STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

THE STATE OF NEW MEXICO, EX REL. HECTOR BALDERAS, ATTORNEY GENERAL,	§	
Plaintiff,	§	C.A. No.: D-101-cv-1997-01235
v.	§	
	§	JURY DEMAND
PHILIP MORRIS, USA, INC.; R.J. REYNOLDS TOBACCO COMPANY; COMMONWEALTH BRANDS, INC.; COMPANIA INDUSTRIAL DE TABACOS MONTE PAZ, S.A.; DAUGHTERS & RYAN, INC.; FARMER'S TOBACCO COMPANY OF CYNTHIANA, INC.; ITG BRANDS, LLC; JAPAN TOBACCO INTERNATIONAL USA, INC.; KING MAKER MARKETING, INC.; KRETEK INTERNATIONAL, INC.; LIGGETT GROUP, LLC.; PETER STOKKEBYE TOBAKSFABRIK A/S; PREMIER MANUFACTURING INC.; P.T. DJARUM; SANTA FE NATURAL TOBACCO COMPANY, INC.; SCANDINAVIAN TOBACCO GROUP, LANE LTD.; SHERMAN'S 1400 BROADWAY N.Y.C., INC.; TOP TOBACCO, LP; and VON EICKEN GROUP,	§	
Defendants.	§	

PLAINTIFF THE STATE OF NEW MEXICO'S
COMPLAINT, OR IN THE ALTERNATIVE, MOTION,
TO ENFORCE CONSENT DECREE AND MASTER SETTLEMENT AGREEMENT

INTRODUCTION

1. The State of New Mexico (the "State" or "New Mexico"), through Attorney General Hector Balderas, brings this action and moves this Court to enforce the Master Settlement Agreement ("MSA") and the Consent Decree filed in the above-captioned case on or about December 11, 1998, and to hold the Defendant tobacco companies, who are part of the group known as the Participating Manufacturers ("PMs"), accountable for their purposeful and fraudulent misuse of the MSA and Consent Decree to evade their obligations to New Mexico and its citizens.

2. In 1998, New Mexico and 51 other jurisdictions (the "MSA States") settled claims against various tobacco companies, including Defendants, for marketing their products to children in order to addict them as "replacement smokers," distorting the science of nicotine addiction and smoking, and deceiving the public about the health effects of smoking, thereby driving up public healthcare costs.

3. In this settlement, which is memorialized by the MSA, the PMs agreed, *inter alia*, to make annual payments in perpetuity to the MSA States in exchange for both resolving the MSA States' past and future claims against the tobacco companies, and maintaining the ability to continue to sell their health-harming products.

4. The MSA included a provision known as the "NPM Adjustment," which aimed to preserve the public health benefits of the MSA by preventing a price disadvantage for PMs vis-à-vis imposing an annual concomitant escrow payment obligation on "Non-Participating Manufacturers" ("NPMs"), i.e., tobacco companies that did not sign on to the MSA.

5. Defendants have united to abuse this provision, to New Mexico's detriment.

6. Every year since at least the MSA payment due for 2008,[12] the Defendants have acted together to abuse the NPM Adjustment process by baselessly asserting that New Mexico failed to diligently enforce a Qualifying Statute and by unilaterally withholding, as of this filing, more than $84 million in MSA payments to New Mexico.

7. New Mexico relies on receiving annual MSA payments to fund a variety of essential government services that would otherwise fall on taxpayers or remain unfunded.

8. The PMs had denied the allegations in New Mexico's initial complaint in this matter, as they had denied all of the MSA States' allegations in their respective state cases, and the MSA was entered before liability determinations were made.

9. However, similar allegations were later proven against several of the same tobacco companies[3] in a federal Racketeer Influenced and Corrupt Organizations Act ("RICO") case. *See United States v. Philip Morris USA Inc., et al.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *aff'd in relevant part*, 566 F.3d 1095 (D.C. Cir. 2009).

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[1] Defendants raised a diligent enforcement dispute in 2009 concerning their payment due to New Mexico for 2008 tobacco sales. Indeed, as recounted in detail below, Defendants have raised a diligent enforcement dispute against every MSA State that has not signed a version of the Term Sheet for each year's payments, since the first payment due under the MSA for 1999 sales. There are two exceptions. First, the PMs have not asserted diligent enforcement disputes against the five U.S. territories that are parties to the MSA. Second, upon information and belief, the PMs did not assert disputes against 15 MSA States in 2003, but they did assert a dispute against New Mexico that year, as for all other years.

[2] For ease of reference, this Motion calls the dispute concerning the MSA payment due in a certain year, the dispute about that year. For example, the "2008 dispute" refers to the dispute about the MSA payment for sales in 2008, though the PMs do not raise the dispute until 2009 in response to the IA request for information concerning the 2008 payment. This nomenclature conforms to the arbitration panels' nomenclature.

[3] The defendants included: Philip Morris USA, R.J. Reynolds Tobacco Co., Brown and Williamson Tobacco Company, Lorillard Tobacco Company, The Liggett Group, American Tobacco Company, and the British American Tobacco Company.

10. In that case, Judge Kessler held that the tobacco companies had violated RICO by engaging in a conspiracy to deceive the American public about the health effects of smoking and second-hand tobacco smoke, the addictiveness of nicotine, and the health benefits from low tar "light" cigarettes, and to manipulate the design and composition of cigarettes in order to foster nicotine addiction.

11. Explaining the context of its holding, the Court observed:

> [This case] is about an industry, and in particular these Defendants, that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly, and with enormous skill and sophistication, denied these facts to the public, to the Government, and to the public health community. . . . In short, Defendants have marketed and sold their lethal products with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.

499 F. Supp. 2d at 28.

12. Even after agreeing to the MSA, Defendants have continued to engage in coordinated deception and to commence baseless arbitrations in order to maximize profits. They no longer deny the health harms of their products, but instead, since at least 2008, have asserted disputes they knew or should have known to be baseless in order to withhold MSA payments and divert limited State resources toward endless arbitration and litigation. To this day and since at least 2008, to quote Judge Kessler, the Defendants continue, "consistently, repeatedly, and with enormous skill and sophistication" and "with a single-minded focus on their financial success," *id.*, to engage in deception and thus to burden New Mexico's public finances by denying that New Mexico has diligently enforced its Qualifying Statute. This action is brought against those same big tobacco companies (and their successors-in-interest)—and a host of smaller tobacco companies

who follow their lead—who continue to engage in deception for their own gain at the expense of the public.

13. Defendants' long-term objective in pursuing unwarranted disputes with New Mexico (and other MSA States) via costly and time-consuming arbitration proceedings is to coerce New Mexico (and other MSA States) to renegotiate the MSA on terms more favorable to the Defendants. Indeed, as of the date of this filing, Defendants have succeeded in entering agreements with 36 of the MSA States, and under such agreements, Defendants stipulate not to dispute a state's compliance with the MSA, in exchange for significant reductions in Defendants' MSA payment obligations for the years covered. As used in this memorandum, the new settlement structure is referred to as the "Term Sheet."

14. The Defendants' bad-faith conspiracy of fabricated disputes and feigned ignorance thus benefits them in at least two ways: first, it improperly reduces each Defendant's annual MSA payment presently and previously owed to New Mexico; and second, it pressures New Mexico to follow the path of the 36 MSA States that have entered into the Term Sheet, reducing Defendants' future MSA payment obligations to New Mexico.

15. To carry out the conspiracy, each year since at least 2008, the Defendants initiate a baseless dispute in the MSA process in which the Independent Auditor ("IA") collects the information necessary to calculate how much each PM will pay to each MSA State that year.

16. The Defendants respond to the IA's request for information by stating that they either "deny" that New Mexico has diligently enforced its Qualifying Statute, or that it is "unknown" whether New Mexico has diligently enforced, when their own internal documents and data and publicly available records, much less any reasonable investigation, would have demonstrated that New Mexico had diligently enforced its Qualifying Statute.

17. The PMs collectively assert the same diligent enforcement disputes as to all of the MSA States that have refused to enter the Term Sheet.

18. The Defendants do not provide the IA with the basis for their assertion that New Mexico did not diligently enforce. To the extent Defendants supply *any* information to explain the basis of their disputes against MSA States in a particular year, the information is not applicable to New Mexico. Nevertheless, Defendants' submissions to the IA trigger a dispute and arbitration concerning whether New Mexico has diligently enforced for the subject year.

19. Having asserted a "dispute," the Defendants then unilaterally withhold from New Mexico millions of dollars from each annual payment they owe under the MSA, claiming the mere assertion of a dispute entitles them to do so.

20. Defendants further claim that they need not have a good-faith basis for contending New Mexico's payment is subject to the NPM Adjustment and withholding millions of dollars.

21. The Defendants then refuse to pay to New Mexico the withheld portions of their MSA payments unless and until New Mexico arbitrates each year's dispute.

22. It has taken substantially more than one year to litigate each dispute, which has created an ever-increasing arbitration backlog. The Arbitration concerning the Defendants' 2004 payments to New Mexico was not decided until October 27, 2022, and the Arbitration concerning their payments in 2005-2007 has just commenced—over 15 years past the date those payments would have been due but for Defendants' spurious disputes.

23. The total amount of MSA payments that Defendants are withholding from New Mexico grows each year.

24. Defendants do not disclose to New Mexico exactly how much they are withholding or where the withheld funds are being held. Some Defendants deposit some or all withheld MSA

payments in the Disputed Payments Account; some simply withhold; and some Defendants follow different withholding practices in different years. With this lack of transparency, New Mexico's best estimate is that Defendants withhold between $6 million and $9 million each year.

25. Accordingly, Plaintiff estimates that as of this filing and since 2008, Defendants have unlawfully withheld over $84 million in funds owed to New Mexico.

26. Defendants refuse to release withheld funds to any MSA State that an Arbitration Panel finds did diligently enforce in the subject year, until there has been a finding concerning diligent enforcement for every MSA State subject to arbitration that year. By now it is clear that the Defendants are manipulating the MSA process to assert total control over which MSA States get paid, how much, and when.

27. By commencing baseless disputes and doggedly pursuing unilateral control of the timing and terms of the disbursement of the withheld funds, the Defendants have successfully forced 36 of the original 52 MSA States (46 States, Washington D.C., and five U.S. territories) to sign onto the side agreement called the Term Sheet and accept a reduced annual payment and additional onerous obligations designed to bolster Defendants' market share and profits. In exchange for these concessions the Defendants agreed to discontinue their disputes and arbitrations for past years, but they do not agree to cease their disputes and arbitrations for future MSA payments.

