CLOSED

U.S. District Court
Western District of Kentucky (Paducah)
CIVIL DOCKET FOR CASE #: 5:98-cv-00108-TBR

Conwood Co L P, et al v. United St Tobacco Co, et al
Assigned to: Senior Judge Thomas B. Russell
Demand: $4,000,000
Case in other court: 00-06267
01-06545
Cause: 15:15 Antitrust Litigation

Date Filed: 04/22/1998
Date Terminated: 03/29/2000
Jury Demand: Plaintiff
Nature of Suit: 410 Anti-Trust
Jurisdiction: Federal Question

Plaintiff

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Date Filed	#	Docket Text
04/22/1998	1	COMPLAINT (Summons(es) issued) filing fee pd - receipt # 55759 w/ videotape (Exhibit C) in exp folder (KJI) Modified on 04/24/1998 (Entered: 04/24/1998)
04/24/1998	2	MOTION by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P for relief from Civil Rule 26(d) ; interrogatories attached; order tendered (KJI) Modified on 11/19/1998 (Entered: 04/24/1998)
04/27/1998		RETURN OF SERVICE executed upon defendant United St Tobacco Co c/o CT Corp Systems on 4/23/98 (KJI) (Entered: 04/27/1998)
04/27/1998		RETURN OF SERVICE executed upon defendant United St Tobacco Sa c/o CT Corp System on 4/23/98 (KJI) (Entered: 04/27/1998)
04/27/1998		RETURN OF SERVICE executed upon defendant UST Inc on 4/23/98 (KJI) (Entered: 04/27/1998)
04/27/1998		RETURN OF SERVICE executed upon defendant United St Tobacco Sa serve: Arthur G. Smith on 4/23/98 (KJI) (Entered: 04/27/1998)
04/27/1998		RETURN OF SERVICE executed upon defendant United St Tobacco Co serve: Robert H. Lawrence, Jr. on 4/23/98 (KJI) (Entered: 04/27/1998)

04/27/1998		RETURN OF SERVICE executed upon defendant UST Richard H. Verheij Inc on 4/23/98 (KJI) (Entered: 04/27/1998)
05/04/1998		RETURN OF SERVICE executed upon defendant United St Tobacco Ma on 4/28/98 (KJI) (Entered: 05/04/1998)
05/14/1998	3	AGREED ORDER EXTENDING DFTS TIME TO ANS OR OTHERWISE RESP TO PLA CMP AND EXT DFTS TIME TO RESP TO PLA MTN FOR RELIEF FROM RULE 26(d) by Judge Thomas B. Russell : (cc: all counsel) (KJI) (Entered: 05/14/1998)
05/18/1998	4	RESPONSE by defendant United St Tobacco Co, defendant United St Tobacco Sa, defendant United St Tobacco Ma, defendant UST Inc to motion for relieffrom Civil Rule 26(d) [2-1] ; order tendered - filed in L'ville 5/18/98 rec'd in Paducah 5/20/98(KJI) (Entered: 05/20/1998)
05/26/1998	5	MOTION for attorney Mark Hansen, Neil Gorsuch, Steven Benz to appear pro hac vice ; Affidavit in Support; order tendered (KJI) (Entered: 05/27/1998)
06/02/1998	6	SCHEDULING ORDER Judge Thomas B. Russell ; pretrial conf set for 11:00 a.m. on 6/9/98 before Judge Thomas B. Russell (cc: all counsel) (KJI) (Entered: 06/02/1998)
06/02/1998	7	REPLY by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P in support to response to motion for relief from Civil Rule 26(d) [2-1] (MHB) (Entered: 06/02/1998)
06/02/1998	8	MOTION by defendant United St Tobacco Co, defendant United St Tobacco Sa, defendant United St Tobacco Ma, defendant UST Inc for attorney Neal R. Stoll, James A. Keyte and Chris T. Athanasia to appear pro hac vice ; Affidavits in Support; order tendered (PHV FEE PAID, RECEIPT #20722,20723 & 20724)(MHB) Modified on 06/05/1998 (Entered: 06/05/1998)
06/10/1998	9	ORDER by Judge Thomas B. Russell granting motion for attorney Mark Hansen, Neil Gorsuch, Steven Benz to appear pro hac vice [5-1] (cc: all counsel) (KJI) (Entered: 06/10/1998)
06/10/1998	10	ORDER by Judge Thomas B. Russell granting motion for attorney Neal R. Stoll, James A. Keyte and Chris T. Athanasia to appear pro hac vice [8-1] (cc: all counsel) (KJI) (Entered: 06/10/1998)
06/10/1998	11	SCHEDULING ORDER Judge Thomas B. Russell ; Pre-trial conf satisfied on 6/9/98 ; telephonic scheduling conf. set for 12:00 noon on 7/7/98 before Judge Thomas B. Russell (cc: all counsel) (KJI) (Entered: 06/10/1998)
06/10/1998	12	ORDER by Judge Thomas B. Russell re: preservation, scope & implementation, each pty will w/in 10 days after receiving this order, designate an individual who shall be responsible for ensuring that the pty carries out the requirements of this order (see order for specifics) (cc: all counsel) (KJI) (Entered: 06/10/1998)
06/12/1998	14	

		MOTION by defendant UST Inc to dismiss case for lack of personal jurisdiction ; Memorandum in Support; order tendered - filed in L'ville 6/12/98 rec'd in Paducah 6/15/98(KJI) Modified on 10/15/1998 (Entered: 06/16/1998)
06/12/1998	15	MOTION by defendant United St Tobacco Co, defendant United St Tobacco Sa, defendant United St Tobacco Ma, defendant UST Inc to dismiss case to the extent that it alleges that dfts violated section 2 of the Sherman Act, etc. ; Memorandum in Support; order tendered - filed in L'ville 6/12/98 rec'd in Paducah 6/15/98 (KJI) Modified on 10/15/1998 (Entered: 06/16/1998)
06/12/1998	13	ANSWER to [1-1] and COUNTERCLAIM by defendant United St Tobacco Co, defendant United St Tobacco Sa, defendant United St Tobacco Ma, defendant UST Inc against plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P (KJI) (Entered: 07/02/1998)
06/22/1998	16	NOTICE REGARDING DOCUMENT RETENTION ORDER by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P (KJI) (Entered: 06/23/1998)
06/29/1998	17	A - RESPONSE by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P to motion to dismiss case [14-1] ; order tendered - EXHIBITS TO RESP IN EXPANDABLE FOLDER (KJI) Modified on 10/15/1998 (Entered: 06/30/1998)
06/29/1998	17	B - RESPONSE by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P to motion to dismiss case to the extent that it alleges that dfts violated section 2 of the Sherman Act, etc. [15-1] ; order tendered (resp were in binders rubber banded together & did not get to docket this at that time) (KJI) (Entered: 10/15/1998)
07/02/1998	18	ANSWER TO COUNTERCLAIM [13-2] by counter-defendant Conwood Co L P, counter-defendant Conwood Sales Co L P (KJI) (Entered: 07/02/1998)
07/09/1998	19	SCHEDULING ORDER Judge Thomas B. Russell ; scheduling conference held on 7/7/98 ; amendments set for 10/27/98 ; disp mtn ddl set for 7/15/99 ; pretrial conf set for 4:00 p.m. on 10/12/99 ; jury trial set for 9:00 a.m. on 11/1/99 before Judge Thomas B. Russell (cc: all counsel) (KJI) (Entered: 07/09/1998)
07/10/1998	20	REPLY by defendant UST Inc to response to motion to dismiss case [14-1]; filed in LV 7/10/98 rec'd in Pad 7/13/98 (KJI) (Entered: 07/13/1998)
07/10/1998	21	REPLY by defendant United St Tobacco Co, defendant United St Tobacco Sa, defendant United St Tobacco Ma to response to motion to dismiss case to the extent that it alleges that dfts violated section 2 of the Sherman Act, etc. [15-1]; filed in LV 7/10/98 rec'd in Pad 7/13/98 (KJI) (Entered: 07/13/1998)
07/14/1998	22	REPORT REGARDING PROTECTIVE ORDER by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P (KJI) (Entered: 07/15/1998)
07/15/1998	23	MOTION by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P for leave to file sur-resp to UST Inc's mtn to dism cmp for lack of personal jurisdiction ; order tendered (KJI) (Entered: 07/15/1998)
07/16/1998	24	

		MOTION by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P for leave to file sur-resp to UST Inc's mtn to dism part of cmp ; order tendered (KJI) (Entered: 07/16/1998)
07/22/1998	25	RULE 26 INITIAL DISCLOSURES w/ attachments by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P (KJI) (Entered: 07/22/1998)
07/22/1998	26	PROTECTIVE ORDER by Judge Thomas B. Russell :see order for specifics Case referred to Magistrate Judge James D. Moyer re: all disputes concerning this protective order (cc: all counsel) (KJI) (Entered: 07/22/1998)
07/23/1998	27	RESPONSE by defendant United St Tobacco Co, defendant United St Tobacco Sa, defendant United St Tobacco Ma, defendant UST Inc to motion for leave to file sur-resp to UST Inc's mtn to dism part of cmp [24-1], to motion for leave to file sur-resp to UST Inc's mtn to dism cmp for lack of personal jurisdiction [23-1] ; order tendered (KJI) (Entered: 07/24/1998)
07/29/1998	28	REPLY by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P to response to motion for leave to file sur-resp to UST Inc's mtn to dism part of cmp [24-1], motion for leave to file sur-resp to UST Inc's mtn to dism cmp for lack of personal jurisdiction [23-1] (KJI) (Entered: 07/29/1998)
08/21/1998	29	MOTION by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P to compel ; Memorandum in Support; order tendered; exhibits attached - SEALED PURSUANT TO PROTECTIVE ORDER ENTERED 7/22/98 (KJI) (Entered: 09/09/1998)
09/04/1998	30	MOTION by defendant United St Tobacco Co, defendant United St Tobacco Sa, defendant United St Tobacco Ma, defendant UST Inc to dismiss cmp , or for judgment on the pleadings ; Memorandum in Support; order tendered (filed in LV & rec'd in Pad 9/8/98) (KJI) (Entered: 09/09/1998)
09/04/1998	31	RESPONSE by defendant United St Tobacco Co, defendant United St Tobacco Sa, defendant United St Tobacco Ma, defendant UST Inc to motion to compel [29-1] ; order tendered (filed in LV & rec'd in Pad 9/8/98) (KJI) (Entered: 09/09/1998)
09/09/1998		REMARK: redocketed DN 29 as mtn instead of sealed document (KJI) (Entered: 09/09/1998)
09/16/1998	32	REPLY by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P to response to motion to compel [29-1] (KJI) (Entered: 09/16/1998)
09/22/1998	33	RESPONSE by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P to motion to dismiss cmp [30-1], to motion for judgment on the pleadings [30-2] ; order tendered (KJI) (Entered: 09/22/1998)
09/30/1998	34	MOTION by defendant United St Tobacco Co, defendant United St Tobacco Sa, defendant United St Tobacco Ma, defendant UST Inc for leave to file rply mem in excess of 15 pages ; order tendered; mem attached (filed in LV & rec'd in Pad 10/1/98) (KJI) Modified on 10/01/1998 (Entered: 10/01/1998)
10/23/1998	35	

		MOTION by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P to compel production of documents ;attachments; order tendered (in expandable folder) (KJI) Modified on 10/27/1998 (Entered: 10/26/1998)
10/28/1998	36	RESPONSE by defendant United St Tobacco Sa, defendant United St Tobacco Ma, defendant UST Inc to motion to compel production of documents [35-1] ; order tendered (filed in LV & rec'd in Pad 10/29/98) (KJI) (Entered: 10/30/1998)
11/10/1998	37	REPLY by plaintiff Conwood Co L P, plaintiff Conwood Sales Co L P to response to motion to compel production of documents [35-1] (KJI) (Entered: 11/10/1998)
11/19/1998	38	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell denying motion to dismiss case for lack of personal jurisdiction [14-1], finding the motion to dismiss case to the extent that it alleges that dfts violated section 2 of the Sherman Act, etc. [15-1] moot., finding the motion for leave to file sur-resp to UST Inc's mtn to dism part of cmp [24-1] moot., denying motion to dismiss cmp [30-1], denying motion for judgment on the pleadings [30-2], granting motion for leave to file rply mem in excess of 15 pages [34-1] (cc: all counsel) (KJI) (Entered: 11/19/1998)
11/19/1998	39	ORDER by Judge Thomas B. Russell Case referred to Magistrate Judge James D. Moyer in regards to mot to compel DN 29(sealed) & 35, and all discovery matters (cc: all counsel) (KJI) (Entered: 11/19/1998)
11/20/1998		FILE SUBMITTED to Judge Moyer's Chambers (KJI) (Entered: 11/20/1998)
11/24/1998	40	DISCLOSURE STATEMENT by defendant (CSD) (Entered: 11/25/1998)
12/02/1998		DOCUMENT NUMBER: 40 SUBMITTED to Kate N., L'ville. (FCE) (Entered: 12/02/1998)
12/02/1998	41	ORDER by Magistrate Judge James D. Moyer setting hearing on motion to compel production of documents [35-1] 10:00 a.m. on 12/11/98 (cc: all counsel) (KJI) (Entered: 12/02/1998)
12/03/1998		DOCUMENT NUMBER: 41 SUBMITTED to Judge Moyer for file via K.Nieman (CSD) (Entered: 12/03/1998)
12/09/1998	42	ANSWER TO INTERROGATORIES by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (filed in LV & rec'd in Pad 12/10/98) (KJI) (Entered: 12/10/1998)
12/09/1998	43	SUPPLEMENTAL RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (filed in LV & rec'd in Pad 12/10/98) (KJI) Modified on 12/10/1998 (Entered: 12/10/1998)
12/09/1998	44	RESPONSE TO REQUEST by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for production of documents & things (filed in LV & rec'd in Pad 12/10/98) (KJI) (Entered: 12/10/1998)

12/09/1998	45	RESPONSE TO REQUEST by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for production of documents (filed in LV & rec'd in Pad 12/10/98) (KJI) (Entered: 12/10/1998)
12/09/1998	46	RESPONSE TO REQUEST by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for production of documents (filed in LV & rec'd in Pad 12/10/98) (KJI) (Entered: 12/10/1998)
12/11/1998	47	ORDER by Judge Thomas B. Russell motion to compel production of documents [35-1] ; hearing held on 12/11/98 ; hearing set for 10:00 a.m. on 12/18/98 (discovery disputes) (cc: all counsel) (KJI) (Entered: 12/11/1998)
12/14/1998		DOCUMENT NUMBER: 47 SUBMITTED to Judge Moyer's Chambers (KJI) (Entered: 12/14/1998)
12/16/1998	48	ORDER by Magistrate Judge James D. Moyer granting plaintiff's motion to compel production of documents [35-1], [29-1] (cc: all counsel) (MLG) (Entered: 12/16/1998)
12/31/1998		DOCUMENT NUMBER: 42-46 SUBMITTED to Judge Moyer's Chambers (KJI) (Entered: 12/31/1998)
01/11/1999		REMARK originals of DN's 42-46 filed in LV & rec'd in Pad 1/12/99 sent originals to Judge Moyer's chambers to be placed in the file (KJI) (Entered: 01/12/1999)
01/11/1999	49	RESPONSE TO THIRD REQUEST by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for production of documents (filed in LV & rec'd in Pad 11/12/99) (KJI) (Entered: 01/12/1999)
01/14/1999	50	ORDER by Magistrate Judge James D. Moyer ; hearing continued for 10:00 a.m. to 1:00 p.m. on 1/19/99 before Magistrate Judge James D. Moyer (cc: all counsel) (PAC) (Entered: 01/14/1999)
01/15/1999	53	SECOND SET OF SUPPLEMENTAL RESPONSE TO REQUEST by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for production of documents (filed in LV & rec'd in Pad 1/20/99) (KJI) (Entered: 01/20/1999)
01/15/1999	54	SECOND SET OF SUPPLEMENTAL ANSWER TO INTERROGATORIES by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (filed in LV & rec'd in Pad 1/20/99) (KJI) (Entered: 01/20/1999)
01/19/1999	55	TRANSCRIPT filed of hrg before Mag Judge Moyer on 1/14/99 (filed in LV & rec'd in Pad 1/20/99) (KJI) (Entered: 01/20/1999)
01/20/1999	51	ORDER by Magistrate Judge James D. Moyer ; evidentiary hearing held on 1/19/99; parties shall submit by 1/21/99 a joint agenda to the ct detailing the remaining unresolved discovery issues (cc: all counsel) (MLG) (Entered: 01/20/1999)

01/20/1999	52	MEMORANDUM, OPINION, AND ORDER: by Magistrate Judge James D. Moyer; granting motion to compel to the limited extent as set forth in this memorandum (cc: all counsel) (MLG) (Entered: 01/20/1999)
01/20/1999		DOCUMENT NUMBER: 53-55 SUBMITTED to Mag Judge Moyer's chambers (KJI) (Entered: 01/20/1999)
01/20/1999	56	AFFIDAVIT of Gary Milano (filed in LV & rec'd in Pad 1/21/99) (KJI) (Entered: 01/21/1999)
01/21/1999		DOCUMENT NUMBER: 56 SUBMITTED to Mag Judge Moyer (KJI) (Entered: 01/21/1999)
01/27/1999	57	TRANSCRIPT filed of hrg before Mag. Judge Moyer on January 19, 1999 (filed in LV & rec'd in Pad 1/28/99) (KJI) Modified on 01/28/1999 (Entered: 01/28/1999)
02/01/1999	58	ORDER by Magistrate Judge James D. Moyer ; tele conf held 2/1/99 to discuss discovery disputes contained in parties' 1/21/99 joint agenda; telephone conf. set for set for 3:00 2/8/99 before Magistrate Judge James D. Moyer to discuss the witness lists and any proposed schedule modifications; telephone conf. set for 3:00 2/2/99 before Magistrate Judge James D. Moyer to continue discussing issues contained in 1/21/99 joint agenda; ct will initiate the call (cc: all counsel) (MLG) (Entered: 02/01/1999)
02/05/1999	59	ORDER by Magistrate Judge James D. Moyer ; telephone conference of 2/8/99 is remanded and rescheduled for 3:00 2/10/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 02/05/1999)
02/05/1999	60	MEMORANDUM, OPINION, AND ORDER: by Magistrate Judge James D. Moyer; Conwood's request for further detailed relief in defining scopte of a proper corp search is DENIED; Conwood's mtn to compel resp by UST under R26(a) w/respect to UST's counterclaim is SUSTAINED; Conwood's mtn to bar use of documents not produced in initially R26 disclosures is DENIED; Conwood's mtn to compel w/respect to Swisher 7 Swedish Match (documents 12,13) is DENIED (cc: all counsel) (MLG) (Entered: 02/05/1999)
02/05/1999	61	WITNESS list filed by defendants (filed in LV & rec'd in Paducah 2/8/99) (SEALED) (Entered: 02/08/1999)
02/08/1999	62	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Gerald Welsh on 2/19/99 (SEALED) (Entered: 02/08/1999)
02/08/1999	63	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Andrew Carter on 2/15/99 (SEALED) (Entered: 02/08/1999)
02/10/1999		DOCUMENT NUMBER: 61-63 SUBMITTED to Judge Moyer (FCE) (Entered: 02/10/1999)
02/10/1999	65	AFFIDAVIT of Chris Athanasia (filed in LV & rec'd in Pad 2/12/99) (KJI) (Entered: 02/12/1999)
02/10/1999	66	AFFIDAVIT of Gary Milano (filed in LV & rec'd in Pad 2/12/99) (KJI) (Entered: 02/12/1999)

02/10/1999	67	AFFIDAVIT of Donald L. Cerullo (filed in LV & rec'd in Pad 2/12/99) (KJI) (Entered: 02/12/1999)
02/11/1999	64	ORDER by Magistrate Judge James D. Moyer; USMJ is of view that the issues raised, at the present, are more hypothetical than actual and declines to rule prospectively w/respect to depos which have not been scheduled yet (cc: all counsel) (MLG) (Entered: 02/11/1999)
02/11/1999	68	TRANSCRIPT filed of hrg before Mag. Judge Moyer on 12/18/98(filed in LV & rec'd in Pad 2/16/99) (KJI) Modified on 02/16/1999 (Entered: 02/16/1999)
02/16/1999		DOCUMENT NUMBER: 65-67 SUBMITTED to Judge Moyer's Chambers (KJI) (Entered: 02/16/1999)
02/16/1999		DOCUMENT NUMBER: 68 SUBMITTED to Mag. Judge Moyer's Chambers (KJI) (Entered: 02/16/1999)
02/17/1999	69	ORDER by Magistrate Judge James D. Moyer ; all discovery and dispositive ddls are extended 4mos; jury trial of 11/1/99 is rescheduled for 9:00 2/28/00; final pretrial conference of 10/12/99 is rescheduled for 3:30 2/17/00 before Judge Thomas B. Russell; detailed sched order will be separate order of ct (cc: all counsel) (MLG) (Entered: 02/17/1999)
02/18/1999	70	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 2/17/99 ; discovery hearing set for 9:00 2/27/99 before Magistrate Judge James D. Moyer ; telephone conf. set for 2:00 2/24/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 02/18/1999)
02/18/1999	71	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Andrew Carter on March 1, 1999 (KJI) (Entered: 02/18/1999)
02/18/1999	72	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Gerald Welsh on February 26, 1999 (KJI) (Entered: 02/18/1999)
02/18/1999		DOCUMENT NUMBER: 71 & 72 SUBMITTED to Mag. Judge Moyer's Chambers (KJI) (Entered: 02/18/1999)
02/18/1999	73	ORDER by Magistrate Judge James D. Moyer ; scheduling order of 7/9/98 is amended as set forth in order: dispositive motion ddl set for 11/15/99; final ptc set for 2/17/00 at 3:30pm CST in Paducah KY; jury trial reset for 2/28/00 at 9am CST in Paducah KY w/cnsl in chambers at 8:30am; expected length 2-3 weeks (cc: all counsel) (MLG) (Entered: 02/18/1999)
02/19/1999	74	ORDER by Magistrate Judge James D. Moyer; by 2/15/99 Conwood & UST shall simultaneously file abbreviated, tabbed set of argument concerning outstanding discovery (cc: all counsel) (MLG) (Entered: 02/19/1999)
02/23/1999	75	ORDER by Magistrate Judge James D. Moyer; agenda for the 2/24/99 tele conf as set forth in order (cc: all counsel) (MLG) (Entered: 02/23/1999)
02/25/1999	76	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 2/24/99; omnibus discovery hrg set for 2/27/99 is remanded and telephone conf. set for 10:30 3/5/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 02/25/1999)

03/05/1999	77	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 3/5/99 ; telephone status conf. set for 3/15/99 before Magistrate Judge James D. Moyer; call to be initiated by parties (cc: all counsel) (MLG) (Entered: 03/05/1999)
03/09/1999	78	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for attorney Rachel Mariner to appear pro hac vice order tendered FEE PAID (filed in LV & rec'd in Pad 3/11/99) (KJI) Modified on 03/11/1999 (Entered: 03/11/1999)
03/12/1999		DOCUMENT NUMBER: 78 SUBMITTED to Judge Moyer's Chambers (KJI) (Entered: 03/12/1999)
03/15/1999	79	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 3/15/99; next telephone conf. set for 4:00 3/29/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 03/15/1999)
03/19/1999	80	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take videotaped depositions of James McCarthy, Michael Beyerlein, Byron Parrish, Gregory Zahrt, David Lund, Arlie Anundson, and Lonnie Funk (FCE) (Entered: 03/19/1999)
03/22/1999		RETURN OF SERVICE unexecuted - attempted as to Martha Weiss & Richard Verheij (MLG) (Entered: 03/22/1999)
03/22/1999	81	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Robert Bales on April 12, 1999 (KJI) (Entered: 03/22/1999)
03/22/1999	82	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for attorney Reid M. Figel, Courtney S. Elwood, Benjamin A. Powell to appear pro hac vice ; Affidavits in Support; order tendered (KJI) (Entered: 03/22/1999)
03/23/1999	83	ORDER by Judge Thomas B. Russell granting motion for attorney Rachel Mariner to appear pro hac vice [78-1] (cc: all counsel) (KJI) (Entered: 03/23/1999)
03/23/1999		DOCUMENT NUMBER: 80,81,83 SUBMITTED to Judge Moyer's chambers to be placed w/ file (KJI) (Entered: 03/23/1999)
03/24/1999	84	ORDER by Judge Thomas B. Russell granting motion for attorney Reid M. Figel, Courtney S. Elwood, Benjamin A. Powell to appear pro hac vice [82-1] (cc: all counsel) (KJI) (Entered: 03/24/1999)
03/24/1999		DOCUMENT NUMBER: 82 & 84 SUBMITTED to Mag. Judge Moyer's Chambers to be placed w/ file (KJI) (Entered: 03/24/1999)
03/31/1999	85	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 3/29/99 ; parties rpt discovery was on going, depos being sched and taken; telephone conf. set for 2:00 4/12/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 03/31/1999)
04/05/1999	86	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take videotaped deposition of non-party John Bonoffski on 4/19/99 (FCE) (Entered: 04/05/1999)

04/06/1999		DOCUMENT NUMBER: 86 SUBMITTED to Mag. Judge Moyers' chambers, USDC, LV, to be placed with file (FCE) (Entered: 04/06/1999)
04/09/1999	87	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to compel; concerning UST Sales Force Files ; attachments; order tendered (KJI) Modified on 04/23/1999 (Entered: 04/09/1999)
04/09/1999		DOCUMENT NUMBER: 87 SUBMITTED to Mag. Judge Moyer's Chambers (KJI) (Entered: 04/09/1999)
04/13/1999	88	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 4/12/99; outstanding discovery issues were identified; dft UST shall respond to pla's mtn re:sales documents by 4/16/99; pla's mtn re:agreement w/distributors and retailers is taken under advisement; next telephone conf. set for 10:30 4/20/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 04/13/1999)
04/19/1999	89	ORDER by Magistrate Judge James D. Moyer dft UST shall provide the requested information by 4/26/99 [87-1] (cc: all counsel) (MLG) (Entered: 04/19/1999)
04/19/1999	91	RESPONSE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to [87-1] (filed in LV) (KJI) (Entered: 04/21/1999)
04/20/1999	92	REPLY by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P re [87-1] (KJI) (Entered: 04/21/1999)
04/21/1999	90	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 4/20/99; 1) issue re:production of files from UST sales representive is taken under advisement; 2) UST shall subit by 4/21/99 1-2 pg ltr outlining position on issue re:witness stmts, pla may respond by 4/23/99; telephone status conf. set for 2:00 4/23/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 04/21/1999)
04/22/1999		DOCUMENT NUMBER: 91 & 92 SUBMITTED to Mag. Judge Moyer's chambers (KJI) (Entered: 04/22/1999)
04/23/1999	93	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 4/23/99; mtns taken under advisement; telephone conf. set for 2:30 5/7/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 04/23/1999)
04/23/1999	94	ORDER (WITNESS STATEMENTS) by Magistrate Judge James D. Moyer; dft's mtn to compel production of non-party witness stmts and information re:those stmts is DENIED (cc: all counsel) (MLG) (Entered: 04/23/1999)
04/23/1999	95	ORDER (DAY PLANNERS) by Magistrate Judge James D. Moyer granting pla motion to compel additional documents from UST Sales Force Files [87-1]; to ltd extent that dft shall produce (w/in the limitations set out in 1/20/99 order) day-planners, daybooks and calendars from its sales representatives by 5/24/99 (cc: all counsel) (MLG) (Entered: 04/23/1999)
04/27/1999	96	

		MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for attorney Robert E. Craddock, Jr., Courtney Stallings Leach and John S. Wilson, III to appear pro hac vice ; Affidavits in Support; order tendered (CSD) (Entered: 04/28/1999)
05/04/1999	97	SEALED document by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc. in reference to Pla. Motion UST Sales Force Files. (ARK) (Entered: 05/04/1999)
05/04/1999		DOCUMENT NUMBER: 97 SUBMITTED to Mag. Judge Moyer (ARK) (Entered: 05/04/1999)
05/05/1999	98	ORDER by Magistrate Judge James D. Moyer ; tele status conf set for 10:30 5/10/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 05/05/1999)
05/10/1999	99	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Gayleen F. Rusk on May 14, 1999 (KJI) (Entered: 05/10/1999)
05/11/1999	100	ORDER by Magistrate Judge James D. Moyer ; teleconference held on 5/10/99 (cc: all counsel) (MLG) (Entered: 05/11/1999)
05/11/1999	101	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Carolyn V. Ballard on May 24, 1999 (KJI) (Entered: 05/11/1999)
05/14/1999	102	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Leroy Keil on May 28, 1999 (KJI) (Entered: 05/14/1999)
05/17/1999	103	ORDER by Judge Thomas B. Russell granting motion for attorney Robert E. Craddock, Jr., Courtney Stallings Leach and John S. Wilson, III to appear pro hac vice [96-1] (cc: all counsel) (KJI) (Entered: 05/17/1999)
05/19/1999	104	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Tommy Latta on June 3, 1999 (KJI) (Entered: 05/19/1999)
05/24/1999	105	ORDER by Magistrate Judge James D. Moyer ; teleconference held 5/24/99 to consider discovery matters; telephone conf. set for 1:00 6/2/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 05/24/1999)
05/26/1999	106	ORDER by Magistrate Judge James D. Moyer; telephonic conf held 5/26/99; third-pty witn stmts, otherwise protected by the work product doctrine, are discoverable if the stmt was used to refresh the witness' memory prior to testifying; such stmts shall be produced at the time the witness testifies (cc: all counsel) (MLG) (Entered: 05/26/1999)
05/27/1999	107	ORDER by Magistrate Judge James D. Moyer telephonic discovery conf. was held on 5/27/99 , parties shall comply as set forth in order. (cc: all counsel & faxed) (ARK) (Entered: 05/27/1999)
05/28/1999	108	ORDER by Magistrate Judge James D. Moyer ; Discovery ddl set for 9/1/99 ; telephone conf. set for 2:00 6/2/99 before Magistrate Judge James D. Moyer (cc: all counsel) (PAC) (Entered: 05/28/1999)
05/28/1999	109	

		NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Maudie Rushing on June 14, 1999 (KJI) (Entered: 05/28/1999)
06/03/1999	110	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Albert Lannuzzi on June 29, 1999 (KJI) (Entered: 06/03/1999)
06/04/1999	111	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Georgia Gill-Elkins on June 24, 1999 (KJI) (Entered: 06/04/1999)
06/07/1999	112	ORDER by Magistrate Judge James D. Moyer ; telephone discovery conference held on 6/7/99 ; by 6/14/99 dft shall contact 15 randomly chosen sales representatives and inquire if they have copies of any CAP worksheets; plaintiff's mtn re:disclosure is denied; telephone conf. set 10:30 6/16/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 06/07/1999)
06/08/1999	113	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Marti Stevens on June 28, 1999 (KJI) (Entered: 06/08/1999)
06/18/1999	114	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 6/16/99 ; dfts mtn to compel production of Gayleen Rusk's witn stmt is denied; pla request to prohibit dft from using discovery is denied; telephone conf. set for 10:30 7/6/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 06/18/1999)
06/22/1999	115	ORDER by Magistrate Judge James D. Moyer; plaintiff's request for discovery of dft's costs of production by product line is DENIED (cc: all counsel) (MLG) (Entered: 06/22/1999)
06/25/1999	116	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Ronald Piatek on July 17, 1999 (KJI) (Entered: 06/25/1999)
06/25/1999	117	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Patricia J. Leinen on July 10, 1999 (KJI) (Entered: 06/25/1999)
07/06/1999	118	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 7/6/99 , ; telephone conf. will resume at 10:30 on 7/19/99 before Magistrate Judge James D. Moyer (cc: all counsel) (PAC) (Entered: 07/06/1999)
07/08/1999	119	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Rob Engster on July 23, 1999 (KJI) (Entered: 07/08/1999)
07/14/1999	120	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Rodney L. Weckman on July 31, 1999 (KJI) (Entered: 07/14/1999)
07/19/1999	121	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 7/19/99; telephone conf. set for 10:30 8/2/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 07/19/1999)
07/29/1999	122	ORDER by Magistrate Judge James D. Moyer ; telephone conference of 8/2/99 is rescheduled for 10:30 8/4/99 before Magistrate Judge James D. Moyer (cc: all counsel) (MLG) (Entered: 07/29/1999)

07/30/1999	123	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Joe Marconi on August 16, 1999 (KJI) (Entered: 07/30/1999)
08/02/1999	124	NOTICE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to take deposition of Bobby Carlson on August 9, 1999 (filed in LV) (KJI) (Entered: 08/03/1999)
08/03/1999	125	NOTICE OF PRODUCTION OF DOCUMENTS BY WAL-MART, INC. AND THE MCLANE CO by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 08/03/1999)
08/03/1999	126	EXPERT REPORT AND DECLARATION of Robert C. Blattberg (FILED UNDER SEAL pursuant to protective order; located in Clerk's Office in the safe) (KJI) (Entered: 08/03/1999)
08/03/1999	127	EXPERT REPORT AND DECLARATION of Gregory T. Gundlach (FILED UNDER SEAL pursuant to protective order; located in Clerk's Office in safe) (KJI) (Entered: 08/03/1999)
08/03/1999	128	EXPERT REPORT of Morton I. Kamien (FILED UNDER SEAL pursuant to protective order; located in Clerk's Office in safe) (KJI) (Entered: 08/03/1999)
08/03/1999	129	EXPERT REPORT AND DECLARATION of Richard Leftwich (FILED UNDER SEAL pursuant to protective order; located in Clerk's Office in safe) (KJI) (Entered: 08/03/1999)
08/03/1999	130	EXPERT REPORT AND DECLARATION of Edward T.L. Popper (FILED UNDER SEAL pursuant to protective order; located in Clerk's Office in safe) (KJI) (Entered: 08/03/1999)
08/05/1999	132	NOTICE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to take deposition of Dennis Oldani on August 12, 1999 (filed in LV) (KJI) (Entered: 08/06/1999)
08/05/1999	133	NOTICE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to take deposition of Frank Feeney on August 13, 1999 (filed in LV) (KJI) (Entered: 08/06/1999)
08/05/1999	134	NOTICE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to take deposition of David Dill on August 24,1999 (filed in LV) (KJI) (Entered: 08/06/1999)
08/05/1999	135	NOTICE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to take deposition of Paul McGuire on August 31, 1999 (filed in LV) (KJI) (Entered: 08/06/1999)
08/06/1999	131	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 8/4/99 , ; telephone conf. will continue at 11:00 on 8/23/99 before Magistrate Judge James D. Moyer (cc: all counsel) (PAC) (Entered: 08/06/1999)
08/06/1999	136	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Bonnie Townsend on August 18, 1999 (KJI) (Entered: 08/06/1999)
08/06/1999	137	

		NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Robert Jansing on August 23, 1999 (KJI) (Entered: 08/06/1999)
08/09/1999	138	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Waynell Renfro on August 25, 1999 (KJI) (Entered: 08/10/1999)
08/09/1999	139	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Lawrence Borrowdale on August 24, 1999 (KJI) (Entered: 08/10/1999)
08/09/1999	140	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Alan Hart on August 30, 1999 (KJI) (Entered: 08/10/1999)
08/10/1999	141	ORDER by Magistrate Judge James D. Moyer ; Discovery ddl extended to 9/3/99 (cc: all counsel) (MLG) (Entered: 08/10/1999)
08/10/1999	143	AMENDED NOTICE by defendant to take deposition of Dennis Oldani on August 12, 1999 (filed in LV) (KJI) (Entered: 08/12/1999)
08/10/1999	144	NOTICE by defendant to take deposition of Kay Laessig on August 25, 1999 (filed in LV) (KJI) (Entered: 08/12/1999)
08/10/1999	145	NOTICE by defendant to take deposition of Gary Jones on August 16, 1999 (filed in LV) (KJI) (Entered: 08/12/1999)
08/10/1999	146	NOTICE by defendant to take deposition of Bobby Carlson on August 17, 1999 (filed in LV) (KJI) (Entered: 08/12/1999)
08/10/1999	147	NOTICE by defendant to take deposition of Dennis Gagnon on August 17, 1999 (filed in LV) (KJI) (Entered: 08/12/1999)
08/10/1999	148	NOTICE by defendant to take deposition of Dan Walden on August 23, 1999 (filed in LV) (KJI) (Entered: 08/12/1999)
08/11/1999	142	MEMORANDUM, OPINION, AND ORDER: by Magistrate Judge James D. Moyer; no further conf w/csnl is necessary and tele conf of this date at 3:30pm is REMANDED; the 30(b)(6) depo ntc is QUASHED (cc: all counsel) [Entry Date: 8/11/99] (MLG) (Entered: 08/11/1999)
08/11/1999	150	NOTICE by defendant to take deposition of Jack Barger on August 24, 1999 (filed in LV) (KJI) (Entered: 08/13/1999)
08/11/1999	151	AMENDED NOTICE by defendant to take deposition of Kay Laessig on August 25, 1999 (filed in LV) (KJI) (Entered: 08/13/1999)
08/12/1999	149	OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER (made orally in conf w/ Mag Judge Moyer)by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to [142-1], to [142-2] (KJI) (Entered: 08/13/1999)
08/13/1999		DOCUMENT NUMBER: 149 SUBMITTED to Mag. Judge Moyer (KJI) (Entered: 08/13/1999)
08/13/1999		DOCUMENT NUMBER: 96, 99, 101-104, 109-111, 113, 116-117, 119-120, 123-125, 132-140, 143-148, 150-151 SUBMITTED to Kate N. or Kathy Pritchard to be placed w/ file (KJI) (Entered: 08/13/1999)

08/16/1999	152	NOTICE OF PRODUCTION OF DOCUMENTS BY GATE PETROLEUM by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 08/16/1999)
08/16/1999	153	CROSS-NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Dennis Gagnon on August 17, 1999 (KJI) (Entered: 08/16/1999)
08/16/1999	154	CROSS-NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of David Dill on August 24, (KJI) (Entered: 08/16/1999)
08/16/1999	155	CROSS-NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Gary Jones on August 16, (KJI) (Entered: 08/16/1999)
08/16/1999	156	CROSS-NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Kay Laessig on August 25, 1999 (KJI) (Entered: 08/16/1999)
08/16/1999	157	CROSS-NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Bobby Carlson on August 17, 1999 (KJI) (Entered: 08/16/1999)
08/16/1999	158	CROSS-NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Dan Walden on August 23,1999 (KJI) (Entered: 08/16/1999)
08/16/1999	159	CROSS-NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Jack Barger on August 24, 1999 (KJI) (Entered: 08/16/1999)
08/16/1999	160	NOTICE OF PRODUCTION OF DOCUMENTS BY CONVENIENCE KING/MORGAN OIL & PROPANE CO. by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 08/16/1999)
08/16/1999	161	NOTICE OF PRODUCTION OF DOCUMENTS BY GOLDEN PANTRY FOOD STORES by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 08/16/1999)
08/16/1999	162	NOTICE OF PRODUCTION OF DOCUMENTS BY BEELINE STORES, INC. by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 08/16/1999)
08/16/1999		DOCUMENT NUMBER: 152-162 SUBMITTED to Kate N. or Kathy Pritchard to be placed w/ file (KJI) (Entered: 08/16/1999)
08/17/1999	163	NOTICE OF PRODUCTION OF DOCUMENTS BY KENYON OIL CO, INC. by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 08/17/1999)
08/17/1999	164	CROSS-NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Frank Feeney on August 13, 1999 (KJI) (Entered: 08/17/1999)
08/17/1999		DOCUMENT NUMBER: 163-164 SUBMITTED to Kate N. or Kathy Pritchard to be placed w/ file (KJI) (Entered: 08/17/1999)

08/17/1999	165	CROSS-NOTICE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to take deposition of Waynell Renfro on August 25, 1999 (filed in LV) (KJI) (Entered: 08/18/1999)
08/17/1999	166	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for attorney Robert B. Greenbaum to appear pro hac vice ; Memorandum in Support; order tendered (FEE PAID RECEIPT #316605) (filed in LV) (KJI) (Entered: 08/18/1999)
08/18/1999	167	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of David Waller on August 30, 1999 (KJI) (Entered: 08/18/1999)
08/18/1999	168	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Shawn Ulizo on September 2, 1999 (KJI) (Entered: 08/18/1999)
08/18/1999	169	NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of John Naifeh on September 3, 1999 (KJI) (Entered: 08/18/1999)
08/18/1999	170	ORDER by Judge Thomas B. Russell granting motion for attorney Robert B. Greenbaum to appear pro hac vice [166-1] (cc: all counsel) [Entry Date: 8/18/99] (KJI) (Entered: 08/18/1999)
08/18/1999		DOCUMENT NUMBER: 166-170 SUBMITTED to Kate N. or Kathy Pritchard (KJI) (Entered: 08/18/1999)
08/18/1999	171	AMENDED NOTICE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to take deposition of Frank Feeney on September 3, 1999 (filed in LV) (KJI) (Entered: 08/19/1999)
08/19/1999	172	OBJECTION TO SUBPOENA by movant Golden Pantry Food to [161-1] (KJI) (Entered: 08/19/1999)
08/19/1999		DOCUMENT NUMBER: 171-172 SUBMITTED to Kate N. or Kathy Pritchard (KJI) (Entered: 08/19/1999)
08/20/1999	173	AMENDED NOTICE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to take deposition of Jack Barger on August 24, 1999 (filed in LV) (KJI) (Entered: 08/23/1999)
08/24/1999		DOCUMENT NUMBER: 173 SUBMITTED to Kate N. or Kathy Pritchard (KJI) (Entered: 08/24/1999)
08/25/1999	174	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 8/23/99; telephone conf. set for 2:00 9/7/99 before Magistrate Judge James D. Moyer; at that time, parties shall rpt when they believe a settlment conf might be productive; dft shall initiate the call (cc: all counsel) [Entry Date: 8/25/99] (MLG) (Entered: 08/25/1999)
09/01/1999	175	CROSS-NOTICE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to take deposition of Lundy Edwards on September 1999 (KJI) (Entered: 09/02/1999)

09/02/1999		RETURN OF SERVICE unexecuted - attempted as to Martha Weiss (MLG) (Entered: 09/02/1999)
09/02/1999		DOCUMENT NUMBER: 175 SUBMITTED to Kate N. or Kathy Pritchard (KJI) (Entered: 09/02/1999)
09/02/1999	176	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for attorney Michael J. Guzman to appear pro hac vice ; Affidavit in Support; order tendered (KJI) (Entered: 09/03/1999)
09/02/1999	177	NOTICE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to take deposition of Lundy Edwards on September 2, 1999 (filed in LV) (KJI) (Entered: 09/03/1999)
09/02/1999	178	AMENDED NOTICE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to take deposition of Lundy Edwards on September 1999 (filed in LV) (KJI) (Entered: 09/03/1999)
09/02/1999	179	CROSS-NOTICE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to take deposition of John Naifeh on September 3, 1999 (filed in LV) (KJI) (Entered: 09/03/1999)
09/03/1999		DOCUMENT NUMBER: 176-179 SUBMITTED to Kate N. or Kathy Pritchard (KJI) (Entered: 09/03/1999)
09/03/1999	180	ORDER by Judge Thomas B. Russell granting motion for attorney Michael J. Guzman to appear pro hac vice [176-1] (cc: all counsel) [Entry Date: 9/3/99] (KJI) (Entered: 09/03/1999)
09/03/1999		DOCUMENT NUMBER: 180 SUBMITTED to Kate N. or Kathy Pritchard (KJI) (Entered: 09/03/1999)
09/07/1999	181	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 9/7/99; telephone conf. set for 10:30 9/9/99 before Magistrate Judge James D. Moyer to establish definitive dates for settlment conf w/principals as well as for the preparatory session w/cnsl (cc: all counsel) [Entry Date: 9/7/99] (MLG) (Entered: 09/07/1999)
09/08/1999	182	ORDER by Magistrate Judge James D. Moyer ; telephonic status conf held 9/7/99; telephone conf. set for 2:00 9/23/99 before Magistrate Judge James D. Moyer; plaintiff shall initiate call (cc: all counsel) [Entry Date: 9/8/99] (MLG) (Entered: 09/08/1999)
09/20/1999	183	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 9/10/99; settlement conf set for 11/18/99 before Magistrate Judge James D. Moyer; in-court hearing set for 11:00 11/2/99 before Magistrate Judge James D. Moyer; responses to disp mtns shall be made by 12/10/99 w/any replies filed by 12/24/99 (cc: all counsel) [Entry Date: 9/20/99] (MLG) (Entered: 09/20/1999)
09/22/1999	184	

		INITIAL DISCLOSURE OF "FIELD PERSONNEL" TRIAL WITNESSES by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 09/22/1999)
09/22/1999		DOCUMENT NUMBER: 184 SUBMITTED to Kate N. or Kathy P. (KJI) (Entered: 09/22/1999)
09/22/1999	186	NOTICE OF DISCLOSURE AND FILING OF EXPERT TESTIMONY UNDER SEAL by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (filed in LV) (KJI) (Entered: 09/24/1999)
09/22/1999	187	EXPERT REPORT OF WINSTON WEBER filed by defendant US Tobacco,et al (filed in LV) FILED UNDER SEAL (located in safe in Clerk's Office) (KJI) Modified on 03/20/2000 (Entered: 09/24/1999)
09/22/1999	188	EXPERT REPORT OF DAVID T. SCHEFFMAN filed by defendant US Tobacco,e t al (filed in LV) FILED UNDER SEAL (located in safe in Clerk's Office) (KJI) Modified on 03/20/2000 (Entered: 09/24/1999)
09/23/1999	185	ORDER by Magistrate Judge James D. Moyer ; telephone conf. set for 2:00 10/13/99 before Magistrate Judge James D. Moyer (cc: all counsel) [Entry Date: 9/23/99] (PAC) (Entered: 09/23/1999)
09/23/1999	189	ANSWER TO SUPPLEMENTAL INTERROGATORIES by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (filed in LV) (KJI) (Entered: 09/24/1999)
09/24/1999		DOCUMENT NUMBER: 186 SUBMITTED to Kate N. or Kathy P. (KJI) (Entered: 09/24/1999)
09/24/1999		DOCUMENT NUMBER: 189 SUBMITTED to Kate N. or Kathy P. (KJI) (Entered: 09/24/1999)
10/04/1999		RETURN OF SERVICE unexecuted - attempted as to Martha Weiss and Richard Verheij (MLG) (Entered: 10/04/1999)
10/04/1999	190	DECLARATION AND EXPERT REBUTTAL REPORT of Morton I. Kamien -FILED UNDER SEAL (located in safe in Clerk's Office) (KJI) Modified on 10/05/1999 (Entered: 10/05/1999)
10/04/1999	191	DECLARATION AND REBUTTAL REPORT of Gregory T. Gundlach -FILED UNDER SEAL (located in safe in Clerk's Office) (KJI) (Entered: 10/05/1999)
10/04/1999	192	DECLARATION AND EXPERT REBUTTAL REPORT of Richard Leftwich -FILED UNDER SEAL (located in safe in Clerk's Office) (KJI) (Entered: 10/05/1999)
10/04/1999	193	DECLARATION AND REBUTTAL REPORT of Professor Robert C. Blattberg -FILED UNDER SEAL (located in safe in Clerk's Office) (KJI) (Entered: 10/05/1999)
10/04/1999	194	DECLARATION AND REBUTTAL REPORT of Edward T.L. Popper -FILED UNDER SEAL (located in safe in Clerk's Office) (KJI) (Entered: 10/05/1999)

10/13/1999	195	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 10/13/99; ct will allow Mr Handelsman attendance at the expert depositions, such attendance is conditioned on his signing the confidentially order and following in all respects the provisions concerning non-disclosure of information (cc: all counsel) [Entry Date: 10/13/99] (MLG) (Entered: 10/13/1999)
10/14/1999	196	ORDER by Magistrate Judge James D. Moyer ; telephonic conf held 10/13/99; pla shall produce requested information re:its experts by 10/15/99; pla stated they would not be offering the declarations from the 45 non-party retailers in its case-in-chief, but would reserve them for rebuttal, if necessary; telephone conf. set for 2:00 10/27/99 before Magistrate Judge James D. Moyer (cc: all counsel) [Entry Date: 10/14/99] (MLG) (Entered: 10/14/1999)
10/15/1999	197	ORDER by Magistrate Judge James D. Moyer; telephonic conf held 10/15/99; depos of the two Conwood field representatives may be conducted after the 10/21/99 ddl, so long as they are completed in the month of October (cc: all counsel) [Entry Date: 10/15/99] (MLG) (Entered: 10/15/1999)
10/27/1999	198	SUPPLEMENTAL DECLARATION OF MORTON KAMIEN by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P re affidavit [190-1] - FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER (located in safe in Clerk's Office) (KJI) (Entered: 10/27/1999)
10/28/1999	199	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 10/27/99; dft shall file brief by 10/28/99; pla to file response by 11/1/99; next tele conf will be set at 11/2/99 meeting (cc: all counsel) [Entry Date: 10/28/99] (MLG) (Entered: 10/28/1999)
10/29/1999	200	ORDER by Magistrate Judge James D. Moyer, to the extent tha Price's testimony is based on direct, personal in-the-field observations, it is barred as he was not timely identified in accordance with court's order of May 11. To the extent that his testimony is based on other knowledge it is not barred by the order. (cc: all counsel) [Entry Date: 10/29/99] (PAC) (Entered: 10/29/1999)
10/29/1999	201	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to compel production of documents purs. to Rule 26 ; Memorandum in Support; order tendered (KDN) (Entered: 11/01/1999)
11/02/1999	202	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion to compel production of documents purs. to Rule 26 [201-1] ; order tendered (KJI) (Entered: 11/03/1999)
11/03/1999		DOCUMENT NUMBER: 202 SUBMITTED to Kate N. or Kathy P. (KJI) (Entered: 11/03/1999)
11/03/1999	203	REPORT by Magistrate Judge James D. Moyer, conference held 11/2/99; settlement conference will begin at 9:30 a.m. on 11/18/99; Oral arguments held on motion to compel. cc: all counsel [Entry Date: 11/3/99] (PAC) (Entered: 11/03/1999)
11/04/1999	204	

		ORDER by Magistrate Judge James D. Moyer ; oral arguments held on 11/2/99 ; oral argument supplemented by tele conf 11/4/99; denying US Tobacco Co's motion to compel production of documents purs. to Rule 26 [201-1] (cc: all counsel) [Entry Date: 11/4/99] (MLG) (Entered: 11/04/1999)
11/04/1999	205	ORDER by Magistrate Judge James D. Moyer ; telephone conf. set for 10:30 11/16/99 before Magistrate Judge James D. Moyer (cc: all counsel) [Entry Date: 11/4/99] (MLG) (Entered: 11/04/1999)
11/15/1999	206	ORDER by Judge Thomas B. Russell; cnsl shall file w/ the Clerk of Ct the originals of any mots for sum jgm, resp and replies thereto, and shall forward copies w/ exhibits to the undersigned's Paducah Chambers, and to Judge Moyer's Louisville Chambers (cc: all counsel,Judge Moyer) [Entry Date: 11/15/99] (KJI) (Entered: 11/15/1999)
11/15/1999	207	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for partial summary judgment ; Memorandum in Support; order tendered w/ 3 volumes of exhibits filed under seal pursuant to protective order (located in vault in clerk's office) (KJI) (Entered: 11/16/1999)
11/15/1999	208	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa for summary judgment ; order tendered (SEALED MEMORANDUM IN SUPPORT AND VOLUMES I & II SEALED APPENDIX TENDERED) (FILED IN LV & REC'D IN PADUCAH 11/17/99) (CSD) (Entered: 11/18/1999)
11/15/1999	209	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa for leave to file memorandum in support of mtn/SJ in excess of 40 pages ; order tendered (CSD) (Entered: 11/18/1999)
11/15/1999	210	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa to exclude damages study and future testimony of Dr. Richard Leftwich ; SEALED Memorandum & Appendix in Support; order tendered (CSD) (Entered: 11/18/1999)
11/18/1999	211	ORDER by Judge Thomas B. Russell granting motion for leave to file memorandum in support of mtn/SJ in excess of 40 pages [209-1] (cc: all counsel) [Entry Date: 11/18/99] (KJI) (Entered: 11/18/1999)
11/18/1999	212	MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT by defendant to motion for summary judgment [208-1] 3 VOLUMES (FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER) located in vault in clerk's office (KJI) (Entered: 11/18/1999)
11/22/1999	213	REPORT by Magistrate Judge James D. Moyer: settl negotiations were conducted in good faith, but the ptys were unable to reach an agreement, further settl conf will be scheduled if so requested by the ptys cc: all counsel [Entry Date: 11/22/99] (KJI) (Entered: 11/22/1999)
11/23/1999	214	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 11/16/99 ; telephone conf. set for 10:30 a.m. on 11/23/99 before Magistrate Judge James D. Moyer (cc: all counsel) [Entry Date: 11/23/99] (KJI) (Entered: 11/23/1999)

11/23/1999	215	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 11/23/99 ; telephone conf. set for 10:30 a.m. on 12/13/99 before Magistrate Judge James D. Moyer (cc: all counsel) [Entry Date: 11/23/99] (KJI) (Entered: 11/23/1999)
12/03/1999	216	ORDER by Magistrate Judge James D. Moyer ; telephone conference of 12/13/99 is rescheduled for 10:30 12/15/99 before Magistrate Judge James D. Moyer; dft shall initiate the call (cc: all counsel) [Entry Date: 12/3/99] (SEALED) (Entered: 12/03/1999)
12/10/1999	217	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion to exclude damages study and future testimony of Dr. Richard Leftwich [210-1] ; order tendered (FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER) Located in vault in the clerk's office (KJI) (Entered: 12/10/1999)
12/10/1999	218	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for leave to file memorandum in excess of 40 pages Memorandum attached; order tendered (FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER) Located in vault in clerk's office (KJI) Modified on 12/10/1999 (Entered: 12/10/1999)
12/10/1999	219	ORDER by Judge Thomas B. Russell granting motion for leave to file memorandum in excess of 40 pages [218-1] (cc: all counsel) [Entry Date: 12/10/99] (FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER) Located in vault in Clerk's office (KJI) (Entered: 12/10/1999)
12/10/1999	220	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion for summary judgment [208-1] ; order tendered w/ appendixes (4-5 volumes) (FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER) located in vault in clerk's office (KJI) (Entered: 12/10/1999)
12/10/1999	221	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc, plaintiff Conwood Sales Co L P for order for oral arguments ; order tendered (filed in LV) (KJI) (Entered: 12/15/1999)
12/10/1999	222	RESPONSE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc, plaintiff Conwood Sales Co L P to motion for partial summary judgment [207-1] ; order tendered w/ appendix to response to mot for sum jgm (FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER) (filed in LV) (KJI) (Entered: 12/15/1999)
12/17/1999	223	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 12/15/99; next telephone conf. set for 10:30 1/13/00 before Magistrate Judge James D. Moyer (cc: all counsel) [Entry Date: 12/17/99] (MLG) (Entered: 12/17/1999)
12/22/1999	224	MOTION by defendants for leave to file reply memo re mtn/SJ in excess of 15 pages ; order & SEALED reply tendered (Volume I and II Appendix to reply SEALED & tendered reply SEALED IN VAULT IN CLERK'S OFFICE) (CSD) (Entered: 12/23/1999)

12/22/1999	225	MOTION by defendants for leave to file reply memo in support of mtn to exclude damages study, etc. in excess of 15 pages ; order & SEALED REPLY tendered with SEALED APPENDIX (IN VAULT IN CLERK'S OFFICE) (CSD) (Entered: 12/23/1999)
12/22/1999	226	MOTION by defendants to strike certain affidavits filed by plas in support of opposition to defts' mtn/SJ ; Memorandum in Support; order tendered (CSD) (Entered: 12/23/1999)
12/23/1999	227	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for leave to file reply memo in excess of 15 pages ; order & SEALED REPLY tendered (IN VAULT IN CLERK'S OFFICE) (CSD) (Entered: 12/23/1999)
12/23/1999	228	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion for order for oral arguments [221-1] ; order tendered (CSD) (Entered: 12/23/1999)
12/29/1999	229	ORDER by Judge Thomas B. Russell denying motion for order for oral arguments [221-1]; the Ct has not had the opportunity to review these pleadings, if after the review, the Ct feels that oral arguments would be helpful it will so order (cc: all counsel) [Entry Date: 12/29/99] (KJI) (Entered: 12/29/1999)
12/29/1999	230	ORDER by Judge Thomas B. Russell granting motion for leave to file reply memo re mtn/SJ in excess of 15 pages [224-1] (cc: all counsel) [Entry Date: 12/29/99] (KJI) (Entered: 12/29/1999)
12/29/1999	231	ORDER by Judge Thomas B. Russell granting motion for leave to file reply memo in support of mtn to exclude damages study, etc. in excess of 15 pages [225-1] (cc: all counsel) [Entry Date: 12/29/99] (KJI) (Entered: 12/29/1999)
12/29/1999	232	ORDER by Judge Thomas B. Russell granting motion for leave to file reply memo in excess of 15 pages [227-1] (cc: all counsel) [Entry Date: 12/29/99] (KJI) (Entered: 12/29/1999)
12/29/1999	233	REPLY by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to response to motion for summary judgment [208-1] FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER (located in the vault in the Clerk's office) (KJI) (Entered: 12/29/1999)
12/29/1999	234	REPLY by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to response to motion to exclude damages study and future testimony of Dr. Richard Leftwich [210-1] FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER (located in vault in Clerk's office) (KJI) (Entered: 12/29/1999)
12/29/1999	235	REPLY by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to response to motion for partial summary judgment [207-1] FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER (located in vault in Clerk's office) (KJI) (Entered: 12/29/1999)
01/07/2000	236	

		RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion to strike certain affidavits filed by plas in support of opposition to defts' mtn/SJ [226-1] ; order tendered (KJI) (Entered: 01/07/2000)
01/10/2000	237	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc, plaintiff Conwood Sales Co L P for leave to file suppl mem in support of mot for SJ ; Memorandum in Support; order tendered (filed in LV) (KJI) (Entered: 01/12/2000)
01/13/2000	238	ORDER by Magistrate Judge James D. Moyer ; telephonic status conference held on 1/13/00; telephonic status conf set for 9:30 2/4/00 before Magistrate Judge James D. Moyer (cc: all counsel) [Entry Date: 1/13/00] (MLG) (Entered: 01/13/2000)
01/18/2000	239	ORDER by Judge Thomas B. Russell granting motion for leave to file suppl mem in support of mot for SJ [237-1] (cc: all counsel) [Entry Date: 1/18/00] (KJI) (Entered: 01/18/2000)
01/18/2000	240	SUPPLEMENTAL MEMORANDUM IN SUPPORT by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc, plaintiff Conwood Sales Co L P re motion reply [233-1] (FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER) - Located in vault in Clerk's Office (KJI) (Entered: 01/18/2000)
01/18/2000	241	NOTICE of change of address by the law firm of Skadden, Arps, Slate, Meagher & Flom LLP (filed in LV) cc:KJ in LV (KJI) (Entered: 01/19/2000)
01/18/2000	242	REPLY by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to response to motion to strike certain affidavits filed by plas in support of opposition to defts' mtn/SJ [226-1] (filed in LV) (KJI) (Entered: 01/21/2000)
01/21/2000	243	RESPONSE TO DEFENDANTS' MOTION FOR LEAVE TO FILE "SUPPLEMENTAL" BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to [237-1] (KJI) (Entered: 01/21/2000)
01/21/2000	244	PRETRIAL brief filed by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 01/21/2000)
01/21/2000	245	TRIAL WITNESS list filed by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 01/21/2000)
01/21/2000	246	TRIAL EXHIBIT list by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 01/24/2000)
01/21/2000	247	TRIAL WITNESS list filed by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant States Tobacc (filed in LV) (KJI) (Entered: 01/25/2000)
01/21/2000	248	DESIGNATIONS OF DEPOSITIONS by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (filed in LV) (KJI) (Entered: 01/25/2000)

01/21/2000	249	EXHIBIT list by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (filed in LV) (KJI) (Entered: 01/25/2000)
01/21/2000	250	TRIAL brief filed by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER (located in vault in clerk's office) filed in LV (KJI) (Entered: 01/25/2000)
01/21/2000	251	CERTIFICATE OF SERVICE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant States Tobacc (filed in LV) (KJI) (Entered: 01/25/2000)
01/28/2000	252	JURY INSTRUCTIONS submitted by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (w/ disk) (KJI) (Entered: 01/28/2000)
01/28/2000	253	VOIR DIRE filed by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P w/ disk (KJI) (Entered: 01/28/2000)
01/28/2000	254	NOTICE OF FILING SAMPLE INSTRUCTIONS by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 01/28/2000)
01/28/2000	255	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P in limine as to 1. Conwood's owners and their alleged wealth, etc. 2. testimony of David Scheffman 3. evidence that companies other than UST seek to exclude 4. retailer permission evidence 5. any evidence offered in support of UST's counterclaim 6. hearsay deposition testimony and documents ; order tendered (KJI) Modified on 02/23/2000 (Entered: 01/31/2000)
01/28/2000	256	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for order for an appropriate trial exhibit list and deposition designations ; order tendered (KJI) Modified on 02/07/2000 (Entered: 01/31/2000)
01/28/2000	257	OBJECTIONS TO DEFENDANTS' TRIAL EXHIBITS by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to [249-1] (KJI) (Entered: 01/31/2000)
01/28/2000	258	OBJECTIONS AND COUNTER-DESIGNATIONS TO DEFENDANTS' DEPOSITION DESIGNATIONS by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to [248-1] (KJI) (Entered: 01/31/2000)
01/31/2000	260	MOTIONS by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc in limine 1. preclude undisclosed expert witness 2. require Conwood to prove exclusionary conduct 3. preclude Conwood from offering Professor Gundlach's "study" of purported "exclusive agreements" 4. enter an order simplifying the issues at trial 5. preclude certain of Conwood intended trial exhibits 6. preclude all evidence offered by Conwood concerning conduct protected by Noerr-Pennington immunity 7. preclude irrelevant, misleading and unfairly prejudicial statements and references by or on behalf of Conwood; tendered order (filed in LV) memorandums in support docketed separately (KJI) Modified on 02/02/2000 (Entered: 02/02/2000)
01/31/2000	261	MEMORANDUM IN SUPPORT OF OF MOTION IN LIMINE TO PRECLUDE UNDISCLOSED EXPERT WITNESS MATERIALS by

		defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion in limine [260-1] (filed in LV) (KJI) (Entered: 02/02/2000)
01/31/2000	262	MEMORANDUM IN SUPPORT OF MOTION IN LIMINE REQUIRING PLAINTIFFS TO PROVE EXCLUSIONARY CONDUCT AND FACT OF INJURY AT SPECIFIC RETAIL STORES AND CHAINS by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion in limine [260-1] (filed in LV) (KJI) (Entered: 02/02/2000)
01/31/2000	263	MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO PRECLUDE PROFESSOR GUNDLACH'S "STUDY" OF PURPORTED "EXCLUSIVE AGREEMENTS" AND RELATED TESTIMONY by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion in limine [260-1] (filed in LV) (KJI) (Entered: 02/02/2000)
01/31/2000	264	MEMORANDUM IN SUPPORT OF MOTION IN LIMINE FOR ANO RDER SIMPLIFYING THE ISSUES AT TRIAL AND FACILITATING THE DISPOSITION OF THIS LAWSUIT by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion in limine [260-1] (filed in LV) (KJI) (Entered: 02/02/2000)
01/31/2000	265	MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO PRECLUDE CERTAIN INTENDED TRIAL EXHIBITS AND TESTIMONY OR OTHER REFERENCE TO SUCH MATERIALS by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion in limine [260-1] (filed in LV) (KJI) (Entered: 02/02/2000)
01/31/2000	266	MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO PRECLUDE ALL EVIDENCE CONCERNING CONDUCT PROTECTED BY NOERR-PENNINGTON IMMUNITY by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion in limine [260-1] (filed in LV) (KJI) (Entered: 02/02/2000)
01/31/2000	267	MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO PRECLUDE IRRELEVANT, MISLEADING AND UNFAIRLY PREJUDICIAL STATEMENTS AND REFERENCES by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion in limine [260-1] (filed in LV) (KJI) (Entered: 02/02/2000)
01/31/2000	268	OBJECTIONS TO PLAINTIFFS' DESIGNATIONS OF DEPOSITIONS by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to [254-1] (filed in LV) (KJI) (Entered: 02/02/2000)
01/31/2000	269	COUNTER DESIGNATIONS TO PLAINTIFFS' DESIGNATIONS OF DEPOSITIONS by defendant UST Inc, defendant United St Tobacco Ma,

		defendant United St Tobacco Sa, defendant United States Tobacc (filed in LV) (KJI) (Entered: 02/02/2000)
01/31/2000	270	OBJECTIONS TO PROPOSED EXHIBITS by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to [246-1] (filed in LV) (KJI) (Entered: 02/02/2000)
01/31/2000	271	FIRST STIPULATIONS OF FACT filed by plaintiffs' and defendants' (filed in LV) (KJI) (Entered: 02/02/2000)
01/31/2000	272	VOIR DIRE filed by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (filed in LV) (KJI) (Entered: 02/02/2000)
01/31/2000	273	REQUEST FOR JURY INSTRUCTIONS TO BE GIVEN AT THE CLOSE OF EVIDENCE WITH VERDICT FORM submitted by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant States Tobacc (filed in LV) (KJI) Modified on 02/02/2000 (Entered: 02/02/2000)
01/31/2000	274	CERTIFICATE OF SERVICE OF DOCUMENTS 260-273 by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant States Tobacc (filed in LV) (KJI) (Entered: 02/02/2000)
02/01/2000	259	ORDER by Magistrate Judge James D. Moyer denying dft UST's motion to strike certain affidavits filed by plas in support of opposition to defts' mtn/SJ [226-1] (cc: all counsel) Date: 2/1/00] (MLG) (Entered: 02/01/2000)
02/02/2000		REMARK called atty John Reed in re to signature on DN's 260 & 261 (KJI) (Entered: 02/02/2000)
02/04/2000	275	SUPPLEMENTAL TRIAL EXHIBIT LIST by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc re list [249-1] (filed in LV) (KJI) (Entered: 02/07/2000)
02/04/2000	276	MEMORANDUM IN OPPOSITION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion in limine as to Conwood's owners and their alleged wealth, etc. [255-1] ; filed in LV (KJI) (Entered: 02/07/2000)
02/04/2000	277	RESPONSE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion for order for an appropriate trial exhibit list and deposition designations [256-1] (filed iN LV) (KJI) (Entered: 02/07/2000)
02/07/2000	278	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion in limine [260-1] ; order tendered (KJI) (Entered: 02/07/2000)
02/07/2000	279	NOTICE OF FILING SUPPLEMENTAL DECLARATION OF RICHARD LEFTWICH by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 02/07/2000)
02/08/2000	280	OBJECTIONS AND COUNTER DESIGNATIONS TO CERTIN OF DEFENDANTS' DEPOSITION DESIGNATIONS by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to [269-1] (KJI) (Entered: 02/08/2000)

02/08/2000	281	ORDER by Magistrate Judge James D. Moyer ; telephone conference held on 2/8/00; UST granted lv to file supplemental brief today w/respect to Leftwich in limine issues; UST granted lv to depose Dr. Leftwich w/respect to his supplemental declaration and should proceed as soon as possible (cc: all counsel) [Entry Date: 2/8/00] (MLG) (Entered: 02/08/2000)
02/09/2000	282	ORDER by Magistrate Judge James D. Moyer; oral mtn of pla to compel is GRANTED to extent that, w/in 7 days of entry of this order, dft shall provide pla w/info re:Dr. Sheffman's total income generated from this litigation, either directly or indirectly through LECG/Navigant (cc: all counsel) [Entry Date: 2/9/00] (MLG) (Entered: 02/09/2000)
02/09/2000	283	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for order to preclude UST employees from testifying live if UST refuses to make them available during plas' case-in-chief ; Memorandum in Support; order tendered (KJI) (Entered: 02/09/2000)
02/09/2000	284	MOTION by defendant United States Tobacc to compel withdrawal of trial subpoenas to defts' employess and to preclude issuance of additional subpoenas ; order tendered (filed in LV) (CSD) (Entered: 02/10/2000)
02/09/2000	285	REPLY MEMORANDUM by defendant to response to motion in limine [260-1] w/exhibits (in separate folder) (CSD) (Entered: 02/10/2000)
02/09/2000	285	SUPPLEMENTAL MEMORANDUM by defendant re motion to exclude damages study and future testimony of Dr. Richard Leftwich [210-1] (CSD) (Entered: 02/10/2000)
02/14/2000	286	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion in limine [260-1] ; order tendered (KJI) (Entered: 02/14/2000)
02/14/2000	287	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion in limine [260-1] ; order tendered (KJI) (Entered: 02/14/2000)
02/14/2000	288	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion in limine [260-1] ; order tendered (KJI) (Entered: 02/14/2000)
02/14/2000	289	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion in limine to preclude pla from using certain "irrelevant, misleading and unfairly prejudicial" words[260-1] ; order tendered (KJI) (Entered: 02/14/2000)
02/14/2000	290	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion in limine to require plas to prove exclusionary conduct and fact of injury on a store-by-store basis [260-1] ; order tendered (KJI) (Entered: 02/14/2000)
02/14/2000	291	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion in limine for an order simplifying the issues at trial and facilitating the disposition of this lawsuit [260-1] ; order tendered (KJI) (Entered: 02/14/2000)
02/15/2000	292	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell granting motion for order to preclude UST employees from testifying live if UST refuses to make them available during plas' case-in-chief [283-1], finding the motion to compel withdrawal of trial subpoenas to defts' employess and to

		preclude issuance of additional subpoenas [284-1] moot. ; pretrial conf set for 1:00 p.m. on 2/17/00 before Judge Thomas B. Russell (cc: all counsel) [Entry Date: 2/15/00] (KJI) (Entered: 02/15/2000)
02/15/2000	293	REPLY by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to response to motion in limine as to Conwood's owners and their alleged wealth, etc. [255-1] (KJI) (Entered: 02/15/2000)
02/15/2000	295	SUPPLEMENTAL WITNESS list filed by defendant (filed in LV & rec'd in Paducah 2/17/00) (CSD) (Entered: 02/17/2000)
02/15/2000	296	SECOND SUPPLEMENTAL EXHIBIT list by defendants (filed in LV & rec'd in Paducah 2/17/00) (CSD) (Entered: 02/17/2000)
02/16/2000	294	REPLY TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR MOTION TO EXCLUDE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to [285-1] (KJI) (Entered: 02/16/2000)
02/17/2000	297	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell denying motion for partial summary judgment [207-1], denying motion for summary judgment [208-1]; see order for specifics (faxed cc: all counsel) [Entry Date: 2/17/00] (KJI) Modified on 02/17/2000 (Entered: 02/17/2000)
02/22/2000	298	REVISED EXHIBIT list by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 02/22/2000)
02/22/2000	299	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for leave to pre-admit exhibits exhibits attached (2 volumes) ; order tendered (KJI) (Entered: 02/22/2000)
02/22/2000		FILE RETURNED from LV (KJI) (Entered: 02/23/2000)
02/23/2000	300	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell granting [255-1] motion in limine as to 1. Conwood's owners and their alleged wealth, etc. 2. testimony of David Scheffman is moot 3. evidence that companies other than UST seek to exclude is denied 4. retailer permission evidence is denied 5. any evidence offered in support of UST's counterclaim is moot 6. hearsay deposition testimony and documents is denied (faxed: all counsel) [Entry Date: 2/23/00] (KJI) Modified on 02/23/2000 (Entered: 02/23/2000)
02/23/2000	301	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell denying motion to exclude damages study and future testimony of Dr. Richard Leftwich [210-1], denying motion in limine to preclude undisclosed expert witness materials and related testimony and delcarations [260 & 261] (faxed: all counsel) [Entry Date: 2/23/00] (KJI) Modified on 02/23/2000 (Entered: 02/23/2000)
02/23/2000	302	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell denying motion in limine to preclude Professor Gundlach's "study" of purported "exclusive agreements" and related testimony [260 & 263] (faxed: all counsel) [Entry Date: 2/23/00] (KJI) Modified on 02/23/2000 (Entered: 02/23/2000)

02/23/2000	303	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell denying motion in limine to prove exclusionary conduct and fact of injury at specific retail stores and chains [260 & 262] (faxed: all counsel) [Entry Date: 2/23/00] (KJI) Modified on 02/23/2000 (Entered: 02/23/2000)
02/23/2000	304	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell denying motion in limine for an order simplifying the isses at trial and facilitating the disposition of this lawsuit [260 & 264] (faxed: all counsel) [Entry Date: 2/23/00] (KJI) Modified on 02/23/2000 (Entered: 02/23/2000)
02/23/2000	305	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell denying motion in limine to preclude certain intended trial exhibits and testimony or other reference to such material [260 & 265] (faxed: all counsel) [Entry Date: 2/23/00] (KJI) Modified on 02/23/2000 (Entered: 02/23/2000)
02/23/2000	306	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell grants motion in limine to preclude all evidence concerning conduct protected by Noerr-Pennington Immunity [260 & 266] (faxed: all counsel) [Entry Date: 2/23/00] (KJI) (Entered: 02/23/2000)
02/23/2000	307	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell grants motion in limine to preclude irrelevant, misleading and unfairly prejudicial statements and references [260 & 267] (faxed: all counsel) [Entry Date: 2/23/00] (KJI) (Entered: 02/23/2000)
02/23/2000	308	MOTION by defendant for order to preclude plas' proposed new version of the Gundlach "study" of "exclusionary" agreements and any related exhibits or testimony ; Memorandum in Support; order tendered (KJI) (Entered: 02/23/2000)
02/25/2000	309	ORDER by Judge Thomas B. Russell ; pretrial conference held on 2/24/00 ; Jerry Roppel, Ct Report, recorded the hrg (faxed: all counsel) [Entry Date: 2/25/00] (KJI) Modified on 02/25/2000 (Entered: 02/25/2000)
02/25/2000	310	ORDER by Judge Thomas B. Russell the Ct was presented w/ the depos of Byron T. Parish, Joseph Marconi and Robert Bales, the following objections are sustained Byron T. Parish - no objections highlighted, Joseph Marconi - no objections highlighted, Robert Bales - page 11, lines 19-25 and page 12, lines 1-4 (faxed: all counsel) [Entry Date: 2/25/00] (KJI) (Entered: 02/25/2000)
02/28/2000	311	EX PARTE DISCLOSURE OF WITNESSES AND EXHIBITS filed by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (FILED UNDER SEAL PER JUDGE RUSSELL) located in vault in Clerk's Office (KJI) (Entered: 02/28/2000)
02/28/2000	312	JURY LIST by the Ct (KJI) (Entered: 02/28/2000)
02/29/2000	313	RESPONSE TO DEFENDANTS' OBJECTIONS TO PROPOSED DEMONSTRATIVES AND EXHIBITS by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to [270-1] (KJI) (Entered: 02/29/2000)
02/29/2000	314	ORDER by Judge Thomas B. Russell: the following obj are sustained Timothy Entwistle 7/1/99 p47 lines 20-25, p48 lines 1-3, p204 lines 16-19, 8/13/99 no obj; Richard Fasanelli; Lawrence Borrowdale p19 lines 3-4 & 6-9; Shawn

		Ulizio p4 lines 15-25, p5 lines 1-7; Carolyn Ballard; Georgia Gill-Elkins; Thomas H. Latta; Gayleen F. Rusk p12 lines 24-25 p13 line 1 & 19-24, p23 lines 2-6; Donald Blackburn p391 lines 8-17, p396 lines 4-25; p397 lines 1-24, p399 lines 16-25, p400 lines 1-13, p429 line 4 (cc: all counsel,hand-delivered in courtroom) [Entry Date: 2/29/00] (KJI) (Entered: 02/29/2000)
03/02/2000	315	ORDER by Judge Thomas B. Russell after reviewing additional depos, the following obj were sutained David Waller, Andy Carter, Rob Engster, Bonita Townsend (cc: all counsel) [Entry Date: 3/2/00] (KJI) (Entered: 03/02/2000)
03/03/2000	316	ORDER by Judge Thomas B. Russell re objection [280-1] [268-1] [258-1] re depos (see order for spcfcs). (cc: all counsel) [Entry Date: 3/3/00] (CSD) (Entered: 03/03/2000)
03/03/2000	317	ORDER by Judge Thomas B. Russell the Ct was presented w/ designated depos, obj were shown w/ resp and counter-designations the following obj are sustained: Marti Stevens p18 lines 1-4, p23 lines 23-25, p47 lines 19-25, p48 lines 1-8; Patricia Leinen none; Robert Jansing none; Robert Weckman p22 lines 10-16, p23 lines 1-12; James Wheatley none (cc: all counsel, hand-delivered in Ct) [Entry Date: 3/3/00] (KJI) (Entered: 03/03/2000)
03/03/2000	319	OBJECTIONS TO DEFENDANTS' PROPOSED EXHIBITS AND DEMONSTRATIVES FOR GAY MILANO by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to [296-1] (KJI) (Entered: 03/06/2000)
03/06/2000	318	ORDER by Judge Thomas B. Russell the following obj are sustained Robert Fitzmaurice p59 lines 15-18, p92 lines 23-25, p93 lines 1-7, p93 line 11, p166 lines 15-16, p169 lines 14-15, p170 lines 20-21, p175 lines 19-20, p178 lines 19-20, p182 lines 10-13, p196 lines 89 (cc: all counsel, hand-delivered in Ct) [Entry Date: 3/6/00] (KJI) Modified on 03/06/2000 (Entered: 03/06/2000)
03/06/2000	320	RESPONSE TO PLAINTIFFS' OBJECTIONS TO GARY MILANO'S EXHIBITS AND DEMONSTRATIVES by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to [319-1] (KJI) (Entered: 03/06/2000)
03/06/2000	321	REPLY TO DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED EXHIBITS FOR GARY MILANO by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P re [320-1] (KJI) (Entered: 03/06/2000)
03/06/2000	322	OBJECTIONS TO PLAINTIFFS' PROPOSED EXHIBITS FOR GARY MILANO by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to [298-1] (KJI) (Entered: 03/06/2000)
03/06/2000	323	OBJECTIONS TO PLAINTIFFS' EXHIBITS (Attached to document) by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (KJI) (Entered: 03/07/2000)
03/07/2000	324	OBJECTIONS TO PLAINTIFFS' PROPOSED EXHIBITS by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (KJI) (Entered: 03/07/2000)
03/08/2000	325	

		ORDER by Judge Thomas B. Russell: after obj, some designated testimony was w/drawn of the remaining designated testimony the following obj are sustained Maudi Rushing p9 lines 15-20 (cc: all counsel) [Entry Date: 3/8/00] (KJI) (Entered: 03/08/2000)
03/09/2000	326	ORDER by Judge Thomas B. Russell after obj some designated testimony was w/drawn of the remaining designated testimony the following obj are sustained Leroy Keil - none (cc: all counsel) [Entry Date: 3/9/00] (KJI) (Entered: 03/09/2000)
03/09/2000	327	DEPOSITION of Richard Leftwich taken on the following date(s): 3/5/00 (JCD) (Entered: 03/09/2000)
03/10/2000	328	OBJECTIONS TO PLAINTIFFS' PROPOSED EXHIBITS by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (KJI) (Entered: 03/10/2000)
03/13/2000	329	OBJECTIONS TO PROPOSED EXHIBITS FOR DEWAYNE BIDDY, ROBERT CARLSON, GREG GERMANY, MORGAN JONES AND LUNDY EDWARDS by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 03/13/2000)
03/13/2000	330	SUPPLEMENTAL OBJECTIONS TO DEFENDANTS' PROPOSED EXHIBIT FOR DEWAYNE BIDDY by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P re objection [329-1] (KJI) Modified on 03/13/2000 (Entered: 03/13/2000)
03/13/2000	331	REPLY TO PLAINTIFFS' OBJECTIONS TO PROPOSED EXHIBITS by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc re [329-1] (KJI) (Entered: 03/13/2000)
03/13/2000	332	OBJECTIONS TO EXHIBITS (exhibits listed) by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (KJI) (Entered: 03/13/2000)
03/13/2000	333	MEMORANDUM REGARDING DEFENDANTS' USE OF DEPOSITION TESTIMONY OF CONWOOD EMPLOYEES by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (KJI) (Entered: 03/13/2000)
03/13/2000	334	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell this Ct orders plas to provide depo counterdesignations to those witneses who are officers, directors, or managing agents under Fed. R. Civ. P. 32(a)(2) that dfts plan to use at trial, regardless of their availability (cc: all counsel; hand-delivered) [Entry Date: 3/13/00] (KJI) (Entered: 03/13/2000)
03/13/2000	335	ORDER by Judge Thomas B. Russell after obj, the remaining desginated testimony the following obj are sustained Gary Jones p29 lines 22-25, p30 lines 1-25, p31 line 1, p31 lines 11-25, p32 lines 1-8; David Dill p 54 lines 24-25, p55 lines 1-8 (cc: all counsel, hand-delivered) [Entry Date: 3/13/00] (KJI) (Entered: 03/13/2000)
03/13/2000		SUBPOENA as to: Steve Luckett (KJI) (Entered: 03/13/2000)

03/14/2000	336	RESPONSE TO DEFENDANTS' MEMORANDUM CONCERNING THE APPLICABILITY OF RULE 32(a)(2) by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to [333-1] (KJI) (Entered: 03/14/2000)
03/14/2000	337	ORDER by Judge Thomas B. Russell the Ct was presented w/ designated depos; obj were shown w/ resp, after obj some designated testimony was w/drawn, the following obj are sustained Robert K. Carolson none (cc: all counsel, hand-delivered) [Entry Date: 3/14/00] (KJI) (Entered: 03/14/2000)
03/14/2000	338	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell re dfts' mem re dfts' use of depo testimony of Conwood Employees 1. dist mgrs are "managing agents" for the purpose of Fed. R. Civ. P. 32(a)(2) and their depo testimony can be used for any purpose at trial 2. the depos of those deponents who were officers, directors, or managing agents for the purposes of Fed. R. civ. P. 32(a)(2) at the time of their depo can be used for any purpose at trial 3. plas are to provide dfts w/ counterdesignations for the depo testimony of those included in the ruling; final & app order (cc: all counsel, hand-delivered) [Entry Date: 3/14/00] {47}(KJI) Modified on 03/14/2000 (Entered: 03/14/2000)
03/14/2000		SUBPOENA as to: Steve Butler (KJI) (Entered: 03/14/2000)
03/14/2000	339	MEMORANDUM CONCERNING THE APPLICABILITY OF RULE 32(a)(1) WHERE THE MANAGING AGENT HAS RETIRED by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (KJI) (Entered: 03/14/2000)
03/14/2000	340	MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW (oral motion) by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (KJI) (Entered: 03/14/2000)
03/15/2000	341	OBJECTIONS by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to defts' exhibits 145 & 195 (CSD) (Entered: 03/15/2000)
03/15/2000	342	REPLY by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to defts' objections to exhibits (CSD) (Entered: 03/15/2000)
03/15/2000	343	ORDER by Judge Thomas B. Russell re designated depos; after objections, some designated testimony w/drawn; remaining designated testimony sustained--William Ingram-none. (cc: all counsel, hand delivered) [Entry Date: 3/15/00] (CSD) (Entered: 03/15/2000)
03/16/2000	344	ORDER by Judge Thomas B. Russell re designated depos; after objections, some testimony w/drawn; following objs sustained--1. Ted Coatney - Page 39, Lines 24, 25; Page 40, lines 1-7, Page 41, lines 10-13. (cc: all counsel, hand-delivered) [Entry Date: 3/16/00] (CSD) (Entered: 03/16/2000)
03/17/2000		BEGIN VOLUME # 8 (JCD) (Entered: 03/17/2000)
03/17/2000	345	NOTICE OF FILING OF RECENT AUTHORITY by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (JCD) (Entered: 03/17/2000)
03/20/2000	346	

		OBJECTIONS TO PROPOSED DEMONSTRATIVES OF VINCENT GIERER by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 03/20/2000)
03/20/2000	347	SUPPLEMENT TO PROPOSED JURY INSTRUCTION NO. 14 by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P re jury [252-1] (KJI) (Entered: 03/20/2000)
03/20/2000	348	ORDER by Judge Thomas B. Russell the Ct was presented w/ designated depos, obj were shown w/ resp and counter-designations, after obj some testimony was w/drawn, the following obj are sustained Russell Frank p129 line 25, p130 lines 1-15, p131 lines 2-12; Thomas Balk p216 line 4, p218 line 6; Calvin Knol none (cc: all counsel, hand-delivered) [Entry Date: 3/20/00] (KJI) (Entered: 03/20/2000)
03/20/2000	349	NOTICE OF FILING VIDEOTAPES PLAYED FOR JURY DURING TRIAL by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (VIDEOTAPES LOCATED IN VAULT IN CLERK'S OFFICE) (KJI) (Entered: 03/20/2000)
03/21/2000		SUBPOENA as to: Kimberly Overby issued by cnsl for defts for 3/23/00, 9:00 am (CSD) (Entered: 03/21/2000)
03/21/2000	350	MOTION by defendant in limine to exclude testimony of Messrs. Williams, Ingram, Borrowdale & Ulizio (JCD) (Entered: 03/21/2000)
03/21/2000	351	ORDER by Judge Thomas B. Russell re designated depositions; after objections, some designated testimony was w/drawn; of remaining designated testimony,the following objections sustained--1. Michael Keane - none. (cc: all counsel, hand delivered) [Entry Date: 3/21/00] (CSD) (Entered: 03/21/2000)
03/22/2000	352	MOTION by defendants to introduce exhibits into evidence (JCD) (Entered: 03/22/2000)
03/22/2000	353	MOTION by defendants to introduce exhibits into evidence (amended) (JCD) (Entered: 03/22/2000)
03/24/2000	354	MOTION by defendants for supplemental jury instruction re meaning of "evidence" and to limit plas' arguments at closing ; Exhibits in Support (SEALED) (Entered: 03/24/2000)
03/27/2000	355	SUPPLEMENTAL PROPOSED JURY INSTRUCTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc re jury [273-1] (KJI) (Entered: 03/27/2000)
03/27/2000	356	ORDER by Judge Thomas B. Russell: this matter is before the Ct on plas mot for directed verdict on dfts' counterclaim of conversion, plas have agreed to dism all of their state claims as well as their Lanham Act claim, dfts have agreed to dism their Lanham Act counterclaim, upon careful consideration, plas' mot for a directed verdict on dfts' conversion counterclaim is den, plas' antitrust claims and dfts' conversion counterclaim shall proceed (cc: all counsel, hand-delivered) [Entry Date: 3/27/00] (KJI) (Entered: 03/27/2000)
03/27/2000	357	NOTICE OF FILING OF VIDEOTAPE PLAYED FOR JURY DURING TRIAL ON MARCH 27, 2000 OF LAWRENCE BORROWDALE AND

		SHAWN ULIZIO by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 03/27/2000)
03/27/2000	358	NOTICE OF FILING VIDEOTAPED DEPOSITION TESTIMONY by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (videotapes in vault) (KJI) (Entered: 03/27/2000)
03/28/2000	359	JURY INSTRUCTIONS AND VERDICT FORM filed by the Court (KJI) (Entered: 03/29/2000)
03/29/2000	360	ORDER by Judge Thomas B. Russell the jury shall be sequestered during the lunch period 3/16/00 and their lunch shall be delivered to them at the expense of the Ct (cc: Financial Deputy) [Entry Date: 3/29/00] (KJI) Modified on 03/29/2000 (Entered: 03/29/2000)
03/29/2000	361	ORDER by Judge Thomas B. Russell that the jury shall be sequestered during the lunch period on 3/23/00 and their lunch shall be delivered to them at the expense of the Ct (cc: Financial Deputy) [Entry Date: 3/29/00] (KJI) (Entered: 03/29/2000)
03/29/2000	362	ORDER by Judge Thomas B. Russell that the jury shall be sequestered during the lunch period on 3/28/00 and their lunch shall be delivered to them at the expense of the Ct (cc: Financial Deputy) [Entry Date: 3/29/00] (KJI) (Entered: 03/29/2000)
03/29/2000	363	JUDGMENT: by Judge Thomas B. Russell the Ct enters jgm in favor of plas Conwood, et al in the amt of $1,050,000,000, treble the jury verdict of $350,000,000 dismissing case (faxed: all counsel) [Entry Date: 3/29/00] {138} (KJI) Modified on 03/29/2000 (Entered: 03/29/2000)
03/29/2000	364	ORDER by Judge Thomas B. Russell automatic stay provided by FRCP 62 is ext to allow the ptys to brief the issues, dft shall not enter into or conduct any corporate transactions that would jeopardize any security responsible for the jgm, dfts shall file a brief on the issues of conditions for the security by 4/19/00, plas shall resp 7 days thereafter and dft are granted 7 day thereafter to file a reply, mots for atty fees, bill of costs, and injunctions shall be filed w/in 21 days w/ 14 days to resp and 7 days to reply terminating case referral to Magistrate Judge James D. Moyer (faxed: all counsel) Date: 3/29/00] (KJI) Modified on 03/29/2000 (Entered: 03/29/2000)
03/29/2000	365	TRANSCRIPT filed VOLUME IV of Jury Trial before Judge Thomas B. Russell on March 2, 2000 (filed in LV) (KJI) (Entered: 03/30/2000)
04/12/2000	366	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for judgment as a matter of law , or for new trial , or for order for reduced damages award ; Memorandum in Support of mot for new trial and reduced damages award; order, jgm tendered (filed in LV) (KJI) (Entered: 04/14/2000)
04/12/2000	367	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for leave to file memorandum in excess of forty pages ; Memorandum in Support of mot for

		jgm as a matter of law attached; order tendered (filed in LV) (KJI) (Entered: 04/14/2000)
04/13/2000	368	COPIES OF CASES FILED PURSUANT TO LR 7.1(j) CITED IN MEMORANDUM IN SUPPORT OF DFTS' MOTION FOR A NEW TRIAL, IN THE ALTERNATIVE, A REDUCE DAMAGES AWARD by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc re motion for judgment as a matter of law [366-1], motion for new trial [366-2], re motion for order for reduced damages award [366-3] (filed in LV) (KJI) (Entered: 04/14/2000)
04/13/2000	369	APPENDIX filed by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc re [366-1], re [366-2], re [366-3] (filed in LV) (in expandable folder) (KJI) Modified on 04/14/2000 (Entered: 04/14/2000)
04/13/2000	372	COPIES OF CASES FILED PURSUANT TO LR 7.1(j) CITED IN MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc re memorandum [371-1] (filed in LV) (KJI) (Entered: 04/14/2000)
04/14/2000	370	ORDER by Judge Thomas B. Russell granting motion for leave to file memorandum in excess of forty pages [367-1] (cc: all counsel) [Entry Date: 4/14/00] (KJI) (Entered: 04/14/2000)
04/14/2000	371	MEMORANDUM IN SUPPORT OF MOTION FOR JUDGMENT AS A MATTER OF LAW by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion for judgment as a matter of law [366-1] (KJI) (Entered: 04/14/2000)
04/18/2000	373	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for order to conduct post-verdict juror interviews ; order tendered (filed in LV) (KJI) (Entered: 04/19/2000)
04/19/2000		BILL TENDERED by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P re [363-2] for costs (KJI) (Entered: 04/20/2000)
04/19/2000	374	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for permanent injunction ; Memorandum in Support; order tendered (KJI) (Entered: 04/20/2000)
04/19/2000	375	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for attorney fees & costs ; Memorandum in Support; order tendered (KJI) (Entered: 04/20/2000)
04/19/2000	376	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for bond and other conditions for security of the jgm ; order tendered (filed in LV & rec'd in Pad 4/21/00) FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER (KJI) Modified on 04/25/2000 (Entered: 04/25/2000)

04/19/2000	377	MEMORANDUM by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion for bond and other conditions for security of the jgm [376-1] (filed in LV & rec'd in Pad 4/21/00) FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER (KJI) (Entered: 04/25/2000)
04/20/2000	378	SIGNED ORIGINALS OF DECLARATION OF ROBERT D'ALESSANDRO AND ATTACHMENT TO THE DECLARATION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc in support of [377-1] (filed in LV) FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER (KJI) (Entered: 04/25/2000)
04/25/2000	379	OPPOSITION TO MOTION FOR POST-VERDICT JUROR INTERVIEWS by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion for order to conduct post-verdict juror interviews [373-1] ; order tendered (KJI) (Entered: 04/25/2000)
04/27/2000	380	OPPOSITION TO MOTION TO STAY EXECUTION BASED ON PARTIAL SUPERSEDEAS BOND by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion for bond and other conditions for security of the jgm [376-1] FILED UNDER SEAL PER JUDGE RUSSELL (located in vault in Clerk's office) (KJI) Modified on 04/28/2000 (Entered: 04/27/2000)
04/30/2000		BEGIN VOLUME # 9 (JCD) (Entered: 05/02/2000)
05/01/2000	381	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for leave to file memo in excess of 40 pages ; order & Consolidated Opposition to Motions for Judgement tendered (JCD) (Entered: 05/01/2000)
05/01/2000	382	ORDER by Judge Thomas B. Russell granting motion for leave to file memo in excess of 40 pages [381-1] (cc: all counsel) [Entry Date: 5/1/00] (JCD) (Entered: 05/01/2000)
05/01/2000	383	CONSOLIDATED OPPOSITION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion for judgment as a matter of law [366-1], to motion for new trial [366-2], to motion for order for reduced damages award [366-3] ; order tendered; w/two volumes exhibits (JCD) (Entered: 05/01/2000)
05/02/2000	384	REPLY by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to response to motion for order to conduct post-verdict juror interviews [373-1] (filed in LV) (KJI) (Entered: 05/04/2000)
05/03/2000	385	REPLY by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to response to motion for bond and other conditions for security of the jgm [376-1] FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER (filed in LV) (KJI) (Entered: 05/05/2000)
05/03/2000	386	MEMORANDUM IN OPPOSITION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion for attorney fees & costs [375-1] ; order tendered (filed in LV) (KJI) (Entered: 05/05/2000)

05/03/2000	387	RESPONSE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion for permanent injunction [374-1] ; order tendered (filed in LV) (KJI) (Entered: 05/05/2000)
05/12/2000	390	REPLY MEMORANDUM IN SUPPORT by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to response to motion for judgment as a matter of law [366-1], motion for new trial [366-2], motion for order for reduced damages award [366-3] (filed in LV) (KJI) (Entered: 05/16/2000)
05/12/2000	391	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for leave to file reply memorandum in excess of 15 pages ; Reply Memorandum attached; order tendered (filed in LV) (KJI) (Entered: 05/16/2000)
05/15/2000	388	REPLY by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to response to motion for attorney fees & costs [375-1] (KJI) (Entered: 05/15/2000)
05/15/2000	389	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for leave to file memorandum in excess of 15 pages ; Memorandum & attachments attached; order tendered (KJI) (Entered: 05/15/2000)
05/17/2000	392	ORDER by Judge Thomas B. Russell granting motion for leave to file reply memorandum in excess of 15 pages [391-1] (cc: all counsel) [Entry Date: 5/17/00] (KJI) (Entered: 05/17/2000)
05/17/2000	393	REPLY by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to response to motion for judgment as a matter of law [366-1] w/ attachments (expandable folder) (KJI) (Entered: 05/17/2000)
05/17/2000	394	ORDER by Judge Thomas B. Russell granting motion for leave to file memorandum in excess of 15 pages [389-1] (cc: all counsel) [Entry Date: 5/17/00] (KJI) (Entered: 05/17/2000)
05/17/2000	395	REPLY by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to response to motion for permanent injunction [374-1] w/ attachments (expandable folder) (KJI) (Entered: 05/17/2000)
05/22/2000	396	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for leave to file Notice of Recent Public Disclosure ; Notice of Recent Public Disclosure attached (KJI) (Entered: 05/22/2000)
05/23/2000	397	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for hearing on pla's mot for permanent injuctive relief ; Memorandum in Support; order tendered (filed in LV) (KJI) (Entered: 05/25/2000)
06/02/2000	398	STATUS REPORT REGARDING PREPARATIONS FOR MEETING CONDITIONS FOR SECURING THE JUDGMENT DURING POST-TRIAL MOTION PRACTICE AND APEAL by defendant UST Inc, defendant United

		St Tobacco Ma, defendant United St Tobacco Sa, defendant States Tobacc (filed in LV) (KJI) (Entered: 06/05/2000)
06/02/2000	398	RESPONSE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion for leave to file Notice of Recent Public Disclosure [396-1] ; order tendered (filed in LV) (KJI) (Entered: 06/05/2000)
06/05/2000	399	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion for hearing on pla's mot for permanent injuctive relief [397-1] (KJI) (Entered: 06/05/2000)
06/06/2000		REMARK attachment w/ certiificate of service omitted from original pleading placed w/ DN 398 (KJI) (Entered: 06/06/2000)
06/12/2000	400	TRANSCRIPT OF JURY TRIAL on 2/28/00 VOLUME 1 (KJI) (Entered: 06/12/2000)
06/12/2000	401	TRANSCRIPT OF JURY TRIAL on 4/29/00 VOLUME 2 (KJI) (Entered: 06/12/2000)
06/12/2000	402	TRANSCRIPT OF JURY TRIAL on 3/1/00 VOLUME 3 (KJI) (Entered: 06/12/2000)
06/12/2000	403	TRANSCRIPT OF JURY TRIAL on 3/3/00 VOLUME 4 (KJI) (Entered: 06/12/2000)
06/12/2000	404	TRANSCRIPT OF JURY TRIAL on 3/6/00 VOLUME 5 (KJI) (Entered: 06/12/2000)
06/12/2000	405	TRANSCRIPT OF JURY TRIAL on 3/7/00 VOLUME 6 (KJI) (Entered: 06/12/2000)
06/12/2000	406	TRANSCRIPT OF JURY TRIAL on 3/8/00 VOLUME 7A (KJI) (Entered: 06/12/2000)
06/12/2000	407	TRANSCRIPT OF JURY TRIAL on 3/9/00 VOLUME 8 (KJI) (Entered: 06/12/2000)
06/12/2000	408	TRANSCRIPT OF JURY TRIAL on 3/10/00 VOLUME 9 (KJI) (Entered: 06/12/2000)
06/12/2000	409	TRANSCRIPT OF JURY TRIAL on 3/13/00 VOLUME 10B (KJI) (Entered: 06/12/2000)
06/12/2000	410	TRANSCRIPT OF JURY TRIAL on 3/14/00 VOLUME 11A (KJI) (Entered: 06/12/2000)
06/12/2000	411	TRANSCRIPT OF JURY TRIAL on 3/15/00 VOLUME 12 (KJI) (Entered: 06/12/2000)
06/12/2000	412	TRANSCRIPT OF JURY TRIAL on 3/16/00 VOLUME 13 (KJI) (Entered: 06/12/2000)
06/12/2000	413	TRANSCRIPT OF JURY TRIAL on 3/20/00 VOLUME 14 (KJI) (Entered: 06/12/2000)

06/12/2000	414	TRANSCRIPT OF JURY TRIAL on 3/21/00 VOLUME 15 (KJI) (Entered: 06/12/2000)
06/12/2000	415	TRANSCRIPT OF JURY TRIAL on 3/22/00 VOLUME 16 (KJI) (Entered: 06/12/2000)
06/12/2000	416	TRANSCRIPT OF JURY TRIAL on 3/23/00 VOLUME 17 (KJI) (Entered: 06/12/2000)
06/12/2000	417	TRANSCRIPT OF JURY TRIAL on 3/24/00 VOLUME 18 (KJI) (Entered: 06/12/2000)
06/12/2000	418	TRANSCRIPT OF JURY TRIAL on 3/27/00 VOLUME 19 (KJI) (Entered: 06/12/2000)
06/12/2000	419	TRANSCRIPT OF JURY TRIAL on 3/28/00 VOLUME 20 (KJI) (Entered: 06/12/2000)
06/12/2000	420	TRANSCRIPT OF JURY VERDICT on 3/28/00 VOLUME 21 (KJI) (Entered: 06/12/2000)
06/16/2000	421	NOTICE OF RECENT DECISION BEARING ON MOTION FOR PERMANENT INJUNCTIVE RELIEF by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 06/16/2000)
06/22/2000	422	ORDER by Judge Thomas B. Russell re [375-1]; Conwood shall provide a full and unredacted itemized version of its billing records and expenses to this Ct for in camera review by 7/3/00 this should include the date the svc was performed, the billing person and a description of svc, Conwood shall provide UST and this Ct w/ a redacted itemized version of its billing records and expenses by 7/3/00; see order for specifics (faxed: all counsel) [Entry Date: 6/22/00] (KJI) (Entered: 06/22/2000)
06/23/2000	423	SECOND STATUS REPORT REGARDING PREPARATIONS FOR MEETING ANY CONDITIONS FOR SECURING THE JUDGMENT DURING POST-TRIAL MOTION PRACTICE AND APPEAL by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc re status [398-1] (filed in LV) (KJI) (Entered: 06/26/2000)
06/26/2000	424	NOTICE OF RECENT PUBLIC STATEMENT BY UST CONCERNING BOND PENDING APPEAL by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (KJI) (Entered: 06/26/2000)
07/03/2000	425	SUBMISSION OF BILLING RECORDS AND EXPENSES IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to [422-1] FILED UNDER SEAL PER JUDGE RUSSELL (located in vault in Clerk's office) (2 boxes of records in Joan's office that are ct records) (KJI) (Entered: 07/05/2000)
07/14/2000	427	AFFIDAVIT of Lizabeth B. Macoretta, Esquire FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER (filed in LV & rec'd in Pad 7/20/00) (KJI) (Entered: 07/21/2000)
07/14/2000	429	

		MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to compel compliance w/ the ct's order re Conwood's billing records and expenses for the production of additional info , and to extend time to make specific objections to Conwood's motion for fees and costs ; Memorandum in Support; order tendered (filed in LV, mot was in sealed envelope w/ an affidavit that is sealed, did not know about motion until resp was filed 8/1/00) (KJI) (Entered: 08/02/2000)
07/17/2000	428	AFFIDAVIT of LIZABETH B. MACORETTA (FILED UNDER PROTECTIVE ORDER--SEALED) (CSD) (Entered: 07/21/2000)
07/19/2000	426	RESPONSE TO SECOND STATUS REPORT by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to [423-1] (KJI) (Entered: 07/19/2000)
08/01/2000	430	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion to compel compliance w/ the ct's order re Conwood's billing records and expenses for the production of additional info [429-1], to motion to extend time to make specific objections to Conwood's motion for fees and costs [429-2] ; order tendered (KJI) (Entered: 08/02/2000)
08/07/2000	433	NOTICE of further development in cited case by defendant re motion for judgment as a matter of law [366-1] (filed in LV & rec'd in Paducah 8/9/00) (CSD) (Entered: 08/09/2000)
08/07/2000	434	THIRD STATUS REPORT by defendant re preparations for meeting conditions for securing judgment during post-trial motion practice and appeal (filed in LV 8/7/00 & rec'd in Paducah 8/9/00) (CSD) (Entered: 08/09/2000)
08/08/2000	431	ORDER by Judge Thomas B. Russell Case referred to Magistrate Judge James D. Moyer pursuant to 28:636(b)(1)(A)(B) on all matters pertaining to post-trial motions for atty fees and costs including DNS 375 & 429. (cc: all counsel, Judge Moyer) [Entry Date: 8/8/00] (CSD) (Entered: 08/08/2000)
08/08/2000	432	ORDER by Judge Thomas B. Russell granting motion for leave to file Notice of Recent Public Disclosure [396-1] (cc: all counsel) [Entry Date: 8/8/00] (CSD) (Entered: 08/08/2000)
08/08/2000	435	ATTACHMENT by defendant re [433-1], re motion for judgment as a matter of law [366-1] (filed in LV 8/8/00 & rec'd in Paducah 8/9/00) (CSD) (Entered: 08/09/2000)
08/10/2000	436	MEMORANDUM OPINION by Judge Thomas B. Russell re [366-1], re [366-2], re [366-3], re [373-1] ; appropriate order to enter this date. (cc: all counsel) [Entry Date: 8/10/00]{726} (CSD) Modified on 08/11/2000 (Entered: 08/10/2000)
08/10/2000	437	ORDER by Judge Thomas B. Russell denying motion for judgment as a matter of law [366-1], denying motion for new trial [366-2], denying motion for order for reduced damages award [366-3], denying motion for order to conduct post-verdict juror interviews [373-1] (cc: all counsel) [Entry Date: 8/10/00]{720} (CSD) (Entered: 08/10/2000)
08/10/2000	438	

		MEMORANDUM OPINION by Judge Thomas B. Russell re [376-1]; order to enter this date. (cc: all counsel) [Entry Date: 8/10/00]{721} (CSD) Modified on 08/10/2000 (Entered: 08/10/2000)
08/10/2000	439	ORDER by Judge Thomas B. Russell granting motion for bond and other conditions for security of the jgm [376-1] ; w/in 60 days from entry of this order, defts shall tender to Clerk of Court a cash supersedeas bond in the amount of $500 Million; Magistrate Judge Moyer will handle all matters re bond and requirements; (see order for specifics); terms of this order shall remain in effect until further order of the Court. (cc: all counsel) [Entry Date: 8/10/00]{721} (CSD) Modified on 08/10/2000 (Entered: 08/10/2000)
08/10/2000	440	MEMORANDUM OPINION by Judge Thomas B. Russell re [374-1], re [397-1] ; appropriate order to enter this date. (cc: all counsel) [Entry Date: 8/10/00]{722} (CSD) Modified on 08/10/2000 (Entered: 08/10/2000)
08/10/2000	441	ORDER by Judge Thomas B. Russell granting motion for permanent injunction [374-1] (terminating [397-1]) (see order for specifics); (cc: all counsel) [Entry Date: 8/10/00]{725} (CSD) Modified on 08/11/2000 (Entered: 08/10/2000)
08/11/2000	442	ORDER by Judge Thomas B. Russell that order for permanent injunctive relief re [441-1] effective 9/1/00. (cc: all counsel) [Entry Date: 8/11/00]{723} (CSD) (Entered: 08/11/2000)
08/11/2000		VOLUME 9 OF FILE SUBMITTED to Judge Moyer (CSD) (Entered: 08/11/2000)
08/14/2000	444	REPLY by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to response to motion to compel compliance w/ the ct's order re Conwood's billing records and expenses for the production of additional info [429-1], motion to extend time to make specific objections to Conwood's motion for fees and costs [429-2] (filed in LV) (KJI) (Entered: 08/16/2000)
08/16/2000	443	ORDER by Magistrate Judge James D. Moyer ; telephone conf. set for 2:00 8/28/2000 before Magistrate Judge James D. Moyer (cc: all counsel) [Entry Date: 8/16/00] (PAC) (Entered: 08/16/2000)
08/16/2000	445	ORDER by Magistrate Judge James D. Moyer: that by close of business on Wednesday 8/23/00, cnsl for both Conwood and UST shall simultaneously submit briefs to the Magistrate Judge as to the permissibility or inappropriateness of considering the number of hours billed by defense cnsl as part of the analysis for determination of the lodestar amt, these briefs should not exclude 10 pages (cc: all counsel, faxed to Reed, Gorsuch, Hansen, Roberts, Weiss per Judge Moyer fax to cnsl, faxed & mailed) [Entry Date: 8/16/00] (KJI) (Entered: 08/16/2000)
08/18/2000	446	STATUS REPORT by Judge Thomas B. Russell: a telephonic conf held 8/15/00; a pty indicated a juror had called in house cnsl, pty was reluctant to contact the juror in light of the Ct's recent order, the ptys agreed that the Ct would contact the juror and explain the ptys delay in resp to the call, the Ct made the call and informed the juror of situation, the Ct told the juror that if

		she wished to talk w/ cnsl for either pty she could call them and cnsl were now free to resp to that call, initiation of the call was left to the discretion of the juror (cc: all counsel) [Entry Date: 8/18/00] (KJI) (Entered: 08/18/2000)
08/21/2000	447	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to clarify Ct's order for permanent injunctive relief ; order tendered (filed in LV) (KJI) (Entered: 08/24/2000)
08/23/2000	448	MEMORANDUM IN SUPPORT OF RECIPROCAL FEE DISCOVERY by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P (filed in LV) (KJI) (Entered: 08/24/2000)
08/23/2000	449	MEMORANDUM REGARDING APPROPRIATENESS OF CONSIDERING HOURS BILLED BY DEFENDANT'S COUNSEL IN DECIDING PLAINTIFFS' FEE REQUEST (per order by Judge Moyer) by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc - FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER (located in vault in clerk's office) (filed in LV) (KJI) Modified on 08/25/2000 (Entered: 08/25/2000)
08/28/2000	450	ORDER by Judge Thomas B. Russell denying motion to clarify Ct's order for permanent injunctive relief [447-1], in the Ct's memo opinion re the supersedeas bond (dkt #438) page 5, line 8 should read: "Defendants have over $2 billion in excess of the jgm against them and have a long history of financial prosperity and growth." (cc: all counsel) [Entry Date: 8/28/00] {781} (KJI) Modified on 08/28/2000 (Entered: 08/28/2000)
08/28/2000	451	RESPONSE TO MOTION TO CLARIFY by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to [447-1] (KJI) (Entered: 08/28/2000)
08/30/2000	452	REPLY by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc re [447-1] (filed in LV) (KJI) (Entered: 08/31/2000)
09/08/2000	453	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for order to approve supersedeas bond ; Memorandum in Support; order tendered (filed in LV) (KJI) (Entered: 09/12/2000)
09/11/2000	454	NOTICE OF APPEAL by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to USCA, decision [297-1], [301-1], [363-2], [437-1], [436-1], [441-1], [440-1] (cc: all counsel) receipt # 317906 (filed in LV) (KJI) (Entered: 09/13/2000)
09/12/2000		DOCUMENT NUMBER: 436-442,444-448,450-453 SUBMITTED to Judge Moyer to place w/ file (KJI) (Entered: 09/12/2000)
09/15/2000	455	OPPOSITION TO UST'S MOTION FOR RECONSIDERATION OF SUPERSEDEAS BOND REQUIREMENTS by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion for order to approve supersedeas bond [453-1] (KJI) (Entered: 09/15/2000)
09/18/2000		

		REMARK: exhibits used at trial are located in vault on 2nd floor of Cthouse (KJI) (Entered: 09/18/2000)
09/18/2000		BEGIN VOLUME # 10 w/ DN 436 (KJI) (Entered: 09/18/2000)
09/18/2000		TRANSMISSION form sent to USCA [454-1] w/ pertinent papers (KJI) (Entered: 09/18/2000)
09/18/2000		FILE RETURNED (KJI) (Entered: 09/19/2000)
09/19/2000		FILE SUBMITTED VOLUMES 9 & 10 to Judge Moyer via Kathy (KJI) (Entered: 09/19/2000)
09/20/2000	456	REPLY by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to response to motion for order to approve supersedeas bond [453-1] (filed in LV) (KJI) (Entered: 09/22/2000)
09/21/2000	457	TRANSCRIPT ORDER FORM filed by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc re [454-1]; transcript already on file in Dist Ct Clerk's Office (filed in LV) (KJI) (Entered: 09/25/2000)
09/26/2000	458	FINDINGS OF FACT AND CONCLUSIONS OF LAW concerning motion for order to approve supersedeas bond [453-1] by Magistrate Judge James D. Moyer; recommendating ct to grant mtn of the UST for leave to secure $270 million o fthe $500 million amt by a LOC of the nature suggested and remaining $230 million in cash; cnsl for Conwood & UST shall draft & settle upon a final form of tendered order for the letter of credit (cc: all counsel, faxed to cnsl Guzman,Reed) [Entry Date: 9/26/00] (MLG) Modified on 09/26/2000 (Entered: 09/26/2000)
09/27/2000	459	DESIGNATION of Record on Appeal re [454-1] (KJI) (Entered: 09/27/2000)
10/05/2000	460	ORDER by Judge Thomas B. Russell granting motion for order to approve supersedeas bond [453-1]; USTobacco will provide the clerk of USDC for WD/KY with $500,000,000 to be deposited by the clerk (cc: all counsel) [Entry Date: 10/5/00] (MLG) (Entered: 10/05/2000)
10/10/2000	461	BOND by defendants United States Tobacc, United St Tobacco Sa and United St Tobacco Ma in amount of $ 500,000,000 (MLG) (Entered: 10/10/2000)
10/10/2000		NOTIFICATION by USCA of Appellate Docket Number 00-6267 (KJI) (Entered: 10/10/2000)
10/13/2000	462	ORDER by Chief Judge Charles R. Simpson III; funds on deposit are to be placed in an interest bearing acct through CRIS, administered through USDC WD/KY; CRIS agrees to accept these funds on a one-time basis (cc: all counsel) [Entry Date: 10/13/00] (MLG) (Entered: 10/13/2000)
10/23/2000	463	NOTICE OF CHANGE OF ADDRESS by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P counsel (KJI) (Entered: 10/23/2000)
10/23/2000		REMARK: returned mail sent to Martha Weiss "left no address" (KJI) (Entered: 10/24/2000)

11/02/2000	464	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for leave to file additional authority in support of their opposition to Conwood's request for atty fees and costs ; memorandum in support attached; order tendered (filed in LV) (KJI) (Entered: 11/06/2000)
12/05/2000	465	AMENDED ORDER by Chief Judge Charles R. Simpson III: the Clerk US Dist Ct is ordered to establish the CRIS Conwood v. US Tobacco Fund, the initial CRIS Conwood v. US Tobacco Fund investment shall extend beyond the parameters of the "Liquidty Fund" w/ a maximum of one year, subsequent investments shall meet the CRIS - Conwood v. US Tobacco Fund objectives as stated in the order, as the disbursement date nears any new securities purchased will have a reduced holding period in an attempt to mature on or about the expected disbursement date (cc: all counsel, faxed to LV for disbursement to Finance) [Entry Date: 12/5/00] (KJI) (Entered: 12/05/2000)
12/18/2000	466	JOINT MOTION by defendants, plaintiffs for order for settl , and for order of approval of revised trial transcript order tendered (with 4 boxes of tendered transcripts, boxes located w/ the rest of the Conwood file in back room w/ old copier) (KJI) Modified on 12/19/2000 (Entered: 12/19/2000)
12/20/2000	467	MOTION by defendant for order to reduce the stated amount of the Letter of Credit ; order tendered (PAC) (Entered: 12/20/2000)
12/20/2000	468	ORDER by Magistrate Judge James D. Moyer granting motion for order to reduce the stated amount of the Letter of Credit [467-1] to the extent, and only to the extent of said additional cash deposit of 126 million and Clerk directed to deliver a certificate of reduction directing it to reduce the letter of credit from 170 million to 44 million (cc: all counsel) [Entry Date: 12/20/00] (PAC) (Entered: 12/20/2000)
12/20/2000	469	ORDER by Judge Thomas B. Russell granting motion for order for settl [466-1], granting motion for order of approval of revised trial transcript [466-2] (4 boxes of transcripts filed as of entry of this order) (cc: all counsel) [Entry Date: 12/20/00] (KJI) (Entered: 12/20/2000)
12/28/2000	471	TENDER OF ORDER by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc (filed in LV) (KJI) (Entered: 01/05/2001)
12/29/2000	470	ORDER by Judge Thomas B. Russell that amount of Letter of Credit descirbed in Court's order of 10/05/00 [460-1] shall be reduced to extent of said addtl cash deposit of $42 million and account earnings of $2 million; Clerk directed to execute & deliver to Bank of Nova Scotia a Certificate of Reduction to reduce amount of Letter of Credit from $44 million to zero and a Certificate of Termination of Letter of Credit, directing that Letter of Credit be terminated, together with the original counterpart of the Letter of Credit, sot hat it can be canclled by the Bank of Nova Scotia. (cc: all counsel, financial deputy, LV) [Entry Date: 12/29/00] (CSD) (Entered: 12/29/2000)
03/13/2001	472	ORDER by Magistrate Judge James D. Moyer re [460-1]; UST,Inc as administrator of the fund, shall at least 5 days prior to due date of any tax

		payment, advise CRIS and clerk of ct of amt of payment and provide a completed form 8109-B deposit slip; CRIS & clerk are authorized to take such steops as necessary to effect timely payment from the Fund of the taxes due adn owing; this order does not authorized CRIS or the clerk to make any tax payment which would result in the Fund being reduced below the amt of $500,000 as required in the Order of 10/5/00 (cc: all counsel, faxed to John Reed) [Entry Date: 3/13/01] (MLG) (Entered: 03/13/2001)
06/29/2001	473	SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOTION by counter-defendant Conwood Sales Co L P, counter-defendant Conwood Co L P to motion for attorney & costs [375-1] (KJI) (Entered: 06/29/2001)
07/03/2001		DOCUMENT NUMBER: 473 SUBMITTED to Judge Moyer (KJI) (Entered: 07/03/2001)
09/04/2001	474	FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION concerning motion for attorney fees & costs [375-1] by USMJ James D. Moyer; recommending plaintiffs' motion be granted in the amount of $13,074,600.53 (cc: all counsel) [Entry Date: 9/4/01] (SDB) (Entered: 09/04/2001)
09/13/2001		FILE RETURNED to USDC, Paducah (vols 9 & 10 w/two boxes confidential records) (JCD) (Entered: 09/13/2001)
09/18/2001	475	OBJECTIONS by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to Findings of Fact [474-1] (filed in LV) (KJI) (Entered: 09/20/2001)
09/26/2001		FILE SUBMITTED Vol. 10 to Duncan in BG (KJI) (Entered: 09/26/2001)
09/28/2001	476	RESPONSE TO OBJECTIONS by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to findings of fact motion FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION [474-1]; tendered order (KJI) (Entered: 09/28/2001)
09/28/2001	477	AMENDED RESPONSE TO OBJECTIONS by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to findings of fact motion FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION [474-1] (KJI) (Entered: 09/28/2001)
10/04/2001	478	MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for order to withdraw inadvertent filing ; order tendered (KJI) (Entered: 10/04/2001)
10/04/2001	479	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc for leave to file reply ; reply attached; order tendered (filed in LV) (KJI) (Entered: 10/10/2001)
10/12/2001	480	ORDER by Judge Thomas B. Russell granting motion for order to withdraw inadvertent filing DN 476 RETURNED TO PLA'S CNSL PER ORDER [478-1] (cc: all counsel) [Entry Date: 10/12/01] (order rec'd in Clerk's office 10/9/01) (KJI) Modified on 10/12/2001 (Entered: 10/12/2001)
11/01/2001	481	

		MOTION by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P for an order to show cause why UST should not be held in contempt ; attachments in Support; order tendered (KJI) (Entered: 11/01/2001)
11/16/2001	482	MOTION by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to strike plas' mot for an order to show cause why UST should not be held in contempt ; Memorandum in Support; order tendered (filed in LV) (KJI) (Entered: 11/19/2001)
11/19/2001		FILE RETURNED (KJI) (Entered: 11/19/2001)
11/19/2001	483	MEMORANDUM, OPINION, AND ORDER: by Judge Thomas B. Russell re [474-1], re [375-1]; separate order entered this date consistent w/ memo opinion (cc: all counsel) [Entry Date: 11/19/01] {2444} (KJI) (Entered: 11/19/2001)
11/19/2001	484	ORDER by Judge Thomas B. Russell adopting findings of fact motion FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION [474-1], granting motion for attorney fees costs [375-1] (cc: all counsel) [Entry Date: 11/19/01] {2444} (KJI) (Entered: 11/19/2001)
11/26/2001	485	MOTION AND MEMORANDUM by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to amend [484-1], [483-1] ; order tendered (KJI) (Entered: 11/26/2001)
11/29/2001	486	CONSENT MOTION by plaintiffs to extend time to file reply brief until 12/4/01 ; order tendered (JCD) Modified on 11/30/2001 (Entered: 11/30/2001)
11/29/2001	487	NOTICE OF APPEAL by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to USCA, decision [484-1] (cc: all counsel) receipt # 3012027 (filed in LV) (KJI) (Entered: 12/03/2001)
12/03/2001		TRANSMISSION form sent to USCA [487-1] w/ pertinent papers (KJI) (Entered: 12/03/2001)
12/04/2001	488	RESPONSE by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to motion to amend [484-1], [483-1] [485-1] ; order tendered (filed in LV) (KJI) (Entered: 12/05/2001)
12/04/2001	489	RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion to strike plas' mot for an order to show cause why UST should not be held in contempt [482-1] ; order tendered (KJI) (Entered: 12/05/2001)
12/05/2001	490	ORDER by Judge Thomas B. Russell granting motion to extend time to file reply brief until 12/4/01 [486-1] (cc: all counsel) [Entry Date: 12/5/01] (KJI) (Entered: 12/05/2001)
12/11/2001	491	DESIGNATION of Record on Appeal re [487-1] (filed in LV) (KJI) (Entered: 12/12/2001)
12/13/2001	492	

		ORDER by Judge Thomas B. Russell granting motion to amend to state that in addition to attys' fees & expenses awarded plas in the amt of $13,074,600.53 there is also awarded to plas interest thereon from 3/29/00 to be determined in accordance w/ 28 USCA 1961 [484-1], [483-1] [485-1] (cc: all counsel) [Entry Date: 12/13/01] (KJI) (Entered: 12/13/2001)
12/17/2001	493	AMENDED NOTICE OF APPEAL by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant States Tobacc to USCA, decision [484-1], [492-1] (CSD) (Entered: 12/19/2001)
12/17/2001	494	TRANSCRIPT ORDER FORM filed by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc re [493-1], re [487-1]; transcript unnecessary for appeal purposes (CSD) Modified on 12/19/2001 (Entered: 12/19/2001)
12/17/2001	495	REPLY by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc to response to motion to strike plas' mot for an order to show cause why UST should not be held in contempt [482-1] (CSD) (Entered: 12/19/2001)
12/21/2001	496	SUPPLEMENT TO DESIGNATION OF THE RECORD ON APPEAL by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P re document appeal [491-1] (KJI) (Entered: 12/21/2001)
12/26/2001		NOTIFICATION by USCA of Appellate Docket Number 01-6545 (KJI) (Entered: 12/27/2001)
12/27/2001		APPEAL Supplemental Record to USCA (DN 492 & dkt sheet) (KJI) (Entered: 12/27/2001)
01/03/2002	497	ORDER by Judge Thomas B. Russell denying motion to strike plas' mot for an order to show cause why UST should not be held in contempt [482-1], denying motion for an order to show cause why UST should not be held in contempt [481-1] (cc: all counsel) [Entry Date: 1/3/02] {2626} (KJI) (Entered: 01/03/2002)
01/14/2002		REMARK: USCA rec'd suppl transmission form (KJI) (Entered: 01/14/2002)
01/17/2002	498	SECOND SUPPLEMENTAL DESIGNATION OF RECORD ON APPEAL by defendant UST Inc, defendant United St Tobacco Ma, defendant United St Tobacco Sa, defendant United States Tobacc re document appeal [491-1] (filed in LV) (KJI) (Entered: 01/22/2002)
07/22/2002	499	MOTION by defendant UST Inc, defendant U S Tobacco Mfg, defendant U S Tobacco Sales, defendant U S Tobacco Company to amend supersedeas bond and 8/10/00 order setting out conditions for the stay of execution of the jgm [439-1] ; order tendered (filed in LV) (KJI) (Entered: 07/24/2002)
08/01/2002	500	CONSENT ORDER AMENDING AUGUST 10, 2000 ORDER by Judge Thomas B. Russell: re [439-1] see order for specifics (cc: all counsel) [Entry Date: 8/1/02] (KJI) (Entered: 08/01/2002)
08/05/2002	501	MANDATE from USCA dismissing the appeal [493-1], dismissing the appeal [487-1], dismissing the appeal [454-1] (KJI) (Entered: 08/05/2002)

08/14/2002	502	TRANSCRIPT filed of Jury Trial 3/13/00 before Judge Russell Volume X-A (KJI) (Entered: 08/14/2002)
08/19/2002	503	CERTIFIED COPY of Appellate Court Order: agreed mot to w/draw and the joint consent to entry of an order concerning attys' fees are granted (KJI) (Entered: 08/21/2002)
08/19/2002		REMARK: note from USCA-6 mandate has been stayed pending the filing of a petition for writ of certiori (see attachment to DN 503) (KJI) (Entered: 08/21/2002)
11/12/2002		REMARK: ltr from Supreme Court of the United States addressed to USCA-6 placing the writ of certiorari on the dkt as number 02-603 (KJI) (Entered: 11/13/2002)
01/14/2003	504	AGREED ORDER by Judge Thomas B. Russell: re Liquidation of CRIS - Conwood v. US Tobacco Fund; clk USDC SD/TX designated custodian for the CRIS, acting on behalf of the USDC WD/KY shall immediately commence the sale of all securities belonging to the CRIS fund; see order for specifics (FAXED: USDC SD/TX, J. Reed, N. Gorsuch) [Entry Date: 1/14/03] (KJI) (Entered: 01/14/2003)
01/27/2003		REMARK: ltr from the Supreme Court addressed to USCA-6 re the petition for a writ of certiorari is den (KJI) (Entered: 01/27/2003)
01/31/2003	505	MOTION by defendant UST Inc, defendant U S Tobacco Mfg, defendant U S Tobacco Sales, defendant U S Tobacco Company for attorney Marc Schildkraut & William Reynolds to appear pro hac vice (FEE PAID # 12165) ; Affidavit in Support; order tendered (KJI) (Entered: 01/31/2003)
01/31/2003	506	MANDATE from USCA affirming decision of district court (KJI) (Entered: 02/03/2003)
02/03/2003	507	MOTION by defendant UST Inc, defendant U S Tobacco Mfg, defendant U S Tobacco Sales, defendant U S Tobacco Company for protective order ; Memorandum in Support; order tendered (filed in LV) (KJI) (Entered: 02/05/2003)
02/07/2003	508	ORDER by Judge Thomas B. Russell granting motion for attorney Marc Schildkraut & William Reynolds to appear pro hac vice (FEE PAID # 12165) [505-1] (cc: all counsel) [Entry Date: 2/7/03] (KJI) (Entered: 02/07/2003)
02/11/2003	509	MOTION by movant Jason Feuerabend for attorney Kathleen S. Rogers to appear pro hac vice (FEE PAID #12176) ; Affidavit in Support; order tendered (KJI) (Entered: 02/11/2003)
02/11/2003	510	RESPONSE by movant Jason Feuerabend to motion for protective order [507-1] ; order tendered (KJI) (Entered: 02/11/2003)
02/14/2003	511	ORDER by Judge Thomas B. Russell granting motion for attorney Kathleen S. Rogers to appear pro hac vice (FEE #12176) [509-1] (cc: all counsel) [Entry Date: 2/14/03] (KJI) (Entered: 02/14/2003)
02/19/2003	512	

		RESPONSE by plaintiff Conwood Sales Co L P, plaintiff Conwood Co L P to motion for protective order [507-1] ; order tendered (KJI) (Entered: 02/20/2003)
02/24/2003	513	REPLY TO OPPOSITION OF JASON FEUERABEND TO MOTION TO MODIFY PROTECTIVE ORDER by defendant UST Inc, defendant U S Tobacco Mfg, defendant U S Tobacco Sales, defendant U S Tobacco Company re [510-1] (filed in LV) (KJI) (Entered: 02/25/2003)
03/05/2003	514	REPLY by defendant UST Inc, defendant U S Tobacco Mfg, defendant U S Tobacco Sales, defendant U S Tobacco Company to response to motion for protective order [507-1] (filed in LV) (KJI) (Entered: 03/07/2003)
03/20/2003	515	MEMORANDUM OPINION: by Judge Thomas B. Russell re [507-1] separate order entered this date consistent w/ memo opinion (cc: all counsel) [Entry Date: 3/20/03] (KJI) (Entered: 03/20/2003)
03/20/2003	516	ORDER by Judge Thomas B. Russell granting in part, denying in part [507-1] motion for protective order; the protective order DN 26 is modified as follows: paragraph 21 is modified to the extent that US Smokeless shall be required to return or destroy Litigation Materials subject to the protective order as specified in that paragraph ntc of which is provided to this ct and to pla Conwood Company by US Smokeless (the "Follow-On Actions") the provisions to return or destroy at an earlier date is vacated; in all other respects the protective order shall remain in full force and effect as entered (cc: all counsel) [Entry Date: 3/20/03] (KJI) (Entered: 03/20/2003)
08/01/2003		REMARK: list of video tapes that were taken to Camera Shop to be copied for Dick Roberts (KJI) (Entered: 08/01/2003)
03/07/2005		Remark : all sealed documents in vault on second floor per Judge Russell (KJI) (Entered: 03/07/2005)
05/03/2006	517	ORDER by Judge Thomas B. Russell on 5/3/06: counsel for the parties shall withdraw any exhibits within 14 days from entry of this order; in the event the exhibits are not withdrawn within the 14 day period the clerk shall destroy themcc:Counsel(KJS) (Entered: 05/03/2006)
05/17/2006	518	Richard Roberts, counsel for plaintiff withdrew plaintiff's exhibits submitted at trial. (KJS) (Entered: 05/17/2006)
06/12/2006	519	Mail Returned as Undeliverable. Mail sent to Kathleen S. Rogers. (KJS) (Entered: 06/13/2006)
01/23/2008	520	ORDER by Judge Thomas B. Russell on 1/18/08: parties must show cause within 30 days as to why the pleadings filed under seal may not be unsealed and transferred to the Federal Records Center. Show Cause Response due by 2/25/2008.cc:counsel (KJS) (Entered: 01/23/2008)
02/15/2008	521	Unopposed MOTION for Extension of Time to File Response/Reply as to 520 Order *to Show Cause Regarding Sealed Documents* by Plaintiffs Conwood Company L.P., Conwood Sales Company, L.P. Responses due by 2/28/2008 (Attachments: # 1 Proposed Order) (Roberts, Richard) (Entered: 02/15/2008)

02/20/2008	522	ORDER granting 521 Motion for Extension of Time to File Response up to and including 3/3/08. Signed by Judge Thomas B. Russell on 2/20/08. cc:counsel (KJS) (Entered: 02/20/2008)
03/03/2008	523	RESPONSE TO ORDER TO SHOW CAUSE filed by Conwood Company L.P., Conwood Sales Company, L.P.. (Attachments: # 1 Affidavit Declaration of John S. Wilson, III, # 2 Proposed Order Maintain Individual Conwood Documents Under Seal) (Roberts, Richard) (Entered: 03/03/2008)
03/03/2008	524	Mail Returned as Undeliverable. Mail sent to attorney Michael C. Daniel (KJS) (Entered: 03/04/2008)
03/05/2008	525	Mail Returned as Undeliverable. Mail sent to Richard Verheij (KJS) (Entered: 03/05/2008)
05/19/2008	526	ORDER by Judge Thomas B. Russell on 5/19/08: order unsealing documents, except for DN's 208,212,222,235, and 425 and all attachments to those documentscc:counsel (KJS) (Entered: 05/19/2008)
05/27/2008	527	Mail Returned as Undeliverable. Mail sent to attorney Kathleen S. Rogers (KJS) (Entered: 05/28/2008)
06/02/2008	528	Mail Returned as Undeliverable. Mail sent to attorneys Martha Weiss, Richard Verheij (KJS) (Entered: 06/02/2008)
06/02/2008	529	ORDER by Judge Thomas B. Russell on 6/2/08: regarding letter dated 2/5/1999, parties shall make arrangements with the Court to have these documents returned or they will be destroyed/disposed of by the Clerkcc:counsel (KJS) (Entered: 06/02/2008)
06/02/2008	530	ORDER by Judge Thomas B. Russell on 6/2/08: parties submitted pre-marked proposed trial exhibits, the documents are not part of the Court file, within 30 days parties shall make arrangments with the Court to have these documents returned or they will be destroyed/disposed of by the Clerk cc:counsel (KJS) (Entered: 06/02/2008)
06/02/2008	531	ORDER by Judge Thomas B. Russell on 6/2/08: re DN 469, within 30 days parties shall make arrangements with the Court to have the documents returned or they will be destroyed/disposed of by the Clerk cc:counsel (KJS) (Entered: 06/02/2008)
06/02/2008	532	ORDER by Judge Thomas B. Russell on 6/2/08: unredacted billing records and expenses shall be returned to the parties, the parties shall contact the court within 30 days to make arrangements for the documents to be returned or they will destroyed/disposed of by the Clerk cc:counsel (KJS) (Entered: 06/02/2008)
06/17/2008	533	Mail Returned as Undeliverable. Mail sent to attorney Kathleen S. Rogers (KJS) (Entered: 06/18/2008)
06/23/2008	534	Mail Returned as Undeliverable. Mail sent to attorney Martha Weiss and Richard Verheij (KJS) (Entered: 06/23/2008)
06/24/2008	535	ORDER by Judge Thomas B. Russell on 6/24/08: Vacating 532 Order; see order for specificscc:counsel (KJS) (Entered: 06/24/2008)

07/07/2008	536	Mail Returned as Undeliverable. Mail sent to attorneys Richard Verheij and Martha Weiss (KJS) (Entered: 07/07/2008)
07/16/2008	537	Mail Returned as Undeliverable. Mail sent to attorney Kathleen S. Rogers (KJS) (Entered: 07/16/2008)
07/31/2008	538	NOTICE that documents have been destroyed by the Clerk re 529 Order (KJS) (Entered: 07/31/2008)
07/31/2008	539	NOTICE that documents were destroyed by the Clerk re 531 Order (KJS) (Entered: 07/31/2008)
07/31/2008	540	NOTICE that documents were destroyed by the Clerk re 530 Order, (KJS) (Entered: 07/31/2008)
09/02/2008	541	Mail Returned as Undeliverable re DN 535 sent to Robert B. Greenbaum (CSD) (Entered: 09/02/2008)

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WESTN. DIST. KENTUCKY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

Civil Action No. 5:98CV-108-R

JURY TRIAL DEMANDED

Complaint

Nature of the Action

1. Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood") seek treble damages and injunctive relief to redress injuries to competition in the national market for moist snuff caused by United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc., and UST Inc. (collectively, "UST"). UST, the world's largest manufacturer of smokeless tobacco, has maintained a monopoly share in excess of 82% of this approximately $1.5 billion market through illegal and exclusionary conduct that

has suppressed competition, raised prices, stifled innovation, and reaped hundreds of millions in profits each year for UST.

2. In 1979 Conwood introduced Hawken™, which competed with UST's moist snuff. Hawken was offered in a plastic can, which preserves freshness far longer than the cardboard containers then used by UST. UST had used the brief "shelf life" of cardboard containers to keep rivals out of the market. In addition, UST had instituted a policy -- which became the industry standard -- of permitting retailers to return all dated products. By combining this policy with packaging that had a short shelf life, UST imposed huge costs on rivals seeking to introduce new products to the market. No other firm could afford to enter the market on these terms. But Conwood's long-lived plastic cans reduced returns of stale product, allowed Conwood to elude the previously insurmountable barrier, and for the first time offered moist snuff consumers a choice.

3. UST "tolerated" Conwood's entry into the market while Hawken's sales were negligible. But as Hawken's plastic can, "rough cut," and other innovations started to win consumers, and as Conwood introduced other new products directly competitive with UST's brands, UST abused its monopoly power to prevent distribution of competing products. It regularly removed or hid Conwood's moist

snuff, eliminated or vandalized Conwood's advertising and product display racks, induced retailers and distributors to stop carrying Conwood's competitive products in the areas where they were most popular, and spread lies to consumers about Conwood's competitive products (for example, that Conwood's moist snuff was tainted with "stems" and even fiberglass). UST also schemed to ban advertising and other forms of promotion by which the smaller firms compete, and through false information to promote legislation that would put Conwood and other small moist snuff manufacturers (but not UST) out of business.

4. Through its exclusionary conduct, UST succeeded in halting the substantial sales growth that Conwood had achieved through competition on the merits. Having suppressed competition, UST was able to raise prices on its premium products year after year without interruption. But for UST's suppression of competition, Conwood would have continued to win customers through product innovation and lower prices, and would thereby have increased its market share and its profits. Conwood estimates that its actual damages, before trebling, exceed $400 million.

Parties, Jurisdiction, and Venue

5. Plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., are Delaware limited partnerships with their

principal places of business in Memphis, Tennessee. Plaintiffs manufacture and distribute moist snuff, including Kodiak™, Cougar™, and other brands. Conwood transacts business throughout the United States, including this district, and has a manufacturing facility located within this district at Bowling Green, Kentucky. Conwood also buys substantial amounts of tobacco for use in smokeless products from farmers located in this district.

6. Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc., and UST Inc. are Delaware corporations with their principal places of business in Greenwich, Connecticut.

United States Tobacco Sales and Marketing Company Inc. is one of two wholly owned subsidiaries of defendant United States Tobacco Company, and is engaged in the marketing and sales of smokeless tobacco products, in this district and throughout the United States.

United States Tobacco Manufacturing Company Inc. is the other wholly owned subsidiary of defendant United States Tobacco Company, and is engaged in the manufacture of smokeless tobacco products including moist snuff in this district (at a 900,000 square foot complex of offices, plants, and warehouses in Hopkinsville,

Kentucky) and elsewhere in the United States.

United States Tobacco Company operates exclusively through its two wholly owned subsidiaries to manufacture, market and sell smokeless tobacco products including moist snuff in this district and throughout the United States. On information and belief, United States Tobacco Company controls the acts and decisions of both of its wholly owned subsidiaries, which function as agents of United States Tobacco Company in this district and elsewhere.

UST Inc. operates exclusively through its wholly-owned subsidiary, United States Tobacco Company to manufacture, market and sell smokeless tobacco products including moist snuff in this district and throughout the United States. On information and belief, UST Inc. controls the acts and decisions of its wholly owned subsidiary United States Tobacco Company and, through that subsidiary, controls the acts and decisions of the two wholly owned subsidiaries of United States Tobacco Company, which function as agents of UST Inc. in this district and elsewhere.

UST transacts business throughout the United States, including this district, directly and through agency. UST also has hundreds of millions of dollars worth of assets in this district and buys substantial amounts of tobacco for use in smokeless products from

farmers located in this district.

7. This Court has subject matter jurisdiction over the action, personal jurisdiction over each of the defendants, and venue is proper in this district.

a. *Subject Matter Jurisdiction* exists because the action is instituted under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26, to redress and prevent injuries caused by UST's violations of Section 2 of the Sherman Act, 15 U.S.C. § 2, and the Lanham Act. 28 U.S.C. §§ 1331 and 1337. This action also states claims under state law arising from the same and related conduct, for which the Court has jurisdiction under 28 U.S.C. § 1367.

b. *Personal Jurisdiction*. The Court has personal jurisdiction over each of the defendants under Section 12 of the Clayton Act, 15 U.S.C. § 22, and Kentucky Revised Statutes § 454.210.

1. Defendant United States Tobacco Manufacturing Company Inc. has registered to do business and therefore has consented to personal jurisdiction in this Commonwealth.

2. Defendant United States Tobacco Sales and Marketing Company Inc. may be found and transacts business in this district, 15 U.S.C. § 22, the claims stated herein arise from its transacting business, contracting to supply goods and services, and causing

tortious injury by acts or omissions in this Commonwealth, and the company regularly does and solicits business, engages in other persistent course of conduct, and derives substantial revenue from goods used or consumed or services rendered in this Commonwealth. The secretary of state of the Commonwealth is therefore the designated agent for service of process on this defendant. Kentucky Revised Statutes § 454.210(2)(a)(1)-(4).

3. Defendants United States Tobacco Company and UST Inc., directly or by their agents, may be found and transact business in this district, 15 U.S.C. § 22, the claims stated herein arise from their transacting business, contracting to supply goods and services, and causing tortious injury by acts or omissions in this Commonwealth, and the companies regularly do and solicit business, engage in other persistent course of conduct, and derive substantial revenue from goods used or consumed or services rendered in this Commonwealth. The secretary of state of the Commonwealth is therefore the designated agent for service of process on these defendants. Kentucky Revised Statutes § 454.210(2)(a)(1)-(4).

c. *Venue* is proper in this district under 15 U.S.C. § 22, 28 U.S.C. § 1391, Local Rule 4, and Kentucky Revised Statutes § 452.460, because defendants maintain offices, have agents,

transact business, and are found in this district. Certain of the unlawful acts alleged herein were performed and had effects within this district.

Trade and Commerce

8. Moist snuff is the dominant smokeless tobacco product in the United States. In 1996, moist snuff accounted for 76% by value (or approximately $1.5 billion in sales) of the smokeless tobacco sold in the United States. Moist snuff is the only smokeless tobacco market that has grown in recent years. The moist snuff market has tripled in size in the last ten years alone.

9. According to surveys, consumers who use moist snuff typically enjoy it in a "pinch" placed between the cheek and gum. Moist snuff consumers do not consider other forms of smokeless tobacco -- dry snuff and chewing tobacco -- to be substitutes for moist snuff, and typically will not switch to such products irrespective of price differentials.

10. Smokeless manufacturers cannot readily convert production facilities devoted to other tobacco products to production of moist snuff. Nor can these or other firms effectively enter the moist snuff market. There are virtually insuperable barriers to entry, raised in substantial part by UST's dominant and established brands, its huge cash resources and history of anticompetitive

tactics, its longstanding and often exclusive contracts with farmers, distributors, and retailers, and the increasingly narrow channels for distribution of tobacco products.

11. The market for moist snuff is a national market in which only four firms are considered competitors: UST, Conwood, Swisher International, Inc. ("Swisher"), and Swedish Match North America, Inc. ("Swedish Match").

12. For decades UST had almost 100% of the moist snuff market, which enabled it to charge supra-competitive prices and thereby collect billions of dollars from consumers. UST controls the oldest and best known moist snuff trade brands -- Copenhagen (introduced in 1822) and Skoal (1934). UST enjoys "prodigious free cash generation" (Goldman, Sachs & Co.) from high mark-ups on its low cost moist snuff products and domination of the chain of distribution -- with operating net profits in 1997 of over $712 million. UST continues to maintain a market share in excess of 82% of the moist snuff market.

13. Conwood's share of the moist snuff market is approximately 13.5%. In recent years Conwood's share growth has effectively ceased. Conwood's market share is expected to remain flat or decline in the future if UST's anticompetitive conduct is not enjoined. The other two firms (Swisher and Swedish Match)

total approximately 4.3% of the market. According to industry analysts, their shares are also expected to remain flat or decline.

History of UST and Conwood

14. Until just after the turn of the century, all moist snuff sales were controlled by a cartel known as the American Tobacco Trust. This cartel was broken up in a seminal Sherman Act prosecution. Three smokeless firms (now known as UST, Swisher, and Conwood) were created. UST grew dramatically and soon became dominant. Its growth was fueled by its monopoly of the lucrative moist snuff market. UST Inc. now ranks among the 200 largest publicly held U.S. companies. In 1997, UST Inc. reported sales from smokeless tobacco of $1.18 billion.

15. Conwood and Swisher remained relatively small in the decades following dissolution of the cartel. Both marketed dry snuff or chewing tobacco, products that appealed to older, typically rural and less affluent consumers. In recent years, sales of these products have stagnated or declined.

Conwood Enters the Moist Snuff Market

16. Facing the decline of its traditional markets, Conwood recognized that to survive it had to venture into the growing moist snuff market. In 1979, after unsuccessful attempts to crack the UST monopoly with products sold under the brands Stag™ and

Wintermint™, Conwood introduced Hawken™, its first nationally distributed product that competed with UST's moist snuff brands. Hawken offered customers a new product with innovative packaging, at a competitive price.

17. Hawken's plastic can was an innovation of critical importance to Conwood's attempt to gain a foothold in a market wholly monopolized by UST. UST had used the short shelf life of its moist snuff products (which were packaged in cardboard containers, and thus susceptible to becoming stale within weeks of delivery to stores) to entrench its monopoly. By telling retailers and distributors that they could return stale product, UST effectively required any new entrant to bear the huge cost of paying for return of dated products even before the new entrant gained any share of the market. This prohibitive cost chilled competition. But Hawken's plastic can gave this product a far longer shelf life. This reduced significantly retailers' returns and allowed Conwood to enter the market with a new product as a robust competitor unintimidated by the huge return-cost barrier erected by UST.

18. UST initially took little notice of Conwood's entry into a market competitive with UST. UST representatives even told Conwood representatives that UST would "tolerate" Conwood's

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marginal presence.

19. But Conwood sought to compete for -- and win -- substantial market share. And it quickly began to do just that. In 1981 it introduced a premium brand (Kodiak™) of moist snuff aimed directly at UST's premier Copenhagen™ and Skoal™ brands. With competitive pricing, innovative packaging and a different taste popular with consumers, Kodiak propelled Conwood's moist snuff sales to over $30 million in 1985, and took its market share to nearly 9% in the same year.

20. Conwood continued to innovate and provide new products at competitive prices. In 1986 it introduced "J-racks." Designed for use in stores as a holder for round cans of moist snuff, these racks allow customers to see Conwood's advertising logo on the top of the moist snuff can. UST had long used "S-racks," which show only the can's side. The introduction of J-racks enhanced display of Conwood's products and thereby consumer awareness. This helped Conwood win sales and market share.

21. UST sought to sell only "premium" brands (Skoal and Copenhagen) at premium, supra-competitive prices. In 1995 Conwood challenged this monopoly price structure with the introduction of Cougar™, a discount-priced (or "value") brand of moist snuff. Cougar soon won sales from the premium brands. Conwood's popular

"value brand" benefitted consumers and threatened the huge profit margins that UST had long enjoyed.

UST's Campaign to Exclude Conwood

22. Conwood continued to innovate in the market and offer benefits to consumers with its J-racks, improved packaging, value brand pricing, popular new tastes, and other innovations. UST recognized that Conwood was likely to continue to grow significantly if UST did not arrest that growth. UST responded with systematic and illegal steps to restrain competition, and thus reduce the choices to consumers from Conwood and other small moist snuff manufacturers.

23. Using its monopoly power, UST developed a multi-faceted strategy of exclusionary acts for execution by its large nationwide sales force and others. On information and belief, these UST representatives acted at either the express direction, or with the tacit approval of, UST. Through these means UST sought to damage competition by eliminating or suppressing consumers' opportunity to be aware of and to choose Conwood products. This impaired competition permitted UST to impose annual price increases on consumers, for its premium moist snuff brands, without interruption. UST's exclusionary campaign included, but was not limited to:

24. *Suppression of Competition Through Theft of Conwood Moist Snuff, Distribution Racks, and Point of Sale Advertising.* Conwood products are typically displayed in stores on special plastic racks that Conwood provides to the stores. Consumers are directed to these racks by placard (often called "point of sale") advertising. UST has routinely and systematically, in stores across the United States, taken Conwood moist snuff from the racks (to make it inaccessible to consumers), discarded or defaced Conwood distribution racks, and discarded or defaced Conwood point of sale advertising. In a recent one year period, for example, more than 10,000 Conwood racks were taken out of stores in California alone. This suppression of Conwood's distribution impeded competition and deprived consumers of choice. UST representatives have admitted to Conwood representatives that UST district managers tell sales representatives that the "way to get ahead" in UST is to remove Conwood's racks, that they must "turn up the heat on Conwood," and that if they do not "control the moist racks," they will be "writ[ten] up." When Conwood sales personnel have complained about removal of products, racks, or advertisements by UST, UST district managers have responded that "anything goes" and, in one particularly egregious instance, to "hold on to your pants . . . it's only going to get worse." (Photographs

documenting a few examples of this misconduct are attached hereto as Exhibit "A".)

25. *Suppression of Competition Through Exclusion of Competing Products Based on Misrepresented "Plan-o-Grams."* "Plan-o-grams" are schematic diagrams commonly used by large chain retail stores to set the exact location, type of display, and amount of space to be allotted to the various competing tobacco brands and companies. UST has employed plan-o-grams that exclude Conwood products from stores, contrary to the actual wishes of store management. UST has used these documents to persuade low-level store employees to permit UST to stock stores free of Conwood products. In early 1997, for example, UST took a sample plan-o-gram for Clark Oil stores -- a chain of some 200 stores primarily in Michigan -- and then misrepresented to individual stores that they were *required* to stock UST products and exclude Conwood products. This was untrue. UST's dominant market share made this scheme possible. Through such repeated fraudulent acts, UST denied consumers the benefits of choice.

26. *Suppression of Competition Based on False Representations that UST is the "Category Manager" With Authority To Control Store Shelves.* UST routinely removes Conwood racks, advertising and

products through deception of store personnel. An example of this deception is the "category manager" ruse. UST has falsely represented to low-level store employees that its representatives are the store's authorized "category manager" for smokeless tobacco products, with the right to set the shelves for all brands. Under color of this supposed authority, which in fact UST does not have, UST routinely arranges the smokeless tobacco products in a way that makes competitors' products unavailable or inaccessible. UST's dominant position in the market helped to make UST's claim of authority plausible. UST has successfully employed this tactic in Florida Winn-Dixie stores, Minnesota Food-N-Fuel outlets, and elsewhere.

27. *Suppression of Competition Through Frequent Rack Style Changes to Force Conwood from Stores.* UST, as the monopoly provider of moist snuff, dominates stores' moist snuff sections with its display racks. Conwood and other competitors attempt similarly to display their products on their own racks. Stores typically prefer to have all such racks be consistent in appearance. But UST sabotages such consistency by routinely replacing its racks with racks of a different style and shape. UST then discards Conwood's racks, with or without permission from the

store, because they do not conform in style and shape to the new UST racks. In the last few years -- and for no apparent purpose other than to remove Conwood racks and impose costs on Conwood -- UST has introduced short racks, tall racks, wall racks and others, across the United States.

28. *Exclusive Dealing Agreements.* UST has used its power as a monopolist to induce retail chains and stores across the United States to enter into written and oral agreements barring or restricting Conwood products, racks and point of sale advertising. These agreements, which cover thousands of stores, take many forms. For example:

a. UST has an agreement with some or all Wal-Mart Stores, Inc. outlets (a national chain of over 1900 stores) that gives UST control over the entire moist snuff section of the store. UST is permitted to install its own distribution racks; remove Conwood's distribution racks; force Conwood's products into UST racks; and restrict the space and placement of Conwood products in its racks. This agreement also prohibits Conwood in-store promotions and point of sale advertisements, which further and artificially suppresses demand for Conwood's products. UST reportedly has similar agreements with the 642-store Dairy Mart chain located in seven states; the 498-store WaWa chain; the 245-

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store HEB Store chain; the 35-store Orton Convenience store chain; the Minute Man convenience chain; Uncle Willie's chain in Delaware; Quick Sav stores in Michigan; the Mountaineer Marts chain in West Virginia; and countless other retail outlets across the country.

b. Under the "Copenhagen Incentive Program," UST pays participating retailers across the country to help it restrict both the supply and demand for Conwood products. UST obtains control over all point of sale advertising ("[w]e will have primary positioning of all smokeless tobacco POS [point of sale]"). Participating retailers must also refuse to honor any Conwood promotional discounts ("[n]o competitive round can buy downs") and sample give-away programs (allowing UST "exclusive adult sampling rights").

c. Under its "Free Standing Display #2908 Placement Agreement" scheme, UST provides a moist snuff display stand and other inducements (including cash) to retailers; in return, UST products alone are permanently entitled to positioning on the stand's top shelf, and competitors are relegated to lower, less visible racks. Competitors' point of sale advertisements are restricted to small "product labels" immediately above their distribution slots, while UST is guaranteed advertising on a large overhead sign and on dominating "header cards" placed above all

distribution slots -- including Conwood's slots.

d. Pursuant to its "Customer Alliance Program," UST exchanges discounts on its prices for guarantees from chains and individual retailers that they will provide information about *Conwood's* sales to UST and give UST control of at least 80 percent of all moist snuff shelf space within the store.

(A few examples of these exclusive dealing contracts are attached hereto as Exhibit "B".)

29. *Disparagement of Conwood Products*. UST has regularly and systematically spread disparaging falsehoods about Conwood's products. It has, for instance, used the false pretext that Conwood products are "stale," "out-of-date," or have been "discontinued" in order to remove them from retailers' shelves; misrepresented that Conwood racks no longer "comply" with federal regulations and must be removed; perpetuated a myth that Conwood products contain fiberglass and are full of tobacco stems; and scrawled disparaging comments on Conwood ads, including "low quality." These disparagements are not isolated instances, but form part of the overall UST campaign to drive Conwood moist snuff products from store shelves and thereby perpetuate UST's monopoly. This is yet another respect in which UST has used its size and

monopoly power to destroy competition. (A videotape documenting a few examples of this misconduct is attached hereto as Exhibit "C".)

30. *Predatory pricing.* When retailers and distributors have persisted in carrying Conwood products, UST has offered its own products below cost for no economic purpose other than to drive Conwood from those distribution outlets.

31. Recognizing the threat from Conwood's discount brands, UST has also begun introducing its own discount product, Red Seal. It has largely limited distribution of this product, however, to regions where Conwood's discount products have threatened UST market share. In these areas, UST has systematically campaigned, in the words of one of its representatives, to "give away" its product. In Louisiana and Mississippi, for instance, customers purchasing a single can of moist snuff have recently been given 10 or more free cans of Red Seal in return for the surrender of their chosen brand to the UST representative, while store owners are paid the full retail price for all these "lost sales." Customers are also offered 4 rolls (40 cans) of Red Seal for approximately $14, or roughly 35 cents a can, less than one third Red Seal's normal retail price and, on information and belief, less than UST's costs. Store owners are again compensated fully for these "lost sales."

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This "give away" plan is, on information and belief, part of a scripted UST scheme to undercut and eliminate Cougar from the marketplace, so that UST can return to premium pricing for all its products. If this scheme is successful, UST will more than recoup any losses it sustains from "give aways."

Misuse of Tobacco Settlement for Anticompetitive Purposes

32. UST's campaign of exclusionary conduct damaged competition and consumers by reducing the availability of Conwood's competing products. But it did not eliminate Conwood entirely as a competitor. For that, UST has sought to erect even higher barriers to competition in the national market for moist snuff.

33. For example, UST sought to involve itself in the "Global Settlement" of litigation between cigarette companies and various state attorneys general and private plaintiffs' lawyers. UST, was the sole smokeless tobacco company permitted to participate in this initiative (United States Tobacco Company, alone among the smokeless firms, signed the "Global Settlement"). On information and belief, UST sought to embed the Global Settlement with provisions that would cause disproportionate harm to its moist snuff rivals and, ultimately, drive them from the market.

34. UST promoted a variety of anticompetitive measures, such as a payment structure for the purported settlement amounts that

was designed to impose substantial and punitive costs on non-participating firms, requiring such firms to pay as much as 150% of the amount to be assessed against similarly-situated participants in the private agreement.

35. Congress asked the Federal Trade Commission ("FTC") to analyze the Global Settlement. The FTC readily recognized its anticompetitive impact. It expressly concluded that the proposed settlement would prevent "new entrants or maverick firms with new products, lower priced products, or new brands [from] gain[ing] market share from the other firms in the market . . . . [R]estrictions on advertising could reduce competition and lead to higher prices." See, e.g., FTC, Competition and the Financial Impact of the Proposed Tobacco Industry Settlement Appendix (Sept. 1997).

36. Recognizing the antitrust violations patent in their joint and individual acts, UST and the big cigarette companies proposed an unprecedented blanket antitrust immunity for their private efforts to implement and enforce competitive restrictions. They were required to acknowledge that, without such immunity, their acts "could well be treated as a per se violation of the antitrust laws." See Testimony of Meyer G. Koplow before the Senate Judiciary Subcommittee on Antitrust, Business Rights and

competition (Oct. 29, 1997).

37. UST used the confusion engendered by the Global Settlement and related legislative and regulatory initiatives to encourage distributors and retailers to boycott Conwood and other small rivals. UST representatives warn that stores must "get into compliance." "Compliance," their sales agents insist, means removing tobacco from the open shelves and placing it behind the counter; removing or replacing "unauthorized" Conwood distribution racks with "approved" UST racks; and restricting or eliminating Conwood point of sale advertising materials.

38. UST also misled and threatened distributors, for the purpose of inducing such distributors to refuse to deal with Conwood and the other small firms. It did so by referencing provisions in the Global Settlement that would, if enacted by Congress, protect participating manufacturers and their distributors from civil lawsuits, leaving nonparticipating companies (and those who do business with them) open to such suits. UST has led distributors to believe that these immunity provisions are effective now -- or that they soon will become effective and distributors must act now -- and that to gain the benefits of immunity distributors must refuse to do business with non-participating firms like Conwood.

39. Most recently, UST sought to lobby in Congress for passage of a proposed federal law that would cost UST hundreds of millions of dollars per year, but would put its three competitors in moist snuff out of business. UST was asked why it preferred this bill to an alternative bill that would cost UST hundreds of millions less. When challenged with the assertion that only a plan to drive smaller rivals from the market could explain its position, UST had no response.

Injury, Damages, and Anticompetitive Effects

40. As a direct and proximate result of UST's exclusionary conduct, Conwood has been injured in its business and property in an amount that cannot now be quantified, but which, upon information and belief, exceeds $400 million. UST's conduct has affected and, unless enjoined, will continue to affect interstate commerce. These effects include, without limitation: (a) reduction or elimination of consumer choice among competing moist snuff products; (b) foreclosure of access to retail and distribution facilities necessary for smaller and/or new tobacco manufacturers to compete; (c) increased barriers to entry in the moist snuff market; (c) chilling innovation within the moist snuff industry; (d) loss of competition among manufacturers for retail and distribution outlets; (e) loss of outlets for sale of tobacco

by growers.

CLAIMS FOR RELIEF

Count I

Sherman Act § 2: Unlawful Monopolization

41. Plaintiffs incorporate paragraphs 1 through 40 by reference.

42. UST's conduct constitutes the intentional and unlawful maintenance of monopoly power in the relevant market for moist snuff, in violation of section 2 of the Sherman Act, 15 U.S.C. section 2.

43. In the alternative, UST's conduct is an attempt to monopolize this market in violation of section 2. UST has acted with the specific intent to attempt to monopolize this market, and has sufficient market power to create a dangerous probability of success of monopolizing the market.

44. UST has excluded, or attempted to exclude, competition in this market by preventing or impeding the distribution of competing products.

45. UST's conduct has injured competition and the consumer in the relevant market for moist snuff, suppressed sales of Conwood's products, increased Conwood's development and marketing costs, diminished Conwood's future sales opportunities, increased

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Conwood's operating costs, and prevented Conwood from offering new products to consumers.

Count II

Violation of Section 43(A) of the Lanham Act

46. Plaintiffs incorporate paragraphs 1 through 45 by reference.

47. UST has made false and misleading representations of fact in interstate commerce and in connection with goods or services in commercial advertising or promotion. UST has misrepresented the nature, qualities, and/or origin of plaintiffs' goods, services, or commercial activities. Plaintiffs have been or are likely to be damaged by these acts.

48. UST's false representations actually have confused and deceived, and have the tendency to confuse and deceive, a substantial number of consumers, retailers, and wholesalers concerning the characteristics of products and services sold by the plaintiffs in interstate commerce.

49. Plaintiffs have lost sales, profits, and goodwill, and have suffered injury to their business reputation. Plaintiffs have been and will continue to be injured in their efforts to sell their products and services. Plaintiffs have sustained and will continue to sustain damages, the nature and extent of which cannot presently

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be determined.

Count III

Tortious Interference with Contract

50. Plaintiffs incorporate paragraphs 1 through 49 by reference.

51. UST intentionally, maliciously, improperly and without right or justification engaged in acts calculated to cause damage to plaintiffs in their contractual and economic rights, including but not limited to their rights under contracts with distributors and retailers, with knowledge of those rights.

52. UST acted with ill will, improperly, and in wanton disregard of plaintiffs' contractual and economic rights.

53. As a direct and proximate result of UST's tortious interference with plaintiffs' contractual and economic rights, plaintiffs have suffered damages.

Count IV

Tortious Interference with Prospective Advantage

54. Plaintiffs incorporate paragraphs 1 through 53 by reference.

55. Plaintiffs had economic relationships with retailers and distributors which contained the probability of future economic

benefit in the form of sales of plaintiffs' products.

56. UST was aware of these relationships and intentionally interfered with them by the acts specified herein. UST acted, with improper motive, purposefully and maliciously and with intent to injure plaintiffs by inducing retailers and distributors not to continue or to enter into a business relationship with plaintiffs.

57. As a direct and proximate result of UST's tortious interference with plaintiffs' prospective business relations, plaintiffs have suffered damages.

Count V

Violation of Kentucky Revised Statute Section 365.050

58. Plaintiffs incorporate paragraphs 1 through 57 by reference.

59. UST has engaged in the secret payment or allowance of rebates, refunds, commissions or unearned discounts, in the form of money or otherwise, and secretly extended to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of plaintiffs and to competition, in violation of Kentucky Revised Statutes § 365.050.

60. As a direct and proximate result, plaintiffs have suffered damages.

16diii000091

Count VI

Product Defamation

61. Plaintiffs incorporate paragraphs 1 through 60 by reference.

62. UST has published to customers, retailers and distributors statements disparaging the quality of plaintiffs' products.

63. These disparaging statements were harmful to plaintiffs' pecuniary interests.

64. UST intended that the publication of the disparaging statements cause harm to plaintiffs' pecuniary interests, or either recognized or should have recognized that they were likely to do so.

65. UST knew that the statements were false or acted in reckless disregard of their truth or falsity.

66. UST's statements have caused plaintiffs' pecuniary injury.

16diii000092

Count VII

Unjust Enrichment

67. Plaintiffs incorporate paragraphs 1 through 66 by reference.

68. As a direct result of its unlawful conduct, UST has unjustly received and will receive substantial profits and other economic advantages, all to the detriment of plaintiffs.

69. UST should be required to disgorge the amounts by which it has been unjustly enriched.

Count VIII

Conversion/Trover

70. Plaintiffs incorporate paragraphs 1 through 69 by reference.

71. UST intentionally, wrongfully, and without permission, converted, took, detained, used, or disposed of plaintiffs' property, including without limitation its racks, point of sale advertisements, and moist snuff products.

72. Plaintiffs have been injured as a direct result of UST's unlawful conduct.

73. UST acted willfully and maliciously and with a conscious indifference to the consequences to plaintiffs.

Prayer for Relief

WHEREFORE, plaintiffs respectfully pray that this Court enter judgment on their behalf and against defendants and award as follows:

(a) An Order directing the termination of the alleged anticompetitive conduct and injunctive relief which restores plaintiffs to the same position they occupied prior to UST's unlawful exclusionary conduct;

(b) Treble damages (including, without limitation, lost profits), in an amount to be determined at trial but believed by plaintiffs to be substantially in excess of a billion dollars;

(d) Plaintiffs' costs of suit herein, including without limitation their attorneys' fees actually incurred;

(e) Punitive damages;

(f) Such other relief as may be just and proper.

16diii000094

Request for Trial by Jury

Plaintiffs respectfully request trial by jury in this action.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts
WHITLOW, ROBERTS, HOUSTON
& STRAUB
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, Kentucky 42002-0995
(502) 443-4516
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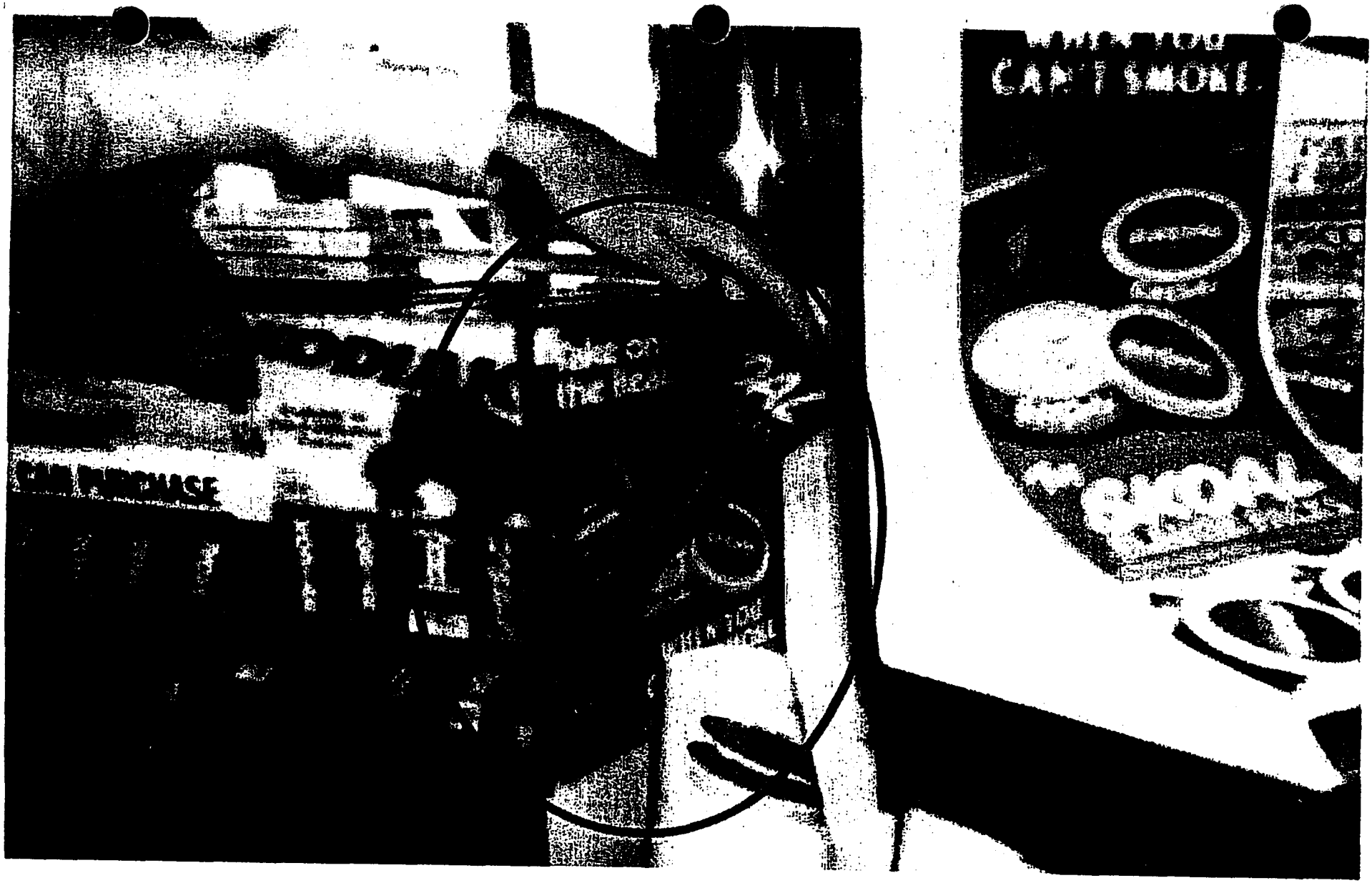
Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

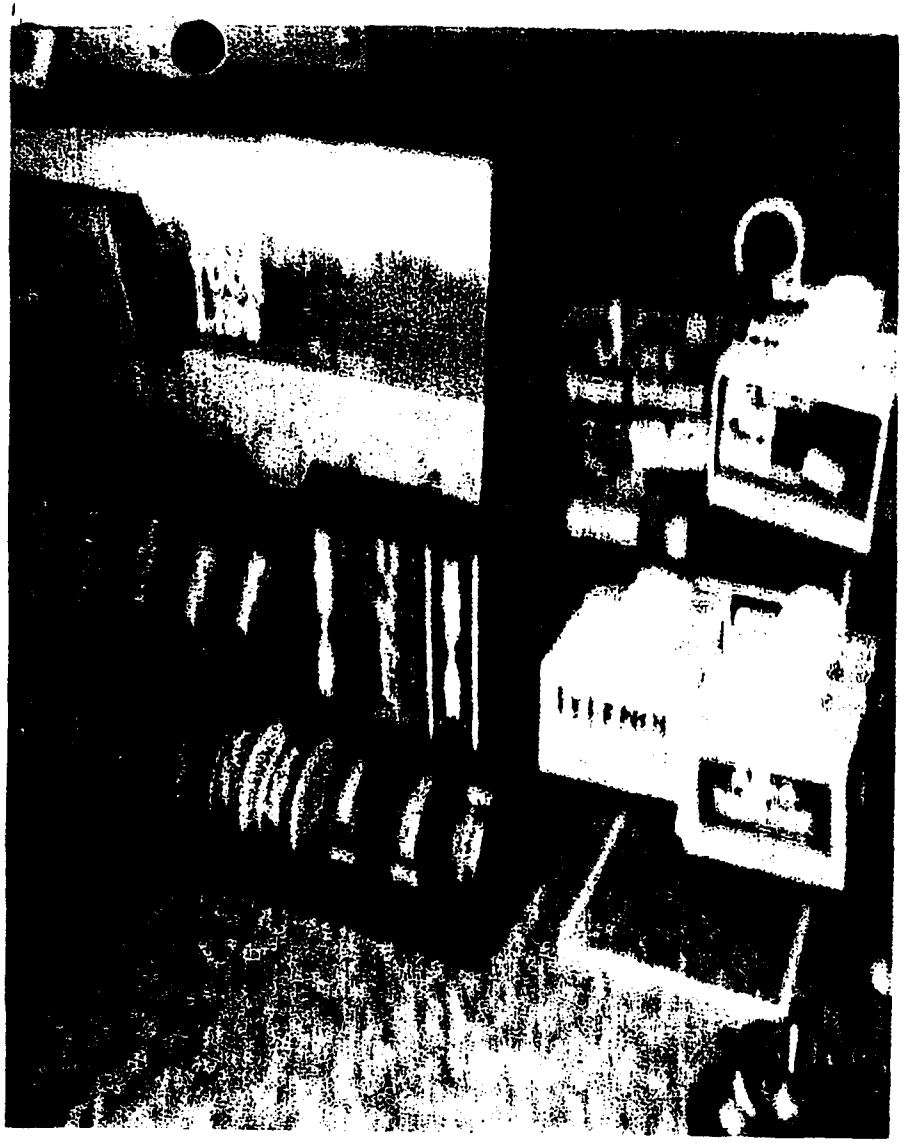
Counsel for Plaintiffs

Dated April 22, 1998.



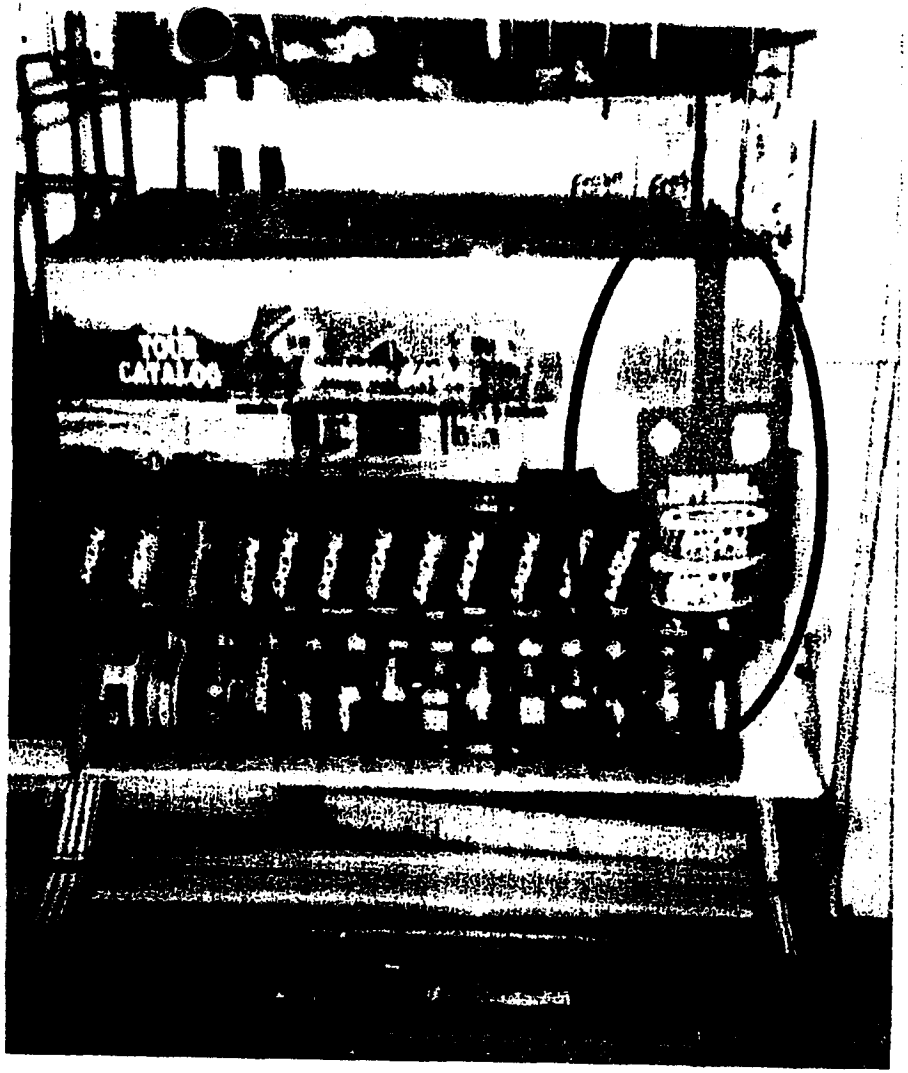
CA; Victory Wine & Spirits; 5/31/96; "Skoal Flavor Packs side panel placed over Kodiak side panel completely covering it."

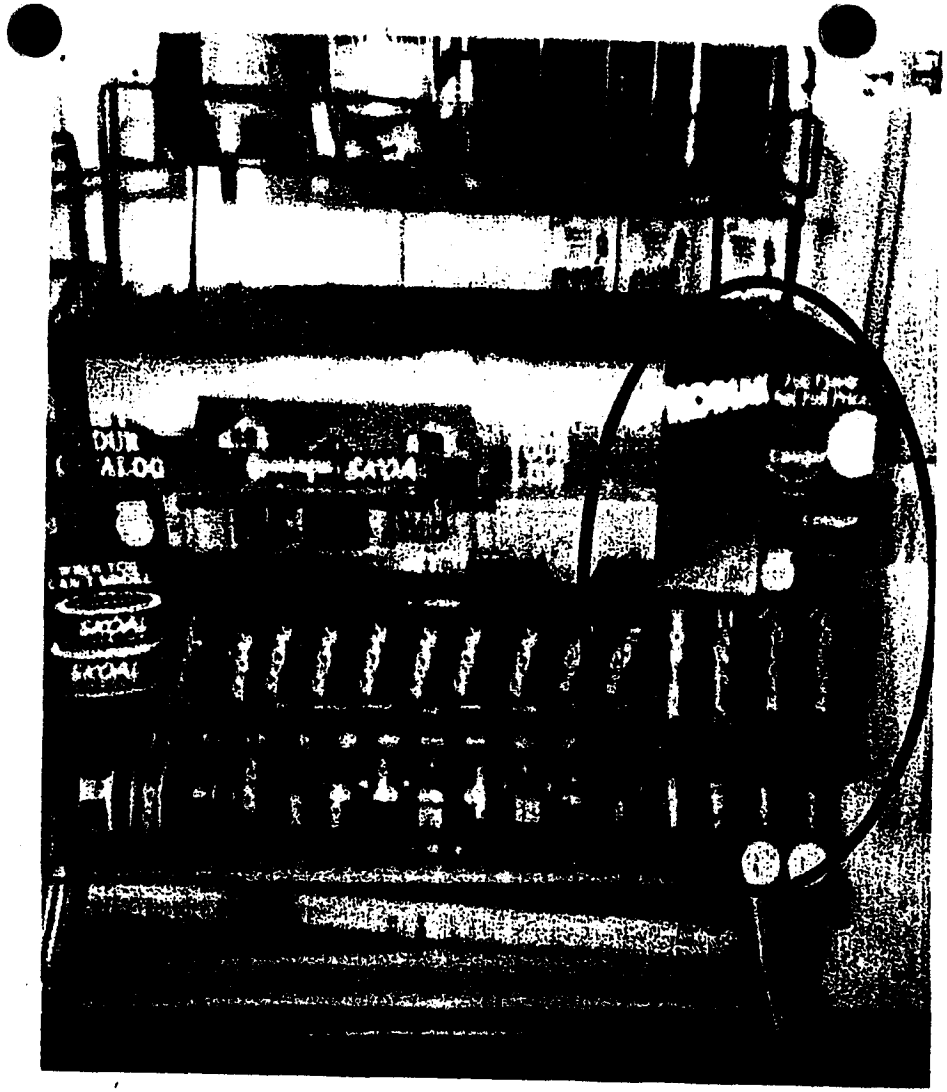
16cm000096



CA; Seven Eleven; 6/6/96; "UST header card placed on top of Kodiak header card."

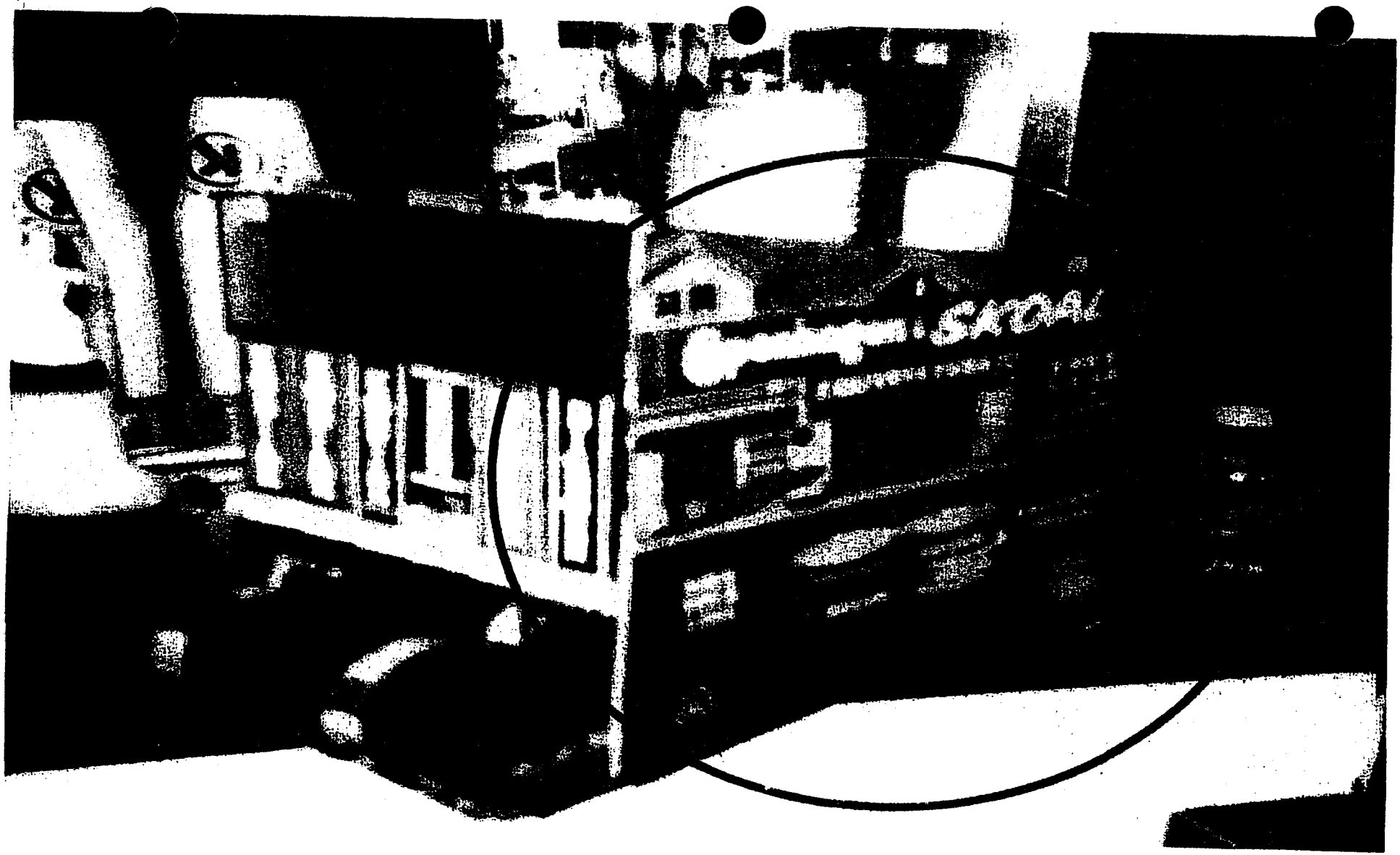
16diii000097





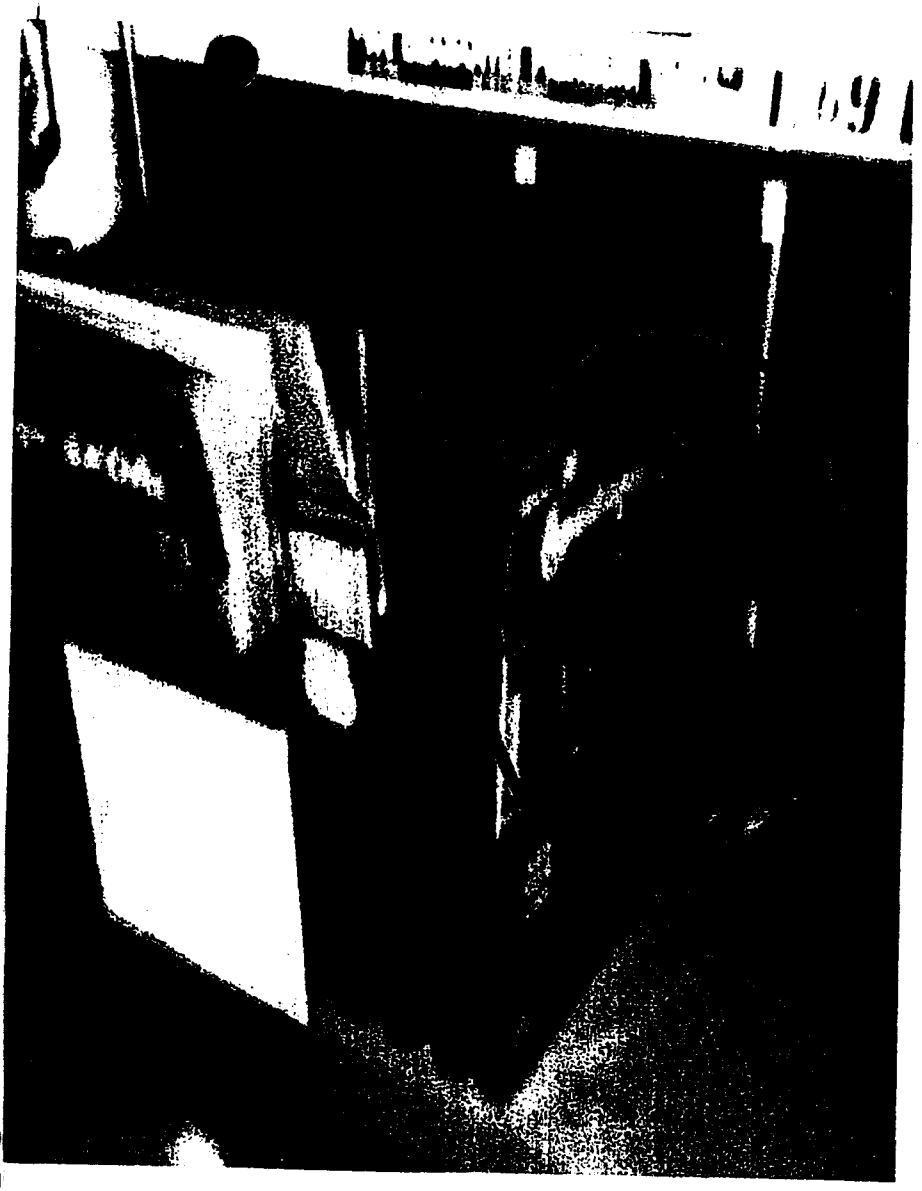
CA; Bonita Valley Liquor; 6/5/96; Conwood header removed and replaced by UST header; Conwood slots covered by Skoal "dangler" advertisement

16diii000098



IL; Circle K; 6/5/96; "UST placed their side panel card over the top of our side panel card."

16diii00099

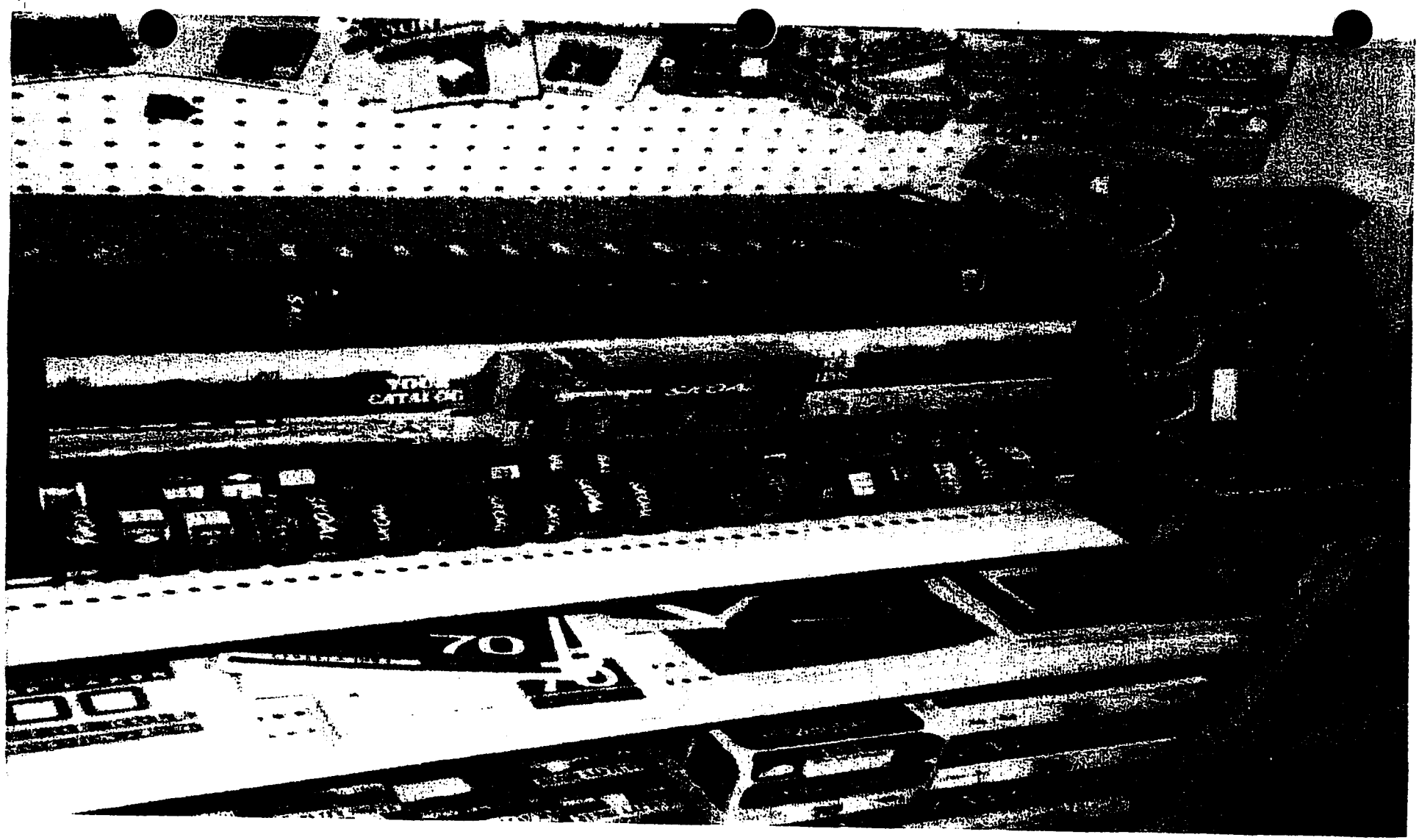


CA; Spring Liquor ; 6/11/96; "the Kodiak side panels were removed... in their place were Copenhagen and Skoal side panels and pamphlets."

16diii000100

CA; Valley Acres Market; 9/4/96; "The UST representative has placed a side panel on the Conwood rack."

16diii000101

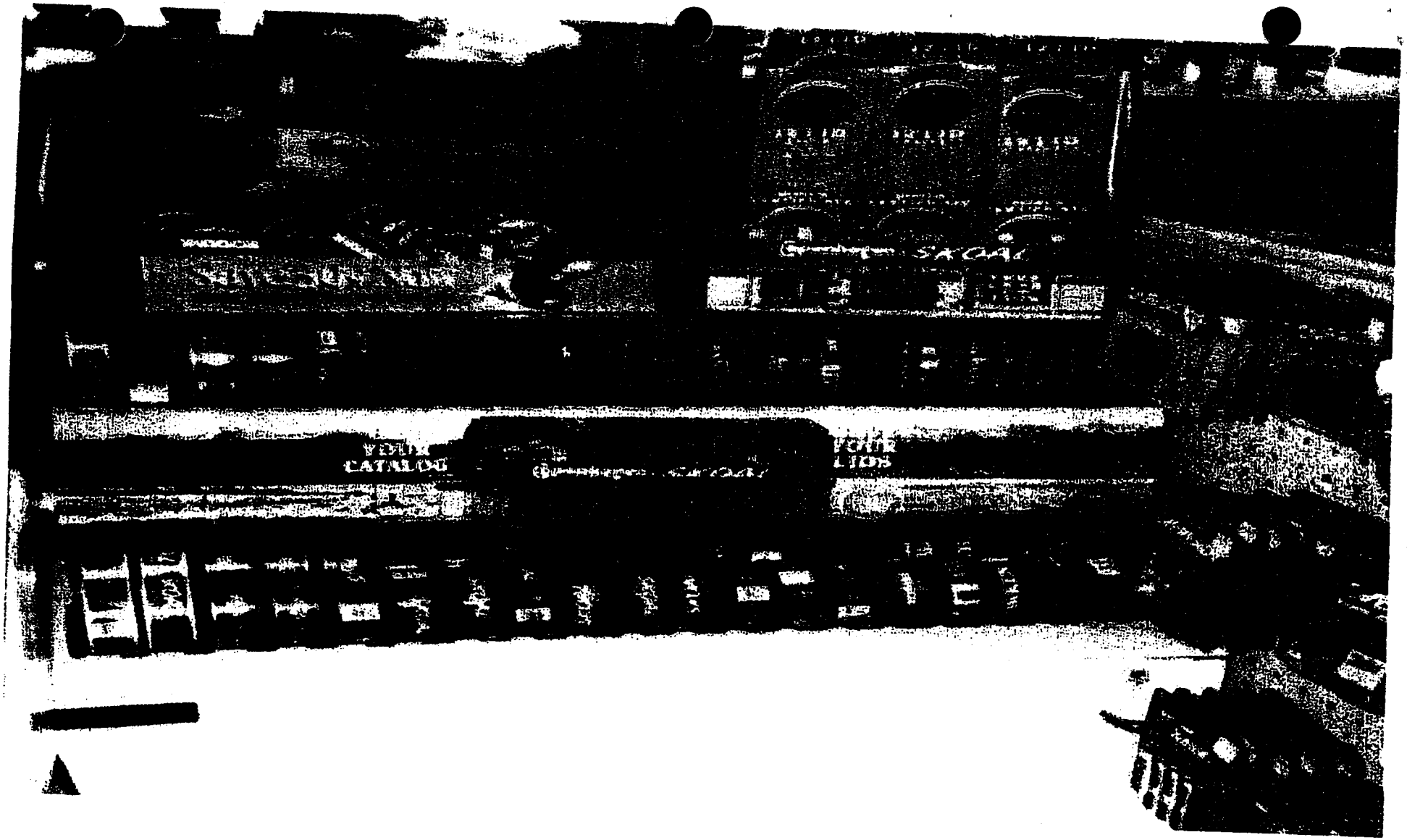


CA; Seven Eleven; 10/8/96; " The Conwood racks at this location had been taken out and replaced with UST racks." UST left no room for Conwood header.

16diii000102

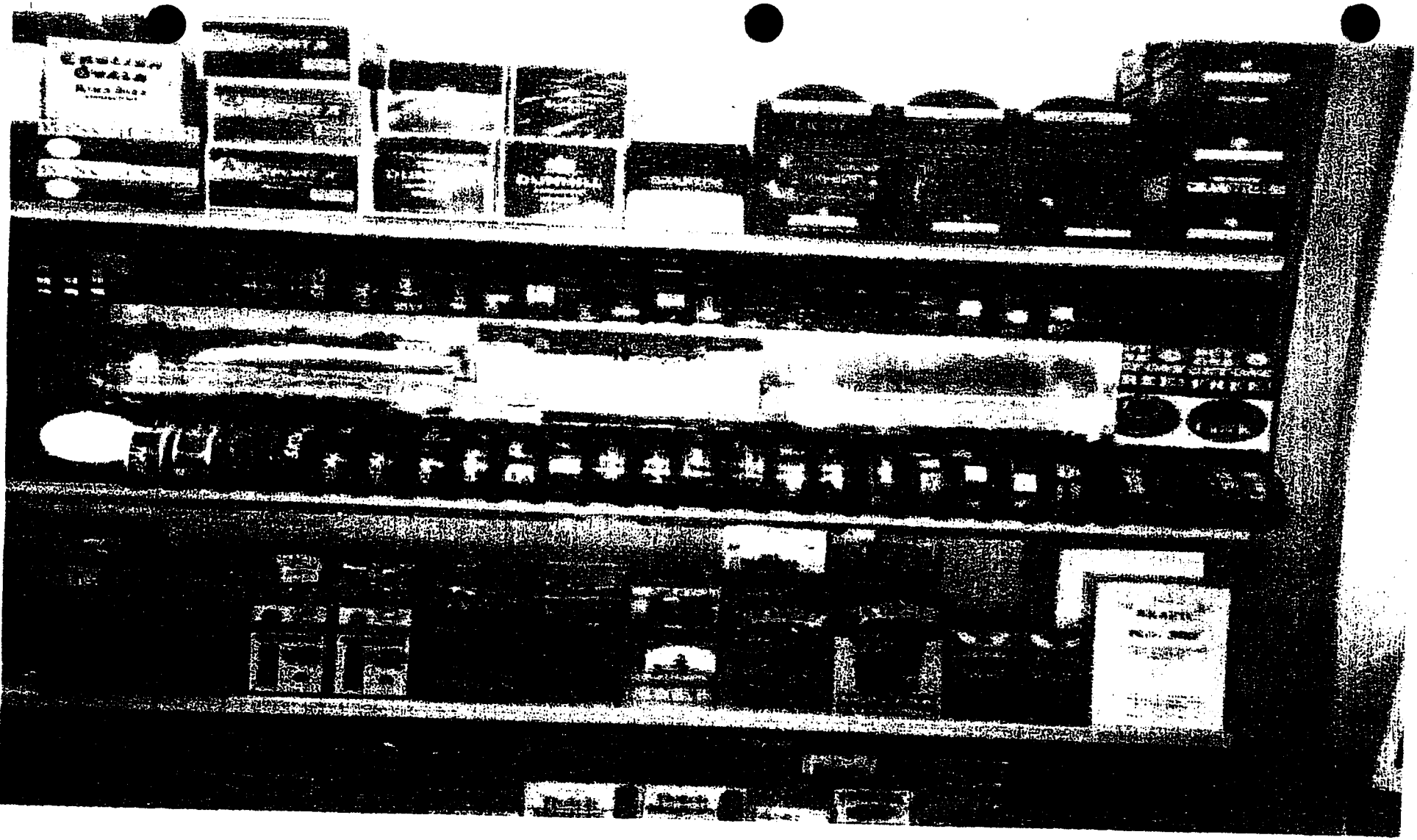
CA; Cigarette Cheaper; 7/22/96; Conwood rack removed. All Conwood products thrown into "unshoppable" condition.

16diii000103



CA; Circle K; 8/19/96; "All of Conwood's moist Tobacco Racks were taken out and replaced with US Tobacco racks without manager's approval."

16diii000104

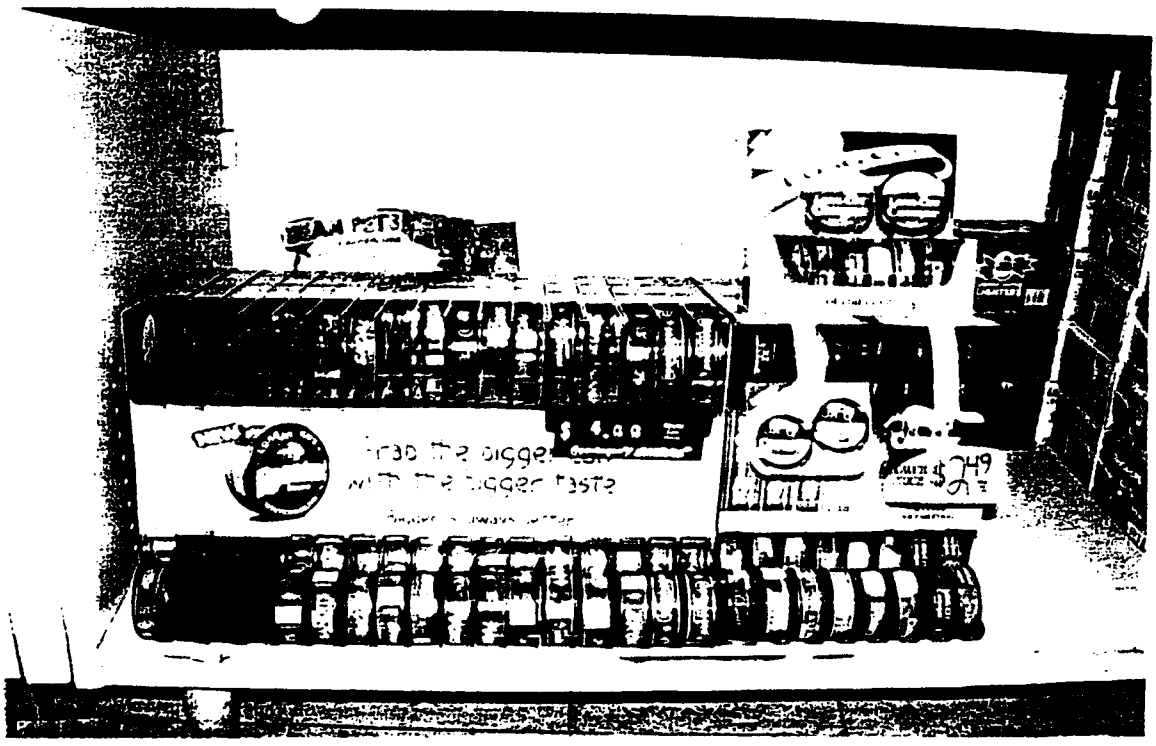


CA; Cigarettes Cheaper; 9/6/96; "A UST rep took out the Conwood … racks and placed a 21 hole rack of their own and did not leave a space for Kodiak Choice."

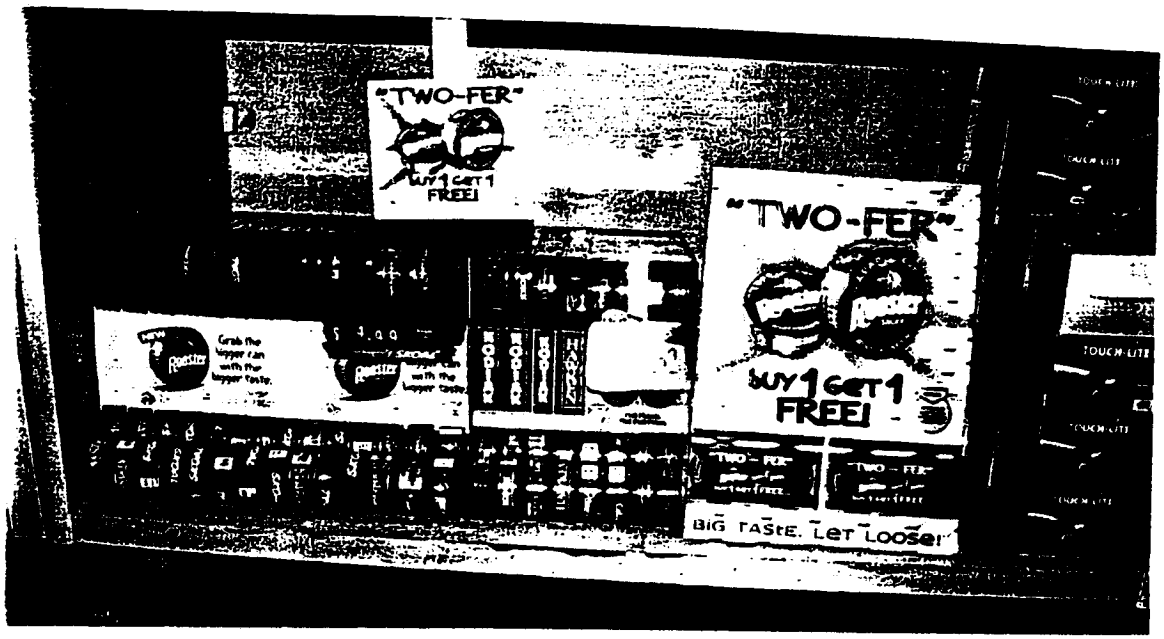
16cmiii000105

CA; Circle K; 9/12/96; UST removed Conwood rack, placed Conwood product in its rack, and left no header space for Conwood advertisement.

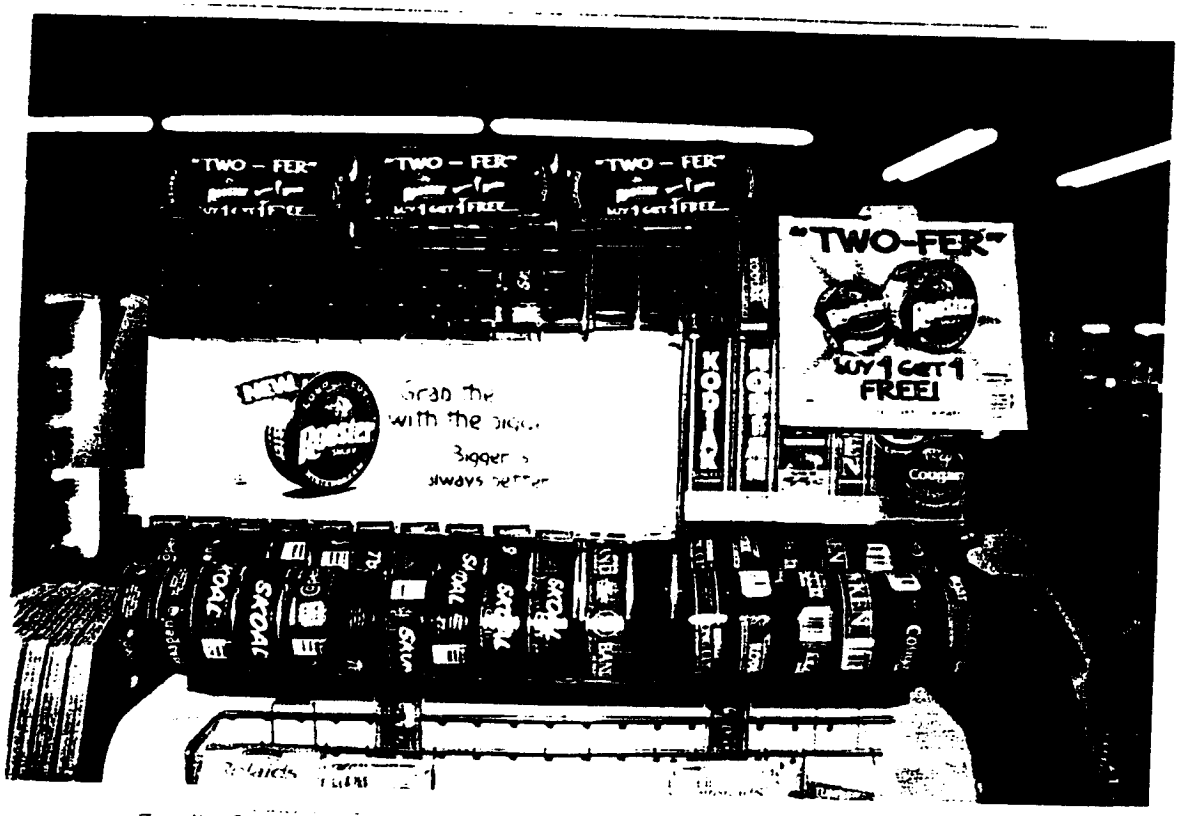
16cdii000106



7-11 product display immediately following re-stocking by client.



7-11 product display immediately following restocking by Erskine.



Family Grocer product display, south view.

FEB 11 '97 03:32 PM FORY ENER 281-355-3424 P.01

UNITED STATES TOBACCO
SALES AND MARKETING COMPANY INC

COPENHAGEN INCENTIVE PROGRAM GUIDELINES
Test Program

1. Eliminate the distribution of competitive round can samples.
2. No competitive round can buy downs during this test program.
3. We will have primary positioning of all smokeless tobacco POS. This shall include but not be limited to a 5' by 3' banner above our vending system.
4. We will control the planogram for smokeless round can vending systems.
5. We will have exclusive adult sampling rights of smokeless tobacco during this test program.
6. There is a two roll limit per customer on products that have been discounted.
7. You may not sell discounted products to another retailer for resale.
8. You must provide USTC with invoices on all smokeless round can tobacco on a weekly basis. This includes transactions from a convenience representative.
9. Allow for a 2X3 scanner display for discounted USTC products only. You must have one display per register.
10. The stickers will only be placed one or possibly two times per week. Therefore, you need to order as few times as possible per week.
11. You may not overstock and resell product back to wholesalers in order to sell further dated product.
12. Suggestive sell discounted copenhagen to all smokeless tobacco consumers.
13. There will be no advertising of this program except for what is provided to you.
14. This is a test program and may be terminated at any time.

DEC-08-97 11:44 FROM:WYATT TARRANT & COMBS ID:8015371810 PAGE 4/4
16dm0001

U.S. TOBACCO SALES & MARKETING COMPANY

FREE STANDING DISPLAY #2908
PLACEMENT AGREEMENT

1) Maintain UST smokeless merchandiser on top shelf and in a self service position.

2) Top shelf to be used exclusively for smokeless tobacco full price brands.

3) Attached overhead sign will remain in place.

4) UST provides the only single can merchandiser for the round can smokeless tobacco that are positioned on the top shelf.

5) Competitive price value products (eg.: BIG1, Timberwolf) and generics are placed on second shelf. Not in Merchandiser.

6) UST provides the POS header card for the single can merchandiser on the top shelf. Only competitive POS allowed are product labels on the single can merchandiser.

7) Appropriate product mixes and facings are designated in a plan-o-gram authorized by management and reviewed regularly.

8) Agree to communicate authorized plan-o-gram to UST and competitive management.

9) No cigarette manufacturer displays to be placed on free standing units in any location.

James H Redhage, Pres.
2-21-96
Date

U.S. Tobacco

2/21/96
Date

From David Klaus

CDW005561

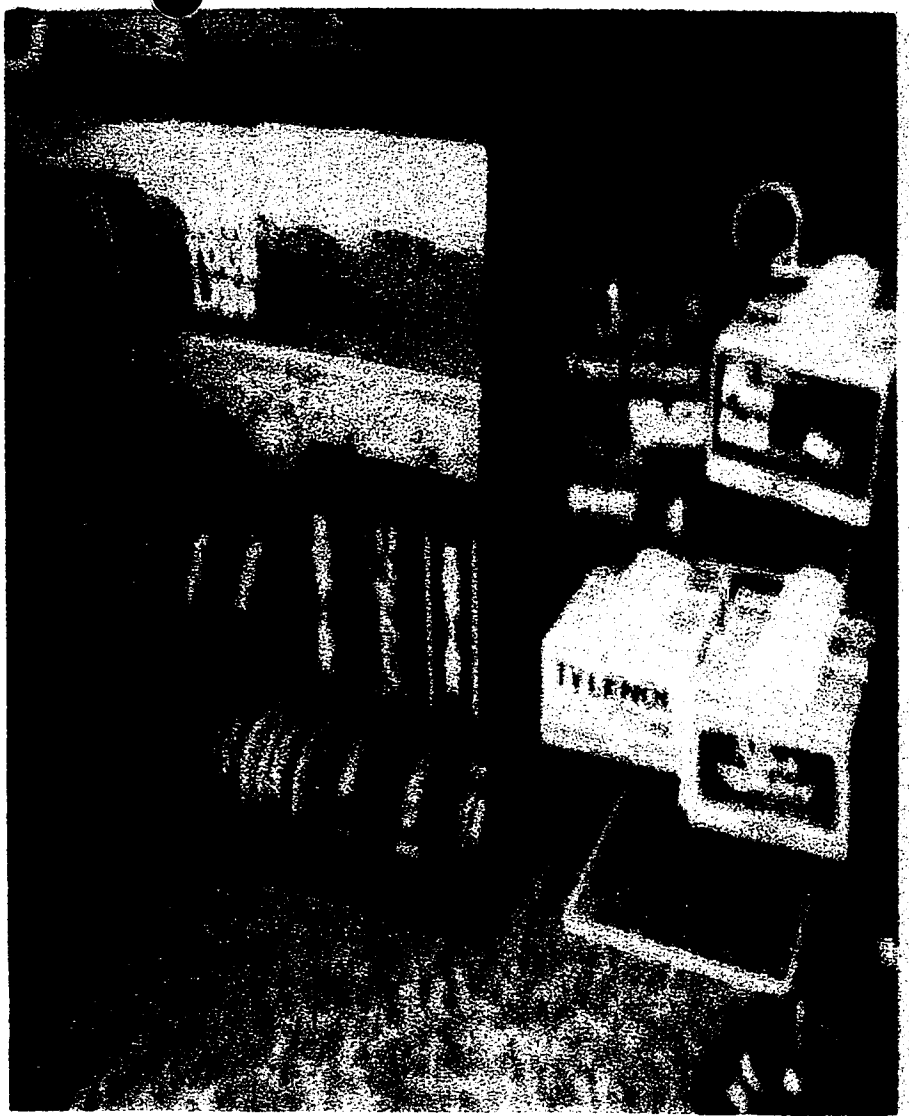
16diii000111

See Enclosed Videotape: Complaint Exhibit C

EXHIBIT A

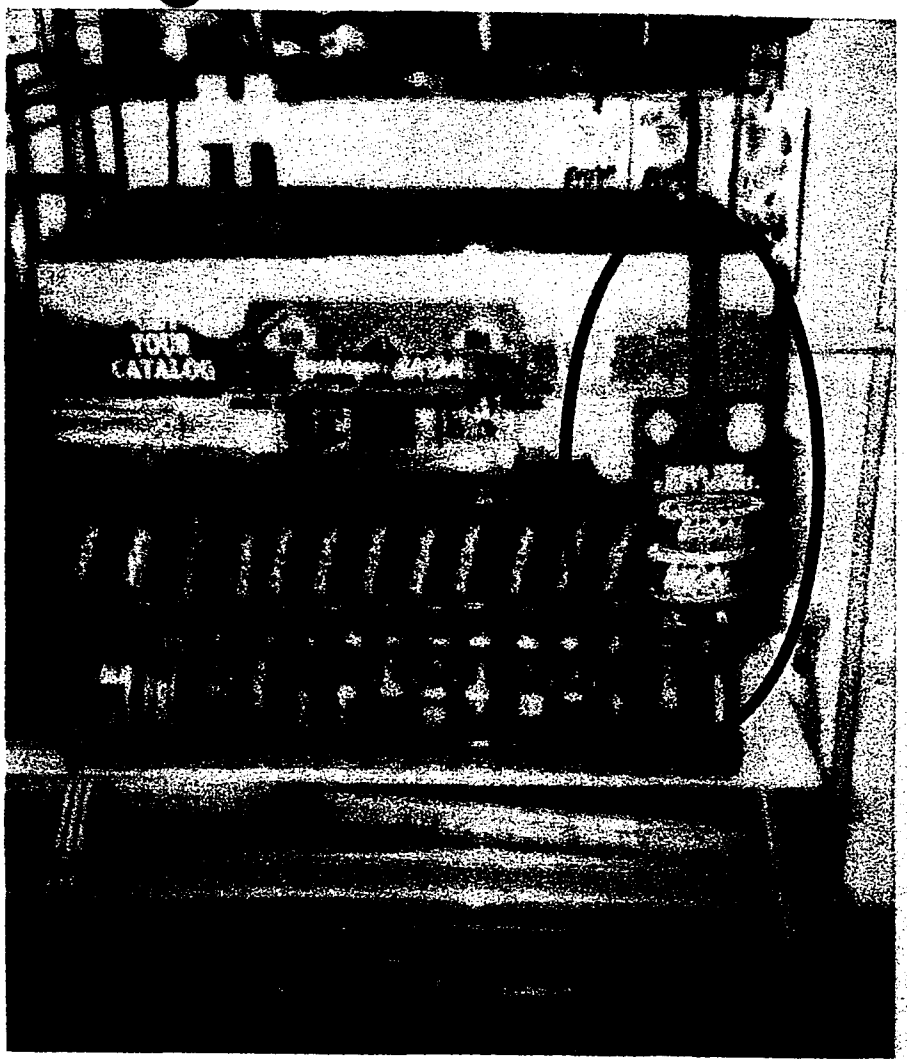
CA; Victory Wine & Spirits; 5/31/96; "Skoal Flavor Packs side panel placed over Kodiak side panel completely covering it."

16diii000114



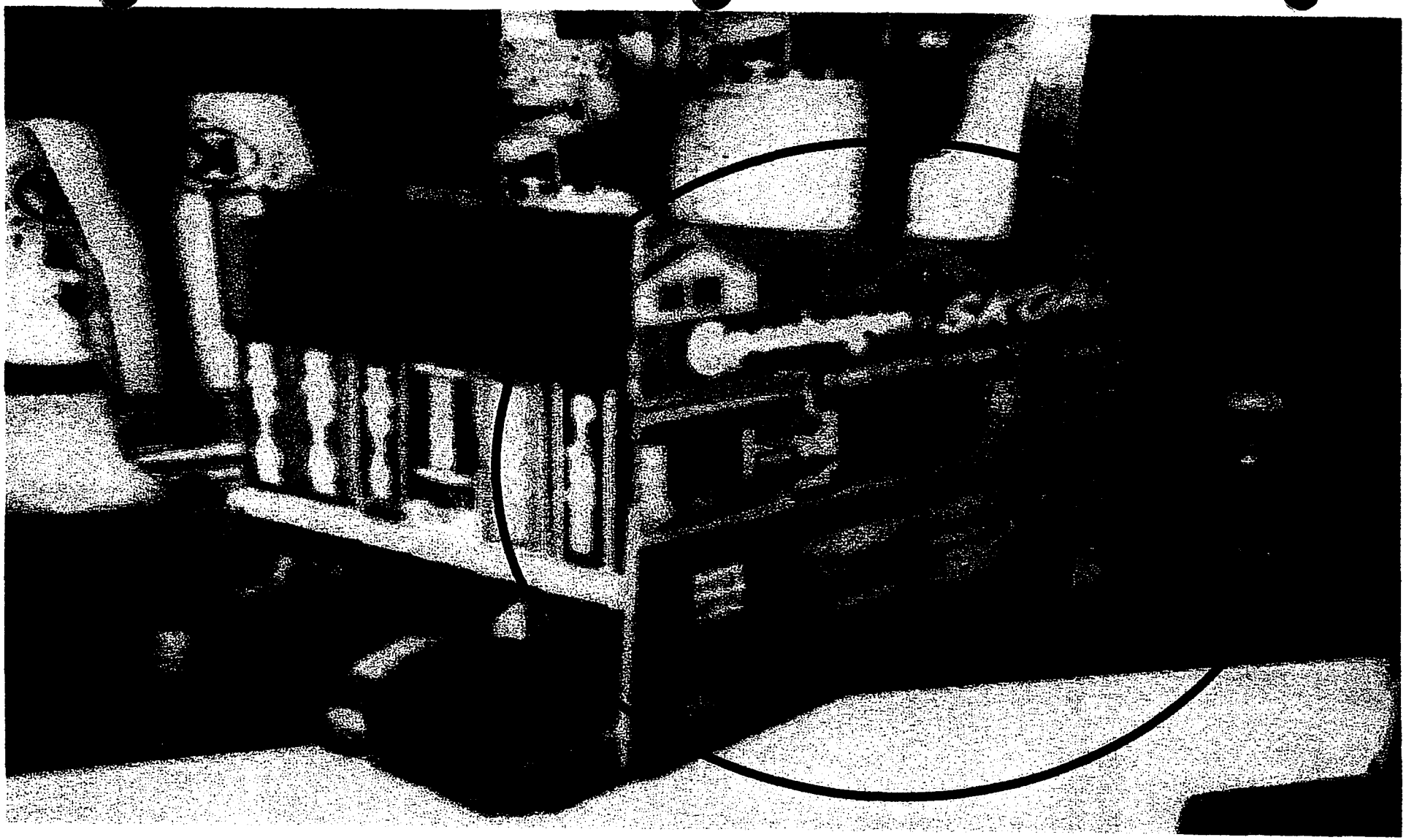
CA; Seven Eleven; 6/6/96; "UST header card placed on top of Kodiak header card."

16diii000115



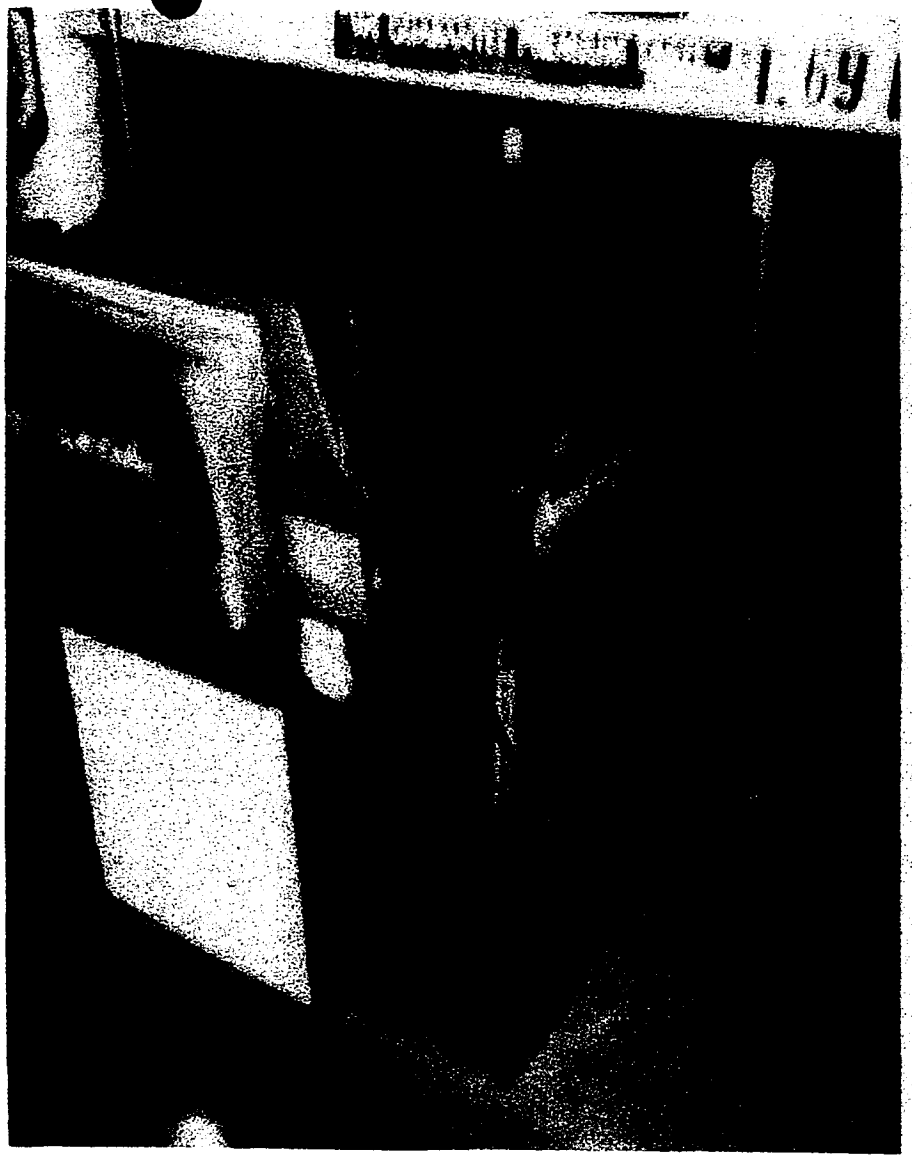
CA; Bonita Valley Liquor; 6/5/96; Conwood header removed and replaced by UST header; Conwood slots covered by Skoal "dangler" advertisement

16diii000116



IL; Circle K; 6/5/96; "UST placed their side panel card over the top of our side panel card."

16diii000117

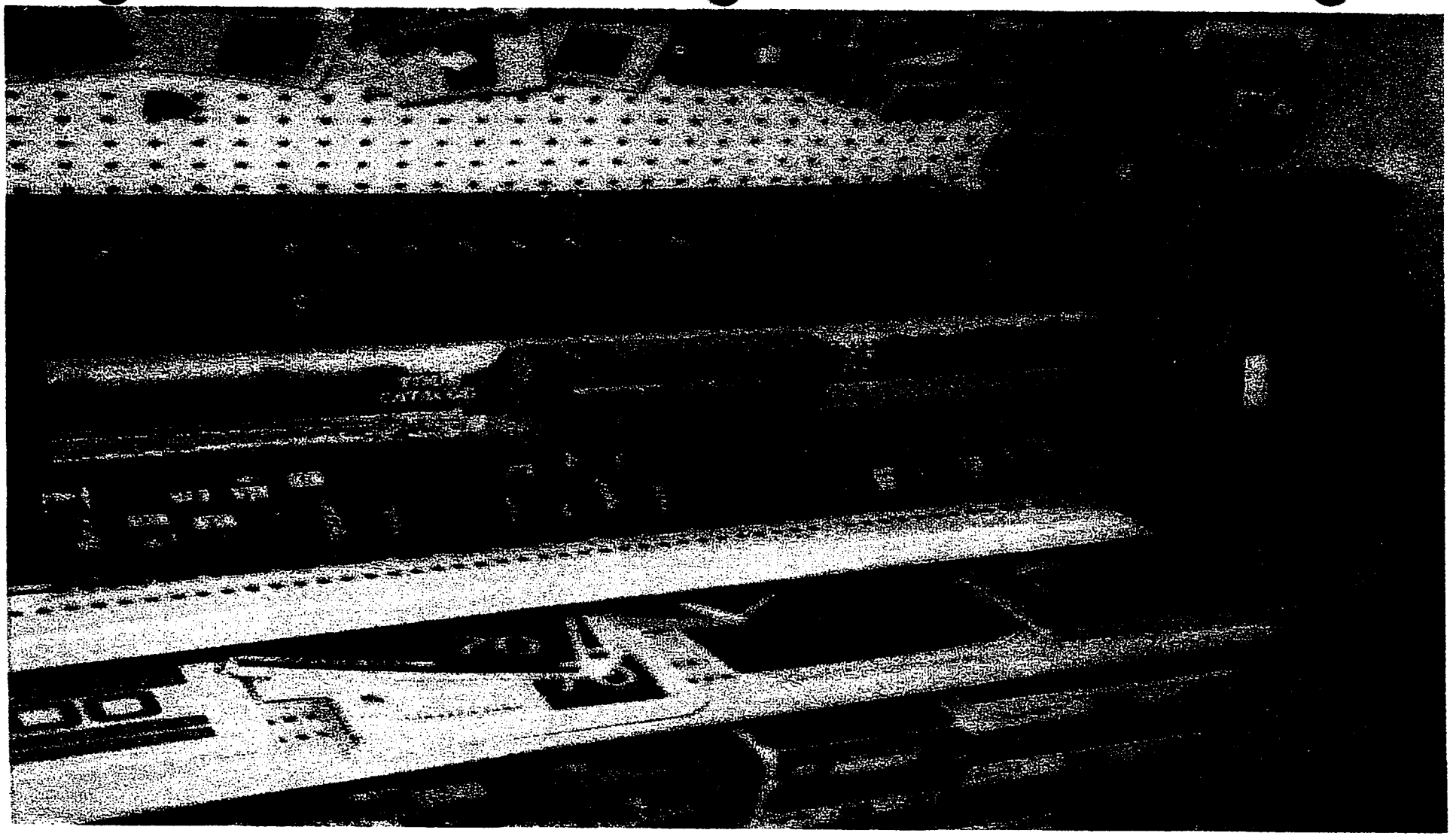


CA; Spring Liquor ; 6/11/96; "the Kodiak side panels were removed… in their place were Copenhagen and Skoal side panels and pamphlets."

16diii000118

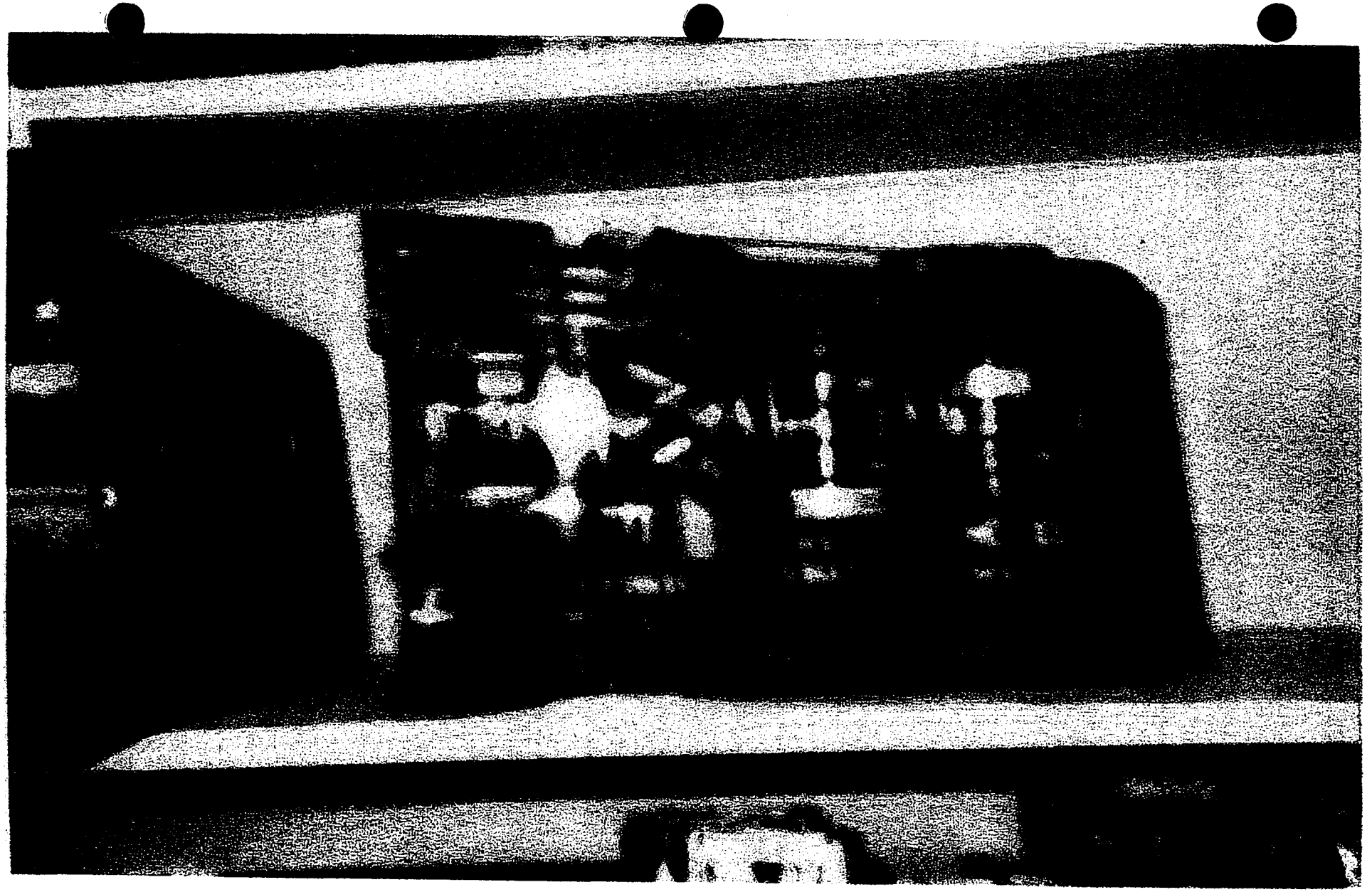
CA; Valley Acres Market; 9/4/96; "The UST representative has placed a side panel on the Conwood rack."

16diii00119



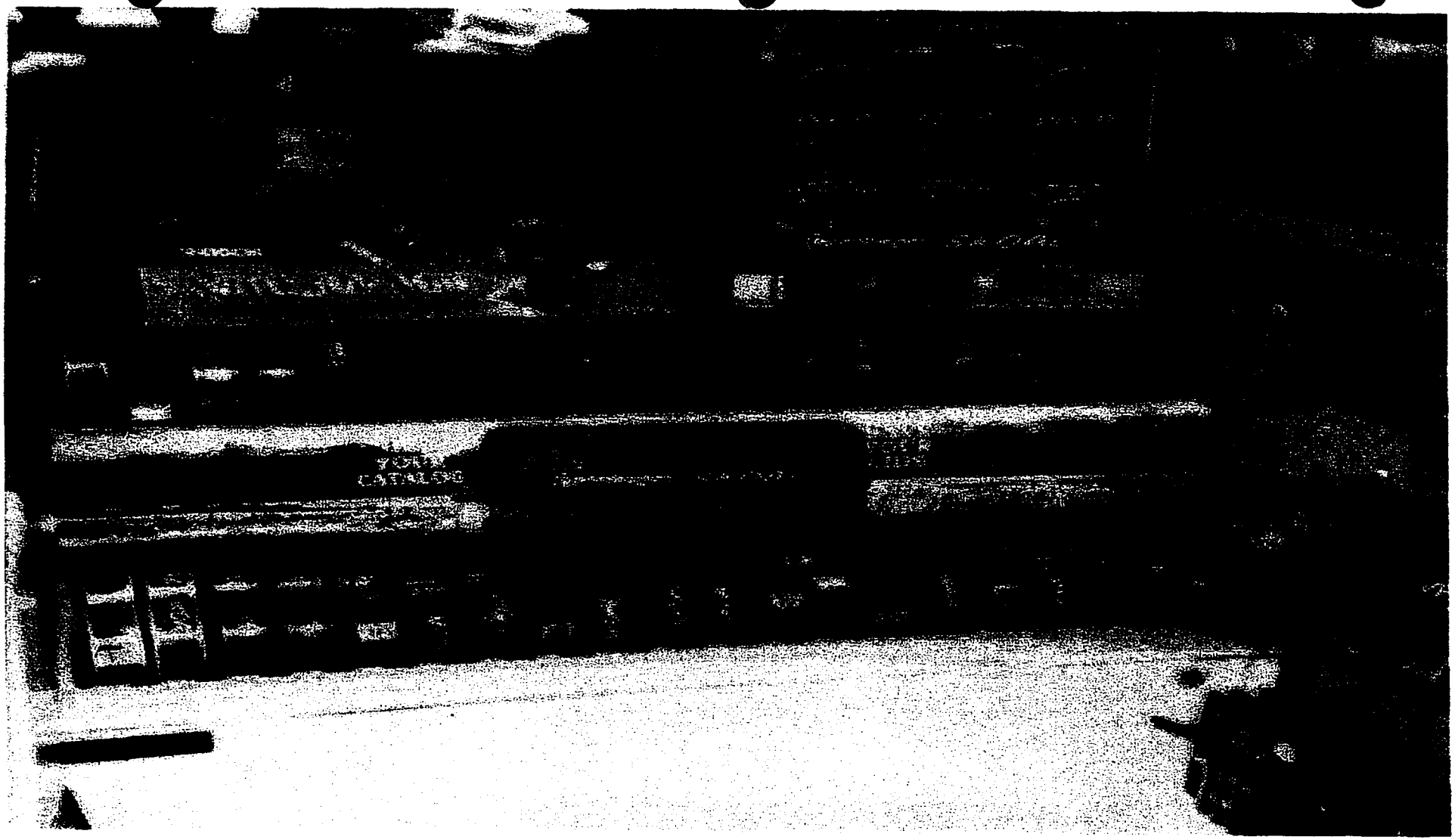
CA; Seven Eleven; 10/8/96; " The Conwood racks at this location had been taken out and replaced with UST racks." UST left no room for Conwood header.

16diii000120



CA; Cigarette Cheaper; 7/22/96; Conwood rack removed. All Conwood products thrown into "unshoppable" condition.

16diii000121



CA; Circle K; 8/19/96; "All of Conwood's moist Tobacco Racks were taken out and replaced with US Tobacco racks without manager's approval."

16diii000122

CA; Cigarettes Cheaper; 9/6/96; "A UST rep took out the Conwood … racks and placed a 21 hole rack of their own and did not leave a space for Kodiak Choice."

16diii000123

CA; Circle K; 9/12/96; UST removed Conwood rack, placed Conwood product in its rack, and left no header space for Conwood advertisement.

16diii000124

7-11 product display immediately following re-stocking by client.

7-11 product display immediately following restocking by Erskine.

Family Grocer product display, south view.

EXHIBIT B

281-355-5324 TO: TORY ENER

UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC

COPENHAGEN INCENTIVE PROGRAM GUIDELINES

Test Program

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3. We will have primary positioning of all smokeless tobacco POS. This shall include but not be limited to a 5' by 3' banner above our vending system.
4. We will control the planogram for smokeless round can vending systems.
5. We will have exclusive shelf sampling rights of smokeless tobacco during this test program.
6. There is a two roll limit per customer on products that have been discounted.
7. You may not sell discounted products to another retailer for resale.
8. You must provide USTC with invoices on all smokeless round can tobacco on a weekly basis. This includes transactions from a competitive representative.
9. Allow for a 2X3 counter display for discounted USTC products only. You must have one display per register.
10. The stickers will only be placed one or possibly two times per week. Therefore, you need to order as few times as possible per week.
11. You may not overstock and send product back to wholesalers in order to sell fresher dated product.
12. Segregate all discounted copenhagen to all smokeless tobacco consumers.
13. There will be no advertising of this program except for what is provided to you.
14. This is a test program and may be terminated at any time.

16diii000129

U.S. TOBACCO SALES & MARKETING COMPANY

FREE STANDING DISPLAY #2908
PLACEMENT AGREEMENT

1) Maintain UST smokeless merchandiser on top shelf and in a self service position.

2) Top shelf to be used exclusively for smokeless tobacco full price brands.

3) Attached overhead sign will remain in place.

4) UST provides the only single can merchandiser for the round can smokeless tobacco that are positioned on the top shelf.

5) Competitive price value products (eg.: BIG1, Timberwolf) and generics are placed on second shelf. Not in Merchandiser.

6) UST provides the POS header card for the single can merchandiser on the top shelf. Only competitive POS allowed are product labels on the single can merchandiser.

7) Appropriate product mixes and facings are designated in a plan-o-gram authorized by management and reviewed regularly.

8) Agree to communicate authorized plan-o-gram to UST and competitive management.

9) No cigarette manufacturer displays to be placed on free standing units in any location.

James H Redhage, Pres.
2-21-96
Date

U.S. Tobacco — 2/21/96 Date

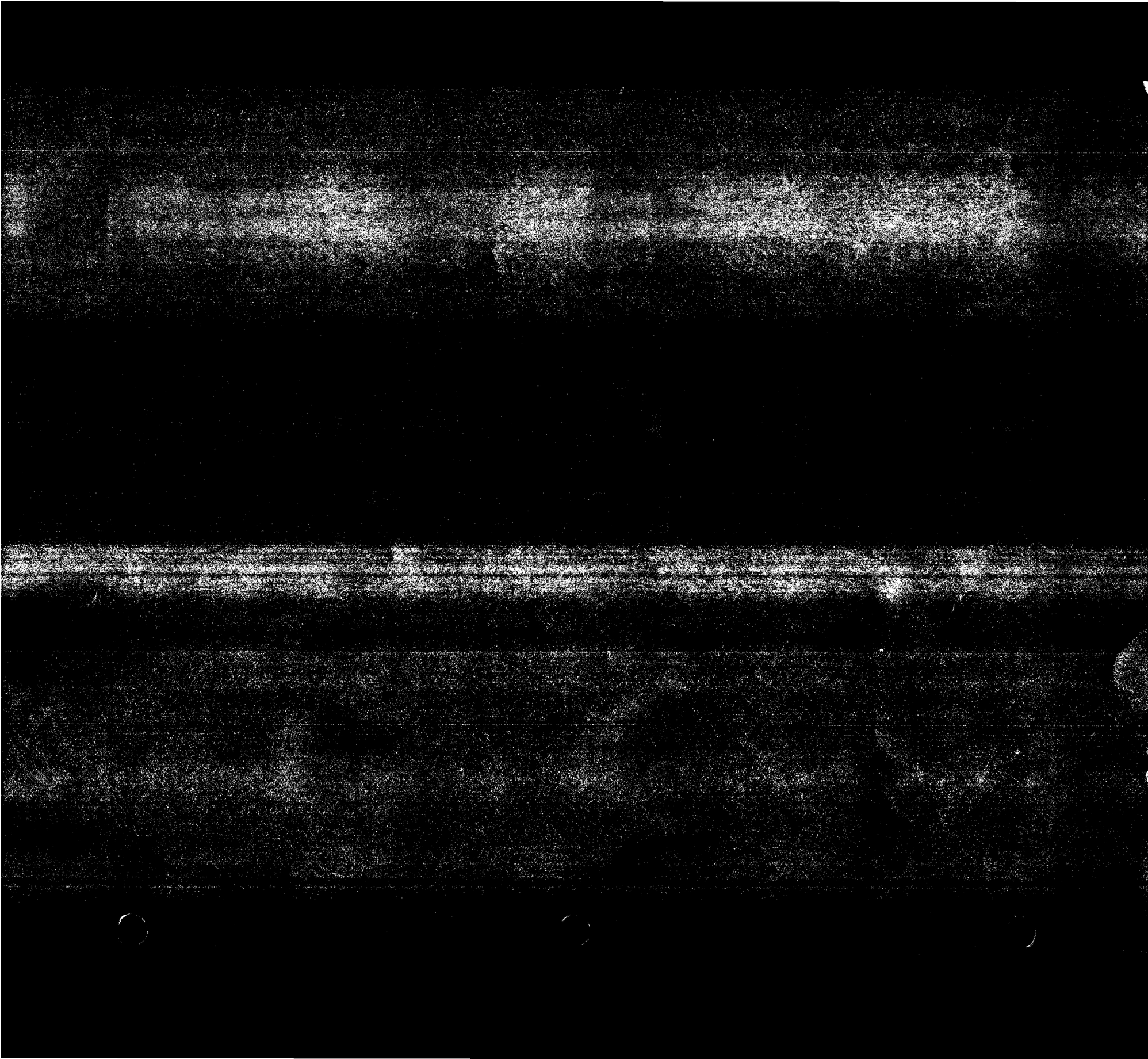
From David Haws

CDW005561

16diii000130

EXHIBIT C

See Enclosed Videotape: Complaint Exhibit C



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. _____

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Fed. R. Civ. P. 26 and 34 and Local Rules 5.2 and 34.2, plaintiffs request that each defendant separately produce documents for inspection and copying at the offices of undersigned counsel within the time set by the Federal Rules or as the Court may otherwise direct in response to Plaintiffs' Motion for Expedited Discovery.

Instructions

Documents shall be produced in accordance with the Federal and Local Rules.

16diii000134

Documents Requested

1. All documents concerning Conwood Company L.P. and/or Conwood Sales Company, L.P. (collectively, "Conwood").

2. All documents concerning the Proposed Tobacco Industry Settlement dated June 20, 1997.

3. All Rule 4(a) lists and any similar lists of documents in defendants' possession, custody or control.

4. All documents concerning communications with tobacco industry analysts.

5. All agreements with distributors of tobacco products.

6. All agreements with retailers of tobacco products.

7. All documents, including sales reports, concerning revenues from the sale of moist snuff.

8. All documents concerning market shares, by geographic region and nationally, for moist snuff.

9. All organization charts, lists of employees, and job descriptions.

10. All documents concerning activities in this district.

11. All documents concerning relationship(s) between defendants.

12. All documents concerning the Smokeless Tobacco Council

16diii000135

("STC").

12. All documents concerning Swisher International, Inc.

13. All documents concerning Swedish Match North America, Inc.

14. All documents concerning Philip Morris, Inc.

15. All documents concerning policies, procedures and training for sales representatives.

16. All documents concerning product racks for display of moist snuff.

17. All documents concerning product quality of moist snuff.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts
WHITLOW, ROBERTS, HOUSTON
& STRAUB
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P.O. Box 995
Paducah, Kentucky 42002-0995
(502) 443-4516
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Mark C. Hansen
Neil M. Gorsuch
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KELLOGG, HUBER, HANSEN,
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1301 K Street, N.W.
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Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated April 22, 1998.

16diii000137

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
Civil Action No. 5:98CV-108-R

CONWOOD COMPANY, L.P., et al. PLAINTIFFS

v. **MOTION FOR RELIEF FROM CIVIL RULE 26(d), GROUNDS, AND MEMORANDUM**

UNITED STATES TOBACCO COMPANY, et al. DEFENDANTS

Plaintiffs move for relief from Federal Rule of Civil Procedure 16(d), and to be allowed to serve on defendants the interrogatories and requests for production of documents attached hereto.

GROUNDS AND MEMORANDUM

1. This is a major anti-trust action. Defendants' records are likely to be important evidence.

a. The sooner plaintiffs discover this material, the more expedient their preparation will be.

b. Defendants' record retention policy may jeopardize the continued existence of requested records. Plaintiffs state on the record now that no requested records should be destroyed.

2. This motion will not prejudice defendants. The order tendered herewith provides that the records be produced 60 days after the entry of the tendered order. This time can be adjusted as necessary.

3. Plaintiffs wish to comply with Joint Local Rule 37.1 and make a good faith effort to resolve any disagreement with

make a good faith effort to resolve any disagreement with defendants regarding this motion without need of intervention of the Court. Plaintiffs cannot do such prior to filing suit and defendants' counsel entering an appearance. Defendants' counsel is requested to confer with plaintiffs' counsel in regard to this motion.

WHITLOW, ROBERTS, HOUSTON & STRAUB
Attorneys for Plaintiffs, Conwood Company, L.P., et al.

BY Richard C Roberts

Richard C. Roberts
P.O. Box 995
Paducah, KY 42002-0995
502-443-4516

I certify that a copy of the foregoing was mailed to:

UST Inc., c/o Richard H. Verheij, 100 West Putnam Ave., Greenwich, CT 06830, and

CT Corporation Systems, 1 Commercial Plaza, Hartford, CT 06103.

United States Tobacco Sales and Marketing Company Inc., c/o Arthur G. Smith, 100 West Putnam Ave., Greenwich, CT 06830; and

CT Corporation Systems, 1 Commercial Plaza, Hartford, CT 06103.

United States Tobacco Company Inc., c/o Robert H. Lawrence, Jr., 100 West Purnam Ave., Greenwich, CT 06830; and

CT Corporation Systems, 1 Commercial Plaza, Hartford, CT 06103.

United States Tobacco Manufacturing Company Inc. c/o CT Corporation Systems, Kentucky Home Life Building, 239 S. 5th St., Louisville, KY 40202.

This the 23rd day of April, 1998.

Richard C Roberts
Richard C. Roberts

121332.1

pleadings

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

AGREED ORDER EXTENDING DEFENDANTS' TIME TO ANSWER OR OTHERWISE RESPOND TO PLAINTIFFS' COMPLAINT AND EXTENDING DEFENDANTS' TIME TO RESPOND TO PLAINTIFFS' MOTION FOR RELIEF FROM RULE 26(d)

This Agreed Order is entered into by and among Plaintiffs, Conwood Company L.P., et al., and Defendants, United States Tobacco Co., et al., with reference to the following facts:

Plaintiffs' summons and complaint were served in person on Defendants on April 23, 1998 and Plaintiffs' Motion for Relief From Civil Rule 26(d) was served by U.S. Mail on Defendants on April 23, 1998.

Federal Rule of Civil Procedure 12(a)(1)(A) requires Defendants to answer or otherwise respond within twenty (20) days after being served with the summons and complaint, and Local Rule 7.1(c) requires Defendants to file a response to Plaintiffs' Motion for Relief From Civil Rule 26(d) within fifteen (15) days of service of the motion.

RECEIVED
MAY 18 1998

The parties believe that it would be appropriate to (a) extend the time for Defendants' response to Plaintiffs' summons and complaint by thirty (30) days and (b) extend the time for Defendants' response to Plaintiffs' Motion for Relief From Civil Rule 26(d) by seven (7) days.

The parties believe that neither the thirty (30) day extension for Defendants' response to Plaintiffs' summons and complaint nor the seven (7) day extension for Defendants' response to Plaintiffs' Motion for Relief From Civil Rule 26(d) will affect pretrial proceedings in this case.

Pursuant to agreement of the parties, through their counsel in this action, IT IS HEREBY ORDERED AND ADJUDGED:

1. The time for Defendants to answer or otherwise respond to Plaintiffs' Complaint shall be extended from May 13, 1998 to June 12, 1998.

2. The time for Defendants to file a response to Plaintiffs' Motion for Relief From Civil Rule 26(d) shall be extended from May 11, 1998 to May 18, 1998.

3. By entering into this Agreed Order, Defendants do not waive any of the defenses enumerated in Fed. R. Civ. P. 12(b).

Entered this 13 day of May, 1998.

UNITED STATES DISTRICT JUDGE

ENTERED
MAY 14 1998
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii000141

HAVE SEEN AND AGREE:

Richard C Roberts

Richard C. Roberts
WHITLOW, ROBERTS, HOUSTON & STRAUB
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
Counsel for Plaintiffs

John S. Reed

John S. Reed
REED WEITKAMP SCHELL COX & VICE
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Counsel for Defendants

16diii000142

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

AGREED ORDER EXTENDING DEFENDANTS' TIME TO ANSWER OR OTHERWISE RESPOND TO PLAINTIFFS' COMPLAINT AND EXTENDING DEFENDANTS' TIME TO RESPOND TO PLAINTIFFS' MOTION FOR RELIEF FROM RULE 26(d)

This Agreed Order is entered into by and among Plaintiffs, Conwood Company L.P., et al., and Defendants, United States Tobacco Co., et al., with reference to the following facts:

Plaintiffs' summons and complaint were served in person on Defendants on April 23, 1998 and Plaintiffs' Motion for Relief From Civil Rule 26(d) was served by U.S. Mail on Defendants on April 23, 1998.

Federal Rule of Civil Procedure 12(a)(1)(A) requires Defendants to answer or otherwise respond within twenty (20) days after being served with the summons and complaint, and Local Rule 7.1(c) requires Defendants to file a response to Plaintiffs' Motion for Relief From Civil Rule 26(d) within fifteen (15) days of service of the motion.

The parties believe that it would be appropriate to (a) extend the time for Defendants' response to Plaintiffs' summons and complaint by thirty (30) days and (b) extend the time for Defendants' response to Plaintiffs' Motion for Relief From Civil Rule 26(d) by seven (7) days.

The parties believe that neither the thirty (30) day extension for Defendants' response to Plaintiffs' summons and complaint nor the seven (7) day extension for Defendants' response to Plaintiffs' Motion for Relief From Civil Rule 26(d) will affect pretrial proceedings in this case.

Pursuant to agreement of the parties, through their counsel in this action, IT IS HEREBY ORDERED AND ADJUDGED:

1. The time for Defendants to answer or otherwise respond to Plaintiffs' Complaint shall be extended from May 13, 1998 to June 12, 1998.

2. The time for Defendants to file a response to Plaintiffs' Motion for Relief From Civil Rule 26(d) shall be extended from May 11, 1998 to May 18, 1998.

3. By entering into this Agreed Order, Defendants do not waive any of the defenses enumerated in Fed. R. Civ. P. 12(b).

Entered this _____ day of _____, 1998.

_____
UNITED STATES DISTRICT JUDGE

16diii000144

HAVE SEEN AND AGREE:

Richard C. Roberts

Richard C. Roberts
WHITLOW, ROBERTS, HOUSTON & STRAUB
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
Counsel for Plaintiffs

John S. Reed

John S. Reed
REED WEITKAMP SCHELL COX & VICE
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Counsel for Defendants

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, -against- UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98 CV-108-R

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR RELIEF FROM FEDERAL CIVIL PROCEDURE RULE 26(d)

Pursuant to Local Rule 7.1, Defendants, United States Tobacco Company, et al. ("USTC"), respectfully submit the following memorandum in opposition to the motion of Plaintiffs, Conwood Company, L.P., et al. ("Conwood"), seeking relief from Fed. R. Civ. P. 26(d) and, by implication, relief from the initial discovery and case-management process embodied in Rule 26(a) and (f), and in this Court's standard Scheduling Order.[1]

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[1] Defendants' response to Plaintiffs' present motion is not a motion or responsive pleading within the meaning of Fed. R. Civ. P. 12(h)(1) and, therefore, cannot constitute a waiver of any defense or defenses enumerated in Fed. R.

(continued...)

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MAY 21 1998
KELLOGG, HUBER, HANSEN, TODD & EVANS

As described below, Conwood offers no legitimate reason why this Court should deviate from the discovery procedures set forth in the new Fed. R. Civ. P. 26, which this District expressly adopted. See Local Rule 26.1. Conwood does not seek preliminary injunctive relief and has not made a showing supporting expedited discovery on any grounds. Instead, Conwood merely asserts that this is a "major" antitrust case, that the "sooner" it obtains discovery, the sooner it can prepare its case, and, without providing any factual basis, that USTC might "destroy" relevant documents.

Conwood's desire to set its own discovery schedule for this case, in direct contravention of Rule 26 as applied by this Court, should be rejected.

BACKGROUND

On April 22, 1998, Conwood filed a 32-page Complaint against Defendants seeking over a billion dollars in damages based on causes of actions under the federal antitrust laws, the Lanham Act, common law and Kentucky statutes. Conwood does not seek preliminary injunctive relief. Along with its Complaint, Conwood served Defendants with Plaintiffs' First Interrogatories To Defendants and Plaintiffs' First Request For Production Of Documents. The service of this discovery is in direct contravention of Rule 26(d), which prohibits, absent a court

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[1] (...continued)
Civ. P. 12(b). Defendants hereby reserve any and all rights to raise, either collectively or individually, any such defense by way of motion or responsive pleading.

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order, serving such discovery until after the meeting of the parties pursuant to Fed. R. Civ. P. 26(f).

Apparently recognizing its error, on April 23, 1998, Conwood filed the present motion seeking relief from Fed. R. Civ. P. 26(d) so that it may "be allowed to serve" Defendants with formal discovery – something it had already done. Plaintiffs are thus seeking to serve formal discovery again without any Rule 26(f) meeting and without satisfying the meet and confer obligation contemplated by Local Rule 37.1. Conwood concedes in its two-page "grounds and memorandum" that it did not comply with Local Rule 37. Rather, Conwood maintains that it could not meet and confer with Defendants "prior to filing suit" and before USTC has filed an appearance before the Court. This observation by Conwood -- which would be true of any discovery requests attached to a complaint -- merely highlights the impropriety of both its initial discovery requests and the instant motion.

On May 5, 1998, Defendants' counsel initiated a telephone call with counsel for Plaintiffs regarding the motion. Defendants' counsel informed Plaintiffs' counsel that, in light of Plaintiffs' moving papers and the relevant authority, Conwood should consider withdrawing its motion to allow discovery in this case to proceed in accordance with the Federal Rules of Civil Procedure and the Local Rules. This suggestion was rejected by letter on May 7, 1998.

For the reasons set forth below, Conwood's highly unusual request should be denied, and this case should proceed under Fed. R. Civ. P. 26 and the standard practice of this Court.

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ARGUMENT

Conwood seeks relief from Fed. R. Civ. P. 26(d). Rule 26(d) provides in relevant part that, absent an "order" or "agreement of the parties," a party "may not seek discovery from any source before the parties have met and conferred as required by subdivision (f)."[2] Rule 26(f) provides that the parties shall meet to discuss the nature and basis of their claims, to discuss prompt settlement or resolution of the case, and to develop a proposed discovery plan prior to a pre-trial conference or scheduling order by the Court under Fed. R. Civ. P. 16. See Fed. R. Civ. P. 26(f). Thus, Rule 26(d) imposes a moratorium on all formal discovery until the parties have met pursuant to Rule 26(f). See Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, §§ 2046.1, 2051.1 (West 1994).

According to the Advisory Committee Notes, the purpose of Rule 26(d) is to preclude formal discovery until the parties have had an opportunity under Rule 26(f) "to attempt in good faith to agree on the contents of the proposed discovery plan." Adv. Comm. Notes to 1993 Amendments. The proposed discovery plan is then presented to the Court at or prior to the Rule 16 pre-trial conference and Scheduling Order. See Fed. R. Civ. P. 16(a) and (b).

Conwood has offered no reason why this mandated procedure should not be followed in this case. Although a party may be relieved of the requirements of Rule 26(d) and (f)

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[2] Certain types of cases may also be exempted from Rule 26(d) by "local rule." Here, there can be no dispute that this case does not fall within any of the exceptions listed in Local Rule 26.1.

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by court order, the moving party bears the burden of showing good cause to depart from the new framework of Rule 26. See Wright & Miller, § 2046.1. Absent such a showing, courts require parties to comply with the letter of Rule 26(d) and (f). See, e.g., Certain Underwriters at Lloyds v. Frichelle Ltd., Civ.A. No. 96-549 1996 WL 125957, *1 (E.D.La. March 20, 1996) (notice of deposition properly quashed as premature because telephone conversations in which depositions were discussed were not Rule 26(f) meetings); Bush v. City of Dallas, No. 3:95-CV-1057-D, 1997 WL 13564, *1 (N.D. Tex. March 14, 1997) (under federal rules, requests for admission would be improper if served before the time specified in Rule 26(d) – i.e., before a Rule 26(f) meeting).[3]

As the Advisory Committee Notes to Rule 26(d) make clear, relief from Rule 26(d) is appropriate only in "some cases, such as those involving an application for preliminary relief or motions challenging personal jurisdiction." Adv. Comm. Notes to 1993 Amendments. See also Wright & Miller § 2051.1, n.2. Moreover, even in those types of cases exempted from Rule 26(d) and (f), the allowed discovery will be limited to issues directly relevant to the equitable relief being sought; no discovery is allowed on the merits of the case. See Independence Blue Cross v. Health Systems Integration, Inc., No. CIV. A. 96-8216, 1997 WL 36961, *2 (Jan. 29, 1997) (even where expedited discovery is otherwise allowed in context of preliminary

---

[3] It should be noted that in Bush, discovery was allowed to proceed because it was initiated before removal to federal court and, therefore, state law controlled.

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injunction, deposition requests seeking to "delve into the merits of the underlying dispute" were premature and thus inappropriate).

Here, Conwood offers no showing of good cause. Conwood does not seek a preliminary injunction or any other interim equitable relief. To the contrary, the reasons offered by Conwood in its moving papers would be equally true for any cause of action brought before this Court. Conwood provides only the following as grounds for its motion:

> This is a major anti-trust action. Defendants' records are likely to be important evidence.
> a. The sooner plaintiffs discover this material, the more expedient their preparation will be.
> b. Defendants' record retention policy may jeopardize the continued existence of requested records.

(Pl. Mem at 1).

These statements simply are inadequate to show good cause. If the Federal Rules of Civil Procedure could be circumvented by these rather unremarkable assertions, then Rule 26 would be rendered meaningless. Moreover, Conwood's suggestion that Defendants would destroy relevant documents is not only baseless and offensive, it is not the type of assertion that would justify ignoring Rule 26 procedures. In short, Conwood has not met its burden of showing good cause.

It is worth highlighting that Conwood's document request, on its face, appears to seek every document in Defendants' possession having anything to do with "moist snuff" – literally truckloads of documents. Indeed, since there is no time period defined in the request,

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Plaintiffs presumably seek any documents going back to 1911, which is when Plaintiffs allege that USTC became a "monopolist." This is precisely the type of improperly broad document request, unfettered by prior judicial review, that Rule 26(d) and (f) were intended to prevent.

Finally, this Court's standard Scheduling Order amplifies the basic tenet that discovery motions generally are to be a last resort. Paragraph 4 includes this prohibition: "No discovery motion may be filed without having a joint telephonic conference with the Judge arranged through his courtroom deputy." Conwood's discovery motion not only fails to meet the substantive burden of good cause, it also violates the procedural good sense and mandates of the rules and practices of this Court.

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CONCLUSION

For the reasons stated above, Plaintiffs' Motion For Relief From Civil Rule 26(d) should be denied, and the case should proceed in accordance with Rule 26.

Dated: May 18, 1998

John S. Reed
REED WEITKAMP SCHELL
COX & VICE
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Attorneys for Defendants

16diii000153

LOCAL RULE 37.1 CERTIFICATION

Defendants hereby represent that, on May 5, 1998, counsel for Defendants met and conferred with counsel for Plaintiffs via telephone conference regarding Plaintiffs' Motion For Relief From Civil Rule 26(d) and were unable to resolve the parties' differences.

Dated: May 14, 1998

Neal R. Stoll

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

The Plaintiffs having moved the Court for relief from F.R.C.P. 26(d), and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs' Motion for Relief from Rule 26(d) is hereby denied.

Entered this _____ day of _____, 1998.

_____
UNITED STATES DISTRICT JUDGE

TENDERED BY:

John S. Reed
REED WEITKAMP SCHELL COX & VICE
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by United States mail, sufficient first-class postage prepaid, to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, P.O. Box 995, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, Counsel for Plaintiffs, this 18th day of May, 1998.

Counsel for Defendants

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'98 MAY 26 P2:50

FILED
US DISTRICT COURT
WESTN. DIST. KENTUCKY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

MOTION FOR ADMISSION PRO HAC VICE

Pursuant to Local Rule 83.2, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., respectfully move the admission pro hac vice of Mark C. Hansen, Neil M. Gorsuch, and Steven F. Benz, to practice before this Court as their counsel in this action.

Each is a member of the firm Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, telephone number (202) 326-7900. Each undertakes to abide by the rules of this Court and submits himself to the jurisdiction of this Court. Each tenders his admission fee herewith. As disclosed by the attached affidavits (see Exhibit A), each is a member of good standing of the courts listed below, as well as other courts:

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

AFFIDAVIT OF MARK C. HANSEN

I, Mark C. Hansen, swear as follows:

1. I am a member of the firm Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, telephone number (202) 326-7900.

2. I am a member in good standing of the following courts, among others: the Supreme Judicial Court of Massachusetts; District of Columbia Bar; U.S. Court of Appeals for the District of Columbia; U.S. District Court for the District of Columbia.

Mark C. Hansen

sworn and subscribed before
me this 22nd day of May, 1998

Notary Public

My Commission Expires May 31, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

AFFIDAVIT OF STEVEN F. BENZ

I, Steven F. Benz, swear as follows:

1. I am a member of the firm Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, telephone number (202) 326-7900.

2. I am a member in good standing of the following courts, among others: the District of Columbia Bar; State of Maryland Bar; U.S. Court of Appeals for the District of Columbia; U.S. District Court for the District of Columbia.

Steven F. Benz

sworn and subscribed before
me this 20th day of May, 1998

Notary Public

My Commission Expires May 31, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of the Motion for Admission Pro Hac Vice ("Motion") of plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., and for good cause shown, the Motion should be, and hereby is, GRANTED. Accordingly, pursuant to Local Rule 83.2, Messrs. Hansen, Gorsuch and Benz are admitted pro hac vice to practice before the Court in this matter.

SO ORDERED.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on this 26th day of May, 1998, a copy of the foregoing was mailed to:

Neal R. Stoll and James A. Keyte, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

UST, Inc., c/o Richard H. Verheij, 100 West Putnam Avenue, Greenwich, CT 06830; and

CT Corporation Systems, 1 Commercial Plaza, Hartford, CT 06103.

United States Tobacco Sales and Marketing Company, Inc., c/o Arthur G. Smith, 100 West Putnam Avenue, Greenwich, CT 06830; and

CT Corporation Systems, 1 Commercial Plaza, Hartford, CT 06103.

United States Tobacco Company, Inc., c/o Robert H. Lawrence, Jr., 100 West Putnam Avenue, Greenwich, CT 06830; and

CT Corporation Systems, 1 Commercial Plaza, Hartford, CT 06103.

United States Tobacco Manufacturing Company, Inc., c/o CT Corporation Systems, Kentucky Home Life Building, 239 South Fifth Street, Louisville, KY 40202.

RCRh

RECEIVED

JUN 5 1998

KELLOGG, HUBER, HANSEN, TODD & EVANS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Case No. 5:98-CV-108-R

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.

VS.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY, INC., and UST, INC.

ORDER

Counsel who will appear at the trial of this matter shall meet in Chambers on **June 9, 1998 at 11:00 A.M. prevailing local time** for a pretrial conference to consider the simplification of the issues, the possibility of obtaining admission of facts and documents to avoid unnecessary proof, and such other matters as may aid in the disposition of this action in conformity with the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

This 2nd day of June, 1998.

ENTERED

JUN 02 1998

JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

ENTERED BY ORDER OF THE COURT:

THOMAS B. RUSSELL, JUDGE
UNITED STATES DISTRICT COURT

JEFFREY A. APPERSON, CLERK

BY: Joan Moore
Deputy Clerk

cc: Counsel

16diii000164

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

98 JUN -2 P12:23

FILED
US DISTRICT COURT
WESTERN DIST. KY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR RELIEF FROM FEDERAL CIVIL PROCEDURE RULE 26(d)

On April 24, 1998, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., filed a motion seeking to begin making progress with certain written discovery in this case: a two-page set of document requests and six straightforward interrogatories, which put defendants on notice as to specific categories of documents and related information that plaintiffs will require.

Defendants responded with a lengthy opposition, chiefly suggesting that the Court may not grant relief from Rule 26(d) as a matter of law. See Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Relief from Federal Civil Procedure Rule 26(d) ("Def. Mem.") at 5. But, in fact, the Court has full discretion in this regard.[1] Defendants also suggest that

[1]UST at one point even intimates that relief is appropriate only in cases involving an application for preliminary relief or

discovery will be available soon enough, and that the Court should simply adhere "to the letter of Rule 26(d) and (f)." Def. Mem. at 5. Yet defendants have declined to schedule a Rule 26(f) meeting to discuss an appropriate discovery plan -- the first step towards commencing discovery under the rules.[2] After first acknowledging that a meeting pursuant to Rule 26(f) would be appropriate, defendants changed course and refused any such meeting on the ground that it would be "premature." See Exhibits A-D.

Under these circumstances, permitting the parties to begin limited written discovery would serve the interests of efficient case management without imposing any undue burden. Indeed, defendants have identified no reason to suggest they would be prejudiced in any way by plaintiffs' reasonable proposal to move this case forward. Plaintiffs, accordingly, respectfully seek this Court's assistance in crafting relief appropriate to this substantial case.

---

motions challenging personal jurisdiction. Id. In reality, the Court is free to fashion any discovery schedule it chooses upon any showing of good cause. 8 Charles A. Wright, et al., Federal Practice and Procedure § 2046.1 at 592 (1994) ("the moratorium may be removed by court order. Although the rule does not say so, it is implicit that some showing of good cause should be made"); 1993 Advisory Committee Notes to 1993 Amendment of Rule 26(d) ("[d]iscovery can begin earlier if authorized . . . by order"; preliminary injunction and personal jurisdiction only examples of cases where such an order "will be appropriate").

[2]Rule 26(f) requires the parties to meet "as soon as practicable" after the filing of the complaint; full Rule 26(a) disclosures — involving substantially *more* discovery than what is sought by plaintiff's motion — are required 10 days later.

16diii000166

EXHIBIT A

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

919 THIRD AVENUE
NEW YORK 10022-3897

TEL: (212) 735-3000
FAX: (212) 735-2000

DIRECT DIAL
(212) 735-3660

FIRM/AFFILIATE OFFICES
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PALO ALTO
SAN FRANCISCO
WASHINGTON, D.C.
WILMINGTON
BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
PARIS
SINGAPORE
SYDNEY
TOKYO
TORONTO

May 11, 1998

Via Facsimile

Mark C. Hansen, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Dear Mark:

Thank you for your letter of May 7, 1998, in which you agreed on behalf of Conwood to extend defendants' time to answer or otherwise respond to plaintiffs' complaint to June 12, 1998 and to extend defendants' time to respond to plaintiffs' Motion For Relief From Civil Rule 26(d) to May 18, 1998. At your suggestion, our local counsel, John S. Reed of Reed Weitkamp Schell Cox and Vice, has prepared a stipulation reflecting these agreed upon extensions. Mr. Reed will forward a copy to Dick Roberts today for his review, execution and filing.

In accordance with Fed. R. Civ. P. 26(f), we also agree that it would be useful to have a face-to-face meeting among counsel to discuss case management issues or any other matters required under the Federal Rules of Civil Procedure, Local Rules or the Court's standard Scheduling Order. We should talk later this week to discuss the time and location of this meeting.

Finally, we are somewhat puzzled by your suggestion that we also discuss "issues raised by [our] prior representation of plaintiffs." As I informed you last week, Skadden Arps does not currently represent Conwood, did not represent Conwood in a related matter in the past and has received a written waiver from

Conwood that precludes Conwood from asserting that Skadden has a conflict in this case. Accordingly, we believe it is now up to Conwood to decide whether and in what manner it may wish to pursue the issue further.

If you have any questions, please feel free to call me at (212) 735-3660.

Very truly yours,

Neal R. Stoll

cc: Richard Roberts, Esq.
John Reed, Esq.

EXHIBIT B

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

May 15, 1998

Via Facsimile

Neal R. Stoll, Esquire
Skadden, Arps, Slate, Meagher & Flom, LLP
919 Third Avenue
New York, NY 10022

Dear Neal:

Thank you for your letter of May 11, 1998. I am available for the case management meeting you propose, pursuant to Rule 26(f), and suggest that we meet next Wednesday, May 20, 1998, or the first day you are available after that. I can arrange to be present on any day from May 20 through May 29. Dick Roberts has kindly offered his offices in Paducah for the meeting. Please let me know, by letter or telephone, which date is most convenient for you.

With respect to your prior representation of Conwood, I would like to discuss this with you at our meeting.

Very truly yours,

Mark C. Hansen

cc: Richard C. Roberts, Esquire
John S. Reed, Esquire

EXHIBIT C

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

919 THIRD AVENUE
NEW YORK 10022-3897

TEL: (212) 735-3000
FAX: (212) 735-2000

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(212) 735-3660

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NEWARK
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HONG KONG
LONDON
MOSCOW
PARIS
SINGAPORE
SYDNEY
TOKYO
TORONTO

May 19, 1998

Via Facsimile

Mark C. Hansen, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Dear Mark:

Thank you for your letter of May 15, 1998, in which you propose that we meet sometime between tomorrow and May 29 for a Rule 26(f) meeting. As I stated in my May 11 letter to you, Defendants prefer to proceed under the time schedule set forth by the Federal Rules of Civil Procedure, as well as the Local Rules and practice of the Western District of Kentucky. Under these established guidelines, your request and proposed dates are premature.

As you know, the timing of the Fed. R. Civ. P. 26(f) meeting is tied explicitly to the Court's scheduling of a Rule 16(b) pre-trial conference or the Court's determination of an appropriate due date of a Rule 16(b) scheduling order. In turn, Rule 16(b) provides that the Court's scheduling order shall issue within 90 days of the appearance of a defendant and within 120 days after the Complaint is served on a defendant. Accordingly, under the Federal Rules your request to meet sometime in the next several days is far earlier than contemplated by Rules 16(b) and 26(f).

It also is my understanding that, in accordance with Rule 16, Judge Russell's practice is to schedule a Rule 16(b) conference only after a defendant has answered the Complaint or otherwise responded pursuant to Fed. R. Civ. P. 12.

Consistent with my letter of May 11, we believe this procedure should be followed here as well. Moreover, because Plaintiffs have moved for relief from Rule 26(d) in order to avoid the established procedures set forth by the Federal Rules, we believe a Rule 26(f) meeting would be counterproductive at this time.

Accordingly, although we continue to agree that it would be useful to have a meeting among counsel to discuss case management issues or any other matters required under the Federal Rules of Civil Procedure, we suggest that it is best to discuss the time and place to conduct a Rule 26(f) meeting only after Defendants have first responded to the Complaint and the Court has scheduled a Rule 16(b) conference. At that time, all of the issues will be on the table for discussion, and the meeting and the subsequent scheduling conference will be more productive for the parties and for the Court.

If you have any questions, please feel free to call me at (212) 735-3660.

Very truly yours,

Neal R. Stoll

cc: Richard Roberts, Esq.
John Reed, Esq.

EXHIBIT D

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

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MARK C. HANSEN
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STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

May 22, 1998

Via Facsimile

Neal R. Stoll, Esquire
Skadden, Arps, Slate, Meagher & Flom, LLP
919 Third Avenue
New York, NY 10022

Re: Conwood Company, et al. v. United States Tobacco Company, et al., No. 5:98CV-108-R

Dear Neal:

Last week you wrote that "[i]n accordance with Fed.R.Civ.P. 26(f), we also agree that it would be useful to have a face-to-face meeting among counsel to discuss case management issues . . . . We should talk later this week to discuss the time and location of this meeting." This week you wrote to reject such a meeting, at least for the present. I am disappointed that you have changed your mind on this point; undoubtedly there are many issues that we will need to address, and we do not believe that these issues can or should be deferred indefinitely.

If after further thought you are willing to meet to discuss case management issues, please let me know. Please also advise me of the first available date on which you are willing to meet.

Finally, I note that we have not received in our offices defendants' opposition to plaintiff's motion for expedited discovery. Mr. Roberts did receive a copy, and sent it to us. To avoid this in the future, I propose that we serve one another by overnight delivery, with service effected by the same means to all counsel. If this is acceptable to you and Mr. Reed, please let me know.

Very truly yours,

Mark C. Hansen

Mark C. Hansen

CERTIFICATE OF SERVICE

I certify that on this ~~1st~~ 2nd day of June, 1998, a copy of the foregoing was mailed to:

Neal R. Stoll and James A. Keyte, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed, Reed Weitkamp Schell Cox & Vice, 24000 Citizens Plaza, Louisville, KY 40202.

E. J. Hus Jr

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION FOR ADMISSION PRO HAC VICE

Pursuant to L.R. 83.2, John S. Reed, counsel for Defendants, moves this Court to admit pro hac vice Neal R. Stoll, James A. Keyte and Chris T. Athanasia of the firm of Skadden, Arps, Slate, Meagher & Flom LLP for purposes of participating as counsel of record for Defendants. The affidavits of Mr. Stoll, Mr. Keyte and Mr. Athanasia as required by L.R. 83.2(a)(2) and 83.2(a)(4) are attached as Exhibits A, B and C.

A proposed Order is attached hereto. A check in the amount of $195 is also tendered with this motion to cover the prescribed fee of $65 for each attorney as required by LR 83.2(a)(3).

John S. Reed
REED WEITKAMP SCHELL COX & VICE
2400 Citizens Plaza
Louisville, KY 40202
(502) 589-1000

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, P.O. Box 995, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 2nd day of June, 1998.

Counsel for Defendants

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

On the Motion of John S. Reed, counsel for Defendants, pursuant to L.R. 83.2, for an Order admitting Neal R. Stoll, James A. Keyte and Chris T. Athanasia of the firm of Skadden, Arps, Slate, Meagher & Flom LLP to appear pro hac vice as counsel for Defendants' and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Neal R. Stoll, James A. Keyte and Chris T. Athanasia of the firm of Skadden, Arps, Slate, Meagher & Flom LLP are hereby granted permission to appear and participate pro hac vice as counsel for Defendants in this action.

Entered this _____ day of _____, 1998.

_____
JUDGE, UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

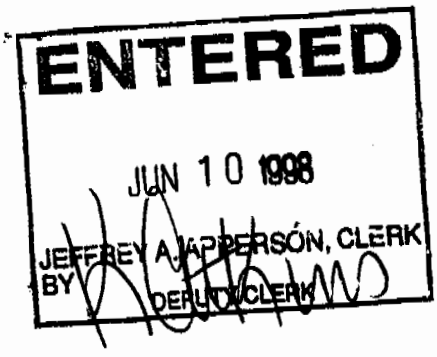
ORDER

Upon consideration of the Motion for Admission Pro Hac Vice ("Motion") of plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., and for good cause shown, the Motion should be, and hereby is, GRANTED. Accordingly, pursuant to Local Rule 83.2, Messrs. Hansen, Gorsuch and Benz are admitted pro hac vice to practice before the Court in this matter.

SO ORDERED.

6/9/98

UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

On the Motion of John S. Reed, counsel for Defendants, pursuant to L.R. 83.2, for an Order admitting Neal R. Stoll, James A. Keyte and Chris T. Athanasia of the firm of Skadden, Arps, Slate, Meagher & Flom LLP to appear pro hac vice as counsel for Defendants' and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Neal R. Stoll, James A. Keyte and Chris T. Athanasia of the firm of Skadden, Arps, Slate, Meagher & Flom LLP are hereby granted permission to appear and participate pro hac vice as counsel for Defendants in this action.

Entered this 8 day of June, 1998.

JUDGE, UNITED STATES DISTRICT COURT

ENTERED
JUN 10 1998
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Case No. 5:98-CV-108-R

CONWOOD COMPANY, L.P., ET AL

VS.

UNITED STATES TOBACCO COMPANY,
ET AL

ORDER

A telephonic conference was held on June 9, 1998.

APPEARANCES:

For the Plaintiffs: Richard C. Roberts, Esquire
Mark Hansen, Esquire
Neil M. Gorsuch, Esquire
Steven F. Benz, Esquire

For the Defendants: John S. Reed, Esquire
James A. Keyte, Esquire

This case is tentatively set for a telephonic scheduling conference on **July 7, 1998 at 12:00 Noon.** Counsel shall contact this Court's courtroom deputy if it appears after counsel's meeting that the conference should be rescheduled for another date.

IT IS SO ORDERED.

This 9th day of June, 1998.

THOMAS B. RUSSELL, JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel

ENTERED
JUN 10 1998
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
Case No. 5:98CV-108-R

CONWOOD CO. L.P., et al. PLAINTIFFS

V. **ORDER**

UNITED STATES TOBACCO CO. DEFENDANTS

IT IS ORDERED.

1. Preservation. During the pendency of this litigation, and for 60 days after entry of a final order closing all cases, each of the parties herein and their respective officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are restrained and enjoined from altering, interlining, destroying, permitting the destruction of, or in any other fashion changing any "document" in the actual or constructive care, custody, or control of such person, wherever such document is physically located, or irrevocably changing the form or sequence of the files in which the document is located. Such persons are also enjoined from changing the location of any such documents except to facilitate compilation, review, or production (as by filing in a document depository).

2. Scope.

(a) "Document" shall mean any writing, drawing, film, videotape, chart, photograph, phonograph record, tape record, mechanical or electronic sound recording or transcript thereof, retrievable date (whether carded, taped coded, electrostatically or electromagnetically recorded, or otherwise), or other data compilation from which information can be obtained, including (but not limited to) notices, memoranda, diaries, minutes, purchase records, purchase invoices, market data, correspondence, computer storage tapes, computer storage cards or disks, books journals, ledgers, statements, reports, invoices, bills, vouchers, worksheets, jottings, notes, letters, abstracts, audits, charts, checks, diagrams, drafts, recordings, instructions lists, logs, orders, recitals, telegram messages, telephone bills and logs, resumes, summaries compilations computations, and

other formal and informal writings or tangible preservations of information.

(b) This order pertains only to documents containing information that may be relevant to , or may lead to the discovery of information relevant to, claims or defenses asserted in this action. Any document described or referred to in any discovery request or response made during this litigation shall, from the time of the request or response, be treated for purposes of this order as containing such information unless and until the Court rules such information to be irrelevant.

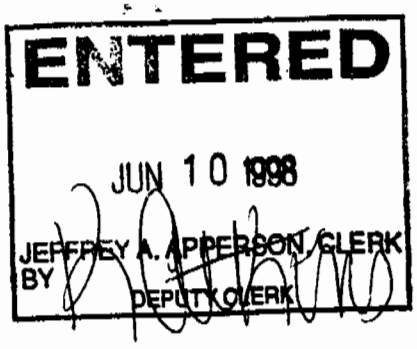
(c) Counsel are directed to confer to resolve questions as to which documents are outside the scope of this order or otherwise need not be preserved and as to an earlier date for permissible destruction of particular categories of documents. If counsel are unable to agree, any party may apply to the Court for clarification or relief from this order upon reasonable notice. A party failing, within 60 days after receiving written notice from another party that specified documents will be destroyed, lost, or otherwise altered pursuant to routine policies and programs, to indicate in writing its objection shall be deemed to have agreed to such destruction.

3. **Implementation.** Each party will, within 10 days after receiving this order, designate an individual who shall be responsible for ensuring that the party carries out the requirements of this order.

This 9th day of June, 1998.

Thomas B. Russell
Judge, United States District Court

cc: Counsel



ORIGINAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS

ANSWER AND AFFIRMATIVE DEFENSES

Defendants, United States Tobacco Company ("USTC"), United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc., and UST Inc., through counsel, answer the Complaint of Plaintiffs Conwood Company, L.P. and Conwood Sales Company, L.P. (together "Conwood"), as follows:

1. Defendants admit that Conwood has filed a Complaint seeking treble damages and injunctive relief. Defendants deny the remaining allegations contained in Paragraph 1.

2. Defendants admit that Conwood introduced a product under the brand name Hawken™. Defendants admit Hawken™ was offered in a plastic can that preserves freshness longer than the fiber board cans used by USTC. Defendants deny the remaining allegations in Paragraph 2.

3. Defendants deny the allegations contained in Paragraph 3.

4. Defendants deny the allegations contained in Paragraph 4.

5. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5.

6. Defendants admit the allegations contained in Paragraph 6 that pertain to Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., and United States Tobacco Manufacturing Company Inc. Defendants deny the allegations contained in Paragraph 6 that pertain to Defendant UST Inc.

7. Except as specifically admitted hereinafter, Defendants deny the allegations contained in Paragraph 7.

Subparagraph 7(a). To the extent that Plaintiffs have stated a claim under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, or under § 43 of the Lanham Act, Defendants admit that the Court has subject matter jurisdiction of those claims under 28 U.S.C. §§ 1331 and 1337. To the extent the Court has such original jurisdiction, and to the extent that Plaintiffs have stated a claim under state law for conduct that forms part of the same case or controversy as Plaintiffs' alleged federal claims, Defendants admit that the Court has supplemental subject matter jurisdiction of those claims under 28 U.S.C. § 1367.

Subparagraph 7(b). Defendants admit the allegations contained in Subparagraph 7(b)(1). Defendants admit the allegations contained in Subparagraph 7(b)(2) to the extent they pertain to personal jurisdiction only. Defendants admit the allegations contained in Subparagraph 7(b)(3) to the extent they pertain to personal jurisdiction over Defendant United States Tobacco Company only. Defendants deny the allegations contained in Subparagraph 7(b)(3) pertaining to UST Inc.

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Subparagraph 7(c). Defendants admit venue is proper in this district. Defendants deny that any unlawful acts were performed by Defendants.

8. Defendants deny the allegations contained in Paragraph 8.

9. Defendants deny the allegations contained in Paragraph 9.

10. Defendants deny the allegations contained in Paragraph 10.

11. Defendants deny the allegations contained in Paragraph 11.

12. USTC, or its predecessor, introduced and continues to produce and sell products under the brand names Copenhagen™ (introduced in 1822) and Skoal™ (introduced in 1934). Defendants deny the other allegations contained in Paragraph 12.

13. Defendants deny the allegations contained in Paragraph 13.

14. Defendants deny the allegations contained in Paragraph 14.

15. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15.

16. Defendants admit that Conwood introduced products under the brand names Stag™, Wintermint™, and Hawken™. Defendants deny the other allegations contained in Paragraph 16.

17. Defendants deny the allegations contained in Paragraph 17.

18. Defendants deny the allegations contained in Paragraph 18.

19. Defendants admit that Conwood introduced a product under the brand name Kodiak™ in 1981. Defendants deny the other allegations contained in Paragraph 19.

20. Defendants admit that Conwood introduced "J-Racks" in 1986, that "J-racks" allow customers to see the top of moist snuff cans, and that "S-racks" allow customers to see the sides of moist snuff cans. Defendants deny the other allegations contained in Paragraph 20.

21. Defendants admit that Conwood introduced a product under the brand name Cougar™. Defendants deny the other allegations contained in Paragraph 21.

22. Defendants deny the allegations contained in Paragraph 22.

23. Defendants deny the allegations contained in Paragraph 23.

24. Defendants deny the allegations contained in Paragraph 24.

25. Defendants admit that "Plan-O-Grams" are schematic diagrams used by some retail stores to set the location, type of display, and amount of space to be allotted to specific categories of products, including smokeless tobacco products. Defendants deny the other allegations contained in Paragraph 25.

26. Defendants deny the allegations contained in Paragraph 26.

27. Defendants deny the allegations contained in Paragraph 27.

28. Defendants deny the allegations contained in Paragraph 28.

29. Defendants deny the allegations contained in Paragraph 29.

30. Defendants deny the allegations contained in Paragraph 30.

31. Defendants admit that one or more Defendants have introduced a new product under the brand name Red Seal™. Defendants deny the other allegations contained in Paragraph 31.

32. Defendants deny the allegations contained in Paragraph 32.

33. Defendants deny the allegations contained in Paragraph 33.

34. Defendants deny the allegations contained in Paragraph 34.

35. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 35.

36. Defendants deny the allegations contained in Paragraph 36.

37. Defendants deny the allegations contained in Paragraph 37.

38. Defendants deny the allegations contained in Paragraph 38.

39. Defendants deny the allegations contained in Paragraph 39.

40. Defendants deny the allegations contained in Paragraph 40.

As To Count I:

41. Defendants incorporate Paragraphs 1 through 40 of this Answer by reference.

42. Defendants deny the allegations contained in Paragraph 42.

43. Defendants deny the allegations contained in Paragraph 43.

44. Defendants deny the allegations contained in Paragraph 44.

45. Defendants deny the allegations contained in Paragraph 45.

As To Count II:

46. Defendants incorporate Paragraphs 1 through 45 of this Answer by reference.

47. Defendants deny the allegations contained in Paragraph 47.

48. Defendants deny the allegations contained in Paragraph 48.

49. Defendants deny the allegations contained in Paragraph 49.

As To Count III:

50. Defendants incorporate Paragraphs 1 through 49 of this Answer by reference.

51. Defendants deny the allegations contained in Paragraph 51.

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52. Defendants deny the allegations contained in Paragraph 52.

53. Defendants deny the allegations contained in Paragraph 53.

As To Count IV:

54. Defendants incorporate Paragraphs 1 through 53 of this Answer by reference.

55. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 55.

56. Defendants deny the allegations contained in Paragraph 56.

57. Defendants deny the allegations contained in Paragraph 57.

As To Count V:

58. Defendants incorporate Paragraphs 1 through 57 of this Answer by reference.

59. Defendants deny the allegations contained in Paragraph 59.

60. Defendants deny the allegations contained in Paragraph 60.

As To Count VI:

61. Defendants incorporate Paragraphs 1 through 60 of this Answer by reference.

62. Defendants deny the allegations contained in Paragraph 62.

63. Defendants deny the allegations contained in Paragraph 63.

64. Defendants deny the allegations contained in Paragraph 64.

65. Defendants deny the allegations contained in Paragraph 65.

66. Defendants deny the allegations contained in Paragraph 66.

As To Count VII:

67. Defendants incorporate Paragraphs 1 through 66 of this Answer by reference.

68. Defendants deny the allegations contained in Paragraph 68.

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69. Defendants deny the allegations contained in Paragraph 69.

As To Count VIII:

70. Defendants incorporate Paragraphs 1 through 69 of this Answer by reference.

71. Defendants deny the allegations contained in Paragraph 71.

72. Defendants deny the allegations contained in Paragraph 72.

73. Defendants deny the allegations contained in Paragraph 73.

74. Defendants deny the allegations contained in Paragraph 74.

75. Defendants deny any allegation not specifically responded to above.

FIRST AFFIRMATIVE DEFENSE

76. This Court lacks jurisdiction over the person of Defendant UST Inc.

SECOND AFFIRMATIVE DEFENSE

77. Plaintiffs fail to state a claim under the federal antitrust laws, the Lanham Act, and Kentucky state law.

THIRD AFFIRMATIVE DEFENSE

78. Plaintiffs' federal and state claims that are based on certain alleged conduct that took place prior to the respective relevant time periods are barred by the statutes of limitations.

FOURTH AFFIRMATIVE DEFENSE

79. Defendants' alleged participation in the legislative process is conduct protected by the First Amendment to the Constitution of the United States.

FIFTH AFFIRMATIVE DEFENSE

80. Plaintiffs are equitably estopped by their own conduct from recovering damages in this action.

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SIXTH AFFIRMATIVE DEFENSE

81. Plaintiffs' claims are barred by the doctrine of in pari delicto.

SEVENTH AFFIRMATIVE DEFENSE

82. Plaintiffs are barred from seeking equitable relief by the doctrine of unclean hands.

EIGHTH AFFIRMATIVE DEFENSE

83. Plaintiffs are barred from seeking equitable relief because they have an adequate remedy at law.

NINTH AFFIRMATIVE DEFENSE

84. Defendants are not liable for any alleged conduct that was performed at the request of retail establishments pursuant to valid contractual agreements.

TENTH AFFIRMATIVE DEFENSE

85. Defendants at all times acted in good faith, without actual malice, and in furtherance of their own business interests.

COUNTERCLAIMS

Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., and United States Tobacco Manufacturing Company Inc. ("Counterclaimants" or "USTC"), for their Counterclaims against Plaintiffs, state as follows:

PARTIES AND JURISDICTION

1. Counterclaimants are Delaware Corporations with their principal places of business in Greenwich, Connecticut. Counterclaimants manufacture, distribute and sell

smokeless tobacco products under various brand names throughout the United States, including this district.

2. Plaintiffs, Conwood Company L.P. and Conwood Sales Company L.P. (together "Conwood"), are Delaware limited partnerships with their principal places of business in Memphis, Tennessee. Conwood manufactures, distributes and sells smokeless tobacco products under various brand names and transacts business throughout the United States, including this district. Conwood has a manufacturing facility located within this district at Bowling Green, Kentucky, and buys substantial amounts of tobacco in this district.

3. The Court has subject matter jurisdiction of all Counterclaims under the Lanham Act pursuant to 28 U.S.C. §§ 1331. The Court has subject matter jurisdiction of all state law Counterclaims pursuant to 28 U.S.C. § 1367.

4. The Court has personal jurisdiction over Conwood, and venue is proper in this district.

CONWOOD'S UNLAWFUL CONDUCT

5. Conwood, through its sales representatives and others, has engaged in conduct in violation of federal and state law, directly and proximately causing injury to USTC. On information and belief, representatives of Conwood, either at the express direction or with the tacit approval of Conwood, have engaged in unlawful conduct including but not limited to the following:

6. Conwood and USTC products typically are displayed in stores on special display racks known as "vendors," according to the express direction of retail store owners and managers. Based on retailer demand, vendors are offered in a wide variety of shapes,

sizes, and designs. Depending on the individual store and on the contractual relationships between the store and the respective tobacco companies, the vendors used for cans of moist snuff are provided by one or more smokeless tobacco companies, including Conwood and USTC. Also depending on the individual retail store, USTC, Conwood, and other smokeless tobacco companies, including Swisher International, Inc. and Swedish Match North America, Inc., place point-of-sale advertising to direct consumers to their respective smokeless tobacco products. Conwood, in stores throughout the United States, has removed USTC products from vendors, has discarded or defaced vendors provided by USTC, and has discarded, altered, or defaced USTC point-of-sale advertising, all without the permission of USTC or the retail stores.

7. In order to save costs and to manage their stores more efficiently, retail store owners and managers, in some cases, enter into agreements with smokeless tobacco companies, including USTC and Conwood, designating a company as "category manager." A company designated as category manager is responsible for managing the specific store space dedicated by the store owner or manager for the display of a certain category of products, here smokeless tobacco products. In most instances, the category manager manages the store space dedicated to smokeless tobacco products pursuant to a plan (sometimes referred to as a Plan-O-Gram) that is designed jointly by the category manager and the retail store based on objective market information, and that is adopted by the retail store owner or manager. Conwood, in stores throughout the United States, has interfered with category management relationships between Counterclaimants and retail stores, and has acted without the authority or permission of the retailer to manipulate improperly the in-store

smokeless tobacco displays managed by USTC. Specifically, Conwood has placed additional and unauthorized display racks and point-of-sale advertising, has removed, discarded, or defaced approved racks and point-of-sale advertising, and has removed and discarded USTC products, all without the knowledge or permission of retail store owners or managers. In some instances, representatives of Conwood, either at the express direction or with the tacit approval of Conwood, have posed as USTC representatives in order to gain access to the smokeless tobacco displays in retail stores.

8. Conwood representatives have direct contact with both retailers and consumers. Conwood has regularly published false and misleading statements concerning the nature and quality of USTC products to wholesalers, to retailers and to consumers. For example, Conwood has published false statements that USTC products contain foreign materials, have misrepresented USTC's manufacturing process, and have stated that USTC products are generally of low quality. In addition, Conwood has made false and misleading statements concerning USTC's business practices with the purpose and intent of causing injury to the goodwill associated with USTC products.

9. Conwood has initiated and carried out false and misleading commercial advertising campaigns regarding USTC's role as category manager for certain retail stores. In particular, Conwood issued the "Smokeless Gun" advertisement campaign, featuring a fictional private investigator named "Frank Delving." The advertisements misrepresent the nature of USTC's category management relationships with numerous false and misleading statements, including but not limited to false statements of contrived complaints by fictional retail store owners, false statements of misrepresentations allegedly made by USTC

representatives acting as category managers, false characterizations of published information, false statements that USTC representatives are "pulling a fast one" or engaging in "dirty trick[s]," false statements that USTC representatives "hid Kodiak" products, false statements that USTC marketing techniques "increases the cost of [USTC] products," false depictions of fictional retail store owners literally tied up at the hands of USTC representatives, and false statements that retail store owners are being "conned" by USTC representatives. Conwood also distributed commercial advertising directly to retail stores which included similar false statements. On information and belief, Conwood's add campaigns are designed to deceive, and do in fact deceive, a substantial segment of their audience with the intent of injuring USTC by a direct diversion of sales and/or a lessening of the goodwill associated with USTC products.

10. On information and belief, Conwood has made "secret payments" to retail stores in order to induce said retailers to allow Conwood to reset the store in whole or in part. As a direct result of these "secret payments," competition between Conwood and USTC was destroyed and USTC suffered injury.

11. Conwood also has interfered with agreements between USTC and retail stores specifically regarding point-of-sale advertising. Counterclaimants negotiate and enter into agreements with retail stores to gain display space for the promotion of USTC products. Conwood, without permission from retail store owners or managers, has interfered with these bargained for rights by, among other things, removing, discarding, or defacing USTC point-of-sale advertising and covering, or replacing altogether, USTC advertising with Conwood advertising.

Count I
VIOLATION OF SECTION 43(A) OF THE LANHAM ACT

12. Counterclaimants incorporate Paragraphs 1 through 11 of these Counterclaims by reference.

13. Conwood has made false and misleading representations of fact in interstate commerce and in connection with goods or services in commercial advertising or promotion. Conwood has materially misrepresented the nature, qualities, and/or origin of the goods, services, or commercial activities of USTC.

14. Conwood's false representations have the tendency to confuse and deceive, and actually have confused and deceived, a substantial number of consumers, retailers, and wholesalers concerning the characteristics of the goods, services, and commercial activities sold by USTC in interstate commerce.

15. As a direct and proximate result of Conwood's conduct, Counterclaimants have lost and will continue to lose sales, profits, and goodwill, and have suffered injury to their business reputation. As a direct and proximate result of Conwood's conduct, Counterclaimants have sustained and will continue to sustain damages in an amount to be determined at trial.

Count II
TORTIOUS INTERFERENCE WITH
CONTRACT AND PROSPECTIVE ADVANTAGE

16. Counterclaimants incorporate Paragraphs 1 through 15 of these Counterclaims by reference.

17. Counterclaimants have contractual agreements with certain individual retail establishments, including agreements whereby Counterclaimants are designated category

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managers. A category manager is responsible for managing the in-store placement and display of a certain category of goods, here smokeless tobacco products. A category manager works with a retail store to design and implement a plan for displaying products, sometimes known as a Plan-O-Gram. These store-approved plans include the designation of in-store shelf space, the approval of promotional materials, including but not limited to point of sale advertising, the approval of vendor sizes and designs, and various other factors of category management.

18. Conwood has full knowledge of Counterclaimants' agreements with certain individual retail stores. In addition, Conwood has full knowledge of Counterclaimants' prospective business relations with retailers. On information and belief, Conwood, without proper authorization and in contravention of said agreements between retailers and USTC, knowingly and improperly interfered with those agreements by resetting the smokeless tobacco displays, in whole or in part, in the retail stores.

19. Conwood intentionally, maliciously, improperly, and without right or justification has engaged in conduct designed to cause damage to Counterclaimants in their contractual and economic rights arising out of Counterclaimants' existing contracts and prospective contractual relationships with retail establishments. Specifically, Conwood has caused false and misleading commercial advertising concerning USTC's role as category manager to enter interstate commerce. Conwood has ignored store policies and procedures and has re-arranged smokeless tobacco displays, introduced non-approved promotional materials, tampered with displays in violation of store-approved plans, and placed Conwood's own display racks on non-approved shelf space, all without the permission of the retail store.

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In addition, on information and belief, Conwood has made secret payments in violation of Kentucky state law in order to induce retailers to designate Conwood, and not Counterclaimants, as category managers. Conwood's conduct tortiously interfered with Counterclaimants' existing contracts as well as their prospective advantage of entering into category manager agreements with retailers.

20. Conwood has acted with ill will, improperly, and in wanton disregard of Counterclaimants' contractual and economic rights and prospective advantage. As a direct and proximate result of Conwood's conduct, Counterclaimants have sustained injury and have suffered pecuniary harm.

Count III
VIOLATION OF KENTUCKY REVISED STATUTE SECTION 365.050

21. Counterclaimants incorporate Paragraphs 1 through 20 of these Counterclaims by reference.

22. Conwood has engaged in the payment or allowance of rebates, refunds, commissions or unearned discounts, in the form of money or otherwise, and secretly extended to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions in violation of Kentucky Revised Statutes § 365.050.

23. Conwood's conduct has injured competition among sellers of smokeless tobacco products and has directly and proximately caused injury to USTC.

Count IV
PRODUCT DEFAMATION

24. Counterclaimants incorporate Paragraphs 1 through 23 of these Counterclaims by reference.

25. Conwood has published to customers, retailers, and distributors false statements disparaging the quality of USTC products. These false and disparaging statements were harmful to Counterclaimants' pecuniary interests.

26. Conwood published false and disparaging statements with the intent to cause harm to Counterclaimants' pecuniary interests, or Conwood either recognized or should have recognized that the false and disparaging statements were likely to do so.

27. Conwood knew the statements were false or acted in reckless disregard of their veracity.

28. As a direct and proximate result of Conwood's statements, Counterclaimants have sustained pecuniary injury and have suffered general and special damages.

Count V
CONVERSION/TROVER

29. Counterclaimants incorporate Paragraphs 1 through 28 of these Counterclaims by reference.

30. Conwood intentionally, wrongfully, and without permission, converted, took, detained, used, or disposed of USTC property, including but not limited to vendors, point-of-sale advertising, and smokeless tobacco products.

31. Conwood acted willfully and maliciously and with a conscious indifference to the consequences to USTC.

32. As a direct and proximate result of Conwood's conduct, Counterclaimants have been injured and have suffered damages.

INJURY AND DAMAGES

33. As a direct and proximate result of Conwood's unlawful conduct, Counterclaimants have been injured and have suffered general and special damages in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Counterclaimants respectfully request the Court to enter judgment on their behalf and against Conwood and to award Counterclaimants compensatory and punitive damages in an amount to be determined at trial.

Dated: June 12, 1998

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Attorneys for Defendants

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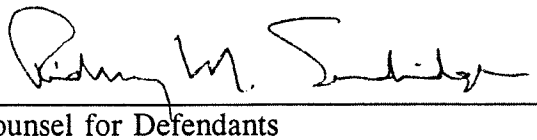
CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, P.O. Box 995, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 12th day of June, 1998.



Counsel for Defendants

ORIGINAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION OF DEFENDANT UST INC. TO DISMISS COMPLAINT FOR LACK OF PERSONAL JURISDICTION

Defendant UST Inc., through counsel, moves the Court, pursuant to Fed. R. Civ. P. 12(b)(2), to dismiss the Complaint against it for lack of personal jurisdiction. With this motion, UST Inc. submits a supporting memorandum of law and the affidavit of Debra A. Baker and tenders a proposed order.

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing motion, the supporting memorandum and affidavit and the tendered order were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, P.O. Box 995, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 12th day of June, 1998.

Counsel for Defendants

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ORIGINAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MOTION TO DISMISS PART OF PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM

Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. (collectively "USTC"), and UST Inc., through counsel, move the Court, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the Complaint to the extent that it alleges that Defendants violated Section 2 of the Sherman Act by exercising their constitutional right to participate in government processes. With this motion, Defendants submit a supporting memorandum of law and tender a proposed order.

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing motion, the supporting memorandum and the tendered order were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, P.O. Box 995, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 12th day of June, 1998.

Counsel for Defendants

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM OF LAW IN SUPPORT OF MOTION BY DEFENDANT UST INC. TO DISMISS COMPLAINT FOR LACK OF PERSONAL JURISDICTION

Defendant UST Inc. respectfully submits this memorandum of law in support of its motion to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction.

Preliminary Statement

Plaintiffs, Conwood Company, L.P. and Conwood Sales Company, L.P. (together "Conwood"), have filed a 32-page Complaint in the United States District Court for the Western District of Kentucky, against multiple Defendants, including UST Inc. Conwood alleges a panoply of misconduct by Defendants, including UST Inc., in an attempt to support numerous claims under both federal and Kentucky law.

UST Inc., however, is simply a holding company that has never manufactured, sold or distributed moist snuff (or any other type of product) anywhere, including the

Commonwealth of Kentucky. Nor does UST Inc. have any other contacts with Kentucky that could give rise to this Court's exercise of personal jurisdiction over it. Accordingly, UST Inc. moves to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction.

Argument

I. PLAINTIFFS' CLAIMS AGAINST UST INC. SHOULD BE DISMISSED BECAUSE THIS COURT LACKS PERSONAL JURISDICTION

In order for a federal court to exercise personal jurisdiction over a defendant, jurisdiction must be conferred by an applicable rule or statute, and the assertion of jurisdiction must comport with due process. "A court. . . must satisfy a two-pronged test: the defendant must be amenable to suit under the forum state's long-arm statute and the due process requirements of the Constitution must be met." Reynolds v. International Amateur Athletic Fed'n, 23 F.3d 1110, 1115 (6th Cir.), cert. denied, 115 S. Ct. 423 (1994). Here, neither prong of the test can be met by plaintiffs.

A. UST Inc. Is Not Subject To Jurisdiction Under The Kentucky Long-Arm Statute

In order to be subjected to personal jurisdiction in Kentucky, a nonresident defendant must commit some act or omission that satisfies one of the enumerated criteria set forth in the Kentucky long-arm statute. That statute provides as follows :

> (2)(a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:
>
> 1. Transacting any business in this Commonwealth;
>
> 2. Contracting to supply services or goods in this Commonwealth;

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3. Causing tortious injury by an act or omission in this Commonwealth;

4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth;

. . .

6. Having an interest in, using, or possessing real property in this Commonwealth, providing the claim arises from the interest in, use of, or possession of the real property, provided, however, that such in personam jurisdiction shall not be imposed on a resident who did not himself voluntarily institute the relationship, and did not knowingly perform, or fail to perform, the act or acts upon which jurisdiction is predicated;

. . . .

Ky. Rev. Stat. Ann. § 454.210(2)(a) (Baldwin 1997). Thus, even if Constitutional minimum contacts otherwise exist – which, as discussed below, they do not – personal jurisdiction is not proper unless the defendant committed some act sufficient to satisfy a relevant provision of the long-arm statute. See Auto Channel, Inc. v. Speedvision Network, LLC, ___ F. Supp. ___, 1997 WL 847047, *2-3 (W.D. Ky. 1997); Wright v. Sullivan Payne Co., 839 S.W.2d 250, 253 (Ky. 1992).

As set forth in the Affidavit of Debra A. Baker, UST Inc. did not itself commit any alleged act in Kentucky sufficient to satisfy any provision of the long-arm statute. UST Inc. does not transact business in Kentucky (Affidavit ¶¶ 2, 4); it does not contract to supply services or goods in Kentucky (Affidavit ¶ 4); it did not cause tortious injury in Kentucky (Affidavit ¶ 4); and it does not have an interest in, use, or possess real property in Kentucky

(Affidavit ¶ 5). Moreover, Conwood's bare allegations that UST Inc. "directly or by [its] agents, may be found and transact business in this district" is insufficient to support personal jurisdiction because courts have long held that courts may not impute the business activities of wholly owned subsidiaries to the parent company merely because of their corporate relationship. See Miller v. Trans World Airlines, Inc., 302 F. Supp. 174 (E.D. Ky. 1969).

Accordingly, the Kentucky long-arm statute cannot confer personal jurisdiction over UST Inc.

B. Even If UST Inc. Were Subject To The Kentucky Long-Arm Statute, The Exercise Of Jurisdiction Over UST Inc. Would Violate Due Process

In any event, the exercise of jurisdiction would violate the due process requirements of the Constitution. Beginning with the seminal case of International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945), the Supreme Court consistently has held that a court cannot exercise personal jurisdiction over a nonresident defendant unless there are "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." 326 U.S. at 316, 66 S. Ct. at 158. See also Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). The focus of the inquiry into whether a suit offends traditional notions of fair play and substantial justice is whether a nonresident defendant has purposefully availed himself of the benefits and protections of the forum state's laws, so as reasonably to anticipate being hailed into court there. Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958). Consistent with due process, personal jurisdiction over a nonresident defendant can be either general or specific. Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co., 91 F.3d 790, 793 (6th Cir. 1996). Conti v. Pneumatic Prod. Corp., 977 F.2d 978, 981 (6th Cir. 1992).

Specific jurisdiction is applicable when a cause of action arises out of a defendant's purposeful contacts with the forum. See Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). General jurisdiction is applicable when a defendant's activities in the forum state are substantial or "continuous and systematic," even if the cause of action is unrelated to those activities. Nationwide Mut. Ins. Co., 91 F.3d at 793, 794; see also Conti, 977 F.2d at 981. Thus, to satisfy the due process portion of the jurisdictional analysis, plaintiffs must allege and prove either that their claims against UST Inc. arose out of sufficient minimum contacts with Kentucky (specific or limited jurisdiction) or that UST Inc. had such "continuous and systematic" contacts with Kentucky that it is subject to personal jurisdiction even if the cause of action did not arise out of those contacts (general jurisdiction).

Conwood has not met, and cannot meet, the due process requirements here. As demonstrated by the Baker Affidavit, UST Inc. is and always has been a holding company. UST Inc. does no business in Kentucky, and, indeed, has never manufactured, sold or distributed any products anywhere, including Kentucky. (Affidavit ¶ 2). As further established by the Baker Affidavit, UST Inc. was formed in 1986 and is a corporation organized and existing under the laws of the State of Delaware with its principal and only place of business in Greenwich, Connecticut. (Affidavit ¶ 2). UST Inc. is a separate and distinct corporation and maintains a separate corporate existence from its subsidiary United States Tobacco Company. (Affidavit ¶ 3). UST Inc. has no office or place of business in Kentucky and does not use, own or rent any real or personal property there. (Affidavit ¶ 5). UST Inc. maintains no bank accounts in Kentucky, has no telephone listing in Kentucky, keeps no books or records in Kentucky and pays no taxes in Kentucky. (Affidavit ¶ 5). UST Inc. does not solicit or advertise for business in

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Kentucky, or anywhere else. (Affidavit ¶ 5). UST Inc. does not have any agents, distributors, servants, employees, officers, directors, brokers, wholesalers or other representatives in Kentucky for the purpose of conducting business there. (Affidavit ¶ 5). Finally, UST Inc. is not, and has never been, qualified or authorized to do business in Kentucky, has never consented to be sued in Kentucky, and has not designated any agent for the service of process in Kentucky. (Affidavit ¶ 6).

Significantly, Conwood cannot base its claim that this Court may exercise personal jurisdiction over UST Inc. on the allegation that UST Inc. is a parent company of one or more corporations doing business in Kentucky. A foreign corporation is not amenable to jurisdiction if it does not itself have sufficient minimum contacts with the forum state. See Velandra v. Regie Nationale Des Usines Renault, 336 F.2d 292, 297 (6th Cir. 1964) (it is "appropriate, for the purpose of determining the amenability to jurisdiction of a foreign corporation which happens to own a subsidiary corporation carrying on local activities, to inquire whether the parent has the requisite minimum contacts with the State of the forum"); Miller v. Trans World Airlines, Inc., 302 F. Supp. 174 (E.D. Ky. 1969) (dismissing claim against parent corporation where "plaintiff ha[d] not shown sufficient contacts between the parent corporation . . . and the Commonwealth of Kentucky to render it subject to jurisdiction"); see also Smith v. Brown & Williamson Tobacco Corp., 1996 WL 751399, *2 (W.D. Mo. 1996) (dismissing complaint against defendant that had ownership interests in other companies that manufactured and sold tobacco products, but did not itself own any tobacco fields, manufacturing plants, or sales force). Conwood cannot establish that UST Inc. itself had sufficient minimum contacts with Kentucky.

In sum, it would offend traditional notions of fair play and substantial justice to keep UST Inc. as a defendant in this case.

CONCLUSION

For the foregoing reasons, this Court lacks personal jurisdiction over defendant UST Inc. and the Complaint should therefore be dismissed as to UST Inc.

Respectfully submitted,

Dated: June 12, 1998

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AUTO CHANNEL, INC., et al. Plaintiffs
v.
SPEEDVISION NETWORK, LLC, et al
Defendants

Civil Action No. 3:97-CV-38-H.

United States District Court,
W.D. Kentucky,
Louisville Division.

Nov. 19, 1997.

Tort action was filed against out-of-state television programming licensors for alleged misappropriation of trade secrets and unfair competition. Licensors moved to dismiss for lack of personal jurisdiction. The District Court, John G. Heyburn, II, J., held that: (1) the licensors did not have contacts with Kentucky that would permit the assertion of long-arm jurisdiction over them for causing tortious injury in Kentucky by virtue of alleged unfair competition and misappropriation of trade secrets; (2) the causes of action did not arise out of any activities in Kentucky; and (3) the assertion of personal jurisdiction would violate due process.

Dismissed.

[1] COURTS ⇐12(2.1)
106k12(2.1)
Purpose of Kentucky long-arm statute is to insure that Kentucky courts comply with federal constitutional requirements of due process before asserting personal jurisdiction over nonresident defendants, but that does not permit courts to ignore precise language that legislature chose to ensure that constitutional compliance. U.S.C.A. Const.Amend. 14; KRS 454.210(2)(a).

[2] FEDERAL COURTS ⇐81
170Bk81
Out-of-state television programming licensors did not have contacts with Kentucky that would permit assertion of long-arm jurisdiction over them for causing tortious injury in Kentucky by virtue of alleged unfair competition and misappropriation of trade secrets; neither company had any business operations in Kentucky, their web sites on the Internet were not active solicitation or advertisement in Kentucky, and there was no indication that licensors sold programming directly to viewers in Kentucky or had any control over where licensees sold programming. KRS 454.210(2)(a)4.

[3] FEDERAL COURTS ⇐79
170Bk79
business
No causal connection was shown between out-of-state television programming licensors' contacts with Kentucky activities and the alleged tortious injuries from unfair competition or misappropriation of trade secrets and, thus, any inference that licensors conducted or solicited business in Kentucky, or derived significant revenue from services rendered in Kentucky, did not establish long-arm jurisdiction over them for causing tortious injuries in Kentucky; allegedly wrongful acts giving rise to claims bore no relationship to any business or advertising engaged in, or revenue derived by, licensors in Kentucky. KRS 454.210(2)(a)4.

[4] CONSTITUTIONAL LAW ⇐305(6)
92k305(6)
Causes of action for unfair competition and alleged misappropriation of trade secrets did not "arise from" out-of-state television programming licensors alleged activities in Kentucky and, thus, relationship between activities and causes of action was too attenuated for assertion of long-arm jurisdiction to comply with due process requirements; causes of action arose from alleged copying of television programming, but licensors did not have direct contacts with any subscribers who may have seen programming through licensees' services. U.S.C.A. Const.Amend. 14; KRS 454.210(2)(a)4.

[4] FEDERAL COURTS ⇐79
170Bk79
Causes of action for unfair competition and alleged misappropriation of trade secrets did not "arise from" out-of-state television programming licensors alleged activities in Kentucky and, thus, relationship between activities and causes of action was too attenuated for assertion of long-arm jurisdiction to comply with due process requirements; causes of action arose from alleged copying of television programming, but licensors did not have direct contacts with any subscribers who may have seen programming through licensees' services. U.S.C.A. Const.Amend. 14; KRS 454.210(2)(a)4.

[5] CONSTITUTIONAL LAW ⇐305(5)
92k305(5)
If out-of-state defendant does not have sufficient contacts with Kentucky, Kentucky's interest in

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providing home forum for its own injured citizens is insufficient to carry day under long-arm statute and to comply with due process. U.S.C.A. Const.Amend. 14; KRS 454.210(2)(a).

[5] FEDERAL COURTS ⚖76.5
170Bk76.5
If out-of-state defendant does not have sufficient contacts with Kentucky, Kentucky's interest in providing home forum for its own injured citizens is insufficient to carry day under long-arm statute and to comply with due process. U.S.C.A. Const.Amend. 14; KRS 454.210(2)(a).

James E. Morreau, Jr., Kruger, Schwartz & Morreau, Louisville, KY, for Auto Channel, Inc.

K. Gregory Haynes, Wyatt, Tarrant & Combs, Louisville, KY, Burt A. Braveman, Sandra Greiner, T. Scott Thompson, Cole, Rayvid & Braveman, Washington, DC, for Speedvision Network.

Janet P. Jakubowicz, John K. Bush, Greenebaum Doll & McDonald, Louisville, KY, Timothy J. O'Rourke, Scott D. Dailard, Dow, Lohnes & Alberson, Washington, DC, for Cox Communications.

James R. Cox, Reed, Weitkamp, Schell, Cox & Vice, Louisville, KY, M. Norman Goldberger, Dana B. Klinges, Robert Goldstein, Wolf, Block, Schorr & Solis- Cohen, Philadelphia, PA, for Comcast Corporation.

Richard A. Vance, Robert W. Griffith, Bethany A. Breetz, Stites & Harbison, Louisville, KY, Andrew D. Crain, U.S. West, Inc., Denver, CO, for Continental Cablevision.

MEMORANDUM OPINION

HEYBURN, District Judge.

*1 In a separate Memorandum Opinion the Court has discussed numerous dispositive motions. As a result, Plaintiffs have the following causes of action remaining: (1) unfair competition and misappropriation of trade secrets against Cox, Comcast, Continental and Speedvision and (2) various contractual, bad faith, fraud and fiduciary duty common law actions against Cox.

The Court now considers motions of Defendant Speedvision Network, LLC ("Speedvision") and Defendant Continental Cablevision, Inc. ("Continental") to dismiss Plaintiffs' remaining claims against each of them for lack of personal jurisdiction and improper venue. Plaintiff Auto Channel, Inc. is a Kentucky corporation with its principal place of business in Louisville, Kentucky. Plaintiff Robert J. Gordon d/b/a Gordon Communications is a resident of Louisville, Kentucky. Plaintiff Marco J. Rauch is a resident of Rancho Cordova, California. Defendant Speedvision is a Delaware limited liability company with its principal place of business in Stamford, Connecticut. Defendant Continental is a Delaware corporation with its principal place of business in Boston, Massachusetts. Neither Speedvision nor Continental has any offices, employees, or agents in Kentucky. Neither has entered into any contracts or advertised (other than via an Internet web page) in Kentucky.

I

Since all antitrust claims against Speedvision and Continental have been dismissed, this Court no longer has personal jurisdiction over the parties pursuant to the nationwide service of process provision set forth in 15 U.S.C. § 22. Accordingly, Plaintiffs must now rely on the Kentucky long-arm statute to establish personal jurisdiction over the parties. See, e.g., Morley v. Cohen, 610 F.Supp. 798, 823 (D.Md.1985) ("[P]laintiffs must plead ... sufficient facts to establish a basis for personal jurisdiction independent of the nationwide service of process provisions of the previously dismissed federal claims.") For the purposes of this motion, Plaintiffs have the burden of establishing a prima facie case of personal jurisdiction under the applicable long-arm statute. See Welsh v. Gibbs, 631 F.2d 436, 438-439 (6th Cir.1980). The Court will consider the pleadings and affidavits in the light most favorable to the Plaintiffs. Id. at 439.

In order to determine whether personal jurisdiction exists over a nonresident defendant in a diversity action, this Court must apply the law of the state in which it sits, subject to due process limitations. Id. Kentucky's long-arm statute provides that:

A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:

1. Transacting any business in this Commonwealth;
2. Contracting to supply services or goods in this

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Commonwealth;
3. Causing tortious injury by an act or omission in this Commonwealth;
4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth.

* * *

*2 K.R.S. 454.210(2)(a).

Kentucky courts may employ the long-arm statute to exercise jurisdiction over nonresidents "only to the limits of the Constitution's due process clause." Wright v. Sullivan Payne Company, 839 S.W.2d 250, 253 (Ky.1992). Therefore, under the long-arm statute, a plaintiff must demonstrate that the defendant has the statutorily required contacts with Kentucky and that the cause of action arose from those contacts. See K.R.S. 454.210(2)(a).

Plaintiffs have properly pleaded claims against Speedvision and Continental for misappropriation of trade secrets [FN1] and common law unfair competition. These claims sound in tort. Moreover, there appears to be no dispute that the alleged tortious acts from which these claims arose occurred outside of Kentucky. Therefore, the applicable section of the Kentucky long-arm statute is K.R.S. 454.210(2)(a)4., which permits personal jurisdiction over nonresident tortfeasors who cause tortious injury in the state through acts done outside the state. [FN2] This subsection requires an "out-of-state" tortfeasor to have at least one of several enumerated contacts with Kentucky before he or she is subject to a court's jurisdiction. Specifically, the tortious injury must "arise[] out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue" in Kentucky. K.R.S. 454.210(2)(a)4.

[1] The oral and written submissions of both parties suggest that the Court should essentially bypass the specific requirements of the long-arm statute and proceed directly to a due process analysis of the Defendants' contacts with the forum. They base this position on language in 6 superth Circuit and Kentucky case law stating that the long-arm statute "allows Kentucky courts to reach to the full constitutional limits of due process in entertaining jurisdiction over non-resident defendants." Mohler v. Dorado Wings, Inc., 675 S.W.2d 404, 405 (Ky.Ct.App.1984); Poyner v. Erma Werke GmbH, 618 F.2d 1186, 1192 (6th Cir.1980). Most of us have heard words to this effect repeated so often that we long ago stopped reflecting upon what might be their true meaning or origin. However, a closer reading of these precedents produces a subtle conclusion. Underlying the holdings in these cases is the notion that "the purpose of the Kentucky long-arm statute is to insure that Kentucky courts comply with federal constitutional requirements of due process before asserting personal jurisdiction over nonresident defendants." Pierce v. Serafin, M.D., 787 S.W.2d 705, 706 (Ky.Ct.App.1990); Texas American Bank v. Sayers, 674 S.W.2d 36, 38 (Ky.Ct.App.1984). The notion is not that we ignore the precise language which the legislature has chosen to ensure that constitutional compliance.

The legislative intent to comply with due process is manifest in the specific provisions of K.R.S. 454.210, which were carefully drafted to ensure that jurisdiction over nonresident defendants in a variety of contexts is predicated on the requisite minimum contacts. For example, "Kentucky has elected to assume personal jurisdiction over a nonresident tort-feasor whose activities outside the state result in injury only if that tort-feasor regularly does or solicits business within the state or has other substantial connection to the Commonwealth." Pierce, 787 S.W.2d at 706-07. The stricter requirements for establishing jurisdiction over out-of-state tortfeasors seem clearly intended to address due process concerns not present when a tortfeasor has acted entirely within the state. Compare K.R.S. 454.210(2)(a)3. with K.R.S. 454.210(2)(a)4. In effect, the legislature has designed the long- arm statute to ensure that non-resident defendants have "minimum contacts" with Kentucky "such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Accordingly, a defendant whose conduct in the forum is covered by the long-arm statute will necessarily have "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253,

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78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958).

*3 However, the fact that a proper application of K.R.S. 454.210(2)(a) will simultaneously satisfy the requirements of due process does not obviate the need to apply its provisions in a manner faithful to the specific language chosen by the legislature. On the other hand, due process principles and precedents may in many circumstances assist a court with the faithful application of the specific provisions of the long-arm statute. Depending on which provision of K.R.S. 454.210(2)(a) is applicable in a given situation, a court may or may not find it appropriate to apply the long-arm statute without some recourse to a due process analysis. In some cases, a court will be able to determine whether there is personal jurisdiction based purely on an application of the express language of K.R.S. 454.210(2)(a). See Jackson v. Wileman, D.D.S., 468 F.Supp. 822, 823-24 (W.D.Ky.1979) (out-of-state tortfeasor did not engage in "doing or soliciting of business... or derivation of substantial revenue" in the state). In other cases, a court seeking to apply a broadly worded provision of the long-arm statute will rely much more heavily on due process principles. See Tube Turns Div. of Chemetron v. Patterson Co., 562 S.W.2d 99, 99-101 (Ky.Ct.App.1978) (scope of "transacting any business" determined with reference to 6 superth Circuit due process analysis). In still others, a court may find it appropriate to move back and forth between the language of the long-arm statute and a due process analysis. See Pierce v. Serafin, M.D., 787 S.W.2d 705, 706-07 (Ky.Ct.App.1990) (applying 6 superth Circuit due process analysis and language of K.R.S. 454.210(2)(a)3-4.). In all cases, however, Kentucky courts arguably have applied the clear directives of the long-arm statute modified only by the requirements of due process. [FN3]

II.

[2] Though Plaintiffs do not specifically address the requirements of the Kentucky long-arm statute, they make a number of factual allegations which might be relevant to establishing jurisdiction. Plaintiffs contend that between February and June of 1994, Continental sent criteria for use in a financial model and a list of contact persons at its local cable systems to Plaintiffs in Louisville, Kentucky. Plaintiffs also contend that Speedvision licenses programming to Primestar, HBO Direct and DirecTV, all of whom make Speedvision available to subscribers in Kentucky. Continental also has indirect links to Kentucky through its ownership interests in Primestar, potentially deriving revenue indirectly from subscriptions to Speedvision in Kentucky. Finally, both Speedvision and Primestar maintain web sites which can be reached by Internet users in Kentucky. [FN4]

The Court concludes that these contacts with Kentucky individually and collectively fail to meet the exacting requirements of K.R.S. 454.210(2)(a) 4. First, there is scant evidence that either Defendant "does or solicits" business in Kentucky. Neither Continental nor Speedvision has any business operations whatsoever within Kentucky and neither has engaged in any advertising in the state. The financial modeling criteria and contact lists sent by Continental to Plaintiffs in Louisville cannot reasonably be characterized as solicitation of business. Moreover, the mere fact that Internet users in Kentucky can view advertisements on web pages provided by Speedvision and Primestar falls far short of demonstrating that Defendants advertise in Kentucky. See, e.g., Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119, 1124 (W.D.Pa.1997) ("[a] passive web site that does little more than make information available to those who are interested in it is not grounds for the exercise [of] personal jurisdiction."); Cf. Kennedy v. Ziesmann, 526 F.Supp. 1328, 1331 (E.D.Ky.1981) ("Nor may the mere carrying of a telephone listing, without additional advertising or other solicitation, amount in and of itself to regular solicitation of business such as to make ... defendant subject to suit under the long-arm statute of a neighboring state where the directory is distributed.")

*4 Similarly, Plaintiffs have pleaded no facts demonstrating that either Speedvision or Continental derives "substantial revenue" from "goods used or consumed or services rendered" in Kentucky. It is undisputed that Speedvision licenses its programming to distributors including Primestar, HBO Direct, and DirecTV who may, in turn, sell programming to Kentucky subscribers. However, Speedvision sells no programming directly to television viewers in Kentucky and has no control over where licensees sell its programming. At best, Continental's ownership interest in Primestar generates revenue only indirectly through subscriptions to Primestar in Kentucky, and there is no indication that the amounts generated, if any, are substantial. Indeed, the available facts indicate that

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Speedvision has, to date, derived a negligible amount of revenue from the distribution of its programming in Kentucky. [FN5]

[3] Moreover, the Plaintiffs seem unable to demonstrate a sufficient causal link between their claims and Defendants' alleged contacts with the state. Even if there were facts sufficient to support the inference that Defendants conducted or solicited business in Kentucky, or derived significant revenue from services rendered in the state, Plaintiffs must show that their injuries "arose out of" these activities, as required by K.R.S. 454.210(2)(a)4. However, Plaintiffs' theories of injury, as applied to the remaining counts of the Complaint, are all rooted in allegations that Cox, Comcast, Continental, and Speedvision combined and conspired to use confidential business information acquired from the Auto Channel to furnish programming format and content for Speedvision. The allegedly wrongful acts giving rise to these claims bear no relationship to any business or advertising presently (or previously) engaged in, or revenue derived by, Defendants in Kentucky. The Defendants' in-state activities are at most incidental to the conduct underlying the cause of action. See Kennedy v. Ziesmann, 526 F.Supp. 1328, 1331 (E.D.Ky.1981) ("Here, the cause of action alleged, if any exists, arose in Ohio when the anesthetic was administered, and the telephone calls [by the doctor to Kentucky] were only incidental."). Indeed, it appears that the allegedly tortious acts causing Plaintiffs' injuries would necessarily have occurred prior to the time that Speedvision was first distributed in Kentucky.

III.

[4] The due process analysis followed in the 6th Circuit only bolsters the Court's conclusion that Plaintiffs' causes of action do not "arise from" Defendant's alleged activities in Kentucky. The Sixth Circuit has incorporated the "arising from" requirement into its three-part test for determining whether a nonresident defendant has the requisite minimum contacts to give rise to personal jurisdiction:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

*5 Southern Machine Co. v. Mohasco Industries, Inc., 401 F.2d 374, 381 (6th Cir.1968) (emphasis added). The necessary degree of relatedness for the plaintiffs claims to "arise from" the defendant's contacts has never been precisely determined. See, e.g ., Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415 n. 10, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). However, the Sixth Circuit requires that the cause of action have at least a "substantial connection" to the defendant's in-state activities. Southern Machine, 401 F.2d at 384 n. 27; Third Nat. Bank v. WEDGE Group, Inc., 882 F.2d 1087, 1091 (6th Cir.1989). In many cases, it is easy discern a direct relationship between the cause of action and the defendant's contacts with the forum. For example, in an action for breach of contract, it necessarily follows that the cause of action arises directly out of the contract entered into by the plaintiff and the nonresident defendant. See, e.g., In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 229 (6th Cir.1972) (contract entered into by nonresident defendant "is necessarily the very soil from which the action for breach grew.").

In this case, the statutorily required relationship between Plaintiffs' tort claims and Defendants' minimal contacts to Kentucky is so attenuated as to be de minimus. The only possible link is that some Kentucky customers of Primestar, HBO Direct, or DirecTV may be subscribing to Speedvision, the network that Defendants allegedly copied from the Auto Channel. [FN6] However, this slight degree of relatedness is not sufficient to support personal jurisdiction over the Defendants. The fact that Defendants could profit indirectly from sales of Speedvision's programming in Kentucky is simply not one of the "operative facts of this controversy." Southern Machine, 401 F.2d at 384. Indeed, the underlying factual basis of the Plaintiffs' claims does not depend on whether Speedvision is presently available to subscribers in Kentucky or any other state. The validity or invalidity of these claims does not seem to depend on anything these Defendants have done (or may be doing) in Kentucky.

Overall, one cannot escape the impression that neither Speedvision nor Continental have acted purposefully within the state in any consequential manner. A comparison of their actions with those in Third Nat. Bank in Nashville v. WEDGE Group,

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Inc., 882 F.2d 1087 (6th Cir.1989) is instructive. For example, Wedge had meetings and negotiations in the forum state; these Defendants did not. Id. at 1090. Wedge held substantial deposits in the forum; these Defendants did not. Id. Those comparisons alone are sufficient to differentiate Wedge's contacts as "purposefully availing" and the Defendant's contacts as "random" or "attenuated." In the Court's view, the differences are significant enough to justify different results.

IV.

[5] The Court's analysis concludes that Plaintiffs' causes of action against the Defendants lack the requisite minimum contacts with Kentucky for this Court to assume jurisdiction under K.R.S. 454.210(2)(a). Nonetheless, the purpose of the Kentucky long-arm statute is to ensure that courts comply with due process, not to deny arbitrarily an injured party his or her day in court. Indeed, Kentucky has a legitimate interest in seeing that its citizens receive compensation for their injuries, especially when, as here, the brunt of the injury may be felt in Kentucky, that is, upon a Kentucky corporation. However, without the requisite contacts, Kentucky's interest in providing a home forum for its own citizens is insufficient to carry the day.

*6 This Court is satisfied that there are other forums in which it would be fair and appropriate to litigate Plaintiffs' claims against the Defendants. Speedvision is a Delaware corporation with its principal place of business in Stamford, Connecticut. Continental is a Delaware corporation with its principal place of business in Boston, Massachusetts. Plaintiffs allege that Speedvision and Continental conspired with others to steal the programming format and content of the Auto Channel. Such a scheme would require a substantial amount of planning and coordination. Much of the alleged wrongdoing is highly likely to have taken place in Connecticut, Massachusetts, or Delaware. It would not be unreasonable to require Plaintiffs, who were pursuing deals with nonresidents across state lines, to seek recovery in those jurisdictions where the conduct giving rise to their injuries occurred. [FN7] Consequently, the Court concludes that its decision has results which are fair to the movants without being unfair to Plaintiffs overall.

Since Defendants' motions have been resolved on the issue of personal jurisdiction, the Court need not reach the venue issue. The Court will issue an order consistent with this memorandum opinion.

ORDER

Defendants, Speedvision Network, LLC and Continental Cablevision, Inc., have moved this Court to dismiss Plaintiffs' claims against them for lack of personal jurisdiction and improper venue. Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Defendants motions are SUSTAINED and the claims against Speedvision and Continental contained in counts 10 and 11 are DISMISSED WITHOUT PREJUDICE.

FN1. K.R.S. § 365.880 et seq. (Uniform Trade Secrets Act)

FN2. Plaintiffs have suggested that KRS 454.210(2)(a)1.-2 may establish personal jurisdiction over Defendants. Their reasoning apparently is that operating or deriving revenue through independent distributors can establish minimum contacts with the forum. See Payne v. Kristofferson, 631 F.Supp. 39, 43 (N.D.Ga.1985) (nonresident's licensing arrangement with national distributor of allegedly infringing song books sufficient to establish minimum contacts with forum); See also Edy Clover Productions, Inc. v. National Broadcasting Co., 572 F.2d 119, 120-21 (3rd Cir.1978) (nonresident programmer could anticipate that allegedly infringing game show might be broadcast by distributor in forum). However, even if such arrangements constituted "transacting any business" or "contracting to supply goods or services" in Kentucky under the long-arm statute, Plaintiffs tort claims still would not "arise from" these contacts. See Thermothrift Industries, Inc. v. Mono-Therm Insulation Systems, Inc., 450 F.Supp. 398, 403 (W.D.Ky.1978) ("... a key factor in weighing the strength of this state's connection is whether the cause of action arises out of defendant's attempts to benefit from the laws of Kentucky by entering the market here."); See also Bowen v. Eastside Jersey Dairy, 521 S.W.2d 822, 823 (Ky.1975). K.R.S. 454.210(2)(a)3. does not apply, because the allegedly tortious acts took place outside of Kentucky.

FN3. The fact that the requirements of K.R.S. 454.210(2)(a) are theoretically satisfied by the same minimum contacts required by due process should not be taken to mean that the long-arm statute is superfluous. First, it is possible to decline jurisdiction based only on the language of the statute, without recourse to a due process analysis.

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Second, the specific provisions of the statute in many cases will provide courts with additional guidance or lend clarity to factual situations not previously encountered in our due process cases. Of course, merely satisfying the plain language of the statute does not obviate the need to check this result against the requirements of due process.

FN4. It is clear that the Defendants contacts with the forum are not sufficiently systematic or continuous for an assertion of general jurisdiction over them. See Third Nat. Bank in Nashville v. WEDGE Group, Inc., 882 F.2d 1087, 1089 (6th Cir.1989).

FN5. Speedvision presently receives about $ 400 per month from retransmission of its programming in Kentucky. This amounts to less than four hundredths of one percent of Speedvision's total monthly revenues.

FN6. Though Continental's delivery of criteria and lists to Louisville may be more directly related to the cause of action, these contacts fail the threshold requirement of the long-arm statute that the contacts fall into the category of "doing or soliciting of business," "derivation of substantial revenue," or other "persistent course of conduct." K.R.S. 454.210(2)(a)4.

FN7. Presumably, Delaware would be a convenient forum, since both Speedvision and Continental are residents of the state.

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Barbara SMITH, et al., Plaintiffs,
v.
BROWN & WILLIAMSON TOBACCO CORPORATION, et al., Defendants.

No. 96-0459-CV-W-3.

United States District Court, W.D. Missouri.

Dec. 19, 1996.

ORDER GRANTING DEFENDANT B.A.T. INDUSTRIES, PLC'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

SMITH, District Judge.

*1 Pending is Defendant B.A.T. Industries' ("BAT-I") Motion to Dismiss for lack of personal jurisdiction. [FN1] For the reasons set forth below, the Motion to Dismiss is granted.

FN1. On October 8, 1996, the Court issued an Order denying this motion, but erroneously observed that briefing on the motion had been completed. Consequently, the Court withdrew this Order on October 10, 1996.

I. BACKGROUND

Plaintiff has sued BAT-I and Brown & Williamson Tobacco Corporation ("B & W") on a variety of theories seeking redress for injuries allegedly caused by cigarette smoke. BAT-I is a public limited company organized under the laws of England and Wales. Prior to July 23, 1976, B & W was owned by British-American Tobacco Company Limited ("BATCo"), and BAT-I was known as Tobacco Securities Trust, Ltd. In July 1976, BAT-I purchased BATCo and B & W and changed its name to B.A.T. Industries Limited and, in July 1981, to the name it bears today.

BAT-I is a holding company, and as such has interests in tobacco and financial services. Prior to 1990, BAT-I also had interests in the paper and retail Industries. However, BAT-I does not manufacture or market tobacco products; to say that BAT-I has "interests in tobacco" is to say that it owns companies (such as B & W and non-defendants BATCo, British-American Tobacco (Germany), and Souza Cruz) that do engage in the manufacture, marketing and sale of cigarettes. Plaintiff has submitted a variety of documents that purportedly demonstrate that BAT-I was involved in the research, manufacture and sale of tobacco products to a degree that belies its status as a mere holding company. Some documents purport to demonstrate that BAT-I is a seller of tobacco products, while others are supposed to demonstrate that BAT-I "has attempted to shield itself from liability while at the same time participating in research that it plainly denies." Plaintiff's Suggestions in Opposition at 15. The specific contents of these documents is discussed in greater detail below. [FN2]

FN2. B & W has posed objections to some of the documents proffered by Plaintiff, alleging that they should not be considered because they are privileged. In light of the Court's ruling, there is no need to expend the parties' (and judicial) resources to determine whether these documents are privileged. The documents will be considered for purposes of BAT-I's motion without ruling or waiving B & W's objection.
Some of the documents were supplied as part of Plaintiff's Supplemental Response to BAT-I's motion, which was filed after BAT-I replied to Plaintiff's initial response. The Supplemental Response should not have been filed, see Local Rule 13(a); however, the Court has reviewed the Supplemental Response and concludes that nothing contained therein would alter the Court's ruling.

II. DISCUSSION

The issue of personal jurisdiction is analyzed on two levels. First, the exercise of jurisdiction must be proper under Missouri's long-arm statute. Once it is determined that those requirements are satisfied, the Court then addresses whether the exercise of personal jurisdiction satisfies the dictates of the Due Process Clause. Dakota Indus. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1387-88 (8th Cir.1991). In making its decision, the Court is mindful that "[w]hile it is true that the plaintiff bears the ultimate burden of proof on this issue, jurisdiction need not be proved by a preponderance of the evidence until trial or until the court holds an evidentiary hearing. To defeat a motion to dismiss for lack of personal jurisdiction, the nonmoving party need only make a prima facie showing." Id. at 1387.

Missouri's long-arm statute provides in pertinent part as follows:

Any person or firm, ... or any corporation, who in

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person or through an agent does any of the acts enumerated in this section, thereby submits such person, firm or corporation ... to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any such acts:
*2 (1) The transaction of any business within this state;
(2) The making of any contract within this state;
(3) The commission of a tortious act within this state;

* * *

Mo.Ann.Stat. § 506.500.1 (Vernon Supp.1995) (emphasis supplied). The objective in enacting these provisions "was to extend the jurisdiction of the courts of [Missouri] over non-resident defendants to that extent permissible under the Due Process Clause of the Fourteenth Amendment of the Constitution." State ex rel. Newport v. Wiesman, 627 S.W.2d 874, 876 (Mo. banc 1982) (quotation omitted). In furtherance of this objective, "Missouri courts have interpreted the words 'transaction of any business within this state' ... broadly so as not to deny jurisdiction under § 506.500 in situations in which the due process clause would permit the assertion of personal jurisdiction." Id.; see also Fairbanks Morse Pump Corp. v. Abba Parts, Inc., 862 F.2d 717, 719 (8th Cir.1988). With respect to the "tortious acts" provision, the phrase has been interpreted to "include extraterritorial acts that produce actionable consequences in Missouri." Institutional Food Marketing Assoc. v. Golden State Strawberries, Inc., 747 F.2d 448, 453 (8th Cir.1984). With respect to the Fourteenth Amendment's requirements, "the "minimum contacts" standard involves consideration of five factors: (1) the nature and quality of contacts with the forum state; (2) the quantity of these contacts; (3) the relationship between the contacts and cause of action; (4) the interest of the forum state; and (5) the convenience of the parties." Wines v. Lake Havasu Boat Mfg., 846 F.2d 40, 42 (8th Cir.1988).

Plaintiff has failed to demonstrate that the BAT-I (as opposed to the companies it holds, BATCo and B & W) has transacted business in this state or was involved in B & W's allegedly tortious conduct. Many of the documents make reference to the involvement by "BAT" in tobacco operations and research, but fail to specify whether the reference is to BAT-I or to BATCo. In some instances, the correct reference is clear; some of the documents are dated prior to July 1976--prior to the time an entity known as BAT-I even existed. [FN3] These documents must, therefore, refer to BATCo as it was the only "BAT" in existence. In other instances, the author of the document has declared that the "BAT" in question was a reference to BATCo and not BAT-I. In some instances, there is absolutely no way to tell whether or not the "BAT" in question in BAT-I. [FN4] One document, which is in BAT-I letterhead, [FN5] is a two page letter offering general legal advice regarding statements by employees and officers that might be considered admissions in a lawsuit and other general matters relating to litigation risks. This level of involvement is insufficient to impute tortious acts of B & W to BAT-I. Finally, some documents contain no reference to "BAT" or BAT-I. [FN6]

FN3. Exhibits 1 and 7 to Plaintiff's Opposition to Motion to Dismiss.

FN4. Exhibit 8 to Plaintiff's Opposition to Motion to Dismiss.

FN5. Exhibit 4 to Plaintiff's Opposition to Motion to Dismiss. Notwithstanding the Court's treatment of B & W's claims of privilege as enunciated in footnote 2, it should be noted that this document is authored by an attorney and is marked "ATTORNEY WORK PRODUCT " on each of the two pages.

FN6. Exhibit 6 to Plaintiff's Opposition to Motion to Dismiss.

Plaintiff has also submitted public documents (such as SEC filings) that purportedly demonstrate that BAT-I is in the business of selling tobacco products. To the contrary, they demonstrate that BAT-I has interests in other companies (e.g., B & W) that do sell tobacco products; BAT-I has no manufacturing plants, tobacco fields, or sales force. Plaintiff points to activities attributed to "the Group," but the context of these statements demonstrates that "the Group" refers to BAT-I's tobacco companies and not to actions taken directly by BAT-I.

*3 Both parties have also provided a variety of court documents from other jurisdictions. With respect to those provided by BAT-I, the Court wishes to make clear that the fact that other courts have ruled that they lack personal jurisdiction over BAT-I has not been a factor in its decision in this case. With respect to the court documents filed by Plaintiff, the Court finds they present no basis for

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concluding that BAT-I is subject to suit in this forum.

III. CONCLUSION

As stated above, at this stage of the proceedings Plaintiff has a relatively slight burden to demonstrate BAT-I is subject to jurisdiction in this state. However, Plaintiff has failed to carry even this slight burden; nothing in the record demonstrates that BAT-I has sufficient minimum contacts with this state to satisfy the requirements of either the Due Process Clause or Missouri's Long-Arm Statute. Accordingly, Defendant B.A.T. Industries PLC is DISMISSED for lack of personal jurisdiction.

IT IS SO ORDERED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

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CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

NOTICE REGARDING DOCUMENT RETENTION ORDER

In compliance with paragraph 3 of the Court's June 9, 1998 document retention order, plaintiffs hereby designate John S. Wilson, III, Assistant Secretary and Assistant General Counsel, Conwood Company, L.P., as the person responsible for ensuring that plaintiffs carry out the requirements of the Court's order.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard Roberts /ng

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Counsel for Plaintiffs

Dated: June 19, 1998.

16diii000229

CERTIFICATE OF SERVICE

I certify that on this 19th day of June, 1998, a copy of the foregoing was sent by overnight delivery service to:

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John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

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June 19, 1998

Via Federal Express

Jeffery A. Apperson
Clerk of the Court
322 Federal Building
501 Broadway
Paducah, KY 40202

Re: Conwood Company, L.P., et al. V. United States Tobacco Company, et al., No. 5:98CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Plaintiffs' Notice Regarding Document Retention Order.

I have also enclosed an additional copy. Please date stamp and return this copy in the attached self-addressed, postage pre-paid envelope.

Thank you for your attention to this matter.

Respectfully,

Neil M. Gorsuch

Enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'98 JUN 29 A11:50

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

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OPPOSITION TO UST INC.'S MOTION TO DISMISS COMPLAINT FOR LACK OF PERSONAL JURISDICTION

Preliminary Statement

Defendant UST Inc. ("Inc.") is a "Fortune 200" company with 1997 revenues of $1.18 billion[1] from tobacco that is grown, manufactured and sold, in significant part, in Kentucky. Inc. claims that it must be dismissed from this suit because it supposedly, unlike each of the co-defendant subsidiaries it closely controls, "does no business in Kentucky." Memorandum of Law in Support of Motion by Defendant UST Inc. to Dismiss Complaint for Lack of Personal Jurisdiction ("Mem.") at 5.

Inc. has no colorable basis for this motion. The Court has personal jurisdiction over Inc. in this antitrust case under Section 12 of the Clayton Act -- a point ignored entirely by Inc.

[1]Corporate Data Shareholder Services, UST Fact Sheet, http://www.shareholder.com/ust/fas2.htm (June 24, 1998) (Exh. A); UST 1997 Form 10-K405 (March 13, 1998) (Exh. B).

Section 12 authorizes jurisdiction over Inc., irrespective of its Kentucky contacts, based on Inc.'s minimum contacts with the United States as a whole. (Point I). Even if the Court were, like Inc., to ignore this controlling statute, Inc. is otherwise subject to jurisdiction based on its contacts with Kentucky. (Point II).

Argument

I. THIS COURT HAS PERSONAL JURISDICTION OVER UST INC. UNDER SECTION 12 OF THE CLAYTON ACT

Section 12 of the Clayton Act provides for nationwide service of process in federal antitrust actions. 15 U.S.C. § 22. Where -- as here -- the case is brought under a federal statute providing for nationwide service of process, it has long been settled in this circuit that a defendant is subject to personal jurisdiction "based on presence of the defendant in the United States, rather than in any particular state." Haile v. Henderson Nat'l Bank, 657 F.2d 816, 825 (6th Cir. 1981), cert. denied, 455 U.S. 949 (1982); United Liberty Life Ins. Co. v. Ryan, 985 F.2d 1320, 1330 (6th Cir. 1993) (Section 27 of Exchange Act, which provides for nationwide service of process, "confers personal jurisdiction in any federal court over any defendant with minimum contacts with the United States"); C.B.S. Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp., No. 88-2677-4B, 1989 WL 76479, at *5 (W.D. Tenn. Mar. 27, 1989) (personal

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jurisdiction based on nationwide service provision of federal securities statute).[2]

Inc. argues that plaintiffs must demonstrate *both* compliance with the Kentucky long-arm statute *and* its minimum contacts with Kentucky, in accordance with International Shoe Co. v. Washington, 326 U.S. 310 (1945). Mem. at 2. But Inc. misapprehends the standard. International Shoe is inapplicable where the action is brought under a federal statute (like Clayton Act § 12) that provides for nationwide service. Haile, 657 F.2d at 824-25 ("In an action . . . pursuant to a federal statute which provides for nationwide service of process, the strictures of International Shoe do not apply . . . . There is no due process requirement of 'minimal contacts' to justify the exercise of jurisdiction by federal courts") (citation omitted); McIntyre's Mini Computer Sales Group, Inc. v. Creative Synergy

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[2]Nor is there any basis for distinguishing among federal statutes providing for nationwide service. All permit the assertion of personal jurisdiction based on minimum contacts with the United States as a whole. It is the fact of nationwide service, rather than the particulars of the statute, that permits assertion of personal jurisdiction on this basis. See Go-Video, Inc. v. Akai Elec. Co., 885 F.2d 1406, 1414 (9th Cir. 1989). And in any event, Section 12 is "nearly identical" to Section 27 of the Exchange Act. Id. See also id. at 1415 (under "the worldwide service provision of § 12 . . . personal jurisdiction may be established in any district, given the existence of sufficient national contacts"); Mariash v. Morrill, 496 F.2d 1138, 1143 (2d Cir. 1974) (personal jurisdiction based on national contacts under Clayton Act § 12); Kinsepp v. Wesleyan Univ., 763 F. Supp. 22, 24 (S.D.N.Y. 1991) ("[i]n cases where Congress [has] authorize[d] nationwide federal jurisdiction, as in section 12 of the Clayton Act, the district court's jurisdiction is coextensive with the boundaries of the United States"); Dunham's, Inc. v. National Buying Syndicate of Texas, 614 F. Supp. 616, 623 (E.D. Mich. 1985) (same).

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Corp., 644 F. Supp. 580, 585 (E.D. Mich. 1986) ("[w]here Congress has provided for nationwide service of process . . . due process requires only that the defendant have minimum contacts with the United States").

The Kentucky long-arm statute is similarly inapplicable. "[W]hen a defendant resides in the United States and is subject to nationwide service of process under a federal statute, the defendant is subject to personal jurisdiction in federal court without regard to state long-arm statutes." Kinsepp, 763 F. Supp. at 25 (jurisdiction under Clayton Act § 12); Dunham's, Inc., 614 F. Supp. at 623 (same).

The only pertinent questions are whether Inc. was served and whether it has minimum contacts with the United States as a whole. Haile, 657 F.2d at 826; Black v. Acme Markets, Inc., 564 F.2d 681, 684 (5th Cir. 1977) ("When a federal statute provides for nationwide service of process, the court has jurisdiction over the person so long as the manner of service is proper").

Inc. was properly served;[3] it has in any event waived objection to service. Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1238 (6th Cir.) ("failure to object to service of process . . . in its Rule 12(b) motion . . . constitutes a waiver of any such objection"), cert. denied, 454 U.S. 893 (1981). Inc. has similarly waived any objection to venue; indeed, in its

[3]Service was properly effected on Inc. twice on April 23, 1998. The first service was effected on Michael Melnyk, Senior Corporate Counsel, the return filed by the Clerk on April 27, 1998. CT Corporation Systems, Hartford, Connecticut, was also served; this return was filed by the Clerk on May 4, 1998.

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answer it has conceded that venue is proper. Answer ¶ 7(c) ("Defendants admit that venue is proper in this district.").

Nor can Inc., one of the largest U.S. corporations, plausibly contest its minimum contacts with the United States. See FTC v. Jim Walter Corp., 651 F.2d 251, 256 (5th Cir. 1981) (a resident corporation necessarily has sufficient "contacts with the United States"); Bankatlantic v. Coast to Coast Contractors, Inc., 947 F. Supp. 480, 488-90 (S.D. Fla. 1996) (defendant's "mere presence within the United States establishes 'minimum contacts'").

Inc. has ignored the principal basis for personal jurisdiction in this Court — and the primary basis for personal jurisdiction pleaded in the Complaint. Complaint ¶ 7(b) (asserting personal jurisdiction under 15 U.S.C. § 22). Because personal jurisdiction is present under this provision, the Court need not even address Inc.'s claim that jurisdiction would not be present under other theories.

II. CLAYTON ACT ASIDE, INC. IS SUBJECT TO THIS COURT'S JURISDICTION

Inc. is regularly a defendant in cases, unlike this one, where plaintiff must establish Inc.'s minimum contacts with the forum State. With the same regularity, Inc. contests personal jurisdiction based on lack of minimum contacts, and just as regularly fails.[4]

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[4]See, e.g., "Motion of UST Inc. To Dismiss First Amended Complaint for Lack of Jurisdiction," filed with "Affidavit of Debra A. Baker," in Florida v. The American Tobacco Co., et al., Case No. 95-1466 (15th Judicial Dist. Cir. Ct., Palm Beach Cty.,

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Here, as in its previous and unsuccessful efforts to escape jurisdiction, Inc. argues that it is beyond the power of this Court because the Kentucky long-arm statute does not reach it, and because such an assertion of jurisdiction would violate due process. Mem. at 2-7. Neither contention can withstand scrutiny.

First, the Kentucky long-arm statute *does* reach Inc. The Complaint alleges that Conwood's claims arise from Inc.'s "transacting business . . . in this Commonwealth," and "causing tortious injury by acts or omissions in this Commonwealth." Complaint ¶ 7(b)(3).[5]

Inc. argues that the affidavit of Debra Baker, which simply denies these allegations, should control. Mem. at 3-4. But that

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Fla., filed Mar. 29, 1996) (Exh. C); "Special Appearance and Motion of UST Inc. To Dismiss the Third Amended Complaint of the Plaintiffs for Lack of Jurisdiction," filed with "Affidavit of Debra A. Baker," in West Virginia v. The American Tobacco Company, et al., Civil Action No. 94-C-1707 (Kanawha Cty. Cir. Ct., W. Va. filed Dec. 5, 1996) (Exh. D). Plaintiffs have been able to locate only one instance — a personal injury case in California where plaintiff had no lawyer — in which this motion has succeeded. Dymits v. American Brands, Inc., et al., No. C 96-1897 CW, 1996 U.S. Dist. LEXIS 19742 (N.D. Cal. Dec. 31, 1996).

[5]The Kentucky long-arm statute, Ky. Rev. Stat. Ann. § 454.210(2)(a), is construed broadly, because it was intended to confer personal jurisdiction to the maximum extent permissible under the Due Process Clause. Tobin v. Astra Pharmaceutical Prods., Inc., 993 F.2d 528, 542 (6th Cir. 1993) ("[t]he Kentucky long-arm statute has been understood to reach the limit permitted by the Constitution"); id. (Kentucky's "long-arm statute 'was designed to extend the permissible scope of jurisdiction over foreign corporations with minimal contact in Kentucky'") (quoting Ford Motor Credit Co. v. Nantz, 516 S.W.2d 840, 842 (Ky. 1974)).

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is precisely what the Sixth Circuit has foreclosed absent a full evidentiary hearing:

> A court disposing of a 12(b)(2) motion does not weigh the controverting assertions of the party seeking dismissal . . . because we want to prevent non-resident defendants from regularly avoiding personal jurisdiction simply by filing an affidavit denying all jurisdictional facts. . . . Dismissal . . . is proper only if all the specific facts which the plaintiff . . . alleges fail to state a prima facie case for jurisdiction.

Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996) (emphasis in original) (citations omitted). Here plaintiffs' allegations more than state a prima facie case for jurisdiction, and Ms. Baker's cursory affidavit need not and should not be considered.[6]

Inc.'s second claim is that it lacks minimum contacts with Kentucky, such that exercise of personal jurisdiction here would "offend traditional notions of fair play and substantial justice." Mem. at 4-7. That argument has two parts: Inc. says it has nothing to do with Kentucky, because it is merely a holding company; and it says the extensive operations of its co-defendant subsidiaries in Kentucky cannot be weighed by this Court. Neither is correct.

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[6]Inc.'s single authority on this point, Miller v. Trans World Airlines, Inc., 302 F. Supp. 174 (E.D. Ky. 1969) is inapposite. There another district court held only that allegations based solely on a parent-subsidiary relationship were insufficient predicate for jurisdiction. Those are not the allegations at issue here; Conwood has alleged far more, and under Compuserve those allegations control.

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Inc. in fact has extensive ties to Kentucky, as it has elsewhere stated. Even without discovery,[7] Conwood has established that:

Inc. purchases tobacco in Kentucky. Inc. represents in its most recent annual report that "[w]e remain committed to purchasing only highest quality American tobacco. The Company currently purchases more than 90% of its tobacco from American growers in the states of *Kentucky*, Tennessee, and Virginia for its moist smokeless tobacco products." UST 1997 Annual Report, Mar. 18, 1998 (Exh. E) (emphasis added).

Inc. is involved in Kentucky politics. Inc. is a major and regular contributor to Kentucky politicians. It has formed a political action committee composed of Inc. executives -- USTeam PAC -- to funnel more than $65,000 to Kentucky candidates in the last three years. Exh. F. In 1996, it also contributed $75,000 to the McConnell Political Leadership Fund at the University of Louisville. Exh. G.[8]

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[7]Before the Court can credit any argument that Inc. has no contacts with Kentucky, plaintiffs should be permitted discovery. 4 Moore's Federal Practice ¶ 26.07(6) at 26-165 to 26-166 ("[i]n cases in which jurisdiction depends upon complicated facts, . . . it has been held that it is error to grant a motion to dismiss without affording the plaintiff an opportunity for discovery").

[8]Top Inc. executives, including CEO Vincent A. Gierer, Executive VP Robert Barrett, and Executive VP and General Counsel Richard Verheij, donated an additional $20,000 during the 1994-96 election cycles to Kentucky campaigns, including the maximum lawful contributions to Senator McConnell's reelection campaign in 1996. Exh. H. Just two years ago, Inc. sponsored a luncheon aboard the 90-foot yacht Electra, for Kentucky delegates attending the Republican National Convention. Exh. I.

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Inc. is involved in other Kentucky affairs. Underscoring the importance of this State to its business, Inc. is regularly involved in programs and activities in Kentucky that pertain to its tobacco interests. For instance, in Inc.'s 1997 Annual Report CEO Vincent A. Gierer reported that "[t]he Company provides support for Agricultural Extension Service education for farmer leadership programs, scholarships at local colleges and workshops," such as the Agricultural Leadership Program at Murray State University. Exh. J.

The deep involvement of Inc. -- itself -- in Kentucky affairs is further illustrated by a recent trip its CEO took to address Kentucky tobacco growers. On May 7, 1998, just days after the filing of this lawsuit, Mr. Gierer met with leaders of Kentucky tobacco growers associations in Hopkinsville. See Affidavit of Bryce Sanders, Exh. K.

These are but a few examples of Inc.'s continuous and systematic contacts with Kentucky. Inc.'s claim, notwithstanding these close ties, that it lacks "minimum contacts" with this forum is spurious.

Moreover, Inc. is inextricably intertwined in the extensive Kentucky operations of its operating subsidiaries -- each of whom has conceded that it is subject to the jurisdiction of this Court.[9] Inc. has stated publicly that it conducts the operations

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[9]They had little choice: Kentucky is effectively the locus of a substantial part of their purchasing, manufacturing, and sales of smokeless tobacco. For example, one of the two largest plants in Inc.'s tobacco empire, a 900,000 square foot office,

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of its subsidiaries[10] and it has echoed those admissions in testimony before Congress.[11] Any claim that it has somehow insulated itself from these operations, because it has organized itself as a "holding company," is thus belied by its own statements.

Inc.'s claim is also belied by the fact that its top officers are also the officers of its subsidiaries, and thus control their day-to-day management. See Exh. N (chart of overlapping management). For instance, though Inc. claims it does not manufacture *anything* (see Debra Baker Aff. ¶ 2), its Senior Vice President, Alton Adams, is expressly charged with responsibility for *manufacturing*. Exh. N. Mr. Adams holds precisely the same title at defendant United States Tobacco Manufacturing Company — the operating subsidiary that purchases, stores, and processes tobacco in Kentucky.

Likewise, Inc. senior vice president and controller Robert Alessandro holds the same positions at United States Tobacco

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storage, and processing facility nominally owned by Inc.'s manufacturing subsidiary, is in Hopkinsville. And a new facility has recently been opened in Cadiz. Exh. L.

[10]"UST Inc., through its subsidiaries (collectively 'registrant' unless the context otherwise requires), is engaged in manufacturing and marketing consumer products in the following industry segments: Tobacco Products: Registrant's primary activities are manufacturing and marketing smokeless tobacco (snuff and chewing tobacco). Registrant imported and marketed pipe tobacco through December 31, 1997." UST March 13, 1998, 10-K405. (Exh. B).

[11]See Tr. of Remarks of Vincent A. Gierer before U.S. House of Representatives, Commerce Committee (Jan. 29, 1998). Exh. M.

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Manufacturing Company. Inc.'s CEO, Mr. Gierer, is also president of United States Tobacco Company. Id. And a total of 16 Inc. executives hold similar titles in the subsidiaries. Exh. N. This substantial overlap in management demonstrates the artificiality of Inc.'s argument that it is uninvolved in the business of its subsidiaries in Kentucky.

In these circumstances, where the parent company is heavily involved in its subsidiaries' operations — even putting aside Inc.'s own significant contacts with the forum State — there is ample constitutional basis for the assertion of personal jurisdiction. See, e.g., Third Nat'l Bank of Nashville v. Wedge Group Inc., 882 F.2d 1087, 1090 (6th Cir. 1989) (finding personal jurisdiction over foreign parent corporation based on parent's close ties to operating subsidiary); In re Telectronics Pacing Systems, Inc. Accufix Atrial "j" Leads Prod. Liability Litigation, 953 F. Supp. 909, 919-21 (S.D. Ohio 1997) (finding personal jurisdiction over parent where parent exercised control over subsidiary); Daher v. G.D. Searle & Co., 695 F. Supp. 436, 438-39 (D. Minn. 1988) (finding personal jurisdiction over parent based upon the parent's "concert[ed]" efforts with its subsidiary); Warren v. Honda Motor Co., 669 F. Supp. 365, 370 (D. Utah 1987) (personal jurisdiction proper where companies were engaged in a "joint effort" to place product in worldwide market; profits of companies were "dependent on the performance of the other"; and, companies, while maintaining a separate corporate existence, were "interdependent"); Brunswick Corp. v. Suzuki

Motor Co., 575 F. Supp. 1412, 1421 (E.D. Wis. 1983) ("the forum activities of affiliated entities may be considered in assessing . . . the constitutionality of [service of process] under the due process clause, notwithstanding the adherence of the parent and subsidiary to the formalities of corporate separateness"); Dunlop Tire & Rubber Corp. v. Pepsico, Inc., 591 F. Supp. 88, 90 (N.D. Ill. 1984) (exercising personal jurisdiction in antitrust case over "holding company" and subsidiaries "whose policies and finances it control[led]"); Hoffman v. United Telecommunications, Inc., 575 F. Supp. 1463, 1471 (D. Kan. 1983) ("corporation's relationship with an affiliated corporation in the forum is relevant to the due process question"); Energy Reserves Group, Inc. v. Superior Oil Co., 460 F. Supp. 483, 507 (D. Kan. 1978) (same).

Just weeks ago, one of Inc.'s tobacco "holding company" confederates had its challenge to personal jurisdiction rejected. See Order Denying B.A.T. Industries Motion to Dismiss the Third Amended Complaint for Lack of Personal Jurisdiction, Washington v. American Tobacco, Inc., et al., No. 96-2-15056-8 SEA (King Cty. Sup. Ct., Wash. June 9, 1998) (denying British tobacco holding company's motion to dismiss because of its claimed lack of contacts with forum State) (Exh. O). The same result would be required here, even if the Court were to bypass the controlling federal statute (Point I, infra).[12]

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[12]Here the evidence of Inc.'s involvement in the tobacco affairs of its operating subsidiaries is substantial. Were the Court to conclude otherwise, however, at very least Conwood must

Conclusion

For the foregoing reasons, UST Inc.'s motion to dismiss for lack of personal jurisdiction should be denied. A proposed order is attached.

Respectfully submitted,

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Counsel for Plaintiffs

Dated: June 29, 1998

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be afforded discovery into the interconnections between Inc. and the operating subsidiaries concededly present in this State. See n.7, supra.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

Upon consideration of the Motion of UST Inc. to Dismiss Complaint for Lack of Personal Jurisdiction, filed June 12, 1998, the Memorandum in Support Thereof, the Opposition and any Replies thereto, this ___ day of _____, 1998, it is hereby:

ORDERED that the motion be and hereby is DENIED.

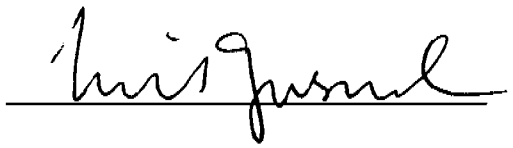
_____
Thomas B. Russell, Judge
United States District Court

CERTIFICATE OF SERVICE

I certify that on this 26th day of June, 1998, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'98 JUN 29 A11:50

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

Civil Action No.
5:98CV-108-R

OPPOSITION TO MOTION TO DISMISS PART OF COMPLAINT

Plaintiffs Conwood Company, L.P. and Conwood Sales Company, L.P. ("Conwood") allege that defendants (collectively, "UST") maintain more than 80% of the moist snuff market through acts that have the purpose and effect of excluding plaintiffs and injuring competition -- e.g., removing plaintiffs' display racks from stores.[1] UST does not deny that *each* of plaintiffs' eight counts states a valid claim for relief. But UST asks the Court to dismiss Conwood's claim under Section 2 of the Sherman Act "to the extent" that the claim is based on UST's efforts to lobby Congress for legislation designed to foreclose competition. Defendants' Memorandum of Law in Support of their Motion To Dismiss Part of

[1]Conwood alleges UST has acted systematically to exclude Conwood from the moist snuff market by removing or defacing Conwood retail distribution racks, point-of-sale advertising, and products; frequently changing the style of distribution racks in order to raise rivals' costs; promulgating exclusive dealing arrangements designed to foreclose competitors' distribution channels; disparaging Conwood products; and predatory pricing. See Complaint ¶¶ 22-31.

Plaintiffs' Complaint for Failure To State a Claim ("Def. Mem.") at 6.

Because each count of the Complaint states a claim on which relief may be granted, none can properly be dismissed. (Point I). Conwood has *not* claimed that UST's lobbying efforts are themselves a basis for liability under any of the eight pleaded counts. UST's argument is thus directed at a straw-man of its own creation, and the Court need not even consider it. And the allegations that UST sought to suppress competition through the "Global Tobacco Settlement" -- and thereby entrench its monopoly -- can properly be pleaded and proved to show UST's intent to monopolize the market for moist snuff. (Point II).

I. BECAUSE EACH COUNT OF THE COMPLAINT STATES A CLAIM, THE MOTION MUST BE DENIED

Seven of plaintiffs' eight counts have nothing to do with UST's efforts to promote anticompetitive legislation.[2] Count I, which alleges that UST violated the Sherman Act by actual or attempted monopolization of the market for moist snuff, is similarly based on UST's conduct *in the market*, not its sham

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[2] See Complaint ¶ 47 (Count II - Lanham Act) (UST has "made false and misleading representations" and done so "in commercial advertising or promotion"); id. ¶ 51 (Count III - Tortious Interference with Existing Contract) (UST has interfered with Conwood "contracts with distributors and retailers"); id. ¶ 56 (Count IV - Tortious Interference with Prospective Advantage) (to same effect); id. ¶ 59 (Count V - Violation of Kentucky Unfair Competition Statute) (UST has "engaged in the secret payment of rebates" to purchasers of its products); id. ¶ 62 (Count VI - Product Defamation) (UST "has published to customers, retailers, and distributors statements disparaging the quality of plaintiffs' products"); id. ¶ 68 (Count VII - Unjust Enrichment) (seeking disgorgement of unlawful profits); id. ¶ 71 (Count VIII - Conversion) (seeking recovery for stolen racks, advertisements, and product).

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petitioning in Congress. E.g., Complaint ¶¶ 22-31, 44. UST does not dispute that these allegations state a claim for relief under federal antitrust law; indeed each defendant has filed an answer as to this count. See Answer, Affirmative Defenses and Counterclaims ¶¶ 41-45.

The Sixth Circuit has instructed that, where a complaint states a claim *under any reading*, a motion to dismiss must be denied. See In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993) (a complaint need only "contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory") (citations omitted); Meador v. Cabinet for Human Resources, 902 F.2d 474, 475 (6th Cir.), cert. denied, 498 U.S. 867 (1990). This Court has recognized the same hornbook rule. See, e.g., Barmet Aluminum Corp. v. Doug Brantley & Sons, Inc., 914 F. Supp. 159, 161 (W.D. Ky. 1995) ("The complaint may not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'") (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); see also 5A C. Wright & A. Miller, Federal Practice and Procedure § 1357, at 337 (1990) ("[T]he court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory."). Because it is undisputed that Count I states a claim, without reference to UST's legislative activities, there is no valid ground for UST's motion to dismiss Count I "in part."

UST cites no authority for the proposition that courts are empowered to dismiss potential interpretations of pleaded causes

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of action rather than the claims themselves. The cases cited by UST all involve claims expressly predicated on petitioning conduct that was, as pleaded, insufficient to state a claim. And in those cases the affected counts themselves were dismissed; they were not "dismissed in part." See, e.g., Norcen Energy Resource Ltd. v. Pacific Gas & Elec. Co., 1994-2 Trade Cases ¶ 70,851 (N.D. Cal. 1994) ("defendants' alleged manipulation of the dual federal-state regulatory scheme" not valid basis for relief; count dismissed); Mountain Grove Cemetery Ass'n v. Norwalk Vault Co. of Bridgeport, 428 F. Supp. 951, 956 (D. Conn. 1977) (dismissing antitrust claim seeking relief "on the basis of defendants' state court litigation").

II. CONWOOD'S ALLEGATIONS REGARDING UST'S EFFORTS TO ELIMINATE COMPETITION THROUGH LEGISLATION ARE PROPERLY PLEADED IN THE COMPLAINT

UST's claim to blanket immunity for sham petitioning is misguided.[3] But it is also beside the point: Count I is not based on UST's efforts to persuade Congress to enact legislation that would further its monopoly. Conwood does not seek damages based on that lobbying activity, nor does Conwood seek to have the Court enjoin such lobbying activity. The factual allegations in paragraphs 33-39 do, however, detail evidence that will help demonstrate a necessary element of plaintiffs' monopolization

[3] See, e.g., Westmac, Inc. v. Smith, 797 F.2d 313, 315 (6th Cir. 1986) ("Noerr-Pennington doctrine does not protect against improper attempts to influence the government or the courts that are a 'mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.'") (quoting California Motor Transport Co. v. Trucking Unlimited, 414 U.S. 508, 511 (1972)).

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claim — UST's *intent* to exclude Conwood from the market for moist snuff.

Since the Pennington case itself, courts have held without exception that even protected petitioning may properly be pleaded and proved to establish a defendant's anticompetitive intent:

> [U]nder the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."

United Mine Workers v. Pennington, 381 U.S. 657, 670 n.3 (1965) (citations omitted) (emphasis added). Such petitioning activity "does have evidentiary value as to the purpose and concerted character of [defendants'] contemporaneous non-exempt activities." Alexander v. National Farmers Org., 687 F.2d 1173, 1196 (8th Cir. 1982). See also, e.g., MCI Communications Corp. v. AT&T Corp., 708 F.2d 1081, 1160 (7th Cir. 1983) (petitioning activity shows "purpose and character of business decisions which had already been made"); General Motors Corp. v. Johnson Matthey, Inc., 887 F. Supp. 1240, 1246 (E.D. Wis. 1995) (upholding magistrate's grant of discovery of information concerning lobbying activities can be used for "purpose of establishing [defendant's] motives in engaging in the anticompetitive conduct at issue in this lawsuit"); United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29, 47 (N.D. Ga. 1977) ("court may consider all of defendants' arguably exempt activities associated with the petitioning process which are relevant and admissible as purpose and character evidence to

prove the anticompetitive intent of defendants' nonexempt conduct as well as the overall anticompetitive scheme").[4]

Thus, it is appropriate for Conwood to plead, conduct discovery, and offer evidence concerning UST's lobbying efforts to "show the purpose and character" of UST's exclusionary plans. Pennington, 381 U.S. at 670 n.3.

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[4]Court after court has admitted petitioning activity in evidence to show anticompetitive intent, and every effort to quash discovery into petitioning activity on "immunity" grounds has likewise been reversed or refused. See, e.g., North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 666 F.2d 50, 52 (4th Cir. 1981) (reversing district court's refusal to permit plaintiff discovery on defendants' petitioning activity, holding that "Noerr-Pennington does not apply to discovery"); Associated Container Transp. (Australia) Ltd. v. United States, 705 F.2d 53, 59 (2d Cir. 1983) (reversing district court and holding that production of documents related to lobbying efforts might reveal "other evidence revealing an illegal antitrust conspiracy entirely unrelated to appellees' legitimate activities before the [administrative agency]"); Brand Name Prescription Drugs Antitrust Litig., 1995 U.S. Dist. LEXIS 12039, *5 (N.D. Ill. Aug. 17, 1995) ("we cannot bar the Class Plaintiffs[] from exploring . . . lobbying documents based on relevance grounds").

Conclusion

The Court should deny UST's Motion To Dismiss Part of Plaintiffs' Complaint for Failure To State a Claim. A proposed order is attached.

Respectfully submitted,

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Counsel for Plaintiffs

Dated: June 29, 1998.

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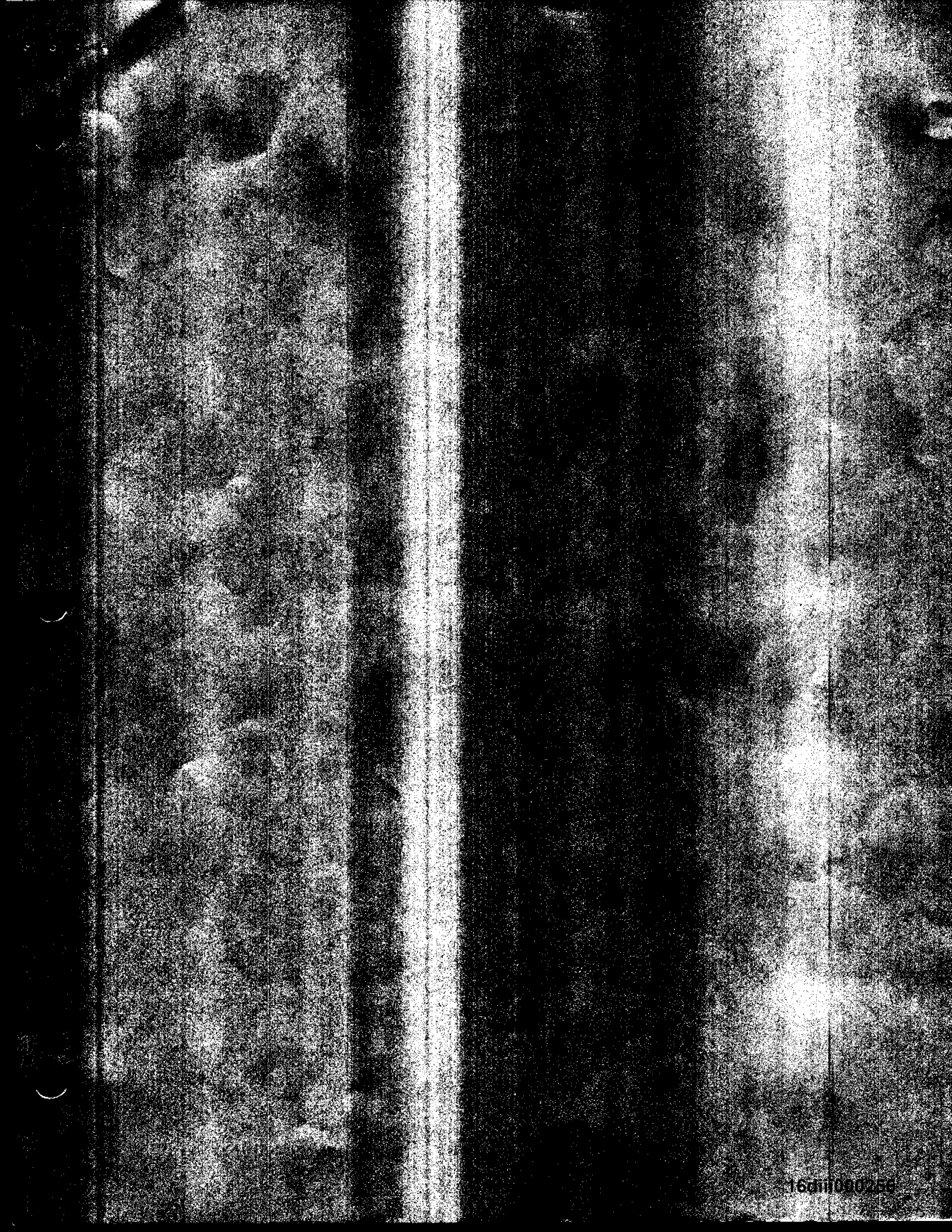


IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

Upon consideration of Defendants' Motion to Dismiss Part of Plaintiffs' Complaint for Failure to State a Claim, the opposition thereto, and for good cause shown, the motion is DENIED.

Honorable Thomas B. Russell
United States District Judge

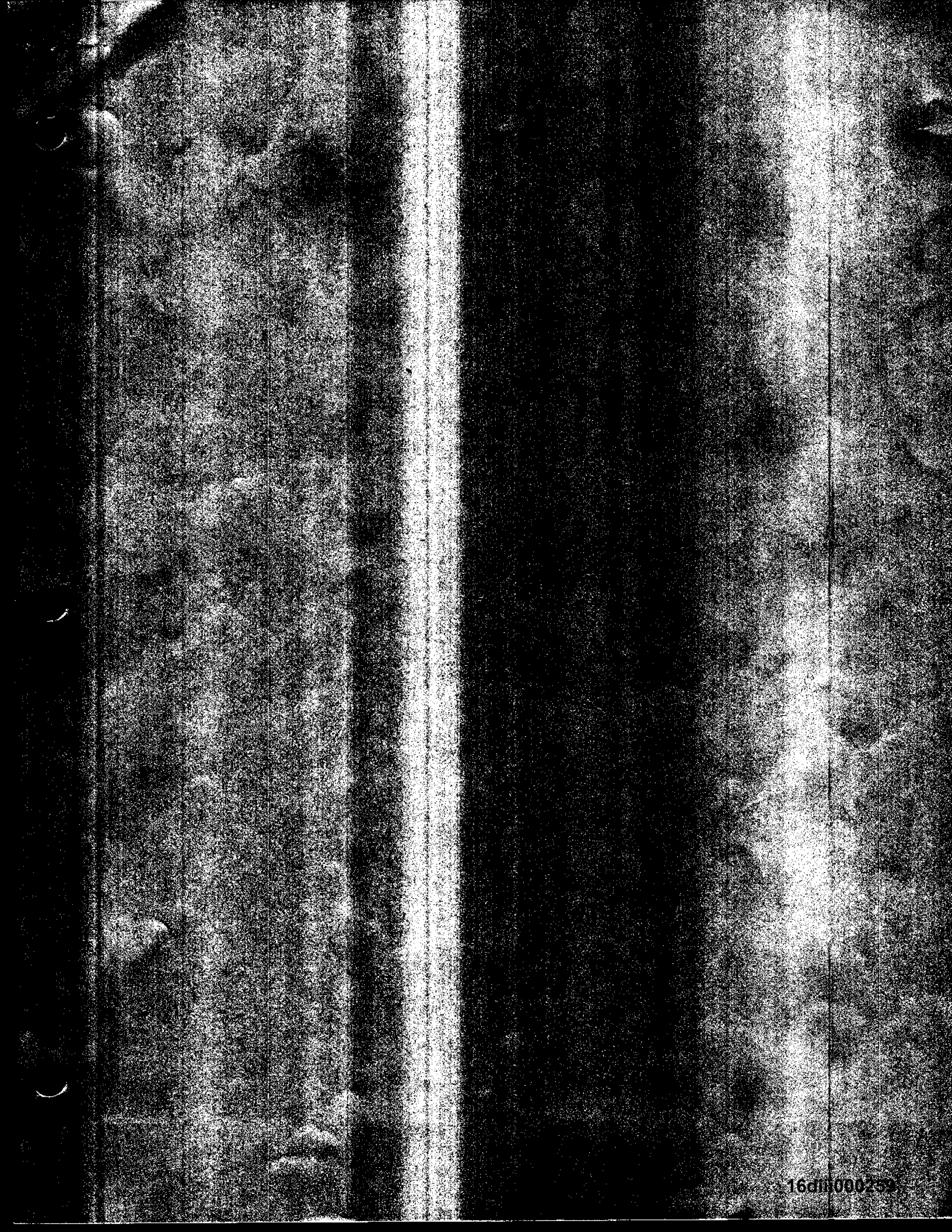
Dated this ___ day of _____, 1998.

CERTIFICATE OF SERVICE

I certify that on this 26th day of June, 1998, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.


16dll000253

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
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AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

June 26, 1998

Richard C. Roberts, Esq.
Whitlow, Roberts, Houston & Straub
300 Broadway
Old National Bank Building
P.O. Box 995
Paducah, KY 42001

Dear Dick:

Enclosed please find an original and six copies of the two briefs. I have enclosed two copies for the Clerk, one for courtesy service to the Judge, one we would appreciate if you could have date-stamped and returned to us, and two copies for your files. We have flagged the places where your signature is required. As discussed on the conference call today, we will serve opposing counsel from here.

In case of emergency, I have also enclosed a diskette with an electronic version of the briefs. If you have any questions, please feel free to call me at 202-326-7978.

Many thanks and warm regards.

Very truly yours,

Neil M. Gorsuch

Enclosures

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'98 JUL -2 A11:09

FILED
US DISTRICT COURT
WESTN. DIST. KY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ANSWER AND AFFIRMATIVE DEFENSES OF CONWOOD COMPANY, L.P., AND CONWOOD SALES COMPANY, L.P., TO DEFENDANTS' COUNTERCLAIMS

Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood"), for their answer and affirmative defenses to the counterclaims of defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., and United States Tobacco Manufacturing Company Inc. (collectively, "Counterclaimants"), state as follows:

1. Conwood admits that Counterclaimants are Delaware corporations with their principal places of business in Greenwich, Connecticut. Conwood further admits that Counterclaimants manufacture, distribute, and sell smokeless tobacco products under various brand names throughout the United States.

2. Conwood admits that Conwood Company, L.P., and Conwood Sales Company, L.P., are Delaware limited partnerships with their principal places of business in Memphis, Tennessee. Conwood admits that it manufacturers, distributes, and sells smokeless tobacco

products under various brand names throughout the United States, including this district. Conwood admits that it has a manufacturing facility located within this district at Bowling Green, Kentucky, and that it buys substantial amounts of tobacco for use in its smokeless products from farmers located in this district.

3. To the extent that the Counterclaimants have stated a claim under the Lanham Act, Conwood admits that the Court has subject matter jurisdiction over that claim under 28 U.S.C. § 1331. To the extent the Court has such original jurisdiction, and to the extent that the Counterclaimants have stated a claim under state law for conduct that forms part of the same case or controversy as Counterclaimants' alleged Lanham Act claim, Conwood admits that the Court has supplemental subject-matter jurisdiction over those claims under 28 U.S.C. § 1367.

4. Conwood admits the allegations of paragraph 4.

5. Conwood denies the allegations of paragraph 5.

6. Conwood admits that moist snuff products typically are displayed in stores on display racks provided by one or more moist snuff tobacco companies. Conwood further admits that Counterclaimants, Conwood, and other smokeless tobacco companies place or attempt to place point-of-sale advertising to direct customers' attention to their smokeless tobacco products. Conwood denies the remaining allegations of paragraph 6.

7. Conwood denies that it has entered into any agreements with retail stores or managers that designate Conwood as "category

manager." Conwood lacks knowledge or information sufficient to admit or deny whether other smokeless tobacco companies have entered into any such agreements, and therefore denies said allegation, but further states that Counterclaimants have from time to time represented the existence of such agreements. Conwood denies the remaining allegations of paragraph 7.

8. Conwood admits that its sales representatives have direct contact in certain instances with retailers and consumers. Conwood denies the remaining allegations of paragraph 8.

9. Conwood admits that it issued certain informational pamphlets under the heading of "Smokeless Gun," which feature a fictional private investigator named "Frank Delving," and respectfully directs the Court to these documents for a full and accurate statement of their contents. Conwood denies the remaining allegations of paragraph 9.

10. Conwood denies the allegations of paragraph 10.

11. Conwood admits that Counterclaimants negotiate and enter into agreements with retail stores to control display space for promotion of their products. Conwood denies the remaining allegations of paragraph 11.

12. Conwood adopts and incorporates by reference its responses to paragraphs 1 through 11 as if fully set forth herein.

13. Conwood denies the allegations of paragraph 13.

14. Conwood denies the allegations of paragraph 14.

15. Conwood denies the allegations of paragraph 15.

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16. Conwood adopts and incorporates by reference its responses to paragraphs 1 through 15 as if fully set forth herein.

17. Conwood admits that Counterclaimaints have contractual agreements with certain individual retail establishments. Conwood lacks knowledge or information sufficient to admit or deny the allegation that Counterlclaimants have contractual agreements with certain retail establishments whereby Counterclaimants are designated category managers, and therefore denies said allegation. Conwood denies the remaining allegations of paragraph 17.

18. Conwood denies the allegations of paragraph 18.

19. Conwood denies the allegations of paragraph 19.

20. Conwood denies the allegations of paragraph 20.

21. Conwood adopts and incorporates by reference its responses to paragraphs 1 through 20 as if fully set forth herein.

22. Conwood denies the allegations of paragraph 22.

23. Conwood denies the allegations of paragraph 23.

24. Conwood adopts and incorporates by reference its responses to paragraphs 1 through 23 as if fully set forth herein.

25. Conwood denies the allegations of paragraph 25.

26. Conwood denies the allegations of paragraph 26.

27. Conwood denies the allegations of paragraph 27.

28. Conwood denies the allegations of paragraph 28.

29. Conwood adopts and incorporates by reference its responses to paragraphs 1 through 28 as if fully set forth herein.

30. Conwood denies the allegations of paragraph 30.

31. Conwood denies the allegations of paragraph 31.

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32. Conwood denies the allegations of paragraph 32.

33. Conwood denies the allegations of paragraph 33.

All allegations not specifically admitted are hereby denied.

First Affirmative Defense

Counterclaimants fail to state a cause of action upon which relief may be granted.

Second Affirmative Defense

Counterclaimants' claims are barred by the applicable statute of limitations and the doctrine of laches.

Third Affirmative Defense

Counterclaimants are equitably estopped by their own conduct from recovering damages in this action.

Fourth Affirmative Defense

Counterclaimants are barred by the doctrine of in pari delicto.

Fifth Affirmative Defense

Counterclaimants acted with unclean hands, inequitably, and in bad faith.

Sixth Affirmative Defense

At all times, Conwood acted in good faith, without actual malice, and in furtherance of its own business, economic, or regulatory interests.

Seventh Affirmative Defense

Counterclaimants have not been harmed in any way by any action or inaction of Conwood.

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Conwood reserves the right to assert any additional affirmative defenses that may be revealed during the course of discovery.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts
WHITLOW, ROBERTS, HOUSTON
& STRAUB
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
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Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel to Plaintiffs

DATED: July 2, 1998

16diii000266

CERTIFICATE OF SERVICE

I certify that on this 2nd day of July, 1998, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Courtney Simmons Elwood

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 10th day of July, 1998.

Counsel for Defendants

16diii000268

COPY

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DARRELL V. McGRAW, JR., ATTORNEY GENERAL ex rel. STATE OF WEST VIRGINIA; the WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY; and the WEST VIRGINIA DEPARTMENT OF ~~HEALTH~~ AND HUMAN RESOURCES,

Plaintiffs,

v. CIVIL ACTION NO. 94-C-1707

THE AMERICAN TOBACCO COMPANY; AMERICAN BRANDS, INC.; R.J. REYNOLDS TOBACCO COMPANY; RJR NABISCO, INC.; B.A.T. INDUSTRIES, PLC; BATUS HOLDINGS, INC.; BROWN & WILLIAMSON TOBACCO CORPORATION; PHILIP MORRIS COMPANIES, INC.; PHILIP MORRIS INCORPORATED (PHILIP MORRIS U.S.A.); LOEWS CORPORATION; LORILLARD TOBACCO COMPANY; UNITED STATES TOBACCO COMPANY; UST INC.; JOHN MIDDLETON, INC.; THE COUNCIL FOR TOBACCO RESEARCH--U.S.A. INC. (SUCCESSOR TO TOBACCO INSTITUTE RESEARCH COMMITTEE); THE TOBACCO INSTITUTE, INC.; HILL & KNOWLTON, INC.; KIMBERLY-CLARK CORPORATION; ANCHOR TOBACCO COMPANY; McCLURE COMPANY, INC.; SHOOK, HARDY & BACON, P.C.; JACOB, MEDINGER & FINNEGAN; CHADBOURNE & PARKE, L.L.P.; and JOE DOE CORPORATIONS "A" THROUGH "Z",

Defendants.

NOTICE OF MOTION

Please take notice that the undersigned will bring the attached **"Special Appearance and Motion of UST Inc. to Dismiss the Third Amended Complaint of the Plaintiffs for Lack of Jurisdiction Over the Person, Insufficiency of Process and Insufficiency of Service of Process"** on for hearing before the Honorable Irene

Berger, Judge of the Circuit Court of Kanawha County, West Virginia, at a date and time to be later determined by the Court.

UST INC.,

By Counsel.

SHUMAN, ANNAND & POE
Suite 1007
405 Capitol Street
P.O. Box 3953
Charleston, West Virginia 25339
(304) 345-1400

By: _____
David L. Shuman, Esquire

_____
Edgar A. Poe, Jr., Esquire

16diii000270

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DARRELL V. McGRAW, JR., ATTORNEY GENERAL ex rel. STATE OF WEST VIRGINIA; the WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY; and the WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES,

Plaintiffs,

vs. CIVIL ACTION NO. 94-C-1707

THE AMERICAN TOBACCO COMPANY; AMERICAN BRANDS, INC.; R.J. REYNOLDS TOBACCO COMPANY; RJR NABISCO, INC.; B.A.T. INDUSTRIES, PLC; BATUS HOLDINGS, INC.; BROWN & WILLIAMSON TOBACCO CORPORATION; PHILIP MORRIS COMPANIES, INC.; PHILIP MORRIS INCORPORATED (PHILIP MORRIS U.S.A.); LOEWS CORPORATION; LORILLARD TOBACCO COMPANY; UNITED STATES TOBACCO COMPANY; UST INC.; JOHN MIDDLETON, INC.; THE COUNCIL FOR TOBACCO RESEARCH--U.S.A. INC. (SUCCESSOR TO TOBACCO INSTITUTE RESEARCH COMMITTEE); THE TOBACCO INSTITUTE, INC.; HILL & KNOWLTON, INC.; KIMBERLY-CLARK CORPORATION; ANCHOR TOBACCO COMPANY; McCLURE COMPANY, INC.; SHOOK, HARDY & BACON, P.C.; JACOB, MEDINGER & FINNEGAN; CHADBOURNE & PARKE, L.L.P.; and JOE DOE CORPORATIONS "A" THROUGH "Z",

Defendants.

SPECIAL APPEARANCE AND MOTION OF UST INC. TO DISMISS THE THIRD AMENDED COMPLAINT OF THE PLAINTIFFS FOR LACK OF JURISDICTION OVER THE PERSON, INSUFFICIENCY OF PROCESS AND INSUFFICIENCY OF SERVICE OF PROCESS

NOW COMES the defendant, UST Inc., by counsel, David L. Shuman and Edgar A. Poe, Jr., of the law firm of Shuman, Annand & Poe, who specially appears and moves to dismiss the Third Amended Complaint against it pursuant to West Virginia Rules of Civil Procedure, Rules 12(b)(2), 12(b)(4) and 12(b)(5).

Specifically, the defendant, UST Inc., states as a basis for its Motion as follows:

1. There is no basis for jurisdiction over the person of UST Inc. as UST Inc. does no business in West Virginia, owns no property in West Virginia and has no minimum contacts with the State of West Virginia whatsoever. UST Inc. has never manufactured, advertised, sold or distributed cigarettes anywhere, including West Virginia, nor has it ever produced, processed, serviced or manufactured any other product, material or thing to be used or consumed anywhere, including West Virginia.

2. In addition, UST Inc. raises the defenses of Rule 12(b)(4) and 12(b)(5) of the West Virginia Rules of Civil Procedure and states that plaintiffs have failed to comply with the rules of process and service of process. UST Inc. is a foreign corporation not authorized to conduct affairs or transact business in West Virginia. As such, it cannot be served process through the Secretary of State's Office in the State of West Virginia unless it makes a contract to be performed in whole or in part in the state, unless it commits a tort in whole or in part in the state, or unless such corporation manufactures, sells or offers for sale supplies or any product in a defective condition which causes injury to any person within the state . . . . None of these requirements have been met in order to effect service of process upon UST Inc.

As a result of the above and as evidenced by the Affidavit of Debra A. Baker, Secretary of UST Inc., attached as Exhibit 1, UST Inc. specially appears and moves that the case be dismissed against it pursuant to the West Virginia Rules of Civil Procedure, Rule 12(b)(2), and/or in the alternative, Rules 12(b)(4) and (5) and/or requests such other relief as the Court may deem appropriate.

16diii000272

UST INC.,

By counsel.

SHUMAN, ANNAND & POE
Post Office Box 3953
Charleston, West Virginia 25339
(304) 345-1400

By: David L. Shuman by eap
David L. Shuman, Esquire

Edgar A. Poe, Jr., Esquire

16diii000273

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

DARRELL V. MCGRAW, JR., ATTORNEY GENERAL ex rel. STATE OF WEST VIRGINIA; the WEST VIRGINIA PUBLIC EMPLOYEES INSURANCE AGENCY; and the WEST VIRGINIA DEPARTMENT of HEALTH AND HUMAN RESOURCES,	:	CIVIL ACTION NO. 94-[illegible]
	:	Judge Berger
Plaintiffs,	:	
VERSUS	:	
THE AMERICAN TOBACCO COMPANY, et al.,	:	
Defendants.	x	

AFFIDAVIT OF DEBRA A. BAKER IN SUPPORT OF MOTION OF UST INC. TO DISMISS THIRD AMENDED COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND IMPROPER SERVICE OF PROCESS

STATE OF CONNECTICUT)
: ss.:
COUNTY OF FAIRFIELD)

I, Debra A. Baker, upon being duly sworn, do depose and state as follows:

1. I am Debra A. Baker, Secretary of UST Inc. ("UST"). I make this Affidavit in support of the Motion of UST to Dismiss Plaintiffs' Third Amended Complaint for Lack of Personal Jurisdiction and Improper Service of Process. The

EXHIBIT 1

statements made herein are based upon my personal knowledge and upon my review of the records relating to the business of UST, which records are maintained in the ordinary course of its operation and are relied upon as being true and accurate by UST in conducting its business.

2. UST was formed in 1986 and is a corporation organized and existing under the laws of the State of Delaware with its principal, and only, place of business in Greenwich, Connecticut. UST's sole business activity is as a holding company. It owns, among other holdings, 100% of the stock of four subsidiaries: United States Tobacco Company, International Wine and Spirits Ltd., UST Enterprises Inc., and UST International Inc. UST is a separate and distinct corporation, and maintains a separate corporate existence from each of its subsidiaries.

3. UST has never manufactured, advertised, sold or distributed cigarettes anywhere, including in West Virginia, nor has UST ever produced, processed, serviced or manufactured any other product, material or thing to be used or consumed anywhere, including in West Virginia.

4. UST has no office or place of business in West Virginia and does not use, own or rent any real or personal property there. UST has no agents, distributors, servants, employees, officers, directors, brokers, wholesalers, or other

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representatives in West Virginia for the purpose of conducting business there. UST maintains no bank accounts in West Virginia, has no telephone listing in West Virginia, keeps no books or records in West Virginia, and pays no taxes of any kind in West Virginia. UST does not solicit or advertise for business in West Virginia.

5. UST is not qualified or authorized to do business in West Virginia. UST has never consented to be sued in West Virginia, nor has it designated any agent for service of process upon it in West Virginia.

6. UST is a holding company only. As set forth above, UST has never manufactured, advertised, sold or distributed cigarettes anywhere, including in West Virginia, nor has UST ever produced, processed, serviced or manufactured any other product, material or thing to be used or consumed anywhere,

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including in West Virginia. Accordingly, UST could not have committed any of the acts alleged in the Third Amended Complaint.

FURTHER AFFIANT SAYETH NAUGHT.

Debra A. Baker
DEBRA A. BAKER

Sworn to and subscribed before me this 2nd day of December, 1996.

Barbara G. Bogue
Notary Public

BARBARA G. BOGUE
Notary Public
State of Connecticut
My Commission Expires August 31, 1997

16diii000277

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

96 DEC -5 PM 1:09

DARRELL V. McGRAW, JR., ATTORNEY GENERAL
ex rel, STATE OF WEST VIRGINIA, et al.,

Plaintiffs,

vs. CIVIL ACTION NO. 94-C-1707
HONORABLE IRENE BERGER, JUDGE

THE AMERICAN TOBACCO COMPANY; , et al.,

Defendants.

CERTIFICATE OF SERVICE

I, Edgar A. Poe, Jr., do hereby certify that I served this 4th day of December, 1996, the foregoing "**Special Appearance and Motion of UST Inc. to Dismiss the Third Amended Complaint of the Plaintiffs for Lack of Jurisdiction Over the Person, Insufficiency of Process and Insufficiency of Service of Process**" and "**Notice of Motion**" upon the following counsel of record by depositing a true copy thereof in the United States mail, postage prepaid:

Deborah L. McHenry, Esquire
Managing Deputy Attorney General
State Capitol, Room 26-E
Charleston, WV 25305
Counsel for Plaintiffs

Victor S. Woods, Esquire
Assistant Attorney General
State Capitol, Room 26-E
Charleston, WV 25305
Counsel for Plaintiffs

Ronald L. Motley, Esquire
Ness, Motley, Loadholt, Richardson & Poole
151 Meeting St., Suite 600
P.O. Box 1137
Charleston, SC 29402
Counsel for Plaintiffs

Scott S. Segal, Esquire
Segal & Davis, L.C.
810 Kanawha Blvd. East
Charleston, WV 25311
Counsel for Plaintiffs

R. Edison Hill, Esquire
Hill Peterson Carper Bee & Deitzler
Northgate Business Park
500 Tracy Way
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Counsel for Plaintiffs

Douglas B. Hunt, Esquire
Hunt & Barber, L.C.
1116-A Kanawha Blvd. East
Charleston, WV 25301
Counsel for Plaintiffs

Richard E. Rowe, Esquire
Goodwin & Goodwin
1500 One Valley Square
Charleston, WV 25301
Counsel for American Brands, Inc.

P. Michael Pleska, Esquire
Leonard B. Knee, Esquire
Bowles, Rice, McDavid, Graff & Love
P. O. Box 1386
Charleston, WV 25326-1386
Counsel for R. J. Reynolds Tobacco Company, RJR Nabisco, Inc. and John Middleton, Inc.

Edward W. Rugeley, Jr., Esquire
Jackson & Kelly
P. O. Box 553
Charleston, WV 25322-0553
Counsel for Brown & Willamson Tobacco Corporation, Individually and as Successor by Merger to The American Tobacco Company, and BATUS Holdings, Inc.

Robert B. King, Esquire
Pamela L. Kandzari, Esquire
King, Allen & Guthrie
P. O. Box 3394
Charleston, WV 25333-3394
Counsel for Philip Morris Companies, Inc., Philip Morris, Incorporated (Philip Morris U.S.A.)

Robert V. Berthold, Jr., Esquire
Berthold & Tiano
P.O. Box 3508
Charleston, WV 25335
Counsel for The Tobacco Institute, Inc.

WHITLOW, ROBERTS, HOUSTON & STRAUB
ATTORNEYS AT LAW
OLD NATIONAL BANK BUILDING
300 BROADWAY
POST OFFICE BOX 995
PADUCAH, KENTUCKY 42002-0995

HENRY O. WHITLOW
RICHARD C. ROBERTS
GARY B. HOUSTON
MARK C. WHITLOW
E. FREDERICK STRAUB, JR.
THOMAS L. OSBORNE, P.S.C.
RANDY L. TREECE *
R. CHRISTION HUTSON
RONALD F. KUPPER
GUTHRIE H. ALLEN **
MATTHEW F. COOGLE

OF COUNSEL
ANNE F. GWINN

*ALSO ADMITTED IN ILLINOIS
**ALSO ADMITTED IN LOUISIANA

TELEPHONE
502-443-4516

FAX / TELECOPIER
502-443-4571

E-MAIL
RSTRAUB@WHITLOW-LAW.COM

THOMAS S. WALLER 1890-1975
THOMAS W. THRELKELD 1905-1985

July 2, 1998

Courtney Simmons Elwood
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, DC 20005

Re: Conwood Company, L.P., et al. v.
United States Tobacco Company, et al.

Dear Ms. Elwood:

Enclosed is a stamped, filed copy of the Answer to Counterclaim we filed July 2, 1998.

The deputy clerk has told us that she does not wish to have an original plus a copy of filings, despite what the local rules say.

Yours truly,

WHITLOW, ROBERTS, HOUSTON & STRAUB

RCRb

Richard C. Roberts

RCR:ct
Enclosure

125493.1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Case No. 5:98-CV-108-R

CONWOOD COMPANY L.P..
ET AL

VS.

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC.

ORDER

A telephonic pretrial conference was held July 7, 1998.

APPEARANCES:

For the Plaintiff: Richard Roberts, Esquire
Mark Hansen, Esquire

For the Defendant: John S. Reed, Esquire
James A. Keyte, Esquire
Neal R. Stoll, Esquire

By agreement of the parties,

IT IS ORDERED:

1. By **July 9, 1998** the parties shall exchange draft proposed protective orders, with submission to the Court by **July 14, 1998** of a proposed agreed order or the parties' respective proposals in the event they are unable to agree upon a proposal;

2. By **July 21, 1998** the parties shall make the initial disclosures required by Fed. R. Civ. P. 26(a)(1).

3. By **October 27, 1998** the parties shall file all motions to amend pleadings.

4. By **December 4, 1998** the parties shall complete substantially all production of documents in response to then outstanding requests for production in accordance with the Federal Rules.

19

5. By **April 1, 1999** the parties shall complete non-expert discovery, and plaintiffs shall make disclosure of expert testimony as provided by Fed. R.Civ.P. 26(a)(2).

6. By **May 15, 1998** defendants shall make disclosure of expert testimony as provided by Fed.R.Civ.P. 26(a)(2).

7. By **June 1, 1999** plaintiffs shall make disclosure of rebuttal expert testimony as provided by Fed. R. Civ. P. 26(a)(2).

8. By **July 1, 1999** the parties shall complete depositions of expert.

9. By **July 15, 1999** parties shall file all dispositive motions.

10. By **August 6, 1999** the parties shall file oppositions to dispositive motions.

11. By **August 24, 1999** the parties shall file replies in support of dispositive motions.

12. By **September 21, 1999** the parties shall:

(a) File a list of exhibits intended to be used at trial and produce said exhibits, marked for identification, for inspection of opposing counsel, provided, however, that by no later than 48 hours in advance of direct examination, and 24 hours in advance of cross-examination, the parties shall produce for inspection of opposing counsel all demonstrative aids intended to be used in such examination, including any charts displays, visual aide or other items that will be shown to the jury, but not offered into evidence.

(b) File a witness list.

(c) File a pretrial brief containing a succinct statement of the facts of the case, the questions of fact and questions of law with citations.

(d) Designate all deposition excerpts intended to be used at trial. Opposing counsel shall have one week thereafter to make counter-designations.

13. By **September 28, 1999** the parties shall:

(a) File agreed proposed jury instructions. If the parties cannot agree, counsel shall submit proposed instructions with supporting authority. The parties should submit both a hard copy and a diskette containing the instructions in either WordPerfect or ASCII format.

(b) File proposed jury voir dire questions.

(c) File motions in limine and any objections to the admission of exhibits and deposition excerpts identified in accordance with paragraph 12. Any exhibit or deposition excerpt so identified shall be admitted into evidence, if otherwise competent, where no such written objection has been filed.

(d) File joint stipulations.

14. Counsel shall provide at or prior to the final pretrial conference a pre-marked set of all proposed trial exhibits.

15. A **final pretrial conference will be held in Chambers in Paducah, Kentucky, on October 12, 1999 at 4 P.M. prevailing local time.** Counsel that will participate at trial shall be present with full settlement authority.

16. This case is set for **jury trial in Paducah, Kentucky on November 1, 1999 at 9 A.M.** Counsel shall meet in Chambers at 8:30 A.M. The expected length of trial is 2-3 weeks.

This 7th day of July, 1998.

Thomas B. Russell

THOMAS B. RUSSELL, JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel

ENTERED

JUL 09 1998

JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT UST INC.'S MOTION TO DISMISS COMPLAINT FOR LACK OF PERSONAL JURISDICTION

Defendant UST Inc. moved to dismiss Plaintiffs' Complaint because UST Inc. is — and always has been — "a holding company that has never manufactured, sold or distributed moist snuff (or any other type of product) anywhere, including the Commonwealth of Kentucky." Def. Mem. at 2. As such, UST Inc. does not "transact business" in the forum district as required by Section 12 of the Clayton Act, 15 U.S.C. § 22, is not subject to the Kentucky long-arm statute, and does not have minimum contacts with this forum sufficient to meet the due process requirements of the United States Constitution.

Plaintiffs' principal response is that, because UST Inc. was properly served in Connecticut, this Court necessarily, and without further inquiry, has personal jurisdiction over UST Inc. under Section 12 of the Clayton Act. Pl. Mem., Point I. However, Plaintiffs simply overlook the fact that Section 12 does not confer personal jurisdiction over parent companies that do not "transact business" in the forum state. Here, it is uncontroverted that UST Inc. does not transact the business of manufacturing, distributing or selling moist snuff, which is done

exclusively through United States Tobacco Company. Nor does UST Inc. transact any other business in Kentucky.

Plaintiffs' second response — that UST Inc. transacts business or caused tortious injury in this District within the meaning of the Kentucky long-arm statute and consistent with the requirements of due process — is equally flawed. Notwithstanding Plaintiffs' bald assertions to the contrary, it remains uncontroverted that UST Inc. does not transact business in this District and lacks the minimum contacts here to meet the requirements of due process. In this respect, Plaintiffs offer nothing of substance to refute the affidavit of Debra A. Baker. If Plaintiffs had jurisdictional facts as to UST Inc., they should have been pled specifically as to UST Inc. in the first place. In light of the uncontroverted facts placed in the record by UST Inc., Plaintiffs are not now entitled to engage in a fishing expedition for jurisdictional facts that do not exist.

In sum, this case in all respects is about Conwood's claims against United States Tobacco Company and its alleged misconduct; it is not about UST Inc. at all. To hold otherwise would condone the type of harassment that neither statute nor due process permits.

ARGUMENT

I. UST INC. DOES NOT TRANSACT BUSINESS IN THIS DISTRICT FOR PURPOSES OF SECTION 12 OF THE CLAYTON ACT.

Plaintiffs claim that the only pertinent question in determining whether this Court has personal jurisdiction over UST Inc. under Section 12 of the Clayton Act is whether UST Inc. was properly served. Pl. Mem. at 4. Plaintiffs ignore the fact, however, that the requirements of Section 12 have not been met here. Specifically, the law is well established that Section 12 does not confer jurisdiction over a properly served parent company if that entity does not "transact business" in the forum district.

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Universal Services, Inc. v. Central Waste Systems, 1976-2 Trade Cases ¶ 61,140, 1976 WL 1339 (S.D. Ind. 1976), is directly on point. In that case, plaintiff averred that the district court had jurisdiction over defendant parent company under Section 12 of the Clayton Act by virtue of the acts of its subsidiary within the state. Id. at *1. Interpreting the "transacts business" element of Section 12, the court explained that:

> personal jurisdiction over the foreign parent corporation based upon the acts of its subsidiary is available to this Court only if the facts of the instant case reveal that the ... subsidiary [within the state] acted as the agent of its parent so that the parent may be said to be found in, doing business in, or an inhabitant of this state.

Id. The court then held that the facts before it — including the parent's performance of central purchasing, accounting, and financing for its subsidiaries, and overlapping officers and directors of the parent and the subsidiaries — were insufficient to establish the required agency relationship. Id. Further, the court held that various "interorganizational activities" between parent and subsidiary were insufficient to establish that the parent was transacting business within the state directly. Id. at *2. Accordingly, the court granted defendant's motion to dismiss for lack of personal jurisdiction.

Similarly, in Phillip Gall & Son v. Garcia Corp., 340 F. Supp. 1255 (E.D. Ky. 1972), plaintiff attempted to bring suit against a parent corporation, claiming that the court had personal jurisdiction over the parent under Section 12. The court rejected plaintiff's claim and granted defendant's motion to dismiss:

> [I]n order to come within the purview of the "transacts business" clause, the corporation's activities within the district must be substantial. No evidence has been adduced to show that the [parent] corporation has undertaken any business whatsoever in this state since its incorporation in 1970 or up until the time of the filing of this suit.
>
> ....

> Normally where the subsidiary maintains a separate legal identity the presence of it in the district will not be sufficient to bring the foreign parent corporation within the ambit of Section 12 of the Clayton Act.

Id. at 1258-59 (citations omitted).[1]

By contrast, none of the cases cited by Plaintiffs involves a parent-subsidiary relationship of any kind, and none involves the question of whether a parent company defendant moving to dismiss under Rule 12(b)(2) "transacts business" in the forum district. As such, they are inapposite. See, e.g., Haile v. Henderson Nat'l Bank, 657 F.2d 816, 823-24 (6th Cir. 1981) (personal jurisdiction conferred under 28 U.S.C. § 1692, a statute which does not have a "transacts business" requirement and is based solely on the location of real property); United Liberty Life Ins. Co. v. Ryan, 985 F.2d 1320, 1330 (6th Cir. 1993) (personal jurisdiction conferred under Section 27 of the Securities Exchange Act over a private defendant directly involved in the fraudulent conduct at issue); CBS Employees Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp., No. 88-2677-4B, 1989 WL 76479, at *5 (W.D. Tenn. Mar. 27, 1989) (same, under both RICO and Exchange Act).[2]

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[1] See also San Antonio Tel. Co. v. AT&T Co., 499 F.2d 349, 351-52 (5th Cir. 1974) (operating companies of AT&T were not "transacting business" within the state and thus were not subject to personal jurisdiction under Section 12); Fisher Baking Co. v. Continental Baking Corp., 238 F. Supp. 322, 327, 328 n.6 (D. Utah 1965) ("domination of the local company through the stock ownership of the parent company and the inter-organizational activity to render that effective" not sufficient to confer jurisdiction over the parent company under Section 12; extending Section 12 to parent corporations for the acts of subsidiaries is a "legislative problem . . . not properly before this court") (citation omitted).

[2] In an apparent attempt to end-run the "transacts business" requirement of Section 12, Plaintiffs suggest that UST Inc. "waived any objection to venue," presumably implying that UST Inc. cannot now argue that it does not "transact business" in Kentucky. Pl. Mem. at 4-5. Defendants' admission that venue is proper, however, does not override its clear and consistent denial of Plaintiffs' allegations that UST Inc. "transacts business" in Kentucky and that UST Inc. is subject to personal jurisdiction in Kentucky. See Answer and Affirmative Defenses, ¶¶ 6,7; Def. Mem., passim; Affidavit of Debra A. Baker, passim.

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In sum, although Section 12 provides for nation-wide service of process, it does not, as a matter of law, confer jurisdiction over a parent corporation that is not present, does not inhabit and does not transact business within the forum district.

II. UST INC. IS NOT SUBJECT TO JURISDICTION UNDER THE KENTUCKY LONG-ARM STATUTE.

In the alternative, Plaintiffs contend that their conclusory allegations that UST Inc. "transact[s] business ... in this Commonwealth" and that UST Inc. "caus[ed] tortious injury ... in this Commonwealth" is sufficient to satisfy the requirements of the Kentucky long-arm statute. Pl. Mem. at 6.[3] As demonstrated in the affidavit of Debra A. Baker, however, these allegations are either simply incorrect or are immaterial to Defendants' motion. Further, as described below, Plaintiffs may not rest on their bare allegations; nor, in the face of the uncontroverted facts, is discovery necessary or appropriate to decide this motion.

Plaintiffs' exclusive reliance on Compuserve, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996), is misplaced. In that case, plaintiff alleged specific facts that demonstrated defendant's contacts with the forum state. For example, plaintiff alleged that defendant subscribed to Compuserve in the forum state, entered into a contract to be decided under the laws of the forum state, repeatedly sent computer software into the forum state, advertised the software in the forum state, and initiated the events in the forum state that led up to the lawsuit. Id. at 1264. Given these specific factual allegations, the court merely recognized that defendant's affidavit, which did no more than simply deny these "jurisdictional facts," could not support his motion to dismiss. By contrast, in this case there are no "controverting assertions" of "specific facts." Plaintiffs have not alleged, presented, or submitted any specific facts or

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[3] In their opposition papers, Plaintiffs claim that they have alleged "far more." Pl. Mem. at 7 n.6. A thorough search of the Complaint, however, does not reveal a single fact alleged in support of this Court's jurisdiction specifically over UST Inc.

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evidence regarding UST Inc.'s contacts with Kentucky — such facts do not exist. Accordingly, Compuserve cannot apply.

Indeed, where a plaintiff — like Plaintiffs here — neither alleges nor otherwise presents any relevant specific facts, a defendant's affidavit is sufficient to establish a lack of personal jurisdiction. For example, in Kerry Steel, Inc. v. Paragon Industries, Inc., 106 F.3d 147 (6th Cir. 1997), the district court considered defendant's affidavit and granted his Rule 12(b)(2) motion without an evidentiary hearing. On appeal, the Sixth Circuit rejected the very argument made by Plaintiffs here:

> Consider the items now claimed to be "controverted" here. [Defendant's] principal place of business, state of incorporation, and ownership or non-ownership of property in [the forum state] are facts ascertainable from public records. [Defendant's] sworn statements as to these matters could easily have been refuted by the plaintiff were they not true. No such refutation was attempted.

Id. at 153 (emphasis added).[4]

Plaintiffs chose to bring this action in the Western District of Kentucky against a Delaware defendant with its principal place of business in Connecticut. Upon Defendant UST Inc.'s motion to dismiss for lack of personal jurisdiction, Plaintiffs do not and cannot allege any specific facts, nor do they present any evidence, in support of personal jurisdiction. Accordingly, this Court should dismiss the Complaint against UST Inc. for lack of personal jurisdiction.[5]

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[4] See also Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 67 n.9 (3d Cir. 1984) ("Once the defense has been raised, then the plaintiff must sustain its burden of proof in establishing jurisdictional facts through sworn affidavits or other competent evidence. [A]t no point may plaintiff rely on the bare pleadings alone in order to withstand a defendant's Rule 12(b)(2) motion . . . . [P]laintiff must respond with actual proof, not mere allegations.") (emphasis added) (citation omitted).

[5] Notwithstanding Plaintiffs' plea for jurisdictional discovery, where, as here, Plaintiffs cannot refute facts that compel the granting of Defendants' motion, the Court can and should

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III. THE EXERCISE OF JURISDICTION OVER UST INC. WOULD VIOLATE DUE PROCESS.

Finally, in the context of the requirements of due process, Plaintiffs submit that UST Inc. "has extensive ties to Kentucky," Pl. Mem. at 8, and that UST Inc. is "inextricably intertwined" in the operations of its subsidiaries. Id. at 9. Apparently, Plaintiffs hope to meet their burden of proof by mischaracterizing UST Inc.'s annual report, Form 10-K, and other documents collected as Exhibits to Plaintiffs' opposition papers.

A. UST Inc. Does Not Have "Extensive Ties To Kentucky."

Plaintiffs' facile attempt to create a jurisdictional issue by quoting inaccurately selected excerpts from UST Inc.'s annual report is disingenuous at best. For example, Plaintiffs claim that UST Inc. is "involved in other Kentucky affairs." Pl. Mem. at 9. In support, Plaintiffs quote Vincent A Gierer from an excerpt of UST Inc.'s annual report stating that the Company provides support for Agricultural Extension Service education, et al. Id. Even a cursory review of the annual report, however, indicates that Mr. Gierer's statement was given in response to the following question: "What is United States Tobacco Company, [not UST Inc.], doing to support the tobacco farmer?" See Pl. Mem., Ex. J, p. 10.[6] Even if such activities — i.e., sponsoring education programs or speaking to tobacco growers — were sufficient to establish minimum contacts, which they are not, Plaintiffs fail to recognize, intentionally or otherwise, that the activities of the subsidiary, United States Tobacco Company, cannot be imputed to UST Inc., its parent company.

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decide the motion on the papers alone. See Kerry Steel, supra, pp. 6-7; Time Share, supra, n.4.

[6] Plaintiffs also refer to the affidavit of Conwood Plant Manager, Bryce Sanders, who declared that Mr. Gierer "was in attendance and spoke for US Tobacco, [not UST Inc.]" Pl. Mem., Ex. K, ¶ 5. Apparently, even Conwood's employees are unwilling to represent under oath that UST Inc. is "involved in other Kentucky affairs."

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Similarly, Plaintiffs claim that UST Inc. purchases more than 90% of its tobacco from growers in Kentucky by quoting a document that clearly and unambiguously states that "UST Inc. is a holding company of four wholly owned subsidiaries," and that "through its subsidiaries, is a leading producer ... of, [inter alia,] moist smokeless tobacco products...." Pl. Mem., Ex. E, at 3. Again, the quoted passage, a selected line from page 11 of this document, reflects a UST representative's response to tobacco farmers' questions about purchasing tobacco; the representative, not surprisingly, chose not to distract from the answer by detailing the intricacies of the corporate structure that includes UST Inc. and United States Tobacco Company.

Finally, Plaintiffs claim that contributions to Kentucky politicians made, not by UST Inc., but by a separate and distinct political action committee, somehow establishes minimum contacts sufficient to satisfy due process. Aside from the fact that "intermittent" political activity by a company cannot, as a matter of law, constitute minimum contacts,[7] the contributions in question, as Plaintiffs themselves established, were not even made by UST Inc. Pl. Mem. at 8.

B. UST Inc. Is Not "Inextricably Intertwined" In The Operation Of Its Subsidiaries.

Finally, Plaintiffs claim that the minimum contacts requirement is met because UST Inc. is "inextricably intertwined" in the operations of its subsidiaries. Pl. Mem. at 10. Again, Plaintiffs' assertions are incorrect on the undisputed record.

Contrary to Plaintiffs' assertion, UST Inc. has not "stated publicly that it conducts the operations of its subsidiaries." Id. at 9-10. It has not done so because this statement simply

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[7] See Williams v. R.J. Reynolds Tobacco Co., 964 F. Supp. 257, 259-60 (N.D. Ohio 1997) ("intermittent lobbying" not sufficient to confer personal jurisdiction on defendant).

is not true. Plaintiffs' quote from UST Inc.'s Form 10-K is not to the contrary. The fact that a parent company states that it operates "through its subsidiaries" is an unremarkable and irrelevant statement of corporate form, not an admission of Plaintiffs conclusory assertions.[8]

Plaintiffs also claim that there is a "substantial overlap in management" between UST Inc. and its subsidiaries. Id. at 11; Ex. N. Despite the numerous cases cited, however, Plaintiffs offer no case that supports Plaintiffs' implicit contention that overlapping management is sufficient to confer jurisdiction over a foreign parent company. Indeed, as a matter of law, overlapping management is not sufficient to confer jurisdiction over a foreign parent company. See Universal Services, Inc., 1976 WL 1339, at *1; see generally Part I, supra.[9]

Finally, Plaintiffs' reference to a case involving another tobacco company, characterized as UST Inc.'s "tobacco 'holding company' confederate," is telling. See Pl. Mem.

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[8] Similarly, Mr. Gierer's testimony before Congress clearly and unambiguously identifies United States Tobacco Company as the subsidiary involved in manufacturing smokeless tobacco products and as the signatory to the proposed resolution. See id., Ex. M, at 127. Plaintiffs' representation to this Court that Mr. Gierer testified otherwise is disturbingly imprecise.

[9] All of the cases cited by Plaintiffs on this subject involve parent companies that were themselves active within the forum state. See, e.g., Third Nat'l Bank v. WEDGE Group Inc., 882 F.2d 1087, 1090 (6th Cir. 1989) (parent maintained checking account in forum state and officers of parent who were not officers of subsidiary entered into an agreement on behalf of parent); In re Telectronics Pacing Sys., Inc., 953 F. Supp. 909, 920-21 (S.D. Ohio 1997) (parent maintained a "central depository" for the cash of its subsidiaries, and parent signed agreements with subsidiary's suppliers); Daher v. G.D. Searle & Co., 695 F. Supp. 436, 438-39 (D. Minn. 1988) (parent "worked in conjunction" with subsidiary to perform the tortious act); Warren v. Honda Motor Co., 669 F. Supp. 365, 370 (D. Utah 1987) (parent manufactured and distributed product); Brunswick Corp. v. Suzuki Motor Co., 575 F. Supp. 1412, 1422 (E.D. Wis. 1983) (parents manufactured and sold products and possessed "a continuing sales and marketing relationship with [the forum state]"); Dunlop Tire & Rubber Corp. v. Pepsico, Inc., 591 F. Supp. 88, 90 (N.D. Ill. 1984) (parent's control of its subsidiaries was "too voluminous to summarize in detail").

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at 12; Ex. O. In that case, the court rejected each and every one of the arguments advanced by Plaintiffs here. The court found that, for purposes of determining personal jurisdiction, the parent company did not have minimum contacts with the forum state; Pl. Mem., Ex. O, at 4-5; the parent's subsidiary was not the alter ego of the parent company; id. at 5-6; the parent's subsidiary was not an agent of the parent; id. at 6; and the court could not exercise jurisdiction over the parent "merely because it [was] closely associated with a subsidiary doing business in [the forum state]." Id. at 7.[10]

Accordingly, despite Plaintiffs' efforts to recast the facts and the law in favor of exercising personal jurisdiction over UST Inc., the simple facts remain. UST Inc. is — and always has been — a holding company that does not manufacture or sell any products, or provide any services, anywhere. It is an individual corporate entity, separate and distinct from its subsidiaries, that does not transact business in Kentucky, did not commit any tortious acts in Kentucky, did not cause tortious injury in Kentucky, owns no property in Kentucky, and never has contracted to supply services or goods in Kentucky. UST Inc., therefore, is not subject to the personal jurisdiction of this Court.

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[10] Moreover, Plaintiffs fail to cite the approximately fourteen cases in which the same parent tobacco company has won motions to dismiss for lack of personal jurisdiction on these grounds. See, e.g., City and County of San Francisco v. Phillip Morris, 1998 U.S. Dist LEXIS 3056 (N.D. Cal. March 3, 1998); Arch v. American Tobacco Co., 984 F. Supp. 830 (E.D. Pa. 1997); Smith v. Brown & Williamson Tobacco Corp., No. 96-0459-CV-W-3, 1996 WL 751399 (W.D. Mo. Dec. 19, 1996).

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CONCLUSION

For the foregoing reasons, Defendant UST Inc.'s motion to dismiss for lack of personal jurisdiction should be granted.

Dated: July 10, 1998

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PART OF PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM

In their Complaint, Plaintiffs clearly allege that Defendants participated in a legislative initiative — the so-called "Global Settlement" — with the intent of injuring Plaintiffs and other competitors in the alleged moist snuff market. Compl. ¶ 32 et seq. Moreover, there is no question that, on the face of the Complaint, Plaintiffs seek to base antitrust liability on Defendants' alleged intent to harm competition through their involvement in the Global Settlement. As Defendants established in their moving papers, however, such conduct — assuming it occurred — is protected by the First Amendment, regardless of any alleged anticompetitive intent, and even if it is alleged to be part of an overall scheme. See Def. Mem. at 3-6. Thus, a plaintiff cannot, as a matter of law, state a claim under the antitrust laws based in whole or in part on conduct protected by the Noerr-Pennington doctrine.

In response to Defendants' motion, Plaintiffs now beat a full retreat and proclaim — contrary to the clear allegations in the Complaint — that they do not seek to base

antitrust liability on Defendants' alleged conduct relating to the Global Settlement. Pl. Mem. at 2. Further, Plaintiffs do not seriously contend that they base antitrust liability on the "sham" exception to Noerr-Pennington.[1] Under the case law cited in Defendants' moving brief, these concessions, alone, require dismissal of Paragraphs 32 through 39 of Plaintiffs' Complaint.

In a strained effort to keep the "Global Settlement" allegations in their Complaint, Plaintiffs offer two arguments that are easily dispatched. First, Plaintiffs contend that because they have collected allegations of both protected and unprotected conduct under one Count, the entire claim must necessarily stand as pleaded. Pl. Mem., Point I. As described below, however, this argument is simply wrong as a matter of law; in fact, numerous cases dismiss parts of complaints where the conduct alleged is shielded by Noerr-Pennington immunity.

Second, Plaintiffs argue that because evidence of immune activity may, in some circumstances, be deemed relevant to show the "purpose and character" of unprotected conduct, Plaintiffs' allegations relating to the Global Settlement must necessarily survive the present motion to dismiss. Pl. Mem., Point II. Not surprisingly, Plaintiffs offer no Rule 12(b)(6) cases for this proposition, but instead rely on cases relating to discovery or evidentiary disputes. In this case, of course, discovery has yet to begin, and if Plaintiffs decide to seek discovery on

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[1] Although Plaintiffs refer in passing to the alleged conduct as "sham petitioning," (see, e.g., Pl. Mem. at 2-3, 4), Plaintiffs have not pursued the sham exception in their opposition papers. Moreover, while Plaintiffs cite Westmac, Inc. v. Smith, 797 F.2d 313 (6th Cir. 1986), cert. denied, 479 U.S. 1035 (1987), they fail to disclose the relevant statement of law made by the Sixth Circuit in that case – i.e., that to constitute a "sham," the alleged conduct must be undertaken "without the legitimate expectation that such efforts will in fact induce lawful government action." Id. at 316 (emphasis added). In fact, Plaintiffs allege at every turn that Defendants conduct was undertaken with a legitimate expectation that the conduct would induce lawful government action. Compl. ¶¶ 33, 34, 36, 39.

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Global Settlement issues, they will have to make the proper showing of relevance at that time. Plaintiffs' cases, however, offer no basis to salvage defective allegations from dismissal under Rule 12(b)(6).

In sum, Plaintiffs have starkly conceded that their allegations relating to the "Global Settlement" have no place in their own Complaint. Accordingly, this Court should dismiss those portions of the Complaint under Fed. R. Civ. P. 12(b)(6).

ARGUMENT

In their Complaint, Plaintiffs allege that Defendants "sought to erect even higher barriers to competition" and "sought to embed the Global Settlement with provisions that would cause disproportionate harm to its moist snuff rivals and, ultimately, drive them from the market." Compl. ¶¶ 32-33. In their opposition papers, however, Plaintiffs disavow any claim of antitrust liability based on Defendants alleged participation in the "Global Settlement":

> Count I is not based on UST's efforts to persuade Congress to enact legislation that would further its [alleged] monopoly. Conwood does not seek damages based on that lobbying activity, nor does Conwood seek to have the Court enjoin such lobbying activity.

Pl. Mem. at 4. Instead, Plaintiffs assert that it only meant to "detail evidence" that might eventually bear on Defendants' overall anticompetitive "intent" to exclude Conwood from the market.

Having contradicted their own Complaint, Plaintiffs then assert that (i) this Court cannot dismiss the Complaint to the extent it is based on conduct relating to the Global Settlement, and (ii) because Plaintiffs may eventually seek discovery on the Global Settlement

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under the guise of "intent," this Court must permit Plaintiffs' allegations to stand. As set forth below, both propositions are without any support and, in fact, are contrary to the law.

