(d)(2) is the diligent enforcement provision directing that the NPM Adjustment “shall apply” to States “except ... if” they have enacted and diligently enforced a Qualifying Statute. It is the only MSA provision that mentions diligent enforcement.

The State, indeed, has conceded that diligent enforcement “concern[s]” the “application”

¹⁰ See, e.g., *New York*, 813 N.Y.S.2d 71, 75 (N.Y. App. Div. 2006) (describing “clear intent of the parties as embodied in subsection IX(c) that any matter arising out of or relating to the subject matter of the Independent Auditor’s calculations and determinations is a proper subject of arbitration”) (emphasis in original), *aff’d*, 869 N.E.2d 636; *Hawaii v. Philip Morris USA*, No. 06-1-0695, slip op. at 6 (Haw. Cir. Ct. Aug. 3, 2006) (“The plain and ordinary meaning of the term ‘relating to’ suggests that the parties intended to subject to arbitration a broad field of issues having connection with or referring to the Independent Auditor’s determinations.”).

of the NPM Adjustment and its “operation.” *See* Mot. Decl. J. at 2 (R. 1 at 2) (seeking order that no Adjustment may be “applied” because the State claims to have diligently enforced).

Recognizing the effect of this unambiguous language in the arbitration clause, other MSA courts have agreed with the Circuit Court, and explicitly held that the parenthetical clause of the arbitration provision directly encompasses, and thus requires arbitration of, the parties’ dispute regarding the NPM Adjustment, including the issue of diligent enforcement.¹¹

B. The State’s Arguments Would Require Rewriting The Arbitration Provision

The State concedes that the “plain language” of the MSA governs this dispute and that, under West Virginia law, contracts must be enforced as they are written. State Br. at 5, 12. The same rules apply to arbitration provisions – indeed, they must interpreted generously in accordance with the strong public policy supporting arbitration. *See infra* at 20. Faced with the plain language of the MSA that requires arbitration, however, the State seeks to rewrite the arbitration provision to impose limitations and exceptions it simply does not contain.

First, the unambiguous language of the MSA refutes the State’s claim that diligent enforcement is unrelated to the dispute over the Auditor’s determination not to apply the NPM Adjustment – a dispute that the State concedes is arbitrable. State Br. at 4; Pet. for App. at 12,

¹¹ *See, e.g., Illinois*, 865 N.E.2d at 554 (“The parenthetical phrase in the Arbitration Provision provides clear examples of disputes subject to arbitration as ‘including, without limitation, any dispute concerning the operation or application of any of the adjustments, ... described in subsection IX(j).’ Subsection IX(j) includes the NPM Adjustment.”) (citation omitted); *New York*, 869 N.E.2d at 640 (“We find especially compelling the parenthetical clause in the arbitration provision giving examples of arbitrable disputes The language is expansive and the examples are telling ... among the listed adjustments is the NPM adjustment”); *Massachusetts*, 864 N.E.2d at 17 (the arbitration clause “specifically includes disputes related to the adjustments described in IX(j)”); *Indiana v. Philip Morris Tobacco Co.*, 879 N.E.2d 1212, 1217 (“this parenthetical language merely reinforces the fact that the arbitration clause compels arbitration ... of the determination of diligent enforcement”), *pet. app. denied* (Ind. July 31, 2008); *Maryland v. Philip Morris, Inc.*, 944 A.2d 1167, 1176 (Md. Ct. App. 2008) (“The parenthetical ‘without limitation’ clause directly identifies the diligent enforcement issue and sets forth that diligent enforcement ... is subject to arbitration.”), *cert. denied*, 949 A.2d 653 (Md. 2008).