28. New Mexico has refused to sign on to the Term Sheet.

29. As with their original conspiracy to deny the health harms of their products, Defendants' conspiracy here is once again to assert falsehoods when they know the truth. They claim that New Mexico is not complying with the terms of the MSA when they know the opposite is true. As the RICO case uncovered, their means are sophisticated, fraudulent, and designed to

play out over long periods of time—their only purpose being to increase their already astronomical profits at public expense.

THE PARTIES

30. New Mexico entered into the MSA and thus is a "Settling State" as defined in the MSA (also referred to as an "MSA State").

31. The Attorney General is authorized to bring this action to enforce the MSA on behalf of the State of New Mexico under section VI.A of the Consent Decree and Final Judgment and section VII(c)(1) of the MSA.

32. The Attorney General is further authorized to bring these claims pursuant to N.M. Stat. § 8-5-2, and specifically to enforce the Unfair Practices Act ("UPA") N.M. Stat. § 57-12-2(C), and the Fraud Against Taxpayers Act ("FATA"), N.M. Stat. § 44-9-2.

33. Defendant R.J. Reynolds Tobacco Company is an Original Participating Manufacturer ("OPM"), as defined in section II(hh) of the MSA.[4]

34. Defendant Philip Morris USA Inc., (formerly Philip Morris Incorporated), is also an OPM.

35. Defendants Commonwealth Brands, Inc.; Compania Industrial de Tabacos Monte Paz, S.A.; Daughters & Ryan, Inc.; Farmers Tobacco Company of Cynthiana, Inc.; ITG Brands, LLC (formerly Lignum-2, LLC); Japan Tobacco International U.S.A., Inc.; King Maker Marketing, Inc.; Kretek International, Inc.; Liggett Group LLC; Peter Stokkebye Tobaksfabrik A/S; Premier Manufacturing Inc.; P.T. Djarum; Santa Fe Natural Tobacco Company, Inc.; Scandinavian Tobacco Group Lane Limited (formerly Lane Limited); Sherman's 1400 Broadway

[4] The remaining two OPMs, Brown & Williamson Tobacco Corporation and Lorillard Tobacco Company, merged with R.J. Reynolds.

N.Y.C., LLC; Top Tobacco, L.P.; and Von Eicken Group are Subsequent Participating Manufacturers ("SPMs"), as defined in section II(tt) of the MSA.

36. The OPMs and SPMs are collectively referred to as the Participating Manufacturers ("PMs"). The PMs specifically identified above are Defendants in this action and are referred to as "Defendants" throughout this Motion.

37. The Defendants are participants in a conspiracy to deprive New Mexico of funds it is contractually owed under the MSA.

JURISDICTION

38. This Court has exclusive subject matter jurisdiction over this action for the purpose of implementing and enforcing the MSA in New Mexico. MSA § VII(a)(2); Consent Decree § VI.A (filed and docketed Dec. 12, 1998) (attached hereto as Exhibit A).

39. New Mexico files this Motion pursuant to section VI.A of the Consent Decree and Final Judgment, which authorizes the State to apply to this Court "at any time for further orders and directions as may be necessary or appropriate for the implementation and enforcement of the Consent Decree and Final Judgment," and also pursuant to section VII(c)(1) of the MSA, which authorizes any MSA State to bring an action to enforce the MSA ("Enforcement Order") or for a declaration construing any such term ("Declaratory Order") with respect to disputes, alleged violations, or alleged breaches within such MSA State.

40. The Defendants consented to this Court's jurisdiction when they, or their subsidiaries or predecessors-in-interest, signed on to the MSA. MSA § VII.

41. Before filing this Motion, New Mexico provided each PM, the National Association of Attorneys General ("NAAG"), and each MSA State with thirty days' written notice of its intent to initiate proceedings as required by section VII(c)(2) of the MSA.

PROCEDURE

42. As discussed above, the Consent Decree mandates that this case remain open in perpetuity for purposes of implementing and enforcing the MSA. MSA § VII(a)(2).

43. The Consent Decree mandates that disputes concerning the IA's calculations of the amounts of adjustments and the net payments each PM must make each year to each MSA State are subject to arbitration. MSA § VII(a)(3).

44. This pleading does not assert a dispute concerning IA (the accounting firm) calculations, but instead asserts breach by the Defendants of the express terms of the MSA and of the covenant of good faith and fair dealing inherent in the MSA, as well as malicious prosecution, unfair competition, false claims, and conspiracy. It requests relief in the form of a judgment holding Defendants liable for the breaches and statutory violations and resulting contract damages, statutory damages, treble damages, civil penalties, restitution, declaratory and injunctive relief, attorneys' fees and costs, and punitive damages. It demands a jury on all issues triable by a jury.

45. Capitalized terms used throughout this pleading but not defined herein refer to terms and phrases used in the MSA. For the Court's convenience, a glossary of MSA terms of art and other acronyms used herein is attached hereto as Exhibit B.

THE CONSPIRACY

46. Beginning no later than 2008, Defendants knew or should have known they had no basis to assert a "dispute" with New Mexico concerning whether it had diligently enforced its Qualifying Statute for that year. Nevertheless, Defendants asserted a dispute concerning New Mexico's diligent enforcement in 2008 and each year thereafter without basis. Indeed, since the MSA's first required payment was due to the MSA States in 1999, each Defendant has asserted a

diligent enforcement dispute against New Mexico every year that the Defendant has been a signatory to the MSA.

47. Defendants possessed or had access to documents and data demonstrating that New Mexico has diligently enforced its Qualifying Statute, at least since 2008.

48. Defendants have well-established practices of gathering detailed sales data and market information directly from New Mexico's wholesalers and retailers, their own employees and contractors, other MSA States and NAAG, and have also received productions of documents and data in connection with MSA Significant Factor proceedings.

49. In addition, Defendants have access to publicly available sources, and can and do obtain documents and data from New Mexico in public records requests. All of these sources of information are available to Defendants without the commencement of arbitration.

50. Nevertheless, upon information and belief, Defendants file documents each year telling the IA that they "deny" New Mexico diligently enforced its Qualifying Statute or that it is "unknown" whether New Mexico has diligently enforced, thereby commencing an arbitration on this issue.

51. Defendants contend they are entitled to withhold millions of dollars from New Mexico simply by virtue of denying New Mexico diligently enforced (or stating that they do not know whether New Mexico diligently enforced) its Qualifying Statute, regardless of the lack of any good-faith basis to do so.

52. In 2011 New Mexico first learned that Defendants were baselessly disputing whether New Mexico has had a Qualifying Statute since 2006. Defendants continue to argue that New Mexico lacks a Qualifying Statute through to the present.

53. Despite the Defendants' lack of factual basis for their asserted disputes, their bare assertion of disputes has enmeshed New Mexico in multiple years of costly and time-consuming arbitrations in order to obtain each year's full payment.

54. Indeed, Defendants have already indicated that they are challenging New Mexico's diligent enforcement of its Qualifying Statute for each of the years from 2008 to 2022. Thus, New Mexico is obliged to arbitrate its diligent enforcement for each of those years in a series of proceedings for which there is no factual basis to challenge its enforcement.

55. These disputes and arbitrations are protracted. The latest annual payment dispute to be resolved is that of 2004, which was decided for New Mexico on October 27, 2022, almost 20 years after the MSA annual payment was due. Meanwhile the arbitration for the 2005-2007 payments has commenced its pre-arbitration proceedings.

56. Even if New Mexico prevails in the pending arbitration of Defendants' 2005-2007 MSA payment, or in subsequent arbitrations Defendants have already initiated, Defendants would deny that New Mexico is entitled to any interest or other compensation for the time value consumed as a result of the delay in payment, like they have done with other MSA States.

57. This conspiracy is a calculated strategy to permanently and fraudulently decrease Defendants' contractual payments under the MSA, and to frustrate the purposes of the MSA.

58. Defendants' ultimate objective in pursuing these baseless disputes is to coerce New Mexico into accepting substantially reduced annual payments by agreeing to the Term Sheet. Defendants succeeded in obtaining Term Sheet signatures for nearly all other MSA States. New Mexico has declined to enter the Term Sheet and accept a reduction in payments.

59. The Defendants' resources vastly outstrip those of New Mexico. They possess immense information and resources for gathering and analyzing information regarding Tobacco

Product sales in New Mexico, and regarding New Mexico's diligent enforcement efforts to enforce its Qualifying Statute and ensure that NPM's are depositing the requisite amounts in their escrow accounts.

60. Defendants are the largest and most profitable multi-national tobacco companies in the world, whereas New Mexico is a small state with the third-highest rate of poverty in the United States.

61. The 2021 profits of Altria Group and British American Tobacco, the two parent companies of the OPMs (the largest companies among the Defendants), were approximately $14 billion and $31.7 billion, respectively. By contrast, New Mexico's entire state budget was $8.5 billion and it is charged to provide for the welfare of more than two million residents.

62. New Mexico spends approximately $981 million in annual healthcare costs directly caused by smoking. New Mexico's average annual MSA payment (before NPM Adjustment withholding) is between $30 and $40 million and only covers a small portion of these Tobacco Product costs.

The NPM Adjustment

63. The MSA obligates each PM to make an annual payment, subject to certain adjustments, to each MSA State. MSA § IX(c)(1); *id.* § IX(j).

64. The PMs' collective, adjusted payment is allocated among the MSA States based on fixed, state-specific percentages ("Allocated Payments"). MSA § IX(j) (Fifth Clause).

65. After allocation of the PMs' aggregate payment among the MSA States, a final adjustment—the NPM Adjustment—*might* apply to the Allocated Payments disbursed to *some* of the MSA States *if and only if* certain conditions exist. MSA § IX(j) (Sixth Clause).

66. According to those conditions, if the PMs have lost the specified national market share of sales to NPMs during the subject year, and the MSA is deemed to be a "Significant Factor" in that loss, then the IA imposes the Maximum Potential NPM Adjustment. MSA § IX(d)(1).

67. Since 2003 and every year thereafter the MSA has been found to be a Significant Factor for a sufficient national market loss to trigger the NPM Adjustment provision.[5]

68. The Maximum Potential NPM Adjustment is a theoretical amount, because it is contingent on the resolution of the Defendants' disputes and the Arbitrators' determinations of which MSA States' payments will be reduced for the subject year.

69. The NPM Adjustment can operate to greatly reduce, and even eliminate, a State's annual MSA payment. MSA §§ IX(d)(1), (d)(2)(C). The MSA, however, provides a safe harbor as a means for an MSA State to avoid the NPM Adjustment. MSA § IX(d)(2)(B) (the "Safe Harbor Provision").

70. A State's MSA payment "shall not be subject to an NPM Adjustment" if the State had a Qualifying Statute in place and "diligently enforced the provisions of such statute during the entire calendar year." *Id*.