I. THIS COURT MAY DISMISS THE PART OF THE COMPLAINT RELATING TO THE "GLOBAL SETTLEMENT."

Plaintiffs argue that its amalgamated antitrust claim must stand or fall as a whole and that, as a result of Plaintiffs' artful pleading, this Court is precluded from dismissing that part of the claim based on conduct protected by the Noerr-Pennington doctrine. Plaintiffs are simply wrong. Numerous courts — including the two cited in Defendants' moving papers and then mischaracterized in Plaintiffs' opposition papers (see Pl. Mem. at 4) — have dismissed antitrust claims "in part" based on protected conduct.

In Norcen Energy Resource Ltd. v. Pacific Gas & Elec. Co., 1994-2 Trade Cases ¶ 70,851, 1994 WL 519461 (N.D. Cal. 1994), plaintiff brought an antitrust claim alleging that defendants: (i) denied plaintiff access to defendants' pipeline; (ii) repeatedly informed plaintiff's customers that plaintiff could not provide reliable supply; (iii) refused to extend joint pipeline delivery in order to exclude competitors; (iv) discriminatorily allocated capacity in a manner to exclude competition; and (v) petitioned government agencies for, inter alia, a "crossover ban" to impose heightened costs of delivery on competitors. Id. at *1-3. Defendants moved to dismiss plaintiff's antitrust claim on several grounds, including the application of the Noerr-Pennington doctrine. The court granted defendants' motion with prejudice "to the extent they are based on defendants' actions before [regulatory agencies]." Id. at *7. The court then went on to consider the remainder of plaintiff's "monopoly broth" allegations purporting to support its claim. Id. at *13.

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Similarly, in Mountain Grove Cemetery Ass'n v. Norwalk Vault Co., 428 F. Supp. 951 (D. Conn. 1977), plaintiff alleged that defendants: (i) refused to deal with plaintiff; (ii) boycotted plaintiff's product; (iii) disparaged the design, construction, and use of plaintiff's product; and (iv) joined together to initiate litigation. Id. at 952. Plaintiff alleged that defendants' acts constituted violations of Sections 1 and 2 of the Sherman Act. Like the instant case, defendants moved to dismiss the Section 1 and Section 2 claims only to the extent they were based on allegations of conduct protected by the Noerr-Pennington doctrine. Id. at 953. The court granted defendants motion and dismissed plaintiff's complaint "to the extent [it] alleges an antitrust violation on the basis of defendants' . . . litigation." Id. at 956 (emphasis added). The remaining issues were decided separately. Id.

More recently, in Christian Memorial Cultural Center, Inc. v. Michigan Funeral Directors Ass'n, __ F. Supp. __, 1998 WL 129954 (E.D. Mich. March 6, 1998), plaintiff alleged that defendants: (i) sued various entities including plaintiff; (ii) engaged in administrative and legislative lobbying; (iii) directly interfered with plaintiff's customers by refusing to service plaintiff's caskets; and (iv) disparaged plaintiff's business activities as "con games" and "illegal schemes." Id. at *2. Like Plaintiffs here, plaintiff used all of these allegations to support a single count of its complaint — an antitrust claim. The court nevertheless analyzed the allegations of Count I in two categories — those activities protected by the Noerr-Pennington doctrine and those that were not. Id. at *3. Finding that the conduct in the first category was protected, the court dismissed "that part of Count I." Id. at *6. See also Invictus Records, Inc. v. American Broadcasting Cos., 98 F.R.D. 419, 432 n.1 (E.D. Mich. 1982) (Noerr-Pennington doctrine would require striking from the complaint all reference to protected conduct irrespective

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of other reasons for dismissal of claims); Johns-Manville Corp. v. Guardian Indus., Civ. No. 81-70248, 1981 WL 2083 (E.D. Mich. Apr. 27, 1981) (dismissing antitrust claims "insofar as [they] are based on" protected conduct); Brazil v. Arkansas Board of Dental Examiners, 593 F. Supp. 1354 (E.D. Ark. 1984) (after searching complaint for any allegations of antitrust violations, court granted motion to dismiss as to the allegations involving protected conduct), aff'd, 759 F.2d 674 (8th Cir. 1985).

In sum, in response to Defendants' motion, Plaintiffs have conceded that the Noerr-Pennington immunity applies to the allegations made in Paragraphs 32 through 39 of their Complaint. Plaintiffs correctly point out that a motion to dismiss must fail if a complaint states a claim under a "viable legal theory." Pl. Mem. at 3. As the ample — and undisputed — authority set forth above clearly demonstrates, however, allegations of conduct protected by the Noerr-Pennington doctrine cannot state a "viable legal theory." Accordingly, Defendants' motion to dismiss should be granted.

II. PLAINTIFFS CANNOT CIRCUMVENT NOERR-PENNINGTON IMMUNITY BY RECHARACTERIZING THE ALLEGATIONS AS RELATING ONLY TO "INTENT."

Plaintiffs' concession that they do not seek to base antitrust liability on Defendants' petitioning activity, without more, mandates striking Paragraphs 32 through 39 of the Complaint.[2] Plaintiffs hope to avoid this necessary consequence by asserting that the

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[2] Given this admission, even if it were not a complete recharacterization of the Complaint, all allegations relating to Defendants' lobbying activities should be stricken from the Complaint under Rule 12(f) of the Federal Rules of Civil Procedure as immaterial and impertinent. See Fed. R. Civ. P. 12(f); see also Thermos Co. v. Igloo Products Corp., 1996-1 Trade Cases ¶ 71,323, 1995 WL 745832 (N.D. Ill. 1995) (affirming dismissal of claims based on Noerr-Pennington doctrine and striking under Rule 12(f) additional related allegations).

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immune activity is "properly pleaded" so long as they now recharacterize the conduct as pertaining only to the element of "intent." Such a rule not only would eviscerate the Noerr-Pennington doctrine — which expressly protects petitioning activity motivated by alleged anticompetitive intent (Def. Mem. at 4-6) — it would encourage antitrust plaintiffs to permeate Complaints with irrelevant and potentially harassing "evidentiary" allegations that are best left to be resolved in the discovery and pretrial process.[3]

Plaintiffs assert that "courts have held without exception that even protected petitioning may properly be pleaded." Pl. Mem. at 5 (emphasis added). All of the cases cited by Plaintiffs, however, reflect nothing more than the resolution of discovery disputes over relevance or evidentiary disputes over admissibility.[4] In fact, as readily apparent from even the most favorable excerpts quoted by Plaintiffs, none of the eight cases even involved a defendant's motion to dismiss; none involved the merit of pleading allegations of protected conduct in any context; and none involved, in any relevant way, a complaint, counterclaim, or any other pleading. See United Mine Workers v. Pennington, 381 U.S. 657, 670 n.3 (1965) (evidence

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[3] See Fed. R. Civ. P. 8; see also Lawline v. American Bar Ass'n, 738 F. Supp. 288, 291 n.1 (N.D. Ill. 1990) (finding complaint to be "permeated with unnecessary evidentiary allegations" in violation of Rule 8 as an alternative basis for dismissal), aff'd, 956 F.2d 1378 (7th Cir. 1992), cert. denied, 510 U.S. 992 (1993).

[4] Defendants by no means concede that evidence of conduct that would be protected by the Noerr-Pennington doctrine will be discoverable in this case or admissible at trial. As Plaintiffs' own cases demonstrate, such evidence is neither discoverable nor admissible except under certain conditions. See, e.g., MCI Communications Corp. v. AT&T Corp., 708 F.2d 1081, 1160 (7th Cir. 1983) (evidence of protected conduct is admissible only if shown to be relevant and not overly prejudicial to defendants); Brand Name Prescription Drugs Antitrust Litig., No. 94C 897, MDL 997, 1995 U.S. Dist. LEXIS 12039, at *5 (N.D. Ill. Aug. 17, 1995) (admission of evidence of protected conduct raises "significant evidentiary concerns"). Until Plaintiffs seek such discovery, however, that dispute is not ripe for resolution by this Court.

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of protected conduct "may . . . be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny") (emphasis added); Alexander v. National Farmers Org., 687 F.2d 1173, 1196 (8th Cir. 1982) (same), cert. denied, 461 U.S. 937 (1983); United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29, 47 (N.D. Ga. 1977) (same); MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1160 (7th Cir.) (district court did not err by not giving Noerr-Pennington instruction when evidence was offered to prove purpose and character of nonexempt conduct), cert. denied, 464 U.S. 891 (1983); General Motors Corp. v. Johnson Matthey, Inc., 887 F. Supp. 1240, 1246 (E.D. Wis. 1995) (court allowed discovery of information concerning protected conduct where plaintiff demonstrated relevance to purpose and character of unprotected conduct); North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 666 F.2d 50, 52 (4th Cir. 1981) (same); Associated Container Transp. Ltd. v. United States, 705 F.2d 53, 59 (2d Cir. 1983) (same); Brand Name Prescription Drugs Antitrust Litig., No. 94C 897, MDL 997, 1995 U.S. Dist. LEXIS 12039, *5 (N.D. Ill. Aug. 17, 1995) (same).

In sum, Plaintiffs' reliance on these cases to support the contention that allegations of protected conduct may survive a motion to dismiss is badly misplaced, and Plaintiffs' assertion that these cases hold "without exception that even protected petitioning may properly be pleaded," (Pl. Mem. at 5) (emphasis added), is more than mere mischaracterization.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss Count I of Plaintiffs' Complaint to the extent it is based on alleged conduct that is protected from antitrust liability under the Noerr-Pennington doctrine.

Dated: July 10, 1998

John S. Reed
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Attorneys for Defendants

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 10th day of July, 1998.

Counsel for Defendants

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File

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John S. Reed

July 14, 1998

Hon. Thomas B. Russell
Judge, United States District Court
307 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed for your consideration is Defendants' proposed Protective Order, which represents a number of compromises that were reached after several conferences with Plaintiffs and Plaintiffs' counsel. We have provided our proposed order both in hard copy and Word Perfect disk format. The parties made substantial progress toward a final, agreed-upon order, but were unable to resolve a single remaining issue.

The parties could not agree on the appropriate language to differentiate HIGHLY CONFIDENTIAL information (or "Tier 1 Information") and CONFIDENTIAL information (or "Tier 2 Information"). Defendants' position is that, considering the directly competitive relationship of the parties, and in order to preserve the confidentiality of competitively sensitive business documents and other materials, it is necessary to provide for a discrete class of documents that, in the first instance, would be disclosed to Outside Counsel only.

In our discussions, Plaintiffs accepted, in principle, Defendants' proposal for two tiers of protection, but the parties were unable to agree on a specific definition for the types of documents and information that could be designated as HIGHLY CONFIDENTIAL. Defendants believe that the best approach would permit the producing party to designate certain documents as HIGHLY CONFIDENTIAL, see Proposal ¶ 3, but would also allow the receiving party to challenge any such designation it believes is inappropriate. See Proposal, ¶ 14. Plaintiffs, however, maintain that the Protective Order should, at this time, attempt to enumerate a list of documents — exclusive as to the type of document and as to the date the document was created — that could be designated as HIGHLY CONFIDENTIAL. In a complex antitrust case like this one, Plaintiffs' suggestion is simply impractical and would likely lead to more disputes

before the Court concerning the meaning and scope of the Order than would a mechanism that provides for informal resolution of disputed designations.

As initial disclosures of documents required by Fed. R. Civ. P. 26(a)(1) are due to be exchanged on July 21, 1998, Defendants respectfully request that the Court enter, at its earliest convenience, a protective order that reflects the genuine concerns for confidentiality presented by this litigation.

Respectfully,

John S. Reed

JSR/kmc
Enclosures
cc: Mark C. Hansen
Richard C. Roberts

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

PROTECTIVE ORDER

IT IS HEREBY ORDERED AND ADJUDGED that:

1. This Stipulation and Protective Order (the "Stipulation") shall apply to all information disclosed during the course of the above-captioned litigation (the "Litigation"), including, without limitation, information disclosed: during discovery, hearing or trial; in any pleading, affidavit, brief, motion, transcript or other writing; or in any testimony given in deposition, hearing, or trial ("Litigation Materials").

2. Nothing in this Stipulation shall impose any restriction on the use or disclosure by a party of (i) its own documents or (ii) information, not otherwise subject to any protective order or to any other restriction as to its use, that is properly obtained from sources other than a party to this action or a non-party served with process in this action.

3. For purposes of this Stipulation, "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL ONLY" (also known as "Tier 1 Information") shall mean all information or materials, including documents and portions of deposition transcripts, that constitute information that the producing party, in good faith, believes are of a currently highly competitively

sensitive nature – i.e., information that a party, in good faith, believes would result in competitive harm in the market place, or other business or financial harm, if the information were disseminated to persons other than those specifically identified in this Paragraph. The parties agree that this category of information is to be applied by the producing party as narrowly as possible, consistent with the party's good faith belief as to the need to preserve the confidentiality of the Tier 1 Information. Tier 1 Information may be disclosed only to the following: outside counsel for the parties in this action and their stenographic, clerical, secretarial, paralegal, or other personnel whose functions make it appropriate for them to have access to Tier 1 Information; the Court (and any appellate court), including court personnel, jurors, and alternate jurors; court reporters to the extent necessary to allow them to record court proceedings and depositions in the Litigation; and independent consultants or expert witnesses.

4. For purposes of this Stipulation, "CONFIDENTIAL INFORMATION" (also known as "Tier 2 Information") shall mean all information or materials, including documents and portions of deposition transcripts, that constitute information that the producing party, in good faith, believes is confidential financial, business, or commercial information, but is not included within Tier 1 Information. Tier 2 Information may be disclosed to any "Qualified Recipient" as defined in Paragraph 7 of this Stipulation.

5. Parties and non-parties may designate documents or other tangible Litigation Materials as Tier 1 or Tier 2 Information ("Protected Information") in the following manner:

(a) Tier 1 Information shall be designated by stamping or affixing thereto in red or black ink the legend "HIGHLY CONFIDENTIAL -- OUTSIDE COUNSEL ONLY" on the cover or first page or as necessary to indicate the designation (or relevant portion thereof) and, as to multi-page documents, on each page (or relevant portion thereof) containing highly confidential outside counsel only information.

(b) Tier 2 Information shall be designated by stamping or affixing thereto in red or black ink the legend "CONFIDENTIAL -- SUBJECT TO PROTECTIVE ORDER" on the cover or first page or as necessary to indicate the designation (or relevant portion thereof) and, as to multi-page documents, on each page (or relevant portion thereof) containing confidential information.

(c) The parties or non-parties and their attorneys shall make a good faith effort to designate as Tier 1 and Tier 2 Information only such documents and information that are appropriate to those respective levels of confidential treatment, as set forth above. The parties agree that only that portion of a document or other tangible Litigation Materials constituting Protected Information shall be designated as such in accordance with the terms set forth above, and, where feasible and practical, shall be produced in both redacted and unredacted form.

6. Parties or non-parties may designate deposition or other testimony as Protected Information by stating orally on the record that the information is Protected Information on the day the testimony is given. Testimony so designated as Protected Information prior to transcription shall be placed by the reporter in a separate volume. Parties or non-parties may also designate deposition or other testimony as Protected Information by sending written notice within ten (10) days after the parties receive transcripts of the testimony. Prior to the termination of this five day period, all deposition or other testimony shall be considered Tier 1 information unless otherwise agreed by the parties.

7. For purposes of this Stipulation, except as otherwise agreed to by the parties or ordered by the Court pursuant to Paragraph 9 of this Stipulation, "Qualified Recipient" means:

(a) The Court (and any appellate court), including court personnel, jurors, and alternate jurors.

(b) Court reporters to the extent necessary to allow them to record court proceedings and depositions in the Litigation.

(c) Outside counsel for the parties to the Litigation and their stenographic, clerical, secretarial, paralegal, or other personnel whose functions make it appropriate for them to have access to all Protected Information in connection with the prosecution and defense of this litigation.

(d) In-house attorneys for the parties to the Litigation and their stenographic, clerical, secretarial, paralegal, or other personnel whose functions make it appropriate for them to have access to Tier 2 Information in connection with the prosecution and defense of this litigation, and who have executed the attached Confidentiality Agreement.

(e) Senior executives (including any person assisting such executives) of the parties to the Litigation (as designated in a separate list to be exchanged by the parties by July 21, 1998, as such list may be amended), where review of Tier 2 Information is in connection with the prosecution and defense of this litigation, and who have executed the attached Confidentiality Agreement.

(f) Any independent consultants or expert witnesses or other persons employed for purposes of this litigation by the foregoing and their stenographic, clerical, secretarial, or other personnel whose functions make it appropriate for them to have access to all Protected Information in connection with the prosecution and defense of this litigation, and who have executed the attached Confidentiality Agreement. The parties agree that independent consultants and expert witnesses may review all Protected Information in the Litigation, including Tier 1 Information, as defined by the Stipulation, so long as any such person (or other persons reviewing Protected Information) execute the attached Confidentiality Agreement and have it duly notarized.

8. Protected Information shall be entitled to confidential treatment pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. Each Qualified Recipient to whom Protected Information is disclosed shall use the Protected Information only for the prosecution or defense of this litigation and shall not otherwise disclose it to any person who is not a Qualified Recipient with respect to such information, except as hereinafter provided. All Protected Information shall be carefully maintained so as to preclude access by persons who are not Qualified Recipients with respect to such information. However, this Stipulation does not prohibit disclosure of a document containing Protected Information to persons indicated on the face of such document as having been authors or recipients of such document in substantially the form produced.

9. If a receiving party, in good faith, believes a disclosure of Protected Information to any person other than to a Qualified Recipient, including those persons noticed for depositions or designated as trial witnesses, is necessary for the prosecution or defense of this litigation, the receiving party must give at least ten (10) days written notice to the producing party of such intended disclosure. The written notice shall identify the Protected Information to be disclosed, the person or persons to whom the identified Protected Information will be disclosed and the purpose of the disclosure. If the producing party objects to the intended disclosure, counsel will confer to resolve the dispute. In the event the parties fail to resolve such dispute informally, the producing party may, within the 10-day notice period, apply for relief to the Court. The burden on any such application shall be on the producing party to demonstrate why the intended disclosure should not be permitted. Unless and until the Court denies the application, the receiving party shall not make the intended disclosure. If the Court denies the producing party's application, the person or persons to whom the intended disclosure is to be made must execute the attached Confidentiality Agreement and will be subject to the terms of this Stipulation as a Qualified Recipient.

10. Every person, other than outside counsel for the parties to the Litigation (and their stenographic, clerical, secretarial, paralegal, or other personnel whose functions require access to the Protected Information), who receives Protected Information shall read this Stipulation and execute a Confidentiality Agreement in the form of Attachment A, stating that the person agrees to be bound by the terms of this Stipulation. The undersigned counsel shall maintain a file containing the Confidentiality Agreement executed by each such person to whom disclosure of Protected Information is made by such counsel. Each Confidentiality Agreement executed by a Qualified Recipient as described in Subparagraph 7(e) of this Stipulation shall be promptly disclosed to any party or non-party that designated the disclosed information as Protected Information.

11. The receiving party, and all persons to whom disclosure of Protected Information is made, must take all reasonable measures to ensure that they abide by the terms of this Stipulation. The Court has jurisdiction to hear and determine applications for appropriate sanctions for any violation of this Order.

12. Protected Information shall not be copied or otherwise reproduced by a receiving party, except for transmission to Qualified Recipients. Nothing herein, however, shall restrict a Qualified Recipient from making copies, abstracts, digests, and analyses of Protected Information for use in connection with the prosecution or defense of this litigation. Such working copies, abstracts, digests, and analyses shall be deemed Tier 1 or Tier 2 Information, respectively, under the terms of this Stipulation.

13. This Order shall not restrict (or enlarge) the parties' rights to offer evidence at trial, provided that the parties shall attempt to agree upon the conditions under which Tier 1 or Tier 2 Information shall be used at trial and, if they are unable to agree, the Court shall order appropriate protections for any Tier 1 or Tier 2 Information the parties seek to use at trial. Any party filing in the Court any document containing Protected Information shall seal

such document in a closed envelope and shall attach thereon a label containing the case caption and the following legend:

"CONFIDENTIAL INFORMATION -- UNDER PROTECTIVE ORDER"

"The enclosed document has been filed under seal pursuant to terms of a Protective Order entered in this action. This envelope shall not be opened or its contents disclosed or examined without order of the Court. Violation thereof may be regarded as contempt of the Court."

14. Nothing in this Stipulation shall prevent a party, in good faith, from contending that any or all information designated as Protected Information should not be subject to this Stipulation or that materials designated as Tier 1 or Tier 2 Information has been improperly designated by the producing party. A party may at any time request the designating party to cancel the designation of information as Tier 1 or Tier 2 Information with respect to any information and to agree that, thereafter, such information shall no longer be subject to the provisions of this Stipulation. A party also may request that the producing party redesignate information from Tier 1 Information to Tier 2 Information. Any such request shall be written, shall be served on counsel for the producing party, shall identify the Protected Information that the requesting party contends should not be subject to this Stipulation or should be redesignated and should indicate the receiving party's basis for the requested redesignation. Where a party has made such an objection, the parties shall confer to attempt to resolve the issue within seven (7) business days from actual receipt of the written objection. To the extent any designation of Protected Information is challenged before the Court, the producing party will bear the burden of demonstrating why the information in contention was properly designated.

15. Nothing in this Stipulation shall prevent a party, in good faith, from designating or redesignating a document or information that has already been produced to

another party, in which case the receiving party shall thereafter treat the document or information as redesignated. In the event that two copies of a document or information are produced under different designations, the more restrictive designation shall apply. In the event that two copies of the same document or information are produced by different parties, the designation of the creating party shall govern. The designation of information as Protected Information, pursuant to this Stipulation, shall not be construed as a concession by a producing party that such information is relevant or material to any issue or is otherwise discoverable, or by a receiving party that such information is, in fact, confidential or sensitive financial, business, or commercial information.

16. Nothing in this Stipulation shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of Protected Information; provided, however, that in rendering such advice and otherwise communicating with such clients, counsel shall not make specific disclosure of any item so designated except as otherwise provided herein.

17. This Stipulation shall be without prejudice to the right of any party to oppose production of any information, the production of which has not already been ordered by the Court, for lack of timeliness or relevance or any other ground.

18. The production of any Litigation Materials during the Litigation shall be without prejudice to any claim that such materials either are privileged or are protected from discovery as work product within the meaning of Rule 26 of the Federal Rules of Civil Procedure, and no party shall be held to have waived any rights under any privilege or under Rule 26 by such production. Upon receiving a demand from a producing party for return of

such material, the receiving party shall promptly comply by returning the requested material (and destroying all copies that have been made) and shall not use the material in any way until the validity of the claim of exemption from discovery has been resolved by the parties or by the Court.

19. Any of the notice requirements herein may be waived, in whole or in party, but only in writing signed by the attorney of record for the party against whom such waiver will be effective.

20. Upon final termination of the Litigation, including all appeals, the receiving party shall return to the producing party all Litigation Materials designated as Tier 1 Protected Information, except for pleadings and deposition transcripts and other materials filed with the Court. In addition, the receiving party shall, at its option, either return to the producing party or destroy, in whatever form stored or reproduced, all other Litigation Materials, except for pleadings and deposition transcripts and other materials filed with the Court, including, but not limited to, correspondence, memoranda, notes, and other work-product materials, which contain or refer to Protected Information. All Protected Information not embodied in physical objects and documents shall remain subject to this Stipulation. In the event that any party chooses to destroy physical objects and documents, such party shall certify within thirty days that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge.

21. The parties may amend or modify any provision of this Stipulation by mutual agreement, which agreement shall be embodied in a written stipulation to be approved by the Court.

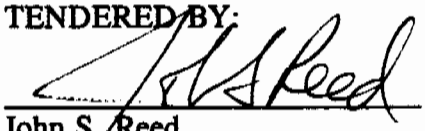
22. This Stipulation is entered into without prejudice to the right of any party or non-party to apply to the Court at any time for additional protection, or to relax or rescind the restrictions of this Stipulation.

23. Until such time as this Stipulation has been "So Ordered" by the Court, the parties agree that upon execution by the parties, it will be treated as though it had been "So Ordered."

Entered this _____ day of _____, 1998.

_____
JUDGE, UNITED STATES DISTRICT COURT

TENDERED BY:



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

STIPULATION AND [PROPOSED] PROTECTIVE ORDER

IT IS HEREBY STIPULATED AND AGREED by the undersigned parties to this action, by and through their respective counsel as follows:

1. This Stipulation and Protective Order (the "Stipulation") shall apply to all information disclosed during the course of the above-captioned litigation (the "Litigation"), including, without limitation, information disclosed: during discovery, hearing or trial; in any pleading, affidavit, brief, motion, transcript or other writing; or in any testimony given in deposition, hearing, or trial ("Litigation Materials").

2. Nothing in this Stipulation shall impose any restriction on the use or disclosure by a party of (i) its own documents or (ii) information, not otherwise subject to any protective order or to any other restriction as to its use, that is properly obtained from sources other than a party to this action or a non-party served with process in this action.

3. For purposes of this Stipulation, "HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL ONLY" (also known as "Tier 1 Information") shall mean all information or materials, including documents and portions of deposition transcripts, that constitute informa-

tion that the producing party, in good faith, believes are of a currently highly competitively sensitive nature – i.e., information that a party, in good faith, believes would result in competitive harm in the market place, or other business or financial harm, if the information were disseminated to persons other than those specifically identified in this Paragraph. The parties agree that this category of information is to be applied by the producing party as narrowly as possible, consistent with the party's good faith belief as to the need to preserve the confidentiality of the Tier 1 Information. Tier 1 Information may be disclosed only to the following: outside counsel for the parties in this action and their stenographic, clerical, secretarial, paralegal, or other personnel whose functions make it appropriate for them to have access to Tier 1 Information; the Court (and any appellate court), including court personnel, jurors, and alternate jurors; court reporters to the extent necessary to allow them to record court proceedings and depositions in the Litigation; and independent consultants or expert witnesses.

4. For purposes of this Stipulation, "CONFIDENTIAL INFORMATION" (also known as "Tier 2 Information") shall mean all information or materials, including documents and portions of deposition transcripts, that constitute information that the producing party, in good faith, believes is confidential financial, business, or commercial information, but is not included within Tier 1 Information. Tier 2 Information may be disclosed to any "Qualified Recipient" as defined in Paragraph 8 of this Stipulation.

5. Parties and non-parties may designate documents or other tangible Litigation Materials as Tier 1 or Tier 2 Information ("Protected Information") in the following manner:

(a) Tier 1 Information shall be designated by stamping or affixing thereto in red or black ink the legend "HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL ONLY" on the cover or first page or as necessary to indicate the designation (or relevant portion

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thereof) and, as to multi-page documents, on each page (or relevant portion thereof) containing highly confidential outside counsel only information.

(b) Tier 2 Information shall be designated by stamping or affixing thereto in red or black ink the legend "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER" on the cover or first page or as necessary to indicate the designation (or relevant portion thereof) and, as to multi-page documents, on each page (or relevant portion thereof) containing confidential information.

(c) The parties or non-parties and their attorneys shall make a good faith effort to designate as Tier 1 and Tier 2 Information only such documents and information that are appropriate to those respective levels of confidential treatment, as set forth above. The parties agree that only that portion of a document or other tangible Litigation Materials constituting Protected Information shall be designated as such in accordance with the terms set forth above, and, where feasible and practical, shall be produced in both redacted and unredacted form.

6. Parties or non-parties may designate deposition or other testimony as Protected Information by stating orally on the record that the information is Protected Information on the day the testimony is given. Testimony so designated as Protected Information prior to transcription shall be placed by the reporter in a separate volume. Parties or non-parties may also designate deposition or other testimony as Protected Information by sending written notice within ten (10) days after the parties receive transcripts of the testimony. Prior to the termination of this five day period, all deposition or other testimony shall be considered Tier 1 information unless otherwise agreed by the parties.

7. For purposes of this Stipulation, except as otherwise agreed to by the parties or ordered by the Court pursuant to Paragraph 9 of this Stipulation, "Qualified Recipient" means:

(a) The Court (and any appellate court), including court personnel, jurors, and alternate jurors.

(b) Court reporters to the extent necessary to allow them to record court proceedings and depositions in the Litigation.

(c) Outside counsel for the parties to the Litigation and their stenographic, clerical, secretarial, paralegal, or other personnel whose functions make it appropriate for them to have access to all Protected Information in connection with the prosecution and defense of this litigation.

(d) In-house attorneys for the parties to the Litigation and their stenographic, clerical, secretarial, paralegal, or other personnel whose functions make it appropriate for them to have access to Tier 2 Information in connection with the prosecution and defense of this litigation, and who have executed the attached Confidentiality Agreement.

(e) Senior executives (including any person assisting such executives) of the parties to the Litigation (as designated in a separate list to be exchanged by the parties simultaneously with the execution of this Stipulation, as such list may be amended), where review of Tier 2 Information is in connection with the prosecution and defense of this litigation, and who have executed the attached Confidentiality Agreement.

(f) Any independent consultants or expert witnesses or other persons employed for purposes of this litigation by the foregoing and their stenographic, clerical, secretarial, or other personnel whose functions make it appropriate for them to have access to all Protected Information in connection with the prosecution and defense of this litigation, and who have executed the attached Confidentiality Agreement. The parties agree that independent consultants and expert witnesses may review all Protected Information in the Litigation, including Tier 1 Information, as defined by the Stipulation, so long as any such person (or other

persons reviewing Protected Information) execute the attached Confidentiality Agreement and have it duly notarized.

8. Protected Information shall be entitled to confidential treatment pursuant to Rule 26(c) of the Federal Rules of Civil Procedure. Each Qualified Recipient to whom Protected Information is disclosed shall use the Protected Information only for the prosecution or defense of this litigation and shall not otherwise disclose it to any person who is not a Qualified Recipient with respect to such information, except as hereinafter provided. All Protected Information shall be carefully maintained so as to preclude access by persons who are not Qualified Recipients with respect to such information. However, this Stipulation does not prohibit disclosure of a document containing Protected Information to persons indicated on the face of such document as having been authors or recipients of such document in substantially the form produced.

9. If a receiving party, in good faith, believes a disclosure of Protected Information to any person other than to a Qualified Recipient, including those persons noticed for depositions or designated as trial witnesses, is necessary for the prosecution or defense of this litigation, the receiving party must give at least ten (10) days written notice to the producing party of such intended disclosure. The written notice shall identify the Protected Information to be disclosed and the person or persons to whom the identified Protected Information will be disclosed. If the producing party objects to the intended disclosure, counsel will confer to resolve the dispute. In the event the parties fail to resolve such dispute informally, the receiving party shall apply for relief to the Court. The burden of any such application shall be on the receiving party to demonstrate why the intended disclosure should be permitted. Unless and until the Court grants the application, the receiving party shall not make the intended disclosure. If the Court grants the receiving party's application, the person or persons to whom the intended

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disclosure is to be made must execute the attached Confidentiality Agreement and will be subject to the terms of this Stipulation as a Qualified Recipient.

10. Every person, other than outside counsel for the parties to the Litigation (and their stenographic, clerical, secretarial, paralegal, or other personnel whose functions require access to the Protected Information), who receives Protected Information shall read this Stipulation and execute a Confidentiality Agreement in the form of Attachment A, stating that the person agrees to be bound by the terms of this Stipulation. The undersigned counsel shall maintain a file containing the Confidentiality Agreement executed by each such person to whom disclosure of Protected Information is made by such counsel. Each Confidentiality Agreement executed by a Qualified Recipient as described in Subparagraph 8(e) of this Stipulation shall be promptly disclosed to any party or non-party that designated the disclosed information as Protected Information.

11. The receiving party, and all persons to whom disclosure of Protected Information is made, must take all reasonable measures to ensure that they abide by the terms of this Stipulation. The Court has jurisdiction to hear and determine applications for appropriate sanctions for any violation of this Order.

12. Protected Information shall not be copied or otherwise reproduced by a receiving party, except for transmission to Qualified Recipients. Nothing herein, however, shall restrict a Qualified Recipient from making copies, abstracts, digests, and analyses of Protected Information for use in connection with the prosecution or defense of this litigation. Such working copies, abstracts, digests, and analyses shall be deemed Tier 1 or Tier 2 Information, respectively, under the terms of this Stipulation.

13. This Order shall not restrict (or enlarge) the parties' rights to offer evidence at trial, provided that the parties shall attempt to agree upon the conditions under which Tier 1 or Tier 2 Information shall be used at trial and, if they are unable to agree, the Court

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shall order appropriate protections for any Tier 1 or Tier 2 Information the parties seek to use at trial. Any party filing in the Court any document containing Protected Information shall seal such document in a closed envelope and shall attach thereon a label containing the case caption and the following legend:

"CONFIDENTIAL INFORMATION -- UNDER PROTECTIVE ORDER"

"The enclosed document has been filed under seal pursuant to terms of a Protective Order entered in this action. This envelope shall not be opened or its contents disclosed or examined without order of the Court. Violation thereof may be regarded as contempt of the Court."

14. Nothing in this Stipulation shall prevent a party, in good faith, from contending that any or all information designated as Protected Information should not be subject to this Stipulation or that materials designated as Tier 1 or Tier 2 Information has been improperly designated by the producing party. A party may at any time request the designating party to cancel the designation of information as Tier 1 or Tier 2 Information with respect to any information and to agree that, thereafter, such information shall no longer be subject to the provisions of this Stipulation. A party also may request that the producing party redesignate information from Tier 1 Information to Tier 2 Information. Any such request shall be written, shall be served on counsel for the producing party, shall identify the Protected Information that the requesting party contends should not be subject to this Stipulation or should be redesignated and should indicate the receiving party's basis for the requested redesignation. Where a party has made such an objection, the parties shall confer to attempt to resolve the issue within seven (7) business days from actual receipt of the written objection. To the extent any designation of Protected Information is challenged before the Court, the producing party will bear the burden of demonstrating why the information in contention was properly designated.

15. Nothing in this Stipulation shall prevent a party, in good faith, from designating or redesignating a document or information that has already been produced to another party, in which case the receiving party shall thereafter treat the document or information as redesignated. In the event that two copies of a document or information are produced under different designations, the more restrictive designation shall apply. In the event that two copies of the same document or information are produced by different parties, the designation of the creating party shall govern. The designation of information as Protected Information, pursuant to this Stipulation, shall not be construed as a concession by a producing party that such information is relevant or material to any issue or is otherwise discoverable, or by a receiving party that such information is, in fact, confidential or sensitive financial, business, or commercial information.

16. Nothing in this Stipulation shall prevent or otherwise restrict counsel from rendering advice to their clients and, in the course thereof, relying generally on examination of Protected Information; provided, however, that in rendering such advice and otherwise communicating with such clients, counsel shall not make specific disclosure of any item so designated except as otherwise provided herein.

17. This Stipulation shall be without prejudice to the right of any party to oppose production of any information, the production of which has not already been ordered by the Court, for lack of timeliness or relevance or any other ground.

18. The production of any Litigation Materials during the Litigation shall be without prejudice to any claim that such materials either are privileged or are protected from discovery as work product within the meaning of Rule 26 of the Federal Rules of Civil

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Procedure, and no party shall be held to have waived any rights under any privilege or under Rule 26 by such production. Upon receiving a demand from a producing party for return of such material, the receiving party shall promptly comply by returning the requested material (and destroying all copies that have been made) and shall not use the material in any way until the validity of the claim of exemption from discovery has been resolved by the parties or by the Court.

19. Any of the notice requirements herein may be waived, in whole or in party, but only in writing signed by the attorney of record for the party against whom such waiver will be effective.

20. Upon final termination of the Litigation, including all appeals, the receiving party shall return to the producing party all Litigation Materials designated as Tier 1 Protected Information, except for pleadings and deposition transcripts and other materials filed with the Court. In addition, the receiving party shall, at its option, either return to the producing party or destroy, in whatever form stored or reproduced, all other Litigation Materials, except for pleadings and deposition transcripts and other materials filed with the Court, including, but not limited to, correspondence, memoranda, notes, and other work-product materials, which contain or refer to Protected Information. All Protected Information not embodied in physical objects and documents shall remain subject to this Stipulation. In the event that any party chooses to destroy physical objects and documents, such party shall certify within thirty days that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge.

21. The parties may amend or modify any provision of this Stipulation by mutual agreement, which agreement shall be embodied in a written stipulation to be approved by the Court.

22. This Stipulation is entered into without prejudice to the right of any party or non-party to apply to the Court at any time for additional protection, or to relax or rescind the restrictions of this Stipulation.

23. Until such time as this Stipulation has been "So Ordered" by the Court, the parties agree that upon execution by the parties, it will be treated as though it had been "So Ordered."

Dated: _____ By: _____

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Attorneys for Defendants

ORDER

SO ORDERED this _____ day of _____, 1998:

_____
UNITED STATES DISTRICT JUDGE

16diii000327

Attachment A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P.	)	
Plaintiffs,	)	
v.	)	Civil Action No. 5:98-CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,	)	
Defendants.	)	

CONFIDENTIALITY AGREEMENT

[Name of person, firm, or organization] agrees to be bound by the terms of the Stipulation and Protective Order dated _____ ___, 1998 in the above-captioned litigation.

Dated: _____, 1998

_____
[Signature]

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

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FILED
US DISTRICT COURT
WESTN. DIS. KENTUCKY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

MOTION FOR LEAVE TO FILE SUR-RESPONSE TO UST INC.'S MOTION TO DISMISS COMPLAINT FOR LACK OF PERSONAL JURISDICTION

UST Inc. ("Inc.") makes a number of arguments in its reply brief that were not originally part of its motion.[1] Plaintiffs respectfully move for leave to submit this sur-response to address Inc.'s new grounds for asking this Court to hold, without discovery or an evidentiary hearing, and effectively for the first time,[2] that Inc. is insulated from the Court's jurisdiction because it is a "holding company."

1. The Clayton Act Provides for Personal Jurisdiction

Inc. can defend its motion only by confusing personal jurisdiction, which it contests, with venue, which it concedes.

[1]Rather than burden the Court with a separate motion for leave to file a sur-response, and then a sur-response itself, plaintiffs have combined this submission.

[2]Inc. does not dispute that it has attempted this strategem in many courts, and has failed in all but one case (where plaintiff lacked counsel). See Pl. Opp. at 5 n.4.

Pl. Opp. at 4-5; Answer ¶ 7(c); Def. Reply at 2 n.4. In this circuit, it is beyond dispute that the Court has personal jurisdiction over Inc. based on Section 12 of the Clayton Act. Pl. Opp. at 2-5. There is *no* requirement that plaintiffs establish that Inc. is "transacting business" in Kentucky for the purpose of establishing personal jurisdiction, because the Clayton Act "confers personal jurisdiction in any federal court over any defendant with minimum contacts with the United States." United Liberty Life Ins. Co. v. Ryan, 985 F.2d 1320, 1330 (6th Cir. 1993).[3]

Section 12 *also* contains a venue provision. See Gall v. Garcia Corp., 340 F. Supp. 1255, 1257 (E.D. Ky. 1972)("The first clause [of Section 12] pertains to venue, and provides that venue is proper in any district in which the corporation inhabits, may be found, or transacts business. The second clause [regarding nationwide service of process] pertains to personal jurisdiction . . . ."). Venue, unlike personal jurisdiction, is appropriate where a defendant "may be found or transacts business." Inc. has specifically conceded that venue is appropriate in this district. Pl. Opp. at 4-5; Answer ¶ 7(c). It has not sought to withdraw that concession and indeed has reaffirmed it in its reply. Def. Reply at 2 n.4. Because venue is not contested here, Inc.'s

[3]Ryan cannot be distinguished on the ground that Section 12 has a "transacting business" requirement (for venue, see infra). Section 27 of the Exchange Act is identical to Section 12 of the Clayton Act. The Sixth Circuit made plain in Ryan that, such language notwithstanding, a defendant need not be "transacting business" in the forum to be subject to personal jurisdiction.

citation to Section 12's venue provision is beside the point. It cannot contest personal jurisdiction based on a supposed failure to establish venue -- where it concedes venue.

The cases cited by Inc. (the most recent of which was decided in 1976) follow reasoning that is foreclosed by the recent Sixth Circuit authority on point. In Universal Services, Inc. v. Central Waste Systems, 1976-2 Trade Case (CCH) ¶ 61,140, 1976 WL 1339 (S.D. Ind. 1976), and Fisher Baking Co. v. Continental Baking Corp., 238 F. Supp. 322, 323, 328 (D. Utah 1965), the courts read Section 12 as requiring plaintiff to establish each defendant's contacts with the forum state as a prerequisite for personal jurisdiction. That is not the law of this circuit after Ryan and Haile v. Henderson Nat'l Bank, 657 F.2d 816, 825 (6th Cir. 1981), cert. denied, 455 U.S. 949 (1982).

In the Gall case, similarly, the Eastern District of Kentucky ruled -- twenty-six years ago -- that satisfaction of the venue provision of Section 12 was a prerequisite to the exercise of personal jurisdiction under the distinct personal jurisdiction provision of the statute. 340 F. Supp. at 1258. But the Sixth Circuit addressed that very issue in Ryan. There the district court dismissed defendants because of supposed lack of minimum contacts with the forum and ignored a federal statute that provided for nationwide service. 985 F.2d at 1329. On appeal, defendant argued that "jurisdiction under section 27 [of the Exchange Act, identical to Section 12 of the Clayton Act] is predicated upon proper venue and venue is not proper . . . ."

Id. at 1330. The Sixth Circuit considered and rejected that argument -- the same argument made here by Inc. -- and held that the statute provided "personal jurisdiction in any federal district court over any defendant with minimum contacts to the United States." Id. Inc.'s argument runs four-square into Ryan, which it cannot distinguish.[4] The motion to dismiss must be denied for this reason alone.[5]

2. Inc.'s Other Arguments Lack Merit

Acknowledging its substantial presence in Kentucky, both directly and via the subsidiaries through which it does business in Kentucky, Inc. nonetheless asks the Court to take on faith its characterization of these substantial contacts as trivial, and to dismiss it without discovery or an evidentiary hearing. The Sixth Circuit does not permit such legerdemain. "To avoid dismissal where there has been no evidentiary hearing, a plaintiff need only present a *prima facie* case for jurisdiction." Kerry Steel, Inc. v. Paragon Indus., Inc., 106 F.3d 147, 149 (6th Cir. 1997)(citations omitted).[6] The Court cannot even weigh

---

[4]That Ryan did not involve a parent/subsidiary relationship is irrelevant: Inc. is subject to jurisdiction based on its own conceded contacts with the United States, not because of any contacts of its subsidiaries with Kentucky.

[5]Inc.'s sole remaining case -- San Antonio Tel. Co. v. AT&T Co., 499 F.2d 349 (5th Cir. 1974) -- involved certain Bell operating companies who expressly challenged venue under the Clayton Act. The court *refused* to dismiss other operating companies who (like Inc. here) waived any venue challenge. Id. at 351 n.2.

[6]Far from *disputing* Compuserve, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996), the Sixth Circuit in Kerry Steel followed

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Inc.'s controverting affidavit, nor can it credit Inc.'s challenges to plaintiffs' showing. Compuserve, 89 F.3d at 1262.[7]

Plaintiffs have established a *prima facie* case. Inc. cannot cite a single case in which dismissal has been granted (or affirmed) on a record as substantial as that provided by plaintiffs. It cannot find a case that supports its remarkable claim that, notwithstanding the substantial contacts identified by plaintiffs even without discovery, it should be permitted to escape this case without discovery to determine what additional contacts it may have, and the extent of its involvement in the substantial Kentucky operations of the subsidiaries through which *it* "is engaged in manufacturing and marketing consumer products," according to its own public filings. In these circumstances it would be plain error for the Court to dismiss Inc. from the case.

---

it. 106 F.3d at 147. The court upheld the dismissal only because, accepting all of plaintiff's allegations as true, the only basis for jurisdiction was that plaintiff "in response to an unsolicited sales call, ordered products from a Michigan seller and negotiated with the seller via fax and telephone to finalize the transaction." Id. at 152. Here, by contrast, plaintiffs have specifically alleged, and indeed have shown, that Inc. both directly and through its operating arms has engaged in substantial activities in Kentucky and has committed a variety of torts in this state.

[7]Notably, while Inc. quarrels with plaintiffs' recitation of the facts, it has done nothing to disprove them aside from the boiler-plate form denial signed by its assistant secretary, Debra A. Baker.

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Conclusion

For the foregoing reasons, UST Inc.'s motion to dismiss for lack of personal jurisdiction should be denied. A proposed order granting leave to file this sur-response is attached.

Respectfully submitted,

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Counsel for Plaintiffs

Dated: July 15, 1998

16diii000334

CERTIFICATE OF SERVICE

I certify that on this 15th day of July, 1998, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Richard C[illegible]

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

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FILED
US DISTRICT COURT
WESTN DIST. KENTUCKY

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

Civil Action No.
5:98CV-108-R

MOTION FOR LEAVE TO FILE SUR-RESPONSE TO UST INC.'S MOTION TO DISMISS PART OF COMPLAINT

Defendants (collectively, "UST") make a number of arguments in their reply brief that were not originally part of their motion.[1] Plaintiffs respectfully move for leave to submit this sur-response to address UST's new grounds for asking this Court to dismiss under Fed. R. Civ. P. 12(b)(6) *paragraphs* of plaintiffs' background allegations.

1. There Is No Authority for Dismissing An Unpleaded Claim

In Count I, plaintiff alleges that UST violated the Sherman Act by actual or attempted monopolization of the market for moist snuff. Defendants did this by curtailing distribution of competing products -- by removing Conwood's racks, defacing and removing Conwood's point of sale advertising, and locking up distributors and stores in exclusive dealing arrangements designed to foreclose competitors' access to distribution

[1]Rather than burden the Court with a separate motion for leave to file a sur-response, and then a sur-response itself, plaintiffs have combined this submission.

channels. It is undisputed that Count I, as pleaded, states a claim for relief under Section 2 of the Sherman Act based on UST's illegal, anticompetitive conduct in the market for moist snuff. UST's Motion to Dismiss therefore must fail, for Count I of Conwood's Complaint relies squarely on UST's conduct in the market.

Plaintiffs also allege that defendants *sought* to achieve the same anticompetitive result though the so-called "Global Tobacco Settlement," which would have severely restricted advertising and distribution of competing products. This places into sharp relief the anticompetitive intent underlying UST's monopolization of the moist snuff market. But that activity does *not* form the basis of Conwood's claims under the Sherman Act. Indeed, UST cannot cite anything in the Complaint to support its argument to the contrary.

UST's effort to have the Court dismiss Conwood's claim "in part," by deleting Paragraphs 32 through 39 of plaintiffs' background allegations from the complaint, is unprecedented and legally incoherent. A court cannot "dismiss" such factual allegations. Rule 12(b)(6) provides relief only in those cases where a complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). See In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993). UST has not argued and cannot argue that it meets that standard as to *any* of the Complaint's eight counts.

Even though no language in the Complaint alleges that UST's anticompetitive lobbying effort violates the antitrust laws, and even though Conwood has explicitly stated that it does not seek

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legal or equitable relief from UST's anticompetitive legislative forays, UST argues that the Court should read Conwood's Complaint as if it did make such a claim in order to dismiss that (non-existent) claim. This would be an approach entirely without precedent: as Conwood has already pointed out, a Court "'is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory.'" Pl. Opp. at 3 (quoting 5A C. Wright & A. Miller, Federal Practice and Procedure § 1357, at 337 (1990)). UST, ignoring the basic purpose of a motion to dismiss, instead invites the Court to determine if the Complaint could be read to articulate a possible legal theory that would *not* provide for relief. The Court should decline this invitation to engage in a pointless and legally unwarranted exercise.

The cases cited by UST underscore this point. In each instance, the plaintiff explicitly claimed that political activity or litigation violated the antitrust laws, and defendant moved to dismiss that express claim. See Norcen Energy Resources Ltd. v. Pacific Gas & Elec. Co., No. C-94-0911-VRW, 1994-2 Trade Cases ¶ 70,851, 1994 WL 519461 at *5 (N.D. Cal. Sept. 19, 1994) (plaintiff claimed efforts to secure favorable regulation violated antitrust laws under "'price squeeze' exception" to Noerr); Mountain Grove Cemetery Ass'n v. Norwalk Vault Co., 428 F. Supp. 951, 953 (D. Conn. 1977) (plaintiff contended that defendants' state court litigation "falls within . . . the so-called Noerr 'sham exception'"); Christian Memorial Cultural Center, Inc. v. Michigan Funeral Directors Ass'n, 998 F. Supp. 772, 776-778 (E.D. Mich. 1998) (plaintiff argued lobbying effort

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fell within "'sham' exception to Noerr-Pennington"); Johns-Manville Corp. v. Guardian Indus., Civ. No. 81-70248 , 1981 WL 2083 at *1-2 (E.D. Mich. Apr. 27, 1981) (allegations of wrongful litigation did not fall within "sham exception"); Brazil v. Arkansas Bd. of Dental Examiners, 593 F. Supp. 1354 (E.D.Ark. 1984) (claims based on allegations of lobbying activity dismissed) aff'd 759 F. 2d 674 (8th Cir. 1985). In each case, the court dismissed plaintiff's express and specific claim that defendant's petition activity gave rise to antitrust liability. In no case did the court dismiss an admittedly valid claim concerning activity in the marketplace -- in whole, in part, or otherwise -- based on defendant's argument that the Complaint could be read to raise a potentially invalid claim. Yet that is what UST would have the Court do here.

2. UST's Motion Is Really a Motion To Strike, Which Should Also Be Denied

UST asks the Court to *strike* Paragraphs 32-39 from the Complaint. That motion, however, is untimely[2] and, in any event, without substance.

Matter may be stricken from a complaint only if it is "redundant, immaterial, impertinent, or scandalous." Fed. R. Civ. P. 12(f). A motion to strike is a "drastic remedy." Brown & Williamson Tobacco Corp. v. United States, 201 F.2d 819, 822 (6th Cir. 1953). "[S]uch motions are generally viewed with

---

[2]To be timely, such a motion should have been filed at the time of UST's other Rule 12 motions. Fed. R. Civ. P. 12(f). UST made no such motion, and cannot now casually transform its motion to dismiss into a motion to strike merely by dropping a footnote into its reply brief. See Def. Reply at 6 n.2 (suggesting that Court should strike subject paragraphs under Rule 12(f)).

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disfavor and rarely granted." Chiropractic Co-op Ass'n v. American Med. Ass'n, 617 F. Supp. 264, 267 (E.D. Mich. 1985). Motions to strike will be denied unless the material "has no possible relation to the controversy" or "has no bearing on the subject matter of the litigation." Lumbard v. Maglia, Inc., 621 F. Supp. 1529, 1539 (S.D.N.Y. 1985) (internal quotations and citations omitted).

Here, UST concedes that Conwood has established, with citations to eight separate cases (including Pennington itself), that even conduct protected from liability under Noerr can prove intent. See Pl. Opp. at 5-6. It is thus clear beyond question that Conwood's allegations "bear[] on the subject of the action," and can properly be included in Conwood's complaint. UST's weak effort to explain away this clear authority -- by arguing that courts may permit discovery and receive evidence of such conduct but that allegations of the conduct may not be pleaded in a complaint -- makes no sense. Def. Reply at 7. Not surprisingly, UST offers no authority for the strange distinction it urges on this Court.

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Conclusion

The Court should deny UST's Motion to Dismiss Part of Plaintiffs' Complaint for Failure to State a Claim.

Respectfully submitted,

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Counsel for Plaintiffs

Dated: July 16, 1998.

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CERTIFICATE OF SERVICE

I certify that on this 16th day of July, 1998, a copy of the foregoing was sent by overnight delivery service to:

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John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED **CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER**

PLAINTIFFS' INITIAL DAMAGES COMPUTATIONS

Pursuant to Fed. R. Civ. P. 26(a)(1)(C), plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood"), make the following initial disclosure of damages computations. Supporting documents are included in plaintiffs' Rule 26(a)(1)(B) disclosures, certain of which are also provided at Exhibit A.

Plaintiffs' computations are very preliminary and are subject to change. Plaintiffs have not completed their own investigation of the facts. Nor have plaintiffs received any discovery to date. Accordingly, plaintiffs will supplement these disclosures as further information becomes available, consistent with the obligations imposed by the Federal Rules of Civil Procedure and this Court's Local Rules. The computations below exclude pre- or post-judgment interest, statutory penalties, and punitive damages. To the extent the behavior alleged in the

Complaint continues into the future, additional damages will accrue.

These calculations are based in part on Conwood's proprietary or otherwise confidential information and are to be treated as such for purposes of the Protective Order applicable to this case.

Conwood alleges that United States Tobacco Company, United States Tobacco Sales & Marketing Company, United States Tobacco Manufacturing Company, and UST Inc. (collectively, "UST"), have unlawfully monopolized or attempted to monopolize the national moist snuff market by, inter alia, removing or defacing Conwood retail distribution racks, point-of-sale advertising, and products; frequently changing the style of distribution racks in order to raise rivals' costs; promulgating exclusive dealing arrangements designed to foreclose competitors' distribution channels; disparaging Conwood products; and predatory pricing. See Complaint ¶¶ 22-31. Conwood also alleges that it has lost sales, profits, goodwill, and business reputation as a result of UST's false representations about Conwood products, id. ¶ 48; that UST has interfered with its actual and prospective contractual and economic relationships, id. ¶ 50-57; that it has engaged in the secret and unlawful payment or allowable of rebates, refunds, commissions or unearned discounts, id. ¶ 58-60; that it has unlawfully defamed Conwood products, id. ¶ 61-66; that UST has been unjustly enriched by its unlawful conduct, id. ¶ 67-69; and that it has intentionally converted Conwood

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property, including racks, point of sale advertisements, and moist snuff products, id. ¶ 70.

To compute damages, Conwood will calculate the available market to which it could have sold its moist snuff products in the preceding four years. Conwood will then calculate the market share and revenues it would have earned but for UST's conduct and will compare those to actual sales. Once it has calculated total lost revenues, Conwood will deduct appropriate operating costs based on historical experience and judgment, reduced further by costs incurred due to UST misconduct, to arrive at the final amount of lost past profits. Conwood will also calculate the present value of lost future profits. Pursuant to federal law, Conwood's total lost past and future profits will then be trebled. Based on the above methodology, Conwood currently estimates that UST's conduct has resulted, before trebling, in losses of approximately $360,248,728.64. Conwood bases these estimates on the following calculations.

A. Past Profits

The Available Market. As shown in Exhibit B, in 1994 53,177,000 pounds of moist snuff were sold nationwide; the total market was 54,081,000 pounds in 1995, 56,786,000 pounds in 1996, and 58,051,000 pounds in 1997.[1] Based on experience and judgment, Conwood believes the available market would have been

[1]Conwood bases its present calculations on information for fiscal years ending January 1, 1995 through January 1, 1998, except for information concerning pounds of moist snuff sold, which are for calendar years 1995 through 1997.

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substantially larger in each year had UST not suppressed the availability of competitors' products, advertisements, and distribution systems.

Market Penetration. As reflected in Exhibit C, Conwood's moist snuff market share was 13.0 percent in 1994, 13.3 percent in 1995, 13.6 percent in 1996, and 13.6 percent in 1997. As is also reflected in Exhibit C, Conwood estimates that its market share would have been at least six percentage points higher in each year but for UST's efforts to suppress competition. That means Conwood would have netted additional sales of 2,807,746 pounds in 1994, 2,920,374 pounds in 1995, 3,090,294 pounds in 1996, and 3,103,406 pounds in 1997.

Price. As reflected in Exhibit D, Conwood's average net sales per pound of moist snuff was $18.99 in 1994, $20.41 in 1995, $20.66 in 1996, and $21.01 in 1997.

Expenses. Conwood's expenses per net pound of moist snuff sold was $6.01 in 1994, $5.82 in 1995, $5.71 in 1996, and $6.09 in 1997. Exhibit D. Conwood's net profits per pound were $12.98 in 1994, $14.59 in 1995, $14.95 in 1996, and $14.92 in 1997. But for UST's misconduct, Conwood's per unit costs would have been lower (and its per unit profits higher) for at least two reasons. First, Conwood would have had higher volumes and greater efficiencies of scale; with its higher volumes, UST currently enjoys lower costs per unit than Conwood. Second, Conwood would not have had to incur substantial costs in replacing racks,

advertisement, and products improperly removed by UST.

Net Lost Past Profits. Based on additional market penetration of six percent during the 1994-1997 period, the prices Conwood actually charged, and Conwood's actual expenses minus ten percent (attributable to increased volume and elimination of costs incurred because of UST misconduct), Conwood currently estimates it lost $38,129,191 in 1994, $44,302,074 in 1995, $47,961,363 in 1996, and $48,195,895 in 1997, for total lost profits of at least $178,588,523 before trebling. Exhibit E. This estimate does not account for the possibility of greater market penetration, higher prices, or lower costs -- all of which Conwood is currently exploring and all of which could materially increase Conwood's damages calculation.

B. Future Profits

As a result of UST's past conduct, Conwood has been effectively foreclosed from certain retail outlets and distribution channels, it has lost the chance to gain loyal brand users, other moist snuff users have permanently changed to UST brands, and opportunities to induce UST brand users to switch may be restricted by regulatory efforts to reduce or eliminate tobacco advertising and in-store display. Conwood presently estimates that it has lost at least $269,143,162 in future profits due to UST past misconduct.

This estimate is based on the following calculations.

The Available Market. In 1997, 58,051,000 pounds of moist

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snuff were sold nationally. Third parties expect the moist snuff market to grow rapidly in coming years. For example, Goldman Sachs estimates that shipments will grow from 815 million cans in 1996 to 881 million by 2000. Exhibit F. With fair competition, Conwood believes the market would grow even more.

Market Penetration. Absent anticompetitive conduct by UST, Conwood believes its market share would already be approximately 20.6 percent, six points higher that it is, and would grow even further over the coming years. However, because of UST's past misconduct -- e.g., foreclosing distribution points that cannot be reopened -- Conwood estimates based on experience and judgment that for the next ten years it has been effectively foreclosed from at least three percent of the expanding moist snuff market. Id.

Price. Third parties estimate that moist snuff prices will increase in coming years due, among other things, to increased regulation. Exhibit G.

Expenses. With the additional market penetration and increased volume Conwood could achieve in a competitive market, as well as the absence of any need to incur costs in response to UST misconduct, Conwood's cost per unit would drop in coming years.

Net Lost Future Profits. Assuming a market expanding two percent per year, Conwood's actual 1997 profit per pound of moist snuff sold ($14.92), and Conwood's exclusion from three per cent

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of the national market, Conwood estimates that it will lose at least $269,143,162 over the next ten years. This calculation does not account for the possibility of higher prices (as expected by third parties), lower expenses (e.g., due to higher Conwood volumes and absence of costs incurred because of UST misconduct), or exclusion from a larger share of the market -- all of which Conwood is currently exploring and all of which could materially increase Conwood's damages calculation.

To determine the net present value of Conwood's future losses, Conwood will consult UST's borrowing rate. For present purposes, assuming a borrowing rate of 8.5 per cent (June 1998 Bank Prime Rate), the net present value of Conwood's future losses is approximately $181,660,205.64.

16diii000349

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
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Paducah, KY 42002-0995
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Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: July 21, 1998.

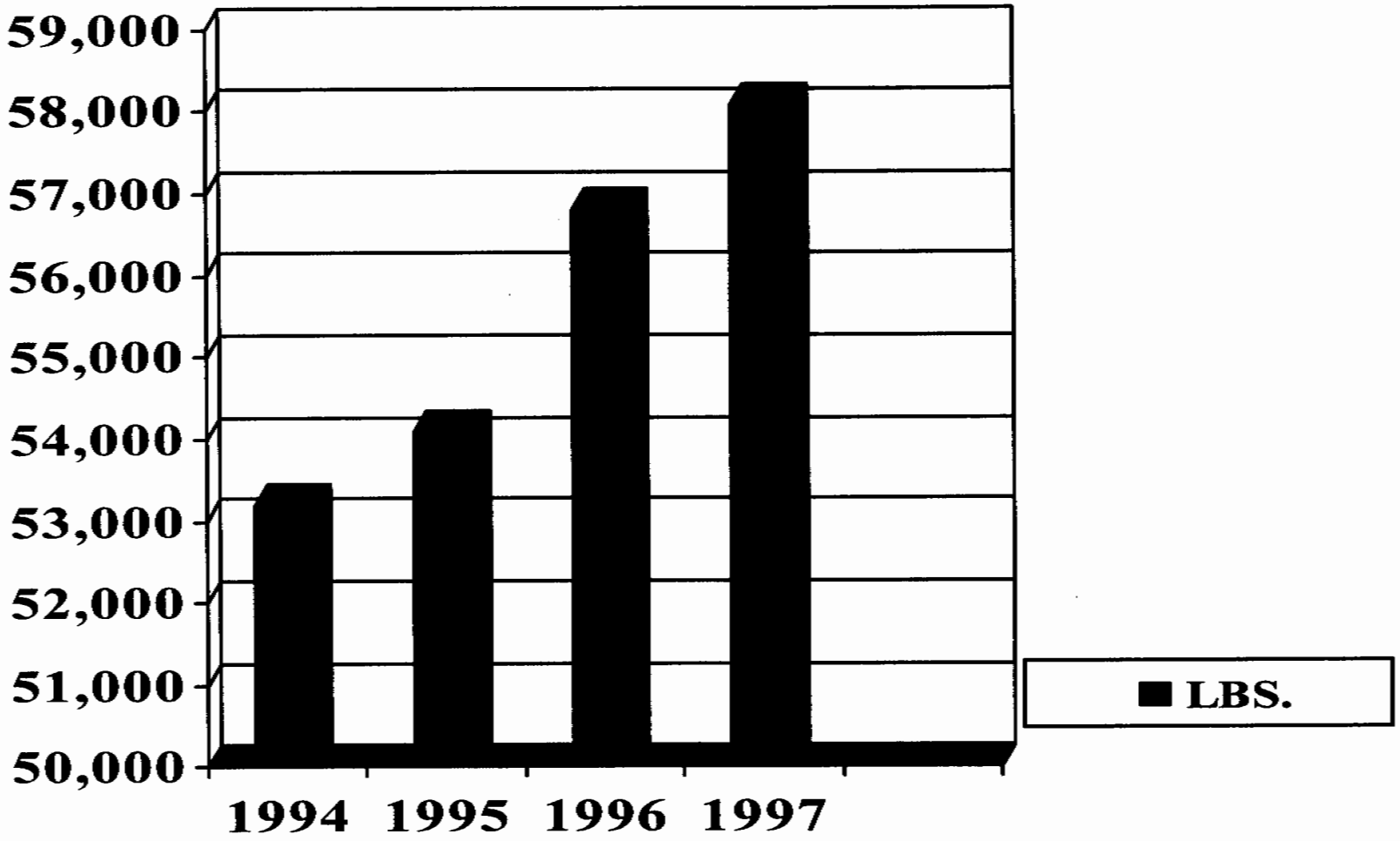
16diii000350

Exhibit B

Conwood Company, L.P., et al. v. United States Tobacco Company, Inc., et al.
Civil Action No. 5: 98-CV-108-R

16diii000351

Pounds of moist snuff sold, 1994-1997 (000 lbs.)



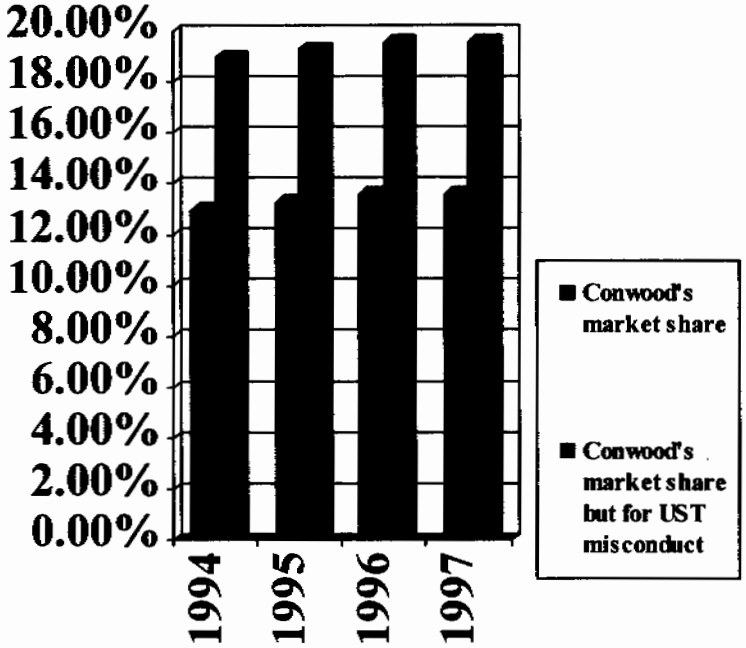
Source: USDA

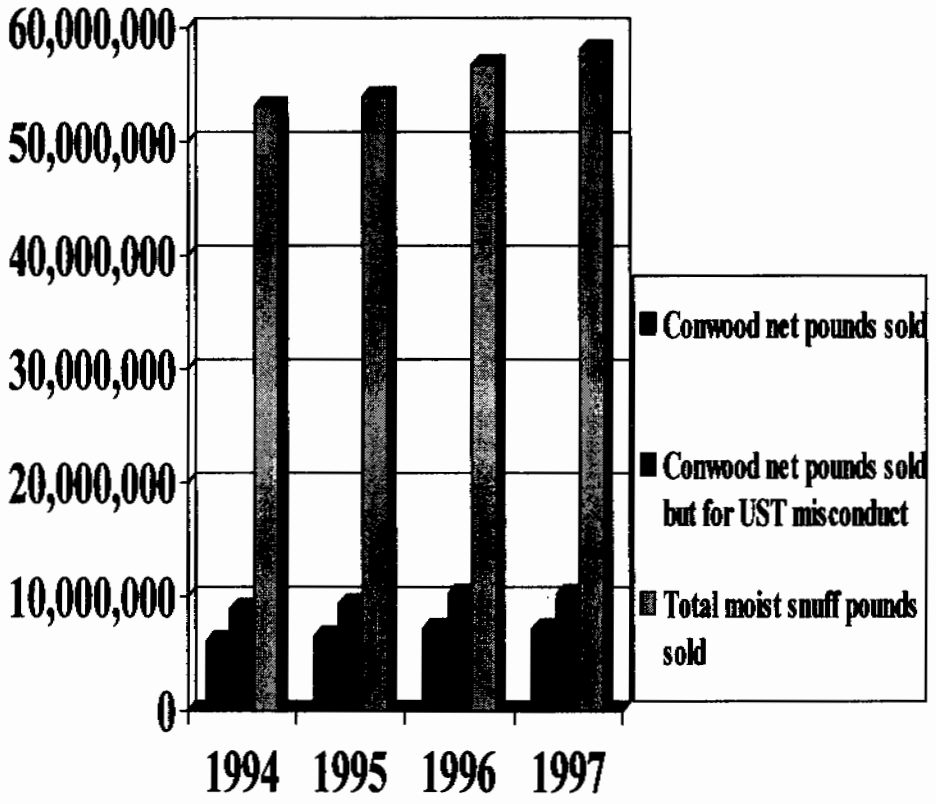
Exhibit C

Conwood Company, L.P., et al. v. United States Tobacco Company, Inc., et al.
Civil Action No. 5: 98-CV-108-R

16diii000352

Conwood's moist snuff market share





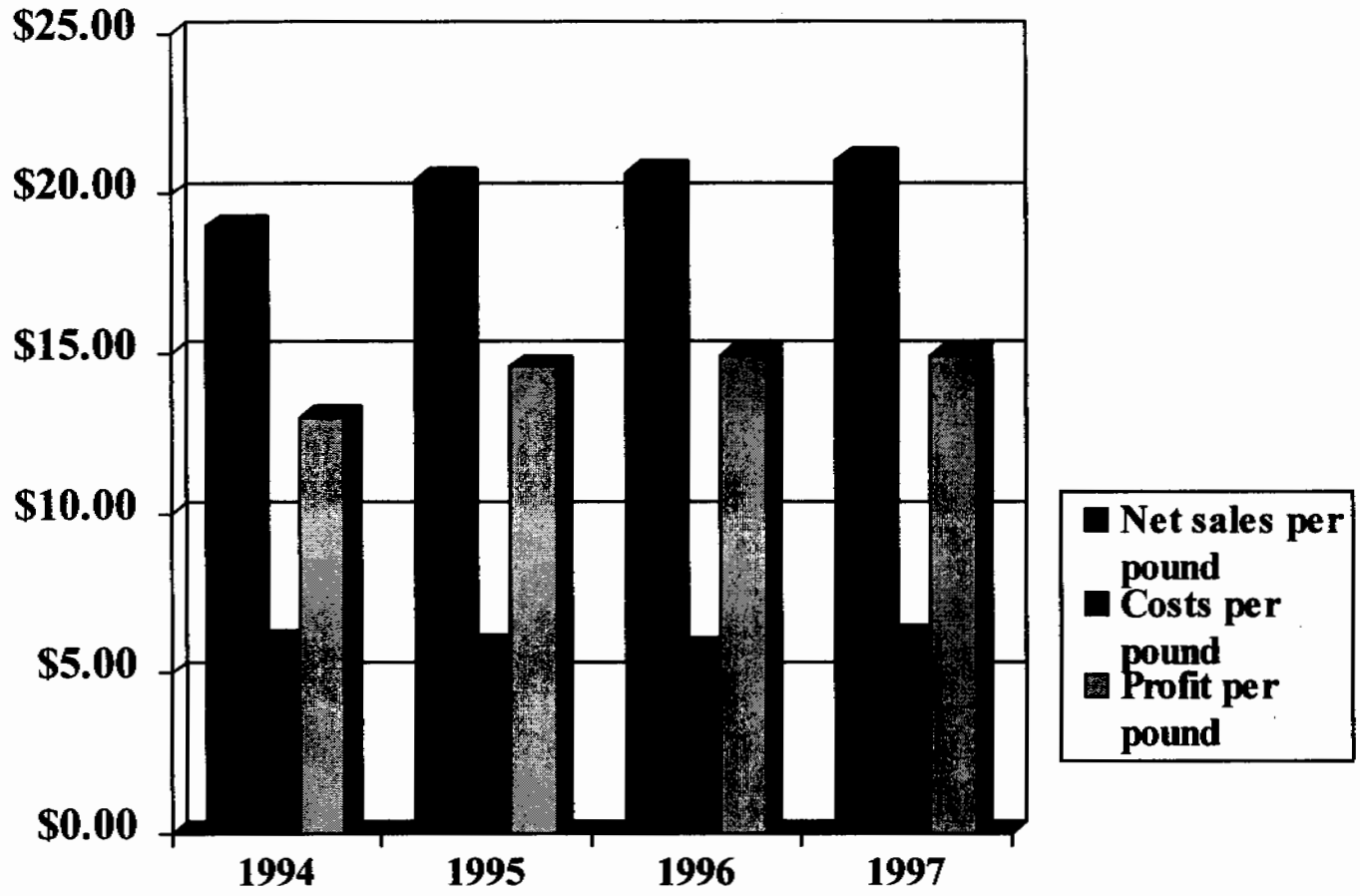
Source: A.C. Nielsen

Exhibit D

Conwood Company, L.P., et al. v. United States Tobacco Company, Inc., et al.
Civil Action No. 5: 98-CV-108-R

16diii000353

Conwood's net sales, costs, and profits per pound of moist snuff



Source: Conwood

Exhibit E

Conwood Company, L.P., et al. v. United States Tobacco Company, Inc., et al.
Civil Action No. 5: 98-CV-108-R

16diii000354

Conwood's Lost Past Profits

Lost past profits calculated by multiplying additional pounds Conwood would have sold but for UST misconduct by Conwood's actual profit per pound plus 10 percent of actual costs per pound (which would not have been incurred but for UST misconduct):

2,807,746 x 12.98 + .60 =	$ 38,129,191	(1994)
2,920,374 x 14.59 + .58 =	$ 44,302,074	(1995)
3,090,294 x 14.95 + .57 =	$ 47.961,363	(1996)
3,103,406 x 14.92 + 61 =	$ 48,195,895	(1997)
Lost past profits	$178,588,523	

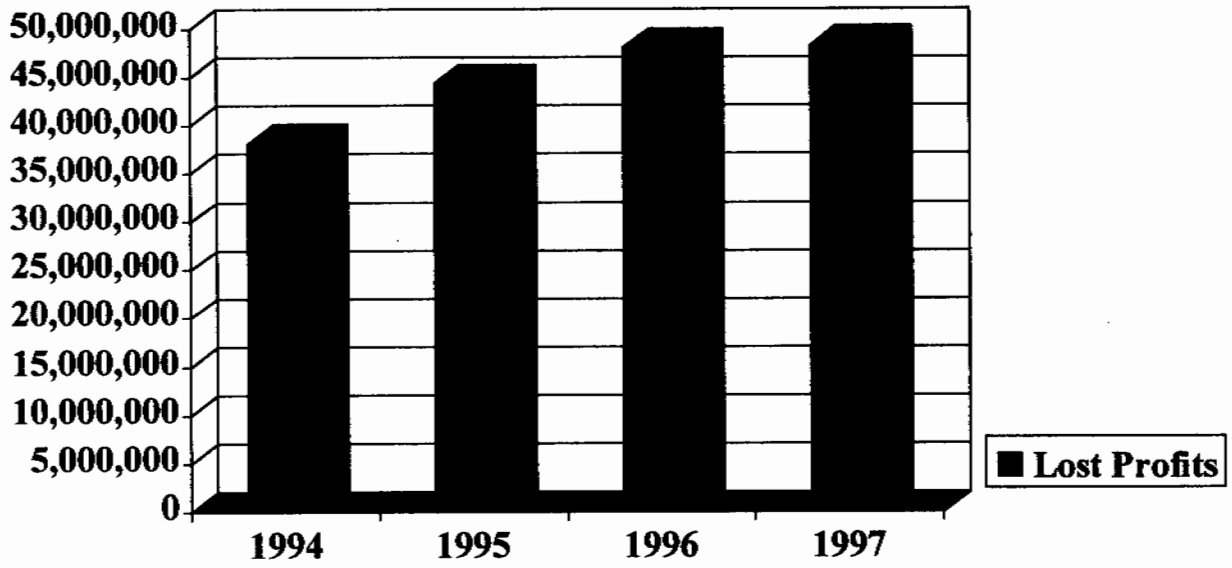
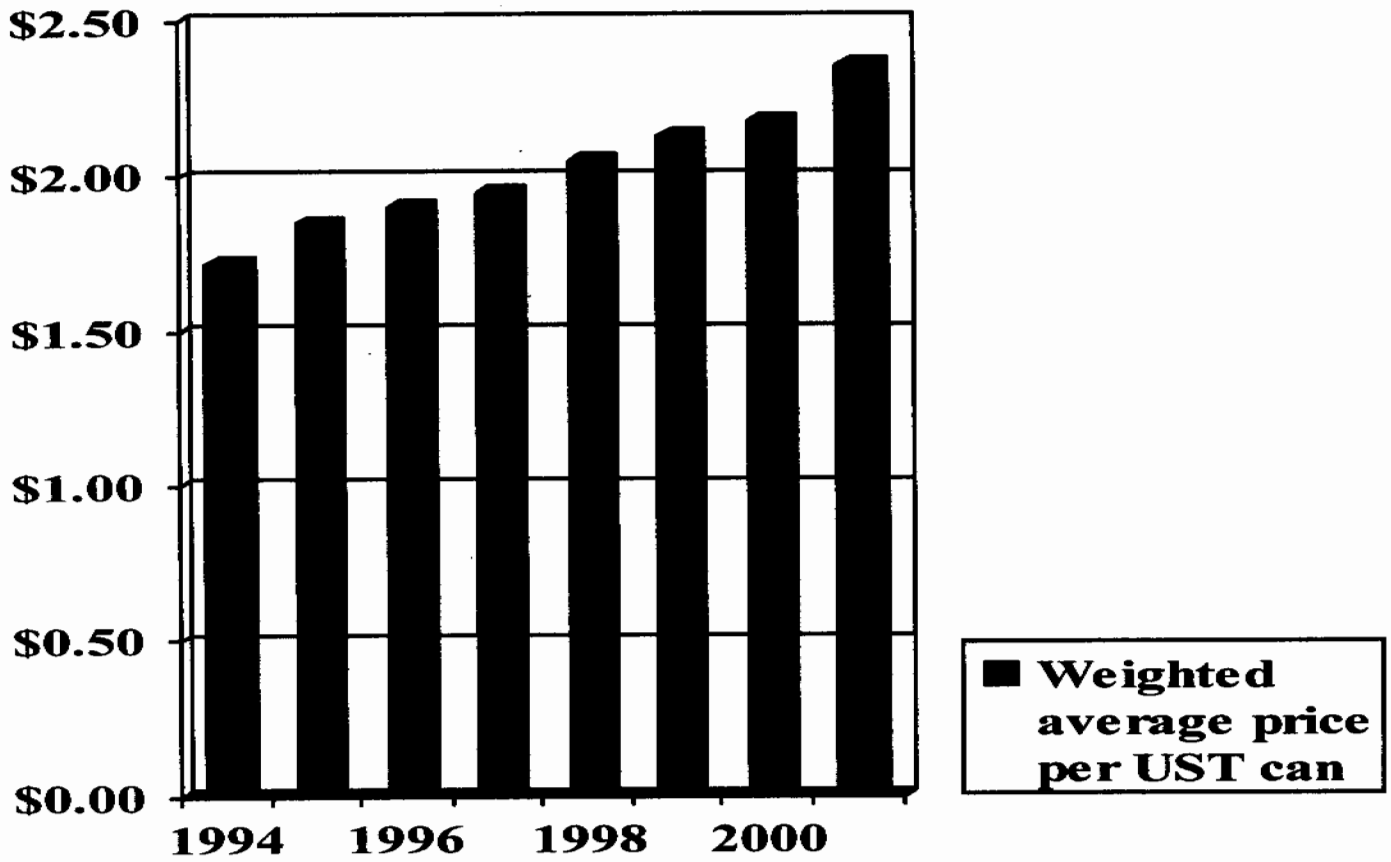


Exhibit G

Conwood Company, L.P., et al. V. United States Tobacco Company, Inc., et al.
Civil Action No. 5: 98-CV-108-R

16diii000355

Third party estimate that moist snuff prices per can will rise with a tobacco settlement



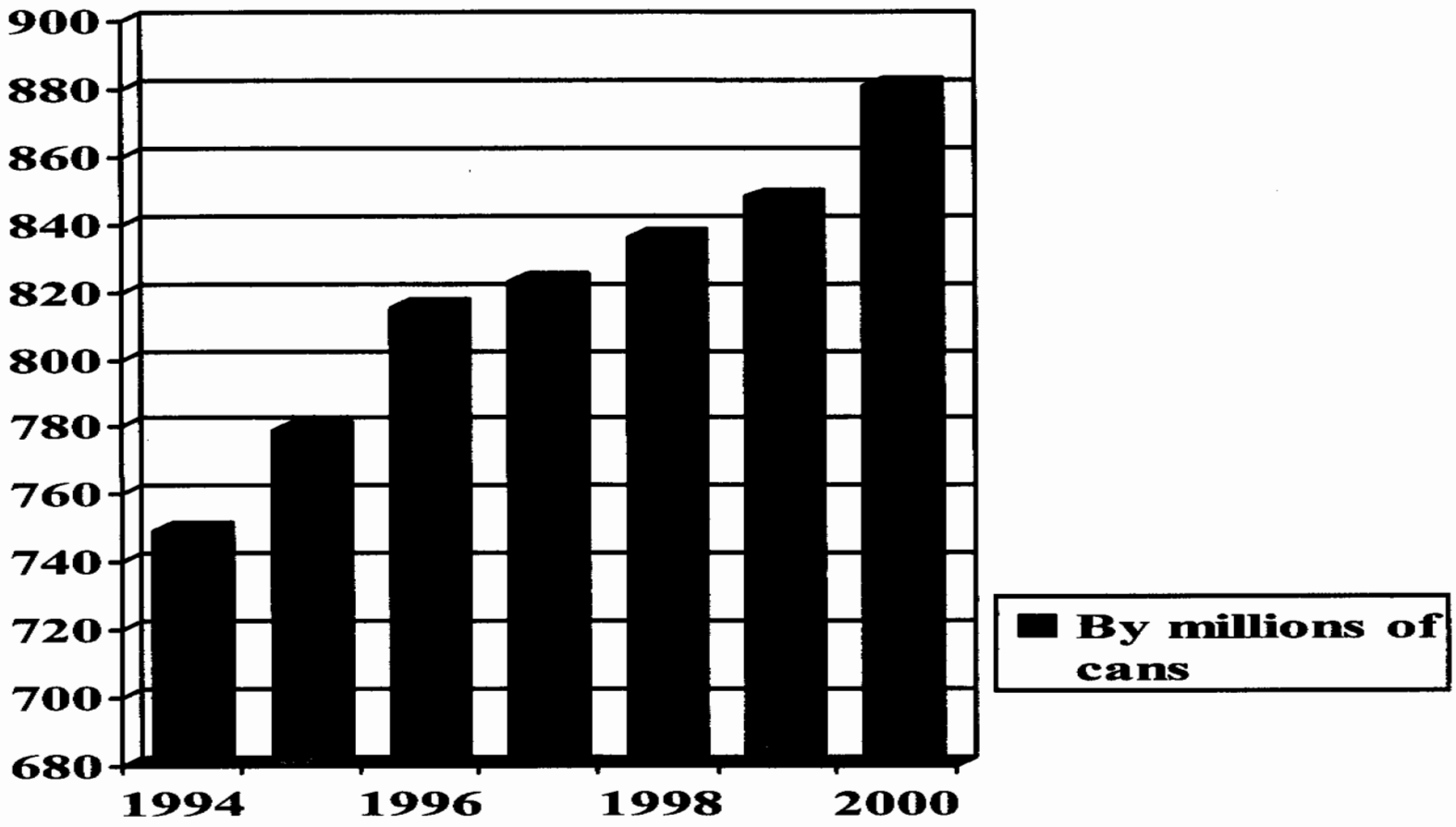
Source: Bernstein Research, December 2, 1997.

Exhibit F

Conwood Company, L.P., et al. v. United States Tobacco Company, Inc., et al.
Civil Action No. 5: 98-CV-108-R

16diii000356

Expected Growth in the Moist Snuff Market



Source: Goldman Sachs July 30, 1997. (1997 - 2001 projected)

****
*** TX REPORT ***
****

TRANSMISSION OK

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CONNECTION ID	
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PGS.	15
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
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Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick
Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg

FACSIMILE TRANSMISSION

TO: Richard C. Roberts, Esquire
WHITLOW, ROBERTS, HOUSTON & STRAUB

FAX NO.: (502) 443-4571 **CLIENT NO.:** 97718

FROM: Neil M. Gorsuch

PHONE: (202) 326-7978

DATE: July 20, 1998

MESSAGE: Dick: Attached is our draft damages disclosure. Please fax or email any comments. We are planning at noon (Eastern time) conference call to discuss this and other disclosure issues. Call-in number will be forthcoming. Many thanks, Neil.

TOTAL NUMBER OF PAGES: 15 **(INCLUDING THIS SHEET)**

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL US IMMEDIATELY OR CONTACT OUR COPY SERVICE CENTER:

(202) 326-7949

OUR FAX #: (202) 326-7999

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS PRIVILEGED AND CONFIDENTIAL ATTORNEY INFORMATION INTENDED ONLY FOR THE USE OF THE ADDRESSEE. PERSONS RESPONSIBLE FOR DELIVERING THIS COMMUNICATION TO THE INTENDED RECIPIENT ARE HEREBY NOTIFIED NOT TO READ THE ATTACHED AND THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE AND FAX

COPY

'98 JUL 22 A9:30

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

FILED
US DISTRICT COURT
WESTN. DIST. KY.

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' RULE 26(a)(1) INITIAL DISCLOSURES

Pursuant to Fed. R. Civ. P. 26(a)(1), plaintiffs state as follows:

1. Plaintiffs are providing herewith, at Exhibit A, the name and, if known, the address and telephone number of each individual considered likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information. Rule 26(a)(1)(A).

2. Plaintiffs are providing, under separate cover, CD-ROM disks containing scanned images of certain documents and data compilations in single page TIFF format, along with a custodial index to those images. By prior agreement, one copy of these CD-ROMs will be sent for delivery on July 22, 1998, to defendants' agent, Alpha Systems, 458 Pike Road, Huntingdon Valley, PA 19006, attention: Rich Tetzner; a second set will be sent for delivery on July 23, 1998 to defense counsel, attention: Chris Athanasia.

In addition, plaintiffs have identified certain tangible things in their possession (racks, advertisements, and photographs) which they will make available for inspection upon 48 hours written notice in Memphis, Tennessee. Rule 26(a)(1)(B).

3. Plaintiffs provide herewith, at Exhibit B, an initial computation of their damages. Rule 26(a)(1)(C).

4. Plaintiffs have not yet identified any insurance agreement under which any person carrying on an insurance business may be liable to satisfy all or part of a judgment which may be entered in this action or to indemnify or reimburse for payments made by plaintiffs to satisfy any judgment. But plaintiffs are continuing their search for any such agreements and will provide them if and when they are identified. Rule 26(a)(1)(D).

16diii000359

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

16diii000360

CERTIFICATE OF SERVICE

I certify that on this 21st day of June, 1998, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999
WRITER'S DIRECT DIAL:
(202) 326-

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

July 21, 1998

Jeffrey A. Apperson, Clerk
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of "Plaintiffs' Rule 26(a)(1) Initial Disclosures."

Also enclosed is an additional copy. I would be grateful if you would date-stamp and return this copy in the enclosed self-addressed, stamped envelope.

Many thanks for your assistance.

Respectfully,

Neil M. Gorsuch

Enclosures

cc: Neal R. Stoll, Esquire
John S. Reed, Esquire

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
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SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

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K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

July 21, 1998

VIA FEDERAL EXPRESS

John S. Reed, Esquire
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

RE: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed please find plaintiffs' initial disclosures pursuant to Rule 26 of the Federal Rules of Federal Procedure and the Court's Order of July 8, 1998.

If you have questions about any of the enclosed materials, please let me know.

Very truly yours,

Mark C. Hansen

cc: Richard C. Roberts, Esquire

EXHIBIT A

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Abbott, Cameron Dale	P.O. Box 399, Fincastle, VA 24090; (540) 992-6540	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Adams, John B., Jr.	P.O. Box 8009, Bossier City, LA 71113; (318) 747-5109	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Adcock, Jonathan Skeen	13812 Durant Road, Raleigh, NC 27614; (919) 870-7137	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Adkins, Ray		Information regarding defendants' exclusionary practices
UST	Aldstrom, Terry		Information regarding defendants' exclusionary practices

16diii000365

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Allard, M.R.	P.O. Box 881502, San Diego, CA 92165-1502; (519) 279-6732	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Allen, Mary	Albertsons #4267, 4249 Rufo Snow Drive, Wautanga, TX 76148; (817) 581-7233	Information regarding defendants' exclusionary practices
CWD	Anderson, E.K.	P.O. Box 529, Jersey Shore, PA 17740; (717) 398-3515	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Andreau, Andy (McCarty - Hull)	Toot 'n Totum, Amarillo, TX	Information regarding defendants' exclusionary practices
third party	Andrews, Jim	Circle K, 1421 Ocean Avenue, Lompoc, CA	Information regarding defendants' exclusionary practices

16diii000366

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Andrews, P.J.	P.O. Box 646, Jenison, MI 49429; (615) 457-6028	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Ansted, D.T.	P.O. Box 138, Clarkston, MI 48347-0138; (248) 674-8521	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Antle, Dave	Town & Country Food Stores, TX	Information regarding defendants' exclusionary practices
UST	Anunsen, Arlie		Information regarding defendants' exclusionary practices
third party	Applegreen, Kevin	East Bay, 19961 Chippowa, Chippowa, MI 49320; (616) 867-5619	Information regarding defendants' exclusionary practices

16diii000367

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Archaleta, K.	Forwards Mini Plaza, 600 L. Hougnton, West Branch, MI 48661; (517) 345-1693	Information regarding defendants' exclusionary practices
CWD	Arrington, John Charles	P.O. Box 492, Pensacola, FL 32593; (850) 934-1966	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Assiter, S.C.	P.O. Box 64176, Lubbock, TX 79464; (806) 794-7062	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Astrom, Shannon		Information regarding defendants' exclusionary practices

16diii000368

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Atchley, Alan	Atchley Outpost, 7110 Central, Hot Springs, AR ; (501) 525-3651	Information regarding defendants' exclusionary practices
CWD	Avedissian, J.M.	P.O. Box 592, Stoughton, MA 02072; (817) 341-5233	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Bailey, Bob	Stephenson Wholesale/Indian Nation Wholesalers, OK	Information regarding defendants' exclusionary practices

16diii000369

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Baker, Gary B.	P.O. Box 584, Bloomingdale, GA 31302; (912) 748-1710	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Baldran, Babette	Amoco, 12412 Mason, Grant, MI 49327; (616) 834-5741	Information regarding defendants' exclusionary practices
CWD	Balk, T.T.	P.O. Box 2096, Butler, PA 16003-2096; (412) 282-9813	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Bamberger, T.A.	P.O. Box 6908, Rockford, IL 61125-1936; (815) 397-9241	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Banks, Donnati	Cumberland Farms #4573, 291 Speilman Hwy., Burlington, CT 06013; (860) 673-9036	Information regarding defendants' exclusionary practices

16diii000370

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Barfield, Terry		Information regarding defendants' exclusionary practices
CWD	Barker, William Anthony	P.O. Box 1806, Conway, SC 29528; (843) 365-9441	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Barrett, Robert E.		Information regarding defendants' exclusionary practices
CWD	Bauman, T.J.	P.O. Box 23782, Belleville, IL 62223; (618) 396-8307	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000371

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Baxter, Rex		Information regarding defendants' exclusionary practices
UST	Baxter, William		Information regarding defendants' exclusionary practices
UST	Beard, Pat		Information regarding defendants' exclusionary practices
CWD	Beaudoin, D.N.	P.O. Box 2407, Lewiston, ME 04241-2407; (207) 784-8905	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Bejgrowicz, C.R.	P. O. Box 204, Landisville, PA 17536; (717) 898-0313	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000372

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Bell, Joe	Kroger, Lexington, TN	Information regarding defendants' exclusionary practices
third party	Belschner, Kyle	U-Save, P.O. Box 3667, 1602 North Redditt Drive, Lufkin, TX 75903; (409) 634-2903	Information regarding defendants' exclusionary practices
third party	Bennett, Jo	Alloquee Quickstop, 2203 S. Wevster, Greenbay, WI 54301; (920) 437-8070	Information regarding defendants' exclusionary practices
third party	Benson, Joe	Mobil, 14299 Manchester at 141, Manchester, MO 63011;	Information regarding defendants' exclusionary practices

16diii000373

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Bernardo, Stephen, III	36 Country Club Drive, Rocky Mount, NC 27804; (252) 443-6362	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Beurlein, Mike		Information regarding defendants' exclusionary practices
third party	Bible, Geoffrey C.	Philip Morris, 120 Park Avenue, New York, NY 10017; (212) 880-5000	Information regarding defendants' promotion of anti-competitive settlements and/or legislation
third party	Binder, Jack	Food Center, Hot Springs, AR	Information regarding defendants' exclusionary practices
CWD	Bistolfi, Robert J.	P.O. Box 337, Jackson, TN 38302; (901) 680-9036	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000374

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Blaken, Carol	615-239-3651	Information regarding defendants' exclusionary practices
CWD	Blok, D.	P. O. Box 2876, Syracuse, NY 13220; (315) 432-1187	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Blumenstock, D.E.	5201 Capitol Blvd., Suite 208, Tumwater, WA 98501; (360) 455-9669	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Bobo, William Levi	P.O. Box 896, Laurens, SC 29360; (864) 984-6068	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Bofman, R.A.	P. O. Box 54456, Phoenix, AZ 85078; (602) 971-1858	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000375

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Bohochile, Jane	Quarry Mini Mart, 2206 Velp, Greenbay, WI 54303; (414) 434-2068	Information regarding defendants' exclusionary practices
third party	Bonfiglio, Tom	Dallas, TX	Information regarding defendants' exclusionary practices
UST	Booth, Susan		Information regarding defendants' exclusionary practices

16diii000376

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Bowie, Tom		Information regarding defendants' exclusionary practices
third party	Brambt, C.	State Market, 55 Elm, Coalinga, CA 93210	Information regarding defendants' exclusionary practices
third party	Bramlet, Carmen	State Market, 555 Elm, Coalinga, CA	Information regarding defendants' exclusionary practices
UST	Bramlett, Ron		Information regarding defendants' exclusionary practices
third party	Brookes, Nick G.	Brown & Williamson, 401 S. Fouth Avenue, Suite 200, Louisville, KY 40202; (502) 568-7000	Information regarding defendants' promotion of anti-competitive settlements and/or legislation

16diii000377

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Brown, Carrie	Beacon Ultra Mart, 600 Elm, Coalinga, CA 93210; (209) 935-1961	Information regarding defendants' exclusionary practices
CWD	Brown, Darrell R.	P.O. Box 1681, Fort Smith, AK 72901; (501) 474-9762	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000378

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Brown, M.	Super America, 3744 Chicago Avenue South, Minneapolis, MN ; (612) 827-4241	Information regarding defendants' exclusionary practices
CWD	Brown, Richard	P.O. Box 2803, Pikeville, Kentucky 41502; (606) 432-5327	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Brown, Steve	Hay's Supermarket, Hwy 63 South, Truman, AR ; (501) 239-5513	Information regarding defendants' exclusionary practices
third party	Brunell, Dawn	Q-Mart, 227 Calumet, Valders, WI 54245; (414) 775 4922	Information regarding defendants' exclusionary practices

16diii000379

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Bruns, Larry	Amoco Food Stop, Pipestone, MN	Information regarding defendants' exclusionary practices
third party	Brusky, Chris	Center Court Convenience, 1614 Center Street, Kewanee, WI 54216; (414) 388-3755	Information regarding defendants' exclusionary practices
CWD	Bryant, Ray	813 Ridge Lake Blvd., Memphis, TN 38101-0217; (901) 761-2050	Information regarding manufacturing practices in the moist snuff industry; defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000380

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Buchanan, D.S.	P.O. Box 1872, Altoona, PA 16603; (814) 946-3965	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Buchner, Jolisa	Circle K, Oxnard or Camarillo, CA ;	Information regarding defendants' exclusionary practices
third party	Buck, Meghan	C-Mart, 200 Wisconsin Ave., Denmark, WI 54208; (920) 863-8559	Information regarding defendants' exclusionary practices
UST	Buhler, Mark		Information regarding defendants' exclusionary practices
CWD	Bullock, Jeffrey A.	P.O. Box 551701, Jacksonville, FL 32255-1701; (904) 732-4939	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000381

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Burger, Lisa	76 Nap Mart, El Dorado, IL	Information regarding defendants' exclusionary practices
UST	Burlinson, Dave		Information regarding defendants' exclusionary practices
UST	Burns, J.		Information regarding defendants' exclusionary practices
UST	Burns, Jim		Information regarding defendants' exclusionary practices

16diii000382

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Buschke, D.M.	813 Ridge Lake Blvd., Memphis, TN 38101-0217; (901) 761-2050	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Bush, Kelly	Rod's Amoco, 4350 13th Avenue, Fargo, ND 58103; (701) 277-1402	Information regarding defendants' exclusionary practices
third party	Bussler, John	Q-Mart, 1430 East Chester, Jackson, TN 38301; (901) 424 9502	Information regarding defendants' exclusionary practices
UST	Buttress, Linda		Information regarding defendants' exclusionary practices
CWD	Byrn, Thomas James	P.O. Box 651, London, KY 40743; (606) 864-5725	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000383

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Byrum, W.A.	P.O. Box 1153, Mechanicsburg, PA 17055; (717) 790-0677	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Cafery, Keith		Information regarding defendants' exclusionary practices
third party	Callahan, Mrs.	Castle Corner, 875 Bowie, White Castle, LA 76788; (504) 545-9966	Information regarding defendants' exclusionary practices
CWD	Campbell, J.H.	P. O. Box 1614, Gaylord, MI ; (517) 731-1201	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Campbell, Vince		Information regarding defendants' exclusionary practices

16diii000384

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Capela, Hank		Information regarding defendants' exclusionary practices
CWD	Caples, Mickey Lynn	P.O. Box 1521, Jonesboro, AR 72401; (870) 932-5146	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Carano, John Paul	P.O. Box 1452, McAlester, Oklahoma 74502; (918) 423-7956	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Caron, E.U. III	P.O. Box 147, Meridian, ID 83680; (208) 327-9528	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Carpenter, Kay	Buttrey, W. 1000 - 4th, Kennewick, WA ; (509) 582-9545	Information regarding defendants' exclusionary practices

16diii000385

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Carter, B.A.	P. O. Box 31403, Colorado Springs, CO 80931; (719) 391 8893	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Carter, Steve		Information regarding defendants' exclusionary practices
UST	Carter, Tim	(803) 667-0045	Information regarding defendants' exclusionary practices
UST (former)	Cartwright, Keith		Information regarding defendants' exclusionary practices

16diii000386

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Carver, Shaun	Holiday, 1051 10th Avenue, Menomonice, MI 49852; (906) 863-4001	Information regarding defendants' exclusionary practices
CWD	Case, D.D.	P.O. Box 10542, Spokane, WA 99205; (509) 327-5917	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Case, Paul		Information regarding defendants' exclusionary practices
CWD	Cash, D.F.	813 Ridge Lake Blvd., Memphis, TN 38101-0217; (901) 761-2050	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Casmus, John		Information regarding defendants' exclusionary practices

16diii000387

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Cedau, Wayne	Stax, 1100 Midwest Blvd., Oklahoma City, OK	Information regarding defendants' exclusionary practices
third party	Cetchler, Alan	Atchley Outpost, Hot Springs, AR	Information regarding defendants' exclusionary practices
CWD	Chandler, B.H.	P.O. Box 49375, Greensboro, NC 27419; (910) 643-9248	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Chapman, Tom Lynn	P.O. Box 2328, Mt. Vernon, IL 62864; (618) 735-2594	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Charles, David	Bentonville, AR	Information regarding defendants' exclusionary practices

16diii000388

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Chastain, John T.	P.O. Box 1048, Blue Ridge, GA 30513; (706) 632-5832	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Chudy, L.S.	P.O. Box 62394, Cincinnati, OH 45262; (513) 489-6513	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Church, Syd		Information regarding defendants' exclusionary practices
UST	Churches, Mike		Information regarding defendants' exclusionary practices

16diii000389

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Clanton, Tony		Information regarding defendants' exclusionary practices
CWD	Clardy, Aleck Wayne	P. O. Box 347, Florence, SC 29503; (843) 661-7420	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Clark, Alice	Norman's IGA, 600 North 10th Street, Nebraska City, NE 68410; (402) 873-5780	Information regarding defendants' exclusionary practices

16diii000390

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Clayton, Janice		Information regarding defendants' exclusionary practices
CWD	Clinard, James Keith	P.O. Box 354, Mount Juliet, TN 37121; (615) 758-5024	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Clute, A.W		Information regarding defendants' exclusionary practices
CWD	Coatney, T.	813 Ridge Lake Blvd., Memphis, TN 38101-0217; (901) 761-2050	Information regarding manufacturing practices in moist snuff industry; defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000391

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Coffus, David		Information regarding defendants' exclusionary practices
UST	Colber, Johnny		Information regarding defendants' exclusionary practices
CWD	Collard, Tim	P.O. Box 3575, Lacey, WA 98509; (916) 354-0553	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Collins, John	Buttry Foods, 900 W. Idaho, Kalispell, MT ;	Information regarding defendants' exclusionary practices

16diii000392

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Collins, Larry	Pioneer Oil, 181 N. Main, Malvern, AR 72104+J136	Information regarding defendants' exclusionary practices
UST	Collins, Ron		Information regarding defendants' exclusionary practices
CWD	Combs, T.H.	813 Ridge Lake Blvd., Memphis, TN 38101-0217; (901) 761-2050	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Condon, W.J.	813 Ridge Lake Blvd., Memphis, TN 38101-0217; (901) 761-2050	Information regarding defendants' promotion of anti-competitive settlements and/or legislation

16diii000393

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Conley, Yvonne	Windmill Market, 25174 Dorris, Coalinga, CA 93210; (209) 935-9038	Information regarding defendants' exclusionary practices
UST (former)	Cooper, Suzi		Information regarding defendants' exclusionary practices

16diii000394

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Cooper, Trent	Springfield, MO	Information regarding defendants' exclusionary practices
CWD	Cortinas, Raymond S.	P.O. Box 376735, San Antonio, TX 78237; (210) 436 0097	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Cothren, J.W.	813 Ridge Lake Blvd., Memphis, TN 38101-0217; (901) 761-2050	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Cothren, Patrick Finch	P.O. Box 1810, Apex, NC 27502; (919) 363-2544	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Cotton, Thurman		Information regarding defendants' exclusionary practices

16diii000395

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Coughlin, Bob		Information regarding defendants' exclusionary practices
UST	Counts, Chris		Information regarding defendants' exclusionary practices
third party	Cowan, Tanya	Red Apple #5, Hwy 158, Jackson, WY J179	Information regarding defendants' exclusionary practices
UST	Craves, Keith		Information regarding defendants' exclusionary practices

16diii000396

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Creighton, Joe		Information regarding defendants' exclusionary practices
CWD	Crepps, Joe R.	P.O. Box 867, North Port, AL 35476; (205) 349-3569	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Cresini, Diane	Randalls, 6806 Hwy 6 & Bellani, Houston, TX	Information regarding defendants' exclusionary practices
CWD	Cribbs, Richard Dennis	P.O. Box 2574, Plant City, FL 33566; (813) 754-4934	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Crockett, Rodney	AR	Information regarding defendants' exclusionary practices

16diii000397

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Crow, Don		Information regarding defendants' exclusionary practices
UST	Crowell, Don		Information regarding defendants' exclusionary practices
UST (former)	Crowle, Dan		Information regarding defendants' exclusionary practices
UST	Crutcher, David		Information regarding defendants' exclusionary practices

16diii000398

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Culp, Tommy		Information regarding defendants' exclusionary practices
UST	Cunningham, Bill		Information regarding defendants' exclusionary practices
UST	Cunningham, Patti		Information regarding defendants' exclusionary practices

16diii000399

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Curran, Bob		Information regarding defendants' exclusionary practices
UST	Cushing, Craig		Information regarding defendants' exclusionary practices
UST	Custard, Dan		Information regarding defendants' exclusionary practices
CWD	Dafgard, K.L.	P.O. Box 4146, Kenmore, NY 14217; (716) 835-7074	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000400

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Dahlhauser, Stephen	P.O. Box 1796, Columbia, TN 38401; (931) 388-2098	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Daniels, Davis		Information regarding defendants' exclusionary practices
UST	Daniels, Zell		Information regarding defendants' exclusionary practices
UST	Danielski, Stephen		Information regarding defendants' exclusionary practices
CWD	Danz, G.A.	P.O. Box 548, St. Peters, MO 63376-0548; (314) 939-0475	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000401

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Darrott, Tom		Information regarding defendants' exclusionary practices
CWD	Davidson, W.E.	P.O. Box 329, Meadville, PA 16335; (814) 724-6629	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Davis, B.R.	813 Ridge Lake Blvd., Memphis, TN 38101-0217; (901) 761-2050	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Davis, Mike		Information regarding defendants' exclusionary practices
CWD	Davis, Timothy, A.	P.O. Box 2427, Waycross, GA 31501; (912) 283-8519	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000402

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Dawson, Darren		Information regarding defendants' exclusionary practices
CWD	Dawson, H.A.	813 Ridge Lake Blvd., Memphis, TN 38101-0217; (901) 761-2050	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Deal, Jody		Information regarding defendants' exclusionary practices
UST (former)	Decker, Chad		Information regarding defendants' exclusionary practices

16diii000403

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	DeGraw, M.E.	P.O. Box 103, Churchville, MD 21028; (410) 803-8544	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Delkirby, Edwin	Kirby's, TX	Information regarding defendants' exclusionary practices
third party	Deltart, Penny	Shell Food Mart, 1221 Lombardi, Green Bay, WI 54304; (414) 435-4449	Information regarding defendants' exclusionary practices
third party	Demerath, Lois	Badger Quick Stop, N1891 City Rd. J, Kaukam, WI 54130; (414) 766-4747	Information regarding defendants' exclusionary practices
third party	Denger, Michael	Gibson, Dunn & Crutcher, LLP, 1050 Connecticut Avenue, NW, Washington, D.C., 20036;(202) 955-8500	Information regarding defendants' exclusionary practices

16diii000404

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD (former)	Depenbrock, Brian D.	P.O. Box 425, Cataula, GA 31804; (706) 660-8740	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Destephano, Fran	Belwood Liquor, 4435 Alamo St., Simo Valley, CA 93063; (805) 527-5136	Information regarding defendants' exclusionary practices
UST	Dibble, Jerry		Information regarding defendants' exclusionary practices
UST	Dicken, Keith		Information regarding defendants' exclusionary practices

16diii000405

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Dickey, Richard	Hucks, Mount Vernon, Centralia & Sand Oval, IL	Information regarding defendants' exclusionary practices
CWD	Dickson, D.D.	10117 S.E. Sunnyside 10117 S.E. Sunnyside, Box F-402, Clackamas, OR 97015; (503) 788-1804	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Diffle, Mr. (first name unknown)		Information regarding defendants' exclusionary practices
UST	Dilstrom, Terry		Information regarding defendants' exclusionary practices

16diii000406

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Dolan, Todd	P.O. Box 202, Lakeland, MN 56043; (612) 436-1986	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Dominey, Jana Bailey	P.O. Box 1946, Midlothian, VA 23113; (804) 739-0341	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Donovan, Fred		Information regarding defendants' exclusionary practices
CWD	Dotson, David F.	P.O. Box 51228, Bowling Green, KY 42102; (502) 622-7447	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Dotson, Peggy		Information regarding defendants' exclusionary practices

16diii000407

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Dowdell, David		Information regarding defendants' exclusionary practices
CWD	Dowdy, Jimmy Ray	P. O. Box 1498, Brandon, MS 39042; (601) 825-1095	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Dowdy, Marilyn	Bentonville, AR	Information regarding defendants' exclusionary practices
CWD	Dragosavac, Steven John	P. O. Box 19373, Amarillo, TX 79114-1373; (806) 355-4278	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000408

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Dreyer, Jerry		Information regarding defendants' exclusionary practices
UST (former)	Drier, Jenny		Information regarding defendants' exclusionary practices
CWD	Dring, J.G.	P.O. Box 380, Sioux Falls, SD 57101; (605) 372-4923	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Dubose, J.V.	P.O. Box 397, Andalusia, AL 36420; (334) 388-5608	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Dufrane, Bob		Information regarding defendants' exclusionary practices

16diii000409

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Eanes, Bruce		Information regarding defendants' exclusionary practices
third party	Eaton, Larry	Bev's Convenience, Route 103, Newport, NH 03773; (603) ###-####	Information regarding defendants' exclusionary practices
third party	Eddy, Defice	Quick Sav Foods #19, 8135 E., Cadillac, MI 49601; (616) 775-7891	Information regarding defendants' exclusionary practices
CWD	Edge, Denney P.	P.O. Box 4092, Rock Hill, SC 29731; (803) 366-1028	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000410

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Elliot, J.M.	P.O. Box 723, Holt, MI 48842; (517) 349-0955	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Ellis, G.P.	P.O. Box 217, Memphis, TN 38101; (901) 753-0229	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Ellis, Tiny		Information regarding defendants' exclusionary practices
CWD	Elms, Ronnie Joe	P. O. Box 360305, Dallas, TX 75336-0305; (972) 427-6997	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Elsik, Scot	P. O. Box 496441, Garland, TX 75049; (972) 412-2406	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Englert, David Curlee	P. O. Box 65015, Lubbock, TX 79464; (806) 783-9389	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Engster, Rob	Discount Tobacco, Fort Smith, AR	Information regarding defendants' exclusionary practices
third party	Evans, Terry	On the Way Food Stores, VA	Information regarding defendants' exclusionary practices

16diii000412

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Faas, Doug		Information regarding defendants' exclusionary practices
UST	Faer, Doug		Information regarding defendants' exclusionary practices
CWD	Falevsky, J.A.	P.O. Box 452, West Bend, WI 53095; (414) 526-4832	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Fallquist, Jan	Uresco, 1680 Maple Island, Freemont, MI 499412; (616) 924-4651	Information regarding defendants' exclusionary practices
CWD	Feathers, J.B.	P.O. Box 162642, Altamonte Springs, FL 32716; (407) 884-8313	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000413

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Fedak, Mary	(904) 926-2188	Information regarding defendants' exclusionary practices
UST	Ferring, Dave		Information regarding defendants' exclusionary practices
UST	Fiddler, John		Information regarding defendants' exclusionary practices
third party	Field, Linda	Wal-Mart, 111 W.Perkins Rd., Stillwater, OK 74075	Information regarding defendants' exclusionary practices

16diii000414

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Fields, J.R.	P.O. Box 1443, Elk Grove, CA 95759; (916) 684-9523	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Fleetwood, Matt		Information regarding defendants' exclusionary practices
CWD	Fleming, Joe A.	P.O. Box 61951, Ft. Myers, FL 33906; (941) 481-8136	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Flemming, Mark	P.O. Box 4511, Saratoga Springs, NY 12865; (518) 587 1278	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Florance, Ronald Gregory	P.O. Box 6303, Virginia Beach, VA 23456; (757) 468-5676	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000415

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Flowers, Donald N.	P.O. Box 243, Conover, NC 28613; (704) 465-2281	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Flynn, Linda	Bayland Shell, 3987 Algoro Rd., Green Bay, WI 54311; (520) 866-3500	Information regarding defendants' exclusionary practices
CWD	Forrest, A.F.	P.O. Box 264, Bay City, MI 48707; (517) 892-8255	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Fortner, Rick		Information regarding defendants' exclusionary practices
CWD	Foster, D.J.	P.O. Box 292640, Sacramento, CA 95829; (916) 688-5384	Information regarding defendants' exclusionary practices

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Foster, E.J.	813 Ridge Lake Blvd., P.O. Box 217, Memphis, TN 38101 0217; (901) 761-2050	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Foster, J.W.	P.O. Box 3566, Brookhaven , MS 39603-7566; (601) 833-3079	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Fowler, Sharon	Bob's Handy Mart, 400 Kern St., Taft, CA 93268	Information regarding defendants' exclusionary practices
CWD	Francis, Glynn E.	P.O. Box 206, Swartz, LA 71278; (318) 343-5925	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Frank, R.D.	P.O. Box 1343, Elk Grove, CA 95759; (916) 684-7456	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000417

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Fritz, Dave		Information regarding defendants' exclusionary practices
third party	Froicks, H.E.	Clark Gas, 4001 Page, Michigan Center, MI 49254; (517) 764-3087	Information regarding defendants' exclusionary practices
third party	Fuerst, Christina	Mini Mart, 626 10th Ave. South, Great Falls, MT ; (406) 727- 7448	Information regarding defendants' exclusionary practices
CWD	Fulkerson, J.E.	7942 Country B|rook Lane, Westerville, OH 43081; (614) 888-7217	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Fuller, M.J.	P.O. Box 240111, Montgomery, AL 36124-0114; (334-) 271-5878	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000418

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Fulner, Linda	Tiger Mart, 1229 MacDade Blvd., Woodlyn, PA 19094+3421	Information regarding defendants' exclusionary practices
UST	Funk, Loni		Information regarding defendants' exclusionary practices
CWD	Futrell, Daniel Lee	P.O. Box 24665, Winston Salem, NC 27114-4685; (910) 945-3421	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Gabris, T.J.	P.O. Box 3432, Mission Viejo, CA 92690; (714) 459-8174	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Gaines, Edward W. III	P.O. Box 1295, Harrisonburg, VA 22801; (540) 433-2158	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000419

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Galvan, Richard	4249 Snowmass, Corpus Christi, TX 78413; (512) 850-9831	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Gammon, Amy	Pop Shoppe, 1701 Cedar Ave., Helena , MT 59601	Information regarding defendants' exclusionary practices
CWD	Gantz, Mark B.	P. O. Box 20, Albuquerque, NM ; (505) 271-2428	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Garrish, Bill		Information regarding defendants' exclusionary practices
CWD	Gastley, Joseph Edward	P.O. Box 2191, Gainesville, GA 30503; (770) 536-5663	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Gehl, R.J.	P.O. Box 8834, Rolling Meadows, IL 60006-8834; (847) 303-5447	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Ghadu, Sikardre	Quick N EZ, 5480 Shaw, Fresno, CA	Information regarding defendants' exclusionary practices
UST	Gibbs, Gene		Information regarding defendants' exclusionary practices
CWD	Gibian, Eric		Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Gierer, Vincent		Information regarding defendants' exclusionary practices; defendants' promotion of anti-competitive settlements and/or legislation

16diii000421

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Gill, John		Information regarding defendants' exclusionary practices
CWD	Gilliam, Ronald D.	P.O. Box 342, Ooltewah, TN 37363; (423) 238-5303	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Gillis, D.		Information regarding defendants' exclusionary practices
UST	Gilly, Phillip		Information regarding defendants' exclusionary practices

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Gokey, John	Cumberland Farms, 160 Worcester Providence Rd., Sutton, MA ; (508) 865-2991	Information regarding defendants' exclusionary practices
third party	Goldstone, Steven F.	RJR, 1301 Avenue of the Americas, New York, NY 10019; (212) 258-5000	Information regarding defendants' promotion of anti-competitive settlements and/or legislation
CWD	Gongre, J.L.	P.O. Box 208, Walker, LA 70785-0208; (504) 667-0859	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Gooch, Ruth	Maguire 66, 19933 Virginia Hills Rd., Council Bluffs, IA 51503; (712) 366-1063	Information regarding defendants' exclusionary practices

16diii000423

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Good, Ruth	Maguire 66, 19933 Virginia Hills Road, Council Bluffs, Iowa 51503; (712) 366-1063	Information regarding defendants' exclusionary practices
UST	Goodnight, Larry		Information regarding defendants' exclusionary practices
CWD	Gotheridge, Richard E.	P.O. Box 1666, Summerville, SC 29484; (843) 873-5673	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Goult, Doug		Information regarding defendants' exclusionary practices

16diii000424

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Graham, James		Information regarding defendants' exclusionary practices
CWD	Green, Barten Daniel	P.O. Box 571028, Tulsa, OK 74107; (918) 445-4443	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Green, David		Information regarding defendants' exclusionary practices
UST	Green, Jeff		Information regarding defendants' exclusionary practices
CWD	Green, Phillip Lee	P.O. Box 384, Sulphur Springs, TX 75483; (903) 866 0929	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000425

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST (former)	Greene, Jeff		Information regarding defendants' exclusionary practices
CWD	Greeson, John Arthur	1605 Palmer Street, Graham, NC 27253; (336) 229-1685	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Gregory, Patrick Todd	P. O. Box 541, Crowley, TX 76036; (817) 561-5130	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Gresham, Scott Kelley	P.O. Box 194, Austell, GA 30168; (770) 941-4110	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Griest, S.R.	P.O. Box 153, Ganesvoort, NY 12831; (518) 695-4945	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000426

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Griffin, Arnal	Food Mart, 2723 W. Kickapoo, Shawnee, OK ;	Information regarding defendants' exclusionary practices
UST	Griffith, Jerry		Information regarding defendants' exclusionary practices
third party	Grinstaff, Jeff	Ingles Market, Asheville, NC	Information regarding defendants' exclusionary practices

16diii000427

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Groves, Lester E.	813 Ridge Lake Blvd., Memphis, TN 38101-0217; (901) 761-2050	Information regarding manufacturing in the moist snuff industry; defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Gsell, Judy	Wal-Mart, 3680 Shaw, Fresno, CA ; 277-8191	Information regarding defendants' exclusionary practices
third party	Gunther, Buddy	Super S, San Antonio, TX	Information regarding defendants' exclusionary practices

16diii000428

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Hacket, June	Wal-Mart #1642, 1680 Packard Hwy., Charlotte, MI 48813; (517) 543-0300	Information regarding defendants' exclusionary practices
CWD	Hackett, J.L.	P.O. Box 494476, Redding , CA 96049; (916) 224-1769	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Haggard, John		Information regarding defendants' exclusionary practices
UST	Haley, John		Information regarding defendants' exclusionary practices
CWD	Hall, T.R.	P.O. Box 1743, Springfield, OH 45501-1743; (513) 325-4933	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000429

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Ham, Jeff		Information regarding defendants' exclusionary practices
CWD	Ham, Jeffry	P.O. Box 210994, Columbia, SC 29221; (503) 772-3444	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Hamblin, Alan		Information regarding defendants' exclusionary practices
CWD	Hamilton, Kenneth E., Jr.	13135 Lima, Houston, TX 77099; (281) 933-7606	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000430

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Hamlett, Alan		Information regarding defendants' exclusionary practices
CWD	Hammer, James G.	P. O. Box 2972, Denton, TX 76202; (940) 388-1773	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Hanes, S.	DB Mart, 1440 West Main, Williamantic, CT ; (860) 456-0944	Information regarding defendants' exclusionary practices
third party	Hanks, Jody	Rushing's Tobacco Shop, 3414 N. Main, Liberty, TX 77575; (409) 336-1166	Information regarding defendants' exclusionary practices

16diii000431

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Hann, J.	Wal-Mart #1642, 1680 Packard Hwy., Charlotte, MI 48813; (517) 543-0300	Information regarding defendants' exclusionary practices
third party	Hansen, Rick	Quick Stop Food Stores, 8998 E. M21 Ovid, 709 W. State, Flushing, MI ; (517) 834-9610	Information regarding defendants' exclusionary practices

16diii000432

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Hardigan, Pat		Information regarding defendants' exclusionary practices
CWD	Harriman, Scott B.	P.O. Box 545, Powell, TN 37849; (423) 947-7811	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000433

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST (former)	Harrington, Clark	Moon Road, Columbus, GA	Information regarding defendants' exclusionary practices
CWD	Harris, D.W.	P.O. Box 50610, Oxnard, CA 93031; (605) 484-3844	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Harris, Debra		Information regarding defendants' exclusionary practices
CWD	Harris, Timothy Clyde	P.O. Box 6433, Ashville, NC 28806; (828) 665-4498	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000434

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Hart, Alan	1002 W. Grant Street, Dexter, MO 63841; (573) 624-5414	Information regarding defendants' exclusionary practices
CWD	Hart, Dennis J.	P.O. Box 447, New London, NC 28127; (704) 463-1680	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Hartly, Tom		Information regarding defendants' exclusionary practices
UST	Hasse, Scott		Information regarding defendants' exclusionary practices
UST	Hatch, Terry		Information regarding defendants' exclusionary practices

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Hayes, Terry		Information regarding defendants' exclusionary practices
CWD	Haynes, Larry Edward	P.O. Box 6099, Sherwood, AR 72124; (501) 834-2417	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Haynes, R.		Information regarding defendants' exclusionary practices
UST	Hazard, John		Information regarding defendants' exclusionary practices

16diii000436

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Healey, Kathy	(404) 974-5492	Information regarding defendants' exclusionary practices
third party	Heath, Ed	P.S. Food Marts, Lansing, MI	Information regarding defendants' exclusionary practices
third party	Heifiefer, Tammy	Windsor Big "M", Chapel Street, Windsor, NY	Information regarding defendants' exclusionary practices
UST	Heinz, Laura		Information regarding defendants' exclusionary practices
CWD	Heinze, P.K.	P.O. Box 753, Bowling Green, OH 43402-0753; (419) 655-3540	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000437

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Henchey, Richard H.	P.O. Box 97, Scott Depot, W. VA 25560; (304) 757-7531	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Hendrick, Patrick Daniel	P.O. Box 244, Danville, VA 24543; (804) 724-4163	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Hendricks, W.	Juvilee Foods, 2165 Military , Green Bay, WI 48866; (517) 834-5803	Information regarding defendants' exclusionary practices
third party	Henry, Ken		Information regarding defendants' exclusionary practices

16diii000438

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Henry, Mike		Information regarding defendants' exclusionary practices
CWD	Hensley, Danny K.	P.O. Box 442, Bristol, TN 37620; (423) 878-2326	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Hensley, Gary Wayne	P. O. Box 720432, Oklahoma City, OK 73172; (405) 722-7805	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Herndon, Mark Stephen	P.O. Box 5935, Forsyth, GA 31029; (912) 994-2859	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Herrick, Lisa	Kelly's Party Store, 106 Main, Orio, MI 51529; (712) 643-5852	Information regarding defendants' exclusionary practices
UST	Hessey, Scott		Information regarding defendants' exclusionary practices
CWD	Hettinger, J.P.	P.O. Box 1433, Clifton Park, NY 12065; (518) 371-9568	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000440

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Hicks, Gail	Dave's Country Store, 720 Iowa Ave., Dunlap, IA ; (###) 722-4554	Information regarding defendants' exclusionary practices
UST	Higgins, Shawn		Information regarding defendants' exclusionary practices
UST	Hiles, Chris		Information regarding defendants' exclusionary practices
UST	Hintz, Laura		Information regarding defendants' exclusionary practices
UST	Hoban, Ed		Information regarding defendants' exclusionary practices

16diii000441

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Holley, Joseph Scott	P.O. Box 2212, Florence, AL 35633; (256) 764-2965	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Holy, Tammy	Overland Express, I-20 & 34, Terrell, TX	Information regarding defendants' exclusionary practices
CWD	Hooper, P.L.	P.O Box 205, Broomfield, CO 80038; (303) 466-2402	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST (former)	Horton, George		Information regarding defendants' exclusionary practices
CWD	Horvath, P.R.	P.O. Box 2402, South Bend, IN 46860; (219) 291-9880	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Houck, D.L.	P.O. Box 153, Wyoming, PA 18644; (717) 893-0607	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Howard, Mike		Information regarding defendants' exclusionary practices
CWD	Hughey, Ronald Dale	P.O. Box 360322, Birmingham, AL 35236; (205) 991-8865	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Hummell, Nancy	Sun Mart, 4600 Johnson St., Cedar Rapids, IA	Information regarding defendants' exclusionary practices
CWD	Humphrey, Richard A.	P.O. Box 5488, Lexington, KY 40555; (502) 863-1645	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000443

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST (former)	Hurley, Janice		Information regarding defendants' exclusionary practices
third party	Husely, Tim	Holiday 72, 233 South Frazee, Detroit Lakes, MN	Information regarding defendants' exclusionary practices
third party	Husky, Debbie	Bentonsville, AR 20036; (202) 778-1200	Information regarding defendants' exclusionary practices
CWD	Hutcheons, B.P.	P.O. Box 4307, Manchester, NH 03108; (603) 424-6093	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Hyder, David H.	P.O. Box 1718, Goldenrod, FL 32733; (407) 657-7194	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Hynek, D.L.	P.O. Box 21346, Eagan, MN 55121; (612) 452-6529	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Idstrom, Terry		Information regarding defendants' exclusionary practices
CWD	Ingram, W.E.	813 Ridge Lake Blvd., P.O. Box 217, Memphis, TN 38101 0217; (901)761-2050	Information regarding manufacturing practices in the moist snuff industry; defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Investigative Group, Inc.	Investigative Group, Inc., 1140 Connecticut Avenue., NW, Washington, DC	Information regarding defendants' exclusionary practices

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Irons, Charles		Information regarding defendants' exclusionary practices
UST	Jacboy, Richard		Information regarding defendants' exclusionary practices
UST	Jackson, J.B.		Information regarding defendants' exclusionary practices
third party	Jacob, Angie	Number Nine Superette, 1780 SE 24th (Hwy 9), Norman, OK ; (905) 631-8374	Information regarding defendants' exclusionary practices

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Jaimus, Paul		Information regarding defendants' exclusionary practices
third party	Jans, Robert	Stax #1265, 5933 S. High, Oklahoma City, OK ; (414) 487-5460	Information regarding defendants' exclusionary practices
UST	Jarman, Paul		Information regarding defendants' exclusionary practices
UST	Jayson (first name unknown)		Information regarding defendants' exclusionary practices
CWD	Jeffrey, B.J.	P.O. Box 3199, Union Gap, WA 98903-0199; (509) 972-2640	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000447

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Jenkins, Franklin K.	P.O. Box 914, Culpeper, VA 22701; (540) 825-1561	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Jennings, Wayde		Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Jenson, Don	Wiegard Amoco, 616 4th St., Algoma, WI	Information regarding defendants' exclusionary practices

16diii000448

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Johnsen, J.	Super QuikStop, Council Bluffs, IA 49643	Information regarding defendants' exclusionary practices
third party	Johnson, Beverly	Pinpointe Grocery, 2614 M-137, Interlochin, MI 49643	Information regarding defendants' exclusionary practices
CWD	Johnson, C.S.	P.O. Box 1325, Englewood, CO 80150; (303) 979-4768	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Johnson, C.S.	Super Quik Stop, 2800 Twin City Drive, Council Bluffs, IA ; (817) 645-1575	Information regarding defendants' exclusionary practices
UST	Johnson, Glen		Information regarding defendants' exclusionary practices

16diii000449

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Johnson, Guelda	Wal-Mart, 1616 W. Henderson, Cleburne, TX 51501; (712) 366-2375	Information regarding defendants' exclusionary practices
CWD	Johnson, Haywood H.	P.O. Box 627, Newberry, FL 32669; (352) 472-3155	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Johnson, Howard		Information regarding defendants' exclusionary practices
third party	Johnson, J.	Super Quik Stop, 2800 Twin City Drive, Council Bluffs, IA 49643	Information regarding defendants' exclusionary practices
CWD	Johnson, Jasper C.	P.O. Box 687, Sumter, SC 29151; (803) 481-9336	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000450

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Johnson, Jeff		Information regarding defendants' exclusionary practices
third party	Johnson, Wayne	Pinpointe Grocery, 2614 M-137, Interlochin, MI 49643	Information regarding defendants' exclusionary practices
UST	Johnston, Mary		Information regarding defendants' exclusionary practices
CWD	Jones, Bruce Wayne	P.O. Box 130130, The Woodlands, TX 77393; (281) 362-0963	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Jones, James Dallas	P.O. Box 141, Hartsell, AL 35640; (256) 796-8481	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000451

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Jones, T.E.	P.O. Box 531, Germantown, MD 20875; (301) 916-2854	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Jons, Robert	Stax #1265, 5933 S. High, Oklahoma City, OK	Information regarding defendants' exclusionary practices
UST	Jordan, Andy		Information regarding defendants' exclusionary practices
CWD	Junot, K.	P.O. Box 7, Scott, LA 70583; (318) 237-1256	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Kahl, Phil	Distribution Center - Lansin, Charlotte, Lansing, MI 93060; (805) 933-1828	Information regarding defendants' exclusionary practices

16diii000452

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Kaulfus, David		Information regarding defendants' exclusionary practices
third party	Kaur, Beljinder	China's Market & Gas, 806 W. Harvard Blvd., Santa Paula, CA 54901; (414) 232-7603	Information regarding defendants' exclusionary practices
CWD	Keane, Michael Patrick	P.O. Box 1998, Cumming, GA 30028; (770) 889-5007	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Keemper,Tom		Information regarding defendants' exclusionary practices
CWD	Keenan, M.P.	P.O. Box 167, Sauk Rapids, MN 56379-0167; (320) 252-9384	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Kelley, Jobey		Information regarding defendants' exclusionary practices
UST	Kelley, Lloyd		Information regarding defendants' exclusionary practices
CWD	Kelly, Kevin P.	P.O. Box 13979, Tampa, FL 33611; (813) 831-2006	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Kelther, Buzz		Information regarding defendants' exclusionary practices
third party	Kendall, Melissa	Lang Oil 76, 835 Main, Osh Kosh, WI ; 202-452-1253	Information regarding defendants' exclusionary practices

16diii000454

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Kendall, Preston		Information regarding defendants' exclusionary practices
UST	Kennedy, Mark		Information regarding defendants' exclusionary practices
UST	Kenner, Nancy		Information regarding defendants' exclusionary practices
UST	Kenny, Mark		Information regarding defendants' exclusionary practices
CWD	Kerr-Harding, G.K.	P.O. Box 19303, Portland, OR 97260; (503) 254-7123	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Kerrigan, Michael	Kerrigan & Associates, Inc., 1104 Dapple Grey Court, Great Falls, VA;(703) 757-2829	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff; defendants' promotion of anti-competitive settlements and/or legislation
UST	Kesseling, Eddie		Information regarding defendants' exclusionary practices
CWD	Kibler, Dale Allen	P.O. Box 4475, Wilmington, NC 28409; (910) 799-4906	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Kidd, Luster	Kidd Jones, TX	Information regarding defendants' exclusionary practices

16diii000456

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST (former)	Kiel, Leroy	Tulsa, OK	Information regarding defendants' exclusionary practices
third party	Kilibardo, Judy	Super Quick Stop, 2800 Twin City Drive, Council Bluffs, IA 10019; (212) 403-1000	Information regarding defendants' exclusionary practices
CWD	King, Steven Craig	P.O. Box 1702, Washington, NC 27889; (919) 975-6229	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000457

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Kinsey, Todd		Information regarding defendants' exclusionary practices
UST	Kirts, Doug		Information regarding defendants' exclusionary practices

16diii000458

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Kissering, Eddie		Information regarding defendants' exclusionary practices
UST	Kitson, Ted		Information regarding defendants' exclusionary practices

16diii000459

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Klang, D.M.	P.O. Box 7541, Columbia, MO 65205; (573) 445-2345	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Klinge, L.J.	P.O. Box 10206, Bakersfield, CA 93369; (805) 837-4429	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Knobby, Don		Information regarding defendants' exclusionary practices
CWD	Knol, C.G.	P.O. Box 25606, Overland Park, KS 66226-5605; (913) 469-5665	Information regarding defendants' exclusionary practices

16diii000460

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Knoll, Ed		Information regarding defendants' exclusionary practices
UST	Knowles, Ed		Information regarding defendants' exclusionary practices

16diii000461

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Koplow, Meyer	Wachtell, Lipton, Rosen & Katz, 51 W. 52nd St., New York, NY 56501; (218) 847-3635	Information regarding defendants' promotion of anti-competitive settlements and/or legislation
CWD	Koressel, Donald E.	P.O. Box 2231, Evansville, Indiana 47728-0231; (812) 476-1209	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Kren, Jeffery	P.O. Box 252272, West Bloomfield, MI 48325-2272; (248) 768-9482	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Kundo, Carol	Fina Pump & Pantry, Randolph Rd., Detroit Lakes, MN 15110	Information regarding defendants' exclusionary practices
third party	Kunker, Jane	Toot n Scoot, 818 Duquesne Blvd., Duquesne, PA	Information regarding defendants' exclusionary practices

16diii000462

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Kurtz, Doug		Information regarding defendants' exclusionary practices
UST	Kurtz, Doug		Information regarding defendants' exclusionary practices
UST	Lairsey, Harry		Information regarding defendants' exclusionary practices
UST	Land, Dave		Information regarding defendants' exclusionary practices

16diii000463

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	LaPradd, Ron		Information regarding defendants' exclusionary practices
UST	Largoy, John		Information regarding defendants' exclusionary practices
CWD	LaRocca, Nick Frank	935 Iris Lane 935 Iris Lane, Beaumont, TX 77706; (409) 866-6894	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD (former)	Larsen, E.O.	2631 Trojan, Apt. 220, Green Bay, WI 54304	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000464

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Larson, Jill		Information regarding defendants' exclusionary practices
third party	Larson, Linda	33115 Hwy 75, Plaquemine, LA	Information regarding defendants' exclusionary practices
UST	Lathom, Derrick		Information regarding defendants' exclusionary practices
UST	Lawrence, Robert H.		Information regarding defendants' exclusionary pracitces
CWD	Laws, Marvin V., Jr.	P.O. Box 447, Forrest City, AR 72336; (870) 633-2247	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000465

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Lemoine, Phillip Stannie	P.O. Box 17844, Memphis, TN 38187; (901) 794-2364	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Lemon, Daniel		Information regarding defendants' exclusionary practices
UST	Lewis, Bob		Information regarding defendants' exclusionary practices
UST	Liand, Dave		Information regarding defendants' exclusionary practices

16diii000466

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Lid, Patty	Admiral Discount Tobacco, 1216 S. Garfield, Traverse City, MI 54911; (414) 734-9967	Information regarding defendants' exclusionary practices
UST	Ligon, Red		Information regarding defendants' exclusionary practices
CWD (former)	Lindler, Charles Hugh	(704) 464-4069	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Lirry, Cynthia	Open Pantry, 111 W. Wisconsin, Appleton, WI 54177; (920) 856-5731	Information regarding defendants' exclusionary practices

16diii000467

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Lofton, Rudy		Information regarding defendants' exclusionary practices
third party	Long, Brenda	Amoco Mini Mart, Hwy 141, Wansabee, WI 48684; (517) 426-6621	Information regarding defendants' exclusionary practices
UST (former)	Lowrey, Matt		Information regarding defendants' exclusionary practices

16diii000468

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Lowry, Mike		Information regarding defendants' exclusionary practices
third party	Lubick, Carolyn	Crystal Flash Store, 702 N. Mitchell, Cadillac, MI 49601; (601) 775-9303	Information regarding defendants' exclusionary practices
CWD	Ludwig, W.P.	P.O. Box 401, Greenwood, IN 46142; (317) 888-3777	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Lund, Dave		Information regarding defendants' exclusionary practices

16diii000469

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Luttgeharm, Brenda L.	P.O. Box 8518, Alexandria, LA 71306; (318) 442-1919	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Lynch, W.F.	P.O. Box 1527, Keller, TX 76244; (817) 514-0650	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Madarica, Diani		Information regarding defendants' exclusionary practices
UST	Magee, Anthony		Information regarding defendants' exclusionary practices
CWD	Malone, R.W.	P.O. Box 509, Columbus, MS 38701; (601) 328-0564	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000470

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Mancel, Mike		Information regarding defendants' exclusionary practices
UST	Maness, Mack		Information regarding defendants' exclusionary practices
CWD	Mankin, Samuel Ashley	P.O. Box 870063, Stone Mountain, GA 30008; (770) 985-0927	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Marano, L.M.	P.O. Box 16297, Philadelphia, PA 19114; (215) 632-0371	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Marciniak, M.B.	P.O. Box 23613, Richfield, MN 65423-3613; (612)926-9470	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000471

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Marion, Mark Alan	P.O. Box 151432, Arlington, TX 76015; (817) 468-5643	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Marisham, M.C.		Information regarding defendants' exclusionary practices
UST	Marren, Elizabeth T.		Information regarding defendants' exclusionary practices
UST	Martin, John		Information regarding defendants' exclusionary practices

16diii000472

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Masa, J.R.	P.O. Box 97985, Pittsburgh, PA 15227-9996; (412)653-6970	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Mather, Patsy	Next Door Food Store, 601 Cedar St., Gladwin, MI ; (905) 793-9723	Information regarding defendants' exclusionary practices
third party	Mathes, Sandra	Stax #1980, 2801 N. Sheilds, Moore, OK 71418; (318) 649-5518	Information regarding defendants' exclusionary practices
UST	McCarthey, James J.		Information regarding defendants' exclusionary practices
third party	McCarty, Bill (McCarty - Hull)	Toot 'n Totum, Amarillo, TX	Information regarding defendants' exclusionary practices

16diii000473

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	McCarty, Holman	Jitney Jungle, West Jackson Ave.; North Lamar, Jackson, MS	Information regarding defendants' exclusionary practices
CWD (former)	McCormack, Tom	6406 Shadowood Lane, Memphis, TN 38119	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	McCoy, Michael Lee	P.O. Box 10274, College Station, TX 77842; (409) 272-3225	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	McCray, Mr.G523	Walgreen, 1811 Belvidin Rd., Wauhega, IL	Information regarding defendants' exclusionary practices
CWD	McDaniel, G.A.	P.O. Box 269, Buffalo, IN 47925-0269; (219) 278-6229	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000474

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	McDowell, Steve		Information regarding defendants' exclusionary practices
CWD	McGregor, Howard Hoge	P.O. Box 32157, Knoxville, TN 32157; (423) 693-4757	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	McIntosh, Timothy Scott	Rt. 1, Box 367A, Hope Mills, NC 28348; (910) 424-9230	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	McKaig, Ann		Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	McKeon, G.M.	P.O. Box 1697, Cranberry Township, PA 16066; (412) 772-6996	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000475

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	McKeon, Ken		Information regarding defendants' exclusionary practices

16diii000476

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	McMillian, Bert		Information regarding defendants' exclusionary practices
CWD	McVey, Jimmy Henson	P.O. Box 576, Rockmart, GA 30153; (770) 684-9223	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000477

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Medeiros, C.J.	P.O. Box 316, Monson, MA 01067; (413) 267-0008	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Medlin, Michael Joseph	P.O. Box 459, Lake Charles, LA 70602-0459; (318) 433-0354	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Menchesni, Baw	Marathon, Hwy 96, Denmark, WI 54914; (414) 738-4828	Information regarding defendants' exclusionary practices
UST	Mentz, Barry		Information regarding defendants' exclusionary practices
CWD	Metz, J.G.	P.O. Box 561216, Charlotte, NC 28256; (704) 947-9126	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000478

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Metz, Stephen Joseph	P.O. Box 560216, Charlotte, NC 28256; (704) 947-0104	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Meyer, Betty	Mike'sTown & Country, 420 S. Outagmie, Appleton, WI 53014; (414) 849-8741	Information regarding defendants' exclusionary practices
third party	Meyer, Joy	Mobil Mart, 613 N. Madison, Chilton, WI ; (817) 645-1575	Information regarding defendants' exclusionary practices
UST (former)	Middleton, Bob	Cavanaugh Cars, Black Rock, AR	Information regarding defendants' exclusionary practices

16diii000479

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Mielke, Frank		Information regarding defendants' exclusionary practices
CWD	Miley, K.J.	P.O. Box 69, Sycamore, IL 60178; (815) 896-7832	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Miller, Connie	Wal-Mart, 1616 W. Henderson, Cleburne, TX 49202; (517) 789-7300	Information regarding defendants' exclusionary practices

16diii000480

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Miller, Debbie	Zan's Party Store, 802 W. Ganson, Jackson, MI 49202; (517) 789-7300	Information regarding defendants' exclusionary practices
UST	Miller, Frank		Information regarding defendants' exclusionary practices
CWD	Miller, K.A.	P.O. Box4581, Austintown, OH 44515; (330) 793-6606	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000481

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Miraile, Judy	Sunrise Convenience #20, 1747 N M-76, St. Helen, MI 75440; (903) 473-5123	Information regarding defendants' exclusionary practices
third party	Mirhof, Fred	Nu-Way #725, 601 N. Texas St. (Hwy 19 W.), Emory, TX	Information regarding defendants' exclusionary practices
CWD	Monroe, Stan Lee	P.O. Box 14, Wacissa, FL 32361; (850) 997-1159	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Montgomery, Richard Jerry	P.O. Box 18584, Memphis, TN 38118; (901) 682-6560	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Moon, R.E.	P.O. Box 8885, Burbank , CA 91510; (818) 842-5808	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000482

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Moon, Russ		Information regarding defendants' exclusionary practices
third party	Moore, Joe	Speedway, 184 N. 4th, Sturgeon Bay, WI	Information regarding defendants' exclusionary practices
CWD	Moore, Lonnie C.	P.O. Box 103, Dublin, MS 38739; (601) 627-2420	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Moore, Ronald Brooks	P.O. Box 2113, Hattiesburg, MS 39403-2113; (601) 545-7527	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Moreau, Bob	M&M Beverage, Depot St., Randolph , VT ; (919) 332-8652	Information regarding defendants' exclusionary practices

16diii000483

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Morel, M.T.	P.O. Box 9558, Ft. Wayne, IN 46899; (219) 422-6833	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Morris, Daniel Clayton	P.O. Box 220, Appling, GA 30802; (706) 541-0899	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Morton, T.L.	P.O. Box 583 , Livermoore, CA 94551-0583; (510) 499-0605	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Motley, Lorrie	Valley Acres Market, 27532 Taft Hwy, Valley Acres, CA	Information regarding defendants' exclusionary practices

16diii000484

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Mr. Blackburn, (first name unknown)		Information regarding defendants' exclusionary practices
third party	Mr. Burns, (first name unknown)	Albertson's, corner of June and Masters Streets, Dallas, TX	Information regarding defendants' exclusionary practices
third party	Mull, Micky	Revco Discount Drugs, 2619 South Main Street, High Point, NC 54220; (414) 684-9750	Information regarding defendants' exclusionary practices
UST	Murphy, Mike		Information regarding defendants' exclusionary practices

16diii000485

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Murray, Betty	813 Ridge Lake Blvd., Memphis, TN 38101; (901) 761-2050	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Nabors, Devin Charles	P.O. Box 4798, Dublin, GA 31040; (912) 275-4735	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Nachtney, Linda	Uni-Mart, 1700 S. 10th St., Manitoma, WI	Information regarding defendants' exclusionary practices
UST	Naifeh, Johhny		Information regarding defendants' exclusionary practices
UST	Naiteh, John		Information regarding defendants' exclusionary practices

16diii000486

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Naseth, P.A.	P.O. Box 5861, Fargo, ND 58105-5881; (701) 239-9949	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Nash, Erik		Information regarding defendants' exclusionary practices
UST	Natieh, Johnny		Information regarding defendants' exclusionary practices
UST	Neiff, Larry		Information regarding defendants' exclusionary practices

16diii000487

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Nelson, Phillip	Eckerd's, Tampa, FL	Information regarding defendants' exclusionary practices
third party	Neu, Shirley	R&R Pop Stop, Leslie, MI ; (507) ###-9753	Information regarding defendants' exclusionary practices
third party	Neuman, Kim	Texaco Super Stop, Hwy 19, Gibbon, MN 54220; (414) 683 6840	Information regarding defendants' exclusionary practices
third party	Nicholls, Vicki	C-Store #21, 240 E. Columbia, Battle Creek, MI 71822; (870) 898-3510	Information regarding defendants' exclusionary practices
CWD	Norris, James Anthony	P.O. Box 234, Lexington, SC 29071; (803) 356-0858	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000488

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Norton, Renee	Jr. Food Mart, 981 S. Locust St., Ashdown, AR	Information regarding defendants' exclusionary practices
CWD	Noyes, D.A.	P.O. Box 318, Barrie, VT 5841; (802) 476-3182	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	O'Brien, Duane	Main Big "M", Rt. 26, Maine, NY ; (318) ###-####	Information regarding defendants' exclusionary practices
CWD	O'Dell, K.R.	P.O. Box 117, Brady, NE 9123; (308) 584-3888	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	O'Donnell, William		Information regarding defendants' exclusionary practices

16diii000489

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Oldstrom, Terry		Information regarding defendants' exclusionary practices
CWD	Oliver, Larry A.	P.O. Box 2083, Lindale, TX 75771; (903) 882-1861	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Oliver, M.R.	P.O. Box 1505, Brighton, Mi 48116; (517) 750-3801	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000490

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Olstrom, Shannon		Information regarding defendants' exclusionary practices
CWD	O'Neal, Glen A., Jr.	P.O. Box 7446, Louisville, KY 40207; (502) 245-6451	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	O'Neal, Jeffrey C.	P.O. Box 621708, Oviedo, FL 621708; (407) 366-0110	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Orberson, Steven Lynn	P.O. Box 99206, Louisville, KY 40299; (502) 267-9432	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000491

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Ordonez, Tina	Chevron Mini Mart #1, 2525 E. 70th , Shreveport, LA ; (318) ###-####	Information regarding defendants' exclusionary practices
CWD	Orr, Susanna Elizabeth	P.O. Box 151574, Austin, TX 78745; (512) 442-2649	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Osterhat, Zach	Bob's Interstate Amoco, I 94 & Hwy 16, Box 700, Beach, ND 54301; (414) 465-8376	Information regarding defendants' exclusionary practices
third party	Ostron, Q.C.	Speedway, 2445 University, Green Bay, WI	Information regarding defendants' exclusionary practices

16diii000492

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	O'Toole, R.F., Jr.	P.O. Box 427, Camden, DE 19934; (302) 736-1211	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Page, Mike		Information regarding defendants' exclusionary practices
CWD	Pallen, P.A.	P.O. Box 3, Hilliard , OH 4302-0003; (614) 850-0508	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000493

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Parish, Todd		Information regarding defendants' exclusionary practices
CWD	Parker, B.D.	P.O. Box 40354, Indianapolis, IN 48240; (317) 581-1312	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Parrish, Jill	(904) 769-4421	Information regarding defendants' exclusionary practices

16diii000494

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Parrott, Tom		Information regarding defendants' exclusionary practices
CWD	Pasteur, Robert Edward	329 East I-30, #102, Garland, TX 75043; (972) 240-9203	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Pate, Jeff		Information regarding defendants' exclusionary practices
UST	Pati, Jeff		Information regarding defendants' exclusionary practices
CWD	Paulk, R.L.	P.O. Box 1471, Lake Elsinore, CA 92531-1471; (909) 674-4177	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000495

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Pearson, R.L.	P.O. Box 25881, Salt Lake City , UT 84125; (801) 965-6801	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Peglou, B.	Hooks Drugstore, 2806 Ashman St., Midland, MI 51529; (712) 643-5852	Information regarding defendants' exclusionary practices
CWD	Peroni, D.F.	P.O. Box 2227, Wheeling, WV 26003; (304) 242-0254	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Perri, F.S.	P.O. Box 1475, Clarksburg, W. VA 26301; (304) 622-4965	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000496

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Peterson, Nathan		Information regarding defendants' exclusionary practices
CWD	Petre, K.A.	P.O. Box 12687, Dothan, AL 36302; (334) 793-3834	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Petrey, George F.	P.O. Box 1191, Dothan, AL 36302; (334) 793-3634	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Phillips, Bobby		Information regarding defendants' exclusionary practices
CWD	Phillips, Kelsie Lee	P.O. Box 20113, Jackson, MS 39289; (601) 923-9712	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000497

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Phillyno, Dave	Dave's Country Store, 720 Iowa Ave., Dunlap, IA 46016; (317) 622-9663	Information regarding defendants' exclusionary practices
third party	Pierce, L.	Low Bob's, 2116 St. Rd. 9 South, Anderson, IN 74727; (405) 566-9906	Information regarding defendants' exclusionary practices
third party	Pierce, Randy	Pierce Grocery, Hwy 70, Boswell, OK 77379; (281) 370-6366	Information regarding defendants' exclusionary practices
CWD	Platoff, T.E.	P.O. Box 116, Republic, MO 65738; (417) 732-4481	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000498

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Pool, Peter	Klein Quick Check, 7110 Lovetta, Spring, TX 49017; (616) 968-3371	Information regarding defendants' exclusionary practices
UST	Poore, Matt		Information regarding defendants' exclusionary practices
CWD	Pope, J.R.	P.O. Box 2, Orland Park, IL 60462; (708) 301-8267	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Porman, Cindy		Information regarding defendants' exclusionary practices

16diii000499

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Powell, Bill	United Super, Hewitt, TX 58501; (701) 428-3069	Information regarding defendants' exclusionary practices
CWD	Powell, Dwight Baden	P.O. Box 46, Ashland, VA 23005; (804) 796-1618	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Prater, Dennis Ray	P.O. Box 16, Wheelersburg, OH 45694; (740) 820-4475	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Pratschiner, Nancy	Express Lane, Country Rd. 15, Kindred, ND 63555; (816) ###-####	Information regarding defendants' exclusionary practices
CWD	Price, D.M.	P.O. Box 2121, Independence, MO 64055-0021; (816) 478-4093	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000500

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Pruett, Lawrence		Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Pugh, Rich		Information regarding defendants' exclusionary practices

16diii000501

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST (former)	Pugh, Rick	Cartersville, GA	Information regarding defendants' exclusionary practices
CWD	Pulley, John Wesley	1515 Barraud Court, Katy, TX 77449; (281) 347-6640	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Pulliam, Kasey		Information regarding defendants' exclusionary practices

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Quirk, J.B.	P.O. Box 2045, West Chester, PA 19380; (810) 436-9996	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Ragain, D.R.	7406 S. Gerdes Road, Mapleton, IL 61547; (309) 697-0625	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Rahaly, J.		Information regarding defendants' exclusionary practices
UST	Rawaly, John		Information regarding defendants' exclusionary practices

16diii000503

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Ray, Harold Ray	P.O. Box 250, Pinson, AL 35126; (205) 274-8328	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Reeder, Donald Charles	P.O. Box 9177, Metairie, LA 70055; (504) 833-6992	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Reiman, Craig		Information regarding defendants' exclusionary practices
UST	Reining, Geoff		Information regarding defendants' exclusionary practices

16diii000504

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Rendon, Diane	Randalls, 12555 Weathermer, Houston, TX 71220; (318) 281-9384	Information regarding defendants' exclusionary practices
third party	Renfro, Nell	Bentonville, AR	Information regarding defendants' exclusionary practices
CWD	Reynolds, Craig Hillyer	P.O. Box 71131, Albany, GA 31708; (912) 888-3353	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Rhedis, Jerri	Wal-Mart, 2030 East Madison, Bastrop, LA 77879; (409) 596-2073	Information regarding defendants' exclusionary practices
CWD	Ricard, G.A.	P.O. Box 385, Oxford , MI 48371; (248) 969-0652	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000505

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Rice, G.H.	P.O. Box 1858, Costa Mesa, CA 92628-1858; (714) 7511-8528	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Richey, Burton Oscar Jr.	P.O. Box 150234, Lufkin, TX 75918; (409) 632-5065	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Riley, Frank Taylor	P.O. Box 1731, Greenwood, MS 38930; (601) 453-8211	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Riley, Judy	Circle K, Hwy 36, Somerville, TX	Information regarding defendants' exclusionary practices

16diii000506

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Riley, Perry		Information regarding defendants' exclusionary practices
third party	Ritz, Dorothy	Q-Midwest, Spring Park, MN	Information regarding defendants' exclusionary practices
CWD	Roberson, E.S.	813 Ridge Lake Blvd., P.O. Box 217, Memphis, TN 38101 0217	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff; defendants' promotion of anti-competitive settlements and/or legislation

16diii000507

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Robinson, Charles		Information regarding defendants' exclusionary practices
CWD	Robinson, I.H.		Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Robinson, Jan	Quick Stop Food Stores, Flushing, MI	Information regarding defendants' exclusionary practices
UST	Rodgers, Nate		Information regarding defendants' exclusionary practices

16diii000508

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Roe, D.R.	P.O. Box 857, Middletown, OH 45044-0857; (513 743-3237	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Rogers, Gene	P.O. Box 70906, Albany, GA 31708; (912) 431-2064	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Rogers, Horace Lynn	P.O. Box 2122, Tupelo, MS 38801; (601) 842-9626	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Roqueimore, Messa	Texaco Food Mart, 8955 Mansfield Rd, Shreveport, LA 27019; (910) 591-5113	Information regarding defendants' exclusionary practices

16diii000509

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Rose, Ruby	Texaco Food Mart #7, Hwy 8 & 65, Germantown, NC 27020; (910) 591-5114	Information regarding defendants' exclusionary practices
UST	Ross, Dave		Information regarding defendants' exclusionary practices
CWD	Rosson, W.M.	813 Ridge Lake Blvd., P.O. Box 217, Memphis, TN 38101 0217	Information regarding manufacturing practices in the moist snuff industry; defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff; defendants' promotion of anti-competitive settlements and/or legislation

16diii000510

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Roux, S.D.	P.O. Bpx 1341, Maple Grove, MN 55311; (612) 420-8963	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Ruching, M.	Rushings Tobacco Shop, 3414 N. Main, Liberty , TX ; (###) 994-0224	Information regarding defendants' exclusionary practices
CWD	Rumley, Charles Bruce	P.O. Box 1317, Channelview, TX 77530; (281) 452-4147	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Russel, Tim	Hay's Supermarket, 710 Moultrie, Blytheville, AR	Information regarding defendants' exclusionary practices
UST	Russell, Mac		Information regarding defendants' exclusionary practices

16diii000511

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Russell, R.J.	P.O. Box 3, Williamsburgh, IN 47393; (765) 886-5153	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Ryan, Gary Wayne	P.O. Box 261, Sikeston, MO 63801; (573) 471-1920	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Saddler, Andy	Pit Stop Market	Information regarding defendants' exclusionary practices
UST	Salimi, Sam		Information regarding defendants' exclusionary practices
third party	Sandus, Delilia	Sinclair, 4301 SE 29th, Drill City, OK	Information regarding defendants' exclusionary practices

16diii000512

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Sartin, Chris	Admiral, 519 Main, Freemont, MI ; 202-452-1252	Information regarding defendants' exclusionary practices
third party	Saunders, Jerry	Bella Vista, AR	Information regarding defendants' exclusionary practices
CWD	Savage, N.F.	P.O. Box 585, Vestal, NY 13851-0685; (607) 785-1708	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Schlagenhauf, Jeff	Smokeless Tobacco Company, 1627 K. Street NW, Washington, DC 46135; (317) 653-2481	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff; defendants' promotion of anti-competitive settlements and/or legislation

16diii000513

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Schneider, W.T.	P.O. Box 376, Betterdorf, IA 52722-0375; (319) 332-8698	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Schoeler, G.J.	P.O. Box 3836, Federal Way, WA 96063; (253) 838-6473	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Schofield, Marlene	Wal-Mart, 25 Dutnam Plaza, Greencastle, IN 46136; (317) 653-2482	Information regarding defendants' exclusionary practices
CWD	Schultz, Ken	813 Ridge Lake Blvd., P.O. Box 217, Memphis, TN 38101 0217	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Schuppel, J.S.	P.O. Box 8033, Eau Claire, WI 54702-8033; (715) 831-7852	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Scriber, Rick	Woodland Oil Co., , MI ; (504) 252-4211	Information regarding defendants' exclusionary practices
UST	Segelstrom Don		Information regarding defendants' exclusionary practices

16diii000515

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Seidel, L.R.	P.O. Box 2541, Vacaville , CA 95687; (707) 451-7204	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Selmer, Judy	Sentry, 2100 Reidge, Green Bay , WI 59801;	Information regarding defendants' exclusionary practices
CWD	Senger, J.G.	P.O. Box 50488, Billings, MT 58105; (406) 248-9291	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Senn, Mike		Information regarding defendants' exclusionary practices

16diii000516

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Sepulveda, Juan Carlos	P.O. Box 840108, Pember Pine, FL 33308; (954) 389-1800	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Shaneberger, S.R.	p.o. BOX 817, Saylorsburgh, PA 18353-0817; (610) 381-49325	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Shannon, John		Information regarding defendants' exclusionary practices

16diii000517

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Shearer, Paul	(304) 842-5059	Information regarding defendants' exclusionary practices
third party	Shelby, Jennifer	Quarry Mini Mart, 2206 Velp, Green Bay, WI	Information regarding defendants' exclusionary practices
third party	Sherman, Linda	Fred's Discount Store, Arkadelphia, AR 76645	Information regarding defendants' exclusionary practices

16diii000518

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Shiffield, Michael	Hillsboro Fastop, Hwy 22 & Hwy 35, Hillsboro, TX	Information regarding defendants' exclusionary practices
UST	Shilts, Mark		Information regarding defendants' exclusionary practices
UST	Short, (first name unknown)		Information regarding defendants' exclusionary practices
UST	Shurtz, Nancy	(804) 422-5426	Information regarding defendants' exclusionary practices

16diii000519

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Simpson, David L.	813 Ridge Lake Blvd., P.O. Box 217, Memphis, TN 38101 0217; (901) 761-2050	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Sinel, Tammy	Cenex, 706 N. Mill, Weyanuega, WI 77803; (404) 778-6981	Information regarding defendants' exclusionary practices
CWD	Singletary, P.		Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Slabbakorn, M.		Information regarding defendants' exclusionary practices

16diii000520

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Smith, A. Gary		Information regarding defendants' exclusionary practices; defendants' promotion of anticompetitive settlements and/or legislation
third party	Smith, Dana	Circle K #3312, 2205 N. Hugh, Bryan , TX 27408; (910) 373-6600	Information regarding defendants' exclusionary practices
UST	Smith, Darryl		Information regarding defendants' exclusionary practices
UST	Smith, Kelly		Information regarding defendants' exclusionary practices

16diii000521

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Smith, Morgan H.	P.O. Box 65, Kinston, NC 28502; (919) 526-0293	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Smith, Pat	P.O. Box 4776, Winter Park, FL 32793; (407) 672-2155	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Smith, Robert		Information regarding defendants' exclusionary practices
UST	Smith, Stacy		Information regarding defendants' exclusionary practices
CWD	Sodosky, Terry Lee	P.O. Box 189, Beckley, W. VA 25801; (304) 877-2909	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000522

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Sopko, J.R.	P.O. Box 360782, Strongsville, OH 44136; (216) 572-1959	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Sparks, Darrell Lew	P.O. Box 1736, North Wilksboro, NC 28659; (336) 957-2646	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Sparks, Thomas Milton	P.O. Box 27, Flatwoods, KY 41139; (606) 836-3590	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Spears, Alexander W.	Lorillard, 714 Green Valley Road, Greensboro, NC 56529; (218) 287-2208	Information regarding defendants' promotion of anti-competitive settlements and/or legislation
UST	Stanke, Mike		Information regarding defendants' exclusionary practices

16diii000523

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Stare, Reggie	Lenex "C" Store, 1707 Hwy 10 West, Moorhead, MN 59102; (406) 652-9698	Information regarding defendants' exclusionary practices
CWD	Steele, Lawrence Edward	P.O. Box 11112, Lynchburg, VA 24506; (804) 846-2642	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Stevens, Marti	Kwik Way, 2010 Henesta, Billlings, MT ; (412) 727-2411	Information regarding defendants' exclusionary practices
third party	Stewart, H.	Glassmart, 1824 Hancock Avenue, Apollo, PA 54220; (414) 683-0294	Information regarding defendants' exclusionary practices

16diii000524

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Stewart, J.A.	P.O. Box 4000-178, Olathe, KS 86063-40000; (913) 764-4784	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Stewart, James Darrell	P.O. Box 3015, Cookeville, TN 38501; (931) 432-4490	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Stickley, P.D.	P.O. Box 7446, Carlisle, IA 50047-0074; (515) 989-9185	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Stockton, Kenneth Wayne	P.O. Box 54916, Oklahoma City, OK 73154; (405) 521-0788	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000525

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Stokes, S.		Information regarding defendants' exclusionary practices
CWD	Stokes, S.T.	P.O. Box 868, Acworth, GA 30101-06886; (770) 425-5964	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Stoll, Neal	Skadden Arps, 919 3rd Avenue, Floor 35, New York, NY;(212)735-3660	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Stone, George		Information regarding defendants' exclusionary practices

16diii000526

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Street, Tommy		Information regarding defendants' exclusionary practices
CWD	Strickland, James Ellis	P.O. Box 287, Meridian, MS 39301; (601) 693-7929	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Sullivan, K.R.	P.O. Box 623, New Hartford, NY 13413; (315) 733-1782	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Swanson, G.P.	P.O. Box 2848, Eugene, OR 97402; (541) 683-5880	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Swisher, Brian		Information regarding defendants' exclusionary practices

16diii000527

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Sylvester, Donna	Foss & Fuel, Hwy 19 & Carver St., Wintrop, MN ; (507) 647-5931	Information regarding defendants' exclusionary practices
CWD	Sympson, Marvin Robert	P.O. Box 371, Mayfield, KY 42066; (502) 247-3685	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Szydel, Ellen	Q Mart, 707 Ellis, Kenonee, WI	Information regarding defendants' exclusionary practices
UST	Tammy, Jerry		Information regarding defendants' exclusionary practices

16diii000528

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST (former)	Tanner, Richard		Information regarding defendants' exclusionary practices
UST	Tate, Bob		Information regarding defendants' exclusionary practices
third party	Taylor, C.T.	Spee-N-Mart, 122 Chicago, Jonesville, MI 49601; (616) 775-4891	Information regarding defendants' exclusionary practices
CWD	Taylor, D.H.	P.O. Box 15185, Duluth, MN 86815; (218) 728-4014	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000529

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Taylor, H.		Information regarding defendants' exclusionary practices
CWD (former)	Taylor, Hardy	9452 Doe Meadow Drive, Germantown, TN 38138	
UST	Taylor, Judy		Information regarding defendants' exclusionary practices
CWD	Taylor, M.E.	P.O. Box 301453, Portland , OR 97294; (503) 244-4906	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000530

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Tefteller, Gary Matthew	P.O. Box 927, Texarkana, TX 75504; (870) 772-5952	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Tennua, Joe		Information regarding defendants' exclusionary practices
third party	Terrel, Sheila	Quick Foods #19, 8185 E M 115, Cadillac, MI	Information regarding defendants' exclusionary practices
UST	Theobald, Gary		Information regarding defendants' exclusionary practices
UST	Thibodeaux, Bruce		Information regarding defendants' exclusionary practices

16diii000531

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Thomas, Elana	Admiral, 631 State, Big Rapids , MI 71930; (501) 865-3695	Information regarding defendants' exclusionary practices
UST	Thorn, Gary		Information regarding defendants' exclusionary practices
CWD	Thorn, Paul Jeffery	P.O. Box 5021, Vienna, W. VA 26105; (304) 295-0219	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Thornton, Gary	T&T Trading Post, Roue 8, Box 206, Bismark, AR 71929; (210) 523-1091	Information regarding defendants' exclusionary practices
CWD	Threlkeld, Terry Maurice	P.O. Box 1393, Pine Bluff, AR 71613; (870) 879-5731	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000532

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Tiemain, Jerry	Wal-Mart #1235, 5025 Hwy 410, San Antonio, TX 78202; (210) 523-1091	Information regarding defendants' exclusionary practices
UST	Toth, Dave		Information regarding defendants' exclusionary practices
third party	Townsend, Ronnie	Stax #1782, 4500 S I-35, Oklahoma City, OK 71854; (870) 772-9555	Information regarding defendants' exclusionary practices
CWD	Troglin, Michael Todd	P.O. Box 12026, Odessa Odessa, TX 79768; (800) 238-5990	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Trummell, Juanita	E-Z Mart #544, 906 State Line Ave., Texarkana, TX 93003; (805) 647-9434	Information regarding defendants' exclusionary practices

16diii000533

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Uhlenhake, Clay		Information regarding defendants' exclusionary practices
CWD	Umshler, S.	14617 Drexel Street, Omaha, NE 68137; (402) 895-0806	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Van Duersen, Heather	14 Chardonnay Court, Grand Junction, CO 81503; (901) 241-5777	Information regarding defendants' exclusionary practices
CWD	Vandergriff, John W.	P.O. Box 18272, Knoxville, TN 27928; (433) 522-2452	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Vasquez, S.	Circle K, 11501 Citrus Drive; Ventura, CA 56716; (218) 281-3690	Information regarding defendants' exclusionary practices

16diii000534

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Vaudru, Linda	Hugo's, 1310 University Drive, Crookston, MN	Information regarding defendants' exclusionary practices
CWD	Vaught, Charles	813 Ridge Lake Blvd., Memphis, TN 38120; (901) 761-2050	Information regarding manufacturing practices in the moist snuff industry; defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000535

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Vernon, Mr.	Yakima Distributors, Tri Cities, WA 01534; (508) 234-9431	Information regarding defendants' exclusionary practices
third party	Voecks, David	Winn Dixie, Orlando, FL ;	Information regarding defendants' exclusionary practices

16diii000536

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Voight, D.	Albertson's, 5500 South 6th Street, Klamath Falls, OR	Information regarding defendants' exclusionary practices
third party	Voshell, Bob	NJ	Information regarding defendants' exclusionary practices

16diii000537

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Vrondron, John	(616) 436-5721	Information regarding defendants' exclusionary practices
CWD	Wadkins, Franklin Martin	6801 Velvet Antler Court, Midlothian, VA 23112; (804) 739-2319	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Waldenheger, Martha		Information regarding defendants' exclusionary practices
CWD	Walke, B.J.	P.O. Box 14648, Phoenix, AZ 85063; (602) 849-1130	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000538

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Wall, Kathryn Walker	2528 Tall Pines Lane, Matthews, NC 28105; (704) 845-0925	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Wallow, Ed	8775 Drumlin Heights, Baldwinsville, NY 13027; (315) 635-2672	Information regarding defendants' exclusionary practices
third party	Walters, Tina	GA	Information regarding defendants' exclusionary practices
UST	Ward, Galen		Information regarding defendants' exclusionary practices
CWD	Warneke, Jeff C.	P.O. Box 10492, Conway, AR 72033; (501) 327-1865	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000539

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Washer, Geogre Ken	P.O. Box 99, Benton, LA 71006; (318) 965-0401	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST (former)	Watson, Keith		Information regarding defendants' exclusionary practices
CWD	Watters, Barru Eugene	P.O. Box 18008, South Charleston, WV 25303; (304) 744-4412	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Weatherely, Sara		Information regarding defendants' exclusionary practices

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST (former)	Weatherly, Sarah	Louisville, TX	Information regarding defendants' exclusionary practices
CWD	Webster, D.T.	P.O. Box 6935, Rochester, MN 55903-6935; (507) 288-5871	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Wethington, Sue	Hop-IN, AnnArbor, MI 27932; (919) 482-4854	Information regarding defendants' exclusionary practices

16diii000541

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	White, Joseph	Etna, Bread Street, Edenton, NC ; (414) 388-5070	Information regarding defendants' exclusionary practices
third party	White, Marrie	Kewanee Town Mart, 323 N. Miluanke, Kewanee, WI ; (317) 392-4688	Information regarding defendants' exclusionary practices
CWD	White, Ronald Edgar	P.O. Box 5383, Abilene, TX 79608; (915) 676-9110	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	White, Tim		Information regarding defendants' exclusionary practices

16diii000542

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Whiteford, Brenda	Crystal Flash, 1005 N. Riley Hwy, Shelbyville, IN ; (317) 392-4688	Information regarding defendants' exclusionary practices
CWD	Whorton, Donald Lewis	P.O. Box 138, Gadsden, AL 35901; (205) 492-7217	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Wickman, Charles V.	P.O. Box 443, Washington, IN 47501; (812) 254-6172	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000543

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Wickware, Tiffany	Kwik Stop, Shawnee, OK	Information regarding defendants' exclusionary practices
CWD	Wiggins, Kenneth Reed	P.O. Box 850154, Mobile, AL 36685; (334) 649-6631	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Wilde, Bonnie	Premium Quick Stop, 1078 Portage, S.S. Marie, MI 49783; (906) 635-9055	Information regarding defendants' exclusionary practices

16diii000544

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Wiley, Mike	U-Save, Jasper, TX ;	Information regarding defendants' exclusionary practices
CWD	Willding, Guy William	P.O. Box 13074, Maumelle, AR 72113; (501) 851-7819	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Williams, Catherine	Piggly Wiggly #141-z, 3873 Choctaw, Baton Rouge, LA 70805	Information regarding defendants' exclusionary practices
CWD	Williams, Charles D.	P.O. Box 561, Murfreesboro, TN 37133; (615) 896-1342	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000545

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST	Williams, Charlie		Information regarding defendants' exclusionary practices
CWD	Williams, Del Ray II	P.O. Box 721302, Oklahoma City, OK 73172; (405) 341-6920	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Williams, Doyle		Information regarding defendants' exclusionary practices

16diii000546

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Williams, T.M.	813 Ridge Lake Blvd., Memphis, TN 38120; (901) 761-2050	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000547

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
UST (former)	Williams, Trace		Information regarding defendants' exclusionary practices

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Wilson, Gary Eddie	P.O. Box 498, Mauldin, SC 29662; (864) 281-9659	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Wilson, John S. III	813 Ridge Lake Blvd., Memphis, TN 38120; (901) 761-2050	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
third party	Wilson, Patricia	Kwik Stop, 822 N. Harrison, Shawnee, OK	Information regarding defendants' exclusionary practices
UST	Wingret, Scott		Information regarding defendants' exclusionary practices

16diii000549

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Wolfe, Gayla	Corner G-Store, 7500 Bosque Blvd., Waco, TX 76710; 772-0076	Information regarding defendants' exclusionary practices
third party	Wolfe, Maine B.	S7 Cigarette Store #307, 411 W. Broadway, Jawistown, MT 59457; (406) 538-6543	Information regarding defendants' exclusionary practices
third party	Wolfe, Maxine	S7 Cigarette Store #307, 411 West Broadway, Lewiston, MT 59457; (406) 538-6543	Information regarding defendants' exclusionary practices
UST	Womack, Gary		Information regarding defendants' exclusionary practices
CWD	Woodall, Ricky A.	P.O. Box 714, Lawton, OK 73501; (580) 355-0549	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000550

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
CWD	Woods, James Andrew	P.O. Box 140453, Memphis, TN 38114-0453; (901) 774-2018	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Woodson, George	P.O. Box 401, Glasgow, KY 42142; (502) 651-8218	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
UST	Wooten, Ron		Information regarding defendants' exclusionary practices
CWD	Workman, Richard Alan	P.O. Box 1001, Johnson City, TN 37605; (423) 542-0985	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff
CWD	Worley, R.C.	P.O. Box 6383, Fresno, CA 3703; (209) 355-5177	Information regarding defendants' exclusionary practices; plaintiffs' efforts to compete in the market for moist snuff

16diii000551

Party Affiliation	Name	Last Known Address and Telephone Number	Subject of Information
third party	Wright, Lula	Etna, Bread Street, Edenton, NC 27932; (919) 482-4854	Information regarding defendants' exclusionary practices
third party	Wright, Michelle	Phil Flint Oil Co.	Information regarding defendants' exclusionary practices

16diii000552

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED **HIGHLY CONFIDENTIAL SUBJECT TO PROTECTIVE ORDER**

PLAINTIFFS' INITIAL DAMAGES COMPUTATIONS

Preliminary Statement

Pursuant to Fed. R. Civ. P. 26(a)(1)(C), plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood"), make the following disclosure of their preliminary computations of damages.

Plaintiffs make this disclosure based on the information that is reasonably available to them at this time. Plaintiffs have not received any discovery, and have not otherwise completed their investigation of the case. Plaintiffs expect the calculation of damages to be the subject of expert analysis and testimony and accordingly subject to the disclosures of Rule 26(a)(2) and the Court's order of July 8, 1998.

This initial disclosure is based on and contains Conwood's proprietary or otherwise confidential information. Conwood therefore designates this disclosure as "Highly Confidential Information."[1]

Initial Computation of Damages

Conwood alleges that United States Tobacco Company, United States Tobacco Sales & Marketing Company, United States Tobacco Manufacturing Company, and UST Inc. (collectively, "UST"), have unlawfully monopolized or attempted to monopolize the national moist snuff market by, inter alia, removing or defacing Conwood retail distribution racks, point-of-sale advertising, and products; frequently changing the style of distribution racks in order to raise rivals' costs; promulgating exclusive dealing arrangements designed to foreclose competitors' distribution channels; disparaging Conwood products; and predatory pricing. See Complaint ¶¶ 22-31. Conwood also alleges that it has lost sales, profits, goodwill, and business reputation as a result of UST's false representations about Conwood products, id. ¶ 48; that UST has interfered with its actual and prospective contractual and economic relationships, id. ¶ 50-57; that it has engaged in the secret and unlawful payment or allowance of rebates, refunds, commissions or unearned discounts, id. ¶ 58-60; that it has unlawfully defamed Conwood products, id. ¶ 61-66;

[1]By agreement of the parties, this information will be treated as "Highly Confidential Information" subject to the terms of defendants' proposed Protective Order of July 14, 1998 pending the Court's entry of a protective order.

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that UST has been unjustly enriched by its unlawful conduct, id. ¶ 67-69; and that it has intentionally converted Conwood property, including racks, point of sale advertisements, and moist snuff products, id. ¶ 70.

Conwood expects at trial to prove actual damages[2] consisting of the profits plaintiffs lost in each of the four years immediately preceding the commencement of the action as well as profits that plaintiffs will lose in the future as the result of defendants' past conduct.

A. Past Profits

In 1994, 53,177,000 pounds of moist snuff were sold nationwide; the total market was 54,081,000 pounds in 1995, 56,786,000 pounds in 1996, and 58,051,000 pounds in 1997.[3]

Total Nationwide Moist Snuff Market (pounds)

1994	53,177,000
1995	54,081,000
1996	56,786,000
1997	58,051,000

Conwood believes that substantially more moist snuff would have been sold during the period from 1994-97 had defendants not

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[2]For purposes of these initial computations, plaintiffs have excluded pre- and post-judgment interest, statutory penalties, treble damages and punitive damages, as well as damages that may accrue in the future if defendants continue their anticompetitive activities.

[3]Conwood bases its present calculations on information for fiscal years ending January, 1995, through January, 1998, except for information concerning pounds of moist snuff sold, which are for calendar years 1995 through 1997.

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suppressed the availability of competitors' products, advertisements, and distribution systems. Conwood is not yet prepared to estimate total moist snuff sales for the period from 1994-97 without defendants' misconduct, and accordingly for present purposes uses only the actual figures in its computations.

Conwood's share of the moist snuff market was 13.0 percent in 1994, 13.3 percent in 1995, 13.6 percent in 1996, and 13.6 percent in 1997. Conwood estimates, preliminarily, that its market share would have increased at least to the levels listed below if defendants had not suppressed competition ("but for" share).

Conwood's Market Share

year	actual market share	"but for" share
1994	13.0	19.0
1995	13.3	19.3
1996	13.6	19.6
1997	13.6	19.6

Based on the increased market share listed above, Conwood would have sold substantially more moist snuff in each of the four years preceding the filing of this action. The following table reflects the additional sales (by pound) that Conwood believes it would have made absent UST's anticompetitive conduct.

16diii000557

Additional Conwood Sales (by pound)

year	actual net sales (pounds)[4]	"but for" net sales (pounds)	additional net sales (pounds)
1994	6,063,300	8,871,046	2,807,746
1995	6,454,500	9,374,874	2,920,374
1996	6,998,500	10,088,794	3,090,294
1997	7,028,900	10,132,306	3,103,406

Conwood earned an average net profit per pound of $12.98 in 1994, $14.59 in 1995, $14.95 in 1995, and $14.92 in 1997 for its moist snuff products. For its additional sales, Conwood thus estimates that it would have received additional profits as follows.

Additional Conwood Profits (dollars)

year	add'l sales (pounds)	net profit/lb.	add'l profits (dollars)
1994	2,807,746	$12.98	$36,444,543.08
1995	2,920,374	$14.59	$42,608,256.66
1996	3,090,294	$14.95	$46,199,895.30
1997	3,103,406	$14.92	$46,302,817,52

Conwood believes that its net profit per pound for the period from 1994-97 was adversely affected by defendants' misconduct. Absent this misconduct, Conwood's unit costs would have been lower (and its profits higher) for at least two reasons. First, defendants' misconduct reduced plaintiffs' sales

[4]Net sales are derived by subtracting all gratis and sample pounds from gross pounds sold.

of moist snuff (as noted above). At significantly higher sales volumes, Conwood would have benefitted from greater efficiencies of scale. (For example, Conwood believes that defendants currently enjoy lower unit costs than Conwood because of their higher sales volume.) Second, Conwood's costs were increased significantly by defendants' anticompetitive conduct. For example, Conwood incurred substantial costs as a result of UST's destruction, removal, defacement, or alteration of Conwood racks, advertisements, and products. Conwood's present estimate is that its unit costs in each year of the damages period would have decreased by at least 10% if defendants had not engaged in anticompetitive conduct. Conwood's actual historical costs per pound of moist snuff sold (unit costs) totaled $6.01 in 1994, $5.82 in 1995, $5.71 in 1996, and $6.09 in 1997. Accordingly, Conwood believes that its "but for" sales should be multiplied by this estimated (10%) cost reduction per pound, to produce additional profits as listed below.

Additional Profits Due to Reduced Expenses

year	but for net sales (pounds)	reduced cost/lb.	Conwood's add'l profits (dollars)
1994	8,871,046	$0.60	$5,322,627.60
1995	9,374,874	$0.58	$5,437,426.92
1996	10,088,794	$0.57	$5,750,612.58
1997	10,132,306	$0.61	$6,180,706.66

By adding its estimated additional profits from additional sales and reduced expenses, Conwood reaches its preliminary

computation of total lost profits for each year of the damages period.

Conwood's Lost Profits

year	add'l profits from sales	cost reductions	net lost profits
1994	$36,444,543.08	$5,322,627.60	$41,767,170.68
1995	$42,608,256.66	$5,437,426.92	$48,045,683.58
1996	$46,199,895.30	$5,750,612.58	$51,950,507.88
1997	$46,302,817.52	$6,180,706.66	$52,483,524.18

By adding the net lost profits in each of the four years of the damages period, Conwood presently estimates that its lost profits for the period from 1994-97 total $194,246,886.32.

Conwood's preliminary computation may be substantially affected by further analysis of relevant factors. Conwood is continuing its evaluation of all relevant factors and expects to refine its damage estimates as the case proceeds.

B. Future Profits

In 1997, 58,051,000 pounds of moist snuff were sold nationally. Third parties expect the moist snuff market to grow rapidly over the next ten years. Conwood is not yet prepared to estimate how rapidly the overall market will grow and, accordingly, for purposes of this computation assumes growth in the market of only two percent per year in each of the next ten years.

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Market Growth

Year	Moist Snuff Market/pounds at 2% growth rate/year
1998	59,212,020
1999	60,396,260
2000	61,604,185
2001	62,836,994
2002	64,092,994
2003	65,374,854
2004	66,682,351
2005	68,015,998
2006	69,376,318
2007	70,763,844

As a result of defendants' past misconduct, Conwood has been effectively foreclosed from certain retail outlets and distribution channels, it has lost the chance to gain loyal brand users, other moist snuff users have permanently changed to defendants' brands, and opportunities to induce defendants' brand users to switch may be restricted by regulatory efforts to reduce or eliminate tobacco advertising and in-store display. Conwood estimates that even if defendants cease their misconduct today, over the next ten years their past actions will effectively foreclose Conwood from selling moist snuff equal to approximately three percent of the overall moist snuff market.

Conwood's Lost Market Share (pounds)

Year	Total Market (Pounds)	Conwood's Net Lost Market Share (3%) (Pounds)
1998	59,212,020	1,776,361
1999	60,396,260	1,811,888
2000	61,604,185	1,848,126
2001	62,836,269	1,885,088
2002	64,092,994	1,922,790
2003	65,374,854	1,961,216
2004	66,682,351	2,000,471
2005	68,015,998	2,040,480
2006	69,376,318	2,081,290
2007	70,763,844	2,122,915

Third parties estimate that moist snuff prices will rise in coming years. With the additional market penetration and increased volume Conwood could achieve in a competitive market, as well as the absence of any need to incur costs in response to UST misconduct, Conwood would expect its costs per unit to drop substantially in the future. Conwood is not yet prepared to estimate market prices and its costs over the next ten years absent UST misconduct; accordingly, for present purposes Conwood assumes its profits per pound will remain constant from 1997 through 2007, at $14.92 (excluding even nominal price increases due to inflation and other factors). Conwood, thus, calculates its lost future profits as follows.

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Conwood's Lost Future Profits

Year	Conwood's Net Lost Market Share (Pounds)	Profit per pound	Conwood's Lost Future Profits
1998	1,776,361	$14.92	$26,503,306
1999	1,811,888	$14.92	$27,033,369
2000	1,848,126	$14.92	$27,574,040
2001	1,885,088	$14.92	$28,125,513
2002	1,922,790	$14.92	$28,688,027
2003	1,961,216	$14.92	$29,261,343
2004	2,000,471	$14.92	$29,847,027
2005	2,040,480	$14.92	$30,443,962
2006	2,081,290	$14.92	$31,052,847
2007	2,122,915	$14.92	$31,673,892

By adding the profits Conwood will lose in each of the next ten years, Conwood presently estimates that its lost future profits total $290,203,326. To determine the net present value of these losses, Conwood will use defendants' borrowing rate. For present purposes, assuming a borrowing rate of 8.5 per cent (June 1998 Bank Prime Rate), the net present value of Conwood's future losses is approximately $203,883,235.

This preliminary computation may be substantially affected by further analysis of relevant factors. Conwood is continuing its evaluation of all relevant factors and expects to refine its damage estimates as the case proceeds.

Documents that support plaintiffs' initial damages calculation are provided with plaintiffs' Rule 26(a)(1)(B) disclosures.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTIONS FOR LEAVE TO FILE "SUR-RESPONSES"

Plaintiffs have filed two separate motions for leave to file "sur-response" briefs in order to address what they now claim are "new grounds" raised in the reply briefs in support of Defendants' Rule 12(b) motions. It is abundantly clear, however, that no new grounds were raised in either reply brief, and that no new facts or legal arguments are presented in Plaintiffs' proposed "sur-responses." Rather, Defendants' reply briefs properly responded to the arguments that were first raised by Plaintiffs in their opposition papers, and that are now repeated by Plaintiffs. Accordingly, Plaintiffs' inappropriate attempts to have the last word should be denied.

ARGUMENT

Plaintiffs' motions for leave to file "sur-response" briefs should be denied for several reasons. First, Local Rule 7.1(d) specifically limits the number and type of memoranda allowed: "Memoranda pertaining to motions are limited to a supporting memorandum, an opposing

memorandum, and a reply memorandum." L.R. 7.1(d). There is no provision for filing "sur-responses," and Plaintiffs provide no basis for filing them here.[1] Second, as discussed below, Plaintiffs raise no new arguments on "sur-response," but instead, merely repeat the arguments made in their opposition papers.[2] Finally, Plaintiffs' motions are nothing more than an unreasonable delay of the disposition of the legal issues before the Court.

Plaintiffs' first "sur-response" brief asserts that UST Inc. raised for the first time in its reply brief that the Court lacks jurisdiction over it because it is merely a "holding company." Pl. Sur-Response #1, at 1. Plaintiffs, however, overlook — intentionally or otherwise — the principal argument of UST Inc.'s initial moving papers: "UST Inc., however, is simply a holding company that has never manufactured, sold or distributed moist snuff (or any other type of product) anywhere, including the Commonwealth of Kentucky." Def. Moving Papers at 2. To state that this is a "new ground" raised for the first time in UST Inc.'s reply brief is simply and obviously not true. Indeed, Plaintiffs' reliance on United States Liberty Life Ins. Co. v. Ryan, 985 F.2d 1320 (6th Cir. 1993), and Haile v. Henderson Nat'l Bank, 657 F.2d 816 (6th Cir. 1981), as well as Plaintiffs' reliance on insupportable allegations, are as misplaced on "sur-response" as they were in Plaintiffs' response brief. Defendant's authority and legal argument

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1 See Archdiocese of Milwaukee v. Underwriters at Lloyd's, London, 955 F. Supp. 1066, 1070 (E.D. Wis. 1997) (motion to file surreply denied where local rule limits memoranda to moving paper, response and reply); Valuejet Airlines, Inc. v. Transworld Airlines, Inc., 1996-2 Trade Cases ¶ 71,537, 1996 WL 557851, *2 (N.D. Ga. 1996) (same); Resolution Trust Corp. v. Youngblood, 807 F. Supp. 765, 774 (N.D. Ga. 1992) (same).

2 See Half Price Books, Records, Magazines, Inc. v. Riepe, 1998 WL 329383, *2 (N.D. Tex. 1998) (motion for leave denied where proposed surreply did not contain any new legal theories or evidence); Resolution Trust, 807 F. Supp. at 774 (motion denied where proposed surreply was "cumulative of the arguments presented in earlier pleadings").

so demonstrated. See, e.g.,Universal Services, Inc. v. Central Waste Systems, 1972-2 Trade Cases ¶ 61,140, 1976 WL 1339 (S.D. Ind. 1976) (regardless of proper service, jurisdiction over a parent corporation is not proper under Section 12 of the Clayton Act where the parent corporation does not transact business in the state).

Similarly, with respect to the Noerr-Pennington issues, Plaintiffs filed a second motion for leave to file a "sur-response" brief that primarily argues — in the face of Defendants' clear authority to the contrary — that a court may not dismiss a claim "in part" to the extent the claim is based on allegations of conduct protected by the Noerr-Pennington doctrine. Pl. Sur-Response #2, at 1-4.[3] This is the precise argument asserted in Plaintiffs' original opposition papers, see Pl. Opp., at 2-4. Plaintiffs' attempt to repeat the argument at this time not only is without merit, as demonstrated by Defendants' reply brief, but is also inappropriate. Plaintiffs also argue that Defendants' motion to dismiss "is really a motion to strike" and should be denied.[4] Defendants' motion, however, is and always has been a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Accordingly, the motion should be granted under the clear weight of authority presented in Defendants' moving papers and in Defendants' reply brief.

In short, where, as here, a moving party's reply brief directly addresses issues raised by a non-moving party's response brief, a motion to file a "sur-response" merely to repeat those

---

[3] It also should be noted that, contrary to Plaintiffs' assertion, Defendants do not concede that the remainder of Count I states a cognizable antitrust claim.

[4] Apparently, this argument is based on a footnote in Defendants' reply brief that properly responded to Plaintiffs' evasive statement that they do not seek to base antitrust liability on Defendants' petitioning activity. In response, Defendants respectfully suggested that, given this admission directly contradicting the Complaint, the Court can and should "on its own initiative at any time" strike Plaintiffs' allegations. See Fed. R. Civ. P. 12(f).

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issues is both unnecessary and inappropriate. See Half Price Books, Records, Magazines, Inc. v. Riepe, 1998 WL 329383, *2 (N.D. Tex. 1998) (where surreply was duplicative of plaintiff's arguments, moving defendant is entitled to the "last word").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion to file "sur-response" briefs to Defendants' motions to dismiss, and upon review of the properly filed memoranda, grant Defendants' Rule 12(b) motions.

Dated: July 22, 1998

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 22nd day of July, 1998.

Counsel for Defendants

16diii000569

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

The Plaintiffs having moved the Court for leave to file two "sur-response" briefs, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs' motions to file "sur-response" briefs are hereby denied.

Entered this _____ day of _____, 1998.

_____
UNITED STATES DISTRICT JUDGE

TENDERED BY:

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REPLY MEMORANDUM IN SUPPORT OF MOTIONS FOR LEAVE TO FILE SUR-RESPONSES

Defendants argue that the Court should deny Plaintiffs' Motions for Leave to File Sur-Responses because Local Rules do not provide for sur-responses and because their reply memoranda raised no new grounds warranting sur-responses. See Defendants' Memorandum in Opposition to Plaintiffs' Motions for Leave to File "Sur-Responses" at 1. Neither argument is correct.

Argument

1. The Court Has Discretion to Grant Leave to File Sur-Responses

Where local rules do not provide for the filing of a surreply, a district court "may grant leave to file a surreply at its discretion." American Forest & Paper Ass'n v. EPA, No. 93-CV-0694(RMU) 1996 WL 509601, at *3 (D.D.C. Sept. 4, 1996). A court may grant a proposed surreply simply because it "is helpful to the adjudication of the . . . motions in [the] case, and is not unduly prejudicial." Id.; see also City of Heath v. Ashland Oil, Inc., 834 F. Supp. 971, 974 (E.D. Ohio 1993) (granting a motion for leave

to file a surreply discussing legal issue because "the information provides the Court with additional helpful information on issues in dispute").

Where, as here, a party has introduced new legal arguments in a reply brief, it is the better practice to grant leave to file. See, e.g., Beaird v. Seagate Technology, Inc., Nos. 96-6087, 96-6145, 1998 WL 271563, at *4 (10th Cir. May 10, 1998) ("Having accepted the reply brief, the district court . . . . could either have permitted a surreply or . . . it could have refrained from relying on any new material contained in the reply brief."). This Court follows that practice. See Anheuser-Busch, Inc. v. Ford Motor Co., No. 93-526, 1997 WL 594498 (W.D. Ky. Feb. 10, 1997).

2. Defendants' Reply Memoranda Introduce New Legal Matter that Requires a Response

Defendants raise two new legal issues in their reply memoranda: the application of the venue provisions of the Clayton Act to this case; and the propriety of dismissing or striking factual allegations in the Complaint related to relevant conduct that is claimed to be immune from liability under Noerr-Pennington doctrine.

Personal Jurisdiction: On June 12, 1998, defendants filed two partial Motions to Dismiss. The first (with five pages of argument) claimed that plaintiffs' claim against UST Inc. ("Inc.") should be dismissed for lack of personal jurisdiction because 1) Inc. is not subject to jurisdiction under the Kentucky Long-Arm Statute and 2) exercise of jurisdiction under the Kentucky Long-Arm Statute as to Inc. would violate due process. In response, plaintiffs pointed out that the Court has jurisdiction under

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Section 12 of the Clayton Act, and defendants' arguments were without merit in any event.

In their Reply Memorandum, filed on July 10, 1998, defendants added eight pages to their original five pages of argument. They claimed for the first time that jurisdiction was not appropriate in this district under the Clayton Act because Inc. does not transact business in Kentucky. For this proposition, defendants cited four decades-old cases, none of which was cited in its opening brief.

In fact, the provision of the Clayton Act upon which defendants purport to rely concern venue,[1] not jurisdiction; the cases they cite run four-square against governing circuit precedent. It is these points that plaintiffs make in their sur-response, and which they had no opportunity to make previously.

Motion to Dismiss "in Part": Plaintiffs' second "Motion to Dismiss in Part" (with a three-page argument section) set forth defendants' claim that some portion of Count I of the Complaint failed to state a claim because it relied on conduct protected under the Noerr-Pennington doctrine. In response, plaintiffs noted that no part of the Complaint relied on protected conduct, and that defendants' anticompetitive lobbying efforts were properly included in the complaint because such conduct sheds light on the anticompetitive intent underlying defendants' actions in the marketplace.

Defendants replied with six pages of argument (twice the length of their original pleading), citations to several additional

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Plaintiffs' sur-response addresses these new arguments, pointing out that 1) it is legally incoherent to request dismissal of background factual allegations; 2) Defendants' Motion to Strike is untimely and insupportable. Plaintiffs should be permitted to make these arguments, because defendants put these theories forward for the first time in their Reply Memorandum.

Conclusion

The Court should grant Plaintiffs' Motions to File Sur-Responses.

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Respectfully submitted,

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Counsel for Plaintiffs

Dated: July 28, 1998.

16diii000583

CERTIFICATE OF SERVICE

I certify that on this 28th day of July, 1998, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

98 JUL 29 A9:59

FILED
US DISTRICT COURT
WESTN DIST. KENTUCKY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

REPLY MEMORANDUM IN SUPPORT OF MOTIONS FOR LEAVE TO FILE SUR-RESPONSES

Defendants argue that the Court should deny Plaintiffs' Motions for Leave to File Sur-Responses because Local Rules do not provide for sur-responses and because their reply memoranda raised no new grounds warranting sur-responses. See Defendants' Memorandum in Opposition to Plaintiffs' Motions for Leave to File "Sur-Responses" at 1. Neither argument is correct.

Argument

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Plaintiffs' sur-response addresses these new arguments, pointing out that 1) it is legally incoherent to request dismissal of background factual allegations; 2) Defendants' Motion to Strike is untimely and insupportable. Plaintiffs should be permitted to make these arguments, because defendants put these theories forward for the first time in their Reply Memorandum.

Conclusion

The Court should grant Plaintiffs' Motions to File Sur-Responses.

16diii000588

Respectfully submitted,

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FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: July 28, 1998.

16diii000589

CERTIFICATE OF SERVICE

I certify that on this 28th day of July, 1998, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MOTION TO DISMISS THE COMPLAINT OR FOR JUDGMENT ON THE PLEADINGS

Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc., and UST Inc. (collectively "USTC"), through counsel, move the Court, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the Complaint or, alternatively, pursuant to Fed. R. Civ. P. 12(c) to enter judgment on the pleadings. With this motion, Defendants submit a supporting memorandum of law and tender a proposed order.

Respectfully submitted,

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Ridley M. Sandidge, Jr.
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New York, NY 10022
(212) 735-3000

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing motion, the supporting memorandum and the tendered order were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 3rd day of September, 1998.

Counsel for Defendants

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

On the Motion of the Defendants pursuant to Fed. R. Civ. P. 12(b)(6) and 12(c), and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that no material issue of fact exists and Defendants are entitled to judgment as a matter of law and, therefore, Defendants' motion is granted. Plaintiffs' federal law claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, and Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), are hereby dismissed. Having dismissed all claims over which it has original jurisdiction, the Court declines to exercise supplemental jurisdiction under 28 U.S.C. § 1367 over the purely state law claims in Counts III through VIII of the Complaint. Accordingly, those state law claims are dismissed without prejudice.

Entered this _____ day of _____, 1998.

_____
JUDGE, UNITED STATES DISTRICT COURT

TENDERED BY:

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Ridley M. Sandidge, Jr.
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Counsel for Defendants

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL COMPLIANCE WITH INITIAL DISCLOSURES

Defendants, United States Tobacco Co., et al. ("USTC"), respectfully request this Court to deny in full Plaintiffs' motion to compel "compliance" with Rule 26(a)(1) of the Federal Rules of Civil Procedure. Defendants have made appropriate initial disclosures under Rule 26(a)(1), and it is now time to proceed with the discovery process contemplated by Rule 34 (document requests) and Rule 33 (interrogatories).[1] In what is becoming a disturbing trend in this case, however, Plaintiffs have for some unexplained reason become fixated on Rule 26(a)(1) disclosures without regard to the customary progression of a case under the Federal Rules of Civil Procedure. Thus, instead of simply using Defendants' disclosures as a place to begin

[1] To that end, having received and reviewed Plaintiffs' Rule 26(a)(1) disclosures, USTC has served Plaintiffs with a document request and an initial set of interrogatories aimed at identifying those persons most knowledgeable about certain specified subjects.

discovery as the Federal Rules contemplate, Plaintiffs chose to submit a 23-page brief asserting, without regard for the established purpose and scope of Rule 26(a)(1), that Defendants have failed to comply sufficiently with their obligations under that rule. Perhaps even more inexplicable is Plaintiffs' request, without a showing or even a suggestion of any prejudice at this stage of the case, that this Court impose draconian sanctions against Defendants, including the preclusion of evidence and witnesses at trial. In this respect, Plaintiffs' motion to compel, which purports to "keep this case on track" (Pl. Mem. at 1), instead needlessly injects this Court into a discovery process that, due to Plaintiffs' own misconceptions of Rule 26(a), has barely left the station.[2]

As the Court will see, Plaintiffs' motion, to which Defendants have no choice but to respond in detail, and on which Plaintiffs have already sought a hearing and will undoubtedly file a reply, seems more calculated to churn this case than to move expeditiously toward the November 1, 1999 trial date Plaintiffs sought so assiduously. Any plaintiff serious about taking a case to trial would, at this time, eschew the procedural theatrics defendants are so often accused of engaging in and proceed with this case under the federal rules and the established practices of this Court.

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[2] Plaintiffs' extraordinary assertion that Defendants have been "long on notice of the areas of plaintiffs' likely interest" because "plaintiffs served a document request with their Complaint in April, 1998, to which [Defendants have] not offered any reply," (see Pl. Mem. at 6 n.2), ignores the facts that (i) Plaintiffs' "document request" was untimely and invalid because it was served in violation of Rule 26(d); and (ii) this Court denied Plaintiffs' subsequent motion for relief from Rule 26(d) and instructed the parties to proceed according to the standards and procedures for discovery set forth in the federal rules. Moreover, Plaintiffs' assertion here that an improper document request filed with the Complaint could have any bearing on Defendants obligations under Rule 26(a)(1) clearly demonstrates Plaintiffs' misunderstanding of the scope of that rule.

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ARGUMENT

I. PLAINTIFFS MISTAKE THE PURPOSE OF RULE 26(a)(1)

In their moving papers, and throughout the course of discovery thus far, Plaintiffs have mistaken the purpose of Rule 26(a)(1). Plaintiffs' position is as follows: a plaintiff makes broad, general and conclusory allegations of unlawful conduct and, pursuant to Rule 26(a)(1), all parties against whom such allegations are made are automatically under an obligation to provide the plaintiff with every document that relates, in any way, to the general subject matter of those allegations. Under Plaintiffs' theory, Rule 26(a)(1) would effectively displace the traditional vehicles of discovery because, instead of serving document requests or interrogatories, a plaintiff could simply file a motion to compel, itemizing all of the documents that "should have been disclosed." Thus, this new form of discovery would bypass the discovery limitations of Rule 26(b) and the procedures for objecting to the production of documents under Rule 34(b). Moreover, under Plaintiffs' theory, Rule 26(a)(1) apparently would provide the added feature of precluding a disclosing party's use of any document not included in its initial disclosures.

Plaintiffs' unique interpretation of Rule 26(a)(1) simply ignores the intended purpose of the rule. According to the Advisory Committee Notes, and as Defendants pointed out in their August 3, 1998 letter to Plaintiffs, that purpose of Rule 26(a)(1) is to facilitate the disclosure of "certain basic information" so that the parties may proceed more efficiently with traditional discovery methods. Thus, under Rule 26(a)(1), "an itemized listing of each exhibit is not required...." See 1993 Advisory Committee Notes. What is required is disclosure of the nature and location of documents sufficient to allow the receiving party "(1) to make an informed decision concerning which documents might need to be examined, at least initially, and

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(2) to frame their document requests in a manner likely to avoid squabbles...." Id. Based on Plaintiffs' detailed account of what purportedly was missing from Defendants' Initial Disclosures, it is obvious that Defendants' Rule 26(a)(1) disclosures satisfy these objectives. From this point on, Plaintiffs can and presumably will use the information obtained from Defendants pursuant to Rule 26(a)(1) in order to make informed decisions concerning what documents may be relevant to this lawsuit and to frame a Rule 34 document request in accordance with those decisions.

II. DEFENDANTS HAVE COMPLIED IN FULL WITH RULE 26(a)(1)

In any event, Plaintiffs motion must fail because Defendants complied in full with Rule 26(a)(1). As a threshold matter, overlooked by Plaintiffs, Rule 26(a)(1) requires a party to make disclosures based only on those facts that were alleged with particularity in the pleadings. Broadly based, general allegations, though sufficient to satisfy the liberal standards of notice pleading, are not sufficient to create obligations under Rule 26(a)(1). See 1993 Advisory Committee Notes ("Broad, vague, and conclusory allegations sometimes tolerated in notice pleading ... should not impose upon responding parties the obligation at that point to search for and identify all persons possibly involved in, or all documents affecting [the alleged conduct]."). Pursuant to Rule 26(a)(1)(B), Defendants have produced or described those documents relevant to disputed facts alleged with particularity. Pursuant to Rule 26(a)(1)(A), Defendants have identified those persons likely to have discoverable information about disputed facts alleged with particularity.

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A. DEFENDANTS COMPLIED IN FULL WITH RULE 26(a)(1)(B)

Pursuant to the express language of Fed. R. Civ. P. 26(a)(1)(B), Defendants provided to Plaintiffs either a copy, or a description by category and location, of all documents that are relevant to disputed facts alleged with particularity in the Complaint. Thus, Defendants produced over 15,485 pages of documents, as well as appropriate descriptions of other documents that could not practically be produced, such as collected USTC point of sale advertising that had been defaced by Conwood sales representatives.[3] In their moving papers, Plaintiffs claim that Defendants did not disclose "entire categories of materials that are obviously relevant to plaintiffs' allegations." Pl. Mem. at 7. With this assertion, Plaintiffs avoid — intentionally or otherwise — any reference to the particularity requirement of Rule 26(a)(1)(B). Even a cursory review of Plaintiffs' category-by-category argument reveals that Plaintiffs' entire motion is based on obscuring this legal standard.

1. Competitive Activity Reports and Supporting Documentation

Plaintiffs claim that Defendants "acknowledged [their] duty to produce CARs," and therefore should have produced all CARs and all of the data and information on which they are based. Despite their best efforts and certain misrepresentations of documents, however, Plaintiffs did not and cannot demonstrate how CARs — which were produced in relation to Plaintiffs' allegations concerning the market shares of smokeless tobacco companies — are relevant to any other disputed facts alleged with particularity in the Complaint.

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[3] It should be noted that, unlike Plaintiffs, Defendants produced only one copy of each document and did not fill boxes with duplicates and completely irrelevant documents such as scores of photocopies of advertisements that have absolutely nothing to do with this lawsuit in general, much less anything to do with any facts alleged with particularity in the pleadings.

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For example, Plaintiffs imply that USTC 014389 indicates that Conwood "has faced problems distributing for [sic] its new Cougar discount product" (Pl. Mem. at 7-8 n.3) as a result of "defendants' exclusive distribution rack agreement with Wal-Mart." Id. In reality, however, the document merely states the fact that Conwood's Cougar product has lost presence in Wal-Mart. The inference Plaintiffs draw is rank speculation. In fact, the document implies that the popularity of Timberwolf, a competing price-value product (manufactured by Pinkerton), is the reason for Conwood's lost presence in Wal-Mart.

Similarly, Plaintiffs cite excerpts from several documents in USTC's production while ignoring the actual reason those documents were produced. For example, Plaintiffs cite to USTC 013080 (stating that Conwood will not be changing its distribution racks); USTC 013082 and USTC 013095 (stating the price of Cougar); and USTC 013086 (stating the average facings held by the Cougar product) (Pl. Mem. at 8 n.4.); but none of the excerpts selected by Plaintiffs from these documents relate in any way to any disputed facts alleged with particularity in the Complaint. Although Plaintiffs allege that Defendants change rack design to impose costs on Conwood (Compl. ¶ 27), the cited CAR page says nothing about any USTC rack change or the motivations for any change. Likewise, Plaintiffs made no allegations — with particularity or otherwise — concerning the price of Cougar or concerning the number of facings held by the Cougar product.

Finally, Plaintiffs argue that because the CARs are based on USTC's "Profile Activity Reporting System" (or "PAR"), all PAR documents should be produced pursuant to Rule 26(a)(1)(B). Plaintiffs make no independent effort, however, to explain how general sales data contained in PAR reports is related to any disputed fact alleged with particularity in the

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Complaint. Defendants, therefore, are unable to respond to this assertion at this time beyond stating that Plaintiffs conclusion is, as described above, based on a faulty premise, and therefore is simply wrong.

2. Retail Chain Store Contracts

Plaintiffs generally alleged that Defendants misrepresent market share information, but they make no particularized allegation whatsoever in terms of any specific retail store, or even a specific sales region. Defendants, however, produced to Plaintiffs actual presentations made to retail chain stores which included valid and accurate sales share data based on objective sources. Plaintiffs presume that these documents were produced in response to other allegations in the Complaint and assert that Defendants should have produced all of its alleged "exclusive contracts" with retail stores. Indeed, despite Plaintiffs' lack of specificity in their Complaint and notwithstanding Plaintiffs' misapprehension as to what "exclusive contracts" exist, Defendants produced documents pertaining to their relationships with certain specific retail stores. Plaintiffs should now proceed under Rule 34 to request any further production of documents.

In purported support of their contentions, Plaintiffs misrepresent that they have obtained and produced copies of "UST exclusive vending contracts." Pl. Mem. at 9. This is not true. The document referenced by Plaintiffs, CWD 0100000182-83, is an internal memorandum from one Evelyn M. Banks of Uncle Willie's retail store to Uncle Willie's Store Managers, not a contract with USTC. Moreover, the document does not refer to any exclusive agreement, but allows for "Manager's Discretion" in placing competitive products. Similarly, USTC 013321, while referring to an "agreement with WalMart," does not refer to any written contract, and expressly states that USTC will work "in conjunction with Philip Morris and

Swisher" (emphasis added), a competing smokeless tobacco company. Accordingly, Plaintiffs' assertions are without merit.

3. Promotional Alliances

In response to Plaintiffs' allegations of "promotional alliances," Defendants produced Customer Alliance Program ("CAP") documents, including a copy of each and every CAP contract form, fully disclosing the terms of the CAP program. Defendants then described all executed CAP contracts — which, as is evident from Defendants' disclosures, includes all wholesaler, distributor and retail CAP programs — by category and location. Thus, Defendants fully complied with Rule 26(a)(1)(B). As for the "other promotional alliances" cited in Plaintiffs' moving papers (Pl. Mem. at 10-11), Plaintiffs' Complaint mischaracterized such documents as "exclusive dealing agreements," which, as is clear from the face of the documents, is simply not true. Based on this general and conclusory allegation, however, Plaintiffs now demand the production of "all documentation concerning retail or wholesale promotional programs," Pl. Mem. at 11, without any reference to facts alleged with particularity in the Complaint and with complete disregard for their own general allegations concerning these documents. If Plaintiffs require additional documents concerning Defendants' promotional programs, they should frame their Rule 34 document request accordingly, and properly serve the request pursuant to Fed. R. Civ. P. 34.

4. Sales Force Reports

Plaintiffs also assert that Defendants were obligated to disclose "all of their sales representatives reports — many of which plaintiffs expect will reflect defendants' anticompetitive activity." Pl. Mem. at 12. In support of this assertion, Plaintiffs refer to the allegations made

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in Paragraphs 23-28 of the Complaint. Contrary to Plaintiffs' wishful thinking, however, no USTC sales representative report relates in any way to "a multi-faceted strategy of exclusionary tactics," Compl. ¶ 23, "theft of Conwood moist snuff, distribution racks, and point of sale advertising," Compl. ¶ 24, "misrepresented 'Plan-O-Grams'" Compl. ¶ 25, "false representations that UST is the 'Category Manager' with authority to control store shelves," Compl. ¶ 26, "the suppression of competition through frequent rack style changes," Compl. ¶ 27, or any "written or oral agreements barring or restricting Conwood products, racks and point of sale advertising." Compl. ¶ 28. Accordingly, aside from the fact that Plaintiffs did not make one allegation with any particularity concerning the actions of any USTC sales representative — and Plaintiffs point to no such allegation now — Plaintiffs have no basis for asserting that Defendants were obligated under Rule 26(a)(1)(B) to disclose all of the USTC sales representative reports.

5. Training Materials and Sales Meeting Documents

Plaintiffs state that they have alleged that "UST developed a multi-faceted strategy of exclusionary acts for execution by its large nationwide sales force and others." Pl. Mem. at 12. Based solely on this allegation, clearly not made with particularity, Plaintiffs assert that Defendants are obligated to produce all training materials as well as all sales meeting documents. Defendants, however, cannot produce documents relating to allegations of "a multi-faceted strategy of exclusionary acts" that does not exist. Plaintiffs' unreasonable contention that, based on their broad allegations, Defendants should produce all training materials, regardless of their content, mistakes the purpose and scope of Rule 26(a)(1)(B).

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6. Personnel Files

Similarly, Plaintiffs' assertion that Defendants should produce all personnel files based on the vague and speculative allegation that USTC "rewards anticompetitive conduct by its sales force and punishes those who refuse to engage in such conduct" (Pl. Mem. at 14) is patently absurd. Once again, Plaintiffs demand the production of documents based on their own fanciful allegations for which there is no support. Under Plaintiffs' theory, a plaintiff could make any sweeping general allegation concerning a company's employees — no matter how baseless — and then demand every personnel file as part of the initial disclosures under Rule 26(a)(1)(B). This is not, and cannot be, the intent or spirit of Rule 26(a)(1). See Fed. R. Civ. P. 34 (providing procedure for requesting and objecting to the production of documents).

7. Global Settlement

Plaintiffs also demand the production, presumably, of every document that relates in any way to the so-called Global Settlement. Defendants, on the other hand, have produced all documents relevant to disputed facts alleged with particularity. First, Defendants do not dispute that they were involved in lobbying efforts relating to the so-called Global Settlement. Accordingly, no documents relevant to this general, undisputed fact were produced pursuant to Rule 26(a)(1)(B). Second, Defendants do dispute that they "sought anticompetitive legislation." Pl. Mem. at 14 (emphasis added). Plaintiffs, however, did not allege any facts with particularity concerning this claim.

8. Rack Style Changes

Plaintiffs state that, because they alleged that USTC "alter[s] and develop[s] new moist snuff distribution racks as a way of imposing costs on rivals," they "expected to see some

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documentation in defendants' production concerning how many racks they purchase annually, new rack style designs and blueprints, and reasons for style changes." Pl. Mem. at 15. Presumably, Plaintiffs had knowledge of what particular rack changes by USTC imposed costs on Conwood. Nevertheless, Plaintiffs did not allege with particularity — for example, in terms of time frame, or in terms of particular retail locations — any specific USTC rack style change or any imposition of costs on Conwood. Accordingly, Defendants could not and did not produce documents relevant to any facts alleged with particularity.

9. Kentucky Contacts

Plaintiffs' assertion that Defendants should produce all documents concerning Defendants' "Kentucky contacts," as well as those documents concerning "UST Inc.'s control over the acts and decisions of its subsidiaries" (Pl. Mem. at 15-16) demonstrates most clearly Plaintiffs' misapprehension of the legal standard of Rule 26(a)(1)(B). In Paragraphs 6 and 7(b)(3) of the Complaint, Plaintiffs do not allege with any particularity whatsoever that UST Inc. has any contacts with Kentucky — direct or indirect. Similarly, Plaintiffs make no factual allegations whatsoever about the relationship between UST Inc. and its subsidiaries beyond the conclusory allegation that UST Inc. controls their acts and decisions. Accordingly, Defendants would not be obligated under Rule 26(a)(1)(B) to disclose any such documents, even if they existed.

10. Internal Market Projections

Defendants produced third-party market share reports and projections in response to Plaintiffs' allegations concerning the market shares of each company in the alleged relevant market. Defendants do not admit, as Plaintiffs state, that any of these materials are relevant to

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any other of Plaintiffs' allegations, including the baseless allegation that Conwood's "market share has been constrained by defendants' conduct." Pl. Mem. at 16. In any event, Defendants also produced monthly internal market projections based on the market share information contained in the third-party reports. See, e.g., USTC 014571-014594. Accordingly, Plaintiffs' contention that Defendants did not disclose internal market projections is simply wrong.

B. DEFENDANTS COMPLIED IN FULL WITH RULE 26(a)(1)(A)

Unlike Plaintiffs, Defendants did not choose to subvert the purpose of Rule 26(a)(1)(A) by providing an incomplete, and at times inventive, list of the names, addresses and telephone numbers of over 700 persons purporting to have discoverable information about disputed facts alleged with particularity in the pleadings.[4] Instead, Defendants identified those disputed facts alleged with particularity and then, pursuant to Rule 26(a)(1)(A), identified those persons likely to have discoverable information about those facts. Plaintiffs, once again, ignore the particularity standard of Rule 26(a)(1) and baselessly assert that Defendants' disclosures are inadequate. Plaintiffs are wrong.[5]

Without repeating the insufficiencies of Plaintiffs' factual allegations in the Complaint, as discussed in subsection A above, it should be re-emphasized that, like Rule 26(a)(1)(B), Rule 26(a)(1)(A) does not impose any obligation on a party to search for and

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[4] The vast majority of listings provided by Plaintiffs contain wildly inaccurate name spellings, addresses and phone numbers. Rather than "streamline future discovery" as contemplated by the federal rules, Plaintiffs' irresponsible effort merely complicates it.

[5] Moreover, having identified over 700 persons purportedly with discoverable information, Plaintiffs fail to demonstrate how they are prejudiced by any inadequacies in Defendants' disclosures. See 1993 Advisory Committee Notes ("the exception for violations that are 'harmless' is needed to avoid unduly harsh penalties in a variety of situations: e.g., . . . the failure to list as a trial witness a person so listed by another party").

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identify all persons possibly having knowledge of disputed facts, or involved in conduct, not alleged with sufficient particularity. Defendants further respond to each of Plaintiffs' specific contentions as follows:

UST Inc. Personnel. Plaintiffs assert that because Conwood personnel met and exchanged correspondence with UST Inc. personnel, Defendants were obligated to disclose those personnel under Rule 26(a)(1). Plaintiffs, however, point to no facts alleged with particularity concerning the substance or even the existence of any meetings or correspondence. Plaintiffs also assert that UST Inc. personnel should have been listed in response to the broad, conclusory allegations concerning UST Inc.'s contacts with Kentucky. As discussed above, Plaintiffs did not allege any facts with particularity in the Complaint concerning such contacts. Moreover, Plaintiffs' reference to Ms. Debra A. Baker illustrates Defendants' rather than Plaintiffs' point. Ms. Baker's affidavit was submitted to present facts that were noticeably absent from the Complaint in response to Plaintiffs' broad, conclusory allegations concerning UST Inc.'s Kentucky contacts. Thus, Ms. Baker, like all other UST Inc. personnel, is beyond the scope of Rule 26(a)(1)(A).

Global Settlement Personnel. As discussed above, the Complaint does not include disputed facts alleged with particularity concerning the so-called Global Settlement. Accordingly, no persons involved in the so-called Global Settlement lobbying activities are within the scope of Rule 26(a)(1)(A).

Third-Party Anticompetitive Activity Witnesses. Plaintiffs point out that Defendants did not disclose any "third party anticompetitive activity witnesses." Plaintiffs fail to recognize that they did not allege with particularity any incidents of the conduct they reference

here. Plaintiff did not identify any particular retail store (as opposed to generally naming a national or regional retail chain), any particular USTC personnel involved in such activity, or any particular date of any particular incident. Instead, in their moving papers, Plaintiffs point to USTC and Conwood documents and contend that persons referenced in certain documents should have been listed. Rule 26(a)(1), however, does not require a party to spend time and effort attempting to match certain documents with certain general allegations. Rather, Rule 26(a)(1)(A) requires a party only to identify those persons likely to have knowledge of disputed facts alleged with particularity. Defendants fully complied with this obligation.

In addition, as of the present time, Defendants have not conducted any investigation as to what knowledge any third party may or may not possess about the disputed facts alleged with particularity in the Complaint. See 1993 Advisory Committee Notes ("Subparagraph (A) requires identification of all persons who, based on the investigation thus far, are likely to have discoverable information").

Training Personnel and Sales Force. As discussed above in Section I, Plaintiffs' imaginative allegation that USTC has developed a "multi-faceted strategy of exclusionary acts" is not sufficiently particular to require the disclosure of the names addresses and telephone numbers of all USTC training personnel or members of its sales force. Even if it were, it is not likely — to say the very most — that any USTC sales representative will have discoverable information concerning any such strategy. It simply does not exist.

C. DEFENDANTS ARE NOT OBLIGATED TO PRODUCE A DAMAGES CALCULATION UNDER RULE 26(a)(1)(C)

Plaintiffs point out that Rule 26(a)(1)(C) provides that a party shall provide a computation of any category of damages claimed by that party. Plaintiffs fail to point out,

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however, that Rule 26(a)(1)(C) does not require a party to provide such a computation if it would depend on information not then available to the party. See 1993 Advisory Committee Notes ("a party would not be expected to provide a calculation of damages which ... depends on information in the possession of another party or person").

Contrary to Plaintiffs' representation, Defendants responded promptly to Plaintiffs' inquiry concerning Rule 26(a)(1)(C), and receiving no further correspondence from Plaintiffs, assumed the matter had been resolved. Thus, in a letter of July 23, 1998, Defendants informed Plaintiffs that, without discovery, Defendants did not have sufficient information upon which to base an accurate calculation of damages. Defendants also informed Plaintiffs that, "[a]s discovery in this case proceeds, and Defendants acquire adequate information to provide an accurate calculation of damages, Defendants will then provide such a calculation, either pursuant to Fed. R. Civ. P. 26(a)(1)(C) if appropriate, or pursuant to Fed. R. Civ. P. 26(a)(2) [expert disclosures]." Indeed, in Plaintiffs' own calculation of damages, Plaintiffs state that they "expect the calculation of damages to be the subject of expert analysis and testimony...," but nevertheless provided a dubious calculation of damages based on a simplistic comparison of Conwood's "actual market share" and baseless and speculative projections of what Conwood's "but for" share would have been and of the expected growth of the moist snuff market as a whole. Defendants declined to engage in such a meaningless exercise.

Accordingly, there is no legal or factual basis whatsoever for requiring that Defendants provide prematurely a calculation of damages when sufficient information is not available. Plaintiffs' argument, therefore, must fail.

III. PLAINTIFFS HAVE NOT DEMONSTRATED ANY PREJUDICE

Finally, at this early stage of this case when there could be no prejudice to a party, Plaintiffs take the untenable position that this Court should levy draconian sanctions, including the preclusion of evidence and witnesses from trial. Rule 37(c), however, expressly provides that sanctions for failure to disclose under Rule 26(a) are appropriate "unless such failure is harmless." Indeed, the authority cited by Plaintiffs highlights the untimeliness of Plaintiffs' request for sanctions. See Sears, Roebuck & Co. v. Goldstone & Sudalter, P.C., 128 F.3d 10 (1st Cir. 1997) (striking affidavit of undisclosed witness at summary judgment stage, after close of discovery); Taydus v. Cisneros, 902 F. Supp. 288 (D. Mass. 1995) (sanctions considered after close of discovery for failure to disclose documents); Nelson v. Ford Motor Company, 1998 WL 423111, *1 (8th Cir. 1998) (excluding expert opinion not included in expert report).

Here, by contrast, Plaintiffs could not be prejudiced by any alleged failure by Defendants to disclose documents or identify persons under Rule 26(a)(1). Any additional documents that Plaintiffs claim — without merit — should have been produced pursuant to Rule 26(a)(1)(B) can easily be requested by Plaintiffs under Rule 34. This Court's June 9, 1998 Order for the Preservation of Documents ensures that such documents will remain in Defendants' possession. Similarly, Plaintiffs can simply frame interrogatories to obtain the names, addresses and telephone numbers of any additional persons they claim — without merit — should have been disclosed pursuant to Rule 26(a)(1)(A). Accordingly, even assuming a violation of Rule 26(a) by Defendants, an assumption that has no basis in law or fact, Plaintiffs are not entitled to the sanctions they request.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion to compel compliance with Rule 26(a)(1) should be denied in full.

Dated: September 3, 1998

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 3rd day of September, 1998.

Counsel for Defendants

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COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'98 SEP 16 A9:34

FILED
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CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

Civil Action No.
5:98CV-108-R

REPLY IN SUPPORT OF PLAINTIFFS' MOTION
TO COMPEL COMPLIANCE WITH MANDATORY DISCLOSURES

Defendants' Opposition to Plaintiffs' Motion to Compel Compliance with Mandatory Disclosures ("Def. Opp.") is remarkable for what it does not say. Defendants do not dispute that their one-box document disclosure fails to include or mention category after category of relevant documents. Point I, infra. They do not dispute that their 25-name witness list omits entire categories of persons with relevant knowledge. Point II, infra. They do not dispute that they have failed to supply any initial calculation of their supposed counterclaim damages. Point III, infra. And they do not dispute that Rule 37 specifically authorizes the Court to compel production of, and exclude defendants from using, such improperly withheld information. Point IV, infra.

Defendants instead devote their opposition to arguing that plaintiffs are "fixated" on Rule 26(a)(1) and should simply propound document requests and interrogatories pursuant to Rules 33 and 34. Def. Opp. 1; see also id. at 2 (labeling plaintiffs' attempt to secure Rule 26(a)(1) compliance "theatrics" and "churn[ing]"). Defendants' dismissive attitude toward Rule

26(a)(1), however, is at odds with the judgment of Congress and the courts.[1] Indeed, the drafters thought the Rule so important that they included automatic sanctions to ensure compliance. Rule 37(c)(1). Defendants cannot now excuse their failure to abide by Rule 26(a)(1) simply because they think it unimportant.

Defendants' effort to encourage plaintiffs to ignore Rule 26(a)(1) and seek relief through "traditional vehicles of discovery" (Def. Opp. 3) is particularly ironic given that they have resisted answering plaintiffs' document requests and interrogatories for five months. See Exh. A (Letter from Mark Hansen). Indeed, defendants have filed frivolous motion after frivolous motion seeking to derail the Court's expedited scheduling order. They have filed a motion to strike allegations in the Complaint that are expressly permissible to show intent under United Mine Workers v. Pennington, 381 U.S. 657 (1965); a motion to dismiss UST Inc. for lack of personal jurisdiction despite the Clayton Act's provision for nationwide jurisdiction; and, most recently, a belated motion to dismiss (filed five months after initiation of this lawsuit) that depends entirely on misrepresenting the Complaint's plain allegations. Such dilatory tactics should be put to an end and compliance with the Court's Rules should be ordered to begin.

The only other excuse UST offers for its refusal to comply with Rule 26(a)(1) is that the Complaint supposedly lacks sufficient particularity. See Def. Opp. 3-et seq. Notably, defendants have not challenged the Complaint's supposed lack of

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[1] 8 C. Wright, et al., Federal Practice and Procedure § 2053, at 633 (2d ed. 1994) (Rule adopted as mechanism to ensure that "a substantial amount of 'core information' [is] identified and exchanged at the outset to avoid much delay and cost . . . [and] adversarial antics").

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particulars under Rule 12(f). Nor can they. Moreover, some of the documents and witnesses defendants have withheld are expressly referenced either in their own production or in plaintiffs' detailed, thirty-one page, seventy-three paragraph Complaint. Withholding such material is precisely the sort of gamesmanship Rule 26(a)(1) was designed to prevent.[2]

Argument

I. UST HAS IMPROPERLY WITHHELD DOCUMENTS

This is a $400 million (before trebling) antitrust lawsuit alleging that an 80 percent monopolist has systematically restrained competition in the moist snuff industry for years through myriad schemes. See Complaint ¶¶ 23-31 (alleging theft of rival racks and advertising, misrepresentation based on plan-o-grams, misrepresentation that UST is "category manager," frequent rack style changes, exclusive dealing agreements, product disparagement, predatory pricing). In response to these allegations, defendants claim that a single box of internal documents fulfills their Rule 26(a)(1)(B) disclosure obligations.[3] This is a patent attempt to avoid compliance with the federal rules, as the following examples further illustrate.

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[2]146 F.R.D. at 631 ("[t]he greater the specificity and clarity of the allegations in the pleadings, the more complete should be the listing of the potential witnesses and types of documentary evidence. . . . The litigants should not indulge in gamesmanship with respect to the disclosure obligations").

[3]UST claims that it has produced 15,485 pages. Def. Opp. 5. It does not dispute, however, that most of these documents are third party marketing reports. Neither does it contest that its internal document disclosure fill just a single box. Memorandum in Support of Plaintiffs' Motion to Compel Compliance with Mandatory Disclosures ("Pl. Mem.") at 6.

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A. Competitive Activity Reports. Defendants concede that its Competitive Activity Reports ("CARs") are relevant "to plaintiffs' allegations concerning the market shares of smokeless tobacco companies." Def. Opp. 5. Defendants likewise do not dispute that their CARs contain only conclusions about market share, omitting the data and reasoning underlying those conclusions. Indeed, defendants' CARs expressly incorporate by reference other materials containing such underlying information. See Pl. Mem. at 8 n.5 (CAR cover memo referring reader to reports "submitted by the field sales management" available in the "Sales Reporting Systems Department"; referring reader to Profile Activity Reporting data). Despite this, none of the expressly-referenced underlying materials have been disclosed. Defendants do not (and cannot) explain how their CAR conclusions are relevant to plaintiffs' claims and admittedly must be disclosed while expressly-incorporated underlying data and analysis are irrelevant and free from disclosure. Indeed, the parties' ability to examine and test such data is necessarily critical to an antitrust case alleging that improper acts by a monopolist have restricted rivals' growth. UST itself recognizes the point, demanding production of all similar market share data in Conwood's control. See Exh. B at 5, ¶ 4 (demanding not just conclusory reports, but "[a]ll documents that constitute, refer, or relate to Conwood's financial performance in the alleged moist snuff market").

Despite defendants' contrary suggestion, materials underlying CARs are also directly relevant to plaintiffs' allegations of unlawful exclusionary conduct. One of defendants' CARs alone reports that Conwood has been successfully limited to between 3.1 and 4.3 facings in certain retail outlets; that UST

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has managed to reduce Conwood's Kodiak product to one facing in a large Western retail chain; that Conwood will not be able to match UST's latest rack style change; and that Conwood's Cougar product is losing presence in Wal-Mart, a chain with which UST has an exclusive dealing contract.[4] See Pl. Mem. at 7-8 nn. 3-4. These matters directly bear on plaintiffs' express allegations that UST has tried to restrict distribution for rivals, that it has constantly changed rack styles in order to impose costs on smaller competitors, and that it has achieved substantial market foreclosure through exclusive dealing arrangements with some of the country's largest retailers. See Complaint ¶¶ 23-28.

B. Retail Chain Store Contracts. UST does not dispute that the Complaint alleges that it has contracted with retail chains across the country in order to obtain the exclusive right to place moist snuff racks and point-of-sale materials. Complaint ¶ 28(a)-(d). In apparent recognition of these allegations, UST has concededly disclosed "documents pertaining to [its] relationships with certain specific retail stores." Def. Opp. 7 (emphasis added). Yet, defendants still do not (and cannot) explain why they have chosen to limit their disclosure to "certain" chains. Indeed, defendants have even (inexplicably)

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[4]Defendants dispute that Cougar's diminishing presence in Wal-Mart was due to their exclusive dealing contract, arguing instead that the reasonable inference from their CAR is that the success of another rival product, Timberwolf, was responsible. Def. Opp. 6. But the plausibility of this explanation can only be assessed by reference to the data underlying defendants' CAR; the CAR makes no express link between Timberwolf's success and Cougar's loss. (Even if the underlying data did support such a link, moreover, it would only suggest the fact that UST's exclusive vending contract with Wal-Mart has artificially limited the number of slots available for new rival products, deliberately making market entry by new products unnecessarily difficult.).

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failed to produce all documents concerning deals reached with chains mentioned by name in the Complaint. Compare Complaint ¶ 28(a) (naming Wal-Mart and Uncle Willie's) with Pl. Mem. Exhs. H (document showing undisclosed exclusive deal with Wal-Mart) & I (document reflecting undisclosed exclusive deal with Uncle Willie's chain).[5] Defendants' materials for all relevant chains should be disclosed.

C. Promotional Alliances. Again, defendants do not dispute the specificity of plaintiffs' allegations concerning UST promotional alliance programs aimed at providing defendants with exclusive distribution rack, point-of-sale advertising, or promotional rights. Complaint ¶ 28. Indeed, defendants even boast that their disclosure has "described all executed CAP contracts . . . by category and location." Def. Opp. 8. Yet defendants nowhere explain or defend their nondisclosure of numerous other similar promotional alliance programs, including ones expressly referenced in the Complaint or UST's own production. E.g., Wholesaler Alliance Program and Retail Data Program (both mentioned in UST's own documents); Copenhagen Incentive Program (expressly mentioned at Complaint ¶ 28(b)); Free Standing Expandable Tobacco Center Agreement (expressly

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[5]Defendants argue that its contracts with Uncle Willie's and Wal-Mart are proper. Def. Opp. 7. But that merits argument is irrelevant: the Complaint specifically alleges these agreements are unlawful; as evidence of disputed facts, they must be disclosed. Rule 26(a)(1). Besides, even a cursory review of the undisclosed Uncle Willie's contract confirms the Complaint's allegation that UST gained the exclusive right to place vending racks in that chain (limiting all rival products to just three slots in UST's exclusive 16 slot rack). Compare Pl. Mem. Exh. H at CWD0100000182 ("1) Exclusive Vending UST 16 Slot Plastic Vendor") with Complaint ¶ 28(a). The Wal-Mart letter also expressly references an unproduced "agreement with Wal-Mart to reset their stores." Compare Exh. I at 013321 with Complaint ¶ 28(a).

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mentioned at Complaint ¶ 28(c)); Retail Merchandising Placement Agreements (see Pl. Mem. Exh. J).

D. Sales Force Reports. In support of their counterclaims defendants produced sales force reports purporting to record misconduct by Conwood representatives. Pl. Mem. 12. It is possible that UST's sales representatives also report their own improper activities; indeed, UST's sales force report forms specifically leave space for representatives to comment on activity concerning rivals' distribution racks, point-of-sale advertising, and promotional efforts. See Pl. Mem. Exh. K; Complaint ¶¶ 23-28. And Rule 26(a)(1) indisputably obliges UST to disclose all "potentially relevant items . . . whether or not supportive of its contentions in the case." 146 F.R.D. at 630 (emphasis added). There is, thus, no basis for UST's selective disclosure of sales reports.

E. Training Materials and Sales Meeting Documents. UST claims that the Complaint lacks allegations concerning its training materials and sales meetings. Yet, paragraphs 23 and 24 specifically allege that UST representatives have "acted at either the express direction, or with the tacit approval of, UST," and that UST teaches its sales representatives that "the 'way to get ahead'" is to engage in anticompetitive behavior against Conwood. Id. UST apparently understood these allegations to require disclosure of one recent training manual and certain documents pertaining to an Orlando, Florida training meeting. Pl. Mem. Exhs. G & M. Plaintiffs seek only full disclosure of the training and sales meeting materials UST already acknowledges must be disclosed.

F. Personnel Files. UST concedes that the Complaint specifically alleges that it rewards anticompetitive conduct by

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its sales representatives against Conwood, and punishes those who refuse to engage in such conduct. Def. Opp. 10; Complaint ¶ 24. UST claims that it need not disclose sales representative personnel files only because any suggestion that its personnel are engaged in anticompetitive activities is "fanciful" and "baseless," and, in any event, Rule 34 supplies a mechanism for discovery of these materials. Def. Opp. 10. Disputing the merits of plaintiffs' claims is, however, no basis for refusing disclosure of relevant information. Neither is the availability of additional discovery mechanisms grounds for ignoring Rule 26(a)(1).

G. Global Settlement. Defendants admit that they have disclosed no documents pertaining to the Global Settlement despite their own admission that they "were involved in lobbying efforts relating to the so-called Global Settlement." Def. Opp. 10. Defendants rationalize their failure on the grounds that plaintiffs fail to allege with particularity how defendants' activities were aimed at securing anticompetitive legislation. Id. Plaintiffs' allegations, however, cover seven full paragraphs and detail exactly how defendants sought to secure anticompetitive legislation. See Complaint ¶¶ 32-38.[6] UST's

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[6]"UST sought to embed the Global Settlement with provisions that would cause disproportionate harm to its moist snuff rivals . . . such as a payment structure for the purported settlement amounts that was designed to impose substantial and punitive costs on non-participating firms, requiring such firms to pay as much as 150% of the amount to be assessed against similarly-situated participants in the private agreement. * * * Most recently, UST sought to lobby in Congress for passage of a proposed federal law that would cost UST hundreds of millions of dollars per year, but would put its three moist snuff competitors out of business. . . . [When] asked why it preferred this bill to an alternative that would cost UST hundreds of millions less[,] . . . UST had no response." Complaint ¶¶ 32-33, 38.

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obvious discomfort with defending its participation in an anti-competitive legislative cabal (see Defendants' Motion to Dismiss Part of the Complaint), provides no basis for disregarding Rule 26(a)(1).

H. Rack Style Changes. UST does not dispute that it has documents concerning rack style changes, or that it failed to disclose them. It defends its failure (again) solely on the grounds that plaintiffs' claims lack sufficient particularity. In fact, however, the Complaint specifically alleges that "[i]n the last few years -- and for no apparent purpose other than to remove Conwood racks and impose costs on Conwood -- UST has introduced short racks, tall racks, wall racks, and others, across the United States." Id. ¶ 27. UST's failure to disclose in the face of such a plain allegation is precisely the sort of "adversarial antics" Rule 26(a)(1)'s drafters sought to prevent -- and punish. 8 C. Wright, et al, Federal Practice and Procedure § 2053, at 633.

I. Kentucky Contacts. Again UST does not dispute that it has relevant documents, or that it has failed to disclose them. Again, it argues only that the Complaint lacks sufficient particularity to trigger any obligation to disclose. The Complaint, however, specifically alleges that UST has "hundreds of millions of dollars worth of assets in this district and buys substantial amounts of tobacco for use in smokeless products from farmers located in this district." Complaint ¶ 7. It also alleges that UST controls the acts and decisions of subsidiaries doing business in Kentucky. Id. ¶ 6. UST cannot seriously suggest that it was unable to understand these allegations, or that it was unable to frame a responsive disclosure.

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J. Internal Market Projections. While contesting plaintiffs' allegation that their market share has been suppressed by UST's activities (see Complaint ¶ 40), UST admits that it has produced six boxes of third party market reports in response to this allegation. It further represents that it has "also produced monthly internal market projections based on the market share information contained in the third party reports." Def. Opp. 12. Yet, UST still fails to indicate that its disclosure encompasses all internal UST market projections; all such materials, not a few hand-picked examples, should be disclosed.

II. DEFENDANTS HAVE FAILED TO DISCLOSE WITNESSES

According to defendants, they know of only 25 persons with knowledge bearing on any of plaintiffs' -- or their own -- allegations. Defendants claim that they do not know of a single person at UST Inc., United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. with knowledge of any disputed fact. They claim they do not know of a single relevant third party witness. And they claim they do not know of a single Conwood employee with relevant knowledge. Such representations are incredible on their face, as the following examples only further demonstrate.

A. UST Inc. Personnel. Defendants concede that they named not a single UST Inc. executive in their Rule 26(a)(1)(A) disclosure. They defend this omission on the grounds that the Complaint lacks any allegations which would require disclosure of UST Inc. personnel. But multiple examples of the anticompetitive activities alleged in the Complaint (id. ¶¶ 23-28) were discussed by Conwood and senior UST Inc. executives over the last several years. Indeed, defendants have even produced correspondence

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between Conwood and UST Inc. executives concerning such discussions. See, e.g., Pl. Mem. Exh. N (Letter to UST executive raising examples of unauthorized rack and point-of-sale advertisement removal and misrepresentations by UST representatives). Accordingly, defendants cannot seriously suggest that no UST Inc. employee has discoverable information relevant to disputed facts.

Defendants allege that "plaintiffs' reference to Ms. Debra A. Baker illustrates Defendants' rather than Plaintiffs' point" because her affidavit was submitted to present facts that were "noticeably absent from the Complaint." Def. Opp. 13. In fact, however, the Complaint alleges specific contacts between UST Inc. and the State of Kentucky. Complaint ¶¶ 6-7; see supra Point I(I). Ms. Baker's affidavit was provided in an attempt to disprove those allegations. Yet, improperly, neither Ms. Baker nor anyone else with relevant knowledge concerning UST Inc.'s contacts with Kentucky was named in defendants' disclosure.

B. Global Settlement Personnel. UST does not dispute that it failed to disclose Global Settlement personnel. Instead, it seeks to defend that failure on the grounds that the Complaint contains no specific disputed allegations about UST's involvement in Global Settlement discussions. As noted above, however, this defense is implausible given plaintiffs' detailed seven paragraph allegations concerning UST's efforts to secure anticompetitive legislation. See supra Point I(G) & n.6.

C. Third Party Anticompetitive Activity Witnesses. UST says it was not required to disclose third party witnesses because the Complaint does not identify any particular retail store at which an anticompetitive incident occurred. But, tellingly, defendants do not dispute that they are fully aware of

specific retailers with relevant knowledge about the anticompetitive conduct alleged in the Complaint. Besides, defendants are simply inaccurate about the level of detail in the Complaint. E.g., id. ¶ 25 (mentioning Clark Oil stores in Michigan); id. ¶ 26 (Florida Winn-Dixies, Minnesota Fuel-N-Foods); ¶ 28(a) (citing Wal-Mart, Dairy Mart, WaWa, HEB Stores, Orton Convenience, Minute Man, Uncle Willie's, Quick Sav stores in Michigan, Mountaineer Marts in West Virginia); id. Exh. A (mentioning multiple specific stores in California and Illinois). Further, defendants offer no excuse whatsoever for failing to name third parties with relevant knowledge of their own counterclaims and defenses. Pl. Mem. 19.[7]

D. Training Personnel and Sales Force Personnel. Defendants assert that their training personnel and sales force have no knowledge concerning the anticompetitive conduct alleged in the Complaint because "it simply does not exist." Def. Opp. 14. Such merits-based arguments, however, do nothing to relieve defendants of their burden to name individuals likely to have knowledge concerning whether or not the anticompetitive activity alleged in the Complaint exists. Rule 26(a)(1)(A) (all persons likely to have knowledge of disputed facts must be revealed). And there can be no doubt that defendants' own training personnel and sales force are among the persons likely to know whether or not defendants have engaged in the various kinds of anticompetitive conduct alleged in Complaint at ¶¶ 23-28.

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[7]Defendants claim that their investigation is still ongoing. But this is no excuse for failing to disclose witnesses known to them. Rule 26(a)(1). And defendants cannot credibly suggest that their investigation has so far turned up no third parties likely to have relevant knowledge of either plaintiffs' claims or their own counterclaims and defenses.

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III. DEFENDANTS HAVE PRODUCED NO DAMAGES CALCULATION

UST's open hostility to the initial disclosure mechanism is evident again in its attempt to brush off the Rule 26(a)(1)(C) initial damages disclosure requirement as "a meaningless exercise." Def. Opp. 15. In fact, however, Conwood's detailed eleven-page initial damages calculation shows the benefits of such disclosures, providing UST with substantial detailed proprietary information about Conwood's historical prices, profit margins, volumes, market projections, as well as Conwood's initial damages calculations. UST has denied Conwood similar useful -- and legally required -- information.

UST (fleetingly) suggests that it lacks sufficient information on which to base a damages calculation. But the Advisory Committee Notes make clear this is an acceptable excuse for nondisclosure only in extremely limited circumstances where all necessary information is in the hands of another party or person (such as patent infringement cases where the infringer's financials alone will reflect the infringed party's damages). 146 F.R.D. at 632; Pl. Mem. 22. UST nowhere explains what information it lacks for an initial calculation, nor who else is likely to have it. Indeed, as an eighty percent monopolist, UST cannot seriously suggest that it does not have sufficient information to provide at least an initial estimate of damages supposedly inflicted by a rival several times smaller than itself.

IV. THE COURT SHOULD COMPEL PROPER DISCLOSURES AND ENTER AUTOMATIC SANCTIONS

In response to UST's single-box, 25-name, missing-damages-calculation Rule 26(a)(1) disclosures, plaintiffs seek an order compelling a proper set of disclosures pursuant to Rule

37(a)(2)(A). Defendants do not challenge the authority of the Court to enter such an order.

Plaintiffs also seek entry of an order pursuant to Rule 37(c)(1) precluding UST from making use of the information it has improperly withheld. UST does not dispute that this sanction was specifically added in 1993 to deter noncompliance with Rule 26(a)(1). See Pl. Mem. 4; 146 F.R.D. at 691. Instead, UST argues that Rule 37(c)(1) sanctions should be denied because "plaintiffs have not demonstrated any prejudice." Def. Opp. 16. But nothing in Rule 37(c)(1) suggests that movant bears the duty to show harm; indeed, the Rule suggests the opposite. 146 F.R.D. at 691 (sanction "self-executing" unless evidence of harmlessness produced). Defendants' sole effort to suggest harmlessness, however, is its (repeated) suggestion that Rule 26(a)(1) compliance is unimportant because plaintiffs may propound document requests and interrogatories. Def. Opp. 16; but see supra p.2. But if such an argument could suffice, no showing of harm would be possible and Rule 37(c)(1) would be a nullity. Besides, even if plaintiffs bore the burden of proof, they have been harmed in several concrete ways[8] and courts in analogous circumstances have repeatedly authorized Rule 37(c)(1) sanctions.

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[8](1) Plaintiffs have no information concerning what defendants' counterclaim damages may be, or how they might be calculated and are unlikely to obtain any through other discovery mechanisms given defendants' claimed inability to calculate its damages. (2) Plaintiffs have no idea which third parties and employees of UST Inc., United States Tobacco Manufacturing Company Inc., or United States Tobacco Sales and Marketing Company Inc. that defendants are likely to use as witnesses at trial (and, thus, persons whom they may need to depose). (3) Plaintiffs have virtually no information concerning what relevant documents defendants have that would allow plaintiffs to focus appropriate document requests. (4) Defendants have jeopardized the expedited trial schedule set by the Court by refusing to disclose information that was due three months ago.

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See Pl. Mem. 4 (citing cases).[9]

Conclusion

Defendants should be ordered to provide proper Rule 26(a)(1) disclosures and precluded from making use of information it has failed to disclose.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

[9]Defendants suggest that Rule 37(c)(1)'s automatic sanction was applied in later stages of litigation in these cases. Def. Opp. 16. In fact, the sanctions were applied when sought, and nothing in either those cases, Rule 37(c)(1), or the Advisory Committee Notes suggests that timing is of any significance. To the contrary, the Advisory Committee Notes state that the sanction is to be "self-executing." 146 F.R.D. at 691 And the stated purpose of the sanction — deterring parties from ignoring their Rule 26(a)(1) duties — would be best served by quick and certain application of Rule 37(c)(1)'s sanctions. See id. (purpose to "provide[] a strong inducement for disclosure")

16diii000626

CERTIFICATE OF SERVICE

I certify that on this 15th day of September, 1998, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

EXHIBIT A

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PETER W. HUBER
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MARK L. EVANS
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1 COMMERCE SQUARE
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SUITE 2340
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(215) 864-7270
FACSIMILE: (215) 864-7280

September 10, 1998

VIA FACSIMILE AND FIRST CLASS MAIL

John S. Reed, Esquire
Reed Weitkamp Schell Cox & Vice
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Louisville, KY 40202

Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

RE: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

We have received your recent requests for production of documents and interrogatories. While a substantial volume of relevant materials has already been provided to defendants as part of plaintiffs' compliance with their disclosure obligations under Rule 26(a), we are continuing our search for relevant and non-privileged materials and will supplement our production if additional materials are available.

We are still unclear on when defendants will produce their responsive documents. As you know, we propounded document requests and interrogatories on April 22, 1998. Defendants initially did not respond to these requests, apparently because the discovery period had not yet commenced. After discovery officially commenced on July 8, 1998, we expected that defendants would provide the requested materials as part of their compliance with their Rule 26(a) disclosure obligations. But that has not occurred. We still have not received your responses to the pending requests for production and interrogatories even though discovery commenced two months ago and the requests were propounded more than four months ago.

I enclose copies of the pending requests for your convenience. We do not want to engage in unnecessary discovery disputes, so we propose that you now provide written responses to these requests, as well as all responsive and non-privileged documents, at the same time that we respond to the discovery requests you propounded to us last Friday. I suggest that we make this mutual exchange of discovery responses and documents on or before October 2, 1998.

If for some reason this is not acceptable to defendants, please let me know.

Very truly yours,

Mark C. Hansen

cc: Richard C. Roberts, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

PLAINTIFFS' FIRST INTERROGATORIES TO DEFENDANTS

Pursuant to Fed. R. Civ. P. 26 and 33 and Local Rules 5.2 and 33.2, plaintiffs request that each defendant respond separately by answering the following interrogatories within the time provided by the Federal Rules or as the Court may otherwise direct in response to Plaintiffs' Motion for Expedited Discovery.

Instructions

These interrogatories shall be answered in accordance with the Federal and Local Rules.

Interrogatories

1. Identify each person from whose files documents were produced in response to Plaintiffs' First Request for Production of Documents, identify the documents produced from each such person's files, and identify the person(s) most familiar respectively with each of said files.

2. Describe generally each computer system used by defendant, including types of data maintained in each, and for each such system identify the person(s) most familiar therewith.

3. Identify by name, address, title, job description, and date of service all persons involved in the marketing and/or sale of defendants' moist snuff products.

4. Identify all distributors and retailers of moist snuff products with which one or more defendants has or had an agreement.

5. Identify by name, address, title, job description, and date of service all persons who have spoken to tobacco industry analysts on matters pertaining to moist snuff.

6. Identify by name, address, title, job description, and date of service all persons who participated in the preparation of answers to these interrogatories.

16diii000632

Respectfully submitted,

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CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

Dated April 22, 1998.

16diii000633

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Fed. R. Civ. P. 26 and 34 and Local Rules 5.2 and 34.2, plaintiffs request that each defendant separately produce documents for inspection and copying at the offices of undersigned counsel within the time set by the Federal Rules or as the Court may otherwise direct in response to Plaintiffs' Motion for Expedited Discovery.

Instructions

Documents shall be produced in accordance with the Federal and Local Rules.

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Documents Requested

1. All documents concerning Conwood Company L.P. and/or Conwood Sales Company, L.P. (collectively, "Conwood").

2. All documents concerning the Proposed Tobacco Industry Settlement dated June 20, 1997.

3. All Rule 4(a) lists and any similar lists of documents in defendants' possession, custody or control.

4. All documents concerning communications with tobacco industry analysts.

5. All agreements with distributors of tobacco products.

6. All agreements with retailers of tobacco products.

7. All documents, including sales reports, concerning revenues from the sale of moist snuff.

8. All documents concerning market shares, by geographic region and nationally, for moist snuff.

9. All organization charts, lists of employees, and job descriptions.

10. All documents concerning activities in this district.

11. All documents concerning relationship(s) between defendants.

12. All documents concerning the Smokeless Tobacco Council

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("STC").

12. All documents concerning Swisher International, Inc.

13. All documents concerning Swedish Match North America, Inc.

14. All documents concerning Philip Morris, Inc.

15. All documents concerning policies, procedures and training for sales representatives.

16. All documents concerning product racks for display of moist snuff.

17. All documents concerning product quality of moist snuff.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

Dated April 22, 1998.

16diii000637

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P.,	:	
Plaintiffs,	:	
-against-	:	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATE TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,	:	
Defendants.	:	

DEFENDANTS' FIRST REQUEST FOR DOCUMENTS

Pursuant to Rule 34 of the Federal Rules Of Civil Procedure, Defendants, United States Tobacco Company, et al., serve on Plaintiffs, Conwood Company, L.P., et al., the document request set forth below.

Definitions and Instructions

The following definitions and instructions shall be employed in responding to this request for the production of documents:

A. The terms "Conwood," "you," and "your" refer to Conwood Company, L.P., Conwood Sales Company, L.P., any other Conwood subsidiary or affiliate involved in the manufacturing and sale of smokeless tobacco products, and those entities' current and former officers, employees, affiliates, representatives, counsel, and other agents.

B. The term "Defendants" refers to United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc., UST Inc., and those entities' current and former officers, employees, affiliates, representatives, counsel, and other agents.

C. The term "smokeless tobacco company" refers to Conwood, Defendants, and any other company involved in the manufacturing and sale of smokeless tobacco products, including but not limited to Swisher International, Inc.; Swedish Match North America, Inc.; and those entities' current and former officers, employees, affiliates, representatives, counsel, and other agents.

D. The term "document" is used in its broadest sense and includes all tangible things that record information. "Documents" include both originals and copies, any and all drafts, and all copies that contain any notation not on the original. Examples of documents include, but are not limited to, handwritten, typed, or printed papers, handwritten notes, office

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notes, calendar entries, diaries, memoranda, press clippings, photographs, reports, deposition transcripts, deposition exhibits, receipts, invoices, correspondence, ledger entries, audio and visual recordings, films, and computer printouts, cards, tapes, disks, and other types of electronically or magnetically maintained information.

E. Documents that are in paper form or that constitute other physical objects from which recorded information may be visually read, as well as audio or video tapes and similar recordings, should be produced in their original form or in copies that are exact duplicates of the originals. Computer files and similar electronic records should be produced in a readable form mutually agreed upon by the parties.

F. If you object to any portion of any request, you should identify the portion to which you object and respond to the remainder.

G. Unless otherwise indicated, these requests cover documents created or that came into your possession between January 1, 1977, and the date of response.

H. The scope of these requests includes all responsive documents that are within your custody or control, regardless of whether they are currently in your possession.

I. Documents should be produced either: (a) as they are kept in the ordinary course of business, complete with the original file folders, binders, or other containers in which they are stored (or legible copies of the labels from those folders, binders or containers); or (b) organized according to the document request(s) to which they are responsive. If you elect the latter mode of production, each document or set of documents from a particular file, binder or

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other container should be accompanied by a legible copy of the label from that container or some other reliable indicator of the file from which it was taken.

J. If you assert a claim of privilege as to one or more documents sought in this request, you should list, for each such document, the document's date, signatory or signatories, author(s), addressee(s), each other person who received a copy of such document, the subject matter of the document, its location and custodian, and the basis for the claim of privilege, including the identity of any and all clients on whose behalf the privilege is claimed. Such information should be supplied in sufficient detail to permit Defendants to assess the applicability of the privilege claimed. See Fed. R. Civ. P. 26(b)(5).

Document Request

Defendants request the production of the following documents:

1. All documents that constitute, refer, or relate to Conwood's distribution and sale of smokeless tobacco products other than Conwood's moist snuff products, including but not limited to (a) all documents that constitute, refer, or relate to any agreements with wholesalers, distributors, retailers, or any other persons or entities involved in the distribution and/or sale of Conwood smokeless tobacco products, (b) all documents that constitute, refer, or relate to pricing or pricing policies of smokeless tobacco products other than moist snuff, and how such policies are affected by the sale of moist snuff products, and (c) all documents that constitute, refer, or relate to sales data (whether in terms of price or in terms of units) for Conwood smokeless tobacco products, and how such data are affected by the sale of moist snuff products.

2. All documents that constitute, refer, or relate to Conwood's initial entry into the alleged moist snuff market, including but not limited to (a) all documents that constitute, refer, or relate to Conwood's development, introduction, and use of the plastic can for Conwood's moist snuff products; (b) all documents that constitute, refer, or relate to discussions, projections, or considerations of the effect Conwood's entry into the alleged moist snuff market would have on the sales of other Conwood smokeless tobacco products; and (c) all documents that constitute, refer, or relate to the research and development, production, distribution, or sale of any of Conwood's moist snuff products.

3. All documents that constitute, refer, or relate to entry or potential entry into the alleged moist snuff market by any other existing or non-existing smokeless tobacco company, including but not limited to documents that constitute, refer, or relate to the conversion of production facilities devoted to other tobacco products to the production of moist snuff, and the research and development, production, or distribution of moist snuff products.

4. All documents that constitute, refer, or relate to Conwood's financial performance in the alleged moist snuff market, including but not limited to (a) budgets; (b) business or strategic plans; (c) financial and/or profit analyses; and (d) sales projections or forecasts.

5. All documents that constitute, refer, or relate to Conwood's financial performance in the sale of smokeless tobacco products other than moist snuff products, including

but not limited to (a) budgets; (b) business or strategic plans; (c) financial and/or profit analyses; and (d) sales projections or forecasts.

6. All documents that constitute, refer, or relate to Conwood's sales share of the alleged moist snuff market, including but not limited to (a) all documents that constitute, refer, or relate to Conwood's moist snuff sales data; (b) all documents that constitute, refer, or relate to any reason for any increase or decrease in Conwood's sales share; (c) all documents that refer to your allegation that Conwood's share growth has effectively ceased; and (d) all documents that constitute, refer, or relate to your allegation that Conwood's market share is expected to remain flat or decline in the future.

7. All documents that constitute, refer, or relate to Conwood's sales shares of smokeless tobacco products other than Conwood's moist snuff products.

8. All documents that constitute, refer, or relate to the pricing or pricing policies and/or promotions or promotion-related policies for any Conwood smokeless tobacco product, including but not limited to (a) discounting, (b) couponing, (c) buy downs, (d) "free goods" or "free fills," (e) slotting allowances, (f) return policies, and (g) any monies or compensation offered to distributors, wholesalers, retailers, or other persons or entities involved in the distribution and/or sale of Conwood's smokeless tobacco products.

9. All documents that constitute, refer, or relate to competition in the alleged moist snuff market, including but not limited to (a) consumer surveys; (b) analyses of competi-

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tors and/or competitors' products; and (c) all documents that constitute, refer, or relate to the sales share of other smokeless tobacco companies in the alleged moist snuff market.

10. All documents that constitute, refer, or relate to competition between and among all smokeless tobacco products, including but not limited to (a) consumer surveys; (b) analyses of competitors and/or competitors' products; and (c) all documents that constitute, refer, or relate to the sales share of other smokeless tobacco companies.

11. All documents that constitute, refer, or relate to the pricing or pricing policies for any of Defendants' moist snuff products.

12. All documents that constitute, refer, or relate to the pricing or pricing policies and/or promotions or promotion-related policies for any smokeless tobacco company's smokeless tobacco products, including but not limited to (a) discounting, (b) couponing, (c) buy downs, (d) "free goods" or "free fills," (e) slotting allowances, (f) return policies, and (g) any monies or compensation offered to distributors, wholesalers, retailers, or other persons or entities involved in the distribution and/or sale of smokeless tobacco products.

13. All documents that constitute, refer, or relate to the pricing, promotion, or sales share of any price-value moist snuff product, including but not limited to Red Seal™, Cougar™, and/or Timberwolf™.

14. All documents that constitute, refer, or relate to any misrepresentations and/or false representations made to store personnel involving moist snuff sales data and/or the management of store shelf space.

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15. All documents that constitute, refer, or relate to the alleged theft, removal, destruction or defacing by Defendants of moist snuff products, distribution racks, and/or point of sale advertising.

16. All documents that constitute, refer, or relate to the theft, removal, destruction or defacing by Conwood of moist snuff products, distribution racks, and/or point of sale advertising.

17. All documents that constitute, refer, or relate to the theft, removal, destruction or defacing by any other smokeless tobacco company of moist snuff products, distribution racks, and/or point of sale advertising.

18. All documents that constitute, refer, or relate to the reasons for, or the purpose and effect of, any change in rack style, size, design, or shape by Defendants, including but not limited to documents that constitute, refer, or relate to the imposition of costs on Conwood.

19. All documents that constitute, refer, or relate to the reasons for, or the purpose and effect of, any change in rack style, size, design, or shape by Conwood.

20. All documents that constitute, refer, or relate to the reasons for, or the purpose and effect of, any change in rack style, size, design, or shape by any other smokeless tobacco company.

21. All documents that constitute, refer, or relate to any statements made by Conwood about the products or services of any other smokeless tobacco company, including but

not limited to all documents that refer to the planning, development, or implementation of the "Frank Delving" series, or any other advertisement or informational campaigns.

22. All documents that constitute, refer, or relate to any statements made by Defendants about the products or services of any other smokeless tobacco company.

23. All documents that constitute, refer, or relate to any statements made by any other smokeless tobacco company about the products or services of another smokeless tobacco company.

24. All documents that constitute, refer, or relate to customer or consumer complaints about Conwood products, including but not limited to the "complaint letters" referred to in the minutes of the August 19, 1992 and April 22, 1992 Marketing Meetings (see CWD 1022000067 and CWD 1022000070).

25. All documents that constitute, refer, or relate to any communications between Conwood and any actual, potential or past retailer, distributor, or farmer.

26. All documents that constitute, refer, or relate to any agreement between any smokeless tobacco company and any retailer, distributor, or farmer.

27. All documents that constitute, refer, or relate to any agreement between any smokeless tobacco company and any retail chain or store involving the in-store management and display of moist snuff products, which includes but is not limited to: (a) promotions or restrictions on promotions; (b) sampling of products; (c) incentive programs or inducements to retailers; (d) exclusive rights "to control" the moist snuff section of the store; (e) installation of

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distribution racks; (f) placement and maintenance of moist snuff products and/or point of sale advertising; or (g) removal of any moist snuff products, distribution racks, or point of sale advertising.

28. All documents that constitute, refer, or relate to any injury to Conwood's business or property caused by Defendants' conduct.

29. All edited and unedited videotapes or audio recordings relating to Defendants and all documents referring or relating to any videotapes or audio recordings relating to Defendants, including but not limited to the videotapes collected in Plaintiffs' Exhibit C to the Complaint.

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30. All documents that constitute, refer, or relate to the investigation, evaluation, commencement and/or prosecution of this lawsuit.

Dated: September 3, 1998

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Chris T. Athanasia
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Attorneys for Defendants

16diii000648

CERTIFICATE OF SERVICE

I certify that on September 3, 1998, I caused to be served by facsimile and by U.S. Mail, a true and accurate copy of the foregoing to:

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Steven F. Benz, Esq.
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COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

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FILED
US DISTRICT COURT
WESTN. DIST. KENT.

CONWOOD COMPANY, L.P., and CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Conwood Sales Company, L.P.

September 21, 1998.

16diii000650

Counterstatement of Points and Authorities

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., and CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Conwood Company, L.P. and Conwood Sales Company, L.P. ("Conwood") hereby oppose the Motion for Judgment on the Pleadings of defendants United States Tobacco Company, et al. ("UST").

Introduction

UST, an 82 percent monopolist in the moist snuff market, has undertaken a systematic campaign of anticompetitive conduct with the purpose and effect of suppressing competition. UST company policy encourages its representatives to remove and to deface competitors' racks (tens of thousands, if not hundreds of thousands, of racks have been lost), to remove their products from distribution racks, to discard or to deface point of sale advertising, to use misrepresentations to exclude products from stores, and to defame these competing products. In addition, UST has used its market power to induce retailers and distributors to restrict or eliminate distribution of competitors' brands, foreclosing a substantial share of the market. These and other UST

tactics, including predatory pricing, are textbook examples of what the federal antitrust law prohibits.

Under settled law of this circuit and elsewhere, Conwood has alleged a violation of section 2 of the Sherman Act. To state a claim for monopolization, Conwood must allege that 1) UST has monopoly power in the relevant market and 2) UST has engaged in improper exclusionary conduct. UST has conceded that it has monopoly power in the market for moist snuff, at least for purposes of this Motion. UST argues only that Conwood's allegations do not amount to exclusionary conduct. But if the UST conduct set forth in the Complaint does not violate section 2, the Sherman Act is a dead letter.

UST can challenge these well-pleaded allegations only by changing them, adding others of their own devising, and asking the Court to draw factual inferences that are not only unfavorable to Conwood but contrary to the allegations of the Complaint:

- Where conduct is alleged to be "routine[] and systematic[]" (Complaint ¶ 24), it cannot be treated as though it occurred "from time to time" (Motion at 12).
- Where UST representatives are alleged to have "acted at either the express direction, or with the tacit approval of" UST (Complaint ¶ 23), the conduct cannot be characterized as "one of its employees . . . say[ing] something bad about Conwood's products or remov[ing] a Conwood product from a display rack" (Motion at 15).
- Where product defamation is alleged to have been "regular[] and systematic[]" (Complaint ¶ 29), it cannot be dismissed as "isolated statements" (Motion at 18).
- Where a monopolist is alleged to have used its market power to induce retailers to enter into exclusive dealing arrangements (Complaint ¶ 28), the agreements cannot be said to be "available to all of the other participants in the alleged market," who lack monopoly power (Motion at 15).

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- Where the Complaint alleges that "UST has offered its own products below cost for no economic purpose other than to drive Conwood from those distribution outlets," (Complaint ¶ 30), it cannot be claimed that the allegation is limited to one example of such below-cost pricing pleaded as an illustrative example.

Nowhere in the Complaint does it appear that Conwood employees "crossed the line of rough-and-tumble competition," as UST now claims. Motion at 2. UST may not argue that "it would be a rare occasion if a UST[] employee removed a Conwood product from a UST[] display rack" without a retailer's approval. Id. at 15 n.7. In short, UST may not rewrite the Complaint and then argue for its dismissal -- though this appears to be its favored approach. See Plaintiffs' Opposition to Motion To Dismiss Part of Complaint (filed June 29, 1998).

UST's Motion is simply an attempt to delay progress in this case. The Motion is filed weeks after UST filed its answer and a "Motion To Dismiss [in] Part," which implicitly recognized the merit of Conwood's core antitrust claims.[1] Now, having failed to comply with its obligations under Federal Rule of Civil Procedure 26(a), UST attempts to stall further by filing a Motion that is wholly without merit. Indeed, UST served extensive discovery demands on the same day that it argued that discovery is unnecessary because Conwood's Complaint should be dismissed as a matter of law.

[1]That motion did not challenge any of Conwood's antitrust claims based on market conduct, but instead objected to the inclusion in the Complaint of factual allegations concerning UST's efforts to secure anticompetitive legislation through Global Tobacco Settlement lobbying efforts.

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Counterstatement of the Case

UST has a monopoly share of the most snuff market, with over 82 percent of this $1.5 billion market. Complaint ¶ 1. For decades, UST's monopoly position in this market went unchallenged. Id. ¶ 12. Conwood entered the moist snuff market in 1979. Id. ¶ 16. In 1981, Conwood introduced a premium brand that began to win substantial market share from UST's premier brands. Id. ¶ 19. UST's reaction to Conwood's early success was to develop a multi-faceted strategy of exclusionary acts, for execution by its large, nationwide sales force and others. Id. ¶ 23. As a direct result, Conwood's growth was halted. Its share of the moist snuff market has stagnated, id. ¶ 13, and consumers have been damaged by this suppression of competition, id. ¶ 23.

As part of this campaign of exclusionary conduct, UST has "routinely and systematically, in stores across the United States, taken Conwood moist snuff from the racks (to make it inaccessible to consumers), discarded or defaced Conwood distribution racks, and discarded or defaced Conwood point of sale advertising." Id. ¶ 24. The number of racks lost is in the tens of thousands, if not hundreds of thousands -- "[i]n a recent one year period, for example, more than 10,000 Conwood racks were taken out of stores in California alone." Id. This rack removal was actively encouraged by UST management. Id. In addition, UST has frequently changed rack styles for the purpose of removing Conwood racks and to impose costs on Conwood. Id. ¶ 27.

UST has also used misrepresentation to exclude Conwood products. UST has used faked or fraudulent "plan-o-grams" -- schematic diagrams used by chain retail stores to set the location

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and display space for competing brands -- to convince low-level store employees to permit UST to exclude Conwood products. Id. ¶ 25. In other cases, UST has claimed authority over a store's entire smokeless tobacco section by falsely representing its sales personnel as "category managers" for smokeless tobacco. Id. ¶ 26. This ruse, made plausible by UST's dominant market position, has permitted UST to make competitors' products unavailable or inaccessible. Id.

UST has also regularly and systematically disparaged Conwood products. Id. ¶ 29. UST has told retailers that Conwood products are stale or discontinued in order to remove them from stores, and that Conwood racks do not "comply" with federal regulations and must be removed. UST also has disparaged the quality of Conwood products orally and in writing. Id. These disparagements have not been isolated incidents, but have been part of UST's systematic campaign of anticompetitive acts. Id.

In addition to this pervasive pattern of misconduct, UST has used its monopoly power to induce retail chains and stores to enter into exclusive dealing arrangments that exclude or restrict Conwood products, racks, point of sale advertising, and point of purchase discounts and promotions. Id. ¶ 28. These arrangements cover thousands of stores, id., and have substantially foreclosed Conwood's access to retail and distribution facilities, id. ¶ 40.

UST has also engaged in predatory pricing, in that it has offered its products below cost in order to drive Conwood products from distribution outlets. Id. ¶ 30. One example of such conduct is UST's pricing of its price-value product, which has been intended to eliminate Conwood's price-value product from the

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marketplace. Id. ¶ 31. UST will more than recoup its investment in below-cost pricing if its predatory pricing strategy is successful.

Argument

UST's Motion rests on three unpersuasive propositions: that unfair marketplace conduct can never be exclusionary; that a monopolist cannot offend the Sherman Act by inducing distributors and retailers to enter into exclusive dealing arrangements; and that a plaintiff must plead predatory pricing claims with microscopic particularity in order for offending conduct to be cognizable under the antitrust laws. Not one of these arguments has merit.

I. STANDARD OF REVIEW

"In an antitrust case, . . . 'dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'" Michaels Bldg. Co. v. Ameritrust Co., 848 F.2d 674, 681 (6th Cir. 1988) (quoting Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976)). A dismissal on the pleadings is warranted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College, 128 F.3d 59, 62-63 (2d Cir. 1997) (reversing dismissal of claim under Sherman Act § 2); Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135, 136 (6th Cir. 1988) (same), cert. dismissed, 490 U.S. 1087 (1989).[2] "In an antitrust action,

[2]As an initial matter, UST's Motion To Dismiss "under Fed. R. Civ. P. 12(b)(6)" is procedurally improper. Having filed its

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moreover, 'the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws.'" Kerasotes Michigan Theatres, 854 F.2d at 136 (quoting Newman v. Universal Pictures, 813 F.2d 1519, 1522 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988)). In making that determination, the court "must, of course, take as true the material facts alleged in [Conwood's] complaint." Hospital Building Co., 425 U.S. at 740 (reversing dismissal of antitrust claim); see Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1025 (6th Cir. 1990) (same), cert. denied, 498 U.S. 1086 (1991). Likewise, the court "must draw all reasonable inferences in favor of the plaintiff[s]," Hamilton Chapter, 128 F.3d at 63, and "construe the complaint in the light most favorable to the plaintiff[s]," In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993).

II. CONWOOD HAS ALLEGED A CLAIM UNDER SECTION 2 OF THE SHERMAN ACT

To make out a claim that UST has committed the offense of unlawful monopolization under section 2 of the Sherman Act, 15 U.S.C. § 2, Conwood must plead two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from

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Answer on June 12, 1998, UST has waived its right to file a "Motion to Dismiss" pursuant to Rule 12(b). E.g., Mulhall v. District of Columbia, 747 F. Supp. 15, 18 (D.D.C. 1990) ("Since defendants answered plaintiff's complaint prior to filing their motion to dismiss the complaint for failure to state a claim upon which relief can be granted, . . . this motion is untimely."), aff'd, 946 F.2d 1565 (D.C. Cir. 1991) (Table); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1361, at 444-45 (2d ed. 1990) ("If defendant decides to assert a Rule 12(b) defense by motion, then he must do so before filing his answer.").

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growth or development as a consequence of superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); see Byars v. Bluff City News Co., 609 F.2d 843, 849 (6th Cir. 1979).

UST concedes for purposes of this Motion that it has monopoly power in the market for moist snuff. See Motion at 3. Therefore, the only question for the Court is whether Conwood's Complaint adequately pleads exclusionary conduct. Conwood need not allege that UST has completely excluded rivals from the market; it is enough that Conwood plead that UST has impaired competition on the merits. See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). "[I]f a monopolist abuses its monopoly power and acts in an unreasonably exclusionary manner vis-a-vis rivals or potential rivals, then § 2 is violated." Byars, 609 F.2d at 853.

Moreover, it is the exclusionary impact of UST's conduct, as pleaded, judged as a whole, not the effect of each individual act of misconduct, that is relevant. See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962) (anticompetitive conduct must be evaluated "without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each"); Litton Systems, Inc. v. AT&T, 700 F.2d 785, 816 (2d Cir. 1983) (same), cert. denied, 464 U.S. 1073 (1984); City of Mishawaka v. American Elec. Power Co., 616 F.2d 976, 986 (7th Cir. 1980) ("It is the mix of the various ingredients . . . in a monopoly broth that produces the unsavory flavor."), cert. denied, 449 U.S. 1096 (1981).

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UST ignores the cumulative effect of the anticompetitive activity alleged in the Complaint and instead seeks to obscure these effects by "tightly compartmentalizing" each allegation. But the cumulative effect of the alleged conduct is far more severe than the effect of any one category of anticompetitive conduct standing alone. For example, UST's persistent removal and destruction of Conwood's display racks is far more damaging when UST has entirely excluded Conwood racks from substantial numbers of retail outlets by inducing retailers to enter into exclusive rack agreements. Likewise, such exclusive rack arrangements greatly exacerbate the impact of UST sales personnel's efforts to pass themselves off as "category managers" and to present false "plan-o-grams" that reduce the amount of shelf space allocated to UST's competitors. Combined with these other tactics intended to raise its rivals' costs, UST's predatory pricing is similarly more damaging than it would be standing alone.

Established authority teaches that each type of UST's misconduct, as pleaded, itself violates the antitrust laws. But the question for this Court is not whether each allegation of anticompetitive activity, taken alone, states a claim. Rather, the Court must decide whether the alleged conduct, taken in its entirety, and with all inferences drawn in plaintiffs' favor, may have been intended to "exclude rivals on some basis other than efficiency." Aspen Skiing Co., 472 U.S. at 605 (internal quotation marks omitted). Conwood's Complaint far exceeds this standard.

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A. UST's Campaign of Misconduct Violates the Antitrust Laws

UST dismisses Conwood's allegations of pervasive anti-competitive conduct as "age-old common law business torts." Motion at 15. To be sure, much of UST's conduct has, in fact, been tortious. See generally Complaint Counts III-VIII. But for purposes of Conwood's Complaint under section 2 of the Sherman Act, the question is not whether UST has violated other common law rules. Rather, the question is whether the behavior, as pleaded, can be said to "anticompetitively create or sustain a monopoly." 3 P. Areeda & H. Hovenkamp, Antitrust Law ¶ 651d, at 80 (1996). Conwood has alleged that UST's conduct constitutes "intentional and unlawful maintenance of monopoly power in the relevant market for moist snuff" or "[i]n the alternative . . . an attempt to monopolize this market in violation of section 2." Complaint ¶¶ 42, 43. The anticompetitive effects of such conduct include "reduction or elimination of consumer choice[,] . . . foreclosure of [competitors'] access to retail and distribution facilities[,] . . . increased barriers to entry[,] . . . chilling innovation[,] . . . loss of competition among manufacturers for retail and distribution outlets[,] . . . [and] loss of outlets for sale of tobacco by growers." Id. ¶ 40. These are precisely the types of anticompetitive effects that lie at the core of the antitrust law's concern.

Controlling precedent from this circuit establishes that this conduct violates section 2. In Byars, the plaintiff alleged "predatory conduct" by the defendant including:

> 1) removal of plaintiff's periodicals from sales racks at various retail outlets; 2) covering up of plaintiff's

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> periodicals on the racks to put them out of the view of prospective buyers; 3) below cost pricing of those few periodicals being distributed by the plaintiff; 4) disparagement of the plaintiff, his financial condition, and the periodicals he was able to obtain; 5) surreptitious addition of its own periodicals identical to those placed on racks by plaintiff in order to increase plaintiff's return and diminish plaintiff's profits; 6) intimidation of plaintiff's customers to purchase periodicals solely from defendant; 7) threats to the regional representative of an independent news company with reprisals if he assisted plaintiff in the direct purchase of periodicals from independents.

609 F.2d at 854 n.30. The district court had found for the defendant on the plaintiff's section 2 claim, and the court of appeals reversed. The court of appeals directed the district court, on remand, to "carefully examine the alleged 'dirty tricks.'" Id. at 863. "Predatory conduct on [the defendant's] part would go a long way toward establishing a § 2 violation." Id.[3]

Each of the allegations in the Byars case has its counterpart in the Complaint. "UST has routinely and systematically, in stores across the United States, taken Conwood moist snuff from the racks (to make it inaccessible to consumers)." Complaint ¶ 24. "When retailers and distributors have persisted in carrying Conwood products, UST has offered its own products below cost for no economic purpose other than to drive Conwood from those distribution outlets." Id. ¶ 30. "UST has regularly and systematically spread disparaging falsehoods about Conwoood's products." Id. ¶ 29. UST has "routinely replace[d] its racks with racks of a different style and shape. UST then discards Conwood's

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[3]On remand, the plaintiff failed to prove the alleged conduct; on subsequent appeal, the Sixth Circuit -- reiterating that the evidence of "predatory 'dirty tricks'" could support the plaintiff's claims, affirmed the evidentiary conclusions of the district court. Byars v. Bluff City News Co., 683 F.2d 981 (6th Cir. 1982).

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racks, . . . impos[ing] costs on Conwood." Id. ¶ 27. Conwood has "used its power as a monopolist to induce retail chains and stores across the United States to enter into . . . agreements barring or restricting Conwood products, racks and point of sale advertising." Id. ¶ 28. And Conwood's Complaint goes further, alleging that UST has used false plan-o-grams to exclude Conwood products from stores, and that UST sales personnel have falsely held themselves out as "category managers" with authority to remove Conwood products or relegate them to undesirable display locations. Id. ¶¶ 25, 26.

1. UST's Efforts To "Control the Moist Racks," Even Without More, Violate Section 2

Cases from other courts confirm that even conduct far less pervasive and severe in its anticompetitive effects than UST's can run afoul of the antitrust law when it helps to sustain a monopoly. In Sara Lee Corp. v. Kayser-Roth Corp., Civ. No. 6:92CV00460, 1995 U.S. Dist. LEXIS 6554 (M.D.N.C. Apr. 10, 1995), the plaintiff alleged that the defendant had "induced many stores to display all or nearly all pantyhose that the stores sell in displays furnished by" the defendant. Id. at *6. The defendant "promote[d] [its racks] as a replacement for all hosiery racks then in use by a store, including racks furnished by [the plaintiffs]. . . . This arrangement cause[d] [the defendant] to become the sole supplier of permanent displays for [the plaintiff's] pantyhose in those stores." Id. The plaintiff further alleged that this arrangement had the effect of

> degrad[ing] the presentation of [the plaintiff's] pantyhose; impos[ing] unnecessary rack and rack maintenance costs on [the plaintiff]; mak[ing] it impossible for [the plaintiff] to introduce new pantyhose products or to increase its space allocations without [the defendant's] advance knowledge; imped[ing] the

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introduction of new pantyhose products; and mak[ing] [the plaintiff] vulnerable to a product displacement scheme.

Id. at *9. Held: The plaintiff had stated a claim under both section 1[4] and 2 of the Sherman Act. Because the plaintiff had alleged that the defendant had induced retailers to accept displays that "provide[d] poor presentation" for the plaintiff's products "to increase [the plaintiff's] costs," the plaintiff had alleged that the defendant was "attempting to exclude rivals on . . . bases other than efficiency." Id. at *28 (internal quotation marks omitted). "These allegations sufficiently meet [the plaintiff's] pleading requirements." Id.

UST's exclusionary conduct is considerably more malignant than the conduct alleged in Sara Lee. To be sure, among the anticompetitive tactics employed by UST are exclusive rack agreements that "force Conwood's products into UST racks[] and restrict the space and placement of Conwood products in its racks." Complaint ¶ 28a. Many of these agreements relegate UST's competitors to "lower, less visible racks." Id. ¶ 28c. And UST also prevents Conwood from employing point of sale advertising or engaging in competitive price promotions at the point of sale. Id. ¶¶ 28a, 28b. But, even worse, UST has engaged in outright destruction and removal of Conwood racks -- simply to "impose costs" on its competitor. Id. ¶ 27. Moreover, this conduct was undertaken in the context of a multitude of other anticompetitive

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[4]A monopolist violates section 2 if the monopolist has "maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under [Sherman Act] § 1." United States v. Griffith, 334 U.S. 100, 106 (1948).

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acts and restrictive agreements, conduct which compounds the effects of UST's express policy of "control[ling] the moist racks." Id. ¶ 24. Conwood's well-pleaded allegations go far beyond the fully sufficient claims of the plaintiff in Sara Lee.

2. UST's Campaign of Misrepresentations, Even Without More, Violates Section 2

Likewise, Conwood's allegations that UST has misrepresented both store plan-o-grams and UST's authority over the moist snuff product category similarly state a claim for monopolization, even standing alone. In National Association of Pharmaceutical Manufacturers, Inc. v. Ayerst Laboratories, 850 F.2d 904 (2d Cir. 1988), the defendant sent a letter to pharmacists in California warning of "possible liability associated with dispensing a generic drug for an indication not included in its labeling." Id. at 908. The plaintiff alleged that the letter constituted an effort to monopolize the sale of a certain drug. The district court dismissed the claim on the grounds that "one letter sent in the context of an ongoing debate . . . is insufficient to violate the antitrust laws." Id. at 916.

The court of appeals reversed, holding that the plaintiff "should be allowed to go forward with the discovery process to substantiate its claim" that the letter in question was false, misleading, and likely to induce reasonable reliance. Id. Here, Conwood has alleged that UST has "repeated[ly]" employed plan-o-grams that "exclude Conwood products from stores, contrary to the actual wishes of store management." Complaint ¶ 25. Likewise, UST personnel have

> falsely represented to low-level store employees that its representatives are the store's authorized "category

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> manager" for smokeless tobacco products . . . . Under color of this supposed authority, which in fact UST does not have, UST routinely arranges the smokeless tobacco products in a way that makes competitors' products unavailable or inaccessible. UST's dominant position in the market help[s] to make UST's claim of authority plausible.

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Id. ¶ 26. As a result of UST's "large nationwide sales force," id. ¶ 23, and the high visibility of its brands, no competitor can neutralize UST's tactics without incurring overwhelming expense.[5]

Davis v. Southern Bell Telephone & Telegraph Co., 1994-1 Trade Cas. (CCH) ¶ 70,510, 1994 U.S. Dist. LEXIS 13257 (S.D. Fla. 1994), provides further support. The defendant was alleged to have distributed misleading inserts with its bills regarding the costs and benefits of an inside wiring maintenance plan. The court denied the defendant's motion for summary judgment:

> Plaintiffs' theory of antitrust injury is that [the defendant's] coercive and deceptive sales techniques required potential competitors to engage in corrective advertising. Plaintiffs allege that the need for corrective advertising deterred potential competitors from entering the market . . . because of the high cost associated with such advertising and the low rate at which those costs could be recouped. The adequacy of Plaintiffs' theory turns on the adequacy of the evidence supporting this allegation.

Id. at *42. Here, too, the anticompetitive effects of UST's conduct must be resolved at trial.

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[5]It is sometimes said that, for any "false and misleading advertising [to] constitut[e] exclusionary conduct, the disparagement must overcome a presumption that the effect on competition . . . [is] de minimis." American Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997). To overcome this presumption, plaintiffs must show, as they have have alleged, that the representations were false, material, likely to induce reliance, made to unknowledgeable buyers, continued for prolonged periods, and not readily susceptible of offset by rivals. Id.; Complaint ¶¶ 25,26. All these are issues of fact.

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3. UST's Disparagement of Conwood Products, Even Without More, Violates Section 2

Product disparagement such as Conwood has alleged can also, by itself, satisfy the exclusionary conduct element of a section 2 claim. In International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255 (8th Cir.), cert. denied, 449 U.S. 1063 (1980), the court affirmed a judgment against the defendant on the ground that the defendant had engaged in a campaign of publicity against the plaintiff that was intended to prevent the plaintiff "from becoming a competitive threat" to the defendant. Id. at 1268. "[T]he means by which [the defendant] sought to achieve this end was not fair competition, but rather an organized full frontal attack which (1) used false, misleading and deceptive advertising and (2) was directed at" end-users and distributors. Id. "[I]t was not reasonable for a monopolist . . . to use the means described above with the purpose of preventing any effective competition" from the plaintiff. Id. See also Serfecz v. Jewel Food Stores, Inc., 1993-1 Trade Cas. (CCH) ¶ 70,226, 1993 U.S. Dist. LEXIS 3947, at *4 (N.D. Ill. 1993) (allegations that defendant "engage[d] in a pattern of misrepresentation and coercion in order to devalue and destroy" competitor supported claims under sections 1 and 2).

4. UST's Arguments to the Contrary Are Without Merit

Conwood's allegations are not limited to any single category of illegal conduct, for UST has "developed a multi-faceted strategy of exclusionary acts for execution by its large nationwide sales force." Complaint ¶ 23. It is hard to imagine a more widespread,

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persistent, and determined campaign of anticompetitive conduct than that alleged in the Complaint.

None of the cases that UST cites supports its contention that marketplace misconduct by a monopolist cannot constitute the exclusionary conduct prohibited by section 2. In Merkle Press Inc. v. Merkle, 519 F. Supp. 50 (D. Md. 1981), the court rejected the plaintiff's claims because the alleged acts had increased, not decreased, competition. The plaintiff had both "fail[ed] to allege the market power of defendants' enterprise" and failed to allege that "the predator constituted a significant factor in the particular product market." Id. at 54. These holdings have no application here, for UST has conceded for the purpose of this Motion that it has market power in a properly defined market.[6]

Finally, UST cites two district court cases that dismissed claims based in one case on "vague allegations of disparagement" RE/MAX Int'l v. Realty One, Inc., 900 F. Supp. 132, 159 (N.D. Ohio 1995), and in the other on unspecified "defamatory comments,"

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[6]Defendants also purport to rely on an unpublished decision, L.B. Cleveland, Inc. v. Bluestone, 1987-1 Trade Cas. (CCH) ¶ 67,624, 1987 U.S. App. LEXIS 7868 (6th Cir. 1987) (820 F.2d 1225 (Table)), though sixth circuit rules state that "citation of unpublished decisions . . . is disfavored." Sixth Cir. R. 24(c). In all events, the case is not on point. The court did not find that the alleged conduct was legal under the antitrust laws because it was a business tort. Cf. Motion at 16. Rather, the court found that the plaintiffs had failed to plead any conduct that "threatens 'competition' in the market place as opposed to one competitor." L.B. Cleveland, 1987 U.S. App. LEXIS 7868, at *2. The plaintiff's allegation of misconduct was limited to one case of misuse of confidential trade information -- nothing like the systematic campaign alleged in the Complaint. Moreover, the defendants there were attempting to enter the market in order to compete with plaintiffs. See id. at *4. Thus the alleged effect of the defendants' actions was only to threaten a competitor's monopoly on a certain industrial process, not to threaten competition.

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Broyles v. Wilson, 812 F. Supp. 651, 655 (M.D. La.), aff'd, 3 F.3d 439 (5th Cir. 1993) (Table). These cases do not stand for the proposition that disparagement can never contribute to a claim under section 2 of the Sherman Act, and any such suggestion would be contrary to the explicit holding of Byars, as well as to the decisions of the courts of appeals in National Association of Pharmaceutical Manufacturers and International Travel Arrangers. Where, as here, such disparagement is simply one ingredient in a particularly unsavory "monopoly broth," City of Mishawaka, 616 F.2d at 986, plaintiffs have stated a claim under the Sherman Act.

B. UST's Exclusive Dealing Contracts Violate the Antitrust Laws

The law condemns the impairment of competition on the merits, even if that impairment does not constitute complete exclusion of a rival or total foreclosure of its opportunities. Conwood need not allege that every possible avenue of distribution has been effectively foreclosed. See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) (claim stated where defendant merely impeded competitor's ability to market its product). Rather, the exclusionary provisions of UST's agreements with retailers are unlawful if, on balance, they impair competition and unreasonably restrain trade. See, e.g., Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327-28 (1961). Such arrangements run afoul of the antitrust laws if they restrict rivals' output more than they further UST's legitimate objectives. National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978); American Ad Management, Inc. v. GTE Corp., 92 F.3d 781, 791 (9th Cir. 1996).

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Such an inquiry is practical and fact-based, and it "focuses directly on the challenged restraint's impact on competitive conditions." National Soc'y of Prof'l Eng'rs, 435 U.S. at 688. For this reason, judgment on the pleadings is improper. Conwood must be given the opportunity to prove what it has pleaded: that the alleged exclusive agreements had an exclusionary effect and were not reasonably necessary to a legitimate business objective. See Sullivan v. National Football League, 34 F.3d 1091, 1103 (1st Cir. 1994), cert. denied, 513 U.S. 1190 (1995).

UST's conduct places this case at the heart of current private and public efforts to protect consumers from the pernicious effects of monopoly. As with other comparable enforcement efforts, Conwood's allegations cannot be summarily decided on the pleadings. See PepsiCo, Inc. v. Coca-Cola Co., No. 98 Civ. 3282 (LAP), 1998 WL 547088, at *18 (S.D.N.Y. Aug. 27, 1998) (copy attached) (allegation regarding exclusive dealing arrangements "states a section 2 claim"; motion to dismiss denied); United States v. Microsoft, Nos. Civ. A. 98-1232 & 98-1233 (TPJ), 1998 WL 614485, at *19-*20 (D.D.C. Sept. 14, 1998) (copy attached) (denial of summary judgment on monopolization claim based on exclusive dealing arrangements); 3 Areeda & Hovenkamp, supra, ¶ 651c, at 78 (conduct that "reasonably appear[s] capable of making a significant contribution to creating or maintaining monopoly power" violates section 2).

UST fails to address these core legal principles. It does not cite a single case in which allegations of exclusive dealing were dismissed on the pleadings. The absence of even a single holding in support of UST's pleading challenge confirms that the argument is without foundation.

UST cites two cases that purportedly support its motion; neither is on point. Bayou Bottling, Inc. v. Dr Pepper Co., 725 F.2d 300 (5th Cir.), cert. denied, 469 U.S. 833 (1984), was decided on summary judgment -- not on the pleadings -- and did not involve allegations at all comparable to the allegations in Conwood's Complaint. In that case, the plaintiff alleged that the defendants had provided coolers and vending machines to retailers on the condition that the plaintiff's products not be stocked in those machines. Id. at 304. The plaintiff did not allege that its own coolers or products were excluded from retail outlets. Here, by contrast, Conwood has alleged that UST has induced retailers to take only UST racks and to place Conwood products in those racks exclusively. This excludes many Conwood products from stores entirely and caps Conwood's market share, restricts its promotional efforts -- including discounting -- and impairs the presentation of Conwood's products. See Complaint ¶ 28. By inducing retailers to accept exclusive UST racks, UST effectively gains control of 100 percent of the shelf space dedicated to moist snuff in thousands of retail outlets. Moreover, the restrictions imposed on Conwood's point-of-sale promotional efforts take on particular significance in the moist snuff market, where alternative methods of marketing and promotion are not available. See Comprehensive Smokeless Tobacco Health Education Act of 1986, Pub. L. No. 99-252, 100 Stat. 30.

Finally, UST cites a district court case, Beverage Management, Inc. v. Coca-Cola Bottling Corp., 653 F. Supp. 1144 (S.D. Ohio 1986), in which, after an evidentiary hearing, the district court found that the plaintiff was unlikely to prevail on a claim that an

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agreement between a soft-drink manufacturer and a retailer constituted an exclusive dealing arrangement. Contrary to UST's suggestion, the court simply did not find that the plaintiff's claim failed as a matter of law, but rather as a matter of fact. Thus, the district court implicitly accepted the proposition that "foreclos[ure] from 14 percent of the relevant market for national brand soft drinks" would violate the antitrust laws. Id. at 1153-54. However, the court found that the agreements in question -- the factual details of which were already before the court -- were not "equivalent to a requirements contract or an exclusive dealing contract," id. at 1154; the court also held that the plaintiff's market definition would "likely prove untenable," id. Where, as here, the details of UST's exclusive dealing arrangements must await discovery and where the defendants do not contest the definition of the alleged market, the cited case has no application.

UST's legal argument is thus without support; nor can it be bolstered with UST's unsworn assertions that it has no exclusive dealing agreements -- contrary to the allegations in the Complaint -- or that its agreements are merely "ordinary marketing methods." Motion at 12, 15. This characterization of the Complaint is wrong on its face and particularly untenable in the context of a motion to dismiss, where all factual inferences must be drawn in favor of the plaintiff. Hamilton Chapter, 128 F.3d at 63; In re DeLorean, 991 F.2d at 1240. Conwood specifically alleges that UST was able to secure, and did in fact secure, exclusive agreements with retailers across the country by "us[ing] its power as a monopolist." Complaint ¶ 28. These are, in other words, opportunities that only

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a monopolist may pursue. When a monopolist does so, it breaks the law.

C. Conwood Properly Alleges Predatory Pricing

To establish a claim that UST has engaged in predatory pricing in violation of the Sherman Act, Conwood must allege that UST has set prices below cost, and that there is a dangerous probability that UST will be able to recoup its investment in below-cost prices. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24 (1993); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117, 119 n.15 (1986). Conwood's Complaint does so. It alleges that "UST has offered its own products below cost for no economic purpose other than to drive Conwood from" distribution outlets. Complaint ¶ 30. Conwood illustrates that such a strategy is likely to permit UST to recoup its investment: for example, if UST succeeds in driving Cougar from the market, UST will be able to "return to premium pricing for all its products," which will permit UST to recoup "more than . . . any losses it sustains" from its predatory pricing strategy. Id. ¶ 31. At this stage, Conwood need plead nothing more to make out a claim of predatory pricing.

UST fails to cite a case disposing of a predatory pricing claim on the pleadings. Instead, UST argues the facts -- and the facts it argues are of its own invention.[7] It claims that the

[7]UST's argument appears to be based on the notion that predatory pricing claims must be pleaded with particularity as though they were allegations of fraud. Cf. Fed. R. Civ. P. 9(b). But "the test for the sufficiency of a complaint in an antitrust action is more liberal that the test for claims of fraud under Rule 9(b), and is guided by the 'short, plain and concise' language in Rule 8." Michaels Bldg. Co., 848 F.2d at 681. "The liberal rules

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specific allegations concerning pricing of Red Seal are the sole basis for Conwood's Complaint. See Motion at 6. Not so. Conwood alleges that "UST has offered its own products below cost." Complaint ¶ 30 (emphasis added). One example of this is its pricing of "its . . . discount product." Id. ¶ 31. Inclusion of an illustrative example of predatory conduct strengthens but does not limit Conwood's claims. See 5 C. Wright & A. Miller, Federal Practice and Procedure § 1218, at 183 (2d ed. 1990); Sinaiko Bros. Coal & Oil Co. v. Ethyl Gasoline Corp., 2 F.R.D. 305, 306 (S.D.N.Y. 1942) (inclusion of evidentiary matter "appears to give a fuller understanding of the complaint").

Thus, to the extent that UST's Motion is based on the proposition that "[p]laintiffs' predatory pricing allegations . . . include only [UST's] Red Seal price-value brand" (Motion at 8-9), UST's Motion must fail, for Conwood's allegations go further. UST's claim that "[p]laintiffs do not . . . allege any below-cost pricing of any kind with respect to any other UST[] moist snuff product" ignores the plain language of paragraph 30 of the Complaint.

Even if Conwood's allegations were limited to the price-value category, these allegations could not be dismissed. Contrary to UST's suggestion, a multi-product company can be guilty of predatory pricing if its below-cost pricing of a single product

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of pleading embodied in Fed.R.Civ.P. 8 are as applicable to claims in antitrust . . . as they are in any other case. All that is required is a short, plain statement of facts sufficient to give the defendant fair notice of the basis of the claim." Baxley-Delamar Monuments, Inc. v. American Cemetery Ass'n, 843 F.2d 1154, 1156 (8th Cir. 1988) (quoting Fusco v. Xerox Corp., 676 F.2d 332, 337 n.7 (8th Cir. 1982)).

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injures competition. See, e.g., Marsann Co. v. Brammall, Inc., 788 F.2d 611, 614 & n.2 (9th Cir. 1986) (holding that services performed for a single customer could form the basis of a predatory pricing claim); C.E. Servs., Inc. v. Control Data Corp., 759 F.2d 1241, 1247-48 (5th Cir.) (same), cert. denied, 474 U.S. 1037 (1985). In Brooke Group Ltd., the Supreme Court held that the defendant's below-cost pricing in the generic segment of the cigarette market failed to support a predatory pricing claim only because "[n]o inference of recoupment is sustainable on this record." 509 U.S. at 232. Here, were Conwood to limit its allegations to the price-value sector -- which it has not -- the Court would nonetheless be required to permit Conwood to show that UST, as a monopolist, has a dangerous probability of recoupment if competitors' price-value brands are driven from the market or if, "to avoid further losses, [competitors] would raise [their] list prices on [price-value brands] or acquiesce in price leadership by [UST]." Id. at 231 (explaining theory of plaintiff's case).

UST's other asserted grounds for dismissal are similarly unfounded. For example, UST claims that Conwood has not alleged anything more than "a promotional offering of the Red Seal brand." Motion at 9. But, in making this argument, UST asks the Court not merely to infer -- contrary to the language of the Complaint -- that Red Seal is the only product that UST prices below cost, but also that the duration of this below-cost pricing has been too brief to support a claim. Id. at 9-10. There is no basis for drawing such an inference against the plaintiffs. Finally, UST also makes the flatly false assertion that "[p]laintiffs cannot . . . plead anticompetitive harm to the alleged relevant market."

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Id. at 11. Plaintiffs have pleaded just that. Complaint ¶¶ 30-31, 40, 45. And again, this is a quintessential question of fact precluding dismissal, as UST's own citations attest. Motion at 11.

III. CONWOOD HAS ALLEGED A CLAIM UNDER THE LANHAM ACT

UST cannot argue that Conwood has failed to plead a Lanham Act claim, because UST's counterclaim mimics Conwood's claim virtually word for word. See Defendants' Answer, Affirmative Defenses, and Counterclaims at 13 (filed June 12, 1998). Instead, UST argues that its false statements to customers cannot qualify as "commercial advertising," because the behavior does not involve sufficient dissemination to the public. This argument is wrong.

The Lanham Act prohibits misrepresentations about another person's products made "in commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B) (emphasis added).

> "In order for representations to constitute 'commercial advertising or promotion' under Section 43(a)(1)(B), they must be: (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services. . . . [In addition,] the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry."

Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1384 (5th Cir. 1996) (quoting Gordon & Breach Science Publishers S.A. v. American Inst. of Physics, 859 F. Supp. 1521, 1535-36 (S.D.N.Y. 1994). The Complaint alleges all four elements of the claim. UST does not and cannot contest that the representations of its salesmen constitute commercial speech. UST does not and cannot contest that it is in competition with Conwood. UST does not and cannot contest that its representations were made with the intent of inducing retailers to

stock, and consumers to buy, UST's products rather than Conwood's products.

UST's only challenge to Conwood's claim is that Conwood has alleged only "isolated statements to consumers." Motion at 19. This argument, however, ignores the language of the Complaint, which states:

> UST has regularly and systematically spread disparaging falsehoods about Conwood's products. [Listing examples.] These disparagements are not isolated instances, but form part of the overall UST campaign to drive Conwood moist snuff products from store shelves.

Complaint ¶ 29. UST's response to these allegations is to deny their truth and to suggest that the Court should dismiss this well-pleaded Complaint on the basis of UST's bare denial. But whether UST's statements were or were not "isolated instances" is a question of fact, one that cannot be resolved on these pleadings. See, e.g., Seven-Up Co., 86 F.3d at 1386 (sales presentation not "merely isolated, individual statements of opinion by a single sales representative to a single customer" was commercial advertising for purposes of Lanham Act); H & R Indus., Inc. v. Kirshner, 899 F. Supp. 995, 1005-06 (E.D.N.Y. 1995) (statements made by defendant that competitor was engaging in improper commercial practices held to raise fact issues for jury on trade disparagement claim under Lanham Act); National Artists Management Co. v. Weaving, 769 F. Supp. 1224, 1229 (S.D.N.Y. 1991) (allegation that defendants had made phone calls and statements to plaintiffs' clients stated claim for commercial disparagement under Lanham Act); Gordon & Breach Science Publishers S.A. v. American Inst. of Physics, 859 F. Supp. 1521 (S.D.N.Y. 1994) (allegations of deceptive promotional efforts stated claim under Lanham Act).

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IV. CONWOOD'S STATE LAW CLAIMS ARE UNCHALLENGED ON THE MERITS

UST does not argue that Conwood has failed to make out its state law claims. To the contrary, it virtually admits their validity. Motion at 17. Because UST's challenges to Conwood's claims under the Sherman Act and under the Lanham Act are without merit, its argument that pendent state law claims should be dismissed likewise should fail.

Conclusion

For the foregoing reasons, the Court should deny UST's Motion for Judgment on the Pleadings in its entirety.

Respectfully submitted,

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Dated: September 21, 1998.

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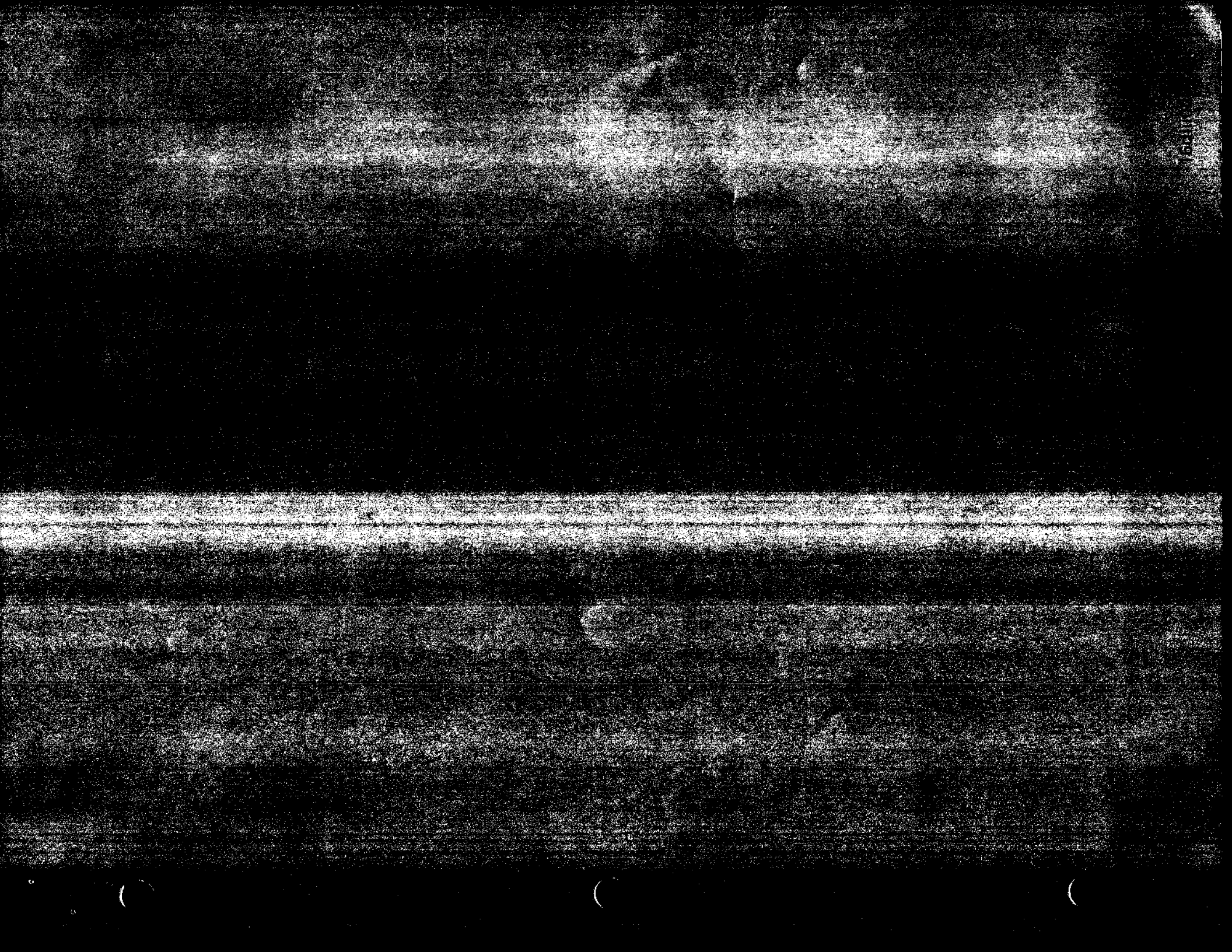

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

Upon consideration of Defendants' Motion to Dismiss or for Judgment on the Pleadings, the opposition thereto, and for good cause shown, the motion is DENIED.

Honorable Thomas B. Russell
United States District Judge

Dated this ___ day of _____, 1998.

EXHIBIT A

PEPSICO, INC., Plaintiff,
v.
THE COCA-COLA COMPANY, INC., Defendant.

No. 98 CIV. 3282(LAP).

United States District Court, S.D. York.

Aug. 27, 1998.

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Jonathan M. Jacobson, Esq., Daniel F. McInnis, Esq., Anthony W. Swisher, Esq., Akin, Gump, Strauss, Hauer & Feld, L.L.P., New York, Michael C. Russ, Esq., Jeffrey S. Cashdan, Esq., King & Spalding, Atlanta, GA, Abbot B. Lipsky, Jr., Esq., James M. Koelemay, Jr., Esq ., Kenneth L. Glazer, Esq., Joel M. Neuman, Esq., The Coca-Cola Company, Atlanta, GA, for Defendant.

OPINION AND ORDER

PRESKA, District J.

*1 Plaintiff PepsiCo, Inc. ("PepsiCo") has sued defendant The Coca-Cola Company, Inc. ("Coca-Cola"), alleging that Coca-Cola has violated section 2 of the Sherman Act, 15 U.S.C. § 2, by monopolizing and attempting to monopolize a segment of the fountain-dispensed soft drink industry. Coca-Cola moves to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). For the reasons that follow, Coca-Cola's motion is denied.

BACKGROUND

The facts alleged in the complaint are as follows. PepsiCo complains of Coca- Cola's behavior in a market described as "sales of fountain-dispensed soft drinks distributed through foodservice distributors throughout the United States." Complaint ¶ 9. This market allegedly consists of "an increasing number of restaurant chains, movie theater chains and other 'on-premise' accounts" that purchase "most of their supplies, including fountain soft drink products, through foodservice distributors." Id. ¶ 7.

Foodservice distributors are "independent companies that distribute a broad variety of food products, paper products and other supplies, including fountain-dispensed soft drinks, in consolidated deliveries to restaurant chains, movie theater chains and other customers." Id. ¶ 2. These distributors carry thousands of items and supply all of a customer's needs at once, using consolidated single-truck deliveries and consolidated bookkeeping. Id. ¶ 8.

Because foodservice distributors offer a form of one-stop shopping, their customers take delivery of all of the customer's supplies from only one distributor at each of the customer's locations. Id. ¶ 2. Foodservice distributors' customers "generally make it a practice not to purchase these supplies through any other means." Id. Furthermore, for "logistical and economic reasons, these accounts make it a practice to have only a single foodservice distributor supply any given outlet, and it is common for a single foodservice distributor to supply either an entire chain or groups of outlets within a chain." Id. As a result, "for each location in each such chain there is only one foodservice distributor through which a supplier" can have its product distributed. Id. ¶ 7.

According to PepsiCo, the accounts in question have no viable alternatives to fountain-dispensed soft drinks distributed through foodservice distributors. As an initial matter, soft drinks sold in bottles and cans are not adequate substitutes for fountain products. Indeed, virtually all of the soft drink volume of these accounts is in fountain-dispensed products (which provide considerably greater profits than drinks sold in bottles and cans), and the cost of switching a fountain business to bottles and cans would be prohibitive. Id. ¶ 8.

Other modes of delivery also fail to present an adequate alternative to distribution through foodservice distributors. According to PepsiCo, "customers of foodservice distributors generally refuse to be supplied by any other means once they have begun receiving supplies through such distributors, because changing from their established distribution and accounting practices to other methods of distribution, or even switching distributors, would cause them to incur severely

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adverse economic and logistical consequences." Id. As described in the complaint, the distribution "superhighway" formed by the growth of independent foodservice distributors has become "the lifeblood of competitive efficiency in the restaurant business, movie theater business and other businesses that depend upon delivery through foodservice distributors in order to remain logistically efficient." Id.

*2 PepsiCo alleges that Coca-Cola "dominates" the market described above, see Complaint ¶¶ 9, 33, 36, and that "virtually every major foodservice distributor in America today" has an agreement with Coca-Cola to distribute Coca-Cola fountain products. Id. ¶ 16. Coca-Cola is alleged to control over 90% of that market and to possess the power to control prices and exclude competition in the market. Id. ¶ 9.

PepsiCo alleges that the parties' past business practices explain Coca-Cola's dominance in, and PepsiCo's absence from, this market. Although PepsiCo itself markets fountain-dispensed soft drinks, for two reasons "it historically has been less successful than Coca-Cola in penetrating the relevant market." Id. ¶ 10. First, the fountain products that PepsiCo sold to its "on-premise" accounts were distributed exclusively through PepsiCo local bottlers, while Coca-Cola's sales were made through various types of national, regional and local fountain distributors. Id. ¶ 11. As a result, when foodservice distributors "began to take over" distribution of supplies to restaurant chains, movie theater chains and other "on-premise" accounts, Coca-Cola was able to designate the foodservice distributors as Coca-Cola fountain distributors as well, "thereby facilitating sales to the growing number of customers that had begun to receive their supplies only through such distributors." Id. ¶ 11. In contrast, PepsiCo's arrangements with its local bottlers prevented it from selling its products through foodservice distributors, and PepsiCo lost the opportunity to capitalize on the emergence of foodservice distribution. Id. ¶ 11.

PepsiCo attributes its disadvantage as well to its acquisition in the 1970's and 1980's of restaurant chains which featured PepsiCo products. Coca-Cola capitalized on PepsiCo's restaurant ownership by "convincing other restaurant chains that PepsiCo had become their competitor and therefore they should spurn Pepsi and support Coke." Id.

In 1997, PepsiCo changed its business strategy. It negotiated new arrangements with its bottlers, thereby allowing it to distribute fountain-dispensed soft drinks through foodservice distributors rather than local bottlers. PepsiCo also divested itself of its restaurant chains "so that it could no longer be portrayed as a competitor of the other chains." Id. ¶ 13. As a result of these moves, PepsiCo "emerged in 1997 as a significantly more potent competitive threat to Coca-Cola's dominance" in the alleged market. Id. ¶ 14. Rid of its self-imposed constraints, PepsiCo increased its efforts to sell and market its fountain products; to this end, PepsiCo approached restaurant chains, movie theater chains and other customers with "highly competitive proposals, offering to sell to them through foodservice distributors for less money than Coca-Cola." See id.

According to the complaint, Coca-Cola viewed PepsiCo's emergence as a threat to Coca-Cola's market dominance. Coca-Cola thus embarked on a "strategy to use its market power to perpetuate its monopoly by threatening foodservice distributors with the loss of Coke if they dare to carry Pepsi for their customers who want Pepsi, and by cutting off any distributors that decide to carry Pepsi anyway, making examples of them." Id. ¶ 15. PepsiCo maintains that Coca-Cola's strategy "threatens to freeze PepsiCo out of the market and leave customers that require delivery through foodservice distributors with no alternative to Coke." Id.

*3 According to the complaint, to carry out its strategy Coca-Cola relied on the terms of its contracts with foodservice distributors. Those contracts allegedly contain an express condition prohibiting the distributor from handling PepsiCo soft drink products. Id. ¶ 17. While those agreements historically contained such a condition, Coca-Cola rarely enforced it and even had acquiesced when some foodservice distributors refused to agree to the provision. Id. As soon as PepsiCo "became a serious competitive threat," however, Coca-Cola began to enforce the condition actively. Id. ¶ 20. Coca- Cola allegedly cut off foodservice distributors that began to distribute PepsiCo products and threatened to cut off those that showed an interest in carrying PepsiCo products. Id. ¶¶ 20-26.

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PepsiCo maintains that Coca-Cola's tactics lock foodservice distributors into Coca-Cola, depriving those distributors of the ability to distribute competing brands to their customers. In particular, because of Coca-Cola's

> huge share of the relevant market, its particular dominance of fountain- dispensed cola (which restaurants, theaters and other accounts must have), and the fact that foodservice distributors must carry Coke products in order to fill orders from their other customers who sell Coke, such a threat is overwhelmingly powerful and coercive, and reflects Coca-Cola's single-minded determination to hold on to its monopoly.

Id. ¶ 25. As a consequence, restaurant chains, theater chains and other customers of foodservice distributors "remain locked into Coca-Cola as their supplier without the real ability to entertain a competitive bid from PepsiCo." Id. ¶ 11. Because their distributors will only deliver Coca-Cola products, establishments that wish to serve PepsiCo products are forced to remain with Coca-Cola products and are prevented from putting their requirements out for fair and open competitive bids. Id. ¶ 27. This absence of price competition is alleged to affect the consumers who are customers of these establishments and deprives PepsiCo of opportunities to compete on the merits for the business of the customers that require delivery through foodservice distributors. Id. ¶¶ 27-28.

DISCUSSION

Coca-Cola moves to dismiss, under Fed.R.Civ.P. 12(b)(6), on the ground that PepsiCo's complaint fails to state a claim upon which relief may be granted. "A dismissal is warranted under Rule 12(b)(6) only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College, 128 F.3d 59, 62-63 (2d Cir.1997). Under this standard, the question is not "whether a plaintiff will or might ultimately prevail on [its] claim, but whether [it] is entitled to offer evidence in support of the allegations in the complaint." Id. at 62. As explained by the Supreme Court, and recently reiterated by the Court of Appeals, "it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974) (quoted in Hamilton College, 128 F.3d at 62). To this end, I must "accept as true all the factual allegations in the complaint and must draw all reasonable inferences in favor of the plaintiff." Hamilton College, 128 F.3d at 63 (citing Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 740, 96 S.Ct. 1848, 1850, 48 L.Ed.2d 338 (1976)). This "generous approach to pleading applies in the antitrust context," and courts should recall that "where the proof of the alleged antitrust violation is largely in the hands of the defendants, dismissals prior to giving the plaintiff an opportunity for discovery should be granted sparingly." Id.

I. SECTION 2 OF THE SHERMAN ACT

***4** PepsiCo alleges that Coca-Cola is guilty of actual or attempted unlawful monopolization of the relevant market in violation of section 2 of the Sherman Act, 15 U.S.C. § 2. To state a monopolization claim under section 2, a plaintiff must establish "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966); Clorox Co. v. Sterling Winthrop, Inc., 117 F.3d 50, 61 (2d Cir.1997). To state an attempted monopolization claim, a plaintiff must establish "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S.Ct. 884, 890, 122 L.Ed.2d 247 (1993); Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 99-100 (2d Cir.1998).

According to Coca-Cola, PepsiCo's complaint must be dismissed because it fails, as a matter of law, to allege either (1) a valid relevant market or (2) prohibited anticompetitive conduct. These contentions are discussed in turn below.

II. FAILURE TO ALLEGE A VALID RELEVANT MARKET

It is "a basic principle in the law of monopolization that the first step in a court's analysis must be a

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definition of the relevant markets." Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 268 (2d Cir.1979), cert. denied, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). This is so because "[w]ithout a definition of that market, there is no way to measure [a defendant's] ability to lessen or destroy competition." Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177, 86 S.Ct. 347, 350, 15 L.Ed.2d 247 (1965); see Morgenstern v. Wilson, 29 F.3d 1291, 1296 (8th Cir.1994) ("An actual monopolization claim often succeeds or fails strictly on the definition of the product or geographic market."), cert. denied, 513 U.S. 1150, 115 S.Ct. 1100, 130 L.Ed.2d 1068 (1995). Accordingly, PepsiCo's first task is to plead a relevant market. See Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832, 840 (2d Cir.1980); Theatre Party Assocs., Inc. v. Shubert Org., Inc., 695 F.Supp. 150, 153 (S.D.N.Y.1988).

A. Defining a Relevant Product Market

For antitrust purposes a relevant market has both a product dimension and a geographic dimension. See Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962); T. Harris Young & Assoc. v. Marquette Elec. Inc., 931 F.2d 816, 823 (11th Cir.), cert. denied, 502 U.S. 1013, 112 S.Ct. 658, 116 L.Ed.2d 749 (1991). Coca-Cola does not contest PepsiCo's allegation that the relevant geographic market in this case consists of sales "throughout the United States." This dispute thus focuses on whether PepsiCo has alleged a valid and relevant product market.

***5** As the Supreme Court has explained, "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross- elasticity of demand between the product itself and substitutes for it." Brown Shoe, 370 U.S. at 325, 82 S.Ct. at 1523; Hayden Pub. Co., Inc. v. Cox Broadcasting Corp., 730 F.2d 64, 70-71 (2d Cir.1984). Defining the relevant product market requires consideration of "cross-elasticity of demand" between products, which measures "the extent to which consumers will change their consumption of one product in response to a price change in another." Eastman Kodak v. Image Technical Servs., 504 U.S. 451, 469, 112 S.Ct. 2072, 2083, 119 L.Ed.2d 265 (1992). If customers are able to substitute one product or service in response to a nontrivial increase in the price of another, these products or services must fall within the same product market. F.T.C. v. R.R. Donnelly & Sons Co., 1990-2 Trade Cas. (CCH) ¶ 69,239, at 64,854 (D.D.C.1990) (citing United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 400, 76 S.Ct. 994, 1010, 100 L.Ed. 1264 (1956)). As explained by the Court of Appeals, " '[d]efining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products, have the ability--actual or potential--to take significant amounts of business away from each other." ' Hayden, 730 F.2d at 71 (quoting SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056, 1063 (3d Cir.), cert. denied, 439 U.S. 838, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978)).

At play in this case is the principle that within a broad product market there may exist "well-defined submarkets ... which, in themselves, constitute product markets for antitrust purposes." Brown Shoe, 370 U.S. at 325, 82 S.Ct. at 1524 (citing United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 593-95, 57 S.Ct. 872, 877 (1957)). The boundaries of so-called "submarkets" may be established by reference to such "practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Id.; see F.T.C. v. Cardinal Health, Inc., Nos. Civ. A. 98-595, Civ. A. 98-596, 1998 WL 433784, at *12 (D.D.C. July 31, 1998); F.T.C. v. Staples, Inc., 970 F.Supp. 1066, 1075 (D.D.C.1997).

Ultimately, a "submarket" definition turns on the same inquiry as a "market" definition--"whether the products in a proposed submarket are reasonably interchangeable in use or production with products in the broader market." ABA Antitrust Section, Antitrust Law Developments 521 (4th ed.1997). At bottom, then, "the same proof which establishes the existence of a relevant product market also shows (or fails ... to show) the existence of a product submarket." H.J., Inc. v. International Tel. & Tel. Corp., 867 F.2d 1531, 1540 (8th Cir.1989); AD/SAT v. Associated Press, 920 F.Supp. 1287, 1296 n. 6 (S.D.N.Y.1996) (observing that "[t]he required analysis does not change whether a particular product market is deemed a market or a submarket," agreeing with commentators that "submarket" term draws no meaningful distinction and restricting itself

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to use of the term "market"); Staples, 970 F.Supp. at 1080 n. 11 (noting that use of term "submarket" may be confusing and observing that "[w]hatever term is used--market, submarket, relevant product market--the analysis is the same"). As Professor Areeda counseled, "speaking of submarkets is both superfluous and confusing in an antitrust case," and "nothing would be lost by deleting the word 'submarket' from the antitrust lexicon." IIA Antitrust Law ¶ 533e, at 170, 173. Heeding this advice, where possible this Opinion will speak only of relevant "markets".

*6 Also crucial here is the principle that to define a relevant product market one must look at how consumers view the products in question. See Westman Commission Co. v. Hobart Int'l, Inc., 796 F.2d 1216, 1220 (10th Cir.1986) ("Any definition of a line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful." (quoting United States v. Bethlehem Steel Corp., 168 F.Supp. 576, 592 (S.D.N.Y.1958)); Cardinal Health, 1998 WL 433784, at *11 ("[T]he relevant market consists of all of the products that the Defendant's customers view as substitutes to those supplied by the Defendants.").

The market definition inquiry set out in Cardinal Health, which involved a potential merger of pharmaceutical wholesalers, is apt here. In deciding whether wholesale distribution services constituted a market distinct from other distribution methods, Judge Sporkin focused on customers' decisions:

> Thus, in this case, if enough customers view other forms of prescription drug delivery methods as acceptable substitutes to the services provided by the Defendants, then the relevant market should include these alternative methods. On the other hand, if customers do not view the other methods of distribution as viable substitutes, then the relevant product market should be limited to wholesalers' services.

1998 WL 433784, at *11. Judge Sporkin also reflected that "[i]t is imperative that the Court, in determining the relevant market, take into account the economic and commercial realities of the pharmaceutical industry." Id. at 12. Similarly, market definition in this case must account for the "economic and commercial realities" of the beverage industry, but on this motion to dismiss such consideration must be limited to how those realities are alleged in the complaint.

B. The Standard for Evaluating Market Definition on a Motion to Dismiss

As the above cases might suggest, market definition is most often a factual inquiry. See Hayden, 730 F.2d at 70 n. 8 (noting that " 'a pronouncement as to market definition is not one of law, but of fact" ' (quoting Jennings Oil Co. v. Mobil Oil Corp., 539 F.Supp. 1349, 1352 (S.D.N.Y.1982))); International Audiotext Network, Inc. v. American Tel. & Tel. Co., 893 F.Supp. 1207, 1214 (S.D.N.Y.1994) ("Market definition ... is generally ultimately a question of fact which 'can be determined only after a factual inquiry into the "commercial realities" faced by consumers." ' (quoting Eastman Kodak, 504 U.S. at 482, 112 S.Ct. at 2090)), aff'd, 62 F.3d 69 (2d Cir.1995). Motions to dismiss in this context thus may be granted only if the alleged market makes "no economic sense under any set of facts." National Communications Ass'n v. American Tel. & Tel. Co., 808 F.Supp. 1131, 1134 (S.D.N.Y.1992) (quoting Theatre Party, 695 F.Supp. at 154); Envirosource, Inc. v. Horsehead Resource Dev. Co., 1997-2 Trade Cas. (CCH) ¶ 71,944, at 80,608 (S.D.N.Y.1997) ("Extensive analyses of reasonable interchangeability and cross elasticity of demand ... are not required at the pleading stage."); Michael Anthony Jewelers, Inc. v. Peacock Jewelry, Inc., 795 F.Supp. 639, 647 (S.D.N.Y.1992) (deeming market definition-based 12(b)(6) dismissal proper only where proposed market definition is "patently implausible solely on the basis of the four corners" of the complaint). Absent an inherently implausible market allegation, the question must be resolved on the facts and economic realities of the case. See, e.g., R.R. Donnelly, 1990-2 Trade Cas. ¶ 69,239, at 64,854 (rejecting market definition where evidence showed that technological developments in relevant fields rendered once-viable market allegation implausible).

C. PepsiCo's Alleged Market

*7 As explained above, PepsiCo defines the relevant market as "sales of fountain-dispensed soft drinks distributed through independent foodservice distributors throughout the United States." Complaint ¶ 6. In alleging this market, PepsiCo contends, and for the purposes of the motion Coca-Cola accepts, that the relevant sales are to the

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restaurants, movie theaters, or other establishments that purchase fountain-dispensed soft drinks for later sale to individual consumers, not sales to the diners, moviegoers, or other customers who patronize those retail establishments and actually drink the soft drinks. The market PepsiCo alleges consists of an "increasing number" of these restaurants, theater operators, and other "on-premise" accounts who "generally make it a practice" to purchase the supplies exclusively through foodservice distributors. Id. PepsiCo thus alleges that the relevant market consists not of the sale of all soft drinks, or even of all fountain-dispensed soft drinks, but only of sales of fountain-dispensed soft drinks distributed through foodservice distributors. In this way, PepsiCo alleges that within the broader market for fountain-dispensed soft drinks, there exists a separate distinct market (or submarket) for fountain-dispensed soft drinks distributed through foodservice distributors. The boundaries of PepsiCo's proposed product market are thus defined by this particular method of distribution. As one would expect, Coca-Cola takes issue with this market definition.

D. Coca-Cola's Arguments

1. A Market Cannot Be Limited to Sales Through a Single Group of Distributors

At the outset I must address Coca-Cola's argument that "as a matter of law, a market cannot be limited to sales through a single group of distributors." Memorandum of Defendant The Coca-Cola Company in Support of Its Motion to Dismiss ("Coca-Cola Mem.") at 12. This statement is incorrect--numerous courts have defined product markets by reference to a channel of distribution. See e.g ., Cardinal Health, 1998 WL 433784, at *13 (holding that wholesale distribution of pharmaceutical products to customers who demanded such distribution was a relevant market, even though products so delivered were identical to those delivered through other modes of distribution); Staples, 970 F.Supp. at 1080 (holding that sales of consumable office supplies through office supply superstores constituted relevant market, even though the office supplies sold in those outlets were physically identical to those sold elsewhere; relying on "compelling pricing evidence" which demonstrated that customers of office superstores did not turn to non-superstore outlets when faced with price increases in the superstore market); Columbia Broadcasting Sys., Inc. v. FTC, 414 F.2d 974, 978-79 (7th Cir.1969), cert. denied, 397 U.S. 907, 90 S.Ct. 903, 25 L.Ed.2d 88 (1970) (phonograph records sold through record clubs comprised relevant market even though records delivered by clubs were identical to those sold in record stores and other outlets); Henry v. Chloride, Inc., 809 F.2d 1334, 1343 (8th Cir.1987) (sales of automobile batteries through route salespersons distinct from sales of such batteries through retail stores even though "the batteries sold by route salespersons are not different in character, creation or use from those sold from a warehouse or store"); Ansell Inc. v.. Schmid Lab., Inc., 757 F.Supp. 467, 471-75 (D.N.J.1991) (holding that sales of condoms "to retail distributors does constitute an 'economically significant submarket" ' even though manufacturers "may sell their products through a number of different channels of distribution").

***8** The point was expressly made in Greyhound Computer Corp., Inc. v. International Business Mach. Corp., 559 F.2d 488, 494 (9th Cir.1977), cert. denied, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978), where IBM argued that leasing general purpose computers did not constitute a submarket "economically distinct from others in which such computers are made available to users," such as sales, time-sharing and contracting with service bureaus. Id. at 494. In upholding the jury's finding that leasing of computers did constitute a separate submarket, the court noted:

> No rule of law or economic principle bars application of section 2 of the Sherman Act to one of several alternative means of distributing a product. The statute prohibits monopolization of 'any part' of interstate or foreign commerce. Accordingly, the Sherman Act and other antitrust statutes have been applied to protect competition in one of alternate channels of distribution.

Id.

Accordingly, it is appropriate to limit a market to a discrete channel of distribution so long as it is shown, using established market-definition criteria, that enough customers do not view other methods of distribution as viable substitutes to the distribution method in question. See Cardinal Health, 1998 WL 433784, at *11. PepsiCo's allegations on this score are more than adequate.

PepsiCo's complaint expressly alleges that there are

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no viable substitutes to fountain-dispensed soft drinks distributed through independent foodservice distributors. See, e.g., Complaint ¶ 8 (alleging that neither sales of soft drinks in bottles and cans nor sales of fountain-dispensed soft drinks through alternative means of distribution are viable alternatives to foodservice distribution of fountain-dispensed soft drinks). According to the complaint, distribution through foodservice distributors constitutes "the lifeblood of competitive efficiency" among the delineated restaurants, theaters, and other customers who must take delivery in this fashion in order to "remain logistically efficient." Id. ¶ 8. Indeed, "because customers of foodservice distributors maintain a tightly integrated relationship with their distributors, relying on the distributor for virtually all of their supplies, it is far more difficult for them to switch distributors than to switch brands of soft drinks." Id. ¶ 24. Accordingly, even though PepsiCo has made "highly competitive proposals" to customers of foodservice distributors, id. ¶ 14, those customers "remain locked into Coca-Cola as their supplier without the real ability to entertain a competitive bid from PepsiCo." Id. ¶ 27. PepsiCo has adequately alleged a market with reference to cross-elasticity of demand and a lack of reasonable interchangeability within the meaning of the distribution channel cases cited above.

Nonetheless, Coca-Cola argues that it is inappropriate to define the relevant product market in this way, because there is no difference in the products that the parties manufacture. Viewing PepsiCo's proposed market definition as a "submarket" within a broader soft-drink market, Coca-Cola argues that "there can be no relevant submarket without some differences in the products" the parties sell. In support Coca-Cola cites T. Harris, 931 F.2d 816, where a supplier of EKG paper alleged that its competitor monopolized the market in EKG paper sold to "hospitals with more than 200 beds." Id. at 825. Although recognizing that "a relevant product market can be limited to a portion of customers," the court cautioned that such a limitation must be "based on a distinction in the product sold to those customers." Id. at 823. The court rejected plaintiffs' purported distinction, finding after discovery that the paper sold to hospitals with more than 200 beds was identical to the paper sold to all other hospitals. Coca-Cola seizes on the court's holding, observing that "[t]he product that Coca-Cola and PepsiCo supply--soft drinks--is identical irrespective of the form of distribution that is used." See Reply Brief of Defendant The Coca-Cola Company in Support of Its Motion to Dismiss ("Coca-Cola Reply Mem.") at 11. Coca-Cola maintains that this fact is fatal to PepsiCo's claim.

***9** Although T. Harris is not dispositive for Coca-Cola, it highlights a crucial aspect of PepsiCo's claim: under PepsiCo's purported market definition, there is a distinction among the products in question--PepsiCo has alleged that the relevant product market is not the market for soft-drinks, or fountain- dispensed soft drinks, but rather the market for "fountain-dispensed soft drinks distributed through foodservice distributors." This product--fountain- dispensed soft drinks distributed through foodservice distributors--is alleged to be something distinct from "fountain-dispensed soft drinks" distributed through any other means. Indeed, the complaint posits that the buyers in question have real efficiency-based reasons to take delivery of all of their supplies, including fountain syrup, from foodservice distributors; the complaint maintains that for these customers delivery through other means simply will not do. The T. Harris plaintiff made no showing to this effect. [FN1] Further, PepsiCo alleges that a soft drink manufacturer that can offer its product delivered through the preferred--indeed required--channel of distribution offers something markedly different than does a soft drink manufacturer that can only offer delivery of its product through alternate, but disfavored, methods of distribution.

> FN1. Further, as another court in this Circuit has observed, T. Harris was decided "not on law, but on facts." See Sunshine Cellular v. Vanguard Cellular Sys., Inc., 810 F.Supp. 486, 494 (S.D.N.Y.1992). Its consideration of the economic realities of the marketplace before it thus provide limited guidance on this motion under Rule 12(b)(6).

Coca-Cola contends generally that PepsiCo has merely selected one group of customers and called it a market. Coca-Cola posits that "just as Coca-Cola could not define a market made up of [fast-food restaurants owned by a PepsiCo subsidiary] and then accuse PepsiCo of monopolizing the sale of soft drinks within that market, PepsiCo cannot make out a monopolization case focused entirely on a segment of the selling opportunities in which Coca-Cola has

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achieved substantial success." Coca-Cola Reply Mem. at 7.

In this vein, Coca-Cola relies on Redmond v. Missouri Western State College, 1988-2 Trade Cas. ¶ 68,323, at 59,843 (W.D.Mo.1988). There, a private college-textbook bookstore claimed that the college-owned bookstore unlawfully monopolized a market for the sale of college textbooks to scholarship students by issuing vouchers to the students usable only for books in the college-owned bookstore. The court rejected plaintiff's attempt to "define the relevant market in terms of a certain class of prospective purchasers," noting that to do so would run "contrary to the classic tests used in a monopolization case." Id. The court observed that "it seems unprecedented to allow a claim that a defendant has monopolized a class of customers as distinguished from a product or service." Id. The Redmond court noted, and Coca-Cola relies upon, the proposition that a plaintiff cannot artificially define a market so as to cover only the practice complained of; to do so would, as described by the Redmond court, be an example of "circular or at least result-oriented reasoning." Id.

Redmond is distinguishable. Here, the complaint alleges that market realities force the end users in question to make their purchases exclusively through foodservice distributors. Thus, at least at the pleading stage, it is economic reality, not reference to "the practice complained of," that delineates the boundaries of the alleged market. Further, the books at issue in Redmond were identical whether delivered by the plaintiff or the defendant; as noted above, PepsiCo argues that the character and value of the product actually manufactured by the parties--fountain syrup used to create fountain-dispensed soft drinks--changes in the eyes of buyers by virtue of the manner in which it is delivered. Because foodservice distributors satisfy all of their customers' supply needs at once, offering consolidated delivery and accounting systems, their customers buy supplies through them to the exclusion of all other methods of distribution. See, e.g., Staples, 970 F.Supp. at 1080; Cardinal Health, 1998 WL 433784, at *11. Thus, a manufacturer offering to sell its product through a foodservice distributor is offering something different from a manufacturer offering to sell the same product through other means of distribution. The cluster of products and services offered by independent foodservice distributors selling fountain syrup is alleged to constitute a different product, for antitrust purposes, than fountain syrup sold through other methods of distribution. See, e.g., Staples, 970 F.Supp. at 1080; Cardinal Health, 1998 WL 433784, at *15.

***10** Finally, the Redmond scholarship students had the option of exchanging their vouchers for cash and then using that cash to purchase books elsewhere; the class of customers alleged to have no alternative to textbooks in the college-owned store in actuality were free to purchase their books from other distributors. Here, in contrast, PepsiCo alleges that buyers who take delivery through foodservice distributors are unable to switch to any product/distribution combination other than fountain-dispensed soft drinks distributed through foodservice distributors. If, as alleged, Coca-Cola has monopoly power in the market for distribution of fountain syrup within the distinct cluster of products and services offered by foodservice distributors, Coca-Cola would have the ability to restrict output, raise prices, and exclude competition in that market to the detriment of its rivals and buyers in the market.

PepsiCo has not, as suggested at argument, merely "drawn a circle around" certain customers and called those customers a market. To the contrary, PepsiCo has alleged a market using criteria traditionally considered in antitrust cases and has alleged that Coca-Cola has monopolized or attempted to monopolize that market. The market alleged indeed contains a disproportionately high number of Coca-Cola purchasers; but those purchasers are alleged to be distinct, not because they buy Coca-Cola, but because market forces dictate that they purchase their fountain syrup only through foodservice distributors, and those foodservice distributors offer only Coca-Cola.

Coca-Cola also relies on Queen City Pizza v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir.1997), cert. denied, --- U.S. ----, 118 S.Ct. 1385, 140 L.Ed.2d 645 (1998), to argue that a market cannot be defined by reference to the purchasing restrictions of a distinct class of customers. There, Domino's pizza franchisees, bound under the terms of their franchise agreements to purchase Domino's-approved supplies and distribution services, claimed that Domino's had monopolized the market for the supplies and services "used in the operation of

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Domino's stores." Id. at 437. The district court granted the defendant's Rule 12(b)(6) motion to dismiss for failure to allege a valid relevant market, and the Third Circuit affirmed. The court of appeals observed that the supplies available from other pizza suppliers and used by other pizza companies differed from Domino's approved supplies in but one particular: only the latter could be used by Domino's franchisees without precipitating a breach of the franchise contract. Because "the test for a relevant market is not commodities reasonably interchangeable by a particular plaintiff, but 'commodities reasonably interchangeable by consumers for the same purposes," ' the inquiry properly focused not on the contractual restrictions of one class of consumers but rather on the decisions of all consumers purchasing the commodity for the same purpose. Id. at 438. The court rejected the notion that a market may be defined by reference to a particular consumer's contractual restraints, affirming the district court's conclusion that the relevant economic power in the antitrust context must flow from the market, not from private contractual relations. Id. at 435; see also IIA Phillip E. Areeda et al., Antitrust Law ¶ 510b, at 111 (Supp.1998) (discussing Queen City holding and noting that "the existence of even an unconscionable contract does not create a relevant market for antitrust purposes").

***11** In contrast to the Queen City plaintiffs, however, PepsiCo alleges a market based on consumer demand, not on contractual restrictions. As noted above, PepsiCo has alleged that "logistical efficiency" considerations compel an increasing number of purchasers to take delivery of supplies exclusively through foodservice distributors and that such customers will not switch away from that method of distribution once they have chosen it because to do so would result in "severely adverse economic and logistical consequences." Complaint ¶ 8. Again, as alleged, economic forces, not contractual restraints, dictate the boundaries of the market defined in the complaint, and Queen City is thus distinguishable. See IIA Antitrust Law ¶ 510b, at 112 (noting importance of distinguishing between "lock-in" imposed by a contract and that imposed by market forces).

The above cases demonstrate that market definition is a particularly fact- based inquiry. Thus it is not surprising that courts granting 12(b)(6) motions for failure to allege a proper market generally have dismissed only those complaints that failed to explain how the product in question was not reasonably interchangeable with other similar products. See e.g., Rohlfing v. Manor Care, Inc., 172 F.R.D. 330, 347 (N.D.Ill.1997) (dismissing complaint where alleged market "improperly excludes interchangeable substitutes"); Deep-South Pepsi-Cola Bottling Co. v. PepsiCo, Inc ., 1989-1 Trade Cas. (CCH) ¶ 68,560 (S.D.N.Y.1989) (granting 12(b)(6) dismissal where plaintiff failed "to set out a theoretically rational explanation to support its proposed relevant product market"; plaintiff "failed to allege why Pepsi-Cola franchises are not interchangeable with franchises for the distribution of other soft drinks"); Theatre Party, 695 F.Supp. at 153 (dismissing complaint after concluding that plaintiff alleging a market limited only to the defendant- supplier's own product had "narrowly defined the market in an attempt to conform the alleged market to the facts of the present case"). Here, the complaint addresses and explains the basis for the market, and on this score is more than sufficient to withstand a motion to dismiss.

While not compelling on a motion to dismiss, Coca-Cola's arguments highlight the difficulties PepsiCo may encounter in proving the existence of the market it has alleged in the complaint. Indeed, numerous cases have rejected purported market definitions, some of which were similar to that proposed here, after evidence culled during discovery demonstrated that the plaintiff had excluded reasonably interchangeable products or services from its proposed market definition. See e.g., Thurman v. Pay 'N Pak Stores, Inc., 875 F.2d 1369 (9th Cir.1989) (rejecting proposed submarket based on one-stop shopping where evidence failed to support plaintiff's purported market); Westman, 796 F.2d 1216 (rejecting proposed market limited to one-stop shopping distributors of goods where evidence in record failed to establish inelastic demand between defendant's products and similar products offered by competing brands); see also R.R. Donnelly, 1990 Trade Cas. at ¶ 64,852 (denying motion for a preliminary injunction after five days of evidentiary hearings because plaintiff was unable to prove the contours of the product market that it had alleged); T. Harris, 931 F.2d 816 (rejecting alleged market because record failed to support finding that products included in alleged

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market differed from those sold to different class of customers).

*12 Here, if the facts adduced during discovery demonstrate that customers purchasing fountain-dispensed soft drinks view other methods of fountain- dispensed soft drink delivery as acceptable substitutes to delivery through foodservice distributors, then the market alleged should include those alternative methods, and Coca-Cola may be entitled to summary judgment at that time. But for the moment our attention is limited to the complaint, and the allegations contained therein must be taken as true. Those allegations expressly state that an "increasing number" of customers do not view the other distribution methods as viable substitutes. As such the market alleged in the complaint is properly limited to fountain-dispensed soft drinks distributed through foodservice distributors.

2. Even if the Purported Market Exists, It is Irrelevant to This Claim

Conceding that a market may, in certain circumstances, be defined by reference to a distribution channel, Coca-Cola argues that even if such a market exists here, it is irrelevant to PepsiCo's claim. In particular, Coca-Cola points out that PepsiCo alleges it has been foreclosed from competition. Therefore, Coca- Cola maintains, citing Tampa Electric Co. V. Nashville Coal Co., 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961), that foreclosure must be measured within the context of a market which "includes the full range of selling opportunities reasonably open to rivals, namely, all the product and geographic sales they may readily compete for, using easily convertible plants and marketing organizations." Coca-Cola Reply Brief at 4 (citing IIA Antitrust Law ¶ 570b, at 278 (rev. ed.1995)). To this end, Coca-Cola asserts that foreclosure should be "measured in a market including the total output of the sellers who would be included in the market for assessing a horizontal merger between the merging seller [i.e., Coca-Cola] and any allegedly foreclosed rival [i .e., Pepsi]." Coca-Cola Mem. at 13. Coca-Cola maintains that whatever amount of sales might be attributed to the buyers PepsiCo delineates in its alleged market, such a distinct class of customers is meaningless unless considered in the context of the entire market in which PepsiCo and Coca-Cola, both soft drink manufacturers, compete generally. I disagree.

A " 'market' for antitrust purposes is the one relevant to the particular legal issue at hand." IIA Antitrust Law ¶ 533, at 167. With this in mind it is helpful to examine the nature of the claim PepsiCo asserts. Here, PepsiCo asserts monopoly claims under section 2 of the Sherman Act. That Act prohibits unlawful monopolies because monopoly power allows the monopolist to control a market by excluding competition, restricting output, and raising prices, all without losing customers. See Grinnell Corp., 384 U.S. at 571, 86 S.Ct. at 1704; Hamilton College, 128 F.3d at 67 (explaining that ability to "restrict output and raise prices" without losing customers is "precisely the vice of a monopoly"). The essence of product market definition in a monopoly case, therefore, is determining whether there exists a group of buyers which is unable, because of market forces, to switch to an alternative product or service in the face of a monopolist's price increase. [FN2]

FN2. Courts have also considered "supply substitutability," or cross- elasticity of supply, i.e., "the ability of firms in a given line of commerce to turn their productive facilities toward the production of commodities in another line because of similarities in technology between them." See Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1271 (9th Cir.1975). While the parties have not focused on this potential factor, I note that the effect, if any, of supply substitutability on market definition can be determined after discovery.

*13 An example by Professor Areeda, advanced in his attempt to discourage use of the term "submarket," see supra, demonstrates that identifying the relevant market turns on identifying the harm to be avoided. Presume a glass maker selling containers for food, medicine, etc.; presume also that some of the buyers can readily substitute cans or other packages, but others find substitution more difficult. In explaining how to define the market properly in such a case, Professor Areeda noted that "while the glass firms might be able to charge the latter higher prices than others, the more vulnerable customers are not a 'submarket,' ' but rather are properly deemed a relevant product market in their own right. IIA Antitrust Law ¶ 533e, at 170. The following F.T.C. discussion makes the point even more clearly:

[I]f in fact price could be raised above competitive

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> levels for the glass containers sold in these end-use segments, those segments would be proper topics of antitrust concern not because they are submarkets, but because they would be relevant product markets in their own right. At least in theory, each end-use segment could stand as a grouping of sales for which a hypothetical monopolist might be able to impose a significant price increase.

In re Owens-Illinois, Inc., 115 F.T.C. 14 (1992) (emphasis added).

Here, the complaint alleges a distinct "end-use segment" comprised of those fountain-dispensed soft drink purchasers who can take delivery only through foodservice distributors. For these customers nothing else will do; in Professor Areeda's words, they find substitution "more difficult" than do other purchasers of fountain syrup. If a monopolist--in this case Coca-Cola--can charge these customers more than it charges others, these "more vulnerable" customers constitute a separate product market, and that market is directly relevant to a case complaining about the monopolist's anticompetitive behavior.

As noted above, Coca-Cola suggests that the proper market definition inquiry in a case between manufacturers would be the same as that undertaken in evaluating a horizontal merger between those parties. Exploring this suggestion, I note that in evaluating a horizontal merger between sellers, it is appropriate to consider not only the effect of the merger across a market defined by the full range of those companies' selling opportunities, but also to explore the merger's effects within smaller, distinct markets for "unique" items that the merging entities offer. As the Supreme Court put it in Brown Shoe, "[b]ecause § 7 of the Clayton Act prohibits any merger which may substantially lessen competition 'in any line of commerce', it is necessary to examine the effect of a merger in each economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition." Brown Shoe, 370 U.S. at 325, 82 S.Ct. at 1524. Indeed, as then-Judge Bork observed, "[t]hat view of submarket analysis is also mandated by the purpose of antitrust laws: the promotion of consumer welfare." Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 218 (D.C.Cir.1986) (Bork, J .), cert. denied, 479 U.S. 1033, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987); see also United States v. Household Fin. Corp., 602 F.2d 1255 (7th Cir.1979) (noting that "in determining the effect of competition in mergers of one type of institution, it is the effect in any area of unique services that must be considered" (citing United States v. Phillipsburg Nat'l Bank, 399 U.S. 350, 360-61, 90 S.Ct. 2035, 26 L.Ed.2d 658 (1970))), cert. denied, 444 U.S. 1044 (1980).

***14** Indeed, in Owens-Illinois, supra, which involved a proposed merger of glass container manufacturers, the F.T.C. looked not only at the market for the broadest range of the companies' selling opportunities, but also examined the effect within distinct "end-user segments" that might be vulnerable to price increases imposed by a hypothetical monopolist. The Commission found that certain classes of customers put the glass containers to different end uses, with varying abilities to substitute away from the product in the event of price increases. The Commission concluded that so long as an "end-user segment within the larger grouping meets the same economic standard which defines a market, the end-use segment may properly be analyzed as a product market in its own right." Owens-Illinois, 115 F.T.C. at 16. Accordingly, here, where the complaint alleges an end-use segment that "meets the same economic standard which defines a market," it is appropriate to consider that segment a market.

3. Coca-Cola Cannot Monopolize a Market in Which It Does Not Participate

Coca-Cola also argues that PepsiCo's allegations indicate that the proper market here is really the market for foodservice distribution services, not any type of market for fountain syrup. Coca-Cola argues that PepsiCo's market definition is thus inappropriate in a claim against Coca-Cola because Coca-Cola is not a foodservice distributor.

To support the proposition that an entity may not be said to monopolize a market in which it does not participate, Coca-Cola points to Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir.1980), cert. denied, 450 U.S. 917, 101 S.Ct. 1362, 67 L.Ed.2d 343 (1981). There, the petitioner published an airline guide which provided detailed information on flight connections and fares. The guide, described as the "bible" of the industry, was the "standard reference for airline ticket offices, travel agents, businesses, and the public generally" and

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was the "primary market tool of ... virtually every (air) carrier ... in the United States." Id. at 921-22. The publisher's concededly arbitrary listing policy was found to handicap commuter carriers attempting to compete against certificated carriers. The Court of Appeals held that the publisher, not itself an air carrier, had no duty under the Federal Trade Commission Act "not to discriminate unjustifiably between certificated air carriers and commuter airlines so as to place the latter at a significant competitive disadvantage." Id. at 921.

In so holding, the Court of Appeals noted at the outset that the guide publisher had no "purpose to create or maintain a monopoly" in the relevant market, which was defined as the airline industry. Id. at 925. The court concluded that the guide publisher, "though possibly a monopolist in the airline schedule publishing industry, admittedly had no anticompetitive motive or intent with respect to the airline industry and is engaged in a different line of commerce from that of the air carriers." Id. at 926.

***15** Here, in contrast, the complaint clearly alleges that Coca-Cola has acted with "anticompetitive motive or intent with respect" to the downstream distribution of its product, that is to say, in the market for fountain- dispensed soft drinks distributed through foodservice distributors. In particular, by virtue of its agreements with foodservice distributors and in carrying out its actual and threatened refusals to deal, Coca-Cola is alleged to have exhibited anticompetitive conduct in a market for its product as delivered through a particular method of distribution that a number of customers must have in order to remain efficient. It is alleged to have done so to the detriment of both retail customers and ultimate consumers, as well as to the detriment of PepsiCo, which is foreclosed from reaching the buyers in this market. Moreover, in contrast to Official Airline Guide, both PepsiCo and Coca-Cola compete with one another in the market alleged.

Coca-Cola also relies on Interface Group, Inc. v. Massachusetts Port Authority, 816 F.2d 9 (1st Cir.1987), but that case is distinguishable as well. There, the defendant was a municipal authority which possessed a monopoly over an airport's facilities. The plaintiff, an air carrier, was denied access to the ground facility of its choice and claimed that defendant had denied plaintiff access to an "essential facility" in violation of section 2 of the Sherman Act. The court rejected the claim, because it was "difficult to see how denying a facility to one who, like [plaintiff], is not an actual or potential competitor could enhance or reinforce the monopolist's market power." Id. at 12. Here in contrast, Coca-Cola's alleged refusals to deal clearly could "enhance or reinforce" Coca-Cola's market power in the market for the sale of its product to those customers who must take delivery through independent foodservice distributors.

The lingering question, however, is whether it makes sense to charge Coca- Cola, a soft-drink manufacturer, with monopolizing a product market defined by reference to both the product Coca-Cola manufactures, fountain syrup, and the independent, value-added method of distribution through which that syrup is delivered. As PepsiCo alleges it, this case involves one market with two components: the market for (1) fountain-dispensed soft drinks (2) distributed through foodservice distributors. As Coca-Cola would have it, this case involves two distinct markets: (1) a market for fountain-dispensed soft drinks (in which PepsiCo and Coca-Cola compete) and (2) a market for foodservice distribution services (in which neither PepsiCo nor Coca-Cola participate or compete). Coca-Cola maintains that the market PepsiCo has alleged is at most a distribution-specific market; thus, because Coca-Cola does not participate or operate in any distribution business, a claim that it monopolizes such a market makes no sense. According to Coca-Cola, it may be accused of monopolizing only a market for the "thing" it produces, which in this case is the fountain syrup used to make fountain-dispensed soft drinks.

***16** But PepsiCo does more than allege a market for distribution services and it has not alleged that Coca-Cola monopolizes the foodservice distribution industry generally. Rather, PepsiCo alleges that Coca-Cola has monopolized the market for fountain-dispensed soft drinks as distributed through foodservice distributors. According to the allegations in the complaint, consumers view fountain syrup distributed within this cluster of products and services to be different from fountain-dispensed soft drinks distributed through other means. According to the complaint, therefore, the relevant product is neither fountain-dispensed soft drinks alone nor

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foodservice distribution services alone, but rather a distinct product created by the combination of fountain- dispensed soft drinks and distribution through foodservice distributors. So understood, Coca-Cola has a hand in making this combined product--it manufactures the fountain syrup and secures delivery of that syrup through a distinct channel of distribution that the complaint describes as the "lifeblood of competitive efficiency in the restaurant business, movie theater business and other businesses that depend upon delivery through foodservice distributors in order to remain logistically efficient." Complaint ¶ 8. In this way Coca- Cola creates a product that is unique in the purchasing eyes of an increasing number of restaurants, movie theaters, and other "on-premise" accounts. Moreover, the complaint alleges that by virtue of its actual and threatened refusals to deal Coca-Cola has acted with anticompetitive purpose and intent in this market. Thus, while the complaint does not allege that Coca-Cola is a direct participant in the downstream foodservice distribution market, i.e ., it does not compete horizontally with foodservice distributors, the complaint does allege Coca-Cola's purposeful participation in the distribution of its product and in that regard trumps, at the pleading stage, any attempt by Coca-Cola to disclaim participation in the market alleged in the complaint.

III. FAILURE TO ALLEGE ANTICOMPETITIVE CONDUCT

PepsiCo alleges that Coca-Cola is unlawfully exercising its monopoly power by refusing to deal and threatening to refuse to deal with foodservice distributors that carry or desire to carry Pepsi. Coca-Cola properly notes that even where a defendant has monopoly power, a plaintiff's claims of actual or attempted monopolization require proof of anticompetitive conduct as an essential element of the claim. See Spectrum Sports, 506 U.S. at 456, 113 S.Ct. at 890; Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 902 F.2d 174, 178 (2d Cir.1990), cert. denied, 500 U.S. 928, 111 S.Ct. 2041, 114 L.Ed.2d 125 (1991).

Coca-Cola argues that the conduct in which it is alleged to have engaged is not anticompetitive as a matter of law. In particular, Coca-Cola contends that PepsiCo's complaint is fatally flawed because it fails to allege that Coca- Cola's agreements with foodservice distributors are not terminable at will. For this proposition Coca-Cola cites a number of cases of "fairly recent vintage": Paddock Publications, Inc. v. Chicago Tribune Co., 103 F.3d 42 (7th Cir.), cert. denied, --- U.S. ----, 117 S.Ct. 2435, 138 L.Ed.2d 196 (1997); Omega Envt'l, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1164 (9th Cir.1997), pet. for cert. filed, 66 U.S.L.W. 3750 (May 11, 1998); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 236-38 (1st Cir.1983).

***17** Each of these cases held that exclusive dealing arrangements that were terminable at will or of short duration were not barred by the antitrust laws because they left the relevant market up for grabs and because competitors were not foreclosed from the market but rather were encouraged to "compete for the contract." See Paddock, 103 F.3d at 45 (dismissing exclusive dealing claim brought under section 1 of the Sherman Act because, inter alia, "other firms that want to enter the market can do so by competing at intervals for these contracts"); Gilbarco, 127 F.3d at 1164 (finding, after trial, that exclusive dealing arrangements did not foreclose rivals from substantial portion of market because other modes of distribution were available and all relevant distributors were open to bids within one year or less); Barry Wright, 724 F.2d at 236-38 (affirming district court's rejection of claim that requirements contract was exclusionary after finding, on complete record, that multiple factors, including nature and duration of contract, suggested the agreements were not 'exclusionary').

Coca-Cola argues that in this case the ability of all distributors to switch to Coca-Cola's competitors' products at all times precludes a finding of exclusionary conduct as a matter of law. Coca-Cola points out that the complaint itself alleges that the reason distributors faced with threats do not carry Pepsi is because those distributors could not afford to stop distributing Coca-Cola in favor of Pepsi because those distributors have customers who want Coca-Cola. According to Coca-Cola, this reflects Coca-Cola's superior product and superior business strategy, not unlawful monopolistic activity.

PepsiCo points out, however, that this complaint does not assert that Coca- Cola has entered into anticompetitive exclusive dealing contracts. Rather, PepsiCo complains that Coca-Cola's actual and

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threatened refusals to deal represent anticompetitive monopolization or attempted monopolization of the relevant market. To this effect, PepsiCo relies predominantly upon Lorain Journal Co. v. United States, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951), which held that a defendant-monopolist's refusal to deal with any advertiser that also dealt with an emerging competitor constituted a section 2 violation because it was a use of "monopoly to destroy threatened competition ." Id. at 143, 72 S.Ct. at 187 (recognizing the general right of a private business to select its customers, but holding that the exercise of that right for the purpose of monopolization violates the Sherman Act). This principle may be traced back to the Supreme Court's pronouncement generations ago that:

> In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he may deal.

***18** United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919). The principle has remained valid law. See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602, 105 S.Ct. 2847, 2857, 86 L.Ed.2d 467; Byars v. Bluff City News Co., 609 F.2d 843, 858 (6th Cir.1979) (observing that where "a monopolist refuses to deal with customers who deal with its rivals," such "behavior is inherently anticompetitive; Lorain Journal ... makes it clear that this is illegal ...."). As noted by Professors Areeda and Hovenkamp:

> Extraction of an agreement not to deal with any competitor--or the equivalent, refusing to deal with buyers who do--can be exclusionary and particularly damaging where the buyers cannot do without the seller's product or service. We see no convincing justification for a requirement that a customer not deal with a particular rival.

IIIA Phillip E. Areeda et al., Antitrust Law ¶ 768e6 (citing Lorain Journal, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162).

In this case, PepsiCo asserts that Coca-Cola has refused to deal and threatened to refuse to deal with independent foodservice distributors who wish to distribute Pepsi. This conduct might be unobjectionable had PepsiCo not alleged that Coca-Cola has acted with a "purpose to create or maintain a monopoly." But PepsiCo's complaint does allege that Coca-Cola possesses or is likely to possess monopoly power in the market for fountain-dispensed soft drinks delivered through these distributors and that Coca-Cola's actual and threatened refusals to deal have been undertaken with the "purpose to create or maintain" monopoly power in that market. The complaint also alleges that Coca- Cola's actions effectively foreclose PepsiCo from reaching any consumers in the relevant market. As such, PepsiCo's complaint states a section 2 claim, and Coca-Cola's motion to dismiss on the ground that PepsiCo has failed to allege anticompetitive conduct must be denied.

CONCLUSION

"Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." Eastman Kodak, 504 U.S. at 467-68, 112 S.Ct. at 2082. Taking the allegations in the complaint as true, I find that they describe an economically viable market relevant to the section 2 claims PepsiCo asserts. Thus, because it does not appear that PepsiCo "can prove no set of facts in support of [its] claim which would entitle [it] to relief," see Hamilton College, 128 F.3d at 62, Coca- Cola's motion to dismiss is denied. PepsiCo now must demonstrate, however, that "market realities" support the market it has alleged.

Counsel shall appear for an initial pre-trial conference in Courtroom 12A on Friday, October 2, 1998, at 10:00 a.m.

SO ORDERED:

END OF DOCUMENT

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EXHIBIT B

UNITED STATES of America, Plaintiff,
v.
MICROSOFT CORPORATION, Defendant.
STATE of New York, ex rel. Attorney General Dennis C. Vacco, et al .,
Plaintiffs and Counterclaim-Defendants,
v.
MICROSOFT CORPORATION, Defendant and Counterclaim Plaintiff.

No. CIV. A. 98-1232 (TPJ, CIV. A. 98-1233 (TPJ.

United States District Court, District of Columbia.

Sept. 14, 1998.

MEMORANDUM AND ORDER

JACKSON, District J.

***1** On May 18, 1998, in separate actions, the United States Department of Justice ("U.S." or "DOJ") and twenty states' Attorneys General (the "States") [FN1] filed complaints against Microsoft Corporation ("Microsoft"), alleging violations of federal and numerous state antitrust statutes. The DOJ and the States also applied separately for preliminary injunctive relief to prevent irreparable harm to competition in an alleged market for Internet browsers and to potential competition in the market for personal computer ("PC") operating systems. The Court consolidated the cases pursuant to Fed.R.Civ.P. 42(a) and advanced and consolidated the trial of both actions on the merits with the hearing of plaintiffs' preliminary injunction applications, pursuant to Fed.R.Civ.P. 65(a)(2). The hearing/trial is scheduled to begin on September 23, 1998.

FN1. This memorandum refers to the U.S. and the States collectively as "plaintiffs."

The complaints allege essentially the same antitrust violations, namely, that Microsoft: (1) unreasonably restrained competition by "tying" its Internet browser to Windows 98; (2) unreasonably restrained competition by entering into "exclusive dealing" arrangements with various Internet providers; (3) unreasonably restrained competition by imposing "boot and start-up screen" restrictions on original equipment manufacturers ("OEMs"); (4) illegally maintained a monopoly in its operating system software through various exclusionary and predatory practices, including, but not limited to, the tying and exclusive dealing arrangements; and (5) attempted to monopolize the market for Internet browsers. The States bring a separate claim of monopoly "leveraging," arguing, inter alia, that Microsoft has unlawfully used its operating system monopoly to obtain a competitive advantage in the browser market. Each state also brings a pendent claim alleging violations of its respective state's antitrust laws.

The U.S. and the plaintiff States seek virtually the same relief, namely, that the Court enjoin Microsoft from: (1) entering into or enforcing certain contractual provisions which allegedly foreclose distribution and/or promotion of competing Internet browsers; (2) distributing a "bundled" version of its operating system and browser unless Microsoft provides a practical way of removing browser functions and provides OEMs that do not wish to license the browser an appropriate deduction from the royalty fee; (3) distributing a "bundled" version of its operating system and browser unless Microsoft treats Netscape Corporation's ("Netscape") browser the same as its own with respect to inclusion and removal; and (4) retaliating against any OEM that chooses to remove Microsoft's browser from Windows 98.

Microsoft denies the allegations, and moves for summary judgment on all counts. The Court finds sufficient material facts to be in dispute to preclude the entry of summary judgment on all but one of plaintiffs' claims. Because the theory of "monopoly leveraging" is inconsistent with both the Sherman Act's plain text and with Supreme Court pronouncements on the general limitations of its reach, the Court will grant summary judgment in favor of Microsoft on the States' Third Claim for Relief. See States' First Am. Compl. at 26. In all other respects the motion will be denied.

I.

***2** A microprocessor [FN2] is the "brain" of the PC. Most of the world's PCs run on the "x86/ Pentium" class of microprocessor, originally designed by Intel Corporation. In addition to the processor, the PC consists of a number of other components, including various hardware device.

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(e.g., disk drives) and the operating system.

> FN2. The microprocessor is sometimes referred to as the "processor," the "microchip" (or simply "chip"), or the central processing unit ("CPU").

The operating system ("OS") is the "command center" of the personal computer. It controls the interaction between the processor, memory, peripheral devices such as keyboards, screens, disk drives, and printers. Independent software vendors ("ISVs") write software application programs (such as word processors, games, etc.) that rely on certain general functions embedded in the OS. Applications software does this by using (or "calling on") the OS's application programming interfaces ("APIs"). Because those functions reside on the OS, ISVs do not have to write them into every software application they develop.

In 1980, Microsoft licensed from another company a PC operating system which it modified and introduced in 1981 as the "Microsoft Disk Operating System" ("MS-DOS"). When IBM entered the PC market in 1981, it selected MS-DOS as its operating system. As a result, MS-DOS enjoyed enormous sales and eventually commanded a dominant share of the market.

In 1985, Microsoft introduced a product called "Windows." Originally, Windows was a "shell," which acted as a graphical interface between the user and the MS-DOS operating system, permitting the user to perform functions by pointing and clicking with his mouse, rather than by typing text. Windows and MS-DOS were originally offered and sold separately, but Microsoft combined the underlying operating system with the graphical user interface in "Windows 95," presently the most widely-used PC operating system in the world.

The Internet is a global network that links smaller networks of computers. The World Wide Web ("Web") is the fastest-growing part of the Internet, composed of multimedia "pages" written in Hypertext Markup Language ("HTML") and connected to other pages by hypertext links. "Browsers" are specialized software programs that allow PC users to locate, access, and display content and applications located on the Web, by, among other things, "translating" HTML into an intelligible format for the user.

Consumers most often obtain their browsers as preinstalled software from their OEMs or via downloads from their Internet Access Providers ("IAPs"). IAPs provide users with telephone numbers and software that their computers use to access the Web. There are two types of IAPs: (1) Online Service Providers ("OLSs") (e.g., America Online, Prodigy, CompuServe, Microsoft Network) offer a full range of online services in addition to Web access, including e-mail, news, entertainment, and places to "meet" people with similar interests; and (2) Internet Service Providers ("ISPs") (e.g., AT & T Worldnet, Mindspring, Netcom) offer a cheaper, more "bare bones" package, including e-mail, Web access, and basic software.

***3** On July 15, 1994, the U.S. commenced an action against Microsoft under Section 2 of the Sherman Act, 15 U.S.C. § 2 (" § 2"). The complaint alleged, among other things, that Microsoft had entered into anticompetitive agreements and engaged in unlawful marketing practices directed at OEMs. The effect of those practices, the DOJ alleged, was unlawfully to maintain Microsoft's monopoly in the PC operating system market.

Microsoft ultimately consented to the entry of a "Final Judgment" (or "Consent Decree"), which the Court entered on August 21, 1995. The Consent Decree prohibited Microsoft from continuing the challenged practices and from engaging in other anticompetitive behavior.

On October 20, 1997, the U.S. petitioned the Court for an order to show cause why Microsoft should not be found in civil contempt for violating the terms of the Consent Decree by requiring OEMs to license and distribute Microsoft's Internet browser ("Internet Explorer" or "IE") as a condition of obtaining a license for Microsoft's Windows 95 operating system. On December 11, 1997, the Court declined to hold Microsoft in contempt, but preliminarily enjoined the company from continuing the challenged licensing practices. See United States v. Microsoft Corp., 980 F.Supp. 537 (D.D.C.1997).

Microsoft appealed the December 11 Order. The D.C. Circuit reversed and remanded, holding that the Court "erred procedurally in entering a

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preliminary injunction without notice to Microsoft and substantively in its implicit construction of the consent decree on which the preliminary injunction rested." See United States v. Microsoft Corp., 147 F.3d 935, 938 (D.C.Cir.1998) ("Microsoft "). The D.C. Circuit also granted Microsoft's application for a writ of mandamus revoking the Court's reference of certain matters to a special master. See id.

The Court of Appeals "tentatively" concluded that Windows 95/IE is a permissible "integrated product" under the applicable terms of the Consent Decree. Id. at 953. An "integrated product," the court held, is one "that combines functionalities (which may also be marketed separately and operated together) in a way that offers advantages unavailable if the functionalities are bought separately and combined by the purchaser." Id. at 948. The D.C. Circuit concluded that Microsoft had "clearly met the burden of ascribing facially plausible benefits to its integrated design as compared to an operating system combined with a stand-alone browser," id. at 950, but left the issue to be finally decided based "on a more complete record." Id. at 952.

II.

Plaintiffs contend, and for present purposes, the Court must assume, that Microsoft enjoys a monopoly in the market for operating systems that are compatible with Intel x86/Pentium microprocessors. [FN3] According to the DOJ's economic expert, between 1991 and 1997, Microsoft's share of that market held consistently at approximately 90%. See Declaration of David S. Sibley. [FN4] ("Sibley Decl.") ¶ 14 (citing International Data Corp., Operating Environments, Review and Forecast 1996-2001 (1997)). Several OEMs, including Packard Bell, Hewlett Packard, Micron, and Gateway, have expressed their belief that they have no commercially reasonable alternative to Microsoft's operating system. Plaintiffs postulate that Microsoft's dominant position in the market is reinforced by high barriers to entry, most importantly its enormous "installed base" and the large number of software applications that run on Windows but not on other operating systems.

FN3. Microsoft disputes plaintiffs' definition of the "relevant markets" and their allegations of Microsoft's power within those markets. Microsoft recognizes, however, that these issues are "sharply disputed by the parties" and are "typically resolved in a battle among expert economists" at trial. See Def.'s Mem. in Opp'n to Pls.' Mots. for Prelim. Inj. at 2, 3. Microsoft concedes that, for purposes of deciding its motion for summary judgment, the Court must assume that Microsoft is a monopolist in a relevant market.

FN4. Dr. Sibley is a Professor of Economics at the University of Texas at Austin.

*4 Despite its strong position in the market for operating systems, internal Microsoft correspondence indicates that the company recently discerned a threat to its operating system monopoly in the growing popularity of Internet browsers. Because browsers offer the potential to overcome the incompatibility between different operating systems by allowing applications to run on a variety of operating systems, browsers threaten to reduce or eliminate the key barrier to entry that protects Microsoft's share of the operating systems market.

Software created to run on particular operating systems (or "platforms") generally will not function on different platforms. Independent software vendors ("ISVs") must, therefore, choose the platforms for which they will develop and support different versions of their software. See generally Sun Microsystems, Inc. v. Microsoft Corp., 999 F.Supp. 1301, 1302 (N.D.Cal.1998). Because of Windows' dominant market share, ISVs naturally write their applications to run on Windows, leading to "network effects" that support Microsoft's high market share; the more applications that are written for a particular OS, the more attractive will consumers find that OS, thus further increasing market share, leading to more new software applications, and so forth.

A new programming language, known as "Java," [FN5] is designed in part to permit applications written in it to run on any platform or operating system ("across platforms"), thus permitting ISVs to create and distribute a single version of their software capable of operating on many otherwise incompatible system platforms and browsers. Programs written in Java are compiled into intermediate instructions which are then "interpreted" by another computer program which emulates a hypothetical CPU called a "Java Virtual

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Machine" ("JVM"). The JVM translates the instructions into language that can be understood by the specific CPU on which the JVM is running.

> FN5. Java was developed by Sun Microsystems, Inc ("Sun").

Netscape Corporation's ("Netscape") "Navigator" browser is one means by which Java is distributed to consumers, since a JVM component is shipped with Netscape's browser. See P. Maritz (Vice President in charge of Microsoft's Platforms Group) 7/14/97 e-mail (recognizing Netscape as "the major distribution vehicle" for Java) (Ex. 61 to Pls.' Joint Resp. to Microsoft's Mot. for Summ. J. & Reply in Supp. of Mots. for Prelim. Inj.). [FN6] Furthermore, Navigator is itself a "platform" to which many applications are written.

> FN6. This memorandum refers to exhibits attached to DOJ's preliminary injunction application as "PI Ex."; the States' preliminary injunction exhibits as "States' PI Ex."; Microsoft's summary judgment exhibits as "SJ Ex."; and plaintiffs' exhibits in opposition thereto as "SJ Opp'n Ex."

The more applications written directly to the browser or the JVM it hosts, the more fungible the underlying operating system becomes. Because browsers such as Navigator will run on any operating system, and have the ability to host "cross-platform" applications, they pose a potential threat to Windows' dominance.

Certain statements of Microsoft executives proffered by plaintiffs indicate that the company recognized the impending danger. For example, Microsoft CEO Bill Gates stated that the Netscape/Java combination threatens to "commoditize" the operating system. See B. Gates 5/26/95 e-mail (PI Ex. 2). Following a 1997 meeting with Mr. Gates, Microsoft's Ben Slivka described Java as "the biggest threat to Microsoft" and wrote to Mr. Gates that "clearly the work the Java team is doing has hit a raw nerve with you." SJ Opp'n Ex. 60. And in an essay posted on Microsoft's Web site, Mr. Gates recognized the potential of Netscape's browser to "become a de facto platform for software development, ultimately replacing Windows as the mainstream set of software standards." States' PI Ex. 3. Other Microsoft executives recognized browsers as "alternative platform[s] to Windows," B. Silverberg Internet Platforms & Tools Div. Mtg. Agenda (emphasis in original) (PI Ex. 33), that might eventually "obsolete" Windows. B. Chase 4/4/97 e-mail (PI Ex. 15). One Vice President warned that "[t]he situation is threatening our operating systems and desktop applications share at a fundamental level," and declared: "Netscape pollution must be eradicated." J. Raikes 8/13/96 memo (PI Ex. 34).

*5 Microsoft allegedly set out to eliminate the threats posed by Java and Netscape. Plaintiffs contend that Mr. Gates led the charge to "wrest control of Java away from Sun," SJ Opp'n Ex. 60, and to convert Java to what Microsoft called a "polluted" version which would effectively limit applications to those which would run on Microsoft's systems. To accomplish this goal, Microsoft allegedly entered into a series of anticompetitive agreements with customers and competitors to restrict the use of Java and to substitute the use of Microsoft's version of Java, known as "J/Direct." See, e.g., T. Nielsen 8/25/97 e-mail to B. Gates ("[W]e are just proactively trying to put obstacles in Sun's path and get anyone that wants to write in java to use J/Direct.") (SJ Opp'n Ex. 62).

According to plaintiffs, while Microsoft was combating Sun's Java on one front, it simultaneously set its sights on Netscape. In July of 1996, plaintiffs contend, Netscape enjoyed a 48% share of the browser market, compared to Microsoft's 11%. See Microsoft 11/11/96 "Internet Explorer Marketing Plan Review" (States' PI Ex. 26). Microsoft allegedly made it "job # 1" to remedy that disparity. See, e.g., P. Maritz 6/20/96 e-mail (PI Ex. 92). But to accomplish that job, plaintiffs claim, Microsoft was unwilling to compete on the merits of Internet Explorer alone.

According to plaintiffs, Microsoft's strategy depended largely on leveraging its strong position in the operating systems market to gain a foothold in the market for browsers. Once again, plaintiffs rely heavily on contemporaneous statements of Microsoft executives to support their claims. For example, Jim Allchin, a Microsoft Senior Vice President, wrote: "I don't understand how IE is going to win. The current path is simply to copy everything that Netscape does packaging and product wise ... My conclusion is that we must leverage Windows more ... We need to advantage Windows--more

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specifically [Windows 98]." PI Ex. 94.

Moshe Dunie, another Microsoft Vice President, wrote in an e-mail to Mr. Gates and several other executives: "The stunning insight is this: To make [consumers] switch away from Netscape, we need to make them to upgrade [sic] to [Windows 98] ... [W]e can leverage these assets to convert the Navigator installed base and eclipse Netscape's browser market share leadership. But if we rely on IE4 alone to achieve this, we will fail." See M. Dunie 2/24/97 e- mail (States' PI Ex. 1). Microsoft executive Christian Wildfeuer apparently agreed: "It seems clear that it will be very hard to increase browser market share on the merits of IE 4 alone. It will be more important to leverage the [operating system] asset to make people use IE instead of Navigator." C. Wildfeuer 2/24/97 e-mail (PI Ex. 23).

Microsoft representatives met with top executives from Netscape on June 21, 1995. The parties disagree vehemently regarding the substance and purpose of that meeting. Plaintiffs allege that Microsoft proposed an illegal market allocation, with Microsoft becoming the sole supplier of browsers for use with Windows and with Netscape becoming the sole supplier for other PC platforms, such as Apple and UNIX. Plaintiffs contend that this proposal was consistent with a pattern of Microsoft's behavior that included similar discussions with Intel (to urge Intel not to continue to develop certain software), Apple (to persuade Apple to stop marketing its "QuickTime" media streaming software for use with Windows), and a company called Real Networks (seeking Real Network's assurances that it would get out of the base streaming media platform business and not share its technology with Microsoft's competitors).

***6** Plaintiffs claim that Netscape refused the market allocation offer, causing Microsoft to adopt a two-part strategy to gain market share for IE. First, it began to distribute IE free of charge. One Microsoft Vice President, Paul Maritz, allegedly told Intel Corporation executives that Microsoft intended to "cut off [Netscape's] air supply. Everything they're selling, we're going to give away for free." See Steve Lohr & John Markoff, Why Microsoft is Taking a Hard Line With the Government, N.Y. Times, Jan. 12, 1998, at D1 (PI Ex. 4).

Plaintiffs further charge that Microsoft was not content with pricing Netscape out of the market, but was also determined to cut off Netscape's means of distributing its product. According to internal Microsoft documents, consumers most often obtain their browsers from their IAPs or as preinstalled software from their OEMs; approximately 43% of all browser users obtain their software from one of those two sources. [FN7] In deposition testimony, Microsoft executives acknowledged that the ISP channel and the OEM channel are the two most important channels for distribution. See, e.g., Myhrvold Dep. at 43:7-18.

> FN7. Twenty-five percent obtain their browser from their place of employment, 13% by "downloading" it from the Internet, and 4% at retail. See Microsoft 4/97 "IE Market Review" (States' PI Ex. 25).

Plaintiffs contend that Microsoft used a variety of illegal means to ensure that significant market participants did not distribute Netscape's browser through either the IAP or OEM channel. Microsoft allegedly accomplished its purpose by: (1) implementing an illegal tie between IE and Windows, purchased of necessity by virtually every OEM for installation on new PCs; and (2) using its control over a monopoly asset--"real estate" on the Windows desktop--to restrict IAPs and Internet Content Providers ("ICPs") [FN8] from offering their customers competing browsers.

> FN8. Internet Content Providers are firms such as Disney, Hollywood Online and CBS Sportsline, that provide news, entertainment, and other information from sites on the Web.

In addition to a direct assault on Netscape's major channels of distribution, plaintiffs allege, Microsoft used its monopoly power to induce major computer industry firms, including Apple and Intel, to limit or reduce their use of and support for Netscape's browser. As a result of the totality of Microsoft's efforts, plaintiffs contend, its share of the browser market increased from 3% or 4% in early 1996 to approximately 50% in early 1998.

Plaintiffs concede that Microsoft's dominance in the operating system market does not, by itself, warrant concern. There is no reason to believe that the market, left to itself, will not generate alternatives to Windows, despite the high barriers to entry. See

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Sibley Decl. ¶ 17. Historical precedent, for example, demonstrates that compact disc technology was able to overcome similar barriers in the music industry and overtake the LP as the standard medium for recording music. The antitrust laws are implicated, however, if it can be shown that Microsoft constructed artificial entry barriers that further restrict the naturally difficult task of providing alternatives to Microsoft's operating system.

Plaintiffs contend that Microsoft's behavior, including the bundling of its browser with Windows and the contractual restrictions on the use of competing browsers by OEMs, IAPs and ICPs, was designed to enable Microsoft to monopolize the browser market. The intended result was twofold: first, to remove the Internet browser as a software platform that can exert competitive pressure on Microsoft's operating system monopoly; and second, to establish for Microsoft a new monopoly in the browser market. Such conduct, plaintiffs allege, violates Sections 1 and 2 of the Sherman Act. [FN9]

FN9. Section 1 of the Sherman Act prohibits "[e]very contract, combination ..., or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Section 2 proscribes the "monopoliz[ation], or attempt[ed] monopoliz[ation], or combin[ation] or conspir[acy] ... to monopolize any part of the trade or commerce among the several States." 15 U.S.C. § 2.

III.

*7 "A tying arrangement is an 'agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from another supplier." ' Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)). Such arrangements are "per se " Section 1 violations, i.e., conclusively unreasonable if proven, when the seller exploits its market power in the tying product market "to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms," Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984), [FN10] and a "substantial volume of commerce in the tied market" is affected. See Eastman Kodak, 504 U.S. at 462; see also Foster v. Maryland State Savs. & Loan Ass'n, 590 F.2d 928, 931 (D.C.Cir.1978) (arrangement must affect a "not insubstantial" volume of commerce).

FN10. In Jefferson Parish, four concurring Justices would have abandoned the per se rule. Id. at 32.

"Before an unlawful tying arrangement may properly be found, ... it must be determined that 'two separate products are in fact involved." ' See Foster, 590 F.2d at 931 (quoting Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 507, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969)). In the typical case, whether a package consists of one or more "separate" products depends "not on the functional relation" between the components, "but rather on the character of the demand" for them. See Jefferson Parish, 466 U.S. at 19; see also Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1289 (9th Cir.1983) ("Products that function together and are sold in combination may still be 'separate' if consumers would prefer to buy them individually at the price necessary to market them separately ... It is the relationship of the producer's selling decision to market demand, not the physical characteristics of the products alone, that determines the existence of legally separable products."). The critical question is whether the bundle consists of products which are "distinguishable in the eyes of buyers." Jefferson Parish, 466 U.S. at 19. Courts generally find two products to exist if there is "sufficient consumer demand so that it is efficient for a firm to provide" them separately, Eastman Kodak, 504 U.S. at 462, even if the products are "functionally linked" so that one is "useless without the other." Id. (quoting Jefferson Parish, 466 U.S. at 19 n. 30).

Microsoft argues that Jefferson Parish 's "demand" test does not apply to cases involving physically integrated products or questions of product design. Microsoft distinguishes Jefferson Parish on the ground that it dealt not with an integrated product, but with a "functionally integrated package of services." See Jefferson Parish, 466 U.S. at 19 (emphasis supplied). Similarly, Eastman Kodak dealt with the question of whether replacement parts and service for Kodak's photocopiers were separate products. See Eastman Kodak, 504 U.S. at 459.

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*8 Microsoft advances a theory that courts considering tying claims involving physically integrated products or questions of product design--like the Windows 98/IE combination--have applied a much more deferential standard. Such "technological tying" claims, Microsoft contends, can succeed only if plaintiffs prove that the challenged combination was carried out solely for the purpose of tying two separate products together "rather than to achieve some technologically beneficial result." See Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307, 1330 (5th Cir.1976). Any other rule, Microsoft argues, "would enmesh the courts with technical and uncertain inquiry into the technological justifiability of functional integration and cast unfortunate doubt on the legality of product innovations in serious detriment to the industry and without any legitimate antitrust purpose." See Telex Corp. v. IBM, 367 F.Supp. 258, 347 (N.D.Okla.1973), rev'd on other grounds, 510 F.2d 894 (10th Cir.1975).

Microsoft's argument has its genesis in a body of case law addressing claims that, in the 1960s and 1970s, IBM illegally tied the central processing unit of its computers to various peripheral devices, such as disk drives. The peripheral devices and the CPUs were originally manufactured and sold separately and connected to each other with cables. As IBM developed new technologies with more compact circuitry, it was able to place many devices in one box along with the CPU, and to sell the combination as one unit. Naturally, the effect was to injure small manufacturers who were in the business of producing the peripheral devices.

Courts generally concluded that IBM's integrations did not amount to illegal tying, holding that "where a court is dealing with what is physically and in fact a single product," the antitrust laws do "not contemplate judicial dissection of that product into parts and the reconstitution of these parts into a tying agreement." See Telex, 367 F.Supp. at 347 (denying claim that IBM's "integration of additional memory and control functions" into its CPUs constituted unlawful tying, even though the court found IBM to be a monopolist, and that there was evidence that IBM's actions "were designed to help stem the growth of its plug compatible competition"); see also Innovation Data Processing, Inc. v. IBM, 585 F.Supp. 1470, 1476 (D.N.J.1984) (integration of "dump-restore" utility into mainframe operating system held to be "a lawful package of technologically interrelated components"); ILC Peripherals Leasing Corp. v. IBM, 448 F.Supp. 228 (N.D.Cal.1978) (disk drive and head/disk assembly ("HDA") combination lawful), aff'd per curiam sub nom., Memorex Corp. v. IBM, 636 F.2d 1188 (9th Cir.1980). So long as the evidence demonstrated that the challenged integration "represented technological advancements," the courts generally held that IBM's decision to integrate additional functionality into its CPUs could not "be fairly regarded as predatory within the contemplation of antitrust policy." Telex, 367 F.Supp. at 342.

*9 In a more recent case, the Ninth Circuit considered a tying challenge to Kodak's decision to simultaneously introduce its "110 Instamatic" camera, a new film and developing process, and the equipment necessary to process the new film. See Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534 (9th Cir.1983). One of Kodak's competitors in the photofinishing business alleged an unlawful tying arrangement because "the 110 system was incompatible with then existing photographic products and photofinishing equipment." Id. at 544. The Ninth Circuit rejected the claim, "even if ... effective use of any one of the new products necessitates purchase of some or all of the others." Id. at 543. "Any other conclusion," the court reasoned, "would unjustifiably deter the development and introduction of those new technologies so essential to the continued progress of our economy." Id.

In the IBM cases, plaintiffs unsuccessfully challenged IBM's right to bundle two technologically related products. The allegations in the present case differ from the IBM allegations in one critical respect: plaintiffs allege that Microsoft did not just bundle IE into Windows 98, but took the further step of contractually prohibiting OEMs from unbundling the two (assuming that IE could be "unbundled" from the operating system, a disputed issue of fact). [FN11] In contrast, in the Telex case, there was no forced tie of memory and control functions. The integration was "wholly optional," 367 F.Supp. at 347, and IBM continued to offer the two products separately. Id. Similarly, in Innovation Data Processing, IBM continued to license the utility program and the operating system separately as well as together, at the user's option. 585 F.Supp. at 1475. [FN12] And Foremost Pro Color did not

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involve the bundling of products at all, but rather Kodak's development of new technological formats that rendered competitors' complements incompatible. "The development and introduction " of those formats, "standing alone" (without any contractual requirement that users take the products together) was deemed not to amount to tying. See Foremost Pro Color, 703 F.2d at 542 (emphasis supplied). [FN13]

FN11. Plaintiffs rely on the Declaration of Edward W. Felten, Assistant Professor of Computer Science at Princeton University, for the proposition that Web browsing functionality can be removed from Windows 98 without damaging the underlying operating system. Whether Dr. Felten's "mechanism," see Felten Decl. ¶ 7, actually removes the "browser," or merely removes code that "look[s] more like a key to opening IE than anything that could plausibly be considered IE itself." Microsoft, 147 F.3d at 952 n. 17, remains to be seen.

FN12. That court went on to state that, even had IBM not offered the products separately, there would be no unlawful tie because the items were part of a single product. Innovation Data Processing, 585 F.Supp. at 1476. Following Jefferson Parish, however, the court revisited its decision, emphasizing that the basis for its original decision was the finding of no coercion, and declining to reach the "separate product" question. See Innovation Data Processing v. IBM, 603 F.Supp. 646, 648- 49 (D.N.J.1984).

FN13. Plaintiffs also distinguish the ILC case. There, the court found that the drive unit and head/ disk assembly were a single product because: they were designed to be and would be used as a unit; the aggregation offered dramatically larger online storage capacity; the aggregation satisfied a recognized customer need; the aggregation resulted in cost savings that were passed on, at least in part, to end users; the drive unit and head/drive assembly were normally used in fixed proportions; and the practice of other industry participants was to sell the integrated product at a single price. See ILC, 448 F.Supp. at 232-34. In contrast, plaintiffs contend, operating systems and browsers are not used in fixed proportions. Despite the D.C. Circuit's assumption to the contrary, see Microsoft, 147 F.3d at 948, plaintiffs contend that some users prefer to use as many as three separate browsers while others prefer none at all. Furthermore, plaintiffs argue, not all sellers bundle the products together; no consumer savings have been shown to result from the bundling; and not even Microsoft claims that the benefits of bundling Windows and IE are "dramatic."

Unlike the IBM plaintiffs, neither the U.S. nor the States challenges Microsoft's right to bundle IE and Windows. Instead, they challenge the contractual prohibitions against unbundling, and Microsoft's refusal to offer what plaintiffs allege are two products separately. The cases Microsoft cites in opposition are not inconsistent with the teaching of Jefferson Parish and Eastman Kodak that it is for the market (and not Microsoft) to determine whether the bundling is desirable. See also Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 287 (2d Cir.1979) ("[N]o one can determine with any reasonable assurance whether one product is 'superior' to another. The only question that can be answered is whether there is sufficient demand for a particular product to make its production worthwhile, and the response, so long as the free choice of consumers is preserved, can only be inferred from the reaction of the market."). The market can make that determination only if two bundled products are also offered in their unbundled form, as they were in the IBM cases.

***10** In short, this Court is not convinced that either the IBM cases or Foremost Pro Color dictate that Microsoft's licensing practices should be evaluated by a more lenient standard than the one articulated by the Supreme Court in Jefferson Parish and Eastman Kodak, simply because the case involves "physically integrated products or questions of product design," as Microsoft puts it. [FN14] Despite the Court's misgivings, however, the D.C. Circuit clearly appears to have adopted Microsoft's proposed "technological tying" standard in reversing this Court's Order preliminarily enjoining Microsoft from requiring OEMs to take IE as a condition of licensing Windows 95. See United States v. Microsoft Corp., 147 F.3d 935 (D.C.Cir.1998) ("Microsoft "), rev'g United States v. Microsoft Corp., 980 F.Supp. 537 (D.D.C.1997). While that decision was ostensibly limited to interpreting specific terms of the Consent Decree, see Microsoft, 147 F.3d at 950 n. 14, the analysis was, in the Court of Appeals' eyes, "consistent with tying law." Id. at 950.

FN14. In fact, in Jefferson Parish, the Supreme Court implicitly rejected Microsoft's argument that the Court's analysis was limited to integrated

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> packages of services. See Jefferson Parish, 466 U.S. at 19 n. 30 ("We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices.") (emphasis supplied) (citing, e.g., Mercoid Corp. v. Mid-Continent Co., 320 U.S. 661, 64 S.Ct. 268, 88 L.Ed. 376 (1944) (heating system and stoker switch); Morton Salt Co. v. Suppiger Co., 314 U.S. 488, 62 S.Ct. 402, 86 L.Ed. 363 (1942) (salt machine and salt); Leitch Mfg. Co. v. Barber Co., 302 U.S. 458, 58 S.Ct. 288, 82 L.Ed. 371 (1938) (process patent and material used in the patented process); International Business Machines Corp. v. United States, 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085 (1936) (computer and computer punch cards); Carbice Corp. v. American Patents Corp., 283 U.S. 27, 51 S.Ct. 334, 75 L.Ed. 819 (1931) (ice cream transportation package and coolant); FTC v. Sinclair Refining Co., 261 U.S. 463, 43 S.Ct. 450, 67 L.Ed. 746 (1923) (gasoline and underground tanks and pumps); United Shoe Mach. Co. v. United States, 258 U.S. 451, 42 S.Ct. 363, 66 L.Ed. 708 (1921) (shoe machinery and supplies, maintenance, and peripheral machinery), United States v. Jerrold Electronics Corp., 187 F.Supp. 545, 558-60 (E.D.Pa.1960) (components of television antennas), aff'd, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961) (per curiam)).

In cases challenging technical integrations, the Court of Appeals wrote, the ultimate issue is whether the "integrated design offers benefits when compared to a purchaser's combination of corresponding stand-alone functionalities." Id. at 949. Noting what it views as the "limited competence of courts to evaluate high-tech product designs and the high cost of error" in making such evaluations, the Court of Appeals cautioned that courts should be "wary of second-guessing the claimed benefits of a particular design decision ." Id. at 950 n. 13. Courts should reject any challenge to an integrated product design, the court opined, if there is "a plausible claim" that the integration "brings some advantage." Id. at 950.

The Court of Appeals went on to articulate a framework for determining whether an integration amounts to a single product for purposes of evaluating a tying claim. "[I]ntegration may be considered genuine if it is beneficial when compared to a purchaser combination." Id. at 949. And "in making this inquiry," a court should not "embark on [a] product design assessment," id., but rather, "[a] court's evaluation of a claim of integration must be narrow and deferential." Id. at 949-50. An integrated product should pass muster if there are "facially plausible benefits to its integrated design." Id. at 950. The court noted, however, that manufacturers should not be permitted "to metaphorically 'bolt' two products together," i.e., place two separate products in a single package "for an anticompetitive purpose (or for no purpose at all)." Id. at 949 & n. 12; see also X Phillip E. Areeda et al., Antitrust Law ¶ 1746b, at 227 (1996) ("The main test is whether the items operate better when bundled by the defendant than when linked by the end user.").

The Court of Appeals expressed its "tentative" view, id. at 953, that the Windows 95/IE combination amounted to a "genuine" integration, but expressly left to a more fully developed factual record the final determination of whether Microsoft's claims of "technological benefits" could be substantiated. Id. at 951 n. 15, 952. Because numerous issues of material fact remain in dispute as the record presently stands, the Court will deny Microsoft's motion for summary judgment on the tying claims.

***11** Microsoft argues that the Windows/IE integration offers users a myriad of benefits. It asserts, for example, that the integrated design allows users to move "seamlessly" from a Web site to a floppy disk to a CD-ROM to a local area network with a single mouse click, thus making computers easier for consumers to use. But plaintiffs contend that "a comparable browsing experience can be achieved by the combination of Windows 98 and a competing browser." Sibley Decl. ¶ 35.

Microsoft also claims that "IE technologies" in Windows not only permit access to the Internet, but also provide numerous "system services" that are "not directly related to Web browsing" that "enhanc[e] the functionality of a wide variety of applications." See Microsoft, 147 F.3d at 951. Because that functionality resides on the operating system, ISVs are freed from the need to develop and include it as part of their products. In response, plaintiffs contend that "the ability to browse the web using IE can be removed and replaced with a competing browser in such a way that the consistency of the Windows platform for ISVs would not be frustrated in any appreciable manner."

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Sibley Decl. ¶ 34.

Microsoft also asserts that IE technologies perform numerous functions in Windows that are totally "unrelated to Web browsing." Microsoft, 147 F.3d at 951. For example, IE technologies supply a new user interface in Windows that adopts the navigational paradigms of the Web, including "back" and "forward" buttons, lists of "favorite" sources of information and a "history" of recently-accessed information. Microsoft also claims that IE technologies are essential to the Windows 98 "Help" system, which requires an HTML "interpreter" to display the content of "Help" files and to provide easy user access from "Help" to updated on-line resources. Furthermore, Microsoft asserts, IE technologies in Windows 98:(1) provide support for multiple video monitors; (2) invoke a "Disk Cleanup Wizard" to free up hard disk space by deleting unnecessary files; and (3) invoke a Windows Update feature that permits users to download Windows updates from a Microsoft Web site. Whether or not those functions actually rely on technology provided by the browser, and whether they could be just as efficiently provided by a competing browser, is unclear on the record as it presently stands.

In any event, whether or not the "integration brings benefits does not," the Court of Appeals made clear, "end the inquiry." Microsoft, 147 F.3d at 951. "It is also necessary that there be some reason Microsoft, rather than the OEMs or end users, must bring the functionalities together." Id. (citing X Phillip E. Areeda et al., Antitrust Law ¶ 1746b, at 227; ¶ 1747, at 229 (1996)). Without the benefit of a factual record that this Court had expected the special master to develop, the D.C. Circuit expressed its preliminary belief that "if Microsoft presented [OEMs] with an operating system and a stand-alone browser application, rather than with the interpenetrating design of Windows 95 and IE 4, the OEMs could not combine them in the way in which Microsoft has integrated IE 4 into Windows 95." Microsoft, 147 F.3d at 952 (emphasis supplied). That conclusion applies even more forcefully to Windows 98, Microsoft argues, where IE technologies are even more deeply integrated into the OS. Whether it is so remains to be seen.

***12** Plaintiffs disagree. While they concede that IE provides "a small number of Internet-oriented updates that are not available through the installation of Internet Explorer, as distributed separately from the operating system," see Mem. of the U.S. in Supp. of Mot. for Prelim. Inj. at 43 n. 41, plaintiffs nevertheless contend that "the browsing functionality in Windows 98 is almost entirely equivalent to that provided when Internet Explorer 4.01 is installed on top of Windows 95." Id. (citing C. Jones (Microsoft) Dep. at 34:2-8).

To summarize, the Court cannot determine whether Windows and IE are "separate products" until it becomes clear what are the synergistic benefits that are unique to the Windows/IE combination, i.e., benefits that could not be obtained by combining another browser with Windows. Moreover, it is unclear exactly how the integration is more beneficial when compared to a combination effected by an OEM or an ultimate consumer. Finally, the Court must determine whether Microsoft "metaphorically 'bolt[ed]' two products together," "for an anticompetitive purpose (or for no purpose at all)." See Microsoft, 147 F.3d at 949 & n. 12. Plaintiffs cite Microsoft documents describing the bundling as motivated by a desire to thwart browser competition and to "weld" the products together to achieve that goal. See, e.g., B. Veghte 2/8/97 e-mail (SJ Opp'n Ex. 19).

To succeed on their tying claims, however, plaintiffs must do more than prove that Windows and IE are separate products. They must also show that Windows (the alleged tying product) is conditioned on the purchase of IE, and that the conditioning affects a "substantial volume of commerce" in the browser market. See Eastman Kodak, 504 U.S. at 462; Foster, 590 F.2d at 931. Microsoft contends that neither of those elements can be proved.

In order to prove the requisite "conditioning," plaintiffs must prove that licensees "might have preferred" not to license a browser, or to license it "elsewhere on different terms," Jefferson Parish, 466 U.S. at 12, and that Microsoft "coerces the abdication of [licensees'] independent judgment" as to the relative merits of competing browsers. See Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 605, 73 S.Ct. 872, 97 L.Ed. 1277 (1953); see also Service & Training, Inc. v. Data Gen. Corp., 963 F.2d 680, 684 (4th Cir.1992) ("The purpose of the inquiry into consumer demand is to determine whether there are customers who would,

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absent an illegal agreement, purchase the tied product without the tying product, and the tying product without the tied product."). Plaintiffs allege that Microsoft's goal was to "make people use IE instead of Navigator" by "leverag[ing] the [operating system]." See C. Wildfeuer 2/24/97 e-mail (emphasis supplied) (PI Ex. 23).

Microsoft argues that plaintiffs cannot satisfy the "conditioning" requirement of the tying test, because no OEM has been forced to purchase a separate product; IE technologies are included in a single royalty paid by OEMs for Windows 98. But as Professor Areeda has pointed out, "the tie may be obvious, as in the classic form, or somewhat more subtle, as when a machine is sold or leased at a price that covers 'free' servicing." See IIIA Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 760b6, at 51 (1996). Whether Microsoft invoices OEMs separately for Windows and IE or collects a single royalty of the same amount, it compels OEMs to take (and, one way or the other, to pay for) the entire package of software.

*13 Microsoft also disputes plaintiffs' claims that the Windows/IE combination affects a not insubstantial amount of commerce in the browser market. It argues that neither the design of Windows 98 nor the Windows licensing agreements appreciably impacts Netscape's ability to distribute its browser. OEMs are free to preinstall Netscape Navigator as an add-on (so long as they do not disturb IE) and several leading OEMs apparently do so.

But plaintiffs maintain that while OEMs may preinstall Netscape's browser (leaving IE itself in place, with no other icons or folders larger than IE's), the reality is that many OEMs hesitate to do so, mainly because they believe that too many icons and layers cause customer confusion, which could increase product support costs. OEMs bear the burden of providing technical support for the software they preinstall, a fact that creates a disincentive for preinstalling duplicative titles in a single product category. Furthermore, preinstalling two browsers would double the necessary product testing for OEMs. In fact, Microsoft has actually cited these factors itself to dissuade some OEMs from loading a second browser on their computers. See J. Kempin 10/2/97 Dep at 37. And Joachim Kempin, Microsoft's Senior Vice President of OEM Sales, agrees that OEMs "should be" concerned about installing two browsers on their machines. See id. at 31.

The volume of foreclosed commerce necessary to satisfy the tying standard need only be "substantial enough in terms of dollar-volume so as not to be merely de minimis." Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 501, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969) ($190,000 not an insubstantial amount, even though only a very small percentage of the market); see also Digidyne Corp. v. Data General Corp., 734 F.2d 1336, 1341, 1347 (9th Cir.1984) (citing Fortner). While plaintiffs do not cite a dollar value or a percentage of the market that is allegedly foreclosed, the facts are sufficiently in dispute to at least raise a genuine issue for trial. Furthermore, where, as here, products in the tied product market (browsers) are potential "partial substitutes" for the tying product, antitrust concerns are heightened because tying agreements not only reduce competition in the tied market, but also reinforce market power in the tying market. See X Phillip E. Areeda et al., Antitrust Law ¶ 1747 a-c, at 230-33 (1996); see also Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 795 (1st Cir.1988).

IV.

As Microsoft recognizes in its own internal communications, consumers are likely to select whatever Internet services (including browsers and IAPs) they see the first time they turn on their PC, see, e.g., M. Dunie 2/24/97 e-mail ("[O]nce everything is in the OS and right there, integrated into the OS ... there would be no more need to use something 'separate." ') (States' PI Ex. 1), and are unlikely to go through the trouble of switching. See, e.g., B. Chase 4/4/96 Planning Memo ("We know that it is very hard and expensive to make people switch") (States' PI Ex. 2).

*14 Plaintiffs allege that, in addition to "tying" IE to Windows, Microsoft sought to control the OEM channel of browser distribution by restricting OEMs' ability to alter the Windows "boot-up" sequence. [FN15] After the machine boots up, the user sees a default or "first" screen. The boot-up and first screen present a convenient opportunity for vendors of software and services to address potential customers, providing them with information about

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and access to their products, and for OEMs to communicate with their customers about configuration options.

> FN15. The "boot-up" sequence is the installation and configuration routine a PC goes through when a user turns it on.

When Windows 95 was first released, a number of OEMs who preinstalled Windows 95 customized the content and configurations of the computers' boot-up and first screens for various commercial reasons. Some OEMs altered the arrangement, number and content of icons and folders which accessed IAPs, Internet browsers and other software through the Windows 95 desktop. These OEMs struck deals with IAPs and ICPs that earned revenue for OEMs and garnered customers for the IAPs and ICPs. In an internal e-mail, Bill Gates wrote of his concern that OEMs were bundling non-Microsoft browsers and "coming up with offerings together with Internet Service providers that get displayed on their machines in a FAR more prominent way than ... our Internet browser" and that those offerings were interfering with the "very very important goal" of "[w]inning Internet browser share." B. Gates 1/5/96 e-mail (PI Ex. 45) (emphasis in original).

Allegedly to address this concern, Microsoft, as a condition of licensing Windows 98, began prohibiting OEMs from adding to the sequence of screens every user sees in the boot-up sequence and from modifying the first screen displayed to the user at the conclusion of the boot-up sequence. [FN16] OEMs could not remove folders or icons from the Windows desktop, create icons or folders larger than those placed by Microsoft on the desktop, and could not alter the boot-up sequence by, for instance, presenting an OEM-created screen that would highlight a choice of Internet browsers or the OEM's own Internet offerings. Plaintiffs contend that the boot and start-up screen restrictions amount to an unreasonable restraint of trade in violation of § 1.

> FN16. Several OEMs, including Micron, Hewlett Packard, and Gateway, have requested that Microsoft allow them to provide new PC purchasers with an alternative boot-up sequence or first screen, but Microsoft has refused.

The restrictions are subject to a "rule of reason" analysis, and are unlawful only if they injure competition by restricting competitors' output more than they further Microsoft's legitimate objectives, see, e.g., National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); American Ad Management, Inc. v.. GTE Corp., 92 F.3d 781, 791 (9th Cir.1996), or if Microsoft's objectives could be achieved by a less restrictive means, see Sullivan v. NFL, 34 F.3d 1091, 1103 (1st Cir.1994).

Microsoft argues that its OEM license agreements merely highlight and expressly state the rights that Microsoft already enjoys under federal copyright law. Consequently, it contends, the agreements are not subject to challenge under the antitrust laws. According to Microsoft, the license agreements merely require that the very first time a consumer turns on his new computer, Microsoft's copyrighted operating system be allowed to go through its initial startup sequence as designed, developed and tested by Microsoft and to display the Windows "desktop" screen without any aspects of that screen having been altered by the OEM.

***15** Microsoft argues that it "may refrain from vending or licensing and content [itself] with simply exercising the right to exclude others from using [its intellectual] property." See Fox Film Corp. v. Doyal, 286 U.S. 123, 127, 52 S.Ct. 546, 76 L.Ed. 1010 (1932). But whatever copyright protection Microsoft enjoys in its software is not unlimited. For example, copyright in a computer program does not extend to its functional aspects. See, e.g., Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir.1995), aff'd by an equally divided Court, 516 U.S. 233, 116 S.Ct. 804, 133 L.Ed.2d 610 (1996). It does not preclude design choices dictated by necessity, cost, convenience or consumer demand. See, e.g., Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435, 1442 (9th Cir.1994) (user interface of computer program entitled to only limited protection against "virtually identical" copying, because of license and because of limited number of different ways the underlying idea can be expressed); Computer Assocs. Int'l v. Altai, 982 F.2d 693, 715 (2d Cir.1992) (significant portions of structure, sequence, and organization of program may be copied in order to write similar program to run on different platform). And it does not render inviolate portions of the program that are not original to its creator. See Stenograph L.L.C. v. Bossard Assocs., Inc., 144 F.3d 96, 99

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(D.C.Cir.1998).

Furthermore, copyright law does not give Microsoft blanket authority to license (or refuse to license) its intellectual property as it sees fit. A copyright does not give its holder immunity from laws of general applicability, including the antitrust laws. See Data General Corp. v. Grumman Sys. Supp. Corp., 36 F.3d 1147, 1185 n. 63 (1st Cir.1994) ("It is in any event well settled that concerted and contractual behavior that threatens competition is not immune from antitrust inquiry simply because it involves the exercise of copyright privileges."). Copyright holders are restricted in their ability to extend their control to other markets. See Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 479 n. 29, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) ("The Court has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next.") (internal citation and quotation marks omitted). They may not prevent the development and use of interoperable programs by competitors. See, e.g., DSC Communications Corp. v. DGI Techs. Inc., 81 F.3d 597, 601 (5th Cir.1996) (likely copyright misuse to use copyright in a computer program operating a telephone switch to prevent a competitor from designing and testing a compatible switch using copyright holder's protocol). Antitrust liability may also attach to other anticompetitive licensing restrictions involving copyrighted works. See, e.g., Practice Management Info. Corp. v. American Med. Ass'n, 121 F.3d 516, 520-21 (9th Cir.1997) (finding copyright misuse where copyright owner entered into license agreements restricting licensees from competing with it), amended by, 133 F.3d 1140 (9th Cir.), cert. denied, --- U.S. ----, 118 S.Ct. 2367, --- L.Ed.2d ---- (1998); Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970 (4th Cir.1990) (same).

***16** In addition to claiming a right to "exclude" licensees as it sees fit, Microsoft cites the Second Circuit's opinion in Gilliam v. ABC, 538 F.2d 14 (2d Cir.1976), recognizing a copyright holder's "moral right of integrity" where a copyrighted work was significantly changed, or "mutilated," but still promoted under its original name. But the Gilliam court acknowledged the lack of statutory or doctrinal support in copyright law for the right it recognized, see Gilliam, 538 F.2d at 24, and ultimately grounded its decision in trademark law. Id. at 24-25. Several subsequent decisions considering Gilliam have declined to endorse the "moral right"argument Microsoft advances. See, e.g., Halicki v. United Artists Communications, Inc., 812 F.2d 1213, 1214 (9th Cir.1987); Weinstein v. University of Illinois, 811 F.2d 1091, 1095 n. 3 (7th Cir.1987); Paramount Pictures Corp. v. Video Broad. Sys, Inc., 724 F.Supp. 808, 820 (D.Kan.1989).

Moreover, whatever policy justifications that may exist for a moral right of integrity in works of art are substantially weaker when the work at issue is a computer program, whose value lies in its functionality, not its artistry. The Copyright Act itself expressly allows owners of a copy of a computer program to "adapt" it in certain circumstances without the copyright owner's permission. See 17 U.S.C. § 117; see also Aymes v. Bonelli, 47 F.3d 23 (2d Cir.1995). Although Microsoft undoubtedly enjoys some "right against mutilation" in its software, there are significant factual questions in dispute on this issue, chief among them the extent of copyright protection in the specific portions of the software plaintiffs seek to modify.

Microsoft also claims that the boot and start-up screen restrictions are justified by legitimate business reasons, each of which is disputed by plaintiffs. For example, the restrictions purportedly ensure a "stable and consistent platform" for ISVs who must know that the software code that provides required system services ("APIs") will be present on every computer. In response, plaintiffs contend that the necessary APIs would be unaffected by alterations to the Windows boot-up sequence, modifications to the contents of desktop folders, or creation of icons of different shapes and sizes.

Microsoft also insists that the restrictions are necessary to ensure a "consistent user experience across multiple brands of computers." But plaintiffs point out that Microsoft permits OEM modifications that do not affect the browser, even though such modifications may result in an "inconsistent user experience." For example, Microsoft grants exceptions to the screen restrictions for some OEM tutorials and "system check" applications. See J. Kempin (Microsoft) 3/18/98 Dep., 58:24--59:25. It permits some OEMs to display their own ISP sign-

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up software before the Windows 98 boot-process is completed for the first time, and permits OEMs to preload the software of their choice, subject to Microsoft's license restrictions. Removal by OEMs of the IE icon would not, plaintiffs argue, affect the overall "look and feel" of Windows any more than adding various software (which Microsoft permits). Similarly, the "look and feel" would not be affected by permitting OEMs to install icons of different sizes, plaintiffs contend.

*17 Finally, Microsoft claims that the restrictions are necessary to "preserve Microsoft's reputation as a supplier of quality operating system software and enhance[ ] the value of Microsoft's brand name." See Gilliam, 538 F.2d at 18-19 (reputational injury resulting from unauthorized alteration of copyrighted work is irreparable). But plaintiffs argue that this "quality control" defense is implausible. Microsoft requires OEMs to bear the cost of providing post-sale software support for the computers they sell. Accordingly, OEMs are unlikely to take any action that will do anything to increase the likelihood that customers will call them for technical assistance.

Regardless of the viability of its justifications for the agreements, Microsoft contends that there is no antitrust violation because there is no market foreclosure. OEMs are free to configure the computers so that on all subsequent occasions (after the initial boot) they will boot directly into an alternative "shell" (such as Netscape Communicator). But several OEMs (and Microsoft executives) have expressed their belief that, while the licenses technically allow OEMs to engineer a mechanism for "user-initiated" action after the first boot-up is complete to alter the Microsoft-required screens, these factors are of negligible value to OEMs. It is both costly and time- consuming for OEMs to develop such a mechanism, plaintiffs contend. See B. Chase (Microsoft) 3/1/96 e-mail ("most OEMs won't go through the hassle to develop such a DOS utility") (PI Ex. 43); J. Kempin (Microsoft) 3/18/98 Dep., 62:2--63:10; R. Brownrigg (Gateway 2000) Dep., 49:15--51:2; F. Santos (Hewlett-Packard) Dep., 29:11--30:15.

Numerous issues remain genuinely in dispute on the boot and start-up screen claim. These include the extent of copyright protection in the specific portions of software plaintiffs seek to modify and whether Microsoft abused its copyright for anticompetitive purposes. Plaintiffs also contest the legitimacy of Microsoft's claimed business justifications and Microsoft's claims that the restrictions do not foreclose competitors' opportunities.

V

Since May 1995, plaintiffs allege, Microsoft has substantially foreclosed non- Microsoft browsers from the IAP and ICP distribution channels by relying on its operating system monopoly to coerce IAPs and ICPs into entering into what amount to "exclusive dealing" arrangements. Plaintiffs claim that, in return for placement on Microsoft's coveted Windows desktop the content of which Microsoft controls by virtue of the boot and start-up screen restrictions), providers reluctantly agreed to distribute and promote IE and not to distribute and/ or promote competitive browsers.

For example, plaintiffs assert, Microsoft reached agreements with the largest OLSs, including America Online, CompuServe, and Prodigy, by which Microsoft undertook to include an icon for the OLSs' client software both in the "Online Services" folder [FN17] that is displayed on the Windows desktop, and in the Windows "Start" menu. Pursuant to the agreements, Microsoft must also invest in the support and development of improved versions of the OLSs' client software. In return, the OLSs agree to: (1) distribute and promote IE to their subscribers as the "exclusive" or "primary" browser, and not to distribute a non-Microsoft browser unless a customer specifically requests it; (2) eliminate links on their Web sites from which their subscribers could download a competing browser; (3) refrain from "expressing or implying" to their subscribers that a competing browser is available (and even from displaying a logo for a non-Microsoft browser on the OLS's home page or elsewhere); (4) limit the percentage of competing browsers they distribute to 15%, even in response to specific requests from customers; and (5) design their Web sites using Microsoft-specific, proprietary programming extensions so that those sites look better when viewed with IE than when viewed through a competing browser.

FN17. This folder contains the icons of the various providers. When the user "double-clicks" the icon, he is connected to the provider and permitted to "sign up" for the provider's service.

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*18 A number of ISPs agreed to similar terms in return for Microsoft's agreement to include them in a list of providers that are shown to an end-user who selects his Internet access provider using a Windows 98 feature called the Internet Connection Wizard ("ICW"). When a user elects to use the ICW, Windows dials into a computer maintained by Microsoft that transmits to the user a list of participating ISPs. If the user decides to sign up for an ISP's service, Windows connects him to a computer maintained by that ISP, and the user's computer is automatically configured to work properly with the Internet connection provided by that ISP. In return, ISPs pay Microsoft a referral fee for each customer referred to them through the ICW and agree to terms similar to those in the OLS agreements.

The third group of providers entering into such agreements with Microsoft were ICPs. One of IE 4.0's new features is the provision of "channels" that appear on the right side of the Windows desktop screen after IE 4.0 is installed. Channel buttons are icons on the Windows desktop screen that, when clicked, lead the user directly to a particular content provider's Web site or service, [FN18] without having to sign on to the Internet through some intermediary step. In order to gain prominent "channel placement," certain ICPs agreed: (1) not to compensate the manufacturer of an "other browser" [FN19] (including by distributing its browser) for the distribution, marketing, or promotion of the ICP's content; (2) not to promote any browser produced by any manufacturer of an "other browser"; (3) not to allow any manufacturer of an "other browser" to promote and highlight the ICP's channel content on or for its browsers; and (4) to design its Web sites using Microsoft-specific, proprietary programming extensions so that those sites look better when viewed with IE than when viewed through a competing browser.

FN18. Examples include The Disney Channel and a channel, developed by Intuit, providing financial software and services.

FN19. For purposes of the ICP agreements, "other browsers" include the top two browsers (exclusive of IE) by browser share.

Plaintiffs contend that providers sometimes agreed to Microsoft's terms despite their preference not to be locked into exclusive browser distribution agreements. CompuServe, the nation's second-largest OLS, for example, expressed its preference "to have flexibility in software" that it distributes. See K. Knott Dep. at 25:4-5. An MCI executive testified that his company would have liked to "have had the flexibility to be able to promote other browsers should there be a marketing advantage to do so." See S. Von Rump (MCI) Dep. at 11:15- 17. And AT & T told Microsoft that it wanted to remain "browser neutral," and that the "level of exclusivity" demanded by Microsoft was problematic for AT & T's partnership with Netscape. See D. Steele (Microsoft) 3/14/96 e-mail (PI Ex. 58); B. Silverberg Dep., 170:21--171:5. Nevertheless, plaintiffs contend, these providers acceded to Microsoft's restrictions in order to gain access to the nearly ubiquitous Windows desktop. For example, Microsoft allegedly told AT & T during negotiations: "You want to be part of the Windows box, you're going to have to do something special for us ... If you want that preferential treatment from us ... we're going to want something very extraordinary from you." See B. Silverberg Dep. at 159:10-16.

*19 Exclusive dealing arrangements pose two related, but distinct antitrust concerns. First, they threaten to eliminate opportunities for products unable to find ample other outlets to the marketplace. Second, they raise the barriers to entry in a market because, in order to enter, producers will have to be vertically integrated (i .e., they will have to operate at both the manufacturing and retailing levels).

Recognizing potentially pro-competitive rationales for such agreements, see, e.g., Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir.1997) ("well-recognized economic benefits to exclusive dealing arrangements"), petition for cert. filed, 66 U.S.L.W. 3750 (U.S. May 11, 1998) (No. 97-1828), courts are obliged to apply a "rule of reason" analysis. See, e.g., Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 393 (7th Cir.1984) (rule of reason must be applied to exclusive dealing). As a threshold matter, courts generally determine whether a "substantial share of the relevant market" is foreclosed. See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328-29, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961). Once foreclosure of a sufficient percentage is found, courts consider the agreements' actual impact on

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competition (as opposed to merely the foreclosed market share), see Tampa Elec., 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580; see also Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 478-79 (7th Cir.1988); Interface Group v. Massachusetts Port Auth. ., 816 F.2d 9, 11-12 (1st Cir.1987), and any procompetitive justifications that may outweigh anticompetitive effects.

In considering the degree of foreclosure, it is important to remember that the relevant figure is the share of the browser market that is foreclosed by the challenged agreements, and not Microsoft's total browser share. Plaintiffs do not need to show that Microsoft's competitors are completely excluded from the marketplace. Cf. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985) (competitor never contended that the joint marketing program at issue was essential to its survival, but rather that it impeded its marketing efforts). Nevertheless, plaintiffs must establish foreclosure on the order of greater than 40% to prevail on their exclusive dealing claims. See, e.g., United States v. Dairymen, Inc., 758 F.2d 654 (6th Cir.1985) (unpublished) (50% sufficient); Sewell Plastics, Inc. v. Coca-Cola Co., 720 F.Supp. 1196, 1212-14 (W.D.N.C.1989) (40% insufficient); Oltz v. St. Peter's Community Hosp., 656 F.Supp. 760 (D.Mont.1987) (84% sufficient). Plaintiffs must also establish the extent to which exclusive dealing contracts are imposed on other resellers in the market. See Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co., 810 F.2d 1289, 1295 (4th Cir.1987) (j .n.o.v. for defendant where plaintiff failed to show extent to which exclusive dealing was used in the market as a whole).

Without citing a specific percentage of the market that is allegedly foreclosed, plaintiffs allege that Microsoft has entered into agreements with the "largest and most important" ISPs and OLSs and the "largest and most popular" ICPs. The OLSs in Microsoft's Online Services folder include America Online, CompuServe, Prodigy, AT & T WorldNet and Microsoft Network, which, according to plaintiffs, collectively account for over 53% of the total North American subscriber base for Internet access. See Microsoft 1/23/98 Internet Customer Unit FY '98 Mid-Year Review (SJ Opp'n Ex. 26). In 1997, Microsoft estimated that 43% of home users access the Internet through AOL alone. See Microsoft April 1997 IE Market Review (PI Ex. 54). And one Microsoft executive has estimated Internet Explorer's share of usage among AOL subscribers as 92%. See C. Myhrvold 1/13/98 e-mail (SJ Opp'n Ex. 80).

***20** Plaintiffs contend that Microsoft's conduct, in the aggregate, see Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962) (courts should consider cumulative effects in assessing likelihood of anticompetitive harm); City of Anaheim v. Southern Cal. Edison Co., 955 F.2d 1373, 1376 (9th Cir.1992), is substantially likely to entrench Microsoft's operating system monopoly and harm competition. Most importantly, plaintiffs allege, Netscape is foreclosed from the "vast majority" of IAPs, which are the single most important channel through which users acquire their browsers. [FN20]

> FN20. In September 1996, Microsoft executive Brad Chase estimated that at least 31% of Internet users get their browsers from an IAP. See B. Chase 9/9/96 e-mail.

Microsoft contends that Netscape and other competitors are not foreclosed from the marketplace, and that the availability to Netscape and others of alternative channels of distribution, including the possibility of direct sales to end users, by itself is fatal to an exclusive dealing claim. See, e.g., Omega Envtl., 127 F.3d at 1162-63; Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir.1991); Stitt Spark Plug Co. v. Champion Spark Plug Co., 840 F.2d 1253, 1258 (5th Cir.1988). Microsoft claims that Netscape has arrangements with thousands of ISPs and ICPs, who include "Netscape Now" buttons on their Web sites that facilitate the electronic downloading of Navigator. Netscape also apparently has arrangements with leading ISVs such as Corel, IBM, Novell, Oracle and Sun, and various OEMs who pre-install Navigator on their computers. Netscape executives testified that the company, through these and other channels, will distribute between 150 and 170 million copies of its browser this year alone.

But Netscape's CEO also testified that the ISP channel is one of the principal means through which Netscape has historically distributed its browser, and that other methods of distribution cannot make up for the lack of access to the ISP and OEM channels.

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Netscape's principal remaining channel for distributing its browser is to permit users to download it from a Netscape Web site, but Microsoft itself recognizes the decreasing viability of browser distribution through downloads, as browsers increase in complexity and size, resulting in inordinately long download times and a high rate of failure. See Myhrvold Dep., 152:19--153:4; J. Belfiore Dep. at 45:2-16; B. Chase 11/19/97 e-mail (PI Ex. 73). Microsoft's Carl Stork, who oversaw the development of Windows 95 and Windows 98, testified that having a browser preinstalled on a PC when a user buys it avoids the "painstaking" process of downloading, which is "fraught with risk," and reduces support calls and the potential for errors. See Stork Dep. at 42-43.

In addition to disputing the percentage of the market that may be foreclosed by the agreements in question, the parties disagree about numerous other factors courts consider in determining whether competition in the relevant market is actually affected. Microsoft argues that, since the OLS arrangements are short-term, they cannot unreasonably restrain trade. See, e.g., Omega Envtl., 127 F.3d at 1163-64. [FN21] Excluding the agreement with AOL, which expires on January 1, 2001, all of Microsoft's OLS agreements expire either this year or next. See Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc., 676 F.2d 1291 (9th Cir.1982) (condemning contracts in excess of ten years); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 236-38 (1st Cir.1983) (approving two-year contracts); Roland Mach., 749 F.2d at 394-95 (approving agreements that could be terminated on one year notice). This factor may be appropriate to consider in a final determination of whether the agreements unreasonably restrain trade. It is, however, only one among many factors the Court will consider and does not admit of, much less compel summary judgment for Microsoft on this claim.

> FN21. Microsoft also argues that since it has unilaterally waived the challenged provisions of its ISP and ICP agreements, the claims related to those agreements are moot. But the Court retains jurisdiction to consider even the "waived" practices if they caused anticompetitive effects. See Northwest Envtl. Defense Ctr. v. Gordon, 849 F.2d 1241, 1245 (9th Cir.1988) ("The fact that the alleged violation has itself ceased is not sufficient to render a case moot. As long as effective relief may still be available to counteract the effects of the violation, the controversy remains live and present."). "[V]oluntary cessation of allegedly illegal conduct" does "not make the case moot." United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). Where the "defendant is free to return to his old ways," id., it must demonstrate that it is "absolutely clear" that "the allegedly wrongful behavior could not reasonably be expected to recur." Vitek v. Jones, 445 U.S. 480, 487, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (internal citation and quotation marks omitted). Microsoft has not made such a showing.

***21** Microsoft also argues that the limitations on OLSs are justified to prevent "free-riding" by other browser manufacturers on Microsoft's investment in support for the development of improved versions of OLSs' software the agreements commit it to undertake. See generally Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (preventing free riding may justify certain vertical restraints); see also American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1252 (3d Cir.1975) (hotel chain's exclusionary agreements with franchisees justified, in part, by chain's desire to strengthen its position vis-a-vis its competitors); Joyce Beverages v. Royal Crown Cola Co., 555 F.Supp. 271, 278 (S.D.N.Y.1983) (recognizing exclusive dealing as a means of assuring that retailer "devotes undivided loyalty to its particular brand and that it competes vigorously against all competing brands."). But "[w]hen payment is possible, free-riding is not a problem because the 'ride' is not free." Chicago Prof'l Sports, Ltd. Partnership v. NBA, 961 F.2d 667, 675 (7th Cir.1992) (Easterbrook, J.). In other words, in order to recoup its investment, Microsoft could simply charge OLSs a fee rather than extract exclusionary rights.

Microsoft views its ISP agreements as nothing more than "commonplace cross- marketing arrangements." See Chuck's Feed & Seed, 810 F.2d at 1295 (considering extent to which exclusive dealing was used in the market as a whole). For example, Netscape has similar agreements with all five of the regional Bell operating companies ("RBOCs"), providing that Navigator must be the default browser for all customers who do not specifically request an alternative. But plaintiffs point out that the Netscape restrictions will automatically terminate in the event that Microsoft's restrictions on AT & T and MCI are eliminated. See

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Solnik Dep. at 79:2-22; Beran Dep. at 49-52; Barksdale Dep. at 220-21. Moreover, those agreements (unlike Microsoft's) do not require that the RBOCs ship Navigator as a certain minimum percentage of their browsers. And the ISPs in Microsoft's Internet referral server have a combined base of over 4.3 million subscribers, compared to the 625,000 subscribers to the RBOCs. See Microsoft 1/28/98 ISP Marketing Update (SJ Opp'n Ex. 25).

Microsoft also points out that its ISP agreements involve only eleven of the more than 4,500 ISPs in the United States and, once again, are short term, typically no longer than one or two years. Moreover, Microsoft points out, the customers of the eleven ISPs appear to be using Netscape's Web browsing software and IE in about the same proportion as Internet users generally. While that may be true, Microsoft's own documents, see Microsoft 1/26/98 Referral Server Business Plan (SJ Opp'n Ex. 40), show that IE's share of browser usage is much higher among subscribers to ISPs that have been subject to its agreements since mid-1996 than among subscribers to ISPs that entered into agreements in mid- or late 1997. This supports plaintiffs' argument that the agreements have had a substantial role in increasing Microsoft's browser share.

***22** In summary, the record to date discloses many material issues of fact genuinely in dispute on plaintiffs' exclusive dealing claims. Chief among them is the degree to which the browser market is foreclosed and the actual effect the agreements have had on competition. Also hotly in dispute is whether the arrangements serve legitimate business purposes that might outweigh any anticompetitive effect. Microsoft claims that consumers benefit by easier access to the Internet; ISPs included in its referral server and OLSs in the Online Services folder benefit by opening the door to a new source of customers; and Microsoft itself benefits by receiving referral fees from the providers and promotion of its browser technologies. But see Myhrvold Dep. at 137:6-7. (explaining that the referral server "doesn't even pay for itself, much less generate any profits").

Furthermore, any claimed benefit "cannot outweigh its harm to competition, if a reasonable, less restrictive alternative to the policy exists that would provide the same benefits" as the challenged policies. See Sullivan v. NFL, 34 F.3d 1091, 1103 (1st Cir.1994). This difficult balancing of potentially legitimate business justifications against what plaintiffs contend are exclusionary effects are fact-bound questions that generally cannot be resolved on summary judgment. See, e.g., Betaseed, Inc. v. U & I, Inc., 681 F.2d 1203, 1228-30 (9th Cir.1982) (explaining that "the reasonableness of a restrictive practice is a paradigm fact question" and reversing grant of summary judgment for defendant on rule of reason claim).

VI.

Plaintiffs contend that Microsoft has monopoly power in Intel-compatible PC operating systems, the relevant product market in this case, and that its monopoly is reinforced by high barriers to entry and network effects. Plaintiffs also allege that Microsoft has "willfully" maintained that monopoly by engaging in anticompetitive conduct, including the tying [FN22] and other alleged § 1 violations discussed supra, aimed at eradicating competition in the browser market, which it perceives as a threat to its operating system monopoly. This conduct, plaintiffs contend, lacks any legitimate business justification.

> FN22. By using monopoly power to compel a customer to purchase a product it might prefer to purchase elsewhere, a monopolist "forecloses competition on the merits in a product market distinct from the market for the tying item." Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 22, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). "[B]y doing so, the [monopolist] may build a strong market position in [the tied product market]; and that position [in the tied product market], in turn, may increase its power" in its monopoly product. Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 795 (1st Cir.1988).

In order to succeed on their claims of illegal monopolization, plaintiffs must prove: (1) Microsoft's possession of monopoly power in a relevant market; and (2) the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." See United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966). For purposes of summary judgment, Microsoft concedes its possession of monopoly

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power in the market for Intel- compatible PC operating systems. Accordingly, the Court must deny summary judgment on the monopolization claim if there are disputed facts regarding whether Microsoft has "willfully" maintained its alleged monopoly.

***23** A monopolist's conduct that violates § 1 necessarily violates § 2. See United States v. Griffith, 334 U.S. 100, 106, 68 S.Ct. 941, 92 L.Ed. 1236 (1948); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 239 (1st Cir.1983). Since the Court found sufficient facts to be in dispute to preclude summary judgment for defendant on plaintiffs' § 1 allegations, summary judgment is ipso facto precluded on the monopolization claims. Furthermore, a monopolist's conduct that does not rise to the level of a § 1 violation may nevertheless violate § 2 if it "impair[s] competition in an unnecessarily restrictive way." Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985); see also Lorain Journal Co. v. United States, 342 U.S. 143, 149, 72 S.Ct. 181, 96 L.Ed. 162 (1951). As Justice Scalia wrote in Eastman Kodak, "[w]here a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws--or that might even be viewed as procompetitive--can take on exclusionary connotations when practiced by a monopolist." 504 U.S. at 488 (Scalia, J., dissenting); see also Berkey Photo v. Eastman Kodak Co., 603 F.2d 263, 274-75 (2d Cir.1979). These are quintessential fact questions and are genuinely disputed.

Plaintiffs also contend that Microsoft is unlawfully attempting to monopolize the market for Internet browsers. In order to prevail on this claim, plaintiffs must prove that Microsoft: (1) engaged in predatory or anticompetitive behavior (2) with a specific intent to monopolize and, that (3) there is a "dangerous probability" of its achieving monopoly power. See Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993); see also International Distribution Ctrs. v. Walsh Trucking Co., 812 F.2d 786, 790 (2d Cir.1987); William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., 668 F.2d 1014, 1027 (9th Cir.1981).

The Supreme Court has held that intent to injure or destroy a rival and to expand one's own business are, standing alone, insufficient to produce an antitrust violation. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993); see also Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 927 (4th Cir.1990); Morgan v. Ponder, 892 F.2d 1355, 1359 (8th Cir.1989) (statements such as "we'll do whatever it takes" are "often legitimately used by business people in the heat of competition"); Great Escape, Inc. v. Union City Body Co., 791 F.2d 532, 541 (7th Cir.1986) (because "[a]ll lawful competition aims to defeat and drive out competitors," the "mere intention to exclude competition and to expand one's own business is not sufficient to show a specific intent to monopolize"); Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 (6th Cir.1982). The intent must be "something more than an intent to compete vigorously." See Spectrum Sports, 506 U.S. at 459.