28. Indeed, the *only* significance of diligent enforcement under the MSA is that it affects how the NPM Adjustment applies and is allocated to reduce payments received by the States. MSA § IX(d)(2)(A), (B) (R. 79 at Ex. A, p. 63) (containing MSA’s only reference to diligent enforcement). As the other MSA courts have found in rejecting exactly the argument the State makes here, diligent enforcement not only “arises out of” and “relates to” calculations and determinations made by the Auditor, but it is an “inextricable” and “indispensable” part of the Auditor’s determinations and calculations relating to the NPM Adjustment.¹² The State, indeed, has repeatedly confirmed what the plain language of the MSA provides – that the diligent enforcement issue is integrally related to the Auditor’s determinations with respect to the NPM Adjustment. State Br. at 2 (“The NPM Adjustment permits settling tobacco companies to ‘reduce’ or ‘eliminate’ a settling State’s payment if . . . that State does not ‘diligently enforce’ its ‘qualifying statute.’”); Mot. Decl. J. at 4 (R. 1 at 4) (seeking an order “that the State of West Virginia ‘diligently enforced’ its Qualifying Statute . . . and therefore the April 2004 Allocated Payment received by West Virginia . . . is not subject to being reduced by the Non-Participating Manufacturer Adjustment”).

Second, unambiguous MSA language compels rejection of the State’s argument that the

¹² E.g., *Arizona*, slip op. at 14 (“The applicability of the NPM Adjustment and the diligent enforcement issue are inextricably interrelated.”); *New Hampshire*, 927 A.2d at 512 (“[t]he parties do not point to, and the Court is not aware of, any provisions in the MSA other than those regarding the NPM Adjustment, where the diligent enforcement of a Qualifying Statute has any relevance”); *Georgia v. Philip Morris USA Inc.*, No. 2006CV116128, slip op. at 3 (Ga. Sup. Ct. Feb. 5, 2008) (“The issue of diligent enforcement does not and cannot stand alone; it is inextricably tied to the NPM adjustment.”); *North Carolina v. Philip Morris USA, Inc.*, 2008 WL 4467962, at *8 (N.C. App. Oct. 7, 2008) (“The NPM adjustment cannot be divorced from the question whether a state diligently enforced its escrow statute.”); *Maryland*, 944 A.2d at 1177 (“the [diligent enforcement] determination and [NPM Adjustment] calculations are inextricably linked”); *Indiana*, 879 N.E.2d at 1217 (“The determination of whether a state has enacted and diligently enforced a Qualifying Statute is inextricably related to the determination of the NPM Adjustment for any given year”); *Idaho v. Philip Morris, Inc.*, No. CV OC 97 032391D, slip op. at 8 (Idaho Dist. Ct. June 30, 2006) (diligent enforcement is “inextricably linked with the NPM Adjustment because the diligent enforcement determination necessarily controls the outcome of any NPM Adjustment”), *perm. app. denied*, No. 99567 (Idaho Oct. 12, 2006).

arbitration clause is a direct appeal provision, limited to “review” of determinations already made by the Auditor. State Br. at 5, 10, 17-18. “There is nothing in the arbitration clause limiting arbitration to those questions actually determined” by the Auditor. *Massachusetts*, 864 N.E.2d at 21.¹³ The State’s argument ignores the broad and plain “arising out of or relating” language in the arbitration clause. *Id.* “By using the expansive words ‘any’ and ‘relating to,’ the MSA makes explicit that all claims that have a connection with the Independent Auditor’s calculations and determinations are arbitrable.” *New York*, 869 N.E.2d at 639. The State’s argument further ignores the specific direction in the “without limitation” provision that disputes concerning the operation or application of the MSA’s adjustments and allocations must be arbitrated. As the Massachusetts Supreme Court found, “[t]his language includes disputes over issues not actually determined, just as well as those over issues which were actually determined.” *Massachusetts*, 864 N.E.2d at 22. *See also, e.g., North Dakota*, 732 N.W.2d at 728.¹⁴

Third, even if the State were correct that an actual determination is a prerequisite to arbitration (it is not), this dispute still would be arbitrable because the Auditor in fact made a determination on diligent enforcement when, at the States’ repeated request (*see supra* at 4 and note 2) it determined not to reduce the PMs’ payments by the 2003 NPM Adjustment. *See Order* at 3-4 (R. 326 at 3-4). As the Circuit Court and MSA courts around the country have held, that is

¹³ *Accord New York*, 869 N.E.2d at 639 (“we discern no intent to limit arbitration to review of calculations performed by or decisions reached by the Independent Auditor”); *New Hampshire*, 927 A.2d at 510 (an arbitration clause includes “disputes over issues not actually determined, just as well as those over issues which are actually determined”); *North Dakota*, 732 N.W.2d at 727 (rejecting a claim that the “arbitration clause does not apply because the independent auditor did not actually settle the diligent enforcement controversy”); *Michigan*, 2007 Mich. App. LEXIS 1490, at *11 (arbitration is required “regardless of whether the independent auditor actually ‘determined’ whether the state ‘diligently enforced’ its qualifying legislation”).