71. Even if a State is found either to lack a Qualifying Statute or to have failed to "diligently enforce" its Qualifying Statute during the year in question, MSA § IX(d)(2), the amount of the NPM Adjustment assessed against it depends on how many other MSA States were found lacking, if any, and which *specific* States those were.

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[5] Upon information and belief, the PM's have not lost market share relative to NPMs in New Mexico during the life of the MSA. However, because the MSA defines Market Share as determined by the sale of all cigarettes sold in the 50 United States, the District of Columbia and Puerto Rico, New Mexico's relatively small market is practically irrelevant to the MSA Market Share determination.

72. If all States had a Qualifying Statute and diligently enforced it, then the amount of the NPM Adjustment is zero, meaning there is no NPM Adjustment that year.

73. Alternatively, if some MSA States failed to enforce their statutes, but New Mexico is not one of those States, the NPM Adjustment would not apply to reduce New Mexico's MSA payment for that year.

74. During the arbitrations of the 2004 MSA payments, an *en banc* panel of arbitrators held that the Term Sheet States had settled disputes concerning their diligent enforcement, and therefore had not proved they had diligently enforced their Qualifying Statutes. As a result, the Term Sheet States were allocated their respective shares of the NPM Adjustment,[6] along with the few MSA States that had continued to arbitrate and been determined to have failed to have diligently enforced. *In Re: 2004 NPM Adjustment Proceedings*, JAMS Ref. No. 1260003649, Order Re: Arbitrating States Motion to Vacate in Part the Panels' May 25, 2017 Order Re: The Impact of the 2003 Term Sheet and New York Settlements on Reallocation of the 2004 NPM Adjustment (July 19, 2022) ("*In Re: 2004 NPM Adjustment Proceedings*, JAMS Ref. No. 1260003649").

75. The NPM Adjustment is thus State-specific. It applies to MSA States' individual payment entitlements, not to the Defendants' payment obligations.

76. Once the MSA and Consent Decree were entered in December 1998, New Mexico expeditiously enacted the Qualifying Statute, adopting the verbatim language of the Model Escrow

[6] Pursuant to the Term Sheet States' separate side agreement with the PMs, the PMs do not actually reduce the net amount they pay to the Term Sheet States beyond the reductions they agreed to in the Term Sheet. However, the MSA process for allocating the NPM Adjustment continues to govern.

Statute in Exhibit T to the MSA. Laws of 1999, ch. 108 Sections 1 & 2, codified at N.M. Stat. §§ 6-4-12 and 6-4-13.

77. The Qualifying Statute contains only two primary provisions that relate to diligent enforcement: first, it requires NPMs to deposit escrow for units sold in New Mexico and annually certify compliance with that requirement; and second, it provides the State with one tool to enforce that obligation—file lawsuits. N.M. Stat. § 6-4-13 ("The attorney general may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required. . . .").

How Defendants' Conspiracy Is Implemented

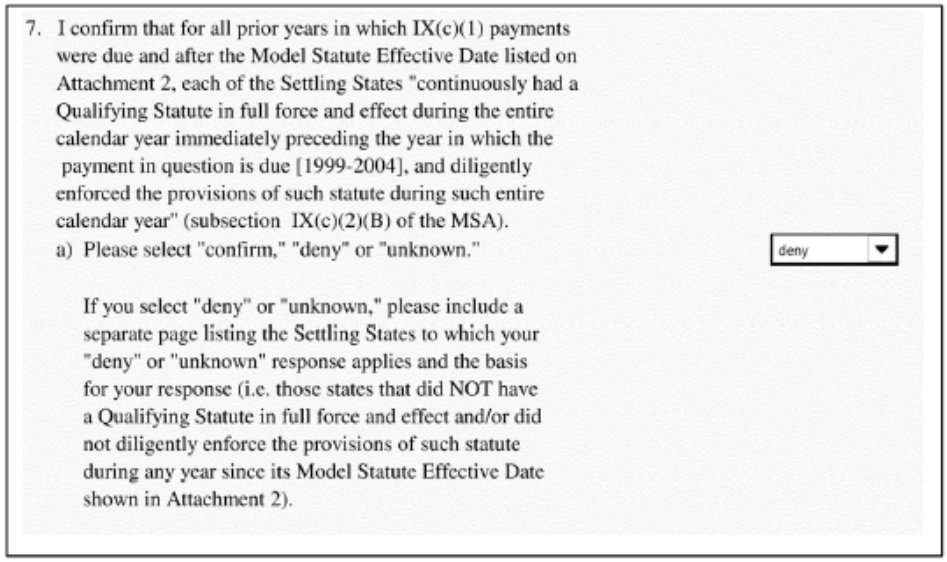
78. MSA section XI(d)(1) mandates that the IA request the information necessary for each year to determine: (a) the amount due from each PM (i.e., each PM's payment obligation); and (b) how much of each of those PM payments goes to which recipient (i.e., each MSA State's payment entitlement). MSA § XI(d)(1).

79. Once the IA has requested the information it needs, the MSA requires each party to use its best efforts to supply responsive information in its possession or available to it. *Id.*

80. That requirement is ongoing, meaning that if the information necessary to determine, for example, how much the Defendants owe New Mexico for 2008 becomes available in 2022, then each Defendant has an obligation to provide that information to the IA in 2022. *Id.*

81. Each year in February, the IA sends a form that requests information from the PMs, including Defendants, and from the MSA States, that is necessary for it to determine which States, if any, are subject to an NPM Adjustment for the payment due in April of that year.

82. The IA asks the same question about all previous years, giving parties the opportunity to update or amend previous answers as further information becomes available to them:


7. I confirm that for all prior years in which IX(c)(1) payments were due and after the Model Statute Effective Date listed on Attachment 2, each of the Settling States "continuously had a Qualifying Statute in full force and effect during the entire calendar year immediately preceding the year in which the payment in question is due [1999-2004], and diligently enforced the provisions of such statute during such entire calendar year" (subsection IX(c)(2)(B) of the MSA).
a) Please select "confirm," "deny" or "unknown." deny

If you select "deny" or "unknown," please include a separate page listing the Settling States to which your "deny" or "unknown" response applies and the basis for your response (i.e. those states that did NOT have a Qualifying Statute in full force and effect and/or did not diligently enforce the provisions of such statute during any year since its Model Statute Effective Date shown in Attachment 2).

83. The dropdown menu on the right has three choices: "confirm," "deny," or "unknown." The form then instructs the answering party to explain which MSA States the response applies to and the basis for the response if the answer is "deny" or "unknown."

84. Each year New Mexico confirms it had a Qualifying Statute and diligently enforced it for that payment year.

85. Upon information and belief, each year the Defendants have answered either "unknown" or "deny."[7]

[7] New Mexico makes these allegations concerning the Defendants' responses to the IA form request "upon information and belief." New Mexico does not have access to these form responses until they are exchanged in discovery for the then pending arbitrations. Plaintiff currently has access only to Defendant's responses through 2007. The actual Defendant form responses for 2008 through 2022 will be obtained through discovery in the present suit.

86. The image above is a screenshot of one of Philip Morris's response forms and is representative of Defendants' responses.

87. In response to the request for information about to *which States* the Defendants' "deny" and "unknown" responses apply, and the bases for the responses, the Defendants either refuse to respond, or make vague and general statements about unidentified "States" insufficiently enforcing their respective Qualifying Statutes.

88. No Defendant's response makes any explanation specific to New Mexico concerning its lack of diligent enforcement. The written explanations submitted are always generic assertions that unquestionably do not apply to all States.

89. Defendants' responses as to New Mexico have been inaccurate and intentionally misleading since at least 2008.

90. Philip Morris USA and R.J. Reynolds Tobacco use the exact same wording in their respective responses, indicating they coordinate their messaging. For example, this wording appears verbatim in both companies' responses for 2007:

> [RJRT/Philip Morris] denies[y] that the Settling States have been diligently enforcing their respective Model Statutes during any of the years in question.
> [RJRT/Philip Morris] bases this position on a variety of factors, including: the growth in both the number of NPMs and their aggregate market share; the widespread availability of NPM products; the prices at which the NPM products are sold, which are lower than would be commercially feasible if the NPMs have been making escrow deposits required by the Model Statutes; the small number of actions brought by the Settling States to enforce the Model Statutes; an apparent refusal by a number of Settling States to enforce their Model Statutes against certain categories of tobacco products despite having legislative authority to do so (including tobacco products sold by Native American Tribes, via the internet or direct mail, imported products, and "roll your own" tobacco); . . .

91. Despite Defendants' failure to comply with their obligations to provide state specific responses to the IA each year, their invocation of the dispute process without a good faith

basis has required New Mexico to arbitrate the Defendants' alleged disputes at enormous cost to the State.

History of the Defendants' Abuse of the Diligent Enforcement Dispute Process

92. The MSA was adopted and incorporated into this Court's Consent Decree dated December 11, 1998.

93. The MSA States dutifully enacted the specified escrow statute within months of entry of the Consent Decree in their respective states. MSA § IX(d)(2)(E) & Ex. T ("Model Escrow Statute") (once enacted, "Qualifying Statute").

94. The PMs immediately began claiming that the MSA States failed to diligently enforce their Qualifying Statutes.

95. Accordingly, the PMs withheld an NPM Adjustment on their first MSA payment, which was for 1999, and continued to claim NPM Adjustments for 2000, 2001, and 2002.

96. Those disputes over diligent enforcement for the first four years of the MSA were resolved in 2003 when the Parties agreed that the NPM Adjustment would not apply for the years 1999-2002.

97. The States had discovered that at least one OPM was evading its MSA payment obligation by contract manufacturing cigarettes for an NPM—which not only allowed it to sell cigarettes for which it did not make MSA payments, but also inflated NPM sales, thereby inflating the amount of the NPM Adjustment the PMs were claiming.

98. In 2005, the MSA States entered into an agreement with the OPMs that foreclosed that particular method of evading their MSA obligations and stipulated that no NPM Adjustment would apply to MSA payments for 1999-2002.

99. Not missing a beat, in 2006, the Defendants asserted a diligent enforcement dispute against New Mexico concerning their 2003 MSA payments. Indeed, with the few exceptions noted above, Defendants have continued to raise diligent enforcement disputes against every MSA State that has not signed the Term Sheet for every MSA payment year thereafter.

100. In 2006, the PMs retroactively reduced their 2003 payment to New Mexico and the other MSA States on the grounds that they disputed the MSA States' diligent enforcement of their respective Qualifying Statutes.