***24** As Professor Hovenkamp points out, "[i]ntent to 'exclude' is consistent with both efficient practices (research and development) and inefficient ones (predatory pricing)." See Herbert Hovenkamp, Federal Antitrust Policy 252 (1994). Consequently, courts are hesitant to decide cases as a matter of law where the evidence of intent is ambiguous. See, e.g., U.S. Phillips Corp. v. Windmere Corp., 861 F.2d 695, 698-703 (Fed.Cir.1988) (letting jury decide whether internal memoranda containing statements such as "let's pound [our competitors] into the sand" were simply sales talk or sufficient evidence of anticompetitive intent).

In Spectrum Sports the Supreme Court held that improper intent may be inferred from objective evidence such as predatory conduct. See 506 U.S. at 459 ("Unfair or predatory conduct may be sufficient to prove the necessary intent to monopolize."); see also William Inglis & Sons, 668 F.2d at 1027; United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir.1976). The same facts that preclude summary judgment on plaintiffs' § 1 allegations, if proven, might be sufficient for the Court to infer an improper intent from that behavior.

Plaintiffs also contend that Microsoft's specific intent to monopolize the browser market can be inferred from its attempt to solicit its major competitor, Netscape, to participate in an illegal market allocation scheme. Cf. United States v.

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American Airlines, Inc., 743 F.2d 1114, 1121 (5th Cir.1984) (a solicitation to form a cartel in a concentrated market, even if the solicitation is rejected, can in itself constitute an attempt to monopolize). While Microsoft vigorously disputes plaintiffs' account of the June 21, 1995 meeting with Netscape, plaintiffs' evidence is sufficient to create a genuine dispute. Chris Jones, Microsoft's then Group Manager for Internet Explorer, participated in that meeting. In deposition testimony, Mr. Jones indicated that Microsoft "absolutely" intended to persuade Netscape not to compete and offered as a quid pro quo the prospect of Microsoft's staying out of browser development for non-Windows platforms. See Jones Dep., 208:5-- 209:6; 211:22--212:6. Plaintiffs allege that Microsoft's offer was part of a larger pattern of conduct that included similar discussions with Intel, Apple, and Real Networks. See infra at 11.

The test of conduct necessary to prove an attempt claim is, of course, substantially more demanding than the requirements for illegal monopolization. See, e.g., Transamerica Computer Co., Inc. v. IBM, 698 F.2d 1377, 1382 (9th Cir.1983) (if conduct is not monopolization, it is not attempt either). The conduct must be sufficiently hostile toward competition so as to be branded "predatory," meaning an attempt to drive rivals from the market or to deter their entry. See Neumann v. Reinforced Earth Co., 786 F.2d 424, 427 (D.C.Cir.1986). In support of their "attempt" claims, plaintiffs cite, among other behavior, the same conduct that supports their claims of tying and other unlawful restraints of trade. While Microsoft repeats its claims that it did not engage in any predatory behavior, the relevant facts are, as previously discussed, genuinely in dispute.

***25** To sustain the attempted monopolization claim, plaintiffs must also prove a "dangerous probability" of Microsoft's succeeding in its effort to monopolize the market for Internet browsers. To prove a "dangerous probability," courts generally require plaintiffs to show that a defendant has a certain minimum market share. In Lorain Journal v. United States, 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162 (1951), for example, the Supreme Court upheld a judgment that a newspaper had attempted to monopolize the sale of advertising by refusing to deal with advertisers who purchased advertising from a local radio station. The Supreme Court took particular note of the newspaper's market power and the likelihood that the boycott would eventually eliminate the broadcaster-competitor. See id. at 152-54.

The Fourth Circuit has articulated the market share requirement as follows: "(1) claims of less than 30% market shares should presumptively be rejected; (2) claims involving between 30% and 50% shares should usually be rejected, except when conduct is very likely to achieve monopoly or when conduct is invidious ...; (3) claims involving greater than 50% share should be treated as attempts at monopolization when the other elements for attempted monopolization are also satisfied." See M & M Med. Supplies & Serv. v. Pleasant Valley Hosp., 981 F.2d 160, 168 (4th Cir.1992) (en banc).

According to plaintiffs, the latest data from a commercial market research firm show that as of February 1998, Internet Explorer had a 58% share of the browser market, with Navigator at 40%. See Sibley Decl. ¶ 29 & Table 3. Courts have found a dangerous probability of success on a comparable share of the market. See, e.g., McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1506 (11th Cir.1988) ("[A] sixty or sixty-five percent market share is a sufficiently large platform ... to create a genuine issue of material fact as to whether ... [the defendant] would succeed in achieving a monopoly."); Kelco Disposal, Inc. v. Browning-Ferris Indus., 845 F.2d 404, 409 (2d Cir.1988) (55% share sufficient), aff'd, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).

Microsoft agrees that its browser "usage share" has increased in the last several years. It argues, however, that IE's success is due to the rapid addition of features and functionality, rather than any anticompetitive conduct. Moreover, Microsoft also contends that Netscape is still the market leader: Netscape's own June 1998 internal marketing studies show that the usage share for Navigator is 56.7% while IE's share is 37.2%. Microsoft correctly points out that courts rarely find a market share between 30% and 50% sufficient to establish a dangerous probability of monopolization. See, e.g., U.S. Anchor Mfg. v. Rule Indus., Inc., 7 F.3d 986, 1001 (11th Cir.1993) (less than 50% market share insufficient "as a matter of law"); Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1415 (7th Cir.1989) (nearly 50%

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share insufficient); Broadway Delivery Corp. v. United Parcel Serv. of Am., 651 F.2d 122, 129 (2d Cir.1981) (share below 50% precludes finding of dangerous probability absent "significant evidence concerning the market structure to show that the defendant's share ... gives it monopoly power").

***26** Microsoft also argues that, regardless of market share, in order to prove attempted monopolization, plaintiffs must show that the structure of the browser market lends itself to monopolization. See Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 694 (10th Cir.1989) (defendant must have "the ability to propel itself to monopolistic control over the market"). Microsoft argues that the "fast-moving nature of the software business--where no single firm can gain control over productive assets"--makes it highly unlikely that any firm could ever acquire the power to control prices or exclude competition, regardless of its market share. See, e.g., Dial A Car, Inc. v. Transportation, Inc., 82 F.3d 484, 486-87 (D.C.Cir.1996) (no unlawful attempt absent indication that monopolization of corporate car service business in District of Columbia is even possible). Plaintiffs disagree, contending that the structure of the browser market--like the operating system market--lends itself to dominance by one firm.

The statements of Microsoft executives, when considered in conjunction with other evidence of anticompetitive behavior (including the evidence supporting the § 1 claims as well as evidence that Microsoft may have sought to induce Netscape to agree to an illegal market allocation), at least raises a question as to Microsoft's intent to monopolize the browser market. Plaintiffs, of course, must prove that Microsoft intended to do more than "compete vigorously." Similarly, whether or not Microsoft's conduct was "predatory" is not an issue that can be properly decided as a matter of law. And whether Microsoft may be deemed to have a "dangerous probability" of monopolizing the browser market depends primarily on Microsoft's and Netscape's relative shares of the browser market, a question that is sharply disputed. Consequently, the Court must deny Microsoft's motion for summary judgment on plaintiffs' attempted monopolization claims.

VII.

The States bring a separate claim of monopoly "leveraging" under § 2. Under this theory, first recognized by the Second Circuit in dictum [FN23] in Berkey Photo v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir.1979), a seller who has a monopoly in one product violates § 2 when it uses a tie-in to obtain a competitive advantage in a second market, "even if there has not been an attempt to monopolize the second market." See id. (ultimately not finding liability on this theory) (emphasis supplied).

> FN23. See Twin Lab., Inc. v. Weider Health & Fitness, 900 F.2d 566, 570 (2d Cir.1990) (Second Circuit characterizing its Berkey Photo leveraging language as dictum).

The continuing viability of the monopoly leveraging theory is in serious doubt. The Supreme Court has offered conflicting views on the theory. In a footnote to Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451, 479 n. 29, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992), the Supreme Court observed that it had "held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if a seller exploits his dominant position in one market to expand his empire into the next." Less than a year later, however, the Supreme Court noted that " § 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." See Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 113 S.Ct. 884, 122 L.Ed.2d 247 (1993). And in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), the Supreme Court noted that "[b]ecause the Sherman Act does not prohibit unreasonable restraints of trade as such--but only restraints effected by a contract, combination, or conspiracy--it leaves untouched a single firm's anticompetitive conduct (short of threatened monopolization)." (emphasis supplied).

***27** While those statements were dicta in cases not involving a "leveraging" claim as such, several courts have either rejected the theory outright or expressed extreme doubts about its viability. For example, in Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 548 (9th Cir.1991), the Ninth Circuit flatly rejected Berkey Photo 's

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theory, holding that, "[u]nless the monopolist uses its power in the first market to acquire and maintain a monopoly in the second market, or to attempt to do so, there is no Section 2 violation." Similarly, in Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 205 (3d Cir.1992), the Third Circuit relied on Copperweld in holding that "Berkey Photo 's formulation of monopoly leveraging to proscribe unilateral restraints of trade does violence to the text of the Sherman Act." But see Kerasotes Mich. Theatres v. National Amusements, Inc., 854 F.2d 135, 138 (6th Cir.1988) (reversing dismissal of leverage claim).

The D.C. Circuit has never spoken definitively on the leveraging theory, but has noted "substantial academic criticism cast upon the leveraging concept." See Association for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577, 586 & n. 14 (D.C.Cir.1984). Professor Hovenkamp agrees that the idea that a seller can use a tie-in to enlarge monopoly profits has been "condemned repeatedly by commentators." See Herbert Hovenkamp, Federal Antitrust Policy 371 (1994). Assuming that Microsoft has an operating system monopoly and browsers are being sold competitively, Microsoft's incentive is to extract all available monopoly profits from the OS/browser combination. Accordingly, it already prices its operating system at the monopoly profit-maximizing price, considering what consumers are willing to pay for the entire package. Even if Microsoft were to obtain a monopoly in the market for browsers, the profit- maximizing price for the combination wouldn't change; Microsoft could not make additional monopoly profits even by monopolizing the browser market as well. See Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1349 n. 19 (9th Cir.1982).

In fact, the Ninth Circuit noted that "leveraging" may actually "tend to undermine monopoly power,"see Alaska Airlines, 948 F.2d at 549 (emphasis in original), since "[e]very time the monopolist asserts its market dominance on a firm in the leveraged market, the leveraged firm has more incentive to find an alternative supplier, which in turn gives alternate suppliers more reason to think they can compete with the monopolist." Id.

The Court will grant Microsoft's motion for summary judgment on the States' leveraging claim. While the Supreme Court has not considered a leveraging claim per se, it has clearly stated that a firm violates § 2 only when it actually monopolizes or dangerously threatens to do so. The Third and Ninth Circuits and many commentators have rejected the theory outright, as contrary to both economic theory and the Sherman Act's plain language.

VIII.

***28** Finally, Microsoft contends that the States' pendent state-law claims, seeking to force Microsoft to alter its copyrighted operating system software (and to allow OEMs to do so), directly conflict with the copyright laws' goal of promoting the distribution of copyrighted works to the general public. See Harper & Row Publishers, Inc. v. National Enters., 471 U.S. 539, 558, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985) (federal copyright laws' "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors") (internal citation and quotation marks omitted). Microsoft repeats many of the same arguments it made in support of the boot and start-up screen restrictions, i.e., that it has an unfettered right to license (or not to license), and to prevent alterations to its copyrighted software. While courts have upheld the ability of states to regulate some aspects of copyrighted works, see, e.g., Fox Film Corp. v. Doyal, 286 U.S. 123, 131, 52 S.Ct. 546, 76 L.Ed. 1010 (1932) (upholding ability of state to levy tax on copyright royalties); Associated Film Distribution Corp. v. Thornburgh, 683 F.2d 808, 814-17 (3d Cir.1982) (upholding state regulation of certain procedures by which films were marketed and licensed to theaters), Microsoft argues, they have also recognized that a state law prohibiting the exercise of specific rights conveyed by the copyright laws would be invalid. See, e.g., Allied Artists Pictures Corp. v. Rhodes, 496 F.Supp. 408, 445 n. 19 (S.D.Ohio 1980); Remick Music Corp. v. Interstate Hotel Co., 58 F.Supp. 523, 544-45 (D.Neb.1944) (invalidating state statute that interfered with copyright holder's ability to license public performances of copyrighted music).

"[T]he Supremacy Clause, U.S. Const. Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to,' federal law." Hillsborough County, Florida v. Automated Med. Lab., Inc., 471 U.S.

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707, 712, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211, 6 L.Ed. 23 (1824)). State laws are "preempted" when they "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 85 L.Ed. 581 (1941); accord Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 98-99, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992). But "[c]onsideration of issues arising under the Supremacy Clause starts with the assumption that the historic police powers of the States are not to be superseded by Federal Act unless that is the clear and manifest purpose of Congress." Cipollene v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (internal citation and quotation marks omitted).

It is fairly clear that the copyright laws do not preempt state antitrust statutes. The Copyright Act's preemption clause provides that "[n]othing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." See 17 U.S.C. § 301(b)(3).

***29** The Tenth Circuit recently addressed a similar preemption question. In Harolds Stores, Inc. v. Dillard Department Stores, Inc., 82 F.3d 1533 (10th Cir.), cert. denied, --- U.S. ----, 117 S.Ct. 297, 136 L.Ed.2d 216 (1996), a retailer sued a competitor, alleging that the competitor's copying of fabric designs violated its copyrights and the state antitrust laws. The defendant argued that the antitrust law was preempted by the federal copyright scheme. Id. at 1543. The court rejected the defense, holding that "the restraint of trade component of [the state antitrust act] claim requires a litigant claiming a violation of [that act] to establish proof beyond that required to demonstrate a violation of the exclusive rights protected by § 106 of the Copyright Act, i.e., copying, preparation of derivative works, performance, distribution or display." Id.

As explained, supra, the Copyright Act does not give a copyright holder a license to engage in anticompetitive behavior that violates federal antitrust law. See, e.g., Data General Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1186-87 & n. 63 (1st Cir.1994) (it is "well settled that concerted and contractual behavior that threatens competition is not immune from antitrust inquiry simply because it involves the exercise of copyright privileges") (citations omitted); Allied Artists, 496 F.Supp. at 443-44 (holding that "ownership of a copyright does not entitle a company to abuse the market power it obtains thereby by engaging in a per se illegal tying arrangement"). Microsoft fails to articulate how state antitrust laws, which are based upon and largely emulate the federal scheme, see California v. ARC Am. Corp. ., 490 U.S. 93, 102, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989) (state antitrust laws are consistent with broad purposes of federal antitrust laws), "conflict" with any right conferred by federal copyright law. The Supreme Court has recognized that there is "nothing either in the language of the copyright laws or in the history of their enactment to indicate any congressional purpose to deprive the states, either in whole or in part, of their long-recognized power to regulate combinations in restraint of trade." See Watson v. Buck, 313 U.S. 387, 404, 61 S.Ct. 962, 85 L.Ed. 1416 (1941).

Furthermore, Microsoft has not established the extent of any copyright protection in the specific portions of software plaintiffs seek to modify, and the parties dispute whether Microsoft abused its copyright for anticompetitive purposes. Until those questions are resolved, Microsoft's copyright argument is premature at best.

For the foregoing reasons, it is, this 14th day of September, 1998,

ORDERED, that the motion of the defendant Microsoft Corporation for summary judgment on the plaintiff States' Third Claim for Relief is granted, and that claim is dismissed with prejudice; and it is

FURTHER ORDERED, that the motion of Microsoft Corporation for summary judgment is otherwise denied.

END OF DOCUMENT

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CERTIFICATE OF SERVICE

I certify that on this 18th day of September, 1998, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

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Bernadette Murphy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION OF DEFENDANTS FOR LEAVE TO FILE REPLY MEMORANDUM IN EXCESS OF FIFTEEN PAGES

Pursuant to LR 7.1(d), Defendants seek leave to file the attached reply memorandum in support of their motion for judgment on the pleadings. The reply is in excess of the fifteen-page limit because additional pages are necessary to enable Defendants to address fully the cases cited by Plaintiffs in their response and to set forth adequately the law and facts in support of Defendants' motion in light of Plaintiffs' response.

A tendered order directing the Clerk to accept the attached memorandum for filing is attached hereto.

Respectfully submitted,

Dated: September 30, 1998

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I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 30th day of September, 1998.

Counsel for Defendants

16diii000727

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

Defendants having moved the Court for leave to file a reply memorandum in support of their motion for judgment on the pleadings in excess of fifteen pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted and the Clerk is instructed to file the reply memorandum tendered by the Defendants with their motion for leave.

Entered this _____ day of _____, 1998.

_____
UNITED STATES DISTRICT JUDGE

TENDERED BY:

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COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'98 OCT 23 A10:28

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND INTERROGATORY ANSWERS, FOR SANCTIONS, AND FOR A PRETRIAL CONFERENCE

Plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. ("Conwood") propounded document requests and interrogatories to UST six months ago. UST chose not to respond until October 13, 1998. When UST did respond, it produced not a single document and provided not one meaningful interrogatory answer. Conwood respectfully submits that UST's conduct should be met with an order to compel and Rule 37 sanctions. Point I, infra.

UST's failure to provide discovery is jeopardizing plaintiffs' ability to prepare for trial and meet deadlines imposed by the Court's Scheduling Order. For instance, plaintiffs have sought for the last six months to obtain the names of UST's potential witnesses who might merit deposition. UST has responded by refusing to supply a compliant Rule 26(a)(1)(A) witness list, refusing to produce pertinent employee directories, and refusing to answer four separate interrogatories

aimed at identifying likely witnesses. The Court's April 1, 1999 deposition deadline -- itself just six months away -- is placed at increasing risk with each such refusal and each day that passes without answers. Plaintiffs respectfully seek a pretrial conference pursuant to Rule 16(a) to discuss means of preserving the Court's Scheduling Order and initiating meaningful and prompt discovery participation from all parties. Point II, infra.

Background

On April 22, 1998 Conwood served its first set of written discovery with the Complaint, along with a motion for expedited discovery. Conwood hoped that the parties could agree to move forward promptly on discovery, without court intervention, particularly since UST decided to answer the Complaint. Conwood was also concerned that many documents critical to this case could be subject to a document destruction policy and destroyed unless immediate action was taken. Exh. 1 (motion and discovery requests).

UST responded by asking for a thirty-day extension for answering the Complaint (which Conwood granted) and refusing to respond to the First Set of Written Discovery. For the initiation of discovery, UST suggested that Conwood should simply await Rule 26(a)(1) automatic disclosures. Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Relief from Federal Civil Procedure Rule 26(d) at 8 (urging that discovery "should proceed in accordance with Rule 26").

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Conwood sought to schedule a case management meeting with UST. Exh. 2 (May 7, 1998 letter). Initially, UST agreed and proposed that the meeting be conducted in accord with Rule 26(f), thus requiring Rule 26(a)(1) disclosures ten days later. Exh. 3 (May 11, 1998 letter). Conwood accepted in writing and proposed several meeting dates in May. Exh. 4 (May 15, 1998 letter). Inexplicably, UST responded by retracting its offer to hold a Rule 26(f) conference and declining to identify any dates for a potential meeting. Exh. 5 (May 19, 1998 letter).

At this point, the Court intervened. At a hearing on June 9, 1998 the Court entered a document preservation order and instructed the parties to develop a schedule for discovery and trial. A month later, the Court adopted a scheduling order providing for Rule 26(a)(1) disclosures on July 21, 1998, the substantial completion of written discovery by December 15, 1998, the completion of fact depositions by April 1, 1999, and trial beginning November 1, 1999. Exh. 6 (Scheduling Order).

On the July 21, 1998 Rule 26(a)(1) disclosure deadline, however, UST produced just 1 box of non-public documents, the names of only 25 UST employees, and no calculation of its alleged counterclaim damages. Conwood wrote to UST requesting appropriate supplementation of UST's disclosures. Exhs. 7 (July 22, 1998 letter) & 8 (July 27, 1998 letter). UST responded by suggesting that Conwood was "fixated" on Rule 26(a)(1) compliance and should instead await Rule 33 interrogatory answers and Rule 34 document request responses. UST's initial disclosures are now

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themselves the subject of Conwood's motion to compel. See Plaintiffs' Motion to Compel Compliance with Initial Disclosures.

When UST did finally respond to plaintiffs' initial Rule 33 and 34 requests on October 13, 1998, six months after service,[1] it failed to provide any documents or any meaningful interrogatory answers. Exh. 11 (document request responses) & 12 (interrogatory responses). Instead, UST told Conwood (again) to await a future discovery event -- this time UST's responses to Plaintiff's Second Request for Production of Documents and Things. See, e.g., Exh. 11 ¶¶ 5-11. But UST did not commit to produce documents in response to these requests either. Conwood (unsuccessfully) offered to meet and confer and asked UST to reconsider its discovery (non)responses. Exh. 13 (October 16, 1998 letter); Exhs. 17 & 18 (October 21, 1998 letters).

Argument

I. THE COURT SHOULD COMPEL PRODUCTION OF DOCUMENTS AND INTERROGATORY ANSWERS AND AWARD RULE 37 SANCTIONS

A. UST Has Improperly Withheld Documents

Plaintiffs propounded 18 simple and straightforward document requests. UST, however, refused to produce any documents whatsoever.

Request No. 1 Plaintiffs seek production of documents concerning Conwood in UST's control. Exh. 11 at 4. This suit alleges that UST has for years deliberately employed exclusionary

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[1]UST's delinquent responses came only after substantial prodding from Conwood. See Exhs. 9 (September 10, 1998 letter) & 10 (September 16, 1998 letter).

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tactics to maintain its monopolist market share and disadvantage rivals like Conwood. Complaint ¶¶ 41-45. It also alleges that UST has made false and misleading statements to third parties about Conwood. Id. ¶¶ 46-49. Conwood is, thus, entitled to know what information UST possesses about Conwood in its files. UST's supposed objections to this request are belied, moreover, by its own document request which expressly demands (and in response to which Conwood has agreed to produce) similar materials. See, e.g., Exh. 14 (Plaintiffs' Objections and Responses to Defendants' First Request for Documents) ¶ 28 (demanding production of "all documents that constitute, refer, or relate to any injury to Conwood's business or property caused by Defendants' conduct"). Accordingly, UST should be ordered to produce.

Request No 2 Plaintiffs seek documents concerning the Global Settlement. Exh. 11 at 5. These materials bear directly on paragraphs 32-39 of the Complaint, and are relevant evidence concerning UST's intent. See United Mine Workers v. Pennington, 381 U.S. 657, 670 n.3 (1965) (evidence of anticompetitive lobbying admissible "to show the purpose and character" of defendants' marketplace activity); see also Opposition to Motion to Dismiss Part of Complaint (June 29, 1998). UST, thus, has no basis for withholding production.

Request No. 3 Plaintiffs seek production of all "Rule 4(a) lists and any similar lists of documents" in UST's control. Exh. 11 at 5. UST claims that it has "no knowledge" of Rule 4(a)

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lists. Id. In fact, however, UST well knows that in the Minnesota State Attorney General Litigation defendant tobacco companies (not including UST) were ordered to establish a warehouse repository for their internal documents and create detailed indices of these materials pursuant to 4(a) of the Minnesota Court's Order. Exh. 15 ¶ 4(a). Indeed, in the Texas litigation, United States Tobacco Company ("USTC") was subject to a court order expressly discussing the Minnesota Rule 4(a) indices, compelling their production, and ordering USTC to identify and produce by December 15, 1996 all similar "computerized or electronic databases relating to documents in its possession or control." Exh. 16 at 6. For UST to contend now that it knows nothing about Rule 4(a) or similar indices borders on the fraudulent.

Request No. 4 Conwood seeks documents concerning communications between UST and tobacco industry analysts. Exh. 11 at 5. Conwood believes that UST has shared its anticompetitive plans with analysts who have expressed concerns about UST's rivals and their threat to UST market share. Conwood also believes that UST has illegally disparaged Conwood's product to analysts and other persons. Complaint ¶ 29. Accordingly, UST should be ordered to produce the requested documents.

Requests Nos. 5 & 6 Conwood seeks UST's written agreements with retailers and distributors. Exh. 11 at 6. These agreements frequently contain anticompetitive restrictions — e.g., provisions limiting rivals' ability to promote their products in

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retail outlets, limiting rivals' shelf space or distribution racks, paying retailers or distributors to discontinue rivals' products. Complaint ¶ 28(a)-(d). Accordingly, they are critical evidence to this antitrust dispute and should be produced. See, e.g., Sara Lee Corp. v. Kayser-Rother Corp., Civ. No. 6:92CV00460, 1995 U.S. Dist. LEXIS 6554, *6 (M.D.N.C. Apr. 10, 1995) (agreements inducing "many stores to display all or nearly all pantyhose that the stores sell in displays furnished by" defendant violate antitrust laws).

Request Nos. 7 & 8 Conwood seeks production of sales reports concerning UST's moist snuff sales. Exh. 11 at 6-7. These materials are necessary for measuring the success of UST's anticompetitive conduct. Complaint ¶ 40 (alleging that as a result of UST misconduct, rivals' moist snuff sales have been adversely affected, competition has suffered, and consumer choice has been limited). UST's own (meager) Rule 26(a)(1) production contains a few such select documents (i.e., Competitive Activity Reports for January 1997 through April 1998). And UST has itself demanded all sales reports from Conwood, which Conwood has agreed to produce. See, e.g., Exh. 14 ¶ 7 (demanding "[a]ll documents that constitute, refer, or relate to Conwood's sales share of the alleged moist snuff market"). UST should not be permitted to produce its own materials selectively while simultaneously demanding (and receiving) full production from plaintiffs.

Request No. 9 Plaintiffs seek production of organization charts and employee lists. Exh. 11 at 7. These materials are

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necessary to determine who within UST has relevant knowledge and, thus, may merit deposition. They are especially critical since UST has failed to comply with Rule 26(a)(1)(A)'s express command that it identify all persons "likely to have discoverable information." See Plaintiffs' Motion to Compel Compliance with Mandatory Disclosures at 16-21. The Court should order production of responsive materials forthwith.

Request Nos. 10 & 11 Conwood seeks documents concerning UST's connection to this forum and the relationship between UST Inc. and the subsidiary defendants. Exh. 11 at 8. UST Inc. has filed a motion to dismiss claiming that it is not subject to personal jurisdiction in Kentucky because it does not do business in the Commonwealth and does not control the day-to-day business of its subsidiaries who do. Before UST Inc.'s motion may be granted, however, plaintiff is entitled under long-settled law to discovery on these matters. See Opposition to UST Inc.'s Motion to Dismiss Complaint for Lack of Personal Jurisdiction at 8 n.7. UST Inc. should have disclosed any materials relevant to personal jurisdiction in response to Rule 26(a)(1), but failed to do so. See Plaintiffs' Motion to Compel Compliance with Mandatory Disclosures at 15-16. Now it seeks to evade a simple Rule 34 request for the same information. The Court should order UST to produce.

Request No. 12 Plaintiffs seek documents concerning the Smokeless Tobacco Council ("STC"). Exh. 11 at 9. UST withdrew participation and funding from the STC after other members

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refused to accept anticompetitive advertising and distribution restrictions championed by UST. These materials may be relevant to show UST's intent to punish smaller rivals through any means available — legislation and regulation, trade associations, or the marketplace. Cf. Pennington, 381 U.S. at 670 n.3. Accordingly, they should be produced.

Request Nos. 12 [sic] & 13 Plaintiffs seek UST's documents concerning the two other moist snuff manufacturers besides Conwood. Plaintiffs wish to learn whether UST's campaign to exclude Conwood includes other rivals. If so, this would be dramatic further proof of UST's intent to monopolize the moist snuff market. UST's own document request demands Conwood's files on these companies; Conwood has agreed to produce them. See, e.g., Exh. 14 ¶ 9 ("All documents that constitute, refer, or relate to competition in the alleged moist snuff market"). Accordingly, there is no basis for UST withholding its responsive materials.

Request No. 14 Conwood seeks documents concerning Philip Morris, Inc. Exh. 11 at 10. Philip Morris has been the leading force behind the Global Settlement; its lawyer admitted before the Senate Judiciary Committee that provisions of the Global Settlement "could well be treated as a per se violation of the antitrust laws." Complaint ¶ 36. UST's relationship and correspondence with Philip Morris is, thus, critical to understanding its involvement and purposes in Global Settlement negotiations. As with all other requests, plaintiffs

(unsuccessfully) offered to meet to discuss ways to facilitate at least some production; UST declined. Exhs. 13, 17-18. UST should therefore be ordered to produce.

Request No. 15 Conwood seeks documents concerning UST's training procedures for sales representatives. Exh. 11 at 10. Such information goes directly to Conwood's allegation that UST has trained and instructed its sales representatives to: mislead retailers; steal Conwood products, racks, and advertising; and impose unreasonably restrictive agreements on retailers, all in an effort to crush competition. Complaint ¶¶ 23-24. Conwood alleges that sales representatives who follow these instructions are rewarded and those who refuse are punished. Id. Forced to concede their relevance, UST produced a few training materials in response to Rule 26(a)(1)(B), withholding many relevant documents expressly referenced in the few it did disclose. Despite Conwood's request that it supplement its production, UST refused and its mandatory disclosure of such materials remains incomplete. Plaintiffs' Motion to Compel Compliance with Mandatory Disclosures at 12-13. Now UST seeks to avoid even a direct Rule 34 request. The Court should order UST to provide a full and complete production.

Request No. 16. Plaintiffs seek documents concerning moist snuff distribution racks. Exh. 11 at 11. Such information bears directly on plaintiffs' allegation that UST has frequently altered and developed new moist snuff racks as a way of imposing costs on rivals. Complaint ¶ 27. Again, given these plain

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allegations in the Complaint, plaintiffs expected UST to disclose such materials in response to Rule 26(a)(1)(B). It failed to do so. Plaintiffs' Motion to Compel Compliance with Mandatory Disclosures at 15. UST should now be compelled to respond to a direct discovery request. This is particularly so given UST's own analogous requests, which Conwood has answered by producing documents. Exh. 14 ¶¶ 18-20.

Request No. 17 Plaintiffs seek documents concerning the quality of moist snuff products. Exh. 11 at 11. Such information is directly relevant to plaintiffs' allegation that UST sales representatives and other UST employees or agents have misled consumers and retailers by disparaging Conwood's products as inferior in quality. Complaint ¶ 19. Accordingly, UST should be ordered to produce.

B. UST Has Improperly Refused to Answer Interrogatories

Plaintiffs propounded six simple interrogatories, most aimed at identifying potential witnesses for deposition. UST has refused any meaningful reply.

Interrogatory Nos. 1, 3, 4, 5, and 6 These questions ask for the names of various categories of persons who have relevant knowledge and therefore may be important deposition candidates: persons whose files have been produced; persons responsible for marketing UST moist snuff; retailers or distributors with whom UST has a potentially unlawful agreement; UST personnel who have discussed its (anticompetitive) marketing efforts with tobacco industry analysts; and persons who have participated in answering

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plaintiffs' interrogatories. Exh. 12 at 2-4. Answers to these interrogatories have become particularly critical given UST's refusal to provide a compliant Rule 26(a)(1)(A) witness list. Plaintiffs' Motion to Compel Compliance with Mandatory Disclosures at 16-21. Every day UST fails to answer these simple questions further jeopardizes the parties' ability to complete fact depositions within the time prescribed by the Court.[2] UST should be ordered to provide full and complete answers immediately.

Interrogatory No. 2 Conwood asks UST to "describe generally" its computer systems and to identify the persons most familiar with them. Exh. 12 at 3. Without such information, it will be impossible for Conwood or this Court to assess whether UST's document production (when UST actually makes one) includes all responsive electronic materials. Nor can UST seriously contest the reasonableness of this request when in the Texas State Attorney General antitrust suit it was expressly ordered to produce far more detailed computer system information. Exh. 16 at 6 (compelling production of "all existing databases relating to documents in [your] possession custody or control").

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[2]UST has refused any answer to Interrogatories 1, 4, or 6 and its responses to 3 and 5 are obviously incomplete. When asked to name persons involved in its moist snuff sales (Interrogatory No. 3), UST has provided the names of just its three most senior executives, failing to list any of its hundreds of sales representatives. When asked to identify executives who have spoken with tobacco industry analysts (Interrogatory No. 5), it has supplied the name of only the one person who is "most knowledgeable" about discussions with such analysts.

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C. The Court Should Award Sanctions

Under Rule 37(a)(4), once a motion to compel is granted, an award of fees is automatic: "If the motion is granted . . . the party or deponent whose conduct necessitated the motion . . . [shall] pay to the moving party the reasonable expenses it incurred in making the motions, including attorney's fees." Id. Accordingly, plaintiffs respectfully request their costs and expenses associated with this motion.

II. THE COURT SHOULD HOLD A PRETRIAL CONFERENCE

Under Rule 16(a) the Court may schedule a pretrial conference for any purposes, including "discouraging wasteful pretrial activities" and "establishing early and continuing control so that the case will not be protracted." Id. Such a conference is warranted now.

The Court's July 9, 1998 Scheduling Order contemplated a prompt exchange of written discovery. Indeed, the Court even specifically prescribed that "the parties shall complete substantially all production of documents" by December 4, 1998. Exh. 6 at 1. This prompt exchange was designed to set the stage for fact depositions, which are scheduled to close April 1, 1999.

UST's conduct is threatening the speedy discovery schedule set by the Court. It has been nearly four months since the Court entered the Scheduling Order. In that span, UST has turned over precisely one box of internal documents in a nationwide antitrust case spanning years of misconduct. It has refused to supply any meaningful witness list despite the plain language of Rule

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26(a)(1)(A). It has refused to supply any calculation of its alleged counterclaim damages. Now it has refused to supply any documents in response to 18 documents requests or to provide any meaningful answers in response to 6 interrogatories. Just six weeks remain in the time allotted primarily to written discovery. Unless UST is prodded into action by the Court, UST's footdragging will jeopardize the Court's deposition schedule and perhaps the Court's trial date. Accordingly, plaintiffs respectfully request that the Court hold a hearing to discuss ways to preserve the Scheduling Order and initiate meaningful discovery participation by all parties.

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Conclusion

The Court should compel production of withheld documents and interrogatory answers, award plaintiffs their costs and expenses, schedule a pretrial conference for the earliest possible date, and award such other relief as the Court deems just and proper. A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

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Rule 27(a)(2)(A) Certification

Plaintiffs, through their undersigned counsel, certify that they sought to resolve with defendants the issues raised in the foregoing motion to compel. See Exh. 13 (October 16, 1998 letter). Defendants, however, declined to amend their document production or interrogatory answers in any way. See Exhs. 17 & 18 (October 21, 1998 letters).

Respectfully submitted,

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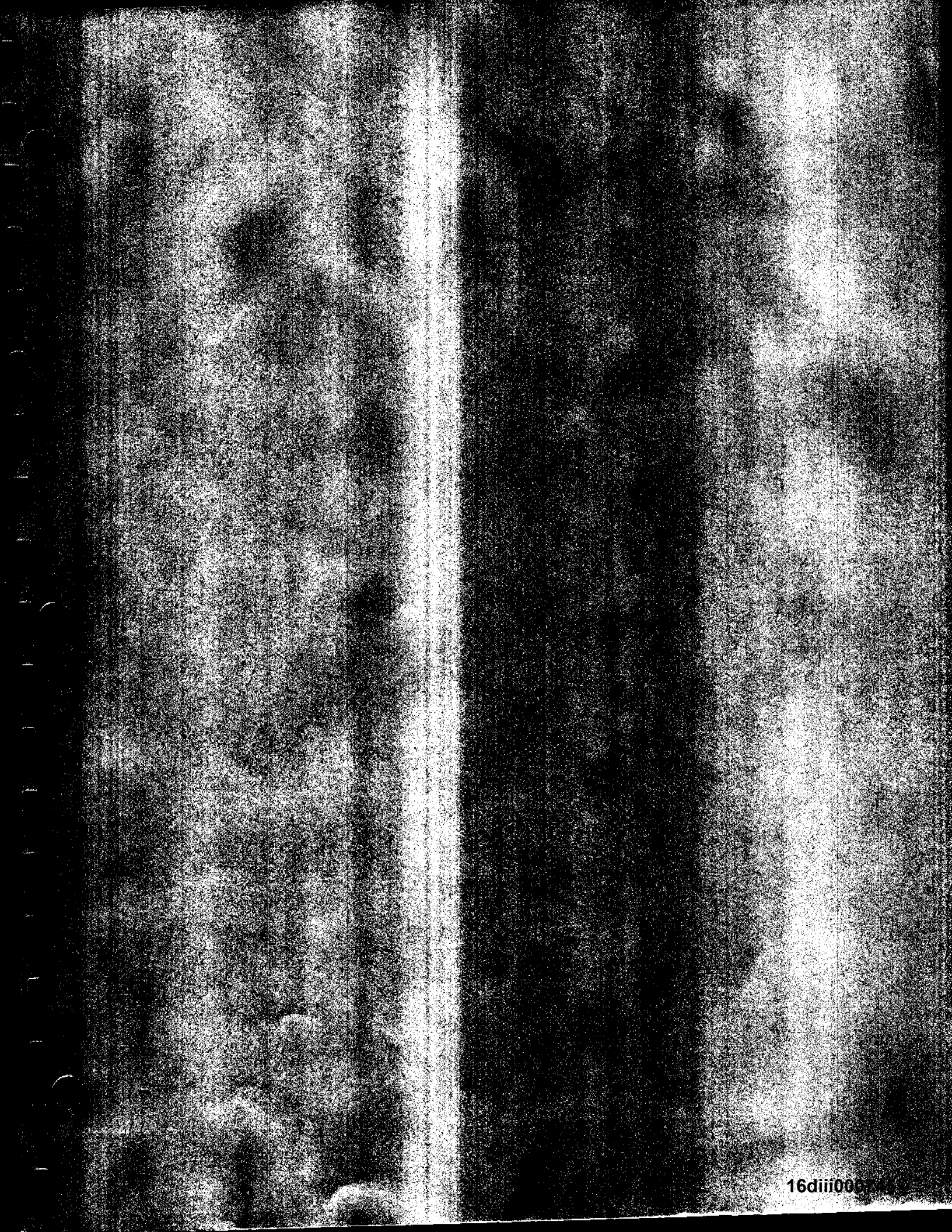
Counsel for Plaintiffs



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of Plaintiffs' Motion to Compel Production of Documents and Interrogatory Answers, for Sanctions, and for a Pretrial Conference, any opposition thereto, and for good cause shown, it is hereby ORDERED that said motion should be, and hereby is, GRANTED. Accordingly:

1. Within 10 days after the date of this Order, defendants shall provide a full and complete production of documents in response to plaintiffs' First Request for Production of Documents, and they shall provide full and complete answers in response to Plaintiffs' First Interrogatories to Defendants.

2. Within 10 days after the date of this Order, defendants shall pay Rule 37 expenses and costs to plaintiffs in the amount of $_____.

3. A pretrial conference will be held at _____ a.m/p.m. on the _____ day of _____, 1998, before this Court at Paducah, Kentucky.

SO ORDERED.

Dated this ___ day of _____, 1998.

_____
HONORABLE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

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CERTIFICATE OF SERVICE

I certify that on this 22 day of October, 1998, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
Civil Action No. 5:98CV-108-R

CONWOOD COMPANY, L.P., et al. PLAINTIFFS

v. **MOTION FOR RELIEF FROM CIVIL RULE 26(d), GROUNDS, AND MEMORANDUM**

UNITED STATES TOBACCO COMPANY, et al. DEFENDANTS

Plaintiffs move for relief from Federal Rule of Civil Procedure 16(d), and to be allowed to serve on defendants the interrogatories and requests for production of documents attached hereto.

GROUNDS AND MEMORANDUM

1. This is a major anti-trust action. Defendants' records are likely to be important evidence.

a. The sooner plaintiffs discover this material, the more expedient their preparation will be.

b. Defendants' record retention policy may jeopardize the continued existence of requested records. Plaintiffs state on the record now that no requested records should be destroyed.

2. This motion will not prejudice defendants. The order tendered herewith provides that the records be produced 60 days after the entry of the tendered order. This time can be adjusted as necessary.

3. Plaintiffs wish to comply with Joint Local Rule 37.1 and make a good faith effort to resolve any disagreement with

make a good faith effort to resolve any disagreement with defendants regarding this motion without need of intervention of the Court. Plaintiffs cannot do such prior to filing suit and defendants' counsel entering an appearance. Defendants' counsel is requested to confer with plaintiffs' counsel in regard to this motion.

WHITLOW, ROBERTS, HOUSTON & STRAUB
Attorneys for Plaintiffs, Conwood Company, L.P., et al.

BY Richard C Roberts

Richard C. Roberts
P.O. Box 995
Paducah, KY 42002-0995
502-443-4516

I certify that a copy of the foregoing was mailed to:

UST Inc., c/o Richard H. Verheij, 100 West Putnam Ave., Greenwich, CT 06830, and

CT Corporation Systems, 1 Commercial Plaza, Hartford, CT 06103.

United States Tobacco Sales and Marketing Company Inc., c/o Arthur G. Smith, 100 West Putnam Ave., Greenwich, CT 06830; and

CT Corporation Systems, 1 Commercial Plaza, Hartford, CT 06103.

United States Tobacco Company Inc., c/o Robert H. Lawrence, Jr., 100 West Purnam Ave., Greenwich, CT 06830; and

CT Corporation Systems, 1 Commercial Plaza, Hartford, CT 06103.

United States Tobacco Manufacturing Company Inc. c/o CT Corporation Systems, Kentucky Home Life Building, 239 S. 5th St., Louisville, KY 40202.

This the 23rd day of April, 1998.

Richard C Roberts
Richard C. Roberts

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	

PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Fed. R. Civ. P. 26 and 34 and Local Rules 5.2 and 34.2, plaintiffs request that each defendant separately produce documents for inspection and copying at the offices of undersigned counsel within the time set by the Federal Rules or as the Court may otherwise direct in response to Plaintiffs' Motion for Expedited Discovery.

Instructions

Documents shall be produced in accordance with the Federal and Local Rules.

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Documents Requested

1. All documents concerning Conwood Company L.P. and/or Conwood Sales Company, L.P. (collectively, "Conwood").

2. All documents concerning the Proposed Tobacco Industry Settlement dated June 20, 1997.

3. All Rule 4(a) lists and any similar lists of documents in defendants' possession, custody or control.

4. All documents concerning communications with tobacco industry analysts.

5. All agreements with distributors of tobacco products.

6. All agreements with retailers of tobacco products.

7. All documents, including sales reports, concerning revenues from the sale of moist snuff.

8. All documents concerning market shares, by geographic region and nationally, for moist snuff.

9. All organization charts, lists of employees, and job descriptions.

10. All documents concerning activities in this district.

11. All documents concerning relationship(s) between defendants.

12. All documents concerning the Smokeless Tobacco Council

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("STC").

12. All documents concerning Swisher International, Inc.

13. All documents concerning Swedish Match North America, Inc.

14. All documents concerning Philip Morris, Inc.

15. All documents concerning policies, procedures and training for sales representatives.

16. All documents concerning product racks for display of moist snuff.

17. All documents concerning product quality of moist snuff.

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Respectfully submitted,

CONWOOD COMPANY, L.P.
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Counsel for Plaintiffs

Dated April 22, 1998.

16diii000756

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	

PLAINTIFFS' FIRST INTERROGATORIES TO DEFENDANTS

Pursuant to Fed. R. Civ. P. 26 and 33 and Local Rules 5.2 and 33.2, plaintiffs request that each defendant respond separately by answering the following interrogatories within the time provided by the Federal Rules or as the Court may otherwise direct in response to Plaintiffs' Motion for Expedited Discovery.

Instructions

These interrogatories shall be answered in accordance with the Federal and Local Rules.

Interrogatories

1. Identify each person from whose files documents were produced in response to Plaintiffs' First Request for Production of Documents, identify the documents produced from each such person's files, and identify the person(s) most familiar respectively with each of said files.

2. Describe generally each computer system used by defendant, including types of data maintained in each, and for each such system identify the person(s) most familiar therewith.

3. Identify by name, address, title, job description, and date of service all persons involved in the marketing and/or sale of defendants' moist snuff products.

4. Identify all distributors and retailers of moist snuff products with which one or more defendants has or had an agreement.

5. Identify by name, address, title, job description, and date of service all persons who have spoken to tobacco industry analysts on matters pertaining to moist snuff.

6. Identify by name, address, title, job description, and date of service all persons who participated in the preparation of answers to these interrogatories.

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Respectfully submitted,

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Counsel for Plaintiffs

Dated April 22, 1998.

EXHIBIT B

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May 7, 1998

By Telecopier

Neal R. Stoll, Esquire
Skadden, Arps Slate, Meagher & Flom, L.L.P.
919 3rd Avenue
New York, NY 10022-3897

Re: Conwood v. UST, Inc., et al.
Dkt. No. 5:98CV-108-R

Dear Neal:

I called you this morning but learned you would be out of the office for the day, and I was also out of the office, so I thought it might be easier to send this letter.

This will confirm your request of behalf of all defendants in the above-captioned matter for an extension of thirty (30) days within which to answer or otherwise move in response to the complaint. I believe you mentioned that, by your calculations, the response would otherwise be due on May 13. On behalf of plaintiffs, I consent to your request for an extension. The responsive pleading will therefore be due on June 12, 1998.

This will also confirm your request for an additional week within which to respond to the pending motion for expedited discovery. You may have this extension as well. Your responsive pleading will therefore be due on May 18, 1998.

If you would like to prepare a stipulation reflecting these extensions, please do so and forward it to Mr. Roberts in Paducah. He will execute it and file it with the Court, if you wish.

Finally, as we discussed it seems appropriate to have a face-to-face meeting to discuss case management issues, including the issues raised by your prior representation of plaintiffs. I suggest we try to schedule this meeting in Paducah at your earliest convenience, but preferably within the next two weeks. Please call me to discuss scheduling.

Very truly yours,

Mark C. Hansen

MCH:dc

cc: James Keyte, Esquire
Richard C. Roberts, Esquire

EXHIBIT C

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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MOSCOW
PARIS
SINGAPORE
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May 11, 1998

Via Facsimile

Mark C. Hansen, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Dear Mark:

Thank you for your letter of May 7, 1998, in which you agreed on behalf of Conwood to extend defendants' time to answer or otherwise respond to plaintiffs' complaint to June 12, 1998 and to extend defendants' time to respond to plaintiffs' Motion For Relief From Civil Rule 26(d) to May 18, 1998. At your suggestion, our local counsel, John S. Reed of Reed Weitkamp Schell Cox and Vice, has prepared a stipulation reflecting these agreed upon extensions. Mr. Reed will forward a copy to Dick Roberts today for his review, execution and filing.

In accordance with Fed. R. Civ. P. 26(f), we also agree that it would be useful to have a face-to-face meeting among counsel to discuss case management issues or any other matters required under the Federal Rules of Civil Procedure, Local Rules or the Court's standard Scheduling Order. We should talk later this week to discuss the time and location of this meeting.

Finally, we are somewhat puzzled by your suggestion that we also discuss "issues raised by [our] prior representation of plaintiffs." As I informed you last week, Skadden Arps does not currently represent Conwood, did not represent Conwood in a related matter in the past and has received a written waiver from

Conwood that precludes Conwood from asserting that Skadden has a conflict in this case. Accordingly, we believe it is now up to Conwood to decide whether and in what manner it may wish to pursue the issue further.

If you have any questions, please feel free to call me at (212) 735-3660.

Very truly yours,

Neal R. Stoll

cc: Richard Roberts, Esq.
John Reed, Esq.

EXHIBIT D

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May 15, 1998

Via Facsimile

Neal R. Stoll, Esquire
Skadden, Arps, Slate, Meagher & Flom, LLP
919 Third Avenue
New York, NY 10022

Dear Neal:

Thank you for your letter of May 11, 1998. I am available for the case management meeting you propose, pursuant to Rule 26(f), and suggest that we meet next Wednesday, May 20, 1998, or the first day you are available after that. I can arrange to be present on any day from May 20 through May 29. Dick Roberts has kindly offered his offices in Paducah for the meeting. Please let me know, by letter or telephone, which date is most convenient for you.

With respect to your prior representation of Conwood, I would like to discuss this with you at our meeting.

Very truly yours,

Mark C. Hansen

cc: Richard C. Roberts, Esquire
John S. Reed, Esquire

EXHIBIT E

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May 19, 1998

Via Facsimile

Mark C. Hansen, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Dear Mark:

Thank you for your letter of May 15, 1998, in which you propose that we meet sometime between tomorrow and May 29 for a Rule 26(f) meeting. As I stated in my May 11 letter to you, Defendants prefer to proceed under the time schedule set forth by the Federal Rules of Civil Procedure, as well as the Local Rules and practice of the Western District of Kentucky. Under these established guidelines, your request and proposed dates are premature.

As you know, the timing of the Fed. R. Civ. P. 26(f) meeting is tied explicitly to the Court's scheduling of a Rule 16(b) pre-trial conference or the Court's determination of an appropriate due date of a Rule 16(b) scheduling order. In turn, Rule 16(b) provides that the Court's scheduling order shall issue within 90 days of the appearance of a defendant and within 120 days after the Complaint is served on a defendant. Accordingly, under the Federal Rules your request to meet sometime in the next several days is far earlier than contemplated by Rules 16(b) and 26(f).

It also is my understanding that, in accordance with Rule 16, Judge Russell's practice is to schedule a Rule 16(b) conference only after a defendant has answered the Complaint or otherwise responded pursuant to Fed. R. Civ. P. 12.

Consistent with my letter of May 11, we believe this procedure should be followed here as well. Moreover, because Plaintiffs have moved for relief from Rule 26(d) in order to avoid the established procedures set forth by the Federal Rules, we believe a Rule 26(f) meeting would be counterproductive at this time.

Accordingly, although we continue to agree that it would be useful to have a meeting among counsel to discuss case management issues or any other matters required under the Federal Rules of Civil Procedure, we suggest that it is best to discuss the time and place to conduct a Rule 26(f) meeting only after Defendants have first responded to the Complaint and the Court has scheduled a Rule 16(b) conference. At that time, all of the issues will be on the table for discussion, and the meeting and the subsequent scheduling conference will be more productive for the parties and for the Court.

If you have any questions, please feel free to call me at (212) 735-3660.

Very truly yours,

Neal R. Stoll

cc: Richard Roberts, Esq.
John Reed, Esq.

EXHIBIT F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Case No. 5:98-CV-108-R

CONWOOD COMPANY L.P..
ET AL

VS.

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC.

ORDER

A telephonic pretrial conference was held July 7, 1998.

APPEARANCES:

For the Plaintiff: Richard Roberts, Esquire
Mark Hansen, Esquire

For the Defendant: John S. Reed, Esquire
James A. Keyte, Esquire
Neal R. Stoll, Esquire

By agreement of the parties,

IT IS ORDERED:

1. By **July 9, 1998** the parties shall exchange draft proposed protective orders, with submission to the Court by **July 14, 1998** of a proposed agreed order or the parties' respective proposals in the event they are unable to agree upon a proposal;

2. By **July 21, 1998** the parties shall make the initial disclosures required by Fed. R. Civ. P. 26(a)(1).

3. By **October 27, 1998** the parties shall file all motions to amend pleadings.

4. By **December 4, 1998** the parties shall complete substantially all production of documents in response to then outstanding requests for production in accordance with the Federal Rules.

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5. By **April 1, 1999** the parties shall complete non-expert discovery, and plaintiffs shall make disclosure of expert testimony as provided by Fed. R.Civ.P. 26(a)(2).

6. By **May 15, 1998** defendants shall make disclosure of expert testimony as provided by Fed.R.Civ.P. 26(a)(2).

7. By **June 1, 1999** plaintiffs shall make disclosure of rebuttal expert testimony as provided by Fed. R. Civ. P. 26(a)(2).

8. By **July 1, 1999** the parties shall complete depositions of expert.

9. By **July 15, 1999** parties shall file all dispositive motions.

10. By **August 6, 1999** the parties shall file oppositions to dispositive motions.

11. By **August 24, 1999** the parties shall file replies in support of dispositive motions.

12. By **September 21, 1999** the parties shall:

(a) File a list of exhibits intended to be used at trial and produce said exhibits, marked for identification, for inspection of opposing counsel, provided, however, that by no later than 48 hours in advance of direct examination, and 24 hours in advance of cross-examination, the parties shall produce for inspection of opposing counsel all demonstrative aids intended to be used in such examination, including any charts displays, visual aide or other items that will be shown to the jury, but not offered into evidence.

(b) File a witness list.

(c) File a pretrial brief containing a succinct statement of the facts of the case, the questions of fact and questions of law with citations.

(d) Designate all deposition excerpts intended to be used at trial. Opposing counsel shall have one week thereafter to make counter-designations.

13. By **September 28, 1999** the parties shall:

(a) File agreed proposed jury instructions. If the parties cannot agree, counsel shall submit proposed instructions with supporting authority. The parties should submit both a hard copy and a diskette containing the instructions in either WordPerfect or ASCII format.

(b) File proposed jury voir dire questions.

(c) File motions in limine and any objections to the admission of exhibits and deposition excerpts identified in accordance with paragraph 12. Any exhibit or deposition excerpt so identified shall be admitted into evidence, if otherwise competent, where no such written objection has been filed.

(d) File joint stipulations.

14. Counsel shall provide at or prior to the final pretrial conference a pre-marked set of all proposed trial exhibits.

15. A **final pretrial conference will be held in Chambers in Paducah, Kentucky, on October 12, 1999 at 4 P.M. prevailing local time.** Counsel that will participate at trial shall be present with full settlement authority.

16. This case is set for **jury trial in Paducah, Kentucky on November 1, 1999 at 9 A.M.** Counsel shall meet in Chambers at 8:30 A.M. The expected length of trial is 2-3 weeks.

This 7th day of July, 1998.

Thomas B. Russell

THOMAS B. RUSSELL, JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel

ENTERED

JUL 09 1998

JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

EXHIBIT G

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July 22, 1998

VIA FACSIMILE

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New York, NY 10022

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

We today received defendants' Rule 26(a)(1)(A), (B), and (D) disclosures. You will be hearing from shortly regarding the inadequacies of these disclosures. We wanted, however, to alert you immediately to the fact that we have apparently not received any Rule 26(a)(1)(C) disclosure. Please advise us immediately whether defendants will seek damages in this case and, if so, when they will provide the required disclosure.

Sincerely,

Neil M. Gorsuch

cc: Richard C. Roberts, Esquire

EXHIBIT H

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July 27, 1998

VIA FACSIMILE

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919 Third Avenue
New York, NY 10022

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

Out initial review of defendants' Rule 26(a)(1)(A) and(B) disclosures (no Rule 23(a)(1)(C) disclosure was provided) has revealed numerous deficiencies. The purpose of this letter is to try to bring some of these obvious shortcomings to your attention so that defendants will have every opportunity to make appropriate initial disclosures.

Rule 26(a)(1)(A). As you know, the parties were required to identify any individual "likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings." Defendants nonetheless produced a list of only 25 senior United States Tobacco Company ("USTC") employees. Several significant categories of persons are plainly missing, including without limitation:

1. Defendants' Sales Representatives. The Complaint specifically alleges that defendants' sales representatives have been engaged in removing Conwood racks, point of sale advertising, and products (Complaint ¶ 24); misrepresenting "plan-o-grams" (id. ¶ 25); misrepresenting that UST is "category manager" (id. ¶ 26); frequently changing defendants' distribution racks as part of a coordinated scheme to impose costs on rivals (id. ¶ 27); helping implement exclusive dealing agreements (id.

¶ 28); and disparaging Conwood products (id. ¶ 29). Accordingly, there is no basis for defendants to withhold the names, addresses, and telephone numbers of each of its current and former sales representatives who have worked for defendants at any point over the last four years. Affirming this conclusion is the fact that defendants have produced several documents concerning the alleged misconduct of their sales representatives. See, e.g., USTC 012958. And they have voluntarily produced additional documents, many generated in the last few months, by sales representatives purporting to report activity in the marketplace, presumably in support of defendants' counterclaims. See, e.g., USTC 011985, USTC 012008, USTC 012248. Yet none of these persons or their addresses and phone numbers are disclosed.

2. Defendants' Division Managers and Other Senior Sales Personnel. The Complaint specifically alleges that defendants' division managers have played a role in encouraging and overseeing defendants' unlawful conduct. See, e.g., Complaint ¶ 24 ("UST district managers tell sales representatives that the 'way to get ahead' in UST is to remove Conwood racks, that they must 'turn up the heat on Conwood,' and that if they do not 'control the moist snuff racks,' they will be 'writ[ten] up.' When Conwood sales personnel have complained . . . UST district managers have responded that 'anything goes' and, in one particularly egregious instance, to 'hold onto your pants . . . it's only going to get worse."). Again, defendants' own document production includes materials generated by or about defendants' division managers that reveal their importance to this case. See, e.g., USTC 012332. Other current or former supervisory personnel, including David Fritz, are also frequently mentioned in defendants' document production (see, e.g., USTC 012332), yet nowhere found on defendants' Rule 26(a)(1)(A) list. Thus, there is no basis for withholding the names, addresses, and telephone numbers for each of defendants' current and former division managers or senior sales personnel who have worked for defendants at any point over at least the last four years.

3. UST Inc. Personnel. Defendants provide the names of only 25 senior USTC personnel and are careful to avoid mentioning any UST Inc. personnel (for obvious reasons given UST Inc.'s motion to dismiss for lack of personal jurisdiction/venue). But, as you know, senior UST Inc. executives have been intimately involved in past discussions with Conwood concerning defendants' anticompetitive activities. In efforts to avoid this lawsuit, Conwood raised defendants' conduct in multiple meetings and

correspondence over the last six years with Vincent Gierer, Richard Verheij, and William O'Donnell, among others. Defendants' own document production reveals some of these contacts. See, e.g., USTC 012958-012986. Accordingly, there is no basis for excluding UST Inc. employees with relevant knowledge from defendants' Rule 26(a)(1)(A) disclosure. The omission of even UST Inc.'s own affiant, Deborah Baker (who has purported to swear that UST Inc. has no contacts with the State of Kentucky) illustrates just how inadequate defendants' disclosures are.

4. Global Settlement Participants. Plaintiffs specifically allege that defendants have simultaneously sought anticompetitive legislation and regulation while conducting unlawful activities in the marketplace. Complaint ¶¶ 32-38. Defendants, however, have produced not identified a single third party with whom they dealt in their Global Settlement efforts, nor have they identified anyone within their own companies who was involved in Global Settlement discussions.

5. Third Party Anti-Competitive Activity Witnesses. Defendants fail to identify a single third party in their disclosure. They fail to mention a single store owner or manager who has witnessed activities discussed in the Complaint or counterclaims, despite defendants' own document production which suggests intimate knowledge of such persons with relevant knowledge. See, e.g., USTC 012958. Defendants likewise fail to mention a single buyer or chain executive with whom defendants have negotiated a "category management" or other similar agreement specifically challenged in plaintiffs' pleadings (Complaint ¶ 28) — again despite documents in their own production which reveal multiple contacts with such persons at WalMart, Kmart, Krogers, Dairy Mart and other retail outlets.

6. Conwood Personnel. Though defendants purport to claim misconduct by Conwood personnel in their counterclaims, they fail to identify a single Conwood employee who is likely to have knowledge of such conduct or any other relevant facts.

7. Inside and Outside Training Personnel. Plaintiffs allege that defendants' have directed a systematic campaign to exclude competitors. Complaint ¶ 23. Defendants recognize the pertinence of training information to plaintiffs' allegations, having provided one version of their sales operations training manual. See USTC 014900 et seq. Yet defendants identify no training personnel, either within defendants' organization or

outside it, who helps train defendants' sales personnel. Defendants' own documents, however, confirm that both inside and outside training personnel are in fact used. See, e.g., USTC 015111-015112.

The foregoing categories are only examples of persons obviously missing from defendants' disclosure. Even standing alone, however, they suggest a failure by defendants to honor their Rule 26(a)(1) obligations. Indeed, defendants astonishingly fail to mention persons who are repeatedly named in defendants' own document production, such as William O'Donnell, or in their own pleadings, such as Deborah Baker. In accord with the Rule's plain requirements, we ask that defendants provide a full disclosure of all persons — not just senior USTC personnel — known to them who are likely to have relevant knowledge, no later than August 3, 1998.

Rule 26(a)(1)(B). Defendants' document production is as inadequate as its list of likely witnesses. Defendants have produced just seven boxes of materials. Five of these contain third party (primarily Nielsen) market reports which are virtually public information. One of the remaining two boxes is itself approximately half-filled with outside market reports (this time by Maxwell). And the other box is approximately two thirds empty. Thus, defendants have produced -- at most -- one full box of internally generated documents. This, too, is a worrisome sign that defendants have chosen not to take their Rule 26(a)(1) obligations seriously.

Indeed, defendants' own production reveals entire categories of materials that were improperly omitted, including without limitation:

1. Competitive Activity Reports and Supporting Documentation. You have produced Competitive Activity Reports ("CARs") for periods covering January, 1997-April, 1998. We see no such reports for any period prior to January, 1997. Please provide the missing materials or explain their omission. Likewise please explain the apparent omission of page USTC 014085 in the January-February, 1998 report.

Defendants' CARs purport to provide detailed conclusions about marketplace activity on which both parties will want to rely — e.g., that since introduction of defendants' rack

agreement with Walmart Conwood has faced distribution problems for its new Cougar products (USTC 014389); that UST competitors have been limited to between 3.1 and 4.3 facings per account (USTC 013086). Yet the data or other underlying support for these conclusions cannot be found in defendants' production. Such information plainly exists — for instance, defendants' documents repeatedly tout their "Profile Activity Reporting System" as a key generator of marketplace information. Plaintiffs are entitled to all documents underlying defendants' CARs as they will bear directly on their allegations that defendants have sought to exclude rivals from the marketplace, and may contain useful information selectively edited from the CAR reports themselves.

2. Training Materials. You have produced one version of a "Sales Operating Manual," with different pages bearing different editing dates. See USTC 014900 et seq. Please provide all prior versions of this Manual. The Manual also notes the existence of an inhouse training program, external training courses, and an in-house "Resource Center" (USTC 015112). Such training materials are obviously relevant to plaintiffs' allegation that defendants have encouraged and coordinated a strategy to harm rivals and should also be produced.

3. Sales Meeting Documents. Defendants' documents indicate that they hold occasional meetings of sales representatives, division managers, or regional managers. See, e.g., 013974 (Florida meeting). We are aware of other such meetings (e.g., in Las Vegas and Connecticut). Except for a couple documents pertaining to the Florida meeting, there appear to be no documents from these meetings in defendants' production. Such materials are again obviously relevant to plaintiffs' allegations that defendants have encouraged their salesforce to engage in anticompetitive activities and should be produced.

4. Retail Chain Store Contacts. As you know, plaintiffs allege that defendants have actively encouraged retail chains to enter into contracts providing UST with exclusive distribution rack or point of sale advertising rights. Complaint ¶ 28. Your production contains certain "power point" presentations to certain retail chains, but is incomplete for several reasons.

First, defendants' documents reveal contacts with only a handful of chains, while plaintiffs have substantial independent information showing contacts between UST and scores of other

chains. Plaintiffs have even produced copies of defendants' exclusive vending contracts with chains that are not included in defendants' production. See, e.g., CWD 000182-183 (unproduced UST document providing UST with "exclusive vending" rights in Uncle Willie's Convenience Store chain).

Second, even for the few chains mentioned in your production, the documentation is patently incomplete. Indeed, for all but two chains (Walmart and a gasoline convenience chain), all you have provided are "power point" presentations to management, not any related correspondence or contracts. Certainly your presentations did not occur in a vacuum: prior or subsequent correspondence surely exists; on information and belief, defendants have unproduced written "exclusive vending" agreement with several of the chains mentioned in your production.

Third, even for the couple accounts for whom have provided some documentation beyond a "power point" presentation, you fail to provide complete production. For example, while we find some correspondence with Walmart in defendants' production, the actual exclusive vending agreement with that chain is missing, though expressly referenced. See USTC 013321 (referencing fact that UST "formed an agreement with Walmart"). Likewise, though the Walmart agreement has been in effect for approximately a year, there is (implausibly) no sales data concerning its impact nor any materials concerning its recent renegotiation.

We ask that you produce all presentations, correspondence, agreements, and data concerning any effort by defendants which have the effect of restricting rivals' products, racks, or point of sale advertising. See Complaint ¶ 28.

5. Promotional Alliances. Documents you produced suggest that defendants have a number of other independent alliance programs with retailers and wholesalers, including without limitation:

- Customer Alliance Program;
- Wholesaler Alliance Program;
- Retail Account Data Program.

These programs variously exclude rivals' distribution racks, point of sale advertising, or products, or provide defendants with store data concerning sales, movement, facings, or other information pertaining to distribution of defendants' and rivals' products. Such information, thus, again directly bears upon plaintiffs' allegations in the Complaint. See id ¶ 28. However, your production does not include any signed agreements with merchants or any of the data defendants have obtained as a result of merchant participation in these programs.

Plaintiffs are further aware of other programs operated by defendants which have the direct effect and purpose of excluding or restraining rivals' rack distribution or advertising (and thus bear directly on Complaint ¶ 28) for which you have provided no documentation whatsoever. These include, without limitation:

- Copenhagen Incentive Program;
- 2908 Free Standing, Expandable Tobacco Center Agreement (see, e.g., CWD 004922;005291);
- Retail Merchandising Placement Agreements (see, e.g., CWD 005467).

Defendants' failure even to mention the existence of such programs demonstrates the perfunctory nature of their approach to Rule 26. Please produce all documentation concerning defendants' retail or wholesale promotional programs that have the effect of restraining distribution of rivals' racks, advertising, or products.

5. Weekly Report Letters, Call Books and Other Sales Force Documentation. Your production is replete with discussion of weekly reports, call books, and other documentation generated by defendants' sales force for consumption by headquarters. See, e.g., USTC 012356 (weekly report letter); USTC 015058 (same); USTC 015287 (call books). These materials appear to contain information about the comparative distribution of defendants' and rivals' racks, products, and point of sale in each store around the country. See, e.g., USTC 015289. Accordingly, they will shed direct and important light on plaintiffs' allegation that defendants have sought to suppress rivals' distribution, yet none of these materials were produced. These materials may also contain notations by defendants' sales force about their anticompetitive efforts and instructions. Defendants have chosen

to provide certain examples of these documents in service of their counterclaims; plaintiffs are entitled to review all such documents for bearing on their claims as well. Accordingly, please produce all sales force documentation, including without limitation weekly report letters, call books, and "Profile Activity Reporting" documentation.

6. Personnel Files. Plaintiffs' allege that defendants' supervisory personnel reward anticompetitive conduct by their salesforce and punish those who refuse to engage in such conduct. Complaint ¶ 24. The personnel files of your sales representatives, division managers, and regional managers are thus directly relevant to show whether warnings or positive reviews were issued based on individuals' willingness to engage in anticompetitive conduct. None, however, has been produced. Accordingly, please produce all personnel files for any present or former member of your sales force (including regional and divisional managers).

7. Global Settlement. Plaintiffs specifically allege that defendants have simultaneously sought anticompetitive legislation and regulation while conducting unlawful activities in the marketplace. Complaint ¶¶ 32-38. There are, however, no documents in your production concerning defendants' Global Settlement efforts. I understand that you have a motion to dismiss/strike pending concerning these allegations, but that does not absolve you from discovery obligations. Nor have you sought a protective order on this issue. Accordingly, please produce all Global Settlement documents.

8. Rack Style Changes. Plaintiffs allege that defendants alter and develop new rack styles frequently as a way of imposing costs on rivals. Complaint ¶ 27. Accordingly, we expected to see some documentation in your production concerning how many racks defendants purchase annually, new rack style introductions, blueprints, and reasons for new designs. However, none can be located in your production. Please produce all documents concerning rack style production and changes.

9. Kentucky Contacts. Plaintiffs allege UST Inc. has contacts with Kentucky both directly and through the operations of its subsidiaries. UST Inc. has denied such contacts and introduced an affidavit on the issue. Yet, we find no documents in defendants' production concerning Kentucky contacts either by UST Inc. or its subsidiaries, nor any documents concerning the

corporate relationship and interaction between UST Inc. and its subsidiaries. Please produce all such materials.

10. Projections. Defendants' production includes third party market share forecasts. But notably absent are any financial projections or other documents discussing market trends generated by defendants themselves. Such materials bear directly on plaintiffs' assertion that Conwood's growth has been stalled by UST's anticompetitive efforts and that UST is seeking to suppress rivals' distribution. Please produce all such materials.

This list of defects, apparent from even a preliminary examination of your Rule 26(a)(1) disclosures, is not comprehensive, nor should it be taken to limit defendants' Rule 26(a)(1) obligations. The entire point of Rule 26(a)(1) is to require the parties to come forward with information, without waiting for discovery requests from the opposing parties. Please provide an appropriate disclosure, including but not limited to the materials noted above, by August 3, 1998.

Sincerely,

Mark C. Hansen

cc: Richard C. Roberts, Esquire

EXHIBIT I

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September 10, 1998

VIA FACSIMILE AND FIRST CLASS MAIL

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RE: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

We have received your recent requests for production of documents and interrogatories. While a substantial volume of relevant materials has already been provided to defendants as part of plaintiffs' compliance with their disclosure obligations under Rule 26(a), we are continuing our search for relevant and non-privileged materials and will supplement our production if additional materials are available.

We are still unclear on when defendants will produce their responsive documents. As you know, we propounded document requests and interrogatories on April 22, 1998. Defendants initially did not respond to these requests, apparently because the discovery period had not yet commenced. After discovery officially commenced on July 8, 1998, we expected that defendants would provide the requested materials as part of their compliance with their Rule 26(a) disclosure obligations. But that has not occurred. We still have not received your responses to the pending requests for production and interrogatories even though discovery commenced two months ago and the requests were propounded more than four months ago.

I enclose copies of the pending requests for your convenience. We do not want to engage in unnecessary discovery disputes, so we propose that you now provide written responses to these requests, as well as all responsive and non-privileged documents, at the same time that we respond to the discovery requests you propounded to us last Friday. I suggest that we make this mutual exchange of discovery responses and documents on or before October 2, 1998.

If for some reason this is not acceptable to defendants, please let me know.

Very truly yours,

Mark C. Hansen

cc: Richard C. Roberts, Esquire

EXHIBIT J

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September 16, 1998

VIA FACSIMILE AND FIRST CLASS MAIL

John S. Reed, Esquire
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
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919 Third Avenue
New York, NY 10022

RE: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

I have Chris Athanasia's letter of September 10. I understand that defendants now propose to respond to our pending interrogatories and document requests within 30 days after September 7, 1998.

With respect to plaintiffs' production of additional documents in response to their ongoing obligations under Rule 26(a), and in response to your requests under Rule 34, we expect to produce in accordance with and as provided by these rules.

The remaining discussion in the September 10 letter contains much with which we disagree, but there appears to be little value in continued expressions of disagreement on these matters. Our interest is in proceeding expeditiously with discovery, and we hope we will have your cooperation in this regard.

Very truly yours,

Mark C. Hansen

cc: Richard C. Roberts, Esquire

EXHIBIT K

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, -against- UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	:	Civil Action No. 5:98 CV-108-R

DEFENDANTS' RESPONSE TO
PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Fed. R. Civ. P. 34, Defendants respond to Plaintiffs' First Request for Production of Documents as follows:

PRELIMINARY STATEMENT

On April 22, 1998, Plaintiffs filed their Complaint in this action and, on the same day, improperly served Plaintiffs' First Request For Production Of Documents. Subsequently, Plaintiffs moved for relief from Fed. R. Civ. P. 26(d), which states that no party may seek discovery prior to a meeting of the parties under Fed. R. Civ. P. 26(f). The Court denied

Plaintiffs' motion. Despite the Court's ruling, however, Plaintiffs frequently and erroneously have referred to their First Request For Production Of Documents as "still pending." See, e.g., Plaintiffs' Motion To Compel Compliance With Initial Disclosures, at 6 n.2.

In any event, after Defendants completed their review of Plaintiffs' Rule 26(a)(1) Initial Disclosures, Defendants framed their Rule 34 document requests, properly describing categories of documents with the requisite particularity, and, on September 3, 1998, Defendants served those document requests on Plaintiffs. By letter of September 10, 1998, Plaintiffs confirmed the receipt of Defendants' discovery requests and inquired as to when Defendants would respond to Plaintiffs' First Request For The Production Of Documents. To this letter, Plaintiffs attached the April 22, 1998 document requests and again asserted the untenable position that those requests were still pending. On September 11, 1998, Defendants responded to Plaintiffs' letter, informing Plaintiffs that their First Request For Production Of Documents was never properly served in accordance with Rule 34, and that Plaintiffs' April 22, 1998 version of those requests was improperly framed – primarily because they were framed prior to receipt of Defendants' Rule 26(a)(1) Initial Disclosures and thus ignored the purpose and intent of Rule 26(a)(1). Defendants also suggested to Plaintiffs that, in the interests of facilitating the production of documents, Plaintiffs should reframe their document requests and properly serve the revised requests on Defendants pursuant to Rule 34. In the alternative, Defendants offered that they would accept the service of Plaintiffs' document requests, as they were framed on April 22, 1998, and as if they were properly served on September 10, 1998. On September 16, 1998,

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Plaintiffs responded to Defendants' letter, misstating pertinent dates and again asserting that their original document request was "pending." Defendants responded to Plaintiffs' letter, correcting several wrongful assertions regarding the date of correspondence and the date of the accepted constructive service of Plaintiffs' discovery requests. Plaintiffs, however, never responded in substance to Defendants' September 11, 1998 letter, and never informed Defendants that Plaintiffs intended to revise or re-serve their document requests.

Accordingly, Defendants proceeded in good faith to prepare their response to Plaintiffs' First Request For Production Of Documents. On September 28, 1998, however, in the midst of that preparation and rather than withdrawing their first request, Plaintiffs' served on Defendants Plaintiffs' Second Request For Production Of Documents And Things. While Plaintiffs' second request in part subsumes their first request, Plaintiffs apparently have attempted to narrow their requests and to describe documents with the requisite particularity, in large part by simply mirroring the language of Defendants' Request For Documents.

At this juncture, Defendants hereby submit their response to Plaintiffs' First Request For Production Of Documents And Things, in accordance with Defendants' September 11 letter and the Federal Rules of Civil Procedure. Defendants also are proceeding to prepare their response to Plaintiffs' Second Request For Production Of Documents And Things in accordance with the Federal Rules of Civil Procedure.

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GENERAL OBJECTIONS

1. Defendants object to Plaintiffs' requests insofar as they do not meet the particularity requirement of Fed. R. Civ. P. 34(b), and insofar as they are repetitive of and superseded by Plaintiffs' Second Request For Production Of Documents And Things, the response to which is due on October 28, 1998. Defendants currently are conducting a good faith search for non-privileged documents that are responsive to Plaintiffs' Second Request For Production Of Documents And Things.

2. Defendants object to Plaintiffs' requests insofar as they exceed the requirements of Fed. R. Civ. P. 34.

3. Defendants object to Plaintiffs' requests insofar as they seek the production of confidential, proprietary business information.

4. Defendants object to Plaintiffs' requests insofar as they seek the production of information protected by the attorney client privilege, the attorney work product doctrine, and/or any other applicable privilege or protection.

5. Defendants object to Plaintiffs' requests on the ground that they do not specify a relevant time period.

RESPONSES TO REQUESTS FOR DOCUMENTS

Request No. 1. All documents concerning Conwood Company L.P. and/or Conwood Sales Company, L.P. (collectively, "Conwood").

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Response to Request No. 1: Defendants object to this request on the ground that it is vague and ambiguous, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 2. All documents concerning the Proposed Tobacco Industry Settlement dated June 20, 1997.

Response to Request No. 2: Defendants object to this request on the ground that it is irrelevant, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 3. All Rule 4(a) lists and any similar lists of documents in defendants' possession, custody or control.

Response to Request No. 3: Defendants object to this request on the ground that it is vague and ambiguous. Defendants have no knowledge as to what "Rule 4(a) lists and any other similar lists of documents" refers.

Request No. 4. All documents concerning communications with tobacco industry analysts.

Response to Request No. 4: Defendants object to this request on the ground that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that, subject to any further relevant objections, non-privileged documents concerning communications with tobacco industry analysts that are responsive to relevant categories described with reasonable particularity

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in Plaintiffs' Second Request For Production Of Documents And Things will be produced in accordance with the Federal Rules of Civil Procedure.

Request No. 5. All agreements with distributors of tobacco products.

Response to Request No. 5: Defendants object to this request on the ground that it is vague and ambiguous, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that, subject to any further objections, agreements with distributors of tobacco products that are responsive to relevant categories described with reasonable particularity in Plaintiffs' Second Request For Production Of Documents And Things will be produced in accordance with the Federal Rules of Civil Procedure.

Request No. 6. All agreements with retailers of tobacco products.

Response to Request No. 6: Defendants object to this request on the ground that it is vague and ambiguous, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that, subject to any further objections, agreements with retailers of tobacco products that are responsive to relevant categories described with reasonable particularity in Plaintiffs' Second Request For Production Of Documents And Things will be produced in accordance with the Federal Rules of Civil Procedure.

Request No. 7. All documents, including sales reports, concerning revenues from the sale of moist snuff.

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Response to Request No. 7: Defendants object to this request on the ground that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that, subject to any further objections, documents concerning revenues from the sale of moist snuff that are responsive to relevant categories described with reasonable particularity in Plaintiffs' Second Request For Production Of Documents And Things will be produced in accordance with the Federal Rules of Civil Procedure.

Response No. 8. All documents concerning market shares, by geographic region and nationally, for moist snuff.

Response to Request No. 8: Defendants have produced non-privileged documents responsive to this request as part of their Initial Disclosures. Without waiving objection, Defendants state that, subject to any further objections, additional documents concerning market shares that are responsive to this request, or to relevant categories described with reasonable particularity in Plaintiffs' Second Request For Production of Documents and Things, will be produced in accordance with the Federal Rules of Civil Procedure.

Response No. 9. All organization charts, lists of employees, and job descriptions.

Response to Request No. 9: Defendants object to this request on the ground that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that, subject to any further objections, organization charts, lists of employees, and job descriptions that are respon-

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sive to relevant categories described with reasonable particularity in Plaintiffs' Second Request For Production Of Documents And Things will be produced in accordance with the Federal Rules of Civil Procedure.

Request No. 10. All documents concerning activities in this district.

Response to Request No. 10: Defendants object to this request on the ground that it is vague and ambiguous because, inter alia, it does not specify any activities in this district either in terms of type or in terms of persons conducting such activities. To the extent the request is meant to describe documents concerning activities by Defendants, Defendants object to this request on the ground that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that, subject to any further objections, documents concerning Defendants' activities in this district that are responsive to relevant categories described with reasonable particularity in Plaintiffs' Second Request For Production Of Documents And Things will be produced in accordance with the Federal Rules of Civil Procedure.

Request No. 11. All documents concerning relationship(s) between defendants.

Response to Request No. 11: Defendants object to this request on the ground that it is vague and ambiguous, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that, subject to any further objections, documents concerning relationship(s) between Defendants that are responsive to relevant categories described with reasonable particularity in Plaintiffs' Second

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Request For Production Of Documents And Things will be produced in accordance with the Federal Rules of Civil Procedure.

Request No. 12. All documents concerning the Smokeless Tobacco Council ("STC").

Response to Request No. 12: Defendants object to this request on the ground that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that, subject to any further objections, documents concerning the STC that are responsive to relevant categories described with reasonable particularity in Plaintiffs' Second Request For Production Of Documents And Things will be produced in accordance with the Federal Rules of Civil Procedure.

Request No. 12 [sic]. All documents concerning Swisher International, Inc.

Response to Request No. 12 [sic]: Defendants object to this request on the ground that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that, subject to any further objections, documents concerning Swisher International, Inc. that are responsive to relevant categories described with reasonable particularity in Plaintiffs' Second Request For Production Of Documents And Things will be produced in accordance with the Federal Rules of Civil Procedure.

Request No. 13. All documents concerning Swedish Match North America, Inc.

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Response to Request No. 13: Defendants object to this request on the ground that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that, subject to any further objections, documents concerning Swedish Match North America, Inc. that are responsive to relevant categories described with reasonable particularity in Plaintiffs' Second Request For Production Of Documents And Things will be produced in accordance with the Federal Rules of Civil Procedure.

Request No. 14. All documents concerning Philip Morris, Inc.

Response to Request No. 14: Defendants object to this request on the ground that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that, subject to any further objections, documents concerning Philip Morris, Inc. that are responsive to relevant categories described with reasonable particularity in Plaintiffs' Second Request For Production of Documents and Things will be produced in accordance with the Federal Rules of Civil Procedure.

Request No. 15. All documents concerning policies, procedures and training for sales representatives.

Response to Request No. 15: Defendants have produced non-privileged documents responsive to this request as part of their Initial Disclosures. Defendants further state that, subject to any further objections, additional documents concerning policies, procedures, and

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training for sales representatives that are responsive to this request and also to relevant categories described with reasonable particularity in Plaintiffs' Second Request For Production of Documents and Things will be produced in accordance with the Federal Rules of Civil Procedure.

Request No. 16. All documents concerning product racks for display of moist snuff.

Response to Request No. 16: Defendants object to this request on the ground that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that, subject to any further objections, documents concerning product racks for display of moist snuff that are responsive to relevant categories described with reasonable particularity in Plaintiffs' Second Request For Production Of Documents And Things will be produced in accordance with the Federal Rules of Civil Procedure.

Request No. 17. All documents concerning product quality of moist snuff.

Response to Request No. 17: Defendants object to this request on the ground that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that, subject to any further objections, documents concerning product quality of moist snuff that are responsive to relevant categories described with reasonable particularity in Plaintiffs' Second Request For Production Of Documents And Things will be produced in accordance with the Federal Rules of Civil Procedure.

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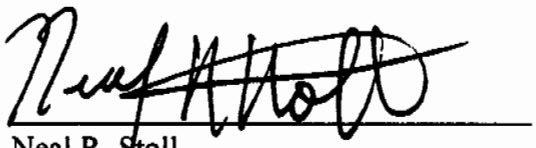
Dated: October 13, 1998



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Attorneys for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October, 1998, I caused a copy of the foregoing Defendants' Response To Plaintiffs' First Request For Production Of Documents and Defendants' Response To Plaintiffs' First Set Of Interrogatories to be sent by Federal Express to:

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Washington, DC 20005-3317

/s/
James A. Keyte

EXHIBIT L

RECEIVED

OCT 1 4 1998

KELLOGG, HUBER, HANSEN, TODD & EVANS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, -against- UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98 CV-108-R

DEFENDANTS' RESPONSE TO
PLAINTIFFS' FIRST SET OF INTERROGATORIES

Pursuant to Fed. R. Civ. P. 33, Defendants respond to Plaintiffs' First Interrogatories To Defendants as follows:

GENERAL OBJECTIONS

1. Defendants object to these interrogatories insofar as they purport to seek separate responses from each Defendant. A demand for such separate responses would be unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Unless otherwise specifically noted, all Defendants have responded to these interroga-

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tories based on information reasonably available to them. Defendants have no reason to believe that separate responses provided by any of the individual Defendants would differ from those provided here in any meaningful way.

2. Defendants object to these interrogatories insofar as they seek the production of confidential, proprietary business information.

3. Defendants object to these interrogatories insofar as they seek the production of information protected by the attorney client privilege, the attorney work product doctrine, and/or any other applicable privilege or protection.

4. Defendants object to these interrogatories on the ground that they do not specify a relevant time period.

RESPONSES TO INTERROGATORIES

Interrogatory No. 1. Identify each person from whose files documents were produced in response to Plaintiffs' First Request for Production of Documents, identify the documents produced from each such person's files, and identify the person(s) most familiar with each of said files.

Response to Interrogatory No. 1: Defendants incorporate by reference Defendants' Response To Plaintiffs' First Request For Production Of Documents. Defendants also object to this interrogatory on the ground that, to the extent any documents will be produced in response to Plaintiffs' First Request for Production of Documents, the information sought can be obtained as readily by Plaintiffs as by Defendants from such documents. See Fed. R. Civ. P. 33(d).

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Interrogatory No. 2. Describe generally each computer system used by defendant, including types of data maintained in each, and for each such system identify the person(s) most familiar therewith.

Response to Interrogatory No. 2: Defendants also object to this interrogatory on the ground that it is irrelevant, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Interrogatory No. 3. Identify by name, address, title, job description, and date of service all persons involved in the marketing and/or sale of defendants' moist snuff products.

Response to Interrogatory No. 3: Defendants object to this interrogatory on the ground that it is vague and ambiguous, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that the following persons have overall responsibility for the marketing and/or sale of Defendants' moist snuff products:

A. Gary Smith, President, United States Tobacco Company Inc., 100 West Putnam Avenue, Greenwich, Connecticut 06830.

Gary Milano, Vice President, United States Tobacco Company Inc., 100 West Putnam Avenue, Greenwich, Connecticut 06830.

Richard Fasanelli, Vice President, United States Tobacco Sales and Marketing Company Inc., 100 West Putnam Avenue, Greenwich, Connecticut 06830.

Interrogatory No. 4. Identify all distributors and retailers of moist snuff products with which one or more defendants has or had an agreement.

Response to Interrogatory No. 4: Defendants object to this interrogatory on the ground that it is vague and ambiguous, overbroad, unduly burdensome, and not reasonably

calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that Defendants have or have had agreements, including sale/purchase agreements, with each and every distributor and/or retailer with which Defendants have ever done business.

Interrogatory No. 5. Identify by name, address, title, job description, and date of service all persons who have spoken to tobacco industry analysts on matters pertaining to moist snuff.

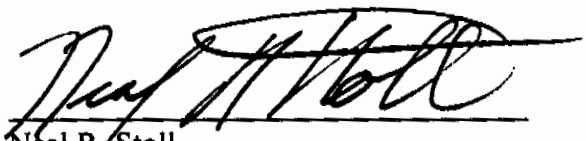
Response to Interrogatory No. 5: Defendants object to this interrogatory on the ground that it is vague and ambiguous, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving this objection, Defendants state that the person most knowledgeable about discussions with tobacco industry analysts on matters pertaining to moist snuff is:

> Mark A. Rozelle, Vice President, UST Inc., 100 West Putnam Avenue, Greenwich, Connecticut 06830.

Interrogatory No. 6. Identify by name, address, title, job description, and date of service all persons who participated in the preparation of answers to these interrogatories.

Response to Interrogatory No. 6: Defendants object to this interrogatory on the ground that it is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

Dated: October 13, 1998



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Attorneys for Defendants

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I have read the foregoing Defendants' Response to Plaintiffs' First Set of Interrogatories and know the contents thereof. Pursuant to Fed. R. Civ. P. 33(b), I certify that the answers given are true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 13, 1998

Debra A. Baker

EXHIBIT M

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October 16, 1998

Via Facsimile and First Class Mail

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James A. Keyte, Esquire
Chris T. Athanasia, Esquire
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New York, NY 10022

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

Yesterday we received defendants' responses to Plaintiffs' First Request for Production of Documents and Plaintiffs' First Set of Interrogatories (collectively, "First Set of Written Discovery").

As you know, we served the First Set of Written Discovery with the Complaint on April 22, 1998. We had hoped that the parties could agree to move forward promptly on discovery, without court intervention, particularly since UST decided to answer the Complaint. You indicated, however, that you would not respond to our First Set of Written Discovery and that we should instead await Rule 26(a)(1) automatic disclosures to begin the discovery process. The Court set a firm July 21, 1998 deadline for Rule 26(a)(1) disclosures.

On July 21, you provided just 1 box of internal UST documents, the names of only 25 UST employees, and no initial damages calculation. Shortly thereafter we requested appropriate supplementation of UST's disclosures. You responded by suggesting that we simply await Rule 33 and 34 interrogatory answers and document request responses.

However, when you did respond yesterday to our Rule 33 and 34 requests, six months after service, you refused to produce any documents despite 17 separate requests and supplied no answers to our 6 interrogatories. Instead, you told us (again) to await a future discovery event -- this time UST's responses to Plaintiff's Second Request for Production of Documents and Things. But you did not commit to produce documents in response to these requests either.

Nor are your refusals to answer our First Set of Written Discovery appropriate. For instance, you claim that you are unfamiliar with Rule 4(a) indices and similar lists. Defendants' Response to Plaintiff's First Request for Production of Documents, Response No. 3, at 5. In fact, however, United States Tobacco Company ("USTC") has been subject to at least one order expressly discussing Rule 4(a) indices and compelling production of all "computerized or electronic indices," and all "existing databases." See Order Compelling Disclosure, Texas v. The American Tobacco Co., et al., No. 5:96CV91 (E.D. Tex. Nov. 13, 1996) (attached hereto).

Likewise, you claim that plaintiffs' request for information about your computer systems is irrelevant, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendant's Response to Plaintiffs' First Set of Interrogatories, Response No. 2, at 3. But in the very same Texas lawsuit involving antitrust claims against USTC, your arguments along these lines failed and you were ordered to produce precisely the information we seek. Id. ("all existing databases relating to documents in [your] possession custody or control").

In light of LR 37.1, we request that you reconsider your position with regard to written discovery and, in particular, defendants' refusal to provide any documents or answers to Plaintiffs' First Set of Written Discovery. We have attached an outline detailing the parties' conduct in discovery to date that we believe further illuminates the need for defendants to reconsider their position.

If a conference on this matter would be productive, please let us know. We would appreciate your response by close of business Monday, October 19, 1998, so that, if necessary, we may bring this matter to the Court's attention at the earliest possible moment to avoid further delay.

Very truly yours,

Mark C. Hansen

Enclosures

cc: Richard C. Roberts, Esquire

EXHIBIT N

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

PLAINTIFFS' OBJECTIONS AND RESPONSES TO DEFENDANTS' FIRST REQUEST FOR DOCUMENTS

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiffs Conwood Company, L.P. and Conwood Sales Company, L.P. ("Conwood") hereby respond to Defendants' First Request for Documents ("Defendants' Requests") as set forth below:

General Objections Applicable to All Requests:

1. Conwood objects to Defendants' Requests to the extent they seek information protected by the attorney-client privilege or work product doctrine, or any other applicable privilege that would make the information or documents immune from discovery in whole or in part.

2. Conwood objects to Defendants' Requests to the extent they seek documents already disclosed by plaintiffs pursuant to Federal Rule of Civil Procedure 26(a). With respect to all such requests for which Conwood has already produced documents, Conwood will timely supplement its production if additional

responsive and non-privileged documents are located.

3. It should not be inferred from the form or substance of any objection or response contained herein that documents responsive to any particular request exist.

Specific Objections and Responses:

REQUEST NO. 1: All documents that constitute, refer, or relate to Conwood's distribution and sale of smokeless tobacco products other than Conwood's moist snuff products, including but not limited to (a) all documents that constitute, refer, or relate to any agreements with wholesalers, distributors, retailers, or any other persons or entities involved in the distribution and/or sale of Conwood smokeless tobacco products, (b) all documents that constitute, refer, or relate to pricing or pricing policies of smokeless tobacco products other than moist snuff, and how such policies are affected by the sale of moist snuff products, and (c) all documents that constitute, refer, or relate to sales data (whether in terms of price or in terms of units) for Conwood smokeless tobacco products, and how such data are affected by the sale of moist snuff products.

RESPONSE TO REQUEST NO. 1: Conwood objects to Request No. 1 on the ground that it fails to identify the requested documents with reasonable particularity. Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1019000003-1019005559; CWD1005000001-001000; CWD1011000001-001881; CWD1031000001-1852; CWD1037000001-1855; CWD1002000001-0001126; CWD1016000001-178; CWD1033000001-916; CWD1001000001-125; CWD1028000001-1836; CWD0100000001-9517; CWD1000000001-909.

REQUEST NO. 2: All documents that constitute, refer, or relate to Conwood's initial entry into the alleged moist snuff market, including but not limited to (a) all documents that constitute, refer, or relate to Conwood's development, introduction, and use of the plastic can for Conwood's moist snuff products; (b) all documents that constitute, refer, or relate to discussions, projections, or considerations of the

effect Conwood's entry into the alleged moist snuff market would have on the sales of other Conwood smokeless tobacco products; and (c) all documents that constitute, refer, or relate to the research and development, production, distribution, or sale of any of Conwood's moist snuff products.

RESPONSE TO REQUEST NO. 2: Conwood is conducting a good-faith search for responsive and non-privileged documents.

REQUEST NO. 3: All documents that constitute, refer, or relate to entry or potential entry into the alleged moist snuff market by any other existing or non-existing smokeless tobacco company, including but not limited to documents that constitute, refer, or relate to the conversion of production facilities devoted to other tobacco products to the production of moist snuff, and the research and development, production, or distribution of moist snuff products.

RESPONSE TO REQUEST NO. 3: Conwood objects to Request No. 3 on the grounds that it calls for information not in Conwood's possession, custody or control. To the extent that the request seeks information in Conwood's possession, custody or control about entry or potential entry into the moist snuff market by firms other than Conwood and UST, Conwood is conducting a good-faith search for responsive and non-privileged documents.

REQUEST NO. 4: All documents that constitute, refer, or relate to Conwood's financial performance in the alleged moist snuff market, including but not limited to (a) budgets; (b) business or strategic plans; (c) financial and/or profit analyses; and (d) sales projections or forecasts.

RESPONSE TO REQUEST NO. 4: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1005000001-1000; CWD1011000001-1881; CWD1028000001-999; CWD1037000001-1855; CWD1002000001-0001126; CWD1001000001-125; CWD100000001-909. Conwood is conducting a good-faith search for,

and expects to produce shortly, additional responsive and non-privileged documents.

REQUEST NO. 5: All documents that constitute, refer, or relate to Conwood's financial performance in the sale of smokeless tobacco products other than moist snuff products, including, but not limited to (a) budgets; (b) business or strategic plans; (c) financial and/or profit analyses; and (d) sales projections or forecasts.

RESPONSE TO REQUEST NO. 5: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1005000001-1000; CWD1011000001-1881; CWD1028000001-999; CWD1031000001-1852; CWD1037000001-1855; CWD1002000001-0001126; CWD1001000001-125; CWD1028000001-1836; CWD100000001-909. Conwood is conducting a good-faith search for, and expects to produce shortly, additional responsive and non-privileged documents.

REQUEST NO. 6: All documents that constitute, refer, or relate to Conwood's sales share of the alleged moist snuff market, including but not limited to (a) all documents that constitute, refer, or relate to Conwood's moist snuff sales data; (b) all documents that constitute, refer, or relate to any reason for any increase or decrease in Conwood's sales share; (c) all documents that refer to your allegation that Conwood's share growth has effectively ceased; and (d) all documents that constitute, refer, or relate to your allegation that Conwood's market share is expected to remain flat or decline in the future.

RESPONSE TO REQUEST NO. 6: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1019000003-1019005559; CWD1011000001-1881; CWD1028000001-999; CWD1033000001-916; CWD1001000001-125 CWD1028000001-1836; CWD1001000001-13190; CWD1037000001-1855. Conwood will make

available for inspection Nielsen market reports at a mutually-convenient time and location.

REQUEST NO. 7: All documents that constitute, refer, or relate to Conwood's sales shares of smokeless tobacco products other than Conwood's moist snuff products.

RESPONSE TO REQUEST NO. 7: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1011000001-1881; CWD1028000001-999; CWD1033000001-916; CWD103700001-1855; CWD1016000001-178. Conwood is conducting a good-faith search for, and expects to produce shortly, additional responsive and non-privileged documents. Conwood will make available for inspection Nielsen market reports at a mutually-convenient time and location.

REQUEST NO. 8: All documents that constitute, refer, or relate to the pricing or pricing policies and/or promotions or promotion-related policies for any Conwood smokeless tobacco product, including but not limited to (a) discounting, (b) couponing, (c) buy downs, (d) "free goods" or "free fills," (e) slotting allowances, (f) return policies, and (g) any monies or compensation offered to distributors, wholesalers, retailers, or other persons or entities involved in the distribution and/or sale of Conwood's smokeless tobacco products.

RESPONSE TO REQUEST NO. 8: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1011000001-1881; CWD1031000001-1852; CWD1033000001-916; CWD1014000001-848; CWD10250000069-437; CWD1028000001-1836; CWD1001000001-9517; CWD1037000001-1855.

REQUEST NO. 9: All documents that constitute, refer, or relate to competition in the alleged moist snuff market,

including but not limited to (a) consumer surveys; (b) analyses of competitors and/or competitors' products; and (c) all documents that constitute, refer, or relate to the sales share of other smokeless tobacco companies in the alleged moist snuff market.

RESPONSE TO REQUEST NO. 9: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1005000001-1000; CWD1028000001-1836; CWD1011000001-1881; CWD1001000001-13190. Conwood will make available for inspection Nielsen market reports at a mutually-convenient time and location.

REQUEST NO. 10: All documents that constitute, refer, or relate to competition between and among all smokeless tobacco products, including but not limited to (a) consumer surveys; (b) analyses of competitors and/or competitors' products; and (c) all documents that constitute, refer, or relate to the sales share of other smokeless tobacco companies.

RESPONSE TO REQUEST NO. 10: Conwood does not believe that there is competition "between and among all smokeless tobacco products," and accordingly cannot provide documents responsive to the request as written. To the extent that the request seeks information regarding competition between and among different producers of moist snuff, Conwood responds as follows: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1028000001-999; CWD1002000001-0001126; CWD1033000001-916; CWD1028000001-1836; CWD1001000001-13190. Conwood will make available for inspection Nielsen market reports at a mutually-convenient time and location.

REQUEST NO. 11: All documents that constitute, refer, or relate to the pricing or pricing policies for any of Defendants' moist snuff products.

RESPONSE TO REQUEST NO. 11: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1005000001-1000; CWD10250000069-437; CWD1028000001-1836; CWD1011000001-1881; CWD1001000001-9517.

REQUEST NO. 12: All documents that constitute, refer, or relate to the pricing or pricing policies and/or promotions or promotion-related policies for any smokeless tobacco company's smokeless tobacco products, including but not limited to (a) discounting, (b) couponing, (c) buy downs, (d) "free goods" or "free fills," (e) slotting allowances, (f) return policies, and (g) any monies or compensation offered to distributors, wholesalers, retailers, or other persons or entities involved in the distribution and/or sale of smokeless tobacco products.

RESPONSE TO REQUEST NO. 12: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1028000001-999; CWD1031000001-1852; CWD1033000001-916; CWD1014000001-848; CWD10250000069-437; CWD1011000001-1881; CWD1001000001-9517. Conwood will make available for inspection retail display materials including but not limited to small color advertisements, coupons and packaging exemplars at a mutually-convenient time and location.

REQUEST NO. 13: All documents that constitute, refer, or relate to the pricing, promotion, or sales share of any price-value moist snuff product, including but not limited to Red Seal™, Cougar™, and/or Timberwolf™.

RESPONSE TO REQUEST NO. 13: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged

documents as part of its initial disclosures. See, e.g., CWD1011000001-1881; CWD1031000001-1852; CWD1033000001-916; CWD1014000001-848; CWD10250000069-437; CWD1028000001-1836 CWD1001000001-9517. Conwood will make available for inspection Nielsen market reports at a mutually-convenient time and location.

REQUEST NO. 14: All documents that constitute, refer, or relate to any misrepresentations and/or false representations made to store personnel involving moist snuff sales data and/or the management of store shelf space.

RESPONSE TO REQUEST NO. 14: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1016000001-178; CWD0100000001-13190.

REQUEST NO. 15: All documents that constitute, refer, or relate to the alleged theft, removal, destruction or defacing by Defendants of moist snuff products, distribution racks, and/or point of sale advertising.

RESPONSE TO REQUEST NO. 15: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1005000001-1000; CWD1026000001-521; CWD1027000001-186; CWD1031000001-1852; CWD1016000001-178; CWD1014000001-848; CWD1022000001-106; CWD10250000069-437; CWD1001000001-13190; CWD1011000001-1881.

REQUEST NO. 16: All documents that constitute, refer, or relate to the theft, removal, destruction or defacing by Conwood of moist snuff products, distribution racks, and/or point of sale advertising.

RESPONSE TO REQUEST NO. 16: Conwood denies the theft, improper removal, destruction or defacing by Conwood of moist snuff products, distribution racks, and/or point of sale advertising, and has requested that defendants produce documents relating to such alleged acts. Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1005000001-1000; CWD1026000001-521; CWD1027000001-186; CWD1031000001-1852; CWD1014000001-848; CWD0100000001-13190; CWD101100001-1881; CWD10160000001-178.

REQUEST NO. 17: All documents that constitute, refer, or relate to the theft, removal, destruction or defacing by any other smokeless tobacco company of moist snuff products, distribution racks, and/or point of sale advertising.

RESPONSE TO REQUEST NO. 17: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1005000001-1000; CWD1026000001-521; CWD1027000001-186; CWD1031000001-1852; CWD1014000001-848; CWD10250000069-437; CWD1016;CWD0100000001-13190; CWD101100001-1881.

REQUEST NO. 18: All documents that constitute, refer, or relate to the reasons for, or the purpose and effect of, any change in rack style, size, design, or shape by Defendants, including but not limited to documents that constitute, refer, or relate to the imposition of costs on Conwood.

RESPONSE TO REQUEST NO. 18: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1026000001-521; CWD1028000001-999; CWD1005000001-1000.

REQUEST NO. 19: All documents that constitute, refer, or relate to the reasons for, or the purpose and effect of, any change in rack style, size, design, or shape by Conwood.

RESPONSE TO REQUEST NO. 19: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1005000001-1000; CWD1011000001-1881; CWD1028000001-999; CWD1001000001-9517.

REQUEST NO. 20: All documents that constitute, refer, or relate to the reasons for, or the purpose and effect of, any change in rack style, size, design, or shape by any other smokeless tobacco company.

RESPONSE TO REQUEST NO. 20: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1001000001-9157; CWD1011000001-1881.

REQUEST NO. 21: All documents that constitute, refer, or relate to any statements made by Conwood about the products or services of any other smokeless tobacco company, including but not limited to all documents that refer to the planning, development, or implementation of the "Frank Delving" series, or any other advertisement or informational campaigns.

RESPONSE TO REQUEST NO. 21: Conwood objects to Request No. 21 on the ground that it fails to identify the requested documents with reasonable particularity. Notwithstanding its objection, Conwood, upon diligent inquiry, believes that it has produced non-privileged documents responsive to Request No. 21. See, e.g., CWD1001000001-9517; CWD1027000001-77.

REQUEST NO. 22: All documents that constitute, refer, or relate to any statements made by Defendants about the products or services of any other smokeless tobacco company.

RESPONSE TO REQUEST NO. 22: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1001000001-13190; CWD1016000001-178.

REQUEST NO. 23: All documents that constitute, refer, or relate to any statements made by any other smokeless tobacco company about the products or services of another smokeless tobacco company.

RESPONSE TO REQUEST NO. 23: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1001000001-13190.

REQUEST NO. 24: All documents that constitute, refer, or relate to customer or consumer complaints about Conwood products, including but not limited to the "complaint letters" referred to in the minutes of the August 19, 1992 and April 22, 1992 Marketing Meetings (see CWD 1022000067 and CWD 1022000070).

RESPONSE TO REQUEST NO. 24: Conwood is conducting a good-faith search for, and expects to produce shortly, responsive and non-privileged documents.

REQUEST NO. 25: All documents that constitute, refer, or relate to any communications between Conwood and any actual, potential or past retailer, distributor, or farmer.

RESPONSE TO REQUEST NO. 25: Conwood objects to Request No. 25 on the ground that it is unduly burdensome to produce "[a]ll documents that . . . relate to any communications between Conwood and any actual, potential or past retailer, distributor, or farmer." Without waiving that objection, Conwood upon diligent inquiry believes that it has produced responsive and non-

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privileged documents as part of its initial disclosures. See, e.g., CWD1011000001-1881; CWD1031000001-1852; CWD 0100000001-9517.

REQUEST NO. 26: All documents that constitute, refer, or relate to any agreement between any smokeless tobacco company and any retailer, distributor, or farmer.

RESPONSE TO REQUEST NO. 26: Conwood objects to Request No. 26 on the grounds that it is overbroad as written and does not specify with reasonable particularity the documents requested. Without waiving those objections, Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1027000001-186; CWD1028000001-999; CWD1031000001-1852; CWD1016000001-178; CWD1014000001-848; CWD10250000069-437; CWD1001000001-9517.

REQUEST NO. 27: All documents that constitute, refer, or relate to any agreement between any smokeless tobacco company and any retail chain or store involving the in-store management and display of moist snuff products, which includes but is not limited to: (a) promotions or restrictions on promotions; (b) sampling of products; (c) incentive programs or inducements to retailers; (d) exclusive rights "to control" the moist snuff section of the store; (e) installation of distribution racks; (f) placement and maintenance of moist snuff products and/or point of sale advertising; or (g) removal of any moist snuff products, distribution racks, or point of sale advertising.

RESPONSE TO REQUEST NO. 27: Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1011000001-1881; CWD1027000001-186; CWD1031000001-1852; CWD1016000001-178; CWD1014000001-848; CWD1022000001-106;

CWD10250000069-437; CWD1028000001-1836; CWD1001000001-9517; CWD1016000001-186.

REQUEST NO. 28: All documents that constitute, refer, or relate to any injury to Conwood's business or property caused by Defendants' conduct.

RESPONSE TO REQUEST NO. 28: Conwood objects to Request No. 28 on the ground that it does not specify the documents sought with reasonable particularity. Without waiving that objection, Conwood upon diligent inquiry believes that it has produced responsive and non-privileged documents as part of its initial disclosures. See, e.g., CWD1005000001-1000; CWD1037000001-1855; CWD1001000001-9517; CWD1011000001-1881.

REQUEST NO. 29: All edited and unedited videotapes or audio recordings relating to Defendants and all documents referring or relating to any videotapes or audio recordings relating to Defendants, including but not limited to the videotapes collected in Plaintiffs' Exhibit C to the Complaint.

RESPONSE TO REQUEST NO. 29: Conwood is conducting a good-faith search for, and expects to produce shortly, additional responsive and non-privileged videotapes.

REQUEST NO. 30: All documents that constitute, refer, or relate to the investigation, evaluation, commencement and/or prosecution of this lawsuit.

RESPONSE TO REQUEST NO. 30: Conwood upon diligent inquiry believes that there are no non-privileged documents responsive to this request. Conwood declines to produce documents in response to Request No. 30.

Dated: October 5, 1998

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

I certify that on this 5th day of October, 1998, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher
& Flom, L.L.P.
919 Third Avenue
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John S. Reed
Ridley M. Sandidge
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202.

Karen Richardson
Karen Richardson

EXHIBIT O

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

THE STATE OF MINNESOTA

BY HUBERT H. HUMPHREY, III,

ITS ATTORNEY GENERAL, and BLUE CROSS AND BLUE SHIELD OF MINNESOTA,

Plaintiffs,

v.

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION, B.A.T. INDUSTRIES, P.L.C., LORILLARD TOBACCO COMPANY, THE AMERICAN TOBACCO COMPANY, LIGGETT GROUP, INC., THE COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC., and

THE TOBACCO INSTITUTE,

Defendants.

File #C1-94-8565

July 17, 1995

ORDER

Fitzpatrick, Kenneth J.

The above matter came on for a regularly scheduled general status conference before the Honorable Kenneth J. Fitzpatrick on July 11, 1995, pursuant to the Case Management (Order dated March 29, 1995. Michael V. Ciresi, Esq., appeared and argued on behalf of Plaintiffs. Allen M. Katz, Esq., appeared and argued on behalf of Defendants Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown and Williamson Tobacco Corporation, Lorillard Tobacco Company, The American Tobacco Company, Liggett Group, Inc., The Council For Tobacco Research - U.S.A., Inc., and The Tobacco Institute. Additional counsel also appeared, but did not argue, on behalf of the parties.

Based on the file, arguments, and representations of counsel

IT IS HEREBY ORDERED:

1. Pursuant to agreement of Plaintiffs and B.A.T. Industries, p.l.c., the time limits for jurisdictional discovery relating to the Motion of B.A.T. Industries, p.l.c., to Dismiss shall be tolled beginning June 21, 1995.

2. *Special Master* . Plaintiffs' request for a Special Master is DENIED at this time. The court

cautions the parties, however, that it may at any time, on its own motion, decide to appoint a Referee pursuant to Minn. R. Civ. P. 53, particularly if despite the court's admonishment the parties persist in bringing matters of a minute nature before the court.

3. *Document Depositories* .

A. One depository located within thirty (30) miles of the Minneapolis/St. Paul International Airport shall be established for timely and efficient control and management of discovery in this action. All documents produced by any party to this action shall be deposited therein. Within thirty (30) days of this order, the parties shall inform the court of their chosen site, along with mutually agreed upon vendors of security, maintenance, copying, imaging, and administrative/staff support.

B. The depository shall be open for inspection of documents from 8 a.m. to 8 p.m., Monday through Friday, at the request of any party on written notice of five business days, unless the parties agree or the Court orders expanded or reduced hours. Each person entering the warehouse shall be required to identify himself or herself, by law firm and party represented, and sign in on a registration log.

C. All parties with access to the depository shall be allowed to view the entire depository at any time during which the depository is open and to select any box or group of boxes for immediate review. The depository staff mutually selected by the parties or appointed by the Court shall have the sole authority to physically remove.the requested boxes from the depository shelves for viewing by an authorized party and to replace the requested boxes back on the depository shelves after viewing by the authorized party.

D. The cost of placing documents requested for production into the depository shall be borne by the party producing the documents. The administrative costs and expenses of operating the depository shall be allocated among the parties on a pro-rata basis determined by use of the facility.

E. The cost of copying or imaging selected documents from the depository shall be borne by the party requesting the copying or imaging of the selected documents. The party selecting the documents shall choose the method of copying or imaging. The copying or imaging shall be performed by the vendor (s) selected by the parties or appointed by the court. All documents duplicated or imaged for the requesting party shall be copied or imaged off of the actual documents in the depository and not from documents maintained at a different location, absent agreement of the parties or order of the Court.

F. Regardless of the manner of copying or imaging, the producing party shall be entitled to receive a record of which documents have been copied or imaged by the requesting party, or a duplicate set of the copies shall be provided to the producing party upon its request and at its expense.

G. Regardless of the manner of copying or imaging, a requesting party shall have the right to designate a reasonable number of documents each day for immediate copying and delivery. At the election of the producing party, this may be accomplished either by providing a convenience copier in the depository for use by the requesting party, or if copying is to be performed off-site, by making appropriate arrangements for the delivery of the requested documents by air courier or hand delivery within one business day.

H. All documents in the depository shall be Bates numbered in accordance with the Case Management Order and shall be placed in numbered boxes. Each box shall be labeled with a box number and the beginning and ending of Bates numbers of documents contained therein, with the labels clearly visible for viewing by walk-by inspection. In addition, the party operating the depository shall maintain a list in each box of each and every document contained within each box, as well as a master list maintained in the depository and distributed to all other parities of each and every document in each box. Such lists shall be updated as necessary.

I. The producing party shall notify all other parties in writing within 48 hours of the placement of

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documents in the depository. The identification of documents in such notice shall include the Bates numbers of the documents, the box numbers, and the document requests to which the documents are responsive (in accordance with the Case Management Order).

J. The staff operating the depository shall maintain a written guide to the location of documents in the depository, for example, a guide to the location of documents by box and Bates numbers.

K. The staff operating the depository shall maintain at the depository copies of all privilege logs and written document responses from a party in this litigation.

L. Once placed in the depository, documents shall not be removed from the depository, renumbered, reboxed, or moved to a different location of the depository, absent agreement of the parties or order of the Court; provided, however, that:

(i) Documents may be removed from the depository for the purpose of making copies or images as requested by the reviewing party;

(ii) Documents may be reboxed or moved to a different location of the depository in order to keep documents in sequential Bates-numbered order as new documents are placed in the depository; however, any reboxing or moving done pursuant to this subparagraph shall be accompanied by immediate (48 hours) and explicit notice to all other parties of new Bates numbers, new box numbers, and new locations. Where it is more convenient to do so, in lieu of reboxing to keep documents in sequential order, a party may place later-produced documents in a box supplemental to the original box. For example, if box 1 has a Bates-number range of 100 to 500 and later produced documents belong in that box, these documents may be placed in box 1A and placed next to box 1.

M. The depository shall have at least one telephone and one dedicated line for computers.

N. Computer versions of documents shall not be transmitted from the depository itself. The receiving party shall have the right, for any depository document for which it has received a copy pursuant to this order, to transmit the document via computer from any other location to any person authorized to receive the document.

O. The depository shall be reasonably heated and air conditioned and have restroom facilities on site.

P. The depository shall be equipped with tables and chairs to serve as a work space for persons reviewing documents. This work space shall be contiguous with (under the same roof as) the storage area for documents.

4. *Document Indexes* .

A. *Existing Indexes:* To the extent that any party has previously prepared or produced any index of documents relative to the subject matter of this action, said party shall immediately produce such existing index to the opposing party; provided, however, that if the producing party claims an existing index contains subjective information protected by the attorney-client or work product privileges, it shall submit such index to the court for *in camera* inspection and determination.

B. *Indexing Upon Production.* All parties shall, in conformance with the Case Management Order and this order, provide an index to the documents produced in discovery. Said index shall be provided along with the documents produced. Each such index shall contain at least the following standard information with respect to each document produced:

(i) Author(s) of document;

(ii) Recipient(s) of document, including those receiving copies;

(iii) Date of document;

(iv) Type of document (e.g., memo, letter, news release, pamphlet, etc.);

(v) Title of document (e.g., title, subject, or "re" line, etc.); and

(vi) Bates identification number.

5. *Computer-Assisted Litigation Man-agement Technology* . The parties shall within ten (10) days of this order inform the court of their progress with respect to choice of computer-assisted litigation management technology, such as CLAD. Absent the parties' agreement, the court shall determine this matter for efficient management of this action.

Kenneth J. Fitzpatrick

CHIEF JUDGE

Back to Minnesota STIC Library

EXHIBIT P

UNITED STATES DISTRICT COUR

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

November 13, 1996

ORDER COMPELLING DISCLOSURE

Judge: David Folsom

Magistrate: Wendell C. Radford

The Motion of the State of Texas to Compel Defendants' compliance with the provisions of the Eastern District's Civil Justice Expense and Delay Reduction Plan (the "Plan") and Defendants [All Defendants except B.A.T. Industries, p.l.c. (BAT) and United States Tobacco Company.] Motion to Compel Plaintiff to comply with the Plan were heard on September 27, 1996. After considering all filings related to the motions, arguments of counsel and applicable law, the Court makes the following findings of fact and order:

The Court finds that both moving parties are entitled to disclosure under the Plan beyond that which has already been made. It is of great concern to the Court that several Defendants have made little or no meaningful attempt to comply with the Plan. As set forth below in detail, the Court orders compliance with the Plan by *all* parties. [By order of this Court on October 7, 1996, BAT was ordered to make initial disclosure to Plaintiff on the issue of personal jurisdiction. This order supplements the October 7, 1996 order relative to production of documents and information that significantly bear on the issue of personal jurisdiction of this Court over B.A.T.] In ordering the parties to comply with the Plan, the Court is mindful of the countervailing arguments of the parties, the complexity of the issues and the tremendous volume of records that must be reviewed and disclosed.

However, out of the myriad issues, complexities and voluminous document production requirements that have been addressed so thoroughly by both parties in memoranda and argument, there are several considerations that rise to prominence against the procedural backdrop framed by the Plan and the Federal Rules' stated objectives for the just, speedy, and inexpensive determination of every action.

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This Court recognizes the State of Texas' interest in the health and lives of its citizens and, particularly, the health and welfare of its children. Accordingly, the Court finds there is a legitimate public interest in the resolution of the issues set forth by Plaintiff. Of equal importance is the opportunity for the Defendants to answer and refute the State's claims, as soon as possible, if the claims are without merit.

Another consideration in fashioning this order is the parties' agreement and request for a September, 1997, trial date. The workload undertaken by the parties' counsel, as well as the considerable employment of this Court's resources, is no small commitment. It is essential, therefore, that this Court order every reasonable measure to facilitate pre-trial preparation that is affordable, timely and fair. At the same time, those measures must enhance the economy of judicial resources as this matter progresses to trial. The initial disclosure requirement under the Plan is the best tool to initiate meaningful discovery that will later be supplemented by the discovery provided for in the Case Management Order.

Finally, in fashioning this order, both parties have impressed the Court with the absolute need to utilize existing computer database indices, as well as indices to be provided with document production, in order to have meaningful access to the millions of pages of documents or electronic data that constitute the universe of relevant information. Counsel for Defendants, particularly, argued convincingly that the use of existing indices was the quickest way to make available documents, both as a matter of paper and as a matter of computers. Counsel for Plaintiff took the Defendants' point further and argued that preexisting databases, prepared by Defendants or their counsel in anticipation of or in preparation for litigation and produced in the *Minnesota Case* [The State of Minnesota et al v. Philip Morris et al., File #C1-94-8565, 2 nd Judicial District Court, County of Ramsey, State of Minnesota.] should be produced in this case. Plaintiff asserts that the 4(a) and 4(b) indices are necessary to fulfill the intent of the Plan. Defendants are agreeable to produce the 4(b) indices but argue that the 4(a) indices constitute work-product protected from production under the doctrine outlined in *Hickman v. Taylor* ,329 U.S. 495 (1947).

The work-product doctrine is a qualified immunity under the applicable rules of the FRCP and *Hickman* . The standard for the production of "work- product" material to an opposing party is set forth in FRCP Rule 26(b)(3). It is abundantly evident from the affidavits and exhibits submitted by all parties, and it is a finding of fact by this Court, that the Plaintiff has substantial need of both the 4 (a) and 4(b) indices in order to prepare its case for the September, 1997 trial date. The Court finds that it would create an undue, if not impossible, hardship on Plaintiff to process, review and recreate the databases indices for the millions of pages of documents in the possession of Defendants. Defendants' own affidavits submitted in connection with these motions show it has taken years and millions of dollars to produce the 4(a) indices. Defendants' affidavits and arguments before this Court are quite convincing that there does not exist a substantial equivalent to the 4(a) indices that Plaintiff can reasonably use considering the time and expense factors. To withhold production of the 4(a) indices from Plaintiff, would run directly counter to the objectives of the Plan. The latter consequence is especially avoidable as this Court has, as does the state court in Minnesota, the ability to order production of the indices and protect against disclosing the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of any Defendant concerning the litigation.

Accordingly,

IT IS THEREFORE ORDERED. that:

1. Plaintiff and Defendants shall produce computerized or electronic indices [For purposes of this Order, production of indices shall be in the form of ASCII or WordPerfect 5.0/5.1 documents on 3.5 inch disk only.] for all documents produced to other parties in this litigation. Said indices shall be produced contemporaneously with document production and shall include the following fields:

1. Begin Bates/Document No.

2. End Bates/Document No.

3. Year - (of the document)

4. Month

5. Day

6. Document Type

7. Title/Reference

8. Author

9. Recipient

10. CC's

For those documents already produced the parties shall provide computer or electronic indices within twenty (20) days of this order.

2. Plaintiff shall produce to Defendants all documents bearing significantly on the models and/or methods used in calculating damages when the Center for Disease Control damage model has been finalized or within ninety (90) days from the signing of this order, whichever is sooner. This production shall include all software programs and user manuals to the extent production is not prohibited by licensing agreements or copyright laws.

3. Plaintiff shall produce to Defendants all documents bearing significantly on the computations of its alleged damages for each of the three categories of damages identified in Plaintiff's Amended and Supplemental Disclosure, dated July 24, 1996, at 44, as soon as the Center for Disease Control damage model has been finalized and applied to the State of Texas' Medicaid data or within ninety (90) days from the signing of this order, whichever is sooner. This production shall include all data used in calculating damages and data generated from data calculations.

4. Plaintiff shall produce on or before December 15, 1996, organizational charts from 1967 to present for all State agencies and commissions administrating or operating the Medicaid, State employee insurance and retirement program and State-funded health care providers (the "Programs").

5. Plaintiff shall produce on or before December 15, 1996, all documents that bear significantly on the State's awareness of the health risks associated with tobacco, including documents relating to the State's efforts to educate Texas residents about or discourage Texas residents from using tobacco."

6. Those portions of Defendants' Motion requesting disclosure of Medicaid recipient specific information are denied pending further orders of this Court.

7. A hearing on the confidentiality and/or production of information from Medicaid data tapes is hereby set for 10:00 a.m. the 2nd day of December, 1996 in Beaumont, Texas.

8. Defendants shall produce the following:

1. On or before December 15, 1996, Defendants [Excluding B.A.T. Industries, p.l.c.] shall produce copies of all documents, data compilations or tangible items that bear significantly on any claim or defense of the parties. Documents to be produced include documents produced by Defendants in current or past litigation or otherwise in their possession and/or control that bear significantly on any of the Plaintiff's claims.

2. In addition to paper copies of the documents set forth in item 1, to the extent Defendants have optically scanned, or otherwise stored electronically the documents or data compilations, Defendants are ordered within twenty (20) days to provide Plaintiff with that data and information in the identical format.

3. Within twenty (20) days of this order, Defendants shall produce the database indices identified as the 4(a) and 4(b) indices produced in *The State of Minnesota. et al v. Philip Morris. et al.* File #Cl-94-8565, 2nd Judicial District Court, County of Ramsey, State of Minnesota case pursuant to Chief Judge Kenneth J. Fitzpatrick's November 1, 1995 order, specifically, as follows:

A. Philip Morris Incorporated shall release the following fields:

SHB Database: Document ID, Master ID, Other Number, Document Date, Primary Type, Other Type, Person Author, Person Recipient, Person Copied, Person Mentioned, Person Attending, Person Noted, Organization Author, Organization Recipient, Organization Copied, Organization Mentioned, Organiza-tion Attending, Organization Noted, Mentioned Brand File Name, Site, Area, Verbatim Title

ABC Database: Starting and Ending Bates Numbers, Date Title, Document Type, Author, Addressee, Copyee, Source, File

A&P

Database: Source, Document Number, Attachment Range, Document Date, Document *Types 05 through l 5 only,* Title, To/Addressee - Personal Names, To/Addressee - Organizational Names, From/Author - Personal Names, From/Author - Organizational Names, Copyee - Personal Names, Copyee - Organizational Names

B. R.J. Reynolds Tobacco Company shall release the following fields:

Litigation

Database: Addressee, Attachments, Author, Brand Names, Copyee, Doc Date, Doc ID X, Doc Type, Mentioned Names, Page Length, Referenced Doc, RJR Intnl Docs, Source, Split Record, Title

Additives

Database: Release Additive Brands, Addictive Name, Pesticide Name, and Other Brands in addition to those fields listed for Litigation Database, above.

Premier Database: 75% of the documents in this database are included in the Litigation Database, thus of the 25% which is not included, the following shall be released: Addressees AFF, Attachment (s), Authors AFF, Brand(s), Copyees, Doc ID #, Document Type, Item Date, Other Names, Source, Title.

Outside Attorney

Database: Addressee, Attachments, Author, Brand Names, Copyee, Doc ID #, Doc Type, Item Date, Other Name, Source, Title.

C. Brown & Williamson Tobacco Corporation shall release the following fields:

Litigation

Database: Document Identification Number, Document Date, Objective Date, Document Type, Primary Docu-ment Type, Secondary Document Type, Personal Names/Organiza-tions, Recipient, Organizer, Copyee, Mentioned, Forwarded To, Owner of Document, Attendee, File Folder Name, Area/Sub-Area Names, Brand Names, Verbatim Title, Substan-ces, Substances No Code, Diseases

Stolen Database: DocID, Date, File, Type, To, From, Orig, Title (Verbatim only, i.e., may redact Title Inferred)

D. Lorillard Tobacco Company shall release its document database showing the following fields:

Document ID, Master ID, Other Number, Document Date, Primary Type, Other Type, Person Author, Person Recipient, Person Copied, Person Mentioned, Person Attending, Person Noted, Organization Copies, Organization Mentioned, Organization Attending, Organization Noted, File Names, Site, Area, Verbatim Title, Mentioned Brand

E. The American Tobacco Company shall release the following fields [The following database indices referred to as "Exhibit A", etc., are those referred to in Judge Fitzpatrick's November 1, 1995 Order in Minnesota, supra .] :

Exhibit A: DOCNO, DATE, TITLE, TYPE, AUTHOR, RECIP, COPIES, PERSONS, BRANDS, PAGES, ATTACH, DRAFT, COMPS, ORGS

Exhibit B: DOC_TYPE, BEGIN_DOC, END_DOC, TITLE, DESCRIPTION,AUTHOR, ADDRES-SEE, COPIED, MENTIONED, DOC_DATE, ATTACHMENT, DRAFT __

Exhibit C: BEGIN_BATE, END_BATE, RENUMBERED, DOCNO, DATE, TITLE, TYPE, AUTHOR, RECIP, COPIES, PER-SONS, BRANDS, PAGES, ATTACH, DRAFT, COMPS, ORGS

Exhibit D: BOXNO, BARCHNO, PAGESTART, PAGEEND, YRSTART, YREND, BLUESTART, BLUEEND, DATE, AUTHOR, RECIPIENT, PAGECOUNT

Exhibit E: PAGENO, PAGE-START, PAGEEND, BLUESTART, BLUEEND, PAGECOUNT, YRNUM-BER

Exhibit F: BOX_NUMBER, BATCH_NO, START_PAGE, END_PAGE, BLUE_START, BLUE_END, DATE, AUTHOR, RECIPIENT, PAGE_COUNT, LOOSE

Exhibit G: START_DATE, END_DATE, DOC_TYPE, AUTHOR, RECIPIENT, TITLE, PERS COPIED, COMP_COPIED, NUMBER_PAGES, ATTACHMENT, PERSONS. COMPA-NIES, SUBJECTS, ATCO_FILES

F. Liggett may redact from its index or database all information contained in columns or fields EXCEPT that information contained in the fields identified below, and it shall then produce its index, as redacted, to plaintiffs:

Document Number, End Number, Date, Type, Author, Recipient, Ccs, Title/Reference, Name Mentioned

G. CTR may redact from its indices or databases all information contained in columns or fields EXCEPT that information contained in the fields identified below and shall then produce its indices, as redacted, to plaintiffs:

Debevoise

Database: Authors, Recipients, Copyees, Document Date and Date Qualifier, Title, Primary Doc, Primary Doc and Secondary Doc, Attendee, Mentioned Names, Brand Names and Reference Brands, Doc Range, Original Doc ID, Custodian, Doc ID

Special Projects Publications

Database: Publ, Recip

H. The Tobacco Institute may redact from its index or database all information contained in columns or fields EXCEPT that information contained in the fields identified below and shall then produce its index, as redacted, to plaintiffs:

PREFIX, BPROD, BSUFFIX, E PROD, QPROD, DATE, AUTHOR, ADDRES-SEE, COPY, PLACE, TYPE, NAMES, COPY

I. Within ten (10) days, Defendants, Hill & Knowlton ("H&K") and United States Tobacco Company ("US&C") shall identify to Plaintiff all existing databases relating to documents in its possession or control. On or before December 15, 1996, H&K and USTC shall provide Plaintiff with a copy of all document databases, however, H&K and USTC may redact portions of their databases to delete attorney subjective comments.

9. Defendants producing documents into the Minneapolis depository in the *Minnesota Case* , *supra* , shall immediately allow Plaintiff access to their documents in Minneapolis for inspection and copying.

10. The parties are ordered to meet and confer in good faith on other matters that bear significantly on the claims and defenses.

11. It is further provided that nothing in this Order shall be construed to require a party to create a document for production. Except for the creation of production indices, this Order requires production of only those documents to the extent they exist and are within the actual or constructive possession, custody and/or control of that party.

12. The use and dissemination of any and all documents produced in this case in accordance with this Order Compelling Disclosure or subsequent orders or discovery requests shall be governed by the "Confidentiality Order" attached hereto as Exhibit "A." The "Confidentiality Order" reflects this Courts' finding that this action is of great public interest as it involves important public health and welfare concerns. Accordingly, and until further orders of this Court, the attached Confidentiality Order" is controlling and supersedes any other order concerning the documents produced in this action.

EXHIBIT Q

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FRANKFURT
HONG KONG
LONDON
MOSCOW
PARIS
SINGAPORE
SYDNEY
TOKYO
TORONTO

October 21, 1998

Via Facsimile

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Gentlemen:

This letter responds to Mark Hansen's October 16, 1998 letter regarding Defendants' responses to Plaintiffs' First Set of Written Discovery. The letter raises several issues that need to be corrected.

Plaintiffs did not serve their First Set of Written Discovery with the Complaint on April 22, 1998. As the Court held in its June 9, 1998 Order denying Plaintiffs' motion for relief from Rule 26(d), and as Defendants have repeatedly pointed out to Plaintiffs since the entry of that Order, Plaintiffs' First Set of Written Discovery was improperly served in violation of the Federal Rules. As you know, service of process in violation of the Federal Rules of Civil Procedure is not, and cannot be, service within any legally significant meaning of that word. In fact, Plaintiffs' First Set of Written Discovery was never served on Defendants in accordance with the Federal Rules until, and only because, Defendants voluntarily stipulated to service on September 10, 1998 in order to expedite the discovery process. At this time, Plaintiffs again

pointedly ignored the alternative option offered by Defendants – i.e., to reframe their document requests and interrogatories in accordance with Rules 33 and 34.

Notwithstanding Defendants' voluntary stipulation, Plaintiffs then waited over two weeks and served on Defendants Plaintiffs' Second Request For The Production Of Documents And Things. Some of these requests completely subsumed Plaintiffs' first requests; most of these requests copied Defendants' Rule 34 requests almost verbatim. Plaintiffs could not have acted more determinedly to undermine, confuse and protract the discovery process.

Second, it was not improper for Defendants to "indicate[]" that they would not respond to Plaintiffs' First Set of Written Discovery, as Mr. Hansen suggested in his letter. As the Court held, those requests were in violation of the Federal Rules and therefore warranted no response by Defendants. Nor was it at all improper for Defendants to suggest that Plaintiffs should await a Rule 26(f) meeting and, subsequently, Rule 26(a)(1) disclosures before Plaintiffs sought discovery under Rules 33 and 34. Rule 26(d) requires parties to "await" a Rule 26(f) meeting, and Rule 26(a)(1) disclosures, by design, necessarily precede discovery requests under Rules 33 and 34. As Defendants have pointed out to Plaintiffs several times, the purpose of Rule 26(a)(1) is to provide information from which the receiving party can properly frame discovery requests with sufficient particularity as required by Rules 33 and 34. See 1993 Advisory Committee Notes to Rule 26(a). Again, Plaintiffs' conduct has been completely at odds with the Federal Rules.

Third, Mark Hansen's letter misrepresents the events that occurred shortly after Defendants made its Initial Disclosures under Rule 26(a)(1). Although Plaintiffs did request additional documents and other information as indicated in Mr. Hansen's letter, Defendants did not merely respond that Plaintiffs should await further discovery under Rules 33 and 34. Indeed, Defendants responded by explaining to Plaintiffs the purpose and scope of Rule 26(a)(1), the dearth of facts alleged with particularity in Plaintiffs' Complaint, and the lack of any legal basis for Plaintiffs' vague and ambiguous, overbroad, and unduly burdensome requests purportedly made under Rule 26(a)(1). Defendants also responded that if Plaintiffs wished to seek discovery of information beyond the scope of Rule 26(a)(1), and frankly beyond the scope of Rule 26 in general, it should proceed under the Federal Rules so that Defendants would have the opportunity to respond appropriately in accordance with the procedures set forth therein. Until September 28, 1998, Plaintiffs refused properly to serve document requests framed in accordance with Rule 34. To this date, Plaintiffs have not served properly framed interrogatories with the exception of those in response to which Defendants have already provided information.

Fourth, Defendants' response to Plaintiffs' First Set of Written Discovery was completely proper. After Defendants requested several times that Plaintiffs reframe and serve their discovery requests pursuant to Rules 33 and 34, Plaintiffs insisted on relying on discovery requests that were drafted at the time of the Complaint on April 22, 1998. As stated above, the Federal Rules provide Rule 26(a)(1) so that a party can frame discovery requests based on representative disclosures of certain basic information. Thus, on September 3, 1998, after receiving and reviewing Plaintiffs' Initial Disclosures, and in accordance with the intent and purpose of Rule 26(a)(1), Defendants served interrogatories and document requests framed with the requisite particularity. Plaintiffs' refusal to do the same – even after Defendants' request that they do so – left Defendants with no choice but to object to Plaintiffs' vague and ambiguous, overbroad, and unduly burdensome requests. Plaintiffs cannot claim that they were without sufficient information. Indeed, after two months had passed since Defendants made their Rule 26(a)(1) disclosures, Plaintiffs had written a letter, improperly requesting additional documents and further disclosures under Rule 26(a)(1), had moved the Court, without any legal basis, to compel production of specific documents and further disclosures under Rule 26(a)(1), but refused simply to request documents and serve interrogatories in accordance with the procedures for doing so under Rules 33 and 34. There can be no explanation for such conduct other than Plaintiffs' intent to disregard and act in contravention of the discovery process. Such conduct certainly is not consistent with Plaintiffs' frequent proclamation that it is Defendants who intend to delay discovery.

Fifth, Defendants were unfamiliar with "Rule 4(a)" for the simple reason that no "Rule 4(a)" exists. Plaintiffs' objectionable discovery request did not include any explanation, cite, or other source to provide Defendants with sufficient information to identify "Rule 4(a)." Notwithstanding Defendants' diligent and good faith inquiry as to the existence and applicability of any "Rule 4(a)" of the Federal Rules of Civil Procedure, Kentucky Rules of Civil Procedure, or applicable past and present local rules, Defendants remained unable to respond to Plaintiffs' vague and ambiguous document request. Mark Hansen now attaches to his letter a discovery order from an unrelated case, from which Defendants now have knowledge that by "Rule 4(a)," Plaintiffs meant to request indices of documents created by certain tobacco companies pursuant to Paragraph 4(a) of a protective order in an unrelated products liability case to which USTC was not a party. Plaintiffs' request is therefore improper for four reasons: (1) "Rule 4(a)" to which the request referred is not a rule, but a provision in a protective order (2) that is neither relevant nor applicable to this law suit (3) in a case to which USTC was not a party (4) which fact Plaintiffs should, with proper due diligence, have known.

Sixth, Mark Hansen's letter offers no explanation as to why information about Defendants' computer systems is discoverable in this case. Mark Hansen's letter also offers no explanation as to what specific type of information about Defendants' computer systems Plaintiffs seek. If documents that are otherwise discoverable are in computer format, they will be produced in response to a specific document request. General information about Defendants' computer systems in and of itself, however, is not discoverable and Plaintiffs request is objectionable for the reasons already stated in Defendants' response. Plaintiffs' reference to and reliance on Texas v. American Tobacco Co., et al. to the contrary is misplaced.[1]

Pursuant to Local Rule 37.1, we suggest that the parties meet and confer in an effort to resolve several of these issues, as well as several issues presented by Plaintiffs' October 5, 1998 responses to Defendants' discovery requests, including but not limited to, those issues set forth below. In order to facilitate our discussions, it would be helpful if Plaintiffs would provide clarification of their positions concerning the following issues:

- Please explain the legal and factual basis for Plaintiffs' assertion of the joint defense privilege, the common interest doctrine, the investigative privilege, and the party communications privilege in response to Defendants' interrogatories.

- Plaintiffs have responded to a number of Defendants' document requests simply by asserting that, upon diligent inquiry, they have produced responsive documents as part of their Initial Disclosures. In most instances, Plaintiffs do not indicate that they are continuing a good-faith search for responsive documents. For each such response, please explain whether Plaintiffs have produced all non-privileged and responsive documents in accordance with their legal obligations, and, if they have not, when Plaintiffs expect to produce additional documents in light of the applicable October 5, 1998 response date.

- Please explain why Plaintiffs did not respond to Defendants' Interrogatory No. 27 with respect to audio taping.

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[1] Moreover, Plaintiffs' reliance on a discovery order in an unrelated case, which pertains to unrelated and unidentified documents, is itself objectionable. The fact that USTC was involved in prior litigation does not allow Plaintiffs access to the discovery produced in that case on the chance that they might turn up a discoverable document. Rather, each of Plaintiffs' document requests must meet the particularity requirements of Rule 34. None of them do.

- Please explain the legal basis for Plaintiffs' reliance on a list of over 700 names purportedly produced pursuant to Plaintiffs' obligations under Rule 26(a)(1) in response to Defendants' specific Interrogatories Nos. 11 and 12.

Please inform us at your earliest convenience of an acceptable time for a conference call to further discuss these and other issues related to Mark Hansen's October 16, 1998 letter and Plaintiffs' responses to Defendants' discovery requests.

Very truly yours,

Chris Athanasia

cc: Richard Roberts, Esq.
John Reed, Esq.

EXHIBIT R

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October 21, 1998

Via Facsimile

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Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

Thank you for your letter of earlier today.

On October 16, 1998 we wrote asking defendants to reconsider their refusal to provide any documents in response to plaintiffs' document requests and their refusal to provide any meaningful answers in response to plaintiffs' interrogatories. We also asked whether it would be useful to meet to explore ways to facilitate at least some production of documents and interrogatory answers.

Your letter makes clear that defendants have no interest in modifying their position; to the contrary, you devote fully four pages of your correspondence to rehashing a defense of defendants' nonproduction. On the fifth page you discuss a possible meeting, but for the purpose of discussing perceived faults in plaintiffs' voluminous and ongoing production. We will

address your concerns about plaintiffs' production in due course. With respect to defendants' discovery responses, however, it appears that you leave us no choice but to seek relief from the Court.

Very truly yours,

Mark C. Hansen

cc: Richard C. Roberts, Esquire

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND INTERROGATORY ANSWERS AND FOR SANCTIONS

Defendants respectfully submit that Plaintiffs' Motion to Compel Production of Documents and Interrogatory Answers and for Sanctions should be denied for the following reasons:

(1) Plaintiffs are seeking production pursuant to discovery requests that were never properly served and to which Defendants responded voluntarily, by stipulation, in order to end the stalling by Plaintiffs to file proper discovery requests in accordance with Fed. R. Civ. P. 33 and 34.

(2) In filing their motion, Plaintiffs have pointedly ignored two written requests by Defendants to meet and confer to resolve outstanding discovery disputes in accordance with Fed. R. Civ. P. 33 and 34, and Local Rule 37.1.

(3) Plaintiffs' discovery requests do not meet the particularity requirements of the Federal Rules, and Defendants have responded to them accordingly.

(4) Plaintiffs have conceded the inadequacy of their first set of document requests by serving a second set of document requests. Plaintiffs' second set of requests in substance subsumes their first, but does attempt to describe categories of documents with somewhat greater particularity than their first. Thus, in

accordance with Rule 34, Defendants will respond to this second set of requests on Thursday, October 29, 1998, and will produce dozens of boxes of documents to Plaintiffs. Despite the contrary impression Plaintiffs seek to create, discovery is proceeding on or ahead of schedule.

ARGUMENT

I.

Plaintiffs move to compel production of documents and interrogatory answers under their first set of discovery requests, which were improperly "served" with the Complaint on April 22, 1998 in violation of Fed. R. Civ. P. 26(d) and 34(b). Those requests were the subject of this Court's June 9, 1998 Order denying Plaintiffs' Motion for Relief from Rule 26(d) and instructing the parties to proceed with discovery in accordance with the Federal Rules. To this day, however, Plaintiffs continue to assert that their discovery requests were "served" on April 22, 1998. (See Pl. Mem. at 1, 2) This is untrue. Indeed, the thirty-day response period under Rule 34 was triggered only because Defendants voluntarily stipulated to service of Plaintiffs' requests as of September 10, 1998 in order to move discovery along. (See Ex. A at 2-3)

II.

Had Plaintiffs made a good faith effort to meet and confer with Defendants to discuss and attempt to resolve the discovery disputes presented in Plaintiffs' motion, as is required by Local Rule 37.1, Plaintiffs could have obtained the assurances they apparently seek. Instead, Plaintiffs filed and continue to pursue the present motion in the face of Defendants' October 21, 1998 letter suggesting a meet and confer between the parties (see Pl. Mem. Ex. 17 at 4) and Defendants' October 22, 1998 letter informing Plaintiffs of their Rule 37.1 obligations and renewing Defendants' suggestion that the parties meet and confer to discuss all outstanding discovery disputes (see Ex. B).

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III.

In any event, Plaintiffs' first requests, on their face, are vague and ambiguous, overbroad, and unduly burdensome.[1] As such, Plaintiffs' requests do not meet the requirements of Fed. R. Civ. P. 33 and 34, and more importantly, do not provide sufficient information for Defendants to conduct a search for responsive documents and other information. This fact was brought to Plaintiffs' attention several times by Defendants, but each time Plaintiffs refused simply to redraft and reserve proper discovery requests pursuant to the requirements of Fed. R. Civ. P. 33 and 34.

Plaintiffs' arguments regarding two individual discovery requests warrant specific responses. Plaintiffs' request for "[a]ll documents concerning the proposed Tobacco Industry Settlement dated June 20, 1997" calls for the production of irrelevant documents for those reasons stated in Defendants' prior motion under Fed. R. Civ. P. 12(b)(6) to dismiss that part of the Complaint which seeks to base antitrust liability on conduct protected by the Noerr-Pennington doctrine. Further, the request is overbroad and unduly burdensome because it would encompass all types of documents beyond those that would purportedly "bear directly on paragraphs 32-39 of the Complaint." Pl. Mem. at 5. As such, the request is not reasonably calculated to lead to the discovery of admissible evidence.

Likewise, Plaintiffs' request for "[a]ll Rule 4(a) lists and any similar lists of documents in defendants' possession, custody or control" — as we now understand it — calls for irrelevant

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[1] For example, Plaintiffs' first document request states in full: "All documents concerning Conwood Company L.P. and/or Conwood Sales Company, L.P. (collectively 'Conwood')." As written, the request clearly is overbroad and ambiguous. In fact, even in their papers in support of their present motion, Plaintiffs use a more focused description of the types of documents sought under this and other requests. (See Pl. Mem. at 4-5, 5-12)

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and unduly burdensome material. Because of Plaintiffs' own error — i.e., using the misnomer, "Rule 4(a)," to describe indices created pursuant to a court order in unrelated tort litigation — Defendants were misled and, after a good faith inquiry, responded accordingly. Only when Plaintiffs conceded their error by letter of October 16, 1998 were Defendants informed that Plaintiffs meant to request indices of documents created by certain tobacco companies pursuant to Paragraph (4)(a) of a protective order in an unrelated products liability case to which USTC was not even a party. Based on this information, Defendants can now definitively state that Plaintiffs' request for any "4(a)" indices created by other tobacco companies for tort litigation in a foreign jurisdiction is not reasonably calculated to lead to the discovery of admissible evidence in this antitrust case and is burdensome and harassing.

IV.

Inexplicably, two weeks after Defendants' stipulation to service of Plaintiffs' first set of discovery requests and before the response period had run, Plaintiffs served on USTC Plaintiffs' Second Request for Production of Documents and Things. This second request in large part subsumes the first. However, this latest request at least attempts to achieve the particularity required by the Federal Rules — a result sought primarily by copying, almost verbatim, language from Defendants' document request.

Under Rule 34(c), Defendants' responses to Plaintiffs' second request are due on Thursday, October 29, 1998. In full compliance with the Federal Rules, Defendants will produce dozens of boxes of documents to Plaintiffs. Although Defendants anticipate that some documents will be produced on a rolling basis, Defendants believe that their production will be substantially completed well before the December 4, 1998 target date for completion of the

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production of documents. Accordingly, document discovery is on schedule in this case, and there was no reason for Plaintiffs to file a motion to compel relating to its improper first request.

CONCLUSION

To the extent that Plaintiffs were entitled to a response to their first set of discovery requests, Defendants have responded. Plaintiffs will also have received a response to their second set of document requests almost before the ink is dry on this memorandum. Plaintiffs' Motion to Compel Production of Documents and Interrogatory Answers, for Sanctions, and for a Pretrial Conference should, therefore, be denied.

Dated: October 27, 1998

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
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919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 27th day of October, 1998.

Counsel for Defendants

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EXHIBIT A

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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TORONTO

September 11, 1998

Via Facsimile

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Gentlemen:

I received Mark Hansen's letter of September 10, 1998, and I am both puzzled and troubled by Plaintiffs' continuing effort to foist Plaintiffs' improper April 22 discovery requests on Defendants. I also am troubled by Plaintiffs' unrelenting campaign to confuse the intent and purpose of Rule 26(a)(1) and Rules 33 and 34, with the apparent goal of evading the well-established procedures for seeking discovery under the Federal Rules.

As an initial matter, Defendants are well aware that Plaintiffs have produced documents pursuant to their own understanding of Rule 26(a)(1). The discovery process, however, has progressed beyond Rule 26(a)(1). Now that Defendants have served Rule 34 document requests, and have identified specific categories of documents as required by Rule 34(b), we anticipate that Plaintiffs will produce all responsive documents organized according to the categories described in Defendants' document requests. If copies of certain responsive documents have already been produced with Plaintiffs Rule 26(a)(1) disclosures, those documents should be identified by Bates number and by the category or categories to which they

respond. A mutual understanding on these procedures at this time will prevent any confusion that might arise during the remainder of discovery.

Defendants also are aware that Plaintiffs attached interrogatories and document requests to their Complaint, which was served on April 22, 1998. Those discovery requests, of course, were served improperly in violation of Rule 26(d), which prohibits a party from seeking discovery from any source prior to a Rule 26(f) meeting. Plaintiffs' subsequent motion for relief from Rule 26(d) was denied by the Court and the parties were directed to proceed according to the Federal Rules.[1] The Court's ruling was in accordance with the established intent and purpose of Rule 26(a)(1): to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined and (2) to frame their document requests accordingly. See 1993 Advisory Committee Notes.

Accordingly, after the parties met pursuant to Rule 26(f) and made their Rule 26(a)(1) disclosures in this case, we expected that Plaintiffs would reframe their discovery requests with the requisite particularity based on the information it received in Defendants' Rule 26(a)(1) disclosures. Indeed, Plaintiffs undertook such an exercise in its motion to compel "compliance" with Rule 26(a)(1). We also expected that Plaintiffs would properly serve revised discovery requests pursuant to Rules 33 and 34. Neither of these events has occurred. Moreover, your persistent, though now implicit, contention that Defendants should have responded to Plaintiffs' improperly served discovery requests, either directly or pursuant to Rule 26(a)(1), is unfounded. First, Plaintiffs cannot simply ignore the procedures of Rules 33 and 34. Unless interrogatories and document requests are properly served pursuant to Rules 33 and 34, the procedures for service of, and response to, such discovery requests are rendered superfluous. Second, document requests, whether properly served under Rule 34 or not, have no bearing on the scope of a party's Rule 26(a)(1) obligations, obligations that explicitly are based only on facts alleged with particularity in the pleadings.

It is our suggestion that, in accordance with the Federal Rules, Plaintiffs withdraw the document requests and interrogatories improperly served with the Complaint on April 22, 1998, reframe them based on the information produced by Defendants under Rule 26(a)(1), and then properly serve appropriately framed discovery requests pursuant to the procedures set forth in Rules 33 and 34. Otherwise, Defendants will address Plaintiffs' First Interrogatories to

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[1] According to the Federal Rules, after the Rule 26(f) meeting, parties are obligated to make initial disclosures pursuant to Rule 26(a)(1).

Defendants and Plaintiffs' First Request For Production of Documents, as they were originally propounded, and as if they were served on September 10, 1998 (not on September 3, 1998 as you suggest in your letter). Defendants will then respond to those discovery requests pursuant to the procedures of Rules 33 and 34.

Please advise us by the end of the day as to your intended course of action. If we do not hear from you, we will presume that you intend to rely on your April 22 discovery requests.

If you have any questions please do not hesitate to call me at (212) 735-2375.

Very truly yours,

Chris Athanasia

cc: Richard Roberts, Esq.
John Reed, Esq.

EXHIBIT B

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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October 22, 1998

Via Facsimile

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Gentlemen:

We received Mark Hansen's October 21, 1998 letter, and we again feel it is necessary to point out the misrepresentations it contains and the complete disregard for procedural rules that it demonstrates on Plaintiffs' behalf.

As an initial matter, my October 21, 1998 letter cannot reasonably be used as a pretext for Plaintiffs to avoid their obligation to "make a good faith effort to resolve extrajudicially any dispute relating to discovery," as Local Rule 37.1 requires. Indeed, contrary to the suggestion of Mr. Hansen's letter, my letter did not simply "rehash[] a defense of Defendants' nonproduction." Rather, it responded in full to Plaintiffs' contentious October 16, 1998 letter, which was replete with misstatements of fact and unsupportable accusations of misconduct. Moreover, my letter proposed a meet and confer between the parties in order to discuss all discovery disputes that have arisen thus far.

As such, my letter did not suggest a meet and confer only to discuss the deficiencies of Plaintiffs' production, as Mr. Hansen's letter falsely states. The letter made clear that the meet and confer should also include those issues raised by Plaintiffs and discussed in my letter. In an effort to avoid further confusion, I will quote my letter of yesterday in relevant part:

> Pursuant to Local Rule 37.1, we suggest that the parties meet and confer in an effort to resolve several of these issues, as well as several issues presented by Plaintiffs' October 5, 1998 responses to Defendants' discovery requests, including but not limited to, those issues set forth below. (emphasis added)

Defendants are at a loss as to how this passage can be interpreted to mean that Defendants are not willing to meet and confer in an attempt to resolve the discovery disputes raised in Plaintiffs' October 16, 1998 letter. But, to remove all doubt regarding Defendants' intentions, Defendants' are ready and willing to meet and confer with Plaintiffs to discuss and attempt to resolve all outstanding discovery disputes. Plaintiffs, therefore, have a ready alternative to seeking relief from the Court.

Accordingly, Defendants suggest that Plaintiffs reconsider their premature entrenchment and respond directly to Defendants' request to meet and confer in accordance with Local Rule 37.1.

Very truly yours,

Chris Athanasia

cc: Richard Roberts, Esq.
John Reed, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

The Plaintiffs having moved the Court to compel production of documents and interrogatory answers, for sanctions, and for a pretrial conference, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs' Motion to compel production of documents and interrogatory answers, for sanctions, and for a pretrial conference is hereby denied in all respects.

Entered this _____ day of _____, 1998.

_____
UNITED STATES DISTRICT JUDGE

TENDERED BY:

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Counsel for Defendants

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, -against- UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98 CV-108-R

DEFENDANTS' RESPONSE TO PLAINTIFFS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

Pursuant to Fed. R. Civ. P. 34, Defendants respond to Plaintiffs' First Request for Production of Documents as follows:

GENERAL OBJECTIONS

1. Defendants object to Plaintiffs' requests insofar as they exceed the requirements of Fed. R. Civ. P. 34.

2. Defendants object to Plaintiffs' requests insofar as they are vague and ambiguous, overbroad, unduly burdensome, and/or not reasonably calculated to lead to the discovery of admissible evidence.

3. Defendants object to Plaintiffs' requests insofar as they seek the production of confidential, proprietary business information.

4. Defendants object to Plaintiffs' requests insofar as they seek the production of information protected by the attorney client privilege, the attorney work product doctrine, and/or any other applicable privilege or protection.

RESPONSES TO REQUESTS FOR DOCUMENTS

Request No. 1. All documents that constitute, refer, or relate to the distribution and sale of smokeless tobacco products by UST, Conwood, or any other smokeless tobacco company. This includes, but is not limited to, documents that constitute, refer, or relate to: (a) agreements with wholesalers, distributors, retailers, or any other persons or entities involved in the distribution and/or sale of smokeless tobacco products; (b) pricing or pricing policies of smokeless tobacco, including moist snuff and products other than moist snuff; (c) sales data (whether in terms of price, pounds, or other units) for smokeless tobacco products, and how such data are affected by the sale of moist snuff products; (d) promotional programs and agreements, including UST's Wholesaler Alliance Program, Customer Alliance Program, Retail Data Program, Copenhagen Incentive Program, Free Standing Expandable Tobacco Center Agreements, and Retail Merchandising Placement Agreements; (e) UST's Profile Activity Reporting materials; (f) reports from UST sales representatives, division managers, or regional managers; (g) UST's Competitive Activity Reports; (h) the development, manufacture, alteration, purchase, and cost of smokeless tobacco distribution racks.

Response to Request No. 1: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection

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stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 2. All documents that constitute, refer, or relate to Conwood's initial entry into the alleged moist snuff market, including but not limited to, all documents that constitute, refer, or relate to discussions, projections, or considerations of the effect Conwood's entry into the alleged moist snuff market would have on the sales of UST smokeless tobacco products.

Response to Request No. 2: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 3. All documents that constitute, refer, or relate to entry or potential entry into the alleged moist snuff market by any other existing or non-existing smokeless tobacco company, including but not limited to documents that constitute, refer, or relate to the conversion of production facilities devoted to other tobacco products to the production of moist snuff, and the research and development, production, or distribution of moist snuff products.

Response to Request No. 3: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents,

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Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 4. All documents that constitute, refer, or relate to UST's financial performance in the sale of smokeless tobacco products, including, but not limited to (a) budgets; (b) business or strategic plans; (c) financial and/or profit analyses; and (d) sales projections or forecasts.

Response to Request No. 4: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 5. All documents that constitute, refer, or relate to UST's smokeless tobacco production costs. This includes, without limitation (a) data on costs by brand, flavor, raw material, labor, and overhead; (b) explanations or descriptions of which costs are variable, which are fixed, and how variable costs change with incremental volume.

Response to Request No. 5: Defendants object to this request on the grounds that it is irrelevant, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 6. All documents that constitute, refer, or relate to UST's advertising expenditures for smokeless tobacco products. This includes documents reflecting your advertising expenditures by type (including point of sale, billboard, print media, race sponsorships), month, brand, flavor, package type, or location.

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Response to Request No. 6: Defendants object to this request on the grounds that it is irrelevant, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 7. All documents that constitute, refer, or relate to your research and development expenditures for smokeless tobacco products.

Response to Request No. 7: Defendants object to this request on the grounds that it is irrelevant, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 8. All documents that constitute, refer, or relate to UST's profits from smokeless tobacco products. This includes, without limitation, data on UST's profitability by brand and flavor and explanations or descriptions of how UST's profits are calculated.

Response to Request No. 8: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 9. All documents that constitute, refer, or relate to UST's sales share of the moist snuff market. This includes, without limitation: (a) market share data for each category of moist snuff, such as value-priced or premium; (b) market share data for each area of the country (e.g., by region, city, or metropolitan area); (c) market share data for wholesalers, distributors, or retailers; (d) any study or analysis or data concerning any increase or decrease in UST's sales share.

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Response to Request No. 9: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 10. All documents that constitute, refer, or relate to the market share of Conwood or other smokeless tobacco companies. This includes, without limitation: (a) market share data for each category of moist snuff, such as value-priced or premium; (b) market share data for each area of the country (e.g., by region, city, or metropolitan area); (c) market share data for wholesalers, distributors, or retailers; (d) any study or analysis or data concerning any increase or decrease in sales share.

Response to Request No. 10: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 11. For any smokeless tobacco product, whether produced by UST, Conwood, or any other smokeless tobacco company, all documents that constitute, refer, or relate to (a) pricing or pricing policies or strategies; (b) promotions or promotion-related policies or strategies; or (c) advertising or advertising-related policies or strategies. This includes, but is not limited to, documents that constitute, refer, or relate to: (a) discounting; (b) couponing; (c) buy downs; (d) "free goods" or "free fills"; (e) slotting allowances; (f) return policies; (g) any monies or compensation offered to distributors, wholesalers, retailers, or other persons or entities involved in the distribution and/or sale of smokeless tobacco products; (h) agreements concern-

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ing distribution racks or promotional advertising; (i) new rack development; (j) expenditures on racks and advertising materials; (k) new product introductions; (1) the allocation and size of sales forces; (m) the allocation of advertising or promotion expenditures by date or region; (n) pricing of different brands, reasons for price changes, variances in pricing depending on locality or region, how prices relate to sales, or reasons for temporary or long-term price discounts; (c) draft or final plan-o-grams; (p) alternative rack designs, rack configurations, or reasons for changing rack designs; (q) the results of focus groups or of other test marketing efforts.

Response to Request No. 11: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 12. All documents that constitute, refer, or relate to pricing agreements, whether written or unwritten, involving UST smokeless tobacco products. This includes all documents that constitute, refer, or relate to: (a) volume discounts or other incentives if UST's share of sales or total volume of sales reach a certain level, (b) acceptance of responsibility for rack placement or maintenance if UST competitors are excluded from certain pricing, promotion or other activities.

Response to Request No. 12: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

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Request No. 13. All documents that constitute, refer, or relate to competition in the alleged moist snuff market. This includes, without limitation, all documents that constitute, refer, or relate to: (a) consumer surveys; (b) analyses of competitors and/or competitors' products; (c) the sales share of other smokeless tobacco companies in the alleged moist snuff market; (d) competitors' pricing, pricing policies, advertising activity, use of racks, salespeople, or relations with retailers.

Response to Request No. 13: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 14. All documents that constitute, refer, or relate to competition between and among all smokeless tobacco products. This includes, without limitation, all documents that constitute, refer, or relate to: (a) consumer surveys; (b) analyses of competitors and/or competitors' products; and (c) the sales share of other smokeless tobacco companies; (d) competitors, pricing, pricing policies, advertising activity, use of racks, salespeople, or relations with retailers.

Response to Request No. 14: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 15. All documents that constitute, refer, or relate to the pricing, promotion, or sales share of any value-priced moist snuff product, including but not limited to Red Seal™, Cougar ™, and/or Timberwolf™.

Response to Request No. 15: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 16. All documents that constitute, refer, or relate to any misrepresentations and/or false representations made by Conwood concerning the nature, quality, and/or origin of the goods, services, or commercial activities of UST.

Response to Request No. 16: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 17. All documents that constitute, refer, or relate to any statements made by UST about the products or services of any other smokeless tobacco company, including but not limited to all documents that refer to the planning, development, or implementation of any advertisement or informational campaigns.

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Response to Request No. 17: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 18. All documents that constitute, refer, or relate to any statements made by any smokeless tobacco company other than Conwood or UST about the products or services of any other smokeless tobacco company (including Conwood or UST).

Response to Request No. 18: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 19. All documents that constitute, refer, or relate to customer or consumer complaints about (i) the price, quality, distribution, promotion, or availability of smokeless tobacco products of UST, Conwood, or any other smokeless tobacco company, or (ii) the services of UST, Conwood, or any other smokeless tobacco company.

Response to Request No. 19: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection

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stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 20. All documents that constitute, refer, or relate to any communications between UST and any actual, potential or past retailer, distributor, or farmer.

Response to Request No. 20: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 21. All documents that constitute, refer, or relate to any agreement between any smokeless tobacco company and any retailer, distributor, or farmer.

Response to Request No. 21: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 22. All documents that constitute, refer, or relate to the alleged theft, removal, destruction or defacing by Conwood of moist snuff products, distribution racks, and/or point of sale advertising.

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Response to Request No. 22: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 23. All documents that constitute, refer, or relate to the theft, removal, destruction or defacing by UST of moist snuff products, distribution racks, and/or point of sale advertising.

Response to Request No. 23: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 24. All documents that constitute, refer, or relate to the theft, removal, destruction or defacing by any smokeless tobacco company other than Conwood or UST of moist snuff products, distribution racks, and/or point of sale advertising.

Response to Request No. 24: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents,

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Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 25. All documents that constitute, refer, or relate to the reasons for, or the purpose and effect of, any change in rack style, size, design, or shape by UST, including but not limited to documents that constitute, refer, or relate to the imposition of costs on Conwood.

Response to Request No. 25: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 26. All documents that constitute, refer, or relate to UST's expenditures on, and allocation of, smokeless tobacco distribution racks. This includes, without limitation, all documents or data relating to: (a) the design, production, or acquisition of distribution racks; (b) the allocation of such racks by location (whether by store, territory, division, or region).

Response to Request No. 26: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 27. All documents that constitute, refer, or relate to the reasons for, or the purpose and effect of, any change in rack style, size, design, or shape by Conwood.

Response to Request No. 27: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 28. All documents that constitute, refer, or relate to the reasons for, or the purpose and effect of, any change in rack style, size, design, or shape by any smokeless tobacco company other than Conwood or UST.

Response to Request No. 28: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 29. All documents that: constitute, refer, or relate to any agreement between any smokeless tobacco company and any retail chain or store involving the in-store management and display of moist snuff products. This includes, without limitation, any agreements involving: (a) promotions or restrictions on promotions; (b) sampling of products; (c) incentive programs or inducements to retailers; (d) exclusive rights "to control" the moist snuff section of the store; (e) category management; (f) installation of distribution racks; (g) placement

and maintenance of moist snuff products and/or point of sale advertising; or (h) removal of any moist snuff products, distribution racks, or point of sale advertising.

Response to Request No. 29: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 30. All documents that constitute, refer, or relate to any injury to the business or property of, or any damages suffered by, UST that were caused by Conwood's conduct.

Response to Request No. 30: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 31. All edited and unedited videotapes or audio recordings relating to Conwood and all documents referring or relating to any videotapes or audio recordings relating to Conwood.

Response to Request No. 31: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without

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waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 32. All documents that constitute, refer, or relate to training of UST smokeless tobacco sales representatives, managers, or regional managers. This includes, without limitation, UST training manuals and other training materials, external training courses including the "Resource Center," documents distributed at all training meetings (including such meetings in Florida, Las Vegas, and Connecticut), all notes from training meetings, and documents disclosing the persons responsible for training activities.

Response to Request No. 32: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 33. All personnel records for present or former UST smokeless tobacco sales representatives, division managers, and regional managers. This includes, without limitation, all resumes and any other description of professional qualifications or experience, performance evaluations or appraisals, employment agreements, other agreements, records of training, correspondence to and from each such person, calendars, diaries, and disciplinary records. It also includes, without limitation, any documents concerning the hiring, promotion, demotion, firing, or resignation of each such person.

Response to Request No. 33: Defendants object to this request on the grounds that it is irrelevant, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 34. All documents that constitute, refer, or relate to UST's contacts with or activities in the Commonwealth of Kentucky. This includes, without limitation, documents disclosing UST tobacco purchases; manufacturing operations and facilities; sales volumes, earnings, and profits; educational efforts; political contributions; offices; or resident employees.

Response to Request No. 34: Defendant UST Inc. responds that no documents exist that are responsive to this request. In addition tot he objections otherwise stated herein, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., and United States Tobacco Manufacturing Company Inc. object to this request as irrelevant because each of these Defendants have conceded personal jurisdiction in this lawsuit.

Request No. 35. Any list of UST smokeless tobacco sales representatives, division managers, or regional managers.

Response to Request No. 35: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 36. All documents that constitute, refer, or relate to visits by your smokeless tobacco sales representatives to retail establishments. This includes, without

limitation, documents which reveal: (a) the number of retail establishments visited; (b) the identity of the retail establishments which are and are not visited; (c) the average duration of visits; (d) the frequency of visits; (e) the activities of your salespersons during such visits.

Response to Request No. 36: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 37. All documents that constitute, refer, or relate to studies or analyses UST has performed, commissioned, or obtained, of consumer behavior with regard to smokeless tobacco products. This includes, without limitation, any documents that constitute, refer, or relate to: (a) the results of focus groups or other test marketing efforts; (b) the importance of price, packaging, availability, or advertising in determining consumer choice among brands; (c) the strength of consumer loyalty; (d) the likely impact of past, current or future restrictions on advertising and promotion; (e) regional preferences for particular products or types of products.

Response to Request No. 37: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 38. All documents that constitute, refer, or relate to studies or analyses that UST has performed, commissioned, or obtained of wholesaler or retailer behavior

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with regard to smokeless tobacco products. This includes, without limitation, documents that constitute, refer, or relate to: (a) the responsiveness of wholesalers or retailers to promotional activity or price discounting by suppliers; (b) the willingness of wholesalers or retailers to purchase from new suppliers or to purchase new products from current suppliers; (c) the responsiveness of wholesalers or retailers to incentive programs; (d) the impact of discount tobacco outlets on the growth of UST.

Response to Request No. 38: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 39. All documents that constitute, refer, or relate to the sale of smokeless tobacco products through Wal-Mart Stores, Inc. This includes, without limitation, any data concerning smokeless tobacco sales by month, brand, flavor, package, or outlet.

Response to Request No. 39: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 40. All documents that constitute, refer, or relate to whether and to what extent premium and value-priced brands of smokeless tobacco products compete with each other. This includes, without limitation, all documents and data discussing how the introduction

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of value-priced brands by UST, Conwood, or other smokeless tobacco companies would affect, or has affected, UST's sales of premium brands.

Response to Request No. 40: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 41. All things that constitute, refer, or relate to Conwood distribution racks, promotional activities, advertising, pricing, or products. This includes, without limitation, all Conwood distribution racks, banners, point of sale advertising materials, promotional items, or products.

Response to Request No. 41: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Request No. 42. All things that constitute, refer, or relate to UST distribution racks, promotions, advertising, pricing, or products that you claim have been defaced, altered, or removed by Conwood. This includes, without limitation, any point of sale advertisements you claim have been defaced or altered by Conwood personnel.

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Response to Request No. 42: To the extent Defendants have not produced documents responsive to this request as part of its initial disclosures, and subject to and without waiving the objections stated herein and subject to and without waiving any applicable objection stated in Defendants' response to Plaintiffs' First Request For Production Of Documents, Defendants will make available to Plaintiffs documents responsive to this request for inspection and copying at a mutually agreeable time and place.

Dated: October 29, 1998

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October 29, 1998

Via Facsimile

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Gentlemen:

Enclosed please find Defendants' Rule 34(c) responses to Plaintiffs' Second Request For Production Of Documents And Things. Documents described in Defendants' responses will be made available for inspection and copying at a mutually agreeable time and place.

Defendants also received Neil Gorsuch's letter of October 22, 1998, suggesting that the parties meet and confer to attempt to resolve outstanding discovery disputes. As we have noted on several occasions, Defendants are, and have been, ready and willing to meet and discuss all discovery issues, as well as Plaintiffs' recent attempt to designate its Rule 26(a)(1)(A) disclosures as Tier 2 Confidential Information.

Mr. Gorsuch's letter stated that Plaintiffs would be available on October 29, October 30, or November 1. We anticipate, however, that Plaintiffs will want to review Defendants' enclosed responses and reconsider the issues that need to be resolved prior to any

meet and confer. As soon as possible, however, the parties should discuss the time and place where responsive documents will be made available.

Accordingly, please inform us of an agreeable time for a telephone conference.

Very truly yours,

Chris Athanasia

cc: Richard Roberts, Esq.
John Reed, Esq.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'98 NOV 10 A10:18

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND INTERROGATORY ANSWERS, FOR SANCTIONS, AND FOR A PRETRIAL CONFERENCE

Defendants initially refused to supply any meaningful answers to Plaintiffs' First Set of Interrogatories ("First Interrogatories") or any documents in response to Plaintiffs' First Document Request ("First Document Requests"). In repeated correspondence and two lengthy conferences plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. ("Conwood") sought to narrow the parties' differences and facilitate at least some production. In the end, however, defendants still declined to answer request after request. Their failure to provide written discovery at this late date jeopardizes plaintiffs' ability to prepare for depositions and, with it, the Court's Scheduling Order. Plaintiffs respectfully submit that an order compelling discovery, awarding automatic Rule 37(a)(4) sanctions, and scheduling a Rule 16 pretrial conference remains both warranted and necessary.

Argument

I. DEFENDANTS STILL SUPPLY NO REASON FOR WITHHOLDING INTERROGATORY ANSWERS OR DOCUMENTS

A. Defendants fleetingly complain about service of plaintiffs' First Interrogatories and First Document Requests. Def. Opp. at 2. But they do not dispute that they received plaintiffs' discovery in April 1998; that they opposed initiating early discovery despite the fact they answered the Complaint; or that after discovery began June 9, 1998 it still took four months -- and repeated prodding from plaintiffs[1] -- before they responded. Pl. Mot. at 4-12. Nor can they explain how their complaints about service justify their refusal to supply any meaningful interrogatory answers or documents.

B. Defendants suggest that a meet-and-confer could have resolved plaintiffs' concerns. Def. Opp. at 2 ("[p]laintiffs could have obtained the assurances they apparently seek"). In fact, however, until this motion to compel was filed defendants made no effort to resolve plaintiffs' concerns, but merely rehashed their objections in correspondence. See Exh. A (Oct. 28, 1998 Letter); Pl. Mot., Exhs. 13, 17 & 18. Once this motion was filed, two lengthy conferences were held but defendants repeatedly rejected plaintiffs' efforts to facilitate production. See Exh. B (Nov. 5, 1998 Letter) discussing Interrogatories 1, 2; First Document Requests 1, 2, 3, 4, 7, 8, 10, 11, 12-14, 16-17; Second Document Request 34. In the few instances where defendants did reverse their position and agree to produce, it

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[1] See Pl. Mot., Exhs. 9 & 10.

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was unclear why they had for so long refused to answer plaintiffs' straightforward requests. See Exh. B discussing Interrogatories 3, 4, 5, 6; First Document Requests 5-6, 9, 15.

C. Tellingly, defendants do not even attempt to answer plaintiffs' point-by-point discussion of the inadequacies in their discovery responses. Pl. Mot. at 4-12. Instead, they specifically defend just three of their document responses (and none of their interrogatory answers).

First, defendants argue that they should not be forced to produce any documents concerning the Global Settlement because they have a pending motion to dismiss portions of the Complaint pertaining to that deal. Def. Opp. at 3; Pl. Mot. at 5 (First Document Request No. 2). Defendants, however, nowhere raised this objection as a basis for withholding production in their written discovery response. Pl. Mot., Exh. 11 at 5. Nor could they have done so: merely filing a motion to dismiss does not stay discovery obligations. If defendants had wished to obtain such a stay, they should have filed a motion as required by Fed. R. Civ. P. 26(c). There is, accordingly, no basis for defendants' refusal to produce.[2]

Second, defendants argue that they were confused by plaintiffs' use of the term "Rule 4(a)" rather than "Paragraph 4(a)" in referring to database indices generated as a result of a ruling in the Minnesota Attorney General tobacco lawsuit. Pl.

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[2]Defendants fleetingly suggest that plaintiffs' request is overbroad. Def. Opp. at 3. But they expressly rejected reasonable efforts to narrow this request at the parties' meet-and-confer. Exh. B at 4 (Request No. 2).

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Mot. at 5-6; First Document Request No. 3. Any possible claim to confusion, however, was resolved between the parties a month ago, as defendants admit. See Def. Opp. at 4.

Accordingly, defendants are left to complain only that their database indices are not relevant. Def. Opp. at 4. But plaintiffs are entitled to these indices to ensure that all potential sources of information in defendants' control have been searched. See Exh. B at 2 (Interrogatory 2); id. at 7-8 (electronic documents discussion). Such information is typically produced in antitrust and business tort litigation. Id. at 7-8. And precisely these same indices were compelled from UST in the Texas Attorney General suit. Pl. Mot. at 6; id., Exh. 16 at 6.[3] Production is particularly warranted in this case given that defendants have so far been unable to confirm whether they will produce electronically-stored data responsive to plaintiffs' document requests -- despite their express obligation under Fed. R. Civ. P. 34(a) to do so. See Exh. B at 7-8.

Third, defendants complain that plaintiffs' request for "documents concerning Conwood" is too broad. First Document Request No. 1; Def. Opp. at 3, n.1. But in an antitrust, unfair competition, and product defamation case plaintiffs are entitled to know what defendants say and plan about them. Pl. Mot. at 4-5. Plaintiffs have, moreover, offered to limit the scope of production to the files of a finite number of defendants'

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[3]Contrary to UST's suggestion (Def. Opp. at 3), the Texas litigation did include antitrust claims (Count IV) and, also as here, allegations of deceptive trade practices (Count XIV). See http://stic.neu.edu.Tx/1STAMD.htm (Texas complaint).

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executives; impose reasonable date restrictions; and forego responsive published third party documents in defendants' possession. Exh. B at 3 (Document Request No. 1). Based on their own document production, plaintiffs believe that a finite and manageable production can easily be made under these circumstances. Defendants do not contest the manageability of such a search but have nevertheless refused all good faith efforts to facilitate production.

D. Defendants suggest that their refusal to produce documents in response to plaintiffs' First Document Requests is immaterial since they are producing documents in response to certain of plaintiffs' Second Document Requests. Def. Opp. at 4-5. This is no defense, however, to defendants' failure to provide meaningful interrogatory answers. Besides, defendants are not at liberty to refuse responding to the First Document Requests simply because plaintiffs have issued a second set of document demands. Fed. R. Civ. P. 26(a) (parties may use any mix and sequence of discovery methods). Plaintiffs' First Document Requests are, moreover, deliberately designed to capture materials that may escape production under the Second Document Requests. Defendants do not (and cannot) suggest otherwise. Def. Opp. at 4 (complaining only that two sets overlap "in large part").[4]

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[4]Notably, defendants do not dispute that under Rule 37(a)(4) they are liable for fees and expenses if this motion is granted. Pl. Mot. at 13-14.

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II. A PRETRIAL CONFERENCE REMAINS WARRANTED

Defendants have not responded to plaintiffs' motion for a pretrial conference. There is little question that such a conference is needed. Defendants continue to refuse any response to large numbers of written discovery requests: Interrogatories 1, 2; First Document Requests 1, 2, 3, 4, 7, 8, 10, 11, 12-14, 16-17; Second Document Request 34. See Exh. B. They have rejected plaintiffs' good faith efforts to narrow disputes over these requests. Id. They have declined to supply any meaningful Rule 26(a)(1)(A) witness list. They have refused to produce any calculation of their counterclaim damages as required by Rule 26(a)(1)(C). Until this last week, they had produced just one box of internal UST materials.[5] Unless the Court intercedes, UST's inaction will jeopardize the Court's deposition deadline (less than six months away) and, with it, the Court's scheduled trial date.

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[5]On November 3, 1998 defendants produced 25 further boxes. But even then defendants refused to supply their materials in electronic form (as plaintiffs have), and they have been unable to confirm whether they will make a complete production of their responsive electronic data as required by Fed. R. Civ. P. 34(a). Exh. B at 7-8. Meanwhile, less than four weeks remain in the period allotted by the Court primarily to written discovery and plaintiffs have already produced or made available nearly 400 boxes.

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Conclusion

The Court should compel production of withheld documents and interrogatory answers, award plaintiffs their costs and expenses, schedule a pretrial conference for the earliest possible date, and award such other relief as the Court deems just and proper.

Respectfully submitted,

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CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

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CERTIFICATE OF SERVICE

I certify that on this 9th day of November, 1998, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

EXHIBIT A

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K. CHRIS TODD
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NEIL M. GORSUCH
GEOFFREY M. KLINEBERG

October 28, 1998

Via Facsimile

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919 Third Avenue
New York, NY 10022

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

Thank you for your letter of October 22, 1998.

We strongly disagree with your characterization of the recent events. On October 13, 1998 defendants finally responded to discovery outstanding for six months. Yet in doing so defendants refused production of any documents in response to 18 distinct requests and refused any meaningful answers to 6 straightforward interrogatories. Defendants' refusal to supply discovery, first through Rule 26(a)(1) and now through Rules 33 and 34, is placing plaintiffs' ability to prepare for depositions and trial in increasing jeopardy.

Accordingly, we promptly wrote on October 16, 1998. We asked you to reconsider defendants' document request and interrogatory responses and inquired whether it would be useful to meet to explore ways to facilitate at least some production from defendants. On October 21, 1998, however, we received a five page letter which promised no change in defendants' position, offered no new documents or interrogatory answers, nowhere stated that defendants were even willing to consider amending their discovery responses, and instead purported to defend at length defendants' claimed ignorance of Rule 4(a)

indices and their absolute right to withhold information concerning computer databases. Defendants indicated that they were willing to meet, but listed as agenda items supposed defects in plaintiffs' production. We saw, in sum, no indication that defendants were willing to provide any of the discovery plaintiffs requested or state a recognized reason why such discovery is not being provided.

If, however, defendants are now willing to reconsider their incomplete responses to plaintiffs' interrogatories and first document requests by providing additional answers and documents, please let us know. If this is the case, we would of course be willing to discuss ways of narrowing differences between us and facilitating production. We would propose a telephone conference and are available October 29, the afternoon of October 30, or November 1.

Very truly yours,

Neil M. Gorsuch

cc: Richard C. Roberts, Esquire

EXHIBIT B

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November 5, 1998

Via Facsimile

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Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

This is to document the results of the telephone conferences Monday evening and Tuesday morning, November 2 and 3, 1998 between Chris Athanasia, John Reed, Steven Benz, Bill Conyngham, and myself. I also address a few additional outstanding discovery-related issues.

1. Plaintiffs' First Set of Interrogatories

Interrogatory No. 1 (Identify persons whose files were searched in response to Plaintiffs' First Request for Production of Documents). We explained that this interrogatory simply seeks to discovery whether defendants examined anyone's files before responding to our first document requests and, if so, whose files were reviewed. You stated that you will attach labels to any boxes produced reflecting the appropriate custodian. But this is no excuse for refusing to answer a simple and straightforward interrogatory. Besides, you may have searched the files of custodians for whom you have produced no documents. After a lengthy discussion, defendants refused to provide a list of persons whose files were searched, or to supplement their response in any way.

Interrogatory No. 2 (Describe generally defendants' computer systems). We explained that we need this information, inter alia, to ensure that all potential sources of information have been searched. We noted that defendants were forced to produce even more specific database information in the recent Texas litigation (also involving antitrust and tort claims); accordingly, there can be little burden associated with our more modest request. We also explained that, in our experience, lists of computer systems and databases are typically provided in antitrust and commercial litigation. This interrogatory appears particularly warranted given that, despite our direct inquiry, you were unable to confirm to us that defendants will produce all responsive electronic materials. See Point 4, infra. Nonetheless, defendants refused to provide a list of their computer systems, or to supplement their response in any way.

Interrogatory No. 3 (Identify defendants' moist snuff sales personnel). We explained that we were unable to see how identifying defendants' sales force personnel would be unduly burdensome, overbroad, or unlikely to lead to discovery of admissible evidence, as defendants' written response claimed. You eventually agreed to answer this interrogatory insofar as it seeks the name, address, title, job description, and dates of service for (a) all persons who have served as sales representatives, division managers, regional managers involved in the marketing and/or sale of defendants' moist snuff products, and (b) all persons who have been involved in training persons identified in (a). We are at a loss to understand why defendants declined to provide this information until now.

Interrogatory No. 4 (Identify distributors and retailers with whom defendants have or had an agreement). We explained that defendants' agreements with retailers and distributors are at the heart of plaintiffs' exclusive dealing claims. Complaint ¶ 28. You eventually agreed to answer this interrogatory insofar as it seeks the identity of all distributors and retailers of moist snuff products with whom any defendant has or had an agreement that concerns moist snuff racks (e.g., which company's racks may be installed, where a company's racks must be placed), slot allotment, or point of sale advertising. This includes, but is not limited to, all retailers or distributors who have participated in the Customer Alliance Program, Wholesaler Alliance Program, Retail Account Data Program, Copenhagen

Incentive Program, Retail Merchandising Placement, or the 2908 Free Standing Expandable Tobacco Center program.

We fail to understand why this information was not provided earlier. As you know, even when defendants' requests have been ambiguously drafted in our judgment, we have not declined production but instead attempted to produce immediately to the best of our ability. See, e.g., Plaintiffs' Objections and Responses to Defendants' First Request for Documents, Response to Request No. 1 (noting ambiguity of question, but agreeing to produce immediately).

Interrogatory No. 5 (Identify persons who have spoken to tobacco industry analysts concerning moist snuff issues). Defendants' written response claimed that this interrogatory was burdensome and overbroad. We questioned these claims, explaining that if defendants conform to industry practice, few of their employees have authority to speak with outside industry analysts. You were unable to state whether defendants' practices were different. In an effort to avoid dispute, however, we offered to narrow the scope of our request to identification of the top 25 persons, by name title, job description, and date of service, who have responsibilities which include speaking with tobacco industry analysts on matters pertaining to moist snuff. You agreed to respond to this interrogatory.

Interrogatory No. 6 (Identify persons who participated in preparation of interrogatories). After discussion, you agreed to provide the names, addresses, titles, job descriptions, and dates of service for all persons, except counsel, who participated in the preparation of these interrogatories. This includes, without limitation, any third parties (e.g., investigators). Again, we see no reason why this information was not provided earlier.

2. Plaintiffs' First Request for Production of Documents

Request No. 1 (Documents concerning Conwood). In an effort to avoid needless dispute, we offered to narrow this request to encompass the files of a finite list of defendants' executives. We offered to accept a reasonable time restriction. And we agreed to forego any published third party documents (e.g., Nielsen data) mentioning Conwood. Defendants rejected all of these attempts to facilitate production, and refused to provide any documents.

Request No. 2 (Documents concerning Proposed Tobacco Industry Settlement). Seeking to avoid dispute, we offered to narrow this request to encompass documents which concern the potential or actual effects of any settlement on competition in the marketplace. Such documents are relevant to show intent. United Mine Workers v. Pennington, 381 U.S. 657, 670 n.3 (1965). Defendants refused this offer and declined to produce any documents.

Request No. 3 (Rule 4(a) and similar document indices). Though defendants claimed ignorance of 4(a) indices in their document response, we reminded you that less than two years ago USTC was subject to a Texas federal district court order expressly discussing 4(a) indices and ordering USTC to produce all similar "computerized or electronic databases relating to documents in its possession or control." Despite our efforts to facilitate some production, defendants refused to modify their document response in any way.

Request No. 4 (Documents concerning communications with tobacco industry analysts). We offered to narrow this request to encompass the files of a limited number of executives (e.g., to the 25 persons defendants now agree to identify as having contacts with tobacco industry analysts in response to Interrogatory No. 5). Inexplicably, defendants still refused to provide any documents.

Request Nos. 5 & 6 (Documents concerning defendants' agreements with retailers and distributors). In an attempt to obtain at least some discovery, we offered to narrow these requests to all agreements with distributors and retailers of moist snuff products that affect moist snuff racks (e.g., which company's racks may be installed, where a company's racks must be placed), slot allotment, or point of sale advertising. This includes, but is not limited to, Customer Alliance Program, Wholesaler Alliance Program, Retail Account Data Program, Copenhagen Incentive Program, Retail Merchandising Placement, or 2908 Free Standing Expandable Tobacco Center agreements. Defendants agreed to produce in response to this request.

Request No. 7 (Documents concerning revenues from the sale of moist snuff). We offered to narrow the scope of this request by time. We offered to limit the number of custodians to be

searched. Defendants, however, refused all of these efforts and declined any production. We find defendants' refusal troublesome. As we explained, these documents are highly relevant to plaintiffs' claims of monopoly pricing and to the issue of damages; in our experience, these materials are ordinarily produced in antitrust litigation.

Request No. 8 (Documents concerning market share for moist snuff). Again, we sought ways of narrowing this request to facilitate production. We offered to exclude third party publications (e.g., Nielsen data). We offered to limit the number of custodians to be searched. We offered to limit the applicable time period. Again, none of these efforts were successful and defendants continued to refuse production. Here, too, defendants' refusal to produce is untenable given that the issue of market share is at the heart of any Section 2 monopolization claim.

Request No. 9 (Organization charts, employee lists, job descriptions). Despite their initial refusal, in our conversation defendants agreed to produce all organization charts. Defendants also agreed to provide all employee lists and job descriptions, except for materials pertaining to support staff. As with Defendants' First Request for Documents, the period covered by this request is January 1, 1977 to present. We fail to see why such material was withheld until now.

Request Nos. 10 & 11 (Documents concerning defendants' activities in this district and the relationship between defendants). As you know, it is impossible for the Court to grant UST Inc.'s motion to dismiss for lack of personal jurisdiction until discovery is granted concerning defendants' contacts with Kentucky. Because we allege that UST Inc. directly controls the activities of the other corporate defendants, the Kentucky contacts of all defendants must be examined, as must document concerning UST Inc.'s relationship of control with the other corporate defendants. When we explained these points in our November 2, 1998 conversation, defendants agreed to amend their answer and provide documents concerning defendants' contacts with Kentucky. In our subsequent conversation on November 3, 1998, however, defendants retracted this offer and stood on their refusals to produce.

Request No. 12 (Documents concerning Smokeless Tobacco Council). Though defendants claimed burden, we explained that we have reason to believe that defendants have a reasonably limited set of responsive materials, based upon our own review of Conwood's analogous files. It also became evident from our discussion that counsel did not make even a modest attempt to determine how many responsive documents exist before interposing its boilerplate burden objection. Defendants also claimed that they could not see the relevance of these materials. We explained at length orally, as we have done in writing, the reasons why we believe them to be relevant and likely to lead to discovery of admissible evidence. Cf. Plaintiffs' Motion to Compel Production of Documents and Interrogatory Answers, for Sanctions, and for a Pretrial Conference at 9. Nonetheless, defendants still refused to produce any documents.

Request Nos. 12-14 (Documents concerning Swisher, Swedish Match, Philip Morris). Defendants claimed that these requests are overbroad and unduly burdensome. To avoid needless dispute, we offered to narrow them by custodian and time, and to exclude externally generated publications. Given our proposed limitations, we explained that a very limited set of responsive documents should exist based upon our review (and production) of Conwood's analogous materials. Defendants nonetheless refused to produce any documents.

Request No. 15 (Documents concerning policies, procedures, and training for sales representatives). After discussion, defendants agreed to produce all documents concerning policies, procedures, and training for sales representatives, excluding basic human resources materials (e.g., drug testing policies).

Request Nos. 16 & 17 (Documents concerning moist snuff distribution racks and quality). We explained that these requests bear directly on plaintiffs' allegations that defendants impose costs on rivals by changing rack design (Complaint ¶ 27) and that they disparage Conwood's products as inferior in quality (id. ¶ 19). We offered to narrow our requests by date to facilitate production. Despite the obvious relevance of the materials sought, however, defendants refused stood by their decision to refuse production of any documents.

3. Plaintiffs' Second Request for Production of Documents and Things

General Objections. You clarified for us that defendants will not withhold any documents as a result of General Objections Nos. 1-3, and that these objections are interposed solely for purposes of preserving defendants' rights. You further explained that any documents withheld as a result of General Objection No. 4 will be identified on a privilege log.

Request Nos. 5-7 (Documents concerning defendants' costs). We explained that these documents are relevant to plaintiffs' claims of price predation, monopoly pricing, and to damages. You agreed to revise your answers and provide full production.

Request No. 34 (Documents concerning defendants' contacts with Kentucky). We explained, again, that all of defendants' contacts with Kentucky are relevant and discoverable given our claim that UST Inc. directly controls and manages the affairs of each of the other defendant corporations who do business in Kentucky. You still refused production. See Point 2, Request Nos. 10 & 11, supra.

4. Other Matters

Amended Discovery Responses. In accord with the results of our conferences, we expect defendants to modify their written responses to Interrogatories 3, 4, 5, and 6 of Plaintiffs' First Set of Interrogatories; their written responses to Requests 5, 6, 9, and 15 of Plaintiffs' First Request for Production of Documents; and their written responses to Requests 5-7 of Plaintiffs' Second Request for Production of Documents and Things. Plaintiffs are entitled to defendants' revised responses in writing; we believe that they can and should be made promptly to avoid any future dispute. We would appreciate them by Monday, November 9, 1998. We believe that responsive documents should be produced at the same time, and in no event later than Monday November 16, 1998 — two weeks after our conferences, and seven months after our requests were first propounded.

Electronic Documents. As noted above, see Point 1 Interrogatory No. 2, supra, we specifically asked whether defendants plan to make full production of electronically-stored

information, including information concerning sales reports. Defendants indicated that they were not sure, but would respond as soon as possible. We ask for a response by Friday, November 6, 1998. If defendants are not planning to make such production, despite (a) Fed. R. Civ. P. 34(a), and (b) plaintiffs' document request, which employs a definition of "documents" encompassing all electronically stored media (e.g., computer databases, computer-stored voice mail, e-mail), we need to know immediately in order to seek appropriate relief.

Mode of Production. With the exception of certain voluminous and hard-to-copy materials, to date plaintiffs have delivered to defendants a free electronic copy of their discovery documents. In our conferences, however, defendants indicated that they will not reciprocate by providing electronic copies of their documents. Defendants also stated that in the future they will not even deliver hard copies of their documents to plaintiffs, but merely make materials available for plaintiffs to retrieve and copy at their expense. This represents an abandonment even of the modest courtesy defendants afforded in response to Rule 26(a)(1) by delivering hard copies of certain materials. Accordingly, in the future plaintiffs will likewise simply make their documents available for inspection and copying at defendants' expense.

As we outlined in our conversation, all of plaintiffs' documents are located in a repository in Fort Worth, Texas. Approximately 300 boxes are now ready for your review in electronic or paper form. We expect additional materials to become available for review in the near future. Suitable workstations will be made available for your use free of charge. You may designate for copying and delivery, at your expense, any documents you wish. Chris Athanasia indicated that he would contact us with proposed dates to visit plaintiffs' repository. We will make every reasonable effort to accommodate your schedules.

Plaintiffs' Rule 26(a)(1)(A) Disclosure. Pursuant to the express language in paragraph 15 of the Court's Protective Order, on October 16, 1998 plaintiffs redesignated their Rule 26(a)(1)(A) list as Tier 2 confidential information. Accordingly, access to plaintiffs' disclosure must be restricted to those persons identified in paragraph 7 of the Court's Confidentiality Order.

Chris Athanasia's letter of October 28, 1998 is very troubling. In it he states that, despite plaintiffs' redesignation, "defendants will continue" to meet and interview potential witnesses listed in plaintiffs' Rule 26(a)(1)(A). Please clarify immediately whether plaintiffs' Rule 26(a)(1)(A) disclosure, or information derived from it, is being used by or distributed to non-qualified paragraph 7 recipients. I hardly need to remind you that, under the Protective Order drafted by defendants and adopted by the Court, if defendants disagree with a confidentiality designation they may not unilaterally disregard that designation but must bring the matter to the Court's attention.

Athanasia Letter of November 2, 1998. I see nothing productive in responding to each of the inaccuracies and epithets in Chris Athanasia's letter of November 2, 1998. Two badly misrecorded points about our October 30, 1998 conversation do, however, warrant correction. Contrary to Chris's representation, I never stated that plaintiffs do "not intend to produce documents to Defendants as part of a Fed. R. Civ. P. 34 response." Instead, I explained that many documents responsive to defendants Rule 34 requests have already been produced in plaintiffs' voluminous Rule 26(a)(1) production as they have been kept in the ordinary course of business. I also explained that many additional responsive materials are being readied for production. As we discussed on November 2 and 3, nearly 300 such boxes are presently available for your inspection, with more to come. We have not, to put it mildly, experienced a reciprocal level of production from defendants.

Chris Athanasia's letter accuses me of "evad[ing] the question[s]" whether and when certain documents would be made available for production. This, too, is incorrect. In fact, I explained in our October 30 call that certain categories of documents were ready for inspection, that they were voluminous, but that Steven Benz had more detailed information about the content and quantity of these materials. I even volunteered to find out more about these documents and supply it to Chris in our next conversation, which we scheduled for Monday, November 2 — just three days off. And, as promised, when we spoke on November 2, Steven, Bill Conyngham, and I provided Chris with all relevant details concerning the documents that are now available, their

volume, and their location. We also expressed our willingness to make every reasonable effort to schedule a mutually convenient time for your review.

Very truly yours,

Neil M. Gorsuch

cc: Richard C. Roberts, Esquire

EXHIBIT C

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'98 NOV 10 A10:18

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND INTERROGATORY ANSWERS, FOR SANCTIONS, AND FOR A PRETRIAL CONFERENCE

Defendants initially refused to supply any meaningful answers to Plaintiffs' First Set of Interrogatories ("First Interrogatories") or any documents in response to Plaintiffs' First Document Request ("First Document Requests"). In repeated correspondence and two lengthy conferences plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. ("Conwood") sought to narrow the parties' differences and facilitate at least some production. In the end, however, defendants still declined to answer request after request. Their failure to provide written discovery at this late date jeopardizes plaintiffs' ability to prepare for depositions and, with it, the Court's Scheduling Order. Plaintiffs respectfully submit that an order compelling discovery, awarding automatic Rule 37(a)(4) sanctions, and scheduling a Rule 16 pretrial conference remains both warranted and necessary.

Argument

I. DEFENDANTS STILL SUPPLY NO REASON FOR WITHHOLDING INTERROGATORY ANSWERS OR DOCUMENTS

A. Defendants fleetingly complain about service of plaintiffs' First Interrogatories and First Document Requests. Def. Opp. at 2. But they do not dispute that they received plaintiffs' discovery in April 1998; that they opposed initiating early discovery despite the fact they answered the Complaint; or that after discovery began June 9, 1998 it still took four months -- and repeated prodding from plaintiffs[1] -- before they responded. Pl. Mot. at 4-12. Nor can they explain how their complaints about service justify their refusal to supply any meaningful interrogatory answers or documents.

B. Defendants suggest that a meet-and-confer could have resolved plaintiffs' concerns. Def. Opp. at 2 ("[p]laintiffs could have obtained the assurances they apparently seek"). In fact, however, until this motion to compel was filed defendants made no effort to resolve plaintiffs' concerns, but merely rehashed their objections in correspondence. See Exh. A (Oct. 28, 1998 Letter); Pl. Mot., Exhs. 13, 17 & 18. Once this motion was filed, two lengthy conferences were held but defendants repeatedly rejected plaintiffs' efforts to facilitate production. See Exh. B (Nov. 5, 1998 Letter) discussing Interrogatories 1, 2; First Document Requests 1, 2, 3, 4, 7, 8, 10, 11, 12-14, 16-17; Second Document Request 34. In the few instances where defendants did reverse their position and agree to produce, it

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[1] See Pl. Mot., Exhs. 9 & 10.

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was unclear why they had for so long refused to answer plaintiffs' straightforward requests. See Exh. B discussing Interrogatories 3, 4, 5, 6; First Document Requests 5-6, 9, 15.

C. Tellingly, defendants do not even attempt to answer plaintiffs' point-by-point discussion of the inadequacies in their discovery responses. Pl. Mot. at 4-12. Instead, they specifically defend just three of their document responses (and none of their interrogatory answers).

First, defendants argue that they should not be forced to produce any documents concerning the Global Settlement because they have a pending motion to dismiss portions of the Complaint pertaining to that deal. Def. Opp. at 3; Pl. Mot. at 5 (First Document Request No. 2). Defendants, however, nowhere raised this objection as a basis for withholding production in their written discovery response. Pl. Mot., Exh. 11 at 5. Nor could they have done so: merely filing a motion to dismiss does not stay discovery obligations. If defendants had wished to obtain such a stay, they should have filed a motion as required by Fed. R. Civ. P. 26(c). There is, accordingly, no basis for defendants' refusal to produce.[2]

Second, defendants argue that they were confused by plaintiffs' use of the term "Rule 4(a)" rather than "Paragraph 4(a)" in referring to database indices generated as a result of a ruling in the Minnesota Attorney General tobacco lawsuit. Pl.

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[2]Defendants fleetingly suggest that plaintiffs' request is overbroad. Def. Opp. at 3. But they expressly rejected reasonable efforts to narrow this request at the parties' meet-and-confer. Exh. B at 4 (Request No. 2).

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Mot. at 5-6; First Document Request No. 3. Any possible claim to confusion, however, was resolved between the parties a month ago, as defendants admit. See Def. Opp. at 4.

Accordingly, defendants are left to complain only that their database indices are not relevant. Def. Opp. at 4. But plaintiffs are entitled to these indices to ensure that all potential sources of information in defendants' control have been searched. See Exh. B at 2 (Interrogatory 2); id. at 7-8 (electronic documents discussion). Such information is typically produced in antitrust and business tort litigation. Id. at 7-8. And precisely these same indices were compelled from UST in the Texas Attorney General suit. Pl. Mot. at 6; id., Exh. 16 at 6.[3] Production is particularly warranted in this case given that defendants have so far been unable to confirm whether they will produce electronically-stored data responsive to plaintiffs' document requests -- despite their express obligation under Fed. R. Civ. P. 34(a) to do so. See Exh. B at 7-8.

Third, defendants complain that plaintiffs' request for "documents concerning Conwood" is too broad. First Document Request No. 1; Def. Opp. at 3, n.1. But in an antitrust, unfair competition, and product defamation case plaintiffs are entitled to know what defendants say and plan about them. Pl. Mot. at 4-5. Plaintiffs have, moreover, offered to limit the scope of production to the files of a finite number of defendants'

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[3]Contrary to UST's suggestion (Def. Opp. at 3), the Texas litigation did include antitrust claims (Count IV) and, also as here, allegations of deceptive trade practices (Count XIV). See http://stic.neu.edu.Tx/1STAMD.htm (Texas complaint).

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executives; impose reasonable date restrictions; and forego responsive published third party documents in defendants' possession. Exh. B at 3 (Document Request No. 1). Based on their own document production, plaintiffs believe that a finite and manageable production can easily be made under these circumstances. Defendants do not contest the manageability of such a search but have nevertheless refused all good faith efforts to facilitate production.

D. Defendants suggest that their refusal to produce documents in response to plaintiffs' First Document Requests is immaterial since they are producing documents in response to certain of plaintiffs' Second Document Requests. Def. Opp. at 4-5. This is no defense, however, to defendants' failure to provide meaningful interrogatory answers. Besides, defendants are not at liberty to refuse responding to the First Document Requests simply because plaintiffs have issued a second set of document demands. Fed. R. Civ. P. 26(a) (parties may use any mix and sequence of discovery methods). Plaintiffs' First Document Requests are, moreover, deliberately designed to capture materials that may escape production under the Second Document Requests. Defendants do not (and cannot) suggest otherwise. Def. Opp. at 4 (complaining only that two sets overlap "in large part").[4]

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[4]Notably, defendants do not dispute that under Rule 37(a)(4) they are liable for fees and expenses if this motion is granted. Pl. Mot. at 13-14.

II. A PRETRIAL CONFERENCE REMAINS WARRANTED

Defendants have not responded to plaintiffs' motion for a pretrial conference. There is little question that such a conference is needed. Defendants continue to refuse any response to large numbers of written discovery requests: Interrogatories 1, 2; First Document Requests 1, 2, 3, 4, 7, 8, 10, 11, 12-14, 16-17; Second Document Request 34. See Exh. B. They have rejected plaintiffs' good faith efforts to narrow disputes over these requests. Id. They have declined to supply any meaningful Rule 26(a)(1)(A) witness list. They have refused to produce any calculation of their counterclaim damages as required by Rule 26(a)(1)(C). Until this last week, they had produced just one box of internal UST materials.[5] Unless the Court intercedes, UST's inaction will jeopardize the Court's deposition deadline (less than six months away) and, with it, the Court's scheduled trial date.

[5]On November 3, 1998 defendants produced 25 further boxes. But even then defendants refused to supply their materials in electronic form (as plaintiffs have), and they have been unable to confirm whether they will make a complete production of their responsive electronic data as required by Fed. R. Civ. P. 34(a). Exh. B at 7-8. Meanwhile, less than four weeks remain in the period allotted by the Court primarily to written discovery and plaintiffs have already produced or made available nearly 400 boxes.

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Conclusion

The Court should compel production of withheld documents and interrogatory answers, award plaintiffs their costs and expenses, schedule a pretrial conference for the earliest possible date, and award such other relief as the Court deems just and proper.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

16diii000921

CERTIFICATE OF SERVICE

I certify that on this 9th day of November, 1998, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

EXHIBIT D

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October 28, 1998

Via Facsimile

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James A. Keyte, Esquire
Chris T. Athanasia, Esquire
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Meagher & Flom, L.L.P.
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New York, NY 10022

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

Thank you for your letter of October 22, 1998.

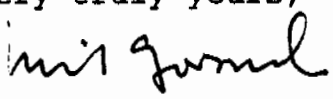
We strongly disagree with your characterization of the recent events. On October 13, 1998 defendants finally responded to discovery outstanding for six months. Yet in doing so defendants refused production of any documents in response to 18 distinct requests and refused any meaningful answers to 6 straightforward interrogatories. Defendants' refusal to supply discovery, first through Rule 26(a)(1) and now through Rules 33 and 34, is placing plaintiffs' ability to prepare for depositions and trial in increasing jeopardy.

Accordingly, we promptly wrote on October 16, 1998. We asked you to reconsider defendants' document request and interrogatory responses and inquired whether it would be useful to meet to explore ways to facilitate at least some production from defendants. On October 21, 1998, however, we received a five page letter which promised no change in defendants' position, offered no new documents or interrogatory answers, nowhere stated that defendants were even willing to consider amending their discovery responses, and instead purported to defend at length defendants' claimed ignorance of Rule 4(a)

indices and their absolute right to withhold information concerning computer databases. Defendants indicated that they were willing to meet, but listed as agenda items supposed defects in plaintiffs' production. We saw, in sum, no indication that defendants were willing to provide any of the discovery plaintiffs requested or state a recognized reason why such discovery is not being provided.

If, however, defendants are now willing to reconsider their incomplete responses to plaintiffs' interrogatories and first document requests by providing additional answers and documents, please let us know. If this is the case, we would of course be willing to discuss ways of narrowing differences between us and facilitating production. We would propose a telephone conference and are available October 29, the afternoon of October 30, or November 1.

Very truly yours,



Neil M. Gorsuch

cc: Richard C. Roberts, Esquire

EXHIBIT E

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November 5, 1998

Via Facsimile

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Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

This is to document the results of the telephone conferences Monday evening and Tuesday morning, November 2 and 3, 1998 between Chris Athanasia, John Reed, Steven Benz, Bill Conyngham, and myself. I also address a few additional outstanding discovery-related issues.

1. Plaintiffs' First Set of Interrogatories

Interrogatory No. 1 (Identify persons whose files were searched in response to Plaintiffs' First Request for Production of Documents). We explained that this interrogatory simply seeks to discovery whether defendants examined anyone's files before responding to our first document requests and, if so, whose files were reviewed. You stated that you will attach labels to any boxes produced reflecting the appropriate custodian. But this is no excuse for refusing to answer a simple and straightforward interrogatory. Besides, you may have searched the files of custodians for whom you have produced no documents. After a lengthy discussion, defendants refused to provide a list of persons whose files were searched, or to supplement their response in any way.

Interrogatory No. 2 (Describe generally defendants' computer systems). We explained that we need this information, inter alia, to ensure that all potential sources of information have been searched. We noted that defendants were forced to produce even more specific database information in the recent Texas litigation (also involving antitrust and tort claims); accordingly, there can be little burden associated with our more modest request. We also explained that, in our experience, lists of computer systems and databases are typically provided in antitrust and commercial litigation. This interrogatory appears particularly warranted given that, despite our direct inquiry, you were unable to confirm to us that defendants will produce all responsive electronic materials. See Point 4, infra. Nonetheless, defendants refused to provide a list of their computer systems, or to supplement their response in any way.

Interrogatory No. 3 (Identify defendants' moist snuff sales personnel). We explained that we were unable to see how identifying defendants' sales force personnel would be unduly burdensome, overbroad, or unlikely to lead to discovery of admissible evidence, as defendants' written response claimed. You eventually agreed to answer this interrogatory insofar as it seeks the name, address, title, job description, and dates of service for (a) all persons who have served as sales representatives, division managers, regional managers involved in the marketing and/or sale of defendants' moist snuff products, and (b) all persons who have been involved in training persons identified in (a). We are at a loss to understand why defendants declined to provide this information until now.

Interrogatory No. 4 (Identify distributors and retailers with whom defendants have or had an agreement). We explained that defendants' agreements with retailers and distributors are at the heart of plaintiffs' exclusive dealing claims. Complaint ¶ 28. You eventually agreed to answer this interrogatory insofar as it seeks the identity of all distributors and retailers of moist snuff products with whom any defendant has or had an agreement that concerns moist snuff racks (e.g., which company's racks may be installed, where a company's racks must be placed), slot allotment, or point of sale advertising. This includes, but is not limited to, all retailers or distributors who have participated in the Customer Alliance Program, Wholesaler Alliance Program, Retail Account Data Program, Copenhagen

Incentive Program, Retail Merchandising Placement, or the 2908 Free Standing Expandable Tobacco Center program.

We fail to understand why this information was not provided earlier. As you know, even when defendants' requests have been ambiguously drafted in our judgment, we have not declined production but instead attempted to produce immediately to the best of our ability. See, e.g., Plaintiffs' Objections and Responses to Defendants' First Request for Documents, Response to Request No. 1 (noting ambiguity of question, but agreeing to produce immediately).

Interrogatory No. 5 (Identify persons who have spoken to tobacco industry analysts concerning moist snuff issues). Defendants' written response claimed that this interrogatory was burdensome and overbroad. We questioned these claims, explaining that if defendants conform to industry practice, few of their employees have authority to speak with outside industry analysts. You were unable to state whether defendants' practices were different. In an effort to avoid dispute, however, we offered to narrow the scope of our request to identification of the top 25 persons, by name title, job description, and date of service, who have responsibilities which include speaking with tobacco industry analysts on matters pertaining to moist snuff. You agreed to respond to this interrogatory.

Interrogatory No. 6 (Identify persons who participated in preparation of interrogatories). After discussion, you agreed to provide the names, addresses, titles, job descriptions, and dates of service for all persons, except counsel, who participated in the preparation of these interrogatories. This includes, without limitation, any third parties (e.g., investigators). Again, we see no reason why this information was not provided earlier.

2. Plaintiffs' First Request for Production of Documents

Request No. 1 (Documents concerning Conwood). In an effort to avoid needless dispute, we offered to narrow this request to encompass the files of a finite list of defendants' executives. We offered to accept a reasonable time restriction. And we agreed to forego any published third party documents (e.g., Nielsen data) mentioning Conwood. Defendants rejected all of these attempts to facilitate production, and refused to provide any documents.

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Request No. 3 (Rule 4(a) and similar document indices). Though defendants claimed ignorance of 4(a) indices in their document response, we reminded you that less than two years ago USTC was subject to a Texas federal district court order expressly discussing 4(a) indices and ordering USTC to produce all similar "computerized or electronic databases relating to documents in its possession or control." Despite our efforts to facilitate some production, defendants refused to modify their document response in any way.

Request No. 4 (Documents concerning communications with tobacco industry analysts). We offered to narrow this request to encompass the files of a limited number of executives (e.g., to the 25 persons defendants now agree to identify as having contacts with tobacco industry analysts in response to Interrogatory No. 5). Inexplicably, defendants still refused to provide any documents.

Request Nos. 5 & 6 (Documents concerning defendants' agreements with retailers and distributors). In an attempt to obtain at least some discovery, we offered to narrow these requests to all agreements with distributors and retailers of moist snuff products that affect moist snuff racks (e.g., which company's racks may be installed, where a company's racks must be placed), slot allotment, or point of sale advertising. This includes, but is not limited to, Customer Alliance Program, Wholesaler Alliance Program, Retail Account Data Program, Copenhagen Incentive Program, Retail Merchandising Placement, or 2908 Free Standing Expandable Tobacco Center agreements. Defendants agreed to produce in response to this request.

Request No. 7 (Documents concerning revenues from the sale of moist snuff). We offered to narrow the scope of this request by time. We offered to limit the number of custodians to be

searched. Defendants, however, refused all of these efforts and declined any production. We find defendants' refusal troublesome. As we explained, these documents are highly relevant to plaintiffs' claims of monopoly pricing and to the issue of damages; in our experience, these materials are ordinarily produced in antitrust litigation.

Request No. 8 (Documents concerning market share for moist snuff). Again, we sought ways of narrowing this request to facilitate production. We offered to exclude third party publications (e.g., Nielsen data). We offered to limit the number of custodians to be searched. We offered to limit the applicable time period. Again, none of these efforts were successful and defendants continued to refuse production. Here, too, defendants' refusal to produce is untenable given that the issue of market share is at the heart of any Section 2 monopolization claim.

Request No. 9 (Organization charts, employee lists, job descriptions). Despite their initial refusal, in our conversation defendants agreed to produce all organization charts. Defendants also agreed to provide all employee lists and job descriptions, except for materials pertaining to support staff. As with Defendants' First Request for Documents, the period covered by this request is January 1, 1977 to present. We fail to see why such material was withheld until now.

Request Nos. 10 & 11 (Documents concerning defendants' activities in this district and the relationship between defendants). As you know, it is impossible for the Court to grant UST Inc.'s motion to dismiss for lack of personal jurisdiction until discovery is granted concerning defendants' contacts with Kentucky. Because we allege that UST Inc. directly controls the activities of the other corporate defendants, the Kentucky contacts of all defendants must be examined, as must document concerning UST Inc.'s relationship of control with the other corporate defendants. When we explained these points in our November 2, 1998 conversation, defendants agreed to amend their answer and provide documents concerning defendants' contacts with Kentucky. In our subsequent conversation on November 3, 1998, however, defendants retracted this offer and stood on their refusals to produce.

Request No. 12 (Documents concerning Smokeless Tobacco Council). Though defendants claimed burden, we explained that we have reason to believe that defendants have a reasonably limited set of responsive materials, based upon our own review of Conwood's analogous files. It also became evident from our discussion that counsel did not make even a modest attempt to determine how many responsive documents exist before interposing its boilerplate burden objection. Defendants also claimed that they could not see the relevance of these materials. We explained at length orally, as we have done in writing, the reasons why we believe them to be relevant and likely to lead to discovery of admissible evidence. Cf. Plaintiffs' Motion to Compel Production of Documents and Interrogatory Answers, for Sanctions, and for a Pretrial Conference at 9. Nonetheless, defendants still refused to produce any documents.

Request Nos. 12-14 (Documents concerning Swisher, Swedish Match, Philip Morris). Defendants claimed that these requests are overbroad and unduly burdensome. To avoid needless dispute, we offered to narrow them by custodian and time, and to exclude externally generated publications. Given our proposed limitations, we explained that a very limited set of responsive documents should exist based upon our review (and production) of Conwood's analogous materials. Defendants nonetheless refused to produce any documents.

Request No. 15 (Documents concerning policies, procedures, and training for sales representatives). After discussion, defendants agreed to produce all documents concerning policies, procedures, and training for sales representatives, excluding basic human resources materials (e.g., drug testing policies).

Request Nos. 16 & 17 (Documents concerning moist snuff distribution racks and quality). We explained that these requests bear directly on plaintiffs' allegations that defendants impose costs on rivals by changing rack design (Complaint ¶ 27) and that they disparage Conwood's products as inferior in quality (id. ¶ 19). We offered to narrow our requests by date to facilitate production. Despite the obvious relevance of the materials sought, however, defendants refused stood by their decision to refuse production of any documents.

3. Plaintiffs' Second Request for Production of Documents and Things

General Objections. You clarified for us that defendants will not withhold any documents as a result of General Objections Nos. 1-3, and that these objections are interposed solely for purposes of preserving defendants' rights. You further explained that any documents withheld as a result of General Objection No. 4 will be identified on a privilege log.

Request Nos. 5-7 (Documents concerning defendants' costs). We explained that these documents are relevant to plaintiffs' claims of price predation, monopoly pricing, and to damages. You agreed to revise your answers and provide full production.

Request No. 34 (Documents concerning defendants' contacts with Kentucky). We explained, again, that all of defendants' contacts with Kentucky are relevant and discoverable given our claim that UST Inc. directly controls and manages the affairs of each of the other defendant corporations who do business in Kentucky. You still refused production. See Point 2, Request Nos. 10 & 11, supra.

4. Other Matters

Amended Discovery Responses. In accord with the results of our conferences, we expect defendants to modify their written responses to Interrogatories 3, 4, 5, and 6 of Plaintiffs' First Set of Interrogatories; their written responses to Requests 5, 6, 9, and 15 of Plaintiffs' First Request for Production of Documents; and their written responses to Requests 5-7 of Plaintiffs' Second Request for Production of Documents and Things. Plaintiffs are entitled to defendants' revised responses in writing; we believe that they can and should be made promptly to avoid any future dispute. We would appreciate them by Monday, November 9, 1998. We believe that responsive documents should be produced at the same time, and in no event later than Monday November 16, 1998 — two weeks after our conferences, and seven months after our requests were first propounded.

Electronic Documents. As noted above, see Point 1 Interrogatory No. 2, supra, we specifically asked whether defendants plan to make full production of electronically-stored

information, including information concerning sales reports. Defendants indicated that they were not sure, but would respond as soon as possible. We ask for a response by Friday, November 6, 1998. If defendants are not planning to make such production, despite (a) Fed. R. Civ. P. 34(a), and (b) plaintiffs' document request, which employs a definition of "documents" encompassing all electronically stored media (e.g., computer databases, computer-stored voice mail, e-mail), we need to know immediately in order to seek appropriate relief.

Mode of Production. With the exception of certain voluminous and hard-to-copy materials, to date plaintiffs have delivered to defendants a free electronic copy of their discovery documents. In our conferences, however, defendants indicated that they will not reciprocate by providing electronic copies of their documents. Defendants also stated that in the future they will not even deliver hard copies of their documents to plaintiffs, but merely make materials available for plaintiffs to retrieve and copy at their expense. This represents an abandonment even of the modest courtesy defendants afforded in response to Rule 26(a)(1) by delivering hard copies of certain materials. Accordingly, in the future plaintiffs will likewise simply make their documents available for inspection and copying at defendants' expense.

As we outlined in our conversation, all of plaintiffs' documents are located in a repository in Fort Worth, Texas. Approximately 300 boxes are now ready for your review in electronic or paper form. We expect additional materials to become available for review in the near future. Suitable workstations will be made available for your use free of charge. You may designate for copying and delivery, at your expense, any documents you wish. Chris Athanasia indicated that he would contact us with proposed dates to visit plaintiffs' repository. We will make every reasonable effort to accommodate your schedules.

Plaintiffs' Rule 26(a)(1)(A) Disclosure. Pursuant to the express language in paragraph 15 of the Court's Protective Order, on October 16, 1998 plaintiffs redesignated their Rule 26(a)(1)(A) list as Tier 2 confidential information. Accordingly, access to plaintiffs' disclosure must be restricted to those persons identified in paragraph 7 of the Court's Confidentiality Order.

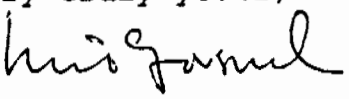
Chris Athanasia's letter of October 28, 1998 is very troubling. In it he states that, despite plaintiffs' redesignation, "defendants will continue" to meet and interview potential witnesses listed in plaintiffs' Rule 26(a)(1)(A). Please clarify immediately whether plaintiffs' Rule 26(a)(1)(A) disclosure, or information derived from it, is being used by or distributed to non-qualified paragraph 7 recipients. I hardly need to remind you that, under the Protective Order drafted by defendants and adopted by the Court, if defendants disagree with a confidentiality designation they may not unilaterally disregard that designation but must bring the matter to the Court's attention.

Athanasia Letter of November 2, 1998. I see nothing productive in responding to each of the inaccuracies and epithets in Chris Athanasia's letter of November 2, 1998. Two badly misrecorded points about our October 30, 1998 conversation do, however, warrant correction. Contrary to Chris's representation, I never stated that plaintiffs do "not intend to produce documents to Defendants as part of a Fed. R. Civ. P. 34 response." Instead, I explained that many documents responsive to defendants Rule 34 requests have already been produced in plaintiffs' voluminous Rule 26(a)(1) production as they have been kept in the ordinary course of business. I also explained that many additional responsive materials are being readied for production. As we discussed on November 2 and 3, nearly 300 such boxes are presently available for your inspection, with more to come. We have not, to put it mildly, experienced a reciprocal level of production from defendants.

Chris Athanasia's letter accuses me of "evad[ing] the question[s]" whether and when certain documents would be made available for production. This, too, is incorrect. In fact, I explained in our October 30 call that certain categories of documents were ready for inspection, that they were voluminous, but that Steven Benz had more detailed information about the content and quantity of these materials. I even volunteered to find out more about these documents and supply it to Chris in our next conversation, which we scheduled for Monday, November 2 — just three days off. And, as promised, when we spoke on November 2, Steven, Bill Conyngham, and I provided Chris with all relevant details concerning the documents that are now available, their

volume, and their location. We also expressed our willingness to make every reasonable effort to schedule a mutually convenient time for your review.

Very truly yours,



Neil M. Gorsuch

cc: Richard C. Roberts, Esquire

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November 5, 1998

Via Facsimile

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Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
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New York, NY 10022

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

This is to document the results of the telephone conferences Monday evening and Tuesday morning, November 2 and 3, 1998 between Chris Athanasia, John Reed, Steven Benz, Bill Conyngham, and myself. I also address a few additional outstanding discovery-related issues.

1. Plaintiffs' First Set of Interrogatories

Interrogatory No. 1 (Identify persons whose files were searched in response to Plaintiffs' First Request for Production of Documents). We explained that this interrogatory simply seeks to discovery whether defendants examined anyone's files before responding to our first document requests and, if so, whose files were reviewed. You stated that you will attach labels to any boxes produced reflecting the appropriate custodian. But this is no excuse for refusing to answer a simple and straightforward interrogatory. Besides, you may have searched the files of custodians for whom you have produced no documents. After a lengthy discussion, defendants refused to provide a list of persons whose files were searched, or to supplement their response in any way.

Interrogatory No. 2 (Describe generally defendants' computer systems). We explained that we need this information, inter alia, to ensure that all potential sources of information have been searched. We noted that defendants were forced to produce even more specific database information in the recent Texas litigation (also involving antitrust and tort claims); accordingly, there can be little burden associated with our more modest request. We also explained that, in our experience, lists of computer systems and databases are typically provided in antitrust and commercial litigation. This interrogatory appears particularly warranted given that, despite our direct inquiry, you were unable to confirm to us that defendants will produce all responsive electronic materials. See Point 4, infra. Nonetheless, defendants refused to provide a list of their computer systems, or to supplement their response in any way.

Interrogatory No. 3 (Identify defendants' moist snuff sales personnel). We explained that we were unable to see how identifying defendants' sales force personnel would be unduly burdensome, overbroad, or unlikely to lead to discovery of admissible evidence, as defendants' written response claimed. You eventually agreed to answer this interrogatory insofar as it seeks the name, address, title, job description, and dates of service for (a) all persons who have served as sales representatives, division managers, regional managers involved in the marketing and/or sale of defendants' moist snuff products, and (b) all persons who have been involved in training persons identified in (a). We are at a loss to understand why defendants declined to provide this information until now.

Interrogatory No. 4 (Identify distributors and retailers with whom defendants have or had an agreement). We explained that defendants' agreements with retailers and distributors are at the heart of plaintiffs' exclusive dealing claims. Complaint ¶ 28. You eventually agreed to answer this interrogatory insofar as it seeks the identity of all distributors and retailers of moist snuff products with whom any defendant has or had an agreement that concerns moist snuff racks (e.g., which company's racks may be installed, where a company's racks must be placed), slot allotment, or point of sale advertising. This includes, but is not limited to, all retailers or distributors who have participated in the Customer Alliance Program, Wholesaler Alliance Program, Retail Account Data Program, Copenhagen

Incentive Program, Retail Merchandising Placement, or the 2908 Free Standing Expandable Tobacco Center program.

We fail to understand why this information was not provided earlier. As you know, even when defendants' requests have been ambiguously drafted in our judgment, we have not declined production but instead attempted to produce immediately to the best of our ability. See, e.g., Plaintiffs' Objections and Responses to Defendants' First Request for Documents, Response to Request No. 1 (noting ambiguity of question, but agreeing to produce immediately).

Interrogatory No. 5 (Identify persons who have spoken to tobacco industry analysts concerning moist snuff issues). Defendants' written response claimed that this interrogatory was burdensome and overbroad. We questioned these claims, explaining that if defendants conform to industry practice, few of their employees have authority to speak with outside industry analysts. You were unable to state whether defendants' practices were different. In an effort to avoid dispute, however, we offered to narrow the scope of our request to identification of the top 25 persons, by name title, job description, and date of service, who have responsibilities which include speaking with tobacco industry analysts on matters pertaining to moist snuff. You agreed to respond to this interrogatory.

Interrogatory No. 6 (Identify persons who participated in preparation of interrogatories). After discussion, you agreed to provide the names, addresses, titles, job descriptions, and dates of service for all persons, except counsel, who participated in the preparation of these interrogatories. This includes, without limitation, any third parties (e.g., investigators). Again, we see no reason why this information was not provided earlier.

2. Plaintiffs' First Request for Production of Documents

Request No. 1 (Documents concerning Conwood). In an effort to avoid needless dispute, we offered to narrow this request to encompass the files of a finite list of defendants' executives. We offered to accept a reasonable time restriction. And we agreed to forego any published third party documents (e.g., Nielsen data) mentioning Conwood. Defendants rejected all of these attempts to facilitate production, and refused to provide any documents.

Request No. 2 (Documents concerning Proposed Tobacco Industry Settlement). Seeking to avoid dispute, we offered to narrow this request to encompass documents which concern the potential or actual effects of any settlement on competition in the marketplace. Such documents are relevant to show intent. United Mine Workers v. Pennington, 381 U.S. 657, 670 n.3 (1965). Defendants refused this offer and declined to produce any documents.

Request No. 3 (Rule 4(a) and similar document indices). Though defendants claimed ignorance of 4(a) indices in their document response, we reminded you that less than two years ago USTC was subject to a Texas federal district court order expressly discussing 4(a) indices and ordering USTC to produce all similar "computerized or electronic databases relating to documents in its possession or control." Despite our efforts to facilitate some production, defendants refused to modify their document response in any way.

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Request No. 7 (Documents concerning revenues from the sale of moist snuff). We offered to narrow the scope of this request by time. We offered to limit the number of custodians to be

searched. Defendants, however, refused all of these efforts and declined any production. We find defendants' refusal troublesome. As we explained, these documents are highly relevant to plaintiffs' claims of monopoly pricing and to the issue of damages; in our experience, these materials are ordinarily produced in antitrust litigation.

Request No. 8 (Documents concerning market share for moist snuff). Again, we sought ways of narrowing this request to facilitate production. We offered to exclude third party publications (e.g., Nielsen data). We offered to limit the number of custodians to be searched. We offered to limit the applicable time period. Again, none of these efforts were successful and defendants continued to refuse production. Here, too, defendants' refusal to produce is untenable given that the issue of market share is at the heart of any Section 2 monopolization claim.

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General Objections. You clarified for us that defendants will not withhold any documents as a result of General Objections Nos. 1-3, and that these objections are interposed solely for purposes of preserving defendants' rights. You further explained that any documents withheld as a result of General Objection No. 4 will be identified on a privilege log.

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4. Other Matters

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information, including information concerning sales reports. Defendants indicated that they were not sure, but would respond as soon as possible. We ask for a response by Friday, November 6, 1998. If defendants are not planning to make such production, despite (a) Fed. R. Civ. P. 34(a), and (b) plaintiffs' document request, which employs a definition of "documents" encompassing all electronically stored media (e.g., computer databases, computer-stored voice mail, e-mail), we need to know immediately in order to seek appropriate relief.

Mode of Production. With the exception of certain voluminous and hard-to-copy materials, to date plaintiffs have delivered to defendants a free electronic copy of their discovery documents. In our conferences, however, defendants indicated that they will not reciprocate by providing electronic copies of their documents. Defendants also stated that in the future they will not even deliver hard copies of their documents to plaintiffs, but merely make materials available for plaintiffs to retrieve and copy at their expense. This represents an abandonment even of the modest courtesy defendants afforded in response to Rule 26(a)(1) by delivering hard copies of certain materials. Accordingly, in the future plaintiffs will likewise simply make their documents available for inspection and copying at defendants' expense.

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Athanasia Letter of November 2, 1998. I see nothing productive in responding to each of the inaccuracies and epithets in Chris Athanasia's letter of November 2, 1998. Two badly misrecorded points about our October 30, 1998 conversation do, however, warrant correction. Contrary to Chris's representation, I never stated that plaintiffs do "not intend to produce documents to Defendants as part of a Fed. R. Civ. P. 34 response." Instead, I explained that many documents responsive to defendants Rule 34 requests have already been produced in plaintiffs' voluminous Rule 26(a)(1) production as they have been kept in the ordinary course of business. I also explained that many additional responsive materials are being readied for production. As we discussed on November 2 and 3, nearly 300 such boxes are presently available for your inspection, with more to come. We have not, to put it mildly, experienced a reciprocal level of production from defendants.

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volume, and their location. We also expressed our willingness to make every reasonable effort to schedule a mutually convenient time for your review.

Very truly yours,

Neil M. Gorsuch

cc: Richard C. Roberts, Esquire

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November 9, 1998

Via Federal Express
Hon. Thomas B. Russell
Judge, United States District Court
307 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., v. United States Tobacco Company, et al., CA No. 5:98CV-108-R

Dear Judge Russell:

Please find enclosed a courtesy copy of Plaintiffs' Reply in Support of Their Motion to Compel Production of Documents and Interrogatory Answers, For Sanctions, and For a Pretrial Conference.

Thank you for your attention to this matter.

Respectfully,

Neil M. Gorsuch

Enclosures

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November 9, 1998

Via Federal Express
Jeffery A. Apperson
Clerk of the Court
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., v. United States Tobacco Company, et al., CA No. 5:98CV-108-R

Dear Mr. Apperson:

Please find enclosed for filing an original and one copy of Plaintiffs' Reply in Support of Their Motion to Compel Production of Documents and Interrogatory Answers, For Sanctions, and For a Pretrial Conference.

I have enclosed an additional copy. Please date stamp and return this copy in the attached self-addressed, postage pre-paid envelope.

Thank you for your attention to this matter.

Respectfully,

Neil M. Gorsuch

Enclosures

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98CV-108(R)

CONWOOD COMPANY, L.P. ET AL **PLAINTIFFS**

vs.

UNITED STATES TOBACCO COMPANY, ET AL **DEFENDANTS**

MEMORANDUM OPINION & ORDER

Currently before the Court are three motions to dismiss filed by the defendant and several procedural motions filed by both parties. For the reasons that follow, Defendants' motion to dismiss for lack of personal jurisdiction (dkt. # 14) and motion to dismiss on the substance of the Complaint (dkt. # 30) are DENIED. Defendants' motion to dismiss claims barred under the *Noerr-Pennington* doctrine is MOOT based on the parties agreement that no claim can be based substantively on Defendants' participation in the "Global Tobacco Settlement."

This suit is filed under § § 4 and 16 of the Clayton Act, 15 U.S.C. § § 15, 26, which provide a private cause of action for violations of Sherman Act, 15 U.S.C. § 1 et.seq., and the Lanham Act, 15 U.S.C. § 1125. The Complaint also asserts various state tort claims.

I. MOTION TO DISMISS PARENT CORP. FOR LACK OF PERSONAL JURISDICTION

There are four defendants named in the Complaint, (1) United States Tobacco Company, (2) United States Tobacco Sales and Marketing Company., (3) United States Tobacco Manufacturing Company Inc., and (4) UST Inc. It is the fourth named defendant, UST Inc., that

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is the subject of this motion to dismiss.

Defendant asserts that Defendant UST Inc. is "simply a holding company that has never manufactured, sold or distributed moist snuff (or any other type of product) anywhere, including the Commonwealth of Kentucky." (Motion to Dismiss, dkt. # 14 at 1-2).

Plaintiff takes two approaches to personal jurisdiction in this case. First, Plaintiff argues that Clayton Act § 22 gives this Court personal jurisdiction with any party having minimum contacts anywhere in the United States. Second, Plaintiff argues that Defendant UST Inc. has sufficient minimum contacts with Kentucky to invoke Kentucky's long-arm statute, or at least to support an evidentiary hearing on the issue.

A. Jurisdiction under Clayton Act § 22

The Sixth Circuit has held that "In an action where service of process is effected pursuant to a federal statute which provides for nationwide service of process, the strictures of *International Shoe* do not apply." *United Liberty Life Insurance Co. v. Ryan,* 985 F.2d 1320, 1330 (6th Cir. 1993) (quoting *Haile v. Henderson Nat'l Bank,* 657 F.2d 816, 825 (6th Cir. 1981).

Clayton Act § 22, 15 U.S.C. § 22, provides for nationwide service of process,

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant.

This language is nearly identical to the language of the statute in question in *Ryan*, § 27 of the Exchange Act (15 U.S.C. § 78aa). The *Ryan* Court concluded that "section 27 [of the Exchange Act] confers personal jurisdiction in any federal district court over any defendant with

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minimum contacts to the United States." The *Ryan* Court remanded the case for a determination as to whether the plaintiff had adequately stated a claim under § 27 so that the personal jurisdiction could be based upon that statute.

Defendants reply that the requirements of the Clayton Act have not been met in this case because UST Inc. does not "transact business" in Kentucky, as required by § 22. However, under *Ryan,* the factual question in issue is whether the plaintiff has stated a substantive claim under the Clayton Act, not whether UST Inc. transacted business in Kentucky. The Complaint asserts that UST Inc. played an adequate role in the alleged antitrust violations. Therefore, dismissal of UST Inc. would be premature at this time.

B. Kentucky Long-Arm Statute

If jurisdiction cannot be based on Clayton Act § 22, Defendant UST Inc. correctly asserts that this Court's assertion of personal jurisdiction must be based on the Kentucky long arm statute, K.R.S. 454.210. Defendants assert that "even if Constitutional minimum contacts otherwise exist . . . personal jurisdiction is not proper unless the defendant committed some act sufficient to satisfy a relevant provision of the long-arm statute." (Motion to dismiss, dkt. # 14 at 3). However, both federal and Kentucky courts have rejected this analysis.

In *In re Air Crash Disaster at Gander, Newfoundland,* 660 F.Supp. 1202, 1206 (W.D. Ky. 1987), Judge Johnstone held that "The determination and reach of the Kentucky long arm statute and the reach of due process are one in the same." *Id.* (citing *Handley v. Indiana & Michigan Elec., Co.,* 732 F.2d 1265, 1268-1270 (6th Cir. 1980) additional citations omitted) *See also, Wright v. Sullivan Payne Co.,* 839 S.W.2d 250, 253 (Ky. 1992).

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Therefore, the only relevant question regarding personal jurisdiction under the Kentucky long arm statute is whether Defendant UST Inc. had constitutionally sufficient minimum contacts with Kentucky for this Court to assert personal jurisdiction over it.

Defendants attached an affidavit by a UST Inc. vice president stating that UST Inc. is and always has been a holding company, and has never transacted business in Kentucky. Defendants assert that Plaintiff cannot "rest on their bare allegations" that Defendant UST Inc. has sufficient minimum contacts with Kentucky. Defendant relies on *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 153 (6th Cir. 1997) in which the Sixth Circuit upheld a 12(b)(2) dismissal for lack of jurisdiction where the Defendant's sworn statements about its principal place of business, state of incorporation, and ownership of property could have been "easily refuted" by the plaintiff because it was a matter of public record.

In this case, Plaintiff's assertions about Defendants contacts with Kentucky are not matters of public record or "easily refuted." Therefore, dismissal of Defendant UST Inc. based on the Kentucky long-arm statute is premature.

II. MOTION TO DISMISS CLAIMS BARRED BY NOERR-PENNINGTON DOCTRINE

Defendants move to dismiss any claims to the extent that they are barred by the *Noerr-Pennington* Doctrine, under which "genuine attempts to influence passage or enforcement of laws are immune from antitrust scrutiny, regardless of the anticompetitive purpose behind such attempts." *Westmac, Inc. v. Smith,* 797 F.2d 313, 315 (6th Cir. 1986) (citing *United Mine Workers v. Pennington,* 381 U.S. 657, 669-71, (1965), *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137-39 (1961). "The right to petition, upon which

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the doctrine is based . . . extends to all departments of government, and therefore governs the access of citizens to courts and administrative agencies." *Id.* (citing *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510 (1972)).

The Complaint asserts in its general background section that Defendant "sought to involve itself in the 'Global Settlement' of litigation between cigarette companies and various state attorneys general and private plaintiffs' lawyers . . . UST, was the sole smokeless tobacco company permitted to participate in this initiative . . . UST sought to embed the Global Settlement with provisions that would cause disproportionate harm to its moist snuff rivals and, ultimately, drive them from the market." (Complaint, Dkt. #1 at 21-24). The specific Counts of the Complaint then incorporate the general background section by reference.

Plaintiff agrees that these allegations cannot form the basis of an antitrust claim under the *Noerr-Pennington* Doctrine. Since these allegations are not the sole basis for any single count of the complaint, this motion is MOOT. The Court reserves ruling on the admissibility of evidence of this nature.

III. MOTION TO DISMISS ON SUBSTANCE OF CLAIMS

The Sixth Circuit maintains a somewhat more liberal standard for 12(b)(6) motions to dismiss in antitrust cases than in other types of suits. A panel of the Sixth Circuit held in a § 1 Sherman Act case that "[i]n an antitrust case, 'where the proof is largely in the hands of the alleged conspirators, dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Michaels Building Co. v. Ameritrust Co.,* 848 F.2d 674, 681 (6th Cir. 1988) (internal citations omitted). While this is a § 2 case, the reasoning would be the

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same in that the proof would be largely in the hands of the alleged monopolist.

However, in an unpublished opinion the Sixth Circuit has affirmed a district court's granting of a 12(b)(6) motion in a Sherman Act case. In *Cleveland, Inc. v. Bluestone,* 820 F.2d 1225 (6th Cir. 1987) (table), 1987 WL 37754, the Court affirmed the district court's holding that the complaint was insufficient to allege a cause of action under § § 1 and 2 of the Sherman Act because "plaintiffs have not convinced this Court that the challenged conduct threatens 'competition' in the market place as opposed to one competitor . . . . Plaintiffs' complaint, at best, raises causes of action under state law." *Id.*

In *Bluestone,* the Plaintiff was a manufacturing company that filed an antitrust action against some of its former managers and two corporations formed by the former managers to compete against the plaintiff. The plaintiffs also sued a third corporation which owned the land on which the plaintiff's plant had been located. The Plaintiffs alleged that the defendants conspired to charge plaintiff an exorbitant rent, and wrongfully used confidential and trade secret information of plaintiff "enabling defendants to start a competing business without suffering the enormous development costs incurred [by plaintiff] in developing its business." *Id.* at *1.

Therefore, while the burden on defendants for 12(b)(6) motions to dismiss is greater in antitrust cases than some other causes of action, a Plaintiff must still allege conduct in the complaint that would constitute a violation.

As discussed below, the allegations in the Complaint in this case are distinguishable from *Bluestone* because the broad language of the Complaint alleges more than mere state torts but the exercise of monopoly power to unlawfully exclude competition. Therefore, a 12(b)(6) motion to

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dismiss is not appropriate in this case.

A. Sherman Act Claim

1. Overview

The complaint asserts a claim under § 2 of the Sherman Act, 15 U.S.C. § 2, which states

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

A private cause of action is authorized for violations of the Sherman Act by the Clayton Act, 15 U.S.C. § 15 (trebled damages and attorneys fees) and § 26 (injunctive relief).

To assert a claim under § 2 of the Sherman Act, a plaintiff must assert the defendant's "(1) possession of monopoly power in the relevant market and (2) its willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Rogers Associates, Inc., v. Gardner-Denver Co.*, 718 F.2d 1431, 1438 (6th Cir. 1983) (quoting *United States v. Grinnell,* 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-04 (1966). Therefore, the two elements of a Sherman Act § 2 claim can be summarized as (1) monopoly power, and (2) unlawful conduct.

For purposes of this motion only, Defendants have conceded that they have monopoly power in the relevant market. Therefore, for this motion to dismiss, the only issue is whether the conduct alleged by the Complaint constitutes a violation of § 2.

2. Exclusive Dealing

The Complaint alleges that Defendants "used its power as a monopolist to induce retail

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chains and stores across the United States to enter into written and oral agreements barring or restricting Conwood's products, racks, and point of sale advertising." (Complaint, Dkt. # 1 at 17). The Complaint then lists several examples of what it considers to be exclusive dealing contracts. (Complaint, Dkt. # 1 at 17–19).

The majority of exclusive dealing cases involve § 1, in which the "unreasonableness" of an agreement requires an analysis of the percentage of commerce foreclosed within a properly defined relevant market.

Federal Courts have found that exclusive dealing contracts can form the basis of the unlawful conduct element of § 2 claims. In *Hartz Mountain Corp. v. General Indus. Corp.*, 810 F.2d 795 (8th 1987), the Eighth Circuit upheld a jury verdict for the plaintiff in a § 2 exclusive dealing case. In *Hartz*, the defendant, a leading manufacturer of pet products, was found to have used its monopoly power to force its distributor to stop carrying a rival's products. The Court held that "the jury could reasonably have concluded that Hartz exhibited anticompetitive conduct not motivated by legitimate business concerns about [the distributor's] financial soundness but designed primarily to restrict the consumer's access to competing products." *Id* at 802.

The *Hartz* Court reasoned that "a business, especially one with a large degree of market power, may violate § 2 of the Sherman Act if it exercises its power to deal with others, including its own distributor, in a manner which is designed to unreasonably restrain trade." *Id.* at 803.

Defendant relies on *Bayou Bottling, Inc. v. Dr. Pepper Co.*, 725 F.2d 300, 304 (5th Cir. 1984) in which the Fifth Circuit granted summary judgment for the defendant where the plaintiff had complained that the defendant "does not permit retail outlets to place [plaintiff's] products in

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vending machines and coolers owned by [defendant] and that [defendant] provides free maintenance service on machines and coolers owned by businesses if the machines and coolers are stocked only with [defendant's] products." This fact pattern can be distinguished from the current case where the allegation is that Defendants used their monopoly power to completely exclude Plaintiff's products from retail stores.

Defendant also relies on *PepsiCo, Inc. v. Coca-Cola Co.*, 1998 WL 547088 (S.D. N.Y. 1998) for the proposition that exclusive dealing agreements cannot be unlawful unless it involves a threatened refusal to deal and is not terminable at will by the customer, "exclusive dealing arrangements that were terminable at will or of short duration [are] not barred by the antitrust laws because they left the relevant market up for grabs and because competitors were not foreclosed from the market but rather were encouraged to 'compete for the contract.'" *Id.* at *17 (citing *Paddock Publications, Inc., v. Chicago Tribune Co.*, 103 F.3d 42 (7th Cir. 1997) (dismissing exclusive dealing claim brought under § 1 of the Sherman Act because, inter alia, "other firms that want to enter the market can do so by competing at intervals for these contracts.") (additional citations omitted)).

Again, the Complaint in the current case alleges that the Defendants used their monopoly power to completely exclude Plaintiff's products from retail stores. Under these allegations, Plaintiff cannot compete at intervals for these contracts.

The Court need not decide at this time whether the specific examples listed in the complaint would be sufficient to support an exclusive dealing claim under § 2 of the Sherman Act. The Complaint alleges that the Defendants used their monopoly power to completely

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exclude Plaintiff's products from retail stores. These allegations are sufficient to overcome a 12(b)(6) motion to dismiss.

3. Predatory Pricing

The Complaint alleges that "UST has offered its own products below cost for no economic purpose other than to drive Conwood from those distribution outlets." (Complaint, Dkt. # 1 at 20). The Complaint further alleges that UST introduced its own discount product and marketed it below cost. The initial allegation of predatory pricing did not restrict the allegation to the discount brand.

"Predatory pricing differs from healthy competitive pricing in its motive a predator by his pricing practices seeks to impose losses on other firms, not garner gains for itself." *D.E. Rogers Associates, Inc., v. Gardner-Denver Co.*, 718 F.2d 1431, 1436 (6th Cir 1983) (quoting *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 823 (6th Cir. 1982)(internal citations omitted).

In order to establish a claim under the theory of predatory pricing, a plaintiff must demonstrate that the defendant "at least sacrificed present revenues for the purpose of driving [the plaintiff] out of the market with the hope of recouping the losses through subsequent higher prices." *Bayou Bottling, Inc., v. Dr. Pepper Co.*, 725 F.2d 300, 305 (5th Cir. 1984) (quoting *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 723 (5th Cir. 1975)).

In order to demonstrate that the defendant has sacrificed present revenues, it is necessary to establish that the defendant's prices were below marginal or average variable cost. *Bayou Bottling*, 725 F.2d at 305. The marginal or average cost in question must pertain to a single

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relevant market. *Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606, 613-14 (6th Cir. 1987).

Defendant also argues that the complaint only asserts a claim for predatory pricing of Defendants' discount brand. While the only specific example of predatory pricing in the Complaint involves Defendants' discount brand, a fair reading of the complaint alleges predatory pricing for all brands. "When retailers and distributors have persisted in carrying Conwood products, UST has offered its own products below cost for no economic purpose other than to drive Conwood from those distribution outlets." (Complaint, Dkt # 1 at 20).

Therefore, as discussed above regarding the exclusive dealing claim, the Court need not rule on whether evidence of the specific examples in the Complaint would be sufficient to support the predatory pricing claim. A fair reading of the Complaint makes dismissal on a 12(b)(6) motion premature.

4. State Torts/"Dirty Tricks"

The Complaint alleges that Defendants suppressed competition through the theft or destruction of Plaintiff's product, distribution racks, and point of sale advertising. The Complaint further alleges false representations by Defendants' representatives to "low-level store management" regarding the allocation of space for Plaintiff's products and displays.

The Complaint also alleges that Defendants have "regularly and systematically spread disparaging falsehoods about Conwood's products." (Complaint, Dkt. # 1 at 20). Plaintiff asserts that this is relevant to their Sherman Act claim as well as the basis of their Lanham Act claim.

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Defendants rely on *Brooke Group v. Brown & Williamson Tobacco,* 509 U.S. 209, 225, 113 S.Ct. 2578, 2589 (1993), for the proposition that a federal antitrust claim cannot be based on mere state law violations absent a "core" antitrust claim, such as exclusive dealing or predatory pricing. This is too narrow a reading of *Brown & Williamson Tobacco.*

> [W]e held in the Sherman Act § 2 context that it was not enough to inquire "whether the defendant has engaged in 'unfair' or 'predatory' tactics"; rather, we insisted that the plaintiff prove "a dangerous probability that [the defendant] would monopolize a particular market." *Spectrum Sports,* 506 U.S. at 459, 113 S.Ct. at 892. Even an act of pure malice against by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt v. Crumboch,* 325 U.S. 821, 826, 65 S.Ct. 1545, 1548 (1945).

Brown & Williamson Tobacco, 509 U.S. at 225.

In this case, Defendant allegedly has 83% market share, as opposed to the 30% held by the defendant in *Brown & Williamson Tobacco*. The Complaint in this case alleges "acts of pure malice" by a firm using its significant market power to conduct a regular and systematic campaign to exclude Plaintiff from the relevant market.

Defendants also rely on a Fourth Circuit opinion which held that "courts should be circumspect in converting ordinary business torts into violations of antitrust laws. To do so would be to create a federal common law of unfair competition which was not the intent of the antitrust laws." *ABCOR Corp. v. AM International, Inc.,* 916 F.2d 924, 931 (4th Cir. 1990) (quoting *Military Services Realty, Inc., v. Realty Consultants of Virginia, Ltd.,* 823 F.2d 829, 832 (4th Cir. 1987) (internal citations omitted). The *ABCOR* Court determined that the "sporadic activity" identified by the Plaintiffs did not amount to an antitrust violation and granted the Defendant's motion for summary judgment.

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Again, Plaintiff in this case has argued that the anticompetitive conduct was "routine and systematic." Defendants argue that merely pleading that the alleged conduct was "routine and systematic" and "either directed or tacitly approved at the corporate level" cannot be sufficient to "federalize" state torts.

Neither party cites to a case that addressed the issue as to whether "routine and systematic" tortious conduct could be the sole basis of a Sherman Act claim absent a more traditional form of anticompetitive conduct such as predatory pricing or exclusive dealing. However, since the motion to dismiss the claims based on alleged exclusive dealing and predatory pricing is denied, the Court need not address this issue at this time.

B. Lanham Act Claim

Count II of the Complaint asserts a claim under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), which states, *inter alia*,

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term name, symbol or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, which . . . . (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

To state a claim for false advertising under the Lanham Act, 15 U.S.C. § 1125, a plaintiff must show

> (1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that is likely to influence the purchasing decision; (4) the defendant

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> caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured in as a result of the false statement, either by direct diversion of sales from itself to defendant or by a lessening of the goodwill associated with its products.

Sothaland Sod Farms v. Stover Seed Co., 108 F.3d1134, 1139 (9th Cir. 1997) (citations and footnotes omitted).

Defendants assert that the Lanham Act claim must be dismissed because the Complaint does not allege that any false claims were made in "commercial advertising" which is necessary to state a claim under the Lanham Act. However, federal courts have recognized that "commercial advertising or promotion" under the Lanham Act is "broader than merely the 'classic advertising campaign.'" *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1384 (5th Cir. 1996) (citations omitted). In *Seven-Up*, the Fifth Circuit adopted the following requirements for establishing "commercial advertising or promotion" under the Lanham Act:

> (1) commercial speech; (2) By a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services. . . . (4) [the representations] must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

Id. (citations omitted).

In *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379 (5th Cir. 1996), the Fifth Circuit held that sales presentations to bottlers that distributed both parties products that sought to convince the bottlers to switch brands of a particular flavor constituted "commercial advertising or promotion" under the Lanham Act. The Court held that since the presentation was made to every bottler that distributed the products of both parties, the presentation "was a far cry from the individualized comments held by some courts to fall outside the meaning of commercial advertising. . . ." *Id.* at 1386. Defendant distinguishes *Seven-up*, arguing that this Complaint

does not assert that sales presentations consisting of "charts, graphs, and overhead projection displays" were made to "each and every one" of the relevant purchasing public in the relevant market. (Response, dkt. # 34 at 22).

Count II of the Complaint states: "UST has made false and misleading representations of fact in interstate commerce and in connection with goods or services in commercial advertising or promotion." (Complaint, dkt. # 1 at 26). The Complaint also directly asserts that "UST has regularly and systematically spread disparaging falsehoods about Conwood's products." (Complaint, dkt. # 1 at 19). As discussed above, these allegations support not only a claim under the Lanham Act, but also could support Plaintiff's Sherman Act claims.

Defendants argue that "Plaintiffs' conclusory allegation that isolated instances of product defamation are 'routine and systematic' does nothing to cure the deficiency of the Complaint." (Defendants' Response, dkt. # 34 at 21), and cite several federal cases that held that individualized comments cannot constitute a Lanham Act violation.

At this stage of the proceedings, it is Defendants' classification of the allegations as "isolated instances" that is itself conclusory. While the examples listed in the complaint, standing alone, would not be sufficient to state a claim under the Lanham Act, the allegations that the conduct was "routine and systematic" is sufficient to overcome a 12(b)(6) motion to dismiss.

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THEREFORE, IT IS ORDERED:

(1) Defendants' motion to dismiss for lack of jurisdiction (dkt. # 14) is **DENIED**.

(2) Defendants' motion to dismiss claims barred under the *Noerr-Pennington* Doctrine (dkt. # 15) is **MOOT**; Plaintiff's motion to file a sur response (dkt. # 24) is **MOOT**.

(3) Defendants' motion to dismiss and/or judgment on the pleadings (dkt. # 30) is **DENIED**; Defendants' motion to file reply memorandum in excess of 15 pages (dkt. # 34) is **GRANTED**.

This the 19 day of November, 1998.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED
NOV 19 1998
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98CV-108(R)

CONWOOD COMPANY, L.P. ET AL **PLAINTIFFS**

vs.

UNITED STATES TOBACCO COMPANY, ET AL **DEFENDANTS**

ORDER

Currently before the Court are Plaintiff's motions to compel (dkt. #'s 29 (sealed) and 35). Pursuant to 28 U.S.C. § 636(b)(1)(A), all discovery matters, including the motions to compel, are referred to United States Magistrate Judge James D. Moyer for his determination.

IT IS SO ORDERED.

This the 19 day of November, 1998.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED
NOV 19 1998
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT OR FOR JUDGMENT ON THE PLEADINGS

Defendants, United States Tobacco Co., et al. ("USTC"), respectfully request that this Court dismiss plaintiffs' entire complaint under Fed. R. Civ. P. 12(b)(6) or, in the alternative, enter judgment on the pleadings for Defendants under Fed. R. Civ. P. 12(c).

PRELIMINARY STATEMENT

This lawsuit is an ill-conceived attempt by Conwood Company, L.P., et al. ("Conwood") to make a federal case out of alleged conduct that is either procompetitive and encouraged by the antitrust laws or, at most, constitutes the type of business tort that is, and should remain, the province of state court actions.[1]

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[1] On June 12, 1998, USTC filed a 12(b)(6) motion to dismiss that part of the Complaint alleging anticompetitive conduct based on USTC's involvement in the so-called "Global Settlement." This motion is directed against the remainder of the Plaintiffs' Complaint.

Taking Plaintiffs' factual allegations as true, established law under Section 2 of the Sherman Act compels the following conclusions:

- USTC has not engaged in predatory pricing in the alleged "moist snuff market" with the promotion of its Red Seal brand because the alleged promotion involved one of many USTC brands, priced above USTC's cost, for a limited promotional period of time;[2]

- USTC may, as a matter of law, enter into "exclusive dealing agreements" with retailers who wish to do so and may offer various incentive programs to encourage retailers to carry and promote USTC products;[3]

- Run-of-the-mill alleged business torts — conversion, theft, disparagement — cannot violate the antitrust laws even if they may, theoretically, violate state law; and

- USTC cannot violate Section 43(a) of the Lanham Act where the alleged false representations were not made in the context of commercial advertising.

Stripped to its essence, Conwood's Complaint is that USTC had a promotion for one of its new smokeless tobacco brands and aggressively competes for retail shelf space, and that, from time to time, some USTC sales personnel — like Conwood's — allegedly crossed the line of rough-and-tumble competition. This, however, is precisely what a highly competitive marketplace looks like, even where one of the participants is an alleged monopolist. Indeed, the law has long been established that every company in the marketplace, regardless of its size and

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[2] For purposes of this motion only, USTC will assume, arguendo, that the relevant antitrust market is the national market for the sale of moist snuff, and USTC will assume, arguendo, that USTC has monopoly power in that market. Compl. ¶ 1. A more appropriately defined relevant market, however, would include — at a minimum — other smokeless tobacco products (such as loose leaf tobacco products) of which Conwood is the largest seller.

[3] As a factual matter, USTC has no exclusive dealing agreements with retailers, but will assume that it does for purposes of this motion.

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past success, is entitled to compete vigorously and creatively against all its rivals, even its smaller ones.

In sum, even if this Court accepts the dubious proposition that the stagnation or decline of Conwood's sales is somehow attributable to USTC, the antitrust laws — which are for the protection of consumers, not Conwood — both condone and encourage USTC's competitiveness and the resulting effect on Conwood's sales share. The Court should also dismiss Conwood's purely state law claims based on theft, conversion and disparagement. And before Conwood pursues those non-antitrust claims, it may wish to consider the glass house in which it lives and then, if it is still willing to throw the first stone, it should do so in state court.

RELEVANT ALLEGATIONS IN THE COMPLAINT

As noted above, for purposes of this motion only, USTC does not dispute the relevant market for "moist snuff" or USTC's alleged share of that market. Accordingly, the only alleged facts relevant to this motion are those that purport to describe USTC conduct that violates Section 2 of the Sherman Act. That alleged conduct is as follows:

Predatory Pricing Allegations. In Paragraphs 30 and 31 of the Complaint, Conwood alleges that Defendants began "introducing its own discount product, Red Seal." Conwood also alleges that Defendants introduced their products through promotional offers, including a product "give away," Compl. ¶ 31, where consumers received "4 rolls (40 cans) of Red Seal for approximately $14, or roughly 35 cents a can...." Id. Conwood makes no allegation concerning the duration of any promotional offer, and Conwood's predatory pricing allegations are limited to Defendants' price-value brand, Red Seal.

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Exclusive Dealing Agreements. In Paragraph 28 of the Complaint, Conwood alleges that Defendants enter into "exclusive dealing agreements" with retailers whereby the retailers "give[] UST control over the entire moist snuff section of the store"; "permit[] [Defendants] to install [USTC] distribution racks; remove Conwood's distribution racks; force Conwood's products into UST racks; and restrict the space and placement of Conwood products in its racks." Id. Conwood also alleges that the retail stores "prohibit[] Conwood in-store promotions and point of sale advertisements." Id.

Conversion, Theft, and Disparagement. In Paragraphs 24, 25, and 26 of the Complaint, Conwood alleges that Defendants' engage in several types of business torts. Specifically, Conwood alleges that Defendants have taken Conwood products from display racks, discarded or defaced Conwood display racks, and discarded and defaced Conwood point of sale advertising. Compl. ¶ 24. Conwood also alleges that Defendants have made misrepresentations to retail store employees in order to remove or exclude Conwood products from those stores. Compl. ¶¶ 25, 26.

Product Defamation. In Paragraph 29 of the Complaint, Conwood alleges that Defendants disparage Conwood products by stating, inter alia, that they are "stale," or "out of date," or that they have been "discontinued." Conwood also alleges that Defendants have "perpetuated a myth that Conwood products contain fiberglass and are full of tobacco stems." Id. Conwood does not allege that Defendants made any misleading statements in any commercial advertising that was sufficiently disseminated to the public.

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ARGUMENT

Under Fed. R. Civ. P. 12(c), a district court must grant a motion for a judgment on the pleadings if "no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." Paksvan v. City of Cleveland Service, 946 F.2d 1233, 1235 (6th Cir. 1991). Although a court, for purposes of this motion, must construe the complaint "in the light most favorable to plaintiff, and its well-pleaded facts must be accepted as true," Garcia v. City of Oakwood, 99 F.3d 1138, 1996 WL 593602, **2 (6th Cir. Oct. 15, 1996), the Court does not have to accept as true "legal conclusions or unwarranted factual inferences." Id.; see also Blackburn v. Fisk University, 443 F.2d 121 (6th Cir. 1971) ("we are required to accept only the well pleaded facts as true, not the legal conclusions that may be alleged or that may be drawn from the well pleaded facts").

Under these standards and based on the pleadings, Conwood's claims must fail as a matter of law. Accordingly, Defendants are entitled to judgment as a matter of law under Rule 12(c) of the Federal Rules of Civil Procedure.

I. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON PLAINTIFF'S SHERMAN ACT SECTION 2 CLAIMS

Conwood's Section 2 monopolization claim reflects the desperate strategy of a competitor that would rather sue its larger rival than have to compete against it. Specifically, every alleged act of monopolization in the Complaint is either perfectly lawful under the antitrust laws or, as a basis of a potential state court squabble, does not implicate the antitrust laws at all.

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A. Plaintiffs' Section 2 Claim Based On Allegations Of Predatory Pricing Must Fail As A Matter Of Law

Conwood alleges that Defendants sold Red Seal, a generic or "price value" moist snuff brand, at a price "less than UST[C]'s costs." Compl. ¶ 31. Based on this conclusory allegation, Plaintiffs apparently believe that they have adequately pled that USTC has monopolized the "market" for moist snuff through predatory pricing. Id.

Judgment as a matter of law as to this claim is warranted for three reasons. First, even if the evidence were to support the factual allegations asserted "on information and belief," Conwood's predatory pricing claims are based on an improper measure of below-cost pricing. Second, because Conwood's claim describes, at most, an introductory promotional "give away" of the Red Seal brand (Compl. ¶ 31) the alleged conduct cannot, as a matter of law, constitute predatory pricing. Third, even assuming arguendo that the Red Seal promotion pricing could be labeled "predatory," such temporary promotional pricing of a generic product in discrete geographic areas (see Compl. ¶ 31) could not have had a significant anticompetitive effect on the alleged national market for all moist snuff products. Each of these reasons independently requires dismissal of Conwood's Section 2 claim to the extent it is based on allegations of predatory pricing.

1. Plaintiffs' Claim Is Based On An Improper Measure Of "Below Cost"

In order to establish a predatory pricing claim, Conwood must be able to prove that the alleged predatory prices were below a proper measure of actual production cost. D.E. Rogers Assoc., Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1435 (6th Cir. 1983); see also III Areeda & Hovenkamp, Antitrust Law ¶ 738a ("a predatory price requires objective evidence of prices that are below 'some measure of incremental cost'") (quoting Brooke Group Ltd. v. Brown &

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Williamson Tobacco Corp., 509 U.S. 209 (1993)). Critically, however, the relevant measure for pleading predatory pricing is not a comparison of the price and cost of a single product such as Red Seal, but rather the price and cost of the entire line of products sold by defendant in the relevant market — here, the alleged national market for all moist snuff products. Compl. ¶ 1.

Indeed, where, as here, a plaintiff does not even allege that the product in question is sold in a separate relevant market, a predatory pricing claim as to that product must fail as a matter of law, and summary disposition is required. The Sixth Circuit's decision in Directory Sales Management Corp. v. Ohio Bell Telephone, 833 F.2d 606 (6th Cir. 1987) is on point. There, the plaintiff alleged that defendant violated Section 2 of the Sherman Act because it sold "first listing" advertising below cost. The Sixth Circuit specifically pointed out that the plaintiff alleged that the relevant product market was the entire "yellow pages" market, not the "first listings" market. The court then affirmed summary judgment for the defendant because plaintiff could not show that defendant's overall charges for all yellow pages advertising space, rather than its charges for first line advertising, were priced below cost. Id. at 614. Thus, as the court stated, "the relevant inquiry should be [the defendants'] operations taken as a whole." Id.

Similarly, in a case with allegations substantially the same as those made by Conwood here, Liggett Group v. Brown & Williamson Tobacco Corp., 748 F. Supp. 344 (M.D.N.C. 1990), aff'd, 964 F.2d 335 (4th Cir. 1992), aff'd, 509 U.S. 209 (1993), the court awarded the defendant judgment notwithstanding the verdict on the plaintiff's predatory pricing claim. In that case, the parties stipulated to a relevant market defined as the market for all cigarettes in the United States. Id. at 362. The plaintiff, however, alleged that the defendant

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engaged in predatory pricing of its generic brand cigarette only. The court analyzed the plaintiff's predatory pricing claim in the context of the stipulated market for all cigarettes and held that, where plaintiff and defendant "were both profitable, full product line competitors with access to the same customers and markets,... applying the average variable cost test solely to [defendant's] generic cigarettes would be inappropriate." Id. at 363. As the court explained,

> If the average variable cost test is applied solely to generic cigarettes and antitrust injury is inferred from this below-cost pricing, then [plaintiff] is unjustly rewarded for failing to compete on price with its branded cigarettes. Under this scenario, [plaintiff's] antitrust injury would come from its unwillingness to charge a competitive price for its branded cigarettes and not from [defendant's conduct].

See also id. at 363 n.44 (collecting "numerous" cases "refus[ing] to apply the average variable cost test to a single product line because there could be no competitive injury in the relevant market even if that product line was priced below cost"); Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300, 305 (5th Cir. 1984) (where plaintiff and defendant were full-line soft drink dealers in the soft drink market, predatory pricing claim must include the full product line, not just 32-ounce returnable bottles, and thus judgment as a matter of law was appropriate); Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 856 (9th Cir. 1977) (same); see also III Areeda & Hovenkamp, ¶ 742d (when a defendant produces multiple products in the same plant, and significant variable as well as fixed costs are common to both the allegedly predated and non-predated products, predation requires a showing that the defendant is pricing below average cost across its entire product line).

Here, the alleged market is the national market for moist snuff. Compl.¶ 1. Plaintiffs' predatory pricing allegations, however, include only USTC's Red Seal price-value

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brand. Compl. ¶ 31. Plaintiffs do not and cannot allege any below-cost pricing of any kind with respect to any other USTC moist snuff product or products, including over a dozen different premium brands. More significantly, Plaintiffs do not and cannot allege that USTC engaged in any predatory pricing with respect to USTC's entire line of products taken as a whole. Thus, even assuming Plaintiffs' allegations with respect to the pricing of Red Seal to be true, which they are not, allegations of below-cost pricing of USTC's price-value product only — which is merely one of many products sold by USTC in the alleged national moist snuff market (see Compl. ¶¶ 12-19) — cannot violate Section 2 of the Sherman Act. Accordingly, Plaintiffs predatory pricing claim must fail as a matter of law.

2. The Alleged Promotional Conduct Cannot, As A Matter Of Law, Constitute Predatory Pricing

It also is clear that Plaintiffs' allegations, at most, describe a promotional offering of the Red Seal brand.[4] Promotional prices, however, are lawful - no matter what the price-cost relationship - when they only last long enough for consumers to judge and accept or reject the promoted product. See, e.g., Airweld v. Airco, 742 F.2d 1184, 1194 (9th Cir. 1984) (even if prices were below cost, promotional below-cost pricing is not a Section 2 violation); Buffalo Courier-Express v. Buffalo Evening News, 601 F.2d 48, 55 (2d Cir. 1979) (free introductory offerings for two or even five weeks could not constitute predatory pricing); Lormar, Inc. v. Kroger Co., 1979-1 Trade Cas. ¶ 62,498, 1979 WL 1593, *6 (S.D. Ohio) (promotional items offered below cost are quite common and do not constitute a violation of Section 2). Indeed,

[4] Areeda and Hovenkamp define promotional pricing as "a temporary low price designed to induce patronage with the expectation that the customer will continue purchasing the product in the future at a higher price." III Areeda & Hovenkamp ¶ 746.

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sales at prices below average cost cannot be predatory unless they cover a "significant" enough time period to imply that they were not merely promotional. See In re ITT, 104 F.T.C. 280, 404 (1984) (promotional period must be "sufficiently long to make it likely that sales at prices below average variable cost could in fact force equally efficient firms to exit. Discontinuous or episodic instances of sales at such prices are unlikely to satisfy this standard."). Accordingly, to establish a predatory pricing claim, it is insufficient for a plaintiff merely to allege, as Plaintiffs do here, that a defendant priced below average cost. Compl. ¶ 31. A plaintiff must also allege that the below-cost pricing continued for a period of time beyond a promotional pricing period and into a time frame where it threatens the viability of equally efficient rivals. See ITT, 104 F.T.C. at 404.

Here, Conwood does not and cannot allege that USTC's introductory "give away" (Compl. ¶ 31) was anything more than a temporary promotion of the Red Seal brand during its introduction into the marketplace. Absent some supportable factual allegations that the complained-of conduct was continuous for a legally sufficient period of time, Plaintiffs' predatory pricing claim must fail as a matter of law.[5]

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[5] Plaintiffs' conclusory allegation that the Red Seal promotion was a "scheme to undercut and eliminate [Plaintiffs' price-value product] from the marketplace" is not only insupportable, it also does nothing to cure the deficiency in Plaintiffs' predatory pricing claim. Moreover, this allegation is belied by the videotape Plaintiffs attached as Exhibit C to their Complaint, which clearly shows USTC sales representatives approaching customers purchasing Conwood's premium brands, not just its price-value product, during the Red Seal promotion at issue. In any event, the law is clear that temporary promotions structured around below-cost pricing, even if aimed at winning customers from a competitor, are perfectly lawful means of competition. See text above.

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3. Any Effect On The Alleged Market Could Only Be *De Minimis*

Finally, even if Plaintiffs could establish a predatory pricing violation limited to the Red Seal brand — which, as demonstrated above, they cannot as a matter of law — Plaintiffs cannot adequately plead anticompetitive harm to the alleged relevant market. Judgment as a matter of law is appropriate where, as here, an antitrust plaintiff cannot establish more than a de minimis effect on competition in the relevant market.

For example, in Stratmore v. Goodbody, 866 F.2d 189 (6th Cir. 1989), the Sixth Circuit affirmed summary judgment for defendant where the complained-of conduct had only a "negligible" effect on competition. Id. at 194. In that case, the court assumed an antitrust violation and assumed the narrow market definition asserted by plaintiff, but found that the complained-of conduct did not appreciably suppress competition in that market. Id.; see also William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 461 F. Supp. 410 (N.D. Cal. 1978) (because effect of pricing violation on the alleged market was "so minimal in relation to [defendant's] market-wide sales, there could be no substantial effect on competition"); Collins v. Associated Pathologists, Ltd., 844 F.2d 473, 478 (7th Cir. 1988) (upholding summary judgment in favor of the defendants where the complained-of conduct had a negligible effect on the entire relevant market).

Here, Plaintiffs' allegations, on their face, indicate that the complained-of conduct could not have had any appreciable anticompetitive effect in the alleged market. First, Plaintiffs' allegations are limited to the Red Seal brand (Compl. ¶ 31), which has been on the market for only a matter of months and comprises less than 1% of the alleged moist snuff market. Second, Plaintiffs' allegations of predatory pricing are further limited to two discrete geographic areas,

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Louisiana and Mississippi. Compl. ¶ 31. Even accepting Plaintiffs' allegations as true, which they are not, and even assuming the alleged conduct could constitute an antitrust violation, which it could not, Plaintiffs simply cannot establish that conduct limited to such a small segment of the overall alleged relevant market — in terms of both product and geographic area — could have any significant anticompetitive effect in the alleged national market for moist snuff. Accordingly, judgment as a matter of law is appropriate.

B. Plaintiffs' Section 2 Claim Based On Allegations Of "Exclusive Dealing" Must Fail As A Matter Of Law

Plaintiffs also allege that USTC has monopolized the national moist snuff market through "exclusive dealing agreements" with retailers. Conwood, of course, has a difficult time describing the nature of these exclusive dealing agreements because USTC has none in the traditional — and perfectly lawful — sense of the term.

Instead, Plaintiffs describe four categories of "exclusive dealing agreements"[6] that USTC allegedly has with various retail stores. These include the following: (i) USTC's category management relationships with several large-scale retail chains; (ii) what Plaintiffs refer to as the "Copenhagen Incentive Program"; (iii) the "Free Standing Display #2908 Placement Agreement"; and (iv) USTC's "Customer Alliance Program." Compl. ¶ 28. Even a cursory review of Section 2 jurisprudence, however, confirms that these types of "agreements" and activities are earmarks of vigorous competition and are to be encouraged, rather than condemned.

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[6] It should be noted that none of the documents cited by Plaintiffs, including those attached as exhibits to the Complaint, is an "exclusive agreement" in terms of display racks, point of sale advertising, or products.

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In Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300 (5th Cir. 1984), the court affirmed judgment as a matter of law for defendants on plaintiff's Sherman Act Section 2 claims, which were based on essentially the same facts alleged by Plaintiffs here. In that case, plaintiff, a competing wholesaler, complained that defendant wholesaler (with a 75% market share) monopolized or attempted to monopolize the soft drink market by entering into several categories of "exclusionary" agreements with retailers, including an agreement to provide free service and maintenance if vending machines and coolers were not stocked with plaintiff's products. Id. at 304 n.2. The effect of these agreements, plaintiff alleged, was to bar or restrict plaintiff's products from defendant's vending machines and coolers and also from the retailers' shelf space. Id. at 304. The court rejected plaintiff's arguments, holding that "these practices are not barred by the antitrust laws," even if defendant was a monopolist and even if the effect was to exclude plaintiff's products. Id. As the court stated, "[i]t ought to be apparent that a monopolist's right to compete is not limited to actions undertaken with an altruistic purpose. Even monopolists must be allowed to do as well as they can with their business." Id. (emphasis added). The court specifically rejected plaintiff's implication that the antitrust laws somehow entitled plaintiff to more shelf space in the retail stores. Id.

Similarly, in Beverage Management, Inc. v. Coca-Cola Bottling Corp., 653 F. Supp. 1144 (S.D. Ohio 1986), the court rejected plaintiff's claim that it had been "barred from gaining exposure for its products" and "illegally foreclosed" from the market by defendant Coca-Cola's agreements with retailers, including volume incentive and promotion allowances. Id. at 1152. Plaintiff argued, as Conwood alleges here, that defendant's agreements with retailers were, in effect, exclusive dealing arrangements that excluded plaintiff from a segment of the

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market. Id. at 1153. The court rejected plaintiff's claims. Relying on the Supreme Court's admonition that "the antitrust laws were enacted for the protection of competition, not competitors," id. at 1155 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)), as well as on prevailing authority that "competitive marketing practices" do not violate the antitrust laws, "even when the challenged party enjoyed a monopoly in the relevant market," id., the court stated:

> [E]ven were Coca-Cola a monopolist in the relevant market ..., it would still have the option of employing ordinary marketing methods available to all in the market to make its promotional offers the most attractive to [retailers].

Id. at 1156. See also Northeastern Tel. Co. v. AT&T, 651 F.2d 76, 93 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982) (monopolist's use of "ordinary marketing methods available to all in the market" does not violate the antitrust laws); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 287 (2d Cir. 1979) (promotional efforts by defendant with substantial market power did not violate the antitrust laws).

Here, Plaintiffs merely enumerate various marketing agreements USTC is alleged to have with certain retailers. According to Plaintiffs' allegations, the result of these alleged agreements is to "permit [USTC] to install its own distribution racks" (Compl. ¶ 28(a)), to "restrict the space and placement of Conwood products" (Compl. ¶ 28(a)), to allow USTC to "have primary positioning of all smokeless tobacco POS [advertising] (Compl. ¶ 28(b)), to give USTC products "positioning on the stand's top shelf, [while] competitors are relegated to lower, less visible racks" (Compl. ¶ 28(c)), and to "give UST[C] control of at least 80% of all moist snuff shelf space within the store." (Compl. ¶ 28(d)). Significantly, Plaintiffs do not allege, nor can they, that any of the enumerated types of agreements are anything other than marketing

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strategies available to all of the other participants in the alleged market, including Plaintiffs; nor do Plaintiffs allege that the alleged agreements are anything but "ordinary marketing methods" used in the course of legitimate competition. Thus, even assuming that Plaintiffs' allegations could be proven, they do not and cannot establish a violation of the antitrust laws. Perhaps the Beverage Management court best summarized why Conwood cannot blame USTC, under the antitrust laws, for Conwood's failure to do better against USTC in the marketplace:

> [C]onsiderations as to the drawing power of a featured soft drink and perhaps even interpersonal relationships are among the other factors which have influenced [retailers]. The fact that Plaintiff's promotional offers have not proven sufficient vis-a-vis the other factors in [the retailers'] calculus for Plaintiff to have prevailed in the highly competitive struggle ... does not establish that Defendant, one of Plaintiff's rivals, has engaged in an unreasonable restraint of trade.

653 F. Supp. at 1156. Accordingly, judgment as a matter of law is required as to this theory of Section 2 liability.

C. Plaintiffs' Section 2 Claim Based On Allegations Of Business Torts Must Fail As A Matter Of Law

Finally, in a last ditch effort to create an antitrust case where none exists, Plaintiffs claim that USTC violates the Sherman Act every time one of its employees allegedly says something bad about Conwood's products or removes a Conwood product from a display rack (presumably a USTC display rack) without the approval of the retailer.[7] What Conwood alleges, of course, are age-old common law business torts of conversion, theft and disparagement — conduct that has long been the province of state courts despite repeated

[7] As a factual matter, it would be a rare occasion if a USTC employee removed a Conwood product from a USTC display rack without the express approval of the retailer.

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attempts by plaintiffs to convert the federal antitrust laws and federal courts into arenas for litigating every type of wrong a plaintiff can imagine.

The Supreme Court clearly drew this line in Brooke Group Ltd. v. Brown & Williamson, 509 U.S. 209 (1993), explaining:

> It is axiomatic that the antitrust laws were passed for "the protection of competition, not competitors".... [I]n the Sherman Act §2 context ... it [is] not enough to inquire "whether the defendant has engaged in 'unfair' or 'predatory' tactics".... Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."

Id. at 225 (citations omitted). See also Hunt v. Crumboch, 325 U.S. 821, 826 (1945) ("whether respondents' [tortious] conduct amounts to an actionable wrong subjecting them to liability for damages under [state] law is not [of antitrust] concern"). Accordingly, the Sixth Circuit routinely has rejected attempts by plaintiffs to recast state law and common law causes of action as Sherman Act claims.

For example, in L.B. Cleveland, Inc. v. Bluestone, 820 F.2d 1225, 1987 WL 37754 (6th Cir. 1987), the court rejected plaintiffs' argument that instances of conversion of trade secrets and business property could constitute an antitrust violation:

> The Court finds the Complaint to be insufficient to allege a cause of action under the federal antitrust laws as plaintiffs have not convinced this Court that the challenged conduct threatens "competition" in the market place as opposed to one competitor. Plaintiffs' complaint, at best, raises causes of action under state law and/or common law. Since federal antitrust laws do not afford remedies for all torts committed against persons involved in interstate commerce, plaintiffs' federal claims must be dismissed for failure to state a cause of action justiciable by this Court.

Id. at *1 (quoting district court decision) (as altered); see also Merkle Press, Inc. v. Merkle, 519 F. Supp. 50, 53-54 (Plaintiffs' conclusory allegations of injury to competition arising from business torts were insufficient to survive a motion to dismiss because "[c]ourts must be circumspect in converting ordinary business torts into violations of the antitrust laws. To do so would be to create a federal common law of unfair competition which was not the intent of the antitrust laws.").

Further, courts have specifically rejected Sherman Act claims where, as here, they were based on allegations of disparagement. In RE/MAX International v. Realty One, Inc., 900 F. Supp. 132 (N.D. Ohio 1995), for example, the court granted defendants' motion to dismiss as to plaintiff's Sherman Act claims to the extent they were based on disparagement because disparagement cannot cause antitrust injury. Id. at 159. As the court stated, "[m]ere allegations of business disparagement are not the type of injuries to competition that the antitrust laws were designed to prevent." Id.; see also Broyles v. Wilson, 812 F. Supp. 651, 655 (M.D. La. 1993) (granting motion to dismiss because, even where defamatory comments damaged business reputation, "such conduct is not the type of conduct the antitrust laws were enacted to prohibit or punish").

Here, Plaintiffs allege that USTC sales representatives removed Conwood display racks and products from stores (Compl. ¶ 24), made misrepresentations to third parties concerning USTC's authority to manage in-store displays (Compl. ¶¶ 25, 26), and disparaged Conwood products (Compl. ¶ 29). While such allegations might, if properly pled, rise to the level of a state law tort claim, they do not implicate harm to competition in the overall market as opposed to harm to Conwood alone. Consumers in the alleged national market for moist

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snuff would gain no benefit from USTC being required to pay Conwood treble damages for these alleged commonplace torts based on conduct that is inevitable in nearly every marketplace. Indeed, a decision not to dismiss Conwood's Section 2 claim based on those allegations would be an open invitation to undermine the objectives of the federal antitrust laws and clog this Court with every type of tort claim dressed up in Sherman Act clothing.

II. PLAINTIFFS' LANHAM ACT CLAIM MUST FAIL AS A MATTER OF LAW

Plaintiffs allege in the second claim of their Complaint that USTC violated Section 43(a) of the Lanham Act.[8] In order to establish such a claim, however, a plaintiff must establish, inter alia, that the alleged statements were made in "commercial advertising," and were not merely isolated statements made by the defendant, or as alleged in this case, by the defendant's employees. See Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1139 (9th Cir. 1997); United Industries Corporation v. Clorox Company, 140 F.3d 1175 (8th Cir. 1998); Abbott Laboratories v. Gerber Products Company, Inc., 979 F. Supp. 569, 571 (W.D. Mich. 1997).

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[8] Section 43(a), 15 U.S.C. § 1125(a), provides in relevant part:

> Any person who, or in connection with any goods or services ... uses in commerce any word, term, name, ... or any combination thereof, or any ... false or misleading description of fact, or false or misleading representation of fact, which in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is likely to be damaged by such act.

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Although the Lanham Act itself does not define commercial advertising, courts have established what type of speech can give rise to a Lanham Act claim and what types cannot. For example, in Gordon and Breach Science Publishers S.A. STBS v. American Institute of Physics, 859 F. Supp. 1521, 1536 (S.D.N.Y. 1994), the court held that under Section 43(a) of the Lanham Act, statements would constitute "commercial advertising" only if they met a four-part test:

> (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing customers to buy defendant's goods or services. While the advertising campaign need not be made in a "classic advertising campaign," but may consist instead of more informal types of "promotion," the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute "advertising" or "promotion" within that industry.

See also U-Haul International, Inc. v. Kresch, 943 F. Supp. 802, 811 (E.D. Mich. 1996); Medical Graphics Corporation v. Sensormedics Corporation, 872 F. Supp. 643, 650 (D. Minn. 1994); Liberty Telephone v. Burke, No. 96 C 50381, 1997 WL 177140, *5 (N.D. Ill. Mar. 31, 1997). Thus, courts consistently have denied recovery under Section 43(a) of the Lanham Act where, as here, a plaintiff merely alleges a number of isolated statements to consumers in the context of a large market for the goods in question.

In Licata & Co. Inc. v. Goldberg, 812 F. Supp. 403 (S.D.N.Y. 1993), for example, defendant's employee made disparaging remarks about plaintiff to several customers. The court held that the complained-of conduct did not and could not constitute "commercial advertising," and that the Lanham Act would be "trivialized" if it were applied to statements in oral conversations by a sales representative to a customer. As the court stated, competitors are

encouraged to make claims that one's product is superior to a competitor's as part of the "hurly-burly inherent in a free market system." Id. at 408.

Similarly, in Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc., 942 F. Supp. 209 (S.D.N.Y. 1996), the court granted defendants' motion for summary judgment even though the plaintiff offered evidence of twenty-one instances where the defendants' employees disparaged the plaintiff's goods or services (twelve to customers and nine to undercover investigators hired by the plaintiff). Despite this evidence, the plaintiff had not established that the alleged speech was disseminated sufficiently to the public. As the court explained, when the market for the goods in question consists of "thousands of customers," twenty-one instances of defendants' employees' conduct was not enough to constitute dissemination to the purchasing public:

> [Plaintiff's] best evidence is that seven people, six of whom were undercover investigators, heard defendants' employees make allegedly disparaging comments about customer service. This evidence does not prove that, as a result of defendants' policy, disparaging comments about [plaintiff's] customer service were sufficiently disseminated to the large relevant purchasing public. Nor is the fact that a handful of employees made disparaging comments to a small fraction of the relevant purchasing public evidence of a policy to disparage the quality or authenticity of the merchandise sold by [plaintiff].

Id. at 216-217. See also Medical Graphics, 872 F. Supp. at 650 (where the potential market for the product is large, a "handful" of statements made by sales representatives is not enough to constitute commercial advertising); American Needle & Novelty, Inc. v. Drew Pearson Marketing, Inc., 820 F. Supp. 1072, 1078 (N.D. Ill. 1993) (to permit recovery under Section 43(a) for isolated statements "would sweep within the ambit of the Act any disparaging comment made in the context of a commercial transaction").

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Here, Conwood cannot establish that the complained-of behavior constituted "commercial advertising." Plaintiff alleges a nationwide market consisting of millions of moist snuff consumers. Compl. ¶ 8. Although Plaintiffs make the conclusory allegation that statements made by USTC sales representatives "are not isolated instances" (Compl. ¶ 29), Plaintiffs have not and cannot establish, or even allege, any facts that would demonstrate that more than a relative "handful" of allegedly disparaging statements were made in the alleged national market for moist snuff. Compl. ¶ 29. Because the statements allegedly made by USTC's sales representatives were, at most, only isolated instances of conversations with individual customers, Conwood does not and cannot allege that they were disseminated sufficiently to the moist snuff purchasing public. As the court in Fashion Boutique held, such isolated statements are not "sufficiently disseminated" to establish a violation of Section 43(a) of the Lanham Act and, significantly, any evidence of such statements would not be evidence of a policy to disparage Conwood's products. Plaintiffs' Lanham Act claim, therefore, must fail as a matter of law.

III. PLAINTIFFS' STATE LAW CLAIMS MUST FAIL AS A MATTER OF LAW

Plaintiffs allege that this Court has subject matter jurisdiction of Plaintiffs' state law claims only under 28 U.S.C. § 1367, see Compl. ¶ 7(a). Section 1367 allows a district court to exercise supplemental jurisdiction over claims that form the same case or controversy as the claims over which the court has original jurisdiction. Defendants respectfully request that, after entering judgment on the pleadings as to all of Plaintiffs' federal claims, the Court exercise its discretion and dismiss Plaintiffs' state claims for lack of subject matter jurisdiction.

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The Sixth Circuit has consistently and repeatedly held that a district court may decline to exercise supplemental jurisdiction over state law claims where the court has dismissed or entered judgment as a matter of law on plaintiff's federal claims. See, e.g., Lenox v. Healthwise of Kentucky, Ltd., __ F.3d __, 1998 WL 374754 (6th Cir. 1998) (affirming district court's dismissal of plaintiff's state law claims); Grindstaff v. Green, 133 F.3d 416 (6th Cir. 1998) (dismissing state law claims after entering judgment on the pleadings for defendant on plaintiff's federal claims); Valot v. Southeast Local School District Board of Education, 107 F.3d 1220, 1230 (6th Cir. 1997) ("[a] district court may decline to exercise supplemental jurisdiction over a state law claim where it has dismissed all of the federal claims over which it had original jurisdiction").

Accordingly, Plaintiffs' state law claims should be dismissed for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court dismiss the Complaint or enter judgment on the pleadings for Defendants.

Dated: September 3, 1998

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. PLAINTIFFS

vs. NO. 5:98CV-108-R

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC. DEFENDANTS

ORDER

IT IS HEREBY ORDERED that a hearing on plaintiffs' motions to compel discovery is scheduled for **FRIDAY, DECEMBER 11, 1998** at 10:00 a.m., Courtroom #3, Gene Snyder U.S. Courthouse, 601 West Broadway, Louisville, Kentucky.

IT IS FURTHER ORDERED that prior to December 11, 1998, counsel are to meet in person to attempt to resolve all outstanding discovery issues. In attendance at such meeting shall be counsel fully familiar with the details of the discovery dispute who are fully authorized to resolve them. Counsel are to advise the magistrate judge's chambers well in advance of the time, place and attendees of such meeting.

A Court Reporter is need for this hearing.

Date: December 2, 1998

JDMoyer
JAMES D. MOYER
UNITED STATES DISTRICT COURT

Copies to:
Counsel of Record

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DEC 02 1998
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Case: 5:98-cv-00108

Neil M. Gorsuch, Esq.
Kellogg, Huber, Hansen, Todd & Evans PLLC
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Suite 1000 West
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, -against- UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	:	Civil Action No. 5:98 CV-108-R

DEFENDANTS' SUPPLEMENTAL RESPONSES TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Pursuant to Fed. R. Civ. P. 33, Defendants supplement their responses to Plaintiffs' First Set Of Interrogatories to Defendants as follows:

PRELIMINARY STATEMENT

On November 2 and 3, 1998, Defendants and Plaintiffs met via telephone conference to attempt to resolve discovery disputes relating to Plaintiffs' First Set of Interrogatories. Defendants submit the following supplemental responses to Plaintiffs' First Set of Interrogatories to clarify and document the compromises reached during the meet and confer. These

responses supercede Defendants' original responses and fully address the issues discussed during the meet and confer.

GENERAL OBJECTIONS

1. Defendants object to these interrogatories insofar as they purport to seek separate responses from each Defendant. A demand for such separate responses would be unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Unless otherwise specifically noted, all Defendants have responded to these interrogatories based on information reasonably available to them. Defendants have no reason to believe that separate responses provided by any of the individual Defendants would differ from those provided here in any meaningful way.

2. Defendants object to these interrogatories insofar as they seek the production of confidential, proprietary business information.

3. Defendants object to these interrogatories insofar as they seek the production of information protected by the attorney client privilege, the attorney work product doctrine, and/or any other applicable privilege or protection.

4. Defendants object to these interrogatories on the ground that they do not specify a relevant time period.

RESPONSES TO INTERROGATORIES

Interrogatory No. 1. Identify each person from whose files documents were produced in response to Plaintiffs' First Request for Production of Documents, identify the

documents produced from each such person's files, and identify the person(s) most familiar with each of said files.

Response to Interrogatory No. 1: Defendants incorporate by reference Defendants' Supplemental Response To Plaintiffs' First Request For Production Of Documents. Defendants also object to this interrogatory on the ground that, to the extent documents are produced in response to Plaintiffs' First Request for Production of Documents and in response to Plaintiffs' Second Request for Production of Documents and Things, the information sought can be obtained as readily by Plaintiffs as by Defendants from such documents. See Fed. R. Civ. P. 33(d). Defendants are under no obligation to index all documents as requested.

Interrogatory No. 2. Describe generally each computer system used by defendant, including types of data maintained in each, and for each such system identify the person(s) most familiar therewith.

Response to Interrogatory No. 2: Defendants object to this interrogatory on the ground that it is irrelevant, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Defendants fail to see how descriptions of any computer system, in and of themselves, are relevant to this lawsuit or would lead to the discovery of relevant evidence.

Interrogatory No. 3. Identify by name, address, title, job description, and date of service all persons involved in the marketing and/or sale of defendants' moist snuff products.

The parties agreed to limit this interrogatory to request the identity by name, address, title, job description, and date of service of only those employees who have served as sales representatives, divisional managers, or regional managers involved in the marketing and/or sale of Defendants' moist snuff products, and/or employees who have been involved in training such persons.

Response to Interrogatory No. 3: Defendants state that the following persons have overall responsibility for the marketing and/or sale of Defendants' moist snuff products:

A. Gary Smith, President, United States Tobacco Company Inc., 100 West Putnam Avenue, Greenwich, Connecticut 06830.

Gary Milano, Vice President, United States Tobacco Company Inc., 100 West Putnam Avenue, Greenwich, Connecticut 06830.

Richard Fasanelli, Vice President, United States Tobacco Sales and Marketing Company Inc., 100 West Putnam Avenue, Greenwich, Connecticut 06830.

Defendants also refer Plaintiffs to Attachment A to these responses, which is the current Field Sales Directory. Additionally, all prior lists of employees who have served as sales representatives, divisional managers, or regional managers involved in the marketing and/or sale of Defendants' moist snuff products, and/or employees who have been involved in training such persons, are currently being produced in response to Plaintiffs' document requests.

Interrogatory No. 4. Identify all distributors and retailers of moist snuff products with which one or more defendants has or had an agreement.

The parties agreed to limit this interrogatory to distributors and retailers with which one or more defendants has or had an exclusive dealing agreement that is or was, by way of example only, exclusive in terms of display racks, slotting allowances, and/or point of sale advertising.

Response to Interrogatory No. 4: Defendants state that, to the extent this request, as agreed upon by the parties, refers to exclusive dealing agreements that create obligations on behalf of any distributor or retailer to exclude the vendors, products, or point of sale advertising of any smokeless tobacco company, Defendants have no such agreements with any distributors

or retailers. Plaintiffs' November 5, 1998 letter does not reflect the agreement of the parties and does not address Defendants' objections to the original interrogatory. To the extent Plaintiffs seek a list of all distributors and retailers that have authorized the placement of Defendants' vendor(s), products, or point of sale advertising - which would include every distributor and retailer with which Defendants conduct business - Defendants object to the interrogatory as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Further, to the extent Plaintiffs seek a list of distributors and retailers who participate in the Customer Alliance Program ("CAP") and/or the Retail Account Data Program ("RAD"), all executed CAP and RAD contracts have been produced to Plaintiffs pursuant to Rule 34.

Interrogatory No. 5. Identify by name, address, title, job description, and date of service all persons who have spoken to tobacco industry analysts on matters pertaining to moist snuff.

Response to Interrogatory No. 5: Subject to and without waiving any objection stated herein, Defendants state that the persons most knowledgeable about discussions with tobacco industry analysts on matters pertaining to moist snuff is:

Mark A. Rozelle, Vice President, UST Inc., 100 West Putnam Avenue, Greenwich, Connecticut 06830.

Richard H. Verheij, Esq., Executive Vice President and General Counsel, UST Inc., 100 West Putnam Avenue, Greenwich, Connecticut 06830.

Vincent A. Gierer, Jr., Chairman of the Board, Chief Executive Officer and President, UST Inc., 100 West Putnam Avenue, Greenwich, Connecticut 06830.

Interrogatory No. 6. Identify by name, address, title, job description, and date of service all persons who participated in the preparation of answers to these interrogatories.

Response to Interrogatory No. 6: Persons who participated in the preparation of answers to these interrogatories include the following:

Martha J. Weiss, Esq., Senior Corporate Counsel, UST Inc., 100 West Putnam Avenue, Greenwich, CT 06830.

Richard H. Verheij, Esq., Executive Vice President and General Counsel, UST Inc., 100 West Putnam Avenue, Greenwich, Connecticut 06830.

Dated: November 19, 1998

Neal R. Stoll
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MEAGHER & FLOM LLP
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Louisville, Kentucky 40202
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Attorneys for Defendants

ATTACHMENT A

FIELD SALES DIRECTORY

CHANGES REFLECT MONTH OF JUNE

☞Legend

DM - Division Manager
DEPT - Department Manager
RSA - Regional Sales Analyst
RMM - Regional Marketing Manager
RVP - Regional Vice President
NAM- Nat'l Account Manager
RS - Rodeo Supervisor
CAM - Chain Account Manager
KAM - Key Account Manager
RMPS - Reg. Mktg. Promo Supervisor
RMPM - Reg. Mktg. Promo Manager
SR - Sales Representative
MPPSP- Mktg. Promo. Programs Specialist

NEW HIRES	SAJDX	ASSIGNMENT		EFFECTIVE DATE
Jared Day	6284	OAC07	SR	6/1/98
Christopher Happ	6593	FEC05	SR	6/1/98
Harry Sanborn	6484	AEA06	SR	6/1/98
Jeffrey Kissinger	6610	BLD01	SR	6/8/98
Brian Steber	6665	BLC01	SR	6/15/98
Ryan Alizaga	6638	JHB04	SR	6/22/98
William Robinson	6707	BGH03	SR	6/29/98
Donald Crosby II	6645	HDC04	SR	6/29/98
Daniel May	6711	SW302	RMPS	6/29/98
Jason Trosper	6713	S4019	RMPS	6/29/98
Tracy Harsche	6716	SW103	RS	6/29/98
Amy Sad	6712	CNF02	SR	6/29/98

SEPARATIONS	ASSIGNMENT	EFFECTIVE DATE
Kasey Pulliam	JDI02	6/3/98
Alex Beltran	JKE04	6/5/98
Steven Scribner	SW102	6/12/98
Richard Zima	NBC03	6/19/98
Justin Larsen	FHB03	6/23/98

RETIREMENTS	ASSIGNMENT	EFFECTIVE DATE

PROMOTIONS	FROM		TO		EFFECTIVE DATE
Troy Ault	FEE01	SR	SA503	RSA	6/1/98
Craig Jones	MK302	RMM	Corp.	Strategic Bus. Dev.Mgr	6/1/98
Jeffrey Smither	EJC03	SR	EI003	DM	6/1/98
Neil Ward	KCG01	SR	KB003	DM	6/1/98
Richard Fletcher	NAD01	SR	CL002	DM	6/22/98
Francisco Hogg	JHA02	SR	S4018	RMPS	6/29/98
Sean Erskine	TAB02	SR	S4017	RMPS	6/29/98

LONG-TERM DISABILITY				EFFECTIVE DATE

DEPLOYMENT / TRANSFERS	FROM		TO	EFFECTIVE DATE
Shawn Higgins	SR	LBE04	LBX01 - Specialty SR	6/29/98
John Beasley	SR	NAA04	NAD02 - SR	6/22/98

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REGION I

REGION I SALES OFFICE

204 Spring Hill Road
Trumbull, CT 06611

Office: (203) 268-7742 Fax: (203) 261-5992

Regional Vice President, Sales	Ronald Huth RO103 Home: (203) 459-8302 Audix: 6461
Regional Sales Analyst	Aidan Dockery SA103 Audix: 6104
Manager, State Government Relations/East	T. J. Bolger 100 West Putnam Avenue Greenwich, CT 06830 Phone (203) 622-3216 Fax (203) 863-7240
Regional Manager, State Gov't Relations Representative	Richard Haselwood Phone (203) 622-3497 Fax (203) 863-7240
Regional Marketing Manager	Bill Bleitz MK101 Audix: 6137
Key Account Manager	Bob Chiaradio KA101 Audix: 6103
Administrative Secretary	Jeannette Greathouse XX536 Audix: 6619

Department AOO

204 Spring Hill Road
Trumbull, CT 06611

Office: (203) 268-7742 Fax: (203) 261-5992

Department Manager	Phil Russell AO002 Home (203) 649-3823 Audix: 6139
Chain Account Manager	David Cunningham AO101 Audix: 6140
Department Secretary	Ruth Meyer XX532 Audix: 6648

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DEPARTMENT BOO	
MAILING: PO BOX 2246 WEIRTON, WV 26062	SHIPPING: 2436 PENNSYLVANIA AVE SUITE 4A WEIRTON, WV 26062 OFFICE: (304) 723-1016 FAX: (304) 723-4377
Department Manager	James Wheatley BO003 Home: (724) 935-7115 Audix: 6142
Chain Account Manager	Tom Berkebile BO104 Audix: 6136
Department Secretary	Rosemary Weekley XXS07 Audix: 6144

DEPARTMENT UOO 8814 FARGO ROAD SUITE 105 RICHMOND, VA 23229	
OFFICE: (804) 288-7750	FAX: (804) 288-7962
Department Manager	Jeffrey Brown UO001 Home: (804) 360-0747 Audix: 6143
Chain Account Manager	Howard Heylmun UO102 Audix: 6145
Department Secretary	Corinne Clark XXS31 Audix: 6141

REGION I MARKETING PROMOTIONS OFFICE 204 SPRING HILL ROAD TRUMBULL, CT 06611 OFFICE: (203) 261-3863 FAX: (203) 261-5992 Sr. PTST Audix #: 7193	
Regional Marketing Promotions Manager	Timothy White S1009 Audix: 6130
Regional Marketing Promotions Supervisor	Jackson Dunlap S1004 Audix: 6437
Regional Marketing Promotions Supervisor	Jeffrey Hachmann S1010 Audix: 6178
Regional Marketing Promotions Supervisor (P.O. Box 2248 Weirton, WV 26062)	Matt Wachtel S1011 Audix: 6037
Marketing Promotions Administrative Secretary	Mark Sepkaski XXS44 Audix: 6571

DEPARTMENT AOO

AO002 PHIL RUSSELL
DEPARTMENT MANAGER

DIVISION MANAGER	SALES REPRESENTATIVE				TERRITORY DESCRIPTION
AA004 Rich Janne Manchester, CT (860) 643-9478 Audix #: 6100 / Sr. PTST: 7100 RI CT Eastern MA	AAD04	Michael Liguori	6584	Clarkstown, RI	RI/E CT
	AAF05	Paul Lombardo	6107	Darien, CT	Fairfield Cnty CT
	AAG05	Steven Greenberg	6111	Sharon, MA	SE MA
	AAJ02	Richard Potash	6109	Berlin, CT	Cntrl CT
	AAN01	Jerry Reck	6113	Manorville, NY	Long Island, NY
	AAP01	Michael Perez	6115	Maywood, NJ	Bronx, Wstchster NY
AC003 Edward Wallon Cicero, NY (315) 699-7927 Audix #: 6117 / Sr. PTST: 7102 Upstate NY, Utica-Buffalo	ACB05	Michael Murphy	6393	N. Syracuse, NY	Central NY
	ACC04	David Rusnak	6395	Binghamton, NY	Binghamton, NY
	ACG02	Mark Ella	6120	Rochester, NY	Rochester, NY
	ACI01	Edward Fairbrother	6373	Horsehead, NY	N. Sycuse, NY
AD004 Daryl Miller Somersworth, NH (603) 692-6357 Audix #: 6119 / Sr. PTST: 7103 NH ME	ADB04	James Graham	6122	Candia, NH	Western, NH
	ADD06	James Rines	6675	Bangor, ME	Bangor, ME
	ADE03	Stephen Macdowell	6125	Falmouth, ME	Portland, ME
	ADG01	Joseph Tenuta	6126	Dover NH	Eastern NH
	ADH01	Steven Osgood	7024	Methuen, MA	N.E. Mass
AE002 Greg Romprey Ballston Spa, NY (518) 885-5708 Audix #: 6123 / Sr. PTST: 7104 Eastern NY, VT West MA	AEA06	Harry Sanborn	6484	Plattsburg, NY	Plattsburg, NY
	AEB02	Eugene (Bill) Gerrish	6128	Montpelier, VT	VT
	AEC03	Scott Early	6329	Cohoes, NY	Capitol Region NY
	AED05	Richard J. Wilson	6181	Chicopee, MA	Western MA
	AEF02	Daniel Fullem	6658	Rexford, NY	Albany, NY
AF001 Richard Rafalko Cherry Hill, NJ (609) 428-2031 Audix #: 6105 / Sr. PTST: 7105 NJ	AFA01	Daniel Freire	6131	Jersey City, NJ	Newark, NJ
	AFB02	Michael Munsey	6132	Wayne, NJ	NW NJ
	AFC03	Scott Perrone	6133	Bradley Beach, NJ	Central NJ
	AFD01	Charles Clements	6134	Lawnside, NJ	Southern NJ
	AFE02	Vacant (5/7/98)			Sullivan Cnty, NY
AG001 Kenneth Truninger West Seneca, NY (716)674-9325 Audix #: 6032 / Sr. PTST:	AGA01	Henry Kapela	6121	Buffalo, NY	Buffalo, NY
	AGB01	Jon Woods	6651	Painted Post, NY	Elmira, NY
	AGC01	Vaugh Cornell	6365	Jamestown, NY	Jamestown, NY
	AGD01	Vacant			S. Buffalo, NY

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Department Managers	1	1	0
Division Managers	7	6	1
Sales Representative	30	27	3
TOTAL	38	34	4

	DIVISION	TERRITORY
ADDITIONS	AGO	AGA01, AGB01, AGC01, AGD01, ACI01, AAM01, ADH01, AAN01, AAP01, AFE01,
DELETIONS	ABO	AAL01, ACD04, ACH01, ACA01, ADC01, AAK01, ABA05, ABC01, ABJ01, ABK01, AAM01

DEPARTMENT BOO

BO003 JAMES WHEATLEY
DEPARTMENT MANAGER

DIVISION MANAGER		SALES REPRESENTATIVE ASSIGNED		ACCOUNT	TERRITORY DESCRIPTION
BA005	Jim Pearson Wexford, PA (724) 935-3476	BAB04	Nelson Miller III	6026	Sutersville, PA	Allegheny Cty
		BAC04	Mark Kradel	6127	Butler, PA	WC PA
		BAD04	Michelle Hall	6051	Connellsville, PA	SW PA
		BAJ03	Scott Watkins	6222	Meadville, PA	NW PA
Audix #:	6170 / Sr. PTST: 7106 Western PA	BAJ01	John Rohaly	6168	Vanergrift, PA	Armstrg/Wstmreind, Ctys PA
BF001	Dennis Greenly Williamsport, PA (717) 323-4131	BFD02	Brian Swisher	6166	Williamsport, PA	W NE PA
		BFI01	Daniel Wygant	6418	Whitehall, PA	Lehigh, N. Hampton Cty
		BFJ01	William Higgins	6672	Kingston, PA	Carbon LuzerneWyoming Cty
Audix #:	6148 / Sr. PTST: 7107 NE PA	BFK01	Richard Conte	7013	Taylor, PA	Eastern - N.E. PA
		BFL01	Bradley Treaster	6383	Harrisburg, PA	Dauphin Schuylkill Ctys
BG002	John Webb Newark, OH (740) 344-8373	BGD02	Rick Kimble	6169	Shadyside, OH	SE OH/WV Panhandle
		BGF04	Michael Andre	6066	Gahanna, OH	Franklin Cnty OH
		BGG03	Donald Moore	6171	Newark, OH	Central OH
		BGH03	William Robinson	6707	Waverly, OH	S Central OH
Audix #:	6149 / Sr. PTST: 7108 Central & SE OH; WV Panhandle	BGI03	Vacant (4/13/98)			N Central OH
BH002	Gary Theobald Wernersville, PA (610) 670-4850	BHA03	Michael Markham	6174	Camphill, PA	Adams/York PA
		BHC05	Douglas Paine	6396	Kenhorst, PA	Berks / Chester Ctys
		BHD03	Kevin Grande	6175	Trappe, PA	Mntgmry/Bucks Ctys PA
		BHE02	Vacant (5/25/98)			Lancaster/Lebanon/Cntys
Audix #:	6167 / Sr. PTST: 7109 SE PA	BHF01	Steven Nelson	6667	Newark, DE	Phil & DE Ctys
BI001	Ed Voyles Chesterland, OH (440) 423-3102	BIA03	Scott Miller	6695	Akron, OH	W Cuyahoga/Summit Cntys OH
		BIB01	Gary Gamble	6179	Cleveland, OH	N Cntrl E OH
		BIC03	Gary Gilanyi	6249	Girard, OH	NE OH
		BIE02	Jeffrey Gabler	6244	No. Canton,OH	Portage/Stark/Carroll/ Columbia Cntys OH
Audix #:	6151 / Sr. PTST: 7110 NE OH	BIF01	Ken Mesaros	6182	Elyria, OH	N Cntrl OH
BK001	Keith Craffey Cincinnati, OH (513) 231-5782	BKA01	Susan Ring	6495	Cincinnati, OH	SW OH
		BKB01	Jorge Benitez	6494	Cincinnati, OH	Hamilton Cnty OH
		BKC01	Charles Johnson	6492	Dayton, OH	Preble/Montgomery/ Butler Cntys OH
		BKD01	Mark Tomlinson	6493	Springfield, OH	W Cntrl OH
		BKE01	Steven Moorman	6505	Lima, OH	NW OH
Audix #:	6474 / Sr. PTST: 7191 Western OH	BKF01	Jeffrey Stawiarski	6504	Toledo, OH	N Cntrl W OH
BL001	Susan Pater New Lexington, OH (740)342-7610	BLA01	Mark Putignano	6429	Falls Creek, PA	NW Central PA
		BLB01	Vacant			SW Central PA
		BLC01	Brian Steber	6665	Lewistown, PA	SE Central PA
		BLD01	Jeffrey Kissinger	6610	Lock Haven, PA	NE Central PA
Audix #:	6172 / Sr. PTST: Central, PA					

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Department Managers	1	1	0
Division Managers	7	7	0
Sales Representative	35	32	3
TOTAL	43	40	3

	DIVISION	TERRITORY
ADDITIONS	BLO	BLA01, BLB01, BLC01, BLD01, BFK01, BFL01
DELETIONS		BFG02, BFA02

DEPARTMENT UOO

UO001 JEFFREY BROWN
DEPARTMENT MANAGER

DIVISION MANAGER	ASSIGN #	NAME	EXT	TERRITORY DESCRIPTION
UA002 Warren McElfresh Midlothian, VA (804) 739-6800 Audix #: 6164 / Sr. PTST: 7111 Eastern VA	UAA01	Robert Cameron	6277	Glen Allen, VA — N Richmond
	UAB01	Patrick Hartigan	6425	Hampton, VA — E Richmond
	UAC01	Tammy Mikell	6636	Norfolk, VA — Eastern Shore/VA Bch
	UAD02	Marjorie Parrish	6534	VA Beach, VA — S Richmond
	UAE04	Jerry M. Gibson II	6605	Suffolk, VA — W Richmond
UB002 Michael Mawhinney Roanoke, VA (540) 966-4960 Audix #: 6155 / Sr. PTST: 7112 Southwestern VA	UBA01	Philip (Steve) Carter	6309	Cloverdale, VA — Roanoke/surrd'g cntys Rural/SW VA
	UBB01	Robert Smith, Jr.	6310	Radford, VA — Lwr Shenandoah Valley
	UBD01	Tracy Shelton	6307	Evington, VA
	UBF01	Jacob Clarke	6697	Wytheville, VA
	UBG01	Eden Hodges	6698	Lewisburg, WV — SE WV
UC001 Charles Roberts S. Charleston, WV (304) 744-8543 Audix #: 6161 / Sr. PTST: 7113 WV; E KY; W VA	UCA04	David A. Lanham	6693	Cross Lanes, WV — S Cntrl WV
	UCB01	Ray Adkins II	6162	Huntington, WV — Wstrn WV/E KY
	UCE01	Bernadette Loftus	6657	Madison, WV — S.W., W VA
	UCG01	David Lee Henderson	6156	Cabin Creek,WV — East Central WV
UD001 Gene Day Cross Junction, VA (540) 888-4314 Audix #: 6146 / Sr. PTST: 7114 N VA; W MD; NE WV; Washington DC	UDA01	Dennis Stout	6157	Winchester, VA — N VA/E Panhandle WV
	UDC02	Johnny Williams	6582	FredericksbrgVA — NE VA
	UDE01	Paul Gordon	6022	Cumberland,MD — Cumberland, MD
	UDF01	John Skrobe	6700	Hampstead, MD — C. MD, N.E. WV
	UDG01	Barkley Breeden	6381	Ruckersville, VA — E. Central VA
	UDH01	Stephen Britt	6671	Stauton, VA — Central VA
UE002 John Haley Elkton, MD (410) 620-3123 Audix #: 6177 / Sr. PTST: 7115 DE ; Cntrl & Eastern MD	UEA01	Scott Emmerich	6184	Bowie, MD — Sthrn MD
	UEB01	Scott Gaus	6185	Kensington, MD — Cntrl MD
	UED01	Felix Flanigan	6183	Newark, DE — Nrthrn DE/Philadelphia
	UEE02	Donnell Marshall	6618	Milford, DE — & DE Cntys, PA
	UEF01	Andre Rollins	6035	Temple Hills MD — S MD, Fairfax VA
UF001 Ricky Fortner Beckley, WV (304) 253-0919 Audix #: 6163 / Sr. PTST:	UFA01	Edgar Rush	7000	Hinton, WV — S.C. W VA
	UFB01	Lisa Neal	6701	Bluefield, WV — S. WV / W. VA
	UFC01	Ginger Miller	6702	Bristol, TN — S. Virgina
	UFD01	Chad Hood	6703	Duffield, VA — Far West VA
UG001 Robert Sommerfeld Jane Lew, WV (304) 884-6522 Audix #: 6180 / Sr. PTST:	UGA01	Terry Stutler	6692	Parkersburg, WV — NW, W VA
	UGB01	Joseph Dean	6704	Jane Lew, WV
	UGC01	Timothy Snider	6705	Lumberport WV — North WV
	UGD01	Garth Bodnar	6706	MorgantownWV — North Central WV

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Department Managers	1	1	0
Division Managers	7	7	0
Sales Representative	33	33	0
TOTAL	41	41	0

	DIVISION	TERRITORY
ADDITIONS	UFO,UGO	UFA01, UFB01, UFC01, UFD01, UGA01, UGB01, UCG01, UDF01, UBF01, UBG01, UDG01, UDH01, UGD01, UGC01, UEF01
DELETIONS		UCC03, UCD01, UBC03, UBE02, UDD02, UCF01

REGION II

REGION II SALES OFFICE 124 Bandit Lane Mooresville, NC 28115 Office: (704) 664-1091 Fax: (704) 664-3763	
Regional Vice President, Sales	Robert Curan RO203 Audix: 6150/Direct Dial: 235
Regional Sales Analyst	Nathan Peterson SA204 Audix: 6176 /Direct Dial: 234
Regional Manager, State Government Relations	John Rainey Fax: (704) 664-6792 Audix: 6687/Direct Dial: 237
Regional Marketing Manager	Thomas A. Madison MK203 Audix: 6308/Direct Dial: 211
Key Account Manager	Merritt Eslick, KA201 Audix: 6188/Direct Dial: 229
Administrative Secretary	Janice Brawley XX502 Audix: 6189/Direct Dial: 236

DEPARTMENT COO 140 KATHI AVENUE SUITE E FAYETTEVILLE, GA 30214 OFFICE: (770) 461-0878 FAX: (770) 461-1208	
Department Manager	Tom Ventimiglia CO003 Home: 704 932-6560 Audix: 6204
Chain Account Manager	Donald Nabi CO101 Audix: 6192
Department Secretary	Cynthia Ivey XX546 Audix: 6422

DEPARTMENT EOO

MAILING:	WOODBINE STATION PO BOX 110269 NASHVILLE, TN 37222-0269	SHIPPING:	301 S. PERIMETER PARK DR. SUITE 114 NASHVILLE, TN 37211 OFFICE: (615) 831-9070 FAX: (615) 831-1902

Department Manager	Robert Fields EO002 Home: (615) 754-0446 Audix: 6194
Chain Account Manager	Dewayne Biddy EO105 Audix: 6260
Department Secretary	Mary Pate XXS09 Audix: 6196

DEPARTMENT KOO

124 BANDIT LANE
MOORESVILLE, NC 28115

OFFICE: (704) 664-1091 FAX: (704) 664-3763

Department Manager	David Crutcher KO003 Home: 704-660-9118 Audix: 6276 /Direct Dial: 240
Chain Account Manager	Dwight Little KO102 Audix: 6198/Direct Dial: 238
Department Secretary	Pepper Waugh XXS10 Audix: 6199/Direct Dial: 239

DEPARTMENT NOO

MAILING:	PO BOX 522410 LONGWOOD, FL 32752-2410	SHIPPING:	705-H WEST STATE RD 434 LONGWOOD, FL 32750
OFFICE:	(407) 830-5585		
FAX:	(407) 830-0795		

Department Manager	John Hazard NO002 Home: (501) 660-4507 Audix: 6084
Chain Account Manager	Stephen Towle NO101 Audix: 6201
Department Secretary	Christine Miller XXS39 Audix: 6684

REGION II MARKETING PROMOTIONS OFFICE

124 BANDIT LANE
MOORESVILLE, NC 28115

OFFICE: (704) 664-1091 FAX: (704) 664-3763

Sr. PTST Audix # 7194

Regional Marketing Promotions Manager	Scott Marks S2002 Audix: 6453/Direct Dial: 214
Regional Marketing Promotions Supervisor	Todd Gosart S2007 Audix: 6668/Direct Dial: 219
Regional Marketing Promotions Supervisor	Jody Deal S2005 Audix: 6304/Direct Dial: 218
Regional Marketing Promotions Supervisor (140 Kathi Avenue Suite E Fayetteville, GA)	Adam Taylor S2008 Audix: 6441/ 770 461-0878
Marketing Promotions Administrative Secretary	Vacant (5/5/98) XXS Audix: /Direct Dial: 212

MOTORSPORTS

124 BANDIT LANE
MOORESVILLE, NC 28115

OFFICE: (704) 664-1091 FAX: (704) 664-3763

Manager - National Motorsports Promo	Brian Buchauer RAC08 Audix: 6592/Direct Dial: 213
Program Manager - Motorsports Operations	John Bruce RAC09 Audix: 6439/Direct Dial: 217
Motorsports Coordinator	Terri Brooks RAC07 Audix: 6591/Direct Dial: 216
Motorsports Administrator	Laura Howard XXS49 Audix: 6594 /Direct Dial: 215

DEPARTMENT COO

CO003 TOM VENTIMIGLIA
DEPARTMENT MANAGER

DIVISION MANAGER		SALES REPRESENTATIVE ASSIGNED	NAME	AUDIX	TERRITORY DESCRIPTION	
CA001	Charles Irons Decatur, AL (205) 353-0927	CAA01	Michael Davis	6252	Tuscombia, AL	Florence, AL
		CAB01	James Boggs	6253	Meridiaville, AL	Huntsville, AL
		CAC01	Randall Spurlin	6254	Boaz, AL	Cullman, AL
		CAD01	Rodney Peterson	6255	RainbowCity, AL	Gadsden, AL
Audix #:	6286 / Sr. PTST: 7124	CAE01	Darrell Reed	6585	Northport, AL	Tuscaloosa, AL
	North AL					
CB004	Vince Campbell Cumming, GA (770) 888-5379	CBE01	Edward Clark	6023	Stone Mtn., GA	Conyers, GA
		CBF08	James Franklin	6507	Cedartown, GA	Marietta, GA
		CBG01	Doyle Williams	6210	Athens, GA	Athens, GA
		CBJ01	Elbert McMillan	6211	Woodstock, GA	Canton, GA
		CBM02	John Johnson	6661	Blue Ridge, GA	Dalton, GA
Audix #:	6229 / Sr. PTST: 7116	CBN02	Fred Blackmon	6213	Gillsville, GA	Gainesville, GA
	North GA					
CG002	Ron La Pradd Macon, GA (912) 476-9825	CGA02	Ronald Parish, Jr.	6214	Macon, GA	Macon, G A
		CGB01	Dana Stroman	6219	Atlanta, GA	Douglasville, GA
		CGC01	Harry Allen	6221	Lithonia, GA	N. Atlanta, GA
		CGG01	Ronald Tankersley	6215	Harlem, GA	Augusta, GA
		CGH01	Terry Barfield	6216	E. Dublin, GA	Dublin, GA
Audix #:	6306. PTST: 7117	CGI03	Partricia Cunningham	6217	Newnan, GA	Newnan, GA
	Central GA					
CL002	Richard Fletcher Orange Park, FL (904) 278-8015	CLA04	Robin Slaughter	6580	Pelham, GA	Valdosta, GA
		CLB06	Bret Rogers	6632	Lake Park, GA	Albany, GA
		CLC01	Harry Lairsey	6225	Waverly, GA	Brunswick, GA
		CLD04	David Dowdell	6278	Statesboro, GA	Savannah, GA
Audix #:	6319 / Sr. PTST: 7119	CLE01	Stacy McLemore	6341	Leesburg, GA	Columbus, GA
	South GA					
CM001	Avery Thompson Alabaster, AL (205) 664-3353	CMA02	Barry Willis	6397	Hoover, AL	Vestavia Hills, AL
		CMB01	Donald McCullum	6228	Birmingham, AL	Bessemer, AL
		CMD01	Thomas Culp	6230	Montgomery, AL	Montgomery East, AL
		CMF01	Oscar Bryant	6231	Gadsden, AL	East Birmingham, AL
Audix #:	6207 / Sr. PTST: 7120	CMG02	David Cox	6581	Montgomery, AL	S. Montgomery, AL
	Central AL					
CN001	Jody McArdle (Robert) Mobile, AL (334) 666-6218	CNA01	Perry Riley	6232	Andalusia, AL	Dothan, AL
		CNB02	Phillip Gilley	6676	Pensacola, FL	Pensacola, FL
		CNC01	Alan Prine	6234	Daphne, AL	Fairhope, AL
		CND02	Riley Holman	6604	Saraland, AL	Mobile, AL
Audix #:	6208 / Sr. PTST: 7121	CNF02	Amy Sad	6712	Panama City, FL	Panama City, FL
	S. AL FL Panhandle					

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Deparoment Managers	1	1	0
Division Managers	6	6	0
Sales Representative	32	32	0
TOTAL	39	39	0

	DIVISION	TERRITORY
ADDITIONS		
DELETIONS		

DEPARTMENT EOO

EO002 ROBERT FIELDS
DEPARTMENT MANAGER

DIVISION MANAGER		SALES REPRESENTATIVE ASSIGN #	NAME	AUDIX #	TERRITORY DESCRIPTION	
EA003	Guy Wyatt Louisville, KY (502) 746-0408	EAC01	David Mosby	6243	Scottsville, KY	Bowling Green, KY
		EAD04	Tom Potter	6485	Marion, KY	Paducah, KY
		EAE02	Walter Chapman	6245	Louisville, KY	Southwest Louisville, KY
Audix #:	6212 / Sr. PTST: 7122 Western KY	EAG01	James E. Jones	6246	Morgantown, KY	Owensboro, KY
		EAH01	Wayne Lawson	6247	Louisville, KY	North Louisville, KY
ED002	Thomas Bule Jackson, TN (901) 664-6199	EDB01	Mack A. Maness	6248	Lexington, TN	Jackson, TN
		EDC02	Brad Hemby	6431	Memphis, TN	Northeast Memphis, TN
		EDF02	Joseph Seagrist	6390	Memphis, TN	Southwest Memphis, TN
Audix #:	6317 / Sr. PTST: 7123 West TN	EDG01	Scott Fisher	6251	Savannah, TN	Columbia, TN
EH002	Buford Hayes (Terry) Goodlettsville (615) 859-3038	EHA02	James Graves	6256	Springfield, TN	Gallatin, TN
		EHB04	Bryan Moody	6483	Jamestown, TN	Cookeville, TN
		EHC01	William (Keith) Dickens	6258	Franklin, TN	South Nashville, TN
Audix #:	6240 / Sr. PTST: 7125 Middle TN	EHD03	Victoria Wheat	6259	Murfreesboro, TN	Murfreesboro, TN
EI003	Jeffrey Smither Hixson, TN (423) 842-9123	EIA02	James Bowman	6646	Lancaster, KY	Lexington, KY
		EIB03	Jeff Ralston	6434	Middlesboro, KY	Somerset, KY
		EIC03	Vanessa Hamilton	6541	Georgetown, KY	Florence, KY
Audix #:	6316 / Sr. PTST: 7126 Eastern KY	EID01	Denford Curtis	6263	Morehead, KY	Richmond, KY
		EIE01	Robin Williams	6264	Boonescamp, KY	Pikeville, KY
EJ001	Edward Starnes Knoxville, TN (615) 531-0277	EJA01	Susan Booth	6265	Jonesborough, TN	Johnson City, TN
		EJB02	Tammy Keller	6662	Knoxville, TN	Oak Ridge, TN
		EJC04	Vacant (6/1/98)			Chattanooga, TN
		EJD01	Carol Blanken	6268	Kingsport, TN	Bristol, TN
Audix #:	6242 / Sr. PTST: 7127 East TN	EJE01	Mary Shelton (Molly)	6269	Clinton, TN	Knoxville, TN

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Department Managers	1	1	0
Division Managers	5	5	0
Sales Representative	23	22	1
TOTAL	29	28	1

	DIVISION	TERRITORY
ADDITIONS		
DELETIONS		

DEPARTMENT KOO

KO003 DAVID CRUTCHER
DEPARTMENT MANAGER

DIVISION MANAGER	ASSIGNED SALES REPRESENTATIVE		LOCATION	TERRITORY DESCRIPTION	
KB003 Neil Ward Rocky Mount, NC (252) 937-7923 Audix #: 6291 / Sr. PTST: 7128 West Central NC	KBD02 KBG02 KBH03 KBJ03	Steve Davis Richard Jacoby Vacant (3/11/98) Vacant (1/26/98)	6630 6303	Rocky Mount, NC Burlington, NC	Charlotte, NC Burlington, NC Raleigh, NC Asheboro, NC
KC001 Hayward Cameron(Tony) Goldsboro, NC (919) 734-6616 Audix #: 6272 / Sr. PTST: 7129 Eastern NC	KCD03 KCE04 KCF02 KCG02	Larry Bryant Norwood Ligon Darren Dawson Vacant (6/1/98)	6663 6289 6305	New Bern, NC Goldsboro, NC Dunn, NC	New Bern, NC Goldsboro, NC Dunn, NC Wilmington, NC
KD004 Joe Blankenship Candler, NC (704) 667-8923 Audix #: 6273 / Sr. PTST: 7130 Wstrn NC & Wstrn SC	KDB02 KDC02 KDF01 KDH01	Ronald Pruitt Christopher Counts Matthew Poore Preston Kendall	6292 6293 6296 6442	Asheville, NC Easley, SC Anderson, SC Asheville, NC	Asheville, NC Greenville, SC Anderson, SC Western NC
KE001 Lloyd Kelley Columbia, SC (803) 732-1586 Audix #: 6274 / Sr. PTST: 7131 Eastern SC	KEB02 KEC02 KED01 KEF01 KEG01	Brett Rogers John Donachie Timothy Carter Michael Hall Paul Couch	6297 6298 6299 6300 6301	Lexington, NC Mt. Pleasant, SC Florence, SC Blythewood, SC Summerville, SC	Columbia, SC Charleston, SC Florence, SC W. Columbia Summerville, SC
KF001 Richard Smith Greensboro, NC (910) 665-1254 Audix #: 6275 / Sr. PTST: 7132 Central NC	KFA02 KFB04 KFD03 KFF03	Bernard Erhard Troy Horton Larry Goodnight William (Fred) Rogers	6302 6402 6285 6403	Greensboro, NC Salisbury, NC Salisbury, NC Rock Hill, SC	High Point, NC Clemmons, NC Salisbury, NC Rock Hill, SC
KH001 Dwayne Owens Mooresville, NC (704) 662-8352 Audix #: 6197 / Sr. PTST: 7302 Mooresville, NC	KHA01 KHB01 KHC01 KHD01 KHE01	Cathy Myers Derek Latham Kevin Thompson Andrew Christopher Daniel Thompson	6282 6283 6606 6470 6294	Elkin, NC Taylorsville, NC Davidson, NC Forest City, NC Spartanburg, SC	Wilkesboro, NC Hickory, NC Charlotte, NC Forest City, NC Spartanburg, SC

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Department Managers	1	1	0
Division Managers	6	6	0
Sales Representative	26	23	3
TOTAL	33	30	3

	DIVISION	TERRITORY
ADDITIONS		
DELETIONS		

DEPARTMENT NOO

NO002 JOHN HAZARD
DEPARTMENT MANAGER

DIVISION MANAGER		SALES REPRESENTATIVE ASSIGN #	NAME	AUDIX	TERRITORY DESCRIPTION	
NA001	James West	NAA05	Vacant (6/22/98)			Tallahassee, FL
	Lake City, FL	NAB02	Robert Springer	6233	Gainesville, FL	Gainesville, FL
	(904) 752-6719	NAC02	Matthew Friend	6430	Yulee, FL	Jacksonville, FL
Audix #:	6311 / Sr. PTST: 7133	NAD02	John Beasley	6417	Jacksonville, FL	Orange Park Florida, FL
	North FL	NAF01	(Mr) Loren Dodson	6336	Ocala, FL	Ocala, FL
NB002	William Keezel	NBA01	Clayton Appleby	6321	Apopka, FL	North Orlando, FL
	Longwood, FL	NBB03	Marsha Glass	6313	Lakeland, FL	Polk County/Lakeland, FL
	(407) 774-0736	NBC03	Vacant (6/22/98)			E Orlando, Space Cst, FL
Audix #:	6331 / Sr. PTST: 7134	NBD02	Robert Wingert	6324	Daytona Bch, FL	Daytona Beach, FL
	East Central FL	NBE03	Laura Mannarino	6322	Orlando, FL	Kissimmee, St. Cloud, FL
		NBF01	David Jones	6326	Melbourne, FL	Melbourne, FL
ND001	William (Ed) Bozeman	NDA04	Julio Campodonico	6335	Valrico, FL	East Tampa, FL
	Plant City, FL	NDB01	Robert Tate	6332	Safety Harbor,FL	Pinellas County, FL
	(813) 754-2152	NDC03	David Whitaker	6333	Sarasota, FL	Sarasota County, FL
Audix #:	6314 / Sr. PTST: 7136	NDD02	Joe Homan	6086	Spring Hill, FL	Bradenton, FL
	West Central FL	NDE02	John Choronenko	6334	Tampa, FL	North Tampa, FL
		NDH01	James Brown	6330	Estero, FL	Fort Myers, FL
NF001	Mitchell Goldberg	NFA02	Nelson Lafont	6566	Miami, FL	Homestead, FL Keys, FL
	Miami, FL	NFD03	Vacant (5/9/97)			Hialeah, North Miami, FL
	(305) 274-8056	NFE02	George Hernandez	6339	Miramar, FL	S Broward County, FL
Audix #:	6315 / Sr. PTST: 7137	NFF01	Patrice Manley	6328	PompanoBch,FL	Boca Raton, FL
	Miami, The Florida Keys	NFG01	Vacant (12/19/97)			W. Palm Beach, FL
		NFH01	Richard Cirolia	6327	Wellington, FL	Stuart, FL

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Department Managers	1	1	0
Division Managers	4	4	0
Sales Representative	23	19	4
TOTAL	28	24	4

	DIVISION	TERRITORY
ADDITIONS		
DELETIONS		

REGION III

REGION III SALES OFFICE 7801 MESQUITE BEND DRIVE SUITE 101 IRVING, TX 75063 OFFICE: (972) 831-8171 FAX: (972) 831-8170	
Regional Vice President, Sales	Don Segelstrom RO303 Home: (817) 251-1835 Audix: 6464
Regional Sales Analyst	Amy Bost SA301 Audix: 6038
Regional Manager, State Government Relations	R. Eric Donaldson ST303 Office: (972) 831-8183 Fax: (972) 831-9340 Audix: 6386
Regional Marketing Manager	Vacant (6/1/98) MK303 Audix:
Key Account Manager	Burton Thibodeaux KA302 Audix: 6055
Administrative Secretary	Loretta Jeter XXS03 Audix: 6041

DEPARTMENT HOO 25132 OAKHURST DRIVE SUITE 201 SPRING, TX 77386 OFFICE: (281) 367-0526 FAX: (281) 292-8954	
Department Manager	Dan Custred HO002 Home: (281) 367-1209 Audix: 6042
Chain Account Manager	Rudy Lofton HO102 Audix: 6053
Department Secretary	Theresa Schuler XXS12 Audix: 6043

DEPARTMENT LOO

7801 MESQUITE BEND DRIVE
SUITE 101
IRVING, TX 75063

OFFICE: (972) 831-8171 FAX: (972) 831-8170

Department Manager	Larry Glass LO002 Home: (972) 517-5432 Audix: 6010
Chain Account Manager	Gary Lemoine LO104 Audix: 6021
Department Secretary	Marie Nolting XXS13 Audix: 6017

DEPARTMENT OOO

MAILING: PO BOX 40467
BATON ROUGE, LA
70835

SHIPPING: 12097 OLD HAMMOND HWY
SUITE E-1
BATON ROUGE, LA 70816

OFFICE: (504) 272-5394
FAX: (504) 272-5499

Department Manager	Mark Lawson OO002 Home: (504) 667-2710 Audix: 6187
Chain Account Manager	Janice Sarto OO101 Audix: 6045
Department Secretary	Wendy Kennard XXS29 Audix: 6019

SOUTHWEST PROMOTIONS OFFICE

156 WEST MAIN STREET
LEWISVILLE, TX 75057

OFFICE: (972) 436-7114 FAX: (972) 436-6407

Manager National / Event Operations	Randall Barnes (SW001) Office Address: 156 West Main Street Lewisville, TX 75057 Phone: (972) 436-7114 Fax: (972) 436-6407 Audix: 6447
Western Marketing Promotions Manager	Darrell Barron SWS01 Audix: 6443
Rodeo Supervisor	Tracy Harsche SW103 Audix: 6716
Rodeo Supervisor	Daniel May SW302 Audix: 6711
Rodeo Supervisor	Leon Schweitzer SW202 Audix: 6338
Rodeo Supervisor	Scott Walton SW401 Audix: 6388
Rodeo Supervisor	Ricky Sallee SW601 Audix: 6237
Western Events Administrator	Karyn Moore XXS40 Audix: 6110

REGION III MARKETING PROMOTIONS OFFICE

7801 MESQUITE BEND DRIVE
SUITE 101
IRVING, TX 75063

OFFICE: (972) 831-8932 FAX: (972)-831-8170

Regional Marketing Promotions Manager	Randy Vaughn S3007 Audix: 6444	
Regional Marketing Promotions Supervisor	Sean Flinn S3008 Audix: 6078 Sr. PTST Audix #: 7195	MPC Audix 1: 7306 MPC Audix 2: 7307 MPC Audix 3: 7308 MPC Audix 4: 7309 MPC Audix 5: 7310
Regional Marketing Promotions Supervisor	Albert Mondragon S3006 Audix: 6027 Sr. PTST Audix #: 7198 MPC Audix 1: 7161 MPC Audix 2: 7165	
Regional Marketing Promotions Supervisor	Brandon Rex S3009 Audix: 6664 Sr. PTST Audix #: 7135 MPC Audix 1: - 7303 MPC Audix 2: - 7304 MPC Audix 3: - 7305	
Marketing Promotions Administrative Secretary	Carolyn Songer XXS23 Audix: 6643	

DEPARTMENT HOO

HO002 DAN CUSTRED
DEPARTMENT MANAGER

DIVISION MANAGER	ASSIGN #	SALES REPRESENTATIVE NAME	AUDIX	TERRITORY DESCRIPTION	
HC004 Thomas Thibodeaux Spring, TX (281) 516-0848 Audix #: 6055 / Sr. PTST: 7138 TX	HCG08	Nicholas Brown	6438	Beaumont, TX	East Texas
	HCJ04	Patrick Morrow	6681	Huntsville, TX	E Central Texas
	HCK04	Todd Kinsey	6058		SE Texas
	HCL01	Jack Glenn	6059	Humble, TX	Houston Metro, NW Houston, TX
HD002 Mark Buhler Humble, TX (281) 370-6417 Audix #: 6052 / Sr. PTST: 7139 TX	HDA01	Newell White	6060	Pasadena, TX	Harris County (Houston Metro), TX
	HDC04	Donald Crosby II	6645	Huntsville, TX	NW Harris County (Houston Metro), TX
	HDD05	Ronald Ridgeway	6642	Houston, TX	W Harris County (Houston Metro), TX
	HDH04	Debra Carter	6063	Houston, TX	S Harris County & Victoria Metro, TX
	HDI01	Luana Tazioli	6064	Houston, TX	Central Harris County (Houston Metro), TX
HE004 Shawn Mitchell San Antonio, TX (915) 529-3024 Audix #: 6652/ Sr. PTST: 7140 Southwest TX	HEB02	Bradley Boyd	6065	Atascosa, TX	N San Antonio, TX
	HEG03	Kevin Rawlings	6195	Abilene, TX	NW Texas
	HEH02	Miguel Lopez	6067	Marion, TX	E San Antonio, TX
	HEJ01	Kilmer (Blaine) Corbin	6068	Odessa, TX	West Texas
	HEK01	Joe Tovar	6069	San Antonio, TX	Rural San Antonio, TX
HH002 Edward Knoll Hutto, TX (512) 759-2007 Audix #: 6054 / Sr. PTST: 7141 Central TX	HHA04	Collin, Gels	6008	Hewitt, TX	N Central Texas
	HHB05	Jason May	7023	Lubbock, TX	Central Texas
	HHC04	Joseph Russell	6666	College Stat, TX	E Central Texas
	HHD04	Thomas Swenson	6250	Austin, TX	SE Central Texas
	HHE02	David Kaulfus	6074	Belton, TX	W Central Texas
HJ004 Joe Wooley Corpus Christi, TX (512) 949-9559 Audix #: 6257 / Sr. PTST: 7142 SMD TX	HJB05	Roberto Aguirre	6271	Laredo, TX	S West Texas
	HJC03	Javier Villarreal	6611	Corpus Christi, TX	Corpus Christi Rural, TX
	HJD01	Victor Ramos	6077	McAllen, TX	Rio Grande Valley, TX
	HJE03	Carlos Garcia	6190	Corpus Christi, TX	Corpus Christi Metro, TX

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Department Managers	1	1	0
Division Managers	5	5	0
Sales Representative	23	23	0
TOTAL	29	29	0

	DIVISION	TERRITORY
ADDITIONS		
DELETIONS		

DEPARTMENT LOO

LO002 LARRY GLASS
DEPARTMENT MANAGER

DIVISION MANAGER	SALES REPRESENTATIVE ASSIGN #	NAME	AUDIX	TERRITORY DESCRIPTION
LA001 Ann Searcy Winnsboro, TX (903) 725-5119 Audix #: 6031 / Sr. PTST: 7143 NE TX; AR	LAB02	William Young	6239	Sulpher Spgs, TX	NE Texas
	LAC02	Kerry Hamblett	6013	Tyler, TX	Central NE Texas
	LAF02	Alan Hamblett	6012	Texarkana, TX	TX & AR
	LAG03	Dustin Hood	7003	Lufkin, TX	Rural Central NE TX
LB001 Jim Burns Plano, TX (972) 964-3496 Audix #: 6005 / Sr. PTST: 7144 TX	LBD07	Timothy Chauncey	6656	Little Elm, TX	NW Dallas, TX
	LBE04	Vacant (6/29/98)			
	LBH03	Edward Wilson	6281	Dallas, TX	South Dallas, TX
	LBJ01	Teresa Hatch	6016	Pilot Point, TX	Denton & N. Collin, TX
	LBX01	Shawn Higgins	6600	Allen, TX	NE Dallas; SE Collin, TX
LC004 Jeffrey Green Oklahoma City, OK (405) 348-3815 Audix #: 6011 / Sr. PTST: 7145 OK	LCC02	Chad Schroeder	6673	Chickasha, OK	SW Oklahoma
	LCD02	Leigh Ann Smith	6033	Cashion, OK	Metro Oklahoma City
	LCE03	Byron Parish	6029	Jones, OK	E. Central Oklahoma
	LCG03	Timothy Flinn	6644	Enid, OK	NW Oklahoma
	LCH02	Gary Noble	6613	Amarillo, TX	Northern TX Panhandle
LF003 David Todd Lubbock, TX (806) 791-4580 Audix #: 6036 / Sr. PTST: 7146 TX NM	LFA02	Clyde Harris	6014	Lubbock, TX	Mid-Texas Panhandle
	LFD03-SMD	Ricardo Lucero	6160	El Paso, TX	Far West Texas
	LFE05	Chester Bowyer	6147	Albuquerque, NM	Northern New Mexico
	LFF03-SMD	Raymond Valdez	6609	Albuquerque, NM	Southern New Mexico
	LFG05	Jim Andrews	6685	Lubbock, TX	Southern TX Panhandle
LG002 Jose Martinez Watauga, TX (817) 281-4452 Audix #: 6025 / Sr. PTST: 7147 TX	LGA02-SMD	Gary Polunsky	6030	Dallas, TX	N. Fort Worth, TX
	LGB03	Frank Cuccurullo	6659	Ft. Worth, TX	S. Fort Worth, TX
	LGC03	Darren Terrell	6660	Weatherford, TX	Weatherford, TX
	LGD04	Charles McHatton	6653	Marietta, OK	N. Texas
	LGE02-SMD	David Burleson	6004	Plano, TX	Arlington/Mid Cities, TX
LH002 Eddie Kesselring Tulsa, OK (918) 660-4959 Audix #: 6020 / Sr. PTST: 7148 OK	LHA03	Casey Soden	6559	Tulsa, OK	Metro Tulsa, OK
	LHB01	Mickey Martin	6024	Inola, OK	NE Oklahoma
	LHC02	John Knox	6682	Broken Arrow, OK	N. Central Oklahoma
	LHD02	Mike Henry	6158	Gore, OK	SE Oklahoma
	LHE01	Kevin Carpenter	6007	Durant, OK	SE Oklahoma

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Department Managers	1	1	0
Division Managers	6	6	0
Sales Representative	29	28	1
TOTAL	36	35	1

	DIVISION	TERRITORY
ADDITIONS		LBX01
DELETIONS		

DEPARTMENT OOO

OO002 MARK LAWSON
DEPARTMENT MANAGER

DIVISION MANAGER	SALES REPRESENTATIVE			TERRITORY DESCRIPTION
OA003 Scott Atwood Baton Rouge, LA (504) 752-3079 Audix #: 6089 / Sr. PTST: 7149 LA	OAA04 OAC07 OAF04 OAG03 OAH02	Holger Heap Jared Day Jason Salazar Russelle Romero Vince Holyfield	6680 6284 6267 6625 6270	Baton Rouge, LA Baton Rouge, LA Mandeville, LA New Iberia, LA Laplace, LA	South Southeast LA South Central LA Southeast LA South LA New Orleans, LA
OB001 Fred Dunavant Conway, AR (501) 329-8720 Audix #: 6080 / Sr. PTST: 7150 AR	OBA02 OB805 OBC02 OBD01 OBF03	Don Ingold Stacy Smith Bobby Phillips Judith Taylor Russ Moon	6340 6679 6093 6092 6090	Uniontown, AR Fayetteville, AR Jonesboro, AR Little Rock, AR Greenbriar, AR	West Central AR Northwest AR Northeast, AR Central AR North Central AR
OC001 George Boggan Greenwood, MS (601) 453-7114 Audix #: 6081 / Sr. PTST: 7151 MS	OCA02 OCC01 OCD03 OCE01	Jeffrey Pate Billy Spears Joby Kelly John Coghlan	6094 6096 6635 6098	Oxford, MS Tupelo, MS Greenwood, MS Newton, MS	Northwest MS Northeast MS Northcentral MS Northeast MS
OD001 Lane Simmons Purvis, MS (601) 794-2425 Audix #: 6082 / Sr. PTST: 7152 MS	ODA02 ODB02 ODC01 ODD02 ODE01	Melvin Dilworth Joseph Furlan Malcolm (David) Green Tommy Hill Jerry Gillis	6631 6235 7001 7002 6095	Jackson, MS Natchez, MS Purvis, MS Gulfport, MS Pearl, MS	Southwest MS Southeast Central MS South Central MS South MS Central, MS
OE001 Pete Thompson Denville, LA (318) 466-3625 Audix #: 6083 / Sr. PTST: 7153 LA	OEA02 OEB02 OEC03 OED01 OEE02	Nancy Kenner Joe Gremillion Charlotte Ashmore Mike Page Cynthia Frey	6368 6375 6071 7006 6001	Bossier City, LA W. Monroe, LA Woodworth, LA Lake Charles, LA Eunice, LA	Northwest LA Northeast LA Central LA Southwest LA South Central LA
OF002 Chris Tipton Alexander, AR (501) 315-0503 Audix #: 7007 / Sr. PTST: 7154 AR	OFA01 OFB02 OFC01 OFD01	Zell Daniels Michael Macfarlane Ronald Collins Dennis Davis	7008 7009 7010 7011	N. Little Rock, AR Wynne, AR Hot Springs, AR East Camden, AR	Southeast AR East AR Southwest AR Sthrn AR/Nrthrn LA

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Department Managers	1	1	0
Division Managers	6	6	0
Sales Representative	28	28	0
TOTAL	35	35	0

	DIVISION	TERRITORY
ADDITIONS		
DELETIONS		

REGION IV

REGION IV SALES OFFICE 22785 SAVI RANCH PARKWAY YORBA LINDA, CA 92887 OFFICE: (714) 282-0818 FAX: (714) 282-0191	
Regional Vice President, Sales	Bruce O'Connor RO401 Home: (714) 282-0300 Audix: 6342
Regional Sales Analyst	Michael (Beau) McNicholas SA403 Audix: 6049
Regional Marketing Manager	Tom Lowrey MK403 Audix: 6423
Key Account Manager	John Miller KA401 Audix: 6356
Administrative Secretary	Lorie Elwood XXS47 Audix: 6690

DEPARTMENT IOO 22785 SAVI RANCH PARKWAY YORBA LINDA, CA 92887 OFFICE: (714) 282-0818 FAX: (714) 282-0191	
Department Manager	Peter Rossi IO002 Home: (714) 637-6213 Audix: 6347
Chain Account Manager	Robert Klein IO103 Audix: 6355
Department Secretary	Sharon Atwood XXS45 Audix: 6108

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DEPARTMENT JOO

3164 GOLD CAMP DRIVE
SUITE 230
RANCHO CORDOVA, CA 95670

OFFICE: (916) 853-9066 FAX: (916) 853-9067

Department Manager	Curtis Farkas JO003 Home: (916) 672-2808 Audix: 6353
Chain Account Manager	Mitchell DeMarte JO106 Home: (916) 660-0362 Audix: 6420
State Gov't Relations Representative	Berman Obaldia ST401 Office: (916) 631-0282 Audix: 6543
Department Secretary	Pamela Hehn Audix: 6295

DEPARTMENT TOO

15786 SW UPPER BOONES FERRY ROAD
LAKE OSWEGO, OR 97035

OFFICE: (503) 624-7122 FAX: (503) 624-7256

Department Manager	Ken Lewis TO001 Home: (503) 620-4334 Audix: 6348
Chain Account Manager	Carl Orth TO101 Audix: 6392
Department Secretary	Lisa Cassel XXS50 Audix: 6138

REGION IV MARKETING PROMOTIONS OFFICE

22785 SAVI RANCH PARKWAY
YORBA LINDA, CA 92887

OFFICE: (714) 282-7675 FAX: (714) 282-0191
Sr. PTST Audix # 7196

Regional Marketing Promotions Manager	Frank Pisacane S4015 Audix: 6266
Regional Marketing Promotions Supervisor	Sean Erskine S4017 Audix: 6351
Regional Marketing Promotions Supervisor	Francisco Hogg S4018 Audix: 6320
Regional Marketing Promotions Supervisor	Jason Trosper S4019 Audix: 6713
Regional Marketing Promotions Programs Specialist	Shane Clouse S4016 Audix: 6699
Marketing Promotions Administrative Secretary	Lynne Cheline XXS24 Audix: 6450

DEPARTMENT 100

100002 PETER ROSSI
DEPARTMENT MANAGER

DIVISION MANAGER		SALES REPRESENTATIVE CASSIGN #	NAME	ADDRESS	TERRITORY DESCRIPTION	
IC005	Stephanie Anderson Cypress, CA (714) 816-0113 Audix #: 6354 / Sr. PTST: 7155 Long Beach	ICH01	Dee Ajimine	6360	Honolulu, HI	Maui, HI
		ICI01	Albert Jeffrey	6361	Covina, CA	NE LosAngeles,CA
		ICJ02	Raymond Couch	6152	Aliso Viejo, CA	Long Beach, CA
		ICK01	Charles Shinsato	6363	Honolulu, HI	Oahu, HI
		ICL01	Osmar Dechavez	6364	Chino, CA	S Los Angeles, CA
		ICM02	Lila Barrios	6677	Buena Park, CA	NW Orange Cty,CA
ID005	Gregory Richard Vista, CA (619) 598-0510 Audix #: 6367 / Sr. PTST: 7156 San Diego	IDA05	Rich Heide	6040	Hemet, CA	S. Riverside, CA
		IDB04	John McLean	6114	Palm Desert, CA	Palm Springs, CA
		IDE07	Dennis McGrath	6087	La Jolla, CA	SW San Diego, CA
		IDF09	Andrew Pak	7004	Carlsbad, CA	NE San Diego, CA
		IDH04	Charles Seyfried	6456	Imperial Beach, CA	Cntrl SanDiego,CA
IF006	Robert Ryan Cave Creek, AZ (602) 515-4638 Audix #: 6372/ Sr. PTST: 7157 Glendale	IFA03	David McKinney	6370	Phoenix, AZ	SE Phoenix, AZ
		IFB05	Brent Carter	6371	Phoenix, AZ	NE Phoenix, AZ
		IFD06	Brock Kemp	6449	Tucson, AZ	N. Tucson, AZ
		IFF05	Matthew Fleetwood	6655	Flagstaff, AZ	Northern, AZ
		IFG02	Ernesto Alvarez	6572	Phoenix, AZ	SW Phoenix, AZ
		IFH01	Martin McKinney	6598	Tucson, AZ	S. Tucson, AZ
IG007	Susan Butler Chino Hills, CA (909) 606-1509 Audix #: 6366 / Sr. PTST: 7158 Irvine	IGE04	Steve Harwood	6374	R. SntaMargarita,CA	N. Orange Cty, CA
		IGF05	John Chavez	6238	Corona, CA	Riverside, CA
		IGG01	Philip Shealy	6376	Henderson, NV	Nevada
		IGH03	David Itatani	6241	Chino, CA	SanBernardino,CA
		IGI01	Angus Brown	6344	Paradise Valley, AZ	Las Vegas / Nevada
IJ002	Miguel Anaya Orange, CA (714) 771-7857 Audix #: 6358 / Sr. PTST: 7159 San Pedro	IJA01	Emilio Andres	6382	Covina, CA	Pico Rivera, CA
		IJB03	Eduardo Sanabria	6637	Norwalk, CA	Bellflower, CA
		IJC03	Mario Velasquez	6072	Whittier, CA	Santa Ana, CA
		IJE02	Juan Montano	6527	Cudahy, CA	Central Los Angeles, CA
		IJF01	Manuel Martinez	6057	Chula Vista, CA	S. San Diego, CA
IK002	Michael Freudenthal Ventura, CA (805) 659-1476 Audix #: 6408 / Sr. PTST: 7160 Ventura	IKA02	Herbert Hart	6626	Santa Barbara, CA	Santa Barbara, CA
		IKB04	Todd Taylor	6683	Canyon Country,CA	West Valley, CA
		IKC01	Matthew Yardley	6576	Los Angeles, CA	South Valley, CA
		IKD01	Julie Kennedy	6387	Canyon Country,CA	North Valley, CA
		IKE02	Bradley Crane	6577	Canyon County, CA	W. Los Angeles,CA

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Deparoment Managers	1	1	0
Division Managers	6	6	0
Sales Representative	31	32	0
TOTAL	38	39	0

	DIVISION	TERRITORY
ADDITIONS		ICJ02
DELETIONS		IGD03

DEPARTMENT JOO

JO003 CURTIS FARKAS
DEPARTMENT MANAGER

DIVISION MANAGER	SALES REPRESENTATIVE				TERRITORY DESCRIPTION
JB006 James A. Jones Sheridan, CA (530)633-4323 Audix #: 6421 / Sr. PTST: 7192 Northern CA; NW NV	JBE04 JBG04 JBH03 JBK04 JBM04	Matthew Bloesch Raul Lopez Janet Valenti Richard Sabbagh Ryan Jackson	6689 6595 6401 6686 6003	Chico, CA Sacramento, CA Sparks, NV Citrus Heights, CA Redding, CA	Northern California Sacaramento, CA Northwest Nevada Foothills, CA Red Bluff, CA
JD006 Danny Ross La Grange, CA (209) 852-9658 Audix #: 6400 / Sr. PTST: 7162 Central CA	JDC06 JDI03 JDK02 JDL02	Eric Tumacder Vacant (6/3/98) Diane Elias Terry Parr	6106 6173 6061	Modesto, CA Stockton, CA Merced, CA	Modesto, CA Turlock, CA Calaveras, CA Fresno, CA
JH003 Barbara Kitchen Esparto, CA (916) 787-3860 Audix #: 6350 / Sr. PTST: 7163 San Francisco/Oakland, CA	JHA03 JHB04 JHC03 JHD03 JHF01	Vacant (6/29/98) Ryan Alizaga Stephen Arviso Vacant (2/2/98) Nick Peters	 6638 6224 6409	 Daly City, CA Vacaville, CA Sacramento, CA	San Francisco, CA Oakland, CA Vallejo, CA Northern Coast, CA W. Sacramento, CA
JJ002 Michael Bearnson Livermore, CA (510) 455-6809 Audix #: 6640 / Sr. PTST: 7164 San Jose/East Bay Area	JJA01 JJB01 JJC03 JJD02 JJE01	Eric Doerner David Ross Vincent Rivas Steven Gallegos Joel Russell	6427 6428 6407 6649 6076	San Jose, CA Tracy, CA Salinas, CA Aptos, CA San Francisco, CA	Mountain View, CA Livermore, CA Santa Cruz, CA Gilroy, CA San Francisco, CA
JK002 Darin Johnston Bakersfield, CA (805) 664-7842 Audix #: 6369 / Sr. PTST: 7165 Fresno/Bishop, CA	JKC02 JKD01 JKE05 JKF04	John Burns Debera Harris Vacant (6/5/98) Andrew Vogt	6091 6380 6459	Bakerfield, CA Bakersfield, CA Morro Bay, CA	Bakersfield, CA Bakersfield, CA Visalia, CA Santa Maria, CA

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Department Managers	1	1	0
Division Managers	5	5	0
Sales Representative	23	19	4
TOTAL	29	25	4

	DIVISION	TERRITORY
ADDITIONS		
DELETIONS		

DEPARTMENT TOO

TO001 KEN LEWIS
DEPARTMENT MANAGER

DIVISION MANAGER		SALES REPRESENTATIVE ASSIGN #	NAME	AUDIX	TERRITORY DESCRIPTION	
TA001	Steven Clark Sumner, WA (253) 891-2098 Audix #: 6389 / Sr. PTST: 7166 West WA; AK	TAA04	Corey Hensley	6205	Everett, WA	Northern WA
		TAB03	Vacant (6/29/98)			Seattle-Metro Area, WA
		TAC02	Tim Roepke	6002	Anchorage, AK	Alaska
		TAD01	Walter Kingsbury	6399	Kent, WA	South Seattle, WA
TB001	Gary Thorn Spokane, WA (509) 465-8515 Audix #: 6391 / Sr. PTST: 7167 WA; ID; MT	TBA03	Jeffrey Toole	6073	Spokane, WA	Eastern WA; No. ID
		TBB01	Daryl Smith	6404	Lolo, MT	Western MT
		TBC03	Chris Hiles	6312	Yakima, WA	Cntrl WA, Northern OR
		TBD01	Terry Idstrom	6406	Billings, MT	Central/Eastern MT
TC002	Eric Nash Tigard, OR (503) 524-4574 x6544 Sr. PTST: 7168	TCA02	Michael Shumacher	6694	Beaverton, OR	Northwest OR
		TCB02	Yannal Al-Attrash	6352	Clatskanie, OR	Northwest WA
		TCC01	David Ulrich	6412	Spanaway, WA	Tacoma, WA
		TCD01	Mike Kellher	6413	Gig Harbor, WA	Northwest WA
TD001	Howard Johnson Boise, ID (208) 342-1038 Audix #: 6394 / Sr. PTST: 7169 UT; ID; NV; WY; OR	TDA01	Robert Losee	6414	Chubbuck, ID	Southeast ID
		TDB03	Jeffery Azevedo	6044	Nampa, ID	Eastern OR, West ID
		TDC04	Shane Wilde	6385	Riverton, UT	Salt Lake City, UT
		TDD04	Delroy Mark	6691	S. Jordan, UT	East/West/Mid UT
TE002	Thomas Parrott Portland, OR (503) 531-8322 Audix #: 6410 / Sr. PTST: 7170 OR; WA	TEA01	Douglas Schulte	6575	Vancouver, WA	Portland, OR
		TEB01	Kelly Smith	6424	Beaverton, OR	Eastern, OR
		TEC04	Vacant (4/29/98)			Southwest OR
		TED01	James Jensen	6426	Medford, OR	Southwest OR
TF001	Stephen Danielski Broomfield, CO (303) 466-8844 Audix #: 6537 / Sr. PTST: 7171 SMD; CO; NM	TFA03	Kirlyn Fouts	6099	Monument, CO	SE CO; North NM
		TFB02	George Vande Walle	6545	Englewood, CO	Boulder, CO
		TFC02	Douglas Williams	6602	Grand Jnctn, CO	Southwest CO
		TFD04	Brian Nowicki	6411	Ft. Collins, CO	Northwest/Central CO
		TFE01	William Halamicek	6547	Denver, CO	East/Central CO
		TFF01	Lance Aikire	6614	H.landsRanch,CO	Denver, CO

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Department Managers	1	1	0
Division Managers	6	6	0
Sales Representative	26	24	2
TOTAL	33	31	2

	DIVISION	TERRITORY
ADDITIONS		
DELETIONS		

REGION V

REGION V SALES OFFICE

603 EAST DIEHL ROAD
SUITE 135
NAPERVILLE, IL 60563

OFFICE: (630) 505-0210 FAX: (630) 505-0774

Regional Vice President, Sales	Robert Polinsky RO503 Audix: 6102 Home: (630) 406-8403
Regional Sales Analyst	Troy Ault SA503 Audix: 6628
Manager, State Government Relations/West	Kerry Paulson ST504 Phone (630) 505-3270 Fax (630) 505-9092 Audix: 6202
Regional Manager, State Government Relations	Brian Fojtik ST503 Phone (630) 505-3270 Fax (630) 505-9092 Audix: 6218 Audix: 6075 Office: (708) 505-3270
Regional Marketing Manager	Gary Gajslewicz MK502 Audix: 6465
Key Account Manager	Sherry Teeguarden KA501 Audix: 6457
Administrative Secretary	Mary Jahnke XX505 Audix: 6460

DEPARTMENT DOO

603 EAST DIEHL ROAD
SUITE 135
NAPERVILLE, IL 60563

OFFICE: (630) 505-0210 FAX: (630) 505-0774

Department Manager	Brian Charipar DO007 Audix: 6039 Home: (630) 761-8355
Chain Account Manager	Steve Hofferkamp DO101 Audix: 6462
Department Secretary	Patricia Mondek XX518 Audix: 6463

DEPARTMENT FOO 7650 CURRELL BOULEVARD SUITE 330 WOODBURY, MN 55125 OFFICE: (651) 738-9153 FAX: (651) 738-9166	
Department Manager	Thomas Kemper FO004 Audix: 6538 Home: (651) 714-4548
Chain Account Manager	Michael Stanke FO105 Audix: 6517
Department Secretary	Stephanie Gibson XX543 Audix: 6349

DEPARTMENT GOO 3000 BROOKTREE LANE SUITE 110 GLADSTONE, MO 64119 OFFICE: (816) 452-5001 FAX: (816) 452-6220	
Department Manager	Greg Germany GO002 Audix: 6009 Home: (816) 532-3994
Chain Account Manager	Philip Rinkoski GO101 Audix: 6469
Department Secretary	Robin Ware XX551 Audix: 6280

REGION V MARKETING PROMOTIONS OFFICE

603 EAST DIEHL ROAD, SUITE 135
NAPERVILLE, IL 60563
OFFICE: (630) 505-0578 FAX: (630) 505-4694
Sr. PTST Audix # 7197

Regional Marketing Promotions Manager	Kevin Arnold S5003 Audix: 6451
Regional Marketing Promotions Supervisor	Vane Weidenkopf S5008 Audix: 6085
Regional Marketing Promotions Supervisor	Mark Kenney S5007 Audix: 6633
Regional Marketing Promotions Supervisor (DEPT. GOO-Gladstone, MO)	Craig Reiman S5009 Audix: 6641
Marketing Promotions Administrative Secretary	Barbara Smith XXS25 Audix: 6454

DEPARTMENT DOO

DO007 BRIAN CHARIPAR
DEPARTMENT MANAGER

DIVISION MANAGER		SALES REPRESENTATIVE ASSIGNMENT	NAME	AGENCY	TERRITORY	DESCRIPTION
DA002	William Kozuch Bay City, MI (517) 686-3967 Audix #: 6471 / Sr. PTST: 7172 East Central MI	DAC04	Frank Mielke	6480	Lapeer, MI	East Central Flint, MI
		DAG01	Richard Ricard	6481	Bay City, MI	East Central, Bay City
		DAK01	John Vrondran	6498	Boyne City, MI	North MI part of UP
		DAL01	Shannon Olstrom	6433	Harrison, MI	North East Michigan
		DAM02	Trent Worden	6620	Freeland, MI	E Central M - Saginaw
DB002	Alan Story - SMD Naperville, IL (630) 983-5656 Audix #: 6472 / Sr. PTST: 7173 West Chicago Suburb	DBA03	Scott Edmundson	6570	Tinley Park, IL	S. Chicago Suburbs
		DBD05	Ronald Sagarino	6435	Carol Stream, IL	Far W. Chi Suburbs
		DBI02	Scott Bracken	6079	Naperville, IL	Far SW Chi Sub (Joliet)
		DBJ01	George Shinkan	6486	Schererville, IN	NW IN (Gary)/NE IL
		DBL01	Patrick Corricelli	6569	Peoria, IL	N Cntrl IL (Peoria)
DC002	Ralph Militello Indianapolis, IN (317) 845-0522 Audix #: 6473 / Sr. PTST: 7174 Central/Southern IN	DCA02	Donald Keltner II	6487	Clayton, IN	W Cntrl IN-TerreHaute
		DCC01	Morgan Jones	6488	Evansville, IN	Far SW IN (Evansville)
		DCH02	Bryan Eyer	6490	Indianapolis, IN	Indpls/East Cntrl IN
		DCI01	Vickki Marconi	6491	Carmel, IN	Indpls/North Cntrl IN
		DCJ03	Spencer Grimm	6154	New Albany, IN	South East IN
DF002	Robert Coughlin Kentwood, MI (616) 827-0839 Audix #: 6475 / Sr. PTST: 7175 West MI (G Rapids/Lansing)	DFA01	Mike Stabbekoorn	6496	Hardings, MI	SWCtrlMI(Kalamazoo)
		DFB01	Gregory Zahrt	6497	Fremont, MI	W Cntrl MI(Muskegon)
		DFD03	Michael Beyerlein	6499	Lansing, MI	S Cntrl MI (Lansing)
		DFE02	Paul Jarmus	6500	Grand Rapids,MI	W Cntrl MI (G. Rapids)
		DFF01	John Losey	6615	Fennville, MI	Far SW MI
DG001	William Hodgen Wolcottville, IN (219) 351-4882 Audix #: 6476 / Sr. PTST: 7176 North/Central IN	DGA02	Cynthia Porman	6501	South Bend, IN	W Cntrl IN (So. Bend
		DGB03	Thomas Hartley	6502	Huntington, IN	NE Cntrl (Fort Wayne,
		DGC03	Michael Howard	6503	Upland, IN	East Cntrl IN (Muncie)
		DGF01	David Toth	6489	Lafayette, IN	NW Cntrl IN(Lafayette)
		DGG01	Matthew Tomlinson	6629	Middlebury, IN	Far NE IN (Elkhart)
DH001	Ronald Felten - SMD Wauconda, IL (847) 487-1371 Audix #: 6477 / Sr. PTST: 7177 Far N/NW IL (Inc. Chi.)	DHA01	Sam Salamy	6506	Chicago, IL	Chicago Metro Area
		DHB03	Vacant (5/21/98)			NW Chi Sub (Elgin)
		DHC03	Ronald Metz	6050	Lake Hills, IL	Far N Chi (Waukegan)
		DHD01	John Grieser	6509	Belevidere, IL	Far NW IL (Rockford)
		DHE02	Victor Garcia	6419	Franklin Park, IL	Chicago Metro Area
DI003	Geoffrey Reinig Howell, MI (517) 552-0019 Audix #: 6616 / Sr. PTST: 7178 SE MI (includes Detroit)	DIA01	David Willoughby	6622	Ypsilanti, MI	SE MI (Ann Arbor)
		DIB02	Marc Morano	6046	RochesterHills,MI	NW Det.Subs(Pontiac)
		DIC02	Jamal Bakou	6048	ClintonTwshp,MI	NE Detroit Suburbs
		DID01	Zakaria Musallam	6482	Sterling Hts, MI	Detroit Metro
		DIE01	Nathaniel Rodgers	6478	Redford, MI	SE Detroit Suburbs

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Deparment Managers	1	1	0
Division Managers	7	7	0
Sales Representative	35	34	1
TOTAL	43	42	1

	DIVISION	TERRITORY
ADDITIONS		
DELETIONS		

DEPARTMENT FOO

FO004 THOMAS KEMPER
DEPARTMENT MANAGER

DIVISION MANAGER	SALES REPRESENTATIVE ASSIGN #	NAME	AUDIX #	TERRITORY DESCRIPTION	
FA002 Michael Churches Waukesha, WI (414) 968-5812 Audix #: 6510 / Sr. PTST: 7179 S WI/Milwaukee/Madison Metro	FAA03 FAB03 FAC04 FAD07	Michael Burke Tim Knoeck Joseph Syring Jody Hess	6562 6118 6129 6670	Greendale, WI Madison, WI Neenah, WI Pewaukee, WI	S Milwaukee Market Madison Market East Central WI Milwaukee Metro
FB002 Thomas Meyer Woodbury, MN (651) 731-0978 Audix #: 6511 / Sr. PTST: 7180 St. Paul Metro; SE MN & NW WI	FBA02 FBC02 FBD03 FBI03	George Stone Joseph Creighton Laura Hinz Michael Mansel	6533 6522 6467 6524	Menominee, WI Rochester, MN Woodbury, MN Woodbury, MN	Western WI Southeastern MN St. Paul Metro Eastern St.PaulMetro
FE001 Mary Johnston Hiawatha, IA (319) 393-6471 Audix #: 6512 / Sr. PTST: 7181 Eastern/Central IA	FEA04 FEB03 FEC05 FED04 FEE02	Rick Bohnhoff Douglas Faas Christopher Happ Shane Wickett Vacant (6/1/98)	6525 6526 6593 6528	Ankeny, IA Evansdale, IA Cedar Rapids, IA Bettendorf, IA	Des Moines Metro N Eastern IA Central Cities IA Quad Cities Market N Central IA
FF002 Lynn (Mr) Glock Bismarck, ND (701) 255-7999 Audix #: 6513 / Sr. PTST: 7182 North & South Dakota	FFA06 FFB01 FFC04 FFD04	John Carmichael Arlie Anundson Warren Dietrich Jon Jokela	6678 6530 6639 6532	Canbtota, SD Valley City, ND Bismarck, ND Rapid City, SD	Eastern SD Eastern ND Western ND Western SD
FG001 William Rhodes Rothschild, WI (715) 355-8525 Audix #: 6514 / Sr. PTST: 7183 N WI; Up MI	FGC01 FGD01 FGE01 FGF03	Mark Shilts Robert Dufresne James McCarthy Kevin Papushak	6535 6536 6519 7025	Schofield, WI Menominee, MI Kewaunee, WI Strongsville, OH	Central WI Upper Peninsula MI N Eastern WI S Western WI
FH001 Clay Uhlenhake Chanhassen, MN (612) 949-6125 Audix #: 6452 / Sr. PTST: 7184 MN Metro; W & N MN	FHA02 FHB04 FHC02 FHD03	Daniel King Vacant (6/23/98) David Lund Scott Hesse	6236 6520 6523	Baxter, MN Maple Grove, MN Monticello, MN	N Central MN N Eastern MN MN Metro Southwestern MN

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Department Managers	1	1	0
Division Managers	6	6	0
Sales Representative	25	23	2
TOTAL	32	30	2

	DIVISION	TERRITORY
ADDITIONS		
DELETIONS		

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DEPARTMENT GOO

GO002 GREG GERMANY
DEPARTMENT MANAGER

DIVISION MANAGER	SALES REPRESENTATIVE ASSIGN #	NAME	AUDIX	TERRITORY DESCRIPTION
GC002 David Carr St. Charles, MO (314) 940-9804 Audix #: 6568/ Sr. PTST: 7185 St. Louis	GCA04	Gerald Vitale	6599	St. Louis; SW MO
	GCB03	Richard Loelike	6549	St. Louis InnerCity,MO
	GCJ01	Carl Lane	6551	St. Louis; South MO
	GCL01	Lewis Pierce	6617	St. Louis; NW MO
GF002 Randal Kreisel Olathe, KS (913) 764-8252 Audix #: 6554 / Sr. PTST: 7186 Kansas City; MO/KS	GFA05	John Wilcox	6553	Olathe, KS SouthKansas City, KS SWNE Kansas/MWMO Kansas City, MO; NE
	GFB02	Louis Malinowski	6135	
	GFE02	Kirk Hanna	6557	
	GFF03	Glenn Hagan Jr.	6455	
GG002 Trent Cooper Republic, MO (417) 732-4450 Audix #: 6627/ Sr. PTST: 7187 Springfield, MO	GGA05	Kendrick Wall	6362	Columbia, MO Southeast MO South Central MO South Central MO Southwest MO
	GGB02	Gerald Gibbs	6558	Poplar Bluff, MO
	GGC01	Lonnie Funk	6560	Springfield, MO
	GGD04	Daniel Lemons	6561	Conway, MO
	GGF01	Edwin Nelson	6623	Joplin, MO
GH002 William Lequire Omaha NE (402) 894-0655 Audix #: 6531 / Sr. PTST: 7188 Omaha, NE	GHA02	Wayne Shields	6563	Grand Island, NE Northeast NE; NW IA Southeast NE; SW IA Omaha, NE; W Cntrl IA Northwest NE; SE WY
	GHB01	Kenneth Dass	6564	S. Sioux City, NE
	GHC01	Lynn (Mr) Hagan	6565	Firth, NE
	GHD04	Peter Donahoo	6440	Elkhorn, NE
	GHE01	Billy Zurcher	6567	Mitchell, NE
GI001 Richard Davis Jerseyville, IL (618) 498-9355 Audix #: 6542 / Sr. PTST: 7189 Springfield, IL	GIA02	Scott Merle	6548	Dow, IL West Central IL Central IL East Central IL Southwest IL South & Southeast IL
	GIB03	Jonathon Short	6398	St. Joseph, IL
	GID03	David Fritz	6696	Swansea, IL
	GIE01	Brent Hoelscher	6552	Carterville, IL
	GIF01	Tod Griffin	6550	
GJ002 Cory Ferguson Wichita, KS (316) 684-3466 Audix #: 6529 / Sr. PTST: 7190 Wichita, KS	GJA01	Barry Wentz	6555	N. Newton, KS Wichita; S Cntrl KS Western KS North Central KS Southeast KS
	GJB02	James Wohler	6578	Hays, KS
	GJC01	Christopher Temple	6556	Salina, KS
	GJD03	Marc Powell	6674	Pittsburgh, KS

	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Department Managers	1	1	0
Division Managers	6	6	0
Sales Representative	27	27	0
TOTAL	34	34	0

	DIVISION	TERRITORY
ADDITIONS		
DELETIONS		

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NATIONAL ACCOUNTS OFFICES

Wal-Mart / Sam's Sales Office
1000 McClain Road
Suite 612
Bentonville, AR 72712

Toll Free - 888-878-8506

OFFICE: (501) 271-6921 FAX: (501) 271-6979

Key Account Manager (Wal-Mart / Sam's)	Don Blackburn - KA601 Home #: (501) 925-3985 Audix: 6539
Administrative Secretary	Susan Pendergraft - XXS52 Home#: 501-361-5806 Audix: 6165

McLane Sales Office
2027 South 61st Street
Suite 124
Temple, TX 76504

Toll Free - 888-878-8845

OFFICE: (254) 742-0380 FAX: (254) 742-0344

National Account Manager	Daniel Elrod - NA101 Home #: (254) 780-3560 Audix: 6203
Account Development Manager	Tony Clanton - NA201 Home #: (254) 780-3655 Audix: 6290
Administrative Secretary	Vacant - XXS Home#: Audix:

SALESFORCE TOTALS

POSITION TITLE	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Regional Vice President Sales	5	5	0
Department Managers	16	16	0
Regional Sales Analysts	5	5	0
Chain Account Managers	16	16	0
Division Managers	97	96	1
Sales Representative	449	426	24
Key Account Managers	5	5	0
Regional Marketing Mgrs	5	4	1
Administrative Secretaries	5	5	0
Department Secretaries	16	16	0
TOTAL	619	594	26
MKTG PROMOTIONS			
Reg. Marketing Promo. Mgrs	5	5	0
Reg. Marketing Promo. Supervisor	15	15	0
Reg. Marketing Promo.	1	1	0
Mktg Promo. Admin. Secretary	5	4	1
TOTAL	26	25	1
SOUTHWEST PROMO.			
Manager Nat'l/Event Oper.	1	1	0
Western Mktg. Promo. Mgr	1	1	0
Rodeo Supervisors	5	5	0
Western Events Admin.	1	1	0
TOTAL	8	8	0
MOTORSPORTS			
Manager - Natl Motorsport Promo	1	1	0
Prgm Mgr Motorsport Oper.	1	1	0
Motorsports Coordinators	1	1	0
Motorsports Administrator	1	1	0
TOTAL	4	4	0
NATL ACCOUNT OFFICES			
Key Acnt Mgr Walmart/Sam's	1	1	0
Nat'l Account Manager	1	1	0
Account Development Mgr	1	1	0
Administrative Secretary	1	1	0
TOTAL	4	4	0
GRAND TOTALS:	661	635	27

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REGION I PERSONNEL

POSITION TITLE	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Regional Vice President, Sales	1	1	0
Department Managers	3	3	0
Regional Sales Analysts	1	1	0
Chain Account Managers	3	3	0
Division Managers	21	20	1
Sales Representative	98	92	6
Administrative Secretaries	1	1	0
Department Secretaries	3	3	0
Key Account Managers	1	1	0
Regional Marketing Managers	1	1	0
Reg. Mktg. Promotions Mgrs.	1	1	0
Reg. Mktg. Promo Supervisors	3	3	0
Mktg. Promotions Administrative Secretary	1	1	0
TOTAL	138	132	7

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REGION II PERSONNEL

POSITION TITLE	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Regional Vice President, Sales	1	1	0
Department Managers	4	4	0
Regional Sales Analysts	1	1	0
Chain Account Managers	4	4	0
Division Managers	21	21	0
Sales Representative	104	96	8
Administrative Secretaries	1	1	0
Department Secretaries	4	4	0
Key Account Managers	1	1	0
Regional Marketing Managers	1	1	0
Mgr - National / Event Oper.	1	1	0
Mgr - National / Motorsports Promo.	1	1	0
Program Mgr - Motorsports Oper.	1	1	0
Motorsports Coordinator	1	1	0
Motorsports Administrator	1	1	0
Reg. Mktg Promotions Mgrs.	1	1	0
Reg. Mktg. Promo Supervisors	3	3	0
Mktg. Promotion Administrative Secretary	1	0	1
TOTAL	152	143	9

REGION III PERSONNEL

POSITIONS TITLE	POSITONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Regional Vice President, Sales	1	1	0
Department Managers	3	3	0
Regional Sales Analysts	1	1	0
Chain Account Managers	3	3	0
Division Managers	17	17	0
Sales Representative	80	79	1
Administrative Secretaries	1	1	0
Department Secretaries	3	3	0
Key Account Managers	1	1	0
Regional Marketing Managers	1	0	1
Western Mktg. Promo. Manager	1	1	0
Rodeo Supervisors	5	5	0
Western Events Administrator	1	1	0
Reg. Mktg. Promotions Managers	1	1	0
Reg. Mktg. Promo Supervisors	3	3	0
Mktg. Promotions Administrative Secretary	1	1	0
TOTAL	123	121	2

REGION IV PERSONNEL

POSITION TITLE	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Regional Vice President, Sales	1	1	0
Department Managers	3	3	0
Regional Sales Analysts	1	1	0
Chain Account Managers	3	3	0
Division Managers	19	19	0
Sales Representative	80	75	6
Administrative Secretaries	1	1	0
Department Secretaries	3	3	0
Key Account Managers	1	1	0
Regional Marketing Managers	1	1	0
Reg. Mktg. Promotions Managers	1	1	0
Reg. Mktg. Promo Supervisors	3	3	0
Reg. Mktg. Promo. Prgm Specialist	1	1	0
Mktg. Promotions Administrative Secretary	1	1	0
TOTAL	119	114	6

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REGION V PERSONNEL

POSITION TITLE	POSITIONS BUDGETED	POSITIONS OCCUPIED	POSITIONS VACANT
Regional Vice President, Sales	1	1	0
Department Managers	3	3	0
Regional Sales Analysts	1	1	0
Chain Account Managers	3	3	0
Division Managers	19	19	0
Sales Representative	87	84	3
Administrative Secretaries	1	1	0
Department Secretaries	3	3	0
Key Account Managers	1	1	0
Regional Marketing Managers	1	1	0
Reg. Mktg. Promotions Managers	1	1	0
Reg. Mktg. Promo Supervisors	3	3	0
Mktg. Promotions Administrative Secretary	1	1	0
TOTAL	125	122	3

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ALPHABETICAL INDEX/
HOME PHONE/AUDIX LISTING

NAME	ASSN. #	AUDIX #	PHONE #	PAGE #
ADKINS, RAY	UCB01	6162	304-733-0776	6
AGUIRRE, ROBERTO	HJB05	6271	210-723-4925	17
AJIMINE, DEE	ICH01	6360	808-396-7515	22
ALIZAGA, RYAN	JHB04	6638	415-333-7564	23
ALKIRE, LANCE	TFF01	6614	303-683-5087	24
ALLEN, HARRY	CGC01	6221	770-981-0246	10
ALVAREZ, ERNESTO	IFG02	6572	602-936-8419	22
AL-ATTRASH, YANNAL	TCB02	6352	503-397-3762	24
ANAYA, MIGUEL	IJ002	6358	714-771-7857	22
ANDERSON, STEPHANIE	IC005	6354	714-816-0113	22
ANDRE, MICHAEL	BGF04	6066	614-478-9032	5
ANDRES, EMILIO	IJA01	6382	818-966-0243	22
ANDREWS, JIM	LFG05	6685	806-794-3144	18
ANUNDSON, ARLIE	FFB01	6530	701-845-1329	29
APPLEBY, CLAYTON	NBA01	6321	407-862-7426	13
ARNOLD, KEVIN	S5003	6451	630-443-8779	27
ARVISO, STEPHEN	JHC03	6224	707-453-1412	23
ASHMORE, CHARLOTTE	OEC03	6071	318-442-4908	19
ATWOOD, SCOTT	OA003	6089	504-752-3079	19
ATWOOD, SHARON	XXS45	6108	714-879-8943	20
AULT, TROY	SA503	6628	515-233-2275	29
AZEVEDO, JEFFERY	TDB03	6044	208-345-8223	24
BAKOU, JAMAL	DIC02	6048	810-263-1794	28
BARFIELD, TERRY	CGH01	6216	912-275-2878	10
BARNES, RANDY	SW001	6447	909-672-7587	16
BARRIOS, LILA	ICM02	6677	714-229-8338	22
BARRON, DARRELL	SW501	6443	872-831-8932	16
BEARNSON, MICHAEL	JJO02	6640	510-455-6809	23

NAME	ASSN. #	AUDIX #	PHONE #	PAGE #
BEASLEY, JOHN	NAD02	6417	904-636-5903	13
BENITEZ, JORGE	BKB01	6494	937-877-2203	5
BERKEBILE, THOMAS	BO104	6136	412-490-9049	3
BEYERLEIN, MICHAEL	DFD03	6499	517-323-7155	28
BIDDY, ERNEST	EO105	6260	606-548-2219	8
BIELTZ, WILLIAM	MK101	6137	203-268-9617	2
BLACKBURN, DON	KA601	6539	501-925-3985	31
BLACKMON, FRED	CBN02	6213	770-869-1002	10
BLANKEN, CAROL	EJD01	6268	423-239-3651	11
BLANKENSHIP, JOE	KD004	6273	828-667-8923	12
BLOESCH, MATTHEW	JBE04	6689	916-892-0482	23
BODNAR, GARTH	UGD01	6706	304-284-8428	6
BOGGAN, GEORGE	OC001	6081	601-453-7114	19
BOGGS, JAMES	CAB01	6253	205-828-4574	10
BOHNHOFF, RICK	FEA04	6525	515-964-9377	29
BOOTH, SUSAN	EJA01	6265	423-753-2902	11
BOST, AMY	SA301	6038	817-481-9835	14
BOWYER, CHESTER	LFE05	6147	806-748-0572	18
BOWMAN, JAMES	EIA02	6646	606-548-4044	11
BOYD, BRADLEY	HEB02	6065	210-622-9496	17
BOZEMAN, WILLIAM	ND001	6314	813-754-2152	13
BRACKEN, SCOTT	DBI02	6079	630-904-3019	28
BRAWLEY, JANICE	XXS02	6189	704-663-0196	7
BREEDEN, BARKLEY	UDG01	6381	804-973-6558	6
BRITT, STEPHEN	UDH01	6671	540-885-1977	6
BROOKS, TERRI	RAC07	6591	704-664-5846	9
BROWN, ANGUS	IGI01	6344	602-553-0631	22
BROWN, JAMES	NDH01	6330	813-495-8459	13
BROWN, JEFF	UO001	6143	804-360-0747	3
BROWN, NICHOLAS	HCG08	6438	409-861-4183	17
BRUCE, JOHN	RAC09	6439	704-483-3653	9

NAME	ASSN. #	AUDIX #	PHONE #	PAGE #
BRYANT, LARRY	KCD03	6663	919-514-6990	12
BRYANT, OSCAR	CMF01	6231	205-492-0920	10
BUCHAUER, BRIAN	RAC08	6592	704-873-0115	9
BUHLER, MARK	HD002	6052	281-370-6417	17
BUIE, THOMAS	ED002	6317	901-664-6199	11
BURKE, MICHAEL	FAA03	6562	616-353-9717	29
BURLESON, DAVID	LGE02	6004	972-517-8112	18
BURNS, JAMES	LB001	6005	972-964-3496	18
BURNS, JOHN	JKC02	6091	805-589-0145	23
BUTLER, SUSAN	IG007	6366	909-606-1509	22
CAMERON, HAYWARD	KC001	6272	919-734-6616	12
CAMERON, ROBERT	UAA01	6277	804-883-7747	6
CAMPBELL, VINCE (David)	CB004	6229	770-889-7815	10
CAMPODONICO, JULIO	NDA04	6335	813-654-2402	13
CARPENTER, KEVIN	LHE01	6007	580-924-0657	18
CARMICHAEL, JOHN	FFA06	6678	605-296-3678	29
CARR, DAVID	GC002	6568	314-940-9804	30
CARTER, BRENT	IFB05	6371	602-996-3621	22
CARTER, DEBRA	HDH04	6063	713-433-5901	17
CARTER, PHILIP	UBA01	6309	540-992-4120	6
CARTER, TIMOTHY	KED01	6299	803-667-0046	12
CASSEL, LISA	XXS50	6138	503-768-9573	21
CHAPMAN, WALTER	EAE02	6245	502-368-1269	11
CHARIPAR, BRIAN	DO007	6039	630-761-8355	25
CHAUNCEY, TIMOTHY	LBD07	6656	972-292-2759	18
CHAVEZ, JOHN	IGF05	6238	909-273-1030	22
CHELINE, LYNN	XXS24	6450	714-529-7454	21
CHIARADIO, ROBERT	KA101	6103	203-452-8339	2
CHORONENKO, JOHN	NDE02	6334	813-991-6685	13
CHRISTOPHER, ANDREW	KHD01	6470	704-245-6249	12
CHURCHES, MICHAEL	FA002	6510	414-968-5812	29

NAME	ASSN. #	AUDIX #	PHONE #	PAGE #
CIROLIA, RICHARD	NFH01	6327	561-790-7847	13
CLANTON, ANTHONY	NA201	6290	254-780-3655	31
CLARK, CORINNE	XXS31	6141	804-288-7750	3
CLARK, EDWARD	CBE01	6023	770-879-5903	10
CLARK, STEVEN	TA001	6389	253-891-2098	24
CLARKE, JACOB	UBF01	6697	540-223-4409	6
CLEMENTS, CHARLES	AFD01	6134	609-547-4565	4
CLOUSE, SHANE	S4016	6699	360-573-7806	21
COGHLAN, JOHN	OCE01	6098	601-683-2724	19
COLLINS, RONALD	OFC01	7010	501-623-7185	19
CONTE, RICHARD	BFK01	7013	717-562-0404	5
COOPER, TRENT	GGO02	6627	417-732-4450	30
CORBIN, KILMER	HEJ01	6068	915-368-4715	17
CORNELL, VAUGHN	AGC01	6365	716-484-2435	4
CORRICELLI, PATRICK	DBL01	6569	309-682-0917	28
COUCH, PAUL	KEG01	6301	803-821-1381	12
COUCH, RAYMOND	ICJ02	6152	714-643-0305	22
COUGHLIN, ROBERT	DF002	6475	616-827-0839	28
COUNTS, CHRISTOPHER	KDC02	6293	864-855-4750	12
COX, DAVID	CMG02	6581	334-265-0964	10
CRAFFEY, KEITH	BKO01	6474	513-231-5782	5
CRANE, BRADLEY	IKE02	6577	805-250-0970	22
CREIGHTON, JOSEPH	FBC02	6522	507-288-5481	29
CROSBY, DONALD II	HDC04	6645	281-255-8723	17
CRUTCHER, DAVID	KO003	6276	704-660-9118	8
CUCCURULLO, FRANK	LGB03	6659	817-237-0231	18
CULP, THOMAS	CMD01	6230	334-244-6539	10
CUNNINGHAM, DAVID	A0101	6140	860-343-1643	2
CUNNINGHAM, PATRICIA	CGI03	6217	770-251-4978	10
CURAN, ROBERT	RO203	6150	704-660-6861	7
CURTIS, DENFORD	EID01	6263	606-783-1295	11

NAME	ASSN. #	AUDIX #	PHONE #	PAGE #
CUSTRED, RICHARD (DAN)	HO002	6042	409-321-3264	14
DANIELS, ZELL	OFA01	7008	501-945-5765	19
DANIELSKI, STEPHEN	TF001	6537	303-466-8844	24
DASS, KENNETH	GHB01	6564	402-494-8016	30
DAVIS, DENNIS	OFD01	7011	870-574-2676	19
DAVIS, MICHAEL	CAA01	6252	205-383-3616	10
DAVIS, RICHARD	GI001	6542	618-498-9355	30
DAVIS, STEVE	KBD02	6630	252-451-7872	12
DAWSON, DARREN	KCF02	6305	919-819-1182	12
DAY, GENE	UD001	6146	540-888-4314	6
DAY, JARED	OAC07	6284	504-332-0877	19
DEAL, JODY	S2005	6304	704-878-2412	9
DEAN, JOSEPH	UGB01	6704	304-884-7425	6
DECHAVEZ, OSMAR	ICL01	6364	909-393-6920	22
DEMARTE, MITCHELL	J0106	6420	916-660-0362	21
DICKENS, WILLIAM	EHC01	6258	615-591-6915	11
DIETRICH, WARREN	FFC04	6639	701-222-0819	29
DILWORTH, MELVIN	ODA02	6631	601-956-4006	19
DOCKERY, AIDAN	SA103	6104	860-643-7344	2
DODSON, LOREN (Mr.)	NAF01	6336	904-237-0946	13
DOERNER, ERIC	JJA01	6427	408-224-1579	23
DONACHIE, JOHN	KEC02	6298	803-884-4528	12
DONAHOO, PETER	GHD04	6440	402-332-2626	30
DONALDSON, R. ERIC	ST303	6386	972-831-8183	14
DOWDELL, DAVID	CLD04	6278	912-489-4589	10
DUFRESNE, ROBERT	FGD01	6536	906-789-9390	29
DUNAVANT, FRED	08001	6080	501-329-8720	19
DUNLAP, JACKSON	S1004	6437	203-775-1282	3
EARLY, SCOTT	AEC03	6329	518-235-6164	4
EDMUNDSON, SCOTT	DBA03	6570	708-702-8106	28
ELIA, MARK	ACG02	6120	716-671-4633	4

NAME	ASSN. #	AUDIX #	PHONE #	PAGE #
ELIAS, DIANE	JDK02	6173	209-478-3963	23
ELROD, DANIEL	NA101	6203	254-780-3560	31
ELWOOD, LORIE	XXS47	6690	562-924-7544	20
EMMERICH, SCOTT	UEA01	6184	301-249-0647	6
ERHARD, BERNARD	KFA02	6302	336-856-2909	12
ESLICK, MERRITT	KA201	6188	704-892-7120	7
ERSKINE, SEAN	S4017	6351	425-255-2545	24
EYER, BRYAN	DCH02	6490	317-842-2538	28
FAAS, DOUGLAS	FEB03	6526	319-236-1016	29
EDWARD FAIRBROTHER	ACI01	6373	607-796-9720	4
FARKAS, CURTIS	JO003	6353	916-672-2808	21
FELTEN, RON	DH001	6477	847-487-1371	28
FERGUSON, CORY	GJ002	6529	316-684-3466	30
FIELDS, ROBERT	E0002	6194	615-754-0446	8
FISHER, SCOTT	EDG01	6251	901-925-6658	11
FLANIGAN, FELIX	UED01	6183	302-738-5162	6
FLEETWOOD, MATTHEW	IFF05	6655	520-714-9421	22
FLETCHER, RICHARD	CL002	6319	904-278-8015	10
FLINN, SEAN	S3008	6078	504-272-5413	16
FLINN, TIMOTHY	LCG03	6644	405-237-0527	18
FORTNER, RICKY	UF001	6163	304-253-0919	6
FOUTS, KIRLYN	TFA03	6099	719-481-2770	24
FRANKLIN, JAMES (Randy)	CBF08	6507	770-748-5355	10
FREIRE, DANIEL	AFA01	6131	201-659-0261	4
FREUDENTHAL, MICHAEL	IK002	6408	805-659-1476	22
FREY, CYNTHIA	OEE02	6001	318-457-7337	19
FRIEND, MATTHEW	NAC02	6430	904-225-2412	13
FRITZ, DAVID	GID03	6696	217-469-7330	30
FULLEM, DANIEL	AEF02	6658	518-899-0032	4
FUNK, LONNIE	GGC01	6560	417-833-4938	30
FURLAN, JOSEPH	ODB02	6235	601-446-7191	19

NAME	ASSN. #	AUDIX #	PHONE #	PAGE #
GABLER, JEFFREY	BIE02	6244	330-499-6656	5
GAJSIEWICZ, GARY	MK502	6465	630-262-0234	25
GALLEGOS, STEVEN	JJD02	6649	408-695-9640	23
GAMBLE, GARY	BIB01	6179	216-681-9443	5
GARCIA, CARLOS	HJE03	6190	512-852-8306	17
GARCIA, VICTOR	DHE02	6419	847-451-6406	28
GAUS, SCOTT	UEB01	6185	301-949-7516	6
GEIS, COLLIN	HHA04	6008	254-666-4292	17
GERMANY, GREG	GO002	6009	816-532-3994	26
GERRISH, EUGENE	AEB02	6128	802-229-4509	4
GIBBS, GERALD	GGB02	6558	573-785-0536	30
GIBSON, II, JERRY	UAE04	6605	804-934-1768	6
GIBSON, STEPHANIE	XXS43	6349	651-458-1153	26
GILANYI, GARY	BIC03	6249	330-539-1517	5
GILLEY, PHILLIP	CNB02	6676	850-435-9190	10
GILLIS, JERRY	ODE01	6095	601-939-2512	19
GLASS, LARRY	LO002	6010	972-517-5432	15
GLASS, MARSHA	NBB03	6313	941-858-5301	13
GLENN, JACK	HCL01	6059	281-852-1053	17
GLOCK, LYNN (Mr.)	FF002	6513	701-255-7999	29
GOLDBERG, MITCHELL	NF001	6315	305-270-6944	13
GOODNIGHT, LARRY	KFD03	6285	704-636-0481	12
GORDON, PAUL	UDE01	6022	301-724-1825	6
GOSART, TODD	S2007	6668	704-732-7504	9
GRAHAM, JAMES	ADB04	6122	603-483-0127	4
GRANDE, KEVIN	BHD03	6175	610-454-1240	5
GRAVES, JAMES	EHA02	6256	615-382-7101	11
GREATHOUSE, JEANNETTE	XXS36	6619	203-723-8751	2
GREEN, JEFFREY	LC004	6011	405-348-3815	18
GREEN, MALCOLM	ODC01	7001	601-296-7721	19
GREENBERG, STEVEN	AAG05	6111	617-784-1450	4

NAME	ASSN. #	AUDIX #	PHONE #	PAGE #
GREENLY, DENNIS	BF001	6148	717-323-4131	5
GREMILLION, JOE	OEB02	6375	318-397-3193	19
GRIESER, JOHN	DHD01	6509	815-544-4116	28
GRIFFIN, TOD	GIF01	6550	618-985-4602	30
GRIMM, SPENCER	DCJ03	6154	812-948-0391	28
HACHMANN, JEFFREY	S1010	6178	203-734-1149	3
HAGAN, GLENN JR.	GFF03	6455	913-962-5385	30
HAGAN, LYNN (Mr.)	GHC01	6565	402-791-2212	30
HALAMICEK, WILLIAM	TFE01	6547	303-373-4654	24
HALEY, JOHN	UE002	6177	410-620-3123	6
HALL, MICHAEL	KEF01	6300	803-754-5160	12
HALL, MICHELLE	BAD04	6051	412-628-0431	5
HAMBLETT, ALAN	LAF02	6012	903-838-9488	18
HAMBLETT, KERRY	LAC02	6013	903-894-8337	18
HAMILTON, VANESSA	EIC03	6541	606-263-3765	11
HANNA, KIRK	GFE02	6557	913-441-4654	30
HAPP, CHRISTOPHER	FEC05	6593	319-393-6811	29
HARRIS, CLYDE	LFA02	6014	806-234-3012	18
HARRIS, DEBERA	JKD01	6380	805-831-6495	23
HARSCHE, TRACY	SW103	6716	605-342-2037	16
HART, HERBERT	IKA02	6626	805-967-1755	22
HARTIGAN, PATRICK	UAB01	6425	804-727-0787	6
HARTLEY, THOMAS	DGB03	6502	219-358-0132	28
HARWOOD, STEVE	IGE04	6374	714-858-3619	22
HATCH, TERESA	LBJ01	6016	940-458-7111	18
HAYES, BUFORD	EH002	6240	615-859-3038	11
HAZARD, JOHN	NO002	6084	407-788-7035	8
HEAP, HOLGER	OAA04	6680	504-753-1892	19
HEHN, PAMELA	XX548	6295	530-677-5937	21
HEIDE, RICH	IDA05	6040	909-929-1599	22
HEMBY, BRAD	EDC02	6431	901-382-4632	11

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HENDERSON, DAVID LEE	UCG01	6156	304-595-6465	6
HENRY, MIKE	LHD02	6158	918-489-5988	18
HENSLEY, COREY	TAA04	6205	425-257-3175	24
HERNANDEZ, GEORGE	NFE02	6339	954-704-4832	13
HESS, JODY	FAD07	6670	414-695-1921	29
HESSE, SCOTT	FHD03	6523	612-295-2073	29
HEYLMUN, HOWARD	UO102	6145	804-550-0407	3
HIGGINS, SHAWN	LBX01	6600	972-396-9637	18
HIGGINS, WILLIAM	BFJ01	6672	717-288-4370	5
HILES, CHRIS	TBC03	6312	509-965-5882	24
HILL, TOMMY	ODD02	7002	228-831-9268	19
HINZ, LAURA	FBD03	6467	651-730-4380	29
HODGEN, WILLIAM	DG001	6476	219-351-4882	28
HODGES, EDEN	UBG01	6698	304-645-2312	6
HOELSCHER, BRENT	GIE01	6552	618-277-5803	30
HOFFERKAMP, STEPHEN	D0101	6462	630-539-8044	25
HOGG, FRANCISCO	S4018	6320	707-571-1495	23
HOLMAN, RILEY	CND02	6604	334-675-7282	10
HOLYFIELD, VINCE	OAH02	6270	504-652-7961	19
HOMAN, JOSEPH	NDD02	6086	352-597-4682	13
HOOD, CHAD	UFD01	6703	540-431-2714	6
HOOD, DUSTIN	LAG03	7003	409-634-7614	18
HORTON, TROY	KFB04	6402	704-642-1756	12
HOWARD, LAURA	XXS49	6594	704-664-2817	9
HOWARD, MICHAEL	DGC03	6503	765-998-6183	28
HUTH, RON	RO103	6461	203-459-8302	2
IDSTROM, TERRY	TBD01	6406	406-248-5165	24
INGOLD, DON	OBA02	6340	501-471-5166	19
IRONS, CHARLES	CA001	6286	205-353-0927	10
ITATANI, DAVID	IGH03	6241	909-627-9685	22
IVEY, CYNTHIA	XXS46	6422	770-461-1126	7

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JACOBY, RICHARD	KBG02	6303	919-538-0948	12
JACKSON, RYAN	JBM04	6003	530-223-5426	23
JAHNKE, MARY	XXS05	6460	630-416-0644	25
JANNE, RICHARD	AA004	6100	860-643-9478	4
JARMUS, PAUL	DFE02	6500	616-248-3170	28
JEFFREY, ALBERT	ICI01	6361	818-967-8660	22
JENSEN, JAMES	TED01	6426	541-857-9649	24
JETER, LORETTA	XXS03	6041	972-346-2677	14
JOHNSON, CHARLES	BKC01	6492	513-667-9015	5
JOHNSON, HOWARD	TD001	6394	208-342-1038	24
JOHNSON, JOHN	CBM02	6661	706-632-8599	10
JOHNSTON, DARIN	JK002	6369	805-664-7842	23
JOHNSTON, MARY	FE001	6512	319-393-6471	29
JOKELA, JON	FFD04	6532	605-342-9077	29
JONES, DAVID	NBF01	6326	407-984-1781	13
JONES, JAMES A	JB006	6421	530-633-4323	23
JONES, JAMES E	EAG01	6246	502-526-6292	11
JONES, MORGAN	DCC01	6488	812-963-6988	28
KAPELA, HENRY	AGA01	6121	716-873-8407	4
KAULFUS, DAVID	HHE02	6074	817-780-3042	17
KEEZEL, WILLIAM	NB002	6331	407-774-2497	13
KELIHER, MICHAEL	TCD01	6413	425-851-5963	24
KELLER, TAMMY	EJB02	6662	423-691-8893	11
KELLEY, LLOYD	KE001	6274	803-732-1586	12
KELLY, JOBY	OCD03	6635	601-453-6635	19
KELTNER, DON	DCA02	6487	317-539-6900	28
KEMP, BROCK	IFD06	6449	602-647-7548	22
KEMPER, THOMAS	FO004	6538	651-714-4548	26
KENDALL, PRESTON	KDH01	6442	828-252-1692	12
KENNARD, WENDY	XXS29	6019	504-667-1932	15
KENNEDY, JULIE	IKD01	6387	805-252-5202	22

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KENNER, NANCY	OEA02	6368	318-746-4260	19
KENNEY, MARK	S5007	6633	630-443-3485	27
KESSELRING, EDDIE	LH002	6020	918-835-5377	18
KIMBLE, RICK	BGD02	6169	740-676-6528	5
KINGSBURY, WALTER	TAD01	6399	425-630-2315	24
KINSEY, TODD	HCK04	6058	281-992-9122	17
KING, DANIEL	FHA02	6236	218-825-3947	29
KISSINGER, JEFFREY	BLD01	6610	717-893-0160	5
KITCHEN, BARBARA	JH003	6350	916-787-3860	23
KLEIN, ROBERT	IO103	6355	714-280-8743	20
KNOECK, TIM	FAB03	6118	608-288-1093	29
KNOLL, EDWARD	HH002	6054	512-759-2007	17
KNOX, JOHN	LHC02	6682	918-455-8007	18
KOZUCH, WILLIAM	DA002	6471	517-686-3967	28
KRADEL, MARK	BAC04	6127	724-287-5154	5
KREISEL, RANDAL	GFO02	6554	913-764-8252	30
LAFONT, NELSON	NFA02	6366	305-380-8777	13
LAIRSEY, HARRY	CLC01	6225	912-265-4609	10
LANE, CARL	GCJ01	6551	314-894-4613	30
LANHAM, DAVID	UCA04	6693	304-776-0802	6
LA PRADD, RONALD	CG002	6306	912-476-9825	10
LATHAM, DEREK	KHB01	6283	704-635-1083	12
LAWSON, MARK	OO002	6187	504-667-2710	15
LAWSON, WAYNE	EAH01	6247	502-962-8053	11
LEMOINE, GARY	L0104	6021	972-539-9711	15
LEMONS, DANIEL	GGD04	6561	417-589-2456	30
LEQUIRE, WILLIAM	GH002	6531	402-894-0655	30
LEWIS, KEN	TO001	6348	503-620-4334	21
LIGON, NORWOOD	KCE04	6289	919-242-3217	12
LIGUORI, MICHAEL	AAD04	6584	401-364-6356	4
LITTLE, DWIGHT	K0102	6198	704-948-3996	8

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LOELLKE, RICHARD	GCB03	6549	314-281-0469	30
LOFTON, RUDY	H0102	6053	281-351-8257	14
LOFTUS, BERNADETTE	UCE01	6657	304-369-4363	6
LOMBARDO, PAUL	AAF05	6107	203-662-0212	4
LOPEZ, MIGUEL	HEH02	6067	210-914-2367	17
LOPEZ, RAUL	JBG04	6595	916-393-8712	23
LOSEE, ROBERT	TDA01	6414	208-238-3550	24
LOSEY, JOHN	DFF01	6615	616-561-5145	28
LOWREY, THOMAS	MK403	6423	714-280-8797	20
LUCERO, RICARDO	LFD03	6160	915-594-4949	18
LUND, DAVID	FHC02	6520	612-533-7561	29
MACDOWELL, STEPHEN	ADE03	6125	207-781-5502	4
MACFARLANE, MICHAEL	OFB02	7009	870-238-7467	19
MADISON, THOMAS	MK203	6308	704-896-3407	7
MALINOWSKI, LOUIS	GFB02	6135	913-397-0370	30
MANESS, MACK	EDB01	6248	901-968-6856	11
MANLEY, PATRICE	NFF01	6328	305-427-5737	13
MANNARINO, LAURA	NBE03	6322	407-648-4050	13
MANSEL, MICHAEL	FBI03	6524	651-739-3316	29
MARCONI, VICKKI	DCI01	6491	317-846-8575	28
MARKHAM, MICHAEL	BHA03	6174	717-932-7739	5
MARK, DELROY	TDD04	6691	801-267-0050	24
MARKS, SCOTT	S2002	6453	704-896-0481	9
MARSHALL, DONNELL	UEE02	6618	302-422-2543	6
MARTIN, MICKEY	LHB01	6024	918-543-8741	18
MARTINEZ, JOSE	LG002	6025	817-281-4452	18
MARTINEZ, MANUEL	IJF01	6057	619-656-0281	22
MAWHINNEY, MICHAEL	UB002	6155	540-966-4960	6
MAY, DANIEL	SW302	6711	972-436-7114	16
MAY, JASON	HHB05	7023	806-745-7941	17
MCARDLE, ROBERT (JODY)	CN001	6208	334-666-6218	10

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MCCARTHY, JAMES	FGE01	6519	920-388-0891	29
MCCULLUM, DON	CMB01	6228	205-833-4345	10
MCELFRESH, WARREN	UA002	6164	804-739-6800	6
MCGRATH, DENNIS	IDE07	6087	619-456-0268	22
MCHATTON, CHARLES	LGD04	6653	405-276-3071	18
MCKINNEY, DAVID	IFA03	6370	602-848-1612	22
MCKINNEY, MARTIN	IFH01	6598	520-579-1373	22
MCLEAN, JOHN	IDB04	6114	760-341-2973	22
MCLEMORE, STACY	CLE01	6341	706-321-9949	10
MCMILLAN, ELBERT	CBJ01	6211	770-592-5687	10
MCNICHOLAS, MICHAEL (BEAU)	SA403	6049	714-515-8839	20
MERLE, SCOTT	GIA02	6548	618-786-3205	30
MESAROS, KENNETH	BIF01	6182	216-235-8861	5
METZ, RONALD	DHC03	6050	847-458-8258	28
MEYER, RUTH	XXS32	6648	203-888-9937	2
MEYER, THOMAS	FB002	6511	651-731-0978	29
MIELKE, FRANK	DAC04	6480	810-667-4946	28
MIKELL, TAMMY	UAC01	6636	757-461-4463	6
MILITELLO, RALPH	DC002	6473	317-845-0522	28
MILLER, CHRISTINE	XXS39	6684	904-789-1549	8
MILLER, DARYL	ADO04	6119	607-962-4337	4
MILLER, GINGER	UFC01	6702	540-669-7380	6
MILLER, JOHN	KA401	6356	714-544-4917	20
MILLER, SCOTT	BIA03	6695	330-448-7851	5
MILLER, NELSON III	BAB04	6026	412-872-5278	5
MITCHELL, SHAWN	HE004	6652	210-341-3985	17
MONDEK, PATRICIA	XXS18	6463	630-305-3425	25
MONDRAGON, ALBERT	S3006	6027	972-831-8932	16
MONTANO, JUAN	IJE02	6527	213-771-4722	22
MOODY, BRYAN	EHB04	6483	931-879-4640	11
MOON, RUSS	OBF03	6090	501-679-6267	19

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MOORE, DON	BGG03	6171	740-366-7389	5
MOORE, KARYN	XXS40	6110	214-724-0218	16
MOORMAN, STEVEN	BKE01	6505	419-647-6418	5
MORANO, MARC	DIB02	6046	248-656-9466	28
MORROW, PATRICK	HCJ04	6681	409-294-0969	17
MOSBY, DAVID	EAC01	6243	502-622-7192	11
MUNSEY, MICHAEL	AFB02	6132	973-790-1336	4
MURPHY, MICHAEL	ACB05	6393	315-452-5802	4
MUSALLAM, ZAKARIA	DID01	6482	810-997-0408	28
MYERS, CATHY	KHA01	6282	919-835-5629	12
NABI, DON	CO101	6192	770-922-3048	7
NASH, ERIC	TC002	6544	503-524-4574	24
NEAL, LISA	UFB01	6701	304-325-9290	6
NELSON, EDWIN	GGF01	6623	417-782-3653	30
NELSON, STEVEN	BHF01	6667	302-292-1785	5
NOBLE, GARY	LCH02	6613	806-355-8727	18
NOLTING, MARIE	XXS13	6017	940-497-4312	15
NOWICKI, BRIAN	TFD04	6411	970-206-9231	24
OBALDIA, BERMAN	ST401	6543	916-737-0724	21
O'CONNOR, BRUCE	RO401	6342	714-282-0300	20
OLSTROM, SHANNON	DAL01	6433	517-539-9426	28
ORTH, CARL	T0101	6392	503-612-1727	21
OSGOOD, STEVEN	ADH01	7024	978-685-3298	4
OWENS, DWAYNE	KH001	6197	704-662-8352	12
PAGE, MICHAEL	OED01	7006	318-478-5663	19
PAINE, DOUGLAS	BHC05	6396	610-775-9950	5
PAK, ANDREW	IDF09	7004	760-436-4292	22
PAPUSHAK, KEVIN	FGF03	7025	440-572-1182	29
PARISH, BYRON	LCE03	6029	405-771-4916	18
PARISH JR., RONALD	CGA02	6214	912-474-1289	10
PARR, TERRY	JDL02	6061	209-725-9075	23

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PARRISH, MARJORIE	UAD02	6534	757-426-7207	6
PARROTT, THOMAS	TE002	6410	503-531-8322	24
PATE, JEFFREY	OCA02	6094	601-236-4589	19
PATE, MARY	XXS09	6196	615-331-1332	8
PATER, SUSAN	BL001	6172	814-941-8264	5
PAULSON, KERRY	ST504	6202	312-266-0359	25
PEARSON, JIM	BA005	6170	724-935-3476	5
PENDERGRAFT, SUSAN	XXS52	6165	501-361-5806	31
PEREZ JR., MICHAEL	AAP01	6115	201-843-3003	4
PERRONE, SCOTT	AFC03	6133	732-774-0598	4
PETERS, NICK	JHF01	6409	916-455-2035	23
PETERSON, NATHAN	SA204	6176	717-390-2968	5
PETERSON, RODNEY	CAD01	6255	205-442-8479	10
PHILLIPS, BOBBY	OBC02	6093	870-931-5127	19
PIERCE, LEWIS	GCL01	6617	314-770-0038	30
PISACANE, FRANK	S4015	6266	909-371-0171	21
POLINSKY, ROBERT	RO503	6102	630-406-8403	25
POLUNSKY, GARY	LGA02	6030	972-818-2149	18
POORE, MATTHEW	KDF01	6296	803-224-5540	12
PORMAN, CYNTHIA	DGA02	6501	219-291-6414	28
POTASH, RICHARD	AAJ02	6109	203-828-5419	4
POTTER, TOM	EAD04	6485	502-965-2812	11
POWELL, MARC	GJD03	6674	316-231-8466	30
PRINE, ALAN	CNC01	6234	334-626-2411	10
PRUITT, RONALD	KDB02	6292	828-298-0260	12
PUTIGNANO, MARK	BLA01	6429	814-375-7617	5
RAFALKO, RICHARD	AF001	6105	609-428-2031	4
RALSTON, JEFF	EIB03	6434	606-248-1562	11
RAMOS, VICTOR	HJD01	6077	512-631-4512	17
RAWLINGS, KEVIN	HEG03	6195	915-695-2195	17
RECK, JERRY	AAN01	6113	516-878-0895	4

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REED, DARRELL	CAE01	6585	205-344-4586	10
REIMAN, CRAIG	S5009	6641	816-873-3463	27
REINIG, GEOFFREY	DI003	6616	517-552-0019	28
REX, BRANDON	S3009	6664	512-246-0954	16
RHODES, WILLIAM	FG001	6514	715-355-8525	29
RICARD, RICHARD	DAG01	6481	517-686-1876	28
RICHARD, GREGORY	IDO05	6367	760-598-0510	22
RIDGEWAY, RONALD	HDD05	6642	281-495-6126	17
RILEY, PERRY	CNA01	6232	334-222-3381	10
RINES, JAMES	ADD06	6675	207-942-9675	4
RING, SUSAN	BKA01	6495	513-474-2926	5
RINKOSKI, PHIL	G0101	6469	816-587-8034	26
RIVAS, VINCENT	JJC03	6407	408-758-1866	23
ROBERTS, CHARLES	UCO01	6161	304-744-8543	6
ROBINSON, WILLIAM	BGH03	6707	740-947-9040	5
RODGERS, NATHANIEL	DIE01	6478	313-538-7983	28
ROEPKE, TIM	TAC02	6002	907-243-8436	24
ROGERS, BRET	CLB06	6632	912-559-1370	10
ROGERS, BRETT	KEB02	6297	803-356-5199	12
ROGERS, WILLIAM (FRED)	KFF03	6403	803-831-8593	12
ROHALY, JOHN	BAJ01	6168	412-446-3415	5
ROLLINS, ANDRE	UEF01	6035	301-505-0485	6
ROMERO, RUSSELLE	OAG03	6625	318-365-2235	19
ROMPREY, GREG	AEO02	6123	518-885-5708	4
ROSS, DANNY	JD006	6400	209-852-9658	23
ROSS, DAVID	JJB01	6428	209-833-3563	23
ROSSI, PETER	IO002	6347	714-637-6213	20
RUSH, EDGAR	UFA01	7000	304-466-3756	6
RUSNAK, DAVID	ACC04	6395	607-648-7600	4
RUSSELL, JOEL	JJE01	6076	415-255-1108	23
RUSSELL, JOSEPH	HHC04	6666	409-690-3666	17

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RUSSELL, PHILIP	AO002	6139	630-649-6014	2
RYAN, ROBERT	IF006	6372	602-515-4638	22
SABBAGH, RICHARD	JBK04	6686	916-631-9377	23
SAD, AMY	CNF02	6712	904-264-6891	10
SAGARINO JR., RONALD	DBD05	6435	630-690-2995	28
SALAMY, SAM	DHA01	6506	773-622-8980	28
SALAZAR, JASON	OAF04	6267	504-626-0932	19
SALLEE, RICKY	SW601	6237	580-980-9082	16
SANABRIA, EDUARDO	IJB03	6637	310-868-8078	22
SANBORN, HARRY	AEA06	6484	518-566-6990	4
SARTO, JANICE	OO101	6045	504-261-2785	15
SCHROEDER, CHAD	LCC02	6673	405-224-6985	18
SCHULER, THERESA	XXS12	6043	281-353-4772	14
SCHULTE, DOUGLAS	TEA01	6575	206-892-1269	24
SCHUMACHER, MICHAEL	TCA02	6694	509-350-1787	24
SCHWEITZER, LEON	SW202	6338	916-677-0826	16
SEAGRIST, JOSEPH	EDF02	6390	901-386-7346	11
SEARCY, ANN	LA001	6031	903-725-5119	18
SEGELSTROM, DON	RO303	6464	817-424-2612	14
SEPKASKI, MARK	XXS44	6571	203-929-3322	3
SEYFRIED, CHARLES	IDH04	6456	619-424-3312	22
SHEALY, PHILLIP	IGG01	6376	702-260-4912	22
SHELTON, MARY (Molly)	EJE01	6269	423-457-5307	11
SHELTON, TRACY	UBD01	6307	804-525-4632	6
SHILTS, MARK	FGC01	6535	715-359-4577	29
SHINKAN, GEORGE	DBJ01	6486	219-736-7784	28
SHINSATO, CHARLES	ICK01	6363	808-836-0894	22
SHORT, JONATHON	GIB03	6398	217-287-2662	30
SHULTIS, WAYNE	GHA02	6563	308-382-1643	30
SIMMONS, LANE	OD001	6082	601-582-2425	19
SKROBE, JOHN	UDF01	6700	410-374-3935	6

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SLABBEKOORN, MICHAEL	DFA01	6496	616-453-0614	28
SLAUGHTER, ROBIN	CLA04	6580	912-294-3424	10
SMITH, BARBARA	XXS25	6454	630-879-0071	27
SMITH, DARYL	TBB01	6404	406-273-4708	24
SMITH, KELLY	TEB01	6424	503-297-0937	24
SMITH, LEIGH ANN	LCD02	6033	405-433-2148	18
SMITH, RICHARD	KF001	6275	910-665-1254	12
SMITH JR., ROBERT	UBB01	6310	540-382-3520	6
SMITH, STACY	OBB05	6679	501-444-9339	19
SMITHER, JEFFREY	EI003	6316	423-842-9123	11
SNIDER, TIMOTHY	UGC01	6705	304-783-4260	6
SODEN, CASEY	LHA03	6559	918-438-0161	18
SOMMERFELD, ROBERT	UG001	6180	304-884-6522	6
SONGER, CAROLYN	XXS23	6643	214-831-8932	16
SPEARS, BILLY	OCC01	6096	601-842-2208	19
SPRINGER, ROBERT	NAB02	6233	904-332-1671	13
SPURLIN, RANDALL	CAC01	6254	205-878-2842	10
STANKE, MICHAEL	FO105	6517	651-748-0459	26
STARNES, ED	EJ001	6242	423-5310277	11
STAWIARSKI, JEFFREY	BKF01	6504	419-354-1728	5
STEBER, BRIAN	BLC01	6665	717-242-3429	5
STONE III, GEORGE	FBA02	6533	715-232-0572	29
STORY, ALAN	DB002	6472	630-983-5656	29
STOUT, DENNIS	UDA01	6157	540-869-4390	6
STROMAN, DANA	CGB01	6219	770-699-0909	10
STUTLER, TERRY	UGA01	6692	304-485-5115	6
SWENSON, THOMAS	HHD04	6250	512-292-8713	17
SWISHER, BRIAN	BFD02	6166	717-546-5824	5
SYRING, JOSEPH	FAC04	6129	920-751-9206	29
TANKERSLEY, RONALD	CGG01	6215	706-541-1826	10
TATE, ROBERT	NDB01	6332	813-797-9080	13

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NAME	ASSN. #	AUDIX #	PHONE #	PAGE #
TAYLOR, ADAM J.	S2008	6441	606-678-5344	9
TAYLOR, JUDITH	OBD01	6092	501-221-1052	19
TAYLOR, TODD	IKB04	6683	805-252-2543	22
TAZIOLI, LUANA	HD101	6064	281-373-1660	17
TEEGUARDEN, SHERRY	KA501	6457	630-369-3928	25
TEMPLE, CHRISTOPHER	GJC01	6556	913-825-7950	30
TENUTA, JOSEPH	ADG01	6126	603-742-6581	4
TERRELL, DARREN	LGC03	6660	817-613-0961	18
THEOBALD, GARY	BH002	6167	610-670-4850	5
THIBODEAUX, BURTON	KA302	6055	281-362-7454	14
THIBODEAUX, THOMAS	HC004	6070	281-516-0848	17
THOMPSON, AVERY	CM001	6207	205-664-3353	10
THOMPSON, DANIEL	KHE01	6294	803-576-2126	12
THOMPSON, KEVIN	KHC01	6606	704-892-7874	12
THOMPSON, PETE	OE001	6083	318-466-3625	19
THORN, GARY	TB001	6391	509-465-8515	24
TIPTON, CHRISTOPHER	OF002	7007	501-847-1112	19
TODD, DAVID	LF003	6036	806-791-4580	18
TOMLINSON, MARK	BKD01	6493	513-323-1835	5
TOMLINSON, MATTHEW	DGG01	6629	219-293-7087	28
TOOLE, JEFFREY	TBA03	6073	509-892-0634	24
TOTH, DAVID	DGF01	6489	765-448-1377	28
TOVAR JR., JOSEPH	HEK01	6069	210-521-7633	17
TOWLE, STEPHEN	N0101	6201	407-333-4725	8
TREASTER, BRADLEY	BFL01	6383	717-232-2145	5
TROSPER, JASON	S4019	6713	940-479-2291	21
TRUNINGER, KENNETH	AG001	6032	716-674-9325	4
TUMACDER, ERIC	JDC06	6106	209-575-1113	23
UHLENHAKE, CLAY	FH001	6452	612-949-6125	29
ULRICH, DAVID	TCC01	6412	206-846-1904	24
VALDEZ, RAYMOND	LFF03	6609	505-266-3731	18

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P.	:	
Plaintiffs,	:	
	:	Civil Action No. 5:98 CV-108-R
-against-	:	
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,	:	
Defendants.	:	

DEFENDANTS' RESPONSE TO PLAINTIFFS' THIRD REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

Pursuant to Fed. R. Civ. P. 34, Defendants respond to Plaintiffs' Third Request for Production of Documents as follows:

GENERAL OBJECTIONS

1. Defendants object to Plaintiffs' requests insofar as they exceed the requirements of Fed. R. Civ. P. 34.

2. Defendants object to Plaintiffs' requests insofar as they are vague and ambiguous, overbroad, unduly burdensome, and/or not reasonably calculated to lead to the discovery of admissible evidence.

3. Defendants object to Plaintiffs' requests insofar as they seek the production of confidential, proprietary business information.

4. Defendants object to Plaintiffs' requests insofar as they seek the production of information protected by the attorney client privilege, the attorney work product doctrine, and/or any other applicable privilege or protection.

RESPONSES TO REQUESTS FOR DOCUMENTS

Request No. 1: All documents concerning the Smokeless Tobacco Master Settlement Agreement.

Response to Request No. 1. Defendants and Plaintiffs have agreed that Defendants will produce documents concerning the so-called "Global Settlement" only to the extent such documents concern the actual or potential effects of the "Global Settlement" on competition in the marketplace. Subject to the same limitation, Defendants will produce documents responsive to this request. To the extent this request seeks information beyond the scope of that agreement, Defendants object to this request on the ground that it is irrelevant overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 2: All documents concerning the Cigarette Master Settlement Agreement entered into between various States and cigarette manufacturers on or about November 23, 1998.

Response to Request No. 2. Defendants and Plaintiffs have agreed that Defendants will produce documents concerning the so-called "Global Settlement" only to the extent such documents concern the actual or potential effects of the "Global Settlement" on competition in the marketplace. Subject to the same limitation, Defendants will produce documents responsive to this request. To the extent this request seeks information beyond the scope of that agreement, Defendants object to this request on the ground that it is irrelevant overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 3: All documents produced by you in the lawsuits listed in Exhibit A to the Smokeless Tobacco Master Settlement Agreement.

Response to Request No. 3. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 4: All documents produced by you in any lawsuit alleging any antitrust, unfair competition, or unfair advertising violation by you. This includes, but is not limited to, lawsuits filed by unions, pension funds, or insurance companies.

Response to Request No. 4. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further

object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 5: All documents concerning the review or evaluation of the performance of members of your smokeless tobacco sales force.

Response to Request No. 5. Defendants object to this request on the grounds that it is duplicative of an agreement reached by the parties to produce such documents in response to Plaintiffs' Second Request For Production Of Documents And Things. To the extent this request seeks materials not within the scope of that agreement, Defendants object to this request as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 6: All documents concerning any actual or contemplated merger, acquisition, or marketing agreement between you and any third party. This includes, but is not limited to, all documents concerning merger or acquisition discussions between you and Philip Morris, Inc. or any of its subsidiaries or affiliates.

Response to Request No. 6. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 7: All documents concerning multi-year business plans. This includes, but is not limited to, all five-year business plans. See, e.g., USTC 094874 (covering only years 1997-2002).

Response to Request No. 7. Defendants object to this request on the ground that it is duplicative of Request No. 4 of Plaintiffs' Second Request For Produc-

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tion Of Documents And Things. Defendants have conducted a good faith search, and subject to objections, documents responsive to this request and to Request No. 4 of Plaintiffs' Second Request For Production Of Documents And Things were produced in accordance with the Federal Rules.

Request No. 8: All business presentations, plans, or strategies concerning smokeless tobacco presented to your officers or directors, whether presented by your personnel or third parties. This includes, but is not limited to, all presentations by investment bankers, brokers, or companies concerning mergers, acquisitions, or marketing agreements.

Response to Request No. 8. Defendants object to this request on the ground that it is duplicative of Plaintiffs' Second Request For Production Of Documents And Things. Defendants have conducted a good faith search, and subject to objections, documents responsive to this request and/or to Plaintiffs' Second Request For Production Of Documents And Things have been produced in accordance with the Federal Rules.

Request No. 9: All documents concerning "Project W."

Response to Request No. 9. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. To the extent this request seeks information that is responsive to Plaintiffs' Second Request For Production Of Documents And Things, Defendants have conducted a good faith search, and subject

to stated objections, documents have been produced in accordance with the Federal Rules.

Request No. 10: All video or audio tapes from any sales meeting or training session.

Response to Request No. 10. Defendants object to this request on the grounds that it is duplicative of an agreement reached by the parties to produce such documents in response to Plaintiffs' Second Request For Production Of Documents And Things. To the extent this request seeks materials not within the scope of that agreement, Defendants object to this request as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 11: All documents concerning any interaction between (1) UST Inc. or any of its personnel and (2) any vendor or supplier of any other defendant corporation. This includes, without limitation, any documents concerning meetings between UST Inc. personnel and tobacco growers, distributors, or retailers.

Response to Request No. 11. Defendants object to this request on the grounds that it is vague and ambiguous, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 12: All documents concerning production of "2 for 1" slots for your vending systems. See, e.g., USTC 41464.

Response to Request No. 12. Defendants object to this request on the ground that it is duplicative of Request No. 25 of Plaintiffs' Second Request For Production Of Documents And Things. To the extent this request exceeds the scope of Request

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No. 25, Defendants object to this request as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 13: All documents concerning store or chain profiles, measurements, merchandising, or priority goals in the sale of smokeless tobacco for any period covered by Definition G in Defendants' First Request for Documents. See, e.g., USTC 020240 (chain profile for Safeway-Colorado Division discussing 1995 sales results).

Response to Request No. 13. Defendants object to this request on the ground that it is duplicative of Plaintiffs' Second Request For Production Of Documents And Things. Defendants have conducted a good faith search, and subject to objections, documents responsive to this request and/or to Plaintiffs' Second Request For Production Of Documents And Things have been produced in accordance with the Federal Rules.

Request No. 14: All documents concerning compliance (or lack of compliance) by retailers, wholesalers, or chains with your smokeless tobacco incentive and "alliance" programs. This includes, but is not limited to, any "performance business reviews" conducted by you; documents referring to the disqualification of customers or customer drop-out; budget forecasting; and changes in incentive program policies. See, e.g., USTC 023288.

Response to Request No. 14. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. To the extent this request seeks information that is responsive to Plaintiffs' Second Request For Production Of Documents And Things, Defendants have conducted a good faith search, and subject

to stated objections, documents have been produced in accordance with the Federal Rules.

Request No. 15: All documents concerning how the manufacture, sale, or marketing of smokeless tobacco might be affected by the Global Settlement, the Smokeless Tobacco Master Settlement Agreement, the Cigarette Master Settlement Agreement, or federal regulation. This includes, but is not limited to, all documents concerning the "New World Order," or "N.W.O."

Response to Request No. 15. Defendants and Plaintiffs have agreed that Defendants will produce documents concerning the so-called "Global Settlement" only to the extent such documents concern the actual or potential effects of the "Global Settlement" on competition in the marketplace. Subject to the same limitation, Defendants have or will produce documents responsive to this request. To the extent this request seeks information beyond the scope of that agreement, Defendants object to this request on the ground that it is irrelevant overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 16: All documents concerning the share of inventory, fixtures, sales, or point of sale display enjoyed by you, Conwood, or any other smokeless tobacco company in any retail store, wholesale establishment, or chain. This includes, but is not limited to, all documents concerning your "Conquest Program" and all documents concerning your share of inventory, fixtures, sales, or point of sale displays relative to your market share.

Response to Request No. 16. Defendants object to this request on the ground that it is duplicative of Plaintiffs' Second Request For Production Of Documents And Things. Defendants have conducted a good faith search, and subject to objections,

documents responsive to this request and/or to Plaintiffs' Second Request For Production Of Documents And Things have been produced in accordance with the Federal Rules.

Request No. 17: All documents obtained from, or provided to, Management Sciences Associates or any of its directors, officers, partners, employees, agents, representatives, predecessors, or successors.

Response to Request No. 17. To the extent this request seeks information relevant to this lawsuit, Defendants have conducted a good faith search, and subject to objections, documents responsive to this request and/or Plaintiffs' Second Request For Production Of Documents And Things (e.g., "CAP" documents or presentations and reports based on "RAD" data) have been produced in accordance with the Federal Rules. Otherwise, Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 18: All documents obtained from, or provided to, ACG Communications or any of its directors, officers, partners, employees, agents, representatives, predecessors, or successors, including, but not limited to, Euro RSCG Worldwide.

Response to Request No. 18. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

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Request No. 19: All documents concerning any investigation you have made regarding the possible violation of the antitrust laws, or the possible violation of any company policy relating to compliance with the antitrust laws, by any of your present or former officers, directors, agents, or employees.

Response to Request No. 19. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. To the extent this request seeks information that is responsive to Plaintiffs' Second Request For Production Of Documents And Things, Defendants have conducted a good faith search, and subject to stated objections, documents have been produced in accordance with the Federal Rules.

Request No. 20: All documents concerning the retention, destruction, disposal, or preservation of your documents, including electronically stored data.

Response to Request No. 20. Defendants will make documents responsive to this request available for inspection and copying at a mutually agreeable time and place.

Request No. 21: All speeches or presentations given by any of your officers, directors, employees, or representatives concerning smokeless tobacco.

Response to Request No. 21. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not

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reasonably calculated to lead to the discovery of admissible evidence. To the extent this request seeks information that is responsive to Plaintiffs' Second Request For Production Of Documents And Things, Defendants have conducted a good faith search, and subject to stated objections, documents have been produced in accordance with the Federal Rules.