¹⁴ The State’s argument also proves too much. If the State were correct, the Auditor could skip the mathematical tasks that even the State concedes the MSA assigns to the Auditor and the parties would have no recourse to arbitration because there would be no “determination.”

the only way the Auditor could have avoided applying the NPM Adjustment, because the requirements for the Adjustment's application (the Market Share Loss and the Significant Factor determinations) had been met. *Id.* at 4. Under these circumstances, the NPM Adjustment "shall apply" to the Allocated Payments of each Settling State "except" if a state has enacted and diligently enforced a Qualifying Statute. MSA § IX(d)(2) (R. 79 at Ex. A, p. 63). As the Massachusetts Supreme Court held, "the only means by which the auditor could have denied the NPM Adjustment for that year was by affirmatively finding that there was diligent enforcement by the States. It is therefore logically necessary that the auditor did make a diligent enforcement determination." *Massachusetts*, 864 N.E.2d at 847.¹⁵ The State successfully persuaded the Auditor to presume diligent enforcement, and escaped allocation of the NPM Adjustment as a result. The State should not now be heard to argue that the Auditor neither made nor was authorized to make the very same determination the State sought and obtained. "Whether the Auditor made this determination explicitly, impliedly, or by employing a presumption makes no difference." *Id.*

Fourth, there is no basis for the State's claim that section VII, the MSA's "court jurisdiction" clause, requires the MSA court to determine diligent enforcement. The Circuit Court correctly rejected that claim, which has also been universally rejected by MSA courts around the country, *e.g.*, *Massachusetts*, 864 N.E.2d at 14; *New Hampshire*, 927 A.2d at 509;

¹⁵ *Accord New Hampshire*, 927 A.2d at 510 ("the Independent Auditor did, in fact, make a determination regarding diligent enforcement of Qualifying Statutes"); *North Dakota*, 732 N.W.2d at 729 (Auditor "made a 'calculation' or 'determination' of the diligent enforcement issue by its denial of the non-participating manufacturer adjustment"); *Vermont v. Philip Morris USA, Inc.*, 945 A.2d 887, 893 (Vt. 2008) ("auditor cannot calculate payments due ... without deciding whether the NPM adjustment applies, and it can make that decision only after first deciding whether each state performed diligent enforcement"); *Indiana*, 879 N.E.2d at 1216; *Arizona*, slip op. at 12 ("the Auditor did make a determination on diligent enforcement"); *Connecticut v. Philip Morris, Inc.*, No. X02cv96014841S, 2005 WL 2081763, *16 (Conn. Super. Ct. Aug. 3, 2005) (there was "[n]o other reason [than a determination of diligent enforcement] ...

North Dakota, 732 N.W.2d at 727, because section VII specifically *excludes* from the MSA court's jurisdiction disputes that are arbitrable under MSA section XI(c) and the issues related to the NPM Adjustment and the inextricably-related diligent enforcement issue under subsection IX(d). MSA §§ VII(a)(3), (c)(1) (R. 79 at Ex. A, p. 48-49).