101. Only fifteen MSA States arbitrated all the way through to a decision.

102. Upon information and belief, in 2009, a group of MSA States succumbed to the impossibility of resolving the PMs' asserted disputes through never-ending, costly arbitrations to determine their still unresolved MSA payments for 2003, and for their MSA payments for every year thereafter; the group of MSA States agreed to enter a side agreement with the PMs called the Term Sheet.

103. By that point, the PMs had lodged six diligent enforcement disputes, one for each year from 2003 through 2008.

104. Additional MSA States subsequently agreed to join the Term Sheet, and New York negotiated its own side agreement.

105. In 2018, a total of twenty-six MSA States entered a new version of the Term Sheet the "2016 and 2017 NPM Adjustments Settlement Agreement."

106. Finally, in August 2020, the PMs entered into yet another version of the Term Sheet, "2018 Through 2022 NPM Adjustments Settlement Agreement," with an additional nine MSA States joining.

107. This revised Term Sheet now also included resolution of MSA payments for 2018-2022. (The various incarnations of this side agreement are jointly referred to as the "Term Sheet.")

108. Most recently, in March 2022, Illinois entered its own side agreement with the PMs.

109. All told, 36 MSA States have now succumbed to the PMs' war of attrition and agreed to some version of the Term Sheet.

110. Of the original 52 MSA State entities, only eight continue to pursue full payment of what they are due under the MSA.

111. The Term Sheet: (1) requires each Term Sheet State to relinquish its claim to between 25 and 54 percent of the money that the PMs unilaterally withheld from these States' MSA payments in connection with the PMs' alleged diligent enforcement disputes; (2) grants significantly expanded discretion to the PMs over the application of the NPM Adjustment with regard to the Term Sheet States; (3) imposes additional, costly enforcement obligations on the Term Sheet States; and (4) exceeds the MSA in both complexity and opacity.

The History of Defendants' Disputes Against New Mexico

112. Defendants "deny" (or claim they do not know whether) New Mexico has ever sufficiently enforced its Qualifying Statute to qualify for the Safe Harbor Provision—that is, they jointly allege that in the 23-year history of the MSA, New Mexico has never once enforced its Qualifying Statute in a manner consistent with the MSA.

113. Defendants have raised diligent enforcement disputes against New Mexico and withheld MSA payments every year from 1999 through 2022.

114. Defendants assert these diligent enforcement disputes despite having no good-faith basis, particularly as to the years relevant to this action (i.e., 2008 through 2022).

115. Defendants fail to provide any New Mexico-specific basis each year when they initiate arbitration by responding to the IA that they deny New Mexico has diligently enforced, or that it is "unknown" whether New Mexico has diligently enforced.

116. Defendants deny or claim they do not know whether New Mexico diligently enforced, despite their established practices of gathering detailed New Mexico specific sales data and market information directly from New Mexico's wholesalers and retailers, their own employees and contractors, other MSA States and NAAG. In addition, Defendants can and do access publicly available documents and data relating to New Mexico tobacco sales. All of these sources of information are available to Defendants to conduct a reasonable investigation prior to commencing arbitrations.

117. New Mexico learned in 2011 that Defendants also contend that New Mexico's Qualifying Statute became deficient in 2006, despite the fact that it was enacted verbatim (codified at NMSA §§ 6-4-12, 6-4-13), and remains unchanged, from the Model Escrow Statute of the MSA that all MSA Parties agreed constitutes a Qualifying Statute. MSA § IX(d)(2)(E) & Ex. T.

118. The Defendants now assert that as of 2006, New Mexico's Qualifying Statute ceased to be a Qualifying Statute, because in that year New Mexico amended its tax code (not its Qualifying Statute) in order to codify New Mexico's longstanding practice of only requiring escrow deposits for cigarettes and roll your own tobacco for which state excise tax ("SET") was paid. *See* NMSA § 7-12-5. New Mexico's longstanding policy and practice, in place when the MSA was negotiated and entered in 1998 and continuing to today, is that it does not collect excise taxes on tribal sales of cigarettes in deference to tribal sovereignty.

119. As the MSA states explicitly, the Qualifying Statute means a statute "applicable everywhere the Settling State has authority to legislate." MSA § IX(d)(2)(E).

120. In its 2013 decision, the 2003 Arbitration Panel rejected the PM arguments that New Mexico failed to comply with the MSA because it exempted tribal sales from excise taxes, and therefore did not require tribal NPM sales to be covered with escrow deposits. The unanimous 2003 Panel found, "although some [MSA] States with large numbers of cigarettes sold on Tribal Lands declined to change their policy regarding non-taxation of such sales, those [MSA] States presented valid policy reasons for their decisions. . . [and] the [MSA does not require them] to elevate their [MSA] obligations above other statutory or rational policy considerations." *In the 2003 NPM Adjustment Proceedings*, JAMS Ref. No. 1100053390, Final Award Re: State of New Mexico (Sept 11, 2013) ("*2003 Arb. Order*") p. 15.

121. Defendants cannot argue in good faith that New Mexico's alteration to its tax code rendered its Qualifying Statute no longer "Qualifying." To the contrary, the 2006 amendments codify New Mexico's historic practices regarding tribal sales, did not impact escrow collections, and did not render its Qualifying Statute nonqualifying.

The Arbitration of the 2003 MSA Payment

122. Of the fifteen MSA States that arbitrated the 2003 disputes to a decision in 2015, a supermajority prevailed and were not allocated any part of the NPM Adjustment. New Mexico, however, did not prevail.

123. For 2003, New Mexico was found not to have diligently enforced its Qualifying Statute despite an escrow collection rate of 69 to 81 percent because the Arbitration Panel found: 26 percent of monthly distributor reports were either missing or incorrect and there was direct evidence of significant underreporting of tobacco product sales in the State; 13 NPMs out of 29 were in compliance with their escrow obligation, two partially complied and 14 failed to comply; New Mexico had not filed any civil enforcement actions in either 2002 or 2003 against

noncompliant NPMs, though seven of these NPMs had been noncompliant in prior years; New Mexico had no formal plan or guidelines for data collection, did not send Notice or Demand letters to NPMs (except for two which were paid), and apparently left the job of demanding and organizing NPM escrow data in the hands of a part-time unpaid intern; there was no budget allocated to escrow enforcement in contrast to the budget for excise tax enforcement; and New Mexico's lack of escrow enforcement efforts resulted in an increase in noncompliance in the State.

124. Curiously, the Panel also noted as weighing in its decision, findings that New Mexico failed to adequately enforce what is known as the "Complementary Legislation," and also failed to use its State tax code authority to seize foreign cigarettes.

125. By 2002, the MSA States had determined that the Model Escrow Statute was not effective for escrow enforcement because its sole authorized enforcement tool was the filing of civil lawsuits against NPMs who had not deposited sufficient funds in their respective escrow accounts.

126. To address these challenges, the States, in consultation with the PMs, crafted Model Complementary Legislation, which authorized the creation of a Directory that lists all tobacco product manufacturers whose products can be sold in that State. Additionally, the Complementary Legislation gave the States the power to delist NPMs from their Directories if they did not deposit escrow, and to pursue statutory enforcement actions against other entities that stamped or sold tobacco products that were not listed on the Directory. None of these remedies are "provisions" of the agreed-upon Model Escrow Statute included in the MSA.

127. Before enacting the Complementary Legislation, the MSA States demanded that the PMs provide them with specific written assurances concerning the impact of the Complementary Legislation on their diligent enforcement obligations under the MSA (the

"Assurance Letters"). The PMs issued Assurance Letters that, consistent with the MSA, confirmed, *inter alia*:

(a) "enactment of the proposed Model Complementary Legislation shall not be construed as an amendment to the Model Escrow Statute or to the MSA and shall not constitute any breach of the MSA;" and

(b) "the diligent enforcement obligation set forth in Section IX(d)(2)(B) of the MSA shall not apply to the proposed Model Complementary Legislation."

128. Relying on these Assurance Letters, in early 2003 New Mexico enacted the Model Complementary Legislation, entitled the "Tobacco Escrow Fund Act." L. 2003, Ch. 114, § 1, and codified at N.M. Stat. § 6-4-14, *et seq*.

129. The Tobacco Escrow Fund Act authorized the Attorney General ("AG") to require NPMs to certify, under penalty of perjury, their escrow compliance and to do that quarterly (not just annually). N.M. Stat. § 6-4-21. It required each foreign NPM to designate an agent for service within New Mexico, and imposed joint and several liability between foreign NPMs and their importers. *Id.* §§ 6-4-17, 6-4-20.1.

130. In addition, the Tobacco Escrow Fund Act required each PM and NPM to certify to the AG its complete list of its brand families for cigarettes sold in the State. *Id.*

131. Though enactment and enforcement of the Model Complementary Legislation was not a requirement of the MSA, and despite the PMs' pre-enactment assurances, the PMs argued to the 2003 Arbitration Panel, and the Panel found, that New Mexico's failure to send notice that it had enacted the Model Complementary Legislation in 2003 to the NPMs and did not post it on any State website, were factors it weighed to find New Mexico had not diligently enforced its Qualifying Statute.

132. Similarly, the 2003 Arbitration Panel weighed that New Mexico had not used the State tax code's powers to inspect and seize foreign cigarettes if an NPM failed to file a certificate attesting to its compliance with the Qualifying Statute. But seizure is not authorized by the MSA Model Escrow Statute and should not be a factor for diligent enforcement of the Qualifying Statute.

133. Lastly, the Panel noted that New Mexico had made inadequate efforts to be aware of NAAG and other MSA States' enforcement efforts in 2003.

The Arbitration of the 2004 MSA Payment

134. Although the Arbitration Panel's decision that New Mexico had not diligently enforced the Qualifying Statute in 2003, was not issued until 2013, New Mexico worked diligently to improve its enforcement in 2004 in the absence of guidance concerning how an arbitration panel might interpret the State's "diligent enforcement" obligation.

135. The second national arbitration, this time over the Defendants' dispute concerning the MSA States' 2004 diligent enforcement, began in 2016 and was finally decided as to New Mexico on October 27, 2022.

136. The 2004 Arbitration involved multiple, overlapping panels of arbitrators and extensive delays. In addition, the death in 2019 of the arbitrator chosen by the MSA States resulted in further combinations of arbitration panels and delays.

137. Notably, Defendants refused to abide by decisions from the prior 2003 arbitration proceedings, necessitating substantial pointless discovery production and re-litigation of identical issues.