Dated: January 6, 1999

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL
& VICE P.L.L.C.
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Attorneys for Defendants

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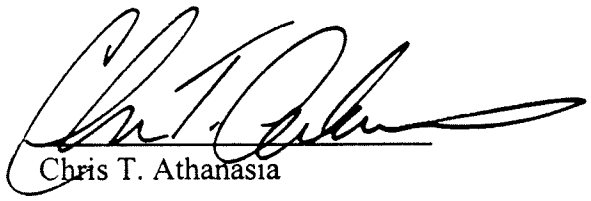
CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 1999, I caused a copy of the foregoing Defendants' Responses To Plaintiffs' Third Request For Production Of Documents And Things to be sent by Federal Express to:

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Washington, DC 20005-3317



Chris T. Athanasia

ATTORNEY WORK PRODUCT
PRIVILEGED AND CONFIDENTIAL

MEMORANDUM

January 6, 1999

TO: Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.

FROM: Chris Athanasia, Esq.

Re: Conwood Co. et al vs. United States Tobacco Co. et al

Per our agreement, enclosed please find the list of Customer Alliance Program participants you requested.

If you have any questions please do not hesitate to call me at (212) 735-2375.

Thank You

CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	D	BARNETTE ENTERPRISES/DOUBLE KWIK	WISE	VA	24293
P	D	BUTTREY FOODS	GREAT FALLS	MT	59403
P	D	CASEY'S GENERAL STORES INC	ANKENY	IA	50021
P	D	CUMBERLAND FARMS INC	CANTON	MA	02021
P	D	FRED MEYER	PORTLAND	OR	97202
P	D	INGLE'S MARKETS INC	ASHEVILLE	NC	28816
P	D	KWIK TRIP INC	LA CROSSE	WI	54602
P	D	MINYARD FOOD STORES INC	COPPELL	TX	75019
P	D	QUIK TRIP CORPORATION	TULSA	OK	74116
P	D	SAFEWAY INC	SAN FRANCISCO	CA	94160
P	D	SHOP RITE FOOD STORES DBA FMY FD	CROWLEY	LA	70526
P	D	SPEEDWAY SUPER AMERICA LLC	SPRINGFIELD	OH	45501
P	D	TAG DISTRIBUTORS	CHATTANOOGA	TN	37409
P	D	THE S&H COMPANY	NEWTON FALLS	OH	44444
P	D	WESTGATE OIL	MUSKEGON	MI	49444
P	N	11E STOP N SHOP	RUSSELLVILLE	TN	37860
P	N	11E STOP'N'SHOP	RUSSELLVILLE	TN	37860
P	N	15 SPEEDWAY	SANDERSVILLE	GA	31082
P	N	169 SMOKE SHOP	TALALA	OK	74080
P	N	29 FOOD MART	WARRENTON	VA	20186
P	N	3 FEATHERS SMOKE SHOP	HASKELL	OK	74436
P	N	31ST STREET ENTERPRISES	HUNTINGTON	WV	25702
P	N	4 FEATHERS SMOKE SHOP-ISS	PRYOR	OK	74361
P	N	411 CITGO MKT	NEWPORT	TN	37821
P	N	4408 INC DBA JIMS MARKET	ASHLAND	KY	41102
P	N	5 STAR BEVERAGE	NORTH WALPOLE	NH	03609
P	N	51ST STREET INDIAN SMOKE SHOP	TULSA	OK	74107
P	N	57 MARATHON	WADSWORTH	OH	44281
P	N	66 SMOKE SHOP	CHANDLER	OK	74834
P	N	7 11	SANDUSKY	OH	44870
P	N	7 DAYS FOOD STORE	AUSTIN	TX	78745
P	N	7-11 STORE #11357	PHILADELPHIA	PA	19154
P	N	7-11 STORE 27376	PHILADELPHIA	PA	19152
P	N	7-ELEVEN	PHILADELPHIA	PA	19149
P	N	7-ELEVEN	MESA	AZ	85210
P	N	7-ELEVEN	TEMPE	AZ	85282

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	7-ELEVEN #11349	PHILADELPHIA	PA	19152
P	N	7-ELEVEN #26908	GILBERT	AZ	85234
P	N	7-ELEVEN #29153	PHILADELPHIA	PA	19114
P	N	81 FOOD MARKET	HARRISBURG	PA	17112
P	N	95 CARRY OUT	PARKERSBURG	WV	26101
P	N	96 TRUCK PLAZA	JEFFERSONVILLE	GA	31044
P	N	A & A PETROLEUM	MILWAUKEE	WI	53225
P	N	A & D DISCOUNT BEVERAGE	TALLAHASSEE	FL	32304
P	N	A & Q INDIAN SMOKE SHOP	HENRYETTA	OK	74437
P	N	A CORNER MART	BAKER	WV	26801
P	N	A TO Z CARRYOUT	HUNTINGTON	WV	25702
P	N	A-B PETROLEUM	DENVER	CO	80223
P	N	A-WA-GIN INC	TULSA	OK	741500334
P	N	ABBIE'S INC	SAVANNAH	GA	31401
P	N	ABDUL WHEED	LAWRENCEVILLE	PA	15201
P	N	ABEL OIL COMPANY	LOUISIANA	MO	63353
P	N	ABSTON SERVICES INC	GILBERTOWN	AL	36908
P	N	ACE CONVENIENCE STORE	WACO	TX	76710
P	N	ACI OIL CO	WACO	TX	76706
P	N	ACME SERVICES INC	GASTONIA	NC	28052
P	N	ACT FOODS INC	MANDEVILLE	LA	70471
P	N	ACTION MART INC	PRESTONSBURG	KY	41653
P	N	ADENS MINIT MARKETS	DOUGLAS	GA	31535
P	N	ADKINS GROCERY DBA TILLMAN ADKNS	WAYNE	WV	25570
P	N	AGLAND INC	EATON	CO	80615
P	N	AHMAD SAEED ANSARD	AKRON	OH	44306
P	N	AJ & Z INC/UNIVERSITY CITGO	FRANKLINTON	LA	70438
P	N	AJ COULTER III	TARENTUM	PA	15084
P	N	AJB AUTO CTR	CHALFONT	PA	18914
P	N	AKASH ENTERPRISES INC	SYLVESTER	GA	31791
P	N	AL'S FOOD MART	LAGRANGE	TX	78945
P	N	AL-ILAM ENTERPRISE INC	LIBERTY	TX	77575
P	N	ALABAMA OIL CO OF SHEFFIELD INC	SHEFFIELD	AL	35660
P	N	ALAN ALFORD	CABOT	AR	72023
P	N	ALDIN ASSOC	E HTFD	CT	06128
P	N	ALEX GUIDE	MCKEESPORT	PA	15134
P	N	ALEX GUIDE	MCKEESPORT	PA	15134
P	N	ALL AMERICAN PLAZAS INC	BETHEL	PA	19507

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P	ID	Pay Name	Pay City	ST	Zip
P	N	ALL-AMERICAN QUALITY FOODS	STOCKBRIDGE	GA	30281
P	N	ALLANDALE EXPRESS	KINGSPORT	TN	37660
P	N	ALLISON WHOLESALE	PAINT ROCK	AL	35764
P	N	ALLSTATE 76 TRUCK STOP	UNADILLA	GA	31091
P	N	ALLSUPS CONV STORES INC	CLOVIS	NM	88101
P	N	ALMA SMOKE SHOP	ALMA	AR	72921
P	N	ALPENA OIL CO INC	ALPENA	MI	49707
P	N	ALTHEIMER OIL COMPANY INC	ALTHEIMER	AR	72004
P	N	ALVEY STORE	CATHARPIN	VA	20143
P	N	AMAR OIL CO INC	HAMMOND	LA	70401
P	N	AMERICAN GAS & OIL	SPARTA	MI	49345
P	N	AMERICAN PRIDE COOP-AMPRIDE C-ST	BRIGHTON	CO	80601
P	N	AMITE SPAR STATION INC	AMITE	LA	70422
P	N	AMMRA INTERNATIONAL INC	WACO	TX	76712
P	N	AMOCO	DALE CITY	VA	22193
P	N	AMOCO EXPRESS	NEWPORT	TN	37821
P	N	AMOCO-TRI STATE	PURCELLVILLE	VA	22132
P	N	AMOCOLAND STORES	MORRISTOWN	TN	37816
P	N	ANDERSONS AMOCO	NEW MARTINSVILLE	WV	26155
P	N	ANDRE FARMS	OLEY	PA	19547
P	N	ANGLER'S MINI-MART INC	SUMMERVILLE	SC	29483
P	N	ANGUS I HINES INC T/A SENTRY FD	SUFFOLK	VA	23434
P	N	ANNANDALE STATION	HILLIARDS	PA	16040
P	N	ANNE C BRANNON	GRIFFIN	GA	30224
P	N	ANTHONY MATTEN	CHERRY HILL	NJ	08003
P	N	ANWAR KHAN	SQUIRRELL HILL	PA	15217
P	N	AOC FOOD MARTS INC	TALLADEGA	AL	35161
P	N	APOLLO OIL	ST LOUIS PARK	MN	55416
P	N	APPALACHIAN OIL CO INC	BLOUNTVILLE	TN	37617
P	N	APPLE VALLEY FOODS, INC	LEESBURG	VA	20176
P	N	AQUIA TEXACO	STAFFORD	VA	22554
P	N	ARBAUGH GROCERY CO DBA FASCHECK	SALT ROCK	WV	25559
P	N	ARENS OIL CO	MONTGOMERY CITY	MO	63361
P	N	ARGUIWDEGUI OIL CO	LAREDO	TX	78043
P	N	ARROWHEAD SMOKE SHOP	CANADIAN	OK	74425
P	N	ART HINCKLEY	RENO	NV	89502
P	N	ASBURYS SUPERMARKET INC	WAYNE	WV	25570
P	N	ASHLAND GAS ONE STOP	WARREN	OH	44485

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P	ID	Pay Name	Pay City	ST	Zip
P	N	ASHLAND ONE STOP	HANOVATON	OH	44423
P	N	AT WILLIAMS OIL CO-WILCO	WINSTON-SALEM	NC	27109
P	N	ATLANTIC QUICK STOP	WARREN	OH	44483
P	N	AUBURN BEVERAGE & BAIT	BURTON	OH	44021
P	N	AUSTIN STORES INC	BURNET	TX	78611
P	N	AUSTIN'S MOBIL	NORWOOD	MA	02062
P	N	AUSTINBURG COUNTRY STORE	KNOXVILLE	PA	16928
P	N	AUTO STOP INC	WYNNE	AR	72396
P	N	AUTOBAHN TRAVEL SHOPPE	SCHULENBURG	TX	78956
P	N	AUTOBAHN TRAVEL SHOPPE	SCHULENBURG	TX	78956
P	N	AUTRY PETROLEUM CO	THOMASVILLE	GA	31792
P	N	AVANTI PETROLEUM INC	FLORISSANT	MO	63033
P	N	AW HERNDON OIL CO	ABBEVILLE	AL	36310
P	N	AYERS OIL CO	CANTON	MO	63435
P	N	AZTEX	KNOXVILLE	TN	37921
P	N	B & A ENTERPRISES INC	CHATTANOOGA	TN	37415
P	N	B & B MARKET/WILLIAM BOGGESS	SISSONVILLE	WV	25320
P	N	B & B PONCHATOULA	PONCHATOULA	LA	70462
P	N	B & B QUICK SHOPPER	WINFIELD	AL	35594
P	N	B & B TOBACCO SALES	GREENWOOD	IN	46142
P	N	B & H PETROLEUM	KIRKSVILLE	MO	63501
P	N	B & J CARRY OUT	NEWPORT	OH	45768
P	N	B & J ENTERPRISES	FAYETTEVILLE	NC	28303
P	N	B & J SHORT STOP INC	OLATHE	KS	66061
P	N	B & R DISTRIBUTORS, INC	TUNKHANOCK	PA	18657
P	N	B & W MARKET	JOHNSON CITY	TN	37601
P	N	BAGGETTS DISCOUNT TOBACCO	WIGGINS	MS	39577
P	N	BAGWELL SPEARS	CANTON	GA	30114
P	N	BAILEY LAKES GENERAL STORE	ASHLAND	OH	44805
P	N	BAKERS MARKET INC (PAUL F BAKER)	MARION	NC	28752
P	N	BALDINI'S M T MART	SPARKS	NV	89431
P	N	BALL MART-ANIKSON	LIBERTY	SC	29657
P	N	BALLOW OIL CO/GEM DANDY STORES	HAMILTON	TX	76531
P	N	BAMA PITT FOOD MARTS INC	FLORENCE	AL	35631
P	N	BANDYS INC DBA SUNNY SPOT	HICO	WV	25854
P	N	BARBARA M STUTZMAN	EXPORT	PA	15632
P	N	BARGAIN TOWN	STEPHENVILLE	TX	76401
P	N	BARNSDALL SMOKE SHOP	BARNSDALL	OK	74002

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P	ID	Pay Name	Pay City	ST	Zip
P	N	BARON OIL C/O RAY DIST CO	JACKSONVILLE	FL	32203
P	N	BARON OIL C/O RAY DISTRIBUTING	JACKSONVILLE	FL	32203
P	N	BASEBALL CITY SHELL	DAVENPORT	FL	33837
P	N	BATTLEGROUND AUTOMOTIVE INC	GREENSBORO	NC	27408
P	N	BAUER BURT DBA HANDY MART	DURAND	WI	54736
P	N	BAUSERMAN OIL CO INC	WINCHESTER	VA	22601
P	N	BAXTERS DRIVE THRU INC	PAINESVILLE	OH	44077
P	N	BAY OIL CO DBA SHOPPERS MART	DICKINSON	TX	77539
P	N	BAY SHORE OIL INC	FAIRHOPE	AL	36532
P	N	BE TASS INC	PARKERSBURG	WV	26101
P	N	BEAR FOOD MART #1	WACO	TX	76706
P	N	BEAR'S DEN	BEAR CREEK	AL	35543
P	N	BEAVER PARK INVESTMENTS/KWIK STP	PENROSE	CO	81240
P	N	BEAVER PHARMACY	CANESTEO	NY	14823
P	N	BECK OIL CO	PRINCETON	IL	61356
P	N	BEDNAR'S SHOP-RITE INC	HAZEN	AR	72064
P	N	BEELINE SMOKE SHOP	SAPALPA	OK	74066
P	N	BEELINE STORES INC	TROY	AL	36081
P	N	BEER & SODA MART	RED LION	PA	17356
P	N	BEER BARREL DIST CO INC	WAYNESBURG	PA	15370
P	N	BEER CITY	FAYETTEVILLE	WV	25840
P	N	BELL'S INC	CHATTANOOGA	TN	37409
P	N	BEN FITZGERALD	CORSICANA	TX	75110
P	N	BERLIN HTS GROCERY CO INC	BERLIN HTS	OH	44814
P	N	BERNIES VARIETY MRKT	BEAVER MEADOWS	PA	18216
P	N	BERRY COMPANY	FALLON	NV	89407
P	N	BERT TRAHERN	SUBLETTE	KS	67877
P	N	BEST OIL INC	PITTSBURGH	PA	15227
P	N	BEST PRICE CIG #2 MEDINA	MEDINA	OH	44256
P	N	BETTY JEAN FRESHOUR	MARION	NC	28752
P	N	BEVERAGE DOCK 22	ZANESVILLE	OH	43701
P	N	BFS FOODS INC	MORGANTOWN	WV	26505
P	N	BIG D OIL	RAPID CITY	SD	57702
P	N	BIG G MARKET	GREENEVILLE	TN	37743
P	N	BIG G MARKET	ELIZABETHTON	TN	37643
P	N	BIG G MARKET #1	WHITE PINE	TN	37890
P	N	BIG JOHNS	ONEIDA	TN	37841
P	N	BIG RIVER OIL CO	HANNIBAL	MO	63401

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P	ID	Pay Name	Pay City	ST	Zip
P	N	BIG/LITTLE FOOD STORES	ENTERPRISE	AL	31331
P	N	BILL MULKEY	FENTON	MO	63026
P	N	BILL RHODES	ADVANCE	MO	63730
P	N	BILL SHADE	GRATZ	PA	17030
P	N	BILL'S FOOD MART	HILLIARD	OH	43026
P	N	BILLS CORNER DELI	MT PLEASANT	OH	43939
P	N	BILLY FOUCH	MOREHEAD	KY	40351
P	N	BILLY MATTHEWS/MATTHEWS GROCERY	MCINTYRE	GA	31054
P	N	BJ EXPRESS	FITZGERALD	GA	31750
P	N	BJ'S EXPRESS MART	LINDSAY	CA	93247
P	N	BJ'S GAS & FOOD MART INC	PICKENS	SC	29671
P	N	BK TOBACCO	ULYSSES	KS	67880
P	N	BL HARTNETT	SOMERVILLE	TX	77879
P	N	BLACK GOLD MANAGEMENT	WESTERVILLE	OH	43081
P	N	BLACK INC DBA CONOCO ONE STOP	DEWITT	AR	72042
P	N	BLACK MARKET SMOKESHOP	JOPLIN	MO	64804
P	N	BLACK OAK SMOKE & CHEW	KNOXVILLE	TN	37918
P	N	BLACK'S FOODLAND	DANVILLE	WV	25053
P	N	BLACKBERRY STATION	ELIZABETHTON	TN	37643
P	N	BLACKHAW SMOKE SHOP	TAHLEQUAH	OK	74464
P	N	BLASINGIM'S DISCOUNT TOBACCO	POCA	WV	25159
P	N	BLASINGIMS GUNS & AMMO	NITRO	WV	25143
P	N	BLODGETT OIL	MT PLEASANT	MI	48858
P	N	BLOSSMAN OIL CO INC	COVINGTON	LA	70433
P	N	BLUE SKY PETROLEUM LLC	SMYRNA	GA	30080
P	N	BLVD GROCERY EXPRESS	AKRON	OH	44319
P	N	BOARDMAN PETROLEUM INC	AUGUSTA	GA	30904
P	N	BOB & ANN'S COUNTRY CORNER	MOULTRIE	GA	31776
P	N	BOB BRYANT BRYANT'S GROCERY	FORDYCE	AR	71742
P	N	BOB GILLIAM	CLINTON	TN	37716
P	N	BOB WILLIAMS/RODNEY WALKER	COLLEGE STATION	TX	77840
P	N	BOB'S CMART & DELI INC	EASTON	PA	18042
P	N	BOB'S MARKET	KINSMAN	OH	44428
P	N	BOB'S SERVICE INC	MADAWASKA	ME	04756
P	N	BOBBY MADDELA	PHOENIX	AZ	85018
P	N	BOBBY RADNEY	WARNER ROBINS	GA	31093
P	N	BOBBY S HANNA	HOT SPRINGS	AR	71901
P	N	BOBBY SPROLES	BRISTOL	VA	24202

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P	ID	Pay Name	Pay City	ST	Zip
P	N	BOBBY TAYLOR OIL CO	FAYETTEVILLE	NC	28311
P	N	BOGGS PENNZOIL INC	ELIZABETH	WV	26143
P	N	BOND ENTERPRISE	FAIRFIELD	TX	75840
P	N	BONNIE MIDDLETON	PHOENIX	AZ	85008
P	N	BOOK'S MARKET	NEW CASTLE	PA	16101
P	N	BOSSELMAN INC	GRAND ISLAND	NE	688021567
P	N	BOUNTYLAND STORES	SENECA	SC	29672
P	N	BOWMAN BEVERAGE DBA BOWAN BEV	WOOSTER	OH	44691
P	N	BOYD S SMITH	COVE	AR	71937
P	N	BOYDS CORNER STORE	COUDERSPORT	PA	16915
P	N	BOYER'S FOOD MARKET	ORWIGSBURG	PA	17961
P	N	BOYER'S MARKET INC	FLEETWOOD	PA	19522
P	N	BOYLE'S MARKET INC	BANDERA	TX	78007
P	N	BP FOOD MART	PARKERSBURG	WV	26101
P	N	BP FOOD MART	LAKE WALES	FL	33853
P	N	BP OIL	CLEVELAND	OH	44114
P	N	BP ROAD RUNNER-TOM SEAMAN	SCOTTDALE	PA	15683
P	N	BP STOP N GO	DANDRIDGE	TN	37725
P	N	BRAD MARTIN	SYLVANIA	GA	30467
P	N	BRADFORD OIL CO	BRADFORD	VT	05033
P	N	BRANCHLAND QUICK MART	BRANCHLAND	WV	25506
P	N	BREAD BOX FOOD STORES	KNOXVILLE	TN	37950
P	N	BREEZ-IN	HOPEWELL	VA	23860
P	N	BREMEN QUIK STOP	BREMEN	OH	43107
P	N	BRENDA TRIMBLE	WINCHESTER	KY	40391
P	N	BREW THRU	WADSWORTH	OH	44281
P	N	BREWER OIL CO	ALBUQUERQUE	NM	87107
P	N	BRIDGEPORT PARTY CENTER	BRIDGEPORT	OH	43912
P	N	BRIDGEVIEW TOBACCO SHOP INC	RAINIER	OR	97048
P	N	BRIGGS TOBACCO OUTLET	TAHLEQUAH	OK	74464
P	N	BRILAN INC	ASHEVILLE	NC	28803
P	N	BRILL'S MARATHON	OBERLIN	OH	44074
P	N	BRISTOW SMOKE SHOP	BRISTOW	OK	74010
P	N	BROAD & YORK CONVENIENCE STORE	PATASKALA	OH	43062
P	N	BROADWAY EXXON	S BOSTON	MA	02127
P	N	BROCK INVESTMENTS INC	DALLAS	GA	30132
P	N	BROCK'S DRIVE THRU	WILLARD	OH	44890
P	N	BRODIE FOOD MART	AUSTIN	TX	78745

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P	ID	Pay Name	Pay City	ST	Zip
P	N	BROKEN ARROW SMOKE SHOP	SALLISAW	OK	74955
P	N	BROWNFIELD OIL CO INC	MOBERLY	MO	65270
P	N	BROWNIE'S MINI MART INC	LINDLEY	NY	14858
P	N	BRUCE A FRAZIER	NEWNAN	GA	30265
P	N	BRUCE HENDERSON JR	ALBANY	GA	31702
P	N	BRUTUS B INC	HARRISBURG	PA	17011
P	N	BUC STORE #1	JOHNSON CITY	TN	37604
P	N	BUCCANEER GROC	BRENHAM	TX	77833
P	N	BUCK'S FOOD CTR/V & E OWENS	BRISTOL	TN	37620
P	N	BUCKEYE BEVERAGE	NILES	OH	44446
P	N	BUDDY BARFORD	CHARLESTON	WV	25312
P	N	BUDDY'S	ATLANTA	GA	30307
P	N	BUDDY'S FOOD MART	TUSCALOOSA	AL	35403
P	N	BUDDY'S MINI-MARTS	JACKSON	MI	49203
P	N	BULLOCK ENT INC	MT VERNON	OH	43050
P	N	BUMBLE BEE STATION	LITTLE RIVER	TX	76554
P	N	BURGER KING	W LEBANON	NH	03784
P	N	BURNS & BURNS INC	MERIDIAN	MS	39302
P	N	BURNS BROS INC	PORTLAND	OR	97214
P	N	BURNS OIL	PASCAGOULA	MS	395681588
P	N	BURSAW OIL CORP AKA PUMP'N PNTRY	DANVERS	MA	01923
P	N	BURWELL OIL SERVICE INC	LINCOLN	IL	62656
P	N	BUSHNELL STORE	CONNEAUT	OH	44030
P	N	BUSINESSENSE INC	ORLANDO	FL	32803
P	N	BUTCH HEDGER	HAMPTON	AR	71744
P	N	BUTT HUT #5	WADSWORTH	OH	44281
P	N	BUZZ IRWINE	HOT SPRINGS	AR	71901
P	N	BY-LO MARKETS	MORRISTOWN	TN	37816
P	N	BYRON L & TERRY L CLAYTON	WILLIAMSTOWN	WV	26187
P	N	C & B MARKET	WABBASEKA	AR	72175
P	N	C & B PETRO	SYLVESTER	GA	31791
P	N	C & B SHELL	GAHANNA	OH	43230
P	N	C & B WAREHOUSE	VIRGINIA	MN	55792
P	N	C & D FOOD INC	MILTON	WV	25541
P	N	C & D TOBACCO	JASPER	TN	37347
P	N	C & F FOOD STORES	GRAND JUNCTION	CO	81501
P	N	C & K MARKETS	BROOKINGS	OR	97415
P	N	C & W ENTERPRISE INC	SAN ANGELO	TX	76903

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P	ID	Pay Name	Pay City	ST	Zip
P	N	C ALPHA G INC	WINTER GARDEN	FL	34787
P	N	C MART	CROSSETT	AR	71635
P	N	C-MART FOOD STORES INC	AUSTIN	TX	78763
P	N	C-STORE MANAGEMENT CO INC	BURLESON	TX	76097
P	N	C.V.'S FAMILY FOODS	VAN BUREN	AR	72956
P	N	C.V.'S FAMILY FOODS	VAN BUREN	AR	72956
P	N	CALDWELL CONVENIENCE	CALDWELL	OH	43724
P	N	CALPER INC DBA FOOD PLAZA	BROWNWOOD	TX	76804
P	N	CAMERON SHELL	CAMERON	TX	76520
P	N	CAMP CONLEY MART	POINT PLEASANT	WV	25550
P	N	CAMP OIL COMPANY	ROME	GA	30161
P	N	CAMPUS BP	KENT	OH	44240
P	N	CAMPUS CORNER INC	TEMPE	AZ	85281
P	N	CANES CORNER	PIEDMONT	SC	29673
P	N	CANNON OIL CORP	DOTHAN	AL	36302
P	N	CANYON CONVENIENCE INC	GRAND JUNCTION	CO	81503
P	N	CAPITOL SERVICE STATIONS INC	MONTGOMERY	AL	36102
P	N	CAPT LARRYS MARATHON	VERMILLION	OH	44089
P	N	CAR-MAC INC T/A BREWERS OUTLET	LANCASTER	PA	17602
P	N	CARDINAL OIL	FOREST	VA	24551
P	N	CAREYS GROC INC	COHOCTON	NY	14826
P	N	CARL'S NORTHLAND OIL	STURGIS	MI	49091
P	N	CARLOS GARZA	LA GRULLA	TX	78548
P	N	CARMICHAEL MANAGEMENT INC	N CHAS	SC	294151553
P	N	CAROL DUDLEY	MESA	AZ	85203
P	N	CAROL'S CORNER	TALLAHASSEE	FL	32310
P	N	CAROLINA BEACH ROAD GROCERY CO	WILMINGTON	NC	28412
P	N	CARON & SON MOBIL	MERRIMACK	NH	03054
P	N	CARTHAGE SUPER DISCOUNT TOBACCO	CARTHAGE	MS	39051
P	N	CASSADY INC DBA SIMONS MARKET	PINE GROVE	WV	264190506
P	N	CASTLE SUNOCO	MCKEESPORT	PA	15131
P	N	CAT'S PITT STOP	CALDWELL	TX	77836
P	N	CATHERINE B SEALS	WIGGINS	MS	39577
P	N	CATLETT IGA	CATLETT	VA	20119
P	N	CATLETTSBURG TOBACCO SHOPPE	CATLETTSBURG	KY	41129
P	N	CB MART INC	BELTON	SC	29627
P	N	CC FOOD MARTS INC	BREESE	IL	62230
P	N	CCF INC	EDINA	MN	55436

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P	ID	Pay Name	Pay City	ST	Zip
P	N	CD SCHNECK INC	SINKING SPRING	PA	19608
P	N	CDJ ASSOCIATES	BRICK	NJ	08724
P	N	CEDAR CREEK CHEVRON	RUSSELLVILLE	AL	35653
P	N	CEFCO FOOD STORES	TEMPLE	TX	76503
P	N	CENEX	MINOT	ND	58701
P	N	CENEX PETROLEUM INC	ST PAUL	MN	551640124
P	N	CENTER FOODS	STRUTHERS	OH	44471
P	N	CENTER INDEPENDENT OIL CO	SMOLK	PA	15480
P	N	CENTRE ROAD AMOCO	MANASSAS	VA	22111
P	N	CERTIFIED OIL #233	CANTON	OH	44707
P	N	CERTIFIED OIL COMPANY	COLUMBUS	OH	432122662
P	N	CFM #734	BRUNSWICK	OH	44212
P	N	CFM #744	N RIDGEVILLE	OH	44039
P	N	CFM OF MID-MISSOURI INC	JEFFERSON CITY	MO	65102
P	N	CHA'S CONVENIENCE	WINCHESTER	NH	03470
P	N	CHA-TIS CONVENIENCE STORE	GRANTSVILLE	WV	26147
P	N	CHAD & TABATHA ALEXANDER	ADDISON	AL	35540
P	N	CHAGRIN OIL & GAS	MIDDLEFIELD	OH	44062
P	N	CHALET PREMIER	NORTH LIMA	OH	44452
P	N	CHARLES GINDER	STAFFORD	VA	22554
P	N	CHARLES M GOODWIN	ELM MOTT	TX	76640
P	N	CHARLES MAYO	NEW MARTINSVILLE	WV	26155
P	N	CHARLES REICHENAU	SAN SABA	TX	76877
P	N	CHARLESTON DISCOUNT TOBACCO	CHAS	WV	25304
P	N	CHARLIE JENKINS	TIMBERVILLE	VA	22853
P	N	CHARLIES FUEL & DELI	EPHRATA	PA	17552
P	N	CHARLOTTE LAMBERT - TOBACCO ROAD	MARYVILLE	TN	37801
P	N	CHASE OIL CO	FLORENCE	SC	29501
P	N	CHATHAM GENERAL STORE	MEDINA	OH	44256
P	N	CHEAP BUTTS INC	ESCATAWPA	MS	39552
P	N	CHEAP TOBACCO	ASHTABULA	OH	44004
P	N	CHEBON ENTERPRISES	BROKEN ARROW	OK	74012
P	N	CHECKERBOARD MARKET	PARROTTSVILLE	TN	37843
P	N	CHECOTAH SMOKE SHOP	CHECOTAH	OK	74426
P	N	CHEROKEE FOOD STORES	KINGSPORT	TN	37660
P	N	CHEROKEE TOBACCO SALES	TAHLEQUAH	OK	74464
P	N	CHERRY DISCOUNT INC	OLD FORGE	PA	18518
P	N	CHESTNUT EXXON INC	STEPHENVILLE	TX	76401

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P	ID	Pay Name	Pay City	ST	Zip
P	N	CHEVRON FOOD MART	MOULTRIE	GA	31768
P	N	CHICKASAW ENTERPRISES	ADA	OK	74820
P	N	CHICO ENTERPRISES INC	MORGANTOWN	WV	26505
P	N	CHISSOR & BRANDON INC	TULSA	OK	74137
P	N	CHOCTAW TRAVEL PLAZAS	DURANT	OK	74702
P	N	CHRIS' CORNER	E DUBLIN	GA	31027
P	N	CHRISMAN LP GAS	DEXTER	MO	63841
P	N	CHRISTIANS AMOCO	MT CARMEL	TN	37645
P	N	CHRISTOPHER WHITE CASES & CARTNS	BATH	ME	04530
P	N	CHRISTY'S MARKET STORES	BROCKTON	MA	02401
P	N	CHUCK HILLIS - CHUCKS DISCOUNT	HAZELGREEN	AL	35750
P	N	CHUCK'S CARRY OUT	NORWALK	OH	44857
P	N	CHUNKY MUNKY	DES ARC	AR	72040
P	N	CHURCHILL AMOCO	CHURCHILL	TN	37642
P	N	CIGARETTE OUTLET LTD	PIKEVILLE	KY	41502
P	N	CIGARETTE SHOP	LOGAN	WV	25601
P	N	CIGARETTE SHOP	LAKE CHARLES	LA	70601
P	N	CIGARETTE STORE	LOGAN	WV	25601
P	N	CIGARETTE STORE III	S CHAS	WV	25309
P	N	CIGARETTE WAREHOUSE INC	TUPPER LAKE	NY	12986
P	N	CIGARETTES & CHECKS	LAFAYETTE	LA	70503
P	N	CIGARETTS FOR LESS	ST LOUIS	MO	63110
P	N	CIRCLE C FOOD STORES	HUNTSVILLE	AL	35810
P	N	CIRCLE K STORES INC	PHOENIX	AZ	85012
P	N	CIRCLE M FOOD SHOPS	GAINESVILLE	GA	30501
P	N	CIRCLE N	WALLER	TX	774849703
P	N	CIRCLE N	WALLER	TX	774849703
P	N	CITGO	N RIDGEVILLE	OH	44039
P	N	CITGO FOOD MART	BOLIVAR	OH	44612
P	N	CITGO MART	LAKE WALES	FL	33853
P	N	CITGO MART	ELGIN	TX	78621
P	N	CITIZENS FOOD STORES-VIC SHEALY	ASHEVILLE	NC	28802
P	N	CITY MARKET INC	GRAND JUNCTION	CO	81505
P	N	CITY SMOKESHOP 2	MORRISTOWN	TN	37816
P	N	CJ'S FOOD PLAZA	BLANCO	TX	78606
P	N	CLARENCE CARDWELL INC	ORIENT	OH	43146
P	N	CLARK GAS & OIL CO INC	STUART	VA	24171
P	N	CLARK REFINING & MARKETING	GLEN ELLYN	IL	60137

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P	ID	Pay Name	Pay City	ST	Zip
P	N	CLEARBROOK SHOPPING CENTER	CLEARBROOK	VA	22624
P	N	CLEMON'S SPUR	FLORENCE	AL	35634
P	N	CLIFF BRICE STATIONS INC	PUEBLO	CO	81003
P	N	CLINCH RIVER MARKET	TAZEWELL	TN	37879
P	N	CMS OIL CO	LAPEER	MI	48446
P	N	CN BROWN CO	S PARIS	ME	04281
P	N	CO MAC INC	BECKLEY	WV	25802
P	N	CO-OP COUNTRY PARTNERS	BARABOO	WI	53913
P	N	COAL CITY CASH MKT	COAL CITY	WV	25823
P	N	COASTAL MART INC	HOUSTON	TX	77046
P	N	COBORN'S INC	ST CLOUD	MN	56302
P	N	COCKERHAM OIL	GALAX	VA	24333
P	N	COCO MART INC DBA JIFFY MART	CLAREMONT	NH	03743
P	N	COFFEY OIL CO	MOULTON	AL	35650
P	N	COGO'S	PITTSBURGH	PA	15241
P	N	COHRAN VENTURES INC	HIRAM	GA	30141
P	N	COLE TOBACCO	POTTSTOWN	PA	19464
P	N	COLEMAN OIL/HAPPY MART	PIKEVILLE	KY	41502
P	N	COLES ENERGY INC	MILAN	OH	44846
P	N	COLLA MARKET	YOUNGSTOWN	OH	44515
P	N	COLLINSVILLE DISCOUNT CENTER	BROGUE	PA	17309
P	N	COLONIAL PANTRY CONV STORES	CHAMPAIGN	IL	61824
P	N	COMPASS OIL INC	BONITA SPRINGS	FL	33923
P	N	COMPTON POINT INC DBA CHEAP TOBA	CINCINNATI	OH	45236
P	N	CONDON COMPANIES	RIPON	WI	54971
P	N	CONN'S ONE STOP INC	LEBANON	MO	65536
P	N	CONNIE FRENCH	MESA	AZ	85210
P	N	CONNIE FRENCH	MESA	AZ	85210
P	N	CONSUMER GASOLINE STATIONS	NASHVILLE	TN	37202
P	N	CONVENIENCE PLUS PARTNERS LTD	LOVELAND	CO	80538
P	N	CONVENIENCE PRODUCTS INC	NEVADA	MO	64772
P	N	CONVENIENCE STORE ALLIANCE	SAN ANGELO	TX	76903
P	N	CONVENIENT	WARREN	OH	44483
P	N	CONVENIENT	NILES	OH	44446
P	N	COOKS DISC TOBACCO/DAVE & PAUL	BUCKHANNON	WV	26201
P	N	COOKS TEXACO	RUSSELLVILLE	AL	35653
P	N	COOPER OIL CO INC	PEVELY	MO	63070
P	N	COPCO SHELL	INDIANAPOLIS	IN	46253

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P	ID	Pay Name	Pay City	ST	Zip
P	N	COPPER MART	BRYAN	TX	77802
P	N	COPPER MART	BRYAN	TX	77802
P	N	CORAOPOLIS FAST STOP	CORAOPOLIS	PA	15108
P	N	CORNER MARKET	WHITESBURG	TN	37891
P	N	CORNER MART INC	ONANCOCK	VA	23417
P	N	CORNER STORE	N RIDGEVILLE	OH	44039
P	N	CORNER STORE	FRANKLIN	TX	77856
P	N	CORNER TOBACCO SHOP	RUSSELL	KY	41169
P	N	CORNERSBURG BEV	CORNERSBURG	OH	44411
P	N	COSTA FOOD CENTER INC	COUDERSPORT	PA	16915
P	N	COUGAR OIL INC	SELMA	AL	36702
P	N	COUNTRY CLUB DELI INC	MANANGAHELA	PA	15063
P	N	COUNTRY CLUB TEXACO	MESA	AZ	85210
P	N	COUNTRY CONVENIENCE	NEWPORT	TN	37821
P	N	COUNTRY CONVENIENCE	HARVIELL	MO	63945
P	N	COUNTRY CONVENIENCE INC	BURGHILL	OH	44404
P	N	COUNTRY CORNER	STILSON	GA	30415
P	N	COUNTRY CUPBOARD FOOD STORES INC	DAWSONVILLE	GA	30534
P	N	COUNTRY GENERAL INC	MANITO	IL	61546
P	N	COUNTRY GROCER & DELI	ASTORIA	OR	97103
P	N	COUNTRY MARKET	EDINBURG	PA	16116
P	N	COUNTRY PANTRY	ELLSWORTH	OH	44416
P	N	COUNTRY TRADER	SHARON CENTER	OH	44274
P	N	COUNTRY VIEW DRIVE THRU	WILLARD	OH	44890
P	N	COUNTRYSIDE GROC	CALDWELL	TX	77836
P	N	COUNTYLINE SERVICE CTR	SOUDERTON	PA	18964
P	N	COVES COUNTRY STORES INC	OKLAHOMA CITY	OK	73120
P	N	COVINGTON'S FOOD STORE	BENTON	LA	71006
P	N	COWBOY'S FOOD MARTS	ROME	GA	30161
P	N	COWSHELL INC	LONGVIEW	WA	98632
P	N	COX CHEVRON INC	FOREST	MS	39074
P	N	COXCO PETROLEUMS INC	HOT SPRINGS	AR	71913
P	N	CR'S FRIENDLY MKT #152	EPHRATA	PA	17522
P	N	CRABTREE MARKET PLACE/JERRY NEIL	CLYDE	NC	28721
P	N	CRACKER BARREL CONVENIENCE STRS	BATON ROUGE	LA	70809
P	N	CRAWDAD'S CONVIENT STORES	MAURICEVILLE	TX	77626
P	N	CREED'S MARKET	SAN MANUEL	AZ	85631
P	N	CREEKSIDE GROC & GAS	GRAY	GA	31032

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P	ID	Pay Name	Pay City	ST	Zip
P	N	CRESCENT OIL	INDEPENDENCE	KS	67301
P	N	CROCKETT OIL CO	RECTOR	AR	72461
P	N	CROMWELL ENTERPRISES INC	LAKE WALES	FL	33853
P	N	CROSBY DAIRY PRODUCTS INC	BRADFORD	PA	16701
P	N	CROSS OIL COMPANIES	BALLWIN	MO	63011
P	N	CROSS ROADS COUNTRY STORE	CROSS ROADS	PA	17322
P	N	CROSS ROADS SHELL	WESTFIELD	IN	46074
P	N	CROSSETT ROAD MART	CROSSETT	AR	71635
P	N	CROSSING FOOD MART	GRAY	GA	31032
P	N	CROSSROADS	JONESBOROUGH	TN	37659
P	N	CROSSROADS #1	COCHRAN	GA	31014
P	N	CROSSROADS #2	COCHRAN	GA	31014
P	N	CROSSROADS FOOD MART	BELLE VERNON	PA	15012
P	N	CROSSROADS THE WOODS	CANAL WINCHESTER	OH	43110
P	N	CROWN CENTRAL PETROLEUM	BALTIMORE	MD	212755349
P	N	CROWN CO CO EZ STOP INC	MINNEAPOLIS	MN	554132638
P	N	CRYSTAL FLASH PETROLEUM	INDIANAPOLIS	IN	46206
P	N	CUB FOODS	MINNEAPOLIS	MN	55440
P	N	CUNNINGHAM'S SUNOCO	COAL CITY	WV	25823
P	N	CURT'S	MUSKOGEE	OK	74402
P	N	CWIP, INC	MAGNOLIA	AR	71753
P	N	CYNTHIA M BALDWIN	BLUM	TX	76627
P	N	D & B CONVENIENCE STORES INC	MIDDLETAIN	VA	22645
P	N	D & C LETOURNEAU ENT	DULUTH	MN	55812
P	N	D & D QUICK STOP	W UNION	SC	29696
P	N	D & H KEYSTONE	CANTON	PA	17724
P	N	D & H OIL	VALPARAISO	FL	32580
P	N	D & L SHELL SUPERSTOP	DIERKS	AR	71833
P	N	D & P'S PIT STOP	WOODSVILLE	NH	03785
P	N	DA GOHIL/U-SAVE	RICHWOOD	WV	26261
P	N	DABBS MARKETING INC	BRYAN	TX	77803
P	N	DAIRY MART	HUDSON	OH	44236
P	N	DAIRY MART CONVENIENCE	CUYAHOGA FALLS	OH	44222
P	N	DAKOTA MART	PIERRE	SD	57501
P	N	DALLAS COUNTRY STORE	RIDGWAY	CO	81432
P	N	DALTON PET DBA PENNY PINCHERS	HAYTI	MO	63851
P	N	DAN ANKRUM	HOPEWELL	OH	43746
P	N	DAN'S DISCOUNT TOBACCO OUTLET #1	CANDLER	NC	28715

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P	ID	Pay Name	Pay City	ST	Zip
P	N	DANDY MINI MARTS INC	SAYRE	PA	18840
P	N	DANDY OIL INC	TONITOWN	AR	72770
P	N	DANIEL WARNER INC/DBA LAKELAND	WICKLIFFE	OH	44092
P	N	DANNIE BARTLEY	BUTT CITY	TN	37618
P	N	DANNY RAINS/NORMAN NAUNI	RANDLETT	OK	73562
P	N	DANO'S	TAHLEQUAH	OK	74464
P	N	DARI MART STORES INC	JUNCTION CITY	OR	97448
P	N	DARLENE COLLINS	MARSHALL	MO	65340
P	N	DARRELL COSTON ENTERPRISES INC	FORDYCE	AR	71742
P	N	DARRELL POTTS	SPRING HILL	TN	37174
P	N	DASH-IN FOOD STORES	LAPLATA	MD	20646
P	N	DAUGHERTYS BPI REST INC	MANSFIELD	OH	44903
P	N	DAVE GIM	PHOENIX	AZ	85016
P	N	DAVE HAHN	COSHOCTON	OH	43812
P	N	DAVE'S CITGO	DEMOTTE	IN	46310
P	N	DAVE'S FOOD MART	NORWALK	OH	44857
P	N	DAVID CARBAUGH	JONESTOWN	PA	17038
P	N	DAVID E BROWN	MARTINSVILLE	IN	46151
P	N	DAVID HAWES	HOLDEN	ME	04412
P	N	DAVID O TEEL	POYEN	AR	72128
P	N	DAVID PARKER/PARKER FARM SUPPLY	MARS HILL	NC	28754
P	N	DAVID PATEL	WINTER HAVEN	FL	33880
P	N	DAVID SINGH	WACO	TX	76708
P	N	DAVID WRIGHT	WEST LIBERTY	KY	41472
P	N	DAVIDSON'S GROCERY	BLADENSBURG	OH	43005
P	N	DAVIS & DAVIS ENTERPRISES INC	MACCLENNY	FL	32063
P	N	DAVIS COMPANY INC	PERRY	GA	31069
P	N	DAVISON OIL & GAS INC	DAVISON	MI	48423
P	N	DAY NITE FOOD MART	VERSAILLES	IN	47042
P	N	DAYBREAK	WAUKESHA	WI	53186
P	N	DAZU INC	STEPHENVILLE	TX	76401
P	N	DB MARKETING	PAWTUCKET	RI	02860
P	N	DBA AM/PM	GILBERT	AZ	85234
P	N	DBA COLD AS ICE SLIDE THRU	MONROEVILLE	OH	44847
P	N	DBA DUNCANS FOOD INC	NEWBERN	TN	38059
P	N	DC CARRYOUT	HUNTINGTON	WV	25701
P	N	DC'S DISCOUNT CIGARETTES	CLINTON	MO	64735
P	N	DE JIM CORP OF TABOR CITY	TABOR CITY	NC	28463

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P	ID	Pay Name	Pay City	ST	Zip
P	N	DE SOTO FUEL INC	DE SOTO	MO	63020
P	N	DEAD RIVER COMPANY	SCARBOROUGH	ME	040700467
P	N	DEAN MITCHEM	MARION	NC	28752
P	N	DEBRA S BREWER	TEXARKANA	AR	71854
P	N	DECCA DESIGN & DEV INC	SIERRA VISTA	AZ	85635
P	N	DEE'S CARRY OUT	HAMLIN	WV	25523
P	N	DELCO OIL	DELAND	FL	32721
P	N	DELMAR BARNETT	CLAY CITY	KY	40312
P	N	DELOCKS LIQUORS	DYER	IN	46311
P	N	DEMPSEY ALPHIN	JACKSONVILLE	NC	28540
P	N	DENMAN CORP	PHOENIX	AZ	85069
P	N	DENNIE PEREGORY	STAFFORD	VA	22554
P	N	DENNIS BUTLER	NEW CONCORD	OH	43762
P	N	DENNIS HARRISON DIST	POTEAW	OK	74953
P	N	DENNIS LOVELACE	SHERRILL	AR	72152
P	N	DENNIS PEYTON	WHITNEY	TX	76692
P	N	DENNY'S QUICK STOP	PETAL	MS	39465
P	N	DENO'S FOOD MARTS	VERONA	VA	24482
P	N	DES ARC FOODS	DES ARC	AR	72040
P	N	DG & H INC	MARYVILLE	MO	64468
P	N	DIAMOND MINI MART INC	BAY CITY	TX	774042250
P	N	DIAMOND OIL INC	ATMORE	AL	36504
P	N	DICK'S MARKET	ELIZABETH	WV	26143
P	N	DICKERSON PETROLEUM	BELLEVILLE	IL	62221
P	N	DILMAR OIL CO	LATTA	SC	29565
P	N	DION'S QUIK MARTS INC	KEY WEST	FL	330411209
P	N	DIRECT STORES	EAU CLAIRE	WI	54702207
P	N	DISCOUNT CIG OUTLET	METTER	GA	30439
P	N	DISCOUNT DRUG MART INC	MEDINA	OH	44256
P	N	DISCOUNT FOOD MART	FORT PAYNE	AL	35967
P	N	DISCOUNT SMOKE SHOPS	BRIDGETON	MO	63044
P	N	DISCOUNT SMOKES	NITA	MO	65714
P	N	DISCOUNT TOBACCO	PINE BLUFF	AR	71602
P	N	DISCOUNT TOBACCO	IRVINE	KY	40336
P	N	DISCOUNT TOBACCO INC	SPRINGFIELD	IL	62704
P	N	DISCOUNT TOBACCO MART	GULFPORT	MS	39506
P	N	DISCOUNT TOBACCO OF FT SMITH	FT SMITH	AR	72901
P	N	DISCOUNT TOBACCO OUTLET	LEBANON	VA	24266

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P	ID	Pay Name	Pay City	ST	Zip
P	N	DISCOUNT TOBACCO OUTLET	ATHENS	AL	35611
P	N	DISCOUNT TOBACCO OUTLET	SODDY DAISY	TN	37379
P	N	DISCOUNT TOBACCO OUTLET	SCOTTSBORO	AL	35768
P	N	DISCOUNT TOBACCO OUTLETS	GRAY	TN	37615
P	N	DISCOUNT TOBACCO SHED II	LOUISA	KY	41230
P	N	DISCOUNT TOBACCO SHOP	PECKVILLE	PA	18452
P	N	DISCOUNT TOBACCO WORLD	COLLINS	MS	39428
P	N	DISTRICT PETROLEUM	SANDUSKY	OH	44870
P	N	DITMER'S TEXACO	MECHANICSBURG	PA	17055
P	N	DIXIE FOOD STORES	TIFTON	GA	31794
P	N	DIXIE QUICK STOP	JOHNSON CITY	TX	78636
P	N	DJ'S CITGO	LOUDONVILLE	OH	44842
P	N	DJ'S DRIVE THRU	DUNCAN FALLS	OH	43734
P	N	DJ'S SUPERMART	STEPHENVILLE	TX	76401
P	N	DNJ ENTERPRISES	BEAUMONT	TX	777267474
P	N	DODGE BROTHERS	TUPELO	MS	38802
P	N	DOGWOOD GROCERY	HAUGHTON	LA	71037
P	N	DOGWOOD OIL CO	BLOUNTVILLE	TN	37617
P	N	DOLAWAY PROPERTIES	NAPANOCH	NY	12458
P	N	DOLLY CREEK SERVICE STATION	BIRMINGHAM	AL	35209
P	N	DON A STEWART INC	AUSTIN	TX	78760
P	N	DON ARMEL	GREENSBURG	PA	15601
P	N	DONALD CARSON	DONIPHAN	MO	63935
P	N	DONALD S BAKER	GLENWOOD	AR	71943
P	N	DONNA JENKINS	TIMBERVILLE	VA	22853
P	N	DONNA MARSHALL	DUKE CENTER	PA	16729
P	N	DONNIE BREWER	PALESTINE	AR	72372
P	N	DONNINI ENTERPRISES	LAKE PARK	FL	33403
P	N	DONNY WATSON DBA SHELL FOOD MART	AKRON	OH	44312
P	N	DORE'S INC	KAWKAWLIN	MI	48631
P	N	DORIS SHERIDAN STEWART	FRANKLINTON	LA	70438
P	N	DOS LLANOS DEVELOPERS	JUNCTION	TX	76849
P	N	DOTSON'S EXXON INC	ELIZABETH	WV	26143
P	N	DOUBLE D	GROESBECK	TX	76642
P	N	DOUBLE DELTA INC	CROSSVILLE	AL	35962
P	N	DOUBLE QUICK INC	INDIANOLA	MS	38751
P	N	DOUBLE TOLLGATE FOOD SHOP	CAPON BRIDGE	WV	26711
P	N	DOUBLEHEAD MT SMOKE SHOP	STILWELL	OK	74960

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P	N	DOUGLAS D JENNINGS DBA DOUG'S GR	PIEDMONT	AL	36272
P	N	DOUGS QUIK CHEK	HUNTINGTON	WV	25704
P	N	DOURMS MINI MART	WARREN	OH	44481
P	N	DOWNEAST ENERGY/PUFFIN STOP CONV	BRUNSWICK	ME	04210
P	N	DOWNTOWN TIME SAVER MARKETS	MANSFIELD	PA	16933
P	N	DOYCE GUIDRY	KAPLAN	LA	70548
P	N	DREW OIL INTERPRISES INC	CAIRO	GA	31728
P	N	DUCK CREEK INDIAN COMM SMOKE SHP	BEGGS	OK	74421
P	N	DUKE PETROLEUM CO INC	FT WORTH	TX	76161
P	N	DUKE'S COUNTRY STORE	BASTROP	TX	78602
P	N	DUNMORE OIL CO	DUNMORE	PA	18512
P	N	DUTCH CUPBOARD	BERLIN	OH	44610
P	N	DWIGHT TIEDEMANN	BELTON	TX	76513
P	N	DWJW INC	LONGVIEW	WA	98632
P	N	DYSART'S SERVICE INC	BANGOR	ME	04401
P	N	DYSART'S SERVICE INC	BANGOR	ME	1689 1689
P	N	E'S MART	ERWIN	TN	37650
P	N	E-Z MART STORES INC	TEXARKANA	TX	755041426
P	N	E-Z SERVE CONVENIENCE STORES	HOUSTON	TX	77092
P	N	E-Z STOP/JAMIE MAGALHAES	WAYNESVILLE	NC	28786
P	N	EAGLE FOOD CENTERS INC	ROCK ISLAND	IL	612046700
P	N	EAGLE GAS	CARSON CITY	NV	89706
P	N	EARL MARONAY	LONOKE	AR	72086
P	N	EASLEY'S CORNER STORE	SHERIDAN	AR	72150
P	N	EAST COAST OIL CORPORATION	RICHMOND	VA	23224
P	N	EAST HILL EXXON SHOP	HUNTINGTON	WV	25705
P	N	EAST RICHLAND MARKET	ST CLAIRSVILLE	OH	43950
P	N	EAST TENN PIONEER OIL	KNOXVILLE	TN	37927
P	N	EASTERN FUELS INC	AHOSKIE	NC	27910
P	N	EASTERN PETRO MART	ENFIELD	NC	27823
P	N	EASTLAND CITGO	COLUMBUS	OH	43232
P	N	EASTSIDE TOBACCO STOP	LEXINGTON	TN	38351
P	N	EASTVIEW MKT & DELI	GREENEVILLE	TN	37743
P	N	EASY IN MARKET	WHITE PINE	TN	37890
P	N	ECKERTS OUTPOST	CARMINE	TX	78932
P	N	ECON'S STORES FEASTER & SONS OIL	MONROEVILLE	AL	36461
P	N	EDITH IBARRA	BUCKEYE	AZ	85326
P	N	EDMUND E RIDINGS	OLIVER SPRINGS	TN	37840

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P	ID	Pay Name	Pay City	ST	Zip
P	N	EJ FLEMISTER OIL CO	MILLEDGEVILLE	GA	31061
P	N	EJ POPE & SON INC	MT OLIVE	NC	28365
P	N	EL CHEAPO'S	MERIDIAN	MS	39301
P	N	ELDRED SHUR SAVE FOOD SHOP INC	ELDRED	PA	16731
P	N	ELDRED SHUR SAVE FOOD SHOP INC	ELDRED	PA	16731
P	N	ELEANOR FOOD MART INC	ELEANOR	WV	25070
P	N	ELEMAR INC T/A BREWERS OUTLET	LANCASTER	PA	17601
P	N	ELIZABETH HARPER	N OLMSTED	OH	44070
P	N	ELLISING FOOD SHOP INC	ARLINGTON	WI	53911
P	N	ELLISING FOOD SHOP INC	POYNETTE	WI	53955
P	N	ELLISON'S CONVENIENCE STORE	LA GRANGE	TX	78945
P	N	ELM COUNTRY MKT INC	ELM	PA	17521
P	N	EMAD ELSEIDI	BOSTON	MA	02109
P	N	ENERGY MART STORES INC	HENDERSONVILLE	NC	28792
P	N	ENFIELD GULF	ENFIELD	CT	06082
P	N	ENGLE VENTURES	QUARRYVILLE	PA	17566
P	N	ENGLE VENTURES	QUARRYVILLE	PA	17566
P	N	ERIC PETERSON	WILLOUGHBY	OH	44094
P	N	ERICKSON OIL PRODUCTS	HUDSON	WI	54016
P	N	ERNST LASANSKE	BUTLER	WI	53007
P	N	ESTES OIL FOOD STORE DIVISION	MUSCLE SHOALS	AL	35661
P	N	ETD PRYMAS SHELL	BROOKPARK	OH	44142
P	N	EUFAULA SMOKE SHOP	EUFAULA	OK	74432
P	N	EVANS GROUP INC	EPSOM	NH	03234
P	N	EWING OIL CO INC	HAGERSTOWN	MD	217424483
P	N	EXEL SALES INC	LINCOLNWOOD	IL	60659
P	N	EXIT 76 MARTS	WYOMING	MI	49509
P	N	EXPRESS FOOD MART	MECHANICSBURG	PA	17055
P	N	EXPRESS FOOD STORES	MACON	GA	31210
P	N	EXPRESS LANE INC	PANAMA CITY	FL	32401
P	N	EXPRESS MART	NEVADA CITY	CA	95959
P	N	EXPRESS MART	COLLEGE STATION	TX	77845
P	N	EXPRESS MART	MORRISTOWN	TN	37813
P	N	EXPRESS MART INC	CHATHAM	VA	24054
P	N	EXPRESS STOP	CORAOPOLIS	PA	15108
P	N	EXPRESSLANE C-STORES	SPRINGFIELD	MO	65802
P	N	EXXON FOOD MART	ST ALBANS	WV	25177
P	N	EXXON HOUSTON CORS	DALLAS	TX	753951288

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P	ID	Pay Name	Pay City	ST	Zip
P	N	EZ SHOP	MEDINA	OH	44256
P	N	EZ STOP MARKETS	MARYVILLE	TN	37801
P	N	FAILLA MERC CO INC	GOULD	AR	71643
P	N	FAIR MART INC	MORGANTOWN	WV	26505
P	N	FAIRFAX SMOKE SHOP	FAIRFAX	OK	74637
P	N	FALLS CAPITAL	KOSSE	TX	76653
P	N	FALLS CAPITAL	MARLIN	TX	76661
P	N	FAMILY SUPERMARKETS INC	LONGVIEW	WA	98632
P	N	FANNING OIL CO	JACKSONVILLE	IL	62650
P	N	FARLEY CHEVRON INC	LAVALETTE	WV	25535
P	N	FARM FRESH INC	WHEELING	WV	26003
P	N	FAS MART INC	MECHANICSVILLE	VA	23111
P	N	FAST LANE INC	LOVELY	KY	41231
P	N	FAST MART FOOD STORES	ROSWELL	GA	30075
P	N	FAST MAX INC	BALTIMORE	OH	43105
P	N	FAST PETROLEUM	DALTON	GA	30720
P	N	FAST POINT FOOD STORES INC	SPARTANBURG	SC	29301
P	N	FAST SAVER	COVINGTON	LA	70434
P	N	FAST SERV INC	HILLSBORO	OR	97123
P	N	FAST TRACK DISCOUNT BEVERAGE	PERRY	FL	32347
P	N	FASTIME FINA 244	MART	TX	76664
P	N	FASTLANE DISCOUNT TOBACCO	PIKEVILLE	KY	41502
P	N	FASTOP	TULSA	OK	74128
P	N	FASTOP INC	QUINCY	IL	62301
P	N	FASTOP MARKETS	MORRISTOWN	TN	378161176
P	N	FASTRIP	BAKERSFIELD	CA	93309
P	N	FASTRIP #702	FARMERSVILLE	CA	93223
P	N	FAVORITE MARKET	DALTON	GA	30720
P	N	FEARLESS FARRIS DBA STINKER STAT	BOISE	ID	83707
P	N	FEATHER PETROLEUM	JR JCT	CO	81505
P	N	FEERICK'S CANDY CO	JOPLIN	MO	64801
P	N	FERGUSON & HASSLER	QUARRYVILLE	PA	17566
P	N	FERGUSON SUPPLY	CLYDE	NC	28721
P	N	FFP PARTNERS LTD	FORT WORTH	TX	761174391
P	N	FIESTA MART INC	HOUSTON	TX	77007
P	N	FILL ZONE FOOD & FUEL	WINCHESTER	KY	40392
P	N	FINA MART	FT PIERCE	FL	34982
P	N	FINASERVE INC	DALLAS	TX	752061602

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P	ID	Pay Name	Pay City	ST	Zip
P	N	FIRST & LAST INC	CATLETTSBURG	KY	41129
P	N	FIRST COAST ENERGY	JACKSONVILLE	FL	32205
P	N	FISHER STORES INC	NEW BERN	NC	28562
P	N	FITZGERALD CONVENIENCE	MARIETTA	GA	30062
P	N	FIVE FORKS GROC	WESTMINISTER	SC	29693
P	N	FIVE POINTS COUNTRY STORE INC	LEROY	OH	44077
P	N	FIVE STAR BUSYMART	ELKLAND	PA	16920
P	N	FIVE-O D/T	MARION	OH	43302
P	N	FJ MAHAR SERVICE STORES INC	OLEAN	NY	14760
P	N	FKG OIL	BELLEVILLE	IL	62220
P	N	FLAGWAY INC	WASH CH	OH	43160
P	N	FLASH FOODS INC	WAYCROSS	GA	31502
P	N	FLASH MARKET INC	W MEMPHIS	AR	72301
P	N	FLATONIA FOOD MART	FLATONIA	TX	78941
P	N	FLEET MORRIS PETROLEUM INC	BRANDON	MS	39047
P	N	FLEMING BROS OIL CO	SOUTH HAVEN	MI	49090
P	N	FLEMING CO INC	OKLAHOMA CITY	OK	73118
P	N	FLINCHBAUGH'S MOBIL	YORK	PA	17402
P	N	FLYING J INC	BRIGHAM CITY	UT	84302
P	N	FOLK OIL	HOMER	MI	492450157
P	N	FOOD & FUEL INC	LONGVIEW	WA	98632
P	N	FOOD BASKET	CONCORD	NH	03301
P	N	FOOD FAST HOLDINGS LTD	TYLER	TX	75701
P	N	FOOD PANTRY	BRENHAM	TX	77833
P	N	FOOD-N-FUEL	ARDEN HILLS	MN	55112
P	N	FOOD-N-FUN	NEW IBERIA	LA	70560
P	N	FORD'S ENTERPRISE INC	ZANESVILLE	OH	43701
P	N	FOREST DISCOUNT TOBACCO	FOREST	MS	39074
P	N	FORRY'S CORP	CORDORUS	PA	17311
P	N	FORWARD CORP	STANDISH	MI	48658
P	N	FOSTERS HOLIDAY MKT INC	ELIZABETHTON	TN	37643
P	N	FOUR CORNERS SMOKE SHOP	BIXBY	OK	74008
P	N	FOUR ST LOUIS INC	JOPLIN	MO	64801
P	N	FOWLER OIL CO INC	FAYETTE	AL	35555
P	N	FOYSTER WILLIAMS INC	ASHVILLE	OH	43103
P	N	FRANCOIS OIL CO INC	BELLEVILLE	WI	53508
P	N	FRANK GRIFFIN OIL CO	RUSSELLVILLE	AR	72811
P	N	FRED ROBLON	TEMPE	AZ	85282

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P	ID	Pay Name	Pay City	ST	Zip
P	N	FRED TEUTENBERG	FENTON	MO	63026
P	N	FREDERICKTOWN MARATHON	FREDERICKTOWN	OH	43019
P	N	FREEDOM OIL COMPANY	BLOOMINGTON	IL	617023697
P	N	FRIEND'S CONVENIENCE STORES	LUBBOCK	TX	79408
P	N	FRIENDLY GUS STORES	DUBLIN	GA	31040
P	N	FRIENDS CORNER TEXACO	NEWPORT	RI	02840
P	N	FROEHLICH ENTERPRISES INC	BARNESVILLE	OH	43713
P	N	FRONTIER LIQUOR & SPT GDS	FALLON	NV	89406
P	N	FRUITVILLE COUNTRY STORE	SCHWENKSVILLE	PA	19473
P	N	FT MYERS TRAVEL PLAZA	FT MYERS	FL	33905
P	N	FUEL SERVICES INC	CHIPPEWA FALLS	WI	54729
P	N	FUELMAN/FAST LANE	VICKSBURG	MS	39180
P	N	FULLER FOODS, INC	COLORADO CITY	TX	79512
P	N	FUQUA & DAVIS INC	MARIANNA	FL	32447
P	N	FURRS SUPERMARKETS INC	ALBUQUERQUE	NM	87107
P	N	G & A TEXACO	ATHENS	AL	35611
P	N	G MICHAEL CHAMIEE	MC DONOUGH	GA	30253
P	N	GABBY'S	FREDERICKTOWN	PA	15333
P	N	GAILS INC	WOODSTOCK	VA	22664
P	N	GARB-KO INC	SAGINAW	MI	48603
P	N	GARDEN SPOT #2	GREENVILLE	SC	29617
P	N	GARDNERS MARKET INC	GARDNERS	PA	17324
P	N	GARLAND COPE	RAVENSWOOD	WV	26164
P	N	GARLANDS	HOT SPRINGS	AR	71913
P	N	GARRETT HILL BEVERAGE T/A BREWER	LANCASTER	PA	17603
P	N	GARVER'S SERVICE STATION INC	KILLBUCH	OH	44637
P	N	GARVIN OIL CO INC	WAGENER	SC	29164
P	N	GARY ADAMS	RIESEL	TX	76682
P	N	GARY ELLISON	BILLINGS	MO	65610
P	N	GARY JONES	CRESTVIEW	FL	32536
P	N	GARY MARSHALL	NATRONA HEIGHTS	PA	15065
P	N	GARY SMITH	STRONGSVILLE	OH	44136
P	N	GARY'S BP	DIAMOND	OH	44412
P	N	GARY'S MARATHON	ZANESVILLE	OH	43701
P	N	GAS 4 LESS	WHEATRIDGE	CO	80033
P	N	GAS AMERICA SERVICES INC	SHIRLEY	IN	47384
P	N	GAS CENTER INC	WILMINGTON	NC	28402
P	N	GAS CITY LTD	FRANKFORT	IL	60423

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P	ID	Pay Name	Pay City	ST	Zip
P	N	GAS MART INC DBA MINUTEMAN	ELIZABETHTOWN	NC	28337
P	N	GAS N SHOP INC	LINCOLN	NE	68501
P	N	GAS-N-GOODS INC	WILLIAMSTOWN	WV	26187
P	N	GASNACKS INC DBA TRI CITY MOBIL	TEMPE	AZ	85281
P	N	GASSENSHOP	NEW MARTINSVILLE	WV	26155
P	N	GAST ENTERPRISES INC	MOUNDSVILLE	WV	26041
P	N	GATE PETROLEUM CORP	JACKSONVILLE	FL	32257
P	N	GATES U-PUMP-IT/GATES CIG OUTLET	GARDEN CITY	KS	67846
P	N	GAWKSKEY INC	GORE	OK	74435
P	N	GEM STOP	NAMPA	ID	83687
P	N	GENE BEHIOL	ONEONTA	NY	13820
P	N	GENE DUNLAP	SPRINGFIELD	CO	81073
P	N	GENERAL OIL CO INC	BATESVILLE	AR	72501
P	N	GENERAL OIL CORP	SIKESTON	MO	63801
P	N	GENES PENNZOIL	CAMBRIDGE	OH	43725
P	N	GEORGES FOOD-N-FUEL	MONTEVIDEO	MN	56265
P	N	GERRAR A SALIBA	DUNBAR	PA	15431
P	N	GET & GO MARKETS INC	CLINTON	TN	37716
P	N	GHASSAN HALABY	MESA	AZ	85201
P	N	GHODA MATAR	AKRON	OH	44314
P	N	GIANT EAGLE	NEWTON FALLS	OH	44444
P	N	GIANT EAGLE	BROOKFIELD	OH	44403
P	N	GIANT INDUSTRIES INC-AZ	ALBUQUERQUE	NM	87109
P	N	GIBBS	CHELSEA	MA	02150
P	N	GILBERT FOODLAND	GILBERT	WV	25621
P	N	GILBERT FOODLAND	GILBERT	WV	25621
P	N	GILES MARATHON INC	WILLOUGHBY	OH	44094
P	N	GIT N GO	DES MOINES	IA	50315
P	N	GKB CORP/DBA BIG G TOBACCO	WOODBRIDGE	VA	22191
P	N	GLAD-E-O'S	KINGSVILLE	OH	44048
P	N	GLASSMERE FUEL SERVICE	TARENTUM	PA	15084
P	N	GLEN GROCERY	WATKINS GLEN	NY	14891
P	N	GLEN'S MARKETS	GAYLORD	MI	49735
P	N	GLENN'S MARKET	NEWARK	OH	43055
P	N	GLENPOOL COMMUNITY SMOKE SHOP	GLENPOOL	OK	74033
P	N	GLESSNER ENTERPRISE	WHEELING	WV	26003
P	N	GLOBAL HOUSTON TRADING	MISSOURI CITY	TX	77459
P	N	GMT PETROLEUM	GOODYEAR	AZ	85338

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P	ID	Pay Name	Pay City	ST	Zip
P	N	GO-MART INC	CASSAWAY	WV	26624
P	N	GOC LTD	BUTLER	AL	36904
P	N	GODDARD'S ENTERPRISES INC	MOUNDSVILLE	WV	26041
P	N	GOFFS CARRY OUT	SHADYSIDE	OH	43947
P	N	GOLDEN FOOD MART	YOUNGSTOWN	OH	44515
P	N	GOLDEN GALLON	CHATTANOOGA	TN	37416
P	N	GOLDEN PANTRY FOOD STORES INC	BOGART	GA	30622
P	N	GOLDEN RIDGE TRAVEL CENTER	YORK SPRINGS	PA	17372
P	N	GOLDEN RULE OIL CO	EAU CLAIRE	WI	54702
P	N	GOLDIN SWIFTI INC	BREMEN	GA	30110
P	N	GOODWILL ENT DBA CITGO	MUNSTER	IN	46321
P	N	GORDON D ZUBER	SPARTANBURG	SC	29305
P	N	GOSSETT'S GROCERY/DWAYNE GOSSETT	LEICESTER	NC	28748
P	N	GOURMET CORNER	CIRCLEVILLE	OH	43113
P	N	GRACEVILLE OIL CO INC	GRACEVILLE	FL	32440
P	N	GRAHAM & HUDSON BP	CUYAHOGA FALLS	OH	44223
P	N	GRAND SMOKE SHOP INC	HAZLETON	PA	18201
P	N	GRANDPA'S	BRIDGETON	MO	63044
P	N	GRANDVIEW DEPOT TEXACO	SELLERSVILLE	PA	18960
P	N	GRAY'S CITGO	JACKSONVILLE	NC	28540
P	N	GRAY'S GROCERY	PRINCETON	LA	71067
P	N	GREEN LANE TEXACO	GREEN LANE	PA	18054
P	N	GREEN OIL CO	LINCOLN	IL	62656
P	N	GREEN SIX OAKS	TUXEDO	NC	28784
P	N	GREENACRES CARRY OUT	BLUE ROCK	OH	43720
P	N	GREENWAY MARKET INC	ROANOKE	VA	24019
P	N	GREENWICH BEV CTR	GREENWICH	OH	44837
P	N	GREENWOOD MARKET	KINGSPORT	TN	37664
P	N	GREG VANOVER	ONEIDA	TN	37841
P	N	GREGORY CASICO	LAFAYETTE	LA	70501
P	N	GRIFFIN PETROLEUM INC	JONESBORO	AR	72402
P	N	GRIFFINS BUSINESS SYSTEMS INC	EDNEYVILLE	NC	28727
P	N	GRIGGS INC	PHENIX CITY	AL	36867
P	N	GRIMSLEY OIL COMPANY	WAUCHULA	FL	33873
P	N	GRIMWOOD'S MOBIL MART	HARRISBURG	PA	17109
P	N	GROCERIES PLUS	HAZELTON	PA	18201
P	N	GROCERY STATION	SCOTTSDALE	AZ	85259
P	N	GROVERS RIVERVIEW	HARRISBURG	PA	17110

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P	ID	Pay Name	Pay City	ST	Zip
P	N	GUESS SMOKE SHOP	TAHLEQUAH	OK	74464
P	N	GUJJAR PETROLEUM	ELLENVILLE	NY	12428
P	N	GULF QUICKLETTE	LOCKESBURG	AR	71846
P	N	GULSHAN ENTERPRISES INC	HOUSTON	TX	770742212
P	N	GUMBY'S LLC	WHEELING	WV	26003
P	N	GURVACON INC	PHOENIX	AZ	85008
P	N	GWYNEDD EXXON RAI GUTTIA	NORTH WALES	PA	19454
P	N	H & R FOOD	AUSTIN	TX	78745
P	N	H & W DISCOUNT II	CAMDEN	TN	38320
P	N	HACKNEY PETROLEUM INC	KNOXVILLE	TN	37950
P	N	HAKE'S GROCERY INC	DOVER	PA	17315
P	N	HAMILTON CONVENIENCE	HAMILTON	VA	20158
P	N	HAMMER WILLIAMS CO	CHEROKEE	OK	73728
P	N	HANDEE MART	SPARTA	IL	62286
P	N	HANDEE MART STORES	TRAVELERS REST	SC	29690
P	N	HANDY ANDY	GRAY	GA	31032
P	N	HANDY DANDY MARKET	WOODBRIDGE	VA	22191
P	N	HANDY PANTRY #2	BARBOURSVILLE	WV	25504
P	N	HANDY PANTRY MART	HURRICANE	WV	25526
P	N	HANDY PANTRY MART	HURRICANE	WV	25526
P	N	HANDY WAY FOOD STORES	CRESCENT CITY	FL	32112
P	N	HANK RICHARD INC	AKRON	OH	44319
P	N	HANOVER VILLAGE IGA	NEWARK	OH	43055
P	N	HANOVERTON COUNTY PRIDE	HANOVERTON	OH	44423
P	N	HAPPY STORES INC	DESTIN	FL	32540
P	N	HAPPY TRAILS SMOKE SHOP	SKIATOOK	OK	74070
P	N	HARDE MART	MONROE	LA	71211
P	N	HARDIN'S RACEWAY	SPRUCE PINE	AL	35585
P	N	HARDWICKE'S COUNTRY STORE	CALAIS	ME	04619
P	N	HARDY OIL/BP MARTS	IRVINE	KY	40336
P	N	HARLESS PIT STOP INC	GILBERT	WV	25621
P	N	HARMS OIL COMPANY	ABERDEEN	SD	57401
P	N	HAROLD FRIEDMAN INC	BUTLER	PA	16001
P	N	HAROLD'S AMOCO INC	CORDELE	GA	31010
P	N	HARPER OIL CO	SPRINGFIELD	IL	62702
P	N	HARVEY'S MINI MARKET	FROSTPROOF	FL	33843
P	N	HARVEYS SUPERSTOP #129 LLC	HOT SPRINGS	AR	71913
P	N	HASAN ENTERPRISE/DBA DAIRY MART	AKRON	OH	44304

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P	ID	Pay Name	Pay City	ST	Zip
P	N	HB JAM/DJ'S DISCOUNT TOBACCO	INDIANAPOLIS	IN	46241
P	N	HC BRANUM	MAYNARDVILLE	TN	37807
P	N	HEARTLAND EXPRESS	ASTABULA	OH	44004
P	N	HEFFELFINGER'S MARATHON	LOUDONVILLE	OH	44842
P	N	HELEN DECENA	MESA	AZ	85210
P	N	HELENWOOD FOODS	HELENWOOD	TN	37755
P	N	HELSN LETNER	MARS HILL	NC	28754
P	N	HENRY'S GAS AND GROCERIES	IVA	SC	29655
P	N	HENRY'S MARKET	WORTHINGTON	PA	16262
P	N	HERDRICH PETROLEUM	RUSHVILLE	IN	46173
P	N	HERNDON OIL CORP	ABBEVILLE	AL	36310
P	N	HEROLD FAMILY SHELL	MEDINA	OH	44256
P	N	HERRINGBONES DELI & GRILL	CROZET	VA	22932
P	N	HI HO STORE & CAFE	NAVASOTA	TX	77868
P	N	HICKORY HILL	COLUMBUS	TX	78934
P	N	HIGGINSON OIL CO	MACKEY	IN	47654
P	N	HIGH UP MART	STERLING	VA	20164
P	N	HIGH'S OF BALTIMORE	HANOVER	MD	21076
P	N	HIGHWAY 290 GENERAL STORE INC	AUSTIN	TX	78736
P	N	HIGHWAY MARKET	BUTLER	PA	16001
P	N	HIHO STORE & CAFÉ	NAVASOTA	TX	77868
P	N	HILL CITY OIL	VICKSBURG	MO	39180
P	N	HILL COUNTRY FOOD MART	AUSTIN	TX	78738
P	N	HILLCREST MARKET/HARRY CAPPLIN	UNIONTOWN	PA	15401
P	N	HILLTOP GENERAL STORE	EVANS CITY	PA	16033
P	N	HILLTOP GENERAL STORE	EVANS CITY	PA	16033
P	N	HINE MOTORS INC/DBA KINSMAN BP	KINSMAN	OH	44428
P	N	HISTORIC ROUTE 66 SMOKE SHOP	CHANDLER	OK	74834
P	N	HIT-N-RUN FOOD STORES	ALTON	IL	62002
P	N	HITCHING POST	SAXONBURG	PA	16056
P	N	HITCHING POST	NORWALK	OH	44857
P	N	HN FUNKHOUSTR & CO INC	WINCHESTER	VA	22601
P	N	HOBBS CHEVRON	JOHNSON CITY	TX	78636
P	N	HOGUE CREEK COUNTRY MKT INC	WINCHESTER	VA	22603
P	N	HOLIDAY FOOD STORES INC	WARNER ROBINS	GA	310990842
P	N	HOLIDAY OIL	SALT LAKE CITY	UT	84119
P	N	HOLLCO INC	BAXTER	MN	56425
P	N	HOLLENBUSH'S SHOP & SAVE INC	ORWIGSBURG	PA	17961

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P	ID	Pay Name	Pay City	ST	Zip
P	N	HOLLIDAY MINI MARTS INC.	MARION	IL	62959
P	N	HOLLIS COLE	TAZWELL	TN	37879
P	N	HOLT'S IGA-LYNCOO	BEAN STATION	TN	37708
P	N	HOME OIL CO., INC.	ASHFORD	AL	36312
P	N	HOME SERVICE OIL CO	BARNHART	MO	63012
P	N	HOMER PARKS	SMACKOVER	AR	71762
P	N	HONEY FARMS	WORCESTER	MA	01609
P	N	HOOPER CREEK STORE	FLETCHER	NC	28732
P	N	HOOVER SHELL	CORSICANA	TX	75110
P	N	HOP-N-SAVE STORES	LAKELAND	FL	338023889
P	N	HORIZON ENERGY MKTG	SULPHUR	LA	70665
P	N	HOST ENTERPRISES INC	CAPE GIRARDEAU	MO	63702
P	N	HOUCHENS IND	BOWLING GREEN	KY	42101
P	N	HOWARD'S DRIVE-IN	ROBINSON	TX	76706
P	N	HOWLETT OIL COMPANY	CULLMAN	AL	35055
P	N	HOYTE DILLINGHAM	WEAVERVILLE	NC	28787
P	N	HRUSKA'S GROCERY STORE	ELLINGER	TX	78938
P	N	HUBER OIL OF LA INC	LAKE CHARLES	LA	70601
P	N	HUDSON FOOD STORES INC	CHIEFLAND	FL	32626
P	N	HUFFCO INC	MARYVILLE	TN	37804
P	N	HUGH CAMPBELL	NEW STANTON	PA	15672
P	N	HUNGRY HUNTER	TENNILLE	GA	31098
P	N	HURLERS GROCERY	WESTFIELD	PA	16950
P	N	HY HOLDING INC	WACO	TX	76706
P	N	HYDE'S MIDGET MARKET - JR HYDE	SHERIDAN	AR	72150
P	N	I-80 SMOKE SHOP	WADSWORTH	NV	89442
P	N	I-90 FUEL SERVICES INC	SIOUX FALLS	SD	571011025
P	N	I-95 TEXACO	LAKE PARK	FL	33403
P	N	ICE SERVICE INC	ASHEVILLE	NC	28803
P	N	ILDERTON OIL CO dba ILOCO MART	HIGH POINT	NC	27264
P	N	ILLINOIS AYERS OIL CO	QUINCY	IL	62306
P	N	IN & OUT MINI-MARTS OF LA	LAKE CHARLES	LA	70602
P	N	INDEPENDENCE STREET SMOKE SHOP	TULSA	OK	74110
P	N	INLAND ENERGY INC	INDIANAPOLIS	IN	46217
P	N	INTER CITY OIL CO INC	DULUTH	MN	55803
P	N	INTERMARK	INDIANAPOLIS	IN	46254
P	N	INTERSTATE HARDWARE INC	HENDERSONVILLE	NC	28792
P	N	INTERSTATE OIL COMPANY INC	MONTGOMERY	AL	361010967

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P	ID	Pay Name	Pay City	ST	Zip
P	N	INTERSTATE SERVICE CENTER	FREDERICKSBURG	VA	22406
P	N	INVESTING ASSOCIATES INC	COOPERTOWN	NY	13326
P	N	IRBY PUCKETT	CENTRE	AL	35960
P	N	IRON POST SMOKE SHOP	MULDROW	OK	74948
P	N	ISLAND FOOD STORES	JACKSONVILLE	FL	32256
P	N	ISSAM'S MOBIL INC	LEBANON	PA	17042
P	N	IVAN WALKER INC/DBA WALKERS	PLEASANT GROVE	UT	84062
P	N	J & B MARKET INC	PIGEON FORGE	TN	37863
P	N	J & J OIL CO	ATHENS	AL	35612
P	N	J & J STOP N SHOP	ENDICOTT	NY	13760
P	N	J & K SHELL	COSHOCTON	OH	43812
P	N	J & L	SYLVESTER	WV	25193
P	N	J & L OIL INC	VERNON HILLS	IL	60061
P	N	J & M MARKET/JAMES A PAUGH	CLARKSBURG	WV	26301
P	N	J & O FARMERS MARKET	CATLETTSBURG	KY	41129
P	N	J & R GROCERY/JENNIFER SMITH	HUMPHREY	AR	71603
P	N	J FOOD MART	JONESBOROUGH	TN	37659
P	N	J G SERVICE STATIONS INC	UNIONTOWN	PA	15401
P	N	J WADE QUINN CO	JONESBORO	AR	72401
P	N	J&J INVESTMENTS DBA MINI-MARKETS	ALAMOGORDO	NM	88310
P	N	J-MART #14	MALVERN	AR	72104
P	N	J-MART INC	VICTOR	NY	14564
P	N	JACK GRIFFITH GAS UP INC	STILLWATER	OK	74074
P	N	JACK MILLARD	WHEELING	WV	26003
P	N	JACK RABBIT FOODS	THOMASVILLE	GA	31799
P	N	JACK RABBIT MARKETS	MORRISTOWN	TN	37815
P	N	JACK STEWART	MINERAL WELLS	WV	26150
P	N	JACKIE A BEVARD	BROWNSVILLE	PA	15417
P	N	JACKS CONVENIENCE STORE LLC	FRANKLINTON	LA	70438
P	N	JACKS SMOKE SHOP - ISS	LOCUST GROVE	OK	74352
P	N	JACKSON COUNTY OIL CO	SCOTTSBORO	AL	35768
P	N	JACKSON OIL COMPANY	CLARKSVILLE	TN	37040
P	N	JACKSONS FOOD STORES	MERIDIAN	ID	83642
P	N	JACO JAMIESON LLC DBA FASTRIP FD	BAKERSFIELD	CA	93308
P	N	JAKES STORE	WHITNEY	TX	76692
P	N	JAMES A PAUGH	NUTTER FORT	WV	26301
P	N	JAMES A PAUGH/NUTTER FORT CIG	NUTTER FORT	WV	26301
P	N	JAMES BOARD PETE KATSILAMOS	POPLAR BLUFF	MO	63901

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P	ID	Pay Name	Pay City	ST	Zip
P	N	JAMES BRIUER	LENEXA	KS	66215
P	N	JAMES KINCAID	WASHINGTON	WV	26181
P	N	JAMES LISTER DBA JIMMY'S CARRY	CALEDONIA	OH	43314
P	N	JAMES MOLER - DBA CISCO STORE	PETROLEUM	WV	26161
P	N	JAMISON EXXON SHOP	JAMISON	PA	18929
P	N	JAPAMH CO INC #19	CANTON	OH	44707
P	N	JASHAM	PHILADELPHIA	MS	39350
P	N	JAVA JACKS	HEWITT	TX	76643
P	N	JAY DELANO	ST JAMES	MO	65559
P	N	JAY OIL	BAY SPRINGS	MS	39422
P	N	JB'S SMOKE SHOP	STROUD	OK	74079
P	N	JD & B INC	MARKED TREE	AR	72365
P	N	JD STREETT & COMPANY INC	MARYLAND HEIGHTS	MO	63043
P	N	JEAN P MARTIN	WARRENTON	VA	20186
P	N	JEFF LAVENDER	BOAZ	AL	35957
P	N	JEFF LOWERY	JASPER	AL	35501
P	N	JEFF MILLS	RIPLEY	TN	38063
P	N	JEFFREY WELCH	WAYNESVILLE	NC	28786
P	N	JEKS PIT STOP, INC.	FREDERICKSBURG	TX	78624
P	N	JENNIFER CORNETT	RUSHVILLE	IN	46173
P	N	JERNIGAN OIL CO/DUCK THRU	AHOSKIE	NC	27910
P	N	JERRY'S ENTERPRISES INC	EDINA	MN	55436
P	N	JET FOOD STORES OF GEORGIA INC	SANDERSVILLE	GA	31082
P	N	JET STOP	LOCKHART	TX	78644
P	N	JFM INC	JACKSON	MS	39296
P	N	JIFFY MART	MESA	AZ	85201
P	N	JIFFY MINI MART	TERRE HAUTE	IN	47811
P	N	JIM & SHELLEY EANES	ROCKDALE	TX	76567
P	N	JIM BARLEEN	ESTES PARK	CO	80517
P	N	JIM ESTES OIL CO INC	WETUMPKA	AL	36092
P	N	JIM STUCKERT	OAKLAND	PA	15213
P	N	JIM'S GULF	TROY	PA	16947
P	N	JIM'S PARTY SHOP	NORTH JACKSON	OH	44451
P	N	JIMMY JONES	DUMAS	AR	71639
P	N	JIMMY'S FOOD MART	MT VERNON	GA	30445
P	N	JIMS BEER & WINE CARRYOUT	ALLIANCE	OH	44601
P	N	JIMS BEER & WINE CARRYOUT	ALLIANCE	OH	44601
P	N	JJ'S DRIVE THRU	ZANESVILLE	OH	43701

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P	ID	Pay Name	Pay City	ST	Zip
P	N	JJJ #2	CULLODEN	WV	25510
P	N	JM DAVIS IND., INC.	MOREHEAD CITY	NC	28557
P	N	JMJ INC	HORNELL	NY	14843
P	N	JO & ED'S CARRY OUT INC	NORWALK	OH	44857
P	N	JOC STOPS	JASPER	TX	75951
P	N	JOE CLARK	LEBANON	IN	46052
P	N	JOE GROOM	OBETZ	OH	43207
P	N	JOE HANNON	TALLAHASSEE	FL	32314
P	N	JOE HANNON	TALLAHASSEE	FL	32314
P	N	JOE HUNTER	PITTSBURGH	PA	15222
P	N	JOE LYCINDA	VIPER	KY	41774
P	N	JOE ZAATAR	ELYRIA	OH	44035
P	N	JOE'S SUPERETTE DBA D&B SALES	BULAN	KY	41722
P	N	JOHN HAUGE	PINE BLUFF	AR	71611
P	N	JOHN HERR'S VILLAGE MKT	MILLERSVILLE	PA	17551
P	N	JOHN L VERNIER	DERIDDER	LA	70634
P	N	JOHN M WHEAT	COCHRAN	GA	31014
P	N	JOHN MC ADAM	ROCHESTER	NY	14623
P	N	JOHN NAIFEH	COVINGTON	TN	38019
P	N	JOHN S THOMPSON dba JT ENTERPRIS	PLEASANT HILL	CA	94523
P	N	JOHN VANCE	HAYMARKET	VA	22069
P	N	JOHN'S FOOD MART	AUSTIN	TX	78741
P	N	JOHNNY'S MARKET	LIMESTONE	TN	37681
P	N	JOHNS EXXON	KING OF PRUSSIA	PA	19406
P	N	JOHNSON & JOHNSON INC	MADISON	FL	32341
P	N	JOHNSON OIL CO INC	COLUMBUS	IN	47202
P	N	JOHNSON OIL CO.	GAYLORD	MI	49735
P	N	JOHNSON OIL COMPANY	ROCK FALLS	IL	61071
P	N	JOLLEY ASSOCIATES	ST ALBANS	VT	05478
P	N	JONES OIL CO INC DBA MR. ROY'S	SELMA	AL	36701
P	N	JONES SMOKE SHOP	BATH	NY	14810
P	N	JOPO INC dba ZIP TRIP	SPOKANE	WA	99202
P	N	JORDAN'S DRIVE THRU	WADSWORTH	OH	44281
P	N	JOYCE POWELL/POWELLS GEN STORE	WASHINGTON	WV	26181
P	N	JOYCE'S COUNTRY VARIETY	W SWANZEY	NH	03469
P	N	JP MILLS INC	TUPELO	MS	38801
P	N	JR FOOD MART OF ARKANSAS	LITTLE ROCK	AR	72211
P	N	JR MORGAN OIL CO	CARROLLTON	GA	30117

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P	ID	Pay Name	Pay City	ST	Zip
P	N	JR'S COUNTRY STORES	PUEBLO	CO	81003
P	N	JUDGE'S HANDY MART	LOGANSPORT	LA	71049
P	N	JUDS FOOD STORES	BRENHAM	TX	778340769
P	N	JUPITER SHELL	JUPITER	FL	33458
P	N	JUST CIGARETTES	DYER	IN	46311
P	N	JUSTICE TO GO MARKET	ROGERSVILLE	TN	37857
P	N	JW TOBACCO DBA TOBACCO DISCOUNTS	COVINGTON	LA	70433
P	N	JW WHITTEN	FLATWOODS	KY	41139
P	N	K & B KWIK STOP INC	POCATELLO	ID	83201
P	N	K & F INC	ABBEVILLE	LA	70510
P	N	K & K FOOD MART	BROCKPORT	NY	14420
P	N	K & L BAR INC	TOMS BROOK	VA	22660
P	N	K & L CONVENIENCE	WHITNEY	TX	76692
P	N	K & M GROC	BRENHAM	TX	77833
P	N	K & S MARKET	MORRISTOWN	TN	37815
P	N	K & W RESTAURANT & CARRYOUT INC	LANCASTER	OH	43130
P	N	K H MATTIS	FLUSHING	MI	48433
P	N	K KOUNTRY-KIRSHMAN OIL	BELLE GLADE	FL	33430
P	N	KAHLER'S EXXON	YORK	PA	17402
P	N	KAMANI MANAGEMENT CORP	FAIRLESS HILLS	PA	19030
P	N	KAMP & ASSOCS INC/QUICK SHOP	LONGVIEW	WA	98632
P	N	KANE LIQUID FUELS, INC DBA SPARK	KANE	PA	16735
P	N	KANGAROO INC	GAINESVILLE	GA	30501
P	N	KANGAROOS OUTBACK POST	ASHEVILLE	NC	28806
P	N	KANZA TRAVEL PLAZA	BRAMAN	OK	74632
P	N	KARCO INC	OKAWVILLE	IL	62271
P	N	KATHY BUSSARD	IRWIN	PA	15642
P	N	KATO INC	ROCHESTER	MN	55903
P	N	KAW TOBACCO	NEWKIRK	OK	74647
P	N	KC GROUP TOBACCO RANCH	KNOXVILLE	TN	37917
P	N	KEENAN DART	DIGHTON	KS	67839
P	N	KEG DBA DAIRY 224	LOWELLVILLE	OH	44436
P	N	KELLER CAPITAL INC	MOGADORE	OH	44260
P	N	KELLEY-WILLIAMSON COMPANY	ROCKFORD	IL	61104
P	N	KELLY'S CITGO	MANASSAS	VA	22110
P	N	KELLY'S CORNER STORE	COLLEGE STATION	TX	77840
P	N	KEN DILL	LONOKE	AR	72086
P	N	KEN KAMINGA	AUBURNDALE	FL	33823

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P	ID	Pay Name	Pay City	ST	Zip
P	N	KEN-JO MARKETS	MARYVILLE	TN	37801
P	N	KENDRICKS CORNER	SALEM	OH	44460
P	N	KENNY'S THRIFTWAY	HUNTINGTON	WV	25701
P	N	KENSINGTON MARKET	KENSINGTON	OH	44427
P	N	KENT OIL INC	MIDLAND	TX	79707
P	N	KENTUCKY OIL/CARDINAL COUNTRY ST	BETSY LAYNE	KY	41605
P	N	KEOWEE STORE	SENECA	SC	29672
P	N	KERR'S SALES & SERVICE	WARDENSVILLE	WV	26851
P	N	KEVIN HAZELWOOD	POWDERLY	KY	42367
P	N	KEVIN HERSHA	KNOXVILLE	TN	37849
P	N	KEVIN MUST	WALKER VALLEY	NY	12588
P	N	KHIZER BAWAHAB	BRYAN	TX	77803
P	N	KHOTIAR CORP	COCHECTON	NY	12726
P	N	KICKAPOO CORNER	GLOSTER	LA	71030
P	N	KIEL BROTHERS OIL INC	COLUMBUS	IN	47202
P	N	KIM BROWN	VALLEY MILLS	TX	76689
P	N	KING & KING ENT INC	KANSAS CITY	MO	64119
P	N	KING CUTRATE TOBACCOS INC	BECKLEY	WV	25801
P	N	KINGS E-Z STOP	TAHLEQUAH	OK	74464
P	N	KINGSPOINT MARKET	MORRISTOWN	TN	37816
P	N	KISTLER GROCERY	KISTLER	WV	25628
P	N	KISTLER GROCERY	KISTLER	WV	25628
P	N	KIVETT OIL CO	STATESVILLE	NC	28687
P	N	KJ'S CONOCO	GREENBRIER	AR	72058
P	N	KNAPP OIL CO	XENIA	IL	62899
P	N	KNOXVILLE CARRY OUT	TORONTO	OH	43964
P	N	KOCOLENE MARKETING CO INC	SEYMOUR	IN	47274
P	N	KOHLER & HECKER INC	ZANESVILLE	OH	43701
P	N	KOM PAK I	PARKERSBURG	WV	26101
P	N	KOMPAK	PARKERSBURG	WV	26101
P	N	KONVIE MART	YORK	PA	17403
P	N	KOOL KAT TOBACCO	KNOXVILLE	TN	37931
P	N	KOUNTRY KORNER	ROBERTSVILLE	OH	44670
P	N	KOUNTRY KUBBARD	HORSESHOE	NC	28742
P	N	KOUNTRY KUBBARD	CLANTON	AL	35046
P	N	KOUNTY LINE CONVENIENCE	ARDEN	NC	28704
P	N	KOWETA SMOKE SHOP	COWETA	OK	74429
P	N	KRAUSE GENTLE CORP	W DES MOINES	IA	50266

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P	ID	Pay Name	Pay City	ST	Zip
P	N	KRIS SELVIDGE	KNOXVILLE	TN	37849
P	N	KRIST OIL COMPANY	IRON RIVER	MI	49935
P	N	KRUPP OIL CO INC	TUSCALOOSA	AL	35403
P	N	KWIK KING FOOD STORES INC	OCALA	FL	34470
P	N	KWIK KING FOODS	TORONTO	OH	43964
P	N	KWIK STOP	FLATONIA	TX	78941
P	N	KWIK STOP	KOSSE	TX	76653
P	N	KWIK STOP #3	EATONTON	GA	31024
P	N	KWIK STOP FOOD STORES	N PLATTE	NE	69103
P	N	KWIK WAY INC	BILLINGS	MT	59104
P	N	L & C ENTERPRISE	MORRISTOWN	TN	37816
P	N	L & D ENTERPRISES 97 LTD	BRUSH PRAIRIE	WA	98606
P	N	L & J COUNTRY STORE	WEARE	NH	03281
P	N	L & J DISCOUNT TOBACCO #4	KINGSPORT	TN	37663
P	N	L & L FOOD STORES INC	NASHVILLE	NC	27856
P	N	L & L OIL CO INC	MOUNTAIN HOME	AR	72653
P	N	L & M MARKET	AUGUSTA	WV	26704
P	N	L&R SMOKESHOP	CLARKSVILLE	AR	72830
P	N	LA DISCOUNT TOBACCO CO INC	SHREVEPORT	LA	71106
P	N	LA DRIVE THRU MARKET	CROOKSVILLE	OH	43731
P	N	LADDS SPEEDY MARKET	HUNTINGTON	WV	25701
P	N	LAFAYETTE MARKET	MEDINA	OH	44256
P	N	LAIRD INC	MCKEESPORT	PA	15132
P	N	LAIRD INC	MCKEESPORT	PA	15132
P	N	LAKERS FOOD MARKET	DIAMOND	OH	44412
P	N	LAKESIDE SPORT SHOP	CORTLAND	OH	44410
P	N	LAKEVIEW MINI MART	BATH	NY	14810
P	N	LAMAR CHATHAM	TUSCALOOSA	AL	35404
P	N	LAND MART	JEMISON	AL	35085
P	N	LANDHOPE FARMS INC	KENNETT SQUARE	PA	19348
P	N	LANDMARK INDUSTRIES INC	HOUSTON	TX	77042
P	N	LANDON'S CEDAR LODGE SERVICE INC	CANTON	PA	17724
P	N	LARRY D CATHEY	CHINA SPRING	TX	76633
P	N	LARRY KUYKENDALL	NEWTON	IL	62448
P	N	LARRY TAYLOR/TAYLOR'S AUTO INC	FREDERICKTOWN	PA	15333
P	N	LARSON CITGO INC	GREER	SC	29650
P	N	LAST STOP INC	WACO	TX	76706
P	N	LATCH ENTERPRISES DBA CASH N DAS	JASPER	TX	75951

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P	ID	Pay Name	Pay City	ST	Zip
P	N	LEADBETTER'S SUPER STOP	BANGOR	ME	04401
P	N	LEE ANDERSON CO	BRENHAM	TX	77834
P	N	LEE HERSHA	OAK RIDGE	TN	37830
P	N	LEE KNIFFIN	BLACKFOOT	ID	83221
P	N	LEGEND VENTURES INC	UTICA	OH	430800605
P	N	LENAPE TRADING POST	DEWEY	OK	74029
P	N	LENORA HERNANDEZ	OAK RIDGE	TN	37830
P	N	LEONARD POWELL & CARLTON COX	GREENSBORO	NC	27405
P	N	LEVITOWN NEWS	FAIRLESS HILLS	PA	19030
P	N	LEWIS DRUG	SIOUX FALLS	SD	57105
P	N	LEWIS GROC	HEMPSTEAD	TX	77445
P	N	LHB LIMITED	CAMP HILL	PA	17011
P	N	LIBERTY EXXON	LIBERTY	PA	14930
P	N	LIBERTY HILARD FOODS	LIBERTY	OH	44505
P	N	LIBERTY MARATHON	LOUISVILLE	OH	44641
P	N	LIL GENERAL INC	WOONSOCKET	RI	02895
P	N	LIL INDIAN SMOKE SHOP	JAY	OK	74346
P	N	LIL RED HEN CONVENIENCE STORES	TROY	PA	16947
P	N	LIMESTONE COVE MKT	UNICOL	TN	37692
P	N	LINCOLN LAND OIL	SPRINGFIELD	IL	62703
P	N	LINCOLN SHELL SERVICE	PAINESVILLE	OH	44077
P	N	LINDSAYS MKT	DANDRIDGE	TN	37725
P	N	LION PHARMACY	RED LION	PA	17356
P	N	LIONS DEN FOOD MART	HALEYVILLE	AL	35565
P	N	LISA PEEBLES	WEAVERVILLE	NC	28787
P	N	LISI'S TEXACO'S	ELIZABETHVILLE	PA	17023
P	N	LITCO PETRO	TUPELO	MS	38802
P	N	LITITZ PIKE INC	LANCASTER	PA	17601
P	N	LITTLE AL'S OIL LLC	CLAYTON	AL	36016
P	N	LITTLE BEAR MARKET	CIRCLEVILLE	OH	43113
P	N	LITTLE BRITAIN STORE INC	QUARRYVILLE	PA	17566
P	N	LITTLE GENERAL STORES	ANDERSON	SC	29621
P	N	LITTLE GENERAL STORES INC	BECKLEY	WV	25802
P	N	LITTLE SAINTS	JENSEN BEACH	FL	34958
P	N	LITTLE TRIANGLE	SEALY	TX	77474
P	N	LITTLE'S CONVENIENCE	RICHMOND	VA	23224
P	N	LITTLESTOWN EXXON SERVICENTER IN	LITTLESTOWN	PA	17340
P	N	LIVERMAN'S GROCERY, INC.	JUNCTION	TX	76849

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P	ID	Pay Name	Pay City	ST	Zip
P	N	LO-BOY OIL	MANCHESTER	OH	44319
P	N	LOAF 'N JUG	PUEBLO	CO	81001
P	N	LOCO INC	GRAND JUNCTION	CO	81503
P	N	LODI MARKET	LODI	OH	44254
P	N	LOEDER OIL	LAKE MILLS	WI	53551
P	N	LONE STAR ICE & FOOD STORES	SAN ANTONIO	TX	78210
P	N	LONE STAR UNLIMITED	ABILENE	TX	79608
P	N	LORRAINE AMMA	WHITE OAK	PA	15131
P	N	LOVEDALE ISALYS	ELIZABETH	PA	15037
P	N	LOW BOB'S #68	GREENSBURG	IN	47240
P	N	LOWER STATE MKTG INC DBA E-Z SHP	BAMBERG	SC	29003
P	N	LOWES FOOD STORES INC	WINSTON SALEM	NC	271144908
P	N	LOY FORD STORES INC	BUCKEYE	AZ	85047
P	N	LOYAL SHAWNEE SMOKE SHOP	VINITA	OK	74301
P	N	LUCKY 13 INC	MOULTRIE	GA	31768
P	N	LUCKY LADY STORES	FT WORTH	TX	76016
P	N	LUCKY SEVEN	VIRGINIA	MN	55792
P	N	LUCKY'S	BELLVILLE	TX	77418
P	N	LUKE OIL-LORI HUTCHENS	HOBART	IN	46342
P	N	LULU INC	MAPLE HTS	OH	44137
P	N	LUTTREL OIL DBA CIMARRON TVL PLZ	STILLWATER	OK	74075
P	N	LYNDON'S MARKET	FREEPORT	PA	16229
P	N	LYNN'S COUNTRY STORE	HAVANA	FL	32333
P	N	LYNNE SELF SERVE	ELKINS	WV	26241
P	N	M AND K FOODS	GORDON	GA	31031
P	N	MACK BYRD	HUNTSVILLE	TN	37756
P	N	MADDIES INC	BOSTON	MA	02135
P	N	MADHUS SERVICE STATION	YORK	PA	17403
P	N	MAGGIORES DRIVE THRU	CANTON	OH	44708
P	N	MAHONING VALLEY DAIRY	BELOIT	OH	44609
P	N	MAIN ST MARKET	SPENCER	OH	44275
P	N	MAIN STREET DELI & GROCERY	MARSHALL	VA	20115
P	N	MAJOR MART INC DBA B-QUICK FD ST	STARKVILLE	MS	39760
P	N	MANCHESTER MARKETING INC	RICHMOND	VA	23235
P	N	MANLEY'S MIGHTY MARTS LLC	BINGHAMTON	NY	13905
P	N	MAPCO EXPRESS INC	NASHVILLE	TN	37217
P	N	MARATHON	NEWTON FALLS	OH	44444
P	N	MARATHON FLINT OIL COMPANY	FLINT	MI	48503

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P	ID	Pay Name	Pay City	ST	Zip
P	N	MARITIME FARMS/ENERGY	ROCKLAND	ME	04841
P	N	MARK A KILDOU	MARION	OH	43302
P	N	MARK MINTER	STAMPS	AR	71860
P	N	MARK ROTUNO	VERMILLION	OH	44089
P	N	MARK SWAIM	BAKERSFIELD	CA	93304
P	N	MARK-KERRY MEHWALD	HINCKLEY	OH	44233
P	N	MARKET BASKET	PORTAGE	WI	53901
P	N	MARKET PLACE OF TEXAS	BEAUMONT	TX	77707
P	N	MARKS CARRY OUT	WELLSBURG	WV	26070
P	N	MARQUITA CHANDLER	PULASKI	TN	38478
P	N	MARR INC	STATESVILLE	NC	28687
P	N	MARSH PETROLEUM CO	GREENEVILLE	TN	37745
P	N	MARSHALL BROS INC	WEEDSPORT	NY	13166
P	N	MARTIN & BAYLEY INC	CARMI	IL	62821
P	N	MARTIN FOOD MARTS INC	HALEYVILLE	AL	355651000
P	N	MARTIN OIL CO	JACKSONVILLE	FL	32247
P	N	MARTIN'S 1-STOP INC	LEBANON	MO	65536
P	N	MASONBORO COUNTRY STORE INC	WILMINGTON	NC	28403
P	N	MATHERLY OIL CO	CABOOL	MO	65689
P	N	MATTHEW SCHULTE	JEFFERSON CITY	MO	65109
P	N	MATTHEWS OIL	JONESBORO	AR	72401
P	N	MATUS SUPERMARKET	CALDWELL	TX	77836
P	N	MAUPINS EXXON	ELIZABETHTON	TN	37643
P	N	MAVERICK COUNTRY STORES INC	NORTH SALT LAKE	UT	84054
P	N	MAVERICK MINI MART	CUSHING	OK	74023
P	N	MAX'S DISCOUNT TOB	MINDEN	LA	71055
P	N	MAXI-PIERCE GROCERY	ABBEVILLE	LA	70510
P	N	MAYFIELD OIL COMPANY	CENTREVILLE	AL	35042
P	N	MAYHUGHS STORE	NEW BALTIMORE	VA	20187
P	N	MAYHUGHS STORE	NOKESVILLE	VA	20181
P	N	MAZE ENTERPRISES-RICHARD MAZE	ELIZABETH	WV	26143
P	N	MBC PARTNERS	KNOXVILLE	TN	37927
P	N	MC CALLIE'S PHILLIPS CC INC	CARLISLE	AR	72024
P	N	MC CANN'S TOP OF THE MOUNTAIN	HOT SPRINGS	AR	71910
P	N	MC CLINTOCK MOBIL	TEMPE	AZ	85284
P	N	MC COMAS SELF SERVE	SPENCER	OH	44275
P	N	MC DOWELL GARDEN HARDWARE INC	MARION	NC	28752
P	N	MCGUIRE FOOD MARTS INC	MOBILE	AL	36660

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P	ID	Pay Name	Pay City	ST	Zip
P	N	MCKENZIES TOBACCO SHOP	ZACHARY	LA	70791
P	N	MCKNIGHT OIL CORPORATION	GALAX	VA	24333
P	N	MCLEOD'S #40	DUBLIN	GA	31040
P	N	MCMAHON'S QUIK STOP INC	FENTON	MI	48430
P	N	MCPHERSON OIL CO	BIRMINGHAM	AL	35209
P	N	MEADOWBROOK RESORT INC	WAYNESVILLE	NC	28786
P	N	MEDINA SHELL	MEDINA	OH	44256
P	N	MEEKER TOBACCO SHOP	MEEKER	OK	74855
P	N	MEGA MARTS	EAU CLAIRE	WI	54701
P	N	MEHTA BROS INC	LURAY	VA	22835
P	N	MEIER OIL SERVICE INC	ASHKUM	IL	60911
P	N	MEIJER INC	GRAND RAPIDS	MI	49544
P	N	MEKESIWA	CUSHING	OK	74023
P	N	MELISSA GOZA	TEXARKANA	AR	71854
P	N	MEMPHIS SMOKE HOUSE INC	BROOKLYN	OH	44144
P	N	MERRIES FOODS	AURORA	IN	47001
P	N	MERRITT OIL CO	MOBILE	AL	36652
P	N	METRO PETROLEUM CO INC	JACKSON	MS	392363607
P	N	MEYER OF TEMPE INC	TEMPE	AZ	85281
P	N	MEYER TOWN PUMP	TEMPE	AZ	85282
P	N	MEYERS EXPRESS MART	DUNLAP	IL	61525
P	N	MFA PETROLEUM CO	COLUMBIA	MO	65201
P	N	MFG ENTERPRISE INC/DBA SWIFTY	SCOTTSBORO	AL	35768
P	N	MG OIL	RAPID CITY	SD	57709
P	N	MG OIL INC	NAPLES	FL	34114
P	N	MIC SMOKE SHOP	MUSKOGEE	OK	74401
P	N	MICHAEL BOSSI	CHESTERFIELD	MO	63006
P	N	MICHAEL FOTI	GILBERT	AZ	85234
P	N	MICHAEL WARE	BATTLE CREEK	MI	49015
P	N	MICHAEL'S MINI MART	BRUNSWICK	OH	44212
P	N	MICHEALS MARKET	SPINNERSTOWN	PA	18961
P	N	MICHELLE TAULHER	WARREN	AR	71671
P	N	MICK DOERR	CUBA	MO	65453
P	N	MICK DOERR	CUBA	MO	65453
P	N	MICKEY MART	GREENWICH	OH	44837
P	N	MICKEY'S ENTERPRISES INC	KILLEEN	TX	76541
P	N	MID VALLEY OIL CO INC	NEW WINDSOR	NY	12553
P	N	MIDDLETON OIL CO	GREENVILLE	AL	36037

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P	ID	Pay Name	Pay City	ST	Zip
P	N	MIDEI SERVICE INC	BRILLIANT	OH	43913
P	N	MIDLAND SMOKE SHOP	FT SMITH	AR	72904
P	N	MIDWAY GROCERY	TAHLEQUAH	OK	74464
P	N	MIDWAY OIL CORP	RUTLAND	VT	05701
P	N	MIDWAY SUPERMARKET INC	HEGINS	PA	17938
P	N	MIDWEST ENERGY/AMERIMART	CAPE GIRARDEAU	MO	63701
P	N	MIDWEST PETROLEUM COMPANY	ST LOUIS	MO	631432635
P	N	MIKE HILL	SPRINGDALE	AR	72764
P	N	MIKES MARKET	HUNTINGTON	WV	25705
P	N	MILL AVE MOBIL	TEMPE	AZ	85281
P	N	MILL CREEK DELI	YOUNGSTOWN	OH	44511
P	N	MILLER & HOLMES INC	ST PAUL	MN	55101
P	N	MILLER MART	NORFOLK	VA	23504
P	N	MILLER'S FOOD MARKET	BURNET	TX	78611
P	N	MILLIGAN GRO	MILLIGAN COLLEGE	TN	37682
P	N	MILTONS BP	MIDDLEBOURNE	WV	26149
P	N	MINI GIANTS #7	PARKERSBURG	WV	26101
P	N	MINI MART INC	CASPER	WY	82602
P	N	MINIT MART #9	CANAL FULTON	OH	44614
P	N	MINIT MART FOODS, INC.	BOWLING GREEN	KY	42102
P	N	MINIT SHOP - OAKHURST	CROSSETT	AR	71635
P	N	MINOR MARKET	CHURCH HILL	TN	37642
P	N	MINUTE STOP INC	BAY MINETTE	AL	36507
P	N	MISSISSIPPI OIL INC	HATTIESBURG	MS	39404
P	N	MMHT INC	FITZGERALD	GA	31750
P	N	MO FUELS INC SUNOCO	TREVOSE	PA	19047
P	N	MOBIL GAS-N-GO	STERLING	VA	20164
P	N	MOBIL MART FRANCHISES	STOUGHTON	MA	02072
P	N	MOBIL OIL CORP	FAIRFAX	VA	22037
P	N	MOHAN SINGH	PHOENIX	AZ	85013
P	N	MOHSIN ENTERPRISES INTL	BRENHAM	TX	77833
P	N	MONTOUR BEVERAGE	MONTOURSVILLE	PA	17754
P	N	MONTVILLE COUNTRY STORE INC	MONTVILLE	OH	44064
P	N	MONUMENT OIL CO	GRAND JUNCTION	CO	81505
P	N	MOORE OIL CO INC	MANNING	SC	29102
P	N	MOORE OIL CO INC (STOP-N-SAVE)	MONROE	LA	71201
P	N	MOORE'S C-STORES LTD	WINFIELD	AL	35594
P	N	MORELAND INC	STARKVILLE	MS	39759

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P	ID	Pay Name	Pay City	ST	Zip
P	N	MORGANTOWN CIGARETTE & TOBACCO O	BOWLING GREEN	KY	42101
P	N	MORISKY INC	BROOK PARK	OH	44142
P	N	MORRIS CORP	RIDGELAND	MS	39157
P	N	MORRIS OIL	SPRINGFIELD	MO	65802
P	N	MOUNTAIN EMPIRE OIL CO/ROADRUNNE	JOHNSON CITY	TN	37601
P	N	MOUNTAIN VIEW CONVENIENCE	BIGLERVILLE	PA	17307
P	N	MOUNTAINEER FOOD STORE	MARS HILL	NC	28754
P	N	MOUNTAINEER MARTS J & J MART INC	BUCKHANNON	WV	26201
P	N	MOWERY'S CONVIENCE STORES	STRASBURG	VA	22657
P	N	MOYLE PETROLEUM/COMMON CENTS FD	RAPID CITY	SD	57709
P	N	MR G'S LIQUOR	CALIFORNIA	MO	65018
P	N	MR GAS	MARYVILLE	TN	37802
P	N	MR HENRY'S FOOD MARTS	OPP	AL	36467
P	N	MR JIM'S	MANOR	TX	78653
P	N	MR MIKE'S MINI MARTS	LEOMINSTER	MA	02138
P	N	MR PETAL	CLEWISTON	FL	33440
P	N	MR RED COLEMAN	DALLAS	TX	75235
P	N	MR T'S - BOB POYNOR	CARDWELL	MO	63829
P	N	MR TOBACCO SMOKE SHOP	POTEAU	OK	74953
P	N	MR ZIP INC OF TENNESSEE	CLEVELAND	TN	37312
P	N	MR. UNLEADED	LAKEPARK	GA	31636
P	N	MT WERNER CONVENIENCE LLC	STEAMBOAT SPRINGS	CO	80488
P	N	MTP DBA MISSY'S MARKET	MILL CREEK	WV	26280
P	N	MUDZAID RESAD	DEFOREST	WI	53532
P	N	MUNCHIES FOOD SHOP	PT ALLEGANY	PA	16743
P	N	MUNRO PETROLEUM	BILOXI	MS	39530
P	N	MUNSTER SMOKE SHOP	MUNSTER	IN	46321
P	N	MUSSER'S INC	QUARRYVILLE	PA	17566
P	N	MVP INC	MC KEESPORT	PA	15135
P	N	MW SEWALL	BATH	ME	04530
P	N	MY-T-MART/ALICO INC	EDMOND	WA	98026
P	N	MYER'S MOBIL	SYRACUSE	NY	13206
P	N	MYERS DISCOUNT CENTER	HANNA CITY	IL	61536
P	N	MYRICK'S GROCERY	BUNNELL	FL	32110
P	N	MYRNA TROIANO	REMINGTON	VA	22734
P	N	N & N GROCERY/MIONES MKT	HARRISBURG	PA	17112
P	N	N ROAN CHEVRON	JOHNSON CITY	TN	37601
P	N	NABE ENTERPRISES INC	POLAND	OH	44514

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P	ID	Pay Name	Pay City	ST	Zip
P	N	NAD JAHAN	WACO	TX	76706
P	N	NADA GROC	NADA	TX	77460
P	N	NANCY ADAMS	TEMPE	AZ	85281
P	N	NANCY SEESE	CUYAHOGA FALLS	OH	44223
P	N	NATHAN KHAMO	AVONDALE	AZ	85323
P	N	NATIONAL OIL & GAS DISTRIBUTORS	VERO BEACH	FL	32966
P	N	NATIVE AMERICAN SMOKE SHOP	WESTVILLE	OK	74965
P	N	NATIVE AMERICAN/TULSA	BROKEN ARROW	OK	74012
P	N	NBS INC DBA SMOKER FRIENDLY	PARKERSBURG	WV	26101
P	N	NE TOBACCO	WOBURN	MA	01801
P	N	NEIGHBORHOOD CONVENIENCE INC	GLOUCESTER	VA	236010626
P	N	NEIGHBORHOOD CONVENIENCE INC	GLOUCESTER	VA	236010626
P	N	NELLA OIL	AUBURN	CA	95602
P	N	NEU-MART	INGRAM	TX	78025
P	N	NEW BALTIMORE SHELL	WARRENTON	VA	20187
P	N	NEW HOPE MOBIL	NEW HOPE	PA	18938
P	N	NEW MARKET BP	NEW MARKET	TN	37820
P	N	NEW MARKET GRO & VIDEO	NEW MARKET	TN	37820
P	N	NEW STANTON EXXON	NEW STANTON	PA	15672
P	N	NEW WATERFORD ENTERPRISES	E PALESTINE	OH	44413
P	N	NEW WATERFORD MGMT GROUP	NEW WATERFORD	OH	44445
P	N	NEWS LEASING AND DEVELOPMENT	BUTLER	GA	31006
P	N	NEWSOME OIL CO	ROANOKE RAPIDS	NC	27870
P	N	NEWTON FALLS IGA	NEWTON FALLS	OH	44444
P	N	NEWTONS	SHINGLEHOUSE	PA	16748
P	N	NEXT DOOR STORE	MT PLEASANT	MI	48858
P	N	NICE-N-EASY GROCERY SHOPPES INC	CANASTOTA	NY	13032
P	N	NICK FEERASTA	EAST PEORIA	IL	61611
P	N	NICK SARSOUR	MARSHALL	VA	22115
P	N	NICK'S SERVICE STATION	WASHINGTON	PA	15301
P	N	NICK'S TOBACCO SHOP	CLARENDON	AR	72029
P	N	NICKMAN'S DRUG INC	LEMONT FURNACE	PA	15456
P	N	NICKS DISCOUNT TOBACCO SHOP	LAFAYETTE	LA	70503
P	N	NICKS MARKET/NICK DAVENPORT	MORRISTOWN	TN	37813
P	N	NIEBRUGGE OIL CO	EFFINGHAM	IL	62401
P	N	NIMOCK'S OIL CO INC	FORREST CITY	AR	72335
P	N	NOCO EXPRESS	TONAWANDA	NY	14150
P	N	NOEL POWELL	ATOKA	OK	74525

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P	ID	Pay Name	Pay City	ST	Zip
P	N	NORM'S MINIT MARTS	NAPLES	NC	28760
P	N	NORTH FEDERAL HEIGHTS TEXACO	FEDERAL HEIGHTS	CO	80221
P	N	NORTH MAIN SMOKE SHOP	MC ALESTER	OK	74501
P	N	NORTHEAST OIL & GAS CO INC	MONROE	LA	71201
P	N	NORTHERN EXPRESS-LOCKARD CO	INDIANA	PA	15701
P	N	NORTHRUP OIL CO INC	CHILLICOTHE	IL	61523
P	N	NORTHSIDE SUPER STOP	MENA	AR	71953
P	N	NUCO DISCOUNT	HAMMOND	IN	46320
P	N	NUGGET OIL CO	CRESTVIEW	FL	32536
P	N	O-GAH-PAH	MIAMI	OK	74354
P	N	OAK HILL SHELL	FAYETTEVILLE	WV	25840
P	N	OCI INC ITA GRAFT OIL	CONNELLSVILLE	PA	15425
P	N	OCONNOR OIL	FOND DU LAC	WI	54935
P	N	ODESSA CORP	S BURLINGTON	VT	05407
P	N	OHIO FUEL STOP	SULLIVAN	OH	44880
P	N	OIC SMOKE SHOP	OKMULGEE	OK	74447
P	N	OIL SPRINGS CORNER	KILLBUCK	NY	14748
P	N	OKEE DOKEE MARKETS	GREENEVILLE	TN	37743
P	N	OKEMAH SMOKE SHOP	OKEMAH	OK	74859
P	N	OLD CLINTON GAS	GRAY	GA	31032
P	N	OLD SOUTH TOBACCO	STROUD	OK	74079
P	N	OLD TAVERN MERCHANTILE INC	THE PLAINS	VA	22171
P	N	OLSON OIL CO	SIOUX FALLS	SD	57106
P	N	OMAR ATWAY	JUPITER	FL	33458
P	N	OMARS EXXON	CATLETTSBURG	KY	41129
P	N	ONE STOP	JOHNSON CITY	TN	37601
P	N	ONE STOP #6	DUBLIN	TX	76446
P	N	ONE STOP ASHLAND	WARREN	OH	44483
P	N	ONE STOP CENTRAL	LEBANON	MO	65536
P	N	ONE STOP CITGO	CORSICANA	TX	75151
P	N	ONE STOP FOOD STORES INC	PLANO	TX	75074
P	N	ONE STOP GROC	THORNDALE	TX	76577
P	N	ONE STOP INC	AUSTIN	AR	72007
P	N	ONO TRUCK CENTER	ONO	PA	17077
P	N	OPEN PANTRY FOOD MARTS OF WI	RACINE	WI	53403
P	N	OPM INC DBA SPEED EZE	JOPLIN	MO	64801
P	N	ORLOSKI'S QUICK MARTS	WILKES-BARRE	PA	18703
P	N	OSAGE TRADING CO	PONCA CITY	OK	74604

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P	N	OSAMA ALSEPAI	PHOENIX	AZ	85004
P	N	OSAN PETROLEUM	MACON	GA	31203
P	N	OSCEOLA BIG M	OSCEOLA	PA	16942
P	N	OSI LTD LIABILITY CO DBA ONE STP	CHARLESTON	WV	25322
P	N	OTOE TRADING	RED ROCK	OK	74651
P	N	OTTO'S SAAD MOBIL	SHREVEPORT	LA	711052116
P	N	OU PON AHLUNG SMOKE SHOP #1	OCHELATA	OK	74051
P	N	OVERMAN'S TEXACO	BLYTHEVILLE	AR	72315
P	N	OWG TEXACO FOOD MART	ORLANDO	FL	32835
P	N	OXFORD CONVIENT MART	OXFORD	IN	479718601
P	N	OXMOOR STATION TEXACO	BIRMINGHAM	AL	35209
P	N	P & M ENTERPRISES	SYLVESTER	GA	31791
P	N	P & R UNLIMITED	BAKERSVILLE	NC	28705
P	N	P-N-J GROCERY	MC DADE	TX	78650
P	N	PAIR ENTERPRISES INC	WINNIE	TX	77665
P	N	PAK-N-GO	CORSICANA	TX	75110
P	N	PALISADE OIL CO	GARRETSON	SD	57030
P	N	PALKO'S MILL CREEK SERVICE	YOUNGSTOWN	OH	44511
P	N	PAM-RIK INC AMOCO FOOD SHOP	CAPON BRIDGE	WV	26711
P	N	PAM-RIK LC APPLE MNT CHEVRON	CAPON BRIDGE	WV	26711
P	N	PANTRY QUIK	HAZELTON	PA	18201
P	N	PAR MAR	MARIETTA	OH	45750
P	N	PARK MINI MART	NILES	OH	44446
P	N	PARMAN OIL	NASHVILLE	TN	37208
P	N	PAT'S PETRO FOOD STORE	CAIRO	GA	31728
P	N	PATRICIA T SMITH	CHARLOTTESVILLE	VA	22903
P	N	PAUL DHALIWAL	KINGSPORT	TN	37660
P	N	PAUL HUCKABEE	TEXARKANA	AR	71854
P	N	PAUL J COX-COX OIL COMPANY INC	BOLIVAR	MO	65613
P	N	PAUL'S SUNOCO	WRIGHTSVILLE	PA	17368
P	N	PAULS EXXON	PT PLEASANT	WV	25550
P	N	PAULS MARKETS	HOMEDALE	ID	83628
P	N	PAXSON OIL CO INC	SAGINAW	MI	48602
P	N	PAYLESS OIL COMPANY INC	TAMPA	FL	33614
P	N	PDQ FOOD STORES INC	MIDDLETON	WI	53562
P	N	PEARL & VERNON INC	ST CLOUD	FL	34772
P	N	PEEK & MORRIS INC	STATESBORO	GA	30458
P	N	PEL STATE OIL CO	SHREVEPORT	LA	71106

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P	ID	Pay Name	Pay City	ST	Zip
P	N	PEN-DAY ENT INC	CLEARBROOK	VA	22624
P	N	PEN-MART INC	DALLAS	PA	18612
P	N	PENZ-MART	SHREVEPORT	LA	71109
P	N	PEOPLES FOODSTORE INC	JOHNSON CITY	TN	37601
P	N	PEPCO	PASCAGOULA	MS	39567
P	N	PERRY MART FOOD CORP	CANTON	OH	44706
P	N	PERVEZ ALI	WACO	TX	76710
P	N	PESTER MARKETING INC	AURORA	CO	80014
P	N	PETER CAPALDI	MIDDLEFIELD	OH	44062
P	N	PETR-ALL PETROLEUM CORP/EXPRESS	DE WITT	NY	13214
P	N	PETRO CONCEPTS MOBIL	SOUDERTON	PA	18964
P	N	PETRO EXPRESS	CHARLOTTE	NC	28217
P	N	PETRO TRAVEL CENTER	PORTAGE	WI	53901
P	N	PETROL PANTRY #1	COLUMBUS	GA	31909
P	N	PETROL PANTRY #10	COLUMBUS	GA	31904
P	N	PETROLEUM SALES INC-BUD'S	DECATUR	AL	35601
P	N	PETROTEX FUELS INC	BEAUMONT	TX	77726
P	N	PHAR MOR	CLEVELAND	OH	441012199
P	N	PHIL'S GROCERY	MAGGIE VALLEY	NC	28751
P	N	PHILLIP RUSSEL	THOMASVILLE	GA	31792
P	N	PHILLIPS 66 CO	BARTLESVILLE	OK	74004
P	N	PIASA MOTOR FUELS	ALTON	IL	62002
P	N	PIC N SAV	NINETY SIX	SC	29666
P	N	PIC UP FOODS INC	THOMASVILLE	GA	31757
P	N	PIC-QUIK STORES INC	LAS CRUCES	NM	88001
P	N	PICTO INC	BLUE SPRINGS	MO	64015
P	N	PIEDMONT PANTRY INC	HUNTINGTON	WV	25704
P	N	PIEDMONT PETROLEUM CORP	GREENVILLE	SC	29602
P	N	PIFERS SERVICE CENTER	MINERAL WELLS	WV	26150
P	N	PIGGLY WIGGLY #273	SPRINGFIELD	LA	70462
P	N	PIGOT OIL CO	TYLERTOWN	MS	39667
P	N	PIK-NIK FOODS INC	SAN ANTONIO	TX	78237
P	N	PILKINGTON BIG TEX INC	BELTON	TX	76513
P	N	PILOT CORP	KNOXVILLE	TN	379390146
P	N	PIONEER MARKET	GREENEVILLE	TN	37743
P	N	PIPES INDIAN SMOKESHOP	CLAREMORE	OK	74017
P	N	PIPESTONE SMOKE SHOP	VINITA	OK	74301
P	N	PIT STOP	CARDWELL	MO	63829

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P	ID	Pay Name	Pay City	ST	Zip
P	N	PIT STOP INC	LAFAYETTE	GA	30728
P	N	PIT STOP QUIK SHOP	DERRY	PA	15627
P	N	PITTSBURGH DIST CO	PITTSBURGH	PA	15222
P	N	PJ'S TEXACO	EASTMAN	GA	31023
P	N	PLAID PANTRIES INC	BEAVERTON	OR	97005
P	N	PLATOLENE 500	CARMI	IL	62821
P	N	PLAZA C-MART INC/THOMAS ROBERTS	WEAVERVILLE	NC	28787
P	N	PLESANT GROVE SHELL	ZANESVILLE	OH	43701
P	N	PLEZ U STORES INC	ANDERSON	SC	29621
P	N	PLUMMERS GASOLINE & CONV STRS #3	SUNBERRY	OH	43074
P	N	PLYMOUTH MOBIL	CONSHEHOCKEN	PA	19428
P	N	POINT PLEASANT FOOD MART	PT PLEASANT	WV	25550
P	N	POLZIN ENTERPRISES	WAUKESHA	WI	53188
P	N	POP SHULTZ	HENNEKEN	NH	03242
P	N	PORTER'S GRO	GREENEVILLE	TN	37745
P	N	PORTS PETROLEUM CO INC DBA FUEL	WOOSTER	OH	44691
P	N	PORTVILLE SUGAR CREEK	PORTVILLE	NY	147700467
P	N	POST RD EXXON	BRANFORD	CT	06405
P	N	POTTS CARRY OUT	NEWELL	WV	26050
P	N	PRAFULLA ENT INC	SUN PRAIRIE	WI	53590
P	N	PRAGUE SMOKE SHOP (R-TEK)	PRAGUE	OK	74864
P	N	PRESTO FOOD MART	QUITMAN	GA	31643
P	N	PRESTO FOOD STORES INC	PLANT CITY	FL	33566
P	N	PRESTO OIL	GARDEN CITY	KS	67846
P	N	PRESTON MKT	PRESTON	CT	06365
P	N	PRESTON'S COLONIAL MARKETS INC	LAWRENCEVILLE	PA	16929
P	N	PRI-MAR PETROLEUM	ST JOSEPH	MI	49127
P	N	PRICHARD MART INC	PRICHARD	WV	25555
P	N	PRIMA MARKETING LLC	WEXFORD	PA	15090
P	N	PRIN DOR FOODS	BUNNELL	FL	32110
P	N	PRINCE OIL COMPANY INC	CHRISTIANSBURG	VA	24073
P	N	PUFF DISCOUNT CIGARETTES INC	LOCK HAVEN	PA	17745
P	N	PUFFS CIG & TOB INC	MANSFIELD	OH	44907
P	N	PURCELLVILLE AMOCO	PURCELLVILLE	VA	22132
P	N	PURVIS BROTHERS INC	MARS	PA	160460957
P	N	PUTNAM CO	WELLSBORO	PA	16901
P	N	Q & T FOODS INC	MONTROSE	CO	81401
P	N	Q-Q CIGARETTES INC	KANSAS CITY	KS	66102

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P	ID	Pay Name	Pay City	ST	Zip
P	N	QC STORES INC	DOUGLAS	GA	31533
P	N	QUALITY RETAIL SERVICES	HARLINGEN	TX	78550
P	N	QUALITY STATE OIL COMPANY INC	SHEBOYGAN	WI	53083
P	N	QUICK CHEK FOOD STORES	WHITEHOUSE STATION	NJ	08889
P	N	QUICK STOP	BELLVILLE	TX	77418
P	N	QUICK STOP	FAYETTE	AL	35555
P	N	QUICK STOP CONV	PORTSMOUTH	RI	02871
P	N	QUICK STOP FOOD MARTS	FAYETTEVILLE	NC	28302
P	N	QUICK STOP FOOD STORES INC	SARASOTA	FL	34232
P	N	QUICK STOP MARKETS	FLORENCE	AL	35630
P	N	QUICK STOP MARKETS	GREENEVILLE	TN	37743
P	N	QUICK TRIP CONVENIENCE STORE	CAIRO	GA	31728
P	N	QUICK WAY STORES	PANAMA CITY	FL	32405
P	N	QUICKWAY FOOD STORES	SIDNEY	NY	13838
P	N	QUIK CHEK	TROY	NC	27371
P	N	QUIK PAK #7 DBA KASKAS	WEST	TX	76691
P	N	QUIK PAK FOOD STORES INC	WACO	TX	76711
P	N	QUIK SAK	MT IDA	AR	71957
P	N	QUIK SAK INC	FT. WORTH	TX	76114
P	N	QUIK STOP MARKET	KANE	PA	16735
P	N	QUIK THRIFT FOOD STORES INC	MARIETTA	GA	30064
P	N	QUIK-WAY FOODS INC	DALLAS	TX	75243
P	N	QUIKIE MART	RENO	NV	89502
P	N	QUINNS	BRISTOLVILLE	OH	44402
P	N	QUINNS-JOHNSTON	CORTLAND	OH	44410
P	N	QWIK STOP #3	MILLEDGEVILLE	GA	31061
P	N	R & H MAXXON INC	AIKEN	SC	29802
P	N	R & N ENTERPRISES	BRISTOL	TN	37620
P	N	R & N MORITZ INC	WENTZVILLE	MO	63385
P	N	R & S INVESTMENT	MANSFIELD	LA	71052
P	N	R & Z	WOOSTER	OH	44691
P	N	R AND M FOODS	ORLANDO	FL	32808
P	N	R CHAPMAN ENTERPRISE	LANCASTER	OH	43130
P	N	R E V ENTERPRISES dba SANDY'S CO	FORT COLLINS	CO	80524
P	N	RACEWAY	TALLAHASSEE	FL	32304
P	N	RACEWAY E-Z STOP	ELIZABETHTON	TN	37643
P	N	RACEWAY FOOD MARTS	WEAVERVILLE	NC	28787
P	N	RADIANT FOOD STORES	TAMPA	FL	33675

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P	N	RAFIQ AHMED	BULLVILLE	NY	10915
P	N	RAGLAND BROTHERS RETAIL COS INC	HUNTSVILLE	AL	35804
P	N	RAINBOW MARKETERS INC	LAFAYETTE	LA	70505
P	N	RAINEY CAWTHON DISTRIBUTOR	TALLAHASSEE	FL	32302
P	N	RAINWATER GAS & OIL CO INC	FLORENCE	SC	29503
P	N	RALPHS STORE	SENECA	SC	29678
P	N	RAMCO INC DBA MINIT MART	HATTIESBURG	MS	39404
P	N	RAMSEUR OIL COMPANY	ANDERSON	SC	29622
P	N	RANDALL RAPP	MINERAL WELLS	WV	26150
P	N	RANGER CONVENIENCE	MURPHY	NC	28906
P	N	RANKS A-PLUS	QUAKERTOWN	PA	18950
P	N	RAPID GAS INC	GARDENA	CA	90248
P	N	RAPID ROBERTS	CRANE	MO	65633
P	N	RASUL MARKET	BERLIN CENTER	OH	44401
P	N	RAY DIPASLUAL/RON SCHRAM	BLOOMFIELD	PA	15224
P	N	RAY HARTMANN	NORTH HUNTINGTON	PA	15642
P	N	RAY HICE/TOBACCO OUTLETS	MORRISTOWN	TN	37814
P	N	RAYMOND OR EMMA JEAN O'HERN	SAPULPA	OK	74066
P	N	RAYS LEISURE TIME SHOP	SHADY SPRING	WV	25918
P	N	RD CADE INC	LEESBURG	AL	35983
P	N	RED CROWN MARKETING	WESTMONT	IL	60559
P	N	RED HOG SMOKESHOP	VAN BUREN	AR	72956
P	N	RED MAN SMOKE SHOP	WAGONER	OK	74467
P	N	RED POINT GROCERY	HAUGHTON	LA	71037
P	N	RED-EYE STOP INC	ROUND MOUNTAIN	TX	78663
P	N	REDIMART INC	HAMPTON	TN	37658
P	N	REDNER'S MARKETS INC	READING	PA	19605
P	N	REED'S SUNOCO	MILLERSBURG	PA	17061
P	N	REEDS	GENESSE	PA	16923
P	N	REEVES BOOMLAND INC	CHARLESTON	MO	63834
P	N	REICH'S SERVICE INC	WEST CHESTER	PA	19382
P	N	RENO SPARKS INDIAN COL SMOKESHOP	RENO	NV	89502
P	N	RENSSELAER CITGO	RENSSELAER	IN	47978
P	N	REOPCO	ROCKFORD	IL	61104
P	N	RESORT RETAILERS INC	PARK CITY	UT	84068
P	N	REVEL'S PIC N CHIK	MONTICELLO	FL	32344
P	N	REX W DODSON	CROSSETT	AR	71635
P	N	REXOCO STORE LTD	DENVER	CO	80221

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P	ID	Pay Name	Pay City	ST	Zip
P	N	RHH PROPERTIES LTD	FENTON	MI	48430
P	N	RHODES 101 STOPS	CAPE GIRARDEAU	MO	63701
P	N	RICH OIL CO	MOULTRIE	GA	31768
P	N	RICHARD HULLINGER	SPEARFISH	SD	57783
P	N	RICHARD KEIM	KNOXVILLE	TN	37920
P	N	RICHARD L HAZLETT	CHESWICK	PA	15024
P	N	RICHARD PAMLIANCHI	MCGEHEE	AR	71654
P	N	RICHARD SMITH	CAPON BRIDGE	WV	26711
P	N	RICHARD T BRISLIN INC DBA FIRST	ASHLAND	KY	41101
P	N	RICHCOR INC DBA GROOVIN NOOVINS	PENSACOLA	FL	32501
P	N	RICHCREEK'S AMOCO	PIERPONT	OH	44082
P	N	RICHLAND HILLS EXXON	LYNCHBURG	VA	24502
P	N	RICK & GINA MONSON	CARTHAGE	MO	64836
P	N	RICK GRIFFIN	CULLMAN	AL	35055
P	N	RICKEN BACKER BP	GROVEPORT	OH	43125
P	N	RICKY L DOSS	ELLENBORO	WV	26346
P	N	RICKY TIMBES	SAVANNAH	TN	38372
P	N	RIDER'S AMOCO	DE FOREST	WI	53532
P	N	RIDGE RD MARATHON	MEDINA	OH	44256
P	N	RIDGEPOINT CONVENIENCE STORES	HAYS	KS	67601
P	N	RIDGEPOINT CONVENIENCE STORES	HAYS	KS	67601
P	N	RIISER OIL INC	WAUSAU	WI	544020239
P	N	RISCH'S DIST	FORESTVILLE	PA	16035
P	N	RISSER PETROLEUM INC	LAKE CITY	FL	32055
P	N	RITA DORE'	CARENCRO	LA	70520
P	N	RIVER COUNTRY CO-OP	CADOTT	WI	54727
P	N	RIVER STOP CHEVRON	SPRINGFIELD	LA	70462
P	N	RIVER STOP INC	DODGE CITY	KS	67801
P	N	RIVERCITY ENERGY CO INC	LITTLE ROCK	AR	72212
P	N	RIVERSIDE DRIVE-IN GROCERY	LAGRANGE	TX	78945
P	N	RJS	FAIRFIELD	PA	17320
P	N	RJS	FAIRFIELD	PA	17320
P	N	ROACH OIL INC	MARTINSBURG	WV	25401
P	N	ROACHDALE MINI MART	ROACHDALE	IN	46172
P	N	ROAN VALLEY MKT	MOUNTAIN CITY	TN	37683
P	N	ROBERT DEMPSEY	ASHEVILLE	NC	28806
P	N	ROBERT FUNKHOUSER	BASYE	VA	22810
P	N	ROBERT G SMITH DBA COUNTRY EXPRS	MTN GROVE	MO	65711

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P	N	ROBERT M HOLDERBAUM	HERMINIE	PA	15637
P	N	ROBERT N STEWART	ALEXANDRIA	OH	43001
P	N	ROBERT RAFFERTY INC	BREESPORT	NY	14816
P	N	ROBERT STEWART ENT	GILBERT	AZ	85233
P	N	ROBINSON ENTERPRISE INC	ATHENS	TN	37303
P	N	ROBISONS 1 STOP	MOULTRIE	GA	31768
P	N	ROBYN'S SHOPPE/ASHBRIDGE OIL CO	JOHNSTOWN	PA	15904
P	N	ROCKY TOP MKTS LLC	HARRIMAN	TN	37748
P	N	ROGER D PARK DBA REESES COUNTRY	WAVERLY	WV	26184
P	N	RON & TAMMY BALDWIN	SANDUSKY	OH	44870
P	N	RONALD BELL	ELLABELL	GA	31308
P	N	RONALD BOMBACH SR	GREENSBURG	PA	15601
P	N	RONALD ROSS	PIEDMONT	MO	63957
P	N	RONNIE & MONA STANLEY	GREENSBORO	NC	27406
P	N	RONSICK'S OIL COMPANY	FLORISSANT	MO	63033
P	N	ROSES CARRY OUT	FOLLANSBEE	WV	26037
P	N	ROSEY INTERNATIONAL	NEWTON	TX	75966
P	N	ROSS MINIT MART	PIEDMONT	MO	63957
P	N	ROSSVILLE BEER DISTRIBUTOR	ROSSVILLE	PA	17358
P	N	ROTTEN ROBBIE	SAN JOSE	CA	95129
P	N	ROUND HILL SHOPPING CENTER INC	WINCHESTER	VA	22603
P	N	ROY C JENKINS INC - JENKINS MINI	BURKEVILLE	VA	23922
P	N	ROYAL CREST DAIRY DBA FARM CREST	DENVER	CO	80209
P	N	ROYAL FARMS	BALTIMORE	MD	21211
P	N	ROYS SERVICE CENTER INC	BERKELEY SPRINGS	WV	25411
P	N	RPF OIL CO	FLINT	MI	48503
P	N	RS HENARD JR	BRINKLEY	AR	72021
P	N	RSD INC DBA 7-ELEVEN	CHARLESTON	WV	25301
P	N	RT 663 SERVICE CENTER	QUAKERTOWN	PA	18951
P	N	RUFF CREEK GENERAL STORE INC	RUFF CREEK	PA	15329
P	N	RUFFIN'S TOBACCO CORNER	MANSFIELD	LA	71052
P	N	RUNWAY FOOD INC	THOMASVILLE	GA	31757
P	N	RUSSELL OIL COMPANY	GALATIA	IL	62935
P	N	RUSSELL OIL COMPANY INC PACECAR	LAPINE	AL	36046
P	N	RUSSELL PETROLEUM CO	MONTGOMERY	AL	36108
P	N	RUSTY'S	W HELENA	AR	72390
P	N	RUTH STAUFFER	BRISTOL	TN	37620
P	N	RUTTER'S FARM STORES	YORK	PA	17404

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P	ID	Pay Name	Pay City	ST	Zip
P	N	S & J MARKET INC	BARBOURSVILLE	WV	25504
P	N	S & S MARKET	MOUNTAIN CITY	TN	37683
P	N	S & S MARKET 2	MOUNTAIN CITY	TN	37683
P	N	S BECKER INC	CAMDENTON	MO	65020
P	N	S PHAM INC DBA BP OF GUYANDOTTE	HUNTINGTON	WV	25702
P	N	S TENN OIL CO INC DBA QUIK MART	LAWRENCEBURG	TN	38464
P	N	S-N-GO STORES INC	FARGO	ND	58103
P	N	SAAD FOOD MART INC	PAWTUCKET	RI	02861
P	N	SAFE ENTERPRIZES	MARS HILL	NC	28754
P	N	SAK'S FOOD MART	LA GRANGE	TX	78945
P	N	SALEM MARKETS INC ARCO	MESA	AZ	85201
P	N	SALIBA SUNOCO A PLUS	CONNELLSVILLE	PA	15425
P	N	SALLES HOME SUPERMARKET	BOGALUSA	LA	70427
P	N	SAM ANN	MESA	AZ	85203
P	N	SAM CARTER OIL-DBA ASAP	RIVERSIDE	MO	64116
P	N	SAM HODROGE	NITRO	WV	25143
P	N	SAM POSE INC	ATLANTA	GA	30329
P	N	SAM SHEEHAN	SMITHFIELD	PA	15478
P	N	SAM'S FOOD MARKET	ALEXANDRIA	AL	36250
P	N	SAM'S MART INC	CHARLOTTE	NC	28212
P	N	SAMI QUICK STOP	YTOWN	OH	44514
P	N	SAMI QUICK STOP	SALEM	OH	44460
P	N	SAMSKYS CITGO	MANASSAS	VA	20112
P	N	SANDERS CORNER STOP INC	CAMERON	TX	76520
P	N	SANDUSKY BP	SANDUSKY	OH	44870
P	N	SANDY/SHANNON DAY	MOREHEAD	KY	40351
P	N	SARAH INC T/A GETTY MART	HARRISBURG	PA	17112
P	N	SAV-M	ABILENE	TX	79605
P	N	SAVE MORE INC	SENECA	SC	29679
P	N	SAVE-TIME DBA QUIK STOP	JOPLIN	MO	64802
P	N	SCAFF'S INC DBA S & S FOOD STORE	LAKE CITY	FL	32055
P	N	SCHIERL SALES CORP	STEVENS POINT	WI	54481
P	N	SCHMUCKAL OIL CO	TRAVERSE CITY	MI	49686
P	N	SCHNUCKS MARKETS INC	ST LOUIS	MO	631466928
P	N	SCHONHARDT GROCERY	SANDUSKY	OH	44870
P	N	SCHRADER OIL CO	FT COLLINS	CO	80524
P	N	SCHULENBURG FOOD MART	SCHULENBURG	TX	78956
P	N	SCOOTY'S INC	PENNSBURG	PA	18071

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P	ID	Pay Name	Pay City	ST	Zip
P	N	SCOTLAND OIL COMPANY, INC	ALMA	MI	48801
P	N	SCOTTYS CONVENIENCE STORE INC	COVE	AR	71937
P	N	SCRIVENER OIL COMPANY INC	SPRINGFIELD	MO	65807
P	N	SEALOCK I/BATTLEFIELD TEXACO INC	MANASSAS	VA	20109
P	N	SELF SERVICE MARKET	PORTLAND	OR	97266
P	N	SEQUOYAH TOBACCO SALES	PARK HILL	OK	74451
P	N	SER ENTERPRISES	GIRARD	OH	44420
P	N	SERESTEW INC DBA MARATHON FOOD	NEW HAVEN	WV	25265
P	N	SERVCO	ALBEMARLE	NC	28001
P	N	SERVICE OIL CO/T/A SUN-UP CONV S	HARRISBURG	PA	17111
P	N	SEVERNS ENTERPRISES INC	NLR	AR	72118
P	N	SEVERSON OIL CO	WINONA	MN	55987
P	N	SEVILLE CITGO	SEVILLE	OH	44273
P	N	SHAMROCK TOB SHOP	JOHNSON CITY	TN	37604
P	N	SHANNON COLE	MAYNARDVILLE	TN	37807
P	N	SHARON GRAVER	N VERSAILLES	PA	15137
P	N	SHARON MC CULLOUGH	GRIFFIN	GA	30223
P	N	SHARON'S BP	WARREN	OH	44483
P	N	SHAWS GULF	STILLWATER	OK	74075
P	N	SHAY OIL CO INC	YUMA	AZ	853661249
P	N	SHEETZ, INC	ALTOONA	PA	16602
P	N	SHELBY BEER DOCK INC	SHELBY	OH	44875
P	N	SHELL FOOD MART	HUBBARD	OH	44425
P	N	SHELL MULTICORP	LA GRANGE	GA	30240
P	N	SHELL OIL CO	HOUSTON	TX	77252
P	N	SHELTON'S JIFFY MART	MOULTON	AL	35650
P	N	SHENANDOAH MARKETING INC	STEPHENS CITY	VA	22655
P	N	SHERMAN V ALLEN INC	RUTLAND	VT	05701
P	N	SHERWOODS SHELL	N KINGSTON	RI	02852
P	N	SHILLITO OIL INC	DILLSBURG	PA	17019
P	N	SHILOH MINIT MART	SHILOH	GA	31826
P	N	SHIPLEY STORES INC	YORK	PA	17405
P	N	SHIRLEY BREWSTER - TOBACCO BARN	GREENBACK	TN	37742
P	N	SHIRLEY'S EXXON	ANDERSON	SC	29625
P	N	SHIRLEY'S TWO	ANDERSON	SC	29623
P	N	SHIRLEYS EXXON	ANDERSON	SC	29623
P	N	SHIRLEYS MINI MART	ATHENS	AL	35611
P	N	SHOP & HOP	SAVANNAH	MO	64485

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P	ID	Pay Name	Pay City	ST	Zip
P	N	SHOP & HOP	SAVANNAH	MO	64504
P	N	SHOP & HOP	SAVANNAH	MO	64485
P	N	SHOP & HOP	SAVANNAH	MO	64485
P	N	SHOP & SAVE	FOREST HILLS	PA	15221
P	N	SHOP RITE INC	CROWLEY	LA	70526
P	N	SHOP-A-SNAK FOOD MART INC	BIRMINGHAM	AL	35209
P	N	SHOP-N-GO	W ELIZABETH	PA	15088
P	N	SHOP-N-GO INC (JIM LINSCOTT)	RENO	NV	89511
P	N	SHOP-N-SAVE	COTTON VALLEY	LA	71018
P	N	SHORE STOP'S	SALISBURY	MD	21801
P	N	SHORT STOP	BAY SPRINGS	MS	39422
P	N	SHORTY'S QUIK STOPS	EASTMAN	GA	31023
P	N	SHOUSE ENTERPRISES INC	PANAMA CITY BEACH	FL	32408
P	N	SHUI HALL	PHOENIX	AZ	85006
P	N	SIDS TOBACCO STORE	MEMPHIS	TN	38125
P	N	SIERRA MINIT MART	PORTERVILLE	CA	93257
P	N	SILVER STAR GROCERY	ELLENBORO	WV	26346
P	N	SIMPSONS EXXON	KENOVA	WV	25530
P	N	SIMPSONS MINI-MART	GETTYSBURG	PA	17325
P	N	SINCLAIR MARKETING COMPANY	SALT LAKE CITY	UT	84102
P	N	SINCLAIR'S GENERAL STORE	AIRVILLE	PA	17302
P	N	SINGER SUNOCO LLC	CALDWELL	OH	43724
P	N	SINGIN OIL INC	LAKEWOOD	NJ	08701
P	N	SISSONVILLE FOODLAND	SISSONVILLE	WV	25360
P	N	SITE OIL COMPANY	ST LOUIS	MO	63105
P	N	SJB FOODS	ALUM CREEK	WV	25003
P	N	SKOGLUND OIL INC	NEW RICHMOND	WI	54017
P	N	SKYLINE OIL CO	SCOTTSBORO	AL	35768
P	N	SKYWAY TRUCK STOP	MTN HOME	NC	28758
P	N	SLABTOWN VARIETY	PENDLETON	SC	29670
P	N	SLEEPY HOLLOW MKT	BRUNSWICK	OH	44212
P	N	SLOPPY JOE'S	BRYAN	TX	77802
P	N	SLUGAS	MT JEWETT	PA	16740
P	N	SMITH ROGERS OIL/TIGER MART	MULLINS	SC	29574
P	N	SMITH WACO MARKET	CANTON	OH	44707
P	N	SMITH'S GAS MART	HIGHSPIRE	PA	17034
P	N	SMITH'S HANDI MART	HARTS	WV	25524
P	N	SMITTY'S POP & HOP'S	WAYLAND	NY	14572

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P	ID	Pay Name	Pay City	ST	Zip
P	N	SMOKE CITY OF ALLIANCE INC	ALLIANCE	OH	44601
P	N	SMOKE CITY OF RAVENNA INC	RAVENNA	OH	44266
P	N	SMOKE PIT #1	KNOXVILLE	TN	37938
P	N	SMOKE SHOP 5	DYER	IN	46311
P	N	SMOKE SHOP INC	SPRINGFIELD	MO	65807
P	N	SMOKE STACK INC	KNOXVILLE	TN	37920
P	N	SMOKE-N-CHEW	COUSHATTA	LA	71019
P	N	SMOKEHOUSE	LEXINGTON	TN	38351
P	N	SMOKER'S BREAK	BATON ROUGE	LA	70815
P	N	SMOKERS OUTLET	YORK	PA	17403
P	N	SMOKERS OUTLET	ODESSA	TX	79762
P	N	SMOKERS OUTLET STORE INC	AKRON	OH	44312
P	N	SMOKERS PARADISE LTD	URICHSVILLE	OH	44683
P	N	SMOKERS TOBACCO OUTLET	KNOXVILLE	TN	37917
P	N	SMOKESAVERS SMOKE SHOP	MUSKOGEE	OK	74403
P	N	SMOKEY'S #2	COLUMBIA	MS	39429
P	N	SMOKEY'S #3	CAMBRIDGE	OH	43725
P	N	SMOKEY'S #4	PASCAGOULA	MS	39567
P	N	SMOKEY'S #5	OCEAN SPRINGS	MS	39564
P	N	SMOKEY'S DISCOUNT TOBACCO	COVINGTON	LA	70434
P	N	SMOKEY'S TOBACCO #7	VANCLEAVE	MS	39565
P	N	SMOKEYS CIGARETTE OUTLET	STEUBENVILLE	OH	43952
P	N	SMOKIN	FRANKFORT	IN	46041
P	N	SMOKIN' JOE'S TOBACCO	WAYMART	PA	18472
P	N	SNAK MART	WILMINGTON	NC	28405
P	N	SNAPPY MART	GASSVILLE	AR	72635
P	N	SNUFFY'S DISCOUNT TOBACCO	DIBERVILLE	MS	39532
P	N	SNYDER'S MARKET	LITTLESTOWN	PA	17340
P	N	SO AR OIL CO EXPRESSWAY STORES	ELDORADO	AR	71730
P	N	SON BILLY INC	BROKEN ARROW	OK	74112
P	N	SONNY OLIVER	LUMBERTON	NC	28358
P	N	SONNY'S SOUTHGATE SHELL	CAMBRIDGE	OH	43725
P	N	SOUDERS CITGO	MIDDLETOWN	PA	17057
P	N	SOUTH END GROCERY-F STONEBURNER	MT JACKSON	VA	22842
P	N	SOUTH MINNESOTA OIL	ALBERT LEA	MN	56007
P	N	SOUTHEASTERN OIL CO INC	DOTHAN	AL	36301
P	N	SOUTHERN EXPRESS	RICHMOND	VA	23228
P	N	SOUTHERN SMOKERS CLUB #1	GAUTIER	MS	39553

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P	ID	Pay Name	Pay City	ST	Zip
P	N	SOUTHERN SMOKERS CLUB #2	PASCAGOULA	MS	39567
P	N	SOUTHLAND CORPORATION	DALLAS	TX	75204
P	N	SOUTHMARTS	CULLMAN	AL	35055
P	N	SOUTHTOWN INC	ZANESVILLE	OH	43701
P	N	SOUTHWEST CONVENIENCE STORES LLP	ODESSA	TX	79761
P	N	SOUTHWEST PLAZA INVEST DBA OASIS	LIBERAL	KS	67901
P	N	SPANKY'S SUPERSTOP	HATFIELD	AR	71945
P	N	SPARKY'S FOOD STORES	PLANT CITY	FL	33566
P	N	SPARTAN OIL CO INC	HENDERSONVILLE	NC	28792
P	N	SPEAR OIL/SPE-DEE-C	MONTGOMERY	AL	36117
P	N	SPECTRUM STORES INC	WEST POINT	GA	31833
P	N	SPEE-D-FOODS INC	CANTON	OH	44703
P	N	SPEEDY STOP FOOD STORE LTD	VICTORIA	TX	77902
P	N	SPELLS GROCERY	ABITA SPRINGS	LA	70420
P	N	SPICER PLUS INC	PRESTON	CT	06365
P	N	SPICKO'S GIANT EAGLE	WARREN	OH	44485
P	N	SPORTSMAN SUPERSTOP (DUKE'S)	WACO	TX	76705
P	N	SPOSIT'S CITGO	BRUNSWICK	OH	44212
P	N	SPRINGER EUBANK OIL CO	WILMINGTON	NC	28402
P	N	SRL STORES INC	BANGOR	ME	04401
P	N	SSG CORPORATION	HUDSON	WI	54016
P	N	SSP/CIRCLE K	CORPUS CHRISTI	TX	78408
P	N	SSS DEVELOPMENT	PITTSFIELD	IL	62363
P	N	STAGGERS OIL CO	MARSHALL	TX	75671
P	N	STANGELAND DISCOUNT CIGARETTES	NEVADA	MO	64772
P	N	STANLEY H KOENIG DBA S & H DRIVE	GROESBECK	TX	76642
P	N	STAR DISCOUNT	ORLANDO	FL	32804
P	N	STAR ENTERPRISE	NORCROSS	GA	30092
P	N	STAR STOP	HOT SPRING	AR	71901
P	N	STARFIRE EXPRESS CLARINGTON	CLARINGTON	OH	43915
P	N	STATE LINE 1 STOP	GENESEE	PA	16923
P	N	STAWEART'S SUNOCO - WM STAWEART	JOHNSTOWN	OH	43031
P	N	STEFANICK BROTHERS	HAZLETON	PA	18201
P	N	STEINHAGEN OIL CO INC	BEAUMONT	TX	77720
P	N	STEPHANEE ENTERPRISES	BROKEN ARROW	OK	74012
P	N	STERLING BAIRD	HELENWOOD	TN	37755
P	N	STEVE & ANNE DOLLERY	CALDWELL	TX	77836
P	N	STEVE MC CLUSKEY	OXFORD	MS	38655

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P	ID	Pay Name	Pay City	ST	Zip
P	N	STEVE NEHAL	CORSICANA	TX	75110
P	N	STEVE'S AMOCO	GRANVILLE	IL	61326
P	N	STEVES ASHLAND INC	MIDDLEBOURNE	WV	26149
P	N	STILTNERS B P #2	HUNTINGTON	WV	25702
P	N	STILWELL SMOKE SHOP	STILWELL	OK	74960
P	N	STN ENTERPRISES INC	KILLEEN	TX	76541
P	N	STN ENTERPRISES INC	KILLEEN	TX	76541
P	N	STOGIES TOBACCO & BEVERAGE INC	HUNTINGTON	WV	25701
P	N	STOKES MART	FRONT ROYAL	VA	22630
P	N	STOP 'N SERV	HOUSTON	TX	77205
P	N	STOP IN FOOD STORES INC	ROANOKE	VA	24022
P	N	STOP N BYE	BRENHAM	TX	77833
P	N	STOP N SAVE	EAST RIDGE	TN	37412
P	N	STOP N SHOP PENNZOIL	CHARLESTON	WV	25313
P	N	STOP-N-GO	MADISON	WI	53713
P	N	STOP-N-GO OF WESTERN PA INC	ROCHESTER	PA	15074
P	N	STORE & MORE INC	PICKENS	SC	29671
P	N	STORE & MORE INC	PICKENS	SC	29671
P	N	STORE 24	WALTHAM	MA	02254
P	N	STORES INC	MCALLEN	TX	78504
P	N	STOVER'S NEWS AGENCY	COLUMBIA	PA	17512
P	N	STRATTAN COOP	STRATTAN	CO	80836
P	N	STRIPLING'S GENERAL STORE, INC	CORDELE	GA	31015
P	N	STUFF-N-GO	TAHLEQUAH	OK	74464
P	N	SUE WISENER	NORMAN	AR	71960
P	N	SUE YARBROUGH	PINE BLUFF	AR	71603
P	N	SUGAR CREEK STORES INC	ROCHESTER	NY	14619
P	N	SULLY EXXON	STERLING	VA	20164
P	N	SUN COMPANY INCORPORATED	PHILADELPHIA	PA	19103
P	N	SUN SHOP	BRIDGEPORT	OH	43912
P	N	SUNCOAST OIL CO	ST PETERSBURG	FL	33713
P	N	SUNIL	BLOOMINGDALE	GA	31302
P	N	SUNOCO A-PLUS	HATBORO	PA	19040
P	N	SUNRISE CONVENIENCE STORES INC	RICHMOND	MI	48062
P	N	SUNRISE FOOD STORES	SYRACUSE	NY	13220
P	N	SUNRISE GROCERY & DELI	PEACH BOTTOM	PA	17563
P	N	SUNRISE TRAVEL CENTER	HARRISBURG	PA	17112
P	N	SUNSHINE FOOD STORE	BASTROP	TX	78602

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P	ID	Pay Name	Pay City	ST	Zip
P	N	SUNSHINE MARKET	LITTLETON	NH	03561
P	N	SUPER MART INC	TAHLEQUAH	OK	74464
P	N	SUPER ONE FOODS	DULUTH	MN	55811
P	N	SUPER SAVER #2	MILAN	TN	38358
P	N	SUPER STOP ENTERPRIZE	GONZALES	LA	70738
P	N	SUPER STOP!	MERIDIAN	MS	39302
P	N	SUPER-FLITE OIL CO INC	SAGINAW	MI	48604
P	N	SUPER-TEST SERVICE STATIONS/IND	LAFAYETTE	IN	47903
P	N	SUPERMART	FRUITA	CO	81521
P	N	SUPERPUMPER INC	MINOT	ND	58703
P	N	SURFSIDE STORE INC	ANDERSON	SC	29625
P	N	SUSIE QS	THOMASVILLE	GA	31757
P	N	SUTEY OIL COMPANY INC	BUTTE	MT	59701
P	N	SUTTON AND WOLF	ETTERS	PA	17319
P	N	SUTTON AND WOLF	ETTERS	PA	17319
P	N	SWEETSPRINGS SHELL	PURCELLVILLE	VA	22132
P	N	SWIFTY MART	TALLAHASSEE	FL	32303
P	N	T & E OIL COMPANY	HUTCHINSON	KS	675041303
P	N	T & S TOBACCO OUTLET	ETOWAH	TN	37331
P	N	T & V PLUS 2 INC.	JOHNSON CITY	TN	37601
P	N	T-MART FOOD STORES INC	DUNN	NC	28335
P	N	T-REX CORP	FARMINGTON	MO	63640
P	N	TAMMY NOBLE	BUCKEYE	AZ	85326
P	N	TARGET	BELLMEAD	TX	76705
P	N	TARLTON MARKET	TARLTON	OH	43156
P	N	TAYLOR OIL COMPANY	WINSTON-SALEM	NC	27113
P	N	TAYLOR'S CONVENIENCE STORE	FITZGERALD	GA	317501135
P	N	TBB STORES INC	CUBA	NY	14727
P	N	TBM INC CBA SMOKEY'S	BOGOLUSA	LA	70427
P	N	TBM INC/DBA SMOKEYS	BOGALUSA	LA	70427
P	N	TE JO'S DRIVE IN	HEARNE	TX	77859
P	N	TEAGUE'S SUPERETTE	MAGGIE VALLEY	NC	28751
P	N	TEAL'S TRAVEL MART	TEMPLE	TX	76504
P	N	TEAM'S	PIEDMONT	SC	29673
P	N	TED'S MARATHON	COLUMBUS	OH	43228
P	N	TEDESCHI FOOD SHOPS INC	ROCKLAND	MA	02370
P	N	TEE PEE SMOKE SHOPS	YALE	OK	74085
P	N	TEMMEN MINI MART	JEFFERSON CITY	MO	65101

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P	ID	Pay Name	Pay City	ST	Zip
P	N	TEREK SERVICE INC	VALENCIA	PA	16059
P	N	TERI FOODS INC	REDFIELD	AR	72132
P	N	TERRY WEST	PARSONS	TN	38363
P	N	TERRY'S FOOD STORE INC	VALLEY MILLS	TX	76689
P	N	TESORO NORTHSTORE CO	ANCHORAGE	AK	995196970
P	N	TETCO STORES INC	SAN ANTONIO	TX	78216
P	N	TEX-MART	MC ALLEN	TX	78502
P	N	TEXACO FOOD MART	TAHLEQUAH	OK	74464
P	N	TEXACO REFINING & MARKETING	PHOENIX	AZ	85018
P	N	TEXAN #2	STEPHENVILLE	TX	76401
P	N	TEXAN MARKETS INC	ROUND ROCK	TX	78664
P	N	TEXAN'S QUIK STOP	STEPHENVILLE	TX	76401
P	N	TEXAS CONVENIENCE STORES INC	BELTON	TX	76513
P	N	TEXAS STAR INVESTMENTS	CORPUS CHRISTI	TX	78403
P	N	TEXAS TOBACCO	CLEBURNE	TX	76031
P	N	TH & A MARKET	BULLS GAP	TN	37711
P	N	THALER OIL CO	CHIPPEWA FALLS	WI	54729
P	N	THE CIGARETTE STORE CORP	BOULDER	CO	80303
P	N	THE CORNER STORE	MASSILLON	OH	44646
P	N	THE COUNTRY STORE	BROWNWOOD	TX	76804
P	N	THE CRACKERBOX STORES	MONTICELLO	AR	71657
P	N	THE GENERAL STORE	BUCKHANNON	WV	26201
P	N	THE HARTLEY COMPANY	CAMBRIDGE	OH	43725
P	N	THE HOLLAR CO	GADSDEN	AL	35902
P	N	THE HUB	SMETHPORT	PA	16749
P	N	THE HUB INC	PARKERSBURG	WV	26101
P	N	THE LAMP POST	WHITNEY	TX	76692
P	N	THE LITTLE STORES INC	CLOQUET	MN	55720
P	N	THE LYDEN COMPANY	TOLEDO	OH	436351090
P	N	THE OLD STORE	MOUNTAIN REST	SC	29664
P	N	THE PANTRY STORE INC	CLARKSBURG	WV	26301
P	N	THE PIT STOP MINI MART	OBERLIN	OH	44074
P	N	THE RIGHT STUFF FOOD STORES INC	ATLANTA	GA	30328
P	N	THE SINGLETON STORE INC	SINGLETON	TX	77831
P	N	THE SMOKEHOUSE	WEATHERFORD	TX	76076
P	N	THE SMOKER'S DEN	AKRON	OH	44310
P	N	THE SPENCER CO INC	DOLOMITE	AL	35061
P	N	THE SPINX COMPANY	GREENVILLE	SC	29601

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P	ID	Pay Name	Pay City	ST	Zip
P	N	THE TOBACCO CO/ITC OF VA INC	ROANOKE	VA	24012
P	N	THE TOBACCO PLACE	COLUMBUS	GA	31907
P	N	THE TOBACCO SHOP #1	SPRINGHILL	LA	71075
P	N	THE TOBACCO SHOP INC	SEYMOUR	TN	37865
P	N	THE TOWPATH DRIVE THRU	MINERVA	OH	44657
P	N	THEMAR INC	BATTLE CREEK	MI	49017
P	N	THOELE OIL CO	ST CHARLES	MO	63302
P	N	THOMAS A SMITH DBA SMITTIE'S CIT	IBERIA	OH	43325
P	N	THOMAS BLASINGIM SR	CHARLESTON	WV	25312
P	N	THOMAS II	AKRON	OH	44305
P	N	THOMKAR INC	KILLEEN	TX	76541
P	N	THOMPSONS ROADSIDE MARKET	STRAW PLAINS	TN	37871
P	N	THORNTON OIL CORPORATION	LOUISVILLE	KY	40223
P	N	THREE FLAGS SMOKE SHOP	SAPULPA	OK	74066
P	N	THRIFTY LIQUOR	BOSSIER CITY	LA	71112
P	N	THRIFTY SMOKE SHOPS INC	RAPID CITY	SD	57702
P	N	THROCKMORTON SUPERMARKETS INC	WAYNESBURG	PA	15370
P	N	THUNDER SMOKE SHOP	HOMINY	OK	74035
P	N	THURLAND REAY FAMILY INVESTMENT	TUCSON	AZ	85715
P	N	THURMAN OIL - QUICK STOP	BOGALUSA	LA	704270608
P	N	TICKET'S SMOKE SHOP	OAKS	OK	74359
P	N	TIGER FUEL CO	CHARLOTTESVILLE	VA	22902
P	N	TIGER TOTE FOOD STORES INC	GONZALES	TX	78629
P	N	TIGER'S DEN INC	SCHUYLKILL HAVEN	PA	17972
P	N	TIM GARDNER	HAUTI	MO	63851
P	N	TIM MOSS	KALAMAZOO	MI	49009
P	N	TIM SNEDEGAR	FLEMINGSBURG	KY	41041
P	N	TIP TOP CONV STORES dba BIG K ST	HATTIESBURG	MS	39402
P	N	TOBACCO & BEER DISCOUNT HOUSE IN	BILOXI	MS	39531
P	N	TOBACCO & GAS DISCOUNT	COVINGTON	TN	38019
P	N	TOBACCO BARN	NEWPORT	TN	37821
P	N	TOBACCO BARN/DONALD TABOR	INDPLS	IN	46224
P	N	TOBACCO BOX	LOUDON	TN	37774
P	N	TOBACCO CENTER	TRENTON	TN	38382
P	N	TOBACCO CENTRAL	SOUTH BEND	IN	466289772
P	N	TOBACCO CHEAPER	SPRINGFIELD	IL	62703
P	N	TOBACCO CHEAPER	SPRINGFIELD	IL	62703
P	N	TOBACCO DISCOUNT HOUSE #1	SHREVEPORT	LA	71105

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P	ID	Pay Name	Pay City	ST	Zip
P	N	TOBACCO EXPRESS	MEMPHIS	TN	38134
P	N	TOBACCO HILL	LAMAR	MO	64759
P	N	TOBACCO HUT	PINE BLUFF	AR	71603
P	N	TOBACCO HUT PLUS	GILBERT	WV	25621
P	N	TOBACCO JUNCTION	MILLINGTON	TN	38053
P	N	TOBACCO JUNCTION	MADISON	AL	35758
P	N	TOBACCO JUNCTION VII	TEMPLE	TX	76504
P	N	TOBACCO KING	LENOIR CITY	TN	37771
P	N	TOBACCO KING	MEMPHIS	TN	38134
P	N	TOBACCO KING LLC HEADQUARTERS	BUCKHANNON	WV	26201
P	N	TOBACCO KING/MASON STORE	MASON	WV	25260
P	N	TOBACCO LEAF	CAMPBELL	OH	44405
P	N	TOBACCO MART	CHATTANOOGA	TN	37411
P	N	TOBACCO OUTLET	VAN BUREN	AR	72956
P	N	TOBACCO OUTLET	LOUISVILLE	MS	39339
P	N	TOBACCO OUTLET	ATTALLA	AL	35954
P	N	TOBACCO PLACE II	JACKSON	TN	38301
P	N	TOBACCO PLUS	CROWLEY	LA	70526
P	N	TOBACCO ROAD II	DELAWARE	OH	43015
P	N	TOBACCO ROAD INC	MAN	WV	25635
P	N	TOBACCO ROAD INC	HIGHLAND	IN	46322
P	N	TOBACCO ROAD INC - MIKE CARLIN	HOT SPRING	AR	71901
P	N	TOBACCO ROW INC	INDEPENDENCE	KS	67301
P	N	TOBACCO SHACK	ALAMO	TN	38001
P	N	TOBACCO SHACK	SOUTHAVEN	MS	38671
P	N	TOBACCO SHACK	HORN LAKE	MS	38637
P	N	TOBACCO SHED	COLUMBUS	MS	39701
P	N	TOBACCO SUPERSTORE	MEMPHIS	TN	38115
P	N	TOBACCO SUPERSTORE	FORREST CITY	AR	72335
P	N	TOBACCO SUPERSTORE 19	HOT SPRINGS	AR	71913
P	N	TOBACCO WAREHOUSE LTD	MARION	OH	43302
P	N	TOBACCO WORLD	UNIONTOWN	PA	15401
P	N	TOBY'S PIT STOP	CLIFTON	TX	76634
P	N	TODD SHERMAN INC	HENDERSONVILLE	NC	28739
P	N	TOKEN INC	WINFIELD	AL	35594
P	N	TOM FARRELL	BAKERSFIELD	LA	93309
P	N	TOM HUTCHINSON	CONSHEHOCKE	PA	19428
P	N	TOM SOUTHSIDE	ELDRED	PA	16731

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P	ID	Pay Name	Pay City	ST	Zip
P	N	TOM'S DISCOUNT TOBACCO	ASHLAND	KY	41102
P	N	TOM-LIN ENTERPRISES INC	REYNOLDSBURG	OH	43068
P	N	TOMCO INC/SHELL FOOD MARTS	HUNTSVILLE	AL	35804
P	N	TOMMY JOINER	MOULTON	AL	35650
P	N	TOMS SIERRA CO INC	COLFAX	CA	95713
P	N	TONY DENUNZIO	IRWIN	PA	15642
P	N	TOOLEY OIL CO	SACRAMENTO	CA	95825
P	N	TOOT 'N TOTUM INC	AMARILLO	TX	79101
P	N	TOOTSIE'S BUY N' BYE	BRENHAM	TX	77833
P	N	TOP HILL FOOD MART	ASTABULA	OH	44404
P	N	TOTAL Q-MIDWEST	SPRING PARK	MN	55384
P	N	TOWN & COUNTRY FOOD STORES INC	SAN ANGELO	TX	76904
P	N	TOWN - N - COUNTRY	CRAWFORDVILLE	FL	32327
P	N	TOWN MARKET	BRENHAM	TX	77833
P	N	TOWN PUMP INC	BUTTE	MT	59701
P	N	TRADE OIL CO	GREENVILLE	NC	27834
P	N	TRADER BILLS OUTDOOR SPORTS INC	HOT SPRINGS	AR	71913
P	N	TRADING POST - GROCERY	FORT HALL	ID	83203
P	N	TRAXX COMPANY	LEXINGTON	KY	40507
P	N	TRENCO	PHOENIX	AZ	85034
P	N	TRI CITY OIL CO	KENNEWICK	WA	99336
P	N	TRI STAR MARKETING INC	URBANA	IL	618030279
P	N	TRI-CARNES SERVICE INC	BELLE VALLEY	OH	43717
P	N	TRI-CON INC	BEAUMONT	TX	77720
P	N	TRI-COUNTY PETROLEUM INC	TROY	MI	48083
P	N	TRI-LAKES PETROLEUM CO	BRANSON	MO	656157500
P	N	TRI-VALLEY DIST	HEBER	UT	84032
P	N	TRIPLE R FAS CHEK	YAWKEY	WV	25573
P	N	TRIPLE S OIL	BURLEY	ID	83318
P	N	TRIPLE S PETROLEUM	AUSTIN	TX	78702
P	N	TRIPLE T INC	CLINTWOOD	VA	24228
P	N	TRIPO INC	ALBANY	GA	31707
P	N	TRITON MARKETING INC	ATLANTA	GA	30350
P	N	TRUCK WORLD INC	BOARDMAN	OH	44514
P	N	TRUMAN'S DRUG	CAIRO	GA	31728
P	N	TUCKERS FOODS INC	THOMASTON	GA	30286
P	N	TULSA CREEK INDIAN COMMUNITY #2	TULSA	OK	74170
P	N	TURKEY HILL MINIT MKTS	LANCASTER	PA	17603

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P	N	TURNER OIL CO	MARVELL	AR	72366
P	N	TWIN CITIES STORES INC	EAGAN	MN	55122
P	N	TWIN CITIES TEXACO	PIERCE	SD	57501
P	N	TWIN OAKS 1-STOP	LEBANON	MO	65536
P	N	TWO JOHNS SHORT SHOP INC	BECKLEY	WV	25801
P	N	TY-MAG DBA DANIELS BLUE FLASH	DANIELS	WV	25832
P	N	UNCLE NEAL'S COUNTRY CONV STORE	HASTINGS	NE	68901
P	N	UNCLE SAM'S CONVENIENT STORES	ELSA	TX	78543
P	N	UNDERWOOD CONVENIENCE STORES INC	ROGERSVILLE	MO	65742
P	N	UNI-MART	BRISTOL	PA	19007
P	N	UNI-MARTS INC	STATE COLLEGE	PA	168015690
P	N	UNICORN MARKET & GRILL	WHITESBURG	TN	37891
P	N	UNIONVILLE SERV CTR	HATFIELD	PA	19440
P	N	UNITED DAIRY FARMERS	CINCINNATI	OH	45212
P	N	UNITED OIL	PINEY FLATS	TN	37686
P	N	UNITED REFINING COMPANY OF PENNS	WARREN	PA	16365
P	N	UNITED STOP-N-SHOP INC	MONTGOMERY	AL	36108
P	N	UNIVERSITY FOOD MKT	AKRON	OH	44304
P	N	US CONVENIENT	ASHTABULA	OH	44040
P	N	USA GASOLINE CORP	AGOURA HILLS	CA	91301
P	N	USELTON OIL CO INC	PEKIN	IL	61554
P	N	USHA PATEL - RADHESHYAM INC	LAKEWOOD	OH	44107
P	N	USHA PATEL-RADHESHYAM INC	LAKEWOOD	OH	44107
P	N	V-MART INC	COMFORT	WV	25049
P	N	VAL SMITH PETROLEUM CO INC	BLANCO	TX	78606
P	N	VALCO INC BDA SMOKERS OUTLET STO	MASSILLON	OH	44646
P	N	VALLEY CITY MKT	VALLEY CITY	OH	44280
P	N	VALLEY MARKET	HAMMONDSVILLE	OH	43930
P	N	VALLEY MINI MART	HUNTINGTON	WV	25701
P	N	VALLEY OIL CORP	STAUNTON	VA	24402
P	N	VALLEY PETROLEUM PRODUCTS INC	SMETHPORT	PA	16749
P	N	VALLEY SHAMROCK INC	MC ALLEN	TX	78505
P	N	VALLEY VIEW	WARREN	OH	44483
P	N	VARIETY VILLAGE	SANDUSKY	OH	44870
P	N	VASSILIKI VELLIOS	MASSILLON	OH	44647
P	N	VERNON D SWARTWOOD	TIPTONVILLE	TN	38079
P	N	VERONA OIL CO/COUNTRY STORES	ROSCOE	NY	12776
P	N	VICTORIA SPENCER	MC KEESPORT	PA	15134

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P	N	VICTORY LANE FOOD STORE	MOULTRIE	GA	31776
P	N	VIDEO HUT TOBACCO SHOP	STAR CITY	AR	71667
P	N	VILLAGE GROCERY	PINE BLUFF	AR	71603
P	N	VILLAGE VENDOR I	VANCOUVER	WA	98684
P	N	VINCENT OIL INC	LAKE CHARLES	LA	70605
P	N	VINCENT OIL INC	LAKE CHARLES	LA	70605
P	N	VIRGINIA L HULL	YOUNGSTOWN	OH	44511
P	N	VISTA VIEW MARKET	NASHPORT	OH	43830
P	N	VITNER'S SHELL	FT MYERS	FL	33912
P	N	VJ MURRAY	OLIVER SPRINGS	TN	37840
P	N	VOLUNTEER CHEVRON FOOD MART	BRISTOL	TN	37620
P	N	W GREENWICH TEXACO	WEST GREENWICH	RI	02817
P	N	WACO OIL CO	COVINGTON	KY	41011
P	N	WADES DELI MART	CHRISTIANSBURG	VA	24073
P	N	WADES SUPERMARKETS	CHRISTIANSBURG	VA	24073
P	N	WADSWORTH BEVERAGE CENTER	WADSWORTH	OH	44281
P	N	WAG-A-BAG INC	ROUND ROCK	TX	78664
P	N	WAH SHO SHAH	PAWHUSKA	OK	74056
P	N	WAHOCO ENT INC	MIDDLETOWN	VA	22645
P	N	WAL MART STORES INC	BENTONVILLE	AR	72716
P	N	WALKER BRO COUNTRY CORNER	HAUGHTON	LA	71037
P	N	WALKER OIL CO/DBA SQUIRES PANTRY	NOTTINGHAM	PA	19362
P	N	WALLACE OIL COMPANY INC	LA JUNTA	CO	81050
P	N	WALNUT CREEK MARATHON FOOD MART	WALNUT CREEK	OH	44687
P	N	WALTER HOLLOWAY	PUXICO	MO	63960
P	N	WALTER S TRKULA	WARREN	OH	44484
P	N	WALTHAL COMPANY	MACON	GA	31202
P	N	WARD'S TOTAL STOP	DIERKS	AR	71833
P	N	WARDEN RIDGE AUTOMOTIVE	BAKER	WV	26801
P	N	WARDENS SMOKE STOP	DERIDDER	LA	70634
P	N	WARE OIL & SUPPLY CO INC	PERRY	FL	32347
P	N	WARECO	JACKSONVILLE	IL	62650
P	N	WARING OIL COMPANY	VICKSBURG	MS	39180
P	N	WARRENS BP	ROGERSVILLE	AL	35652
P	N	WARRENTON OIL CO	TRUESDALE	MO	63383
P	N	WARRENTON TEXACO	WARRENTON	VA	20186
P	N	WARRENTON TEXACO	WARRENTON	VA	20186
P	N	WASHOE TRIBE OF NEVADA	GARDNERVILLE	NV	89710

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P	N	WAVERLY DISCOUNT TOBACCO	WAVERLY	TN	37185
P	N	WAWA INC	WAWA	PA	19063
P	N	WAYNE P BUNCH JR	TOMBALL	TX	77375
P	N	WAYNES EXPRESS	PT ALLEN	LA	70767
P	N	WAYSIDE FARM #2	TALLAHASSEE	FL	32304
P	N	WAYSIDE FARM #2	TALLAHASSEE	FL	32304
P	N	WAYSIDE MARKET	SEVILLE	OH	44273
P	N	WD MILLER INC	LIBERTY	TX	77575
P	N	WE WILLIS	TRAVELERS REST	SC	29617
P	N	WEBB OIL CO	RUSSELLVILLE	AL	35653
P	N	WEEKS BAIT & TACKLE	GEORGETOWN	GA	31754
P	N	WEHMAN INC	PLEASANTON	TX	78064
P	N	WEIGELS	POWELL	TN	37849
P	N	WELCOME SMOKERS	MARYLAND HEIGHTS	MO	63043
P	N	WELCOME SMOKERS	WICHITA	KS	67218
P	N	WELDIE MURRAY	OLIVER SPRINGS	TN	37840
P	N	WELLBORN GROC	WELLBORN	TX	77881
P	N	WELLS TEXACO FOOD MART	PIERRE	SD	57501
P	N	WELSH INC	MERRILLVILLE	IN	46411
P	N	WENDY ROSE CATHERINES CORNER STO	ODESSA	NY	14869
P	N	WES-KAN OIL CO INC	LIBERAL	KS	67901
P	N	WES-T-CO	ABILENE	TX	79604
P	N	WESLEY BOWDEN	SYLACAUGA	AL	35150
P	N	WEST BANK INC	AKRON	OH	44311
P	N	WEST PIKE SHELL	ZANESVILLE	OH	43701
P	N	WEST PINE INC	TULSA	OK	74127
P	N	WEST SIDE DISCOUNT CIGARETTE	DOVER	OH	44622
P	N	WEST STAR CORPORATION	OLYMPIA	WA	985072527
P	N	WEST TEXAS GAS	MIDLAND	TX	79701
P	N	WEST UNION 66	WEST UNION	SC	29696
P	N	WESTERN CONVENIENCE STORES INC	ENGLEWOOD	CO	80112
P	N	WESTERN LIGHTS MOBIL	SYRACUSE	NY	13215
P	N	WESTERN OIL/GREG EBLE	ST LOUIS	MO	63114
P	N	WESTLAKE GROCERY	AUSTIN	TX	78746
P	N	WESTMINISTER 66	WESTMINISTER	SC	29693
P	N	WESTSIDE STOP & SHOP	BRENHAM	TX	77833
P	N	WH EMMART OIL CO	WINCHESTER	VA	22604
P	N	WHEELER DAM MKT & DELI	ROGERSVILLE	AL	35652

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P	N	WHEELOCK EXPRESS	WHEELOCK	TX	77882
P	N	WHITE EAGLE	TULSA	OK	741472285
P	N	WHITE HEN PANTRY INC	STONEHAM	MA	02180
P	N	WHITE'S TEXACO	HOT SPRINGS	AR	71901
P	N	WHITES DUNBAR MART	DUNBAR	WV	25064
P	N	WHITEVILLE OIL & GAS COMPANY	LITTLE RIVER	SC	29566
P	N	WHITMAN'S SERVICE CENTER INC	HALEYVILLE	AL	35565
P	N	WHIZZ MARTS INC	JACKSONVILLE	NC	28540
P	N	WILL JONES	ATOKA	TN	38004
P	N	WILLAREDT OIL CO INC	MATTOON	IL	61938
P	N	WILLIAM & JUDIE GIDDES INC	QUITMAN	GA	31643
P	N	WILLIAM J FRITZ JR DBA MINI-MART	KERRVILLE	TX	78028
P	N	WILTON BURGESS/WITCO INC	LYNCHBURG	VA	24501
P	N	WINFIELD QUICK STOP	WINFIELD	WV	25213
P	N	WINN-DIXIE MIDWEST INC	LOUISVILLE	KY	40217
P	N	WISE & SOBJYSHELL INC	WESTLAKE	OH	44145
P	N	WITSCHEYS TYLER CO SHOP N SAVE	MIDDLEBOURNE	WV	26149
P	N	WL PETREY	LUVERNE	AL	36049
P	N	WOLF'S GROCERY	GIDDINGS	TX	78942
P	N	WONDER FOOD STORES INC	MCALLEN	TX	78504
P	N	WONDERLAND OF FOODS	W SALEM	OH	44287
P	N	WOOD FOR HEATING INC	MECHANICSVILLE	VA	23111
P	N	WOOD OIL CO	LEAVENWORTH	KS	66048
P	N	WOODLAND OIL CO	BUCKEYE	AZ	85326
P	N	WOODMAN'S FOOD MARKET	JANESVILLE	WI	53545
P	N	WOODSON'S CASH STORES INC	LAFOLLETTE	TN	37766
P	N	WOODYS ENTERPRISES, LTD	WICKENBURG	AZ	85390
P	N	WORSLEY COMPANIES DBA SCOTCHMAN	WILMINGTON	NC	28403
P	N	WORTHINGTON SUNOCO	WORTHINGTON	OH	43085
P	N	WT WADSWORTH OIL CO., INC.	TUSKEGEE	AL	36083
P	N	WW SMOKE SHOP LLC	ALTUS	OK	73521
P	N	WYMAN INTERPRISES INC	WESTON	WV	26452
P	N	WYSOX GENERAL STORE	WYSOX	PA	18854
P	N	XTRA MART	N GROSVENORDALE	CT	06255
P	N	YAUAPI INDIAN SMOKE SHOP	PRESCOTT	AZ	86301
P	N	YAWKEY QUIK MART	YAWKEY	WV	25573
P	N	YAWKEY QUIK MART	YAWKEY	WV	25573
P	N	YERINGTON PAIUTE TRIBE	YERINGTON	NV	89447

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P	N	YIM'S STOP N SHOP	MILLEDGEVILLE	GA	31061
P	N	YORK COUNTY FOODS INC	YORK	PA	17404
P	N	YOUNGS MARKET	LEAVITTSBURG	OH	44430
P	N	YOUNGS MKT	WOXALL	PA	18979
P	N	YOUR C STORE	LAGRANGE	TX	78945
P	N	YOUR STORE OF STORES	GLASS PORT	PA	15045
P	N	Z & Z ENTERPRISES INC DBA APPLEG	APPLE GROVE	WV	25502
P	N	ZACKS PIT STOP	PIEDMONT	SC	29673
P	N	ZEAKES SUNOCO	BRIDGEPORT	OH	43912
P	N	ZEK INC DBA PIT ROW STORES	HINTON	WV	25951
P	N	ZEKES MKT	JOHNSON CITY	TN	37601
P	N	ZERO SMOKE SHOP	GREENWOOD	AR	72936
P	N	ZIP MART	ROCKY MOUNT	NC	27803
P	N	ZIP STOP INC	JEFFERSON CITY	MO	65109
P	N	ZOOMERZ	MORRISTOWN	TN	37816
P	N	ZOOMS INC	HAMPTON	VA	23661
P	W	AC COURVILLE	DETROIT	MI	48238
P	W	AD BEDELL CO	SALAMANCA	NY	14779
P	W	ADCO DISTRIBUTORS INC	CANTON	OH	44702
P	W	AFFILIATED FOOD STORES	ABILENE	TX	79605
P	W	AFFILIATED FOODS CO-OP INC	NORFOLK	NE	68701
P	W	AFFILIATED FOODS INC	AMARILLO	TX	79120
P	W	AFFILIATED FOODS INC	ST JOSEPH	MO	645020938
P	W	AFFILIATED FOODS SW	LITTLE ROCK	AR	72209
P	W	AH HERMEL COMPANY	MANKATO	MN	56001
P	W	AJ SILBERMAN & COMPANY	BRADDOCK	PA	15104
P	W	ALBERT BROTHERS WHOLESALE	ELK CITY	OK	73648
P	W	ALBERT GUARNIERI & CO INC	WARREN	OH	44482
P	W	ALBERT NOTINI & SONS	LOWELL	MA	01854
P	W	ALL BRANDS CIGARETTES & CANDY	HOUSTON	TX	77092
P	W	ALLISON WHOLESALE INC	PAINT ROCK	AL	35764
P	W	AMCON DISTRIBUTING	OMAHA	NE	68127
P	W	AMSTER KIRTZ CO	CANTON	OH	44709
P	W	ANCHOR CIGAR & CANDY CO INC	YOUNGSTOWN	OH	44502
P	W	ANCHOR TOBACCO CO	CHARLESTON	WV	25301
P	W	ANDALUSIA DIST CO INC	ANDALUSIA	AL	36420

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P	W	ANDERSON WHOLESALE	LOGAN	WV	25601
P	W	ARIZONA COMPLETE	GLENDALE	AZ	85301
P	W	ARK-LA-TX TOBACCO	TYLER	TX	757101411
P	W	ARKANSAS VALLEY WHOLESALE	MORRILTON	AR	72110
P	W	ARROW ROCK SUPPLY	BOISE	ID	83709
P	W	ASHLAND SPECIALTY CO	ASHLAND	KY	41101
P	W	ASSOCIATED FOOD STORES INC	SALT LAKE CITY	UT	84130
P	W	ASSOCIATED GROCERS INC	BATON ROUGE	LA	70810
P	W	ASSOCIATED WHOLESALERS INC	ROBESONIA	PA	19551
P	W	ATLANTIC DOMINION DIST	VA BEACH	VA	23462
P	W	AUBURN MERCHANDISE DIST	WHITINSVILLE	MA	01588
P	W	AW MARSHALL	SALT LAKE CITY	UT	84116
P	W	AXTON CANDY	LOUISVILLE	KY	40204
P	W	B & G WHOLESALE	HOUSTON	TX	77002
P	W	B & W WHOLESALE DIST	MURFREESBORO	TN	37129
P	W	BACON GROCERY D/B/A DIST SOUTH	ALMA	GA	31510
P	W	BALLEW DISTRIBUTING INC	ROSWELL	NM	88202
P	W	BARBER & SONS TOBACCO	KANSAS CITY	MO	64106
P	W	BATESVILLE GRO	BATESVILLE	AR	72501
P	W	BELL'S WHOLESALE GROCERY INC	MORGANTOWN	WV	26505
P	W	BEST CANDY & TOBACCO CO	PHOENIX	AZ	85040
P	W	BF SPECIALTY COMPANY	CLARKSBURG	WV	26301
P	W	BLAIR CANDY CO INC	ALTOONA	PA	16602
P	W	BLUE RIDGE TOBACCO	TOCCOA	GA	30577
P	W	BOND WHOLESALE INC	TRENTON	MO	64683
P	W	BRAZOS WHOLESALE INC	BRYAN	TX	77802
P	W	BRENHAM WHOLESALE GROCERY CO INC	BRENHAM	TX	77833
P	W	BURKLUND DISTRIBUTOR	EAST PEORIA	IL	61611
P	W	C & B DISTRIBUTOR	LOWELL	NC	28098
P	W	CALDWELL WHOLESALE	SHREVEPORT	LA	71106
P	W	CALIFORNIA WHOLESALE	BENICIA	CA	94510
P	W	CAMPBELL WHOLESALE CO INC	TULSA	OK	74120
P	W	CAPITAL CANDY CO	BARRE	UT	05641
P	W	CAPITOL DISTRIBUTING INC	MERIDIAN	ID	83642
P	W	CASH & CARRY	NASHVILLE	TN	37208
P	W	CASH & CARRY INC	TOPEKA	KS	66619
P	W	CASH & CARRY STORES	ELKIN	NC	28621
P	W	CASH-WA DISTRIBUTING CO	KEARNEY	NE	68848

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P	ID	Pay Name	Pay City	ST	Zip
P	W	CD HARTNETT CO	WEATHERFORD	TX	76086
P	W	CENTRAL DIST CO	GRAND JUNCTION	CO	81502
P	W	CENTURY DISTRIBUTORS INC	ROCKVILLE	MD	20855
P	W	CHAMBERS & OWEN INC	JANESVILLE	WI	53547
P	W	CHARLES C PARKS CO	GALLATIN	TN	37066
P	W	CHARTERED DIST SERVICES	SANTA FE SPRINGS	CA	90670
P	W	CHAS M SLEDD CO	WHEELING	WV	26003
P	W	CHUCKS CIGARETTE VENDING	ELKINS	WV	26241
P	W	CHURCH POINT WHOLESALE GRO CO IN	CHURCH POINT	LA	70525
P	W	CIGARETTE SERVICE	KNOXVILLE	TN	37917
P	W	CITY SALES INC	HIGHLAND	IN	46322
P	W	CITY WHOLESALE GROCERY CO	BIRMINGHAM	AL	352190208
P	W	CITY WHOLESALE INC	WEST POINT	MS	39773
P	W	CLAUDE FANNIN	ASHLAND	KY	41101
P	W	CLIFFORD D FITE CO	CEDARTOWN	GA	30125
P	W	COASTAL WHOLESALE	KINSTON	NC	28501
P	W	COCHRAN BROS CO	DUBLIN	GA	31021
P	W	COLE BROS & FOX	CANTON	MS	39046
P	W	CONCO FOOD DISTRIBUTORS	LAFAYETTE	LA	70501
P	W	CONSUMER PRODUCTS dba J POLEP	CHICOPEE	MA	01013
P	W	CONVENIENCE STORE DISTRIBUTING	RICHMOND	IN	47375
P	W	COOPER BOOTH WHOLESALE	MOUNTVILLE	PA	17554
P	W	CORE-MARK INTERNATIONAL	S SAN FRANCISCO	CA	94080
P	W	CORR WILLIAMS WHLS INC	MERIDIAN	MS	39302
P	W	COWLITZ CANDY & TOBACCO INC	LONGVIEW	WA	98632
P	W	CUBAN CIGAR	SALT LAKE CITY	UT	84165
P	W	CW BROWER INC	MODESTO	CA	95354
P	W	D & R WHOLESALE	HOUSTON	TX	77057
P	W	DAIZA INC	DETROIT	MI	48228
P	W	DAVIS & BUTLER INC	DOVER	DE	19901
P	W	DAY WHOLESALE	TUPPER LAKE	NY	12986
P	W	DE MIKESELL CO	LEXINGTON	KY	40575
P	W	DIGRAZIA WHOLESALE	WELLS	NV	89835
P	W	DILLON CO INC DBA GHC MERCH WRHS	DENVER	CO	80223
P	W	DISCOUNT DISTRIBUTING	SPRINGDALE	AR	72764
P	W	DITTMAN ADAMS CO	FAIRFIELD	OH	45018
P	W	DIXIE SAVINGS STORES	CHATTANOOGA	TN	37401
P	W	DIXIE TOBACCO & CANDY CO	SHAW	MS	38773

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P	ID	Pay Name	Pay City	ST	Zip
P	W	DONAHUE & HIGGINS CANDY & TOB	GLEN FALLS	NY	12801
P	W	DOUGLAS CENTRAL ARK CO	CONWAY	AR	72032
P	W	DOUGLAS NORTHEAST CO	JONESBORO	AR	72404
P	W	DOUGLAS TOBACCO	TEXARKANA	AR	71854
P	W	DOWLING'S INC	MILTON	UT	05468
P	W	DUNCAN CANDY & TOBACCO CO	DUNCAN	OK	73533
P	W	DUSA DISTRIBUTION CENTER	MELBOURNE	FL	32935
P	W	EAST-MONT ENTERPRISES INC	SIDNEY	MT	59270
P	W	EBY BROWN COMPANY INC	NAPERVILLE	IL	605667067
P	W	ECONOMICAL WHOLESALE	BELLE ROSE	LA	70341
P	W	ECONOMY WHOLESALE CO	LAVALE	MD	21504
P	W	EDMISTON BROS	CROCKETT	TX	75835
P	W	EDW BADEAUX CO	THIBODAUX	LA	70301
P	W	EL GRANDE DISTRIBUTORS	CARLSBAD	NM	88220
P	W	ELLWOOD CITY CANDY CO	ELLWOOD CITY	PA	16117
P	W	ELUM MUSIC COMPANY	MASSILLON	OH	44646
P	W	EMPIRE CANDY & TOBACCO	PEARL RIVER	NY	10965
P	W	EP KIRST & SON INC	HAMBURG	NY	14075
P	W	F & F TOBACCO PRODUCTS	BRYAN	TX	77803
P	W	F & T DIST CO INC	ITHACA	NY	14850
P	W	F MC CONNELL & SONS	NEW HAVEN	IN	46774
P	W	FA DAVIS & SONS CO INC	BALTIMORE	MD	21226
P	W	FANCI CANDY & TOBACCO	GREENVILLE	TX	75401
P	W	FANNING WHOLESALE	IDAHO FALLS	ID	83402
P	W	FARNER BOCKEN CO	CARROLL	IA	51401
P	W	FINKLE DISTRIBUTORS INC	MAYFIELD	NY	12117
P	W	FLEMING CO INC	OKLAHOMA CITY	OK	73118
P	W	FLICHIA WHOLESALE DIST	COLUMBUS	OH	43236
P	W	FOOD-4-LESS WHOLESALE	TAHLEQUAH	OK	74465
P	W	FORREST CITY GROCERY CO	FORREST CITY	AR	72335
P	W	FRANK MCKONE CIGAR CO	FARGO	ND	58102
P	W	FRANK P CORSO	BILOXI	MS	39533
P	W	FRANK SILVA & SONS INC	CHALMETTE	LA	70043
P	W	FRITZ COMPANY INC	NEWPORT	MN	55055
P	W	FRONTIER EXPEDITORS	ANCHORAGE	AK	99518
P	W	GARBER BROTHERS	STOUGHTON	MA	02072
P	W	GEM CANDY & NOVELTY CO INC	YORK	PA	17403
P	W	GEM STATE DISTRIBUTORS	ALBUQUERQUE	NM	87109

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P	ID	Pay Name	Pay City	ST	Zip
P	W	GEMS DISTRIBUTING INC	WICHITA	KS	67203
P	W	GENERAL DISTRIBUTORS	ALBUQUERQUE	NM	87199
P	W	GENERAL TOBACCO & CANDY	GRAND FORKS	ND	58203
P	W	GEO F PATRICK & CO	HONAKER	VA	24260
P	W	GEORGE J FALTER CO	BALTIMORE	MD	212270676
P	W	GEORGE MC CHADO CO	SHARON	MA	02067
P	W	GILA CANDY & TOBACCO	SAFFORD	AZ	85546
P	W	GLACIER WHOLESALE	KALISPELL	MT	599035369
P	W	GLIDEWELL DISTRIBUTING	FORT SMITH	AR	72902
P	W	GOLDEN EMPIRE CANDY CO	CHICO	CA	95928
P	W	GOLDSMIT BLACK	PARKERSBURG	WV	26102
P	W	GOLDSMIT SYDNOR	HUNTINGTON	WV	25701
P	W	GRAGNON WHOLESALE	NEW IBERIA	LA	70560
P	W	GRANITE CITY JOBBING	ST CLOUD	MN	56301
P	W	GRAY'S WHOLESALE INC	CLAYTON	NY	13624
P	W	GREAT DISCOVERY'S	HOUSTON	TX	77092
P	W	GREAT NORTH FOODS	ALPENA	MI	49707
P	W	GREENE GROCERY CO	METTER	GA	30439
P	W	GROCERS SUPPLY I & C INC	HOUSTON	TX	77270
P	W	GROCERY SUPPLY CO	SULPHUR SPRINGS	TX	754830638
P	W	GUMMER WHOLESALE INC	HEATH	OH	43056
P	W	H & M DISTRIBUTING	TWIN FALLS	ID	83303
P	W	H WILLEY INC	NORWICH	CT	06360
P	W	HALE HALSELL	TULSA	OK	74158
P	W	HALE WHOLESALE DIST CO INC	LAKE CHARLES	LA	70601
P	W	HANOVER CANDY & TOBACCO SUPPLIES	HANOVER	PA	17331
P	W	HARBOR WHOLESALE GROCERY INC	TUMWATER	WA	985017227
P	W	HAROLD'S WHOLESALE	SAN MARCOS	TX	78666
P	W	HARREL BROS WHOLESALE	FOREST CITY	NC	28043
P	W	HARRISON CO INC	BOSSIER CITY	LA	71111
P	W	HARRY KENYON INC	WILMINGTON	DE	19801
P	W	HARTZ FOODS INC	THIEF RIVER FALLS	MN	56701
P	W	HATTIESBURG GROCERY CO	HATTIESBURG	MS	39401
P	W	HAWAIIAN ISLES ENTERPRISES INC	HONOLULU	HI	96819
P	W	HAWK GRO CO INC	NEWPORT	TN	37821
P	W	HB PAULK GROCERY CO	OPP	AL	36467
P	W	HEAD DISTRIBUTING	SMYRNA	GA	30080
P	W	HEBER SPRINGS WHOLESALE	HEBER SPRINGS	AR	72543

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P	ID	Pay Name	Pay City	ST	Zip
P	W	HENRY'S FOODS INC	ALEXANDRIA	MN	56308
P	W	HF HILLMANN	NAPA	CA	94558
P	W	HI-LINE WHOLESALE CO	WOLF POINT	MT	59201
P	W	HIBBERT & MC GEE WHOLESALERS INC	EAST BARRE	VT	05649
P	W	HICKS WHOLESALE COMPANY	PORTSMOUTH	OH	45662
P	W	HJ BAILEY CO	NEPTUNE	NJ	07754
P	W	HOLIDAY WHOLESALE INC	WISCONSIN DELLS	WI	53965
P	W	HOLLOWAY DISTRIBUTING INC	PUXICO	MO	63960
X	W	HT HACKNEY	HAROLD	KY	41635
X	W	HT HACKNEY	TAMPA	FL	33601
X	W	HT HACKNEY	CANTON	GA	30114
X	W	HT HACKNEY	W COLUMBIA	SC	29171
X	W	HT HACKNEY	KNOXVILLE	TN	37901
X	W	HT HACKNEY	GLASGOW	KY	42142
X	W	HT HACKNEY	ATHENS	TN	373710589
X	W	HT HACKNEY	PENSACOLA	FL	32591
X	W	HT HACKNEY	MIAMI	FL	33168
X	W	HT HACKNEY	MIDDLEBORO	KY	40965
X	W	HT HACKNEY	ONEIDA	TN	378414757
X	W	HT HACKNEY	SOMERSET	KY	42502
X	W	HT HACKNEY	HICKORY	NC	28603
X	W	HT HACKNEY	WAYNESVILLE	NC	28786
X	W	HT HACKNEY	MURPHY	NC	28906
X	W	HT HACKNEY	PADUCAH	KY	420022335
X	W	HT HACKNEY	COVINGTON	TN	38019
X	W	HT HACKNEY	GREENVILLE	SC	29610
X	W	HT HACKNEY	JOHNSON CITY	TN	37605
X	W	HT HACKNEY	HUNTSVILLE	AL	35804
X	W	HT HACKNEY	NEWTON	NC	28658
X	W	HT HACKNEY	ORANGEBURG	SC	29116
P	W	HUB INC	FENTON	MO	63026
P	W	HUGHES CANDY & TOBACCO	GEORGETOWN	KY	40324
P	W	HUNTSVILLE WHOLESALE GROCERS	HUNTSVILLE	TX	77342
P	W	HUSER-PAUL CO INC	FORT WAYNE	IN	46804
P	W	IDAHO CANDY CO	BOISE	ID	83705
P	W	IMPERIAL TRADING COMPANY INC	HARAHAN	LA	701830508
P	W	INDEPENDENT WHOLESALE	ORLANDO	FL	32804
P	W	J J ROGERS & SONS	TUPELO	MS	38801

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P	ID	Pay Name	Pay City	ST	Zip
P	W	J MURRAY CO	MT PLEASANT	MI	48858
P	W	JACKSON WHOLESALE	JACKSON	KY	41339
P	W	JAKE'S VARIETY WHOLESALE	ABBEVILLE	LA	70511
P	W	JEFFERSON WHOLESALE GROC CO	PUWXSUTAWNEY	PA	15767
P	W	JF JOHNSON INC	LEESVILLE	SC	29070
P	W	JF WALKER CO INC	SANDUSKY	OH	44870
P	W	JJ BRODSKY & SONS INC	CHICAGO	IL	60619
P	W	JL GADDY ENTERPRISE INC	HICKORY GROVE	SC	29717
P	W	JOE SMITH CO	PITTSBURGH	KS	66762
P	W	JONES MC INTOSH	SYRACUSE	NY	13206
P	W	JOS H STOMEL & SONS	WEST BERLIN	NJ	08091
P	W	JT DAVENPORT & SONS	SANFORD	NC	27330
P	W	JUNCTION CITY DIST & VENDING	JUNCTION CITY	KS	66441
P	W	K & M WHOLESALE	LEXINGTON	NC	27292
P	W	KAISER WHOLESALE INC	NEW ALBANY	IN	47150
P	W	KEYSTONE TOBACCO CO	BINGHAMTON	NY	139021771
P	W	KING WHOLESALE	HOUSTON	TX	77003
P	W	KLAFTER'S	NEWCASTLE	PA	16101
P	W	KLAMATH COUNTY TOBACCO & CANDY	KLAMATH FALLS	OR	97601
P	W	KLEIN CANDY CO LP	WILKES-BARRE	PA	18703
P	W	KLOSTERMAN	KALAMAZOO	MI	49001
P	W	KOCH CANDY COMPANY	TRENTON	IL	62293
P	W	L & L/JIROCH	GRAND RAPIDS	MI	49518
P	W	LA NELSON/DBA BURKE'S	SPOKANE	WA	99202
P	W	LAG INC	TUCKER	GA	300850025
P	W	LAMONE CANDY & TOBACCO CO INC	SALINA	KS	67401
P	W	LAUGHINGHOUSE WHOLESALE	WAYCROSS	GA	31501
P	W	LAUREL CIGAR CO	LAUREL	MS	39440
P	W	LAUREL GROCERY COMPANY	LONDON	KY	40741
P	W	LAWTON & EWING FOODS INC	SOUTH SAN FRANCISCO	CA	94080
P	W	LAYMAN CANDY CO	SALEM	VA	24153
P	W	LEBANON UNITED JOBBERS	LEBANON	PA	17046
P	W	LEE DEE WHOLESALE DIST CO	LAKE CHARLES	LA	70601
P	W	LEE'S WHOLESALE	FORT WORTH	TX	76114
P	W	LIBERTY USA	WEST MIFFLIN	PA	15122
P	W	LIBERTY WHOLESALE	FORT PAYNE	AL	35967
P	W	LJ ZUCCA INC	VINELAND	NJ	08360
P	W	LOGAN INC	BUTLER	PA	160018759

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P	ID	Pay Name	Pay City	ST	Zip
P	W	LONG WHOLESALE DIST INC	CORINTH	MS	38834
P	W	LONGO DIST	WESTERLY	RI	02891
P	W	LP SHANKS WHOLESALE CO	CROSSVILLE	TN	38557
P	W	LW GATEWOOD WHSLE	FOREST	MS	39074
P	W	LYONS SPECIALTY CO INC	BATON ROUGE	LA	70806
P	W	MACKOUL DIST INC	JACKSONVILLE	FL	32206
P	W	MACON CIGAR & TOBACCO	MACON	GA	31201
P	W	MADISON WHOLESALE GROCERY	CARROLLTON	KY	41008
P	W	MANCHESTER WHOLESALE DIST	MANCHESTER	NH	03101
P	W	MARK MATHENY	EVERETT	WA	98203
P	W	MARKETPLACE DISTRIBUTORS	NEW PHILADELPHIA	OH	446632338
P	W	MATHEW ZECHMAN INC	ELYRIA	OH	44035
P	W	MC ANENY BROS INC	EBENSBURG	PA	159314114
P	W	MC CARTY-HULL CIGAR CO INC	AMARILLO	TX	79106
P	W	MC DOWELL SUPPLY	BECKLEY	WV	25801
P	W	MCCLURE CO	CHARLESTON	WV	25324
P	W	MCLANE	TEMPLE	TX	765036131
P	W	MERCHANTS GROCERY CO INC	CULPEPER	VA	22701
P	W	MERCHANTS WHOLESALE INC	QUINCY	IL	62305
P	W	MERRILL DIST INC	MERRILL	WI	54452
P	W	MERRITT WHOLESALE	HOT SPRINGS	AR	71901
P	W	MGH WHOLESALE GROCERS INC	LAWRENCEBURG	TN	38464
P	W	MID-AMERICA WHOLESALE CO	ENID	OK	73702
P	W	MIDDLESEX TOBACCO	PERTH AMBOY	NJ	08861
P	W	MIDSOUTH DISTRIBUTION	DOUGLAS	GA	31533
P	W	MIKE ALEXANDER & SONS INC	MORGANTOWN	WV	265054097
P	W	MILLER & HARTMAN WHOLESALE	LANCASTER	PA	176084000
P	W	MILLER & HARTMAN WHOLESALE	LANCASTER	PA	176084000
P	W	MILLER DISTRIBUTING	ST CLAIR	PA	17970
P	W	MILLER DISTRIBUTING CO INC	NASHVILLE	TN	37203
P	W	MINTER-WEISMAN CO	PLYMOUTH	MN	55441
P	W	MINTER-WEISMAN CO	DAVENPORT	IA	52802
P	W	MITCHELL GROCERY	ALBERTVILLE	AL	35950
P	W	MK GRO/BATES DIST CO	RUSSELLVILLE	AR	72801
P	W	MODERN DISTRIBUTORS	SOMERSET	KY	42502
P	W	MONTANO CIGARETTE CANDY & TOB	MILFORD	CT	06460
P	W	MORELAND WHOLESALE	CHEYENNE	WY	82001
P	W	MOSELEY & REECE	MT AIRY	NC	27030

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P	ID	Pay Name	Pay City	ST	Zip
P	W	MOSLEY CANDY & TOB CO	CAMDEN	AR	71701
P	W	MOUND CITY INDUSTRIES	ST LOUIS	MO	63118
P	W	MOUNTAIN CANDY & CIGAR CO	S FALLSBURG	NY	12779
P	W	MR WILLIAMS INC	HENDERSON	NC	27536
P	W	MTC DISTRIBUTING	MODESTO	CA	95352
P	W	MUSKINGUM VALLEY GROCERY	MALTA	OH	43758
P	W	MYERS-COX CO	PEOSTA	IA	52068
P	W	NASH FINCH CO INC	LUMBERTON	NC	28358
P	W	NATIONAL TOBACCO	BUTLER	WI	53007
P	W	NEW CIGAR & CANDY INC	GRIFFIN	GA	30224
P	W	NEWMAN & ULLMAN	DECATUR	IL	625255167
P	W	NEWMAN & ULLMAN	PEKIN	IL	61554
P	W	NORTH CENTRAL DIST INC	DALLAS	TX	75228
P	W	NORTH COAST DISTRIBUTORS	SAN RAFAEL	CA	949150429
P	W	NORTH IDAHO DIST	COEUR D ALENE	ID	83814
P	W	NORTHERN SALES CO OF AK	JUNEAU	AK	99801
P	W	NORTHLAND TOBACCO CO	BOYNE CITY	MI	49712
P	W	NORTHWEST TOBACCO CO	FAYETTEVILLE	AR	72702
P	W	OBADE CANDY CO	KITTANNING	PA	16201
P	W	OHIO VALLEY WHOLESALE	ASHLAND	KY	41101
P	W	OK DIST CO	WILLISTON	ND	58801
P	W	OLEAN WHOLESALE GROCERY COOP INC	OLEAN	NY	14760
P	W	ONE STOP MARKET INC	PIKEVILLE	KY	41502
P	W	ONEIDA WHOLESALE	ONEIDA	NY	13421
P	W	PACIFIC GROSERVICE INC	SAN JOSE	CA	95112
P	W	PATE DANIEL TOBACCO CO	TUSCALOOSA	AL	35401
P	W	PAUL JACKSON WHOLESALE	ROSEBURG	OR	97470
P	W	PELICAN CIGAR CO INC	LAKE CHARLES	LA	70601
P	W	PELICAN STATE WHOLESALE	MONROE	LA	71201
P	W	PENMARVA GROCERS	KINGWOOD	WV	26537
P	W	PENNINGTONS INC	HAVRE	MT	59501
P	W	PETER P DENNIS INC	PHILLIPSBURG	NJ	08865
P	W	PHELPS JOB & CANDY	FREMONT	NE	68025
P	W	PHILIP'S WHOLESALE CANDY & TOB	LAFAYETTE	LA	70501
P	W	PIEDMONT CANDY	ANDERSON	SC	29621
P	W	PINE STATE TRADING	AUGUSTA	ME	04330
P	W	PIONEER DIST CO INC	GREEN BAY	WI	54306
P	W	PIPPIN WHOLESALE CO	HARRISON	AR	72601

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P	ID	Pay Name	Pay City	ST	Zip
P	W	PITTSBURG WHOLESALE GROCERY	SAN JOSE	CA	95112
P	W	PLAINFIELD TOBACCO & CANDY	S PLAINFIELD	NJ	07080
P	W	PORTS PETROLEUM CO INC	WOOSTER	OH	44691
P	W	PRICE & CO INC	BEAUMONT	TX	77705
P	W	QUAGLINO TOBACCO & CANDY	NEW ORLEANS	LA	70125
P	W	QUALITY FOODS	LYNCHBURG	VA	24506
P	W	QUEEN CITY WHOLESALE INC	SIOUX FALLS	SD	57101
P	W	RC TAYLOR WHOLESALE	LUBBOCK	TX	79401
P	W	REDSTONE DISTRIBUTING CO	REPUBLIC	PA	15475
P	W	REIDS CONFECTIONERY CO	BANGOR	ME	04401
P	W	REIDSVILLE GROCERY CO INC	REIDSVILLE	NC	27323
P	W	RENFRO SUPPLY	WILLIAMSBURG	KY	40769
P	W	RICE WHOLESALE CO INC	BRISTOL	VA	242030323
P	W	RICH & RHINE INC	PORTLAND	OR	972949547
P	W	RICH WHOLESALE & CO	LOGAN	OH	43138
P	W	RICHMOND MASTER DIST DBA MASTER	SOUTH BEND	IN	46660
P	W	RL JONES & SON INC	BATH	NY	14810
P	W	RL LIPTON	PITTSBURGH	PA	15213
P	W	RN MASON INC	LA JUNTA	CO	81050
P	W	ROACH & SMITH	BUTTE	MT	59702
P	W	ROADSIDE TRUCK PLAZA	ASHEVILLE	NC	28814
P	W	ROBERTS CIGAR & TOBACCO CO	SHREVEPORT	LA	71101
P	W	ROUNDY'S INC	PEWAUKEE	WI	53072
P	W	S ABRAHAM & SONS	GRAND RAPIDS	MI	495011768
P	W	SAM COHEN & SONS	WASHINGTON	PA	15301
P	W	SAM FRANK INC	RUTLAND	VT	05701
P	W	SANDSTROM'S	GRAND RAPIDS	MN	55744
P	W	SARVER CANDY CO	BLUEFIELD	WV	24701
P	W	SCHEIDELMAN INC	UTICA	NY	13502
P	W	SCHLEMMER WHOLESALE	GREENSBURG	IN	47240
P	W	SCHLESINGERS WHOLESALE	LAKE CHARLES	LA	70601
P	W	SEAMAN WHOLESALE	EVERSON	PA	15631
P	W	SEGAL WHOLESALE	MINNEAPOLIS	MN	55406
P	W	SERVICE CANDY CO	BILLINGS	MT	59103
P	W	SERVICE DIST INC	BOZEMAN	MT	59715
P	W	SHEEHAN-MAJESTIC INC	MISSOULA	MT	59802
P	W	SHINN WHOLESALE	MAGNOLIA	AR	71753
P	W	SHRYACK-GIVENS	BOONVILLE	MO	65233

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P	ID	Pay Name	Pay City	ST	Zip
P	W	SHRYACK-HIRST GROC CO	JEFFERSON CITY	MO	65102
P	W	SID KURLANDER & SON INC	SANTA ROSA	CA	95402
P	W	SKINNER'S CASH & CARRY	ANNISTON	AL	36201
P	W	SMITH WHOLESALE	JOHNSON CITY	TN	37605
P	W	SOMERSET CANDY COMPANY	SOMERSET	PA	15501
P	W	SOUTHCO DIST	GOLDSBORO	NC	27533
P	W	SOUTHERN WHOLESALE	FT SMITH	AR	72917
P	W	SOUTHWEST VIRGINIA TOBACCO	RADFORD	VA	24141
P	W	SPRINKLE SHELTON WHOLESALE	MARSHALL	NC	28753
P	W	ST JOSEPH TOBACCO CO	ST JOSEPH	MO	64506
P	W	STANDARD TOBACCO CO INC	SAPULPA	OK	740670390
P	W	STANDARD-ROSENBAUM INC	LATHAM	NY	12110
P	W	STEPHENSON WHOLESALE CO INC	DURANT	OK	74701
P	W	STERLING GRO	PRINCETON	WV	24740
P	W	STEWART DIST	WAYCROSS	GA	31501
P	W	SUNFLOWER SUPPLY	GALENA	KS	66739
P	W	SUPERVALU INC	EDEN PRAIRIE	MN	55344
P	W	SWD CORP	LIMA	OH	45801
P	W	TBI CORP	MANCHESTER	NH	03109
P	W	TH BURT & SONS INC	HAMMOND	LA	70401
P	W	THE CORR WILLIAMS CO	JACKSON	MS	39201
P	W	THE FARNER CO INC	NORFOLK	NE	687020639
P	W	THE GROCERS SUPPLY CO INC	HOUSTON	TX	77270
P	W	THE HAGMAN'S CORP	PITTSBURG	KS	66762
P	W	THOMAS & HOWARD CO INC	COLUMBIA	SC	292243659
P	W	TOBA INC DBA THOMPSON CO	GRAND ISLAND	NE	68801
P	W	TOM FITTS TOBACCO	PINE BLUFF	AR	71601
P	W	TOWN & COUNTRY WHO	BELLE PLAINE	IA	52208
P	W	TREPCO WEST	CHULA VISTA	CA	91911
P	W	TRI-COM INC	CARTHAGE	MO	64836
P	W	TRI-MART CORPORATION	MENOMONIE	WI	54751
P	W	TRIANGLE CANDY & TOBACCO CO	PITTSBURGH	PA	15232
P	W	TRIANGLE WHOLESALE	DERMOTT	AR	71638
P	W	TRIPI FOODS INC	BUFFALO	NY	14240
P	W	TVC WHOLESALE INC	FLORENCE	AL	35631
P	W	TWIN CITY WHOLESALE INC	OPELIKA	AL	36801
P	W	UNION GROCERY CO INC	NEW ALBANY	MS	38652
P	W	UNITED TOBACCO CO	STAMFORD	CT	06904

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P	ID	Pay Name	Pay City	ST	Zip
P	W	UNITED VENDING	PHILADELPHIA	PA	19136
P	W	UNIVERSAL WHOLESALE	COMMERCE	CA	90040
P	W	VA WHOLESALE CO INC	BRISTOL	VA	24201
P	W	VALLEY VENDING	MARTINS FERRY	OH	43935
P	W	VICKSBURG SPECIALTY CO	VICKSBURG	MS	39180
P	W	W LEE FLOWERS & CO	LAKE CITY	SC	29560
P	W	WA DEHART INC	NEW COLUMBIA	PA	17856
P	W	WABASH FOOD SERVICE	VINCENNES	IN	47591
P	W	WALKER WHOLESALE	MARION	IL	62959
P	W	WAREHOUSE DISTRIBUTING	MORRILTON	AR	72110
P	W	WARREN WHO CO	WARREN	AR	71671
P	W	WEASE DISTRIBUTING	DE SOTO	MO	63020
P	W	WEEKE WHOLESALE	FAIRVIEW HEIGHTS	IL	62208
P	W	WEIRTON WHOLESALE DIST	WEIRTON	WV	26062
P	W	WENCAR INC	CORPUS CHRISTI	TX	78416
P	W	WENCAR INC	CORPUS CHRISTI	TX	78416
P	W	WHOLESALE SUPPLY CO INC	MINOT	ND	587021948
P	W	WICHITA TOBACCO & CANDY CO INC	WICHITA	KS	67203
P	W	WIEMUTH & SON CO INC	TERRE HAUTE	IN	47803
P	W	WIGLEY & CULP	GULFPORT	MS	39501
P	W	WIGLEY & CULP	LUCEDALE	MS	39452
P	W	WILLIAM F BROCKMAN WHO	JERSEYVILLE	IL	62052
P	W	WILSON WHOLESALE	LAWTON	OK	73502
P	W	WL PETREY	LUVERNE	AL	36049
P	W	WM ENDERT DIST	CRESCENT CITY	CA	95531
P	W	WR FAETH WHOLESALE	FT MADISON	IA	52627
P	W	YAKIMA DIST	YAKIMA	WA	98902

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — PLAINTIFFS

v. — NO. 5:98CV-108-R

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — DEFENDANT

ORDER

This matter came before the Magistrate Judge on December 11, 1998 for a hearing on pending discovery disputes.

APPEARANCES:

FOR THE PLAINTIFF: Richard Roberts, Neil Gorsuch, Ben Powell and Harold Handelsman, counsel.

FOR THE DEFENDANT: James Keyte, John Reed and Chris Athanasia, counsel.

At the hearing, counsel presented arguments on several of the pending discovery disputes.

IT IS HEREBY ORDERED that a further hearing on discovery disputes will be held on **Friday, December 18, 1998 at 10:00 a.m.**, Courtroom 3, U.S. Courthouse, Louisville, Kentucky. The issues already argued are taken under advisement.

Date: 12/11/98

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
DEC 11 1998
JEFFREY A. APPERSON, CLERK
BY: DEPUTY CLERK

16diii001148

Case: 5:98-cv-00108

Neil M. Gorsuch, Esq.
Kellogg, Huber, Hansen, Todd & Evans PLLC
1301 K. Street, N.W.
Suite 1000 West
Washington, DC 20005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — PLAINTIFFS

v. — NO. 5:98CV-108-R

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Date: 12/11/98

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UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
DEC 11 1998
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. — PLAINTIFFS

vs. — NO. 5:98CV-108-R

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC. and UST INC. — DEFENDANTS

ORDER

This matter is before the Court on motions of plaintiff to compel production of discovery materials. (Docket Nos. 29 and 35). Defendant has responded, (Docket Nos. 31 and 36), and plaintiff has replied. (Docket Nos. 32 and 37). The matter was referred to the Magistrate Judge for decision pursuant to 28 U.S.C. § 636(b)(1)(A), (Docket No. 39), and a hearing was held on the motions on December 11, 1998.

I.

Plaintiffs have moved to compel a broader range of discovery from defendants. More particularly, plaintiffs seek to compel the production of weekly and other regular reports from sales representatives, most especially at the district office level, but also at the regional office level. These reports, in the view of Conwood, may well document the alleged exclusionary conduct of UST carried out, *inter alia*, through actions of UST sales representatives with respect to distribution racks in stores. UST argues that, if any conduct is to be attributable to the corporation, it must be centrally directed and not merely the unauthorized or spontaneous actions of sales representatives. This argument is unavailing. The Court is of the view that, even if it were true that for there to be liability such conduct must be centrally directed, there could well exist

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documentation at a "grassroots" level which would corroborate or document the implementation of a centrally planned policy. To say that the policy is directed from above does not mean it may not be documented from below.

In addition, UST also argues that, in addition to its contention that the documents are of "weak relevance," the collection of the data would be burdensome. However, it has not particularized this objection, and in view of the significant scope of the claims and the apparent gravity of the litigation, the Court finds no reason based on burden to deny the request. Accordingly,

IT IS HEREBY ORDERED that UST's objection to the production of documents from the district level is without merit and UST shall produce responsive documents from district and regional offices.

II.

The next issue taken up at the hearing involved disagreements over the format and other technical details with respect to CD-ROM's used by the plaintiffs to store its multiple boxes of documents. Based on the discussion on the record between counsel, it appears that the differences between the parties are being narrowed and may be eliminated. Accordingly, the Court defers any ruling on this issue.

III.

Defendant UST objects to the designation as confidential by plaintiff of the identity of all persons identified as knowledgeable pursuant to Rule 26. Plaintiff counters that, while it did not initially designate all these individuals as confidential, arguably improper contacts have been made by UST employees with respect to Conwood personnel. Accordingly, plaintiffs have designated the entire list as confidential in order to prevent further contacts.

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The purpose of the confidentiality order, however, is not to prevent witness tampering or improper contacts; the purpose of the confidentiality order is rather to protect trade secrets and other confidential material from disclosure. In the view of the Court, the use of the confidentiality designation to prospectively protect against improper contacts is not a proper use of the protective order. Accordingly,

IT IS HEREBY ORDERED that the motion of UST to remove the designation is **GRANTED**. However, the Court notes that, should there be any inappropriate contact with witnesses or potential witnesses, the Court would view that matter most seriously and would wish to review any details, where appropriate. The Court is not making any ruling at all as to whether improper contact has occurred, but reminding the parties it has the authority and the readiness to resolve such issues if it becomes necessary.

IT IS FURTHER ORDERED that all issues contained in the pending motions which are not decided in this order are reserved for future rulings.

Date: 12/16/98

JAMES D. MOYER
UNITED STATES DISTRICT COURT

Copies via facsimile to:
Counsel of Record

ENTERED
DEC 16 1998
JEFFREY APPERSON, CLERK
BY
DEPUTY CLERK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, -against- UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	:	Civil Action No. 5:98 CV-108-R

DEFENDANTS' RESPONSE TO PLAINTIFFS' THIRD REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS

Pursuant to Fed. R. Civ. P. 34, Defendants respond to Plaintiffs' Third Request for Production of Documents as follows:

GENERAL OBJECTIONS

1. Defendants object to Plaintiffs' requests insofar as they exceed the requirements of Fed. R. Civ. P. 34.

2. Defendants object to Plaintiffs' requests insofar as they are vague and ambiguous, overbroad, unduly burdensome, and/or not reasonably calculated to lead to the discovery of admissible evidence.

3. Defendants object to Plaintiffs' requests insofar as they seek the production of confidential, proprietary business information.

4. Defendants object to Plaintiffs' requests insofar as they seek the production of information protected by the attorney client privilege, the attorney work product doctrine, and/or any other applicable privilege or protection.

RESPONSES TO REQUESTS FOR DOCUMENTS

Request No. 1: All documents concerning the Smokeless Tobacco Master Settlement Agreement.

Response to Request No. 1. Defendants and Plaintiffs have agreed that Defendants will produce documents concerning the so-called "Global Settlement" only to the extent such documents concern the actual or potential effects of the "Global Settlement" on competition in the marketplace. Subject to the same limitation, Defendants will produce documents responsive to this request. To the extent this request seeks information beyond the scope of that agreement, Defendants object to this request on the ground that it is irrelevant overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 2: All documents concerning the Cigarette Master Settlement Agreement entered into between various States and cigarette manufacturers on or about November 23, 1998.

Response to Request No. 2. Defendants and Plaintiffs have agreed that Defendants will produce documents concerning the so-called "Global Settlement" only to the extent such documents concern the actual or potential effects of the "Global Settlement" on competition in the marketplace. Subject to the same limitation, Defendants will produce documents responsive to this request. To the extent this request seeks information beyond the scope of that agreement, Defendants object to this request on the ground that it is irrelevant overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 3: All documents produced by you in the lawsuits listed in Exhibit A to the Smokeless Tobacco Master Settlement Agreement.

Response to Request No. 3. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 4: All documents produced by you in any lawsuit alleging any antitrust, unfair competition, or unfair advertising violation by you. This includes, but is not limited to, lawsuits filed by unions, pension funds, or insurance companies.

Response to Request No. 4. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further

object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 5: All documents concerning the review or evaluation of the performance of members of your smokeless tobacco sales force.

Response to Request No. 5. Defendants object to this request on the grounds that it is duplicative of an agreement reached by the parties to produce such documents in response to Plaintiffs' Second Request For Production Of Documents And Things. To the extent this request seeks materials not within the scope of that agreement, Defendants object to this request as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 6: All documents concerning any actual or contemplated merger, acquisition, or marketing agreement between you and any third party. This includes, but is not limited to, all documents concerning merger or acquisition discussions between you and Philip Morris, Inc. or any of its subsidiaries or affiliates.

Response to Request No. 6. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 7: All documents concerning multi-year business plans. This includes, but is not limited to, all five-year business plans. See, e.g., USTC 094874 (covering only years 1997-2002).

Response to Request No. 7. Defendants object to this request on the ground that it is duplicative of Request No. 4 of Plaintiffs' Second Request For Produc-

tion Of Documents And Things. Defendants have conducted a good faith search, and subject to objections, documents responsive to this request and to Request No. 4 of Plaintiffs' Second Request For Production Of Documents And Things were produced in accordance with the Federal Rules.

Request No. 8: All business presentations, plans, or strategies concerning smokeless tobacco presented to your officers or directors, whether presented by your personnel or third parties. This includes, but is not limited to, all presentations by investment bankers, brokers, or companies concerning mergers, acquisitions, or marketing agreements.

Response to Request No. 8. Defendants object to this request on the ground that it is duplicative of Plaintiffs' Second Request For Production Of Documents And Things. Defendants have conducted a good faith search, and subject to objections, documents responsive to this request and/or to Plaintiffs' Second Request For Production Of Documents And Things have been produced in accordance with the Federal Rules.

Request No. 9: All documents concerning "Project W."

Response to Request No. 9. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. To the extent this request seeks information that is responsive to Plaintiffs' Second Request For Production Of Documents And Things, Defendants have conducted a good faith search, and subject

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to stated objections, documents have been produced in accordance with the Federal Rules.

Request No. 10: All video or audio tapes from any sales meeting or training session.

Response to Request No. 10. Defendants object to this request on the grounds that it is duplicative of an agreement reached by the parties to produce such documents in response to Plaintiffs' Second Request For Production Of Documents And Things. To the extent this request seeks materials not within the scope of that agreement, Defendants object to this request as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 11: All documents concerning any interaction between (1) UST Inc. or any of its personnel and (2) any vendor or supplier of any other defendant corporation. This includes, without limitation, any documents concerning meetings between UST Inc. personnel and tobacco growers, distributors, or retailers.

Response to Request No. 11. Defendants object to this request on the grounds that it is vague and ambiguous, overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 12: All documents concerning production of "2 for 1" slots for your vending systems. See, e.g., USTC 41464.

Response to Request No. 12. Defendants object to this request on the ground that it is duplicative of Request No. 25 of Plaintiffs' Second Request For Production Of Documents And Things. To the extent this request exceeds the scope of Request

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No. 25, Defendants object to this request as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 13: All documents concerning store or chain profiles, measurements, merchandising, or priority goals in the sale of smokeless tobacco for any period covered by Definition G in Defendants' First Request for Documents. See, e.g., USTC 020240 (chain profile for Safeway-Colorado Division discussing 1995 sales results).

Response to Request No. 13. Defendants object to this request on the ground that it is duplicative of Plaintiffs' Second Request For Production Of Documents And Things. Defendants have conducted a good faith search, and subject to objections, documents responsive to this request and/or to Plaintiffs' Second Request For Production Of Documents And Things have been produced in accordance with the Federal Rules.

Request No. 14: All documents concerning compliance (or lack of compliance) by retailers, wholesalers, or chains with your smokeless tobacco incentive and "alliance" programs. This includes, but is not limited to, any "performance business reviews" conducted by you; documents referring to the disqualification of customers or customer drop-out; budget forecasting; and changes in incentive program policies. See, e.g., USTC 023288.

Response to Request No. 14. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. To the extent this request seeks information that is responsive to Plaintiffs' Second Request For Production Of Documents And Things, Defendants have conducted a good faith search, and subject

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to stated objections, documents have been produced in accordance with the Federal Rules.

Request No. 15: All documents concerning how the manufacture, sale, or marketing of smokeless tobacco might be affected by the Global Settlement, the Smokeless Tobacco Master Settlement Agreement, the Cigarette Master Settlement Agreement, or federal regulation. This includes, but is not limited to, all documents concerning the "New World Order," or "N.W.O."

Response to Request No. 15. Defendants and Plaintiffs have agreed that Defendants will produce documents concerning the so-called "Global Settlement" only to the extent such documents concern the actual or potential effects of the "Global Settlement" on competition in the marketplace. Subject to the same limitation, Defendants have or will produce documents responsive to this request. To the extent this request seeks information beyond the scope of that agreement, Defendants object to this request on the ground that it is irrelevant overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 16: All documents concerning the share of inventory, fixtures, sales, or point of sale display enjoyed by you, Conwood, or any other smokeless tobacco company in any retail store, wholesale establishment, or chain. This includes, but is not limited to, all documents concerning your "Conquest Program" and all documents concerning your share of inventory, fixtures, sales, or point of sale displays relative to your market share.

Response to Request No. 16. Defendants object to this request on the ground that it is duplicative of Plaintiffs' Second Request For Production Of Documents And Things. Defendants have conducted a good faith search, and subject to objections,

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documents responsive to this request and/or to Plaintiffs' Second Request For Production Of Documents And Things have been produced in accordance with the Federal Rules.

Request No. 17: All documents obtained from, or provided to, Management Sciences Associates or any of its directors, officers, partners, employees, agents, representatives, predecessors, or successors.

Response to Request No. 17. To the extent this request seeks information relevant to this lawsuit, Defendants have conducted a good faith search, and subject to objections, documents responsive to this request and/or Plaintiffs' Second Request For Production Of Documents And Things (e.g., "CAP" documents or presentations and reports based on "RAD" data) have been produced in accordance with the Federal Rules. Otherwise, Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 18: All documents obtained from, or provided to, ACG Communications or any of its directors, officers, partners, employees, agents, representatives, predecessors, or successors, including, but not limited to, Euro RSCG Worldwide.

Response to Request No. 18. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Request No. 19: All documents concerning any investigation you have made regarding the possible violation of the antitrust laws, or the possible violation of any company policy relating to compliance with the antitrust laws, by any of your present or former officers, directors, agents, or employees.

Response to Request No. 19. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. To the extent this request seeks information that is responsive to Plaintiffs' Second Request For Production Of Documents And Things, Defendants have conducted a good faith search, and subject to stated objections, documents have been produced in accordance with the Federal Rules.

Request No. 20: All documents concerning the retention, destruction, disposal, or preservation of your documents, including electronically stored data.

Response to Request No. 20. Defendants will make documents responsive to this request available for inspection and copying at a mutually agreeable time and place.

Request No. 21: All speeches or presentations given by any of your officers, directors, employees, or representatives concerning smokeless tobacco.

Response to Request No. 21. Defendants object to this request on the ground that it seeks information that is irrelevant to this lawsuit. Defendants further object to this request on the grounds that it is overbroad, unduly burdensome, and not

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reasonably calculated to lead to the discovery of admissible evidence. To the extent this request seeks information that is responsive to Plaintiffs' Second Request For Production Of Documents And Things, Defendants have conducted a good faith search, and subject to stated objections, documents have been produced in accordance with the Federal Rules.

Dated: January 6, 1999

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
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Louisville, Kentucky 40202
(502) 589-1000

Attorneys for Defendants

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of January, 1999, I caused a copy of the foregoing Defendants' Responses To Plaintiffs' Third Request For Production Of Documents And Things to be sent by Federal Express to:

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Washington, DC 20005-3317

Chris T. Athanasia

ATTORNEY WORK PRODUCT
PRIVILEGED AND CONFIDENTIAL

MEMORANDUM

January 6, 1999

TO: Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.

FROM: Chris Athanasia, Esq.

Re: Conwood Co. et al vs. United States Tobacco Co. et al

Per our agreement, enclosed please find the list of Customer Alliance Program participants you requested.

If you have any questions please do not hesitate to call me at (212) 735-2375.

Thank You

CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	D	BARNETTE ENTERPRISES/DOUBLE KWIK	WISE	VA	24293
P	D	BUTTREY FOODS	GREAT FALLS	MT	59403
P	D	CASEY'S GENERAL STORES INC	ANKENY	IA	50021
P	D	CUMBERLAND FARMS INC	CANTON	MA	02021
P	D	FRED MEYER	PORTLAND	OR	97202
P	D	INGLE'S MARKETS INC	ASHEVILLE	NC	28816
P	D	KWIK TRIP INC	LA CROSSE	WI	54602
P	D	MINYARD FOOD STORES INC	COPPELL	TX	75019
P	D	QUIK TRIP CORPORATION	TULSA	OK	74116
P	D	SAFEWAY INC	SAN FRANCISCO	CA	94160
P	D	SHOP RITE FOOD STORES DBA FMY FD	CROWLEY	LA	70526
P	D	SPEEDWAY SUPER AMERICA LLC	SPRINGFIELD	OH	45501
P	D	TAG DISTRIBUTORS	CHATTANOOGA	TN	37409
P	D	THE S&H COMPANY	NEWTON FALLS	OH	44444
P	D	WESTGATE OIL	MUSKEGON	MI	49444
P	N	11E STOP N SHOP	RUSSELLVILLE	TN	37860
P	N	11E STOP'N'SHOP	RUSSELLVILLE	TN	37860
P	N	15 SPEEDWAY	SANDERSVILLE	GA	31082
P	N	169 SMOKE SHOP	TALALA	OK	74080
P	N	29 FOOD MART	WARRENTON	VA	20186
P	N	3 FEATHERS SMOKE SHOP	HASKELL	OK	74436
P	N	31ST STREET ENTERPRISES	HUNTINGTON	WV	25702
P	N	4 FEATHERS SMOKE SHOP-ISS	PRYOR	OK	74361
P	N	411 CITGO MKT	NEWPORT	TN	37821
P	N	4408 INC DBA JIMS MARKET	ASHLAND	KY	41102
P	N	5 STAR BEVERAGE	NORTH WALPOLE	NH	03609
P	N	51ST STREET INDIAN SMOKE SHOP	TULSA	OK	74107
P	N	57 MARATHON	WADSWORTH	OH	44281
P	N	66 SMOKE SHOP	CHANDLER	OK	74834
P	N	7 11	SANDUSKY	OH	44870
P	N	7 DAYS FOOD STORE	AUSTIN	TX	78745
P	N	7-11 STORE #11357	PHILADELPHIA	PA	19154
P	N	7-11 STORE 27376	PHILADELPHIA	PA	19152
P	N	7-ELEVEN	PHILADELPHIA	PA	19149
P	N	7-ELEVEN	MESA	AZ	85210
P	N	7-ELEVEN	TEMPE	AZ	85282

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	7-ELEVEN #11349	PHILADELPHIA	PA	19152
P	N	7-ELEVEN #26908	GILBERT	AZ	85234
P	N	7-ELEVEN #29153	PHILADELPHIA	PA	19114
P	N	81 FOOD MARKET	HARRISBURG	PA	17112
P	N	95 CARRY OUT	PARKERSBURG	WV	26101
P	N	96 TRUCK PLAZA	JEFFERSONVILLE	GA	31044
P	N	A & A PETROLEUM	MILWAUKEE	WI	53225
P	N	A & D DISCOUNT BEVERAGE	TALLAHASSEE	FL	32304
P	N	A & Q INDIAN SMOKE SHOP	HENRYETTA	OK	74437
P	N	A CORNER MART	BAKER	WV	26801
P	N	A TO Z CARRYOUT	HUNTINGTON	WV	25702
P	N	A-B PETROLEUM	DENVER	CO	80223
P	N	A-WA-GIN INC	TULSA	OK	741500334
P	N	ABBIE'S INC	SAVANNAH	GA	31401
P	N	ABDUL WHEED	LAWRENCEVILLE	PA	15201
P	N	ABEL OIL COMPANY	LOUISIANA	MO	63353
P	N	ABSTON SERVICES INC	GILBERTOWN	AL	36908
P	N	ACE CONVENIENCE STORE	WACO	TX	76710
P	N	ACI OIL CO	WACO	TX	76706
P	N	ACME SERVICES INC	GASTONIA	NC	28052
P	N	ACT FOODS INC	MANDEVILLE	LA	70471
P	N	ACTION MART INC	PRESTONSBURG	KY	41653
P	N	ADENS MINIT MARKETS	DOUGLAS	GA	31535
P	N	ADKINS GROCERY DBA TILLMAN ADKNS	WAYNE	WV	25570
P	N	AGLAND INC	EATON	CO	80615
P	N	AHMAD SAEED ANSARD	AKRON	OH	44306
P	N	AJ & Z INC/UNIVERSITY CITGO	FRANKLINTON	LA	70438
P	N	AJ COULTER III	TARENTUM	PA	15084
P	N	AJB AUTO CTR	CHALFONT	PA	18914
P	N	AKASH ENTERPRISES INC	SYLVESTER	GA	31791
P	N	AL'S FOOD MART	LAGRANGE	TX	78945
P	N	AL-ILAM ENTERPRISE INC	LIBERTY	TX	77575
P	N	ALABAMA OIL CO OF SHEFFIELD INC	SHEFFIELD	AL	35660
P	N	ALAN ALFORD	CABOT	AR	72023
P	N	ALDIN ASSOC	E HTFD	CT	06128
P	N	ALEX GUIDE	MCKEESPORT	PA	15134
P	N	ALEX GUIDE	MCKEESPORT	PA	15134
P	N	ALL AMERICAN PLAZAS INC	BETHEL	PA	19507

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P	ID	Pay Name	Pay City	ST	Zip
P	N	ALL-AMERICAN QUALITY FOODS	STOCKBRIDGE	GA	30281
P	N	ALLANDALE EXPRESS	KINGSPORT	TN	37660
P	N	ALLISON WHOLESALE	PAINT ROCK	AL	35764
P	N	ALLSTATE 76 TRUCK STOP	UNADILLA	GA	31091
P	N	ALLSUPS CONV STORES INC	CLOVIS	NM	88101
P	N	ALMA SMOKE SHOP	ALMA	AR	72921
P	N	ALPENA OIL CO INC	ALPENA	MI	49707
P	N	ALTHEIMER OIL COMPANY INC	ALTHEIMER	AR	72004
P	N	ALVEY STORE	CATHARPIN	VA	20143
P	N	AMAR OIL CO INC	HAMMOND	LA	70401
P	N	AMERICAN GAS & OIL	SPARTA	MI	49345
P	N	AMERICAN PRIDE COOP-AMPRIDE C-ST	BRIGHTON	CO	80601
P	N	AMITE SPAR STATION INC	AMITE	LA	70422
P	N	AMMRA INTERNATIONAL INC	WACO	TX	76712
P	N	AMOCO	DALE CITY	VA	22193
P	N	AMOCO EXPRESS	NEWPORT	TN	37821
P	N	AMOCO-TRI STATE	PURCELLVILLE	VA	22132
P	N	AMOCOLAND STORES	MORRISTOWN	TN	37816
P	N	ANDERSONS AMOCO	NEW MARTINSVILLE	WV	26155
P	N	ANDRE FARMS	OLEY	PA	19547
P	N	ANGLER'S MINI-MART INC	SUMMERVILLE	SC	29483
P	N	ANGUS I HINES INC T/A SENTRY FD	SUFFOLK	VA	23434
P	N	ANNANDALE STATION	HILLIARDS	PA	16040
P	N	ANNE C BRANNON	GRIFFIN	GA	30224
P	N	ANTHONY MATTEN	CHERRY HILL	NJ	08003
P	N	ANWAR KHAN	SQUIRRELL HILL	PA	15217
P	N	AOC FOOD MARTS INC	TALLADEGA	AL	35161
P	N	APOLLO OIL	ST LOUIS PARK	MN	55416
P	N	APPALACHIAN OIL CO INC	BLOUNTVILLE	TN	37617
P	N	APPLE VALLEY FOODS, INC	LEESBURG	VA	20176
P	N	AQUIA TEXACO	STAFFORD	VA	22554
P	N	ARBAUGH GROCERY CO DBA FASCHECK	SALT ROCK	WV	25559
P	N	ARENS OIL CO	MONTGOMERY CITY	MO	63361
P	N	ARGUIWDEGUI OIL CO	LAREDO	TX	78043
P	N	ARROWHEAD SMOKE SHOP	CANADIAN	OK	74425
P	N	ART HINCKLEY	RENO	NV	89502
P	N	ASBURYS SUPERMARKET INC	WAYNE	WV	25570
P	N	ASHLAND GAS ONE STOP	WARREN	OH	44485

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	ASHLAND ONE STOP	HANOVATON	OH	44423
P	N	AT WILLIAMS OIL CO-WILCO	WINSTON-SALEM	NC	27109
P	N	ATLANTIC QUICK STOP	WARREN	OH	44483
P	N	AUBURN BEVERAGE & BAIT	BURTON	OH	44021
P	N	AUSTIN STORES INC	BURNET	TX	78611
P	N	AUSTIN'S MOBIL	NORWOOD	MA	02062
P	N	AUSTINBURG COUNTRY STORE	KNOXVILLE	PA	16928
P	N	AUTO STOP INC	WYNNE	AR	72396
P	N	AUTOBAHN TRAVEL SHOPPE	SCHULENBURG	TX	78956
P	N	AUTOBAHN TRAVEL SHOPPE	SCHULENBURG	TX	78956
P	N	AUTRY PETROLEUM CO	THOMASVILLE	GA	31792
P	N	AVANTI PETROLEUM INC	FLORISSANT	MO	63033
P	N	AW HERNDON OIL CO	ABBEVILLE	AL	36310
P	N	AYERS OIL CO	CANTON	MO	63435
P	N	AZTEX	KNOXVILLE	TN	37921
P	N	B & A ENTERPRISES INC	CHATTANOOGA	TN	37415
P	N	B & B MARKET/WILLIAM BOGGESS	SISSONVILLE	WV	25320
P	N	B & B PONCHATOULA	PONCHATOULA	LA	70462
P	N	B & B QUICK SHOPPER	WINFIELD	AL	35594
P	N	B & B TOBACCO SALES	GREENWOOD	IN	46142
P	N	B & H PETROLEUM	KIRKSVILLE	MO	63501
P	N	B & J CARRY OUT	NEWPORT	OH	45768
P	N	B & J ENTERPRISES	FAYETTEVILLE	NC	28303
P	N	B & J SHORT STOP INC	OLATHE	KS	66061
P	N	B & R DISTRIBUTORS, INC	TUNKHANOCK	PA	18657
P	N	B & W MARKET	JOHNSON CITY	TN	37601
P	N	BAGGETTS DISCOUNT TOBACCO	WIGGINS	MS	39577
P	N	BAGWELL SPEARS	CANTON	GA	30114
P	N	BAILEY LAKES GENERAL STORE	ASHLAND	OH	44805
P	N	BAKERS MARKET INC (PAUL F BAKER)	MARION	NC	28752
P	N	BALDINI'S M T MART	SPARKS	NV	89431
P	N	BALL MART-ANIKSON	LIBERTY	SC	29657
P	N	BALLOW OIL CO/GEM DANDY STORES	HAMILTON	TX	76531
P	N	BAMA PITT FOOD MARTS INC	FLORENCE	AL	35631
P	N	BANDYS INC DBA SUNNY SPOT	HICO	WV	25854
P	N	BARBARA M STUTZMAN	EXPORT	PA	15632
P	N	BARGAIN TOWN	STEPHENVILLE	TX	76401
P	N	BARNSDALL SMOKE SHOP	BARNSDALL	OK	74002

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	BARON OIL C/O RAY DIST CO	JACKSONVILLE	FL	32203
P	N	BARON OIL C/O RAY DISTRIBUTING	JACKSONVILLE	FL	32203
P	N	BASEBALL CITY SHELL	DAVENPORT	FL	33837
P	N	BATTLEGROUND AUTOMOTIVE INC	GREENSBORO	NC	27408
P	N	BAUER BURT DBA HANDY MART	DURAND	WI	54736
P	N	BAUSERMAN OIL CO INC	WINCHESTER	VA	22601
P	N	BAXTERS DRIVE THRU INC	PAINESVILLE	OH	44077
P	N	BAY OIL CO DBA SHOPPERS MART	DICKINSON	TX	77539
P	N	BAY SHORE OIL INC	FAIRHOPE	AL	36532
P	N	BE TASS INC	PARKERSBURG	WV	26101
P	N	BEAR FOOD MART #1	WACO	TX	76706
P	N	BEAR'S DEN	BEAR CREEK	AL	35543
P	N	BEAVER PARK INVESTMENTS/KWIK STP	PENROSE	CO	81240
P	N	BEAVER PHARMACY	CANESTEO	NY	14823
P	N	BECK OIL CO	PRINCETON	IL	61356
P	N	BEDNAR'S SHOP-RITE INC	HAZEN	AR	72064
P	N	BEELINE SMOKE SHOP	SAPALPA	OK	74066
P	N	BEELINE STORES INC	TROY	AL	36081
P	N	BEER & SODA MART	RED LION	PA	17356
P	N	BEER BARREL DIST CO INC	WAYNESBURG	PA	15370
P	N	BEER CITY	FAYETTEVILLE	WV	25840
P	N	BELL'S INC	CHATTANOOGA	TN	37409
P	N	BEN FITZGERALD	CORSICANA	TX	75110
P	N	BERLIN HTS GROCERY CO INC	BERLIN HTS	OH	44814
P	N	BERNIES VARIETY MRKT	BEAVER MEADOWS	PA	18216
P	N	BERRY COMPANY	FALLON	NV	89407
P	N	BERT TRAHERN	SUBLETTE	KS	67877
P	N	BEST OIL INC	PITTSBURGH	PA	15227
P	N	BEST PRICE CIG #2 MEDINA	MEDINA	OH	44256
P	N	BETTY JEAN FRESHOUR	MARION	NC	28752
P	N	BEVERAGE DOCK 22	ZANESVILLE	OH	43701
P	N	BFS FOODS INC	MORGANTOWN	WV	26505
P	N	BIG D OIL	RAPID CITY	SD	57702
P	N	BIG G MARKET	GREENEVILLE	TN	37743
P	N	BIG G MARKET	ELIZABETHTON	TN	37643
P	N	BIG G MARKET #1	WHITE PINE	TN	37890
P	N	BIG JOHNS	ONEIDA	TN	37841
P	N	BIG RIVER OIL CO	HANNIBAL	MO	63401

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	BIG/LITTLE FOOD STORES	ENTERPRISE	AL	31331
P	N	BILL MULKEY	FENTON	MO	63026
P	N	BILL RHODES	ADVANCE	MO	63730
P	N	BILL SHADE	GRATZ	PA	17030
P	N	BILL'S FOOD MART	HILLIARD	OH	43026
P	N	BILLS CORNER DELI	MT PLEASANT	OH	43939
P	N	BILLY FOUCH	MOREHEAD	KY	40351
P	N	BILLY MATTHEWS/MATTHEWS GROCERY	MCINTYRE	GA	31054
P	N	BJ EXPRESS	FITZGERALD	GA	31750
P	N	BJ'S EXPRESS MART	LINDSAY	CA	93247
P	N	BJ'S GAS & FOOD MART INC	PICKENS	SC	29671
P	N	BK TOBACCO	ULYSSES	KS	67880
P	N	BL HARTNETT	SOMERVILLE	TX	77879
P	N	BLACK GOLD MANAGEMENT	WESTERVILLE	OH	43081
P	N	BLACK INC DBA CONOCO ONE STOP	DEWITT	AR	72042
P	N	BLACK MARKET SMOKESHOP	JOPLIN	MO	64804
P	N	BLACK OAK SMOKE & CHEW	KNOXVILLE	TN	37918
P	N	BLACK'S FOODLAND	DANVILLE	WV	25053
P	N	BLACKBERRY STATION	ELIZABETHTON	TN	37643
P	N	BLACKHAW SMOKE SHOP	TAHLEQUAH	OK	74464
P	N	BLASINGIM'S DISCOUNT TOBACCO	POCA	WV	25159
P	N	BLASINGIMS GUNS & AMMO	NITRO	WV	25143
P	N	BLODGETT OIL	MT PLEASANT	MI	48858
P	N	BLOSSMAN OIL CO INC	COVINGTON	LA	70433
P	N	BLUE SKY PETROLEUM LLC	SMYRNA	GA	30080
P	N	BLVD GROCERY EXPRESS	AKRON	OH	44319
P	N	BOARDMAN PETROLEUM INC	AUGUSTA	GA	30904
P	N	BOB & ANN'S COUNTRY CORNER	MOULTRIE	GA	31776
P	N	BOB BRYANT BRYANT'S GROCERY	FORDYCE	AR	71742
P	N	BOB GILLIAM	CLINTON	TN	37716
P	N	BOB WILLIAMS/RODNEY WALKER	COLLEGE STATION	TX	77840
P	N	BOB'S CMART & DELI INC	EASTON	PA	18042
P	N	BOB'S MARKET	KINSMAN	OH	44428
P	N	BOB'S SERVICE INC	MADAWASKA	ME	04756
P	N	BOBBY MADDELA	PHOENIX	AZ	85018
P	N	BOBBY RADNEY	WARNER ROBINS	GA	31093
P	N	BOBBY S HANNA	HOT SPRINGS	AR	71901
P	N	BOBBY SPROLES	BRISTOL	VA	24202

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	BOBBY TAYLOR OIL CO	FAYETTEVILLE	NC	28311
P	N	BOGGS PENNZOIL INC	ELIZABETH	WV	26143
P	N	BOND ENTERPRISE	FAIRFIELD	TX	75840
P	N	BONNIE MIDDLETON	PHOENIX	AZ	85008
P	N	BOOK'S MARKET	NEW CASTLE	PA	16101
P	N	BOSSELMAN INC	GRAND ISLAND	NE	688021567
P	N	BOUNTYLAND STORES	SENECA	SC	29672
P	N	BOWMAN BEVERAGE DBA BOWAN BEV	WOOSTER	OH	44691
P	N	BOYD S SMITH	COVE	AR	71937
P	N	BOYDS CORNER STORE	COUDERSPORT	PA	16915
P	N	BOYER'S FOOD MARKET	ORWIGSBURG	PA	17961
P	N	BOYER'S MARKET INC	FLEETWOOD	PA	19522
P	N	BOYLE'S MARKET INC	BANDERA	TX	78007
P	N	BP FOOD MART	PARKERSBURG	WV	26101
P	N	BP FOOD MART	LAKE WALES	FL	33853
P	N	BP OIL	CLEVELAND	OH	44114
P	N	BP ROAD RUNNER-TOM SEAMAN	SCOTTDALE	PA	15683
P	N	BP STOP N GO	DANDRIDGE	TN	37725
P	N	BRAD MARTIN	SYLVANIA	GA	30467
P	N	BRADFORD OIL CO	BRADFORD	VT	05033
P	N	BRANCHLAND QUICK MART	BRANCHLAND	WV	25506
P	N	BREAD BOX FOOD STORES	KNOXVILLE	TN	37950
P	N	BREEZ-IN	HOPEWELL	VA	23860
P	N	BREMEN QUIK STOP	BREMEN	OH	43107
P	N	BRENDA TRIMBLE	WINCHESTER	KY	40391
P	N	BREW THRU	WADSWORTH	OH	44281
P	N	BREWER OIL CO	ALBUQUERQUE	NM	87107
P	N	BRIDGEPORT PARTY CENTER	BRIDGEPORT	OH	43912
P	N	BRIDGEVIEW TOBACCO SHOP INC	RAINIER	OR	97048
P	N	BRIGGS TOBACCO OUTLET	TAHLEQUAH	OK	74464
P	N	BRILAN INC	ASHEVILLE	NC	28803
P	N	BRILL'S MARATHON	OBERLIN	OH	44074
P	N	BRISTOW SMOKE SHOP	BRISTOW	OK	74010
P	N	BROAD & YORK CONVENIENCE STORE	PATASKALA	OH	43062
P	N	BROADWAY EXXON	S BOSTON	MA	02127
P	N	BROCK INVESTMENTS INC	DALLAS	GA	30132
P	N	BROCK'S DRIVE THRU	WILLARD	OH	44890
P	N	BRODIE FOOD MART	AUSTIN	TX	78745

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	BROKEN ARROW SMOKE SHOP	SALLISAW	OK	74955
P	N	BROWNFIELD OIL CO INC	MOBERLY	MO	65270
P	N	BROWNIE'S MINI MART INC	LINDLEY	NY	14858
P	N	BRUCE A FRAZIER	NEWNAN	GA	30265
P	N	BRUCE HENDERSON JR	ALBANY	GA	31702
P	N	BRUTUS B INC	HARRISBURG	PA	17011
P	N	BUC STORE #1	JOHNSON CITY	TN	37604
P	N	BUCCANEER GROC	BRENHAM	TX	77833
P	N	BUCK'S FOOD CTR/V & E OWENS	BRISTOL	TN	37620
P	N	BUCKEYE BEVERAGE	NILES	OH	44446
P	N	BUDDY BARFORD	CHARLESTON	WV	25312
P	N	BUDDY'S	ATLANTA	GA	30307
P	N	BUDDY'S FOOD MART	TUSCALOOSA	AL	35403
P	N	BUDDY'S MINI-MARTS	JACKSON	MI	49203
P	N	BULLOCK ENT INC	MT VERNON	OH	43050
P	N	BUMBLE BEE STATION	LITTLE RIVER	TX	76554
P	N	BURGER KING	W LEBANON	NH	03784
P	N	BURNS & BURNS INC	MERIDIAN	MS	39302
P	N	BURNS BROS INC	PORTLAND	OR	97214
P	N	BURNS OIL	PASCAGOULA	MS	395681588
P	N	BURSAW OIL CORP AKA PUMP'N PNTRY	DANVERS	MA	01923
P	N	BURWELL OIL SERVICE INC	LINCOLN	IL	62656
P	N	BUSHNELL STORE	CONNEAUT	OH	44030
P	N	BUSINESSENSE INC	ORLANDO	FL	32803
P	N	BUTCH HEDGER	HAMPTON	AR	71744
P	N	BUTT HUT #5	WADSWORTH	OH	44281
P	N	BUZZ IRWINE	HOT SPRINGS	AR	71901
P	N	BY-LO MARKETS	MORRISTOWN	TN	37816
P	N	BYRON L & TERRY L CLAYTON	WILLIAMSTOWN	WV	26187
P	N	C & B MARKET	WABBASEKA	AR	72175
P	N	C & B PETRO	SYLVESTER	GA	31791
P	N	C & B SHELL	GAHANNA	OH	43230
P	N	C & B WAREHOUSE	VIRGINIA	MN	55792
P	N	C & D FOOD INC	MILTON	WV	25541
P	N	C & D TOBACCO	JASPER	TN	37347
P	N	C & F FOOD STORES	GRAND JUNCTION	CO	81501
P	N	C & K MARKETS	BROOKINGS	OR	97415
P	N	C & W ENTERPRISE INC	SAN ANGELO	TX	76903

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	C ALPHA G INC	WINTER GARDEN	FL	34787
P	N	C MART	CROSSETT	AR	71635
P	N	C-MART FOOD STORES INC	AUSTIN	TX	78763
P	N	C-STORE MANAGEMENT CO INC	BURLESON	TX	76097
P	N	C.V.'S FAMILY FOODS	VAN BUREN	AR	72956
P	N	C.V.'S FAMILY FOODS	VAN BUREN	AR	72956
P	N	CALDWELL CONVENIENCE	CALDWELL	OH	43724
P	N	CALPER INC DBA FOOD PLAZA	BROWNWOOD	TX	76804
P	N	CAMERON SHELL	CAMERON	TX	76520
P	N	CAMP CONLEY MART	POINT PLEASANT	WV	25550
P	N	CAMP OIL COMPANY	ROME	GA	30161
P	N	CAMPUS BP	KENT	OH	44240
P	N	CAMPUS CORNER INC	TEMPE	AZ	85281
P	N	CANES CORNER	PIEDMONT	SC	29673
P	N	CANNON OIL CORP	DOTHAN	AL	36302
P	N	CANYON CONVENIENCE INC	GRAND JUNCTION	CO	81503
P	N	CAPITOL SERVICE STATIONS INC	MONTGOMERY	AL	36102
P	N	CAPT LARRYS MARATHON	VERMILLION	OH	44089
P	N	CAR-MAC INC T/A BREWERS OUTLET	LANCASTER	PA	17602
P	N	CARDINAL OIL	FOREST	VA	24551
P	N	CAREYS GROC INC	COHOCTON	NY	14826
P	N	CARL'S NORTHLAND OIL	STURGIS	MI	49091
P	N	CARLOS GARZA	LA GRULLA	TX	78548
P	N	CARMICHAEL MANAGEMENT INC	N CHAS	SC	294151553
P	N	CAROL DUDLEY	MESA	AZ	85203
P	N	CAROL'S CORNER	TALLAHASSEE	FL	32310
P	N	CAROLINA BEACH ROAD GROCERY CO	WILMINGTON	NC	28412
P	N	CARON & SON MOBIL	MERRIMACK	NH	03054
P	N	CARTHAGE SUPER DISCOUNT TOBACCO	CARTHAGE	MS	39051
P	N	CASSADY INC DBA SIMONS MARKET	PINE GROVE	WV	264190506
P	N	CASTLE SUNOCO	MCKEESPORT	PA	15131
P	N	CAT'S PITT STOP	CALDWELL	TX	77836
P	N	CATHERINE B SEALS	WIGGINS	MS	39577
P	N	CATLETT IGA	CATLETT	VA	20119
P	N	CATLETTSBURG TOBACCO SHOPPE	CATLETTSBURG	KY	41129
P	N	CB MART INC	BELTON	SC	29627
P	N	CC FOOD MARTS INC	BREESE	IL	62230
P	N	CCF INC	EDINA	MN	55436

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P	ID	Pay Name	Pay City	ST	Zip
P	N	CD SCHNECK INC	SINKING SPRING	PA	19608
P	N	CDJ ASSOCIATES	BRICK	NJ	08724
P	N	CEDAR CREEK CHEVRON	RUSSELLVILLE	AL	35653
P	N	CEFCO FOOD STORES	TEMPLE	TX	76503
P	N	CENEX	MINOT	ND	58701
P	N	CENEX PETROLEUM INC	ST PAUL	MN	551640124
P	N	CENTER FOODS	STRUTHERS	OH	44471
P	N	CENTER INDEPENDENT OIL CO	SMOLK	PA	15480
P	N	CENTRE ROAD AMOCO	MANASSAS	VA	22111
P	N	CERTIFIED OIL #233	CANTON	OH	44707
P	N	CERTIFIED OIL COMPANY	COLUMBUS	OH	432122662
P	N	CFM #734	BRUNSWICK	OH	44212
P	N	CFM #744	N RIDGEVILLE	OH	44039
P	N	CFM OF MID-MISSOURI INC	JEFFERSON CITY	MO	65102
P	N	CHA'S CONVENIENCE	WINCHESTER	NH	03470
P	N	CHA-TIS CONVENIENCE STORE	GRANTSVILLE	WV	26147
P	N	CHAD & TABATHA ALEXANDER	ADDISON	AL	35540
P	N	CHAGRIN OIL & GAS	MIDDLEFIELD	OH	44062
P	N	CHALET PREMIER	NORTH LIMA	OH	44452
P	N	CHARLES GINDER	STAFFORD	VA	22554
P	N	CHARLES M GOODWIN	ELM MOTT	TX	76640
P	N	CHARLES MAYO	NEW MARTINSVILLE	WV	26155
P	N	CHARLES REICHENAU	SAN SABA	TX	76877
P	N	CHARLESTON DISCOUNT TOBACCO	CHAS	WV	25304
P	N	CHARLIE JENKINS	TIMBERVILLE	VA	22853
P	N	CHARLIES FUEL & DELI	EPHRATA	PA	17552
P	N	CHARLOTTE LAMBERT - TOBACCO ROAD	MARYVILLE	TN	37801
P	N	CHASE OIL CO	FLORENCE	SC	29501
P	N	CHATHAM GENERAL STORE	MEDINA	OH	44256
P	N	CHEAP BUTTS INC	ESCATAWPA	MS	39552
P	N	CHEAP TOBACCO	ASHTABULA	OH	44004
P	N	CHEBON ENTERPRISES	BROKEN ARROW	OK	74012
P	N	CHECKERBOARD MARKET	PARROTTSVILLE	TN	37843
P	N	CHECOTAH SMOKE SHOP	CHECOTAH	OK	74426
P	N	CHEROKEE FOOD STORES	KINGSPORT	TN	37660
P	N	CHEROKEE TOBACCO SALES	TAHLEQUAH	OK	74464
P	N	CHERRY DISCOUNT INC	OLD FORGE	PA	18518
P	N	CHESTNUT EXXON INC	STEPHENVILLE	TX	76401

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P	ID	Pay Name	Pay City	ST	Zip
P	N	CHEVRON FOOD MART	MOULTRIE	GA	31768
P	N	CHICKASAW ENTERPRISES	ADA	OK	74820
P	N	CHICO ENTERPRISES INC	MORGANTOWN	WV	26505
P	N	CHISSOR & BRANDON INC	TULSA	OK	74137
P	N	CHOCTAW TRAVEL PLAZAS	DURANT	OK	74702
P	N	CHRIS' CORNER	E DUBLIN	GA	31027
P	N	CHRISMAN LP GAS	DEXTER	MO	63841
P	N	CHRISTIANS AMOCO	MT CARMEL	TN	37645
P	N	CHRISTOPHER WHITE CASES & CARTNS	BATH	ME	04530
P	N	CHRISTY'S MARKET STORES	BROCKTON	MA	02401
P	N	CHUCK HILLIS - CHUCKS DISCOUNT	HAZELGREEN	AL	35750
P	N	CHUCK'S CARRY OUT	NORWALK	OH	44857
P	N	CHUNKY MUNKY	DES ARC	AR	72040
P	N	CHURCHILL AMOCO	CHURCHILL	TN	37642
P	N	CIGARETTE OUTLET LTD	PIKEVILLE	KY	41502
P	N	CIGARETTE SHOP	LOGAN	WV	25601
P	N	CIGARETTE SHOP	LAKE CHARLES	LA	70601
P	N	CIGARETTE STORE	LOGAN	WV	25601
P	N	CIGARETTE STORE III	S CHAS	WV	25309
P	N	CIGARETTE WAREHOUSE INC	TUPPER LAKE	NY	12986
P	N	CIGARETTES & CHECKS	LAFAYETTE	LA	70503
P	N	CIGARETTS FOR LESS	ST LOUIS	MO	63110
P	N	CIRCLE C FOOD STORES	HUNTSVILLE	AL	35810
P	N	CIRCLE K STORES INC	PHOENIX	AZ	85012
P	N	CIRCLE M FOOD SHOPS	GAINESVILLE	GA	30501
P	N	CIRCLE N	WALLER	TX	774849703
P	N	CIRCLE N	WALLER	TX	774849703
P	N	CITGO	N RIDGEVILLE	OH	44039
P	N	CITGO FOOD MART	BOLIVAR	OH	44612
P	N	CITGO MART	LAKE WALES	FL	33853
P	N	CITGO MART	ELGIN	TX	78621
P	N	CITIZENS FOOD STORES-VIC SHEALY	ASHEVILLE	NC	28802
P	N	CITY MARKET INC	GRAND JUNCTION	CO	81505
P	N	CITY SMOKESHOP 2	MORRISTOWN	TN	37816
P	N	CJ'S FOOD PLAZA	BLANCO	TX	78606
P	N	CLARENCE CARDWELL INC	ORIENT	OH	43146
P	N	CLARK GAS & OIL CO INC	STUART	VA	24171
P	N	CLARK REFINING & MARKETING	GLEN ELLYN	IL	60137

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P	ID	Pay Name	Pay City	ST	Zip
P	N	CLEARBROOK SHOPPING CENTER	CLEARBROOK	VA	22624
P	N	CLEMON'S SPUR	FLORENCE	AL	35634
P	N	CLIFF BRICE STATIONS INC	PUEBLO	CO	81003
P	N	CLINCH RIVER MARKET	TAZEWELL	TN	37879
P	N	CMS OIL CO	LAPEER	MI	48446
P	N	CN BROWN CO	S PARIS	ME	04281
P	N	CO MAC INC	BECKLEY	WV	25802
P	N	CO-OP COUNTRY PARTNERS	BARABOO	WI	53913
P	N	COAL CITY CASH MKT	COAL CITY	WV	25823
P	N	COASTAL MART INC	HOUSTON	TX	77046
P	N	COBORN'S INC	ST CLOUD	MN	56302
P	N	COCKERHAM OIL	GALAX	VA	24333
P	N	COCO MART INC DBA JIFFY MART	CLAREMONT	NH	03743
P	N	COFFEY OIL CO	MOULTON	AL	35650
P	N	COGO'S	PITTSBURGH	PA	15241
P	N	COHRAN VENTURES INC	HIRAM	GA	30141
P	N	COLE TOBACCO	POTTSTOWN	PA	19464
P	N	COLEMAN OIL/HAPPY MART	PIKEVILLE	KY	41502
P	N	COLES ENERGY INC	MILAN	OH	44846
P	N	COLLA MARKET	YOUNGSTOWN	OH	44515
P	N	COLLINSVILLE DISCOUNT CENTER	BROGUE	PA	17309
P	N	COLONIAL PANTRY CONV STORES	CHAMPAIGN	IL	61824
P	N	COMPASS OIL INC	BONITA SPRINGS	FL	33923
P	N	COMPTON POINT INC DBA CHEAP TOBA	CINCINNATI	OH	45236
P	N	CONDON COMPANIES	RIPON	WI	54971
P	N	CONN'S ONE STOP INC	LEBANON	MO	65536
P	N	CONNIE FRENCH	MESA	AZ	85210
P	N	CONNIE FRENCH	MESA	AZ	85210
P	N	CONSUMER GASOLINE STATIONS	NASHVILLE	TN	37202
P	N	CONVENIENCE PLUS PARTNERS LTD	LOVELAND	CO	80538
P	N	CONVENIENCE PRODUCTS INC	NEVADA	MO	64772
P	N	CONVENIENCE STORE ALLIANCE	SAN ANGELO	TX	76903
P	N	CONVENIENT	WARREN	OH	44483
P	N	CONVENIENT	NILES	OH	44446
P	N	COOKS DISC TOBACCO/DAVE & PAUL	BUCKHANNON	WV	26201
P	N	COOKS TEXACO	RUSSELLVILLE	AL	35653
P	N	COOPER OIL CO INC	PEVELY	MO	63070
P	N	COPCO SHELL	INDIANAPOLIS	IN	46253

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P	ID	Pay Name	Pay City	ST	Zip
P	N	COPPER MART	BRYAN	TX	77802
P	N	COPPER MART	BRYAN	TX	77802
P	N	CORAOPOLIS FAST STOP	CORAOPOLIS	PA	15108
P	N	CORNER MARKET	WHITESBURG	TN	37891
P	N	CORNER MART INC	ONANCOCK	VA	23417
P	N	CORNER STORE	N RIDGEVILLE	OH	44039
P	N	CORNER STORE	FRANKLIN	TX	77856
P	N	CORNER TOBACCO SHOP	RUSSELL	KY	41169
P	N	CORNERSBURG BEV	CORNERSBURG	OH	44411
P	N	COSTA FOOD CENTER INC	COUDERSPORT	PA	16915
P	N	COUGAR OIL INC	SELMA	AL	36702
P	N	COUNTRY CLUB DELI INC	MANANGAHELA	PA	15063
P	N	COUNTRY CLUB TEXACO	MESA	AZ	85210
P	N	COUNTRY CONVENIENCE	NEWPORT	TN	37821
P	N	COUNTRY CONVENIENCE	HARVIELL	MO	63945
P	N	COUNTRY CONVENIENCE INC	BURGHILL	OH	44404
P	N	COUNTRY CORNER	STILSON	GA	30415
P	N	COUNTRY CUPBOARD FOOD STORES INC	DAWSONVILLE	GA	30534
P	N	COUNTRY GENERAL INC	MANITO	IL	61546
P	N	COUNTRY GROCER & DELI	ASTORIA	OR	97103
P	N	COUNTRY MARKET	EDINBURG	PA	16116
P	N	COUNTRY PANTRY	ELLSWORTH	OH	44416
P	N	COUNTRY TRADER	SHARON CENTER	OH	44274
P	N	COUNTRY VIEW DRIVE THRU	WILLARD	OH	44890
P	N	COUNTRYSIDE GROC	CALDWELL	TX	77836
P	N	COUNTYLINE SERVICE CTR	SOUDERTON	PA	18964
P	N	COVES COUNTRY STORES INC	OKLAHOMA CITY	OK	73120
P	N	COVINGTON'S FOOD STORE	BENTON	LA	71006
P	N	COWBOY'S FOOD MARTS	ROME	GA	30161
P	N	COWSHELL INC	LONGVIEW	WA	98632
P	N	COX CHEVRON INC	FOREST	MS	39074
P	N	COXCO PETROLEUMS INC	HOT SPRINGS	AR	71913
P	N	CR'S FRIENDLY MKT #152	EPHRATA	PA	17522
P	N	CRABTREE MARKET PLACE/JERRY NEIL	CLYDE	NC	28721
P	N	CRACKER BARREL CONVENIENCE STRS	BATON ROUGE	LA	70809
P	N	CRAWDAD'S CONVIENT STORES	MAURICEVILLE	TX	77626
P	N	CREED'S MARKET	SAN MANUEL	AZ	85631
P	N	CREEKSIDE GROC & GAS	GRAY	GA	31032

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	CRESCENT OIL	INDEPENDENCE	KS	67301
P	N	CROCKETT OIL CO	RECTOR	AR	72461
P	N	CROMWELL ENTERPRISES INC	LAKE WALES	FL	33853
P	N	CROSBY DAIRY PRODUCTS INC	BRADFORD	PA	16701
P	N	CROSS OIL COMPANIES	BALLWIN	MO	63011
P	N	CROSS ROADS COUNTRY STORE	CROSS ROADS	PA	17322
P	N	CROSS ROADS SHELL	WESTFIELD	IN	46074
P	N	CROSSETT ROAD MART	CROSSETT	AR	71635
P	N	CROSSING FOOD MART	GRAY	GA	31032
P	N	CROSSROADS	JONESBOROUGH	TN	37659
P	N	CROSSROADS #1	COCHRAN	GA	31014
P	N	CROSSROADS #2	COCHRAN	GA	31014
P	N	CROSSROADS FOOD MART	BELLE VERNON	PA	15012
P	N	CROSSROADS THE WOODS	CANAL WINCHESTER	OH	43110
P	N	CROWN CENTRAL PETROLEUM	BALTIMORE	MD	212755349
P	N	CROWN CO CO EZ STOP INC	MINNEAPOLIS	MN	554132638
P	N	CRYSTAL FLASH PETROLEUM	INDIANAPOLIS	IN	46206
P	N	CUB FOODS	MINNEAPOLIS	MN	55440
P	N	CUNNINGHAM'S SUNOCO	COAL CITY	WV	25823
P	N	CURT'S	MUSKOGEE	OK	74402
P	N	CWIP, INC	MAGNOLIA	AR	71753
P	N	CYNTHIA M BALDWIN	BLUM	TX	76627
P	N	D & B CONVENIENCE STORES INC	MIDDLETAIN	VA	22645
P	N	D & C LETOURNEAU ENT	DULUTH	MN	55812
P	N	D & D QUICK STOP	W UNION	SC	29696
P	N	D & H KEYSTONE	CANTON	PA	17724
P	N	D & H OIL	VALPARAISO	FL	32580
P	N	D & L SHELL SUPERSTOP	DIERKS	AR	71833
P	N	D & P'S PIT STOP	WOODSVILLE	NH	03785
P	N	DA GOHIL/U-SAVE	RICHWOOD	WV	26261
P	N	DABBS MARKETING INC	BRYAN	TX	77803
P	N	DAIRY MART	HUDSON	OH	44236
P	N	DAIRY MART CONVENIENCE	CUYAHOGA FALLS	OH	44222
P	N	DAKOTA MART	PIERRE	SD	57501
P	N	DALLAS COUNTRY STORE	RIDGWAY	CO	81432
P	N	DALTON PET DBA PENNY PINCHERS	HAYTI	MO	63851
P	N	DAN ANKRUM	HOPEWELL	OH	43746
P	N	DAN'S DISCOUNT TOBACCO OUTLET #1	CANDLER	NC	28715

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P	ID	Pay Name	Pay City	ST	Zip
P	N	DANDY MINI MARTS INC	SAYRE	PA	18840
P	N	DANDY OIL INC	TONITOWN	AR	72770
P	N	DANIEL WARNER INC/DBA LAKELAND	WICKLIFFE	OH	44092
P	N	DANNIE BARTLEY	BUTT CITY	TN	37618
P	N	DANNY RAINS/NORMAN NAUNI	RANDLETT	OK	73562
P	N	DANO'S	TAHLEQUAH	OK	74464
P	N	DARI MART STORES INC	JUNCTION CITY	OR	97448
P	N	DARLENE COLLINS	MARSHALL	MO	65340
P	N	DARRELL COSTON ENTERPRISES INC	FORDYCE	AR	71742
P	N	DARRELL POTTS	SPRING HILL	TN	37174
P	N	DASH-IN FOOD STORES	LAPLATA	MD	20646
P	N	DAUGHERTYS BPI REST INC	MANSFIELD	OH	44903
P	N	DAVE GIM	PHOENIX	AZ	85016
P	N	DAVE HAHN	COSHOCTON	OH	43812
P	N	DAVE'S CITGO	DEMOTTE	IN	46310
P	N	DAVE'S FOOD MART	NORWALK	OH	44857
P	N	DAVID CARBAUGH	JONESTOWN	PA	17038
P	N	DAVID E BROWN	MARTINSVILLE	IN	46151
P	N	DAVID HAWES	HOLDEN	ME	04412
P	N	DAVID O TEEL	POYEN	AR	72128
P	N	DAVID PARKER/PARKER FARM SUPPLY	MARS HILL	NC	28754
P	N	DAVID PATEL	WINTER HAVEN	FL	33880
P	N	DAVID SINGH	WACO	TX	76708
P	N	DAVID WRIGHT	WEST LIBERTY	KY	41472
P	N	DAVIDSON'S GROCERY	BLADENSBURG	OH	43005
P	N	DAVIS & DAVIS ENTERPRISES INC	MACCLENNY	FL	32063
P	N	DAVIS COMPANY INC	PERRY	GA	31069
P	N	DAVISON OIL & GAS INC	DAVISON	MI	48423
P	N	DAY NITE FOOD MART	VERSAILLES	IN	47042
P	N	DAYBREAK	WAUKESHA	WI	53186
P	N	DAZU INC	STEPHENVILLE	TX	76401
P	N	DB MARKETING	PAWTUCKET	RI	02860
P	N	DBA AM/PM	GILBERT	AZ	85234
P	N	DBA COLD AS ICE SLIDE THRU	MONROEVILLE	OH	44847
P	N	DBA DUNCANS FOOD INC	NEWBERN	TN	38059
P	N	DC CARRYOUT	HUNTINGTON	WV	25701
P	N	DC'S DISCOUNT CIGARETTES	CLINTON	MO	64735
P	N	DE JIM CORP OF TABOR CITY	TABOR CITY	NC	28463

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	DE SOTO FUEL INC	DE SOTO	MO	63020
P	N	DEAD RIVER COMPANY	SCARBOROUGH	ME	040700467
P	N	DEAN MITCHEM	MARION	NC	28752
P	N	DEBRA S BREWER	TEXARKANA	AR	71854
P	N	DECCA DESIGN & DEV INC	SIERRA VISTA	AZ	85635
P	N	DEE'S CARRY OUT	HAMLIN	WV	25523
P	N	DELCO OIL	DELAND	FL	32721
P	N	DELMAR BARNETT	CLAY CITY	KY	40312
P	N	DELOCKS LIQUORS	DYER	IN	46311
P	N	DEMPSEY ALPHIN	JACKSONVILLE	NC	28540
P	N	DENMAN CORP	PHOENIX	AZ	85069
P	N	DENNIE PEREGORY	STAFFORD	VA	22554
P	N	DENNIS BUTLER	NEW CONCORD	OH	43762
P	N	DENNIS HARRISON DIST	POTEAW	OK	74953
P	N	DENNIS LOVELACE	SHERRILL	AR	72152
P	N	DENNIS PEYTON	WHITNEY	TX	76692
P	N	DENNY'S QUICK STOP	PETAL	MS	39465
P	N	DENO'S FOOD MARTS	VERONA	VA	24482
P	N	DES ARC FOODS	DES ARC	AR	72040
P	N	DG & H INC	MARYVILLE	MO	64468
P	N	DIAMOND MINI MART INC	BAY CITY	TX	774042250
P	N	DIAMOND OIL INC	ATMORE	AL	36504
P	N	DICK'S MARKET	ELIZABETH	WV	26143
P	N	DICKERSON PETROLEUM	BELLEVILLE	IL	62221
P	N	DILMAR OIL CO	LATTA	SC	29565
P	N	DION'S QUIK MARTS INC	KEY WEST	FL	330411209
P	N	DIRECT STORES	EAU CLAIRE	WI	54702207
P	N	DISCOUNT CIG OUTLET	METTER	GA	30439
P	N	DISCOUNT DRUG MART INC	MEDINA	OH	44256
P	N	DISCOUNT FOOD MART	FORT PAYNE	AL	35967
P	N	DISCOUNT SMOKE SHOPS	BRIDGETON	MO	63044
P	N	DISCOUNT SMOKES	NITA	MO	65714
P	N	DISCOUNT TOBACCO	PINE BLUFF	AR	71602
P	N	DISCOUNT TOBACCO	IRVINE	KY	40336
P	N	DISCOUNT TOBACCO INC	SPRINGFIELD	IL	62704
P	N	DISCOUNT TOBACCO MART	GULFPORT	MS	39506
P	N	DISCOUNT TOBACCO OF FT SMITH	FT SMITH	AR	72901
P	N	DISCOUNT TOBACCO OUTLET	LEBANON	VA	24266

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P	ID	Pay Name	Pay City	ST	Zip
P	N	DISCOUNT TOBACCO OUTLET	ATHENS	AL	35611
P	N	DISCOUNT TOBACCO OUTLET	SODDY DAISY	TN	37379
P	N	DISCOUNT TOBACCO OUTLET	SCOTTSBORO	AL	35768
P	N	DISCOUNT TOBACCO OUTLETS	GRAY	TN	37615
P	N	DISCOUNT TOBACCO SHED II	LOUISA	KY	41230
P	N	DISCOUNT TOBACCO SHOP	PECKVILLE	PA	18452
P	N	DISCOUNT TOBACCO WORLD	COLLINS	MS	39428
P	N	DISTRICT PETROLEUM	SANDUSKY	OH	44870
P	N	DITMER'S TEXACO	MECHANICSBURG	PA	17055
P	N	DIXIE FOOD STORES	TIFTON	GA	31794
P	N	DIXIE QUICK STOP	JOHNSON CITY	TX	78636
P	N	DJ'S CITGO	LOUDONVILLE	OH	44842
P	N	DJ'S DRIVE THRU	DUNCAN FALLS	OH	43734
P	N	DJ'S SUPERMART	STEPHENVILLE	TX	76401
P	N	DNJ ENTERPRISES	BEAUMONT	TX	777267474
P	N	DODGE BROTHERS	TUPELO	MS	38802
P	N	DOGWOOD GROCERY	HAUGHTON	LA	71037
P	N	DOGWOOD OIL CO	BLOUNTVILLE	TN	37617
P	N	DOLAWAY PROPERTIES	NAPANOCH	NY	12458
P	N	DOLLY CREEK SERVICE STATION	BIRMINGHAM	AL	35209
P	N	DON A STEWART INC	AUSTIN	TX	78760
P	N	DON ARMEL	GREENSBURG	PA	15601
P	N	DONALD CARSON	DONIPHAN	MO	63935
P	N	DONALD S BAKER	GLENWOOD	AR	71943
P	N	DONNA JENKINS	TIMBERVILLE	VA	22853
P	N	DONNA MARSHALL	DUKE CENTER	PA	16729
P	N	DONNIE BREWER	PALESTINE	AR	72372
P	N	DONNINI ENTERPRISES	LAKE PARK	FL	33403
P	N	DONNY WATSON DBA SHELL FOOD MART	AKRON	OH	44312
P	N	DORE'S INC	KAWKAWLIN	MI	48631
P	N	DORIS SHERIDAN STEWART	FRANKLINTON	LA	70438
P	N	DOS LLANOS DEVELOPERS	JUNCTION	TX	76849
P	N	DOTSON'S EXXON INC	ELIZABETH	WV	26143
P	N	DOUBLE D	GROESBECK	TX	76642
P	N	DOUBLE DELTA INC	CROSSVILLE	AL	35962
P	N	DOUBLE QUICK INC	INDIANOLA	MS	38751
P	N	DOUBLE TOLLGATE FOOD SHOP	CAPON BRIDGE	WV	26711
P	N	DOUBLEHEAD MT SMOKE SHOP	STILWELL	OK	74960

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	DOUGLAS D JENNINGS DBA DOUG'S GR	PIEDMONT	AL	36272
P	N	DOUGS QUIK CHEK	HUNTINGTON	WV	25704
P	N	DOURMS MINI MART	WARREN	OH	44481
P	N	DOWNEAST ENERGY/PUFFIN STOP CONV	BRUNSWICK	ME	04210
P	N	DOWNTOWN TIME SAVER MARKETS	MANSFIELD	PA	16933
P	N	DOYCE GUIDRY	KAPLAN	LA	70548
P	N	DREW OIL INTERPRISES INC	CAIRO	GA	31728
P	N	DUCK CREEK INDIAN COMM SMOKE SHP	BEGGS	OK	74421
P	N	DUKE PETROLEUM CO INC	FT WORTH	TX	76161
P	N	DUKE'S COUNTRY STORE	BASTROP	TX	78602
P	N	DUNMORE OIL CO	DUNMORE	PA	18512
P	N	DUTCH CUPBOARD	BERLIN	OH	44610
P	N	DWIGHT TIEDEMANN	BELTON	TX	76513
P	N	DWJW INC	LONGVIEW	WA	98632
P	N	DYSART'S SERVICE INC	BANGOR	ME	04401
P	N	DYSART'S SERVICE INC	BANGOR	ME	1689 1689
P	N	E'S MART	ERWIN	TN	37650
P	N	E-Z MART STORES INC	TEXARKANA	TX	755041426
P	N	E-Z SERVE CONVENIENCE STORES	HOUSTON	TX	77092
P	N	E-Z STOP/JAMIE MAGALHAES	WAYNESVILLE	NC	28786
P	N	EAGLE FOOD CENTERS INC	ROCK ISLAND	IL	612046700
P	N	EAGLE GAS	CARSON CITY	NV	89706
P	N	EARL MARONAY	LONOKE	AR	72086
P	N	EASLEY'S CORNER STORE	SHERIDAN	AR	72150
P	N	EAST COAST OIL CORPORATION	RICHMOND	VA	23224
P	N	EAST HILL EXXON SHOP	HUNTINGTON	WV	25705
P	N	EAST RICHLAND MARKET	ST CLAIRSVILLE	OH	43950
P	N	EAST TENN PIONEER OIL	KNOXVILLE	TN	37927
P	N	EASTERN FUELS INC	AHOSKIE	NC	27910
P	N	EASTERN PETRO MART	ENFIELD	NC	27823
P	N	EASTLAND CITGO	COLUMBUS	OH	43232
P	N	EASTSIDE TOBACCO STOP	LEXINGTON	TN	38351
P	N	EASTVIEW MKT & DELI	GREENEVILLE	TN	37743
P	N	EASY IN MARKET	WHITE PINE	TN	37890
P	N	ECKERTS OUTPOST	CARMINE	TX	78932
P	N	ECON'S STORES FEASTER & SONS OIL	MONROEVILLE	AL	36461
P	N	EDITH IBARRA	BUCKEYE	AZ	85326
P	N	EDMUND E RIDINGS	OLIVER SPRINGS	TN	37840

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	EJ FLEMISTER OIL CO	MILLEDGEVILLE	GA	31061
P	N	EJ POPE & SON INC	MT OLIVE	NC	28365
P	N	EL CHEAPO'S	MERIDIAN	MS	39301
P	N	ELDRED SHUR SAVE FOOD SHOP INC	ELDRED	PA	16731
P	N	ELDRED SHUR SAVE FOOD SHOP INC	ELDRED	PA	16731
P	N	ELEANOR FOOD MART INC	ELEANOR	WV	25070
P	N	ELEMAR INC T/A BREWERS OUTLET	LANCASTER	PA	17601
P	N	ELIZABETH HARPER	N OLMSTED	OH	44070
P	N	ELLISING FOOD SHOP INC	ARLINGTON	WI	53911
P	N	ELLISING FOOD SHOP INC	POYNETTE	WI	53955
P	N	ELLISON'S CONVENIENCE STORE	LA GRANGE	TX	78945
P	N	ELM COUNTRY MKT INC	ELM	PA	17521
P	N	EMAD ELSEIDI	BOSTON	MA	02109
P	N	ENERGY MART STORES INC	HENDERSONVILLE	NC	28792
P	N	ENFIELD GULF	ENFIELD	CT	06082
P	N	ENGLE VENTURES	QUARRYVILLE	PA	17566
P	N	ENGLE VENTURES	QUARRYVILLE	PA	17566
P	N	ERIC PETERSON	WILLOUGHBY	OH	44094
P	N	ERICKSON OIL PRODUCTS	HUDSON	WI	54016
P	N	ERNST LASANSKE	BUTLER	WI	53007
P	N	ESTES OIL FOOD STORE DIVISION	MUSCLE SHOALS	AL	35661
P	N	ETD PRYMAS SHELL	BROOKPARK	OH	44142
P	N	EUFAULA SMOKE SHOP	EUFAULA	OK	74432
P	N	EVANS GROUP INC	EPSOM	NH	03234
P	N	EWING OIL CO INC	HAGERSTOWN	MD	217424483
P	N	EXEL SALES INC	LINCOLNWOOD	IL	60659
P	N	EXIT 76 MARTS	WYOMING	MI	49509
P	N	EXPRESS FOOD MART	MECHANICSBURG	PA	17055
P	N	EXPRESS FOOD STORES	MACON	GA	31210
P	N	EXPRESS LANE INC	PANAMA CITY	FL	32401
P	N	EXPRESS MART	NEVADA CITY	CA	95959
P	N	EXPRESS MART	COLLEGE STATION	TX	77845
P	N	EXPRESS MART	MORRISTOWN	TN	37813
P	N	EXPRESS MART INC	CHATHAM	VA	24054
P	N	EXPRESS STOP	CORAOPOLIS	PA	15108
P	N	EXPRESSLANE C-STORES	SPRINGFIELD	MO	65802
P	N	EXXON FOOD MART	ST ALBANS	WV	25177
P	N	EXXON HOUSTON CORS	DALLAS	TX	753951288

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P	ID	Pay Name	Pay City	ST	Zip
P	N	EZ SHOP	MEDINA	OH	44256
P	N	EZ STOP MARKETS	MARYVILLE	TN	37801
P	N	FAILLA MERC CO INC	GOULD	AR	71643
P	N	FAIR MART INC	MORGANTOWN	WV	26505
P	N	FAIRFAX SMOKE SHOP	FAIRFAX	OK	74637
P	N	FALLS CAPITAL	KOSSE	TX	76653
P	N	FALLS CAPITAL	MARLIN	TX	76661
P	N	FAMILY SUPERMARKETS INC	LONGVIEW	WA	98632
P	N	FANNING OIL CO	JACKSONVILLE	IL	62650
P	N	FARLEY CHEVRON INC	LAVALETTE	WV	25535
P	N	FARM FRESH INC	WHEELING	WV	26003
P	N	FAS MART INC	MECHANICSVILLE	VA	23111
P	N	FAST LANE INC	LOVELY	KY	41231
P	N	FAST MART FOOD STORES	ROSWELL	GA	30075
P	N	FAST MAX INC	BALTIMORE	OH	43105
P	N	FAST PETROLEUM	DALTON	GA	30720
P	N	FAST POINT FOOD STORES INC	SPARTANBURG	SC	29301
P	N	FAST SAVER	COVINGTON	LA	70434
P	N	FAST SERV INC	HILLSBORO	OR	97123
P	N	FAST TRACK DISCOUNT BEVERAGE	PERRY	FL	32347
P	N	FASTIME FINA 244	MART	TX	76664
P	N	FASTLANE DISCOUNT TOBACCO	PIKEVILLE	KY	41502
P	N	FASTOP	TULSA	OK	74128
P	N	FASTOP INC	QUINCY	IL	62301
P	N	FASTOP MARKETS	MORRISTOWN	TN	378161176
P	N	FASTRIP	BAKERSFIELD	CA	93309
P	N	FASTRIP #702	FARMERSVILLE	CA	93223
P	N	FAVORITE MARKET	DALTON	GA	30720
P	N	FEARLESS FARRIS DBA STINKER STAT	BOISE	ID	83707
P	N	FEATHER PETROLEUM	JR JCT	CO	81505
P	N	FEERICK'S CANDY CO	JOPLIN	MO	64801
P	N	FERGUSON & HASSLER	QUARRYVILLE	PA	17566
P	N	FERGUSON SUPPLY	CLYDE	NC	28721
P	N	FFP PARTNERS LTD	FORT WORTH	TX	761174391
P	N	FIESTA MART INC	HOUSTON	TX	77007
P	N	FILL ZONE FOOD & FUEL	WINCHESTER	KY	40392
P	N	FINA MART	FT PIERCE	FL	34982
P	N	FINASERVE INC	DALLAS	TX	752061602

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P	ID	Pay Name	Pay City	ST	Zip
P	N	FIRST & LAST INC	CATLETTSBURG	KY	41129
P	N	FIRST COAST ENERGY	JACKSONVILLE	FL	32205
P	N	FISHER STORES INC	NEW BERN	NC	28562
P	N	FITZGERALD CONVENIENCE	MARIETTA	GA	30062
P	N	FIVE FORKS GROC	WESTMINISTER	SC	29693
P	N	FIVE POINTS COUNTRY STORE INC	LEROY	OH	44077
P	N	FIVE STAR BUSYMART	ELKLAND	PA	16920
P	N	FIVE-O D/T	MARION	OH	43302
P	N	FJ MAHAR SERVICE STORES INC	OLEAN	NY	14760
P	N	FKG OIL	BELLEVILLE	IL	62220
P	N	FLAGWAY INC	WASH CH	OH	43160
P	N	FLASH FOODS INC	WAYCROSS	GA	31502
P	N	FLASH MARKET INC	W MEMPHIS	AR	72301
P	N	FLATONIA FOOD MART	FLATONIA	TX	78941
P	N	FLEET MORRIS PETROLEUM INC	BRANDON	MS	39047
P	N	FLEMING BROS OIL CO	SOUTH HAVEN	MI	49090
P	N	FLEMING CO INC	OKLAHOMA CITY	OK	73118
P	N	FLINCHBAUGH'S MOBIL	YORK	PA	17402
P	N	FLYING J INC	BRIGHAM CITY	UT	84302
P	N	FOLK OIL	HOMER	MI	492450157
P	N	FOOD & FUEL INC	LONGVIEW	WA	98632
P	N	FOOD BASKET	CONCORD	NH	03301
P	N	FOOD FAST HOLDINGS LTD	TYLER	TX	75701
P	N	FOOD PANTRY	BRENHAM	TX	77833
P	N	FOOD-N-FUEL	ARDEN HILLS	MN	55112
P	N	FOOD-N-FUN	NEW IBERIA	LA	70560
P	N	FORD'S ENTERPRISE INC	ZANESVILLE	OH	43701
P	N	FOREST DISCOUNT TOBACCO	FOREST	MS	39074
P	N	FORRY'S CORP	CORDORUS	PA	17311
P	N	FORWARD CORP	STANDISH	MI	48658
P	N	FOSTERS HOLIDAY MKT INC	ELIZABETHTON	TN	37643
P	N	FOUR CORNERS SMOKE SHOP	BIXBY	OK	74008
P	N	FOUR ST LOUIS INC	JOPLIN	MO	64801
P	N	FOWLER OIL CO INC	FAYETTE	AL	35555
P	N	FOYSTER WILLIAMS INC	ASHVILLE	OH	43103
P	N	FRANCOIS OIL CO INC	BELLEVILLE	WI	53508
P	N	FRANK GRIFFIN OIL CO	RUSSELLVILLE	AR	72811
P	N	FRED ROBLON	TEMPE	AZ	85282

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P	ID	Pay Name	Pay City	ST	Zip
P	N	FRED TEUTENBERG	FENTON	MO	63026
P	N	FREDERICKTOWN MARATHON	FREDERICKTOWN	OH	43019
P	N	FREEDOM OIL COMPANY	BLOOMINGTON	IL	617023697
P	N	FRIEND'S CONVENIENCE STORES	LUBBOCK	TX	79408
P	N	FRIENDLY GUS STORES	DUBLIN	GA	31040
P	N	FRIENDS CORNER TEXACO	NEWPORT	RI	02840
P	N	FROEHLICH ENTERPRISES INC	BARNESVILLE	OH	43713
P	N	FRONTIER LIQUOR & SPT GDS	FALLON	NV	89406
P	N	FRUITVILLE COUNTRY STORE	SCHWENKSVILLE	PA	19473
P	N	FT MYERS TRAVEL PLAZA	FT MYERS	FL	33905
P	N	FUEL SERVICES INC	CHIPPEWA FALLS	WI	54729
P	N	FUELMAN/FAST LANE	VICKSBURG	MS	39180
P	N	FULLER FOODS, INC	COLORADO CITY	TX	79512
P	N	FUQUA & DAVIS INC	MARIANNA	FL	32447
P	N	FURRS SUPERMARKETS INC	ALBUQUERQUE	NM	87107
P	N	G & A TEXACO	ATHENS	AL	35611
P	N	G MICHAEL CHAMIEE	MC DONOUGH	GA	30253
P	N	GABBY'S	FREDERICKTOWN	PA	15333
P	N	GAILS INC	WOODSTOCK	VA	22664
P	N	GARB-KO INC	SAGINAW	MI	48603
P	N	GARDEN SPOT #2	GREENVILLE	SC	29617
P	N	GARDNERS MARKET INC	GARDNERS	PA	17324
P	N	GARLAND COPE	RAVENSWOOD	WV	26164
P	N	GARLANDS	HOT SPRINGS	AR	71913
P	N	GARRETT HILL BEVERAGE T/A BREWER	LANCASTER	PA	17603
P	N	GARVER'S SERVICE STATION INC	KILLBUCH	OH	44637
P	N	GARVIN OIL CO INC	WAGENER	SC	29164
P	N	GARY ADAMS	RIESEL	TX	76682
P	N	GARY ELLISON	BILLINGS	MO	65610
P	N	GARY JONES	CRESTVIEW	FL	32536
P	N	GARY MARSHALL	NATRONA HEIGHTS	PA	15065
P	N	GARY SMITH	STRONGSVILLE	OH	44136
P	N	GARY'S BP	DIAMOND	OH	44412
P	N	GARY'S MARATHON	ZANESVILLE	OH	43701
P	N	GAS 4 LESS	WHEATRIDGE	CO	80033
P	N	GAS AMERICA SERVICES INC	SHIRLEY	IN	47384
P	N	GAS CENTER INC	WILMINGTON	NC	28402
P	N	GAS CITY LTD	FRANKFORT	IL	60423

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P	ID	Pay Name	Pay City	ST	Zip
P	N	GAS MART INC DBA MINUTEMAN	ELIZABETHTOWN	NC	28337
P	N	GAS N SHOP INC	LINCOLN	NE	68501
P	N	GAS-N-GOODS INC	WILLIAMSTOWN	WV	26187
P	N	GASNACKS INC DBA TRI CITY MOBIL	TEMPE	AZ	85281
P	N	GASSENSHOP	NEW MARTINSVILLE	WV	26155
P	N	GAST ENTERPRISES INC	MOUNDSVILLE	WV	26041
P	N	GATE PETROLEUM CORP	JACKSONVILLE	FL	32257
P	N	GATES U-PUMP-IT/GATES CIG OUTLET	GARDEN CITY	KS	67846
P	N	GAWKSKEY INC	GORE	OK	74435
P	N	GEM STOP	NAMPA	ID	83687
P	N	GENE BEHIOL	ONEONTA	NY	13820
P	N	GENE DUNLAP	SPRINGFIELD	CO	81073
P	N	GENERAL OIL CO INC	BATESVILLE	AR	72501
P	N	GENERAL OIL CORP	SIKESTON	MO	63801
P	N	GENES PENNZOIL	CAMBRIDGE	OH	43725
P	N	GEORGES FOOD-N-FUEL	MONTEVIDEO	MN	56265
P	N	GERRAR A SALIBA	DUNBAR	PA	15431
P	N	GET & GO MARKETS INC	CLINTON	TN	37716
P	N	GHASSAN HALABY	MESA	AZ	85201
P	N	GHODA MATAR	AKRON	OH	44314
P	N	GIANT EAGLE	NEWTON FALLS	OH	44444
P	N	GIANT EAGLE	BROOKFIELD	OH	44403
P	N	GIANT INDUSTRIES INC-AZ	ALBUQUERQUE	NM	87109
P	N	GIBBS	CHELSEA	MA	02150
P	N	GILBERT FOODLAND	GILBERT	WV	25621
P	N	GILBERT FOODLAND	GILBERT	WV	25621
P	N	GILES MARATHON INC	WILLOUGHBY	OH	44094
P	N	GIT N GO	DES MOINES	IA	50315
P	N	GKB CORP/DBA BIG G TOBACCO	WOODBRIDGE	VA	22191
P	N	GLAD-E-O'S	KINGSVILLE	OH	44048
P	N	GLASSMERE FUEL SERVICE	TARENTUM	PA	15084
P	N	GLEN GROCERY	WATKINS GLEN	NY	14891
P	N	GLEN'S MARKETS	GAYLORD	MI	49735
P	N	GLENN'S MARKET	NEWARK	OH	43055
P	N	GLENPOOL COMMUNITY SMOKE SHOP	GLENPOOL	OK	74033
P	N	GLESSNER ENTERPRISE	WHEELING	WV	26003
P	N	GLOBAL HOUSTON TRADING	MISSOURI CITY	TX	77459
P	N	GMT PETROLEUM	GOODYEAR	AZ	85338

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P	ID	Pay Name	Pay City	ST	Zip
P	N	GO-MART INC	CASSAWAY	WV	26624
P	N	GOC LTD	BUTLER	AL	36904
P	N	GODDARD'S ENTERPRISES INC	MOUNDSVILLE	WV	26041
P	N	GOFFS CARRY OUT	SHADYSIDE	OH	43947
P	N	GOLDEN FOOD MART	YOUNGSTOWN	OH	44515
P	N	GOLDEN GALLON	CHATTANOOGA	TN	37416
P	N	GOLDEN PANTRY FOOD STORES INC	BOGART	GA	30622
P	N	GOLDEN RIDGE TRAVEL CENTER	YORK SPRINGS	PA	17372
P	N	GOLDEN RULE OIL CO	EAU CLAIRE	WI	54702
P	N	GOLDIN SWIFTI INC	BREMEN	GA	30110
P	N	GOODWILL ENT DBA CITGO	MUNSTER	IN	46321
P	N	GORDON D ZUBER	SPARTANBURG	SC	29305
P	N	GOSSETT'S GROCERY/DWAYNE GOSSETT	LEICESTER	NC	28748
P	N	GOURMET CORNER	CIRCLEVILLE	OH	43113
P	N	GRACEVILLE OIL CO INC	GRACEVILLE	FL	32440
P	N	GRAHAM & HUDSON BP	CUYAHOGA FALLS	OH	44223
P	N	GRAND SMOKE SHOP INC	HAZLETON	PA	18201
P	N	GRANDPA'S	BRIDGETON	MO	63044
P	N	GRANDVIEW DEPOT TEXACO	SELLERSVILLE	PA	18960
P	N	GRAY'S CITGO	JACKSONVILLE	NC	28540
P	N	GRAY'S GROCERY	PRINCETON	LA	71067
P	N	GREEN LANE TEXACO	GREEN LANE	PA	18054
P	N	GREEN OIL CO	LINCOLN	IL	62656
P	N	GREEN SIX OAKS	TUXEDO	NC	28784
P	N	GREENACRES CARRY OUT	BLUE ROCK	OH	43720
P	N	GREENWAY MARKET INC	ROANOKE	VA	24019
P	N	GREENWICH BEV CTR	GREENWICH	OH	44837
P	N	GREENWOOD MARKET	KINGSPORT	TN	37664
P	N	GREG VANOVER	ONEIDA	TN	37841
P	N	GREGORY CASICO	LAFAYETTE	LA	70501
P	N	GRIFFIN PETROLEUM INC	JONESBORO	AR	72402
P	N	GRIFFINS BUSINESS SYSTEMS INC	EDNEYVILLE	NC	28727
P	N	GRIGGS INC	PHENIX CITY	AL	36867
P	N	GRIMSLEY OIL COMPANY	WAUCHULA	FL	33873
P	N	GRIMWOOD'S MOBIL MART	HARRISBURG	PA	17109
P	N	GROCERIES PLUS	HAZELTON	PA	18201
P	N	GROCERY STATION	SCOTTSDALE	AZ	85259
P	N	GROVERS RIVERVIEW	HARRISBURG	PA	17110

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P	ID	Pay Name	Pay City	ST	Zip
P	N	GUESS SMOKE SHOP	TAHLEQUAH	OK	74464
P	N	GUJJAR PETROLEUM	ELLENVILLE	NY	12428
P	N	GULF QUICKLETTE	LOCKESBURG	AR	71846
P	N	GULSHAN ENTERPRISES INC	HOUSTON	TX	770742212
P	N	GUMBY'S LLC	WHEELING	WV	26003
P	N	GURVACON INC	PHOENIX	AZ	85008
P	N	GWYNEDD EXXON RAI GUTTIA	NORTH WALES	PA	19454
P	N	H & R FOOD	AUSTIN	TX	78745
P	N	H & W DISCOUNT II	CAMDEN	TN	38320
P	N	HACKNEY PETROLEUM INC	KNOXVILLE	TN	37950
P	N	HAKE'S GROCERY INC	DOVER	PA	17315
P	N	HAMILTON CONVENIENCE	HAMILTON	VA	20158
P	N	HAMMER WILLIAMS CO	CHEROKEE	OK	73728
P	N	HANDEE MART	SPARTA	IL	62286
P	N	HANDEE MART STORES	TRAVELERS REST	SC	29690
P	N	HANDY ANDY	GRAY	GA	31032
P	N	HANDY DANDY MARKET	WOODBRIDGE	VA	22191
P	N	HANDY PANTRY #2	BARBOURSVILLE	WV	25504
P	N	HANDY PANTRY MART	HURRICANE	WV	25526
P	N	HANDY PANTRY MART	HURRICANE	WV	25526
P	N	HANDY WAY FOOD STORES	CRESCENT CITY	FL	32112
P	N	HANK RICHARD INC	AKRON	OH	44319
P	N	HANOVER VILLAGE IGA	NEWARK	OH	43055
P	N	HANOVERTON COUNTY PRIDE	HANOVERTON	OH	44423
P	N	HAPPY STORES INC	DESTIN	FL	32540
P	N	HAPPY TRAILS SMOKE SHOP	SKIATOOK	OK	74070
P	N	HARDE MART	MONROE	LA	71211
P	N	HARDIN'S RACEWAY	SPRUCE PINE	AL	35585
P	N	HARDWICKE'S COUNTRY STORE	CALAIS	ME	04619
P	N	HARDY OIL/BP MARTS	IRVINE	KY	40336
P	N	HARLESS PIT STOP INC	GILBERT	WV	25621
P	N	HARMS OIL COMPANY	ABERDEEN	SD	57401
P	N	HAROLD FRIEDMAN INC	BUTLER	PA	16001
P	N	HAROLD'S AMOCO INC	CORDELE	GA	31010
P	N	HARPER OIL CO	SPRINGFIELD	IL	62702
P	N	HARVEY'S MINI MARKET	FROSTPROOF	FL	33843
P	N	HARVEYS SUPERSTOP #129 LLC	HOT SPRINGS	AR	71913
P	N	HASAN ENTERPRISE/DBA DAIRY MART	AKRON	OH	44304

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P	ID	Pay Name	Pay City	ST	Zip
P	N	HB JAM/DJ'S DISCOUNT TOBACCO	INDIANAPOLIS	IN	46241
P	N	HC BRANUM	MAYNARDVILLE	TN	37807
P	N	HEARTLAND EXPRESS	ASTABULA	OH	44004
P	N	HEFFELFINGER'S MARATHON	LOUDONVILLE	OH	44842
P	N	HELEN DECENA	MESA	AZ	85210
P	N	HELENWOOD FOODS	HELENWOOD	TN	37755
P	N	HELSN LETNER	MARS HILL	NC	28754
P	N	HENRY'S GAS AND GROCERIES	IVA	SC	29655
P	N	HENRY'S MARKET	WORTHINGTON	PA	16262
P	N	HERDRICH PETROLEUM	RUSHVILLE	IN	46173
P	N	HERNDON OIL CORP	ABBEVILLE	AL	36310
P	N	HEROLD FAMILY SHELL	MEDINA	OH	44256
P	N	HERRINGBONES DELI & GRILL	CROZET	VA	22932
P	N	HI HO STORE & CAFE	NAVASOTA	TX	77868
P	N	HICKORY HILL	COLUMBUS	TX	78934
P	N	HIGGINSON OIL CO	MACKEY	IN	47654
P	N	HIGH UP MART	STERLING	VA	20164
P	N	HIGH'S OF BALTIMORE	HANOVER	MD	21076
P	N	HIGHWAY 290 GENERAL STORE INC	AUSTIN	TX	78736
P	N	HIGHWAY MARKET	BUTLER	PA	16001
P	N	HIHO STORE & CAFÉ	NAVASOTA	TX	77868
P	N	HILL CITY OIL	VICKSBURG	MO	39180
P	N	HILL COUNTRY FOOD MART	AUSTIN	TX	78738
P	N	HILLCREST MARKET/HARRY CAPPLIN	UNIONTOWN	PA	15401
P	N	HILLTOP GENERAL STORE	EVANS CITY	PA	16033
P	N	HILLTOP GENERAL STORE	EVANS CITY	PA	16033
P	N	HINE MOTORS INC/DBA KINSMAN BP	KINSMAN	OH	44428
P	N	HISTORIC ROUTE 66 SMOKE SHOP	CHANDLER	OK	74834
P	N	HIT-N-RUN FOOD STORES	ALTON	IL	62002
P	N	HITCHING POST	SAXONBURG	PA	16056
P	N	HITCHING POST	NORWALK	OH	44857
P	N	HN FUNKHOUSTR & CO INC	WINCHESTER	VA	22601
P	N	HOBBS CHEVRON	JOHNSON CITY	TX	78636
P	N	HOGUE CREEK COUNTRY MKT INC	WINCHESTER	VA	22603
P	N	HOLIDAY FOOD STORES INC	WARNER ROBINS	GA	310990842
P	N	HOLIDAY OIL	SALT LAKE CITY	UT	84119
P	N	HOLLCO INC	BAXTER	MN	56425
P	N	HOLLENBUSH'S SHOP & SAVE INC	ORWIGSBURG	PA	17961

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P	N	HOLLIDAY MINI MARTS INC.	MARION	IL	62959
P	N	HOLLIS COLE	TAZWELL	TN	37879
P	N	HOLT'S IGA-LYNCOO	BEAN STATION	TN	37708
P	N	HOME OIL CO., INC.	ASHFORD	AL	36312
P	N	HOME SERVICE OIL CO	BARNHART	MO	63012
P	N	HOMER PARKS	SMACKOVER	AR	71762
P	N	HONEY FARMS	WORCESTER	MA	01609
P	N	HOOPER CREEK STORE	FLETCHER	NC	28732
P	N	HOOVER SHELL	CORSICANA	TX	75110
P	N	HOP-N-SAVE STORES	LAKELAND	FL	338023889
P	N	HORIZON ENERGY MKTG	SULPHUR	LA	70665
P	N	HOST ENTERPRISES INC	CAPE GIRARDEAU	MO	63702
P	N	HOUCHENS IND	BOWLING GREEN	KY	42101
P	N	HOWARD'S DRIVE-IN	ROBINSON	TX	76706
P	N	HOWLETT OIL COMPANY	CULLMAN	AL	35055
P	N	HOYTE DILLINGHAM	WEAVERVILLE	NC	28787
P	N	HRUSKA'S GROCERY STORE	ELLINGER	TX	78938
P	N	HUBER OIL OF LA INC	LAKE CHARLES	LA	70601
P	N	HUDSON FOOD STORES INC	CHIEFLAND	FL	32626
P	N	HUFFCO INC	MARYVILLE	TN	37804
P	N	HUGH CAMPBELL	NEW STANTON	PA	15672
P	N	HUNGRY HUNTER	TENNILLE	GA	31098
P	N	HURLERS GROCERY	WESTFIELD	PA	16950
P	N	HY HOLDING INC	WACO	TX	76706
P	N	HYDE'S MIDGET MARKET - JR HYDE	SHERIDAN	AR	72150
P	N	I-80 SMOKE SHOP	WADSWORTH	NV	89442
P	N	I-90 FUEL SERVICES INC	SIOUX FALLS	SD	571011025
P	N	I-95 TEXACO	LAKE PARK	FL	33403
P	N	ICE SERVICE INC	ASHEVILLE	NC	28803
P	N	ILDERTON OIL CO dba ILOCO MART	HIGH POINT	NC	27264
P	N	ILLINOIS AYERS OIL CO	QUINCY	IL	62306
P	N	IN & OUT MINI-MARTS OF LA	LAKE CHARLES	LA	70602
P	N	INDEPENDENCE STREET SMOKE SHOP	TULSA	OK	74110
P	N	INLAND ENERGY INC	INDIANAPOLIS	IN	46217
P	N	INTER CITY OIL CO INC	DULUTH	MN	55803
P	N	INTERMARK	INDIANAPOLIS	IN	46254
P	N	INTERSTATE HARDWARE INC	HENDERSONVILLE	NC	28792
P	N	INTERSTATE OIL COMPANY INC	MONTGOMERY	AL	361010967

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P	ID	Pay Name	Pay City	ST	Zip
P	N	INTERSTATE SERVICE CENTER	FREDERICKSBURG	VA	22406
P	N	INVESTING ASSOCIATES INC	COOPERTOWN	NY	13326
P	N	IRBY PUCKETT	CENTRE	AL	35960
P	N	IRON POST SMOKE SHOP	MULDROW	OK	74948
P	N	ISLAND FOOD STORES	JACKSONVILLE	FL	32256
P	N	ISSAM'S MOBIL INC	LEBANON	PA	17042
P	N	IVAN WALKER INC/DBA WALKERS	PLEASANT GROVE	UT	84062
P	N	J & B MARKET INC	PIGEON FORGE	TN	37863
P	N	J & J OIL CO	ATHENS	AL	35612
P	N	J & J STOP N SHOP	ENDICOTT	NY	13760
P	N	J & K SHELL	COSHOCTON	OH	43812
P	N	J & L	SYLVESTER	WV	25193
P	N	J & L OIL INC	VERNON HILLS	IL	60061
P	N	J & M MARKET/JAMES A PAUGH	CLARKSBURG	WV	26301
P	N	J & O FARMERS MARKET	CATLETTSBURG	KY	41129
P	N	J & R GROCERY/JENNIFER SMITH	HUMPHREY	AR	71603
P	N	J FOOD MART	JONESBOROUGH	TN	37659
P	N	J G SERVICE STATIONS INC	UNIONTOWN	PA	15401
P	N	J WADE QUINN CO	JONESBORO	AR	72401
P	N	J&J INVESTMENTS DBA MINI-MARKETS	ALAMOGORDO	NM	88310
P	N	J-MART #14	MALVERN	AR	72104
P	N	J-MART INC	VICTOR	NY	14564
P	N	JACK GRIFFITH GAS UP INC	STILLWATER	OK	74074
P	N	JACK MILLARD	WHEELING	WV	26003
P	N	JACK RABBIT FOODS	THOMASVILLE	GA	31799
P	N	JACK RABBIT MARKETS	MORRISTOWN	TN	37815
P	N	JACK STEWART	MINERAL WELLS	WV	26150
P	N	JACKIE A BEVARD	BROWNSVILLE	PA	15417
P	N	JACKS CONVENIENCE STORE LLC	FRANKLINTON	LA	70438
P	N	JACKS SMOKE SHOP - ISS	LOCUST GROVE	OK	74352
P	N	JACKSON COUNTY OIL CO	SCOTTSBORO	AL	35768
P	N	JACKSON OIL COMPANY	CLARKSVILLE	TN	37040
P	N	JACKSONS FOOD STORES	MERIDIAN	ID	83642
P	N	JACO JAMIESON LLC DBA FASTRIP FD	BAKERSFIELD	CA	93308
P	N	JAKES STORE	WHITNEY	TX	76692
P	N	JAMES A PAUGH	NUTTER FORT	WV	26301
P	N	JAMES A PAUGH/NUTTER FORT CIG	NUTTER FORT	WV	26301
P	N	JAMES BOARD PETE KATSILAMOS	POPLAR BLUFF	MO	63901

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P	ID	Pay Name	Pay City	ST	Zip
P	N	JAMES BRIUER	LENEXA	KS	66215
P	N	JAMES KINCAID	WASHINGTON	WV	26181
P	N	JAMES LISTER DBA JIMMY'S CARRY	CALEDONIA	OH	43314
P	N	JAMES MOLER - DBA CISCO STORE	PETROLEUM	WV	26161
P	N	JAMISON EXXON SHOP	JAMISON	PA	18929
P	N	JAPAMH CO INC #19	CANTON	OH	44707
P	N	JASHAM	PHILADELPHIA	MS	39350
P	N	JAVA JACKS	HEWITT	TX	76643
P	N	JAY DELANO	ST JAMES	MO	65559
P	N	JAY OIL	BAY SPRINGS	MS	39422
P	N	JB'S SMOKE SHOP	STROUD	OK	74079
P	N	JD & B INC	MARKED TREE	AR	72365
P	N	JD STREETT & COMPANY INC	MARYLAND HEIGHTS	MO	63043
P	N	JEAN P MARTIN	WARRENTON	VA	20186
P	N	JEFF LAVENDER	BOAZ	AL	35957
P	N	JEFF LOWERY	JASPER	AL	35501
P	N	JEFF MILLS	RIPLEY	TN	38063
P	N	JEFFREY WELCH	WAYNESVILLE	NC	28786
P	N	JEKS PIT STOP, INC.	FREDERICKSBURG	TX	78624
P	N	JENNIFER CORNETT	RUSHVILLE	IN	46173
P	N	JERNIGAN OIL CO/DUCK THRU	AHOSKIE	NC	27910
P	N	JERRY'S ENTERPRISES INC	EDINA	MN	55436
P	N	JET FOOD STORES OF GEORGIA INC	SANDERSVILLE	GA	31082
P	N	JET STOP	LOCKHART	TX	78644
P	N	JFM INC	JACKSON	MS	39296
P	N	JIFFY MART	MESA	AZ	85201
P	N	JIFFY MINI MART	TERRE HAUTE	IN	47811
P	N	JIM & SHELLEY EANES	ROCKDALE	TX	76567
P	N	JIM BARLEEN	ESTES PARK	CO	80517
P	N	JIM ESTES OIL CO INC	WETUMPKA	AL	36092
P	N	JIM STUCKERT	OAKLAND	PA	15213
P	N	JIM'S GULF	TROY	PA	16947
P	N	JIM'S PARTY SHOP	NORTH JACKSON	OH	44451
P	N	JIMMY JONES	DUMAS	AR	71639
P	N	JIMMY'S FOOD MART	MT VERNON	GA	30445
P	N	JIMS BEER & WINE CARRYOUT	ALLIANCE	OH	44601
P	N	JIMS BEER & WINE CARRYOUT	ALLIANCE	OH	44601
P	N	JJ'S DRIVE THRU	ZANESVILLE	OH	43701

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P	ID	Pay Name	Pay City	ST	Zip
P	N	JJJ #2	CULLODEN	WV	25510
P	N	JM DAVIS IND., INC.	MOREHEAD CITY	NC	28557
P	N	JMJ INC	HORNELL	NY	14843
P	N	JO & ED'S CARRY OUT INC	NORWALK	OH	44857
P	N	JOC STOPS	JASPER	TX	75951
P	N	JOE CLARK	LEBANON	IN	46052
P	N	JOE GROOM	OBETZ	OH	43207
P	N	JOE HANNON	TALLAHASSEE	FL	32314
P	N	JOE HANNON	TALLAHASSEE	FL	32314
P	N	JOE HUNTER	PITTSBURGH	PA	15222
P	N	JOE LYCINDA	VIPER	KY	41774
P	N	JOE ZAATAR	ELYRIA	OH	44035
P	N	JOE'S SUPERETTE DBA D&B SALES	BULAN	KY	41722
P	N	JOHN HAUGE	PINE BLUFF	AR	71611
P	N	JOHN HERR'S VILLAGE MKT	MILLERSVILLE	PA	17551
P	N	JOHN L VERNIER	DERIDDER	LA	70634
P	N	JOHN M WHEAT	COCHRAN	GA	31014
P	N	JOHN MC ADAM	ROCHESTER	NY	14623
P	N	JOHN NAIFEH	COVINGTON	TN	38019
P	N	JOHN S THOMPSON dba JT ENTERPRIS	PLEASANT HILL	CA	94523
P	N	JOHN VANCE	HAYMARKET	VA	22069
P	N	JOHN'S FOOD MART	AUSTIN	TX	78741
P	N	JOHNNY'S MARKET	LIMESTONE	TN	37681
P	N	JOHNS EXXON	KING OF PRUSSIA	PA	19406
P	N	JOHNSON & JOHNSON INC	MADISON	FL	32341
P	N	JOHNSON OIL CO INC	COLUMBUS	IN	47202
P	N	JOHNSON OIL CO.	GAYLORD	MI	49735
P	N	JOHNSON OIL COMPANY	ROCK FALLS	IL	61071
P	N	JOLLEY ASSOCIATES	ST ALBANS	VT	05478
P	N	JONES OIL CO INC DBA MR. ROY'S	SELMA	AL	36701
P	N	JONES SMOKE SHOP	BATH	NY	14810
P	N	JOPO INC dba ZIP TRIP	SPOKANE	WA	99202
P	N	JORDAN'S DRIVE THRU	WADSWORTH	OH	44281
P	N	JOYCE POWELL/POWELLS GEN STORE	WASHINGTON	WV	26181
P	N	JOYCE'S COUNTRY VARIETY	W SWANZEY	NH	03469
P	N	JP MILLS INC	TUPELO	MS	38801
P	N	JR FOOD MART OF ARKANSAS	LITTLE ROCK	AR	72211
P	N	JR MORGAN OIL CO	CARROLLTON	GA	30117

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P	ID	Pay Name	Pay City	ST	Zip
P	N	JR'S COUNTRY STORES	PUEBLO	CO	81003
P	N	JUDGE'S HANDY MART	LOGANSPORT	LA	71049
P	N	JUDS FOOD STORES	BRENHAM	TX	778340769
P	N	JUPITER SHELL	JUPITER	FL	33458
P	N	JUST CIGARETTES	DYER	IN	46311
P	N	JUSTICE TO GO MARKET	ROGERSVILLE	TN	37857
P	N	JW TOBACCO DBA TOBACCO DISCOUNTS	COVINGTON	LA	70433
P	N	JW WHITTEN	FLATWOODS	KY	41139
P	N	K & B KWIK STOP INC	POCATELLO	ID	83201
P	N	K & F INC	ABBEVILLE	LA	70510
P	N	K & K FOOD MART	BROCKPORT	NY	14420
P	N	K & L BAR INC	TOMS BROOK	VA	22660
P	N	K & L CONVENIENCE	WHITNEY	TX	76692
P	N	K & M GROC	BRENHAM	TX	77833
P	N	K & S MARKET	MORRISTOWN	TN	37815
P	N	K & W RESTAURANT & CARRYOUT INC	LANCASTER	OH	43130
P	N	K H MATTIS	FLUSHING	MI	48433
P	N	K KOUNTRY-KIRSHMAN OIL	BELLE GLADE	FL	33430
P	N	KAHLER'S EXXON	YORK	PA	17402
P	N	KAMANI MANAGEMENT CORP	FAIRLESS HILLS	PA	19030
P	N	KAMP & ASSOCS INC/QUICK SHOP	LONGVIEW	WA	98632
P	N	KANE LIQUID FUELS, INC DBA SPARK	KANE	PA	16735
P	N	KANGAROO INC	GAINESVILLE	GA	30501
P	N	KANGAROOS OUTBACK POST	ASHEVILLE	NC	28806
P	N	KANZA TRAVEL PLAZA	BRAMAN	OK	74632
P	N	KARCO INC	OKAWVILLE	IL	62271
P	N	KATHY BUSSARD	IRWIN	PA	15642
P	N	KATO INC	ROCHESTER	MN	55903
P	N	KAW TOBACCO	NEWKIRK	OK	74647
P	N	KC GROUP TOBACCO RANCH	KNOXVILLE	TN	37917
P	N	KEENAN DART	DIGHTON	KS	67839
P	N	KEG DBA DAIRY 224	LOWELLVILLE	OH	44436
P	N	KELLER CAPITAL INC	MOGADORE	OH	44260
P	N	KELLEY-WILLIAMSON COMPANY	ROCKFORD	IL	61104
P	N	KELLY'S CITGO	MANASSAS	VA	22110
P	N	KELLY'S CORNER STORE	COLLEGE STATION	TX	77840
P	N	KEN DILL	LONOKE	AR	72086
P	N	KEN KAMINGA	AUBURNDALE	FL	33823

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P	ID	Pay Name	Pay City	ST	Zip
P	N	KEN-JO MARKETS	MARYVILLE	TN	37801
P	N	KENDRICKS CORNER	SALEM	OH	44460
P	N	KENNY'S THRIFTWAY	HUNTINGTON	WV	25701
P	N	KENSINGTON MARKET	KENSINGTON	OH	44427
P	N	KENT OIL INC	MIDLAND	TX	79707
P	N	KENTUCKY OIL/CARDINAL COUNTRY ST	BETSY LAYNE	KY	41605
P	N	KEOWEE STORE	SENECA	SC	29672
P	N	KERR'S SALES & SERVICE	WARDENSVILLE	WV	26851
P	N	KEVIN HAZELWOOD	POWDERLY	KY	42367
P	N	KEVIN HERSHA	KNOXVILLE	TN	37849
P	N	KEVIN MUST	WALKER VALLEY	NY	12588
P	N	KHIZER BAWAHAB	BRYAN	TX	77803
P	N	KHOTIAR CORP	COCHECTON	NY	12726
P	N	KICKAPOO CORNER	GLOSTER	LA	71030
P	N	KIEL BROTHERS OIL INC	COLUMBUS	IN	47202
P	N	KIM BROWN	VALLEY MILLS	TX	76689
P	N	KING & KING ENT INC	KANSAS CITY	MO	64119
P	N	KING CUTRATE TOBACCOS INC	BECKLEY	WV	25801
P	N	KINGS E-Z STOP	TAHLEQUAH	OK	74464
P	N	KINGSPOINT MARKET	MORRISTOWN	TN	37816
P	N	KISTLER GROCERY	KISTLER	WV	25628
P	N	KISTLER GROCERY	KISTLER	WV	25628
P	N	KIVETT OIL CO	STATESVILLE	NC	28687
P	N	KJ'S CONOCO	GREENBRIER	AR	72058
P	N	KNAPP OIL CO	XENIA	IL	62899
P	N	KNOXVILLE CARRY OUT	TORONTO	OH	43964
P	N	KOCOLENE MARKETING CO INC	SEYMOUR	IN	47274
P	N	KOHLER & HECKER INC	ZANESVILLE	OH	43701
P	N	KOM PAK I	PARKERSBURG	WV	26101
P	N	KOMPAK	PARKERSBURG	WV	26101
P	N	KONVIE MART	YORK	PA	17403
P	N	KOOL KAT TOBACCO	KNOXVILLE	TN	37931
P	N	KOUNTRY KORNER	ROBERTSVILLE	OH	44670
P	N	KOUNTRY KUBBARD	HORSESHOE	NC	28742
P	N	KOUNTRY KUBBARD	CLANTON	AL	35046
P	N	KOUNTY LINE CONVENIENCE	ARDEN	NC	28704
P	N	KOWETA SMOKE SHOP	COWETA	OK	74429
P	N	KRAUSE GENTLE CORP	W DES MOINES	IA	50266

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P	ID	Pay Name	Pay City	ST	Zip
P	N	KRIS SELVIDGE	KNOXVILLE	TN	37849
P	N	KRIST OIL COMPANY	IRON RIVER	MI	49935
P	N	KRUPP OIL CO INC	TUSCALOOSA	AL	35403
P	N	KWIK KING FOOD STORES INC	OCALA	FL	34470
P	N	KWIK KING FOODS	TORONTO	OH	43964
P	N	KWIK STOP	FLATONIA	TX	78941
P	N	KWIK STOP	KOSSE	TX	76653
P	N	KWIK STOP #3	EATONTON	GA	31024
P	N	KWIK STOP FOOD STORES	N PLATTE	NE	69103
P	N	KWIK WAY INC	BILLINGS	MT	59104
P	N	L & C ENTERPRISE	MORRISTOWN	TN	37816
P	N	L & D ENTERPRISES 97 LTD	BRUSH PRAIRIE	WA	98606
P	N	L & J COUNTRY STORE	WEARE	NH	03281
P	N	L & J DISCOUNT TOBACCO #4	KINGSPORT	TN	37663
P	N	L & L FOOD STORES INC	NASHVILLE	NC	27856
P	N	L & L OIL CO INC	MOUNTAIN HOME	AR	72653
P	N	L & M MARKET	AUGUSTA	WV	26704
P	N	L&R SMOKESHOP	CLARKSVILLE	AR	72830
P	N	LA DISCOUNT TOBACCO CO INC	SHREVEPORT	LA	71106
P	N	LA DRIVE THRU MARKET	CROOKSVILLE	OH	43731
P	N	LADDS SPEEDY MARKET	HUNTINGTON	WV	25701
P	N	LAFAYETTE MARKET	MEDINA	OH	44256
P	N	LAIRD INC	MCKEESPORT	PA	15132
P	N	LAIRD INC	MCKEESPORT	PA	15132
P	N	LAKERS FOOD MARKET	DIAMOND	OH	44412
P	N	LAKESIDE SPORT SHOP	CORTLAND	OH	44410
P	N	LAKEVIEW MINI MART	BATH	NY	14810
P	N	LAMAR CHATHAM	TUSCALOOSA	AL	35404
P	N	LAND MART	JEMISON	AL	35085
P	N	LANDHOPE FARMS INC	KENNETT SQUARE	PA	19348
P	N	LANDMARK INDUSTRIES INC	HOUSTON	TX	77042
P	N	LANDON'S CEDAR LODGE SERVICE INC	CANTON	PA	17724
P	N	LARRY D CATHEY	CHINA SPRING	TX	76633
P	N	LARRY KUYKENDALL	NEWTON	IL	62448
P	N	LARRY TAYLOR/TAYLOR'S AUTO INC	FREDERICKTOWN	PA	15333
P	N	LARSON CITGO INC	GREER	SC	29650
P	N	LAST STOP INC	WACO	TX	76706
P	N	LATCH ENTERPRISES DBA CASH N DAS	JASPER	TX	75951

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P	ID	Pay Name	Pay City	ST	Zip
P	N	LEADBETTER'S SUPER STOP	BANGOR	ME	04401
P	N	LEE ANDERSON CO	BRENHAM	TX	77834
P	N	LEE HERSHA	OAK RIDGE	TN	37830
P	N	LEE KNIFFIN	BLACKFOOT	ID	83221
P	N	LEGEND VENTURES INC	UTICA	OH	430800605
P	N	LENAPE TRADING POST	DEWEY	OK	74029
P	N	LENORA HERNANDEZ	OAK RIDGE	TN	37830
P	N	LEONARD POWELL & CARLTON COX	GREENSBORO	NC	27405
P	N	LEVITOWN NEWS	FAIRLESS HILLS	PA	19030
P	N	LEWIS DRUG	SIOUX FALLS	SD	57105
P	N	LEWIS GROC	HEMPSTEAD	TX	77445
P	N	LHB LIMITED	CAMP HILL	PA	17011
P	N	LIBERTY EXXON	LIBERTY	PA	14930
P	N	LIBERTY HILARD FOODS	LIBERTY	OH	44505
P	N	LIBERTY MARATHON	LOUISVILLE	OH	44641
P	N	LIL GENERAL INC	WOONSOCKET	RI	02895
P	N	LIL INDIAN SMOKE SHOP	JAY	OK	74346
P	N	LIL RED HEN CONVENIENCE STORES	TROY	PA	16947
P	N	LIMESTONE COVE MKT	UNICOL	TN	37692
P	N	LINCOLN LAND OIL	SPRINGFIELD	IL	62703
P	N	LINCOLN SHELL SERVICE	PAINESVILLE	OH	44077
P	N	LINDSAYS MKT	DANDRIDGE	TN	37725
P	N	LION PHARMACY	RED LION	PA	17356
P	N	LIONS DEN FOOD MART	HALEYVILLE	AL	35565
P	N	LISA PEEBLES	WEAVERVILLE	NC	28787
P	N	LISI'S TEXACO'S	ELIZABETHVILLE	PA	17023
P	N	LITCO PETRO	TUPELO	MS	38802
P	N	LITITZ PIKE INC	LANCASTER	PA	17601
P	N	LITTLE AL'S OIL LLC	CLAYTON	AL	36016
P	N	LITTLE BEAR MARKET	CIRCLEVILLE	OH	43113
P	N	LITTLE BRITAIN STORE INC	QUARRYVILLE	PA	17566
P	N	LITTLE GENERAL STORES	ANDERSON	SC	29621
P	N	LITTLE GENERAL STORES INC	BECKLEY	WV	25802
P	N	LITTLE SAINTS	JENSEN BEACH	FL	34958
P	N	LITTLE TRIANGLE	SEALY	TX	77474
P	N	LITTLE'S CONVENIENCE	RICHMOND	VA	23224
P	N	LITTLESTOWN EXXON SERVICENTER IN	LITTLESTOWN	PA	17340
P	N	LIVERMAN'S GROCERY, INC.	JUNCTION	TX	76849

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P	ID	Pay Name	Pay City	ST	Zip
P	N	LO-BOY OIL	MANCHESTER	OH	44319
P	N	LOAF 'N JUG	PUEBLO	CO	81001
P	N	LOCO INC	GRAND JUNCTION	CO	81503
P	N	LODI MARKET	LODI	OH	44254
P	N	LOEDER OIL	LAKE MILLS	WI	53551
P	N	LONE STAR ICE & FOOD STORES	SAN ANTONIO	TX	78210
P	N	LONE STAR UNLIMITED	ABILENE	TX	79608
P	N	LORRAINE AMMA	WHITE OAK	PA	15131
P	N	LOVEDALE ISALYS	ELIZABETH	PA	15037
P	N	LOW BOB'S #68	GREENSBURG	IN	47240
P	N	LOWER STATE MKTG INC DBA E-Z SHP	BAMBERG	SC	29003
P	N	LOWES FOOD STORES INC	WINSTON SALEM	NC	271144908
P	N	LOY FORD STORES INC	BUCKEYE	AZ	85047
P	N	LOYAL SHAWNEE SMOKE SHOP	VINITA	OK	74301
P	N	LUCKY 13 INC	MOULTRIE	GA	31768
P	N	LUCKY LADY STORES	FT WORTH	TX	76016
P	N	LUCKY SEVEN	VIRGINIA	MN	55792
P	N	LUCKY'S	BELLVILLE	TX	77418
P	N	LUKE OIL-LORI HUTCHENS	HOBART	IN	46342
P	N	LULU INC	MAPLE HTS	OH	44137
P	N	LUTTREL OIL DBA CIMARRON TVL PLZ	STILLWATER	OK	74075
P	N	LYNDON'S MARKET	FREEPORT	PA	16229
P	N	LYNN'S COUNTRY STORE	HAVANA	FL	32333
P	N	LYNNE SELF SERVE	ELKINS	WV	26241
P	N	M AND K FOODS	GORDON	GA	31031
P	N	MACK BYRD	HUNTSVILLE	TN	37756
P	N	MADDIES INC	BOSTON	MA	02135
P	N	MADHUS SERVICE STATION	YORK	PA	17403
P	N	MAGGIORES DRIVE THRU	CANTON	OH	44708
P	N	MAHONING VALLEY DAIRY	BELOIT	OH	44609
P	N	MAIN ST MARKET	SPENCER	OH	44275
P	N	MAIN STREET DELI & GROCERY	MARSHALL	VA	20115
P	N	MAJOR MART INC DBA B-QUICK FD ST	STARKVILLE	MS	39760
P	N	MANCHESTER MARKETING INC	RICHMOND	VA	23235
P	N	MANLEY'S MIGHTY MARTS LLC	BINGHAMTON	NY	13905
P	N	MAPCO EXPRESS INC	NASHVILLE	TN	37217
P	N	MARATHON	NEWTON FALLS	OH	44444
P	N	MARATHON FLINT OIL COMPANY	FLINT	MI	48503

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	MARITIME FARMS/ENERGY	ROCKLAND	ME	04841
P	N	MARK A KILDOU	MARION	OH	43302
P	N	MARK MINTER	STAMPS	AR	71860
P	N	MARK ROTUNO	VERMILLION	OH	44089
P	N	MARK SWAIM	BAKERSFIELD	CA	93304
P	N	MARK-KERRY MEHWALD	HINCKLEY	OH	44233
P	N	MARKET BASKET	PORTAGE	WI	53901
P	N	MARKET PLACE OF TEXAS	BEAUMONT	TX	77707
P	N	MARKS CARRY OUT	WELLSBURG	WV	26070
P	N	MARQUITA CHANDLER	PULASKI	TN	38478
P	N	MARR INC	STATESVILLE	NC	28687
P	N	MARSH PETROLEUM CO	GREENEVILLE	TN	37745
P	N	MARSHALL BROS INC	WEEDSPORT	NY	13166
P	N	MARTIN & BAYLEY INC	CARMI	IL	62821
P	N	MARTIN FOOD MARTS INC	HALEYVILLE	AL	355651000
P	N	MARTIN OIL CO	JACKSONVILLE	FL	32247
P	N	MARTIN'S 1-STOP INC	LEBANON	MO	65536
P	N	MASONBORO COUNTRY STORE INC	WILMINGTON	NC	28403
P	N	MATHERLY OIL CO	CABOOL	MO	65689
P	N	MATTHEW SCHULTE	JEFFERSON CITY	MO	65109
P	N	MATTHEWS OIL	JONESBORO	AR	72401
P	N	MATUS SUPERMARKET	CALDWELL	TX	77836
P	N	MAUPINS EXXON	ELIZABETHTON	TN	37643
P	N	MAVERICK COUNTRY STORES INC	NORTH SALT LAKE	UT	84054
P	N	MAVERICK MINI MART	CUSHING	OK	74023
P	N	MAX'S DISCOUNT TOB	MINDEN	LA	71055
P	N	MAXI-PIERCE GROCERY	ABBEVILLE	LA	70510
P	N	MAYFIELD OIL COMPANY	CENTREVILLE	AL	35042
P	N	MAYHUGHS STORE	NEW BALTIMORE	VA	20187
P	N	MAYHUGHS STORE	NOKESVILLE	VA	20181
P	N	MAZE ENTERPRISES-RICHARD MAZE	ELIZABETH	WV	26143
P	N	MBC PARTNERS	KNOXVILLE	TN	37927
P	N	MC CALLIE'S PHILLIPS CC INC	CARLISLE	AR	72024
P	N	MC CANN'S TOP OF THE MOUNTAIN	HOT SPRINGS	AR	71910
P	N	MC CLINTOCK MOBIL	TEMPE	AZ	85284
P	N	MC COMAS SELF SERVE	SPENCER	OH	44275
P	N	MC DOWELL GARDEN HARDWARE INC	MARION	NC	28752
P	N	MCGUIRE FOOD MARTS INC	MOBILE	AL	36660

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P	ID	Pay Name	Pay City	ST	Zip
P	N	MCKENZIES TOBACCO SHOP	ZACHARY	LA	70791
P	N	MCKNIGHT OIL CORPORATION	GALAX	VA	24333
P	N	MCLEOD'S #40	DUBLIN	GA	31040
P	N	MCMAHON'S QUIK STOP INC	FENTON	MI	48430
P	N	MCPHERSON OIL CO	BIRMINGHAM	AL	35209
P	N	MEADOWBROOK RESORT INC	WAYNESVILLE	NC	28786
P	N	MEDINA SHELL	MEDINA	OH	44256
P	N	MEEKER TOBACCO SHOP	MEEKER	OK	74855
P	N	MEGA MARTS	EAU CLAIRE	WI	54701
P	N	MEHTA BROS INC	LURAY	VA	22835
P	N	MEIER OIL SERVICE INC	ASHKUM	IL	60911
P	N	MEIJER INC	GRAND RAPIDS	MI	49544
P	N	MEKESIWA	CUSHING	OK	74023
P	N	MELISSA GOZA	TEXARKANA	AR	71854
P	N	MEMPHIS SMOKE HOUSE INC	BROOKLYN	OH	44144
P	N	MERRIES FOODS	AURORA	IN	47001
P	N	MERRITT OIL CO	MOBILE	AL	36652
P	N	METRO PETROLEUM CO INC	JACKSON	MS	392363607
P	N	MEYER OF TEMPE INC	TEMPE	AZ	85281
P	N	MEYER TOWN PUMP	TEMPE	AZ	85282
P	N	MEYERS EXPRESS MART	DUNLAP	IL	61525
P	N	MFA PETROLEUM CO	COLUMBIA	MO	65201
P	N	MFG ENTERPRISE INC/DBA SWIFTY	SCOTTSBORO	AL	35768
P	N	MG OIL	RAPID CITY	SD	57709
P	N	MG OIL INC	NAPLES	FL	34114
P	N	MIC SMOKE SHOP	MUSKOGEE	OK	74401
P	N	MICHAEL BOSSI	CHESTERFIELD	MO	63006
P	N	MICHAEL FOTI	GILBERT	AZ	85234
P	N	MICHAEL WARE	BATTLE CREEK	MI	49015
P	N	MICHAEL'S MINI MART	BRUNSWICK	OH	44212
P	N	MICHEALS MARKET	SPINNERSTOWN	PA	18961
P	N	MICHELLE TAULHER	WARREN	AR	71671
P	N	MICK DOERR	CUBA	MO	65453
P	N	MICK DOERR	CUBA	MO	65453
P	N	MICKEY MART	GREENWICH	OH	44837
P	N	MICKEY'S ENTERPRISES INC	KILLEEN	TX	76541
P	N	MID VALLEY OIL CO INC	NEW WINDSOR	NY	12553
P	N	MIDDLETON OIL CO	GREENVILLE	AL	36037

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P	ID	Pay Name	Pay City	ST	Zip
P	N	MIDEI SERVICE INC	BRILLIANT	OH	43913
P	N	MIDLAND SMOKE SHOP	FT SMITH	AR	72904
P	N	MIDWAY GROCERY	TAHLEQUAH	OK	74464
P	N	MIDWAY OIL CORP	RUTLAND	VT	05701
P	N	MIDWAY SUPERMARKET INC	HEGINS	PA	17938
P	N	MIDWEST ENERGY/AMERIMART	CAPE GIRARDEAU	MO	63701
P	N	MIDWEST PETROLEUM COMPANY	ST LOUIS	MO	631432635
P	N	MIKE HILL	SPRINGDALE	AR	72764
P	N	MIKES MARKET	HUNTINGTON	WV	25705
P	N	MILL AVE MOBIL	TEMPE	AZ	85281
P	N	MILL CREEK DELI	YOUNGSTOWN	OH	44511
P	N	MILLER & HOLMES INC	ST PAUL	MN	55101
P	N	MILLER MART	NORFOLK	VA	23504
P	N	MILLER'S FOOD MARKET	BURNET	TX	78611
P	N	MILLIGAN GRO	MILLIGAN COLLEGE	TN	37682
P	N	MILTONS BP	MIDDLEBOURNE	WV	26149
P	N	MINI GIANTS #7	PARKERSBURG	WV	26101
P	N	MINI MART INC	CASPER	WY	82602
P	N	MINIT MART #9	CANAL FULTON	OH	44614
P	N	MINIT MART FOODS, INC.	BOWLING GREEN	KY	42102
P	N	MINIT SHOP - OAKHURST	CROSSETT	AR	71635
P	N	MINOR MARKET	CHURCH HILL	TN	37642
P	N	MINUTE STOP INC	BAY MINETTE	AL	36507
P	N	MISSISSIPPI OIL INC	HATTIESBURG	MS	39404
P	N	MMHT INC	FITZGERALD	GA	31750
P	N	MO FUELS INC SUNOCO	TREVOSE	PA	19047
P	N	MOBIL GAS-N-GO	STERLING	VA	20164
P	N	MOBIL MART FRANCHISES	STOUGHTON	MA	02072
P	N	MOBIL OIL CORP	FAIRFAX	VA	22037
P	N	MOHAN SINGH	PHOENIX	AZ	85013
P	N	MOHSIN ENTERPRISES INTL	BRENHAM	TX	77833
P	N	MONTOUR BEVERAGE	MONTOURSVILLE	PA	17754
P	N	MONTVILLE COUNTRY STORE INC	MONTVILLE	OH	44064
P	N	MONUMENT OIL CO	GRAND JUNCTION	CO	81505
P	N	MOORE OIL CO INC	MANNING	SC	29102
P	N	MOORE OIL CO INC (STOP-N-SAVE)	MONROE	LA	71201
P	N	MOORE'S C-STORES LTD	WINFIELD	AL	35594
P	N	MORELAND INC	STARKVILLE	MS	39759

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P	ID	Pay Name	Pay City	ST	Zip
P	N	MORGANTOWN CIGARETTE & TOBACCO O	BOWLING GREEN	KY	42101
P	N	MORISKY INC	BROOK PARK	OH	44142
P	N	MORRIS CORP	RIDGELAND	MS	39157
P	N	MORRIS OIL	SPRINGFIELD	MO	65802
P	N	MOUNTAIN EMPIRE OIL CO/ROADRUNNE	JOHNSON CITY	TN	37601
P	N	MOUNTAIN VIEW CONVENIENCE	BIGLERVILLE	PA	17307
P	N	MOUNTAINEER FOOD STORE	MARS HILL	NC	28754
P	N	MOUNTAINEER MARTS J & J MART INC	BUCKHANNON	WV	26201
P	N	MOWERY'S CONVIENCE STORES	STRASBURG	VA	22657
P	N	MOYLE PETROLEUM/COMMON CENTS FD	RAPID CITY	SD	57709
P	N	MR G'S LIQUOR	CALIFORNIA	MO	65018
P	N	MR GAS	MARYVILLE	TN	37802
P	N	MR HENRY'S FOOD MARTS	OPP	AL	36467
P	N	MR JIM'S	MANOR	TX	78653
P	N	MR MIKE'S MINI MARTS	LEOMINSTER	MA	02138
P	N	MR PETAL	CLEWISTON	FL	33440
P	N	MR RED COLEMAN	DALLAS	TX	75235
P	N	MR T'S - BOB POYNOR	CARDWELL	MO	63829
P	N	MR TOBACCO SMOKE SHOP	POTEAU	OK	74953
P	N	MR ZIP INC OF TENNESSEE	CLEVELAND	TN	37312
P	N	MR. UNLEADED	LAKEPARK	GA	31636
P	N	MT WERNER CONVENIENCE LLC	STEAMBOAT SPRINGS	CO	80488
P	N	MTP DBA MISSY'S MARKET	MILL CREEK	WV	26280
P	N	MUDZAID RESAD	DEFOREST	WI	53532
P	N	MUNCHIES FOOD SHOP	PT ALLEGANY	PA	16743
P	N	MUNRO PETROLEUM	BILOXI	MS	39530
P	N	MUNSTER SMOKE SHOP	MUNSTER	IN	46321
P	N	MUSSER'S INC	QUARRYVILLE	PA	17566
P	N	MVP INC	MC KEESPORT	PA	15135
P	N	MW SEWALL	BATH	ME	04530
P	N	MY-T-MART/ALICO INC	EDMOND	WA	98026
P	N	MYER'S MOBIL	SYRACUSE	NY	13206
P	N	MYERS DISCOUNT CENTER	HANNA CITY	IL	61536
P	N	MYRICK'S GROCERY	BUNNELL	FL	32110
P	N	MYRNA TROIANO	REMINGTON	VA	22734
P	N	N & N GROCERY/MIONES MKT	HARRISBURG	PA	17112
P	N	N ROAN CHEVRON	JOHNSON CITY	TN	37601
P	N	NABE ENTERPRISES INC	POLAND	OH	44514

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P	ID	Pay Name	Pay City	ST	Zip
P	N	NAD JAHAN	WACO	TX	76706
P	N	NADA GROC	NADA	TX	77460
P	N	NANCY ADAMS	TEMPE	AZ	85281
P	N	NANCY SEESE	CUYAHOGA FALLS	OH	44223
P	N	NATHAN KHAMO	AVONDALE	AZ	85323
P	N	NATIONAL OIL & GAS DISTRIBUTORS	VERO BEACH	FL	32966
P	N	NATIVE AMERICAN SMOKE SHOP	WESTVILLE	OK	74965
P	N	NATIVE AMERICAN/TULSA	BROKEN ARROW	OK	74012
P	N	NBS INC DBA SMOKER FRIENDLY	PARKERSBURG	WV	26101
P	N	NE TOBACCO	WOBURN	MA	01801
P	N	NEIGHBORHOOD CONVENIENCE INC	GLOUCESTER	VA	236010626
P	N	NEIGHBORHOOD CONVENIENCE INC	GLOUCESTER	VA	236010626
P	N	NELLA OIL	AUBURN	CA	95602
P	N	NEU-MART	INGRAM	TX	78025
P	N	NEW BALTIMORE SHELL	WARRENTON	VA	20187
P	N	NEW HOPE MOBIL	NEW HOPE	PA	18938
P	N	NEW MARKET BP	NEW MARKET	TN	37820
P	N	NEW MARKET GRO & VIDEO	NEW MARKET	TN	37820
P	N	NEW STANTON EXXON	NEW STANTON	PA	15672
P	N	NEW WATERFORD ENTERPRISES	E PALESTINE	OH	44413
P	N	NEW WATERFORD MGMT GROUP	NEW WATERFORD	OH	44445
P	N	NEWS LEASING AND DEVELOPMENT	BUTLER	GA	31006
P	N	NEWSOME OIL CO	ROANOKE RAPIDS	NC	27870
P	N	NEWTON FALLS IGA	NEWTON FALLS	OH	44444
P	N	NEWTONS	SHINGLEHOUSE	PA	16748
P	N	NEXT DOOR STORE	MT PLEASANT	MI	48858
P	N	NICE-N-EASY GROCERY SHOPPES INC	CANASTOTA	NY	13032
P	N	NICK FEERASTA	EAST PEORIA	IL	61611
P	N	NICK SARSOUR	MARSHALL	VA	22115
P	N	NICK'S SERVICE STATION	WASHINGTON	PA	15301
P	N	NICK'S TOBACCO SHOP	CLARENDON	AR	72029
P	N	NICKMAN'S DRUG INC	LEMONT FURNACE	PA	15456
P	N	NICKS DISCOUNT TOBACCO SHOP	LAFAYETTE	LA	70503
P	N	NICKS MARKET/NICK DAVENPORT	MORRISTOWN	TN	37813
P	N	NIEBRUGGE OIL CO	EFFINGHAM	IL	62401
P	N	NIMOCK'S OIL CO INC	FORREST CITY	AR	72335
P	N	NOCO EXPRESS	TONAWANDA	NY	14150
P	N	NOEL POWELL	ATOKA	OK	74525

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P	ID	Pay Name	Pay City	ST	Zip
P	N	NORM'S MINIT MARTS	NAPLES	NC	28760
P	N	NORTH FEDERAL HEIGHTS TEXACO	FEDERAL HEIGHTS	CO	80221
P	N	NORTH MAIN SMOKE SHOP	MC ALESTER	OK	74501
P	N	NORTHEAST OIL & GAS CO INC	MONROE	LA	71201
P	N	NORTHERN EXPRESS-LOCKARD CO	INDIANA	PA	15701
P	N	NORTHRUP OIL CO INC	CHILLICOTHE	IL	61523
P	N	NORTHSIDE SUPER STOP	MENA	AR	71953
P	N	NUCO DISCOUNT	HAMMOND	IN	46320
P	N	NUGGET OIL CO	CRESTVIEW	FL	32536
P	N	O-GAH-PAH	MIAMI	OK	74354
P	N	OAK HILL SHELL	FAYETTEVILLE	WV	25840
P	N	OCI INC ITA GRAFT OIL	CONNELLSVILLE	PA	15425
P	N	OCONNOR OIL	FOND DU LAC	WI	54935
P	N	ODESSA CORP	S BURLINGTON	VT	05407
P	N	OHIO FUEL STOP	SULLIVAN	OH	44880
P	N	OIC SMOKE SHOP	OKMULGEE	OK	74447
P	N	OIL SPRINGS CORNER	KILLBUCK	NY	14748
P	N	OKEE DOKEE MARKETS	GREENEVILLE	TN	37743
P	N	OKEMAH SMOKE SHOP	OKEMAH	OK	74859
P	N	OLD CLINTON GAS	GRAY	GA	31032
P	N	OLD SOUTH TOBACCO	STROUD	OK	74079
P	N	OLD TAVERN MERCHANTILE INC	THE PLAINS	VA	22171
P	N	OLSON OIL CO	SIOUX FALLS	SD	57106
P	N	OMAR ATWAY	JUPITER	FL	33458
P	N	OMARS EXXON	CATLETTSBURG	KY	41129
P	N	ONE STOP	JOHNSON CITY	TN	37601
P	N	ONE STOP #6	DUBLIN	TX	76446
P	N	ONE STOP ASHLAND	WARREN	OH	44483
P	N	ONE STOP CENTRAL	LEBANON	MO	65536
P	N	ONE STOP CITGO	CORSICANA	TX	75151
P	N	ONE STOP FOOD STORES INC	PLANO	TX	75074
P	N	ONE STOP GROC	THORNDALE	TX	76577
P	N	ONE STOP INC	AUSTIN	AR	72007
P	N	ONO TRUCK CENTER	ONO	PA	17077
P	N	OPEN PANTRY FOOD MARTS OF WI	RACINE	WI	53403
P	N	OPM INC DBA SPEED EZE	JOPLIN	MO	64801
P	N	ORLOSKI'S QUICK MARTS	WILKES-BARRE	PA	18703
P	N	OSAGE TRADING CO	PONCA CITY	OK	74604

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P	ID	Pay Name	Pay City	ST	Zip
P	N	OSAMA ALSEPAI	PHOENIX	AZ	85004
P	N	OSAN PETROLEUM	MACON	GA	31203
P	N	OSCEOLA BIG M	OSCEOLA	PA	16942
P	N	OSI LTD LIABILITY CO DBA ONE STP	CHARLESTON	WV	25322
P	N	OTOE TRADING	RED ROCK	OK	74651
P	N	OTTO'S SAAD MOBIL	SHREVEPORT	LA	711052116
P	N	OU PON AHLUNG SMOKE SHOP #1	OCHELATA	OK	74051
P	N	OVERMAN'S TEXACO	BLYTHEVILLE	AR	72315
P	N	OWG TEXACO FOOD MART	ORLANDO	FL	32835
P	N	OXFORD CONVIENT MART	OXFORD	IN	479718601
P	N	OXMOOR STATION TEXACO	BIRMINGHAM	AL	35209
P	N	P & M ENTERPRISES	SYLVESTER	GA	31791
P	N	P & R UNLIMITED	BAKERSVILLE	NC	28705
P	N	P-N-J GROCERY	MC DADE	TX	78650
P	N	PAIR ENTERPRISES INC	WINNIE	TX	77665
P	N	PAK-N-GO	CORSICANA	TX	75110
P	N	PALISADE OIL CO	GARRETSON	SD	57030
P	N	PALKO'S MILL CREEK SERVICE	YOUNGSTOWN	OH	44511
P	N	PAM-RIK INC AMOCO FOOD SHOP	CAPON BRIDGE	WV	26711
P	N	PAM-RIK LC APPLE MNT CHEVRON	CAPON BRIDGE	WV	26711
P	N	PANTRY QUIK	HAZELTON	PA	18201
P	N	PAR MAR	MARIETTA	OH	45750
P	N	PARK MINI MART	NILES	OH	44446
P	N	PARMAN OIL	NASHVILLE	TN	37208
P	N	PAT'S PETRO FOOD STORE	CAIRO	GA	31728
P	N	PATRICIA T SMITH	CHARLOTTESVILLE	VA	22903
P	N	PAUL DHALIWAL	KINGSPORT	TN	37660
P	N	PAUL HUCKABEE	TEXARKANA	AR	71854
P	N	PAUL J COX-COX OIL COMPANY INC	BOLIVAR	MO	65613
P	N	PAUL'S SUNOCO	WRIGHTSVILLE	PA	17368
P	N	PAULS EXXON	PT PLEASANT	WV	25550
P	N	PAULS MARKETS	HOMEDALE	ID	83628
P	N	PAXSON OIL CO INC	SAGINAW	MI	48602
P	N	PAYLESS OIL COMPANY INC	TAMPA	FL	33614
P	N	PDQ FOOD STORES INC	MIDDLETON	WI	53562
P	N	PEARL & VERNON INC	ST CLOUD	FL	34772
P	N	PEEK & MORRIS INC	STATESBORO	GA	30458
P	N	PEL STATE OIL CO	SHREVEPORT	LA	71106

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P	ID	Pay Name	Pay City	ST	Zip
P	N	PEN-DAY ENT INC	CLEARBROOK	VA	22624
P	N	PEN-MART INC	DALLAS	PA	18612
P	N	PENZ-MART	SHREVEPORT	LA	71109
P	N	PEOPLES FOODSTORE INC	JOHNSON CITY	TN	37601
P	N	PEPCO	PASCAGOULA	MS	39567
P	N	PERRY MART FOOD CORP	CANTON	OH	44706
P	N	PERVEZ ALI	WACO	TX	76710
P	N	PESTER MARKETING INC	AURORA	CO	80014
P	N	PETER CAPALDI	MIDDLEFIELD	OH	44062
P	N	PETR-ALL PETROLEUM CORP/EXPRESS	DE WITT	NY	13214
P	N	PETRO CONCEPTS MOBIL	SOUDERTON	PA	18964
P	N	PETRO EXPRESS	CHARLOTTE	NC	28217
P	N	PETRO TRAVEL CENTER	PORTAGE	WI	53901
P	N	PETROL PANTRY #1	COLUMBUS	GA	31909
P	N	PETROL PANTRY #10	COLUMBUS	GA	31904
P	N	PETROLEUM SALES INC-BUD'S	DECATUR	AL	35601
P	N	PETROTEX FUELS INC	BEAUMONT	TX	77726
P	N	PHAR MOR	CLEVELAND	OH	441012199
P	N	PHIL'S GROCERY	MAGGIE VALLEY	NC	28751
P	N	PHILLIP RUSSEL	THOMASVILLE	GA	31792
P	N	PHILLIPS 66 CO	BARTLESVILLE	OK	74004
P	N	PIASA MOTOR FUELS	ALTON	IL	62002
P	N	PIC N SAV	NINETY SIX	SC	29666
P	N	PIC UP FOODS INC	THOMASVILLE	GA	31757
P	N	PIC-QUIK STORES INC	LAS CRUCES	NM	88001
P	N	PICTO INC	BLUE SPRINGS	MO	64015
P	N	PIEDMONT PANTRY INC	HUNTINGTON	WV	25704
P	N	PIEDMONT PETROLEUM CORP	GREENVILLE	SC	29602
P	N	PIFERS SERVICE CENTER	MINERAL WELLS	WV	26150
P	N	PIGGLY WIGGLY #273	SPRINGFIELD	LA	70462
P	N	PIGOT OIL CO	TYLERTOWN	MS	39667
P	N	PIK-NIK FOODS INC	SAN ANTONIO	TX	78237
P	N	PILKINGTON BIG TEX INC	BELTON	TX	76513
P	N	PILOT CORP	KNOXVILLE	TN	379390146
P	N	PIONEER MARKET	GREENEVILLE	TN	37743
P	N	PIPES INDIAN SMOKESHOP	CLAREMORE	OK	74017
P	N	PIPESTONE SMOKE SHOP	VINITA	OK	74301
P	N	PIT STOP	CARDWELL	MO	63829

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	PIT STOP INC	LAFAYETTE	GA	30728
P	N	PIT STOP QUIK SHOP	DERRY	PA	15627
P	N	PITTSBURGH DIST CO	PITTSBURGH	PA	15222
P	N	PJ'S TEXACO	EASTMAN	GA	31023
P	N	PLAID PANTRIES INC	BEAVERTON	OR	97005
P	N	PLATOLENE 500	CARMI	IL	62821
P	N	PLAZA C-MART INC/THOMAS ROBERTS	WEAVERVILLE	NC	28787
P	N	PLESANT GROVE SHELL	ZANESVILLE	OH	43701
P	N	PLEZ U STORES INC	ANDERSON	SC	29621
P	N	PLUMMERS GASOLINE & CONV STRS #3	SUNBERRY	OH	43074
P	N	PLYMOUTH MOBIL	CONSHEHOCKEN	PA	19428
P	N	POINT PLEASANT FOOD MART	PT PLEASANT	WV	25550
P	N	POLZIN ENTERPRISES	WAUKESHA	WI	53188
P	N	POP SHULTZ	HENNEKEN	NH	03242
P	N	PORTER'S GRO	GREENEVILLE	TN	37745
P	N	PORTS PETROLEUM CO INC DBA FUEL	WOOSTER	OH	44691
P	N	PORTVILLE SUGAR CREEK	PORTVILLE	NY	147700467
P	N	POST RD EXXON	BRANFORD	CT	06405
P	N	POTTS CARRY OUT	NEWELL	WV	26050
P	N	PRAFULLA ENT INC	SUN PRAIRIE	WI	53590
P	N	PRAGUE SMOKE SHOP (R-TEK)	PRAGUE	OK	74864
P	N	PRESTO FOOD MART	QUITMAN	GA	31643
P	N	PRESTO FOOD STORES INC	PLANT CITY	FL	33566
P	N	PRESTO OIL	GARDEN CITY	KS	67846
P	N	PRESTON MKT	PRESTON	CT	06365
P	N	PRESTON'S COLONIAL MARKETS INC	LAWRENCEVILLE	PA	16929
P	N	PRI-MAR PETROLEUM	ST JOSEPH	MI	49127
P	N	PRICHARD MART INC	PRICHARD	WV	25555
P	N	PRIMA MARKETING LLC	WEXFORD	PA	15090
P	N	PRIN DOR FOODS	BUNNELL	FL	32110
P	N	PRINCE OIL COMPANY INC	CHRISTIANSBURG	VA	24073
P	N	PUFF DISCOUNT CIGARETTES INC	LOCK HAVEN	PA	17745
P	N	PUFFS CIG & TOB INC	MANSFIELD	OH	44907
P	N	PURCELLVILLE AMOCO	PURCELLVILLE	VA	22132
P	N	PURVIS BROTHERS INC	MARS	PA	160460957
P	N	PUTNAM CO	WELLSBORO	PA	16901
P	N	Q & T FOODS INC	MONTROSE	CO	81401
P	N	Q-Q CIGARETTES INC	KANSAS CITY	KS	66102

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	QC STORES INC	DOUGLAS	GA	31533
P	N	QUALITY RETAIL SERVICES	HARLINGEN	TX	78550
P	N	QUALITY STATE OIL COMPANY INC	SHEBOYGAN	WI	53083
P	N	QUICK CHEK FOOD STORES	WHITEHOUSE STATION	NJ	08889
P	N	QUICK STOP	BELLVILLE	TX	77418
P	N	QUICK STOP	FAYETTE	AL	35555
P	N	QUICK STOP CONV	PORTSMOUTH	RI	02871
P	N	QUICK STOP FOOD MARTS	FAYETTEVILLE	NC	28302
P	N	QUICK STOP FOOD STORES INC	SARASOTA	FL	34232
P	N	QUICK STOP MARKETS	FLORENCE	AL	35630
P	N	QUICK STOP MARKETS	GREENEVILLE	TN	37743
P	N	QUICK TRIP CONVENIENCE STORE	CAIRO	GA	31728
P	N	QUICK WAY STORES	PANAMA CITY	FL	32405
P	N	QUICKWAY FOOD STORES	SIDNEY	NY	13838
P	N	QUIK CHEK	TROY	NC	27371
P	N	QUIK PAK #7 DBA KASKAS	WEST	TX	76691
P	N	QUIK PAK FOOD STORES INC	WACO	TX	76711
P	N	QUIK SAK	MT IDA	AR	71957
P	N	QUIK SAK INC	FT. WORTH	TX	76114
P	N	QUIK STOP MARKET	KANE	PA	16735
P	N	QUIK THRIFT FOOD STORES INC	MARIETTA	GA	30064
P	N	QUIK-WAY FOODS INC	DALLAS	TX	75243
P	N	QUIKIE MART	RENO	NV	89502
P	N	QUINNS	BRISTOLVILLE	OH	44402
P	N	QUINNS-JOHNSTON	CORTLAND	OH	44410
P	N	QWIK STOP #3	MILLEDGEVILLE	GA	31061
P	N	R & H MAXXON INC	AIKEN	SC	29802
P	N	R & N ENTERPRISES	BRISTOL	TN	37620
P	N	R & N MORITZ INC	WENTZVILLE	MO	63385
P	N	R & S INVESTMENT	MANSFIELD	LA	71052
P	N	R & Z	WOOSTER	OH	44691
P	N	R AND M FOODS	ORLANDO	FL	32808
P	N	R CHAPMAN ENTERPRISE	LANCASTER	OH	43130
P	N	R E V ENTERPRISES dba SANDY'S CO	FORT COLLINS	CO	80524
P	N	RACEWAY	TALLAHASSEE	FL	32304
P	N	RACEWAY E-Z STOP	ELIZABETHTON	TN	37643
P	N	RACEWAY FOOD MARTS	WEAVERVILLE	NC	28787
P	N	RADIANT FOOD STORES	TAMPA	FL	33675

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P	ID	Pay Name	Pay City	ST	Zip
P	N	RAFIQ AHMED	BULLVILLE	NY	10915
P	N	RAGLAND BROTHERS RETAIL COS INC	HUNTSVILLE	AL	35804
P	N	RAINBOW MARKETERS INC	LAFAYETTE	LA	70505
P	N	RAINEY CAWTHON DISTRIBUTOR	TALLAHASSEE	FL	32302
P	N	RAINWATER GAS & OIL CO INC	FLORENCE	SC	29503
P	N	RALPHS STORE	SENECA	SC	29678
P	N	RAMCO INC DBA MINIT MART	HATTIESBURG	MS	39404
P	N	RAMSEUR OIL COMPANY	ANDERSON	SC	29622
P	N	RANDALL RAPP	MINERAL WELLS	WV	26150
P	N	RANGER CONVENIENCE	MURPHY	NC	28906
P	N	RANKS A-PLUS	QUAKERTOWN	PA	18950
P	N	RAPID GAS INC	GARDENA	CA	90248
P	N	RAPID ROBERTS	CRANE	MO	65633
P	N	RASUL MARKET	BERLIN CENTER	OH	44401
P	N	RAY DIPASLUAL/RON SCHRAM	BLOOMFIELD	PA	15224
P	N	RAY HARTMANN	NORTH HUNTINGTON	PA	15642
P	N	RAY HICE/TOBACCO OUTLETS	MORRISTOWN	TN	37814
P	N	RAYMOND OR EMMA JEAN O'HERN	SAPULPA	OK	74066
P	N	RAYS LEISURE TIME SHOP	SHADY SPRING	WV	25918
P	N	RD CADE INC	LEESBURG	AL	35983
P	N	RED CROWN MARKETING	WESTMONT	IL	60559
P	N	RED HOG SMOKESHOP	VAN BUREN	AR	72956
P	N	RED MAN SMOKE SHOP	WAGONER	OK	74467
P	N	RED POINT GROCERY	HAUGHTON	LA	71037
P	N	RED-EYE STOP INC	ROUND MOUNTAIN	TX	78663
P	N	REDIMART INC	HAMPTON	TN	37658
P	N	REDNER'S MARKETS INC	READING	PA	19605
P	N	REED'S SUNOCO	MILLERSBURG	PA	17061
P	N	REEDS	GENESSE	PA	16923
P	N	REEVES BOOMLAND INC	CHARLESTON	MO	63834
P	N	REICH'S SERVICE INC	WEST CHESTER	PA	19382
P	N	RENO SPARKS INDIAN COL SMOKESHOP	RENO	NV	89502
P	N	RENSSELAER CITGO	RENSSELAER	IN	47978
P	N	REOPCO	ROCKFORD	IL	61104
P	N	RESORT RETAILERS INC	PARK CITY	UT	84068
P	N	REVEL'S PIC N CHIK	MONTICELLO	FL	32344
P	N	REX W DODSON	CROSSETT	AR	71635
P	N	REXOCO STORE LTD	DENVER	CO	80221

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P	ID	Pay Name	Pay City	ST	Zip
P	N	RHH PROPERTIES LTD	FENTON	MI	48430
P	N	RHODES 101 STOPS	CAPE GIRARDEAU	MO	63701
P	N	RICH OIL CO	MOULTRIE	GA	31768
P	N	RICHARD HULLINGER	SPEARFISH	SD	57783
P	N	RICHARD KEIM	KNOXVILLE	TN	37920
P	N	RICHARD L HAZLETT	CHESWICK	PA	15024
P	N	RICHARD PAMLIANCHI	MCGEHEE	AR	71654
P	N	RICHARD SMITH	CAPON BRIDGE	WV	26711
P	N	RICHARD T BRISLIN INC DBA FIRST	ASHLAND	KY	41101
P	N	RICHCOR INC DBA GROOVIN NOOVINS	PENSACOLA	FL	32501
P	N	RICHCREEK'S AMOCO	PIERPONT	OH	44082
P	N	RICHLAND HILLS EXXON	LYNCHBURG	VA	24502
P	N	RICK & GINA MONSON	CARTHAGE	MO	64836
P	N	RICK GRIFFIN	CULLMAN	AL	35055
P	N	RICKEN BACKER BP	GROVEPORT	OH	43125
P	N	RICKY L DOSS	ELLENBORO	WV	26346
P	N	RICKY TIMBES	SAVANNAH	TN	38372
P	N	RIDER'S AMOCO	DE FOREST	WI	53532
P	N	RIDGE RD MARATHON	MEDINA	OH	44256
P	N	RIDGEPOINT CONVENIENCE STORES	HAYS	KS	67601
P	N	RIDGEPOINT CONVENIENCE STORES	HAYS	KS	67601
P	N	RIISER OIL INC	WAUSAU	WI	544020239
P	N	RISCH'S DIST	FORESTVILLE	PA	16035
P	N	RISSER PETROLEUM INC	LAKE CITY	FL	32055
P	N	RITA DORE'	CARENCRO	LA	70520
P	N	RIVER COUNTRY CO-OP	CADOTT	WI	54727
P	N	RIVER STOP CHEVRON	SPRINGFIELD	LA	70462
P	N	RIVER STOP INC	DODGE CITY	KS	67801
P	N	RIVERCITY ENERGY CO INC	LITTLE ROCK	AR	72212
P	N	RIVERSIDE DRIVE-IN GROCERY	LAGRANGE	TX	78945
P	N	RJS	FAIRFIELD	PA	17320
P	N	RJS	FAIRFIELD	PA	17320
P	N	ROACH OIL INC	MARTINSBURG	WV	25401
P	N	ROACHDALE MINI MART	ROACHDALE	IN	46172
P	N	ROAN VALLEY MKT	MOUNTAIN CITY	TN	37683
P	N	ROBERT DEMPSEY	ASHEVILLE	NC	28806
P	N	ROBERT FUNKHOUSER	BASYE	VA	22810
P	N	ROBERT G SMITH DBA COUNTRY EXPRS	MTN GROVE	MO	65711

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P	ID	Pay Name	Pay City	ST	Zip
P	N	ROBERT M HOLDERBAUM	HERMINIE	PA	15637
P	N	ROBERT N STEWART	ALEXANDRIA	OH	43001
P	N	ROBERT RAFFERTY INC	BREESPORT	NY	14816
P	N	ROBERT STEWART ENT	GILBERT	AZ	85233
P	N	ROBINSON ENTERPRISE INC	ATHENS	TN	37303
P	N	ROBISONS 1 STOP	MOULTRIE	GA	31768
P	N	ROBYN'S SHOPPE/ASHBRIDGE OIL CO	JOHNSTOWN	PA	15904
P	N	ROCKY TOP MKTS LLC	HARRIMAN	TN	37748
P	N	ROGER D PARK DBA REESES COUNTRY	WAVERLY	WV	26184
P	N	RON & TAMMY BALDWIN	SANDUSKY	OH	44870
P	N	RONALD BELL	ELLABELL	GA	31308
P	N	RONALD BOMBACH SR	GREENSBURG	PA	15601
P	N	RONALD ROSS	PIEDMONT	MO	63957
P	N	RONNIE & MONA STANLEY	GREENSBORO	NC	27406
P	N	RONSICK'S OIL COMPANY	FLORISSANT	MO	63033
P	N	ROSES CARRY OUT	FOLLANSBEE	WV	26037
P	N	ROSEY INTERNATIONAL	NEWTON	TX	75966
P	N	ROSS MINIT MART	PIEDMONT	MO	63957
P	N	ROSSVILLE BEER DISTRIBUTOR	ROSSVILLE	PA	17358
P	N	ROTTEN ROBBIE	SAN JOSE	CA	95129
P	N	ROUND HILL SHOPPING CENTER INC	WINCHESTER	VA	22603
P	N	ROY C JENKINS INC - JENKINS MINI	BURKEVILLE	VA	23922
P	N	ROYAL CREST DAIRY DBA FARM CREST	DENVER	CO	80209
P	N	ROYAL FARMS	BALTIMORE	MD	21211
P	N	ROYS SERVICE CENTER INC	BERKELEY SPRINGS	WV	25411
P	N	RPF OIL CO	FLINT	MI	48503
P	N	RS HENARD JR	BRINKLEY	AR	72021
P	N	RSD INC DBA 7-ELEVEN	CHARLESTON	WV	25301
P	N	RT 663 SERVICE CENTER	QUAKERTOWN	PA	18951
P	N	RUFF CREEK GENERAL STORE INC	RUFF CREEK	PA	15329
P	N	RUFFIN'S TOBACCO CORNER	MANSFIELD	LA	71052
P	N	RUNWAY FOOD INC	THOMASVILLE	GA	31757
P	N	RUSSELL OIL COMPANY	GALATIA	IL	62935
P	N	RUSSELL OIL COMPANY INC PACECAR	LAPINE	AL	36046
P	N	RUSSELL PETROLEUM CO	MONTGOMERY	AL	36108
P	N	RUSTY'S	W HELENA	AR	72390
P	N	RUTH STAUFFER	BRISTOL	TN	37620
P	N	RUTTER'S FARM STORES	YORK	PA	17404

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	S & J MARKET INC	BARBOURSVILLE	WV	25504
P	N	S & S MARKET	MOUNTAIN CITY	TN	37683
P	N	S & S MARKET 2	MOUNTAIN CITY	TN	37683
P	N	S BECKER INC	CAMDENTON	MO	65020
P	N	S PHAM INC DBA BP OF GUYANDOTTE	HUNTINGTON	WV	25702
P	N	S TENN OIL CO INC DBA QUIK MART	LAWRENCEBURG	TN	38464
P	N	S-N-GO STORES INC	FARGO	ND	58103
P	N	SAAD FOOD MART INC	PAWTUCKET	RI	02861
P	N	SAFE ENTERPRIZES	MARS HILL	NC	28754
P	N	SAK'S FOOD MART	LA GRANGE	TX	78945
P	N	SALEM MARKETS INC ARCO	MESA	AZ	85201
P	N	SALIBA SUNOCO A PLUS	CONNELLSVILLE	PA	15425
P	N	SALLES HOME SUPERMARKET	BOGALUSA	LA	70427
P	N	SAM ANN	MESA	AZ	85203
P	N	SAM CARTER OIL-DBA ASAP	RIVERSIDE	MO	64116
P	N	SAM HODROGE	NITRO	WV	25143
P	N	SAM POSE INC	ATLANTA	GA	30329
P	N	SAM SHEEHAN	SMITHFIELD	PA	15478
P	N	SAM'S FOOD MARKET	ALEXANDRIA	AL	36250
P	N	SAM'S MART INC	CHARLOTTE	NC	28212
P	N	SAMI QUICK STOP	YTOWN	OH	44514
P	N	SAMI QUICK STOP	SALEM	OH	44460
P	N	SAMSKYS CITGO	MANASSAS	VA	20112
P	N	SANDERS CORNER STOP INC	CAMERON	TX	76520
P	N	SANDUSKY BP	SANDUSKY	OH	44870
P	N	SANDY/SHANNON DAY	MOREHEAD	KY	40351
P	N	SARAH INC T/A GETTY MART	HARRISBURG	PA	17112
P	N	SAV-M	ABILENE	TX	79605
P	N	SAVE MORE INC	SENECA	SC	29679
P	N	SAVE-TIME DBA QUIK STOP	JOPLIN	MO	64802
P	N	SCAFF'S INC DBA S & S FOOD STORE	LAKE CITY	FL	32055
P	N	SCHIERL SALES CORP	STEVENS POINT	WI	54481
P	N	SCHMUCKAL OIL CO	TRAVERSE CITY	MI	49686
P	N	SCHNUCKS MARKETS INC	ST LOUIS	MO	631466928
P	N	SCHONHARDT GROCERY	SANDUSKY	OH	44870
P	N	SCHRADER OIL CO	FT COLLINS	CO	80524
P	N	SCHULENBURG FOOD MART	SCHULENBURG	TX	78956
P	N	SCOOTY'S INC	PENNSBURG	PA	18071

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	SCOTLAND OIL COMPANY, INC	ALMA	MI	48801
P	N	SCOTTYS CONVENIENCE STORE INC	COVE	AR	71937
P	N	SCRIVENER OIL COMPANY INC	SPRINGFIELD	MO	65807
P	N	SEALOCK I/BATTLEFIELD TEXACO INC	MANASSAS	VA	20109
P	N	SELF SERVICE MARKET	PORTLAND	OR	97266
P	N	SEQUOYAH TOBACCO SALES	PARK HILL	OK	74451
P	N	SER ENTERPRISES	GIRARD	OH	44420
P	N	SERESTEW INC DBA MARATHON FOOD	NEW HAVEN	WV	25265
P	N	SERVCO	ALBEMARLE	NC	28001
P	N	SERVICE OIL CO/T/A SUN-UP CONV S	HARRISBURG	PA	17111
P	N	SEVERNS ENTERPRISES INC	NLR	AR	72118
P	N	SEVERSON OIL CO	WINONA	MN	55987
P	N	SEVILLE CITGO	SEVILLE	OH	44273
P	N	SHAMROCK TOB SHOP	JOHNSON CITY	TN	37604
P	N	SHANNON COLE	MAYNARDVILLE	TN	37807
P	N	SHARON GRAVER	N VERSAILLES	PA	15137
P	N	SHARON MC CULLOUGH	GRIFFIN	GA	30223
P	N	SHARON'S BP	WARREN	OH	44483
P	N	SHAWS GULF	STILLWATER	OK	74075
P	N	SHAY OIL CO INC	YUMA	AZ	853661249
P	N	SHEETZ, INC	ALTOONA	PA	16602
P	N	SHELBY BEER DOCK INC	SHELBY	OH	44875
P	N	SHELL FOOD MART	HUBBARD	OH	44425
P	N	SHELL MULTICORP	LA GRANGE	GA	30240
P	N	SHELL OIL CO	HOUSTON	TX	77252
P	N	SHELTON'S JIFFY MART	MOULTON	AL	35650
P	N	SHENANDOAH MARKETING INC	STEPHENS CITY	VA	22655
P	N	SHERMAN V ALLEN INC	RUTLAND	VT	05701
P	N	SHERWOODS SHELL	N KINGSTON	RI	02852
P	N	SHILLITO OIL INC	DILLSBURG	PA	17019
P	N	SHILOH MINIT MART	SHILOH	GA	31826
P	N	SHIPLEY STORES INC	YORK	PA	17405
P	N	SHIRLEY BREWSTER - TOBACCO BARN	GREENBACK	TN	37742
P	N	SHIRLEY'S EXXON	ANDERSON	SC	29625
P	N	SHIRLEY'S TWO	ANDERSON	SC	29623
P	N	SHIRLEYS EXXON	ANDERSON	SC	29623
P	N	SHIRLEYS MINI MART	ATHENS	AL	35611
P	N	SHOP & HOP	SAVANNAH	MO	64485

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P	ID	Pay Name	Pay City	ST	Zip
P	N	SHOP & HOP	SAVANNAH	MO	64504
P	N	SHOP & HOP	SAVANNAH	MO	64485
P	N	SHOP & HOP	SAVANNAH	MO	64485
P	N	SHOP & SAVE	FOREST HILLS	PA	15221
P	N	SHOP RITE INC	CROWLEY	LA	70526
P	N	SHOP-A-SNAK FOOD MART INC	BIRMINGHAM	AL	35209
P	N	SHOP-N-GO	W ELIZABETH	PA	15088
P	N	SHOP-N-GO INC (JIM LINSCOTT)	RENO	NV	89511
P	N	SHOP-N-SAVE	COTTON VALLEY	LA	71018
P	N	SHORE STOP'S	SALISBURY	MD	21801
P	N	SHORT STOP	BAY SPRINGS	MS	39422
P	N	SHORTY'S QUIK STOPS	EASTMAN	GA	31023
P	N	SHOUSE ENTERPRISES INC	PANAMA CITY BEACH	FL	32408
P	N	SHUI HALL	PHOENIX	AZ	85006
P	N	SIDS TOBACCO STORE	MEMPHIS	TN	38125
P	N	SIERRA MINIT MART	PORTERVILLE	CA	93257
P	N	SILVER STAR GROCERY	ELLENBORO	WV	26346
P	N	SIMPSONS EXXON	KENOVA	WV	25530
P	N	SIMPSONS MINI-MART	GETTYSBURG	PA	17325
P	N	SINCLAIR MARKETING COMPANY	SALT LAKE CITY	UT	84102
P	N	SINCLAIR'S GENERAL STORE	AIRVILLE	PA	17302
P	N	SINGER SUNOCO LLC	CALDWELL	OH	43724
P	N	SINGIN OIL INC	LAKEWOOD	NJ	08701
P	N	SISSONVILLE FOODLAND	SISSONVILLE	WV	25360
P	N	SITE OIL COMPANY	ST LOUIS	MO	63105
P	N	SJB FOODS	ALUM CREEK	WV	25003
P	N	SKOGLUND OIL INC	NEW RICHMOND	WI	54017
P	N	SKYLINE OIL CO	SCOTTSBORO	AL	35768
P	N	SKYWAY TRUCK STOP	MTN HOME	NC	28758
P	N	SLABTOWN VARIETY	PENDLETON	SC	29670
P	N	SLEEPY HOLLOW MKT	BRUNSWICK	OH	44212
P	N	SLOPPY JOE'S	BRYAN	TX	77802
P	N	SLUGAS	MT JEWETT	PA	16740
P	N	SMITH ROGERS OIL/TIGER MART	MULLINS	SC	29574
P	N	SMITH WACO MARKET	CANTON	OH	44707
P	N	SMITH'S GAS MART	HIGHSPIRE	PA	17034
P	N	SMITH'S HANDI MART	HARTS	WV	25524
P	N	SMITTY'S POP & HOP'S	WAYLAND	NY	14572

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P	ID	Pay Name	Pay City	ST	Zip
P	N	SMOKE CITY OF ALLIANCE INC	ALLIANCE	OH	44601
P	N	SMOKE CITY OF RAVENNA INC	RAVENNA	OH	44266
P	N	SMOKE PIT #1	KNOXVILLE	TN	37938
P	N	SMOKE SHOP 5	DYER	IN	46311
P	N	SMOKE SHOP INC	SPRINGFIELD	MO	65807
P	N	SMOKE STACK INC	KNOXVILLE	TN	37920
P	N	SMOKE-N-CHEW	COUSHATTA	LA	71019
P	N	SMOKEHOUSE	LEXINGTON	TN	38351
P	N	SMOKER'S BREAK	BATON ROUGE	LA	70815
P	N	SMOKERS OUTLET	YORK	PA	17403
P	N	SMOKERS OUTLET	ODESSA	TX	79762
P	N	SMOKERS OUTLET STORE INC	AKRON	OH	44312
P	N	SMOKERS PARADISE LTD	URICHSVILLE	OH	44683
P	N	SMOKERS TOBACCO OUTLET	KNOXVILLE	TN	37917
P	N	SMOKESAVERS SMOKE SHOP	MUSKOGEE	OK	74403
P	N	SMOKEY'S #2	COLUMBIA	MS	39429
P	N	SMOKEY'S #3	CAMBRIDGE	OH	43725
P	N	SMOKEY'S #4	PASCAGOULA	MS	39567
P	N	SMOKEY'S #5	OCEAN SPRINGS	MS	39564
P	N	SMOKEY'S DISCOUNT TOBACCO	COVINGTON	LA	70434
P	N	SMOKEY'S TOBACCO #7	VANCLEAVE	MS	39565
P	N	SMOKEYS CIGARETTE OUTLET	STEUBENVILLE	OH	43952
P	N	SMOKIN	FRANKFORT	IN	46041
P	N	SMOKIN' JOE'S TOBACCO	WAYMART	PA	18472
P	N	SNAK MART	WILMINGTON	NC	28405
P	N	SNAPPY MART	GASSVILLE	AR	72635
P	N	SNUFFY'S DISCOUNT TOBACCO	DIBERVILLE	MS	39532
P	N	SNYDER'S MARKET	LITTLESTOWN	PA	17340
P	N	SO AR OIL CO EXPRESSWAY STORES	ELDORADO	AR	71730
P	N	SON BILLY INC	BROKEN ARROW	OK	74112
P	N	SONNY OLIVER	LUMBERTON	NC	28358
P	N	SONNY'S SOUTHGATE SHELL	CAMBRIDGE	OH	43725
P	N	SOUDERS CITGO	MIDDLETOWN	PA	17057
P	N	SOUTH END GROCERY-F STONEBURNER	MT JACKSON	VA	22842
P	N	SOUTH MINNESOTA OIL	ALBERT LEA	MN	56007
P	N	SOUTHEASTERN OIL CO INC	DOTHAN	AL	36301
P	N	SOUTHERN EXPRESS	RICHMOND	VA	23228
P	N	SOUTHERN SMOKERS CLUB #1	GAUTIER	MS	39553

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	SOUTHERN SMOKERS CLUB #2	PASCAGOULA	MS	39567
P	N	SOUTHLAND CORPORATION	DALLAS	TX	75204
P	N	SOUTHMARTS	CULLMAN	AL	35055
P	N	SOUTHTOWN INC	ZANESVILLE	OH	43701
P	N	SOUTHWEST CONVENIENCE STORES LLP	ODESSA	TX	79761
P	N	SOUTHWEST PLAZA INVEST DBA OASIS	LIBERAL	KS	67901
P	N	SPANKY'S SUPERSTOP	HATFIELD	AR	71945
P	N	SPARKY'S FOOD STORES	PLANT CITY	FL	33566
P	N	SPARTAN OIL CO INC	HENDERSONVILLE	NC	28792
P	N	SPEAR OIL/SPE-DEE-C	MONTGOMERY	AL	36117
P	N	SPECTRUM STORES INC	WEST POINT	GA	31833
P	N	SPEE-D-FOODS INC	CANTON	OH	44703
P	N	SPEEDY STOP FOOD STORE LTD	VICTORIA	TX	77902
P	N	SPELLS GROCERY	ABITA SPRINGS	LA	70420
P	N	SPICER PLUS INC	PRESTON	CT	06365
P	N	SPICKO'S GIANT EAGLE	WARREN	OH	44485
P	N	SPORTSMAN SUPERSTOP (DUKE'S)	WACO	TX	76705
P	N	SPOSIT'S CITGO	BRUNSWICK	OH	44212
P	N	SPRINGER EUBANK OIL CO	WILMINGTON	NC	28402
P	N	SRL STORES INC	BANGOR	ME	04401
P	N	SSG CORPORATION	HUDSON	WI	54016
P	N	SSP/CIRCLE K	CORPUS CHRISTI	TX	78408
P	N	SSS DEVELOPMENT	PITTSFIELD	IL	62363
P	N	STAGGERS OIL CO	MARSHALL	TX	75671
P	N	STANGELAND DISCOUNT CIGARETTES	NEVADA	MO	64772
P	N	STANLEY H KOENIG DBA S & H DRIVE	GROESBECK	TX	76642
P	N	STAR DISCOUNT	ORLANDO	FL	32804
P	N	STAR ENTERPRISE	NORCROSS	GA	30092
P	N	STAR STOP	HOT SPRING	AR	71901
P	N	STARFIRE EXPRESS CLARINGTON	CLARINGTON	OH	43915
P	N	STATE LINE 1 STOP	GENESEE	PA	16923
P	N	STAWEART'S SUNOCO - WM STAWEART	JOHNSTOWN	OH	43031
P	N	STEFANICK BROTHERS	HAZLETON	PA	18201
P	N	STEINHAGEN OIL CO INC	BEAUMONT	TX	77720
P	N	STEPHANEE ENTERPRISES	BROKEN ARROW	OK	74012
P	N	STERLING BAIRD	HELENWOOD	TN	37755
P	N	STEVE & ANNE DOLLERY	CALDWELL	TX	77836
P	N	STEVE MC CLUSKEY	OXFORD	MS	38655

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	STEVE NEHAL	CORSICANA	TX	75110
P	N	STEVE'S AMOCO	GRANVILLE	IL	61326
P	N	STEVES ASHLAND INC	MIDDLEBOURNE	WV	26149
P	N	STILTNERS B P #2	HUNTINGTON	WV	25702
P	N	STILWELL SMOKE SHOP	STILWELL	OK	74960
P	N	STN ENTERPRISES INC	KILLEEN	TX	76541
P	N	STN ENTERPRISES INC	KILLEEN	TX	76541
P	N	STOGIES TOBACCO & BEVERAGE INC	HUNTINGTON	WV	25701
P	N	STOKES MART	FRONT ROYAL	VA	22630
P	N	STOP 'N SERV	HOUSTON	TX	77205
P	N	STOP IN FOOD STORES INC	ROANOKE	VA	24022
P	N	STOP N BYE	BRENHAM	TX	77833
P	N	STOP N SAVE	EAST RIDGE	TN	37412
P	N	STOP N SHOP PENNZOIL	CHARLESTON	WV	25313
P	N	STOP-N-GO	MADISON	WI	53713
P	N	STOP-N-GO OF WESTERN PA INC	ROCHESTER	PA	15074
P	N	STORE & MORE INC	PICKENS	SC	29671
P	N	STORE & MORE INC	PICKENS	SC	29671
P	N	STORE 24	WALTHAM	MA	02254
P	N	STORES INC	MCALLEN	TX	78504
P	N	STOVER'S NEWS AGENCY	COLUMBIA	PA	17512
P	N	STRATTAN COOP	STRATTAN	CO	80836
P	N	STRIPLING'S GENERAL STORE, INC	CORDELE	GA	31015
P	N	STUFF-N-GO	TAHLEQUAH	OK	74464
P	N	SUE WISENER	NORMAN	AR	71960
P	N	SUE YARBROUGH	PINE BLUFF	AR	71603
P	N	SUGAR CREEK STORES INC	ROCHESTER	NY	14619
P	N	SULLY EXXON	STERLING	VA	20164
P	N	SUN COMPANY INCORPORATED	PHILADELPHIA	PA	19103
P	N	SUN SHOP	BRIDGEPORT	OH	43912
P	N	SUNCOAST OIL CO	ST PETERSBURG	FL	33713
P	N	SUNIL	BLOOMINGDALE	GA	31302
P	N	SUNOCO A-PLUS	HATBORO	PA	19040
P	N	SUNRISE CONVENIENCE STORES INC	RICHMOND	MI	48062
P	N	SUNRISE FOOD STORES	SYRACUSE	NY	13220
P	N	SUNRISE GROCERY & DELI	PEACH BOTTOM	PA	17563
P	N	SUNRISE TRAVEL CENTER	HARRISBURG	PA	17112
P	N	SUNSHINE FOOD STORE	BASTROP	TX	78602

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	N	SUNSHINE MARKET	LITTLETON	NH	03561
P	N	SUPER MART INC	TAHLEQUAH	OK	74464
P	N	SUPER ONE FOODS	DULUTH	MN	55811
P	N	SUPER SAVER #2	MILAN	TN	38358
P	N	SUPER STOP ENTERPRIZE	GONZALES	LA	70738
P	N	SUPER STOP!	MERIDIAN	MS	39302
P	N	SUPER-FLITE OIL CO INC	SAGINAW	MI	48604
P	N	SUPER-TEST SERVICE STATIONS/IND	LAFAYETTE	IN	47903
P	N	SUPERMART	FRUITA	CO	81521
P	N	SUPERPUMPER INC	MINOT	ND	58703
P	N	SURFSIDE STORE INC	ANDERSON	SC	29625
P	N	SUSIE QS	THOMASVILLE	GA	31757
P	N	SUTEY OIL COMPANY INC	BUTTE	MT	59701
P	N	SUTTON AND WOLF	ETTERS	PA	17319
P	N	SUTTON AND WOLF	ETTERS	PA	17319
P	N	SWEETSPRINGS SHELL	PURCELLVILLE	VA	22132
P	N	SWIFTY MART	TALLAHASSEE	FL	32303
P	N	T & E OIL COMPANY	HUTCHINSON	KS	675041303
P	N	T & S TOBACCO OUTLET	ETOWAH	TN	37331
P	N	T & V PLUS 2 INC.	JOHNSON CITY	TN	37601
P	N	T-MART FOOD STORES INC	DUNN	NC	28335
P	N	T-REX CORP	FARMINGTON	MO	63640
P	N	TAMMY NOBLE	BUCKEYE	AZ	85326
P	N	TARGET	BELLMEAD	TX	76705
P	N	TARLTON MARKET	TARLTON	OH	43156
P	N	TAYLOR OIL COMPANY	WINSTON-SALEM	NC	27113
P	N	TAYLOR'S CONVENIENCE STORE	FITZGERALD	GA	317501135
P	N	TBB STORES INC	CUBA	NY	14727
P	N	TBM INC CBA SMOKEY'S	BOGOLUSA	LA	70427
P	N	TBM INC/DBA SMOKEYS	BOGALUSA	LA	70427
P	N	TE JO'S DRIVE IN	HEARNE	TX	77859
P	N	TEAGUE'S SUPERETTE	MAGGIE VALLEY	NC	28751
P	N	TEAL'S TRAVEL MART	TEMPLE	TX	76504
P	N	TEAM'S	PIEDMONT	SC	29673
P	N	TED'S MARATHON	COLUMBUS	OH	43228
P	N	TEDESCHI FOOD SHOPS INC	ROCKLAND	MA	02370
P	N	TEE PEE SMOKE SHOPS	YALE	OK	74085
P	N	TEMMEN MINI MART	JEFFERSON CITY	MO	65101

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P	ID	Pay Name	Pay City	ST	Zip
P	N	TEREK SERVICE INC	VALENCIA	PA	16059
P	N	TERI FOODS INC	REDFIELD	AR	72132
P	N	TERRY WEST	PARSONS	TN	38363
P	N	TERRY'S FOOD STORE INC	VALLEY MILLS	TX	76689
P	N	TESORO NORTHSTORE CO	ANCHORAGE	AK	995196970
P	N	TETCO STORES INC	SAN ANTONIO	TX	78216
P	N	TEX-MART	MC ALLEN	TX	78502
P	N	TEXACO FOOD MART	TAHLEQUAH	OK	74464
P	N	TEXACO REFINING & MARKETING	PHOENIX	AZ	85018
P	N	TEXAN #2	STEPHENVILLE	TX	76401
P	N	TEXAN MARKETS INC	ROUND ROCK	TX	78664
P	N	TEXAN'S QUIK STOP	STEPHENVILLE	TX	76401
P	N	TEXAS CONVENIENCE STORES INC	BELTON	TX	76513
P	N	TEXAS STAR INVESTMENTS	CORPUS CHRISTI	TX	78403
P	N	TEXAS TOBACCO	CLEBURNE	TX	76031
P	N	TH & A MARKET	BULLS GAP	TN	37711
P	N	THALER OIL CO	CHIPPEWA FALLS	WI	54729
P	N	THE CIGARETTE STORE CORP	BOULDER	CO	80303
P	N	THE CORNER STORE	MASSILLON	OH	44646
P	N	THE COUNTRY STORE	BROWNWOOD	TX	76804
P	N	THE CRACKERBOX STORES	MONTICELLO	AR	71657
P	N	THE GENERAL STORE	BUCKHANNON	WV	26201
P	N	THE HARTLEY COMPANY	CAMBRIDGE	OH	43725
P	N	THE HOLLAR CO	GADSDEN	AL	35902
P	N	THE HUB	SMETHPORT	PA	16749
P	N	THE HUB INC	PARKERSBURG	WV	26101
P	N	THE LAMP POST	WHITNEY	TX	76692
P	N	THE LITTLE STORES INC	CLOQUET	MN	55720
P	N	THE LYDEN COMPANY	TOLEDO	OH	436351090
P	N	THE OLD STORE	MOUNTAIN REST	SC	29664
P	N	THE PANTRY STORE INC	CLARKSBURG	WV	26301
P	N	THE PIT STOP MINI MART	OBERLIN	OH	44074
P	N	THE RIGHT STUFF FOOD STORES INC	ATLANTA	GA	30328
P	N	THE SINGLETON STORE INC	SINGLETON	TX	77831
P	N	THE SMOKEHOUSE	WEATHERFORD	TX	76076
P	N	THE SMOKER'S DEN	AKRON	OH	44310
P	N	THE SPENCER CO INC	DOLOMITE	AL	35061
P	N	THE SPINX COMPANY	GREENVILLE	SC	29601

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P	ID	Pay Name	Pay City	ST	Zip
P	N	THE TOBACCO CO/ITC OF VA INC	ROANOKE	VA	24012
P	N	THE TOBACCO PLACE	COLUMBUS	GA	31907
P	N	THE TOBACCO SHOP #1	SPRINGHILL	LA	71075
P	N	THE TOBACCO SHOP INC	SEYMOUR	TN	37865
P	N	THE TOWPATH DRIVE THRU	MINERVA	OH	44657
P	N	THEMAR INC	BATTLE CREEK	MI	49017
P	N	THOELE OIL CO	ST CHARLES	MO	63302
P	N	THOMAS A SMITH DBA SMITTIE'S CIT	IBERIA	OH	43325
P	N	THOMAS BLASINGIM SR	CHARLESTON	WV	25312
P	N	THOMAS II	AKRON	OH	44305
P	N	THOMKAR INC	KILLEEN	TX	76541
P	N	THOMPSONS ROADSIDE MARKET	STRAW PLAINS	TN	37871
P	N	THORNTON OIL CORPORATION	LOUISVILLE	KY	40223
P	N	THREE FLAGS SMOKE SHOP	SAPULPA	OK	74066
P	N	THRIFTY LIQUOR	BOSSIER CITY	LA	71112
P	N	THRIFTY SMOKE SHOPS INC	RAPID CITY	SD	57702
P	N	THROCKMORTON SUPERMARKETS INC	WAYNESBURG	PA	15370
P	N	THUNDER SMOKE SHOP	HOMINY	OK	74035
P	N	THURLAND REAY FAMILY INVESTMENT	TUCSON	AZ	85715
P	N	THURMAN OIL - QUICK STOP	BOGALUSA	LA	704270608
P	N	TICKET'S SMOKE SHOP	OAKS	OK	74359
P	N	TIGER FUEL CO	CHARLOTTESVILLE	VA	22902
P	N	TIGER TOTE FOOD STORES INC	GONZALES	TX	78629
P	N	TIGER'S DEN INC	SCHUYLKILL HAVEN	PA	17972
P	N	TIM GARDNER	HAUTI	MO	63851
P	N	TIM MOSS	KALAMAZOO	MI	49009
P	N	TIM SNEDEGAR	FLEMINGSBURG	KY	41041
P	N	TIP TOP CONV STORES dba BIG K ST	HATTIESBURG	MS	39402
P	N	TOBACCO & BEER DISCOUNT HOUSE IN	BILOXI	MS	39531
P	N	TOBACCO & GAS DISCOUNT	COVINGTON	TN	38019
P	N	TOBACCO BARN	NEWPORT	TN	37821
P	N	TOBACCO BARN/DONALD TABOR	INDPLS	IN	46224
P	N	TOBACCO BOX	LOUDON	TN	37774
P	N	TOBACCO CENTER	TRENTON	TN	38382
P	N	TOBACCO CENTRAL	SOUTH BEND	IN	466289772
P	N	TOBACCO CHEAPER	SPRINGFIELD	IL	62703
P	N	TOBACCO CHEAPER	SPRINGFIELD	IL	62703
P	N	TOBACCO DISCOUNT HOUSE #1	SHREVEPORT	LA	71105

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P	ID	Pay Name	Pay City	ST	Zip
P	N	TOBACCO EXPRESS	MEMPHIS	TN	38134
P	N	TOBACCO HILL	LAMAR	MO	64759
P	N	TOBACCO HUT	PINE BLUFF	AR	71603
P	N	TOBACCO HUT PLUS	GILBERT	WV	25621
P	N	TOBACCO JUNCTION	MILLINGTON	TN	38053
P	N	TOBACCO JUNCTION	MADISON	AL	35758
P	N	TOBACCO JUNCTION VII	TEMPLE	TX	76504
P	N	TOBACCO KING	LENOIR CITY	TN	37771
P	N	TOBACCO KING	MEMPHIS	TN	38134
P	N	TOBACCO KING LLC HEADQUARTERS	BUCKHANNON	WV	26201
P	N	TOBACCO KING/MASON STORE	MASON	WV	25260
P	N	TOBACCO LEAF	CAMPBELL	OH	44405
P	N	TOBACCO MART	CHATTANOOGA	TN	37411
P	N	TOBACCO OUTLET	VAN BUREN	AR	72956
P	N	TOBACCO OUTLET	LOUISVILLE	MS	39339
P	N	TOBACCO OUTLET	ATTALLA	AL	35954
P	N	TOBACCO PLACE II	JACKSON	TN	38301
P	N	TOBACCO PLUS	CROWLEY	LA	70526
P	N	TOBACCO ROAD II	DELAWARE	OH	43015
P	N	TOBACCO ROAD INC	MAN	WV	25635
P	N	TOBACCO ROAD INC	HIGHLAND	IN	46322
P	N	TOBACCO ROAD INC - MIKE CARLIN	HOT SPRING	AR	71901
P	N	TOBACCO ROW INC	INDEPENDENCE	KS	67301
P	N	TOBACCO SHACK	ALAMO	TN	38001
P	N	TOBACCO SHACK	SOUTHAVEN	MS	38671
P	N	TOBACCO SHACK	HORN LAKE	MS	38637
P	N	TOBACCO SHED	COLUMBUS	MS	39701
P	N	TOBACCO SUPERSTORE	MEMPHIS	TN	38115
P	N	TOBACCO SUPERSTORE	FORREST CITY	AR	72335
P	N	TOBACCO SUPERSTORE 19	HOT SPRINGS	AR	71913
P	N	TOBACCO WAREHOUSE LTD	MARION	OH	43302
P	N	TOBACCO WORLD	UNIONTOWN	PA	15401
P	N	TOBY'S PIT STOP	CLIFTON	TX	76634
P	N	TODD SHERMAN INC	HENDERSONVILLE	NC	28739
P	N	TOKEN INC	WINFIELD	AL	35594
P	N	TOM FARRELL	BAKERSFIELD	LA	93309
P	N	TOM HUTCHINSON	CONSHEHOCKE	PA	19428
P	N	TOM SOUTHSIDE	ELDRED	PA	16731

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P	ID	Pay Name	Pay City	ST	Zip
P	N	TOM'S DISCOUNT TOBACCO	ASHLAND	KY	41102
P	N	TOM-LIN ENTERPRISES INC	REYNOLDSBURG	OH	43068
P	N	TOMCO INC/SHELL FOOD MARTS	HUNTSVILLE	AL	35804
P	N	TOMMY JOINER	MOULTON	AL	35650
P	N	TOMS SIERRA CO INC	COLFAX	CA	95713
P	N	TONY DENUNZIO	IRWIN	PA	15642
P	N	TOOLEY OIL CO	SACRAMENTO	CA	95825
P	N	TOOT 'N TOTUM INC	AMARILLO	TX	79101
P	N	TOOTSIE'S BUY N' BYE	BRENHAM	TX	77833
P	N	TOP HILL FOOD MART	ASTABULA	OH	44404
P	N	TOTAL Q-MIDWEST	SPRING PARK	MN	55384
P	N	TOWN & COUNTRY FOOD STORES INC	SAN ANGELO	TX	76904
P	N	TOWN - N - COUNTRY	CRAWFORDVILLE	FL	32327
P	N	TOWN MARKET	BRENHAM	TX	77833
P	N	TOWN PUMP INC	BUTTE	MT	59701
P	N	TRADE OIL CO	GREENVILLE	NC	27834
P	N	TRADER BILLS OUTDOOR SPORTS INC	HOT SPRINGS	AR	71913
P	N	TRADING POST - GROCERY	FORT HALL	ID	83203
P	N	TRAXX COMPANY	LEXINGTON	KY	40507
P	N	TRENCO	PHOENIX	AZ	85034
P	N	TRI CITY OIL CO	KENNEWICK	WA	99336
P	N	TRI STAR MARKETING INC	URBANA	IL	618030279
P	N	TRI-CARNES SERVICE INC	BELLE VALLEY	OH	43717
P	N	TRI-CON INC	BEAUMONT	TX	77720
P	N	TRI-COUNTY PETROLEUM INC	TROY	MI	48083
P	N	TRI-LAKES PETROLEUM CO	BRANSON	MO	656157500
P	N	TRI-VALLEY DIST	HEBER	UT	84032
P	N	TRIPLE R FAS CHEK	YAWKEY	WV	25573
P	N	TRIPLE S OIL	BURLEY	ID	83318
P	N	TRIPLE S PETROLEUM	AUSTIN	TX	78702
P	N	TRIPLE T INC	CLINTWOOD	VA	24228
P	N	TRIPO INC	ALBANY	GA	31707
P	N	TRITON MARKETING INC	ATLANTA	GA	30350
P	N	TRUCK WORLD INC	BOARDMAN	OH	44514
P	N	TRUMAN'S DRUG	CAIRO	GA	31728
P	N	TUCKERS FOODS INC	THOMASTON	GA	30286
P	N	TULSA CREEK INDIAN COMMUNITY #2	TULSA	OK	74170
P	N	TURKEY HILL MINIT MKTS	LANCASTER	PA	17603

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P	ID	Pay Name	Pay City	ST	Zip
P	N	TURNER OIL CO	MARVELL	AR	72366
P	N	TWIN CITIES STORES INC	EAGAN	MN	55122
P	N	TWIN CITIES TEXACO	PIERCE	SD	57501
P	N	TWIN OAKS 1-STOP	LEBANON	MO	65536
P	N	TWO JOHNS SHORT SHOP INC	BECKLEY	WV	25801
P	N	TY-MAG DBA DANIELS BLUE FLASH	DANIELS	WV	25832
P	N	UNCLE NEAL'S COUNTRY CONV STORE	HASTINGS	NE	68901
P	N	UNCLE SAM'S CONVENIENT STORES	ELSA	TX	78543
P	N	UNDERWOOD CONVENIENCE STORES INC	ROGERSVILLE	MO	65742
P	N	UNI-MART	BRISTOL	PA	19007
P	N	UNI-MARTS INC	STATE COLLEGE	PA	168015690
P	N	UNICORN MARKET & GRILL	WHITESBURG	TN	37891
P	N	UNIONVILLE SERV CTR	HATFIELD	PA	19440
P	N	UNITED DAIRY FARMERS	CINCINNATI	OH	45212
P	N	UNITED OIL	PINEY FLATS	TN	37686
P	N	UNITED REFINING COMPANY OF PENNS	WARREN	PA	16365
P	N	UNITED STOP-N-SHOP INC	MONTGOMERY	AL	36108
P	N	UNIVERSITY FOOD MKT	AKRON	OH	44304
P	N	US CONVENIENT	ASHTABULA	OH	44040
P	N	USA GASOLINE CORP	AGOURA HILLS	CA	91301
P	N	USELTON OIL CO INC	PEKIN	IL	61554
P	N	USHA PATEL - RADHESHYAM INC	LAKEWOOD	OH	44107
P	N	USHA PATEL-RADHESHYAM INC	LAKEWOOD	OH	44107
P	N	V-MART INC	COMFORT	WV	25049
P	N	VAL SMITH PETROLEUM CO INC	BLANCO	TX	78606
P	N	VALCO INC BDA SMOKERS OUTLET STO	MASSILLON	OH	44646
P	N	VALLEY CITY MKT	VALLEY CITY	OH	44280
P	N	VALLEY MARKET	HAMMONDSVILLE	OH	43930
P	N	VALLEY MINI MART	HUNTINGTON	WV	25701
P	N	VALLEY OIL CORP	STAUNTON	VA	24402
P	N	VALLEY PETROLEUM PRODUCTS INC	SMETHPORT	PA	16749
P	N	VALLEY SHAMROCK INC	MC ALLEN	TX	78505
P	N	VALLEY VIEW	WARREN	OH	44483
P	N	VARIETY VILLAGE	SANDUSKY	OH	44870
P	N	VASSILIKI VELLIOS	MASSILLON	OH	44647
P	N	VERNON D SWARTWOOD	TIPTONVILLE	TN	38079
P	N	VERONA OIL CO/COUNTRY STORES	ROSCOE	NY	12776
P	N	VICTORIA SPENCER	MC KEESPORT	PA	15134

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P	ID	Pay Name	Pay City	ST	Zip
P	N	VICTORY LANE FOOD STORE	MOULTRIE	GA	31776
P	N	VIDEO HUT TOBACCO SHOP	STAR CITY	AR	71667
P	N	VILLAGE GROCERY	PINE BLUFF	AR	71603
P	N	VILLAGE VENDOR I	VANCOUVER	WA	98684
P	N	VINCENT OIL INC	LAKE CHARLES	LA	70605
P	N	VINCENT OIL INC	LAKE CHARLES	LA	70605
P	N	VIRGINIA L HULL	YOUNGSTOWN	OH	44511
P	N	VISTA VIEW MARKET	NASHPORT	OH	43830
P	N	VITNER'S SHELL	FT MYERS	FL	33912
P	N	VJ MURRAY	OLIVER SPRINGS	TN	37840
P	N	VOLUNTEER CHEVRON FOOD MART	BRISTOL	TN	37620
P	N	W GREENWICH TEXACO	WEST GREENWICH	RI	02817
P	N	WACO OIL CO	COVINGTON	KY	41011
P	N	WADES DELI MART	CHRISTIANSBURG	VA	24073
P	N	WADES SUPERMARKETS	CHRISTIANSBURG	VA	24073
P	N	WADSWORTH BEVERAGE CENTER	WADSWORTH	OH	44281
P	N	WAG-A-BAG INC	ROUND ROCK	TX	78664
P	N	WAH SHO SHAH	PAWHUSKA	OK	74056
P	N	WAHOCO ENT INC	MIDDLETOWN	VA	22645
P	N	WAL MART STORES INC	BENTONVILLE	AR	72716
P	N	WALKER BRO COUNTRY CORNER	HAUGHTON	LA	71037
P	N	WALKER OIL CO/DBA SQUIRES PANTRY	NOTTINGHAM	PA	19362
P	N	WALLACE OIL COMPANY INC	LA JUNTA	CO	81050
P	N	WALNUT CREEK MARATHON FOOD MART	WALNUT CREEK	OH	44687
P	N	WALTER HOLLOWAY	PUXICO	MO	63960
P	N	WALTER S TRKULA	WARREN	OH	44484
P	N	WALTHAL COMPANY	MACON	GA	31202
P	N	WARD'S TOTAL STOP	DIERKS	AR	71833
P	N	WARDEN RIDGE AUTOMOTIVE	BAKER	WV	26801
P	N	WARDENS SMOKE STOP	DERIDDER	LA	70634
P	N	WARE OIL & SUPPLY CO INC	PERRY	FL	32347
P	N	WARECO	JACKSONVILLE	IL	62650
P	N	WARING OIL COMPANY	VICKSBURG	MS	39180
P	N	WARRENS BP	ROGERSVILLE	AL	35652
P	N	WARRENTON OIL CO	TRUESDALE	MO	63383
P	N	WARRENTON TEXACO	WARRENTON	VA	20186
P	N	WARRENTON TEXACO	WARRENTON	VA	20186
P	N	WASHOE TRIBE OF NEVADA	GARDNERVILLE	NV	89710

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P	ID	Pay Name	Pay City	ST	Zip
P	N	WAVERLY DISCOUNT TOBACCO	WAVERLY	TN	37185
P	N	WAWA INC	WAWA	PA	19063
P	N	WAYNE P BUNCH JR	TOMBALL	TX	77375
P	N	WAYNES EXPRESS	PT ALLEN	LA	70767
P	N	WAYSIDE FARM #2	TALLAHASSEE	FL	32304
P	N	WAYSIDE FARM #2	TALLAHASSEE	FL	32304
P	N	WAYSIDE MARKET	SEVILLE	OH	44273
P	N	WD MILLER INC	LIBERTY	TX	77575
P	N	WE WILLIS	TRAVELERS REST	SC	29617
P	N	WEBB OIL CO	RUSSELLVILLE	AL	35653
P	N	WEEKS BAIT & TACKLE	GEORGETOWN	GA	31754
P	N	WEHMAN INC	PLEASANTON	TX	78064
P	N	WEIGELS	POWELL	TN	37849
P	N	WELCOME SMOKERS	MARYLAND HEIGHTS	MO	63043
P	N	WELCOME SMOKERS	WICHITA	KS	67218
P	N	WELDIE MURRAY	OLIVER SPRINGS	TN	37840
P	N	WELLBORN GROC	WELLBORN	TX	77881
P	N	WELLS TEXACO FOOD MART	PIERRE	SD	57501
P	N	WELSH INC	MERRILLVILLE	IN	46411
P	N	WENDY ROSE CATHERINES CORNER STO	ODESSA	NY	14869
P	N	WES-KAN OIL CO INC	LIBERAL	KS	67901
P	N	WES-T-CO	ABILENE	TX	79604
P	N	WESLEY BOWDEN	SYLACAUGA	AL	35150
P	N	WEST BANK INC	AKRON	OH	44311
P	N	WEST PIKE SHELL	ZANESVILLE	OH	43701
P	N	WEST PINE INC	TULSA	OK	74127
P	N	WEST SIDE DISCOUNT CIGARETTE	DOVER	OH	44622
P	N	WEST STAR CORPORATION	OLYMPIA	WA	985072527
P	N	WEST TEXAS GAS	MIDLAND	TX	79701
P	N	WEST UNION 66	WEST UNION	SC	29696
P	N	WESTERN CONVENIENCE STORES INC	ENGLEWOOD	CO	80112
P	N	WESTERN LIGHTS MOBIL	SYRACUSE	NY	13215
P	N	WESTERN OIL/GREG EBLE	ST LOUIS	MO	63114
P	N	WESTLAKE GROCERY	AUSTIN	TX	78746
P	N	WESTMINISTER 66	WESTMINISTER	SC	29693
P	N	WESTSIDE STOP & SHOP	BRENHAM	TX	77833
P	N	WH EMMART OIL CO	WINCHESTER	VA	22604
P	N	WHEELER DAM MKT & DELI	ROGERSVILLE	AL	35652

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P	ID	Pay Name	Pay City	ST	Zip
P	N	WHEELOCK EXPRESS	WHEELOCK	TX	77882
P	N	WHITE EAGLE	TULSA	OK	741472285
P	N	WHITE HEN PANTRY INC	STONEHAM	MA	02180
P	N	WHITE'S TEXACO	HOT SPRINGS	AR	71901
P	N	WHITES DUNBAR MART	DUNBAR	WV	25064
P	N	WHITEVILLE OIL & GAS COMPANY	LITTLE RIVER	SC	29566
P	N	WHITMAN'S SERVICE CENTER INC	HALEYVILLE	AL	35565
P	N	WHIZZ MARTS INC	JACKSONVILLE	NC	28540
P	N	WILL JONES	ATOKA	TN	38004
P	N	WILLAREDT OIL CO INC	MATTOON	IL	61938
P	N	WILLIAM & JUDIE GIDDES INC	QUITMAN	GA	31643
P	N	WILLIAM J FRITZ JR DBA MINI-MART	KERRVILLE	TX	78028
P	N	WILTON BURGESS/WITCO INC	LYNCHBURG	VA	24501
P	N	WINFIELD QUICK STOP	WINFIELD	WV	25213
P	N	WINN-DIXIE MIDWEST INC	LOUISVILLE	KY	40217
P	N	WISE & SOBJYSHELL INC	WESTLAKE	OH	44145
P	N	WITSCHEYS TYLER CO SHOP N SAVE	MIDDLEBOURNE	WV	26149
P	N	WL PETREY	LUVERNE	AL	36049
P	N	WOLF'S GROCERY	GIDDINGS	TX	78942
P	N	WONDER FOOD STORES INC	MCALLEN	TX	78504
P	N	WONDERLAND OF FOODS	W SALEM	OH	44287
P	N	WOOD FOR HEATING INC	MECHANICSVILLE	VA	23111
P	N	WOOD OIL CO	LEAVENWORTH	KS	66048
P	N	WOODLAND OIL CO	BUCKEYE	AZ	85326
P	N	WOODMAN'S FOOD MARKET	JANESVILLE	WI	53545
P	N	WOODSON'S CASH STORES INC	LAFOLLETTE	TN	37766
P	N	WOODYS ENTERPRISES, LTD	WICKENBURG	AZ	85390
P	N	WORSLEY COMPANIES DBA SCOTCHMAN	WILMINGTON	NC	28403
P	N	WORTHINGTON SUNOCO	WORTHINGTON	OH	43085
P	N	WT WADSWORTH OIL CO., INC.	TUSKEGEE	AL	36083
P	N	WW SMOKE SHOP LLC	ALTUS	OK	73521
P	N	WYMAN INTERPRISES INC	WESTON	WV	26452
P	N	WYSOX GENERAL STORE	WYSOX	PA	18854
P	N	XTRA MART	N GROSVENORDALE	CT	06255
P	N	YAUAPI INDIAN SMOKE SHOP	PRESCOTT	AZ	86301
P	N	YAWKEY QUIK MART	YAWKEY	WV	25573
P	N	YAWKEY QUIK MART	YAWKEY	WV	25573
P	N	YERINGTON PAIUTE TRIBE	YERINGTON	NV	89447

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P	ID	Pay Name	Pay City	ST	Zip
P	N	YIM'S STOP N SHOP	MILLEDGEVILLE	GA	31061
P	N	YORK COUNTY FOODS INC	YORK	PA	17404
P	N	YOUNGS MARKET	LEAVITTSBURG	OH	44430
P	N	YOUNGS MKT	WOXALL	PA	18979
P	N	YOUR C STORE	LAGRANGE	TX	78945
P	N	YOUR STORE OF STORES	GLASS PORT	PA	15045
P	N	Z & Z ENTERPRISES INC DBA APPLEG	APPLE GROVE	WV	25502
P	N	ZACKS PIT STOP	PIEDMONT	SC	29673
P	N	ZEAKES SUNOCO	BRIDGEPORT	OH	43912
P	N	ZEK INC DBA PIT ROW STORES	HINTON	WV	25951
P	N	ZEKES MKT	JOHNSON CITY	TN	37601
P	N	ZERO SMOKE SHOP	GREENWOOD	AR	72936
P	N	ZIP MART	ROCKY MOUNT	NC	27803
P	N	ZIP STOP INC	JEFFERSON CITY	MO	65109
P	N	ZOOMERZ	MORRISTOWN	TN	37816
P	N	ZOOMS INC	HAMPTON	VA	23661
P	W	AC COURVILLE	DETROIT	MI	48238
P	W	AD BEDELL CO	SALAMANCA	NY	14779
P	W	ADCO DISTRIBUTORS INC	CANTON	OH	44702
P	W	AFFILIATED FOOD STORES	ABILENE	TX	79605
P	W	AFFILIATED FOODS CO-OP INC	NORFOLK	NE	68701
P	W	AFFILIATED FOODS INC	AMARILLO	TX	79120
P	W	AFFILIATED FOODS INC	ST JOSEPH	MO	645020938
P	W	AFFILIATED FOODS SW	LITTLE ROCK	AR	72209
P	W	AH HERMEL COMPANY	MANKATO	MN	56001
P	W	AJ SILBERMAN & COMPANY	BRADDOCK	PA	15104
P	W	ALBERT BROTHERS WHOLESALE	ELK CITY	OK	73648
P	W	ALBERT GUARNIERI & CO INC	WARREN	OH	44482
P	W	ALBERT NOTINI & SONS	LOWELL	MA	01854
P	W	ALL BRANDS CIGARETTES & CANDY	HOUSTON	TX	77092
P	W	ALLISON WHOLESALE INC	PAINT ROCK	AL	35764
P	W	AMCON DISTRIBUTING	OMAHA	NE	68127
P	W	AMSTER KIRTZ CO	CANTON	OH	44709
P	W	ANCHOR CIGAR & CANDY CO INC	YOUNGSTOWN	OH	44502
P	W	ANCHOR TOBACCO CO	CHARLESTON	WV	25301
P	W	ANDALUSIA DIST CO INC	ANDALUSIA	AL	36420

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	W	ANDERSON WHOLESALE	LOGAN	WV	25601
P	W	ARIZONA COMPLETE	GLENDALE	AZ	85301
P	W	ARK-LA-TX TOBACCO	TYLER	TX	757101411
P	W	ARKANSAS VALLEY WHOLESALE	MORRILTON	AR	72110
P	W	ARROW ROCK SUPPLY	BOISE	ID	83709
P	W	ASHLAND SPECIALTY CO	ASHLAND	KY	41101
P	W	ASSOCIATED FOOD STORES INC	SALT LAKE CITY	UT	84130
P	W	ASSOCIATED GROCERS INC	BATON ROUGE	LA	70810
P	W	ASSOCIATED WHOLESALERS INC	ROBESONIA	PA	19551
P	W	ATLANTIC DOMINION DIST	VA BEACH	VA	23462
P	W	AUBURN MERCHANDISE DIST	WHITINSVILLE	MA	01588
P	W	AW MARSHALL	SALT LAKE CITY	UT	84116
P	W	AXTON CANDY	LOUISVILLE	KY	40204
P	W	B & G WHOLESALE	HOUSTON	TX	77002
P	W	B & W WHOLESALE DIST	MURFREESBORO	TN	37129
P	W	BACON GROCERY D/B/A DIST SOUTH	ALMA	GA	31510
P	W	BALLEW DISTRIBUTING INC	ROSWELL	NM	88202
P	W	BARBER & SONS TOBACCO	KANSAS CITY	MO	64106
P	W	BATESVILLE GRO	BATESVILLE	AR	72501
P	W	BELL'S WHOLESALE GROCERY INC	MORGANTOWN	WV	26505
P	W	BEST CANDY & TOBACCO CO	PHOENIX	AZ	85040
P	W	BF SPECIALTY COMPANY	CLARKSBURG	WV	26301
P	W	BLAIR CANDY CO INC	ALTOONA	PA	16602
P	W	BLUE RIDGE TOBACCO	TOCCOA	GA	30577
P	W	BOND WHOLESALE INC	TRENTON	MO	64683
P	W	BRAZOS WHOLESALE INC	BRYAN	TX	77802
P	W	BRENHAM WHOLESALE GROCERY CO INC	BRENHAM	TX	77833
P	W	BURKLUND DISTRIBUTOR	EAST PEORIA	IL	61611
P	W	C & B DISTRIBUTOR	LOWELL	NC	28098
P	W	CALDWELL WHOLESALE	SHREVEPORT	LA	71106
P	W	CALIFORNIA WHOLESALE	BENICIA	CA	94510
P	W	CAMPBELL WHOLESALE CO INC	TULSA	OK	74120
P	W	CAPITAL CANDY CO	BARRE	UT	05641
P	W	CAPITOL DISTRIBUTING INC	MERIDIAN	ID	83642
P	W	CASH & CARRY	NASHVILLE	TN	37208
P	W	CASH & CARRY INC	TOPEKA	KS	66619
P	W	CASH & CARRY STORES	ELKIN	NC	28621
P	W	CASH-WA DISTRIBUTING CO	KEARNEY	NE	68848

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	W	CD HARTNETT CO	WEATHERFORD	TX	76086
P	W	CENTRAL DIST CO	GRAND JUNCTION	CO	81502
P	W	CENTURY DISTRIBUTORS INC	ROCKVILLE	MD	20855
P	W	CHAMBERS & OWEN INC	JANESVILLE	WI	53547
P	W	CHARLES C PARKS CO	GALLATIN	TN	37066
P	W	CHARTERED DIST SERVICES	SANTA FE SPRINGS	CA	90670
P	W	CHAS M SLEDD CO	WHEELING	WV	26003
P	W	CHUCKS CIGARETTE VENDING	ELKINS	WV	26241
P	W	CHURCH POINT WHOLESALE GRO CO IN	CHURCH POINT	LA	70525
P	W	CIGARETTE SERVICE	KNOXVILLE	TN	37917
P	W	CITY SALES INC	HIGHLAND	IN	46322
P	W	CITY WHOLESALE GROCERY CO	BIRMINGHAM	AL	352190208
P	W	CITY WHOLESALE INC	WEST POINT	MS	39773
P	W	CLAUDE FANNIN	ASHLAND	KY	41101
P	W	CLIFFORD D FITE CO	CEDARTOWN	GA	30125
P	W	COASTAL WHOLESALE	KINSTON	NC	28501
P	W	COCHRAN BROS CO	DUBLIN	GA	31021
P	W	COLE BROS & FOX	CANTON	MS	39046
P	W	CONCO FOOD DISTRIBUTORS	LAFAYETTE	LA	70501
P	W	CONSUMER PRODUCTS dba J POLEP	CHICOPEE	MA	01013
P	W	CONVENIENCE STORE DISTRIBUTING	RICHMOND	IN	47375
P	W	COOPER BOOTH WHOLESALE	MOUNTVILLE	PA	17554
P	W	CORE-MARK INTERNATIONAL	S SAN FRANCISCO	CA	94080
P	W	CORR WILLIAMS WHLS INC	MERIDIAN	MS	39302
P	W	COWLITZ CANDY & TOBACCO INC	LONGVIEW	WA	98632
P	W	CUBAN CIGAR	SALT LAKE CITY	UT	84165
P	W	CW BROWER INC	MODESTO	CA	95354
P	W	D & R WHOLESALE	HOUSTON	TX	77057
P	W	DAIZA INC	DETROIT	MI	48228
P	W	DAVIS & BUTLER INC	DOVER	DE	19901
P	W	DAY WHOLESALE	TUPPER LAKE	NY	12986
P	W	DE MIKESELL CO	LEXINGTON	KY	40575
P	W	DIGRAZIA WHOLESALE	WELLS	NV	89835
P	W	DILLON CO INC DBA GHC MERCH WRHS	DENVER	CO	80223
P	W	DISCOUNT DISTRIBUTING	SPRINGDALE	AR	72764
P	W	DITTMAN ADAMS CO	FAIRFIELD	OH	45018
P	W	DIXIE SAVINGS STORES	CHATTANOOGA	TN	37401
P	W	DIXIE TOBACCO & CANDY CO	SHAW	MS	38773

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	W	DONAHUE & HIGGINS CANDY & TOB	GLEN FALLS	NY	12801
P	W	DOUGLAS CENTRAL ARK CO	CONWAY	AR	72032
P	W	DOUGLAS NORTHEAST CO	JONESBORO	AR	72404
P	W	DOUGLAS TOBACCO	TEXARKANA	AR	71854
P	W	DOWLING'S INC	MILTON	UT	05468
P	W	DUNCAN CANDY & TOBACCO CO	DUNCAN	OK	73533
P	W	DUSA DISTRIBUTION CENTER	MELBOURNE	FL	32935
P	W	EAST-MONT ENTERPRISES INC	SIDNEY	MT	59270
P	W	EBY BROWN COMPANY INC	NAPERVILLE	IL	605667067
P	W	ECONOMICAL WHOLESALE	BELLE ROSE	LA	70341
P	W	ECONOMY WHOLESALE CO	LAVALE	MD	21504
P	W	EDMISTON BROS	CROCKETT	TX	75835
P	W	EDW BADEAUX CO	THIBODAUX	LA	70301
P	W	EL GRANDE DISTRIBUTORS	CARLSBAD	NM	88220
P	W	ELLWOOD CITY CANDY CO	ELLWOOD CITY	PA	16117
P	W	ELUM MUSIC COMPANY	MASSILLON	OH	44646
P	W	EMPIRE CANDY & TOBACCO	PEARL RIVER	NY	10965
P	W	EP KIRST & SON INC	HAMBURG	NY	14075
P	W	F & F TOBACCO PRODUCTS	BRYAN	TX	77803
P	W	F & T DIST CO INC	ITHACA	NY	14850
P	W	F MC CONNELL & SONS	NEW HAVEN	IN	46774
P	W	FA DAVIS & SONS CO INC	BALTIMORE	MD	21226
P	W	FANCI CANDY & TOBACCO	GREENVILLE	TX	75401
P	W	FANNING WHOLESALE	IDAHO FALLS	ID	83402
P	W	FARNER BOCKEN CO	CARROLL	IA	51401
P	W	FINKLE DISTRIBUTORS INC	MAYFIELD	NY	12117
P	W	FLEMING CO INC	OKLAHOMA CITY	OK	73118
P	W	FLICHIA WHOLESALE DIST	COLUMBUS	OH	43236
P	W	FOOD-4-LESS WHOLESALE	TAHLEQUAH	OK	74465
P	W	FORREST CITY GROCERY CO	FORREST CITY	AR	72335
P	W	FRANK MCKONE CIGAR CO	FARGO	ND	58102
P	W	FRANK P CORSO	BILOXI	MS	39533
P	W	FRANK SILVA & SONS INC	CHALMETTE	LA	70043
P	W	FRITZ COMPANY INC	NEWPORT	MN	55055
P	W	FRONTIER EXPEDITORS	ANCHORAGE	AK	99518
P	W	GARBER BROTHERS	STOUGHTON	MA	02072
P	W	GEM CANDY & NOVELTY CO INC	YORK	PA	17403
P	W	GEM STATE DISTRIBUTORS	ALBUQUERQUE	NM	87109

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	W	GEMS DISTRIBUTING INC	WICHITA	KS	67203
P	W	GENERAL DISTRIBUTORS	ALBUQUERQUE	NM	87199
P	W	GENERAL TOBACCO & CANDY	GRAND FORKS	ND	58203
P	W	GEO F PATRICK & CO	HONAKER	VA	24260
P	W	GEORGE J FALTER CO	BALTIMORE	MD	212270676
P	W	GEORGE MC CHADO CO	SHARON	MA	02067
P	W	GILA CANDY & TOBACCO	SAFFORD	AZ	85546
P	W	GLACIER WHOLESALE	KALISPELL	MT	599035369
P	W	GLIDEWELL DISTRIBUTING	FORT SMITH	AR	72902
P	W	GOLDEN EMPIRE CANDY CO	CHICO	CA	95928
P	W	GOLDSMIT BLACK	PARKERSBURG	WV	26102
P	W	GOLDSMIT SYDNOR	HUNTINGTON	WV	25701
P	W	GRAGNON WHOLESALE	NEW IBERIA	LA	70560
P	W	GRANITE CITY JOBBING	ST CLOUD	MN	56301
P	W	GRAY'S WHOLESALE INC	CLAYTON	NY	13624
P	W	GREAT DISCOVERY'S	HOUSTON	TX	77092
P	W	GREAT NORTH FOODS	ALPENA	MI	49707
P	W	GREENE GROCERY CO	METTER	GA	30439
P	W	GROCERS SUPPLY I & C INC	HOUSTON	TX	77270
P	W	GROCERY SUPPLY CO	SULPHUR SPRINGS	TX	754830638
P	W	GUMMER WHOLESALE INC	HEATH	OH	43056
P	W	H & M DISTRIBUTING	TWIN FALLS	ID	83303
P	W	H WILLEY INC	NORWICH	CT	06360
P	W	HALE HALSELL	TULSA	OK	74158
P	W	HALE WHOLESALE DIST CO INC	LAKE CHARLES	LA	70601
P	W	HANOVER CANDY & TOBACCO SUPPLIES	HANOVER	PA	17331
P	W	HARBOR WHOLESALE GROCERY INC	TUMWATER	WA	985017227
P	W	HAROLD'S WHOLESALE	SAN MARCOS	TX	78666
P	W	HARREL BROS WHOLESALE	FOREST CITY	NC	28043
P	W	HARRISON CO INC	BOSSIER CITY	LA	71111
P	W	HARRY KENYON INC	WILMINGTON	DE	19801
P	W	HARTZ FOODS INC	THIEF RIVER FALLS	MN	56701
P	W	HATTIESBURG GROCERY CO	HATTIESBURG	MS	39401
P	W	HAWAIIAN ISLES ENTERPRISES INC	HONOLULU	HI	96819
P	W	HAWK GRO CO INC	NEWPORT	TN	37821
P	W	HB PAULK GROCERY CO	OPP	AL	36467
P	W	HEAD DISTRIBUTING	SMYRNA	GA	30080
P	W	HEBER SPRINGS WHOLESALE	HEBER SPRINGS	AR	72543

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	W	HENRY'S FOODS INC	ALEXANDRIA	MN	56308
P	W	HF HILLMANN	NAPA	CA	94558
P	W	HI-LINE WHOLESALE CO	WOLF POINT	MT	59201
P	W	HIBBERT & MC GEE WHOLESALERS INC	EAST BARRE	VT	05649
P	W	HICKS WHOLESALE COMPANY	PORTSMOUTH	OH	45662
P	W	HJ BAILEY CO	NEPTUNE	NJ	07754
P	W	HOLIDAY WHOLESALE INC	WISCONSIN DELLS	WI	53965
P	W	HOLLOWAY DISTRIBUTING INC	PUXICO	MO	63960
X	W	HT HACKNEY	HAROLD	KY	41635
X	W	HT HACKNEY	TAMPA	FL	33601
X	W	HT HACKNEY	CANTON	GA	30114
X	W	HT HACKNEY	W COLUMBIA	SC	29171
X	W	HT HACKNEY	KNOXVILLE	TN	37901
X	W	HT HACKNEY	GLASGOW	KY	42142
X	W	HT HACKNEY	ATHENS	TN	373710589
X	W	HT HACKNEY	PENSACOLA	FL	32591
X	W	HT HACKNEY	MIAMI	FL	33168
X	W	HT HACKNEY	MIDDLEBORO	KY	40965
X	W	HT HACKNEY	ONEIDA	TN	378414757
X	W	HT HACKNEY	SOMERSET	KY	42502
X	W	HT HACKNEY	HICKORY	NC	28603
X	W	HT HACKNEY	WAYNESVILLE	NC	28786
X	W	HT HACKNEY	MURPHY	NC	28906
X	W	HT HACKNEY	PADUCAH	KY	420022335
X	W	HT HACKNEY	COVINGTON	TN	38019
X	W	HT HACKNEY	GREENVILLE	SC	29610
X	W	HT HACKNEY	JOHNSON CITY	TN	37605
X	W	HT HACKNEY	HUNTSVILLE	AL	35804
X	W	HT HACKNEY	NEWTON	NC	28658
X	W	HT HACKNEY	ORANGEBURG	SC	29116
P	W	HUB INC	FENTON	MO	63026
P	W	HUGHES CANDY & TOBACCO	GEORGETOWN	KY	40324
P	W	HUNTSVILLE WHOLESALE GROCERS	HUNTSVILLE	TX	77342
P	W	HUSER-PAUL CO INC	FORT WAYNE	IN	46804
P	W	IDAHO CANDY CO	BOISE	ID	83705
P	W	IMPERIAL TRADING COMPANY INC	HARAHAN	LA	701830508
P	W	INDEPENDENT WHOLESALE	ORLANDO	FL	32804
P	W	J J ROGERS & SONS	TUPELO	MS	38801

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P	ID	Pay Name	Pay City	ST	Zip
P	W	J MURRAY CO	MT PLEASANT	MI	48858
P	W	JACKSON WHOLESALE	JACKSON	KY	41339
P	W	JAKE'S VARIETY WHOLESALE	ABBEVILLE	LA	70511
P	W	JEFFERSON WHOLESALE GROC CO	PUWXSUTAWNEY	PA	15767
P	W	JF JOHNSON INC	LEESVILLE	SC	29070
P	W	JF WALKER CO INC	SANDUSKY	OH	44870
P	W	JJ BRODSKY & SONS INC	CHICAGO	IL	60619
P	W	JL GADDY ENTERPRISE INC	HICKORY GROVE	SC	29717
P	W	JOE SMITH CO	PITTSBURGH	KS	66762
P	W	JONES MC INTOSH	SYRACUSE	NY	13206
P	W	JOS H STOMEL & SONS	WEST BERLIN	NJ	08091
P	W	JT DAVENPORT & SONS	SANFORD	NC	27330
P	W	JUNCTION CITY DIST & VENDING	JUNCTION CITY	KS	66441
P	W	K & M WHOLESALE	LEXINGTON	NC	27292
P	W	KAISER WHOLESALE INC	NEW ALBANY	IN	47150
P	W	KEYSTONE TOBACCO CO	BINGHAMTON	NY	139021771
P	W	KING WHOLESALE	HOUSTON	TX	77003
P	W	KLAFTER'S	NEWCASTLE	PA	16101
P	W	KLAMATH COUNTY TOBACCO & CANDY	KLAMATH FALLS	OR	97601
P	W	KLEIN CANDY CO LP	WILKES-BARRE	PA	18703
P	W	KLOSTERMAN	KALAMAZOO	MI	49001
P	W	KOCH CANDY COMPANY	TRENTON	IL	62293
P	W	L & L/JIROCH	GRAND RAPIDS	MI	49518
P	W	LA NELSON/DBA BURKE'S	SPOKANE	WA	99202
P	W	LAG INC	TUCKER	GA	300850025
P	W	LAMONE CANDY & TOBACCO CO INC	SALINA	KS	67401
P	W	LAUGHINGHOUSE WHOLESALE	WAYCROSS	GA	31501
P	W	LAUREL CIGAR CO	LAUREL	MS	39440
P	W	LAUREL GROCERY COMPANY	LONDON	KY	40741
P	W	LAWTON & EWING FOODS INC	SOUTH SAN FRANCISCO	CA	94080
P	W	LAYMAN CANDY CO	SALEM	VA	24153
P	W	LEBANON UNITED JOBBERS	LEBANON	PA	17046
P	W	LEE DEE WHOLESALE DIST CO	LAKE CHARLES	LA	70601
P	W	LEE'S WHOLESALE	FORT WORTH	TX	76114
P	W	LIBERTY USA	WEST MIFFLIN	PA	15122
P	W	LIBERTY WHOLESALE	FORT PAYNE	AL	35967
P	W	LJ ZUCCA INC	VINELAND	NJ	08360
P	W	LOGAN INC	BUTLER	PA	160018759

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	W	LONG WHOLESALE DIST INC	CORINTH	MS	38834
P	W	LONGO DIST	WESTERLY	RI	02891
P	W	LP SHANKS WHOLESALE CO	CROSSVILLE	TN	38557
P	W	LW GATEWOOD WHSLE	FOREST	MS	39074
P	W	LYONS SPECIALTY CO INC	BATON ROUGE	LA	70806
P	W	MACKOUL DIST INC	JACKSONVILLE	FL	32206
P	W	MACON CIGAR & TOBACCO	MACON	GA	31201
P	W	MADISON WHOLESALE GROCERY	CARROLLTON	KY	41008
P	W	MANCHESTER WHOLESALE DIST	MANCHESTER	NH	03101
P	W	MARK MATHENY	EVERETT	WA	98203
P	W	MARKETPLACE DISTRIBUTORS	NEW PHILADELPHIA	OH	446632338
P	W	MATHEW ZECHMAN INC	ELYRIA	OH	44035
P	W	MC ANENY BROS INC	EBENSBURG	PA	159314114
P	W	MC CARTY-HULL CIGAR CO INC	AMARILLO	TX	79106
P	W	MC DOWELL SUPPLY	BECKLEY	WV	25801
P	W	MCCLURE CO	CHARLESTON	WV	25324
P	W	MCLANE	TEMPLE	TX	765036131
P	W	MERCHANTS GROCERY CO INC	CULPEPER	VA	22701
P	W	MERCHANTS WHOLESALE INC	QUINCY	IL	62305
P	W	MERRILL DIST INC	MERRILL	WI	54452
P	W	MERRITT WHOLESALE	HOT SPRINGS	AR	71901
P	W	MGH WHOLESALE GROCERS INC	LAWRENCEBURG	TN	38464
P	W	MID-AMERICA WHOLESALE CO	ENID	OK	73702
P	W	MIDDLESEX TOBACCO	PERTH AMBOY	NJ	08861
P	W	MIDSOUTH DISTRIBUTION	DOUGLAS	GA	31533
P	W	MIKE ALEXANDER & SONS INC	MORGANTOWN	WV	265054097
P	W	MILLER & HARTMAN WHOLESALE	LANCASTER	PA	176084000
P	W	MILLER & HARTMAN WHOLESALE	LANCASTER	PA	176084000
P	W	MILLER DISTRIBUTING	ST CLAIR	PA	17970
P	W	MILLER DISTRIBUTING CO INC	NASHVILLE	TN	37203
P	W	MINTER-WEISMAN CO	PLYMOUTH	MN	55441
P	W	MINTER-WEISMAN CO	DAVENPORT	IA	52802
P	W	MITCHELL GROCERY	ALBERTVILLE	AL	35950
P	W	MK GRO/BATES DIST CO	RUSSELLVILLE	AR	72801
P	W	MODERN DISTRIBUTORS	SOMERSET	KY	42502
P	W	MONTANO CIGARETTE CANDY & TOB	MILFORD	CT	06460
P	W	MORELAND WHOLESALE	CHEYENNE	WY	82001
P	W	MOSELEY & REECE	MT AIRY	NC	27030

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	W	MOSLEY CANDY & TOB CO	CAMDEN	AR	71701
P	W	MOUND CITY INDUSTRIES	ST LOUIS	MO	63118
P	W	MOUNTAIN CANDY & CIGAR CO	S FALLSBURG	NY	12779
P	W	MR WILLIAMS INC	HENDERSON	NC	27536
P	W	MTC DISTRIBUTING	MODESTO	CA	95352
P	W	MUSKINGUM VALLEY GROCERY	MALTA	OH	43758
P	W	MYERS-COX CO	PEOSTA	IA	52068
P	W	NASH FINCH CO INC	LUMBERTON	NC	28358
P	W	NATIONAL TOBACCO	BUTLER	WI	53007
P	W	NEW CIGAR & CANDY INC	GRIFFIN	GA	30224
P	W	NEWMAN & ULLMAN	DECATUR	IL	625255167
P	W	NEWMAN & ULLMAN	PEKIN	IL	61554
P	W	NORTH CENTRAL DIST INC	DALLAS	TX	75228
P	W	NORTH COAST DISTRIBUTORS	SAN RAFAEL	CA	949150429
P	W	NORTH IDAHO DIST	COEUR D ALENE	ID	83814
P	W	NORTHERN SALES CO OF AK	JUNEAU	AK	99801
P	W	NORTHLAND TOBACCO CO	BOYNE CITY	MI	49712
P	W	NORTHWEST TOBACCO CO	FAYETTEVILLE	AR	72702
P	W	OBADE CANDY CO	KITTANNING	PA	16201
P	W	OHIO VALLEY WHOLESALE	ASHLAND	KY	41101
P	W	OK DIST CO	WILLISTON	ND	58801
P	W	OLEAN WHOLESALE GROCERY COOP INC	OLEAN	NY	14760
P	W	ONE STOP MARKET INC	PIKEVILLE	KY	41502
P	W	ONEIDA WHOLESALE	ONEIDA	NY	13421
P	W	PACIFIC GROSERVICE INC	SAN JOSE	CA	95112
P	W	PATE DANIEL TOBACCO CO	TUSCALOOSA	AL	35401
P	W	PAUL JACKSON WHOLESALE	ROSEBURG	OR	97470
P	W	PELICAN CIGAR CO INC	LAKE CHARLES	LA	70601
P	W	PELICAN STATE WHOLESALE	MONROE	LA	71201
P	W	PENMARVA GROCERS	KINGWOOD	WV	26537
P	W	PENNINGTONS INC	HAVRE	MT	59501
P	W	PETER P DENNIS INC	PHILLIPSBURG	NJ	08865
P	W	PHELPS JOB & CANDY	FREMONT	NE	68025
P	W	PHILIP'S WHOLESALE CANDY & TOB	LAFAYETTE	LA	70501
P	W	PIEDMONT CANDY	ANDERSON	SC	29621
P	W	PINE STATE TRADING	AUGUSTA	ME	04330
P	W	PIONEER DIST CO INC	GREEN BAY	WI	54306
P	W	PIPPIN WHOLESALE CO	HARRISON	AR	72601

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	W	PITTSBURG WHOLESALE GROCERY	SAN JOSE	CA	95112
P	W	PLAINFIELD TOBACCO & CANDY	S PLAINFIELD	NJ	07080
P	W	PORTS PETROLEUM CO INC	WOOSTER	OH	44691
P	W	PRICE & CO INC	BEAUMONT	TX	77705
P	W	QUAGLINO TOBACCO & CANDY	NEW ORLEANS	LA	70125
P	W	QUALITY FOODS	LYNCHBURG	VA	24506
P	W	QUEEN CITY WHOLESALE INC	SIOUX FALLS	SD	57101
P	W	RC TAYLOR WHOLESALE	LUBBOCK	TX	79401
P	W	REDSTONE DISTRIBUTING CO	REPUBLIC	PA	15475
P	W	REIDS CONFECTIONERY CO	BANGOR	ME	04401
P	W	REIDSVILLE GROCERY CO INC	REIDSVILLE	NC	27323
P	W	RENFRO SUPPLY	WILLIAMSBURG	KY	40769
P	W	RICE WHOLESALE CO INC	BRISTOL	VA	242030323
P	W	RICH & RHINE INC	PORTLAND	OR	972949547
P	W	RICH WHOLESALE & CO	LOGAN	OH	43138
P	W	RICHMOND MASTER DIST DBA MASTER	SOUTH BEND	IN	46660
P	W	RL JONES & SON INC	BATH	NY	14810
P	W	RL LIPTON	PITTSBURGH	PA	15213
P	W	RN MASON INC	LA JUNTA	CO	81050
P	W	ROACH & SMITH	BUTTE	MT	59702
P	W	ROADSIDE TRUCK PLAZA	ASHEVILLE	NC	28814
P	W	ROBERTS CIGAR & TOBACCO CO	SHREVEPORT	LA	71101
P	W	ROUNDY'S INC	PEWAUKEE	WI	53072
P	W	S ABRAHAM & SONS	GRAND RAPIDS	MI	495011768
P	W	SAM COHEN & SONS	WASHINGTON	PA	15301
P	W	SAM FRANK INC	RUTLAND	VT	05701
P	W	SANDSTROM'S	GRAND RAPIDS	MN	55744
P	W	SARVER CANDY CO	BLUEFIELD	WV	24701
P	W	SCHEIDELMAN INC	UTICA	NY	13502
P	W	SCHLEMMER WHOLESALE	GREENSBURG	IN	47240
P	W	SCHLESINGERS WHOLESALE	LAKE CHARLES	LA	70601
P	W	SEAMAN WHOLESALE	EVERSON	PA	15631
P	W	SEGAL WHOLESALE	MINNEAPOLIS	MN	55406
P	W	SERVICE CANDY CO	BILLINGS	MT	59103
P	W	SERVICE DIST INC	BOZEMAN	MT	59715
P	W	SHEEHAN-MAJESTIC INC	MISSOULA	MT	59802
P	W	SHINN WHOLESALE	MAGNOLIA	AR	71753
P	W	SHRYACK-GIVENS	BOONVILLE	MO	65233

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CAP ENROLLMENT

P	ID	Pay Name	Pay City	ST	Zip
P	W	SHRYACK-HIRST GROC CO	JEFFERSON CITY	MO	65102
P	W	SID KURLANDER & SON INC	SANTA ROSA	CA	95402
P	W	SKINNER'S CASH & CARRY	ANNISTON	AL	36201
P	W	SMITH WHOLESALE	JOHNSON CITY	TN	37605
P	W	SOMERSET CANDY COMPANY	SOMERSET	PA	15501
P	W	SOUTHCO DIST	GOLDSBORO	NC	27533
P	W	SOUTHERN WHOLESALE	FT SMITH	AR	72917
P	W	SOUTHWEST VIRGINIA TOBACCO	RADFORD	VA	24141
P	W	SPRINKLE SHELTON WHOLESALE	MARSHALL	NC	28753
P	W	ST JOSEPH TOBACCO CO	ST JOSEPH	MO	64506
P	W	STANDARD TOBACCO CO INC	SAPULPA	OK	740670390
P	W	STANDARD-ROSENBAUM INC	LATHAM	NY	12110
P	W	STEPHENSON WHOLESALE CO INC	DURANT	OK	74701
P	W	STERLING GRO	PRINCETON	WV	24740
P	W	STEWART DIST	WAYCROSS	GA	31501
P	W	SUNFLOWER SUPPLY	GALENA	KS	66739
P	W	SUPERVALU INC	EDEN PRAIRIE	MN	55344
P	W	SWD CORP	LIMA	OH	45801
P	W	TBI CORP	MANCHESTER	NH	03109
P	W	TH BURT & SONS INC	HAMMOND	LA	70401
P	W	THE CORR WILLIAMS CO	JACKSON	MS	39201
P	W	THE FARNER CO INC	NORFOLK	NE	687020639
P	W	THE GROCERS SUPPLY CO INC	HOUSTON	TX	77270
P	W	THE HAGMAN'S CORP	PITTSBURG	KS	66762
P	W	THOMAS & HOWARD CO INC	COLUMBIA	SC	292243659
P	W	TOBA INC DBA THOMPSON CO	GRAND ISLAND	NE	68801
P	W	TOM FITTS TOBACCO	PINE BLUFF	AR	71601
P	W	TOWN & COUNTRY WHO	BELLE PLAINE	IA	52208
P	W	TREPCO WEST	CHULA VISTA	CA	91911
P	W	TRI-COM INC	CARTHAGE	MO	64836
P	W	TRI-MART CORPORATION	MENOMONIE	WI	54751
P	W	TRIANGLE CANDY & TOBACCO CO	PITTSBURGH	PA	15232
P	W	TRIANGLE WHOLESALE	DERMOTT	AR	71638
P	W	TRIPI FOODS INC	BUFFALO	NY	14240
P	W	TVC WHOLESALE INC	FLORENCE	AL	35631
P	W	TWIN CITY WHOLESALE INC	OPELIKA	AL	36801
P	W	UNION GROCERY CO INC	NEW ALBANY	MS	38652
P	W	UNITED TOBACCO CO	STAMFORD	CT	06904

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P	ID	Pay Name	Pay City	ST	Zip
P	W	UNITED VENDING	PHILADELPHIA	PA	19136
P	W	UNIVERSAL WHOLESALE	COMMERCE	CA	90040
P	W	VA WHOLESALE CO INC	BRISTOL	VA	24201
P	W	VALLEY VENDING	MARTINS FERRY	OH	43935
P	W	VICKSBURG SPECIALTY CO	VICKSBURG	MS	39180
P	W	W LEE FLOWERS & CO	LAKE CITY	SC	29560
P	W	WA DEHART INC	NEW COLUMBIA	PA	17856
P	W	WABASH FOOD SERVICE	VINCENNES	IN	47591
P	W	WALKER WHOLESALE	MARION	IL	62959
P	W	WAREHOUSE DISTRIBUTING	MORRILTON	AR	72110
P	W	WARREN WHO CO	WARREN	AR	71671
P	W	WEASE DISTRIBUTING	DE SOTO	MO	63020
P	W	WEEKE WHOLESALE	FAIRVIEW HEIGHTS	IL	62208
P	W	WEIRTON WHOLESALE DIST	WEIRTON	WV	26062
P	W	WENCAR INC	CORPUS CHRISTI	TX	78416
P	W	WENCAR INC	CORPUS CHRISTI	TX	78416
P	W	WHOLESALE SUPPLY CO INC	MINOT	ND	587021948
P	W	WICHITA TOBACCO & CANDY CO INC	WICHITA	KS	67203
P	W	WIEMUTH & SON CO INC	TERRE HAUTE	IN	47803
P	W	WIGLEY & CULP	GULFPORT	MS	39501
P	W	WIGLEY & CULP	LUCEDALE	MS	39452
P	W	WILLIAM F BROCKMAN WHO	JERSEYVILLE	IL	62052
P	W	WILSON WHOLESALE	LAWTON	OK	73502
P	W	WL PETREY	LUVERNE	AL	36049
P	W	WM ENDERT DIST	CRESCENT CITY	CA	95531
P	W	WR FAETH WHOLESALE	FT MADISON	IA	52627
P	W	YAKIMA DIST	YAKIMA	WA	98902

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16diii001241

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on January 14, 1999 for a hearing on pending discovery disputes.