Fifth, the State's claim that the Auditor lacked authority under the MSA to make the diligent enforcement determination is inconsistent with the plain language of the MSA. The MSA requires the Auditor every year to "determine" "adjustments" and "allocations." MSA § XI(a) (R. 79 at Ex. A, p. 86). It directs the Auditor to apply the NPM Adjustment as part of its required calculations. *Id.* § IX(j), cl. "Sixth," (R. 79 at Ex. A, p. 81). As part of that direction, it requires the Auditor to determine whether the NPM Adjustment applies under subsection IX(d)(1) and whether it is allocated to reduce States' payments because they have not diligently enforced under subsection IX(d)(2). *Id.* (requiring Auditor to apply the NPM Adjustment "pursuant to subsections IX(d)(1) and (d)(2)"). Under these provisions, and as the Circuit Court and other MSA courts have held, the Auditor must address diligent enforcement as part of its mandatory determination every year. Order at 3 (R. 326 at 3).¹⁶ When the MSA drafters wanted to assign a payment-related determination to another decision-maker besides the Auditor and an arbitration panel, they did so explicitly. *See* MSA § IX(d)(1)(C) (R. 79 at Ex. A, p. 61) (economic consulting firm decides whether MSA was a "significant factor" contributing to

for not applying the NPM Adjustment to payments owed by Participating Manufacturers to the Settling States for calendar year 2003"), *aff'd*, 905 A.2d 40 (Conn. 2006).

¹⁶ *New Hampshire*, 927 A.2d at 510 ("the MSA not only authorizes the Independent Auditor to make the initial determination of whether to apply the NPM Adjustment to the PMs annual payments, but it *requires* the Auditor to make this determination") (emphasis in original); *Arizona*, slip op. at 13-14 ("[t]he MSA requires the Independent Auditor to determine whether the NPM Adjustment ... reduces a payment to a Settling State because it has not diligently enforced" a Qualifying Statute); *Michigan*, 2007 Mich. App. LEXIS 1490, at *10 ("the auditor is required to ... determine whether the participating States failed to diligently enforce qualifying legislation").

Market Share Loss).¹⁷

Sixth, there is no basis for the State's claim that the Auditor is limited to "accounting" determinations so the determination regarding diligent enforcement was "beyond the scope" of its duties. *E.g.*, State Br. at 17-18; Pet. for App. at 28. The State makes no attempt to explain why the Auditor is not qualified to make a diligent enforcement determination. More important, its argument would read out of the MSA most of section XI(a)(1) (R. 79 at Ex. A, p. 86), which expressly requires the Auditor to make all "determinations" relating to the PMs' annual payments and adjustments, as well as section IX(j) (R. 79 at Ex. A, p. 80), which specifically requires the Auditor to make determinations regarding whether to apply and how to allocate the NPM Adjustment, along with the intertwined matter of diligent enforcement. If the Auditor's role were as limited as the State urges, moreover, the MSA would not have provided for arbitration by three retired federal judges. The other MSA courts have uniformly rejected this argument.¹⁸

Finally, the State is simply wrong when it claims that there can be no arbitration because "there is no existing dispute to arbitrate between West Virginia and the OMPs [*sic*]." State Br. at 4. There clearly is a dispute, as the State itself recognized when it filed its Motion for

¹⁷ The State's repeated suggestion that the PMs have admitted that the Auditor has no authority or ability to determine diligent enforcement (State Br. at 19, 31) is belied by the record. The State mischaracterizes the OPMs' documents (as explained in the OPMs' brief), and it completely ignores separate SPM submissions to the Auditor which disputed the Auditor's failure to engage in the "mandatory" and "necessary" diligent enforcement analysis. Letter from Commonwealth Brands to Ind. Auditor 3, 4 (Mar. 16, 2006) (R. 60 at Ex. 1).

¹⁸ *E.g.*, *North Carolina*, 2008 WL 4467962, at *9 ("To construe subsection XI(c) as the State requests and limit its scope only to accounting calculations . . . would require rewriting the MSA."); *New York*, 813 N.Y.S.2d at 75 ("Nothing in the MSA indicates that [the issue of diligent enforcement is] ... beyond the scope of the Independent Auditor's authority to determine."), *aff'd*, 869 N.E.2d 636 (2007); *Connecticut*, 2005 WL 2081763, at *36 ("Auditor is not simply, as the State has argued, to make mathematical computations of the sort it routinely performs as a certified public accounting firm"); *Arizona*, slip op. at 13 ("language ... does not support the State's argument that the Auditor is limited to making mathematical computations or crunching numbers").