138. For example, after a 2003 Arbitration Panel decided that the Term Sheet States would not be allocated any part of the NPM Adjustment, this Court reviewed that decision and reversed, holding "the NPM Adjustment applied to states unless they demonstrate they diligently

enforced their statutes," and the Term Sheet States had settled rather than arbitrate and prove their diligent enforcement. *See* Order at p. 7, *State of New Mexico v. Philip Morris, USA, et al,* No. D-1-1-CV-1997-01235 (1st Judicial District Court, County of Santa Fe, Sept. 27, 2016).

139. In 2017, in compliance with this Order, an additional $14,560,037.80 was paid to New Mexico for the NPM Adjustment that had been wrongfully withheld from the 2003 MSA payment.

140. Three other MSA Courts (Pennsylvania, Maryland, and Missouri) similarly held that Term Sheets States must share in the NPM Adjustment Allocation.

141. Nevertheless, during the 2004 Arbitration, the PMs once again sought to have the Term Sheet States exempted from the NPM Adjustment Allocation, requiring re-litigation of that issue.

142. As noted above, in July of 2022, an *en banc* decision on behalf of all 2004 Arbitration Panels held that the Term Sheet States are subject to the NPM Adjustment and must be included in the NPM Adjustment Allocation calculation. *In Re: 2004 NPM Adjustment Proceedings,* JAMS Ref. No. 1260003649.

143. In addition, the PMs once again asserted that "Units sold" for purposes of the MSA escrow obligation for NPMs in New Mexico (and everywhere), should include cigarette sales on Tribal Lands.

144. The PMs made this argument despite the fact that the 2003 Arbitration Panels had found unanimously as a matter of law that the MSA term, "Units sold" was "unambiguous," and for New Mexico the 2003 Panel held, "Units sold" did not include sales on Tribal Lands. *2003 Arb. Order,* p. 15.

145. The 2004 Panel rejected the PMs argument once again and found "no ambiguity in the definition of 'Units sold' set forth in the MSA." *In Re: 2004 NPM Adjustment Proceedings,* JAMS Ref. No. 1260003649, Final Award for the State of New Mexico 2004 NPM Adjustment Proceeding (Oct. 27, 2022) ("*2004 New Mexico Final Award*") p. 24. The Panel held, "To qualify as a 'Unit sold' the cigarette or [Roll Your Own] RYO container, must be both stamped and taxed." *Id.* at 24. Because New Mexico exempts Tribal Lands from State tax authority, it does not collect excise tax on sales on Tribal Lands and NPM product sold there is not subject to escrow. Accordingly, the Panel found, NPM sales on Tribal Lands form no part of the diligent enforcement calculation.[8]

146. In addition, despite the clear language of the MSA and their own prior admissions that MSA States are entitled to Safe Harbor from the NPM Adjustment so long as they enact and enforce a Qualifying Statute, the Defendants continued to assert that diligent enforcement requires enforcement of a State's civil or criminal tax laws, and "all available provisions of all available statutes."

[8] The vast majority of sales on Tribal Lands in New Mexico are PM sales, and are predominantly sales of OPM brands. Thus the PMs also benefit from the price advantage resulting from lack of excise tax for sales on Tribal Lands. This is one of the most regulated industries in the United States and the PMs know where their products are sold. The OPMs in particular are not ignorant of the details of their sales on New Mexico Tribal Lands.

The PMs' litigation and relitigation of this issue in the Arbitrations is patently abusive, calculated to expend MSA States resources, rather than to preserve an endangered and critical aspect of the MSA bargain. Brazenly, the PMs argued in the 2004 Arbitration that the eight litigating MSA States could and do violate the MSA contract and the covenant of good faith and fair dealing by intentionally refusing to collect excise tax (on Tribal Lands and elsewhere) in order to avoid their diligent enforcement obligations to ensure escrow is deposited for NPM "Units sold." *2004 New Mexico Final Award* n.17. Understandably, this argument also failed.

147. Of the eight MSA States that arbitrated the 2004 disputes to a decision in 2022, a supermajority prevailed and were not allocated any part of the NPM Adjustment. New Mexico, however, did not prevail.

148. Defendants continue their baseless disputes concerning their MSA payments to New Mexico from 2005 to the present.

FIRST CAUSE OF ACTION

Breach of Contract (False Disputes)

149. The State of New Mexico realleges and incorporates all preceding paragraphs here.

150. The MSA and the Consent Decree incorporating it are written contracts to which New Mexico and all of the Defendants are parties.

151. Each year pursuant to section IX (d) of the MSA, the IA asks the PMs whether they assert a dispute regarding a specific MSA State's diligent enforcement of its Qualifying Statute.

152. The express purpose of the diligent enforcement requirement is, "[t]o protect the public health gains achieved by [the MSA]."

153. If a PM asserts a dispute by either affirming to the IA that it denies that a specific MSA State diligently enforced, or the PM responds that diligent enforcement is "unknown" for that MSA State, the PM must have a basis for asserting "deny" or "unknown" to trigger a diligent enforcement dispute as to that State. MSA IX(d).

154. Each year since at least 2008, the Defendants have denied or refused to admit to the IA that New Mexico has diligently enforced its Qualifying Statute, even though Defendants submit no basis specific to New Mexico to support this assertion and a reasonable investigation, including of records and data available to them, would demonstrate the lack of basis for their assertions.

155. Indeed, Defendants had evidence available to them demonstrating—and thus they knew or, at minimum, should have known—that New Mexico has diligently enforced its Qualifying Statute during each subject year.

156. The State has suffered and continues to suffer enormous financial damage as a result of Defendants' breach, including reductions in MSA payments that are due, the cost to conduct litigations, the cost to conduct arbitrations, and the diminution of value resulting from the delay in receipt of payment.

157. But for Defendants' breaches by way of false disputes over the amounts due to New Mexico, New Mexico would have received the full monetary amounts owed to it under the MSA.

158. Defendants' MSA breaches are in bad faith and are malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for New Mexico's rights.

SECOND CAUSE OF ACTION

Breach of Contract (Failure to Provide Information)

159. The State realleges and incorporates all preceding paragraphs here.

160. The MSA and the Consent Decree incorporating it are written contracts to which the State of New Mexico and all of the Defendants are parties.

161. Each year, the IA requests the information necessary to determine how much each Defendant owes and the portion of that amount that goes to each State. MSA § XI(d)(1).

162. The MSA obligates Defendants to use best efforts to supply responsive information in their possession or available to them.

163. That requirement is ongoing, meaning that if the information necessary to determine, for example, how much the Defendants owe New Mexico for 2008 becomes available in 2021, then each Defendant has an obligation to provide that information in 2021.

164. Each Defendant has violated this obligation each year since at least 2008 by:

(a) Refusing to respond to the IA request;

(b) Falsely claiming they lack sufficient information to respond;

(c) Providing false information; and/or

(d) Failing to update their responses as information becomes available to them.

165. The State has suffered and continues to suffer enormous financial damage as a result of Defendants' breach, including reductions in MSA payments that are due, the cost to conduct litigations, the cost to conduct arbitrations, and the diminution of value resulting from the delay in receipt of payment.

166. But for Defendants' breaches by way of false disputes over New Mexico's diligent enforcement or the amounts due to New Mexico, New Mexico would have received the full monetary amounts owed to it under the MSA.

167. Defendants' MSA breaches are in bad faith and are malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for New Mexico's rights.

THIRD CAUSE OF ACTION

Breach of the Covenant of Good Faith and Fair Dealing

168. The State realleges and incorporates all preceding paragraphs here.

169. The MSA and the Consent Decree incorporating it are written contracts to which the State of New Mexico and all of the Defendants are parties.

170. Under New Mexico law, every contract contains an implied covenant of good faith and fair dealing. *See e.g., Sanders v. FedEx Ground Package Sys., Inc.*, 144 N.M. 449, 188 P.3d 1200, 1203 (N.M. 2008); *Cont'l Potash, Inc. v. Freeport–McMoran, Inc.*, 115 N.M. 690, 858 P.2d

66, 82 (N.M. 1993); *Watson Truck & Supply Co. v. Males*, 111 N.M. 57, 801 P.2d 639, 642 (N.M. 1990).

171. Defendants repeatedly invoke MSA provisions to dispute New Mexico's diligent enforcement, claiming those provisions grant them discretion to raise disputes and withhold portions of payments.

172. New Mexico law, however, requires Defendants to exercise that discretion in a good faith manner that avoids depriving New Mexico of the benefit of the contract itself. This covenant "requires that neither party do anything that will injure the rights of the other to receive the benefit of their agreement." *Bourgeous v. Horizon Healthcare Corp.*, 117 N.M. 434, 872 P.2d 852, 856 (N.M. 1994).

173. The Defendants have breached, and continue to breach, the covenant of good faith and fair dealing by engaging in injurious conduct that includes, but is not limited to:

(a) Withholding money due and owing to New Mexico under the MSA for each and every year from at least 2008 through the present;

(b) Withholding those funds based on the allegation that New Mexico did not diligently enforce its Qualifying Statute for each and every year from 2005 through the present, with no reasonable basis for making that allegation since at least 2008;

(c) From 2005 and continuing every subsequent year, withholding more than they ever might obtain from New Mexico even if an Arbitration finds that New Mexico failed to diligently enforce and none of the other non-Term Sheet States are found to have failed in diligent enforcement for the subject year.

(d) Asserting that the *only* way for New Mexico to recover the amounts rightfully owed to it under the MSA is to arbitrate the same unsupported allegations for each year in perpetuity;

(e) Claiming that the Defendants know nothing about New Mexico's enforcement (other than it was purportedly deficient) until arbitration is initiated and discovery has commenced, despite their possession of and access to New-Mexico-specific private and public documents and data;

(f) Claiming that even if New Mexico prevails against the Defendants' claims of deficient enforcement, New Mexico still cannot recover the withheld payments unless and until Defendants' other disputes with all other MSA States over the payment year in question are resolved; and

(g) Claiming that even if New Mexico prevails, New Mexico is still not entitled to full interest on the MSA payments improperly withheld from it for over a decade and not deposited into the Disputed Payments Account.

174. The Defendants claim they have complete discretion under the MSA as to which States they assert disputes against, when they choose to assert those disputes, when they disclose the evidentiary basis for their asserted disputes, and how quickly the States whose disputes are resolved recover the money withheld from them.

175. The Defendants exercise their claimed discretion in bad faith in order to deprive New Mexico of the benefit of the MSA contract which settled New Mexico's initial litigation over the Defendants' decades-long deceit and harm to the public health.

176. So far, the Defendants have collectively withheld in excess of $84 million of the payments they owe to New Mexico by locking that money in the Disputed Payments Account—

which gives Defendants exclusive control over those funds—or simply by refusing to pay what they owe.

177. Until the Defendants' bad faith scheme is terminated, the amounts owed to New Mexico under the MSA and withheld indefinitely will continue to grow.