APPEARANCES:

FOR THE PLAINTIFF: Neil Gorsuch and Ben Powell, counsel.

FOR THE DEFENDANT: James Keyte, John Reed and Chris Athanasia, counsel.

At the hearing, counsel presented arguments on several of the pending discovery disputes and the court issued oral rulings on a number of issues. In addition to the oral rulings on the record,

IT IS HEREBY ORDERED that the next hearing is scheduled for **Tuesday, January 19, 1999, from 10:00 a.m. to 1:00 p.m.** With respect to what discoverable documents. if any, are maintained by field personnel. UST shall produce a witness at the hearing who is highly experienced and fully knowledgeable with respect to UST's sales and business practices, and the practical realities of where, how, and what documents field representatives may have in their possession.

Date: January 14, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

ENTERED
JAN 14 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

Copies to:
Counsel of Record

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16diii001242

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. — PLAINTIFFS

vs. — NO. 5:98CV-108-R

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC. and UST INC. — DEFENDANTS

MEMORANDUM OPINION AND ORDER

The undersigned Magistrate Judge conducted a hearing on January 19, 1999, concerning the issue of whether the scope of search for documents by defendant UST should extend to documents retained by sales representatives. For the reasons set forth on the record, in more detail,

IT IS HEREBY ORDERED that defendant UST shall extend its search for responsive documents previously requested to the following categories of documents in the possession, custody or control of sales representatives:

1. Any notes, correspondence, memoranda, day-planner, calendar, journal, or other similar written summary of activities prepared by or retained by a sales representative which relates in any way to any of the alleged anti-competitive activities asserted by the plaintiff in paragraphs 22-31 of the complaint.

2. Any regularly maintained corporate documents, including so-called PAR's and any other related reports, memoranda, summaries, and the like, in the possession, custody or control of the sales representatives for calendar year 1995 or earlier, and responsive to the previously filed document requests.

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3. The Magistrate Judge set out in some detail on the record the reasons for the ruling. Briefly, the scope of Rule 26 is broad, and the plaintiff is entitled to discovery documents which are either relevant or may lead to the discovery of relevant evidence. While the testimony at the hearing from the corporate representative was clear that sales representatives *should* send official documentation "up the chain" to the regional office, the representative did not deny that it was possible that additional documents were individually prepared and maintained by sales representatives. Given the allegations of the complaint, in which some or many of the anti-competitive activities alleged against UST are supposedly carried out by sales representative personnel, it would be an extraordinary result to deny discovery into the files of the sales representatives who are claimed to have implemented supposedly illegal policies.

The assertions of burden by the defendant are essentially conclusory. Defendant did no more than to argue that there are 448 sales representatives, a fact which is not disputed. Defendant presented no evidence concerning the amount of time which it would take to conduct such a search, and given defendant's position that few such documents are maintained, the task of compliance would not be unduly burdensome. Moreover, to the extent that diaries, journals, individual notes, and the like may document or reflect actions alleged by the plaintiff to be anti-competitive or illegal, such individual records would potentially be of considerable significance in plaintiff's attempt to prove its case.

In short, given the indisputable relevance of the documents, to the extent that they are found to exist, and the generalized assertions of burden, the motion to compel will be **GRANTED** to the limited extent set out above.

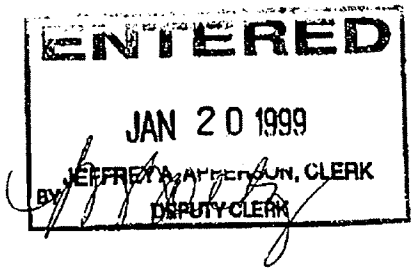
16diii001244

The testimony of the corporate representative was uncontradicted that corporate documents are not retained indefinitely (they are "purged," in the language of one of the memoranda), and given the uncontradicted assertion of plaintiff's counsel that some sales representatives do keep corporate reports longer than the period of time for which the corporate document policy extends, it is not illogical to extend the search for relevant documents to a level of the company where documents no longer retained at the corporate level still may exist.

Finally, while merely pleading an antitrust case is not an authorization for discovery without limits, it is also apparent to the Magistrate Judge that the complaint is one brought by one established competitor against a larger, arguably dominant firm, and given the experience and resources of counsel on both sides of the dispute, and the scope of the case, it cannot be said that a thorough search for documents which may be of considerable significance should be limited to exclude a search at the sales representative level.

Date: 1/20/99

JAMES D. MOYER
UNITED STATES DISTRICT COURT



Copies to:
Counsel of Record

16diii001245

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. — PLAINTIFFS

vs. — NO. 5:98CV-108-R

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC. and UST INC. — DEFENDANTS

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52

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The assertions of burden by the defendant are essentially conclusory. Defendant did no more than to argue that there are 448 sales representatives, a fact which is not disputed. Defendant presented no evidence concerning the amount of time which it would take to conduct such a search, and given defendant's position that few such documents are maintained, the task of compliance would not be unduly burdensome. Moreover, to the extent that diaries, journals, individual notes, and the like may document or reflect actions alleged by the plaintiff to be anti-competitive or illegal, such individual records would potentially be of considerable significance in plaintiff's attempt to prove its case.

In short, given the indisputable relevance of the documents, to the extent that they are found to exist, and the generalized assertions of burden, the motion to compel will be **GRANTED** to the limited extent set out above.

16diii001247

The testimony of the corporate representative was uncontradicted that corporate documents are not retained indefinitely (they are "purged," in the language of one of the memoranda), and given the uncontradicted assertion of plaintiff's counsel that some sales representatives do keep corporate reports longer than the period of time for which the corporate document policy extends, it is not illogical to extend the search for relevant documents to a level of the company where documents no longer retained at the corporate level still may exist.

Finally, while merely pleading an antitrust case is not an authorization for discovery without limits, it is also apparent to the Magistrate Judge that the complaint is one brought by one established competitor against a larger, arguably dominant firm, and given the experience and resources of counsel on both sides of the dispute, and the scope of the case, it cannot be said that a thorough search for documents which may be of considerable significance should be limited to exclude a search at the sales representative level.

Date: 1/20/99

JAMES D. MOYER
UNITED STATES DISTRICT COURT

ENTERED
JAN 20 1999
JEFFREY A. APPERSON, CLERK
BY: DEPUTY CLERK

Copies to:
Counsel of Record

16diii001248

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CONWOOD COMPANY L.P., ET AL, Plaintiffs	)	
v.	)	5:98-CV-00108
UNITED STATES TOBACCO COMPANY, ET AL, Defendants	)	

TRANSCRIPT OF HEARING

* * * * * * * *

BEFORE MAGISTRATE JUDGE JAMES D. MOYER, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE, KENTUCKY, ON JANUARY 19, 1999.

* * * * * * * *

DORIS LYNN MORRIS
COURT REPORTER
7803 Deep Trail Court
Prospect, KY 40059
502/228-0394

APPEARANCES:

For the Plaintiffs:

Neil M. Gorsuch
Ben Powell
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005

For the Defendants:

John S. Reed
2400 Citizens Plaza
Louisville, Kentucky 40202

James A. Keyte
Chris T. Athanasia
919 Third Avenue
New York, New York 10022-3897

I N D E X

Witness for the Defendants: Pages

Kevin Eugene Freudenthal
Direct Examination
Mr. Keyte 4
Cross-Examination
Mr. Gorsuch 31
Redirect Examination
Mr. Keyte 61

E X H I B I T S

For the Defendants: Pages

1-A - (Marked) - Photograph of rear view of USTC sales representative van showing smokeless tobacco product 8

1-B - (Marked) - Photograph of back seat of USTC sales representative van showing smokeless tobacco product rack, point of sale advertising and other promotional materials 8

1-C - (Marked) - Photograph of front seat of USTC sales representative van showing car files and profile activity reporting materials on passenger seat . 8

2 - (Marked) - Page out of Sales Operations Manual entitled Car File Heading Suggestions 11

7 - (Marked) - E-mail dated April 15, 1998 from Gary Milano 33

8 - (Marked) - Affidavit of Gary Milano . . 38

9 - (Marked) - Document entitled Territory Management, Building Business for the Retailer 51

10 - (Marked) - Memorandum to Bruce O'Connor from Kevin Freudenthal 55

THE CAPTIONED MATTER WAS CALLED IN OPEN COURT AT THE HOUR OF 10:05 A.M., ON JANUARY 19, 1998; AND THE FOLLOWING PROCEEDINGS OCCURRED:

THE COURT: Mr. Golden, would you call the case, please.

CLERK OF THE COURT: Conwood Company v. United States Tobacco Company, Civil Action Number 5:98-cv-108-R.

THE COURT: All right. Good morning, everyone.

MR. GORSUCH: Good morning, Your Honor.

MR. REED: Good morning, Your Honor.

MR. KEYTE: Good morning, Your Honor.

THE COURT: The Court recognizes Mr. Gorsuch and Mr. Powell for the plaintiff, Conwood; and for United States Tobacco, Mr. Reed and Mr. Athanasia and Mr. Keyte; and we are here as a continuation of proceedings we've had on discovery-related issues; and last week, the Court requested that UST bring a highly knowledgeable person who could speak to the issue about where and whether documents are kept at the sales or field level and that the reason the Court did that was simply that it was apparent to the Court that there was a good deal of disagreement between the parties as to whether the sales personnel had relevant documents in their possession. And given the nature of the case and the possible importance of the issue to discovery, the Magistrate Judge simply thought that the best thing to

do would be to hear from someone. Affidavits can be useful, but sometimes live testimony is the best way to try and resolve a factual conflict.

The Magistrate Judge wants to be very clear that the Court has no predilection or inclination as to what the facts will show here; but I thought that, rather than having an affidavit-based decision, we'd just hear from someone.

So Mr. Keyte, I take it . . .

MR. KEYTE: Yeah.

THE COURT: I see some new faces.

MR. KEYTE: Let me introduce two new faces. First, on your right is Martha Weiss, the senior corporate counsel of U.S. Tobacco.

THE COURT: Good morning, Ms. Weiss. We heard your name last week when we were scurrying around on the phone.

MR. KEYTE: And then Kevin Freudenthal, who will be our witness, who is the Director of Trade and Marketing for U.S. Tobacco.

THE COURT: Maybe you could spell that for the court reporter.

MR. KEYTE: Sure.

COURT REPORTER: I have it.

THE COURT: She has it, okay, all right.

MR. KEYTE: So whenever you'd like to begin.

THE COURT: Unless someone has some procedural comment, the Court's inclination is to let UST put on testimony of Mr. Freudenthal. Did I say that right?

MR. FREUDENTHAL: Yes sir.

THE COURT: And we'll give Conwood, of course, the opportunity to cross-examine; and then we'll have a better factual record from which to determine whether the plaintiffs' contention that discovery ought to be extended to the sales level is correct.

MR. KEYTE: Okay. U.S. Tobacco calls Mr. Freudenthal.

THE COURT: All right. If you'll come forward and be sworn, sir.

* * * * * * * *

KEVIN EUGENE FREUDENTHAL, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

THE COURT: Okay, Mr. Freudenthal, if you'd spell your name for me.

MR. FREUDENTHAL: Okay. Well, certainly. It's F as in Frank . . .

Q Yes sir.

A . . . r-e-u . . .

Q Right.

A . . . d-e-n-t-h-a-l.

Q Very good.

THE COURT: Now people often want to look at me, and you'll get a stiff neck if you do that. You can just look at Mr. Keyte and . . .

MR. KEYTE: And if the Court has a question . . .

THE COURT: Yeah. If I have a question, I'll address you; but I don't want you to have to turn around like that.

MR. FREUDENTHAL: Great.

THE COURT: Mr. Keyte, you may proceed.

DIRECT EXAMINATION

BY MR. KEYTE:

Q Please state your name for the record.

A Kevin Eugene Freudenthal.

Q What is your current position at U.S. Tobacco?

A I'm Director of Trade and Marketing.

Q And briefly describe your responsibilities in that position.

A I'm responsible for developing sales and marketing programs and promotions.

Q How long have you been employed by U.S. Tobacco?

A A little over 13 years.

Q And what was your first position there?

A I started as a sales rep in January of 1986.

Q And briefly explain to the Court what other positions you held at U.S. Tobacco between 1986 and the present.

A As I mentioned, I started as a sales rep in 1986; and then I was promoted to a Division Manager in 1987, and then I was promoted to a Chain Account Manager in 1988, and then I was promoted to a Regional Marketing Manager in 1990, and then I was promotion to Department Manager in 1993, and then I was promoted to Director of Trade and Marketing in 1997.

Q So to summarize, you were in the U.S. Tobacco sales force for approximately 11 years?

A Yes.

Q And you were elevated about a year-and-a-half ago to your current position?

A Correct.

Q Please briefly describe for the Court the basic organizational structure of the U.S. Tobacco sales force.

A The company is very organized out in the field. The sales rep reports to a division manager, and a division manager reports to a department manager, and a department manager reports to the Regional Vice President, who reports to the Vice President of Sales.

Q How many sales reps did you supervise as a division manager?

A As a division manager, six.

Q And how many sales reps did you supervise as a department manager?

A Approximately 30.

Q And do you still work in the field today in your current position?

A Yes, I do. My job description calls for developing various sales and marketing promotions and programs, and 40 percent or thereabouts, field sales, travel and interaction in the marketplace.

Q Is the organizational structure of the U.S. Tobacco sales force essentially the same now as it was when you were promoted in 1997?

A Yes, it is.

Q What are the responsibilities of the division managers with respect to documenting the activities of the sales

representatives?

A The division managers are the team leaders. They're responsible for insuring that all the proper administrative forms are completed and that all the information is sent to them so that they can send it up the chain of command.

Q And what are the responsibilities of sales representatives in documenting their own activities?

A Our sales reps are the eyes and ears of the company out there. They're required to follow procedures and report on administrative forms and reports and send everything to their immediate supervisor, who is their division manager.

Q And based on your experience, do you have an understanding as to what types of documents are used by U.S. Tobacco sales representatives in carrying out their responsibilities?

A Yes sir.

Q Are you familiar with the vans used by U.S. Tobacco sales representatives?

A Yes, I am.

Q And when was the last time you looked inside one of these vans?

A I had the opportunity to look into a sales rep's van yesterday.

Q Okay. And why did you do that?

A Well, I wanted to just take a look and see if the van set-up today is the way it has been over the course of my experience; and it has.

Q And when you're out in the field, in your current work, did you have occasion to look at the vans and how they're set up in other parts of the country as well?

A Yeah. That's part of my responsibility is getting out and working with sales reps and division managers and department managers and working with them in their environment.

MR. KEYTE: Let me - Your Honor, I would like to mark - I don't how you want to do procedurally. I'd like to mark a couple of exhibits.

THE COURT: Why don't you mark them and hand them to the Court if you have copies to make available.

MR. KEYTE: Okay. I'll just call them Freudenthal 1 and . . .

THE COURT: That would be fine.

MR. KEYTE: . . . if that's acceptable.

Let me mark as Freudenthal Exhibits 1, 2, and 3.

(Freudenthal Exhibit Numbers 1 A, B, and C (group exhibit) were so marked for identification.)

BY MR. KEYTE:

Q Mr. Freudenthal, are these pictures of the van you

looked at yesterday?

A Yes.

Q And could you just explain to the Court what the three pictures are, of what parts of the van?

A Sure. A that's listed on the bottom, that would be the rear of the van; and that's where the sales rep would carry their various car-stock product, Copenhagen and Skoal and some POS materials and their supplies, back there.

THE COURT: Is that a Chrysler-made van? What kind of mini-van is that?

MR. FREUDENTHAL: This is a . . .

THE COURT: It doesn't really matter. I'm just trying to . . .

MR. FREUDENTHAL: This is an Aerostar.

THE COURT: Aerostar.

MR. FREUDENTHAL: So that the back of the hatch comes up.

THE COURT: It's not a Silhouette, is it?

MR. FREUDENTHAL: Pardon me?

THE COURT: It's not the Silhouette. You know, that's the Cadillac.

MR. FREUDENTHAL: No, no, no.

MR. KEYTE: It doesn't appear to be.

THE COURT: That's a reference to a movie. You may continue.

MR. FREUDENTHAL: No. That's the back of an Aerostar; and as you can see, there's two handles; and those trays actually move in and out of the van so they can access the materials easily.

MR. KEYTE: All right.

MR. FREUDENTHAL: And then B is the side door that's a sliding door; and as you can see, there's a seat, a bench seat, in there; and that's where the sales rep would carry any larger point-of-sale items or displays or promotions.

And then C is the front of the van, which would have the driver's and passenger's seat; and in the middle, there's a little console there.

BY MR. KEYTE:

Q Okay. And is that commonly referred to as a car file?

A Yeah.

Q And what is a - briefly describe what a car file is.

A It's a piece of wood furniture. It's about 8 inches wide by maybe 14 - 12, 14 inches long, and that's where the sales rep would keep some files and their manuals.

Q And did you have an opportunity to talk to the sales rep who uses the van you were talking about yesterday?

A Yes.

Q And what did you talk to him about?

A I just - you know, I just asked him a couple of

questions in looking at his van to really see - look at the organization and see if it's how I remember, and it is. I'm out in the field, as I mentioned, all the time; and I looked at it back - what my experience was as a sales rep and just point of reference and clarify and make sure it's the same.

Q Okay. And did you review the types of documents that he creates or receives and are kept in the car file?

A Yeah. We briefly talked about, you know, some of the things that he carries in his own van.

Q Okay. And has much of anything changed since you left the retail sales force in 1997?

A No.

Q Okay. And in your experience, would these vans or the car files be significantly different in any other parts of the country?

A No. As I mentioned, you know, the opportunity that I have is I got to get out and see different parts of the country. So I had an opportunity to work with different sales reps.

MR. KEYTE: Now I'd like to mark as Freudenthal Number 2, a page out of the Sales Operations Manual that was referenced.

BY MR. KEYTE:

Q Could you identify for the record what this exhibit

is?

A Yeah. It's a suggested topic list of different car files for the sales rep to carry in his van.

Q And is that found in the Sales Operation Manual?

A Yes, it is.

Q I'll walk you through some of these items.

Before I do that, is the van that you looked at yesterday, did it contain the type of documents that are listed here in the exhibit?

A Uh huh, yes.

Q Let's go through it for the Court. The first item listed there is Direct Accounts. What would be found in the Direct Account file?

A That would be Direct Account listing, which would include the name of our direct accounts and address.

Q Is there any other information that would be on that document?

A No, it's really a direct account listing of all the direct accounts in a particular assignment, whatever that might be.

Q Okay. And who creates the direct account list?

A That's created at the regional level, and it's also maintained at the department, the division level.

Q Who would receive copies of it?

A Everybody would receive copies of the direct account

listing. That would be sales reps and division, department, region, and corporate.

Q Next on the list is Chain Headquarters. What documents would be in a Chain Headquarters file?

A That would be information contained for chain accounts, like Seven-11 or Circle K. It would be headquarter listings, so again it would be a listing of those particular accounts that would have profiled information, like name and address and everything for that particular chain account.

Q Who creates those documents?

A Those are created with the key account managers, the chain account managers, and working with the regions and departments.

Q And who would receive copies of the headquarters material?

A As I mentioned with the direct accounts, everyone would receive copies of anything to do with the chain account headquarters, up and down the chain of command.

Q And next on the list is a Chain Promotion Planner. What's a Chain Promotion Planner?

A The Chain Promotion Planners, they would be calendar, either a 6- or 12-month calendar that would identify different programs or promotions that would be executed in chain accounts; and it would be generated by the manager

responsible for that particular headquarter, either a chain account manager or a key account manager.

Q Okay. Just so it's clear, the people who create those documents are at the regional level or department level?

A It could be either/or.

Q Okay.

A It could be a key account manager at the national accounts level, or it could be a chain account manager that would be at the department level.

Q And who would receive a copy?

A Everyone that would be involved with that particular account, which would be the sales reps that would be responsible for executing, the division managers in that area, the department managers in that area. And if it's anything from a key account manager, it would include anyone in the region.

Q The next on the list is Coordinators. What does that refer to?

A That refers to PTST, which is part-time sales trainee coordinators; and that would be a file to maintain things like time sheets and activity sheets from the actual part-timers themselves.

Q Who creates those?

A Those are created at corporate level. It's an administrative reporting form that's just completed and

submitted to corporate.

Q And who gets copies of those?

A Everyone that would be involved with that particular person, which would be the division manager, department manager. The regions receive a copy, and then it goes to the PTST Department, in their headquarters.

Q Now in general, is there a lot of duplication of documents, you know, from sales rep up through the regions?

A Yeah. Everything we do is duplicated. That's why all of our forms are in triplicate or four-part because that's - that's what's important, is passing the information on so that all the field sales managers have all the information that's contained in the marketplace.

Q And next on the list is Promotions. What does that refer to?

A That would refer to any consumer promotions that would be created in the corporate headquarters in the Marketing Department and then any executional plans that are developed at the regional level.

Q So those again are - those are created by the sales representative at the representative level?

A Yes.

Q And who receives copies of that material?

A Everyone receives copies. It starts - as I mentioned, it starts in the corporate headquarters; and then the

information is disseminated down to the - to all the different positions in field sales.

Q Next is Programs. What does Programs refer to - and again we're talking about what might be in the file of a sales rep's van.

A It would be work-related programs, things that - things that would outline what's happening in a particular retail store or what's happening in a particular market that a sales rep was working at any given time.

Q And who creates the Program material?

A Although there's - there's two kinds. There's national programs, which are similar to the national promotions; and then if there were regional or department programs, there would be - they would be developed in the regions.

Q Who receives copies of that material?

A Everyone that would be affected, which would be the division managers, the department managers, and the regional vice presidents.

Q The next listing is Promotional Events. What does that refer to?

A Promotional Events are rodeos or races, things that we're participating in on an event level.

Q Who creates those documents?

A The promotional team.

Q Who receives copies - well, is the promotional team above the sales rep level?

A Yeah. The promotional team is on a national level, and it's - we have some satellite offices, which are in the regional offices themselves; and they coordinate all of our events.

Q To the extent they're even relevant to the case, who receives copies of that material?

A Everyone up the chain of command receives copies of it.

Q Next on the list, if I have it right, is Correspondence to/from Supervisor/Department/Region/Chain Manager. These - what does that refer to?

A Correspondence. That would be any correspondence from a division manager or a department manager to a sales rep. It may be a correspondence that sales rep communicated to his immediate supervisor or division manager. Then it would be copied to the department manager if that was the case.

Q And does all such correspondence get put up the chain, copies of that?

A Yes.

Q Well, does a U.S. Tobacco sales representative ever have correspondence with a retailer?

A In the rare instance that they would have

communication, it may be with a small chain account that they have, that that would be correspondence that's coordinated with the division manager and created by their division manager.

Q Okay. And would copies of any such correspondence have to be sent up the chain as well?

A Yes, always - everything that we have is communicated up the chain of command to immediate supervisors.

Q And then what about the current project file? What does that refer to?

A The current project file could be any active activities. It could be some promotions or programs that would go into the current project file that they're actively working up and down the street or in the marketplace at that particular time.

Q And who creates those documents?

A Those would be created at the national or the regional level.

Q And who receives copies of those documents?

A The department managers and division managers would have a copy of them.

Q Now let me ask you about some other documents that sales representatives use in their work. What is a call book or a route book?

A A call book or a route book is - it's an output; it's

a book that lists all of the retail stores, and it lists the direct accounts in a given area by the sales rep, a division manager, a department manager or regional manager could identify all the call activity for every store in a geographic area.

Q Who creates the route books or call books?

A They're created at the corporate level. A company called Fastech actually sends the output books to field sales.

Q Okay. And who receives copies of them?

A The corporate office receives a copy. The regional vice president receives a copy. The department manager receives a copy. The division manager receives a copy, and then the sales representative receives a copy.

Q What is a par scanner sheet?

A A par scanner sheet is - it's the profile activity reporting scanner, it's a document that is completed by the sales rep for every call that they make; and then that's the information that's tossed up the chain to profile the account information, and then that's the input that creates the call book that they receive as an output.

MR. KEYTE: Let me mark, Your Honor Freudenthal Number 3.

(Freudenthal Exhibit Number 3 is marked for identification.)

THE COURT: Please continue.

BY MR. KEYTE:

Q Who creates the par . . .

A Yeah. This is done by Fastech in our corporate office, or we have a profile activity reporting department that puts together this form and all the information that's contained on it.

Q And what is the purpose of the par scanner sheet?

A It's to collect - as you can see on the form, it's to collect information for retail stores and direct accounts and then to send the information up so that you could profile the environment or the retail activity and what the actual retail store looks like on a call book.

Q Okay. Now I'd like to focus - I think it's on the bottom of the par scanner sheet - there's a comment section. What's the purpose of the comment section on the par scanner sheet?

A Well, if there's anything that takes place in the retail store or an observation to collect anything out in the marketplace, the sales rep would have an area to write comments so then those comments could be shared with their division manager.

Q Who receives copies of the par scanner sheet, including the comment section?

A Each week the sales rep takes this three-part form,

and they take the original, and they tear it off, and they mail it to Fastech, and then they send a copy of the form to their direct supervisor, which is their division manager; and then they keep a copy for themselves.

Q What happens if the U.S. Tobacco sales representative doesn't fill out the par scanner sheet and send it up the chain?

A Well, first off, if he doesn't fill out the par scanner, he'd not doing his job; and that's a requirement of his job is to send information on the par scanner to his immediate supervisor. If he doesn't send it in, it's really the same as not filling it out. It's required and disciplinary action be taken. It's a critical part of the job.

Q To whom - switching gears a little bit here - to whom does U.S. Tobacco sell its products?

A We sell our products to direct accounts.

Q What is a direct account?

A A direct account is - could be classified as a wholesaler or a distributor, and that's an account that we sell our Copenhagen and Skoal product to; and in turn, they're a supplier that sells to retailers, let them sell to consumers.

Q And what are the different types of direct accounts?

A There's - as I mentioned, there's wholesalers or

distributors; and then there's chain accounts, and an example of a chain account would be if, for example - if the Circle K with a thousand stores out there, they bought directly from us, we would ship our product to them; and then they would, in turn, ship it to their stores versus a wholesaler/distributor that we would sell it to and then they would ship it to the retail stores.

Q Do U.S. Tobacco sales representatives sell products?

A No. They don't - they don't sell products. They sell promotions; they sell programs; they service the accounts.

Q What is their role with respect to servicing those accounts?

A They're implementers and executors. They take programs and promotions, and they provide service to the retailer. They execute the plans that are developed for them to put out into the market.

Q Is all that activity documented and sent up, up the chain of command?

A Yes, yes, yes. They're - you know, they gather the information that's asked of them on either reports or any type administrative forms; and again they're required to submit that to their immediate supervisor on up.

Q What is an authorization letter?

A An authorization letter would be a letter or instructions from a retailer to one of our - through one of

our chain account managers or key account managers that would authorize U.S. Tobacco representative to perform a service in a store or to introduce a new product. It could be many different things, but it's an authorization from a retailer that says, I'm going to let you do this in my store and I want you to carry it out and let the - let my store managers know that these are - these are okay things to do.

Q Okay. So including retailers, who creates - who creates authorization letters and why?

A Well, it's - it's part of the key account management teams' and chain account managers' responsibility. They work with our chain account customers, and they develop the - they develop the presentations, the proposals for chain accounts and - which are retailers; and then they work to develop these authorization letters with those retailers.

Q Are sales representatives allowed to do their own authorization letters?

A No, they're not. As I mentioned, that's - that's really what the management team's all about. They put together the plans, and the sales reps execute.

Q So they just need the copy to get in the store?

A They need the copy to get in the store.

Q What is the . . .

A Keeps them out of harm's way.

Q Right. What is a retail transaction form?

A A retail transaction form is a form that the sales reps use in the - within their retail accounts that - there's various applications. But it's a form that they could use based on procedures of whatever the plan is that they're executing.

Q Okay. And who creates - who creates that form?

A That's created at the corporate level, and it's sent to all the field sales managers, and it's in - it's in duplicate copy for the retailer, for the sales rep, and for the division manager.

Q And that goes up the chain as well?

A It goes up the chain.

Q If an agreement were executed on a retail transaction form, what would a sales representative do with that form?

A They would give a copy of it to the retailer, and then they would assemble it with their week-ending paper work, and they would send it up the chain of command to their division manager.

Q And what are the consequences if he doesn't do that?

A If he doesn't do it, then he's not accurately reporting information that's happening in the retail store and he's not doing his job because he's responsible for reporting all transactions that take place out there to his

immediate supervisor.

Q Without going into characterizations of documents, can you think of any type of document that could be described as an agreement that a sales representative would have with the retailer without sending a copy up the chain?

A No, I can't. That's what makes our organization so efficient is the procedures that we have in place is to let these sales reps go out and execute and implement and have a management team in place that's efficient to get things done.

Q Would that be against U.S. Tobacco Company policy?

A Yes, it would be.

Q What about incentive programs, for example, exchanging a Copenhagen hat for a vendor placement? How are those documented?

A There's a - there's a form for that, and that would be completed by the sales rep and the retailer, and then there would be a copy given to the retailer, and then the form itself would be sent to the company administrating the program and then the division manager.

Q Do U.S. Tobacco sales representatives do weekly or monthly reports?

A They may. That would depend on the sales area and what information somebody would want.

Q All right. Well, how do those sales representatives

that are required to do it, how did they decide what goes into the report?

A Well, the report would be - would be similar to any of our other forms. Someone would create a report and list the topics that the information is requested from, and then the sales rep would be required to fill out that report and address those issues that are listed.

Q And who receives copies of the reports?

A Those reports would be generated to the division manager, department manager. They would go to the regional vice presidents and then on up to corporate.

Q In your experience, how do sales representatives put together their weekly or monthly report?

A If they - if they're asked to put together a report, then - in my experience in the field, that's what the comment section is provided for. Let's not create another piece of paper out there. Let's use exactly what we have, and that is the comment section. So if there's something happening in a retail store or in a given area, then the sales rep would write down whatever it is that's related to topics on his report that he's asked to fill out; and then he could use those comments to construct the report whenever it's requested.

Q And when you refer to the comments, you're referring to the comment section on the par . . .

A On the par scanner.

Q . . . scanner?

Did you work off of any notes when you did your own weekly or monthly reports other than the par scanner?

A Not other than the par scanner. I put all my notes down in the comment section, and that's - that's how I constructed any reports that were asked of me.

Q And in your experience, is it common for U.S. Tobacco sales reps to work off of notes not on the par scanner?

A Yes. It's to work off of the par scanner, and it's to construct your comments there. I mean it's a given place. It's a great point of reference because it also contains the information for that particular account, and that's a great area to do it. It would probably be a rare instance that someone would, you know, use a note pad or something to construct any type of report or documents asked of them.

Q And as a practical matter, if the sales rep decided to use a note pad rather than par scanner to construct his report, what would typically happen to his notes?

A They would probably be discarded because there's - there's enough things that he has to do - or she has to do, and the information is really what he or she is putting together, and that's all that they want to do. So they put together the information and fill it out on a report. Then

they send it to their division manager and to the department manager, and there's no use for that information any more. They've already done what was asked of them.

Q Let me ask you about some of the other affidavits that were put before the Court last week.

(Off-the-record discussion between Mr. Keyte and the Court.)

Did you have an opportunity to review the affidavits submitted by plaintiff in this case last week?

A Yes, I had an opportunity to look at them.

Q Let me first ask you a few questions about the declaration of Mr. Williams, which I think is marked as Freudenthal Number 4.

Based on your review of Mr. Williams' description of Conwood's documentation of sales rep activity, is U.S. Tobacco's the same?

A Just reviewing this, no, I don't believe it's the same at all.

Q What are the primary differences?

A Well, we forward all our information. Everything's contained in an administrative form or report and it's sent up the chain of command; and it appears that in this affidavit, they aren't required to forward everything to their supervisors.

Q Let's look at the affidavit of Mr. Paulk, who was - it

says in his affidavit that he was a representative, a sales rep at UST from 1981 until 1985. And if you could look at the documents listed in Paragraph 3 - and in particular, I'll just read them into the record. He references:

> " . . . a cash sale book, jobber information files [with a parentheses] promotional letters presented to wholesale buyers), and business correspondence."

My question is when you started in 1986, did sales representatives keep copies of these documents?

A Yeah, they would keep copies of the documents.

Q Okay. But did they also send copies up the chain?

A Yes. That's what they're required to do.

Q And if you look at the - let's look at the documents listed in Paragraph 4:

> " . . . personal notes on retail activity - [and again I have a hard time reading that.]

A It says:

> " . . . personal notes on retail activity, and records of payments to retailers . . ."

THE COURT: What's the personal notes? Is it some kind of activity report?

MR. KEYTE: Oh, I'm sorry. Unethical activity reports.

THE COURT: Okay. Thank you.

BY MR. KEYTE:

Q Again is it your understanding that when you joined in 1986, to the extent that any similar reports would have had a different name would - a copy would be kept by a sales rep?

A A copy would be kept by the sales rep, but it's his responsibility to make sure that he submits it to his division manager.

Q Now let's look at the affidavit of Mr. Jeffery, who was a part-time employee from 1997 to 1998, and I think also is apparently an employee of Conwood. It appears the only documents he references is in Paragraph 4, which are:

" . . . account listings and company updates."

Again just for the record, what's an account listing?

A You're asking my opinion of what he's referring to?

Q Yeah.

A I would say an account listing would be a direct account listing that would be maintained in the file, but that would be something that would be given to a sales rep from his management team.

And then company updates?

Q Uh huh.

A All of our manuals are updated on a regular basis from our corporate office, and they're sent down to all of our field sales managers and to our sales reps.

Q So just to summarize, do U.S. Tobacco sales representatives create any documentation, competitive activity at the retail level that is not copied up the chain of the sales force?

A No.

Q Okay. And do U.S. Tobacco sales reps receive any documents relating to carrying out the responsibilities that is not copied or - from the division department or region?

A No. Everything they get is from their managers.

MR. KEYTE: Thank you.

THE COURT: All right, Mr. Gorsuch, you may cross-examine the witness.

MR. GORSUCH: Good morning, Your Honor. Good morning, Mr. Freudenthal.

MR. FREUDENTHAL: Good morning.

MR. GORSUCH: Before we begin, I just want to pass along Dick Roberts' apologies for not being able to be here today. He's preparing for trial in Paducah next week. So that explains his absence.

CROSS-EXAMINATION

BY MR. GORSUCH:

Q Mr. Freudenthal, are you aware that UST purported to introduce an affidavit from Mr. Milano last week?

A I've seen an affidavit from Mr. Milano.

Q And Mr. Milano is the head of sales nationally for UST, isn't that correct?

A He's the Vice President of Sales.

Q And that puts him in charge of the whole Sales Division in UST, isn't that correct?

A Yeah. He's responsible for that whole Sales Department.

Q Mr. Milano isn't here today, is he?

A No, I don't see him here today.

Q Where is Mr. Milano today?

A I don't know.

Q He was aware of this hearing, was he not?

A I don't know.

THE COURT: Mr. Gorsuch, in fairness, the Magistrate Judge tried to be clear in his order that he was not requiring Mr. Milano to be here, but . . .

MR. GORSUCH: Your Honor, I didn't mean to suggest that. I am going to argue that the Milano affidavit, however, should be disregarded because I don't have the ability to cross-examine him, amongst other problems with it.

BY MR. GORSUCH:

Q Mr. Freudenthal, isn't it true that UST field sales representatives keep track of how many Conwood facings they eliminate?

MR. KEYTE: Object as to . . .

MR. FREUDENTHAL: No, I don't know anything about eliminating.

BY MR. GORSUCH:

Q Are you aware of an e-mail from Mr. Milano, the head of sales nationally, to the regional sales managers in April of 1998?

A No.

MR. GORSUCH: Your Honor, we'll mark what, I guess Freudenthal 6, is that correct?

THE COURT: Seven.

(Freudenthal Exhibit Number 7 was so marked for identification.)

BY MR. GORSUCH:

Q Mr. Freudenthal, this is an e-mail that was sent on April the 15th of 1998 from Gary Milano; and you're listed as one of the CCs on it, isn't that correct?

A Yes.

Q Okay. And amongst other things, Mr. Milano said that he wanted the regional managers to stop sending in monthly reports that used terms such as:

"We have eliminated competitive brands,"

isn't that correct?

A I'd have to read the document if I could.

MR. KEYTE: Your Honor . . .

MR. GORSUCH: Please, go ahead. Take your time.

MR. KEYTE: Could I state an objection, please.

Right now we're now talking about things sent from the regional people to Gary Milano with respect to - frankly things that are going to - are heading towards the merits of the case. I just want to make sure we focus on what documents are found at the sales rep level that are not found elsewhere.

THE COURT: With all respect, Mr. Keyte, that's not a valid evidentiary objection but an argument. So let's let Mr. Gorsuch examine.

MR. GORSUCH: Just let me know when you've finished reading it, Mr. Freudenthal.

(Mr. Freudenthal continues reading.)

I'm just going to ask you about Paragraph listed Number 1.

MR. FREUDENTHAL: Okay.

BY MR. GORSUCH:

Q Isn't it correct that UST sales reps keep track of how many Conwood facings they've eliminated?

A No. My experience, they fill out a par scanner; and on the par scanner, it asks them what's the distribution and how many facings of competitive brands that are reported in the store.

Q Isn't it correct Mr. Milano was sending this out to the field to say he didn't want to receive any more monthly reports that use the terms such as:

"We've eliminated competitive brands . . ."

MR. KEYTE: Objection.

MR. GORSUCH: "We have had Timber Wolf discontinued [or] Our chain manager has Conwood facings reduced by X number."

THE COURT: I'll sustain the objection. I think that you're asking the witness what Mr. Milano had in mind.

MR. GORSUCH: Okay, I'll rephrase it.

BY MR. GORSUCH:

Q Isn't it correct that he sent out an e-mail saying he didn't want any more monthly reports that Conwood facings are reduced by X number?

A It says, category management, we should use new terms, and it's our goal to make sure that we're using the correct terminology.

Q Had you seen Mr. Milano's affidavit?

A Yes, I have.

Q Okay. And isn't it true that sales representatives sometimes maintain personal calendars?

A It could be.

Q And that those calendars are not always forwarded to division managers, isn't that correct?

A Well, if they were maintaining a personal calendar, if it's a personal, meaning they're talking about their wife's birthday or their mom's birthday, I don't . . .

Q No, Mr. Freudenthal. I'm asking about calendars pertaining to their business activities. I'm not going to ask you about what they do in their social time.

Isn't it true that they sometimes maintain calendars . . .

MR. KEYTE: Objection, Your Honor. If he could let the witness answer the question.

BY MR. GORSUCH:

Q . . . that do not go to the division managers, isn't that correct?

THE COURT: Time out. There are too many people talking at once for the reporter to put it down - to take it down. So . . .

MR. GORSUCH: If I could finish my question.

THE COURT: If you'll ask your question again, I'll ask Mr. Keyte not to object while Mr. Gorsuch is

phrasing a question and I'll ask that the witness let the questioner finish the question. That way we can - so let's start all over.

BY MR. GORSUCH:

Q Isn't it correct sometimes UST sales representatives maintain calendars that pertain to their business work that are not always forwarded to division managers?

A No. The information that would be contained there would always be a record for something that they would submit to their division manager.

Q Mr. Freudenthal, I'm not asking you what's reflected in the division policy. I'm asking about those calendars. Do those calendars get forwarded to division managers all the time, yes or no.

A I wouldn't know what calendars you're referring to.

Q Okay. Well, I ask this be marked as Exhibit 8.

(Freudenthal Exhibit Number 8 was so marked for identification.)

Turn to Paragraph 5. Do you disagree with Mr. Milano that sometimes sales representatives keep calendars that aren't sent up to division managers?

A No. As I said, they may keep them. I don't know if they do or not.

Q The truth is you don't know what all 448 sales reps keep, do you?

A I don't know what they personally keep.

Q Right.

A I know what they're required to submit to corporate office and to their immediate supervisor.

Q But above and beyond what they're required to submit, you don't know what they keep, do you?

A No, I don't know what they keep.

Q And, in fact, you don't disagree with Mr. Milano they sometimes keep day books that go up - that don't go up to division managers, isn't that correct?

A No. I believe that everything that they're required to submit on behalf of the company . . .

Q Mr. Freudenthal, I'm just going to ask you to answer my questions.

A Okay.

Q And I may have to ask the Court for some guidance to get you to answer my questions. I hope we don't come to that. The question is very simple though.

Do you disagree with Mr. Milano there are day books that the sales representatives sometimes keep that are not sent to division managers? That's a yes or no.

A There could be.

Q In fact, you served as a sales representative for one year, isn't that correct?

A No, a year-and-a-half.

Q Year-and-a half. '86 to '87, is that correct?

A Correct.

Q So 12 years ago was the last time you served as a sales representative, isn't that right?

A As a sales representative, yes.

Q Okay. And in preparation for your testimony here today, did you e-mail the sales representatives, the 448 sales representatives, about what files they maintained?

MR. KEYTE: Foundation.

MR. FREUDENTHAL: No, I didn't.

THE COURT: Overruled. Please answer the question.

MR. FREUDENTHAL: No, I didn't e-mail because I . . .

BY MR. GORSUCH:

Q Did you send out a memo . . .

MR. REED: Your Honor, may the witness please answer?

MR. GORSUCH: Excuse me. Could I conduct my cross-examination?

THE COURT: All right, all right. We're going to take a five-minute break right now.

MR. GORSUCH: Thank you, Your Honor.

AFTER RECESS

THE COURT: All right. Let's go back on the record here. Just a couple of guidelines for everybody.

First, our reporter is probably the most experienced court reporter in the Western District; but she cannot - even she, as able as she is, cannot record two people talking at once; and so please do not interrupt each other.

Secondly - this is probably not necessary - but a lot of objections and a lot of argument about the form of the question is not going to materially help us efficiently use the limited amount of time that we have, and I think I can sort out pretty well what's a good question and what's not a good question, and probably the best thing to do is to let it roll so we don't have to have colloquy from counsel about the form of the questions.

So let us continue.

MR. KEYTE: Understood, Your Honor.

THE COURT: Mr. Gorsuch, I have my supply of Hall's cough drops left over from last week.

MR. GORSUCH: I may have to indulge you on that, Your Honor. I'm in a bad way today.

THE COURT: Let us know. I would offer the same to UST.

MR. GORSUCH: I may, with the Court's indulgence, take an occasional sip of water.

THE COURT: If you need them, let her know. She's a full-service court reporter, especially if you don't interrupt anybody.

MR. GORSUCH: Thank you.

BY MR. GORSUCH:

Q Let's just go quickly back to Exhibit Number 7, Mr. Freudenthal. Isn't it correct that Mr. Milano was sending this out to all the regional sales managers telling them he didn't want to receive any more monthly reports using terms such as, we have eliminated competitive brands?

A Yes.

Q And isn't it correct, Mr. Freudenthal, that Conwood - that UST sales representatives keep track of how many Conwood facings they eliminate?

A No.

Q You say that despite Mr. Milano's statement that future monthly reports shouldn't use terms such as, quote:

"Our chain manager has Conwood facings reduced by X number"?

A Well, he's referring to using terms; and the way that I understand the question is that not a practice and it's - in my opinion, it's not a practice that they report that.

Q I'm not asking what practice is. I'm asking what you know that they do.

And doesn't it suggest, Mr. Freudenthal,

don't you know that they do keep track of how many facings they've reduced because Mr. Milano's talking about it?

A No, I'm not aware that they do.

Q Then again you just served as a sales representative for a year-and-a-half back in '86 and '87, isn't that right?

A Yes. I have 11 years of practical experience in every position in the field sales group.

Q That's very good, Mr. Freudenthal; but again, if you'd answer my questions, this would move along a little more quickly.

A Certainly.

Q And I asked you earlier whether you - whether you sent out a memo to sales representatives in anticipation of today's hearing asking what documents they keep in their files. You didn't do that, did you?

A I can't.

Q You can't send out a memo?

A You did not say that. You said if I sent an e-mail.

Q No sir, no sir. My question was - and I'm sorry to interrupt.

A Your question before we broke was e-mail.

Q Okay. My question now to you, sir, is did you send out a memo to the sales reps asking them what documents they maintained.

A No.

Q Okay. Did you call the sales reps to ask what documents they maintained?

A No.

Q Okay. Did you check their files to see what documents they maintained and to verify that all of them are reflected in the district offices?

A Not all.

Q Did you check more than one?

A I have over the course of the last year-and-a-half.

Q Okay. I'm asking you, in preparation for today's testimony, did you check more than one sales rep's files?

A No.

Q Okay. And in the month, over the month since the Court ordered discovery in this matter in December, has anyone at UST sent out a memo to sales reps asking what they keep in their files?

A That I don't know.

Q Okay. Do you know if anyone at UST has made any phone calls to sales reps asking what they keep in their files in the month?

A That I don't know.

Q Okay. Do you know in the month that's passed whether - that anyone else has checked sales reps' files to see what they maintain . . .

A

Q . . . and whether they're reflected at district managers?

A Yes.

Q Okay. Who did that?

A Ninety-five division managers, 16 department managers, and 5 regional vice presidents. That's their - that's their job description responsibilities, and they do it on a daily basis.

Q Do you have any documents or testimony from them here today to tell us that all the documents that their sales reps maintain are reflected in the district offices?

A I don't have a document other than referring to any of the policies and procedures.

Q Okay. You have policies. I'm asking whether, in fact, someone checked and found that all the documents are, in fact, maintained in the district offices. Did someone do that?

A If they were performing their job, they would.

Q Do you have any testimony or documents from them here today?

A I don't.

Q Okay. And do you know if Mr. Milano did any checking of sales representatives' files to see what they keep?

A That I wouldn't know.

Q You didn't talk with them about that in preparation for today, did you?

A No.

Q Okay. And you've had a chance to look at Mr. Paulk's affidavit, isn't that correct?

A Yes, I've looked at it.

Q I believe that's already marked as Freudenthal Exhibit . . .

A Five.

Q . . . 5.

With the Court's indulgence, I'm going to take a sip of water.

THE COURT: Sure.

BY MR. GORSUCH:

Q I refer you to Paragraph 4 of that declaration - and I'll just read it very quickly.

> "Based on my experience as a UST representative, it is my belief that some of these documents do not leave the possession of UST sales representatives. Such documents include unethical activity reports, personal notes on retail activity [activities], and records of payments to retailers (including jackets and

free merchandise)."

Do you have any personal knowledge to dispute that Mr. Paulk, in fact, maintained such records that didn't go to division offices?

A Yes.

Q You know for a fact that Mr. Paulk sent all of his documents to divisional offices?

A Well, I would know for a fact that Number 4, it says:

"Based on my experience as a UST [Tobacco] representative . . .,"

and he lists some documents; and it says:

" . . . records of payments to retailers (including jackets and free merchandise).

Mr. Paulk was employed from 1981 to 1985, and that particular program didn't begin until the latter part of 1980.

Q Okay.

A So I . . .

Q 1980?

A Until the latter part of the '80s.

Q Okay. So you're saying Mr. Paulk's a liar?

A I don't know if he's a liar or not.

Q Well, that's my - that leads me to the question, do you know for a fact that he didn't retain any documents

that didn't get sent to division offices? Do you know?

A I don't know Mr. Paulk's behavior.

Q In fact, you have no idea what records he maintained that didn't go to division offices, do you?

A From Mr. Paulk? No, other than what was required of him.

Q Okay. And again just to clarify, you don't know what documents sales representatives kept above and beyond what they were required to keep, isn't that true?

A Only U.S. Tobacco documents that they're required to send up, which would include all their materials.

Q And isn't it true that sales representatives are trained to keep files?

A The files that I've kind of outlined in the prior testimony, yes.

Q So, for instance, you even - you talked about in Freudenthal Exhibit 2 an excerpt from the Sales Operation Manual suggesting ten different file headings that sales representatives are supposed to maintain, isn't that correct?

A Well, they're not supposed to. They're suggested topic headings.

Q Okay. Suggested topic headings of files that they're supposed to maintain, isn't that correct?

A They are the headings for all the materials. This -

basically these ten headings would be named for and capture every reporting form or administrative form or piece of paper that they are responsible for, and those are suggested topics, how to head those files to kind of organize some of their systems.

Q Okay. Mr. Freudenthal, real simple question: They are suggested by the company to maintain documents, isn't that correct?

A Those are suggested headings. They're required to submit all their documents.

Q I'm not asking what they're required to submit, sir. I'm asking what they're required to keep.

They are required to keep documents, isn't that correct?

A Yes.

Q Okay. And these are the suggested headings on the files that they're supposed to keep, isn't that correct?

A Correct.

Q Okay. And are you - you're familiar with Mr. Jeffery's affidavit, are you not, which was previously marked as Exhibit 6?

A I've looked at it.

Q Okay. And when he says that - in 5, Paragraph 5:

"At present, UST sales representatives have a custom built filing cabinet in

their company vans for the purpose of maintaining documents for the territory they serve,"

you don't dispute that, do you?

A No. It's the car file that I described earlier.

Q Okay. Isn't is true that sales representatives visit approximately 50 stores per week?

A Approximately.

Q Okay. And there are approximately 500 stores in the territory?

A No.

Q Okay. How many stores are there?

A Approximately 3-- to 350.

Q Three to 350. UST doesn't have a policy against sales reps keeping personal notes to keep all of these hundreds of stores straight, does it?

A No, it doesn't. But we provide the filing systems and all the materials that they're required to do.

Q But as a matter of common sense, if the sales representative wants to have some personal notes to keep his 50 calls per week and his 350 stores in his territory straight in his own mind, there's no rule against that, is there?

A Why would I want to do that?

Q Sir, I'm not asking . . .

THE COURT: Answer - yeah. You're arguing with Mr. Gorsuch. Simply answer his question.

MR. FREUDENTHAL: He has everything that's needed and necessary to do the job for all the reporting. If he, in the rare instance, had a personal note somewhere that he had written down on a document, then he would have that information. But he would be capturing that information for some request.

THE COURT: Mr. Freudenthal, in fairness now to Mr. Gorsuch, the question, as the Magistrate Judge heard it, was would it be against UST policy or would it be improper for him to keep records; and if you could just give a simple answer to that question, we'll move along.

MR. FREUDENTHAL: No, it's not against the company policy.

BY MR. GORSUCH:

Q And, in fact, you've testified that the sales representatives are, quote, the eyes and the ears of the company, isn't that correct?

A Yes.

Q Isn't it true that sales representatives from time to time make presentations to retailers concerning facings, displays, point-of-sale material, and price?

A They make presentations on promotions and sales programs.

Q I'm going to hand you what we'll mark Freudenthal Exhibit Number 9.

(Freudenthal Exhibit Number 9 was so marked for identification.)

My questions will pertain only to the second page and specifically the language:

"Make all necessary presentations on product promotions; facings; merchandisers; displays; positioning; programs; P.O.S. materials; and retail pricing [(EDLP)]. Use company marketing plans and training programs to prepare presentations. Anticipate possible objections and be prepared in all aspects of your presentation."

Do you see that language, Mr. Freudenthal?

A Uh huh.

Q So sales representatives are responsible for making presentations to retailers, isn't that correct?

A They make presentations to retailers.

Q And these presentations affect - face - the number of facings that - different than manufacturers are entitled to in a rack, isn't that correct?

A It may or may not. That would depend on the circumstances.

Q Okay. But that is one of the things the did presentations on, isn't that correct?

A On merchandising, yes.

Q Okay. And they give presentations on point-of-sale advertising materials, isn't that correct?

A Yes.

Q Okay. And then . . .

THE COURT: Let me ask a question, Mr. Freudenthal. This is just deep background to me and no mystery to it.

The word, facing, comes up a lot. I've read it in the papers. Give me a one- or two-sentence description of facing.

MR. FREUDENTHAL: Sure. That would be - there would be a label that would identify a specific product, an SKU; and that would be a facing. So if you had ten products and they were identified as ten different products, then you would have ten facings. It's actually the face of whatever product it is that's out . . .

THE COURT: Thank you, sir.

BY MR. GORSUCH:

Q And, in fact, some of these presentations on facings involve how many facings should be allotted to UST products, how many should be allotted to rivals' products, isn't that correct?

A Most presentations are developed for merchandising for our products, how many products should that retailer manage on a profitability basis for that particular retail account; and that would be - that would be his whole category. That would be U.S. Tobacco products and all the competing brands on the market.

Q Okay. So the answer to the question, I believe, is yes?

A Would you repeat the question.

Q Okay. The question's very simple. Don't UST sales representatives give presentations on how many facings should be allotted to UST products and the competitors' products . . .

A We make recommendations, yes. That's what we do.

Q Okay. And isn't it true that sales representatives sometimes use materials that have come down from company marketing plans and training programs to prepare their own presentations, isn't that correct?

A They use all of the preapproved programs, yes, for their individual retailers.

Q Okay. And they sometimes create personal notes in anticipation of these presentations, don't they?

A They may have their notes for their presentation of what's going to be addressed for that particular account.

Q Okay. And there's nothing in any Sales Operation

Manual or elsewhere that requires those notes to be sent up, is there?

A Well, the presentations are always forwarded as complete documents back to any of the managers after a presentation so that everything that transpired within that presentation with the retailer and the division manager or a sales rep, it's all recorded as a formal presentation back to U.S. Tobacco.

Q Mr. Freudenthal, my question again is very simple.

A Uh huh.

Q There's no policy, is there, in the Sales Operation Manual or elsewhere requiring a sales representative to send up his personal notes that he created in anticipation of the presentation, is there?

A No. In those rare instances, I wouldn't see it.

Q Is it true that you were a department manager in Region 4 in 1997?

A Yes, part of 1997.

Q In January, 1997?

A Yes.

Q And didn't you report on January the 3rd, just three days into the year up to your regional manager that you had, quote:

> "Purged all the 1996 files and administrative paper work in the

department's offices"?

A I don't recall.

Q Well, see if we can refresh your recollection.

A Thank you.

MR. GORSUCH: Mark this Exhibit 10.

(Freudenthal's Exhibit Number 10 was so marked for identification.)

BY MR. GORSUCH:

Q I'll refer you to Paragraph 3.

A Uh huh, that's correct.

Q So three days into 1997, and you were able to report that you had purged all department office files, isn't that correct, for 1996?

A Correct. We take them out of the filing system in the storage room in the office, and we put them into file boxes, and we put them in the back storage room.

Q All right.

A Purge all the current files.

Q Aren't, in fact, documents destroyed?

A No.

Q You're saying you never destroyed any documents?

A No sir.

Q Okay. What's your document retention policy?

A As I understand it, it would be three-to-five years, maintain any of the working expense reports, any of the

activities, any pertinent information that would be used in the future.

Q Okay. Isn't it true that there's nothing in the Sales Operating Manual that instructs sales representatives to purge their files on a periodic basis?

A That I don't know off the top of my head.

Q You're unaware of any rule telling sales representatives when to purge their files, aren't you?

A I'm not aware of anything to purge their files.

Q Are you aware that back in August we subpoenaed to receive documents and UST was made aware of this from a former sales representative, Sarah Weatherly at UST?

A No, I'm not.

Q Are you aware that she, in fact, maintained documents as far back as 1989?

A No, I'm not.

Q Are you aware of the fact that those documents cannot be found anywhere in UST's production at a department level or the regional level or otherwise?

A No. I find that surprising.

THE COURT: I'm sorry. You find it?

MR. FREUDENTHAL: Surprising.

BY MR. GORSUCH:

Q Well, if, in fact, you only maintain documents for three-to-five years in your present position but there are

sales representatives who don't have any instructions about how long to maintain documents, isn't it quite possible that they maintain documents for longer than you do?

A But those would be all the documents that we maintain because they're required to send everything to us.

Q Right. But if you destroyed them in three-to-five years . . .

THE COURT: Mr. Gorsuch, don't point at the witness.

MR. GORSUCH: I'm sorry. I apologize.

THE COURT: All right.

MR. GORSUCH: No pointing fingers.

BY MR. GORSUCH:

Q If you destroy those - the documents that you created in three-to-five years, they could be in sales representatives' files for longer than that, couldn't they?

A Well, I didn't necessarily say they were destroyed. I said they were kept. That's what I answered, and they could be kept. They could be transferred up through the chain of command to the regional office.

MR. GORSUCH: May I approach the witness, Your Honor?

I don't think it's necessary to mark this exhibit. I'll just ask you where I can find, sir, whether these documents from UST . . .

MR. KEYTE: Your Honor, could I have a sidebar for a second.

MR. REED: Out of the hearing of the witness.

MR. KEYTE: I could raise the issue . . .

THE COURT: Well, let's let the Magistrate Judge raise an issue.

We're not going to take the time to have the witness go through a series of documents unless you can tell the Magistrate Judge that that's something that you know Mr. Freudenthal's personally familiar with. I don't think we have the time for him to review a stack of paper that's four or five inches thick. I don't know if that goes with the concern expressed.

MR. KEYTE: Your Honor, our concern is that we're in the process, as everybody in this courtroom knows, maybe with the exception of Mr. Freudenthal, of producing up to a hundred boxes from the department and division levels. This entire line of questioning, frankly, I think is premature and unfair.

THE COURT: Well . . .

MR. KEYTE: He's asking him if, based on documents he hasn't seen yet because he hasn't got - we've sent him twenty boxes today, we're in the process of producing the documents he's crossing him about.

THE COURT: Where are we going with this, Mr.

Gorsuch?

MR. GORSUCH: I'm almost finished.

THE COURT: Okay.

MR. GORSUCH: If we could just let me finish.

THE COURT: Why don't you rephrase your question.

MR. GORSUCH: I'll be happy to do that.

THE COURT: I lost track of what it was, but I'm disinclined to require the witness to look at anything that is that thick.

MR. GORSUCH: That's fine, Your Honor.

BY MR. GORSUCH:

Q Is there - let me just ask you a couple more questions, Mr. Freudenthal.

On par forms, one of the copies is to be maintained for your records, isn't that correct?

A Correct.

Q Okay. Specifically says it on the sheet, copy for your records, isn't that right?

A Uh huh.

Q Okay. And are you aware of what Fastech's document-retention policy is with regard to these par forms?

A No, I'm not.

Q Are you - do you know that they actually only keep them for about two years?

THE COURT: I think he just said he didn't know what that policy was.

BY MR. GORSUCH:

Q And again just to clarify, the sales representatives, there's no policy forbidding them from keeping documents much longer than that, is there?

A No. They're encouraged to maintain what's active at the time that they need.

MR. GORSUCH: Thank you very much.

THE COURT: Any redirect?

MR. KEYTE: Yeah, just a couple of questions, Your Honor.

THE COURT: Just so everybody knows where I'd like to go with this, assuming that your redirect is limited and that any recross is equally limited, when we get through with Mr. Freudenthal, if there are no other witnesses, I'd like to take a break and then come back and have counsel briefly argue the issue of whether a thorough and complete search should include the sales representative. I'll give you a chance to collect your thoughts and . . .

MR. GORSUCH: Just so Your Honor's aware . . .

THE COURT: With some luck, I may be able to give you a ruling.

Yes sir?

MR. GORSUCH: You asked if there are no more witnesses.

THE COURT: Yeah.

MR. GORSUCH: We do have witnesses available by telephone, Your Honor . . .

THE COURT: Okay.

MR. GORSUCH: . . . if you'd like. I don't believe it's necessary.

THE COURT: Let's just continue on.

REDIRECT EXAMINATION

BY MR. KEYTE:

Q Mr. Freudenthal, if you could look at the Milano affidavit, Paragraph 5, and let me read into the record the complete sentence.

> "To the extent that any Sales Representative keeps calendars or day books, and retains them, these are not likely to reflect competitively significant information, which, as described above, is forwarded to the Division Managers through other means."

Do you understand that paragraph when it referred to calendars or day books to reference personal calendars?

A If they had any calendars that they maintained, yeah, that would be something that they would have.

Q And do you agree with Mr. Milano that personal calendars are not as a practical matter likely to reflect competitive information?

A I agree. They're - that information would be documented on a par scanner and reported on a monthly status report.

Q In your experience, as a practical matter, do sales representatives know that competitive information is either supposed to be on the par scanner or in their weekly or monthly report?

A We give them a place to put it; and any information that we need, it's captured on the par scanner. If there's any questions for monthly reports, then they would answer those questions and send it to their division department members.

Q Mr. Gorsuch also asked you about the fact that sales reps keep copies of documents, and I think he suggested that they may not be kept as long at the division or department level. In your experience, as a practical matter, how long do sales reps keep documents?

A Well, this is - the first scanner is the documents that they use most frequently, and they use that with every call. They would retain the copy of this scanner until

they received their new call books and - at which time the information is already updated.

And if there was a mistake in the reporting system, which is highly unlikely, then they could look at the par scanner to make sure all their information is accurate and at which time they would discard their copy because as I was asked how many calls did they make if they're covering 3-- to 350 calls a cycle, that could be five-to-six weeks, they're going to have a lot of paper; and it's all going to be contained here.

So they're already getting recaps of the information, and they get rid of the scanners.

Q Let me ask you about personal notes with respect to presentations.

Again as a practical matter, would any such notes be kept by sales reps, in your experience?

A My experience is no. Their - we solicit input from the sales reps for their accounts; and the business that we're going to present to a retailer, we contain that in the presentation. Anything that is written down after a presentation with a retailer would have been written down on the presentation that they have in some form or fashion, assimilated into that report; and that's what the chain account managers or key account managers keep.

Q And finally, with respect to keeping copies of

documents, as a practical matter, what is your experience with sales reps - and I'll use this word - purging documents versus the different levels up the chain at UST keeping documents? As a practical matter, who keeps them longer?

A They're not required to keep all this information. They're required to report the information. So they report the information, and then it's compiled up the chain through division and department and regional vice presidents, the information. So they only retain it for the period of time that they're actively doing it, and then they discard it.

MR. KEYTE: No more questions.

THE COURT: Any recross?

MR. GORSUCH: Nothing, Your Honor.

THE COURT: Okay. Mr. Freudenthal, thank you. You may step down.

You ever been a witness before?

MR. FREUDENTHAL: No.

THE COURT: You don't have to tell me.

Why don't you take that file back.

I'm disinclined to hear any witnesses by telephone unless there - somebody can tell me really urgent reasons to do so.

What I'd like to ask you to do, unless

someone has a contrary thought, is to take - you know, it's now 20 to 12 - take ten minutes and organize your thoughts as to your observations that you want to make in pulling all this argument together, and it doesn't have to be simply what Mr. Freudenthal said, but what you think are the salient points in deciding this discovery-related issue.

And then I'll hear - I'll hear from Mr. Gorsuch first since it's his motion to compel, in effect. Then I'll hear from UST; and if I'm able, I will give you a ruling from the bench. I will try to do that, but I'm not promising.

MR. KEYTE: Thank you, Your Honor.

THE COURT: Take ten minutes.

AFTER RECESS

THE COURT: Let's ask each side to sum up its arguments with respect to what I will call the sales-representative issue. If you could take no more - you know, five minutes probably would be adequate. Don't go more than ten.

The reason I say that is that I need to be off the bench by 12:30 or 12:25, which gives us about a half an hour; and I'd like to have a chance to think about your arguments and, if I'm able, give you a ruling from the bench.

So Mr. Gorsuch.

MR. GORSUCH: Thank you, Your Honor.

Would you like to hear from me here or from the podium?

THE COURT: I'd like to hear from you wherever it is you are not going to collapse from the flu.

MR. GORSUCH: Thank you.

Back in December, December the 18th, the Court recognized the importance of grass-roots documents in this case; and, in fact, if you look at the complaint, the allegations in our complaint all deal with the conduct by UST sales representatives in the field.

Under Rule 26, we're entitled to all documents that are likely to be discovered admissible evidence. I think there are only two plausible arguments for not producing sales arguments - sales reps' documents, and we've only heard two.

One is that they don't retain any original documents, and two is that it's overly burdensome to produce those original documents. I'd like to address each of those in turn.

The primary argument as near as I can tell from the defendants is the first one, that there just aren't any original documents at the sales rep level. Look at the Milano affidavit itself. He nowhere says there are

no original documents at the sales rep level. In fact, he admits there are at least two categories of documents, calendars and call books, that are maintained at the sales rep level and may be kept by sales reps that don't get to the district office.

Defendants have had a month to look into this issue. That's more than adequate time. We can see from this Document Number 7, and Mr. Milano didn't cut the mustard, and this is the same fellow who, in fact, not only admits that there are some documents but specifically sent out an e-mail to the field telling them that he didn't want to hear any more - get any more documents saying that we've eliminated Conwood facings. That's pretty strong evidence there's stuff down there at the sales rep level that's not percolating up.

Mr. Freudenthal here today doesn't and can't and hasn't testified that as a matter of personal knowledge there are no documents at the sales rep level. He was a sales rep for a year-and-a-half over 12 years ago. In the last month, neither he nor anyone else at UST has done any checking with the sales representatives personally to gain personal knowledge as to what they maintained with the exception of looking at one sales representative's van.

He admits - Mr. Freudenthal admits that he doesn't know what documents sales representatives keep

above and beyond what they're minimally required to keep by UST policy. He admitted that repeatedly in cross-examination, Your Honor; and he admitted that Milano's right, they may maintain calendars and day books.

And Your Honor, when you're visiting 50 stores a day and 300 to 350 in your territory, it's a matter of common sense you're going to maintain some personal notes on those sales calls and your interactions that aren't reflected in corporate documents. That's something Terry Williams says has been in this industry for twenty years and says in his affidavit. That's not disputed. That's not disputed that they maintain those notes. There's no policy against it.

And Your Honor, we all maintain documents above and beyond what we're minimally required to keep. I can't think of anyone who doesn't do that. And all Mr. Freudenthal can tell you about it is the documents that they're minimally required to keep go up. That's all he can tell you.

He also admits that presentations affecting our distribution, which are at the heart of the case, presentations on agreements that lock up the racks and the facings and allocate space that UST had spaced to Conwood, and at the heart of the case, Paragraph 28 of the complaint, he admits that there are sometimes, it's

possible that sales reps keep personal notes on these things, customize and tailor the UST presentation materials. He admitted that these personal notes may not go up.

Mr. Freudenthal also admitted that documents which - even the documents which do come from the regions are retained for three-to-five years at the regional level. And yet he also admitted that there's no document-retention policy or instruction policy for sales representative documents.

And I will represent to you, Your Honor, back in August, just to give you one example, we subpoenaed one former UST sales representative, Sarah Weatherly. UST knows about this; they've known about it since August. She kept documents back to 1989. What is that, ten years ago. These documents, a lot of them are from regional headquarters, Your Honor.

We haven't found them in the regional headquarter production. Mr. Keyte knows that he has made production at the regional headquarters offices. He's correct, the departmental and division manager offices are still being searched. But there are documents in here that should have been found in the regional offices, Your Honor, but were not. They came from the regional offices but were not. And the answer, found out today, is because they're

only kept at the regional office for three-to-five years and sales reps may keep them longer.

So even for those documents - and Your Honor, those include these critical par forms, which you've heard a lot about. These record how many - I mean this is critical stuff. It records how many facings each side has in each store across the country, price and all that.

And you heard from Mr. Freudenthal about this comment form at the bottom, which is the basis of all their reports. All subsequent reports - and we discussed at length how critically important these are. Well, they're only maintained at the regional offices for three-to-five years.

We know from Fastech that it doesn't even get the comment form; and if you'll look at it, you'll see that what goes to the comment form goes to the direct supervisor and the other is retained for your records. So it's only going to be in two places. One is the supervisor who keeps it for three-to-five years, and the other is the sales rep, who we have proof, Your Honor, keep documents longer in some cases. And there's no policy forbidding them from doing so.

So the most critical comment forms that Mr. Freudenthal testified at length about are likely to be found in the sales representative files and only in the

sales representative files.

Your Honor, I respectfully suggest that under Rule 26, it's pro disclosure. The presumption is in favor of disclosure, and UST has not met any kind of burden in showing you there are no original documents at the sales rep level.

Let me just address very quickly a few more points before I get to the burden issue. I don't think we had to do anything, but we have done something affirmatively. We've presented an uncontroverted affidavit from Mr. Paulk saying that he did, as a practical matter, retain documents on his retail activities that did ont go to the district level office; and he's sitting by his phone here this morning in California. We didn't call him in from California, but he's supposed to sit by the phone until 1:00.

THE COURT: His subpoena is pretty old.

MR. GORSUCH: Your Honor, with respect, two things on that. Mr. Freudenthal's is just as old, number one. So if you're going to discredit somebody, you've got to discredit the other on that basis. They're even; it's a wash.

And number two, Mr. Freudenthal says things haven't changed since 1986. That's throughout his testimony on direct, Your Honor.

So Mr. Paulk could testify - and he's prepared by phone to tell you one of the things he did - and I'll just make this proffer - is frequently . . .

THE COURT: I really don't want to hear any proffer about . . .

MR. GORSUCH: That's fine, Your Honor.

THE COURT: I really want to keep it to argument because then they may feel that they need to put Mr. Freudenthal on, and then the door is open again.

MR. GORSUCH: That's fine, Your Honor. I take you on that. I just want you to know he's prepared to elucidate on his affidavit and explain to you . . .

THE COURT: Talk to me about burden.

MR. GORSUCH: Okay.

THE COURT: And I'm not trying to cut you short, but I am trying to manage our time. We've plowed a fair amount of ground pretty repetitively, so talk to me about burden. Then I want to hear from Mr. Keyte.

MR. GORSUCH: Okay. Your Honor, on burden I want to say a few things. First, there is no burden here because we're willing to do it for them; and we've been saying we've been willing to do it for them for months; and we'll get it done in three weeks, Your Honor. So there can't be any burden when they don't have to do it - when they don't have to lift a finger.

Second, burden is an argument that is equitable in nature. You have to look at what's on the other side of the balance. In this case, we have alleged the complaint is specifically alleged about the activities of these individuals in the marketplace. It would be extraordinary for you not to permit discovery of the documents of the alleged bad actors. These are the people who carry out the bad acts.

Now I cannot think of any case in which the Court has not permitted discovery or any authority for the proposition that the people who are alleged to have done the wrong are immune from discovery.

Your Honor, this is a $400,000,000 lawsuit before trebling. It contains serious allegations of misconduct. So when you - when you talk about burden and you're going to talk about fairness, on one side, you have to go look at 400 people's files. On the other hand, this is the most direct evidence available on what these people have done. They are the alleged wrongdoers. It is a $400,000,000 case alleging wrongdoing for over the last twenty years across the country.

And finally, Your Honor, the third point on burden is that the burden really is on us at this point. We've been seeking these documents since forever, as you're aware; and UST could have - could have made this production

a lot easier. They could have done it over the course of time. They could have done it in conjunction with sales meetings which they hold from time to time, regional sales meetings, national sales meetings. That's what we did, Your Honor. They've known about this lawsuit. They've known that we've wanted these documents for months - for a year almost.

So if they're going to tell you it's going to be so burdensome for us to have to do it in the next three weeks, well, you know, it might. But the fact of the matter is, they caused this train wreck and they have to live with that; and we're the ones who are really going to wind up suffering from the train wreck, Your Honor, because there's an April 1 deadline for the close of depositions, and we are bound and determined to do everything we can to keep to keep this case on schedule.

But they have yet to even produce their division and department managers' files, which you ordered over a month ago. We're going to be behind the eight ball when we get - if and when we ever finally get these sales rep files, process them, and get them produced. So . . .

THE COURT: I don't have as many stripes as Chief Justice Rehnquist does, but I think I'm going to have to . . .

MR. GORSUCH: Okay. Those are my burden

arguments, Your Honor.

THE COURT: Okay.

MR. GORSUCH: Last point?

THE COURT: Right.

MR. GORSUCH: Last point.

THE COURT: Okay.

MR. GORSUCH: Fastech's independent findings. They've made independent findings, Your Honor, that there are original documents that are not centrally maintained. You asked the other day, well, aren't they just the vendor seeking to sell something? You're right, they are; and, in fact, they're trying to sell an automation program to get the sales reps laptops so that this problem may continue. UST bought it. They're now distributing laptops to their sales force. So they've endorsed those findings, Your Honor. I suggest you don't have to make any independent findings yourself.

So I'm finished.

THE COURT: All right, Mr. Keyte.

MR. KEYTE: And I think I'm going to be briefer than five minutes.

THE COURT: That's fine. Brevity is always appreciated.

MR. KEYTE: First, with respect to Fastech, that, of course, wasn't even risked to be part of the

cross-examination. So I don't think we need to put any weight on that.

Ultimately Rule 26, as the Court has observed I believe in the past, is a practical test that balances the likelihood of plaintiff obtaining additional probative documents versus the burden of having to try and find them and process them.

What has the plaintiff shown here? Ultimately plaintiffs' showing is really just conjecture that there may be handwritten notes on calendars. There may be notes with respect to presentations that may have been kept even though there are policies and procedures firmly in place and enforced to make sure that competitive information goes up the chain from the sales rep to the division and on forward. Those are the par scanner sheets with the Comment section and the monthly report.

I agree that Mr. Paulk's affidavit - and he is not here for us to cross live with documents - I think cannot be relied on. It is not a wash with Mr. Freudenthal, we submit, who has been at every stage of the sales rep organization up through 1997, 11 years, who is out in the field looking at what sales rep documents have. He testified that division and department managers' job is to make sure they bring up into the chain the competitively relevant information.

It is a scavenger hunt to see - to try to find out whether a particular sales rep in their personal calendar may have scheduled something and made a comment. They - the practical experiences, they don't put competitive information there because they have to do it somewhere else anyway, and there's nothing really to rebut that that they've shown.

What have we shown? One, that we are not like Conwood. We don't - the structure is not the same. The reporting requirements are not the same. The documents are not the same. How they track competitive activity is not the same, and clearly where the documents have to go from the sales rep up the chain is not the same.

If you compare what is being produced - has been produced and is being produced at the division and department level with respect to par scanner sheets, weekly and monthly reports with the prospect of the potential that there might be a written note here and there, it is clear that with respect to the merits issues and relevant documents, they will have the probative information they need to pursue their case.

The direct evidence that Mr. Gorsuch refers to is not going to be the personal note in the calendar. It's going to be the information in the par scanner sheets and the reports going up, and that's been our position

throughout, and I think that is really uncontroverted here today at the hearing.

Even with respect to Sarah Weatherly, it is - we have - there is yet to be a production at the division and department level. It's under way, and it's premature to make those kind of arguments, and it also - I guess the suggestion is that we have to go look for the occasional pack-rat who may keep something and may keep something longer than the division or department even though, as a matter of practical experience, these guys and women are very busy. They don't like to keep documents. It's hard enough to get them to fill the reports out that they have to, and those are where the probative information is going to be found.

So with respect to the merits before we even get to the burden, I don't think there's been a showing that these documents are likely to be - add probative information - information, in this case, beyond what has been produced and what is being produced.

With respect to the burden, there are 448 reps. They do work out of vans. They already have the burden of putting the relevant documents on a weekly and monthly basis up the division to the departments and to the regions. There is, by the way, no e-mail to direct them what to do.

It would be extremely disruptive and burdensome to have these 448 reps have to search their documents, produce their documents on the prospect that there might be a handwritten note that is - that reflects competitive information rather than personal information and that is not on a par scanner or in a monthly report. It's conjecture, and it's really not credible.

So, Your Honor, I think when you balance that burden versus the prospect of obtaining additional probative information, I think the balance is zero or near zero with respect to the prospect of additional probative information and quite high with respect to the burden in this case. And for those reasons, we would request that the order be denied.

THE COURT: All right. Here's what I'm going to do. You all just sit tight for a couple of minutes. I've been banging away on my laptop, and I want to pull my notes together, and I'm going to give you a ruling rather than making you leave and come back. If you'll just sit still, I'll give it to you in a minute.

AFTER RECESS

THE COURT: I'm going to grant the motion to compel to the following extent: I'm going to order that UST conduct a search of the records of its sales representatives and produce the following categories of

documents:

Number one, any notes or personally maintained documents, such as planners, notes, journals, written summary of activities that relate to the specific anti-competitive activities that are alleged in Paragraphs 22 through 31 of the complaint. The complaint sets out what those are.

One of the concerns that the Magistrate Judge has about the discovery - and this is not a criticism but just an observation - some of the requests by Conwood are quite broad. I think it is fair to inquire if there are individual records of the sales representatives that go to the specific anti-competitive allegations that are alleged to have occurred and that may, if true, involve field activity, those are set out in the complaint.

Secondly, I will order the production of any regularly maintained competitive records that, whether they go up the chain of command or not, from 1995 back. I listened to Mr. Freudenthal, and he said that the corporate retention policy was three-to-five years.

Taking the most aggressive version of that and assuming that everything that has been regularly sent up the chain in the last three years from the divisional or the regional offices, it's fair to look in the records of the sales representatives from 1995 back. So I will order

that.

I want to give you some of the reasons for this, and I will do something in writing; but because we have wanted to get these rulings out quickly, I want to give it to you.

First, I think that UST has difficulty, I think, of proving a negative. Mr. Freudenthal got up and testified to what the regular course of business is, and the Magistrate Judge doesn't have any reason to doubt the accuracy of the regular course of business.

However, what may happen and what may be the regular chain of command does not disprove the possibility of - which is a real one - that individuals keep other records. And ordinarily in corporate litigation, it's altogether fair to look not just in the ultimate corporate repository but in other places where records may be kept. And certainly day planners, notes, journals, things like that that may reflect activities that the plaintiff alleges to be anti-competitive may well be retained or created; and I think it is fair to look, especially given the fact that this is an anti-trust case of no small scope.

I listened very carefully to Mr. Freudenthal's testimony. He talked about what the policy is of sending things up the chain of command, and I'm sure that that's an accurate summary of how UST wants the

documents to flow so that its management can understand things. But it doesn't disprove the distinct possibility that sales representatives may have relevant information.

When all is said and done, a lot of this has to do with Rule 26, and Rule 26 does say that the information sought need not be admissible at trial if it may lead to discovery of admissible evidence. There's a distinct possibility that reviewing these materials may lead to discovery of witnesses who the plaintiff wishes to depose. What they may say, how credible they are, whether the information helps one side more than the other, the Magistrate Judge knows not at all. But I think, without looking at that material, it's not possible to tell.

As to the burden, the Magistrate Judge would make the following observations:

I hear the argument that there are 448 people. I tried to address that by giving some scope in the course of this order to what needs to be reviewed. I don't think that there is a compelling argument that the burden here of going to these people to look for their individual records is of a scope that it would - that it would negate the ability to discover this kind of material.

I have no opinion - no insight at all as to the merits of this litigation. I don't know if the plaintiff is altogether wrong, a little bit right, or right

big time or somewhere in between.

If the plaintiffs' allegations are true, as to which the Magistrate Judge has no opinion at all, then the people in the field who engage in the activities which the plaintiff believes are wrongful would indeed be knowledgeable witnesses and may well have records; and I think that on the basis of the record that is in front of this Court, I am not able to say under Rule 26 that UST should not be required to look for those documents.

So that's the Court's ruling. I will try to do something in writing; but because we have a reporter here today and I know this is an important issue, I'm going to rule based on that; and I do now need to excuse myself.

I know that there are other issues that are out there. What I'm going to ask counsel to do is to go back to the - what I would call the joint-agenda approach. It worked the last time. I'll ask Mr. Keyte and Mr. Gorsuch or whatever pairing seems to work to make up a joint list and - what's today, Monday - say by Thursday submit that to the Magistrate Judge as to what issues remain unresolved.

I know that I took under submission an issue that related to discovery, I think, of some research and development costs because I told you that I thought I needed to look at case law. I feel relatively confident

that, given the number of papers that are here on the bench, that there are other things that need to be addressed. But what I'd like to do is to get the joint agenda from you all, look at that, and then figure out what we do next.

So that will be the ruling. I do think that this has been useful, to get Mr. Freudenthal. Good to meet you, Ms. Weiss. And when I get that joint agenda, I will have a telephone-status call as to where we go from here with counsel, which probably won't be till next week because I'm starting a five-day jury trial tomorrow.

So thank you all very much.

MR. GORSUCH: Thank you, Your Honor.

MR. KEYTE: Thank you, Your Honor.

AT THIS POINT, THE PROCEEDINGS WERE ADJOURNED.

* * * * * * * * *

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dana Lynn Mumm
COURT REPORTER

1/26/99
DATE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CONWOOD COMPANY L.P., ET AL, Plaintiffs	)	
v.	)	5:98-CV-00108
UNITED STATES TOBACCO COMPANY, ET AL, Defendants	)	

TRANSCRIPT OF HEARING

* * * * * * * *

BEFORE MAGISTRATE JUDGE JAMES D. MOYER, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE, KENTUCKY, ON JANUARY 19, 1999.

* * * * * * * *

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I N D E X

Witness for the Defendants:	Pages
Kevin Eugene Freudenthal	
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E X H I B I T S

For the Defendants:		Pages
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1-B	(Marked) - Photograph of back seat of USTC sales representative van showing smokeless tobacco product rack, point of sale advertising and other promotional materials	8
1-C	(Marked) - Photograph of front seat of USTC sales representative van showing car files and profile activity reporting materials on passenger seat .	8
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THE CAPTIONED MATTER WAS CALLED IN OPEN COURT AT THE HOUR OF 10:05 A.M., ON JANUARY 19, 1998; AND THE FOLLOWING PROCEEDINGS OCCURRED:

THE COURT: Mr. Golden, would you call the case, please.

CLERK OF THE COURT: Conwood Company v. United States Tobacco Company, Civil Action Number 5:98-cv-108-R.

THE COURT: All right. Good morning, everyone.

MR. GORSUCH: Good morning, Your Honor.

MR. REED: Good morning, Your Honor.

MR. KEYTE: Good morning, Your Honor.

THE COURT: The Court recognizes Mr. Gorsuch and Mr. Powell for the plaintiff, Conwood; and for United States Tobacco, Mr. Reed and Mr. Athanasia and Mr. Keyte; and we are here as a continuation of proceedings we've had on discovery-related issues; and last week, the Court requested that UST bring a highly knowledgeable person who could speak to the issue about where and whether documents are kept at the sales or field level and that the reason the Court did that was simply that it was apparent to the Court that there was a good deal of disagreement between the parties as to whether the sales personnel had relevant documents in their possession. And given the nature of the case and the possible importance of the issue to discovery, the Magistrate Judge simply thought that the best thing to

do would be to hear from someone. Affidavits can be useful, but sometimes live testimony is the best way to try and resolve a factual conflict.

The Magistrate Judge wants to be very clear that the Court has no predilection or inclination as to what the facts will show here; but I thought that, rather than having an affidavit-based decision, we'd just hear from someone.

So Mr. Keyte, I take it . . .

MR. KEYTE: Yeah.

THE COURT: I see some new faces.

MR. KEYTE: Let me introduce two new faces. First, on your right is Martha Weiss, the senior corporate counsel of U.S. Tobacco.

THE COURT: Good morning, Ms. Weiss. We heard your name last week when we were scurrying around on the phone.

MR. KEYTE: And then Kevin Freudenthal, who will be our witness, who is the Director of Trade and Marketing for U.S. Tobacco.

THE COURT: Maybe you could spell that for the court reporter.

MR. KEYTE: Sure.

COURT REPORTER: I have it.

THE COURT: She has it, okay, all right.

MR. KEYTE: So whenever you'd like to begin.

THE COURT: Unless someone has some procedural comment, the Court's inclination is to let UST put on testimony of Mr. Freudenthal. Did I say that right?

MR. FREUDENTHAL: Yes sir.

THE COURT: And we'll give Conwood, of course, the opportunity to cross-examine; and then we'll have a better factual record from which to determine whether the plaintiffs' contention that discovery ought to be extended to the sales level is correct.

MR. KEYTE: Okay. U.S. Tobacco calls Mr. Freudenthal.

THE COURT: All right. If you'll come forward and be sworn, sir.

* * * * * * * * *

KEVIN EUGENE FREUDENTHAL, DEFENDANTS' WITNESS, SWORN

DIRECT EXAMINATION

THE COURT: Okay, Mr. Freudenthal, if you'd spell your name for me.

MR. FREUDENTHAL: Okay. Well, certainly. It's F as in Frank . . .

Q Yes sir.

A . . . r-e-u . . .

Q Right.

A . . . d-e-n-t-h-a-l.

Q Very good.

THE COURT: Now people often want to look at me, and you'll get a stiff neck if you do that. You can just look at Mr. Keyte and . . .

MR. KEYTE: And if the Court has a question . . .

THE COURT: Yeah. If I have a question, I'll address you; but I don't want you to have to turn around like that.

MR. FREUDENTHAL: Great.

THE COURT: Mr. Keyte, you may proceed.

DIRECT EXAMINATION

BY MR. KEYTE:

Q Please state your name for the record.

A Kevin Eugene Freudenthal.

Q What is your current position at U.S. Tobacco?

A I'm Director of Trade and Marketing.

Q And briefly describe your responsibilities in that position.

A I'm responsible for developing sales and marketing programs and promotions.

Q How long have you been employed by U.S. Tobacco?

A A little over 13 years.

Q And what was your first position there?

A I started as a sales rep in January of 1986.

Q And briefly explain to the Court what other positions you held at U.S. Tobacco between 1986 and the present.

A As I mentioned, I started as a sales rep in 1986; and then I was promoted to a Division Manager in 1987, and then I was promoted to a Chain Account Manager in 1988, and then I was promoted to a Regional Marketing Manager in 1990, and then I was promotion to Department Manager in 1993, and then I was promoted to Director of Trade and Marketing in 1997.

Q So to summarize, you were in the U.S. Tobacco sales force for approximately 11 years?

A Yes.

Q And you were elevated about a year-and-a-half ago to your current position?

A Correct.

Q Please briefly describe for the Court the basic organizational structure of the U.S. Tobacco sales force.

A The company is very organized out in the field. The sales rep reports to a division manager, and a division manager reports to a department manager, and a department manager reports to the Regional Vice President, who reports to the Vice President of Sales.

Q How many sales reps did you supervise as a division manager?

A As a division manager, six.

Q And how many sales reps did you supervise as a department manager?

A Approximately 30.

Q And do you still work in the field today in your current position?

A Yes, I do. My job description calls for developing various sales and marketing promotions and programs, and 40 percent or thereabouts, field sales, travel and interaction in the marketplace.

Q Is the organizational structure of the U.S. Tobacco sales force essentially the same now as it was when you were promoted in 1997?

A Yes, it is.

Q What are the responsibilities of the division managers with respect to documenting the activities of the sales

representatives?

A The division managers are the team leaders. They're responsible for insuring that all the proper administrative forms are completed and that all the information is sent to them so that they can send it up the chain of command.

Q And what are the responsibilities of sales representatives in documenting their own activities?

A Our sales reps are the eyes and ears of the company out there. They're required to follow procedures and report on administrative forms and reports and send everything to their immediate supervisor, who is their division manager.

Q And based on your experience, do you have an understanding as to what types of documents are used by U.S. Tobacco sales representatives in carrying out their responsibilities?

A Yes sir.

Q Are you familiar with the vans used by U.S. Tobacco sales representatives?

A Yes, I am.

Q And when was the last time you looked inside one of these vans?

A I had the opportunity to look into a sales rep's van yesterday.

Q Okay. And why did you do that?

A Well, I wanted to just take a look and see if the van set-up today is the way it has been over the course of my experience; and it has.

Q And when you're out in the field, in your current work, did you have occasion to look at the vans and how they're set up in other parts of the country as well?

A Yeah. That's part of my responsibility is getting out and working with sales reps and division managers and department managers and working with them in their environment.

MR. KEYTE: Let me - Your Honor, I would like to mark - I don't how you want to do procedurally. I'd like to mark a couple of exhibits.

THE COURT: Why don't you mark them and hand them to the Court if you have copies to make available.

MR. KEYTE: Okay. I'll just call them Freudenthal 1 and . . .

THE COURT: That would be fine.

MR. KEYTE: . . . if that's acceptable.

Let me mark as Freudenthal Exhibits 1, 2, and 3.

(Freudenthal Exhibit Numbers 1 A, B, and C (group exhibit) were so marked for identification.)

BY MR. KEYTE:

Q Mr. Freudenthal, are these pictures of the van you

looked at yesterday?

A Yes.

Q And could you just explain to the Court what the three pictures are, of what parts of the van?

A Sure. A that's listed on the bottom, that would be the rear of the van; and that's where the sales rep would carry their various car-stock product, Copenhagen and Skoal and some POS materials and their supplies, back there.

THE COURT: Is that a Chrysler-made van? What kind of mini-van is that?

MR. FREUDENTHAL: This is a . . .

THE COURT: It doesn't really matter. I'm just trying to . . .

MR. FREUDENTHAL: This is an Aerostar.

THE COURT: Aerostar.

MR. FREUDENTHAL: So that the back of the hatch comes up.

THE COURT: It's not a Silhouette, is it?

MR. FREUDENTHAL: Pardon me?

THE COURT: It's not the Silhouette. You know, that's the Cadillac.

MR. FREUDENTHAL: No, no, no.

MR. KEYTE: It doesn't appear to be.

THE COURT: That's a reference to a movie. You may continue.

MR. FREUDENTHAL: No. That's the back of an Aerostar; and as you can see, there's two handles; and those trays actually move in and out of the van so they can access the materials easily.

MR. KEYTE: All right.

MR. FREUDENTHAL: And then B is the side door that's a sliding door; and as you can see, there's a seat, a bench seat, in there; and that's where the sales rep would carry any larger point-of-sale items or displays or promotions.

And then C is the front of the van, which would have the driver's and passenger's seat; and in the middle, there's a little console there.

BY MR. KEYTE:

Q Okay. And is that commonly referred to as a car file?

A Yeah.

Q And what is a - briefly describe what a car file is.

A It's a piece of wood furniture. It's about 8 inches wide by maybe 14 - 12, 14 inches long, and that's where the sales rep would keep some files and their manuals.

Q And did you have an opportunity to talk to the sales rep who uses the van you were talking about yesterday?

A Yes.

Q And what did you talk to him about?

A I just - you know, I just asked him a couple of

questions in looking at his van to really see - look at the organization and see if it's how I remember, and it is. I'm out in the field, as I mentioned, all the time; and I looked at it back - what my experience was as a sales rep and just point of reference and clarify and make sure it's the same.

Q Okay. And did you review the types of documents that he creates or receives and are kept in the car file?

A Yeah. We briefly talked about, you know, some of the things that he carries in his own van.

Q Okay. And has much of anything changed since you left the retail sales force in 1997?

A No.

Q Okay. And in your experience, would these vans or the car files be significantly different in any other parts of the country?

A No. As I mentioned, you know, the opportunity that I have is I got to get out and see different parts of the country. So I had an opportunity to work with different sales reps.

MR. KEYTE: Now I'd like to mark as Freudenthal Number 2, a page out of the Sales Operations Manual that was referenced.

BY MR. KEYTE:

Q Could you identify for the record what this exhibit

is?

A Yeah. It's a suggested topic list of different car files for the sales rep to carry in his van.

Q And is that found in the Sales Operation Manual?

A Yes, it is.

Q I'll walk you through some of these items.

Before I do that, is the van that you looked at yesterday, did it contain the type of documents that are listed here in the exhibit?

A Uh huh, yes.

Q Let's go through it for the Court. The first item listed there is Direct Accounts. What would be found in the Direct Account file?

A That would be Direct Account listing, which would include the name of our direct accounts and address.

Q Is there any other information that would be on that document?

A No, it's really a direct account listing of all the direct accounts in a particular assignment, whatever that might be.

Q Okay. And who creates the direct account list?

A That's created at the regional level, and it's also maintained at the department, the division level.

Q Who would receive copies of it?

A Everybody would receive copies of the direct account

listing. That would be sales reps and division, department, region, and corporate.

Q Next on the list is Chain Headquarters. What documents would be in a Chain Headquarters file?

A That would be information contained for chain accounts, like Seven-11 or Circle K. It would be headquarter listings, so again it would be a listing of those particular accounts that would have profiled information, like name and address and everything for that particular chain account.

Q Who creates those documents?

A Those are created with the key account managers, the chain account managers, and working with the regions and departments.

Q And who would receive copies of the headquarters material?

A As I mentioned with the direct accounts, everyone would receive copies of anything to do with the chain account headquarters, up and down the chain of command.

Q And next on the list is a Chain Promotion Planner. What's a Chain Promotion Planner?

A The Chain Promotion Planners, they would be calendar, either a 6- or 12-month calendar that would identify different programs or promotions that would be executed in chain accounts; and it would be generated by the manager

responsible for that particular headquarter, either a chain account manager or a key account manager.

Q Okay. Just so it's clear, the people who create those documents are at the regional level or department level?

A It could be either/or.

Q Okay.

A It could be a key account manager at the national accounts level, or it could be a chain account manager that would be at the department level.

Q And who would receive a copy?

A Everyone that would be involved with that particular account, which would be the sales reps that would be responsible for executing, the division managers in that area, the department managers in that area. And if it's anything from a key account manager, it would include anyone in the region.

Q The next on the list is Coordinators. What does that refer to?

A That refers to PTST, which is part-time sales trainee coordinators; and that would be a file to maintain things like time sheets and activity sheets from the actual part-timers themselves.

Q Who creates those?

A Those are created at corporate level. It's an administrative reporting form that's just completed and

submitted to corporate.

Q And who gets copies of those?

A Everyone that would be involved with that particular person, which would be the division manager, department manager. The regions receive a copy, and then it goes to the PTST Department, in their headquarters.

Q Now in general, is there a lot of duplication of documents, you know, from sales rep up through the regions?

A Yeah. Everything we do is duplicated. That's why all of our forms are in triplicate or four-part because that's - that's what's important, is passing the information on so that all the field sales managers have all the information that's contained in the marketplace.

Q And next on the list is Promotions. What does that refer to?

A That would refer to any consumer promotions that would be created in the corporate headquarters in the Marketing Department and then any executional plans that are developed at the regional level.

Q So those again are - those are created by the sales representative at the representative level?

A Yes.

Q And who receives copies of that material?

A Everyone receives copies. It starts - as I mentioned, it starts in the corporate headquarters; and then the

information is disseminated down to the - to all the different positions in field sales.

Q Next is Programs. What does Programs refer to - and again we're talking about what might be in the file of a sales rep's van.

A It would be work-related programs, things that - things that would outline what's happening in a particular retail store or what's happening in a particular market that a sales rep was working at any given time.

Q And who creates the Program material?

A Although there's - there's two kinds. There's national programs, which are similar to the national promotions; and then if there were regional or department programs, there would be - they would be developed in the regions.

Q Who receives copies of that material?

A Everyone that would be affected, which would be the division managers, the department managers, and the regional vice presidents.

Q The next listing is Promotional Events. What does that refer to?

A Promotional Events are rodeos or races, things that we're participating in on an event level.

Q Who creates those documents?

A The promotional team.

Q Who receives copies - well, is the promotional team above the sales rep level?

A Yeah. The promotional team is on a national level, and it's - we have some satellite offices, which are in the regional offices themselves; and they coordinate all of our events.

Q To the extent they're even relevant to the case, who receives copies of that material?

A Everyone up the chain of command receives copies of it.

Q Next on the list, if I have it right, is Correspondence to/from Supervisor/Department/Region/Chain Manager. These - what does that refer to?

A Correspondence. That would be any correspondence from a division manager or a department manager to a sales rep. It may be a correspondence that sales rep communicated to his immediate supervisor or division manager. Then it would be copied to the department manager if that was the case.

Q And does all such correspondence get put up the chain, copies of that?

A Yes.

Q Well, does a U.S. Tobacco sales representative ever have correspondence with a retailer?

A In the rare instance that they would have

communication, it may be with a small chain account that they have, that that would be correspondence that's coordinated with the division manager and created by their division manager.

Q Okay. And would copies of any such correspondence have to be sent up the chain as well?

A Yes, always - everything that we have is communicated up the chain of command to immediate supervisors.

Q And then what about the current project file? What does that refer to?

A The current project file could be any active activities. It could be some promotions or programs that would go into the current project file that they're actively working up and down the street or in the marketplace at that particular time.

Q And who creates those documents?

A Those would be created at the national or the regional level.

Q And who receives copies of those documents?

A The department managers and division managers would have a copy of them.

Q Now let me ask you about some other documents that sales representatives use in their work. What is a call book or a route book?

A A call book or a route book is - it's an output; it's

a book that lists all of the retail stores, and it lists the direct accounts in a given area by the sales rep, a division manager, a department manager or regional manager could identify all the call activity for every store in a geographic area.

Q Who creates the route books or call books?

A They're created at the corporate level. A company called Fastech actually sends the output books to field sales.

Q Okay. And who receives copies of them?

A The corporate office receives a copy. The regional vice president receives a copy. The department manager receives a copy. The division manager receives a copy, and then the sales representative receives a copy.

Q What is a par scanner sheet?

A A par scanner sheet is - it's the profile activity reporting scanner, it's a document that is completed by the sales rep for every call that they make; and then that's the information that's tossed up the chain to profile the account information, and then that's the input that creates the call book that they receive as an output.

MR. KEYTE: Let me mark, Your Honor Freudenthal Number 3.

(Freudenthal Exhibit Number 3 is marked for identification.)

THE COURT: Please continue.

BY MR. KEYTE:

Q Who creates the par . . .

A Yeah. This is done by Fastech in our corporate office, or we have a profile activity reporting department that puts together this form and all the information that's contained on it.

Q And what is the purpose of the par scanner sheet?

A It's to collect - as you can see on the form, it's to collect information for retail stores and direct accounts and then to send the information up so that you could profile the environment or the retail activity and what the actual retail store looks like on a call book.

Q Okay. Now I'd like to focus - I think it's on the bottom of the par scanner sheet - there's a comment section. What's the purpose of the comment section on the par scanner sheet?

A Well, if there's anything that takes place in the retail store or an observation to collect anything out in the marketplace, the sales rep would have an area to write comments so then those comments could be shared with their division manager.

Q Who receives copies of the par scanner sheet, including the comment section?

A Each week the sales rep takes this three-part form,

and they take the original, and they tear it off, and they mail it to Fastech, and then they send a copy of the form to their direct supervisor, which is their division manager; and then they keep a copy for themselves.

Q What happens if the U.S. Tobacco sales representative doesn't fill out the par scanner sheet and send it up the chain?

A Well, first off, if he doesn't fill out the par scanner, he'd not doing his job; and that's a requirement of his job is to send information on the par scanner to his immediate supervisor. If he doesn't send it in, it's really the same as not filling it out. It's required and disciplinary action be taken. It's a critical part of the job.

Q To whom - switching gears a little bit here - to whom does U.S. Tobacco sell its products?

A We sell our products to direct accounts.

Q What is a direct account?

A A direct account is - could be classified as a wholesaler or a distributor, and that's an account that we sell our Copenhagen and Skoal product to; and in turn, they're a supplier that sells to retailers, let them sell to consumers.

Q And what are the different types of direct accounts?

A There's - as I mentioned, there's wholesalers or

distributors; and then there's chain accounts, and an example of a chain account would be if, for example - if the Circle K with a thousand stores out there, they bought directly from us, we would ship our product to them; and then they would, in turn, ship it to their stores versus a wholesaler/distributor that we would sell it to and then they would ship it to the retail stores.

Q Do U.S. Tobacco sales representatives sell products?

A No. They don't - they don't sell products. They sell promotions; they sell programs; they service the accounts.

Q What is their role with respect to servicing those accounts?

A They're implementers and executors. They take programs and promotions, and they provide service to the retailer. They execute the plans that are developed for them to put out into the market.

Q Is all that activity documented and sent up, up the chain of command?

A Yes, yes, yes. They're - you know, they gather the information that's asked of them on either reports or any type administrative forms; and again they're required to submit that to their immediate supervisor on up.

Q What is an authorization letter?

A An authorization letter would be a letter or instructions from a retailer to one of our - through one of

our chain account managers or key account managers that would authorize U.S. Tobacco representative to perform a service in a store or to introduce a new product. It could be many different things, but it's an authorization from a retailer that says, I'm going to let you do this in my store and I want you to carry it out and let the - let my store managers know that these are - these are okay things to do.

Q Okay. So including retailers, who creates - who creates authorization letters and why?

A Well, it's - it's part of the key account management teams' and chain account managers' responsibility. They work with our chain account customers, and they develop the - they develop the presentations, the proposals for chain accounts and - which are retailers; and then they work to develop these authorization letters with those retailers.

Q Are sales representatives allowed to do their own authorization letters?

A No, they're not. As I mentioned, that's - that's really what the management team's all about. They put together the plans, and the sales reps execute.

Q So they just need the copy to get in the store?

A They need the copy to get in the store.

Q What is the . . .

A Keeps them out of harm's way.

Q Right. What is a retail transaction form?

A A retail transaction form is a form that the sales reps use in the - within their retail accounts that - there's various applications. But it's a form that they could use based on procedures of whatever the plan is that they're executing.

Q Okay. And who creates - who creates that form?

A That's created at the corporate level, and it's sent to all the field sales managers, and it's in - it's in duplicate copy for the retailer, for the sales rep, and for the division manager.

Q And that goes up the chain as well?

A It goes up the chain.

Q If an agreement were executed on a retail transaction form, what would a sales representative do with that form?

A They would give a copy of it to the retailer, and then they would assemble it with their week-ending paper work, and they would send it up the chain of command to their division manager.

Q And what are the consequences if he doesn't do that?

A If he doesn't do it, then he's not accurately reporting information that's happening in the retail store and he's not doing his job because he's responsible for reporting all transactions that take place out there to his

immediate supervisor.

Q Without going into characterizations of documents, can you think of any type of document that could be described as an agreement that a sales representative would have with the retailer without sending a copy up the chain?

A No, I can't. That's what makes our organization so efficient is the procedures that we have in place is to let these sales reps go out and execute and implement and have a management team in place that's efficient to get things done.

Q Would that be against U.S. Tobacco Company policy?

A Yes, it would be.

Q What about incentive programs, for example, exchanging a Copenhagen hat for a vendor placement? How are those documented?

A There's a - there's a form for that, and that would be completed by the sales rep and the retailer, and then there would be a copy given to the retailer, and then the form itself would be sent to the company administrating the program and then the division manager.

Q Do U.S. Tobacco sales representatives do weekly or monthly reports?

A They may. That would depend on the sales area and what information somebody would want.

Q All right. Well, how do those sales representatives

that are required to do it, how did they decide what goes into the report?

A Well, the report would be - would be similar to any of our other forms. Someone would create a report and list the topics that the information is requested from, and then the sales rep would be required to fill out that report and address those issues that are listed.

Q And who receives copies of the reports?

A Those reports would be generated to the division manager, department manager. They would go to the regional vice presidents and then on up to corporate.

Q In your experience, how do sales representatives put together their weekly or monthly report?

A If they - if they're asked to put together a report, then - in my experience in the field, that's what the comment section is provided for. Let's not create another piece of paper out there. Let's use exactly what we have, and that is the comment section. So if there's something happening in a retail store or in a given area, then the sales rep would write down whatever it is that's related to topics on his report that he's asked to fill out; and then he could use those comments to construct the report whenever it's requested.

Q And when you refer to the comments, you're referring to the comment section on the par . . .

A On the par scanner.

Q . . . scanner?

Did you work off of any notes when you did your own weekly or monthly reports other than the par scanner?

A Not other than the par scanner. I put all my notes down in the comment section, and that's - that's how I constructed any reports that were asked of me.

Q And in your experience, is it common for U.S. Tobacco sales reps to work off of notes not on the par scanner?

A Yes. It's to work off of the par scanner, and it's to construct your comments there. I mean it's a given place. It's a great point of reference because it also contains the information for that particular account, and that's a great area to do it. It would probably be a rare instance that someone would, you know, use a note pad or something to construct any type of report or documents asked of them.

Q And as a practical matter, if the sales rep decided to use a note pad rather than par scanner to construct his report, what would typically happen to his notes?

A They would probably be discarded because there's - there's enough things that he has to do - or she has to do, and the information is really what he or she is putting together, and that's all that they want to do. So they put together the information and fill it out on a report. Then

they send it to their division manager and to the department manager, and there's no use for that information any more. They've already done what was asked of them.

Q Let me ask you about some of the other affidavits that were put before the Court last week.

(Off-the-record discussion between Mr. Keyte and the Court.)

Did you have an opportunity to review the affidavits submitted by plaintiff in this case last week?

A Yes, I had an opportunity to look at them.

Q Let me first ask you a few questions about the declaration of Mr. Williams, which I think is marked as Freudenthal Number 4.

Based on your review of Mr. Williams' description of Conwood's documentation of sales rep activity, is U.S. Tobacco's the same?

A Just reviewing this, no, I don't believe it's the same at all.

Q What are the primary differences?

A Well, we forward all our information. Everything's contained in an administrative form or report and it's sent up the chain of command; and it appears that in this affidavit, they aren't required to forward everything to their supervisors.

Q Let's look at the affidavit of Mr. Paulk, who was - it

says in his affidavit that he was a representative, a sales rep at UST from 1981 until 1985. And if you could look at the documents listed in Paragraph 3 - and in particular, I'll just read them into the record. He references:

> " . . . a cash sale book, jobber information files [with a parentheses] promotional letters presented to wholesale buyers), and business correspondence."

My question is when you started in 1986, did sales representatives keep copies of these documents?

A Yeah, they would keep copies of the documents.

Q Okay. But did they also send copies up the chain?

A Yes. That's what they're required to do.

Q And if you look at the - let's look at the documents listed in Paragraph 4:

> " . . . personal notes on retail activity - [and again I have a hard time reading that.]

A It says:

> " . . . personal notes on retail activity, and records of payments to retailers . . ."

THE COURT: What's the personal notes? Is it some kind of activity report?

MR. KEYTE: Oh, I'm sorry. Unethical activity reports.

THE COURT: Okay. Thank you.

BY MR. KEYTE:

Q Again is it your understanding that when you joined in 1986, to the extent that any similar reports would have had a different name would - a copy would be kept by a sales rep?

A A copy would be kept by the sales rep, but it's his responsibility to make sure that he submits it to his division manager.

Q Now let's look at the affidavit of Mr. Jeffery, who was a part-time employee from 1997 to 1998, and I think also is apparently an employee of Conwood. It appears the only documents he references is in Paragraph 4, which are:

" . . . account listings and company updates."

Again just for the record, what's an account listing?

A You're asking my opinion of what he's referring to?

Q Yeah.

A I would say an account listing would be a direct account listing that would be maintained in the file, but that would be something that would be given to a sales rep from his management team.

And then company updates?

Q Uh huh.

A All of our manuals are updated on a regular basis from our corporate office, and they're sent down to all of our field sales managers and to our sales reps.

Q So just to summarize, do U.S. Tobacco sales representatives create any documentation, competitive activity at the retail level that is not copied up the chain of the sales force?

A No.

Q Okay. And do U.S. Tobacco sales reps receive any documents relating to carrying out the responsibilities that is not copied or - from the division department or region?

A No. Everything they get is from their managers.

MR. KEYTE: Thank you.

THE COURT: All right, Mr. Gorsuch, you may cross-examine the witness.

MR. GORSUCH: Good morning, Your Honor. Good morning, Mr. Freudenthal.

MR. FREUDENTHAL: Good morning.

MR. GORSUCH: Before we begin, I just want to pass along Dick Roberts' apologies for not being able to be here today. He's preparing for trial in Paducah next week. So that explains his absence.

CROSS-EXAMINATION

BY MR. GORSUCH:

Q Mr. Freudenthal, are you aware that UST purported to introduce an affidavit from Mr. Milano last week?

A I've seen an affidavit from Mr. Milano.

Q And Mr. Milano is the head of sales nationally for UST, isn't that correct?

A He's the Vice President of Sales.

Q And that puts him in charge of the whole Sales Division in UST, isn't that correct?

A Yeah. He's responsible for that whole Sales Department.

Q Mr. Milano isn't here today, is he?

A No, I don't see him here today.

Q Where is Mr. Milano today?

A I don't know.

Q He was aware of this hearing, was he not?

A I don't know.

THE COURT: Mr. Gorsuch, in fairness, the Magistrate Judge tried to be clear in his order that he was not requiring Mr. Milano to be here, but . . .

MR. GORSUCH: Your Honor, I didn't mean to suggest that. I am going to argue that the Milano affidavit, however, should be disregarded because I don't have the ability to cross-examine him, amongst other problems with it.

BY MR. GORSUCH:

Q Mr. Freudenthal, isn't it true that UST field sales representatives keep track of how many Conwood facings they eliminate?

MR. KEYTE: Object as to . . .

MR. FREUDENTHAL: No, I don't know anything about eliminating.

BY MR. GORSUCH:

Q Are you aware of an e-mail from Mr. Milano, the head of sales nationally, to the regional sales managers in April of 1998?

A No.

MR. GORSUCH: Your Honor, we'll mark what, I guess Freudenthal 6, is that correct?

THE COURT: Seven.

(Freudenthal Exhibit Number 7 was so marked for identification.)

BY MR. GORSUCH:

Q Mr. Freudenthal, this is an e-mail that was sent on April the 15th of 1998 from Gary Milano; and you're listed as one of the CCs on it, isn't that correct?

A Yes.

Q Okay. And amongst other things, Mr. Milano said that he wanted the regional managers to stop sending in monthly reports that used terms such as:

"We have eliminated competitive brands,"

isn't that correct?

A I'd have to read the document if I could.

MR. KEYTE: Your Honor . . .

MR. GORSUCH: Please, go ahead. Take your time.

MR. KEYTE: Could I state an objection, please.

Right now we're now talking about things sent from the regional people to Gary Milano with respect to - frankly things that are going to - are heading towards the merits of the case. I just want to make sure we focus on what documents are found at the sales rep level that are not found elsewhere.

THE COURT: With all respect, Mr. Keyte, that's not a valid evidentiary objection but an argument. So let's let Mr. Gorsuch examine.

MR. GORSUCH: Just let me know when you've finished reading it, Mr. Freudenthal.

(Mr. Freudenthal continues reading.)

I'm just going to ask you about Paragraph listed Number 1.

MR. FREUDENTHAL: Okay.

BY MR. GORSUCH:

Q Isn't it correct that UST sales reps keep track of how many Conwood facings they've eliminated?

A No. My experience, they fill out a par scanner; and on the par scanner, it asks them what's the distribution and how many facings of competitive brands that are reported in the store.

Q Isn't it correct Mr. Milano was sending this out to the field to say he didn't want to receive any more monthly reports that use the terms such as:

"We've eliminated competitive brands . . ."

MR. KEYTE: Objection.

MR. GORSUCH: "We have had Timber Wolf discontinued [or] Our chain manager has Conwood facings reduced by X number."

THE COURT: I'll sustain the objection. I think that you're asking the witness what Mr. Milano had in mind.

MR. GORSUCH: Okay, I'll rephrase it.

BY MR. GORSUCH:

Q Isn't it correct that he sent out an e-mail saying he didn't want any more monthly reports that Conwood facings are reduced by X number?

A It says, category management, we should use new terms, and it's our goal to make sure that we're using the correct terminology.

Q Had you seen Mr. Milano's affidavit?

A Yes, I have.

Q Okay. And isn't it true that sales representatives sometimes maintain personal calendars?

A It could be.

Q And that those calendars are not always forwarded to division managers, isn't that correct?

A Well, if they were maintaining a personal calendar, if it's a personal, meaning they're talking about their wife's birthday or their mom's birthday, I don't . . .

Q No, Mr. Freudenthal. I'm asking about calendars pertaining to their business activities. I'm not going to ask you about what they do in their social time.

Isn't it true that they sometimes maintain calendars . . .

MR. KEYTE: Objection, Your Honor. If he could let the witness answer the question.

BY MR. GORSUCH:

Q . . . that do not go to the division managers, isn't that correct?

THE COURT: Time out. There are too many people talking at once for the reporter to put it down - to take it down. So . . .

MR. GORSUCH: If I could finish my question.

THE COURT: If you'll ask your question again, I'll ask Mr. Keyte not to object while Mr. Gorsuch is

phrasing a question and I'll ask that the witness let the questioner finish the question. That way we can - so let's start all over.

BY MR. GORSUCH:

Q Isn't it correct sometimes UST sales representatives maintain calendars that pertain to their business work that are not always forwarded to division managers?

A No. The information that would be contained there would always be a record for something that they would submit to their division manager.

Q Mr. Freudenthal, I'm not asking you what's reflected in the division policy. I'm asking about those calendars. Do those calendars get forwarded to division managers all the time, yes or no.

A I wouldn't know what calendars you're referring to.

Q Okay. Well, I ask this be marked as Exhibit 8.

(Freudenthal Exhibit Number 8 was so marked for identification.)

Turn to Paragraph 5. Do you disagree with Mr. Milano that sometimes sales representatives keep calendars that aren't sent up to division managers?

A No. As I said, they may keep them. I don't know if they do or not.

Q The truth is you don't know what all 448 sales reps keep, do you?

A I don't know what they personally keep.

Q Right.

A I know what they're required to submit to corporate office and to their immediate supervisor.

Q But above and beyond what they're required to submit, you don't know what they keep, do you?

A No, I don't know what they keep.

Q And, in fact, you don't disagree with Mr. Milano they sometimes keep day books that go up - that don't go up to division managers, isn't that correct?

A No. I believe that everything that they're required to submit on behalf of the company . . .

Q Mr. Freudenthal, I'm just going to ask you to answer my questions.

A Okay.

Q And I may have to ask the Court for some guidance to get you to answer my questions. I hope we don't come to that. The question is very simple though.

Do you disagree with Mr. Milano there are day books that the sales representatives sometimes keep that are not sent to division managers? That's a yes or no.

A There could be.

Q In fact, you served as a sales representative for one year, isn't that correct?

A No, a year-and-a-half.

Q Year-and-a half. '86 to '87, is that correct?

A Correct.

Q So 12 years ago was the last time you served as a sales representative, isn't that right?

A As a sales representative, yes.

Q Okay. And in preparation for your testimony here today, did you e-mail the sales representatives, the 448 sales representatives, about what files they maintained?

MR. KEYTE: Foundation.

MR. FREUDENTHAL: No, I didn't.

THE COURT: Overruled. Please answer the question.

MR. FREUDENTHAL: No, I didn't e-mail because I . . .

BY MR. GORSUCH:

Q Did you send out a memo . . .

MR. REED: Your Honor, may the witness please answer?

MR. GORSUCH: Excuse me. Could I conduct my cross-examination?

THE COURT: All right, all right. We're going to take a five-minute break right now.

MR. GORSUCH: Thank you, Your Honor.

AFTER RECESS

THE COURT: All right. Let's go back on the record here. Just a couple of guidelines for everybody.

First, our reporter is probably the most experienced court reporter in the Western District; but she cannot - even she, as able as she is, cannot record two people talking at once; and so please do not interrupt each other.

Secondly - this is probably not necessary - but a lot of objections and a lot of argument about the form of the question is not going to materially help us efficiently use the limited amount of time that we have, and I think I can sort out pretty well what's a good question and what's not a good question, and probably the best thing to do is to let it roll so we don't have to have colloquy from counsel about the form of the questions.

So let us continue.

MR. KEYTE: Understood, Your Honor.

THE COURT: Mr. Gorsuch, I have my supply of Hall's cough drops left over from last week.

MR. GORSUCH: I may have to indulge you on that, Your Honor. I'm in a bad way today.

THE COURT: Let us know. I would offer the same to UST.

MR. GORSUCH: I may, with the Court's indulgence, take an occasional sip of water.

THE COURT: If you need them, let her know. She's a full-service court reporter, especially if you don't interrupt anybody.

MR. GORSUCH: Thank you.

BY MR. GORSUCH:

Q Let's just go quickly back to Exhibit Number 7, Mr. Freudenthal. Isn't it correct that Mr. Milano was sending this out to all the regional sales managers telling them he didn't want to receive any more monthly reports using terms such as, we have eliminated competitive brands?

A Yes.

Q And isn't it correct, Mr. Freudenthal, that Conwood - that UST sales representatives keep track of how many Conwood facings they eliminate?

A No.

Q You say that despite Mr. Milano's statement that future monthly reports shouldn't use terms such as, quote:

"Our chain manager has Conwood facings reduced by X number"?

A Well, he's referring to using terms; and the way that I understand the question is that not a practice and it's - in my opinion, it's not a practice that they report that.

Q I'm not asking what practice is. I'm asking what you know that they do.

And doesn't it suggest, Mr. Freudenthal,

don't you know that they do keep track of how many facings they've reduced because Mr. Milano's talking about it?

A No, I'm not aware that they do.

Q Then again you just served as a sales representative for a year-and-a-half back in '86 and '87, isn't that right?

A Yes. I have 11 years of practical experience in every position in the field sales group.

Q That's very good, Mr. Freudenthal; but again, if you'd answer my questions, this would move along a little more quickly.

A Certainly.

Q And I asked you earlier whether you - whether you sent out a memo to sales representatives in anticipation of today's hearing asking what documents they keep in their files. You didn't do that, did you?

A I can't.

Q You can't send out a memo?

A You did not say that. You said if I sent an e-mail.

Q No sir, no sir. My question was - and I'm sorry to interrupt.

A Your question before we broke was e-mail.

Q Okay. My question now to you, sir, is did you send out a memo to the sales reps asking them what documents they maintained.

A No.

Q Okay. Did you call the sales reps to ask what documents they maintained?

A No.

Q Okay. Did you check their files to see what documents they maintained and to verify that all of them are reflected in the district offices?

A Not all.

Q Did you check more than one?

A I have over the course of the last year-and-a-half.

Q Okay. I'm asking you, in preparation for today's testimony, did you check more than one sales rep's files?

A No.

Q Okay. And in the month, over the month since the Court ordered discovery in this matter in December, has anyone at UST sent out a memo to sales reps asking what they keep in their files?

A That I don't know.

Q Okay. Do you know if anyone at UST has made any phone calls to sales reps asking what they keep in their files in the month?

A That I don't know.

Q Okay. Do you know in the month that's passed whether - that anyone else has checked sales reps' files to see what they maintain . . .

A

Q . . . and whether they're reflected at district managers?

A Yes.

Q Okay. Who did that?

A Ninety-five division managers, 16 department managers, and 5 regional vice presidents. That's their - that's their job description responsibilities, and they do it on a daily basis.

Q Do you have any documents or testimony from them here today to tell us that all the documents that their sales reps maintain are reflected in the district offices?

A I don't have a document other than referring to any of the policies and procedures.

Q Okay. You have policies. I'm asking whether, in fact, someone checked and found that all the documents are, in fact, maintained in the district offices. Did someone do that?

A If they were performing their job, they would.

Q Do you have any testimony or documents from them here today?

A I don't.

Q Okay. And do you know if Mr. Milano did any checking of sales representatives' files to see what they keep?

A That I wouldn't know.

Q You didn't talk with them about that in preparation for today, did you?

A No.

Q Okay. And you've had a chance to look at Mr. Paulk's affidavit, isn't that correct?

A Yes, I've looked at it.

Q I believe that's already marked as Freudenthal Exhibit . . .

A Five.

Q . . . 5.

With the Court's indulgence, I'm going to take a sip of water.

THE COURT: Sure.

BY MR. GORSUCH:

Q I refer you to Paragraph 4 of that declaration - and I'll just read it very quickly.

> "Based on my experience as a UST representative, it is my belief that some of these documents do not leave the possession of UST sales representatives. Such documents include unethical activity reports, personal notes on retail activity [activities], and records of payments to retailers (including jackets and

free merchandise)."

Do you have any personal knowledge to dispute that Mr. Paulk, in fact, maintained such records that didn't go to division offices?

A Yes.

Q You know for a fact that Mr. Paulk sent all of his documents to divisional offices?

A Well, I would know for a fact that Number 4, it says:

"Based on my experience as a UST [Tobacco] representative . . .,"

and he lists some documents; and it says:

" . . . records of payments to retailers (including jackets and free merchandise).

Mr. Paulk was employed from 1981 to 1985, and that particular program didn't begin until the latter part of 1980.

Q Okay.

A So I . . .

Q 1980?

A Until the latter part of the '80s.

Q Okay. So you're saying Mr. Paulk's a liar?

A I don't know if he's a liar or not.

Q Well, that's my - that leads me to the question, do you know for a fact that he didn't retain any documents

that didn't get sent to division offices? Do you know?

A I don't know Mr. Paulk's behavior.

Q In fact, you have no idea what records he maintained that didn't go to division offices, do you?

A From Mr. Paulk? No, other than what was required of him.

Q Okay. And again just to clarify, you don't know what documents sales representatives kept above and beyond what they were required to keep, isn't that true?

A Only U.S. Tobacco documents that they're required to send up, which would include all their materials.

Q And isn't it true that sales representatives are trained to keep files?

A The files that I've kind of outlined in the prior testimony, yes.

Q So, for instance, you even - you talked about in Freudenthal Exhibit 2 an excerpt from the Sales Operation Manual suggesting ten different file headings that sales representatives are supposed to maintain, isn't that correct?

A Well, they're not supposed to. They're suggested topic headings.

Q Okay. Suggested topic headings of files that they're supposed to maintain, isn't that correct?

A They are the headings for all the materials. This -

basically these ten headings would be named for and capture every reporting form or administrative form or piece of paper that they are responsible for, and those are suggested topics, how to head those files to kind of organize some of their systems.

Q Okay. Mr. Freudenthal, real simple question: They are suggested by the company to maintain documents, isn't that correct?

A Those are suggested headings. They're required to submit all their documents.

Q I'm not asking what they're required to submit, sir. I'm asking what they're required to keep.

They are required to keep documents, isn't that correct?

A Yes.

Q Okay. And these are the suggested headings on the files that they're supposed to keep, isn't that correct?

A Correct.

Q Okay. And are you - you're familiar with Mr. Jeffery's affidavit, are you not, which was previously marked as Exhibit 6?

A I've looked at it.

Q Okay. And when he says that - in 5, Paragraph 5:

"At present, UST sales representatives have a custom built filing cabinet in

their company vans for the purpose of maintaining documents for the territory they serve,"

you don't dispute that, do you?

A No. It's the car file that I described earlier.

Q Okay. Isn't is true that sales representatives visit approximately 50 stores per week?

A Approximately.

Q Okay. And there are approximately 500 stores in the territory?

A No.

Q Okay. How many stores are there?

A Approximately 3-- to 350.

Q Three to 350. UST doesn't have a policy against sales reps keeping personal notes to keep all of these hundreds of stores straight, does it?

A No, it doesn't. But we provide the filing systems and all the materials that they're required to do.

Q But as a matter of common sense, if the sales representative wants to have some personal notes to keep his 50 calls per week and his 350 stores in his territory straight in his own mind, there's no rule against that, is there?

A Why would I want to do that?

Q Sir, I'm not asking . . .

THE COURT: Answer - yeah. You're arguing with Mr. Gorsuch. Simply answer his question.

MR. FREUDENTHAL: He has everything that's needed and necessary to do the job for all the reporting. If he, in the rare instance, had a personal note somewhere that he had written down on a document, then he would have that information. But he would be capturing that information for some request.

THE COURT: Mr. Freudenthal, in fairness now to Mr. Gorsuch, the question, as the Magistrate Judge heard it, was would it be against UST policy or would it be improper for him to keep records; and if you could just give a simple answer to that question, we'll move along.

MR. FREUDENTHAL: No, it's not against the company policy.

BY MR. GORSUCH:

Q And, in fact, you've testified that the sales representatives are, quote, the eyes and the ears of the company, isn't that correct?

A Yes.

Q Isn't it true that sales representatives from time to time make presentations to retailers concerning facings, displays, point-of-sale material, and price?

A They make presentations on promotions and sales programs.

Q I'm going to hand you what we'll mark Freudenthal Exhibit Number 9.

(Freudenthal Exhibit Number 9 was so marked for identification.)

My questions will pertain only to the second page and specifically the language:

"Make all necessary presentations on product promotions; facings; merchandisers; displays; positioning; programs; P.O.S. materials; and retail pricing [(EDLP)]. Use company marketing plans and training programs to prepare presentations. Anticipate possible objections and be prepared in all aspects of your presentation."

Do you see that language, Mr. Freudenthal?

A Uh huh.

Q So sales representatives are responsible for making presentations to retailers, isn't that correct?

A They make presentations to retailers.

Q And these presentations affect - face - the number of facings that - different than manufacturers are entitled to in a rack, isn't that correct?

A It may or may not. That would depend on the circumstances.

Q Okay. But that is one of the things the did presentations on, isn't that correct?

A On merchandising, yes.

Q Okay. And they give presentations on point-of-sale advertising materials, isn't that correct?

A Yes.

Q Okay. And then . . .

THE COURT: Let me ask a question, Mr. Freudenthal. This is just deep background to me and no mystery to it.

The word, facing, comes up a lot. I've read it in the papers. Give me a one- or two-sentence description of facing.

MR. FREUDENTHAL: Sure. That would be - there would be a label that would identify a specific product, an SKU; and that would be a facing. So if you had ten products and they were identified as ten different products, then you would have ten facings. It's actually the face of whatever product it is that's out . . .

THE COURT: Thank you, sir.

BY MR. GORSUCH:

Q And, in fact, some of these presentations on facings involve how many facings should be allotted to UST products, how many should be allotted to rivals' products, isn't that correct?

A Most presentations are developed for merchandising for our products, how many products should that retailer manage on a profitability basis for that particular retail account; and that would be - that would be his whole category. That would be U.S. Tobacco products and all the competing brands on the market.

Q Okay. So the answer to the question, I believe, is yes?

A Would you repeat the question.

Q Okay. The question's very simple. Don't UST sales representatives give presentations on how many facings should be allotted to UST products and the competitors' products . . .

A We make recommendations, yes. That's what we do.

Q Okay. And isn't it true that sales representatives sometimes use materials that have come down from company marketing plans and training programs to prepare their own presentations, isn't that correct?

A They use all of the preapproved programs, yes, for their individual retailers.

Q Okay. And they sometimes create personal notes in anticipation of these presentations, don't they?

A They may have their notes for their presentation of what's going to be addressed for that particular account.

Q Okay. And there's nothing in any Sales Operation

Manual or elsewhere that requires those notes to be sent up, is there?

A Well, the presentations are always forwarded as complete documents back to any of the managers after a presentation so that everything that transpired within that presentation with the retailer and the division manager or a sales rep, it's all recorded as a formal presentation back to U.S. Tobacco.

Q Mr. Freudenthal, my question again is very simple.

A Uh huh.

Q There's no policy, is there, in the Sales Operation Manual or elsewhere requiring a sales representative to send up his personal notes that he created in anticipation of the presentation, is there?

A No. In those rare instances, I wouldn't see it.

Q Is it true that you were a department manager in Region 4 in 1997?

A Yes, part of 1997.

Q In January, 1997?

A Yes.

Q And didn't you report on January the 3rd, just three days into the year up to your regional manager that you had, quote:

> "Purged all the 1996 files and administrative paper work in the

department's offices"?

A I don't recall.

Q Well, see if we can refresh your recollection.

A Thank you.

MR. GORSUCH: Mark this Exhibit 10.

(Freudenthal's Exhibit Number 10 was so marked for identification.)

BY MR. GORSUCH:

Q I'll refer you to Paragraph 3.

A Uh huh, that's correct.

Q So three days into 1997, and you were able to report that you had purged all department office files, isn't that correct, for 1996?

A Correct. We take them out of the filing system in the storage room in the office, and we put them into file boxes, and we put them in the back storage room.

Q All right.

A Purge all the current files.

Q Aren't, in fact, documents destroyed?

A No.

Q You're saying you never destroyed any documents?

A No sir.

Q Okay. What's your document retention policy?

A As I understand it, it would be three-to-five years, maintain any of the working expense reports, any of the

activities, any pertinent information that would be used in the future.

Q Okay. Isn't it true that there's nothing in the Sales Operating Manual that instructs sales representatives to purge their files on a periodic basis?

A That I don't know off the top of my head.

Q You're unaware of any rule telling sales representatives when to purge their files, aren't you?

A I'm not aware of anything to purge their files.

Q Are you aware that back in August we subpoenaed to receive documents and UST was made aware of this from a former sales representative, Sarah Weatherly at UST?

A No, I'm not.

Q Are you aware that she, in fact, maintained documents as far back as 1989?

A No, I'm not.

Q Are you aware of the fact that those documents cannot be found anywhere in UST's production at a department level or the regional level or otherwise?

A No. I find that surprising.

THE COURT: I'm sorry. You find it?

MR. FREUDENTHAL: Surprising.

BY MR. GORSUCH:

Q Well, if, in fact, you only maintain documents for three-to-five years in your present position but there are

sales representatives who don't have any instructions about how long to maintain documents, isn't it quite possible that they maintain documents for longer than you do?

A But those would be all the documents that we maintain because they're required to send everything to us.

Q Right. But if you destroyed them in three-to-five years . . .

THE COURT: Mr. Gorsuch, don't point at the witness.

MR. GORSUCH: I'm sorry. I apologize.

THE COURT: All right.

MR. GORSUCH: No pointing fingers.

BY MR. GORSUCH:

Q If you destroy those - the documents that you created in three-to-five years, they could be in sales representatives' files for longer than that, couldn't they?

A Well, I didn't necessarily say they were destroyed. I said they were kept. That's what I answered, and they could be kept. They could be transferred up through the chain of command to the regional office.

MR. GORSUCH: May I approach the witness, Your Honor?

I don't think it's necessary to mark this exhibit. I'll just ask you where I can find, sir, whether these documents from UST . . .

MR. KEYTE: Your Honor, could I have a sidebar for a second.

MR. REED: Out of the hearing of the witness.

MR. KEYTE: I could raise the issue . . .

THE COURT: Well, let's let the Magistrate Judge raise an issue.

We're not going to take the time to have the witness go through a series of documents unless you can tell the Magistrate Judge that that's something that you know Mr. Freudenthal's personally familiar with. I don't think we have the time for him to review a stack of paper that's four or five inches thick. I don't know if that goes with the concern expressed.

MR. KEYTE: Your Honor, our concern is that we're in the process, as everybody in this courtroom knows, maybe with the exception of Mr. Freudenthal, of producing up to a hundred boxes from the department and division levels. This entire line of questioning, frankly, I think is premature and unfair.

THE COURT: Well . . .

MR. KEYTE: He's asking him if, based on documents he hasn't seen yet because he hasn't got - we've sent him twenty boxes today, we're in the process of producing the documents he's crossing him about.

THE COURT: Where are we going with this, Mr.

Gorsuch?

MR. GORSUCH: I'm almost finished.

THE COURT: Okay.

MR. GORSUCH: If we could just let me finish.

THE COURT: Why don't you rephrase your question.

MR. GORSUCH: I'll be happy to do that.

THE COURT: I lost track of what it was, but I'm disinclined to require the witness to look at anything that is that thick.

MR. GORSUCH: That's fine, Your Honor.

BY MR. GORSUCH:

Q Is there - let me just ask you a couple more questions, Mr. Freudenthal.

On par forms, one of the copies is to be maintained for your records, isn't that correct?

A Correct.

Q Okay. Specifically says it on the sheet, copy for your records, isn't that right?

A Uh huh.

Q Okay. And are you aware of what Fastech's document-retention policy is with regard to these par forms?

A No, I'm not.

Q Are you - do you know that they actually only keep them for about two years?

THE COURT: I think he just said he didn't know what that policy was.

BY MR. GORSUCH:

Q And again just to clarify, the sales representatives, there's no policy forbidding them from keeping documents much longer than that, is there?

A No. They're encouraged to maintain what's active at the time that they need.

MR. GORSUCH: Thank you very much.

THE COURT: Any redirect?

MR. KEYTE: Yeah, just a couple of questions, Your Honor.

THE COURT: Just so everybody knows where I'd like to go with this, assuming that your redirect is limited and that any recross is equally limited, when we get through with Mr. Freudenthal, if there are no other witnesses, I'd like to take a break and then come back and have counsel briefly argue the issue of whether a thorough and complete search should include the sales representative. I'll give you a chance to collect your thoughts and . . .

MR. GORSUCH: Just so Your Honor's aware . . .

THE COURT: With some luck, I may be able to give you a ruling.

Yes sir?

MR. GORSUCH: You asked if there are no more witnesses.

THE COURT: Yeah.

MR. GORSUCH: We do have witnesses available by telephone, Your Honor . . .

THE COURT: Okay.

MR. GORSUCH: . . . if you'd like. I don't believe it's necessary.

THE COURT: Let's just continue on.

REDIRECT EXAMINATION

BY MR. KEYTE:

Q Mr. Freudenthal, if you could look at the Milano affidavit, Paragraph 5, and let me read into the record the complete sentence.

> "To the extent that any Sales Representative keeps calendars or day books, and retains them, these are not likely to reflect competitively significant information, which, as described above, is forwarded to the Division Managers through other means."

Do you understand that paragraph when it referred to calendars or day books to reference personal calendars?

A If they had any calendars that they maintained, yeah, that would be something that they would have.

Q And do you agree with Mr. Milano that personal calendars are not as a practical matter likely to reflect competitive information?

A I agree. They're - that information would be documented on a par scanner and reported on a monthly status report.

Q In your experience, as a practical matter, do sales representatives know that competitive information is either supposed to be on the par scanner or in their weekly or monthly report?

A We give them a place to put it; and any information that we need, it's captured on the par scanner. If there's any questions for monthly reports, then they would answer those questions and send it to their division department members.

Q Mr. Gorsuch also asked you about the fact that sales reps keep copies of documents, and I think he suggested that they may not be kept as long at the division or department level. In your experience, as a practical matter, how long do sales reps keep documents?

A Well, this is - the first scanner is the documents that they use most frequently, and they use that with every call. They would retain the copy of this scanner until

they received their new call books and - at which time the information is already updated.

And if there was a mistake in the reporting system, which is highly unlikely, then they could look at the par scanner to make sure all their information is accurate and at which time they would discard their copy because as I was asked how many calls did they make if they're covering 3-- to 350 calls a cycle, that could be five-to-six weeks, they're going to have a lot of paper; and it's all going to be contained here.

So they're already getting recaps of the information, and they get rid of the scanners.

Q Let me ask you about personal notes with respect to presentations.

Again as a practical matter, would any such notes be kept by sales reps, in your experience?

A My experience is no. Their - we solicit input from the sales reps for their accounts; and the business that we're going to present to a retailer, we contain that in the presentation. Anything that is written down after a presentation with a retailer would have been written down on the presentation that they have in some form or fashion, assimilated into that report; and that's what the chain account managers or key account managers keep.

Q And finally, with respect to keeping copies of

documents, as a practical matter, what is your experience with sales reps - and I'll use this word - purging documents versus the different levels up the chain at UST keeping documents? As a practical matter, who keeps them longer?

A They're not required to keep all this information. They're required to report the information. So they report the information, and then it's compiled up the chain through division and department and regional vice presidents, the information. So they only retain it for the period of time that they're actively doing it, and then they discard it.

MR. KEYTE: No more questions.

THE COURT: Any recross?

MR. GORSUCH: Nothing, Your Honor.

THE COURT: Okay. Mr. Freudenthal, thank you. You may step down.

You ever been a witness before?

MR. FREUDENTHAL: No.

THE COURT: You don't have to tell me.

Why don't you take that file back.

I'm disinclined to hear any witnesses by telephone unless there - somebody can tell me really urgent reasons to do so.

What I'd like to ask you to do, unless

someone has a contrary thought, is to take - you know, it's now 20 to 12 - take ten minutes and organize your thoughts as to your observations that you want to make in pulling all this argument together, and it doesn't have to be simply what Mr. Freudenthal said, but what you think are the salient points in deciding this discovery-related issue.

And then I'll hear - I'll hear from Mr. Gorsuch first since it's his motion to compel, in effect. Then I'll hear from UST; and if I'm able, I will give you a ruling from the bench. I will try to do that, but I'm not promising.

MR. KEYTE: Thank you, Your Honor.

THE COURT: Take ten minutes.

AFTER RECESS

THE COURT: Let's ask each side to sum up its arguments with respect to what I will call the sales-representative issue. If you could take no more - you know, five minutes probably would be adequate. Don't go more than ten.

The reason I say that is that I need to be off the bench by 12:30 or 12:25, which gives us about a half an hour; and I'd like to have a chance to think about your arguments and, if I'm able, give you a ruling from the bench.

So Mr. Gorsuch.

MR. GORSUCH: Thank you, Your Honor.

Would you like to hear from me here or from the podium?

THE COURT: I'd like to hear from you wherever it is you are not going to collapse from the flu.

MR. GORSUCH: Thank you.

Back in December, December the 18th, the Court recognized the importance of grass-roots documents in this case; and, in fact, if you look at the complaint, the allegations in our complaint all deal with the conduct by UST sales representatives in the field.

Under Rule 26, we're entitled to all documents that are likely to be discovered admissible evidence. I think there are only two plausible arguments for not producing sales arguments - sales reps' documents, and we've only heard two.

One is that they don't retain any original documents, and two is that it's overly burdensome to produce those original documents. I'd like to address each of those in turn.

The primary argument as near as I can tell from the defendants is the first one, that there just aren't any original documents at the sales rep level. Look at the Milano affidavit itself. He nowhere says there are

no original documents at the sales rep level. In fact, he admits there are at least two categories of documents, calendars and call books, that are maintained at the sales rep level and may be kept by sales reps that don't get to the district office.

Defendants have had a month to look into this issue. That's more than adequate time. We can see from this Document Number 7, and Mr. Milano didn't cut the mustard, and this is the same fellow who, in fact, not only admits that there are some documents but specifically sent out an e-mail to the field telling them that he didn't want to hear any more - get any more documents saying that we've eliminated Conwood facings. That's pretty strong evidence there's stuff down there at the sales rep level that's not percolating up.

Mr. Freudenthal here today doesn't and can't and hasn't testified that as a matter of personal knowledge there are no documents at the sales rep level. He was a sales rep for a year-and-a-half over 12 years ago. In the last month, neither he nor anyone else at UST has done any checking with the sales representatives personally to gain personal knowledge as to what they maintained with the exception of looking at one sales representative's van.

He admits - Mr. Freudenthal admits that he doesn't know what documents sales representatives keep

above and beyond what they're minimally required to keep by UST policy. He admitted that repeatedly in cross-examination, Your Honor; and he admitted that Milano's right, they may maintain calendars and day books.

And Your Honor, when you're visiting 50 stores a day and 300 to 350 in your territory, it's a matter of common sense you're going to maintain some personal notes on those sales calls and your interactions that aren't reflected in corporate documents. That's something Terry Williams says has been in this industry for twenty years and says in his affidavit. That's not disputed. That's not disputed that they maintain those notes. There's no policy against it.

And Your Honor, we all maintain documents above and beyond what we're minimally required to keep. I can't think of anyone who doesn't do that. And all Mr. Freudenthal can tell you about it is the documents that they're minimally required to keep go up. That's all he can tell you.

He also admits that presentations affecting our distribution, which are at the heart of the case, presentations on agreements that lock up the racks and the facings and allocate space that UST had spaced to Conwood, and at the heart of the case, Paragraph 28 of the complaint, he admits that there are sometimes, it's

possible that sales reps keep personal notes on these things, customize and tailor the UST presentation materials. He admitted that these personal notes may not go up.

Mr. Freudenthal also admitted that documents which - even the documents which do come from the regions are retained for three-to-five years at the regional level. And yet he also admitted that there's no document-retention policy or instruction policy for sales representative documents.

And I will represent to you, Your Honor, back in August, just to give you one example, we subpoenaed one former UST sales representative, Sarah Weatherly. UST knows about this; they've known about it since August. She kept documents back to 1989. What is that, ten years ago. These documents, a lot of them are from regional headquarters, Your Honor.

We haven't found them in the regional headquarter production. Mr. Keyte knows that he has made production at the regional headquarters offices. He's correct, the departmental and division manager offices are still being searched. But there are documents in here that should have been found in the regional offices, Your Honor, but were not. They came from the regional offices but were not. And the answer, found out today, is because they're

only kept at the regional office for three-to-five years and sales reps may keep them longer.

So even for those documents - and Your Honor, those include these critical par forms, which you've heard a lot about. These record how many - I mean this is critical stuff. It records how many facings each side has in each store across the country, price and all that.

And you heard from Mr. Freudenthal about this comment form at the bottom, which is the basis of all their reports. All subsequent reports - and we discussed at length how critically important these are. Well, they're only maintained at the regional offices for three-to-five years.

We know from Fastech that it doesn't even get the comment form; and if you'll look at it, you'll see that what goes to the comment form goes to the direct supervisor and the other is retained for your records. So it's only going to be in two places. One is the supervisor who keeps it for three-to-five years, and the other is the sales rep, who we have proof, Your Honor, keep documents longer in some cases. And there's no policy forbidding them from doing so.

So the most critical comment forms that Mr. Freudenthal testified at length about are likely to be found in the sales representative files and only in the

sales representative files.

Your Honor, I respectfully suggest that under Rule 26, it's pro disclosure. The presumption is in favor of disclosure, and UST has not met any kind of burden in showing you there are no original documents at the sales rep level.

Let me just address very quickly a few more points before I get to the burden issue. I don't think we had to do anything, but we have done something affirmatively. We've presented an uncontroverted affidavit from Mr. Paulk saying that he did, as a practical matter, retain documents on his retail activities that did ont go to the district level office; and he's sitting by his phone here this morning in California. We didn't call him in from California, but he's supposed to sit by the phone until 1:00.

THE COURT: His subpoena is pretty old.

MR. GORSUCH: Your Honor, with respect, two things on that. Mr. Freudenthal's is just as old, number one. So if you're going to discredit somebody, you've got to discredit the other on that basis. They're even; it's a wash.

And number two, Mr. Freudenthal says things haven't changed since 1986. That's throughout his testimony on direct, Your Honor.

So Mr. Paulk could testify - and he's prepared by phone to tell you one of the things he did - and I'll just make this proffer - is frequently . . .

THE COURT: I really don't want to hear any proffer about . . .

MR. GORSUCH: That's fine, Your Honor.

THE COURT: I really want to keep it to argument because then they may feel that they need to put Mr. Freudenthal on, and then the door is open again.

MR. GORSUCH: That's fine, Your Honor. I take you on that. I just want you to know he's prepared to elucidate on his affidavit and explain to you . . .

THE COURT: Talk to me about burden.

MR. GORSUCH: Okay.

THE COURT: And I'm not trying to cut you short, but I am trying to manage our time. We've plowed a fair amount of ground pretty repetitively, so talk to me about burden. Then I want to hear from Mr. Keyte.

MR. GORSUCH: Okay. Your Honor, on burden I want to say a few things. First, there is no burden here because we're willing to do it for them; and we've been saying we've been willing to do it for them for months; and we'll get it done in three weeks, Your Honor. So there can't be any burden when they don't have to do it - when they don't have to lift a finger.

Second, burden is an argument that is equitable in nature. You have to look at what's on the other side of the balance. In this case, we have alleged the complaint is specifically alleged about the activities of these individuals in the marketplace. It would be extraordinary for you not to permit discovery of the documents of the alleged bad actors. These are the people who carry out the bad acts.

Now I cannot think of any case in which the Court has not permitted discovery or any authority for the proposition that the people who are alleged to have done the wrong are immune from discovery.

Your Honor, this is a $400,000,000 lawsuit before trebling. It contains serious allegations of misconduct. So when you - when you talk about burden and you're going to talk about fairness, on one side, you have to go look at 400 people's files. On the other hand, this is the most direct evidence available on what these people have done. They are the alleged wrongdoers. It is a $400,000,000 case alleging wrongdoing for over the last twenty years across the country.

And finally, Your Honor, the third point on burden is that the burden really is on us at this point. We've been seeking these documents since forever, as you're aware; and UST could have - could have made this production

a lot easier. They could have done it over the course of time. They could have done it in conjunction with sales meetings which they hold from time to time, regional sales meetings, national sales meetings. That's what we did, Your Honor. They've known about this lawsuit. They've known that we've wanted these documents for months - for a year almost.

So if they're going to tell you it's going to be so burdensome for us to have to do it in the next three weeks, well, you know, it might. But the fact of the matter is, they caused this train wreck and they have to live with that; and we're the ones who are really going to wind up suffering from the train wreck, Your Honor, because there's an April 1 deadline for the close of depositions, and we are bound and determined to do everything we can to keep to keep this case on schedule.

But they have yet to even produce their division and department managers' files, which you ordered over a month ago. We're going to be behind the eight ball when we get - if and when we ever finally get these sales rep files, process them, and get them produced. So . . .

THE COURT: I don't have as many stripes as Chief Justice Rehnquist does, but I think I'm going to have to . . .

MR. GORSUCH: Okay. Those are my burden

arguments, Your Honor.

THE COURT: Okay.

MR. GORSUCH: Last point?

THE COURT: Right.

MR. GORSUCH: Last point.

THE COURT: Okay.

MR. GORSUCH: Fastech's independent findings. They've made independent findings, Your Honor, that there are original documents that are not centrally maintained. You asked the other day, well, aren't they just the vendor seeking to sell something? You're right, they are; and, in fact, they're trying to sell an automation program to get the sales reps laptops so that this problem may continue. UST bought it. They're now distributing laptops to their sales force. So they've endorsed those findings, Your Honor. I suggest you don't have to make any independent findings yourself.

So I'm finished.

THE COURT: All right, Mr. Keyte.

MR. KEYTE: And I think I'm going to be briefer than five minutes.

THE COURT: That's fine. Brevity is always appreciated.

MR. KEYTE: First, with respect to Fastech, that, of course, wasn't even risked to be part of the

cross-examination. So I don't think we need to put any weight on that.

Ultimately Rule 26, as the Court has observed I believe in the past, is a practical test that balances the likelihood of plaintiff obtaining additional probative documents versus the burden of having to try and find them and process them.

What has the plaintiff shown here? Ultimately plaintiffs' showing is really just conjecture that there may be handwritten notes on calendars. There may be notes with respect to presentations that may have been kept even though there are policies and procedures firmly in place and enforced to make sure that competitive information goes up the chain from the sales rep to the division and on forward. Those are the par scanner sheets with the Comment section and the monthly report.

I agree that Mr. Paulk's affidavit - and he is not here for us to cross live with documents - I think cannot be relied on. It is not a wash with Mr. Freudenthal, we submit, who has been at every stage of the sales rep organization up through 1997, 11 years, who is out in the field looking at what sales rep documents have. He testified that division and department managers' job is to make sure they bring up into the chain the competitively relevant information.

It is a scavenger hunt to see - to try to find out whether a particular sales rep in their personal calendar may have scheduled something and made a comment. They - the practical experiences, they don't put competitive information there because they have to do it somewhere else anyway, and there's nothing really to rebut that that they've shown.

What have we shown? One, that we are not like Conwood. We don't - the structure is not the same. The reporting requirements are not the same. The documents are not the same. How they track competitive activity is not the same, and clearly where the documents have to go from the sales rep up the chain is not the same.

If you compare what is being produced - has been produced and is being produced at the division and department level with respect to par scanner sheets, weekly and monthly reports with the prospect of the potential that there might be a written note here and there, it is clear that with respect to the merits issues and relevant documents, they will have the probative information they need to pursue their case.

The direct evidence that Mr. Gorsuch refers to is not going to be the personal note in the calendar. It's going to be the information in the par scanner sheets and the reports going up, and that's been our position

throughout, and I think that is really uncontroverted here today at the hearing.

Even with respect to Sarah Weatherly, it is - we have - there is yet to be a production at the division and department level. It's under way, and it's premature to make those kind of arguments, and it also - I guess the suggestion is that we have to go look for the occasional pack-rat who may keep something and may keep something longer than the division or department even though, as a matter of practical experience, these guys and women are very busy. They don't like to keep documents. It's hard enough to get them to fill the reports out that they have to, and those are where the probative information is going to be found.

So with respect to the merits before we even get to the burden, I don't think there's been a showing that these documents are likely to be - add probative information - information, in this case, beyond what has been produced and what is being produced.

With respect to the burden, there are 448 reps. They do work out of vans. They already have the burden of putting the relevant documents on a weekly and monthly basis up the division to the departments and to the regions. There is, by the way, no e-mail to direct them what to do.

It would be extremely disruptive and burdensome to have these 448 reps have to search their documents, produce their documents on the prospect that there might be a handwritten note that is - that reflects competitive information rather than personal information and that is not on a par scanner or in a monthly report. It's conjecture, and it's really not credible.

So, Your Honor, I think when you balance that burden versus the prospect of obtaining additional probative information, I think the balance is zero or near zero with respect to the prospect of additional probative information and quite high with respect to the burden in this case. And for those reasons, we would request that the order be denied.

THE COURT: All right. Here's what I'm going to do. You all just sit tight for a couple of minutes. I've been banging away on my laptop, and I want to pull my notes together, and I'm going to give you a ruling rather than making you leave and come back. If you'll just sit still, I'll give it to you in a minute.

AFTER RECESS

THE COURT: I'm going to grant the motion to compel to the following extent: I'm going to order that UST conduct a search of the records of its sales representatives and produce the following categories of

documents:

Number one, any notes or personally maintained documents, such as planners, notes, journals, written summary of activities that relate to the specific anti-competitive activities that are alleged in Paragraphs 22 through 31 of the complaint. The complaint sets out what those are.

One of the concerns that the Magistrate Judge has about the discovery - and this is not a criticism but just an observation - some of the requests by Conwood are quite broad. I think it is fair to inquire if there are individual records of the sales representatives that go to the specific anti-competitive allegations that are alleged to have occurred and that may, if true, involve field activity, those are set out in the complaint.

Secondly, I will order the production of any regularly maintained competitive records that, whether they go up the chain of command or not, from 1995 back. I listened to Mr. Freudenthal, and he said that the corporate retention policy was three-to-five years.

Taking the most aggressive version of that and assuming that everything that has been regularly sent up the chain in the last three years from the divisional or the regional offices, it's fair to look in the records of the sales representatives from 1995 back. So I will order

that.

I want to give you some of the reasons for this, and I will do something in writing; but because we have wanted to get these rulings out quickly, I want to give it to you.

First, I think that UST has difficulty, I think, of proving a negative. Mr. Freudenthal got up and testified to what the regular course of business is, and the Magistrate Judge doesn't have any reason to doubt the accuracy of the regular course of business.

However, what may happen and what may be the regular chain of command does not disprove the possibility of - which is a real one - that individuals keep other records. And ordinarily in corporate litigation, it's altogether fair to look not just in the ultimate corporate repository but in other places where records may be kept. And certainly day planners, notes, journals, things like that that may reflect activities that the plaintiff alleges to be anti-competitive may well be retained or created; and I think it is fair to look, especially given the fact that this is an anti-trust case of no small scope.

I listened very carefully to Mr. Freudenthal's testimony. He talked about what the policy is of sending things up the chain of command, and I'm sure that that's an accurate summary of how UST wants the

documents to flow so that its management can understand things. But it doesn't disprove the distinct possibility that sales representatives may have relevant information.

When all is said and done, a lot of this has to do with Rule 26, and Rule 26 does say that the information sought need not be admissible at trial if it may lead to discovery of admissible evidence. There's a distinct possibility that reviewing these materials may lead to discovery of witnesses who the plaintiff wishes to depose. What they may say, how credible they are, whether the information helps one side more than the other, the Magistrate Judge knows not at all. But I think, without looking at that material, it's not possible to tell.

As to the burden, the Magistrate Judge would make the following observations:

I hear the argument that there are 448 people. I tried to address that by giving some scope in the course of this order to what needs to be reviewed. I don't think that there is a compelling argument that the burden here of going to these people to look for their individual records is of a scope that it would - that it would negate the ability to discover this kind of material.

I have no opinion - no insight at all as to the merits of this litigation. I don't know if the plaintiff is altogether wrong, a little bit right, or right

big time or somewhere in between.

If the plaintiffs' allegations are true, as to which the Magistrate Judge has no opinion at all, then the people in the field who engage in the activities which the plaintiff believes are wrongful would indeed be knowledgeable witnesses and may well have records; and I think that on the basis of the record that is in front of this Court, I am not able to say under Rule 26 that UST should not be required to look for those documents.

So that's the Court's ruling. I will try to do something in writing; but because we have a reporter here today and I know this is an important issue, I'm going to rule based on that; and I do now need to excuse myself.

I know that there are other issues that are out there. What I'm going to ask counsel to do is to go back to the - what I would call the joint-agenda approach. It worked the last time. I'll ask Mr. Keyte and Mr. Gorsuch or whatever pairing seems to work to make up a joint list and - what's today, Monday - say by Thursday submit that to the Magistrate Judge as to what issues remain unresolved.

I know that I took under submission an issue that related to discovery, I think, of some research and development costs because I told you that I thought I needed to look at case law. I feel relatively confident

that, given the number of papers that are here on the bench, that there are other things that need to be addressed. But what I'd like to do is to get the joint agenda from you all, look at that, and then figure out what we do next.

So that will be the ruling. I do think that this has been useful, to get Mr. Freudenthal. Good to meet you, Ms. Weiss. And when I get that joint agenda, I will have a telephone-status call as to where we go from here with counsel, which probably won't be till next week because I'm starting a five-day jury trial tomorrow.

So thank you all very much.

MR. GORSUCH: Thank you, Your Honor.

MR. KEYTE: Thank you, Your Honor.

AT THIS POINT, THE PROCEEDINGS WERE ADJOURNED.

* * * * * * * *

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dana Lynn Mann
COURT REPORTER

1/26/99
DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P. Plaintiffs	)	
vs	)	Miscellaneous No. 99-33
US TOBACCO COMPANY, et al Defendants	)	

ORDER OF COURT

AND NOW, this 12 day of February, 1999, Management Science Associates, Inc. having filed a Motion To Quash or Modify A Subpoena (document no. 1),

IT IS HEREBY ORDERED that plaintiff's counsel file a response to the above-entitled motion on or before February 12, 1999.

If the response is not timely filed, the motion may, at the discretion of the Court, be granted for lack of opposition thereto.

Donald J. Lee
United States District Judge

cc: Counsel of Record.

Jessica

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Western District of Kentucky
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Louisville, KY 40202-2249
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Jeffrey A. Apperson
Clerk of Court

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Chief Deputy Clerk

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL.	**PLAINTIFFS**
v.	**NO. 5:98CV-108-R**
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.	**DEFENDANT**

ORDER

This matter came before the Magistrate Judge on February 1, 1999 for a teleconference to discuss discovery disputes contained in the parties' January 21, 1999 joint agenda.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, Ben Powell, and Dick Roberts, counsel.

FOR THE DEFENDANT: James Keyte, John Reed, Chris Athanasia, and Neal Stall, counsel.

The following orders were orally announced at the teleconference.

IT IS HEREBY ORDERED that:

1) Each party shall prepare an "A" list of five to fifteen fact witnesses that it intends to depose as well as a "B" list of additional witnesses. These lists shall be disclosed to the other side and to the court by letter no later than February 6, 1999. The parties shall meet and confer, no later than Friday, February 6, 1999, regarding proposed amendments to the scheduling order. A teleconference is scheduled for **3:00 p.m., February 8, 1999** to discuss the witness lists and any proposed schedule modifications. The court will initiate the teleconference.

2) A teleconference is scheduled for **3:00 p.m., Tuesday, February 2, 1999** to continue discussing the issues contained in the parties January 21, 1999 joint agenda. The court will

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initiate the teleconference.

Date: 2/1/99

JD Moyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies via facsimile to:
Counsel of Record

ENTERED
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JEFFREY A. APPERSON, CLERK
BY
DEPUTY CLERK

16diii001430

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. **PLAINTIFFS**

vs. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC. **DEFENDANTS**

ORDER

At the most recent teleconference, the Court set a further telephonic status conference for Monday, February 8, at 3:00 p.m., to discuss broader scheduling issues. The Court, on its own motion, hereby **REMANDS** that conference from the docket, and reschedules it for **3:00 p.m. on Wednesday, February 10, Gene Snyder U.S. Courthouse, 601 West Broadway, Louisville, Kentucky**. Senior trial counsel, whom the Magistrate Judge understands to be Mr. Hansen for the plaintiffs and Mr. Stoll for the defendants, are directed to attend. In addition, the Court invites but does not require the attendance of corporate legal department representatives. The purpose of the conference is to hold a working session to plan the nature, scope, and schedule of further discovery in this case, and to put this case on track for the prompt and timely conclusion of discovery and resolution of all outstanding disputes.

The Court recognizes that this is comparatively short notice for a conference in Louisville with senior trial counsel and possibly corporate representatives. If the February 10th

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date is unacceptable, the Court's chamber staff can work to reschedule this date, although the Magistrate Judge urges the parties to make every effort to make this conference date achievable.

Date: February 5, 1999

James D. Moyer

JAMES D. MOYER
UNITED STATES DISTRICT COURT

Copies to:
Counsel of Record (via facsimile)

ENTERED
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. **PLAINTIFFS**

vs. **NO. 5:98CV-108(R)**

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST, INC. **DEFENDANTS**

MEMORANDUM OPINION AND ORDER

This antitrust case has generated an extraordinary number of discovery disputes, both in terms of numbers of issues, and amount of lawyer and judicial time involved. The matter was referred by the district judge to the magistrate judge in November of 1998. The magistrate judge, since December of 1998, has held numerous hearings in Louisville, with and without witnesses, and multiple teleconferences with counsel as well. The hearings have resulted in the resolution of some discovery issues, but there remains a broad range of discovery disputes pending. Moreover, given the rate at which additional objections continue to accumulate,[1] the court is left with the firm conviction that there is

[1]See, e.g., plaintiffs' 18 page, single-spaced letter of this date, transmitted by facsimile.

no reason to expect there will be, under the current approach to discovery, any forseeable end to the disputes.

In order to address the discovery situation, and to bring a conclusion to the disagreements by which this case has been marked, some general observations are needed before particular disputes are resolved.

Chronology of Discovery Disputes. Conwood began the case by serving interrogatories and document production requests with the complaint on April 22, 1998, in spite of the prohibition of Rule 26 against the commencement of discovery before the 26(f) scheduling meeting. Conwood then followed up by a motion [DN 2] seeking relief from the bar of Rule 26(d), a motion which was not granted. Instead, as is standard practice in the Western District, the court held a scheduling conference on July 7, 1998 and entered a scheduling order on July 9. [DN 19] Clearly, at this point, discovery had commenced; although the district court never ruled on the motion for relief from the 26(d) bar on immediate discovery, it was rendered moot by the scheduling order, which required, for example, that document discovery be completed by December 4, 1998, less than five months after the scheduling conference..

The court's scheduling order required the making of initial disclosures by July 21. This, of course, was already three months after the filing of the complaint. Conwood wasted no time engaging in motion practice, filing its first motion to compel on August 21, a mere one month after the mandatory disclosures were to have been made. UST had

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made some Rule 26 disclosures. Conwood found the UST production inadequate, and filed a two inch thick motion to compel, seeking the very serious remedy of barring UST from using at trial any materials which Conwood contends should have been disclosed [DN 29]. Conwood's motion went into great particularity as to specific categories of documents which should have been disclosed in the initial Rule 26(a) filings. UST had interposed the argument that Rule 26(a) disclosures are not meant to displace traditional discovery avenues. See August 3, 1998 letter from Chris Athanasia to Mark Hansen, attached as exhibit B to Conwood's August 21 motion to compel [DN 29].

While UST was seeking to minimize its responsibilities under Rule 26(a) by pointing to regular discovery options as the alternative to Rule 26, UST was nonetheless pursuing a technical, delaying strategy with respect to answering the very "traditional discovery methods" it had invoked as obviating the need for extensive Rule 26(a) disclosures. UST took the position, which it apparently did not clearly or immediately communicate to Conwood, that the initial interrogatories and document production requests, served with the complaint and before the the July 7 scheduling conference, were simply a nullity. Therefore, even though the July scheduling conference and order had commenced discovery, UST took no action to respond to the previously served discovery. Instead, it took comfort in its formalistic theory that the initial round of interrogatories and document production requests needed to be physically mailed once again to have any legal force. UST apparently did not disclose this position until September 11, more than

two months after the scheduling conference, when it offered to treat the first round of discovery as having been effectively served on September 10. See defendants' response to plaintiff's first request for production of documents, served October 13, 1998. [This pleading does not appear in the court's file but is attached as exhibit 11 to Conwood's second motion to compel, dated October 23 and found at DN 35.] Thus, UST sought to have its cake and eat it too, by minimizing its 26(a) responsibilities but denying that it had been served correctly with the "traditional discovery."

Further significant problems were created by Conwood's strategy of serving obviously overbroad, generalized discovery requests while simultaneously relying on the general sweep of Rule 26(a). For example, Conwood's first set of document requests asked UST boldly for "all documents concerning Conwood;" "all documents concerning relationships between defendants;" "all documents concerning Swedish Match [a competitor]; "all documents concerning product racks;" and "all documents concerning product quality." These requests, while notable for their simplicity, are so sweeping as to provide no useful guidance to UST as to what Conwood legitimately sought in a major antitrust case.

General Analysis. Conwood offered to cure the overbroad requests by communicating narrowing restrictions to UST, and a series of "meet and confer" activities took place. Some of these were before and some of these were after the filing by Conwood of its second motion to compel on October 23 [DN 35]. Conwood's

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approach to discovery, instead of asking from the start for carefully defined and clear categories of documents, has been to paint with the broadest possible brush, then to engage in negotiation, and then motion practice, to narrow them down. The court is of the view that this process, a seemingly endless one of negotiation followed by legal argument, is not an adequate substitute for careful initial draftsmanship and is not what the rules contemplate. It also requires major judicial resources.

Conwood's tactic of extremely broad requests has continued. In reviewing the pleading file, the magistrate judge looked closely at plaintiff's third document production request. It likewise contains overbroad requests, such as "all documents concerning the review or evaluation of the performance of members of your smokeless tobacco sales force;" or "all documents concerning multi-year business plans." Other very broad requests concern the so-called global settlement. All these have drawn overbreadth objections, and it is obvious that many of these issues will eventually be presented to the court for resolution.

Conwood has, however, presented some very legitimate discovery concerns to the court for decision. UST resolutely resisted discovery of documents at the sales force level, even though the clear allegations of the complaint assert anti-competitive tactics by UST, carried out store-by-store. Such an anticompetitive campaign would necessarily be implemented (if it occurred at all) by sales personnel. The court's decision on this fairly

obvious point required multiple hearings, and testimony from witnesses, and UST's basis for objection was not especially substantial.

On the other hand, in part because of the overbreadth of its requests, Conwood has also sought an extraordinary degree of discovery micromanagment by the magistrate judge. Conwood seeks relief from the court by having it order e-mails be sent to officers whom UST asserts have no involvement in the factual background of this dispute, by requiring discovery from officials whose only responsibilities are manufacturing, and by seeking discovery from personnel whose only responsibility is to create racks. All these requests arise in the context of a motion to compel based on broad, generic requests.

Rather than relying on focused requests which identify particular categories of documents which might be kept by particular people, Conwood wants to involve the court in defining in exquisite detail what the corporate scope of its very general document request should be. No court has the resources to engage in such an exercise, and Conwood has a variety of specific discovery tools which it certainly can use to discover specific information from specific people. Conwood's pleadings readily show a detailed familiarity with categories of documents and personnel; it can always specifically request under the rules what instead it demands in motions to compel.

Discovery commenced six months ago, yet no deposition has been taken. Both parties share considerable responsibility for this situation. The court has no inclination to impose sanctions as a cure for the current state of affairs, both because sanctions are

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generally counterproductive and because neither party is without accountability for the current state of deadlock and disagreement. Counsel should carefully consider all these factors in preparing for next week's conference concerning overall discovery status and deadlines.

For the forgoing reasons, the court makes the following rulings:

1. Conwood's request for further detailed relief in defining the scope of a proper corporate search is **denied**. This includes Conwood's request for a directive to send an e-mail to officers, and its requests to specifically include in an order of the court the categories of marketing promotions managers, rack personnel, manufacturing officers, and retail positioning and vendor teams. Such relief is beyond the scope to which Conwood is entitled and the court declines the invitation to become a full-time member of the discovery team in this case. However, UST is cautioned that the disinclination of the court to *specifically* order that such personnel be included in a search does not automatically exclude them from the scope of the search, either. UST must make a thorough search -- but the court will not become intimately involved in defining every conceivable aspect of the search. UST should also be mindful that, when the court took up an especially significant issue, i.e., the extension of the search to the field sales personnel, the court found UST's objections to be unpersuasive. Finally, the court notes that, should Conwood be convinced that particular people possess important documents,

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it has many tools to obtain the documents other than motion practice based on generic, overbroad requests.

2. Conwood's motion to compel a response by UST under Rule 26(a) with respect to UST's counterclaim is **sustained**. However, Conwood's motion to bar the use of documents not produced in initially in the Rule 26 disclosures is **denied**.

3. Conwood's motion to compel with respect to Swisher and Swedish Match (first documents request numbers 12 and 13) is **denied**.

The purpose of this opinion is not to take either party, or either party's counsel, to task for the discovery issues which have arisen in this case. Counsel on both sides are of the highest quality. Nonetheless, significant discovery problems have arisen in this major case. It is the goal of the court to get the case ready for trial promptly and efficiently, so that the real merits of the case may be fairly resolved.

DATE: February 5, 1999

James D. Moyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record (via facsimile)
Thomas B. Russell, United States District Judge (via facsimile)

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AO 88 (11/91) Subpoena in a Civil Case

United States District Court

FOR THE WESTERN DISTRICT OF WISCONSIN

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Gerald "Gus" Welsh
300 S. Main St., Oregon, WI 53575

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Sheraton, Chairman's Room 706 John Nolen Drive Madison, WI 53713	February 19, 1999 at 9:30 a.m.

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents referring or relating in any way to United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company, Inc., UST Inc., Conwood Company, L.P., and/or Conwood Sales Company, L.P.**

PLACE	DATE AND TIME
Same as specified above	Same as specified above

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	February 3, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

16diii001442

PROOF OF SERVICE

	DATE	PLACE
SERVED	2/5/99	300 S. MAIN STREET OREGON, WI 53575

SERVED ON (PRINT NAME)	MANNER OF SERVICE
GERALD "Gus" WELSH	Personal
SERVED BY (PRINT NAME)	**TITLE**
ARNOLD L. FRITSCH	Investigator

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on 2/5/99
DATE

ARNOLD L. FRITSCH
CONFIDENTIAL SERVICES

Arnold L. Fritsch
SIGNATURE OF SERVER

208 E. MAIN STREET
ADDRESS OF SERVER

COBB, WI 53526

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

February 3, 1998

Federal Express

Arnold Fritsch
Confidential Services
208 East Main Street
Cobb, WI 53526

Re: Conwood Company, L.P. v. United States Tobacco
No. 5:98CV-108-R (W.D. Ky)

Dear Mr. Fritsch:

Enclosed is an original and one copy of a subpoena. Please serve the original subpoena on Gerald Gus Welsh, 300 S. Main St., Oregon, Wisconsin. I would request that service be made as soon as possible. The process server should then complete the proof of service attached to the copy of the subpoena and return it to me in the envelope provided as soon as service has been effected.

Also enclosed is our check for $46.20, representing the appearance and mileage fee to be provided to Mr. Welsh.

Kindly submit your bill to me for service of the subpoena.

Thank you for your assistance, and if you have any questions, please call me at (202) 326-7953.

Sincerely,

Benjamin A. Powell

Enclosures

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

14649

VENDOR ID	NAME	PAYMENT NUMBER	CHECK DATE
			2/3/99

OUR VOUCHER NUMBER	YOUR VOUCHER NUMBER	DATE	AMOUNT	AMOUNT PAID	DISCOUNT	WRITE-OFF	NET
							46.20

COMMENT

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET N.W., SUITE 1000 WEST
WASHINGTON, DC 20005
(202) 326-7900

CRESTAR BANK N.A.
WASHINGTON, DC
15-52/540

14649

DATE Feb 3, 1999 AMOUNT
#46.20

PAY Fourty Six dollars and twenty cents

TO THE ORDER OF
Gerald Welsh
300 S. Main St.
Oregon, WI 53575

Michael Kellogg MP
AUTHORIZED SIGNATURE

⑈014649⑈ ⑆054000522⑆ 20658271 4⑈

SECURITY FEATURES INCLUDED. DETAILS ON BACK.

16diii001445

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION AND PRODUCTION OF DOCUMENTS BY NON-PARTY GERALD WELSH

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Gerald Welsh, 300 S. Main St., Oregon, WI 53575. The deposition will commence at 9:30 a.m. on February 19, 1999, and will continue from day to day until complete. The deposition will be taken at the Sheraton, Chairman's Room, 706 John Nolen Drive, Madison, WI 53713.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Gerald Welsh will be required to produce the documents described in the attached

subpoena on February 19, 1999, at 9:30 a.m. at the Sheraton, Chairman's Room, 706 John Nolen Drive, Madison, WI 53713.

Respectfully submitted,

Richard Roberts /sg
Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: February 5, 1999

16diii001447

United States District Court

FOR THE WESTERN DISTRICT OF WISCONSIN

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Gerald "Gus" Welsh
300 S. Main St., Oregon, WI 53575

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Sheraton, Chairman's Room 706 John Nolen Drive Madison, WI 53713	February 19, 1999 at 9:30 a.m.

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents referring or relating in any way to United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company, Inc., UST Inc., Conwood Company, L.P., and/or Conwood Sales Company, L.P.**

PLACE	DATE AND TIME
Same as specified above	Same as specified above

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	February 3, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 5th day of February, 1999, copies of the foregoing Notice of Videotaped Deposition and Production of Documents by Non-Party Gerald Welsh, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher
& Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Benjamin A. Powell

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS

CONWOOD COMPANY, L.P.,
et al.

v.

UNITED STATES TOBACCO COMPANY,
et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Andrew Carter
5770 Sam Ct, Venus, TX 76084

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Holiday Inn 1515 N Beckley Ave. De Soto, TX 75115 (or as agreed)	February 15, 1999 at 10:00 a.m.

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents referring or relating in any way to United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company, Inc., UST Inc., Conwood Company, L.P., and/or Conwood Sales Company, L.P.**

PLACE	DATE AND TIME
Same as specified above	Same as specified above

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	February 3, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Andrew Carter	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
N. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on February 3, 1999
DATE

SIGNATURE OF SERVER

1301 K St, NW #1000 West
ADDRESS OF SERVER

Washington, DC 20005

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
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MICHAEL K. KELLOGG
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MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

February 3, 1999

By Federal Express

Mr. Andrew Carter
5770 Sam Court
Venus, TX 76084

Dear Mr. Carter:

Enclosed is the subpoena for your deposition. Thank you for agreeing in advance to accept service by federal express. As you will see, the subpoena also requires production of your documents; please bring them with you to the deposition.

As we agreed, your deposition will be held in Washington on February 15, 1999 at 10 a.m. It will be conducted in our offices, which are located at

1301 K Street, N.W.
10th floor, West tower
Washington, D.C. 20005.

As required by law, we are enclosing a $40 witness fee. We have also agreed to pay reasonable expenses associated with your attendance. Accordingly, you will find enclosed airline tickets and your hotel room confirmation for the Capital Hilton Hotel. It is located at 16th and K Streets, N.W., approximately 3 blocks North of the White House and 3 blocks West of our offices. Please keep any meal, taxicab, or other receipts for reimbursement.

If you wish to change your reservations in any way, or have questions about the above, please feel free to call. I look forward to meeting you.

Very truly yours,

Neil M. Gorsuch

Enclosures

KELLOG[redacted]ER, HANSEN, TODD & EVANS, P.L.L.C.

14647

VENDOR ID	NAME	PAYMENT NUMBER	CHECK DATE
AND0002	Andrew Carter	00000007322	2/3/99

OUR VOUCHER NUMBER	YOUR VOUCHER NUMBER	DATE	AMOUNT	AMOUNT PAID	DISCOUNT	WRITE-OFF	NET
0000006345	020399	2/3/99	$40.00	$40.00	$0.00	$0.00	$40.00
COMMENT			$40.00	$40.00	$0.00	$0.00	$40.00

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET N.W., SUITE 1000 WEST
WASHINGTON, DC 20005
(202) 326-7900

CRESTAR BANK N.A.
WASHINGTON, DC
15-52/540

14647

DATE	AMOUNT
2/3/99	$40.00

PAY Forty Dollars And 00 Cents

TO THE ORDER OF
Andrew Carter
5770 Sam Ct.
Venus TX 76084

AUTHORIZED SIGNATURE

⑈014647⑈ ⑆054000522⑆ 20658 27 14⑈

SECURITY FEATURES INCLUDED. DETAILS ON BACK.

16diii001454

FedEx®

Federal Express

The World On Time®

Ben Powell
KELLOGG HUBER HANSEN
1301 K STREET NW
WASHINGTON DC 20005
(202)326-7953

SHIP DATE: 03FEB99
ACCOUNT # 165081617
MAN-WGT: 1 LBS

TO: ANDREW CARTER ( ) -

5770 SAM CT
VENUS TX 76084

236 5998 424

FedEx. POWERSHIP 3

236 5998 424

REF: 97718

PRIORITY OVERNIGHT THU PM

CAD # 77192 03FEB99

FedEx Letter

Trk# 236 5998 424

DFW

76084-TX-US N6FTW

▶▶▶ Pull to open

Extremely Urgent:
Recipient please hand deliver to addressee.

Customer: These service boxes are provided for your convenience. Service must be marked on airbill.

☐ **FedEx Priority Overnight®**
Next business morning service (not available to all locations).

☐ **FedEx Standard Overnight®**
Next business day service (not available to all locations).

☐ **FedEx First Overnight™**
Earliest next business morning delivery to select locations.

☐ **FedEx International Services**
Scheduled delivery times vary by location.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. **PLAINTIFFS**

vs. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC. **DEFENDANTS**

ORDER

The parties have discussed, in an in-chambers conference with the Magistrate Judge, the issue of the effect of the agreed protective order on scheduled depositions and have particularly directed the attention of the Court to paragraphs 6 and 9.

With respect to paragraph 6, it deals with the designation of deposition testimony as confidential, and requires no advance ruling by the Court with respect to the proposed deposition schedule.

With respect to paragraph 9, this paragraph governs the procedures for disclosing Protected Information to a proposed witness, and requires a period of at least ten days written notice to the other party. In the event that either party believes that the application of paragraph 9 to the preparation for or taking of the deposition of any particular deponent creates a burden or a problem, that party may apply to the Magistrate Judge on a case-by-case basis for relief

104

from the ten day period set out in paragraph 9. However, the Court does not read paragraph 9 as imposing a general ten day minimum notice rule related to the taking of depositions.

Other concerns were raised in the conference concerning the sequence of discovery where a third party witness produces documents and is simultaneously video taped for trial purposes. The Magistrate Judge is of the view that no special ruling is required for this problem, which is one which occurs with regularity in trial practice. The parties are urged to cooperate with each other with respect to making documents available cooperatively, to the extent possible, concerning depositions. However, in the event of a disagreement, the general principles of the Federal Rules of Civil Procedure will apply to any deposition of a third party or of a deposition of a company employee.

The Magistrate Judge is of the view that the issues raised, at the present, are more hypothetical than actual and declines to rule prospectively with respect to depositions which have not even been scheduled yet.

Date: February 10, 1999

JDMoyer

JAMES D. MOYER
UNITED STATES DISTRICT COURT

ENTERED
FEB 11 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

Copies to:
Counsel of Record (via facsimile)

16diii001457

Conwood / Jessica

United States District Court
Western District of Kentucky
Office of the Clerk
601 W. Broadway
Louisville, KY 40202-2249
502-625-3500
Fax: 502-625-3880

Jeffrey A. Apperson
Clerk of Court

William W. Clark
Chief Deputy Clerk

Divisional Office Fax Nos:
Bowling Green 502-842-2836
Owensboro 502-685-4601
Paducah 502-442-1919

FACSIMILE TRANSMISSION

TO: Mark Hoover
Richard Roberts
John Reed Neil Stall

DATE: 2-11-99

FROM: M. Bolzinger

In case of transmission error, please call _____

COMMENTS: _____

Total Pages _____
(Including cover)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, -against- UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	:	Civil Action No. 5:98 CV-108-R

AFFIDAVIT OF CHRIS ATHANASIA

I, Chris Athanasia, upon being duly sworn, do depose and state as follows:

1. I am an associate attorney with the law firm, Skadden, Arps, Slate Meagher & Flom LLP. I have been involved in the discovery process of this case from its inception, and I have been involved personally in the document collection and review process for Defendants' Rule 34 production to Plaintiffs. The statements made herein are based on my own personal knowledge as well as on interviews with computer systems personnel of Defendant companies and with the other attorneys participating in Defendants' document production.

2. Electronic mail. Each person whose office was searched, with the exception of USTC Sales Representatives, has access to the company e-mail system. The system is backed-up every

night and all e-mails stored on network personal computers (i.e., not on laptops used by certain USTC personnel) are saved and stored on a backup tape. The tapes are on a five week rotation and are re-written after this five-week period. Beyond the five-week period, there is no central storage of e-mail.

3. Every person whose office was searched provided the attorneys access to his or her e-mail files, if any existed. In each instance, an attorney reviewed the index of e-mails in order to identify those e-mails containing information relevant to this case. Potentially relevant e-mails were printed out, reviewed and, if relevant and responsive, produced to Plaintiffs.

4. Other Documents Stored Electronically. The company's system drives operate in the same way as the e-mail system. The system is backed-up every night and all document files on network personal computers are saved and stored on a backup tape. Beyond the five-week period, there is no central storage of computer files.

5. Every person whose office was searched also provided the attorneys access to his or her computer files on the system drives. Attorneys reviewed the documents by file name to identify relevant subject matter. Potentially relevant documents were printed out, reviewed and, if relevant and responsive, produced to Plaintiffs.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and recollection.

Chris Athanasiou, Esq.

Sworn to and subscribed before me
this 22nd day of January, 1999

Notary Public

KLEE CHANG
Notary Public, State of New York
No. 02CH4782007
Qualified in New York County
Commission Expires April 15, 2000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P.	:	
Plaintiffs,	:	Civil Action No. 5:98 CV-108-R
-against-	:	
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,	:	
Defendants.	:	

AFFIDAVIT OF GARY MILANO

I, Gary Milano, upon being duly sworn, do depose and state as follows:

1. I am currently the Vice President of Sales for United States Tobacco Sales and Marketing Company Inc. ("USTC"). The statements made herein are based upon my own personal knowledge of the structure and organization of the field sales organization, as well as the practices, policies, and procedures that apply to all field sales personnel in the ordinary conduct of their duties and responsibilities.

2. The entire sales force of USTC is comprised of over 600 individuals. Among these, there are five Regional Vice Presidents, 16 Department Managers, 95 Division Managers, and 448 Sales Representatives located in every state throughout the country. Sales Representatives do not

maintain offices, and instead work out of their vehicles and/or homes. In each of the five regions, each USTC Department Manager supervises a number of Division Managers, each of whom, in turn, supervises the several USTC Sales Representatives operating within that Division. In the ordinary course of business, it is USTC's policy that each USTC Sales Representative regularly and systematically deliver to the appropriate Division Office those documents that are material to the assessment of the competitive environment in the marketplace, including USTC's own activity.

3. As a general matter, Sales Representatives, in the ordinary course of business, do not create or retain any such documents that are not sent to their direct supervisor at the division level. This is the very purpose of creating such documents. Although each region has different practices, most regions have some form of competitive activity report (or competitive incident report) that is periodically delivered to the Division Managers. In addition, every Sales Representative fills out Profile Activity Reporting scanner sheets and delivers the originals to Fastech, Inc. for processing, with a copy delivered to the Division Manager.

4. Within USTC's sales structure, it is neither the function nor the responsibility of Sales Representatives to enter into written agreements with resellers, and it would be rare for any such agreement to be created by a Sales Representative. Any agreements that are entered into with retailers, as a matter of policy, must be approved at the corporate level, and for this reason, any such agreements would typically be found at the Department Level and above -- although, from time to time, Division Managers may initially draft such agreements. Accordingly, even if a Sales Representative were asked by a retailer to enter into a written agreement with that retailer, it is USTC's policy that that request be

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forwarded to and considered by the Division Manager, and if appropriate, by the department level and above.

5. To the extent that any Sales Representative keeps calendars or day books, and retains them, these are not likely to reflect competitively significant information, which, as described above, is forwarded to the Division Managers through other means.

I declare under penalty of perjury that the foregoing is true and correct.

Gary Milano
Vice President,
United States Tobacco Sales & Marketing Co. Inc.

Sworn to and subscribed before me
this 13 day of January, 1999

Barbara G. Bogue
Notary Public
BARBARA G. BOGUE
Notary Public
State of Connecticut
My Commission Expires August 31, 2002

16diii001464

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, -against- UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	:	Civil Action No. 5:98 CV-108-R

AFFIDAVIT OF DONALD L. CERULLO

I, Donald L. Cerullo, upon being duly sworn, do depose and state as follows:

1. I am currently Vice President, Information Systems for Defendant United States Tobacco Company. The statements made herein are based on my own personal knowledge of the computer systems used by defendant companies.

2. The following is a list and general description of the Information Systems Department computer systems, used by defendant companies:

DCS II. DCS II is the order processing and fulfillment system for U.S. Tobacco Company's distribution of moist snuff product lines. As such, it manages orders taken by the Telemarketing Department and through Electronic Data Interchange (EDI), reserves inventory, validates credit, schedules shipments, controls the physical loading of the product onto the trucks, prints carriers' bills of lading, prints customer invoices, records customer receivables and records shipment information for use by other systems.

STARS II. STARS II is the Sales Tracking and Reporting System. Data is fed into the STARS II database by the DCS II Shipping System. The STARS II database is organized by time period and year, by geography and customer, and by product and by data type.

P.O.S. Point-Of-Sale (POS) material used by U.S. Tobacco Company's sales personnel is processed through this system. Requisitions for material are entered into this system by field sales. Packing and shipping paperwork is produced at the distribution center in Nashville, TN.

SIMS. The Sales Information Management System is a service provided by Fasteoh, Inc. of Broomall, Pennsylvania. The system forwards information via a dial network to the first line sales management group known as Division Managers. Information is in three categories:

a. Summary of Product/Customer shipment data from the DCS II described above.
b. Summary of the retail and distribution profile activity data, described below under "PAR."
c. The Division Manager's actual versus budgeted financial data described under the Financial General Ledger.

PAR. The Profile Activity Reporting system is used by the field sales representatives to record various data that they observed while making a retail account call.

RAD. The Retail Account Data system was developed for U.S. Tobacco Company by Management Science Associates, Inc. ("MSA") of Pittsburg, Pennsylvania. Through agreements with participating distributors, a weekly file of shipments from distributors to retail stores is sent to MSA. This file is edited for product, customer, data accuracy, and shipment consistency. Data is loaded into a database at the MSA site.

CAP. CAP is a service provided by IRM of Dallas, Texas. On a quarterly basis, IRM uses available data to distribute incentive checks to participants in the Customer Alliance Program.

MLS. The Mailing Label System provides generic printed labels and/or electronic labels for mailgrams.

EMS. Events Management System records materials, locations, attendance statistics, sales personnel requirements and costs associated with product sampling around scheduled events such as car races and county fairs.

PTST. The PTST system is an activity tracking mechanism that interfaces with the Payroll system for the Part Time Sales Trainees' weekly hours worked.

CONSUMER LETTERS. A server and network based system that is used to record any consumer correspondence regarding the product.

CA CAS - General Ledger, Accounts Payable and Purchasing.

The General Ledger (GL) system is the financial database that receives all revenue and expense data, organizes it by chart of account number, and provides reports on profit and loss and balance sheet accounts as well as numerous other financial statements.

The Accounts Payable (AP) system is responsible for cash disbursements and vendor payments via checks as well as the distribution of these expenses to the proper accounts within the GL.

The Purchasing system manages U.S. Tobacco Company's purchase orders to vendors, item specifications, and price files.

BUDGETS. The budget system is a series of spreadsheets that are used to develop a plan for the future year's profit and loss statements and capital project planning.

GELCO. The GELCO system is a service provided by GELCO to record travel expenses for Headquarters personnel and field sales expenses for all sales personnel.

FACTSYS. This system is PC based at Headquarters and is used to track capital items such as buildings, machinery or any other capital asset.

QUICKEN. A PC based system, similar to the financial systems described above, that is used at the regional offices to manage local payables and record those expenses.

FASTAX. A PC based system used by the Tax Department to develop income tax filing statements with the appropriate taxing authorities.

CHRIS. CHRIS is the Human Resource data base used to record personnel, compensation and benefits information on each employee.

GRANT MANAGER. A PC based system used to track corporate contributions by individuals through the company's matching contribution program.

AVIATION SCHEDULING. A PC based system used by the Travel Department to schedule the aircraft, limos and facilities for use by various departments and employees.

INVESTOR DATABASE. A PC based system that records stock owners and is used for mailing of any financial communications such as the Annual Report.

REGS DATA BASE. A server and network based system that records the regulations and restrictions of various states, counties and cities.

RELOCATION. A PC based system used to track specific moving expenses of individuals within the company.

PCS. A mainframe system used to track project requests of the IS Department and personnel time expended against those projects.

ORGANIZER. A server and network based system used by some individuals to schedule their time.

CC:MAIL. The company's e-mail system that connects certain employees through the company's network of computers.

MANUFACTURING. A series of PC based systems and mid-range AS/400 systems that is used to track expenses, pay vendors, monitor inventory, plan production and schedule shipments.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and recollection.

Donald L. Cerullo,
Vice President, Information Systems,
United States Tobacco Company

Sworn to and subscribed before me
this 27th day of January, 1999

Notary Public

BARBARA A. WALKLEY
COMMISSIONER OF DEEDS
CONNECTICUT
MY COMMISSION EXPIRES JULY 14, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

- - -

CONWOOD COMPANY, L.P. CONWOOD SALES COMPANY, L.P.	)	
Plaintiffs	)	Misc. No. 99-33
vs.	)	
U.S. TOBACCO COMPANY, et al.,	)	
Defendants	)	

- - -

Transcript of: Hearing on motion to quash subpoena.

Date: February 16, 1999.

Before: Donald J. Lee, U.S. District Judge.

Reporter: Colvin Vogel, Official Reporter
1031 U.S. Courthouse
Pittsburgh, PA 15219
(412) 261-4095

APPEARANCES:

WILLIAM D. GEIGER, Davies McFarland & Carroll, One Gateway Center, 10th Floor, Pittsburgh, PA 15222; and NEIL M. GORSUCH, Kellogg, Huber, Hansen, Todd & Evans, 1301 K Street, N.W., Suite 1000 West, Washington, D.C. 20005, appearing in behalf of the Plaintiffs.

JON HOGUE, Hogue & Lannis, 3400 Gulf Tower, Pittsburgh, PA 15219, appearing in behalf of the Defendants.

- - -

PROCEEDINGS

(February 16, 1999.)

THE COURT: Okay. This is the time fixed for a hearing on the motion of Management Science Associates Inc. to quash or modify a subpoena.

I have read the submissions of the parties, and I understand the MSA's position, and I'm going to call upon whoever is going to speak for the Conwood parties this morning. Which of you is going to speak on behalf of Conwood?

MR. GEIGER: Your Honor, I am William Geiger admitted to this bar. Neil Gorsuch is here who has far more knowledge than I on these issues. And, as I think you know, this arises from litigation in Kentucky. He's with the Washington D.C. law firm that is representing Conwood. He has attempted, Mr. Gorsuch, for some time to get the information that we are here today to discuss, first from the defendants in that case, U. S. Tobacco --

THE COURT: I understand the petition. I have a few questions that might help us here.

MR. GEIGER: May I refer you to Mr. Gorsuch.

THE COURT: Yes. And we will admit him PHV for the purpose of arguing this matter this morning. And I'm going to ask that you file a written motion. We usually require that for PHV pro hac vice admission. If you will do

that, and we'll admit you.

MR. HOGUE: And I will have no objections.

THE COURT: Would you come forward, please.

MR. GORSUCH: Yes.

THE COURT: First of all, with regard to the five items that were or are in contention, the production in Pittsburgh is no problem. I think that is a given. I don't think you have any obligation to go to some other state.

With regard to the confidentiality, I'm going to require the parties to confer about that, but what I'm going to do is ask MSA to submit a proposed confidentiality order to Conwood in 20 days. Conwood can respond in 20 dates thereafter. If the parties do not agree, then each side within another 20 days shall submit a proposed order. And whichever order I deem most appropriate, I will adopt. That way there will be some impetus for you to not impose something unreasonable on the other side because you may not get it.

With regard to your document subpoena, I want to clarify this. This is one of the reasons I wanted to ask you questions. Essentially, and I don't know whether it is primarily that I read it differently, but you are seeking documents that you have the right to receive in the underlying discovery against the defendants in the pending action. It is my understanding that that discovery has been

required.

MR. GORSUCH: Yes, Your Honor, that is correct.

THE COURT: Okay. However, when I read the documents requested, it would appear to me that you are going beyond that. For example, in item three of the documents requested, you are asking for: All documents, including but not limited to computer or electronic representations, records, databases or other data stored on any type of magnetic media, relating to the demand, supply, pricing, consumption and/or marketing of products offered by smokeless tobacco companies in the United States.

My reaction is that is beyond what documents pass between MSA and any of the defendants; is that correct?

MR. GORSUCH: Your Honor, actually, Judge Moyer has ordered UST, in the underlying litigation, ordered UST to produce all their computer sales data bases that are in their control. UST tells us go to MSA. MSA says go to UST. We want to close the loop, Your Honor. We are after the electronic sales data bases. We believe we are entitled to them, and Judge Moyer ordered them from UST.

THE COURT: Do they say they are not in their custody or control?

MR. GORSUCH: That is correct. They say they are in MSA's control and custody. And MSA in its papers say we do have physical possession, but they are in UST's control.

THE COURT: Do I take it item 3 of the documents requested is to be limited to the documents that pass between MSA and the defendant, and not beyond that?

MR. GORSUCH: That is what we are after, Your Honor. There has been no objection as to scope of this subpoena, none whatsoever. I don't think you need to address that issue at all, frankly.

THE COURT: There has obliquely insofar as the request for market value of that additional information. That is what they are seeking.

MR. GORSUCH: They are seeking compensation, Your Honor. And I will be happy to address that. As to the scope of production, the data bases are what we are after, and that is the most essential and critical component of the subpoena. And, Your Honor, that is what Judge Moyer has ordered. And there has been no objection as to the scope of that production.

THE COURT: Item four goes to that.

Item five deals with all manuals, instructions, field descriptions and other documents necessary to read, understand and manipulate any data described in number three above. Which again on its face goes beyond, by the very text, the documents that pass between them. That is why I want to clear this up.

What you are really seeking are documents that

were exchanged or passed between MSA and any of the defendants, some of which one or all of the defendants say they don't have possession of at the present time; is that correct?

MR. GORSUCH: Your Honor, that is partially correct. In addition we are after anything that is maintained on behalf of the defendants that may or may not pass between MSA and the defendants, sales data bases that physically reside here in Pennsylvania, all of which may not all the time be passing back and forth. We are after the underlying data that is maintained on behalf of UST and any programs necessary to manipulate that information.

THE COURT: Have you received documents from any of the defendants as of this date?

MR. GORSUCH: We have received documents in discovery. We have received no sales data bases.

THE COURT: Have you received anything which is identified as having been generated, produced or otherwise involving MSA?

MR. GORSUCH: We have received a select number of printouts, computer printouts, Your Honor, a very few. That is why we sought the sales data bases in excess to them, and that is why Judge Moyer ordered them.

The answer I think is effectively no. I'm not going to deny there are not a couple of stray documents.

THE COURT: Are you able to identify them? What I want you to do is to submit to the court and MSA at least an itemization of those documents you already received.

MR. GORSUCH: Your Honor, I think the answer then is effectively nothing. I mean, you are talking about an enormous document production, Your Honor.

THE COURT: I understand that.

MR. GORSUCH: And I can point -- I might be able to point to a couple of printout reports that I'm not going to be able to attribute to Fastech or other vendors. That is simply because they are not our documents. We didn't produce them or manufacture them.

If I may raise one more point, Your Honor, with regard to the proposed protective order. We cannot wait 60 days for these documents. Discovery is closing April 1. This information is necessary for our expert reports which also must be prepared by April 1, and we have a November trial date, Your Honor.

THE COURT: Mr. Hogue, are you able to submit a proposed order to the Conwood parties within ten days?

MR. HOGUE: Your Honor, if I had until Monday, a week, I can do that. I have to file a Third Circuit brief by Friday. That will give me the weekend. Dr. Kuehn, who's the owner, and I have actually consulted and have one almost drafted.

THE COURT: I think the simple answer is if the parties confer perhaps you can resolve most of the issues. I understand you want to adopt the order that has already been entered by Judge Russell, is it?

MR. GORSUCH: Yes, Your Honor.

THE COURT: And you want to incorporate that.

And you apparently, Mr. Hogue, on behalf of your client, want some additional provisions, and one of them is the identification of the parties to whom it is released; is that correct?

MR. HOGUE: Yes, Your Honor.

THE COURT: I've done that very thing, and I'll have to look at it. Within the last six months I have had that issue, and we have required that. I'm not saying I'm going to here. That may not be unreasonable. I am going to ask the parties to attempt to agree on that.

With regard to the compensation, I understand that Conwood is willing to pay the costs of reproduction. Is that reproduction only? What about assembling and identifying documents that are responsive to the motion?

MR. GORSUCH: That is fine, Your Honor. We are happy to pay for any of those kind of costs.

THE COURT: Okay. And with regard to the market value, if the documents go beyond what actually was prepared or generated or passed to any of the defendants, then I'll

consider an order requiring compensation at market value, whatever you are charging there.

On that issue it seems to me, and this goes to the confidentiality order as well, if there is duplication between the documents that the defendants are producing and what MSA has in its care, custody or control, then it seems to me that Judge Russell really should control that part of it. With regard to any matters that you can identify, Mr. Hogue, that you think require some kind of special protection, we will consider. But on the compensation I would want you to identify by filing a statement of what MSA expects to receive as a market value of those items. And just so we make it clear, if you get a description from Conwood as to what documents have already been received, seems to me if they want those from you, duplicates, then you should only be able to charge the reasonable costs of assembling and photocopying.

MR. HOGUE: And I agree with that.

THE COURT: If you go beyond that, then that is the issue that remains in doubt.

Now, do you want to speak to that.

MR. GORSUCH: Yes, I do.

THE COURT: I will certainly give you that opportunity right now.

MR. GORSUCH: Thank you, Your Honor.

Your Honor hit the nail on the head. What we are after is what is created for, maintained for, is in the care of MSA for UST. We want to be placed in UST's shoes, Your Honor, and have the same access to the same information they do for purposes of this litigation. This data base information is critical to this case. I can't stress that enough.

THE COURT: Do you have anything from any of the defendants indicating or anything in writing that says we don't have possession of these items, go to MSA?

MR. GORSUCH: Your Honor, since January 14th, the court order by Judge Moyer, I can tell you they have produced nothing. They are now subject to a motion to compel compliance with the court's order which will be heard tomorrow I can tell you that. I would and I actually do have a letter. I don't have it here with me. I'm afraid -- yes, we do have a letter that says go to MSA. We do have that letter, yes.

THE COURT: Can you make that available to Mr. Hogue and to the court.

MR. GORSUCH: I will be happy to do that.

On the compensation point, we believe the law is very clear that we should pay the reasonable expenses. We are happy to do that to get the same information that UST has. If Your Honor is talking about going beyond the data

bases maintained on behalf of UST, beyond software that is used for UST's products, fine, I understand the market value argument there, but I do not understand the market value argument to be placed in UST's shoes.

THE COURT: I'm not saying I'm going to award that.

MR. GORSUCH: Okay. Then we are fine. You and I are on the same wave length.

THE COURT: Then we have the issue of reasonable attorneys fees. And I know your position on that. And I understand MSA's position. It is something I will consider. I'm not going to make a decision at this point in time, but I would ask Mr. Hogue to submit a statement identifying the services and the fees which you have or will charge your client in that regard. And you will have a chance to look at them and respond as to what you think is inappropriate or whatever. But I think that might be the faster way to resolve this. But I think right now the confidentiality order is the most pressing issue.

MR. GORSUCH: What is the most pressing to us is getting production as fast as possible.

THE COURT: I'm not going to require it until we have an order in place. Do whatever you can.

MR. GORSUCH: I want to stress again -- I know you already heard it, and it doesn't --

THE COURT: The answer to that is you go to the judge who is handling the case and move for an enlargement, at least as to that point in time. And you can explain that I directed you to do that if that becomes a problem.

MR. GORSUCH: If I have to do that to Judge Russell, I will do that. I understand.

We have been seeking this information, Your Honor, for over a month from MSA alone. This was issued December 15; it is now February 15. We have filed for an extension of time. We offered to do a site visit to MSA to help reduce the amount of burden on MSA to identify that specifically which we need, and work with their employees in a congenial manner. All that has been rejected. Here we are two months later without anything.

I would respectfully ask that the parties be required to get to you within a week or ten days their proposed protective order for prompt resolution thereafter so we can facilitate production immediately, and an order that as soon as confidentiality is in place production will begin.

I would also ask on the compensation issue for an order saying if we go beyond that which UST enjoys the benefits from MSA's services, the court will reserve that issue, but as to the materials maintained on behalf of or for the benefit of UST, we'll pay costs. I think those two

things will facilitate prompt disposition of this, Your Honor, which is so critical to my client.

THE COURT: Okay.

Mr. Hogue, this is your opportunity to respond.

MR. HOGUE: First of all, I have with me Dr. Alfred Kuehn who is the owner and Chairman of the Board sitting at the table, and Alec Boright who is the Vice-president and Director of Information Systems as fact witnesses if necessary.

But I would like to explain to Your Honor as best I can as a lawyer and somewhat of a computer techy, but not of their ilk, what is under this subpoena. MSA maintains a variety of data bases --

THE COURT: I think you explained that.

MR. HOGUE: -- only one of which is accessible by UST. The scope of the subpoena covers other data bases beyond those that are licensed for access to UST. So there is within the subpoena more than just UST.

In addition, the way this works is somewhat similar to WESTLAW or LEXIS. You have access to the data bases, but you don't own the data base. WESTLAW maintains ownership. MSA maintains ownership. You have the right to go in with software, and for each time you go in you pay a charge. For each time UST goes in to generate a report, we get cases, they get reports, they pay charges.

What Conwood wants is the right to take the UST license unilaterally and go in and run any report it wants to off of the data base which we grant access to UST and run their own set of reports. They are not just seeking what UST has or gets; they want more. They want to use this on their own. And that is why I believe they go beyond the normal thing of, UST give us the report you get from MSA. What they want is, MSA produce your data base for free to us and your softwear so we can access this proprietary data base you have, which is worth millions of dollars, on our own and for free. That is where they go beyond the normal steps and sequence of events under the subpoena. It is that point where we have legitimate concerns that they are essentially taking our product, our confidential product, and trying to use it for free. And I don't think that that is what the rule permits. So that is where I was making or trying to make that distinction in our moving paper; that is, they want more than what UST accesses. They want their own access and be able to run their own sets of reports, even though in the real word we offered them that right as a customer and they rejected it. So they are requesting more than just UST information; they want right of access. That is what distinguishes this from a normal communication.

THE COURT: That is the main issue that perplexed me, and I will tell you I don't really fully understand or

comprehend the nature of your client's data base and what have you. But what I think you have to do is in responding you'll have to identify -- the subpoena required if you have some kind of privilege, to state certain information. Seems to me that is probably the way to go if you feel something is beyond the scope, the reasonable scope and proper scope of a subpoena duces tecum. I would want to know what market value, what compensation you seek for that as well. And that would give the Conwood parties an opportunity to respond as to whether or not this assertion is appropriate or not, and, secondly, whether the request for compensation is appropriate.

MR. HOGUE: Okay.

THE COURT: These are things I can't really decide at this point in time. I think if you two gentlemen can talk this morning about the proposed, if you have time, the confidentiality order, and at least try to identify the precise provisions where you disagree, that might expedite your getting this proposed order to me. You can use the courtroom if you wish, or jury room, or whatever. Okay?

MR. HOGUE: Yes, sir.

THE COURT: Do you have anything else for Conwood?

MR. GEIGER: I was just going to propose that normally under our local rule the conference would have already taken place, the one that is taking take place

today. Mr. Gorsuch is available today. I think the issues are actually straightforward and well understood by the two parties. It is really just a question of what they want to be compensated for what is beyond the scope --

THE COURT: Some sort of a confidentiality order.

MR. GEIGER: There is an excellent order already in place that I think addresses each one of these concerns. If the parties could sit down today and go through it and have MSA point out what they think the deficiencies are, I think we could make great progress and maybe cut down on that ten-day problem. I think Mr. Gorsuch proposed that. Unfortunately he has two judges to contend with.

THE COURT: One of whom is unreasonable.

MR. GEIGER: We don't know that. We know it can be no more than one. This court is certainly not unreasonable.

THE COURT: Flattery will get you everywhere.

MR. GEIGER: We are willing to make whatever reasonable accommodation that the court wishes. That is certainly how we practice in this bar. The parties might be put at a disadvantage in Kentucky where maybe they place a greater premium on meeting scheduled dates than on helping counsel. But this is something that was served a long time ago.

THE COURT: December, wasn't it? January 7 was

the production time.

MR. HOGUE: 17th;

THE COURT: By agreement you extended to the 17th. The original date was the 7th, wasn't it?

MR. HOGUE: Yes.

THE COURT: That is not two months.

MR. GEIGER: Technically a motion to quash was not filed timely on the 7th or 17th or 19th or any other day.

THE COURT: He did respond by letter of January 18th.

MR. GEIGER: Without objection, I may point out, Your Honor. If we could be ordered to confer today as the local rule would have already required us to do, I wouldn't see why an order couldn't be in place either by the end of the day, or certainly by the end of the week, which may take some of the pressure off Mr. Gorsuch in this case. The judge in Kentucky places a great premium on meeting scheduled dates.

THE COURT: Mr. Hogue, you indicated you are available; is that correct?

MR. HOGUE: Through the noon hour.

MR. GEIGER: Any chance of shortening the return date to the court?

THE COURT: Well, I'm going to ask you to confer, and I'm unwilling to say at this point in time that we are

going to shorten it. But if someone can convince me for cause that I should do it, I'll consider it. But as of now the ten-day limit is in place. Okay.

MR. GEIGER: Thank you, Your Honor.

MR. GORSUCH: Your Honor, if I may be heard on -- and I apologize for multiple lawyers -- but I would just ask that the court does order that once a protective order is in place, that production begin. We can litigate over compensation issues or attorneys' fees at any time.

THE COURT: And with regard to those documents that go beyond the scope, as I have described it before, the matters that were transmitted, whatever, to the defendant, that is something I think has to be identified if there is going to be any disagreement on that.

MR. GORSUCH: We ask that that doesn't hold up production, Your Honor.

THE COURT: No, I'm suggesting that MSA, once we get the order in place, can start producing those things to which apparently there would be no objection or within the scope, proper scope, according to MSA's standards, of the subpoena. And those matters that go beyond we may have to revisit them as to whether or not they should be produced or under what circumstances. Seems to me if MSA is willing to produce them at its regular retail cost or prices, then I understand it has certain confidentiality provisions, as I

understand it, between it and its customers with regard to disclosure. Seems to me if it is willing to sell it to you, that the only issue then is the reasonable compensation.

MR. GORSUCH: Thank you, Your Honor.

THE COURT: Okay. I'm going to order this record to be transcribed. 50 percent of the cost will be assessed to Conwood, and 50 percent to MSA. And we'll have that, because I made some rulings. And also in this record will be the reasons why I've entered preliminary orders.

Okay, gentlemen, thank you very much.

(Whereupon, the hearing was adjourned.)

I CERTIFY THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

Colvin Vogel, Official Reporter
1031 U.S. Courthouse
Pittsburgh, PA 15219
(412) 261-4095

DAVIES, McFARLAND & CARROLL, P.C.
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. **PLAINTIFFS**

vs. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC. **DEFENDANTS**

ORDER

This matter has been referred to the Magistrate Judge by order of the District Court.

IT IS HEREBY ORDERED that all discovery deadlines and dispositive motion deadlines are extended for four months.

IT IS FURTHER ORDERED that the jury trial scheduled for November 1, 1999 in this case is rescheduled to **FEBRUARY 28, 2000 at 9:00 a.m. Central Standard Time** and the final pretrial conference scheduled for October 12, 1999 is **REMANDED** from the Court's docket and rescheduled to **FEBRUARY 17, 2000, at 3:30 p.m. Central Standard Time, in Chambers in Paducah, Kentucky.**

A detailed amended scheduling order will be by separate order of this Court.

Date: February 17, 1999

JAMES D. MOYER
UNITED STATES DISTRICT COURT

ENTERED
FEB 18 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

Copies to:
Counsel of Record (via facsimile)

189

NM6

Please enclose 1. Consent to P
2. Consent of

United States District Court
Western District of Kentucky
Office of the Clerk
601 W. Broadway
Louisville, KY 40202-2249
502-625-3500
Fax: 502-625-3880

Jeffrey A. Apperson
Clerk of Court

William W. Clark
Chief Deputy Clerk

Divisional Office Fax Nos:
Bowling Green 502-842-2836
Owensboro 502-685-4601
Paducah 502-442-1919

FACSIMILE TRANSMISSION

TO: Mark Hansen
Richards Roberts
John Reed Neal Stoll

DATE: 2-17-99

FROM: Michelle Goetzinger

In case of transmission error, please call _____

COMMENTS: _____

Total Pages _____
(Including cover)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	

NOTICE OF VIDEOTAPED DEPOSITION AND PRODUCTION OF DOCUMENTS BY NON-PARTY ANDREW CARTER

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Andrew Carter, 5770 Sam Ct, Venus, TX 76084. The deposition will commence at 10:00 a.m. on March 1, 1999, and will continue from day to day until complete. The deposition will be taken at the offices of Glast, Phillips & Murray, 2200 One Galleria Tower, 13355 Noel Road, L.B. 48, Dallas, TX 75240.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and

stenographic means.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Andrew Carter will be required to produce the documents described in the attached subpoena on March 1, 1999, at 10:00 a.m. at the offices of Glast, Phillips & Murray, 2200 One Galleria Tower, 13355 Noel Road, L.B. 48, Dallas, TX 75240.

Respectfully submitted,

Richard Roberts /nmg
Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: February 17, 1999

16diii001493

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Andrew Carter
5770 Sam Ct, Venus, TX 76084

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Glast, Phillips & Murray 2200 One Galleria Tower, 13355 Noel Road, L.B. 48 Dallas, TX 75240	March 1, 1999 at 10:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents referring or relating in any way to United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company, Inc., UST Inc., Conwood Company, L.P., and/or Conwood Sales Company, L.P.**

PLACE	DATE AND TIME
Same as specified above	Same as specified above

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	17 February 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Andrew Carter	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
N. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on 2·17·99
DATE

SIGNATURE OF SERVER

Suite 1400 West
1301 K ST NW
ADDRESS OF SERVER

Washington, DC 20005

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 17th day of February, 1999, copies of the foregoing Notice of Videotaped Deposition and Production of Documents by Non-Party Andrew Carter, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Robert B. Cousins, Jr.
Glast, Phillips & Murray
2200 One Galleria Tower
13355 Noel Road, L.B. 48
Dallas, TX 75240-6657

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Benjamin A. Powell

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	

NOTICE OF VIDEOTAPED DEPOSITION AND PRODUCTION OF DOCUMENTS BY NON-PARTY GERALD WELSH

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Gerald Welsh, 300 S. Main St., Oregon, WI 53575. The deposition will commence at 9:30 a.m. on February 26, 1999, and will continue from day to day until complete. The deposition will be taken at the Sheraton, Chairman's Room, 706 John Nolen Drive, Madison, WI 53713.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and

stenographic means.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Gerald Welsh will be required to produce the documents described in the attached subpoena on February 26, 1999, at 9:30 a.m. at the Sheraton, Chairman's Room, 706 John Nolen Drive, Madison, WI 53713.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: February 17, 1999

United States District Court

FOR THE WESTERN DISTRICT OF WISCONSIN

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Gerald "Gus" Welsh
300 S. Main St., Oregon, WI 53575

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Sheraton, Chairman's Room 706 John Nolen Drive Madison, WI 53713	February 26, 1999 at 9:30 a.m.

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents referring or relating in any way to United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company, Inc., UST Inc., Conwood Company, L.P., and/or Conwood Sales Company, L.P.**

PLACE	DATE AND TIME
Same as specified above	Same as specified above

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
/s/ [illegible] Attorney for Plaintiffs	2.1.99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

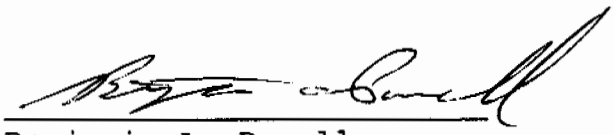
CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	

CERTIFICATE OF SERVICE

I certify that on this 17th day of February, 1999, copies of the foregoing Notice of Videotaped Deposition and Production of Documents by Non-Party Gerald Welsh, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher
& Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202



Benjamin A. Powell

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — PLAINTIFFS

v. — NO. 5:98CV-108-R

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — DEFENDANT

ORDER

This matter came before the Magistrate Judge on February 17, 1999 for a teleconference to hear argument on the discovery issues raised in the parties' February 15, 1999 joint agenda.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, Ben Powell, Dick Roberts, David Simpson, Steven Benz, and Bill Cunningham, counsel.

FOR THE DEFENDANT: James Keyte, John Reed, Chris Athanasia, Neal Stoll, and Richard Verheij, counsel.

1. Pritzker documents. The objections by Conwood to furnishing documents for related Pritzker entities are overruled. Documents otherwise responsive to the UST discovery requests and which are in the custody or control of a Conwood related company, whether up the chain of ownership or down the chain of ownership, shall be furnished.

2. MSA. The parties have argued concerning the compliance by UST with court's prior order concerning the furnishing of databases. The court is of the view that UST has not promptly complied with the court's prior directives, notwithstanding the possible existence of issues unique to MSA and its software. Counsel for UST represented at the February 17 telephonic hearing

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that UST has in-house access to the database through computer connections at its headquarters, but that it is powerless to furnish source code or a usable program copy for the arguably proprietary database program created by MSA. Put another way, UST does not dispute that it owns the data, and asserts that it has corporate access to the data, but it does interpose the argument that it cannot turn over the database program in which MSA has arguable proprietary rights. Certainly if UST can use the data, Conwood can as well.

Accordingly, it is ordered that UST furnish full, complete, unhindered access to its data by providing immediately at its headquarters the use of computer equipment, of a kind and type comparable to the best used by UST personnel, with complete access to the UST database to which UST has in-house access. This shall be at UST expense. Further, UST shall furnish a confidential and secure conference room or similar, professional working area where Conwood, its counsel, experts, and computer consultants may have untrammelled access to the database, for the purpose of generating their own inquiries or queries of the database. UST shall further furnish access to all paper or other printouts of such data maintained by it. UST shall further provide access to Conwood, in the conference room, to all manuals and other documentation concerning the use of the database, and shall also provide access, for Conwood and its consultants, to UST personnel knowledgeable in the use of the database and the generation of queries, so that Conwood may begin full, immediate access to the data and may have any technical questions about the use of the database answered immediately by appropriately knowledgeable UST personnel. UST shall communicate the substance and spirit of this ruling to its chief information officer, who shall designate a high level MIS person to implement this ruling immediately and with full cooperation.

3. Fastech. With respect to the Fastech-maintained data, UST shall immediately

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communicate with Fastech and shall use its full and best efforts to cause Fastech to furnish immediate access to Conwood to any Fastech-maintained data on a priority, expedited basis. The court does not understand Fastech to have interposed any legal or technical objection to access by Conwood; rather it is represented that the process has gone from free-flowing to uncooperative.

Conwood has made disturbing allegations more than once in telephonic hearings to the effect that UST has "poisoned the well" at Fastech by discouraging Fastech from cooperation. Such an assertion, if true, would be very serious. UST has asserted that it has done nothing more than take steps to assure that any e-mail files maintained by Fastech be subject to appropriate reviews for privilege and confidentiality. Given the proliferation of discovery disputes in this case, the court is, for the moment, disinclined to pursue such allegations, preferring to see if Fastech data is made available promptly. The court takes no view at all concerning whether there is a sustainable factual basis for these assertions. Conwood is cautioned that making such allegations is most serious and should not be engaged in without a full basis for them; and UST is cautioned that impeding access to discovery from third parties raises equally serious concerns.

4. Any and all remaining discovery disputes will be heard and resolved in Louisville at the courthouse in an omnibus discovery hearing on Saturday, February 27, beginning at 9:00 a.m., and continuing throughout the day until all issues are addressed. The court will make every effort to rule that day on all issues presented there. A subsequent order will detail an abbreviated briefing schedule and procedures for argument and presentation.

5. The previously scheduled telephonic conference for February 24, 1999 at 2:00 p.m. shall remain on the court's calendar.

6. This civil case has been characterized by delay and disagreement rather than

16diii001504

compliance and cooperation in discovery. The court's procedures for the prompt resolution of these issues will be guided accordingly.

Date: February 18, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies via facsimile to:
Counsel of Record

ENTERED
FEB 18 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii001505

REED WEITKAMP SCHELL & VICE
(A PARTNERSHIP INCLUDING A PROFESSIONAL SERVICE CORPORATION)
2400 Citizens Plaza
Louisville, Kentucky 40202

Telephone: (502) 589-1000
Telecopier: (502) 562-2200

TELECOPIER COVER SHEET

February 19, 1999

TO: Neil M. Gorsuch

COMPANY: Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.

TELECOPIER NO.: (202) 326-7999

CONFIRMATION NO.: (202) 326-7900

FROM: John S. Reed

NUMBER OF PAGES *(including cover sheet)*: 5

IF ANY PROBLEMS ARISE, PLEASE CONTACT: Karen Childers
(502) 589-1000

RE: *Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R*

MESSAGE:

NOTE: This facsimile contains CONFIDENTIAL information intended only for the use of the specific individual or entity named above. If you or your employer is not the intended recipient of this facsimile or any employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any unauthorized dissemination or copying of this facsimile or the information contained in it is strictly prohibited. If you have received this facsimile in error, please immediately notify the person named above at once by telephone and return the original facsimile to us at the above address via the U.S. Postal Service. Thank you.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. PLAINTIFFS

vs. NO. 5:98CV-108-R

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC. and UST INC. DEFENDANTS

ORDER

This matter has been referred to the Magistrate Judge by order of the District Court.

IT IS HEREBY ORDERED that the court's scheduling order entered July 9, 1998, is amended as follows:

1. By August 1, 1999 the parties shall complete non-expert discovery, and plaintiffs shall make disclosure of expert testimony as provided by Fed. R.Civ.P. 26(a)(2).

2. By September 15, 1999 defendants shall make disclosure of expert testimony as provided by Fed. R.Civ.P. 26(a)(2).

3. By October 1, 1999 plaintiffs shall make disclosure of rebuttal expert testimony as provided by Fed. R.Civ.P. 26(a)(2).

4. By November 1, 1999 the parties shall complete depositions of expert.

5. By November 15, 1999 the parties shall file all dispositive motions.

6. By December 6, 1999 the parties shall file oppositions to dispositive motions.

7. By December 24, 1999 the parties shall file replies in support of dispositive motions.

8. By January 21, 2000 the parties shall:

(a) File a list of exhibits intended to be used at trial and produce said exhibits, marked for identification, for inspection of opposing counsel, provided, however, that by no later than 48 hours in advance of direct examination, and 24 hours in advance of cross-examination, the parties shall produce for inspection of opposing counsel all demonstrative aids intended to be used in such examination, including any charts displays, visual aide or other items that will be shown to the jury, but not offered into evidence.

(b) File a witness list.

(c) File a pretrial brief containing a succinct statement of facts of the case, the questions of fact and questions of law with citations.

(d) Designate all deposition excerpts intended to be used at trial. Opposing counsel shall have one week thereafter to make counter-designations.

9. By January 28, 2000 the parties shall:

(a) File agreed proposed jury instructions. If the parties cannot agree, counsel shall submit proposed instructions with supporting authority. The parties should submit both a hard copy and a diskette containing the instructions in either WordPerfect or ASCII format.

(b) File proposed jury voir dire questions.

(c) File motions in limine and any objections to the admission of exhibits and deposition excerpts identified in accordance with paragraph 12. Any exhibit or deposition excerpt so identified shall be admitted into evidence, if otherwise competent, where no such written objection has been filed.

(d) File joint stipulations.

10. Counsel shall provide at or prior to the final pretrial conference a pre-marked set of all proposed trial exhibits.

11. The **final pretrial conference scheduled for October 12, 1999 is REMANDED** from the court's docket and is rescheduled to **February 17, 2000 at 3:30 P.M. prevailing local time, to be held in Chambers in Paducah, Kentucky**. Counsel that will participate at trial shall be present with full settlement authority.

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12. This case is set for a jury trial on November 1, 1999 is **REMANDED** from the court's docket and rescheduled to **February 28, 2000 at 9:00 a.m in Paducah, Kentucky**. Counsel shall meet in Chambers at 8:30 A.M. The expected length of trial is 2-3 weeks.

Date: 2/18/99

JD Moyer

JAMES D. MOYER
UNITED STATES DISTRICT COURT

ENTERED
FEB 18 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

Copies to:
Counsel of Record (via facsimile)

16diii001509

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

Upon consideration,

IT IS HEREBY ORDERED that no later than Wednesday, February 15, 1999, Conwood and UST shall simultaneously file abbreviated, tabbed sets of argument papers concerning the outstanding discovery disputes as identified on the most recent joint agenda. Thus, e.g., plaintiffs identified four issues a prioritized list, and defendants identified seven issues (with some subparts) on their prioritized list.

Each party shall file with the court its abbreviated argument papers, in the following format:

A. Each set of papers will contain a set of tabs, correlating to plaintiffs' issues numbers one through four, and defendants issues numbers one through seven. The papers will consist principally or exclusively of excerpts of already exchanged correspondence relating to the issues, so that the court can readily refer to the exchange of prior communications as it relates to each of the issues. The court discourages the parties from drafting new arguments or briefs, as the proceedings will be expedited and the court does not have the resources to review extensive pleadings. If a party wants to add a paragraph or a brief citation to an issue, that is acceptable, but significant new briefing

will not be accepted and may well be stricken from the record on the courts on motion for failure to comply with the letter and spirit of this order.

B. If either party believes that there are additional issues beyond those identified in the February 15 prioritized joint agenda, it must clearly communicate those in writing to its adversary by the close of business on Monday, February 22.

The concept of this order is merely to have each party prepare a set of tabbed, previous correspondence as it relates to the issues enumerated in the joint, prioritized agenda of February 15.

Date: February 12, 1999

JDMoya

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies via facsimile to:
Counsel of Record

ENTERED
FEB 19 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

United States District Court
Western District of Kentucky
Office of the Clerk
601 W. Broadway
Louisville, KY 40202-2249
502-625-3500
Fax: 502-625-3880

Jeffrey A. Apperson
Clerk of Court

William W. Clark
Chief Deputy Clerk

Divisional Office Fax Nos:
Bowling Green 502-842-2836
Owensboro 502-685-4601
Paducah 502-442-1919

FACSIMILE TRANSMISSION

TO: Mark Hansen DATE: 2-19-99
Richard Roberts
John Reed Neal Stoll

FROM: M. Bertzinger

In case of transmission error, please call _____

COMMENTS: _____

Total Pages _____
(Including cover)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. PLAINTIFFS

vs. NO. 5:98CV-108-R

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC. and UST INC. DEFENDANTS

ORDER

The agenda for the teleconference on February 24, 1999 at 2:00 p.m. is as follows:

1. Report on compliance by UST with court order concerning data base access.

   a. report from UST counsel
   b. report from Conwood counsel

2. Procedures for omnibus discovery hearing on February 27, 1999.

3. Identification of any additional issues beyond those already identified by the parties on the immediately prior joint agenda.

4. Preparation of joint agenda for February 27, 1999, discovery hearing.

5. Any other items requiring immediate attention.

The Court has set aside one hour for this teleconference.

15

Counsel, through their staff, will please advise the Magistrate Judge's secretary, Kathy Pritchard, (502) 625-3930, of the persons who will attend the teleconference, and their telephone numbers. Please do so by the close of business today, Tuesday, February 23, 1999.

Date: February 23, 1999

JAMES D. MOYER
UNITED STATES DISTRICT COURT

Copies to:
Counsel of Record (via facsimile)

ENTERED
FEB 23 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

United States District Court
Western District of Kentucky
Office of the Clerk
601 W. Broadway
Louisville, KY 40202-2249
502-625-3500
Fax: 502-625-3880

Jeffrey A. Apperson
Clerk of Court

William W. Clark
Chief Deputy Clerk

Divisional Office Fax Nos:
Bowling Green 502-842-2836
Owensboro 502-685-4601
Paducah 502-442-1919

FACSIMILE TRANSMISSION

TO: Mark Hansen DATE: 2-23-99
Richards Roberts
Neel Hall - John Reed

FROM: M. Pilkington

In case of transmission error, please call _____

COMMENTS: _____

Total Pages _____
(Including cover)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on February 24, 1999 for a teleconference to consider discovery issues raised by the parties.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, William Geiger, and Dick Roberts, counsel.

FOR THE DEFENDANT: James Keyte, John Reed, Chris Athanasia, Neal Stoll, Martha Weiss, and Richard Verheij, counsel.

FOR NON-PARTY MSA: John Hogue, counsel.

Discovery issues were discussed.

IT IS HEREBY ORDERED that:

1) The omnibus discovery hearing previously scheduled for Saturday, February 27, 1999 is **REMANDED FROM THE DOCKET**.

2) A telephonic status conference is scheduled for **10:30 a.m. EST, Friday, March 5,**

16

1999.

Date: 2/25/99

ENTERED BY ORDER OF COURT:

JEFFREY A. APPERSON, CLERK
JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

BY: _____
Deputy Clerk

ENTERED
FEB 25 1999
APPERSON, CLERK
CLERK

Copies via facsimile to:
Counsel or record.

United States District Court
Western District of Kentucky
Office of the Clerk
601 W. Broadway
Louisville, KY 40202-2249
502-625-3500
Fax: 502-625-3880

Jeffrey A. Apperson
Clerk of Court

William W. Clark
Chief Deputy Clerk

Divisional Office Fax Nos:
Bowling Green 502-842-2836
Owensboro 502-685-4601
Paducah 502-442-1919

FACSIMILE TRANSMISSION

TO: Mark Hanson Wm. Geiger DATE: 2-25-99
Richard Roberts Martha Weiss
John Reed Neal Stahl

FROM: M. McGregor

In case of transmission error, please call _____

COMMENTS: _____

Total Pages _____
(Including cover)

RECEIVED

MAR 8 1999

KELLOGG, HUBER, HANSEN, TODD & EVANS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L.P., ET AL.	PLAINTIFFS
v.	NO. 5:98CV-108-R
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.	DEFENDANT

ORDER

This matter came before the Magistrate Judge on March 5, 1999 for a teleconference to consider discovery issues raised by the parties.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, and Dick Roberts, counsel.

FOR THE DEFENDANT: John Reed, Neal Stoll, Martha Weiss, and Rachel Mariner, counsel.

The parties did not report any pending discovery issues that needed attention from the court.

IT IS HEREBY ORDERED that:

A telephonic status conference is scheduled for **10:30 a.m. EST, Monday, March 15, 1999.** In the future telephonic conferences will be initiated by the parties, rather than chambers. The next teleconference will be initiated by counsel for plaintiff, and the following by counsel for defendant. Responsibility will then alternate between the parties.

Date: March 5, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
MAR 5 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION FOR ADMISSION PRO HAC VICE

Pursuant to L.R. 83.2, John S. Reed, counsel for Defendants, moves this Court to admit pro hac vice Rachel Mariner of Skadden, Arps, Slate, Meagher & Flom LLP for purposes of participating as counsel of record for Defendants. The affidavit of Ms. Mariner as required by L.R. 83.2(a)(2) and 83.2(a)(4) is attached as Exhibit A.

A proposed Order is attached hereto. A check in the amount of $65 is also tendered with this motion to cover the prescribed fee required by LR 83.2(a)(3).

John S. Reed
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, KY 40202
(502) 589-1000

Counsel for Defendants

Date: March 9, 1999

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission and United States mail, sufficient first-class postage prepaid, to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, P.O. Box 995, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 9th day of March, 1999.

Counsel for Defendants

16diii001521

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

On the Motion of John S. Reed, counsel for Defendants, pursuant to L.R. 83.2, for an Order admitting Rachel Mariner of the firm of Skadden, Arps, Slate, Meagher & Flom LLP to appear pro hac vice as counsel for Defendants and the Court being otherwise sufficiently advised.

IT IS HEREBY ORDERED AND ADJUDGED that Rachel Mariner of the firm of Skadden, Arps, Slate, Meagher & Flom LLP is hereby granted permission to appear and participate pro hac vice as counsel for Defendants in this action.

Entered this ____ day of _____, 1999.

_____
JUDGE, UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

AFFIDAVIT OF RACHEL MARINER

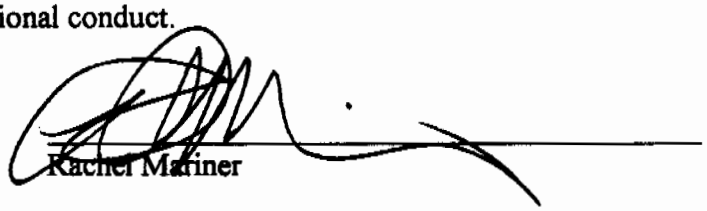
Affiant, Rachel Mariner, being duly sworn, states as follows:

1. I am an associate in the law firm of Skadden, Arps, Slate, Meagher & Flom LLP.

2. I am an attorney licensed to practice in the State of New York and the District of Columbia.

3. I am a member in good standing of the Bar of the State of New York and the District of Columbia..

4. I hereby consent to be subject to the jurisdiction and rules of the Kentucky Supreme Court governing professional conduct.



Rachel Mariner

DISTRICT OF COLUMBIA)

Subscribed and sworn to before me, a Notary Public, by Rachel Mariner this 8th day of March, 1999.

My commission expires: 10/14/99

Notary Public

16diii001524

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on March 15, 1999 for a teleconference to consider discovery matters.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, and Dick Roberts, counsel.

FOR THE DEFENDANT: James Keyte, John Reed, Chris Athanasia, Neal Stoll, Martha Weiss, and Richard Verheij, counsel.

Both parties reported that there were currently no discovery issues needing the court's attention.

IT IS HEREBY ORDERED that:

The next telephonic status conference is scheduled for **4:00 p.m. EST, Monday, March 29, 1999.** Plaintiff shall initiate the teleconference.

Date: March 15, 1999

JD Moyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
MAR 15 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii001525

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 MAR 19 A9:51 Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITIONS OF JAMES MCCARTHY, MICHAEL BEYERLEIN, BYRON PARRISH, GREGORY ZAHRT, DAVID LUND, ARLIE ANUNDSON, AND LONNIE FUNK

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the depositions of the following employees of defendants United States Tobacco Company, et al., at the time and place set forth below. The depositions will continue from day to day until complete. The depositions will be taken at Skadden, Arps, Slate, Meagher & Flom, L.L.P. 919 Third Avenue, New York, NY 10022.

The depositions will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

DEPONENT	DAY AND DATE	TIME	PLACE
James McCarthy	Tuesday, March 23	9:00 a.m.	Skadden, Arps, Slate, Meagher & Flom, L.L.P. 919 Third Avenue, New York, NY 10022
Michael Beyerlein	Thursday, March 25	9:00 a.m.	same place
Byron Parrish	Friday, March 26	9:00 a.m.	same place
Gregory Zahrt	Tuesday, March 30	9:00 a.m.	same place
David Lund	Wednesday, March 31	9:00 a.m.	same place
Arlie Anundson	Wednesday, April 7	9:00 a.m.	same place
Lonnie Funk	Thursday, April 8	9:00 a.m.	same place

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

16diii001527

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: March 18, 1999

16diii001528

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 18th day of March, 1999, copies of the foregoing Notice of Videotaped Depositions of James McCarthy, Michael Beyerlein, Byron Parrish, Gregory Zahrt, David Lund, Arlie Anundson, and Lonnie Funk were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher
& Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Benjamin A. Powell

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 MAR 19 A9:52 Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITIONS OF JAMES MCCARTHY, MICHAEL BEYERLEIN, BYRON PARRISH, GREGORY ZAHRT, DAVID LUND, ARLIE ANUNDSON, AND LONNIE FUNK

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the depositions of the following employees of defendants United States Tobacco Company, et al., at the time and place set forth below. The depositions will continue from day to day until complete. The depositions will be taken at Skadden, Arps, Slate, Meagher & Flom, L.L.P. 919 Third Avenue, New York, NY 10022.

The depositions will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

DEPONENT	DAY AND DATE	TIME	PLACE
James McCarthy	Tuesday, March 23	9:00 a.m.	Skadden, Arps, Slate, Meagher & Flom, L.L.P. 919 Third Avenue, New York, NY 10022
Michael Beyerlein	Thursday, March 25	9:00 a.m.	same place
Byron Parrish	Friday, March 26	9:00 a.m.	same place
Gregory Zahrt	Tuesday, March 30	9:00 a.m.	same place
David Lund	Wednesday, March 31	9:00 a.m.	same place
Arlie Anundson	Wednesday, April 7	9:00 a.m.	same place
Lonnie Funk	Thursday, April 8	9:00 a.m.	same place

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

16diii001531

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: March 18, 1999

16diii001532

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 18th day of March, 1999, copies of the foregoing Notice of Videotaped Depositions of James McCarthy, Michael Beyerlein, Byron Parrish, Gregory Zahrt, David Lund, Arlie Anundson, and Lonnie Funk were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher
& Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Benjamin A. Powell

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

March 18, 1999

Via Federal Express

Jeffery A. Apperson
Clerk of the Court
322 Federal Building
501 Broadway
Paducah, KY 40202

Re: Conwood Company, L.P., et al. V. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of the Notice of Videotaped Depositions of James McCarthy, Michael Beyerlein, Byron Parrish, Gregery Zahrt, David Lund, Arlie Anundson, and Lonnie Funk.

I have also enclosed an additional copy. Please date stamp and return this copy in the attached self-addressed, postage pre-paid envelope.

Thank you for your attention to this matter.

Respectfully,

Benjamin A. Powell*

Enclosures

* Admitted in New York; not admitted in the District of Columbia.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

March 19, 1999

Via Federal Express

Jeffery A. Apperson
Clerk of the Court
322 Federal Building
501 Broadway
Paducah, KY 40202

Re: Conwood Company, L.P., et al. V. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of the Notice of Videotaped Deposition of Non-Party Robert Bales.

I have also enclosed an additional copy. Please date stamp and return this copy in the attached self-addressed, postage pre-paid envelope.

Thank you for your attention to this matter.

Respectfully,

Benjamin A. Powell*

Enclosures

* Admitted in New York; not admitted in the District of Columbia.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY ROBERT BALES

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Robert Bales, Klepper Korner Stores, 2617 N. Broadway St., Wichita, KS 67219. The deposition will commence at 10:00 a.m. on April 12, 1999, and will continue from day to day until complete. The deposition will be taken at the Hyatt Hotel, Santa Fe Trail Room, 400 W. Waterman St., Wichita, KS 67202.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: March 19, 1999

16diii001537

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 19th day of March, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Robert Bales, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Benjamin A. Powell

United States District Court

FOR THE DISTRICT OF KANSAS

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Robert Bales, Klepper Korner Stores
2617 N. Broadway St., Wichita, KS 67219

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Hyatt Hotel, Santa Fe Trail Room 400 W. Waterman St. Wichita, KS 67202	April 12, 1999 at 10:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	19 March 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

United States District Court

FOR THE DISTRICT OF KANSAS

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Robert Bales, Klepper Korner Stores
2617 N. Broadway St., Wichita, KS 67219

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Hyatt Hotel, Santa Fe Trail Room 400 W. Waterman St. Wichita, KS 67202	April 12, 1999 at 10:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	19 March 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	March 23, 1999	2617 North Broadway, Wichita, KS

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Robert Bales, Klepper Korner Stores	Personal Service
SERVED BY (PRINT NAME)	**TITLE**
Brandon Tindle	Special Process Server

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on March 23, 1999
DATE

SIGNATURE OF SERVER

P.O. Box 781444, Wichita, KS 67278
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'99 MAR 22 P2

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

MOTION FOR ADMISSION PRO HAC VICE

Pursuant to Local Rule 83.2, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., respectfully move the admission pro hac vice of Reid M. Figel, Courtney S. Elwood, and Benjamin A. Powell, to practice before this Court as their counsel in this action.

Mr. Figel is a member, and Ms. Elwood and Mr. Powell are associates, of the firm Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005. Each undertakes to abide by the rules of this Court and submits to the jurisdiction of this Court. Each tenders the admission fee herewith. As disclosed by the attached affidavits

(see Exhibit A), each is a member of good standing of the courts listed below:

Reid M. Figel: State of New York Bar; State of Colorado Bar; State of California Bar.

Courtney S. Elwood: District of Columbia Bar; State of Georgia Bar.

Benjamin A. Powell: State of New York Bar.

Richard C. Roberts joins this motion.

A proposed order is attached.

Respectfully submitted,

Richard C. Roberts
WHITLOW, ROBERTS, HOUSTON
& STRAUB
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
FAX - (502) 443-4571

Reid M. Figel*

* Admitted in New York, Colorado, and California; not admitted in the District of Columbia.

Courtney S. Elwood /BAP with permission

Courtney S. Elwood

Benjamin A. Powell

Benjamin A. Powell**

** Admitted only in New York; not admitted in the District of Columbia.

CERTIFICATE OF SERVICE

I certify that on this 22th day of March, 1999, copies of the foregoing Motion For Admission Pro Hac Vice were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher
& Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

RCRob

Richard C. Roberts

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

AFFIDAVIT OF REID M. FIGEL

I, Reid M. Figel, swear as follows:

1. I am a member of the law firm of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.

2. I am a member in good standing of the following courts: the State of New York Bar; State of Colorado Bar; State of California Bar.

3. I am an attorney duly admitted to practice law in New York, Colorado, and California.

4. I hereby consent to be subject to the jurisdiction and rules of the Kentucky Supreme Court governing professional conduct.

Reid M. Figel*

Sworn to and subscribed
before me this 19th day
of March, 1999.

Catherine D. Collins
NOTARY PUBLIC

My Commission expires: April 30, 2001

CATHERINE D. COLLINS
My Commission Expires April 30, 2001

* Admitted in New York, Colorado, and California; not admitted in the District of Columbia.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

AFFIDAVIT OF COURTNEY S. ELWOOD

I, Courtney S. Elwood, swear as follows:

1. I am an associate in the law firm of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.

2. I am a member in good standing of the following courts: the District of Columbia Bar and the State of Georgia Bar.

3. I am an attorney duly admitted to practice law in the District of Columbia and Georgia.

4. I hereby consent to be subject to the jurisdiction and rules of the Kentucky Supreme Court governing professional conduct.

Courtney S. Elwood

Sworn to and subscribed
before me this 15th day
of March, 1999.

Jeanne M. Layden
NOTARY PUBLIC

My Commission expires: 6/17/99

"OFFICIAL SEAL"
Jeanne M. Layden
Notary Public, State of Illinois
My Commission Expires 06/17/99

Benjamin A. Powell*

Sworn to and subscribed
before me this 19th day
of March, 1999.

NOTARY PUBLIC

My Commission expires: April 30, 2001

CATHERINE D. COLLINS
My Commission Expires April 30, 2001

* Admitted only in New York; not admitted in District of Columbia.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P.	)	
Plaintiffs,	)	
v.	)	Civil Action No. 5:98-CV-108-R
UNITED STATES TOBACCO COMPANY UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,	)	
Defendants.	)	

ORDER

On the Motion of John S. Reed, counsel for Defendants, pursuant to L.R. 83.2, for an Order admitting Rachel Mariner of the firm of Skadden, Arps, Slate, Meagher & Flom LLP to appear pro hac vice as counsel for Defendants and the Court being otherwise sufficiently advised.

IT IS HEREBY ORDERED AND ADJUDGED that Rachel Mariner of the firm of Skadden, Arps, Slate, Meagher & Flom LLP is hereby granted permission to appear and participate pro hac vice as counsel for Defendants in this action.

Entered this 22 day of March, 1999.

JUDGE, UNITED STATES DISTRICT COURT

ENTERED

MAR 23 1999

JEFFREY A. APPERSON, CLERK
BY
DEPUTY CLERK

83

16diii001551

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of the Motion for Admission Pro Hac Vice ("Motion") of plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., and for good cause shown, the Motion should be, and hereby is, GRANTED. Accordingly, pursuant to Local Rule 83.2, Ms. Elwood and Messrs. Figel and Powell are admitted pro hac vice to practice before the Court in this matter.

SO ORDERED.

3/24/99

ENTERED

MAR 24 1999

JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

UNITED STATES DISTRICT JUDGE

16diii001552

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on March 29, 1999 for a teleconference to consider discovery matters.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, Ben Powell, and Dick Roberts, counsel.

FOR THE DEFENDANT: John Reed, Chris Athanasia, Neal Stoll, and Rachel Mariner, counsel.

Both parties reported that discovery was ongoing, depositions are being scheduled and are being taken. Plaintiff anticipated that it would soon file a motion regarding a document dispute.

IT IS HEREBY ORDERED that:

The next telephonic status conference is scheduled for **2:00 p.m. EDT, Monday, April 12, 1999.** Defendant shall initiate the teleconference.

Date: 3/30/99

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
MAR 31 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii001558

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 APR -5 A8:59 FILED IN DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION AND PRODUCTION OF DOCUMENTS BY NON-PARTY JOHN M. BONOFFSKI

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party John M. Bonoffski, 11550 Thurston Rd., Meadville, PA 16335. The deposition will commence at 10:00 a.m. on April 19, 1999, and will continue from day to day until complete. The deposition will be taken at the Days Inn, 18360 Conneaut Lake Road, Meadville, PA 16335.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party John M. Bonoffski will be required to produce the documents described in the attached subpoena on April 12, 1999, at 5:00 p.m. at the offices

of Kellogg, Huber, Hansen, Todd & Evans, PLLC, 1301 K Street N.W., Suite 1000 West, Washington D.C. 20005-3317, or at such other place and time as is agreed by counsel.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: April 2, 1999

16diii001555

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 2nd day of April, 1999, copies of the foregoing Notice of Videotaped Deposition and Production of Documents by Non-Party John M. Bonoffski, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Hank Gent
314 West Park Street
Franklin, PA 16323

Benjamin A. Powell

AO 88 (11/91) Subpoena in a Civil Case

United States District Court

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: John M. Bonoffski
11550 Thurston Rd, Meadville, PA 16335

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Days Inn 18360 Conneaut Lake Road Meadville, PA 16335	April 19, 1999 at 10:00 a.m.

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents referring or relating in any way to United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company, Inc., UST Inc., Conwood Company, L.P., and/or Conwood Sales Company, L.P.**

PLACE	DATE AND TIME
Kellogg, Huber, Hansen, Todd & Evans, PLLC 1301 K St NW, Suite 1000 West or at such other place and Washington, DC 20005 time as is agreed by counsel	April 12, 1999 at 5:00 p.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch/Bonoffski Attorney for Plaintiffs	April 2, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises.. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

16diii001558

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 APR -9 A9:58 FILED U.S. DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' MOTION CONCERNING UST SALES FORCE FILES

This motion is being filed now in the interest of time.

Although just six UST sales representatives have been deposed so far, each deponent has confirmed that entire categories of responsive sales force documents remain unproduced. UST has not fully produced sales force files despite Conwood's document requests outstanding for nearly a year, a December 16, 1998 court order requiring production of division office files (Exh. A), and a court order, entered after a lengthy evidentiary hearing, mandating production from sales representatives' files (Exh. B).

The six UST sales representatives deposed to date have testified that they keep unproduced day books recording their sales activities.[1] They have conceded that they use home

[1]Anundson Depo. at 21, 27-29; McCarthy Depo. at 50; id. at 52; id. at 200; Lund Depo. at 39; Zahrt Depo. at 61; Beyerlein Depo. at 36.

computers for business purposes and that these computers have not been searched.[2] They have testified that they generate unproduced "Retail Transaction Forms" recording agreements with retailers.[3] They have testified that they keep or send to division managers "noncompliance reports" on retailers who fail to meet UST demands.[4] They have testified that they have completed unproduced forms discontinuing credit to stores that fail to comply with UST policies.[5] They have confirmed the existence of unproduced training materials.[6] They have admitted that they received unproduced documents concerning a key sales incentive program.[7] They have testified to the existence of unproduced daily voice mail messages between themselves and their supervisors.[8] Some sales representatives testified that they have written "monthly competitive reports" or "daily call

---

[2]Lund Depo. at 76-78.

[3]Zahrt Depo. at 62-63; McCarthy Depo. at 36-37; id. at 51; id. at 181; Parish Depo. at 26-27; Beyerlein Depo. at 28-29.

[4]Lund Depo. at 41-42; Parish Depo. at 28; McCarthy Depo. at 147-48; Zahrt Depo. at 63-64.

[5]Zahrt Depo. at 191-92; McCarthy Depo. at 147; Anundson Depo. at 97-98.

[6]Anundson Depo. at 45-48; id. at 50-55; Lund Depo. at 67; id. at 49; id. at 52; Zahrt Depo. at 34-36; McCarthy Depo. at 53.

[7]Lund Depo. at 63-65; Zahrt Depo. at 76-77; Beyerlein Depo. at 102-03; Anundson Depo. at 95.

[8]Anundson Depo. at 29-36; Lund Depo. at 68-69; Zahrt Depo. at 70-71; Parish Depo. at 86-87; McCarthy Depo. at 44.

16diii001560

reports," and maintain "marketing books."[9] See Exh. C (attaching deposition pages).[10]

In all, UST has produced documents from fewer than ten percent of its 448 sales representatives. Its entire sales representative production fills less than 1 box and is less than 1000 pages. Meanwhile, in response to our subpoenas three former UST representatives alone have produced an equal quantity of material. And Conwood sales representatives have produced over 450,000 pages.

We twice sought to resolve this matter without court intervention (Exhs. D & E). Both times, UST rebuffed our overtures (Exhs. F & G).

There is no good reason for UST's refusal to heed the Court's months-old rulings. Further production delay seriously prejudices Conwood's ability to conduct depositions and complete fact discovery by the Court's August 1 deadline. To remedy UST's persistent refusal to supply reasonable discovery of these materials, the Court should order Conwood full and unfettered review of UST division and sales representative files. The Court should further order UST barred from using in its defense the few documents it has selectively chosen to produce from sales representative and division files. See Rule 37(b)(2)(B).

---

[9]McCarthy Depo. at 45-46; Anundson Depo. at 36-37; id. at 41-44; id. at 103-04.

[10]Only rough draft transcripts are currently available. They include typographical errors.

16diii001561

A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts /BAP w/permission

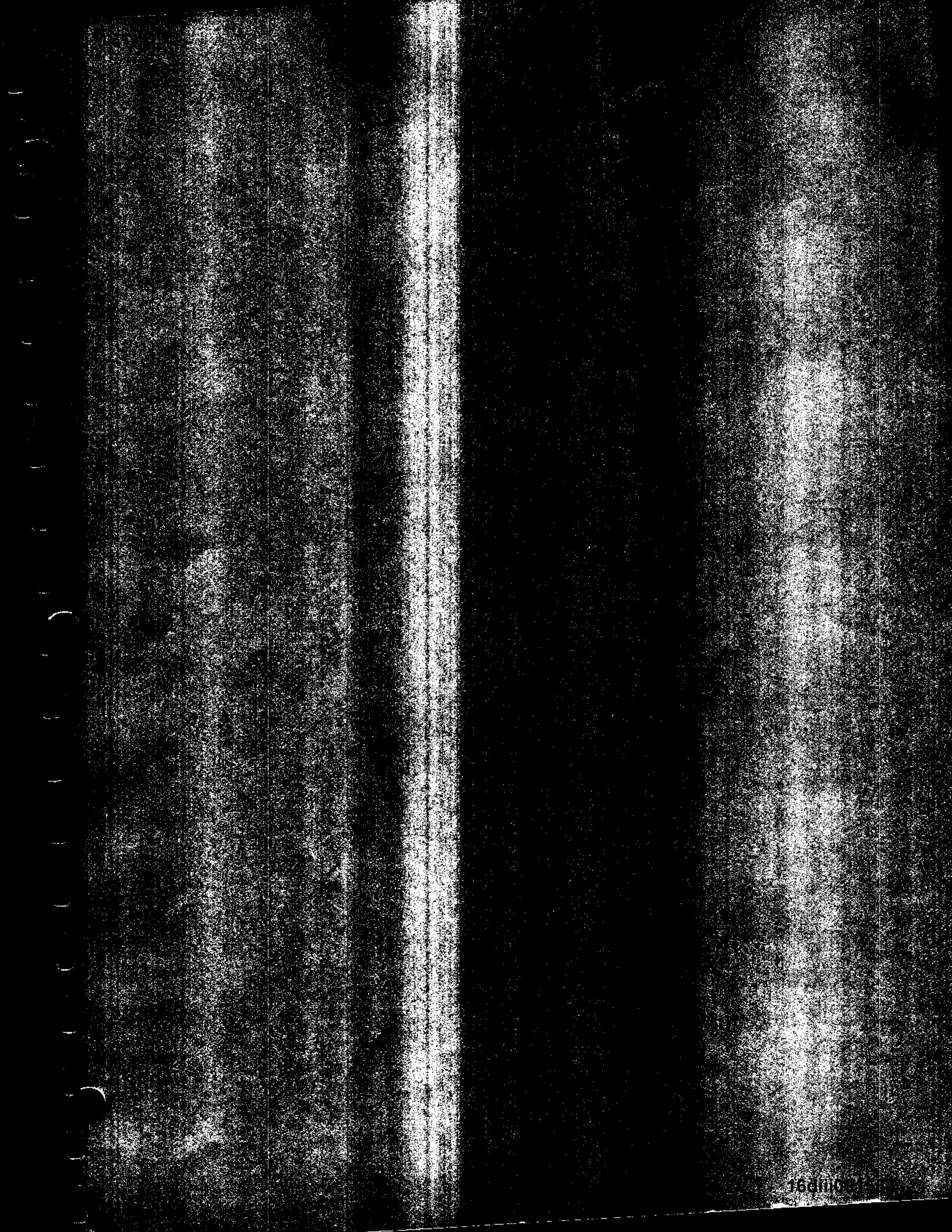
Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
FAX - (502) 443-4571

Neil M. Gorsuch /BAP w/ permission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

16diii001562



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of Plaintiffs' Motion to Compel, any opposition thereto, and for good cause shown, it is hereby ORDERED that:

1. Within 10 days defendants shall make their division office and sales representative files available for inspection by Conwood attorneys;

2. Pursuant to Rule 37(b)(2)(B) defendants shall not be permitted to introduce in evidence any documents generated by their division offices or sales representatives.

SO ORDERED.

Dated this ___ day of _____, 1999.

_____
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

I certify that on this 6 day of April, 1999, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Benjamin A. Powell

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. — PLAINTIFFS

vs. — NO. 5:98CV-108-R

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC. — DEFENDANTS

ORDER

This matter is before the Court on motions of plaintiff to compel production of discovery materials. (Docket Nos. 29 and 35). Defendant has responded, (Docket Nos. 31 and 36), and plaintiff has replied. (Docket Nos. 32 and 37). The matter was referred to the Magistrate Judge for decision pursuant to 28 U.S.C. § 636(b)(1)(A), (Docket No. 39), and a hearing was held on the motions on December 11, 1998.

I.

Plaintiffs have moved to compel a broader range of discovery from defendants. More particularly, plaintiffs seek to compel the production of weekly and other regular reports from sales representatives, most especially at the district office level, but also at the regional office level. These reports, in the view of Conwood, may well document the alleged exclusionary conduct of UST carried out, *inter alia*, through actions of UST sales representatives with respect to distribution racks in stores. UST argues that, if any conduct is to be attributable to the corporation, it must be centrally directed and not merely the unauthorized or spontaneous actions of sales representatives. This argument is unavailing. The Court is of the view that, even if it were true that for there to be liability such conduct must be centrally directed, there could well exist

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documentation at a "grassroots" level which would corroborate or document the implementation of a centrally planned policy. To say that the policy is directed from above does not mean it may not be documented from below.

In addition, UST also argues that, in addition to its contention that the documents are of "weak relevance," the collection of the data would be burdensome. However, it has not particularized this objection, and in view of the significant scope of the claims and the apparent gravity of the litigation, the Court finds no reason based on burden to deny the request. Accordingly,

IT IS HEREBY ORDERED that UST's objection to the production of documents from the district level is without merit and UST shall produce responsive documents from district and regional offices.

II.

The next issue taken up at the hearing involved disagreements over the format and other technical details with respect to CD-ROM's used by the plaintiffs to store its multiple boxes of documents. Based on the discussion on the record between counsel, it appears that the differences between the parties are being narrowed and may be eliminated. Accordingly, the Court defers any ruling on this issue.

III.

Defendant UST objects to the designation as confidential by plaintiff of the identity of all persons identified as knowledgeable pursuant to Rule 26. Plaintiff counters that, while it did not initially designate all these individuals as confidential, arguably improper contacts have been made by UST employees with respect to Conwood personnel. Accordingly, plaintiffs have designated the entire list as confidential in order to prevent further contacts.

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The purpose of the confidentiality order, however, is not to prevent witness tampering or improper contacts; the purpose of the confidentiality order is rather to protect trade secrets and other confidential material from disclosure. In the view of the Court, the use of the confidentiality designation to prospectively protect against improper contacts is not a proper use of the protective order. Accordingly,

IT IS HEREBY ORDERED that the motion of UST to remove the designation is **GRANTED**. However, the Court notes that, should there be any inappropriate contact with witnesses or potential witnesses, the Court would view that matter most seriously and would wish to review any details, where appropriate. The Court is not making any ruling at all as to whether improper contact has occurred, but reminding the parties it has the authority and the readiness to resolve such issues if it becomes necessary.

IT IS FURTHER ORDERED that all issues contained in the pending motions which are not decided in this order are reserved for future rulings.

Date: 12/16/98

JAMES D. MOYER
UNITED STATES DISTRICT COURT

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Counsel of Record

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EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. — PLAINTIFFS

vs. — NO. 5:98CV-108-R

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC. and UST INC. — DEFENDANTS

MEMORANDUM OPINION AND ORDER

The undersigned Magistrate Judge conducted a hearing on January 19, 1999, concerning the issue of whether the scope of search for documents by defendant UST should extend to documents retained by sales representatives. For the reasons set forth on the record, in more detail,

IT IS HEREBY ORDERED that defendant UST shall extend its search for responsive documents previously requested to the following categories of documents in the possession, custody or control of sales representatives:

1. Any notes, correspondence, memoranda, day-planner, calendar, journal, or other similar written summary of activities prepared by or retained by a sales representative which relates in any way to any of the alleged anti-competitive activities asserted by the plaintiff in paragraphs 22-31 of the complaint.

2. Any regularly maintained corporate documents, including so-called PAR's and any other related reports, memoranda, summaries, and the like, in the possession, custody or control of the sales representatives for calendar year 1995 or earlier, and responsive to the previously filed document requests.

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EXHIBIT C

3. The Magistrate Judge set out in some detail on the record the reasons for the ruling. Briefly, the scope of Rule 26 is broad, and the plaintiff is entitled to discovery documents which are either relevant or may lead to the discovery of relevant evidence. While the testimony at the hearing from the corporate representative was clear that sales representatives *should* send official documentation "up the chain" to the regional office, the representative did not deny that it was possible that additional documents were individually prepared and maintained by sales representatives. Given the allegations of the complaint, in which some or many of the anti-competitive activities alleged against UST are supposedly carried out by sales representative personnel, it would be an extraordinary result to deny discovery into the files of the sales representatives who are claimed to have implemented supposedly illegal policies.

The assertions of burden by the defendant are essentially conclusory. Defendant did no more than to argue that there are 448 sales representatives, a fact which is not disputed. Defendant presented no evidence concerning the amount of time which it would take to conduct such a search, and given defendant's position that few such documents are maintained, the task of compliance would not be unduly burdensome. Moreover, to the extent that diaries, journals, individual notes, and the like may document or reflect actions alleged by the plaintiff to be anti-competitive or illegal, such individual records would potentially be of considerable significance in plaintiff's attempt to prove its case.

In short, given the indisputable relevance of the documents, to the extent that they are found to exist, and the generalized assertions of burden, the motion to compel will be **GRANTED** to the limited extent set out above.

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The testimony of the corporate representative was uncontradicted that corporate documents are not retained indefinitely (they are "purged," in the language of one of the memoranda), and given the uncontradicted assertion of plaintiff's counsel that some sales representatives do keep corporate reports longer than the period of time for which the corporate document policy extends, it is not illogical to extend the search for relevant documents to a level of the company where documents no longer retained at the corporate level still may exist.

Finally, while merely pleading an antitrust case is not an authorization for discovery without limits, it is also apparent to the Magistrate Judge that the complaint is one brought by one established competitor against a larger, arguably dominant firm, and given the experience and resources of counsel on both sides of the dispute, and the scope of the case, it cannot be said that a thorough search for documents which may be of considerable significance should be limited to exclude a search at the sales representative level.

Date: 1/20/99

JAMES D. MOYER
UNITED STATES DISTRICT COURT

ENTERED
JAN 20 1999
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BY DEPUTY CLERK

Copies to:
Counsel of Record

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Deposition Transcript of Arlie Anundson at 21

* * * * *

09:36:40 17 Q. Do you keep a day book?

09:36:40 18 A. Yes.

Deposition Transcript of Arlie Anundson at 27

* * * * *

09:43:30 22 Q. Notes concerning your activities as

09:43:34 23 a sales representative for U.S. Tobacco,

24 correct?

Deposition Transcript of Arlie Anundson at 28

* * * * *

09:43:34 25 A. Yes.

09:43:36 1 Q. Notes concerning your meetings with

09:43:42 2 retailers and distributors amongst others; is

3 that correct?

09:43:42 4 A. No.

09:43:44 5 Q. Sir you have testified notes about

09:43:46 6 when you were to meet with people; is that

7 correct?

09:43:50 8 A. Yes.

09:43:52 9 Q. Some of those meetings included

09:43:56 10 meetings with retailers and distributors didn't

09:43:56 11 they?

09:43:56 12 MR. REED: Objection. Misstates

09:44:10 13 the testimony.

09:44:14 14 A. The notes may say I need to schedule an

09:44:18 15 appointment with a contribute tor a retail

09:44:18 16 chain.

09:44:20 17 Q. As well as notes about scheduling

09:44:22 18 meetings with your part-time sales
09:44:24 19 representatives, correct?
09:44:24 20 A. Yes.
09:44:28 21 Q. And perhaps strike that and any
09:44:32 22 notes regarding the need to schedule meetings
09:44:34 23 with your division manager or other
09:44:36 24 supervisors; isn't that correct?
09:44:36 25 A. No.

* * * * *

09:44:36 1 Q. Why not?
09:44:40 2 A. They schedule meetings with me.
09:44:42 3 Q. Wouldn't you reflect that in your
09:44:44 4 day planner?
09:44:50 5 A. Possibly.
09:44:54 6 Q. And did any layer ever review your
09:44:54 7 day planner?
09:44:56 8 A. No.
09:44:58 9 Q. So, you just made the unilateral
09:45:02 10 judgment that those entries in your 1999 day
09:45:06 11 planner were not relevant to this lawsuit
09:45:06 12 didn't?
09:45:06 13 MR. REED: Objection.
09:45:10 14 Q. Go ahead and answer it.
09:45:10 15 A. Yes.

* * * * *

09:45:38 20 Q. How about a voice mail account.
09:45:40 21 Do you have a voice mail account sir?

09:45:42 22 A. Excuse me. Yes.

09:45:42 23 Q. Thank you.

09:45:44 24 Do you use that to communicate with

09:45:46 25 your division manager?

Deposition Transcript of Arlie Anundson at 30

* * * * *

09:45:48 1 A. Yes

Deposition Transcript of Arlie Anundson at 31

* * * * *

09:47:24 7 Q. Do you exchange voice mail messages

09:47:26 8 with other sales representatives?

09:47:28 9 A. Yes.

* * * * *

09:48:06 21 Q. Do you exchange voice mail messages

09:48:06 22 with retailers?

09:48:08 23 A. No exchange.

09:48:12 24 Q. Do you ever receive voice mail

09:48:12 25 messages from them?

Deposition Transcript of Arlie Anundson at 32

* * * * *

09:48:14 1 A. On occasion.

* * * * *

09:48:32 8 Q. How about distributors or

09:48:38 9 wholesalers do you ever receive voice mail

09:48:38 10 messages from them?

09:48:38 11 A. Occasionally.

* * * * *

09:48:56 17 Q. How about other UST personnel other

09:48:58 18 than your division manager do you ever receive

09:49:04 20 Did you ever receive voice mail
09:49:06 21 messages from persons at U.S. Tobacco other
09:49:08 22 than your division manager or other sales
09:49:08 23 represent tivity?
09:49:08 24 A. Occasion.
09:49:10 25 Q. I who are those people who leave

* * * * *

09:49:14 1 you voice mail messages?
09:49:24 2 A. Those would come from the corporate
09:49:24 3 office

* * * * *

09:50:16 16 A. Not that I can recall at this time.
09:50:18 17 Q. Did you ever receive voice mail
09:50:18 18 messages from your department manager?
09:50:20 19 A. Yes.

* * * * *

09:50:34 23 Q. How about your regional manager did
09:50:40 24 you ever receive voice mail messages from him?
09:50:40 25 A. Very rarely.

* * * * *

09:50:44 1 Q. But you do receive voice mail
09:50:44 2 messages from him; is that correct?
09:50:46 3 A. On a rare occasion.
09:50:48 4 Q. How about chain account personnel
09:50:52 5 do you ever receive voice mail mess yes, sir
09:50:56 6 from chain account personnel?
09:50:58 7 Yes occasionally.

09:53:02 Q. Mr. Anundson do you relay reports
09:53:04 to your division manager ever?
09:53:06 A. Yes.
09:53:10 Q. Is there a title associated these
09:53:10 reports?
09:53:12 A. Yes.
09:53:12 Q. What is that?
09:53:26 A. Send him my daily recall reports.
09:53:30 Q. How frequently do you send him your
09:53:30 daily call reports?
09:53:32 A. Once a week.

09:54:20 Q. Do you maintain copies of your
09:54:22 daily call reports?
09:54:22 A. Yes.
09:54:24 Q. And for what period of time do you
09:54:26 retain your daily call reports?
09:54:28 A. Approximately one month.
09:54:30 Q. So, would you have presently March
09:54:36 1999 daily call reports more or less; is that
correct?
09:54:40 A. That would be close.
09:54:44 Q. Today being April the seven
09:54:48 right. Has anyone asked you to review those
09:54:52 daily call reports for possible production in
09:54:54 this case?

09:54:56 16 A. No.

09:55:04 17 Q. Have you forwarded them to anybody

09:55:06 18 for possible production in this case?

09:55:06 19 A. No.

Deposition Transcript of Arlie Anundson at 41

* * * * *

09:57:42 2 Q. And you say you forwarded these

09:57:46 3 daily call interrogatories your division

09:57:48 4 manager is that right?

09:57:50 5 A. Yes.

09:57:52 6 Q. And do you that on a weekly basis?

09:57:52 7 A. Yes.

Deposition Transcript of Arlie Anundson at 42

* * * * *

09:58:40 1 A. Yes. Weekly experience report.

09:58:40 2 Q. Other than your weekly expense

09:58:44 3 report is there any other reports you forward

09:58:44 4 to your division manager?

09:58:50 5 A. Yes. There is a weekly call recap

09:58:52 6 sheet.

09:58:52 7 Q. What is that?

09:58:56 8 A. That details the number of calls I

09:58:58 9 made per day.

Deposition Transcript of Arlie Anundson at 44

* * * * *

10:01:04 7 Q. And these reports are produced on a

10:01:06 8 weekly basis; is that correct?

10:01:06 9 A. Yes.

10:01:10 10 Q. And do you maintain them in your

10:01:10 11 possession?

10:01:10 12 A. No.

10:01:14 13 Q. You only forward them to your

10:01:14 14 division office; is that correct?

10:01:16 15 A. Yes.

10:01:18 16 Q. And do you so on a weekly basis,

17 correct?

10:01:18 18 A. Yes.

* * * * *

10:01:50 4 Q. Have you ever attended draining

10:01:54 5 courses?

10:01:54 6 A. Yes.

10:01:58 7 Q. What training courses are those?

10:02:06 8 A. Several years ago we had a program

10:02:08 9 called act.

10:02:18 10 Q. Was there two parts to it by any

10:02:20 11 chance. ACT 1 and ACT 2?

10:02:20 12 A. Yes.

10:02:22 13 Q. Did you attend both?

10:02:22 14 A. Yes.

10:02:24 15 Q. Did you receive any materials in

10:02:28 16 conjunction with your attendance?

10:02:30 17 A. Yes.

10:02:34 18 Q. And approximately how much material

10:02:36 19 did you receive at ACT 1?

10:02:40 20 A. I don't recall.

10:02:42 21 Q. Was it a notebook?

10:02:44 22 A. Yes.

Deposition Transcript of Arlie Anundson at 46

* * * * *

10:03:06 7 Q. And did the materials you receive
10:03:10 8 at the ACT 2 training session were they
10:03:14 9 approximately of the same character of the once
10:03:16 10 you received in ACT 1?
10:03:16 11 A. I don't recall.
10:03:20 12 Q. You did receive materials at ACT 2
10:03:22 13 training course though?
10:03:22 14 A. I believe so.

Deposition Transcript of Arlie Anundson at 47

* * * * *

10:04:08 4 Q. Do you have any other recollection
10:04:12 5 about what the materials consisted of?
10:04:16 6 A. It was just, basically, about how
10:04:18 7 to be a better sales rep.

Deposition Transcript of Arlie Anundson at 48

* * * * *

10:05:46 13 Q. Have you attended, in fact, two
10:05:52 14 national sales neting one in 1998 and one in
10:05:52 15 1997?
10:05:52 16 A. Yes.
10:05:56 17 Q. Did you receive materials at either
18 of those?
10:05:56 19 A. Yes.

Deposition Transcript of Arlie Anundson at 50

* * * * *

10:08:28 18 Q. Did you receive any materials at

10:08:30 19 the 1998 national sales meeting?

10:08:30 20 A. Yes.

10:08:32 21 Q. What did you receive?

10:08:34 22 A. Pretty much the same thing that I

10:08:34 23 recall.

10:08:38 24 Q. And did the regional marketing plan

10:08:40 25 was it about the same volume of materials

* * * * *

10:08:42 1 3/eight of an inch?

10:08:42 2 A. I believe so.

10:08:46 3 Q. And what did you do with those

10:08:46 4 materials?

10:08:48 5 A. I still have those.

10:08:50 6 Q. Did anyone ask you to produce those

10:08:54 7 in connection with this litigation?

10:08:54 8 A. No.

10:08:56 9 Q. Did anyone review those materials

10:08:58 10 in connection with this litigation?

10:09:02 11 A. Not that I know of.

* * * * *

10:09:30 21 Q. Did you receive materials at these

10:09:32 22 regional sales meetings?

10:09:34 23 A. I am sure we did.

* * * * *

10:10:40 3 Q. Okay. Let's say how about prior to

10:10:44 4 195 how frequently did you receive a department
10:10:44 5 meetings?
10:10:44 6 A. An.
10:10:46 7 Q. I what material did you receive in
10:10:48 8 file at these meetings?
10:10:48 9 A. I don't recall.
10:10:52 10 Q. Did you receive a department
10:10:52 11 marketing plan for instance,?
10:10:56 12 A. I don't know.
10:11:04 13 Q. Did you receive an agenda for those
10:11:04 14 meetings?
10:11:06 15 A. I assume we did.
10:11:06 16 Q. Any other materials that you
10:11:08 17 received at those meetings?
10:11:12 18 A. I don't recall what they would have
10:11:14 19 been.
10:11:16 20 Q. Do you maintain any documents from
10:11:16 21 those meetings?
10:11:18 22 A. No do I not.
10:11:20 23 Q. Any documents you received in those
10:11:22 24 meetings have come from the department office;
25 is that correct?

* * * * *

10:11:24 1 A. Assume.
10:11:26 2 MR. GORSUCH: John we have received
10:11:28 3 no documents concerning any of Mr. Anundson
10:11:30 4 department meetings and we ask that they be

10:11:34 produce used we will take it under advisement.

10:11:36 Q. How about division sales meetings

10:11:38 did you ever ever attend division sales

10:11:40 meetings?

10:11:40 A. Occasionally.

* * * * *

10:11:56 Q. Do you receive any materials at

10:11:58 these meetings?

10:12:06 A. That's usually when we get the

10:12:08 promotional handouts.

* * * * *

10:12:14 A. Promotions plan of work.

10:12:14 Q. Anything else?

10:12:28 A. There maybe other handouts if the

10:12:30 division manager has something to hand out.

* * * * *

10:12:32 Q. So, would you get materials

10:12:34 concerning any promotions that are running over

10:12:38 that quarter or the next several months is that

10:12:38 the idea?

10:12:38 A. Yes.

10:12:42 Q. And anything -- and you may have

10:12:44 received other materials as well you just don't

10:12:48 remember what they are. Is that your

10:12:48 testimony?

10:12:54 A. If it is pertinent then he would

10:12:54 hand that out.

10:12:56 12 Q. Do you retain any of these
10:12:58 13 materials?
10:13:00 14 A. Only the promotional plan of work.
10:13:02 15 Q. Have you produced any of these in
10:13:04 16 conjunction with this litigation?
10:13:06 17 A. No.

Deposition Transcript of Arlie Anundson at 95

* * * * *

11:06:56 13 Q. Do you retain any documents
11:06:56 14 concerning the A.I.M. Program?
11:06:58 15 A. No.
11:07:02 16 Q. Where did you receive these
11:07:04 17 documents from?
11:07:12 18 A. The division manager I believe.
11:07:14 19 MR. GORSUCH: We have received none
11:07:18 20 of Mr. Anundson's AIM documents or from other
11:07:22 21 places I ask for it to be produced.

Deposition Transcript of Arlie Anundson at 97

* * * * *

11:08:58 6 Q. Have you ever filled out a form
11:09:00 7 either distinct credit from a store or
11:09:02 8 threatening to do so?
11:09:06 9 A. Yes.

* * * * *

11:09:50 22 Q. When you fill out one of these
11:09:54 23 forms, do you give a copy to the retailer?
11:09:54 24 A. Yes.
11:09:58 25 Q. Do you keep a copy for yourself?

* * * * *

11:09:58 A. Yes.

11:10:00 Q. Do you send a copy to your division manager?

11:10:00 A. No.

11:10:04 Q. Do you send a copy to anyone other than the retailer?

11:10:04 A. No.

11:10:08 Q. So, no one at U.S. Tobacco other than you knows about this issue is that your testimony?

11:10:12 A. Yes.

11:10:18 Q. Do you have any of these forms in your possession presently?

11:10:22 A. Yes.

11:10:26 Q. Did anyone review them for possible production in this case?

11:10:32 A. They are blank.

11:10:36 Q. Sir I'm asking you about ones that you filled out?

11:10:36 A. No.

* * * * *

11:15:16 Q. Do you keep anything else in your van?

11:15:18 A. Just my marketing book.

11:15:26 Q. How big is that?

11:15:28 A. A loose leave binder.

11:15:30

11:15:32 8 Q. The size of this note book here on
11:15:32 9 the table?
11:15:34 10 A. Yes.
11:15:36 11 Q. Can you hold that up so weak have
11:15:38 12 that reflected on the record?
11:15:40 13 A. Marketing.
11:15:44 14 Q. Okay.. How thick is that would you
11:15:46 15 approximate for the record?
11:15:48 16 MR. REED: Are you referring to the
11:15:50 17 one here or the one in his van.
11:15:52 18 MR. GORSUCH: The one in his van?
11:15:54 19 A. Probably about as full as that one.
11:15:58 20 Q. How thick is that in inches would
11:15:58 21 you say?
11:16:00 22 A. Oh an inch and a half.
11:16:04 23 Q. Has anyone ever reviewed either
11:16:06 24 that note book are your file in your van for
11:16:10 25 production -- possible production of materials

11:16:10 1 in this case?
11:16:10 2 A. No.
11:16:14 3 Q. Fully other materials you maintain
11:16:16 4 in your van or home?
11:16:16 5 A. No.

28

09:47:06 20 Q. Do you use a retail transaction
09:47:06 21 form?
09:47:08 22 A. Rarely.
09:47:10 23 Q. When would you use a retail
09:47:10 24 transaction form?
09:47:14 25 A. I would use a retail transaction

29

09:47:18 1 form in a case where I would have to sell the
09:47:24 2 store some smokeless tobacco.
09:47:30 3 Q. Is that the only case that you use
09:47:32 4 a retail transaction form?
09:47:34 5 MS. MARINER: Objection. He says
09:47:40 6 he rarely uses a retail transaction form.
09:47:42 7 A. Yes in my area, yes.

Deposition Transcript of Michael Beyerlein at 28-29

* * * * *

36

10:00:40 11 Q. Do you keep a day book or a
10:00:42 12 calendar of your appointments?
10:00:48 13 A. I use my calendar as my regular
10:01:02 14 monthly calendar as my appointment schedule.

Deposition Transcript of Michael Beyerlein at 36

* * * * *

102

12:20:30 8 Q. What types of objectives were set
12:20:30 9 under the A.I.M. program?
12:20:40 10 A. The ones I can remember were the
12:20:48 11 number of counter display units placed at
12:20:56 12 retail with store management approval, point of
12:21:00 13 sale placed at retail outlets with store
12:21:18 14 management approval. Adult sampling time.

12:21:24 15 And I daily call average.

Deposition Transcript of Michael Beyerlein at 102

* * * * *

39

09:43:44 17 Q. But do you have a 1999 day book; is
18 that right?
09:43:46 19 A. Just the current month only.
09:43:48 20 Q. We ask that that be produced?
09:43:50 21 MS. MARINER: He we will take it
09:43:52 22 under advisement.

Deposition Transcript of David R. Lund at 39

* * * * *

41

09:45:54 16 Q. What do you do with those
09:45:58 17 noncompliance reports once you have written one
09:45:58 18 up?
09:46:06 19 A. I forward them to the person in
09:46:08 20 charge -- or the chain accounts representative
09:46:14 21 and the division manager.
09:46:18 22 Q. Do you keep a copy yourself?
09:46:18 23 A. I do.
09:46:22 24 MR. GORSUCH: We have received no
09:46:24 25 noncompliance reports from either Mr. Lund or

42

09:46:28 1 his division manager. We ask that those be
09:46:32 2 produced used we'll take it under advisement
09:46:32 3 counsel.

Deposition Transcript of David R. Lund at 41-42

* * * * *

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09:55:02 17 Q. , in fact, it was a binder of
09:55:04 18 materials that you received at the national
09:55:06 19 sales meeting; is that right?

09:55:08 20 A. Yes, it was something like a
09:55:08 21 binder.
09:55:10 22 Q. It was in a binder was it not sir?
09:55:12 23 MS. MARINER: Objection. Asked and
09:55:12 24 answered?

* * * * *

52

09:58:38 20 Q. Do you recall receiving materials
09:58:40 21 at the second national sales meeting?
09:58:42 22 A. Yes.

Deposition Transcript of David R. Lund at 49, 52

* * * * *

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10:22:20 11 Q. How did you know what your
10:22:22 12 objectives were under the A.I.M. program?
10:22:34 13 A. There had to be a communication
10:22:36 14 prepare, yes.

* * * * *

10:22:48 21 Q. But to the best of your
10:22:50 22 recollection were there A.I.M. program
10:22:52 23 documents?
10:22:54 24 A. To the best much my recollection.
10:22:58 25 Q. And did you receive periodic

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10:23:18 5 Q. How did you know what points you
10:23:22 6 had and what success you had achieved under the
10:23:22 7 A.I.M. program?
10:23:38 8 A. Towards the end of the year you
10:23:42 9 would have an update I am thinking.
10:23:42 10 Q. A written update?
10:23:46 11 A. I think so. , but I'm not positive.

* * * * *

10:24:02 19 Q. What years did the A.I.M. program
10:24:04 20 was it in effect?
10:24:18 21 A. I am not real sure. I am not real
10:24:36 22 sure the years, but I do believe, but I do
10:24:42 23 believe 1992 to 1994. 19 is '91 to 1994. It
10:24:44 24 could have been 12 or three years. Right in
10:24:44 25 there.

65

10:24:46 1 MR. GORSUCH: Counsel we have
10:24:50 2 received no documents either pertaining to this
10:24:52 3 witness or any other sales representative
10:24:56 4 activities under compliance name points we ask
10:25:00 5 that those documents be produced. We will take
10:25:02 6 it under advisement counsel.

Deposition Transcript of David R. Lund at 63-65

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67

10:28:06 7 Q. Fair enough. Did you receive any
10:28:08 8 materials at these training courses?
10:28:14 9 A. I am sure we did.
10:28:18 10 Q. And did these materials pertain to
10:28:20 11 your activities as a sales representative?
10:28:24 12 A. I am sure it did.
10:28:24 13 Q. I?
10:28:26 14 MR. GORSUCH: I would ask that these
10:28:30 15 be produced as well we have received anything
10:28:32 16 from the act one or act two programs from U.S.
17 Tobacco.
10:28:34 18 MS. MARINER: Counsel we'll take it

10:28:36 19 under advisement.

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68

10:29:44 14 Q. But on a weekly basis let's say
10:29:46 15 approximately how many voice mail messages
10:29:48 16 would you leave for your superiors?
10:29:50 17 MS. MARINER: Same objection.
10:29:52 18 A. It varies. It varies.
10:29:54 19 Q. Can you give me a low and a high?
10:30:12 20 A. Six or seven, eight. Six to 10 a
21 week.
10:30:14 22 Q. Six to 10 a week?
10:30:14 23 A. Yeah.
10:30:16 24 Q. To whom are these voice mails
10:30:18 25 directed?

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10:30:22 1 A. They are directed to clay u len
10:30:24 2 hag.
10:30:26 3 Q. That is your division manager?
10:30:26 4 A. Right.
10:30:30 5 Q. Did you ever leave voice mail
10:30:32 6 messages for anyone else in the company?
10:30:40 7 A. Sometimes.
10:30:42 8 Q. Who would that be?
10:30:50 9 A. It could be the department
10:31:06 10 manager. Chain manager, that would be about
10:31:08 11 it.
10:31:10 12 Q. How frequently would you say you
10:31:12 13 leave messages for your department manager?

10:31:14 14 A. Once a month.

10:31:16 15 Q. And how about for your chain

10:31:18 16 manager?

10:31:22 17 A. Similar to less. Once a month.

10:31:24 18 Three, five weeks.

10:31:24 19 Q.

10:31:30 20 MR. GORSUCH: None of these voice

10:31:32 21 mail messages have been produced. We ask that

10:31:34 22 they be produced.

10:31:38 23 MS. MARINER: We will take it under

10:31:38 24 advisement counsel.

Deposition Transcript of David R. Lund at 68-69

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10:38:58 2 Q. Do you use that computer for your

10:38:58 3 business purposes?

10:39:00 4 A. No.

10:39:02 5 Q. You have never written a letter?

10:39:04 6 A. I will take it back. I have

10:39:06 7 written a letter on it.

10:39:08 8 Q. You have written?

10:39:10 9 A. And it is an old computer.

10:39:12 10 Q. Have you written just one letter on

10:39:14 11 it or have you written more than a letter on

10:39:16 12 it?

10:39:16 13 A. I have written more than a letter

10:39:18 14 on it.

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10:39:52 9 Q. To whom are these letters directed

10:39:52 10 sir?

10:39:58 11 A. They would be to clay.

10:40:00 12 Q. Your division manager?

10:40:00 13 A. Yes.

10:40:18 14 Q. Okay. Who else.

10:40:22 15 A. Tom Kemper the department manager

10:40:24 16 and chain accounts representative.

10:40:26 17 Q. Is has anyone searched your

10:40:28 18 computer for responsive materials in this case?

10:40:32 19 MS. MARINER: I am going to object

10:40:34 20 to that as vague.

10:40:36 21 Q. Let me ask you this, has anyone

10:40:38 22 asked to you produce or to look for any

10:40:42 23 responsive documents on your computer there

10:40:42 24 this case?

10:40:44 25 MS. MARINER: Objection. Same

10:40:44 1 socks.

10:40:46 2 Q. Go ahead and answer it?

10:40:46 3 A. No.

10:40:48 4 Q. Would you be willing to do so if

10:40:50 5 you were asked?

10:41:00 6 A. I have nothing to hide.

10:41:02 7 MR. GROSUCH: I ask that that

10:41:06 8 computer be searched and produced pursuant to

10:41:08 9 the courts orders.

10:41:10 10 MS. MARINER: We will take it under

10:41:12 11 advisement counsel.

* * * * *

36

10:14:20 16 Q. A port from the PAR scanner do you
10:14:22 17 fill in any other documents?
10:14:26 18 A. It all depends on what went on in
10:14:26 19 the store.
10:14:30 20 Q. How about a retail transaction
10:14:32 21 form?
10:14:36 22 A. If a retail transaction form needs
10:14:38 23 to be filled out, yes.
10:14:40 24 Q. What would be the circumstances
10:14:42 25 under which a retail transaction form would

37

10:14:44 1 have to be filled out?
10:14:58 2 A. Well, you might have product
10:15:02 3 exchange. You could have a bill through.
10:15:10 4 You could have a count ter payment.

Deposition Transcript of James Joseph McCarthy at 36-37

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44

10:24:40 4 Q. Well, I asked previously if you do
10:24:44 5 any daily and weekly reports and I think you
10:24:46 6 testified that you didn't apart from the PAR
10:24:50 7 scanner sheet how do you communicate with Mr.
10:24:50 8 Rhodes?
10:24:50 9 A. Letter.
10:24:54 10 Q. Apart from the PAR scanner sheets
10:24:54 11 and letters anything else?
10:24:56 12 A. Voice mail.

Deposition Transcript of James Joseph McCarthy at 44

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45

10:26:56 24 Q. Have you ever heard of the term
10:26:58 25 monthly competitive reports?

46

10:26:58 1 A. Yes.
10:27:00 2 Q. What are those?
10:27:06 3 A. Those are reports dealing with
10:27:08 4 competitive activity.
10:27:10 5 Q. Who prepares the monthly
10:27:12 6 competitive reports?
10:27:16 7 A. I don't know how it is handled.
10:27:18 8 All I know is I take my competitive activity
10:27:22 9 and I forward it up through the proper channel
10:27:24 10 he is. What happened there I have no idea.
10:27:28 11 Q. How do you forward your competitive
10:27:32 12 activity up through the proper channels?
10:27:34 13 A. Put it in an envelope and mail
10:27:36 14 it.

Deposition Transcript of James Joseph McCarthy at 45-46

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50

10:41:46 4 Q. Have you ever kept a day book?
10:41:48 5 A. Yes, I have.
10:41:50 6 Q. Do you currently keep a day book?
10:41:52 7 A. Yes, I do.

* * * * *

51

10:43:38 16 Q. Apart from the documents you just
10:43:42 17 described, did you comply any other documents
10:43:44 18 for production in this litigation?
10:43:46 19 A. No, I didn't.
10:43:48 20 Q. So, it is fair to say you didn't
10:43:52 21 provide any retail transactions forms for
10:43:52 22 production?

10:43:56 23 A. There may have been I believe there
10:44:00 24 was some retail transaction forms in the
10:44:04 25 competitive file that was sent up.

52

10:44:16 3 Q. Do you have any other documents
10:44:20 4 either in your car or at your house in your
10:44:22 5 possession that was not gathered together for
10:44:24 6 production in the litigation?
10:44:24 7 A. Yes.
10:44:26 8 Q. Can you describe those documents
10:44:26 9 please?
10:44:34 10 A. They are documents -- they would
10:45:00 11 include maybe my past appraisal. Maybe chain
10:45:16 12 a cone authorization letter, files with chain
10:45:18 13 head quarter calls.
10:45:18 14 Q. Anything else?
10:45:24 15 A. From what I can tell you at the top
10:45:26 16 of my head that would be pretty much it.
10:45:30 17 Q. How about your day book, did you
10:45:32 18 copy your day books and send them up?
10:45:32 19 A. No.
10:45:36 20 Q. Is there any correspondence in your
10:45:38 21 possession at your house or in your car that
10:45:42 22 you did not copy and send up?
10:45:42 23 A. Yes.
10:45:44 24 Q. Can you describe that?
10:45:50 25 A. It would be material that I

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10:45:54 1 received that originateed from other people
10:45:58 2 within U.S. tobacco. Or information that
10:46:04 3 would be in division manager bill Rhodes files.

10:46:10 4 Q. Do you have any manuals UST manuals
10:46:12 5 in your possession?
10:46:12 6 A. At home.
10:46:14 7 Q. Correct.
10:46:14 8 A. Yes.
10:46:18 9 Q. Those were not provided for
10:46:20 10 production in the litigation?
10:46:20 11 A. By me?
10:46:22 12 Q. Correct.
10:46:22 13 A. Correct.

Deposition Transcript of James Joseph McCarthy at 50-53

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14:19:30 13 Q. By properly display does that mean
14:19:34 14 you have to have the UST product displayed in a
14:19:36 15 prominent location?
14:19:38 16 A. Not necessarily.
14:19:38 17 Q. What does it mean?
14:19:42 18 A. What does it mean is every brand
14:19:48 19 that they order that they have, in their store
14:19:54 20 in their inventory should been properly
14:20:00 21 identified in the slot. What I mean by that
14:20:06 22 is they can't expect to get returns if they
14:20:10 23 have Skoal band mint and physical bond winter
14:20:14 24 green in the same spots because it is
14:20:18 25 impossible for the vendor oh heck he can.

* * * * *

147

14:21:04 22 Q. What is the procedure if a store is
14:21:14 23 not (COMPLYING) do you fill out a form?
14:21:16 24 A. Eventually yes. My personal
14:21:20 25 experience is that I work with the proper

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14:21:24 1 persons nel. I say way look this is the
14:21:30 2 situation. I back it up with what I am
14:21:34 3 seeing. If I am going to tell you that they
14:21:38 4 are not ordering properly. I am going to tell
14:21:40 5 you why they are not ordering properly and what
14:21:44 6 happened. I am going to know that before I
14:21:46 7 tell you so when you do ask me I can give you
14:21:50 8 an answer. I am going to work with you on
14:21:54 9 this and it may be coming back to the store
14:21:56 10 next week and taking the product out instead of
14:22:00 11 you placing an order and issuing a credit
14:22:04 12 then. I'm going to do everything. If the
14:22:06 13 mem continues here is your warning. If the
14:22:08 14 problem continues here is your warning. If
14:22:10 15 the problem continues you are done. No credit
14:22:12 16 from me.
14:22:14 17 Q. And that's the point when you fill
14:22:16 18 out the none come my answer form?
14:22:20 19 A. Actually I first give a verbal
14:22:22 20 warning and then in possible two written
14:22:24 21 warnings.

Deposition Transcript of James Joseph McCarthy at 146-48

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15:41:32 4 Q. These were the only retail
15:41:38 5 transaction forms from your documents set that
15:41:42 6 were produced. To the best of your knowledge
15:41:44 7 are there any other retail transaction forms in
15:41:48 8 existence from your files?
15:41:48 9 A. Sure.
15:41:50 10 Q. Where are they?

15:41:52 11 A. I had -- they are hat home.

16:22:24 6 Q. Do you still have day planners your
16:22:26 7 possession Mr. McCarthy?
16:22:28 8 A. No I don't. Just the current
16:22:28 9 year.
16:22:30 10 Q. What happened to the other ones?
16:22:30 11 A. I though them out.
16:22:32 12 Q. You got the ones for the current
16:22:34 13 year, correct?
16:22:38 14 A. Correct. 1999.
16:22:40 15 Q. So, do you have the one for 1998?
16:22:42 16 A. No, I don't.
16:22:42 17 MR. BENZ: Still would I ask that
16:22:44 18 the day planner for 1999 be produced.
16:22:46 19 MR. REED: I take it under
16:22:46 20 advisement.

26

09:53:32 24 Q. Do you use a retail transaction

09:53:36 25 form in your duties as a sales representative?

27

09:53:36 1 A. Yes.

09:53:40 2 Q. When did you use a retail

09:53:40 3 transaction form?

09:53:48 4 A. When I sale a customer a role of a

09:53:54 5 product. Or transactions made in the store.

Deposition Transcript of Byron Parish at 26-27

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28

09:55:32 4 Q. Are you familiar with a

09:55:32 5 noncompliance form?

09:55:34 6 A. Yes.

09:55:36 7 Q. What is a noncompliance form?

09:55:50 8 A. It is a form used to control

09:55:52 9 damaged goods.

09:56:00 10 Q. How do you use the noncompliance

09:56:04 11 form to control damaged goods?

09:56:10 12 A. As I would use it in my work?

09:56:14 13 Because I don't use it.

09:56:18 14 Q. Have you ever filled out a none

09:56:20 15 come my answer form on a retail account?

09:56:20 16 A. Yes.

09:56:22 17 Q. Why did you fill out the

09:56:24 18 noncompliance form?

09:56:28 19 A. After talking with store personnel

09:56:32 20 about a damage mem and they did not do anything

09:56:36 21 to correct it. They forced me to sign a

09:56:40 22 noncompliance form.

Deposition Transcript of Byron Parish at 28

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86

12:01:18 21 Q. So, if you see a competitive

12:01:22 22 vending system in an E-Z Mart you remove that

12:01:24 23 competitive easy system?

12:01:26 24 A. I show the management the picture

12:01:30 25 and they decide what to do with the vendor.

87

12:01:34 1 Q. What if they decide to do nothing

12:01:34 2 with the vendor?

12:01:38 3 A. I try to show them who the

12:01:42 4 authorization kind by. And it is from their

12:01:52 5 own chain. And if they don't go by the

12:01:56 6 assigned Plan-o-gram then I can't force them to

12:01:56 7 do anything.

12:02:00 8 Q. Do you bring it to the attention of

12:02:02 9 your division manager?

12:02:02 10 A. Sometimes.

12:02:06 11 Q. How do you bring it to the

12:02:08 12 attention of your division manager?

12:02:14 13 A. Sometimes I may voice mail him.

Deposition Transcript of Byron Parish at 86-87

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09:37:54 23 Q. What happened to the materials from
09:37:56 24 these meetings over the years that you
09:37:58 25 accumulated?

09:38:00 1 A. I don't act late materials.
09:38:04 2 Materials that I have gotten from years passed
09:38:06 3 I don't keep it.
09:38:10 4 Q. These were generateed by your --
09:38:14 5 well by whom were they generated the materials?
09:38:16 6 A. I really couldn't tell you who
09:38:16 7 generated them.
09:38:20 8 Q. Let me ask you where they came from
09:38:22 9 then. In the case of your division meetings
09:38:24 10 they did come from your division mer?
09:38:26 11 A. In the case ever a division
09:38:30 12 mountain, for example, yes.
09:38:30 13 Q. So in a department meeting they
09:38:32 14 come from your department manager right?
09:38:34 15 A. I don't know who puts out the
09:38:36 16 material. They are there on the table to pick
09:38:40 17 up or pass out on the table. It may be
09:38:42 18 generated by the department manager or his
09:38:44 19 secretary or whoever.
09:38:46 20 Q. It comes out of the department's
09:38:48 21 office though isn't that right?
09:38:48 22 A. I believe so.
09:38:50 23 Q. And in the case of the regional

09:38:52 24 meetings it comes out of regional offers
09:38:54 25 doesn't it?

36

09:38:54 1 A. I believe so.
09:38:58 2 Q. Again, we have received none of
09:39:02 3 these materials and I would ask that they been
09:39:02 4 produced?
09:39:02 5 MR. REED: I understand the
09:39:08 6 request.
09:39:10 7 MR. GORSUCH: Does that mean you
09:39:14 8 would take it under advisement to produce it or
09:39:16 9 you merely understand the question.
09:39:18 10 MR. REED: Neil we will always
09:39:24 11 listen to reasonable requests. We will take
09:39:26 12 it under advisement.

Deposition Transcript of Gregory A. Zahrt at 34-36

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61

10:25:42 12 Q. Let me ask you is do you keep a
10:25:46 13 calendar or diary or day book?
10:25:48 14 A. I keep a day planer.
10:25:50 15 Q. And do you keep that day planner
10:25:52 16 can you use it in conjunction with your
10:25:54 17 business activities as a sales representative?
10:25:56 18 A. Yes, I do.
10:25:58 19 MR. GORSUCH: I ask that that be
10:26:00 20 produced we have not seen that either.
10:26:02 21 MR. REED: I understand the
10:26:04 22 question. Request. We take it under
10:26:06 23 advisement.

10:26:54 Q. Do you maintain or keep Retail Transaction Forms?
10:26:56 A. I don't keep any.
10:26:58 Q. Is what do you do with them?
10:27:06 A. In some cases I send them onto my division manager very few. And my copy of the retail transaction I through away.
10:27:18 Q. And there is a copy for you, there is a copy for the retailer and a copy for you your divsion manager; is that right?
10:27:26 A. There is on the form, but is it not required to send them?
10:27:32 Q. But do you send some into your division manager isn't that right?
10:27:38 A. I sent some in the past I believe.
10:27:40 Q. How many would you say you would

10:27:42 send in a year or a month or any period of time?
10:27:46 A. Well, maybe five, 10 a year.
10:27:52 MR. GORSUCH: We asked that these be produced we have not seen any retail transaction formation for Mr. Zahrt.
10:28:00 MR. REED: Take it under advisement.
10:28:06 Q. Is how about noncompliance reports, do you keep copies of those?
10:28:14 A. I have kept copies of them in the

10:28:18 12 past. I may even have a couple of copies now.
10:28:22 13 Q. And do you also forward copies of
10:28:24 14 none come plains reports to your division
10:28:24 15 manager?
10:28:28 16 A. To my division manager correct.
10:28:28 17 Q. How many reports would you forward
10:28:34 18 to him in a year or a month or any given period
19 of time?
10:28:38 20 A. It varies. It could be zero. It
10:28:42 21 could be three or four or five. Again I don't
22 know.
10:28:46 23 Q. Somewhere between zero and five a
10:28:48 24 year though you think you send?
10:28:50 25 A. It could well be.

10:28:52 1 Q. Could it be more?
10:28:54 2 A. It could be a few more. Not
10:28:56 3 probably too many more.
10:28:58 4 Q. So, it may be between zero and
10:28:58 5 eight a year?
10:29:04 6 A. I would say zero to 10 probably.
10:29:08 7 MR. GORSUCH: I would ask that these
10:29:12 8 be produced. We have not seen any compliance
10:29:14 9 reports from Mr. Zahrt or his division
10:29:16 10 manager. We will take it under advicement.

Deposition Transcript of Gregory A. Zahrt at 61-64

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10:34:40 22 Q. Sir I'm not asking a directive.
10:34:44 23 I'm asking your practice. Have you still from

10:34:46 24 time-to-time submit written reports to your
10:34:46 25 division manager?

10:34:48 1 A. I have sent him different things
10:34:50 2 from time-to-time.
10:34:52 3 MR. GORSUCH: We received none of
10:34:56 4 these either I asked that they bee produced Mr.
5 Reed.
10:34:58 6 MR. REED: I will take it under
10:34:58 7 advisement.

Deposition Transcript of Gregory A. Zahrt at 69-70

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10:35:04 8 Q. How frequently do you leave voice
10:35:06 9 mail for your division manager?
10:35:12 10 A. There is no set amount of time.
10:35:14 11 Q. Just as a matter of course sir?
10:35:16 12 A. At least once a week.
10:35:18 13 Q. At least once a week. Thank you?
10:35:18 14 MR. GORSUCH: Is we have received no
10:35:22 15 voice mail either I asked that they be produced
10:35:24 16 to the extent that they still exist.
10:35:26 17 MR. REED: I will take it under
10:35:28 18 advisement Neil.
10:35:32 19 Q. Did other sales representatives
10:35:36 20 report to your division manager using voice
21 mail?
10:35:36 22 MR. REED: Objection. To the
10:35:38 23 extent it calls for speculation.
10:35:42 24 Q. Go ahead and answer it if you know?

10:35:44 25 A. I believe they do.

10:35:46 1 Q. Do you know how frequently they
10:35:50 2 leave voice mail reports for their division
10:35:50 3 manager?
10:35:50 4 A. No, I do not.
10:36:02 5 Q. Did your division manager ever tell
10:36:04 6 you as a group, sales representatives in the
10:36:08 7 division, to leave him regular voice mail
8 messages?
10:36:14 9 A. He asked me to call him every
10:36:20 10 Friday evening. And I believe that that's the
10:36:22 11 entire division.
10:36:24 12 Q. The same rule applies to the other
10:36:26 13 sales representatives?
10:36:28 14 A. I believe so.
10:36:30 15 MR. GORSUCH: We have not pro
10:36:32 16 received any of those voice mails either Mr.
10:36:36 17 Reed and I ask that those be produced.
10:36:38 18 MR. REED: I will take it under
19 advisement.

Deposition Transcript of Gregory A. Zahrt at 70-71

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10:42:00 13 Q. You received to being uments
10:42:04 14 earning the A.I.M. program haven't you?
10:42:06 15 MR. REED: Objection asked and
10:42:10 16 answered.
10:42:12 17 A. I answered that yes, I got a letter
10:42:16 18 from my boss from my division manager.

10:42:16 19 Q. Setting your goals right?
10:42:18 20 A. We set the goals together.
10:42:22 21 Q. And you also got to being uments
10:42:28 22 how you sucessed or failed on those goals
10:42:28 23 haven't you?
10:42:34 24 A. I believe at the end of the program
10:42:40 25 we get a statement saying you ahead of four out

10:42:44 1 of whatever goals so you got so many points.
10:42:50 2 Q. You also got documents about the
10:42:52 3 merchandise, isn't that right?
10:42:54 4 A. Of merchandise.
10:42:56 5 Q. And you got written information
10:42:58 6 about how many points you would spend in that
10:43:00 7 catalog; isn't that right?
10:43:02 8 A. We got a thing that said how many
10:43:04 9 points we had right.
10:43:04 10 MR. GORSUCH: We received no
10:43:06 11 information from Mr. Zahrt or any other sales
10:43:08 12 representative earning the A.I.M. program.
10:43:12 13 And their goals. As well as the points they
10:43:16 14 obtained and the merchandise they received and
10:43:20 15 we asked that they be produced. We will take
10:43:22 16 it under advisement.

Deposition Transcript of Gregory A. Zahrt at 76-77

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15:03:26 4 Q. Sir were you told not to pursue
15:03:32 5 vendor exclusivity during 1998?

15:03:32 6 A. Not that I remember.

15:03:34 7 Q. Did this corporate directive that

15:03:38 8 is refered to hear in your review have anything

15:03:40 9 to do with the figure of this lawsuit?

15:03:42 10 A. I have no idea.

15:03:44 11 Q. We would ask for production these

15:03:48 12 corporate directives that are referred to. I

15:03:48 13 don't believe we have seen them?

15:03:50 14 MR. REED: I'll take it under

15:03:52 15 advisement.

Deposition Transcript of Gregory A. Zahrt at 182

* * * * *

191

15:14:20 8 Q. Had you ever discontinued credit

15:14:22 9 for a retailer distributor?

15:14:24 10 A. Yes I probably have.

15:14:28 11 Q. And when you do discontinue it do

15:14:30 12 you create a form fill out a form I'm sorry?

15:14:32 13 A. Yes we do.

15:14:36 14 Q. And what happens to those forms?

15:14:42 15 A. They get sent onto my supervisor.

15:14:44 16 Q. How many of those do you fill out a

15:14:44 17 year?

15:14:48 18 A. I have no idea.

15:14:50 19 Q. In your 20 years of experience can

15:14:54 20 you give me a general ballpark number?

15:14:58 21 A. 20.

15:15:08 22 Q. It would be 20 I don't know for

15:15:08 23 sure?

15:15:10 24 MR. GORSUCH: John if I have not

15:15:12 25 requested it already I request that we get

15:15:16 1 those discontinue iation of credit reports.

15:15:18 2 MS. MARINER: I will take it under

15:15:18 3 advisement.

Deposition Transcript of Gregory A. Zahrt at 191-92

* * * * *

EXHIBIT D

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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MICHAEL K. KELLOGG
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STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

March 16, 1999

Via Facsimile

John S. Reed, Esquire
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

While we are still reviewing defendants' most recent document productions, there are a few issues we would like to raise.

1. Agreements with Retailers/Distributors

It appears that many responsive agreements with retailers or distributors are missing. For example:

- You have produced documents that expressly reference approximately 20 different agreements with large retail chains that cannot be located in your production. We list some examples in Exhibit A.

- At USTC/CWD 173906 you will find a copy of a form UST agreement entitled "Free Standing Display #2908 Placement Agreement." The two pages following the form agreement suggest its widespread use in the marketplace. However, we see no executed copies in your production.

- The "Copenhagen Incentive Program" appears to be another form UST-retailer agreement. We have not found any executed versions in your production.

- Documents produced to you reflect an agreement between UST and the Uncle Willie's chain. See Complaint Exh. I. We have not found copies of this agreement in your production.

For at least 8 months, we have sought a complete production of all responsive agreements, yet production is still not complete. Please make a prompt and complete production.

2. Sales Representative Files

You have produced documents from fewer than 10% of your 443 sales representatives. In total, these documents fill less than 1 box (i.e., constitute fewer than 1000 pages). Yet you represent that your sales representative production is substantially complete.

This representation is difficult to understand, especially given the volume of documents that have been produced by three former UST representatives in response to our subpoenas. Mr. Carter has produced 74 documents dated 1995 or earlier. Mr. Welsh has produced 364 pages, many dated 1995 or earlier. Ms. Weatherly has produced 547 pages, almost all of which are dated 1995 or earlier. These three ex-UST sales representatives alone have produced nearly as many documents as defendants have for all of their 448 representatives combined.

Please undertake a full and complete production of your sales representatives' files and explain how you have conducted your search to date.

3. MSA Production

We have received what defendants represent is a machine-readable version of "USTC data on MSA systems." We have not received the software USTC uses to access such data. We are prepared to proceed without such software so long as the USTC data proves readable and searchable -- and so long as it is understood that defendants will not seek to exploit the fact that the plaintiffs do not have access to the unproduced software. In this regard, we believe it would be appropriate for defendants to

enter into a written stipulation in which they explicitly waive their right to make any argument, contention, representation, or claim to the court or jury, or elicit any testimony, that is based, directly or indirectly, on the fact that plaintiffs did not have access to this software. Please advise us whether this is acceptable so that we may know how to proceed.

Similarly, defendants' explanation that they are providing "USTC data on MSA systems" raises the question whether defendants can access other, non-USTC data on MSA systems. Please advise us whether defendants have such a capacity, what kinds of data they can access, and whether defendants plan to make use of such data in this lawsuit.

Do not hesitate to call if you would like to discuss any of the above.

Very truly yours,

Neil Gorsuch/jms

Neil Gorsuch

Enclosure

Exhibit A

REFERENCES TO AGREEMENTS NOT FOUND IN UST PRODUCTION

BATES RANGE	DATE	DESCRIPTION
USTC/CWD 215033 - 215035	03/22/93	Weekly Activity Report references a presentation that was "accepted in its entirety" by Gary King, Regional Vice President of COASTAL MART
USTC/CWD 213801 - 213802	01/24/94	Weekly Activity Report states that three different proposals were "accepted in [their] entirety" by SUGAR CREEK, GREAT AMERICAN SUPERMARKETS, and EXPRESS MART
USTC/CWD 435492	Unknown	Reference to CHEVRON's approval for six months of UST counter displays, and UST participation in CHEVRON's marketing program
USTC/CWD 704636 - 704637	03/22/96	Letter to Stephen R. Oliver, THE PANTRY STORE, from Gene Day, UST, confirms agreement
USTC/CWD 564726	06/10/96	Memorandum to Ric Smetak, KRIST OIL CO., from Bob Dufresne, UST, confirms counter display agreement
USTC/CWD 012829	09/25/96	Letter to Beth Schommer, WAL-MART, from A. Gary Smith, UST, confirming agreement for new merchandising system
USTC/CWD 407004 - 407005	09/28/96	Merchandising Proposal for K-MART--no signed proposal/agreement available in production
USTC/CWD 407002 - 407003	11/12/96	Letter to Bill Burgess, K-MART, from Tim Entwistle, UST, outlines unproduced "New Planogram Setup For 1997"
USTC/CWD 274517 - 274518	11/15/96	Letter to Richard Fasanelli, UST, from Debbie L. Huskey and Beth Schommer, WALMART, outlines unproduced agreement
USTC/CWD 540510	11/21/96	Letter to David Crutcher, UST, from Michael D. Rodgers, THORNTON OIL, references "1996 Partnership-For-Profit Agreement," and requests $5000.00 pursuant to agreement--no agreement available in production

BATES RANGE	DATE	DESCRIPTION
USTC/CWD 556852 - 556866; and USTC/CWD 557086 - 557088	04/11/97 and 04/23/97	Memoranda, with attachments, outline merchandising agreement with 7-ELEVEN/SOUTHLAND CORPORATION--no agreement available in production
USTC/CWD 077450 - 077453	05/01/97	Letter to Kelcourse, BRENHAM WHOLESALE, from Harvey Jaffer, UST, encloses Addendum to "Project RAD" Data Purchase Agreement--no signed agreement or addendum available in production
USTC/CWD 159235	05/05/97	Memorandum references attached authorization letter from K-MART--no authorization letter available in production
USTC/CWD 556847 - 556851	05/06/97	Memorandum outlines agreement with ECKERD DRUG--no agreement available in production
USTC/CWD 205965 and USTC/CWD 145666 - 145668	01/06/98 and 04/10/98	Letter and Weekly Activity Report referencing UST's commitment and cost of paying for the "entire moist smokeless tobacco space" at DAIRY MART--no agreement available in production
USTC/CWD 155148 - 155149	07/17/98	Weekly Activity Report describes rack agreement with KROGER/MID-ATLANTIC--no agreement available in production
USTC/CWD 529217 - 529219	Unknown	Partial copy of Weekly Activity Report outlines merchandising issues discussed with FOOD LION--no agreement(s) available in production
USTC/CWD 564516 - 564522	09/09/98	Memorandum Re: Circle K Resets states "we have entered into an agreement with TOSCO MARKETING, CIRCLE K Stores to supply vendors to support the reset of all 330 stores in the Northwest Region"--agreement not available in production

EXHIBIT E

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April 1, 1999

Via Facsimile

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919 Third Avenue
New York, NY 10022

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

We wrote you March 16, 1999 concerning the apparent incompleteness of defendants' sales representative production. We asked you to undertake a more thorough search. On March 18 you responded by insisting that your production was already thorough and complete.

In subsequent depositions UST sales representatives have testified to the existence of category after category of unproduced documents. We ask that the materials identified at deposition be produced. We also ask that you undertake a new, more thorough search of sales representative and division files.

Please advise us of your position on these requests by April 5, 1999. Likewise, please do not hesitate to call should you like to discuss the above or have any questions.

Very truly yours,

Neil Gorsuch

EXHIBIT F

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TORONTO

March 18, 1999

Via Facsimile

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Gentlemen:

We received Mr. Gorsuch's letter of March 16, 1999, which purports to raise issues concerning Defendants' document production. A review of the letter and the referenced documents indicates that Plaintiffs seek to raise issues where none exist. Accordingly, as explained below, further discussion of these "issues" between counsel will serve no worthwhile purpose.

1. Agreements With Retailers/Distributors

Syllogistically, the existence of the documents listed in Exhibit A is not sufficient to support Plaintiffs' conclusion that any written agreements were not produced by Defendants in the course of discovery. Not one of these documents indicates that any further written agreements exist. In fact, several of the documents listed on Exhibit A clearly are memorializations of prior conversations -- which, as you must know, would not have been created if any written agreement had existed.

Plaintiffs also refer specifically to the "Free Standing Display #2908 Placement Agreement" as well as two additional pages that "suggest its widespread use in the marketplace." Nothing in these documents proves that there exist "executed copies" of any written agreement.

Plaintiffs speculate that the Copenhagen Incentive Program "appears to be another form UST-retailer agreement," and based on that speculation, state that there are no "executed

versions" in Defendants' production. Once again, Plaintiffs' assumptions are simply wrong, as are the conclusions that follow. This same pattern of speculation followed by faulty conclusion also holds true for Plaintiffs' reference to Complaint Ex. I.

In contrast to Plaintiffs' speculative assertions, please note the following concrete indications of deficiencies in Plaintiffs' production:

- Defendants have brought to Plaintiffs' attention several documents from Plaintiffs' production that unequivocally indicate that Conwood sales representatives communicate about subject matter pertinent to this lawsuit via e-mail. No e-mails have been produced. No explanation has been provided.

- Defendants also have brought to Plaintiffs' attention documents that unequivocally indicate that higher level sales personnel were provided with computer equipment and software for the purpose of providing sales reports to Conwood management. No such computer documents have been produced. No explanation has been provided.

- Defendants also brought to Plaintiffs' attention that it was difficult to believe that Conwood did not maintain any sales databases. While at USTC's Greenwich facilities, Mr. Conyngham represented to me that a mainframe computer system is, in fact, maintained by Conwood and that Mr. Conyngham would provide me with a list of the types of sales documents stored on that system. Now, over two weeks later – in which time Plaintiffs took it upon themselves to complain that Defendants did not need two weeks to produce an entire 15-Gigabyte STARS II database – no list has been produced. No explanation has been provided.

- Defendants also brought to Plaintiffs' attention that no work-product immunity attached to the complete set of video tapes used to create the obviously-edited Complaint Exhibit C video tape. Plaintiffs withdrew their baseless work-product objection and represented that all video tapes would be produced. No video tapes have been produced. No explanation has been provided.

Please provide all of the information Plaintiffs have failed to provide thus far no later than Friday, March 26, 1999, so that we will know what issues need to be resolved by Magistrate Judge Moyer.

2. Sales Representative Files

Pursuant to the Court's Order, Defendants have made a full and complete production of documents from the files of USTC sales representatives.

3. MSA Production

As noted in Plaintiffs' letter, Plaintiffs have received the information contained on the RAD database in machine-readable format. Plaintiffs now suggest that Defendants should enter into a stipulation that would limit Defendants' ability to examine the way in which this data is used by Plaintiffs. Defendants will entertain no such stipulation.

Plaintiffs also "raise[] a question" based on language from a letter memorializing an agreement between and among USTC, Plaintiffs, and MSA, Inc. With respect to Plaintiffs' inquiry as to what other data Defendants have access to, Defendants respond as follows: Defendants have provided Plaintiffs with a complete list of the computer systems used by USTC; Plaintiffs have sought the production of certain databases that Plaintiffs selected from the provided list; Defendants have provided Plaintiffs with complete access to the requested databases. Accordingly, Plaintiffs have obtained all discovery from USTC to which it is entitled.

If you have any questions, please do not hesitate to call me.

Very truly yours,

Chris Athanasia

cc: Richard C. Roberts, Esq.
John S. Reed, Esq.

EXHIBIT G

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April 5, 1999

Via Facsimile

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
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Suite 1000 West
Washington, D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Gentlemen:

We received Mr. Gorsuch's letter of April 1, 1999, which, once again, presumes deficiencies in Defendants' document production from USTC sales representatives. As we informed you by letter on March 18, 1999, Defendants' document production is in full compliance with the Court's January 20, 1999 Order.

Mr. Gorsuch's letter states that USTC sales representatives have testified in depositions as to "category after category of unproduced documents." This assertion is unsupported by the record. A review of the deposition transcripts will make it readily apparent that Defendants have complied in full with the Court's Order. In order for Defendants to address your stated concerns, however, please provide specific transcript cites to any testimony that concerns categories of documents called for by the Court's January 20, 1999 Order that were not produced. Should Plaintiffs identify any such testimony, Defendants, of course, will produce any and all referenced documents to the extent they exist.

16diii001628

If you have any questions or would care to discuss these issues further, please do not hesitate to call.

Very truly yours,

Chris Athanasia

cc: John Reed, Esq.
Richard C. Roberts, Esq.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 APR -9 A9:58

FILED
U.S. DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

JURY TRIAL DEMANDED

PLAINTIFFS' MOTION CONCERNING UST SALES FORCE FILES

This motion is being filed now in the interest of time.

Although just six UST sales representatives have been deposed so far, each deponent has confirmed that entire categories of responsive sales force documents remain unproduced. UST has not fully produced sales force files despite Conwood's document requests outstanding for nearly a year, a December 16, 1998 court order requiring production of division office files (Exh. A), and a court order, entered after a lengthy evidentiary hearing, mandating production from sales representatives' files (Exh. B).

The six UST sales representatives deposed to date have testified that they keep unproduced day books recording their sales activities.[1] They have conceded that they use home

[1]Anundson Depo. at 21, 27-29; McCarthy Depo. at 50; id. at 52; id. at 200; Lund Depo. at 39; Zahrt Depo. at 61; Beyerlein Depo. at 36.

computers for business purposes and that these computers have not been searched.[2] They have testified that they generate unproduced "Retail Transaction Forms" recording agreements with retailers.[3] They have testified that they keep or send to division managers "noncompliance reports" on retailers who fail to meet UST demands.[4] They have testified that they have completed unproduced forms discontinuing credit to stores that fail to comply with UST policies.[5] They have confirmed the existence of unproduced training materials.[6] They have admitted that they received unproduced documents concerning a key sales incentive program.[7] They have testified to the existence of unproduced daily voice mail messages between themselves and their supervisors.[8] Some sales representatives testified that they have written "monthly competitive reports" or "daily call

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[2]Lund Depo. at 76-78.

[3]Zahrt Depo. at 62-63; McCarthy Depo. at 36-37; id. at 51; id. at 181; Parish Depo. at 26-27; Beyerlein Depo. at 28-29.

[4]Lund Depo. at 41-42; Parish Depo. at 28; McCarthy Depo. at 147-48; Zahrt Depo. at 63-64.

[5]Zahrt Depo. at 191-92; McCarthy Depo. at 147; Anundson Depo. at 97-98.

[6]Anundson Depo. at 45-48; id. at 50-55; Lund Depo. at 67; id. at 49; id. at 52; Zahrt Depo. at 34-36; McCarthy Depo. at 53.

[7]Lund Depo. at 63-65; Zahrt Depo. at 76-77; Beyerlein Depo. at 102-03; Anundson Depo. at 95.

[8]Anundson Depo. at 29-36; Lund Depo. at 68-69; Zahrt Depo. at 70-71; Parish Depo. at 86-87; McCarthy Depo. at 44.

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reports," and maintain "marketing books."[9] See Exh. C (attaching deposition pages).[10]

In all, UST has produced documents from fewer than ten percent of its 448 sales representatives. Its entire sales representative production fills less than 1 box and is less than 1000 pages. Meanwhile, in response to our subpoenas three former UST representatives alone have produced an equal quantity of material. And Conwood sales representatives have produced over 450,000 pages.

We twice sought to resolve this matter without court intervention (Exhs. D & E). Both times, UST rebuffed our overtures (Exhs. F & G).

There is no good reason for UST's refusal to heed the Court's months-old rulings. Further production delay seriously prejudices Conwood's ability to conduct depositions and complete fact discovery by the Court's August 1 deadline. To remedy UST's persistent refusal to supply reasonable discovery of these materials, the Court should order Conwood full and unfettered review of UST division and sales representative files. The Court should further order UST barred from using in its defense the few documents it has selectively chosen to produce from sales representative and division files. See Rule 37(b)(2)(B).

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[9]McCarthy Depo. at 45-46; Anundson Depo. at 36-37; id. at 41-44; id. at 103-04.

[10]Only rough draft transcripts are currently available. They include typographical errors.

16diii001632

A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts /BAP w/permission

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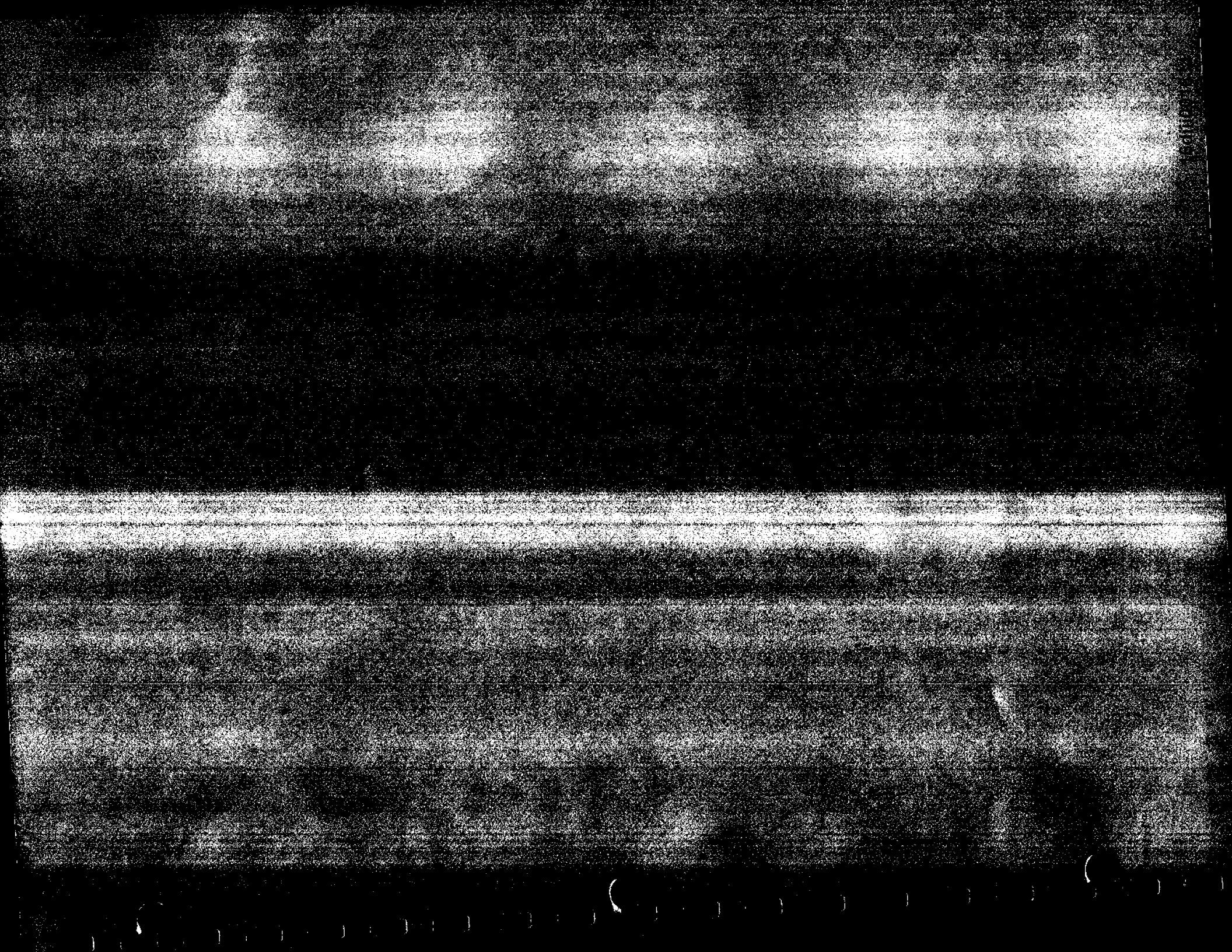
Counsel for Plaintiffs

16diii001633



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of Plaintiffs' Motion to Compel, any opposition thereto, and for good cause shown, it is hereby ORDERED that:

1. Within 10 days defendants shall make their division office and sales representative files available for inspection by Conwood attorneys;

2. Pursuant to Rule 37(b)(2)(B) defendants shall not be permitted to introduce in evidence any documents generated by their division offices or sales representatives.

SO ORDERED.

Dated this ___ day of _____, 1999.

_____
UNITED STATES DISTRICT COURT

16dili08161

CERTIFICATE OF SERVICE

I certify that on this 6 day of April, 1999, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Benjamin A. Powell

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. — PLAINTIFFS

vs. — NO. 5:98CV-108-R

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC. — DEFENDANTS

ORDER

This matter is before the Court on motions of plaintiff to compel production of discovery materials. (Docket Nos. 29 and 35). Defendant has responded, (Docket Nos. 31 and 36), and plaintiff has replied. (Docket Nos. 32 and 37). The matter was referred to the Magistrate Judge for decision pursuant to 28 U.S.C. § 636(b)(1)(A), (Docket No. 39), and a hearing was held on the motions on December 11, 1998.

I.

Plaintiffs have moved to compel a broader range of discovery from defendants. More particularly, plaintiffs seek to compel the production of weekly and other regular reports from sales representatives, most especially at the district office level, but also at the regional office level. These reports, in the view of Conwood, may well document the alleged exclusionary conduct of UST carried out, *inter alia*, through actions of UST sales representatives with respect to distribution racks in stores. UST argues that, if any conduct is to be attributable to the corporation, it must be centrally directed and not merely the unauthorized or spontaneous actions of sales representatives. This argument is unavailing. The Court is of the view that, even if it were true that for there to be liability such conduct must be centrally directed, there could well exist

48

documentation at a "grassroots" level which would corroborate or document the implementation of a centrally planned policy. To say that the policy is directed from above does not mean it may not be documented from below.

In addition, UST also argues that, in addition to its contention that the documents are of "weak relevance," the collection of the data would be burdensome. However, it has not particularized this objection, and in view of the significant scope of the claims and the apparent gravity of the litigation, the Court finds no reason based on burden to deny the request. Accordingly,

IT IS HEREBY ORDERED that UST's objection to the production of documents from the district level is without merit and UST shall produce responsive documents from district and regional offices.

II.

The next issue taken up at the hearing involved disagreements over the format and other technical details with respect to CD-ROM's used by the plaintiffs to store its multiple boxes of documents. Based on the discussion on the record between counsel, it appears that the differences between the parties are being narrowed and may be eliminated. Accordingly, the Court defers any ruling on this issue.

III.

Defendant UST objects to the designation as confidential by plaintiff of the identity of all persons identified as knowledgeable pursuant to Rule 26. Plaintiff counters that, while it did not initially designate all these individuals as confidential, arguably improper contacts have been made by UST employees with respect to Conwood personnel. Accordingly, plaintiffs have designated the entire list as confidential in order to prevent further contacts.

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The purpose of the confidentiality order, however, is not to prevent witness tampering or improper contacts; the purpose of the confidentiality order is rather to protect trade secrets and other confidential material from disclosure. In the view of the Court, the use of the confidentiality designation to prospectively protect against improper contacts is not a proper use of the protective order. Accordingly,

IT IS HEREBY ORDERED that the motion of UST to remove the designation is **GRANTED**. However, the Court notes that, should there be any inappropriate contact with witnesses or potential witnesses, the Court would view that matter most seriously and would wish to review any details, where appropriate. The Court is not making any ruling at all as to whether improper contact has occurred, but reminding the parties it has the authority and the readiness to resolve such issues if it becomes necessary.

IT IS FURTHER ORDERED that all issues contained in the pending motions which are not decided in this order are reserved for future rulings.

Date: 12/16/98

JAMES D. MOYER
UNITED STATES DISTRICT COURT

Copies via facsimile to:
Counsel of Record

ENTERED
DEC 16 1998
JEFFREY A. APPERSON, CLERK
BY
DEPUTY CLERK

16diii001641

EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. — PLAINTIFFS

vs. — NO. 5:98CV-108-R

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC. and UST INC. — DEFENDANTS

MEMORANDUM OPINION AND ORDER

The undersigned Magistrate Judge conducted a hearing on January 19, 1999, concerning the issue of whether the scope of search for documents by defendant UST should extend to documents retained by sales representatives. For the reasons set forth on the record, in more detail,

IT IS HEREBY ORDERED that defendant UST shall extend its search for responsive documents previously requested to the following categories of documents in the possession, custody or control of sales representatives:

1. Any notes, correspondence, memoranda, day-planner, calendar, journal, or other similar written summary of activities prepared by or retained by a sales representative which relates in any way to any of the alleged anti-competitive activities asserted by the plaintiff in paragraphs 22-31 of the complaint.

2. Any regularly maintained corporate documents, including so-called PAR's and any other related reports, memoranda, summaries, and the like, in the possession, custody or control of the sales representatives for calendar year 1995 or earlier, and responsive to the previously filed document requests.

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3. The Magistrate Judge set out in some detail on the record the reasons for the ruling. Briefly, the scope of Rule 26 is broad, and the plaintiff is entitled to discovery documents which are either relevant or may lead to the discovery of relevant evidence. While the testimony at the hearing from the corporate representative was clear that sales representatives *should* send official documentation "up the chain" to the regional office, the representative did not deny that it was possible that additional documents were individually prepared and maintained by sales representatives. Given the allegations of the complaint, in which some or many of the anti-competitive activities alleged against UST are supposedly carried out by sales representative personnel, it would be an extraordinary result to deny discovery into the files of the sales representatives who are claimed to have implemented supposedly illegal policies.

The assertions of burden by the defendant are essentially conclusory. Defendant did no more than to argue that there are 448 sales representatives, a fact which is not disputed. Defendant presented no evidence concerning the amount of time which it would take to conduct such a search, and given defendant's position that few such documents are maintained, the task of compliance would not be unduly burdensome. Moreover, to the extent that diaries, journals, individual notes, and the like may document or reflect actions alleged by the plaintiff to be anti-competitive or illegal, such individual records would potentially be of considerable significance in plaintiff's attempt to prove its case.

In short, given the indisputable relevance of the documents, to the extent that they are found to exist, and the generalized assertions of burden, the motion to compel will be **GRANTED** to the limited extent set out above.

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The testimony of the corporate representative was uncontradicted that corporate documents are not retained indefinitely (they are "purged," in the language of one of the memoranda), and given the uncontradicted assertion of plaintiff's counsel that some sales representatives do keep corporate reports longer than the period of time for which the corporate document policy extends, it is not illogical to extend the search for relevant documents to a level of the company where documents no longer retained at the corporate level still may exist.

Finally, while merely pleading an antitrust case is not an authorization for discovery without limits, it is also apparent to the Magistrate Judge that the complaint is one brought by one established competitor against a larger, arguably dominant firm, and given the experience and resources of counsel on both sides of the dispute, and the scope of the case, it cannot be said that a thorough search for documents which may be of considerable significance should be limited to exclude a search at the sales representative level.

Date: 1/20/99

JAMES D. MOYER
UNITED STATES DISTRICT COURT

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JAN 20 1999
JEFFREY N. ARMSTRONG, CLERK
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Copies to:
Counsel of Record

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EXHIBIT C

Deposition Transcript of Arlie Anundson at 21

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09:36:40 17 Q. Do you keep a day book?

09:36:40 18 A. Yes.

Deposition Transcript of Arlie Anundson at 27

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09:43:30 22 Q. Notes concerning your activities as

09:43:34 23 a sales representative for U.S. Tobacco,

24 correct?

Deposition Transcript of Arlie Anundson at 28

* * * * *

09:43:34 25 A. Yes.

09:43:36 1 Q. Notes concerning your meetings with

09:43:42 2 retailers and distributors amongst others; is

3 that correct?

09:43:42 4 A. No.

09:43:44 5 Q. Sir you have testified notes about

09:43:46 6 when you were to meet with people; is that

7 correct?

09:43:50 8 A. Yes.

09:43:52 9 Q. Some of those meetings included

09:43:56 10 meetings with retailers and distributors didn't

09:43:56 11 they?

09:43:56 12 MR. REED: Objection. Misstates

09:44:10 13 the testimony.

09:44:14 14 A. The notes may say I need to schedule an

09:44:18 15 appointment with a contribute tor a retail

09:44:18 16 chain.

09:44:20 17 Q. As well as notes about scheduling

09:44:22 18 meetings with your part-time sales
09:44:24 19 representatives, correct?
09:44:24 20 A. Yes.
09:44:28 21 Q. And perhaps strike that and any
09:44:32 22 notes regarding the need to schedule meetings
09:44:34 23 with your division manager or other
09:44:36 24 supervisors; isn't that correct?
09:44:36 25 A. No.

* * * * *

09:44:36 1 Q. Why not?
09:44:40 2 A. They schedule meetings with me.
09:44:42 3 Q. Wouldn't you reflect that in your
09:44:44 4 day planner?
09:44:50 5 A. Possibly.
09:44:54 6 Q. And did any layer ever review your
09:44:54 7 day planner?
09:44:56 8 A. No.
09:44:58 9 Q. So, you just made the unilateral
09:45:02 10 judgment that those entries in your 1999 day
09:45:06 11 planner were not relevant to this lawsuit
09:45:06 12 didn't?
09:45:06 13 MR. REED: Objection.
09:45:10 14 Q. Go ahead and answer it.
09:45:10 15 A. Yes.

* * * * *

09:45:38 20 Q. How about a voice mail account.
09:45:40 21 Do you have a voice mail account sir?

09:45:42 22 A. Excuse me. Yes.

09:45:42 23 Q. Thank you.

09:45:44 24 Do you use that to communicate with

09:45:46 25 your division manager?

* * * * *

09:45:48 1 A. Yes

* * * * *

09:47:24 7 Q. Do you exchange voice mail messages

09:47:26 8 with other sales representatives?

09:47:28 9 A. Yes.

* * * * *

09:48:06 21 Q. Do you exchange voice mail messages

09:48:06 22 with retailers?

09:48:08 23 A. No exchange.

09:48:12 24 Q. Do you ever receive voice mail

09:48:12 25 messages from them?

* * * * *

09:48:14 1 A. On occasion.

* * * * *

09:48:32 8 Q. How about distributors or

09:48:38 9 wholesalers do you ever receive voice mail

09:48:38 10 messages from them?

09:48:38 11 A. Occasionally.

* * * * *

09:48:56 17 Q. How about other UST personnel other

09:48:58 18 than your division manager do you ever receive

09:49:04 20 Did you ever receive voice mail
09:49:06 21 messages from persons at U.S. Tobacco other
09:49:08 22 than your division manager or other sales
09:49:08 23 represent tivity?
09:49:08 24 A. Occasion.
09:49:10 25 Q. I who are those people who leave

* * * * *

09:49:14 1 you voice mail messages?
09:49:24 2 A. Those would come from the corporate
09:49:24 3 office

* * * * *

09:50:16 16 A. Not that I can recall at this time.
09:50:18 17 Q. Did you ever receive voice mail
09:50:18 18 messages from your department manager?
09:50:20 19 A. Yes.

* * * * *

09:50:34 23 Q. How about your regional manager did
09:50:40 24 you ever receive voice mail messages from him?
09:50:40 25 A. Very rarely.

* * * * *

09:50:44 1 Q. But you do receive voice mail
09:50:44 2 messages from him; is that correct?
09:50:46 3 A. On a rare occasion.
09:50:48 4 Q. How about chain account personnel
09:50:52 5 do you ever receive voice mail mess yes, sir
09:50:56 6 from chain account personnel?
09:50:58 7 Yes occasionally.

09:53:02 1 Q. Mr. Anundson do you relay reports
09:53:04 2 to your division manager ever?
09:53:06 3 A. Yes.
09:53:10 4 Q. Is there a title associated these
09:53:10 5 reports?
09:53:12 6 A. Yes.
09:53:12 7 Q. What is that?
09:53:26 8 A. Send him my daily recall reports.
09:53:30 9 Q. How frequently do you send him your
09:53:30 10 daily call reports?
09:53:32 11 A. Once a week.

09:54:20 2 Q. Do you maintain copies of your
09:54:22 3 daily call reports?
09:54:22 4 A. Yes.
09:54:24 5 Q. And for what period of time do you
09:54:26 6 retain your daily call reports?
09:54:28 7 A. Approximately one month.
09:54:30 8 Q. So, would you have presently March
09:54:36 9 1999 daily call reports more or less; is that
10 correct?
09:54:40 11 A. That would be close.
09:54:44 12 Q. Today being April the seven
09:54:48 13 right. Has anyone asked you to review those
09:54:52 14 daily call reports for possible production in
09:54:54 15 this case?

09:54:56 16 A. No.

09:55:04 17 Q. Have you forwarded them to anybody

09:55:06 18 for possible production in this case?

09:55:06 19 A. No.

Deposition Transcript of Arlie Anundson at 41

* * * * *

09:57:42 2 Q. And you say you forwarded these

09:57:46 3 daily call interrogatories your division

09:57:48 4 manager is that right?

09:57:50 5 A. Yes.

09:57:52 6 Q. And do you that on a weekly basis?

09:57:52 7 A. Yes.

Deposition Transcript of Arlie Anundson at 42

* * * * *

09:58:40 1 A. Yes. Weekly experience report.

09:58:40 2 Q. Other than your weekly expense

09:58:44 3 report is there any other reports you forward

09:58:44 4 to your division manager?

09:58:50 5 A. Yes. There is a weekly call recap

09:58:52 6 sheet.

09:58:52 7 Q. What is that?

09:58:56 8 A. That details the number of calls I

09:58:58 9 made per day.

Deposition Transcript of Arlie Anundson at 44

* * * * *

10:01:04 7 Q. And these reports are produced on a

10:01:06 8 weekly basis; is that correct?

10:01:06 9 A. Yes.

10:01:10 10 Q. And do you maintain them in your

10:01:10 11 possession?

10:01:10 12 A. No.

10:01:14 13 Q. You only forward them to your

10:01:14 14 division office; is that correct?

10:01:16 15 A. Yes.

10:01:18 16 Q. And do you so on a weekly basis,

17 correct?

10:01:18 18 A. Yes.

* * * * *

10:01:50 4 Q. Have you ever attended draining

10:01:54 5 courses?

10:01:54 6 A. Yes.

10:01:58 7 Q. What training courses are those?

10:02:06 8 A. Several years ago we had a program

10:02:08 9 called act.

10:02:18 10 Q. Was there two parts to it by any

10:02:20 11 chance. ACT 1 and ACT 2?

10:02:20 12 A. Yes.

10:02:22 13 Q. Did you attend both?

10:02:22 14 A. Yes.

10:02:24 15 Q. Did you receive any materials in

10:02:28 16 conjunction with your attendance?

10:02:30 17 A. Yes.

10:02:34 18 Q. And approximately how much material

10:02:36 19 did you receive at ACT 1?

10:02:40 20 A. I don't recall.

10:02:42 21 Q. Was it a notebook?

10:02:44 22 A. Yes.

Deposition Transcript of Arlie Anundson at 46
* * * * *

10:03:06 7 Q. And did the materials you receive
10:03:10 8 at the ACT 2 training session were they
10:03:14 9 approximately of the same character of the once
10:03:16 10 you received in ACT 1?
10:03:16 11 A. I don't recall.
10:03:20 12 Q. You did receive materials at ACT 2
10:03:22 13 training course though?
10:03:22 14 A. I believe so.

Deposition Transcript of Arlie Anundson at 47
* * * * *

10:04:08 4 Q. Do you have any other recollection
10:04:12 5 about what the materials consisted of?
10:04:16 6 A. It was just, basically, about how
10:04:18 7 to be a better sales rep.

Deposition Transcript of Arlie Anundson at 48
* * * * *

10:05:46 13 Q. Have you attended, in fact, two
10:05:52 14 national sales neting one in 1998 and one in
10:05:52 15 1997?
10:05:52 16 A. Yes.
10:05:56 17 Q. Did you receive materials at either
18 of those?
10:05:56 19 A. Yes.

Deposition Transcript of Arlie Anundson at 50
* * * * *

10:08:28 18 Q. Did you receive any materials at

10:08:30 19 the 1998 national sales meeting?

10:08:30 20 A. Yes.

10:08:32 21 Q. What did you receive?

10:08:34 22 A. Pretty much the same thing that I

10:08:34 23 recall.

10:08:38 24 Q. And did the regional marketing plan

10:08:40 25 was it about the same volume of materials

* * * * *

10:08:42 1 3/eight of an inch?

10:08:42 2 A. I believe so.

10:08:46 3 Q. And what did you do with those

10:08:46 4 materials?

10:08:48 5 A. I still have those.

10:08:50 6 Q. Did anyone ask you to produce those

10:08:54 7 in connection with this litigation?

10:08:54 8 A. No.

10:08:56 9 Q. Did anyone review those materials

10:08:58 10 in connection with this litigation?

10:09:02 11 A. Not that I know of.

* * * * *

10:09:30 21 Q. Did you receive materials at these

10:09:32 22 regional sales meetings?

10:09:34 23 A. I am sure we did.

* * * * *

10:10:40 3 Q. Okay. Let's say how about prior to

10:10:44 4 195 how frequently did you receive a department
10:10:44 5 meetings?
10:10:44 6 A. An.
10:10:46 7 Q. I what material did you receive in
10:10:48 8 file at these meetings?
10:10:48 9 A. I don't recall.
10:10:52 10 Q. Did you receive a department
10:10:52 11 marketing plan for instance,?
10:10:56 12 A. I don't know.
10:11:04 13 Q. Did you receive an agenda for those
10:11:04 14 meetings?
10:11:06 15 A. I assume we did.
10:11:06 16 Q. Any other materials that you
10:11:08 17 received at those meetings?
10:11:12 18 A. I don't recall what they would have
10:11:14 19 been.
10:11:16 20 Q. Do you maintain any documents from
10:11:16 21 those meetings?
10:11:18 22 A. No do I not.
10:11:20 23 Q. Any documents you received in those
10:11:22 24 meetings have come from the department office;
25 is that correct?

* * * * *

10:11:24 1 A. Assume.
10:11:26 2 MR. GORSUCH: John we have received
10:11:28 3 no documents concerning any of Mr. Anundson
10:11:30 4 department meetings and we ask that they be

10:11:34 produce used we will take it under advisement.

10:11:36 Q. How about division sales meetings

10:11:38 did you ever ever attend division sales

10:11:40 meetings?

10:11:40 A. Occasionally.

* * * * *

10:11:56 Q. Do you receive any materials at

10:11:58 these meetings?

10:12:06 A. That's usually when we get the

10:12:08 promotional handouts.

* * * * *

10:12:14 A. Promotions plan of work.

10:12:14 Q. Anything else?

10:12:28 A. There maybe other handouts if the

10:12:30 division manager has something to hand out.

* * * * *

10:12:32 Q. So, would you get materials

10:12:34 concerning any promotions that are running over

10:12:38 that quarter or the next several months is that

10:12:38 the idea?

10:12:38 A. Yes.

10:12:42 Q. And anything -- and you may have

10:12:44 received other materials as well you just don't

10:12:48 remember what they are. Is that your

10:12:48 testimony?

10:12:54 A. If it is pertinent then he would

10:12:54 hand that out.

10:12:56 12 Q. Do you retain any of these
10:12:58 13 materials?
10:13:00 14 A. Only the promotional plan of work.
10:13:02 15 Q. Have you produced any of these in
10:13:04 16 conjunction with this litigation?
10:13:06 17 A. No.

Deposition Transcript of Arlie Anundson at 95

* * * * *

11:06:56 13 Q. Do you retain any documents
11:06:56 14 concerning the A.I.M. Program?
11:06:58 15 A. No.
11:07:02 16 Q. Where did you receive these
11:07:04 17 documents from?
11:07:12 18 A. The division manager I believe.
11:07:14 19 MR. GORSUCH: We have received none
11:07:18 20 of Mr. Anundson's AIM documents or from other
11:07:22 21 places I ask for it to be produced.

Deposition Transcript of Arlie Anundson at 97

* * * * *

11:08:58 6 Q. Have you ever filled out a form
11:09:00 7 either distinct credit from a store or
11:09:02 8 threatening to do so?
11:09:06 9 A. Yes.

* * * * *

11:09:50 22 Q. When you fill out one of these
11:09:54 23 forms, do you give a copy to the retailer?
11:09:54 24 A. Yes.
11:09:58 25 Q. Do you keep a copy for yourself?

* * * * *

11:09:58 A. Yes.

11:10:00 Q. Do you send a copy to your division manager?

11:10:00 A. No.

11:10:04 Q. Do you send a copy to anyone other than the retailer?

11:10:04 A. No.

11:10:08 Q. So, no one at U.S. Tobacco other than you knows about this issue is that your testimony?

11:10:12 A. Yes.

11:10:18 Q. Do you have any of these forms in your possession presently?

11:10:22 A. Yes.

11:10:26 Q. Did anyone review them for possible production in this case?

11:10:32 A. They are blank.

11:10:36 Q. Sir I'm asking you about ones that you filled out?

11:10:36 A. No.

* * * * *

11:15:16 Q. Do you keep anything else in your van?

11:15:18 A. Just my marketing book.

11:15:26 Q. How big is that?

11:15:28 A. A loose leave binder.

11:15:30

11:15:32 8 Q. The size of this note book here on
11:15:32 9 the table?
11:15:34 10 A. Yes.
11:15:36 11 Q. Can you hold that up so weak have
11:15:38 12 that reflected on the record?
11:15:40 13 A. Marketing.
11:15:44 14 Q. Okay.. How thick is that would you
11:15:46 15 approximate for the record?
11:15:48 16 MR. REED: Are you referring to the
11:15:50 17 one here or the one in his van.
11:15:52 18 MR. GORSUCH: The one in his van?
11:15:54 19 A. Probably about as full as that one.
11:15:58 20 Q. How thick is that in inches would
11:15:58 21 you say?
11:16:00 22 A. Oh an inch and a half.
11:16:04 23 Q. Has anyone ever reviewed either
11:16:06 24 that note book are your file in your van for
11:16:10 25 production -- possible production of materials

* * * * *

11:16:10 1 in this case?
11:16:10 2 A. No.
11:16:14 3 Q. Fully other materials you maintain
11:16:16 4 in your van or home?
11:16:16 5 A. No.

28

09:47:06 20 Q. Do you use a retail transaction
09:47:06 21 form?
09:47:08 22 A. Rarely.
09:47:10 23 Q. When would you use a retail
09:47:10 24 transaction form?
09:47:14 25 A. I would use a retail transaction

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09:47:18 1 form in a case where I would have to sell the
09:47:24 2 store some smokeless tobacco.
09:47:30 3 Q. Is that the only case that you use
09:47:32 4 a retail transaction form?
09:47:34 5 MS. MARINER: Objection. He says
09:47:40 6 he rarely uses a retail transaction form.
09:47:42 7 A. Yes in my area, yes.

Deposition Transcript of Michael Beyerlein at 28-29

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10:00:40 11 Q. Do you keep a day book or a
10:00:42 12 calendar of your appointments?
10:00:48 13 A. I use my calendar as my regular
10:01:02 14 monthly calendar as my appointment schedule.

Deposition Transcript of Michael Beyerlein at 36

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12:20:30 8 Q. What types of objectives were set
12:20:30 9 under the A.I.M. program?
12:20:40 10 A. The ones I can remember were the
12:20:48 11 number of counter display units placed at
12:20:56 12 retail with store management approval, point of
12:21:00 13 sale placed at retail outlets with store
12:21:18 14 management approval. Adult sampling time.

12:21:24 15 And I daily call average.

Deposition Transcript of Michael Beyerlein at 102

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09:43:44 17 Q. But do you have a 1999 day book; is
18 that right?
09:43:46 19 A. Just the current month only.
09:43:48 20 Q. We ask that that be produced?
09:43:50 21 MS. MARINER: He we will take it
09:43:52 22 under advisement.

Deposition Transcript of David R. Lund at 39

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09:45:54 16 Q. What do you do with those
09:45:58 17 noncompliance reports once you have written one
09:45:58 18 up?
09:46:06 19 A. I forward them to the person in
09:46:08 20 charge -- or the chain accounts representative
09:46:14 21 and the division manager.
09:46:18 22 Q. Do you keep a copy yourself?
09:46:18 23 A. I do.
09:46:22 24 MR. GORSUCH: We have received no
09:46:24 25 noncompliance reports from either Mr. Lund or

42

09:46:28 1 his division manager. We ask that those be
09:46:32 2 produced used we'll take it under advisement
09:46:32 3 counsel.

Deposition Transcript of David R. Lund at 41-42

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09:55:02 17 Q. , in fact, it was a binder of
09:55:04 18 materials that you received at the national
09:55:06 19 sales meeting; is that right?

09:55:08 20 A. Yes, it was something like a
09:55:08 21 binder.
09:55:10 22 Q. It was in a binder was it not sir?
09:55:12 23 MS. MARINER: Objection. Asked and
09:55:12 24 answered?

* * * * *

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09:58:38 20 Q. Do you recall receiving materials
09:58:40 21 at the second national sales meeting?
09:58:42 22 A. Yes.

Deposition Transcript of David R. Lund at 49, 52

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10:22:20 11 Q. How did you know what your
10:22:22 12 objectives were under the A.I.M. program?
10:22:34 13 A. There had to be a communication
10:22:36 14 prepare, yes.

* * * * *

10:22:48 21 Q. But to the best of your
10:22:50 22 recollection were there A.I.M. program
10:22:52 23 documents?
10:22:54 24 A. To the best much my recollection.
10:22:58 25 Q. And did you receive periodic

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10:23:18 5 Q. How did you know what points you
10:23:22 6 had and what success you had achieved under the
10:23:22 7 A.I.M. program?
10:23:38 8 A. Towards the end of the year you
10:23:42 9 would have an update I am thinking.
10:23:42 10 Q. A written update?
10:23:46 11 A. I think so. , but I'm not positive.

* * * * *

10:24:02 19 Q. What years did the A.I.M. program
10:24:04 20 was it in effect?
10:24:18 21 A. I am not real sure. I am not real
10:24:36 22 sure the years, but I do believe, but I do
10:24:42 23 believe 1992 to 1994. 19 is '91 to 1994. It
10:24:44 24 could have been 12 or three years. Right in
10:24:44 25 there.

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10:24:46 1 MR. GORSUCH: Counsel we have
10:24:50 2 received no documents either pertaining to this
10:24:52 3 witness or any other sales representative
10:24:56 4 activities under compliance name points we ask
10:25:00 5 that those documents be produced. We will take
10:25:02 6 it under advisement counsel.

Deposition Transcript of David R. Lund at 63-65

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10:28:06 7 Q. Fair enough. Did you receive any
10:28:08 8 materials at these training courses?
10:28:14 9 A. I am sure we did.
10:28:18 10 Q. And did these materials pertain to
10:28:20 11 your activities as a sales representative?
10:28:24 12 A. I am sure it did.
10:28:24 13 Q. I?
10:28:26 14 MR. GORSUCH: I would ask that these
10:28:30 15 be produced as well we have received anything
10:28:32 16 from the act one or act two programs from U.S.
17 Tobacco.
10:28:34 18 MS. MARINER: Counsel we'll take it

10:28:36 19 under advisement.

* * * * *

10:29:44 14 Q. But on a weekly basis let's say
10:29:46 15 approximately how many voice mail messages
10:29:48 16 would you leave for your superiors?
10:29:50 17 MS. MARINER: Same objection.
10:29:52 18 A. It varies. It varies.
10:29:54 19 Q. Can you give me a low and a high?
10:30:12 20 A. Six or seven, eight. Six to 10 a
21 week.
10:30:14 22 Q. Six to 10 a week?
10:30:14 23 A. Yeah.
10:30:16 24 Q. To whom are these voice mails
10:30:18 25 directed?

10:30:22 1 A. They are directed to clay u len
10:30:24 2 hag.
10:30:26 3 Q. That is your division manager?
10:30:26 4 A. Right.
10:30:30 5 Q. Did you ever leave voice mail
10:30:32 6 messages for anyone else in the company?
10:30:40 7 A. Sometimes.
10:30:42 8 Q. Who would that be?
10:30:50 9 A. It could be the department
10:31:06 10 manager. Chain manager, that would be about
10:31:08 11 it.
10:31:10 12 Q. How frequently would you say you
10:31:12 13 leave messages for your department manager?

10:31:14 14 A. Once a month.

10:31:16 15 Q. And how about for your chain

10:31:18 16 manager?

10:31:22 17 A. Similar to less. Once a month.

10:31:24 18 Three, five weeks.

10:31:24 19 Q.

10:31:30 20 MR. GORSUCH: None of these voice

10:31:32 21 mail messages have been produced. We ask that

10:31:34 22 they be produced.

10:31:38 23 MS. MARINER: We will take it under

10:31:38 24 advisement counsel.

Deposition Transcript of David R. Lund at 68-69

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10:38:58 2 Q. Do you use that computer for your

10:38:58 3 business purposes?

10:39:00 4 A. No.

10:39:02 5 Q. You have never written a letter?

10:39:04 6 A. I will take it back. I have

10:39:06 7 written a letter on it.

10:39:08 8 Q. You have written?

10:39:10 9 A. And it is an old computer.

10:39:12 10 Q. Have you written just one letter on

10:39:14 11 it or have you written more than a letter on

10:39:16 12 it?

10:39:16 13 A. I have written more than a letter

10:39:18 14 on it.

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10:39:52 9 Q. To whom are these letters directed

10:39:52 10 sir?

10:39:58 11 A. They would be to clay.

10:40:00 12 Q. Your division manager?

10:40:00 13 A. Yes.

10:40:18 14 Q. Okay. Who else.

10:40:22 15 A. Tom Kemper the department manager

10:40:24 16 and chain accounts representative.

10:40:26 17 Q. Is has anyone searched your

10:40:28 18 computer for responsive materials in this case?

10:40:32 19 MS. MARINER: I am going to object

10:40:34 20 to that as vague.

10:40:36 21 Q. Let me ask you this, has anyone

10:40:38 22 asked to you produce or to look for any

10:40:42 23 responsive documents on your computer there

10:40:42 24 this case?

10:40:44 25 MS. MARINER: Objection. Same

10:40:44 1 socks.

10:40:46 2 Q. Go ahead and answer it?

10:40:46 3 A. No.

10:40:48 4 Q. Would you be willing to do so if

10:40:50 5 you were asked?

10:41:00 6 A. I have nothing to hide.

10:41:02 7 MR. GROSUCH: I ask that that

10:41:06 8 computer be searched and produced pursuant to

10:41:08 9 the courts orders.

10:41:10 10 MS. MARINER: We will take it under

10:41:12 11 advisement counsel.

* * * * *

10:14:20 16 Q. A port from the PAR scanner do you
10:14:22 17 fill in any other documents?
10:14:26 18 A. It all depends on what went on in
10:14:26 19 the store.
10:14:30 20 Q. How about a retail transaction
10:14:32 21 form?
10:14:36 22 A. If a retail transaction form needs
10:14:38 23 to be filled out, yes.
10:14:40 24 Q. What would be the circumstances
10:14:42 25 under which a retail transaction form would

10:14:44 1 have to be filled out?
10:14:58 2 A. Well, you might have product
10:15:02 3 exchange. You could have a bill through.
10:15:10 4 You could have a count ter payment.

Deposition Transcript of James Joseph McCarthy at 36-37

* * * * *

10:24:40 4 Q. Well, I asked previously if you do
10:24:44 5 any daily and weekly reports and I think you
10:24:46 6 testified that you didn't apart from the PAR
10:24:50 7 scanner sheet how do you communicate with Mr.
10:24:50 8 Rhodes?
10:24:50 9 A. Letter.
10:24:54 10 Q. Apart from the PAR scanner sheets
10:24:54 11 and letters anything else?
10:24:56 12 A. Voice mail.

Deposition Transcript of James Joseph McCarthy at 44

* * * * *

10:26:56 24 Q. Have you ever heard of the term
10:26:58 25 monthly competitive reports?

10:26:58 1 A. Yes.
10:27:00 2 Q. What are those?
10:27:06 3 A. Those are reports dealing with
10:27:08 4 competitive activity.
10:27:10 5 Q. Who prepares the monthly
10:27:12 6 competitive reports?
10:27:16 7 A. I don't know how it is handled.
10:27:18 8 All I know is I take my competitive activity
10:27:22 9 and I forward it up through the proper channel
10:27:24 10 he is. What happened there I have no idea.
10:27:28 11 Q. How do you forward your competitive
10:27:32 12 activity up through the proper channels?
10:27:34 13 A. Put it in an envelope and mail
10:27:36 14 it.

Deposition Transcript of James Joseph McCarthy at 45-46

* * * * *

10:41:46 4 Q. Have you ever kept a day book?
10:41:48 5 A. Yes, I have.
10:41:50 6 Q. Do you currently keep a day book?
10:41:52 7 A. Yes, I do.

* * * * *

10:43:38 16 Q. Apart from the documents you just
10:43:42 17 described, did you comply any other documents
10:43:44 18 for production in this litigation?
10:43:46 19 A. No, I didn't.
10:43:48 20 Q. So, it is fair to say you didn't
10:43:52 21 provide any retail transactions forms for
10:43:52 22 production?

10:43:56 23 A. There may have been I believe there
10:44:00 24 was some retail transaction forms in the
10:44:04 25 competitive file that was sent up.

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10:44:16 3 Q. Do you have any other documents
10:44:20 4 either in your car or at your house in your
10:44:22 5 possession that was not gathered together for
10:44:24 6 production in the litigation?
10:44:24 7 A. Yes.
10:44:26 8 Q. Can you describe those documents
10:44:26 9 please?
10:44:34 10 A. They are documents -- they would
10:45:00 11 include maybe my past appraisal. Maybe chain
10:45:16 12 a cone authorization letter, files with chain
10:45:18 13 head quarter calls.
10:45:18 14 Q. Anything else?
10:45:24 15 A. From what I can tell you at the top
10:45:26 16 of my head that would be pretty much it.
10:45:30 17 Q. How about your day book, did you
10:45:32 18 copy your day books and send them up?
10:45:32 19 A. No.
10:45:36 20 Q. Is there any correspondence in your
10:45:38 21 possession at your house or in your car that
10:45:42 22 you did not copy and send up?
10:45:42 23 A. Yes.
10:45:44 24 Q. Can you describe that?
10:45:50 25 A. It would be material that I

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10:45:54 1 received that originateed from other people
10:45:58 2 within U.S. tobacco. Or information that
10:46:04 3 would be in division manager bill Rhodes files.

10:46:10 4 Q. Do you have any manuals UST manuals
10:46:12 5 in your possession?
10:46:12 6 A. At home.
10:46:14 7 Q. Correct.
10:46:14 8 A. Yes.
10:46:18 9 Q. Those were not provided for
10:46:20 10 production in the litigation?
10:46:20 11 A. By me?
10:46:22 12 Q. Correct.
10:46:22 13 A. Correct.

Deposition Transcript of James Joseph McCarthy at 50-53

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14:19:30 13 Q. By properly display does that mean
14:19:34 14 you have to have the UST product displayed in a
14:19:36 15 prominent location?
14:19:38 16 A. Not necessarily.
14:19:38 17 Q. What does it mean?
14:19:42 18 A. What does it mean is every brand
14:19:48 19 that they order that they have, in their store
14:19:54 20 in their inventory should been properly
14:20:00 21 identified in the slot. What I mean by that
14:20:06 22 is they can't expect to get returns if they
14:20:10 23 have Skoal band mint and physical bond winter
14:20:14 24 green in the same spots because it is
14:20:18 25 impossible for the vendor oh heck he can.

* * * * *

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14:21:04 22 Q. What is the procedure if a store is
14:21:14 23 not (COMPLYING) do you fill out a form?
14:21:16 24 A. Eventually yes. My personal
14:21:20 25 experience is that I work with the proper

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14:21:24 1 persons nel. I say way look this is the
14:21:30 2 situation. I back it up with what I am
14:21:34 3 seeing. If I am going to tell you that they
14:21:38 4 are not ordering properly. I am going to tell
14:21:40 5 you why they are not ordering properly and what
14:21:44 6 happened. I am going to know that before I
14:21:46 7 tell you so when you do ask me I can give you
14:21:50 8 an answer. I am going to work with you on
14:21:54 9 this and it may be coming back to the store
14:21:56 10 next week and taking the product out instead of
14:22:00 11 you placing an order and issuing a credit
14:22:04 12 then. I'm going to do everything. If the
14:22:06 13 mem continues here is your warning. If the
14:22:08 14 problem continues here is your warning. If
14:22:10 15 the problem continues you are done. No credit
14:22:12 16 from me.
14:22:14 17 Q. And that's the point when you fill
14:22:16 18 out the none come my answer form?
14:22:20 19 A. Actually I first give a verbal
14:22:22 20 warning and then in possible two written
14:22:24 21 warnings.

Deposition Transcript of James Joseph McCarthy at 146-48

* * * * *

15:41:32 4 Q. These were the only retail
15:41:38 5 transaction forms from your documents set that
15:41:42 6 were produced. To the best of your knowledge
15:41:44 7 are there any other retail transaction forms in
15:41:48 8 existence from your files?
15:41:48 9 A. Sure.
15:41:50 10 Q. Where are they?

15:41:52 11 A. I had -- they are hat home.

16:22:24 6 Q. Do you still have day planners your
16:22:26 7 possession Mr. McCarthy?
16:22:28 8 A. No I don't. Just the current
16:22:28 9 year.
16:22:30 10 Q. What happened to the other ones?
16:22:30 11 A. I though them out.
16:22:32 12 Q. You got the ones for the current
16:22:34 13 year, correct?
16:22:38 14 A. Correct. 1999.
16:22:40 15 Q. So, do you have the one for 1998?
16:22:42 16 A. No, I don't.
16:22:42 17 MR. BENZ: Still would I ask that
16:22:44 18 the day planner for 1999 be produced.
16:22:46 19 MR. REED: I take it under
16:22:46 20 advisement.

26

09:53:32 24 Q. Do you use a retail transaction

09:53:36 25 form in your duties as a sales representative?

27

09:53:36 1 A. Yes.

09:53:40 2 Q. When did you use a retail

09:53:40 3 transaction form?

09:53:48 4 A. When I sale a customer a role of a

09:53:54 5 product. Or transactions made in the store.

Deposition Transcript of Byron Parish at 26-27

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09:55:32 4 Q. Are you familiar with a

09:55:32 5 noncompliance form?

09:55:34 6 A. Yes.

09:55:36 7 Q. What is a noncompliance form?

09:55:50 8 A. It is a form used to control

09:55:52 9 damaged goods.

09:56:00 10 Q. How do you use the noncompliance

09:56:04 11 form to control damaged goods?

09:56:10 12 A. As I would use it in my work?

09:56:14 13 Because I don't use it.

09:56:18 14 Q. Have you ever filled out a none

09:56:20 15 come my answer form on a retail account?

09:56:20 16 A. Yes.

09:56:22 17 Q. Why did you fill out the

09:56:24 18 noncompliance form?

09:56:28 19 A. After talking with store personnel

09:56:32 20 about a damage mem and they did not do anything

09:56:36 21 to correct it. They forced me to sign a

09:56:40 22 noncompliance form.

* * * * *

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12:01:18 21 Q. So, if you see a competitive

12:01:22 22 vending system in an E-Z Mart you remove that

12:01:24 23 competitive easy system?

12:01:26 24 A. I show the management the picture

12:01:30 25 and they decide what to do with the vendor.

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12:01:34 1 Q. What if they decide to do nothing

12:01:34 2 with the vendor?

12:01:38 3 A. I try to show them who the

12:01:42 4 authorization kind by. And it is from their

12:01:52 5 own chain. And if they don't go by the

12:01:56 6 assigned Plan-o-gram then I can't force them to

12:01:56 7 do anything.

12:02:00 8 Q. Do you bring it to the attention of

12:02:02 9 your division manager?

12:02:02 10 A. Sometimes.

12:02:06 11 Q. How do you bring it to the

12:02:08 12 attention of your division manager?

12:02:14 13 A. Sometimes I may voice mail him.

* * * * *

09:37:54 23 Q. What happened to the materials from
09:37:56 24 these meetings over the years that you
09:37:58 25 accumulated?

09:38:00 1 A. I don't act late materials.
09:38:04 2 Materials that I have gotten from years passed
09:38:06 3 I don't keep it.
09:38:10 4 Q. These were generateed by your --
09:38:14 5 well by whom were they generated the materials?
09:38:16 6 A. I really couldn't tell you who
09:38:16 7 generated them.
09:38:20 8 Q. Let me ask you where they came from
09:38:22 9 then. In the case of your division meetings
09:38:24 10 they did come from your division mer?
09:38:26 11 A. In the case ever a division
09:38:30 12 mountain, for example, yes.
09:38:30 13 Q. So in a department meeting they
09:38:32 14 come from your department manager right?
09:38:34 15 A. I don't know who puts out the
09:38:36 16 material. They are there on the table to pick
09:38:40 17 up or pass out on the table. It may be
09:38:42 18 generated by the department manager or his
09:38:44 19 secretary or whoever.
09:38:46 20 Q. It comes out of the department's
09:38:48 21 office though isn't that right?
09:38:48 22 A. I believe so.
09:38:50 23 Q. And in the case of the regional

09:38:52 24 meetings it comes out of regional offers
09:38:54 25 doesn't it?

09:38:54 1 A. I believe so.
09:38:58 2 Q. Again, we have received none of
09:39:02 3 these materials and I would ask that they been
09:39:02 4 produced?
09:39:02 5 MR. REED: I understand the
09:39:08 6 request.
09:39:10 7 MR. GORSUCH: Does that mean you
09:39:14 8 would take it under advisement to produce it or
09:39:16 9 you merely understand the question.
09:39:18 10 MR. REED: Neil we will always
09:39:24 11 listen to reasonable requests. We will take
09:39:26 12 it under advisement.

Deposition Transcript of Gregory A. Zahrt at 34-36

* * * * *

10:25:42 12 Q. Let me ask you is do you keep a
10:25:46 13 calendar or diary or day book?
10:25:48 14 A. I keep a day planer.
10:25:50 15 Q. And do you keep that day planner
10:25:52 16 can you use it in conjunction with your
10:25:54 17 business activities as a sales representative?
10:25:56 18 A. Yes, I do.
10:25:58 19 MR. GORSUCH: I ask that that be
10:26:00 20 produced we have not seen that either.
10:26:02 21 MR. REED: I understand the
10:26:04 22 question. Request. We take it under
10:26:06 23 advisement.

10:26:54 Q. Do you maintain or keep Retail Transaction Forms?
10:26:56 A. I don't keep any.
10:26:58 Q. Is what do you do with them?
10:27:06 A. In some cases I send them onto my division manager very few. And my copy of the retail transaction I through away.
10:27:18 Q. And there is a copy for you, there is a copy for the retailer and a copy for you your divsion manager; is that right?
10:27:26 A. There is on the form, but is it not required to send them?
10:27:32 Q. But do you send some into your division manager isn't that right?
10:27:38 A. I sent some in the past I believe.
10:27:40 Q. How many would you say you would

10:27:42 send in a year or a month or any period of time?
10:27:46 A. Well, maybe five, 10 a year.
10:27:52 MR. GORSUCH: We asked that these be produced we have not seen any retail transaction formation for Mr. Zahrt.
10:28:00 MR. REED: Take it under advisement.
10:28:06 Q. Is how about noncompliance reports, do you keep copies of those?
10:28:14 A. I have kept copies of them in the

10:28:18 12 past. I may even have a couple of copies now.
10:28:22 13 Q. And do you also forward copies of
10:28:24 14 none come plains reports to your division
10:28:24 15 manager?
10:28:28 16 A. To my division manager correct.
10:28:28 17 Q. How many reports would you forward
10:28:34 18 to him in a year or a month or any given period
19 of time?
10:28:38 20 A. It varies. It could be zero. It
10:28:42 21 could be three or four or five. Again I don't
22 know.
10:28:46 23 Q. Somewhere between zero and five a
10:28:48 24 year though you think you send?
10:28:50 25 A. It could well be.

10:28:52 1 Q. Could it be more?
10:28:54 2 A. It could be a few more. Not
10:28:56 3 probably too many more.
10:28:58 4 Q. So, it may be between zero and
10:28:58 5 eight a year?
10:29:04 6 A. I would say zero to 10 probably.
10:29:08 7 MR. GORSUCH: I would ask that these
10:29:12 8 be produced. We have not seen any compliance
10:29:14 9 reports from Mr. Zahrt or his division
10:29:16 10 manager. We will take it under advicement.

Deposition Transcript of Gregory A. Zahrt at 61-64

* * * * *

10:34:40 22 Q. Sir I'm not asking a directive.
10:34:44 23 I'm asking your practice. Have you still from

10:34:46 24 time-to-time submit written reports to your
10:34:46 25 division manager?

10:34:48 1 A. I have sent him different things
10:34:50 2 from time-to-time.
10:34:52 3 MR. GORSUCH: We received none of
10:34:56 4 these either I asked that they bee produced Mr.
5 Reed.
10:34:58 6 MR. REED: I will take it under
10:34:58 7 advisement.

Deposition Transcript of Gregory A. Zahrt at 69-70

* * * * *

10:35:04 8 Q. How frequently do you leave voice
10:35:06 9 mail for your division manager?
10:35:12 10 A. There is no set amount of time.
10:35:14 11 Q. Just as a matter of course sir?
10:35:16 12 A. At least once a week.
10:35:18 13 Q. At least once a week. Thank you?
10:35:18 14 MR. GORSUCH: Is we have received no
10:35:22 15 voice mail either I asked that they be produced
10:35:24 16 to the extent that they still exist.
10:35:26 17 MR. REED: I will take it under
10:35:28 18 advisement Neil.
10:35:32 19 Q. Did other sales representatives
10:35:36 20 report to your division manager using voice
21 mail?
10:35:36 22 MR. REED: Objection. To the
10:35:38 23 extent it calls for speculation.
10:35:42 24 Q. Go ahead and answer it if you know?

10:35:44 25 A. I believe they do.

10:35:46 1 Q. Do you know how frequently they
10:35:50 2 leave voice mail reports for their division
10:35:50 3 manager?
10:35:50 4 A. No, I do not.
10:36:02 5 Q. Did your division manager ever tell
10:36:04 6 you as a group, sales representatives in the
10:36:08 7 division, to leave him regular voice mail
8 messages?
10:36:14 9 A. He asked me to call him every
10:36:20 10 Friday evening. And I believe that that's the
10:36:22 11 entire division.
10:36:24 12 Q. The same rule applies to the other
10:36:26 13 sales representatives?
10:36:28 14 A. I believe so.
10:36:30 15 MR. GORSUCH: We have not pro
10:36:32 16 received any of those voice mails either Mr.
10:36:36 17 Reed and I ask that those be produced.
10:36:38 18 MR. REED: I will take it under
19 advisement.

Deposition Transcript of Gregory A. Zahrt at 70-71

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10:42:00 13 Q. You received to being uments
10:42:04 14 earning the A.I.M. program haven't you?
10:42:06 15 MR. REED: Objection asked and
10:42:10 16 answered.
10:42:12 17 A. I answered that yes, I got a letter
10:42:16 18 from my boss from my division manager.

10:42:16 19 Q. Setting your goals right?
10:42:18 20 A. We set the goals together.
10:42:22 21 Q. And you also got to being uments
10:42:28 22 how you sucessed or failed on those goals
10:42:28 23 haven't you?
10:42:34 24 A. I believe at the end of the program
10:42:40 25 we get a statement saying you ahead of four out

10:42:44 1 of whatever goals so you got so many points.
10:42:50 2 Q. You also got documents about the
10:42:52 3 merchandise, isn't that right?
10:42:54 4 A. Of merchandise.
10:42:56 5 Q. And you got written information
10:42:58 6 about how many points you would spend in that
10:43:00 7 catalog; isn't that right?
10:43:02 8 A. We got a thing that said how many
10:43:04 9 points we had right.
10:43:04 10 MR. GORSUCH: We received no
10:43:06 11 information from Mr. Zahrt or any other sales
10:43:08 12 representative earning the A.I.M. program.
10:43:12 13 And their goals. As well as the points they
10:43:16 14 obtained and the merchandise they received and
10:43:20 15 we asked that they be produced. We will take
10:43:22 16 it under advisement.

Deposition Transcript of Gregory A. Zahrt at 76-77

* * * * *

15:03:26 4 Q. Sir were you told not to pursue
15:03:32 5 vendor exclusivity during 1998?

15:03:32 6 A. Not that I remember.

15:03:34 7 Q. Did this corporate directive that

15:03:38 8 is refered to hear in your review have anything

15:03:40 9 to do with the figure of this lawsuit?

15:03:42 10 A. I have no idea.

15:03:44 11 Q. We would ask for production these

15:03:48 12 corporate directives that are referred to. I

15:03:48 13 don't believe we have seen them?

15:03:50 14 MR. REED: I'll take it under

15:03:52 15 advisement.

Deposition Transcript of Gregory A. Zahrt at 182

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15:14:20 8 Q. Had you ever discontinued credit

15:14:22 9 for a retailer distributor?

15:14:24 10 A. Yes I probably have.

15:14:28 11 Q. And when you do discontinue it do

15:14:30 12 you create a form fill out a form I'm sorry?

15:14:32 13 A. Yes we do.

15:14:36 14 Q. And what happens to those forms?

15:14:42 15 A. They get sent onto my supervisor.

15:14:44 16 Q. How many of those do you fill out a

15:14:44 17 year?

15:14:48 18 A. I have no idea.

15:14:50 19 Q. In your 20 years of experience can

15:14:54 20 you give me a general ballpark number?

15:14:58 21 A. 20.

15:15:08 22 Q. It would be 20 I don't know for

15:15:08 23 sure?

15:15:10 24 MR. GORSUCH: John if I have not

15:15:12 25 requested it already I request that we get

15:15:16 1 those discontinue iation of credit reports.

15:15:18 2 MS. MARINER: I will take it under

15:15:18 3 advisement.

Deposition Transcript of Gregory A. Zahrt at 191-92

* * * * *

EXHIBIT D

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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March 16, 1999

Via Facsimile

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Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

While we are still reviewing defendants' most recent document productions, there are a few issues we would like to raise.

1. Agreements with Retailers/Distributors

It appears that many responsive agreements with retailers or distributors are missing. For example:

- You have produced documents that expressly reference approximately 20 different agreements with large retail chains that cannot be located in your production. We list some examples in Exhibit A.

- At USTC/CWD 173906 you will find a copy of a form UST agreement entitled "Free Standing Display #2908 Placement Agreement." The two pages following the form agreement suggest its widespread use in the marketplace. However, we see no executed copies in your production.

- The "Copenhagen Incentive Program" appears to be another form UST-retailer agreement. We have not found any executed versions in your production.

- Documents produced to you reflect an agreement between UST and the Uncle Willie's chain. See Complaint Exh. I. We have not found copies of this agreement in your production.

For at least 8 months, we have sought a complete production of all responsive agreements, yet production is still not complete. Please make a prompt and complete production.

2. Sales Representative Files

You have produced documents from fewer than 10% of your 443 sales representatives. In total, these documents fill less than 1 box (i.e., constitute fewer than 1000 pages). Yet you represent that your sales representative production is substantially complete.

This representation is difficult to understand, especially given the volume of documents that have been produced by three former UST representatives in response to our subpoenas. Mr. Carter has produced 74 documents dated 1995 or earlier. Mr. Welsh has produced 364 pages, many dated 1995 or earlier. Ms. Weatherly has produced 547 pages, almost all of which are dated 1995 or earlier. These three ex-UST sales representatives alone have produced nearly as many documents as defendants have for all of their 448 representatives combined.

Please undertake a full and complete production of your sales representatives' files and explain how you have conducted your search to date.

3. MSA Production

We have received what defendants represent is a machine-readable version of "USTC data on MSA systems." We have not received the software USTC uses to access such data. We are prepared to proceed without such software so long as the USTC data proves readable and searchable -- and so long as it is understood that defendants will not seek to exploit the fact that the plaintiffs do not have access to the unproduced software. In this regard, we believe it would be appropriate for defendants to

enter into a written stipulation in which they explicitly waive their right to make any argument, contention, representation, or claim to the court or jury, or elicit any testimony, that is based, directly or indirectly, on the fact that plaintiffs did not have access to this software. Please advise us whether this is acceptable so that we may know how to proceed.

Similarly, defendants' explanation that they are providing "USTC data on MSA systems" raises the question whether defendants can access other, non-USTC data on MSA systems. Please advise us whether defendants have such a capacity, what kinds of data they can access, and whether defendants plan to make use of such data in this lawsuit.

Do not hesitate to call if you would like to discuss any of the above.

Very truly yours,

Neil Gorsuch/jms

Neil Gorsuch

Enclosure

Exhibit A

REFERENCES TO AGREEMENTS NOT FOUND IN UST PRODUCTION

BATES RANGE	DATE	DESCRIPTION
USTC/CWD 215033 - 215035	03/22/93	Weekly Activity Report references a presentation that was "accepted in its entirety" by Gary King, Regional Vice President of COASTAL MART
USTC/CWD 213801 - 213802	01/24/94	Weekly Activity Report states that three different proposals were "accepted in [their] entirety" by SUGAR CREEK, GREAT AMERICAN SUPERMARKETS, and EXPRESS MART
USTC/CWD 435492	Unknown	Reference to CHEVRON's approval for six months of UST counter displays, and UST participation in CHEVRON's marketing program
USTC/CWD 704636 - 704637	03/22/96	Letter to Stephen R. Oliver, THE PANTRY STORE, from Gene Day, UST, confirms agreement
USTC/CWD 564726	06/10/96	Memorandum to Ric Smetak, KRIST OIL CO., from Bob Dufresne, UST, confirms counter display agreement
USTC/CWD 012829	09/25/96	Letter to Beth Schommer, WAL-MART, from A. Gary Smith, UST, confirming agreement for new merchandising system
USTC/CWD 407004 - 407005	09/28/96	Merchandising Proposal for K-MART--no signed proposal/agreement available in production
USTC/CWD 407002 - 407003	11/12/96	Letter to Bill Burgess, K-MART, from Tim Entwistle, UST, outlines unproduced "New Planogram Setup For 1997"
USTC/CWD 274517 - 274518	11/15/96	Letter to Richard Fasanelli, UST, from Debbie L. Huskey and Beth Schommer, WALMART, outlines unproduced agreement
USTC/CWD 540510	11/21/96	Letter to David Crutcher, UST, from Michael D. Rodgers, THORNTON OIL, references "1996 Partnership-For-Profit Agreement," and requests $5000.00 pursuant to agreement--no agreement available in production

BATES RANGE	DATE	DESCRIPTION
USTC/CWD 556852 - 556866; and USTC/CWD 557086 - 557088	04/11/97 and 04/23/97	Memoranda, with attachments, outline merchandising agreement with 7-ELEVEN/SOUTHLAND CORPORATION--no agreement available in production
USTC/CWD 077450 - 077453	05/01/97	Letter to Kelcourse, BRENHAM WHOLESALE, from Harvey Jaffer, UST, encloses Addendum to "Project RAD" Data Purchase Agreement--no signed agreement or addendum available in production
USTC/CWD 159235	05/05/97	Memorandum references attached authorization letter from K-MART--no authorization letter available in production
USTC/CWD 556847 - 556851	05/06/97	Memorandum outlines agreement with ECKERD DRUG--no agreement available in production
USTC/CWD 205965 and USTC/CWD 145666 - 145668	01/06/98 and 04/10/98	Letter and Weekly Activity Report referencing UST's commitment and cost of paying for the "entire moist smokeless tobacco space" at DAIRY MART--no agreement available in production
USTC/CWD 155148 - 155149	07/17/98	Weekly Activity Report describes rack agreement with KROGER/MID-ATLANTIC--no agreement available in production
USTC/CWD 529217 - 529219	Unknown	Partial copy of Weekly Activity Report outlines merchandising issues discussed with FOOD LION--no agreement(s) available in production
USTC/CWD 564516 - 564522	09/09/98	Memorandum Re: Circle K Resets states "we have entered into an agreement with TOSCO MARKETING, CIRCLE K Stores to supply vendors to support the reset of all 330 stores in the Northwest Region"--agreement not available in production

EXHIBIT E

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

April 1, 1999

Via Facsimile

John S. Reed, Esquire
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

We wrote you March 16, 1999 concerning the apparent incompleteness of defendants' sales representative production. We asked you to undertake a more thorough search. On March 18 you responded by insisting that your production was already thorough and complete.

In subsequent depositions UST sales representatives have testified to the existence of category after category of unproduced documents. We ask that the materials identified at deposition be produced. We also ask that you undertake a new, more thorough search of sales representative and division files.

Please advise us of your position on these requests by April 5, 1999. Likewise, please do not hesitate to call should you like to discuss the above or have any questions.

Very truly yours,

Neil Gorsuch

EXHIBIT F

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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MOSCOW
PARIS
SINGAPORE
SYDNEY
TOKYO
TORONTO

March 18, 1999

Via Facsimile

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Gentlemen:

We received Mr. Gorsuch's letter of March 16, 1999, which purports to raise issues concerning Defendants' document production. A review of the letter and the referenced documents indicates that Plaintiffs seek to raise issues where none exist. Accordingly, as explained below, further discussion of these "issues" between counsel will serve no worthwhile purpose.

1. Agreements With Retailers/Distributors

Syllogistically, the existence of the documents listed in Exhibit A is not sufficient to support Plaintiffs' conclusion that any written agreements were not produced by Defendants in the course of discovery. Not one of these documents indicates that any further written agreements exist. In fact, several of the documents listed on Exhibit A clearly are memorializations of prior conversations – which, as you must know, would not have been created if any written agreement had existed.

Plaintiffs also refer specifically to the "Free Standing Display #2908 Placement Agreement" as well as two additional pages that "suggest its widespread use in the marketplace." Nothing in these documents proves that there exist "executed copies" of any written agreement.

Plaintiffs speculate that the Copenhagen Incentive Program "appears to be another form UST-retailer agreement," and based on that speculation, state that there are no "executed

versions" in Defendants' production. Once again, Plaintiffs' assumptions are simply wrong, as are the conclusions that follow. This same pattern of speculation followed by faulty conclusion also holds true for Plaintiffs' reference to Complaint Ex. I.

In contrast to Plaintiffs' speculative assertions, please note the following concrete indications of deficiencies in Plaintiffs' production:

- Defendants have brought to Plaintiffs' attention several documents from Plaintiffs' production that unequivocally indicate that Conwood sales representatives communicate about subject matter pertinent to this lawsuit via e-mail. No e-mails have been produced. No explanation has been provided.

- Defendants also have brought to Plaintiffs' attention documents that unequivocally indicate that higher level sales personnel were provided with computer equipment and software for the purpose of providing sales reports to Conwood management. No such computer documents have been produced. No explanation has been provided.

- Defendants also brought to Plaintiffs' attention that it was difficult to believe that Conwood did not maintain any sales databases. While at USTC's Greenwich facilities, Mr. Conyngham represented to me that a mainframe computer system is, in fact, maintained by Conwood and that Mr. Conyngham would provide me with a list of the types of sales documents stored on that system. Now, over two weeks later – in which time Plaintiffs took it upon themselves to complain that Defendants did not need two weeks to produce an entire 15-Gigabyte STARS II database – no list has been produced. No explanation has been provided.

- Defendants also brought to Plaintiffs' attention that no work-product immunity attached to the complete set of video tapes used to create the obviously-edited Complaint Exhibit C video tape. Plaintiffs withdrew their baseless work-product objection and represented that all video tapes would be produced. No video tapes have been produced. No explanation has been provided.

Please provide all of the information Plaintiffs have failed to provide thus far no later than Friday, March 26, 1999, so that we will know what issues need to be resolved by Magistrate Judge Moyer.

2. Sales Representative Files

Pursuant to the Court's Order, Defendants have made a full and complete production of documents from the files of USTC sales representatives.

3. MSA Production

As noted in Plaintiffs' letter, Plaintiffs have received the information contained on the RAD database in machine-readable format. Plaintiffs now suggest that Defendants should enter into a stipulation that would limit Defendants' ability to examine the way in which this data is used by Plaintiffs. Defendants will entertain no such stipulation.

Plaintiffs also "raise[] a question" based on language from a letter memorializing an agreement between and among USTC, Plaintiffs, and MSA, Inc. With respect to Plaintiffs' inquiry as to what other data Defendants have access to, Defendants respond as follows: Defendants have provided Plaintiffs with a complete list of the computer systems used by USTC; Plaintiffs have sought the production of certain databases that Plaintiffs selected from the provided list; Defendants have provided Plaintiffs with complete access to the requested databases. Accordingly, Plaintiffs have obtained all discovery from USTC to which it is entitled.

If you have any questions, please do not hesitate to call me.

Very truly yours,

Chris Athanasia

cc: Richard C. Roberts, Esq.
John S. Reed, Esq.

EXHIBIT G

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
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TOKYO
TORONTO

April 5, 1999

Via Facsimile

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

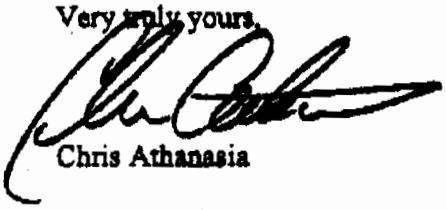
Gentlemen:

We received Mr. Gorsuch's letter of April 1, 1999, which, once again, presumes deficiencies in Defendants' document production from USTC sales representatives. As we informed you by letter on March 18, 1999, Defendants' document production is in full compliance with the Court's January 20, 1999 Order.

Mr. Gorsuch's letter states that USTC sales representatives have testified in depositions as to "category after category of unproduced documents." This assertion is unsupported by the record. A review of the deposition transcripts will make it readily apparent that Defendants have complied in full with the Court's Order. In order for Defendants to address your stated concerns, however, please provide specific transcript cites to any testimony that concerns categories of documents called for by the Court's January 20, 1999 Order that were not produced. Should Plaintiffs identify any such testimony, Defendants, of course, will produce any and all referenced documents to the extent they exist.

If you have any questions or would care to discuss these issues further, please do not hesitate to call.

Very truly yours,



Chris Athanasia

cc: John Reed, Esq.
Richard C. Roberts, Esq.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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REID M. FIGEL
HENK BRANDS
SEAN A. LEV

April 8, 1999

Via Federal Express

Honorable James D. Moyer
208 Snyder U.S. Courthouse
610 West Broadway
Louisville, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., No. 5:98-CV-108-R

Dear Magistrate Judge Moyer:

Enclosed is a courtesy copy of Plaintiffs' Motion Concerning UST Sales Force Files for your consideration. The original was filed with the clerk.

Very truly yours,

Neil M. Gorsuch /BAP

Neil M. Gorsuch

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April 5, 1999

Via Facsimile

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
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Washington, D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Gentlemen:

We received Mr. Gorsuch's letter of April 1, 1999, which, once again, presumes deficiencies in Defendants' document production from USTC sales representatives. As we informed you by letter on March 18, 1999, Defendants' document production is in full compliance with the Court's January 20, 1999 Order.

Mr. Gorsuch's letter states that USTC sales representatives have testified in depositions as to "category after category of unproduced documents." This assertion is unsupported by the record. A review of the deposition transcripts will make it readily apparent that Defendants have complied in full with the Court's Order. In order for Defendants to address your stated concerns, however, please provide specific transcript cites to any testimony that concerns categories of documents called for by the Court's January 20, 1999 Order that were not produced. Should Plaintiffs identify any such testimony, Defendants, of course, will produce any and all referenced documents to the extent they exist.

If you have any questions or would care to discuss these issues further, please do not hesitate to call.

Very truly yours,

Chris Athanasia

cc: John Reed, Esq.
Richard C. Roberts, Esq.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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April 8, 1999

Jeffrey A. Apperson, Clerk
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of the Plaintiffs' Motion Concerning UST Sales Force Files.

I have also enclosed an additional copy. Please date-stamp and return these in the enclosed self-addressed, stamped envelope.

Respectfully,

Neil M. Gorsuch

Neil M. Gorsuch

Enclosure

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

April 8, 1999

Via Federal Express

Honorable James D. Moyer
208 Snyder U.S. Courthouse
610 West Broadway
Louisville, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., No. 5:98-CV-108-R

Dear Magistrate Judge Moyer:

Enclosed is a courtesy copy of Plaintiffs' Motion Concerning UST Sales Force Files for your consideration. The original was filed with the clerk.

Very truly yours,

Neil M. Gorsuch /bap

Neil M. Gorsuch

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on April 12, 1999 for a teleconference to consider discovery matters.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, and Dick Roberts, counsel.

FOR THE DEFENDANT: James Keyte, Chris Athanasia, Neal Stoll, and Martha Weiss, counsel.

The parties identified the following outstanding discovery issues:

a) Plaintiff Conwood has requested defendant UST to identify the distributors and retailers with whom it has or had an agreement affecting the distribution of moist snuff products.

b) Plaintiff Conwood has filed a motion regarding sales documents.

c) Plaintiff Conwood seeks information from UST to assist it in analyzing MSA data.

d) Defendant UST has requested plaintiff to produce Pritzker documents.

e) Defendant UST identified an unresolved discovery issue regarding third party declaration.

The parties reported that the first of these issues is full submitted and ready for a decision by the court, the second issue is not yet fully submitted, and the remaining three issues do not yet require court intervention.

IT IS HEREBY ORDERED that:

1) Defendant UST shall respond to plaintiff's pending motion regarding sales documents no later than Friday, April 16, 1999 and shall provide a copy of its response to plaintiff and the magistrate judge's chambers by facsimile on that date. The merits of the motion will be discussed at the next teleconference.

2) Plaintiff's motion regarding agreements with distributors and retailers is taken under advisement.

3) The next telephonic status conference is scheduled for **10:30 a.m. EDT, Tuesday, April 20, 1999.** Plaintiff shall initiate the teleconference.

Date: April 13, 1999

JDMoyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
APR 13 1999
JEFFREY A. APPERSON, CLERK
BY
DEPUTY CLERK

16diii001707

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

This matter is before the court on plaintiffs' request for additional information about documents already produced by defendant. Nearly a year ago, plaintiffs served an interrogatory asking defendant UST to identify the distributors and retailers with whom it has or had an agreement affecting the distribution of moist snuff products. Defendant responded that all such agreements could be found in its voluminous document production. Plaintiffs request guidance as to where those agreements can be found in defendant's document production.

On January 14, 1998, this matter was argued and the Magistrate Judge ordered defendant UST to provide "a detailed narrative description ... where in the overall document production agreements ... would be found. ... I want you to in a narrative way give [plaintiffs] the best reasonable road map that somebody can, and if the answer is that it is utterly random and no one knows where they are, ... you can say that."

UST has provided an affidavit from Mr. Gary Milano, Vice-President of UST, indicating that there is no systematic way in which these contract or agreements are stored. This assertion merely repeats the contention of counsel at the previous hearing, a contention which the court accepted at face value. What the court directed UST to do at the hearing was to provide detailed, useful, practical information about where these documents may be found.

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Businesses regularly need to retrieve information, files and documents which are not cataloged in a "Dewey decimal" system of perfect precision. UST must do more than reaffirm that there is no overall, structured system of filing these agreements.

Imagine the following scenario. Hypothesize that the president of UST sent an e-mail to Mr. Milano, asking Mr. Milano to gather all these agreements, for some business reason unrelated to litigation, by the end of the week. What would Mr. Milano do? What instructions would be given to subordinates as to where to look for and how to find these documents? This is the information which needs to be provided.

IT IS HEREBY ORDERED that defendant UST shall provide the requested information no later than Monday, April 26, 1999.

Date: April 19, 1999

JDMoyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies via facsimile to:
Counsel of Record

ENTERED
APR 19 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii001709

United States District Court
Western District of Kentucky
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Jeffrey A. Apperson
Clerk of Court

William W. Clark
Chief Deputy Clerk

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FACSIMILE TRANSMISSION

TO: Mark Hansen
Richard Roberts
~~John Reed~~
Neil Stall
William Geiger
Martha Weiss

DATE: 4-19-99

FROM: M. Bethurum

In case of transmission error, please call _____

COMMENTS: _____

Total Pages _____
(Including cover)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on April 23, 1999 for a teleconference to consider discovery matters.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, Trip Wilson, and David Simpson, counsel.

FOR THE DEFENDANT: John Reed, Neal Stoll, and Martha Weiss, counsel.

The court heard arguments on plaintiff's motion regarding the production of files from UST sales representatives and defendant's motion to compel production of non-party witness statements in plaintiff's possession.

IT IS HEREBY ORDERED that the motions are taken under advisement. The next telephonic status conference is scheduled for **2:30 p.m. EDT, Friday, May 7, 1999.** Plaintiff shall initiate the teleconference.

Date: April 23, 1999

JDMoyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
APR 23 1999
JEFFREY A. APPERSON, CLERK
DEPUTY CLERK

93

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on April 20, 1999 for a teleconference to consider discovery matters.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, Ben Powell, and Trip Wilson, counsel.

FOR THE DEFENDANT: John Reed, Rachel Mariner, Chris Athanasia, Neal Stoll, and Martha Weiss, counsel.

The court heard arguments on plaintiff's motion regarding the production of files from UST sales representatives. The matter has been fully briefed. The court also heard brief arguments on an issue raised by UST regarding witness statements.

The following orders were orally announced by the court.

IT IS HEREBY ORDERED that

1) The issue regarding the production of files from UST sales representatives is taken under advisement. No later than Thursday morning, April 22, 1999, the parties shall jointly produce to the court the relevant portions of the sales representative depositions regarding document production. There will be no further briefing on the issue.

2) UST shall submit to the court, no later than April 21, 1999, a one or two page letter outlining its position on the issue regarding witness statements. Plaintiff may respond with a one or

two page letter to the court by Friday morning, April 23, 1999.

3) The next telephonic status conference is scheduled for **2:00 p.m. EDT, Friday, April 23, 1999.** Defendant UST shall initiate the teleconference.

Date: April 20, 1999

JDMoyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
APR 21 1999
JEFFREY A. APPERSON, CLERK
BY: DEPUTY CLERK

16diii001713

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

'99 APR 20 A10:39

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION CONCERNING UST SALES FORCE FILES

Despite the Court's January 20, 1999 Order, undisputed record testimony establishes that UST has conducted no meaningful review of its sales representative files. Point I, infra. UST responds by pressing a technical reading of the Court's Order that would require plaintiffs to prove the existence of relevant documents in the possession of a particular sales representative before UST will conduct a search of his files. That cannot be right. Point II, infra.

Argument

I. UST HAS NOT CONDUCTED THE SEARCH ORDERED BY THE COURT

Despite the Court's January 20 Order, deponent after deponent has testified under oath that he has forwarded no documents to UST for review and that no one from UST has bothered to visit his home or van to search business documents retained there. See, e.g., Funk Depo. 38 (Q: "Has anyone asked you to

send in any paper . . . for possible production in this case?" A: "No sir."); id. at 39 (Q: "has anyone ever come to your house and your vehicle to look for documents or paper that might be produced in this case?" A: "No sir."); Anundson Depo. 103-04 (Q: "Has anyone ever reviewed either that note book or your file in your van for production -- possible production of materials in this case?" A: "No."); Lund Depo. 79-80 (Q: "[After testimony that witness uses a home computer to generate work-related correspondence], Let me ask you this, has anyone asked you to produce or to look for any responsive documents on your computer in this case?" . . . A: "No."); McCarthy Depo. 60 (Q: "How about your day book, did you copy your day books and send them up [for review]?" A: "No."); Anundson Depo. 29-30 (Q: "And did any lawyer ever review your day planner?" A: "No." Q: "So, you just made the unilateral judgment that those entries in your 1999 day planner were not relevant to this lawsuit didn't you?" . . . A: "Yes.").

Additional undisputed facts underscore the lack of any meaningful search. It is undisputed that UST has produced documents for fewer than 10 percent of its 448 sales representatives, that its entire sales representative production fills less than one box, and that Conwood's comparable production is over 450,000 pages. It is undisputed, too, that three subpoenaed former UST representatives have alone produced more

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documents than UST has for all of its 448-member sales force combined.[1]

II. UST OFFERS NO BASIS FOR FAILING TO COMPLY WITH THE COURT'S ORDER

Unable to represent that it has conducted a thorough search of its sales representative files, UST dismisses the fact it has produced so little as "specious" (UST Opp. 9) and argues that "plaintiffs ignore the import" of the January 20, 1999 Court Order (UST Opp. 2). As UST apparently reads that Order, it was entitled to forego reviewing individual sales representative files for two reasons. Neither can withstand scrutiny.

A. The "Paragraphs 22-31" Argument

Under the January 20 Order, UST was obligated to produce documents relevant to allegations raised in paragraphs 22-31 of the Complaint. UST argues no further production is warranted in part because "[n]o testimony elicited in depositions demonstrates that any of the documents in the deponents' possession relate to Paragraphs 22-31 of the Complaint." UST Opp. 2. See also id. 3 (complaining plaintiffs' depositions do not "prove" that day books contain "substantive notes"); id. 5 (same argument for

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[1]UST fleetingly argues these witnesses' productions "included irrelevant materials." UST Opp. 9, n.9. This argument, however, suggests only that UST must have a cramped view of relevance: Welsh, Carter and Weatherly produced their performance evaluation forms (which confirm that UST sales representatives must meet certain facings, point of sale, and rack targets), promotional material, calendars, and notes -- all of which Conwood believes are highly relevant information and should be produced by UST for all sales representatives pursuant to the January 20 Order.

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retail transaction forms and noncompliance reports); id. 6 (same argument for "forms discontinuing credit").[2]

This argument, however, simply bypasses the fact that the Court assigned UST the task of reviewing sales representatives' documents to assess their relevance and that UST's own witnesses have repeatedly testified that no one has bothered to do so. See testimony cited at Point I, infra. Under the Court's Order, it is not up to plaintiffs to establish that each deponent has relevant documents before becoming entitled to production. It was up to UST to conduct a thorough review of each representative's files. And that has not been done.

UST asserts that it knows various kinds of sales representative documents -- including daybooks, calendars, retail transaction forms, noncompliance forms, forms discontinuing credit or other "corporate documents" -- "have nothing to do with the subject matter" of this case or are "rarely retained." See,

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[2]UST representatives have testified that voice mail is one of the primary means by which they receive instructions from, and report their activities to, supervisors. See Plaintiffs' Motion Concerning UST Sales Force Files at 2 n.8; Exh. A (excerpts from Funk deposition, taken after we filed our April 8, 1999 motion papers). Yet, it is undisputed that their voice mail has not been searched or produced. UST responds by asserting that voice mail is saved for only 15 days. UST Opp. 8, n.8. But UST does not dispute that it has taken no steps to gather and retain these electronically-saveable messages despite the Court's June 9, 1998 document retention order. Nor does it dispute that it has taken no steps to review these messages for possible production. Given the importance of voice mail within the company, UST should be instructed as part of the Court's order to take both steps immediately.

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e.g., UST Opp. at 5, 6. Under the Court's Order, however, UST was not free to disregard category after category of materials on the basis of such a fortiori speculation. UST was obligated to examine any materials still in existence and make a considered judgment about their relevance. See Jan. 20, 1999 Order ¶ 1 (ordering review of "any notes, correspondence, memoranda, day-planner, calendar, journal, or other similar written summary").[3] According to the testimony of its own personnel, UST has not done so. See Point I. And, quite in contrast to UST's speculation about the relevance of these documents, the few that have emerged to date do contain highly material evidence. See, e.g., Exh. B (UST retail transaction form bearing warning to Conwood sales

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[3]UST further resists producing day books unless they contain "substantive notes." UST Opp. 3. Under the Court's Order, however, UST was expressly ordered to produce any relevant information from day-books. Jan. 20, 1999 Order ¶ 1. And, as UST well knows, even a sales representative's notation that he appeared at a certain store is potentially probative evidence when linked to Conwood unethical activity reports documenting the removal of its racks from that store on or about the same date.