Declaratory Judgment. Apr. 19, 2006 State's Mot. Decl. J. (R. 1); *accord* Letter from Poling to Ind. Auditor (Mar. 16, 2006) at 3 (R. 60 at Ex. 1) (disputing diligent enforcement). The State's real point is not that there is no dispute, but that PMs must make some evidentiary showing to substantiate lack of diligent enforcement before they are entitled to arbitration. The law is clear, however, that arbitrability is a threshold issue that must be decided without addressing the merits of the underlying dispute, which are solely for the arbitrators.¹⁹ The State's argument also ignores that it is the State that bears the burden of proving diligent enforcement and that it is the State that possesses the relevant information regarding its enforcement efforts. See MSA § IX(d)(2)(A) (R. 79 at Ex. A, p. 63) ("The NPM Adjustment ... shall apply to the Allocated Payments of all Settling States, except ... if ..." it diligently enforced a Qualifying Statute).

C. The State Does Not Distinguish The Decisions of Courts in 47 Other States Compelling Arbitration

The Circuit Court's decision is supported by the unanimous holdings of appellate and trial courts from 47 other jurisdictions that have also ordered arbitration of the parties' dispute regarding application of the NPM Adjustment, including the inextricably-related issue of diligent enforcement, under the same plain MSA language. These decisions include all 19 appellate courts (including several high courts) that have addressed the issue. The State never cites these decisions, much less tries to distinguish or refute them, even though it acknowledges that their reasoning is relevant. State Br. at 13.

¹⁹ E.g., *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987) (courts considering arbitrability "have no business weighing the merits of the grievance"); *Barber v. Union Carbide Corp.*, 172 W. Va. 199, 202 (1983); *see also Alabama*, slip op. at 34, fn. 9 ("the merits of the issue regarding diligent enforcement are not before us") *app. reh. denied* (Ala. June 27, 2008); *Wisconsin v. Philip Morris Inc.*, No. 97-CV-0328, slip op. at 5-6 (Wis. Cir. Ct. Mar. 14, 2007).

D. The State Cannot Overcome the Strong Presumption In Favor of Arbitration

Even if there were any room for doubt that the MSA's arbitration clause covers this dispute – and there is none – the strong and well-established presumption in favor of arbitration would require this Court to compel arbitration. Under both West Virginia and federal law, courts have held that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *State ex rel. Wells v. Matish*, 215 W.Va. 686, 693 (2004).²⁰ In fact, the rule in West Virginia and in federal court is that the presumption requires arbitration unless “it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Local Div. No. 812 v. Cent. W. Va. Transit Auth.*, 179 W.Va. 31, 35 (1987); *see also AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986). Even setting aside every textual and legal argument regarding the MSA itself, the fact that 47 other courts have ordered arbitration means that a court may not say with “positive assurance” that arbitration is not required.²¹

The State does not dispute that West Virginia and federal law apply a presumption in favor of arbitration. State Br. at 20-21. Rather it claims that the rule should apply with less force when the arbitration clause is “narrow,” as the State claims this one is. *Id.* The State is incorrect. First, the clause is not narrow. While it does not encompass all MSA related disputes, it uses language (“any disputes,” “arising out of or relating to”) that courts have repeatedly found is the broadest the parties can possibly use. *Ross Bros. Constr. Co. v. Int'l Steel Servs.*, 283 F.3d 867, 876 (7th Cir. 2002) (arbitration clause with phrase “arising out of or relating to” used “the

²⁰ *Accord Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989).

²¹ *See, e.g., Idaho*, slip op. at 10 (the “outcomes of cited decisions in sister States” preclude finding “with positive assurance” that issues are not arbitrable).

broadest conceivable language”). The New York Appellate Division expressly recognized the breadth of the clause – as have other MSA courts – noting that “the terms ‘arising out of,’ and most particularly ‘relating to,’ certainly evince a broad arbitration clause. While . . . the arbitration clause does not encompass the entire MSA, it does not lessen the clear intent of the parties . . . that any matter arising out of, or relating to, the subject matter of the Independent Auditor’s calculations and determinations is a proper subject of arbitration.” *New York*, 813 N.Y.S.2d at 75. *See supra* at 10-11. Second, even if the clause were narrow (it is not), applicable law makes plain that the presumption still applies.²²