178. Defendants' breaches are in bad faith, and are malicious, fraudulent, oppressive, or committed recklessly with a wanton disregard for New Mexico's rights.

FOURTH CAUSE OF ACTION

Malicious Abuse of Process

179. The State realleges and incorporates all preceding paragraphs here.

180. Each year since at least 2008, the Defendants have pursued arbitration proceedings by asserting that New Mexico has failed to diligently enforce its Qualifying Statute.

181. Defendants have initiated these arbitration proceedings without a reasonable belief founded on known fact established after a reasonable pre-initiation investigation that a claim that New Mexico had not diligently enforced its Qualifying Statute could be established to the satisfaction of the arbitrators.

182. Defendants have misused the MSA arbitration process for improper purposes, including but not limited to:

(a) to delay paying what they owe to New Mexico and deprive the State of critical public program dollars;

(b) to consume New Mexico's resources in draining discovery, legal battles and arbitrations;

(c) to pressure New Mexico to go the way of the 36 MSA States who succumbed to the PMs' war of attrition and enter the Term Sheet in exchange for partial relief from the interminable arbitration proceedings; and

(d) to pressure New Mexico to renegotiate the MSA and make massive reductions in what the Defendants are required to pay New Mexico each year to compensate for the increased health costs of the health harming tobacco products they sell, as well as to take on burdensome increases in the State's enforcement duties.

183. Accordingly, New Mexico has been harmed as a result of Defendants' malicious abuse of process and has suffered, and continues to suffer, damages and other losses in amounts to be proven at trial.

184. Defendants' abuse of the arbitration process has been intentional, malicious, willful, reckless, wanton, or in bad faith and should be punished in order to deter them and others from similar conduct.

FIFTH CAUSE OF ACTION

Violation of the Unfair Practices Act, N.M. Stat. §§ 57-12-1, *et seq.*

185. The State realleges and incorporates all preceding paragraphs here.

186. The MSA established a framework that allows Defendants to continue to sell their harmful tobacco products while mitigating the public health harms of those products.

187. Specifically, the MSA prohibits advertisement for tobacco products, claims concerning the health impacts of tobacco, and any promotion of tobacco use by minors.

188. The MSA also requires the Defendants to pay New Mexico for the increased public health expenses caused by their products.

189. Thus, the MSA is fundamentally a consumer protection agreement.

190. Defendants have knowingly made unfounded and false claims that New Mexico did not diligently enforce its Qualifying Statute, and thus Defendants have **deceptively** withheld payments to the State and have breached their MSA obligations and abused the arbitration process in order to circumvent the MSA, while continuing to sell tobacco products and harm consumers.

191. The MSA is also intended to level the playing field between the PMs who entered the MSA and agreed to make large annual payments to the MSA States, and the NPMs who did not join the settlement and take on its payment obligations.

192. The MSA requirement to enact and enforce a Qualifying Statute against the NPMs is intended to "effectively neutralize the cost disadvantages that the [PMs] experience vis-à-vis the [NPMs] within such [MSA State] as a result of the provisions of this [MSA]."

193. The MSA is thus also a fair competition agreement.

194. Defendants gain an **unfair** advantage and engage in **unfair** trade practices when they avoid their payment obligations under the MSA and tilt the playing field in their favor.

195. Accordingly, Defendants have violated the UPA.

196. The State seeks injunctive relief, restitution of funds unlawfully withheld as a result of Defendants' violations of the UPA and civil penalties for each such violation.

SIXTH CAUSE OF ACTION

Violation of the Fraud Against Taxpayers Act, N.M. Stat. §§ 44-9-2, *et seq.*

197. The State realleges and incorporates all preceding paragraphs here.

198. Defendants also knowingly use false, misleading or fraudulent records and statements to conceal, avoid or decrease their MSA obligation to pay the State each year at least since 2008.

199. Namely, Defendants submit written responses to the IA asserting that New Mexico does not diligently enforce its Qualifying Statute, or that Defendants do not know whether New Mexico has enforced its Qualifying Statute each year.

200. Defendants use these false written responses to the IA in order to trigger a diligent enforcement dispute and arbitration, and to withhold an NPM Adjustment from New Mexico's annual MSA payment.

201. Defendants use these false records in order to conceal, avoid or decrease their MSA obligation to pay money to the State, in violation of FATA.

202. Accordingly, New Mexico has been harmed, and has suffered, and continues to suffer, damages and other losses in amounts to be proven at trial.

203. The State also seeks

(a) three times the amount of damages sustained;

(b) civil penalties of not less than five thousand dollars ($5,000) and not more than ten thousand dollars ($10,000) for each violation;

(c) its costs in pursuing this civil action; and

(d) reasonable attorney fees, including the fees of the attorney general, state agency and New Mexico's outside counsel. N.M. Stat. § 44-9-3.

204. Defendants acted together to commit these FATA violations, and are jointly and severally liable. N.M. Stat. § 44-9-13.

SEVENTH CAUSE OF ACTION

Conspiracy (Baseless Disputes)

205. The State realleges and incorporates all preceding paragraphs here.

206. Defendants constitute two or more individual entities.

207. The Defendants have coordinated their strategy to falsely and baselessly claim New Mexico did not diligently enforce its Qualifying Statute each year since at least 2008, and to withhold MSA funds with no good faith basis.

208. Defendants act in unison to pursue baseless arbitration proceedings, often copying the exact same language to submit their false claims that New Mexico has not diligently enforced or they do not know whether New Mexico has diligently enforced.

209. Defendants thus conspire to breach the MSA contract, to deprive New Mexico of the benefit of its bargain in violation of the covenant of good faith and fair dealing, to maliciously abuse the arbitration process, to engage in deceptive and unfair trade practices, and to submit false claims and false records in order to avoid paying what they owe to New Mexico each year under the MSA.

210. In conspiring to commit these wrongs, the Defendants are jointly and severally liable for New Mexico's losses and harms.

211. The State has suffered and continues to suffer enormous financial damage as a result of Defendants' conspiracy.

212. Defendants' conduct was intentional, malicious, fraudulent, oppressive, reckless or in bad faith.

EIGHTH CAUSE OF ACTION

Declaratory and Enforcement Relief

213. The State realleges and incorporates all preceding paragraphs here.

214. The MSA and Consent Decree expressly authorize the State to request, and for this Court to issue, Declaratory or Enforcement Orders to implement and enforce the MSA and the Consent Decree.

215. The State seeks Declaratory Orders or Enforcement Orders that:

(a) Prohibit Defendants from preemptively reducing their annual MSA payments to New Mexico in violation of the MSA and Consent Decree because the Defendants are not entitled to unilaterally reduce their payment to New Mexico unless and until they have a reasonable belief founded on known fact established after a reasonable pre-initiation New Mexico specific investigation that New Mexico did not enforce its Qualifying Statute for the given year at issue;

(b) Prohibit Defendants from responding to the IA inquiry each year that they "deny" New Mexico diligently enforced its escrow statute, or that New Mexico's diligent enforcement is "unknown," without a documented, reasonable basis for these assertions;

(c) Prohibit Defendants from pursuing arbitrations concerning whether New Mexico diligently enforced its Qualifying Statute, or whether New Mexico's NPM escrow statute is a "Qualifying Statute," without a documented, reasonable basis for these assertions; and

(d) Declare that "Units sold" as used in the MSA and under New Mexico law does not include sales on Tribal Lands.

PRAYER FOR RELIEF

Based on the foregoing, the State of New Mexico respectfully requests judgment in its favor on all claims and the following relief:

1. Actual damages in an amount determined at trial, and all future withholdings, plus any amounts Defendants have withheld from the MSA Annual payment to New Mexico after the commencement of this action;

2. Treble damages, as available under the New Mexico FATA or other legal authority;

3. Punitive damages, as allowed by law;

4. Maximum statutory penalties under the UPA and FATA for each individual instance in which a Defendant has withheld part of New Mexico's MSA payment for a given year on the grounds of a "dispute" over New Mexico's enforcement during the year subject to payment in violation of said statutes;

5. Attorneys' fees and costs of litigation, as allowed by law;

6. Pre-judgment interest and post-judgment interests on all monies awarded;

7. Declaratory and injunctive relief; and

8. Any further relief the Court determines to be just and necessary.

JURY DEMAND

The State of New Mexico demands a jury trial on all issues triable of right by a jury.

Dated: November 29, 2022 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2022, a true and correct copy of the foregoing was electronically filed through the Court's E-File & Serve System and was served via electronic mail on all defendants as follows:

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EXHIBIT A

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.* Tom Udall,
Attorney General of the State of New Mexico,

Plaintiff,

No. SF 97-1235(c)

vs.

THE AMERICAN TOBACCO COMPANY;
R.J. REYNOLDS TOBACCO COMPANY;
BROWN & WILLIAMSON TOBACCO CORPORATION
(individually and as successor by merger to The American
Tobacco Company); B.A.T. INDUSTRIES, P.L.C.; BRITISH
AMERICAN TOBACCO CO., LTD.; PHILIP MORRIS
INCORPORATED; PHILIP MORRIS COMPANIES, INC.;
LORILLARD TOBACCO COMPANY; LORILLARD, INC.;
UNITED STATES TOBACCO COMPANY; SANTA FE
NATURAL TOBACCO COMPANY, INC.; THE TOBACCO
INSTITUTE, INC.; and THE COUNCIL FOR TOBACCO
RESEARCH-U.S.A., INC.,

Defendants.

CONSENT DECREE AND FINAL JUDGMENT

WHEREAS, Plaintiff, the State of New Mexico, commenced this action on May 29, 1997, by and through its Attorney General Tom Udall, pursuant to his common law powers and the provisions of NMSA 1978 § 36-1-22;

WHEREAS, the State of New Mexico asserted various claims for monetary, equitable and injunctive relief on behalf of the State of New Mexico against certain tobacco product manufacturers and other defendants;

WHEREAS, Defendants have contested the claims in the State's complaint and amended complaints and denied the State's allegations and asserted affirmative defenses;

WHEREAS, the parties desire to resolve this action in a manner which appropriately addresses the State's public health concerns, while conserving the parties' resources, as well as those of the Court, which would otherwise be expended in litigating a matter of this magnitude; and

EXHIBIT A

WHEREAS, the Court has made no determination of any violation of law, this Consent Decree and Final Judgment being entered prior to the taking of any testimony and without trial or final adjudication of any issue of fact or law;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AS FOLLOWS:

I. JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter of this action and over each of the Participating Manufacturers. Venue is proper in this judicial district and county.

II. DEFINITIONS

The definitions set forth in the Agreement (a copy of which is attached hereto) are incorporated herein by reference.