UST suggests that unproduced "PAR scanners" in the possession of its sales representatives need not be produced because 93 boxes of scanners from division, department, or regional offices were produced and remain "untouched" by plaintiffs. Id. Under the Court's Order, however, UST was not free to make such unilateral decisions: it was expressly ordered to make full production of all sales representative PAR scanners dated 1995 or earlier. Jan. 20, 1999 Order ¶ 2. Besides, UST is simply wrong on the facts. PAR scanners produced from district, department, and regional offices were reviewed by plaintiffs and returned to defense counsel's Washington office over a month ago.

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representative to "keep your POS off my rack or die!"); Exh. C (noncompliance form tasking retailer for failure to comply with restrictive counter display and point of sale advertising requirements).[4]

B. The "1995" Argument

Under the Court's January 20 Order, UST was required to produce all "regularly maintained corporate documents" from sales representative files generated prior to 1996. UST argues that plaintiffs "have failed to establish that any 'regularly maintained corporate documents' in the deponents possession were dated 1995 or earlier." UST Opp. 2.

UST does not (and cannot) dispute that its sales representatives do possess "regularly maintained corporate documents." Undisputed testimony reveals that they maintain retail transaction forms, noncompliance reports, credit withdrawal forms, training materials, sales incentive program documents, and monthly report forms. See Plaintiffs' Motion

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[4]UST also repeatedly claims that plaintiffs are not entitled to discovery from sales representatives' files because the documents they seek are sent "up the chain" and, thus, can be located in division, department, or regional files. See UST Opp. 5, 6, 8, 9. The Court, however, heard and rejected this argument three months ago. See Jan. 20, 1999 Order ¶ 3 (noting that while "sales representatives *should* send official documents 'up the chain' . . . [UST] did not deny that it was possible that additional documents were individually prepared and maintained by sales representatives. Given the allegations of the complaint . . . it would be an extraordinary result to deny discovery into the files of the sales representatives"). UST should not be heard to reargue that settled point at this late date.

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Concerning UST Sales Force Files at 2 nn. 3-7; 9 (citing deposition excerpts); Exh. A (Funk deposition excerpts).

Instead, UST again argues only that plaintiffs have not "established" the exact date of documents admittedly in the possession of UST sales representatives that UST has never bothered to inspect. See, e.g., UST Opp. 4 ("[p]laintiffs make[] no attempt to establish the date" of unreviewed home computer documents). However, it is not up to plaintiffs to ask every UST representative the date of every document he possesses. Under the Court's Order, it was UST's task to conduct a thorough review of sales representative files and produce all corporate documents dated 1995 or earlier. Uniform deposition testimony and UST's own production confirm that no such review took place.

Conclusion

Despite the Court-recognized importance of "documentation at the 'grassroots' level" (Dec. 16, 1998 Order at 1-2), UST continues to resist the "fairly obvious point" that such material must be produced (Feb. 5, 1999 Order at 5). Nearly six months have passed since the Court first addressed the issue, yet UST still has not undertaken any meaningful search. Under these circumstances, the Court should order UST to provide plaintiffs full access to sales representative files in a central location (as it did UST computer files) so that a proper search can be conducted in a timely manner; bar UST from using the few self-serving sales representative documents it has chosen to produce

(Rule 37(b)(2)(B)); and enter such other relief as it deems just and proper.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Paducah, KY 42002-0995
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Mark C. Hansen
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(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

April 19, 1999

16diii001721

CERTIFICATE OF SERVICE

I certify that on this 19th day of April, 1999, a copy of the foregoing was sent by facsimile service and overnight mail to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Benjamin C. Powell

Benjamin A. Powell

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on April 23, 1999 for a teleconference to consider discovery matters.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, Trip Wilson, and David Simpson, counsel.

FOR THE DEFENDANT: John Reed, Neal Stoll, and Martha Weiss, counsel.

The court heard arguments on plaintiff's motion regarding the production of files from UST sales representatives and defendant's motion to compel production of non-party witness statements in plaintiff's possession.

IT IS HEREBY ORDERED that the motions are taken under advisement. The next telephonic status conference is scheduled for **2:30 p.m. EDT, Friday, May 7, 1999.** Plaintiff shall initiate the teleconference.

Date: April 23, 1999

JDMoyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

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APR 23 1999
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER (WITNESS STATEMENTS)

This matter is before the court on defendant's discovery request for information regarding witness statements obtained by plaintiffs. Plaintiffs contend that the information is protected by the work product doctrine and is not discoverable.

Specifically, defendants seek copies of all signed statements, affidavits, or declarations obtained by plaintiffs as well as any other documents or notes of statements made by third parties. Defendant also seek: 1) the names and addresses of the persons from whom statements were taken; 2) the dates on which such statements were taken; and, 3) the names of each person involved in taking or recording each statement.

Under Rule 26(b)(3), Fed.R.Civ.P., "documents and tangible things ... prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative" are discoverable "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. ... A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party."

In other words, a statement by a party to the action is discoverable without any

showing of particularized need. If, however, the statements sought were given by non-parties, the party seeking the statements must show: 1) "substantial need," which requires a showing of more than mere relevance; 2) the party would suffer "undue" hardship, which is not merely some expense or inconvenience; 3) in order to obtain the "substantial equivalent."

Statements by non-parties are covered by the work product doctrine and Rule 26(b)(3) "creates no right in a party to the litigation to obtain a copy of a statement of an ordinary witness without the usual showing required for work product." Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2028 at 414 (1994).

The statements at issue in this case include statements given by defendant's current or former employees to plaintiffs' representatives. Defendants have not shown that they are unable to obtain statements from their own employees which would be substantially equivalent to the statements obtained by plaintiffs' counsel. The desire on the part of defendant to insure that it is not overlooking anything does not satisfy the "substantial need" requirement. Hickman v. Taylor, 329 U.S. 495, 513 (1947).

In addition to the statements themselves, defendant also seeks the names of the non-parties who gave statements, the dates on which the statements were taken, and the names of individuals involved in collecting the statements. This information is also protected by the work product doctrine. As stated by professors Wright and Miller:

> Wholesale access to all witness statements taken by a party could impinge important work-product protections. Surely an interrogatory asking a party to identify all persons interviewed would contravene work product. Yet automatic disclosure of witness statements would require revelation of the identities of all witnesses from whom the attorney decided to take a statement, thereby intruding into the heart of attorney trial preparation.

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Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d § 2028 at 415 (1994).

IT IS HEREBY ORDERED that defendant's motion to compel production of non-party witness statements and information regarding those statements is **DENIED.**

Date: April 23, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

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Counsel of Record

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER (DAY PLANNERS)

This matter is before the court on plaintiffs' motion for production of additional documents from defendant UST sales representatives. (Docket No. 87). Defendant has responded, (Docket No. 91), and the court has heard oral arguments on the motion.

The parties have argued extensively concerning whether UST is required to go further with the production of documents from field representatives. To some extent, the parameters of this argument are set by the specific language of paragraph one of the court's order of January 20, 1999, which required the production from the field of certain documents, including day-planners, which related to paragraphs 22-31 of the complaint. These are the paragraphs which specify the allegedly anticompetitive activity in which plaintiff claims UST engaged.

UST, on its own initiative, forwarded to the court under seal a copy of the written instructions from UST's corporate counsel to the field representatives, calling in broad and appropriate language for the forwarding to UST of materials such as day-planners which document field activities. UST has thus produced only those day-planners which were forwarded by the representatives to counsel.

The court stated in the telephonic hearing, and repeats, that UST's course of action in communicating with field representatives was fully professional. Conwood, however, continues to

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press for more disclosure. There are, apparently, two issues. First, the issue is whether a field sales representative, even in response to the best and clearest written instructions, will know what to forward. Field representatives are sales people of no more than ordinary education, certainly not trained in reviewing documents in commercial litigation. Second, Conwood asserts that information in the day-planners may be discoverable and important, either because it corroborates other information which Conwood counsel has concerning dates of visits when allegedly anticompetitve actions were taken by UST representatives, or because it provides a second source of data concerning sales personnel visits and a cross-check to the so-called PAR reports.

The court views this as a close question and each side has vigorously and thoroughly argued its points. Given the scope of this litigation, and the specific usefulness of the day-planners articulated by Conwood counsel, the court will modify its prior order of January 20 to also require the production by UST of all day-planners, daybooks, or calendars maintained by UST sales representatives. The full production of the planners is consistent with the policies of civil discovery and is most likely to lead to a just result based on full information. Moreover, while the burden point has not been raised as a principal objection by UST, UST has clearly represented that many field representatives do not keep these daybooks and planners for lengthy periods, leading to the inference that the scope and volume of production is not that great, even though there are some 448 field representatives.

Therefore,

IT IS HEREBY ORDERED that the motion is **GRANTED** to the limited extent that defendant shall produce (without the limitations set out in the January 20, 1999 order) day-planners,

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daybooks, and calendars from its sales representatives, no later than May 24, 1999.

Date: April 23, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

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TO: Edward J. Foster, Esq.
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
Civil Action No. 5:98CV-108-R

CONWOOD COMPANY, L.P., et al. PLAINTIFFS

v. **MOTION FOR ADMISSION *PRO HAC VICE***

UNITED STATES TOBACCO COMPANY, et al. DEFENDANTS

The undersigned as counsel for plaintiffs and on behalf of the persons named below, moves the admission to this court for the practice of the abovestyled action the following persons:

Robert E. Craddock, Jr.; Courtnay Stallings Leach; and John S. Wilson, III.

Affidavits of said persons demonstrating their eligibility, address and telephone numbers are attached. Admission fees are tendered herewith.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K. Street, N.W.
Suite 1000 West
Washington, D.C. 20005

WHITLOW, ROBERTS, HOUSTON & STRAUB
Attorneys for Plaintiffs, Conwood Company, L.P., et al.

BY _____
Richard C. Roberts
P.O. Box 995
Paducah, KY 42002-0995
502-443-4516

16diii001733

I certify that a copy of the foregoing was mailed to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022, and

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Scheel Cox and Vice, 2400 Citizens Plaza, Louisville, KY 40202, Attorneys for Defendants.

This the 26TH day of April, 1999.

Richard C. Roberts

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98-CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	

AFFIDAVIT OF ROBERT E. CRADDOCK, JR.
PURSUANT TO LOCAL RULE 83.2(2)

Robert E. Craddock, Jr., being duly sworn, submits this Affidavit in support of the Motion to Proceed Pro Hac Vice and states as follows:

1. I am licensed to practice in the state of Tennessee and am admitted and in good standing with the United States District Court for the Western District of Tennessee, Western Division; U. S. Supreme Court; Tennessee Supreme Court (Nashville); U.S. Court of Appeals for the Fifth Circuit (New Orleans); U. S. Court of Appeals for the Sixth Circuit (Cincinnati, Ohio); U.S. Court of Appeals for the Eighth Circuit; U. S. Court of Appeals for the Tenth Circuit (Denver, Colorado); U. S. Court of Appeals, District of Columbia (Washington, D. C.); U.S. Tax Court, Washington, D. C.; U.S. District Court, Eastern District of Tennessee (Knoxville); U . S . District Court, Middle District of Tennessee (Nashville).

2. My Tennessee Bar Number is 5826.

16diii001735

3. My current address is 6075 Poplar Avenue, Suite 650, Memphis, TN 38119.

4. My current phone number is (901) 537-1000.

5. There are no disciplinary proceedings or criminal charges instituted against me.

6. For purposes of the above captioned matter, I hereby consent to be subject to the jurisdiction and rules of the Kentucky Supreme Court governing professional conduct.

Robert E. Craddock, Jr. (TN Bar # 5826)

STATE OF TENNESSEE)

: SS

COUNTY OF SHELBY)

The foregoing instrument was subscribed, sworn to and acknowledged before me this 23rd of April, 1999, by ROBERT E. CRADDOCK, JR..

My commission expires: _____.

CYNTHIA I. COMPTON MY COMMISSION NOTARY PUBLIC AT LARGE EXPIRES AUG. 13, 2002 SHELBY COUNTY, TN

Cynthia I Compton

Notary Public

318619.1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98-CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	

AFFIDAVIT OF COURTNAY STALLINGS LEACH PURSUANT TO LOCAL RULE 83.2(2)

Courtnay Stallings Leach, being duly sworn, submits this Affidavit in support of the Motion to Proceed Pro Hac Vice and states as follows:

1. I am licensed to practice in the state of Tennessee and am admitted and in good standing with all Tennessee state courts and the United States District Court for the Western District of Tennessee, Western Division. In addition, I am licensed to practice in the state of Alabama and am admitted and in good standing with all Alabama state courts and the U.S. District Courts for the Northern and Middle Districts of Alabama.

2. My Tennessee Bar Association Number is 19471.

3. My current address is 6075 Poplar Avenue, Suite 650, Memphis, TN 38119.

4. My current phone number is (901) 537-1000.

5. There are no disciplinary proceedings or criminal charges instituted against me.

16diii001737

6. For purposes of the above captioned matter, I hereby consent to be subject to the jurisdiction and rules of the Kentucky Supreme Court governing professional conduct.

Courtnay Stallings Leach (TN Bar # 19471)

STATE OF TENNESSEE)
: SS
COUNTY OF SHELBY)

The foregoing instrument was subscribed, sworn to and acknowledged before me this 23rd of April, 1999, by COURTNAY STALLINGS LEACH.

My commission expires: _____.

CYNTHIA I. COMPTON NOTARY PUBLIC AT LARGE SHELBY COUNTY, TN MY COMMISSION EXPIRES AUG. 13, 2000

Notary Public

318619.1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98-CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	

AFFIDAVIT OF JOHN S. WILSON, III
PURSUANT TO LOCAL RULE 83.2(2)

John S. Wilson, III, being duly sworn, submits this Affidavit in support of the Motion to Proceed Pro Hac Vice and states as follows:

1. I am licensed to practice in the state of Tennessee and am admitted and in good standing with all Tennessee state courts, the United States District Court for the Western District of Tennessee, Western Division, and the United States Court of Appeals for the Sixth Circuit.

2. My Tennessee Bar Number is 18288.

3. My current address is 6075 Poplar Avenue, Suite 650, Memphis, TN 38119.

4. My current phone number is (901) 537-1000.

5. There are no disciplinary proceedings or criminal charges instituted against me.

16diii001739

6. For the purposes of the above captioned matter, I hereby consent to be subject to the jurisdiction and rules of the Kentucky Supreme Court governing professional conduct.

John S. Wilson, III (TN Bar # 18288)

STATE OF TENNESSEE)
: SS
COUNTY OF SHELBY)

The foregoing instrument was subscribed, sworn to and acknowledged before me this 23rd of April, 1999, by JOHN S. WILSON, III.

My commission expires: _____.

CYNTHIA I. COMPTON NOTARY PUBLIC AT LARGE SHELBY COUNTY, TN MY COMMISSION EXPIRES AUG. 13, 2002

Notary Public

318619.1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
Civil Action No. 5:98CV-108-R

CONWOOD COMPANY, L.P., et al. PLAINTIFFS

v. **ORDER ADMITTING PRO HAC VICE**

UNITED STATES TOBACCO COMPANY, et al. DEFENDANTS

On motion duly made, IT IS ORDERED that Robert E. Craddock, Jr, Courtnay Stallings Leach and John S. Wilson, III are admitted to this court for the purpose of practicing the abovestyled case *pro hac vice*.

This ___ day of _____, 1999.

_____
JUDGE, U.S. District Court

142375.1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

Upon request of the parties,

IT IS HEREBY ORDERED that the telephonic status conference scheduled for 2:30 p.m. EDT, Friday, May 7, 1999 is rescheduled for **10:30 a.m. EDT, Monday, May 10, 1999.**

Plaintiff shall initiate the teleconference.

Date: 5-5-99

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
MAY 5 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY GAYLEEN F. RUSK

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Gayleen F. Rusk, Amoco Pronto Express, 711 Gordon Drive, Sioux City, Iowa 51101. The deposition will commence at 10:00 a.m. on May 14, 1999, and will continue from day to day until complete. The deposition will be taken at the Riverboat Inn, 701 Gordon Drive, Sioux City, Iowa 51101.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: May 7, 1999

16diii001744

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 7th day of May, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Gayleen F. Rusk, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Steven F. Benz

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA

CONWOOD COMPANY, L.P.,
et al.

v.

UNITED STATES TOBACCO COMPANY,
et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Gayleen F. Rusk
c/o James M. Rocklin, Esquire
627 Frances Bldg., 505 5th St.
Sioux City, Iowa 51101

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Riverboat Inn 701 Gordon Drive Sioux City, Iowa 51101	May 14, 1999 at 10:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Steven F. Benz	7 May 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	7 May 1999	Counsel agreed to accept Service on behalf of client.

SERVED ON (PRINT NAME)	MANNER OF SERVICE
James M. Rocklin, Esquire 627 Frances Bldg., 505 5th St. Sioux City, Iowa 51101	Federal Express
SERVED BY (PRINT NAME)	**TITLE**

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	0646
CONNECTION TEL	79539771813127508545
SUBADDRESS	
CONNECTION ID	
ST. TIME	05/10 09:32
USAGE T	01'38
PGS.	6
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, DC 20005

(202) 326-7900
FACSIMILE: (202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

FACSIMILE TRANSMISSION

TO: Hank Handelsman

FAX NO.: (312) 750-8545 **CLIENT NO.:** 97718

PHONE:

FROM: Benjamin A. Powell
PHONE: (202) 326-7953
DATE: May 7, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 6 (INCLUDING THIS SHEET)

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*** TX REPORT ***
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TRANSMISSION OK

TX/RX NO	0647
CONNECTION TEL	79539771819017671302
SUBADDRESS	
CONNECTION ID	
ST. TIME	05/10 09:34
USAGE T	01'36
PGS.	6
RESULT	OK

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1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, DC 20005

(202) 326-7900
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MICHAEL K. KELLOGG
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REID M. FIGEL
HENK BRANDS
SEAN A. LEV

FACSIMILE TRANSMISSION

TO: Tripp Wilson
Eddie Foster
David Simpson

FAX NO.: (901) 767-1302 **CLIENT NO.:** 97718

PHONE: (901) 761-2050

FROM: Benjamin A. Powell
PHONE: (202) 326-7953
DATE: May 7, 1999
MESSAGE:

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	0649
CONNECTION TEL	79539771819015371010
SUBADDRESS	
CONNECTION ID	
ST. TIME	05/10 09:41
USAGE T	01'36
PGS.	6
RESULT	OK

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SUITE 1000 WEST
WASHINGTON, DC 20005

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PETER W. HUBER
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MARK L. EVANS
AUSTIN C. SCHLICK
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GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

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TO: Edward J. Foster

FAX NO.: (901) 767-1302 AND (901) 537-1010

CLIENT NO.: 97718

PHONE: (901) 761-2050 (901) 537-1033

FROM: Benjamin A. Powell
PHONE: (202) 326-7978
DATE: May 10, 1999
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CONNECTION ID	
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USAGE T	03'42
PGS.	6
RESULT	OK

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1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, DC 20005

(202) 326-7900
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PETER W. HUBER
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MARK L. EVANS
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NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

FACSIMILE TRANSMISSION

TO: Richard C. Roberts

FAX NO.: (502) 443-4571 **CLIENT NO.: 97718**

PHONE: (502) 443-4516

FROM: Benjamin A. Powell
PHONE: (202) 326-7953
DATE: May 7, 1999
MESSAGE:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

In a teleconference on May 10, 1999, counsel for UST raised two related issues: whether doubletracking of depositions should be permitted, and whether there should be an earlier deadline for disclosure of trial witnesses, with an accompanying opportunity to do "clean up" depositions of anyone designated as a witness and not already deposed.

First, with respect to doubletracking, there is no prohibition against simultaneous depositions in either the civil rules or any pretrial order of this court. Moreover, by the magistrate judge's count, Conwood had six lawyers in attendance at yesterday's teleconference, and UST had six lawyers in attendance. UST is represented by a very large, national law firm, and by Kentucky counsel. Conwood is represented by a smaller, District of Columbia litigation law firm, as well as a Paducah law firm, and by Wyatt, Tarrant, and Combs, the largest law firm in Kentucky and Tennessee. Each side seems to have more than adequate resources. To the extent that the position of Conwood in yesterday's hearing amounts to a request for a protective order forbidding doubletracking, the request is denied.

This is not an invitation to triple tracking or to any of the wily methods of vexatious deposition scheduling which sometimes have occurred in the heat of battle in other cases with which the court is familiar. Counsel for both sides are urged to continue to schedule cooperatively, bearing

100

in mind the old litigation adage that "what goes around, comes around."

Next, the court will address the suggestion that the pretrial order be modified to require earlier disclosure of trial witnesses. Currently, the trial date is set for February 28, 2000, and the final witness list is required to be disclosed by each side on January 21, 2000. UST argues that there are potentially hundreds or even thousands of potential witnesses who may have personal knowledge of alleged "in the field" activities which Conwood contends are illegal. Conwood argues that UST could have started discovery earlier and that if it doesn't depose every trial witness, "that's the way the world works."

The court has previously given Conwood the benefit of deeper discovery than might be afforded in a run-of-the-mine case, requiring the production of a broad range of calendars, planners, and day-timers from field personnel as well as other lower level documents. Part of the rationale of the court was that, in a case of this scope and importance to each party, discovery should be deeper and more probing than in a simpler case. Moreover, the court has, under a rather ordinary reading of Hickman v. Taylor, 329 U.S. 495, 513 (1947), denied UST access to Conwood's witness statements, reasoning that such statements constitute attorney work product shielded from disclosure except under compelling circumstances. (Docket No. 94, Order of April 23, 1999). The combination of the very broad pool of potential trial witnesses, together with UST's inability to get witnesses statements, may have the result of leaving UST in the dark as to who will be the fact witnesses against whom it must defend at trial

Therefore, the court will amend the previous pretrial order to require the disclosure by Conwood by September 21, 1999 of its trial witnesses who are "field personnel," meaning witnesses who have alleged direct personal knowledge of UST's "in the field" anti-competitive behavior. Such

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field personnel witnesses would include UST field sales personnel and former sales personnel, Conwood field sales personnel, convenience store owners, managers, and employees, and others who may have directly, personally observed "in the field" activity which Conwood alleges to be anti-competitive.

Likewise, no later than September 21, 1999, UST shall disclose its "field personnel" trial witnesses who have direct personal knowledge regarding the allegations contained in UST's counterclaim.

In addition, the court will allow the parties until October 21, 1999 to do "clean up" discovery of field witnesses.

This amendment of the witness disclosure requirement is meant to be highly limited, and is not considered by the court to "open the door" to massive discovery after the field personnel witness lists are revealed. Neither is it intended to invite either party to bide its time and take minimal discovery now and to wait to the disclosure of the field personnel witness list for a barrage of multitrack depositions. Nor is it meant to suggest that the trial date can or should or will be changed. It most certainly is not a signal to either party that it should defer the deposition of any field personnel until later.

The parties can avoid a later field personnel discovery crunch by making disclosures now of those field personnel whom it reasonably anticipates as trial witnesses. While many seasoned trial lawyers attempt to "save the good stuff for the jury," given the amount of damages at issues in this case and the very large pool of potential field fact witnesses, the court can and will fashion appropriate orders to assure meaningful discovery by both parties.

This amendment of the witness disclosure requirements does not in any apply to any

16diii001754

witness who is not in the limited category of "field personnel," and will not authorize depositions after the normal discovery cutoff of management personnel, experts, and other witnesses. The previously ordered discovery cutoff of August 1, 1999 otherwise remains in full force.

Date: May 11, 1999

J.D.Moyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
MAY 11 1999
JEFFREY A. APPERSON, CLERK
BY
DEPUTY CLERK

16diii001755

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*** TX REPORT ***
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CONNECTION ID	
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KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
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K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands

FACSIMILE TRANSMISSION

TO:	DAVID SIMPSON, ESQ. EDDIE FOSTER, ESQ. TRIPP WILSON, ESQ.
FAX NO.:	901-767-1302
CLIENT NO.	97718
FROM:	NEIL M. GORSUCH
PHONE:	(202) 326-7978
DATE:	May 11, 1999

MESSAGE:

****
*** TX REPORT ***
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TX/RX NO	0740
CONNECTION TEL	79769771815024434571
SUBADDRESS	
CONNECTION ID	
ST. TIME	05/11 16:23
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PGS.	5
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
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Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands

FACSIMILE TRANSMISSION

TO: Richard C. Roberts

FAX NO.: (502) 443-4571 **CLIENT NO.: 97718**

PHONE: (502) 443-4516

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: May 11, 1999
MESSAGE:

COMMAND #013

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	5/11	16:32	3127508545	EC--S	01'18"	005	OK

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1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands

FACSIMILE TRANSMISSION

TO: Hank Handelsman

FAX NO.: (312) 750-8545 **CLIENT NO.:** 97718

PHONE: (312) 750-8400

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PHONE: (202) 326-7978
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001	5/11	16:30	9015371010	EC--S	01'16"	005	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands

FACSIMILE TRANSMISSION

TO: Edward J. Foster, Esq.
Tripp Wilson, Esq.

FAX NO.: **(901) 537-1010**

CLIENT NO.: **97718**

PHONE: (901) 537-1033

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: May 11, 1999
MESSAGE:

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46diii001759

Jessica

United States District Court
Western District of Kentucky
Office of the Clerk
601 W. Broadway
Louisville, KY 40202-2249
502-625-3500
Fax: 502-625-3880

Jeffrey A. Apperson
Clerk of Court

William W. Clark
Chief Deputy Clerk

Divisional Office Fax Nos:
Bowling Green 502-842-2836
Owensboro 502-685-4601
Paducah 502-442-1919

FACSIMILE TRANSMISSION

TO: John Reed
Neal Stall
Neil Gorsuch

DATE: 5-11-99

FROM: Michelle

In case of transmission error, please call _____

COMMENTS: _____

Total Pages _____
(Including cover)

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 MAY 11 A9:50

FILED
U.S. DISTRICT COURT CLERK
W.D.KY. DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

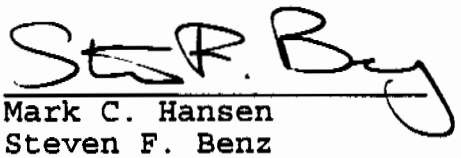
NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY CAROLYN V. BALLARD

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Carolyn V. Ballard, D&R Grocery store, 1702 Airport Road, Hot Springs Arkansas, 71913. The deposition will commence at 2:00 p.m. on May 24, 1999, and will continue from day to day until complete. The deposition will be taken at the Lake Hamilton Resort, 2803 Albert Pike Road Hot Springs, Arkansas 71313.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571



Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: May 10, 1999

16diii001762

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 10th day of May, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Carolyn V. Ballard, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Michael E. Sanders, Esquire
1424 Airport Rd., Ste. A-2
Hot Springs National Park, Arkansas 71913

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Steven F. Benz

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Michael E. Sanders, Esquire 1424 Airport Rd., Ste. A-2 Hot Springs National Park, Arkansas 71913	Federal Express
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	0710
CONNECTION TEL	79539771815024434571
SUBADDRESS	
CONNECTION ID	
ST. TIME	05/11 09:23
USAGE T	03'37
PGS.	6
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, DC 20005

(202) 326-7900
FACSIMILE: (202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

FACSIMILE TRANSMISSION

TO: Richard C. Roberts

FAX NO.: (502) 443-4571 **CLIENT NO.: 97718**

PHONE: (502) 443-4516

FROM: Benjamin A. Powell
PHONE: (202) 326-7953
DATE: May 10, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 6 (INCLUDING THIS SHEET)

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL US IMMEDIATELY OR CONTACT OUR COPY SERVICE CENTER AT (202) 326-7949:

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	0711
CONNECTION TEL	795397718190176713O2
SUBADDRESS	
CONNECTION ID	
ST. TIME	05/11 09:21
USAGE T	01'36
PGS.	6
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, DC 20005

(202) 326-7900
FACSIMILE: (202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

FACSIMILE TRANSMISSION

TO: Tripp Wilson
David Simpson
Eddie Foster

FAX NO.: (901) 767-1302 CLIENT NO.: 97718

PHONE: (901) 761-2050

FROM: Benjamin A. Powell
PHONE: (202) 326-7953
DATE: May 10, 1999
MESSAGE:

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	0709
CONNECTION TEL	79539771813127508545
SUBADDRESS	
CONNECTION ID	
ST. TIME	05/11 09:18
USAGE T	01'42
PGS.	6
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, DC 20005

(202) 326-7900
FACSIMILE: (202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

FACSIMILE TRANSMISSION

TO: Hank Handelsman

FAX NO.: (312) 750-8545 **CLIENT NO.:** 97718

PHONE:

FROM: Benjamin A. Powell
PHONE: (202) 326-7953
DATE: May 10, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 6 (INCLUDING THIS SHEET)

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	0708
CONNECTION TEL	79539771819015371010
SUBADDRESS	
CONNECTION ID	
ST. TIME	05/11 09:15
USAGE T	01'46
PGS.	6
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, DC 20005

(202) 326-7900
FACSIMILE: (202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

FACSIMILE TRANSMISSION

TO: Edward J. Foster

FAX NO.: ~~(901) 767-1302~~ AND (901) 537-1010

CLIENT NO.: 97718

PHONE: (901) 761-2050 (901) 537-1033

FROM: Benjamin A. Powell
PHONE: (202) 326-7978
DATE: May 10, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 6 (INCLUDING THIS SHEET)

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL US IMMEDIATELY

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 MAY 14 A9:25 FILED US DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY LEROY KEIL

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Leroy Keil, 2315 South Eighth Street Circle, Chikasha, OK 73018. The deposition will commence at 2:00 p.m. on May 28, 1999, or such other time and date as is mutually agreeable, and will continue from day to day until complete. The deposition will be taken at the law office of Ivy, Ratcliff & Chasteen, P.C., 308 Choctaw Avenue, Chikasha, OK 73018.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: May 13, 1999

16diii001770

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 13th day of May, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Leroy Keil, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

David Ratcliff, Esq.
Ivy, Ratcliff & Chasteen, P.C.
308 Choctaw Avenue
Chikasha, OK 73018

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Steven F. Benz

United States District Court

FOR THE WESTERN DISTRICT OF OKLAHOMA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Leroy Keil
c/o David Ratcliffe, Esq.
Ivy, Ratcliff & Chasteen P.C.
308 Choctaw Avenue
Chikasha, OK 73018

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Ivy, Ratcliff & Chasteen P.C. 308 Choctaw Avenue Chikasha, OK 73018	May 28, 1999 at 2:00 p.m. or such other time and date as is mutually agreeable

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs S F. Benz	13 May 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
David Ratcliffe, Esq. Ivy, Ratcliff & Chasteen P.C. 308 Choctaw Avenue Chikasha, OK 73018	Federal Express to counsel for non-party witness as agreed
SERVED BY (PRINT NAME) Steven F. Benz, Esq.	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

May 13, 1999

Via Federal Express

John S. Reed, Esquire
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear John:

Enclosed is a subpoena for Mr. Leroy Keil. As you will see, the deposition is noticed for Friday, May 28, 1999 at 2:00 p.m. or such other time and date as is mutually agreeable. May 28 was chosen by the witness for his convenience.

If you are unable to appear that date, please let me know immediately so that we can promptly reschedule. Mr. Ratcliff (Mr. Keil's attorney) has indicated that he may also be available the afternoon of June 1, or the morning of June 2, 1999, if another date is needed, but Mr. Ratcliff has not checked these dates with his client.

Please do not hesitate to call if you would like to discuss this matter.

Very truly yours,

Steven F. Benz

Enclosures
cc: David Ratcliff, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
Civil Action No. 5:98CV-108-R

CONWOOD COMPANY, L.P., et al. PLAINTIFFS

v. **ORDER ADMITTING PRO HAC VICE**

UNITED STATES TOBACCO COMPANY, et al. DEFENDANTS

On motion duly made, IT IS ORDERED that Robert E. Craddock, Jr, Courtnay Stallings Leach and John S. Wilson, III are admitted to this court for the purpose of practicing the abovestyled case *pro hac vice*.

This 14 day of May, 1999.

JUDGE, U.S. District Court

ENTERED
MAY 17 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

142375.1

16diii001703

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 MAY 19 A9:14

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

NOTICE OF VIDEOTAPED DEPOSITION AND PRODUCTION OF DOCUMENTS BY NON-PARTY TOMMY LATTA

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Tommy Latta, 105 Kenning Road No. 14 Crosby, TX 77532-6123. The deposition will commence at 9:30 a.m. on June 3, 1999, or at such other time and date as may be agreed upon by counsel. The deposition will continue from day to day until complete, and will be taken at the law office of Kellogg, Huber, Hansen, Todd & Evans P.L.L.C.,1301 K Street N.W. Suite 1000 West Washington, D.C. 20005-3317.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the

Federal Rules of Civil Procedure, non-party Tommy Latta will be required to produce the documents described in the attached subpoena on May 27, 1999, at 5:30 p.m. at the offices of Kellogg, Huber, Hansen, Todd & Evans P.L.L.C 1301 K Street N.W. Suite 1000 West Washington, D.C. 20005-3317.

Respectfully submitted,

Richard Roberts/amy

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: May 18, 1999

16diii001777

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 18th day of May, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Tommy Latta, and subpoena, were served upon the following:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022
(by mail)

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202
(by mail)

Alice Fisher, Esq.
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004-2505
(by hand delivery)

Neil Gorsuch

PROOF OF SERVICE

	DATE	PLACE
SERVED	May 18, 1999	Latham & Watkins 1001 Pennsylvania Avenue, N.W. Suite 1300 Washington, D.C. 20004-2505

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Alice Fisher, Esq. Latham & Watkins 1001 Pennsylvania Avenue, N.W. Suite 1300 Washington, D.C. 20004-2505	Hand Delivery
SERVED BY (PRINT NAME)	TITLE
Neil Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P.,	)	MISC. DOCKET NO. 99-33
Plaintiffs,	)	IN RE: SUBPOENA SERVED ON MANAGEMENT SCIENCE ASSOCIATES, INC.
vs.	)	
US TOBACCO COMPANY, US TOBACCO SALES AND MARKETING COMPANY, INC., US TOBACCO MANUFACTURING COMPANY, INC., AND UST, INC.,	)	CA: 5:98CV-108-R (UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT PADUCAH)
Defendants.	)	

CONFIDENTIALITY ORDER

WHEREAS Management Science Associates, Inc. ("MSA") is engaged in the disclosure of documents and information to Conwood Company, L.P. and Conwood Sales Company, L.P. (collectively "Conwood") pursuant to a subpoena duces tecum served on MSA by Conwood on December 16, 1998 ("Subpoena");

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WHEREAS this matter arises through discovery in the action styled Conwood Company, L.P. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R, in the United States District Court for the Western District of Kentucky, where a confidentiality order was entered on July 22, 1998 by District Judge Thomas B. Russell (the "Kentucky Protective Order"), and where some of the information, documents, and data sought by Conwood through this Subpoena are subject to court orders compelling production to the extent they are within the possession, custody, or control of the defendants;

WHEREAS, MSA's disclosure involves, among other things, the production of documents or information that MSA deems confidential, including proprietary commercial information;

WHEREAS Conwood has a legitimate interest in protecting the identity of its non-testifying experts,

IT IS ORDERED THAT:

1. This Protective Order shall apply to materials produced by MSA in response to the Subpoena except to the extent they duplicate materials which have been produced or which are subject to orders compelling production by defendants in the underlying litigation with Conwood in the Western District of Kentucky. See Feb. 16, 1999 Tr. at p. 9, lines 3-8 (attached hereto as Exhibit "A"). The Kentucky Protective Order shall apply, exclusively and without modification by this order, to materials which have been produced to date or which are presently subject to orders compelling production by defendants directly. Any further confidentiality concerns with regard to such materials should be addressed to the United States District Court for the Western District of Kentucky.

2. As to non-duplicative documents produced by MSA pursuant to the Subpoena, the Kentucky Protective Order (attached hereto as Exhibit "B") is incorporated in this Order by reference and modified as follows:

a. Any application with respect to a dispute concerning this Stipulation and Order of Confidentiality shall be made only to United States District Court for the Western District of Pennsylvania.

b. Within five days of this Order's execution Conwood shall provide to MSA's counsel, Jon Hogue, for review by MSA's chairman, Alfred A. Kuehn and Mr. Hogue only, a numbered list of all persons or entities (including all non-testifying experts), to whom it proposes to disclose information designated by MSA pursuant to this Order and the Kentucky Protective Order as Highly Confidential/Tier 1 Information or Confidential/Tier 2 Information ("Conwood's List").

c. Mr. Hogue and Dr. Kuehn shall treat the identities of all persons or entities (including all non-testifying experts) on Conwood's List as confidential and shall protect and not disclose to any other person or entity, without limitation but especially including the defendants in the underlying action, their representatives or any person or entity acting in concert with them, the identities of all persons or entities on Conwood's List

d. Dr. Kuehn, through MSA's attorney, Jon Hogue, shall notify Conwood's counsel within five days if a person or entity on Conwood's List is viewed by MSA as a competitor.

e. In the event that MSA notifies Conwood's counsel that a person or entity on Conwood's list is viewed as a competitor, Conwood shall make no disclosure to such person or entity until Conwood's counsel notifies MSA's counsel of Conwood's desire to do so and for 10 days thereafter or such shorter time as is required for the parties to make application to the Court for an order allowing or precluding disclosure of MSA's Highly Confidential/Tier 1 Information or

Confidential/Tier 2 Information to the contested person or entity. If the matter is not resolved by agreement of the parties, no disclosure shall be made to such person or entity until the dispute is resolved by the court. To prevent disclosure of the identity of Conwood's non-testifying experts, the Court's order shall not refer to any person or entity on Conwood's List by name, but shall instead refer only to the corresponding number provided on Conwood's List, pursuant to the form provided herein (see attached Exhibit "C").

f. Before any disclosure is made, Dr Kuehn and each non-testifying expert to whom disclosure of MSA's confidential information is to be made by Conwood shall sign a confidentiality acknowledgement in the form attached as Exhibit "D".

g. Either MSA or Conwood may apply for relief or modification of the Court's order concerning disclosure of MSA's Highly Confidential/Tier 1 Information or Confidential/Tier 2 Information.

SO ORDERED:

Dated: May 20, 1999

HONORABLE DONALD LEE
UNITED STATES DISTRICT JUDGE

cm: All parties of record

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on May 24, 1999 for a teleconference to consider discovery matters.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, David Simpson, Dick Roberts, counsel.

FOR THE DEFENDANT: John Reed, Neal Stoll, Rachel Mariner, Chris Athanasia, James Keyte, counsel.

The following orders were orally announced.

IT IS HEREBY ORDERED that:

1) No later than Wednesday, May 26, 1999, each side shall submit a status report to chambers, via facsimile, which includes the following information: witnesses whose depositions have been noticed; witnesses the parties intend to depose but have not yet noticed for deposition; and a list of depositions, scheduled and unscheduled.

2) Defendant requested that in instances where a video-taped trial deposition is conducted, any prior written statement of the deponent obtained by the party who noticed the deposition should be made available to the opposing party in order to allow for a more complete cross-examination. Before the court addresses this issue, the parties are to confer and attempt to come to a resolution on their own – they have not yet done so. If the parties are unable to work out a

solution, they are to contact the Magistrate Judge's staff and so report.

3) When noticing deposition, in addition to providing the name and address of the deponent, the noticing party shall disclose the deponent's business affiliation.

4) The next telephonic status conference is scheduled for **1:00 p.m. EDT, Wednesday, June 2, 1999.** Defendant shall initiate the teleconference.

Date: May 24, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
MAY 24 1999
JEFFREY A. APPERSON, CLERK
BY
DEPUTY CLERK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on May 26, 1999 for a telephonic discovery conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, David Simpson, Dick Roberts, counsel.

FOR THE DEFENDANT: Neal Stoll, Rachel Mariner, Matt Barnett, counsel.

At issue is whether defendant can discover, pursuant to Rule 612, Fed.R.Evid., the third-party witness statements obtained by plaintiff. The court previously determined that such statements are generally protected by the attorney work product doctrine and the court has been given no reason to reconsider that opinion.

Rule 612, however, opens the door to production of the statements if they are used to refresh a witness' memory prior to testifying. If a statement consists of factual recitations by the witness and is used to refresh the witness' memory prior to testifying, the interests of justice require its production. *See*, In re Comair Air Disaster Litigation, 100 F.R.D.350 (E.D.Ky. 1983). If, however, the statement contains attorney opinions, analysis, or conclusions, the interests of justice do not require the statement to be produced. *See*, Parry v. Highlight Industries, Inc., 125 F.R.D. 449 (W.D. Mich. 1989).

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The phrase, "to refresh memory," as contained in Rule 612, is given a broad definition and is not limited to the situation where a prior statement is physically handed to the witness to read and review. However, the initial taking of the statement does not constitute refreshing the witness' memory unless the statement is taken immediately prior to the deposition and is part of the deposition preparation.

IT IS HEREBY ORDERED that third-party witness statements, otherwise protected by the work product doctrine, are discoverable if the statement was used to refresh the witness' memory prior to testifying. Such statements shall be produced at the time the witness testifies.

Date: May 26, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
MAY 26 1999
JEFFREY A. APPERSON, CLERK
DEPUTY CLERK

16diii001787

WHITLOW, ROBERTS, HOUSTON, & STRAUB
ATTORNEYS AT LAW
OLD NATIONAL BANK BUILDING
500 BROADWAY
POST OFFICE BOX 995
PADUCAH, KENTUCKY 42002-0995

HENRY Q. WHITLOW
RICHARD C. ROBERTS
GARY B. HOUSTON
MARK C. WHITLOW
E. FREDERICK STRAUB, JR.
THOMAS L. OSBORNE, P.S.C.
RANDY L. TERRICE *
R. CHRISTION HUTSON
RONALD F. KUPPER
GUTHRIE H. ALLEN **
MATTHEW F. COOGLE
[illegible]

* ALSO ADMITTED IN ILLINOIS
** ALSO ADMITTED IN LOUISIANA

TELEPHONE
502/443-4516

FAX/TELECOPIER
502/443-4571
E-MAIL
MAIL@WHITLOW-LAW.COM

THOMAS S. WALLER 1890-1975
THOMAS W. THRELKELD 1905-1985

TO: Jessica

FROM: Leiza

DATE: 6.15.99

RE: Conwood v. UST

3 PAGES INCLUDING THIS PAGE

COMMENTS:

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL _____

at (502) 443-4516.

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED FOR THE USE OF THE ADDRESSEE ONLY. IF YOU ARE NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE TO DELIVER THIS MESSAGE TO THE INTENDED RECIPIENT, PLEASE DO NOT USE THIS TRANSMISSION IN ANY WAY, BUT CONTACT THE SENDER BY A COLLECT CALL TO THE TELEPHONE NUMBER LISTED ABOVE.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on May 27, 1999 for a telephonic discovery conference to discuss the scheduling of depositions.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, David Simpson, Dick Roberts, counsel.

FOR THE DEFENDANT: Neal Stoll, Martha Weiss, James Keyte, Chris Athanasia, counsel.

The following orders were orally announced at the teleconference.

IT IS HEREBY ORDERED that:

1) The court's prior order authorizing double-tracking of depositions contemplated two depositions per day, not two depositions per party (which would mean four depositions per day).

2) No later than the close of business on May 27, 1999, the parties shall fax to chambers a list of the categories of witnesses they intend to depose and a good faith estimate of the number of witnesses in each category. This list refers to depositions that have not yet been taken.

3) The court will fax to the parties a proposed order dealing with the depositions schedule. That proposed order will be discussed with the parties in a teleconference at 1:00 p.m., Friday, May 28, 1999. Also under discussion will be the possibility of limiting the number of

depositions each party may take. Plaintiff shall initiate the teleconference.

Date: May 27, 1999

James D. Moyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies via facsimile to:
Counsel of Record

ENTERED
MAY 27 1999
JEFFREY A. APPERSON, CLERK
BY
DEPUTY CLERK

16diii001790

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on May 28, 1999 for a telephonic discovery conference to discuss the scheduling of depositions.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, Dick Roberts, counsel.

FOR THE DEFENDANT: Neal Stoll, counsel.

The following orders were orally announced at the teleconference.

IT IS HEREBY ORDERED that:

1) The court's prior scheduling order (Docket No. 73) is amended in that the deadline for completion of non-expert discovery is moved from August 1, 1999 to September 1, 1999. All other deadlines remain unchanged.

2) From this date on, each party is permitted to take up to, but no more than, three hundred hours of deposition testimony, with a maximum number of 60 additional witnesses. This includes witnesses noticed or identified but not yet taken. Depositions previously concluded will not count toward either the hour or the witness limit.

3) The telephonic conference previously scheduled for Wednesday, June 2, 1999 is

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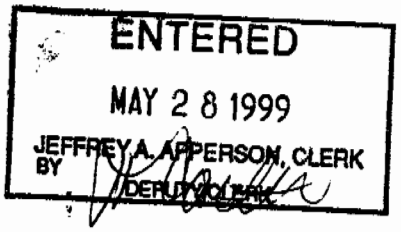
rescheduled for 2:00 p.m., EDT, Monday, June 7, 1999. Defendant shall initiate the teleconference.

Date: May 28, 1999

JDMoyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record



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COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 MAY 28 A10:03

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

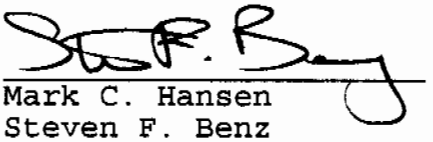
NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY MAUDIE RUSHING

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Maudie Rushing, Rushing's Smoke Shop, 319 Independence, Liberty, TX 77575. The deposition will commence at 11:00 a.m. on June 14, 1999 or such other time and date as is mutually agreeable, and will continue from day to day until complete. The deposition will be taken at the Liberty County Courthouse, 1923 Sam Houston Street, Liberty, TX 77575.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571



Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: May 27, 1999

16diii001794

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 27th day of May, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Maudie Rushing, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Walter P. Fontenot, Esq.
P.O. Box 249
Liberty, Texas 77575

Steven F. Benz

United States District Court

FOR THE EASTERN DISTRICT OF TEXAS

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Maudie Rushing
c/o Walter P. Fontenot, Esq.
P.O. Box 249
Liberty, Texas 77575

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Liberty County Courthouse 1923 Sam Houston Street Liberty, TX 77575	June 14, 1999 at 11:00 a.m., or such other time and date as is mutually agreeable

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Steven R. Benz	27 May 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Walter P. Fontenot, Esq. P.O. Box 249 Liberty, Texas 77575	U.S. Express Mail
SERVED BY (PRINT NAME)	**TITLE**
Steven F. Benz	

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

DATE STAMP
AND RETURN
'99 MAY 28 A10:03
FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

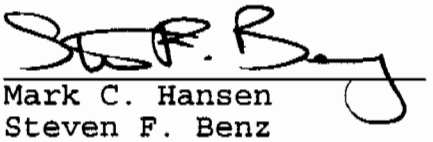
NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY MAUDIE RUSHING

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Maudie Rushing, Rushing's Smoke Shop, 319 Independence, Liberty, TX 77575. The deposition will commence at 11:00 a.m. on June 14, 1999 or such other time and date as is mutually agreeable, and will continue from day to day until complete. The deposition will be taken at the Liberty County Courthouse, 1923 Sam Houston Street, Liberty, TX 77575.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571



Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: May 27, 1999

16diii001799

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 27th day of May, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Maudie Rushing, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Walter P. Fontenot, Esq.
P.O. Box 249
Liberty, Texas 77575

Steven F. Benz

DATE STAMP
AND RETURN
'99 MAY 28 A10:03
FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

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The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: May 27, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	

CERTIFICATE OF SERVICE

I certify that on this 27th day of May, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Maudie Rushing, and subpoena, were sent by overnight mail to:

Walter P. Fontenot, Esq.
P.O. Box 249
Liberty, Texas 77575

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Steven F. Benz

United States District Court

FOR THE EASTERN DISTRICT OF TEXAS

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Maudie Rushing
c/o Walter P. Fontenot, Esq.
P.O. Box 249
Liberty, Texas 77575

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Liberty County Courthouse 1923 Sam Houston Street Liberty, TX 77575	June 14, 1999 at 11:00 a.m., or such other time and date as is mutually agreeable

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Steven R. Benz	27 May 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Walter P. Fontenot, Esq. P.O. Box 249 Liberty, Texas 77575	U.S. Express Mail
SERVED BY (PRINT NAME)	**TITLE**
Steven F. Benz	

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

May 27, 1999

Via Federal Express

Jeffery A. Apperson
Clerk of the Court
322 Federal Building
501 Broadway
Paducah, KY 40202

Re: Conwood Company, L.P., et al. V. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of the Notice of Videotaped Deposition of Maudie Rushing.

I have also enclosed additional copies. Please date stamp and return these copies in the attached self-addressed, postage pre-paid envelope.

Thank you for your attention to this matter.

Respectfully,

Steven F. Benz

Enclosures

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 JUN -3 A9:30 FILED U.S. DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY ALBERT IANNUZZI

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Albert Iannuzzi, B&D Citgo, 736 Boston Post Road, Springfield, MA 01109. The deposition will commence at 8:30 a.m. on June 29, 1999 or such other time and date as is mutually agreeable, and will continue from day to day until complete. The deposition will be taken at the law offices of Bacon & Wilson, 33 State Street, Springfield, MA, 01106.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: June 2, 1999

16diii001808

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 2nd day of June, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Albert Iannuzzi, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Richard Corbert
Bacon & Wilson
33 State Street
Springfield, MA 01106

Neil M. Gorsuch

United States District Court

FOR THE DISTRICT OF MASSACHUSETTS

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Albert Iannuzzi
c/o Richard Corbert, Esq.
Bacon & Wilson
33 State Street
Springfield, MA 01106

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Bacon & Wilson 33 State Street Springfield, MA 01106	June 29, 1999 at 8:30 a.m. or such other time and date as is mutually agreeable.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Neil Gorsuch	June 2, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900
Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	June 1, 1999	Bacon & Wilson 33 State Street Springfield, MA 01106

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Richard Corbert, Esq. Bacon & Wilson 33 State Street Springfield, MA 01106	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
N. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

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COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 JUN -3 A9:30 FILED US DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY ALBERT IANNUZZI

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The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: June 2, 1999

16diii001813

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

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Neal R. Stoll
James A. Keyte
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Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Richard Corbert
Bacon & Wilson
33 State Street
Springfield, MA 01106

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE DISTRICT OF MASSACHUSETTS

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Albert Iannuzzi
c/o Richard Corbert, Esq.
Bacon & Wilson
33 State Street
Springfield, MA 01106

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Bacon & Wilson 33 State Street Springfield, MA 01106	June 29, 1999 at 8:30 a.m. or such other time and date as is mutually agreeable.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Neil Gorsuch	June 2, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900
Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	June 1, 1999	Bacon & Wilson 33 State Street Springfield, MA 01106

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Richard Corbert, Esq. Bacon & Wilson 33 State Street Springfield, MA 01106	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
N. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

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(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

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(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

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(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	1832
CONNECTION TEL	7976977182892221
SUBADDRESS	
CONNECTION ID	
ST. TIME	06/28 14:37
USAGE T	02'14
PGS.	6
RESULT	OK

FAXED 6/28/99

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands

FACSIMILE TRANSMISSION

TO: Carilyn Torres
Alderson Reporting

FAX NO.: 202-289-2221 **CLIENT NO.:** 97718

PHONE:

FROM: Jessica Bartlow
PHONE: 202-326-7976
DATE: June 28, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 6 (INCLUDING THIS SHEET)

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 JUN -4 A9:22

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

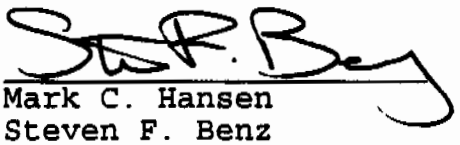
NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY GEORGIA GILL-ELKINS

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Georgia Gill-Elkins,Berreth Oil Min-A-Mart, 12495 McKinley Highway, Mishawaka, Indiana, 46545. The deposition will commence at 2:00 p.m. on June 24, 1999, and will continue from day to day until complete. The deposition will be taken at the law office of Baker & Daniels, First Bank Building, 205 West Jefferson Boulevard South Bend, Indiana 46601.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571



Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: June 3, 1999

16diii001819

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 3rd day of June, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Georgia Gill-Elkins, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

D. Lucetta Pope
Baker & Daniels
First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Steven F. Benz

United States District Court

FOR THE NORTHERN DISTRICT OF INDIANA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Georgia Gill-Elkins
c/o D. Lucetta Pope
Baker & Daniels
First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Baker & Daniels First Bank Building 205 West Jefferson Boulevard South Bend, Indiana 46601	June 24, 1999 at 2:00 p.m. or such other time and date as is mutually agreeable.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Steven F. Benz	3 June 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	June 3, 1999	Baker & Daniels First Bank Building 205 West Jefferson Boulevard South Bend, Indiana 46601

SERVED ON (PRINT NAME)	MANNER OF SERVICE
D. Lucetta Pope	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Steven F. Benz	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 JUN -4 A9:22

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY GEORGIA GILL-ELKINS

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Georgia Gill-Elkins,Berreth Oil Min-A-Mart, 12495 McKinley Highway, Mishawaka, Indiana, 46545. The deposition will commence at 2:00 p.m. on June 24, 1999, and will continue from day to day until complete. The deposition will be taken at the law office of Baker & Daniels, First Bank Building, 205 West Jefferson Boulevard South Bend, Indiana 46601.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: June 3, 1999

16diii001824

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 3rd day of June, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Georgia Gill-Elkins, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

D. Lucetta Pope
Baker & Daniels
First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Steven F. Benz

United States District Court

FOR THE NORTHERN DISTRICT OF INDIANA

CONWOOD COMPANY, L.P.,
et al.

v.

UNITED STATES TOBACCO COMPANY,
et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Georgia Gill-Elkins
c/o D. Lucetta Pope
Baker & Daniels
First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Baker & Daniels First Bank Building 205 West Jefferson Boulevard South Bend, Indiana 46601	June 24, 1999 at 2:00 p.m. or such other time and date as is mutually agreeable.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Steven F. Benz	3 June 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

1 COMMERCE SQUARE
2005 MARKET STREET
SUITE 2340
PHILADELPHIA, PA 19103
(215) 864-7270
FACSIMILE: (215) 864-7280

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV

June 3, 1999

Via Federal Express

John S. Reed, Esquire
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a subpoena for Ms. Georgia Gill-Elkins, of the Berreth Oil Mini-A-Mart in Mishawaka, Indiana. As you will see, the deposition is noticed for Thursday, June 24, 1999 at 2:00 p.m. or at such other time and date as is mutually agreeable. June 24 was chosen by the witness and her counsel for their convenience.

If you are unable to appear that date, please let me know immediately so that we can promptly reschedule. Ms. Pope (Ms. Gill-Elkins' attorney) has indicated that they may also be available on June 25.

Please do not hesitate to call if you would like to discuss this matter.

Very truly yours,

Steven F. Benz

cc: D. Lucetta Pope, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on June 7, 1999 for a telephonic discovery conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, David Simpson, Dick Roberts, Ben Powell, counsel.

FOR THE DEFENDANT: Neal Stoll, Martha Weiss, James Keyte, Chris Athanasia, John Reed, counsel.

Plaintiff raised two issues for the court's consideration. The court issued oral orders in regard to both issues.

I.

First, plaintiff seeks production of CAP worksheets that accompany the CAP form contracts entered into between defendant UST and retailers. The worksheets provide the details of the retailers' marketing and display obligations. According to plaintiff, UST has such agreements with 2700 retailers but has produced only 100 worksheets. Defendant states that its corporate records do not contain copies of any more worksheets. Plaintiff seeks an order requiring defendant to contact its approximately 450 sales representatives to locate copies of additional worksheets.

In response, defendant UST denied that all CAP contracts have accompanying

received 6/14 92 16dili001828

worksheets and there is no need to contact sales representatives because copies of all worksheets would be forwarded up the corporate chain of command.

IT IS HEREBY ORDERED that, no later than Monday, June 14, 1999, defendant shall contact fifteen randomly chosen sales representatives and inquire if they have copies of any CAP worksheets. Defendant shall convey the names of the sales representatives to plaintiff along with the results of the request. Plaintiff may raise this issue again at a later conference with the court if plaintiff believes that the results of this limited search warrant further action.

II.

The second issue raised by plaintiff relates to the disclosure of trial witnesses. By prior order, the court ordered the plaintiff to disclose, no later than September 21, 1999, its trial witnesses who are "field personnel" who have direct knowledge of UST's "in the field" anti-competitive behavior. Defendant UST was likewise ordered to disclose, by the same date, its field personnel trial witnesses who have direct personal knowledge regarding the allegations contained in UST's counterclaim. (Docket No. 100, May 11, 1999).

Plaintiff argues that this order requires the disclosure of both offensive and defensive field personnel witnesses – defendant must not only disclose the names of field personnel who will testify regarding its counterclaim but also those who will testify defensively regarding the allegations in plaintiff's complaint.

IT IS HEREBY ORDERED that plaintiff's motion is **DENIED**. The order of May 11, 1999 only requires each party to disclose the names of field personnel witnesses who have direct knowledge of facts regarding that party's claim against the other party. Plaintiff need only disclose the names of the field personnel witnesses who will testify regarding the claims in plaintiff's

16diii001829

complaint and defendant need only disclose the names of the field personnel witnesses who will testify regarding the claims in defendant's counterclaim.

IT IS FURTHER ORDERED that the next teleconference will be held at 10:30 a.m., EDT, Wednesday, June 16, 1999. Plaintiff shall initiate the teleconference.

Date: June 7, 1999

JD Moyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
JUN 7 1999
JEFFREY A. APPERSON, CLERK
BY: DEPUTY CLERK

16diii001830

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 JUN -8 A9:29

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY MARTI STEVENS

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Marti Steven, 324 Grand Avenue, Billings, Montana 59101. The deposition will commence at 9:00 a.m. on June 28, 1999, and will continue from day to day until complete. The deposition will be taken at the law office of Matthew L. Erekson 2409 Arnold Lane, Suite # 4 Billings, MT 59102.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: June 7, 1999

16diii001832

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 7th day of June, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Marti Stevens, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Matthew L. Erekson
2409 Arnold Lane
Suite # 4
Billings, MT 59102

Steven F. Benz

United States District Court

FOR THE DISTRICT COURT OF MONTANA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Marti Stevens
c/o Matthew L. Erekson
2409 Arnold Lane
Suite # 4
Billings, MT 59102

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
2409 Arnold Lane Suite # 4 Billings, MT 59102	June 28, 1999 at 9:00 a.m. or such other time and date as is mutually agreeable.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Steven F. Benz	7 June 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	June 3, 1999	2409 Arnold Lane Suite # 4 Billings, MT 59102

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Marti Stevens	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Steven F. Benz	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

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COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 JUN -8 A9:29 FILED DISTRICT COURT CLERK ESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY MARTI STEVENS

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Marti Steven, 324 Grand Avenue, Billings, Montana 59101. The deposition will commence at 9:00 a.m. on June 28, 1999, and will continue from day to day until complete. The deposition will be taken at the law office of Matthew L. Erekson 2409 Arnold Lane, Suite # 4 Billings, MT 59102.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
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Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: June 7, 1999

16diii001837

United States District Court

FOR THE DISTRICT COURT OF MONTANA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Marti Stevens
c/o Matthew L. Erekson
2409 Arnold Lane
Suite # 4
Billings, MT 59102

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

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PLACE OF DEPOSITION	DATE AND TIME
2409 Arnold Lane Suite # 4 Billings, MT 59102	June 28, 1999 at 9:00 a.m. or such other time and date as is mutually agreeable.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Steven F. Benz	7 June 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	June 3, 1999	2409 Arnold Lane Suite # 4 Billings, MT 59102

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Marti Stevens	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Steven F. Benz	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL.	**PLAINTIFFS**
v.	**NO. 5:98CV-108-R**
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.	**DEFENDANT**

ORDER

This matter came before the Magistrate Judge on June 16, 1999 for a telephonic discovery conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, Steve Benz, counsel.

FOR THE DEFENDANT: Neal Stoll, Martha Weiss, James Keyte, Chris Athanasia, Rachel Mariner, counsel.

The following orders were orally announced at the hearing.

I.

Defendant seeks the production of a third-party statement given by Ms. Gayleen Rusk. The facts show that Ms. Rusk signed a written statement at the request of plaintiff's counsel and then sometime later was deposed by defendant. At the deposition, defense counsel asked for a copy of the statement but plaintiff refused. Defendant now moves the court to compel the production of the statement.

Defense counsel questioned Ms. Rusk about the circumstances of her giving the written statement. She testified that plaintiff's counsel came to her place of employment and, after discussion, drafted the statement on a laptop computer. At the deposition, defense counsel asked if she had a chance to edit the statement. She testified that she made changes in the statement before

received
6/22/99 9am CHT

signing it. Defense counsel then asked, at the deposition, "Did you review it before you gave your deposition today?" Ms. Rusk answered, "yes."

By prior order, (Docket No. 106, May 26, 1999), the court ruled that "third-party witness statements, otherwise protected by the work product doctrine, are discoverable if the statement was used to refresh the witness' memory prior to testifying. Such statements shall be produced at the time the witness testifies."

In the present situation, the deposition testimony fails to establish two key elements. First, when the deponent testified that she had reviewed her written statement prior to being deposed, it is not at all clear whether she meant that she reviewed it as a part of the editing process when she gave the statement or whether she reviewed it immediately prior to giving her deposition. Second, there is no indication that she used the written statement to refresh her memory.

IT IS HEREBY ORDERED that defendant's motion for an order compelling the production of Ms. Gayleen Rusk's witness statement is **DENIED**.

II.

In the second issue, plaintiff argues that defendant should be prohibited from using at trial that which it has been ordered to produce in discovery but has not yet done so. Some of defendant's business records are stored in a database maintained by non-party MSA. Defendant owns the data but MSA owns the software that allows the data to be read and manipulated. Plaintiff has received the data from this database in a readable format but contends that without the MSA software it is unable to manipulate the data in ways that defendant can. Plaintiff also contends that defendant has access to other databases maintained by MSA which contain additional data not available to plaintiff.

Plaintiff makes a two-pronged request: 1) that defendant not be allowed to use, for trial purposes, its data contained in the MSA maintained database; and, 2) that defendant not be allowed to use or rely on the additional MSA databases not available to plaintiff.

In response, defendant states that it is not able to produce the MSA software or the other databases because they are owned by MSA. If plaintiff wants access to those items, it should purchase a license from MSA or otherwise negotiate with MSA for the right to use its property. Regardless of what plaintiff chooses to do, defendant intends to make full use of all resources legally at its disposal.

IT IS HEREBY ORDERED that plaintiff's request is **DENIED**. At this point, the need for any relief is hypothetical and speculative. Plaintiff may raise this issue again if a more concrete problem arises.

IT IS FURTHER ORDERED that the next teleconference is scheduled for **Tuesday, July 6, 1999 at 10:30 a.m., EDT.** Defendant shall initiate the teleconference.

Date: June 16, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
JUN 16 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii001842

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 JUN 25 A11:56

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY RONALD PIATEK

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Ronald Piatek, 139 East Colverhurst Avenue, Athens, Georgia 30605. The deposition will commence at 10:00 a.m. on July 17, 1999, or such other time and date as is mutually agreeable, and will continue from day to day until complete. The deposition will be taken at the law office of McArthur & McArthur, P.A., 269 North Jackson Street, Athens, GA 30603.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: June 24, 1999

16diii001844

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 24th day of June, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Ronald Piatek, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Charles E. Auslander, Esq.
McArthur & McArthur, P.A.
269 North Jackson Street
Athens, GA 30603

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Steven F. Benz

United States District Court

FOR THE MIDDLE DISTRICT OF GEORGIA

CONWOOD COMPANY, L.P.,
et al.

v.

UNITED STATES TOBACCO COMPANY,
et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Ronald Piatek,
c/o Charles E. Auslander, Esq.
McArthur & McArthur, P.A.
269 North Jackson Street
Athens, GA 30603

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
McArthur & McArthur, P.A. 269 North Jackson Street Athens, GA 30603	July 17, 1999 at 10:00 a.m. or such other time and date as is mutually agreeable.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	24 June 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	June 25, 1999	McArthur & McArthur, P.A. 269 North Jackson Street Athens, GA 30603

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Charles E. Auslander, Esq.	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Steven F. Bënz	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK

STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

June 24, 1999

Via Federal Express

John S. Reed, Esquire
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a subpoena for former U.S. Tobacco sales representative Ronald Piatek. As you will see, the deposition is noticed for Saturday, July 17, 1999 at 10:00 a.m. or at such other time and date as is mutually agreeable. July 17 was chosen by the witness and his counsel for their convenience.

If you are unable to appear that date, please let me know immediately so that we can promptly reschedule.

Please do not hesitate to call if you would like to discuss this matter.

Very truly yours,

Steven F. Benz

cc: Charles E. Auslander, Esq.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 JUN 25 A11:56 FILED US DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY PATRICIA J. LEINEN

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Patricia J. Leinen, Dunlap Senior Citizen Center, 619 Iowa Avenue, Dunlap, Iowa 51529. The deposition will commence at 9:00 a.m. on July 10, 1999, or such other time and date as is mutually agreeable, and will continue from day to day until complete. The deposition will be taken at the law office of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street NW Suite 1000 West, Washington, DC 20005-3317.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: June 24, 1999

16diii001850

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 24th day of June, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Patricia J. Leinen and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Anthony Martin, Esq.
Solomon & Martin
7500 Greenway Center Drive
Suite 1000
Greenbelt, MD 20770

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Steven F. Benz

United States District Court

FOR THE SOUTHERN DISTRICT OF IOWA

CONWOOD COMPANY, L.P.,
et al.

v.

UNITED STATES TOBACCO COMPANY,
et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Patricia J. Leinen
c/o Anthony Martin, Esq.
Solomon & Martin
7500 Greenway Center Drive
Suite 1000
Greenbelt, MD 20770

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. 1301 K Street NW Suite 1000 West Washington, DC 20005-3317	July 10, 1999 at 9:00 a.m. or such other time and date as is mutually agreeable

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	24 June 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	June 25, 1999	Solomon & Martin 7500 Greenway Center Drive Suite 1000 Greenbelt, MD 20770

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Anthony Martin, Esq.	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Steven F. Benz	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK

STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

June 24, 1999

Via Federal Express

John S. Reed, Esquire
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a subpoena for Ms. Patricia Leinen, formerly an employee at Dave's Country Store in Dunlap, Iowa. As you will see, the deposition is noticed for Saturday, July 10, 1999 at 9:00 a.m. at Kellogg, Huber's office in Washington, D.C. or at such other time, date and place as is mutually agreeable. July 10 was chosen by the witness and her counsel for their mutual convenience.

If you are unable to appear that date, please let me know immediately so that we can promptly reschedule.

Please do not hesitate to call if you would like to discuss this matter.

Very truly yours,

Steven F. Benz

cc: Anthony D. Martin, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on July 6, 1999 for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, Ben Powell, counsel.

FOR THE DEFENDANT: Neal Stoll, Martha Weiss, Chris Athanasia, John Reed, Ridley Sanders, Richard Vierheij, counsel.

Neither party raised any issues for the court's consideration.

IT IS HEREBY ORDERED that the next teleconference is scheduled for **Monday, July 19, 1999 at 10:30 a.m., EDT.** Plaintiff shall initiate the teleconference.

Date: July 6, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
JUL 06 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii001855

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'99 JUL -8 A10:09

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION AND PRODUCTION OF DOCUMENTS BY NON-PARTY ROB ENGSTER

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Rob Engster, 10812 Old Harbor Road, Apartment 7, Fort Smith, Arkansas 72903. The deposition will commence at 9:00 a.m. on July 23, 1999, or at such other time and date as may be agreed upon by counsel. The deposition will continue from day to day until complete, and will be taken at the law office of Kellogg, Huber, Hansen, Todd & Evans P.L.L.C., 1301 K Street N.W. Suite 1000 West, Washington, D.C. 20005-3317.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the

PROOF OF SERVICE

	DATE	PLACE
SERVED	July 7, 1999	Latham & Watkins 1001 Pennsylvania Avenue, N.W. Suite 1300 Washington, D.C. 20004-2505

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Alice Fisher, Esq. Latham & Watkins 1001 Pennsylvania Avenue, N.W. Suite 1300 Washington, D.C. 20004-2505	Hand Delivery
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

Federal Rules of Civil Procedure, non-party Rob Engster will be required to produce the documents described in the attached subpoena on July 19, 1999, at 5:30 p.m. at the offices of Kellogg, Huber, Hansen, Todd & Evans P.L.L.C, 1301 K Street N.W., Suite 1000 West, Washington, D.C. 20005-3317.

Respectfully submitted,

Richard Roberts /mj
Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: July 7, 1999

16diii001858

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 7th day of July, 1999, copies of the foregoing Notice of Videotaped Deposition and Production of Documents by Non-Party Rob Engster, and subpoena, were served upon the following:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022
(by mail)

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202
(by mail)

Alice Fisher, Esq.
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004-2505
(by hand delivery)

Neil M. Gorsuch

United States District Court

FOR THE WESTERN DISTRICT OF ARKANSAS

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Rob Engster
c/o Alice Fisher, Esq.
Latham & Watkins
1001 Pennsylvania Avenue, N.W.Suite 1300
Washington, D.C. 20004-2505

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Kellogg, Huber, Hansen, Todd & Evans P.L.L.C 1301 K Street N.W. Suite 1000 West Washington, D.C. 20005-3317	July 23, 1999 at 9:00 a.m. or at such other time and date as may be agreed upon by counsel

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents referring or relating in any way to United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company, Inc., UST Inc., Conwood Company, L.P., and/or Conwood Sales Company, L.P.**

PLACE	DATE AND TIME
Kellogg, Huber, Hansen, Todd & Evans P.L.L.C 1301 K Street N.W. Suite 1000 West Washington, D.C. 20005-3317	July 19, 1999 by 5:30 p.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	7. 7. 99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 JUL 14 A11:03

FILED
US DISTRICT COURT CLERK
WESTERN DIST KENTUCKY

Civil Action No.
5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY RODNEY L. WECKMAN

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Rodney L. Weckman, 2332 S 33rd Street, Lincoln, Nebraska 68506. The deposition will commence at 2:00 p.m. on July 31, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at the office of Baylor, Evnen, Curtiss, Grimit & Witt, 206 South 13th Street, Suite 1200, Lincoln, Nebraska 68508.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: July 13, 1999

16diii001862

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 13th day of July, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Rodney L. Weckman , and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Walter E. Zink II
Baylor, Evnen, Curtiss, Grimit & Witt,
206 South 13th Street
Suite 1200
Lincoln, Nebraska 68508

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE DISTRICT OF NEBRASKA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Rodney L. Weckman
c/o Walter E. Zink II
Baylor, Evnen, Curtiss, Grimit & Witt,
206 South 13th Street
Suite 1200
Lincoln, Nebraska 68508

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Baylor, Evnen, Curtiss, Grimit & Witt, 206 South 13th Street Suite 1200 Lincoln, Nebraska 68508	July 31, 1999 at 2:00 p.m. or at such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	13 July 99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 JUL 14 A11:03

FILED
US DISTRICT COURT CLERK
WEST. DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY RODNEY L. WECKMAN

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Rodney L. Weckman, 2332 S 33rd Street, Lincoln, Nebraska 68506. The deposition will commence at 2:00 p.m. on July 31, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at the office of Baylor, Evnen, Curtiss, Grimit & Witt, 206 South 13th Street, Suite 1200, Lincoln, Nebraska 68508.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: July 13, 1999

16diii001866

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 13th day of July, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Rodney L. Weckman , and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Walter E. Zink II
Baylor, Evnen, Curtiss, Grimit & Witt,
206 South 13th Street
Suite 1200
Lincoln, Nebraska 68508

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE DISTRICT OF NEBRASKA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Rodney L. Weckman
c/o Walter E. Zink II
Baylor, Evnen, Curtiss, Grimit & Witt,
206 South 13th Street
Suite 1200
Lincoln, Nebraska 68508

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Baylor, Evnen, Curtiss, Grimit & Witt, 206 South 13th Street Suite 1200 Lincoln, Nebraska 68508	July 31, 1999 at 2:00 p.m. or at such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	13 July 99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	July 14 , 1999	Baylor, Evnen, Curtiss, Grimit & Witt, 206 South 13th Street Suite 1200 Lincoln, Nebraska 68508

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Walter E. Zink II, Esquire	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Steven F. Benz	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 5 , 1999	Baylor, Evnen, Curtiss, Grimit & Witt, 206 South 13th Street Suite 1200 Lincoln, Nebraska 68508

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Walter E. Zink II, Esquire	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on August 5, 1999
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL.	**PLAINTIFFS**
v.	**NO. 5:98CV-108-R**
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.	**DEFENDANT**

ORDER

This matter came before the Magistrate Judge onJuly 19, 1999 for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch, Ben Powell and Dick Roberts, counsel.

FOR THE DEFENDANT: Neal Stoll, Martha Weiss, Chris Athanasia, and Rachel Mariner, counsel.

Plaintiff raised no issues for the court's consideration. Defendant raised one issue regarding the privilege log submitted by plaintiff in regard to Pritzker documents. Defendant reported that it had contacted plaintiff by letter in an attempt to resolve this issue but had not yet received a response.

IT IS HEREBY ORDERED that:

1) Plaintiff shall respond in writing via facsimile to defendant regarding the Pritzker privilege log no later than Friday, July 23, 1999. Should the parties not be able to resolve their differences on this issue, it will be considered at the next telephonic status conference with the court.

2) The next teleconference is scheduled for **Monday, August 2, 1999 at 10:30 a.m.,**

EDT. Defendant shall initiate the teleconference.

Date: July 19, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
JUL 19 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii001872

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

Upon review of the court's calendar, and with the agreement of the parties,

IT IS HEREBY ORDERED that the telephonic status conference previously scheduled for Monday, August 2, 1999 is rescheduled for **Wednesday, August 4, 1999 at 10:30 a.m. EDT.** The defendant shall initiate the teleconference.

Date: July 28, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
JUL 29 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

received
8/2/99 9am AT

16diii001873
122

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 JUL 30 A9:35 FILED US DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION AND PRODUCTION OF DOCUMENTS BY NON-PARTY JOE MARCONI

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Joe Marconi, 3121 Royal Oak Drive, Thousand Oaks, California 91362. The deposition will commence at 1:00 p.m. on August 16, 1999, or such other date and time as is mutually agreeable, and will continue from day to day until complete. The deposition will be taken at Pierpont Inn, Santa Rosa Room, 550 Sanjon Road, Ventura, CA 93001..

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Joe Marconi will be

required to produce the documents described in the attached subpoena on August 9, 1999 at the law offices of Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street, N.W. Suite 1000 West, Washington D.C. 20005-3317.

Respectfully submitted,

Richard Roberts /mg

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: July 29, 1999

16diii001875

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 21th day of July, 1999, copies of the foregoing Notice of Videotaped Deposition and Production of Documents by Non-Party Joe Marconi, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Alan N. Bick
Gibson, Dunn & Crutcher LLP
4 Park Plaza
Irvine, California 92614-8557

Neil M. Gorsuch

United States District Court

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Joe Marconi
c/o Alan N. Bick
Gibson, Dunn & Crutcher LLP
4 Park Plaza
Irvine, California 92614-8557

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Pierpont Inn Santa Rosa Room 550 Sanjon Road Ventura, CA 93001	August 17, 1999 at 1:00 p.m. or such other date and time as is mutually agreeable.

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents referring or relating in any way to United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company, Inc., UST Inc., Conwood Company, L.P., and/or Conwood Sales Company, L.P.**

PLACE	DATE AND TIME
Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street, N.W. Suite 1000 West Washington D.C. 20005-3317	August 9, 1999 by 5:00 p.m. EST

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs S. F. Benz	23 July 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED		Alan N. Bick Gibson, Dunn & Crutcher LLP 4 Park Plaza Irvine, California 92614-8557

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Alan N. Bick	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Steven F. Benz	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

July 30, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a subpoena directed to Bobby Carlson, an employee of McLane Company, Inc., a wholly owned subsidiary of Wal-Mart Stores, Inc. The deposition is noticed for 8:00 a.m. Monday, August 9, 1999, in Bentonville, Arkansas. We are advised that Mr. Carlson's schedule is rather full and his time is limited. The noticed time was selected by Mr. Carlson in the hope that the deposition could be completed by noon. We want to do everything possible to honor this particular request, but if this presents a problem, please let me know immediately.

I am advised by Blake Clardy, counsel at Wal-Mart, that one should fly into the Northwest Arkansas Regional Airport (XNA) in Fayetteville and that Bentonville is within half an hour of the airport. Mr. Clardy also recommends making a hotel reservation for Sunday evening as early as possible. He suggests the Clarion or the Courtyard by Marriott.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Blake Clardy
Neal R. Stoll

RECEIVED
AUG 02 1999
KHHTE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

NOTICE TO TAKE VIDEOTAPED DEPOSITION OF BOBBY CARLSON

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Bobby Carlson at the Executive Center, 1104 S. Walton Boulevard, Bentonville, Arkansas, 72712. The deposition will commence at 8:00 a.m. on Monday, August 9, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: July 30, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 30th day of July, 1999.

Counsel for Defendants

16diii001881

AO 88 (Rev. 11/91) Subpoena in a Civi

United States District Court

WESTERN DISTRICT OF ARKANSAS, FAYETTEVILLE DIVISION

CONWOOD COMPANY, L.P., et al.

V.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No. 5:98CV-108-R in the United States District Court for the Western District of Kentucky at Paducah

TO: Bobby Carlson
c/o Blake Clardy
Wal-Mart Stores, Inc.
702 S.W. 8th Street
Bentonville, Arkansas 72716-8314

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Executive Center, 1104 S. Walton Boulevard, Bentonville, Arkansas 72712	August 9, 1999 at 8:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
, Attorney for Defendants	July 30, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
John S. Reed, Reed Weitkamp Schell & Vice PLLC, 2400 Citizens Plaza, Louisville, Kentucky 40202, (502) 589-1000

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

PROOF OF SERVICE

	DATE	PLACE
SERVED	July 30, 1999	Blake Clardy Wal-Mart Stores, Inc., 702 S.W. 8th Street Bentonville, Arkansas 72716-8314

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Blake Clardy	Via Facsimile Transmission
SERVED BY (PRINT NAME)	**TITLE**
John S.Reed	Attorney for Defendants

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK

STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

August 2, 1999

Via Federal Express

Blake Clardy, Esquire
Wal-Mart Stores, Inc.
702 S.W. 8th Street
Bentonville, AR 72716-8314

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al.

Dear Mr. Clardy:

Thank you for speaking with me earlier this afternoon.

As we discussed, this morning I received a notice from U.S. Tobacco Company indicating that it has subpoenaed Mr. Carlson for deposition. To allow us to prepare adequately for the deposition, we would very much appreciate the opportunity to review certain documents in advance. Accordingly, I am enclosing two subpoenas outlining the materials we require. I would be pleased to discuss any questions you may have about our requests at your convenience.

In the interest of avoiding inconvenience to Mr. Carlson, we also discussed the possibility of postponing his deposition until after documents are produced. This would prevent any chance Mr. Carlson might be deposed a second time, after documents raising additional questions come to light. I have spoken with counsel for U.S. Tobacco, John Reed. He has agreed with this approach.

I look forward to working with you on this matter.

Very truly yours,

Neil M. Gorsuch

Enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

NOTICE OF PRODUCTION OF DOCUMENTS BY WAL-MART INC. AND THE MCLANE COMPANY

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-parties Wal-Mart Inc. and the McLane Company will be required to produce the documents described in the attached subpoena on August 6, 1999 at 9:00 a.m. at a place to be determined among counsel.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 6, 1999

16diii001886

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 2nd day of August, 1999, copies of the foregoing Notice of Document Production of Wal-Mart Inc. and the McLane Company, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

COPY

United States District Court

FOR THE WESTERN DISTRICT OF ARKANSAS

'99 AUG -3 A11:33

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action Nos. 98CV-108-R

FILED
WESTN. DIST. KENTUCKY

In the United States District Court for the Western District of Kentucky at Paducah

TO: Wal-Mart Stores, Inc.
c/o Blake Clardy
Wal-Mart Stores, Inc.
702 S.W. 8th Street
Bentonville, AR 72716

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents concerning moist snuff sales, product mix, displays, racks, vending systems, promotions, incentive or alliance programs, or point of sale advertising from 1996 to the present. This includes, without limitation, all moist snuff movement figures and correspondence or e-mails to or from U.S. Tobacco Company personnel.**

PLACE	DATE AND TIME
To be agreed upon by Counsel.	August 6, 1999 by 9:00 a.m. Eastern Daylight

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	8/2/99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 3, 1999	Wal-Mart Stores, Inc. 702 S.W. 8th Street Bentonville, AR 72716

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Blake Clardy	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

United States District Court

COPY

FOR THE WESTERN DISTRICT OF ARKANSAS

'99 AUG -3 A11:33

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

FILED
WESTN DIST KENTUCKY

CASE NUMBER: Civil Action No. 5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: McLane Company
c/o Blake Clardy
Wal-Mart Stores, Inc.
702 S.W. 8th Street
Bentonville, AR 72716

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents concerning Wal-Mart moist snuff sales, product mix, displays, racks, vending systems, promotions, incentive or alliance programs, or point of sale advertising from 1996 to the present. This includes, without limitation, all moist snuff movement figures and correspondence or e-mails to or from U.S. Tobacco Company personnel.**

PLACE	DATE AND TIME
To be agreed upon by Counsel.	August 6, 1999 by 9:00 a.m. Eastern Daylight

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	8/2/99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	8/3/99	Wal-Mart Stores, Inc. 702 S.W. 8th Street Bentonville, AR 72716

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Blake Clardy	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____

DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

August 2, 1999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK

STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

Via Overnight Mail

Jeffery A. Apperson
Clerk of the Court
322 Federal Building
501 Broadway
Paducah, KY 40202

Re: Conwood Company, L.P., et al. V. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Mr. Apperson:

Enclosed for filing under seal please find an original and one copy of Conwood's Expert Reports and Declarations of: Robert Blattberg, Gregory Gundlach, Morton Kamien, Edward Popper, Richard Leftwich and accompanying exhibits. The reports and exhibits are being filed under seal because they contain materials that are confidential pursuant to the terms of the protective order governing this matter.

These reports and exhibits have also been served on opposing counsel via overnight mail.

I have also enclosed an additional copy. Please date stamp and return this copy in the attached self-addressed, postage pre-paid envelope.

Thank you for your attention to this matter.

Respectfully,

Michael J. Guzman

cc: Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, John S. Reed

Enclosures

CERTIFICATE OF SERVICE

I certify that on this 2nd day of August, 1999, a copy of the foregoing Conwood's Expert Reports and Declarations of: Robert Blattberg, Gregory Gundlach, Morton Kamien, Edward Popper, Richard Leftwich and accompanying exhibits was sent by overnight mail to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY .

John S. Reed, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Michael J. Guzman

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
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NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

August 2, 1999

Via Overnight Mail

Hon. Thomas B. Russell
Judge, United States District Court
307 Federal Building
501 Broadway
Paducah, KY 40202

Dear Judge Russell:

Enclosed is a courtesy copy of the following expert reports and accompanying exhibits which were filed under seal with the clerk of the court via overnight mail and also served on opposing counsel via overnight mail:

Expert Report and Declaration of Robert Blattberg
Expert Report and Declaration of Gregory Gundlach
Expert Report and Declaration of Morton Kamien
Expert Report and Declaration of Edward Popper
Expert Report and Declaration of Richard Leftwich

Thank you for your consideration of this matter.

Respectfully,

Michael J. Guzman

cc: Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, John S. Reed

Enclosure

SUREWAY WORLDWIDE
A CONSOLIDATED DELIVERY AND LOGISTICS COMPANY

2500 Oakville Street, Alexandria, VA 22301
1-703-684-7400
1-800-237-0271

SERVICE REQUEST FORM

BILL TO ACCT #

DCA E 668007
AIRBILL PACKAGE TRACKING NUMBER

DATE 8/2/95 ☐ COLLECT ☐ PREPAID ☐ 3rd PARTY

DECLARED VALUE $ 400

The liability of Sureway Worldwide for loss or damage is limited to $100.00 unless excess value is declared and charge is paid. See terms and conditions on reverse side.

FROM

SERVICE AUTHORIZED BY (TEL #): B Coyngham 202 326-7137

SHIPPER: KELLOGG HUBER

ADDRESS: 1301 K STREET N.W.

CITY: WASHINGTON STATE: D.C. ZIP CODE: 20005

ATTENTION:

SHIPPER'S JOB #: 17718

SHIPPER'S P.O. #:

IF THIRD PARTY BILLING NAME & ADDRESS BELOW

BILL TO

NAME:

ADDRESS:

CITY STATE ZIP CODE

TO

CONSIGNEE: Reed Weitkamp Law Firm

ADDRESS (P.O. Box Not An Acceptable Address): 2400 Citizens Plaza

CITY: Louisville STATE/COUNTRY: Ky ZIP CODE: 40202

ATTENTION (TEL #): John S. Reed

ADDITIONAL ADDRESS INFO: (502) 589-1000

PIECES: 1 WEIGHT: PLEASE CHECK APPROPRIATE SERVICE BOX(ES) BELOW

DIMENSIONS (INCHES) L X W X H DIM WEIGHT ÷ 184 (DOM) = ÷ 166 (INT) =

DESCRIPTION OF PIECES AND CONTENTS

SERVICES

- ☐ Overnight Letter
- ☒ AM Next Day
- ☐ Next Day
- ☐ Economizer Service (2 day)
- ☐ Deferred (3-5 day)
- ☐ Truck

Additional charges apply
- ☐ Same Day
- ☐ Next Business Morning By 9 AM
- ☐ Saturday Delivery

INTERNATIONAL ONLY

- ☐ STANDARD ☐ ECONOMIZER
- ☐ LETTER ☐ AIR FREIGHT
- ☐ OCEAN ☐ ASAP (Surcharge may apply call in advance to arrange)
- ☐ Document
- ☐ Non-Document (Please attach 3 copies of commercial invoice)

Declared Value for Customs

Bill Duties and Taxes to: ☐ Shipper ☐ Consignee

AVAILABLE SERVICES

- OVERNIGHT
- SAME DAY DELIVERY
- EARLY MORNING DELIVERY
- LATE NIGHT PICK-UP
- INTERNATIONAL SERVICE
- AIR FREIGHT/TRUCKING
- CUSTOMIZED BILLING

SPECIAL INSTRUCTIONS (delivery date, handling, etc.)

P/U TICKET #

Received by SUREWAY WORLDWIDE DATE TIME: RL 8/3/95

REGULATIONS REQUIRE PAYMENT WITHIN 10 DAYS

F200-11/96

SHIPPER'S RECEIPT

SUREWAY WORLDWIDE
A CONSOLIDATED DELIVERY AND LOGISTICS COMPANY

2500 Oakville Street, Alexandria, VA 22301
1-703-684-7400
1-800-237-0271

SERVICE REQUEST FORM

BILL TO ACCT #

DCA E 668008
AIRBILL PACKAGE TRACKING NUMBER

DATE 8/2/93 ☐ COLLECT ☐ PREPAID ☐ 3rd PARTY

DECLARED VALUE $ 40000

The liability of Sureway Worldwide for loss or damage is limited to $100.00 unless excess value is declared and charge is paid. See terms and conditions on reverse side.

FROM

SERVICE AUTHORIZED BY: B Coyngham (TEL #) 202 326-7900

SHIPPER: KELLOGG HUBER

ADDRESS: 1301 K STREET N.W.

CITY: WASHINGTON STATE: D.C. ZIP CODE: 20005

ATTENTION:

SHIPPER'S JOB #: 97718

SHIPPER'S P.O. #:

TO

CONSIGNEE: Clerk of The Court

ADDRESS (P.O. Box Not An Acceptable Address): 501 Broadway

CITY: Paducah STATE/COUNTRY: KY ZIP CODE: 42001

ATTENTION: Jeffrey A. Apperson (TEL #) 502 582-5156

ADDITIONAL ADDRESS INFO: Rm 322 Federal Bldg.

PIECES: 1 WEIGHT: PLEASE CHECK APPROPRIATE SERVICE BOX(ES) BELOW

DIMENSIONS (INCHES) L X W X H DIM WEIGHT ÷ 184 (DOM) = ÷ 166 (INT) =

DESCRIPTION OF PIECES AND CONTENTS

IF THIRD PARTY BILLING NAME & ADDRESS BELOW

BILL TO

NAME

ADDRESS

CITY STATE ZIP CODE

SERVICES

- ☐ Overnight Letter
- ☒ AM Next Day
- ☐ Next Day
- ☐ Economizer Service (2 day)
- ☐ Deferred (3-5 day)
- ☐ Truck

Additional charges apply
- ☐ Same Day
- ☐ Next Business Morning By 9 AM
- ☐ Saturday Delivery

INTERNATIONAL ONLY

- ☐ STANDARD
- ☐ ECONOMIZER
- ☐ LETTER
- ☐ AIR FREIGHT
- ☐ OCEAN
- ☐ ASAP (Surcharge may apply call in advance to arrange)
- ☐ Document
- ☐ Non-Document (Please attach 3 copies of commercial invoice)

Declared Value for Customs

Bill Duties and Taxes to: ☐ Shipper ☐ Consignee

AVAILABLE SERVICES

- OVERNIGHT
- SAME DAY DELIVERY
- EARLY MORNING DELIVERY
- LATE NIGHT PICK-UP
- INTERNATIONAL SERVICE
- AIR FREIGHT/TRUCKING
- CUSTOMIZED BILLING

SPECIAL INSTRUCTIONS (delivery date, handling, etc.)

Please deliver second copy to Judge Russell's chambers, Room 387, Federal Bldg. Thank you.

P/U TICKET #

Received by SUREWAY WORLDWIDE DATE TIME

R+2 8/3/93

REGULATIONS REQUIRE PAYMENT WITHIN 10 DAYS

F200-11/98

SHIPPER'S RECEIPT

SUREWAY WORLDWIDE
A CONSOLIDATED DELIVERY AND LOGISTICS COMPANY

2500 Oakville Street, Alexandria, VA 22301
1-703-684-7400
1-800-237-0271

SERVICE REQUEST FORM

DCA E 668012

BILL TO ACCT #

AIRBILL PACKAGE TRACKING NUMBER

DATE 8/2 ☐ COLLECT ☐ PREPAID ☐ 3rd PARTY

DECLARED VALUE $400

The liability of Sureway Worldwide for loss or damage is limited to $100.00 unless excess value is declared and charge is paid. See terms and conditions on reverse side.

FROM

SERVICE AUTHORIZED BY (TEL #): B. Conyngham 202 326-7939

SHIPPER: KELLOGG HUBER

ADDRESS: 1301 K STREET N.W.

CITY: WASHINGTON STATE: D.C. ZIP CODE: 20005

ATTENTION:

SHIPPER'S JOB #: 97718

SHIPPER'S P.O. #:

IF THIRD PARTY BILLING NAME & ADDRESS BELOW

BILL TO

NAME:

ADDRESS:

CITY STATE ZIP CODE:

TO

CONSIGNEE: Skadden Arps Law Firm

ADDRESS (P.O. Box Not An Acceptable Address): 919 Third Ave

CITY: New York STATE/COUNTRY: NY ZIP CODE: 10022

ATTENTION: C. Athanasiu (TEL #): 212 735-3000

ADDITIONAL ADDRESS INFO:

PIECES: 1 WEIGHT: PLEASE CHECK APPROPRIATE SERVICE BOX(ES) BELOW

DIMENSIONS (INCHES) L X W X H DIM WEIGHT ÷ 184 (DOM) = ÷ 166 (INT) =

DESCRIPTION OF PIECES AND CONTENTS:

SERVICES

- ☐ Overnight Letter
- ☒ AM Next Day 9:30 AM
- ☐ Next Day
- ☐ Economizer Service (2 day)
- ☐ Deferred (3-5 day)
- ☐ Truck

Additional charges apply
- ☐ Same Day
- ☐ Next Business Morning By 9 AM
- ☐ Saturday Delivery

INTERNATIONAL ONLY

- ☐ STANDARD ☐ ECONOMIZER
- ☐ LETTER ☐ AIR FREIGHT
- ☐ OCEAN ☐ ASAP (Surcharge may apply call in advance to arrange)
- ☐ Document
- ☐ Non-Document (Please attach 3 copies of commercial invoice)

Declared Value for Customs:

Bill Duties and Taxes to: ☐ Shipper ☐ Consignee

AVAILABLE SERVICES

- OVERNIGHT
- SAME DAY DELIVERY
- EARLY MORNING DELIVERY
- LATE NIGHT PICK-UP
- INTERNATIONAL SERVICE
- AIR FREIGHT/TRUCKING
- CUSTOMIZED BILLING

SPECIAL INSTRUCTIONS (delivery date, handling, etc.)

P/U TICKET #

Received by SUREWAY WORLDWIDE DATE TIME: R. L 8/3/99

REGULATIONS REQUIRE PAYMENT WITHIN 10 DAYS

F200-11/98

SHIPPER'S RECEIPT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on August 4, 1999 for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch and Ben Powell, counsel.

FOR THE DEFENDANT: Neal Stoll, Martha Weiss, John Keyte, Richard Vierheij and John Reed, counsel.

Neither party identified any issues for the court's consideration at this time.

IT IS HEREBY ORDERED that the next teleconference is scheduled for **Monday, August 23 at 11:00 a.m., EDT.** Plaintiff shall initiate the teleconference.

Date: August 4, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
AUG 0 6 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii001898

COMMAND #207

	DATE	TIME		TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	8/10	10:52	1	901 682 1223	EC--S	00'53"	002	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO:	DAVID SIMPSON, ESQ. EDDIE FOSTER, ESQ. TRIPP WILSON, ESQ.
FAX NO.:	901-682-1223
CLIENT NO.	97718
FROM:	NEIL M. GORSUCH
PHONE:	(202) 326-7978
DATE:	August 10, 1999
RE:	

TOTAL NUMBER OF PAGES: 2 **(INCLUDING THIS SHEET)**

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL US IMMEDIATELY OR CONTACT OUR COPY SERVICE CENTER: (202) 326-7949

OUR FAX # : (202) 326-7999

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS PRIVILEGED AND CONFIDENTIAL ATTORNEY INFORMATION INTENDED ONLY FOR THE USE OF THE ADDRESSEE. PERSONS RESPONSIBLE FOR DELIVERING THIS COMMUNICATION TO THE INTENDED RECIPIENT ARE HEREBY NOTIFIED NOT TO READ THE ATTACHED AND THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND PLEASE RETURN THE ORIGINAL MESSAGE TO US AT OUR LETTERHEAD ADDRESS VIA THE U.S. POSTAL SERVICE.

** TX CONFIRMATION REPORT ** AS OF AUG 10 '99 10:51 PAGE. 1

COMMAND #206

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	8/10	10:48	1-502-443-4870	G3--S	00'54"	000	INC
002		10:49	5024434571	G3--S	00'21"	000	INC
003		10:50	5024434571	G3--S	01'10"	002	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Richard C. Roberts

FAX NO.: (502) 443-4571 **CLIENT NO.: 97718**

PHONE: (502) 443-4516

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: August 10, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 2 **(INCLUDING THIS SHEET)**

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL US IMMEDIATELY OR CONTACT OUR COPY SERVICE CENTER AT (202) 326-7949

OUR FAX # : (202) 326-7999

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16diii001900

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*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	2872
CONNECTION TEL	79769771819015371010
SUBADDRESS	
CONNECTION ID	
ST. TIME	08/10 10:37
USAGE T	00'40
PGS.	2
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Edward J. Foster, Esq.
Tripp Wilson, Esq.
Bob Craddock, Esq.

FAX NO.: **(901) 537-1010**

CLIENT NO.: **97718**

PHONE: (901) 537-1033

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: August 10, 1999
MESSAGE:

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	2871
CONNECTION TEL	79769771813129202470
SUBADDRESS	
CONNECTION ID	
ST. TIME	08/10 10:34
USAGE T	00'41
PGS.	2
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Hank Handelsman

FAX NO.: (312) 920-2470 **CLIENT NO.:** 97718

PHONE: (312) 750-8400

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: August 10, 1999
MESSAGE:

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 6, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is an amended notice to take the deposition of Dennis Oldani changing the time of the deposition to 1:00 p.m.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Robert Weeger, Esq.
Neal R. Stoll

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

AMENDED NOTICE TO TAKE VIDEOTAPED DEPOSITION OF DENNIS OLDANI

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Dennis Oldani at Schnucks, 12921 Enterprise Way, Bridgeton, MO 63044. The deposition will commence at 1:00 p.m. on Wednesday, August 12, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 6, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 6th day of August, 1999.

Counsel for Defendants

16diii001905

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 3, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a notice of the deposition of Frank Feeney, an employee of Kenyon Oil. The deposition is noticed for 10:00 a.m. Friday, August 13, 1999, in Cranston, Rhode Island. The date was selected by Mr. Feeney. Please let me know immediately if this date is impossible for you.

Mr. Feeney is represented by Jeff Walker, general counsel to Kenyon Oil, whose address and telephone number is: 200 Mall Road, Suite 230, Burlington, MA 01803, 781-229-0400.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Jeff Walker
Frank Eastman
Neal R. Stoll

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

NOTICE TO TAKE VIDEOTAPED DEPOSITION OF FRANK FEENEY

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Frank Feeney at the offices of Sciacca & Piccirilli, 121 Phoenix Avenue, Cranston, RI 02920. The deposition will commence at 10:00 a.m. on Friday, August 13, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 3, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 3rd day of August, 1999.

Counsel for Defendants

16diii001908

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 4, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is the subpoena for the previously noticed deposition of Frank Feeney.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Jeff Walker
Frank Eastman
Neal R. Stoll

United States District Court

DISTRICT OF Rhode Island

CONWOOD COMPANY, L.P. et al.

V.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No. 5:98CV-108-R in the United States District Court for the Western District of Kentucky at Paducah

TO: Frank Feeney
c/o Jeff Walker, General Counsel
Kenyon Oil Company, Inc.
200 Mall Road, Suite 230
Burlington, MA 01803

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Sciacca & Piccirili, 121 Phenix Avenue, Cranston, RI 02920	August 13, 1999 10:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Defendants	August 4, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
John S. Reed, Reed Weitkamp Schell & Vice PLLC, 2400 Citizens Plaza, Louisville, KY 40202
(502) 589-1000

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 4, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a subpoena directed to David Dill, an employee of Gate Petroleum. The deposition is noticed for 9:00 a.m. Tuesday, August 24, 1999, in Jacksonville, Florida. The noticed date was selected by Mr. Dill. Please let me know immediately if this date is impossible for you.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Joseph O. Stroud, Jr.
Neal R. Stoll

AO 88 (Rev. 11/91) Subpoena in a Civi

United States District Court

Middle DISTRICT OF Florida at Jacksonville

CONWOOD COMPANY, L.P., et al.

V.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No. 5:98CV-108-R in the United States District Court for the Western District of Kentucky at Paducah

TO: David Dill
c/o Joseph O'Stroud, Jr.
Rogers, Towers, Bailey, Jones & Gay, P.A.
1301 Riverplace Boulevard, Suite 1500
Jacksonville, FL 32207-9020

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Rogers, Towers, Bailey, Jones & Gay, P.A., 1301 Riverplace Boulevard, Suite 1500, Jacksonville, FL 32207-9020	August 24, 1999 at 9:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Defendants	August 4, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

John S. Reed, Reed Weitkamp Schell & Vice PLLC, 2400 Citizens Plaza, Louisville, KY 40202 (502) 589-1000

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

NOTICE TO TAKE VIDEOTAPED DEPOSITION OF DAVID DILL

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of David Dill at the law offices of Rogers, Towers, Bailey, Jones & Gay, P.A., 1301 Riverplace Boulevard, Suite 1500, Jacksonville, FL 32207-9020. The deposition will commence at 9:00 a.m. on Tuesday, August 24, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 4, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 4th day of August, 1999.

Counsel for Defendants

16diii001914

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 4, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a subpoena directed to Paul McGuire, an employee of Best Oil. The deposition is noticed for 10:00 a.m. Tuesday, August 31, 1999, in Pittsburgh, Pennsylvania. The noticed date was selected by Mr. McGuire. Please let me know immediately if this date is impossible for you.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Neal R. Stoll

AO 88 (Rev. 11/91) Subpoena in a Civi

United States District Court

WESTERN DISTRICT OF PENNSYLVANIA at PITTSBURGH

CONWOOD COMPANY, L.P., et al.

V.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No. 5:98CV-108-R in the United States District Court for the Western District of Kentucky at Paducah

TO: Paul McGuire
Best Oil
Saw Mill Run Boulevard
Pittsburgh, PA 15227

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Polito & Smock, P.C., Suite 400, Four Gateway Center Pittsburgh, PA 15222	August 31, 1999 at 10:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Defendants	

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

John S. Reed, Reed Weitkamp Schell & Vice PLLC, 2400 Citizens Plaza, Louisville, KY 40202
(502) 589-1000

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

16diii001916

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

NOTICE TO TAKE VIDEOTAPED DEPOSITION OF PAUL McGUIRE

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Paul McGuire at Polito & Smock, P.C., Suite 400, Four Gateway Center, Pittsburgh, PA 15222. The deposition will commence at 10:00 a.m. on Tuesday, August 31, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 4, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 4th day of August, 1999.

Counsel for Defendants

16diii001918

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

NOTICE TO TAKE VIDEOTAPED DEPOSITION OF PAUL McGUIRE

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Paul McGuire at Polito & Smock, P.C., Suite 400, Four Gateway Center, Pittsburgh, PA 15222. The deposition will commence at 10:00 a.m. on Tuesday, August 31, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 4, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 4th day of August, 1999.

Counsel for Defendants

16diii001920

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 AUG -6 A10:01 FILED US DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY BONNIE TOWNSEND

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Bonnie Townsend, 433 S.W. 64th Street, Oklahoma City, OK 73139. The deposition will commence at 2:00 p.m. on August 18, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at the Days Inn, 2616 South I 35 Service Road, Oklahoma City, OK 73129 .

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 5, 1999

16diii001922

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 5th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Bonnie Townsend, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE WESTERN DISTRICT OF OKLAHOMA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Bonnie Townsend
433 S.W. 64th Street
Oklahoma City, OK 73139

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Days Inn 2616 South I 35 Service Road Oklahoma City, OK 73129	August 18, 1999 at 2:00 p.m. or such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	8/5/99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	August , 1999	433 S.W. 64th Street Oklahoma City, OK 73139

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Bonnie Townsend	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on 8/5/99
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'99 AUG -6 A10:01

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY BONNIE TOWNSEND

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Bonnie Townsend, 433 S.W. 64th Street, Oklahoma City, OK 73139. The deposition will commence at 2:00 p.m. on August 18, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at the Days Inn, 2616 South I 35 Service Road, Oklahoma City, OK 73129 .

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 5, 1999

16diii001927

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 5th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Bonnie Townsend, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE WESTERN DISTRICT OF OKLAHOMA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Bonnie Townsend
433 S.W. 64th Street
Oklahoma City, OK 73139

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Days Inn 2616 South I 35 Service Road Oklahoma City, OK 73129	August 18, 1999 at 2:00 p.m. or such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	8/5/99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	August , 1999	433 S.W. 64th Street Oklahoma City, OK 73139

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Bonnie Townsend	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on 8/5/99
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 AUG -6 A10:01 FILED US DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY ROBERT JANSING

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party. Robert Jansing, 2113 Meridian, Norman, OK 73071. The deposition will commence at 2:00 p.m. on August 23, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at the Southgate Inn, 5245 South I 35 Service Road, Oklahoma City, OK 73129.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 5, 1999

16diii001932

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 5th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Robert Jansing, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE WESTERN DISTRICT OF OKLAHOMA

CONWOOD COMPANY, L.P.,
et al.

v.

UNITED STATES TOBACCO COMPANY,
et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Robert Jansing
2113 Meridian
Norman, OK 73071

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Southgate Inn 5245 South I 35 Service Road Oklahoma City, OK 73129	August 23, 1999 at 2:00 p.m. or such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	August 5, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 6, 1999	2113 Meridian Norman, OK 73071

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Robert Jansing	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on August 5, 1999
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 AUG -6 A10:01

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY ROBERT JANSING

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party. Robert Jansing, 2113 Meridian, Norman, OK 73071. The deposition will commence at 2:00 p.m. on August 23, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at the Southgate Inn, 5245 South I 35 Service Road, Oklahoma City, OK 73129.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 5, 1999

16diii001937

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	

CERTIFICATE OF SERVICE

I certify that on this 5th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Robert Jansing, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE WESTERN DISTRICT OF OKLAHOMA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Robert Jansing
2113 Meridian
Norman, OK 73071

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Southgate Inn 5245 South I 35 Service Road Oklahoma City, OK 73129	August 23, 1999 at 2:00 p.m. or such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	August 5, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 6, 1999	2113 Meridian Norman, OK 73071

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Robert Jansing	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on August 5, 1999
DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 AUG -9 A10:02 FILED US DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY WAYNELL RENFRO

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Waynell Renfro, 721 Tucks Chapel Road, Rogers, AR 72756. The deposition will commence at 1:00 p.m. on August 25, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at the Clarion Hotel, 211 SE Waldon Boulevard, Bentonville, AR 72712-6765.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 6th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Waynell Renfro, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch
Neil M. Gorsuch

United States District Court

FOR THE WESTERN DISTRICT OF ARKANSAS

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Waynell Renfro
721 Tucks Chapel Road
Rogers, AR 72756

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Clarion Hotel 211 SE Waldon Boulevard Bentonville, AR 72712-6765	August 25, 1999 at 1:00 p.m. or at such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Neil M. Gorsuch /omd	8/6/99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	8/6/99	721 Tucks Chapel Road Rogers, AR 72756

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Wayleen Renfro	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 AUG -9 A10:02

FILED
US DISTRICT COURT CLERK
WESTN DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION AND PRODUCTION OF DOCUMENTS BY NON-PARTY LAWRENCE BORROWDALE

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Lawrence Borrowdale, 12244 Cordova N.E., Albuquerque, NM 87112. The deposition will commence at 9:00 a.m. on August 24, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at the Sheraton Albuquerque Uptown, 2600 Louisiana Boulevard, N.E., Albuquerque, NM 87110.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the

Federal Rules of Civil Procedure, non-party Lawrence Borrowdale will be required to produce the documents described in the attached subpoena on August 16, 1999 at the law offices of Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street, N.W. Suite 1000 West, Washington D.C. 20005-3317.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 6, 1999

16diii001946

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 6th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Lawrence Borrowdale, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch /mjs
Neil M. Gorsuch

United States District Court

FOR THE DISTRICT OF NEW MEXICO

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Lawrence Borrowdale
12244 Cordova N.E.
Albuquerque, NM 87112

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Sheraton Albuquerque Uptown 2600 Louisiana Boulevard, N.E. Albuquerque, NM 87110	August 24, 1999 at 9:00 a.m. or such other time and date as may be agreed upon by counsel

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):**All documents referring or relating in any way to United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company, Inc., UST Inc., Conwood Company, L.P., and/or Conwood Sales Company, L.P.**

PLACE	DATE AND TIME
Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street, N.W. Suite 1000 West Washington D.C. 20005-3317	August 16, 1999 by 5:00 p.m. Eastern

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	8/2/99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____

DATE

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 AUG -9 A10:03

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION AND PRODUCTION OF DOCUMENTS BY NON-PARTY LAWRENCE BORROWDALE

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Lawrence Borrowdale, 12244 Cordova N.E., Albuquerque, NM 87112. The deposition will commence at 9:00 a.m. on August 24, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at the Sheraton Albuquerque Uptown, 2600 Louisiana Boulevard, N.E., Albuquerque, NM 87110.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the

Federal Rules of Civil Procedure, non-party Lawrence Borrowdale will be required to produce the documents described in the attached subpoena on August 16, 1999 at the law offices of Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street, N.W. Suite 1000 West, Washington D.C. 20005-3317.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 6, 1999

16diii001951

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	

CERTIFICATE OF SERVICE

I certify that on this 6th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Lawrence Borrowdale, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch /mgs
Neil M. Gorsuch

United States District Court

FOR THE DISTRICT OF NEW MEXICO

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Lawrence Borrowdale
12244 Cordova N.E.
Albuquerque, NM 87112

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Sheraton Albuquerque Uptown 2600 Louisiana Boulevard, N.E. Albuquerque, NM 87110	August 24, 1999 at 9:00 a.m. or such other time and date as may be agreed upon by counsel

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):**All documents referring or relating in any way to United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company, Inc., UST Inc., Conwood Company, L.P., and/or Conwood Sales Company, L.P.**

PLACE	DATE AND TIME
Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street, N.W. Suite 1000 West Washington D.C. 20005-3317	August 16, 1999 by 5:00 p.m. Eastern

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs	8/2/99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED		

SERVED ON (PRINT NAME)	MANNER OF SERVICE
SERVED BY (PRINT NAME)	TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 AUG -9 A10:02

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY WAYNELL RENFRO

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Waynell Renfro, 721 Tucks Chapel Road, Rogers, AR 72756. The deposition will commence at 1:00 p.m. on August 25, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at the Clarion Hotel, 211 SE Waldon Boulevard, Bentonville, AR 72712-6765.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 6, 1999

16diii001956

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 6th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Waynell Renfro, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch
Neil M. Gorsuch

United States District Court

FOR THE WESTERN DISTRICT OF ARKANSAS

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Waynell Renfro
721 Tucks Chapel Road
Rogers, AR 72756

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Clarion Hotel 211 SE Waldon Boulevard Bentonville, AR 72712-6765	August 25, 1999 at 1:00 p.m. or at such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Neil M. Gorsuch /omd	8/6/99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	8/6/99	721 Tucks Chapel Road Rogers, AR 72756

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Wayleen Renfro	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

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(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 AUG -9 A10:03

FILED
US DISTRICT COURT CLERK
WESTN DIST KENTUCKY

Civil Action No.
5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY ALAN HART

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Alan Hart, 1002 West Grant Street, Dexter, MO 63841. The deposition will commence at 10:00 a.m. on August 30, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at the office of Yewell Lawrence Esq., 1402 West Business Highway 60, Dexter, MO 63841.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 6, 1999

16diii001961

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 6th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Alan Hart, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Yewell Lawrence, Esq.
1402 West Business Highway 60
Dexter, MO 63841

Neil M. Gorsuch

United States District Court

FOR THE EASTERN DISTRICT OF MISSOURI

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Alan Hart
c/o Yewell Lawrence, Esq.
1402 West Business Highway 60
Dexter, MO 63841

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
1402 West Business Highway 60 Dexter, MO 63841	August 30, 1999 at 10:00 a.m. or such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Neil M Gorsuch /amjb	8/6/99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 6, 1999	1402 West Business Highway 60 Dexter, MO 63841

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Yewell Lawrence, Esq.	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 AUG -9 A10:03

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY ALAN HART

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Alan Hart, 1002 West Grant Street, Dexter, MO 63841. The deposition will commence at 10:00 a.m. on August 30, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at the office of Yewell Lawrence Esq., 1402 West Business Highway 60, Dexter, MO 63841.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 6th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Alan Hart, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Yewell Lawrence, Esq.
1402 West Business Highway 60
Dexter, MO 63841

Neil M. Gorsuch

United States District Court

FOR THE EASTERN DISTRICT OF MISSOURI

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Alan Hart
c/o Yewell Lawrence, Esq.
1402 West Business Highway 60
Dexter, MO 63841

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
1402 West Business Highway 60 Dexter, MO 63841	August 30, 1999 at 10:00 a.m. or such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Neil M Gorsuch /amjs	8/6/99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 6, 1999	1402 West Business Highway 60 Dexter, MO 63841

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Yewell Lawrence, Esq.	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

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(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

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(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

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(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on August 4, 1999 for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch and Ben Powell, counsel.

FOR THE DEFENDANT: Neal Stoll, Martha Weiss, John Keyte, Richard Vierheij and John Reed, counsel.

Neither party identified any issues for the court's consideration at this time.

IT IS HEREBY ORDERED that the next teleconference is scheduled for **Monday, August 23 at 11:00 a.m., EDT.** Plaintiff shall initiate the teleconference.

Date: August 4, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
AUG 0 6 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii001969

COMMAND #207

	DATE	TIME		TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	8/10	10:52	1	901 682 1223	EC--S	00'53"	002	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO:	DAVID SIMPSON, ESQ. EDDIE FOSTER, ESQ. TRIPP WILSON, ESQ.
FAX NO.:	901-682-1223
CLIENT NO.	97718
FROM:	NEIL M. GORSUCH
PHONE:	(202) 326-7978
DATE:	August 10, 1999
RE:	

TOTAL NUMBER OF PAGES: 2 **(INCLUDING THIS SHEET)**

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL US IMMEDIATELY OR CONTACT OUR COPY SERVICE CENTER: (202) 326-7949

OUR FAX # : (202) 326-7999

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS PRIVILEGED AND CONFIDENTIAL ATTORNEY INFORMATION INTENDED ONLY FOR THE USE OF THE ADDRESSEE. PERSONS RESPONSIBLE FOR DELIVERING THIS COMMUNICATION TO THE INTENDED RECIPIENT ARE HEREBY NOTIFIED NOT TO READ THE ATTACHED AND THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND PLEASE RETURN THE ORIGINAL MESSAGE TO US AT OUR LETTERHEAD ADDRESS VIA THE U.S. POSTAL SERVICE.

COMMAND #206

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	8/10	10:48	1-502-443-4870	G3--S	00'54"	000	INC
002		10:49	5024434571	G3--S	00'21"	000	INC
003		10:50	5024434571	G3--S	01'10"	002	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Richard C. Roberts

FAX NO.: (502) 443-4571 **CLIENT NO.: 97718**

PHONE: (502) 443-4516

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: August 10, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 2 **(INCLUDING THIS SHEET)**

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OUR FAX # : (202) 326-7999

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46diii001971

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	2872
CONNECTION TEL	79769771819015371010
SUBADDRESS	
CONNECTION ID	
ST. TIME	08/10 10:37
USAGE T	00'40
PGS.	2
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Edward J. Foster, Esq.
Tripp Wilson, Esq.
Bob Craddock, Esq.

FAX NO.: **(901) 537-1010**

CLIENT NO.: **97718**

PHONE: (901) 537-1033

FROM: Neil M. Gorsuch

PHONE: (202) 326-7978

DATE: August 10, 1999

MESSAGE:

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	2871
CONNECTION TEL	79769771813129202470
SUBADDRESS	
CONNECTION ID	
ST. TIME	08/10 10:34
USAGE T	00'41
PGS.	2
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
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Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Hank Handelsman

FAX NO.: (312) 920-2470 **CLIENT NO.:** 97718

PHONE: (312) 750-8400

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: August 10, 1999
MESSAGE:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

Upon joint request of the parties and after being sufficiently advised,

IT IS HEREBY ORDERED that the discovery deadline in this matter is extended from August 31, 1999 to September 3, 1999.

Date: August 10, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
AUG 10 1999
JEFFREY A. APPERSON, CLERK
BY _____ DEPUTY CLERK

received
8/10/99 9am CDT

16diii001974

COMMAND #246

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	8/16	17:40	3129202470	EC--S	00'32"	002	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
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Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Hank Handelsman

FAX NO.: (312) 920-2470 **CLIENT NO.:** 97718

PHONE: (312) 750-8400

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: August 16, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 2 **(INCLUDING THIS SHEET)**

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL US IMMEDIATELY OR CONTACT OUR COPY SERVICE CENTER AT (202) 326-7949

OUR FAX # : (202) 326-7999

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16diii001975

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	3051
CONNECTION TEL	79769771815024434571
SUBADDRESS	
CONNECTION ID	
ST. TIME	08/16 17:28
USAGE T	00'56
PGS.	2
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
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Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Richard C. Roberts

FAX NO.: (502) 443-4571 **CLIENT NO.: 97718**

PHONE: (502) 443-4516

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: August 16, 1999
MESSAGE:

COMMAND #247

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	8/16	17:42	9015371010	EC--S	00'31"	002	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
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Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

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FAX NO.:	**(901) 537-1010**
CLIENT NO.:	**97718**
PHONE:	(901) 537-1033
FROM:	Neil M. Gorsuch
PHONE:	(202) 326-7978
DATE:	August 16, 1999
MESSAGE:	

TOTAL NUMBER OF PAGES: 2 **(INCLUDING THIS SHEET)**

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*** TX REPORT ***
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TX/RX NO	3050
CONNECTION TEL	797697718190168221223
SUBADDRESS	
CONNECTION ID	
ST. TIME	08/16 17:27
USAGE T	00'40
PGS.	2
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO:	DAVID SIMPSON, ESQ. EDDIE FOSTER, ESQ. TRIPP WILSON, ESQ.
FAX NO.:	901-682-1223
CLIENT NO.	97718
FROM:	NEIL M. GORSUCH
PHONE:	(202) 326-7978
DATE:	August 16, 1999
RE:	

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. **PLAINTIFFS**

vs. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC. **DEFENDANTS**

MEMORANDUM OPINION AND ORDER

At a telephonic status conference on Monday, August 9, 1999, counsel for defendant UST brought to the court's attention a recently served 30(b)(6) deposition notice filed by counsel for plaintiff. At a further teleconference on Tuesday, August 10, 1999, the parties argued the propriety of the 30(b)(6) notice, and the court will treat the argument in that telephonic conference as an oral motion for protective order by UST seeking to quash the 30(b)(6) notice. Following the teleconference, each party served by facsimile on the court case law summaries on the topic of the propriety of the 30b(6) notice.[1]

The 30(b)(6) notice under consideration is extraordinarily broad, and comes at the end of a lengthy period of factual discovery in a hotly contested antitrust case where both sides have expended very significant legal resources. Even though deposition discovery has been going on for months, and even though documents have been produced and interrogatories propounded even longer, at this late hour, Conwood has filed a 30b(6) notice which seeks, with three weeks left in the

[1]The Magistrate Judge must observe that the parties were specifically directed not to file briefs, but to file case summaries. Conwood counsel asked for an extension of time because of personnel and travel reasons to file the case law summary, which the court readily granted. The court was surprised to find that a brief and then a supplemental brief were filed by plaintiff. A listing of cases, not a brief, was requested.

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fact discovery period, the depositions of unnamed corporate representatives on very broad topics, essentially encompassing the entirety of this complex litigation.

For instance, one of the eleven requests, number one, seeks a 30(b)(6) deponent or deponents knowledgeable about the history of twenty years worth of moist snuff price increases, including the amount and date and reasons for each price increase. Also dramatically overbroad is number five, which seeks corporate representatives to testify about "any evidence concerning the facts testified to by non-parties in this case." The notice then goes on to list fifteen deponents about whose testimony witnesses would be demanded. The list of deposition topics goes on, and the court will not repeat each and every one of them. Plaintiff seeks, at the eleventh hour, to require the defendant to put forth deponents knowledgeable about every aspect of the litigation which the plaintiff finds material, even though plaintiff has been very actively taking discovery for months and months.

This is plainly an abuse of the Rule 30(b)(6) process, and the court will not allow such a tactic. Rule 30(b)(6) does not require a corporate party to "marshal all of its factual proof" and prepare one or more witnesses to respond to what are essentially a form of contention interrogatories. In Re Independent Service Organizations Antitrust Litigation, 168 F.R.D. 651, 654-55 (D.Kansas 1996). This is particularly true when the information appears to be discoverable by other means. E.E.O.C. v. HBE Corp., 157 F.R.D. 465, 466-67 (E.D.Mo. 1994). The use of 30(b)(6) depositions has been justly criticized when the information sought can be obtained through by other discovery means such as Rule 33 interrogatories to persons with knowledge of facts or through contention interrogatories. Securities and Exchange Commission v. Rosenfeld, 1997 WL 576021, *3 (S.D.N.Y.)

16diii001980

Such a last minute maneuver on the part the plaintiff strikes the court as an attempt to accomplish one of two objectives. One possible objective is to extend the discovery period without having to make a motion for such an extension. Another possible strategy is to require, in effect, the production of a trial witness list through indirect means by forcing the identification through 30(b)(6) of knowledgeable individuals whom Conwood may have neglected to depose during the discovery period. Whatever the reason for the requested discovery, it will not be allowed.

Conwood has long had available to it a broad range of discovery devices, included among them Rule 26 disclosures, contention interrogatories, and more tightly focused 30(b)(6) deposition notices. It is far too late now to serve such an overbroad deposition notice in this case, and the Magistrate Judge believes such a request would properly have been quashed even if it had been filed on the first day of discovery. To file it at the end of discovery is all the more reason to quash it.

This issue is so clear that no further argument or conference with counsel is necessary and, as a result, this afternoon's teleconference, set for 3:30 p.m., is **REMANDED** from the court's docket. The 30(b)(6) deposition notice is hereby **QUASHED.**

Date: August 4, 1999

James D. Moyer

JAMES D. MOYER
UNITED STATES DISTRICT COURT

Copies to:
Counsel of Record (Via Facsimile)

ENTERED
AUG 11 1999
JEFFREY A. APPERSON, CLERK
BY: DEPUTY CLERK

16diii001981

****
*** TX REPORT ***
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FAXED 8-12-99

TRANSMISSION OK

TX/RX NO	2978
CONNECTION TEL	79789771813129202470
SUBADDRESS	
CONNECTION ID	
ST. TIME	08/12 13:19
USAGE T	01'36
PGS.	5
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
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K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Hank Handelsman

FAX NO.: (312) 920-2470 **CLIENT NO.:** 97718

PHONE: (312) 750-8400

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: August 12, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 5 (INCLUDING THIS SHEET)

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*** TX REPORT ***
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TX/RX NO	2979
CONNECTION TEL	79789771815024434571
SUBADDRESS	
CONNECTION ID	
ST. TIME	08/12 13:21
USAGE T	02'45
PGS.	5
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Richard C. Roberts

FAX NO.: (502) 443-4571 **CLIENT NO.: 97718**

PHONE: (502) 443-4516

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: August 12, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 5 (INCLUDING THIS SHEET)

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PGS.	5
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Edward J. Foster, Esq.
Tripp Wilson, Esq.
Bob Craddock, Esq.

FAX NO.: **(901) 537-1010**

CLIENT NO.: **97718**

PHONE: (901) 537-1033

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: August 12, 1999
MESSAGE:

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FAXED 8-12-99

TRANSMISSION OK

TX/RX NO	2981
CONNECTION TEL	797897718190168221223
SUBADDRESS	
CONNECTION ID	
ST. TIME	08/12 13:27
USAGE T	02'03
PGS.	5
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO:	DAVID SIMPSON, ESQ. EDDIE FOSTER, ESQ. TRIPP WILSON, ESQ.
FAX NO.:	901-682-1223
CLIENT NO.	97718
FROM:	NEIL M. GORSUCH
PHONE:	(202) 326-7978
DATE:	August 12, 1999
RE:	

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 6, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is an amended notice to take the deposition of Dennis Oldani changing the time of the deposition to 1:00 p.m.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Robert Weeger, Esq.
Neal R. Stoll

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

AMENDED NOTICE TO TAKE VIDEOTAPED DEPOSITION OF DENNIS OLDANI

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Dennis Oldani at Schnucks, 12921 Enterprise Way, Bridgeton, MO 63044. The deposition will commence at 1:00 p.m. on Wednesday, August 12, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 6, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 6th day of August, 1999.

Counsel for Defendants

16diii001988

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'99 AUG 16 A10:04

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY KAY LAESSIG

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Kay Laessig. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Wednesday, August 25, 1999 at 10:00 a.m. The deposition will be taken at Blasingame, Burch, Garrard, Bryant & Ashby, P.C., 440 College Avenue, North, Athens, GA 30601.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii001990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Kay Laessig were sent by facsimile transmission to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

June Ann Sauntry
Blasingame, Burch, Garrard, Bryant & Ashby, P.C.
440 College Avenue, North
Athens, GA 30601.

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

Neil M. Gorsuch

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 AUG 16 A10:03

FILED
US DISTRICT COURT CLERK
WESTN DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY KAY LAESSIG

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Kay Laessig. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Wednesday, August 25, 1999 at 10:00 a.m. The deposition will be taken at Blasingame, Burch, Garrard, Bryant & Ashby, P.C., 440 College Avenue, North, Athens, GA 30601.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii001993

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Kay Laessig were sent by facsimile transmission to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

June Ann Sauntry
Blasingame, Burch, Garrard, Bryant & Ashby, P.C.
440 College Avenue, North
Athens, GA 30601.

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

Neil M. Gorsuch

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 6, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a subpoena directed to Gary Jones of Ritz Food Stores. The deposition is noticed for 9:00 a.m. Monday, August 16, 1999, in Pensacola, Florida. The noticed date was selected by Mr. Jones. Please let me know immediately if this date is impossible for you.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Millard Fretland
Neal R. Stoll

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

NOTICE TO TAKE VIDEOTAPED DEPOSITION OF GARY JONES

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Gary Jones at Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Harbourview Building, 25 West Cedar Street, 4th Floor, Pensacola, Fl 32501-5974. The deposition will commence at 9:00 a.m. on Monday, August 16, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 6, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 6th day of August, 1999.

Counsel for Defendants

16diii001997

AO 88 (Rev. 11/91) Subpoena in a Civi

United States District Court

NORTHERN DISTRICT OF FLORIDA, Pensacola Division

CONWOOD COMPANY, L.P., et al.

V.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No. 5:98CV-108-R in the United States District Court for the Western District of Kentucky at Paducah

TO: Gary Jones
c/o Millard Fretland
Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.
Harbourview Building, 25 West Cedar Street, 4th Floor
Pensacola, FL 32501-5974

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Harbourview Building, 25 West Cedar Street, 4th Floor Pensacola, FL 32501-5974	August 16, 1999 9:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
/s/ John S. Reed Attorney for Defendants	August 6, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

John S. Reed, Reed Weitkamp Schell & Vice PLLC, 2400 Citizens Plaza, Louisville, KY 40202
(502) 589-1000

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

16diii001998

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 6, 1999	c/o Millard Fretland; Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A.; Harbourview Bldg.; 25 West Cedar Street, 4th Fl.; Pensacola, FL 35201

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Gary Jones	Via facsimile transmission and U.S. Mail
SERVED BY (PRINT NAME)	**TITLE**
John S. Reed	Attorney for Defendants

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on Aug 6, 1999
DATE

John S. Reed
SIGNATURE OF SERVER

Reed Weitkamp Schell & Vice PLLC
2400 Citizens Plaza, Louisville, KY 40202
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 6, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a notice to take the deposition of Kay Laessig of Golden Pantry. The deposition is noticed for 10:00 a.m. Wednesday, August 25, 1999, in Athens, Georgia. The noticed date was selected by Mr. Laessig. Please let me know immediately if this date is impossible for you.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Neal R. Stoll

16diii002000

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 9, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is the subpoena for the previously noticed deposition of Kay Laessig.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: June Ann Sauntry, Esq.
Frank Eastman
Neal R. Stoll

received
8/13/99 9am CHT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

NOTICE TO TAKE VIDEOTAPED DEPOSITION OF KAY LAESSIG

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Kay Laessig at Blasingame Burch Garrard Bryant & Ashby, P.S.C., 400 College Avenue, N., Athens, Georgia 30601. The deposition will commence at 10:00 a.m. on Wednesday, August 25, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 6, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 6th day of August, 1999.

Counsel for Defendants

AO 88 (Rev. 11/91) Subpoena in a Civi

United States District Court

MIDDLE DISTRICT OF GEORGIA, Athens Division

CONWOOD COMPANY, L.P., et al.

V.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No. 5:98CV-108-R in the United States District Court for the Western District of Kentucky at Paducah

TO: Kay Laessig
c/o June Ann Sauntry
Troutman Sanders LLP
5200 Nationsbank Plaza
600 Peachtree Street, N.E., Atlanta, GA 30308-2216

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Blasingame Burch Garrard Bryant & Ashby, P.S.C., 400 College Avenue, N, Athens, Georgia 30601	August 25, 1999 at 10:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Defendants	August 9, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

John S. Reed, Reed Weitkamp Schell & Vice PLLC, 2400 Citizens Plaza, Louisville, KY 40202
(502) 589-1000

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 9, 1999	c/o June Ann Sauntry Troutman Sanders LLP 5200 Nationsbank Plaza, 600 Peachtree Street, NE. Atlanta, GA 30308-2216

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Kay Laessig	Via Facsimile Transmission and U.S. Mail
SERVED BY (PRINT NAME)	**TITLE**
John S. Reed	Attorney for Defendants

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on August 9, 1999
DATE

SIGNATURE OF SERVER

Reed Weitkamp Schell & Vice PLLC
2400 Citizens Plaza, Louisville, KY 40202
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 6, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a notice to take the deposition of Dennis Gagnon of Happy Stores. The deposition is noticed for 1:00 p.m. Tuesday, August 17, 1999, in Destin, Floria. The noticed date was selected by Mr. Gagnon. Please let me know immediately if this date is impossible for you.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Dana C. Matthews
Neal R. Stoll

16diii002006

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

NOTICE TO TAKE VIDEOTAPED DEPOSITION OF DENNIS GAGNON

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Dennis Gagnon at Matthews & Hawkins, P.A., 607 East Highway 98, Destin, FL 32541. The deposition will commence at 1:00 p.m. on Tuesday, August 17, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 6, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 6th day of August, 1999.

Counsel for Defendants

16diii002008

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 9, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a copy of the subpoena for the previously noticed deposition of Dennis Gagnon.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Dana C. Matthews, Esq.
Neal R. Stoll

received
8/13/99 9am CDT

AO 88 (Rev. 11/91) Subpoena in a Civil

United States District Court

Northern DISTRICT OF Florida

CONWOOD COMPANY, L.P., et al.

V.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No. 5:98CV-108-R in the United States District Court for the Western District of Kentucky at Paducah

TO: Dennis Gagnon
c/o Dana C. Matthews
Matthews & Hawkins, P.A.
607 East Highway 98
Destin, FL 32541

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Matthews & Hawkins, P.A., 607 East Highway 98, Destin, Florida 35241	August 17, 1999 at 1:00 p.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
John S. Reed Attorney for Defendants	August 9, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

John S. Reed, Reed Weitkamp Schell & Vice PLLC, 2400 Citizens Plaza, Louisville, KY 40202 (502) 589-1000

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

16diii002010

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 9, 1999	c/o Dana C. Matthews, Matthews & Hawkins, P.A. 607 East Highway 98, Destin, FL 32541

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Dennis Gagnon	Via facsimile transmission and U.S. Mail
SERVED BY (PRINT NAME)	**TITLE**
John S. Reed	Attorney for Defendants

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on 8/9/99
DATE

SIGNATURE OF SERVER

John S. Reed
Reed Weitkamp Schell & Vice PLLC
ADDRESS OF SERVER
2400 Citizens Plaza
Louisville, KY 40202

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 6, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a notice to take the deposition of Dan Walden of Beeline Stores, Inc. The deposition is noticed for 1:00 p.m. Monday, August 23, 1999, in Troy, Alabama. The noticed date was selected by Mr. Walden. Please let me know immediately if this date is impossible for you.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Dennis Kelly
Neal R. Stoll

16diii002012

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 9, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a copy of the subpoena for the previously noticed deposition of Dan Walden.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Dennis Kelly
Neal R. Stoll

received
8/13/99 9am CDT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

NOTICE TO TAKE VIDEOTAPED DEPOSITION OF DAN WALDEN

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Dan Walden at Cervera & Ralph, 914 South Brundidge Street, Troy, AL 36081. The deposition will commence at 1:00 p.m. on Monday, August 23, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 6, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 6th day of August, 1999.

Counsel for Defendants

16diii002015

AO 88 (Rev. 11/91) Subpoena in a Civi

United States District Court

Middle DISTRICT OF Alabama

CONWOOD COMPANY, L.P., et al.

V.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No. 5:98CV-108-R in the United States District Court for the Western District of Kentucky at Paducah

TO: Dan Walden
c/o Dennis Kelly
Beeline Stores, Inc.
P.O. Box 1067, Troy, AL 36081

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Cervera & Ralph, 914 South Brundidge Street, Troy, AL 36081	August 23, 1999 at 1:00 p.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
John S. Reed Attorney for Defendants	August 9, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

John S. Reed, Reed Weitkamp Schell & Vice PLLC, 2400 Citizens Plaza, Louisville, KY 40202 (502) 589-1000

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

16diii002016

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 9, 1999	c/o Dennis Kelly, Beeline Stores, Inc. P.O. Box 1067, Troy, AL 36081

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Dan Walden	Facsimile Transmission and U.S. Mail
SERVED BY (PRINT NAME)	**TITLE**
John S. Reed	Attorney for Defendants

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on August 9, 1999
DATE

SIGNATURE OF SERVER

John S. Reed
Reed Weitkamp Schell & Vice PLLC
ADDRESS OF SERVER

2400 Citizens Plaza
Louisville, KY 40202

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

'99 AUG 12 A9:59
FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

In their "Summary of Cases in Support of Protective Order Against Plaintiffs' Notice of a Rule 30(b)(6) Deposition," defendants for the first time take the position that Conwood's notice "intrude[s] upon attorney work product." Even if the Court were to entertain this last-minute argument -- never raised in the parties' Court-ordered consultations or in two conference calls with the Court over the last two days -- it cannot save defendants' motion.

Plaintiffs' notice does not seek work product, but facts about defendants' pricing, marketing efforts, vending system designs, and the like.[1] Even paragraph 11, which defendants seem to target as invading their "strategies concerning allegations

[1]For example, paragraph 1 seeks the history of UST price increases, and paragraph 2 seeks information concerning the impact on moist snuff sales of different vending systems and point of sale advertising.

made, [and] affirmative defenses raised," does no such thing. By its express terms it seeks only the "factual basis" of defendants' pleading allegations. Under long-settled law, such factual information is not protected from discovery and is information organizational witnesses must be prepared to discuss at deposition.[2]

---

[2]See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) (attorney-client privilege "does not protect disclosure of the underlying facts by those who communicated with the attorney"); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2023, at 330-31 (2d ed. 1994) ("the work product concept furnishe[s] no shield against discovery, by interrogatories or deposition, of the facts that the adverse party's lawyer has learned"); Hickman v. Taylor, 329 U.S. 495, 508 (1947) ("the protective cloak of [the] privilege does not extend to information which an attorney secures from a witness while acting for his client"); FDIC v. Butcher, 116 F.R.D. 196, 199 (E.D. Tenn. 1986) (Murrian, J.) (ordering 30(b)(6) deponent to review work product memorandum and testify concerning facts therein since "the underlying facts known to those who generated the work product or attorney-client materials are not privileged information"); Protective Nat. Ins. v. Commonwealth Ins., 137 F.R.D. 267, 283 (D. Neb. 1989) (directing that organizational deponent "must recite the facts upon which [it] relie[s] . . . even though those facts may have been provided to her or her employer by [the organization's] lawyers."); Resolution Trust Corp. v. Sands, 151 F.R.D. 616, 620 (N.D. Tex. 1993) (ordering organizational witness to do same); Sedco Int'l, S.A. v. Cory, 683 F.2d 1201, 1205 (8th Cir.), cert. denied, 459 U.S. 1017 (1982) ("No contention can be made that the attorney-client privilege precludes disclosure of factual information.") (citation omitted).

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

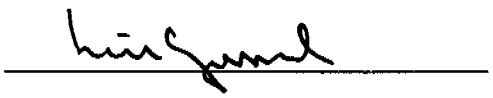
August 11, 1999

CERTIFICATE OF SERVICE

I certify that on this 11th day of August, 1999, a copy of the foregoing was sent by facsimile service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.



COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 AUG 12 A10:00 FILED U.S. DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

In their "Summary of Cases in Support of Protective Order Against Plaintiffs' Notice of a Rule 30(b)(6) Deposition," defendants for the first time take the position that Conwood's notice "intrude[s] upon attorney work product." Even if the Court were to entertain this last-minute argument -- never raised in the parties' Court-ordered consultations or in two conference calls with the Court over the last two days -- it cannot save defendants' motion.

Plaintiffs' notice does not seek work product, but facts about defendants' pricing, marketing efforts, vending system designs, and the like.[1] Even paragraph 11, which defendants seem to target as invading their "strategies concerning allegations

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made, [and] affirmative defenses raised," does no such thing. By its express terms it seeks only the "factual basis" of defendants' pleading allegations. Under long-settled law, such factual information is not protected from discovery and is information organizational witnesses must be prepared to discuss at deposition.[2]

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[2]See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 395 (1981) (attorney-client privilege "does not protect disclosure of the underlying facts by those who communicated with the attorney"); 8 C. Wright & A. Miller, Federal Practice and Procedure § 2023, at 330-31 (2d ed. 1994) ("the work product concept furnishe[s] no shield against discovery, by interrogatories or deposition, of the facts that the adverse party's lawyer has learned"); Hickman v. Taylor, 329 U.S. 495, 508 (1947) ("the protective cloak of [the] privilege does not extend to information which an attorney secures from a witness while acting for his client"); FDIC v. Butcher, 116 F.R.D. 196, 199 (E.D. Tenn. 1986) (Murrian, J.) (ordering 30(b)(6) deponent to review work product memorandum and testify concerning facts therein since "the underlying facts known to those who generated the work product or attorney-client materials are not privileged information"); Protective Nat. Ins. v. Commonwealth Ins., 137 F.R.D. 267, 283 (D. Neb. 1989) (directing that organizational deponent "must recite the facts upon which [it] relie[s] . . . even though those facts may have been provided to her or her employer by [the organization's] lawyers."); Resolution Trust Corp. v. Sands, 151 F.R.D. 616, 620 (N.D. Tex. 1993) (ordering organizational witness to do same); Sedco Int'l, S.A. v. Cory, 683 F.2d 1201, 1205 (8th Cir.), cert. denied, 459 U.S. 1017 (1982) ("No contention can be made that the attorney-client privilege precludes disclosure of factual information.") (citation omitted).

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
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P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
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Mark C. Hansen
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Steven F. Benz
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Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

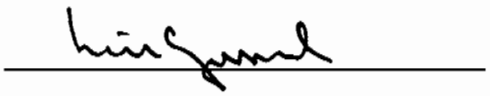
August 11, 1999

CERTIFICATE OF SERVICE

I certify that on this 11th day of August, 1999, a copy of the foregoing was sent by facsimile service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.



REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 11, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a subpoena directed to Jack Barger, of Convenience King. The deposition is noticed for 9:30 a.m. Tuesday, August 24, 1999, in Asheville, North Carolina. The date was selected by Mr. Barger. Please let me know immediately if this date is impossible for you.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Neal R. Stoll

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

NOTICE TO TAKE VIDEOTAPED DEPOSITION OF JACK BARGER

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Jack Barger at the offices of Sperling & Barraco, Inc., 53 Orange Street, Asheville, North Carolina 28801. The deposition will commence at 9:30 a.m. on Tuesday, August 24, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 11, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 11th day of August, 1999.

Counsel for Defendants

16diii002028

United States District Court

WESTERN DISTRICT OF NORTH CAROLINA

CONWOOD COMPANY, L.P., et al.

V.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No. 5:98CV-108-R in the United States District Court for the Western District of Kentucky at Paducah

TO: Mr. Jack Barger
Convenience King/Morgan Oil & Propane Co.
352 Georgia Avenue
Waynesville, NC 28787

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Sperling & Barraco, Inc., 53 Orange Street Asheville, NC 28801	August 24, 1999 at 9:30 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Ridley M. Sandidge, Jr. Attorney for Defendants	August 11, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Ridley M. Sandidge, Jr. Reed Weitkamp Schell & Vice PLLC, 2400 Citizens Plaza, Louisville, KY 40202
(502) 589-1000

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 11, 1999	Convenience King/Morgan Oil & Propane Co. 352 Georgia Avenue Waynesville, NC 28786

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Jack Barger	Via Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Ridley M. Sandidge, Jr.	Attorney for Defendants

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on August 11, 1999
DATE

SIGNATURE OF SERVER

Reed Weitkamp Schell & Vice PLLC
2400 Citizens Plaza
ADDRESS OF SERVER

Louisville, KY 40202

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 11, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Please note that the address of Blasingame, Burch, Garrard, Bryant & Ashby, P.C., which is the noticed location of the deposition of Kay Laessig, is **440 College Avenue North**, Athens, Georgia. An amended notice is enclosed making this correction.

Sincerely,

John S. Reed /kmc

John S. Reed

JSR/kmc
Enclosure
cc: June Ann Sauntry, Esq.
Neal R. Stoll

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

AMENDED NOTICE TO TAKE VIDEOTAPED DEPOSITION OF KAY LAESSIG

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Kay Laessig at Blasingame Burch Garrard Bryant & Ashby, P.C., 440 College Avenue North, Athens, Georgia 30601. The deposition will commence at 10:00 a.m. on Wednesday, August 25, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 11, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 11th day of August, 1999.

Counsel for Defendants

16diii002033

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 AUG 16 P1:32

FILED
US DISTRICT COURT CLERK
WESTN DIST. KENTUCKY

NOTICE OF PRODUCTION OF DOCUMENTS BY GATE PETROLEUM

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Convenience Gate Petroleum will be required to produce the documents described in the attached subpoena on August 20, 1999 at 5:00 p.m. at Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street N.W. Suite 1000 West, Washington, D.C. 20005 or at a place to be determined among counsel.

Respectfully submitted,

Richard C. Roberts/BAP

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
502) 443-4516
FAX - (502) 443-4571

Neil M. Gorsuch/BAP

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 13, 1999

16diii002035

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 13th day of August, 1999, copies of the foregoing Notice of Document Production by Gate Petroleum and subpoena were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Joseph O. Stroud, Jr.
Rogers, Towers, Bailey, Jones & Gay, P.A.
1301 Riverplace Boulevard
Suite 1500
Jacksonville, FL 32207-9020

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

Neil M. Gorsuch

United States District Court

FOR THE MIDDLE DISTRICT OF FLORDIA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Gate Petroleum
Joseph O. Stroud, Jr.
Rogers, Towers, Bailey, Jones & Gay, P.A.
1301 Riverplace Boulevard
Suite 1500
Jacksonville, FL 32207-9020

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents concerning moist snuff sales, product mix, displays, racks, vending systems, promotions, incentive or alliance programs, or point of sale advertising from 1996 to the present. This includes, without limitation, all moist snuff movement figures and correspondence or e-mails to or from U.S. Tobacco Company personnel.**

PLACE	DATE AND TIME
Kellogg Huber Hansen Todd & Evans, P.L.L.C. 1301 K Street, N.W., Suite 1000 West Washington, D.C. 20005 or as agreed upon by Counsel.	August 20, 1999 by 5:00 p.m. Eastern Daylight

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch Attorney for Plaintiffs	August 13, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	Aug. 13, 1999	Rogers, Towers, Bailey, Jones & Gay, P.A. 1301 Riverplace Boulevard Suite 1500 Jacksonville, FL 32207-9020

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Joseph O. Stroud, Jr.	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 AUG 16 P1:32

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

NOTICE OF PRODUCTION OF DOCUMENTS BY GATE PETROLEUM

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Convenience Gate Petroleum will be required to produce the documents described in the attached subpoena on August 20, 1999 at 5:00 p.m. at Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street N.W. Suite 1000 West, Washington, D.C. 20005 or at a place to be determined among counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 13th day of August, 1999, copies of the foregoing Notice of Document Production by Gate Petroleum and subpoena were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Joseph O. Stroud, Jr.
Rogers, Towers, Bailey, Jones & Gay, P.A.
1301 Riverplace Boulevard
Suite 1500
Jacksonville, FL 32207-9020

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE MIDDLE DISTRICT OF FLORDIA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Gate Petroleum
Joseph O. Stroud, Jr.
Rogers, Towers, Bailey, Jones & Gay, P.A.
1301 Riverplace Boulevard
Suite 1500
Jacksonville, FL 32207-9020

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents concerning moist snuff sales, product mix, displays, racks, vending systems, promotions, incentive or alliance programs, or point of sale advertising from 1996 to the present. This includes, without limitation, all moist snuff movement figures and correspondence or e-mails to or from U.S. Tobacco Company personnel.**

PLACE	DATE AND TIME
Kellogg Huber Hansen Todd & Evans, P.L.L.C. 1301 K Street, N.W., Suite 1000 West Washington, D.C. 20005 or as agreed upon by Counsel.	August 20, 1999 by 5:00 p.m. Eastern Daylight

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch Attorney for Plaintiffs	August 13, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	Aug. 13, 1999	Rogers, Towers, Bailey, Jones & Gay, P.A. 1301 Riverplace Boulevard Suite 1500 Jacksonville, FL 32207-9020

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Joseph O. Stroud, Jr.	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____ _____

DATE SIGNATURE OF SERVER

_____

ADDRESS OF SERVER

_____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY DENNIS GAGNON

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Dennis Gagnon. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Tuesday, August 17, 1999 at 1:00 p.m. The deposition will be taken at Matthews & Hawkins, P.A., 607 East Highway 98, Destin, Flordia 35241.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts /BAP

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Neil M. Gorsuch /BAP

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii002044

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Dennis Gagnon were sent by facsimile transmission to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Dana C. Matthews
Matthews & Hawkins, P.A.
607 East Highway 98
Destin, FL 32541

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

Neil M. Gorsuch

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, DC 20005

(202) 326-7900
FACSIMILE: (202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

FACSIMILE TRANSMISSION

TO: Dana C. Matthews

FAX NO.: 850-652-1634 **CLIENT NO.: 97718**

PHONE: 850-837-3662

Fax # Not in Service

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: August 12, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 7 **(INCLUDING THIS SHEET)**

IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CALL US IMMEDIATELY OR CONTACT OUR COPY SERVICE CENTER AT (202) 326-7949:

THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS PRIVILEGED AND CONFIDENTIAL ATTORNEY INFORMATION INTENDED ONLY FOR THE USE OF THE ADDRESSEE. PERSONS RESPONSIBLE FOR DELIVERING THIS COMMUNICATION TO THE INTENDED RECIPIENT ARE HEREBY NOTIFIED NOT TO READ THE ATTACHED AND THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE, AND PLEASE RETURN THE ORIGINAL MESSAGE TO US AT OUR LETTERHEAD ADDRESS VIA THE U.S. POSTAL SERVICE.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 AUG 16 A10:03

FILED
US DISTRICT COURT CLERK
WESTERN DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY DAVID DILL

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party David Dill. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on David Dill, August 24, 1999 at 9:00 a.m. The deposition will be taken at Rogers, Towers, Bailey, Jones & Gay, P.A., 1301 Riverplace Boulevard, Suite 1500, Jacksonville, FL 32207-9020.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii002048

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party David Dill were sent by facsimile transmission to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Joseph O. Stroud, Jr.
Rogers, Towers, Bailey, Jones & Gay, P.A.
1301 Riverplace Boulevard
Suite 1500
Jacksonville, FL 32207-9020.

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 AUG 16 A10:04 FILED US DISTRICT COURT CLERK WESTERN DIST KENTUCKY Civil Action No. 5:98CV-108-R

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY DAVID DILL

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party David Dill. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on David Dill, August 24, 1999 at 9:00 a.m. The deposition will be taken at Rogers, Towers, Bailey, Jones & Gay, P.A., 1301 Riverplace Boulevard, Suite 1500, Jacksonville, FL 32207-9020.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party David Dill were sent by facsimile transmission to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Joseph O. Stroud, Jr.
Rogers, Towers, Bailey, Jones & Gay, P.A.
1301 Riverplace Boulevard
Suite 1500
Jacksonville, FL 32207-9020.

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action 5:98CV-108-R

'99 AUG 16 A10:03

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY GARY JONES

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Gary Jones. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Monday, August 16, 1999 at 9:00 a.m. The deposition will be taken at Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. Harbourview Building, 25 West Cedar Street, 4th Floor, Pensacola, FL 32501-5974.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii002053

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Gary Jones were sent by facsimile transmission to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Millard Fretland
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
Harbourview Building
25 West Cedar Street, 4th Floor,
Pensacola, FL 32501-5974

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

'99 AUG 16 A10:04

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY GARY JONES

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Gary Jones. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Monday, August 16, 1999 at 9:00 a.m. The deposition will be taken at Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A. Harbourview Building, 25 West Cedar Street, 4th Floor, Pensacola, FL 32501-5974.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii002056

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Gary Jones were sent by facsimile transmission to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Millard Fretland
Carlton, Fields, Ward, Emmanuel,
Smith & Cutler, P.A.
Harbourview Building
25 West Cedar Street, 4th Floor,
Pensacola, FL 32501-5974

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

Neil M. Gorsuch

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

'99 AUG 16 A10:04

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY KAY LAESSIG

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Kay Laessig. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Wednesday, August 25, 1999 at 10:00 a.m. The deposition will be taken at Blasingame, Burch, Garrard, Bryant & Ashby, P.C., 440 College Avenue, North, Athens, GA 30601.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Kay Laessig were sent by facsimile transmission to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

June Ann Sauntry
Blasingame, Burch, Garrard, Bryant & Ashby, P.C.
440 College Avenue, North
Athens, GA 30601.

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

Neil M. Gorsuch

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action 5:98CV-108-R

'99 AUG 16 A10:03
FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY KAY LAESSIG

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Kay Laessig. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Wednesday, August 25, 1999 at 10:00 a.m. The deposition will be taken at Blasingame, Burch, Garrard, Bryant & Ashby, P.C., 440 College Avenue, North, Athens, GA 30601.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii002062

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Kay Laessig were sent by facsimile transmission to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

June Ann Sauntry
Blasingame, Burch, Garrard,
Bryant & Ashby, P.C.
440 College Avenue, North
Athens, GA 30601.

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

Neil M. Gorsuch

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 AUG 16 A10:03
FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY BOBBY CARLSON

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Bobby Carlson. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Tuesday, August 17, 1999 at 8:00 a.m. The deposition will be taken at Executive Center, 1104 S. Walton Boulevard, Bentonville, AR 72712.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts /BAP
Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Neil M. Gorsuch /BAP
Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 13, 1999

16diii002065

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 13th day of August, 1999, copies of the foregoing Cross Notice of Videotaped Deposition of Non-Party Bobby Carlson was sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Blake Clardy, Esq.
Wal-Mart Stores, Inc.
702 S.W. 8th Street
Bentonville, AR 72716-8314

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

/s/ Neil M. Gorsuch 8/13/99
Neil M. Gorsuch

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 AUG 16 A10:05

FILED
U.S. DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY BOBBY CARLSON

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Bobby Carlson. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Tuesday, August 17, 1999 at 8:00 a.m. The deposition will be taken at Executive Center, 1104 S. Walton Boulevard, Bentonville, AR 72712.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts /BAP

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Neil M. Gorsuch /BAP

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 13, 1999

16diii002068

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Cross Notice of Videotaped Deposition of Non-Party Bobby Carlson was sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Blake Clardy, Esq.
Wal-Mart Stores, Inc.
702 S.W. 8th Street
Bentonville, AR 72716-8314

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 AUG 16 A10:03 FILED US DISTRICT COURT CLERK WESTERN DIST. KENTUCKY Civil Action No. 5:98CV-108-R

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY DAN WALDEN

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Dan Walden. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Monday, August 23, 1999 at 1:00 p.m. The deposition will be taken at Cervera & Ralph, 914 South Brundidge Street, Troy, AL 36081.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts /BAP

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Neil M. Gorsuch /BAP

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii002071

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Dan Walden were sent by facsimile transmission to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Dennis Kelly
Cervera & Ralph
914 South Brundidge Street
Troy, AL 36081.

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 AUG 16 A10:03 FILED US DISTRICT COURT CLERK WESTN DIST. KENTUCKY Civil Action No. 5:98CV-108-R

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY JACK BARGER

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Jack Barger. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Tuesday, August 24, 1999 at 9:30 a.m. The deposition will be taken at Sperling & Barraco, Inc., 53 Orange Street, Asheville, NC 28801.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii002074

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Jack Barger were sent by overnight mail transmission to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Jack Barger
Convenience King/Morgan Oil &
Propane Co.
352 Georgia Avenue
Waynesville, NC 28787

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 AUG 16 A10:04
FILED
U.S. DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY JACK BARGER

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Jack Barger. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Tuesday, August 24, 1999 at 9:30 a.m. The deposition will be taken at Sperling & Barraco, Inc., 53 Orange Street, Asheville, NC 28801.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii002077

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Jack Barger were sent by overnight mail transmission to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Jack Barger
Convenience King/Morgan Oil &
Propane Co.
352 Georgia Avenue
Waynesville, NC 28787

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

'99 AUG 16 A10:08

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

NOTICE OF PRODUCTION OF DOCUMENTS BY CONVENIENCE KING/MORGAN OIL & PROPANE CO.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Convenience King/Morgan Oil & Propane Co. will be required to produce the documents described in the attached subpoena on August 20, 1999 at 5:00 p.m. at Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street N.W. Suite 1000 West, Washington, D.C. 20005 or at a place to be determined among counsel.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii002080

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Document Production by Convenience King/Morgan Oil & Propane Co., and subpoena were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Convenience King/Morgan Oil & Propane Co.
c/o Larry Harris Jr.
Van Winkle, Buck, Wall, Starnes and Davis
11 North Market Street
Asheville, North Carolina 28801

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents concerning moist snuff sales, product mix, displays, racks, vending systems, promotions, incentive or alliance programs, or point of sale advertising from 1996 to the present. This includes, without limitation, all moist snuff movement figures and correspondence or e-mails to or from U.S. Tobacco Company personnel.**

PLACE	DATE AND TIME
Kellogg Huber Hansen Todd & Evans, P.L.L.C. 1301 K Street, N.W., Suite 1000 West Washington, D.C. 20005 or agreed upon by Counsel.	August 20, 1999 by 5:00 p.m. Eastern Daylight

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE, INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch /BAP Attorney for Plaintiffs	July 12, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	Aug. 12, 1999	Van Winkle, Buck, Wall, Starnes and Davis 11 North Market Street Asheville, North Carolina 28801

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Larry Harris	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 AUG 16 A10:07 FILED U.S. DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF PRODUCTION OF DOCUMENTS BY CONVENIENCE KING/MORGAN OIL & PROPANE CO.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Convenience King/Morgan Oil & Propane Co. will be required to produce the documents described in the attached subpoena on August 20, 1999 at 5:00 p.m. at Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street N.W. Suite 1000 West, Washington, D.C. 20005 or at a place to be determined among counsel.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii002085

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Document Production by Convenience King/Morgan Oil & Propane Co., and subpoena were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Convenience King/Morgan Oil & Propane Co.
c/o Larry Harris Jr.
Van Winkle, Buck, Wall, Starnes and Davis
11 North Market Street
Asheville, North Carolina 28801

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents concerning moist snuff sales, product mix, displays, racks, vending systems, promotions, incentive or alliance programs, or point of sale advertising from 1996 to the present. This includes, without limitation, all moist snuff movement figures and correspondence or e-mails to or from U.S. Tobacco Company personnel.**

PLACE	DATE AND TIME
Kellogg Huber Hansen Todd & Evans, P.L.L.C. 1301 K Street, N.W., Suite 1000 West Washington, D.C. 20005 or agreed upon by Counsel.	August 20, 1999 by 5:00 p.m. Eastern Daylight

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE, INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch /BAP Attorney for Plaintiffs	July 12, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	Aug. 12, 1999	Van Winkle, Buck, Wall, Starnes and Davis 11 North Market Street Asheville, North Carolina 28801

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Larry Harris	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 AUG 16 A10:08

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

NOTICE OF PRODUCTION OF DOCUMENTS BY GOLDEN PANTRY FOOD STORES

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Golden Pantry Food Stores, Inc. will be required to produce the documents described in the attached subpoena on August 20, 1999 at 5:00 p.m. at Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street N.W. Suite 1000 West, Washington, D.C. 20005 or at a place to be determined among counsel.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii002090

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Document Production by Golden Pantry Food Stores, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE MIDDLE DISTRICT OF GEORGIA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Golden Pantry Food Stores, Inc.
Michael Griffith
1150 Wall Street
Bogart, GA 30622

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents concerning moist snuff sales, product mix, displays, racks, vending systems, promotions, incentive or alliance programs, or point of sale advertising from 1996 to the present. This includes, without limitation, all moist snuff movement figures and correspondence or e-mails to or from U.S. Tobacco Company personnel.**

PLACE	DATE AND TIME
Kellogg Huber Hansen Todd & Evans, P.L.L.C. 1301 K Street, N.W., Suite 1000 West Washington, D.C. 20005 or as agreed upon by Counsel.	August 20, 1999 by 5:00 p.m. Eastern Daylight

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch /BAO Attorney for Plaintiffs	Aug 12, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	Aug. 12, 1999	1150 Wall Street Bogart, GA 30622

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Michael Griffith	Via Facsimile and Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

'99 AUG 16 A10:08

FILED
US DISTRICT COURT CLERK
WESTN DIST. KENTUCKY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

NOTICE OF PRODUCTION OF DOCUMENTS BY GOLDEN PANTRY FOOD STORES

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Golden Pantry Food Stores, Inc. will be required to produce the documents described in the attached subpoena on August 20, 1999 at 5:00 p.m. at Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street N.W. Suite 1000 West, Washington, D.C. 20005 or at a place to be determined among counsel.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 12, 1999

16diii002095

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 12th day of August, 1999, copies of the foregoing Notice of Document Production by Golden Pantry Food Stores, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil R. Gorsuch /SAP
Neil M. Gorsuch

United States District Court

FOR THE MIDDLE DISTRICT OF GEORGIA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Golden Pantry Food Stores, Inc.
Michael Griffith
1150 Wall Street
Bogart, GA 30622

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents concerning moist snuff sales, product mix, displays, racks, vending systems, promotions, incentive or alliance programs, or point of sale advertising from 1996 to the present. This includes, without limitation, all moist snuff movement figures and correspondence or e-mails to or from U.S. Tobacco Company personnel.**

PLACE	DATE AND TIME
Kellogg Huber Hansen Todd & Evans, P.L.L.C. 1301 K Street, N.W., Suite 1000 West Washington, D.C. 20005 or as agreed upon by Counsel.	August 20, 1999 by 5:00 p.m. Eastern Daylight

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch /BAM Attorney for Plaintiffs	Aug 12, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY
'99 AUG 16 A10:08
FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

NOTICE OF PRODUCTION OF DOCUMENTS BY BEELINE STORES, INC.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Beeline Food Stores, Inc. will be required to produce the documents described in the attached subpoena on August 19, 1999 at 5:00 p.m. at Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street N.W. Suite 1000 West, Washington, D.C. 20005 or at a place to be determined among counsel.

Respectfully submitted,

Richard E. Roberts /BAP

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
502) 443-4516
FAX - (502) 443-4571

Neil M. Gorsuch /BAP

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 13, 1999

16diii002099

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 13th day of August, 1999, copies of the foregoing Notice of Document Production by Beeline Food Stores Inc. and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

Neil M. Gorsuch

AO 88 (11/91) Subpoena in a Civil Case

United States District Court

FOR THE MIDDLE DISTRICT OF ALABAMA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Dennis Kelly
Beeline Stores, Inc.
P.O. Box 1067
Troy, AL 36081

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents concerning moist snuff sales, product mix, displays, racks, vending systems, promotions, incentive or alliance programs, or point of sale advertising from 1996 to the present. This includes, without limitation, all moist snuff movement figures and correspondence or e-mails to or from U.S. Tobacco Company personnel.**

PLACE	DATE AND TIME
Kellogg Huber Hansen Todd & Evans, P.L.L.C. 1301 K Street, N.W., Suite 1000 West Washington, D.C. 20005 or as agreed upon by Counsel.	August 19, 1999 by 5:00 p.m. Eastern Daylight

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE/ INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch Attorney for Plaintiffs	August 13, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

16diii002101

PROOF OF SERVICE

	DATE	PLACE
SERVED	Aug. 12, 1999	Beeline Stores, Inc. P.O. Box 1067 Troy, AL 36081

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Dennis Kelly	U.S. Mail
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 AUG 16 A10:08 FILED US DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF PRODUCTION OF DOCUMENTS BY BEELINE STORES, INC.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Beeline Food Stores, Inc. will be required to produce the documents described in the attached subpoena on August 19, 1999 at 5:00 p.m. at Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street N.W. Suite 1000 West, Washington, D.C. 20005 or at a place to be determined among counsel.

Respectfully submitted,

Richard E. Roberts /BAP

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
502) 443-4516
FAX - (502) 443-4571

Neil M. Gorsuch /BAP

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 13, 1999

16diii002104

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 13th day of August, 1999, copies of the foregoing Notice of Document Production by Beeline Food Stores Inc. and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

Neil M. Gorsuch

AO 88 (11/91) Subpoena in a Civil Case

United States District Court

FOR THE MIDDLE DISTRICT OF ALABAMA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Dennis Kelly
Beeline Stores, Inc.
P.O. Box 1067
Troy, AL 36081

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents concerning moist snuff sales, product mix, displays, racks, vending systems, promotions, incentive or alliance programs, or point of sale advertising from 1996 to the present. This includes, without limitation, all moist snuff movement figures and correspondence or e-mails to or from U.S. Tobacco Company personnel.**

PLACE	DATE AND TIME
Kellogg Huber Hansen Todd & Evans, P.L.L.C. 1301 K Street, N.W., Suite 1000 West Washington, D.C. 20005 or as agreed upon by Counsel.	August 19, 1999 by 5:00 p.m. Eastern Daylight

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE/ INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch Attorney for Plaintiffs	August 13, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

16diii002106

PROOF OF SERVICE

	DATE	PLACE
SERVED	Aug. 12, 1999	Beeline Stores, Inc. P.O. Box 1067 Troy, AL 36081

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Dennis Kelly	U.S. Mail
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

DATE STAMP
'99 AUG 17 AM 8:50
AND RETURN

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

Civil Action No. 5:98CV-108-R

NOTICE OF PRODUCTION OF DOCUMENTS BY KENYON OIL COMPANY, INC.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Kenyon Oil Company, Inc. will be required to produce the documents described in the attached subpoena on August 25, 1999 at 5:00 p.m. at Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street N.W. Suite 1000 West, Washington, D.C. 20005 or at a place to be determined among counsel.

Respectfully submitted,

Richard C. Roberts /BHH
Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
502) 443-4516
FAX - (502) 443-4571

Neil M. Gorsuch /BHH
Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 16, 1999

16diii002109

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 16th day of August, 1999, copies of the foregoing Notice of Document Production by Kenyon Oil Company, Inc. and subpoena were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Jeff Walker, General Counsel
Kenyon Oil Company, Inc.
c/o Warren Equities Law
Department
20 Burlington Mall Road,
Suite 230
Burlington, MA 01803

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

Neil M. Gorsuch

AO 88 (11/91) Subpoena in a Civil Case

DATE STAMP

AND RETURN

United States District Court

FOR THE DISTRICT OF RHODE ISLAND

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Kenyon Oil Company, Inc.
Jeff Walker, General Counsel
c/o Warren Equities Law Department
20 Burlington Mall Road, Suite 230
Burlington, MA 01803

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents concerning moist snuff sales, product mix, displays, racks, vending systems, promotions, incentive or alliance programs, or point of sale advertising from 1996 to the present. This includes, without limitation, all moist snuff movement figures and correspondence or e-mails to or from U.S. Tobacco Company personnel.**

PLACE	DATE AND TIME
Kellogg Huber Hansen Todd & Evans, P.L.L.C. 1301 K Street, N.W., Suite 1000 West Washington, D.C. 20005 or as agreed upon by Counsel.	August 25, 1999 by 5:00 p.m. Eastern Daylight

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Neil M. Gorsuch /BSS	August 16, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

16diii002111

PROOF OF SERVICE

	DATE	PLACE
SERVED	Aug. 17, 1999	Warren Equities Law Department 20 Burlington Mall Road, Suite 230 Burlington, MA 01803

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Jeff Walker	Facsimile and Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 AUG 17 A9:50 FILED U.S. DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF PRODUCTION OF DOCUMENTS BY KENYON OIL COMPANY, INC.

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, non-party Kenyon Oil Company, Inc. will be required to produce the documents described in the attached subpoena on August 25, 1999 at 5:00 p.m. at Kellogg, Huber, Hansen, Todd & Evans P.L.L.C. 1301 K Street N.W. Suite 1000 West, Washington, D.C. 20005 or at a place to be determined among counsel.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 16, 1999

16diii002114

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 16th day of August, 1999, copies of the foregoing Notice of Document Production by Kenyon Oil Company, Inc. and subpoena were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Jeff Walker, General Counsel
Kenyon Oil Company, Inc.
c/o Warren Equities Law Department
20 Burlington Mall Road,
Suite 230
Burlington, MA 01803

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

Neil M. Gorsuch

United States District Court

FOR THE DISTRICT OF RHODE ISLAND

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: Kenyon Oil Company, Inc.
Jeff Walker, General Counsel
c/o Warren Equities Law Department
20 Burlington Mall Road, Suite 230
Burlington, MA 01803

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents concerning moist snuff sales, product mix, displays, racks, vending systems, promotions, incentive or alliance programs, or point of sale advertising from 1996 to the present. This includes, without limitation, all moist snuff movement figures and correspondence or e-mails to or from U.S. Tobacco Company personnel.**

PLACE	DATE AND TIME
Kellogg Huber Hansen Todd & Evans, P.L.L.C. 1301 K Street, N.W., Suite 1000 West Washington, D.C. 20005 or as agreed upon by Counsel.	August 25, 1999 by 5:00 p.m. Eastern Daylight

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Neil M. Gorsuch /BSP	August 16, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

COPY

DATE STAMP

AND RETURN

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 AUG 17 A9:50

FILED
U.S. DISTRICT COURT CLERK
WESTN DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY FRANK FEENEY

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Frank Feeney. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Friday, August 13, 1999 at 10:00 a.m, or as agreed upon by counsel. The deposition will be taken at Sciacca, Piccirili, 121 Phenix Avenue, Cranston, RI, 02920.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 16, 1999

16diii002118

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 16th day of August, 1999, copies of the foregoing Cross Notice of Videotaped Deposition of Non-Party Frank Feeney were sent by facsimile transmission to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Jeff Walker, General Counsel
Kenyon Oil Company, Inc.
c/o Warren Equities Law
Department
20 Burlington Mall Road
Suite 230
Burlington, MA 01803

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 AUG 17 A9:50

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY FRANK FEENEY

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Frank Feeney. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Friday, August 13, 1999 at 10:00 a.m, or as agreed upon by counsel. The deposition will be taken at Sciacca, Piccirili, 121 Phenix Avenue, Cranston, RI, 02920.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 16, 1999

16diii002121

United States District Court

FOR THE DISTRICT OF RHODE ISLAND

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Kenyon Oil Company, Inc.
Jeff Walker, General Counsel
c/o Warren Equities Law Department
20 Burlington Mall Road, Suite 230
Burlington, MA 01803

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects): **All documents concerning moist snuff sales, product mix, displays, racks, vending systems, promotions, incentive or alliance programs, or point of sale advertising from 1996 to the present. This includes, without limitation, all moist snuff movement figures and correspondence or e-mails to or from U.S. Tobacco Company personnel.**

PLACE	DATE AND TIME
Kellogg Huber Hansen Todd & Evans, P.L.L.C. 1301 K Street, N.W., Suite 1000 West Washington, D.C. 20005 or as agreed upon by Counsel.	August 25, 1999 by 5:00 p.m. Eastern Daylight

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Neil M. Gorsuch /ISSD	August 16, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	Aug. 17, 1999	Warren Equities Law Department 20 Burlington Mall Road, Suite 230 Burlington, MA 01803

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Jeff Walker	Facsimile and Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

_____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

CROSS-NOTICE TO TAKE VIDEOTAPED DEPOSITION OF WAYNELL RENFRO

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Waynell Renfro on matters relevant to this action at the Clarion Hotel, 211 SE Waldon Boulevard, Bentonville, AR 72712-6765, commencing after plaintiffs' examination at 1:00 p.m. on Wednesday, August 25, 1999. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 16, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 16th day of August, 1999.

Counsel for Defendants

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION FOR ADMISSION PRO HAC VICE

Pursuant to L.R. 83.2, John S. Reed, counsel for Defendants, moves this Court to admit pro hac vice Robert B. Greenbaum, an attorney licensed to practice in the District of Columbia, for purposes of participating as counsel of record for Defendants. The affidavit of Mr. Greenbaum as required by L.R. 83.2(a)(2) and 83.2(a)(4) is attached as Exhibit A.

A proposed Order is attached hereto. A check in the amount of $65 is also tendered with this motion to cover the prescribed fee as required by LR 83.2(a)(3).

John S. Reed
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, KY 40202
(502) 589-1000

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, P.O. Box 995, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 16th day of August, 1999.

Counsel for Defendants

16diii002127

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

On the Motion of John S. Reed, counsel for Defendants, pursuant to L.R. 83.2, for an Order admitting Robert B. Greenbaum, an attorney licensed to practice in the District of Columbia, to appear pro hac vice as counsel for Defendants and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Robert B. Greenbaum is hereby granted permission to appear and participate pro hac vice as counsel for Defendants in this action.

Entered this _____ day of _____, 1999.

_____
JUDGE, UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P.	)	
Plaintiffs,	)	
	)	Civil Action No. 5:98-CV-108-R
v.	)	
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATE TOBACCO MANUFACTURING COMPANY INC., and UST INC.,	)	
Defendants.	)	

AFFIDAVIT OF ROBERT B. GREENBAUM

Affiant, Robert B. Greenbaum, being duly sworn, states as follows:

1. I am an attorney in the District of Columbia.

2. I am licensed to practice in the District of Columbia.

3. I am a member in good standing of the Bar of the District of Columbia.

4. I hereby consent to be subject to the jurisdiction and rules of the Kentucky Supreme Court governing professional conduct.

Robert B. Greenbaum

STATE OF District of Columbia)
)
COUNTY OF Washington)

Subscribed and sworn to before me, a Notary Public, by Robert B. Greenbaum this 10th day of August, 1999.

My commission expires: 10/14/99

Jeffrey B. Pendoyter
Notary Public

16diii002131

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

DATE STAMP
'99 AUG 18 - A10:01
AND RETURN
U.S. DISTRICT COURT
WESTN. DIST. KENTUCKY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY DAVID WALLER

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party David Waller, 1807 Pine Street, Monroe, LA 71202. The deposition will commence at 10:00 a.m. on August 30, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at Kellogg, Huber, Hansen, Todd & Evans P.L.L.C, 1301 K Street N.W., Suite 1000 West, Washington, D.C. 20005-3317.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 17, 1999

16diii002133

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 17th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party David Waller, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE WESTERN DISTRICT OF LOUISIANA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: David Waller
Pelican State Wholesaler
1807 Pine Street
Monroe, LA 71202

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Kellogg, Huber, Hansen, Todd & Evans P.L.L.C 1301 K Street N.W., Suite 1000 West Washington, D.C. 20005-3317	August 30, 1999 at 10:00 a.m. or such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch /BSB Attorney for Plaintiffs	August 17, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 18, 1999	Pelican State Wholesaler 1807 Pine Street Monroe, LA 71202

SERVED ON (PRINT NAME)	MANNER OF SERVICE
David Waller	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 - AUG 18 A10:00 FILED US DISTRICT COURT CLERK WESTN DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY DAVID WALLER

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party David Waller, 1807 Pine Street, Monroe, LA 71202. The deposition will commence at 10:00 a.m. on August 30, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at Kellogg, Huber, Hansen, Todd & Evans P.L.L.C, 1301 K Street N.W., Suite 1000 West, Washington, D.C. 20005-3317.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 17, 1999

16diii002138

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 17th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party David Waller, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE WESTERN DISTRICT OF LOUISIANA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: David Waller
Pelican State Wholesaler
1807 Pine Street
Monroe, LA 71202

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Kellogg, Huber, Hansen, Todd & Evans P.L.L.C 1301 K Street N.W., Suite 1000 West Washington, D.C. 20005-3317	August 30, 1999 at 10:00 a.m. or such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch /BAS Attorney for Plaintiffs	August 17, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 18, 1999	Pelican State Wholesaler 1807 Pine Street Monroe, LA 71202

SERVED ON (PRINT NAME)	MANNER OF SERVICE
David Waller	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____ _____

DATE SIGNATURE OF SERVER

_____

ADDRESS OF SERVER

_____

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

DATE STAMP
'99 AUG 18 A10:01
FILED AND RETURN
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

Civil Action No.
5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY SHAWN ULIZO

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Shawn Ulizo, 2894 Sioux Avenue, Ventura, California 93021. The deposition will commence at 10:00 a.m. on September 2, 1999, or such other date and time as is mutually agreeable, and will continue from day to day until complete. The deposition will be taken at the Pierpont Inn, Santa Rosa Room, 550 Sanjon Road, Ventura, CA 93001.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 17, 1999

16diii002143

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 17th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Shawn Ulizo, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Andrew Paley
Latham & Watkins
633 West Fifth Street
Suite 4000
Los Angles, CA 90071

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

United States District Court

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Shawn Ulizo
c/o Andrew Paley
Latham & Watkins
633 West Fifth Street, Suite 4000
Los Angles, CA 90071

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Pierpont Inn Santa Rosa Room 550 Sanjon Road Ventura, CA 93001	September 2, 1999 at 10:00 a.m. or such other date and time as is mutually agreeable.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE, INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch, ssm Attorney for Plaintiffs	August 17, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 18, 199	Latham & Watkins 633 West Fifth Street, Suite 4000 Los Angles, CA 90071

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Andrew Paley	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

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COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 AUG 18 A10:01 FILED US DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY SHAWN ULIZO

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Shawn Ulizo, 2894 Sioux Avenue, Ventura, California 93021. The deposition will commence at 10:00 a.m. on September 2, 1999, or such other date and time as is mutually agreeable, and will continue from day to day until complete. The deposition will be taken at the Pierpont Inn, Santa Rosa Room, 550 Sanjon Road, Ventura, CA 93001.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts /BAS

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Neil M. Gorsuch /BAS

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 17, 1999

16diii002148

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 17th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party Shawn Ulizo, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Andrew Paley
Latham & Watkins
633 West Fifth Street
Suite 4000
Los Angles, CA 90071

Neil M. Gorsuch

Neil M. Gorsuch

United States District Court

FOR THE CENTRAL DISTRICT OF CALIFORNIA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Shawn Ulizo
c/o Andrew Paley
Latham & Watkins
633 West Fifth Street, Suite 4000
Los Angles, CA 90071

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
Pierpont Inn Santa Rosa Room 550 Sanjon Road Ventura, CA 93001	September 2, 1999 at 10:00 a.m. or such other date and time as is mutually agreeable.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE, INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch/SMF Attorney for Plaintiffs	August 17, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 18, 199	Latham & Watkins 633 West Fifth Street, Suite 4000 Los Angles, CA 90071

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Andrew Paley	Federal Express
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

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COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 AUG 18 A10:00

FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY JOHN NAIFEH

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party John Naifeh, 109 Miler Road, Covington, TN 38019. The deposition will commence at 2:00 p.m. on September 3, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete. The deposition will be taken at 120 East Court Square, Covington, TN 38019.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 17, 1999

16diii002153

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 17th day of August, 1999, copies of the foregoing Notice of Videotaped Deposition of Non-Party John Naifeh, and subpoena, were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Michael Whitaker
P.O. Box 1024
Covington, TN 38019

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

Neil M. Gorsuch

United States District Court

FOR THE WESTERN DISTRICT OF TENNESSEE

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: John Naifeh
c/o Michael Whitaker, Esq.
P.O. Box 1024
Covington, TN 38019

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
120 East Court Square Covington, TN 38019	September 3, 1999 at 2:00 p.m. or such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch, ISAO Attorney for Plaintiffs	August 17, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 18, 1999	P.O. Box 1024 Covington, TN 38019

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Michael Whitaker	U.S. Priority Mail
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

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(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

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(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

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(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

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the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

DATE STAMP
'99 AUG 18 A10:01
FILED AND RETURN
US DISTRICT COURT
WESTN. DIST. KENTUCKY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

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The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 17, 1999

16diii002158

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

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Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Michael Whitaker
P.O. Box 1024
Covington, TN 38019

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

Neil M. Gorsuch

United States District Court

FOR THE WESTERN DISTRICT OF TENNESSEE

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R
In the United States District Court for the Western District of Kentucky at Paducah

TO: John Naifeh
c/o Michael Whitaker, Esq.
P.O. Box 1024
Covington, TN 38019

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. **Deposition to be taken by stenographic and sound-and-visual means.**

PLACE OF DEPOSITION	DATE AND TIME
120 East Court Square Covington, TN 38019	September 3, 1999 at 2:00 p.m. or such other time and date as may be agreed upon by counsel

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Neil M. Gorsuch, ISAO Attorney for Plaintiffs	August 17, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 18, 1999	P.O. Box 1024 Covington, TN 38019

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Michael Whitaker	U.S. Priority Mail
SERVED BY (PRINT NAME)	**TITLE**
Neil M. Gorsuch	Attorney

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of American that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C&D:

(C) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall stake reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(D) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

On the Motion of John S. Reed, counsel for Defendants, pursuant to L.R. 83.2, for an Order admitting Robert B. Greenbaum, an attorney licensed to practice in the District of Columbia, to appear pro hac vice as counsel for Defendants and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that Robert B. Greenbaum is hereby granted permission to appear and participate pro hac vice as counsel for Defendants in this action.

Entered this 18 day of August, 1999.

JUDGE, UNITED STATES DISTRICT COURT

ENTERED

AUG 18 1999

JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii0021620

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 17, 1999

Via Federal Express

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Pursuant to our understanding of the retailer deposition scheduling for September 1-3, 1999, enclosed is a notice of the deposition of Frank Feeney, an employee of Kenyon Oil. The deposition is noticed for 10:00 a.m. Friday, September 3, 1999, in North Grosvenordale, Connecticut. The date was selected by Mr. Feeney. Please let me know immediately if this date is impossible for you.

Sincerely,

John S Reed /kymc

John S. Reed

JSR/kmc
Enclosure
cc: Jeff Walker
Frank Eastman
Neal R. Stoll

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

AMENDED NOTICE TO TAKE VIDEOTAPED DEPOSITION OF FRANK FEENEY

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Frank Feeney at 221 Quinebaug Road, North Grosvenordale, CT 06255. The deposition will commence at 10:00 a.m. on Friday, September 3, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 17, 1999

John S. Reed (by mw)

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 17th day of August, 1999.

John S. Reed (by mw)

Counsel for Defendants

16diii002165

AO 88 (Rev. 11/91) Subpoena in a Civi

United States District Court

DISTRICT OF CONNECTICUT

CONWOOD COMPANY, L.P., et al.

V.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No. 5:98CV-108-R in the United States District Court for the Western District of Kentucky at Paducah

TO: Mr. Frank Feeney
221 Quinebaug Road
P.O. Box 866
North Grosvenordale, CT 06255

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
221 Quinebaug Road, North Grosvenordale, Connecticut 06255	September 3, 1999 at 10:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
John S Reed (by mail) Attorney for Defendants	August 17, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

John S. Reed, Reed Weitkamp Schell & Vice PLLC, 2400 Citizens Plaza, Louisville, KY 40202 (502) 589-1000

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

16diii002166

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 17, 1999	221 Quinebaug Road P.O. Box 866 North Grosvenordale, CT 06255

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Frank Feeney	United States Mail
SERVED BY (PRINT NAME)	**TITLE**
John S. Reed	Attorney for Defendants

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on August 17, 1999
DATE

John S. Reed (by mwf)
SIGNATURE OF SERVER

Reed Weitkamp Schell & Vice PLLC
2400 Citizens Plaza
ADDRESS OF SERVER
Louisville, KY 40202

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

CONWOOD COMPANY, L.P.	:	
et. al.	:	
	:	
	:	**C.A. _____**
v.	:	
	:	
	:	
UNITED STATES TOBACCO	:	
COMPANY, et. al.	:	

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P.	:	
et. al.	:	
	:	
	:	**C.A. 5:98CV-108-R**
v.	:	
	:	
	:	
UNITED STATES TOBACCO	:	
COMPANY, et. al.	:	

OBJECTION OF GOLDEN PANTRY FOOD STORES, INC. TO SUBPOENA

COME NOW, Golden Pantry Food Stores, Inc. (the "Objecting Parties"), and, pursuant to Rule 45, of the Fed. R. Civ. P., serves upon Plaintiffs this their

Objection to the subpoena issued by the Clerk of the Middle District of Georgia on August 12, 1999.

The Objecting Parties object to the subpoena on the following grounds:

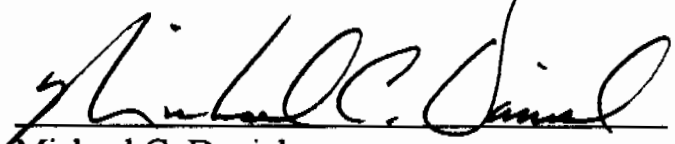
1. The subpoena was not served in accordance with Rule 45 of the Fed. R. Civ. P;

2. The subpoena calls for the production of documents at a location which is in excess of 100 miles from the location of the objecting party;

3. The subpoena is unduly burdensome in that it calls for the production of documents which cannot be gathered reviewed and collated, if they exist, within the time for response. Further, if the documents exist the objecting party will incur significant expense in preparing the documents for production.

This 16th day of August, 1999.

FORTSON, BENTLEY AND GRIFFIN, P.A.

By: 

Michael C. Daniel
State Bar No. 204237
Attorney for Golden Pantry Food Stores, Inc.

P.O. Box 1744
Athens, Georgia 30603-1744
(706) 548-1151

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

CONWOOD COMPANY, L.P. et. al.	:	
	:	**C.A.** _____
v.	:	
UNITED STATES TOBACCO COMPANY, et. al.	:	

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. et. al.	:	
	:	**C.A. 5:98CV-108-R**
v.	:	
UNITED STATES TOBACCO COMPANY, et. al.	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing OBJECTION OF GOLDEN PANTRY FOOD STORES, INC. TO SUBPOENA upon the parties to this matter by causing a copy thereof to be forwarded *via*

facsimile and an additional copy to be deposited in the U. S. Mail, proper postage prepaid, addressed to counsel of record as follows:

Mr. Mark C. Hansen
Mr. Steven F. Benz
Mr. Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005
Fax: (202) 326-7999

Mr. Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
Fax: (502) 443-4571

This 17th day August, 1999.

Respectfully Submitted,

FORTSON, BENTLEY & GRIFFIN, P.A.

By: _____
Michael C. Daniel
Georgia State Bar No. 204237
Attorney for Golden Pantry Food Stores, Inc.

P.O. Box 1744
Athens, GA 30603-1744
(706) 548-1151
{70555_1}

FORTSON, BENTLEY AND GRIFFIN, P.A.

UPSHAW C. BENTLEY, JR.
JOHN E. GRIFFIN
J. EDWARD ALLEN (GA & TN)
ROBERT N. ELKINS (GA & FL)
ELBERT N. WHITMIRE, III, C. P. A.
G. MARCUS HODGE (GA & SC)
MICHAEL C. DANIEL
DAVID K. LINDER
ROY E. MANOLL, III
PAMELA H. DILLARD
JODY JENKINS CORRY
J. BRANSON PARKER
WALTER W. HAYS, JR.
AUGUSTUS T. CURTIS

ATTORNEYS AT LAW
P. O. BOX 1744
440 COLLEGE AVENUE NORTH, SUITE 220
ATHENS, GEORGIA 30603-1744
(706) 548-1151
LITIGATION TELECOPIER (706) 548-8113
REAL ESTATE TELECOPIER (706) 548-8267
CORPORATE/TAX TELECOPIER (706) 548-4151

OF COUNSEL
RICHARD L. FORD

RETIRED
EDWIN B. FORTSON
W. H. KIMBROUGH, JR.

HERBERT T. HUTTO
(1933-1998)

IN ASSOCIATION WITH
BENTON AND PRESTON P.C.
110-112 COURT SQUARE
MONROE, GA 30655
(770) 267-2503
TELECOPIER (770) 267-3596

August 17, 1999

SERVICE COPY

Ms. Joan Moore, Deputy Clerk
Room 127, Federal Building
501 Broadway Street
Paducah, KY 42001

Re: Conwood Company, L.P., et al. V. United States Tobacco Company, et al.
United States District Court for the Western District of Kentucky at Paducah
Civil Action No. 5:98:CV-108-R

Dear Ms. Moore:

Enclosed for filing, please find the Objection of Golden Pantry Food Stores, Inc. To Subpoena in the above referenced matter. Additionally, please place your "Filed" stamped information on the enclosed extra copy and return it to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance in this matter and should you have any questions, do not hesitate to give me a call.

Yours very truly,

FORTSON, BENTLEY AND GRIFFIN, P.A.

Michael C. Daniel

MCD/tkw
Enclosure
cc: Neil M. Gorsuch
Steven F. Benz
Richard C. Roberts

{70613_1}

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

AMENDED NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY ROBERT JANSING

PLEASE TAKE NOTICE that, pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Robert Jansing at the Ramada Inn, 6800 S. I-35 Service Road, Oklahoma City, OK 73149. The deposition will commence at 2:00 p.m. on August 23, 1999, or at such other time and date as may be agreed upon by counsel, and will continue from day to day until complete.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 19, 1999

16diii002174

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	

CERTIFICATE OF SERVICE

I certify that on this 19th day of August, 1999, copies of the foregoing Amended Notice of Videotaped Deposition of Non-Party Robert Jansing were sent by facsimile and overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL.	**PLAINTIFFS**
v.	**NO. 5:98CV-108-R**
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.	**DEFENDANT**

ORDER

This matter came before the Magistrate Judge on August 23, 1999 for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Ben Powell and David Simpson, counsel.

FOR THE DEFENDANT: Neal Stoll, Martha Weiss, Chris Athanasia and Rachel Mariner, counsel.

Also participating in the teleconference was Hon. Thomas B. Russell, U.S. District Judge.

Defendant alleged that plaintiff had not properly identified documents in at least one deposition but stated that court action is not needed at this time.

Plaintiff reported that in depositions of defendant's employees, defendant has improperly instructed the deponent not to read documents into the record. Defendant responded that it has only does this when the deponent was not the author or recipient of the document in question but has offered to have someone else, such as one of defendant's counsel, read the document into the record instead of the deponent.

received
8/30/99 AT 10am

IT IS HEREBY ORDERED that the circumstances under which counsel may instruct a client not to answer a question in a deposition are generally limited to invocations of a privilege. Counsel shall make their objections on the record in the deposition and the court will address the objections at the appropriate time. If this issue arises again in depositions of defendant's employees, defense counsel shall make its objection in some form other than instructing the deponent not to answer the question.

IT IS FURTHER ORDERED that the next teleconference is scheduled for **Tuesday, September 7, 1999 at 2:00 a.m., EDT.** At that time, the parties shall report when they believe a settlement conference might be productive. Defendant shall initiate the teleconference.

Date: August 25, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
AUG 25 1999
JEFFREY A. APPERSON, CLERK
DEPUTY CLERK

16diii002177

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

NOTICE TO TAKE VIDEOTAPED DEPOSITION OF LUNDY EDWARDS

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Lundy Edwards at a location near his residence in Standish, Michigan, to be provided at a later time. The deposition will commence at 2:00 p.m. on Thursday, September 2, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 20, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 20th day of August, 1999.

Counsel for Defendants

16diii002179

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 20, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is a Notice to Take Videotaped Deposition of Lundy Edwards, of Forward Oil Co. The deposition is noticed for 2:00 p.m. Thursday, September 2, 1999. We will provide notice regarding where deposition will be taken as soon as we have a location. The date was selected by Mr. Edwards. Please let me know immediately if this date is impossible for you.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Neal R. Stoll

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

MOTION FOR ADMISSION PRO HAC VICE

Pursuant to Local Rule 83.2, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., respectfully move the admission pro hac vice of Michael J. Guzman, to practice before this Court as their counsel in this action.

Mr. Guzman is an associate, of the firm Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005. He undertakes to abide by the rules of this Court and submits to the jurisdiction of this Court. He tenders the admission fee herewith. As disclosed by the attached affidavit (see Exhibit A), he is a member of good standing of the courts listed below:

> Michael J. Guzman: District of Columbia Bar, United States District Court for the District of Columbia, United States Court of Appeals for the District of Columbia and United States Court for the Fifth Circuit.

Richard C. Roberts joins this motion.

A proposed order is attached.

Respectfully submitted,

Richard C. Roberts
WHITLOW, ROBERTS, HOUSTON
& STRAUB
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
FAX - (502) 443-4571

Michael J. Guzman

Dated: ~~August~~ Sept 1, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

AFFIDAVIT OF MICHAEL J. GUZMAN

I, Michael J. Guzman, swear as follows:

1. I am an associate in the law firm of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.

2. I am a member in good standing of the following courts: the District of Columbia Bar.

3. I am an attorney duly admitted to practice law in the District of Columbia.

4. I hereby consent to be subject to the jurisdiction and rules of the Kentucky Supreme Court governing professional conduct.

Michael J. Guzman

Sworn to and subscribed
before me this 27th day
of August, 1999.

NOTARY PUBLIC

My Commission expires: January 31, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of the Motion for Admission Pro Hac Vice ("Motion") of plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., and for good cause shown, the Motion should be, and hereby is, GRANTED. Accordingly, pursuant to Local Rule 83.2, Messr. Guzman is admitted pro hac vice to practice before the Court in this matter.

SO ORDERED.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on this 1st day of ~~August~~ September, 1999, copies of the foregoing Motion For Admission Pro Hac Vice were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher
& Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

RCRb

Richard C. Roberts

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 SEP -1 A9:43
FILED
US DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

CROSS-NOTICE OF VIDEOTAPED DEPOSITION OF NON-PARTY LUNDY EDWARDS

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P., will take the deposition of non-party Lundy Edwards. Pursuant to this notice, plaintiffs will inquire about matters relevant to this action after defendants' examination on Thursday, September 2, 1999 at 2:00 p.m, or as agreed upon by counsel. The deposition will be taken at General Reporting, 2084 Hemmeter, Saginaw, Michigan 48603.

The deposition will be taken before an officer authorized to administer oaths and will be recorded by videotape and stenographic means.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Steven F. Benz
Neil M. Gorsuch
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: August 31, 1999

16diii002188

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	

CERTIFICATE OF SERVICE

I certify that on this 31st day of August, 1999, copies of the foregoing Cross Notice of Videotaped Deposition of Non-Party Lundy Edwards were sent by overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox &
Vice
2400 Citizens Plaza
Louisville, KY 40202

Neil M. Gorsuch

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK

STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

August 31, 1999

Via Federal Express

Jeffery A. Apperson
Clerk of the Court
322 Federal Building
501 Broadway
Paducah, KY 40202

Re: Conwood Company, L.P., et al. V. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of the Cross-Notice of Videotaped Deposition of Non-Party Lundy Edwards.

I have also enclosed an additional copy. Please date stamp and return this copy in the attached self-addressed, postage pre-paid envelope.

Thank you for your attention to this matter.

Respectfully,

Neil M. Gorsuch

Enclosures

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

August 31, 1999

Via Facsimile Transmission

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
Suite 1000 West
1301 K Street, N.W.
Washington, DC 20005-3317

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway Street
Paducah, KY 42002-0995

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed is an Amended Notice to Take Videotaped Deposition of Lundy Edwards of Forward Corporation. The deposition is still noticed for 2:00 p.m. Thursday, September 2, 1999. It will be taken at the offices of General Reporting in Saginaw, Michigan, much more convenient to the nearest airport than is Standish.

Sincerely,

John S. Reed

JSR/kmc
Enclosure
cc: Neal R. Stoll
Matthew S. Barnett

AO 88 (Rev. 11/91) Subpoena in a Civi

United States District Court

EASTERN DISTRICT OF MICHIGAN, NORTHERN DIVISION

CONWOOD COMPANY, L.P., et al.

V.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No. 5:98CV-108-R in the United States District Court for the Western District of Kentucky at Paducah

TO:

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
General Reporting, 2084 Hemmeter, Saginaw, Michigan 48603	September 2, 1999 at 2:00 p.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
Attorney for Defendants	August 31, 1999

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

John S. Reed, Reed Weitkamp Schell & Vice PLLC, 2400 Citizens Plaza, Louisville, KY 40202 (502) 589-1000

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

PROOF OF SERVICE

	DATE	PLACE
SERVED	August 31, 1999	Forward Corporation 219 North Front Street Standish, Michigan 48658

SERVED ON (PRINT NAME)	MANNER OF SERVICE
Lundy Edwards	Via Federal Express (by agreement)
SERVED BY (PRINT NAME)	**TITLE**
John S. Reed	Counsel for Defendants

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on August 31, 1999
DATE

SIGNATURE OF SERVER

Reed Weitkamp Schell & Vice PLLC
2400 Citizens Plaza
ADDRESS OF SERVER

Louisville, KY 40202

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

AMENDED NOTICE TO TAKE VIDEOTAPED DEPOSITION OF LUNDY EDWARDS

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of Lundy Edwards at the offices of General Reporting, 2084 Hemmeter, Saginaw, Michigan 48603. The deposition will commence at 2:00 p.m. on Thursday, September 2, 1999, or such other date and time as is mutually agreed. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: August 31, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 31st day of August, 1999.

Counsel for Defendants

16diii002195

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

CROSS-NOTICE TO TAKE VIDEOTAPED DEPOSITION OF JOHN NAIFEH

Pursuant to Rules 30 and 45 of the Federal Rules of Civil Procedure, Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. (collectively, "USTC"), through counsel, hereby give notice that they will take the deposition of John Naifeh on matters relevant to this action at 109 Miler Road, Covington, TN 38019, commencing after plaintiffs' examination at 2:00 p.m. on Friday, September 3, 1999. The deposition shall be upon oral examination and shall be recorded stenographically and on videotape.

The deposition shall continue from day to day until completed and may be used for any purpose allowable under the Federal Rules of Civil Procedure.

Respectfully submitted,

Dated: September 2, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 2nd day of September, 1999.

Counsel for Defendants

16diii002197

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.

PLAINTIFFS

vs.

NO. 5:98CV-108-R

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.

DEFENDANTS

ORDER

The court held a telephonic conference on September 7, 1999, with counsel concerning the timing of a settlement conference. The undersigned magistrate judge has now had an opportunity to review the matter with United States District Judge Thomas B. Russell. On the court's own motion,

IT IS HEREBY ORDERED that the court will conduct a detailed and full settlement conference, with principals, at a date during the first two weeks of December, 1999. Prior to that settlement conference with the principals, the magistrate judge will hold an additional, separate session with trial counsel to plan for the settlement conference.

IT IS FURTHER ORDERED that the undersigned will hold a teleconference at 10:30 a.m., September 9, 1999, for the purpose of establishing definitive dates for the settlement conference with principals as well as for the preparatory session with counsel.

Date: September 7, 1999

JAMES D. MOYER
UNITED STATES DISTRICT COURT

Copies to:
Counsel of Record (Via Facsimile)

ENTERED
SEP 7 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P. **PLAINTIFFS**

vs. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC. **DEFENDANTS**

ORDER

The court held a telephonic conference on September 7, 1999, with counsel concerning the timing of a settlement conference. The undersigned magistrate judge has now had an opportunity to review the matter with United States District Judge Thomas B. Russell. On the court's own motion,

IT IS HEREBY ORDERED that the court will conduct a detailed and full settlement conference, with principals, at a date during the first two weeks of December, 1999. Prior to that settlement conference with the principals, the magistrate judge will hold an additional, separate session with trial counsel to plan for the settlement conference.

IT IS FURTHER ORDERED that the undersigned will hold a teleconference at 10:30 a.m., September 9, 1999, for the purpose of establishing definitive dates for the settlement conference with principals as well as for the preparatory session with counsel.

Date: September 7, 1999

JAMES D. MOYER
UNITED STATES DISTRICT COURT

ENTERED
SEP 7 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

Copies to:
Counsel of Record (Via Facsimile)

181

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL.	**PLAINTIFFS**
v.	**NO. 5:98CV-108-R**
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.	**DEFENDANT**

ORDER

This matter came before the Magistrate Judge on September 7, 1999 for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Mark Hanson, Neil Gorsuch, Ben Powell, Eddie Foster, Dick Roberts, and David Simpson, Hank Handelsman, counsel, and Bill Rosson, Chairman of Conwood.

FOR THE DEFENDANT: Neal Stoll, Martha Weiss, Chris Athanasia, Rachel Mariner, and John Reed, counsel.

The timing of a settlement conference was discussed with the parties.

IT IS HEREBY ORDERED that the next teleconference is scheduled for **Thursday, September 23, 1999 at 2:00 a.m., EDT.** Plaintiff shall initiate the teleconference.

Date: September 7, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
SEP 8 1999
JEFFREY A. APPERSON, CLERK
DEPUTY CLERK

16diii002200

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on September 10, 1999for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Mark Hanson, Neil Gorsuch, Ben Powell, Eddie Foster, and David Simpson, counsel.

FOR THE DEFENDANT: Neal Stoll, Martha Weiss, Chris Athanasia, John Keyte, and John Reed, counsel.

The timing of a settlement conference was discussed with the parties and the following orders orally announced.

IT IS HEREBY ORDERED that a settlement conference in this matter is scheduled for Thursday, November 18, 1999 and that counsel shall appear for an in-court hearing on Tuesday, November 2, 1999, at 11:00 EDT, to discuss the agenda and procedures for the settlement conference.

IT IS FURTHER ORDERED that dispositive motions filed on the deadline of November 15, 1999 shall be responded to no later than December 10, 1999 and replies shall be filed no later than December 24, 1999.

Date: September 20, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to Counsel of Record

ENTERED
SEP 20 1999
JEFFREY A. APPERSON, CLERK

16diii002201

03

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 SEP 22 A9:38 FILED US DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' INITIAL DISCLOSURE OF "FIELD PERSONNEL" TRIAL WITNESSES

Plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood") respectfully disclose herewith the "field personnel" Conwood currently expects to call as witnesses in plaintiffs' case-in-chief. See Order of May 11, 1999.

Conwood Field Personnel

Raymond Cortinas, Jr.
Todd Dolan
Jeff Dring
Jim Elliott
John Falevsky
Glynn Francis
Wayne Harris
Brett Jeffery
Eric Larson
Lou Marano
Kevin Miller
Paul Naseth
Scott Roux
Gary Ryan
Jerry Senger
Mia Taylor
Guy Willding

This disclosure is limited to field personnel (district personnel and sales representatives) whose depositions have not already been taken by defendants. All field personnel whose depositions have been taken may also be called as witnesses in Conwood's case-in-chief. Plaintiffs reserve the right to modify

or supplement this list, and to call additional field personnel in rebuttal.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts /BAP

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
FAX - (502) 443-4571

Neil M. Gorsuch /BAP

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

September 21, 1999

16diii002203

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 SEP 22 A9:38 FILED US DISTRICT COURT CLERK WEST'N. DIST. KENTUCKY Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' INITIAL DISCLOSURE OF "FIELD PERSONNEL" TRIAL WITNESSES

Plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood") respectfully disclose herewith the "field personnel" Conwood currently expects to call as witnesses in plaintiffs' case-in-chief. See Order of May 11, 1999.

Conwood Field Personnel

Raymond Cortinas, Jr.
Todd Dolan
Jeff Dring
Jim Elliott
John Falevsky
Glynn Francis
Wayne Harris
Brett Jeffery
Eric Larson
Lou Marano
Kevin Miller
Paul Naseth
Scott Roux
Gary Ryan
Jerry Senger
Mia Taylor
Guy Willding

This disclosure is limited to field personnel (district personnel and sales representatives) whose depositions have not already been taken by defendants. All field personnel whose depositions have been taken may also be called as witnesses in Conwood's case-in-chief. Plaintiffs reserve the right to modify

or supplement this list, and to call additional field personnel in rebuttal.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

September 21, 1999

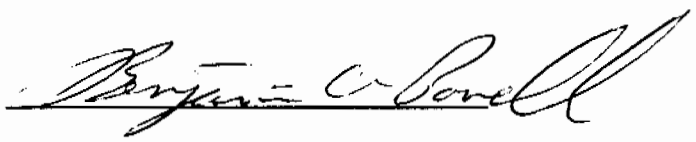
16diii002205

CERTIFICATE OF SERVICE

I certify that on this 21st day of September, 1999, a copy of the foregoing was sent by facsimile, and overnight mail, to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on September 23, 1999 for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Mark Hanson, Neil Gorsuch, Ben Powell, and David Simpson, counsel.

FOR THE DEFENDANT: Neal Stoll, Chris Athanasia, and John Reed, counsel.

Neither party raised any issues for discussion.

IT IS HEREBY ORDERED that the next teleconference is scheduled for **Wednesday, October 13, 1999 at 2:00 p.m., EDT.** Defendant shall initiate the teleconference.

Date: September 22, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

ENTERED
SEP 23 1999
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

Copies to:
Counsel of Record

16diii002207

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

NOTICE OF DISCLOSURE AND FILING OF EXPERT TESTIMONY UNDER SEAL

Defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. give notice that they have made the disclosures required of them under Fed. R. Civ. P. 26(a)(20(A) and (B). The expert reports of Winston Weber and David T. Scheffman filed simultaneously with this notice have previously been served upon Plaintiffs. As explained in the reports, it is anticipated that the reports will be supplemented at a time consistent with the requirements of Rule 26(e)(1) to cover matters that may hereafter be revealed in the course of further examination of relevant materials and further proceedings in this case.

Defendants have designated the reports of Winston Weber and David T. Scheffman as CONFIDENTIAL under the Court's Protective Order except for paragraphs 50, 55 and 115 of the report of David T. Scheffman, together with all attachments referenced therein, which have been designated as HIGHLY CONFIDENTIAL under the Court's Protective Order. Accordingly, the

reports of Messrs. Weber and Scheffman are filed under seal pursuant to paragraph 13 of the Protective Order.

Respectfully submitted,

Dated: September 21, 1999

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 21st day of September, 1999.

Counsel for Defendants

16diii002209

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	3902
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SUBADDRESS	
CONNECTION ID	
ST. TIME	09/22 09:53
USAGE T	01'05
PGS.	3
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO:	DAVID SIMPSON, ESQ. EDDIE FOSTER, ESQ. TRIPP WILSON, ESQ.
FAX NO.:	901-682-1223
CLIENT NO.	97718
FROM:	NEIL M. GORSUCH
PHONE:	(202) 326-7978
DATE:	September 22, 1999
RE:	

TOTAL NUMBER OF PAGES: 3 (INCLUDING THIS SHEET)

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	3903
CONNECTION TEL	97897718190153710 10#
SUBADDRESS	
CONNECTION ID	
ST. TIME	09/22 09:51
USAGE T	01'00
PGS.	3
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
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Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Edward J. Foster, Esq.
Tripp Wilson, Esq.
Bob Craddock, Esq.

FAX NO.: **(901) 537-1010**

CLIENT NO.: **97718**

PHONE: (901) 537-1033

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: September 22, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 3 **(INCLUDING THIS SHEET)**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P.	:	
Plaintiffs,	:	
	:	Civil Action No. 5:98 CV-108-R
-against-	:	
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,	:	
Defendants.	:	

DEFENDANTS' RESPONSE TO
PLAINTIFFS' SUPPLEMENTAL INTERROGATORY

Pursuant to Fed. R. Civ. P. 33, Defendants respond to Plaintiffs' Supplemental Interrogatory as follows:

RESPONSE TO INTERROGATORY

Interrogatory No. 1. Identify the author(s), recipient(s) (including any and all "CC" recipients), and date of the following documents. Also identify the author(s) of any handwritten notations on these documents.

Bates Range: USTC/CWD

A. 170215 - 170276

B. 054339 - 054382

C. 083611 - 083702

D. 069685 - 069707

E. 349015 - 349027

F. 302505 - 302508

G. 149372

H. 150004 - 150006

I. 321001 - 321003

J. 055094 - 055115

Response to Interrogatory No. 1: To the extent additional information is available upon reasonable inquiry, Defendants identify the author(s), recipient(s) and date(s) of the documents listed above as follows:

A. The author of the document is Al Dejewski. Ed Coban was a recipient of the document. No additional information is available beyond that provided in the document itself.

B. Harvey Jaffer and Gary Smith were recipients of the document. No additional information is available beyond that provided in the document itself.

C. Harvey Jaffer, Robert Rothenberg, Gary Smith, Alton Adams, Robert Fitzmaurice and Robert Lawrence were recipients of the document. No additional information is available beyond that provided in the document itself.

16diii002213

D. The author of the document is Harvey Jaffer. Gary Smith was a recipient of the document. No additional information is available beyond that provided in the document itself.

E. No information is available beyond that provided in the document itself.

F. The author of the document is Andy Hoefer. Terry Keuster, Jim Jones, Barbara Kinchen and Kevin Freudenthal were recipients of the document. No additional information is available beyond that provided in the document itself.

G. The author of the document is Dave Untiedt. Tim Entwistle and Gary Smith were recipients of the document. No additional information is available beyond that provided in the document itself.

H. The author of the document is Dave Untiedt. Tim Entwistle and Gary Smith were recipients of the document. No additional information is available beyond that provided in the document itself.

I. No information is available beyond that provided in the document itself.

J. Harvey Jaffer was a recipient of the document. No additional information is available beyond that provided in the document itself.

Dated: September 22, 1999

Neal Stoll /JB

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

John S. Reed
Ridley M. Sandidge
REED WEITKAMP SCHELL
& VICE P.L.L.C.
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Attorneys for Defendants

I have read the foregoing Defendants' Response to Plaintiffs' Supplemental Interrogatory and know the contents thereof. Pursuant to Fed. R. Civ. P. 33(b), I certify that the answers given are true to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 22, 1999

Debra Baker

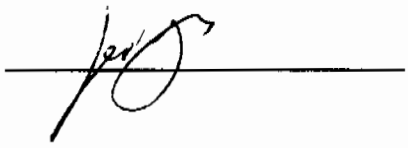
16diii002216

CERTIFICATE OF SERVICE

I certify that on this 22nd day of September, 1999, a copy of the foregoing was sent by overnight delivery service to:

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen, Todd & Evans, PLLC
1301 K Street, NW
Washington, D.C. 20005 - 3317

Richard C. Roberts
Whitlow Roberts Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995



COMMAND #226

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KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
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Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Hank Handelsman

FAX NO.: (312) 920-2470 **CLIENT NO.:** 97718

PHONE: (312) 750-8400

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
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MESSAGE:

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*** TX REPORT ***
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CONNECTION ID	
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RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
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Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Edward J. Foster, Esq.
Tripp Wilson, Esq.
Bob Craddock, Esq.

FAX NO.: **(901) 537-1010**

CLIENT NO.: **97718**

PHONE: (901) 537-1033

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: September 22, 1999
MESSAGE:

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*** TX REPORT ***
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TRANSMISSION OK

TX/RX NO	3920
CONNECTION TEL	79769771819016821223
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CONNECTION ID	
ST. TIME	09/22 15:50
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PGS.	7
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
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Michael K. Kellogg
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Sean A. Lev
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FACSIMILE TRANSMISSION

TO:	DAVID SIMPSON, ESQ. EDDIE FOSTER, ESQ. TRIPP WILSON, ESQ.
FAX NO.:	901-682-1223
CLIENT NO.	97718
FROM:	NEIL M. GORSUCH
PHONE:	(202) 326-7978
DATE:	September 22, 1999
RE:	

TOTAL NUMBER OF PAGES: 7 (INCLUDING THIS SHEET)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL.	**PLAINTIFFS**
v.	**NO. 5:98CV-108-R**
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.	**DEFENDANT**

ORDER

This matter came before the Magistrate Judge on October 13, 1999 for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Mark Hanson, Ben Powell, and David Simpson, counsel.

FOR THE DEFENDANT: Neal Stoll, Chris Athanasia, James Keyte, Martha Weiss, and John Reed, counsel.

Plaintiff Conwood raised one issue at the teleconference which will be dealt with by separate order. Defendant UST raised two issues at the teleconference and rulings were orally announced.

On September 29, 1999, UST requested certain information about plaintiff's experts that UST contends it needs in order to be fully prepared to depose those experts. Plaintiff responded that the information could be sent to defendant by October 15, 1999, at the latest.

In its second issue, defendant sought clarification that 45 declarations from non-party retailers, produced by plaintiff after the deadline for identifying trial witnesses, will not be offered in plaintiff's case-in-chief.

The following rulings were orally announced at the teleconference.

IT IS HEREBY ORDERED that:

1) Plaintiff shall produce the requested information regarding its experts no later than Friday, October 15, 1999. If the information can be produced earlier, plaintiff is encouraged to do so.

2) Plaintiff clearly stated that it would not be offering the declarations from the 45 non-party retailers in its case-in-chief but would reserve them for its rebuttal case, if necessary.

3) The next teleconference is scheduled for **Wednesday, October 27, 1999 at 2:00 p.m., EDT**. Plaintiff shall initiate the teleconference.

Date: OCTOBER 13, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
OCT 14 1999
JEFFREY A. APPERSON, CLERK
BY
DEPUTY CLERK

16diii002222

****
*** TX REPORT ***
****

FAXED 10-18-99

TRANSMISSION OK

TX/RX NO	4697
CONNECTION TEL	79789771819016821223
SUBADDRESS	
CONNECTION ID	
ST. TIME	10/18 11:27
USAGE T	01'06
PGS.	3
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
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FACSIMILE TRANSMISSION

TO:	DAVID SIMPSON, ESQ. EDDIE FOSTER, ESQ. TRIPP WILSON, ESQ.
FAX NO.:	901-682-1223
CLIENT NO.	97718
FROM:	NEIL M. GORSUCH
PHONE:	(202) 326-7978
DATE:	October 18, 1999
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TX/RX NO	4696
CONNECTION TEL	797897718190153710l0
SUBADDRESS	
CONNECTION ID	
ST. TIME	10/18 11:25
USAGE T	00'55
PGS.	3
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
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Michael K. Kellogg
Peter W. Huber
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Geoffrey M. Klineberg
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Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO:	Edward J. Foster, Esq. Tripp Wilson, Esq. Bob Craddock, Esq.
FAX NO.:	**(901) 537-1010**
CLIENT NO.:	**97718**
PHONE:	(901) 537-1033
FROM:	Neil M. Gorsuch
PHONE:	(202) 326-7978
DATE:	October 18, 1999
MESSAGE:	

TOTAL NUMBER OF PAGES: 3 (INCLUDING THIS SHEET)

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*** TX REPORT ***
****

FAXED 10-18-99

TRANSMISSION OK

TX/RX NO	4694
CONNECTION TEL	79789771813129202470
SUBADDRESS	
CONNECTION ID	
ST. TIME	10/18 11:19
USAGE T	00'57
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RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
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Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Hank Handelsman

FAX NO.: (312) 920-2470 **CLIENT NO.:** 97718

PHONE: (312) 750-8400

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: October 18, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 3 **(INCLUDING THIS SHEET)**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL.	**PLAINTIFFS**
v.	**NO. 5:98CV-108-R**
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.	**DEFENDANT**

ORDER

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Date: OCTOBER 13, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
OCT 14 1999
JEFFREY A. APPERSON, CLERK
DEPUTY CLERK

16diii002227

****
*** TX REPORT ***
****

FAXED 10-18-99

TRANSMISSION OK

TX/RX NO	4697
CONNECTION TEL	79789771819016821223
SUBADDRESS	
CONNECTION ID	
ST. TIME	10/18 11:27
USAGE T	01'06
PGS.	3
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
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Washington, D.C. 20005-3317

Michael K. Kellogg
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RE:	

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*** TX REPORT ***
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TX/RX NO	4696
CONNECTION TEL	797897718190153710l0
SUBADDRESS	
CONNECTION ID	
ST. TIME	10/18 11:25
USAGE T	00'55
PGS.	3
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
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TX/RX NO	4694
CONNECTION TEL	79789771813129202470
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CONNECTION ID	
ST. TIME	10/18 11:19
USAGE T	00'57
PGS.	3
RESULT	OK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
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Geoffrey M. Klineberg
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Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Hank Handelsman

FAX NO.: (312) 920-2470 **CLIENT NO.:** 97718

PHONE: (312) 750-8400

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: October 18, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 3 **(INCLUDING THIS SHEET)**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL.	**PLAINTIFFS**
v.	**NO. 5:98CV-108-R**
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.	**DEFENDANT**

ORDER

This matter came before the Magistrate Judge on October 13, 1999 for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Mark Hanson, Ben Powell, and David Simpson, counsel.

FOR THE DEFENDANT: Neal Stoll, Chris Athanasia, James Keyte, Martha Weiss, and John Reed, counsel.

Plaintiff Conwood raised one issue at the teleconference which will be dealt with by separate order. Defendant UST raised two issues at the teleconference and rulings were orally announced.

On September 29, 1999, UST requested certain information about plaintiff's experts that UST contends it needs in order to be fully prepared to depose those experts. Plaintiff responded that the information could be sent to defendant by October 15, 1999, at the latest.

In its second issue, defendant sought clarification that 45 declarations from non-party retailers, produced by plaintiff after the deadline for identifying trial witnesses, will not be offered in plaintiff's case-in-chief.

The following rulings were orally announced at the teleconference.

IT IS HEREBY ORDERED that:

1) Plaintiff shall produce the requested information regarding its experts no later than Friday, October 15, 1999. If the information can be produced earlier, plaintiff is encouraged to do so.

2) Plaintiff clearly stated that it would not be offering the declarations from the 45 non-party retailers in its case-in-chief but would reserve them for its rebuttal case, if necessary.

3) The next teleconference is scheduled for **Wednesday, October 27, 1999 at 2:00 p.m., EDT**. Plaintiff shall initiate the teleconference.

Date: OCTOBER 13, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
OCT 14 1999
JEFFREY A. APPERSON, CLERK
DEPUTY CLERK

16diii002232

****
*** TX REPORT ***
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FAXED 10-18-99

TRANSMISSION OK

TX/RX NO	4697
CONNECTION TEL	79789771819016821223
SUBADDRESS	
CONNECTION ID	
ST. TIME	10/18 11:27
USAGE T	01'06
PGS.	3
RESULT	OK

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TO:	DAVID SIMPSON, ESQ. EDDIE FOSTER, ESQ. TRIPP WILSON, ESQ.
FAX NO.:	901-682-1223
CLIENT NO.	97718
FROM:	NEIL M. GORSUCH
PHONE:	(202) 326-7978
DATE:	October 18, 1999
RE:	

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*** TX REPORT ***
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TRANSMISSION OK

TX/RX NO	4696
CONNECTION TEL	797897718190153710 10
SUBADDRESS	
CONNECTION ID	
ST. TIME	10/18 11:25
USAGE T	00'55
PGS.	3
RESULT	OK

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FACSIMILE TRANSMISSION

TO: Edward J. Foster, Esq.
Tripp Wilson, Esq.
Bob Craddock, Esq.

FAX NO.: **(901) 537-1010**

CLIENT NO.: **97718**

PHONE: (901) 537-1033

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: October 18, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 3 (INCLUDING THIS SHEET)

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*** TX REPORT ***
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SUBADDRESS	
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ST. TIME	10/18 11:19
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PGS.	3
RESULT	OK

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TO: Hank Handelsman

FAX NO.: (312) 920-2470 **CLIENT NO.:** 97718

PHONE: (312) 750-8400

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: October 18, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 3 **(INCLUDING THIS SHEET)**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on October 27, 1999 for a telephonic status conference.

PARTICIPANTS:
FOR THE PLAINTIFF: Dick Roberts, Eddie Foster, Mark Hanson, and Ben Powell, counsel.

FOR THE DEFENDANT: Neal Stoll, Martha Weiss, John Reed, and James Keyte, counsel.

Defendant UST raised two issues for discussion.

I.

Plaintiff recently produced a written declaration of Harold Price, Senior Vice President of Sales & Marketing, Swedish Match North America, dated October 12, 1999. In the declaration, Mr. Price alleges that defendant UST has engaged in the same sort of anti-competitive activities against Swedish Match as it is alleged to have committed against plaintiff. Plaintiff has indicated that it intends to call Mr. Price to testify at trial in conformity with his written declaration.

Defendant argues that Mr. Price is a "field witness" and should have been disclosed as such prior to the September 21, 1999 deadline for disclosure of "field witnesses." In response, plaintiff makes two arguments. First, that defendants did not know precisely what Mr. Price's testimony would be until October 13, 1999 and, second, that Mr. Price is not a "field witness" as that

term is defined in the court's order of May 11, 1999. (Docket No. 100).

Upon consideration,

IT IS HEREBY ORDERED that the issue is taken under advisement.

II.

Defendant contends that it is entitled to all materials relied upon by plaintiff's experts in arriving at their expert opinions, including communications with plaintiff's counsel. Defendant alleges that not all such communications between plaintiff's counsel and plaintiff's experts have been produced.

IT IS HEREBY ORDERED that, upon agreement of the parties, defendant shall file a brief, no more than five pages long, on the issue no later than Thursday, October 28, 1999. Plaintiff shall file its response no later than Monday, November 1, 1999.

IT IS FURTHER ORDERED that the issue will be included on the agenda of the November 2, 1999 meeting with counsel. The date and time of the next teleconference will be set at the November 2, 1999 meeting.

Date: 10/28/99

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

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Counsel of Record

16diii002237

COMMAND #223

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	11/01	12:28	3129202470	EC--S	00'49"	003	OK

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TO: Hank Handelsman

FAX NO.: (312) 920-2470 **CLIENT NO.:** 97718

PHONE: (312) 750-8400

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DATE: November 1, 1999
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SUBADDRESS	
CONNECTION ID	
ST. TIME	11/01 13:09
USAGE T	01'24
PGS.	3
RESULT	OK

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TO: Richard C. Roberts

FAX NO.: (502) 443-4571 **CLIENT NO.: 97718**

PHONE: (502) 443-4516

FROM: Neil M. Gorsuch
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DATE: November 1, 1999
MESSAGE:

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** TX CONFIRMATION REPORT ** AS OF NOV 01 '99 12:27 PAGE. 1

COMMAND #224

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	11/01	12:26	901 537 1010	EC--S	00'51"	003	OK

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TO:	Edward J. Foster, Esq. Tripp Wilson, Esq. Bob Craddock, Esq.
FAX NO.:	**(901) 537-1010**
CLIENT NO.:	**97718**
PHONE:	(901) 537-1033
FROM:	Neil M. Gorsuch
PHONE:	(202) 326-7978
DATE:	November 1, 1999
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16diii002240

COMMAND #225

	DATE	TIME		TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	11/01	12:30	1	901 682 1223	EC--S	00'58"	003	OK

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TO:	DAVID SIMPSON, ESQ. EDDIE FOSTER, ESQ. TRIPP WILSON, ESQ.
FAX NO.:	901-682-1223
CLIENT NO.	97718
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PHONE:	(202) 326-7978
DATE:	November 1, 1999
RE:	

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10diii002241

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL.	**PLAINTIFFS**
v.	**NO. 5:98CV-108-R**
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.	**DEFENDANT**

ORDER

By letter to the court, dated October 25, 1999, defendant informed the court of an issue it intended to raise at the scheduled telephonic conference on October 27, 1999. At the conference the issue was discussed and taken under advisement by the court.

On October 15, 1999 plaintiff produced a written declaration of Harold Price, Senior Vice President of Sales & Marketing for Swedish Match North America. In the declaration, Mr. Price alleges that defendant UST has engaged in the same sort of anti-competitive activities against Swedish Match as it is alleged to have committed against plaintiff. Shortly after producing the declaration, plaintiff indicated that it intends to call Mr. Price to testify at trial in conformity with his written declaration.

Defendant argues that Mr. Price is a "field witness" and should have been disclosed as such prior to the September 21, 1999 deadline for disclosure of "field witnesses." In response, plaintiff makes two arguments. First, defendants did not know precisely what Mr. Price's testimony would be until October 13, 1999 and, second, Mr. Price is not a "field witness" as that term is defined in the court's order of May 11, 1999. (Docket No. 100).

The argument that the testimony of Price should be allowed because he was not firmly

16diii002242

identified as a witness until after the September 21 cutoff is not persuasive. First, there is nothing in the order which suggests that witnesses who suddenly become known after the cutoff could be listed; the purpose of the cutoff was to set a clear and firm deadline for the disclosure of such field witnesses. In any event, Conwood has certainly known of the existence of Swedish Match and its executives for a very long time, and the firming up of the testimony after the cutoff would hardly excuse a delay in witness identification.

However, there is a serious question whether Mr. Price is a member of the category of "field personnel" trial witnesses required to be identified early by the court's order of May 11, 1999. The pertinent paragraph of that order states the following:

> Therefore, the court will amend the previous pretrial order to require the disclosure by Conwood by September 21, 1999 of its trial witnesses who are "field personnel," meaning witnesses who have direct personal knowledge of UST's "in the field" anti-competitive behavior. Such field personnel witnesses would include UST field sales personnel and other former sales personnel, Conwood field sales personnel, convenience store owners, managers, and employee, and others who may have directly, personally observed "in the field" activity which Conwood alleges to be anti-competitive.

(Docket No. 100). Thus, the May 11 order created a limited category of "field personnel" witnesses who had to be disclosed well in advance of the pretrial order's trial witness disclosure requirement.

The early disclosure was meant to prevent unfairness to UST which could arise from its inability to identify and depose store managers, retail employees, and former UST and Conwood salesmen who could have direct knowledge from personal observation of UST in-the-field practices which Conwood challenges, such as the removal of racks, or the elimination of point of sale advertising provided by Conwood for display in stores. Because this group of potential "field personnel" witnesses would be so large, in the absence of the early identification of the actual trial

16diii002243

witnesses, UST would likely never know which of the hundreds or more potential field witnesses might testify against them.

However, the order was limited in its scope. Certainly there are many other categories of witnesses who might appear at trial whose early identification was not required by the May 11 order. The question here is whether Mr. Price is member of the "field personnel" category.

Mr. Price's declaration, attached to the October 25 letter from UST counsel, asserts that his knowledge of UST practices is based on "personal knowledge." See paragraph 2. However, it is not clear whether his knowledge is based on his actual, personal in-the-field observations from his individual travel to retail outlets, whether it is based on reports which he receives in his capacity as senior vice president of sales and marketing, or a combination. It certainly is possible that he has received information both ways.

To the extent that Mr. Price's proposed testimony would be based on his direct, personal, immediate in-the-field observations, his testimony would be properly categorized as that of a "field personnel" witness, and he should have been accordingly identified in the September 21 disclosures of Conwood. Conwood's failure to identify him then will bar him from testifying as a "field personnel" witness. His identification on October 15 rather than on September 21 is more than an inconsequential failure to comply (as might have occurred had he been identified on September 22, for example). The proffered suggestion that his testimony "firmed up" after the deadline is unavailing, particularly since Swedish Match is very well known to Conwood.

However, much of his knowledge may be derivative from his capacity as a corporate executive rather than the result of what he saw on personal travels. To that extent, he would not be a "field personnel" witness, but a business executive whose knowledge comes to him from working in

corporate offices, based on the reports and input of others. In this regard, his testimony would not be barred since it is not from a field personnel but an executive perspective. Whether such testimony runs afoul of evidentiary rules such as the provisions of the Federal Rules of Evidence governing hearsay is not an issue which this order will attempt to address, and likely would be a determination for the trial judge in the context of the jury trial.

Accordingly,

IT IS HEREBY ORDERED that, to the extent that Price's testimony is based on his direct, personal in-the-field observations, it is barred as he was not timely identified in accordance with the court's May 11 order. To the extent that his testimony is based on other knowledge, it is not barred by the May 11 order, but still must pass muster under applicable Federal Rules of Evidence.

Date: 10/28/99

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

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OCT 29 1999
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BY DEPUTY CLERK

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****
*** TX REPORT ***
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TX/RX NO	0017
CONNECTION TEL	79769771813129202470
SUBADDRESS	
CONNECTION ID	
ST. TIME	10/29 12:23
USAGE T	01'34
PGS.	5
RESULT	OK

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TO: Hank Handelsman

FAX NO.: (312) 920-2470 **CLIENT NO.:** 97718

PHONE: (312) 750-8400

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: October 29, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 5 **(INCLUDING THIS SHEET)**

COMMAND #207

	DATE	TIME		TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	10/29	12:39	1	901 682 1223	EC--S	01'46"	005	OK

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TO:	DAVID SIMPSON, ESQ. EDDIE FOSTER, ESQ. TRIPP WILSON, ESQ.
FAX NO.:	901-682-1223
CLIENT NO.	97718
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PHONE:	(202) 326-7978
DATE:	October 29, 1999
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COMMAND #206

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	10/29	12:36	2704434571	EC--S	02' 22"	005	OK

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FACSIMILE TRANSMISSION

TO: Richard C. Roberts

FAX NO.: (502) 443-4571 **CLIENT NO.: 97718**

PHONE: (502) 443-4516

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: October 29, 1999
MESSAGE:

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TX/RX NO	0018
CONNECTION TEL	79769771819015371010
SUBADDRESS	
CONNECTION ID	
ST. TIME	10/29 12:20
USAGE T	01'36
PGS.	5
RESULT	OK

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TO:	Edward J. Foster, Esq. Tripp Wilson, Esq. Bob Craddock, Esq.
FAX NO.:	**(901) 537-1010**
CLIENT NO.:	**97718**
PHONE:	(901) 537-1033
FROM:	Neil M. Gorsuch
PHONE:	(202) 326-7978
DATE:	October 29, 1999
MESSAGE:	

TOTAL NUMBER OF PAGES: 5 **(INCLUDING THIS SHEET)**

f6dlii002249

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, -against- UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98 CV-108-R

MOTION TO COMPEL PRODUCTION
OF DOCUMENTS PURSUANT TO RULE 26

Defendants United States Tobacco Company, et al. ("USTC") respectfully request that this Court, pursuant to Fed. R. Civ. P. 26(a)(2)(B), require Plaintiffs' counsel, and each of its five testifying expert witnesses, to produce all documents or information (in any form) considered by Plaintiffs' experts, including but not limited to documents or information created by or at the direction of Plaintiffs' counsel or created by plaintiffs' experts with input or assistance from the plaintiffs' counsel. Under the 1993 amendment to Rule 26(a)(2)(B), this is information USTC is entitled to prior to expert depositions in order to explore the extent to which Plaintiffs' expert opinions and analyses were based on an objective consideration of the facts or, instead, were influenced by Conwood's counsel advocating a particular position. Indeed, in light of Professor Gundlach's recent testimony, it is readily apparent that Plaintiffs' counsel did not just send "transmittal" letters to its experts; and, under well established case law, we do not have to accept Conwood's representations to the contrary.

BACKGROUND

On October 15, 1999, Defendants deposed Professor Gregory Gundlach – one of Plaintiffs' testifying experts in this case – and learned that, in the course of forming his opinions, he used Conwood's legal counsel as his "staff," jointly created documents with Kellog Huber that "summarized various aspects of the case," and routinely received e-mails that, among other things not yet known to us, "summarized" testimony in this case.

By letter dated October 18, 1999, USTC requested that Plaintiffs produce all documents considered by Professor Gundlach as required pursuant to Fed. R. Civ. P. Rule 26(a)(2)(B). (Attached as Appendix A) On October 21, 1999, Defendants further requested that all documents created by Plaintiffs' counsel and considered by any of Plaintiffs' experts be produced as required by Rule 26. (Attached as Appendix B) In response, on October 26, 1999, Plaintiffs produced a chart apparently created by Plaintiffs' counsel and adopted by Professors Gundlach and Blattberg. (Attached as Appendix C) Remarkably, Plaintiffs' letter provided no explanation for the failure to produce this document concomitantly with the filing of Professor Gundlach's expert report (or rebuttal report) as is required by Rule 26. Indeed, the belated production of the chart – which purports to list the retailers that have some undefined "exclusive" agreements with USTC – ensured that USTC may need another day of deposition with Professor Gundlach. Further, Plaintiffs letter averred, contrary to Professor Gundlach's plain, sworn testimony, that "Dr. Gundlach does not have any additional responsive material."[1]

ARGUMENT

Pursuant to Rule 26 the report of an expert witness "shall contain . . . the data or other information considered by the [expert] witness in forming the opinions" contained in the expert report. The requirement that this information be provided concurrently with the filing

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[1] Significantly, Plaintiffs' letter does not argue, nor did Mr. Hansen assert in the telephonic conference of October 27, 1999, that the material requested by Defendants is privileged or otherwise protected from discovery.

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of the report is fundamental to the purpose of Rule 26. "Indeed, the very purpose of the comprehensive disclosures required from retained experts by Fed. R. Civ. P. 26(a)(2)(B) is to afford opposing counsel sufficient information to prepare for cross-examination." Musselman v. Phillips, 176 F.R.D. 194, 200 (D.Md. 1997).

The Commentary to the 1993 amendments to Rule 26 make clear that the Rule applies to documents and information furnished by counsel that are subsequently shown to, and considered by, expert witnesses: "Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions – whether or not ultimately relied upon by the expert – are privileged or otherwise protected from disclosure when such persons are testifying or being deposed." Commentary to Fed. R. Civ. P. 26(a)(2)(B). See also Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2016.2 at 252 (1994) ("At least with respect to experts who testify at trial, the disclosure requirements of rule 26(a)(2), adopted in 1993, were intended to pretermit further discussion and mandate disclosure despite privilege."); Musselman, 176 F.R.D. at 199 (holding "when an attorney communicates otherwise protected work product to an expert witness retained for the purposes of providing opinion testimony at trial – whether factual in nature or containing the attorney's opinions or impressions – that information is discoverable if it is considered by the expert"); B.C.F. Oil Refining, Inc. v. Consolidated Edison Company of N.Y., Inc., 171 F.R.D. 57, 65-67 (S.D.N.Y. 1997) (same). Accordingly, Plaintiff's counsel in this case is not – at least not yet – attempting to hide behind a work product privilege to avoid the required disclosure under Rule 26.

Further, a party resisting production may not, as here, rely on bald claims that production is not required because the expert witness received, but did not "consider," the documents and information at issue. See B.C.F. Oil, 171 F.R.D. at 62 (requiring production of materials despite Plaintiff's claim that documents at issue did not relate to the expert's

testimony, because "[d]efendant should not have to rely on plaintiff's representation that these documents were not considered by the expert in forming his opinion"). Moreover, the production of documents received and considered by an expert witness is required by the fundamental purpose of Rule 26(a)(2)(B). See Musselman, 176 F.R.D. at 200 ("it is essential that parties be able to discover not only what an opposing expert's opinions are, but also the manner in which they were arrived at . . . and whether this was done as a result of an objective consideration of the facts, or directed by an attorney advocating a particular position") (emphasis added).

The record here demonstrates why USTC should not have to rely on Conwood's counsel's representation that no "responsive" documents exist. Indeed, Mr. Hanson's implicit representation that Dr. Gundlach only has transmittal or scheduling communications is starkly belied by Dr. Gundlach's sworn testimony just last week.[2]

Thus, Professor Gundlach testified that Kellog Huber acted as his "staff" in conducting his expert analysis, (Gundlach Deposition Transcript, attached hereto as Appendix D, pp. 82-85, 89), and that he relied on – not just considered – the work they did with or for him. (Id., p. 86) Further, counsel worked with Dr. Gundlach to identify serious factual mistakes in his analysis (though the origination of these mistakes remains unclear on the current record). (Id., pp. 87-88). Moreover, Dr. Gundlach plainly testified that he was sent "summaries" of testimony as part of the e-mails he "often" received from Plaintiffs, which he retained in his files. (Id., pp. 91-93) This is precisely the type of information that can lead to less than objective consideration of the record by a testifying expert – and it appears to be the tip of the iceberg here.

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[2] Significantly, Plaintiffs October 26 letter does not discuss whether the offices and e-mail system of Plaintiffs' counsel were searched for responsive documents. In light of the testimony given by Professor Gundlach, such a search would seem to be both required and reasonable.

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Finally, Plaintiffs' argument that requiring production of documents sent by Plaintiffs' counsel to testifying experts in this case is premature – because Defendants have not yet heard testimony from each expert that such documents exist – entirely misses the point. Rule 26 requires the production of such documents at the time the expert reports are served because, without such "access to attorney-expert communications, opposing counsel may not be able to effectively reveal the influence that counsel has achieved over the expert's testimony." Kahn v. Rand, 168 F.R.D. 633, 640 (N.D.Ind. 1996).[3]

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' testifying experts and Plaintiffs' counsel (including in-house counsel, if relevant) be ordered to produce all documents or information (in any form) created, or caused to be created by or with counsel for Plaintiffs, that was reviewed by any of Plaintiffs' testifying experts that in any way relate to the evidence or theories in this case, as well as all communications between Plaintiffs' counsel and Conwood's testifying expert witnesses regarding the substance of expert reports or potential testimony at trial.

Dated: October 28, 1999

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
Attorneys For Defendants

[3] Similarly, whether we ask any of the other experts about this type of material in no way relieves Conwood of producing all such material so that we may decide whether re-deposing Conwood's experts on such information is warranted.

16diii002254

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 1999, I caused a copy of the foregoing Defendants' Motion To Compel Production of Documents to be sent by fax and by Federal Express to:

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Washington, DC 20005-3317

James A. Keyte

APPENDIX A

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

919 THIRD AVENUE
NEW YORK 10022-3897

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PARIS
SINGAPORE
SYDNEY
TOKYO
TORONTO

October 18, 1999

By Facsimile

Neil M. Gorsuch, Esq
Steven F. Benz, Esq.
Benjamin Powell, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Gentlemen:

As we discussed on Friday, October 15, 1999, please provide dates when Professor Gunlach will be made available for the continuation of his deposition.

In addition, please provide the following materials as soon as possible and prior to the dates given for the continuation of Professor Gunlach's deposition:

- All documents created, or caused to be created, by counsel for Plaintiffs that were sent to Professor Gunlach and that summarize, characterize, or reference in any way, any record evidence in this case, including any documents and/or testimony;

- All materials relating to Professor Gunlach's purported study of "exclusive agreements" with respect to 22,000 retail locations whether those materials were created, or caused to be created, by Professor Gunlach or by counsel for Plaintiffs; and

- All communications between Plaintiffs' counsel and Professor Gunlach regarding his expert reports or potential testimony at trial.

If you would care to discuss these request further, please do not hesitate to call.

Very truly yours,

Chris Athanasia (CSL)

Chris Athanasia

cc: Richard C. Roberts, Esq.
John S. Reed, Esq.

APPENDIX B

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

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October 21, 1999

By Facsimile

Neil M. Gorsuch, Esq
Steven F. Benz, Esq.
Benjamin Powell, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Gentlemen:

We did not receive any response to our letters of October 18 and 19, 1999.

With respect to our October 18 letter, please provide the requested materials and a date in time for a second day of Professor Gundlach's deposition. In addition, Defendants request that, for each of Plaintiffs' remaining four expert witnesses, Plaintiffs provide the following materials:

- All documents created, or caused to be created, by counsel for Plaintiffs that were sent to the expert and that summarize, characterize, or reference in any way, any record evidence in this case, including any documents and/or testimony;
- All materials relating to any purported study of "exclusive agreements" with respect to 22,000 retail locations whether those materials were created, or caused to be created, by the expert witness or by counsel for Plaintiffs; and
- All communications between Plaintiffs' counsel and the expert witness regarding his expert reports or potential testimony at trial.

With respect to our October 19 letter, we see no reason why Plaintiffs were unable or unwilling to respond to a simple inquiry by the date requested. Defendants merely seek Plaintiffs' position with respect to Mr. Harold Price so that we are able to determine whether there is an issue that may require Judge Moyer's attention. We do not wish to bring issues before

the Court unnecessarily; however, if we do not receive a response to out inquiry by noon on Friday, October 22, 1999, we intend to bring the issue before Judge Moyer at his earliest convenience.

Very truly yours,

Chris Athanasia

cc: Richard C. Roberts, Esq.
John S. Reed, Esq.

APPENDIX C

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
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NEIL M. GORSUCH
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SEAN A. LEV
COURTNEY SIMMONS ELWOOD

October 26, 1999

VIA FACSIMILIE

John S. Reed, Esquire
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2400 Citizens Plaza
Louisville, KY 40202

Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Re: Conwood Co., et al. v. United States Tobacco Co., et al.

Gentlemen:

We received your letters of October 18 and 21, 1999, seeking a second day for the deposition of Professor Gundlach and requesting additional materials regarding Plaintiffs' experts.

Further Gundlach Testimony

Professor Gundlach is available to provide a second day of testimony on Monday November 1, 1999 at 9:00 a.m. in our offices. Please advise us immediately if this date is not acceptable to you.

Extent of Coverage of UST Exclusionary Agreements

Enclosed please find a table that shows UST exclusionary agreements covering approximately 22,000 retail locations that Professor Gundlach mentioned at his deposition. Please note that Professor Blattberg also makes reference to the same analysis in his rebuttal report.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

Additional Materials Requested

In August, we provided you with a listing of materials considered by each of Plaintiffs' experts in connection with their initial reports. Recently, we supplemented those disclosures with an additional list of materials considered by Plaintiffs' experts in connection with their rebuttal reports. We have also provided you with many specific items upon your request, including articles, citations, and the above-referenced table.

Notwithstanding those disclosures, in your letters of October 18 and 21, 1999, you now seek additional materials from the experts. Under Rule 26(a)(2)(B), you are entitled only to materials considered by the experts in forming their opinions. To the best of our knowledge, all such materials have already been produced to you. We note that you have already taken the depositions of two of plaintiffs' five experts, and will depose the remaining three this week and next. You will thus have an opportunity to make the same inquiry of the remaining experts that you have already made of Drs. Popper and Gundlach regarding specific materials they may have considered in connection with forming their opinions.

At the Gundlach deposition, you requested that we attempt to identify and produce certain materials which Dr. Gundlach testified that he may have received from us in connection with his reports. We have consulted with Dr. Gundlach, and, with the exception on the table referenced above, Dr. Gundlach does not have any additional responsive material. Of course, to the extent that any additional materials are identified in future depositions we will make full inquiry.

Request for Clarification of Materials Considered by Winston Weber

Attachment 2 of the report of Winston Weber purports to list all of the materials he considered in connection with the writing of his expert report. At his deposition, however, it became clear that the list was in error. First, Mr. Weber testified that he did not attempt to verify the listing of documents considered prior to the filing of his report. (pages 89-90). Moreover, he testified that he had reviewed materials sent to him after the filing of his report (page 276; lines 9-10). Finally, he testified that attachment 2 is inaccurate (page 276; lines 14-18 ("just . . . because it's not listed here [attachment 2] doesn't mean I haven't seen it"). Please provide us with an accurate list of materials that Mr. Weber considered in connection with his work as an expert in this matter as soon as possible.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

Also, please provide us with a copy of the unnamed study referred to in Mr. Weber's report on page 20. As his deposition, Mr. Weber testified that the study was authorized by Ernst & Young.

Sincerely,

Michael J. Guzman

Evidence of Exclusive Post 1995 Agreements From UST Production

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Citation for Exclusivity
Albertson's, N. California	48	1999 Chain Store Guide directory, p. 75	01/24/1998	USTC/CWD 564037-51
Allsups	309	USTC/CWD 040670	09/09/1998	CWD 0100020483
Altheimer Oil	15	IRM Data	06/07/1996	USTC/CWD 523029
AM/PM	400	UST/CWD 261479	1998	USTC/CWD 158601 - 603
Amar Oil	15	USTC/CWD 532034	03/05/1996	USTC/CWD 532033
American Gas & Oil	15	IRM Data	03/26/1996	USTC/CWD 933957
Amoco	580	UST/CWD 261479	1996-1997	USTC/CWD 688200
A-Plus Mini Market (Sunoco)	415	1999 Chain Store Guide directory, p. 951	1996	USTC/CWD 912675 - 77
Big 10 Mart (Molo Oil)	15	USTC/CWD 596881	02/06/1997	USTC/CWD 596880
BJ's Quick Stop	10	USTC/CWD 532083	06/14/1996	USTC/CWD 532082 -102 (unsigned)
Blue Sky Petroleum	32	USTC/CWD 969648	1998	USTC/CWD 969648 - 51
BP Express	184 (BP AMOCO Plc)	1999 Chain Store Guide directory, p. 817	1997	USTC/CWD 254391
Bradford Oil (Go Go Marts)			03/16/1998	USTC/CWD 1380255
Buy 'n Fly	5	1999 Chain Store Guide directory, p. 950	1996	USTC/CWD 984508 - 22
Circle K (SSP)	172	USTC/CWD 040670 and USTC/CWD 325015	11/12/1998	USTC/CWD 517073
Circle K (TOSCO)	2400	www.tosco.com	01/29/1998	USTC/CWD 969509
Circle N	6	USTC/CWD 532474	06/10/1996	USTC/CWD 532474-76
Co Go's	60	IRM Data	03/24/1998	USTC/CWD 825722 - 26
Coastal Mart	600	UST/CWD 261479	03/12/1997	USTC/CWD 577007-15
Coastal Maverick	155	USTC/CWD 325015	06/08/1998	USTC/CWD 517323-324
Conoco	300	UST/CWD 261479	06/04/1996	USTC/CWD 969469
Cracker Barrel	57	USTC/CWD 532492-95	03/13/1996	USTC/CWD 532491-95
Crockett Oil	11	IRM Data	05/02/1996	USTC/CWD 532552-582

Evidence of Exclusive Post 1995 Agreements From UST Production

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Citation for Exclusivity
Crown Central Petroleum	222	6/16/99 Depo. of H. Heylum at 44.	1996-1998	6/16/99 Depo. of H. Heylum at 43-45.
Crystal Flash	27	IRM Data	1995-1998	USTC/CWD 286194-196
CV's IGA	7	USTC/CWD 532596	06/24/1996	USTC/CWD 532595 - 596
CWX Max Mart	19	USTC/CWD 532616	1996	USTC/CWD 532615-16
Dash In	25	IRM Data	04/15/1996	USTC/CWD 772155-158
Depot Food Stores	52	1999 Chain Store Guide directory, p. 958	03/06/1995	USTC/CWD 969192 - 193
Eagle Food Centers	107	IRM Data	08/12/1998	USTC/CWD 808707
Exit 76 Corp.(Mobil Mart)	22	IRM Data	02/18/1998	USTC/CWD 1380042
Express Mart		IRM Data	1996	USTC/CWD 952735 - 737
Express Mart (FINA)	36	IRM Data	06/13/1997	USTC/CWD 529186
Exxon, BHT	15	USTC/CWD 532058	04/12/1996	USTC/CWD 532056
Exxon, USA	780	UST/CWD 261479	1996	USTC/CWD 760486
E-Z Mart	410	IRM Data	7/16/98 est. (date partially illegible)	USTC/CWD 576985
E-Z Mart		IRM Data	07/08/1997	USTC/CWD 576982
Fas Mart	89	1999 Chain Store Guide directory, p. 1013	1995	USTC/CWD 613178
Fill Zone	14	USTC/CWD 548991 - 92	08/06/1997	USTC/CWD 548986 - 92
Food Chief Stores	29	USTC/CWD 500258	1998	USTC/CWD 500245-258
Gas City	41	IRM Data	10/08/1996	USTC/WD 517428
Gate Food Post/Gate Petroleum	105	USTC/CWD 040670	01/26/1998	USTC/CWD 529230 - 36
Giant Foods	175	www.giantfood.com	pre-April 1998	USTC/CWD 210723 - 725
Golden Pantry	88	USTC/CWD 968584	07/14/1998	USTC/CWD 968584
High's of Baltimore	119	IRM Data	1998	USTC/CWD 582106 - 111
Ingle's	200	www.ingles-markets.com	01/29/1998	USTC/CWD 608190
Kmart	2160	www.Kmart.com	1996-1998	USTC/CWD 157844 - 46 and 157849-50; 7/1/99 Depo. Of T. Entwhistle at 57-58.
Kroger, Atlanta	155	1999 Chain Store Guide directory, p. 149	07/31/1998	USTC/CWD 884436 -441

Evidence of Exclusive Post 1995 Agreements From UST Production

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Citation for Exclusivity
Kroger, Dallas Division	73	www.Krogersouthwest.com	11/18/1997	7/8/99 Depo of D. Blackburn at 28-31 and USTC/CWD 251740 - 741
Kum & Go	125	UST/CWD 261479	1998	USTC/CWD 800236-238
Mapco/Memphis	98	1996 Chain Acct. Memo	06/26/1996	USTC/CWD 540874
Meijer	107	UST/CWD 261479	1998	USTC/CWD 277261-276
Minit Chek Food Stores	8	1999 Chain Store Guide directory, p. 803	04/29/1996	USTC/CWD 885246 and 885247
Mobil	600	UST/CWD 261479	09/06/1996	USTC/CWD 948431-433
Odessa Corp. (Champlain Farms, Fast Stop)	49	CWD 1025006231	03/02/1998	USTC/CWD 1380254
One Stop	27	6/16/99 Depo. Of H. Heylmun at 43.	06/20/1905	6/16/99 Depo. Of H. Heylmun at 43.
PDQ Convenience Stores	45	USTC/CWD 331829	1996 est. Context of report indicates doc. was written in 1996.	USTC/CWD 331829-832
Pelican State Fina	35	USTC/CWD 536126	04/02/1998	USTC/CWD 536122
Pit Row	10	IRM Data	1997	USTC/CWD 688459 - 461
QuikTrip	329	1999 Chain Store Guide directory, p. 944	06/17/1998	USTC/CWD 609441 - 48
Rapid Roberts	19	USTC/CWD 512652	10/16/1997	USTC/CWD 512649 - 652
Rainbow Foods	41	1999 Chain Store Guide directory, p. 347		7/9/99 Depo. Of D. Blackburn at 26-28.
Sentry Food Mart	100	USTC/CWD 331829	03/10/1997	USTC/CWD 808017
Sentry Food Mart		USTC/CWD 331829	1996	USTC/CWD 760370 - 74
Sheetz	200	UST/CWD 261479	1998	UST/CWD 416818-819
Southland (7-Eleven)	2500	UST/CWD 261479	04/01/1997	USTC/CWD 025956 - 964; 7/9/99 Depo of D. Untiedt at 103-105.
Spectrum Stores	58	USTC/CWD 970961	09/13/1996	USTC/CWD 970960; CWD
Spee D Foods	13	IRM Data	May 1997 to May 1998	USTC/CWD 985245 - 249
Stagger's Oil	28	IRM Data	05/09/1996	USTC/CWD 536138
Stop In Food Stores	63	IRM Data	1996	USTC/CWD 952558-60

Evidence of Exclusive Post 1995 Agreements From UST Production

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Citation for Exclusivity
Sun Up Convenience (Service Oil Co.)	7	IRM Data	04/09/1996	USTC/CWD 985389
The Pantry	915	USTC/CWD 888769-71	03/22/1996	USTC/CWD 704636 - 37
Thrifty Liquor	12	USTC/CWD 536470	03/10/1996	USTC/CWD 536469-71
Tom Thumb	149	USTC/CWD 254389	05/09/1997	USTC/CWD 254389 - 390
Toot 'n Scoot	20	1999 Chain Store Guide directory, p. 951	1996	USTC/CWD 984465 - 66
Turkey Hill Minit Markets	230	USTC/CWD 984429	07/03/1997	USTC/CWD 984432-433
United Dairy Farmers	209	IRM Data	01/29/1998	USTC/CWD 888816 - 17;USTC/CWD 734222 - 228; see also USTC/CWD 888480
Waco Oil	18	USTC/CWD 516673	1998	USTC/CWD 516673-80
Wal*Mart	2400	UST/CWD 261479	1997	7/8/99 Depo. Of D. Blackburn at 32; 7/9/99 Depo of D. Untiedt at 222-225; USTC/CWD 274518
Walgreen's	2200	USTC/CWD 040671	1997	USTC/CWD 517580
Wawa	500	USTC/CWD 297457	04/01/1997	USTC/CWD 297451-457
Winn Dixie, Atlanta	94	1999 Chain Store Guide directory, p. 149	03/25/1997	USTC/CWD 254584
TOTAL	21983			

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

- - - - - - - - - - - - - - - - - - X
CONWOOD COMPANY, L.P., :
CONWOOD SALES COMPANY, L.P., :
Plaintiffs, : Civil Action No.
v. : 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, :
UNITED STATES TOBACCO SALES AND:
MARKETING COMPANY, INC., UNITED:
STATES TOBACCO MANUFACTURING :
COMPANY, INC. and UST, INC., :
Defendants. :
- - - - - - - - - - - - - - - - - - X

Washington, D.C.
Friday, October 15, 1999

Deposition of GREGORY T. GUNDLACH, a witness herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice and agreement, the witness being duly sworn by FERNITA R. FINKLEY, a Notary Public in and for the District of Columbia, taken at the offices of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., at

on a lot of different venues of evidence that I've talked about.

Q. How many retail CAP participants are there throughout the country?

A. I've been able to ascertain in working with Conwood counsel, their support staff, that number ranges in the vicinity of 33,000 retail locations as I recall.

Q. And do you recall reviewing any testimony from any of the 33,000 CAP participants who testified that the number of Conwood brand offerings declined sharply as a result of the CAP program?

MR. GUZMAN: Objection, that misstates testimony.

THE WITNESS: I can't recall specific people, specific documents, but I do recall considerable discussion of reduced number of faces for competitors, discussion of reducing competitors' facings through the incentive program.

BY MR. ATHANASIA:

Q. I'm sorry, were you answering with respect to retailer testimony?

A. No. I was answering with regard to the entire body of evidence.

Q. I'm sorry. Were you answering with

specific reference to retailers?
A. Yes.
Q. Any of the 33,000 retailers that participate in the CAP program?
MR. GUZMAN: Objection, again misstates testimony.
THE WITNESS: I wasn't really -- retailers are one portion of the evidence that I looked at, more telling I think is the information regarding the CAP itself, the contracts and the internal memoranda in UST. As I sit here today I don't know if I recall particular retailers, and of course there was only ten depositions that I looked at, retailers who provided that information. I'd have to say I can't recall.
BY MR. ATHANASIA:
Q. Do you know how many depositions of retailers were taken in this case?
A. I can't recall a specific number.
Q. Sir, you referred to working with counsel for Conwood and their support staff. Did you employ your own support staff in your study in this case?
A. I had available to me the Conwood personnel -- I'm sorry, the Conwood counsel staff, and I employ within my position in the college three

research assistants. I have access to them.
Q. Did you employ three research assistants -- strike that. You employed three research assistants in your position as Professor at Notre Dame?
A. They're available to me, yes.
Q. Did any of those three research assistants work on this case?
A. All three of them may have helped organize documents and assisted me in general cursory organization.
Q. Are those research assistants paid?
A. Yes, they're paid by the department.
Q. By the university?
A. Yes.
Q. Did the University of Notre Dame pay research assistants to do work organizing documents in this case?
A. I think the university appreciates my research interests in the area, so finds it well within the objectives of the university to assist me in this type of activity.
Q. So that would be a yes, the university paid these research assistants to do work on this case?

A. No. I think the university pays them to assist me in my work.
Q. And in that role assisting you in your work they worked on this case?
A. Under my direction they may have provided organization of the documents, carried boxes of documents in, moved them around my office.
Q. Did they review any documents, do any substantive work on this case?
A. No, not to the degree of reviewing particular documents, no.
Q. Any substantive work whatsoever other than carry boxes?
A. Mainly their assistance was in the context of gathering secondary data regarding the moist snuff industry, OTP category, and each of the differing organizations' involved competitors, Swedish Match, Swisher, Conwood, UST.
Q. Can you describe to me what Conwood and their staff did to assist you in this case?
A. Well, my objection was to try to understand the extent of the realm of the different exclusive arrangements. They participated in identifying the -- as well as myself, in identifying documents that contained particular evidence of

exclusionary arrangements between UST and particular retailers. They then assisted me in terms of identifying the number of retailers they were represented through those particular arrangements, typically identifying the number of retailers which would be -- fall within those agreements and then helping me to count up the number to arrive at the figure that I used.

Q. Did you rely on this work in quantifying your analysis in this case?

A. To the extent that it had formed my opinions, yes.

Q. Do know how many boxes of documents were produced in this litigation?

A. I'd have to know how many pieces of paper you put inside a box, Chris, but I understand it would be in the vicinity of 1.5 million, copies.

Q. You didn't review all those documents, did you?

A. I reviewed a fair amount, not 1.5 million.

Q. How were the documents you reviewed selected out of the 1.5 million documents?

A. I requested some particular documents regarding particular dimensions of the case that I was interested in. Conwood supplied me with

documents. I obtained additional documents on my own based on secondary research. There's a give and take in terms of accumulation and identification of documents.

Q. In terms of -- why don't you identify the dimensions of documents you were looking at. Did you rely on the Conwood counsel staff to select those documents and provide them to you?

A. Not all the time. They may have helped me locate particular documents, but the substantive realm of the documents I was interested in I had free ranging access to any document that I desired.

Q. Can you tell me the process, how you would go about selecting a document that you wanted to review?

A. Give you an example, I mean there's numerous occasions where developed basis for desiring to review a particular document, for example I was interested in the most recent CAP contract when it became available, asked for a copy of the 1999 version. I was provided it. I asked for specific other documents at times based on reading documents, furthering my understanding of those particular documents. I asked about particular areas where I felt the documents may not have been comprehensive

given that there was an area of my interest or a lot of motivations that incented me to ask for specific documents in the process of research.

Q. Let me ask you about a specific, who did the work selecting and collecting the documents that led you to determine that U.S. Tobacco had an exclusive with its five top customers?

A. I think it was probably a joint effort given my interest in identifying the top retail institutions that UST dealt with, and supplying of those documents on the part of Conwood personnel, and some of those documents were even provided before I arrived at a point in my research where I was interested in reviewing those particular details.

Q. And who discovered that that was a mistake?

A. Well, I think probably we both realized it at the same time separately. In reviewing the final version of the second report I think I was just alerted in my mind that it may not have been a proper allocation of the number of products ascribed to the top five retailers, and I think we may have been jointly calling one another. I don't know that it was -- I can't discern a specific point in time when they arrived at it or I arrived at it or it was a

joint simultaneous occurrence.
Q. Can you tell me who you worked with on the Conwood counsel's staff to assist you in this case?
A. Sure, Michael Guzman of course, Steven Benz, Ben Powell, Neil Gorsuch. Gosh, there have been several members of the Conwood counsel that I've interacted with but I hate to be embarrassed to say that I don't recognize and remember all the names.
Q. And who said that United States Tobacco had an exclusive rack arrangement with the top five customers?
A. I said that.
Q. What did you base that on?
A. Well, again, I corrected it through the errata sheet, but as I recall there was an internal activity report or sales analysis on the part of a UST member that listed the various retailers and the amount of moist snuff sales to those retailers in order descending order. I used that as my basis for identifying Wal-Mart, Southland, Circle K, Sams and Emco. I'm not sure if it's referred to as Emco. I think it's Erco. I used that document as the basis of my findings. I do recall seeing some secondary information that led me to believe that document was correct.

Q. That document spoke to those were the top five customers, correct, not --

A. If you mean retail institutions or customers, I recall the -- merely a listing of the different accounts specifying the top level of sales. I don't know that it described whether or not they were wholesalers or whether or not they were retailers.

Q. My question is what did you use to determine that there was an exclusive rack arrangement with any of these top accounts?

A. Those led me to be able to identify the top accounts. If your question is with regard to the documents that led me to understand there was exclusionary arrangements, typically these were UST documents. They may have been the depositions of people inside the UST organization. They may have been actually copies of the CAP contracts themselves. They may have been copies of other retail incentive programs, 2908 agreements, included various different types of incentive programs, they're far ranging across the different documents that were available to me.

Q. Is Emco a distributor?

A. As I sit here today I can't recall if

their operations stretch into the retail realm or stretch up into the retail or the wholesale realm. Given they didn't have an exclusionary arrangement, I moved on to other arrangements that informed me about the exclusionary agreements during that process.

Q. Did anyone from counsel or Conwood or that staff prepare any fact memos for you?

A. I guess I have to know what a fact memo is in your mind.

Q. Did they create any document whatsoever that summarized any facts or any evidence in this case?

A. I may have received e-mails and other information that may have identified the particular case, they may have summarized -- not necessarily summarized but put declarations in front of me that included excerpts of those declarations, in other words the information was provided in a variety of ways, but mainly the raw documents themselves, the ones that I requested.

Q. Did you ever receive any documents prepared by counsel or counsel's staff that summarized the actual documents?

A. We prepared documents together that summarized the various aspects of the case, yes.

Whether or not I received those -- I may have received those based upon the interplay, sure.

Q. Which counsel -- is it fair to say you did that with all counsel that you named earlier?

A. I'm sorry, your reference to accounts meaning --

Q. Counsel. Counsel.

A. Well, it's hard to tell where I may have received those from, they may play a role in the development of those so it's difficult for me to say I received -- I had e-mail contact and received documents from the firm in general. Oftentimes they did not have a signature on them in terms of personnel.

Q. How about did you ever receive any documents prepared by counsel or counsel's staff that summarized deposition testimony?

A. Yes, I do recall receiving some. I often would receive an e-mail of a -- at times received e-mails that may have contained -- referenced the deposition testimony, particular excerpt that may have been of interest to me across a far ranging variety of areas.

Q. Where are those documents and e-mails today?

A. They're -- the ones that are retained in my files are retained in my office at the university.

MR. ATHANASIA: I'm going to ask for production of all those communications in between counsel and Mr. Gundlach or any of his assistants that referred to or summarized evidence in this case in any way.

MR. GUZMAN: Let me just interject here. Chris, if you would be so kind as to send us a letter, we'd be happy to respond.

BY MR. ATHANASIA:

Q. We were talking about the CAP program and your assertion that it is related to a decline in brand offering of Conwood brands, correct?

MR. GUZMAN: Objection. That misstates the testimony.

THE WITNESS: I believe we were talking in that vicinity, yes.

BY MR. ATHANASIA:

Q. Did you read the deposition of Dan Walden? Just to refresh your recollection a little bit, he is a retailer of a chain of stores in Georgia and Florida.

A. I remember several retailers but I can't tell you as I sit here today whether I remember that

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'99 NOV -2 A10:03

FILED
U.S. DISTRICT COURT CLERK
W.D. OF KENTUCKY

Civil Action No.
5:98CV-108-R

Plaintiffs' Opposition to Motion to Compel Production of Documents

Defendants' Motion to Compel demands production beyond the requirements of the Federal Rules. Pursuant to Rule 26(a)(2)(B), Plaintiffs have already identified the factual material considered by the experts in forming their opinions. Indeed, Plaintiffs have gone beyond the Rule in many instances by re-producing hundreds of pages of documents -- even though these items were already in Defendants' possession. Now Defendants demand a further, all-encompassing search and production simply because one of Plaintiffs' five experts, Dr. Gundlach, suggested at his deposition that he may have reviewed some additional material from counsel. This demand exceeds the scope of the Federal Rules. Moreover, as the attached affidavit from Dr. Gundlach makes clear, there is no factual basis for requiring an additional review of the materials the experts have considered. See Attachment A.

Background

On August 20, 1999, Plaintiffs provided Defendants with lists of materials considered by each of their five experts. See Attachment B. Prior to the depositions of

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each expert, Plaintiffs supplemented those initial lists to include additional materials the experts considered in preparing their rebuttal reports. See Attachment C. In total, the materials identified by Plaintiffs would fill dozens of boxes.

To date, three of Plaintiffs' five experts have been deposed. At their depositions, experts Dr. Popper and Dr. Kamien stated plainly that their disclosure lists were complete and accurate. Dr. Gundlach made a similar representation, though in an abundance of caution added that he "may" have reviewed additional materials. From this "may" Defendants now manufacture a demand that Plaintiffs' re-search all five of their experts' files and search counsel's opinion work product files too.

It bears mention in this context that the lists produced by Defendants appear to be underinclusive and/or inaccurate. For example, when questioned about his list of materials considered, defense expert Winston Weber testified that he had reviewed a variety of materials not included in his disclosure and observed "just . . . because it's not listed here doesn't mean I haven't seen it." Weber Tr. at p. 276; lines 9-18. Mr. Weber's Report also refers explicitly to a study that Plaintiffs have requested but still have not received. Weber Report at 20. Similarly, Dr. Scheffman testified at his deposition that his disclosure was not complete. Scheffman Tr. at 74-75. Plaintiffs have raised this issue with Defendants, but to date Defendants have not responded.

Argument

Defendants seek an order requiring production of "all communications" between Plaintiffs' counsel and their five experts. This demand lacks foundation legally and factually.

Legally, Defendants are not entitled to "all communications" with experts as they suppose. Instead, under the Federal Rules, they are entitled only to "factual information considered by the expert" in forming his or her opinion. Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 295 (W.D. Mich. 1995) (court held that it was error to compel

production of all communications between counsel and the expert witness).[1] Indeed, as to Defendants' passing (and unprecedented) suggestion that counsel should search their own opinion work product files, the "Sixth Circuit holds such opinion work product absolutely privileged." Id. at 295 (citing Toledo Edison Co. v. G.A. Technologies, Inc., 847 F.2d 335, 340-41 (6th Cir. 1988)). Moreover, Defendants' reading of Rule 26 would modify an evidentiary privilege, which would conflict with the Rules Enabling Act, 28 U.S.C. § 2074(b).[2]

Factually, Defendants' motion rests entirely on a mischaracterization of the deposition testimony of Dr. Gundlach. Defendants represent that Dr. Gundlach testified he has previously-undisclosed materials in his possession, that "Kellogg Huber acted as his 'staff' in conducting his expert analysis," and that "he was sent 'summaries' of testimony as part of e-mails he 'often' received from Plaintiffs." Motion to Compel at 4. In fact, however, Defendants overstate Dr. Gundlach's testimony.

Dr. Gundlach never testified that he possesses additional, undisclosed factual information considered in forming his opinions. Instead, in an abundance of caution, at his deposition he testified merely that he "may" have such materials. Tr. at 91-92. A

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[1] See also The Nexxus Products Co. v. CVS New York, Inc., 188 F.R.D. 7, 10 (D. Mass. 1999) ("Based on this Court's review of the relevant cases, the text of the rule and the accompanying Advisory Committee comment, this Court concludes that the required disclosure under 26(a)(2)(B) & (b)(4)(A) does not include core attorney work product"); Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 642-43 (E.D.N.Y. 1997) ("Rule 26(a)(2)(B) extends only to factual materials, and not to core attorney work product . . . . Rule 26(a)(2) should not be construed as vitiating the attorney work product privilege, and the laudable policies behind it, in the absence of clear and unambiguous authority under the [F.R.C.P.]"); Ladd Furniture, Inc. v. Ernst & Young, 1998 WL 1093901, at *12, *13 (M.D.N.C. 1998) (same); All West Pet Supply Co. v. Hill's Pet Prods. Div., 152 F.R.D. 634, 639 n.9 (D. Kan. 1993) (same); 6 James Wm. Moore et al., Moore's Federal Practice, § 26.80[1][a] (3rd ed. 1999) ("The Haworth holding is meritorious, because nothing in the advisory committee notes to the 1993 amendments suggests that Rule 26(b)(4)(A) was intended to abrogate the enhanced protection for opinion work product recognized [in] Upjohn Co. v. United States, 449 U.S. 383, 401 (1981)").

[2] Any "rule . . . modifying an evidentiary privilege shall have no force or effect unless approved by an Act of Congress."

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further check by Dr. Gundlach confirms that he has no undisclosed materials considered in forming his opinions. See Attachment A.

Defendants' claim that Dr. Gundlach used Kellogg Huber as his staff to conduct his expert analysis likewise misstates his testimony. Dr. Gundlach explained that counsel for Conwood and their staff typically assisted him by providing him with requested documents from the record. Tr. at 86, lines 21-25; 87, lines 1-4. Indeed, Dr. Gundlach described a process whereby he "had free ranging access to any document that [he] desired." Tr. at 87, lines 5-12.[3]

Finally, Defendants' assertion that Dr. Gundlach testified he "often" received "summaries" of depositions via e-mail again overstates the record. At his deposition, Dr. Gundlach merely (and as it turns out overcautiously) testified that he may have received such factual documents from counsel. Tr at 91-92. Dr. Gundlach initially stated: "Yes, I do recall receiving some. . . ." Tr. at 92, line 8. In the same answer, however, Dr. Gundlach qualified that statement by noting "I often would receive an e-mail of a - at times received e-mails that may have contained - reference the deposition testimony, particular excerpt that may have been of interest to me across a far ranging variety of areas." Tr. at 92, lines 18-23 (emphasis added). Made after an additional review of his files, Dr. Gundlach's declaration makes clear that all of the factual materials he has considered have been disclosed.[4]

---

[3] Dr. Gundlach also related one instance where counsel and their staff assisted him by tallying up the number of retail locations covered by UST contracts with exclusionary features. Tr. at 85, lines 19-25; 86, lines 1-12. Dr. Gundlach relied on that tally - approximately 22,000 retail locations. The document underlying the count was provided to Defendants.

[4] Counsel in this case often received "rough drafts" of deposition testimony via e-mail from the court reporters weeks before the official copy, and such depositions may have been forwarded to Dr. Gundlach via e-mail for his consideration. Dr. Gundlach's consideration of these depositions has been disclosed to Defendants. See Attachments B & C.

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Conclusion

Defendants' motion should be denied. A proposed order is attached.

Respectfully submitted,

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Counsel for Plaintiffs

Dated: November 1, 1999

16diii002288

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 1 st day of November, 1999, copies of the foregoing Opposition to Motion to Compel were sent by fax and overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
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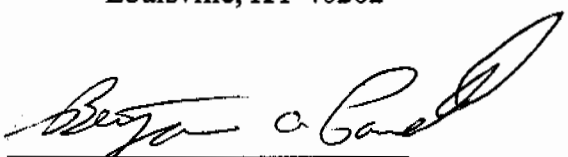
Louisville, KY 40202



Benjamin A. Powell

16diii002289

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	JURY TRIAL DEMANDED

ORDER

Upon consideration of briefing and oral argument Defendants' Motion to Compel Production of Documents is hereby DENIED.

SO ORDERED.

Dated this ___ day of _____, 1999.

HONORABLE JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

[redacted]

16diii00225

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

DECLARATION OF GREGORY T. GUNDLACH

1. I, Gregory T. Gundlach, am over the age of eighteen and make this declaration voluntarily. I am a professor at the College Business at the University of Notre Dame University. I have also been serving as an expert on behalf of Plaintiffs in the above- captioned matter. I make this declaration based on my personal knowledge and on review of documents that are under my custody and control.

2. On Friday, October 15, 1999, I gave a deposition in this matter in my capacity as an expert witness. At the deposition I was asked several questions regarding whether I had ever received materials created by or at the direction of counsel for Conwood that analyzed or summarized evidence in the case. In response to those questions, I stated that I may have such documents. I gave a qualified answer because at the deposition I was unsure about exactly what I had received in light of

the large volume of materials I have considered. In light of the ambiguity in my mind at the time, I decided it would be better to give a qualified answer than to state categorically that I had nothing responsive.

3. On Tuesday, October 19, 1999, Michael Guzman, counsel for Conwood, asked me whether I had in my files documents created by or at the direction of counsel that analyze or summarize evidence in the record or otherwise contain substantive discussions relating to my reports or potential testimony at trial. After searching my files, I responded that same day that I did not have any such materials, except for the analysis underlying the statement in my Rebuttal Report that United States Tobacco has exclusive agreements with retailers covering approximately 22,000 retail locations.

4. I understand that the analysis showing United States Tobacco exclusive agreements covering approximately 22,000 retail locations has been provided to Counsel for Defendants. I further understand that Counsel for Defendants have renewed their requests and are inquiring now whether I have any documents that were "created or caused to be created, by counsel for Plaintiffs that were sent to [me] and that summarize, characterize, or reference in any way, any record evidence in this case, including any documents and/or testimony." I also understand Defendants seek "all communications between Plaintiffs' counsel and [me] regarding [my] expert reports or potential testimony at trial."

5. I have reviewed my files again for information responsive to those requests. I have found nothing.

I hereby declare that the foregoing is true and correct under penalty of perjury.

11/1/99

Gregory T. Gundlach Date

ATTA

16diii00223

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COURTNEY SIMMONS ELWOOD

August 20, 1999

Via Federal Express

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Matthew Barnett, Esquire
Jed Goldfarb, Esquire
Rachael Mariner, Esquire
Skadden, Arps, Slate,
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919 Third Avenue
New York, NY 10022

Re: Conwood Co., et al. v. United States Tobacco Co., et al.

Dear Counsel:

We have your letter of August 9, 1999 requesting certain information related to our expert reports.

First, Professor Kamien has spent 30 hours on this matter to date; Professor Leftwich has spent 62.25 hours; Professor Popper has spent 64 hours; Professor Gundlach has spent 186.7 hours; and Professor Blattberg has spent 47 hours. The work of all experts is, of course, ongoing and we cannot determine the total number of hours each will ultimately spend on this case.

Second, all of our experts have been permitted access to the entire collection of documents and depositions in this case. Nonetheless, we asked them to identify any particular information they have considered to date. The results can be found in the attached binders; we have Bates-numbered these materials for your convenience (CWD-EXP 00001 through CWD-EXP 01135). With regard to your specific question about the 225 declarations "purportedly submitted by Conwood employees," I would refer you to documents already in your possession Bates-numbered CWD 1027001795 through CWD 1027005362.

Please feel free to call with any questions you might have about this matter.

Very truly yours,

COPY

Neil M. Gorsuch

cc: Richard C. Roberts, Esquire
John S. Reed, Esquire

ATTAC

16diii002293

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October 13, 1999

COPY

Via Facsimile and Federal Express

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919 Third Avenue
New York, NY 10022

Re: Conwood Co., et al. v. United States Tobacco Co., et al.

Dear Counsel:

Professor Gundlach has been permitted access to the entire collection of documents and depositions in this case. We asked him to identify any particular supplemental information he has considered to date. That list includes materials cited in his rebuttal report and is attached as Attachment "A". You will note that we have previously forwarded certain declarations bates-labeled CWD-EXP-00001136 through CWD-EXP-00001222.

Please feel free to call if you have any questions.

Very truly yours,

Benjamin A. Powell

cc: Richard C. Roberts, Esquire
John S. Reed, Esquire

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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October 15, 1999

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Re: Conwood Co., et al. v. United States Tobacco Co., et al.

Dear Counsel:

Professor Popper has been permitted access to the entire collection of documents and depositions in this case. We asked him to identify supplemental information he has considered to date. That list includes materials cited in his rebuttal report and is attached as Attachment "A". You will note that we have previously forwarded certain declarations bates-labeled CWD-EXP-00001136 through CWD-EXP-00001222. A declaration bates-labeled CWD-EXP-00001411-418 is attached as Attachment "B".

Please feel free to call if you have any questions.

Very truly yours,

Michael J. Guzman

cc: Richard C. Roberts, Esquire
John S. Reed, Esquire

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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October 25, 1999

Via Facsimile

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Re: Conwood Co., et al. v. United States Tobacco Co., et al. Supplemental Information Regarding Reports of Robert C. Blattberg

Gentlemen:

Enclosed is a supplemental list of materials considered by Robert C. Blattberg in connection with his reports. In addition, enclosed is an errata sheet for Dr. Blattberg's Rebuttal Report.

Please do not hesitate to contact me if you have any further questions.

Sincerely,

Michael J. Guzman

cc: Mark Hansen
Neil Gorsuch
Bill Conyngham
Robert C. Blattberg

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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SEAN A. LEV
COURTNEY SIMMONS ELWOOD

October 26, 1999

Via Facsimile

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James A. Keyte, Esquire
Chris T. Athanasia, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Re: Conwood Co., et al. v. United States Tobacco Co., et al. - Supplemental Information Regarding Reports of Morton I. Kamien

Gentlemen:

Enclosed is a supplemental list of materials considered by Morton I. Kamien in connection with his reports. In addition, enclosed is a Supplemental Report prepared by Dr. Kamien based on the data you provided us on September 21, 1999. We will file and serve the Supplemental Report today as well, but wanted you to have it as soon as it became available.

Please do not hesitate to contact me if you have any further questions.

Sincerely,

Michael J. Guzman

cc: Mark Hansen
Neil Gorsuch
Bill Conyngham
Morton I. Kamien

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 NOV -2

FILED
U.S. DISTRICT COURT
W.D. DIST. KY

Plaintiffs' Opposition to Motion to Compel Production of Documents

Defendants' Motion to Compel demands production beyond the requirements of the Federal Rules. Pursuant to Rule 26(a)(2)(B), Plaintiffs have already identified the factual material considered by the experts in forming their opinions. Indeed, Plaintiffs have gone beyond the Rule in many instances by re-producing hundreds of pages of documents -- even though these items were already in Defendants' possession. Now Defendants demand a further, all-encompassing search and production simply because one of Plaintiffs' five experts, Dr. Gundlach, suggested at his deposition that he may have reviewed some additional material from counsel. This demand exceeds the scope of the Federal Rules. Moreover, as the attached affidavit from Dr. Gundlach makes clear, there is no factual basis for requiring an additional review of the materials the experts have considered. See Attachment A.

Background

On August 20, 1999, Plaintiffs provided Defendants with lists of materials considered by each of their five experts. See Attachment B. Prior to the depositions of

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each expert, Plaintiffs supplemented those initial lists to include additional materials the experts considered in preparing their rebuttal reports. See Attachment C. In total, the materials identified by Plaintiffs would fill dozens of boxes.

To date, three of Plaintiffs' five experts have been deposed. At their depositions, experts Dr. Popper and Dr. Kamien stated plainly that their disclosure lists were complete and accurate. Dr. Gundlach made a similar representation, though in an abundance of caution added that he "may" have reviewed additional materials. From this "may" Defendants now manufacture a demand that Plaintiffs' re-search all five of their experts' files and search counsel's opinion work product files too.

It bears mention in this context that the lists produced by Defendants appear to be underinclusive and/or inaccurate. For example, when questioned about his list of materials considered, defense expert Winston Weber testified that he had reviewed a variety of materials not included in his disclosure and observed "just . . . because it's not listed here doesn't mean I haven't seen it." Weber Tr. at p. 276; lines 9-18. Mr. Weber's Report also refers explicitly to a study that Plaintiffs have requested but still have not received. Weber Report at 20. Similarly, Dr. Scheffman testified at his deposition that his disclosure was not complete. Scheffman Tr. at 74-75. Plaintiffs have raised this issue with Defendants, but to date Defendants have not responded.

Argument

Defendants seek an order requiring production of "all communications" between Plaintiffs' counsel and their five experts. This demand lacks foundation legally and factually.

Legally, Defendants are not entitled to "all communications" with experts as they suppose. Instead, under the Federal Rules, they are entitled only to "factual information considered by the expert" in forming his or her opinion. Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 295 (W.D. Mich. 1995) (court held that it was error to compel

production of all communications between counsel and the expert witness).[1] Indeed, as to Defendants' passing (and unprecedented) suggestion that counsel should search their own opinion work product files, the "Sixth Circuit holds such opinion work product absolutely privileged." Id. at 295 (citing Toledo Edison Co. v. G.A. Technologies, Inc., 847 F.2d 335, 340-41 (6th Cir. 1988)). Moreover, Defendants' reading of Rule 26 would modify an evidentiary privilege, which would conflict with the Rules Enabling Act, 28 U.S.C. § 2074(b).[2]

Factually, Defendants' motion rests entirely on a mischaracterization of the deposition testimony of Dr. Gundlach. Defendants represent that Dr. Gundlach testified he has previously-undisclosed materials in his possession, that "Kellogg Huber acted as his 'staff' in conducting his expert analysis," and that "he was sent 'summaries' of testimony as part of e-mails he 'often' received from Plaintiffs." Motion to Compel at 4. In fact, however, Defendants overstate Dr. Gundlach's testimony.

Dr. Gundlach never testified that he possesses additional, undisclosed factual information considered in forming his opinions. Instead, in an abundance of caution, at his deposition he testified merely that he "may" have such materials. Tr. at 91-92. A

[1] See also The Nexxus Products Co. v. CVS New York, Inc., 188 F.R.D. 7, 10 (D. Mass. 1999) ("Based on this Court's review of the relevant cases, the text of the rule and the accompanying Advisory Committee comment, this Court concludes that the required disclosure under 26(a)(2)(B) & (b)(4)(A) does not include core attorney work product"); Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 642-43 (E.D.N.Y. 1997) ("Rule 26(a)(2)(B) extends only to factual materials, and not to core attorney work product . . . . Rule 26(a)(2) should not be construed as vitiating the attorney work product privilege, and the laudable policies behind it, in the absence of clear and unambiguous authority under the [F.R.C.P.]"); Ladd Furniture, Inc. v. Ernst & Young, 1998 WL 1093901, at *12, *13 (M.D.N.C. 1998) (same); All West Pet Supply Co. v. Hill's Pet Prods. Div., 152 F.R.D. 634, 639 n.9 (D. Kan. 1993) (same); 6 James Wm. Moore et al., Moore's Federal Practice, § 26.80[1][a] (3rd ed. 1999) ("The Haworth holding is meritorious, because nothing in the advisory committee notes to the 1993 amendments suggests that Rule 26(b)(4)(A) was intended to abrogate the enhanced protection for opinion work product recognized [in] Upjohn Co. v. United States, 449 U.S. 383, 401 (1981)").

[2] Any "rule . . . modifying an evidentiary privilege shall have no force or effect unless approved by an Act of Congress."

further check by Dr. Gundlach confirms that he has no undisclosed materials considered in forming his opinions. See Attachment A.

Defendants' claim that Dr. Gundlach used Kellogg Huber as his staff to conduct his expert analysis likewise misstates his testimony. Dr. Gundlach explained that counsel for Conwood and their staff typically assisted him by providing him with requested documents from the record. Tr. at 86, lines 21-25; 87, lines 1-4. Indeed, Dr. Gundlach described a process whereby he "had free ranging access to any document that [he] desired." Tr. at 87, lines 5-12.[3]

Finally, Defendants' assertion that Dr. Gundlach testified he "often" received "summaries" of depositions via e-mail again overstates the record. At his deposition, Dr. Gundlach merely (and as it turns out overcautiously) testified that he may have received such factual documents from counsel. Tr at 91-92. Dr. Gundlach initially stated: "Yes, I do recall receiving some. . . ." Tr. at 92, line 8. In the same answer, however, Dr. Gundlach qualified that statement by noting "I often would receive an e-mail of a - at times received e-mails that may have contained - reference the deposition testimony, particular excerpt that may have been of interest to me across a far ranging variety of areas." Tr. at 92, lines 18-23 (emphasis added). Made after an additional review of his files, Dr. Gundlach's declaration makes clear that all of the factual materials he has considered have been disclosed.[4]

---

[3] Dr. Gundlach also related one instance where counsel and their staff assisted him by tallying up the number of retail locations covered by UST contracts with exclusionary features. Tr. at 85, lines 19-25; 86, lines 1-12. Dr. Gundlach relied on that tally - approximately 22,000 retail locations. The document underlying the count was provided to Defendants.

[4] Counsel in this case often received "rough drafts" of deposition testimony via e-mail from the court reporters weeks before the official copy, and such depositions may have been forwarded to Dr. Gundlach via e-mail for his consideration. Dr. Gundlach's consideration of these depositions has been disclosed to Defendants. See Attachments B & C.

Conclusion

Defendants' motion should be denied. A proposed order is attached.

Respectfully submitted,

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
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Todd & Evans, P.L.L.C.
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FAX - (202) 326-7999

Counsel for Plaintiffs

Dated: November 1, 1999

16diii002307

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CERTIFICATE OF SERVICE

I certify that on this 1st day of November, 1999, copies of the foregoing Opposition to Motion to Compel were sent by fax and overnight mail to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed
Ridley M. Sandidge, Jr.
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Benjamin A. Powell

16diii002308

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	JURY TRIAL DEMANDED

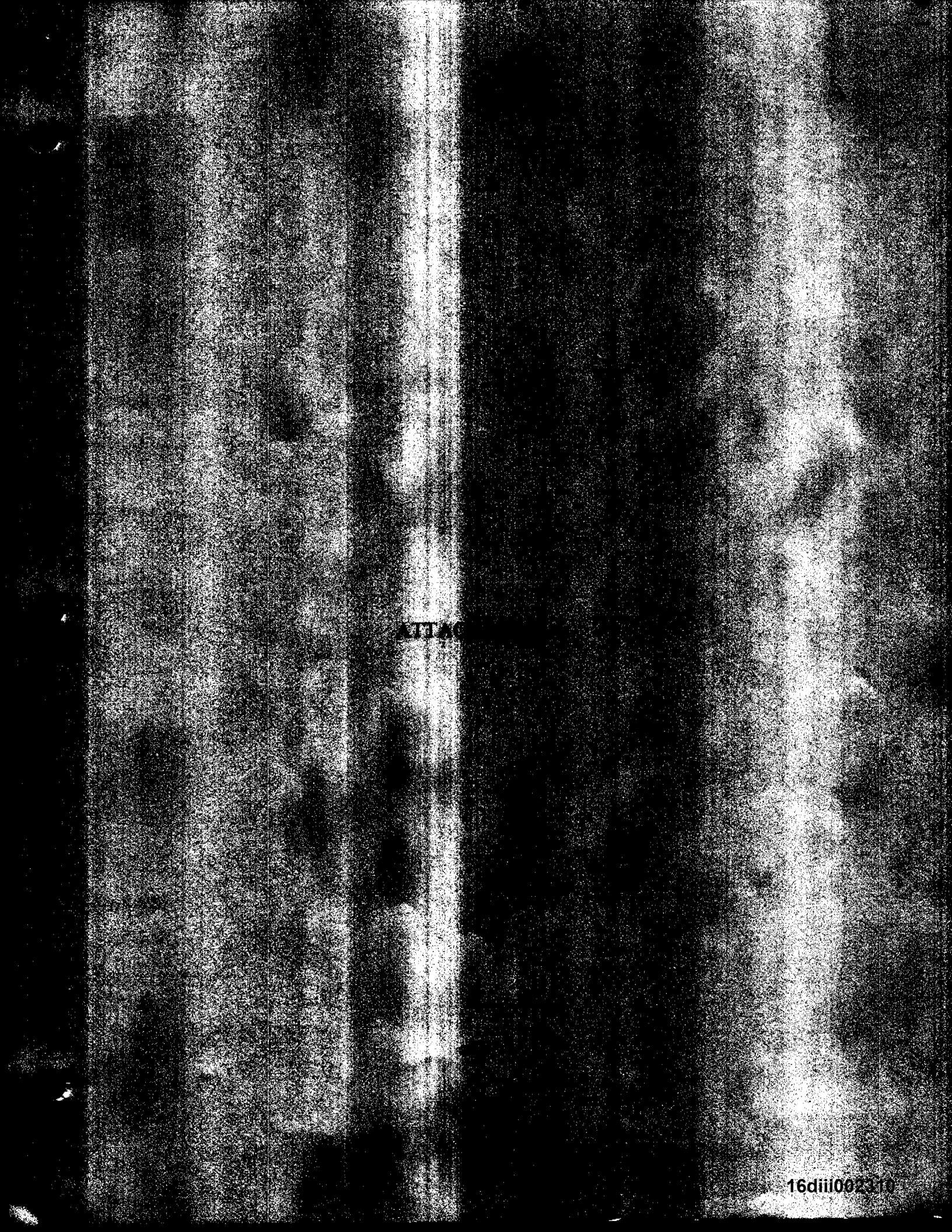
ORDER

Upon consideration of briefing and oral argument Defendants' Motion to Compel Production of Documents is hereby DENIED.

SO ORDERED.

Dated this ___ day of _____, 1999.

_____
HONORABLE JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE



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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

DECLARATION OF GREGORY T. GUNDLACH

1. I, Gregory T. Gundlach, am over the age of eighteen and make this declaration voluntarily. I am a professor at the College Business at the University of Notre Dame University. I have also been serving as an expert on behalf of Plaintiffs in the above- captioned matter. I make this declaration based on my personal knowledge and on review of documents that are under my custody and control.

2. On Friday, October 15, 1999, I gave a deposition in this matter in my capacity as an expert witness. At the deposition I was asked several questions regarding whether I had ever received materials created by or at the direction of counsel for Conwood that analyzed or summarized evidence in the case. In response to those questions, I stated that I may have such documents. I gave a qualified answer because at the deposition I was unsure about exactly what I had received in light of

the large volume of materials I have considered. In light of the ambiguity in my mind at the time, I decided it would be better to give a qualified answer than to state categorically that I had nothing responsive.

3. On Tuesday, October 19, 1999, Michael Guzman, counsel for Conwood, asked me whether I had in my files documents created by or at the direction of counsel that analyze or summarize evidence in the record or otherwise contain substantive discussions relating to my reports or potential testimony at trial. After searching my files, I responded that same day that I did not have any such materials, except for the analysis underlying the statement in my Rebuttal Report that United States Tobacco has exclusive agreements with retailers covering approximately 22,000 retail locations.

4. I understand that the analysis showing United States Tobacco exclusive agreements covering approximately 22,000 retail locations has been provided to Counsel for Defendants. I further understand that Counsel for Defendants have renewed their requests and are inquiring now whether I have any documents that were "created or caused to be created, by counsel for Plaintiffs that were sent to [me] and that summarize, characterize, or reference in any way, any record evidence in this case, including any documents and/or testimony." I also understand Defendants seek "all communications between Plaintiffs' counsel and [me] regarding [my] expert reports or potential testimony at trial."

5. I have reviewed my files again for information responsive to those requests. I have found nothing.

I hereby declare that the foregoing is true and correct under penalty of perjury.

Gregory T. Gundlach Date

ATTA

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August 20, 1999

Via Federal Express

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Matthew Barnett, Esquire
Jed Goldfarb, Esquire
Rachael Mariner, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Re: Conwood Co., et al. v. United States Tobacco Co., et al.

Dear Counsel:

We have your letter of August 9, 1999 requesting certain information related to our expert reports.

First, Professor Kamien has spent 30 hours on this matter to date; Professor Leftwich has spent 62.25 hours; Professor Popper has spent 64 hours; Professor Gundlach has spent 186.7 hours; and Professor Blattberg has spent 47 hours. The work of all experts is, of course, ongoing and we cannot determine the total number of hours each will ultimately spend on this case.

Second, all of our experts have been permitted access to the entire collection of documents and depositions in this case. Nonetheless, we asked them to identify any particular information they have considered to date. The results can be found in the attached binders; we have Bates-numbered these materials for your convenience (CWD-EXP 00001 through CWD-EXP 01135). With regard to your specific question about the 225 declarations "purportedly submitted by Conwood employees," I would refer you to documents already in your possession Bates-numbered CWD 1027001795 through CWD 1027005362.

Please feel free to call with any questions you might have about this matter.

Very truly yours,

COPY

Neil M. Gorsuch

cc: Richard C. Roberts, Esquire
John S. Reed, Esquire

ATTA

16diii00231

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October 13, 1999

COPY

Via Facsimile and Federal Express

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Jed Goldfarb, Esquire
Rachael Mariner, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Re: Conwood Co., et al. v. United States Tobacco Co., et al.

Dear Counsel:

Professor Gundlach has been permitted access to the entire collection of documents and depositions in this case. We asked him to identify any particular supplemental information he has considered to date. That list includes materials cited in his rebuttal report and is attached as Attachment "A". You will note that we have previously forwarded certain declarations bates-labeled CWD-EXP-00001136 through CWD-EXP-00001222.

Please feel free to call if you have any questions.

Very truly yours,

Benjamin A. Powell

cc: Richard C. Roberts, Esquire
John S. Reed, Esquire

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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October 15, 1999

Via Facsimile and Federal Express

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919 Third Avenue
New York, NY 10022

Re: Conwood Co., et al. v. United States Tobacco Co., et al.

Dear Counsel:

Professor Popper has been permitted access to the entire collection of documents and depositions in this case. We asked him to identify supplemental information he has considered to date. That list includes materials cited in his rebuttal report and is attached as Attachment "A". You will note that we have previously forwarded certain declarations bates-labeled CWD-EXP-00001136 through CWD-EXP-00001222. A declaration bates-labeled CWD-EXP-00001411-418 is attached as Attachment "B".

Please feel free to call if you have any questions.

Very truly yours,

Michael J. Guzman

cc: Richard C. Roberts, Esquire
John S. Reed, Esquire

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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October 25, 1999

Via Facsimile

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Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Re: Conwood Co., et al. v. United States Tobacco Co., et al. Supplemental Information Regarding Reports of Robert C. Blattberg

Gentlemen:

Enclosed is a supplemental list of materials considered by Robert C. Blattberg in connection with his reports. In addition, enclosed is an errata sheet for Dr. Blattberg's Rebuttal Report.

Please do not hesitate to contact me if you have any further questions.

Sincerely,

Michael J. Guzman

cc: Mark Hansen
Neil Gorsuch
Bill Conyngham
Robert C. Blattberg

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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October 26, 1999

Via Facsimile

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Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Re: Conwood Co., et al. v. United States Tobacco Co., et al. - Supplemental Information Regarding Reports of Morton I. Kamien

Gentlemen:

Enclosed is a supplemental list of materials considered by Morton I. Kamien in connection with his reports. In addition, enclosed is a Supplemental Report prepared by Dr. Kamien based on the data you provided us on September 21, 1999. We will file and serve the Supplemental Report today as well, but wanted you to have it as soon as it became available.

Please do not hesitate to contact me if you have any further questions.

Sincerely,

Michael J. Guzman

cc: Mark Hansen
Neil Gorsuch
Bill Conyngham
Morton I. Kamien

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COURTNEY SIMMONS ELWOOD

November 1, 1999

Via Federal Express

Jeffery A. Apperson
Clerk of the Court
322 Federal Building
501 Broadway
Paducah, KY 40202

Re: Conwood Company, L.P., et al. V. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Defendants' Motion to Compel Production of Documents

I have also enclosed an additional copy. Please date stamp and return this copy in the attached self-addressed, postage pre-paid envelope.

Thank you for your attention to this matter.

Respectfully,

Michael J. Guzman

Enclosures

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*** TX REPORT ***
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Neil M. Gorsuch
Geoffrey M. Klineberg
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Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: **The Honorable James D. Moyer**

FAX NO.: (502) 625-3949 **CLIENT NO.:** 97718

PHONE: (502) 625-3930

FROM: Neil M. Gorsuch
PHONE: 202-326-7978
DATE: August 11, 1999
RE:

Please find attached Plaintiff's Opposition to Motion to Compel Production of Documents schedule to be heard on November 2, 1999 at 11:00 a.m.

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OUR FAX # : (202) 326-7999

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GEOFFREY M. KLINEBERG
REID M. FIGEL
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SEAN A. LEV
COURTNEY SIMMONS-ELWOOD

FACSIMILE TRANSMISSION

TO: Bob Craddock
Eddie Foster

FAX NO.: **(901) 537-1010**

CLIENT NO.: 97718

FROM: Benjamin A. Powell
PHONE: (202) 326-7953
DATE: November 1, 1999
MESSAGE:

TOTAL NUMBER OF PAGES: 20 **(INCLUDING THIS SHEET)**

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THE INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS PRIVILEGED AND CONFIDENTIAL ATTORNEY INFORMATION INTENDED ONLY FOR THE USE OF THE ADDRESSEE. PERSONS RESPONSIBLE FOR DELIVERING THIS

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., ET AL. — PLAINTIFFS

vs. — NO. 5:98CV-108-R

UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC. — DEFENDANT

REPORT

The undersigned Magistrate Judge held a conference with counsel on November 2, 1999, in the court library, for the principal purpose of discussing the agenda for the upcoming settlement conference on November 18, 1999.

PARTICIPANTS:

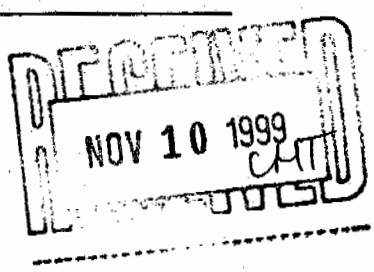
FOR PLAINTIFF: David Simpson, Edward J. Foster, Dick Roberts, Ben Powell, and Mark Hanson, counsel.

FOR DEFENDANT: Neal R. Stoll, Martha Weiss, and John Reed, counsel.

The settlement conference will begin at 9:30 a.m. (not 9:00 a.m.), and the Magistrate Judge has reserved the court library for the entire day for the conference.

In addition, the Magistrate Judge heard oral argument on the pending motion to compel filed by defendant UST with respect to information claimed to have been furnished through counsel to Conwood experts. The Magistrate Judge took the matter under advisement pending a teleconference with one of the experts, which has yet to be scheduled.

Date: 11/3/99



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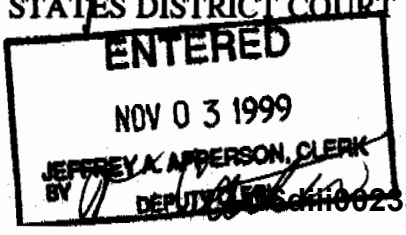

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Case No. 5:98CV-~~198~~-R

CONWOOD SALES COMPANY, ET AL

VS.

UNITED STATES TOBACCO COMPANY,
ET AL

ORDER

Counsel shall file with the Clerk of the Court the originals of any motions for summary judgment, responses and replies thereto, and shall forward copies (so marked), with exhibits, to the undersigned's Paducah Chambers, and to Judge Moyer's Louisville Chambers.

IT IS SO ORDERED.

This 11th day of November, 1999.

THOMAS B. RUSSELL, JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel
Judge Moyer

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

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CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

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MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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Counsel for Plaintiffs

November 15, 1999

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

There are two genuinely contested elements of plaintiffs' antitrust claim: (a) whether UST's[1] long-standing and multifaceted campaign of predatory and exclusionary acts — choking competitors' distribution channels through, e.g., coercive agreements and outright criminal acts — constitutes anticompetitive conduct remediable under Section 2 of the Sherman Act, 15 U.S.C. § 2, and, (b) if so, the amount of damages that Conwood suffered as a result of UST's conduct.

The other elements — specifically (a) definition of the relevant market as the United States market for moist smokeless tobacco ("moist snuff") and (b) UST's possession of monopoly

[1] Defendants are United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc., and UST Inc. (collectively, "UST"). Plaintiffs are Conwood Company, L.P. and Conwood Sales Company, L.P. (collectively, "Conwood").

power in that market — are so well-established (and effectively uncontested by UST) as to present no genuine issue of material fact.

Accordingly, it is in the interest of justice and sound judicial economy to grant Conwood's motion for partial summary judgment. (Point I, infra.) In addition, because UST will be unable to offer any proof to establish either liability or damages with respect to any of its counterclaims, the Court should also dismiss them under Federal Rule of Civil Procedure 56. (Point II, infra.)

Statement of the Case

UST springs from the American Tobacco Company, which engaged in decades of predation before being broken up by judicial decree, first in 1911, then again in 1946.[2] Steeped in this culture of antitrust abuses, UST continued to sustain its near-100% monopoly on moist snuff through anticompetitive acts and the erection of high barriers to entry. UST, for example, combined the promotion of cardboard cans (which promoted rapid product staleness) with refunds to retailers for unsold, stale product. To enter the market, therefore, any potential entrant had to be prepared to withstand crushing costs while its products were being introduced (and hence were slow in selling) to the public.

---

[2] United States v. American Tobacco Co., 221 U.S. 106 (1911); American Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1944), aff'd, 328 U.S. 781 (1946); American Tobacco Co. v. United States, 328 U.S. 781 (1946).

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In 1979, Conwood managed to break UST's stranglehold by first introducing its innovative Hawken™ brand in a plastic can — which preserved freshness longer and thereby reduced returns of stale product. Conwood also pioneered better value for the consumer by providing more tobacco (1.2 ounces versus the 1.0 ounce sold by UST) at a price competitive with UST's.

At first, UST tolerated Conwood as a small and insignificant competitor.[3] Several years ago, however, UST realized that innovative and "value priced" moist snuff sold by Conwood and the two other small competitors in the market[4] threatened its dominant market share and corresponding monopoly profits. UST had grown accustomed to decades of increasing prices (more than doubling the price in the last ten years)[5] and increasing profit margins (among the very highest of U.S. public companies).[6]

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[3] UST's internal documents establish that UST will tolerate a competitor gaining no more than 5% of the market before UST will begin a campaign of systematic exclusion. See, e.g., USTC/CWD 173407 ("5% market share is a point at which a serious response to Helme is warranted") (Exh. 1); USTC/CWD 173421 ("Competition . . . at what market segment share point should USTC respond? 5% Hold back until the[n]") (Exh. 1).

[4] There are four moist smokeless manufacturers of any size. In 1997, UST had approximately 78.1% of the total U.S. market; Conwood had 13.1%; Swedish Match of North America ("Swedish Match") had 3.3%; and Swisher International Group Inc. ("Swisher") had 4.4%. See USTC/CWD 028432 (Exh. 2).

[5] USTC/CWD 093837 (UST wholesale price per can was $1.00 in 1987, $2.06 in 1997) (Exh. 3).

[6] By its own forecast, UST has earned a gross profit margin in excess of a staggering 82% for more than a decade. USTC/CWD 032346 (showing UST yearly increase in gross margins from 82.6% in 1989 to 88.6% in 1997) (Exh. 4). This amounts to approximately $1 billion in 1998 profits. See John P. Renwick,

Afraid that unrestrained competition would erode its premium pricing and hence deflate its unparalleled profits, UST decided to use what it described as its "market power"[7] to stifle competition by (again, its own words) "eliminat[ing]" or "cutting competitive distribution" and taking competitors' advertising from stores.[8]

UST's scheme to abuse its acknowledged market power involved, among other things: (1) systematic and outright

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Morgan Stanley, U.S. Investment Research, UST (UST): Less Confidence in Earnings Outlook, Table 13 (Nov. 4, 1996) ("Morgan Stanley Report") (showing UST profit margins increasing between 1990 and 1995 and projecting further increases in 1996 and 1997) (CWD-EXP-00219) (Exh. 5); see also Merrill Lynch Capital Markets, Sept. 26, 1996 ("Merrill Lynch Report") ("UST boasts one of the highest profit margins and returns on assets in all of corporate America.") (CWD-EXP-00231) (Exh. 6); USTC/CWD 039384 (UST's employee handbook: "The Company has consistently ranked in the top 10 in return on assets and return on sales.") (Exh. 7).

[7] USTC/CWD 186414 ("80% market share gives UST 'market power'") (Exh. 8); USTC/CWD 052118 ("UST's market power enables this policy to exist") (Exh. 9); USTC/CWD 077474 ("Category management . . . plays to U.S. Tobacco's dominant market position. Our participation in this initiative would be beneficial to establish . . . control of the smokeless tobacco section in these [Winn Dixie] accounts.") (Exh. 10) (emphasis added to all).

[8] USTC/CWD 1144417 ("Chain Strategies" are to "Eliminate Comp[etitors] Distribution" and obtain "Exclusive Vending") (Exh. 11); USTC/CWD 215639 ("We [UST] stressed in our Department Meeting the importance of cutting competitive distribution. In many stores, especially supermarkets, distribution of competitive brands is much too high. . . .") (Exh. 12); see also USTC/CWD 075570 (UST "is the market leader for moist smokeless"; UST's category-management system will "benefit[] a market leader and will "use our . . . market position to dominate at retail") (emphasis added) (Exh. 13).

elimination of competitors' product "facings"[9] and point-of-sale advertising ("POS");[10] and (2) inducing retailers — through exercise of market power, false information, kick-backs of monopoly profits, and other inducements — to permit UST "exclusive vending" and "exclusive POS" with the same exclusionary effect.[11] By removing facings and POS — with or without consent — UST squelched competition from fast-growing brands that had not yet achieved a foothold in the market, and marginalized the few competitive brands that had gained acceptance (such as Conwood's Kodiak™). UST forced rivals to devote their resources to counteract the effects of UST's unlawful conduct, rather than actively promoting their products.

UST leveraged its "must carry" Skoal™ and Copenhagen™ to get stores to accede — wittingly or unwittingly — to UST's

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[9] Moist snuff is displayed in retail stores in a plastic rack. The rack typically contains multiple brands with each brand being fed into one or more gravity-fed slots or "facings" in the rack. See USTC/CWD 568166 (Exh. 14); USTC/CWD 529168 (Exh. 15).

[10] "Point-of-sale advertising" or "POS" are advertising materials that are displayed on or near the moist snuff rack. The principal form of POS is sometimes called a "header card." Because of heavy restrictions on almost all forms of tobacco marketing, POS advertising, which was always important, has now become the most effective means to communicate with consumers and to advertise the price advantages of the non-UST brands. See Blattberg Report at ¶¶ 13, 14.

[11] See, e.g., USTC/CWD 1144417 ("Eliminate Comp[etitors] Distribution" and obtain "Exclusive Vending") (Exh. 11); USTC/CWD 888480 ("exclusive UST vending and POS as part of the Customer Alliance Program") (Exh. 16); USTC/CWD 734373 ("UST exclusive vending") (Exh. 17); USTC/CWD 109185 ("Category Management" requires that "U.S. Tobacco has exclusive permanent point of sale placement.") (Exh. 18); USTC/CWD 556853 ("vendor exclusitivity"; "only POS allowed on our [UST's] vendors for competitive products will be the product vendor label.") (Exh. 19).

suppression of competition. For example, UST sought and obtained "vendor exclusivity" and exclusive POS in roughly 8,000 Wal-Mart and 7-11 stores.[12] This led to increases in sales for UST, even as UST prices continued to rise; at the same time, sales for UST's rivals fell sharply. Through these agreements, UST reduced overall sales of moist snuff.[13] Nor are Wal-Mart and 7-11 alone: UST has entered into such anticompetitive agreements with retailers and wholesalers that sell roughly 80% of UST's moist snuff.[14]

This multifaceted campaign of exclusion has been pervasive, systematic, and nationwide. Almost a dozen former UST sales representatives from across the country testified that they were trained — indeed pressured — to exclude competition by

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[12] USTC/CWD 025956 ("We have had a positive breakthrough . . . . [W]e won exclusive vending for all single can brands" at 7-11 stores) (Exh. 20); Chain Store Guide, Directory of Supermarket, Grocery and Convenience Store Chains 40, 982 (Bus. Guides Inc., Apr. 1999) (Exh. 21).

[13] A study by A.C. Nielsen Co., an independent marketing firm that surveys and publishes market share data relied on by competitors, indicates that, after the implementation of the UST/Wal-Mart agreement, overall unit sales decreased by 19%. CWD1011022966 (Exh. 22). The findings of that study were confirmed by former Wal-Mart employee, Waynell Renfro, who testified that, as a result of the UST's vending agreement, overall moist sales at Wal-Mart fell. Deposition of Waynell Renfro at 26-28 (Exh. 23).

[14] USTC/CWD 121118 (82.78% "locations signed to contract") (Exh. 24). The same words used by Judge Jackson in the recent antitrust case against Microsoft can be used against UST. "[UST] expends a significant portion of its monopoly power . . . on imposing burdensome restrictions on its [retailers and distributors] — and in inducing them to behave in ways — that augment and prolong that monopoly power." Findings of Fact ¶ 66, United States v. Microsoft Corp., Civil Action No. 98-1232 (D.D.C. Nov. 5, 1999) (Exh. 25).

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eliminating competitors' product racks, facings, and advertising. They received these instructions from UST's senior executives, including Executive Vice President Gary Milano.[15] Many other UST representatives have admitted to store employees and their Conwood counterparts that they were required by their supervisors to remove competitors' product racks and POS from stores.[16]

Despite a well-justified fear of UST retaliation, more than 55 retail-store employees have also provided sworn testimony and statements about repeated and pervasive acts of exclusion in their stores by UST sales representatives.[17]

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[15] Alan Hart, a former UST sales representative, testified that Gary Milano, then a regional manager, instructed Mr. Hart and approximately 125 other UST employees "to put the competitors' products in UST racks so that UST could control the shelf space and the advertising in the stores"; "to remove Conwood racks from the stores' shelves but not to remove the racks from the stores' premises"; and "to dominate the shelf space with UST racks in those areas where Kodiak was gaining market share." Deposition of Alan Hart at 28, 29 (Exh. 26). According to Mr. Hart, "Mr. Milano emphasized that when Conwood and other competitors lost their racks, they would lose their advertising." Id. at 28. Mr. Hart further testified that "UST executives from headquarters in Connecticut also attended these meetings and observed Mr. Milano giving these instructions." Id. at 29; see also id. at 31 ("Mr. Griffen [UST's Division Manager] also on occasion instructed me to remove Conwood's advertising banners and other point-of-sale materials.").

[16] See, e.g., Deposition of Joseph Marconi at 21 (former UST representative testifying that "I was simply following the orders from my immediate supervisor" by removing Conwood racks from stores) (Exh. 27); CWD1031035710 ("Mr. Wayne Harris reported that he saw a U.S.T. Rep. take our rack out of a Circle K store in his Territory this week. When Mr. Harris confronted the U.S.T. rep, about this the U.S.T. rep told Mr. Harris that he had been told to take out Conwood racks at retail accounts by people higher up.") (Exh. 28).

[17] Deposition of Gayleen Rusk at 17 ("Q. Can you remember how many times, approximately, the U.S. Tobacco representatives have removed Conwood racks without your approval? A. Every time he

Similarly, the Vice President of Sales and Marketing for Swedish Match has stated that, since 1994, "UST has acted to exclude competition from Swedish Match — and Timberwolf [Swedish Match's value-priced brand] — through a variety of tactics that, cumulatively, had the effect of limiting distribution to and effective communication with consumers and potential consumers of Swedish Match's moist snuff products."[18]

Conwood's sales representatives have testified that UST's campaign casts a shadow over everything they do. More than 240 of these representatives have routinely been thwarted in their efforts by the relentless campaign of exclusion carried out in

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came in.") (Exh. 29). See also Deposition of Bonita Townsend at 17 ("Q. How many times did the U.S. Tobacco representative come into your store and remove the rack containing Cougar? . . . . A. I would say at least four to five times. . . . in at least a three-month period.") (Exh. 30); Deposition of Robert Bales at 11 ("Q. How many times approximately . . . has [rack and POS removal] happened over the course of your employment? A. Oh, I'd say I've witnessed that at least half a dozen times.") (Exh. 31); CWD-EXP-00001145-222 (sworn declarations) (Exh. 32). An independent store owner also testified that UST's CEO, upon visiting the store, asked whether UST could pay the owner to discontinue competitors' brands. Deposition of Rob Engster at 21-29 (Exh. 33).

[18] Declaration of Harold Price ¶ 6 (Exh. 34); see also id. ¶¶ 10-18 (describing how "UST sales representatives frequently use false or misleading information . . . in efforts to convince the stores to permit exclusive UST vending"; UST "obtains exclusive vending and POS through formal written agreements"; "UST field representatives . . . systematically remove Swedish Match racks and POS at retail locations . . . [and] remove [Swedish Match] moist snuff products from the racks, bag them up, and leave them in the stock rooms or behind the counter"; and UST "exploits its dominant market position"; and concluding that UST's "exclusionary practices" have been "devastating for Swedish Match"; have limited "the growth potential of [Swedish Match's] innovative, value-priced brands"; and have "reduce[d] choices for consumers, restrict[ed] price competition (and thus lead[] to higher prices), and entrench[ed] UST's dominant market share").

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the field by UST's more than 600 representatives. This pervasive predation consumes the time and attention of Conwood's representatives, raises Conwood's costs, and substantially impedes Conwood's efforts to compete.

UST uses all of these tools for the purpose (in its words) of "provid[ing] a barrier to competitor entry in the moist smokeless market" and "support[ing] [UST's] market share expansion objectives."[19] Indeed, UST details in scores of documents its intention to exclude rivals by restricting distribution of competitors' products and advertising. UST's expert acknowledged that UST officials intended to pursue these activities in order to "control the retailer," fully expecting to succeed.[20]

When UST officials provided sworn testimony in this case, however, they could not recall even the simplest facts regarding what they had previously said and done.[21] The executives — with

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[19] USTC/CWD 052106 (Exh. 9); see also id. ("Protect our market share by creating barriers to competition").

[20] Deposition of David T. Scheffman at 311 (Exh. 35); see also id. at 300-01, 310-11, 313-14.

[21] UST's Manager of National Accounts, Timothy Entwistle, testified about a document that he admittedly authored as follows:

> Q. What did you mean when you said, "I will strongly demand attention by Wal-Mart on disciplines and actions"?
> A. I don't know.
> Q. You don't know what that means?
> A. No.
> Q. You go on to write, "If I'm the competition, I would take the same approach. [So let's] recognize this up front and be prepared to go to war." What did you mean by that?
> A. I really don't know, [counsel].

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notable uniformity — could not provide any information about what they thought, meant, or expected to accomplish through their expressed strategy of curtailing distribution and POS for rival brands of moist snuff.[22]

Q. Well, sitting here today, do you know what that means?
A. No.
Q. What does the phrase "prepare to go to war" mean to you?
A. I don't understand your question.

* * * *

Q. In the next sentence you write, "we have severely cut back on their ability to market products." What did you mean by that?
A. I don't know.

Deposition of Tim Entwistle at 305-09 (Exh. 36).

[22] For instance, when Gary Smith, the President of UST's Sales and Marketing subsidiary, was presented with a memorandum that he admittedly read and on which he admittedly wrote "excellent job," he claimed not to know what the words "exclusive vending" meant, as used by the author in reporting that UST "won exclusive vending for all single can brands" in 7-11 stores. Indeed, Mr. Smith testified that there was nothing in the entire memorandum (which also reported that UST should introduce a particular policy in order to "disrupt the competitive message and have the ability to dominate retail with [a] newly proposed" program, USTC/CWD 025956 (emphasis added)) that he understood. Deposition of Gary Smith at 422-26 & Exh. 11 (Exh. 37). UST's Executive Vice President of Sales, Gary Milano, had a similar problem with his recollection:

Q. . . . [S]itting here today, . . . what do you understand the words . . . "category management intensified (control competition/SOF equal SOM)" to mean?

* * * *

A. I don't know.
Q. Do you have any understanding of what those words mean?
A. No.

Deposition of Gary Milano at 151 (Exh. 38). See also Deposition of David Untiedt, UST, Director of National Accounts, at 104 (Mr. Untiedt claims that he "do[es]n't know" what "vendor exclusivity" means, although he concedes using the term in a memo) (Exh. 39);

While UST's senior managers now claim to have no idea what their own words meant, they previously boasted that their exclusionary tactics had worked. "We [UST] have severely cut back on [competing firms'] ability to market products."[23]

Not content with "go[ing] to war"[24] in the marketplace, UST also sought to enlist other tobacco companies and even Congress in the entrenchment of dominant tobacco firms at the expense of smaller firms. In the proposed Global Tobacco Settlement ("GTS"), UST was the only moist snuff producer involved in crafting a "voluntary proposal" to further narrow competitors' distribution channels through such devices as requiring that product racks be placed behind store counters — where space and visibility are limited — and further limiting advertising. In commenting upon the proposal (which ultimately failed), the FTC concluded that such devices were patently anticompetitive.[25]

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id. at 115-17 (Mr. Untiedt claims that he has "no idea" what "exclusive vending rights" or "exclusive POS" means).

[23] USTC/CWD 411723 (e-mail message from United States Tobacco Co.'s Manager of National Accounts, to United States Tobacco Co.'s Vice President for Sales, UST Inc.'s Executive Vice President for Sales, United States Tobacco Co.'s President, United States Tobacco Sales and Marketing Co.'s President, and dozens of regional managers) (Exh. 40).

[24] Id. (UST's Manager of National Accounts warns that UST must "be prepared to go to war" against its competitors) (Exh. 40).

[25] FTC, Competition and the Financial Impact of the Proposed Tobacco Industry Settlement 6, 23, 24-25 (Sept. 1997) (GTS provisions would "permit a range of anticompetitive conduct"; "mak[e] entry still more difficult"; "reduce competition in the industry and thus lead to higher prices"; "discourage entry" and "force many of the current small firms out of business, [thereby] eliminating the possibility that they could expand enough to affect pricing decisions by the major manufacturers"; "discourage

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UST's monopolization of the market has reduced moist snuff output, raised prices, and reduced choices for consumers,[26] and has also caused Conwood between $291 million and $483 million in damages.[27]

While UST disputes the prevalence and effect of its anticompetitive behavior, it cannot genuinely dispute that U.S. moist snuff is a relevant market or that UST has monopoly power in that market. With its distinct pricing, packaging, consumers, and production equipment, moist snuff is universally recognized as a distinct market by the industry (including UST), market researchers, and the FTC. Consumers of moist snuff simply do not switch to any other product in response to even substantial price increases — as would be expected if those products were ready substitutes. UST, with its more than 77% market share, is — in its words — "dominant."[28] It has repeatedly and consistently demonstrated its ability to raise prices to supracompetive levels. By definition, therefore, UST has monopoly power.

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entry and innovation, including the development of alternative products") (Exh. 81). Recognizing the anticompetitive nature of their effort, proponents of the GTS sought a broad antitrust exemption for their conduct. Id.

[26] See Kamien Report at ¶¶ 34, 37-39 (concluding that UST's practices have harmed the public by, among other things, causing higher prices, less output, and less information for consumers about competitive products, lower pricing, and promotions).

[27] Expert Report of Richard Leftwich at 11 (Aug. 2, 1999).

[28] USTC/CWD 932901 ("our dominant share of market") (Exh. 41).

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Argument

Summary judgment is appropriate where "'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" Humphress v. United Parcel Serv., Inc., 31 F. Supp. 2d 1004, 1009 (W.D. Ky. 1997) (quoting Fed. R. Civ. P. 56(c)), aff'd, 172 F.3d 48 (6th Cir. 1998) (Table), cert. denied, 119 S. Ct. 1576 (1999).[29] The Court may enter judgment on "all or any part" of a claim. Fed. R. Civ. P. 56(a) (emphasis added); Gooch v. E.I. du Pont de Nemours & Co., 40 F. Supp. 2d 857 (W.D. Ky. 1998) (granting partial summary judgment); Midwest Aluminum Mfg. Co. v. General Elec. Co., No. 4:90-CV-143, 1993 WL 724870, at *1 (W.D. Mich. Feb. 5, 1993) ("the same summary judgment standard under Fed.R.Civ.P. 56 applies" "[i]n evaluating a motion for partial summary judgment") (citing Boyd v. Ford Motor Co., 948 F.2d 283 (6th Cir. 1991)) (Exh. 42).

In Count I of its Complaint, Conwood alleges unlawful monopolization and attempted monopolization by UST, in violation of Section 2 of the Sherman Act. "The offense of monopolization under § 2 has two elements: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or

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[29] "The moving party must carry the initial burden by 'informing the district court of the basis for its motion' and identifying the matter that 'it believes demonstrate[s] the absence of a genuine issue of material fact.' . . . If the moving party meets its burden, the burden then shifts to the nonmoving party to present 'specific facts showing that there is a genuine issue for trial.' Fed.R.Civ.P. 56(e)." Humphress, 31 F. Supp. 2d at 1009.

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maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)); Byars v. Bluff City News Co., 609 F.2d 843, 849 (6th Cir. 1979) (same).[30]

Here, the first element — both relevant market (Point A) and UST's power in that market (Point B) — is so clearly proven by undisputed facts that Conwood is entitled to judgment as a matter of law.[31]

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[30] Plaintiffs must also prove "'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" Valley Prods. Co. v. Landmark, 128 F.3d 398, 402 (6th Cir. 1997) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)). To establish attempted monopolization, Conwood must prove that UST "engaged in anticompetitive conduct with a specific intent to monopolize and that there was a dangerous probability that the attempt would be successful." United States v. Dairymen, Inc., 660 F.2d 192, 194 (6th Cir. 1981). To prove there is a "dangerous probability of monopolization," Conwood must establish a relevant market and UST's "ability to lessen or destroy competition in that market." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[31] Courts have not hesitated to enter judgment on market definition and power in appropriate cases. See, e.g., In re Super Premium Ice Cream Distrib. Antitrust Litig., 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) (summary judgment that "relevant product market [wa]s all ice creams" and not "all frozen desserts"), aff'd sub nom. Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc., 895 F.2d 1417 (9th Cir. 1990) (Table); Remington Prods., Inc. v. North Am. Philips Corp., 717 F. Supp. 36, 43-44 (D. Conn. 1989) (summary judgment that market for electric shavers was a viable submarket for purposes of antitrust analysis), on reconsideration on other grounds, 755 F. Supp. 52 (D. Conn. 1991).

I. UST HAS MONOPOLY POWER IN THE MOIST SNUFF MARKET

UST has admitted that its "80% market share gives UST 'market power'" and that the company cannot "legally use that market power to prevent competition from selling their products."[32] UST has thus conceded that it has "monopoly power in the relevant market." Re/Max, 173 F.3d at 1016.

A. The Relevant Market Is Moist Snuff Sold in the United States

The relevant market is the "area of effective competition" within which a single firm holding a dominant share can raise prices above the competitive level without losing sales to other products. Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962); Smith v. Multi-Flow Dispensers of Ohio, Inc., No. 96-4185, 1999 WL 357784, at *3 (6th Cir. May 14, 1999) (Exh. 43). The relevant market "must be determined by reference to a product market . . . and a geographic market." Brown Shoe, 370 U.S. at 324.

1. Moist Snuff Is the Relevant Product Market

Moist snuff is the only tobacco product sold in significant quantities by UST.[33] It is also the only tobacco product that has grown in sales over the past decade, and is far and away the

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[32] USTC/CWD 186414 (Exh. 8).

[33] UST also sells a negligible amount of dry snuff, which constitutes, in UST's CEO's view, a "minuscule part of [UST's] business" — less than $10 million per year. See Deposition of Vincent Gierer at 133 (Exh. 44); Smith Dep. at 72-73 (Exh. 37). This constitutes less than 1% of UST's retail sales dollars. USTC/CWD 028426, 028432, 028436 (from NMR/USTC Marketing Research and Nielsen data) (Exh. 2).

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most profitable tobacco product.[34] UST's profit margins on this product make UST one of America's most profitable corporations.[35] There is no evidence that other companies or products constrain UST's ability to charge ever-increasing prices. As UST has stated, "UST is the pricing leader in the market — others will follow."[36]

"The essential test for ascertaining the relevant product market involves the identification of those products or services that are either (1) identical to or (2) available substitutes for the defendant's product or service." White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 500 (6th Cir. 1983).[37]

To apply that test, courts "'examin[e] such practical indicia as (1) industry or public recognition of the [market] as a separate economic entity, (2) the product's peculiar

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[34] FTC, 1997 Smokeless Tobacco Report, Tables 8A-8D, <http://www.ftc.gov/bcp/reports/smokeless97.htm> (Exh. 45); Gierer Dep. at 135 (Exh. 44); UST/CWD 40158A (p.7) (Gierer stating that moist is more profitable than loose leaf) (Exh. 46); CWD1037172265, CWD1037172267 (comparing products' profitability per linear foot)(Exh. 47).

[35] USTC/CWD 032346 (showing UST yearly increase in gross margins from 82.6% in 1989 to 88.6% in 1997) (Exh. 4); Merrill Lynch Report ("UST boasts one of the highest profit margins and returns on assets in all of corporate America.") (CWD-EXP-00228-41) (Exh. 6).

[36] USTC/CWD 052113 (agenda for a meeting of the steering committee, the members of which include UST's Senior Vice President of Finance and the now-President of UST) (Exh. 9).

[37] Stated differently, products are in the same market if consumers consider the products "reasonably interchangeable" one for the next or, in economic terms, if there is "a high cross-elasticity of demand" between them. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 400 (1956).

characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors.'" Id. at 501 (quoting Brown Shoe, 370 U.S. at 325).[38] Courts also consider barriers to entry and the cross-elasticity of supply. Virtual Maintenance v. Prime Computer, Inc., 11 F.3d 660, 665 (6th Cir. 1993).

In this case, all factors point to the same conclusion: the relevant product market is moist snuff.

a. Moist Snuff Is a Recognized Market

The moist snuff market is universally recognized as a distinct product market, by UST and others. UST regularly prepares internal reports estimating its share of this market.[39] Its business records plainly and regularly reference this market:

- "We [UST] have defined our market as round can snuff."[40]
- "the moist snuff market"[41]

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[38] This practical analysis is sometimes called the "submarket analysis." White, 723 F.2d at 500. This test, however, is not a new test in determining the relevant market for purposes of Section 2. Id. Rather, the submarket inquiry "merely adds new factors to [the traditional] test so as to more precisely define the market affected by the defendant's actions." Id.

[39] See, e.g., USTC/CWD 078583-84 (UST describes its "Market Share" or "% Share of Market" in 1996 as 80.7%, which was its market share in moist snuff) (Exh. 48).

[40] USTC/CWD 024922 (Exh. 49); Smith Dep. at 152 ("round can is moist snuff") (Exh. 37).

[41] USTC/CWD 920082 ("These 12 [brands] make-up 95.9% of the moist snuff market!") (Exh. 50); USTC/CWD 431863 ("UST management provided a thorough discussion of . . . the difficulties of the moist snuff market.") (Exh. 51); USTC/CWD 431895 ("[UST] senior

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- "the moist snuff industry"[42]
- "the total moist snuff market"[43]
- "whole market for moist snuff"[44]

UST executives habitually speak in terms of the moist snuff market.[45] See Ansell Inc. v. Schmid Lab., Inc., 757 F. Supp. 467, 472 (D.N.J.) (reference to market in parties' business plans supports finding of relevant market), aff'd, 941 F.2d 1200 (3d Cir. 1991) (Table).

And UST tells retailers that "[m]oist smokeless tobacco . . . is a distinct manageable group of products that consumers perceive to be interrelated and/or substitutable in

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management outlined . . . the competitive situation in the moist snuff market") (Exh. 52).

[42] USTC/CWD 052356 ("the moist snuff industry will grow an average of 2.5% - 3.0% annually over the next 3-5 years") (Exh. 53).

[43] USTC/CWD 1349445 (Exh. 54).

[44] USTC/CWD 431864 (Exh. 51).

[45] Milano Dep. at 15 ("Q. . . . [W]ould you like, as vice president of sales, to attain a hundred percent of the moist snuff market or, conversely, is there some number short of a hundred percent that you want to stop at? A. . . . No, I wouldn't — I would not want to have a hundred percent of the market. And what I would like to do is hold share.") (emphasis added) (Exh. 38); id. at 31 (UST's "market research" division includes "[a]nalysts who look at the market" for moist snuff); id. at 9 ("Q. Is there competition in the moist snuff market? A. Yes."); id. at 11 ("Q. . . . [I]s reviewing or looking at data or numbers regarding who has what market share in the moist snuff market something you do in your work as vice president of sales? A. Yes."); Smith Dep. at 152, 339 (Exh. 37).

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meeting a consumer need."[46] This is the legal definition of a relevant product market. See White, 723 F.2d at 500.

What UST does, as well as what it says, reveals that moist snuff is a distinct market. UST pays retailers to collect and report relevant sales data. Tellingly, UST requires information only on sales of moist snuff. It makes no effort to obtain similar sales data from retailers for any other product.

UST's view of the relevant market is shared by competitors, outside market researchers, and government regulators. For example, Swedish Match (the third ranking producer) considers moist snuff to be a distinct market.[47] Nielsen tracks "moist snuff" as a distinct market.[48] See Ansell, 757 F. Supp. at 472 (the fact that Nielsen "maintains its data separately for sales of latex condoms to U.S. retail outlets" "support[s] the proposition that the industry participants view this as an economically distinct market segment"); Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250, 1263 (E.D. Pa. 1987) (same). And the FTC recognizes "moist snuff" to be a distinct

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[46] USTC/CWD 101816 (Exh. 55).

[47] Price Decl. ¶¶ 3, 4, 6 (Exh. 34).

[48] See, e.g., USTC/CWD 335391 (referring to Neilsen presentation solely on "Moist Smokeless") (Exh. 56); USTC/CWD 095106-09 (A.C. Nielsen moist snuff "can sales" for UST and "competition") (Exh. 57). Consistent with Nielsen, a marketing firm retained by UST stated that, at the UST national sales meeting, "we want to . . . make sure [the sales reps] view the moist [snuff] market as USTC territory." USTC/CWD 041571 (emphasis added) (Exh. 58).

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market: for years it has prepared a biennial report to Congress on developments in the "moist snuff market."[49]

b. Moist Snuff's Peculiar Characteristics, Including Specialized Vending, Set It Apart from Other Products

It is undisputed that moist snuff has peculiar characteristics that distinguish it from other tobacco products.[50] Moist snuff, alone among tobacco products, is sold in a round, flat can; the cans, again unlike any other product, are displayed on their sides in gravity-fed dispensers for retail sale.[51] As UST has stated, moist snuff also "requires a different system of handling and replenishment" and "differen[t]"

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[49] FTC, Report to Congress for the Years 1996 and 1997, Pursuant to the Comprehensive Smokeless Tobacco Health Education Act of 1986, at 7 (1999) ("FTC 1999 Report") ("U.S. Tobacco reportedly controlled 78% of the moist snuff market in 1997, compared to its closest competitor, Conwood, which reportedly had 14% of that market.") (Exh. 59); FTC, 1997 Smokeless Tobacco Report § 4.1 ("In the market of moist snuff . . . ."), <http://www.ftc.gov/bcp/reports/smokeless97.htm> (Exh. 45).

[50] "[M]oist smokeless" tobacco is "[a]vailable in fine & long cut as well as portion packs" and is "produced in natural or flavored varieties." In contrast, loose leaf or plug chewing tobaccos are "[a]vailable in long leaf or pressed plugs," while dry snuff is "powdered, dry tobacco products designed to be inhaled (snorted) or dipped." Cigars are "smokable products, produced with natural leaf or homogonized tobacco wrappers." Pipe/smoking tobacco products are "medium cut tobacco products designed to be pipe smoked or hand rolled into cigarettes." USTC/CWD 257945-46 (Exh. 60).

[51] See USTC/CWD 257945 (loose leaf and plug are "sold in single pouches or multi-packs") (Exh. 60); USTC/CWD 257946 (dry snuff is sold in [tall] round tins) (Exh. 60); id. (cigars are "available in mini and large sizes and packaged in small packs (4 or 5 count) or boxes"); id. (pipe or smoking tobacco is "sold in pouches and air-tight containers").

"vending" and "merchandising" than other forms of tobacco.[52] Ansell, 757 F. Supp. at 473 (distribution and "packaging differences do distinguish . . . products" and help define the relevant market).

c. Moist Snuff Requires Specialized Production Equipment and Facilities

It is similarly undisputed that the equipment used to produce and package moist snuff is separate and distinct from that used for other tobacco products.[53] See United States v. Mrs. Smith's Pie Co., 440 F. Supp. 220, 228-29 (E.D. Pa. 1976) (distinctive equipment supported finding of relevant market); Ansell, 757 F. Supp. at 473 ("requirement of additional packaging equipment is sufficient to differentiate the production facilities").

d. Moist Snuff Has Distinct Customers

UST recognizes, and instructs its sales representatives to educate retailers, that "the moist smokeless consumer" has "unique characteristics" that set him or her apart from the user of pipes, cigars, or other tobacco.[54] In addition, far more

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[52] USTC/CWD 101822 (Exh. 61) ("moist smokeless is a category in and of itself" and should not be "lump[ed] . . . in with the OTP [other tobacco products]"; "perishability of moist snuff requires a different system of handling and replenishment").

[53] Affidavit of Robert Krauch ¶ 7 (Conwood Vice President, Manufacturing) (Exh. 62).

[54] USTC/CWD 101822 (Exh. 61). The demographic profile of the typical moist snuff consumer differs from that of consumers of other tobacco products. Moist snuff users, for example, tend to be younger than users of loose leaf and cigarettes, are less

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consumers use moist snuff than use any other smokeless tobacco product.[55] See International Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 250 (1959) (difference in number of viewers supported court's finding that relevant market was championship boxing contests and not all professional boxing events).

e. Moist Snuff Has Distinct Pricing and Profits

There is no evidence that UST — or any other moist snuff producer — considers the price of any other product in setting prices for moist snuff. See Mrs. Smith's, 440 F. Supp. at 229 (lack of consideration of other product prices supported court's finding that relevant market was frozen dessert pies).

The empirical evidence, moreover, demonstrates that moist snuff prices have increased dramatically over the last ten years, while the prices of other tobacco products have increased at a much slower pace.[56] And profit margins on moist snuff far exceed

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likely to be African American or Hispanic, are more likely to be employed full time, and are concentrated in different regions of the country. USTC/CWD 028314-15 (Exh. 63); CWD1004010751-55 (median age of moist snuff users is 35 years old and median age of loose leaf user is 45 years old; 43% of moist snuff users are in southern regions while 67% of loose leaf users reside there) (Exh. 64).

[55] See, e.g., USTC/CWD 028426 (comparing 1996 and 1997 dollar sales for moist snuff, loose leaf, plug, dry, and twist) (Exh. 2); FTC, 1997 Smokeless Tobacco Report, Tables 8A-8I, <http://www.ftc.gov/bcp/reports /smokeless97.htm> (Exh. 45) (for years 1986 to 1995; using FTC data to compare sales of moist snuff, dry snuff, plug/twist, and loose leaf).

[56] FTC, 1997 Smokeless Tobacco Report, Tables 8A-8D <http://www.ftc.gov/bcp/reports/smokeless97.htm> (Exh. 45);

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those of loose leaf, dry snuff, plug, twist, or any other tobacco product — indeed, moist snuff profits exceed those of any analogous consumer product.[57] See id.; International Boxing, 358 U.S. at 250 (higher pricing to consumers and higher profits for defendants on championship boxing matches supported relevant market limited to championship boxing contests).

f. Consumers Have Not Been Sensitive to Regular Price Increases in Moist Snuff

Despite substantial annual UST price increases,[58] users of moist snuff have not responded by switching to other products.[59] UST sales volume has continued to increase, year after year.[60]

USTC/CWD 032339-40 (Exh. 65).

[57] UST's gross profit margin has been greater than 82% for the past ten years. USTC/CWD 032346 (showing UST yearly increase in gross margins from 82.6% in 1989 to 88.6% in 1997) (Exh. 65). Such margins are among the highest — if not the highest — reported by any U.S. public company. Merrill Lynch Report ("UST boasts one of the highest profit margins . . . in all of corporate America.") (CWD-EXP-00228-41) (Exh. 6). Margins on other tobacco products, such as loose leaf, are far less impressive. See Gierer Dep. at 134-35 (confirming that the "profit margins" are "substantially higher in moist" than loose leaf) (Exh. 44); UST/CWD40158A (at 7) (same) (Exh. 46).

[58] For example, UST increased wholesale prices per can 106% from 1987 through 1997, for an average yearly increase of just under 8%. USTC/CWD 028565-66 (Exh. 66). For the period from 1989 through 1994, UST's price increases averaged 9.3% per year. USTC/CWD 106965 (Exh. 67). Despite these substantial and regular price increases, consumers have tended not to switch to other forms of tobacco.

[59] Expert Report of Morton I. Kamien ¶ 17 (Oct. 1, 1999).

[60] USTC/CWD 118338 (Exh. 68); USTC/CWD 077603 (Exh. 69). UST's price increases, for example, have caused no material switch to loose leaf. While moist snuff prices climbed dramatically during the 1990s, prices of loose leaf climbed only half as fast. Yet, during this period, consumption of moist snuff increased while

UST recognized that it had the power to increase prices for moist snuff without losing sales to other products. It commissioned a study based on Nielsen data to determine price elasticity.[61] The study concluded that "the moist smokeless business is price inelastic or price insensitive — i.e., the percentage change in price (up or down) will result in a lower percentage change in sales."[62] As UST has observed, "pricing does not influence [the] ordering behavior" of UST's customers.[63]

g. Moist Snuff Has High Barriers to Entry and Corresponding Low Cross-Elasticity of Supply

"The relevant market cannot be determined without considering the cross-elasticity of supply." Virtual Maintenance, 11 F.3d at 665. Cross-elasticity of supply considers "the extent to which producers of one product would be

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consumption of loose leaf fell — directly contrary to what would have occurred if consumers had switched from moist to loose leaf in response to the moist price increases. The same is true for all other forms of smokeless tobacco. FTC, 1997 Smokeless Tobacco Report, Tables 8H-8I, <http://www.ftc.gov/bcp/reports/smokeless97.htm> (Exh. 45); Kamien Report ¶¶ 17, 20. See also Gierer Dep. 108-09 (despite increasing prices, no loss in sales volume in ten years except for possible drop of 1/2% in 1997) (Exh. 44).

61 USTC/CWD 189496-542 (Exh. 70).

62 USTC/CWD 189497 (emphasis added) (Exh. 70).

63 USTC/CWD 052113 (Exh. 9). This UST conclusion is fully supported by the empirical evidence and echoed by industry analysts and executives. See USTC/CWD 431882 (industry analyst agrees that "[m]oist snuff users are generally price insensitive") (Exh. 71); Price Decl. ¶¶ 1, 3 (Senior Vice President of Swedish Match and a 17-year veteran of the tobacco industry: "consumers of moist snuff do not switch to other forms of smokeless tobacco (for example, loose leaf) in response to price increases of moist snuff" (Exh. 34).

willing to shift resources to producing another product in response to an increase in the price of the other product." AD/SAT v. Associated Press, 181 F.3d 216, 227 (2d Cir. 1999). Here, there has been no entry in response to UST's ever-increasing prices and remarkable profits. Two tobacco giants — R.J. Reynolds and Brown & Williamson — tried and failed, and no one has even tried to enter since 1991.[64]

This failed entry (as well as the lack of any new entry) is explained by the barriers to entry that define the moist snuff market. See Mrs. Smith's, 440 F. Supp. at 229 (barriers to entry, which may be proved by an "unsuccessful attempt . . . to enter," are "'practical indicia'" of the relevant market) (quoting Brown Shoe, 370 U.S. at 325); Ansell, 757 F. Supp. at 474-75 (failures evidence entry barriers).

These barriers take many forms. First, government regulation, tobacco litigation, and general anti-tobacco sentiment make the moist snuff market — high profits

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[64] Expert Report of David T. Scheffman ¶¶ 27-28; Gierer Dep. at 163 (Exh. 44); USTC/CWD 145051, 163106, 163112 (Exh. 72). Brown & Williamson's entry failed even though it already has a strong foothold in smokeless tobacco. It is the third largest supplier of plug and the fourth largest supplier of dry snuff. John C. Maxwell, The Maxwell Report -- The Smokeless Tobacco Industry in 1998, Table 3 (Mar. 31, 1999) (CWD-EXP-00074-75) (Exh. 73). Swedish Match in 1990 acquired an existing moist snuff manufacturer, Pinkerton. To the extent other firms have begun to sell moist snuff since that time, they constitute less than 1/3 of 1% of the market, id., CWD-EXP-00071, and are apparently irrelevant to UST in any event, see Smith Dep. at 51-54 ("Q. As vice president of sales, were you interested in who was selling moist snuff to the public? A. Not really. . . . Q. Did U.S. Tobacco follow what its competitors did in the marketplace . . . ? A. I don't ever remember doing that.") (Exh. 37).

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notwithstanding — forbidding. UST's CEO testified that entry by a domestic firm not already producing tobacco products is "highly unlikely."[65] Second, entry would require substantial investments of time and money. There is a limited supply of Dark Fire Tobacco Leaf — the tobacco used to make moist snuff.[66] In addition, a new entrant would need at least two years of preparation (and tens of millions of dollars) to purchase specialized equipment and to allow the tobacco to age before it could expect to sell a product.[67] A prospective entrant would also be required to spend substantial sums on product testing, formula development, and marketing.[68] See United States v. Ivaco, Inc., 704 F. Supp. 1409, 1416 (W.D. Mich. 1989) ("[f]irms in related industries could not quickly enter . . . to discipline a significant price increase, because entry . . . would require an extensive investment in research and development as well as production facilities").

Third, UST's dominance of advertising and distribution raise more daunting barriers. As the Supreme Court has observed, in tobacco "advertising . . . is . . . a widely published warning

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65 Gierer Dep. at 160 (Exh. 44).

66 Government regulators limit the amount of Dark Fire that can be produced in a given year, and each year the supply of usable tobacco is essentially depleted. Therefore, a new entrant would have to compete with existing manufacturers to acquire even a small amount of tobacco to begin production. Krauch Aff. ¶ 3 (Exh. 62).

67 Id. ¶¶ 6-8.

68 Id. ¶ 8.

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that [a monopolist] possess[es] and know[s] how to use a powerful offensive and defensive weapon against new competition. New competition dare not enter such a field, unless it be well supported by comparable national advertising." American Tobacco, 328 U.S. at 797. Even though federal and state regulations have sharply curtailed tobacco advertising — and consequently made it more difficult for a new entrant to win customers — UST has asserted its dominance here as elsewhere. It consistently spends more than $65 million per year on advertising.[69] And, through its exclusionary conduct, it has obtained a choke-hold on the single most effective form of advertising for moist snuff: POS.

UST's effective campaign to eliminate the distribution and advertising of rival firms is more chilling still. Through its "category management" ruses, UST has achieved the complete exclusion of brands that have not yet achieved a substantial market share — including new and growing brands.[70] By demanding that its "share of fixture" equal or exceed its share of market, and by inducing retailers to restrict the total number of brands carried in the store, the entrenched monopolist has served notice to new entrants that it will be difficult and costly to get their

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[69] UST Inc., SEC Form 10-K, Table of Advertising Costs (SEC filed Mar. 12, 1999), <http://www.ustshareholder.com> (Exh. 74); see also UST Inc., SEC Form 10-K, Table of Advertising Costs (SEC filed Mar. 17, 1997), <http://www.ustshareholder.com> (years 1995-1999)(Exh. 75).

[70] USTC/CWD 513582 (UST sales rep describing proposal to limit moist snuff to 14 brands (12 of which belonged to UST) and delete 18 brands (16 of which belonged to UST's competitors)) (Exh. 76); USTC/CWD 254331 (UST rep reporting that "[i]f all goes as planned we will . . . have exclusive vending") (Exh. 77).

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products on store shelves. Even if they make it to the shelves, new brands can expect only to sit unnoticed where UST has obtained "POS exclusivity." All this is "further [to] emphasize the effectiveness of a well financed monopoly in this field against potential competitors if there merely exists an intent to exclude such competitors." American Tobacco, 328 U.S. at 797.

That "intent to exclude" plainly exists. UST has an announced "[b]usiness [s]trateg[y]" to "[p]rotect our market share by creating barriers to competition."[71] It has, for example, stated its goal to "[s]top the growth" of competitors' price-value brands "in order to protect our market share (80%)."[72] And it has instituted policies that create "barrier[s] to competitor entry in the moist smokeless market," barriers designed to "support[] [UST's] market share expansion objectives."[73]

It is telling that UST has not even attempted to define a relevant market other than moist snuff. Its expert offers a critique of the market analysis performed by Professor Morton Kamien of Northwestern University and Dean Edward Popper of

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[71] USTC/CWD 052106 (emphasis added) (Exh. 9).

[72] USTC/CWD 078578 (agenda for November 1996 meeting of UST Strategic Planning Session stated goal to "[s]top the growth of P/V [price-value] in order to protect our market share (80%)" and "[k]eep P/V at under 12% market segment share (currently 7.5%)") (Exh. 48).

[73] USTC/CWD 052106 (Exh. 9).

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Bellarmine College, but has steadfastly refused to offer any alternative definition.[74]

2. Geographic Market Is the United States

The relevant geographic market is the "'area of effective competition.'" White, 723 F.2d at 501 (quoting Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961)). That area is "'charted by . . . select[ing] . . . the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.'" Id. (quoting Tampa Elec., 365 U.S. at 327); see also Re/Max, 173 F.3d at 1016 (the geographic market "is the locale in which consumers of a product or service can turn for alternative sources of supply").

Applying that rule, the geographic market in this case is the United States. UST and other suppliers of moist snuff distribute their products across the country; purchasers can turn to a supplier in any area of the country to obtain an alternative source of supply.[75] UST proclaims itself "as a national company"[76] and adheres to a "pricing strategy of nation-wide delivered pricing."[77] Because "[p]roducers of [moist snuff]

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[74] Scheffman Report ¶ 243; Scheffman Dep. at 297-98 (Exh. 35).

[75] See, e.g., USTC/CWD 049909-36 (showing UST's "ship-to" locations and distributors throughout the United States) (Exh. 78).

[76] USTC/CWD 173406 (Exh. 1); see also USTC/CWD 173416 ("USTC is a national company") (Exh. 1).

[77] USTC/CWD 052112 (Exh. 9); see also USTC/CWD 052103 ("National delivered pricing to customers") (Exh. 9); USTC/CWD 052115 ("Product-based national pricing") (Exh. 9); USTC/CWD

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compete for customers throughout the United States, and [UST] sell[s] [its moist snuff brands] nationally," "the entire country is a proper geographic market." Mrs. Smith's, 440 F. Supp. at 230 (citing United States v. Pabst Brewing Co., 384 U.S. 546 (1966)); see also Brown Shoe, 370 U.S. at 328 ("relevant geographic market is the entire Nation" because "[t]he relationships of product value, bulk, weight and consumer demand enable manufacturers to distribute their shoes on a nationwide basis"). UST has not even attempted to contend otherwise.

B. UST Has Monopoly Power in the Moist Snuff Market

UST has admitted that its "80% market share gives UST 'market power.'"[78] UST also understands that its monopoly power "means [that it] cannot legally use that market power to prevent [the] competition from selling their products."[79]

"There are two ways to establish . . . that [UST] holds monopoly power. The first is by presenting direct evidence

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407885-945 (1998 UST Field Sales Directory showing UST sales representatives by region and demonstrating national coverage) (Exh. 79).

[78] USTC/CWD 186414 (Exh. 8); see also USTC/CWD 052113 ("UST's market power enables this policy to exist.") (Exh. 9). "'Market power' is a synonym for 'monopoly power.'" International Distrib. Ctrs., Inc. v. Walsh Trucking Co., 812 F.2d 786, 791 n.3 (2d Cir.), cert. denied, 482 U.S. 915 (1987).

[79] USTC/CWD 186414 (Exh. 8). Yet that is precisely what UST has done — it has prevented its competitors from freely advertising and effectively distributing their products and has erected barriers to prevent new entry into the moist snuff market. The extent and effect of UST's anticompetitive conduct will be the focus of trial. For purposes of this motion, the relevant issue is UST's admission that it has "market power," and the objective evidence that substantiates that admission.

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'showing the exercise of actual control over prices or the actual exclusion of competitors.' The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market." Re/Max, 173 F.3d at 1016 (internal citation omitted) (quoting Byars, 609 F.2d at 850).

"In recent years, parties and courts have increasingly moved toward utilizing the circumstantial method as a 'shortcut.'" Id. However, the Sixth Circuit has cautioned that "this does not undercut the continued viability of the first avenue of establishing monopoly power." Id. UST's exclusionary conduct has shaped a market in which UST can consistently charge — and has consistently charged and sustained — prices far above the competitive level. UST thereby has, in its words, "define[d] the market" for moist smokeless tobacco.[80] See Virtual Maintenance, 11 F.3d at 665 ("true market power" is the "power sufficient to change and sustain anticompetitive prices").

1. UST's Current 77% Market Share Establishes Its Monopoly Power

The Supreme Court has stated that, if a manufacturer produces "almost 75%" of a product sold in the United States, "it may be assumed it does have monopoly power over that 'market.'" E.I. du Pont, 351 U.S. at 379, 391; PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 821 (6th Cir.) ("the Supreme Court has concluded that . . . over two-thirds of the market . . .

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[80] USTC/CWD 052114 (Exh. 9); see also USTC/CWD 024922 ("We [UST] have defined our market as round can snuff.") (Exh. 49).

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constitute[s] monopoly power under § 2"), cert. denied, 520 U.S. 1265 (1997).

It is undisputed that UST manufactured at least 77% of the moist snuff sold in the United States in 1998.[81] UST has sustained that self-proclaimed "dominant share of the market" for decades.[82] This evidence is itself conclusive; the Court should find that UST holds monopoly power as a matter of law.

2. UST Has the Power To Control Prices

"[E]vidence that the defendant has actually exercised price leadership control over the industry" "can be particularly compelling evidence that [the defendant] has monopoly power."[83] See Re/Max, 173 F.3d at 1018 (plaintiff can "'show[] monopoly power [by] marshal[ling] evidence showing the exercise of actual control over prices'") (quoting Byars, 609 F.2d at 850). Such evidence is irrefutable in this case. UST has boasted about its "price leadership" in just those words. "UST is the pricing

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[81] Scheffman Report, Attach. 14.

[82] USTC/CWD 932901 (UST Chain Accounts Manager informing UST Director of National Accounts that, "because of our dominant share of market, customers look to us for leadership") (Exh. 41). From 1978 to 1998, UST's market share remained between 77% and 97%. Id.

[83] William C. Holmes, Antitrust Law Handbook § 2.03[2] (1999 ed.).

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leader in the market — others will follow."[84] "UST pricing 'leads' and defines the market."[85]

Every January 1 and July 1 since at least 1989, UST has, like clockwork, raised prices on its moist snuff products.[86] These increases have been exacted without reference to external factors, and have always exceeded any increase in the consumer price index. A 1996 analyst report shows that, between 1990 and 1996, UST imposed an average increase in the price of a can of moist snuff of about 8.2% per year.[87]

UST's ability to earn unusually high profits, year after year, provides still further evidence of monopoly power. The prices set by UST have provided the company with profits almost unimaginable for any other U.S. public company. According to the latest annual statistics, UST's profit margin exceeds 84.8%, compared to an S&P 500 average of 47.8% and a tobacco industry average of 29.3%.[88] Such UST profit, sustained for more than a

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[84] USTC/CWD 052113-14 (UST steering committee meeting agenda states that "UST does not 'deal' on its product's prices, we don't have to . . . . UST is the pricing leader in the market — others will follow.") (Exh. 9).

[85] USTC/CWD 052114 (Exh. 9).

[86] See, e.g., USTC/CWD 032339-40 (Exh. 65).

[87] Morgan Stanley Report, Table 5 (CWD-EXP-00211) (Exh. 5).

[88] See <http://www.moneycentral.msn.com/investor/invsub/results/compare.asp?Symbol=ust&Page=ProfitMargins&iPage=qd> (gross margins) (Exh. 80). UST has a pre-tax margin of 49.9%, compared to 10.6% for the S&P 500 and 12.2% for the tobacco industry. Id.; see also id. (UST net profit margin of 30.9% for UST, 7.2% for the S&P 500, and 7.3% for the tobacco industry); Morgan Stanley Report (UST gross margin of 80%, Philip Morris 50%, and RJR Nabisco 54%) (CWD-EXP-00207) (Exh. 5).

decade, prove that "competition must be weak or absent, because it has failed to force price down to cost (including in 'cost' a reasonable return on investment)." In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 603 (7th Cir. 1997) ("power to raise price above cost without losing so many sales as to make the price rise unsustainable" is evidence of "monopoly power"), cert. denied, 118 S. Ct. 1178, 1336 (1998); see also Garot Anderson Mktg., Inc. v. Blue Cross & Blue Shield United, 772 F. Supp. 1054, 1059 (N.D. Ill. 1990) ("finding of monopoly power may be based on a showing that Defendants realize profits consistently in excess of those found generally in the economy") (citing United States v. Aluminum Co. of Am., 148 F.2d 416, 426 (2d Cir. 1945) (L. Hand, J.)); Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 695 (10th Cir. 1989) ("One measure of the degree of market power is the persistence of a firm's ability to profitably charge monopoly prices."), cert. denied, 498 U.S. 972 (1990). UST's ability to charge undeniably supracompetitive prices is, by definition, market power. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde,

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UST's operating margin on moist snuff increased every year between 1990 and 1996, rising from 56.0% to 63.1%. That is, the evidence shows that UST consistently increased its prices by more than its operating costs during an extended period of time. During this period, UST's operating margin increased by 12.7% (i.e., (63.1-56.0)/56.0). The 1996 analyst report forecast that UST would be able to continue to increase its operating margin, from 63.1% in 1996 to 63.7% in 1997 and 64.3% in 1998. See Morgan Stanley Report, Table 5 (CWD-EXP-00211) (Exh. 5). UST's return on assets in its tobacco division was reported to have ranged between 120.3% and 168.0% between 1990 and 1996 (moist snuff accounted for almost all of UST's tobacco sales). Id.

466 U.S. 2, 27 n.46 (1984) ("As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market.").[89]

II. BECAUSE UST CANNOT OFFER ANY EVIDENCE TO SUPPORT ITS COUNTERCLAIMS, THEY SHOULD BE DISMISSED

UST asserted five counterclaims against Conwood.[90] All five allegedly stem from misconduct by Conwood sales representatives, similar to the misconduct alleged in support of Conwood's claims against UST. UST developed no evidence through discovery to support these me-too claims. It has failed to list a single witness with personal knowledge of any claimed actionable misconduct by Conwood; and it cannot claim damages from any such alleged misconduct. For both of these reasons, the counterclaims should be dismissed.

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[89] UST's intent and ability to exclude competitors — a third way to prove monopoly power — is equally clear. See Re/Max, 173 F.3d at 1016 (monopoly power can be established through "direct evidence showing . . . the actual exclusion of competitors" (internal quotation marks omitted). As explained in Part I(A)(1)(g), supra, UST has successfully executed its "business strategy" to create "barriers to entry" and to exclude competitors from the moist snuff market and thereby "protect its market share." USTC/CWD 052106 ("Protect our market share by creating barriers to competition") (Exh. 9); see also id. (UST activities "provide a barrier to competitor entry in the moist smokeless market" and "support [UST's] market share expansion objectives").

[90] Violation of Section 43(A) of the Lanham Act (Count I); Tortious Interference with Contract and Prospective Advantage (Count II); Violation of Kentucky Revised Statute Section 365.050 (Count III); Product Defamation (Count IV); and Conversion/Trover (Count V). See Answer and Affirmative Defenses (June 12, 1998).

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A. UST Has No Witness with Personal Knowledge of Actionable Misconduct by Conwood

On May 11, 1999, the Court (by Magistrate Judge Moyer) ordered UST to disclose "no later than September 21, 1999 . . . 'field personnel' trial witnesses who have direct personal knowledge regarding the allegations contained in UST's counterclaim."[91] UST has not disclosed any witness in compliance with that Order. Accordingly, UST has no competent evidence to support any of its claims, and will be unable at trial to prove any actionable misconduct by Conwood.

B. UST Has No Evidence of Damages

In its initial disclosures under Federal Rule of Civil Procedure 26, UST failed to provide any "computation of any category of damages claimed" (Fed. R. Civ. P. 26(a)(1)(C)) or identify supporting documents with respect to its counterclaims, as required by the rules. Conwood brought UST's default to the Court's attention, and by Order dated February 5, 1999, Magistrate Judge Moyer required UST to provide the requisite damages disclosure.[92] UST never complied with that Order.

---

[91] May 11, 1999 Order at 3. Magistrate Judge Moyer defined these trial witnesses to include "witnesses who have direct personal knowledge" of the parties' "'in the field'" anti-competitive behavior. Such field personnel would include UST field sales personnel and former sales personnel, Conwood field sales personnel, convenience store owners, managers and employees, and others who have directly, personally observed 'in the field' activity" that the parties allege "to be anti-competitive." Id. at 2-3.

[92] Magistrate Judge Moyer issued an Order directing UST to provide a Rule 26(a)(1)(C) counterclaims damages calculation: "Conwood's motion to compel a response by UST under Rule 26(a)

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Nor did UST make any disclosure of damages evidence in its expert reports submitted pursuant to Rule 26. Neither of UST's two experts offered any opinion on damages to UST — nor even made any reference to UST's counterclaims. UST therefore has no expert testimony to support its contentions.

Plainly, UST has no damages evidence of any kind; alternatively, if it has such evidence but failed to disclose it, its failure to comply with Court Orders and Rule 26(a) should preclude any attempt by UST to offer damages evidence at trial.[93] In either case, the absence of any evidence of damages requires entry of judgment on UST's counterclaims.

CONCLUSION

The Court should enter partial summary judgment on the issue of defendants' power in the relevant U.S. product market (moist snuff), and should grant summary judgment in favor of plaintiffs on Counts I through V of defendants' counterclaims.

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with respect to UST's counterclaim is sustained." Feb. 5, 1999 Order at 8.

[93] Federal Rule of Civil Procedure 37(c)(1) provides that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) . . . shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Rule 37(c)(1) is "a self executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under [Rule 37](a)(2)(A)." Commentary to Fed. R. Civ. P. 37, 146 F.R.D. 401, 691 (1993).

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Respectfully submitted,

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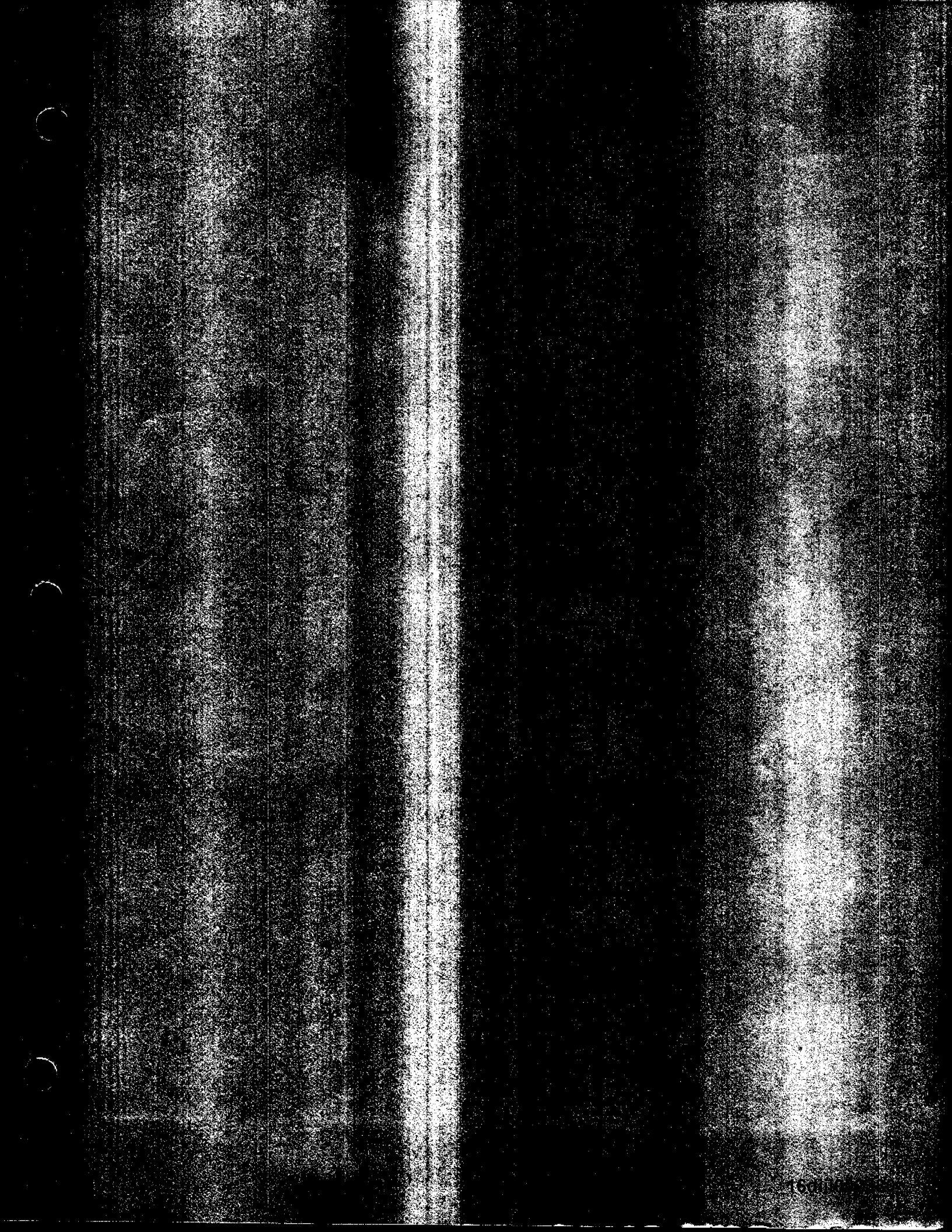
November 15, 1999



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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

On this day came on for consideration Plaintiffs' Motion for Partial Summary Judgment, to wit, that the United States market for moist snuff is the relevant market and that Defendants' have monopoly power in that market, and Defendants' Opposition thereto, and the Court finding that this Motion should be granted, therefore,

IT IS ORDERED that Plaintiffs' Motion for Partial Summary Judgment be, and the same hereby is, GRANTED.

SIGNED this _____ day of _____, 19__.

THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

On this day came on for consideration Plaintiffs' Motion for Summary Judgment as to Defendants' Counterclaims, Defendants' Opposition thereto, and the Court finding that this Motion should be granted, therefore,

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment as to Defendants' Counterclaims be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of Plaintiffs with respect to Counts I - V of Defendants' Counterclaims _____.

SIGNED this _____ day of _____, 19__.

_____
THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that, on this 15th day of November 1999, a copy of the foregoing was hand-delivered to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher
& Flom, L.L.P.
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I certify that, on this 15th day of November 1999, a copy of the foregoing was sent by facsimile and by over-night mail to:

John S. Reed
Ridley M. Sandidge
Reed Weitkamp Schell Cox & Vice
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Louisville, KY 40202

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,

Defendants.

'99 NOV 15 P12:36

FILED

Civil Action No.
5:98CV-108-R

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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November 15, 1999

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

There are two genuinely contested elements of plaintiffs' antitrust claim: (a) whether UST's[1] long-standing and multifaceted campaign of predatory and exclusionary acts — choking competitors' distribution channels through, e.g., coercive agreements and outright criminal acts — constitutes anticompetitive conduct remediable under Section 2 of the Sherman Act, 15 U.S.C. § 2, and, (b) if so, the amount of damages that Conwood suffered as a result of UST's conduct.

The other elements — specifically (a) definition of the relevant market as the United States market for moist smokeless tobacco ("moist snuff") and (b) UST's possession of monopoly

[1] Defendants are United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc., and UST Inc. (collectively, "UST"). Plaintiffs are Conwood Company, L.P. and Conwood Sales Company, L.P. (collectively, "Conwood").

power in that market — are so well-established (and effectively uncontested by UST) as to present no genuine issue of material fact.

Accordingly, it is in the interest of justice and sound judicial economy to grant Conwood's motion for partial summary judgment. (Point I, infra.) In addition, because UST will be unable to offer any proof to establish either liability or damages with respect to any of its counterclaims, the Court should also dismiss them under Federal Rule of Civil Procedure 56. (Point II, infra.)

Statement of the Case

UST springs from the American Tobacco Company, which engaged in decades of predation before being broken up by judicial decree, first in 1911, then again in 1946.[2] Steeped in this culture of antitrust abuses, UST continued to sustain its near-100% monopoly on moist snuff through anticompetitive acts and the erection of high barriers to entry. UST, for example, combined the promotion of cardboard cans (which promoted rapid product staleness) with refunds to retailers for unsold, stale product. To enter the market, therefore, any potential entrant had to be prepared to withstand crushing costs while its products were being introduced (and hence were slow in selling) to the public.

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[2] United States v. American Tobacco Co., 221 U.S. 106 (1911); American Tobacco Co. v. United States, 147 F.2d 93 (6th Cir. 1944), aff'd, 328 U.S. 781 (1946); American Tobacco Co. v. United States, 328 U.S. 781 (1946).

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In 1979, Conwood managed to break UST's stranglehold by first introducing its innovative Hawken™ brand in a plastic can — which preserved freshness longer and thereby reduced returns of stale product. Conwood also pioneered better value for the consumer by providing more tobacco (1.2 ounces versus the 1.0 ounce sold by UST) at a price competitive with UST's.

At first, UST tolerated Conwood as a small and insignificant competitor.[3] Several years ago, however, UST realized that innovative and "value priced" moist snuff sold by Conwood and the two other small competitors in the market[4] threatened its dominant market share and corresponding monopoly profits. UST had grown accustomed to decades of increasing prices (more than doubling the price in the last ten years)[5] and increasing profit margins (among the very highest of U.S. public companies).[6]

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[3] UST's internal documents establish that UST will tolerate a competitor gaining no more than 5% of the market before UST will begin a campaign of systematic exclusion. See, e.g., USTC/CWD 173407 ("5% market share is a point at which a serious response to Helme is warranted") (Exh. 1); USTC/CWD 173421 ("Competition . . . at what market segment share point should USTC respond? 5% Hold back until the[n]") (Exh. 1).

[4] There are four moist smokeless manufacturers of any size. In 1997, UST had approximately 78.1% of the total U.S. market; Conwood had 13.1%; Swedish Match of North America ("Swedish Match") had 3.3%; and Swisher International Group Inc. ("Swisher") had 4.4%. See USTC/CWD 028432 (Exh. 2).

[5] USTC/CWD 093837 (UST wholesale price per can was $1.00 in 1987, $2.06 in 1997) (Exh. 3).

[6] By its own forecast, UST has earned a gross profit margin in excess of a staggering 82% for more than a decade. USTC/CWD 032346 (showing UST yearly increase in gross margins from 82.6% in 1989 to 88.6% in 1997) (Exh. 4). This amounts to approximately $1 billion in 1998 profits. See John P. Renwick,

Afraid that unrestrained competition would erode its premium pricing and hence deflate its unparalleled profits, UST decided to use what it described as its "market power"[7] to stifle competition by (again, its own words) "eliminat[ing]" or "cutting competitive distribution" and taking competitors' advertising from stores.[8]

UST's scheme to abuse its acknowledged market power involved, among other things: (1) systematic and outright

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Morgan Stanley, U.S. Investment Research, UST (UST): Less Confidence in Earnings Outlook, Table 13 (Nov. 4, 1996) ("Morgan Stanley Report") (showing UST profit margins increasing between 1990 and 1995 and projecting further increases in 1996 and 1997) (CWD-EXP-00219) (Exh. 5); see also Merrill Lynch Capital Markets, Sept. 26, 1996 ("Merrill Lynch Report") ("UST boasts one of the highest profit margins and returns on assets in all of corporate America.") (CWD-EXP-00231) (Exh. 6); USTC/CWD 039384 (UST's employee handbook: "The Company has consistently ranked in the top 10 in return on assets and return on sales.") (Exh. 7).

[7] USTC/CWD 186414 ("80% market share gives UST 'market power'") (Exh. 8); USTC/CWD 052118 ("UST's market power enables this policy to exist") (Exh. 9); USTC/CWD 077474 ("Category management . . . plays to U.S. Tobacco's dominant market position. Our participation in this initiative would be beneficial to establish . . . control of the smokeless tobacco section in these [Winn Dixie] accounts.") (Exh. 10) (emphasis added to all).

[8] USTC/CWD 1144417 ("Chain Strategies" are to "Eliminate Comp[etitors] Distribution" and obtain "Exclusive Vending") (Exh. 11); USTC/CWD 215639 ("We [UST] stressed in our Department Meeting the importance of cutting competitive distribution. In many stores, especially supermarkets, distribution of competitive brands is much too high. . . .") (Exh. 12); see also USTC/CWD 075570 (UST "is the market leader for moist smokeless"; UST's category-management system will "benefit[] a market leader and will "use our . . . market position to dominate at retail") (emphasis added) (Exh. 13).

elimination of competitors' product "facings"[9] and point-of-sale advertising ("POS");[10] and (2) inducing retailers — through exercise of market power, false information, kick-backs of monopoly profits, and other inducements — to permit UST "exclusive vending" and "exclusive POS" with the same exclusionary effect.[11] By removing facings and POS — with or without consent — UST squelched competition from fast-growing brands that had not yet achieved a foothold in the market, and marginalized the few competitive brands that had gained acceptance (such as Conwood's Kodiak™). UST forced rivals to devote their resources to counteract the effects of UST's unlawful conduct, rather than actively promoting their products.

UST leveraged its "must carry" Skoal™ and Copenhagen™ to get stores to accede — wittingly or unwittingly — to UST's

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[9] Moist snuff is displayed in retail stores in a plastic rack. The rack typically contains multiple brands with each brand being fed into one or more gravity-fed slots or "facings" in the rack. See USTC/CWD 568166 (Exh. 14); USTC/CWD 529168 (Exh. 15).

[10] "Point-of-sale advertising" or "POS" are advertising materials that are displayed on or near the moist snuff rack. The principal form of POS is sometimes called a "header card." Because of heavy restrictions on almost all forms of tobacco marketing, POS advertising, which was always important, has now become the most effective means to communicate with consumers and to advertise the price advantages of the non-UST brands. See Blattberg Report at ¶¶ 13, 14.

[11] See, e.g., USTC/CWD 1144417 ("Eliminate Comp[etitors] Distribution" and obtain "Exclusive Vending") (Exh. 11); USTC/CWD 888480 ("exclusive UST vending and POS as part of the Customer Alliance Program") (Exh. 16); USTC/CWD 734373 ("UST exclusive vending") (Exh. 17); USTC/CWD 109185 ("Category Management" requires that "U.S. Tobacco has exclusive permanent point of sale placement.") (Exh. 18); USTC/CWD 556853 ("vendor exclusitivity"; "only POS allowed on our [UST's] vendors for competitive products will be the product vendor label.") (Exh. 19).

suppression of competition. For example, UST sought and obtained "vendor exclusivity" and exclusive POS in roughly 8,000 Wal-Mart and 7-11 stores.[12] This led to increases in sales for UST, even as UST prices continued to rise; at the same time, sales for UST's rivals fell sharply. Through these agreements, UST reduced overall sales of moist snuff.[13] Nor are Wal-Mart and 7-11 alone: UST has entered into such anticompetitive agreements with retailers and wholesalers that sell roughly 80% of UST's moist snuff.[14]

This multifaceted campaign of exclusion has been pervasive, systematic, and nationwide. Almost a dozen former UST sales representatives from across the country testified that they were trained — indeed pressured — to exclude competition by

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[12] USTC/CWD 025956 ("We have had a positive breakthrough . . . . [W]e won exclusive vending for all single can brands" at 7-11 stores) (Exh. 20); Chain Store Guide, Directory of Supermarket, Grocery and Convenience Store Chains 40, 982 (Bus. Guides Inc., Apr. 1999) (Exh. 21).

[13] A study by A.C. Nielsen Co., an independent marketing firm that surveys and publishes market share data relied on by competitors, indicates that, after the implementation of the UST/Wal-Mart agreement, overall unit sales decreased by 19%. CWD1011022966 (Exh. 22). The findings of that study were confirmed by former Wal-Mart employee, Waynell Renfro, who testified that, as a result of the UST's vending agreement, overall moist sales at Wal-Mart fell. Deposition of Waynell Renfro at 26-28 (Exh. 23).

[14] USTC/CWD 121118 (82.78% "locations signed to contract") (Exh. 24). The same words used by Judge Jackson in the recent antitrust case against Microsoft can be used against UST. "[UST] expends a significant portion of its monopoly power . . . on imposing burdensome restrictions on its [retailers and distributors] — and in inducing them to behave in ways — that augment and prolong that monopoly power." Findings of Fact ¶ 66, United States v. Microsoft Corp., Civil Action No. 98-1232 (D.D.C. Nov. 5, 1999) (Exh. 25).

eliminating competitors' product racks, facings, and advertising. They received these instructions from UST's senior executives, including Executive Vice President Gary Milano.[15] Many other UST representatives have admitted to store employees and their Conwood counterparts that they were required by their supervisors to remove competitors' product racks and POS from stores.[16]

Despite a well-justified fear of UST retaliation, more than 55 retail-store employees have also provided sworn testimony and statements about repeated and pervasive acts of exclusion in their stores by UST sales representatives.[17]

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[15] Alan Hart, a former UST sales representative, testified that Gary Milano, then a regional manager, instructed Mr. Hart and approximately 125 other UST employees "to put the competitors' products in UST racks so that UST could control the shelf space and the advertising in the stores"; "to remove Conwood racks from the stores' shelves but not to remove the racks from the stores' premises"; and "to dominate the shelf space with UST racks in those areas where Kodiak was gaining market share." Deposition of Alan Hart at 28, 29 (Exh. 26). According to Mr. Hart, "Mr. Milano emphasized that when Conwood and other competitors lost their racks, they would lose their advertising." Id. at 28. Mr. Hart further testified that "UST executives from headquarters in Connecticut also attended these meetings and observed Mr. Milano giving these instructions." Id. at 29; see also id. at 31 ("Mr. Griffen [UST's Division Manager] also on occasion instructed me to remove Conwood's advertising banners and other point-of-sale materials.").

[16] See, e.g., Deposition of Joseph Marconi at 21 (former UST representative testifying that "I was simply following the orders from my immediate supervisor" by removing Conwood racks from stores) (Exh. 27); CWD1031035710 ("Mr. Wayne Harris reported that he saw a U.S.T. Rep. take our rack out of a Circle K store in his Territory this week. When Mr. Harris confronted the U.S.T. rep, about this the U.S.T. rep told Mr. Harris that he had been told to take out Conwood racks at retail accounts by people higher up.") (Exh. 28).

[17] Deposition of Gayleen Rusk at 17 ("Q. Can you remember how many times, approximately, the U.S. Tobacco representatives have removed Conwood racks without your approval? A. Every time he

Similarly, the Vice President of Sales and Marketing for Swedish Match has stated that, since 1994, "UST has acted to exclude competition from Swedish Match — and Timberwolf [Swedish Match's value-priced brand] — through a variety of tactics that, cumulatively, had the effect of limiting distribution to and effective communication with consumers and potential consumers of Swedish Match's moist snuff products."[18]

Conwood's sales representatives have testified that UST's campaign casts a shadow over everything they do. More than 240 of these representatives have routinely been thwarted in their efforts by the relentless campaign of exclusion carried out in

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came in.") (Exh. 29). See also Deposition of Bonita Townsend at 17 ("Q. How many times did the U.S. Tobacco representative come into your store and remove the rack containing Cougar? . . . . A. I would say at least four to five times. . . . in at least a three-month period.") (Exh. 30); Deposition of Robert Bales at 11 ("Q. How many times approximately . . . has [rack and POS removal] happened over the course of your employment? A. Oh, I'd say I've witnessed that at least half a dozen times.") (Exh. 31); CWD-EXP-00001145-222 (sworn declarations) (Exh. 32). An independent store owner also testified that UST's CEO, upon visiting the store, asked whether UST could pay the owner to discontinue competitors' brands. Deposition of Rob Engster at 21-29 (Exh. 33).

[18] Declaration of Harold Price ¶ 6 (Exh. 34); see also id. ¶¶ 10-18 (describing how "UST sales representatives frequently use false or misleading information . . . in efforts to convince the stores to permit exclusive UST vending"; UST "obtains exclusive vending and POS through formal written agreements"; "UST field representatives . . . systematically remove Swedish Match racks and POS at retail locations . . . [and] remove [Swedish Match] moist snuff products from the racks, bag them up, and leave them in the stock rooms or behind the counter"; and UST "exploits its dominant market position"; and concluding that UST's "exclusionary practices" have been "devastating for Swedish Match"; have limited "the growth potential of [Swedish Match's] innovative, value-priced brands"; and have "reduce[d] choices for consumers, restrict[ed] price competition (and thus lead[] to higher prices), and entrench[ed] UST's dominant market share").

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the field by UST's more than 600 representatives. This pervasive predation consumes the time and attention of Conwood's representatives, raises Conwood's costs, and substantially impedes Conwood's efforts to compete.

UST uses all of these tools for the purpose (in its words) of "provid[ing] a barrier to competitor entry in the moist smokeless market" and "support[ing] [UST's] market share expansion objectives."[19] Indeed, UST details in scores of documents its intention to exclude rivals by restricting distribution of competitors' products and advertising. UST's expert acknowledged that UST officials intended to pursue these activities in order to "control the retailer," fully expecting to succeed.[20]

When UST officials provided sworn testimony in this case, however, they could not recall even the simplest facts regarding what they had previously said and done.[21] The executives — with

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[19] USTC/CWD 052106 (Exh. 9); see also id. ("Protect our market share by creating barriers to competition").

[20] Deposition of David T. Scheffman at 311 (Exh. 35); see also id. at 300-01, 310-11, 313-14.

[21] UST's Manager of National Accounts, Timothy Entwistle, testified about a document that he admittedly authored as follows:

> Q. What did you mean when you said, "I will strongly demand attention by Wal-Mart on disciplines and actions"?
> A. I don't know.
> Q. You don't know what that means?
> A. No.
> Q. You go on to write, "If I'm the competition, I would take the same approach. [So let's] recognize this up front and be prepared to go to war." What did you mean by that?
> A. I really don't know, [counsel].

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notable uniformity — could not provide any information about what they thought, meant, or expected to accomplish through their expressed strategy of curtailing distribution and POS for rival brands of moist snuff.[22]

> Q. Well, sitting here today, do you know what that means?
> A. No.
> Q. What does the phrase "prepare to go to war" mean to you?
> A. I don't understand your question.
>
> * * * *
>
> Q. In the next sentence you write, "we have severely cut back on their ability to market products." What did you mean by that?
> A. I don't know.

Deposition of Tim Entwistle at 305-09 (Exh. 36).

[22] For instance, when Gary Smith, the President of UST's Sales and Marketing subsidiary, was presented with a memorandum that he admittedly read and on which he admittedly wrote "excellent job," he claimed not to know what the words "exclusive vending" meant, as used by the author in reporting that UST "won exclusive vending for all single can brands" in 7-11 stores. Indeed, Mr. Smith testified that there was nothing in the entire memorandum (which also reported that UST should introduce a particular policy in order to "disrupt the competitive message and have the ability to dominate retail with [a] newly proposed" program, USTC/CWD 025956 (emphasis added)) that he understood. Deposition of Gary Smith at 422-26 & Exh. 11 (Exh. 37). UST's Executive Vice President of Sales, Gary Milano, had a similar problem with his recollection:

> Q. . . . [S]itting here today, . . . what do you understand the words . . . "category management intensified (control competition/SOF equal SOM)" to mean?
>
> * * * *
>
> A. I don't know.
> Q. Do you have any understanding of what those words mean?
> A. No.

Deposition of Gary Milano at 151 (Exh. 38). See also Deposition of David Untiedt, UST, Director of National Accounts, at 104 (Mr. Untiedt claims that he "do[es]n't know" what "vendor exclusivity" means, although he concedes using the term in a memo) (Exh. 39);

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While UST's senior managers now claim to have no idea what their own words meant, they previously boasted that their exclusionary tactics had worked. "We [UST] have severely cut back on [competing firms'] ability to market products."[23]

Not content with "go[ing] to war"[24] in the marketplace, UST also sought to enlist other tobacco companies and even Congress in the entrenchment of dominant tobacco firms at the expense of smaller firms. In the proposed Global Tobacco Settlement ("GTS"), UST was the only moist snuff producer involved in crafting a "voluntary proposal" to further narrow competitors' distribution channels through such devices as requiring that product racks be placed behind store counters — where space and visibility are limited — and further limiting advertising. In commenting upon the proposal (which ultimately failed), the FTC concluded that such devices were patently anticompetitive.[25]

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id. at 115-17 (Mr. Untiedt claims that he has "no idea" what "exclusive vending rights" or "exclusive POS" means).

[23] USTC/CWD 411723 (e-mail message from United States Tobacco Co.'s Manager of National Accounts, to United States Tobacco Co.'s Vice President for Sales, UST Inc.'s Executive Vice President for Sales, United States Tobacco Co.'s President, United States Tobacco Sales and Marketing Co.'s President, and dozens of regional managers) (Exh. 40).

[24] Id. (UST's Manager of National Accounts warns that UST must "be prepared to go to war" against its competitors) (Exh. 40).

[25] FTC, Competition and the Financial Impact of the Proposed Tobacco Industry Settlement 6, 23, 24-25 (Sept. 1997) (GTS provisions would "permit a range of anticompetitive conduct"; "mak[e] entry still more difficult"; "reduce competition in the industry and thus lead to higher prices"; "discourage entry" and "force many of the current small firms out of business, [thereby] eliminating the possibility that they could expand enough to affect pricing decisions by the major manufacturers"; "discourage

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UST's monopolization of the market has reduced moist snuff output, raised prices, and reduced choices for consumers,[26] and has also caused Conwood between $291 million and $483 million in damages.[27]

While UST disputes the prevalence and effect of its anticompetitive behavior, it cannot genuinely dispute that U.S. moist snuff is a relevant market or that UST has monopoly power in that market. With its distinct pricing, packaging, consumers, and production equipment, moist snuff is universally recognized as a distinct market by the industry (including UST), market researchers, and the FTC. Consumers of moist snuff simply do not switch to any other product in response to even substantial price increases — as would be expected if those products were ready substitutes. UST, with its more than 77% market share, is — in its words — "dominant."[28] It has repeatedly and consistently demonstrated its ability to raise prices to supracompetive levels. By definition, therefore, UST has monopoly power.

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entry and innovation, including the development of alternative products") (Exh. 81). Recognizing the anticompetitive nature of their effort, proponents of the GTS sought a broad antitrust exemption for their conduct. Id.

[26] See Kamien Report at ¶¶ 34, 37-39 (concluding that UST's practices have harmed the public by, among other things, causing higher prices, less output, and less information for consumers about competitive products, lower pricing, and promotions).

[27] Expert Report of Richard Leftwich at 11 (Aug. 2, 1999).

[28] USTC/CWD 932901 ("our dominant share of market") (Exh. 41).

Argument

Summary judgment is appropriate where "'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" Humphress v. United Parcel Serv., Inc., 31 F. Supp. 2d 1004, 1009 (W.D. Ky. 1997) (quoting Fed. R. Civ. P. 56(c)), aff'd, 172 F.3d 48 (6th Cir. 1998) (Table), cert. denied, 119 S. Ct. 1576 (1999).[29] The Court may enter judgment on "all or any part" of a claim. Fed. R. Civ. P. 56(a) (emphasis added); Gooch v. E.I. du Pont de Nemours & Co., 40 F. Supp. 2d 857 (W.D. Ky. 1998) (granting partial summary judgment); Midwest Aluminum Mfg. Co. v. General Elec. Co., No. 4:90-CV-143, 1993 WL 724870, at *1 (W.D. Mich. Feb. 5, 1993) ("the same summary judgment standard under Fed.R.Civ.P. 56 applies" "[i]n evaluating a motion for partial summary judgment") (citing Boyd v. Ford Motor Co., 948 F.2d 283 (6th Cir. 1991)) (Exh. 42).

In Count I of its Complaint, Conwood alleges unlawful monopolization and attempted monopolization by UST, in violation of Section 2 of the Sherman Act. "The offense of monopolization under § 2 has two elements: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or

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[29] "The moving party must carry the initial burden by 'informing the district court of the basis for its motion' and identifying the matter that 'it believes demonstrate[s] the absence of a genuine issue of material fact.' . . . If the moving party meets its burden, the burden then shifts to the nonmoving party to present 'specific facts showing that there is a genuine issue for trial.' Fed.R.Civ.P. 56(e)." Humphress, 31 F. Supp. 2d at 1009.

maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966)); Byars v. Bluff City News Co., 609 F.2d 843, 849 (6th Cir. 1979) (same).[30]

Here, the first element — both relevant market (Point A) and UST's power in that market (Point B) — is so clearly proven by undisputed facts that Conwood is entitled to judgment as a matter of law.[31]

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[30] Plaintiffs must also prove "'antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" Valley Prods. Co. v. Landmark, 128 F.3d 398, 402 (6th Cir. 1997) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)). To establish attempted monopolization, Conwood must prove that UST "engaged in anticompetitive conduct with a specific intent to monopolize and that there was a dangerous probability that the attempt would be successful." United States v. Dairymen, Inc., 660 F.2d 192, 194 (6th Cir. 1981). To prove there is a "dangerous probability of monopolization," Conwood must establish a relevant market and UST's "ability to lessen or destroy competition in that market." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

[31] Courts have not hesitated to enter judgment on market definition and power in appropriate cases. See, e.g., In re Super Premium Ice Cream Distrib. Antitrust Litig., 691 F. Supp. 1262, 1268 (N.D. Cal. 1988) (summary judgment that "relevant product market [wa]s all ice creams" and not "all frozen desserts"), aff'd sub nom. Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc., 895 F.2d 1417 (9th Cir. 1990) (Table); Remington Prods., Inc. v. North Am. Philips Corp., 717 F. Supp. 36, 43-44 (D. Conn. 1989) (summary judgment that market for electric shavers was a viable submarket for purposes of antitrust analysis), on reconsideration on other grounds, 755 F. Supp. 52 (D. Conn. 1991).

I. UST HAS MONOPOLY POWER IN THE MOIST SNUFF MARKET

UST has admitted that its "80% market share gives UST 'market power'" and that the company cannot "legally use that market power to prevent competition from selling their products."[32] UST has thus conceded that it has "monopoly power in the relevant market." Re/Max, 173 F.3d at 1016.

A. The Relevant Market Is Moist Snuff Sold in the United States

The relevant market is the "area of effective competition" within which a single firm holding a dominant share can raise prices above the competitive level without losing sales to other products. Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962); Smith v. Multi-Flow Dispensers of Ohio, Inc., No. 96-4185, 1999 WL 357784, at *3 (6th Cir. May 14, 1999) (Exh. 43). The relevant market "must be determined by reference to a product market . . . and a geographic market." Brown Shoe, 370 U.S. at 324.

1. Moist Snuff Is the Relevant Product Market

Moist snuff is the only tobacco product sold in significant quantities by UST.[33] It is also the only tobacco product that has grown in sales over the past decade, and is far and away the

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[32] USTC/CWD 186414 (Exh. 8).

[33] UST also sells a negligible amount of dry snuff, which constitutes, in UST's CEO's view, a "minuscule part of [UST's] business" — less than $10 million per year. See Deposition of Vincent Gierer at 133 (Exh. 44); Smith Dep. at 72-73 (Exh. 37). This constitutes less than 1% of UST's retail sales dollars. USTC/CWD 028426, 028432, 028436 (from NMR/USTC Marketing Research and Nielsen data) (Exh. 2).

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most profitable tobacco product.[34] UST's profit margins on this product make UST one of America's most profitable corporations.[35] There is no evidence that other companies or products constrain UST's ability to charge ever-increasing prices. As UST has stated, "UST is the pricing leader in the market — others will follow."[36]

"The essential test for ascertaining the relevant product market involves the identification of those products or services that are either (1) identical to or (2) available substitutes for the defendant's product or service." White & White, Inc. v. American Hosp. Supply Corp., 723 F.2d 495, 500 (6th Cir. 1983).[37]

To apply that test, courts "'examin[e] such practical indicia as (1) industry or public recognition of the [market] as a separate economic entity, (2) the product's peculiar

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[34] FTC, 1997 Smokeless Tobacco Report, Tables 8A-8D, <http://www.ftc.gov/bcp/reports/smokeless97.htm> (Exh. 45); Gierer Dep. at 135 (Exh. 44); UST/CWD 40158A (p.7) (Gierer stating that moist is more profitable than loose leaf) (Exh. 46); CWD1037172265, CWD1037172267 (comparing products' profitability per linear foot)(Exh. 47).

[35] USTC/CWD 032346 (showing UST yearly increase in gross margins from 82.6% in 1989 to 88.6% in 1997) (Exh. 4); Merrill Lynch Report ("UST boasts one of the highest profit margins and returns on assets in all of corporate America.") (CWD-EXP-00228-41) (Exh. 6).

[36] USTC/CWD 052113 (agenda for a meeting of the steering committee, the members of which include UST's Senior Vice President of Finance and the now-President of UST) (Exh. 9).

[37] Stated differently, products are in the same market if consumers consider the products "reasonably interchangeable" one for the next or, in economic terms, if there is "a high cross-elasticity of demand" between them. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 395, 400 (1956).

characteristics and uses, (3) unique production facilities, (4) distinct customers, (5) distinct prices, (6) sensitivity to price changes, and (7) specialized vendors.'" Id. at 501 (quoting Brown Shoe, 370 U.S. at 325).[38] Courts also consider barriers to entry and the cross-elasticity of supply. Virtual Maintenance v. Prime Computer, Inc., 11 F.3d 660, 665 (6th Cir. 1993).

In this case, all factors point to the same conclusion: the relevant product market is moist snuff.

a. Moist Snuff Is a Recognized Market

The moist snuff market is universally recognized as a distinct product market, by UST and others. UST regularly prepares internal reports estimating its share of this market.[39] Its business records plainly and regularly reference this market:

- "We [UST] have defined our market as round can snuff."[40]
- "the moist snuff market"[41]

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[38] This practical analysis is sometimes called the "submarket analysis." White, 723 F.2d at 500. This test, however, is not a new test in determining the relevant market for purposes of Section 2. Id. Rather, the submarket inquiry "merely adds new factors to [the traditional] test so as to more precisely define the market affected by the defendant's actions." Id.

[39] See, e.g., USTC/CWD 078583-84 (UST describes its "Market Share" or "% Share of Market" in 1996 as 80.7%, which was its market share in moist snuff) (Exh. 48).

[40] USTC/CWD 024922 (Exh. 49); Smith Dep. at 152 ("round can is moist snuff") (Exh. 37).

[41] USTC/CWD 920082 ("These 12 [brands] make-up 95.9% of the moist snuff market!") (Exh. 50); USTC/CWD 431863 ("UST management provided a thorough discussion of . . . the difficulties of the moist snuff market.") (Exh. 51); USTC/CWD 431895 ("[UST] senior

- "the moist snuff industry"[42]
- "the total moist snuff market"[43]
- "whole market for moist snuff"[44]

UST executives habitually speak in terms of the moist snuff market.[45] See Ansell Inc. v. Schmid Lab., Inc., 757 F. Supp. 467, 472 (D.N.J.) (reference to market in parties' business plans supports finding of relevant market), aff'd, 941 F.2d 1200 (3d Cir. 1991) (Table).

And UST tells retailers that "[m]oist smokeless tobacco . . . is a distinct manageable group of products that consumers perceive to be interrelated and/or substitutable in

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management outlined . . . the competitive situation in the moist snuff market") (Exh. 52).

[42] USTC/CWD 052356 ("the moist snuff industry will grow an average of 2.5% - 3.0% annually over the next 3-5 years") (Exh. 53).

[43] USTC/CWD 1349445 (Exh. 54).

[44] USTC/CWD 431864 (Exh. 51).

[45] Milano Dep. at 15 ("Q. . . . [W]ould you like, as vice president of sales, to attain a hundred percent of the moist snuff market or, conversely, is there some number short of a hundred percent that you want to stop at? A. . . . No, I wouldn't -- I would not want to have a hundred percent of the market. And what I would like to do is hold share.") (emphasis added) (Exh. 38); id. at 31 (UST's "market research" division includes "[a]nalysts who look at the market" for moist snuff); id. at 9 ("Q. Is there competition in the moist snuff market? A. Yes."); id. at 11 ("Q. . . . [I]s reviewing or looking at data or numbers regarding who has what market share in the moist snuff market something you do in your work as vice president of sales? A. Yes."); Smith Dep. at 152, 339 (Exh. 37).

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meeting a consumer need."[46] This is the legal definition of a relevant product market. See White, 723 F.2d at 500.

What UST does, as well as what it says, reveals that moist snuff is a distinct market. UST pays retailers to collect and report relevant sales data. Tellingly, UST requires information only on sales of moist snuff. It makes no effort to obtain similar sales data from retailers for any other product.

UST's view of the relevant market is shared by competitors, outside market researchers, and government regulators. For example, Swedish Match (the third ranking producer) considers moist snuff to be a distinct market.[47] Nielsen tracks "moist snuff" as a distinct market.[48] See Ansell, 757 F. Supp. at 472 (the fact that Nielsen "maintains its data separately for sales of latex condoms to U.S. retail outlets" "support[s] the proposition that the industry participants view this as an economically distinct market segment"); Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250, 1263 (E.D. Pa. 1987) (same). And the FTC recognizes "moist snuff" to be a distinct

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46 USTC/CWD 101816 (Exh. 55).

47 Price Decl. ¶¶ 3, 4, 6 (Exh. 34).

48 See, e.g., USTC/CWD 335391 (referring to Neilsen presentation solely on "Moist Smokeless") (Exh. 56); USTC/CWD 095106-09 (A.C. Nielsen moist snuff "can sales" for UST and "competition") (Exh. 57). Consistent with Nielsen, a marketing firm retained by UST stated that, at the UST national sales meeting, "we want to . . . make sure [the sales reps] view the moist [snuff] market as USTC territory." USTC/CWD 041571 (emphasis added) (Exh. 58).

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market: for years it has prepared a biennial report to Congress on developments in the "moist snuff market."[49]

b. Moist Snuff's Peculiar Characteristics, Including Specialized Vending, Set It Apart from Other Products

It is undisputed that moist snuff has peculiar characteristics that distinguish it from other tobacco products.[50] Moist snuff, alone among tobacco products, is sold in a round, flat can; the cans, again unlike any other product, are displayed on their sides in gravity-fed dispensers for retail sale.[51] As UST has stated, moist snuff also "requires a different system of handling and replenishment" and "differen[t]"

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[49] FTC, Report to Congress for the Years 1996 and 1997, Pursuant to the Comprehensive Smokeless Tobacco Health Education Act of 1986, at 7 (1999) ("FTC 1999 Report") ("U.S. Tobacco reportedly controlled 78% of the moist snuff market in 1997, compared to its closest competitor, Conwood, which reportedly had 14% of that market.") (Exh. 59); FTC, 1997 Smokeless Tobacco Report § 4.1 ("In the market of moist snuff . . . ."), <http://www.ftc.gov/bcp/reports/smokeless97.htm> (Exh. 45).

[50] "[M]oist smokeless" tobacco is "[a]vailable in fine & long cut as well as portion packs" and is "produced in natural or flavored varieties." In contrast, loose leaf or plug chewing tobaccos are "[a]vailable in long leaf or pressed plugs," while dry snuff is "powdered, dry tobacco products designed to be inhaled (snorted) or dipped." Cigars are "smokable products, produced with natural leaf or homogonized tobacco wrappers." Pipe/smoking tobacco products are "medium cut tobacco products designed to be pipe smoked or hand rolled into cigarettes." USTC/CWD 257945-46 (Exh. 60).

[51] See USTC/CWD 257945 (loose leaf and plug are "sold in single pouches or multi-packs") (Exh. 60); USTC/CWD 257946 (dry snuff is sold in [tall] round tins) (Exh. 60); id. (cigars are "available in mini and large sizes and packaged in small packs (4 or 5 count) or boxes"); id. (pipe or smoking tobacco is "sold in pouches and air-tight containers").

"vending" and "merchandising" than other forms of tobacco.[52] Ansell, 757 F. Supp. at 473 (distribution and "packaging differences do distinguish . . . products" and help define the relevant market).

c. Moist Snuff Requires Specialized Production Equipment and Facilities

It is similarly undisputed that the equipment used to produce and package moist snuff is separate and distinct from that used for other tobacco products.[53] See United States v. Mrs. Smith's Pie Co., 440 F. Supp. 220, 228-29 (E.D. Pa. 1976) (distinctive equipment supported finding of relevant market); Ansell, 757 F. Supp. at 473 ("requirement of additional packaging equipment is sufficient to differentiate the production facilities").

d. Moist Snuff Has Distinct Customers

UST recognizes, and instructs its sales representatives to educate retailers, that "the moist smokeless consumer" has "unique characteristics" that set him or her apart from the user of pipes, cigars, or other tobacco.[54] In addition, far more

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[52] USTC/CWD 101822 (Exh. 61) ("moist smokeless is a category in and of itself" and should not be "lump[ed] . . . in with the OTP [other tobacco products]"; "perishability of moist snuff requires a different system of handling and replenishment").

[53] Affidavit of Robert Krauch ¶ 7 (Conwood Vice President, Manufacturing) (Exh. 62).

[54] USTC/CWD 101822 (Exh. 61). The demographic profile of the typical moist snuff consumer differs from that of consumers of other tobacco products. Moist snuff users, for example, tend to be younger than users of loose leaf and cigarettes, are less

consumers use moist snuff than use any other smokeless tobacco product.[55] See International Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 250 (1959) (difference in number of viewers supported court's finding that relevant market was championship boxing contests and not all professional boxing events).

e. Moist Snuff Has Distinct Pricing and Profits

There is no evidence that UST — or any other moist snuff producer — considers the price of any other product in setting prices for moist snuff. See Mrs. Smith's, 440 F. Supp. at 229 (lack of consideration of other product prices supported court's finding that relevant market was frozen dessert pies).

The empirical evidence, moreover, demonstrates that moist snuff prices have increased dramatically over the last ten years, while the prices of other tobacco products have increased at a much slower pace.[56] And profit margins on moist snuff far exceed

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likely to be African American or Hispanic, are more likely to be employed full time, and are concentrated in different regions of the country. USTC/CWD 028314-15 (Exh. 63); CWD1004010751-55 (median age of moist snuff users is 35 years old and median age of loose leaf user is 45 years old; 43% of moist snuff users are in southern regions while 67% of loose leaf users reside there) (Exh. 64).

[55] See, e.g., USTC/CWD 028426 (comparing 1996 and 1997 dollar sales for moist snuff, loose leaf, plug, dry, and twist) (Exh. 2); FTC, 1997 Smokeless Tobacco Report, Tables 8A-8I, <http://www.ftc.gov/bcp/reports /smokeless97.htm> (Exh. 45) (for years 1986 to 1995; using FTC data to compare sales of moist snuff, dry snuff, plug/twist, and loose leaf).

[56] FTC, 1997 Smokeless Tobacco Report, Tables 8A-8D <http://www.ftc.gov/bcp/reports/smokeless97.htm> (Exh. 45);

those of loose leaf, dry snuff, plug, twist, or any other tobacco product — indeed, moist snuff profits exceed those of any analogous consumer product.[57] See id.; International Boxing, 358 U.S. at 250 (higher pricing to consumers and higher profits for defendants on championship boxing matches supported relevant market limited to championship boxing contests).

f. Consumers Have Not Been Sensitive to Regular Price Increases in Moist Snuff

Despite substantial annual UST price increases,[58] users of moist snuff have not responded by switching to other products.[59] UST sales volume has continued to increase, year after year.[60]

USTC/CWD 032339-40 (Exh. 65).

[57] UST's gross profit margin has been greater than 82% for the past ten years. USTC/CWD 032346 (showing UST yearly increase in gross margins from 82.6% in 1989 to 88.6% in 1997) (Exh. 65). Such margins are among the highest — if not the highest — reported by any U.S. public company. Merrill Lynch Report ("UST boasts one of the highest profit margins . . . in all of corporate America.") (CWD-EXP-00228-41) (Exh. 6). Margins on other tobacco products, such as loose leaf, are far less impressive. See Gierer Dep. at 134-35 (confirming that the "profit margins" are "substantially higher in moist" than loose leaf) (Exh. 44); UST/CWD40158A (at 7) (same) (Exh. 46).

[58] For example, UST increased wholesale prices per can 106% from 1987 through 1997, for an average yearly increase of just under 8%. USTC/CWD 028565-66 (Exh. 66). For the period from 1989 through 1994, UST's price increases averaged 9.3% per year. USTC/CWD 106965 (Exh. 67). Despite these substantial and regular price increases, consumers have tended not to switch to other forms of tobacco.

[59] Expert Report of Morton I. Kamien ¶ 17 (Oct. 1, 1999).

[60] USTC/CWD 118338 (Exh. 68); USTC/CWD 077603 (Exh. 69). UST's price increases, for example, have caused no material switch to loose leaf. While moist snuff prices climbed dramatically during the 1990s, prices of loose leaf climbed only half as fast. Yet, during this period, consumption of moist snuff increased while

UST recognized that it had the power to increase prices for moist snuff without losing sales to other products. It commissioned a study based on Nielsen data to determine price elasticity.[61] The study concluded that "the moist smokeless business is price inelastic or price insensitive — i.e., the percentage change in price (up or down) will result in a lower percentage change in sales."[62] As UST has observed, "pricing does not influence [the] ordering behavior" of UST's customers.[63]

g. Moist Snuff Has High Barriers to Entry and Corresponding Low Cross-Elasticity of Supply

"The relevant market cannot be determined without considering the cross-elasticity of supply." Virtual Maintenance, 11 F.3d at 665. Cross-elasticity of supply considers "the extent to which producers of one product would be

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consumption of loose leaf fell — directly contrary to what would have occurred if consumers had switched from moist to loose leaf in response to the moist price increases. The same is true for all other forms of smokeless tobacco. FTC, 1997 Smokeless Tobacco Report, Tables 8H-8I, <http://www.ftc.gov/bcp/reports/smokeless97.htm> (Exh. 45); Kamien Report ¶¶ 17, 20. See also Gierer Dep. 108-09 (despite increasing prices, no loss in sales volume in ten years except for possible drop of 1/2% in 1997) (Exh. 44).

61 USTC/CWD 189496-542 (Exh. 70).

62 USTC/CWD 189497 (emphasis added) (Exh. 70).

63 USTC/CWD 052113 (Exh. 9). This UST conclusion is fully supported by the empirical evidence and echoed by industry analysts and executives. See USTC/CWD 431882 (industry analyst agrees that "[m]oist snuff users are generally price insensitive") (Exh. 71); Price Decl. ¶¶ 1, 3 (Senior Vice President of Swedish Match and a 17-year veteran of the tobacco industry: "consumers of moist snuff do not switch to other forms of smokeless tobacco (for example, loose leaf) in response to price increases of moist snuff" (Exh. 34).

willing to shift resources to producing another product in response to an increase in the price of the other product." AD/SAT v. Associated Press, 181 F.3d 216, 227 (2d Cir. 1999). Here, there has been no entry in response to UST's ever-increasing prices and remarkable profits. Two tobacco giants — R.J. Reynolds and Brown & Williamson — tried and failed, and no one has even tried to enter since 1991.[64]

This failed entry (as well as the lack of any new entry) is explained by the barriers to entry that define the moist snuff market. See Mrs. Smith's, 440 F. Supp. at 229 (barriers to entry, which may be proved by an "unsuccessful attempt . . . to enter," are "'practical indicia'" of the relevant market) (quoting Brown Shoe, 370 U.S. at 325); Ansell, 757 F. Supp. at 474-75 (failures evidence entry barriers).

These barriers take many forms. First, government regulation, tobacco litigation, and general anti-tobacco sentiment make the moist snuff market — high profits

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[64] Expert Report of David T. Scheffman ¶¶ 27-28; Gierer Dep. at 163 (Exh. 44); USTC/CWD 145051, 163106, 163112 (Exh. 72). Brown & Williamson's entry failed even though it already has a strong foothold in smokeless tobacco. It is the third largest supplier of plug and the fourth largest supplier of dry snuff. John C. Maxwell, The Maxwell Report -- The Smokeless Tobacco Industry in 1998, Table 3 (Mar. 31, 1999) (CWD-EXP-00074-75) (Exh. 73). Swedish Match in 1990 acquired an existing moist snuff manufacturer, Pinkerton. To the extent other firms have begun to sell moist snuff since that time, they constitute less than 1/3 of 1% of the market, id., CWD-EXP-00071, and are apparently irrelevant to UST in any event, see Smith Dep. at 51-54 ("Q. As vice president of sales, were you interested in who was selling moist snuff to the public? A. Not really. . . . Q. Did U.S. Tobacco follow what its competitors did in the marketplace . . . ? A. I don't ever remember doing that.") (Exh. 37).

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notwithstanding — forbidding. UST's CEO testified that entry by a domestic firm not already producing tobacco products is "highly unlikely."[65] Second, entry would require substantial investments of time and money. There is a limited supply of Dark Fire Tobacco Leaf — the tobacco used to make moist snuff.[66] In addition, a new entrant would need at least two years of preparation (and tens of millions of dollars) to purchase specialized equipment and to allow the tobacco to age before it could expect to sell a product.[67] A prospective entrant would also be required to spend substantial sums on product testing, formula development, and marketing.[68] See United States v. Ivaco, Inc., 704 F. Supp. 1409, 1416 (W.D. Mich. 1989) ("[f]irms in related industries could not quickly enter . . . to discipline a significant price increase, because entry . . . would require an extensive investment in research and development as well as production facilities").

Third, UST's dominance of advertising and distribution raise more daunting barriers. As the Supreme Court has observed, in tobacco "advertising . . . is . . . a widely published warning

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65 Gierer Dep. at 160 (Exh. 44).

66 Government regulators limit the amount of Dark Fire that can be produced in a given year, and each year the supply of usable tobacco is essentially depleted. Therefore, a new entrant would have to compete with existing manufacturers to acquire even a small amount of tobacco to begin production. Krauch Aff. ¶ 3 (Exh. 62).

67 Id. ¶¶ 6-8.

68 Id. ¶ 8.

that [a monopolist] possess[es] and know[s] how to use a powerful offensive and defensive weapon against new competition. New competition dare not enter such a field, unless it be well supported by comparable national advertising." American Tobacco, 328 U.S. at 797. Even though federal and state regulations have sharply curtailed tobacco advertising — and consequently made it more difficult for a new entrant to win customers — UST has asserted its dominance here as elsewhere. It consistently spends more than $65 million per year on advertising.[69] And, through its exclusionary conduct, it has obtained a choke-hold on the single most effective form of advertising for moist snuff: POS.

UST's effective campaign to eliminate the distribution and advertising of rival firms is more chilling still. Through its "category management" ruses, UST has achieved the complete exclusion of brands that have not yet achieved a substantial market share — including new and growing brands.[70] By demanding that its "share of fixture" equal or exceed its share of market, and by inducing retailers to restrict the total number of brands carried in the store, the entrenched monopolist has served notice to new entrants that it will be difficult and costly to get their

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[69] UST Inc., SEC Form 10-K, Table of Advertising Costs (SEC filed Mar. 12, 1999), <http://www.ustshareholder.com> (Exh. 74); see also UST Inc., SEC Form 10-K, Table of Advertising Costs (SEC filed Mar. 17, 1997), <http://www.ustshareholder.com> (years 1995-1999)(Exh. 75).

[70] USTC/CWD 513582 (UST sales rep describing proposal to limit moist snuff to 14 brands (12 of which belonged to UST) and delete 18 brands (16 of which belonged to UST's competitors)) (Exh. 76); USTC/CWD 254331 (UST rep reporting that "[i]f all goes as planned we will . . . have exclusive vending") (Exh. 77).

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products on store shelves. Even if they make it to the shelves, new brands can expect only to sit unnoticed where UST has obtained "POS exclusivity." All this is "further [to] emphasize the effectiveness of a well financed monopoly in this field against potential competitors if there merely exists an intent to exclude such competitors." American Tobacco, 328 U.S. at 797.

That "intent to exclude" plainly exists. UST has an announced "[b]usiness [s]trateg[y]" to "[p]rotect our market share by creating barriers to competition."[71] It has, for example, stated its goal to "[s]top the growth" of competitors' price-value brands "in order to protect our market share (80%)."[72] And it has instituted policies that create "barrier[s] to competitor entry in the moist smokeless market," barriers designed to "support[] [UST's] market share expansion objectives."[73]

It is telling that UST has not even attempted to define a relevant market other than moist snuff. Its expert offers a critique of the market analysis performed by Professor Morton Kamien of Northwestern University and Dean Edward Popper of

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[71] USTC/CWD 052106 (emphasis added) (Exh. 9).

[72] USTC/CWD 078578 (agenda for November 1996 meeting of UST Strategic Planning Session stated goal to "[s]top the growth of P/V [price-value] in order to protect our market share (80%)" and "[k]eep P/V at under 12% market segment share (currently 7.5%)") (Exh. 48).

[73] USTC/CWD 052106 (Exh. 9).

Bellarmine College, but has steadfastly refused to offer any alternative definition.[74]

2. Geographic Market Is the United States

The relevant geographic market is the "'area of effective competition.'" White, 723 F.2d at 501 (quoting Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961)). That area is "'charted by . . . select[ing] . . . the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.'" Id. (quoting Tampa Elec., 365 U.S. at 327); see also Re/Max, 173 F.3d at 1016 (the geographic market "is the locale in which consumers of a product or service can turn for alternative sources of supply").

Applying that rule, the geographic market in this case is the United States. UST and other suppliers of moist snuff distribute their products across the country; purchasers can turn to a supplier in any area of the country to obtain an alternative source of supply.[75] UST proclaims itself "as a national company"[76] and adheres to a "pricing strategy of nation-wide delivered pricing."[77] Because "[p]roducers of [moist snuff]

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[74] Scheffman Report ¶ 243; Scheffman Dep. at 297-98 (Exh. 35).

[75] See, e.g., USTC/CWD 049909-36 (showing UST's "ship-to" locations and distributors throughout the United States) (Exh. 78).

[76] USTC/CWD 173406 (Exh. 1); see also USTC/CWD 173416 ("USTC is a national company") (Exh. 1).

[77] USTC/CWD 052112 (Exh. 9); see also USTC/CWD 052103 ("National delivered pricing to customers") (Exh. 9); USTC/CWD 052115 ("Product-based national pricing") (Exh. 9); USTC/CWD

compete for customers throughout the United States, and [UST] sell[s] [its moist snuff brands] nationally," "the entire country is a proper geographic market." Mrs. Smith's, 440 F. Supp. at 230 (citing United States v. Pabst Brewing Co., 384 U.S. 546 (1966)); see also Brown Shoe, 370 U.S. at 328 ("relevant geographic market is the entire Nation" because "[t]he relationships of product value, bulk, weight and consumer demand enable manufacturers to distribute their shoes on a nationwide basis"). UST has not even attempted to contend otherwise.

B. UST Has Monopoly Power in the Moist Snuff Market

UST has admitted that its "80% market share gives UST 'market power.'"[78] UST also understands that its monopoly power "means [that it] cannot legally use that market power to prevent [the] competition from selling their products."[79]

"There are two ways to establish . . . that [UST] holds monopoly power. The first is by presenting direct evidence

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407885-945 (1998 UST Field Sales Directory showing UST sales representatives by region and demonstrating national coverage) (Exh. 79).

[78] USTC/CWD 186414 (Exh. 8); see also USTC/CWD 052113 ("UST's market power enables this policy to exist.") (Exh. 9). "'Market power' is a synonym for 'monopoly power.'" International Distrib. Ctrs., Inc. v. Walsh Trucking Co., 812 F.2d 786, 791 n.3 (2d Cir.), cert. denied, 482 U.S. 915 (1987).

[79] USTC/CWD 186414 (Exh. 8). Yet that is precisely what UST has done — it has prevented its competitors from freely advertising and effectively distributing their products and has erected barriers to prevent new entry into the moist snuff market. The extent and effect of UST's anticompetitive conduct will be the focus of trial. For purposes of this motion, the relevant issue is UST's admission that it has "market power," and the objective evidence that substantiates that admission.

'showing the exercise of actual control over prices or the actual exclusion of competitors.' The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market." Re/Max, 173 F.3d at 1016 (internal citation omitted) (quoting Byars, 609 F.2d at 850).

"In recent years, parties and courts have increasingly moved toward utilizing the circumstantial method as a 'shortcut.'" Id. However, the Sixth Circuit has cautioned that "this does not undercut the continued viability of the first avenue of establishing monopoly power." Id. UST's exclusionary conduct has shaped a market in which UST can consistently charge — and has consistently charged and sustained — prices far above the competitive level. UST thereby has, in its words, "define[d] the market" for moist smokeless tobacco.[80] See Virtual Maintenance, 11 F.3d at 665 ("true market power" is the "power sufficient to change and sustain anticompetitive prices").

1. UST's Current 77% Market Share Establishes Its Monopoly Power

The Supreme Court has stated that, if a manufacturer produces "almost 75%" of a product sold in the United States, "it may be assumed it does have monopoly power over that 'market.'" E.I. du Pont, 351 U.S. at 379, 391; PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 821 (6th Cir.) ("the Supreme Court has concluded that . . . over two-thirds of the market . . .

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[80] USTC/CWD 052114 (Exh. 9); see also USTC/CWD 024922 ("We [UST] have defined our market as round can snuff.") (Exh. 49).

constitute[s] monopoly power under § 2"), cert. denied, 520 U.S. 1265 (1997).

It is undisputed that UST manufactured at least 77% of the moist snuff sold in the United States in 1998.[81] UST has sustained that self-proclaimed "dominant share of the market" for decades.[82] This evidence is itself conclusive; the Court should find that UST holds monopoly power as a matter of law.

2. UST Has the Power To Control Prices

"[E]vidence that the defendant has actually exercised price leadership control over the industry" "can be particularly compelling evidence that [the defendant] has monopoly power."[83] See Re/Max, 173 F.3d at 1018 (plaintiff can "'show[] monopoly power [by] marshal[ling] evidence showing the exercise of actual control over prices'") (quoting Byars, 609 F.2d at 850). Such evidence is irrefutable in this case. UST has boasted about its "price leadership" in just those words. "UST is the pricing

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[81] Scheffman Report, Attach. 14.

[82] USTC/CWD 932901 (UST Chain Accounts Manager informing UST Director of National Accounts that, "because of our dominant share of market, customers look to us for leadership") (Exh. 41). From 1978 to 1998, UST's market share remained between 77% and 97%. Id.

[83] William C. Holmes, Antitrust Law Handbook § 2.03[2] (1999 ed.).

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leader in the market — others will follow."[84] "UST pricing 'leads' and defines the market."[85]

Every January 1 and July 1 since at least 1989, UST has, like clockwork, raised prices on its moist snuff products.[86] These increases have been exacted without reference to external factors, and have always exceeded any increase in the consumer price index. A 1996 analyst report shows that, between 1990 and 1996, UST imposed an average increase in the price of a can of moist snuff of about 8.2% per year.[87]

UST's ability to earn unusually high profits, year after year, provides still further evidence of monopoly power. The prices set by UST have provided the company with profits almost unimaginable for any other U.S. public company. According to the latest annual statistics, UST's profit margin exceeds 84.8%, compared to an S&P 500 average of 47.8% and a tobacco industry average of 29.3%.[88] Such UST profit, sustained for more than a

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[84] USTC/CWD 052113-14 (UST steering committee meeting agenda states that "UST does not 'deal' on its product's prices, we don't have to . . . . UST is the pricing leader in the market — others will follow.") (Exh. 9).

[85] USTC/CWD 052114 (Exh. 9).

[86] See, e.g., USTC/CWD 032339-40 (Exh. 65).

[87] Morgan Stanley Report, Table 5 (CWD-EXP-00211) (Exh. 5).

[88] See <http://www.moneycentral.msn.com/investor/invsub/results/compare.asp?Symbol=ust&Page=ProfitMargins&iPage=qd> (gross margins) (Exh. 80). UST has a pre-tax margin of 49.9%, compared to 10.6% for the S&P 500 and 12.2% for the tobacco industry. Id.; see also id. (UST net profit margin of 30.9% for UST, 7.2% for the S&P 500, and 7.3% for the tobacco industry); Morgan Stanley Report (UST gross margin of 80%, Philip Morris 50%, and RJR Nabisco 54%) (CWD-EXP-00207) (Exh. 5).

decade, prove that "competition must be weak or absent, because it has failed to force price down to cost (including in 'cost' a reasonable return on investment)." In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 603 (7th Cir. 1997) ("power to raise price above cost without losing so many sales as to make the price rise unsustainable" is evidence of "monopoly power"), cert. denied, 118 S. Ct. 1178, 1336 (1998); see also Garot Anderson Mktg., Inc. v. Blue Cross & Blue Shield United, 772 F. Supp. 1054, 1059 (N.D. Ill. 1990) ("finding of monopoly power may be based on a showing that Defendants realize profits consistently in excess of those found generally in the economy") (citing United States v. Aluminum Co. of Am., 148 F.2d 416, 426 (2d Cir. 1945) (L. Hand, J.)); Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of Am., 885 F.2d 683, 695 (10th Cir. 1989) ("One measure of the degree of market power is the persistence of a firm's ability to profitably charge monopoly prices."), cert. denied, 498 U.S. 972 (1990). UST's ability to charge undeniably supracompetitive prices is, by definition, market power. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde,

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UST's operating margin on moist snuff increased every year between 1990 and 1996, rising from 56.0% to 63.1%. That is, the evidence shows that UST consistently increased its prices by more than its operating costs during an extended period of time. During this period, UST's operating margin increased by 12.7% (i.e., (63.1-56.0)/56.0). The 1996 analyst report forecast that UST would be able to continue to increase its operating margin, from 63.1% in 1996 to 63.7% in 1997 and 64.3% in 1998. See Morgan Stanley Report, Table 5 (CWD-EXP-00211) (Exh. 5). UST's return on assets in its tobacco division was reported to have ranged between 120.3% and 168.0% between 1990 and 1996 (moist snuff accounted for almost all of UST's tobacco sales). Id.

466 U.S. 2, 27 n.46 (1984) ("As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market.").[89]

II. BECAUSE UST CANNOT OFFER ANY EVIDENCE TO SUPPORT ITS COUNTERCLAIMS, THEY SHOULD BE DISMISSED

UST asserted five counterclaims against Conwood.[90] All five allegedly stem from misconduct by Conwood sales representatives, similar to the misconduct alleged in support of Conwood's claims against UST. UST developed no evidence through discovery to support these me-too claims. It has failed to list a single witness with personal knowledge of any claimed actionable misconduct by Conwood; and it cannot claim damages from any such alleged misconduct. For both of these reasons, the counterclaims should be dismissed.

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[89] UST's intent and ability to exclude competitors — a third way to prove monopoly power — is equally clear. See Re/Max, 173 F.3d at 1016 (monopoly-power can be established through "direct evidence showing . . . the actual exclusion of competitors" (internal quotation marks omitted). As explained in Part I(A)(1)(g), supra, UST has successfully executed its "business strategy" to create "barriers to entry" and to exclude competitors from the moist snuff market and thereby "protect its market share." USTC/CWD 052106 ("Protect our market share by creating barriers to competition") (Exh. 9); see also id. (UST activities "provide a barrier to competitor entry in the moist smokeless market" and "support [UST's] market share expansion objectives").

[90] Violation of Section 43(A) of the Lanham Act (Count I); Tortious Interference with Contract and Prospective Advantage (Count II); Violation of Kentucky Revised Statute Section 365.050 (Count III); Product Defamation (Count IV); and Conversion/Trover (Count V). See Answer and Affirmative Defenses (June 12, 1998).

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A. UST Has No Witness with Personal Knowledge of Actionable Misconduct by Conwood

On May 11, 1999, the Court (by Magistrate Judge Moyer) ordered UST to disclose "no later than September 21, 1999 . . . 'field personnel' trial witnesses who have direct personal knowledge regarding the allegations contained in UST's counterclaim."[91] UST has not disclosed any witness in compliance with that Order. Accordingly, UST has no competent evidence to support any of its claims, and will be unable at trial to prove any actionable misconduct by Conwood.

B. UST Has No Evidence of Damages

In its initial disclosures under Federal Rule of Civil Procedure 26, UST failed to provide any "computation of any category of damages claimed" (Fed. R. Civ. P. 26(a)(1)(C)) or identify supporting documents with respect to its counterclaims, as required by the rules. Conwood brought UST's default to the Court's attention, and by Order dated February 5, 1999, Magistrate Judge Moyer required UST to provide the requisite damages disclosure.[92] UST never complied with that Order.

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[91] May 11, 1999 Order at 3. Magistrate Judge Moyer defined these trial witnesses to include "witnesses who have direct personal knowledge" of the parties' "'in the field'" anti-competitive behavior. Such field personnel would include UST field sales personnel and former sales personnel, Conwood field sales personnel, convenience store owners, managers and employees, and others who have directly, personally observed 'in the field' activity" that the parties allege "to be anti-competitive." Id. at 2-3.

[92] Magistrate Judge Moyer issued an Order directing UST to provide a Rule 26(a)(1)(C) counterclaims damages calculation: "Conwood's motion to compel a response by UST under Rule 26(a)

Nor did UST make any disclosure of damages evidence in its expert reports submitted pursuant to Rule 26. Neither of UST's two experts offered any opinion on damages to UST — nor even made any reference to UST's counterclaims. UST therefore has no expert testimony to support its contentions.

Plainly, UST has no damages evidence of any kind; alternatively, if it has such evidence but failed to disclose it, its failure to comply with Court Orders and Rule 26(a) should preclude any attempt by UST to offer damages evidence at trial.[93] In either case, the absence of any evidence of damages requires entry of judgment on UST's counterclaims.

CONCLUSION

The Court should enter partial summary judgment on the issue of defendants' power in the relevant U.S. product market (moist snuff), and should grant summary judgment in favor of plaintiffs on Counts I through V of defendants' counterclaims.

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with respect to UST's counterclaim is sustained." Feb. 5, 1999 Order at 8.

[93] Federal Rule of Civil Procedure 37(c)(1) provides that "[a] party that without substantial justification fails to disclose information required by Rule 26(a) . . . shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Rule 37(c)(1) is "a self executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under [Rule 37](a)(2)(A)." Commentary to Fed. R. Civ. P. 37, 146 F.R.D. 401, 691 (1993).

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Respectfully submitted,

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Counsel for Plaintiffs

November 15, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

On this day came on for consideration Plaintiffs' Motion for Partial Summary Judgment, to wit, that the United States market for moist snuff is the relevant market and that Defendants' have monopoly power in that market, and Defendants' Opposition thereto, and the Court finding that this Motion should be granted, therefore,

IT IS ORDERED that Plaintiffs' Motion for Partial Summary Judgment be, and the same hereby is, GRANTED.

SIGNED this _____ day of _____, 19__.

_____
THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

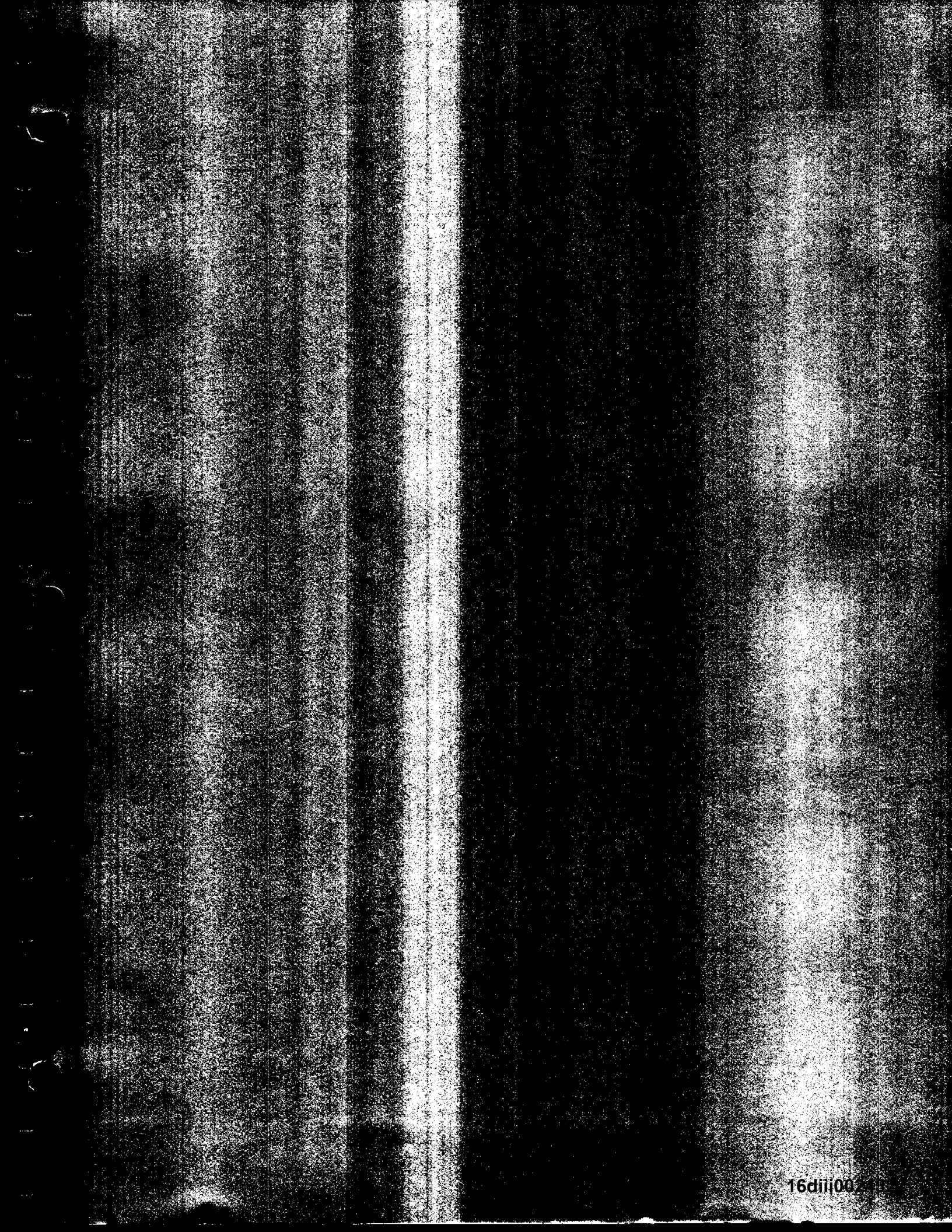
On this day came on for consideration Plaintiffs' Motion for Summary Judgment as to Defendants' Counterclaims, Defendants' Opposition thereto, and the Court finding that this Motion should be granted, therefore,

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment as to Defendants' Counterclaims be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of Plaintiffs with respect to Counts I - V of Defendants' Counterclaims _____.

SIGNED this _____ day of _____, 19__.