E. The Circuit Court Correctly Ordered A Nationwide Arbitration²³

As the OPMs’ brief discusses in full, the Circuit Court also correctly ordered that the arbitration take place on a nationwide basis, before a single panel of three retired federal judges. The plain language and structure of the MSA compel arbitration before a single nationwide panel. The MSA requires each “side” to the “dispute” to pick an arbitrator – not each “State” or each “manufacturer.” MSA XI(c), (R. 79 at Ex. A, p. 88). There is a single “dispute” here –

²² *Int’l Bhd. of Elec. Workers Local 2188 v. W. Elec. Co.*, 661 F.2d 514, 516 n.3 (5th Cir. 1981) (“the presumption of arbitrability applies, regardless of whether one party characterizes the clause as ‘narrow.’”); *Ivax Corp. v. B. Braun of Am., Inc.*, 286 F.3d 1309, 1320 n.23 (11th Cir. 2002) (recognizing “no such distinction”).

²³ The State also argues that Judge Berger’s order was flawed because it did not contain findings of fact or conclusions of law on the nationwide arbitration issue. *See* State Br. at 22. This is incorrect. The order clearly states Judge Berger’s finding that the plain language of the MSA requires nationwide arbitration. Order at 2-3. No other findings of fact or conclusions of law are necessary to make the order “sufficient to allow for intelligent appellate review.” State Br. at 22. Indeed, West Virginia law provides, and the State concedes, that the *only* relevant consideration here is the unambiguous language of the contract itself. *See, e.g., Estate of Tawney v. Columbia Natural Res., LLC*, 219 W. Va. 266, 272 (2006) (“A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.”); *McDaniel v. Kleiss*, 202 W. Va. 272, 276 (1998) (“[W]e find that the contractual language is clear and unambiguous. Thus, there are no factual findings by the circuit court that must be considered to interpret the contract.”).

between the PMs and the Settling States – over whether the NPM Adjustment applies and how it must be allocated among the States. The MSA has a unitary payment structure, in which the Independent Auditor makes a single calculation of payments and adjustments and the PMs each make a single nationwide payment that the Auditor then allocates among the Settling States.

Further confirming that there is a single dispute, a determination on diligent enforcement for one State potentially affects the payments to be received by all *other* Settling States, as the State concedes. State Br. at 7. Under the MSA's allocation and reallocation provision, if one State is determined to have diligently enforced, the NPM Adjustment that would have been allocated to that State shifts to further reduce the payments to States that have not established diligent enforcement. MSA § IX(d)(2)(C) (R. 79 at Ex. A, p. 64). In practical terms, this means that, if there are 52 court proceedings, or 52 arbitrations, a decision-maker considering Virginia or Kentucky's diligent enforcement could reduce West Virginia's MSA payments.

The unitary payment structure of the MSA and the nature of the diligent enforcement dispute further demonstrate why the parties agreed to nationwide arbitration. Nationwide arbitration will ensure that a single clear set of rules applicable to all parties governs, and that decisions affecting payments are issued by one decision-maker after a proceeding in which all interested parties may participate. Otherwise, as other courts have found, there would be "chaos" with "potentially conflicting decisions by multiple tribunals." *See, e.g., New York*, 813 N.Y.S.2d at 76.²⁴ In the case of diligent enforcement, a single decision-maker is particularly

²⁴ The State's claim that "if the Independent Auditor made a diligent enforcement determination, that decision would have been solely as to as to [*sic*] West Virginia" is erroneous. First, the Auditor did in fact make a diligent enforcement determination – a determination (by presumption) that all the States diligently enforced their statutes. *See supra* at 15-16 and notes 15 and 16. Second, any diligent enforcement determination by the Independent Auditor (and, later, by the arbitrators) necessarily affects all the States, because the allocation of the NPM Adjustment to all States is necessarily affected by each State's diligent enforcement.

important because the determination of diligent enforcement for one State will affect all the other States. Furthermore, all States (as well as all PMs) have a strong interest in a single, high standard of diligent enforcement, applied uniformly and fairly to all the States. As the States' representative from the National Association of Attorneys General explained: "NPM sales anywhere in the country hurt all States. All payment calculations are done on the basis of cigarette sales nationally. NPM sales in any state reduce payments to any other State." Letter from Mark A. Greenwold (NAAG) to Settling States (Sept. 12, 2003) at 3 (Dec. 12, 2006, SPMs' Reply In Support of Motion to Compel Arbitration, Ex. 7). To ensure fairness to all States and PMs, a uniform and fair diligent enforcement standard should to be developed by a single arbitration panel, rather than by 52 separate decisionmakers acting independently.