III. APPLICABILITY

A. This Consent Decree and Final Judgment applies only to the Participating Manufacturers in their corporate capacity acting through their respective successors and assigns, directors, officers, employees, agents, subsidiaries, divisions, or other internal organizational units of any kind or any other entities acting in concert or participation with them. The remedies, penalties and sanctions that may be imposed or assessed in connection with a violation of this Consent Decree and Final Judgment (or any order issued in connection herewith) shall only apply to the Participating Manufacturers, and shall not be imposed or assessed against any employee, officer or director of any Participating Manufacturer, or against any other person or entity as a consequence of such violation, and there shall be no jurisdiction under this Consent Decree and Final Judgment to do so.

B. This Consent Decree and Final Judgment is not intended to and does not vest standing in any third party with respect to the terms hereof. No portion of this Consent Decree and Final Judgment shall provide any rights to, or be enforceable by, any person or entity other than the State of New Mexico or a Released Party. The State of New Mexico may not assign or otherwise convey any right to enforce any provision of this Consent Decree and Final Judgment.

IV. VOLUNTARY ACT OF THE PARTIES

The parties hereto expressly acknowledge and agree that this Consent Decree and Final Judgment is voluntarily entered into as the result of arm's-length negotiation, and all parties hereto were represented by counsel in deciding to enter into this Consent Decree and Final Judgment.

V. INJUNCTIVE AND OTHER EQUITABLE RELIEF

Each Participating Manufacturer is permanently enjoined from:

A. Taking any action, directly or indirectly, to target Youth within the State of New Mexico in the advertising, promotion or marketing of Tobacco Products, or taking any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within the State of New Mexico.

B. After 180 days after the MSA Execution Date, using or causing to be used within the State of New Mexico any Cartoon in the advertising, promoting, packaging or labeling of Tobacco Products.

C. After 30 days after the MSA Execution Date, making or causing to be made any payment or other consideration to any other person or entity to use, display, make reference to or use as a prop within the State of New Mexico any Tobacco Product, Tobacco Product package, advertisement for a Tobacco Product, or any other item bearing a Brand Name in any Media; provided, however, that the foregoing prohibition shall not apply to (1) Media where the audience or viewers are within an Adult-Only Facility (provided such Media are not visible to persons outside such Adult-Only Facility); (2) Media not intended for distribution or display to the public; (3) instructional Media concerning non-conventional cigarettes viewed only by or provided only to smokers who are Adults; and (4) actions taken by any Participating Manufacturer in connection with a Brand Name Sponsorship permitted pursuant to subsections III(c)(2)(A) and III(c)(2)(B)(i) of the Agreement, and use of a Brand Name to identify a Brand Name Sponsorship permitted by subsection III(c)(2)(B)(ii).

D. Beginning July 1, 1999, marketing, distributing, offering, selling, licensing or causing to be marketed, distributed, offered, sold, or licensed (including, without limitation, by catalogue or direct mail), within the State of New Mexico, any apparel or other merchandise (other than Tobacco Products, items the sole function of which is to advertise Tobacco Products, or written or electronic publications) which bears a Brand Name. Provided, however, that nothing in this section shall (1) require any Participating Manufacturer to breach or terminate any licensing agreement or other contract in existence as of June 20, 1997 (this exception shall not apply beyond the current term of any existing contract, without regard to any renewal or option term that may be exercised by such Participating Manufacturer); (2) prohibit the distribution to any Participating Manufacturer's employee who is not Underage of any item described above that is intended for the personal use of such an employee; (3) require any Participating Manufacturer to retrieve, collect or otherwise recover any item that prior to the MSA Execution Date was marketed, distributed, offered, sold, licensed or caused to be marketed, distributed, offered, sold or licensed by such Participating Manufacturer; (4) apply to coupons or other items used by Adults solely in connection with the purchase of Tobacco Products; (5) apply to apparel or other merchandise used within an Adult-Only Facility that is not distributed (by sale or otherwise) to any member of the general public; or (6) apply to apparel or other merchandise (a) marketed, distributed, offered, sold, or licensed at the site of a Brand Name Sponsorship permitted pursuant to subsection III(c)(2)(A) or III(c)(2)(B)(i) of the Agreement by the person to

which the relevant Participating Manufacturer has provided payment in exchange for the use of the relevant Brand Name in the Brand Name Sponsorship or a third-party that does not receive payment from the relevant Participating Manufacturer (or any Affiliate of such Participating Manufacturer) in connection with the marketing, distribution, offer, sale or license of such apparel or other merchandise, or (b) used at the site of a Brand Name Sponsorship permitted pursuant to subsections III(c)(2)(A) or III(c)(2)(B)(i) of the Agreement (during such event) that are not distributed (by sale or otherwise) to any member of the general public.

E. After the MSA Execution Date, distributing or causing to be distributed within the State of New Mexico any free samples of Tobacco Products except in an Adult-Only Facility. For purposes of this Consent Decree and Final Judgment, a "free sample" does not include a Tobacco Product that is provided to an Adult in connection with (1) the purchase, exchange or redemption for proof of purchase of any Tobacco Products (including, but not limited to, a free offer in connection with the purchase of Tobacco Products, such as a "two-for-one" offer), or (2) the conducting of consumer testing or evaluation of Tobacco Products with persons who certify that they are Adults.

F. Using or causing to be used as a brand name of any Tobacco Product pursuant to any agreement requiring the payment of money or other valuable consideration, any nationally recognized or nationally established brand name or trade name of any non-tobacco item or service or any nationally recognized or nationally established sports team, entertainment group or individual celebrity. Provided, however, that the preceding sentence shall not apply to any Tobacco Product brand name in existence as of July 1, 1998. For the purposes of this provision, the term "other valuable consideration" shall not include an agreement between two entities who enter into such agreement for the sole purpose of avoiding infringement claims.

G. After 60 days after the MSA Execution Date and through and including December 31, 2001, manufacturing or causing to be manufactured for sale within the State of New Mexico any pack or other container of Cigarettes containing fewer than 20 Cigarettes (or, in the case of roll-your-own tobacco, any package of roll-your-own tobacco containing less than 0.60 ounces of tobacco); and, after 150 days after the MSA Execution Date and through and including December 31, 2001, selling or distributing within the State of New Mexico any pack or other container of Cigarettes containing fewer than 20 Cigarettes (or, in the case of roll-your-own tobacco, any package of roll-your-own tobacco containing less than 0.60 ounces of tobacco).

H. Entering into any contract, combination or conspiracy with any other Tobacco Product Manufacturer that has the purpose or effect of: (1) limiting competition in the production or distribution of information about health hazards or other consequences of the use of their products; (2) limiting or suppressing research into smoking and health; or (3) limiting or suppressing research into the marketing or development of new products. Provided, however, that nothing in the preceding sentence shall be deemed to (1) require any Participating Manufacturer to produce, distribute or otherwise disclose any information that is subject to any privilege or protection; (2) preclude any Participating Manufacturer from entering into any joint defense or joint legal interest agreement or arrangement (whether or not in writing), or from

asserting any privilege pursuant thereto; or (3) impose any affirmative obligation on any Participating Manufacturer to conduct any research.

I. Making any material misrepresentation of fact regarding the health consequences of using any Tobacco Product, including any tobacco additives, filters, paper or other ingredients. Provided, however, that nothing in the preceding sentence shall limit the exercise of any First Amendment right or the assertion of any defense or position in any judicial, legislative or regulatory forum.

VI. MISCELLANEOUS PROVISIONS

A. Jurisdiction of this case is retained by the Court for the purposes of implementing and enforcing the Agreement and this Consent Decree and Final Judgment and enabling the continuing proceedings contemplated herein. Whenever possible, the State of New Mexico and the Participating Manufacturers shall seek to resolve any issue that may exist as to compliance with this Consent Decree and Final Judgment by discussion among the appropriate designees named pursuant to subsection XVIII(m) of the Agreement. The State of New Mexico and/or any Participating Manufacturer may apply to the Court at any time for further orders and directions as may be necessary or appropriate for the implementation and enforcement of this Consent Decree and Final Judgment. Provided, however, that with regard to subsections V(A) and V(I) of this Consent Decree and Final Judgment, the Attorney General shall issue a cease and desist demand to the Participating Manufacturer that the Attorney General believes is in violation of either of such sections at least ten Business Days before the Attorney General applies to the Court for an order to enforce such subsections, unless the Attorney General reasonably determines that either a compelling time-sensitive public health and safety concern requires more immediate action or the Court has previously issued an Enforcement Order to the Participating Manufacturer in question for the same or a substantially similar action or activity. For any claimed violation of this Consent Decree and Final Judgment, in determining whether to seek an order for monetary, civil contempt or criminal sanctions for any claimed violation, the Attorney General shall give good-faith consideration to whether: (1) the Participating Manufacturer that is claimed to have committed the violation has taken appropriate and reasonable steps to cause the claimed violation to be cured, unless that party has been guilty of a pattern of violations of like nature; and (2) a legitimate, good-faith dispute exists as to the meaning of the terms in question of this Consent Decree and Final Judgment. The Court in any case in its discretion may determine not to enter an order for monetary, civil contempt or criminal sanctions.

B. This Consent Decree and Final Judgment is not intended to be, and shall not in any event be construed as, or deemed to be, an admission or concession or evidence of (1) any liability or any wrongdoing whatsoever on the part of any Released Party or that any Released Party has engaged in any of the activities barred by this Consent Decree and Final Judgment; or (2) personal jurisdiction over any person or entity other than the Participating Manufacturers. Each Participating Manufacturer specifically disclaims and denies any liability or wrongdoing whatsoever with respect to the claims and allegations asserted against it in this action, and has stipulated to the entry of this Consent Decree and Final Judgment solely to avoid the further expense, inconvenience, burden and risk of litigation.

C. Except as expressly provided otherwise in the Agreement, this Consent Decree and Final Judgment shall not be modified (by this Court, by any other court or by any other means) unless the party seeking modification demonstrates, by clear and convincing evidence, that it will suffer irreparable harm from new and unforeseen conditions. Provided, however, that the provisions of sections III, V, VI and VII of this Consent Decree and Final Judgment shall in no event be subject to modification without the consent of the State of New Mexico and all affected Participating Manufacturers. In the event that any of the sections of this Consent Decree and Final Judgment enumerated in the preceding sentence are modified by this Court, by any other court or by any other means without the consent of the State of New Mexico and all affected Participating Manufacturers, then this Consent Decree and Final Judgment shall be void and of no further effect. Changes in the economic conditions of the parties shall not be grounds for modification. It is intended that the Participating Manufacturers will comply with this Consent Decree and Final Judgment as originally entered, even if the Participating Manufacturers' obligations hereunder are greater than those imposed under current or future law (unless compliance with this Consent Decree and Final Judgment would violate such law). A change in law that results, directly or indirectly, in more favorable or beneficial treatment of any one or more of the Participating Manufacturers shall not support modification of this Consent Decree and Final Judgment.