_____
THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE



CERTIFICATE OF SERVICE

I certify that, on this 15th day of November 1999, a copy of the foregoing was hand-delivered to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
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I certify that, on this 15th day of November 1999, a copy of the foregoing was sent by facsimile and by over-night mail to:

John S. Reed
Ridley M. Sandidge
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	'99 NOV 15 P12:35 FILED U.S. DISTRICT COURT CLERK WESTERN DIST. KENTUCKY Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(a), plaintiffs hereby move for partial summary judgment that, for purposes of plaintiffs' claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, (a) the definition of the relevant market is the United States market for moist smokeless tobacco ("moist snuff"); and (b) defendants possess monopoly power in that market.

Plaintiffs also move under Federal Rule of Civil Procedure 56(b) for summary judgment as to each of defendants' counterclaims because defendants will be unable to offer any proof to establish either liability or damages with respect to each counterclaim.

A Memorandum in Support and proposed Orders are attached.

Respectfully submitted,

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COURTNEY SIMMONS ELWOOD

November 15, 1999

Honorable Thomas B. Russell
United States District Court
Western District of Kentucky
307 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed is a courtesy copy of Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment and Appendix and Proposed Orders, which we are filing with the Clerk of the Court today.

Respectfully,

Steven F. Benz

Enclosure

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GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

November 15, 1999

Jeffrey A. Apperson, Clerk
United States District Court
Western District of Kentucky
322 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs' Memorandum in Support of Partial Summary Judgement and Appendix, and Proposed Orders.

Also enclosed is an additional copy of each. I would be grateful if you would date-stamp and return these copies in the enclosed self-addressed envelope.

Many thanks for your assistance.

Respectfully,

Steven F. Benz

Enclosures

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,

Defendants.

'99 NOV 15 P12:35

FILED
U.S. DISTRICT COURT CLERK
WESTN. DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

JURY TRIAL DEMANDED

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56(a), plaintiffs hereby move for partial summary judgment that, for purposes of plaintiffs' claims under Section 2 of the Sherman Act, 15 U.S.C. § 2, (a) the definition of the relevant market is the United States market for moist smokeless tobacco ("moist snuff"); and (b) defendants possess monopoly power in that market.

Plaintiffs also move under Federal Rule of Civil Procedure 56(b) for summary judgment as to each of defendants' counterclaims because defendants will be unable to offer any proof to establish either liability or damages with respect to each counterclaim.

A Memorandum in Support and proposed Orders are attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts/ccc

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen/ccc

Mark C. Hansen
Steven F. Benz
Courtney Simmons Elwood
Kellogg, Huber, Hansen, Todd
& Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

November 15, 1999

16diii002439

SUREWAY WORLDWIDE

2500 Oakville Street, Alexandria, VA 22301
1-703-684-7400
1-800-237-9271

SERVICE REQUEST FORM

DCA E 675823

BILL TO ACCT #

AIRBILL PACKAGE TRACKING NUMBER

DATE 11/14 ☐ COLLECT ☐ PREPAID ☐ 3rd PARTY

DECLARED VALUE $10 Max

The liability of Sureway Worldwide for loss or damage is limited to $100.00 unless excess value is declared and charge is paid. See terms and conditions on reverse side.

SERVICE AUTHORIZED BY J BARTLOW (TEL #) 202-326-7976

SHIPPER KELLOGG HUBER

ADDRESS 1301 K STREET N.W.

CITY WASHINGTON STATE D.C. ZIP CODE 20005

ATTENTION

SHIPPER'S JOB # SHIPPER'S P.O. 99718

CONSIGNEE CLERK OF THE COURT

ADDRESS (P.O. Box Not An Acceptable Address) 501 BROADWAY

CITY PADUCAH STATE/COUNTRY KY ZIP CODE 42001

ATTENTION JEFFRY A APPERSON (TEL #) 502-443-1357

ADDRESS (ALTERNATE DELIVERY) 127 FEDERAL BLDG (502-443-1357)

PIECES 1 WEIGHT 38 lbs PLEASE CHECK APPROPRIATE SERVICE BOX(ES) BELOW

DIMENSIONS (INCHES) L x W x H DIM WEIGHT 194 (DOM) = 166 (INT) =

DESCRIPTION OF PACKAGE LEGAL DOCUMENTS

IF THIRD PARTY BILLING NAME & ADDRESS BELOW

NAME

ADDRESS

CITY STATE ZIP CODE

SERVICES

- ☐ Overnight Letter
- ☐ AM Next Day
- ☒ Next Day 3 PM LATEST
- ☐ Economizer Service (2 day)
- ☐ Deferred (3-5 day)
- ☐ Truck

Additional charges apply

- ☐ Same Day
- ☐ Next Business Morning By 9 AM
- ☐ Saturday Delivery

INTERNATIONAL ONLY

- ☐ STANDARD
- ☐ ECONOMIZER
- ☐ LETTER
- ☐ AIR FREIGHT
- ☐ OCEAN
- ☐ ASAP (Surcharge may apply call in advance to arrange)
- ☐ Document
- ☐ Non-Document (Please attach 3 copies of commercial invoice)

Declared Value for Customs

Bill Duties and Taxes to: ☐ Shipper ☐ Consignee

CHARGES

AIR CHARGE	
PICKUP CHARGE	
DELIVERY CHARGE	
EXCESS WEIGHT	
EXCESS MILEAGE	
COD	
CUSTOMS ENTRY	
DUTY	
INSURANCE OR COD FEE	
OTHER	
TOTAL CHARGES $	

SPECIAL INSTRUCTIONS (delivery date, handling, etc.) PLEASE CALL 202-326-7976 W/ CONFIRMATION TO JESSICA BARTLOW. THANK YOU!

PU TICKET # Received by SUREWAY WORLDWIDE DATE TIME

E200-11/98

DUPLICATE

SURFWAY WORLDWIDE

2500 Oakville Street, Alexandria, VA 22301
1-703-684-7400
1-800-237-0271

SERVICE REQUEST FORM

CASE 675824

DATE 11/14 ☐ COLLECT ☐ PREPAID ☐ 3rd PARTY

BILL TO ACCT #

AIRBILL PACKAGE TRACKING NUMBER

SERVICE AUTHORIZED BY J. BARTLOW (TEL #) 202-326-7976

DECLARED VALUE $10 cap

The liability of Surfway Worldwide for loss or damage is limited to $100.00 unless excess value is declared and charge is paid. See terms and conditions on reverse side.

SHIPPER KELLOGG HUBER

ADDRESS 1301 K STREET N.W.

CITY WASHINGTON STATE D.C. ZIP CODE 20005

ATTENTION

SHIPPER'S JOB # SHIPPER'S P.O. # 99718

IF THIRD PARTY BILLING NAME & ADDRESS BELOW

NAME

ADDRESS

CITY STATE ZIP CODE

CONSIGNEE ATTN: THOMAS B. RUSSELL

ADDRESS (No P.O. Box Nor An Accessible Address) 501 BROADWAY

CITY PADUCAH STATE/COUNTRY KY ZIP CODE 42001

ATTENTION (TEL #) (270) 443-1225

ADDITIONAL ADDRESS INFO 307 FEDERAL BLDG

PIECES 1 WEIGHT 1/4 lb. PLEASE CHECK APPROPRIATE SERVICE BOX(ES) BELOW

DIMENSIONS (INCHES) L x W x H DIM WEIGHT + 194 (DOM) = + 166 (INT) =

DESCRIPTION OF PIECES AND CONTENTS LEGAL DOCUMENTS

SERVICES

- ☐ Overnight Letter
- ☐ AM Next Day
- ☑ Next Day 3 PM LATEST
- ☐ Economizer Service (2 day)
- ☑ Deferred (3-5 day)
- ☐ Truck

Additional charges apply

- ☐ Same Day
- ☐ Next Business Morning By 9 AM
- ☐ Saturday Delivery

INTERNATIONAL ONLY

- ☐ STANDARD
- ☐ LETTER
- ☐ OCEAN
- ☐ ECONOMIZER
- ☐ AIR FREIGHT
- ☐ ASAP (Surcharge may apply call in advance to arrange)
- ☐ Document
- ☐ Non-Document (Please attach 3 copies of commercial invoice)

Declared Value for Customs

Bill Duties and Taxes to: ☐ Shipper ☐ Consignee

CHARGES

PICK-UP CHARGE	
DELIVERY CHARGE	
EXCESS WEIGHT	
EXCESS CHARGE	
COD	
CUSTOMS ENTRY	
DUTY	
INSURANCE OR COVERAGE	
OTHER	
TOTAL CHARGES $	

SPECIAL INSTRUCTIONS (delivery date, handling, etc.)

PLEASE CALL 202-326-7976 WITH CONFIRMATION TO JESSICA BARTLOW. THANK YOU!

TICKET # Received by SURFWAY WORLDWIDE DATE TIME

DUPLICATE

SURENWAY WORLDWIDE

2500 Oakville Street, Alexandria, VA 22301
1-703-684-7400
1-800-237-9271

SERVICE REQUEST FORM

DCA E 675825

DATE 1/14 ☐ COLLECT ☐ PREPAID ☐ 3rd PARTY

BILL TO ACCT #

AIRBILL PACKAGE TRACKING NUMBER

The liability of Surenway Worldwide for loss or damage is limited to $100.00 unless excess value is declared and charge is paid. See terms and conditions on reverse side.

SERVICE AUTHORIZED BY B.J. BARTLOW (TEL #)

COMPANY KELLOGG HUBER

ADDRESS 1301 K STREET N.W.

CITY WASHINGTON STATE D.C. ZIP CODE 20005

ATTENTION

SHIPPER'S JOB # SHIPPER'S P.O. 97718

DECLARED VALUE FOR CARRIAGE

CONSIGNEE RICHARD ROBERTS

ADDRESS (P.O. Box not acceptable address) 300 BROADWAY

CITY PADUCAH STATE/COUNTRY KY ZIP CODE 42002

ATTENTION (TEL #) ROBERTS LAW FIRM

ADDRESS (if different from above) 502-443-4516

IF THIRD PARTY BILLING NAME & ADDRESS BELOW

NAME

ADDRESS

CITY STATE ZIP CODE

PIECES WEIGHT 74 lbs

DIMENSIONS (INCHES) L W H

x x

DIM WEIGHT

÷ 194 (DOM) =
÷ 166 (INT) =

PLEASE CHECK APPROPRIATE SERVICE BOX(ES) BELOW

DESCRIPTION OF CONTENTS LEGAL DOCUMENTS

SERVICES

- ☐ Overnight Letter
- ☑ AM Next Day
- ☑ Next Day 3 pm LATEST
- ☐ Economizer Service (2 day)
- ☐ Deferred (3-5 day)
- ☐ Truck

Additional charges apply

- ☐ Same Day
- ☐ Next Business Morning By 9 AM
- ☐ Saturday Delivery

INTERNATIONAL ONLY

- ☐ STANDARD
- ☐ LETTER
- ☐ OCEAN
- ☐ ECONOMIZER
- ☐ AIR FREIGHT
- ☐ Airport (Surcharge may apply, call in advance to arrange)
- ☐ Document
- ☐ Non-Document (Please attach 3 copies of commercial invoice)

Declared Value for Customs

Bill Duties and Taxes to: ☐ Shipper ☐ Consignee

CHARGES

AIR CHARGE	
PICKUP CHARGE	
[illegible]	
EXCESS WEIGHT	
EXCESS MILEAGE	
COD	
CUSTOMS ENTRY	
DUTY	
INSURANCE OR DECLARED VALUE	
OTHER	
TOTAL CHARGES $	

SPECIAL INSTRUCTIONS (delivery date, handling, etc.) PLEASE CALC

202-326-7976 W/ CONFIRMATION TO

JESSICA BARTLOW. THANK YOU!

TICKET #

Received by SURENWAY WORLDWIDE DATE TIME

DUPLICATE

SUREWAY WORLDWIDE
A CONSOLIDATED DELIVERY AND LOGISTICS COMPANY

2500 Oakville Street, Alexandria, VA 22301
1-703-684-7400
1-800-237-0271

SERVICE REQUEST FORM

BILL TO ACCT #

DCA E 675793
AIRBILL PACKAGE TRACKING NUMBER

DATE 11/14 ☐ COLLECT ☐ PREPAID ☐ 3rd PARTY

DECLARED VALUE

The liability of Sureway Worldwide for loss or damage is limited to $100.00 unless excess value is declared and charge is paid. See terms and conditions on reverse side.

FROM

SERVICE AUTHORIZED BY (TEL #)
J. BARTLOW 202-326-7976

SHIPPER
KELLOGG HUBER

ADDRESS
1301 K STREET N.W.

CITY WASHINGTON STATE D.C. ZIP CODE 20005

ATTENTION

SHIPPER'S JOB #

SHIPPER'S P.O. #
97718

TO

CONSIGNEE
SKADDEN ARPS

ADDRESS (P.O. Box Not An Acceptable Address)
919 THIRD AVENUE

CITY NEW YORK STATE/COUNTRY NY ZIP CODE 10022

ATTENTION (TEL #)
CHRIS ATHANASIA

ADDITIONAL ADDRESS INFO
202-735-3000

IF THIRD PARTY BILLING NAME & ADDRESS BELOW

BILL TO

NAME

ADDRESS

CITY STATE ZIP CODE

PIECES 1 | WEIGHT 14 lbs | PLEASE CHECK APPROPRIATE SERVICE BOX(ES) BELOW

DIMENSIONS (INCHES) L X W X H DIM WEIGHT
÷ 184 (DOM) =
÷ 166 (INT) =

DESCRIPTION OF PIECES AND CONTENTS
LEGAL DOCUMENTS

SERVICES

- ☐ Overnight Letter
- ☐ AM Next Day
- ☐ Next Day
- ☐ Economizer Service (2 day)
- ☐ Deferred (3-5 day)
- ☐ Truck

Additional charges apply
- ☒ Same Day
- ☐ Next Business Morning By 9 AM
- ☐ Saturday Delivery

INTERNATIONAL ONLY

- ☐ STANDARD ☐ ECONOMIZER
- ☐ LETTER ☐ AIR FREIGHT
- ☐ OCEAN ☐ ASAP (Surcharge may apply call in advance to arrange)
- ☐ Document
- ☐ Non-Document (Please attach 3 copies of commercial invoice)

Declared Value for Customs

Bill Duties and Taxes to:
☐ Shipper ☐ Consignee

AVAILABLE SERVICES

- OVERNIGHT
- SAME DAY DELIVERY
- EARLY MORNING DELIVERY
- LATE NIGHT PICK-UP
- INTERNATIONAL SERVICE
- AIR FREIGHT/TRUCKING
- CUSTOMIZED BILLING

SPECIAL INSTRUCTIONS (delivery date, handling, etc.) PLEASE CALL 202-326-7976 (JESSICA BARTLOW) WITH CONFIRMATION. THANK YOU!

P/U TICKET #

Received by SUREWAY WORLDWIDE DATE 11/15/99 TIME 1103

REGULATIONS REQUIRE PAYMENT WITHIN 10 DAYS

F200-11/98

SHIPPER'S RECEIPT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants United States Tobacco Company, et al. ("USTC"), through counsel, move the Court pursuant to Fed. R. Civ. P. 56 for summary judgment as to the federal law claims of Plaintiffs Conwood Company, L.P. et al. ("Conwood") in this case and for dismissal without prejudice of Conwoods' pendent state law claims. With this motion, USTC submits a supporting memorandum of law focused on Conwood's core monopolization claim under Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. With respect to the Lanham Act claim, USTC relies upon pp. 18-21 of its Memorandum of Law in Support of its Motion to Dismiss Complaint or for

Judgment on the Pleadings filed September 4, 1998 (Dkt. 30) and pp. 21-23 of USTC's reply memorandum on the same motion submitted September 30, 1998 (Dkt. 34). USTC also tenders a proposed order.

Respectfully submitted,

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, KY 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, NY 10022
(212) 735-3000

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing motion, the supporting memorandum and the tendered order were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 15th day of November, 1999.

Counsel for Defendants

16diii002445

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

On the Motion of the Defendants pursuant to Fed. R. Civ. P. 56 for summary judgment as to Plaintiffs' claims in this action, the Court having determined that the record reflects no genuine issue as to any material fact and that Defendants are entitled to a judgment as a matter of law as to Plaintiffs' federal law claims under Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2 (Count I of the Complaint) and the Lanham Act (Count II of the Complaint),

IT IS HEREBY ORDERED AND ADJUDGED that Defendants' motion is granted. All federal claims of Plaintiffs against Defendants in this action -- the Sherman Act Section 2 monopolization claim in Count I and the Lanham Act claim in Count II of the Complaint -- are dismissed with prejudice. The pendent state law claims in Counts III-VIII of the Complaint are dismissed without prejudice.

Entered this _____ day of _____, _____.

Thomas B. Russell, Judge
United States District Court

TENDERED BY:

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, KY 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
919 Third Avenue
New York, NY 10022
(212) 735-3000

Counsel for Defendants

Exhibits 1-81

Plaintiff's Motion

for Partial Summary Judgment

in Separate Binders

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION OF DEFENDANTS FOR LEAVE TO FILE MEMORANDUM IN EXCESS OF FORTY PAGES

Pursuant to LR 7.1(d), Defendants United States Tobacco Company, et al. ("USTC") seek leave to file the memorandum in support of the motion for summary judgment tendered with this motion. The memorandum is in excess of the forty-page limit because eight additional pages are necessary to enable USTC to address fully and to set forth adequately the law and facts in support of its motion, which covers each element of liability and damages asserted by Plaintiffs Conwood Company, L.P., et al. in their core monopolization claim under Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2.

A tendered order directing the Clerk to accept the attached memorandum for filing is attached hereto.

Respectfully submitted,

John S. Reed
Ridley M. Sandidge, Jr.
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 15th day of November, 1999.

Counsel for Defendants

16diii002450

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

Defendants having moved the Court for leave to file a memorandum in support of their motion for summary judgment in excess of forty pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted and the Clerk is instructed to file the memorandum tendered by the Defendants with their motion for leave.

Entered this _____ day of _____, 1999.

_____
Thomas B. Russell, Judge
United States District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P.	)	
Plaintiffs,	)	
v.	)	Civil Action No. 5:98-CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,	)	
Defendants.	)	

ORDER

Defendants having moved the Court for leave to file a memorandum in support of their motion for summary judgment in excess of forty pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted and the Clerk is instructed to file the memorandum tendered by the Defendants with their motion for leave.

Entered this 18 day of NOV, 1999.

Thomas B. Russell, Judge
United States District Court

ENTERED
NOV 18 1999
JEFFREY A. APPERSON, CLERK
DEPUTY CLERK

16diii00246220

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION OF DEFENDANTS FOR ORAL ARGUMENT

Defendants United States Tobacco Company, et al. ("USTC"), by counsel, hereby move the Court, pursuant to L.R 7.1(g), to enter the attached Order setting oral argument with regard to Defendants' Motion for Summary Judgment (Dkt. 208, 212), Defendants' Motion to Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich (Dkt. 210) and Plaintiffs' Motion for Partial Summary Judgment (Dkt. 207). As grounds for this motion, Defendants state that oral argument will allow the parties to help the Court focus on the specific legal issues involved on their motions in this case, which includes Sherman Act claims, Lanham Act claims and state law tort claims. With trial set for February 28, 2000 and briefing on the summary judgment motions to be completed by December 24, 1999, USTC asks the Court to schedule a time for the parties to be heard on these key motions, the resolution of which will determine the need for a trial and significantly shape preparation for trial of any issues the Court decides a jury should hear.

A tendered order is attached hereto.

Respectfully submitted,

John S. Reed by mkt

John S. Reed
Ridley M. Sandidge, Jr.
Lynn K. Fieldhouse
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 10th day of December, 1999.

John S. Reed by mkt

Counsel for Defendants

16diii002454

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on December 15, 1999 for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Neil Gorsuch and Dick Roberts, counsel.

FOR THE DEFENDANT: Martha Weiss, John Reed, Chris Athanasia, and James Keyte, counsel.

The parties reported that there were no issues for the court's consideration at this time.

IT IS HEREBY ORDERED that

The next teleconference is scheduled for **Thursday, January 13, 2000 at 10:30 a.m.**

Plaintiff shall initiate the telephone call.

Date: 12/17/99

JD Moyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
DEC 17 1999
JEFFREY A. APPERSON, CLERK
BY: DEPUTY CLERK

16diii002455
223

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION OF DEFENDANTS FOR LEAVE TO FILE REPLY MEMORANDUM IN EXCESS OF FIFTEEN PAGES

Pursuant to LR 7.1(d), Defendants seek leave to file the attached reply memorandum in support of their motion to exclude the damages study and future testimony of Dr. Richard Leftwich. A reply in excess of the fifteen-page limit is necessary to enable Defendants to address in detail the law and facts relevant to Plaintiffs' purported justifications of Dr. Leftwich's challenged damages report and testimony.

A tendered order directing the Clerk to accept the attached memorandum for filing is attached hereto.

Respectfully submitted,

Dated: December 23, 1999

John S. Reed
Ridley M. Sandidge, Jr.
Lynn K. Fieldhouse
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Rachel A. Mariner
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 23rd day of December, 1999.

Counsel for Defendants

16diii002457

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

Defendants having moved the Court for leave to file a reply memorandum in support of their motion to exclude the damages study and future testimony of Dr. Richard Leftwich in excess of fifteen pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted and the Clerk is instructed to file the reply memorandum tendered by the Defendants with their motion for leave.

Entered this _____ day of _____, _____.

_____
United States District Judge

TENDERED BY:

John S. Reed
Ridley M. Sandidge,Jr.
Lynn K. Fieldhouse
REED WEITKAMP SCHELL & VICE PLLC
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Counsel for Defendants

16diii002459

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION OF DEFENDANTS FOR LEAVE TO FILE REPLY MEMORANDUM IN EXCESS OF FIFTEEN PAGES

Pursuant to LR 7.1(d), Defendants seek leave to file the attached reply memorandum in support of their motion to exclude the damages study and future testimony of Dr. Richard Leftwich. A reply in excess of the fifteen-page limit is necessary to enable Defendants to address in detail the law and facts relevant to Plaintiffs' purported justifications of Dr. Leftwich's challenged damages report and testimony.

A tendered order directing the Clerk to accept the attached memorandum for filing is attached hereto.

Respectfully submitted,

Dated: December 23, 1999

John S. Reed
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Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 23rd day of December, 1999.

Counsel for Defendants

16diii002461

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

Defendants having moved the Court for leave to file a reply memorandum in support of their motion to exclude the damages study and future testimony of Dr. Richard Leftwich in excess of fifteen pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted and the Clerk is instructed to file the reply memorandum tendered by the Defendants with their motion for leave.

Entered this _____ day of _____, _____.

_____
United States District Judge

TENDERED BY:

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Counsel for Defendants

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE CERTAIN AFFIDAVITS FILED BY PLAINTIFFS IN SUPPORT OF THEIR OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, U.S. Tobacco Co., et al. ("USTC"), move this Court to strike certain of the affidavits offered by Plaintiffs, Conwood Company, L.P. ("Conwood"), in support of Conwood's opposition to USTC's motion for summary judgment. The affidavits do not meet the basic requirements of Fed. R. Civ. P. 56(e): they do not set forth facts that are admissible in evidence; and they do not show affirmatively that the affiants are competent to testify. For these reasons, the affidavits cannot constitute evidence that raises a genuine issue of material fact in this action, and they should be stricken from the record.

FACTUAL AND PROCEDURAL BACKGROUND

In April, 1999, USTC moved this Court to compel the production of all written statements or declarations obtained by Conwood from third parties, including third-party retailers. Magistrate Judge Moyer denied USTC's motion based on his conclusion that any such declarations were protected from discovery by the work-product doctrine. See Order of April 23, 1999 (Dkt. 94).

Subsequently, USTC moved the Court to modify the Scheduling Order to require earlier disclosure of certain trial witnesses in order to provide the parties with a fair opportunity to depose those persons intended to be called as trial witnesses. In light of his earlier ruling on the disclosure of witness statements, Magistrate Judge Moyer granted USTC's motion and modified the Scheduling Order "to require the disclosure by Conwood by September 21, 1999 of its trial witnesses who are 'field personnel.'" See Order of May 11, 1999 at 2 (Dkt. 100). The Order defined "field personnel" as "witnesses who have alleged direct personal knowledge of UST's 'in the field' anticompetitive behavior." Id. at 2-3. The Order provided that, upon disclosure of field personnel witnesses, the parties would have a month-long opportunity to depose those persons. Id.

On September 21, 1999, Conwood disclosed its field personnel witnesses, but did not list any retailers, other than a reference to those who had already been deposed during the regular discovery period (which had ended on September 3, 1999). See Conwood September 21, 1999 Disclosures, App. 1. Subsequent to Conwood's disclosures, USTC wrote to seek confirmation that, despite Conwood's promise to "march into court" retailer after retailer to testify about USTC's anticompetitive behavior, Conwood had not listed a single retailer as a potential live trial witness. See USTC Letter, September 22, 1999, App. 2. Conwood confirmed that it had not intended to

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disclose any third-party retailers as potential trial witnesses. See Conwood Letter, September 22, 1999, App. 3.

On October 1, 1999, for the first time, Conwood disclosed the existence of approximately 40 third-party witness statements obtained from retailers (the "Retailer Declarations"). The Retailer Declarations were vaguely referenced in several of Conwood's expert reports. USTC promptly sought and obtained discovery of these witness statements under Fed. R. Civ. P. 26(a)(2) (requiring disclosure of materials considered by a testifying expert).

Although USTC was belatedly in possession of approximately 40 Retailer Declarations, the regular discovery period had ended, and Conwood had not listed any of the declarants as trial witnesses. Therefore, USTC could not depose the declarants under Magistrate Judge Moyer's May 11, 1999 Order. Accordingly, USTC had no opportunity to seek discovery from these third-parties, and will not have any opportunity to cross-examine them at any trial.

On November 15, 1999, USTC moved for summary judgment. On December 10, 1999, Conwood submitted the Retailer Declarations in opposition to USTC's motion for summary judgment as "evidence" of otherwise unproven facts critical to Conwood's case, namely that USTC has engaged in a systematic campaign of "dirty tricks." See Pl. Opp. at 14-15, 57.

ARGUMENT

Fed. R. Civ. P. 56(e) mandates that any affidavit submitted in opposition to a motion for summary judgment meet the following requirements:

1) "opposing affidavits shall be made on personal knowledge";

2) "opposing affidavits . . . shall set forth facts as would be admissible in evidence"; and

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3) "opposing affidavits . . . shall show affirmatively that the affiant is competent to testify to the matters stated therein."

Thus, if a witness will not testify at trial, an affidavit from that witness must be stricken from the record at the summary judgment stage. In Chappell v. Bradley, 834 F. Supp. 1030 (N.D. Ill. 1993), for example, the plaintiffs submitted affidavits in support of their motion for summary judgment. Id. at 1033. Defendants moved to strike those affidavits because plaintiffs had failed to disclose the affiants as trial witnesses. Id. Defendants argued that, because the affiants were precluded from testifying at trial, their affidavits were not appropriately considered on summary judgment and should be stricken from the record. The court agreed and granted defendants' motion:

> The purpose of a summary judgment motion is to determine whether there are issues present which require decision at trial. The parties then disclose to the court the admissible evidence through the vehicles of affidavits, depositions, etc. that is available to determine whether there is sufficient disagreement to warrant trial. Rule 56(e) requires that an affidavit must set forth facts that are admissible in evidence and "shall show affirmatively that the affiant is competent to testify . . . ." If the plaintiffs have no intention of offering the evidence at trial it would of course not be admissible. If the witness is not disclosed, and is a Rule 26(b)(4)(B) consulting only expert, he is not competent to testify. Since the witnesses were not disclosed, the appropriate remedy is to strike the affidavits.

Id. (emphasis added). Accordingly, if a party fails to disclose a trial witness when the party is required to do so, that party may not rely on an affidavit from that witness on summary judgment.

In its motion for summary judgment, USTC established that Conwood has not proven facts sufficient to create a triable issue of fact on its Sherman Act § 2 claims. See Memorandum In Support Of Defendants' Motion For Summary Judgment. In opposition to USTC's motion for summary judgment, Conwood submitted affidavits from approximately 40 retailers as "evidence" that USTC engages in a pervasive and systematic campaign of so-called "dirty tricks." See Pl. Opp.

at 14-15, 57. This "evidence," however, will not be admissible at trial and therefore should not be considered on summary judgment.

If Conwood planned to introduce evidence from third parties concerning the alleged anticompetitive conduct of USTC in the field, Conwood was obligated to disclose those persons as trial witnesses on September 21, 1999. See May 11, 1999 Order. Whether Conwood was unable or simply unwilling to disclose the identity of these third-parties from whom Conwood obtained affidavits, the fact remains that none of these witnesses may now be called by Conwood to appear at trial. Accordingly, affidavits from these persons submitted by Conwood in opposition to USTC's motion for summary judgment should be stricken from the record. See Chappell, 834 F. Supp. at 1033.

Moreover, the affidavits at issue are demonstrably unreliable. In the brief period of time USTC has been in possession of these declarations, USTC has done its best to contact the affiants, where possible, about the content of their purported affidavits. In some cases, USTC informed them for the first time of Conwood's intent and purpose for obtaining the affidavits. Invariably, USTC discovered that the information contained in the affidavits was incorrect, or at a minimum, incomplete. USTC submits herewith the results of those communications – supplemental affidavits in which a significant number of the affiants took the opportunity to provide this Court with more accurate and more complete information. See App. at 4.

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CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court strike the affidavits from third-party retail personnel offered by Conwood in support of their opposition to Defendants' motion for summary judgment.

Dated: December 23, 1999

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Counsel for Defendants

16diii002469

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'99 DEC 23 P12:02

FILED
U.S. DISTRICT COURT CLERK
WEST'N DIST. KENTUCKY

MOTION OF PLAINTIFFS FOR LEAVE TO FILE MEMORANDUM IN EXCESS OF FIFTEEN PAGES

Pursuant to LR 7.1(d), plaintiffs seek leave to file their Reply Memorandum in Support of Partial Summary Judgment. The memorandum is two pages in excess of the fifteen-page limit because additional pages are necessary to enable plaintiffs to address fully and to set forth adequately the law and facts in reply to defendants' Opposition.

A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on this 22nd day of December, 1999, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Michael J. Guzman

16diii002471

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

Plaintiffs having moved the Court for leave to file a Reply Memorandum in Support of Partial Summary Judgment in excess of fifteen pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that plaintiffs' motion is hereby granted and the Clerk is instructed to file the memorandum tendered by the plaintiffs with their motion for leave.

Entered this ___ day of January, 2000.

THOMAS B. RUSSELL, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'99 DEC 23 P12:02 FILED US DISTRICT COURT WESTERN DIST. KENTUCKY Civil Action No. 5:98CV-108-R

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR ORAL ARGUMENT

Defendants have moved for oral argument with regard to three pending motions: Defendants' Motion for Summary Judgment, Plaintiffs' Motion for Partial Summary Judgment, and Defendants' Motion to Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich.

Plaintiffs respectfully submit that these matters have been briefed with unusual thoroughness and, accordingly, that oral argument would be of little or no material assistance to the Court. Plaintiffs are, however, available and ready for oral argument should the Court believe it useful. Proposed orders are attached.

Respectfully submitted,

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CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on this 22nd day of December, 1999, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Michael J. Guzman

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Defendants having moved the Court for oral argument on consideration of: Defendants' Motion for Summary Judgment, Plaintiffs' Motion for Partial Summary Judgment, and Defendants' Motion to Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' Motion is hereby DENIED.

SO ORDERED.

Dated this ____ day of January 2000.

HONORABLE THOMAS B. RUSSELL
DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Defendants having moved the Court for oral argument on consideration of: Defendants' Motion for Summary Judgment, Plaintiffs' Motion for Partial Summary Judgment, and Defendants' Motion to Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' Motion is hereby granted, and the Court will hear oral argument on the above motions on January ___, 2000 at _____ _.m. at _____.

Entered this ___ day of January, 2000.

SO ORDERED.

Dated this ____ day of January 2000.

HONORABLE THOMAS B. RUSSELL
DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CASE NO. 5:98CV-108-R

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P., PLAINTIFFS

V. **ORDER**

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY, INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY, INC. and UST, INC., DEFENDANTS

Defendants have moved for oral arguments on three pending motions. (Docket #228) The briefs on these issues have just been filed. The Court has not had the opportunity to review these pleadings. If after the review, the Court feels that oral arguments would be helpful, it will so order.

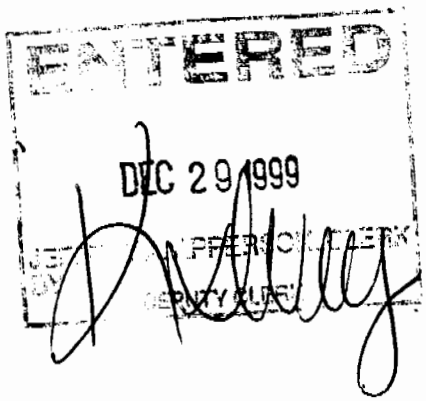
IT IS ORDERED that defendants' motion for oral argument is denied at this time.

IT IS SO ORDERED.

This 28th day of December, 1999.

Thomas B. Russell, Judge
United States District Court

cc: Counsel



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

Defendants having moved the Court for leave to file a reply memorandum in support of their motion for summary judgment in excess of fifteen pages, and the Court being otherwise well and sufficiently advised,

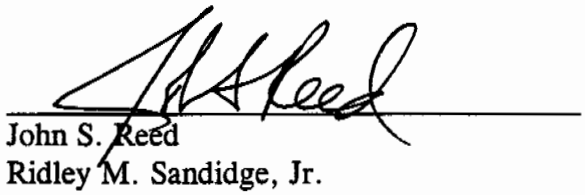
IT IS HEREBY ORDERED that Defendants' motion is hereby granted and the Clerk is instructed to file the reply memorandum tendered by the Defendants with their motion for leave.

Entered this 28 day of Dec, 99.

United States District Judge

ENTERED
DEC 29 1999
CLERK, U.S. DISTRICT COURT
DEPUTY CLERK

TENDERED BY:



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Counsel for Defendants

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

Defendants having moved the Court for leave to file a reply memorandum in support of their motion for summary judgment in excess of fifteen pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted and the Clerk is instructed to file the reply memorandum tendered by the Defendants with their motion for leave.

Entered this 28 day of Dec, 99.

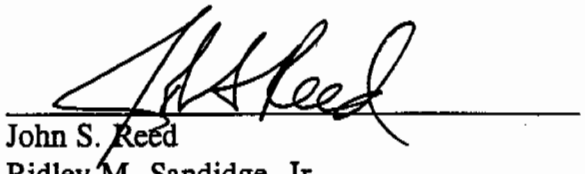
United States District Judge

ENTERED

DEC 29 1999

16diii002480

TENDERED BY:



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Counsel for Defendants

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

Defendants having moved the Court for leave to file a reply memorandum in support of their motion to exclude the damages study and future testimony of Dr. Richard Leftwich in excess of fifteen pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted and the Clerk is instructed to file the reply memorandum tendered by the Defendants with their motion for leave.

Entered this 28 day of Dec, 1999.

United States District Judge

ENTERED
DEC 29 1999
CLERK
BY DEPUTY CLERK

321

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TENDERED BY:

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Counsel for Defendants

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COPY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

Defendants having moved the Court for leave to file a reply memorandum in support of their motion to exclude the damages study and future testimony of Dr. Richard Leftwich in excess of fifteen pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted and the Clerk is instructed to file the reply memorandum tendered by the Defendants with their motion for leave.

Entered this 28 day of Dec, 1999.

United States District Judge

ENTERED
DEC 29 1999

16diii002484

TENDERED BY:

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Counsel for Defendants

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

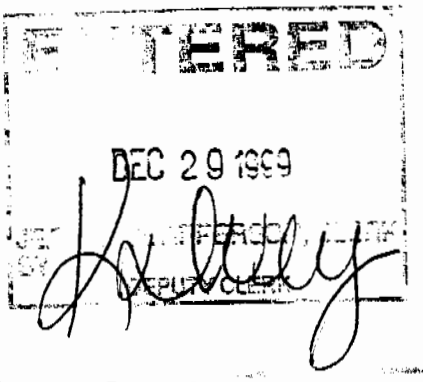
ORDER

Plaintiffs having moved the Court for leave to file a Reply Memorandum in Support of Partial Summary Judgment in excess of fifteen pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that plaintiffs' motion is hereby granted and the Clerk is instructed to file the memorandum tendered by the plaintiffs with their motion for leave.

Entered this 28 day of ~~January~~ Dec, 1999~~2000~~.

THOMAS B. RUSSELL, JUDGE
UNITED STATES DISTRICT COURT



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COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

Plaintiffs having moved the Court for leave to file a Reply Memorandum in Support of Partial Summary Judgment in excess of fifteen pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that plaintiffs' motion is hereby granted and the Clerk is instructed to file the memorandum tendered by the plaintiffs with their motion for leave.

Entered this 28 day of ~~January~~ Dec, 1999~~2000~~.

THOMAS B. RUSSELL, JUDGE
UNITED STATES DISTRICT COURT

FILED
DEC 29 1999

16dii002487

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 JAN -7 A9:39 FILED Civil Action No. 5:98CV-108-R

PLAINTIFFS' OPPOSITION TO MOTION TO STRIKE NON-PARTY DECLARATIONS

In sworn declarations, forty-five retail owners and employees from across the United States recounted defendants' systematic campaign to exclude smaller rivals from the moist snuff market. This corroborates and amplifies testimony from, e.g., another twenty-six such non-party witnesses, ten former UST representatives, and more than 200 Conwood representatives, as well as reams of admissions from defendants' executives and business records. Defendants now ask the Court to wipe the slate clean of the written declarations. They claim that this probative evidence is either procedurally barred or incomplete with respect to twelve of the forty-five declarants.

But the facts defendants (collectively "UST") seek to

suppress fall under no procedural bar. It is hornbook law that the Court may consider written declarations or affidavits on motion for summary judgment. UST's argument that these particular declarations may not be considered -- because they come from witnesses identified as potential rebuttal witnesses, and not disclosed as witnesses for plaintiffs' case-in-chief -- is foreclosed by Sixth Circuit law, unsupported by any other authority, was expressly and properly rejected by Magistrate Judge Moyer, and, tellingly, is exactly the *opposite* of what they argue with respect to their counterclaims. For those, they claim the Court should deny summary judgment based on possible testimony from witnesses undisclosed to this day. (Point I, infra).

Defendants' challenges to twelve of the forty-five witnesses, all of which delve into disputed issues of material fact, only highlight the inappropriateness of the relief they seek. The "supplemental" declarations *confirm* the exclusionary conduct alleged by Conwood. While a few of the declarants, with the monopolist looking over their shoulder, now say that they were *willing* to let defendants practice such exclusion, a store employee's purported willingness to go along provides no defense to a monopolist's exclusion of competition in violation of Section 2. Such supplements provide still less of a basis for disregarding accounts of defendants' use of their market power to

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curtail rivals' opportunities to display and advertise their moist snuff. This evidence bears squarely on the disputed issues of material fact that must be resolved at trial.

I. THE DECLARATIONS CANNOT LAWFULLY BE DISREGARDED ON SUMMARY JUDGMENT

Under Rule 56, a party opposing summary judgment is expressly authorized to submit sworn statements. "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e). There is *no* requirement, correspondingly, that the sworn statements come from identified trial witnesses. Ryder Automotive Carrier Group, Inc. v. General Teamsters Sales & Service, 124 F.3d 199 (Table), Nos. 96-3712, 9738, 1997 WL 540893 at *3 (6th Cir. Sept. 2, 1997)("Rule 56 of the Federal Rules of Civil Procedure does not require that affiants be included in a witness list before their affidavits may be used to support a motion for summary judgment.") (Tab I); Taylor v. St. Louis Southwestern Railway Co., 746 F.Supp. 50, 53 (D. Kan. 1990) (no "strict requirement that affiants used in connection with a motion must appear on a party's witness list; under Rule 56(e), affiants need only be 'competent to testify to the matters stated therein.'").[1]

[1]Courts have gone farther and considered affidavits on summary judgment even when the affiant was unlikely to testify at

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Each of plaintiffs' forty-five declarations meets the Rule 56(e) standard. Defendants base their motion to strike the declarations on the argument that, first, the forty-five declarants may not be allowed to testify at trial because Conwood did not disclose them as witnesses for its case-in-chief; and second, the Court cannot consider sworn statements from witnesses who *may* be prevented from testifying as a possible sanction for the supposed non-disclosure. Both of these necessary predicates to UST's motion are false.

There was no violation of the Scheduling Order. Conwood made appropriate disclosure on September 21, 1999 of all "field personnel" it intended to call in its case-in-chief. In its disclosure, Conwood expressly reserved the right to call, in *rebuttal*, additional witnesses -- including retailers who had given declarations regarding UST misconduct.[2] See Conwood "Field Personnel" Witness List of September 21, 1999, Exhibit "A".

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trial. See, e.g., Banco de Espana v. Fed. Reserve Bank of N.Y., 114 F.2d 438 (2nd Cir. 1940) (considering the affidavit of an ambassador who was immune from any requirement of testifying; "the real requirement is of proof which if presented at the formal trial would be competent to support the issues to which it is directed."); FDIC v. Horn, 751 F.Supp. 186, 188 (D. Colo. 1990) (considering affidavit of witness who had been removed from plaintiff's witness list at the pre-trial conference).

[2]Contrary to UST's suggestion, defendants did not receive the declarations "belatedly." The declarations were first referenced in the expert rebuttals of Professors Kamien and Gundlach filed on October 1, 1999. Conwood provided defendants with copies of all forty-five declarations on October 7, 1999.

Upon receipt of Conwood's disclosure, UST (which inexplicably made *no* disclosure of its own witnesses) sought written confirmation that Conwood did not intend to call non-party witnesses to field misconduct by UST. Exhibit "B". Conwood responded that same day, reiterating that it intended to call in its case all the non-party witnesses whose depositions had been taken, and that it reserved the right to call in rebuttal the forty-five retailers who had given evidence by written declaration regarding UST misconduct. Exhibit "C".

UST then asked Magistrate Judge Moyer at the next Status Conference (October 13, 1999) to preclude Conwood from calling any of the forty-five declarants at trial, on the ground that they had not been disclosed on September 21 in accordance with the Court's Order. Magistrate Judge Moyer denied UST's oral motion, and refused to preclude any of these witnesses. See Order of Oct. 13, 1999; Exhibit "D". UST's claim that "none of these witnesses [the retailer declarants] may now be called by Conwood to appear at trial," UST Memo at 5, simply ignores Magistrate Judge Moyer's contrary ruling.

Finally, UST's position here is just the opposite of what it has argued with respect to its counterclaims. UST did not disclose a single witness to alleged misconduct by Conwood on September 21, yet it argues that the Court cannot grant summary judgment on those claims because it may be able at trial to call

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undisclosed witnesses. See UST Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 31, 34. Accordingly, there is no substance to UST's argument that Conwood violated the Court's scheduling order by failing to list by name on September 21 all potential rebuttal witnesses.

The Court cannot properly ignore the declarations. Equally dispositive is the lack of authority for the relief UST seeks. For even if Conwood *had* failed to make timely disclosure of witnesses -- not the case here -- it would be an abuse of discretion for the Court to ignore the declarations in deciding UST's motion for summary judgment.

The Sixth Circuit so held in Polk v. Local 16, Int'l Union Bricklayers and Allied Craftsmen, 53 F.3d 332 (Table), No. 94-3272, 1995 WL 241999 at *4 (6th Cir. Apr. 25, 1995) (Tab II). There the court reversed a grant of summary judgment where the district court had refused to consider an affidavit submitted by plaintiff along with his opposition. The district court struck the affidavit because the plaintiff had failed to make timely disclosure of the affiant in his answers to defendant's interrogatories, which sought the identity of all plaintiff's trial witnesses. Despite this conceded violation, the Sixth Circuit held it an abuse of discretion for the district court to

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refuse to consider the affidavit in deciding summary judgment.[3] It would be a greater abuse of discretion here to strike competent evidence from the forty-five declarants based on *no* violation of any Federal Rule or Order of the Court.

II. THE DECLARATIONS ARE PROBATIVE AND CREDIBLE EVIDENCE OF UST EXCLUSIONARY CONDUCT

Finally, UST urges the Court to ignore evidence from *some* of the forty-five declarants because UST believes their sworn statements to be inaccurate and/or incomplete.[4] This really amounts to admission by UST that the case turns on disputed issues of material fact. Under no circumstances can the Court properly resolve disputes about the facts -- for example, by deciding which declarations to accept or reject -- on summary judgment. See Williams v. General Motors Corp., 187 F.3d 553,

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[3]In the case UST cites, Chappell v. Bradley, 834 F.Supp. 1030 (N.D. IL 1993), the district court granted a motion to strike affidavits submitted by experts who had not been disclosed in violation of Fed. R. Civ. P. 26. That decision does not support the striking of declarations from *fact* witnesses who were *not* required to be disclosed (but were anyway). It *does* support Conwood's motion for summary judgment based on UST's complete failure to comply with its Rule 26 obligations and the Court's Order demanding compliance with those obligations. See Conwood Motion for Summary Judgment at 38-40.

[4]This last effort demands, on the one hand, that facts inconvenient to UST be disregarded or struck from the record, and on the other, that the Court adopt principles of law never before recognized by any court. For example, no court has read Section 2 out of the statute books as UST proposes with its insistence that a monopolist violates Section 2 *only* by engaging in acts that would themselves constitute some other, "independent violation" of the antitrust law.

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560 (6th Cir. 1999) (summary judgment only appropriate in the absence of disputed facts with the evidence construed favorably to the non-moving party).

Moreover, the evidence UST urges on the Court corroborates the original testimony of the witnesses; the "supplemental" declarations are not recantations, but rather elaborations. They further establish that UST systematically excluded rivals from retail locations. While UST attempts to add the gloss that its exclusion was effected in some instances with acquiescence from store employees, such "permission" is irrelevant; the store's consent, as a matter of law, is no defense to the Section 2 violation established by UST's willful maintenance of its moist snuff monopoly through systematic exclusion of rival products and advertising. See, e.g., Frito-Lay, Inc. v. Bachman Co., 659 F.Supp. 1129, 1136-1140 (S.D.N.Y. 1986) (retailer consent to exclusionary practices not a defense under Section 2); Sara Lee Corp. v. Kayser-Roth Corp., Civ. No. 6:92CV00460, 1995 U.S. Dist. LEXIS 6554 (M.D.N.C. Apr. 10, 1995) (same).

For example, the supplemental declaration of Patricia Heynig corroborates the fact that UST sought and obtained exclusive vending rights at the Hollywood Party Store in Harbor Springs, Michigan. It states that "when I returned to work the next day, there was a new [UST] rack in the store that displayed all of the moist snuff, including Conwood." Heynig Supp. Dec. at ¶5. Ms.

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Heynig's supplemental declaration also leaves wholly unaltered her earlier statement that the UST representative "put the Kodiak products into the UST rack and put Rooster point of sale in front of those products" and that the "Kodiak point of sale ("POS") that was on its rack was removed." Heynig Dec. at ¶¶3 & 5. Ms. Heynig, like the other eleven supplemental declarants, in no way recants her prior testimony.

Similarly, the supplemental declaration of Wayne Smart, owner of Fred's Discount Store in Delhi, Louisiana, recounts that UST persuaded him to reduce the size of the Conwood rack and product offerings as part of a UST-initiated reset. Smart Supp. Dec. at ¶¶4-5. The supplemental declaration does not address Mr. Smart's original statement that UST paid him to put in a UST rack, which was the impetus of the reset. Smart Dec. at ¶3.

The supplements, therefore, do little more than confirm and amplify the evidence originally provided by the forty-five declarants. To the extent that any supplemental declaration conflicts with its predecessor, however, it is hornbook law that the Court cannot resolve that dispute against Conwood at this stage of the case. This is an issue of credibility for trial. See Ingram v. City of Columbus, 185 F.3d 579, 597 (6th Cir. 1999) (reversing grant of summary judgment for defendant because district court failed to credit plaintiff's affidavits and draw all reasonable inferences in favor of plaintiff).

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Conclusion

UST's Motion to Strike Certain Affidavits Filed by Plaintiffs in Support of Their Opposition to Defendants' Motion for Summary Judgment should be denied. A proposed order is attached.

Respectfully submitted,
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Having considered Defendants' Motion to Strike Certain Affidavits Filed By Plaintiffs in Support of Their Opposition To Defendants' Motion for Summary Judgment, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' Motion is hereby DENIED.

SO ORDERED.

Dated this ____ day of January 2000.

HONORABLE THOMAS B. RUSSELL
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I certify that on this 6th day of January 2000, a copy of the foregoing was sent by facsimile service and overnight mail to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

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Michael J. Guzman

EXHIBIT 1

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the publication and citation of unpublished opinions.)

RYDER AUTOMOTIVE CARRIER GROUP, INC., Plaintiff-Appellant,
v.
GENERAL TEAMSTERS SALES & SERVICE AND INDUSTRIAL UNION LOCAL NO. 654, Defendants-Appellees

Nos. 96-3712, 96-3738.

United States Court of Appeals, Sixth Circuit.

Sept. 2, 1997.

On Appeal from the United States District Court for the Southern District of Ohio.

BEFORE: MARTIN, Chief Judge, RYAN and BATCHELDER, Circuit Judges.

PER CURIAM.

**1 In this declaratory action case, Ryder Automotive Carrier Group, Inc. appeals the district's grant of summary judgment, declaring that the grievance filed by General Teamsters Sales & Service and Industrial Union Local No.654 against Ryder Automotive should be submitted to arbitration pursuant to the terms of a collective bargaining agreement between the Union and Ryder Automotive.

Ryder Systems, Inc. is the parent company for several different subsidiaries, including Ryder Automotive and Ryder Truck Rental, Inc. Ryder Truck Rental engages primarily in the business of leasing vehicles to commercial and individual clients. Through several "operating" companies, Ryder Automotive engages primarily in the business of providing transportation for vehicle manufacturers.

In 1992, the operating companies owned by Ryder Automotive entered into a collective bargaining agreement with the Union referred to as the National Automobile Transporters Agreement. In an effort to eliminate the possibility that Ryder Automotive or its operating companies would divert to an affiliated company operations traditionally assigned to Union members (a technique known as "double breasting"), Ryder Automotive, its operating companies, and the Union executed an agreement supplemental to the Collective bargaining agreement, referred to as the Ryder Automotive Work Preservation Agreement.

In March, 1994, the Union filed a grievance with Ryder Automotive, claiming that Ryder Automotive employees should be permitted to transport the new trucks purchased by Ryder Truck Rental. After Ryder Automotive refused to concede to the Union's request, the Union instituted arbitration proceedings pursuant to the terms of the Work Preservation Agreement. Ryder Automotive then filed a declaratory judgment action in the U.S. District Court for the Southern District of Ohio, requesting an order declaring that the Union's dispute should not be arbitrated.

Included in the scheduling order entered by the magistrate judge was a requirement that each party file a list of lay witnesses. Additionally, the order warned that unidentified witnesses would not be permitted to testify. The parties then filed cross motions for summary judgment. However, because Ryder Automotive's motion was supported by affidavits of witnesses not listed in its witness disclosure the magistrate judge granted the Union's motion to strike the offending affidavits.

The magistrate then filed a report, recommending that summary judgment be granted in favor of the Union. After the district court adopted the recommendations of the magistrate, Ryder Automotive sought review by this Court, claiming that the magistrate improperly struck the affidavits included in Ryder Automotive's summary judgment motion and improperly granted summary judgment in favor of the Union. The Union cross-appealed, seeking costs and attorneys' fees.

In Johnston Boiler Co. v. Local Lodge No. 893, International Brotherhood of Boilermakers, 753 F.2d 40 (6th Cir.1985) (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83, 80 S.Ct. 1347, 1352-53, 4 L.Ed.2d 1409 (1960)), we recognized that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the

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arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

**2 Paragraph four of the Work Preservation Agreement states:

> [Ryder Automotive] and [Ryder Automotive's operating companies] agree that no operation, work, or services of the kind, nature, or type covered by the [Collective Bargaining Agreement] and/or applicable Supplemental Agreements currently, traditionally, or hereinafter performed by the collective bargaining unit ("Covered Work") shall be performed by any affiliated business entity other than [Ryder Automotive's operating companies] that is owned, managed, or controlled (whether directly or indirectly through other entities) by [Ryder Automotive], [Ryder Automotive's operating companies] or any business entity they own, manage, or control.

The Union claims that Ryder Truck Rental is an "affiliated business entity" of Ryder Automotive, and that, in not permitting Union employees to transport Ryder Truck Rental's newly purchased vehicles, Ryder Automotive has violated paragraph four of the Work Preservation Agreement. The Union further argues that the dispute should be submitted to arbitration, pursuant to paragraph nine, because the Union's grievance alleges a violation of the Work Preservation Agreement.

Requesting reversal of the district court, Ryder Automotive maintains that the Union's grievance should not be subject to arbitration because the Union's grievance really concerns Ryder Truck Rental, an entity who is not a party to the Work Preservation Agreement. According to Ryder Automotive, the Union is attempting to use its agreement with Ryder Automotive to arbitrate a dispute with Ryder Truck Rental.

However, Ryder Automotive once again advances an argument that misconstrues the nature of the Union's complaint. The Union claims that Ryder Automotive-- not Ryder Truck Rental--violated the terms of the Work Preservation Agreement. According to the Union, Ryder Automotive engaged in practices specifically prohibited by the Work Preservation Agreement: a diversion of work to Ryder Truck Rental (an "associated business entity") by virtue of Ryder Automotive's relationship with Ryder Truck Rental. Thus, contrary to Ryder Automotive's position, the Union's claim rests solely upon an alleged violation of the Work Preservation Agreement by a party to the Work Preservation Agreement.

Paragraph nine of the Work Preservation Agreement states "all grievances or disputes concerning the interpretation or application of this [agreement] shall be resolved in final and binding arbitration before the Board of Arbitration established in ... the [Collective Bargaining Agreement]." Because the Union's grievance concerns the interpretation of the Work Preservation Agreement, it cannot be stated "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Id. Accordingly, the district court did not err in ordering arbitration of the dispute.

Ryder Automotive next argues that the district court erred in striking the affidavits supporting its motion for summary judgment. The district court struck Ryder Automotive's affidavits because Ryder Automotive failed to include the affiants in its lay witness list, as required by the court's scheduling order. Ryder Automotive maintains that, while witness not identified in a witness list may not be permitted to testify at trial, nothing prohibits such witnesses from supporting a summary judgment motion.

**3 We agree with Ryder automotive that Rule 56 of the Federal Rules of Civil Procedure does not require that affiants be included in a witness list before their affidavits may be used to support a motion for summary judgment. However, our conclusion with regard to the affidavits does not alter the disposition of this case. As noted above, the ultimate issue before this Court is not whether Ryder Automotive violated the terms of the Work Preservation Agreement, but whether the Union is entitled to submit its grievance to arbitration. To avoid the strong presumption in favor of arbitrability, Ryder Automotive must establish that the arbitration clause is not susceptible to any interpretation that covers the asserted dispute. Ryder Automotive cannot satisfy this burden with or without the affidavits supporting its motion for summary judgment.

Ryder Automotive's affidavits provide some evidence that the relationship between Ryder Automotive and Ryder Truck Rental is a tentative one. However, as the district court realized, both parties agree that Ryder Automotive and Ryder Truck Rental share a common parent corporation. Under one possible interpretation of the Work Preservation Agreement, this fact alone may establish that Ryder Truck Rental is an "associated business entity."

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Furthermore, Ryder Automotive's affidavits cannot completely refute the evidence produced by the Union. Thus, even if the district court had considered Ryder Automotive's affidavits, it still should have granted summary judgment in favor of the Union.

As a final matter, the Union claims that, because the parties agreed to be bound by the arbitration procedure "in all respects," Ryder Automotive's position is substantially without justification and the district court should have awarded costs and attorneys' fees to the Union. However, even a broad arbitration clause cannot indicate that every possible dispute between two parties must be arbitrated. See Atkinson v. Sinclair Refining Co., 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). While Ryder Automotive is incorrect in its argument that the Union's grievance was not covered by the arbitration clause, it cannot be said that Ryder Automotive brought this action or appeal in bad faith. Accordingly, the district court did not abuse its discretion in declining to award costs and attorneys' fees to the Union.

For the above reasons, the judgment of the district court is affirmed.

END OF DOCUMENT

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EXHIBIT 2

(Cite as: 53 F.3d 332, 1995 WL 241999 (6th Cir.(Ohio)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the publication and citation of unpublished opinions.)

Stephen Wesley POLK, Sr., Plaintiff-Appellant,
v.
LOCAL 16, INTERNATIONAL UNION BRICKLAYERS AND ALLIED CRAFTSMEN, Defendant-Appellee.

No. 94-3272.

United States Court of Appeals, Sixth Circuit.

April 25, 1995.

On Appeal from the United States District Court, for the Northern District of Ohio, No. 38-02884; George W. White, Chief Judge.

N.D.Ohio

REVERSED.

Before: KEITH and MARTIN, Circuit Judges; and SPIEGEL, District Judge. [FN*]

FN* The Honorable S. Arthur Spiegel, United States District Judge for the Southern District of Ohio, sitting by designation.

PER CURIAM.

**1 Stephen Polk appeals the district court's grant of summary judgment for Local 16 on his discrimination claim based on Title VII, Section 1983, and the Age Discrimination in Employment Act. Polk contends that the district court improperly struck an affidavit filed with his opposition to summary judgment.

Stephen Polk, an African-American, is a cement mason. At the time this suit was commenced in 1988, he was 73 years old and had been a member of Local 16, International Union of Bricklayers and Allied Craftsmen since 1960. He alleges that over the years he had regularly been referred to work by business managers of Local 16. However, beginning in 1986, Polk sought job referrals through Local 16 without success despite claims by the union that it attempted to reach Polk regarding jobs.

Local 16 has approximately 200 members, eight percent are African-American and sixty-three percent are over age forty. It has a collective bargaining agreement with the Mason Contractors Association of Lake and Geauga Counties. Although it does not operate a hiring hall, Local 16 does contact members to notify them of employment opportunities. Because employers interested in hiring will often notify the union, some members of Local 16 will call the union office regularly when they are out of work.

On March 19, 1987, Polk filed the first of four administrative charges of race discrimination with the Equal Employment Opportunity Commission. He was issued a "right to sue" letter on May 16, 1988. On August 3, he filed suit in district court challenging Local 16's operation of informal job referrals as discriminatory. Polk's claims were based on Local 16's alleged refusal to refer him for employment.

In his original complaint, Polk alleged that the union discriminated against him on the basis of race, in violation of 42 U.S.C. §§ 1983 and 2000e et seq., and age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 623(c). Polk also claimed that the union breached the collective bargaining agreement, but this charge was later dropped. Two years after the original complaint was filed, a second amended complaint was filed August 24, 1990, raising a charge of retaliation in violation of 42 U.S.C. § 2000e-3.

On March 3, 1989, Local 16 moved for summary judgment. Polk countered this motion on March 17 with the first of many requests for extensions of time. On April 14, Polk received an extension of thirty days after the completion of discovery to respond to Local 16's summary judgment motion. This would prove to delay resolution of this case for years.

On January 28, 1992, the district court referred this case to a magistrate for consideration. The magistrate ordered that discovery be completed by May 18 and that Polk reply to the summary judgment motion by June 18. On May 8, Polk filed a second motion to extend time which was granted, requesting that the discovery deadline be extended until August 1, 1992.

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On July 28, Polk sought and received a third extension, allowing him until August 15 to complete depositions and until September 15 to respond to the summary judgment motion. Then, on September 28, the magistrate granted a fourth extension and required Polk to respond by October 23. At this time, Polk was being represented by new counsel who then filed for a fifth extension of time, until November 2. On that date, Polk sought and was granted a sixth extension, asking to be permitted to respond by November 6. Finally, on November 13, one week after Polk's final extension of time had expired, he filed a memorandum opposing summary judgment.

**2 Local 16 moved to strike Polk's opposition to summary judgment because it was filed late, or in the alternative to strike the accompanying affidavit of Joseph Celli. By way of response to this motion, Polk sought a seventh extension of time, which was not granted. On December 14, two weeks late, Polk filed a memorandum opposing the motion to strike. On December 16, 1993, [FN1] the magistrate granted Local 16's motion to strike the affidavit and recommended that summary judgment be granted in Local 16's favor.

> FN1. No explanation is offered in either party's brief or the record for the one year lapse between the filing of these motions and the magistrate's decision.

Polk again moved for an extension of time (until January 6, 1994) to file objections to the magistrate's report and recommendation. Despite receiving this extension, however, Polk did not file objections until January 10, 1994, having misconstrued Civil Procedure Rule 6(e) as giving him three additional days. The district court, having already prepared an order adopting the magistrate's recommendation, scheduled a hearing on whether to accept Polk's untimely objections. The court found that Polk had not "presented an acceptable reason for filing the objection late." Nevertheless, the court addressed Polk's objections, which went to the striking of Joseph Celli's affidavit:

> Mr. Celli was not listed as a witness in response to Defendant's interrogatory asking for the identification of every fact witness that Plaintiff intended to call at trial and describe in detail the subject and substance of the testimony.... Plaintiff states that Mr. Celli's affidavit should be considered because he only learned of Mr. Celli's existence prior to filing a response to Defendant's motion for summary judgment. The Court agrees with the Magistrate Judge that Mr. Celli's affidavit should not be considered. Defendant had a right to rely on Plaintiff's witness list.

Without the Celli affidavit, the district court found that there was no genuine issue of material fact and granted summary judgment for Local 16. Polk filed a timely notice of appeal on March 4, 1994.

On appeal, Polk argues that the district court abused its discretion by striking Celli's affidavit. Polk contends that no request to supplement had been made prior to the motion to strike and that witness lists need not be disclosed at the discovery stage. Polk maintains that the district court's failure to consider the affidavit was clear error. He then argues that, when considered in the light most favorable to him, summary judgment was inappropriate because there are genuine issues of material fact.

We review a grant of summary judgment de novo. Moore v. Holbrook, 2 F.3d 697, 698 (6th Cir. 1993). Summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). All evidence is viewed in the light most favorable to the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

**3 In United States v. Walters, 638 F.2d 947, 949-50 (6th Cir. 1981), this Court held that failure to file timely objections to a magistrate's report waives a party's right to appeal from the district court's decision to adopt the magistrate's report. See also Thomas v. Arn, 474 U.S. 140, 142 (1985) (approving Walters rule); Kelly v. Withrow, 25 F.3d 363, 365 (6th Cir. 1994). However, the Walters rule is procedural, not jurisdictional-- any default may thus be excused in the interests of justice. Thomas, 474 U.S. at 155; Kent v. Johnson, 821 F.2d 1220, 1222-23 (6th Cir. 1987). "This court has also concluded that when, as here, a district court considers untimely objections, the justifications for enforcing the Walters rule dissipate." O'Neal v. Morris, 3 F.3d 143, 144-45 (6th Cir. 1993) (citing Patterson v. Mintzes, 717 F.2d 284, 286 (6th Cir. 1983)). Here, the district court addressed Polk's objections to the magistrate's report only after noting that it was not required to do so. Thus, Walters will not serve as a bar to appellate review in this case.

Joseph Celli's affidavit states that he has personal knowledge of Local 16's practice of referring cement masons. Celli's affidavit claims that Local 16's business manager regularly refers members for jobs

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and informs contractors of members' availability. It also says that as a general business practice, contractors request referrals from Local 16 and that Local 16 regularly refers union members for jobs. Finally, it relates that Local 16's business manager considers construction to be a "young man's game."

A district court may sanction a party for discovery violations in many ways, including dismissing the lawsuit or entering a default judgment. Bank One of Cleveland, N.S. v. Abbe, 916 F.2d 1067, 1073 (6th Cir. 1990). The rules specifically provide for "striking out pleadings or parts thereof." Fed. R. Civ. P. 37(b)(2)(C). Orders imposing sanctions under Rule 37 are reviewable for an abuse of discretion. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639 (1976).

> Among the factors to be considered in reviewing the imposition of sanctions for an abuse of discretion, the appellate court should consider: (1) whether the adversary was prejudiced by the [sanctioned] party's failure to cooperate in discovery, (2) whether the [sanctioned] party was warned that failure to cooperate could lead to [such a sanction], and (3) whether less drastic sanctions were imposed or considered before dismissal was ordered.

**4 Taylor v. Medtronics, 861 F.2d 980, 986 (6th Cir. 1988) (citing Regional Refuse Systems v. Inland Reclamation Co., 842 F.2d 150, 155 (6th Cir. 1988)).

Considering the above factors, we find no prejudice to Local 16 and no advance warning to Polk; indeed, the court had been quite lenient to that point concerning timeliness. Further, given the lapse of a year between the time Local 16's motion to strike was filed and granted, it certainly could have sought to depose Celli informally despite the discovery period closing. Local 16 concedes that occasionally it refers members to jobs, but claims it is under no duty to do so. Celli's affidavit goes directly to that point; it alleges that Local 16 makes a practice of referrals and concludes with a statement about construction being a "young man's game." Celli's affidavit does raise a material issue.

We conclude that striking Celli's affidavit was an abuse of discretion, and that when it is considered, Polk has raised a genuine issue of material fact. Summary judgment was thus inappropriate in this case and we therefore REVERSE.

END OF DOCUMENT

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' INITIAL DISCLOSURE OF "FIELD PERSONNEL" TRIAL WITNESSES

Plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood") respectfully disclose herewith the "field personnel" Conwood currently expects to call as witnesses in plaintiffs' case-in-chief. See Order of May 11, 1999.

Conwood Field Personnel

Raymond Cortinas, Jr.
Todd Dolan
Jeff Dring
Jim Elliott
John Falevsky
Glynn Francis
Wayne Harris
Brett Jeffery
Eric Larson
Lou Marano
Kevin Miller
Paul Naseth
Scott Roux
Gary Ryan
Jerry Senger
Mia Taylor
Guy Willding

This disclosure is limited to field personnel (district personnel and sales representatives) whose depositions have not already been taken by defendants. All field personnel whose depositions have been taken may also be called as witnesses in Conwood's case-in-chief. Plaintiffs reserve the right to modify

or supplement this list, and to call additional field personnel in rebuttal.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts /BAP

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
FAX - (502) 443-4571

Neil M. Gorsuch /BAP

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

September 21, 1999

16diii002510

EXHIBIT B

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

919 THIRD AVENUE
NEW YORK 10022-3897

TEL: (212) 735-3000
FAX: (212) 735-2000
http://www.skadden.com

DIRECT DIAL
(212) 735-2375

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LONDON
MOSCOW
PARIS
SINGAPORE
SYDNEY
TOKYO
TORONTO

September 22, 1999

By Facsimile

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Re: Conwood Co., et al. vs. United States Tobacco Co., et al.

Gentlemen:

We received "Plaintiffs' Initial Disclosure Of 'Field Personnel' Trial Witnesses."

We are writing to confirm that no third-paty witnesses were identified by Plaintiffs in their disclosure as required by the Court – i.e., "convenience store owners, managers, and employees, and others who may have directly, personally observed 'in the field' activity which Conwood alleges to be anticompetitive." Order of May 11, 1999.

If we do not hear from you by the end of the day today we will proceed on the basis that there are no third-party witnesses within the categories identified in the Court's May 11 Order.

Very truly yours,

Chris Athanasia

cc: Richard C. Roberts, Esq.
John Reed, Esq.

EXHIBIT C

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

1301 K STREET, N.W.
SUITE 1000 WEST
WASHINGTON, D.C. 20005-3317

(202) 326-7900
FACSIMILE:
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK

STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

September 22, 1999

Via Facsimile and Federal Express

John S. Reed, Esquire
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

Re: Conwood Co., et al. v. United States Tobacco Co., et al.

Gentlemen:

We have your letter of 11 a.m. this morning. You indicate that, unless you receive a response today, you will make certain assumptions about plaintiffs' position and case. As you know, it is not always feasible to respond the same day a letter is sent. In the future we think neither side should assume anything if a letter is not responded to the same day it is sent.

We believe plaintiffs' field witness disclosure is self-explanatory. Nonetheless, to avoid confusion, we confirm that all non-party field personnel plaintiffs presently intend to call in their case-in-chief have been deposed (whether noticed by plaintiffs or defendants). Plaintiffs reserve the right to modify and supplement their disclosure as our investigation continues. Plaintiffs also reserve the right to call additional non-party field personnel in rebuttal.

Because we received no disclosure of field personnel trial witnesses from defendants yesterday, we understand that defendants have no such witnesses in support of their counterclaims.

Finally, this letter will confirm my recent conversation

with Jed Goldfarb. Mr. Goldfarb called Monday seeking an extension for interrogatory answers due the same day. Pursuant to his request, we agreed to extend the deadline until this afternoon.

Please do not hesitate to call if you would like to discuss any of these matters.

Sincerely,

Neil Gorsuch /BAO

Neil Gorsuch

EXHIBIT D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL.	PLAINTIFFS
v.	NO. 5:98CV-108-R
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.	DEFENDANT

ORDER

This matter came before the Magistrate Judge on October 13, 1999 for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Mark Hanson, Ben Powell, and David Simpson, counsel.

FOR THE DEFENDANT: Neal Stoll, Chris Athanasia, James Keyte, Martha Weiss, and John Reed, counsel.

Plaintiff Conwood raised one issue at the teleconference which will be dealt with by separate order. Defendant UST raised two issues at the teleconference and rulings were orally announced.

On September 29, 1999, UST requested certain information about plaintiff's experts that UST contends it needs in order to be fully prepared to depose those experts. Plaintiff responded that the information could be sent to defendant by October 15, 1999, at the latest.

In its second issue, defendant sought clarification that 45 declarations from non-party retailers, produced by plaintiff after the deadline for identifying trial witnesses, will not be offered in plaintiff's case-in-chief.

The following rulings were orally announced at the teleconference.

IT IS HEREBY ORDERED that:

1) Plaintiff shall produce the requested information regarding its experts no later than Friday, October 15, 1999. If the information can be produced earlier, plaintiff is encouraged to do so.

2) Plaintiff clearly stated that it would not be offering the declarations from the 45 non-party retailers in its case-in-chief but would reserve them for its rebuttal case, if necessary.

3) The next teleconference is scheduled for **Wednesday, October 27, 1999 at 2:00 p.m., EDT**. Plaintiff shall initiate the teleconference.

Date: OCTOBER 13, 1999

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
OCT 14 1999
JEFFREY A. APPERSON, CLERK
BY
DEPUTY CLERK

16diii002518

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION OF DEFENDANTS FOR LEAVE TO FILE SUPPLEMENTAL REPLY MEMORANDUM IN SUPPORT OF OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to LR 7.1, Defendants seek leave to file the attached supplemental memorandum in support of their motion for summary judgment. The supplemental memorandum is necessary and appropriate because of Conwood's recent introduction of its Retail Incentive Program, an action that is highly relevant to its claims that a similar program of USTC is unlawful.

A tendered order directing the Clerk to accept the attached memorandum for filing is attached hereto.

Respectfully submitted,

Dated: January 10, 2000

John S. Reed
Ridley M. Sandidge, Jr.
Lynn K. Fieldhouse
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Rachel A. Mariner
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 10th day of January, 2000.

Counsel for Defendants

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P.	)	
Plaintiffs,	)	
v.	)	Civil Action No. 5:98-CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,	)	
Defendants.	)	

ORDER

Defendants having moved the Court for leave to file a supplemental memorandum in support of their motion for summary judgment, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted and the Clerk is instructed to file the supplemental memorandum tendered by the Defendants with their motion for leave.

Entered this _____ day of _____, 2000.

_____
United States District Judge

TENDERED BY:

John S. Reed
Ridley M. Sandidge, Jr.
Lynn K. Fieldhouse
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
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919 Third Avenue
New York, New York 10022
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Counsel for Defendants

16diii002522

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on January 13, 2000 for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Ben Powell and Dick Roberts, counsel.

FOR THE DEFENDANT: James Keyte, Martha Weiss, and John Reed, counsel.

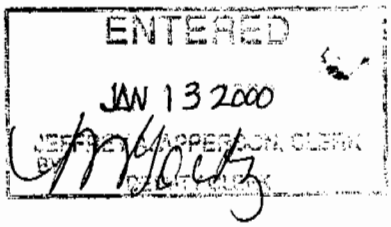
Neither party identified any new issues for the court's consideration.

IT IS HEREBY ORDERED that the next status conference is scheduled for 9:30 a.m., EST, Friday, February 4, 2000. Defendant shall initiate the teleconference.

Date: 1/13/2000

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. — **PLAINTIFFS**

v. — **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — **DEFENDANT**

ORDER

This matter came before the Magistrate Judge on January 13, 2000 for a telephonic status conference.

PARTICIPANTS:

FOR THE PLAINTIFF: Ben Powell and Dick Roberts, counsel.

FOR THE DEFENDANT: James Keyte, Martha Weiss, and John Reed, counsel.

Neither party identified any new issues for the court's consideration.

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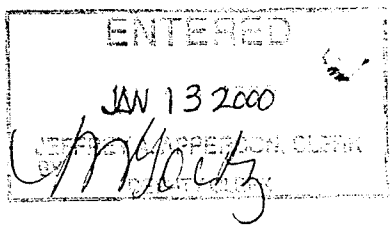
Date: 1/13/2000

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P.	:	Civil Action No. 5:98 CV-108-R
Plaintiffs,	:	**NOTICE OF CHANGE OF ADDRESS**
-against-	:	
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,	:	
Defendants.	:	

PLEASE TAKE NOTICE that effective January 2000, the address for the law firm of Skadden, Arps, Slate, Meagher & Flom LLP has changed. The new address is:

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000 (phone)
(212) 735-2000 (fax)

Please use this new address on all pleadings, correspondence and other documents. Our phone number and fax number will remain the same.

Dated: New York, New York
January 14, 2000

SKADDEN, ARPS, SLATE, MEAGHER
& FLOM, LLP

By: _____
James A. Keyte (0680)
Attorneys for Defendant
Four Times Square
New York, New York 10036
(212) 735-3000 (phone)
(212) 735-2000 (fax)

TO:

Martha Weiss, Esq.
Richard Verheij, Esq.
UST Inc.
100 West Putnam Avenue
Greenwich, Connecticut 06830

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
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Ridley M. Sandidge, Esq.
Reed, Weitkamp, Schell & Vice, PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202

16diii002526

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

James A. Keyte, being duly sworn, deposes and says:

1. I am over eighteen years of age, not a party to the action and am employed by Skadden, Arps, Slate, Meagher & Flom, LLP, Four Times Square, New York, New York 10036.

2. That on the 14th day of January, 2000, I served a true copy of the foregoing Notice of Change of Address by first-class mail by depositing same in a post-paid properly addressed envelope, in an official depository under the exclusive care and custody of the U.S. Postal Service within the State of New York upon:

Martha Weiss, Esq.
Richard Verheij, Esq.
UST Inc.
100 West Putnam Avenue
Greenwich, Connecticut 06830

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq.
Steven F. Benz, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
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Paducah, Kentucky 42002-0095

John S. Reed, Esq.
Ridley M. Sandidge, Esq.
Reed, Weitkamp, Schell & Vice, PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202

James A. Keyte

Sworn to before me this
14th day of January, 2000.

Lynda Cheryl Williams
Notary Public

LYNDA CHERYL WILLIAMS
Notary Public, State of New York
No. 30-4918759
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires April 25, 2000

16diii002527

Index No. 5:98 CV-108-R

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P., and
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

-against-

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY, INC. UNITED
STATES TOBACCO MANUFACTURING
COMPANY, INC. and UST INC.,

Defendants.

NOTICE OF CHANGE OF ADDRESS

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

ATTORNEYS FOR DEFENDANTS

FOUR TIMES SQUARE
BOROUGH OF MANHATTAN
CITY OF NEW YORK
NEW YORK 10036-6522
(212) 735-3000

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Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO:	DAVID SIMPSON, ESQ. EDDIE FOSTER, ESQ. TRIPP WILSON, ESQ.
FAX NO.:	901-682-1223
CLIENT NO.	97718
FROM:	NEIL M. GORSUCH
PHONE:	(202) 326-7978
DATE:	January 19, 2000
RE:	

COMMAND #168

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Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO:	Edward J. Foster, Esq. Tripp Wilson, Esq. Bob Craddock, Esq.
FAX NO.:	**(901) 537-1010**
CLIENT NO.:	**97718**
PHONE:	(901) 537-1033
FROM:	Neil M. Gorsuch
PHONE:	(202) 326-7978
DATE:	January 19, 2000
MESSAGE:	

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OUR FAX # : (202) 326-7999

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K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Hank Handelsman

FAX NO.: (312) 920-2470 **CLIENT NO.:** 97718

PHONE: (312) 750-8400

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: January 19, 2000
RE:

TOTAL NUMBER OF PAGES: 13 (INCLUDING THIS SHEET)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE AFFIDAVITS FILED BY PLAINTIFFS IN SUPPORT OF THEIR OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

USTC moved this Court to strike certain affidavits offered by Conwood in support of its opposition to USTC's motion for summary judgment. In its moving papers, USTC established that evidence that cannot be offered at trial by Conwood cannot support Conwood's opposition to summary judgment. See Def. Mem. at 2-3. USTC also established that this includes affidavits of affiants that cannot testify at trial. See id. As demonstrated again below, Conwood's affiants cannot testify at trial. Thus, the affidavits must be excluded as support for Conwood's opposition to USTC's motion for summary judgment.

While Conwood correctly points out that their case has two parts, the case in chief and the rebuttal, Conwood fails to establish that the affiants could testify in either part. With respect to Conwood's case in chief, as Conwood correctly concedes, the affiants cannot testify since Conwood did not list them as witnesses pursuant to Magistrate Judge Moyer's May 11, 1999 Order.

See Pl. Mem. at 4-5. Conwood's only alternative -- and the focus of their opposition papers – is to attempt to qualify the affiants to testify as rebuttal witnesses. As explained below, however, Conwood's own description of the testimony that the affiants are competent to give clearly indicates that the affiants could only have been case in chief witnesses -- not rebuttal witnesses.

Thus, the affiants cannot testify in either part of Conwood's case. It necessarily follows, then, that their affidavits must be excluded from consideration on summary judgment.

Conwood also argues that whether or not an affiant will actually testify at trial, an affiant need only be competent to testify in the abstract. See id. at 3-4. This argument, too, is unsupported by any applicable case law and, at bottom, does not address the underlying issue raised by USTC -- evidence that cannot be used at trial cannot be used to oppose summary judgment, the very purpose of which is to determine whether there are issues present which require decision if the case is tried.

Finally, in what has become a matter of routine in this case, Conwood responds to USTC's motion to strike by rearguing its case on the merits, including the wild claim that the affidavits in question "corroborate[] and amplif[y]" record evidence, including purported Conwood employee declarations that Conwood -- tellingly -- did not even attempt to introduce as evidence in support of its opposition to USTC's motion for summary judgment.[1] As demonstrated quite clearly by USTC and by the retailer affiants themselves, however, Conwood's affidavits do not "corroborate"

---

[1] Conwood also refers inexplicably to testimony from "another twenty-six such non-party witnesses," Pl. Mem. at 1, apparently including the non-party retailers called as witnesses by USTC, all of whom testified that they make all decisions concerning product, rack and POS selection and placement in their stores. Further, Conwood refers to testimony from "ten former UST sales representatives," apparently ignoring the highly relevant distinction between unauthorized activities and activities that are authorized, or even directed, by USTC's retail customers.

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or "amplify" anything. Instead, they simply highlight the wide gap between the illusion Conwood wishes to create to survive summary judgment and the reality established by the actual record evidence -- i.e., the illusion of a rabid USTC sales force tearing down display racks and POS at every turn, and the reality of a modernized, responsive sales force adapting to the ever-changing retail environment and responding to the requests, needs, and desires of its retail customers in that environment.

I. AS A THRESHOLD MATTER, CONWOOD'S PROFFERED RETAILER "WITNESSES" ARE NOT PROPER REBUTTAL WITNESSES

As set forth in USTC's moving papers, on May 11, 1999, this Court ordered the parties to disclose by September 21, 1999 those field personnel witnesses "who have alleged direct personal knowledge of UST's 'in the field' anticompetitive behavior." May 11, 1999 Order at 2-3 (Dkt. 100). The purpose of this Court's May 11, 1999 Order was to provide the parties with a fair opportunity to depose those persons intended to be called as trial witnesses. On September 21, 1999, Conwood failed to disclose a single retail witness as a live trial witness pursuant to Magistrate Judge Moyer's Order.

As Conwood indicates in its opposition papers, USTC immediately sought clarification from Conwood, and Conwood represented to USTC that, in fact, no retailers would be called as live trial witnesses to establish Conwood's case in chief. Upon receipt of the retailer affidavits at issue, which were sprung on USTC on October 7, 1999, USTC raised the issue with Magistrate Judge Moyer.[2] During the telephonic conference, Magistrate Judge Moyer concluded

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[2] Previously, USTC had sought discovery of witness statements procured by Conwood in order to conduct full and adequate discovery. Conwood asserted the work product doctrine and avoided disclosure of even the identity of those retailers who had given statements to Conwood.

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that, because none of the retailers were disclosed in accordance with the Court's May 11, 1999 Order, none of the retailers could be called by Conwood during its case in chief.[3]

In response to USTC's motion to strike, Conwood relies principally on the unsupportable assertion that the retailer affiants in question may be called as rebuttal witnesses. This assertion is absurd. Conwood cannot claim on one had that the affidavits are affirmative evidence of an alleged "systematic campaign" to exclude rivals -- essentially Conwood's entire case -- and on the other hand claim that the affiants are proper rebuttal witnesses. This is hornbook law:

> The plaintiff who knows that the defendant means to contest an issue that is germane to the prima facie case . . . must put in his evidence on the issue as part of his case in chief. Otherwise the plaintiff could reverse the order of proof, in effect requiring the defendants to put in their evidence before the plaintiff put in his.

Braun v. Lorillard, Inc., 84 F.3d 230, 237 (7th Cir. 1996) (citations omitted); Ellis v. Ficano, 73 F.3d 361, 1995 WL 764127, *16 (6th Cir.) (affirming district court's refusal to allow plaintiff to call two rebuttal witnesses not listed in pretrial order because it was "no secret" that defendants would proceed as they did); Fashauer v. New Jersey Transit, 57 F.3d 1269, 1287 (3d Cir. 1995) (affirming district court's refusal to allow plaintiff to call rebuttal witness not listed in pretrial order because plaintiff was improperly trying to "get the last shot at the jury"); Apex Oil v. Clark Oil, 958 F.2d 243, 245 (8th Cir. 1992) (affirming district court's refusal to allow plaintiff to call previously undisclosed trial witness because "plaintiff can make no reasonable claim of ignorance as to defendant's theory.") (citations omitted).

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[3] Although Conwood cites Magistrate Judge Moyer's Order arising out of the October 13, 1999 telephonic conference, see Pl. Mem. at Ex. D, Conwood fails to disclose to this Court that Magistrate Judge Moyer unequivocally held that Conwood would not be allowed to call undisclosed retail witnesses in support of their case in chief. Indeed, Conwood readily ceded this point and represented to Judge Moyer that no retail witness would be called by Conwood during its case in chief.

There is no doubt that the content of the proffered affidavits are germane to Conwood's prima facie case. Indeed, notwithstanding that the affidavits have been exposed as, at best, artful draftings, Conwood boasts that the affidavits "recount[] defendants' systematic campaign to exclude smaller rivals from the moist snuff market." Pl. Mem. at 1. There also is no doubt that Conwood knows USTC means to contest this issue. Like the plaintiff in Braun, Conwood cannot simply reverse the order of proof by offering these witnesses on rebuttal. If Conwood intended to call retailers as witnesses, they would be part of Conwood's case in chief and therefore were required to be disclosed by this Court's May 11, 1999 Order. Accordingly, Conwood's roll-the-dice gamble on non-disclosure to avoid discovery should not pay off.

II. BECAUSE CONWOOD CANNOT CALL THE AFFIANTS AS WITNESSES AT TRIAL, THE AFFIDAVITS SHOULD BE STRICKEN FROM THE RECORD ON SUMMARY JUDGMENT

Conwood next argues that Fed. R. Civ. P. 56(e) requires only that an affiant be "competent" to testify in the abstract, and therefore the affidavits at issue here should be considered by this Court on summary judgment. As demonstrated by USTC in its moving papers, however, this is not the law. Indeed, because Conwood cannot offer the affiants as witnesses at trial -- either during Conwood's case in chief or on rebuttal -- the affidavits should be stricken on summary judgment.

There can be no clearer statement of the rationale underlying Rule 56(e)'s competency requirement in this context than that given by the court in Chappell v. Bradley, 834 F. Supp. 1030 (N.D. Ill. 1993):

> If the plaintiffs have no intention of offering the evidence at trial it would of course not be admissible. If the witness is not disclosed . . . he is not competent to testify.

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> Since the witnesses were not disclosed, the appropriate remedy is to strike the affidavits.

Id. at 1033 (emphasis added). Conwood's attempt to distinguish this case as a case involving expert witnesses and the requirements of Fed. R. Civ. P. 26 is a non-argument. It does nothing to address the simple and undisputed facts that (1) Conwood was required by this Court to disclose its field witnesses; and (2) Conwood did not disclose these retailers as filed witnesses. "Since the witnesses were not disclosed, the appropriate remedy is to strike the affidavits."

Conwood does not and cannot cite a single case in which a party has disavowed any intention to call a witness in support of its case in chief and then is permitted to rely on an affidavit from that witness to survive summary judgment. Moreover, the cases cited by Conwood in support of its inventive "competent in the abstract" theory are either wholly inapposite or in fact support USTC's motion to strike. In Ryder Automotive Carrier Group, Inc. v. General Teamsters Sales & Service And Indust. Union, 124 F.3d 199 (Table), 1997 WL 540893 (6th Cir. Sept. 2, 1997), for example, the affidavits in question were not affidavits concerning the merits of the proponent's claims. Rather, the affidavits concerned the issue of the parent-subsidiary affiliation of the defendant relevant only to the issue of whether the presented claim would be subject to an arbitration clause, an issue to be decided by the court. Accordingly, that case is not applicable here.

In Banco de Espana v. Federal Reserve Bank of New York, 114 F.2d 438 (2d Cir. 1940), the court denied plaintiff's motion to strike and considered the affidavit of an ambassador who was immune from any requirement of testifying, but the court did so precisely because the ambassador was free to testify at trial, and thus competent. The court reasoned that whether or not the ambassador would exercise his privilege of immunity, the relevant question was whether the

ambassador could testify. Moreover, the court used an analogy to an affidavit submitted by an expert witness to illustrate the point:

> Whatever privilege the Ambassador himself or the government had as to his testimony, plaintiff would be unable to prevent him from surrendering it. A bona fide affidavit to support a summary judgment must necessarily be a statement of the facts which the moving party knows and is able to substantiate at the trial. Here the Ambassador could testify at trial to the facts he has set forth without let or hindrance of the plaintiff. There is no more occasion to assume that he did not intend to substantiate his affidavit with his testimony, should that become necessary, than there is to believe that the legal experts who executed affidavits in behalf of the plaintiff would not be willing to repeat their statements at a formal trial.

Id. at 445 (emphasis added). Thus, Banco de Espana supports USTC's motion to strike the retailer affidavits proffered by Conwood because, unlike the ambassador, the issue here is not merely that the affiants could refuse to testify. The issue is that the affiants cannot testify in support of Conwood's case because they were not disclosed by Conwood at the appropriate time as required by this Court.[4]

Conwood's citation to case law concerning the admissibility of affidavits by those persons not included on a witness list also misses the point. The issue here does not concern a trial witness list. The issue here concerns an Order by this Court to disclose witnesses in order to provide a fair opportunity for discovery. Indeed, the case cited by Conwood expressly notes that witness

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[4] Conwood's feeble argument that USTC somehow argues otherwise with respect to its counterclaims is unfounded. See Pl. Mem. at 5-6, 7 n.3. In opposition to Conwood's partial motion for summary judgment, which claimed that USTC did not disclose any field witnesses, USTC merely pointed out that it can and will prove its counterclaims with documents and testimony already on the record, evidence that already has been disclosed to Conwood, and already has been subject to full cross examination. To the extent USTC would attempt to offer the affidavit of a retailer that it did not disclose by September 21, 1999, that affidavit -- like Conwood's here -- would be inadmissible. For example, if USTC were to offer the supplemental affidavit of Vicki Sharp, which states that "the Conwood representative then sawed off the slots containing Conwood product from the USTC rack with a hacksaw" without permission, the affidavit would properly be stricken.

lists, unlike mandatary disclosures, can be modified and thus persons not on a witness list may still testify at trial. Thus, in all instances, the relevant inquiry remains whether the affiant would be allowed to testify at trial. See, e.g., Taylor v. St. Louis Southwestern Railway Co., 746 F. Supp. 50, 53 (D. Kan. 1990) (allowing affidavit because there is no strict requirement that an affiant appear on a witness list noting that "as practical matter, witness lists tend to be modifiable"); see also Polk v. Local 16, Int'l Union Bricklayers and Allied Craftsman, 53 F.3d 332 (Table), No. 94-3272, 1995 WL 241999 at *4 (6th Cir. Apr.25, 1995) (inappropriate to strike affidavit where moving party had a full year to seek discovery and thus was not prejudiced by the non-disclosure).

Here, in sharp contrast to Taylor and Polk, the affiants in question cannot testify at trial in support of Conwood's case, not because they were simply left off a trial witness list, but because they were not disclosed for purposes of fair and adequate discovery at the appropriate time as required by this Court. See May 11, 1999 Order. In such cases, the appropriate remedy is to strike the proffered affidavits. The court so held in Harris v. AC & S, Inc., 915 F. Supp. 1420 (S.D. Ind. 1995). In that case, a magistrate judge had entered an order ("GOAL") requiring disclosures in order to provide the parties with an opportunity for written and depositional discovery. Undisclosed affidavits offered in opposition to summary judgment were stricken by the court:

> Bearing in mind the objectives of the GOAL and the associated remedy, to provide "any affected defendant . . . a timely opportunity . . . to conduct written and depositional discovery concerning such . . . evidence," (GOAL at 15), this Court will disregard affidavit product identification where the relative timing effectively foreclosed the affected Defendant's opportunity to examine a witness' memory of a product at deposition.

Id. at 1431. There can be no doubt that, here, Conwood's timing in introducing its affidavits "effectively foreclosed" USTC's opportunity to depose these witnesses in violation of the letter and spirit of Magistrate Judge Moyer's May 11, 1999 Order.

Accordingly, because Conwood did not disclose these witnesses, and because Conwood cannot support its opposition to USTC's motion for summary judgment by offering testimony that will not be admitted at trial, USTC's motion to strike the affidavits at issue should be granted.

III. CONWOOD'S PROFFERED AFFIDAVITS DEMONSTRATE THAT THERE ARE NO GENUINE ISSUES OF FACT TO BE DECIDED, ONLY A QUESTION OF LAW FOR THIS COURT TO DECIDE ON SUMMARY JUDGMENT

In its opposition papers, Conwood also chose to argue the merits of its proffered affidavits, and its case. Thus, Conwood claims that its retail affidavits are evidence of a "systematic campaign to exclude smaller rivals from the moist snuff market." Pl. Mem. at 1. Conwood further contends that its Section 2 claim based on this purported systematic campaign to exclude rivals is unaffected by the now completely undisputed fact that USTC sales representatives act at the request and under the direction of its retail customers. Indeed, Conwood boldly asserts that it is a violation of Section 2 of the Sherman Act for USTC to do so. As USTC demonstrated in the appropriate forum, however, this is not the law. See Reply Memorandum In Support Of Defendants' Motion For Summary Judgment at 16. Conwood's statement to the contrary reveals what has always been at the bottom of this case -- i.e., a question of law for this Court as to whether providing better merchandise, better displays, better advertisements, better incentive programs, and better all-around service in response to the needs of one's customers can constitute a violation of the antitrust laws.

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Perhaps recognizing the irony in invoking the antitrust laws to attack competition itself, Conwood retreats to the argument that this Court may not resolve factual disputes at summary judgment. Pl. Mem. at 7. USTC does not dispute this fundamental tenent of civil procedure. USTC's motion to strike and its accompanying supplemental affidavits, however, are not meant to and do not create an issue of fact. Rather, they are intended to ensure that all eyes are kept on the ball in deciding USTC's motion for summary judgment. Thus, the supplemental affidavits plainly illustrate a simple fact central to this case: what Conwood's lawyers call "exclusionary" and illegal rack, POS, and/or product removals are actually procompetitive and perfectly lawful responses by USTC to the needs of its retail customers. Or, in the words of these retail customers:

- "[T]he U.S. Tobacco Company ('USTC') representative had my permission to put a new USTC rack in the store and to display all of the moist snuff. In fact, I specifically requested this particular rack from USTC after seing one displayed in another store." Supplemental Affidavit of Sarkis Abduchai.

- "At all times, I used a Conwood rack to display Conwood moist snuff products. CAP did not require the exclusive use of a USTC rack. . . . I specifically gave [the USTC representative] permission to move the USTC rack because it was in the best interest of my business. . . . This was strictly my decision." Supplemental Affidavit of Teresa Beavers.

- "In March 1998, I decided to place all moist snuff products behind the counter in one rack supplied by USTC. I decided to use a USTC rack because USTC is the leading moist snuff manufacturer in the moist snuff category. There was no agreement to this effect. Sometime later in 1998, however, I decided to move the moist snuff rack out in front of the counter. This change made the moist snuff directly accessible to customers. At this time, I telephoned all of the moist snuff manufacturers to let them know of this change in the store. Conwood never responded. . . . After a short period of time, I noticed that several brands of the moist snuff were not selling and decided to eliminate such brands. After doing so, the store had no need for four different moist snuff racks, so I decided to only use two USTC racks instead. . . . I chose the USTC racks because the racks are nice looking, clean, and easy to use. In addition, USTC provides the best service to our store and does not object to competitors placing header cards above their respective slots in the racks. There is

no agreement that I will only use USTC racks." Supplemental Affidavit of Ross Gwin.

- "I had developed a planogram to govern the reset that was strictly based on moist snuff movement figures. At my request, the U.S. Tobacco Company sales representatives assisted me in the development of this planogram. My door has always been open to any of the moist snuff sales representatives who wish to make suggestions regarding the planogram. No sales representatives from Conwood has ever called or met with me in this regard.... I instructed the U.S. Tobacco Company sales representative to reset the moist snuff section of the store in accordance with the planogram that I had approved for the U-Pak-It chain.... After the U.S. Tobacco Company sales representative completed the reset of the moist snuff section, I reviewed the reset to ensure that it was done in accordance with the planogram." Supplemental Affidavit of John Bradley Lemoine.

- "Some time ago, the USTC sales representative that services this store called on the store to place new product extensions on the USTC rack. I never questioned whether this representative had permission to do so because I know that someone from our store had in fact ordered these new product extensions for the store." Supplemental Affidavit of Vicki Sharp.

- "If any brands of Conwood products were deleted from the store that day, I know from the general pattern of business with U.S. Tobacco Company that such products were deleted because [the store manager] had determined that these products were not selling well enough and not because the U.S. Tobacco Company sales representative deleted them without permission. I have never had such a problem with any U.S. Tobacco Company employee...." Supplemental Affidavit of Randall Macdonald.

- "I would like to clarify that the U.S. Tobacco Company ('USTC') representative had my permission to reset the moist snuff section as described in the Conwood Declaration. In fact, I personally assisted this representative with the reset.... The extra USTC product was stored in a USTC storage unit that sat on top of the USTC rack. This storage unit was provided to me by the USTC representative that same day. I am very pleased with this arrangement." Supplemental Affidavit of Wayne Smart.

It is not unlawful to help one's customers in their lawful business activities, and, as a matter of law, it cannot be a "dirty trick" to act with retailer authorization. USTC's motion to strike should be granted because Conwood's failure to comply with this Court's Order cannot be used to avoid proper discovery and attempt to create factual disputes that, upon examination, do not exist.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court strike the affidavits from third-party retail personnel offered by Conwood in support of their opposition to Defendants' motion for summary judgment.

Dated: January 18, 2000

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Certificate of Service

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 18th day of January, 2000.

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January 20, 2000

Via Federal Express

Jeffrey A. Apperson, Clerk
United States District Court
Western District of Kentucky
450 Snyder U.S. Courthouse
601 W. Broadway
Paducah, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Plaintiffs' Response to Defendants' Motion for Leave to File "Supplemental" Brief In Support of Motion for Summary Judgment.

I have also enclosed an additional copy. I would be grateful if you would date-stamp and return this copy in the self-addressed, stamped envelope provided.

Many thanks for your assistance.

Respectfully,

Neil Gorsuch

Neil M. Gorsuch

Enclosure

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January 20, 2000

Via Federal Express

Honorable Thomas B. Russell
307 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Co., et al. v. United States Tobacco Co., et al.

Dear Judge Russell:

Enclosed is a courtesy copy of Plaintiffs' Response to Defendants' Motion for Leave to File "Supplemental" Brief in Support of Motion for Summary Judgment, which has been filed with the Clerk of the Court.

Respectfully,

Neil Gorsuch

Neil M. Gorsuch

Enclosure

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January 20, 2000

Via Federal Express

Honorable James D. Moyer
208 Gene Snyder U.S. Courthouse
601 West Broadway
Louisville, KY 40202

Re: Conwood Co., et al. v. United States Tobacco Co., et al.

Dear Magistrate Judge Moyer:

Enclosed is a courtesy copy of Plaintiffs' Response to Defendants' Motion for Leave to File "Supplemental" Brief in Support of Motion for Summary Judgment, which has been filed with the Clerk of the Court.

Respectfully,

Neil M. Gorsuch

Enclosure

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,

Defendants.

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Civil Action No.
5:98CV-108-R

JURY TRIAL DEMANDED

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR LEAVE TO FILE "SUPPLEMENTAL" BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants' motion for (partial) summary judgment is a shifting target. When their opening arguments are discredited, defendants promptly offer new ones in lengthy reply briefs and "supplemental" pleadings. In fact, defendants have so far filed some seven pleadings and 137 pages of briefs related to their motion for summary judgment. The latest, a "Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment" (Jan. 10, 2000), contends that Conwood has introduced a retail incentive program practically identical to their own Customer Alliance Program ("CAP"). UST submits that Conwood's action (somehow) insulates its CAP program from legal challenge -- notwithstanding evidence that UST is a monopolist and its CAP program (unlike Conwood's) has the purpose and effect of excluding rivals. Defendants' brief, however, rests on a mistaken premise, omits and mischaracterizes the pertinent facts, and makes a plainly erroneous legal argument.

Discussion

It is understandable why UST continues to fight so hard over its CAP program. According to the view of antitrust law defendants recently espoused in their (first) reply brief, Conwood must state an "independent" antitrust violation, such as a Clayton Act Section 3 exclusive dealing claim, before being permitted to pursue a Sherman Act Section 2 monopolization claim. See Reply Mem. in Supp. of Defs.' Mot. for Summ. J. at 18-26 (Dec. 23, 1999). UST's CAP program concededly covers 80% of its moist snuff volume. Pls.' Mem. in Opp'n to Mot. for Summ J. at 52 (Dec. 9, 1999). Accordingly, if CAP contracts are even arguably exclusionary, the program presents a triable claim even under UST's (mistaken) view of the law. UST's continuing effort to convince the Court to bless CAP as a matter of law, however, fails for at least three reasons:

First, UST's fundamental premise -- that Conwood must state an "independent" antitrust violation, such as an exclusive dealing claim under the Clayton Act or a tying claim under Section 1 of the Sherman Act, before being permitted to pursue a monopolization claim under Section 2 -- is simply wrong.[1] The Sixth Circuit has held that acts violative of Section 2 "need not be in themselves independently unlawful." Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 575 (6th Cir. 1986), (internal

[1]Indeed, taken to its logical conclusion, UST reads Section 2 of the Sherman Act out of the statute books, for if a monopolist only violates Section 2 by violating some other provision of the Sherman Act, then Section 2 independently proscribes no conduct at all.

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quotation marks and citation omitted).[2] Instead, "[r]egarding Section 2 of the Sherman Act, what matters is that the freedom to compete is restrained." Riverview Invs., Inc. v. Ottawa Community Improvement Corp., 769 F.2d 324, 328 (6th Cir. 1985) (reversing summary judgment). Court after court (and UST's expert witness, Professor Scheffman) has found that a monopolist may restrain the freedom to compete, and thus violate Section 2, in many and diverse ways having nothing to do with other, "independent" antitrust violations.[3]

Second, UST's assertion that its CAP program and Conwood's incentive plan are practically identical is demonstrably false. UST pays retailers to exclude competitors' racks and point of sale advertising ("POS"). By contrast, Conwood pays to exclude no one; it merely offers incentives to retailers who agree to include Conwood racks and products.

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[2] See also Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274-75 (2d Cir. 1979) ("[m]any anticompetive actions are possible or effective only if taken by a firm that dominates its smaller rivals").

[3] E.g., by (1) "us[ing] monopoly power to foreclose competition or gain a competitive advantage," Potters Med. Ctr., 800 F.2d at 575 (internal quotation marks omitted); (2) conduct that "'tends to impair the opportunities of rivals,'" id. (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985)); (3) conduct that "'either does not further competition on the merits or does so in an unnecessarily restrictive way,'" id. (quoting Aspen Skiing, 472 U.S. at 605 n.32); (4) conduct intended to raise competitors' operating costs, Forsyth v. Humana, Inc., 114 F.3d 1467, 1478 (9th Cir. 1997) (reversing summary judgment and holding that raising rivals' costs is exclusionary conduct), aff'd, 525 U.S. 299 (1999); S. Salop & D. Scheffman, Recent Advances in the Theory of Industrial Structure: Raising Rivals' Costs, AEA Papers and Proceedings (May 1983) (UST's expert discussing anticompetitive effects of raising rivals' costs); (5) conduct designed to impair the distribution of rival products and racks, Byars v. Bluff City News Co., 609 F.2d 843, 849, 853-54 (6th Cir. 1979).

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UST uses CAP as a means of achieving what it calls "exclusive vending" -- i.e., the elimination of rival racks and attached POS and the forced incorporation of some (but not all) competing brands into the UST rack, under UST control, with only UST advertising affixed. In "worksheets" (which UST curiously cannot find for most of its accounts), defendants record specific CAP terms and conditions agreed upon with individual retail chains. Pls.' Mem. in Opp'n to Mot. for Summ. J. at 26. Scores of these worksheets openly condition UST payments on the exclusion of Conwood racks and POS. Id. at 27 & n.38.[4] In cases where worksheets are not used, UST sales representatives are permitted to use their "discretion" to determine retailer compliance and eligibility for payment under CAP. The evidence shows that they use this "discretion" to enforce exclusive UST vending. Id. As one UST sales representative put it, CAP "has

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[4] See also USTC/CWD 1380257 ("All products will be housed in a UST vendor"); 1380256 ("All smokeless products carried will be housed in a UST vendor"); 1380259 ("In most stores we have exclusive vending"); 249095 ("USTSM will provide the vending system for all smokeless tobacco including headercard"); 127467, 127462, and 821551 ("Utilize the USTSM vending system as the exclusive moist smokeless tobacco vending system in Brewer Oil Stores"); 896758 ("UST provides fixtures for all single can sales"); 516489 ("Preferred UST vending to house all brands of smokeless tobacco") 517019 and 249103 ("UST will provide vending system and headercard for moist tobacco. UST to receive minimum 80% of available space for moist tobacco."); 509661 ("No smokeless competitive POS"); 249121 ("UST will provide vending system for all moist products including headercard"); 821547 ("Have USTSM vending system as the exclusive merchandising system in all Friend's stores. Header cards on these vending systems will also be exclusive to USTSM"); 509670 ("Store look like a UST store"); 509668 ("All smokeless moist snuff in UST vendor. No competition"); 821537 ("Maintain USTSM vending system as the sole vending system in Pic Quik Stores utilizing USTSM header cards (on these systems) exclusively"); 1380258 ("Will provide exclusive vending for each location and the UST vendor will be the only one allowed").

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become a great incentive . . . for the elimination of competitive products." USTC/CWD 825801.[5]

Further, under the terms of the generic CAP form contract itself, retailers are paid to fence competitors out of roughly 80% of the available space. UST expressly dictates that share of retail fixture (or space) must be allocated according to each manufacturer's share of market ("SOF=SOM"). Pls.' Mem. in Opp'n to Mot. for Summ. J. at 27.[6] UST thereby seeks to lock in its existing market share and foreclose opportunities for rival brands seeking to grow share. UST does not even need or want 80% of the fixture space for the two brands -- Copenhagen and Skoal -- that comprise the lion's share of its sales. Instead, UST

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[5]UST's CAP program has still other exclusionary terms nowhere found in Conwood's incentive plan. For example, CAP requires retailers to participate in all UST new brand tests or introductions, even for its "slow selling" product lines, thus ensuring that UST can exert pressure on the space available for rivals and their new products. Under CAP's most recent amendments, retailers are also paid to place moist snuff products behind the counter in a non-self service ("NSS") environment as part of what UST has dubbed its "New World Order" strategy. Chiaradio Dep. Exh. 26 (1999 CAP Contract Amendment offering money to any retailer who adopts UST's NSS program); USTC/CWD 416412 (Chiaradio describing NSS shelving system as "another tool for us to have in our arsenal to lock up space in the NWO"). UST, like major retailers and the Federal Trade Commission, realizes that a NSS confers competitive advantages on dominant tobacco manufacturers and disadvantages smaller rivals. See, e.g., Carlson Dep. at 125-26; Chiaradio Dep. at 311; FTC Report at 23.

[6]The need for allocation of space is created in the first instance by UST, when it removes competitors' racks as part of "exclusive vending." Once competitors no longer have their own racks with their own facings, they become competitors vying for slots in the UST rack, and UST progressively whittles down the number of facings made available for rivals through its "fact based" campaign to convince retailers that products that have not yet gained large market shares (virtually all brands save UST's) should be eliminated. See, e.g., Pls.' Mem. in Opp'n to Mot. for Sum. J. at 16-28.

deliberately fills much of its space with slow-moving products (e.g., Cherry flavored snuff) simply to elbow out the competition. Id. at 20-21 quoting, inter alia, USTC/CWD 416416 (UST stocks slow-movers to "gain space which our competitors cannot get"). UST alone can win such a concession, moreover, because of its massive market power. Id. at 18. Apparently, even UST now recognizes that SOF=SOM is impermissibly exclusionary; in its most recent amendments to the CAP contract, written after this case was filed, all references to the formula were dropped.

Where UST's program seeks to exclude, Conwood's program does nothing of the kind. It nowhere seeks to eliminate rival racks and POS and it nowhere prescribes the share of fixture or POS available to competitors. Nor could Conwood plausibly convince a retailer to agree to such terms, with a bare 14% market share compared to UST's 80% share. Instead, as UST's exhibit shows on its face, Conwood's program provides incentives only for retailers to include Conwood's racks along with UST's. Supp'l Mem. in Supp. of Defs.' Mot. for Summ. J. Exh. 1. The evidence establishes, moreover, that Conwood implemented its incentive program in response to UST's successful exclusion through CAP, among other tactics. Initially, retailers allowed all manufacturers to use their own racks. See Harold Price Decl. ¶ 7 (Swedish Match Vice President). After UST's predatory campaign of exclusion, however, Conwood was forced, in effect, to pay stores to reverse UST's exclusion and permit Conwood again to house its own products in its own racks with its own POS. See, e.g., R. Davis Dep. at 120; G. Ellis Dep. at 164-65; T. Williams Dep. at 40. Thus, if UST wants to compare the

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programs, the comparison is between Conwood's legitimate program to include its racks and UST's illegitimate program to exclude rival racks.

Third, UST's (implicit) suggestion that Conwood's adoption of an incentive program immunizes CAP from attack lacks any legal support. To the contrary, it is (again) long-settled law, undisputed by UST, that "[b]ehavior that might otherwise not be of concern to the antitrust laws -- or that might even be viewed as procompetitive -- can take on exclusionary connotations when practiced by a monopolist." Eastman Kodak v. Image Technical Servs., 504 U.S. 451, 488 (1992) (White, J., dissenting). Thus, the fact that Conwood, with 14% of the market, has an incentive program offers no automatic protection even to an identical program offered by an 80% monopolist. Instead, any discussion of "potentially legitimate business justifications against what plaintiffs contend are exclusionary effects are fact-bound questions that generally cannot be resolved on summary judgment," but must be argued to the jury at trial. United States v. Microsoft, Nos. Civ. A. 98-1232, 98-1233 (TPJ), 1998 WL 614485, at *21, *22 (D.D.C. Sept. 14, 1998); Eastman Kodak, 504 U.S. at 483 ("Factual questions exist . . . about the validity and sufficiency of each claimed justification, making summary judgment inappropriate.").

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Conclusion

Conwood respectfully submits that nothing in defendants' latest filing alters the conclusion that summary judgment remains inappropriate in this case.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,

Defendants.

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FILED
U.S. DISTRICT COURT CLERK
WESTERN DIST. KENTUCKY

Civil Action No.
5:98CV-108-R

JURY TRIAL DEMANDED

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR LEAVE TO FILE "SUPPLEMENTAL" BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants' motion for (partial) summary judgment is a shifting target. When their opening arguments are discredited, defendants promptly offer new ones in lengthy reply briefs and "supplemental" pleadings. In fact, defendants have so far filed some seven pleadings and 137 pages of briefs related to their motion for summary judgment. The latest, a "Supplemental Memorandum in Support of Defendants' Motion for Summary Judgment" (Jan. 10, 2000), contends that Conwood has introduced a retail incentive program practically identical to their own Customer Alliance Program ("CAP"). UST submits that Conwood's action (somehow) insulates its CAP program from legal challenge -- notwithstanding evidence that UST is a monopolist and its CAP program (unlike Conwood's) has the purpose and effect of excluding rivals. Defendants' brief, however, rests on a mistaken premise, omits and mischaracterizes the pertinent facts, and makes a plainly erroneous legal argument.

Discussion

It is understandable why UST continues to fight so hard over its CAP program. According to the view of antitrust law defendants recently espoused in their (first) reply brief, Conwood must state an "independent" antitrust violation, such as a Clayton Act Section 3 exclusive dealing claim, before being permitted to pursue a Sherman Act Section 2 monopolization claim. See Reply Mem. in Supp. of Defs.' Mot. for Summ. J. at 18-26 (Dec. 23, 1999). UST's CAP program concededly covers 80% of its moist snuff volume. Pls.' Mem. in Opp'n to Mot. for Summ J. at 52 (Dec. 9, 1999). Accordingly, if CAP contracts are even arguably exclusionary, the program presents a triable claim even under UST's (mistaken) view of the law. UST's continuing effort to convince the Court to bless CAP as a matter of law, however, fails for at least three reasons:

First, UST's fundamental premise -- that Conwood must state an "independent" antitrust violation, such as an exclusive dealing claim under the Clayton Act or a tying claim under Section 1 of the Sherman Act, before being permitted to pursue a monopolization claim under Section 2 -- is simply wrong.[1] The Sixth Circuit has held that acts violative of Section 2 "need not be in themselves independently unlawful." Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 575 (6th Cir. 1986), (internal

[1]Indeed, taken to its logical conclusion, UST reads Section 2 of the Sherman Act out of the statute books, for if a monopolist only violates Section 2 by violating some other provision of the Sherman Act, then Section 2 independently proscribes no conduct at all.

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quotation marks and citation omitted).[2] Instead, "[r]egarding Section 2 of the Sherman Act, what matters is that the freedom to compete is restrained." Riverview Invs., Inc. v. Ottawa Community Improvement Corp., 769 F.2d 324, 328 (6th Cir. 1985) (reversing summary judgment). Court after court (and UST's expert witness, Professor Scheffman) has found that a monopolist may restrain the freedom to compete, and thus violate Section 2, in many and diverse ways having nothing to do with other, "independent" antitrust violations.[3]

Second, UST's assertion that its CAP program and Conwood's incentive plan are practically identical is demonstrably false. UST pays retailers to exclude competitors' racks and point of sale advertising ("POS"). By contrast, Conwood pays to exclude no one; it merely offers incentives to retailers who agree to include Conwood racks and products.

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[2]See also Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274-75 (2d Cir. 1979) ("[m]any anticompetive actions are possible or effective only if taken by a firm that dominates its smaller rivals").

[3]E.g., by (1) "us[ing] monopoly power to foreclose competition or gain a competitive advantage," Potters Med. Ctr., 800 F.2d at 575 (internal quotation marks omitted); (2) conduct that "'tends to impair the opportunities of rivals,'" id. (quoting Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985)); (3) conduct that "'either does not further competition on the merits or does so in an unnecessarily restrictive way,'" id. (quoting Aspen Skiing, 472 U.S. at 605 n.32); (4) conduct intended to raise competitors' operating costs, Forsyth v. Humana, Inc., 114 F.3d 1467, 1478 (9th Cir. 1997) (reversing summary judgment and holding that raising rivals' costs is exclusionary conduct), aff'd, 525 U.S. 299 (1999); S. Salop & D. Scheffman, Recent Advances in the Theory of Industrial Structure: Raising Rivals' Costs, AEA Papers and Proceedings (May 1983) (UST's expert discussing anticompetitive effects of raising rivals' costs); (5) conduct designed to impair the distribution of rival products and racks, Byars v. Bluff City News Co., 609 F.2d 843, 849, 853-54 (6th Cir. 1979).

UST uses CAP as a means of achieving what it calls "exclusive vending" -- i.e., the elimination of rival racks and attached POS and the forced incorporation of some (but not all) competing brands into the UST rack, under UST control, with only UST advertising affixed. In "worksheets" (which UST curiously cannot find for most of its accounts), defendants record specific CAP terms and conditions agreed upon with individual retail chains. Pls.' Mem. in Opp'n to Mot. for Summ. J. at 26. Scores of these worksheets openly condition UST payments on the exclusion of Conwood racks and POS. Id. at 27 & n.38.[4] In cases where worksheets are not used, UST sales representatives are permitted to use their "discretion" to determine retailer compliance and eligibility for payment under CAP. The evidence shows that they use this "discretion" to enforce exclusive UST vending. Id. As one UST sales representative put it, CAP "has

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[4]See also USTC/CWD 1380257 ("All products will be housed in a UST vendor"); 1380256 ("All smokeless products carried will be housed in a UST vendor"); 1380259 ("In most stores we have exclusive vending"); 249095 ("USTSM will provide the vending system for all smokeless tobacco including headercard"); 127467, 127462, and 821551 ("Utilize the USTSM vending system as the exclusive moist smokeless tobacco vending system in Brewer Oil Stores"); 896758 ("UST provides fixtures for all single can sales"); 516489 ("Preferred UST vending to house all brands of smokeless tobacco") 517019 and 249103 ("UST will provide vending system and headercard for moist tobacco. UST to receive minimum 80% of available space for moist tobacco."); 509661 ("No smokeless competitive POS"); 249121 ("UST will provide vending system for all moist products including headercard"); 821547 ("Have USTSM vending system as the exclusive merchandising system in all Friend's stores. Header cards on these vending systems will also be exclusive to USTSM"); 509670 ("Store look like a UST store"); 509668 ("All smokeless moist snuff in UST vendor. No competition"); 821537 ("Maintain USTSM vending system as the sole vending system in Pic Quik Stores utilizing USTSM header cards (on these systems) exclusively"); 1380258 ("Will provide exclusive vending for each location and the UST vendor will be the only one allowed").

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become a great incentive . . . for the elimination of competitive products." USTC/CWD 825801.[5]

Further, under the terms of the generic CAP form contract itself, retailers are paid to fence competitors out of roughly 80% of the available space. UST expressly dictates that share of retail fixture (or space) must be allocated according to each manufacturer's share of market ("SOF=SOM"). Pls.' Mem. in Opp'n to Mot. for Summ. J. at 27.[6] UST thereby seeks to lock in its existing market share and foreclose opportunities for rival brands seeking to grow share. UST does not even need or want 80% of the fixture space for the two brands -- Copenhagen and Skoal -- that comprise the lion's share of its sales. Instead, UST

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[6]The need for allocation of space is created in the first instance by UST, when it removes competitors' racks as part of "exclusive vending." Once competitors no longer have their own racks with their own facings, they become competitors vying for slots in the UST rack, and UST progressively whittles down the number of facings made available for rivals through its "fact based" campaign to convince retailers that products that have not yet gained large market shares (virtually all brands save UST's) should be eliminated. See, e.g., Pls.' Mem. in Opp'n to Mot. for Sum. J. at 16-28.

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deliberately fills much of its space with slow-moving products (e.g., Cherry flavored snuff) simply to elbow out the competition. Id. at 20-21 quoting, inter alia, USTC/CWD 416416 (UST stocks slow-movers to "gain space which our competitors cannot get"). UST alone can win such a concession, moreover, because of its massive market power. Id. at 18. Apparently, even UST now recognizes that SOF=SOM is impermissibly exclusionary; in its most recent amendments to the CAP contract, written after this case was filed, all references to the formula were dropped.

Where UST's program seeks to exclude, Conwood's program does nothing of the kind. It nowhere seeks to eliminate rival racks and POS and it nowhere prescribes the share of fixture or POS available to competitors. Nor could Conwood plausibly convince a retailer to agree to such terms, with a bare 14% market share compared to UST's 80% share. Instead, as UST's exhibit shows on its face, Conwood's program provides incentives only for retailers to include Conwood's racks along with UST's. Supp'l Mem. in Supp. of Defs.' Mot. for Summ. J. Exh. 1. The evidence establishes, moreover, that Conwood implemented its incentive program in response to UST's successful exclusion through CAP, among other tactics. Initially, retailers allowed all manufacturers to use their own racks. See Harold Price Decl. ¶ 7 (Swedish Match Vice President). After UST's predatory campaign of exclusion, however, Conwood was forced, in effect, to pay stores to reverse UST's exclusion and permit Conwood again to house its own products in its own racks with its own POS. See, e.g., R. Davis Dep. at 120; G. Ellis Dep. at 164-65; T. Williams Dep. at 40. Thus, if UST wants to compare the

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programs, the comparison is between Conwood's legitimate program to include its racks and UST's illegitimate program to exclude rival racks.

Third, UST's (implicit) suggestion that Conwood's adoption of an incentive program immunizes CAP from attack lacks any legal support. To the contrary, it is (again) long-settled law, undisputed by UST, that "[b]ehavior that might otherwise not be of concern to the antitrust laws -- or that might even be viewed as procompetitive -- can take on exclusionary connotations when practiced by a monopolist." Eastman Kodak v. Image Technical Servs., 504 U.S. 451, 488 (1992) (White, J., dissenting). Thus, the fact that Conwood, with 14% of the market, has an incentive program offers no automatic protection even to an identical program offered by an 80% monopolist. Instead, any discussion of "potentially legitimate business justifications against what plaintiffs contend are exclusionary effects are fact-bound questions that generally cannot be resolved on summary judgment," but must be argued to the jury at trial. United States v. Microsoft, Nos. Civ. A. 98-1232, 98-1233 (TPJ), 1998 WL 614485, at *21, *22 (D.D.C. Sept. 14, 1998); Eastman Kodak, 504 U.S. at 483 ("Factual questions exist . . . about the validity and sufficiency of each claimed justification, making summary judgment inappropriate.").

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Conclusion

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Respectfully submitted,

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January 20, 2000

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

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16diii002566

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[6]The need for allocation of space is created in the first instance by UST, when it removes competitors' racks as part of "exclusive vending." Once competitors no longer have their own racks with their own facings, they become competitors vying for slots in the UST rack, and UST progressively whittles down the number of facings made available for rivals through its "fact based" campaign to convince retailers that products that have not yet gained large market shares (virtually all brands save UST's) should be eliminated. See, e.g., Pls.' Mem. in Opp'n to Mot. for Sum. J. at 16-28.

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deliberately fills much of its space with slow-moving products (e.g., Cherry flavored snuff) simply to elbow out the competition. Id. at 20-21 quoting, inter alia, USTC/CWD 416416 (UST stocks slow-movers to "gain space which our competitors cannot get"). UST alone can win such a concession, moreover, because of its massive market power. Id. at 18. Apparently, even UST now recognizes that SOF=SOM is impermissibly exclusionary; in its most recent amendments to the CAP contract, written after this case was filed, all references to the formula were dropped.

Where UST's program seeks to exclude, Conwood's program does nothing of the kind. It nowhere seeks to eliminate rival racks and POS and it nowhere prescribes the share of fixture or POS available to competitors. Nor could Conwood plausibly convince a retailer to agree to such terms, with a bare 14% market share compared to UST's 80% share. Instead, as UST's exhibit shows on its face, Conwood's program provides incentives only for retailers to include Conwood's racks along with UST's. Supp'l Mem. in Supp. of Defs.' Mot. for Summ. J. Exh. 1. The evidence establishes, moreover, that Conwood implemented its incentive program in response to UST's successful exclusion through CAP, among other tactics. Initially, retailers allowed all manufacturers to use their own racks. See Harold Price Decl. ¶ 7 (Swedish Match Vice President). After UST's predatory campaign of exclusion, however, Conwood was forced, in effect, to pay stores to reverse UST's exclusion and permit Conwood again to house its own products in its own racks with its own POS. See, e.g., R. Davis Dep. at 120; G. Ellis Dep. at 164-65; T. Williams Dep. at 40. Thus, if UST wants to compare the

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Conclusion

Conwood respectfully submits that nothing in defendants' latest filing alters the conclusion that summary judgment remains inappropriate in this case.

Respectfully submitted,

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January 20, 2000

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' PRETRIAL BRIEF

Introduction

Plaintiffs ("Conwood") allege that defendants ("UST") monopolized and attempted to monopolize the U.S. moist snuff market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.[1] For decades, UST has maintained a 77%-plus share of the U.S. moist snuff market.[2] UST has used the monopoly power created by its dominant market share to effect large annual price increases -- yielding profits and margins unparalleled in American business. Instead of competing with rivals through lower prices or increased efficiency, UST has also used its monopoly power to "control competition" (its words) by means of what it calls "exclusive vending" -- in which all competing moist snuff brands are captured in a single UST distribution rack, on which UST alone may advertise. Through exclusive vending, UST

[1]Conwood also has claims for violation of the Lanham Act, the Kentucky unfair competition statute, and state tort law.

[2]UST's current share is approximately 77%. During the years that preceded the filing of this action, UST's share varied from from 85.1% in 1993 to 77.1% in 1998.

has systematically eliminated rivals' retail distribution racks, point of sale advertising ("POS"), and ultimately the opportunity to sell their products. As a result of this pervasive exclusion, Conwood has suffered damages in the amount of approximately $280 to $480 million.

Statement of Facts[3]

The parties and public have long recognized moist snuff as a separate product market. While there are other forms of smokeless tobacco, including "plug," "chew," "dry snuff," and "twist," none constrains UST's pricing power over moist snuff. Indeed, while UST has disproportionately hiked prices for moist snuff year after year, users have not switched to other forms of smokeless tobacco.

For decades, UST controlled 100% of the moist snuff market. In 1979, Conwood entered the market as UST's first real competition and brought with it a number of innovations. For example, Conwood introduced a plastic can that preserved freshness weeks longer than UST's fiberboard cans (and, thus, blunted the impact of a UST returns policy for stale product that had previously imposed ruinous costs on new entrants). Conwood provided substantially better value: it offered 20% more tobacco than UST's long-cut Skoal products. Conwood produced innovative product distribution racks and competed vigorously, often outspending its entrenched rival to do so. While permitted to

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[3]Some of the facts supporting Conwood's claims are described more fully in Pls' Mot. for Part. Summ. J. (Nov. 15, 1999), Pls' Reply in Support of Mot. for Partial Summ. J. (Dec. 23, 1999), and Pls' Opp. to Motion for Summ. J. (Dec. 9. 1999). Conwood incorporates these descriptions by reference.

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compete, Conwood flourished. Its market share grew from less than 1% in 1980 to more than 10% by 1990.

According to internal guidelines prepared at the time, UST disregarded competitors with small market shares. But by the early 1990s, UST became alarmed at Conwood's continuing success and concluded that a "serious response" was needed. Because it did not want to erode its profit margins, however, UST decided that its "serious response" would not include competition on the merits, specifically price discounts. It concluded that "UST does not 'deal' on its product's prices, we don't have to." Instead, UST determined that it would use "our market power" to "eliminate comp[etitive] distribution," and thereby "control competition."

UST recognized that Conwood (and other competitors) succeeded best in stores where they could place their products in their own racks, with the best selection of their brands. With their own racks, UST knew that rivals could effectively advertise the price and other advantages of their products (via POS). UST also recognized that, because of pervasive government restrictions on tobacco advertising, retail distribution racks and POS (specifically the "header card" affixed permanently to the rack) were the last available means of effective communication with moist snuff consumers. Accordingly, UST began its "exclusive vending" campaign.

Through exclusive vending, UST sought to exclude rival racks from the store, bring competing brands into its own rack, and eliminate competitors' header cards and other POS. Competing brands, therefore, were merchandised in *UST*-controlled racks under *UST* advertising. Where rivals were once able to advertise

at the point of sale that they offered a better value than UST, exclusive vending prevented that. After incorporating rival brands into its exclusive moist snuff vendor, moreover, UST compounded the exclusion by seeking reduction of the number of slots ("facings") allocated to rivals in the UST "exclusive vendor." While UST used different tactics, its ends remained constant: "eliminate competitive distribution," "reduce facings" for competitive products, and maintain "exclusive POS," all of which choked channels of distribution and thereby harmed competition.

Exclusive Vending by Fiat. Following corporate policy, UST sales representatives imposed exclusive vending on countless stores. They simply took rival products from their own racks, placed some in the UST vendor, and then discarded the rival rack, POS, and the excluded products. As one store employee explained, "I said [to the UST representative] why did you take that down, [Conwood] just put [its racks] up here yesterday. He said that's just my job."

According to ex-UST sales representatives (10 of whom will testify), nonparty retailers (50 of whom are available to testify), and Conwood personnel (226 of whom have given sworn statements and are available to testify), such conduct occurred regularly and systematically across the United States. UST graded employees on their success in executing exclusive vending. In a single year, Conwood lost 10,000 racks in California alone, and 3,000 racks were eliminated in Wichita, Kansas over a mere 9 month period. Nor was such conduct aimed only at Conwood. A senior executive of Swedish-Match, another UST rival, will testify that Swedish-Match was harmed by this same UST predation.

Exclusive Vending by "*Permission*". UST also sought "permission" to exclude rivals. As a former UST Division Manager explained, UST representatives were instructed to ask sales clerks for permission to "clean up" the moist snuff racks. UST representatives then used this or a similar ruse to remove rival racks and execute their exclusive vending plan.[4]

Along the same lines, UST offered "category management" services to effect exclusive vending. Category management, properly practiced, is a marketing strategy designed to increase the sales of an entire product category. Retailers rely on manufacturers to obtain and analyze sales data; they sometimes even delegate responsibility for an entire category to a single manufacturer, who acts as "category captain." Because of its dominant market share, UST is the only credible category captain for moist snuff. While UST acknowledges that this is a position of trust, it regularly abused that trust, employing the rubric of "category management," and its status as "category captain," not to enhance the entire moist snuff category but as merely another way to eliminate rival racks, POS, and brands. UST executives routinely admitted as much in their reports.[5]

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[4]UST suggests such "permission" is a defense to the charge of unlawful monopolization. It is no such thing. As a monopolist, UST is not permitted to practice exclusion of rivals, with or without the acquiescence of retailers. See p. 11, infra (conduct barred by Section 2 need not be "independently" unlawful).

[5]E.g., "[T]hrough our category management efforts, we have been successful in eliminating numerous competitive brands from existing plan-o-grams"; "It is imperative that we continue with this Category Management action plan to eliminate competitive products."

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Professor Robert Blattberg of Northwestern University's graduate business school, a leading expert on retailing (and specifically category management), will testify that UST distorted category management to effect exclusion in many ways, including, without limitation, by providing retailers with misleading data skewed to encourage the discontinuation of Conwood products. See Pls' Opp. to Mot. for Summ. J. at 17-23 (Dec. 9, 1999).

Exclusive Vending by Contract. Where UST was unable to impose exclusive vending, or persuade the store employees to acquiesce to it, the company often *contracted* with retailers to the same effect. In fact, UST reached agreements with some of the nation's largest and most important retail chains (Wal-Mart, 7-Eleven, among others).

To take one example, in 1997 UST convinced Wal-Mart to eliminate Conwood racks, POS, along with a number of Conwood brands. In return, UST provided millions of dollars worth of services and in-kind benefits. Later, when Wal-Mart discovered that the deal hurt overall sales, UST allotted Wal-Mart millions of dollars *more* in rebates and promotions to make up for Wal-Mart's losses and continue the exclusion. These rebates and promotions were not offered to other retailers. In an internal e-mail, UST's National Account Manager acknowledged that the

private deal succeeded in "severely cut[ting] back on [the competition's] ability to market products" and would "most certainly crush the competition."

UST also devised an incentive program, the Customer Alliance Program ("CAP"), for general use across the United States.[6] In "worksheets" used to record the specific terms and conditions applicable to each retailer (which UST curiously cannot find for most accounts), defendants expressly required exclusion of Conwood racks and POS. UST sales representatives were also permitted to use their "discretion" to determine retailer compliance and eligibility for payment under CAP. The evidence shows that they used this "discretion" to demand exclusive UST vending. As one UST sales representative put it, CAP "has become a great incentive . . . for the elimination of competitive products."

Further, under the terms of the generic CAP form contract itself, retailers were paid to conform to UST's principle that share of retail fixture (or space) must be allocated according to each manufacturer's share of market ("SOF=SOM"). Having constricted the number of available slots through its exclusive vending, UST thus added to that exclusion by locking in its existing 77% market share and rendering 77% of the slots unavailable for growing rival brands.

As nationally-recognized experts (including Professor Morton Kamien of Northwestern University) will explain, UST's exclusionary conduct resulted in higher consumer prices, lower

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[6]Surprisingly, UST claims that it does not know how many retailers are covered by CAP. From UST records, Conwood estimates that at least 22,000 retailers participate. UST documents confirm that 80% of its moist snuff volume is covered.

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output, and fewer choices for consumers. Over the last 10 years, UST was able to raise prices an average of 8.2% per year -- more than twice the rate of inflation. In retail outlets where UST succeeded in reducing rivals' share of facings, consumers paid significantly higher prices. Where UST succeeded in eliminating Conwood racks -- as in Wal-Mart and 7-Eleven -- overall moist snuff sales fell. With exclusive vending, consumer choice and valuable consumer information (including coupons and other discounts) were also lost. As a result, and as third party retailers attest, consumers were denied information about less expensive alternatives and paid more for their moist snuff.

UST's exclusion also suppressed Conwood's growth. Where Conwood's market share grew from nothing in 1980 to more than 10% by 1990, Conwood gained just 2.9 additional market points over the last decade -- despite a record of continued innovation and investment. (Per sale, Conwood continues to invest more in retail efforts than UST. And Conwood recently helped ignite a price revolution in the industry, introducing a full line of half-price brands, including a product that competes directly with UST's flagship "natural" flavored Copenhagen brand.)

Using established econometric techniques, Professor Richard Leftwich of the University of Chicago Graduate School of Business established that Conwood continued growing (albeit at a decreased rate) through the 1990s in parts of the United States where it had already attained significant market share. However, where Conwood had not attained this "critical mass" by 1990, UST's exclusionary campaign succeeded in arresting Conwood's growth entirely. No factor other than the exclusion practiced by UST accounts for the economic evidence in this regard. Based on a

consistent application of Conwood's actual growth rate in the markets it had penetrated by 1990 (growth which itself was depressed by UST's actions), to the areas in which Conwood lacked a foothold at the time UST commenced its predatory campaign, Professor Leftwich will testify that Conwood's lost profits as a consequence of UST's actions between approximately $280 and $480 million. UST has offered no alternative calculation of damages.

Questions of Fact and Law

A. CONWOOD'S CLAIMS

1. Monopolization. The elements of Conwood's monopolization claim are "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999) (citation omitted). Conwood must prove these elements by a preponderance of the evidence.

As applied to this case, the questions will be:

- Does the national moist snuff market constitute the relevant product market?

In assessing this question, the jury may consider matters including: (i) industry perception of the market, (ii) evidence of substitution or switching, (iii) differences among consumers, (iv) distinct product characteristics, and (v) competitive conditions. See White & White, Inc. v. American Hosp. Supply Corp. 723 F.2d 495, 501 (6th Cir. 1983); Pls' Reply in Supp. of Motion for Partial Summ. J. at 2 (Dec. 23, 1999).

- Does UST have monopoly power in the moist snuff market?

Conwood may prove monopoly power by "presenting direct evidence 'showing the exercise of actual control over prices or the actual exclusion of competitors.'" Re/Max Int'l, 173 F.3d at 1016 (quoting Byars v. Bluff City News Co., 609 F.2d 843, 850 (6th Cir. 1979)). Alternatively, Conwood may prove UST's monopoly power "by showing a high market share within a defined market." Id. Anything "over two-thirds of the market . . . constitute[s] monopoly power." PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 821 (6th Cir.), cert. denied, 520 U.S. 1265 (1997).

- Did UST unlawfully maintain its monopoly power through exclusionary conduct?

"Regarding Section 2 of the Sherman Act, what matters is that the freedom to compete is restrained." Riverview Invs., Inc. v. Ottawa Community Improvement Corp., 769 F.2d 324, 328 (6th Cir. 1985) (reversing summary judgment). A monopolist is permitted to compete, but only in respects that benefit consumers, such as better prices, product innovation, and the like. Conduct that tends to impair the opportunities of rivals, without benefitting consumers, is exclusionary. Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 575 (6th Cir. 1986) (Section 2 bars the "use of monopoly power to foreclose competition or gain a competitive advantage"); id. (Section 2 bars conduct that "does not further competition on the merits") (internal quotation marks omitted).

Similarly, even conduct that might benefit consumers is exclusionary if it is more restrictive than necessary to serve the interests of consumers. See, e.g., Potters Med. Ctr., 800

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F.2d at 575; Aspen Skiing, 472 U.S. at 605 (Section 2 bars conduct by a monopolist that "impair[s] competition in an unnecessarily restrictive way"). As Judge Martin put the point: conduct "which tend[s] to create a monopoly" is unlawful "whether the tendency is a creeping one or one that proceeds at full gallup." Kerasotes Michigan Theatres, Inc. v. National Amusements, Inc., 854 F.2d 135, 137 (6th Cir. 1988) (internal quotation marks omitted), cert. dismissed, 490 U.S. 1087 (1989).

Exclusionary conduct is a flexible, case-specific element that can be determined only by examining defendants' actions in their totality; none of a monopolist's actions need be "independently" unlawful to give rise to a Section 2 violation. Potters Ass'n, 800 F.2d at 575 (monopolist's actions "need not be in themselves independently unlawful" to violate Section 2) (internal quotation marks and citation omitted); Forsyth v. Humana, Inc., 114 F.3d 1467, 1478 (9th Cir. 1997) (merely raising rivals' costs is exclusionary conduct), aff'd, 525 U.S. 299 (1999); S. Salop & D. Scheffman, Recent Advances in the Theory of Industrial Structure: Raising Rivals' Costs, AEA Papers and Proceedings (May 1983) (UST's expert discussing anticompetitive effects of raising rivals' costs); Byars v. Bluff City News Co., 609 F.2d 843, 849, 853-54 (6th Cir. 1979) (conduct designed to impair the distribution of rival products and racks is actionable under Section 2); Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1443-44 (6th Cir. 1990) ("[t]he jury is entitled 'to look at the whole picture' with respect to allegations and evidence of Sherman Act § 2 violations")(quoting American Tobacco Co. v. United States, 147 F.2d 93, 106 (6th Cir. 1944), aff'd, 328 U.S. 781 (1946)); City of Mishawaka v. American

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Elec. Power Co., 616 F.2d 976, 986 (7th Cir. 1980) ("[i]t is the mix of the various ingredients . . . in a monopoly broth that produces the unsavory flavor"), cert. denied, 449 U.S. 1096 (1981).

One critical touchstone for deciding whether UST's scheme qualifies as "exclusionary" is defendants' intent. In fact, courts have held that evidence of a defendant's intent can *determine* "whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'" Aspen Skiing, 472 U.S. at 602. See also United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978) ("consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct"). Accordingly, the jury will have to assess how UST's conceded intent to exclude rivals (see Defs' Reply Br. in Supp. of Motion for Summ. J. at 11-12 (Dec. 23, 1999)) bears on the nature of its conduct.

2. Attempted Monopolization. If the jury finds that UST monopolized the moist snuff market, it will have no need to consider whether UST *attempted* to do so. But attempted monopolization may be proved even if actual monopolization is not. To prevail on its alternative claim for attempted monopolization, Conwood must prove by a preponderance of the evidence that "(1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

The first and second elements can be satisfied by showing that UST engaged in exclusionary conduct. See, e.g., M&M Med. Supplies & Serv. v. Pleasant Valley Hosp., 981 F.2d 160, 166 (4th

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Cir. 1992) (en banc) ("specific intent may be inferred from the defendant's anticompetitive practices"), cert. denied, 508 U.S. 972 (1993); Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988) ("Proof of . . . anticompetitive or exclusionary conduct, may be used to infer . . . specific intent to monopolize.").

With respect to the final element -- "dangerous probability of success" -- the "[m]ost significant" factual question for the jury "is the defendants' share of the relevant market." Pastore v. Bell Tel. Co., 24 F.3d 508, 513 (3d Cir. 1994). Courts find a dangerous probability of success where a defendant has a market share in excess of 50 percent. See, e.g., Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1443 (6th Cir. 1990) (58% share over seven-year period sufficient), cert. denied, 502 U.S. 899 (1991). Other pertinent factual questions that may bear on the "dangerous probability" element include "the number and strength of other competitors, market trends, and entry barriers." Multistate Legal Studies v. Harcourt Brace Publications, Inc., 63 F.3d 1550, 1554 (10th Cir, 1995), cert. denied, 516 U.S. 1044 (1996). The jury will have to determine, in light of these factors and UST's approximately 77% (current) market share, whether UST has a dangerous probability of achieving monopoly power.

3. Lanham Act Violation. The Lanham Act prohibits misrepresentations made "in commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B) (emphasis added). To succeed on this claim, Conwood must show

> (1) that the defendant has made false or misleading statements as to his own product or another's; (2) that there is actual deception or at least a tendency to deceive

> a substantial portion of the intended audience; (3) that the deception is material in that it is likely to influence purchasing decisions; (4) that the advertised goods travelled in interstate commerce; and (5) that there is likelihood of injury to the plaintiff in terms of declining sales, loss of goodwill, etc.

Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1383 n.3 (5th Cir. 1996) (quoting Ditri v. Coldwell Banker Residential Affiliates, Inc., 954 F.2d 869, 872 (3d Cir. 1992)). Conwood will challenge both the promotional and advertising practices of UST.[7]

Pertinent factual questions in this case include:

- Whether UST sales personnel misleadingly represented that Conwood products contain fiberglass, stems, or other imperfections.
- Whether UST sales personnel misleadingly represented that Conwood dating methods are unreliable.
- Whether UST advertised its Copenhagen products with false or misleading "made on" dates to gain an advantage over rivals.

4. Tortious Interference with Contract/Tortious Interference with Prospective Business Relations. To show tortious interference with contract, Conwood must prove that UST induced or otherwise caused a third person not to perform an

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[7]Promotional misrepresentations made by sales representatives are sufficiently disseminated to violate the Lanham Act when repeated to multiple customers. See, e.g., Seven-Up Co., 86 F.3d at 1386-87 (sales presentation not "merely isolated, individual statements of opinion by a single sales representative to a single customer" was commercial advertising for purposes of Lanham Act); H & R Indus., Inc. v. Kirshner, 899 F. Supp. 995, 1005-06 (E.D.N.Y. 1995) (statements made by defendant that competitor was engaging in improper commercial practices held to raise fact issues for jury on trade disparagement claim under Lanham Act); National Artists Management Co. v. Weaving, 769 F. Supp. 1224, 1229-31 (S.D.N.Y. 1991) (allegation that defendants had made phone calls and statements to plaintiffs' clients stated claim for commercial disparagement under Lanham Act); Gordon & Breach Science Publishers S.A. v. American Inst. of Physics, 859 F. Supp. 1521, 1544 (S.D.N.Y. 1994) (allegations of deceptive promotional efforts stated claim under Lanham Act).

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existing contract with Conwood. Carmichael--Lynch--Nolan v. Bennett, 561 S.W.2d 99, 102 (Ky. Ct. App. 1977). To show tortious interference with prospective business relations, Conwood must show that UST prevented Conwood from acquiring or continuing a valuable prospective business relationship with a third person. See id.; National Collegiate Athletic Ass'n v. Hornung, 754 S.W.2d 855, 857 (Ky. 1988). Conwood does not need to show that UST acted fraudulently or employed coercion to succeed on either tort. Id. at 858.

As applied to this case, pertinent questions will include whether UST interfered with Conwood's existing and prospective relationships with retailers by, inter alia, providing misleading and false sales data to retailers in an effort to exclude Conwood products; conditioning receipt of promotions on the retailer's rejection or restriction of Conwood racks, POS, or products; and ripping out Conwood racks, products, and POS.

5. Unfair Competition (Ky. Rev. Stat. Ann. § 365.050). Under Section 365.050, Conwood must show that UST made a "secret payment or allowance of rebates, refunds, commissions or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers . . . where such payment or allowance tends to destroy competition." Ky. Rev. Stat. Ann. § 365.050. It is not necessary that the rebate be made with the intent to destroy competition. Jefferson Ice & Fuel Co. v. Grocers Ice & Cold Storage Co., 286 S.W.2d 80, 83 (Ky. 1955). Factual questions in this case will include:

- Whether UST provided secret rebates and promotions to certain retailers (such as Wal-Mart) that were not offered to other retailers.

- Whether such secret rebates and promotions tended to harm competition.

6. Product Defamation. To show defamation, Conwood must establish that UST (1) used defamatory language; (2) about the plaintiff; (3) which is published; (4) which caused injury to reputation. Pennington v. Little, 266 Ky. 750, 99 S.W.2d 776 (Ky. 1936); Columbia Sussex Corp., Inc. v. Hay, 627 S.W.2d 270, 274 (Ky. Ct. App. 1981). While the language at issue must be false under element (1), Kentucky law recognizes that language may be considered defamatory in and of itself ("per se") or defamatory given the context of the communication ("per quod") which explain its meaning. Columbia Sussex, 627 S.W.2d at 274; Elkins v. Roberts, 242 S.W.2d 994 (Ky. 1951). In this case, factual questions will include whether UST misrepresented that Conwood products contain fiberglass, stems, and other impurities.

7. Unjust Enrichment. Under Kentucky law, Conwood may recover for unjust enrichment if it (1) conferred a benefit upon defendants, (2) defendants appreciated that a benefit was conferred, and (3) defendants inequitably retained the benefit without payment for its value. Guarantee Elec. Co. v. Big Rivers Elec. Corp., 669 F. Supp. 1371, 1380-81 (W.D. Ky. 1987). Factual questions will include whether UST was inequitably enriched by taking Conwood racks, POS, and product at retail stores across the country.

8. Conversion/Trover. To prove conversion, "[a]ll that is necessary is that the defendant exercise dominion and control over the property which is inconsistent with the plaintiff's rights" and some resulting damages. Mansbach v. Prescott, Ball & Turben, 598 F.2d 1017, 1027 (6th Cir. 1979); Kimberly & European

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Diamonds, Inc., 518 F. Supp. 599, 602 (W.D. Ky. 1981), aff'd, 684 F.2d 363 (6th Cir. 1982). In this case, Conwood alleges that UST sales representatives tortiously converted Conwood racks, POS, and product.

B. UST'S COUNTERCLAIMS

UST has filed counterclaims that are the mirror image of plaintiff's Lanham Act, tortious interference with contract and prospective business relations, unfair competition (Ky. Rev. Stat. Ann. § 365.050), product defamation, and conversion/trover claims. Each of UST's counterclaims must be analyzed under the same legal standards discussed above. Two threshold matters exist, however, that preclude UST's counterclaims.

First, despite a Court order, UST disclosed no witnesses to any of the conduct it alleges; accordingly, it has no competent proof to offer at trial. See Pls' Mot. for Partial Summ. J. at 35-37 (Nov. 15, 1999); Pls' Reply Br. in Support of Mot. for Partial Summ. J. at 13-16 (Dec. 23, 1999). Even the two persons UST belatedly identified in opposition to plaintiff's motion for summary judgment have witnessed no conduct in Kentucky that could sustain UST's Kentucky state tort claims. Id.

Second, UST disclosed no damages from any of the conduct alleged in its counterclaims in conformance with Federal Rule of Civil Procedure 26 and the Court's order compelling production of a damages estimate. Id. Damages are a necessary element for each of the causes of action UST alleges. Id. Without any competent damages evidence, none of UST's counterclaims can stand.

Respectfully submitted,

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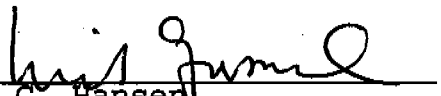

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CERTIFICATE OF SERVICE

I certify that, on this 21st day of January, 2000, a copy of the foregoing was sent via facsimile and overnight delivery to:

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Chris T. Athanasia
Skadden, Arps, Slate, Meagher
& Flom, L.L.P.
Four Times Square
New York, New York 10036

John S. Reed
Ridley M. Sandidge
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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MARK L. EVANS
AUSTIN C. SCHLICK

STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

January 21, 2000

Via Federal Express

Honorable James D. Moyer
208 Gene Snyder U.S. Courthouse
601 West Broadway
Louisville, KY 40202

Re: Conwood Co., et al. v. United States Tobacco Co., et al.

Dear Magistrate Judge Moyer:

Enclosed is a courtesy copy of Plaintiffs' Pretrial Brief, Plaintiffs' List of Trial Exhibits and Plaintiffs' Trial Witness List, which have been filed with the Clerk of the Court.

Respectfully,

Michael J. Guzman

Enclosure

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GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

January 21, 2000

Via Federal Express

Honorable Thomas B. Russell
307 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Co., et al. v. United States Tobacco Co., et al.

Dear Judge Russell:

Enclosed is a courtesy copy of Plaintiffs' Pretrial Brief, Plaintiffs' List of Trial Exhibits, and Plaintiffs' Trial Witness List, which have been filed with the Clerk of the Court.

Respectfully,

Michael J. Guzman

Enclosure

COMMAND #191

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	1/21	18:19	Skadden, Arps	EC--S	05'10"	020	OK

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Sean A. Lev
Courtney Simmons Elwood

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TO: Neal R. Stoll, Esq.
James A. Keyte, Esq.
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Jed Goldfarb, Esq.

FAX NO.: (212) 735-2000 **CLIENT NO.: 97718**

PHONE: (212) 735-3000

FROM: Neil M. Gorsuch
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COMMAND #192

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Courtney Simmons Elwood

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TO: John S. Reed

FAX NO.: (270) 562-2200 **CLIENT NO.:** 97718

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' TRIAL WITNESS LIST

Plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood") respectfully submit their list of witnesses plaintiffs expect to call (designated on the attached Exhibit "A" with an asterisk) or may call in their case-in-chief. Plaintiffs reserve the right to call additional witnesses in rebuttal.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
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Benjamin A. Powell
Michael J. Guzman
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Todd & Evans, P.L.L.C.
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Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

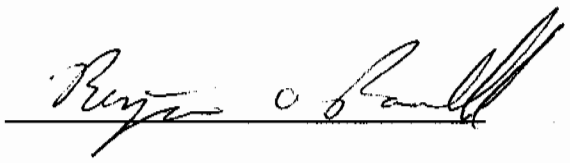
January 21, 2000

CERTIFICATE OF SERVICE

I certify that on this 21st day of January, 2000, a copy of the foregoing was sent by facsimile, and overnight mail, to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., Four Times Square, New York, NY 10036.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.



Witness
Annundson, Arlie
Ansted, David
Bache, Ronnie
Bales, Robert*
Balk, Tom
Ballard, Carolyn*
Berkebile, Tom
Beyerlein, Michael
Blackburn, Donald
Blattberg, Robert*
Bonoffski, John*
Borrowdale, Lawrence*
Carter, Andy*
Cash, David
Chiaradio, Robert
Clardy, Wayne
Coatney, Ted
Combs, Thomas
Cortinas, Raymond
Cothren, Woody
Cothren, Pat
Cutler, Richard
Davis, Bob
Dickson, Dennis
Dolan, Todd
Dolsen, John
Dominey, Jana
Dowdy, Jimmy
Dring, Jeff
Elliott, Jim
Ellis, Greg
Elsik, Scott
Englert, David
Engster, Rob*
Entwistle, Tim
Faas, Doug
Falevsky, John
Fasanelli, Richard*
Feeney, Frank*
Fitzmaurice, Bob
Flemming, Mark
Foster, Donald*
Francis, Glynn
Frank, Russell
Funk, Lonnie
Gierer, Vincent*
Gill-Elkins, Georgia*
Gundlach, Gregory*

Ham, Jeffrey
Harris, Wayne
Hart, Alan*
Haynes, Larry
Henchy, Richard
Hensley, Gary
Hettinger, Joseph
Heylmun, Howard
Hyder, David
Hynek, Doug*
Iannuzzi, Albert*
Ingram, William*
Jacumin, Donna
Jaffer, Harvey
Jeffery, Brett
Jansing, Robert*
Johnson, Steve
Jones, Bruce
Kamien, Morton*
Keane, Michael
Keil, Leroy*
Knol, Calvin
Larson, Eric
Latta, Tommy*
Leftwich, Richard*
Leinen, Patricia*
Lemoine, Phillip
Lovell, Mark
Ludwig, Tim
Lund, David
Luttgeharm, Brenda
Lynch, William
Maples, Bob
Marano, Lou
Marconi, Joseph*
McCarthy, James
McClure, Bill
McCormack, Tom
McGregor, Howard
McKeon, Jerry
Metz, Steve
Milano, Gary*
Miley, Kurt
Miller, Kevin
Murphy, Bernadette
Nabi, Donald
Naifeh, John*
Naseth, Paul
Norris, James

Oldani, Dennis*
O'Neal, Glenn
Pallen, Paul
Parker, Brian
Parrish, Byron
Piatek, Ronald*
Popper, Edward*
Price, Harold
Quirk, James
Ray, Hal
Reeder, Don
Renfro, Waynell*
Rice, Greg
Roberson, Edwin
Rogers, Gene
Rosson, William*
Roux, Scott
Rushing, Maudie*
Rusk, Gayleen*
Ryan, Gary
Schultz, Ken
Segelstrom, Donald
Senger, Jerry
Simpson, David
Slabbekorn, Michael
Smith, Gary*
Sopko, Jim
Stanke, Michael
Stevens, Marti*
Stokes, S.T.
Taylor, Harold
Taylor, Mia
Townsend, Bonita*
Ulizio, Shawn*
UST Custodian of Records
Untiedt, David*
Wadkins, Frank
Walker, Paul
Waller, David*
Washer, Ken
Weckman, Rodney*
Welsh, Gerald*
Wheatley, James*
Willding, Guy
Williams, Terry*
Woodson, Jarnitha
Yager, Steve
Zahrt, Gregory

COMMAND #229

	DATE	TIME		TO/FROM	MODE	MIN/SEC	PGS	STATUS
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TO:	DAVID SIMPSON, ESQ.
FAX NO.:	901-682-1223
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TO: Neal R. Stoll, Esq.
James A. Keyte, Esq.
Chris T. Athanasia, Esq.
Matthew S. Barnett, Esq.
Jed Goldfarb, Esq.

FAX NO.: (212) 735-2000 **CLIENT NO.:** 97718

PHONE: (212) 735-3000

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	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
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Sean A. Lev
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FAX NO.: (270) 562-2200 **CLIENT NO.:** 97718

PHONE: (270) 589-1000

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
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Austin C. Schlick

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Henk Brands
Sean A. Lev
Courtney Simmons Elwood

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TO: Richard C. Roberts

FAX NO.: (270) 443-4571 **CLIENT NO.: 97718**

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' LIST OF TRIAL EXHIBITS

Plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood") respectfully submit the attached list of exhibits plaintiffs may offer in evidence during their case-in-chief ("Exhibit "A"). All listed exhibits have been made available for inspection by counsel for defendants.

Plaintiffs reserve the right to modify or supplement this list as they continue to prepare their case for trial, to offer enlargements of exhibits in evidence, to offer additional exhibits identified and discussed during deposition testimony designated by plaintiffs for potential use at trial (which designations are incorporated herein by reference), and to modify demonstrative exhibits plaintiffs expect to offer during testimony by expert witnesses in order to conform such exhibits to the proof. Plaintiffs further reserve their right to offer additional exhibits, not listed herein, in rebuttal.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Neil M. Gorsuch
Benjamin A. Powell
Michael J. Guzman
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
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FAX - (202) 326-7999

Counsel for Plaintiffs

January 21, 2000

16diii002607

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John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Michael D. G

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
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90	Blackburn Deposition Exh. 21	

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102	301114	301220
103	193470	193485
104	820775	820776
105	734373	734375
106	209839	209840
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108	14946	14946
109	15275	15275
110	157108	157109
111	202768	202770
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112B	249109	249121
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112D	825828	825828
112E	825829	825829
112F	896758	896758
112G	517019	517019
112H	509661	509661
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112O	821537	821537
112P	1380258	1380258
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124F	347209	347210
124G	314496	314496
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128	416416	416419
129	259272	259278
130	286194	286196
131	205280	205281
132	209653	209653
133	034050	034053
134	205979	205982
135	1004007812	1004007813, 1257004168
136	209125	209127
137	201648	201657
138	34016	34040
139	209008	209009
140	109520	109535
141	415952	415953
142	996351	996352
143	94547	94550
144	821608	821609
145	Intentionally Left Blank	
146	Customer Alliance Program Enhancements	
147	Memo from Thibodeaux & Bonfiglio re: Racks	
148	106816	106817
149	109185	109189
150	672309	672311
151	55094	55115
152	042217	042218
153	42223	42260
154	693132	693133
155	217787	217788
156	186413	186419
157	403300	403350

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
158	173906	173908
159	1380036	1380041
160	Declaration of John Naifeh	
161	Declaration of Alan Hart	
162	Declaration of John Bonoffski	
163	Declaration of John Bonoffski	
164	Declaration of Ronald Piatek	
165	Declaration of Borrowdale	
166	Declaration of Leroy Keil	
167	Ulizo Exh. 1	
168	1011022959	1011022971
169	23272	23294
170	534465	534466
171	536138	536160
172	588165	588167
173	305859	305861
174	556987	556988
175	734333	734334
176	132239	132241
177	914378	914383
178	825724	825724
179	227192	227192
180	888816	888818
181	734373	734375
182	154397	154398
183	318185	318186
184	733782	733784
185	912319	912319
186	1002665	1002679
187	141379	141381
188	25970	26971
189	404749	404750
190	404899	404899
191	411834	411834
192	201739	201741
193	251053	251067
194	326041	326048
195	251068	251070
196	251074	251074
197	251427	251430
198	Deposition photos	
199	560594	560610
200	250035	250041
201	249984	249994
202	669844	669864

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
203	529213	529214
204	Carlson Dep. Exh. 18	
205	Carlson Dep. Exh. 19	
206	Carlson Dep. Exh. 20	
207	416671	416676
208	257015	257017
209	404746	404747
210	322221	322224
211	205974	205977
212	205966	205971
213	205979	205982
214	974600	974603
215	153076	153094
216	206570	206573
217	732229	732237
218	416697	416699
219	416809	416812
220	298204	298224
221	Chiaradio Dep. Exh. 26	
222	416783	416786
223	Chiaradio Dep. Exh. 28	
224	Engster Dep. Exh. 1	
225	Engster Dep. Exh. 2	
226	229361	229362
227	147149	147149
228	12829	12830
229	024274	024275
230	202247	202267
231	109389	109415
232	318619	318620
233	149368	149371
234	24544	24544
235	155229	155235
236	201771	201771
237	159231	159235
238	278897	278920
239	331658	331659
240	25912	25912
241	149373	149373
242	512487	512488
243	512483	512484
244	Gill-Elkins Dep. Exh. 1	
245	772155	772158
246	772168	772178
247	556594	556613

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
248	556987	556988
249	210847	210848
250	169908	169908
251	010012592	010012592
252	Keil Exh. 1	
253	Declaration of Leroy Keil	
254	Latta Exh. 1	
255	Leinen Exh. 1	
256	Leinen Exh. 2	
257	1076746	1076760
258	106772	106781
259	1060686	1060700
260	Piatek Exh. 1	
261	Townsend Exh. 1	
262	1169002526	1169002530
263	1169002525	1169002525
264	734422	734424
265		Walsh Dep. Exh. 1
266	250018	250019
267	510926	510926
268	513072	513073
269	UST Reports Fourth Quarter 1999 E.P.S. Up 23%, http://www.shareholder.com/ust/news20000120-13389.htm	
270	404107	404109
271	634433	634434
272	870559	870560
273	589126	589126
274	217796	217797
275	Notice of Deposition of Alan Hart	
276	556997	556998
277	032379	032398
278	640534	640538
279	666185	666186
280	672004	672004
281	254143	254145
282	158372	158374
283	869879	869880
284	262433	262438
285	666183	666183
286	069783	0679786
287	512796	512798
288	109093	109094
289	321002	321003

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
Group Exhibit 290	Misc. Conwood moist snuff products – Available for inspection	
Group Exhibit 291	Misc. Conwood looseleaf products – Available for inspection	
Group Exhibit 292	Misc. Conwood moist plug products – Available for inspection	
Group Exhibit 293	Misc. Conwood twist products - Available for inspection	
Group Exhibit 294	Misc. Conwood dry snuff products – Available for inspection	
Group Exhibit 295	Conwood J racks - Available for inspection	
Group Exhibit 296	Conwood short profile racks with accessories - Available for inspection	
Group Exhibit 297	Conwood tall profile racks with accessories - Available for inspection	
Group Exhibit 298	Conwood wire racks - Available for inspection	
Group Exhibit 299	Conwood counter and shelf display materials - Available for inspection	
Group Exhibit 300	Conwood header and side panel cards – Available for inspection	
Group Exhibit 301	Conwood price promotional POS – Available for inspection	
Group Exhibit 302	Conwood specialty rack - Available for inspection	
Group Exhibit 303	Defaced Conwood racks/materials – Available for inspection	
Group Exhibit 304	Swedish Match merchandising materials - Available for inspection	
Group Exhibit 305	Exemplar UST racks, merchandising materials and product – Available for inspection	
Group Exhibit 306A	Transcript of UST teleconference 3/17/97 Tape Cassette USTC/CWD 408150A	
Group Exhibit 306B	Transcript of UST teleconference 7/24/97 Tape Cassette USTC/CWD 408150B	
Group Exhibit 306C	Transcript of UST teleconference 10/16/97 Tape Cassette USTC/CWD 408150C	
Group Exhibit 306D	Transcript of UST teleconference 1/22/98 Tape Cassette USTC/CWD 408150D	
Group Exhibit 306E	Transcript of UST teleconference 10/21/98 Tape Cassette USTC/CWD 408150E	
Group Exhibit 306F	Transcript of UST teleconference 7/22/98 Tape Cassette USTC/CWD 408150F	
Group Exhibit 307A	Audiocasette of UST teleconference 3/17/97 USTC/CWD 408150A	
Group Exhibit 307B	Audiocasette of UST teleconference 7/24/97 USTC/CWD 408150B	

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
Group Exhibit 307C	Audiocasette of UST teleconference 10/16/97 USTC/CWD 408150C	
Group Exhibit 307D	Audiocasette of UST teleconference 1/22/98 USTC/CWD 408150D	
Group Exhibit 307E	Audiocasette of UST teleconference 10/21/98 USTC/CWD 408150E	
Group Exhibit 307F	Audiocasette of UST teleconference 7/22/98 USTC/CWD 408150F	
308	Conwood Complaint Exhibit C Videocassette	
309	Replica of generic retail display shelf space with rolling casters for courtroom use. Will be made available for inspection at Paducah when completed.	
310A	Distributor invoice	
310B	UST shipping carton panel for COPE LC	
310C	UST shipping carton panel for COPE LC	
311A	Photos of UST signage	
311B	Photo of UST Green Neon Rack	
311C	Photo of store set	
311D	Photo of store set	
311E	Wal*mart photo	
311F	Wal*mart photo	
Group Exhibit 312A	Photo of Conwood rack	
Group Exhibit 312B	Photo of Conwood rack	
Group Exhibit 312C	Photo of Conwood floor display	
Group Exhibit 312D	Photo of Conwood rack POS	
Group Exhibit 312E	Photo of Conwood rack POS	
Group Exhibit 312F	Photo of Conwood rack POS	
Group Exhibit 312G	Photo of Conwood rack POS	
Group Exhibit 312H	Photo of Conwood rack POS	
Group Exhibit 312I	Photo of Conwood rack POS	
Group Exhibit 312J	Photo of Conwood rack POS	
Group Exhibit 312K	Photo of Conwood rack POS	
Group Exhibit 312L	Photo of Conwood rack POS	
Group Exhibit 312M	Photo of Conwood rack POS	

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
Group Exhibit 312N	Photo of Conwood rack POS	
Group Exhibit 312O	Photo of Conwood rack POS	
Group Exhibit 312P	Photo of Conwood rack POS	
313	Report of Morton I. Kamien and all attachments and supplements thereto.	
314	Rebuttal Report of Morton I. Kamien and all attachments and supplements thereto.	
315	Supplemental Report of Morton I. Kamien and all attachments and supplements thereto.	
316	Report of Richard Leftwich and all attachments and supplements thereto.	
317	Rebuttal Report of Richard Leftwich and all attachments and supplements thereto.	
Group Exhibit 318A	Photo of Convenience Store rack	
Group Exhibit 318B	UST POS	
Group Exhibit 318C	Photo of Store set	
Group Exhibit 318D	Photo of Convenience Store rack	
Group Exhibit 318E	Photo of Convenience Store rack	
Group Exhibit 318F	Photo of Convenience Store rack	
Group Exhibit 318G	Photo of Convenience Store rack	
Group Exhibit 318H	Photo of Convenience Store rack	
Group Exhibit 318I	Photo of Convenience Store rack	
Group Exhibit 318J	Conwood POS	
Group Exhibit 318K	UST POS	
Group Exhibit 318L	Photo of Store set	
Group Exhibit 318M	Photo of Convenience Store rack	
Group Exhibit 318N	Photo of Convenience Store rack	
Group Exhibit 318O	Photo of Convenience Store rack	
Group Exhibit 318P	Photo of Wal*Mart set	

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
Group Exhibit 318Q	Photo of Wal*Mart set	
Group Exhibit 318R	UST Rack photo	
Group Exhibit 318S	UST Rack photo	
Group Exhibit 318T	UST Rack photo	
Group Exhibit 318U	UST Rack photo	
Group Exhibit 318V	UST Rack photo	
Group Exhibit 318W	UST Rack photo	
Group Exhibit 318X	Photo of Store set	
Group Exhibit 318Y	Photo of Store set	
319	Declaration of Waynell Renfro	
320	Report of Edward T.L. Popper and all attachments and supplements thereto.	
321	Rebuttal Report of Edward T.L. Popper and all attachments and supplements thereto.	
322	Report of Gregory T. Gundlach and all attachments and supplements thereto.	
323	Rebuttal Report of Gregory T. Gundlach and all attachments and supplements thereto.	
324	Report of Robert C. Blattberg and all attachments and supplements thereto.	
325	Rebuttal Report of Robert C. Blattberg and all attachments and supplements thereto.	
326	Expert Demonstratives of Morton I. Kamien	
327	Expert Demonstratives of Richard Leftwich	
328	Expert Demonstratives of Edward T.L. Popper	
329	Expert Demonstratives of Gregory T. Gundlach	
330	Expert Demonstratives of Robert C. Blattberg	
331	Multi-part PAR scanner sheet	

COMMAND #195

	DATE	TIME	TO/FROM	MODE	MIN/SEC	PGS	STATUS
001	1/21	19:54	5025622200	EC--S	03' 07"	015	OK

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Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick

Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Neal R. Stoll, Esq.
James A. Keyte, Esq.
Chris T. Athanasia, Esq.
Matthew S. Barnett, Esq.
Jed Goldfarb, Esq.

FAX NO.: (212) 735-2000 **CLIENT NO.:** 97718

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CONNECTION ID	
ST. TIME	01/22 18:28
USAGE T	04'56
PGS.	15
RESULT	OK

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Mark L. Evans
Austin C. Schlick

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Neil M. Gorsuch
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Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Richard C. Roberts

FAX NO.: (270) 443-4571 **CLIENT NO.: 97718**

PHONE: (270) 443-4516

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' TRIAL WITNESS LIST

Defendants United States Tobacco Company, et al. ("USTC") submit the following list of trial witnesses. USTC may call any of these witnesses to testify to defend against the claims of Plaintiffs Conwood Company, L.P., et al. ("Conwood") or to prove USTC's counterclaims against Conwood. USTC reserves the right to modify or supplement this list and to call additional witnesses as necessary in rebuttal on its counterclaims or in surrebuttal on Conwoods' claims. Unless otherwise noted, all persons identified by name on the following list are affiliated with USTC.

1. Dewayne Biddy
   Chain Account Manager

2. Leticia Bland-Clark
   Manager
   Smoke Shack
   2455 Lake Road
   Dyersburg, TN 38024

3. Steve Butler
   General Manager
   H.T. Hackney Company
   3000 Shelbourne Street
   P.O. Box 2335
   Paducah, KY 42002-2335

4. Gary Cadd
   Vice President

5. Dave Carr
   Division Manager

6. Kevin Freudenthal
   Director of Trade Marketing

7. Greg Germany
   Department Manager

8. Vincent A. Gierer, Jr.
   CEO
   Chairman of the Board

9. Frank Hinton
   President
   Hinton & Sons'
   621 South 4th Street
   Murray, KY 42071

10. James E. Jones
    Sales Representative

11. Morgan Jones
    Sales Representative

12. Murray Kessler
    Senior Vice President

13. Kay Laessig
    Director of Merchandising
    Golden Pantry
    1150 Wall Street
    Bogart, GA 30622

16diii002624

14. Jeff Leedy
Director of Marketing
CHR Corporation d/b/a Rutter's Farm Stores
2100 North George Street
York, PA 17404

15. Steve Luckett
Drug/GM Merchandising
Kroger
10168 Linn Station Road
Louisville, KY 40223

16. Jerry McCaney
Manager
Accumetric Corporation d/b/a Bo's Smoke Shop
1127 South Main Street
Hartford, KY 42347

17. Gary Milano
Vice President of Sales

18. Kimberly A. Overby
Owner
Cigarettes For Less, Inc.
P.O. Box 3040
Paducah, KY 42002

19. Randy Pickett
Regional Manager
Miller & Hartman South
42 East 12th Street
Highway 408
Benton, KY 42025

20. Tom Potter
Sales Representative

21. David T. Scheffman
Navigant Consulting, Inc.
1700 Broadway
New York, NY 10019

22. Jeffrey Smither
Division Manager

23. Dan Walden
Marketing Manager
Bee-Line Food Stores
P.O. Box 1067
Troy, AL 36081

24. Winston Weber
Winston Weber & Associates, Inc.
5100 Poplar Avenue
Suite 2750
Memphis, TN 38137

25. Charles Wells
President
Tobacco Patch
P.O. Box 226
Hopkinsville, KY 42241

26. Guy Wyatt
Division Manager

27. All non-party witnesses whose depositions have been taken in this action.

28. All USTC and Conwood personnel whose depositions have been taken in this action.

29. All persons identified by Conwood in Plaintiff's Initial Disclosure of "Field Personnel" Trial Witnesses, filed September 21, 1999.

16diii002626

30. All persons identified by Conwood as trial witnesses pursuant to paragraph 8(b) of the Order entered February 18, 1999.

January 21, 2000

Respectfully submitted,

John S. Reed
Ridley M. Sandidge, Jr.
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New York, New York 10036
(212) 735-3000

Counsel for Defendants

16diii002627

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. AND CONWOOD SALES COMPANY, L.P.,	)	
Plaintiffs	)	
v.	)	Civil Action No: 5:98-CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. UNITED STATES TOBACCO MANUFACTURING COMPANY, INC. and UST INC.,	)	
Defendants	)	

DEFENDANTS SUPPLEMENTAL TRIAL WITNESS LIST

Defendants United States Tobacco Company, et al. ("USTC") respectfully supplement their Trial Witness List to add the name of the following witness who may be called to testify to defend against the claims of Plaintiffs Conwood Company, L.P., et al. ("Conwood") or to prove USTC's counterclaims against Conwood. At present, USTC plans to offer this additional witness in place of Randy Pickett, the witness identified at No. 19 in Defendants Trial Witness List, but reserves the right to call Mr. Pickett at trial.

Greg Rainey
District Sales Manager
Miller & Hartman South
42 East 12th Street
Benton, KY 42025

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, on the 15th day of February, 2000.

L. L. Fieldhouse

Counsel for Defendants

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' DESIGNATIONS OF DEPOSITIONS

Pursuant to the Court's February 18, 1999 Scheduling Order, Defendants respectfully submit the following designations of deposition excerpts.

January 21, 2000

Respectfully submitted,

John S. Reed
Ridley M. Sandidge
Lynn K. Fieldhouse
REED WEITKAMP SCHELL
& VICE PLLC
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Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, New York 10036
(212) 735-3000

Counsel for Defendants

16diii002631

WITNESS: GLYNN FRANCIS
10/27/99

From *Page: Line*	**Through** *Page: Line*
5 : 19	5 : 19 ending with "Francis."
6 : 18	7 : 1
14 : 2	16 : 24
22 : 18	23 : 23
24 : 17	25 : 4
36 : 13	36 : 22
37 : 18	38 : 1
39 : 1	39 : 8
42 : 7	43 : 22
43 : 25 beginning with "Did U.S...."	44 : 7
44 : 20 beginning with "Did you..."	45 : 9
45 : 22	46 : 8
46 : 14	46 : 15
46 : 17	46 : 18
48 : 2	48 : 16
51 : 5	51 : 22
51 : 24	53 : 10
64 : 7	65 : 2
65 : 10	65 : 16
66 : 22	67 : 5
67 : 9	67 : 14
69 : 15	71 : 3
72 : 25	74 : 4
74 : 6	74 : 21
75 : 15	76 : 11
77 : 4	78 : 6
78 : 18	79 : 2
79 : 17	80 : 18
80 : 25	81 : 24
83 : 9	85 : 8
85 : 18	87 : 11
91 : 11	92 : 7
93 : 13	94 : 4
94 : 18	95 : 3
95 : 15	95 : 17
97 : 23	98 : 24
99 : 12	99 : 16
123 : 4	123 : 16
128 : 2	128 : 11
132 : 5	132 : 14 ending with "correct."
135 : 19	137 : 10
137 : 22	138 : 9
138 : 17	138 : 19
138 : 21	139 : 8

16diii002632

From *Page: Line*	Through *Page: Line*
140 : 3	141 : 25
172 : 10	173 : 3
173 : 15	174 : 7
174 : 9	174 : 9
176 : 8 beginning with "In 1994..."	176 : 14 ending with "Yes."
176 : 21	179 : 16
180 : 5	182 : 16

From *Page: Line*	**Through** *Page: Line*
6: 5	6: 5
17: 3	17: 18
17: 22	18: 10
18: 18	20: 6
20: 14	20: 25
24: 3	24: 15
24: 22	25: 22
25: 8	25: 15
39: 5	39: 25
40: 5	40: 9
48: 10	49: 8
49: 13	49: 20
50: 3	50: 3
50: 10	50: 25
51: 5	51: 5
53: 7	53: 12
53: 14	53: 14
53: 19	54: 9
54: 18	58: 13
72: 15	72: 16
72: 19	72: 19
78: 4	78: 11
78: 20	78: 24
79: 16	79: 18
79: 20	80: 3
80: 5	80: 5
80: 7	80: 11
80: 22	81: 3
81: 10	81: 10
82: 1	82: 8
82: 11	82: 24
83: 11	84: 19
84: 23	84: 25
85: 10	85: 20
85: 23	86: 4
86: 12	86: 17
86: 20	86: 25
87: 3	87: 12
90: 17	90: 25
92: 11	92: 12
92: 16	92: 17
93: 5	93: 8
97: 16	97: 20
97: 23	98: 16

From *Page: Line*	Through *Page: Line*
100: 23	101: 5
101: 8	101: 10
102: 11	103: 4
103: 7	103: 11
108: 12	109: 11
109: 16	109: 17
109: 19	110: 6
110: 8	110: 13
110: 16	110: 16
110: 18	110: 21
110: 23	111: 7
111: 10	111: 11
113: 13	113: 22
114: 24	115: 7
115: 11	115: 15
116: 4	116: 10
119: 14	119: 16
119: 24	120: 14
120: 16	120: 18
126: 23	127: 15 ending with "remember."
131: 11	131: 23
132: 4	134: 10
134: 22	135: 8
135: 12	135: 22
135: 24	136: 12
136: 15	136: 20
136: 23	136: 24
137: 23	138: 6
138: 9	138: 9
140: 18	141: 13
142: 10	142: 11
146: 15	147: 5
147: 13	147: 15
147: 18	147: 18
147: 20	148: 6
148: 24	149: 16
149: 19	150: 3
150: 5	150: 5
150: 19	155: 7
155: 9	156: 1
156: 4	156: 20
159: 3	159: 9
159: 12	159: 12
162: 3	162: 5
162: 8	163: 8
163: 11	163: 11

From *Page: Line*	**Through** *Page: Line*
6 : 8	6 : 8
38 : 12	38 : 14
38 : 17	38 : 22
39 : 10	39 : 10
39 : 12	39 : 18
39 : 21	39 : 21
40 : 7	40 : 10
40 : 13	40 : 19
40 : 22	40 : 25
41 : 8	41 : 11
41 : 14	41 : 17
41 : 19	41 : 23
42 : 1	42 : 1
43 : 2	43 : 5
43 : 10	44 : 4
44 : 7	44 : 19
44 : 22	44 : 23
44 : 25	45 : 3
45 : 7	45 : 8
45 : 11	45 : 16
45 : 19	45 : 20
45 : 22	46 : 9
47 : 9	47 : 12
47 : 15	48 : 1
48 : 22	50 : 9
50 : 18	50 : 20
50 : 23	50 : 23
52 : 14	53 : 1
53 : 6	55 : 4
55 : 7	55 : 21
56 : 10	57 : 12
61 : 3	61 : 5
61 : 8	61 : 11
61 : 14	61 : 19
62 : 2	62 : 11
62 : 15	64 : 12
64 : 15	64 : 17
69 : 3	69 : 11
69 : 19	71 : 2
72 : 2	73 : 8
81 : 3	83 : 23
84 : 1	85 : 17
85 : 20	86 : 5
86 : 19	87 : 1

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From *Page: Line*	Through *Page: Line*
88 : 12	90 : 1
90 : 4	90 : 7
90 : 10	90 : 14
90 : 16	90 : 20
90 : 23	90 : 24
95 : 17	96 : 8
96 : 11	96 : 23
97 : 1	97 : 7
97 : 10	97 : 11
98 : 19	98 : 24
99 : 3	100 : 25
101 : 5	104 : 9
104 : 12	105 : 6
105 : 14	105 : 19
105 : 22	105 : 23
106 : 8	107 : 21
110 : 7	110 : 24
111 : 2	111 : 20
111 : 23	111 : 23
111 : 25	112 : 3
112 : 6	112 : 20
112 : 23	113 : 17
113 : 20	113 : 24
114 : 2	114 : 25
116 : 12	116 : 14
116 : 21	116 : 22
120 : 22	121 : 6
121 : 9	122 : 11
124 : 4	124 : 14
134 : 12	134 : 24
142 : 16	142 : 23
146 : 17	146 : 22
146 : 25	147 : 5
147 : 8	147 : 24
148 : 3	148 : 5
151 : 4	151 : 19
153 : 24	158 : 12
158 : 15	158 : 17
158 : 19	161 : 21
161 : 24	162 : 2
167 : 9	167 : 22
169 : 25	170 : 8
170 : 11	170 : 21
171 : 2 beginning with "Were you..."	171 : 24
173 : 7	173 : 25
174 : 3	174 : 17
174 : 24	175 : 20

From *Page: Line*	Through *Page: Line*
176 : 4	177 : 4
177 : 6	177 : 22
179 : 6	180 : 3
180 : 6	180 : 20
180 : 23	180 : 24
182 : 6	183 : 12
183 : 21	184 : 6
184 : 10	184 : 16
184 : 19	184 : 19
186 : 17	186 : 20
186 : 23	187 : 12
187 : 17	188 : 22
189 : 13	189 : 20
190 : 1	190 : 7
191 : 2	191 : 13
192 : 9	193 : 3
193 : 7	194 : 24
195 : 5	195 : 17
195 : 20	195 : 21
195 : 23	195 : 24
196 : 4	196 : 7
196 : 10	196 : 22
197 : 1	198 : 10
198 : 13	198 : 14
198 : 17 beginning with "Did you..."	198 : 20
199 : 13	199 : 21
201 : 3	203 : 5
203 : 7	203 : 20
203 : 22 beginning with "In your..."	203 : 24
204 : 2	205 : 22
205 : 25	206 : 20
207 : 1	207 : 23
219 : 23	220 : 22
220 : 25	221 : 2
221 : 4	222 : 1
222 : 5	225 : 14
225 : 18	226 : 13
226 : 15	227 : 8
227 : 15	228 : 10
228 : 16 beginning with "I know..."	230 : 9
230 : 12	231 : 20
231 : 23	231 : 24
232 : 19	233 : 16
234 : 6 beginning with "Do you..."	235 : 12
235 : 15	235 : 16
240 : 9	240 : 12
241 : 3	241 : 8

From *Page: Line*	Through *Page: Line*
241 : 12	245 : 17
246 : 4	246 : 8
246 : 11	246 : 16
246 : 19	246 : 23
247 : 1	247 : 5
247 : 8	248 : 1
248 : 23	249 : 1
249 : 4	249 : 15
249 : 20	250 : 2
250 : 16	250 : 21
251 : 5 beginning with "We really..."	253 : 19
253 : 22	256 : 1
256 : 6	256 : 19
258 : 12	258 : 20
258 : 23	259 : 15
259 : 20	261 : 3
261 : 14	261 : 24
262 : 2	262 : 20

From *Page: Line*	**Through** *Page: Line*
6: 5	6: 5
33: 8	36: 13
36: 22	37: 12
37: 18	38: 13
69: 25	70: 3
70: 9	70: 10
77: 14	77: 22
78: 7	78: 14
78: 18	78: 18
82: 23	83: 11
84: 6	86: 17
87: 8	87: 24
88: 3	88: 20
90: 23	92: 6
96: 20	100: 15
103: 19	103: 24
104: 3	105: 8
114: 16	115: 8
117: 21	120: 6
121: 7	121: 19
122: 10	123: 24
126: 25 beginning with "I'm just..."	130: 6
132: 17	132: 25
133: 17	135: 16
136: 25	136: 25
137: 2	137: 17
137: 19	140: 12
143: 24	144: 19
145: 5	145: 13
145: 16	145: 23
148: 18	149: 5
160: 16	160: 20
162: 12	162: 15
171: 23	173: 14
174: 9	175: 21
176: 4	176: 22
177: 8	184: 18
188: 14	189: 12
189: 25	190: 12
193: 11	193: 15
193: 19	195: 11
195: 14	196: 25
197: 1	197: 16
198: 3	198: 8

From *Page: Line*	Through *Page: Line*
198: 15	199: 9
201: 1	202: 14
202: 23	203: 3
203: 14	204: 9
205: 12	207: 12
207: 24	211: 19
212: 22	212: 25
214: 21	220: 16
221: 10	222: 4
223: 3	225: 22
226: 3	226: 7
226: 10	226: 22
229: 14	229: 19
230: 2	230: 20
231: 21	232: 7
233: 1	233: 9
233: 14	235: 9
237: 6	237: 24
238: 11	240: 16
241: 14	242: 8
243: 22	247: 9

WITNESS: DAVID H. HYDER
6/15/99

From *Page: Line*	**Through** *Page: Line*
6: 12	6: 12
17: 13	17: 22
20: 8	21: 1
21: 22	23: 1
40: 19	41: 17
42: 22	43: 23
44: 10	45: 8
45: 14	47: 8
50: 18	50: 20
50: 25	51: 10
53: 18	53: 19
54: 4	54: 4
54: 11	55: 25
56: 17	57: 2
59: 13	59: 25
60: 5	61: 8
61: 12	62: 9
65: 14	66: 21
66: 24	67: 25
68: 15	69: 23
70: 3	70: 5
70: 8	71: 6
71: 9	71: 13
71: 17	71: 21
71: 24	72: 23
73: 2	74: 10
74: 18	76: 5
76: 8	76: 13
77: 20	78: 18
79: 10	79: 15
79: 22 beginning with "In the..."	80: 11
81: 8	81: 21
83: 2	83: 13
84: 8	84: 8
87: 23	88: 2
88: 5	88: 20
88: 23	89: 15
89: 19	90: 3
91: 4	91: 7
92: 21	93: 3
100: 2	100: 20
108: 16	108: 21
109: 5	111: 14
112: 9	112: 19

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From *Page: Line*	Through *Page: Line*
115: 1	115: 4
115: 15	115: 24
129: 10	134: 5
143: 15	144: 8
144: 24	145: 17
146: 1	146: 23
149: 8	149: 15
151: 4	151: 8
152: 21	153: 10
153: 16	154: 5
154: 11	154: 23
157: 22	160: 1
161: 1	161: 4
161: 16 beginning with "Have you..."	162: 15
162: 24	163: 3
163: 17	163: 20
163: 23	167: 17
167: 22	168: 5

From *Page: Line*	**Through** *Page: Line*
6: 4	6: 5
13: 11	14: 2
14: 14 beginning with "And what..."	15: 4
15: 8	16: 12
16: 16	17: 6
17: 16	17: 18
18: 2	19: 11
20: 23	21: 25
33: 6 beginning with "And as..."	34: 24
35: 22	35: 25
36: 6	36: 7
43: 2	43: 5
44: 21	44: 25
45: 11	45: 15
46: 5	46: 12
47: 13	47: 20
50: 14	50: 15
50: 23	51: 5
55: 15	56: 1
57: 2 beginning with "Do you..."	57: 9
68: 23	69: 2
74: 9 beginning with "Do you..."	75: 16
75: 20	76: 16
83: 15	84: 14
107: 25	108: 6
108: 9	108: 11
108: 14	108: 14
149: 3	149: 4
149: 24	150: 5
150: 10	151: 18
151: 21	152: 9
166: 16	166: 16
166: 24	167: 4
167: 13	168: 5
168: 8	168: 15
168: 18	170: 4
170: 7	170: 16
171: 8 beginning with "At the..."	171: 15

From *Page: Line*	**Through** *Page: Line*
7: 4	7: 4 ending with "Balk."
31: 13	32: 11
32: 14	33: 25
34: 7	35: 15
35: 23	36: 6
36: 11	37: 8
49: 12	49: 14
51: 19	53: 5
53: 13	53: 17
69: 21	69: 24
70: 21	72: 5
75: 10	77: 21 ending at "part,"
78: 9	78: 21
80: 2	80: 10
80: 25	81: 17
81: 20	84: 2
84: 6	86: 2
86 5	86 20
86: 22	87: 8
88: 17	89: 20
89: 23	91: 16
91: 21	92: 14
99: 25	100: 15
102: 6	102: 23
103: 21	105: 4
105: 7	105: 25
107: 13	107: 23
111: 10	111: 15
115: 25	116: 2
116: 9	119: 23
126: 10	126: 13
139: 18 beginning with "Let me..."	139: 20
140: 6	142: 4
144: 20	145: 5
145: 13	145: 15
151: 3	151: 7
151: 11	151: 16
152: 13	152: 15
152: 22	153: 16
153: 19	154: 8
157: 21	160: 11
160: 13	160: 17
161: 6	164: 2
164: 9	165: 9

From *Page: Line*	Through *Page: Line*
165: 19	165: 20
165: 22	166: 25
167: 2	167: 4
167: 13	168: 14
169: 5	170: 14
171: 6	172: 3
172: 7	172: 10
174: 18	174: 20
174: 23	175: 10
175: 13	175: 13
175: 21	176: 8
177: 11	178: 20
179: 10	179: 20
180: 7	180: 19
181: 11	181: 13
190: 14 beginning with "Have you..."	191: 5
191: 8	191: 12
194: 3	194: 7
198: 21	199: 3
199: 25	200: 25
201: 8	201: 9
202: 15	202: 21
202: 24	203: 3
203: 14	205: 15
215: 3 beginning with "You are..."	215: 9
216: 4	216: 6
216: 11	216: 18
216: 22	217: 11
217: 14	218: 6
220: 9	221: 13
221: 16	221: 16
222: 19	222: 21
223: 1	225: 20
225: 23	226: 17
227: 7	228: 14
233: 10	236: 19
237: 3	237: 6
237: 11	237: 14
238: 9	239: 7
240: 10	243: 11
243: 21	244: 20
245: 2	246: 1
247: 1	247: 4
248: 2	248: 21
248: 23	248: 25
249: 6	249: 9
253: 9	253: 11

From *Page: Line*	Through *Page: Line*
253: 17	253: 25
256: 3	257: 23
258: 13	258: 14

From *Page: Line*	**Through** *Page: Line*
6: 3	6: 23
8: 4	8: 19
9: 9 beginning with "Can you..."	9: 13
11: 12	14: 16
15: 22	16: 7
16: 22 beginning with "What is..."	17: 5
17: 22	18: 4
19: 16 beginning with "Do you..."	19: 20
22: 5	22: 10
25: 10	26: 19
31: 21	31: 24

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WITNESS: ROBERT K. CARLSON
8/17/99

From *Page: Line*	**Through** *Page: Line*
5: 6 beginning with "Would you..."	8: 2
8: 7	8: 9
9: 3 beginning with "What subcategories..."	9: 7
9: 14	9: 16
9: 20 beginning with "Who makes..."	10: 9
10: 19	10: 25
11: 3	11: 11
12: 3	12: 3
12: 5	12: 12
12: 22 beginning with "Does U.S..."	12: 24
13: 1	13: 4
13: 6	13: 6
13: 15 beginning with "Mr. Carlson..."	13: 19
13: 22	13: 23
14: 5	14: 13
15: 22 beginning with "When I..."	16: 12
16: 14	17: 15
17: 17	18: 16
20: 16	21: 14
21: 17	22: 4
22: 6	22: 14
23: 1 beginning with "Is it..."	23: 5
23: 17 beginning with "Has United..."	23: 25
24: 11	24: 17
24: 19	24: 25
25: 2	25: 2
25: 8 beginning with "Did United..."	25: 10
25: 12	25: 17
25: 20	28: 17
31: 13	32: 2
32: 10	33: 6
33: 9	33: 24
34: 2	34: 11
34: 15	34: 18
34: 20	34: 20
35: 4 beginning with "In its..."	35: 8
35: 15	37: 13
38: 11	38: 21
39: 11	39: 11
39: 15	39: 24
40: 3	40: 7
40: 10	40: 10
41: 4	41: 9 ending with "cannot."
41: 16	42: 4

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From *Page: Line*	Through *Page: Line*
42: 8	42: 19
43: 1	43: 9
43: 12	44: 2
44: 4	44: 4
47: 6	47: 10
47: 13	48: 20
48: 23	50: 16
51: 3	52: 2
52: 5	52: 8
52: 10	53: 9
53: 12	53: 15
53: 17	53: 21
53: 23	54: 3
54: 10 beginning with "Has U.S...."	54: 12
54: 14	54: 17
54: 19	56: 11
56: 14	56: 17
56: 19	56: 23
56: 25	57: 5
57: 9	58: 16
58: 18	58: 20
58: 22	59: 1
59: 3	59: 11
59: 14	59: 14
59: 21 beginning with "If U.S...."	59: 25
60: 2	60: 10
75: 9	75: 21
75: 25	76: 22
77: 9	78: 2
86: 10	87: 18
97: 21	98: 3
104: 7	104: 22
137: 15 beginning with "As I..."	139: 21
139: 23	140: 12
140: 16	140: 16
143: 5	143: 10
146: 16	146: 20
146: 22	146: 24

WITNESS: DAVID CASH
7/9/99

From *Page: Line*	**Through** *Page: Line*
6: 10	6: 11
11: 10	11: 19
12: 2	14: 10
15: 3	15: 12
15: 20	15: 22
26: 19	28: 13
28: 19	30: 13
34: 7	35: 14
36: 13	36: 23
37: 9	37: 13
39: 2	39: 20
40: 7	40: 11
46: 5	47: 3
48: 1	48: 11
50: 20	50: 25

WITNESS: WAYNE CLARDY
5/21/99

From *Page: Line*	**Through** *Page: Line*
6: 11	6: 13
18: 20	19: 4
20: 3	21: 17
55: 6	55: 8
60: 21	60: 25
61: 2 beginning with "Are there..."	61: 9
62: 7	62: 19
66: 20	68: 14
68: 20	69: 2
82: 1	82: 8
84: 5	85: 21
88: 6	91: 22
93: 18	94: 8
94: 18	95: 4
95: 21	96: 9
97: 2	97: 8
108: 13	108: 17
109: 2	109: 9
110: 9	111: 12
111: 23	112: 8
112: 24	114: 18
114: 20 beginning with "In those..."	114: 23
115: 1	115: 17
115: 23	116: 4
117: 9	117: 23
119: 22	119: 25
120: 7	120: 23
121: 13	122: 5
122: 14	126: 9
127: 2	127: 25
128: 8	128: 12
129: 6	131: 11

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From *Page: Line*	**Through** *Page: Line*
6: 15	6: 16
9: 12	9: 25
10: 11	12: 16
16: 25 beginning with "Can you..."	17: 7
17: 11	20: 10
20: 20	21: 23
26: 16	27: 1
29: 24	36: 5
36: 17 beginning with "Prior to..."	38: 18
39: 24	40: 7
41: 10	41: 13
44: 2	44: 11
49: 10	53: 21
55: 11	56: 14
57: 12	59: 12
60: 5	60: 21
61: 3	62: 9
65: 24	66: 2
66: 6	68: 15
69: 3	70: 10
71: 22	72: 12
72: 20	74: 2
75: 21	76: 22
93: 16	93: 20
94: 1	94: 9
100: 17	102: 6
102: 15	102: 25
108: 4	108: 13
109: 24	110: 11
111: 1	111: 8

From *Page: Line*	**Through** *Page: Line*
6: 8	6: 9
22: 8	22: 23
35: 19	35: 20
35: 23	36: 8
37: 18	37: 20
53: 7	53: 20
54: 13	55: 2
55: 20	55: 24
56: 8	56: 20
60: 4	60: 25
62: 2	62: 13
77: 20	78: 13
88: 13	89: 9
90: 24	91: 2
91: 11	91: 25
92: 8	93: 9
109: 5	109: 7
110: 18	111: 25
112: 7	112: 19
112: 21	113: 4
114: 1	114: 6
116: 6	116: 25
117: 7	117: 12
121: 22	122: 1
122: 8	122: 13
123: 16	124: 3
133: 24	134: 2
134: 19 beginning with "You said..."	135: 20
135: 24	136: 18
148: 20	149: 1
151: 14	152: 5
155: 20	156: 8
157: 6	158: 10
158: 12	159: 25
160: 2	160: 12
160: 15	161: 25
162: 24	163: 3
163: 8	163: 17
174: 17	175: 1
176: 6	176: 21
177: 9	177: 12
177: 17	178: 23
183: 22	183: 24
184: 8	185: 23

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From *Page: Line*	Through *Page: Line*
186: 22	187: 2
198: 19	198: 22
199: 3	201: 25
203: 4	203: 17
203: 22	203: 25
215: 19	215: 23
215: 25	216: 13
219: 10	219: 18
226: 10	227: 4
227: 15	228: 15
228: 19	230: 16
238: 15	239: 4
239: 10	239: 11
239: 25	240: 4
257: 10 beginning with "When was..."	257: 16
257: 24	258: 17
260: 1	260: 4
260: 12	260: 23
261: 16	261: 18
261: 22	262: 3
263: 3	263: 7
263: 18	264: 8
264: 22	265: 7
265: 9	265: 24
267: 9	267: 14
267: 18	268: 2
269: 2	269: 8
270: 23	271: 2
275: 4	275: 7
276: 10	276: 16
278: 4	278: 8
281: 18	281: 20
282: 5	284: 11
288: 7	289: 9
289: 12	289: 17 ending with "benefit."
295: 15	298: 2
298: 4	298: 12
298: 14	299: 5
299: 17	299: 25
301: 6	301: 16
302: 3	302: 4
304: 22	305: 8
305: 19	306: 6
307: 3	307: 22

From *Page: Line*	**Through** *Page: Line*
6: 4	6: 5
20: 11	23: 12
230: 8	231: 8
232: 1	232: 2
232: 4	232: 7
232: 10	232: 16

From *Page: Line*	**Through** *Page: Line*
6: 5	6: 6
10: 21	17: 2
33: 3	33: 13
33: 20 beginning with "Can you..."	37: 13
48: 25 beginning with " Has Conwood..."	51: 13
52: 3	53: 18
54: 14	56: 13
57: 9	57: 25
59: 18	59: 23
61: 7	66: 16
71: 19 beginning with "Does United..."	72: 15
75: 10	75: 23
78: 5	78: 12
78: 15	79: 2
85: 18	86: 1
86: 7	86: 10
86: 25	91: 1
91: 7 beginning with "So in your..."	91: 14
91: 19	92: 13
100: 17	102: 6
103: 23	104: 5
109: 8	109: 23
115: 4	115: 6
115: 12	115: 18
124: 5	126: 18
127: 22	128: 9
128: 25	130: 7
133: 10	133: 16
135: 18	136: 9
140: 18	141: 15
142: 2	142: 7
142: 22	143: 10
145: 22	145: 25
146: 6	148: 2
150: 15	150: 22
151: 10	152: 20
157: 8	158: 7
164: 5	167: 11
167: 17	167: 25
171: 17	172: 2
178: 14 beginning with "What is your..."	182: 2
182: 18	182: 25
183: 7	183: 9
183: 16	183: 24

From *Page: Line*	Through *Page: Line*
184: 3	184: 25
187: 18	188: 20
192: 5	193: 6
194: 12	195: 12
196: 15	197: 5
198: 3	199: 12
200: 3	200: 24
201: 4	201: 24
205: 14	205: 16
206: 2	206: 5

WITNESS: BOB R. DAVIS
8/6/99

From *Page: Line*	**Through** *Page: Line*
6:7	6:8
11:8	11:10
12:18	13:6
16:8	16:23
17:3	17:15
17:19	18:7
19:6	19:9
21:3 beginning with "What was..."	24:18
28:24	29:15
37:22	39:12
40:9 beginning with "How would it..."	41:10
51:8	52:3
54:16	55:2
57:21	58:3
73:2	74:4
76:4	77:7
102:22	103:5
103:12	105:8
125:6	125:9
125:14	125:25
133:4	134:13
134:15	134:18
135:12	136:1
137:8	140:17
146:13	146:20
148:17	148:20
148:25	149:19
155:20 beginning with "You said..."	156:8
157:5	157:17
158:10	158:17
160:14	161:4
161:15	161:25
162:21	163:12
163:17	165:4
169:20	170:25 ending with "call."
172:15	172:25
173:14	173:18
180:12	180:21
181:1	182:16
238:6	238:11
238:13 beginning with "Did you..."	238:16
238:21	241:21

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From *Page: Line*	**Through** *Page: Line*
5:22	5:24
8:21	9:6
9:13	9:25
12:20	12:23
13:7 beginning with "In those..."	13:10
15:23 beginning with "When Conwood..."	16:1
16:6	16:16
16:23	17:1
17:6	17:6
19:5	19:7
19:10	19:12
28:13	28:21
37:9	37:15
37:25	38:18
39:10	40:6
41:1	41:12
41:16	42:5
42:8	42:12
42:15	42:19
43:1	43:1
43:10	43:12
43:18	43:23
45:6 beginning with "If..."	45:10
45:13	45:15
46:10	46:14
46:23	47:1
47:9	47:24
50:17	50:20
50:24	50:24
50:25 beginning with "Could you..."	51:2
51:8	51:10
80:7	80:23
81:1	81:3
82:5	82:13
82:23	83:5
92:7	92:15
93:19	93:21
94:3	94:12
100:7	100:8
100:11	100:12
100:14	101:3
101:6	101:8
118:1	118:2
118:6	118:18

From *Page: Line*	**Through** *Page: Line*
118:22	118:24
119:7	119:13
123:14	124:3
124:6	124:12
124:23	124:25
125:4	125:15
125:18	125:20
125:22	125:24
126:4	126:8
126:10	126:24
129:7	129:8
129:13	129:19
129:24	130:12
135:2	135:3
135:7	135:12
135:21	136:5
140:9	140:15
142:3	143:7
148:11	148:15
148:21	148:24
149:1	149:2
149:4	149:4
149:16	149:24
150:2	151:2
153:2	153:5
153:8	153:23
154:9	154:11
154:21	154:23
155:7	155:9
155:11	155:17
155:21	155:24
158:22	158:25
159:10	162:1
177:15	177:16
177:19	177:23
178:3	178:23
178:25 beginning with "To the best..."	180:8

WITNESS: DAN WALDEN
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From *Page: Line*	**Through** *Page: Line*
4:19	4:20
6:1	6:8
6:16	7:19
8:3	10:8
11:2	13:22
14:17	17:19
18:13	19:22
20:15	21:7
21:11	22:17
22:21	23:8
25:12 beginning with "But do..."	26:2
26:12	27:10
29:12	29:23
31:10	33:16
34:8	37:23
38:4	41:5
42:3	44:20
46:10	48:15
49:4	49:12
49:14	53:1
53:5	53:15
55:3	55:22
56:14	56:20
57:14	58:4
58:8	60:7
62:16	62:19
62:22	63:6
64:1	64:5
71:17	72:10
76:20	77:2
77:9	77:19
80:19	81:3
82:22	85:7
85:14	85:16
85:21	86:4 ending with "that rack."
88:19	89:18
90:17	90:23
91:1	92:2
92:5	92:6
95:6	95:10
102:11	103:21
104:4	105:2
105:16	106:1
110:2	110:4

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From *Page: Line*	**Through** *Page: Line*
110:7	110:23
111:9 beginning with "Can you..."	112:1
112:12	112:23
117:3	117:7
117:10	119:7
128:16	129:4

From *Page: Line*	**Through** *Page: Line*
6:7	6:8
22:7	23:2
26:11	27:24
28:8	30:14 ending with "ago."
30:24	31:8
41:8 beginning with "Is it..."	41:11
41:13	41:13
41:15	41:17
41:19	42:25
43:5	43:9
43:21	43:24
44:5	44:15
47:2	47:5
47:7	47:7
48:2	48:4
48:7	48:8
50:6	50:8
50:10	50:13
50:15	50:15
51:2 beginning with "Do you..."	51:9
51:11 beginning with "Have you..."	51:22
52:7	52:8
52:10	52:14
53:5	53:8
53:18	53:20
53:23	54:3
54:5	54:24
55:6	56:7
56:15	56:15
56:18 beginning with "Do you..."	57:2
57:19	58:3 ending with "No."
58:11	58:21
60:3	60:7
62:25	63:2
63:4	63:8
63:18	63:20
63:23	64:19
64:23	65:16
65:24	66:4
66:17	66:18
66:21	67:1
67:3	67:9
70:14	71:2
71:6	71:13

From *Page: Line*	Through *Page: Line*
71:15	72:3
72:11	72:14
73:25	75:4
75:8	75:13
76:5 beginning with "Would you..."	76:25
78:18	79:9
83:10	84:14
84:20	84:25
85:8	85:12
85:14	85:14
86:2	86:5
86:19	88:9
98:3	98:12
113:3	113:5
113:7	113:10
113:12	115:8
115:10	115:10
115:15	115:16
121:14	121:16
122:1	122:4
123:6	123:13
124:5	124:12
125:9	125:12
126:2	126:13
126:18	127:1
127:14 beginning with "Has..."	128:6
128:13 beginning with "Based on..."	128:16
128:18	128:25
129:23	130:1
130:4	130:5
131:12	131:15
131:18	131:18
131:20	131:20
131:22	131:22
132:14	133:5
133:7	133:14
135:18	136 :12
137:4 beginning with "Since you..."	137:9
137:15	137:19
138:1	138:5
138:16	138:18
138:21	139:2
139:4	139:10
139:14	141:7
141:9	141:16
142:2	142:24
148:2	148:14

From *Page: Line*	Through *Page: Line*
148:24	149:10
149:22	149:24
150:1	150:4
153:9	153:10
153:13	154:6
157:6	157:10
157:14	157:15
157:19	157:20
160:7	160:20
162:8	162:11
164:22 beginning with "The..."	165:10
167:12	167:22
200:1	200:9
201:6	202:8
202:11	202:21
202:24	203:2
204:2	204:13
204:15	204:23
204:25	205:7
205:9	205:9
205:23	205:25
206:2	206:10
208:12	209:8
210:16	210:20
210:23 beginning with "Do you..."	211:2
212:18	212:22
213:23 beginning with "to the best..."	214:5
214:11	214:14
240:16	241:16
241:20	242:20
246:5	248:15
249:6	250:5

From *Page: Line*	**Through** *Page: Line*
6:6	6:7
7:7 beginning with "Sir, does..."	10:20
13:20	17:1
22:5	24:3
26:2	27:1
27:3	27:7
27:9	27:19
34:9	35:23
41:20	41:21
41:24	42 :1
42:21	43:23
45:5	46:18
48:14 beginning with "On the..."	51:2
52:10	52:23
53:6	54:15
55:8	57:13
58:3	58:21
58:22 beginning with "Let me..."	60:3 ending with "Yes."
60:10	60:16
64:7	67:18
77:13	77:25
78:20	79:14
79:16	79:21
80:24	81:10
81:12	81:21
81:23 beginning with "Now, rather..."	83:13
83:24 beginning with "This is..."	84:9
84:11 beginning with "This is..."	86:1
106:15	106:17
106:19	108:2
108:13	108:22
109:1	109:13
109:16 beginning with "Mr. Hynek..."	111:3
113:1	114:5
124:13	128:10
129:2	131:7
131:14	133:25
134:3	134:22
135:8 beginning with "who was..."	135:15
137:5	137:11
138:9	138:20
141:6	141:21
143:18	145:20
145:22	145:24

From *Page: Line*	Through *Page: Line*
146:1	146:21
148:21	149:15
149:18	152:5
154:7	156:16
159:12	161:25
162:8	166:22
167:10	169:16
170:6	174:23
181:5	181:15
181:19	185:8
185:13	186:13
186:15	189:22
193:20	193:22
194:18	196:19
198:9	198:20
199:14	200:3
200:5	201:23
204:6	206:9
206:18	207:9
207:13	207:19 ending with "document."
207:24	211:5
211:7	212:1
212:4 beginning with "Is it..."	216:7
218:19	219:17
219:21	220:4
220:19	222:16
222:18 beginning with "Mr. Dowdy..."	222:21
223:2	223:14
223:16	227:24
228:7	230:8
230:17	233:11
233:13	234:16
234:18	235:19
235:21	236:18
237:8	242:3
243:16	244:17

From *Page: Line*	**Through** *Page: Line*
249:14	249:15
249:19	253:4
255:4	256:5
256:12	258:5
258:7	259:15
260:14	263:12
264:5	267:13
267:15	267:21
270:16	270:23
271:5	271:12
271:14	271:22
271:24	272:10
272:22	274:5
274:7	274:24
275:12	275:20
276:2	276:24
277:1	277:2 ending with "request."
278:4	278:17
280:5 beginning with "Let's look..."	283:21
284:5	284:8
286:5	289:3
289:8	290:19
299:20	303:3
303:19	307:18
307:22	307:25
308:3 beginning with "Well..."	308:17
308:18 beginning with "are you..."	308:24
309:25	311:6
311 :12	312:14 ending with "information."
312:20	312:22
313:8	315:17
315:19	316:12
317:3	317:6
317:20	319:25
329:8	332:3
336:12	337:20
338:6	340:25

From *Page: Line*	**Through** *Page: Line*
6 5	6 6
28:3	29:24
49:8 beginning with "Does Conwood..."	51:12
56:23 beginning with "on..."	58:6
58:15	59:3
72:5	72:24
76:22	77:18 ending with "to."
86:2	86:20
120:15	124:8
124:13	124:21
125:3	125:21
126:9	126:13
126:19	128:6
128 :18	129:7
132:7	132:19
138:10	139:2
140:16	142:20
146:11	146:25
147:17	148:11
148:17	148:25
168:17	169:22
170:2	170:11
173:4	175:12
175:16	176:3
177:2	178:4
181:12	181:20
189:21	190:4
191:4	191:14

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WITNESS: TONY NORRIS
5/20/99

From *Page: Line*	**Through** *Page: Line*
6:7	6:8
20:3	20:5
25:16	26:1 ending with "of 1981."
26:11	27:3
27:7	27:9
27:14	27:16
27:20	28:7
28:16	28:25
37:22	38:16
39:19	39:24
79:2 beginning with "Does..."	79:5
79:11	79:14
79:16	79:18
89:4	89:12
93:3	93:6
93:8	93:8 ending with "No."
94:13	94:15
99:24	100:2
100 23	101 21
107:14	108:4
111:1	111:1
111:13	112:6
112:9	112:19
112:21	113:14
125:5	126:10
128:18 beginning with "Are..."	128:21
128:23	129:3
129:6	129:11
129:13	129:17
129:19	129:19
130:2	130:6

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From *Page: Line*	**Through** *Page: Line*
6:8	6:9
14:7	14:25
15:12	16:4
16:11	16:17
16:23	17:10
18:8	19:18
42:2	42:13
80:23	81:12
85:21	86:10
89:16	89:24
91:10	91:16
119:5	119:21
123:9	124:4
124:6	124:15
127:3	127:18
135:14	136:12
137:24 beginning with "Were..."	139:8
139:18 beginning with "Do you..."	139:25
140:4	140:9
140:17	141:17
142:7	142:21
143:25	146:2
147:15	147:24
154:3	155:17
155:19	156:3
156:21	156:25
157:24	158:4
158:5 beginning with "In those..."	158:12
170:14	170:17
171:3	171:19
172:11	173:9
176:24	177:9
177:10 beginnig with "Were..."	178:3
184:8	186:12
206:18	208:18

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WITNESS: HARDY C. TAYLOR
8/19/99

From *Page: Line*	**Through** *Page: Line*
6:10	6:11
8:15	8:21
9:23	10:2
11:18	11:24
14:19	17:20
34:12	35:25
55:7	55:11
58:17 beginning with " My question..."	58:23
59:6	59:18
60:1	60:14
60:20	61:2
77:23	78:5
85:10	85:14
85:18	85:21
85:23	86:12
87:3	87:15
95:14	95:23
96:5	98:11
98:21	99:16
99:17 beginning with "When was..."	99:25
103:6 beginning with "Were you..."	103:10
103:13	103:18
103:24	103:25
105:19	105:24
106:19	106:24
107:4	108:1
108:4	108:12
108:16	110:18
111:6	111:14
113:1 beginning with "Let's look..."	114:19
114:24	115:4
116:6	116:11
116:16	116:23
117:12	117:25
122:8	123:2
128:15	129:17
130:1	130:3
130:11	130:25
131:4	131:18
168:19	168:25
169:15 beginning with "Do you..."	171:4
172:25	173:21
177:20	178:14
178:19	178:20 ending with "Exhibit 1."

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From *Page: Line*	Through *Page: Line*
179 15 beginning with "On..."	180 2
179:9	179:12
181:11	182:22
197:16	197:24
204:6	207:7
216:3	216:15
216:22	218:15

WITNESS: STEPHEN METZ
6/24/99

From *Page: Line*	**Through** *Page: Line*
6:5	6:6
20:25	21:12
21:21	22:2
22:5	23:8
32:18	33:1
55:25	56:13
60:23	61:4
61:7	61:11
61:14	62:3 ending with "yeah."
62:13	63:14
63:17	63:19
66:21	67:8
70:24	73:18
75:16	76:22
78:18	78:23
79:3	79:17
83:19	87:22
87:25	93:4
104:6	104:17
106:18	108:14
109:4	109:23
110:10	110:13
110:22	111:13
116:10 beginning with "What is..."	116:17
117:7	118:12
119:7	120:23
121:23	122:17
123: 15 beginning with "Are you..."	124:5
125:13	126:14
127:11 beginning with "We are..."	128:11

From *Page: Line*	**Through** *Page: Line*
5:7	5:10
14:10	14:17
15:11	16:10
17:13	17:21
40:21	42:4
63:22	64:13
64:20	65:1
65:3	65:11
65:13	65:16
66:2	66:19
67:15	67:19
68:12	69:12
70:21	71:1
71:6	71:19
72:22	73:3
73:6	74:1
78:21	79:9
79:22	80:11
80:17	80:22
81:3	81:3
81:14	82:6
98:12	98:23
105:21	106:16
108:20	109:23
112:2	112:11
112:21	114:9
114:13 beginning with "In that..."	117:14
118:4	118:9

WITNESS: PAUL MCGUIRE
8/31/99

From *Page: Line*	**Through** *Page: Line*
4: 8	5: 1
5: 4 beginning with "What is..."	5: 12
5: 22 beginning with "Are..."	12: 1
12: 5	14: 4
14: 6 beginning with "Have you..."	14: 11
14: 15 beginning with "When you..."	15 : 11 ending with "there."
15: 18 beginning with "Did U.S...."	15: 22
15: 24 beginning with "are you..."	16: 15
16: 16 beginning with "I saw..."	17: 3
17: 6	17: 14
17: 16 beginning with "you testified..."	25: 15
25: 17	26: 10
26: 12	26: 24
27: 2 beginning with "do you..."	28: 1
28: 3	28: 23 ending with "No."
29: 8	29: 12 ending with "promoted."
29: 25	30: 1
30: 3	30: 18
31: 12	32: 11
32: 13	32: 24
33: 16	33: 24
35: 1	36: 8
36: 16	37: 20
38: 10	38: 25
39: 19	40: 17
41: 6	42: 3
42: 12	42: 17
43: 8 beginning with "When you..."	44: 5
45: 4	45: 17

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WITNESS: HOWARD MCGREGOR
6/22/99

From *Page: Line*	**Through** *Page: Line*
6:14	6:15
9:3	9:23
22:6	22:19
26:6	27:4
27:15	28:11
37:20	38:7
42:9 beginning with "Did you..."	42:24
43:11	43:15
43:24	44:9
44:13	44:15
44:18	45:9
54:3	55:1
55:4	55:15
55:18	55:18
56:6 beginning with "Based on..."	56:11
56:17	56:20
60:10 beginning with "is it..."	61:2
63:4	63:8
64:17	64:21
68:25	69:2
69:5	69:12
69:16	70:1
70:4	70:10
70:13	70:20
70:23	71:4
71:7	71:16
77:5	77:16
77:19	78:4
80:16	80:18
80:21	81:4
81:7	81:10
82:8	82:11
83:9	83:15
83:18	83:18
85:16	87:9
87:12	87:12
87:25	88:20
88:23	89:22
89:25	89:25
93:7	93:11
93:14	93:16
93:19	93:22
93:25	94:5
95:2	95:16

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From *Page: Line*	**Through** *Page: Line*
95:19	96:1
96:8	97:7
97:19	98:1
98:6	98:18
98:21	99:5
99:8	99:9
99:12	99:18
100:2	100:5
100:16	101:10
101:13	101:13
101:18	102:13
102:16	102:16
102:25	103:12
103:15	103:16
105:2	105:6
105:9	105:12
105:15	105:18
106:20 beginning with "Can you..."	106:24
107:3	107:23
108:1	108:7
108:10	108:13
108:18	108:19
109:6	109:15
109:18	109:25
110:25	111:19
111:22	111:24
112:5	113:12
113:15	113:15
114:5 beginning with "What is..."	114:12
114:15	114:21
115:3	115:6
115:15	115:23
116:1	116:10
116:13	116:17
117:2	117:6
117:9	117:12
117:15	117:19
117:22	118:11
118:14	118:19
118:22	118:22
119:6	119:14
121:15	122:5
122:8	122:11
122:14	122:17
124:15	124:17
125:9	127:19
128:2 beginning with "At the..."	128:6

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From *Page: Line*	Through *Page: Line*
128:14	128:15
128:22	129:23
130:1	131:7
136:22	136:25
137:3	137:12
137:15	137:20

WITNESS: S. T. STOKES
6/25/99

From *Page: Line*	**Through** *Page: Line*
7:14	7:15
14:25	16:25
19:6	19:11
20:2	20:13
25:2	25:3
25:6	25:25
26:16 beginning with "Can you..."	27:14
27:24	27:24
31:10	32:1
32:17	33:1
33:13	34:2
34:10	34:12
34:15	34:21
36:23 beginning with "Do you..."	37:7
37:12	37:16
37:22	37:22 ending with "one."
43:11	43:16
58:20	59:14
64:18	65:11
65:17	65:20
65:24	65:25
82:18	83:20
84:9	85:17
86:1	86:1
86:13	87:17
87:25	91:2
92:4	97:10
99:14	100:11
100:24 beginning with "Do you..."	103:7
104:3 beginning with "Do you..."	104:6
104:10	106:4
108:4	108:12
108:15	108:15
108:17	108:23
109:1	109:20
116:20	117:25
118:6	118:13
118:16	121:6
121:11	121:15
121:18	122:1
122:4	124:3
124:16	124:21
124:24	125:12
126:20	128:2

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From *Page: Line*	Through *Page: Line*
128:6	128:25
129:11	130:6
130:9	130:10
130:21	132:14
132:17	133:7
138:17	139:4
139:10	140:3
140:6	140:9
140:12	140:15
140:18	141:12
141:16	141:23
142:1	142:20
142:23	143:13
144:3	144:14
144:17	145:2
145:24	147:19
147:23	148:17
148:20	149:11
149:14	149:17
149:23	150:24
151:6	151:16
152:3	154:4
157:18	162:5
162:11	164:20
165:8	170:7
171:13	172:10
172:15	172:15

WITNESS: SCOTT T. STEVENS
8/11/99

From *Page: Line*	**Through** *Page: Line*
4:10	4:18
4:25	5:1
6:2	8:20
21:11	22:2

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From *Page: Line*	**Through** *Page: Line*
6: 10	6: 11
14: 11	14: 18
16: 14	19: 18
63: 23	65: 9
96: 3	97: 16
99: 6	99: 13
103: 21	105: 21
106: 6	107: 2
107: 24	109: 17
114: 11	115: 15

WITNESS: GLENN O'NEAL
5/26/99

From *Page: Line*	**Through** *Page: Line*
6:5	6:6
15:16	16:8
16:12	16:20
21:10	21:15
21:19	22:18
22:19 beginning with "How many..."	22:25
26:2	26:7
27:10	27:19
28:7	28:15
40:10	40:23
44:4	44:14
46:21	47:7
47:15	47:17
49:9	50:14
51:1	51:14
52:23	52:25
53:5 beginning with "You just..."	53:7
61:17	62:8
63:5	63:17
65:12	66:24
69:4	71:17
72:15	74:18
76:4	76:15
76:22	78:2
81:16 beginning with "For the..."	82:25
100:16	100:22
104:16	105:12
105:25	106:12
111:11	112:12
118:20	119:5
120:13	122:14
122:21	124:8
125:14	125:23
126:6	126:15
128:24	129:8
130:19	133:3 ending with "not."
134:20	135:7
136:19	137:4
137:13	137:20

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WITNESS: WILLIAM M. ROSSON
8/27/99

From *Page: Line*	**Through** *Page: Line*
6:14	6:15
11:23	14:8
14:24	16:3
21:18	22:23
23:11	25:19
30:18	31:5
31:16	32:1
35:24	36:2
36:9	36:18
38:16	38:19
38:22	39:14
39:17	40:18
40:21	41:5
41:8	41:15
43:14	44:14
44:18	44:20
46:3	46:7
46:10	46:16
46:19	46:24
47:2	47:6
47:8 beginning with "Do you..."	47:11
47:16	48:1
49:5	49:10
50:25	51:18
51:24 beginning with "How do..."	52:24
53:15	54:1
59:15 beginning with "Mr. Rosson..."	60:4
60:7	60:17
60:23	61:23
62:8	62:16
62:21beginning with "We..."	62:22
63:2	63:19
64:8	64:12
65:1	65:3 ending with "me."
65:6	65:13
67:1	67:8
67:10 beginning with "Have you..."	67:19
68:24	69:1
69:5	69:13
69:16	69:22
69:25	70:9
70:20 beginning with "You understand..."	70:25
71:3	71:8
71:11	71:18

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From *Page: Line*	Through *Page: Line*
77:1	77:19
78:3	78:5
78:8	78:15
78:22 beginning with "What does..."	79:1
79:4	79:18
80:5 beginning with "My question..."	80:8
80:11	80:20
83:4	84:4
84:7	85:2
85:5	85:16
85:19	86:13
89:15	89 :18
89:21	89:25
90:4	90:5 ending with "no."
90:11	90:16
90:19	91:12
91:17	91:20
92:11	92:12
92:15	92:23
94:14	94:23
96:17	96:20
97:2	97:16
99:17 beginning with "Is it..."	99:21
99:24	100:7
101:12	101:24
102:2	102:13
102:23	103:9
104:6	104:20
119:20	120:3
120:6	120:9
121:25	122:20
122:22 beginning with "Do you..."	122:25
123:3	123:6
133:21 beginning with "What is..."	134:1
134:24 beginning with "When..."	135:2
135:5	135:20
136:2	136:3
138:7 beginning with "Have you..."	138:9
138:12	138:12
143:12	144:8
147:22	149:17
149:20	150:1
152:14 beginning with "Do you..."	153:25
154:3	154:3
156:8	156:9
156:12	157:8
158:7	158:10

From *Page: Line*	**Through** *Page: Line*
158:13	158:17
158:20	158:20
159:4 beginning with "Are you..."	159:8
159:16	159:19
159:21	160:6
160:11	160:11
168:15	168:17
169:24	170:5
170:12	171:25
172:3	172:7
172:10	173:5
173:16	173:20
173:25	174:12
174:15	175:8
175:11	176:5
176:8	176:14
180:6	180:10
186:25	187:18
187:21	188:6
188:10	188:19
188:21	189:1
189:10	189:16
189:19	189:19
190:4 beginning with "Is it..."	190:17
193:9	193:12
193:14	193:15
193:23	194:1
194:10	194:13
194:15	194:20
194:23	195:2
195:5	195:13
195:16	195:24
196:2	196:17
201:18	201:23
202:4	203:4
203:7	203:12
203:18	204:10
204:12 beginning with "Do you..."	204:21
204:24	205:4
205 :11	205:13
205:17	207:1
207:14	209:12
209:15	209:15
211:19	212:8
212:11	213:3
214:4	214:21
214:24	215:1

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From *Page: Line*	Through *Page: Line*
216:21	217:1
217:4	218:13
218:16	219:5
219:8	220:16
221:22	222:7
222:11	222:13
224:13	224:19
225:1	225:5
225:8	225:10
225:20	226:8
226:21	227:1
227:4	227:6
228:12	229 :6
230:10 beginning with " In anticipation..."	230:14
230:17	231:9
234:2	234:4
234:7	234:10
234:14	234:23
235:1	235:22
236:1	236:13
236:16	236:18
241:16	241:18
241:21	241:24
250:11	250:23
253:14	253:18
253:21	253:24
254:4	254:10
254:13	254:20
254:23	254:25
261:11 beginning with "Are you..."	261:13
261:17	262:6
262:9	263:2
267:21	269:5
269:8	269:10
270:11	270:15
270:17	272:10
275:4	275:9

WITNESS: GENE ROGERS
4/20/99

From *Page: Line*	**Through** *Page: Line*
7:5	7:6
25:2	25:23
26:14	26:18
53:23	54:18
54:22	55:21
56:2	56:19
56:25	59:25
60:16	61:8
90:9	90:14
91:5	91:23
92:1	92:2
109:22	111:6
111:9	112:20
119:12	119:14
119:19	119:22
121:16	124:13
141:10	141:20
142:5	142:11
142:19	142:25
143:4	144:22
145:6	145:23
175:21	176:12
187:8	187:20
189:15	190:8 ending with "correct."
191:23	193:6
206:20	208:25
209:2	209:19
209:25	211:3

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WITNESS : EDWIN S. ROBERSON
8/30/99

From *Page: Line*	**Through** *Page: Line*
6 : 5	6:6
21 : 8	21:10
21 : 14	21:18
23 : 18 beginning with "I'm trying..."	23:21
23 : 23	24:1
24 : 13 beginning with "Conwood has..."	24:15
24 : 19	26:9
26 : 12	26:12
26 : 15	27:4
27 : 12 beginning with "Who decides..."	28:15
30 : 3	30:12
33 : 12	33:14
33 : 17	34:2
34 : 6	35:18
35 : 20	35:20
35 : 22	36:4
36 : 22	37:5
42 : 11	42:25
43 : 1	43:3
43 : 5	43:8
44 : 12	44:13
44 : 16	45:11
45 : 13	45:14
45 : 21 beginning with "The question..."	45:23
46 : 1	46:3
49 : 8 beginning with "What is..."	49:25
50 : 18	51:2
52 : 7	52:23
54 : 6 beginning with "Any..."	54:14
57 : 2	57:5
57 : 8	57:25
58 : 9	58:12
58 : 17	60:14
60 : 16	60:23
60 : 25	61:1
64 : 1	64:7
64 : 9	65:8
65 : 23	66:19
75 : 5 beginning with "On that..."	75:17
77 : 5 beginning with "Do you..."	77:13
77 : 15	77:20
78 : 1	78:19
79 : 5	79:19
80 : 12	80:22

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From *Page: Line*	**Through** *Page: Line*
80 : 24	81:12
81 : 16 beginning with "So am..."	81:22
82 : 1	82:6
83 : 23	84:10
91 : 13	91:16
93 : 4	93:15
93 : 24	94:15
95 : 10	95:13
95 : 15	95:18
95 : 20	95:20
96 : 3	96:7
96 : 10	96:10
96 : 18	96:22
97 : 4	97:5
97 : 7	97:15
98 : 17	98:18
98 : 20	98:20
98 : 22	98:23
98 : 25	98:25
99 : 2	99:8
103 : 24 beginning with "Is..."	104:3
104 : 23	106:4
106 : 13	107:1
107 : 14	107:25
108 : 5	108:9
108 : 11	108:11
108 : 13	108:14
108 : 17	108:23
109 : 1	109:10
111 : 18	112:11
112 : 16	113:5
118 : 13	118:15
118 : 17	119:13
119 : 16	119:19
119 : 21	119:21
120 : 12	120:14
120 : 16	120:20
120 : 22	122:8
122 : 14	123:4
123 : 9	123:12
123 : 14	123:17
123 : 21	123:25
124 : 2	124:8
125 : 24	125:25
126 : 3	126:4
126 : 13	126:20
126 : 24	127:2

From *Page: Line*	**Through** *Page: Line*
127 : 5	127:6
128 : 16	129:6
130 : 13	131:3
131 : 6	131:7
131 : 10	131:21
135 : 12	136:3
136 : 13	136:23
137 : 7	137:17
142 : 4	142:19
142 : 24 beginning with "What brands..."	143:1
143 : 3	143:18
143 : 20	143:23
144 : 8	144:24
146 : 17 beginning with "Do you..."	146:21
146 : 23 beginning with "to the..."	146:25
147 : 3	147:3

From *Page: Line*	**Through** *Page: Line*
6:3	6:4
7:11	7:14
7:21	8:7
8:12	9:8
22:7	22:15
23:6	23:15
47:15	47:21
49:7	49:24
51:21	53:19
53:23	55:23
59:21	60:4
60:24	62:10
74:25	75:5
75:15	76:3
78:17	78:20
82:19	83:4
84:24	85:3
88:19	88:23
89:4 beginning with "Can you..."	89:17
90:21	91:4
99:21	101:1
101:7	101:8
102:2	103:5
103:8	104:5
105:2	105:5
105:14	105:23
106:3	106:17
106:23	107:22
108:3	108:11
110:2	110:14
111:8	112:8
112:10 beginning with "Is that..."	112:13
113:6	113:14
113:15 beginning with "What Conwood..."	113:22
114:13	114:15
114:19	114:23
115:12	116:12
116:21	117:18
117:22	117:25
118:15 beginning with "What were..."	119:4
119:21	120:21
123:16	123:20
138:15	138:23
139:16	140:15

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From *Page: Line*	**Through** *Page: Line*
141:20	142:8
142:19 beginning with "Are there..."	143:4
143:12	143:23
145:9	145:16
163:8	166:2
166:13	166:20
167:1 beginning with "During the..."	167:10
167:18 beginning with "In those..."	167:23
172:3	172:7
172:15	172:15
172:17	172:20
172:25	174:7
174:22	174:25

From *Page: Line*	**Through** *Page: Line*
6:3	6:4
13:10	13:15
14:8	14:21
15:15 beginning with "What was..."	16:15
41:13	41:17
43:1	43:5
45:4	46:4
69:4	69:10
70:3	71:5
72:18	73:2
73:15	74:2
74:8	74:17
81:25	82:11
112:10	113:10
113:20	114:4
115:24	116:5
122:14	123:4
135:16	136:9
136:15	136:15
136:17	136:24
137:2	137:7
140:1	140:3
140:6	140:7
140:9	141:9
141:17	141:23
145:19	146:7
146:11	147:5
152:15	153:11 ending with "UST."
157:24	158:2

From *Page: Line*	**Through** *Page: Line*
7:4	7 : 4 ending with "Jones."
13:23	14 : 21
15:17 beginning with "When you..."	17 : 16
18:11	18 : 24
19:22	19 : 25
26:7	26 : 18
28:8	28 : 9
28:16	29 : 5
30:7	30 : 8
30:11	30 : 14
43:17	43 : 19
58:15	59 : 11
60:22	61 : 7
64:2	65 : 12
65:18	65 : 25
68:6 beginning with "you are..."	68 : 18
68:21	69 : 2
71:11	72 : 5
72:10 beginning with "It refers..."	73 : 19
74:16	74 : 19
74:22	75 : 1
75:4	75 : 6
77:5	80 : 18
80:21	81 : 12
81:17	82 : 1
83:23	84 : 21
85:11	85 : 21
86:1	88 : 9
91:18	94 : 7
94:16	94 : 17
94:21	95 : 3
96:3	96 : 13
97:2	98 : 17
100:17	101 : 11
103:10	103 : 12
103:15	104 : 14
106:18	108 : 1
110:3	110 : 22
111:6	111 : 10
111:13	111 : 14
111:24	111 : 25
112:8	112 : 12
112:19	112 : 21
114:13	114 : 25

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From *Page: Line*	Through *Page: Line*
115:5	115 : 25
116:1 beginning with "He writes..."	117 : 2
117:5	117 : 8
117:11	117 : 14
117:16	118 : 11
118:22	118 : 23
119:15	120 : 3
121:10	121 : 14
121:17	122 : 11
122:19	125 : 2 ending with "H-E-B."
125:19	125 : 20
126:2	126 : 4
126:12	127 : 18
127:21	127 : 25
128:2	128 : 3
128:6	129 : 10
148:5	148 : 21
149:1	149 : 24
150:1 beginning with "Did you..."	150 : 9
151:21	151 : 24
152:16	152 : 17
152:24	153 : 13
153:21	156 : 12
159:5	159 : 6
159:9	159 : 15
162:12	163 : 12

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From *Page: Line*	**Through** *Page: Line*
6:5	6:6
17:10	18:7
18:23	19:6
19:9	19:15
21:22	21:23
22:1	23:4
29:8	30:2
30:5	30:15
31:6	32:3
32:17 beginning with "Do you..."	32:23
38:3	38:14
40:16	40:19
40:22	40:22
41:15	42:17
42:22	43:12
43:15	43:19
43:21	44:2
44:9	45:23
45:25	46:3
46:10	47:14
47:22	48:6
48:11	50:3
50:15	50:24
52:15	52:24
57:3	57:20
57:22	57:22
58:1	58:3
58:7	58:19
80:18	82:19
82:21	83:2
83:24	84:17
96:12	97:13
97:17	97:24
98:2	98:3
98:18	98:19
98:23	99:3
99:9	99:14
100:8	102:22
102:25	103:1
104:10	106:10
109:10	109:16
109:21	109:21
113:8	115:3
115:22	117:6

From *Page: Line*	Through *Page: Line*
117:15	118:8
118:11 beginning with "Was there..."	118:15
118:22 beginning with "I'm just..."	119:19
120:14	120:17
120:20	121:12
122:1	122:6
123:21	124:5
124:12	124:15
124:20	125:13
136:19 beginning with "Do you..."	137:9
137:17 beginning with "What other..."	137:20
137:25	138:14
139:10	139:13
139:18	139:24
140:5	140:5
141:7	141:23
148:1	148:4
148:7	148:8
148:18	148:22
149:15	149:19
155:14	156:9
156:12	157:11
157:18	158:16
160:3	160:7
160:17	161:1
161:16	162:3
162:13	162:18
162:21	162:22
162:24	163:1
163:3	163:8
163:10	163:23
164:1	164:6
164:14	164:17
165:13	165:21
165:24	165:25
166:8	166:13
166:17	166:17
167:2	167:8
167:12	168:3
178:16	178:20
180:9	182:10
182:13	183:3
183:8	183:14
183:16 beginning with "Is it..."	183:18
183:21	184:3
196:16	196:19
196:22	196:22

From *Page: Line*	Through *Page: Line*
197:2	198:3
241:6	242:3
242:7	242:8
246:13	247:13
249:9	249:11
249:16	249:18
251:7	251:22

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From *Page: Line*	**Through** *Page: Line*
6:5	6 : 6
19:13	19 : 16
20:20	21 : 1
136:9	138 : 21
139:4	139 : 7 ending with "Yes."

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From *Page: Line*	**Through** *Page: Line*
6:5	6 : 6
20:9	21 : 10
24:5	24 : 9
25:1	25 : 3
43:25 beginning with "Have you..."	44 : 15
58:21	58 : 25
66:18 beginning with "Of the..."	66 : 22
68:13	69 : 16
69:22	69 : 25
72:12	72 : 21
72:23	782 : 23
75:6 beginning with "Have you..."	75 : 21
75:24	76 : 6
76:11	76 : 11
78:24	80 : 19
83:13	84 : 4
89:17	90 : 20
91:16	91 : 23
93:15	93 : 24
94:7	95 : 3
95:8	95 : 12
111:12	113 : 4
113:7	117 : 25
118:9	118 : 25
119:2	122 : 10
122:15	123 : 7
124:22 beginning with "Has Conwood..."	125 : 23
126:7	132 : 11
133:6 beginning with "Did you..."	135 : 8
136:2	137 : 6
137:19	139 : 3
140:25	142 : 13
142:22	143 : 11
143:14	144 : 9
144:23	145 : 13
145:16	146 : 16
146:23	147 : 5
148:14	148 : 16
148:20	151 : 2
151:4 beginning with "When did..."	151 : 9
151:22	152 : 3
175:6	177 : 16
206:25	208 : 11
213:2	213 : 13

From *Page: Line*	**Through** *Page: Line*
215:7	216 : 2
216:24 beginning with "Have any..."	217 : 25
218:12	218 : 20
222:11	224 : 11
224:16	225 : 6
233:16	236 : 9
237:8 beginning with "Have you..."	242 : 11
242:22	244 : 7
246:19	248 : 10

From *Page: Line*	**Through** *Page: Line*
9:6	9 : 7
10:7	15 : 8
16:10	19 : 3
19:9	30 : 6
37:20	38 : 14
40:21 beginning with "Turn with..."	42 : 8
42:10	43 : 13
50:12	50 : 24
56:15	57 : 1
58:19	60 : 12
61:17	61 : 25
94:9	96 : 15

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From *Page: Line*	**Through** *Page: Line*
6:21	6:22
15:23	16:4
16:8	17:3
17:14	17:23
18:12	19:25
20:2	21:5
21:11	23:20
24:2	24:11
24:20	25:11
26:1	29:14
30:9	31:12
31:14	34:13
34:15	34:21
34:24	36:9
37:8	37:12
38:2	39:7
39:25	40:8
40:12	40:17
41:10	42:2
42:4	43:3
43:14	43:15
43:20	44:3
44:10	44:21
45:2	45:10
45:15	45:22
55:16	55:18
56:18	57:7
61:6	61:9
61:11	62:4
87:19	88:13
112:3	112:5
112:8	112:10
116:23	117:1
118:5	118:11
119:5	119:7
119:9	119:14
119:18	120:2
122:22	124:22
125:7	126:6
126:12 beginning with "Why was..."	126:21
126:23	127:4
127:8	127:13
127:19	128:19
128:21	129:2

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From *Page: Line*	**Through** *Page: Line*
129:5	129:13
129:19	129:20
129:22	130:14
132:24	135:5
135:7	135:20
136:1	137:2
137:4	137:9
137:11	137:17
163:21	164:18
165:10 beginning with "Do you..."	165:13
180:5	182:10
182:15	182:18
183:3	184:15
184:18	184:18
206:19 beginning with "How are..."	207:14
209:12	210:23
210:25	211:5
211:10	211:20
212:1	212:7
213:13	213:23
214:8	214:14
214:19	214:23
230:4	230:7
230:10	230:22
232:17	233:14

WITNESS: MICHAEL KEANE
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From *Page: Line*	**Through** *Page: Line*
267 : 10	267 : 13
298 : 7	298 : 9
308 : 5 beginning with "Have you..."	308 : 8
308 : 11	308 : 17
308 : 20	308 : 24
309 : 14	309 : 23
310 : 1	310 : 1

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From *Page: Line*	**Through** *Page: Line*
6:11	6:12
18:14	18:24
19:9	19:14
20:7	21:14
23:17	24:5
35:18	36:5
44:23	45:5
64:18	65:21
66:12	67:18
68:1	68:6
69:13	69:25
71:3	71:13
72:10	72:16
73:8	73:21
74:25	75:3
78:11	79:13
82:11	83:25
86:15	87:7
93:15	95:6
97:5	97:8
97:11	99:3
101:4	101:7
101:13	102:12
102:17	103:11
106:3 beginning with "How many..."	106:21
107:14	107:18
107:21	108:24
109:18	109:21
112:1	112:10
119:24	120:1
120:4	121:3
121:5	121:11
121:14	121:14
125:20	127:14
128:14	128:17
128:25	129:4
129:7	129:7
131:1	131:9
131:13	132:3
132:9	132:19
133:3	133:7
133:13	133:22
134:6	134:20
134:24	135:6

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From *Page: Line*	**Through** *Page: Line*
135:10	136:14
136:17 beginning with "When Wal-Mart..."	137:10
138:14	141:23
142:21	142:24
165:22	165:23
166:1	166:16
168:3	170:15
172:8	173:14
174:19	177:21
178:18	179:7
179:10	180:15
180:24	181:18
181:21	183:1
183:16	183:20
185:12	185:22
186:13	187:14
204:12	204:20
205:8	209:18
210:1	210:5
210:11	211:3
211:9	211:12
211:25	213:9
213:12	214:19
215:23	216:14
216:17	217:3
217:8	218:1
218:13	219:8
219:19	223:2
223:14	223:25
224:3	224:7

WITNESS: GARY JONES
8/16/99

From *Page: Line*	**Through** *Page: Line*
4:6	4:7
4:19	4:25
5:18	6:21
7:4	8:2
9:2	11:25
12:20	15:3
15:17	18:9
21:24	23:23
24:22	25:12
25:15	25:21
26:1	26:20
33:4	33:17

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WITNESS: STEVE JOHNSON
5/18/99

From *Page: Line*	**Through** *Page: Line*
7:8	7:9
18:9	18:18
19:12	20:25
25:13	25:18
36:16	36:20
41:8	43:25
52:9	53:5
53:22	55:7
55:12	55:19
56:1	56:4
66:22	66:25
67:5	68:8
75:1	75:9
82:8	83:18
83:21	84:8
84:11	84:23
85:5	87:1
87:4	87:11
87:14	90:6
93:1	94:18
102:11	103:25
106:2	106:11
106:18	107:8
116:3	117:2
121:23	123:7
123:22	124:16
125:15	126:12
126:17	127:16
129:13 beginning with "When you..."	130:12
136:8	138:7
148:15	148:24
155:17	158:23
159:1	159:21
159:23	160:2
160:10	160:17
160:22	160:23
162:21	163:1
163:3	163:9
163:15	164:19
164:22	164:23
165:23	168:23

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From *Page: Line*	**Through** *Page: Line*
6:11	6:12
12:9	12:24
15:10 beginning with "Are you..."	16:25
17:19 beginning with "Do you..."	17:23
18:15 beginning with "Does Conwood..."	18:21
20:15	21:19
22:3	23:6
25:16	25:18
26:2	26:9
27:12	27:14
27:24	28:12
28:16	28:24
32:3	32:19
50:4	50:15
50:20	52:1
52:25 beginning with "What effort..."	53:24
54:24	55:6
61:25 beginning with "Have you..."	64:21
67:11	67:25
68:5	68:14
68:20	69:3
69:12 beginning with "So to..."	71:24
72:12	73:12
74:20	74:22
75:2	75:11
82:9	82:12
82:17	83:20
84:19	85:4
86:14	86:23
89:12	89:14
89:22	91:4
92:8	92:17
93:15	94:16
96:6 beginning with "Have you..."	97:21
99:12	100:5
100:10	100:25
106:14	107:2
108:3	110:1
110:9	110:18
111:13	112:2
123:1	123:15
125:15 beginning with "To the..."	125:18
126:18	126:18

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From *Page: Line*	**Through** *Page: Line*
6:5	6:5 ending with "Hynek."
27:7	29:13
30:11	31:2
31:7	31:13
54:2	54:9
56:2	56:6
57:22	57:24
58:2	58:4
61:19	62:3
67:9	67:24
68:11	71:12
84:7	85:3
85:13	86:7
93:12	94:2
94:10	94:11
94:15	94:15
95:22	95:24
97:3	97:11
99:8	100:2
101:11	102:4
102:8	102:14
119:11	119:13
119:22	120:3
121:17	122:4
123:11	123:20
141:12	141:15
144:6	144:17
145:2 beginning with "With respect..."	145:21
146:12	147:1
148:6	148:11
181:4	181:22
187:14	190:6
190:25	191:4
197:20	199:9
209:5	211:13
212:1	212:25
215:24	218:3
218:8	218:17
218:20	218:21

From *Page: Line*	**Through** *Page: Line*
6:6	6:7
30:17	32:7
32:17	33:7
35:25	36:7
37:25	38:12
40:16	40:18
125:11	125:18
150:21 beginning with "Are plan-o-grams..."	151:1
151:16	152:8
152:14	152:14
153:11	154:18
154:21	155:2
155:9	155:13
155:17 beginning with "I have..."	155:19
155:23	156:3
156:6	156:8
157:8	157:11
157:15	157:23
160:13	160:16
160:19	160:24
161:4	161:10
161:13	161:14
168:11	168:19
169:9	169:19
170:18	170:23
176:8	176:23
179:18	179:22
182:25	183:21
188:21	189:15
189:22	190:22
190:25	192:7
192:10	192:11
193:25	194:3
194:6	194:21
194:24	194:25
195:2	195:6
195:9	195:9
195:14 beginning with "Are there..."	196:1
197:22	198:11
201:15	202:12
202:15	204:20
204:24	205:3
205:6	206:15
206:18	207:3

From *Page: Line*	**Through** *Page: Line*
207:8	207:10
207:13	207:21
208:3	209:4
209:7	209:19
209:22	210:15
211:13	214:5
214:13	215:24
226:21	229:24
229:25 beginning with "Let me.."	231:18
233:23 beginning with "Are Conwood.."	234:21

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From *Page: Line*	**Through** *Page: Line*
6:4	6:4 ending with "Quirk."
15:17	16:1
16:2 beginning with "During..."	16:6
16:14	16:24
17:9	19:8
19:20	20:21
28:19	28:25
34:18	34:25
35:13	35:25
36:6 beginning with "Is the..."	37:20
38:4	38:14
38:21	39:1
42:11	42:22
43:21	44:16
44:21	45:1
45:5	46:18
47:1	50:19
52:15	52:19
52:23	53:6
53:22	54:1
55:8	57:4
66:1	66:7
67:3 beginning with "Do you..."	67:13
69:24	70:5
73:14 beginning with "Does Conwood..."	74:7
75:20	76:2
76:13	76:23
77:3 beginning with "Do your..."	77:11
80:9	80:16
81:2	82:16
84:4 beginning with "Is it..."	84:11
86:11	87:10
90:8 beginning with "Did you..."	91:17
94:12	94:17
96:11	96:23
114:8	114:17
116:23	117:25
118:6 beginning with "As part..."	118:20
121:19	122:5
125:25	127:13
130:11	131:15
132:2	132:9
132:17	132:20
136:6	136:19

From *Page: Line*	**Through** *Page: Line*
139:24	140:9
140:17	142:15
142:24	143:4
143:17	144:5
145:5	145:8
146:5	146:14
148:3	148:13
149:4	149:15
149:23	150:1
151:1	151:4
151:15	152:18
174:9	174:17
174:22 beginning with "And this..."	176:3
176:9	176:13
180:4	180:20
180:25	182:5
182:21	183:7
183:9 beginning with "In the..."	183:13
186:23	187:2 ending with "mind."

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From *Page: Line*	**Through** *Page: Line*
6:16	6:17
16:8	16:17
17:4	19:6
19:9	19:18
22:3	22:21
23:4	23:8
32:16	32:22
33:9	34:3
34:21	35:1
35:5	35:12
36:2	36:19
37:1	37:9
39:25	40:4
40:11 beginning with "What is..."	41:2
43:6	44:9
46:1	47:25
48:6	49:5
53:3	53:8
54:4	54:21
55:4	55:12
55:24	56:10
58:15	59:2
59:7 beginning with "When a..."	60:10
60:13 beginning with "Do you..."	61:1
74:1	74:11
74:15	75:9
75:15 beginning with "Why do..."	75:25
83:21	84:2
84:3 beginning with "Can you..."	84:10
84:15	84:18
85:3	85:22
87:20	87:25
88:19	89:2
94:22	95:1
95:7	95:10
95:17	95:17
97:23 beginning with "In those..."	99:2
99:6	100:3
103:19	104:10
105:2	105:3
105:11	105:14
105:19	106:17
107:16	107:22
108:8	108:13

From *Page: Line*	Through *Page: Line*
122:7	122:11
122:18	122:19
122:21	123:8
123:16	124:9
124:20	125:6
125:18	125:23
126:12	126:25
127:3 beginning with "Is this..."	127:20
128:9	128:21
128:24	129:1
129:4	129:6
131:6	132:5
133:21	134:5
134:19	135:12
136:3 beginning with "As you..."	136:6
136:9	136:10
137:6	137:11
137:14	137:20
138:2 beginning with "What do..."	139:19
140:4	140:11
140:22	141:10
141:22	142:5
142:13	143:25
144:4	144:24 ending with "two."
145:3 beginning with "out of..."	149:22
155:13 beginning with "Have you..."	155:18

WITNESS: DENNIS OLDANI
8/12/99

From *Page: Line*	**Through** *Page: Line*
6 : 9 beginning with "I would..."	7 : 4
7 : 15	8 : 8
13 : 10 beginning with "What I'm..."	13 : 13
13 : 20	14 : 1
14 : 22	15 : 2
15 : 12	15 : 15
15 : 18	15 : 21
16 : 5 beginning with "Do you..."	17 : 22
18 : 2	18 : 4
19 : 5 beginning with "You said..."	19 : 16
19 : 18	20 : 7
20 : 21 beginning with "Have you..."	21 : 6
21 : 18	22 : 3
22 : 9	23 : 23
24 : 1 beginning with "I want..."	24 : 4 ending with "snuff?"
24 : 8	24 : 18
24 : 20	25 : 11
25 : 17 beginning with "Now, did..."	26 : 8
26 : 11	26 : 11
27 : 9 beginning with "Are you..."	28 : 10
30 : 12	30 : 17
31 : 5 beginning with "Can you..."	31 : 10
31 : 12	31 : 16
31 : 18	31 : 18
33 : 19 beginning with "Has United..."	34 : 17
42 : 13 beginning with "Are you..."	42 : 15
42 : 19	43 : 2
43 : 12	43 : 14
43 : 22 beginning with "Do you..."	44 : 4
46 : 23	48 : 7
52 : 7	54 : 3
65 : 8	65 : 10 ending with "plan-o-gram?"
66 : 1	66 : 16
66 : 21 beginning with "And have..."	66 : 25

From *Page: Line*	**Through** *Page: Line*
6 : 5	6 : 6
19 : 9	19 : 11
19 : 25	21 : 1
21 : 6	24 : 21
37 : 6	37 : 22
38 : 2	38 : 6
38 : 9	38 : 10
38 : 18	39 : 22
40 : 12	41 : 12
41 : 15	42 : 25
47 : 1	47 : 23
48 : 8	49 : 3
49 : 8	49 : 17
50 : 5	50 : 9
50 : 20 beginning with "Do you..."	52 : 3
62 : 15	63 : 4
63 : 10	63 : 13
63 : 25	64 : 16
64 : 20	64 : 24
65 : 25	68 : 18
79 : 17	79 : 22
81 : 7	84 : 13
91 : 7 beginning with "The number..."	91 : 22
92 : 8	92 : 22
92 : 23 beginning with "The introduction..."	94 : 9
95 : 24	96 : 5
103 : 16	104 : 13
104 : 15	105 : 3
105 : 12	107 : 22
108 : 24	109 : 11
113 : 22	114 : 20
124 : 4	124 13
124 : 20	125 : 10
125 : 20	125 : 24
126 : 10	126 : 13
126 : 21	127 : 2
127 : 22	128 : 17
129 : 1	130 : 15
132 : 9	133 : 17
136 : 16	137 : 7
138 : 11	138 : 14
148 : 24	149 : 25
150 : 7	150 : 16
150 : 21	151 : 1

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From *Page: Line*	Through *Page: Line*
151 : 6	151 : 8
155 : 9	155 : 25
157 : 6	160 : 21
163 : 17	163 : 23
164 : 9	164 : 11
164 : 24	165 : 21
167 : 23	168 : 11
168 : 18	169 : 15
172 : 14	174 : 20
177 : 16	177 : 20
177 : 25	181 : 10
182 : 23	183 : 6
184 : 11	185 : 14
189 : 18	189 : 21
189 : 25	190 : 6
190 : 16	191 : 2
191 : 22	192 : 6
192 : 15	193 : 20
194 : 6	194 : 24
195 : 6	197 : 1

From *Page: Line*	**Through** *Page: Line*
6: 5	6: 6
16: 13	17: 13
17: 21	18: 24
19: 4	19: 19
20: 22	21: 22
22: 3	22: 17
71: 19 beginning with "In your..."	71: 21
71: 24	72: 1
78: 17	78: 19
78: 23	79: 5
79: 8	80: 6
85: 16	85: 20
85: 23	86: 4
86: 7	86: 9
86: 22	87: 21
88: 18	88: 22
89: 10	89: 16
89: 19	89: 21
92: 1	92: 8
92: 12	92: 15
92: 18	92: 19
98: 3	98: 9
99: 12	99: 21
100: 4	100: 5
100: 8	101: 4
101: 7	101: 15
101: 18	101: 23
102: 3	102: 23
104: 8	104: 12
104: 15	104: 20
104: 23	104: 24
105: 8	105: 16
105: 19	105: 24
106: 2	106: 3
106: 22	108: 2
108: 5	108: 5
114: 13	115: 20
115: 23	116: 22
117: 5	117: 18

WITNESS: FRANK FEENEY
9/3/99

From *Page: Line*	**Through** *Page: Line*
5 : 23	6 : 25
8 : 11	8 : 19
9 : 1 beginning with "Where you..."	9 : 7
10 : 14	11 : 16
11 : 19	12 : 9
13 : 4	13 : 19
14 : 6	16 : 12
16 : 17 beginning with "Have you..."	17 : 12
18 : 7	18 : 22
22 : 4	22 : 7
22 : 25	23 : 16
24 : 8	25 : 20
36 : 14	36 : 16 ending with "no."
40 : 18	42 : 7

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WITNESS: RONNIE JOE ELMS
4/13/99

From *Page: Line*	**Through** *Page: Line*
5 : 22	5 : 23
22 : 20	24 : 14
52 : 3	52 : 17
87 : 10 beginning with "My question..."	87 : 19
87 : 21	88 : 8
89 : 8	89 : 25
90 : 21	91 : 21
92 : 1	92 : 11
97 : 7	97 : 10
97 : 21	99 : 1
120 : 3	120 : 6
133 : 24	134 : 2
134 : 5	136 : 1
136 : 3	136 : 11
137 : 13	138 : 17
140 : 15 beginning with "So is..."	140 : 23
143 : 25	145 : 4
147 : 7	147 : 24
148 : 4	148 : 7
149 : 12	151 : 4
157 : 9	157 : 24
167 : 4	167 : 6
170 : 8	170 : 11
170 : 19	171 : 8
171 : 16	172 : 14
174 : 3	174 : 7
174 : 17	174 : 22
181 : 10	181 : 11
181 : 16	181 : 17
210 : 13	210 : 25
211 : 8	211 : 20
212 : 1	212 : 8
212 : 24	213 : 8
213 : 14	214 : 4
214 : 8	214 : 16
214 : 24 beginning with "What is..."	215 : 12
216 : 9	216 : 14
217 : 1 beginning with "Does this..."	217 : 10
217 : 17 beginning with "And am..."	219 : 8
248 : 20	249 : 6
249 : 9	249 : 17
255 : 15	256 : 4
260 : 24	261 : 12
262 : 6	262 : 13

From *Page: Line*	Through *Page: Line*
262 : 17	262 : 25
263 : 18	263 : 22
264 : 4	265 : 4
265 : 6	265 : 6
265 : 19	266 : 7
266 : 22	268 : 1
272 : 9	272 : 13
272 : 24	273 : 17
273 : 19	273 : 24
274 : 1	274 : 3
274 : 9	274 : 18
278 : 7	278 : 9
278 : 13	279 : 23

CONFIDENTIAL

MEMORANDUM

January 26, 2000

TO: Benjamin A. Powell, Esq. and Bernadette Murphy

FROM: Charles Scott Lent

Re: Revised Greg P. Ellis Designations

Enclosed please find the revised Greg Ellis designations for the true certified copy of the Greg P. Ellis, June 23, 1999 transcript. If you have any questions, please do not hesitate to call me at (212) 735-3376.

WITNESS: GREG P. ELLIS
6/23/99

From *Page: Line*	Through *Page: Line*
6 : 13	6 : 14 ending with "morning."
22 : 17	24 : 21
40 : 13	40 : 16
40 : 19	40 : 19
41 : 1	41 : 5
43 : 13	43 : 19
43 : 24	43 : 25
44 : 6	45 : 3
46 : 12	46 : 19
47 : 16	47 : 25 ending with "Yes."
48 : 8	48 : 16
51 : 23	52 : 2
52 : 24	53 : 3
53 : 9	53 : 11
56 : 20	57 : 3
57 : 14	58 : 8
58 : 10	58 : 15
58 : 18	58 : 18
67 : 25	68 : 2
97 : 24	98 : 25
99 : 4	99 : 9
99 : 14	100 : 8
100 : 15	100 : 17
100 : 23	101 : 1
103 : 21	105 : 4
105 : 10	107 : 15
125 : 11	125 : 14
125 : 17	126 : 2
126 : 6	126 : 14
132 : 20	133 : 6
133 : 9	133 : 19
134 : 7 beginning with "based on ..."	134 : 10
134 : 13	134 : 19
135 : 22	136 : 7
136 : 17	136 : 25
137 : 13	137 : 25

From *Page: Line*	Through *Page: Line*
138 : 3	138 : 21
139 : 7	139 : 22
141 : 1	141 : 2 ending with "retailer."
141 : 12	141 : 17
143 : 14	143 : 16
143 : 21	146 : 15
148 : 15	148 : 19
149 : 5	150 : 21
150 : 24	151 : 7
155 : 9	155 : 16
155 : 25	156 : 12
157 : 3	159 : 11
160 : 17	161 : 10
162 : 13	162 : 19
163 : 5	163 : 12
165 : 2	165 : 10
167 : 1	167 : 7
189 : 14	189 : 22
190 : 1	191 : 3
193 : 4	193 : 12
195 : 24	196 : 13
205 : 15	205 : 18
205 : 21	206 : 5
225 : 5	225 : 9
228 : 9	228 : 13
228 : 23	231 : 14
231 : 17	231 : 18
232 : 12	233 : 21
234 : 8	235 : 13
235 : 16	235 : 19
236 : 7	236 : 18
237 : 4	237 : 16
239 : 22	240 : 6
240 : 10	240 : 13
240 : 17	241 : 5
242 : 4 beginning with "Directing your..."	242 : 12
242 : 21	244 : 21

From *Page: Line*	Through *Page: Line*
244 : 24	244 : 25 ending with "accurate."
245 : 14	245 : 20
247 : 1 beginning with "Exhibit 12..."	247 : 23
248 : 6	248 : 22
249 : 6	250 : 6
250 : 13	251 : 20
251 : 23	251 : 23

From *Page: Line*	**Through** *Page: Line*
6 : 9	6 : 10 ending with "morning."
22 : 19	24 : 23
40 : 14	40 : 17
40 : 20	40 : 20
41 : 2	41 : 6
43 : 16	43 : 22
44 : 2	44 : 3
44 : 10	45 : 8
46 : 15	46 : 24
47 : 21	48 : 6
48 : 16	48 : 24
52 : 5	52 : 10
53 : 6	53 : 11
53 : 16	53 : 18
57 : 4	57 : 12
57 : 22	58 : 18
58 : 20	58 : 24
59 : 2	59 : 2
67 : 20	67 : 22
97 : 1	98 : 5
98 : 9	98 : 13
98 : 18	99 : 12
99 : 19	99 : 21
100 : 2	100 : 6
102 : 24	104 : 9
104 : 15	106 : 22
124 : 1	124 : 4
124 : 7	124 : 17
124 : 21	125 : 3
131 : 1	131 : 12
131 : 15	131 : 23
132 : 11 beginning with "Based on ..."	132 : 15
132 : 18	132 : 23
134 : 1	134 : 13
134 : 22	135 : 5
135 : 17	136 : 4
136 : 7	137 : 1
137 : 11	138 : 4
139 : 2	139 : 6
139 : 15	139 : 20
141 : 6	141 : 8
141 : 12	144 : 09
146 : 10	146 : 14
147 : 10	149 : 2

From *Page: Line*	Through *Page: Line*
153 : 15	153 : 22
154 : 5	154 : 18
155 : 7	157 : 20
159 : 3	159 : 22
161 : 2	161 : 9
161 : 21	162 : 3
163 : 19	164 : 2
165 : 20	166 : 3
188 : 25	189 : 8
189 : 12	190 : 16
192 : 18	193 : 2
195 : 12	196 : 1
205 : 10	205 : 13
205 : 16	205 : 24
225 : 4	225 : 9
228 : 11	228 : 15
228 : 20	231 : 13
231 : 16	231 : 17
232 : 15	233 : 22
234 : 10	235 : 17
235 : 21	235 : 24
236 : 12	236 : 23
237 : 9	237 : 20
239 : 23	240 : 8
240 : 18	240 : 21
240 : 25	241 : 14
242 : 15 beginning with "Directing your..."	242 : 25
243 : 11	245 : 14
245 : 18	245 : 19 ending with "accurate."
246 : 9	246 : 15
247 : 22	248 : 22
249 : 2	249 : 17
249 : 23	250 : 25
251 : 6	252 : 16
252 : 25	252 : 25

From *Page: Line*	**Through** *Page: Line*
9 : 13	9 : 14
16 : 4	17 : 5
19 : 7	19 : 17
20 : 17	21 : 4
21 : 7	21 : 16
36 : 10	36 : 24
40 : 12	40 : 17
40 : 19	40 : 21
53 : 2	53 : 9
53 : 11	53 : 15
55 : 18 beginning with "During when..."	56 : 6
59 : 20 beginning with "It's your..."	59 : 23
60 : 14	60 : 16
61 : 12	61 : 20
62 : 21	62 : 24
92 : 17	93 : 16
95 : 5	95 : 18
96 : 18	97 : 17
104 : 17	105 : 21
109 : 18	109 : 19
110 : 24	111 : 2
117 : 16	117 : 16 ending with "Exhibit 1."
118 : 19	120 : 4
121 : 21	123 : 3
124 : 13	124 : 15
125 : 3 beginning with "On Exhibit..."	128 : 1
128 : 4	128 : 5
128 : 7	129 : 3
129 : 6	129 : 17
146 : 12	146 : 14
146 : 18	148 : 12
149 : 13 beginning with "For Exhibit..."	150 : 1
150 : 13	150 : 14
150 : 20	151 : 1
155 : 11	155 : 13
155 : 17 beginning with "First Exhibit..."	156 : 4
162 : 2	162 : 8
162 : 12	163 : 18
169 : 1	169 : 3
169 : 16	170 : 1
175 : 1 beginning with "Exhibit 13..."	175 : 10
175 : 14	176 : 10
177 : 7	178 : 4

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From *Page: Line*	**Through** *Page: Line*
180 : 18	181 : 2
191 : 8	191 : 19
198 : 8	200 : 3
201 : 9	201 : 14
208 : 14	208 : 16
208 : 25	210 : 1
210 : 7	210 : 8
211 : 8	211 : 18
217 : 5	217 : 7
217 : 9	217 : 16
221 : 2	221 : 18
229 : 16	229 : 18
229 : 23	231 : 8
231 : 16	232 : 10
233 : 12	233 : 14
233 : 18 beginning with "Mike may..."	234 : 3
237 : 23	237 : 25
238 : 9	238 : 17
243 : 19	244 : 24

WITNESS: LUNDY EDWARDS
9/2/99

From *Page: Line*	**Through** *Page: Line*
3 : 21	3 : 24
4 : 9	5 : 19
5 : 23	6 : 22
7 : 4	9 : 24
10 : 7	10 : 8
10 : 11	12 : 21
13 : 5	14 : 16
14 : 18	14 : 22
20 : 2	21 : 20
23 : 11	23 : 12
23 : 20	26 : 14
27 : 9	27 : 12
27 : 14	28 : 25
29 : 16	29 : 22
30 : 4	33 : 3
33 : 9	34 : 13
36 : 8	38 : 16
38 : 22	40 : 3
41 : 9	44 : 12
44 : 14	45 : 16
45 : 18	47 : 22
48 : 8	48 : 10
48 : 13	48 : 22
48 : 25	49 : 22
49 : 25	50 : 3
72 : 2	72 : 3
77 : 9 beginning with "What upsets..."	80 : 12
80 : 20	81 : 15
84 : 25	85 : 2
85 : 6 beginning with "Are other..."	85 : 15
89 : 13	90 : 6
90 : 8	90 : 21
90 : 24	91 : 5

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7 : 5	7:6
25 : 12	26:7
26 : 16	27:14
27 : 19	30:6
31 : 15	31:17
32 : 8	32:23
34 : 13 beginning with "is it..."	34:17
37 : 25	38:17
41 : 3	41:7
41 : 12	41:14
42 : 1	42:17
43 : 2	44:13
45 : 5	46:20
63 : 12	63:20
63 : 23	65:25
77 : 2	77:10
77 : 13	77:24
78 : 10	78:25
79 : 5	79:20
79 : 24	80:5
80 : 11	82:20
85 : 2	85:7
85 : 8 beginning with "What did..."	85:21
86 : 3 beginning with "let me..."	87:13
87 : 25	88:6
88 : 11	88:15
88 : 21	89:17
89 : 24	90:8
92 : 20	92:23
94 : 16	95:6
97 : 2	97:17
102 : 7 beginning with "Do you..."	102:17
104 : 23	105:21
107 : 24	110:15
111 : 15	113:8
113 : 24	115:23
117 : 3	118:5
118 : 10	119:8
125 : 14	125:17
126 : 21	127:16
128 : 7	129:14
132 : 21	133:7
133 : 16	134:1
139 : 23	141:2

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141 : 7	141:22
142 : 23	143:3
143 : 22	144:13
145 : 24 beginning with "You've said..."	147:7
147 : 11	147:12 ending with "sorry."
147 : 13 beginning with "Did you..."	149:18
149 : 22	150:5
155 : 20	156:10
157 : 5	157:14
161 : 17 beginning with "Have you..."	162:21
163 : 1	164:24
165 : 7	166:6
166 : 9	166:11
166 : 25	168:7
170 : 11	172:20
173 : 10	175:6
175 : 19	177:8
177 : 25	178:4
178 : 9	179:4
180 : 2	180:5
180 : 16	180:20
180 : 24	181:10
181 : 22	182:3
182 : 8	183:1
183 : 20	183:22
183 : 25	184:15
184 : 23	185:10
185 : 16	186:14
186 : 23	187:4
187 : 10	187:21
188 : 9	188:24
189 : 15	189:25
190 : 3	191:19
191 : 23	193:24
196 : 11	196:18

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15 : 14	16 : 2
16 : 8	16 : 24
17 : 5	17 : 12
21 : 12	21 : 14
30 : 21	32 : 3
32 : 8	33 : 2
38 : 24	39 : 1
52 : 11	52 : 14
53 : 1	54 : 1
61 : 18	61 : 24
62 : 4	62 : 24
65 : 25	66 : 2
66 : 9	66 : 20
67 : 20	68 : 10
69 : 13	70 : 15
70 : 25	71 : 13
73 : 7	73 : 16
78 : 17	79 : 4
80 : 23	81 : 2
81 : 6	81 : 13
88 : 15	88 : 20
89 : 17	91 : 12
93 : 8	95 : 6
95 : 12	97 : 10
98 : 6	98 : 18
99 : 3	99 : 15
99 : 18	99 : 18
99 : 24	100 : 21
103 : 19	105 : 3
134 : 13	134 : 16
136 : 4	137 : 16
138 : 3	138 : 9
139 : 13	140 : 18
142 : 21	143 : 18
143 : 23	144 : 5
147 : 8	147 : 16

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5 : 13	7 : 25
8 : 4	8 : 10
8 : 17	10 : 5
10 : 11	16 : 11
16 : 13	18 : 25
20 : 22	20 : 25
21 : 5	29 : 2
29 : 25	30 : 14
34 : 25	37 : 25
38 : 21	39 : 8
56 : 1	56 : 3
56 : 7	56 : 18

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WITNESS: LARRY HAYNES
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6 : 8	6 : 9
21 : 17	21 : 19
24 : 1	24 : 22
25 : 2	26 : 5
31 : 6	32 : 18
34 : 4	34 : 8
36 : 2	37 : 11
39 : 8	39 : 15
42 : 13	42 : 17
44 : 17	45 : 7
45 : 12	46 : 12 ending with "Yes."
48 : 3	48 : 21
53 : 16	53 : 24 ending with "No."
55 : 11	56 : 11
58 : 20	58 : 23
59 : 5	59 : 15
59 : 19 beginning with "Do you..."	59 : 25
66 : 16	68 : 6
75 : 1	75 : 4
77 : 18	78 : 13
78 : 15	79 : 14
80 : 19	80 : 22
81 : 6	81 : 19
83 : 8	83 : 11
83 : 24	84 : 8
85 : 18	85 : 20
86 : 5	86 : 10
87 : 15	88 : 19
90 : 2	90 : 22
104 : 14	104 : 23
105 : 4	105 : 11
105 : 14	105 : 19
113 : 2	113 : 5
113 : 12	113 : 12
125 : 16	125 : 25
133 : 14	133 : 22
135 : 17	136 : 23
137 : 7	137 : 24
138 : 3	138 : 8
138 : 16	138 : 22
140 : 6	140 : 17
141 : 4	141 : 16
154 : 8	154 : 16
154 : 22	156 : 15

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158 : 18	159 : 22
160 : 2	162 : 7
162 : 10	162 : 14

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6 : 6	6 : 7
16 : 21	17 : 13
17 : 17	18 : 12
19 : 5	19 : 24
21 : 15	24 : 15
26 : 7	26 : 12
29 : 22	30 : 5
33 : 13	34 : 5
38 : 25	39 : 17
40 : 12	41 : 4
43 : 3	45 : 16
45 : 20	45 : 23
51 : 13	53 : 7
53 : 25	56 : 16
58 : 18	58 : 25
59 : 3	59 : 20
60 : 16	60 : 18
61 : 15 beginning with "Are you..."	61 : 18
63 : 9	64 : 1
64 : 7 beginning with "Do you..."	64 : 23
64 : 25 beginning with "is there..."	65 : 5
67 : 22	70 : 20
70 : 22 beginning with "Did this..."	71 : 6
71 : 10	71 : 14
71 : 24	73 : 4
74 : 9	74 : 24
75 : 15	76 : 19
77 : 6	77 : 7
77 : 15	78 : 4
78 : 10	78 : 16
79 : 1	79 : 13
81 : 23	82 : 9
82 : 10 beginning with "Did you..."	83 : 5
83 : 14	84 : 15
85 : 1	85 : 18
85 : 24	86 : 15
86 : 24	87 : 11
87 : 21	90 : 17
91 : 2	91 : 24
92 : 4	93 : 7
93 : 23	94 : 5
94 : 14	95 : 4
95 : 8	98 : 14

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From *Page: Line*	Through *Page: Line*
99 : 23	100 : 4
102 : 15	103 : 18
103 : 23	107 : 16
107 : 24	108 : 20
109 : 2	109 : 6
110 : 15	110 : 19
110 : 25	112 : 3
112 : 6	112 : 10
112 : 25	113 : 8
113 : 12	114 : 2
116 : 1	116 : 10
117 : 13 beginning with "You did..."	118 : 6
118 : 13	118 : 22
119 : 11	119 18
120 : 8	120 9
130 : 15 beginning with "In those..."	130 25

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WITNESS: DENNIS GAGNON
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5 : 14	6 : 5
6 : 10	7 : 4
7 : 12 beginning with "What is..."	9 : 3
9 : 11	10 : 13
10 : 19	12 : 10 ending with "problems,..."
12 : 14	14 : 19
15 : 11	20 : 19
22 : 12	22 : 16
22 : 20	23 : 13
24 : 8	24 : 10
24 : 22	24 : 25
26 : 5	26 : 23
26 : 25	28 : 10
28 : 19	29 : 17
29 : 25	30 : 10

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From *Page: Line*	**Through** *Page: Line*
6 : 12	6 : 13
22 : 12	22 : 14
23 : 10	24 : 24
26 : 17	26 : 23
27 : 5	27 : 7
32 : 23	32 : 25
33 : 16	33 : 23
34 : 6	34 : 22
35 : 9	35 : 16
37 : 8	37 : 19
41 : 12	41 : 22
52 : 5	52 : 20
52 : 24	53 : 3
53 : 8	54 : 6
54 : 10	54 : 13
54 : 17	54 : 21
54 : 23	55 : 5
55 : 8	55 : 9
56 : 7	57 : 5
57 : 13	57 21
58 : 6 beginning with "Do you..."	58 : 20
59 : 7	59 : 8
59 : 17	59 : 23
60 : 5	60 : 6
65 : 13	65 : 17
66 : 5	66 : 5
74 : 25	75 : 3
75 : 7	75 : 13
75 : 18	77 : 2
77 : 11	78 : 13
79 : 8	80 : 16
80 : 19	81 : 6
87 : 20	87 : 23
87 : 25	88 : 23
88 : 25	89 : 1
89 : 4	89 : 10
93 : 20	93 : 22
94 : 1	94 : 4
105 : 8	105 : 18
105 : 21	106 : 20
107 : 5	107 : 22
108 : 2	109 : 7
109 : 11	113 : 9

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113 : 19	114 : 4
114 : 21	116 : 18
117 : 5	117 : 22
120 : 14	121 : 8
121 : 12	121 : 16
121 : 23	123 : 5
123 : 12	123 : 19 ending with "Yes."
128 : 15	128 : 18
128 : 23	129 : 2
129 : 7	130 : 15
131 : 2	131 : 16
131 : 23	132 : 1
132 : 6	132 : 14
132 : 23	133 : 6
133 : 9	133 : 19
133 : 23	135 : 19
136 : 2	136 : 12
136 : 14	137 : 1
137 : 18	138 : 14
138 : 17	139 : 16
139 : 20	140 : 7
140 : 10	140 : 18
140 : 20	141 : 11
141 : 14	142 : 2
142 : 4	142 : 4
143 : 4	143 : 17
143 : 20	145 : 20
145 : 23	146 : 11
146 : 14	146 : 19
146 : 23	148 : 4
148 : 10	148 : 19
152 : 19	152 : 22
153 : 8	153 : 18

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6 : 5	6 : 6
16 : 5	16 : 9
17 : 3	17 : 18
17 : 22	18 : 10
18 : 18	20 : 6
20 : 14	20 : 25
24 : 3	24 : 15
24 : 22	25 : 2
25 : 8	25 : 15
25 : 25	26 : 6
39 : 5	39 : 19
72 : 15	72 : 16
72 : 19	72 : 19
82 : 6	82 : 8
82 : 11	82 : 24
83 : 11	84 : 19
84 : 23	84 : 25
85 : 10	85 : 20
85 : 23	86 : 5
86 : 12	86 : 17
86 : 20	86 : 25
87 : 3	87 : 12
90 : 17	90 : 25
92 : 11	92 : 12
92 : 16	92 : 17
93 : 5	93 : 8
108 : 12	109 : 11
109 : 16	109 : 17
109 : 19	110 : 6
110 : 8	110 : 13
110 : 16	110 : 16
110 : 18	110 : 21
110 : 23	111 : 7
111 : 10	111 : 11
119 : 14	119 : 16
119 : 24	120 : 14
120 : 16	120 : 18
124 : 24	125 : 15
126 : 23	127 : 15 ending with "remember."
131 : 11	131 : 23
132 : 4	133 : 2 ending with "That's correct."
133 : 4 beginning with "What types..."	134 : 10
134 : 22	135 : 8

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From *Page: Line*	Through *Page: Line*
135 : 12	135 : 22
135 : 24	136 : 12
136 : 15	136 : 20
136 : 23	136 : 24
137 : 23	138 : 6
138 : 9	138 : 9
146 : 15	147 : 5
148 : 24	149 : 16
149 : 19	150 : 3
150 : 5	150 : 9
150 : 19	151 : 9
154 : 2	155 : 7
155 : 9	155 : 9
155 : 16	156 : 1
156 : 13	156 : 20
162 : 3	162 : 5
162 : 8	163 : 8
163 : 11	163 : 11

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6 : 5	6 : 6
33 : 8	36 : 13
36 : 22	37 : 12
37 : 18	38 : 13
69 : 25	70 : 3
70 : 9	70 : 10
76 : 19	76 : 24
77 : 14	77 : 22
78 : 7	78 : 14
78 : 18	78 : 18
82 : 23	83 : 11
84 : 6	86 : 17
87 : 8	87 : 24
88 : 3	88 : 20
88 : 23	89 : 4
89 : 23	90 : 1
90 : 4	90 : 7
90 : 23	92 : 6
96 : 20	100 : 15
102 : 12	103 : 13
104 : 8	105 : 8
114 : 16	115 : 8
117 : 21	120 : 4
121 : 7	121 : 19
122 : 10	123 : 15
123 : 19	123 : 24
126 : 25 beginning with "I'm just..."	130 : 3
132 : 17	132 : 25
133 : 17	135 : 16
136 : 25	136 : 25
137 : 2	137 : 17
137 : 19	138 : 10
138 : 14	139 : 19
140 : 24 beginning with "Does Conwood..."	141 : 21
142 : 12	142 : 20
143 : 24	144 : 19
145 : 5	145 : 11
145 : 20	146 : 1
146 : 9	146 : 22
147 : 15	147 : 18
148 : 4	148 : 14
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149 : 1	149 : 5
150 : 21	151 : 4
171 : 23	173 : 14
188 : 14	189 : 12
193 : 11	193 : 15
193 : 19	195 : 11
195 : 14	196 : 22
197 : 1	197 : 24
198 : 3	198 : 8
198 : 15	199 : 9
199 : 19	199 : 22
201 : 1	202 : 14
202 : 23	203 : 3
203 : 14	204 : 9
204 : 17	204 : 21
205 : 1	205 : 6
205 : 12	207 : 12
207 : 24	211 : 19
212 : 22	212 : 25
213 : 4	214 : 3
214 : 6	215 : 9
215 : 14	216 : 11
217 : 10	220 : 16
220 : 23	222 : 4
229 : 7	229 : 19
230 : 2	230 : 20
231 : 21	232 : 12
233 : 1	233 : 9
233 : 14	234 : 22
237 : 6	237 : 24
238 : 11	240 : 16
241 : 14	246 : 7
246 : 21	247 : 9

From *Page: Line*	**Through** *Page: Line*
6 : 12	6 : 13
17 : 7	17 : 22
20 : 8	21 : 1
21 : 22	23 : 1
41 : 8	41 : 17
42 : 22	43 : 23
45 : 14	47 : 2
50 : 18	50 : 20
50 : 25	51 : 10
53 : 18	53 : 19
54 : 4	54 : 4
54 : 11	54 : 25
56 : 17	57 : 4
57 : 7	57 : 14
59 : 13	59 : 25
60 : 5	61 : 8
61 : 12	62 : 9
65 : 14	66 : 21
66 : 24	67 : 25
68 : 15	69 : 19
70 : 3	70 : 5
70 : 8	71 : 6
71 : 9	71 : 13
71 : 17	71 : 21
71 : 24	72 : 23
73 : 2	76 : 5
76 : 8	76 : 13
77 : 20	78 : 18
79 : 10	79 : 15
79 : 20	79 : 20
79 : 22 beginning with "In the..."	80 : 11
81 : 8	81 : 21
92 : 23 beginning with "Can you..."	93 : 3
93 : 19	93 : 23
100 : 2	100 : 20
106 : 20	107 : 24
108 : 2	108 : 3
108 : 16	108 : 21
109 : 5	110 : 1
111 : 3	111 : 14
112 : 9	112 : 14
112 : 20	114 : 7

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115 : 1	115 : 4
115 : 15	115 : 24
129 : 1	129 : 5
129 : 10	134 : 5
134 : 13	135 : 1
143 : 15	144 : 8
144 : 24	145 : 17
146 : 1	146 : 23
149 : 8	149 : 21
149 : 24	151 : 21
151 : 25	153 : 10
153 : 16	154 : 5
154 : 11	154 : 23
157 : 22	158 : 21
159 : 1	160 : 6
161 : 1	161 : 4
161 : 16 beginning with "Have you..."	162 : 15
162 : 24	163 : 3
163 : 17	163 : 20
163 : 23	167 : 17
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38 : 17	38 : 22
39 : 10	39 : 10
39 : 12	39 : 18
39 : 21	39 : 21
43 : 2	43 : 5
43 : 24	44 : 4
44 : 7	44 : 19
44 : 22	44 : 23
44 : 25	45 : 3
45 : 7	45 : 8
45 : 11	45 : 16
45 : 19	45 : 20
45 : 22	46 : 9
47 : 9	47 : 11
47 : 15	48 : 1
48 : 22	50 : 9
50 : 18	50 : 20
50 : 23	50 : 23
52 : 5	52 : 7
52 : 14	53 : 1
53 : 6	55 : 4
55 : 7	55 : 8 ending with "no."
61 : 3	61 : 5
61 : 8	61 : 11
61 : 14	61 : 22
62 : 2	62 : 11
62 : 15	64 : 12
64 : 15	64 : 17
69 : 3	69 : 11
69 : 19	71 : 2
72 : 2	73 : 8
81 : 3	83 : 23
84 : 1	85 : 17
85 : 20	86 : 5
86 : 19	87 : 1
88 : 12	90 : 1
90 : 4	90 : 7
90 : 10	90 : 14
90 : 16	90 : 20
90 : 23	90 : 24

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95 : 14	95 : 23
96 : 6	96 : 8
96 : 11	96 : 23
97 : 1	97 : 7
97 : 10	97 : 11
98 : 14	98 : 16
98 : 19	98 : 24
99 : 3	100 : 25
101 : 5	101 : 18
101 : 20	102 : 21 ending with "these stores."
105 : 17	105 : 19
105 : 22	105 : 23
106 : 8	107 : 21
108 : 22	109 : 3
110 : 7	110 : 24
111 : 2	111 : 3
111 : 18	111 : 20
111 : 23	111 : 23
112 : 23	113 : 2 ending with "an instance."
113 : 4	113 : 14
120 : 22	121 : 6
121 : 9	122 : 11
124 : 4	125 : 17
125 : 20	126 : 21
134 : 12	134 : 24
146 : 10	146 : 22
146 : 25	147 : 5
147 : 8	147 : 24
148 : 3	148 : 6
167 : 9	167 : 25
168 : 3	168 : 10
169 : 25	170 : 6
170 : 7 beginning with "Is..."	170 : 8
170 : 11	170 : 21
171 : 2 beginning with "were you..."	171 : 24
173 : 7	173 : 25
174 : 3	174 : 17
174 : 24	175 : 20
176 : 4	177 : 4
177 : 6	177 : 22
179 : 6	180 : 3
180 : 6	180 : 20
180 : 23	180 : 24
182 : 6	183 : 3 ending with "racks."
185 : 18	186 : 2
186 : 6	186 : 20

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186 : 23	187 : 12
187 : 17	188 : 22
189 : 13	189 : 20
191 : 2	191 : 13
192 : 9	193 : 3
193 : 7	193 : 10
193 : 14	194 : 21
195 : 23	195 : 24
196 : 4	196 : 7
196 : 10	197 : 22
198 : 17	198 : 20
199 : 13	199 : 21
201 : 3	203 : 5
203 : 7	203 : 20
203 : 22 beginning with "In your..."	203 : 24
204 : 2	204 : 10
240 : 9	240 : 12
240 : 23	240 : 25
241 : 3	241 : 8
241 : 12	245 : 17
246 : 4	246 : 8
246 : 11	246 : 16
246 : 19	246 : 23
247 : 1	247 : 5
247 : 8	248 : 1
248 : 23	249 : 1
249 : 4	249 : 15
249 : 20	250 : 2
250 : 16	250 : 21
251 : 5 beginning with "We really..."	253 : 19
253 : 23 beginning with "I suggested..."	255 : 5
258 : 12	258 : 20
258 : 23	259 : 15
259 : 20	261 : 3
261 : 14	261 : 22

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6 : 8	6 : 9
16 : 7	18 : 15
18 : 25	19 : 2
47 : 4	47 : 21
47 : 25	48 : 3
58 : 15	59 : 7
59 : 12	60 : 5
60 : 10	60 : 19
67 : 16	67 : 24
68 : 19	68 : 24
72 : 15	72 : 18
72 : 25	73 : 6
73 : 17	75 : 14
75 : 24	77 : 13
78 : 12	78 : 17
78 : 20	79 : 9
80 : 5	80 : 14
81 : 15	81 : 25
82 : 9 beginning with "we had..."	85 : 4
85 : 9	85 : 13
85 : 17	85 : 19
86 : 9	86 : 12
86 : 23	87 : 6
87 : 12	88 : 6
89 : 5	89 : 20
90 : 6	90 : 9
90 : 14	90 : 14
92 : 22	92 : 24
98 : 22	99 : 5
99 : 11	100 : 19
100 : 22	101 : 17
101 : 20	101 : 24
129 : 13	131 : 3
133 : 6	133 : 9
133 : 18	133 : 20
133 : 22 beginning with "The question..."	134 : 2
135 : 24	136 : 1
136 : 21	138 : 3
139 : 6	139 : 17
140 : 2	140 : 4
141 : 16 beginning with "Did Mr...."	142 : 9
145 : 9 beginning with "Mr. Kerr-Harding..."	145 : 22

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145 : 24	146 : 2
147 : 2	147 : 6
147 : 9	148 : 4
148 : 24	148 : 25
149 : 4	149 : 12
149 : 18	150 : 2
150 : 10	150 : 17
151 : 5	151 : 11
151 : 13	151 : 19
151 : 24	152 : 3
152 : 8	153 : 5
154 : 10	155 : 4
159 : 3	159 : 6
162 : 20	162 : 23
163 : 12 beginning with "Is this..."	163 : 18
165 : 6	166 : 20
166 : 22	166 : 23
168 : 3	168 : 21
168 : 24	169 : 3
169 : 7	169 : 9
170 : 8	170 : 11
170 : 17	171 : 22
172 : 1	175 : 12
175 : 18	180 : 5
180 : 13	181 : 21 ending with "No."
181 : 23 beginning with "The last..."	182 : 8
182 : 17	182 : 19
183 : 2	183 : 14
183 : 21	187 : 14 ending with "correct."
188 : 9	189 : 15
189 : 17 beginning with "And that..."	191 : 8
191 : 12	191 : 23
192 : 6	193 : 8
193 : 14	195 : 11
207 : 17	207 : 23
207 : 25	211 : 11
212 : 19	212 : 23
215 : 9	215 : 13
218 : 10	218 : 12
218 : 20	219 : 3
220 : 20	221 : 24
222 : 18	222 : 20
223 : 2	227 : 5
227 : 7	227 : 22
233 : 10	233 : 12
233 : 17	234 : 12

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234 : 19	236 : 6
236 : 14	241 : 16
241 : 21	241 : 25
243 : 19	245 : 4
245 : 6	245 : 10

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7 : 5	7 : 6
17 : 21	18 : 4
18 : 12	19 : 2
19 : 14	21 : 17
22 : 8	23 : 4
48 : 2	48 : 3
48 : 5	48 : 14
48 : 16	48 : 25
49 : 8 beginning with "What product..."	49 : 15
49 : 17	50 : 1 ending with "Ice."
55 : 1 beginning with "Other than..."	55 : 22
56 : 1	57 : 10
57 : 20	57 : 24
58 : 11	58 : 22
59 : 9	60 : 1
60 : 4	60 : 5
60 : 12	61 : 3
61 : 13	61 : 19
61 : 21	62 : 16
62 : 22	64 : 4
64 : 6	64 : 9
70 : 21	71 : 15
73 : 24	73 : 25
74 : 3	74 : 14
74 : 23	75 : 3
75 : 8	75 : 25
76 : 13	77 : 2
77 : 5	77 : 9
80 : 12	80 : 17
80 : 25	81 : 2
81 : 4 beginning with "During the..."	81 : 18
81 : 23	82 : 22 ending with "did."
83 : 22 beginning with "And based..."	84 : 4
86 : 7	86 : 21
87 : 7	88 : 17
89 : 9 beginning with "Did you..."	90 : 18
92 : 1	92 : 5
93 : 5	93 : 19
94 : 2	94 : 5
94 : 16	94 : 19
94 : 23	94 : 25
95 : 2	95 : 6
95 : 21	97 : 1

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98 : 11	98 : 23
99 : 1	99 : 16
99 : 19	100 : 7
100 : 18	101 : 2
101 : 5	101 : 21
102 : 2	102 : 14
102 : 24	103 : 6
103 : 19 beginning with "Have you..."	103 : 21
104 : 2	104 : 6
106 : 21	106 : 23
107 : 2	107 : 10
107 : 19	107 : 20
107 : 22	107 : 23
108 : 12 beginning with "Other than..."	108 : 21
110 : 10	110 : 15
110 : 18	110 : 24
113 : 9	113 : 16
113 : 23 beginning with "Are there..."	114 : 2
115 : 7	115 : 10
115 : 14	116 : 3
116 : 24	117 : 4
117 : 12	117 : 12
117 : 18	117 : 20
117 : 23	119 : 12
119 : 15	120 : 2
120 : 11 beginning with "Do you..."	120 : 18
120 : 21	120 : 21
121 : 3	121 : 23
122 : 7	122 : 10
122 : 19	122 : 19
125 : 15	126 : 9
126 : 15	126 : 22
127 : 1	128 : 5
129 : 15	129 : 18
129 : 20	130 : 9
130 : 13	130 : 14
130 : 24	131 : 4
131 : 7	131 : 11
131 : 15	131 : 22
132 : 2 beginning with "I'm going..."	132 : 17
132 : 22	134 : 6
134 : 11	135 : 25
136 : 4	137 : 5
138 : 16	139 : 17
139 : 20	140 : 1

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141 : 14	141 : 16
141 : 21	142 : 23
143 : 9	144 : 10
144 : 15	144 : 17
144 : 20	145 : 19 ending with "do."
151 : 2	151 : 6
151 : 9	152 : 10
152 : 20	153 : 2
153 : 6	153 : 23
154 : 15	154 : 19
154 : 22	155 : 22
156 : 5	156 : 25
157 : 6	157 : 13
157 : 18	158 : 12 ending with "was."
175 : 18	175 : 20
176 : 5	176 : 10
176 : 16	176 : 17
176 : 19	177 : 1
181 : 20	181 : 25
182 : 3	182 : 5
182 : 6 beginning with "Is Mr...."	182 : 9
182 : 13	182 : 25 ending with "not."
183 : 2	183 : 7
183 : 11	184 : 9
184 : 13	191 : 4
191 : 8	192 : 6
192 : 18	193 : 21
194 : 10	194 : 19
195 : 1	195 : 18
195 : 20	196 : 23
197 : 3	197 : 4
197 : 9	198 : 7
198 : 11	201 : 7
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11 : 24 beginning with "Did you..."	12 : 4
12 : 10	12 : 12
12 : 17	13 : 10
14 : 11	14 : 13
14 : 25	15 : 13
15 : 16	15 : 17
17 : 18	18 : 6
18 : 12 beginning with "I'm trying..."	18 : 22
20 : 9	21 : 8
21 : 12	21 : 25
22 : 3	22 : 6
22 : 12	22 : 18
23 : 6	23 : 15
24 : 1	24 : 3
24 : 6	24 : 6
25 : 1	25 : 4
25 : 8	25 : 11
26 : 14	26 : 18
28 : 3	28 : 11
28 : 19	29 : 4
29 : 8	29 : 13
29 : 16	29 : 18
29 : 21	30 : 1
30 : 4	30 : 10
30 : 13	30 : 18
30 : 22	31 : 2
32 : 10	32 : 13
32 : 16	32 : 18
32 : 20 beginning with "Do you..."	32 : 25
33 : 1 beginning with "Who within..."	33 : 3
33 : 6	33 : 17
33 : 20	34 : 9
34 : 12	34 : 18
34 : 22	35 : 2
39 : 6 beginning with "What is..."	39 : 9
39 : 13	39 : 21
39 : 24	40 : 9
40 : 14	41 : 9

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44 : 4	44 : 22
45 : 1	45 : 3
45 : 9	45 : 10
45 : 13	45 : 24
47 : 9	47 : 11
47 : 15	47 : 16
48 : 4	48 : 6
49 : 5	49 : 10
49 : 15	49 : 20
49 : 23	49 : 24
50 : 2	50 : 9
50 : 12	50 : 17
53 : 13 beginning with "Since 1996..."	54 : 1
54 : 4	55 : 5
57 : 14 beginning with "Conwood as..."	57 : 16
57 : 20	58 : 10
58 : 16	58 : 20
58 : 23	59 : 11
61 : 24	62 : 17
62 : 21	62 : 24
63 : 2	63 : 11
63 : 14	63 : 17
64 : 5	64 : 13
64 : 17	64 : 24
65 : 11	65 : 16
65 : 21	66 : 2
66 : 7	66 : 9
67 : 3	67 : 7
67 : 14	67 : 15 ending with "true."
67 : 17	68 : 14
68 : 19	69 : 2
69 : 8	69 : 20
70 : 1	70 : 2
70 : 14 beginning with "Why do..."	70 : 24
70 : 25 beginning with "I don't..."	71 : 18
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90 : 3 beginning with "your district..."	90 : 6
90 : 10	90 : 10
92 : 6	92 : 13
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92 : 24	93 : 2
93 : 6	93 : 11
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94 : 17	94 : 21
95 : 7	95 : 12
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98 : 8 beginning with "If you..."	98 : 21
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100 : 12	100 : 23
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119 : 17 beginning with "Why did..."	119 : 18
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121 : 22 beginning with "In your..."	122 : 2
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122 : 19	122 : 20
122 : 25	123 : 2
123 : 6	123 : 17
123 : 21	123 : 25
124 : 4	124 : 4
124 : 15	124 : 18
124 : 25	125 : 1
125 : 4	125 : 9
125 : 13	126 : 1
126 : 12	127 : 2
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130 : 22	131 : 4
131 : 7	131 : 14
131 : 17	131 : 22
131 : 25	132 : 9
132 : 12	132 : 12
132 : 19	132 : 21
133 : 1	133 : 3
136 : 20	136 : 24
137 : 2	137 : 5
137 : 8	137 : 8
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139 : 24 beginning with "When you..."	140 : 2
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142 : 3	142 : 8
142 : 13	142 : 14
143 : 3	143 : 7
143 : 16	143 : 17
165 : 8	165 : 17
165 : 23	166 : 10
166 : 13	166 : 20
166 : 24	167 : 8
167 : 21	167 : 24
178 : 8	178 : 11
178 : 14	178 : 18
178 : 21	178 : 25
179 : 13	179 : 15
180 : 3 beginning with "Is this..."	180 : 4
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181 : 18	181 : 21
181 : 24	182 : 8
182 : 11	182 : 16
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183 : 6	183 : 8
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185 : 1	185 : 5
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186 : 1	186 : 7
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186 : 25	187 : 3
187 : 6	187 : 6
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194 : 21	195 : 6
195 : 10	195 : 18
214 : 11	214 : 15
214 : 18	214 : 20
214 : 23 beginning with "Do you..."	215 : 2
215 : 6	215 : 14
215 : 17	215 : 17
215 : 20	215 : 23 ending with "understanding..."
216 : 1	216 : 5
216 : 8	216 : 9 ending with "it."
217 : 21 beginning with "What did..."	217 : 24
218 : 7	218 : 19
218 : 21	218 : 23
219 : 1	219 : 1
220 : 2	220 : 4
220 : 13	220 : 13
222 : 9	222 : 13
222 : 16	222 : 17
223 : 3 beginning with "Somebody has..."	223 : 6
223 : 9	223 : 14
223 : 17	224 : 1
224 : 9	224 : 13
224 : 17	224 : 23
225 : 3	225 : 5
226 : 10	226 : 21
227 : 3	227 : 8
227 : 11	227 : 14
228 : 15	228 : 23
229 : 2	229 : 7
229 : 21	229 : 25
236 : 12	236 : 19
236 : 22	236 : 23
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252 : 5	252 : 17
253 : 2	253 : 4
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254 : 6	254 : 20
255 : 3	255 : 16
255 : 22	256 : 5
256 : 23	257 : 2
257 : 5	257 : 7
257 : 12	258 : 6
263 : 6	263 : 9
263 : 12	263 : 12
270 : 4	270 : 12
270 : 15	270 : 16
271 : 8	271 : 21
272 : 2 beginning with "What does..."	272 : 4
272 : 7	272 : 13
272 : 18	272 : 22
272 : 25	272 : 25
273 : 15	274 : 5
275 : 14	275 : 22
276 : 3	276 : 7
277 : 23	278 : 3
278 : 5	278 : 6
278 : 9	279 : 4
279 : 7	279 : 10
280 : 10 beginning with "For those..."	280 : 19
290 : 17	290 : 19
290 : 22	291 : 3
291 : 6	291 : 8
291 : 11	291 : 11
296 : 18	296 : 20
297 : 2	297 : 8
297 : 24	298 : 5
299 : 14	299 : 18
299 : 21	299 : 25
301 : 10	302 : 1
304 : 17	304 : 21
304 : 24	305 : 4
305 : 7	305 : 19
305 : 25	306 : 17
306 : 20	306 : 21
307 : 7	307 : 18
308 : 5	308 : 8
308 : 18	309 : 1

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310 : 8	310 : 12
312 : 19	312 : 22
313 : 1	313 : 7
313 : 10	313 : 11
315 : 13	315 : 16
315 : 19	316 : 5
316 : 11	316 : 14
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317 : 8	317 : 10
317 : 20	318 : 3
318 : 8	318 : 10
318 : 12 beginning with "Is Conwood..."	318 : 14
318 : 17	318 : 19
318 : 22	318 : 24
320 : 18	321 : 3
321 : 21	321 : 23
321 : 25	321 : 25
323 : 5	323 : 9
323 : 12	323 : 16
232 : 19	323 : 22
324 : 11	324 : 17
324 : 21	324 : 22
325 : 7	325 : 12
326 : 16	326 : 20
328 : 11	328 : 15
328 : 18	329 : 7
329 : 10	329 : 18
329 : 21	329 : 22
339 : 3 beginning with "Is it..."	339 : 9
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365 : 13	365 : 20
365 : 23	366 : 3
367 : 1	367 : 14
367 : 21	368 : 7
368 : 10	368 : 11
368 : 14 beginning with "Is it..."	368 : 23
369 : 1	370 : 2 ending with "all."
370 : 12	371 : 4
375 : 17	376 : 1
376 : 9	376 : 19
376 : 22	377 : 5
378 : 15	381 : 2
392 : 10	392 : 14
392 : 17	392 : 25
393 : 3	393 : 4
394 : 10	394 : 14
394 : 17	394 : 18
398 : 20	399 : 15
399 : 18	400 : 5
400 : 8	400 : 16
400 : 19	400 : 25
402 : 9	402 : 13
402 : 16	403 : 8
403 : 11	403 : 18
404 : 10	404 : 14
404 : 17	404 : 22
404 : 25	405 : 5
406 : 14	407 : 5
407 : 12	407 : 20
407 : 23	408 : 12
408 : 15	408 : 17
411 : 24	412 : 9
412 : 12	412 : 14
412 : 17	412 : 19
414 : 16	414 : 22
414 : 25	415 : 1
415 : 15 beginning with "When you..."	416 : 4
416 : 7	416 : 14
418 : 18	419 : 1
427 : 4	427 : 9

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429 : 17	429 : 22
430 : 1	430 : 6
431 : 8	431 : 10
431 : 13	431 : 17
431 : 20	431 : 22
432 : 2	432 : 3
432 : 15	432 : 16
432 : 19	432 : 20
433 : 6	433 : 12
433 : 16	433 : 18
434 : 9 beginning with "Do you..."	434 : 12
434 : 15 beginning with "I'm sure..."	434 : 17
434 : 19	434 : 22
435 : 2	435 : 2
436 : 17	436 : 25
437 : 4	437 : 9
437 : 14	437 : 19
437 : 24	438 : 14
438 : 17	438 : 18
438 : 22	438 : 25
439 : 3	439 : 6
441 : 3	441 : 5
441 : 8	441 : 21
442 : 5	442 : 20
442 : 23	442 : 23
455 : 8	455 : 10
456 : 12	456 : 13
456 : 17	457 : 3
457 : 14	457 : 15
457 : 17	457 : 18
458 : 1	458 : 6
458 : 20 beginning with "Let me..."	459 : 2
459 : 23	460 : 21
460 : 24	461 : 6
461 : 19	464 : 8
465 : 9	465 : 12
465 : 15	466 : 6
466 : 16	466 : 19
466 : 22	467 : 4
467 : 7	467 : 12
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468 : 16 beginning with "Do retailers..."	468 : 19
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486 : 1	486 : 2
486 : 4	486 : 7
486 : 10	486 : 10
486 : 12	486 : 16
486 : 19	486 : 20
488 : 10	488 : 15
488 : 18	488 : 24
489 : 2	489 : 5
490 : 9	490 : 13
490 : 16	491 : 1
491 : 6	491 : 8
491 : 11	491 : 11
491 : 24	492 : 3
492 : 6	494 : 16
494 : 19	495 : 13
496 : 9	496 : 19
496 : 22	497 : 5
497 : 15	498 : 5
498 : 14	499 : 24
500 : 6	501 : 9
501 : 17	502 : 19
502 : 22	502 : 23
503 : 12	504 : 11
504 : 14	504 : 20
504 : 23	504 : 25
505 : 2	505 : 12
506 : 13	506 : 19
506 : 22	506 : 23
506 : 25	507 : 5
507 : 8	507 : 10
507 : 16	507 : 23
508 : 2	508 : 21
508 : 24	508 : 24
509 : 1	509 : 1
509 : 4	509 : 6
509 : 10	509 : 14
509 : 17	510 : 5
510 : 8	510 : 18
510 : 21	510 : 25
511 : 3	511 : 5
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521 : 23	522 : 3
522 : 10	522 : 18
522 : 21	522 : 22
523 : 12	523 : 14
523 : 17	523 : 17
525 : 10	526 : 18
527 : 21	528 : 11
530 : 21	530 : 22
530 : 25	530 : 25
531 : 2	531 : 3
531 : 6	531 : 6
536 : 12	537 : 20
538 : 5	539 : 9
539 : 12	539 : 13
539 : 15	540 : 18
540 : 21	540 : 22
548 : 16	548 : 22
548 : 25	549 : 1
550 : 14	551 : 2
551 : 20	551 : 22
551 : 25	552 : 10
552 : 13	553 : 11
553 : 14	553 : 14
553 : 16	553 : 17
553 : 22	554 : 3
554 : 6	554 : 8
556 : 2	556 : 12
556 : 15	556 : 18
568 : 1	568 : 6
568 : 22	569 : 14
571 : 6	571 : 7
571 : 10	571 : 19
571 : 23	572 : 3
573 : 8	573 : 17
573 : 20	573 : 22
574 : 14	575 : 20 ending with "Tobacco..."
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579 : 19	579 : 19
580 : 1	580 : 3
580 : 6	580 : 7
580 : 14	580 : 20
581 : 5	581 : 7
581 : 10	581 : 11
584 : 14	584 : 22
584 : 25	585 : 1
585 : 9	586 : 18
586 : 21	586 : 23
587 : 10	587 : 18
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604 : 2	604 : 23
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WITNESS: ROBERT J. CHIARADIO

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18:4 beginning with "And when.."	19:9
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43:11	44:6
44:23	45:22
51:21	51:23
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53:18 beginning with "was there.."	53:25
54:8	54:18
56:11 beginning with "And other...."	56:23
57:25	59:6
59:13	59:16
63:1	63:17
64:10	65:5
71:20	71:24
72:1	72:4
74:2	75:1
76:8	76:16
76:25	77:1
77:10	77:10
77:20	77:22
78:1	78:9
78:13	78:20
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93:19	94:4
95:10	95:12
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123:25 beginning with "Does serving.."	124:2
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129:18 beginning with "How many.."	129:19
129:21	129:23
130:10	130:13
131:24	132:1
132:19	132:22
133:24	134:1
134:9	134:12
144:17	144:20
145:5	145:14
146:1	146:3
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147:9	147:13
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148:4	148:8
149:9	149:11
149:23	150:8
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151:21	151:23
152:7	152:11
153:10	153:12
153:21	154:3
158:13	158:22
160:15	160:19
161:1	161:8
162:1	162:14
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236:5 beginning with "And isn't.."	236:13
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WITNESS: ROBERT J. CHIARADIO
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423:1	423:2
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WITNESS: RICHARD CUTLER
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46:1	46:17
49:16	49:25
52:9	53:9
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64:2	64:2
65:11	65:15
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WITNESS: ROB ENGSTER
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38:16	39:5
39:10	40:4
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41:15	41:18
41:21	42:6
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45:11	46:14
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49:10	49:17
50:10	50:17
55:14	55:23
67:10	68:11
68:13	68:14
68:24	69:11
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82:1	83:1
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61:24	62:24
63:7	63:7
64:16	66:19
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WITNESS: DOUG FAAS
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93:12	94:7
95:14	95:22
99:1	99:13
99:25	100:3
101:8	101:14
106:11	106:19
106:25	107:3
108:16	109:12
109:19	110:12
111:19	111:21
111:25	113:9
113:12	114:10
114:21	116:1
116:12	118:17

16diii002781

From *Page: Line*	Through *Page: Line*
135:1	137:9
137:12	138:9
138:19	139:24
141:19	142:13
142:15	143:7
143:10	143:21
144:15	145:14
145:18	145:21
145:24	146:6
147:4	147:8
152:18	152:19
152:22	153:3
153:10	154:13
157:10	157:11
157:14	157:17
159:22	160:4
160:12	160:18
161:5	161:17
162:23	163:17
169:6	169:7
169:14	170:14
172:3	172:8
172:11	172:21
172:24	173:20
173:23	174:5
175:21	175:24
176:2	176:16
176:19	177:5
177:8	177:19
177:22	178:22
179:1	179:4
179:19	181:8
181:13	182:6
182:9	183:4
183:14	183:15
183:18	184:3
184:6	184:12
184:19	184:22
184:25	185:8
185:20	185:23
185:25	186:10
187:8	187:24

16diii002782

From *Page: Line*	**Through** *Page: Line*
188:8	188:11
188:13	188:14
189:2 beginning with "in those stores.."	189:12
190:10 beginning with "what justification.."	190:21
191:18	192:19
192:23	193:1
201:10	201:14
201:17	203:12
216:4	216:8
253:24	256:21

16diii002783

WITNESS: RICHARD FASANELLI

7/29/99

From *Page: Line*	**Through** *Page: Line*
6:23	7:2
8:22	9:11
9:16	12:4
12:9	14:21
14:25	15:18
16:3	17:4
17:12	18:19
19:2	22:1
22:4	22:17
23:16	24:14
25:18	26:14
26:22	27:7
27:11	28:2
29:12	29:22
30:3	30:11
30:24	31:8
31:19	32:25
33:13	33:20
34:10	34:22
35:14	35:16
36:2	36:17
37:11	37:13
38:7	38:9
39:16	39:21
48:25	49:5
49:22	50:8
50:12	50:17
52:11	52:13
52:19	53:6
53:11	53:18
55:7	55:16
56:3	56:16
57:1	57:12
64:13	64:24
65:22	65:24
66:5	66:12
69:2	69:6
69:10	69:12
70:10	72:1
76:25	77:23

16diii002784

From *Page: Line*	**Through** *Page: Line*
99:6	100:17
103:4	104:8
104:16	104:25
105:23	106:8
106:12	107:1
115:4	116:13
118:10	118:17
148:22	149:12
165:12	165:25
196:7	196:11
196:17	197:17
197:21	198:18

16diii002785

WITNESS: ROBERT FASANELLI

7/30/99

From *Page: Line*	**Through** *Page: Line*
206:13	206:14
234:11	235:14
237:15	237:20
240:12	240:23
278:25	279:13
280:9	280:15
281:1	282:13
283:11	285:16
289:14	289:19
289:24	290:6
293:9 beginning with "have you ever.."	293:12
295:21	296:1
296:5	296:20
297:4	298:14
303:3	303:10
303:15	303:22
303:24	304:1
304:6	304:22
304:25	305:11
305:25	306:5
320:25	321:3
321:8	321:11
321:17	322:3
322:18	322:21
323:1	323:15
335:19 beginning with "do you think.."	336:10
344:17	344:19
344:24	345:2

16diii002786

WITNESS: BOB FITZMAURICE
8/31/99

From *Page: Line*	**Through** *Page: Line*
6:14	6:16
8:20	10:14
10:16	10:18
10:21	11:11
11:12 beginning with " -when you.."	11:18
12:1 beginning with "when you say.."	12:11
23:13	24:2
24:15	25:16
29:15	31:7
40:10	40:22
43:23	43:25
44:4	44:9
236:8	236:15

16diii002787

WITNESS: LONNIE FUNK
4/8/99

From *Page: Line*	**Through** *Page: Line*
9:5	9:9
9:19	10:4
11:7	12:1
12:11	12:15
12:21	13:2
13:5	13:21
15:2	15:3
15:10	15:21
16:25	17:1
47:5	47:16
47:22	49:14
56:8	56:10
56:14	56:20
84:2	84:5
84:7	84:9
88:12	88:17
119:22	120:9
120:19	120:21
120:23	120:25
121:24	122:12
123:9	123:13
123:22	124:7
124:9	124:9
124:17	124:19
124:23	125:2
125:9	125:22
126:8	126:22
128:3	128:15
129:3	129:8
129:12	129:15
129:17	129:19
129:21	129:21
130:21 beginning with "Mr. Funk.."	131:7
137:5	137:6
137:9	138:3
144:17	145:12
210:3	210:5
211:2	212:6
212:10	212:13
214:12	214:15

16diii002788

WITNESS: VINCENT GIERER
8/26/99

From *Page: Line*	**Through** *Page: Line*
6:7	6:9
6:13	6:14
6:18	8:3
8:15	9:12
9:16	9:18
9:23	10:9
17:15	17:17
17:23	18:10
18:18	18:21
36:5	36:6
36:10	36:20
38:20	39:8
39:18	39:21
40:2	40:8
40:11	40:15
45:21	45:25
46:5	46:19
47:3	48:12
49:4	49:13
52:9	52:11
52:16	52:24
62:6	62:15
66:11	66:20
67:1	67:13
113:24	117:11
117:15	118:4
138:5	138:9
138:16	139:5
156:9	156:23
157:4	157:11
157:14	157:15
158:21	159:2
193:8	193:23
213:14	214:4

WITNESS: GAYLEEN F. RUSK
5/17/99

From *Page: Line*	**Through** *Page: Line*
4:9	4:13
4:24	6:11
36:20	37:9
37:12	37:18
37:23	37:24
38:2	38:8
38:13	38:15
38:18	39:20
40:11	41:12
41:14	42:7
42:16	43:14
43:17	44:15
44:17	45:23
45:25	46:13
47:16	48:1
48:3	48:5
48:7	48:13
48:15	49:24
50:3	51:4
52:19	53:22
56:5	56:8
76:22	77:8
77:16	77:20
77:22	77:22
78:3	78:13
78:16	78:19
78:21	79:1
79:17	79:19
79:22	79:24
80:7	80:12
81:5	81:8
81:14	81:18
81:25	81:25
86:20	86:24
87:2	87:9
87:17	88:2

16diii002790

WITNESS: DONALD D. SEGELSTROM
8/18/99

From *Page: Line*	**Through** *Page: Line*
6:18	6:24
7:8	7:17
8:12	8:15
10:1	10:4
22:12	22:15
22:18	22:18
22:23	23:1
23:3	23:3
23:24	24:1
24:3	24:9
24:11	24:14
24:22	25:1
25:3	25:10
25:13	25:13
25:20	25:22
25:25	26:6
26:8	26:16
26:25	27:3
27:6	27:6
27:9	28:13
28:25	29:8
29:15	30:12
30:25	31:13
32:2	32:7
32:10	32:14
32:17	33:2
33:6	33:12
33:15	33:19
33:22	33:23
35:15	35:22
37:3	37:13
39:8	39:10
39:12	39:12
39:17	39:19
39:22	39:25
40:6	40:9
40:16	40:19
40:22	41:2
41:4	41:5

WITNESS: MIKE SLABBEKOORN
6/22/99

From *Page: Line*	**Through** *Page: Line*
7:16	7:17
8:21	8:24
11:9	11:22
12:1	12:9
14:17	14:18
15:20	16:11
16:17	17:3
17:10	18:1
18:16	19:2
19:6	20:7
20:12 beginning with "Did your..."	21:2
21:6	21:7
22:14	22:18
22:23	23:9
32:19	32:23
33:1	34:20
34:25	35:6
35:10	36:10
36:16	36:18
38:15	38:20
39:14	39:18
51:3	51:24
56:6	57:23
58:10	59:4
62:5	62:8
62:12	62:24
63:7 beginning with "But do.."	64:14
74:7	75:10
76:22	76:23
76:25	77:2
84:7	85:23
86:25	88:16
89:11	90:14
93:13	93:22
94:6	94:9
96:4	96:8
98:12	98:22
99:15 beginning with "do you..."	100:4
100:11	101:17
102:4	102:18

16diii002792

From *Page: Line*	Through *Page: Line*
103:6	103:11
104:3	104:11
104:23	105:13
105:22	106:2
106:21	107:6
107:12	108:5
108:11	108:15
108:21	109:17
109:21	109:23
110:3	110:14
110:18	111:3
111:25	115:11
115:18	116:13
116:22	117:2
117:5	117:13
120:14	120:23
125:25	126:15
132:3 beginning with "I want.."	133:16
134:2	134:4
134:6	134:13
135:12	135:14
138:14	138:18
139:4	139:8
139:10	139:15
139:18	140:10
141:4	141:15
143:14	143:19
143:23	144:1
146:11	146:24
147:6	147:11
148:23	150:8
152:18	153:24
154:10	156:10
156:21	158:14
163:2	164:2
164:4	164:11
164:14	164:25
166:1	166:24
167:2	168:5
168:8	168:11
171:13	171:16
171:18	171:21

From *Page: Line*	Through *Page: Line*
179:17	180:4
180:7	182:8
183:2	183:17
184:9	184:12
185:11	186:25
187:8	187:11
188:18	189:8
195:15	195:17
195:20	195:20
197:9	197:12
197:15	198:6
203:15	203:20
203:23	204:13
213:9	213:23
214:19	216:13
216:18	217:6
218:2	219:15
220:14	221:22
223:4	223:17
224:1	225:3
225:8	225:21
226:5	226:20
227:12	228:16
228:21	228:23
228:25	229:23
231:2	232:13
232:16	232:22
233:14	233:16
233:19	234:4
242:1	242:19
244:4	244:20
247:12	247:18
253:2	253:17
254:1	254:15
256:3	256:10
257:10	258:15

WITNESS: GARY SMITH
8/19/99

From *Page: Line*	**Through** *Page: Line*
6:13	6:14
6:24	7:3
7:17	8:3
8:17	9:2
9:16	9:22
18:10	18:20
18:25	19:2
27:8	27:12
31:23	32:1
34:7	34:20
38:22	39:1
39:4	39:5
40:7 beginning with "did you..."	40:13
42:24	43:10
44:11	44:13
44:20	44:23
48:12	48:19
48:24	49:4
60:1	60:5
62:9	62:12
62:15	62:22
130:23	131:1
131:12	131:18
131:23	132:1
134:16	135:19
167:19	167:22
185:10	185:17
216:6	216:10
218:1	218:14
218:18	219:2
222:3	222:20
223:24	224:12
224:16	225:7
230:2	230:2
230:4	230:11
231:25	232:23
233:1	233:9
240:25	241:23
246:15	247:8

16diii002795

WITNESS: GARY SMITH
8/20/99

From *Page: Line*	**Through** *Page: Line*
259:16	259:16
298:4	298:10
298:24	299:14
320:5	320:22
322:23	323:9
324:1	325:4

16diii002796

WITNESS: GARY MILANO
8/31/99

From *Page: Line*	**Through** *Page: Line*
6:5	6:17
6:24	7:16
7:23	8:10
9:15	10:4
10:7	10:11
11:6 beginning with "in general.."	11:22
12:1	12:2
12:16	12:17
93:13	94:8
94:12	94:14
94:17	95:19
95:22	96:12
109:25	110:5
112:8	112:13
114:20	116:4
152:4	152:6
152:8	152:17
157:1	157:5
157:14	158:5
158:14	159:16
159:18	160:3
169:19 beginning with "Why did .."	169:24
208:17	208:19
208:21	209:1
209:6	209:16
215:1	216:11
216:14	217:4
218:10	219:2
219:4	219:7

WITNESS: DONALD R. NABI
8/5/99

From *Page: Line*	**Through** *Page: Line*
6:10	6:10 ending with " Mr. Nabi..."
7:25	10:9
10:19	12:4
12:6	13:15
14:2	14:25
16:8	17:8
17:20	18:2
19:8	19:16
19:18	20:1
29:19	29:23
30:5	30:6 ending with "A&P."
30:24	32:10
44:16	46:1
46:11	46:17
46:24	47:11
50:10	50:17
52:8	52:11
52:15	53:9
54:6	55:2
60:17 beginning with "And you..."	61:7
65:15	65:18
66:3	66:7
66:12	67:8
69:16	70:3
70:13	72:3
73:5	75:7
75:14	75:15
76:5	77:8
77:24	77:25
78:4	78:5
78:23	81:3
81:8	82:9
84:24	85:4
85:23	86:15
86:21	87:11
87:19	88:11
90:5	91:3
91:9	91:19
93:16	95:2
95:15	98:1

16diii002798

From *Page: Line*	**Through** *Page: Line*
98:18	99:6
99:16	100:5
101:3 beginning with "since approximately..	102:2
102:6	103:12
103:20	104:23
113:12	114:12
115:2	115:24
116:15	116:20
117:12	118:18
121:4	121:18
128:10	130:1
131:24	133:7
135:5	135:24
136:8	136:19
136:24	138:7
138:11	139:9
140:11	141:9
142:4	143:3
143:17	143:21
144:6	145:10
148:1	148:14
149:17	149:24
150:15	150:23
151:5	151:16
162:2	162:14
162:19	162:20
163:8	163:11
163:17	164:6

WITNESS: JOHN NAIFEH

9/3/99

From *Page: Line*	**Through** *Page: Line*
6:10	6:25
8:5 beginning with "Let me..."	8:21
8:24	9:22
10:1	10:6
10:16	11:20
12:5	14:5
15:9	15:17
16:1	16:8
16:15	17:2
17:5	19:20
20:21	22:1
22:9	22:19
23:1	23:10
25:11 beginning with "When we.."	25:24
29:7	30:6
57:1	59:10
59:21	60:2
60:7	60:20
61:9	62:23
63:4	63:7
63:13	63:23
64:1	64:4
64:7	64:11
64:14	64:24
65:2	65:11
65:14	65:18
65:21	65:25
66:1	67:21
68:4	68:13
97:22	98:7

WITNESS: BYRON T. PARISH
3/26/99

From *Page: Line*	**Through** *Page: Line*
7:21	8:3
10:3	11:24
12:10	12:16
12:18	13:6
17:6	17:18
18:18	18:21
20:16	21:22
22:1	22:3
38:23	39:4
41:10	41:24
53:11	53:16
56:1	56:5
60:11	61:3
77:11	78:1
78:10	78:21
83:23	84:13
137:19	137:23
138:7	138:12
139:12	139:22
143:7	143:13
144:8	144:11
144:14	144:24
180:10	181:13
186:10	187:16
195:13	195:23
195:25	196:24
197:2	198:14
203:25	204:19
204:23	205:3
205:7	205:14
205:21 beginning with "following your.."	206:7
208:13	208:24

WITNESS: RONALD PIATEK
7/17/99

From *Page: Line*	**Through** *Page: Line*
7:1	7:10
8:18	8:20
9:2	9:20
10:24	11:13
15:3	16:4
16:12	16:12
16:14	16:17
25:20	26:5
49:20	50:10
50:12	50:12
50:14	52:8
52:10	52:17
79:4	79:9
80:3	80:6
80:8	80:8

WITNESS: WAYNELL RENFRO
9/28/99

From *Page: Line*	**Through** *Page: Line*
4:16	4:20
6:14	15:20
17:23	18:13
24:10	24:14
36:9	36:14
37:12 beginning with "You...."	38:25
39:3	39:9
40:3	40:8
40:15	41:24
42:5	42:14
43:13	43:23
49:7	50:12
50:21 beginning with "Was that.."	51:9
53:4	53:8
53:14	54:7
54:13	54:16
54:22	55:13
57:7	57:9
58:22	59:14
60:10	60:13
60:23	61:8
62:11	64:5
64:14	67:11
68:24	69:23
73:3	75:11

WITNESS: MAUDIE RUSHING
6/14/99

From *Page: Line*	**Through** *Page: Line*
4:11	4:14
5:10	6:8
6:10	6:10
7:15	9:6
48:21	48:24
49:5	49:22
50:11	51:25
52:12	52:17
52:23	53:3
53:18	54:10
55:7	58:16
60:12 beginning with "When a..."	60:17
63:18	65:7
75:12	75:22
78:15	79:19
83:2	83:24
86:18	88:3
88:6	88:6
94:12	95:1

16diii002804

WITNESS: ARLIE ANUNDSON

4/7/99

From *Page: Line*	**Through** *Page: Line*
7:14	7:14 ending with "Anundson."
10:2	13:18
17:3	17:7
17:25	18:12
19:4	19:24
20:19	20:23
46:16	47:4
48:9	49:10
49:22	50:3
53:2	53:7
54:16	54:19
57:18	58:7
58:10	58:14
60:19	62:11
64:12	64:24
65:1	65:18
67:4	67:25
68:23	69:11
73:4	73:5
73:8	73:9
76:4	76:6
76:10	76:10
77:3	77:3
77:6	77:9
77:12	77:12
86:6	86:12
86:15	87:12
87:14	88:4
88:19	89:1
90:21	91:13
92:11	93:12
95:7	95:12
95:15	95:19
95:22	96:14
100:9	101:4
102:25	103:10
110:2	110:12
130:16	131:6
132:9	132:16
134:25	135:6

From *Page: Line*	Through *Page: Line*
144:1	144:5
144:8	144:12
171:11	172:2
172:20	173:5
177:2	177:6
178:15	178:22
181:7	181:13
182:8	182:19
183:17	184:3
185:7	185:23
186:5	186:15
188:16	188:18
188:20	189:1
189:15	190:1
190:6	190:17
191:9	192:25
193:18	194:8
194:10	194:22
199:10	199:24
200:9	200:11
220:12	221:4
221:8	223:2
223:5	223:5

WITNESS: ROBERT JAMES BALES

4/12/99

From *Page: Line*	**Through** *Page: Line*
4:17 beginning with "could you..."	5:1
6:5	10:21
22:16	23:8
26:20	28:6
32:2 beginning with "lets.."	33:6
33:9	33:17
33:22	34:20
38:18	38:24
39:2	40:9
41:2 beginning with "let's look.."	41:23
43:12	44:5
48:14 beginning with "if Mr.."	48:18
49:11	50:12
61:15	63:13
63:15	63:20
64:3	64:23
67:11	68:13
68:16	68:22
69:24	70:2
70:4	70:4
70:14 beginning with "during the.."	71:7
75:16	77:13

16diii002807

WITNESS: CAROLYN V. BALLARD
5/28/99

From *Page: Line*	**Through** *Page: Line*
4:8	5:19
6:12	7:4
9:8	9:13
9:20	10:10
10:18	10:22
25:11	25:20
26:22	28:7
29:3	29:13 ending at "in"
29:22	30:5
30:7	30:19
30:24	32:10
32:12	32:12
36:3	36:5
36:8	36:8
36:10	36:11
36:14	36:14
36:16	36:17
36:19	36:19
36:21	37:9
37:12	37:18
37:20	37:20

WITNESS: THOMAS BERKEBILE

6/17/99

From *Page: Line*	**Through** *Page: Line*
7:13	7:18
12:17	17:25
19:19	20:13
22:21	23:7
23:15	24:19
25:22	26:2
26:5	26:25
27:11	27:23
28:1	28:20
29:24	30:12
31:23	32:2
32:5	32:24
33:9	33:12
34:20	34:23
35:2	35:23
36:2	36:6
42:6	44:12
45:2	45:10
45:20	45:25
46:9	47:7
47:17	48:5
49:9	49:20
50:8	50:17
51:6	51:22
53:8 beginning with "have you.."	53:17
53:24 beginning with "have there..."	54:14
54:19	55:1
57:4	57:24
65:20	66:4
74:17	74:19
75:25	76:4
76:22	77:4
77:23	78:7
82:8	82:14
82:24	83:2
84:15	85:2
89:9	89:12
89:18	89:22
91:8	91:13
96:25	97:9

From *Page: Line*	**Through** *Page: Line*
97:16	97:22
98:10	98:16
98:21	98:23
99:2	99:4
103:6	103:7
106:6	106:8
109:22	110:5
111:2	111:18
112:9	113:2
122:24	125:17
125:23	126:5
126:17	126:22
127:6	129:5
129:25	130:13
135:1	135:12
136:22	137:1
140:21	141:2
165:25	166:9
166:25	167:11
180: 5 beginning with "did U.S..."	180:19
187:25	188:8
188:13	188:16
196:22	196:25
197:9	198:14
204:9	204:20
206:16	207:1
207:6	207:15
209:2	209:11
210:14	211:2
268:6	268:10
268:24	269:14
282:20	284:18
287:21	287:24
288:12	288:24

WITNESS: ANDY L. CARTER
3/1/99

From *Page: Line*	**Through** *Page: Line*
5:15	5:17
6:22	9:23
10:5	10:19
11:14	11:24
15:4	16:2
25:20	26:17
27:2	27:11
27:17	27:22
33:21	34:23
54:2	54:10
55:9	55:11
64:21	65:1
65:21	66:19
70:10	71:4
71:19	71:22
72:5	72:16
73:8	73:12
79:17	80:12
82:7	83:4
83:17	84:5
84:7	84:10
84:15	85:2
96:3	97:18
101:10	101:22
102:2	102:6
116:22 beginning with "But I'd.."	117:6
142:2 beginning with "Are you.."	142:16
142:23	143:15
143:19	145:22
146:1	146:13
146:19	148:12
149:5	149:7
149:13	149:19
150:5	151:19
152:3	153:7
154:1	154:4
156:1	156:11
156:22	158:15
166:2	166:6
166:9	167:9

From *Page: Line*	Through *Page: Line*
167:14	167:24

WITNESS: DAVID R. LUND
3/31/99

From *Page: Line*	**Through** *Page: Line*
7:14	7:15
7:20	7:24
9:15	9:21
10:4	10:14
10:18	10:18
26:14	26:19
26:23	27:4
27:14	27:22
30:16	30:21
83:22	83:24
84:2	84:2
84:9	84:11
84:13	84:16
84:22	84:25
85:19	85:22
86:5	86:7
86:10	86:14
86:17	86:19
86:22	86:22
87:7	87:9
87:12	87:12
87:16	87:17
87:20	87:22
87:25	87:25
145:9	145:12
145:18	146:2
146:8	146:12
146:15	146:18
146:21	146:25
147:4	147:10
238:19	240:11
245:14	245:17
245:22	248:3
253:3	253:4
253:11	253:14
253:16	254:11

16diii002813

WITNESS: LEROY KEIL
6/5/99

From *Page: Line*	**Through** *Page: Line*
7:14	8:14
8:24	9:4
17:21	17:24
33:1	33:14
60:20	62:1
64:14	66:12
66:15	66:17

WITNESS: THOMAS H. LATTA

6/3/99

From *Page: Line*	**Through** *Page: Line*
6:2	6:7
7:8	8:10
8:23	9:10
9:16 beginning with "You also.."	9:22
11:5	11:25
100:23	101:18
101:22	102:17
102:22	103:9

16diii002815

WITNESS: HARVEY JAFFER
8/13/99

From *Page: Line*	**Through** *Page: Line*
6:11	6:12
7:23	10:12
10:15	11:17
12:14	12:25
13:12	13:15
13:22	13:22
17:20	18:2
26:7	26:15
26:20	26:22
27:3	27:6
28:5	28:24
48:8	48:10
48:12	48:15
48:19	49:14
49:20	49:25
50:10	50:21
51:17	52:1
53:24	54:3
59:11	59:19
59:23	59:24
60:8	60:10
64:24	65:11
67:21	68:11
70:11	70:23
72:9	72:18
73:7	73:23
74:4	74:7
74:18	75:8
76:15	76:19
79:2	79:14

16diii002816

WITNESS: ALBERT IANNUZZI
6/29/99

From *Page: Line*	**Through** *Page: Line*
7:18	7:19
9:5	11:19
11:24	12:16
13:3	13:13
14:10	15:7
15:17	17:2 ending with "do not."
27:18	28:6
30:9	30:13
36:23	37:17
47:15	48:12
52:12	52:20
52:22	53:14
74:4	74:5
74:7	74:12
74:14	75:21
75:23	76:8
76:10	76:21
80:13	81:4
90:20	91:4
92:10	93:2
95:12	96:3 ending with "from me."
96:18	97:2

WITNESS: HOWARD HEYLMUN
6/16/99

From *Page: Line*	**Through** *Page: Line*
6:5	6:5 ending with "Mr. Heylmun."
7:12 beginning with "Can you.."	7:24
11:24	12:16
12:23	13:13
17:16	17:20
17:22	17:22
23:2	23:2
23:5	23:15
23:23	24:5
24:15	24:20
30:20	30:23
31:1	31:19
31:22	32:17
37:20	40:3
41:2	41:12
41:17	41:18
41:20	41:23
42:4	42:23
80:16	80:18
81:2	81:4
83:6	83:8
88:7	88:15
89:9	90:12
111:1	111:12
111:15	111:18
113:6	113:6
113:8	113:18
113:21	114:5
114:17	115:3
115:10	115:12
115:14	115:20
117:14	117:21
133:25	134:2
134:5	134:9
134:11	134:18
134:22	135:6
135:8	135:12
135:14	135:17
135:21	135:24
137:2	137:4

16diii002818

From *Page: Line*	Through *Page: Line*
137:6	137:18
154:20	154:24
155:10	155:21
184:8	185:17
185:19	186:23

16diii002819

WITNESS: HOWARD HEYLMUN

8/10/99

From *Page: Line*	**Through** *Page: Line*
287:14	288:14
292:6	292:22
294:4	295:5
296:5	296:19
297:1	297:13
331:24	332:2
332:7 beginning with "U.S."	332:21

16diii002820

WITNESS: ALAN HART
8/30/99

From *Page: Line*	**Through** *Page: Line*
5:23	5:24
7:18	8:4
8:11	9:4
41:19 beginning with "What does.."	43:2
43:19	45:2
45:8	46:3
46:6	46:16
47:1	47:14
47:21	48:10
48:13	48:13
69:20	70:3

16diii002821

WITNESS: GEORGIA GILL-ELKINS

6/25/99

From *Page: Line*	**Through** *Page: Line*
6:2	6:7
7:10	7:14
7:24	9:7
9:12	9:19
9:23	9:25
11:12	11:14
11:18	13:12
13:15	13:15
13:20	13:24
37:20	38:2
38:5	38:6
52:13	52:23
56:16	57:2
57:7	57:12
58:17	59:11
63:18	64:2
84:11	85:15
85:17	85:17
86:3	87:8
89:24	90:7

16diii002822

WITNESS: JOSEPH MARCONI
8/17/99

From *Page: Line*	**Through** *Page: Line*
6:19	6:19 ending w/"Mr. Marconi."
7:21	9:19
14:20	15:5
16:1	16:20
48:11	48:14
48:19	48:21

16diii002823

WITNESS: JAMES MCCARTHY
3/23/99

From *Page: Line*	**Through** *Page: Line*
7:18	7:21
10:5	11:1
11:9	12:8
14:9	14:25
15:3	17:2
20:7	20:22
37:15	37:19
39:20	40:5
62:15	62:24
68:7	70:15
70:20	71:12
77:9	77:17
77:22	79:9
85:2	86:22
88:25	89:8
89:16	89:22
89:25	90:24
91:21	91:24
92:2	92:8
92:16	93:13
94:8	94:12
95:7	95:25
101:11	101:16
101:20	101:24
102:11	103:1
119:24	120:7
120:17	120:24
121:3	121:17
123:14	123:20
136:2	136:12
138:13	138:22
139:15	139:17
139:19	139:25
176:13	176:16
176:19	177:24
178:15	180:2
180:4	180:4
181:8	181:9
181:15	181:24
182:21	183:1

16diii002824

From *Page: Line*	Through *Page: Line*
183:9	184:16
204:21	206:19
207:21	208:3
208:6	209:24

16diii002825

WITNESS: MICHAEL BEYERLEIN

3/25/99

From *Page: Line*	**Through** *Page: Line*
7:24	8:2
10:16	11:10
11:17	12:6
13:18	13:24
18:20	18:22
19:2	19:21
24:11	25:5
25:14	25:21
31:23	32:20
33:11	33:19
33:24	34:14
48:9	48:10
48:12	49:3
49:5	50:4
50:8	50:16
50:21	50:23
51:8	51:19
54:20	54:25
56:13	56:14
56:16	57:13
66:2	67:3
67:8	67:16
67:19	67:21
67:23	68:5
84:6	85:19

WITNESS: DONALD W. BLACKBURN
7/8/99

From *Page: Line*	**Through** *Page: Line*
6:7	6:7
12:18 beginning with "Sir, did..."	13:4
13:9	13:20
16:23	17:2
17:19	17:25
18:12	20:23
25:24	26:4
26:15	27:16
28:11	29:1
30:7	30:16
30:24	31:11
35:9	35:12
36:12	36:21
37:19	41:6
41:15	42:1
45:21	46:9
47:1	48:4
65:21	66:8
67:13	67:23
71:9	71:12
71:16	72:3
75:13	75:18
75:21	76:11
88:13	88:16
88:21	89:8
90:1	90:9
119:7	119:22
119:25	119:25
120:3	121:24
123:13	124:9
127:22	128:10
128:14	129:9
144:10 beginning with "doesn't U.S.."	144:12
144:14	144:23
188:3	188:20
193:12	193:18
219:5	219:9
219:13	220:5
227:13	227:18

16diii002827

From *Page: Line*	Through *Page: Line*
265:12	268:5

16diii002828

WITNESS: DONALD BLACKBURN

8/3/99

From *Page: Line*	**Through** *Page: Line*
314:19	314:23
315:15	316:7
317:9	318:4
318:16	318:17
318:21	318:25
473:5	473:6
473:20	473:23
483:3	485:15
489:2	489:19
489:22	491:11
493:13	494:9
542:17	542:23
543:6	543:25
544:15	545:8
587:4	587:13
587:17	587:24
588:3	588:14
588:17	589:7

16diii002829

WITNESS: DAVID WALLER
8/30/99

From *Page: Line*	**Through** *Page: Line*
5:17	5:18
6:9 beginning with "could you.."	7:1
7:9	8:8
8:13 beginning with "Would you.."	8:24
9:11	10:13
66:3	66:11
71:18	75:17
77:1	78:15
78:21 beginning with "In your..."	80:4
81:16	82:9
83:17	84:2
85:24	86:9
105:7	106:15

16diii002830

WITNESS: MARTI STEVENS
7/7/99

From *Page: Line*	**Through** *Page: Line*
7:20	8:20
9:4	9:14
9:17	10:6
10:13	12:9
12:13	13:14
28:20	29:3

16diii002831

WITNESS: GERALD L. WELSH
2/26/99

From *Page: Line*	**Through** *Page: Line*
6:7	6:14
10:3	10:5
10:13	11:3
11:6	11:17
13:24	14:5
19:8	19:13
19:17	19:22
31:2	31:6
31:20	32:7
32:20	32:21
36:23	37:5
37:13	37:17
38:2	38:8
38:20	38:22
39:3	39:12
42:7	42:11
47:11	47:25
57:22	58:10
58:22	59:3
71:8	71:14
71:16	71:21
110:14	112:12
112:14	112:21
112:23	113:17
115:8	115:10
115:12	116:4
116:20	117:9
117:13	117:13
118:9	118:11
118:14	118:14
119:2 beginning with "let's put.."	119:6
119:8	119:13

16diii002832

WITNESS: JAMES WHEATLEY

9/3/99

From *Page: Line*	**Through** *Page: Line*
6:12	6:12
7:13	7:21
10:21	11:2
12:5	12:18
14:16	14:21
15:14	16:25
17:13	17:19
18:11	18:22
20:23	21:9
21:11	21:14
27:14	27:24
36:11 beginning with "are there..."	37:1
37:4	37:15
37:22	38:7
49:8	49:25
50:6	50:11
105:11 beginning with "are you.."	106:1
110:18	110:23
110:25	111:13
111:16	112:2
112:5	112:8
216:5	216:18

WITNESS: GREGORY A. ZAHRT

3/30/99

From *Page: Line*	**Through** *Page: Line*
8:15	8:20
10:17	11:13
23:1	23:5
23:21	24:11
83:1	83:17
83:19	83:22
85:16	85:23
86:2	86:3
92:5	92:12
92:15	93:6
96:16	96:19
96:22	96:25

16diii002834

WITNESS: MIKE STANKE
6/23/99

From *Page: Line*	**Through** *Page: Line*
7:19	7:22
9:14	11:5
12:6	12:21
13:10	13:19
15:2	15:8
15:17	15:20
17:21	18:1
18:12	18:25
25:14	25:25
26:22	27:2
27:5	27:18
30:3	30:7
37:7	37:25
38:6	38:17
44:1	44:8
45:1	46:19
46:22	46:24
47:2	47:6
47:13	47:16
48:4	48:16
48:24	50:19
51:1	51:10
51:22	52:10
52:21	53:18
54:4	56:20
57:1	57:15
57:18	62:8
62:18	63:2
63:19	64:3
64:20	65:24
66:9	67:5
67:14	68:3
71:18	72:15
73:10	73:14
73:18	73:25
74:3	74:13
74:20	76:2
77:11	78:8
91:9	92:22
96:6	96:12

16diii002835

From *Page: Line*	**Through** *Page: Line*
97:18	97:23
103:11	103:17
164:18	165:9
183:3	183:18
185:21	187:16
190:2	190:11
202:7	202:22
204:8	204:13
204:18	205:1
219:8	219:12
219:20	220:3
221:14	221:19
223:18 beginning with "what racks.."	224:5
224:10	224:16
224:20	225:3
226:4	226:19
227:8	228:2
232:9	232:12
232:17	233:12
234:19	234:21
291:21	295:12
295:18	295:25
296:8	296:9
296:11	296:19

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January 21, 2000

BY FEDERAL EXPRESS

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Re: Conwood Company L.P., et al. v. US Tobacco Co., et al.

Gentlemen:

Pursuant to the Court's February 18, 1999 scheduling order, enclosed please find 7 boxes of Defendants' trial exhibits, with identification labels, for your review. If you have any questions, please do not hesitate to call.

Very truly yours,

Chris Athanasia

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' LIST OF EXHIBITS INTENDED TO BE USED AT TRIAL

Pursuant to the Court's February 18, 1999 Scheduling Order, Defendants respectfully submit the following list of exhibits intended to be used at trial.

January 21, 2000

Respectfully submitted,

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Counsel for Defendants

16diii002839

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
1 - 91	Attachments 3 through 93 of the Expert Report of Dr. David T. Scheffman	
92	Memo from Miley to Williams	
93	CWD 1220725	CWD 1220725
94	CWD 25013285	CWD 25013285
95	Letter from Elms to Elsik	
96	CWD 0100007164	CWD 0100007164
97	CWD 0100007050	CWD 0100007051
98	CWD 0100007062	CWD 0100007062
99	CWD 0100007152	CWD 0100007152
100	CWD 0100007086	CWD 0100007086
101	CWD 0100007078	CWD 0100007078
102	CWD 0100007188	CWD 0100007188
103	CWD 0100007087	CWD 0100007089
104	CWD 10182255	CWD 10182256
105	CWD 0100016632	CWD 0100016632
106	Memo from Keane to Williams	
107	CWD 1025000059	CWD 1025000060
108	CWD 1025000065	CWD 1025000066
109	CWD 1025000050	CWD 1025000050
110	CWD 12273853	CWD 12273853
111	CWD 0100007094	CWD 0100007094
112	CWD 13459454	CWD 13459454
113	CWD 0100007095	CWD 0100007095
114	CWD 1025000040	CWD 1025000040
115	Category Management. Getting Started	

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
116	Category Management. A Blueprint for Implementation	
117	Category Management. The Category Plan	
118	Category Management. Information Tools	
119	Category Management. The Role of Supplier Organizations	
120	USTC/CWD 628001	USTC/CWD 628001
121	USTC/CWD 041470	USTC/CWD 041478
122	USTC/CWD 884189	USTC/CWD 884191
123	USTC/CWD 668988	USTC/CWD 668991
124	USTC/CWD 788026	USTC/CWD 788031
125	USTC/CWD 732559	USTC/CWD 732562
126	USTC/CWD 584788	USTC/CWD 584789
127	USTC/CWD 734037	USTC/CWD 734037
128	USTC/CWD 969509	USTC/CWD 969509
129	USTC/CWD 550824	USTC/CWD 550827
130	E-mail from Renfro to Entwistle	
131	Letter from Entwistle to Carlson	
132	USTC/CWD 732071	USTC/CWD 732071
133	USTC/CWD 533676	USTC/CWD 533676
134	USTC/CWD 824519	USTC/CWD 824519
135	USTC/CWD 012829	USTC 012830
136	USTC/CWD 109424	USTC/CWD 109426
137	USTC/CWD 529250	USTC/CWD 529253
138	USTC/CWD 949995	USTC/CWD 949996
139	Letter from Blackburn to Carlson	
140	USTC/CWD 732615	USTC/CWD 732616

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
141	Letter from Blackburn to Carlson	
142	USTC/CWD 668970	USTC/CWD 668974
143	USTC/CWD 525548	USTC/CWD 525553
144	USTC/CWD 525539	USTC/CWD 525547
145	USTC/CWD 533675	USTC/CWD 533675
146	Convienence Store News: 1999 Best of Class - Category Captains	
147	USTC/CWD 897405	USTC/CWD 897406
148	USTC/CWD 897410	USTC/CWD 897410
149	USTC/CWD 897411	USTC/CWD 897411
150	USTC/CWD 897415	USTC/CWD 897415
151	USTC/CWD 897413	USTC/CWD 897413
152	USTC/CWD 897414	USTC/CWD 897414
153	USTC/CWD 897416	USTC/CWD 897416
154	USTC/CWD 897412	USTC/CWD 897412
155	USTC/CWD 897407	USTC/CWD 897407
156	USTC/CWD 897417	USTC/CWD 897417
157	CWD 1158001856	CWD 1158001856
158	USTC/CWD 343489	USTC/CWD 343489
159	USTC/CWD 277460	USTC/CWD 277462
160	USTC/CWD 777167	USTC/CWD 771767A
161	USTC/CWD 277458	USTC/CWD 277459
162	USTC/CWD 277471	USTC/CWD 277463
163	USTC/CWD 897382	USTC/CWD 897382
164	USTC/CWD 897383	USTC/CWD 897391
165	USTC/CWD 897399	USTC 897402

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
166	USTC/CWD 920341	USTC/CWD 920342
167	CWD 1031000191	CWD 1031000191
168	CWD 1031000192	CWD 1031000192
169	CWD 1025000216	CWD 1025000216
170	USTC/CWD 897403	USTC/CWD 897403
171	USTC/CWD 897418	USTC/CWD 897418
172	USTC/CWD 897423	USTC/CWD 897423
173	USTC/CWD 897421	USTC/CWD 897421
174	USTC/CWD 897420	USTC/CWD 897420
175	USTC/CWD 897422	USTC/CWD 897422
176	USTC/CWD 897428	USTC/CWD 897428
177	USTC/CWD 897424	USTC/CWD 897424
178	USTC/CWD 897425	USTC/CWD 897425
179	USTC/CWD 897427	USTC/CWD 897427
180	USTC/CWD 897426	USTC/CWD 897426
181	USTC/CWD 897429	USTC/CWD 897429
182	USTC/CWD 897430	USTC/CWD 897430
183	USTC/CWD 897431	USTC/CWD 897431
184	USTC/CWD 897432	USTC/CWD 897432
185	USTC/CWD 897435	USTC/CWD 897435
186	USTC/CWD 897434	USTC/CWD 897434
187	USTC/CWD 897433	USTC/CWD 897433
188	USTC/CWD 897444	USTC/CWD 897446
189	USTC/CWD 897419	USTC/CWD 897419
190	USTC/CWD 897441	USTC/CWD 897443

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
191	USTC/CWD 897454	USTC/CWD 897454
192	USTC/CWD 897448	USTC/CWD 897450
193	USTC/CWD 897447	USTC/CWD 897447
194	USTC/CWD 343644	USTC/CWD 343644
195	USTC/CWD 343300	USTC/CWD 343301
196	USTC/CWD 344337	USTC/CWD 344337
197	USTC/CWD 1245688	USTC/CWD 1245688
198	USTC/CWD 332283	USTC/CWD 332284
199	USTC/CWD 343956	USTC/CWD 343957
200	USTC/CWD 343960	USTC/CWD 343960
201	USTC/CWD 343929	USTC/CWD 343930
202	USTC/CWD 343924	USTC/CWD 343928
203	USTC/CWD 343931	USTC/CWD 343932
204	USTC/CWD 347597	USTC/CWD 347597
205	USTC/CWD 343938	USTC/CWD 343938
206	USTC/CWD 343933	USTC/CWD 343935
207	USTC/CWD 343942	USTC/CWD 343953
208	USTC/CWD 343954	USTC/CWD 343955
209	USTC/CWD 343496	USTC/CWD 343496
210	USTC/CWD 343493	USTC/CWD 343494
211	USTC/CWD 343495	USTC/CWD 343495
212	USTC/CWD 343488	USTC/CWD 343488
213	USTC/CWD 343487	USTC/CWD 343487
214	USTC/CWD 343318	USTC/CWD 343319
215	USTC/CWD 277469	USTC/CWD 277470

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DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
216	USTC/CWD 897377	USTC/CWD 897380
217	USTC/CWD 277456	USTC/CWD 277457
218	USTC/CWD 277468	USTC/CWD 277468
219	USTC/CWD 277466	USTC/CWD 277467
220	USTC/CWD 025617	USTC/CWD 025710
221	USTC/CWD 548525	USTC/CWD 548549
222	USTC/CWD 920847	USTC/CWD 920852
223	1999 Promotion Preview Wal*Mart/USTC	
224	USTC/CWD 896044	USTC/CWD 896046
225	USTC/CWD 921082	USTC/CWD 921125
226	USTC/CWD 921011	USTC/CWD 921053
227	USTC/CWD 777119	USTC/CWD 777121
228	Retail Non-Compliance Form	
229	USTC/CWD 517081	USTC/CWD 517087
230	USTC/CWD 541517	USTC/CWD 541520
231	USTC/CWD 548462	USTC/CWD 548464
232	USTC/CWD 548050	USTC/CWD 548052
233	USTC/CWD 541549	USTC/CWD 541563
234	USTC/CWD 548479	USTC/CWD 548481
235	USTC/CWD 541379	USTC/CWD 541381
236	USTC/CWD 541373	USTC/CWD 541376
237	USTC/CWD 541362	USTC/CWD 541364
238	USTC/CWD 541346	USTC/CWD 541348
239	USTC/CWD 541334	USTC/CWD 541336
240	USTC/CWD 541327	USTC/CWD 541329

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DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
241	USTC/CWD 541303	USTC/CWD 541306
242	USTC/CWD 541475	USTC/CWD541477
243	USTC/CWD 541580	USTC/CWD 541586
244	USTC/CWD 541492	USTC/CWD 5541494
245	USTC/CWD 541127	USTC/CWD 541130
246	USTC/CWD 541588	USTC/CWD 541591
247	USTC/CWD 541537	USTC/CWD 541539
248	USTC/CWD 541522	USTC/CWD 541524
249	USTC/CWD 550903	USTC/CWD 550909
250	USTC/CWD 585106	USTC/CWD 585109
251	USTC/CWD 860970	USTC/CWD 860973
252	USTC/CWD 792544	USTC/CWD 792545
253	USTC/CWD 733142	USTC/CWD 733151
254	USTC/CWD 541507	USTC/CWD 541509
255	Tobacco Non-Compliance Review	
256	Letter from Blackburn to Carlson	
257	USTC/CWD 540537	USTC/CWD 540539
258	USTC/CWD 277588	USTC/CWD 277590
259	USTC/CWD 105310	USTC/CWD 105319
260	USTC/CWD 277341	USTC/CWD 277345
261	USTC/CWD 544786	USTC/CWD 544789
262	USTC/CWD 317008	USTC/CWD 317009
263	USTC/CWD 347023	USTC/CWD 347024
264	USTC/CWD 517070	USTC/CWD 517080
265	USTC/CWD 347254	USTC/CWD 347257

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DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
266	USTC/CWD 824571	USTC/CWD 824587
267	USTC/CWD 318054	USTC/CWD 318056
268	USTC/CWD 548047	USTC/CWD 548049
269	USTC/CWD 733054	USTC/CWD 733058
270	USTC/CWD 277591	USTC/CWD 277593
271	USTC/CWD 416412	USTC/CWD 416413
272	USTC/CWD 896052	USTC/CWD 896054
273	CWD 1169002526	CWD 1169002530
274	USTC/CWD 896055	USTC/CWD 896056
275	USTC/CWD 733153	USTC/CWD 733163
276	USTC/CWD 733195	USTC/CWD 733207
277	USTC/CWD 896057	USTC/CWD 896058
278	USTC/CWD 516977	USTC/CWD 516988
279	USTC/CWD 516989	USTC/CWD516995
280	USTC/CWD 550664	USTC/CWD 550667
281	USTC/CWD 277579	USTC/CWD 277581
282	CWD 1031084098	CWD 1031084100
283	USTC/CWD 285944	USTC/CWD 285946
284	USTC/CWD 318022	USTC/CWD 318024
285	USTC/CWD 548040	USTC/CWD 548041
286	USTC/CWD 517088	USTC/CWD 517102
287	USTC/CWD 549076	USTC/CWD 549079
288	CWD 1169002525	CWD 1169002525
289	USTC/CWD 920854	USTC/CWD920873
290	USTC/CWD 921181	USTC/CWD 921190

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
291	USTC/CWD 540522	USTC/CWD 540534
292	USTC/CWD 920929	USTC/CWD 920941
293	USTC/CWD 920981	USTC/CWD 920010
294	USTC/CWD 405306	USTC/CWD 405316
295	USTC/CWD 347317	USTC/CWD 347320
296	USTC/CWD 920924	USTC/CWD 920928
297	USTC/CWD 529250	USTC/CWD 529253
298	USTC/CWD 860440	USTC/CWD 860447
299	USTC/CWD 732162	USTC/CWD 732171
300	USTC/CWD 540466	USTC/CWD 540469
301	USTC/CWD 548232	USTC/CWD 548245
302	CWD 1011022961	CWD 1011022971
303	USTC/CWD 525581	USTC/CWD 525581
304	USTC/CWD 965205	USTC/CWD 965217
305	USTC/CWD 968589	USTC/CWD 968599
306	USTC/CWD 949550	USTC/CWD 949561
307	USTC/CWD 525410	USTC/CWD 525416
308	USTC/CWD 732345	USTC/CWD 732379
309	USTC/CWD 532796	USTC/CWD 532814
310	USTC/CWD 532450	USTC/CWD532476
311	USTC/CWD 532059	USTC/CWD 532079
312	USTC/CWD 532001	USTC/CWD 532014
313	USTC/CWD 540150	USTC/CWD 540183
314	USTC/CWD 844945	USTC/CWD 844947
315	USTC/CWD 884185	USTC/CWD 884188

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
316	USTC/CWD 921054	USTC/CWD 921060
317	USTC/CWD 405216	USTC/CWD 405250
318	USTC/CWD 347053	USTC/CWD 347055
319	USTC/CWD 732229	USTC/CWD 732237
320	USTC/CWD 550623	USTC/CWD 550635
321	USTC/CWD 405255	USTC/CWD 405294
322	USTC/CWD 550910	USTC/CWD 550914
323	USTC/CWD 946362	USTC/CWD 946371
324	USTC/CWD 920942	USTC/CWD 920949
325	USTC Newsletter: Statement re: Tobacco Negotiations	
326	USTC/CWD 403779	USTC/CWD 403780
327	USTC/CWD 077694	USTC/CWD 077696
328	Wal*Mart Reset Program	
329	USTC/CWD 405317	USTC/CWD 405333
330	USTC/CWD 407885	USTC/CWD 407945
331	USTC/CWD 285950	USTC/CWD 285951
332	USTC/CWD 897392	USTC/CWD 897392
333	USTC/CWD 920806	USTC/CWD 920825
334	USTC/CWD 921156	USTC/CWD 921180
335	USTC/CWD 585101	USTC/CWD 585103
336	USTC/CWD 733782	USTC/CWD 733783
337	USTC/CWD 532779	USTC/CWD 532792
338	USTC/CWD 545088	USTC/CWD 545091
339	USTC/CWD 921201	USTC/CWD 921217
340	USTC/CWD 788000	USTC/CWD 788003

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
341	USTC/CWD 545094	USTC/CWD 545096
342	USTC/CWD 545092	USTC/CWD 545093
343	USTC/CWD 529231	USTC/CWD 529238
344	USTC/CWD 545097	USTC/CWD 545099
345	USTC/CWD 752554	USTC/CWD 752559
346	"Maximum Profit" Brochure	
347	USTC/CWD 540470	USTC/CWD 540474
348	USTC/CWD 546442	USTC/CWD 546447
349	USTC/CWD 541259	USTC/CWD 541266
350	USTC/CWD 541229	USTC/CWD 541231
351	USTC/CWD 408234	USTC/CWD 408240
352	USTC/CWD 075569	USTC/CWD 075570
353	USTC/CWD 732022	USTC/CWD 732029
354	USTC/CWD 786051	USTC/CWD 786052
355	USTC/CWD 740664	USTC/CWD 740668
356	USTC/CWD 352085	USTC/CWD 352096
357	USTC/CWD 732158	USTC/CWD 732161
358	USTC/CWD 732146	USTC/CWD 732147
359	USTC/CWD 897396	USTC/CWD 897398
360	USTC/CWD 157844	USTC/CWD 157846
361	USTC/CWD 226994	USTC/CWD 226996
362	USTC/CWD 297864	USTC/CWD 297892
363	USTC/CWD 524852	USTC/CWD 524858
364	USTC/CWD 403105	USTC/CWD 403192
365	USTC/CWD 932901	USTC/CWD 932906

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
366	USTC/CWD 202845	USTC/CWD 202959
367	USTC/CWD 297541	USTC/CWD 297555
368	USTC/CWD 732239	USTC/CWD 732241
369	USTC/CWD 205068	USTC/CWD205103
370	USTC/CWD 403709	USTC/CWD 403744
371	USTC/CWD 205000	USTC/CWD 205030
372	USTC/CWD 921133	USTC/CWD 921154
373	USTC/CWD 540863	USTC/CWD 540871
374	USTC/CWD 541108	USTC/CWD 541114
375	USTC/CWD 541073	USTC/CWD 541095
376	USTC/CWD 541054	USTC/CWD 541060
377	USTC/CWD 540131	USTC/CWD 540138
378	USTC/CWD 844146	USTC/CWD 844162
379	USTC/CWD 534166	USTC/CWD 534179
380	USTC/CWD 532154	USTC/CWD 532166
381	USTC/CWD 318552	USTC/CWD 318564
382	USTC/CWD 318508	USTC/CWD 318536
383	USTC/CWD 756500	USTC/CWD 756501
384	USTC/CWD 222655	USTC/CWD 222656
385	USTC/CWD 222657	USTC/CWD 222658
386	USTC/CWD 825406	USTC/CWD 825407
387	Wal*Mart Review	
388	Wal*Mart Buy Down Proposal	
389	Mass Merchandising Review	
390	USTC/CWD 844942	USTC/CWD 844943

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DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
391	USTC/CWD 732140	USTC/CWD 732140
392	USTC/CWD 101315	USTC/CWD 1018327
393	USTC/CWD 318538	USTC/CWD 318540
394	USTC Advertisement	
395	USTC/CWD 024924	USTC/CWD 024924
396	USTC/CWD 920082	USTC/CWD 920082
397	USTC/CWD 052355	USTC/CWD 052360
398	USTC/CWD 403059	USTC/CWD 403104
399	Memo from Blackburn re: Skoal Promotion	
400	USTC/CWD 844887	USTC/CWD 844906
401	USTC/CWD 844961	USTC/CWD 844967
402	USTC/CWD 732551	USTC/CWD 732558
403	USTC/CWD 403360	USTC/CWD 403373
404	USTC/CWD 403194	USTC/CWD 403298
405	USTC/CWD 186414	USTC/CWD 186419
406	1999 Amendment to CAP	
407	CWD 11532665	CWD 11532665
408	CWD 11532667	CWD 11532667
409	CWD 1158001862	CWD 1158001862
410	CWD 1253001527	CWD 1253001527
411	CWD 1158001829	CWD 1158001829
412	CWD 1220008483	CWD 1220008483
413	CWD 1158001848	CWD 1158001848
414	CWD 1158001841	CWD 1158001841
415	CWD 1158001846	CWD 1158001846

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
416	CWD 11061686	CWD 11061686
417	CWD 1026000027	CWD 1026000027
418	CWD 13001710	CWD 13001710
419	CWD 12982180	CWD 12982180
420	CWD 1158001838	CWD 1158001838
421	CWD 1158001819	CWD 1158001819
422	CWD 11580017837	CWD 11580017837
423	CWD 11061629	CWD 11061629
424	CWD 1158001871	CWD 1158001871
425	CWD 1031129131	CWD 1031129131
426	CWD 1158001873	CWD 1158001873
427	CWD 0100012764	CWD 0100012764
428	CWD 0100012772	CWD 0100012772
429	CWD 12407305	CWD 12407307
430	CWD 0100012559	CWD 0100012559
431	CWD 0100012561	CWD 0100012561
432	CWD 1158001865	CWD 1158001865
433	CWD 1158001866	CWD 1158001866
434	CWD 0100012572	CWD 0100012572
435	CWD 1158001864	CWD 1158001864
436	CWD 0100012497	CWD 0100012497
437	CWD 11603136	CWD 11603136
438	CWD 11532650	CWD 11532650
439	CWD 1240733	CWD 1240733
440	CWD 11532658	CWD 11532658

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
441	CWD 11532656	CWD 112532656
442	CWD 0100003794	CWD 0100003794
443	CWD 1304004675	CWD 1304004675
444	CWD 1031000304	CWD 1031000304
445	CWD 12966306	CWD 12966306
446	Memo from O'Neal to Williams	
447	CWD 1031000303	CWD 1031000303
448	CWD 1031000299	CWD 1031000299
449	CWD 11532659	CWD 11532659
450	CWD 11532660	CWD 11532660
451	CWD 11532655	CWD 11532655
452	Memo from Miley to Ludwig	
453	CWD 10170134	CWD 10170134
454	CWD 0100016804	CWD 0100016804
455	CWD 11532668	CWD 11532668
456	CWD 11532669	CWD 11532669
457	CWD 11532670	CWD 11532670
458	CWD 11532674	CWD 11532674
459	CWD 010006760	CWD 010006760
460	Letter from Wiggins to Taylor	
461	CWD 1304004428	CWD 1304004428
462	CWD 11532671	CWD 11532671
463	CWD 11532672	CWD 11532672
464	CWD 1167002335	CWD 1167002335
465	CWD 1167002333	CWD 1167002323

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
466	CWD 0100012699	CWD 0100012699
467	CWD 0100012701	CWD 0100012701
468	CWD 1031000294	CWD 1031000294
469	CWD 1031000292	CWD 1031000292
470	CWD 1031000296	CWD 1031000296
471	CWD 1025000001	CWD 1025000008
472	CWD 1011015049	CWD 1011015054
473	CWD 12966505	CWD 12966505
474	CWD 0100016636	CWD 0100016636
475	CWD 0100016731	CWD 0100016731
476	CWD 0100016909	CWD 0100016909
477	CWD 11532678	CWD 11532678
478	USTC/CWD 897394	USTC/CWD 897395
479	USTC/CWD 897381	USTC/CWD 897381
480	CWD 13044591	CWD 13044591
481	CWD 0100016625	CWD 0100016625
482	CWD 0100016621	CWD 0100016621
483	CWD 0100016647	CWD 0100016647
484	CWD 0100016776	CWD 0100016776
485	CWD 0100016805	CWD 0100016805
486	CWD 0100016770	CWD 0100016770
487	CWD 0100016762	CWD 0100016762
488	CWD 0100016761	CWD 0100016761
489	CWD 0100016696	CWD 0100016696
490	CWD 0100016695	CWD 0100016695

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
491	CWD 0100016632	CWD 0100016632
492	CWD 0100016869	CWD 0100016869
493	CWD 0100016879	CWD 0100016879
494	CWD 0100016885	CWD 0100016885
495	CWD 0100016839	CWD 0100016839
496	CWD 0100016866	CWD 0100016866
497	CWD 0100016634	CWD 0100016634
498	CWD 0100016617	CWD 0100016617
499	Retail Activity Report	
500	Retail Activity Report	
501	CWD 100018905	CWD 100018905
502	CWD 100017808	CWD 100017808
503	CWD 100017928	CWD 100017928
504	CWD 0100013941	CWD 0100013943
505	CWD 0100015938	CWD 0100015938
506	CWD 1027003703	CWD 1027003708
507	CWD 0100015919	CWD 0100015919
508	CWD 0100015774	CWD 0100015774
509	CWD 01000011632	CWD 01000011637
510	Letter from Lemoine to Taylor	
511	CWD 1348004764	CWD 1348004764
512	CWD 15311321	CWD 15311321
513	CWD 0100003813	CWD 0100003813
514	CWD 1014018212	CWD 1014018212
515	CWD 1158001834	CWD 1158001834

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
516	CWD 1158001836	CWD 1158001836
517	CWD 0100016804	CWD 0100016804
518	CWD 1106171	CWD 1106171
519	CWD 1300001732	CWD 1300001732
520	Memo from Ham to Taylor	
521	CWD 1018002147	CWD 1018002147
522	Memo from Quirk to Balk	
523	CWD 0100016621	CWD 0100016621
524	CWD 0100016632	CWD 0100016632
525	CWD 0100016647	CWD 0100016647
526	CWD 0100016625	CWD 0100016625
527	CWD 0100016634	CWD 0100016634
528	CWD 0100016617	CWD 0100016617
529	CWD 0100016695	CWD 0100016695
530	CWD 0100016696	CWD 0100016696
531	CWD 0100016699	CWD 0100016699
532	CWD 0100016839	CWD 0100016839
533	CWD 1014018220	CWD 1014018222
534	CWD 12274088	CWD 12274088
535	CWD 1304005505	CWD 1304005505
536	CWD 1167002322	CWD 1167002322
537	CWD 1167002323	CWD 1167002323
538	CWD 1014001781	CWD 1014001782
539	CWD 1014001786	CWD 1014001786
540	CWD 1014001785	CWD 1014001785

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
541	CWD 1014001783	CWD 1014001783
542	CWD 1014001784	CWD 1014001784
543	CWD 1167002320	CWD 1167002320
544	CWD 1167002321	CWD 1167002321
545	CWD 12273986	CWD 12273989
546	Letter from Zamarch (Tosco) to Dickson	
547	CWD 1031045217	CWD 1031045217
548	CWD 1031045201	CWD 1031045203
549	CWD 1346003298	CWD 1346003298
550	CWD 1138000158	CWD 1138000158
551	Letter from David Antle	
552	CWD 12271987	CWD 12271987
553	CWD EXP 00504	CWD EXP 00510
554	Memo from Johnson to Distribution	
555	Memo from Johnson to Distribution	
556	CWD 19426767	CWD 19426767
557	CWD 1106001890	CWD 1106001892
558	CWD 1031046077	CWD 1031046077
559	Letter to Cash	
560	CWD 11532670	CWD 11532670
561	CWD 1304004406	CWD 1304004407
562	CWD 1252580	CWD 1252580
563	CWD 1304004409	CWD 1304004409
564	CWD 1304004408	CWD 1304004408
565	Memo from Williams to Sales Managers	

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DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
566	CWD 11200140	CWD 11200140
567	CWD 12273996	CWD 12273996
568	Notice re: Cougar	
569	CWD 1296640	CWD 1296640
570	Memo from Taylor to Sales Representatives	
571	CWD 13050777	CWD 13050779
572	CWD 1346003291	CWD 1346003292
573	CWD 12574946	CWD 12574949
574	CWD 11061217	CWD 11061217
575	CWD 12350030	CWD 12350032
576	CWD 12121374	CWD 12121375
577	CWD 12121395	CWD 12121396
578	CWD 25011187	CWD 25011189
579	CWD 1028014709	CWD 1028014709
580	CWD 1005010000	CWD 1005010002
581	CWD 1031083532	CWD 1031083532
582	CWD 1005009995	CWD 1005009995
583	CWD 1025010202	CWD 10250010254
584	CWD 1015000716	CWD 1015000720
585	CWD 1300008032	CWD 1300008039
586	CWD 11061610	CWD 11061620
587	Presentation: Factors Influencing Tobacco Sales	
588	CWD 1002001054	CWD 1002001059
589	CWD 101400003	CWD 101400003
590	CWD 1142027	CWD 1142027

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
591	CWD 1178000145	CWD 1178000145
592	CWD 12116276	CWD 12116277
593	CWD 2081647	CWD 2081647
594	CWD 1162000458	CWD 1162000458
595	Letter from Williams to Sales Representatives	
596	CWD 13009972	CWD 13009987
597	CWD 13487208	CWD 13847209
598	Memo from Schoeler to Dickson	
599	CWD 1031025649	CWD 1031025652
600	CWD 1015003011	CWD 1015003011
601	CWD 12207248	CWD 12207248
602	Memo from Cash to Sales Personnel	
603	CWD 11200149	CWD 11200150
604	CWD 1227000751	CWD 1227000751
605	CWD 11603023	CWD 11603024
606	CWD 1011018425	CWD 1011018426
607	USTC/CWD 920344	USTC/CWD 920344
608	CWD 1011018428	CWD 1011018429
609	CWD 1011000208	CWD 1011000208
610	CWD 1263001821	CWD 1263001821
611	CWD 1028001442	CWD 1028001443
612	CWD 1240689	CWD 1240689
613	CWD 12208169	CWD 12208169
614	Memo from Dickson to Foster	
615	CWD 12116793	CWD 12116798

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DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
616	CWD 11603513	CWD 11603513
617	Letter from Ham to Taylor	
618	CWD 11534730	CWD 11534730
619	CWD 1014019653	CWD 1014019656
620	CWD 1033007591	CWD 1033007592
621	CWD 1033007594	CWD 1033007594
622	CWD 1033007580	CWD 1033007581
623	Questionnaire	
624	CWD 1110000287	CWD 1110000288
625	CWD 1304005964	CWD 1304005964
626	CWD 12208090	CWD 12208091
627	CWD 1304005696	CWD 1304005696
628	CWD 1304005774	CWD 1304005775
629	CWD 1206001813	CWD 1206001813
630	CWD 1304005776	CWD 1304005776
631	CWD 12274087	CWD 12274087
632	Memo from Miley to Cash with handwritten notes	
633	CWD 13640607	CWD 13640607
634	CWD 1031081521	CWD 1031081522
635	CWD 13044477	CWD 13044477
636	CWD 1031096831	CWD 1031096831
637	CWD 1031096833	CWD 1031096833
638	CWD 1031096840	CWD 1031096841
639	CWD 1031096842	CWD 1031096842
640	CWD 1012023788	CWD 1012023791

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
641	Letter from Elms to Taylor	
642	CWD 1012023800	CWD 10102023805
643	CWD 1012023765	CWD 1012023785
644	Swisher Rebate Program	
645	CWD 1027001770	CWD 1027001784
646	CWD 1031000515	CWD 1031000515
647	USTC/CWD 1502155	USTC/CWD 1502236
648	CWD 12121402	CWD 12121416
649	CWD 1011015843	CWD 1011015848
650	CWD 1010025196	CWD 1010025218
651	CWD 101400632	CWD 101400632
652	CWD 12966226	CWD 12966226
653	Memo from Dickson to Foster	
654	CWD 1015007615	CWD 1015007733
655	CWD 1001000001	CWD 1001000081
656	CWD 1015000746	CWD 1015000751
657	CWD 13001638	CWD 13001638
658	CWD 1028014717	CWD 1028014717
659	CWD 13044833	CWD 13044833
660	CWD 1011018492	CWD 1011018492
661	CWD 1012008482	CWD 1012008483
662	CWD 1184007776	CWD 1184007776
663	Kodiak Advertisements	
664	CWD 1028014726	CWD 1028014734
665	CWD 11412702	CWD 11412711

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
666	Convience Store News: Best of Class - Category Captains	
667	CWD 1005011549	CWD 1005011549
668	CWD 1015000770	CWD 1015000772
669	CWD 20816414	CWD 20816414
670	CWD 1141005495	CWD 1141005495
671	CWD 1028014751	CWD 1028014752
672	CWD 1028014751	CWD 1028014752
673	Memo from Ellis to Managers/Sales Representatives	
674	CWD 11603192	CWD 11603192
675	Presentation: Factors Influencing Tobacco Sales	
676	CWD 1031069193	CWD 1031069194
677	CWD 11062110	CWD 11062111
678	CWD 1031083535	CWD 1031083536
679	CWD 10242535	CWD 10242535
680	CWD 12274229	CWD 12274234
681	CWD 13003182	CWD 13003188
682	Memo from Dickson to Foster	
683	Letter from Cothren to Raleigh District	
684	CWD 1012020804	CWD 1012020807
685	CWD 13003378	CWD 13003381
686	CWD 12350046	CWD 12350047
687	CWD 1031084230	CWD 1031084231
688	CWD 1031078395	CWD 1031078397
689	CWD 11538037	CWD 11538038
690	CWD 1031063087	CWD 1031063088

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DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
691	CWD 1031064716	CWD 1031064717
692	CWD 1031069537	CWD 1031069539
693	CWD 1031069587	CWD 1031069589
694	CWD 1031072482	CWD 1031072484
695	CWD 1031064760	CWD 1031064761
696	CWD 1031069595	CWD 1031069597
697	CWD 1031064763	CWD 1031064764
698	CWD 1031078466	CWD 1031078467
699	CWD 1031071546	CWD 1031071548
700	CWD 1031079345	CWD 1031079346
701	CWD 1031064526	CWD 1031064527
702	CWD 1031102061	CWD 1031102062
703	CWD 1031102065	CWD 1031102066
704	CWD 1031064542	CWD 1031064543
705	USTC/CWD 648306	USTC/CWD 648307
706	CWD 12208596	CWD 12208597
707	CWD 1031072266	CWD 1031072267
708	CWD 10241130	CWD 10241131
709	CWD 10177091	CWD 10177092
710	CWD 10242429	CWD 10242430
711	CWD 10241132	CWD 10241134
712	CWD 1194002919	CWD 1194002920
713	CWD 1194002923	CWD 1194002924
714	CWD 1031072282	CWD 1031072283
715	CWD 1158001855	CWD 1158001855

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
716	CWD 12273511	CWD 12273512
717	CWD 1364002283	CWD 1364002284
718	CWD 1141559	CWD 1141559
719	CWD 1031064806	CWD 1031064807
720	Trip Letter	
721	CWD 1031072299	CWD 1031072300
722	CWD 1141558	CWD 1141559
723	CWD 12237428	CWD 12237429
724	CWD 1106016	CWD 1106018
725	CWD 11415587	CWD 11415588
726	CWD 12943475	CWD 12943476
727	CWD 1106000181	CWD 1106000183
728	CWD 1031083440	CWD 1031083440
729	CWD 10171576	CWD 10171577
730	CWD 1364002301	CWD 1364002302
731	CWD 1031064823	CWD 1031064824
732	CWD 1031091027	CWD 1031091029
733	CWD 10177066	CWD 10177067
734	CWD 1217007065	CWD 1217007067
735	CWD 1208013938	CWD 1208013940
736	CWD 1031045057	CWD 1031045058
737	Trip Letter	
738	CWD 1159001652	CWD 1159001653
739	CWD 11063538	CWD 11063539
740	CWD 12207328	CWD 12207329

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
741	CWD 1031083370	CWD 1031083371
742	CWD 1031069214	CWD 1031069215
743	CWD 1031072068	CWD 1031072069
744	CWD 11942847	CWD 11942849
745	CWD 10177125	CWD 10177125
746	CWD 1031083377	CWD 1031083378
747	CWD 1031067352	CWD 1031067353
748	CWD 11060020	CWD 11060022
749	CWD 1031064935	CWD 1031064936
750	CWD 11603604	CWD 11603605
751	Trip Letter	
752	CWD 10184700	CWD 10184702
753	CWD 0100006681	CWD 0100006684
754	CWD 1031064937	CWD 1031064939
755	CWD 0100006269	CWD 0100006270
756	CWD 0100013004	CWD 0100013005
757	CWD 1031080415	CWD 1031080416
758	CWD 1364002743	CWD 1364002743
759	CWD 1018004475	CWD 1018004476
760	CWD 10171644	CWD 10171645
761	CWD 11062961	CWD 11062963
762	CWD 1018004477	CWD 1018004479
763	Trip Letter	
764	CWD 11707203	CWD 11707204
765	CWD 12011050	CWD 12011051

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
766	CWD 0100012804	CWD 0100012805
767	CWD 1031102233	CWD 1031102234
768	CWD 10184724	CWD 10184726
769	CWD 12011063	CWD 12011065
770	CWD 20811700	CWD 20811701
771	Trip Letter	
772	CWD 12350268	CWD 12350269
773	CWD 1031072649	CWD 1031072650
774	CWD 1031107448	CWD 1031107449
775	CWD 20811738	CWD 20811739
776	CWD 12237366	CWD 12237367
777	CWD 1018004501	CWD 1018004502
778	CWD 1031069976	CWD 1031069977
779	CWD 12350277	CWD 12350278
780	CWD 10185609	CWD 10185610
781	CWD 1031072119	CWD 1031072121
782	CWD 1031101800	CWD 1031101803
783	CWD 1031102430	CWD 1031102431
784	CWD 1031078009	CWD 1031078010
785	CWD 10242412	CWD 10242413
786	CWD 1031072126	CWD 1031072127
787	CWD 1031080644	CWD 1031080646
788	CWD 1017006680	CWD 1017006682
789	CWD 10177203	CWD 10172204
790	CWD 1223757	CWD 1223757

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DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
791	CWD 1031080663	CWD 1031080665
792	CWD 1031064636	CWD 1031064637
793	CWD 10170493	CWD 10170494
794	CWD 0100003091	CWD 0100003092
795	CWD 1304006735	CWD 1304006736
796	CWD 10242658	CWD 10242659
797	CWD 1031064658	CWD 1031064659
798	CWD 34512896	CWD 34512898
799	CWD 1031092748	CWD 1031092749
800	CWD 10171503	CWD 10171505
801	Trip Letter	
802	CWD 0100002525	CWD 0100002526
803	CWD 11538012	CWD 11538014
804	CWD 11538010	CWD 11538011
805	CWD 11538006	CWD 11538007
806	Trip Letter	
807	CWD 1031064676	CWD 1031064677
808	CWD 1031084394	CWD 1031084395
809	CWD 11943267	CWD 11943268
810	CWD 10311106901	CWD 10311106903
811	CWD 1031101459	CWD 1031101460
812	CWD 1031052740	CWD 1031052741
813	CWD 1031065396	CWD 1031065397
814	CWD 1031065392	CWD 1031065393
815	CWD 1031046007	CWD 1031046007

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
816	CWD 1031054206	CWD 1031054207
817	CWD 1031065353	CWD 1031065355
818	CWD 1031102151	CWD 1031102151
819	CWD 1031054202	CWD 1031054202
820	CWD 1031052687	CWD 1031052688
821	CWD 1031052675	CWD 1031052676
822	CWD 1031052669	CWD 1031052671
823	CWD 1031102133	CWD 1031102134
824	CWD 1031102121	CWD 1031102122
825	CWD 1031091652	CWD 1031091654
826	CWD 1014001779	CWD 1014001780
827	CWD 0100000641	CWD 0100000642
828	CWD 1031064588	CWD 1031064590
829	CWD 1031102091	CWD 1031102092
830	CWD 1031064575	CWD 10310645877
831	CWD 1031102090	CWD 1031102090
832	CWD 0100001643	CWD 0100001644
833	CWD 0100001567	CWD 0100001569
834	CWD 1031064548	CWD 1031064550
835	CWD 1031065444	CWD 1031065445
836	CWD 1031065464	CWD 1031065465
837	CWD 1031038306	CWD 1031038307
838	CWD 1031065487	CWD 1031065488
839	CWD 13047110	CWD 13047111
840	CWD 12063321	CWD 12063322

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
841	CWD 1304007179	CWD 1304007180
842	CWD 1031068156	CWD 1031068157
843	CWD 1031085767	CWD 1031085768
844	CWD 1031045351	CWD 1031045352
845	Memo from Haynes to Salesmen	
846	CWD 100019850	CWD 100019853
847	CWD 100019858	CWD 100019859
848	CWD 0100020880	CWD 0100020882
849	CWD 100019542	CWD 100019544
850	CWD 01000009446	CWD 01000009446
851	CWD 100019545	CWD 100019546
852	CWD 100018972	CWD 100018975
853	CWD 100019515	CWD 100019516
854	CWD 100019802	CWD 100019804
855	CWD 100019822	CWD 100019824
856	CWD 100019799	CWD 100019800
857	CWD 0100019886	CWD 0100019887
858	CWD 100019552	CWD 100019555
859	CWD 100017994	CWD 100017996
860	CWD 100018167	CWD 100018169
861	CWD 1031069177	CWD 1031069178
862	CWD 1031064894	CWD 1031064895
863	CWD 1031069183	CWD 1031069184
864	CWD 1031069908	CWD 1031069909
865	CWD 1031069910	CWD 1031069911

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
866	CWD 1031072041	CWD 1031072042
867	Trip Letter	
868	CWD 1031069923	CWD 1031069924
869	CWD 20813943	CWD 208113945
870	CWD 20310713	CWD 20310714
871	CWD 11060200	CWD 11060202
872	CWD 10171576	CWD 10171577
873	CWD 12204858	CWD 12204859
874	CWD 11060206	CWD 11060208
875	CWD 12350342	CWD 12350343
876	CWD 1031072320	CWD 1031072321
877	CWD 1217007055	CWD 1217007057
878	CWD 1364002315	CWD 1364002316
879	CWD 1031062918	CWD 1031062920
880	CWD 1031047485	CWD 1031047486
881	CWD 13459168	CWD 13459169
882	CWD 1294346	CWD 1294346
883	CWD 1217007050	CWD 1217007052
884	CWD 11537924	CWD 11537925
885	CWD 1217007045	CWD 1217007046
886	Trip Letter	
887	CWD 11060227	CWD 11060229
888	CWD 1031069401	CWD 1031069402
889	CWD 1031072336	CWD 1031072337
890	CWD 12350355	CWD 12350356

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
891	CWD 0100002141	CWD 0100002143
892	CWD 1227003565	CWD 1227003566
893	Trip Letter	
894	CWD 10177225	CWD 10177226
895	CWD 1031074361	CWD 1031074363
896	CWD 1031082474	CWD 1031082475
897	CWD 1031067632	CWD 1031067633
898	Trip Letter	
899	CWD 1031062951	CWD 1031062954
900	CWD 1031051974	CWD 1031051975
901	CWD 1230001886	CWD 123001886
902	CWD 1364007874	CWD 1364007874
903	CWD 1364002499	CWD 1364002499
904	CWD 1304003886	CWD 1304003886
905	Territory Resume	
906	CWD 11537303	CWD 11537304
907	CWD 12205100	CWD 12205100
908	CWD 12086602	CWD 12086660
909	CWD 1304003658	CWD 1304003658
910	CWD 1138001395	CWD 1138001395
911	Territory Resume	
912	CWD 12086577	CWD 12086577
913	CWD 12086559	CWD 12086559
914	Territory Resume	
915	CWD 1230002095	CWD 1230002096

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DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
916	CWD 12086506	CWD 12086506
917	CWD 1217007566	CWD 1217007567
918	CWD 12086463	CWD 12086463
919	CWD 13009160	CWD 13009160
920	CWD 13009161	CWD 13009161
921	CWD 12275597	CWD 12275597
922	CWD 1230001905	CWD 1230001906
923	CWD 1230001893	CWD 1230001894
924	CWD 12205092	CWD 12205092
925	CWD 12039958	CWD 12039958
926	CWD 1170353	CWD 1170353
927	Territory Resume	
928	Territory Resume	
929	CWD 1364001556	CWD 1364001556
930	Territory Resume	
931	CWD 1230002132	CWD 1230002133
932	CWD 1154000739	CWD 1154000739
933	CWD 1364002361	CWD 1364002361
934	CWD 11413404	CWD 11413404
935	CWD 12205081	CWD 12205081
936	CWD 1364002426	CWD 1364002426
937	Territory Resume	
938	CWD 12237156	CWD 12237156
939	CWD 1138001436	CWD 1138001436
940	Territory Resume	

DEFENDANTS' TRIAL EXHIBITS

DX Number	Description	
941	CWD 1230001919	CWD 1230001920
942	CWD 1138001409	CWD 1138001409
943	CWD 1304003612	CWD 1304003612
944	CWD 12208233	CWD 12208233
945	CWD 1348583	CWD 1348583
946	CWD 12208234	CWD 12208234
947	CWD 12236897	CWD 12236898
948	CWD 13485838	CWD 13485838
949	CWD 1158001876	CWD 1158001876
950	USTC/CWD 297769	USTC/CWD 297800
951	CWD 1031102116	CWD 1031102117
952	USTC/CWD 540862	USTC/CWD 540862
953	USTC/CWD 343921	USTC/CWD 343923
954 - 966	Maxwell Industry Reports	
967	CWD 1027001796	CWD 1027001796
968	CWD 1027001795	CWD 1027001795
969	CWD 1027001797	CWD 1027001797
970	CWD 1027001798	CWD 1027001798
971	1999 Custom POS Program	
972	Intentionally omitted	
973	Wal*Mart RAD Data	
974	USTC POS Brochure	
975 - 987	Samples of destroyed/defaced POS materials (available for inspection)	
988 -997	Samples of display racks/merchandisers available from USTC (available for inspection)	
998-1000	Intentionally omitted	

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DEFENDANTS' TRIAL EXHIBITS

DX Number	Description
1001 - 4191	USTC/CWD 125000 USTC/CWD 142063
4192 - 4250	Samples of POS materials available from USTC (available for inspection)
	Photographs of in-store displays of those retailers listed by USTC on their January 21, 2000 witness list (available for inspection)
	All exhibits listed by Plaintiffs on their January 21, 2000 list of exhibits, subject to objections

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

CERTIFICATE OF SERVICE

I certify that copies of the following documents were served by overnight delivery service upon Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, on the 21st day of January, 2000. On January 21, 2000, items 1 and 4 were also sent to the same persons by facsimile transmission and items 2 and 3 were sent by e-mail to Messrs. Hansen, et al.

1. Defendants' Trial Brief;

2. Defendants' List of Exhibits Intended to be Used at Trial;

3. Defendants' Designations of Depositions; and

4. Defendants' Trial Witness List.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

Plaintiffs' Proposed Jury Instructions

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Counsel for Plaintiffs

January 28, 2000

PLAINTIFFS' PROPOSED INSTRUCTION NO. 1

INTRODUCTION

Now that you have heard all of the evidence and the argument of the attorneys, it is my duty to give you instructions as to the law applicable in this case.

It is your duty as jurors to follow the law as stated in the instructions, and to apply that law to the facts you find from the evidence.

You are not to single out one instruction alone as stating the law. You must consider the instructions as a whole. The fact I have given an instruction on any element does not mean you should find one way or the other as to that element.

You are not to be concerned with the wisdom of any rule of law stated by the Court. You must apply the law given in these instructions whether you agree with it or not.

It is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses, whether live or by deposition, and the exhibits admitted in the record. It is your own interpretation and recollection of the evidence that controls.

You are permitted to draw reasonable inferences, deductions, and conclusions from the testimony and exhibits which you feel are justified in the light of your own common sense.

In saying that you must consider all the evidence, I do not mean to suggest that you must necessarily accept all of the evidence as true or accurate. You are the sole judges of the credibility or believability of each witness and the weight to be given to the testimony of each witness.

In determining the credibility of any witness, you may properly consider the demeanor of the witness while testifying, frankness or lack of it and his or her interest in the outcome of the case, if any.

The statements, objections, and arguments made by the lawyers are not evidence. What the lawyers have said to you is not binding upon you.

The weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You should be guided in your deliberations by the quality and credibility of the evidence you have heard.

In this case it is Plaintiffs' responsibility to persuade you that Plaintiffs' claim is more likely true than not. That is called preponderance of the evidence. If Plaintiff fails to persuade you on every essential element of Plaintiffs' claim, then you should find for the Defendant on that claim.

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PLAINTIFFS' PROPOSED INSTRUCTION NO. 2

DELIBERATION

It is your duty as jurors to consult with one another, and to deliberate with a view to reach an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations do not hesitate to reexamine your own views and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight of effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Any answer must represent the considered judgment of each juror. In order to return an answer to questions presented in these instructions, it is necessary that each juror agree. Your answer must be unanimous.

Upon returning to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesman here in Court.

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PLAINTIFFS' PROPOSED INSTRUCTION NO. 3

WEIGHING THE EVIDENCE - EXPERT WITNESSES

Both Conwood and UST have called expert witnesses in this case. These witnesses, because of their education and experience, have become expert in some profession or calling, have been permitted to state their opinions as to relevant and material matters in which they profess to be expert, and have stated their reasons for their opinions.

You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves.

Source:

3 E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions -- Civil* (4th ed.) § 72.08 (adapted)

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 597 (1993)

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PLAINTIFFS' PROPOSED INSTRUCTION NO. 4

BURDEN OF PROOF -- CRIMINAL BURDEN DISTINGUISHED

As you may know, there are two kinds of cases that come to court: criminal cases and civil cases. Criminal cases are when the government charges a person with a crime, such as theft. Civil cases may also involve illegal acts, but do not involve criminal penalties.

This is a civil case in which Conwood claims it was harmed by UST. I mention this because there is one big difference between criminal cases and civil cases.

In criminal cases, the government must prove its case "beyond a reasonable doubt." That is a stricter standard which applies in criminal cases. It does not apply in civil cases such as this. You should, therefore, put it out of your minds.

Source:

E. Devitt, C. Blackmar & M. Wolff, 3 *Federal Jury Practice and Instructions -- Civil* (4th ed.) § 72.01 (adapted from general notes to the pattern instruction)

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PLAINTIFFS' PROPOSED INSTRUCTION NO. 5

INTRODUCTION TO CONWOOD'S ANTITRUST CLAIMS

Conwood claims that UST violated the antitrust laws by unlawfully monopolizing the market for moist smokeless tobacco, also called moist snuff, in the United States. Conwood also claims that UST unlawfully *attempted* to monopolize the market for moist snuff in the United States. Conwood claims that UST's violations of the antitrust laws harmed competition and caused Conwood to lose profits it would otherwise have earned. UST denies that it violated the antitrust laws in any way, and denies that Conwood was injured or suffered damages.

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PLAINTIFFS' PROPOSED INSTRUCTION NO. 6

PURPOSE OF THE ANTITRUST LAWS

The purpose of the antitrust laws is to preserve and advance our system of free enterprise by encouraging fair competition and by preventing monopolization of any business, so that the consuming public may receive better products at lower cost. The antitrust laws are geared toward protecting the consumer, and you should keep that in mind as you hear evidence about the alleged antitrust violations.

It has been said that the antitrust laws are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. Private antitrust suits, such as this one, are an important way to ensure that the antitrust laws are being followed and enforced.

In enacting the antitrust laws, Congress has determined that monopolies are bad for commerce, and therefore intentionally acquiring or maintaining monopoly power is illegal. Whether or not UST actually exercised its monopoly power is not important. Conwood need only prove that UST acquired or maintained monopoly power through anticompetitive behavior.

Source:

Sample Jury Instructions in Civil Antitrust Cases A-2 (ABA ed. 1999) (adapted)

4 Modern Federal Jury Instructions No. 80-2 (Matthew Bender ed. 1999) (adapted)

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 (1984) (allegations of anticompetitive conduct must be assessed "from the standpoint of the consumer -- whose interests the [Sherman Act] was especially intended to serve.")

United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental economic freedoms.")

2 Areeda & Hovenkamp, *Antitrust Law* ¶ 355b1 (Little, Brown & Co. Rev. ed.(1995) ("private enforcement . . . increases the likelihood that a violator will be found out . . . and thereby helps discourage illegal conduct.")

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PLAINTIFFS' PROPOSED INSTRUCTION NO. 7

ELEMENTS OF MONOPOLIZATION

To win on its claim of illegal monopolization, Conwood must prove each of the following elements:

First, UST had monopoly power in a relevant market;

Second, UST willfully maintained monopoly power in the relevant market through anticompetitive or exclusionary conduct;

Third, Conwood was injured in its business or property.

Source:

Sample Jury Instructions in Civil Antitrust Cases C-2 (ABA ed. 1999) (adapted)

United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.")

Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992) (same)

Re/Max Int'l, Inc. v. Realty One, Inc., 173 F. 3d 995, 1016 (6th Cir. 1999) (same)

PLAINTIFFS' PROPOSED INSTRUCTION NO. 8

FIRST ELEMENT - RELEVANT MARKET

There are two aspects you must consider in defining a relevant market: (i) the relevant product market and (ii) the relevant geographic market.

Relevant Product Market. The basic idea of a relevant product market is that the products within it are reasonably interchangeable substitutes from a buyer's point of view. This does not mean that products must be identical to be in the same product market. It means that, as a matter of practical fact and the actual behavior of buyers, the products are reasonably interchangeable substitutes for the buyer's needs. In this case, Conwood claims that the relevant market includes all moist snuff brands. UST argues that the relevant market is broader and includes all tobacco products such as cigarettes, cigars and other kinds of smokeless tobacco.

There are a number of factors you should consider in determining whether different products are in the same product market. These include, but are not limited to, the following: (i) evidence that consumers substitute or switch from one product to the other when one becomes more expensive; (ii) whether people in the industry consider the products to be in the same market; (iii) whether the products appeal to the same consumers; (iv) whether the products have the same prices; (v) whether the products have the same characteristics such as the way they look, or are used, made or packaged; (vi) whether the competitive conditions for the products are the same.

Relevant Geographic Market. The other aspect is the geographic area in which the products compete. The parties agree that the relevant geographic market is the entire United States.

Source:

Sample Jury Instructions in Civil Antitrust Cases C-6 (ABA 1999) (adapted)

Concord Boat Corp. et al v. Brunswick Corp., No. LR-C 95-781 (E.D. Ark. 1995) (Instruction no. 21) (adapted)

United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 395 (1956) ("In considering what is the relevant market for

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determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up" the market for antitrust analysis)

White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 500 (6th Cir. 1983) ("The essential test for ascertaining the relevant product market involves the identification of those products or services that are either (1) identical to or (2) available substitutes for the defendants' product or service.")

UST Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 2, fn 2. (Conceding that relevant geographic market is entire United States)

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PLAINTIFFS' PROPOSED INSTRUCTION NO. 9

SECOND ELEMENT - MONOPOLY POWER

You must next determine whether UST had monopoly power in the relevant market. Monopoly power is the power to control prices in, or to exclude competition from, the relevant market. If you find UST had the power either to control prices or to exclude competitors, you should find that UST had monopoly power.

Power to Control Prices. Power to control prices can be shown by proof that UST raised prices without a substantial loss of business to competitors. It may also be shown by evidence that UST earned extraordinarily large profits or maintained high margins over a long period of time.

Power to Exclude Competition. Power to exclude competition means the power of a company to dominate a market by preventing existing competition from expanding in that market or by preventing new competition from entering that market. In other words, the power to exclude competition is the power to place barriers in the way of other companies trying to remain in or effectively enter the market and compete for customers.

To establish that UST possessed monopoly power, Conwood need not prove that prices were actually raised or that competition actually was excluded, but only that UST had the power to do so. You also need not find that UST could sell at any price it desired or that UST had no competition whatsoever. A company may face some competition in the relevant market and still have monopoly power.

Source:

ABA Sample Jury Instructions in Civil Antitrust Cases C-4, 14-15 (ABA ed. 1999) (adapted)

American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946) ("[T]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition is actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so.")

William C. Holmes, Antitrust Law Handbook § 2.03[2] (1999 ed.)("[E]vidence that the defendant has actually exercised price

leadership control over the industry . . . can be particularly compelling evidence that [the defendant] has monopoly power.")

Byars v. Bluff City News Co., 609 F.2d 843, 850 (6th Cir. 1979) (Plaintiff can "show[] monopoly power [by] marshal[ling] evidence showing the exercise of actual control over prices...")

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) (same)

PLAINTIFFS' PROPOSED INSTRUCTION NO. 10

SECOND ELEMENT - MONOPOLY POWER - MARKET SHARE AS INDICATOR OF MONOPOLY POWER

You may infer monopoly power from UST's share of the relevant market. Share is a firm's percentage of total industry sales.

The larger UST's market share was, the more likely that UST had the power to control prices and to exclude competition. If you determine that UST's share of the relevant market was 66% percent or higher, that is strong evidence that UST had monopoly power.

Another factor that you may consider is the history of entry into and exit from the relevant market by other companies. If there has been recent entry of new companies into the market, that may indicate that UST lacked monopoly power. On the other hand, if there has been departure of companies from the market or a lack of new competitors entering the market, that is evidence of monopoly power.

Source:

ABA Sample Jury Instructions in Civil Antitrust Cases C-14-15 (ABA ed. 1999) (adapted)

Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1993) (There are two ways to establish monopoly power. "The first is by presenting direct evidence showing the exercise of actual control over prices or the actual exclusion of competitors. The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market.") (internal quotes and citation omitted)

PSI Repair Servs. Inc. v. Honeywell, Inc., 104 F.3d 811, 821 (6th Cir.) ("[T]he Supreme Court has concluded that . . . over two-thirds of the market . . . constitute[s] monopoly power under section 2.")

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 591 n.15 (1986) ("Respondents offer no reason to suppose that entry into the relevant market is especially difficult, yet

without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time.")

United States v. Mrs. Smith's Pie Co., 440 F.Supp. 220, 229 (E.D. Pa. 1976) (Barriers to entry, which may be proved by an "unsuccessful attempt . . . to enter," are "practical indicia" of market power.)

Ansell Inc. v. Schmid Lab., Inc., 757 F.Supp. 467, 474-75 (D.N.J.) *aff'd* 941 F.2d 1200 (3d Cir. 1991) (Failure of competitors evidence of entry barriers)

PLAINTIFFS' PROPOSED INSTRUCTION NO. 11

SECOND ELEMENT - WILLFUL MAINTENANCE OF MONOPOLY POWER AND EXCLUSIONARY CONDUCT DEFINED

You must next decide whether UST willfully maintained monopoly power through anticompetitive or exclusionary conduct.

UST acted willfully if it intended to do acts that naturally result in the elimination of competition and maintenance of monopoly power. UST's conduct was anticompetitive or exclusionary if it had the effect of reducing competition or impairing the efforts of other firms to compete for customers within a relevant market. It is not necessary that such conduct be unlawful by itself. The question is whether it impaired competition without providing lower prices or other consumer benefit. If a company attempts to exclude rivals on some basis other than lower price or other consumer benefit, its behavior must be characterized as exclusionary.

You may look to evidence of UST's intent to help you decide whether UST's conduct was exclusionary. Whether conduct is exclusionary is also determined in part by whether the firm engaging in the conduct is a monopolist. Conduct that might be legitimate, procompetitive behavior if engaged in by a firm without a monopoly can be anticompetitive if practiced by a monopolist; in other words, a monopolist is held to a higher standard when it engages in acts that may have the effect of restricting competition. You should keep this in mind when deciding whether UST's conduct was exclusionary.

Source:

Litton Sys., Inc. v. Honeywell, Inc., CV 90-4823-MRP (D.C. Cal. 1990) (Instruction no. 20) (adapted)

ABA Sample Jury Instructions in Civil Antitrust Cases C-20 (ABA ed. 1999) (adapted)

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 595-96 (1985) ("The question whether [defendant's] conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on [plaintiff]. In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. If a

firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Id.* at 608.) Intent relevant to "whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive.'" *Id.* at 602.

United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978)("consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct.")

Potters Medical Center v. City Hosp. Ass'n, 800 F.2d 568, 575 (6th Cir. 1986) (Section 2 holds unlawful any "use of monopoly power to foreclose competition or gain a competitive advantage")

Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1339 (7th Cir. 1986) (in a section 2 monopolization case, the issue is "whether the large firm seeks to exclude competition on a basis other than efficiency.")

Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) ("Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws -- or that might be viewed as procompetitive -- can take on an exclusionary connotation when practiced by a monopolist.")

PLAINTIFFS' PROPOSED INSTRUCTION NO. 12

SECOND ELEMENT - WILLFUL MAINTENANCE - RELEVANCE OF ALLEGED CONWOOD CONDUCT

It is no defense that other firms may have engaged in conduct similar to or even the same as the alleged conduct of UST. Your focus must be on whether UST willfully maintained monopoly power through exclusionary conduct, not what other firms may have done.

Source:

Paschall v. Kansas City Star Co., 695 F.2d 322, 333 (8th Cir. 1982) ("It is clear that a monopolist is prohibited from engaging in certain conduct that would be lawful if performed by a competitive firm.")

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 488 (1992) (White, J. dissenting) ("Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws — or that might even be viewed as procompetitive — can take on exclusionary connotations when practiced by a monopolist.")

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2nd Cir. 1979) ("[certain] conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even 'honestly industrial.'")

PLAINTIFFS' PROPOSED INSTRUCTION NO. 13

SECOND ELEMENT - WILLFUL MAINTENANCE - STORE PERMISSION NO DEFENSE

If you find that UST engaged in exclusionary conduct, it is no defense that retailers permitted UST to do so. The consent or lack of consent of stores is irrelevant to whether UST's conduct was exclusionary.

Source:

LePage's Inc. v. 3M, 1991-1 Trade Case (CCH) ¶72,538, No. 97-3983, 1999 U.S. Dist. LEXIS 8036 *34 (May 28, 1999) (With respect to monopolist's attempt to discourage use of competitor's private label tape business, retailers were persuaded to go along with monopolists recommendation provided no defense to the anticompetitive acts. "3M's position as a monopolist may affect the evaluation of its conduct and that conduct's effect on the competitive process.")

General Cinema Corp. v. Buena Vista Distrib. Co., 532 F.Supp. 1244, 1274-75 (C.D. Cal. 1982) ("[T]he court agrees with [plaintiff] that as a matter of law, evidence of its acquiescence in [anticompetitive conduct]... is not material to the question of [defendant's] liability . . .")

Potters Med. Ctr., 800 F.2d at 575 (monopolist's actions "need not be in themselves independently unlawful" to violate Section 2) (internal quotation marks and citation omitted)

Byars v. Bluff City News Co., 609 F.2d 843, 849, 853-54 (6th Cir. 1979) (conduct designed to impair the distribution of rival products and racks actionable under Section 2)

PLAINTIFFS' PROPOSED INSTRUCTION NO. 14

THIRD ELEMENT - INJURY/CAUSATION

You must next decide whether Conwood was injured as a result of UST's violation of the antitrust laws. For purposes of this element, you need not consider the *amount* of injury to Conwood. I will instruct you later as to the amount of damages you may award.

Conwood is not required to prove that UST's conduct was the sole cause of its injury; nor need Conwood eliminate all other possible causes of injury; nor need Conwood prove that UST benefitted from the loss experienced by Conwood. It is enough if Conwood has proved that UST's unlawful monopolization was a material cause of its injury even though other factors also may have contributed.

Source:

Sample Jury Instructions in Civil Antitrust Cases F-2-3 (ABA ed. 1999)(adapted)

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 344 (1990) (plaintiff must show that his injury flowed from a competition-reducing aspect of defendants' conduct.)

United States Football League v. National Football League, 842 F.2d 1335, 1377 (2d Cir. 1988) ("[P]laintiffs do not have to prove that the unlawful activity that the defendants allegedly engaged in was the sole cause of their injuries. Plaintiffs meet their burden if they show that the defendants' unlawful facts substantially contributed to their injuries, even though other facts may have contributed significantly. An antitrust plaintiff is not required to show that the defendants' acts were a greater cause of the injury than other factors. Plaintiffs need only show that their injury to some degree resulted from defendants violation.")

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PLAINTIFFS' PROPOSED INSTRUCTION NO. 15

ATTEMPTED MONOPOLIZATION - ELEMENTS

In order to establish Conwood's second claim, attempted monopolization, Conwood must prove the following elements:

First, UST engaged in exclusionary conduct;

Second, UST had a specific intent to achieve monopoly power in a relevant market;

Third, there was a dangerous probability that UST would sooner or later achieve its goal of monopoly power in the relevant market.

Fourth, Conwood was injured in its business or property.

Source:

Sample Jury Instructions in Civil Antitrust Cases C-80 (ABA ed. 1999)

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 ("[I]t is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.")

PLAINTIFFS' PROPOSED INSTRUCTION NO. 16

ATTEMPTED MONOPOLIZATION - FIRST ELEMENT - EXCLUSIONARY CONDUCT

I have previously instructed you on exclusionary conduct. That instruction applies here as well.

PLAINTIFFS' PROPOSED INSTRUCTION NO. 17

ATTEMPTED MONOPOLIZATION - SECOND ELEMENT -

SPECIFIC INTENT TO MONOPOLIZE

You must next decide whether UST had the specific intent to monopolize the relevant market. In other words, you must decide whether UST acted with the conscious object of acquiring the power to control prices or to exclude competition in the relevant market.

There are several ways in which Conwood may prove that UST had the specific intent to monopolize. There may be evidence of direct statements of UST's intent to obtain a monopoly in the relevant market, or there may be evidence of direct statements of UST's intent to exclude or deter entry into the relevant market through various means, such as the erection of entry barriers. For this you may consider documents prepared by employees of UST around the time of the conduct in question and any statements made by employees of UST. You must be careful, however, to distinguish between intent to compete aggressively, which is lawful, and an intent to acquire monopoly power through exclusionary means, which is unlawful.

You may also infer specific intent from what UST did. For example, if the evidence shows that the probable consequence of UST's conduct in the relevant market was to give UST control over prices or destroy competition, and this was plainly foreseeable to UST, then you may infer that UST specifically intended to acquire monopoly power.

Source:

Sample Instructions in Civil Antitrust Cases C-86 (ABA ed. 1999) (second paragraph modified)

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) ("We hold that petitioners may not be liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize.")

Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191, 1199 (3d Cir. 1995) ("In addition to demonstrating predation,

plaintiffs alleging monopolization under section 2 must produce intent evidence.")

PLAINTIFFS' PROPOSED INSTRUCTION NO. 18

ATTEMPTED MONOPOLIZATION - THIRD ELEMENT - DANGEROUS PROBABILITY OF SUCCESS

You must next decide whether there was a dangerous probability that UST would succeed in achieving its intended monopoly if it continued to engage in the same or similar conduct.

The term "dangerous probability of success" does not mean that success was nearly certain. It means that the chance of success was substantial and real; that is, that there was a reasonable likelihood that UST would ultimately achieve its goal of monopoly power.

Source:

Sample Jury Instructions in Civil Antitrust Cases C-89 (ABA ed. 1999) (adapted)

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993) ("[I]t is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.")

American Academic Suppliers, Inc. v. Beckley-Cardy, Inc., 922 F.2d 1317, 1319-1320 (7th Cir. 1991) ("Firms found guilty of attempting to monopolize are typically . . . monopolists.")

UST v. Appleton Papers, Inc., 35 F.Supp.2d 1138, 1146 (D. Minn. 1999) ("Proof of market power in a monopolization claim and proof of dangerous probability of success in an attempt claim are of the same character.")(internal quotes omitted)

PLAINTIFFS' PROPOSED INSTRUCTION NO. 19

ATTEMPTED MONOPOLIZATION -

FOURTH ELEMENT - INJURY

I have previously instructed you on injury. That instruction applies here as well.

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PLAINTIFFS' PROPOSED INSTRUCTION NO. 20

TOTALITY OF THE EVIDENCE

In determining whether Conwood has proved one or both of its antitrust claims, you must view all the evidence together.

You should not view each of UST's acts in isolation from other acts. You should use your judgment to thoroughly and sensitively weigh all of the evidence presented. Your duty, as jurors, is to look at the whole picture and not view each separate act in isolation. Persons claiming violations of the antitrust laws should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.

Source:

Sample Jury Instructions in Civil Antitrust Cases B-2-4 (ABA ed 1990) (adapted)

Continental Ore Co. v. Union Carbide & Carbon Co., 370 U.S. 690, 699 (1962) ("[P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.")

Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1443-44 (6th Cir. 1990) ("The jury is entitled to look at the whole picture with respect to allegations and evidence of Sherman Act §2 violations")

City of Mishawaka v. American Electric Power Co., 616 F.2d 976, 986 (7th Cir. 1980) ("It is the mix of the various ingredients . . . in a monopoly broth that produces the unsavory flavor.")

PLAINTIFFS' PROPOSED INSTRUCTION NO. 21

ANTITRUST DAMAGES

If you find that UST either monopolized *or* attempted to monopolize in accordance with my prior instructions, you must decide what damages, if any, to award Conwood.

The law provides that Conwood should be fairly compensated for all damages to its business and property which were a likely consequence of the conduct which you have found to be unlawful. Violations of the antitrust laws often create situations in which it is hard to determine the precise amount of damages suffered.

The law allows a party injured by violations of the antitrust laws to receive damages even if those damages cannot be calculated with mathematical precision. The reason for this rule is that the law does not reward wrongdoers who cause a harm that is not easy to measure. Any other rule would encourage making wrongdoing so effective and complete in every way as to preclude any recovery, by making the measure of damages uncertain.

This does not mean that you may speculate or guess as to the amount of damages. Rather, based on the evidence presented, you should make a fair and reasonable estimate of the total damages that Conwood suffered as a result of UST's violation of the antitrust laws. Such damages may include lost profits for prior years, if you find that Conwood's profits for those years would have been greater, and lost profits for future years, if you find that Conwood's future earnings are likely to be reduced.

Source:

Sample Jury Instructions in Civil Antitrust Cases, F-8, 12, 16 (1999 ed.)(adapted)

Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264 (1946)

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PLAINTIFFS' PROPOSED INSTRUCTION NO. 22

LANHAM ACT CLAIMS

To establish a Lanham Act violation, Conwood must show that UST:

(i) made a false or misleading representation about its own products and Conwood's;

(ii) retailers and consumers were deceived or were likely to have been deceived by UST's representations;

(iii) the deception was material in the sense that it was likely to influence purchasing decisions;

(iv) the goods in question traveled in interstate commerce;

(v) Conwood was likely damaged by UST's misrepresentations.

If you believe from the evidence that UST violated the Lanham Act and injury to Conwood resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

Source:

15 U.S.C. section 1125(a)

Halicki v. United Artists Communications, 812 F.2d 1213, 1214 (9th Cir. 1987) (competitor has standing to seek relief for injury caused by a theater's false advertising of movie rating)

Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1383 n.3 (5th Cir. 1996) (listing elements of Lanham Act § 43(a))

PLAINTIFFS' PROPOSED INSTRUCTION NO. 23

UNJUST ENRICHMENT

To establish its claim that UST was unjustly enriched, Conwood must show the following:

(i) Conwood conferred a benefit upon UST. A benefit may be services, goods or monies. A loss by Conwood without an actual benefit to UST is not recoverable as unjust enrichment.

(ii) UST accepted the benefit from Conwood under such circumstances that it would be impossible for it to retain the benefit without paying the value thereof. It is not necessary to prove that the recipient of the benefit was a fault or guilty of wrongdoing in any way, but it must be established that as between the parties it would be unjust and unconscionable for the recipient to retain the benefit without paying the reasonable value thereof.

If you believe from the evidence that UST was unjustly enriched at the expense of Conwood, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

Source:

Concord Boat Corp. et al v. Brunswick Corp., No. LR-C 95-781 (E.D. Ark. 1995) (Instruction nos. 125-129) (adapted)

PLAINTIFFS' PROPOSED INSTRUCTION NO. 24

CONVERSION

Conwood contends that UST systematically removed Conwood racks, point-of-sale advertising, and products from retail locations. Conwood claims that UST employees kept these items, threw them away or otherwise disposed of them. UST denies these allegations.

You will find for Conwood if you are satisfied from the evidence that:

(i) UST took racks, point-of-sale advertising and products from retail locations;

AND

(ii) some or all of these racks, point-of-sale advertising and products belonged to Conwood;

AND

(iii) Conwood was damaged thereby.

If you believe from the evidence that UST converted Conwood property and injury to Conwood resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

Source:

2 Palmore and Eades, Kentucky Instructions to Juries, § 29.01 (Anderson Ed. 1989) (adapted)

Mansback v. Prescott, Ball & Turben, 598 F.2d 1017, 1027 (6th Cir. 1979) (To prove conversion, "[a]ll that is necessary is that the defendant exercise dominion and control over the property which is inconsistent with the Plaintiff's rights" and damages result

Sherman v. Adams, 302 Ky. 490, 194 S.W.2d 625 (Ky. 1946)

Guarantee Elec. Co. v. Big Rivers Elec. Corp., 669 F. Supp. 1371, 1380-81 (W.D. Ky. 1987)

PLAINTIFFS' PROPOSED INSTRUCTION NO. 25

PRODUCT DEFAMATION

Conwood claims that UST made false and misleading statements about the quality of Conwood's moist snuff products when UST sales representatives stated that Conwood products contained stems, twigs, and fiberglass. Conwood claims that it suffered damages as a result. UST denies the allegation.

For Conwood to establish liability, it must show that:

(i) UST made statements about Conwood products that would reasonably have been understood to imply that Conwood products were inferior or defective;

(ii) Such statements would tend to injure Conwood's business and reputation;

(iii) Such statements were not true and gave a false a impression of Conwood and its products;

(iv) A reasonably prudent person would not have made statements similar to those made by UST about Conwood products;

(v) Conwood suffered harm to its reputation or economic loss as a direct result of UST's statements.

If you believe from the evidence that UST defamed Conwood or its products and injury to Conwood resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

Source:

2 Palmore and Eades, Kentucky Instructions to Juries, § 40.01 (Anderson ed 1989) (adapted)

Columbia Sussex, Inc. v. Hay, 627 S.W.2d 270, 274 (Ky. Ct. App. 1981)

Kentucky Fried Chicken of Bowling Green, Inc. v. Sanders, 563 S.W.2d 8 (1978)

PLAINTIFFS' PROPOSED INSTRUCTION NO. 26

UNFAIR COMPETITION - KENTUCKY REVISED STATUTE § 365.050

Conwood alleges that UST has violated Kentucky Revised Statute § 365.050, which prohibits unfair trade practices, by making secret payments to certain retailers but not others. UST denies the allegation.

To establish a violation of Ky. Rev. Stat. § 365.050, Conwood must show that:

(i) UST made secret payments to retailers or distributors in the form of allowances, rebates, refunds, commissions, discounts or the like; and

(ii) UST's payments in fact caused injury to Conwood or competition

If you believe from the evidence that UST violated Ky. Rev. Stat. §365.050 and injury to Conwood resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

Source:

Ky. Rev. Stat. Ann. §365.050 (Michie)

Jefferson Ice & Fuel Co. v. Grocers Ice & Cold Storage Co., 286 S.W.2d 80, 83 (Ky. 1955)(intent to destroy competition not necessary)

PLAINTIFFS' PROPOSED INSTRUCTION NO. 27

INTERFERENCE WITH CONTRACTUAL RELATIONS

Conwood alleges that UST interfered with various of its agreements with retailers by virtue of UST's disparaging comments about the quality of Conwood products, misleading presentations of sales data to retailers, and UST insistence on agreements with retailers that tended to exclude Conwood racks, POS, products and promotions. UST denies this allegation.

To establish interference with contractual relations, Conwood must show that:

(i) UST improperly interfered with Conwood's business expectancy, and

(ii) UST did so intentionally, and

(iii) UST did so without a legitimate interest or business purpose.

If you believe from the evidence that UST interfered with Conwood's contractual relations and injury to Conwood resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

Source:

National Collegiate Athletic Association v. Hornung, 754 S.W.2d 855, 857-58(Ky. 1988)

Carmichael-Lynch-Nolan v. Bennett, 561 S.W.2d 99, 102 (Ky. Ct. App. 1977)

PLAINTIFFS' PROPOSED INSTRUCTION NO. 28

INTERFERENCE WITH BUSINESS EXPECTANCY

Conwood alleges that UST interfered with various of its potential agreements with retailers by virtue of UST's disparaging comments about the quality of Conwood products misleading presentations of sales data to retailers and UST insistence on agreements with retailers that tended to exclude Conwood racks, POS, products and promotions. UST denies this allegation.

To establish interference with business expectancy, Conwood must show that:

(i) UST improperly interfered with Conwood's business expectancy, and

(ii) UST did so intentionally, and

(iii) UST did so without a legitimate interest or business purpose.

If you believe from the evidence that UST interfered with Conwood's business expectancy and injury to Conwood resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

Source:

National Collegiate Athletic Association v. Hornung, 754 S.W.2d 855 857-58 (1988)

Carmichael-Lynch-Nolan v. Bennett, 561 S.W.2d 99, 102 (Ky. Ct. App. 1977)

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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Counsel for Plaintiffs

January 28, 2000

CERTIFICATE OF SERVICE

I certify that on this 28th day of January 2000, a copy of the foregoing was sent by overnight mail to:

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STEVEN F. BENZ
NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

January 28, 2000

Honorable Thomas B. Russell
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed are courtesy copies of Plaintiffs' Proposed Jury Instructions, Plaintiffs' Proposed Voir Dire Questions, Plaintiffs' Motions in Limine, Plaintiffs' Objections to Defendants' Trial Exhibits, Plaintiffs' Objections and Counterdesignations to Defendants' Designations of Deposition Testimony, and Plaintiffs' Motion for an Appropriate Trial Exhibit List and Appropriate Deposition Designations. These documents have also been filed with the Clerk.

Respectfully,

Neil M. Gorsuch

Enclosure

cc: Neal R. Stoll
John S. Reed

16diii002916

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REID M. FIGEL
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SEAN A. LEV
COURTNEY SIMMONS ELWOOD

January 28, 2000

Honorable James D. Moyer
208 Snyder U.S. Courthouse
601 W. Broadway
Louisville, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Judge Moyer:

Enclosed are courtesy copies of Plaintiffs' Proposed Jury Instructions, Plaintiffs' Proposed Voir Dire Questions, Plaintiffs' Motions in Limine, Plaintiffs' Objections to Defendants' Trial Exhibits, Plaintiffs' Objections and Counterdesignations to Defendants' Designations of Deposition Testimony, and Plaintiffs' Motion for an Appropriate Trial Exhibit List and Appropriate Deposition Designations. These documents have also been filed with the Clerk.

Respectfully,

Neil M.Gorsuch

Enclosure

cc: Neal R. Stoll
John S. Reed

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' PROPOSED VOIR DIRE QUESTIONS

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Counsel for Plaintiffs

January 28, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' PROPOSED VOIR DIRE QUESTIONS

Plaintiffs Conwood Company, L.P. and Conwood Sales Company, L.P. ("Conwood") respectfully submit the following proposed questions for use by the Court during voir dire:

1. Do you own or rent your home?

2. Where do you live?

3. Have you always lived in that area? If not, where else have you lived and during what period of time?

4. In what year were you born?

5. What is your marital status?

6. Did you graduate from high school? If so, please give the name of the school and date of graduation.

7. Have you attended college, graduate school, or adult education classes? If so, please give the name of the college, university, or graduate school; any degree(s) received and the subject(s) of study; and the dates of attendance or graduation.

8. Do you have any children? If so, please list their gender, ages, and occupations (if they are employed).

9. Do you have any problem with your vision or hearing that would prevent you from giving your full attention to all the evidence at this trial? If so, please describe.

10. Are you taking any medication that might prevent you from giving your full attention to all the evidence at this trial? If so, please describe.

11. Do you regularly read financial articles or the business section of newspapers and other magazines?

12. What organizations or clubs do you belong to or support?

13. Have you ever held an office in any organization? Which ones?

14. What are your hobbies?

15. Do you follow car racing or motorcross sports?

16. Do you ever attend car racing or motorcross sporting events?

17. Do you ever attend rodeos?

18. Do you serve or have ever served in the military? What was your branch, position, and dates of service?

19. Have you ever had any experience, training, or taken any courses in marketing, advertising, or sales?

20. Do you smoke or have you ever smoked cigarettes? Were you/are you now a regular smoker?

21. Have you ever tried to stop smoking? How many times?

22. Do you use or have you ever used moist snuff? Does/did anyone in your immediate family use moist snuff?

    If so,

    a. Where do/did you buy it?
    b. What brand do/did you use?
    c. Have you ever switched brands? Why did you switch? What brand did you switch to?

23. Do you use or have you ever used dry snuff? Does/did anyone in your immediate family use dry snuff?

    If so,

a. Where do/did you buy it?
b. What brand do/did you use?
c. Have you ever switched brands? Why did you switch? What brand did you switch to?

24. Do you use or have you ever used loose leaf tobacco? Does/did anyone in your immediate family use loose leaf tobacco?

If so,

a. Where do/did you buy it?
b. What brand do/did you use?
c. Have you ever switched brands? Why did you switch? What brand did you switch to?

25. Do you use or have you ever used plug/twist tobacco? Does/did anyone in your immediate family use plug/twist tobacco?

If so,

a Where do/did you buy it?
b. What brand do/did you use?
c. Have you ever switched brands? Why did you switch? What brand did you switch to?

26. Have you ever been involved in the growth or manufacture of any kind of tobacco? If so, in what way?

27. Do you have close relative or family friend involved in the growth or manufacture of any kind of tobacco? If so, in what way?

27. Are you currently employed? If so, please give the name of your employer, your title, and your job responsibilities. If you are retired, please give your last employer, title, and job responsibilities.

28. Does your spouse or significant other work outside the home? If so, what are his/her employer, job title, and job responsibilities?

29. Do you hold a supervisory position at work? If yes, how many people do you supervise?

30. Have you ever worked in retail? Please describe what you did, including any experience in inventory, shelving, in-store advertising, etc.

31. Have you ever worked in sales? Please describe.

32. Have you or anyone in your family ever owned your own business? Please describe.

33. Have any of you, or a close friend, or family member, worked for a business or had a business that was involved in a dispute over alleged unfair trade practices? If so, what was the dispute?

34. Have you, or has any close friend or relative, ever studied or practiced law or worked for a law firm? If so, please describe the circumstances.

35. Have you, or any close friend or relative, ever been involved in a lawsuit, including a class action, or had a lawsuit filed against you? If so, please describe what the suit and the outcome.

36. Have you, or any close friend or relative, ever served as a juror in a civil or criminal case? If yes, please state the nature of the case, the result, and whether that experience left any impressions that would influence your evaluation of this case.

37. Have you, or any close friend or relative, ever testified in a civil or criminal case? If so, for which side and what were the circumstances surrounding your testimony? Does anything connected with that experience affect your evaluation of this case?

38. Have you, or has any close friend or relative, ever been employed by a tobacco company, wholesale or retail business? If yes, please describe.

Have you ever worked or had experience with consultants who advise about how to set up or run a retail business?

39. Have you ever heard of any of the following individuals or companies? If so, how?

Conwood Company, L.P.
Conwood Sales Company, L.P.
United States Tobacco Company
United States Tobacco Sales and Marketing Company, Inc.
United States Tobacco Manufacturing Company, Inc.
UST, Inc.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
Whitlow, Roberts, Houston & Straub
Skadden, Arps, Slate Meagher & Flom, LLP
Reed, Weitkamp, Schell & Vice, PLLC
William Rosson
Bill Ingram

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Vincent Gierer
Gary Smith
Mark Hansen
Neil Gorsuch
Ben Powell
Michael Guzman
Richard Roberts
Neal Stoll
James Keyte
Rachel Mariner
Chris Athanasia
John Reed
Robert Blattberg
Morton Kamien
Richard Leftwich
Gregory Gundlach
Edward Popper
David Scheffman
Winston Weber

40. Among the products U.S. Tobacco Company manufactures are Copenhagen, Skoal, Red Seal, and Bandits. Are you familiar with any of these products? If so, how?

41. Among the products Conwood manufactures are Kodiak, Hawken and Cougar. Are you familiar with any of these products? If so, how?

42. As a juror, is there any reason why you would be unable to award damages if you found defendants liable?

43. Do you prefer for any reason not to sit as a juror in this trial which may last as long a month?

44. Does anyone believe that there are too many lawsuits in our country? Why?

45. Should there be laws limiting the rights of people or companies to sue others? Why?

46. Have you ever heard of the term "monopoly"?

49. Do you have any opinion about monopolies? What is it?

48. Do you have any view about antitrust laws? Do you think they are a good or a bad thing?

49. Does anyone believe that companies should be allowed to compete without any restrictions or government regulation?

50. Does anyone believe that there is just too much regulation

of the way businesses are allowed to compete?

51. Does anyone feel that government should stay out of the way businesses are run?

52. Have you followed the government's case against Microsoft in the news? Do you have an opinion about it?

53. Would anyone have difficulty awarding damages to a company, as opposed to a person? Why?

54. Is there any reason you would be unwilling to award damages, if you find that the evidence supported them?

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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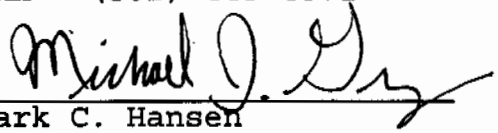

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Counsel for Plaintiffs

January 28, 2000

16diii002925

CERTIFICATE OF SERVICE

I certify that on this 28th day of January 2000, a copy of the foregoing was sent by overnight mail to:

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John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Michael J. Guzman

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' MOTIONS IN LIMINE

Plaintiffs respectfully move the Court, *in limine*, for an order excluding the following evidence from the trial of this case:

1. Evidence as to Conwood's owners and their alleged wealth. Defendants have indicated that they intend to offer evidence that Conwood is owned, indirectly, by members of the Pritzker family, and that the Pritzker family has substantial wealth. Conwood's ownership is entirely irrelevant to any issue in this case, and even more irrelevant is the wealth of the Pritzker family. Evidence about Conwood's – and UST's – profits can fairly be offered, as can evidence of the firms' respective returns (UST's dividends and share repurchases substantially exceeding Conwood's in both absolute and relative terms). But information about the ultimate beneficiaries of these profits would be inflammatory and prejudicial. There should accordingly be no mention of who or what owns Conwood, nor their wealth.

2. Testimony of David Scheffman. Defendants have designated David Scheffman (formerly a faculty member at Vanderbilt and now a full-time "litigation consultant") as their expert on economic and marketing issues. Mr. Scheffman submitted a materially untruthful report about his compensation in this matter. Under Fed. R. Civ. P. 26(a)(2)(B), Mr. Scheffman was required to disclose "the compensation to be paid for [his] study and testimony." Mr. Scheffman disclosed only that "I am currently compensated at a rate of $400 per hour for my work in this matter." Scheffman Expert Rep. at 1. In fact — as plaintiffs' counsel discovered by happenstance at deposition — Mr. Scheffman receives far greater compensation than he disclosed in his report. He receives a percentage (almost 14%) of *all* hourly billings of at least 13 other consultants from his firm (Navigant) who are working on this matter under his supervision. See Scheffman Dep. at 96-97, 103-04. Although Mr. Scheffman was unwilling to state how much money he received on this basis, id. at 106-12, it is beyond dispute that his sworn report is false. His explanation for this falsity is equally troubling: he did not think he should be required to disclose all of his compensation. Id. at 99-106. "The compensation, in whatever form, received by . . . experts to testify . . . [is] relevant to the credibility of their testimony." Thayer v. Liggett & Myers Tobacco Co., Civ. Action No. 5314, 1970 U.S. Dist. LEXIS 12796, at *41-42 (W.D. Mich. Feb. 19, 1970). Mr. Scheffman should be permitted to testify only upon the condition that he disclose, fully and accurately, all the money he has earned and will earn from this engagement, as well as his relative earnings from his academic affiliation (which, on information and belief, plaintiffs

maintain is quite small) and his full-time work as a defendants' litigation expert, which plaintiffs believe may run into the hundreds of thousands of dollars.[1]

3. Evidence that companies other than UST seek to exclude. UST should be precluded from making any reference to, or offering any evidence to support, claims that Conwood and other companies tampered with UST moist snuff racks after UST succeeded in obtaining "exclusive vending" (i.e., UST's as the exclusive moist snuff rack to the exclusion of other manufacturers' racks). It is not relevant that victimized small competitors in some instances sought to restore their brands to their own racks.[2] "Tit for tat" is not a defense to Conwood's antitrust claims. A monopolist (such as UST) violates Section 2 of the Sherman Act by maintaining its market power through exclusion of rivals on any basis other than reduced prices or other consumer benefit. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 615 n.32 (1985); Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 575 (6th Cir. 1986). Nor is it a defense to Conwood's state law claims. Because UST has no evidence of any Conwood conversion of racks in Kentucky, UST's counterclaims do not afford a basis for admission of any evidence regarding alleged Conwood

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[1]Mr. Scheffman testified that he has been engaged in scores of antitrust cases, in all but one of which he testified for the defense. Scheffman Dep. at 16-20.

[2]This is because, to take their own products out of UST's rack, excluded rivals were in some instances required to remove the vacated slots in UST's rack. This was a necessary part of restoring their own racks for their own products. UST's evidence of "misconduct" by competitors typically involves alleged "retaliation" by excluded rivals in response to UST's successful efforts to prevent them from merchandising and advertising their products in their own racks.

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misconduct.

4. "Retailer permission" evidence. The Court should exclude evidence that retailers permitted or agreed to UST's exclusion of rival racks, products, and advertising - except as necessary to rebut any claim by plaintiffs that, in specific instances, UST effected such exclusion against the wishes of the retailer. Otherwise, retailer consent is irrelevant to Conwood's antitrust claims. Where the monopolist procures the exclusion of rivals by means other than lower prices or better products for *consumers*, it commits a Section 2 violation whether or not the retailer goes along with it. Aspen Skiing, 472 U.S. at 615 n.32; Potters Med. Ctr., 800 F.2d at 575; Byars v. Bluff City News Co., 609 F.2d 843, 849, 853-54 (6th Cir. 1979) (conduct designed to impair the distribution of rival products and racks actionable under Section 2; consent not the issue); LePage's Inc. v. 3M, No. Civ. A. 97-3983, 1999-1 Trade Cas. (CCH) ¶ 72,538, 1999 WL 346223, at *4-6 (E.D. Pa. May 14, 1999) (rebate program concededly agreed to by retailer); Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129, 1136 (S.D.N.Y. 1986) (profit guarantee program agreed to by retailers supported Section 2 claim against manufacturer); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 344-45 (D. Mass. 1953) (leasing arrangements, agreed to by consumers, violated Section 2), aff'd, 347 U.S. 521 (1954).