For all these reasons, the MSA appellate and trial courts that have considered this issue so far have uniformly agreed with the Circuit Court and rejected State claims that the MSA contemplates 52 separate proceedings.²⁵

²⁵ *New York*, 813 N.Y.S.2d at 76 (the dispute must be submitted to "a single arbitration panel of three federal judges"); *New York v. Philip Morris, Inc.*, 858 N.Y.S.2d 134 (N.Y. App. Div. 2008) (confirming that nationwide arbitration is required), *perm. app. denied* (N.Y. Sept. 9, 2008); *Oregon v. Philip Morris USA, Inc.*, No. 0604-04252, slip op. at 6 (Or. Cir. Ct. Sept. 6, 2006) ("the Settling States represent one 'side' of the dispute and the PMs represent the other 'side'"); *Idaho*, slip op. at 12 (the "each side" language of section XI(c) means that "all the Settling States are to come together to choose one representative arbitrator who would sit on the only arbitration panel provided for in the MSA"). As the New York court explained, "Since the granting of an exemption by one settling state will automatically lead to the reallocation of its allocated portion of the NPM adjustment to all other non-exempt Settling States, each governmental signatory has its own self-interest at stake in the outcome of this issue, which is necessarily in conflict with every other state. Such a result defeats the whole purpose of having a Master Settlement Agreement. The mechanism of submitting disputes involving the decisions of the Independent Auditor to 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, obviates this problem and ensures fairness for all parties to the MSA. To hold otherwise is contrary to both the spirit and the plain language of the Master Settlement Agreement." 813 N.Y.S.2d at 76. *Accord Maryland*, 944 A.2d at 1180 ("We concur with the numerous jurisdictions that have held that the present dispute must be resolved under one clear set of rules that apply with equal force to every settling state."); *Indiana*, 879 N.E.2d 1220 ("Both the language and the structure of the MSA require that the dispute ... must be submitted to a single, national arbitration panel."); *Vermont*, 945 A.2d at 894-95 (adopting the reasoning of the New York Appellate Division).

The State's attempts to twist the MSA to require state-by-state arbitration are erroneous. First, contrary to the State's claim, section XVIII(n) of the MSA does *not* provide "that the laws of each separate Settling State shall govern that Settling State's 'diligent enforcement' determination." State Br. at 7. This provision does not even mention diligent enforcement, but provides only that the MSA "shall be governed by the laws of the relevant Settling State." MSA § XVIII(n) (R. 79 at Ex. A, p. 135). A single uniform contractual standard, not individual state standards, governs the diligent enforcement issue. As the highest court of Massachusetts explained, "Any determination by the auditor or the arbitrator concerning diligent enforcement has meaning only in the context of the settlement agreement. . . . It is an analysis to determine whether a condition in the contract has been met. *Massachusetts*, 864 N.E.2d at 514; *accord New Hampshire*, 927 A.2d at 513. A nationwide arbitration will ensure uniform application of the contractual standard for diligent enforcement for all parties to the MSA, and in particular will assure that the diligent enforcement determination affecting the payments to all States is assessed under a single standard applied even-handedly to all.²⁶

Likewise, the argument that MSA § VII(f) – which recognizes the potential for conflicting state court decisions – requires that diligent enforcement be decided by the MSA court, rather than through a nationwide arbitration, is without merit. Section VII(f) applies only to issues that are required to be litigated under section VII. As the Circuit Court found, and as discussed above at pages 16-17, however, disputes that are arbitrable, as this one is, are