D. In any proceeding which results in a finding that a Participating Manufacturer violated this Consent Decree and Final Judgment, the Participating Manufacturer or Participating Manufacturers found to be in violation shall pay the State's costs and attorneys' fees incurred by the State of New Mexico in such proceeding.

E. The remedies in this Consent Decree and Final Judgment are cumulative and in addition to any other remedies the State of New Mexico may have at law or equity, including but not limited to its rights under the Agreement. Nothing herein shall be construed to prevent the State from bringing an action with respect to conduct not released pursuant to the Agreement, even though that conduct may also violate this Consent Decree and Final Judgment. Nothing in this Consent Decree and Final Judgment is intended to create any right for the State of New Mexico to obtain any Cigarette product formula that it would not otherwise have under applicable law.

F. No party shall be considered the drafter of this Consent Decree and Final Judgment for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter. Nothing in this Consent Decree and Final Judgment shall be construed as approval by the State of New Mexico of the Participating Manufacturers' business organizations, operations, acts or practices, and the Participating Manufacturers shall make no representation to the contrary.

G. The settlement negotiations resulting in this Consent Decree and Final Judgment have been undertaken in good faith and for settlement purposes only, and no evidence of negotiations or discussions underlying this Consent Decree and Final Judgment shall be offered or received in evidence in any action or proceeding for any purpose. Neither this Consent Decree

and Final Judgment nor any public discussions, public statements or public comments with respect to this Consent Decree and Final Judgment by the State of New Mexico or any Participating Manufacturer or its agents shall be offered or received in evidence in any action or proceeding for any purpose other than in an action or proceeding arising under or relating to this Consent Decree and Final Judgment.

H. All obligations of the Participating Manufacturers pursuant to this Consent Decree and Final Judgment (including, but not limited to, all payment obligations) are, and shall remain, several and not joint.

I. The provisions of this Consent Decree and Final Judgment are applicable only to actions taken (or omitted to be taken) within the States. Provided, however, that the preceding sentence shall not be construed as extending the territorial scope of any provision of this Consent Decree and Final Judgment whose scope is otherwise limited by the terms thereof.

J. Nothing in subsection V(A) or V(I) of this Consent Decree and Final Judgment shall create a right to challenge the continuation, after the MSA Execution Date, of any advertising content, claim or slogan (other than use of a Cartoon) that was not unlawful prior to the MSA Execution Date.

K. If the Agreement terminates in this State for any reason, then this Consent Decree and Final Judgment shall be void and of no further effect.

VII. FINAL DISPOSITION

A. The Agreement, the settlement set forth therein, and the establishment of the escrow provided for therein are hereby approved in all respects, and all claims are hereby dismissed with prejudice as provided therein.

B. The Court finds that the persons signing the Agreement have full and complete authority to enter into the binding and fully effective settlement of this action as set forth in the Agreement. The Court further finds that entering into this settlement is in the best interests of the State of New Mexico.

LET JUDGMENT BE ENTERED ACCORDINGLY.

So ordered this 11th day of December, 1998

The Hon. Stephen Pfeffer
District Judge, Division III

JOINTLY SUBMITTED AND APPROVED:

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EXHIBIT B

Exhibit B -- Glossary of Terms

Allocated Payment	means a particular MSA State's Allocable Share of the sum of all of the payments to be made by the PMs Manufacturers in the year in question pursuant to MSA subsections IX(c)(l) and IX(c)(2), as such payments have been adjusted, reduced and allocated pursuant to clause "First" through the first sentence of clause "Fifth" of subsection IX(j), but before application of the NPM Adjustment and other offsets and adjustments described in clauses "Sixth" through "Thirteenth" of subsection IX(j). *See* MSA § II (g).
Assurance Letters	means the written assurances the PMs gave to the MSA States before they enacted the Complementary Legislation. The Assurance Letters stated that the Complementary Legislation would not impact the MSA States' diligent enforcement obligations under the MSA.

Cigarette		means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (1) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (2) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (3) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (1) of this definition. The term "Cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). Except as provided in MSA subsections II(z) and II(mm), 0.0325 ounces of "roll-your own" tobacco shall constitute one individual "Cigarette." *See* MSA § II (m).
Directory		means a list that each MSA State can maintain of all tobacco product manufacturers whose products can be sold in that State.
Disputed Payments Account		means the account where the IA deposits funds that any PM submits to the IA but contends are disputed. *See* MSA Exhibit B.
Independent Auditor	"IA"	means the certified pubic accounting firm described in MSA subsection XI(b). *See* MSA § II (w).
Master Settlement Agreement	"MSA"	means the Master Settlement Agreement of state Attorney Generals' tobacco litigation, filed with Consent Decree in this action on or about December 11, 1998.

Maximum Potential NPM Adjustment	means the theoretical amount by which the PMs annual payment could be reduced if a sufficiently large number of MSA States are found not to have diligently enforced their Qualifying Statute in the subject year.
Model Complementary Legislation	Model legislation developed by the MSA States in 2002, in consultation with the PMs, to authorize the creation of a Directory that lists all tobacco product manufacturers whose products can be sold in that State. Additionally, the Complementary Legislation gave the States the power to delist NPMs from their Directories if they did not deposit escrow, and to pursue statutory enforcement actions against other entities that stamped or sold tobacco products that were not listed on the Directory. New Mexico enacted the model legislation as the "Tobacco Escrow Fund Act." L. 2003, Ch. 114, § 1, and codified at N.M. Stat. § 6-4-14, et seq.
Model Escrow Statute	The Model Statute that all MSA parties agreed constitutes a Qualifying Statute. *See* MSA § IX(d)(2)(E) & Ex. T.
MSA Court	means the respective court in each MSA State to which the MSA and the Consent Decree are presented for approval and/or entry as to that MSA State, and which retains jurisdiction for purposes of enforcement. *See* MSA §§ VI(a) & II (p).

MSA Market Share		means a Tobacco Product Manufacturer's respective share (expressed as a percentage) of the total number of individual Cigarettes sold in the fifty United States, the District of Columbia and Puerto Rico during the applicable calendar year, as measured by excise taxes collected by the federal government and, in the case of sales in Puerto Rico, arbitrios de cigarillos collected by the Puerto Rico taxing authority. For purposes of the definition and determination of "Market Share" with respect to calculations under subsection IX(i), 0.09 ounces of "roll your own" tobacco shall constitute one individual Cigarette; for purposes of the definition and determination of "Market Share" with respect to all other calculations, 0.0325 ounces of "roll your own" tobacco shall constitute one individual Cigarette. *See* MSA § II (z).
MSA State		means a Settling State.
National Association of Attorneys General	"NAAG"	means the National Association of Attorneys General.
Non-Participating Manufacturer	"NPM"	means any Tobacco Product Manufacturer that is not a signatory to the MSA (and thus not a Participating Manufacturer). MSA § II (cc).
NPM Adjustment		means the adjustment specified in MSA subsection IX(d).
Original Participating Manufacturer	"OPM"	means Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated and R.J. Reynolds Tobacco Company, and the respective successors of each of the foregoing. Except as expressly provided in the MSA, once an entity becomes an Original Participating Manufacturer, such entity shall permanently retain the status of Original Participating Manufacturer. *See* MSA § II (hh).
Participating Manufacturers	"PMs"	The OPMs and SPMs are collectively referred to as the Participating Manufacturers.

Qualifying Statute		All MSA parties agreed that the Model Escrow Statute constitutes a Qualifying Statute. *See* MSA § IX(d)(2)(E) & Ex. T.
Safe Harbor Provision		A State's MSA payment "shall not be subject to an NPM Adjustment" if the State had a Qualifying Statute in place and "diligently enforced the provisions of such statute during the entire calendar year." *See* MSA § IX(d)(2)(B).
Settling State		means a State that is a signatory to the MSA. *See* MSA § II (qq).
Significant Factor		The NPM Adjustment is not applied unless a nationally recognized economic consultant firm determines for the year in question that the MSA was a "significant factor" in the PMs' loss of national market share to NPMs. *See* MSA § IX(d)(1)(C).
State		Plaintiff, the State of New Mexico.
Subsequent Participating Manufacturers	"SPM"	means a Tobacco Product Manufacturer (other than an Original Participating Manufacturer) that: (I) is a Participating Manufacturer, and (2) is a signatory to the MSA, regardless of when such Tobacco Product Manufacturer became a signatory to the MSA. "Subsequent Participating Manufacturer" shall also include the successors of a Subsequent Participating Manufacturer. Except as expressly provided in the MSA, once an entity becomes a Subsequent Participating Manufacturer such entity shall permanently retain the status of Subsequent Participating Manufacturer, unless it agrees to assume the obligations of an Original Participating Manufacturer as provided in subsection XVIII(c). *See* MSA § II(tt).

Term Sheet	means any of the different versions of side agreements between the PMs and some MSA States, in which the MSA States accept a reduction in annual MSA payments and other onerous terms in exchange for release of withheld MSA funds and relief from past disputes and arbitrations concerning the NPM Adjustment.
Term Sheet States	means the MSA States that are signatories to the Term Sheet settlement.
Tobacco Product	means Cigarettes and smokeless tobacco products. *See* MSA § II(vv).
Tobacco Product Manufacturer	means an entity that directly (and not exclusively through any Affiliate): (1) manufactures Cigarettes anywhere that such manufacturer intends to be sold in the States, including Cigarettes intended to be sold in the States through an importer (except where such importer is an Original Participating Manufacturer that will be responsible for the payments under the MSA with respect to such Cigarettes as a result of the provisions of MSA Section II(mm) and that pays the taxes specified in MSA Section II(z) on such Cigarettes, and provided that the manufacturer of such Cigarettes does not market or advertise such Cigarettes in the States); (2) is the first purchaser anywhere for resale in the States of Cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the States; or (3) becomes a successor of an entity described in subsection (1) or (2) above. The term "Tobacco Product Manufacturer" shall not include an Affiliate of a Tobacco Product Manufacturer unless such Affiliate itself falls within any of subsections (1) - (3) of MSA § II (uu).

Units sold	means the number of individual cigarettes sold in the MSA State by the applicable Tobacco Product Mmanufacturer (whether directly or through a distributor, retailer or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected by the MSA State on packs (or "roll-your-own" tobacco containers) bearing the excise tax stamp of the MSA State. *See* MSA Ex. T (j).