²⁶ In a related vein, the State's argument that every other court to have addressed this issue somehow failed to recognize the significance of Section XVIII(n) is a red herring. First, the State's assertion that "not one court has referenced Article XVIII(n)" is incorrect. The South Carolina Court of Common Pleas addressed the XVIII(n) argument specifically, noting that "this general choice-of-law provision does not trump the very specific, clear and unambiguous arbitration clause. . . ." *South Carolina v. Brown and Williamson Tobacco Corp.*, No. 97-CP-40-1686, slip op. at 7-8 (S.C. Ct. Com. Pleas Apr. 27, 2007). Second, numerous other States have raised the same argument in briefs and pleadings, and no court has adopted it.

specifically exempted from section VII. Accordingly, section VII(f) is irrelevant to disputes that are arbitrable. This distinction makes perfect sense. The disputes that the MSA requires to be litigated, such as alleged violations of the MSA's advertising and marketing restrictions, permit the potential of conflicting decisions from state to state, because a company could alter its conduct depending on the location of the conduct. However, there is no room for conflicting decisions regarding a unitary payment calculation that affects all the States and all the PMs. This is precisely why the MSA contains an arbitration clause requiring nationwide arbitration of payment-related disputes.

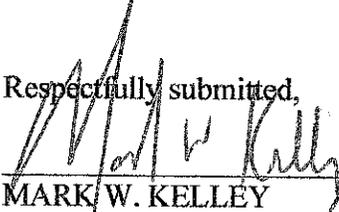
Finally, the State's claim that a national arbitration will lead to unacceptable complexity and burden is wrong. *See* State Br. at 28. The real burden and complexity would come if the State's proposal were adopted. The State concedes that there will be an arbitration on the Auditor's determination not to apply the NPM Adjustment, but proposes that there should also be 52 State court proceedings on diligent enforcement, and then another round of arbitration if there are disputes about how the Auditor subsequently applies the results of those State court proceedings. Under the State's proposal, even if the diligent enforcement issue is arbitrable, it must be determined on a state-by-state basis in 52 separate arbitrations. State Br. at 30. These separate state arbitrations, in each of which all of the other Settling States might intervene to protect their interest against the reallocation of that State's share of the NPM Adjustment, would be in addition to the nationwide arbitration regarding the application of the NPM Adjustment that the State concedes must take place. State Br. at 4, 10, 11. This bizarre and chaotic three ring circus of litigation and arbitration demonstrates precisely why the MSA requires a single nationwide arbitration to resolve all of the issues relating to the NPM Adjustment.

V. CONCLUSION

For the reasons stated above, the SPMs respectfully request that this Court affirm the Circuit Court order compelling arbitration of the parties' dispute.²⁷

DATED: October 8, 2008

Respectfully submitted,



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²⁷ The State does not claim that the SPMs have waived or released claims to a 2003 NPM Adjustment in the 2003 agreements settling claims to the Adjustment for 1999 through 2002, so the SPMs do not respond to that argument. They agree with the OPMs, however, that the question of whether those agreements waived the OPMs' claims to the 2003 Adjustment must be arbitrated, so there can be one answer to the waiver question, not 52 separate ones – the same conclusion reached by every MSA court so far to have considered the issue.

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THE WEST VIRGINIA PUBLIC EMPLOYEES
INSURANCE AGENCY; and THE WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Petitioners/Plaintiffs Below,

v.

THE AMERICAN TOBACCO COMPANY, et al.,

Respondents/Defendants Below.

CERTIFICATE OF SERVICE

I, Mark W. Kelley, Local Counsel, do hereby certify that true copies of the Appellees
Subsequent Participating Manufacturers' Opposition to Petition for Appeal were served upon the
following by U.S. Mail this October 8, 2008, addressed as follows:

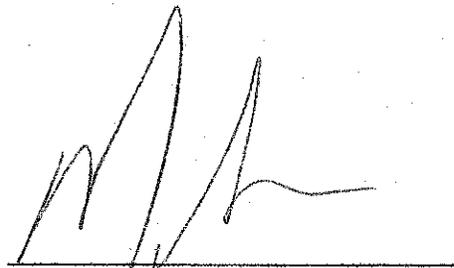
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