5. Any evidence offered in support of UST's counterclaims. For the reasons set forth in Conwood's Motion for Summary Judgment, UST should be precluded from offering any evidence in support of its counterclaims because it failed to list a single witness with personal knowledge of any actionable misconduct by Conwood, despite an order from the Court (by Magistrate Judge

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Moyer) to disclose by September 21, 1999 any and all such witnesses. May 11, 1999 Order at 3. In addition, UST never provided any damages computation, as required both by Fed. R. Civ. P. 26(a)(1)(C) and by a direct Order of the Court. See February 5, 1999 Order.

6. Hearsay deposition testimony and documents. UST has listed, for introduction at trial, 25 depositions of its own employees. These witnesses are all current UST employees available to testify at trial. Because a party may offer deposition testimony only when a witness is "unavailable," UST should not be permitted to play excerpts of its current employees' depositions in lieu of calling them to testify at trial. Fed. R. Civ. P. 32. Similarly, UST has designated (in its list of 4250 putative trial exhibits) hundreds if not thousands of its own prior written statements. These self-serving statements are inadmissible hearsay under Fed. R. Evid. 801 and 802 and should be excluded.

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THEREFORE, Conwood respectfully requests that the Court exclude or condition the admission of the above-listed matters. A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

January 28, 2000

16diii002932

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of Plaintiffs' Motions in Limine, the opposition thereto, and for good cause shown, it is hereby ordered that defendants may not introduce the following at trial:

1. Evidence or testimony concerning the wealth and identity of plaintiffs' owners.

2. Evidence or testimony from David Scheffman unless Mr. Scheffman provides full and accurate testimony regarding all compensation from this and other litigation support matters.

3. Evidence that companies other than defendants have sought to exclude rivals' products.

4. Evidence or testimony that retailers permitted or agreed to defendants' exclusion of rival moist snuff racks, products, and advertising, except as necessary to rebut any claim by plaintiffs that, in specific instances, defendants effected such exclusion against the wishes of the retailer.

5. Evidence or testimony concerning defendants' counterclaims.

6. Deposition testimony of defendants' own employees and defendants' own documents when offered by defendants.

SO ORDERED.

Dated this ____ day of _____ 2000.

HONORABLE THOMAS B. RUSSELL
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I certify that, on this 28th day of January, 2000, a copy of the foregoing was sent via overnight delivery to:

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James A. Keyte
Chris T. Athanasia
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John S. Reed
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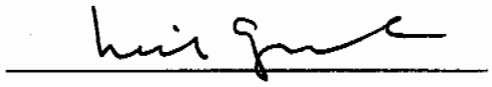
Louisville, KY 40202



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' MOTION FOR AN APPROPRIATE TRIAL EXHIBIT LIST AND APPROPRIATE DEPOSITION DESIGNATIONS

Under the Court's Scheduling Order, defendants ("UST") were directed to provide plaintiffs ("Conwood") with a list of exhibits and deposition designations that they "intend[] to use at trial." Order at 2. Instead, UST threw in the kitchen sink, listing some 4,250 exhibits and huge chunks of 123 separate depositions.

Defendants' overdesignations fail to provide Conwood with reasonable notice of the exhibits and excerpts they intend to use at trial and, accordingly, prejudice Conwood's ability to prepare. In fact, UST would have to introduce 425 documents or other items every single trial day to exhaust its proffered "exhibit list."[1] Playing UST's 123 video deposition designations would alone consume several weeks. UST's overdesignations also made it virtually

[1]Defendants have represented that they anticipate taking two weeks (10 trial days) to put on their defense.

impossible for Conwood to conduct a thorough review and respond with complete set of objections and counterdesignations in the one week period set by the Court's Scheduling Order. Id. at 2.[2]

For these reasons, plaintiffs respectfully move the Court to order defendants to provide a more narrowly-tailored list of those exhibits and deposition excerpts they actually believe they will offer at trial.

A proposed order is attached.

[2]Conwood has filed an initial set of objections and counterdesingations within the week period set by the Court, but has reserved the right to supplement these filings as it continues its review of UST's overbroad designations.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

January 28, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of plaintiffs' Motion for an Appropriate Trial Exhibit List and Appropriate Deposition Designations, any opposition thereto, and for good cause shown, it is hereby ORDERED that defendants shall serve upon plaintiffs a list of the exhibits and deposition excerpts that they actually believe they will use at trial no later than February __, 2000. Plaintiffs shall provide any objections to defendants' exhibit list, and any objections and counterdesignations to defendants' deposition excerpts, no later than February __, 2000.

SO ORDERED.

Dated this ___ day of _____, 2000.

_____
THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on this 28th day of January, 2000, a copy of the foregoing was sent by overnight mail, to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., Four Times Square, New York, NY 10036.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' OBJECTIONS TO DEFENDANTS' TRIAL EXHIBITS

Pursuant to the Court's Scheduling Order, plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood") respectfully submit the attached list of initial objections to the trial exhibits defendants designated on January 21, 2000. Because defendants' overdesignation of 4,250 items fails to provide reasonable notice of the exhibits defendants actually intend to use and trial, and because defendants' overdesignation made it virtually impossible to conduct a thorough review and respond with a complete set of objections in the one week period provided by the Court's Scheduling Order, Conwood reserves the right to supplement its objections as its review continues.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

January 28, 2000

16diii002942

PLAINTIFFS' OBJECTIONS TO DEFENDANTS' TRIAL EXHIBITS

DX Number	Description		Objection[1]
1 - 91	Attachments 3 through 93 of the Expert Report of Dr. David T. Scheffman		F; R; 403; S; IL
92	Memo from Miley to Williams		ILB
93	CWD 1220725	CWD 1220725	R; 403; ILB
94	CWD 25013285	CWD 25013285	F; 403; A; O (unsigned letter)
95	Letter from Elms to Elsik		ILB
96	CWD 0100007164	CWD 0100007164	
97	CWD 0100007050	CWD 0100007051	
98	CWD 0100007062	CWD 0100007062	403
99	CWD 0100007152	CWD 0100007152	403
100	CWD 0100007086	CWD 0100007086	403
101	CWD 0100007078	CWD 0100007078	R; 403
102	CWD 0100007188	CWD 0100007188	R; 403
103	CWD 0100007087	CWD 0100007089	H; R; 403
104	CWD 10182255	CWD 10182256	403
105	CWD 0100016632	CWD 0100016632	R; 403; S
106	Memo from Keane to Williams		F
107	CWD 1025000059	CWD 1025000060	
108	CWD 1025000065	CWD 1025000066	403
109	CWD 1025000050	CWD 1025000050	R; 403
110	CWD 12273853	CWD 12273853	F; A; IL
111	CWD 0100007094	CWD 0100007094	R; 403
112	CWD 13459454	CWD 13459454	
113	CWD 0100007095	CWD 0100007095	
114	CWD 1025000040	CWD 1025000040	R; 403
115	Category Management. Getting Started		H; F; R; 403; U
116	Category Management. A Blueprint for Implementation		H; F; R; 403; U
117	Category Management. The Category Plan		H; F; R; 403; U
118	Category Management. Information Tools		H; F; R; 403; U
119	Category Management. The Role of Supplier Organizations		H; F; R; 403; U
120	USTC/CWD 628001	USTC/CWD 628001	H; F
121	USTC/CWD 041470	USTC/CWD 041478	H; A
122	USTC/CWD 884189	USTC/CWD 884191	H; F
123	USTC/CWD 668988	USTC/CWD 668991	H; F
124	USTC/CWD 788026	USTC/CWD 788031	H ; F ; I
125	USTC/CWD 732559	USTC/CWD 732562	H; F
126	USTC/CWD 584788	USTC/CWD 584789	H; F; I;403
127	USTC/CWD 734037	USTC/CWD 734037	H; F; 403
128	USTC/CWD 969509	USTC/CWD 969509	H; I
129	USTC/CWD 550824	USTC/CWD 550827	H
130	E-mail from Renfro to Entwistle		H; IL

DX Number	Description		Objection[1]
131	Letter from Entwistle to Carlson		H; I
132	USTC/CWD 732071	USTC/CWD 732071	H
133	USTC/CWD 533676	USTC/CWD 533676	H
134	USTC/CWD 824519	USTC/CWD 824519	H; F; 403
135	USTC/CWD 012829	USTC 012830	H
136	USTC/CWD 109424	USTC/CWD 109426	H
137	USTC/CWD 529250	USTC/CWD 529253	H; F; A
138	USTC/CWD 949995	USTC/CWD 949996	H; F
139	Letter from Blackburn to Carlson		H
140	USTC/CWD 732615	USTC/CWD 732616	H; F
141	Letter from Blackburn to Carlson		H; F
142	USTC/CWD 668970	USTC/CWD 668974	H; F
143	USTC/CWD 525548	USTC/CWD 525553	H; F; I; IL;403
144	USTC/CWD 525539	USTC/CWD 525547	H; F; I; IL;403
145	USTC/CWD 533675	USTC/CWD 533675	H; F
146	Convenience Store News: 1999 Best of Class - Category Captains		H; F; R; 403; U
147	USTC/CWD 897405	USTC/CWD 897406	H; F; R; 403; A; S
148	USTC/CWD 897410	USTC/CWD 897410	H; F; R; 403; A; S
149	USTC/CWD 897411	USTC/CWD 897411	H; F; R; 403; A; S
150	USTC/CWD 897415	USTC/CWD 897415	H; F; R; 403; A; S
151	USTC/CWD 897413	USTC/CWD 897413	H; F; R; 403; S
152	USTC/CWD 897414	USTC/CWD 897414	H; F; R; 403; A; S; IL
153	USTC/CWD 897416	USTC/CWD 897416	H; F; R; 403; A; S
154	USTC/CWD 897412	USTC/CWD 897412	H; F; R; 403; S
155	USTC/CWD 897407	USTC/CWD 897407	H; F; R; 403; A; S; IL;
156	USTC/CWD 897417	USTC/CWD 897417	H; F; R; 403; A; S; IL
157	CWD 1158001856	CWD 1158001856	
158	USTC/CWD 343489	USTC/CWD 343489	H; F; R; 403; A; S; IL
159	USTC/CWD 277460	USTC/CWD 277462	H; F; R; 403; S; IL
160	USTC/CWD 777167	USTC/CWD 771767A	H; F; R; 403; S
161	USTC/CWD 277458	USTC/CWD 277459	H; F; I; R; 403; S; A
162	USTC/CWD 277471	USTC/CWD 277463	H; F; I; R; 403; A; S
163	USTC/CWD 897382	USTC/CWD 897382	H; F; R; 403; S; IL
164	USTC/CWD 897383	USTC/CWD 897391	H; F; R; 403; S; IL
165	USTC/CWD 897399	USTC 897402	H; F; R; 403; A; S; IL
166	USTC/CWD 920341	USTC/CWD 920342	H; F; R; 403; A; S
167	CWD 1031000191	CWD 1031000191	H; F;R; 403; A; S
168	CWD 1031000192	CWD 1031000192	H; F; R; 403; A; S; IL; I
169	CWD 1025000216	CWD 1025000216	H; F; R; 403; S
170	USTC/CWD 897403	USTC/CWD 897403	H; F; R; 403; S; IL
171	USTC/CWD 897418	USTC/CWD 897418	H; F; R; 403; S

DX Number	Description		Objection[1]
172	USTC/CWD 897423	USTC/CWD 897423	H; F; R; 403; S
173	USTC/CWD 897421	USTC/CWD 897421	H; F; R; 403
174	USTC/CWD 897420	USTC/CWD 897420	H; F; R; 403; S
175	USTC/CWD 897422	USTC/CWD 897422	H; F; R; 403; A; S; IL
176	USTC/CWD 897428	USTC/CWD 897428	H; F; R; 403; S
177	USTC/CWD 897424	USTC/CWD 897424	H; F; S; R
178	USTC/CWD 897425	USTC/CWD 897425	H; F; R; 403; S; IL
179	USTC/CWD 897427	USTC/CWD 897427	H; F; R; 403; S
180	USTC/CWD 897426	USTC/CWD 897426	H; F; R; 403; S
181	USTC/CWD 897429	USTC/CWD 897429	H; F; R; 403 S
182	USTC/CWD 897430	USTC/CWD 897430	H; F; R; 403; S
183	USTC/CWD 897431	USTC/CWD 897431	H; F; R; 403; S
184	USTC/CWD 897432	USTC/CWD 897432	H; F; R; 403; S
185	USTC/CWD 897435	USTC/CWD 897435	H; F; R; 403; S
186	USTC/CWD 897434	USTC/CWD 897434	H; F; R; 403; S
187	USTC/CWD 897433	USTC/CWD 897433	H; F; R; 403; S
188	USTC/CWD 897444	USTC/CWD 897446	H; F; R; 403; S; IL
189	USTC/CWD 897419	USTC/CWD 897419	H; F; R; 403; S; IL
190	USTC/CWD 897441	USTC/CWD 897443	H; F; R; 403; S
191	USTC/CWD 897454	USTC/CWD 897454	H; F; R; 403; S
192	USTC/CWD 897448	USTC/CWD 897450	H; F; R; 403; S
193	USTC/CWD 897447	USTC/CWD 897447	H; F; R; 403; S; IL
194	USTC/CWD 343644	USTC/CWD 343644	H; F; R; 403; S
195	USTC/CWD 343300	USTC/CWD 343301	H; F; R; 403; S
196	USTC/CWD 344337	USTC/CWD 344337	H; F; R; 403; S
197	USTC/CWD 1245688	USTC/CWD 1245688	H; F; R; 403; S
198	USTC/CWD 332283	USTC/CWD 332284	H; F; R; 403; S
199	USTC/CWD 343956	USTC/CWD 343957	H; F; R; 403; A; S; IL
200	USTC/CWD 343960	USTC/CWD 343960	H; F; R; 403; A; S
201	USTC/CWD 343929	USTC/CWD 343930	H; F; R; 403; S; IL
202	USTC/CWD 343924	USTC/CWD 343928	H; F; R; 403; S
203	USTC/CWD 343931	USTC/CWD 343932	H; F; R; 403; S
204	USTC/CWD 347597	USTC/CWD 347597	H; F; R; 403; S
205	USTC/CWD 343938	USTC/CWD 343938	H; F; R; 403; S; IL
206	USTC/CWD 343933	USTC/CWD 343935	H; F; R; 403; S
207	USTC/CWD 343942	USTC/CWD 343953	H; F; R; 403; S; IL
208	USTC/CWD 343954	USTC/CWD 343955	H; F; R; 403; S; IL
209	USTC/CWD 343496	USTC/CWD 343496	H; F; R; 403; S
210	USTC/CWD 343493	USTC/CWD 343494	H; F; R; 403; S
211	USTC/CWD 343495	USTC/CWD 343495	H; F; R; 403; S
212	USTC/CWD 343488	USTC/CWD 343488	H; F; R; 403; S; IL
213	USTC/CWD 343487	USTC/CWD 343487	H; F; R; 403; S

DX Number	Description		Objection[1]
214	USTC/CWD 343318	USTC/CWD 343319	H;F; R; 403; S
215	USTC/CWD 277469	USTC/CWD 277470	H; F; R; 403; S; IL
216	USTC/CWD 897377	USTC/CWD 897380	H; F; R; 403; S; IL
217	USTC/CWD 277456	USTC/CWD 277457	H; F;R; 403; S
218	USTC/CWD 277468	USTC/CWD 277468	H; F; R; 403; S
219	USTC/CWD 277466	USTC/CWD 277467	H; F; R; 403; S; IL
220	USTC/CWD 025617	USTC/CWD 025710	H; F; 403
221	USTC/CWD 548525	USTC/CWD 548549	H; F; 403
222	USTC/CWD 920847	USTC/CWD 920852	H; F; IL
223	1999 Promotion Preview Wal*Mart/USTC		H; F
224	USTC/CWD 896044	USTC/CWD 896046	H; F; R; 403; S
225	USTC/CWD 921082	USTC/CWD 921125	H; F; IL
226	USTC/CWD 921011	USTC/CWD 921053	H; F; IL
227	USTC/CWD 777119	USTC/CWD 777121	H; F; R; 403; S
228	Retail Non-Compliance Form		H; F; R; 403
229	USTC/CWD 517081	USTC/CWD 517087	H; F; 403; S; IL
230	USTC/CWD 541517	USTC/CWD 541520	H; F; IL
231	USTC/CWD 548462	USTC/CWD 548464	H; F
232	USTC/CWD 548050	USTC/CWD 548052	H; F; IL
233	USTC/CWD 541549	USTC/CWD 541563	H; F; O (duplicates within same exhibit)
234	USTC/CWD 548479	USTC/CWD 548481	H; F
235	USTC/CWD 541379	USTC/CWD 541381	H; F
236	USTC/CWD 541373	USTC/CWD 541376	H; F
237	USTC/CWD 541362	USTC/CWD 541364	H; F
238	USTC/CWD 541346	USTC/CWD 541348	H; F
239	USTC/CWD 541334	USTC/CWD 541336	H; F
240	USTC/CWD 541327	USTC/CWD 541329	H; F
241	USTC/CWD 541303	USTC/CWD 541306	H; F
242	USTC/CWD 541475	USTC/CWD541477	H; F
243	USTC/CWD 541580	USTC/CWD 541586	H; F; IL
244	USTC/CWD 541492	USTC/CWD 5541494	H; F
245	USTC/CWD 541127	USTC/CWD 541130	H; F; 403
246	USTC/CWD 541588	USTC/CWD 541591	H; F;403;IL
247	USTC/CWD 541537	USTC/CWD 541539	H; F
248	USTC/CWD 541522	USTC/CWD 541524	H; F
249	USTC/CWD 550903	USTC/CWD 550909	H; F
250	USTC/CWD 585106	USTC/CWD 585109	H; F; R; 403; S
251	USTC/CWD 860970	USTC/CWD 860973	H; F; 403
252	USTC/CWD 792544	USTC/CWD 792545	H; F; R; 403; S
253	USTC/CWD 733142	USTC/CWD 733151	H; F; 403
254	USTC/CWD 541507	USTC/CWD 541509	H; F; 403

DX Number	Description		Objection[1]
255	Tobacco Non-Compliance Review		H; F; R; 403
256	Letter from Blackburn to Carlson		H
257	USTC/CWD 540537	USTC/CWD 540539	H; F
258	USTC/CWD 277588	USTC/CWD 277590	H; F; R; 403; S
259	USTC/CWD 105310	USTC/CWD 105319	H;F;I;IL
260	USTC/CWD 277341	USTC/CWD 277345	H;S;R
261	USTC/CWD 544786	USTC/CWD 544789	H;403;IL
262	USTC/CWD 317008	USTC/CWD 317009	H; F; R; 403; S; I
263	USTC/CWD 347023	USTC/CWD 347024	H; F; IL
264	USTC/CWD 517070	USTC/CWD 517080	H; F
265	USTC/CWD 347254	USTC/CWD 347257	H; F
266	USTC/CWD 824571	USTC/CWD 824587	H; F; IL; O (refers to undefined studies)
267	USTC/CWD 318054	USTC/CWD 318056	H; F;R; 403; S
268	USTC/CWD 548047	USTC/CWD 548049	H; F
269	USTC/CWD 733054	USTC/CWD 733058	H; F
270	USTC/CWD 277591	USTC/CWD 277593	H; F; R; 403; S
271	USTC/CWD 416412	USTC/CWD 416413	H
272	USTC/CWD 896052	USTC/CWD 896054	H; R; 403; S
273	CWD 1169002526	CWD 1169002530	H; F
274	USTC/CWD 896055	USTC/CWD 896056	H; F; R; 403; S
275	USTC/CWD 733153	USTC/CWD 733163	H; F; IL
276	USTC/CWD 733195	USTC/CWD 733207	H; F; IL
277	USTC/CWD 896057	USTC/CWD 896058	H; F; R; S;403
278	USTC/CWD 516977	USTC/CWD 516988	H; F; I
279	USTC/CWD 516989	USTC/CWD516995	H; F; IL
280	USTC/CWD 550664	USTC/CWD 550667	H; F
281	USTC/CWD 277579	USTC/CWD 277581	H; F; R; 403; S
282	CWD 1031084098	CWD 1031084100	R; 403
283	USTC/CWD 285944	USTC/CWD 285946	H; F; R; 403; S
284	USTC/CWD 318022	USTC/CWD 318024	H; F; R; 403; S
285	USTC/CWD 548040	USTC/CWD 548041	H; F; R; 403
286	USTC/CWD 517088	USTC/CWD 517102	H; F; 403
287	USTC/CWD 549076	USTC/CWD 549079	H; F; 403; IL
288	CWD 1169002525	CWD 1169002525	R; 403
289	USTC/CWD 920854	USTC/CWD920873	H; F; 403; IL
290	USTC/CWD 921181	USTC/CWD 921190	H; F; 403; IL
291	USTC/CWD 540522	USTC/CWD 540534	H; F; R; 403; IL
292	USTC/CWD 920929	USTC/CWD 920941	H; F; 403; IL
293	USTC/CWD 920981	USTC/CWD 920010	H; F; 403; IL
294	USTC/CWD 405306	USTC/CWD 405316	H; F; 403; IL
295	USTC/CWD 347317	USTC/CWD 347320	H; F; 403; IL

DX Number	Description		Objection[1]
296	USTC/CWD 920924	USTC/CWD 920928	H; F; IL
297	USTC/CWD 529250	USTC/CWD 529253	H; F; 403; O (duplicate of prior exhibit)
298	USTC/CWD 860440	USTC/CWD 860447	H; F; 403; IL
299	USTC/CWD 732162	USTC/CWD 732171	H; F; 403; IL
300	USTC/CWD 540466	USTC/CWD 540469	H; F; IL
301	USTC/CWD 548232	USTC/CWD 548245	H; F; 403; IL
302	CWD 1011022961	CWD 1011022971	H; I; IL
303	USTC/CWD 525581	USTC/CWD 525581	H; F; S
304	USTC/CWD 965205	USTC/CWD 965217	H; F; IL
305	USTC/CWD 968589	USTC/CWD 968599	H; F
306	USTC/CWD 949550	USTC/CWD 949561	H; F; 403
307	USTC/CWD 525410	USTC/CWD 525416	H; IL
308	USTC/CWD 732345	USTC/CWD 732379	H; F; 403; IL
309	USTC/CWD 532796	USTC/CWD 532814	H; F; I; IL
310	USTC/CWD 532450	USTC/CWD532476	H; F; IL
311	USTC/CWD 532059	USTC/CWD 532079	H; F; I; IL
312	USTC/CWD 532001	USTC/CWD 532014	H; F; I; A; IL
313	USTC/CWD 540150	USTC/CWD 540183	H; F; 403; IL
314	USTC/CWD 844945	USTC/CWD 844947	H; F; I
315	USTC/CWD 884185	USTC/CWD 884188	H; F; 403; IL
316	USTC/CWD 921054	USTC/CWD 921060	H; F; IL
317	USTC/CWD 405216	USTC/CWD 405250	H; F; 403
318	USTC/CWD 347053	USTC/CWD 347055	H; IL
319	USTC/CWD 732229	USTC/CWD 732237	H; F; 403
320	USTC/CWD 550623	USTC/CWD 550635	H; F; 403; IL
321	USTC/CWD 405255	USTC/CWD 405294	H; F; 403; IL
322	USTC/CWD 550910	USTC/CWD 550914	H; F; 403; IL
323	USTC/CWD 946362	USTC/CWD 946371	H; F; IL; O (combined documents)
324	USTC/CWD 920942	USTC/CWD 920949	H; F; IL
325	USTC Newsletter: Statement re: Tobacco Negotiations		H
326	USTC/CWD 403779	USTC/CWD 403780	F;403
327	USTC/CWD 077694	USTC/CWD 077696	H; I
328	Wal*Mart Reset Program		H; IL
329	USTC/CWD 405317	USTC/CWD 405333	H; F; R; 403; IL
330	USTC/CWD 407885	USTC/CWD 407945	H; U;O (last page not produced with document)
331	USTC/CWD 285950	USTC/CWD 285951	H; F; R; 403; S
332	USTC/CWD 897392	USTC/CWD 897392	H; F; R; 403; S
333	USTC/CWD 920806	USTC/CWD 920825	H; F; 403; IL

DX Number	Description		Objection[1]
334	USTC/CWD 921156	USTC/CWD 921180	H; F; I; 403; IL
335	USTC/CWD 585101	USTC/CWD 585103	H; F; R; 403; S
336	USTC/CWD 733782	USTC/CWD 733783	H; I
337	USTC/CWD 532779	USTC/CWD 532792	H; F; I; 403
338	USTC/CWD 545088	USTC/CWD 545091	H; F; A
339	USTC/CWD 921201	USTC/CWD 921217	H; F; I; IL
340	USTC/CWD 788000	USTC/CWD 788003	H; F; IL
341	USTC/CWD 545094	USTC/CWD 545096	H; F;A
342	USTC/CWD 545092	USTC/CWD 545093	H; F; A
343	USTC/CWD 529231	USTC/CWD 529238	H; F; IL
344	USTC/CWD 545097	USTC/CWD 545099	H; A
345	USTC/CWD 752554	USTC/CWD 752559	H; F; 403; IL
346	"Maximum Profit" Brochure		H; F; I; 403
347	USTC/CWD 540470	USTC/CWD 540474	H; F; I; 403; A; IL
348	USTC/CWD 546442	USTC/CWD 546447	H; F; 403; IL
349	USTC/CWD 541259	USTC/CWD 541266	H; F; 403; IL
350	USTC/CWD 541229	USTC/CWD 541231	H; F; IL
351	USTC/CWD 408234	USTC/CWD 408240	H; F; 403
352	USTC/CWD 075569	USTC/CWD 075570	H; F
353	USTC/CWD 732022	USTC/CWD 732029	H; F; IL
354	USTC/CWD 786051	USTC/CWD 786052	H; F; 403
355	USTC/CWD 740664	USTC/CWD 740668	H; F
356	USTC/CWD 352085	USTC/CWD 352096	H; F; 403; IL
357	USTC/CWD 732158	USTC/CWD 732161	H; F;R; A
358	USTC/CWD 732146	USTC/CWD 732147	H; F
359	USTC/CWD 897396	USTC/CWD 897398	H; F; R; 403; A
360	USTC/CWD 157844	USTC/CWD 157846	H; F
361	USTC/CWD 226994	USTC/CWD 226996	H; F; S
362	USTC/CWD 297864	USTC/CWD 297892	H; F; 403; IL; O (photocopy pages USTC/CWD297891-92 appear combined with exhibit 363)
363	USTC/CWD 524852	USTC/CWD 524858	H; F; I; 403; O (pages appear combined with exhibit 362)
364	USTC/CWD 403105	USTC/CWD 403192	H; F; 403; IL
365	USTC/CWD 932901	USTC/CWD 932906	H; F; IL
366	USTC/CWD 202845	USTC/CWD 202959	H; F; 403
367	USTC/CWD 297541	USTC/CWD 297555	H; F; 403; IL
368	USTC/CWD 732239	USTC/CWD 732241	H; F
369	USTC/CWD 205068	USTC/CWD205103	H; F; 403; IL

DX Number	Description		Objection[1]
370	USTC/CWD 403709	USTC/CWD 403744	H; F; 403; IL
371	USTC/CWD 205000	USTC/CWD 205030	H; F; R
372	USTC/CWD 921133	USTC/CWD 921154	H; F; 403; IL
373	USTC/CWD 540863	USTC/CWD 540871	H; F; IL
374	USTC/CWD 541108	USTC/CWD 541114	H; F; I; 403; IL; O - Page USTC/CWD541114 appears combined with exhibit 375
375	USTC/CWD 541073	USTC/CWD 541095	H; F; R; IL; O - page appears combined with exhibit 374
376	USTC/CWD 541054	USTC/CWD 541060	H; F; 403; IL
377	USTC/CWD 540131	USTC/CWD 540138	H; F; 403; IL
378	USTC/CWD 844146	USTC/CWD 844162	H; F; 403; IL
379	USTC/CWD 534166	USTC/CWD 534179	H; F; 403
380	USTC/CWD 532154	USTC/CWD 532166	H; F; 403; IL
381	USTC/CWD 318552	USTC/CWD 318564	H; F; 403; IL
382	USTC/CWD 318508	USTC/CWD 318536	H; F; 403; IL
383	USTC/CWD 756500	USTC/CWD 756501	H; F; R; S
384	USTC/CWD 222655	USTC/CWD 222656	H; F; 403; S
385	USTC/CWD 222657	USTC/CWD 222658	H; F; R; 403; S
386	USTC/CWD 825406	USTC/CWD 825407	H; F; S
387	Wal*Mart Review		H; F; I; 403; A; IL
388	Wal*Mart Buy Down Proposal		H; F; IL
389	Mass Merchandising Review		H; F; I; IL
390	USTC/CWD 844942	USTC/CWD 844943	H; F; 403; A
391	USTC/CWD 732140	USTC/CWD 732140	H; F; I; 403
392	USTC/CWD 101315	USTC/CWD 1018327[sic]	H; F
393	USTC/CWD 318538	USTC/CWD 318540	H; F; A; IL
394	USTC Advertisement		H; F; R; 403
395	USTC/CWD 024924	USTC/CWD 024924	H; F; I; R; 403
396	USTC/CWD 920082	USTC/CWD 920082	H; F; R; 403
397	USTC/CWD 052355	USTC/CWD 052360	H; F; IL
398	USTC/CWD 403059	USTC/CWD 403104	H; F; IL
399	Memo from Blackburn re: Skoal Promotion		H; F
400	USTC/CWD 844887	USTC/CWD 844906	H; F; I; IL
401	USTC/CWD 844961	USTC/CWD 844967	H; F; IL
402	USTC/CWD 732551	USTC/CWD 732558	H; F; 403; IL
403	USTC/CWD 403360	USTC/CWD 403373	H; F; 403; IL
404	USTC/CWD 403194	USTC/CWD 403298	H; F; R; 403; IL
405	USTC/CWD 186414	USTC/CWD 186419	H; F; IL

DX Number	Description		Objection[1]
406	1999 Amendment to CAP		H; F; I; IL
407	CWD 11532665	CWD 11532665	R; 403; S; IL
408	CWD 11532667	CWD 11532667	R; S
409	CWD 1158001862	CWD 1158001862	
410	CWD 1253001527	CWD 1253001527	
411	CWD 1158001829	CWD 1158001829	403
412	CWD 1220008483	CWD 1220008483	
413	CWD 1158001848	CWD 1158001848	403
414	CWD 1158001841	CWD 1158001841	403
415	CWD 1158001846	CWD 1158001846	
416	CWD 11061686	CWD 11061686	
417	CWD 1026000027	CWD 1026000027	403
418	CWD 13001710	CWD 13001710	S
419	CWD 12982180	CWD 12982180	
420	CWD 1158001838	CWD 1158001838	
421	CWD 1158001819	CWD 1158001819	
422	CWD 11580017837	CWD 11580017837	
423	CWD 11061629	CWD 11061629	
424	CWD 1158001871	CWD 1158001871	
425	CWD 1031129131	CWD 1031129131	
426	CWD 1158001873	CWD 1158001873	
427	CWD 0100012764	CWD 0100012764	403
428	CWD 0100012772	CWD 0100012772	IL
429	CWD 12407305	CWD 12407307	H
430	CWD 0100012559	CWD 0100012559	
431	CWD 0100012561	CWD 0100012561	
432	CWD 1158001865	CWD 1158001865	
433	CWD 1158001866	CWD 1158001866	
434	CWD 0100012572	CWD 0100012572	
435	CWD 1158001864	CWD 1158001864	
436	CWD 0100012497	CWD 0100012497	
437	CWD 11603136	CWD 11603136	R; S
438	CWD 11532650	CWD 11532650	R; S
439	CWD 1240733	CWD 1240733	A
440	CWD 11532658	CWD 11532658	R; S
441	CWD 11532656	CWD 112532656	R; S
442	CWD 0100003794	CWD 0100003794	R; S
443	CWD 1304004675	CWD 1304004675	403
444	CWD 1031000304	CWD 1031000304	
445	CWD 12966306	CWD 12966306	403
446	Memo from O'Neal to Williams		403
447	CWD 1031000303	CWD 1031000303	403

DX Number	Description		Objection[1]
448	CWD 1031000299	CWD 1031000299	403
449	CWD 11532659	CWD 11532659	R; S
450	CWD 11532660	CWD 11532660	R; S
451	CWD 11532655	CWD 11532655	R; S
452	Memo from Miley to Ludwig		R; S
453	CWD 10170134	CWD 10170134	R; S
454	CWD 0100016804	CWD 0100016804	R; S
455	CWD 11532668	CWD 11532668	R; S
456	CWD 11532669	CWD 11532669	R; S
457	CWD 11532670	CWD 11532670	R; S
458	CWD 11532674	CWD 11532674	R; S
459	CWD 010006760	CWD 010006760	R; S
460	Letter from Wiggins to Taylor		403
461	CWD 1304004428	CWD 1304004428	403
462	CWD 11532671	CWD 11532671	R; S
463	CWD 11532672	CWD 11532672	R; S
464	CWD 1167002335	CWD 1167002335	403
465	CWD 1167002333	CWD 1167002323[SIC] SHOULD READ 2333	403
466	CWD 0100012699	CWD 0100012699	403
467	CWD 0100012701	CWD 0100012701	
468	CWD 1031000294	CWD 1031000294	403
469	CWD 1031000292	CWD 1031000292	403
470	CWD 1031000296	CWD 1031000296	403
471	CWD 1025000001	CWD 1025000008	403
472	CWD 1011015049	CWD 1011015054	
473	CWD 12966505	CWD 12966505	R; S
474	CWD 0100016636	CWD 0100016636	R; S
475	CWD 0100016731	CWD 0100016731	R; S
476	CWD 0100016909	CWD 0100016909	R; S
477	CWD 11532678	CWD 11532678	R; S
478	USTC/CWD 897394	USTC/CWD 897395	H;F;R; S
479	USTC/CWD 897381	USTC/CWD 897381	H; F; R; S
480	CWD 13044591	CWD 13044591	403; S
481	CWD 0100016625	CWD 0100016625	403; S
482	CWD 0100016621	CWD 0100016621	403; S
483	CWD 0100016647	CWD 0100016647	403; S; IL
484	CWD 0100016776	CWD 0100016776	R; S
485	CWD 0100016805	CWD 0100016805	S; R; 403
486	CWD 0100016770	CWD 0100016770	R; S; 403
487	CWD 0100016762	CWD 0100016762	R; S
488	CWD 0100016761	CWD 0100016761	R; 403; S

DX Number	Description		Objection[1]
489	CWD 0100016696	CWD 0100016696	R; 403; S
490	CWD 0100016695	CWD 0100016695	403; S
491	CWD 0100016632	CWD 0100016632	403; S
492	CWD 0100016869	CWD 0100016869	R; 403; S
493	CWD 0100016879	CWD 0100016879	R; 403; S
494	CWD 0100016885	CWD 0100016885	R; S
495	CWD 0100016839	CWD 0100016839	H; S; R
496	CWD 0100016866	CWD 0100016866	R; 403; S
497	CWD 0100016634	CWD 0100016634	R; 403; S
498	CWD 0100016617	CWD 0100016617	403; S;R
499	Retail Activity Report		
500	Retail Activity Report		403
501	CWD 100018905	CWD 100018905	403
502	CWD 100017808	CWD 100017808	R; S
503	CWD 100017928	CWD 100017928	403
504	CWD 0100013941	CWD 0100013943	403; S; IL
505	CWD 0100015938	CWD 0100015938	403; S
506	CWD 1027003703	CWD 1027003708	403
507	CWD 0100015919	CWD 0100015919	403; S
508	CWD 0100015774	CWD 0100015774	
509	CWD 01000011632	CWD 01000011637	403
510	Letter from Lemoine to Taylor		403; S;IB
511	CWD 1348004764	CWD 1348004764	R; 403; S
512	CWD 15311321	CWD 15311321	R; S
513	CWD 0100003813	CWD 0100003813	403
514	CWD 1014018212	CWD 1014018212	R; S
515	CWD 1158001834	CWD 1158001834	403
516	CWD 1158001836	CWD 1158001836	403; IL
517	CWD 0100016804	CWD 0100016804	R; S
518	CWD 1106171	CWD 1106171	403;IB
519	CWD 1300001732	CWD 1300001732	R; S
520	Memo from Ham to Taylor		I
521	CWD 1018002147	CWD 1018002147	I; 403; A
522	Memo from Quirk to Balk		
523	CWD 0100016621	CWD 0100016621	R; 403; S; IL
524	CWD 0100016632	CWD 0100016632	R; 403; S
525	CWD 0100016647	CWD 0100016647	R; 403; S
526	CWD 0100016625	CWD 0100016625	403; S;R
527	CWD 0100016634	CWD 0100016634	R; S;403
528	CWD 0100016617	CWD 0100016617	R; 403; S
529	CWD 0100016695	CWD 0100016695	R; 403; S
530	CWD 0100016696	CWD 0100016696	R; 403; S

DX Number	Description		Objection[1]
531	CWD 0100016699	CWD 0100016699	R; 403; S
532	CWD 0100016839	CWD 0100016839	R; 403; S
533	CWD 1014018220	CWD 1014018222	H; F; 403; IL
534	CWD 12274088	CWD 12274088	H; F; I; 403
535	CWD 1304005505	CWD 1304005505	H; F
536	CWD 1167002322	CWD 1167002322	H; F; A; S; IL
537	CWD 1167002323	CWD 1167002323	H; F; I; S
538	CWD 1014001781	CWD 1014001782	H; F; I; R; 403; S
539	CWD 1014001786	CWD 1014001786	H; F; I; R; 403; S
540	CWD 1014001785	CWD 1014001785	H; F; I; R; 403; S
541	CWD 1014001783	CWD 1014001783	H; F; I; 403; S
542	CWD 1014001784	CWD 1014001784	H; F; I; 403; S
543	CWD 1167002320	CWD 1167002320	H; F; I; R; 403; S
544	CWD 1167002321	CWD 1167002321	H; F; I; 403; S
545	CWD 12273986	CWD 12273989	H; F; I; 403
546	Letter from Zamarch (Tosco) to Dickson		H; F; I; IL
547	CWD 1031045217	CWD 1031045217	I; 403
548	CWD 1031045201	CWD 1031045203	
549	CWD 1346003298	CWD 1346003298	H; F
550	CWD 1138000158	CWD 1138000158	R; S
551	Letter from David Antle		H; F; IB; 403
552	CWD 12271987	CWD 12271987	H; F; I
553	CWD EXP 00504	CWD EXP 00510	403
554	Memo from Johnson to Distribution		IL;403;S
555	Memo from Johnson to Distribution		H; I
556	CWD 19426767	CWD 19426767	
557	CWD 1106001890	CWD 1106001892	403
558	CWD 1031046077	CWD 1031046077	403
559	Letter to Cash		H; I
560	CWD 11532670	CWD 11532670	R; S;403
561	CWD 1304004406	CWD 1304004407	
562	CWD 1252580	CWD 1252580	403
563	CWD 1304004409	CWD 1304004409	F-HW
564	CWD 1304004408	CWD 1304004408	
565	Memo from Williams to Sales Managers		
566	CWD 11200140	CWD 11200140	
567	CWD 12273996	CWD 12273996	
568	Notice re: Cougar		
569	CWD 1296640	CWD 1296640	R; S
570	Memo from Taylor to Sales Representatives		I; R; S
571	CWD 13050777	CWD 13050779	
572	CWD 1346003291	CWD 1346003292	

DX Number	Description		Objection[1]
573	CWD 12574946	CWD 12574949	F; R; 403
574	CWD 11061217	CWD 11061217	R; 403;H
575	CWD 12350030	CWD 12350032	403
576	CWD 12121374	CWD 12121375	403
577	CWD 12121395	CWD 12121396	H
578	CWD 25011187	CWD 25011189	H; 403
579	CWD 1028014709	CWD 1028014709	403
580	CWD 1005010000	CWD 1005010002	403
581	CWD 1031083532	CWD 1031083532	403
582	CWD 1005009995	CWD 1005009995	403
583	CWD 1025010202	CWD 10250010254	R; 403
584	CWD 1015000716	CWD 1015000720	403
585	CWD 1300008032	CWD 1300008039	403
586	CWD 11061610	CWD 11061620	R
587	Presentation: Factors Influencing Tobacco Sales		R; 403; IL
588	CWD 1002001054	CWD 1002001059	H; F; I; IL;R
589	CWD 101400003	CWD 101400003	403
590	CWD 1142027	CWD 1142027	I
591	CWD 1178000145	CWD 1178000145	R
592	CWD 12116276	CWD 12116277	F; 403
593	CWD 2081647	CWD 2081647	
594	CWD 1162000458	CWD 1162000458	R; S
595	Letter from Williams to Sales Representatives		
596	CWD 13009972	CWD 13009987	R; 403
597	CWD 13487208	CWD 13847209	
598	Memo from Schoeler to Dickson		403
599	CWD 1031025649	CWD 1031025652	H
600	CWD 1015003011	CWD 1015003011	403
601	CWD 12207248	CWD 12207248	I; 403
602	Memo from Cash to Sales Personnel		I
603	CWD 11200149	CWD 11200150	F; IL
604	CWD 1227000751	CWD 1227000751	I
605	CWD 11603023	CWD 11603024	I; R; 403; IL
606	CWD 1011018425	CWD 1011018426	403
607	USTC/CWD 920344	USTC/CWD 920344	H; F; R; S
608	CWD 1011018428	CWD 1011018429	403
609	CWD 1011000208	CWD 1011000208	F; R; 403
610	CWD 1263001821	CWD 1263001821	403
611	CWD 1028001442	CWD 1028001443	F; 403
612	CWD 1240689	CWD 1240689	403
613	CWD 12208169	CWD 12208169	I; 403
614	Memo from Dickson to Foster		403

DX Number	Description		Objection[1]
615	CWD 12116793	CWD 12116798	R; 403; IL
616	CWD 11603513	CWD 11603513	F; 403
617	Letter from Ham to Taylor		I
618	CWD 11534730	CWD 11534730	403
619	CWD 1014019653	CWD 1014019656	R; 403
620	CWD 1033007591	CWD 1033007592	F; I
621	CWD 1033007594	CWD 1033007594	I; 403
622	CWD 1033007580	CWD 1033007581	I; 403
623	Questionnaire		F; I;403
624	CWD 1110000287	CWD 1110000288	R; IL
625	CWD 1304005964	CWD 1304005964	403
626	CWD 12208090	CWD 12208091	R; 403
627	CWD 1304005696	CWD 1304005696	H
628	CWD 1304005774	CWD 1304005775	403
629	CWD 1206001813	CWD 1206001813	R
630	CWD 1304005776	CWD 1304005776	R; 403;S
631	CWD 12274087	CWD 12274087	I; R; 403
632	Memo from Miley to Cash with handwritten notes		I; IL
633	CWD 13640607	CWD 13640607	R; 403
634	CWD 1031081521	CWD 1031081522	F; I; 403; S
635	CWD 13044477	CWD 13044477	
636	CWD 1031096831	CWD 1031096831	
637	CWD 1031096833	CWD 1031096833	
638	CWD 1031096840	CWD 1031096841	R; 403
639	CWD 1031096842	CWD 1031096842	403
640	CWD 1012023788	CWD 1012023791	403
641	Letter from Elms to Taylor		I; R; S
642	CWD 1012023800	CWD 10102023805	403
643	CWD 1012023765	CWD 1012023785	H; F; I; 403
644	Swisher Rebate Program		H; F; I; R; IL; U
645	CWD 1027001770	CWD 1027001784	R; 403
646	CWD 1031000515	CWD 1031000515	R; 403
647	USTC/CWD 1502155	USTC/CWD 1502236	H; F; 403; IL
648	CWD 12121402	CWD 12121416	I; 403; S
649	CWD 1011015843	CWD 1011015848	H; F; A;403
650	CWD 1010025196	CWD 1010025218	F; 403
651	CWD 101400632	CWD 101400632	403
652	CWD 12966226	CWD 12966226	I; R; S
653	Memo from Dickson to Foster		I; 403
654	CWD 1015007615	CWD 1015007733	R; 403;I
655	CWD 1001000001	CWD 1001000081	I; R; 403; IL
656	CWD 1015000746	CWD 1015000751	F; R

DX Number	Description		Objection[1]
657	CWD 13001638	CWD 13001638	I; 403
658	CWD 1028014717	CWD 1028014717	F; I; 403; O
659	CWD 13044833	CWD 13044833	I
660	CWD 1011018492	CWD 1011018492	403
661	CWD 1012008482	CWD 1012008483	F; I; 403
662	CWD 1184007776	CWD 1184007776	F; R; 403
663	Kodiak Advertisements		H; F; I; R; 403; IL; U
664	CWD 1028014726	CWD 1028014734	F; I; 403
665	CWD 11412702	CWD 11412711	I; R; 403
666	Convenience Store News: Best of Class - Category Captains		H; F; I; R; IL; 403
667	CWD 1005011549	CWD 1005011549	H; 403
668	CWD 1015000770	CWD 1015000772	I; 403
669	CWD 20816414	CWD 20816414	
670	CWD 1141005495	CWD 1141005495	F; R; 403
671	CWD 1028014751	CWD 1028014752	403
672	CWD 1028014751	CWD 1028014752	R; 403
673	Memo from Ellis to Managers/Sales Representatives		403; S
674	CWD 11603192	CWD 11603192	R; 403
675	Presentation: Factors Influencing Tobacco Sales		R; 403; IL
676	CWD 1031069193	CWD 1031069194	H; R
677	CWD 11062110	CWD 11062111	H; 403
678	CWD 1031083535	CWD 1031083536	403
679	CWD 10242535	CWD 10242535	403
680	CWD 12274229	CWD 12274234	I; R; 403
681	CWD 13003182	CWD 13003188	403
682	Memo from Dickson to Foster		I; R; 403; S
683	Letter from Cothren to Raleigh District		I; 403
684	CWD 1012020804	CWD 1012020807	R
685	CWD 13003378	CWD 13003381	R; S; 403
686	CWD 12350046	CWD 12350047	R; 403; A
687	CWD 1031084230	CWD 1031084231	
688	CWD 1031078395	CWD 1031078397	403
689	CWD 11538037	CWD 11538038	R; S
690	CWD 1031063087	CWD 1031063088	
691	CWD 1031064716	CWD 1031064717	R; S
692	CWD 1031069537	CWD 1031069539	R; S; IL
693	CWD 1031069587	CWD 1031069589	H; R; IL
694	CWD 1031072482	CWD 1031072484	
695	CWD 1031064760	CWD 1031064761	R; 403; S
696	CWD 1031069595	CWD 1031069597	H; R
697	CWD 1031064763	CWD 1031064764	R; 403; S
698	CWD 1031078466	CWD 1031078467	403; IL

DX Number	Description		Objection[1]
699	CWD 1031071546	CWD 1031071548	H
700	CWD 1031079345	CWD 1031079346	R
701	CWD 1031064526	CWD 1031064527	R; 403; S
702	CWD 1031102061	CWD 1031102062	R; 403; S
703	CWD 1031102065	CWD 1031102066	R; 403; S
704	CWD 1031064542	CWD 1031064543	H; R; S
705	USTC/CWD 648306	USTC/CWD 648307	H; F; I; R; S
706	CWD 12208596	CWD 12208597	403
707	CWD 1031072266	CWD 1031072267	R; 403
708	CWD 10241130	CWD 10241131	R; S
709	CWD 10177091	CWD 10177092	R; 403
710	CWD 10242429	CWD 10242430	R; 403
711	CWD 10241132	CWD 10241134	R; S
712	CWD 1194002919	CWD 1194002920	R; 403; S
713	CWD 1194002923	CWD 1194002924	403
714	CWD 1031072282	CWD 1031072283	R; 403
715	CWD 1158001855	CWD 1158001855	403
716	CWD 12273511	CWD 12273512	403
717	CWD 1364002283	CWD 1364002284	R; 403
718	CWD 1141559	CWD 1141559	R; 403; S
719	CWD 1031064806	CWD 1031064807	R; 403; S
720	Trip Letter		403; S; IB
721	CWD 1031072299	CWD 1031072300	403
722	CWD 1141558	CWD 1141559	R; 403
723	CWD 12237428	CWD 12237429	403
724	CWD 1106016	CWD 1106018	403
725	CWD 11415587	CWD 11415588	403
726	CWD 12943475	CWD 12943476	403
727	CWD 1106000181	CWD 1106000183	R; 403
728	CWD 1031083440	CWD 1031083440	R; 403
729	CWD 10171576	CWD 10171577	R; 403
730	CWD 1364002301	CWD 1364002302	
731	CWD 1031064823	CWD 1031064824	R; S
732	CWD 1031091027	CWD 1031091029	403
733	CWD 10177066	CWD 10177067	R; 403
734	CWD 1217007065	CWD 1217007067	R; 403
735	CWD 1208013938	CWD 1208013940	R; 403
736	CWD 1031045057	CWD 1031045058	R; 403
737	Trip Letter		R; S; IB
738	CWD 1159001652	CWD 1159001653	R; 403
739	CWD 11063538	CWD 11063539	R; 403
740	CWD 12207328	CWD 12207329	403

DX Number	Description		Objection[1]
741	CWD 1031083370	CWD 1031083371	R; 403
742	CWD 1031069214	CWD 1031069215	R; 403
743	CWD 1031072068	CWD 1031072069	R; 403
744	CWD 11942847	CWD 11942849	R; 403; S; IB
745	CWD 10177125	CWD 10177125	I; R; 403; IB
746	CWD 1031083377	CWD 1031083378	R; 403
747	CWD 1031067352	CWD 1031067353	H
748	CWD 11060020	CWD 11060022	R; 403
749	CWD 1031064935	CWD 1031064936	R; 403; S
750	CWD 11603604	CWD 11603605	R; 403; IB
751	Trip Letter		H; IB
752	CWD 10184700	CWD 10184702	H; IB
753	CWD 0100006681	CWD 0100006684	R; S
754	CWD 1031064937	CWD 1031064939	R; S
755	CWD 0100006269	CWD 0100006270	R; S
756	CWD 0100013004	CWD 0100013005	H
757	CWD 1031080415	CWD 1031080416	
758	CWD 1364002743	CWD 1364002743	I
759	CWD 1018004475	CWD 1018004476	R; S
760	CWD 10171644	CWD 10171645	IB
761	CWD 11062961	CWD 11062963	IB
762	CWD 1018004477	CWD 1018004479	
763	Trip Letter		H; IB
764	CWD 11707203	CWD 11707204	R; S
765	CWD 12011050	CWD 12011051	IB
766	CWD 0100012804	CWD 0100012805	S
767	CWD 1031102233	CWD 1031102234	
768	CWD 10184724	CWD 10184726	IB
769	CWD 12011063	CWD 12011065	IL; IB; 403
770	CWD 20811700	CWD 20811701	IB
771	Trip Letter		I; 403; IB
772	CWD 12350268	CWD 12350269	IB; 403
773	CWD 1031072649	CWD 1031072650	H
774	CWD 1031107448	CWD 1031107449	R; S
775	CWD 20811738	CWD 20811739	IB
776	CWD 12237366	CWD 12237367	403; IB
777	CWD 1018004501	CWD 1018004502	403; IB
778	CWD 1031069976	CWD 1031069977	
779	CWD 12350277	CWD 12350278	IB; R
780	CWD 10185609	CWD 10185610	IB
781	CWD 1031072119	CWD 1031072121	
782	CWD 1031101800	CWD 1031101803	H; 403

DX Number	Description		Objection[1]
783	CWD 1031102430	CWD 1031102431	R
784	CWD 1031078009	CWD 1031078010	403
785	CWD 10242412	CWD 10242413	403; IB
786	CWD 1031072126	CWD 1031072127	403
787	CWD 1031080644	CWD 1031080646	S
788	CWD 1017006680	CWD 1017006682	H; S; IB; R; 403
789	CWD 10177203	CWD 10172204	H; S; IB
790	CWD 1223757	CWD 1223757	S; IB
791	CWD 1031080663	CWD 1031080665	403
792	CWD 1031064636	CWD 1031064637	403; S; R
793	CWD 10170493	CWD 10170494	S; IB; R
794	CWD 0100003091	CWD 0100003092	403
795	CWD 1304006735	CWD 1304006736	S
796	CWD 10242658	CWD 10242659	403; S; IB; R
797	CWD 1031064658	CWD 1031064659	403; S; R
798	CWD 34512896	CWD 34512898	403; S; R; IB
799	CWD 1031092748	CWD 1031092749	H; 403
800	CWD 10171503	CWD 10171505	403; IB
801	Trip Letter		S; IB; R
802	CWD 0100002525	CWD 0100002526	S; R
803	CWD 11538012	CWD 11538014	403; S; R; IB
804	CWD 11538010	CWD 11538011	403; S; R; IB
805	CWD 11538006	CWD 11538007	403; S; R; IB
806	Trip Letter		403; S; R; IB
807	CWD 1031064676	CWD 1031064677	403; S
808	CWD 1031084394	CWD 1031084395	H; 403; S
809	CWD 11943267	CWD 11943268	403; S
810	CWD 10311106901	CWD 10311106903	R; 403; S
811	CWD 1031101459	CWD 1031101460	403; S
812	CWD 1031052740	CWD 1031052741	403
813	CWD 1031065396	CWD 1031065397	403; S
814	CWD 1031065392	CWD 1031065393	R; 403; S
815	CWD 1031046007	CWD 1031046007	403
816	CWD 1031054206	CWD 1031054207	R; 403
817	CWD 1031065353	CWD 1031065355	R; 403; S
818	CWD 1031102151	CWD 1031102151	R; 403; S
819	CWD 1031054202	CWD 1031054202	H; I; R; 403
820	CWD 1031052687	CWD 1031052688	403
821	CWD 1031052675	CWD 1031052676	403; R; S
822	CWD 1031052669	CWD 1031052671	R; 403; S; IL
823	CWD 1031102133	CWD 1031102134	403
824	CWD 1031102121	CWD 1031102122	H; 403

DX Number	Description		Objection[1]
825	CWD 1031091652	CWD 1031091654	R; 403
826	CWD 1014001779	CWD 1014001780	I; O
827	CWD 0100000641	CWD 0100000642	H; R; 403
828	CWD 1031064588	CWD 1031064590	R; 403
829	CWD 1031102091	CWD 1031102092	R; 403
830	CWD 1031064575	CWD 10310645877	R; 403; S
831	CWD 1031102090	CWD 1031102090	403
832	CWD 0100001643	CWD 0100001644	R; S; IL
833	CWD 0100001567	CWD 0100001569	H; R; 403
834	CWD 1031064548	CWD 1031064550	R; 403; S
835	CWD 1031065444	CWD 1031065445	R; 403; S
836	CWD 1031065464	CWD 1031065465	R; 403; S
837	CWD 1031038306	CWD 1031038307	H; R; 403
838	CWD 1031065487	CWD 1031065488	R; 403; S
839	CWD 13047110	CWD 13047111	R; 403
840	CWD 12063321	CWD 12063322	R; 403; S; IB
841	CWD 1304007179	CWD 1304007180	R; 403
842	CWD 1031068156	CWD 1031068157	R; 403; S
843	CWD 1031085767	CWD 1031085768	R
844	CWD 1031045351	CWD 1031045352	R; 403; S
845	Memo from Haynes to Salesmen		I; R; 403; S; IB
846	CWD 100019850	CWD 100019853	H; R; 403
847	CWD 100019858	CWD 100019859	R; 403
848	CWD 0100020880	CWD 0100020882	R; 403; S
849	CWD 100019542	CWD 100019544	R; 403
850	CWD 01000009446	CWD 01000009446	
851	CWD 100019545	CWD 100019546	R; 403
852	CWD 100018972	CWD 100018975	H; 403
853	CWD 100019515	CWD 100019516	R; 403;S
854	CWD 100019802	CWD 100019804	H; R; 403; S
855	CWD 100019822	CWD 100019824	R; 403; S
856	CWD 100019799	CWD 100019800	R; S;403
857	CWD 0100019886	CWD 0100019887	403
858	CWD 100019552	CWD 100019555	403
859	CWD 100017994	CWD 100017996	H; 403
860	CWD 100018167	CWD 100018169	403
861	CWD 1031069177	CWD 1031069178	H; R
862	CWD 1031064894	CWD 1031064895	403; S;R
863	CWD 1031069183	CWD 1031069184	403
864	CWD 1031069908	CWD 1031069909	H;403
865	CWD 1031069910	CWD 1031069911	H;403
866	CWD 1031072041	CWD 1031072042	403

DX Number	Description		Objection[1]
867	Trip Letter		R;403;I; S
868	CWD 1031069923	CWD 1031069924	403;R
869	CWD 20813943	CWD 208113945	H;403
870	CWD 20310713	CWD 20310714	R;403;IB
871	CWD 11060200	CWD 11060202	403;IB
872	CWD 10171576	CWD 10171577	R;403;IB
873	CWD 12204858	CWD 12204859	R;403;S;IB
874	CWD 11060206	CWD 11060208	H; R; 403; S;IB
875	CWD 12350342	CWD 12350343	IB
876	CWD 1031072320	CWD 1031072321	R; 403
877	CWD 1217007055	CWD 1217007057	403
878	CWD 1364002315	CWD 1364002316	403
879	CWD 1031062918	CWD 1031062920	R; 403; S
880	CWD 1031047485	CWD 1031047486	R; 403; S
881	CWD 13459168	CWD 13459169	403;IB
882	CWD 1294346	CWD 1294346	403;IB
883	CWD 1217007050	CWD 1217007052	403
884	CWD 11537924	CWD 11537925	R; 403; S;IB
885	CWD 1217007045	CWD 1217007046	R; 403; S
886	Trip Letter		403;I
887	CWD 11060227	CWD 11060229	403;IB
888	CWD 1031069401	CWD 1031069402	R; 403; S
889	CWD 1031072336	CWD 1031072337	R; 403; S
890	CWD 12350355	CWD 12350356	R; 403; S;IB
891	CWD 0100002141	CWD 0100002143	H
892	CWD 1227003565	CWD 1227003566	R; 403; S; IB; H
893	Trip Letter		H; IB
894	CWD 10177225	CWD 10177226	H; IB
895	CWD 1031074361	CWD 1031074363	403
896	CWD 1031082474	CWD 1031082475	R; 403; S
897	CWD 1031067632	CWD 1031067633	R; 403
898	Trip Letter		R; 403; S; IB
899	CWD 1031062951	CWD 1031062954	R; 403; S
900	CWD 1031051974	CWD 1031051975	R; 403; S
901	CWD 1230001886	CWD 123001886	I; R; S
902	CWD 1364007874	CWD 1364007874	403; S; IB
903	CWD 1364002499	CWD 1364002499	403; IL; IB
904	CWD 1304003886	CWD 1304003886	R; S
905	Territory Resume		403; IB
906	CWD 11537303	CWD 11537304	403; IB
907	CWD 12205100	CWD 12205100	403; IB
908	CWD 12086602	CWD 12086660	403; IB

DX Number	Description		Objection[1]
909	CWD 1304003658	CWD 1304003658	I; 403
910	CWD 1138001395	CWD 1138001395	S; R
911	Territory Resume		403; S; IB
912	CWD 12086577	CWD 12086577	403; IB
913	CWD 12086559	CWD 12086559	403; IB
914	Territory Resume		403; S; IB; R
915	CWD 1230002095	CWD 1230002096	R; 403; S
916	CWD 12086506	CWD 12086506	403; IB; IL
917	CWD 1217007566	CWD 1217007567	403; IB
918	CWD 12086463	CWD 12086463	403; IB
919	CWD 13009160	CWD 13009160	S; R; IB
920	CWD 13009161	CWD 13009161	S; R; IB
921	CWD 12275597	CWD 12275597	403; IB
922	CWD 1230001905	CWD 1230001906	R; 403; S
923	CWD 1230001893	CWD 1230001894	H; 403
924	CWD 12205092	CWD 12205092	403; IB
925	CWD 12039958	CWD 12039958	403; IB
926	CWD 1170353	CWD 1170353	H; 403; IB
927	Territory Resume		403; IB
928	Territory Resume		H; 403; IB
929	CWD 1364001556	CWD 1364001556	403; IB; R; S
930	Territory Resume		403; IL; IB
931	CWD 1230002132	CWD 1230002133	403; S; R
932	CWD 1154000739	CWD 1154000739	403; R; IL
933	CWD 1364002361	CWD 1364002361	R; 403; S
934	CWD 11413404	CWD 11413404	S; R; H
935	CWD 12205081	CWD 12205081	H; 403; IB
936	CWD 1364002426	CWD 1364002426	H; R; S
937	Territory Resume		S; IB; R
938	CWD 12237156	CWD 12237156	H; 403; S; R; IB
939	CWD 1138001436	CWD 1138001436	S; R; 403
940	Territory Resume		I; 403; IB
941	CWD 1230001919	CWD 1230001920	403
942	CWD 1138001409	CWD 1138001409	R; S
943	CWD 1304003612	CWD 1304003612	403
944	CWD 12208233	CWD 12208233	403; S; IB
945	CWD 1348583	CWD 1348583	403; IB
946	CWD 12208234	CWD 12208234	403; IL; IB
947	CWD 12236897	CWD 12236898	H; IB
948	CWD 13485838	CWD 13485838	403; S; R; IB
949	CWD 1158001876	CWD 1158001876	403; S
950	USTC/CWD 297769	USTC/CWD 297800	H; F; 403; IL

DX Number	Description		Objection[1]
951	CWD 1031102116	CWD 1031102117	S; R
952	USTC/CWD 540862	USTC/CWD 540862	H; F; I; 403
953	USTC/CWD 343921	USTC/CWD 343923	H; F; S; R
954 - 966	Maxwell Industry Reports		H; F; U; 403;I;IL;A
967	CWD 1027001796	CWD 1027001796	Will review and respond with any necessary objection(s) upon inspection
968	CWD 1027001795	CWD 1027001795	Will review and respond with any necessary objection(s) upon inspection
969	CWD 1027001797	CWD 1027001797	Will review and respond with any necessary objection(s) upon inspection
970	CWD 1027001798	CWD 1027001798	Will review and respond with any necessary objection(s) upon inspection
971	1999 Custom POS Program		H; F; 403; U
972	Intentionally omitted		
973	Wal*Mart RAD Data		H; F; 403; A; U
974	USTC POS Brochure		H; F; 403; A; IL;U
975 - 987	Samples of destroyed/defaced POS materials (available for inspection)		Will respond with any necessary objection(s) upon inspection
988 -997	Samples of display racks/merchandisers available from USTC (available for inspection)		Will respond with any necessary objection(s) upon inspection
998-1000	Intentionally omitted		
1001 - 4191	USTC/CWD 125000	USTC/CWD 142063	H;F;I;IL;A;403
4192 - 4250	Samples of POS materials available from USTC (available for inspection)		Will respond with any necessary objection(s) upon inspection
	Photographs of in-store displays of those retailers listed by USTC on their January 21; 2000 witness list (available for inspection)		Will respond with any necessary objection(s) upon inspection

DX Number	Description		Objection[1]
	All exhibits listed by Plaintiffs on their January 21; 2000 list of exhibits; subject to objections		
[1]Legend for Objections			
H	Hearsay		
F	Foundation		
I	Incomplete (IB Incomplete Bates No.)		
IL	Illegible (ILB Illegible Bates No.)		
403	Rule 403 objection		
A	Authenticity		
S	Subject to motion in limine to exclude		
U	Unproduced		
O	Other		

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' OBJECTIONS AND COUNTER-DESIGNATIONS TO DEFENDANTS' DEPOSITION DESIGNATIONS

Plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood") respectfully submit the attached list of objections and counterdesignations to the approximately 100 nonparty and Conwood depositions designated for potential use at trial by defendants.[1] Because defendants' deposition designations do not provide appropriate notice of the excerpts defendants actually intend to use at trial, and because the designation of large portions of 100 different depositions made it

[1]Conwood has filed a motion in limine to preclude defendants from using the depositions of an additional 25 witnesses, all of whom are employees of the defendants. Plaintiffs' Motions in Limine ¶ 6 (Jan. 28, 2000). Under settled law, a party may not introduce at trial the out of court statements of its own employees. Id. In the event the motion in limine is denied, plaintiffs respectfully reserve the right to provide objections and counterdesignations to those depositions at that time.

virtually impossible for counsel to conduct a thorough review within the week provided, plaintiffs reserve the right to make additional objections and counterdesignations as review continues.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

January 28, 2000

CERTIFICATE OF SERVICE

I certify that on this 28th day of January 2000, a copy of the foregoing was sent by overnight mail to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., Four Times Square, New York, NY 10036.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Jessica M. Bartlow

OBJECTIONS TO DESIGNATIONS

Ambiguous (AMB)
Argumentative (ARG)
Asked and Answered (A/A)
Assumes Facts Not In Evidence (AFNE)
Compound (COMP)
Calls for Conclusion (CONC)
Designated Portion Contains Discussions Among Lawyers (DISC)
Hearsay (either contains hearsay or asks for hearsay response) (HRY)
Incomplete/Interrupted Question or Answer (INCOMP/INC/INTERRUPT)
Lawyer Testifying (LT)
Lack of Foundation/Business Record (FD/BR)
Lack of Foundation/Expert or Witness (FD)
Leading Question (LD)
Calls for Speculation (SPEC)
Lack of Personal Knowledge (NPK)
Misstatement of Prior Testimony (MIST)
Question/Answer contains matters raised in Motions in Limine (ML)
Non-responsive Answer (NR)
Prejudice, Confusion, Waste of Time, Cumulative (PREJ)
Relevance (REL)
Outside the Scope of Direct (OUT/SCOPE)
Attorney-Client, Work Product (PRIV)
Questions Designated With No Answer (Q-No-A)
No Question Pending (No Q Put)
Motion to Strike (STRIKE)
Vague (VAG)

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David T. Ansted 6/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
36:6	36:7	VAG			
44:21	44:23	INC			
44:21	44:25		63:5	63:24	
55:15	56:1		63:5	63:24	
57:2	57:9		63:5	63:24	
57:2	57:9	INC			
68:23	69:2	AMB, INC			
68:23	69:2		69:3	69:3	
68:23	69:2		69:6	69:8	
76:15	76:16	Q-NO-A			
108:9	108:11	VAG			
108:14	108:14	VAG			
151:16	151:18	SPEC, NPK, FD			
151:21	151:23	SPEC, NPK, FD			
168:3	168:5	SPEC, FD			
168:8	168:11	NR			
168:13	168:15	SPEC, FD			
169:17	169:18	FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert James Bales
4/12/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
22:16	23:8		23:9	23:24	
26:20	28:6	FD/BR/SPEC/ NPK			
32:2	33:6	FD/BR/SPEC/ NPK			
33:9	33:17	FD/BR/SPEC/ NPK			
33:22	34:20	FD/BR/SPEC/ NPK			
38:18	38:24	LD/AMB/VAG			
39:2	39:5	LD/AMB/VAG			
43:12	44:5	FD/BR/SPEC/ NPK			
48:14	48:18	FD/SPEC/NPK			
48:14 49:11	48:18 50:12		48:19	49:10	
61:15	63:13	FD/BR/SPEC/ NPK			
63:15	63:20	FD/BR/SPEC/ NPK			
64:3	64:23	FD/BR/SPEC/ NPK			
67:11	68:13	ML/REL			
68:16	68:22	ML/REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert James Bales 4/12/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
69:24	70:2	ML/REL/PREJ			
70:4	70:4	ML/REL/PREJ			
70:14	71:7	ML/REL/PREJ			
75:16	77:13		77:14	77:22	

16diii002972

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Thomas T. Balk
6/9/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
34:25	35:1	MIST			
36:4	36:6	MIST, IN COMP, INC, INTERRUPT	36:7	36:10	
37:2	37:8	REL, CONC FD, NPK	37:21	37:24	
			41:14	42:14	
49:12	49:14	REL			
51:19	52:12	REL			
52:13	53:1	ARG, AFNE PREJ, REL			
53:2	53:5	PREJ, REL			
53:13	53:17	FD, CONC PREJ, REL			
69:21	69:24	CONC, FD, SPEC, REL	70:4	70:8	
70:21	72:5	CONC, FD, PREJ, REL	70:13	70:17	
75:10	76:3	PREJ, REL			
76:4	77:16	PREJ, REL			
77:17	77:21	FD, PREJ REL, SPEC NPK			
78:9	78:21	PREJ, REL			

16diii002973

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Thomas T. Balk
6/9/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
80:25	81:17	CONC, SPEC NPK REL			
81:20	81:25	CONC, SPEC NPK, REL			
82:1	82:25	PREJ, REL			
83:1	83:9	PREJ, REL			
83:10	84:2	CONC, SPEC PREJ, REL NPK			
84:6	84:18	CONC, SPEC NPK, PREJ REL			
84:19	86:2	PREJ, REL			
86:5	86:20	PREJ, REL			
86:22	86:23	SPEC PREJ, REL			
88:17	88:22	ARG, MIST REL			
88:23	89:4	REL			
89:5	89:16	CONC, SPEC REL			
89:17	89:23	A/A, REL			
89:25	91:9	REL			
91:10	91:16	NPK, SPEC NR, REL			

16diii002974

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Thomas T. Balk
6/9/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
91:21	91:24	CONC, SPEC Q-No-A REL			
92:1	92:14	SPEC, NPK REL			
91:1 91:21 99:25	91:16 92:14 100:15		92:16 93:5 93:10 93:22	93:2 93:8 93:17 93:25	
99:25	100:15	REL	97:11 97:16 98:6 Beginning with "is there..." 98:10 98:14 98:18	97:14 97:20 98:8 98:12 98:15 98:20	
102:6	102:23	MIST, REL	102:2	102:5	
103:21	105:4	REL	108:9	108:23	
105:7	105:25	REL			
107:13	107:23	MIST, REL FD, BR	107:2	107:12	
111:10	111:15	CONC, REL	103:21 105:7 109:18 110:13 111:2	105:21 105:25 109:25 110:20 111:9	
115:25 116:9	116:2 119:23		101:1 101:8	101:3 101:14	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Thomas T. Balk
6/9/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
118:2	118:8	REL			
118:17	118:19	REL			
119:13	119:23	REL			
116:9	119:23		120:20	120:25	
116:09	119:23		121:15	121:21	
126:10	126:13	REL			
139:19	139:20	REL			
140:6	142:4	REL			
144:20	145:2	REL			
145:3	145:5	REL, MIST			
145:13	145:15	REL, MIST			
151:3	151:7	ARG, AFNE FD, REL			
151:11	151:13	ARG, AFNE FD, REL			
151:14	151:16	REL			
152:13	152:15	REL			
152:22	153:16	REL			
153:19	154:8	REL			
157:21	160:11		157:2	157:4	
157:21	158:14	REL			
158:15	158:22	REL, SPEC NPK			

16diii002976

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Thomas T. Balk
6/9/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
158:23	160:8	REL			
160:9	160:17	CON, ARG REL	160:19	161:3	
161:6	164:2	REL			
164:9	165:9	REL			
165:19	165:20	REL			
165:22	165:25	CONC			
166:1	166:19	REL			
166:20	166:25	REL			
167:2	167:4	REL			
167:13	168:14	REL			
169:5	170:14	REL			
171:6	172:3	REL			
172:7	172:10	REL			
174:18	174:20	ARG, CONC REL			
174:23	175:10	ARG, CONC REL			
175:13	175:13	ARG, CONC REL			
175:21	176:8	REL	176:9	176:13	
177:11	178:1	REL			
178:8	178:20	ARG, CONC REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Thomas T. Balk
6/9/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
179:10	179:19	REL			
180:7	180:19	ML, REL			
181:11	181:13	REL			
190:14	191:1	REL, CONC	191:13 191:24 192:20	191:18 192:2 192:23	
194:3	194:7	REL			
198:21	198:25	REL			
199:1	199:3	ARG, REL	199:7 199:14	199:11 199:20	
199:25	200:25	ML, REL			
201:8	201:9	ML, REL			
202:15	202:18	MIST, ARG REL			
202:19	202:21	ARG, REL			
202:24	202:25	ARG, REL			
203:1	203:3	REL			
203:14	204:7	REL			
204:8	204:22	REL, NPK SPEC			
204:23	205:15	ARG, CONC ML, REL			
215:3 starting with "You are"	215:9	AFNE, ML REL			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Thomas T. Balk
6/9/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
216:4	216:6	REL			
216:11	216:18	REL			
216:22	217:11	ML, REL NPK			
217:14	218:6	REL, ML NPK			
220:9	221:13	REL, SPEC CONC, ML			
221:16	221:16	REL, SPEC CONC, ML			
222:19	222:21	REL			
223:1	225:20	REL			
225:23	226:10	REL			
226:11	226:17	REL, ARG			
227:7	228:14	REL, ML	229:24 230:21	230:6 230:21 beginning with "Rite/Aid"	
233:10	236:19	REL, ML			
237:11	237:14	REL, FD			
238:9	239:7	REL			
240:10	243:11	REL			
243:21	244:20	REL			
245:2	245:2	REL			

16diii002979

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Thomas T. Balk
6/9/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
245:7	245:16	REL, NPK FD			
245:17	246:1	REL			
248:2	248:21	REL, NPK			
249:6	249:9	REL, NPK	252:5 252:13	252:10 252:19	
248:23	248:25	REL, NPK			
253:9	253:11	REL			
253:17	253:25	REL			
256:3	257:19	REL			
257:20	257:23	REL, NPK			
258:13	258:14	REL, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Carolyn V. Ballard
5/28/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
25:11	25:20	LD			
27:4	28:1	LD			
29:3	29:13	LD			
29:22	30:19	LD			
30:24	32:10	LD			
36:3	36:24	LD			
37:9	37:18	LD			

16diii002981

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jack L. Barger
8/24/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
8:4	8:19		8:20	9:9	
9:10	9:13		8:20	9:9	
11:12	14:16		14:17	15:21	
15:22	16:7		14:17	15:21	
15:22	16:7		16:8	16:21	
16:22	17:5		16:8	16:21	
19:16	19:20		20:1	20:8	
22:5	22:10		21:7	21:19	
25:10	26:19		24:11	24:14	
25:10	26:19		24:23	25:9	
25:10	26:19		26:20	27:7	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert K. Carlson 8/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
9:14	9:15		9:16	9:19	
9:20	9:22	VAG/AMB			
9:20	10:9		10:10	10:18	
10:19	10:25	COMP/VAG AMB/LD/NPK FD			
11:3	11:7	COMP/VAG AMB/LD/NPK FC			
11:8	11:11	VAG/AMB			
12: 3	12:3	VAG/AMB			
12:5	12:5	VAG/AMB			
12:22	12:24	CONC/VAG AMB/SPEC/ LD			
13:1	13:4	CONC/VAG AMB/SPEC NPK/FD/LD			
13:6	13:6	CONC/VAG AMB/SPEC NPK/FD/LD			
13:15	13:19	A/A COMP/VAG AMB/NPK FD			

16diii002983

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert K. Carlson 8/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
13:22	13:23	A/A COMP/VAG AMB/NPK FD			
16:1	16:12		16:13		
16:14	16:25		16:13		
17:13	17:15	NPK/ FD			
17:17	18:1	NPK/FD LD			
18:6	18:12	FD/NPK/SPEC LD			
21:1	21:2	NPK/SPEC			
21:3	21:7	SPEC			
21:8	21:14	AFNE/LD/NPK HRY/SPEC			
21:17	22:4	AFNE/LD/NPK HRY/SPEC			
22:6	22:14	NPK/SPEC HRY/FD			
22:10	22:14	LD			
24:11	24:17	FD/NPK SPEC			
24:19	24:25	FD/NPK SPEC			
25:2	25:2	FD/NPK SPEC			

16diii002984

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert K. Carlson 8/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
25:8	25:10	FD/NPK SPEC			
25:12	25:17	FD/NPK SPEC/VAG AMB			
25:20	25:20	FD/NPK SPEC/VAG AMB			
28:15	28:17	VAG/AMB A/A			
27:16	27:22	A/A/LD			
31:13	32:2		31:2	31:12	
32:19	32:25	LD			
32:23	32:25	SPEC			
33:1	33:1	SPEC/LD			
33:4	33:6	FD/NPK VAG/AMB			
33:9	33:9	FD/NPK VAG/AMB			
33:21	33:24	FD/NPK VAG/AMB LD			
34:2	34:11	NPK/SPEC LD/VAG/AMB COMP			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert K. Carlson 8/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
34:15	34:18	NPK/SPEC LD/VAG/AMB COMP			
34:20	34:20	NPK/SPEC LD/VAG/AMB COMP			
36:6	36:15	SPEC			
36:20	36:24	SPEC/NPK			
36:25	37:3	NR			
37:9	37:13	LD			
38:18	38:21	SPEC/NPK/LD CONC			
39:11	39:11	SPEC/NPK/LD CONC			
39:15	39:21	A/A/LD			
39:22	39:24	A/A/LD/MIST			
40:3	40:3	A/A/LD/MIST			
40:4	40:7	NPK/FD/SPEC LD/VAG/AMB			
40:10	40:10	NPK/FD/SPEC LD/VAG/AMB			
41:4	41:9	LD/NPK/FD			
42:8	42:19		42:20	42:25	
43:1	43:9	Q-No-A/ HRY MIST			

16diii002986

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert K. Carlson 8/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
43:12	43:15	HRY/ FD/NPK SPEC			
43:16	43:23	A/A			
43:12	44:4		44:5	44:24	
43:24	44:2	NPK/FD/SPEC LD/A/A			
44:4	44:4	NPK/FD/SPEC LD/A/A			
47:6	47:10	SPEC/VAG AMB/FD/NPK			
47:13	47:25	SPEC/VAG AMB/FD/NPK			
48:18	48:20	SPEC/LD/VAG AMB/NPK/FD			
48:23	49:6	SPEC/LD/VAG AMB/NPK/FD			
49:22	49:23	NPK/SPEC			
49:24	50:4	NPK/SPEC HRY			
50:5	50:11	NPK/SPEC HRY/LD			
50:12	50:16	FD			
51:22	51:24	LD			
51:25	52:2	NPK/FD/SPEC LD/A/A			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert K. Carlson 8/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
52:5	52:8	NPK/FD/SPEC LD/A/A			
52:10	52:16	A/A, LD			
53:3	53:9	NPK/FD/SPEC LD, A/A			
53:12	53:15	NPK/FD/SPEC LD/A/A			
53:23	54:3	NPK/FD/SPEC LD/A/A			
54:10	54:12	NPK/FD/SPEC LD/A/A			
54:14	54:17	NPK/FD/SPEC LD/A/A			
54:19	54:19	NPK/FD/SPEC LD/A/A			
54:25	55:4	LD			
55:8	55:11	NPK/FD/SPEC			
55:21	55:24	FD/NPK/SPEC			
56:1	56:11	FD/NPK/SPEC			
56:14	56:17	FD/NPK/SPEC			
56:19	56:23	FD/NPK/SPEC			
56:25	56:25	FD/NPK/SPEC			
57:1	57:5	FD/NPK/SPEC			
57:9	58:16	HRY			

16diii002988

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert K. Carlson 8/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
58:3	58:16	LD			
58:18	58:20	Q-No-A			
59:6	59:9	SPEC/FD/NPK			
59:10	59:11	FD/NPK/VAG AMB			
59:14	59:14	FD/NPK/VAG AMB			
60:2	60:10		61:10 61:18 65:14	61:14 61:24 65:23	
60:5	60:10	SPEC/FD/VAG AMB			
75:9	75:21		75:22	75:24	
75:25	76:11	SPEC			
77:18	78:2	SPEC			
77:9	78:2		78:3	78:12	
77:9	78:2		78:22	80:2	
77:9	78:2		80:12	80:25	
77:9	78:2		81:12	81:20	
77:9	78:2		85:7	85:15	
86:10	87:17		87:19	87:21	
86:10	87:17		90:3	90:10	
86:10	87:17		91:10	91:21	
86:10	87:17		92:8	92:14	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert K. Carlson
8/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
86:10	87:17		92:16	92:21	
86:10	87:17		93:7	93:10	
86:10	87:17		93:21	94:4	
			95:7	95:11	
97:21	98:3		99:3	99:17	
97:21	98:3		100:12	100:15	
97:21	98:3		100:20	100:25	
97:21	98:3		101:1	101:17	
97:21	98:3	SPEC			
104:7	104:22	SPEC/NPK/FD			
104:7	104:22		109:11	109:22	
104:7	104:22		109:24	110:25	
104:7	104:22		111:3	111:19	
104:7	104:22		121:5	121:7	
104:7	104:22		121:17	121:21	
104:7	104:22		131:4	132:4	
104:7	104:22				
137:15	138:6	A/A OUT/SCOPE HRY			
138:7	139:14	LD			
138:11	138:14	FD/NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert K. Carlson 8/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
138:21	138:24	FD/NPK			
139:1	139:14	LD			
139:15	139:21	NPK/FD/SPEC			
139:23	139:23	NPK/FD/SPEC			
140:4	140:7	NPK/FD			
140:8	140:12	A/A NPK/FD/SPEC			
143:5	143:10	A/A FD/NPK/SPEC			
146:16	146:20	HRY/FD/NPK SPEC			
146:22	146:24	HRY/FD/NPK SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Andy L. Carter
3/1/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
11:14	11:24		12:22	12:25	
15:4	16:2		18:15 20:23 23:1 24:1	20:19 22:11 23:7 24:19	
25:20	26:17		25:7	25:15	
26:6	26:9	N/R			
26:12	26:17	REL, M/L			
27:2	27:11	SPEC, NPK, FD	27:12	27:16	
27:17	27:22		27:12 27:23 29:1 31:24	27:16 28:22 29:20 32:6	
33:21	34:23		32:25	33:20	
33:21	34:5	SPEC			
34:6	34:23	NR, SPEC			
33:21	34:23		36:5	37:4	
33:21	34:23		37:19	38:7	
54:2	54:10		52:17 53:2	52:23 53:5	
55:9	55:11		55:12 56:12	56:7 57:10	
64:21	65:1		65:2	65:12	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Andy L. Carter 3/1/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
65:21	66:19		66:20 67:9	67:5 68:9	
70:10	71:4	HRSY, N/R			
72:9	72:16	A/A, SPEC, N/R			
73:8	73:12		73:25 75:16	74:9 75:22	
79:17	80:12		80:13	80:23	
80:1	80:12	NO Q PUT			
82:7	82:13	NR			
82:7	83:4		83:14	83:16	
83:17	84:5		83:14	83:16	
84:7	84:10	NO-Q-PUT, NR			
84:15	85:2	NO-Q-PUT, NR			
97:5	97:18	NR			
101:10 102:2	101:22 102:6		102:7 104:4 106:1 108:3	103:14 104:12 106:15 110:3	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Andy L. Carter 3/1/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
116:22 152:3	117:6 153:7		124:3 125:5 125:10 126:3 130:10 132:9 134:5	124:23 125:7 125:13 126:22 130:23 132:22 134:25	
142:2 beginning with "Are you..."	142:16	REL, ML, SPEC	142:17	142:22	
142:2	142:16	REL, ML, SPEC			
142:23	143:15	REL,ML,SPEC	142:17	142:22	
143:19	144:9	SPEC, LD, NPK, FD ML, REL			
144:10	144:12	LD, ML, REL			
145:9	145:12	SPEC, REL, ML			
145:17	145:22	LD, ML, REL			
146:10	146:13	SPEC, FD, NPK, ML, REL			
146:19	146:22	SPEC, FD, NPK, ML, REL			
149:5	149:7	SPEC, FD, ML, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Andy L. Carter 3/1/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
149:13	149:19	SPEC, FD, ML, REL			
150:5	150:17	REL			
150:22	151:7	LD, HRY, REL, ML			
151:15	151:19	A/A			
156:1	156:11	HRY			
156:22	156:25	HRY			
157:5	157:9	HRY			
166:2	166:17	FD, REL, ML			
166:18	167:4	REL, ML			
167:5	167:9	REL, ML, LD			
167:19	167:24	REL, ML			
167:14	167:24		171:15 172:22	172:14 173:8	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David F. Cash 06/09/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
28:19	29:1	----	18:19	19:10	
30:2	30:13	----	30:23	32:13	
		----	32:23	33:7	
34:7	35:14		35:15	36:12	
36:13	36:23	----	36:24		
			37:5	37:8	
39:2	39:10	HRY, AFNE, VAG, AMB			
39:2	39:20	----	39:21	39:23	
48:1	48:11	FD, SPEC, NPK	48:25	49:10	
50:20	50:25	FD, SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Wayne Clardy
5/21/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
20:3	21:17		21:18	21:21	
61:6	61:9	A/A			
62:7	62:19	HRSY	62:20	63:3	
66:20	67:25		66:1	66:8	
68:2	68:14		68:15	68:19	
68:20	69:2		69:3	69:11	
88:19	88:23	REL, ML			
93:18	94:8		92:5	93:17	
94:18	95:4		94:9	94:17	
95:21	96:9		95:15	95:20	
97:2	97:8		96:13	97:2	
110:9	110:25	REL			
111:1	111:12	REL			
111:10	111:12	A+A			
111:23	112:8		112:9	112:12	
113:13	116:4	REL			
114:20	114:23	SPEC			
115:1	115:2	SPEC			
115:1	115:17		115:18	115:22	
117:9	117:23	REL			
119:22	119:25	REL	118:3	118:7	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Wayne Clardy 5/21/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
120:7	120:23	REL, ML			
121:13	122:5	REL			
122:14	122:25	REL			
123:1	126:9	REL			
127:3	127:25	REL	126:20	127:2	
128:8	128:12	REL	128:13	128:19	
129:6	131:11	REL			
130:4	130:14	HRSY			
131:4	131:5	HRSY			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Ted R. Coatney 7/14/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
10:11	12:16		12:17	12:25	
16:25	17:7		17:8	17:10	
17:11	20:10		17:8	17:10	
17:11	20:10		20:11	20:19	
19:15	19:19	NPK/SPEC			
20:20	21:23		20:11	20:19	
20:20	21:23		21:24	26:15	
21:18	21:23	ARG/MIST/VAG/ AMB			
26:16	27:1		21:24	26:15	
26:16	27:1		27:12	28:15	
26:16	27:1		29:1	29:13	
29:24	36:5		27:12	28:15	
29:24	36:5		29:1	29:13	
34:22	35:2	NPK			
35:9	36:5	NPK/SPEC			
36:17	38:18		38:19	38:24	
39:24	40:7		38:19	38:24	
39:24	40:7	NPK/SPEC			
41:10	41:13	NPK/SPEC/FD			
44:2	44:11	NPK/SPEC/FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Ted R. Coatney 7/14/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
49:10	53:21		53:22	55:10	
55:11	56:14		53:22	55:10	
55:11	56:14		56:15	57:9	
57:12	59:12		56:15	57:9	
60:5	60:21		60:22	61:2	
61:3	62:9		60:22	61:2	
61:3	62:9		63:12	64:22	
61:3	62:9		65:8	65:21	
65:24	66:2		63:12	64:22	
65:24	66:2		65:8	65:21	
66:6	68:15		68:16	68:21	
69:3	70:10		68:16	68:21	
71:22	72:12		72:13	72:19	
72:20	74:2		72:13	72:19	
72:20	74:2		74:3	75:20	
75:21	76:22		74:3	75:20	
75:21	76:22		76:23	77:1	
75:21	76:22		77:14	77:24	
100:17	102:6	FD/SPEC/NPK			
102:15	102:25	FD/SPEC/NPK			
109:24	110:11	FD/SPEC/NPK			
111:1	111:8	FD/SPEC/NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Ted R. Coatney 7/14/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
10:11	12:16		12:17	12:25	
16:25	17:7		17:8	17:10	
17:11	20:10		17:8	17:10	
17:11	20:10		20:11	20:19	
19:15	19:19	NPK/SPEC			
20:20	21:23		20:11	20:19	
20:20	21:23		21:24	26:15	
21:18	21:23	ARG/MIST/VAG/ AMB			
26:16	27:1		21:24	26:15	
26:16	27:1		27:12	28:15	
26:16	27:1		29:1	29:13	
29:24	36:5		27:12	28:15	
29:24	36:5		29:1	29:13	
34:22	35:2	NPK			
35:9	36:5	NPK/SPEC			
36:17	38:18		38:19	38:24	
39:24	40:7		38:19	38:24	
39:24	40:7	NPK/SPEC			
41:10	41:13	NPK/SPEC/FD			
44:2	44:11	NPK/SPEC/FD			
49:10	53:21		53:22	55:10	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Ted R. Coatney 7/14/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
55:11	56:14		53:22	55:10	
55:11	56:14		56:15	57:9	
57:12	59:12		56:15	57:9	
60:5	60:21		60:22	61:2	
61:3	62:9		60:22	61:2	
61:3	62:9		63:12	64:22	
61:3	62:9		65:8	65:21	
65:24	66:2		63:12	64:22	
65:24	66:2		65:8	65:21	
66:6	68:15		68:16	68:21	
69:3	70:10		68:16	68:21	
71:22	72:12		72:13	72:19	
72:20	74:2		72:13	72:19	
72:20	74:2		74:3	75:20	
75:21	76:22		74:3	75:20	
75:21	76:22		76:23	77:1	
75:21	76:22		77:14	77:24	
100:17	102:6	FD/SPEC/NPK			
102:15	102:25	FD/SPEC/NPK			
109:24	110:11	FD/SPEC/NPK			
111:1	111:8	FD/SPEC/NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Tommy H. Combs
6/11/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
35:19	35:21	REL, ML			
36:3	36:8	NR			
77:20	78:13		76:8	76:19	
88:13	89:9		87:13	88:4	
88:13	89:9	REL, ML			
88:13	89:9		89:10	89:16	
90:24	91:2	MIST, Q-No-A, INCOMP			
91:11	91:25		91:5	91:9	
91:19	91:25	A/A, MIST			
92:8	93:9	REL, ML			
110:18	111:25		110:10	110:17	
111:15	111:25	MIST, VAG, AMB			
110:18	111:25		112:2	112:3	
112:16	112:24	VAG, MIST			
116:6	116:25		114:17	114:24	
116:6	116:25		117:19	117:24	
116:6 133:24	116:25 134:2		118:5	118:8	
158:6	158:14	MIST, VAG, A/A			
158:16	158:19	A/A			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Tommy H. Combs 6/11/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
158:23	159:2	MIST			
159:3	159:7	MIST			
159:23	159:25	VAG			
160:6	160:12	VAG			
161:6	161:14	No-Q-Put, PREJ			
174:23	175:1	Q-No-A, VAG, AMB			
174:17	175:1		175:16	176:5	
183:22	183:24		183:25	184:7	
184:8	185:23		185:24	186:6	
184:8	185:23		186:8	186:9	
198:19	198:22	VAG, AMB, FD			
199:3	199:10	INCOMP			
199:11	199:17	INCOMP, PREJ			
199:3	201:25		202:5	202:7	
203:4	203:17		202:8	202:13	
203:4	203:17		202:24	203:1	
215:19	215:23	AMB, VAG, PREJ, No-Q-Put			
215:25	216:13		216:14	217:1	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Tommy H. Combs
6/11/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
226:10	226:18	REL			
226:19	227:4	MIST, VAG			
227:15	227:20	REL, AFNE			
227:21	228:5	REL			
228:14	228:15	Q-No-A, AFNE			
228:19	228:21	AFNE			
229:1	229:25	REL			
230:1	230:5	REL, AFNE			
238:24	239:11	A/A			
257:10	257:16		255:19	256:5	
257:24	258:17		257:17	257:19	
257:24	258:17		257:21	257:22	
260:1	260:4	Q-No-A			
260:13	260:14	FD, SPEC			
260:15	260:23	SPEC, FD			
265:1	265:10	VAG, AMB			
265:12	265:16	AFNE			
265:19	265:24	FD, SPEC			
267:9	267:19	VAG, AMB, MIST, FD			
267:24	268:2	VAG, Q-No-A			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Tommy H. Combs
6/11/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
269:2	269:8	No-Q-Put, Q-No-A			
270:23	271:2	AFNE, FD			
276:10	276:16	REL, PREJ			
278:4	278:8	VAG			
288:7	289:9		289:17	289:23	
295:15	297:23		293:17	293:23	
295:15	297:23		294:6	294:18	
295:15	297:23		294:22	294:24	
295:15	297:23	REL, ML, PREJ			
297:24	298:6	VAG, REL, ML, PREJ			
298:8	298:12	AFNE, VAG			
299:1	299:5	Q-No-A, MIST			
299:17	299:17	No-Q-Put			
299:18	299:25	REL, PREJ			
301:11	301:16	ARG, VAG, MIST, Q-No-A			
305:5	305:8	FD, VAG			
305:25	306:6	AFNE, VAG, Q-No-A			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Tommy H. Combs 6/11/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
307:3	307:22	No-Q-Put, INCOMP, PREJ			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Woody Cothren
8/5/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
33:3	33:13		32:7 33:14	33:2 33:19	
33:20	37:13		37:14 38:1	37:17 38:14	
48:25	49:4	VAG, AMB			
49:11	49:13	NPK, SPEC, VAG			
50:1	50:2	NPK, SPEC			
51:3	51:8	MIST, VAG, AMB			
52:3	53:18		53:19	54:2	
54:14	56:13		54:7	54:13	
57:9	57:25		56:14	57:8	
57:9	57:25		58:1	58:24	
61:7	66:16		66:17	68:17	
62:14	62:19	VAG, AMB, SPEC			
64:4	64:10	VAG, AMB, COMP			
65:14	65:15	FD/BR, NPK			
66:12	66:16	NPK, SPEC			
71:19	72:15		72:16	74:15	
75:10	75:23		75:24	77:5	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Woody Cothren
8/5/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
75:10	75:23		77:11	78:4	
78:15	79:2		79:3	81:8	
85:22	86:1	VAG, AMB, NPK, SPEC			
86:25	91:1		91:2	91:6	
88:17	89:1	ARG, MIST			
90:13	90:18	MIST, COMP			
90:22	90:23	VAG, ARG			
91:7	91:14		91:15	91:18	
91:23	91:25	SPEC, NPK			
100:17	100:22	VAG, AMB			
100:17	102:6		102:7	103:22	
101:4	101:6	VAG, AMB			
101:11	101:13	VAG, AMB			
103:23	104:5		104:6	105:22	
103:23	104:5		107:2	107:15	
109:8	109:14	SPEC, NPK			
109:8	109:23		108:5	108:24	
109:8	109:23		109:24	110:3	
109:15	109:23	HRY, NPK, SPEC			
115:4	115:6	NPK, AMB, VAG, COMP			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Woody Cothren
8/5/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
127:22	128:9		128:10	128:24	
128:6	128:8	VAG, AMB			
128:25	129:4	VAG, AMB, COMP			
128:25	130:7		130:8	130:15	
133:11	133:16		131:22	133:10	
133:11	133:16	AMB, VAG, NPK			
135:18	136:9		136:10	137:25	
142:2	142:7		142:8	142:21	
146:6	148:2		148:3	150:14	
151:10	152:20		150:23	151:9	
157:8	157:14	SPEC, NPK			
158:1	158:4	SPEC, NPK			
165:20	165:22	NPK, SPEC			
166:23	167:3	SPEC, NPK			
171:17	172:2		171:8 172:3	171:16 172:9	
178:14	181:1	MIL			
179:5	179:7	VAG, AMB			
181:4	181:6	MIST			
181:19	181:21	MIST			
178:14	182:2		182:3	182:17	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Woody Cothren
8/5/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
182:18	182:21	ARG			
184:3	184:25		185:1	187:17	
187:18	188:20		188:21	190:2	
194:12	195:12		195:13	196:14	
196:15	197:5		197:6	198:2	
198:8	198:14	COMP, VAG, AMB			
199:1	199:6	ARG			
199:9	199:12	Q-NO-A			
201:4	201:24		201:25	203:7	
201:16	201:18	MIST			
205:14	205:16		204:9	205:13	
205:14	205:16	A/A			
206:2	206:5	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Patrick F. Cothren
6/2/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
230:14	231:8	VAG,AMB,ML			
232:1	232:16	VAG,AMB,ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David H. Hyder
6/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
41:8	41:14	VAG, AMB			
43:19	43:20	VAG, AMB			
45:23	46:4	NQP			
46:8	46:13	SPEC, NPK			
46:25	47:2	SPEC, NPK			
50:18	50:20	VAG, AMB			
50:25	51:10	VAG, AMB			
53:18	53:19	VAG, AMB			
54:4	54:4	VAG, AMB			
54:11	54:25	ML, VAG, AMB			
57:3	57:10	SPEC, NPK			
59:17	59:25	INCOMP	60:1		
60:5	60:13	ML			
60:20	60:25	VAG, AMB			
61:7	61:8	VAG, AMB			
61:12	61:12	VAG. AMB			
62:2	62:5	REL			
62:6	62:9	SPEC, REL, NPK			
65:14	65:22	REL, FD			
66:3	66:7	FD, NR, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David H. Hyder 6/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
66:8	66:10	NPK, SPEC, FD, REL			
66:18	66:21	REL, INTERRUPT			
66:24	67:4	REL, NO Q PUT			
69:6	69:14	SPEC			
69:15	69:19	VAG, AMB			
70:1	70:5	AMB, VAG			
70:8	70:9	AMB, VAG			
71:4	71:17	SPEC, NPK			
71:18	72:1	VAG, AMB			
72:2	72:8	VAG, AMB			
72:9	72:19	SPEC			
72:20	73:9	MIST, NPK, SPEC			
73:14	73:20	ARG			
74:5	74:10	SPEC			
76:3	76:13	MIST, VAG			
77:25	78:9	NPK, SPEC			
79:10	79:20	ARG, MIST, A/A, VAG			
80:2	80:11	FD, VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David H. Hyder 6/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
81:8	81:21	FD, VAG			
92:23	93:3	VAG, SPEC			
107:8	107:13	SPEC			
107:14	107:19	SPEC			
107:20	108:3	VAG, AMB			
108:16	108:21	VAG, AMB			
112:9	112:14	FD, NPK			
113:22	114:3	FD, NPK			
115:1	115:4	VAG, AMB			
129:24	131:19	FD, VAG AMB			
131:20	131:24	FD, NPK, VAG			
131:25	132:13	FD, VAG, AMB, HSY			
132:18	133:7	FD, VAG, AMB			
133:8	133:21	FD, VAG, AMB, HSY			
133:22	133:25	NPK, FD, HSY			
134:1	134:5	FD, VAG, NPK			
134:13	134:17	FD, VAG, SPEC			
143:25	144:8	HSY, FD			
144:24	145:17	HSY, FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David H. Hyder
6/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
146:1	146:5	HSY, NR			
146:7	146:23	NR, SPEC			
149:16	149:21	VAG			
149:24	150:5	VAG			
151:4	151:18	FD, VAG, NPK, SPEC			
151:19	152:5	VAG			
152:6	152:14	VAG, FD			
152:21	152:24	INTERRUPT			
153:6	153:10	SPEC, NPK			
153:16	154:1	SPEC, FD			
154:2	154:5	MIST, REL, FD, NPK			
154:11	154:23	MIST, REL, FD, NPK			
157:22	158:21		158:22	158:25	
158:10	158:15	VAG, COMP			
159:4	159:14	VAG, COMP			
161:1	161:4	FD, NPK, SPEC			
161:16	162:15	VAG, FD			
162:24	163:3	COMP, VAG, FD, HSY, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David H. Hyder 6/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
163:17	164:3	COMP, VAG, HSY, FD, NPK			
164:4	164:11	NPK, SPEC, FD			
164:12	164:24	VAG, FD, ML, REL, SPEC, NPK			
164:25	166:9	ML, REL			
166:10	166:17	ML, REL, HSY			
166:18	167:17	ML, REL			
167:22	168:5	ML, REL, VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Bob R. Davis
8/6/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
103:25	104:1	HRY			
104:2	104:6	MIST,ARG			
104:9	104:16	HRY, FD			
125:6 125:14	125:9 125:25		125:10	125:13	
135:15	135:17	VAG			
134:15	134:18		134:21	135:7	
135:12	136:1		136:2	136:6	
137:8	140:17		136:10	137:7	
146:13	146:20	COMP			
148:17	148:20	VAG,FD			
148:25	149:19	VAG,FD,INC			
148:25	149:19		206:14	207:7	
160:14	161:4	NC			
160:14	161:4		161:5	161:10	
169:24	170:25	INC,REL,ML			
172:15	172:25	ML, RQ, FD, HRY			
173:14	173:18	VAG,NR, SPEC			
180:18	180:21	SPEC, FD, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Bob R. Davis
8/6/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
181:1	181:4	SPEC, FD, NPK			
181:16	182:16	REL			
182:1	182:4	VAG, SPEC, NPK			
182:5	182:16	NR			
181:1	182:16		182:17	182:20	
181:1	182:16		183:3	183:6	
239:11	239:23	FD, FRY			
240:16	240:21	HRY			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Dennis D. Dickson
05/04/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
47:12	47:21	FD, NPK			
47:25	48:3	FD, NPK			
58:18	59:1	FD, NPK			
59:5	59.7	FD, NPK			
59:12	59:14	FD, NPK			
59:15	59:22	HSY, SPEC, NPK			
60:4	60:5	AMB, NPK, SPEC, VAG			
60:10		AMB, NPK, SPEC, VAG			
76:11	78:16	VAG, AMB, CONC			
78:12	78:18	NPK, FD			
78:20	78:22	NPK, FD			
80:11	80:14	SPEC, NDK			
81:15	81:25	----	82:5	82:8	
83:9	83:12	AMB, VAG			
84:22	85:4	HSY			
85:9	85:13	HSY			
85:17	85:19	NPK, AMB, VAG, MIST			
87:24	88:3	HSY, FD, SPEC, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Dennis D. Dickson
05/04/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
89:17	89:20	NPK, HSY, FD, SPEC			
90:13 90:15	90:13 90:16		90:14	90:14	
100.17	100:19	SPEC, HSY, FD, NR			
100:22	100:25	SPEC, HSY, FD, NR			
101:14	101:17	AFNE, SPEC, FD			
101:19	101:23	REL, NPK			
139:6	139:17	----	138:19	139:5	
139:6	139:11	HSY			
139.14	139:17	NPK, FD, SPEC			
140:2	140:4	NPK, FD, SPEC	140:18	140:21	
140.2	140:04	NPK, FD, SPEC	140:23	141:3	
142:2	142:2	ARG			
145:9	145:15	HSY			
145:17	146:2	FD, NPK, SPEL			
147:5	147:12	FD, NPK, SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Dennis D. Dickson
05/04/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
148:24	148:25		149:1	149:3	INCOMP
150:1	150:2	HSY			
150:10	150:17	HSY			
151:5	151:11	FD/BR, HSY			
151:13	151:19	FD/BR, HSY			
151:24	152:3	FD, FD/BR, NPK, HSY			
152:8	152:9	FD, NPK			
152:11	153:3	HSY, FD/BR, NPK			
153:4	153:6	Q NO A			
154:10	155:4	FD/BR, HSY			
165:12	166:3	HSY			
168:7	168:17	NR, SPEC, INTERRUPT, REL, ML			
168:20	168:21	ML, REL			
168:24	168:25	ML, REL			
169:2	169:9	NR			
171.21	171:22	FD, SPEC			
172:1	172:4	SPEC, NPK			
183:21	187:14		187:14	187:22	
189:9	189:15	LE			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Dennis D. Dickson
05/04/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
189:17	189:25	LE, INTERRUPT			
191:5	191:8		191.10	191:11	
191:12	191:23	FD, SPEC, NPK, VAG			
192:6	192:18	SPEC, FD, NPK			
193:6	193:8	----	193:9	193:13	
194:7	194:17	VAG, FD, AMB			
194:18	195:4	VAG, AMB, SPEC			
195:5	195:11	SPEC, FD, VAG, AMB			
207:21	207:25	VAG, AMB			
208:16	208:18	VAG, AMB			
210:13	210:24	VAG, SPEC, FD, NPK			
210:25	211:2	INTERRUPT			
211:3	211:11	SPEC, FD, NPK			
220:24	221:4	FD, HSY, SPEC			
224:2	224:10	NPK, FD			
227:12	227:22	REL, ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Dennis D. Dickson
05/04/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
234:10	234:12	SPEC, FD, NPK			
234:19	235:7	SPEC, FD, NPK			
237:9	338:6	REL, ML			
238:8	238:13	HSY, REL, ML			
238:13	239:22	HSY, ML, REL			
239:23	240:5	VAG, AMB, SPEC			
240:9	240:22	ML, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David Dill
08/24/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
10:11	11:1	LD			
11:19	11:22	LD			
13:23	14:1	LD			
16:5	16:7	LD			
16:25	17:14	LD			
17:11	17:14	CONC			
18:21	18:25	LD, CONC			
21:5	29:2		29:3	29:20	
29:25 29:25	30:14 30:14		31:9 31:22	31:11 33:18	
34:25	37:25		38:1	38:6	
56:1	56:18	LD	56:19 60:13 64:5 72:3	56:23 62:25 64:25 72:20	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jana B. Dominey
5/5/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
21:12	21:14	VAG,COMP, AMB			
31:24	32:1	SPEC,NPK			
32:8	32:10	SPEC,NPK			
32:12	32:14	SPEC,NPK			
32:19	32:20	SPEC,NPK			
38:24	39:1		38:2	38:23	
38:24	39:1		39:2	39:7	
52:11	52:14		51:21 52:22	52:10 52:25	
53:1	54:1		52:22	52:25	
53:22	53:23	VAG,AMB			
53:1	54:1		54:2	54:8	
61:18	61:24		61:25	62:3	
62:4	62:24		61:25 62:25	62:3 65:1	
65:25	66:20		66:21	67:19	
67:20	68:10		66:21	67:19	
71:6	71:8	VAG,AMB			
71:10	71:12	VAG,AMB			
70:25	71:13		71:14	73:6	
73:7	73:16		73:17	73:25	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jana B. Dominey
5/5/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
78:20	78:21	VAG,REL			
78:23	78:24	VAG,REL			
79:1	79:3	VAG,REL			
80:23	81:20	VAG,AMB			
81:7	81:9	VAG, AMB			
81:11	81:12	VAG, AMB			
95:12 98:6	97:10 98:18		97:16	98:5	
103:19	105:3		105:4 106:11 107:11 107:13	105:12 107:4 107:11 107:21	
134:13 136:4	134:16 137:16		131:12	133:8	
138:3	138:9		138:10	138:18	
142:21	144:5		145:18	147:7	
147:8	147:16		145:18 147:17	147:7 147:24	
66:1 66:9 67:20	66:2 66:20 68:10		152:25 153:15	153:9 154:1	
147:8	147:16		154:2	155:5	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jimmy R. Dowdy 4/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
147:11	149:18		19:19	20:1	
28:24	28:25	AFNE			
31:15	31:17	VAG, AMB, PREJ			
32:8	32:9	VAG, AMB			
32:11	32:12	A/A, SPEC			
32:13	32:16	NR			
31:15 32:8 34:13	31:17 32:23 34:17		32:24	34:11	
34:13	34:17	FD, VAG, AMB			
34:13	34:17		34:18	34:22	
37:25	38:17	FD			
43:19	43:25	SPEC, VAG, NR, COMP			
44:1	44:13	COMP, FD, SPEC			
43:2	44:13		44:17	44:22	
45:5	45:12	FD, AFNE			
46:17	46:20	VAG, AMB			
79:15	79:20	FD, REL, ML			
79:24	80:5	FD, REL ML, AFNE			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jimmy R. Dowdy
4/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
80:11	81:20	REL			
81:21	81:23	VAG			
81:24	82:12	REL			
82:13	82:20	FD, SPEC			
85:2	85:7	INCOMP, NR, FD			
86:11	86:15	SPEC			
97:2	97:5	VAG, PREJ, FD			
97:8	97:10	VAG			
97:11	97:13	AFNE			
97:14	97:17	VAG			
105:4	105:21	REL, ML			
107:24	108:8	REL, ML, VAG			
108:13	108:15	REL, ML			
112:13	112:16	REL			
112:22	113:2	VAG, SPEC			
111:15 113:24	113:8 115:23		113:17	113:23	
113:24	114:3	REL, ML			
115:15	115:23	VAG, PREJ			
113:24	115:23		115:24	116:7	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jimmy R. Dowdy 4/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
113:24	115:23		116:17	116:21	
127:5	127:16	REL			
128:7	128:14	SPEC, REL			
128:21	128:25	AFNE, PREJ, INCOMP			
128:7	129:4	AFNE, PREJ, INCOMP			
129:11	129:14	AFNE, VAG, FD			
129:1	129:14		130:11	131:3	
132:21	133:2	REL			
133:3	133:7	AFNE, PREJ			
139:23	140:2	SPEC, PREJ			
144:1	144:5	AFNE, PREJ, VAG, INCOMP			
143:22 145:24	144:13 147:7		145:14	145:22	
146:15	146:25	SPEC			
147:2	147:7	MIST, PREJ, VAG, ML, REL			
155:24	156:5	VAG, PREJ			
157:5	157:14		157:15	157:25	
161:24	162:15	REL, ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jimmy R. Dowdy
4/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
163:1	163:5	REL, ML			
163:11	163:18	REL, ML			
165:7	165:10	NPK, SPEC, FD			
165:11	165:19	NPK, VAG, FD			
165:20	166:2	VAG, FD, NPK			
165:7 166:9	166:6 166:11		166:15	166:17	
170:23	170:25	VAG			
171:21	171:24	AFNE, PREJ			
171:25	172:12	AFNE, PREJ			
173:16	173:19	VAG			
174:11	174:17	FD, SPEC			
175:19	176:12	REL, ML			
176:19	176:25	REL, ML, NR			
177:1	177:8	REL, ML			
175:19	177:8		177:9	177:19	
177:25	178:4	VAG, PREJ			
178:9	178:13	REL, ML			
178:14	178:25	AFNE, REL, ML			
180:16	180:20	HRY, REL, ML			
180:24	181:10	REL, ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jimmy R. Dowdy
4/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
182:15	183:1	REL, HRY, ML, FD			
183:20	183:22	REL, ML, FD, HRY			
183:25	184:15	REL, ML, FD, HRY			
184:23	185:10	HRY, REL, ML, FD			
185:16	186:14	REL, ML, FD, HRY			
186:23	187:4	REL, ML, FD, HRY			
187:10	187:21	REL, ML			
188:9	188:24	REL, HRY, ML, FD			
189:15	189:25	REL, ML, FD			
190:3	191:6	REL, ML, FD, HRY			
196:11	196:15	COMP			
196:16	196:18	A/A			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Lundy Edwards
09/02/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
5:23	6:9	ML, REL			
10:7	10:8	LD, VAG, AMB, FD			
10:11	10:14	LD, VAG, AMB, FD			
11:17	12:4	LD, VAG, AMB			
14:14	14:21	LD, VAG, AMB, Q-No-A			
20:2	21:20		21:25	22:20	
23:11	23:12		21:25	22:20	
27:9	27:12	LD, AMB, VAG, FD			
29:16	29:19	LD, ML, REL			
32:6	33:3	FD, SPEC, NPK			
33:9	34:13		34:14	36:7	
36:8	38:16		34:14	36:7	
38:12	38:16	LD, No Q Put			
38:21	38:21	LD, No Q Put			
38:21	40:3		40:7	40:20	
38:21	40:3		40:24	41:1	
41:9	45:16		40:7	40:20	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Lundy Edwards
09/02/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
41:9	45:16		40:24	41:1	
44:10	44:18	SPEC, FD, LD			
45:1	45:16	FD, SPEC, LD			
45:18	45:18	FD, SPEC, LD			
47:19	47:22	FD, BR, SPEC			
48:8	48:10	ML, AMB, VAG, LD, FD			
48:13	48:22	ML, AMB, VAG, LD, FD			
48:25	48:25	ML, AMB, VAG, LD, FD			
49:3	49:10	FD, BR			
49:18	49:19	ML, REL			
49:20	49:22	LD, FD, SPEC			
49:25	49:25	LD, FD, SPEC			
50:3	50:3	LD, FD, SPEC			
49:1 49:25 50:3	49:22 49:25 50:3		55:5	55:13	
49:1 49:25 50:3	49:22 49:25 50:3		55:15	56:8	
49:1 49:25 50:3	49:22 49:25 50:3		56:11	56:11	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Lundy Edwards
09/02/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
49:1 49:25 50:3	49:22 49:25 50:3		56:22	57:1	
49:1 49:25 50:3	49:22 49:25 50:3		57:3	57:6	
49:1 49:25 50:3	49:22 49:25 50:3		57:8	57:17	
49:1 49:25 50:3	49:22 49:25 50:3		57:22	58:13	
49:1 49:25 50:3	49:22 49:25 50:3		59:17	59:21	
49:1 49:25 50:3	49:22 49:25 50:3		60:1	60:6	
49:1 49:25 50:3	49:22 49:25 50:3		61:13	61:16	
49:1 49:25 50:3	49:22 49:25 50:3		61:18	62:2	
49:1 49:25 50:3	49:22 49:25 50:3		62:4	62:4	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Lundy Edwards
09/02/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
49:1 49:25 50:3	49:1 49:25 50:3		65:3	67:15	
49:1 49:25 50:3	49:22 49:25 50:3		67:18	67:21	
49:1 49:25 50:3	49:22 49:25 50:3		67:24	68:5	
49:1 49:25 50:3	49:22 49:25 50:3		68:7	69:2	
49:1 49:25 50:3	49:22 49:25 50:3		69:4	69:18	
72:2	72:3		72:4	75:14	
72:2	72:3		75:19	76:4	
77:9	80:12	NR, PREJ			
90:4	90:6	LD, CONC			
90:8	90:8	LD, CONC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of James M. Elliott
10/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
20:17	21:4		21:5	21:6	
36:10 36:10	36:24 36:24		35:25 36:25	36:9 37:3	
40:12 40:19	40:17 40:21	AMB, VAG, FD, ML, REL			
53:2 53:11	53:9 53:15	AFNE, FD, SPEC	53:25 54:21	54:18 55:7	
55:18	56:6		53:25 54:21	54:18 55:7	
59:20	59:23	AMB, VAG, NPK			
62:21	62:24		65:14	66:2	
92:17	93:16		93:17	95:4	
95:5 96:18	95:18 97:17		95:19 95:19	96:17 96:17	
104:17 109:18	105:21 109:19		109:20	11:23	
110:24	111:2		111:3	113:5	
118:19 118:19	120:4 120:4		113:19 115:17	115:14 116:1	
125:3	128:1		120:11	121:20	
127:25	128:5	NPK, SPEC, FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of James M. Elliott 10/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
129:1	129:8	SPEC, FD	129:18 130:19 131:21 133:1 133:11 133:17	130:5 131:7 132:24 133:9 133:13 133:19	
146:12	146:14		143:1 146:16	143:22 146:18	
146:18	148:12		146:16	146:18	
149:13	150:1		151:2	152:1	
150:13	150:14		151:2	152:1	
150:20	151:1		151:2	152:1	
155:11 155:17	155:13 156:4		156:5 156:5 158:18 160:7	158:10 158:10 160:5 161:18	
162:2 162:12	162:8 163:18		163:23 163:23	166:16 166:16	
169:1 169:16	169:3 170:1		170:2 174:10	173:14 174:20	
175:1	175:10		175:11	175:13	
180:8	181:2		181:3 183:11 185:11 186:14 188:6	182:18 183:20 186:3 187:24 189:18	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of James M. Elliott 10/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
191:8	191:19		191:20 194:24 197:2	192:16 196:25 197:11	
198:8	200:3		200:4	201:8	
201:9	201:14		201:15	204:11	
208:25	210:1		210:2	210:6	
210:7	210:8		210:9	211:3	
211:8	211:18		211:19	214:1	
217:5	217:16	VAG, AMB	215:13 216:5	215:16 217:3	
221:2	221:18	VAG, AMB, NPK			
229:16	229:18		231:9	231:15	
229:23	231:8		231:9	231:15	
231:16	232:10		232:11	233:3	
233:12	233:14	ML, SPEC, REL, NPK			
233:18	234:3	ML, SPEC, REL, NPK	234:4	235:6	
238:9	238:17		238:18 239:12 241:8 242:18 242:24	239:1 239:18 241:25 242:21 243:9	
243:19	244:24		245:5	247:8	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Greg P. Ellis 6/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
51:23	52:2	SPEC, FD, NPK			
52:24	53:3	SPEC, FD, NPK			
53:9	53:12	SPEC, FD, NPK			
58:12	58:18	FD, SPEC, NPK	60:19	61:4	
97:24	98:25	REL			
99:14	100:8		100:9	100:14	
100:23	101:1		101:10 101:19	101:13 102:4	
97:24 99:4 99:14 100:15 100:23	98:25 99:9 100:8 100:17 101:1		102:14	103:20	
103:21	105:4		102:14	103:20	
105:10	107:15		109:6	109:14	
125:11	125:14	FD, SPEC, NPK,			
125:17	125:19	FD, SPEC, NPK			
125:20	125:22	ARG			
125:23	126:2	MIST, SPEC, NPK, FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Greg P. Ellis
6/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
126:6	126:8	MIST, SPEC, NPK, FD			
126:6	126:14		126:15	127:4	
132:20	133:19		133:20	133:22	
133:12	133:19	VAG, AMB			
134:7 **Beginning with "based on"**	134:10	SPEC, FD, NPK			
134:13	134:13	SPEC, FD, NPK			
134:2	134:10		134:20	135:1	
134:13	134:19		134:20	135:1	
139:19 **Beginning with "You as"**	139:22	Q-NO-A, SPEC			
141:1	141:2	A-NO-Q			
139:7	139:22		140:17 **Beginning with "Have you"**	140:20	
141:12	141:17		141:18	142:3	
141:12 143:14 143:21	141:17 143:16 146:15		143:1	143:7	
143:14	143:16	REL, ML			
143:21	146:15	REL, ML	146:16	146:21	
150:18	150:21	FD, SPEC, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Greg P. Ellis 6/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
150:24	150:25	FD, SPEC, NPK			
151:1	151:7	A/A, PREJ			
155:9 155:25	155:16 156:12		155:20	155:23	
157:3	159:7	REL, ML			
159:8	159:11	SPEC, FD			
157:3	159:11		159:12	159:19	
160:17	161:1	FD, SPEC, NPK			
163:5	163:12		163:13 164:13	164:12 165:1	
165:2	165:10		165:11 165:16 165:21 166:2	165:13 165:19 165:24 16:25	
190:20	191:3	A/A			
190:1	191:3		191:11 191:22 192:14 192:18	191:17 192:4 192:16 192:21	
195:24	196:13		196:21	197:13	
205:15	205:18	SPEC, FD			
205:21	206:5	SPEC, FD			
232:12	233:21	HRY			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Greg P. Ellis 6/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
233:11	233:17	NO-Q-PUT, PREJ			
233:19	233:21	Q-NO-A			
234:8	235:5	HRY, NO-Q-PUT, PREJ			
235:11	235:13	SPEC, HRY			
235:16	235:19	SPEC, HRY			
234:8	235:13		235:20	236:6	
235:16	235:19		235:20	236:6	
236:13	236:18	SPEC, FD			
237:4	237:6	SPEC, FD			
237:7	237:9	HRY			
242:4 **Beginning with "Directing your"**	242:12		242:13	242:20	
242:21	244:5	HRY, NO-Q-PUT, PREJ			
244:18	244:21	FD, SPEC, MIST			
244:24	244:25 **Ending with "very accurate".**	FD, SPEC, MIST	244:25 **Beginning with "The Exhibit"**	245:13	
242:21	244:21		244:25 **Beginning with "The Exhibit"**	245:13	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Greg P. Ellis 6/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
245:14	245:20	A/A, PREJ, HRY, NO-Q-PUT			
247:1 **Beginning with "Exhibit 12"**	247:23	HRY, NO-Q-PUT, PREJ			
249:6	250:6	HRY, NO-Q-PUT, PREJ			
250:13	251:12	HRY, NO-Q-PUT, PREJ			
251:17	251:20	FD, ARG, SPEC			
251:23	251:23	FD, ARG, SPEC			
239:22 240:10 240:17 242:4 242:21	240:6 240:13 241:5 242:12 244:21		253:4 254:22	254:1 256:7	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Ronnie Joe Elms
04/13/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
52:3	52:12	VAG, AMB, LD			
87:10	87:19	VAG, AMB, COMP, ARG, SPEC			
91:11	91:21	----	158:18	158:24	
92:1	92:11	HSY			
98:11	98:20	SPEC, FD, NPK			
133:24	134:3	VAG, FD, AMB, ARG, SPEC			
134:5	134:16	VAG, FD			
134:20	135:7	SPEC, FD			
135:8	135:11	NR			
135:18	135:22	HSY			
135:24	136:1	VAG, FD			
136:3	136:4	NR			
136:6	136:11	----			
138:1	138:17	VAG, AMB, FD, SPEC			
140:20	140:23	FD, MIST, VAG, AMB, CONC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Ronnie Joe Elms
04/13/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
144:21	145:4	FD, SPEC, VAG, AMB			
148:4	148:7	VAG, FD	148:8	148:13	
149:22	149:3	FD, SPEC, NPK			
167:4	167:6	----	167:7	167:22	
171:16	172:14	----	172:15	172:24	
174:17	174:22	VAG, AMB			
181:10	181:17	VAG, AMB, FD, INCOMP			
210:13	210:25	NR			
213:22	214:4	VAG, AMB, SPEC			
214:8	214:16	VAG, AMB, SPEC			
214:24	215:7	ML, REL			
217:8	217:10	VAG, AMB			
217:17	219:8	ML, REL, HSY, SPEC			
248:20	249:6	VAG, AMB, FD, SPEC			
249:9	249:17	VAG, AMB, FD, SPEC			
255:24	256:4	SPEC, FD			
260:24	261:12	ML, REL			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Ronnie Joe Elms
04/13/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
262:6	262:13	ML, REL			
262:17	262:25	ML, REL	285:1 286:23 288.14 288:24	286:8 288:9 288:20 289:3	
264:4	265:4	ML, REL, HSY			
265:6		ML, REL			
265:19	266:7	ML, REL			
266:22	268:1	VAG, SPEC, FD			
266:22	268:1	----	285:1 286:23 288:14 288:24	286:8 288:9 288.20 289.3	
267:13	268:1	VAG, SPEC, FD			
272:24	274:3	NPK, VAG, AMB, FD, ML, REL			
274:9	274:19	ML, REL			
278:7	278:9	FD, VAG, AMB, SPEC			
278:13	279:8	FD, AMB, SPEC, VAG			
279:17	279:23	NR, SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Scot L. Elsik
7/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
19:4	19:19		19:20	20:6	
20:22	21:22		20:15	20:21	
22:3	22:17		22:18	22:23	
22:3	22:17		24:17	24:25	
22:3	22:17		26:7	26:9	
22:17	22:20		49:17	49:20	
71:19	71:21	CONC, NPK, NR, REL			
71:24	72:1	CONC, NPK, NR, REL			
78:17 78:23 79:8	78:19 79:5 80:6		74:6	74:14	
78:17 78:23 79:8	78:19 79:5 80:6		74:17	74:17	
78:17 78:23 79:8	78:19 79:5 80:6		76:12	76:17	
78:17	78:19	REL			
78:23	79:5	AFNE, REL			
79:8	79:8	AFNE, REL			
79:14	79:18	COMP			
85:16	85:20	MIST, REL			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Scot L. Elsik
7/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
85:23	85:24	MIST, REL			
86:1	86:4	ARG, MIST, REL			
86:7	86:9	ARG, MIST, REL			
86:7	86:9		86:11	86:14	
86:22	87:21	REL			
86:22	87:21		87:22	87:25	
86:22	87:21		88:13	88:14	
88:18	88:22	AMB, ARG, A/A, MIST, PREJ, REL			
88:18	88:22		88:25	88:25	
88:18	88:22		89:2	89:3	
89:10	89:16	AMB, ARG, A/A, MIST, PREJ, REL			
89:19	89:21	AMB, ARG, A/A, MIST, PREJ, REL			
92:1	92:8	AFNE, REL			
92:12	92:15	AFNE, NPK, REL			
92:18	92:19	AFNE, NPK, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Scot L. Elsik 7/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
98:3	98:9	REL			
99:19	99:21	REL			
100:4	100:5	REL			
100:8	101:4	REL			
101:7	101:15	REL			
101:18	101:23	REL			
102:12	102:21	HRY, REL			
102:22	102:23	AMB, Q-NO-A, REL			
104:8	104:12	AMB, ARG, CONC, HRY, SPEC, Q-NO-A, REL, NPK, FD			
104:15	104:20	AMB, ARG, CONC, HRY, SPEC, Q-NO-A, REL, NPK, FD			
104:23	104:24	AMB, ARG, CONC, HRY, SPEC, Q-NO-A, REL, NPK, FD			
105:8	105:16	HRY, REL			
105:19	105:20	HRY, REL			
105:22	105:24	CONC, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Scot L. Elsik 7/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
106:2	106:3	CONC, REL			
106:22	107:6	HRY, REL			
107:7	107:17	NPK, REL			
107:18	107:22	HRY, NPK, REL			
107:23	107:25	REL			
108:1	108:2	ABG, HRY, NPK			
108:5	108:5	ABG, HRY, NPK			
114:13	115:20	NPK, REL			
115:23	116:22	NPK, REL			
117:5	117:18	REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David C. Englert 6/10/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
37:21	37:22	VAG			
38:2	38:4	VAG			
38:5	38:6	VAG,AMB			
38:9	38:10	VAG,AMB			
41:10	41:12	VAG,AMB			
41:15	41:18	VAG,AMB			
41:20	41:23	SPEC			
41:24	41:25	STRIKE			
47:1	47:23	REL,PREJ			
48:8	49:3	REL,PREJ			
49:8	49:17	SPEC,PREJ			
50:5	50:9	A/A,SPEC, PREJ			
50:20 beginning with "Do you"	52:3	FD,SPEC			
66:24	67:15	INC			
66:24	67:14		70:10	72:4	
66:24	67:14		72:10	72:16	
79:17	79:22	SPEC,FD			
91:12	91:15	FD			
92:8	93:3	FD			
95:24	96:5		95:21	95:23	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David C. Englert 6/10/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
155:24 beginning with "They are glad..."	155:25	FD,SPEC			
157:6	160:21		160:22	161:3 ending with "proposal"	
165:16	165:21	VAG,AMB, INC			
169:3 beginning with "don't you believe..."	169:6	SPEC			
174:5	174:17	AMB,VAG,FD			
174:18	174:20	AFNE			
179:24	180:5	FD,SPEC			
180:6	180:9	MIST			
181:4	181:10	FD,VAG,SPEC			
183:3	183:6	SPEC			
184:11	184:15	ARG			
184:22	184:25	HRY,FD			
185:1	185:14	MIST			
189:25	190:6	REL,PREJ			
190:16	190:22	A/A,SPEC,FD			
190:23	191:2	SPEC,AFNE			
192:21	193:3	FD,S PEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David C. Englert 6/10/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
193:4	193:5	HRY			
193:6	193:7	FD,SPEC			
193:17	193:20	REL,MIL,FD			
194:11	194:24	SPEC,NPK,FD			
196:1 beginning with "Randy said..."	196:8	HRY,FD,SPEC NPK			
196:13	196:15	HRY,FD,SPEC NPK			
196:22	197:1	FD,SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of ~~Frank Feeney~~ Engster

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
13:16	14:6		14:14	15:14	
15:15	16:18		16:19 16:22 17:16 28:5	16:20 17:7 18:10 28:24	
29:24	29:25		30:20 32:25	30:17 33:15	
30:9	30:15		30:20 32:25 34:7	30:17 33:15 35:15	
36:11 36:19	36:17 36:23		36:25 37:13	37:9 37:24	
39:10	40:4		40:5	40:8	
41:21	42:6		43:10	44:13	
44:14	44:19		44:19	45:10	
45:11	45:14		46:6 48:4	47:25 48:4	
50:10	50:17		50:18	51:3	
55:14	55:23		55:24	56:2	
68:10	68:14	LD, AMB, VAG			
71:10	71:19		70:17 74:5 76:22 77:4	71:9 74:15 77:2 77:6	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Frank ~~Feeney~~ Engster

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
80:13	81:4	ML, REL, VAG, AMB, FD			
81:7	81:8	ML, REL, VAG, AMB, FD			
82:1	82:2	NO Q PUT			
83:12 83:19	83:15 83:23	ML, REL, LD, VAG, AMB			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Frank Feeney
6/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
8:11 9:1	8:19 9:7		8:20	8:25	
11:4	11:16	LD			
15:6	15:10	LD			
15:14	15:17	LD			
22:4 22:25	22:7 23:16		22:8	22:24	
24:8	25:20		25:21	27:18	
24:8	25:20		28:23	31:12	
24:8	25:20		33:14	35:22	
24:8	25:20		34:1	35:22	
36:14	36:16		36:16	37:23	
36:14	36:16		38:9	39:3	
40:18	42:7		43:14	48:3	
40:18	42:7		51:17	54:21	

Sent to opposing counsel via fax
2.1.00

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Mark C. Flemming 07/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
26:7	26:12		26:13	26:16	
29:22	30:5		28:11	28:23	
33:13	33:17	VAG			
33:16	33:17	NR			
33:24	34:1	VAG, AMB, FD			
40:12	41:4		41:5	41:9	
40:24	41:4	MIST, FD, NPK, SPEC			
51:24	52:6	REL, M/L, PREJ			
53:25	56:16		56:17	57:1	
54:1	56:16		56:17	57:1	
54:22	56:16	REL, M/L PREJ			
61:15	61:18	VAG			
69:1	69:9	FD, HRY			
72:8	72:11	FD, HRY			
78:13	78:16	HRY, FD			
84:7	84:11	REL			
88:9	88:11	VAG, SPEC			
88:12	88:15	AFNE			
94:25	95:1	STRIKE			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Mark C. Flemming 07/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
97:24	98:3	A/A, AGR			
102:19	102:22	SPEC, NPK, FD			
103:23	107:16		122:13	123:23	
104:12	104:24	HRY, FD			
105:6	106:16	HRY, FD			
106:24	107:3	VAG, AMB			
107:24	108:20		109:19	109:25	
107:24	108:20		122:13	123:23	
109:2	109:6		109:19	109:25	
109:2	109:6		122:13	123:23	
110:15	110:19		46:1	47:9	
110:15	110:19		110:1	110:5	
110:15	110:19		123:23	125:23	
110:15	110:19		128:7	130:3	
110:25	112:3	REL, PREJ, M/L			
112:1	112:3	SPEC			
112:6	112:10	REL, PREJ, M/L, SPEC			
113:12	113:18	VAG			
117:24	118:6	VAG			
118:13	118:22	SPEC, AFNE			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Mark C. Flemming 07/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
119:11	119:12	SPEC, FD			
119:13	119:18	VAG, SPEC, FD, AFNE			
120:8	120:9	VAG, SPEC, FD, AFNE			
130:15	130:25	SPEC, NPD, FD			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster
07/01/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
10:6	10:9	FD			
10:24	11:19		10:21	10:24	
12:22	13:10	FD, PREJ	13:19	14:3	
14:11	15:5	FD, PREJ			
15:11	15:17	FD	15:20 15:25	15:22 16:1	
23:11	23:15	NR, REL, ML	23:16 23:22	23:19 23:25	
25:1	25:11	PREJ, REL, VAG, FD	25:12	25:18	
26:14	26:20	PREJ, FD, VAG, MIST			
28:3	28:4	VAG, FD, PREJ			
29:1	29:9	MIST			
29:10	29:16	FD			
30:22	31:2	INCOMP, PREJ	31:4	31:6	
32:20 beginning with "Do you..."	32:25	VAG, AMB, PREJ			
33:1 beginning with "Who within..."	33:7	SPEC, FD			
33:8	33:13	VAG, FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster 07/01/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
34:8	34:13	VAG, FD			
34:14	34:23	A/A, FD, SPEC			
39:19	39:20	INCOMP, REL, STRIKE, PREJ, DISC			
29:1 40:1	34:25 40:25		41:10	41:17	
28:1	31:25		41:18 41:24 42:5 42:12 42:21	41:21 42:2 42:10 42:18 43:17	
43:18	43:20	Q-NO-A, INCOMP			
44:4	44:5	NO Q PUT			
44:19	44:22	FD, MIST			
28:1 43:1	31:25 45:25		45:5 45:5	45:8 45:8	
45:9	45:24		45:25	46:2	
28:1 43:1 47:1	31:25 45:25 47:25		47:1 47:1 47:1	47:8 47:8 47:8	
47:9	47:11		47:20 47:20	48:3 48:3	
49:8	49:20	PREJ	49:21	49:22	
49:23	50:3	AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster 07/01/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
50:8	50:13	FD			
50:14	50:17	FD			
62:15	62:17	PREJ, MIST			
62:23	62:25	AMB, VAG			
63:2 63:14	63:11 63:17		63:22 63:22 64:4	64:1 64:1 64:4	
64:17	64:24		64:25 65:5	65:2 65:10	
65:11	65:23	ARG, A/A, MIST, VAG			
65:24	66:9	MIST, ARG, A/A			
67:3	67:7		67:10	67:11	
67:14	67:15 ending with "true."	INCOMP, PREJ	67:15 beginning with "But that..."	67:16	
68:10	68:14	PREJ, MIST			
68:23	69:2	MIST, PREJ			
69:8	69:11	PREJ, MIST			
73:7	73:11	MIST, FD			
75:19	75:24	VAG, MIST			
76:3	76:10	VAG, A/A, MIST			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster
07/01/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
76:1	76:25		77:25 beginning with "Since 1991..."	78:10	
88:6 beginning with "What is..."	88:6		88:21 89:6	88:25 89:7	
88:10	88:12		88:21 89:6	88:25 89:7	
90:2	90:9	VAG			
92:11	92:13	COMP, VAG, REL			
92:25	93:7	VAG			
93:8	93:14	VAG, FD			
94:17	94:21	Q-NO-A			
95:5	95:7	INCOMP, NO Q PUT			
95:9	95:12	Q-NO-A			
95:22	95:23	NO Q PUT, INCOMP			
98:8	98:18	REL			
99:5	99:10	COMP, VAG, INCOMP, PREJ			
100:21	100:23	FD, VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster 07/01/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
112:6 beginning with "You write..."	112:14		112:24	113:5	
112:17	112:23		112:24 113:7	113:5 113:10	
116:5	116:11		MIST, PREJ		
116:18	116:24		A/A, VAG		
117:1 117:9	117:4 117:9		117:9 beginning with "Are you..."	117:10	
122:6 122:19	122:16 122:20		122:21 122:21	122:24 122:24	
122:25	123:2	Q-NO-A, PREJ, INCOMP	123:6	123:12	
123:21	123:22	NO-Q-PUT			
123:23	124:4	FD, SPEC	124:5	124:9	
124:15	124:18		124:12	124:14	
124:15	125:13	A/A, PREJ			
127:6	127:25	FD, SPEC, PREJ	128:1 128:5	128:2 128:6	
128:12	128:20	SPEC, FD			
128:21	129:3	A/A, FD, PREJ			
132:2	132:9	VAG	132:13	132:18	
132:19	132:21	VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster 07/01/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
136:20	136:24	VAG, AMB			
137:4	137:8	A/A, VAG, AMB			
138:25	139:4	FD, A/A			
140:12	140:20	SPEC, FD			
141:16	141:21	VAG, SPEC			
141:22	141:25	SPEC			
142:4	142:8	COMP			
165:8	165:14	INCOMP, VAG			
165:24	166:7	NO Q PUT			
166:8	166:10	PREJ, COMP, REL			
167:7	167:10	A/A			
165:1	167:25		167:25 169:11 169:20	168:13 169:15 170:5	
178:8	178:25	HRY			
179:13	179:15	REL, HRY, PREJ, NO-Q-PUT			
180:1	183:25		181:6 181:12	181:9 181:17	
181:18	181:21	VAG			
182:7	182:8	REL, VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster 07/01/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
182:25	183:3	AFNE, FD, VAG			
183:7	183:8	VAG			
183:15	183:16	NO Q PUT			
184:15	184:16	REL, SPEC			
185:2	185:5	AFNE, FD			
185:18	185:20	REL, ML			
185:21	185:23	VAG, SPEC			
186:3	186:7	ML, VAG, SPEC, REL, FD, AMB			
186:18	186:22	FD, AFNE			
187:2	187:3	VAG			
194:1	195:25		189:24	190:1	
194:1	195:25		190:5	190:11	
194:11	195:2	SPEC, VAG, PREJ, REL			
214:11	214:15	VAG, AFNE, FD			
215:11	215:14	VAG			
215:20	215:21	VAG			
215:23	216:5	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster 07/01/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
216:8	216:9 ending with "it."	INCOMP	216:9 beginning with "To what..."	216:20	
1:1	216:25		216:9 beginning with "To what..." 217:1 217:12	216:20 217:9 217:15	
217:21	217:24	PREJ, MIST, REL			
218:7	218:8	NO Q PUT			
223:18	223:23	VAG, AMB			
224:9	224:13	MIST			
228:15	228:19	SPEC			
229:2	229:7		229:7	229:14	
229:21	229:25	COMP			
236:17	236:23	VAG			
240:12	240:17	VAG, Q-NO-A, REL			
241:4	241:4	REL, NO-Q-PUT, VAG			
241:5	241:9	REL			
244:6	244:9	FD, VAG			
247:15 beginning with "Have you..."	247:18	IMCOMP, VAG, PREJ	247:19 248:1	247:23 248:19	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster 07/01/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
251:1 beginning with "Have you..."	251:22	REL			
253:2	253:4	VAG, Q-NO-A			
253:13	253:13	NO Q PUT			
253:19	254:2	HRY			
254:3	254:4	VAG, HRY			
254:6	254:20	HRY			
255:3	255:6	Q-NO-A, HRY, VAG			
256:23	257:7	VAG, AMB			
263:5	263:12	VAG, AMB			
272:9	272:13	HRY			
272:18	272:25	HRY, FD			
273:21	274:5	FD, NR, SPEC			
275:12	275:22	Q-NO-A, VAG, SPEC, FD			
276:3	276:3	PREJ, INCOMP, NO Q PUT			
277:23	278:3	Q-NO-A, VAG			
278:17	278:20	NO Q PUT, FD			
278:22	279:10	FD, VAG	279:23	280:4	
290:17	290:19	VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster
07/01/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
290:24	291:3	HRY			
291:6	291:8	AMB, VAG			
296:18	296:20	Q-NO-A			
297:2	297:8	NO Q PUT, PREJ	297:9	297:13	
298:1	298:5		298:6	298:8	
299:14	299:25		300:1	300:14	
301:10	302:1		302:2 302:8	302:5 302:9	
296:1	297:25		303:11 303:18	303:16 304:4	
308:5	308:8	VAG, A/A, Q-NO-A, INCOMP, PREJ			
308:18	308:18	NO Q PUT			
310:8	310:12	ML, REL			
312:19	312:22	VAG			
313:5	313:11	REL, ML			
316:4	316:5	Q-NO-A, A/A			
316:11	316:11	NO Q PUT			
316:12	316:14	SPEC			
317:8	317:8	NR			
317:9	317:10	REL, ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster
07/01/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
317:20	318:3		318:4	318:8	
318:13	318:14	VAG			
318:18	318:24	VAG, AMB			
320:18	321:3	REL			
321:21	321:25	A/A			
323:5	323:13	REL, VAG			
323:14	323:16	REL, FD			
324:11	324:17	PREJ, MIST			
325:7	325:12	REL			
326:16	326:22	REL			
328:11	328:15	PREJ, A/A, VAG			
329:1	329:22	REL, FD			
339:3 beginning with "Is..."	339:9	VAG, SPEC			
339:19	339:25	SPEC			
349:6	349:10	PREJ, Q-NO-A, VAG, REL			
349:16	349:19	REL, NO Q PUT			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster 08/03/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
365:18	365:20	AMB, VAG			
368:20	369:5	AFNE, FD, PREJ			
369:22	370:2 ending with "not all."	INCOMP, PREJ, HRY	370:2 beginning with "What we..."	370:3	
370:17	370:21	HRY			
376:17	376:19	MIST, AFNE			
376:22	377:5		377:19 377:24	377:21 378:5	
380:10	380:14	REL, FD, AFNE, PREJ, VAG			
392:23	392:25	ARG, A/A			
393:3	393:4	A/A			
394:10	394:14	VAG, A/A			
400:14	400:20	VAG, AMB			
403:6	403:12	AFNE, FD, SPEC	403:19	403:23	
404:13	404:17	AMB, VAG			
406:14	406:24	A/A			
407:17	407:20	FD, AFNE, CONC			
408:10	408:17	A/A			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster
08/03/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
411:24	412:2	FD, VAG, PREJ			
412:8	412:9	Q-NO-A			
412:12	412:19	VAG, AMB, SPEC, PREJ			
414:16	414:18	REL, ML			
414:20	415:1	REL, ML			
415:15 beginning with "When you..."	416:9	REL, ML			
418:18	418:22	HRY			
418:23	419:1	HRY, REL			
427:4	427:14	A/A, HRY, VAG, FD			
429:17	429:18	NO Q PUT			
429:20	429:22	AFNE			
432:15	432:16	VAG			
433:6	433:18	SPEC, REL, PREJ			
434:9 beginning with "Do you..."	434:17	A/A, VAG, FD	434:15 beginning with "I..."	434:15 ending with "know."	
434:19	434:22	PREJ, A/A, FD			
437:16	437:25	AFNE, PREJ, MIST			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster 08/03/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
438:22	438:25	AFNE, ARG			
441:3	441:9	AFNE			
442:5	442:20		443:13	443:17	
457:1	457:3	Q-NO-A			
457:14	457:15	NO Q PUT			
457:17	458:6	MIST, A/A, PREJ			
465:22	466:3	NR			
466:4	466:6	INCOMP	466:9	466:14	
466:25	467:4	HRY, FD, REL			
467:10	467:24	REL, HRY			
468:16	468:23	HRY, FD			
486:4	486:10	MIST, PREJ			
488:21	488:24	PREJ, MIST			
490:9	490:13	VAG			
491:7	491:11	A/A, VAG	491:13 491:20	491:17 491:23	
492:14	492:17	INCOMP, PREJ			
494:19	494:20	NO Q PUT			
495:5	495:9	AFNE			
495:10	495:13	SPEC			
496:18	496:19	VAG			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster
08/03/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
498:14	498:15	PREJ, REL, MIST			
501:17	501:19	INCOMP, PREJ			
504:9	504:11	COMP, VAG			
504:17	504:20	VAG, AMB			
505:2	505:12		505:13 505:19	505:16 505:24	
507:3	507:10	VAG, AMB			
508:18	508:24	MIST, PREJ			
509:23	511:5	REL			
513:7	513:14		513:3	513:6	
513:18	513:22	A/A, ARG			
514:5	514:10	A/A			
520:6	520:7	VAG			
520:15	520:25	MIST, PREJ			
521:11	521:12	VAG, MIST			
521:17	521:25	FD			
522:2	522:3	Q-NO-A, INCOMP			
522:10	522:11	NO Q PUT			
522:15	522:18	VAG, AMB			
523:12	523:17	A/A			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster 08/03/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
525:10	526:18		526:19	527:1	
540:21	540:22		540:24	541:8	
550:14	551:2		551:3	551:19	
551:20	551:24	VAG, AMB, COMP			
553:9	553:15	COMP, VAG, AMB			
553:22	553:23	NO Q PUT			
553:25	554:3	FD, AFNE, COMP			
568:1	568:6	ML, REL, Q-NO-A, AFNE, FD			
568:22	568:23	NO Q PUT			
568:25	569:1	REL			
574:14	575:20 ending with "Tobacco."		575:20 beginning with "We..."	575:20 ending with "style."	
579:17	579:19	NO Q PUT			
580:1	580:3	MIST, VAG, PREJ			
584:19	585:1	PREJ, FD, SPEC, AFNE			
587:10	587:18		588:6 588:21 589:2	588:10 588:24 589:5	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald J. Foster
08/03/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
501:1	502:25		591:6 beginning with "I would..."	592:6	
501:1	502:25		592:7 593:12	592:25 594:5	
604:2	604:23	REL			
606:16	606:18	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Glynn Francis
10/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
5:18	5:19	REL			
22:18	23:23	FD, REL			
24:17	25:4	FD, REL			
36:13	36:22	REL	36:23	36:25	
37:18	38:1	REL	37:14 38:18	37:17 38:25	
43:9	43:22	HRY	44:8	44:20 **Ending with "12"**	
44:20 **Beginning with "Did you"**	45:9	FD	45:10	45:21	
46:7	46:8	VAG, AMB SPEC			
46:14	46:15	VAG, AMB SPEC			
46:17	46:18	VAG, AMB SPEC	46:19	47:12	
48:2	48:16		49:3	49:18	
51:5	51:22	HRY			
51:24	52:21	HRY			
52:22	53:10	HRY,SPEC			
64:7	65:2	HRY,SPEC			
65:10	65:16	HRY,SPEC			
66:22	67:5	HRY	69:5 69:8	69:6 69:14	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Glynn Francis 10/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
67:9	67:14	HRY			
69:15	69:17	COMP,REL			
69:18	70:4	REL			
70:23	71:3	PREJ			
69:15	71:3		71:22 72:10	72:7 72:12	
74:6	74:21		74:22	75:14	
75:15	76:11		76:12	76:18	
77:4	78:6		78:7	78:10	
78:18	79:2		79:3	79:8	
80:6	80:8	No Q Put			
80:16	80:18	SPEC			
80:25	81:13	SPEC,NR			
80:25	81:24		81:25 82:13	82:5 82:20	
83:18	84:16	SPEC,NPK			
84:17	85:8	HRY			
86:6	86:25	HRY			
87:1	87:7	No Q Put			
91:11	92:7	REL			
93:13	94:4	REL	94:12	94:17	
94:18	95:3	REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Glynn Francis
10/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
95:15	95:17	REL			
123:4	123:16		123:17	124:2	
132:5	132:14 **Ending with "correct"**		135:8 135:13	135:11 135:15	
135:19	137:10		132:14 **Beginning with "I had"**	133:17	
136:14 **Beginning with "And"**	136:22	NR			
136:23	136:24	HRY			
137:22	138:9		138:10	138:16	
138:17	139:8		139:9	139:20	
140:17	141:1	A/A, PREJ			
132:5 135:19 137:22 138:17 138:21 140:3	132:14 137:10 138:9 138:19 139:8 141:25		143:14 145:24 147:5 148:19	145:1 146:15 148:8 149:5	
75:15 77:4 78:18 79:17 80:25 83:9	76:11 78:6 79:2 80:18 81:24 85:8		151:2 153:13 153:23 154:6 154:19 156:9	152:11 153:20 153:24 154:12 155:4 156:16	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Glynn Francis 10/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
176:8 **Beginning with "In 1994"** 176:21 180:5	176:14 179:16 182:16		158:3 158:24 160:3 161:13 161:21 162:13 162:18 163:12 163:21 164:1 164:13 165:8 165:11 166:1 167:3 167:7 168:14 168:25 169:7 170:7 170:24	158:8 159:6 161:9 161:19 162:3 162:15 163:9 163:19 163:23 164:10 164:16 165:9 165:22 166:7 167:4 167:17 168:21 169:5 170:3 170:22 171:20	
172:24	173:3	Q-No-A			
176:8 **Beginning with "In 1994"**	176:14 **Ending with "Yes"**		176:14 **Beginning with "But I"**	176:17 **Ending with "full-time."**	
179:14	179:16	Q-No-A			
182:1	182:16	No Q Put, LT			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Russell D. Frank 06/08/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
32:23	32:25	REL			
33:16	33:21	AMB, REL			
33:22	33:23	AMB, REL			
34:6	34:22	REL			
35:9	35:16	REL			
37:8	37:19	REL			
41:12	41:22	REL			
56:7	57:5		61:12	62:4	
56:7	57:5		62:9	62:11	
56:7	57:5		62:22	62:24	
56:7	57:5		63:7	63:14	
56:7	57:5		99:19	100:3	
56:7	57:5		100:5	100:16	
56:7	57:5		101:4	101:11	
65:13	65:17		65:24	66:2	
74:25	75:13	REL			
75:18	77:2	REL			
77:11	78:13	REL			
79:8	79:16	CONC, REL			
79:17	80:16	REL			
80:19	81:6	REL			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Russell D. Frank 06/08/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
93:20	93:22	FD, PREJ, REL			
94:1	94:4	FD, PREJ, REL			
105:8	105:18	REL			
105:21	106:20	REL			
107:5	107:22	REL			
108:2	109:7	REL			
109:11	111:4	REL			
112:14	113:7	REL			
113:8	113:9	CONC, NPK, REL			
113:19	114:4	CONC, NPK, REL			
114:21	116:18	REL			
117:5	117:22		117:23	118:2	
117:5	117:22		118:12	118:15	
117:5	117:22		118:22	119:9	
121:5	121:8	Q-NO-A			
121:23	123:5		121:20	121:22	
123:12	123:19		123:19	123:21	
129:20	130:15	HRY			
131:2	131:16	FD, REL			
134:17	134:20	REL			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Russell D. Frank
06/08/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
134:25	135:9	REL			
135:10	135:19	REL			
136:2	136:3	REL			
136:4	137:1	REL			
137:18	138:14	REL			
138:17	139:16	REL			
139:20	140:7	REL			
140:20	141:11	REL			
141:14	142:2	REL			
142:4	142:4	REL			
146:23	148:4	REL			
148:10	148:19	REL			
152:19	152:22	REL			
153:8	153:18	REL			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Dennis Gagnon
08/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
5:1	20:24		31:2	31:4	
6:10	7:4		7:5	7:11	
7:12	9:3		9:4	9:10	
8:17	9:3	REL, ML			
9:11	9:25	REL, ML, PREJ			
9:11	10:13		10:14	10:16	
10:19	11:1	REL, ML			
10:19	12:9		12:10	12:13	
11:25	12:9	INCOMP			
12:14	12:16	FD			
12:14	14:19		14:20	15:3	
12:17	12:21	REL, ML			
13:1	13:8	REL, ML			
13:25	14:8	REL, ML			
15:11	15:14	COMP			
15:11	20:19		21:1	21:17	
15:15	15:20	REL, ML			
15:21	16:23	REL			
18:5	18:16	REL, ML			
18:24	18:25	VAG, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Dennis Gagnon
08/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
20:8	20:19	FD, NPK, CONC			
22:20	23:13		23:14	23:17	
24:22	24:25		24:19	24:21	
26:25	28:10		28:11	28:13	
27:21	27:23	FD, CONC			
28:19	29:17		28:16	28:18	
29:25	30:10		30:11	30:20	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Georgia Gill-Elkins
06/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
11:12 11:18	11:14 13:12		11:15	11:17	
52:13	52:23		52:24	53:14	
57:7	57:12		57:13	57:23	
58:17	59:11		59:12	60:4	
84:11	85:15	LD, REL, AMB, VAG, NPK			
86:3	87:8	VAG, AMB, REL, FD, LD			
89:24	90:7		92:17 94:6 95:3	93:12 94:13 95:6	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jeffrey L. Ham 05/28/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
49:17	50:1 **Ending with "Kodiak Ice"**		50:1 **Beginning with "Again, it's very"**	50:12	
55:1	55:7	FD			
58:11	58:22		58:23	58:24	
58:11	58:22		59:2	59:7	
60:12	61:3		61:4	61:5	
60:12	61:3		61:8	61:11	
80:12	80:17		80:8	80:11	
87:7	88:17		88:18	88:22	
89:9	90:18		90:23	91:3	
92:1	92:5		92:6	92:15	
94:2	94:5	REL			
94:16	94:19	REL			
94:23	95:6	REL			
95:21	97:1	REL	97:2	97:3	
97:4	97:25	REL			
99:14	99:16	REL			
99:19	100:7	REL			
100:18	101:2	REL			
101:5	101:15	REL			
101:5	101:21		101:22	102:1	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jeffrey L. Ham 05/28/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
102:24	103:6	REL	103:7	103:12	
103:19 **Beginning with "Have you"**	103:21	REL	103:22	104:1	
104:2	104:6	REL			
106:21	106:23	REL	106:13	106:20	
107:2	107:10	REL	107:16	107:18	
108:12	108:21		109:8	109:21	
115:7	115:10	REL			
115:14	116:3	REL			
116:24	117:4	REL			
117:18	118:22	NPK/FD/HRY			
119:9	119:12	NPK/FD/SPEC			
119:15	119:16	NPK/FD/SPEC			
120:15	120:18	NPK/FD/SPEC	120:23	121:2	
120:21	120:21	NPK/FD/SPEC			
121:3	121:23	HRY/SPEC/FD NPK			
121:3	121:23		120:23	121:2	
122:7	122:10	NPK/SPEC/FD			
122:19	122:19	NPK/SPEC/FD			
125:15	126:4	REL			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jeffrey L. Ham 05/28/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
126:5	126:6	A/A ARG/REL			
126:7	126:9	REL			
126:15	126:22	REL			
127:1	128:5	REL			
129:25	130:9	SPEC			
130:13	130:14	SPEC			
139:15	139:20	VAG/AMB ARG/MIST REL			
141:1	141:6	ARG/MIST A/A			
141:21	142:23	REL	142:24	143:8	
143:9	144:10	REL	144:11	144:14	
144:20	145:19		146:2	146:9	
144:20	145:19		146:16	146:20	
152:7	152:10	REL			
152:20	152:23	REL			
153:6	153:23		154:3	154:5	
154:22	155:22		155:23	156:4	
157:18	158:12 **Ending with "I was"**		158:12 **Beginning with "Just for"**	158:14	
176:24	177:1	NO Q PUT			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jeffrey L. Ham 05/28/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
182:13	182:25 **Beginning with "are not."**		182:25 **Beginning with "But we do"**	183:1	
183:4	183:7	NPK/ FD			
183:11	183:12	NPK/FD			
183:14	183:21	ARG A/A			
184:13	185:23	REL			
187:4	187:10	HRY			
190:15	191:4		191:5	191:7	
191:8	192:6		192:7	192:17	
192:18	193:21		194:6	194:9	
195:15	195:18	REL			
195:20	196:23	REL			
197:9	197:11	A/A, REL			
197:12	198:7	REL	198:8	198:10	
198:11	201:7	REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Alan Hart 08/30/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
41:19	43:2		41:9	41:19	
43:19	44:10		43:3	43:18	
44:11	44:15	LD			
45:22	45:24	VAG			
46:1	46:3	LD, SPEC			
47:1	47:14		47:15	47:20	
48:3	48:6	REL			
48:8	48:10	REL, SPEC			
48:8	48:10		48:14	48:25	
48:13	48:13		48:14	48:25	
69:20	69:23	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Larry Haynes 04/28/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
31:18	31:22	FD			
31:23	32:1	FD			
32:2	32:4	FD			
36:21	37:9	HRY			
44:17	44:22	VAG, FD			
45:12	46:12	FD/BR			
48:3	48:18	FD			
48:19	48:21	FD, SPEC			
53:16	53:24 ending with "No."		53:24 beginning with "To what..."	54:9	
66:24	67:2	SPEC			
75:1	75:4	VAG, AMB			
77:18	78:13	VAG, AMB, FD			
79:8	79:10	NO Q PUT			
81:6	81:19	VAG, AMB			
83:8	83:11	VAG, AMB, FD, NPK, SPEC			
83:24	84:8	VAG, AMB, FD, NPK, SPEC			
85:18	85:20	VAG, AMB, FD, SPEC, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Larry Haynes 04/28/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
86:5	86:10	VAG, AMB, FD, SPEC, NPK			
87:19	87:22	SPEC			
88:4	88:15	SPEC, NR, HRY			
88:16	88:19	VAG, AMB, ML, REL			
90:2	90:13	VAG, AMB			
90:14	90:22	AFNE, VAG, ML, AMB, REL			
104:14	104:20	ML, VAG, AMB, FD, AFNE, REL			
104:21	104:23	VAG, AMB, FD, SPEC			
105:4	105:8	VAG, AMB, FD, SPEC			
105:9	105:11	VAG, AMB, FD, SPEC, ML, REL			
105:14	105:19	VAG, AMB, FD, SPEC, ML, REL			
113:2	113:5	VAG, AMB, REL, ML			
113:12	113:12	VAG, AMB, REL, ML			
125:16	125:25	REL, ML, VAG, FD, AMB			
133:14	133:22	FD, REL, HRY			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Larry Haynes 04/28/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
135:17	135:20	REL, FD, VAG, AMB			
135:21	135:24	REL, FD, VAG, AMB, NPK			
135:25	136:2	FD, VAG, AMB, REL			
136:3	136:8	HRY			
136:9	136:23	VAG, AMB			
137:7	137:20	VAG, AMB			
137:21	137:24	VAG, AMB, NPK, FD			
138:3	138:5	FD, NPK, SPEC			
138:6	138:8	VAG, AMB, FD			
138:16	138:22	VAG, AMB, NPK, FD			
140:6	140:17	HRY, VAG, AMB, SPEC			
141:4	141:7	SPEC, VAG, NPK, AMB			
141:8	141:16	VAG, SPEC, FD, AMB, AFNE			
154:8	154:16	VAG, FD, AMB			
154:22	155:15	VAG, FD, AMB, REL, ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Larry Haynes 04/28/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
155:16	155:22	VAG, FD, AMB, REL, ML, SPEC			
155:23	156:15	VAG, AMB, FD, REL, ML			
158:18	159:10	VAG, AMB, REL, ML			
159:11	159:22	REL, ML			
160:2	160:19	REL, ML			
160:20	161:3	VAG, AMB, REL, SPEC, ML			
161:4	161:10	ML, REL			
161:11	161:19	MIST, AFNE, ML, REL			
161:20	162:4	REL, ML			
162:5	162:7	REL, ML, MIST			
162:10	162:14	REL, ML, MIST			
162:10	162:14		162:15	162:19	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Richard H. Henchey 04/30/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
90:17	90:25	FD, VAG, AMB			
92:11	92:12	VAG, FD, AMB			
92:16	92:17	VAG, FD, AMB			
109:9	109:11	MIST			
109:16	109:17	FD, VAG, AMB, SPEC, NPK			
109:19	110:6	FD, VAG, AMB, SPEC, NPK			
110:8	110:13	FD, VAG, AMB, SPEC, NPK			
110:16	110:16	FD, VAG, AMB, SPEC, NPK			
110:18	110:21	FD, VAG, AMB, SPEC, NPK			
110:23	111:7	FD, VAG, AMB, SPEC, NPK			
111:10	111:11	FD, VAG, AMB, SPEC, NPK			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Richard H. Henchey 04/30/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
131:18	131:23	Q-NO-A			
132:4	133:2		133:2 beginning with "You also..."	133:4 ending with "Okay."	
135:20	135:22	FD, NPK			
135:24	135:24	FD, NPK			
136:9	136:12	FD, SPEC, NPK			
136:15	136:20	FD, SPEC, NPK			
136:23	136:24	FD, SPEC, NPK			
137:23	138:3	VAG, AMB			
138:4	138:6	MIST, SPEC, VAG, AMB			
138:9	138:9	MIST, SPEC, VAG, AMB			
148:24	149:14	VAG, AMB, NPK, FD			
149:15	149:16	VAG, AMB, SPEC			
149:19	149:20	VAG, AMB, SPEC			
150:1	150:3	VAG, AMB, FD			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Richard H. Henchey 04/30/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
150:5	150:5	VAG, AMB, FD			
150:19	151:9		151:10	153:12	
155:16	156:1		155:11	155:15	
155:5	155:7	VAG, AMB, FD, NPK			
155:9	155:9	VAG, AMB, FD, NPK			
162:8	163:8		164:1	164:17	
163:6	163:8	SPEC, ARG, FD			
163:11	163:11	SPEC, ARG, FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary W. Hensley
4/29/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
38:12	38:17	FD, AFNE			
38:18	38:22	Q-NO-A, VAG			
39:9	39:10	NO-Q-PUT			
39:12	39:13	AFNE,FD			
39:14	39:21	AFNE,FD, PREJ			
43:2	43:5	AMB,Q-NO-A, VAG			
43:24	43:24	NO Q PUT,VAG, AMB			
44:4	44:12	REL,PREJ, VAG,AMB			
44:18	44:23	VAG,AMB			
45:7	45:20	SPEC,PREJ,FD VAG, AMB			
47:15	47:16	NO Q PUT			
47:18	48:1	INCOMP			
50:20	50:23	VAG,AMB			
53:6	55:4		102:21	103:22	
53:6	53:19	INCOMP, MIST, PREJ			
53:6	55:4		55:8	57:8	
53:6	55:4		58:16	59:22	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary W. Hensley
4/29/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
53:20	55:7	MIST,PREJ, INCOMP			
61:3	61:5	VAG,AMB			
81:12	83:5	REL			
83:6	83:19	REL,VAG			
83:21	84:1	SPEC			
85:11	85:15	REL			
85:17	85:21	SPEC,FD			
86:2	87:1	VAG,AMB,FD			
86:19	87:1		87:4	87:8	
90:4	90:11	VAG,AMB,FD			
90:12	90:16	VAG,AMV,FD			
90:18	90:24	VAG,AMB,FD			
95:14	95:23		94:23	95:12	
95:14	95:23		95:24	96:5	
96:6	96:19	FD,SPEC			
96:21	96:23	SPEC,FD			
97:1	97:11	SPEC,FD			
101:20	102:6	MIST,PREJ, INCOMP			
101:20	102:21		103:21	103:22	
105:17	105:23	VAG,AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary W. Hensley 4/29/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
106:8	106:12	REL,Q-NO-A			
106:8	107:21		107:22	107:25	
108:22	108:25	MIS,VAG			
108:22 110:7 111:2	109:3 110:24 111:3		111:5	111:8	
108:22 110:7 111:2	109:3 110:24 111:3		111:15	111:17	
111:18 111:23	111:20 111:23	VAG,AMB			
111:18 111:23	111:20 111:23		111:25	112:12	
112:23	112:23	NO Q PUT			
112:23	113:2		113:2 "I might..."	113:3 "...have"	
112:23 113:4	113:2 113:14		114:6	114:16	
112:23 113:4	113:2 113:14		115:4	115:16	
121:5	121:6	SPEC			
121:9	121:17	SPEC			
121:22	122:1	NR			
122:2	122:6	NR			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary W. Hensley 4/29/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
146:10	146:16	SPEC,FD			
146:20	146:25	FD,SPEC, VAG			
147:3 147:8	147:5 147:19	Q-NO-A, PREJ SPEC,FD,VAG			
148:6	148:6	REL			
167:23	168:10	REL,ML			
169:25	170:3	REL,ML			
171:15	171:18	FD,SPEC,A/A			
171:21	171:24	ML,REL,FD, SPEC			
171:2	171:24		171:25 172:6	172:3 172:6	
173:7 174:3 174:24 176:4 177:6 179:6 180:23 182:6	173:25 174:17 175:20 177:4 177:22 180:3 180:24 183:3		183:4 183:15 183:21	183:12 183:19 183:24	
174:8 174:24	174:17 174:25	FD,SPEC,PREJ INCOMP			
175:1	175:5	A/A, FD, SPEC			
175:6	175:20	AMB,VAG, NO Q PUT, FD SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary W. Hensley 4/29/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
176:4	176:12	REL,PREJ			
176:13	177:1	FD,VAG,REL			
180:1	180:3	FD,SPEC,VAG			
180:17 180:23	180:20 180:24	FD,SPEC			
182:6	183:3	INCOMP			
185:25	186:24	VAG,CONC, PREJ			
187:17	188:22	PREJ,INCOMP			
187:1 187:17	187:12 188:22		188:23	189:7	
189:13	189:20	REL,ML			
187:1 187:17	187:12 188:22		190:1	190:19	
193:23	194:2	HRY			
194:3	194:21	HRY			
196:5 196:10	196:7 196:10	SPEC			
196:10	197:22		197:23	198:8	
198:17	198:20	HRY			
198:17	198:20		198:21 198:23	198:21 199:11	
199:13	199:15	SPEC,FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary W. Hensley
4/29/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
199:18	199:21	VAG, AMB, NR, PREJ, ICOMP			
199:13	199:21		199:22	200:16	
201:9	201:14	A/A			
202:7	202:17	HRY, MIST			
202:18	203:5	REL, ML, INCOMP, HRY, REL, ML			
203:7	203:10	HRY			
203:12	203:20	HRY, INCOMP, SPEC			
203:21 204:2	203:24 204:2	SPEC, FD, HRY			
204:2	204:10		204:11	206:16	
240:9	240:12	VAG,SPEC			
244:7	244:9	A/A, PREJ			
244:14	244:18	VAG,NO-Q-A			
245:13	245:17	PREJ,A/A			
246:4	246:6	SPEC			
246:7	246:12	FD,VAG			
247:4 247:8	247:5 247:8	FD			
247:10	247:12	FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary W. Hensley 4/29/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
247:16	247:23	COMP			
247:24	248:1	SPEC			
248:23	249:1	AFNE,VAG, COMP			
249:9	249:15	VAG, AFNE, COMP			
251:5	253:19		253:22	253:23	
253:16 253:23	253:19 253:24	VAG,ARG, AMB			
254:21	254:25	NR,AFNE			
258:18 258:23	258:20 258:23	FD,PREJ			
259:20 261:14	260:3 261:22		261:4	261:13	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Joseph Hettinger
4/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
68:25	70:3	VAG, AMB			
76:19	76:24		76:9	76:18	
77:14	77:22	SPEC			
78:7	78:14	VAG, SPEC			
87:8	87:11	CONC, FD, BR			
87:20	87:24	CONC, SPEC			
88:3	88:20	CONC, SPEC	88:21	88:22	
88:23	88:25		88:21 89:5 89:13	89:4 89:10 89:20	
90:23	92:6		92:9	93:19	
91:6	91:10	VAG, AMB, SPEC			
96:20	100:15		100:16	102:11	
104:8	105:8		105:9	105:13	
114:16 117:21	115:8 119:4		116:7 beginning with "Just explain..."	117:20	
117:21	119:4		120:5	120:11	
127:1	127:7	HRY			
127:23	128:1	HRY			
128:2	128:5	VAG, AMB			
128:13	128:16	AMB, SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Joseph Hettinger
4/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
129:24	130:3	SPEC, AMB, VAG			
134:17	134:18	VAG			
135:7	135:10	COMP, VAG			
135:12	135:16	VAG, AMB			
136:25 137:2	136:25 137:17		135:17	136:24	
137:19 138:14	138:10 139:19		139:20	140:16	
133:17	135:16		135:17	136:24	
137:19	137:21	VAG, AMB			
138:4	138:6	VAG, AMB			
141:1	141:3	VAG, AMB			
141:15	141:17	VAG, CONC, SPEC			
142:12	142:20		142:21	143:19	
144:10	144:13	VAG, AMB, HRY			
145:20	146:1		146:2	146:8	
146:9	146:22	VAG, AMB, FD	146:23	147:6	
148:4	148:14		148:15	148:18	
148:18	148:20	SPEC	148:15	148:18	
150:21	150:25	SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Joseph Hettinger
4/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
151:1	151:4	SPEC, VAG, AMB			
188:14	188:17	VAG			
188:14	189:12		189:13	189:20	
189:3	189:6	PRIV			
189:8	189:10	PRIV			
195:14	195:16	VAG			
197:1	197:4	VAG, AMB			
197:1 198:3	197:24 198:8		197:25	198:2	
199:19	199:22		199:23	200:25	
201:1 202:23	202:14 203:3		202:15	202:22	
202:2	202:3	SPEC			
202:23 203:14	203:3 204:9		203:4	203:13	
201:1 202:23 203:14 204:17	202:14 203:3 204:9 204:21		247:21	248:21	
206:12	206:16	SPEC			
206:17	206:21	SPEC, NPK			
207:24	208:2	VAG, SPEC			
207:24	211:19		211:21	212:21	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Joseph Hettinger
4/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
212:22	212:25		211:21	212:21	
209:5	209:9	MIST, SPEC	211:21	212:21	
213:4	213:9	VAG, AMB			
213:4 214:6 215:14	214:3 215:9 216:11		216:12	216:18	
221:10	221:12	SPEC			
230:2 231:21	230:20 232:12		230:21	230:20	
233:14	234:22		235:1	236:2	
238:11	240:16		240:17	241:13	
241:25	242:7	SPEC			
242:14	242:15	VAG, AMB			
242:16	242:21	VAG, AMB			
241:14	246:7		240:17	241:13	
246:21	247:9		246:8	246:20	
241:14	246:7		246:8	246:20	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David H. Hyder
6/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
41:8	41:14	VAG, AMB			
43:19	43:20	VAG, AMB			
45:23	46:4	NQP			
46:8	46:13	SPEC, NPK			
46:25	47:2	SPEC, NPK			
50:18	50:20	VAG, AMB			
50:25	51:10	VAG, AMB			
53:18	53:19	VAG, AMB			
54:4	54:4	VAG, AMB			
54:11	54:25	ML, VAG, AMB			
57:3	57:10	SPEC, NPK			
59:17	59:25	INCOMP	60:1		
60:5	60:13	ML			
60:20	60:25	VAG, AMB			
61:7	61:8	VAG, AMB			
61:12	61:12	VAG. AMB			
62:2	62:5	REL			
62:6	62:9	SPEC, REL, NPK			
65:14	65:22	REL, FD			
66:3	66:7	FD, NR, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David H. Hyder 6/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
66:8	66:10	NPK, SPEC, FD, REL			
66:18	66:21	REL, INTERRUPT			
66:24	67:4	REL, NO Q PUT			
69:6	69:14	SPEC			
69:15	69:19	VAG, AMB			
70:1	70:5	AMB, VAG			
70:8	70:9	AMB, VAG			
71:4	71:17	SPEC, NPK			
71:18	72:1	VAG, AMB			
72:2	72:8	VAG, AMB			
72:9	72:19	SPEC			
72:20	73:9	MIST, NPK, SPEC			
73:14	73:20	ARG			
74:5	74:10	SPEC			
76:3	76:13	MIST, VAG			
77:25	78:9	NPK, SPEC			
79:10	79:20	ARG, MIST, A/A, VAG			
80:2	80:11	FD, VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David H. Hyder 6/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
81:8	81:21	FD, VAG			
92:23	93:3	VAG, SPEC			
107:8	107:13	SPEC			
107:14	107:19	SPEC			
107:20	108:3	VAG, AMB			
108:16	108:21	VAG, AMB			
112:9	112:14	FD, NPK			
113:22	114:3	FD, NPK			
115:1	115:4	VAG, AMB			
129:24	131:19	FD, VAG AMB			
131:20	131:24	FD, NPK, VAG			
131:25	132:13	FD, VAG, AMB, HSY			
132:18	133:7	FD, VAG, AMB			
133:8	133:21	FD, VAG, AMB, HSY			
133:22	133:25	NPK, FD, HSY			
134:1	134:5	FD, VAG, NPK			
134:13	134:17	FD, VAG, SPEC			
143:25	144:8	HSY, FD			
144:24	145:17	HSY, FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David H. Hyder
6/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
146:1	146:5	HSY, NR			
146:7	146:23	NR, SPEC			
149:16	149:21	VAG			
149:24	150:5	VAG			
151:4	151:18	FD, VAG, NPK, SPEC			
151:19	152:5	VAG			
152:6	152:14	VAG, FD			
152:21	152:24	INTERRUPT			
153:6	153:10	SPEC, NPK			
153:16	154:1	SPEC, FD			
154:2	154:5	MIST, REL, FD, NPK			
154:11	154:23	MIST, REL, FD, NPK			
157:22	158:21		158:22	158:25	
158:10	158:15	VAG, COMP			
159:4	159:14	VAG, COMP			
161:1	161:4	FD, NPK, SPEC			
161:16	162:15	VAG, FD			
162:24	163:3	COMP, VAG, FD, HSY, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David H. Hyder 6/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
163:17	164:3	COMP, VAG, HSY, FD, NPK			
164:4	164:11	NPK, SPEC, FD			
164:12	164:24	VAG, FD, ML, REL, SPEC, NPK			
164:25	166:9	ML, REL			
166:10	166:17	ML, REL, HSY			
166:18	167:17	ML, REL			
167:22	168:5	ML, REL, VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Douglas L. Hynek
4/21/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
31:1	31:13		31:14	32:1	
57:22	57:24	FD, VAG, SPEC, AMB			
58:2	58:4	FD, VAG, SPEC, AMB			
61:19	62:3	FD, VAG, AMB			
67:9	67:24		66:22 67:25	67:8 68:10	
85:13	86:7		86:23	87:17	
93:12	94:2		94:3	94:9	
95:22	95:24		95:1 95:19 95:25	95:5 95:21 96:15	
97:3	97:11		97:12 98:22 100:3	98:15 99:7 101:6	
101:11	102:4		102:21	103:10	
102:8	102:14		102:21 104:20	103:10 104:25	
121:17	122:4		123:3	123:10	
146:12	147:1		147:2	147:10	
148:6	148:11		148:12 148:21 151:19	148:18 151:15 151:23	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Douglas L. Hynek
4/21/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
148:6	148:11		153:5 157:1 159:16 160:6 161:11 162:1 169:23	156:13 157:12 159:22 161:2 161:18 167:10 172:7	
181:4	181:22		177:16 178:3 178:11 179:6 179:15 181:23 182:9	177:24 178:8 178:13 179:9 180:2 182:1 183:11	
187:14	189:20	ML, REL	190:7	190:24	
197:20	199:9		196:23	197:19	
209:5	211:13		211:14	211:25	
212:1	212:25		213:1 214:10	213:20 215:20	
218:8	218:17	SPEC, VAG, AMB, NPK			
218:20	218:21	SPEC, VAG, AMB, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Albert Iannuzzi
6/29/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
47:15	47:17	VAG, AMB			
47:15	48:12		48:13	48:18	
52:16	52:25	LD			
74:4	74:5	VAG			
74:7	74:12	ARG			
74:24	75:1	SPEC			
75:3	75:5	ARG			
75:19	75:21	VAG, LD			
76:17	76:21	LD			
80:13	80:15	VAG			
81:2	81:4				
90:20	91:4		91:5	92:9	
92:10	92:12	LD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William E. Ingram 8/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
12:9	12:24		12:25	14:11	
16:19	16:25	Q-No-A/ VAG AMB			
18:15	18:21		19:18	19:21	
20:15	20:23	VAG/AMB			
21:14	21:19	VAG/AMB OUT/SCOPE			
20:15	21:19		21:20	22:2	
22:3	23:6		21:20	22:2	
22:3	22:10	VAG/AMB			
28:11	28:12	VAG/AMB Q-No-A			
28:16	28:24	VAG/AMB Q-No-A	28:25	29:3	
28:1 28:16	28:12 28:24		28:25	29:3	
28:1 28:16	28:12 28:24		30:8	30:9	
32:8	32:14	COMP			
32:3	32:19		32:20	32:23	
50:4	50:15	A/A	50:16	50:19	
51:10	51:17	VAG/AMB			
50:21	52:1		52:2 52:11	52:5 52:15	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William E. Ingram
8/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
53:22	53:24	Q-No-A			
54:24	55:6		55:15	55:18	
62:5	63:3	VAG/AMB			
61:25	64:21		64:22	64:25	
67:11	67:25		68:1	68:4	
68:5	68:14		68:1	68:4	
69:24	70:11	A/A			
72:12 74:20	73:12 74:22		73:13	74:19	
75:2	75:11		78:3	78:9	
82:9	82:12	VAG/AMB			
82:17	82:19	VAG/AMB			
84:19	85:4	HRY			
86:14	86:23		88:5	88:16	
96:6 **Beginning with "Have you"**	96:10	A/A			
96:6 **Beginning with "Have you"**	97:21		97:22	98:3	
97:10	97:21	VAG/AMB FD/SPEC			
99:12 100:10	100:5 100:25		100:6	100:9	
106:14	107:2	SPEC/FD/NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William E. Ingram 8/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
108:3	108:6	VAG/AMB/ ARG			
108:3	110:1		110:2	110:8	
109:9	110:18		110:2	110:8	
109:10	109:14	COMP			
111:13	112:1		112:11	113:2	
			114:1	114:6	
			121:13	122:3	
123:1	123:15	NO-Q-PUT/SPEC REL	122:12	122:25	
125:15	125:18	SPEC/CONC NPK/FD/VAG AMB			
126:18	126:18	SPEC/CONC NPK/FD/VAG AMB	127:7 128:1 129:23 130:3 131:16 131:22 132:12	127:15 128:20 129:24 130:15 131:19 132:8 132:25	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Steve Johnson 05/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
19:12	20:25	----	21:1	21:9	
19:12	20:25	----	21:12	21:15	
52:9	52:12	MIST			
52:14	52:21	INCOMP INTERRUPT			
53:22	55:17	----	55.20	55:25	
55:6	55:7	FD, CONC			
55:12	55:19	FD, CONC			
66:22	66:25	VAG, AMB			
67:5	67:11	VAG, AMB			
68:4	68:8	VAG, AMB, MIST	69:6	69:13	
		----	69:16	109:23	
		----	70:1	70:18	
83:5	83:13	HSY			
83:21	84:8	HSY			
84:11	84:23	HSY, VAG			
85:5	85:7	HSY, VAG			
86:2	87:1	HSY			
87:4	87:11	HSY, FD, SPEC			
87:14	87:19	NPK, FD, SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Steve Johnson 05/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
88:14	88:17	----	91:17	92:3	
88:18	89.8	VAG, AMB			
93:24	94:6	VAG, FD, SPEC			
103:3	103:25	HSY	104:1	106:1	
106:2	106:11	HSY			
106:18	107:8	----	107:21 108:6	108:3 108.7	
116:3	117:2	----	117:3	117:6	
121:23	123:7	----	123:8	123:21	
123:22	124:16	----	124:12	125:14	
125:15	126:12	ML, REL, HSY			
127:9	127:16	NPK, SPEC, FD			
129:25	130:12	----	131:1	131:17	
137:22	138:7	HSY	138:17	138:18	
157:11	157:16	NPK			
159:18	159:21	INTERRUPT	161:14	161:17	
159:23	160:2	A/A, ARG			
160:10	160:17	A/A, ARG			
160:22	160:23	A/A			
162:21	162:24	HSY			
163:6	163:9	FD, SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Steve Johnson 05/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
164.2	164:10	HSY			
164:17	164:19	MIST, VAG, FD, NPK, SPEC			
164:22	164:23	FD, NPK, SPEC			
166:23	167:11	FD, SPEC, NPK			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Bruce W. Jones 6/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
19:22	19:25	Q-No-A			
26:7	26:10	FD			
26:7	26:18		26:19	27:8	
26:7	26:18		27:13	27:15	
28:8	28:9		29:6	29:11	
28:16	29:5		29:6	29:11	
30:7	30:8	VAG/AMB/FD /NPK			
30:11	30:14	VAG/AMB/FD /NPK			
43:17	43:19		41:7	43:16	
43:17	43:19		43:20	44:12	
58:15	59:11	REL/FD/VAG/ AMB			
60:22	61:7		60:1	60:7	
60:22	61:7		60:11	60:21	
64:2	65:12		63:20	64:1	
65:18	65:25		66:1	66:14	
68:6 beginning with "you are"	69:2	SPEC/NPK/FD /VAG/AMB			
71:11	72:5		72:6	72:10 ending with "that."	
72:10 beginning with "It.."	73:19		72:6	72:10 ending with "that."	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Bruce W. Jones 6/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
73:17	73:19	SPEC/FD			
74:16	74:19	REL/FD/VAG/ NR/AMB			
74:22	75:1	REL/FD/VAG/ NR/AMB			
75:4	75:6	REL/FD/VAG/ NR/AMB			
80:4	80:9	HRY			
80:16	80:18	SPEC/NPK			
80:21	81:8	SPEC/NPK			
81:9	81:12	AMB/VAG/FD /SPEC			
81:17	81:18	AMB/VAG/FD /SPEC			
81:19	82:1	REL			
83:23	84:21		84:22	85:10	
85:11	85:21	FD/BR/REL			
86:1	88:9	FD/BR/REL			
93:14	94:7	ML/REL			
94:16	94:17	VAG/AMB			
94:21	94:23	VAG/AMB			
94:24	95:3	ML/REL			
96:3	96:13		95:19	95:22	
96:3	96:13		96:14	97:1	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Bruce W. Jones
6/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
97:2	98:17		96:14	97:1	
97:2	98:17		98:18	100:16	
100:17	101:11		98:18	100:16	
103:10	103:12		104:15	106:17	
103:15	104:14		104:15	106:17	
106:18	108:1		104:15	106:17	
106:18	108:1		108:2	109:9	
111:6	111:14	VAG/AMB/FD /REL			
111:24	111:25		112:1	112:7	
112:8	112:12		112:1	112:7	
114:13	114:25		115:1	115:4	
115:5	115:25		115:1	115:4	
116:24	117:2	SPEC/NPK/ VAG/AMB			
117:5	117:8	SPEC/NPK/ VAG/AMB			
117:11	117:14	SPEC/NPK/ VAG/AMB			
117:16	118:11	SPEC/NPK/ VAG/AMB			
118:22	118:23	VAG/AMB/ NPK/SPEC			
119:15	120:3		120:4	120:5	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Bruce W. Jones 6/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
119:15	120:3		120:8	120:9	
121:10	121:14	FD/VAG/AMB /SPEC/NPK			
121:17	121:25	FD/VAG/AMB /SPEC/NPK			
121:17	122:11		122:12	122:18	
122:19	125:2 ending with "H-E-B..."		122:12	122:18	
122:19	125:2 ending with "H-E-B..."		125:3	125:8	
126:2	126:4		126:5	126:11	
126:12	127:18		126:5	126:11	
128:2	128:3	SPEC/NPK			
128:6	128:6	SPEC/NPK			
129:4	129:10	FD/NPK/MIST			
148:5	148:21		137:20 137:25 139:10 139:16 141:7 142:10 148:22	137:22 139:5 139:13 140:2 142:6 143:21 148:25	
150:1 beginning with "Did"	150:9	AMB/VAG/NR /NPK			
151:21	151:24	SPEC/NPK			
152:16	152:17	SPEC/NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Bruce W. Jones 6/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
152:24	152:25	No Q Put			
152:24	153:13		153:14	153:20	
153:21	156:12		153:14	153:20	
153:21	156:12		156:13	157:1	
155:24	156:6	VAG/AMB			
156:7	156:12	ML/REL/VAG/ AMB			
159:5	159:15	FD/VAG/AMB /SPEC			
162:19	163:12	ML/REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary Jones
8/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
5:21	6:4	AMB, FD, VAG			
6:8	6:12	COMP, SPEC			
6:16	6:21		20:5	20:11	
6:16	6:21		20:16	20:21	
9:2	9:19	VAG, AMB			
10:4	10:12	VAG			
10:25	11:3	FD			
11:4	11:9	SPEC			
11:10	11:18	NR			
11:19	11:25	VAG, MIST, AMB			
12:20	13:2	VAG, AMB, SPEC			
13:3	13:11	COMP, FD			
13:12	13:18	AMB, VAG			
14:8	14:10	VAG, NR			
14:11	14:15	NO Q PUT			
14:16	15:3	VAG, AMB			
15:17	15:19	NPK, FD, SPEC			
15:24	16:12	VAG, AMB			
16:13	16:16	COMP			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary Jones
8/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
16:22	16:24	NPK, VAG, FD, AMB			
16:25	17:3	COMP, VAG, AMB			
17:4	17:7	VAG, AMB			
17:8	17:15	COMP			
17:16	17:25		26:23	26:25	
17:16	18:5	FD, VAG			
18:1	18:9		26:23	26:25	
18:6	18:9	COMP			
22:3	22:10	COMP			
22:15	22:17	VAG			
22:18	23:3	INTERRUPT, NR			
23:4	23:6	FD, A/A, VAG			
23:7	23:23	FD, SPEC			
24:22	25:1	FD, VAG			
25:2	25:12	VAG			
25:15	25:21	VAG			
25:18	25:20	VAG, HRY			
26:1	26:17	NPK, HRY, SPEC			
26:18	26:20	SPEC, FD, VAG, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary Jones
8/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
33:4	33:7	FD, LD			
33:8	33:17	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Michael Keane
6/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
35:18	36:5	REL	35:12	35:17	
			36:6	36:10	
			36:19	36:25	
64:18	64:25	CONC/REL			
68:1	68:6		68:7	68:10	
68:1	68:6		68:14	68:19	
73:8	73:21		73:22	73:25	
82:11	83:25		84:1	84:17	
86:15	87:7		86:11	86:14	
86:15	87:7		90:13	90:16	
86:15	87:7		91:19	91:23	
87:3	87:7	ARG/CONC NPK/MIST			
94:13	94:18	A/A PREJ/REL			
93:15	95:6		95:7	95:15	
97:5	97:8		96:2	96:7	
97:11	99:3		96:2	96:7	
97.11	99:3		99:19	99:24	
101:4	101:7		100:20	101:3	
107:14	107:18	REL/NPK ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Michael Keane
6/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
107:21	107:24	REL/NPK ML			
119:24	120:1	FD			
119:24	120:1		119:18 119:22	119:19 119:23	
120:4	121:3		119:18 119:22	119:19 119:23	
121:5	121:11	FD			
121:14	121:14	FD			
126:23	127:10	HRY			
127:11	127:14	CONC/FD NPK/REL			
128:14	128:17		128:9	128:13	
128:25	129:4	MIST/CONC NPK/FD	129:8	129:14	
129:7	129:7	MIST/CONC NPK/FD	129:8	129:14	
131:1	131:9	REL			
131:13	132:3	REL			
132:9	132:19	REL			
133:3	133:7	REL			
133:13	133:22	REL			
134:17	134:20	AFNE/PREJ REL/SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Michael Keane
6/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
134:24	135:6	AFNE/PREJ REL/SPEC			
135:10	135:10	AFNE/PREJ REL/SPEC			
136:17	137:10		137:11	137:14	
136:17	137:10		137:18	137:18	
138:14	141:23		138:7	138:9	
139:21	140:18	REL			
165:22	165:23	CONC/NPK REL			
166:1	16:2	CONC/NPK REL			
166:3	166:16	A/A SPEC/FD/NPK REL			
166:1	166:16		166:17	166:23	
166:1	166:16		167:6	167:8	
168:16	170:15	REL			
168:3	170:15		170:16	170:19	
172:8	173:14		173:23	173:25	
172:8	173:14		174:2 **Beginning with "How do"**	174:8	
179:4	179:7	HRY/NPK SPEC/REL			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Michael Keane 6/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
179:10	179:11	HRY/NPK SPEC/REL			
182:21	183:1	Q-No-A			
183:16	183:20		183:11 183:21 184:13 **Beginning with "as of"**	183:15 183:25 184:17	
187:5	187:9	AMB/CONC VAG			
186:13	187:14		196:22	197:5	
186:13	187:14		196:11	196:17	
186:13	187:14		196:20	196:21	
186:13	187:14		198:3	198:7	
205:8	205:18	CONC/SPEC			
207:1	207:3	VAG/AMB			
208:5	208:17	AMB/PREJ REL/ML			
209:4	209:18	AMB/PREJ REL/ML			
210:1	210:5	REL			
210:11	211:3		210:17	210:21	
210:11	211:3		211:4	211:8	
211:9	211:12	REL/ML	211:4	211:8	
211:25	213:9	REL/ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Michael Keane
6/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
213:12	214:19	REL/ML			
215:23	215:25	CONC/ML			
216:1	216:14	CONC/NPK REL			
216:17	216:21	CONC/NPK REL			
216:17	217:3		217:4	217:7	
217:8	218:1	ML/REL	217:4	217:7	
218:13	219:8	REL/ML	219:15	219:18	
219:19	223:2		219:15	219:18	
219:19	220:1	REL/ML			
220:2	222:17	REL			
222:18	222:20	AMB/VAG REL			
223:14	223:18	CONC/SPEC REL			
223:19	223:21	REL			
224:3	224:7		230:13	230:22	
224:3	224:7		232:1	232:11	
224:3	224:7		232:25	233:15	
224:3	224:7		234:3	234:7	
224:3	224:7		234:18	235:4	
224:3	224:7		235:7	235:17	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Michael Keane
6/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
224:3	224:7		240:24	241:16	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Michael Keane
6/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
66:12	67:18		263:13	263:17	
68:1	68:6		263:19	264:21	
69:13	69:25		264:24	264:24	
71:3	71:13		265:7	265:11	
72:10	72:16		265:20	266:1	
73:8	73:21		266:4	266:5	
74:25	75:3		272:10	272:14	
78:11	79:13		272:19	272:25	
93:15	95:6		273:5	273:12	
97:5	99:3		273:16	273:22	
			274:11 [Beginning with "in your"]	274:13	
			274:16	274:16	
			274:22	274:23	
			275:2	275:12	
			275:25	276:3	
			276:7	276:7	
			276:10 [Beginning with "Sir, when"]	276:13	
			276:18	276:22	
			285:16	286:2	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Michael Keane
6/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
205:8	209:18		275:25	276:3	
210:1	210:5		276:7	276:7	
210:11	211:3		276:10	276:13	
211:9	211:12		[Beginning		
211:25	213:9		with "Sir, when		
213:12	214:19		a"]		
215:23	216:14		276:18	276:22	
216:17	217:3		339:9	339:14	
217:8	218:1		339:23	340:4	
218:13	219:8		340:22	341:6	
			341:16	342:1	
			343:1	343:5	
			343:8	343:10	
			343:14	343:20	
			343:23	343:25	
			347:14	347:18	
			[Beginning		
			with "Is it"]		
			347:21	347:23	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Leroy Keil
6/5/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
60:20	61:17	REL, ML			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Calvin Knol
4/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
17:14	17:23		17:4	17:7	
17:14	17:23		17:10	17:12	
24:2	24:3	VAG			
24:4	24:7	NR			
24:8	24:11	VAG			
24:20	24:23	VAG			
25:3	25:11	VAG			
26:7	26:12	VAG			
29:1	29:5	NR			
31:10	31:12	VAG, FD, SPEC			
31:14	31:14	VAG, FD, SPEC			
31:14	31:15	NR			
34:18	35:1	VAG			
35:17	35:19	VAG			
42:1	42:7	FD, SPEC			
43:14	43:15		43:16	43:19	
45:6	45:10	MIST, VAG, FD, SPEC			
45:15	45:16	MIST, VAG, FD, SPEC			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Calvin Knol
4/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
87:19	88:13		244:8 244:19	244:16 245:1	
87:19	88:13		245:4	245:9	
112:3	112:6	VAG			
112:8	112:10	VAG			
119:5	119:7	VAG			
119:9	119:9	VAG			
119:12	119:14	VAG			
119:18	119:18	VAG			
122:22	124:22	FD			
125:7	130:14		246:5	245:11	
125:7	130:14		246:14	246:15	
125:7	130:14		246:17	246:19	
125:7	130:14		246:22	247:14	
125:7	130:14		247:25	248:7	
125:7	130:14		248:11	248:13	
125:7	130:14		248:16	248:17	
125:11	125:12	HRY			
125:16	126:3	HRY			
127:1	127:4	VAG			
127:8	127:10	VAG			
127:12	127:13	HRY			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Calvin Knol
4/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
127:19	127:2	HRY			
128:13	128:19	SPEC, NPK, FD			
128:21	128:23	SPEC, NPK, FD			
128:25	129:2	SPEC, FD, VAG			
129:5	129:13	INC			
130:7	130:8	HRY			
134:5	134:8		245:14	245:19	
134:5	134:8		245:24	246:4	
135:1	135:5	MIST			
135:16	135:20	VAG, AFNE, SPEC			
136:1	136:2	VAG, AFNE, SPEC			
136:25	137:2	VAG, MIST			
137:7	137:9	VAG, SPEC			
137:11	137:17	VAG, SPEC			
163:21	163:24	HRY, FD			
164:7	164:18	HRY, FD			
182:7	182:10	VAG			
182:15	182:18	VAG			
183:24	184:10	CONC, VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Calvin Knol
4/15/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
184:11	184:15	MIST, VAG			
184:18	184:18	MIST, VAG			
210:20	211:1	VAG			
211:16	211:20	A/A			
212:1	212:1	A/A			
212:2	212:7	MIST			
214:13	214:14	A/A, SPEC			
214:19	214:19	A/A, SPEC			
230:4	230:7	SPEC			
230:10	230:14	SPEC			
230:10	230:22		231:2	231:5	
232:17	233:14		233:15	233:19	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Harold K. Laessig
8/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
10:7	15:8		15:9	15:25	
14:17	14:20	REL, ML			
16:10	19:3		19:4	19:8	
19:24	20:2	FD, SPEC			
20:22	20:25	PREJ, LD			
21:1	21:4	FD, SPEC			
21:5	21:12	NR, NO Q PUT, VAG			
22:14	22:16	REL, ML			
22:21	22:24	REL, ML			
25:8	25:14	REL, ML			
25:15	26:1	PREJ, AMB, VAG, FD			
26:12	26:25	PREJ, VAG, AMB, FD			
27:1	27:4	FD, VAG			
27:5	27:8	FD, VAG, REL, ML			
27:16	27:20	NR			
28:4	28:4	DISC			
28:23	29:3	FD			
29:9	29:12	VAG, FD			
29:16	30:6	FD, SPEC, CONC, LD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Harold K. Laessig 8/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
58:19	60:12		65:10	65:17	
61:17	61:25	NR, STRIKE			
95:2	95:10	REL, ML			
95:11	95:22	FD, VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Thomas H. Latta
06/03/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
100:23	101:18	OUT/SCOPE			
101:22	102:17	OUT/SCOPE			
102:22	103:9	OUT/SCOPE			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Phillip S. Lemoine
6/4/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
40:16	40:18		40:19	40:21	
150:21	151:1	REL			
151:16	151:24	AMB, VAG, INCOMP			
151:25	152:14	VAG, REL, AMB, INCOMP			
153:11	154:16	REL			
154:17	154:22	REL, NR, Q-No-A			
154:24	155:9	REL, A/A			
155:11	155:13	A/A, MIST, REL, VAG			
155:11	155:13		155:16	155:17	
155:17	155:19	A/A, MIST, REL, VAG			
155:17	155:19		155:16	155:17	
155:23	156:3	REL, VAG, A/A			
156:6	156:8	REL, VAG, A/A			
157:8	157:11	Q-No-A, REL, A/A, PREJ			
157:15	157:18	Q-No-A, REL, A/A, PREJ			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Phillip S. Lemoine
6/4/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
150:21	151:1		158:25	159:12	
151:16	152:8		158:25	159:12	
152:14	152:14		158:25	159:12	
153:11	154:18		158:25	159:12	
154:21	155:2		158:25	159:12	
155:9	155:13		158:25	159:12	
155:17	155:19		158:25	159:12	
155:23	156:3		158:25	159:12	
156:6	156:8		158:25	159:12	
157:8	157:11		158:25	159:12	
157:15	157:23		158:25	159:12	
160:22	160:24	A/A, FP			
161:4	161:6	A/A, FP			
161:8	161:10	FD, NR, VAG			
161:13	161:14	FD, NR, VAG			
168:11	168:19		165:18	166:5	
168:11	168:19	VAG, INCOMP			
169:9	169:19	HRY, REL, SPEC, ML			
170:18	170:23	FD, HRY			
176:8	176:12	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Phillip S. Lemoine
6/4/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
176:13	176:23	REL, ML			
182:25	183:11	HRY			
188:21	189:15	VAG, REL, PREJ, ML			
189:22	190:22	REL, ML, PREJ			
190:25	192:7	REL, ML, PREJ			
192:10	192:11	REL, ML, PREJ			
190:25	192:7		192:13 192:16 192:18 192:25	192:13 192:16 192:18 193:3	
192:10	192:11		192:13 192:16 192:18 192:25	192:13 192:16 192:18 193:3	
193:25	194:3	REL, VAG, AMB			
194:6	194:7	REL, VAG, AMB			
194:15	194:21	REL, ML			
194:24	194:25	REL, ML			
195:2	195:6	REL, ML			
195:9	195:9	REL, ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Phillip S. Lemoine
6/4/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
201:15	202:12		198:22	198:24	
201:15	202:12		199:2 199:9 199:14	199:7 199:11 199:16	
202:19	203:19	REL, ML			
204:5	204:20	REL, ML			
204:24	204:25	REL, ML			
205:1	205:3	REL, ML			
205:6	205:11	REL, ML			
205:12	205:16	NR, REL, ML			
205:17	206:11	REL, ML			
206:12	206:15	FP, VAG, AMB, REL, ML			
206:18	206:21	FP, VAG, AMB, REL, ML			
206:23	207:3	REL, ML, FD			
207:8	207:10	REL, ML, FD			
207:13	207:17	REL, ML, FD			
207:18	207:21	MIST, REL, ML, FD			
208:3	209:4	MIST, REL, ML, FD			
209:11	209:19	REL, ML			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Phillip S. Lemoine
6/4/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
209:22	209:24				
211:13	211:25	REL, ML, INCOMP			
212:1	212:10	REL, ML, INCOMP			
212:12	214:5	REL, ML			
214:13	215:24	REL, ML			
214:13	215:24		215:25	216:12	
214:13	215:24		216:25	217:25	
214:13	215:24		218:3	218:4	
228:2	228:23	HRY, REL, ML			
229:25	230:8	MIST, PREJ, AFNE, FD			
230:9	230:14	SPEC			
234:5	234:9	REL, ML			
231:1	231:18		235:19	236:17	
231:1	231:18		236:22	237:1	
233:23	234:21		235:19	236:17	
233:23	234:21		236:22	237:1	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W.P. "Tim" Ludwig, Jr.
6/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
25:1	25:3	AFNE			
58:21	58:25	VAG, AMB, NPK, SPEC, FD	59:1	59:5	
66:18	66:22	AFNE, FD, REL, VAG, AMB, SPEC, NPK			
68:25	69:3	VAG, AMB, COMP			
69:4	69:12	FD			
69:13	69:16	FD, SPEC			
69:22	69:25	FD			
72:11	72:17	FD, VAG, AMB, SPEC, NPK			
72:18	72:24	VAG, AMB, COMP, FD	72:25	73:2	
75:6 beginning with "Have you ever..."	75:13	VAG			
75:14	75:18	VAG, HRY			
75:19	75:25	VAG. AMB, SPEC, NPK			
76:1	76:11	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W.P. "Tim" Ludwig, Jr.
6/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
78:24	79:5	VAG, AMB, FD			
79:6	79:8	CONC, MIST			
79:9	79:14	COMP, VAG, FD			
79:15	79:22	AMP, COMP, FD			
79:23	80:2	FD, NK, SPEC			
80:3	80:7	FD			
80:8	80:11	FD, VAG, AMB			
80:12	80:19	FD, VAG, AMB, NR			
83:13	83:18	FD, VAG			
83:19	83:22	FD, VAG, AMB			
83:23	84:4	INCOMP, FD, VAG, AMB			
89:16	89:21	ARG, MIST, FD, VAG			
89:22	90:1	VAG, AMB, FD			
90:2	90:3	NO Q PUT			
90:4	90:7	VAG, FD			
90:8	90:12	VAG, FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W.P. "Tim" Ludwig, Jr.
6/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
90:13	90:20	VAG, FD			
91:16	91:20	REL, FD, ML, AFNE, VAG, AMB			
91:21	91:23	REL, VAG, ML, AMB			
93:15	93:21	SPEC, FD, VAG, REL, ML			
93:22	94:7	MIST, AFNE, VAG, FD			
94:8	95:3	ML, REL, NPK, FD, SPEC			
95:7	95:12	SPEC, FD, NR, REL, ML			
111:22	112:2	REL			
112:7	112:11	REL, SPEC, NPK			
112:25	113:4	REL, VAG, AMB			
113:7	113:13	REL, VAG, AMB, FD			
113:14	113:17	MIST, REL, VAG, AMB, SPEC, AFNE			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W.P. "Tim" Ludwig, Jr.
6/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
113:18	114:10	COMP. VAG, AMB			
114:11	114:14	FD			
114:15	114:20	VAG, AMB, REL			
115:5	115:11	FD, SPEC			
115:12	115:16	VAG			
115:17	115:22	VAG			
116:23	117:4	VAG			
117:5	117:11	COMP			
117:12	117:25	SPEC, REL, ML			
118:9	118:20	REL, ML			
119:23	120:1	MIST, AFNE			
120:2	120:11	VAG, FD			
120:12	120:14	AMB, VAG			
120:15	120:17	AMB, VAG			
120:18	120:21	ANFE			
120:22	121:1	FD, BR			
121:8	121:12	AFNE			
121:19	121:24	NR			
122:7	122:17	VAG, AMB SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W.P. "Tim" Ludwig, Jr.
6/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
122:18	122:23	COMP, VAG, AMB			
124:21	125:1	VAG			
125:10	125:13	INCOMP, COMP			
125:14	125:19	VAG, AMB			
125:20	125:24	SPEC, NPK			
126:16	126:19	SPEC, NPK, FD			
126:20	126:23	SPEC			
127:2	127:4	INTERRUPT			
127:5	127:6	NO Q PUT			
127:7	127:11	HRY, AMB			
127:12	127:16	AMB, AFNE, MIST			
127:17	127:19	AMB			
127:22	127:24	NPK			
127:25	128:5	VAG, AMB, MIST			
128:13	128:18	NPK, SPEC			
128:19	128:22	NPK, SPEC			
128:23	128:24	AMB, VAG			
128:25	129:10	HRY			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W.P. "Tim" Ludwig, Jr.
6/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
130:9	131:9	HRY, SPEC, NPK			
131:10	131:12	SPEC, NPK			
132:3	132:7	VAG, MIST			
133:12	133:18	NPK, VAG			
133:20	133:23	VAG, AMB			
133:24	134:4	COMP, VAG, AMB			
135:3	135:8	SPEC			
136:15	136:19	VAG, AMB, FD, BR			
136:20	136:24	VAG, AMB, FD			
136:25	137:6	VAG, AMB, FD			
137:19	138:6	NPK, FD			
138:7	138:12	VAG, AMB			
138:13	138:18	VAG, AMB, NPK, FD			
139:1	139:3	SPEC, NPK			
141:15	141:17	FD, VAG, AMB			
142:10	142:22	SPEC, FD, NPK, NR			
142:23	143:1	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W.P. "Tim" Ludwig, Jr.
6/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
143:2	143:6	INCOMP, COMP			
143:8	143:15	FD, AFNE, VAG, AMB, NPK			
143:17	143:22	VAG, AMB, MIST			
143:23	144:3	VAG, AMB			
144:4	144:9	AFNE, FD, VAG, AMB, MIST			
145:11:	145:18	VAG, AMB			
145:24	146:2	AFNE			
146:12	146:23	SPEC, FD			
146:24	147:5	SPEC, FD, VAG, AMB			
148:14	148:20	VAG, AMB, FD			
148:22	149:6	FD, NR			
149:8	149:14	AMB, VAG			
149:15	149:18	NO Q PUT, NR			
149:19	149:24	VAG			
149:25	150:8	NPK, INTERRUPT, SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W.P. "Tim" Ludwig, Jr.
6/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
150:9	150:12	SPEC			
150:13	150:15	REL			
150:16	150:21	MIST, AFNE			
150:22	150:23	VAG			
150:24	151:2	NR			
151:4 beginning with "When did the..."	151:9	MIST, AFNE	151:10	151:21	
151:22	152:3	REL, ML	152:4	152:18	
175:12	175:15	INCOMP, INTERRUPT			
175:16	175:24	FD, BR			
175:25	176:7	AFNE			
176:8	176:15	COMP, NPK, FD, BR			
176:16	176:20	SPEC, NR			
176:21	176:25	SPEC, AFNE			
177:1	177:4	AMB, VAG, FD			
177:5	177:10	FD, SPEC, NPK, ML, REL			
177:11	177:16	FD, SPEC, NPK			
207:10	208:11	HRY			
213:2	213:14	REL, ML, HRY			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W.P. "Tim" Ludwig, Jr.
6/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
215:7	215:10	VAG, REL, ML			
215:11	215:12	REL, ML			
215:13	215:16	VAG, REL, ML			
215:17	216:2	VAG, REL, ML, SPEC, FD			
216:24 beginning with "Have any retailers..."	217:6	HRY, VAG, REL, ML			
217:7	217:9	FD, REL, ML			
217:10	217:13	FD, REL, ML, SPEC			
217:15	217:20	FD, REL, ML, SPEC, NR			
217:21	218:13	SPEC, FD, REL, ML			
218:14	218:20	REL			
222:17	223:18	FD, BR, REL, ML			
223:19	223:22	VAG, AMB, REL, ML			
223:23	224:5	REL, ML, VAG, AMB, SPEC			
224:6	224:8	FD, VAG, AMB, NPK			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W.P. "Tim" Ludwig, Jr.
6/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
224:8	224:20	VAG, AMB, FD, FD/BR, SPEC, NPK, REL, ML			
224:21	225:6	REL, ML, VAG, SPEC			
233:16	233:24	MIST, AFNE, VAG, FD			
234:25	235:2	VAG, FD, NR			
234:3	234:8	FD, SPEC			
234:9	234:15	VAG, AMB, AFNE, SPEC, NPK			
234:16	234:24	FD, SPEC, NPK			
234:25	235:2	VAG, AMB			
235:3	235:12	FD, AFNE, MIST, VAG, AMB			
235:13	235:15	VAG, AMB, NR, FD, AFNE, MIST			
235:16	235:20	VAG, AMB			
235:21	235:23	MIST, AFNE, VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W.P. "Tim" Ludwig, Jr.
6/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
236:3	236:9	FD, VAG, AFNE, SPEC, NPK			
237:8 beginning with "Have you or..."	237:14	COMP, HRY, VAG, AMB			
237:15	237:22	VAG, AMB, AFNE			
237:23	237:24	VAG, AMB			
237:25	238:2	VAG, AMB, MIST			
238:3	238:19	HRY, VAG, AMB			
239:22	240:9	SPEC, NPK, FD			
239:10	239:18	VAG, SPEC, NPK, FD			
239:19	241:19	COMP, MIST, AFNE, SPEC, FD, NPK			
241:20	242:6	VAG, HRY, AFNE, MIST			
242:22	243:1	AFNE, VAG			
243:2	244:7	FD/BR, SPEC			
246:19	247:3	FD/BR			
247:4	247:6	FD, SPEC, VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W.P. "Tim" Ludwig, Jr.
6/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
247:7	247:22	FD/BR			
247:23	248:1	NO Q PUT, INTERRUPT			
248:2	248:10	FD/BR, SPEC, FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Brenda L. Luttgeharm
5/7/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
138:6	138:9	MIST			
139:4	139:7	No-Q-Put			
136:9	138:21		139:7 140:1 140:11	139:7 140:4 142:5	
139:4	139:7		139:7 140:1 140:11	139:7 140:4 142:5	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W. Franklin Lynch
6/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
17:10	18:7		18:8	18:22	
21:22	21:23	A/A			
38:12	38:14	REL			
40:16	40:19		36:17	37:1	
40:16	40:19	FD, VAG, AMB, HRY			
40:22	40:22		36:17	37:1	
40:22	40:22	FD, VAG, AMB, HRY			
42:15	42:17	VAG, MIST, FD			
43:18	43:19	VAG, AMB, PREJ			
43:21	43:22	VAG, AMB, PREJ			
43:24	44:2	MIST, PREJ, VAG, AFNE, FD			
44:9	44:14	AFNE, FD, MIST, PREJ			
45:22	45:23	VAG,AMB			
45:25	45:25	VAG,AMB			
47:11	47:14	MIST, PREJ, VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W. Franklin Lynch
6/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
47:22	48:6		107:11	107:22	
48:5	48:6	MIST, PREJ, VAG, FD			
48:11	50:3		50:4	50:4	
50:15	50:24		50:10	50:14	
57:3	57:18	MIST, PREJ, FD, AFNE			
57:20	57:20	VAG, AMB			
57:22	57:22	VAG, AMB			
58:1	58:3	COMP			
58:7	58:8	COMP			
58:7	58:19		58:20	59:9	
58:7	58:19		59:11	59:14	
58:7	58:19		59:16	59:19	
58:7	58:19		60:15	60:21	
58:7	58:19		61:2	62:8	
58:7	58:19		62:11	62:13	
57:3 57:22 58:1 58:7	57:20 57:22 58:3 58:19		67:3	67:6	
57:3 57:22 58:1 58:7	57:20 57:22 58:3 58:19		68:19	69:5	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W. Franklin Lynch
6/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
57:3 57:22 58:1 58:7	57:20 57:22 58:3 58:19		69:7	69:8	
57:3 57:22 58:1 58:7	57:20 57:22 58:3 58:19		69:24	70:1	
57:3 57:22 58:1 58:7	57:20 57:22 58:3 58:19		70:23	71:6	
57:3 57:22 58:1 58:7	57:20 57:22 58:3 58:19		71:11	71:24	
57:3 57:22 58:1 58:7	57:20 57:22 58:3 58:19		72:19	72:25	
57:3 57:22 58:1 58:7	57:20 57:22 58:3 58:19		73:6	73:9	
57:3 57:22 58:1 58:7	57:20 57:22 58:3 58:19		73:12	73:19	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W. Franklin Lynch
6/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
57:3 57:22 58:1 58:7	57:20 57:22 58:3 58:19		74:7	74:11	
80:18	81:8	MIST, PREJ			
82:15	82:19	MIST, VAG, FD			
82:21	82:22	NR			
82:21	83:2		83:3	83:12	
96:12	97:3	HRY			
97:22	97:24	FD, VAG			
98:18	98:19	VAG			
98:23	98:24	VAG			
98:25	99:3	MIST, FD			
99:9	99:9	MIST, FD			
100:25	102:9	HRY			
102:17	102:22	FD, AFNE			
102:25	103:1	FD, AFNE			
104:10	104:20	HRY			
104:10	106:10		106:11	106:13	
105:13	105:16	HRY			
109:10	109:13	VAG, FD, AFNE			
109:14	109:16	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W. Franklin Lynch
6/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
109:21	109:21	VAG, AMB			
113:8	115:3	REL, ML			
115:22	117:6	REL, ML			
117:15	118:8	REL, ML			
118:11	118:15	REL, ML			
118:22	119:19	REL, ML			
118:22	119:19		119:20	119:25	
120:14	120:17	REL, ML			
120:20	121:12	REL, ML			
122:1	122:6	FD, REL, VAG			
123:21	123:23	NR			
125:2	125:13	REL, ML			
137:7	137:9	SPEC, NPK, FD			
137:17	137:20	VAC			
138:7	138:9	NR			
139:12	139:13	VAG, AMB, FD			
139:21	139:24	AFNE, FD			
141:7	141:23	REL, ML			
148:1	148:4	FD, VAG, REL			
148:7	148:8	FD, VAG, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W. Franklin Lynch
6/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
164:16	164:17	VAG, AMB			
165:13	165:21	REL, ML, PREJ			
165:24	165:25	REL, ML, PREJ			
165:24	165:25		166:1	166:3	
166:8	166:13	VAG, REL, ML, AMB			
166:17	166:17	VAG, REL, ML, AMB			
167:2	167:4	VAG, REL, ML, AMB			
167:5	167:8	COMP, REL, ML			
167:12	167:14	COMP, REL, ML			
167:15	168:3	REL, ML			
183:16	183:18	FD			
183:21	183:22	FD			
196:16	196:19	VAG, FD, AMB			
196:22	196:22	VAG, FD, AMB			
197:2	197:2	VAG, FD, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of W. Franklin Lynch 6/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
197:2	198:3		198:4	198:12	
197:2	198:3		198:25	199:13	
197:7	197:18	FD			
246:13	247:13	REL, ML			
249:9	249:11	REL, ML			
249:16	249:18	REL, ML			
249:16	249:18		249:19	249:23	
251:7	251:22	REL, ML			
196:16 196:22 197:2	196:19 196:22 198:3		253:19	253:20	
196:16 196:22 197:2	196:19 196:22 198:3		253:22	253:22	
196:16 196:22 197:2	196:19 196:22 198:3		253:24	254:1	
196:16 196:22 197:2	196:19 196:22 198:3		254:4	254:4	
196:16 196:22 197:2	196:19 196:22 198:3		254:7	254:8	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Joseph S. Marconi 08/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
16:1	16:20	ML, REL	----	----	----
16:1	16:10	NPK	----	----	----
48:11	48:14	OUT/SCOPE			
48:19	48:21	OUT/SCOPE			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Howard McGregor
06/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
27:5	27:7	Q No A			
42:9	42:24	----	43:4	43:5	
			43:9	43:10	
43:24	44:9	ML, REL			
44:8	44:9	VAG, AMB			
44:13	44:15	VAG, AMB, ML, REL			
44:18	44:20	VAG, AMB, FD, ML, REL			
44:21	44:24	FD, SPEC, NPK, ML, REL			
56:6	56:11	FD, VAG, CONC, SPEC, MIST			
56:17	56:20	VAG, CONC, SPEC, FD			
60:10	61:2	VAG, SPEC, FD, AMB			
70.8	70:10	AMB, VAG			
70:13	70:18	AMB, VAG			
77:15	77:16	FD, VAG			
77:19	77:20	FD, VAG			
80:16	80:18	FD, VAG, AMB, CONC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Howard McGregor 06/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
80:21	81:4	VAG, AMB, FD, CONC			
81:7	81:10	VAG, AMB, FD, CONC			
83:9	83:15	LE, VAG, FD, AFNE			
83:18		VAG, FD			
87:8	87:9	LE, AFNE			
87:12		LE, AFNE			
88:18	88:20	NPK, FD, SPEC			
88:23	89:1	NPK, FD, SPEC			
89:19	89:22	VAG			
93:7	93:11	FD, SPEC			
93:14	93:16	FD, SPEC			
93:19	93:22	FD, SPEC, VAG			
93:25	94:1	FD, SPEC, VAG			
94:2	94:5		94:6	94:12	
95:14	95:16	AFNE, FD			
95:19		FD			
96:8	96:20	SPEC, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Howard McGregor
06/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
96:21	97:7	REL	97:8	97:12	
97:19	98:1	REL			
98:6	98:14	REL			
98:15	98:19	VAG			
98:21	98:22	VAG			
99:2	99:5	VAG, AMB, SPEC, FD			
99:8	99:9	VAG, AMB, SPEC, FD			
99:12	99:13	VAG, AMB, SPEC, FD			
101:9	101:10	VAG, MIST			
102:6	102:13	VAG, NPK, SPEC			
102:16		VAG, NPK, SPEC			
103:9	103:12	NPK, SPEC, FD			
103:15	103:16	SPEC, FD			
105:2	105:6	NPK, SPEC, FD			
105:9	105:12	NPK, SPEC, FD			
105:15	105:18	NPK, SPEC, FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Howard McGregor 06/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
106:20	106:24	VAG, AMB, FD			
107:3	107:23	REL			
108:1	108:7	REL			
108:10	108:13	REL			
108:18	108:19	REL			
109:6	109:8	REL			
109:14	109:15	VAG			
109:18	109:19	VAG			
109:20	109:25	VAG			
113:9	113:12	VAG, FD, SPEC, REL			
113:15		VAG, FD, SPEC, REL			
114:6	114:12	REL, VAG	114:22	115:2	
114:15	114:21	REL, VAG	114:22	115:2	
115:20	115:23	VAG, CONC			
116:1	116:10	VAG, CONC			
116:13	116:17	VAG			
117:2	117:3	A No Q			
117:4	117:6	FD, SPEC			
117:9	117:12	FD, SPEC, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Howard McGregor
06/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
117:15	117:19	FD, SPEC, VAG			
118:9	118:12	SPEC, FD			
118:14	118:15	SPEC, FD			
122:9	122:11	VAG, SPEC			
122:14	122:17	VAG, SPEC			
128:14	128:15	INCOMP			
128:22	128:23	INCOMP, VAG, FD/BR			
130:1	131:7	----	131:8	131:23	
			132:9	132:12	
			132:15	133:25	
			134:15	134:17	
			134:20		
			137:21	137:25	
			138:3	138:6	
			139:17	141:1	
			141:4		
			141:8	141:15	
			142:7	143:3	
			143:25	144:14	
			147:22	148:20	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Howard McGregor 06/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
			149.4	149:8	
136:22	136:25	ML, REL, VAG			
137:3	137:12	ML, REL, VAG			
137:15	137:20	ML, REL, VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Paul McGuire
8/31/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
14:6	14:11		14:12	14:14	
14:15	15:11		15:11	15:17	
16:16	17:3		17:4	17:5	
17:1	17:2	VAG,AMB			
17:6	17:14		17:15	17:16	
17:16	17:18	LEAD,MIST			
18:16	18:17	VAG,AMB			
21:9	21:12	LD			
23:16	23:18	VAG,AMB			
25:17	26:10	No Q Put	25:16	25:16	
25:19	25:21	VAG,AMB			
28:18	28:22	VAG,AMB			
29:8	29:12		29:12	29:24	
36:1	37:20		37:21	39:9	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gerald M. McKeon
5/19/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
40:21	41:3		42:5	42:13	
41:4	41:9		42:16	42:20	
41:10	41:18		43:14	43:25	
41:24	42:4		46:11	46:17	
41:24	42:4		47:13	47:19	
64:4	64:8	VAG, AMB			
64:24	65:4	VAG, AMB			
67:15	67:19		67:20	67:22	
68:12	68:12		67:23	67:24	
68:13	68:13		68:9	68:10	
69:8	69:12		69:13	69:17	
69:8	69:12		69:25	70:1	
70:24	71:1		71:2	71:5	
73:23	74:1	AMB, COMP, VAG			
78:21	79:9		78:14	78:20	
78:21	79:1	A/A			
79:22	80:11		79:17	79:21	
80:17	80:22		80:12	80:16	
80:20	80:22	CONC, NPK, FD			
81:14	82:6		82:22	82:25	
98:12	98:23		97:15	98:11	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gerald M. McKeon 5/19/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
106:14	106:16		107:12	107:25	
108:20	109:23		109:23	110:4	
108:20	109:23		110:7	110:12	
108:20	109:23		110:14	112:1	
112:2	112:11		110:14	112:1	
112:21	114:9		110:14	112:1	
114:13	117:14		110:14	112:1	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Stephen Metz
6/24/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
32:18	33:1		33:2	33:4	
61:1	61:4	VAG,AMB			
61:7	61:8	VAG,AMB			
61:9	61:11	SPEC,FD,VAG AMB			
61:14	61:19	SPEC,NR			
61:14	61:15	NPK			
61:24	62:3	VAG			
63:11	63:14	VAG,AMB, SPEC			
63:11	63:14		63:21	63:24	
63:17	63:19	NR			
63:17	63:19		64:2	64:3	
71:5	71:9	HRY			
71:11	71:14	HRY			
71:19	71:20	HRY			
71:21	72:23	HRY			
75:16	76:22	INC			
85:14	85:21	FD,NPK, SPEC			
85:23	86:2	FD,SPEC			
87:8	87:11	SPEC,FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Stephen Metz 6/24/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
87:18	88:6	VAG,CONC, MIST,AFNE, SPEC			
89:16	89:19	HRY			
92:17	92:18	HRY			
106:18	108:14		108:15	109:3	
107:1	107:12	FD,SPEC,VAG			
107:15	108:2	FD,SPEC,VAG			
108:3	108:9	VAG,AMB			
111:1	111:13	SPEC,NPK			
111:8	111:12	HRY			
120:19	120:23	AMB,VAG, INC			
121:23	122:9	INC,AMB			
122:11	122:16	HRY			
123:16	124:5	HRY,COMP, AMB,AFNE			
126:3	126:14	SPEC,FD			
127:11	128:6	SPEC,FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Kurt Miley
5/6/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
42:2	42:13		40:15	42:1	
42:2	42:13	AMB, VAG, COMP			
80:23	81:12		81:13	82:4	
81:10	81:12	AMB, VAG			
89:16	89:24		87:23	89:15	
119:5	119:8	VAG, AMB, SPEC			
119:10	119:11	VAG, AMB, SPEC			
119:14	119:17	VAG, AMB, SPEC			
119:19	119:20	VAG, AMB, SPEC			
123:9	124:4		121:22	123:8	
123:17	123:18	SPEC			
124:1	124:4	SPEC			
127:3	127:5	FD			
127:3	127:18		126:18	126:25	
127:3	127:18		127:19	129:1	
127:10	127:12	SPEC			
127:16	127:18	VAG, AMB			
135:14	136:12		136:13	136:14	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Kurt Miley 5/6/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
137:24	139:8		136:20	137:23	
137:24	139:8		169:12	170:13	
139:18	139:25	VAG, MIST			
140:4	140:9	VAG, AMB			
140:17	141:7	VAG, AMB			
140:17 142:7	141:7 142:21		141:8	142:6	
144:24	144:25	SPEC			
145:22	145:25	AMB, VAG			
147:15	147:24		147:25 148:9 148:14 149:3	148:6 148:9 148:25 149:25	
156:21	156:25	VAG, AMB			
157:24	158:12		157:1	157:23	
171:3 172:11	171:19 173:9		171:20	172:10	
172:11	173:9		173:10	173:22	
176:24	176:25	SPEC			
177:10	178:3		178:4	178:10	
185:1	186:12		187:3	187:17	
206:18	208:18		208:19	208:21	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Tony Norris
05/20/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
79:2 79:11 79:16	79:5 79:14 79:18		71:6	71:8	
93:3	93:6	VAG, AMB			
94:13	94:15	Q-NO-A,VAG			
94:13	94:15		94:20	94:22	
94:13	94:15		94:24	94:25	
94:13	94:15		95:7	95:9	
93:3 94:13	93:6 94:15		98:10	98:13	
99:24	100:2	HRY,REL			
100:23	101:21	HRY			
100:23	101:21		101:22	101:24	
100:23	101:21		102:2	102:2	
107:14	108:4		108:5	109:1	
107:14	108:4		110:9	110:13	
113:10	113:14	HRY			
37:22	38:16		121:25	122:5	
125:5	126:10	REL, ML			
129:1	129:3	VAG, FD, SPEC			
129:6	129:7	VAG, FD, SPEC			
129:9	129:11	HRY,VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Tony Norris
05/20/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
129:13	129:17	HRY,VAG			
129:19	129:19	HRY,VAG			
129:1	129:3		129:21	130:1	
129:6	129:7		129:21	130:1	
129:9	129:11		129:21	130:1	
129:13	129:17		129:21	130:1	
129:19	129:19		129:21	130:1	
130:2	130:6	HRY			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Dennis Oldani
08/12/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
7:15	8:8		36:12	37:25	
13:20	14:1	No Q Put/VAG/AMB			
15:12	15:15	LD/FD/NPK			
15:18	15:21	LD/FD/NPK			
16:5	17:22		17:23	18:1	
18:2	18:4		17:23	18:1	
20:21	21:6		21:7	21:10	
24:1	24:4 ending with "snuff?"		24:4 beginning with "I mean..."	24:4 ending with "that."	
24:1	24:4	VAG/AMB			
24:8	24:18	VAG/AMB			
24:20	25:5	VAG/AMB			
24:20	25:11		25:12	25:16	
25:17	26:8		25:12	25:16	
27:9	28:10		26:24	26:25	
30:12	30:17		29:19	30:3	
30:12	30:17		30:18	30:22	
31:5 31:12	31:10 31:18		30:18	30:22	
31:5	31:18		41:2	41:19	
33:19	34:17		41:2	41:19	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Dennis Oldani
08/12/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
42:19	43:2	NR			
42:19	43:2		43:6	43:11	
43:12	43:14		43:6	43:11	
46:23	48:7		48:24	49:5	
46:23	48:7		49:20	50:9	
52:7	54:3		54:4	54:21	
65:8	65:10	NR			
66:1	66:16	NR			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Glenn O'Neal
05/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
21:10 21:19	21:15 22:25		21:16	21:18	
27:10 28:7	27:19 28:15		27:20	28:6	
40:10	40:11	VAG,AMB			
40:13	40:14	VAG,AMB			
40:18	40:20	VAG,AMB			
44:4	44:14		43:18	43:3	
44:4	44:14		44:15	44:24	
46:21 47:15	47:7 47:17		47:8	47:14	
53:5	53:7	VAG,AMB			
53:5	53:7		53:8	53:24	
65:12	66:24		66:25	67:8	
65:12	66:24		67:23	68:17	
69:4	71:17		71:18	72:14	
72:15	74:18		71:18	72:14	
72:15	74:18		74:19	76:3	
76:4	76:15		74:19	76:3	
76:22	78:2		78:3	79:10	
81:16	82:25		81:15	81:16	
81:16	82:25		83:1	84:6	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Glenn O'Neal
05/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
100:16	100:22		99:11	100:15	
100:16	100:18	VAG,AMB			
105:25	106:2	VAG,AMB			
111:11	111:17	NO-Q-DESIGNATED			
111:11	112:12		112:13	113:8	
118:20	119:5		119:6	119:12	
120:13	122:14		119:6	119:12	
126:6 128:24	126:15 129:8		126:16	128:23	
131:7	131:9	SPEC			
131:14	131:16	VAG,AMB			
130:19	133:3		133:4	133:17	
134:20	135:7		135:8	136:18	
136:19	137:4		135:8	136:18	
136:19 137:14	137:4 137:20		137:5	137:12	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Paul Pallen
05/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
6:18	6:25	NO Q PUT			
22:18	22:21	FD, SPEC			
23:4	23:8	FD, SPEC			
47:6	47:10	MIST			
47:11	47:15	NPK			
47:20	47:25	SPEC			
48:6	49:5	FD, VAG, AMB, REL, HSY, SPEC			
53:3	53:8	REL			
54:4	54:6	A/A, REL			
54:7	54:14	REL, VAG			
54:15	54:18	REL, VAG, NPK			
54:19	54:21	FD			
55:4	55:12	FD, VAG			
58:15	58:25	REL, VAG			
59:1	59:2	VAG			
59:7	59:23	FD			
59:24	60:10	FD, INC, VAG			
60:19	60:22	FD, SPEC			
83:21	84:2	REL, FD, VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Paul Pallen
05/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
84:15	84:18	REL			
85:14	85:22	VAG, AMB			
87:20	87:25	REL			
94:22	95:1	HSY			
95:7	95:17	VAG, AMB			
97:23	99:2		99:3	99:5	
98:8	98:22	FD, VAG			
98:23	99:6	VAG			
99:14	99:17	INTERRUPT			
99:18	100:3	NPK, SPEC			
105:19	105:24	COMP			
105:25	106:10	VAG			
107:20	108:8	VAG, AMB			
122:7	122:19	COMP, VAG			
122:21	123:8	VAG, AMB			
123:16	124:9	VAG, AMB			
124:20	124:25	VAG, AMB			
125:1	125:6	NR			
125:24	125:25	NO Q PUT			
128:9	128:18	HSY			
128:19	128:21	A/A			
128:24	129:6	SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Paul Pallen
05/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
131:6	131:21	HSY			
131:22	132:5	VAG, AMB			
133:21	134:5	HSY			
134:19	135:12	HSY, VAG, SPEC, NPK			
136:3	136:10	VAG, AMB			
137:6	137:9	VAG, AMB			
137:10	137:20	VAG, AMB, SPEC			
139:1	139:7	SPEC, NPK			
140:9	140:22	COMP, SPEC			
140:23	140:24	AMB, VAG			
141:6	141:10	VAG, AMB			
141:22	142:3	VAG, FD, NR	141:16	141:21	
142:4	142:13	VAG			
142:17	142:17	NO Q PUT			
144:4	144:24		144:24 beginning with "I can't remember..."	145:3 ending with "That's right..."	
144:4	149:22		158:12	159:10	
144:4	149:22		163:8	163:20	
145:13	145:19	VAG, AMB			
146:19	146:23	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Paul Pallen
05/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
147:18	147:21	NPK, SPEC			
148:14	148:17	COMP			
148:18	148:20	VAG, AMB			
155:13	155:18	HSY	155:19	156:2	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Ronald Piatek
07/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
25:20	26:5		26:6 27:14 29:9	26:20 27:17 29:12	
50:8	50:10	LD/VAG/AMB			
50:12	50:12	LD/VAG/AMB			
50:14	50:18	LD/VAG/AMB			
50:19	52:5	REL/OUT/ SCOPE			
52:6	52:8	VAG/AMB/FD			
52:10	52:17	VAG/AMB/FD			
79:4	79:9	LD/VAG/AMB			
80:3	80:6	LD/VAG/AMB			
80:8	80:8	LD/VAG/AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jim B. Quirk
05/11/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
28:19	28:25		29:1	29:24	
34:18	34:25		35:1	35:12	
42:11	42:22		43:13	43:20	
49:22	49:23	VAG,AMB			
52:15	52:19		52:20	52:22	
69:24	70:4		69:1	69:23	
69:24	70:4		70:5	71:2	
73:14	73:16	VAG,AMB			
76:1	76:2	VAG,AMB			
80:9	80:16		78:25	80:8	
86:11	87:10		87:10	88:25	
90:8	91:17		89:1	90:7	
96:24	98:10		96:11	96:23	
121:19	122:5		122:6	122:9	
139:24	140:9		140:9	140:16	
143:5	143:16		142:24	143:4	
143:17	144:5		144:6	144:12	
145:5	145:8		145:9	149:25	
149:23	149:1		149:2	149:20	
151:15	152:18		152:19	153:9	
180:4	180:20		176:14	180:3	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Jim B. Quirk 05/11/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
183:9	183:11	HRY			
182:21	183:13		183:14	184:19	
186:23	186:25	VAG,AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Hal Ray
04/14/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
13:7	13:10	Q-NO-A, SPEC			
17:1	17:6		17:7	17:17	
19:5	19:7	AMB, VAG			
37:9	37:15		28:22	28:24	
37:9	37:15		29:3	29:5	
37:25	38:18		28:22	28:24	
37:25	38:18		29:3	29:5	
39:10	40:6		28:22	28:24	
39:10	40:6		29:3	29:5	
41:1	41:12		28:22	28:24	
41:1	41:12		29:3	29:5	
41:16	42:5		28:22	28:24	
41:16	42:5		29:3	29:5	
42:8	42:12		28:22	28:24	
42:8	42:12		29:3	29:5	
42:15	42:19		28:22	28:24	
42:15	42:19		29:3	29:5	
43:10	43:12		29:3	29:5	
43:18	43:23		29:3	29:5	
45:6	45:15	COMP, CONC			
80:7	80:23		80:2	80:6	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Hal Ray 04/14/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
80:7	80:23		81:4	81:13	
81:1	81:3	Q-NO-A			
81:1	81:3		81:4	81:13	
82:5	82:13		82:2	82:4	
82:5	82:13		82:14	82:22	
82:23	83:5		83:6	83:21	
82:23	83:5		84:3	84:8	
100:19	100:25	CONC, SPEC			
101:1	101:3	CONC			
101:6	101:8	CONC			
118:12	118:16	CONC, SPEC			
118:17	118:25	CONC, SPEC			
124:1	124:3	CONC, SPEC			
124:6	124:12	CONC, SPEC			
124:23	124:25	CONC, SPEC			
125:4	125:13	CONC, SPEC			
125:22	126:8	CONC, SPEC			
130:1	130:12		130:13	130:15	
135:2	135:3	AMB, SPEC, VAG			
135:7	135:12	AMB, SPEC, VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Hal Ray
04/14/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
148:11	148:15	AMB, CONC, FD			
148:21	148:24	AMB, CONC, FD			
149:1	149:4	CONC, FD, SPEC			
149:23	149:2	CONC, FD, SPEC			
150:4	150:7	CONC, REL			
150:8	150:25	REL			
150:24	151:2	SPEC, CONC			
153:2	153:5	AMB, VAG			
153:8	153:11	AMB, VAG			
154:9	154:23	AMB, CONC, SPEC, VAG			
155:7	155:24	AMB, VAG CONC, SPEC, FD			
158:22	158:25	AMB, HRY VAG			
160:13	160:23	HRY, NR			
160:24	161:1	SPEC, NR, HRY			
161:2	161:7	HRY, NR			
161:18	162:1	HRY			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Hal Ray
04/14/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
177:15	177:16	AMB, VAG, FD, CONC, SPEC			
177:19	177:23	AMB, VAG, FD, CONC, SPEC			
178:3	178:7	AMB, VAG, FD, SPEC, CONC			
179:23	180:2	SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation
of ~~Greg Rice~~ Waynell Renfro
~~05/27/99~~ 9/28/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
37:12	38:25		37:4	37:12	
50:7	50:12	ML, REL			
50:21	51:9	REL, ML			
50:21	51:9		51:10	51:14	
53:4	53:8	ML, REL			
53:14	54:7	REL, ML			
54:13	54:16	REL,ML			
54:22	55:13	REL,ML			
57:7	57:9	REL,ML	56:1	56:13	
57:7	57:9		56:15	56:23	
57:7	57:9		56:25	57:6	
57:7	57:9		58:17	58:21	
60:23	60:25	FD			
61:1	61:8	LD			
61:5	61:8	LD, COMP			
60:23	61:8		61:9	61:18	
62:11	63:25	REL, ML			
64:1	64:5	REL, ML, LD			
62:11	64:5		64:6	64:10	
65:4	65:8	REL, ML			
66:22	67:11	REL, ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation
of ~~Greg Rice~~ Waymell Centre
05/27/99 9/28/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
68:24	69:23		69:24	70:2	
68:24	69:23		70:14	70:18	
68:24	69:23		70:20	70:24	
73:3	73:17	REL			
73:18	73:21	LD			
73:22	74:3	LD			
74:25	75:6	NR, LD			
75:10	75:11	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Greg Rice
05/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
23:6	23:15	----	24:7	24:14	
49:7	49:24	----	49:25	50:4	
51:21	52:13	REL			
54:1	54:23	REL			
55:16	55:23	----	55:24	56:2	
61:5	61:15	VAG, SPEC, FD	75:6	75:14	
78:17	78:20	----	78:21	79:18	
82:19	83:4	----	83:13	84:11	
89:4	89:17	----	89:18	18:21	
100:20	100:23	LE			
100:24	101:1	----	101:2	101:6	
102:2	102:12	REL			
102:13	102.15	NPK			
102:16	103:5	FD, SPEC, NPK	104:6	104:15	
103:17	103:21	NPK, FD, SPEC			
105:14	105:23	----	105:24	106:2	
107:4	107:22	FD, SPEC, NPK			
108:3	108:10	VAG, SPEC			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Greg Rice
05/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
112:10	112:13	VAG, AMB, SPEC			
116:8	116:12	VAG, FD, SPEC			
116:21	117:18	VAG, FD, SPEC, HSY			
120:18	120:21	HSY			
139:16	140:12	VAG, AMB			
143:12	143:15	VAG, AMB			
145:9	145:16	----	144:8	144:22	
164:10	164:16	LE, NPK, SPEC			
165:2	165:24	HSY	166:3	166:6	
167:1	167:10	----	167:11	167:13	
172:17	172:18	----	172:22	172:24	
173:16	173:7	HSY			
174:22	174:25	FD, SPEC	174:16	174:21	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Edwin Roberson
8/30/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
21:8	21:10	REL, FD, NPK, PREJ			
21:14	21:18	REL, FD, NPK, PREJ			
23:18 beginning with "I'm trying"	23:21	PREJ, REL			
23:23 beginning with "I'm trying"	24:1	PREJ, REL			
24:13 beginning with "Conwood"	24:15	PREJ, REL			
24:19	26:5	PREJ, REL			
26:6	26:9	AMB, VAG, CONC, REL, PREJ			
26:12	26:12	AMB,VAG, CONC, REL, PREJ			
26:15	26:25	AMB, VAG, CONC, REL, PREJ			
27:1	27:4	PREJ, REL			
27:12 beginning with "Who"	28:15	PREJ, REL			
30:3	30:12	PREJ, REL			
33:12	33:14	AMB			
33:17	33:21	AMB			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Edwin Roberson
8/30/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
35:22	36:4	AMB, VAG			
36:22	37:5	AMB, VAG			
42:11	42:25	REL			
43:1	43:8	REL, AMB, ARG			
44:12	44:13	PREJ, REL			
44:16	45:6	PREJ, REL			
45:7	45:14	PREJ, REL, SPEC, CONC			
45:21 beginning with "The"	45:23	PREJ, CONC, SPEC, REL			
46:1	46:3	CONC, SPEC, REL, PREJ			
49:19	49:25	AMB, VAG			
52:21	52:23	AMB, VAG, AFNE, REL			
57:2	57:11	MIST, REL, AMB, VAG	56:19	56:22	
58:9	58:12	PREJ, AMB, VAG, REL	58:14	58:15	
58:17	59:8	PREJ, REL			
59:9	59:17	PREJ, REL, AFNE, AMB, VAG			
59:18	59:22	REL, PREJ			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Edwin Roberson 8/30/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
108:17	108:23	A/A, REL, PREJ			
111:18	111:21	AMB, VAG			
112:16	113:5	PREJ, REL			
118:13	118:15	AMB, VAG			
118:17	118:18	AMB, VAG			
119:10	119:13	ARG, AMB			
119:16	119:21	AMB, FD, NPK			
123:4	123:4	AMB, VAG, REL	123:8 124:17	123:8 124:25	
123:9	123:9	AMB, VAG, REL			
123:17	123:17	REL	123:18	123:20	
123:21	123:25	REL			
124:2	124:2	REL			
124:4	124:8	AMB, REL, VAG			
125:24	125:25	A/A, VAG, PREJ	126:6	126:12	
126:3	126:4	A/A, VAG, PREJ			
126:13	126:20		126:21 127:8	126:23 128:6	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Edwin Roberson
8/30/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
126:24	127:2	AFNE, AMB, VAG			
127:5	127:6	AFNE, AMB, VAG			
128: 16	128:19	A/A			
128:24	129:2	AFNE, REL			
130:13	130:19	AFNE, MIST, PREJ, REL			
130:20	130:24	AFNE, ARG, MIST, PREJ, REL			
130:25	131:3	REL, PREJ			
131:6	131:7	REL, PREJ			
131:10	131:15	REL, PREJ			
131:16	131:21	AFNE, REL, PREJ			
130:13 131:6 131:10	131:3 131:7 131:21		131:25 132:11	132:4 ending with "Yes" 132:16	
135:12	135:21	AFNE, ARG, PREJ			
135:12	136:3		136:4	136:8	
135:22	136:3	PREJ, REL			
136:13	136:18	REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Edwin Roberson
8/30/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
142:4	142:19		142:20	142:24 ending with "sorry."	
142:24 beginning with "What brands"	143:1	MIST			
144:8	144:12	AMB, VAG			
144:8	144:24		144:25	145:3	
146:17 beginning with "Do you have"	146:21	AMB, VAG			
146:23	146:25	AMB, VAG			
147:3	147:3	AMB, VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gene Rogers
4/20/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
53:23 54:22 56:2	54:19 55:21 56:19		53:9	53:22	
54:16	55:18	Q-NO-A			
55:9	55:12	INC/ INTERRUPT			
59:20	59:25	A/A SPEC			
91:22	91:23	AMB,VAG			
92:1	92:2	AMB,VAG			
111:3	111:6	HRY			
112:14	112:20	HRY,Q-NO-A			
119:12	119:14	VAG,AMB, SPEC			
119:19	119:22	VAG,AMB, SPEC			
123:3	123:6	HRY			
123:22	123:23	FD,NPK			
124:1	124:4	HRY			
124:8	124:10	HRY			
141:18	141:20	VAG			
142:5	142:8	VAG,NPK, SPEC			
142:21	142:25	HRY			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gene Rogers
4/20/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
143:12	143:16	HRY			
143:13	143:16	HRY			
144:11	144:15	HRY			
144:17	144:19	HRY			
145:17	145:23	FD,VAG			
187:8	187:20	REL,MIL, SPEC,NPK			
209:25	211:3		211:4	211:21	
209:25	211:3		212:11	121:17	
211:4	211:21		212:21	212:25	
211:4	211:21		213:1	213:5	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
11:23	14:8		10:6	11:22	
14:6	14:8	VAG			
14:24	16:3		14:19 beginning with "Is it..."	14:23	
15:14	15:17	VAG, AMB			
22:19	22:23	NPK			
23:19	24:5	FD			
24:6	24:22	FD, NPK			
24:23	25:5	FD, NPK, SPEC			
25:12	25:19	VAG, AMB			
30:18	30:24	VAG, AMB			
30:25	31:5	VAG, AMB, COMP			
31:16	32:1	REL, PREJ			
35:24	36:2	COMP, VAG, AMB			
36:9	36:14	COMP, VAG, AMB			
36:15	36:16	VAG, AMB			
38:16	38:23	FD, SPEC, NPK			
38:24	39:9	VAG, AMB			
39:10	39:23	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
39:24	40:3	VAG, AMB			
40:8	40:12	VAG, AMB			
40:13	40:18	VAG, AMB, COMP			
40:21	40:24	VAG, AMB, COMP			
40:25	41:5	VAG, AMB			
41:8	41:15	VAG, AMB			
43:14	43:21	FD, NPK, SPEC			
44:11	44:14	FD, ARG, REL, AFNE, NPK, SPEC			
44:18	44:20	FD, ARG, REL, AFNE, NPK, SPEC			
46:3	46:7	VAG, AMB, INTERRUPT			
46:10	46:12	VAG, AMB, INTERRUPT			
46:13	46:21	VAG, AMB			
46:22	46:24	VAG, AMB, COMP			
47:2	47:6	VAG, AMB, COMP			
47:8 beginning with "Do..."	47:11	VAG, AMB, A/A			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson 08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
47:16	48:1	VAG, AMB, A/A			
49:5	49:10	FD, AMB, VAG			
49:5	49:10		49:2	49:4	
50:25	51:12	FD, SPEC, NPK			
51:13	51:18	FD, SPEC, NPK, REL, PREJ			
51:24 beginning with "How do..."	52:24	FD, SPEC, NPK, REL, PREJ			
53:15	54:1	FD, SPEC, NPK, REL, PREJ			
59:15	59:21	PREJ, REL, FD, VAG, AMB, NPK, SPEC			
59:22	59:25	NR, PREJ, REL, A/A, VAG, AMB, FD, NPK, SPEC			
60:1	60:4	VAG, AMB, FD, SPEC, NPK, REL, PREJ			
60:7	60:17	VAG, AMB, FD, SPEC, NPK, REL, PREJ			
60:23	61:3	VAG, AMB, FD, SPEC, NPK, REL, PREJ			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson 08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
61:4	61:23	VAG, AMB, FD, REL			
62:8	62:13	VAG, AMB, NR, SPEC, NPK			
62:14	62:16	VAG, AMB, NR			
62:21	62:22	VAG, AMB, NR			
63:2	63:13	FD, VAG, AMB, NR, SPEC, NPK			
63:14	63:19	VAG, AMB			
64:8	64:12	VAG, AMB			
65:1	65:3 ending with "me."		65:3 beginning with "I..."	65:5	
65:6	65:13		65:3 beginning with "I..."	65:5	
65:6	65:13		65:20 beginning with "the category..."	65:25	
67:1	67:8	VAG, AMB, FD			
67:10 beginning with "Have..."	67:19	VAG, AMB			
68:24	69:1	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson 08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
68:24	69:1		69:4	69:4	
69:5	69:13		69:4	69:4	
69:5	69:9	A/A			
69:10	69:13	VAG, AMB, REL, FD, NPK, SPEC			
69:16	69:17	VAG, AMB, REL, FD, NPK, SPEC			
69:18	69:22	VAG, AMB, FD, REL, NPK, NR, SPEC, PREJ, MIST, AFNE			
69:25	70:3	VAG, AMB, FD, REL, NPK, NR, SPEC, PREJ, MIST, AFNE			
70:4	70:9	VAG			
70:23	70:25	VAG, AMB			
71:3	71:8	VAG, AMB			
71:11	71:12	VAG, AMB			
71:13	71:18	VAG, AMB, FD			
78:3	78:5	SPEC, NPK, VAG, AMB			
78:8	78:10	SPEC, NPK, VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
78:22 beginning with "What does..."	79:1	VAG, AMB, FD, SPEC			
79:4	79:18	VAG, AMB, FD, SPEC			
80:5 beginning with "My question..."	80:8	VAG, AMB, FD, NPK, SPEC			
80:11	80:20	VAG, AMB, FD, NPK, SPEC			
83:4	83:11	HRY, VAG, AMB			
83:12	83:13	NO Q PUT, NR			
83:14	83:18	HRY, VAG, AMB			
83:19	83:23	VAG, AMB			
83:24	84:4	VAG, AMB, FD			
84:7	84:15	VAG, AMB, FD			
84:16	84:21	VAG, AMB, FD, SPEC			
84:22	84:23	VAG, AMB			
84:24	85:2	VAG, AMB			
85:5	85:16	VAG, AMB			
85:19	86:8	VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
86:9	86:13	FD, NPK, SPEC, VAG			
89:15	89:18	A/A			
89:21	89:21	A/A			
89:22	89:25	FD, NPK, SPEC			
90:4	90:5	FD, NPK, SPEC			
90:11	90:16	VAG, AMB			
90:19	90:19	VAG, AMB			
90:20	90:25	SPEC			
91:6	91:9	SPEC, NPK			
91:10	91:12	SPEC, NPK			
91:17	91:20	SPEC, NPK			
92:11	92:12	NR, SPEC			
92:15	92:23	NPK, SPEC			
94:14	94:18	HRY			
94:19	94:23	AFNE			
94:14	94:23		94:24	95:8	
96:17	96:20	FD, SPEC, NPK, VAG			
97:2	97:4	FD, SPEC, NPK, VAG			
97:5	97:8	SPEC			
97:9	97:16	VAG, AMB, ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson 08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
99:17 beginning with "Is..."	99:21	VAG, AMB, A/A, ML			
99:24	100:2	VAG, AMB, A/A, ML			
100:3	100:7	VAG, SPEC, NPK, AMB, ML			
101:12	101:21	VAG, ML			
101:22	101:24	FD, VAG, NO Q PUT			
102:2	102:5	FD, VAG, NO Q PUT			
102:6	102:9	VAG, FD			
102:10	102:13	FD, VAG, AMB, REL			
102:23	103:1	FD, VAG, AMB, REL			
103:2	103:9	FD, NR, REL			
104:6	104:20	REL, ML			
120:1	120:3	VAG, AMB, SPEC, NPK, REL			
120:6	120:9	VAG, AMB, SPEC, NPK, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
122:5	122:14	A/A, VAG, AMB, SPEC, NPK, REL			
122:15	122:20	VAG, AMB, REL			
122:22 beginning with "Do you..."	122:25	VAG, AMB, SPEC, NPK, REL			
123:3	123:3	VAG, AMB, SPEC, NPK, REL			
123:4	123:6	A/A, REL, VAG, AMB, SPEC, NPK			
134:24 beginning with "What did..."	135:2	VAG, AMB			
135:5	135:10	VAG, AMB			
135:11	135:16	STRIKE, VAG, AMB			
135:17	135:20	VAG, AMB			
136:2	136:3	VAG, AMB			
138:7 beginning with "Have you..."	138:9	VAG, AMB, HRY			
138:12	138:12	VAG, AMB, HRY			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson 08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
143:12	144:8	SPEC, NPK, FD, VAG, AMB			
147:22	148:6	VAG, FD			
148:7	148:14	FD, COMP, VAG, AMB			
148:15	148:19	INCOMP, REL			
148:20	148:25	FD, VAG, AMB			
149:1	149:4	FD, VAG, AMB, NPK			
149:5	149:9	NR, FD, VAG, AMB			
149:10	149:12	NO Q PUT			
149:13	149:17	COMP, AFNE, AMB, VAG, FD			
149:20	149:22	COMP, AFNE, AMB, VAG, FD			
149:23	150:1	REL, NO Q PUT			
152:14 beginning with "Do you..."	152:19	VAG			
152:20	152:23	COMP, VAG			
152:24	152:25	VAG, AMB			
153:1	153:6	NPK, AFNE, MIST, VAG, AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson 08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
153:7	153:10	VAG, NPK			
153:11	153:15	MIST, AFNE, VAG, NPK, HRY, SPEC			
153:16	153:20	VAG, NPK			
153:21	153:25	VAG, NPK, HRY, SPEC			
154:3	154:3	VAG, NPK, HRY, SPEC			
156:8	156:9	REL, VAG, AMB			
156:12	156:14	REL, VAG, AMB			
156:15	156:18	REL, VAG, AMB, HRY			
156:19	156:23	REL, VAG			
156:24	157:1	REL, VAG, AMB			
157:2	157:8	REL, NO Q PUT			
158:7	158:10	VAG, AMB			
158:13	158:13	VAG, AMB			
158:14	158:17	FD, AFNE			
158:20	158:20	FD, AFNE			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
159:4 beginning with "Are you..."	159:8	FD, AFNE			
159:16	159:19	VAG, FD, NR			
159:21	159:23	VAG, FD, NR			
160:4	160:6	SPEC			
160:11	160:11	SPEC			
169:24	160:25 ending with "this."	FD/BR			
170:15	171:6	HRY			
171:7	171:14	VAG, AMB			
171:22	171:25	VAG, AMB, SPEC			
172:3	172:3	VAG, AMB, SPEC			
172:4	172:7	VAG, AMB, SPEC, NPK			
172:10	172:12	VAG, AMB, SPEC, NPK			
172:13	173:5	FD/BR,HRY			
173:16	173:20	FD/BR, SPEC, NPK, MIST			
173:25	174:3	FD/BR, SPEC, NPK, MIST			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
174:4	174:7	NO Q PUT, INTERRUPT			
174:8	174:12	AFNE, FD/BR, NPK, A/A			
174:15	174:17	AFNE, FD/BR, NPK, A/A			
174:18	175:4	MIST, AFNE, FD, HRY			
175:5	175:8	SPEC, FD			
175:11	175:14	SPEC, FD			
175:15	175:19	SPEC			
176:4	176:5	A/A			
176:8	176:10	A/A			
186:25	187:12	HRY, FD/BR, ML, REL			
187:13	187:18	VAG, REL, ML			
187:21	187:25	VAG, REL, ML			
188:1	188:6	FD, AFNE, VAG, MIST, REL, ML			
188:10	188:19	FD, AFNE, VAG, MIST, REL, ML			
188:21	189:1	FD, AFNE, VAG, MIST, REL, ML			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
189:10	189:16	VAG, AMB, A/A, NR			
189:19	189:19	VAG, AMB, A/A, NR			
190:13	190:17	ML			
193:9	193:12	VAG, AFNE, MIST			
193:14	193:15	VAG, AFNE, MIST			
193:23	194:1	VAG, AMB, AFNE, MIST			
194:10	194:13	VAG, A/A			
194:15	194:15	VAG, A/A			
194:16	194:20	VAG, COMP, NPK, SPEC			
194:23	194:23	VAG, COMP, NPK, SPEC			
194:24	195:2	ARG, REL, MIST			
195:5	195:7	ARG, REL, MIST			
195:8	195:13	AFNE, REL			
195:16	195:16	AFNE, REL			
195:17	195:20	REL			
195:21	195:24	VAG			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson 08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
196:2	196:2	VAG			
196:3	196:12	VAG			
196:13	196:17	HRY			
201:18	201:23	FD/BR			
202:4	202:17	REL			
202:18	203:4	FD/BR, COMP			
203:7	203:12	FD/BR, COMP			
203:18	203:23	VAG			
203:25	204:10	REL			
204:12 beginning with "Do you..."	204:15	FD/BR			
204:16	204:21	COMP, VAG			
204:24	204:24	COMP, VAG			
204:25	205:4	FD/BR, NPK			
205:11	205:13	FD/BR, NPK			
205:17	206:6	AFNE			
206:7	206:11	FD/BR, NPK, AFNE			
206:12	206:16	COMP			
206:17	206:22	VAG			
206:23	207:1	SPEC, VAG, MIST, AFNE			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
207:14	208:14	FD/BR, REL			
208:25	209:7	AFNE, VAG			
209:8	209:12	FD/BR, SPEC			
209:15	209:15	FD/BR, SPEC			
209:15	209:15		209:24	210:6	
212:6	212:8	COMP, VAG			
212:11	212:11	COMP, VAG			
212:12	212:15	VAG			
213:1 beginning with "Then in..."	213:3	NR			
214:19	214:21	FD			
214:24	215:1	FD			
216:21	217:1	COMP			
217:4	217:5	COMP			
218:9	218:10	VAG, AMB			
218:11	218:13	VAG, SPEC			
218:16	218:22	VAG, SPEC			
218:23	219:2	NPK			
219:3	219:5	SPEC, REL			
219:8	219:8	SPEC, REL			
219:9	219:23	REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
220:2	220:10	AFNE			
220:11	220:16	VAG, AMB			
222:3	222:5	VAG, AMB			
222:6	222:7	VAG, AMB, NR, MIST			
222:11	222:13	VAG, AMB, NR, MIST			
224:17	224:19	NPK, SPEC			
225:1	225:1	NPK, SPEC			
225:2	225:5	VAG, FD			
225:8	225:10	VAG, FD			
225:20	226:8	VAG, AMB, NPK, SPEC			
226:21	227:1	AMB, VAG, NPK, SPEC			
227:4	227:5	AMB, VAG, NPK, SPEC			
228:12	229:2	HRY			
229:3	229:6	HRY, MIST			
230:10 beginning with "In..."	230:14	VAG, FD			
230:17	230:20	VAG, FD			
230:21	231:5	COMP, NR, VAG			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
231:6	231:9	VAG, AMB			
234:2	234:4	VAG, AMB, FD			
234:7	234:7	VAG, AMB, FD			
234:8	234:10	VAG, AMB			
234:14	234:18	VAG, AMB			
234:19	234:23	VAG, AMB, HRY, NR			
235:1	235:4	VAG, AMB, HRY, NR			
235:5	235:8	VAG, AMB, SPEC			
235:9	235:17	VAG, AMB, NR			
235:18	235:22	ARG, PREJ, MIST, AFNE			
236:1	236:2	ARG, PREJ, MIST, AFNE			
236:3	236:10	VAG, AMB			
236:11	236:13	VAG, AMB, COMP			
236:16	236:18	VAG, AMB, COMP			
241:21	241:21	ARG			
241:24	241:24	ARG			
250:11	250:23	REL, ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson 08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
253:14	253:18	ML, VAG, AMB, FD, REL			
253:21	253:22	ML, VAG, AMB, FD, REL			
253:23	253:24	VAG, AMB, FD, NR, ML, REL			
254:4	254:5	VAG, AMB, FD, NR, ML, REL			
254:6	254:10	REL, ML, AFNE, SPEC, NR, FD			
254:13	254:15	REL, ML, AFNE, SPEC, NR, FD			
254:16	254:20	REL, ML, FD			
254:23	254:23	REL, ML, FD			
254:24	254:25	Q-NO-A			
261:11 beginning with "Are you..."	261:13	VAG, NR			
261:17	261:18	VAG, NR			
261:19	262:3	VAG			
262:4	262:6	SPEC, VAG			
262:9	262:11	SPEC, VAG			
262:15	263:2	VAG, AMB, HRY			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of William M. Rosson
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
267:21	268:5	VAG, AMB, NPK, COMP, SPEC			
268:6	269:3	VAG, AMB, SPEC			
269:4	269:5	CONC, VAG, AMB, SPEC, NPK			
269:8	269:10	CONC, VAG, AMB, SPEC, NPK			
270:11	270:15	VAG, AMB, NR, HRY			
270:17	270:24	VAG, AMB, NR, HRY			
275:4	275:9	FD, REL, NPK, SPEC			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Maudie Rushing
06/14/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
48:21	48:24	COMP/REL			
49:5	49:12	COMP/REL			
49:20	49:22	LD			
50:11	51:25	REL			
50:11	50:13	LD			
50:14	50:16	LD			
51:1	51:2	LD			
51:7	51:19	LD			
52:12	52:17		52:18	52:22	
52:23	53:3		52:18	52:22	
53:18	54:10	REL			
55:7	55:22	REL			
56:8	56:14	LD			
56:16	57:3	NR/No Q Put			
57:4	57:6	LD			
57:7	57:9	LD			
57:10	57:14	LD/NR			
57:15	57:18	LD			
60:12 beginning with "When a..."	60:17	LD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Maudie Rushing
06/14/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
60:12 beginning with "When a..."	60:17		62:5	62:14	
60:12 beginning with "When a..."	60:17		62:20	63:2	
63:18	64:21	LD			
63:18	65:7		62:5	62:14	
63:18	65:7		62:20	63:2	
64:15	64:21	No Q Put/NR			
75:12	75:22		66:8	67:3	
75:12	75:22		67:8	67:9	
75:12	75:22		75:23	75:25	
75:16	75:19	LD			
79:2	79:9	LD			
83:2	83:24		83:25	84:4	
88:6	88:6	No Q Put			
94:12	95:1	LD			
94:12	95:1		100:5 101:10	100:17 101:22	
94:23	95:1	SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gayleen Rusk
05/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
36:20	36:24	OUT/SCOPE/ LD			
36:25	37:7	REL,NPK,FD			
37:12	37:18	REL VAG,FD			
37:23	37:24	REL			
38:2	38:8	REL			
38:18	39:20	REL			
36:25	37:7		39:24	40:1	
36.25	37.7		40:5	40:10	
41:6	41:9	REL			
41:20	41:25	REL			
42:5	42:7	PREJ			
42:16	43:14	REL			
43:3	43:14	LD			
44:12	44:15	VAG,COMP			
44:17	44:17	VAG,COMP			
46:8	46:13	VAG,COMP			
45:25	46:13		47:12	47:15	
48:7	48:13	REL			
48:15	48:24	REL			
50:3	50:5	VAG,FD			
50:3	51:4		51:22	52:1	
77:4	77:8	LD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gayleen Rusk
05/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
77:16	77:20	SPEC, VAG, AMB,LD			
77:22	77:22	SPEC, VAG, AMB,LD			
79:22	79:24	Q-NO-A,FD,REL			
80:7	80:7	Q-NO-A,FD,REL			
80:9	80:12	REL,ML			
81:5	81:8	ML,FD,SPEC, MIST,REL,LD			
81:14	81:14	ML,FD,SPEC, MIST,REL,LD			
81:15	81:18	VAG,SPEC, MIST,REL,ML LD			
81:25	81:25	VAG,SPEC, MIST,REL,ML LD			
86:20	86:24	Q-NO-A,VAG, INCOMP			
87:2	87:2	Q-NO-A,VAG, INCOMP			
87:2	87:2	Q-NO-A			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Kenneth R. Schultz
6/30/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
64:1	64:13	REL			
64:14	64:16	REL			
65:2	65:9	REL			
97:13	97:16	VAG			
103:21	104:21	FD, VAG, INCOMP			
105:14	105:21	SPEC			
106:6	106:23	VAG, AMB, PREJ, FD			
106:24	107:2	A/A, REL			
107:24	109:17	REL, ML			
109:9	109:13	REL, SPEC, ML			
107:24	109:17		110:16	110:23	
114:11	115:15		114:1	114:10	
114:18	114:24	REL, FD			
114:25	115:15	REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Scott T. Stevens
8/11/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
4:25	5:1		5:2	5:10	
21:11	22:2		21:1	21:10	
22:1	22:2	Q-No-A			
21:11	22:2		38:14	39:11	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of S.T. Stokes
06/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
19:6	19:11		19:12 19:23	19:15 19:25	
25:2	25:3	FD, VAG, AMB, PREJ			
25:6	25:19	FD, VAG, AMB, PREJ			
31:10	31:13	A/A			
32:23	33:1	VAG, AMB NR			
33:13	33:14	VAG, AMB, NR	34:3	34:9	
34:10	34:12	NPK			
34:15	34:16	NPK			
34: 17	34:21	FD, NPK	35:23 35:25	35:23 36:1	
37:5	37:7	FD, NPK			
37:12	37:16	FD, NPK			
37:22	37:22	FD, NPK	39:6	39:24	
43:11	43:16	VAG, AMB, FD	42:3 42:14	42:9 43:6	
58:20	59:14	FD, NPK			
64:18	65:11	FD, NPK			
65:17	65:20	FD, NPK			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of S.T. Stokes
06/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
65:24	65:25	FD, NPK			
87:13	87:17	Q-No-A			
87:25	87:25	No Q Put			
87:25	91:2		91:3	91:20	
101:11	101:13	SPED, FD, NPK			
103:4	103:7	VAG, AMB			
100:24	103:7		103:20	104:2	
104:3 **Beginning with "Do you"**	104:6	SPEC, NPK, FD			
104:10	104:10	SPEC, NPK, FD			
106:2	106:4	NR			
108:4	108:12		107:25	108:3	
108:20	108:23	VAG, AMB, COMP			
109:1	109:2	VAG, AMB COMP			
109:10	109:17 **Ending with "Foods."**	No Q Put, STRIKE, LT			
108:4	109:20		110:8	110:14	
117:17	117:25	Q No A			
118:6	118:10	A/A			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of S.T. Stokes
06/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
118:11	118:20	VAG, AMB, SPEC, NPK, FD			
118:21	119:19	REL, PREJ, NPK, HRY, SPEC, No Q Put			
120:4	120:11	No Q Put, REL, PREJ, NPK, FD, MIST, SPEC			
120:20	121:6	VAG, AMB, SPEC, FD, NPK, PREJ, HRY			
121:11	121:12	VAG, AMB, SPEC, FD, NPK, PREJ, HRY			
121:13	121:15	VAG, AMB, FD, ARG			
121:18	121:18	VAG, AMB, FD, ARG			
121:18	122:1		122:2	122:3	
123:22	123:3	FD, NPK, SPEC, HRY			
124:16	124:21	FD, NPK, SPEC, HRY			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of S.T. Stokes
06/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
124:24	125:8	FD, NPK, SPEC, HRY			
125:9	125:12	SPEC, FD, NPK	126:14	126:19	
126:20	126:23	FD			
128:8	128:16	No Q Put, REL, HRY, PREJ			
129:11	130:6	A/A, PREJ, SPEC, VAG			
130:9	130:10	A/A, PREJ, SPEC, VAG			
131:20	132:1 **Ending with "explanation"**	STRIKE			
132:17	132:24	STRIKE			
139:20	140:3	FD, NPK, SPEC			
140:6	140:9	FD, NPK, SPEC			
140:12	140:15	FD, NPK, SPEC			
140:18	140:19	FD, NPK, SPEC			
141:1	141:9	A/A, COMP			
141:10	141:12	FD, SPEC, NPK			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of S.T. Stokes
06/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
141:16	141:17	FD, SPEC, NPK			
141:18	141:23	A/A, COMP			
142:8 Beginning with "That's"	142:8 Ending with "happens"	STRIKE			
142:25	142:25	STRIKE			
143:1	143:13	SPEC, FD, NPK			
144:3	144:5	SPEC, FD, NPK			
144:7	144:14	SPEC, FD			
144:17	145:2	SPEC, FD			
146:12	147:15	SPEC			
147:16	147:19	SPEC, FD			
147:23	147:23	SPEC, FD			
148:9	148:13	A/A			
148:14	148:17	SPEC, FD			
148:20	148:20	SPEC, FD			
149:6	149:11	REL			
149:14	149:17	REL			
149:23	150:6	REL			
150:7	150:9	REL, FD			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of S.T. Stokes
06/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
149:23	150:24		150:25	151:5	
151:6	151:16	No Q Put, PREJ			
152:13	152:20	REL			
152:21	154:4	No Q Put, PREJ			
158:12	159:9	No Q Put, PREJ			
160:4	160:9	No Q Put, PREJ			
161:5	161:17	No Q Put, PREJ			
161:22	162:1	No Q Put, PREJ			
162:2	162:5	FD, NPK			
163:22	164:15	HRY			
164:16	164:20	FD, SPEC, NPK			
165:8	170:7		165:3	165:7	
167:6	167:22	No Q Put, PREJ			
168:16	169:5	No Q Put, PREJ			
169:7	169:10	FD, NPK, SPEC, COMP			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of S.T. Stokes
06/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
170:3	170:7	No Q Put, PREJ			
			170:8	170:17	
			170:23	171:2	
171:17	172:10	FD, SPEC, NPK			
172:15	172:15	FD, SPEC, NPK			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Hardy C. Taylor
8/19/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
35:18	35:25	SPEC			
55:7	55:11	FD, VAG, AMB			
58:17	59:13	FD, VAG, AFNE			
59:14	59:18	VAG, SPEC AMB			
60:1	60:5	VAG, SPEC, AMB			
60:6	60:14	COMP, FD, SPEC, VAG			
60:20	60:22	COMP, FD, SPEC, VAG			
60:23	61:2	VAG			
77:23	78:2	FD, VAG, SPEC			
78:3	78:5	FD, VAG			
85:9	85:14	ML, REL, FD, SPEC			
85:18	85:25	ML, REL, FD, SPEC			
86:1	86:12	FD, ML, REL			
87:3	87:7	FD, ML, REL			
87:8	87:12	COMP, FD, ML, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Hardy C. Taylor 8/19/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
87:13	87:15	FD, ML , REL, SPEC			
95:14	95:20	PREJ, REL, ML, AFNE			
96:8	97:6	FD, BR			
97:7	99:16	PREJ, REL, ML, AFNE, FD			
99:17	99:25	AFNE, FD			
103:6 beginning with "Were you aware..."	103:13	ML, REL, VAG, FD, AFNE			
103:14	103:18	VAG, FD, AFNE, REL, ML			
103:24	103:25	VAG, FD, AFNE, REL, ML			
105:19	105:24	SPEC, REL, CONC, ML			
106:19	196:24	AFNE, COMP, ML, REL, FD			
107:4	107:9	REL, ML			
107:10	107:15	ML, SPEC, FD, REL			
107:16	108:12	REL, ML			
108:16	110:18	REL, ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Hardy C. Taylor 8/19/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
111:6	111:14	REL, ML			
113:1	113:18	REL, ML			
113:19	114:3	REL, ML, SPEC, FD			
114:4	115:4	REL, ML			
116:6	116:17	FD, COMP, VAG			
116:18	116:23	NPK, SPEC, FD			
117:12	117:19	SPEC, FD			
122:8	122:18	NR, COMP, SPEC, FD			
122:19	123:2	FD, SPEC, COMP			
128:15	129:9	REL, ML			
129:10	129:17	REL, ML, SPEC, FD, AFNE			
130:1	130:3	MIST, AFNE, SPEC, ML			
130:11	130:16	MIST, AFNE, SPEC, ML			
130:17	130:20	REL, ML			
130:21	131:9	COMP, AFNE, NPK, MIST, REL, ML, FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Hardy C. Taylor
8/19/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
131:10	131:18	MIST, REL, ML, AFNE, NPK, SPEC, FD			
168:19	168:25	FD, VAG			
169:15 beginning with "Do you know..."	169:24	FD, SPEC			
169:25	170:5	HSY, VAG, FD			
170:6	170:10	VAG, FD			
170:11	170:16	VAG			
170:17	171:4	VAG, NR, SPEC			
172:25	173:3	VAG, SPEC			
173:4	173:11	VAG			
173:15	173:21	FD, VAG			
177:20	178:6	HSY			
178:7	178:14	MIST, COMP, NR			
181:11	181:21	VAG			
182:16	182:22	SPEC, FD, NPK			
197:16	197:24		197:25	198:22	
204:6	204:11	VAG			
204:18	205:18	FD, BR, SPEC			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Hardy C. Taylor
8/19/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
205:19	207:2	FD, BR, SPEC			
207:3	207:7	NR, FD, BR			
216:3	216:6	FD, BR, SPEC, VAG			
216:7	216:15	SPEC, VAG, FD			
216:22	217:2	COMP, FD			
217:3	217:8	COMP			
217:9	217:16	NO Q PUT			
217:25	218:6	SPEC			
218:7	218:12	VAG, AMB			
218:13	218:15	MIST			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Frank Wadkins
04/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
14:8	14:21		14:22	15:15 ending with "that."	
15:15 beginning with "What was..."	16:15		14:22	15:15 ending with "that."	
45:4	46:4		44:24	45:3	
69:4	69:10		34:4 69:11	35:3 69:22	
70:3	71:5		34:4 69:11	35:3 69:22	
74:8	74:17		74:18	74:24	
74:8	74:17		75:4	75:12	
74:8	74:17		76:15	77:10	
81:25	82:11	SPEC, FD, VAG, AMB			
81:25	82:11		84:20 85:1	84:22 85:1	
115:24	116:5	SPEC, FD			
122:14	123:4		121:12	121:19	
135:16	136:9	FD, SPEC			
135:16	136:9		135:10	135:14	
136:15	136:15	FD, SPEC			
136:21	136:24	VAG, AMB, FD, SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Frank Wadkins
04/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
137:2	137:7	VAG, AMB, FD, SPEC			
140:1	140:3	VAG, AMB, SPEC			
140:6	140:7	VAG, AMB, SPEC			
140:9	140:11	VAG, AMB, SPEC			
140:1 140:6 140:9	140:3 140:7 141:9		137:16	138:14	
140:1 140:6 140:9	140:3 140:7 141:9		141:10	141:16	
141:17	141:23		141:10	141:16	
141:17	141:23		141:24	142:14	
145:25	146:7	A/A, PREJ			
145:25	146:7		146:10	146:10	
145:25	146:7		149:14 150:11 154:6	149:17 150:13 155:5	
146:5	146:7	Q-NO-A			
146:11	147:5		147:6	147:16	
146:11	147:5		149:14 150:11 154:6	149:17 150:13 155:5	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Frank Wadkins
04/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
146:23	147:1	SPEC			
152:15	153:11		149:14 150:11 153:12 154:6	149:17 150:13 153:21 155:5	
153:5	153:11	NO Q PUT, PREJ			
157:24	158:2	A/A			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Dan Walden
8/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
6:1	40:23		41:6	42:2	
6:1	40:23		119:8	119:11	
6:16	7:19	REL, ML			
8:17	9:13	REL, ML			
11:2	11:6	REL, ML			
11:2	13:22		13:23	14:16	
12:11	12:16	REL, ML, INCOMP			
14:17	16:6	REL, PREJ			
17:1	17:12	LD			
18:13	19:5	VAG, AMB			
18:13	19:22		19:23	20:8	
19:6	19:9	SPEC, FD			
19:10	19:22	SPEC, NR, FD, PREJ, INCOMP			
20:15	20:18	VAG, AMB			
20:17	21:7		27:11	29:8	
21:22	22:2	REL			
22:21	23:8		23:12	23:23	
25:12	25:21	A/A			
25:12	27:10		27:11	29:8	
25:22	26:2	LD, VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Dan Walden
8/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
26:20	27:7	NR, PREJ			
27:8	27:10	PREJ, INCOMP			
29:12	29:23		30:1	30:3	
31:10	33:16		33:17	34:7	
31:16	32:9	REL, PREJ			
32:18	32:21	VAG, A/A			
36:5	36:9	LD			
36:15	36:18	LD			
38:13	40:10	REL, PREJ			
42:3	42:5	FD, NPK			
42:3	44:20		44:21	45:12	
42:10	42:13	A/A, REL, ML			
43:1	43:12	LD			
43:1	44:20		68:16	69:19	
44:3	44:20	SPEC, FD			
46:10	47:10	LD, A/A			
46:20	46:23	LD, A/A, VAG			
47:11	48:2	VAG, SPEC, INCOMP, REL, ML			
48:12	48:15	SPEC, VAG, LD			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Dan Walden
8/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
49:4	49:12	LD, SPEC, REL			
50:2	50:9	NR, SPEC, FD			
50:10	50:12	SPEC, PREJ, REL, CONC			
50:14	51:12	SPEC, VAG, AMB, CONC, LD, INCOMP			
51:13	52:8	AMB, VAG, PREJ			
51:13	53:15		54:10	54:22	
52:20	53:1	VAG			
53:5	53:10	VAG			
55:3	55:22	REL			
56:14	56:20	REL			
62:16	63:6	SPEC			
76:20	77:2		76:3	76:19	
76:20	77:19	SPEC, CONC			
83:18	84:2	REL, ML			
84:3	85:7	NR, PREJ			
85:14	86:4	INCOMP, PREJ			
85:14	86:4		86:4	86:4	
85:14	86:4		87:13	87:21	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Dan Walden
8/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
88:19	89:18		88:9	88:10	
88:19	89:18		88:17	88:18	
105:16	106:1	PREJ, SPEC, INCOMP			
117:3	117:7	CONC, SPEC, FD			
118:4	119:7	SPEC, FD, PREJ			
128:16	129:4	REL, FD			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David Waller
08/31/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
			7:2	7:8	
			10:14	10:25	
66:3	66:11		59:17 66:12	59:22 66:24	
73:8	73:12	A/A			
73:13	73:22	FD, SPEC			
73:23	74:1	SPEC			
74:2	74:5	VAG, AMB, FD			
74:10	74:21	SPEC, FD			
74:22	75:17	LD			
77:22	77:25	LD			
78:21 **Beginning with "In"**	79:17	LD, FD, SPEC	101:2 **Beginning with "Do you"** 101:6 101:21 101:25 102:17 102:20	101:4 101:8 101:23 102:3 102:18 102:22	
79:18	79:25	REL			
80:1	80:4	SPEC, LD, FD			
81:16	81:21	REL			
83:17	84:2	LD, FD, SPEC			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David Waller 08/31/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
85:24	86:3	LD			
86:6	86:9	SPEC, LD			
105:7	106:15		103:15	103:25	
105:7	106:15	SPEC, FD, NPK	106:20 107:6	107:3 108:9	
77:1	78:15		106:20 107:6	107:3 108:9	
78:1	78:15				
78:21 **Beginning with "In"**	80:4		101:2 **Beginning with "Do you"** 101:6 101:21 101:25 102:17 102:20	101:4 101:8 101:23 102:3 102:18 102:22	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of G. K. "Ken" Washer
04/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
43:21	43:24	SPEC			
47:2	47:5	VAG, AMB			
47:7		VAG, AMB			
48:2	48:4	VAG, AMB, SPEC, FD			
48:7	48:8	VAG, AMB, SPEC, FD			
50:6	50:15	VAG, AMB, SPEC, FD			
51:2	51:9	FD, SPEC			
51:11	51:22	FD, SPEC, NPK			
52:7	52:8	FD, SPEC, NPK			
53:5	53:8	MIST			
53:18	53:20	FD, MIST			
53:23	54:3	MIST, FD, SPEC			
54:5	54:10	NPK, FD, SPEC			
57:24	58:3	FD			
			58:22	59:4	
62:25	63:8	FD, SPEC, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of G. K. "Ken" Washer
04/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
63:18	64:2	FD, SPEC,NPK			
65:1	65:16	HSY, FD, SPEC			
65:24	65:25	NR			
66:1	66:4	----	66:14	66:15	
66:24	67:9	HSY, VAG, SPEC			
70:14	71:2	HSY, SPEC			
71:6	71:13	HSY, SPEC			
71:15	72:3	HSY, SPEC			
72:11	72:14	HSY, SPEC			
76:5	76:17	VAG, AMB			
76:18	76:25	FD, SPEC			
85:11	85:12	VAG, AMB			
85:14		VAG, AMB			
86:2	86:5	SPEC, NPK			
114:10	114:16	LE			
125:9	125:12	VAG, AMB			
126:2	126:5	SPEC, VAG			
128:13	128:25	VAG, NR			
131:12	131:22	VAG, AMB, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of G. K. "Ken" Washer
04/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
132:14	133:14	VAG, AMB, NPK, FD			
135:18	136:12	VAG, AMB			
137:4	137:9	NPK, FD			
137:15	137:19	NPK, FD			
138:1	138:5	FD, NPK			
136:16	138:18	VAG, AMB, ARG			
138:25	139:10	ARG, NPK			
141:5	141:7	VAG, FD			
141:9	141:16	VAG, FD, SPEC, NPK			
148:24	149:10	FD, NPK			
153:9	153:10	VAG, AMB			
153:13		VAG, AMB			
157:8	157:10	NR			
164:22	165:10	----	165:20	166:15	
201:15	201:23	SPEC, NPK, FD			
202:5	202:8	VAG, MIST, LE			
202:11	202:16	VAG, MIST, LE			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of G. K. "Ken" Washer
04/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
204:11	204:13	NPK, SPEC, FD			
204:15	204:17	NPK, SPEC, FD			
204:19	204:21	ARG			
204:22	204:23	NPK, SPEC, FD			
204:25	205:3	NPK, SPEC, FD			
205:23	205:25	FD, SPEC, NPK			
206:2	206:5	FD, SPEC, NPK			
208:17	209:2	VAG, AMB			
210:16	210:20	----	209:9	209:10	
			209:14	210:15	
212:18	212:22	----	212:23	213:5	
241:20	242:20	----	243:3	243:5	
241:20	242:20	----	243:8	243:13	

16diii003267

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gerald L. Welsh
2/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
6:7	6:14		9:15	10:2	
10:13	11:3	REL			
12:6	12:16	REL			
31:2	31:6	REL, ML			
32:20	32:21	NR			
38:2	38:8	NR			
39:3	39:12	NR, FD, SPEC			
71:8	71:21		41:1	41:5	
71:8	71:21		41:7	41:8	
71:8	71:21		41:10	41:23	
71:8	71:21		41:25	42:5	
57:22	58:1	NR			
71:11	71:21	SPEC			
110:14	111:8	REL, ML			
111:15	111:18	FD			
111:19	112:2	FD, SPEC			
112:3	112:8	SPEC, FD, PREJ			
112:9	112:18	LD, FD, SPEC, AFNE			
112:20	112:23	LD, FD, SPEC, AFNE			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gerald L. Welsh
2/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
112:25	113:3	LD, FD, SPEC, REL, AFNE			
113:4	113:17	REL			
115:8	115:12	VAG, AMB, FD, LD, AFNE			
115:14	115:23	VAG, SPEC, AFNE			
115:25	116:4	LD, FD			
116:25	117:5	REL, PREJ			
117:6	117:13	REL, ML, VAG, PREJ			
118:9	118:14	MIST, VAG, LD, PREJ			
119:2	119:13	VAG, MIST, NR			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Terry Williams
08/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
7:7 beginning with "Sir, does..."	10:20		11:10	11:16	
7:22	7:25	VAG, AMB			
8:1	8:19	A&A, PREJ			
14:9	14:14	VAG, AMB			
15:14	15:19	VAG, AMB			
15:20	15:22	STRIKE			
16:10	17:1	FD, SPEC			
22:5	24:3		24:4	24:16	
23:3	23:4 ending with "that?"	STRIKE, COMP			
23:9	23:12 ending with "decisions."	STRIKE			
23:25	24:3	FD, SPEC			
26:2	27:1	VAG, AMB, ARG, SPEC, FD			
26:2	27:1		27:20	27:24	
26:12 beginning with "I'll..."	26:13	STRIKE			
26:18	26:18	STRIKE			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Terry Williams
08/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
27:3	27:4	VAG, AMB, ARG, SPEC, FD			
27:3	27:7		27:20	27:24	
27:6	27:7	FD, SPEC			
27:9	27:14	FD, SPEC			
27:9	27:19		27:20	27:24	
27:15	27:19	ARG			
34:25	35:5	A/A, ARG			
42:21	43:3	COMP			
43:9	43:23	SPEC, FD			
45:25	46:18	NO Q PUT, HRY, PREJ			
49:7	49:10	A/A, LT			
50:2	50:6	FD, SPEC			
50:10	50:17	FD, SPEC			
53:6	54:15		54:16	55:3	
53:23	54:15	REL			
55:8	56:3	SPEC, FD			
57:1	57:13	A/A, ARG, LT, VAG			
58:22 beginning with "Let me..."	59:5	FD, SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Terry Williams
08/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
58:22 beginning with "Let me..."	60:3 ending with "Yes."		60:4 beginning with "Last two years ..."	60:9	
60:10	60:16	A/A, ARG			
60:10	60:16		60:17	61:4	
65:4	65:23	SPEC, FD, NPK, REL			
79:11	79:14	VAG, ARB, HRY, SPEC			
79:16	79:21	VAG, ARB, HRY, SPEC			
79:16	79:21		80:6	80:17	
81:9	81:10	ARG, SPEC, LD, A/A, COMP, NPK			
82:19	83:11	FD, SPEC			
84:11 beginning with "This is talking ..."	86:1		86:12	89:18	
107:6	107:15	FD, SPEC			
109:16 beginning with "Mr. Hynek used ..."	109:25	SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Terry Williams
08/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
113:8	114:5	ARG, VAG, AMB, SPEC			
131:1	131:7	NO Q PUT, PREJ, COMP			
131:14	131:23	NO Q PUT, PREJ, COMP			
132:15	133:25	FD, NPK, SPEC, HRY			
134:3	134:8	FD, NPK, SPEC, HRY			
137:5	137:11		136:18	136:22	
137:5	137:11		137:12	138:8	
143:18	144:19	FD, SPEC			
143:18	145:20		143:4	143:10	
145:11	145:15	SPEC, FD			
145:16	145:20	SPEC, FD			
145:22	145:24	SPEC, FD			
146:1	146:21		147:20	148:8	
150:24	151:16	SPEC			
151:20	152:5	HRY			
159:12	159:14 ending with "computers."	STRIKE			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Terry Williams
08/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
161:7	161:10 ending with "October/November."	STRIKE			
161:7	161:13	A/A			
161:20	161:25	A/A			
162:8	162:21	A/A			
163:18	164:4	A/A, VAG, AMB			
164:5	164:10	A/A, SPEC			
164:11	165:21	A/A			
166:19	166:22	NO Q PUT, PREJ, COMP			
167:10	169:16		169:17	169:18	
167:10	169:16		169:21	170:4	
168:24	169:16	NO Q PUT, PREJ, COMP, SPEC			
170:6	174:23		177:15	179:3	
172:15	172:23	SPEC			
172:24	173:8	NO Q PUT, COMP			
173:9	173:18	SPEC, ARG			
184:16	185:8	SPEC, FD			
185:19	185:25	FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Terry Williams 08/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
186:6	186:10	FD, SPEC			
186:11	186:13	VAG, SPEC			
186:15	186:21	VAG, SPEC			
186:15	189:22		189:23	190:5	
187:17	188:19	HRY, FD, SPEC			
189:8	189:22	SPEC, VAG, AMB			
194:18	196:19		194:9	194:10	
194:18	196:19		194:16	194:17	
194:18	196:19		196:20	197:1	
196:8	196:9 ending with "came from."	STRIKE			
198:9	198:20		198:21	199:13	
199:14	200:3		198:21	199:13	
199:17	199:25	NO Q PUT, PREJ, COMP			
200:1	200:3	SPEC			
200:5	200:7	SPEC			
200:13	201:8	NO Q PUT, PREJ, A/A, COMP			
201:9	201:19	SPEC			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Terry Williams
08/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
209:6	209:10	VAG, ARB			
211:2	211:5	A/A, COMP			
211:7	211:12	A/A, COMP			
211:14	211:21	A/A, COMP			
212:4 beginning with "Is it your ..."	212:9	A/A, COMP			
212:4 beginning with "Is it your ..."	216:7		216:8	216:10	
212:4 beginning with "Is it your ..."	216:7		216:12	217:7	
213:6	213:15	Q-NO-A, PREJ, COMP			
213:16	214:8	COMP, A/A			
215:11	215:16	A/A, COMP			
216:3	216:7	A/A, COMP			
218:19	219:17		219:18	219:20	
219:21	220:4		219:18	219:20	
220:19	221:3	NO Q PUT, PREJ, COMP			
221:4	221:9	COMP			
221:10	221:16	NO Q PUT, PREJ, COMP			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Terry Williams
08/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
221:17	221:25	SPEC, VAG, AMB, CONC			
222:1	222:16	NO Q PUT, PREJ, COMP			
223:2	223:9	FD			
223:16	226:14	REL, ML			
225:7	225:17	NO Q PUT, PREJ. COMP			
225:19	225:22	SPEC			
225:23	226:3	A/A, COMP			
226:4	226:9	VAG, AMB			
226:16	227:24	REL, ML			
228:7	230:8	REL, ML			
228:7	230:8		230:9	230:16	
230:17	230:23	REL, ML			
230:17	233:11		230:9	230:16	
232:24	233:11	REL, ML			
233:13	234:16	REL, ML			
234:3	234:11	VAG, AMB			
234:12	234:16	FD, VAG, AMB			
234:18	234:23	FD, VAG, AMB			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Terry Williams
08/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
234:18	235:19	REL, ML			
234:24	235:7	A/A			
235:15	235:23	FD, VAG, AMB			
235:21	235:25	REL, ML			
237:8	242:3		242:4	242:11	
239:4	239:15	A/A, COMP, VAG, AMB			
240:20	242:3	SPEC, FD, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Terry Williams
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
249:19	249:20		249:21	250:1	
250:2	253:4		249:21	250:1	
250:22	251:2	PREJ,A/A			
257:20	258:3	FD			
258:4	258:5	FD,VAG,SPEC AMB			
258:7	258:10	FD,VAG,AMB, SPEC			
258:12	259:6	FD,VAG,ARG			
259:7	259:15	FD			
261:23	262:8	FD			
260:14	263:12		263:13	263:23	
265:10	266:5	SPEC			
267:10	267:21	SPEC,FD,NPK			
271:5	272:10	CALLS FOR OPINION,SPEC			
273:1	273:7	SPEC			
273:20	274:2	FD			
274:3	274:5	SPEC			
274:7	274:10	SPEC			
275:12	275:20	FD,SPEC,PREJ			
276:2	277:2		277:3	277:5	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Terry Williams
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
280:21	280:24	VAG,A/A			
284:5	284:8	REL			
288:8	288:10	REL,NO-Q-PUT			
288:11	288:19	A/A			
288:20	289:3	PREJ			
289:8	289:12	A/A,PREJ			
290:13	290:19	VAG, PREJ, NO-Q-PUT			
289:8	290:19		291:3	291:6	
289:8	290:19		292:24	294:4	
289:8	290:19		294:18	294:24	
289:8	290:19		296:11	296:25	
305:13	305:19	SPEC, FD			
306:23	307:2	FD			
307:6	307:14	NO-Q-PUT, PREJ			
307:15	308:9	SPEC,FD			
309:25	311:6		309:13	309:15	
311:23	312:2	FD,SPEC,NPK			
312:3	312:9	PREJ, NO-Q-PUT			
312:10	312:14	A/A,ATT-CL			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Terry Williams
08/27/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
313:8	315:17	HRY,FD,NPK, PREJ			
315:19	316:12	HRY,FD,NPK, PREJ			
319:9	319:16	NO-Q-PUT,PREJ,			
319:21	319:25	FD,SPEC			
329:20	330:9	NO-Q-PUT,PREJ			
330:10	330:14	FD			
331:25	332:3	FD,PREJ,A/A			
337:1	337:13	NO-Q-PUT,PREJ,			
340:16	340:19	A/A			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Warren S. Yager
5/12/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
29:18	29:24	NPK, SPEC			
56:23 58:15	58:6 59:3		58:7	58:14	
72:5	72:24		72:25	73:16	
86:2	86:20		77:18 beginning with "I can"	79:3	
86:2	86:20		79:14	79:24	
86:2	86:20		82:7	84:7	
86:2	86:20		84:12	84:22	
124:7	124:21	SPEC, NPK, FD			
124:7	124:21		124:22	125:2	
126:9	126:18		126:14	126:18	
128:18	129:7		128:7	128:17	
125:3	125:21		130:4	130:11	
125:3	125:21		130:14	130:17	
132:7	132:19		132:21	132:22	
138:10	139:2	ML, REL			
140:16	142:20	ML, REL			
146:11	146:25	ML, REL			
147:17	148:11	ML, REL			
148:17	148:25	ML, REL			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Warren S. Yager 5/12/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
168:17	169:21	ML, REL			
170:2	170:11	ML, REL			
173:4	174:25	ML, REL			
175:1	175:12	ML, REL, SPEC			
175:16	176:3	ML, REL			
177:2	178:4	ML, REL			
181:12	181:20	ML, REL			
189:21	190:4	ML, REL			
191:4	191:14	ML, REL, AMB			

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL.	PLAINTIFFS
v.	NO. 5:98CV-108-R
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC.	DEFENDANT

ORDER

This matter came before the court on motion of defendant UST to strike ceratin affidavits filed by plaintiff in support of their opposition to defendant's motion for summary judgment. (Docket No. 226). Plaintiff Conwood has responded, (Docket No. 236), and UST has filed a reply. (Docket No. 242).

When defendant moved for summary judgment, plaintiff responded and filed a number of affidavits from retailers regarding defendant's alleged anti-competitive activity at the retail level. Defendant argues, in the present motion, that the affidavits should be stricken because the affiants were not included on plaintiff's witness list and are prevented from testifying at trial. Plaintiff's position is more persuasive for three reasons.

First, defendants rely principally on Chappell v. Bradley, 834 F.Supp. 1030 (N.D. Ill 1993), for the proposition that affidavits should be stricken when the affiants were not included on a witness list. That case dealt with affidavits from expert witnesses who had not been disclosed. None of the affiants in the present case are expert witnesses so the Rule 26 analysis contained in Chappell is inapplicable. The Sixth Circuit has stated that:

> We agree ... that Rule 56 of the Federal Rules of Civil Procedure does not require that affiants be included in a witness list before their affidavits may be used to support a motion for summary judgment.

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Ryder Automotive Carrier Group v. General Teamsters Sales & Service and Industrial Union Local No. 654, 124 F.3d 199 (Table), 1997 WL 540893 (6th Cir. Sept. 2, 1997).

Second, the ruling that defendant seeks is dependent on a finding that none of the affiants at issue will be permitted to testify at trial in any capacity. It is premature at this point to consider or decide who is qualified to testify as a rebuttal witness or to predict how the district court will construe the magistrate judge's orders regarding witnesses for plaintiff's case-in-chief.

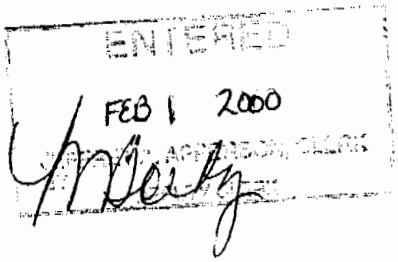
Third, the record contains other evidence regarding plaintiff's allegations of anti-competitive behavior at the retail level and the presence or absence of the affidavits in question is not crucial to deciding defendant's motion for summary judgment.

Date: January 31, 2000

James D. Moyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record



16diii003285

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MOTIONS IN LIMINE

Pursuant to the Court's February 18, 1999 Scheduling Order, Defendants United States Tobacco Company, et al. ("USTC") respectfully ask the Court to:

1. Preclude undisclosed expert witness materials and related testimony and declarations of Conwood Company, L.P., et al. ("Conwood");

2. Require Conwood to prove exclusionary conduct and fact of injury at specific retail stores and chains;

3. Preclude Conwood from offering Professor Gundlach's "study" of purported "exclusive agreements" and related testimony; and

4. Enter an order simplifying the issues at trial and facilitating the disposition of this lawsuit;

5. Preclude certain of Conwood intended trial exhibits and testimony referencing such exhibits.

6. Preclude all evidence offered by Conwood concerning conduct protected by Noerr-Pennington immunity;

7. Preclude irrelevant, misleading and unfairly prejudicial statements and references by or on behalf of Conwood;

A tendered order is attached hereto. With this motion, USTC is filing a separate memorandum in support of each separate motion listed above.

Respectfully submitted,

Dated: January 28, 2000

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16diii003287

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

Defendants United States Tobacco Company, et al. ("USTC") having moved the Court for certain in limine relief with respect to evidence, argument or statements expected or intended to be offered at trial by Plaintiffs Conwood Company, L.P., et al. ("Conwood"), and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED as follows:

1. USTC's motion for an order in limine precluding Conwood from introducing at trial its intended group trial Exhibits 326 and 327 and any related testimony is hereby GRANTED;

2. USTC's motion for an order in limine requiring Conwood to prove specific exclusionary misconduct by USTC, and any injury in fact from such conduct, at specific retail establishments is hereby GRANTED:

3. USTC's motion for an order in limine precluding the introduction of any part of the Gundlach "study" of purported "exclusive agreements" as well as any related testimony is hereby GRANTED;

4. USTC's motion for an order in limine precluding Conwood from presenting its Lanham Act, Kentucky state law, and attempted monopolization claims at trial is hereby GRANTED;

5. USTC's motion for an order in limine precluding the introduction of Conwood "unethical activity reports" and "sworn declarations," as well as any reference to such materials is hereby GRANTED;

6. USTC's motion for an order in limine precluding the introduction of any evidence and any argument concerning conduct protected by Noerr-Pennington immunity is hereby GRANTED; and

7. USTC's motion for an order in limine precluding Conwood from drawing analogies to the United States v. Microsoft case, from referencing violent or criminal behavior such as "kneecapping" a competitor, and from simply referring to USTC as a "monopolist" beyond the bounds of legitimate legal argument is hereby GRANTED;

Entered this _____ day of _____, 2000.

_____

Judge Thomas B. Russell
United States District

16diii003289

TENDERED BY:

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16diii003290

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE TO PRECLUDE UNDISCLOSED EXPERT WITNESS MATERIALS AND RELATED TESTIMONY AND DECLARATIONS

Defendants United States Tobacco Company, et al. ("USTC"), respectfully move this Court for an order in limine precluding Plaintiffs Conwood Company, L.P., et al. ("Conwood"), from introducing any exhibits to be used as a summary of or support for its experts' opinions that were not disclosed at the appropriate time pursuant to Fed. R. Civ. P. 26(a)(2)(B) and precluding Conwood from eliciting testimony or providing declarations from its witnesses reflecting or relating to any of this previously undisclosed material or analysis.

Under this Court's February 18, 1999 Scheduling Order, Conwood was required to disclose its initial expert reports by August 1, 1999. On August 1, Conwood submitted five expert reports. The Scheduling Order also provided Conwood with an opportunity to supplement its initial expert reports on October 1, 1999. On October 1, Conwood submitted five expert rebuttal reports.

Under Fed. R. Civ. P. 26(e), Conwood was "under a duty to supplement" the expert reports it provided on August 1 and October 1. Conwood did not supplement its expert reports.

Now, on the eve of trial, Conwood is apparently reacting to a full realization that USTC's pending Daubert motion is likely to result in the preclusion of Dr. Leftwich's damages testimony. First, on Friday, January 21, 2000, under the guise of exchanging exhibit lists, and then, boldly, this afternoon, Friday, January 28, 2000, in the form of a so-called "Supplemental Declaration of Richard Leftwich," Conwood has revealed the results of a new surprise expert report on alleged damages, among other things. The best we can tell, these new expert "exhibits" and the "Supplemental Declaration" are based on previously undisclosed data and previously undisclosed methodologies and analyses, which result in completely new and previously undisclosed conclusions. Because of Conwood's impermissible, last-ditch tactics to cure its fatally flawed damages "proof," we are procedurally back to square one with an equally defective new damages approach now on the table. Just as this new work is a confession by Conwood that USTC's overwhelming Daubert motion should be granted, it is a desperate attempt to resurrect Dr. Leftwich that seeks to circumvent the disclosure requirements of Rule 26(a)(2)(B) and 26 (e)(1).

The new or modified expert exhibits, whether offered as Conwood's intended trial exhibits, or as demonstrative aids or exhibits, should be excluded on this motion along with all related testimony, and the "Supplemental Declaration" should be rejected and stricken. These submissions are untimely; they deprive USTC of a meaningful opportunity to cross-examine the information and analysis; they deprive USTC's expert witnesses of a meaningful opportunity to respond to the information and analysis; they are made with the intent and purpose of "sandbagging"

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USTC and making an end-run around the disclosure requirements for expert witnesses clearly set forth in the Federal Rules.

Should there be any remaining doubt that, beyond continuing to fail to submit proper damages proof, Conwood has also strung USTC and the Court along, consider these obvious and irrefutable facts:

- The "analysis" behind Dr. Leftwich's Supplemental Declaration must have been completed before Conwood could supply the new expert exhibits relating to the analysis on January 21, 2000, yet we did not receive the Supplemental Declaration itself explaining the analysis until a full week later, on January 28, 2000, the very day motions in limine are due in this case and this memorandum is filed.

- To the extent the Supplemental Declaration is purportedly based upon so-called "information that recently became available" to Dr. Leftwich, see Supp. Decl. ¶ 1, the copy of the "recently" acquired information at Appendix A to the Supplemental Declaration shows on its face that Dr. Leftwich's assistant at Lexecon Inc. was faxed the new information on December 9, 1999, some 50 days ago.

- The "recently" acquired information received on December 9, 1999 apparently represents a correction of faulty data originally received by Dr. Leftwich on July 23, 1999, shortly after he was hired and a mere 10 days before he relied upon it in submitting his original expert report on August 2, 1999. Leftwich Dep. at 13-14, 217, Tab 1. In contrast, with trial bearing down on USTC, Conwood and Dr. Leftwich waited 50 days, more than a month and exactly five times as long as Dr. Leftwich needed the first time, before submitting the surprise "Supplemental Declaration" at the eleventh hour.

- USTC filed its Daubert motion on November 15, 1999. Conwood responded on December 9, 1999, the very day Dr. Leftwich received the "recently" acquired data. USTC replied on December 22, 1999, and the motion stood submitted to the Court. Even though Conwood had begun revamping its damages approach and Dr. Leftwich's testimony at least as early as December 9, 1999, at no point before today, 50 days later, did Conwood advise USTC or the Court of the fact that Conwood intended to rely upon different damages proof at trial. This failure of candor and forthrightness left USTC and the Court to spin their wheels dealing with Conwood's and Dr. Leftwich's now-abandoned first damages effort while Conwood secretly and belatedly prepared a new and different damages approach for trial.

Under these circumstances, there is no basis for allowing Conwood even to attempt to cure, to the unfair prejudice of USTC, what Conwood now has belatedly, but correctly, determined to be unusable expert damages testimony. Accordingly, USTC asks the Court in this motion to reject in its entirety this new damages approach by Conwood and Dr. Leftwich. Separately, unless this motion and USTC's pending Daubert motion are both granted in the meantime, USTC intends to supplement and extend its Daubert motion to Conwood's and Dr. Leftwich's latest, but still unusable, damages work.

ARGUMENT

Fed. R. Civ. P. 26(a)(2)(B) requires a party to submit a report for each expert witness that is retained to testify in the matter. Specifically, the Rule requires, inter alia, that the report contain "any exhibits to be used as a summary of or support for the opinions" of the witness.[1] The rule does not suggest that some exhibits need not be disclosed or that additional exhibits may nevertheless be created and used at trial. Conwood should not be allowed to do so now. Accordingly, USTC respectfully moves this Court for an order in limine precluding Conwood from using any demonstrative exhibit with its expert witnesses that was not disclosed to USTC at the appropriate time and further precluding Conwood from eliciting from its witnesses any testimony related to the contents of the excluded demonstrative exhibits.

I. CONWOOD HAS MADE UNTIMELY SUBMISSIONS OF DEMONSTRATIVE EXHIBITS TO BE USED WITH ITS EXPERT WITNESSES

Conwood's intended trial exhibits (specifically, those exhibits grouped under Exhibit Nos. 326 and 327) includes 131 charts and graphs that summarize and support the opinions of its

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[1] Pursuant to this rule, USTC submitted two expert reports, complete with more than ninety potential trial exhibits summarizing and supporting the opinions to be offered at trial.

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experts. These exhibits cover a myriad of information regarding market shares, prices, costs, revenues, purported "effects" of USTC's allegedly exclusionary conduct, and Conwood's claimed damages. Although some of these exhibits appear to be duplicative of materials that were properly disclosed,[2] the vast majority of the exhibits are new information not properly disclosed under Fed. R. Civ. P. 26(a)(2)(B).[3]

II. CONWOOD SHOULD NOT BE ALLOWED TO USE EXHIBITS AND TESTIMONY THAT WERE NOT PROPERLY DISCLOSED TO USTC

Conwood's failure to comply with Fed. R. Civ. P. 26(a)(2)(B) (or to timely supplement its disclosures under Fed. R. Civ. P. 26(e)(1)), deprived USTC of the opportunity to conduct a complete cross-examination of Conwood's experts -- the very purpose of the Rule's disclosure requirements. Conwood should be precluded from using these exhibits or any related testimony at trial.

In United Phosphorus, Ltd. v. Midland Fumigant, Inc., 173 F.R.D. 675 (D.Kan. 1997), plaintiffs moved in limine to preclude the defendants' use of expert materials that were not produced until the exhibit marking session. Id. at 677. Plaintiffs argued that defendants' failure to disclose the new exhibits until the exhibit-marking session resulted in prejudice because the exhibits "recast[ed] and restat[ed]" the expert's opinion and would, if admitted, defeat the purpose of the disclosure requirements and would encourage "sandbagging". Id. The court agreed. Citing the defendants' failure to disclose the exhibits under Rules 26(a)(2)(B) or supplement its previous

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[2] For example, Ex. 326, pages 24-25, 40-41, 43-54; and Ex. 327, 41-46.

[3] See Ex. 326, pages 1, 5-10, 17, 20, 22, 33-39, 42, 55; Ex. 327, pages 15-16, 28-40, 47-76 (charts and graphs containing entirely new data that was not disclosed pursuant to Fed. R. Civ. P. 26(a)(2)(B)); see also Ex. 326, pages 2- 4, 11-16, 18-19, 26-29, 32; Ex. 327, pages 1-14, 17-24, 26-27, 30-31 (charts and graphs that have been modified and supplemented).

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disclosure under Rule 26(e)(1), the court precluded defendants' use of the additional exhibits. Id. at 677-68. See also Boardman v. National Medical Enterprises, 106 F.3d 840, 843 (8th Cir. 1997) (precluding introduction of undisclosed evidence and noting that "[t]he power of the trial court to exclude exhibits and witnesses not disclosed in compliance with its discovery and pretrial orders is essential" to the judge's control over the case); Pride v. Bic Corp., 54 F.Supp.2d 757, 759 (E.D.Tenn. 1998) (excluding late-disclosed expert witness information).[4]

Here, allowing Conwood to use these additional expert materials at trial clearly would defeat the purpose of the disclosure requirements, and like in United Phosphorous, would encourage "sandbagging," and unfairly prejudice USTC. Conwood had ample opportunity to retain experts, to conduct a study of the industry and of the evidentiary record, and to provide full disclosures, either at the time Conwood's initial expert reports were due, at the time Conwood's rebuttal expert reports were due, or, at a minimum, at any reasonable time pursuant to Fed. R. Civ. P. 26(e). Accordingly, because Conwood made no such disclosures – at any time – USTC respectfully requests that this Court issue an order precluding the use of the non-disclosed exhibits at trial.

III. INTRODUCTION OF CONWOOD'S DEMONSTRATIVE EXHIBITS AND ITS NEW DAMAGES APPROACH WOULD UNFAIRLY PREJUDICE USTC

Conwood's intended trial exhibits contain summaries and graphs of data that is entirely different than that disclosed with its expert reports.[5] These new materials are based on data

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[4] See also United Phosphorus, 173 F.R.D. at 677 (materials excluded because disclosure one week before Daubert hearing resulted in prejudice); Ridder v. City of Springfield, 108 F.3d 1377, 1997 WL 117024, at *2 (striking expert testimony because reports did not comply with Rule 26(a)(2)).

[5] Most notably, Ex. 326, pages 1, 5-10, 17, 20, 22, 33-39, 42, 55; Ex. 327, pages 15-16, 28-40, 47-76.

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that was not disclosed and for which no foundation has been laid. Furthermore, Dr. Leftwich now employs an entirely new methodology, apparently designed to reinflate damage numbers substantially deflated by the substitution of new, untested, but supposedly reliable sales data. Conwood's failure to disclose these materials during expert discovery, or at least when they were received in December 1999, has deprived USTC of the opportunity to challenge, during expert discovery or at a reasonable time, the foundation of these summaries, the accuracy of the underlying data, and the extent and degree of Conwood's experts' reliance upon thereon. Moreover, Dr. Leftwich's new methodology is revealed too late to allow it to be appropriately explored, tested, challenged and refuted by USTC.

Conwood will most likely argue that USTC would have an opportunity to challenge Conwood's new damages approach at trial. This is, at best, a non-argument. USTC will be unfairly prejudiced if forced, on the eve of trial (and five months after Conwood's required 26(a)(2)(B) disclosures), to rush to verify the foundation and accuracy of literally dozens of charts that rely upon newly disclosed data. This is exacerbated by the fact that the vast majority of the charts contained in Exhibits 326 and 327 do not contain source information. It would fly in the face of the intent and purpose of Fed. R. Civ. P. 26(a)(2)(B), as well as the intent and purpose of having expert discovery at all, if cross examination at trial were the first opportunity USTC had to explore the basis of any charts and information and the appropriateness of newly employed methodology. Accordingly, these materials should be excluded.

CONCLUSION

For the foregoing reasons, this Court should enter an order in limine precluding Conwood from introducing at trial its intended group trial Exhibits 326 and 327, any portion of the Supplemental Declaration or its attachments, or any related testimony.

Dated: January 28, 2000

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(Cite as: 108 F.3d 1377, 1997 WL 117024 (6th Cir.(Ohio)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the publication and citation of unpublished opinions.)

Stephen Michael RIDDER, Plaintiff-Appellant,
v.
CITY OF SPRINGFIELD, Clark County, Gene A. Kelly, Roger Evans, Robert Marcum, Ronald Mendah, Robert Kerr, Walter J. Lawrence, Defendants-Appellees.

No. 95-3358.

United States Court of Appeals, Sixth Circuit.

March 13, 1997.

On Appeal from the United States District Court for the Southern District of Ohio, No. 90-00003; Michael R. Merz Magistrate Judge.

S.D.Ohio

AFFIRMED.

Before: SUHRHEINRICH and MOORE, Circuit Judges; McKINLEY, District Judge. [FN*]

FN* The Honorable Joseph H. McKinley, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

OPINION

MOORE, Circuit Judge.

**1 Plaintiff-Appellant Stephen M. Ridder appeals the magistrate judge's entry of summary judgment for all defendants in this 42 U.S.C. § 1983 action. For the reasons that follow, we affirm. [FN1]

FN1. This panel also addresses in a published opinion, No. 95-4220, Ridder's appeal of sanctions imposed after judgment by the magistrate judge pursuant to Fed.R.Civ.P. 11 and 28 U.S.C. § 1927.

I

From January 1986 through July 1988, a series of rapes occurred in and around Springfield, Ohio. In July 1988, Stephen Ridder's hand was nearly severed in an industrial accident. While physicians reattached his hand, a hospital employee identified Ridder's voice as that of her attacker. Police began investigating Ridder. He could be placed in the general area for several of the incidents and five of eight victims identified him in a lineup. Pursuant to a fourteen-count indictment, the Springfield Police Department arrested Ridder on September 8, 1988. From then until January 4, 1989, Ridder was detained in the Clark County Jail.

As of the date he was arrested, the surgical incisions on Ridder's hand had healed and there was no drainage or infection. Nonetheless, he was going to physical therapy three times a week at Miami Valley Hospital, a fact noted on Ridder's detention screening form. On September 14, 1988, Ridder was examined by Dr. Walter R. Lawrence. It is disputed whether Ridder verbally told Dr. Lawrence about his therapy, but, in any event, Dr. Lawrence saw no need for physical therapy. From mid-September through mid-October, Ridder did not attend any physical therapy sessions. In mid-October, Ridder obtained a letter from his treating physician addressing Ridder's need for therapy and follow-up surgery. Subsequent to the letter and corresponding court order, Ridder was transported to all scheduled surgical procedures and therapy sessions and was provided pain medication drugs.

On January 4, 1989, DNA tests exonerated Ridder. He was released from jail that day, and all charges against him were later dropped.

On January 4, 1990, Ridder filed a complaint against the City of Springfield, Clark County, Prosecutor Stephen A. Schumaker, [FN2] Clark County Sheriff Gene A. Kelly, Springfield Chief of Police Roger Evans, Sergeant Robert Marcum, Detectives Ronald Mendah and Robert Kerr, and Dr. Walter Lawrence alleging several causes of action pursuant to 42 U.S.C. § 1983 (deliberate indifference to serious medical needs, denial of due process, and subjection to cruel and unusual punishment), 42 U.S.C. § 1985, and state law (medical malpractice, conspiracy, and defamation). The assigned magistrate judge, Michael R. Merz,

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noted several pleading deficiencies and gave Ridder the opportunity to amend the complaint. The magistrate judge subsequently dismissed most claims in the amended complaint as failing to state a claim upon which relief could be granted or as barred by qualified immunity. Ridder obtained leave and filed a second amended complaint. For this complaint, the magistrate judge granted a defense motion for a more definite statement, noting that several earlier pleading deficiencies remained. Ridder sought leave to file a third amended complaint and filed it on August 17, 1993. The magistrate judge found that complaint sufficient to proceed to discovery.

FN2. Ridder voluntarily dismissed the appeal as to Schumaker on May 5, 1995.

**2 The scheduling order, dated February 15, 1994, specified that Ridder was to furnish expert reports to opposing counsel and the court by May 15, 1994. The magistrate judge expressly reminded counsel about the recent amendments to the Federal Rules of Civil Procedure, and directed that the expert reports "shall comply with Fed.R.Civ.P. 26(a)(2) (as amended December 1, 1993)." Scheduling Order, ¶ 5 n. 2; J.A. at 668.

On May 16, 1994, Ridder purported to comply with the required expert report disclosure, stating that for his fourteen-plus expert witnesses ("each defendant" was listed as an expert for the plaintiff), some reports had already been furnished while others would be forthcoming. The magistrate judge found that Ridder's disclosure failed to comply with Rule 26(a)(2) with respect to every witness. As no expert reports had yet been filed, the magistrate judge ordered Ridder to furnish copies of the supposedly completed reports and warned that nonconforming reports would be stricken and witnesses not permitted to testify. At that time the magistrate judge struck six names from Ridder's expert list for which no reports had been actually or supposedly filed. Ridder then filed reports as to the eight remaining experts. Again, the magistrate judge determined that the reports did not comply with Rule 26(a)(2) and consequently struck those experts. The effect was to bar the testimony of all of Ridder's non-defendant experts.

On July 8, 1994, Ridder requested an additional thirty days to comply with Rule 26(a)(2). The magistrate judge denied the request without prejudice to renewal if Ridder made an actual showing of excusable neglect and attached complying expert reports. The issue of expert testimony then lay dormant for over six and a half months, while the discovery completion date passed. On January 23, 1995, Ridder renewed his effort to allow his experts to testify. The magistrate judge, however, disapproved of the delay and denied Ridder's renewed motion. The magistrate judge found that ignorance of amendments to the Federal Rules of Civil Procedure, especially after repeated reminders, did not amount to excusable neglect, and that Ridder's counsel had been given ample time to come into compliance. When Ridder finally resurrected the expert testimony issue, none of Ridder's proposed expert witnesses had been deposed, discovery had been completed, defendants had filed their summary judgment motions, and the trial date was only forty-two days away.

In December 1994, all defendants filed summary judgment motions. The magistrate judge struck some of Ridder's evidence in opposition of summary judgment, namely the unsworn letters of two physicians and inadmissible opinion testimony of Ridder. On February 28, 1995, the magistrate judge granted summary judgment in full to all defendants. Ridder timely appealed.

II

Ridder alleges several errors in the magistrate judge's handling of this protracted litigation. [FN3] First, Ridder asserts that the magistrate judge erred by dismissing claims against the individual police officers, the Chief of Police, and the Sheriff pursuant to the doctrine of qualified immunity. [FN4] The application of qualified immunity to a particular defendant is a question of law; our review is de novo. Long v. Norris, 929 F.2d 1111, 1114 (6th Cir.), cert. denied sub nom. Jones v. Long, 502 U.S. 863 (1991). The ultimate burden of proof is on Ridder to show that defendants are not entitled to qualified immunity. See Rich v. City of Mayfield Heights, 955 F.2d 1092, 1095 (6th Cir.1992). "[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action ... assessed in light of the legal rules that were 'clearly established' at the time it was taken." Anderson v. Creighton, 483 U.S. 635, 639 (1987) (citing Harlow v. Fitzgerald, 457 U.S. 800, 819

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(1982)). Ridder makes vague allegations that police officers failed to investigate fully the possibility that Ridder might not have been involved in the rapes (although they did question Ridder and make some follow-up calls), and that they withheld from a search warrant affidavit inconsistent information given by the rape victims. Ridder fails to demonstrate what clearly established law created a duty for a police officer to conduct an alibi investigation in a particular manner, or how the claimed affidavit omissions would have negated the search warrant's probable cause. Based upon the proffered evidence, it cannot be said that the officers' conduct in procuring the warrant and partially investigating Ridder's alibis violated clearly established constitutional rights.

FN3. Some defendants assert that Ridder failed to preserve his appeal properly as to orders of the magistrate judge other than the one dated February 28, 1995, due to Ridder's failure to list other orders in his notice of appeal. This argument is not well-taken. Ridder expressly appeals from the "judgment." See Notice of Appeal; J.A. at 406. Such language is construed generally to represent the ultimate resolution of the case. Thus, Ridder preserved appellate review as to all non-moot orders rendered by the magistrate judge previously in the litigation.

FN4. The section of Ridder's appellate brief discussing qualified immunity is entirely based on the magistrate judge's order dated March 4, 1992--an order that never took final effect. Subsequent to this order, Ridder obtained leave and filed a second amended complaint. Counsel is admonished to be mindful of which orders in the course of litigation become final and which are later superseded.

**3 Ridder is also unable to sustain his claims against the Sheriff and Chief of Police. The record provides no basis to conclude that either supervisor was personally involved in Ridder's case, or that either supervisor encouraged or knowingly acquiesced in a constitutional deprivation. Thus, the magistrate judge properly dismissed the claims against the Sheriff, the Chief of Police, and the individual officers on the basis of their qualified immunity from suit.

B

The magistrate judge was also correct in granting summary judgment as to all other claims and defendants. [FN5] We review a district court's granting of summary judgment de novo, viewing all facts and inferences in a light most favorable to the nonmoving party. Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 965 (6th Cir.1991). "[T]he nonmoving party cannot rest on its pleadings but must present some 'specific facts showing that there is a genuine issue for trial.' " Id. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)).

FN5. As Ridder's appellate brief makes no mention of summary judgment as to Clark County, we conclude that Ridder has waived appellate review of this issue.

As to the City of Springfield, a municipality will be liable under § 1983 only if a person was deprived of constitutional rights pursuant to a custom, usage, or policy of that entity. See Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978). Ridder alleges that Springfield had a policy of consistently procuring defective search warrants. Yet, Ridder puts forth no evidence of a written policy or a decision of the person with ultimate authority to establish municipal policy. Nor does Ridder present affidavits or other evidence of other persons similarly violated, which would tend to show a pattern or custom. Even after benefitting from full discovery, Ridder failed to evince a custom, usage, or policy of the City that deprived him of constitutional rights. Thus, Ridder's claim against the City of Springfield was properly dismissed.

As to Dr. Lawrence, Ridder's evidence in opposition to summary judgment is manifestly lacking. Undoubtedly, Ridder's counsel is aware that unsworn, and even unsigned, letters do not amount to admissible evidence. Ridder has thus failed to show facts giving rise to a genuine issue concerning Dr. Lawrence's deliberate indifference to serious medical needs or medical malpractice.

While this litigation was running its course, Rule 26 of the Federal Rules of Civil Procedure was amended, with the amended rule taking effect on December 1, 1993, and governing actions then pending insofar as just and practicable. See 146 F.R.D. 404. Ridder argues that the application of amended Rule 26(a)(2)(B) to his case was unjust and unworkable, thereby prejudicing him to the extent that he was unable to utilize any expert testimony. [FN6] We hold otherwise. It was certainly feasible to apply the amended rule in this case, for discovery

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had not yet commenced when the new rule took effect. It was also just, considering that the magistrate judge alerted counsel twice to the changes in the rule and allowed Ridder two opportunities to comply. Because changes in the federal rules will be applied to pending cases to the fullest extent possible, we stress that Ridder's counsel had the responsibility to stay abreast of such changes, especially when all he had to do in this case was read the scheduling order.

> FN6. Rule 26(a)(2)(B), as amended, requires, with respect to a witness who is retained or specially employed to provide expert testimony, the disclosure of a report containing a statement of all opinions, data, exhibits, qualifications (including publications authored in the preceding ten years), compensation, and a listing of any other cases in which the witness has testified within the preceding four years.

**4 Ridder also objects to the magistrate judge's application of Rule 26(a)(2)(B) to treating physicians. We find no error with the magistrate judge's order. The plain language of the order permits Ridder's treating physicians to testify without Rule 26(a)(2)(B) expert report disclosures "so long as they do not purport to testify beyond the scope of their own diagnosis and treatment." Decision and Order; J.A. at 383. Thus, nothing precluded Ridder from submitting, in opposition to summary judgment, a properly sworn affidavit by a treating physician detailing Ridder's treatment.

We review the magistrate judge's decision to invoke Rule 37 discovery sanctions for abuse of discretion. Taylor v. Medtronics, 861 F.2d 980, 985 (6th Cir.1988). Among the factors to be considered are: (1) whether the adversary was prejudiced by the failure to cooperate in discovery; (2) whether the sanctioned party was warned; and (3) whether less drastic sanctions than dismissal were imposed or considered. Id. at 986. Here, the magistrate judge struck the expert testimony only after repeated failure to produce adequate expert reports. Ridder had been given ample warning that noncompliance with expert report disclosures would result in striking the testimony. Under the circumstances, had the magistrate judge granted Ridder's late request to renew the expert testimony issue after a six-and-a-half-month delay, the non-offending parties would likely be prejudiced. At that point, Ridder's experts had not been deposed, the trial date was six weeks away, and summary judgment motions had already been filed. We cannot hold that, by sanctioning a party who had repeatedly failed to comply with discovery provisions, the magistrate judge abused his discretion in the instant action.

C

Ridder raises other issues dealing with his ability to amend further the complaint, the alleged partiality of the magistrate judge, and what Ridder asserts to be a denial of substantial justice. We have considered those arguments and hold them to be without merit.

As to Ridder's argument that the magistrate judge erroneously held him to a heightened pleading requirement for his § 1983 claims against individual defendants, we direct counsel to Veney v. Hogan, 70 F.3d 917, 919 (6th Cir.1995) (holding that a plaintiff bringing a § 1983 action against individual government officials must satisfy a heightened standard of pleading when the defense of qualified immunity is raised), which remains the law in this circuit. Moreover, we cannot discern how Ridder was prejudiced if such a pleading error occurred, as Ridder's third amended complaint enabled the case to progress beyond the pleadings.

III

We are unable to find fault with the magistrate judge's handling and disposition of Ridder's case. Quite the contrary, we believe that the magistrate judge gave Ridder every reasonable opportunity to litigate these claims. Ridder's counsel simply failed to follow through. We will not countenance holding the magistrate judge accountable for what were, in all respects, Ridder's counsel's shortcomings. The judgment of the magistrate judge is AFFIRMED.

END OF DOCUMENT

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EXHIBIT 1

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

- - - - - - - - - - - - - - - - - - - -X

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.L.P., Plaintiffs, : Civil Action No. 5:98 CV-108-R

vs.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY, INC., and UST, INC., Defendants.

- - - - - - - - - - - - - - - - - - - -X

DEPOSITION OF RICHARD LEFTWICH

(Taken by Defendants)

Chicago, Illinois

Tuesday, November 2, 1999

Reported by: Robin Tokarz-Chimniak, CSR No. 084-001999

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Q. The same one you just mentioned?
A. No, that was a different --
Q. Different one?
A. Different one.
Q. What was the conduct at issue in that case, if you recall?
A. The conduct in that case was price collusion.
Q. So it was a price fixing case?
A. Price fixing essentially, yes.
Q. Did you address issues of causation in that case?
A. No, I did not.
Q. Have you ever been qualified by a court as an expert witness to offer an opinion on antitrust damages?
A. Not that I recall.
Q. In the two cases you had mentioned, did you find that there were damages in those cases, in your expert view?
MR. GORSUCH: The two that you're talking about -- I just want the record to be clear -- is the carbon dioxide case and the chemical industry case?
MR. KEYTE: Yes.

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MR. GORSUCH: Okay.
THE WITNESS: I don't specifically recall on the chemical industry case. I do recall on the carbon dioxide case.
BY MR. KEYTE:
Q. And?
A. That I did.
Q. You did. And what was the result of that case?
A. Both cases were settled.
Q. So in both cases, the plaintiff didn't go through a trial and win at trial; is that correct?
A. In the particular parts of the case I testified -- I prepared -- I was consulted in, no. That's correct.
Q. Have you given expert testimony in any judicial proceeding on prior occasions concerning antitrust damages?
A. If you could define what you mean by "judicial proceeding."
Q. How about in a federal court in the United States?
A. No, I have not.
Q. What experience do you have in

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assessing antitrust damages in the retail industry?
A. As I've testified, I have not -- I have not previously -- I have not previously consulted in that area of antitrust damages.
Q. So am I correct that you have no experience in assessing damages relating to marketing practices by suppliers in a retail industry?
A. I believe that was my previous -- that's the -- that's consistent with my previous answer, yes.
Q. What experience as an expert witness do you have in the moist snuff industry, if any?
A. None previous to this case.
MR. GORSUCH: You don't use the product? I'm sorry.
MR. KEYTE: That's all right.
BY MR. KEYTE:
Q. How about with respect to other tobacco products? Any experience as an expert?
A. I have -- if you could repeat the question.
Q. What experience do you have as an expert witness in other tobacco products?

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A. I have -- I have consulted on occasion on some other tobacco products.
Q. In an antitrust case?
A. Not in an antitrust case.
Q. Who contacted you about potentially testifying in this case?
A. Chip Bamberger.
Q. Who is he?
A. He's a person who works at Lexecon, L-e-x-e-c-o-n.
Q. And when did he contact you?
A. Sometime in the late summer.
Q. Of?
A. 1999.
Q. What do you mean by "late summer"?
A. I was thinking July, somewhat optimistic about when the summer starts in Chicago.
Q. And approximately when in July?
A. I don't specifically recall.
Q. When were you first retained as an expert witness in this case?
A. If you could clarify what you mean by "retained."
Q. Do you understand what that means, to

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be retained, engaged?
MR. GORSUCH: How about "hired"?
MR. KEYTE: "Hired," that's fine, even though I will ask the questions.
MR. GORSUCH: I'm just trying to help.
MR. KEYTE: I know, but sometimes that may move into different areas down the road.
THE WITNESS: My recollection is within one week of my initial contact with -- within -- following shortly within a week of the initial contact with Chip.
BY MR. KEYTE:
Q. Do you recall if this was after the July 4th holiday?
A. No, I don't specifically.
Q. Do you recall whether any parts of the analysis in your report was worked on or prepared before you were retained?
A. Yes, I do recall.
Q. And?
A. The answer is none of it. All of the work was done subsequent to my being engaged. At least to the extent to which -- at least -- if I could -- I have no awareness of some work I referred to, in particular the work by Professor

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Kamien. I have knowledge only of my direct work product.
Q. Did Mr. -- is it Mr. Vandenberger?
A. Bamberger, B-a-m-b-e-r-g-e-r.
Q. Do you know whether Mr. Bamberger had done any work related to damages in this case prior to you being retained?
MR. GORSUCH: Asked and answered.
THE WITNESS: My understanding is he had not.
BY MR. KEYTE:
Q. Do you know whether anybody at Lexecon had done any work, prior to your retention, on the subject of antitrust damages?
MR. GORSUCH: Asked and answered.
THE WITNESS: My understanding is that nobody had done any work relating to damages. Nobody at Lexecon, excuse me.
BY MR. KEYTE:
Q. How about Kellogg, Huber? Is it your understanding that Kellogg, Huber had done any work relating to damages prior to your being retained?
A. You asked was it. It wasn't -- at the time it was my understanding that no work had

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been done.
Q. Did you come to learn at some point that work had been done by Kellogg, Huber?
A. I subsequently learned of a calculation that had been performed by Kellogg, Huber.
Q. What was that calculation?
A. I have an inartful description of the legal document, but it seemed to be an affidavit or a complaint or something like that.
Q. Did you see work by Kellogg, Huber of the calculation they did, prior to your retention, relating to antitrust damages?
MR. GORSUCH: Objection, misstates prior testimony.
Go ahead.
THE WITNESS: After I was retained, I saw a document that contained some calculations that I was told were performed by Kellogg, Huber.
BY MR. KEYTE:
Q. And did you review that document as part of your analysis?
A. I read the document. If by "review" that's what you mean, I read the document.
MR. KEYTE: I'll just ask, for the record, whatever that is, if we could have that.

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MR. GORSUCH: I don't know what it is. I assume it's the complaint. He's talked about a pleading or whatever.
MR. KEYTE: The complaint, I don't believe, has a calculation.
MR. GORSUCH: It talks about $48 million in damages.
BY MR. KEYTE:
Q. Was this a calculation or a narrative description? I think you said calculation.
A. It was a calculation of some --
Q. With numbers?
A. With some numbers. It was a legal document. I don't specifically remember what type of legal document.
MR. GORSUCH: If you can establish more precisely what it is, but I think whatever it is, it's been produced.
BY MR. KEYTE:
Q. What is your relationship with Lexecon?
A. I have an understanding with Lexecon that if I am contacted to do expert witness testimony, that I will use Lexecon to provide litigation support services --
MR. GORSUCH: I know what it is. It's

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by the regression.
Q. Would you agree with me that the relative change in share in some of the relatively low states was higher than the relative change in share in Maine?
MR. GORSUCH: Objection to the characterization -- or mischaracterization of the document.
Go ahead, if you can, Professor, one more time.
THE WITNESS: The regression measures the absolute change, not the relative change. Some of the states have longer names than others, too. I don't see the relevance of that.
BY MR. KEYTE:
Q. Do you see the relevance of knowing why California, for example, had a higher rate of growth than Maine, even though it was a small state? Do you see the relevance of that, sir?
A. Even if California was a --
MR. GORSUCH: Small state?
MR. KEYTE: Low-share state, excuse me.
THE WITNESS: That observation affects the regression. It's included in the regression because I want -- those observations are all

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included in the regression and given the appropriate weight by the regression.
BY MR. KEYTE:
Q. Shouldn't the result of your regression conform, at least, or at least be consistent with the reality of what is going on in each state?
A. The regression reflects the reality of what's going on in each state.
Q. Would that last statement you make depend on the data you use? Correct?
MR. GORSUCH: Vague and ambiguous.
THE WITNESS: The regression are based on the inputs to the regression.
BY MR. KEYTE:
Q. Now, Table 1 is based on Conwood summaries of Peat Marwick reports, correct?
A. It's based on a document provided to me by -- provided to me by Conwood.
Q. And these -- you say Conwood summaries of Peat Marwick reports, correct?
A. We have -- we have produced the documents. If -- I mean, I don't specifically recall that Conwood summarized them, but the documents speak for themselves.
Q. If you look at the second page, Table

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1, under "Source, Conwood Summaries of Peat Marwick Reports," what does it mean, "Conwood Summaries"?
A. As I testified, I took the data from the documents provided to us. If -- the documents speak for themselves. I don't specifically recall why I chose to call it Conwood summaries. There may have been other Peat Marwick documents that I used. There may have been other Conwood-Peat Marwick documents I use -- provided I didn't use. I just don't know why I chose to call it a summary.
Q. Do you know whether Conwood used Peat Marwick reports in the ordinary course of its business?
A. I'm not aware -- I'm not aware one way or the other.
Q. Did you ask anybody?
A. Yes, I did.
Q. You asked whether they did?
A. I asked -- I asked whether they used them in the business purpose of the Peat Marwick documents.
Q. I'm sorry, I'm a little confused.
A. I asked for business purposes of the

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Peat Marwick documents.
Q. Did you ask whether they used the Peat Marwick reports in the day-to-day operation of their business?
A. No, I did not ask that question.
Q. You also used these summaries for the share data used in the regression model that led to your damages estimates, correct? Again, the Peat Marwick reports.
A. I used them -- if we want to characterize them as a summary. I accept that representation for now. But I used those data in the regression model, yes.
Q. Those summaries were dated July 23, 1999. Do you recall that?
A. I don't specifically recall that.
MR. GORSUCH: That's actually the date of the fax, if you look at the source.
BY MR. KEYTE:
Q. It was faxed to you around July 23rd, 1999, right?
A. That's right.
Q. What date did you submit your report?
A. I believe I submitted it, as we've already talked about, on August 2nd, I believe.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE TO PRECLUDE PROFESSOR GUNDLACH'S "STUDY" OF PURPORTED "EXCLUSIVE AGREEMENTS" AND RELATED TESTIMONY

Defendants United States Tobacco Company, et al. ("USTC"), respectfully request that the Court preclude Professor Gundlach's "study" of USTC's purported "exclusive agreements" as well as any related testimony.

As described below, Professor Gundlach's "study" (see Tab 1) and any related testimony should be excluded on several grounds. First, by his own admission, Professor Gundlach did not conduct a "study" of the specific type of exclusive arrangements the antitrust law clearly defines as forbidden exclusive dealing agreements -- i.e., those which preclude a competitor's products from the market. The record contains no evidence of such arrangements by USTC. Nor, indeed, did Professor Gundlach even "study" any other type of "exclusive agreement" (whether involving products, racks or point of sale ("P.O.S.") materials). While the antitrust law does not

forbid exclusive rack or P.O.S. agreements, Professor Gundlach cannot even point to record evidence of such agreements by USTC. Indeed, applying the proper legal criteria, Professor Gundlach's study and related testimony completely lacks foundation in the record and should therefore be excluded under Fed. R. Evid. 702.

Second, it is clear from discovery that Professor Gundlach intends to characterize various documents in this case as "exclusive agreements" with retailers. Under long-established authority, however, any such testimony should be disallowed because it contains a legal conclusion -- i.e., it improperly conveys a legal standard to the jury -- and thereby invades the province of this Court.[1] Finally, Professor Gundlach's "study" and related testimony should be excluded under Fed. R. Evid. 403 because, if allowed, it would likely mislead the jury into thinking that just because a retailer does not carry all Conwood products or does not use Conwood racks, an "exclusive agreement" exists between USTC and the retailer.

PRELIMINARY STATEMENT

Plaintiffs Conwood Company, L.P., et al. ("Conwood"), allege that USTC entered into a number of exclusive agreements with retailers with the purpose and effect of excluding Conwood's products, display racks, and P.O.S. materials from retail stores. See Compl. ¶ 28. It is now indisputably clear, however, that Conwood cannot present evidence of a single agreement or contract between USTC and any retailer that excludes all of Conwood's moist snuff products from the store; that prohibits Conwood from having its P.O.S. materials in the store; or that contractually binds the retailer – in writing or otherwise – to use only USTC racks.

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[1] The analysis is no different if, as we suspect, Professor Gundlach will disavow the wording of his expert report (and study) and now purport to tabulate "exclusionary" agreements rather than exclusive agreements.

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Having failed completely to establish an "exclusive dealing" claim of any kind, Conwood has resorted to filling in the evidentiary gaps with the conclusory testimony of its expert witnesses. Thus, rather than even attempting to establish its exclusive dealing claim by offering evidence of actual agreements entered into by USTC, Conwood intends to offer, through one or more of its expert witnesses, the "results" of a "study" put together by Professor Gundlach with the assistance of Conwood's counsel. Essentially, the "study" is little more than a tabulation of stores that Conwood's counsel and Professor Gundlach believe contain "an indicia of some form, type of exclusion." See Gundlach Dep. at 151-52, Tab 2 (emphasis added). Upon examination, however, Professor Gundlach readily admitted that "indicia of some form, type of exclusion" included indicia that a retailer simply implemented a plan-o-gram, see id. at 156, Tab 2, or even where a retailer chooses to use multiple display racks from the different moist snuff companies, but chooses to place USTC's display rack in the number one position, see id. at 156-57, Tab 2.[2] The resulting "study" of 22,000 retail locations with so-called "exclusive agreements" was then disseminated to and relied upon by Conwood's other expert witnesses.

As described below, this Court should preclude any expert testimony relating to or based upon this study as improper expert testimony and thus inadmissible under Fed. R. Evid. 702. In addition, such testimony would be misleading to the jury and unfairly prejudicial to USTC, and therefore should be precluded under Fed. R. Evid. 403.

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[2] Professor Gundlach reasoned that this would be an exclusive agreement because the other moist snuff companies were "excluded" from the number one position. See Gundlach Dep. at 77, Tab 2.

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ARGUMENT

Under Fed. R. Evid. 702, expert testimony is admissible only if it assists the trier of fact to understand the evidence or to determine a fact in issue. The Gundlach "study," and any testimony related to or based thereon, would do neither.

I. THE GUNDLACH STUDY IS NOT PROPER EXPERT TESTIMONY BECAUSE IT IS NOT SUPPORTED, AND IS IN FACT CONTRADICTED, BY THE RECORD EVIDENCE

The law is well established that where proposed expert testimony is unsupported by the record evidence, it is inadmissible under Fed. R. Evid. 702. See Tyger Construction Company, Inc. v. Pensacola Construction Co., 29 F.3d 137, 143 (4th Cir. 1994) (reversing district court's denial of motion in limine forbidding admission of expert testimony based on assumptions not supported by the record); Hoban v. Grumman Corp., 717 F. Supp. 1129, 1134 (E.D. Va. 1989) ("[a]n expert's opinion must be based on the evidence; he may not speculate in fashions unsupported by, and in this case indeed in contradiction of, the uncontroverted evidence in the case") (citations omitted).

Based on the record in this case, there is absolutely no foundation for Professor Gundlach to conclude that USTC has any exclusive agreements with any retailers, including the retailers included in his "study." The Gundlach "study" is nothing more than a table of retailers with whom USTC purportedly has had exclusive agreements since 1995. See Tab 1. The table references the documents and testimony from which Professor Gundlach concluded that USTC had these exclusive agreements. Even a cursory review of the cited record evidence, however, demonstrates

that Professor Gundlach's opinion testimony that USTC has "exclusive agreements" with the listed retailers is completely baseless.[3]

For example, Professor Gundlach cites one page of a 22-page document and concludes that USTC has an "exclusive agreement" covering 2,400 Wal-Mart stores. The page cited is a letter from Wal-Mart Stores, Inc., indicating that Wal-Mart decided to use USTC product merchandisers and also to work with USTC in a "joint venture for the further development of the best possible merchandising selection for the Wal-Mart planograms." See USTC/CWD 274518, Tab 3. From this letter, Professor Gundlach concludes that USTC has an exclusive agreement with Wal-Mart despite the following undisputed record facts: (i) Robert Carlson, National Director of Wal-Mart Business for McLane's, Wal-Mart's distribution subsidiary, testified that Wal-Mart could decide tomorrow to use another company's display racks or to use display racks from more than one company, see Carlson Dep. at 24-25, Tab 4; (ii) he testified that USTC did not compensate Wal-Mart in any way for "vendor exclusivity," see id., Tab 4; (iii) he testified that Wal-Mart was not pressured or coerced in any way to accept the USTC display racks, see id., Tab 4; (iv) he testified that other moist snuff manufacturers have offered to provide customized display racks for the moist snuff products, see id. at 20, Tab 4; and (v) he testified that Wal-Mart's objective in selecting the USTC display rack was to provide a uniform look in all Wal-Mart stores for the moist snuff products, see id. at 22, Tab 4. Indeed, during his deposition, Professor Gundlach did not recall even reviewing the

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[3] Professor Gundlach does not even purport to suggest that USTC had any exclusive dealing agreements with retailers. But, in any event, any exclusive agreement that would possibly implicate the antitrust laws would also require a contractual commitment not to deal with competitors. Thus, for example, the unilateral decision of a retailer to use only USTC racks could not be an "exclusive" agreement.. See Jones v. Bordon, 430 F.2d 568, 571 (5th Cir. 1970); A-Barr Sales Co. v. Coca-Cola Co., No. 77 C 295, 1981 U.S. Dist. LEXIS 14166, at 11-17 (N.D. Ill. 1981).

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Carlson deposition and was unaware whether the deposition was taken. See Gundlach Dep. at 20-23, Tab 2.

Similarly, Professor Gundlach purports to rely on the testimony of Timothy Entwistle and on documents USTC/CWD 157844-46 and USTC/CWD 157849-50 to conclude that USTC had an exclusive agreement with K-Mart. See Tab 5. The documents cited, however, indicate on their face that the K-Mart program was a proposal made by K-Mart, not USTC, and the documents are plainly phrased as a report using the conditional: "if [USTC] participated." Professor Gundlach made no effort to determine whether USTC did in fact participate in the K-Mart program, or whether the program was ever implemented at K-Mart. Indeed, when asked if it would change his opinion if he were to discover that USTC never participated in the K-Mart program, Professor Gundlach testified that it would not. See Gundlach Dep. at 284-86, Tab 2; see also Stanke Dep. at 250-51, Tab 6 (testifying that the K-Mart program at issue was rejected by USTC). Nevertheless, Professor Gundlach includes all 2,160 K-Mart stores as locations where USTC has an "exclusive agreement."

As another example, Professor Gundlach concludes that USTC has an "exclusive agreement" with the Circle K (Tosco) chain, relying on a single document sent by Tosco Marketing Company, authorizing USTC to replace "current smokeless vending system," and informing the stores that USTC had developed a Circle K header card as the only P.O.S. authorized to be placed on the new vending system, not in the entire store. Thus, the only suggestion of exclusivity is the fact that Tosco preferred to have its own header card on the smokeless tobacco merchandiser. This is not an "exclusive agreement" as defined by the antitrust laws.

Likewise, Professor Gundlach concludes that USTC had an exclusive agreement with the 2,500 Southland (or "7-Eleven") stores despite the fact that the document cited clearly states that

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competitive products were in the stores, and that "upon request" of Southland division managers, USTC would provide additional rack facings for competitors' products. See USTC/CWD 025956-64, Tab 7. Moreover, the same document clearly indicated that Swisher-Helme racks would be used in all 7-Eleven stores. See id. These documents, therefore, do not even remotely suggest any "exclusive agreement."

These are just a few of the more obvious examples where the record in no way supports Professor Gundlach's "study." Yet these examples account for over 43% of the so-called exclusive agreements referenced in that "study." And it is equally true of all of the retailers listed by Professor Gundlach's "study" -- there is no evidence that any of these retailers were contractually bound to deal only with USTC regarding products, racks or P.O.S. Therefore, Conwood should not be allowed to try and have its void in evidence filled by Professor Gundlach's legally irrelevant and factually unsupported tabulation.

II. THE GUNDLACH STUDY IS NOT PROPER EXPERT TESTIMONY BECAUSE IT CONTAINS A LEGAL CONCLUSION

Even if Conwood could overcome the total lack of foundation for the exclusive agreements "study," the proposed testimony should still be precluded because it improperly assumes a legal conclusion which Conwood would have Professor Gundlach impart to the jury. Indeed, the essence of the proposed study and testimony is that USTC has "exclusive agreements" with over 22,000 retail locations. See Gundlach Study, Tab 1. Such testimony is improper expert testimony under Fed. R. Evid. 702 because it necessarily incorporates a legal conclusion -- i.e., that certain documents comprise "exclusive agreements." (Again, the point would remain the same if Professor Gundlach now attempts to change the word "exclusive" to "exclusionary.")

The Sixth Circuit has instructed that "the problem with testimony containing a legal conclusion is in conveying the witness' unexpressed, and perhaps erroneous, legal standards to the jury. This invades the province of the court to determine the applicable law and to instruct the jury as to that law.'" Torres v. County of Oakland, 758 F.2d 147, 150 (6th Cir. 1985) (citations omitted). The Sixth Circuit also has instructed that the relevant inquiry is "whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular." Id. at 151; see also Berry v. City of Detroit, 25 F.3d 1342, 1353-54 (6th Cir. 1994).

There can be no doubt that such testimony would convey Professor Gundlach's clearly erroneous legal standards to the jury. Professor Gundlach's deposition testimony reveals that, in order to reach the 22,000-location number, he used a rather inventive standard for "exclusive agreement." Critically, Professor Gundlach paid little attention to the duration of any so-called "exclusive agreement" (including whether or not it was terminable at will), see Gundlach Dep. at 133-35, Tab 2, or even to whether the terms of any so-called agreement were ever actually implemented at retail. See id. at 282-86, Tab 2 (Gundlach included K-Mart's 2,100 retail locations in the 22,000 total despite the fact that K-Mart's proposal to USTC was rejected). Indeed, according to Professor Gundlach, if a document suggested that a retailer placed the USTC display rack in the "number one" position and the Conwood display rack in the number two position, this would be an "exclusive agreement" in Professor Gundlach's view. See Gundlach Dep. at 77, 156-57, Tab 2; see also id. at 38-44, Tab 2 (testifying that exclusive vending could include situations where multiple racks from different companies were used by a given retailer). To refer to these "exclusive" or "exclusionary" agreements would clearly be a gross misstatement of the law. See supra n.3.

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Moreover, any other Conwood expert who adopts the Gundlach "study" -- which, thus far, is each and every one of them -- will be offering legal conclusions as to whether certain documents comprise "exclusive agreements." These experts, as well, will be improperly using terms that have a "separate, distinct and specialized meaning in the law." Accordingly, under clear Sixth Circuit law, any expert testimony based on the Gundlach "study" is improper expert testimony and inadmissible under Fed. R. Evid. 702.

III. THE GUNDLACH STUDY AND RELATED TESTIMONY SHOULD BE EXCLUDED UNDER FED. R. EVID. 403

Finally, there are several reasons why the likely prejudice of the Gundlach "study" and testimony far outweighs any potential probative value.

First, Professor Gundlach's methodology, analysis and conclusions are highly suspect and of little probative value. It does not take a professor, or an expert of any kind, to sit down with plaintiff's counsel and tally up stores which, in counsel's view, contain an "indicia" of exclusivity. Further, as discussed above, the indicia used by Conwood's counsel and Professor Gundlach cannot, as a matter of law, be probative of the existence of exclusive agreements between USTC and the subject retailers. See Jones v. Bordon, 430 F.2d 568, 571 (5th Cir. 1970).

Second, the "study" and testimony is highly misleading and unfairly prejudicial. A jury could easily be misled into concluding that, because of these purported "exclusive agreements," Conwood is precluded from seeking to place moist snuff products, racks or P.O.S. in these retail stores. That is indisputably not the case. Moreover, the jury will likely be told that the "agreements," even if not exclusive, are "exclusionary" because they make it more difficult for Conwood to place products, racks and P.O.S. in these stores. That, too, would be nothing other than

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an attempt to mislead the jury into thinking that the antitrust laws are to protect Conwood from too much competition from USTC, which of course is not the law.

CONCLUSION

For the foregoing reasons, this Court should enter an order precluding the introduction of any part of the Gundlach "study" as well as any related testimony.

Dated: January 28, 2000

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1981 U.S. Dist. LEXIS 14166 printed in FULL format.

A-BARR SALES CO., Plaintiff, v. THE COCA-COLA COMPANY, Defendant.

No. 77 C 295

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

1981 U.S. Dist. LEXIS 14166

January 13, 1981

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OPINIONBY: GETZENDANNER

OPINION: MEMORANDUM OPINION AND ORDER

Susan Getzendanner, District Judge:

Plaintiff A-Barr Sales Co. ("A-Barr") brought this action against the Coca-Cola Co. ("Coca-Cola") alleging violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act, as well as common law actions for breach of contract and tortious interference with a business relationship. Coca-Cola has moved for summary judgment as to all counts.

Before discussing the contentions of the parties regarding the antitrust claims, a brief comment on the role of summary judgment adjudication in antitrust actions is in order. In *Poller v. Columbia Broadcasting System, Inc. 368 U.S. 464, 473 (1961),* the Supreme Court reiterated the generally strict standard that must be met in order for a court to grant a motion for summary judgment; the Court then enunciated even greater concern regarding the propriety [*2] of summary judgment in antitrust cases:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. (Footnote omitted.)

This case, however, is not a complex antitrust action. The facts and the alleged violation of the antitrust laws are relatively simple. Poller also does not preclude use of summary judgment in antitrust cases. Summary disposition remains appropriate particularly where genuine issues of fact and subjective states of mind are not at issue. *Lupia v. Stella D'Oro Biscuit Co., Inc. 586 F.2d 1163, 1166 (7th Cir. 1978); Modern Home Institute, Inc. vs. Hartford Accident and Indemnity Co., 513 F.2d 102, 109 (2d Cir. 1975).* Nonetheless, this Court has approached the pending motions with an awareness of the Supreme Court's directive to use summary judgment "sparingly" and of the precedents in the Seventh Circuit Court of Appeals which generally disfavor summary judgment.

Section 1 of the Sherman Act

A-Barr is a wholesale distributor and manufacturer of soft drink syrups, commonly known [*3] as "post-mixes." n1 It also leases and sells fountain syrup dispensing equipment to post-mix customers. Coca-Cola manufactures post-mixes in various flavors for sale to wholesale distributors, who in turn resell post-mixes to retail accounts.

> n1 Post-mixes are carbonated soft drinks mixed and dispensed on retail outlet premises through fountain syrup dispensing equipment. Syrups are combined with CO-2 in the equipment, so that the carbonated soft drinks are dispensed in drinkable form. The fountain equipment generally contains a number of valves, with a different flavor dispensed through each.

A-Barr alleges that Coca-Cola engaged in verticle price fixing by coercing wholesalers to resell the post-mixes within a range of 7%-9% over the wholesaler's cost. A-Barr further argues that Coca-Cola enforced this policy by informing retailers of every change in Coca-Cola's price to the wholesaler and by recommending to retailers only those wholesalers who complied with Coca-Cola's price guidelines. These actions, according to A-Barr,

constitute a violation of Section 1 of the Sherman Act.

Coca-Cola contends that summary judgment is appropriate for the following reasons: (1) plaintiff [*4] is unable to show any joint action sufficient to constitute a contract, combination, or conspiracy as required under Section 1; (2) Coca-Cola's policy of notifying retailers regarding the price that Coca-Cola charges wholesalers serves to encourage rather than discourage competition; and (3) the damages which plaintiff seeks from the alleged price fixing are speculative and without proper foundation.

Although it is true that in order to succeed in proving price fixing under Section 1 of the Sherman Act plaintiff must show some joint action, such action may be evidenced by express, implied or inferred understandings. *United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Albrecht v. Herald Co., 390 U.S. 145 (1968).* Coca-Cola asserts that it has shown through deposition testimony that the facts relied upon by A-Barr to support its allegations are not susceptible of the interpretation which A-Barr gives them, and that A-Barr consequently is obligated to offer evidence supporting its inference of joint action under Rule 56(e) of the Federal Rules of Civil Procedure. *Lupia, supra, 586 F.2d at 1166; Modern Home Institute, supra, 513 F.2d at 109.* Contrary to Coca-Cola's assertions, [*5] the Court finds that A-Barr has provided facts regarding defendant's policy of notifying retailers of prices charged to wholesalers which raise material questions of fact as to defendant's motive, and which raise an inference of joint action important to the price fixing allegation. Since material questions of fact have been raised, summary judgment is inappropriate.

Defendant also contends that A-Barr's price fixing allegation is an attempt to reduce competition rather than encourage it, and as such is an improper use of Section 1 of the Sherman Act. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477 (1977).* While it is true that A-Barr's complaint is based upon its inability to charge higher prices and to make greater profits because of the maximum resale price allegedly set by Coca-Cola, it is clear that agreements imposing either minimum or maximum resale prices are illegal under Section 1. *Albrecht, supra, n2 Keifer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).* If, as plaintiff claims, Coca-Cola did set a price range and forced wholesalers to set retail prices within that range, this would plainly have a deletrious effect on the free flow of competition, [*6] regardless of the ultimate effect on retail prices.

n2 The Supreme Court decision in *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977),* may well threaten the viability of the Albrecht rule, which held maximum price fixing to be a per se violation of Section 1. However, even if maximum price fixing is to be judged under a rule of reason analysis rather than as a per se violation, summary judgment remains an inappropriate method of disposition of the claim.

Defendant's contention that A-Barr's price fixing claim is so speculative with respect to damages as to require summary judgment, is likewise without merit. The Supreme Court has established a relaxed standard for proof regarding the amount of damages once an antitrust violation has been shown. *Zenith Radio Corp. v. Hazeltine Research, Inc. 395 U.S. 100, 123-125 (1969).* Moreover, even if plaintiff's proof of damages was no more than sheer speculation, the appropriate response would be for the Court to award nominal damages, not summary judgment. *Newberry v. Washington Post Co. 438 F.Supp. 470, 483 (D.D.C. 1977).*

Section 2 of the Sherman Act

Plaintiff alleges that Coca-Cola has monopolized the sale of [*7] post-mix colas in the Chicago area in violation of Section 2 of the Sherman Act, *15 U.S.C. § 2.* Plaintiff bases its claim on the fact that, according to certain discovery documents, Coca-Cola accounted for 83% of the total sales of post-mixes in the Chicago area in 1974. n3 Plaintiff further alleges that Coca-Cola continues to take actions that serve to maintain its monopoly. These actions include Coca-Cola's equipment and marketing program, whereby Coca-Cola salesmen offer promotional and marketing programs directly to retailers. As part of this program, retail customers receive equipment and promotional signs n4 rent-free from Coca-Cola on the condition that the retailer uses Coca-Cola post-mixes on some of its fountain equipment. Plaintiff does not allege any illegality in Coca-Cola's requirement that retailers use Coca-Cola post-mixes in its equipment. Rather, plaintiff claims that as a result of Coca-Cola's alleged monopolization of the cola post-mix market, it was prevented from selling fountain dispensing equipment and from obtaining income through servicing of such equipment.

n3 Plaintiff's concept of the relevant market area is at best vague and at worst contradictory. In its complaint, A-Barr alleges that Coca-Cola has 90-95% of the cola post-mix market in Northern Illinois and Indiana. In its brief, however, A-Barr appears to argue that the relevant geographic area is "the Chicago area" and that the relevant product is post-mixes, rather than cola-post-mix. For purposes of this motion only, Coca-Cola has conceded that post-mix colas in the Chicago area are a relevant line of commerce and product market under Section 2.

n4 A-Barr does not allege any injury with respect to Coca-Cola's free distribution of signs to retailers. [*8]

Coca-Cola argues that it is entitled to summary judgment with respect to the monopolization claim on two grounds: (1) that there is no evidence of Coca-Cola's monopolization of the relevant market, and (2) that plaintiff's damage claim is legally insufficient to give it standing to assert a claim against Coca-Cola for violation of Section 2 of the Sherman Act.

The offense of monopolization consists of two elements: the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power. *United States v. Grinnel Corp., 384 U.S. 563, 570-571 (1966).* Defendant has failed to convince the Court that genuine issues of fact and subjective states of mind are not at issue on the question of whether Coca-Cola monopolized the relevant market, and therefore, summary judgment cannot be granted on that ground.

Coca-Cola's second argument, however, does not involve any genuine issue of material fact or any question regarding motive or intent. The issue is whether plaintiff has alleged any facts demonstrating a violation that "fits" within the requirements for antitrust recovery under Section 2 of the Sherman Act--a question of law that can be answered [*9] by the Court. *Lupia, supra, 586 F.2d at 1166.* In simple terms, the law demands, either in terms of a standing doctrine, *Multidistrict Vehicle Air Pollution M.D.L. No. 31 v. Automobile Manufacturers Ass'n, Inc., 481 F.2d 122* (9th Cir.), cert. denied sub nom. *Morgan v. Automobile Mfr. Ass'n, 414 U.S. 1045 (1973),* or in terms of a requirement of antitrust damages, *Brunswick, supra,* that recovery be confined to those who have been injured by restraints imposed by defendant on competitive forces in the economy. *Lupia, supra, 586 F.2d at 1168.*

A-Barr grounds its claim for treble damages on Section 4 of the Clayton Act, *15 U.S.C. § 15,* which reads:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit including a reasonable attorney's fee. (Emphasis added.)

The antitrust violation upon which plaintiff hinges its Section 4 claim is the monopolization proscription in Section [*10] 2 of the Sherman Act, *15 U.S.C. § 2.* n5 Plainly, to recover damages A-Barr must prove more than that Coca-Cola violated Section 2, since such proof establishes only that injury may result. In order to bring its treble damage action, plaintiff must show that it was injured by reason of defendant's monopolization of the cola post-mix market.

n5 Section 2 reads as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of misdemeanor....

In Section 2 of the Sherman Act, Congress was not merely concerned with size, but with the obstruction to free trade and open competition that so frequently accompanies monopoly situations. *U.S. v. Yellow Cab Co., 332 U.S. 218 (1947).* This Section is aimed, not so much at improper conduct, as at a pernicious market structure where concentration of power saps the salubrious influence of competition. *Berkey Photo, Inc. vs. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).* Thus, assuming for purposes of this motion that Coca-Cola has monopolized the cola [*11] post-mix market in the Chicago area n6 and that A-Barr has suffered economic loss due to its inability to sell fountain dispensing equipment, the remaining question is whether A-Barr was injured "by reason of" defendant's monopoly and the anticompetitive forces arising therefrom.

n6 In its brief A-Barr also states that Coca-Cola has a monopoly in the fountain dispensing equipment market. However, since A-Barr has made no such allegation in its complaint and presents no support for this rather casual remark, the Court must ignore the claim, as it would any other unsupported assertion of fact.

A review of the uncontroverted facts indicates that plaintiff's difficulty in competing in the fountain dispensing equipment market is wholly unrelated to Coca-Cola's alleged monopolization of the cola post-mix market. A-Barr's problem arises, not because Coca-Cola has a monopoly of the post-mix market, but because the major producers of post-mix colas, Coca-Cola, Pepsi-Cola, and Royal Crown Cola, all offer retailers fountain equipment free of charge on the condition that the products of those companies be used in the equipment. n7 Plaintiff finds difficulty in selling and servicing [*12] fountain equipment because it is attempting to sell a product that retailers already receive for free. Plaintiff's injury bears no relationship to the size of either Coca-Cola or its competitors. If Coca-Cola, Pepsi-Cola, and Royal Crown Cola each controlled one-third of the cola post-mix market, plaintiff would suffer an identical loss. Thus, plain-

the goods of the manufacturer does not run afoul of the section.

Defendant's characterization of the facts puts this case on all fours with the Meyberg decision, where one party terminated an agreement in order to impose a new contract that would include an exclusive dealing provision. No new contract was executed. [*17] The court held that it was manifest that there could be no violation of Section 3 since the old contract did not contain an exclusive dealing provision and no new contract was agreed upon. *215 F.2d at 100.*

A-Barr's version of the facts does not compel a different outcome. A-Barr argues that its contract with Coca-Cola was not terminable at will, but rather that Coca-Cola's attempt to include an exclusive dealing provision constituted a breach of the existing contract. In making this argument, A-Barr effectively concedes that the existing contract did not include an exclusive dealing provision. (Complaint PP14, 15, 17). Moreover, nowhere does A-Barr allege that it complied with Coca-Cola's request for such a provision.Accordingly, even under A-Barr's characterization of the facts, A-Barr has not alleged any facts that show a completed contract with an exclusive dealing provision. As such, A-Barr cannot, as a matter of law, prove a violation of Section 3 of the Clayton Act, and summary judgment will be entered against it on that claim.

Common Law Counts

Finally, A-Barr alleges in Counts II and III of the complaint that Coca-Cola's failure to reappoint A-Barr as its repackager [*18] constituted a breach of contract and that Coca-Cola tortiously interfered with a business relationship between plaintiff and a company called Beverage Dispensers. Coca-Cola has moved for summary judgment on both these common law claims.

In support of a motion for summary judgment, the moving party has the burden of showing that as a matter of law there is no dispute as to any genuine issue of fact material to a judgment in his favor. *Cedillo v. International Association of Bridge & Structural Iron Workers, Local Union No. 1, 603 F.2d 7, 10 (7th Cir. 1979).* The non-moving party is entitled to all reasonable inferences that can be made in its favor from the evidence in the record, *United States v. Diebold, Inc. 369 U.S. 654, 655 (1962),* and as a general rule, questions of motive and intent have been held to be particularly inappropriate for disposition on a motion for summary judgment. *Conrad v. Delta Air Lines, Inc. 494 F.2d 914, 918 (7th Cir. 1974).*

While the record clearly favors the defendant's position, the Court believes that at this stage of the case summary judgment is inappropriate. There appears to be a genuine issue of face as to whether or not there was a binding [*19] contract between the parties and plaintiff's tort action clearly involves questions of intent which are not properly resolvable upon the papers.

In summary, with respect to Count I of plaintiff's complaint, the Court grants Coca-Cola's motion for summary judgment as to the claims arising out of Section 2 of the Sherman Act and Section 3 of the Clayton Act, and denies its motion as to the claim arising under Section 1 of the Sherman Act. With respect to Counts II and III of plaintiff's complaint alleging contract and tort claims, defendant's motion for summary judgment is denied. It is so ordered.

EXHIBIT 1

Evidence of Exclusive Post 1995 Agreements From UST Production

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Citation for Exclusivity
Albertson's, N. California	48	1999 Chain Store Guide directory, p. 75	01/24/1998	USTC/CWD 564037-51
Allsups	309	USTC/CWD 040670	09/09/1998	CWD 0100020483
Altheimer Oil	15	IRM Data	06/07/1996	USTC/CWD 523029
AM/PM	400	UST/CWD 261479	1998	USTC/CWD 158601 - 603
Amar Oil	15	USTC/CWD 532034	03/06/1996	USTC/CWD 532033
American Gas & Oil	15	IRM Data	03/26/1996	USTC/CWD 933957
Amoco	580	UST/CWD 261479	1996-1997	USTC/CWD 688200
A-Plus Mini Market (Sunoco)	415	1999 Chain Store Guide directory, p. 951	1996	USTC/CWD 912675 - 77
Big 10 Mart (Molo Oil)	15	USTC/CWD 596881	02/06/1997	USTC/CWD 596880
BJ's Quick Stop	10	USTC/CWD 532083	06/14/1996	USTC/CWD 532082 -102 (unsigned)
Blue Sky Petroleum	32	USTC/CWD 969648	1998	USTC/CWD 969648 - 51
BP Express	184 (BP AMOCO Plc)	1999 Chain Store Guide directory, p. 817	1997	USTC/CWD 254391
Bradford Oil (Go Go Marts)			03/16/1998	USTC/CWD 1380255
Buy 'n Fly	5	1999 Chain Store Guide directory, p. 950	1996	USTC/CWD 984508 - 22
Circle K (SSP)	172	USTC/CWD 040670 and USTC/CWD 325015	11/12/1998	USTC/CWD 517073
Circle K (TOSCO)	2400	www.tosco.com	01/29/1998	USTC/CWD 969509
Circle N	6	USTC/CWD 532474	06/10/1996	USTC/CWD 532474-76
Co Go's	60	IRM Data	03/24/1998	USTC/CWD 825722 - 26
Coastal Mart	600	UST/CWD 261479	03/12/1997	USTC/CWD 577007-15
Coastal Maverick	155	USTC/CWD 325015	06/08/1998	USTC/CWD 517323-324
Conoco	300	UST/CWD 261479	06/04/1996	USTC/CWD 969469
Cracker Barrel	57	USTC/CWD 532492-95	03/13/1996	USTC/CWD 532491-95
Crockett Oil	11	IRM Data	05/02/1996	USTC/CWD 532552-582

Evidence of Exclusive Post 1995 Agreements From UST Production

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Citation for Exclusivity
Crown Central Petroleum	222	6/16/99 Depo. of H. Heylum at 44.	1996-1998	6/16/99 Depo. of H. Heylum at 43-45.
Crystal Flash	27	IRM Data	1995-1998	USTC/CWD 286194-196
CV's IGA	7	USTC/CWD 532596	06/24/1996	USTC/CWD 532595 - 596
CWX Max Mart	19	USTC/CWD 532616	1996	USTC/CWD 532615-16
Dash In	25	IRM Data	04/15/1996	USTC/CWD 772155-158
Depot Food Stores	52	1999 Chain Store Guide directory, p. 958	03/06/1995	USTC/CWD 969192 - 193
Eagle Food Centers	107	IRM Data	08/12/1998	USTC/CWD 808707
Exit 76 Corp.(Mobil Mart)	22	IRM Data	02/18/1998	USTC/CWD 1380042
Express Mart		IRM Data	1996	USTC/CWD 952735 - 737
Express Mart (FINA)	36	IRM Data	06/13/1997	USTC/CWD 529186
Exxon, BHT	15	USTC/CWD 532058	04/12/1996	USTC/CWD 532056
Exxon, USA	780	UST/CWD 261479	1996	USTC/CWD 760486
E-Z Mart	410	IRM Data	7/16/98 est. (date partially illegible)	USTC/CWD 576985
E-Z Mart		IRM Data	07/08/1997	USTC/CWD 576982
Fas Mart	89	1999 Chain Store Guide directory, p. 1013	1995	USTC/CWD 613178
Fill Zone	14	USTC/CWD 548991 - 92	08/06/1997	USTC/CWD 548986 - 92
Food Chief Stores	29	USTC/CWD 500258	1998	USTC/CWD 500245-258
Gas City	41	IRM Data	10/08/1996	USTC/WD 517428
Gate Food Post/Gate Petroleum	105	USTC/CWD 040670	01/26/1998	USTC/CWD 529230 - 36
Giant Foods	175	www.giantfood.com	pre-April 1998	USTC/CWD 210723 - 725
Golden Pantry	88	USTC/CWD 968584	07/14/1998	USTC/CWD 968584
High's of Baltimore	119	IRM Data	1998	USTC/CWD 582106 - 111
Ingle's	200	www.ingles-markets.com	01/29/1998	USTC/CWD 608190
Kmart	2160	www.Kmart.com	1996-1998	USTC/CWD 157844 - 46 and 157849-50; 7/1/99 Depo. Of T. Entwhistle at 57-58.
Kroger, Atlanta	155	1999 Chain Store Guide directory, p. 149	07/31/1998	USTC/CWD 884436 -441

Evidence of Exclusive Post 1995 Agreements From UST Production

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Citation for Exclusivity
Kroger, Dallas Division	73	www.Krogersouthwest.com	11/18/1997	7/8/99 Depo of D. Blackburn at 28-31 and USTC/CWD 251740 - 741
Kum & Go	125	UST/CWD 261479	1998	USTC/CWD 800236-238
Mapco/Memphis	98	1996 Chain Acct. Memo	06/26/1996	USTC/CWD 540874
Meijer	107	UST/CWD 261479	1998	USTC/CWD 277261-276
Minit Chek Food Stores	8	1999 Chain Store Guide directory, p. 803	04/29/1996	USTC/CWD 885246 and 885247
Mobil	600	UST/CWD 261479	09/06/1996	USTC/CWD 948431-433
Odessa Corp. (Champlain Farms, Fast Stop)	49	CWD 1025006231	03/02/1998	USTC/CWD 1380254
One Stop	27	6/16/99 Depo. Of H. Heylmun at 43.	06/20/1905	6/16/99 Depo. Of H. Heylmun at 43.
PDQ Convenience Stores	45	USTC/CWD 331829	1996 est. Context of report indicates doc. was written in 1996.	USTC/CWD 331829-832
Pelican State Fina	35	USTC/CWD 536126	04/02/1996	USTC/CWD 536122
Pit Row	10	IRM Data	1997	USTC/CWD 688459 - 461
QuikTrip	329	1999 Chain Store Guide directory, p. 944	06/17/1998	USTC/CWD 609441 - 48
Rapid Roberts	19	USTC/CWD 512652	10/16/1997	USTC/CWD 512649 - 652
Rainbow Foods	41	1999 Chain Store Guide directory, p. 347		7/9/99 Depo. Of D. Blackburn at 26-28.
Sentry Food Mart	100	USTC/CWD 331829	03/10/1997	USTC/CWD 808017
Sentry Food Mart		USTC/CWD 331829	1996	USTC/CWD 760370 - 74
Sheetz	200	UST/CWD 261479	1998	UST/CWD 416818-819
Southland (7-Eleven)	2500	UST/CWD 261479	04/01/1997	USTC/CWD 025956 - 964; 7/9/99 Depo of D. Untiedt at 103-105.
Spectrum Stores	58	USTC/CWD 970961	08/13/1996	USTC/CWD 970960; CWD
Spee D Foods	13	IRM Data	May 1997 to May 1998	USTC/CWD 985245 - 249
Stagger's Oil	28	IRM Data	05/09/1996	USTC/CWD 536138
Stop In Food Stores	63	IRM Data	1996	USTC/CWD 952558-60

Evidence of Exclusive Post 1995 Agreements From UST Production

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Citation for Exclusivity
Sun Up Convenience (Service Oil Co.)	7	IRM Data	04/09/1996	USTC/CWD 985389
The Pantry	915	USTC/CWD 888769-71	03/22/1996	USTC/CWD 704636 - 37
Thrifty Liquor	12	USTC/CWD 536470	03/10/1996	USTC/CWD 536469-71
Tom Thumb	149	USTC/CWD 254389	05/09/1997	USTC/CWD 254389 - 390
Toot 'n Scoot	20	1999 Chain Store Guide directory, p. 951	1996	USTC/CWD 984465 - 66
Turkey Hill Minit Markets	230	USTC/CWD 984429	07/03/1997	USTC/CWD 984432-433
United Dairy Farmers	209	IRM Data	01/29/1998	USTC/CWD 888816 - 17;USTC/CWD 734222 - 228; see also USTC/CWD 888480
Waco Oil	18	USTC/CWD 516673	1998	USTC/CWD 516673-80
Wal*Mart	2400	UST/CWD 261479	1997	7/8/99 Depo. Of D. Blackburn at 32; 7/9/99 Depo of D. Untiedt at 222-225; USTC/CWD 274518
Walgreen's	2200	USTC/CWD 040671	1997	USTC/CWD 517580
Wawa	500	USTC/CWD 297457	04/01/1997	USTC/CWD 297451-457
Winn Dixie, Atlanta	94	1999 Chain Store Guide directory, p. 149	03/25/1997	USTC/CWD 254584
TOTAL	21983			

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

- - - - - - - - - - - - - - - - - X

CONWOOD COMPANY, L.P., :
CONWOOD SALES COMPANY, L.P., :
Plaintiffs, : Civil Action No.
v. : 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, :
UNITED STATES TOBACCO SALES AND:
MARKETING COMPANY, INC., UNITED:
STATES TOBACCO MANUFACTURING :
COMPANY, INC. and UST, INC., :
Defendants. :

- - - - - - - - - - - - - - - - - X

Washington, D.C.
Friday, October 15, 1999

Deposition of GREGORY T. GUNDLACH, a witness herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice and agreement, the witness being duly sworn by FERNITA R. FINKLEY, a Notary Public in and for the District of Columbia, taken at the offices of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., at

as OTP.

Q. Let's just stick to moist if you don't mind?

A. I actually think it's important to characterize the retail settings.

Q. Why is that?

A. Well, there's differences, buyer behavior, moist snuff customer in a convenience store versus a Wal-Mart varies, the price of the products vary whether or not you're in a mass merchandiser or convenience retailer or a gas mini-mart, the promotions available to some stores, the resources to those stores vary as well.

Q. Let's get back to Wal-Mart. What other factors did you look at? So far I have type of store and the products and I think you alluded to pricing in your last answer. Anything else?

A. The type of vendor arrangement. I'm speaking of housing of the product, the arrangement as it speaks to the exclusion of that vendor or particulars regarding the vendor, the type of POS available or constricted in the arrangement, the nature of the plan-o-gram and the current product mix prior to the agreement, the understanding that or assumption regarding how the product and the role of

the product inside the store of a mass merchandiser, the type of vendor rack that was used. Have I missed any of the earlier ones that I had mentioned?

Q. What about the objectives of the retailer?

A. Oh, certainly in the Wal-Mart case being a low price provider, being a mass merchandiser, their more global objectives of being price competitive in the marketplace as well as the objectives of how the product category itself work within the other categories.

Q. Did you consider the actual objectives of Wal-Mart according to Mr. Carlson, the director of Wal-Mart sales?

A. I don't recall actually reading information directly from Mr. Carlson, but most of the promotional materials surrounding Wal-Mart and general knowledge and their role in the mass merchandise industry strongly suggest what their objectives are.

Q. So you did not read the deposition of Robert Carlson?

MR. GUZMAN: Objection, that misstates his testimony.

THE WITNESS: I read quite a few depositions. As I sit here today I don't recall

whether I did or did not read Mr. Carlson's deposition.

MR. ATHANASIA: Can you read back the previous answer, please?

THE REPORTER: "Answer: I don't recall actually reading information directly from Mr. Carlson --"

MR. ATHANASIA: Thanks.

BY MR. ATHANASIA:

Q. As you sit here today, can you tell me what Mr. Carlson testified Wal-Mart's objectives are as to the moist snuff category?

A. As I sit here today I have trouble recalling his particular specific objectives that characterize his testimony regarding moist snuff.

Q. As you sit here today can you give me a general idea as to what his testimony was to that effect?

A. It's difficult again to recall the specifics. I wouldn't want to characterize his particular objectives as I sit here today, not able to recall what his particular objectives were for the moist snuff category.

Q. Well, I think Mr. Carlson testified as to Wal-Mart's objectives for the moist snuff category,

not his personal. Do you understand that's what I'm asking you?

MR. GUZMAN: Can we have that question read back, please?

THE REPORTER: "Question: Well, I think Mr. Carlson testified as to Wal-Mart's objectives for the moist snuff category, not his personal. Do you understand that's what I'm asking you?"

MR. GUZMAN: Again, I object to the question as ambiguous. It lacks time frame among other things.

MR. ATHANASIA: The testimony doesn't lack time frame.

BY MR. ATHANASIA:

Q. Go ahead. You can answer.

A. Well, if I were provided -- if you have the information available I'd be glad to look at it particularly as we sit here today. I'm sure I could make some derivations from his testimony if you're speaking of the deposition.

Q. I assumed you had already read the Wal-Mart deposition, sir, but we'll move on.

MR. GUZMAN: Objection. Is there a question pending?

BY MR. ATHANASIA:

probably conclude that exclusive vending meant exclusive arrangement with regard to the vending system which would then mean that only UST racks were allowed inside the store.

BY MR. ATHANASIA:

Q. So your recollection and understanding, what you base your opinion on, Swisher was not allowed to place racks in the 7-Eleven stores under the agreement you're talking about?

MR. GUZMAN: Objection, mischaracterizes his testimony.

THE WITNESS: Again as I interpret the arrangement that was discussed in that memorandum, I would have to infer from the use of the term exclusive vending that probably to mean that that was a state of objective that was desired on the part of Mr. Bonfiglio characterizing the agreement for the Southland stores.

BY MR. ATHANASIA:

Q. And that would in your opinion mean in your understanding that Swisher was not allowed to place racks in the 7-Eleven stores?

A. The extent of my understanding would be that that would be Mr. Bonfiglio's instructions in the characterization of the arrangement.

Q. If Swisher was in fact allowed, even under Mr. Bonfiglio's instructions, to place racks in 7-Eleven stores, would you still consider that to be an exclusive rack arrangement with United States Tobacco?

MR. GUZMAN: Objection, misstates the testimony.

THE WITNESS: I suspect you're offering that as a hypothetical?

BY MR. ATHANASIA:

Q. Absolutely.

A. Given that type of hypothetical, I certainly want to have access to additional information to understand whether or not that's an exclusionary arrangement.

Q. If under the agreement you're referring to from Mr. Bonfiglio to his organization allows for Swisher to place racks in 7-Eleven stores, do you still consider that to be an exclusive rack arrangement between Southland and United States Tobacco?

A. Again without knowing more and using the term exclusionary or exclusive in the way that I am today, having additional information would help me to make further determination of that, but as we sit

here without that information knowing what the vending arrangement was and the impact on consumers, what the prior arrangement was in terms of whether or not the exclusive arrangement meant a portion of a rack without understanding the specifics with regard to what it allowed Swisher to do, it's difficult to characterize. Exclusive vending to me means exclusive vending.

Q. Well, is it possible if a store uses a United States Tobacco rack and a Swisher rack that that's an exclusive rack, exclusive vending?

MR. GUZMAN: Objection. The question is ambiguous.

THE WITNESS: If we're inferring what Mr. Bonfiglio stated in terms of exclusive vending and that's where I'm --

BY MR. ATHANASIA:

Q. That's not my question really, sir, and I don't care if you answer for any store in the whole country. If a store is using a United States Tobacco rack and a Swisher rack, do you consider that to be exclusive vending in your definition?

MR. GUZMAN: Objection. The question is ambiguous.

THE WITNESS: Again I'd have to know more

additional details to determine whether or not it was exclusionary.

BY MR. ATHANASIA:

Q. Exclusive, sir, exclusive.

MR. GUZMAN: Objection. The question is ambiguous.

THE WITNESS: With regard to Southland, my inferences are based on the use of the term exclusive vending.

BY MR. ATHANASIA:

Q. I believe my question was any store in the United States not limited to Southland, can we understand that?

MR. GUZMAN: Chris, he was giving an answer and you interrupted him. You want his answer or you want to raise a new question?

MR. ATHANASIA: I was hoping to get an answer to my question.

MR. GUZMAN: Why don't you ask a new question and then maybe he'll answer it if you let him. Is there a question pending?

MR. ATHANASIA: Yes.

MR. GUZMAN: Could you read the question back, please?

MR. ATHANASIA: I'll take care of it.

BY MR. ATHANASIA:

Q. Any store in the country, if that store uses a United States Tobacco rack and a Swisher rack, do you consider that to be an exclusive rack?

MR. GUZMAN: Objection, the question is ambiguous.

THE WITNESS: You're asking me whether or not one store?

BY MR. ATHANASIA:

Q. Any store.

A. In the large 2,200 chain of Southland --

Q. No, sir, I'm asking you any store in the 300,000 stores that sell moist snuff, any store, pick one, any one you like, if it uses a United States Tobacco rack and a Swisher rack, do you consider that exclusive vending?

A. If I'm looking at Southland, looking at that arrangement, and you recognize one store for me that contains a Swisher rack, all 99 point odd percent of the others contain only UST racks and the basis of that one store using a Swisher rack is in conflict with instruction from Mr. Bonfiglio to have exclusive vending, I don't know that my opinion would vary that would be exclusionary or exclusive, one store out of 2,200 stores.

Q. What if every single 7-Eleven store used a United States Tobacco rack and a Swisher rack for the moist snuff products, would you consider that exclusive vending?

A. Well, when we use the term exclusive vending, my use of the term, my inference for the term doesn't necessarily mean an exclusive rack, exclusive vending, and this is interesting in terms of the use of the term on the part of UST, exclusive vending could mean exclusive POS on a vendor. Could mean exclusive rack, could be some form of vending arrangement that characterizes the placement of the products point of sale on the products, the entire configuration of the set. I'd have to distinguish that from the exclusive use of a rack to determine whether or not that's exclusive vending.

Q. With regard to your report, when you use the word exclusive as in paragraph 15 of your rebuttal report, UST has an exclusive agreement, what do you mean by the word exclusive as an expert?

A. Exclusive would include the ability to constrain the competitive strategies including placement of product, display of product, pricing of product, promotion of product, brands carried, this would include some form of constriction of

competition, constriction of a competitor's desired strategies.

Q. What degree of constraint in your mind, in your opinion as an expert would you need to call something an exclusive agreement?

A. I think we'd have to look at the impact that the arrangement agreement would have on competition to determine the nature of its exclusion.

Q. Did you ever look at this issue from the perspective of the retailer, whether the retailer is constrained from making decisions?

MR. GUZMAN: Objection, the question is ambiguous.

THE WITNESS: Sure, the retailer signs an agreement dictating what they can or can't do and they are limited in terms of what they desire to do with their marketing strategies constrained in their ability to do them.

BY MR. ATHANASIA:

Q. And if a retailer is not constrained in any way, is that an exclusive in your opinion?

A. I think the most important focuses should be on the consumer in terms of implications of the arrangement in terms of the forms of competition.

Q. So with that focus on the consumer if a

Q. What if that competitor's display was simply moved to the number two position but the U.S. Tobacco vendor was moved into the number one position as a result of the payments and/or promotions to obtain the best display space?

A. Well, again I mean if you're characterizing it as the number one and two space, there's obviously been an exclusion from the number one space.

Q. So you still consider that to be exclusive?

MR. GUZMAN: Objection, it misstates his testimony.

THE WITNESS: I like to use the term exclusionary.

BY MR. ATHANASIA:

Q. That's fair. Do you still consider that to be exclusionary?

A. Again I think it could be where you have a circumstance where that second display space happens to be located in the back of the store out of the view and traffic of customers, and the inducement on the part of in this case since we're talking about CAP, UST being the dominant player, the retailer chooses to remove that competitor's display to a

retail industry. Did you do any work to quantify the number of retailers that are affected by these exclusionary programs?

A. Yes, attempted to look at the documents as they were in the record both the primarily the UST documents either in the form of contracts or other forms of retailer incentive programs including the CAP and ascertain then the number of retail locations that were generated or covered by these particular agreements. My findings were somewhere in the vicinity of 22,000 arrangements or agreements that fall under that broad continuum of the different programs that UST used that result in exclusion and upwards towards as I recall 35,000 CAP contracts, interpreting the plain meaning of the contracts, interpreting the plain meaning of how they've been described by UST employees, provide the basis for making those inferences, a number of retailers were identified based on UST documents or reference to secondary sources.

Q. And of the 22,000 retailers that you say you identified were part of exclusive dealing arrangements, what was the average duration of these arrangements in those 22,000 chains you analyzed, time duration?

A. As I recall looking at some of the -- and again let me clarify one thing. The term that I'm using is exclusionary versus exclusive dealing. You seem to be using exclusive dealing I'm using exclusionary. Exclusionary in my mind references competitive implications. That's really my interest. Now in terms of the numbers and the durations as I recall some of the contracts that I examined, the agreements did not specify duration. I can only assume that one side those are binding for whatever period of time is desired on the part of the parties. I'm not here to render a legal opinion as to whether or not the contract that's signed doesn't include some type of reference to a temporal time duration, is binding for a certain period. By inference plain interpretation would mean that they could be binding for a quite lengthy period of time or in perpetuity.

Q. Could they be terminable at will?

A. I don't recall seeing specific reference to that use of the term in many of those contracts.

Q. Did you see any time duration term in any of the exclusive contracts as you call them that you reviewed?

A. I think the CAP contract contains a clause that references time or term.

Q. Why don't you go ahead and look through that and find that for me.

A. I don't recall reference in the other documents though to duration or time. I have found now the term renewal and termination reference in the CAP contract that you provided me. I have read the term and renewal and termination --

Q. Can you read the last sentence of that paragraph for the record?

A. According to the document here it appears to reference the formal part of the Customer Alliance Program. Whether or not this reference is the informal dimension of the CAP contract, it does read either party may terminate this agreement without cause and at any time upon 30 days written notice.

Q. Refer you back to that, your report where you write, numerous CAP worksheets, that's on rebuttal paragraph 19.

A. Yes, I do see that.

Q. You use the term exclusive, am I correct, not exclusionary?

A. Yes, I do use the term exclusive.

Q. Paragraph 20 of your original report Exhibit 1 --

MR. GUZMAN: Pardon me, what was the

A. Well, again I didn't necessarily attempt to determine as a counting criteria the number of particular forms of exclusion, but more or less I was looking to the end result of whether or not exclusion was occurring as a result of the -- as represented by the documents that I had looked at.

Q. And what kind of quantitative analysis did you do to assess the number of CAP participants that had exclusive United States Tobacco point-of-sale materials in their stores?

A. Again I looked at the various representations as evidence in the contracts themselves, UST documents, UST memoranda, and derived from there an understanding of the overall level of exclusion, and my criteria more focused on that level than trying to make a distinction between whether or not it was a rack or whether or not it was POS on a rack or whether or not it was a rack and POS or whether or not it was a display versus a rack versus a modular. My focus was mainly on the exclusionary forms of agreements.

Q. Is it fair to say that you did not do anything quantitatively to separate out the different exclusionary features you identify in your report?

MR. GUZMAN: Objection, ambiguous, you're

still referring to exclusive in the CAP?

MR. ATHANASIA: Uh-huh.

THE WITNESS: Again I looked at the different documents that were available to me in the contracts as they represented the number of retail institutions where these features if one assumes that when one signs a contract the parties agree to the particular attributes of the arrangement, felt in rendering my opinion that was sufficient enough to be an indicia of some form, type of exclusion.

BY MR. ATHANASIA:

Q. I'm just trying to get a sense of if I were to separate exclusive vending from exclusive point-of-sale materials from what you call adherence to plan-o-grams, what work did you do within the CAP universe, CAP participants, did you do to separate those out and quantify each?

A. Well, as I mentioned I focused mainly on the level of exclusion and accepted the particular documents as they related to different forms of exclusion. After all the criteria of interest here is not whether or not a competitor has been injured by exclusion of a competitor's rack or POS. The important criteria is whether or not exclusionary outcomes have impacted competition.

exclusionary features but merely to determine whether or not exclusion was present or not.

Q. And would that be the same answer for if I tried to ask you just the number that had exclusive possible features?

A. Yes, it would.

Q. And also the third thing you described, adherence to require plan-o-grams?

A. Yes, it would.

Q. How about what we talked about earlier about a company getting the number one position and as you said excluding the -- another company from the number one position, would that be included in this 22,000?

MR. GUZMAN: Objection. The question is ambiguous.

THE WITNESS: To the extent that I've characterized three major themes, the positioning of an exclusive display as you characterize it or a display in the number one position or the number two position, to the extent that I would view that as being exclusionary, it may or may not have been considered to be exclusionary. I would have to look at the, you know, the context of the specific circumstance and this gets to your point of

identifying the particular features segregating them into components because in this particular case what we're looking at is often a combination of a variety of exclusionary features that in isolation may mean one thing but in aggregate may mean something entirely different.

BY MR. ATHANASIA:

Q. The third common theme you referred to is adherence to required plan-o-grams. Can you tell me what you mean by that? Are you referring to a retailer who cedes control of the product mix decisions in the stores to United States Tobacco?

A. What I'm describing here in terms of adherence to exclusionary plan-o-grams would be through some mechanism through some approach or process the -- UST is able to obtain the agreement of the retailer to utilize and implement a plan-o-gram that results in exclusionary outcomes.

Q. And can you just describe to me what you mean by exclusionary outcomes?

A. These would be arrangements where the number of products were reduced in terms of facings for a competitor product where the number of total products may have been reduced along with and part of the reduction of the number of facings of the

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

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CONWOOD COMPANY, L.P., CONWOOD :
SALES COMPANY, L.L.P., :
Plaintiffs, : Civil Action No.
vs. : 5:98 CV-108-R
UNITED STATES TOBACCO COMPANY, :
UNITED STATES TOBACCO SALES AND :
MARKETING COMPANY, INC., UNITED :
STATES TOBACCO MANUFACTURING :
COMPANY, INC., and UST, INC., :
Defendants. :

- - - - - - - - - - - - - - - - - - - -X

DEPOSITION OF GREGORY T. GUNDLACH

(Taken by Defendants)

Chicago, Illinois

Wednesday, November 10, 1999

Reported by: Robin Tokarz-Chimniak, CSR No. 084-001999

to attempt to obtain UST documents that provided information as to the agreement, as well as to provide further explanation of the nature of the agreement. So in that respect, the deposition of Mr. Entwistle in paragraphs 57 and 58, I think, provides additional explanatory as to the nature of the earlier-cited documents in the listing. 11:08:48 AM 11:08:59 AM 11:09:02 AM 11:09:05 AM 11:09:38 AM 11:09:38 AM 11:09:38 AM

Q. Can you tell me what specific testimony you're referring to on those pages? 11:09:38 AM 11:09:38 AM

A. I'm referring to all of the testimony on page 57 and 58, as providing further explanation as to the nature of the agreement. 11:09:38 AM 11:09:38 AM 11:09:41 AM

Q. So you're including the testimony about Wal-Mart on page 58 to -- as a citation for exclusivity about the Kmart stores? 11:09:42 AM 11:09:44 AM 11:09:49 AM

MR. GUZMAN: Objection. Can I see that for a second before you answer? 11:09:52 AM 11:10:04 AM

Could you read back his answer, too, please? 11:10:04 AM 11:10:04 AM

THE REPORTER: "Answer: I'm referring to all of the testimony on page 57 and 58, as providing further explanation as to the nature of the agreement." 11:09:38 AM 11:09:38 AM 11:09:41 AM 11:09:41 AM

MR. GUZMAN: I think that answer answers your question. Objection, asked and 11:10:23 AM 11:10:23 AM

answered. 11:10:25 AM
MR. ATHANASIA: Could we mark as 11:10:38 AM
Gundlach 7 another document cited. 11:10:40 AM
(Whereupon Gundlach Exhibit
No. 7 was marked for
identification.)
(Witness examines document.) 11:13:23 AM
THE WITNESS: I've reviewed Exhibit 7. 11:13:23 AM
(Discussion off the record.)
BY MR. ATHANASIA:
Q. Professor Gundlach, on that document in 11:14:01 AM
front of you, the first bullet point in the 11:14:04 AM
memorandum, can you read that for the record, 11:14:08 AM
please? 11:14:10 AM
A. "Kmart position" -- I believe, as it's 11:14:14 AM
spelled p-o-s-t-i-o-n -- ":they need $50,000 from 11:14:20 AM
USTSM to help subsidize the cost of the rack for 11:14:27 AM
this new tobacco set. They are at this point 11:14:31 AM
NEGOTIABLE," in capital letters. 11:14:33 AM
Q. Now, if you could turn to page 2 of the 11:14:37 AM
document, do you see several bullet points that 11:14:45 AM
say "if we participated"? 11:14:47 AM
A. Yes, I do. I see 1, 2, 3 of 13 bullet 11:14:50 AM
points on the page. 11:15:02 AM
Q. Now, what is your understanding of who 11:15:05 AM

"we" refers to when it says "if we participated"? 11:15:07 AM
A. Well, the author of the memo is Mike 11:15:20 AM
Stanke. My sense is that is referring to United 11:15:22 AM
States Tobacco. 11:15:37 AM
Q. Now, did you do anything to determine 11:15:40 AM
whether United States Tobacco participated in the 11:15:42 AM
program that is outlined in that document? 11:15:47 AM
A. Again, Chris, it's hard. 11:16:16 AM
MR. GUZMAN: I'm sorry, let me object 11:16:16 AM
before you answer. 11:16:16 AM
The question is ambiguous, and again, I 11:16:16 AM
note there are more documents cited with respect 11:16:16 AM
to the Kmart entry on the table. We're looking 11:16:16 AM
at one of three documents, one of multiple pages 11:16:16 AM
cited. 11:16:16 AM
THE WITNESS: I would find difficulty 11:16:19 AM
in answering your question without having the 11:16:19 AM
additional materials in front of me as well. 11:16:20 AM
BY MR. ATHANASIA: 11:16:22 AM
Q. Aside from reading the additional 11:16:23 AM
materials listed on the table, did you do 11:16:25 AM
anything to determine whether United States 11:16:27 AM
Tobacco participated in the program, as outlined 11:16:29 AM
on that memorandum? 11:16:32 AM
MR. GUZMAN: Which memorandum are you 11:16:34 AM

referring to, Chris? 11:16:35 AM
THE WITNESS: Again, we reviewed the 11:16:46 AM
entire body of evidence in the case, and this 11:16:47 AM
matter is ongoing. That would include documents 11:16:52 AM
such as the one characterized in Exhibit 7, which 11:16:56 AM
would be an internal memoranda of UST, as well as 11:17:01 AM
depositions, Conwood employee depositions, 11:17:05 AM
internal Conwood documents. 11:17:13 AM
So if by your question do you mean did 11:17:18 AM
we refer to those that, body of evidence, yes. 11:17:22 AM
BY MR. ATHANASIA:
Q. Who is the author of that document? 11:17:28 AM
A. As it's characterized on page 3, 11:17:36 AM
Michael R. Stanke. 11:17:38 AM
Q. Did you read the deposition of 11:17:41 AM
Mr. Stanke to determine if US Tobacco 11:17:42 AM
participated? 11:17:44 AM
MR. GUZMAN: Objection, the question is 11:17:47 AM
ambiguous. 11:17:48 AM
THE WITNESS: I believe I did, but I 11:17:54 AM
can't recall either way whether or not, for this 11:17:55 AM
particular question, if I did or did not. 11:17:57 AM
BY MR. ATHANASIA:
Q. Do you recall Mr. Stanke testifying 11:18:05 AM
that Kmart asked for $50,000 from USTSM for 11:18:07 AM

exclusive vending? 11:18:11 AM
MR. GUZMAN: Are you asking if that's 11:18:16 AM
his understanding?
MR. GUZMAN: He's characterizing 11:18:18 AM
evidence. We have no way of knowing whether he's 11:18:18 AM
characterizing correctly or incorrectly. It's a 11:18:22 AM
hypothetical; potentially an incomplete 11:18:25 AM
hypothetical. Without the documents, it's 11:18:28 AM
impossible to answer that. 11:18:30 AM
THE WITNESS: Without looking at the 11:18:31 AM
document -- and my sense is that you have it in 11:18:32 AM
front of you -- it would be difficult to be able 11:18:36 AM
to answer whether or not Mr. Stanke actually used 11:18:40 AM
those words within the context of the deposition. 11:18:43 AM
I'd be happy to look at it, if you have 11:18:48 AM
it. 11:18:50 AM
BY MR. ATHANASIA:
Q. Let me ask you this. If Mr. Stanke 11:18:53 AM
testified that United States Tobacco declined 11:18:55 AM
Kmart's offer that US Tobacco pay $50,000 for 11:18:59 AM
exclusive vending, would that change your opinion 11:19:03 AM
or change this chart in any way? 11:19:05 AM
A. I don't know that it would. 11:19:14 AM
Q. You also said that you reviewed the 11:19:15 AM
deposition testimony of Conwood personnel, 11:19:17 AM

EXHIBIT 3

WAL*MART STORES, INC.
Merchandising Division
702 Southwest 8th Street
Bentonville, AR 72716-9055

November 15th, 1996

Richard M. Fasanelli
Director of Sales Development
United States Tobacco
Sales and Marketing Company Inc.
100 West Putnam Avenue
Greenwich, CT 06830

Dear Rich,

I would like to take this opportunity to respond back to the letter that was sent to Beth Schommer on October 1st, 1996 regarding the "New Moist Smokeless Tobacco Merchandising System". I have discussed all the different points that were covered in the letter with Beth. Our McLane Category Merchandising Group will continue to work together with U. S. Tobacco in a joint venture for the further development of the best possible merchandising selection for the Wal*Mart planograms.

Together we recognize the following points:

1. U. S. Tobacco owns the moist merchandising racks.
2. U. S. Tobacco agrees to replace any shop-worn or damaged fixtures on a timely basis.
3. Wal*Mart will feature their store name on the large message area on this display, and U. S. Tobacco will be allowed to feature their brand names in a repeating manner in the background area of the pricing billboard.
4. Only Wal*Mart and U. S. Tobacco will be allowed to place point-of-sale material or any other type of communication on this merchandising system. All point-of-sale material must be approved by Wal*Mart.
5. The placement of these merchandising systems will begin February 17, 1997, and will include all the Wal*Mart stores with 8 foot, 12 foot, 16 foot, and 20 foot sections.

The conditions stated above will allow us jointly to enhance the growth of moist smokeless tobacco sales, and bring a greater level of satisfaction to the Wal*Mart customer.

Thank you,

Debbie L. Huskey
McLane Operations

Beth Schommer
Wal*Mart Merchandising

EXHIBIT 4

ORIGINAL TRANSCRIPT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 5:98-CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	

VIDEOTAPED DEPOSITION OF ROBERT KURTIS CARLSON

Taken at 1104 South Walton Boulevard, Suite 32, Bentonville, Arkansas, on August 17, 1999, at 8:05 a.m.

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MR. GORSUCH: I'm -- I'm sorry. I apologize, Mr. Carlson. If you'll just leave me one little second to get in there --

THE WITNESS: Yes, sir.

MR. GORSUCH: -- I'll be grateful. Objection, vague and ambiguous, misstates prior testimony. Go ahead.

A. When a promotion is presented and approved to the home office, at that time, that section is also approved for the use of POS to communicate the promotion.

Q. (Mr. Reed continued.) Okay. So in fact, have Conwood promotions been -- been communicated through use of this promotion strip in Wal-Mart stores?

A. Conwood has been approved -- To my knowledge, Conwood has been approved through -- in the annual calendar to use that section.

Q. Okay. Now, you mentioned earlier, when I asked you if the -- if the vendor designed by U.S. Tobacco met Wal-Mart needs, you said it does currently. Let me ask you with respect to the future, does con -- does Wal-Mart -- do Wal-Mart and McLane's re-evaluate periodically the way that vendors such as this one are meeting Wal-Mart's needs?

A. Yes, they do.

Q. Have other manufacturers of moist snuff offered to provide customized racks to Wal-Mart for moist snuff?

A. Yes, they have.

Q. (Mr. Reed continued.) Prior to the adoption of the current vendor designed by U.S. Tobacco, was there -- what was the status of point-of-sale advertising on the racks in Wal-Mart stores?

MR. GORSUCH: Objection, lack of foundation.

A. To my knowledge, there wasn't. Excuse me. No. Prior to the cabinet, it was whatever was available in the particular rep's car, and that was hung throughout the department or put up throughout the department.

Q. (Mr. Reed continued.) And so with the adoption of this cabinet and the use of the Wal-Mart header card, was that part of the objective to make each one look the same from store to store, each rack look the same from store to store?

A. To my knowledge, yes.

MR. GORSUCH: I'm sorry. I wasn't able to get in there.

THE WITNESS: I didn't pause.

MR. GORSUCH: Objection, lack of foundation. Thanks.

Q. (Mr. Reed continued.) In choosing -- Excuse me. In continuing to work with U.S. Tobacco in connection with the cabinet that you're currently using, what factors with regard to U.S. Tobacco's resources are important to Wal-Mart and McLane's?

MR. GORSUCH: Objection, vague and ambiguous.

A. Can you repeat that for me, please?

Q. Has U.S. Tobacco been able to provide a customized cabinet that accommodates all moist snuff products?

A. Yes.

Q. Now, currently, with the cabinets that are in place in the Wal-Mart stores around the country, are you aware of any problems with those racks, those cabinets?

A. I'm not aware of any problems as far as structurally. In some cases, the cabinet may be too big for the store's needs. As you know, the environment changes constantly in the category, but besides that, it's -- there's no problems that I'm aware of.

Q. Has U.S. Tobacco been open to suggestions that Wal-Mart has had on how to make the cabinets better or how to -- for example, how to deal with the concern that the cabinets be the proper size for each store?

A. Yes, they have.

Q. Can Wal-Mart and McLane's make a decision at any time to -- to change the vending system in the Wal-Mart stores?

MR. GORSUCH: Objection, lack of foundation.

A. Yes, they can, to my knowledge.

Q. (Mr. Reed continued.) Is there anything at all about the relationship between United States Tobacco Company and McLane's and Wal-Mart that would prevent McLane's and Wal-Mart, for example, from making a decision tomorrow to use multiple racks; in other words, a rack from U.S. Tobacco and a rack from Conwood and a rack from Swisher?

MR. GORSUCH: Same objection.

A. There's nothing that I know of today.

Q. (Mr. Reed continued.) Did United States Tobacco pay either Wal-Mart or McLane's for any vendor exclusivity in Wal-Mart stores?

MR. GORSUCH: Objection, vague and ambiguous.

A. Can you repeat that question, please?

Q. (Mr. Reed continued.) Yes. Did United States Tobacco pay anything to Wal-Mart or McLane's in exchange for an agreement by Wal-Mart and McLane's not to use, for example, a Conwood rack?

MR. GORSUCH: Same objections.

A. Not to my knowledge.

Q. (Mr. Reed continued.) Mr. Carlson, are you aware of Wal-Mart or McLane's having felt any pressure from United States Tobacco as a result of any threat by U.S. Tobacco that it would remove its racks from the Wal-Mart stores if certain conditions weren't met?

MR. GORSUCH: Objection, lack of foundation, vague and ambiguous.

A. No, I'm not.

Q. (Mr. Reed continued.) Now, could you describe what a planogram is?

A. A planogram is a schematic or an outline for the stores to follow to set their departments.

Q. And does Wal-Mart use planograms?

EXHIBIT 5

K-MART NOTES FROM SEPTEMBER 25, 1996 MEETING

(K-MART A TIGER OF AN ACCOUNT)

Enclosed are some notes regarding our discussion with Bill Burgess Senior buyer at K-Mart corporation. These notes are my interpretation of the meeting and will be listed in bullet point form. If you have any questions regarding any of this information please feel free to contact me .

* K-Mart postion:they need $50,000 from USTSM to help subsidize the cost of the rack for this new tobacco set. They are at this point NEGOTIABLE.

* This is the first consistent plan-o-gram the K-Mart has ever participated in which will cover all 2200 location and will provide consistency, integrity, merit, and a reference point to manage the category on an ongoing basis.

* On October 2, 1996 they are moving the cigarettes from the front wall to register #2 in all locations improving their positioning.

* Implementation of the new OTP and smokeless plan-o-gram to become effective January 2, 1996 and set that week.

* Current estimate according to the Nielsen figures is that K-mart does approximately 18 million dollars in moist smokeless sales with no real consistency in terms of product mix or merchandising to their current sets.

* K-Mart is looking to implement an automatic replenishment system in 1997. Currently they are working out some bugs and until everything is running smooth they will not begin execution of this program.

* Currently Bill Burgess stated that we are the only company that has not agreed to cost share the building of this fixture and none of the other consumer product companies have even blinked an eye.

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* Of the 2200 location 83-90% of them will have a 10 foot set and 7-10% will have a 15 foot set with this new plan-o-gram.

* Bill mentioned that he would discuss the possibility of pushing out FOUR promotions during the 1997 year if that is what it takes to get us to participate in this cost share. Details must be specific and worked out prior. He said bring the information to the table.

* If we participated we could have exclusive vending for the single and roll units it that is what it takes.

* If we participated we could negotiate exclusive advertising on the smokeless brands and category. The possibility of a specialty header card or advertising was entertained as well.

* If participated we would have some control as to the initial set in terms of product mix including non tobacco products.

* The money for the cost of this fixture is going directly to the manufacturer Bill mentioned.

* K-Mart is going to execute a training program in regard to this category. We will have a specific contact at store level to discuss any concerns with and that has some specific knowledge of this category. He would allow us to participate.

* The Nielsen information that we just provided him with he would like the sample size of the survey and a list of locations that this information came from.

* Bill mentioned that the spend rate of current manufactures that deal with K-Mart is a minimum of 5% of total business dollars.

* This is a one time investment and the commitment time could be negotiated anywhere form one to five years. We need to define this clearly if we are going to participate. We could negotiate future store openings, new product introductions, etc.

* Bill would provide us an opportunity to review the category on an on going basis.

*** K-Mart is putting this program in a Space Man which possibly could be linked directly to UST(with negotiations) to receive data an a daily basis about K-Marts. We would then have the capabilities to have not only Wal-Mart information but K-Marts as well encompassing over 3/4 of the mass merchandise trade class.(Similar to retail link)**

* We could work all the details out in a contractual for payment over a period of time with holding any monies for non compliance issues as a check and balance.

* He mentioned they are going to start a direct mail program exclusive to tobacco consumers and he would consider letting us get involved. Possibly at a cost but he did say bring it to the table and we will discuss it.

* If we do not participate the result mentioned could be: Conwood house and control the merchandising , and some of the distribution of our products, or just not including us in the plan-o-gram. These two point were mentioned.

* Execution at store level would be communicated down and we would have a contact. If at any time we encountered a deviation of the plan-o-gram we would just call Bill and he would take care of it. As well as any unethical behavior would not be tolerated and those involved would be disciplined so that we wouldn't have to police this in the field.

These are just some of the note that I did take during the meeting and spelled out accordingly. This information is just to let you all know what took place and the direction K-Mart is taking in regards to this category. Feel free to make any suggestion or comments regarding this situation.

Best of Luck,

Michael R. Stanke

UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC.
603 EAST DIEHL ROAD / SUITE 135, NAPERVILLE, ILLINOIS 60563

(630) 505-0210

K-Mart Corporation
Attn: Mr. Bill Burgess, Category Manager
3100 W. Big Beaver Road
Troy MI 48084-3163

March 19, 1998

Dear Bill,

It has been almost a year since K-Mart and U. S. Tobacco entered into an agreement to turn K-Mart's tobacco departments into a destination category. I wanted to take this opportunity to reflect on the reasons why U. S. Tobacco was chosen to be the Moist Snuff Category Captain.

The top 15 moist items in the mass merchandiser trade channel account for more than 86% of dollar sales. U. S. Tobacco brands account for 81.2% of these dollars with 12 of the top 15 brands being U. S. Tobacco.

U. S. Tobacco is the only Company in the moist smokeless industry to complete an opportunity study specifically for K-Mart. Highlights of this presentation included:

* Moist Snuff was underdeveloped in K-Mart by 10.6 share points, with U. S. Tobacco brands specifically underdeveloped by 13.1% share points.

* In a 13-week period, Moist Snuff in K-Mart was the only segment posting an increase, +2.2% in the oral segment.

* Moist space share is underdeveloped in K-Marts by 22.9% relative to the dollar share of market.

* In a 52 week period moist smokeless tobacco generated $290,000,904. Of this, one (1) product Copenhagen single can commands 34.6% or $100,387,819 share.

Bill, I could continue on with many facts relating to brand strength and performance, however, U. S. Tobacco brings even more to the table. We have the largest field sales force in the smokeless tobacco industry. This enabled us to provide the manpower required to undertake a reset program the size of K-Mart. Additionally, in good faith, we agreed to be true category partners in providing merchandising for all round can products, not just U. S. Tobacco brands.

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The cost of producing single can vendors was a sizeable investment, let alone the 2 for 1 slots that had to be specially manufactured. This project, overall has been a big commitment for U. S. Tobacco, however, we did not ask for our competitors to share the cost.

A few weeks ago, we met and reflected on what we had learned from the 1997 store reset. We were excited about the development of the OTP 2 1/2 foot rack and what it would do for the category both short and long term. Now, however, we are somewhat disillusioned with the decision to exclude U. S. Tobacco from this space, due to our unwillingness toshare the cost. It is with disappointment that U. S. Tobacco must step away from this project. We have decided not to ship any more merchandising systems to K-Mart Stores. Our sales representatives will continue to make retail calls and during the call, if a new merchandiser is needed, one will be placed.

Bill, we feel the decision that you have made will answer only short term objectives. Long term, you are giving up the opportunity to participate in the only retail incentive program in the smokeless industry. As we first discussed October 14, 1997, the Customer Alliance Program C.A.P., would have paid K-Mart up to 8¢ per roll for performance. We believe that, as U. S. Tobacco sells 8 out of every 10 cans, K-Mart in a year period would have had the opportunity to generate more than $4.85 per SKU.

At your earliest convenience, please call so that we can discuss the outstanding issues.

Sincerely,

Sherry

Sherry Teeguarden
Key Account Manager

EXHIBIT 6

C O N F I D E N T I A L

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

CIVIL ACTION NO. 5:98 CV-108-R

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.L.P.,

Plaintiffs,

-vs-

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY, INC. and UST, INC.,

Defendants.

Wednesday, June 23, 1999

New York, New York

16:21:04 Q. Do you know how that set is
16:21:04 designed?
16:21:04 A. No.
16:21:10 Q. Do you have any K-Marts in your
16:21:12 territory currently?
16:21:12 A. Yes.
16:21:14 Q. Do they have a consistent set for
16:21:16 their moist snuff tobacco?
16:21:18 A. No.
16:21:20 Q. Do they have racks?
16:21:20 A. Some of them.
16:21:24 Q. Do some of them have a different
16:21:24 type of setup?
16:21:26 A. Yes.
16:21:28 Q. What type of setups are you aware
of?
16:21:32 A. I'm not sure what you mean.
16:21:36 Q. Well, besides moist snuff racks, do
16:21:40 they contain moist snuff in other racks or just
16:21:48 cigarette racks or cigarette displays or do
16:21:50 they have a special moist snuff setup?
16:21:54 A. There is no consistency to their
16:21:54 sets.
16:22:12 MR. POWELL: Mark this Stanke
16:22:12 Exhibit 14.

EXHIBIT 7

UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC.
100 WEST PUTNAM AVENUE, GREENWICH, CONNECTICUT 06830

Rich / Dan Tiedt
Excellent — job!
Gary

TO: Gary Smith

CC: A. Hoefer
H. Jaffer
G. Milano
D. Reed
G. Rogers
D. Untiedt

FROM: Rich Fasanelli

DATE: April 16, 1997

RE: *7-Eleven*

We have had a positive breakthrough with Tom Bonfiglio, the new buyer at Southland. After Don Blackburn and Dave Untiedt held two meetings with him, we won exclusive vending for all single can brands and received permission to feature our faceplate on these vending systems.

Strategically it would make sense for us to produce "2 for 1" slots for all our vending systems in order to support our category management efforts, disrupt the competitive message and have the ability to dominate retail with the newly proposed Chain Retail Incentive Program.

Attached please find a recap from Don and a letter from Tom. Thanks for your consideration.

RMF laa
Attachment

USTC CWD 025956
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UNITED STATES TOBACCO
SALES AND MARKETING COMPANY INC.

INTRA-COMPANY CORRESPONDENCE

DATE: April 11, 1997

TO: Distribution

FROM: Don Blackburn, Key Account Manager, Region 3

SUBJECT: **THE SOUTHLAND CORPORATION / 7 ELEVEN**
SMOKELESS MERCHANDISING & MARKET STATUS

The purpose of this letter is to outline and deliver an agreement that we have reached with the Southland Corporation, as it pertains to merchandising smokeless tobacco and to provide you with updated information on Southland's marketing strategies. Enclosed please find a letter from Tom Bonfiglio, Category Manager and a listing of Southland division offices that includes a cross reference of U. S. Tobacco field contacts and Southland's "All Market Core List."

Merchandising:
* Key points of the agreement as listed on Tom Bonfiglio's letter.

1. This agreement provides us with vendor exclusivity.
2. There are to be no double facings for either Conwood or Pinkerton products.
3. The only POS allowed on our vendors for competitive products will be the product vendor label U. S. Tobacco can reinstate the use of color graphics header cards, exclusively to the single can merchandiser.
4. We will continue to supply the use of #1619 vendors as needed as Southland would like to maintain self serve as long as possible. Additionally we have introduced the #3103 as an alternative to accommodate possible self serve regulations. For your information we are also working with Southland Corporate to include the #3103 into a couple of back bar re-merchandising tests currently underway
5. Swisher will continue to provide their own merchandiser.
6. Southland understands that we can not supply facings for non-tobacco products.
7. All competitive management has been copied with Tom Bonfiglio's letter.

The attached letter from has been sent to their Division offices I think you will agree that it will be in our best interest to follow up with these divisions as soon as possible. Historically speaking we have not had such an opportunity in quite some time with Southland. I am confident that together as a team we can get this done and prove our partnership value. We recommend that you gain a specific letter of authorization from your respective Southland division contacts before you forward this correspondence to the field for action Please keep in mind that the Southland corporate office can provide only a recommendation to the franchise operations If at all possible we would like for contact to be made with the Southland division offices by May 15, 199" For your information we have a scheduled appointment with Southland on May 2, 199" to discuss other business and to follow up on our progress with merchandising to date.

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All Market Core List:

The Southland Corporation does not do strict planograms. They do layouts only, as it relates to their All Market Core List. (See attached list and key reference) N = National (must be there) R = Regional (must be there) ***All other brands not listed on the Core list are optional.***

Division Contacts:

According to the input I have received from each of you and Southland the attached cross reference contact list should be correct. Primary contacts for Cigarettes and Tobacco outside of the Non-Foods Merchandising Manger in each of the divisions are identified with an (*) asterisk. We know that the Central, Chesapeake and Florida divisions are comprised of all corporate locations and account for 1,989 stores of Southland's approximate 2,100 total corporate locations

Corporate Strategies:
Notes taken from meeting with Tom Bonfiglio 3-19-97

* Typical consumer. 34 year old, white, male
* They want to build transactions with existing consumer base
* Store growth is directed to white collar positioning
* 40% of sales are accounted for by 60-70% of their shoppers
* Franchises are provided recommendations on all strategies
* 150 - 200 new store openings in 1997 (will have new Rouston back bar fixture)
* 2,000 will be remodeled in 1997
* Division personnel will communicate store openings and remodels to us
* Developing 5 year plan
    - will include a 5 year financial plan model (size, profits, spending)
    - Wants to receive as much data available to determine whether category is viable
    - Wants to see how 7 Eleven performs - compared to category
* Have interest in a multipack or roll offer

Scanning:

* Installation of systems starts by June 1997 (1 yr. to completion)
* Once system is in, they may eliminate product retail exchanges to eliminate possibilities of vendors bringing in unauthorized items
* Southland believes it is their job to order and rotate
* Project that a handful of franchise locations will not participate
* They want to eliminate distractions to clerks from servicing vendors
* Could move to eliminate vendor activity in stores altogether
* Scanning will make pricing programs more effective- includes implementation of price book management

Thank you in advance for your assistance with this important project with a very important customer. Should anyone have any questions, concerns or ideas please give me a call. (Audix: 6539#) (Phone: 871-831-8171)

Sincerely,

Don Blackburn

cc Tom Bonfiglio (Southland)
Dave Untiedt
Rich Fasanelli
Key Account Managers
Regional Vice Presidents

LSTC:CWD 025959
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PLAN-O-GRAM
INFORMATION

SOUTHLAND CORPORATE DOES NOT DO SOLID PLAN-O-GRAMS. THEY DO LAYOUTS ONLY, AS IT RELATES TO THEIR ALL MARKET CORE LIST. (SEE ENCLOSED)

ALL MARKET CORE LIST REFERENCE

PH/01	=	PHILADELPHIA
FL/02	=	FLORIDA
TX/03	=	TEXAS
MT/04	=	UTAH & COLORADO
CS/05	=	CHICAGO
DE/06	=	DETROIT
NC/07	=	NORTHERN CALIFORNIA
NW/08	=	NORTHWEST (Washington, Oregon & Idaho)
NE/09	=	NORTHEAST (New York, Connecticut, Massachusetts)
BL/10	=	BALTIMORE
TR/11	=	SOUTH VIRGINIA
WM/12	=	WASHINGTON D.C. METRO
SO 13	=	SOUTHERN CALIFORNIA

N = NATIONAL - (MUST BE THERE)
R = REGIONAL - (MUST BE THERE)

All other brands not listed are optional.

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(FINAL/ACTIVE)

THE SOUTHLAND CORP

ALL MARKET CORE LIST

IPC # / ITEM #	DESCRIPTION / Comments	SIZE	UOU	M/A/D	PH	FL	TX	MT	CS	De	NC	NW	NF	BI	TR	WMSO
					01	02	03	04	05	06	07	08	09	10	11	12	13
*SA 320101	TOBACCO - ACCESSORIES - LIGHTERS																
07077000006	BIC C/G LIGHTER	50 CT	1	M	N	N	N	N	N	N	N	N	N	N	N	N	
054005																	
07011000127	7 ELEVEN LOGO LIGHTER		50	A	R	R	R	R	R	R	R	R	R	R	R	R	✓
054005	NATIONAL BEST SELLER																
07077000267	MINI CIGARETTE LIGHTER		50	A	R	R	R	R	R	R	R	R	R	R			
377467																	
*SA 320201	TOBACCO - SMOKELESS - CHEWING																
07510000704	BELCHNUT TOBACCO	3 OZ	12	A	R		R			R		R		R			
500165	REGIONAL BEST SELLER																
04210000712	LEVI GARRETT	3 OZ	1	M	R	R	R		R	R	R			R	R	R	R
066257	REGIONAL BEST SELLER																
07019500006	HEDMAN POUCH 3 OZ	3 OZ	1	M	N	N	N	N	N	N	N	N	N	N	N	N	N
500769	NATIONAL BEST SELLER																
07019500800	HEDMAN GOLDEN BLEND	3 OZ	12	A	R	R	R	R							R	R	R
500777	REGIONAL BEST SELLER																
*SA 320203	TOBACCO - SMOKELESS - SNUFF																
04210000294	KODIAK WINTERGREEN	10 CT	1	M	N	N	N	N	N	N	N	N	N	N	N	N	N
066258	NATIONAL BEST SELLER																
07310000060	SKOAL LONG CUT STRAIGHT	10 CT	1	A	N	N	N	N	N	N	N	N	N	N	N	N	N
138362	NATIONAL BEST SELLER																
07310000069	SKOAL LONG CUT MINT	10 CT	1	A	N	N	N	N	N	N	N	N	N	N	N	N	N
008557	NATIONAL BEST SELLER																
07310000107	COPENHAGEN	10 CT	1	M	N	N	N	N	N	N	N	N	N	N	N	N	N
066233	NATIONAL BEST SELLER																
07310000137	SKOAL REGULAR	10 CT	1	M	N	N	N	N	N	N	N	N	N	N	N	N	N
175190	NATIONAL BEST SELLER																
07310000148	SKOAL LONGCUT WINTERGREEN	10 CT	1	M	N	N	N	N	N	N	N	N	N	N	N	N	N
066225	NATIONAL BEST SELLER																
07310000286	SKOAL LONG CUT CHERRY	10 CT	1	A	N	N	N	N	N	N	N	N	N	N	N	N	N
002022	NATIONAL BEST SELLER																
07310000286	SKOAL LONG CUT CLASSIC	10 CT	1	A		R	R			R	R	R					
13013	NATIONAL BEST SELLER																
07310000288	SKOAL LONG CUT SPEARMINT	10 CT	1	A						R							
054021	REGIONAL BEST SELLER																
*SA 320301	TOBACCO - SMOKING - CIGARS																
01176000009	WINCHESTER 20'S	20 PK	1	M	R	R				R					R		
054027	REGIONAL BEST SELLER																

Category Manager: TOM HONEYCUTT

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USTC/CWD 025961

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DATE April 7, 1997

TO/ Division Sales and Marketing Managers
Division Non-Food Merchandising Managers
Division Tobacco Merchandisers

LOCATION All Divisions

FROM/ Tom Bonfiglio
LOCATION 0161
PHONE214-828-7585

SUBJECT Smokeless Moist Snuff Display

Ladies and Gentlemen,

I would like to explain an agreement that has been reached with U. S. Tobacco regarding display of single can smokeless tobacco.

We have product recommended in this sub-category from a number of manufacturers:

U. S. Tobacco	-	Copenhagen and Skoal products.
Conwood	-	Kodiak and Hawken products.
Pinkerton	-	Timberwolf (Value Price).
Swisher	-	Redwood / Silver Creek (Value Price Twin Packs).

There seems to be some confusion as to how to merchandise this product. Do we use the rack provided by U. S. Tobacco exclusively for their product? How do we get racks from the other companies? What kind of Point of Purchase do we allow on the racks? These are some questions I have already heard.

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I have met with U. S. Tobacco and have come to the following understanding with them.

1. They will provide, upon request, additional channels to their basic fixtures which can be used to merchandise product from Conwood and Pinkerton.

2. The channels that a store utilizes to display Conwood and Pinkerton products are to be labeled with the brands by Conwood/Pinkerton Reps at the store. Only one channel per SKU should be allocated (no double facings of Conwood/Pinkerton products).

3. There will be no other signage for Conwood/Pinkerton products on the display, and the front facsia of the fixture will be fully utilized for U. S. Tobacco graphic as shown on the attachments.

4. Be sure to have a store pricing gun sticker on each channel with current retail. This is important for customer communication and also provides some identification of the value price brand.

5. A by-Division listing of U. S. Tobacco contacts has been prepared and is provided to you along with this letter. These will be the individuals to contact for all fixturing needs.

6. There are two basic U. S. Tobacco fixtures now available.

   #1619 - 7 WIDE FIXTURE - (see attached)

   This is the in-line fixture currently in use in many of our stores.
   In addition, there are three different size channel extenders available,
   #1953 - One can wide extender
   #1953 - Two can wide extender
   #1953 - Three can wide extender

   #3103 - 10 WIDE FIXTURE - (see attached)

   This is a new design that is wider and higher than the #1619, but is not as deep, 6 1/2 " as opposed to 11 1/2 " on the #1619. This may be a better option for some stores, particularly if regulations require us to relocate smokeless product to a clerk-serve location.
   Extenders are also available,
   #3104 - One can wide extender
   #3104 - Two can wide extender
   #3104 - Three can wide extender

   So each store can be provided the numbers of channels they need to accommodate the exact number of items in this sub-category they carry. If they delete or add items, they can delete or add channels.

SN[illegible]

U. S. Tobacco is making the use of their fixtures available to merchandise all three brands in the effort to support Southland Corporation, as we are a key retailer of this product. They cannot provide unlimited fixturing to the whole retail world in this manner, so the fixtures and extenders will not be stocked at McLane. They have committed to promptly deliver anything we request to either Division or Market location, and could deliver directly to store if you desire.

Swisher "Buy One Get One" Package

For those stores who carry the Redwood / Silvercreek packages, there are no U. S. Tobacco racks that will accommodate this product. Swisher has display racks for this product. We only recommend one, the PV2T-4F, an illustration of this is attached. If these are needed, contact your local Swisher Rep, and if you do not have a contact, let me know and I will put someone in touch with you.

Non-Tobacco Moist Chew

There are two brands of these products that pretty much own this business, Smokey Mountain Chew and Oregon Mint. Oregon Mint is strong in the Northwest, while Smokey Mountain is capturing shares in the Midwest and Southwest.

These products are NOT to be merchandised in the smokeless tobacco fixture. Both of these products come in a inner pack display carton that should be used, as it identifies the product as a non-tobacco alternative to regular roll tobacco. This is also a product that can remain as self-serve on a gondola display if and when the tobacco products are required to be clerk-serve.

I am meeting with suppliers in an effort to develop a listing of display fixture options that will be available if the FDA regulations scheduled for August 28, 1997, are not put on hold. This would require all cigarettes, chewing and plug tobacco and dry/moist snuff to all be clerk-serve. It does NOT include cigars or pipe tobacco. However we are starting to see local ordinances being enacted which are even more restrictive than the FDA, and do include cigars and pipe tobacco.

As soon as I have this display fixture listing completed, I will provide it to you along with the information on how to obtain them.

If there are any questions on this issue, please let me know. If we use this opportunity to take control of the way we display smokeless tobacco, we can eliminate the "turf wars" that go on between the vendors in our stores.

Thank you,

Tom Bonfiglio

cc: Gary Rose
Wendy Barth
Ronny Volkening

Scott Elsik - Conwood
Al Allen - Swedish Match
Jay Bush - Swisher
Don Blackburn - U. S. Tobacco

SNJ[illegible].DOC

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE FOR AN ORDER SIMPLIFYING THE ISSUES AT TRIAL AND FACILITATING THE DISPOSITION OF THIS LAWSUIT

Defendants United States Tobacco Company, et al. ("USTC"), respectfully move this Court for an order in limine formulating and simplifying the issues to be decided at trial, including the elimination of redundant or unnecessary claims. As described below, Conwood set forth in its trial brief claims and related evidentiary theories that either: (i) were not pursued in discovery and are unsupported by any record evidence; or (ii) would be duplicative and confusing to any jury. Accordingly, USTC respectfully requests that this Court issue an order under Fed. R. Civ. P. 16, to ensure the "just, speedy and inexpensive disposition of the action." Fed. R. Civ. P. 16(c)(16).

ARGUMENT

In its trial brief Conwood in effect asks this Court to transplant its Lanham Act claim and certain of its state law claims straight from the Complaint into the trial without Conwood having pursued these claims in discovery. It would be a waste of judicial resources, as well as confusing

for the jury, to burden any trial with claims by Conwood that were essentially (and understandably) ignored for almost two years. Conwood's trial brief and proposed jury instructions also reveal an intent to pursue an attempted monopolization claim that is, at best, duplicative of and encompassed by its monopolization claim, and, at worse, contradicted by its claim that it is USTC's use of actual monopoly power that is harming Conwood. Either way, it would serve no purpose to burden this Court and the jury with duplicative evidence and argument, as well as significantly more jury instructions, when any Section 2 theory by Conwood will rise or fall with its actual monopolization claim. Accordingly, this Court should issue a pretrial order eliminating all but the central claims of this lawsuit.

I. There Are No Triable Issues of Fact In Four of Conwood's Claims

In the twenty-one month history of this litigation, Conwood has failed to gather or present any evidence that would support its claims against USTC under (1) the Lanham Act; (2) the Kentucky state law standard for product defamation; (3) the Kentucky state law standard for tortious interference with contract/tortious interference with prospective business relations; or (4) Kentucky Revised Statute 365.050 (Unfair Competition) ("KRS 365.050"). Accordingly, these claims should be precluded by an appropriate pretrial order under Fed. R. Civ. P. 16.

Tellingly, Conwood's trial brief does not represent that it will elicit evidence at trial to support these claims. Instead, Conwood simply lists "pertinent factual questions" without indicating how any answers can or will be reached:

- Lanham Act: "whether UST sales personnel misleadingly represented that Conwood products contain fiberglass, stems, or other imperfections . . . misleadingly represented that Conwood dating methods are unreliable . . .whether UST advertised its Copenhagen products with false or misleading "made on" dates to gain an advantage over rivals"

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- Tortious Interference With Contract/Tortious Interference With Prospective Business Relations: whether "UST induced or otherwise caused a third person not to perform an existing contract with Conwood"

- Product Defamation: "whether UST misrepresented that Conwood products contain fiberglass, stems, and other impurities"

- Kentucky Revised Statute 365.05: "whether UST provided secret rebates and promotions to certain retailers (such as Wal-mart) that were not offered to other retailers . . . whether such secret rebates and promotions tended to harm competition."

Pls. Tr. Br. at 14, 15, and 16. These could have been "pertinent factual questions" during discovery, but they were not pursued with any success by Conwood. Instead, for the first time since Conwood drafted its Complaint, these claims have been resurrected and presented as claims to be pursued by Conwood at trial. Under Fed. R. Civ. P. 16, this Court should issue a pretrial order eliminating these dormant claims at trial.

A. Conwood's Claims Utterly Lacking In Evidentiary Bases Should Be Eliminated From Trial

The law is well established that when issues such as these are raised "in an altogether off-hand manner, late in the trial proceedings," those issues should be eliminated "as unworthy of trial." Smith v. Gulf Oil Co., 995 F.2d 638, 642 (6th Cir. 1991) (affirming district court's preclusion of one of plaintiff's theories of liability before trial as a matter of law). "Conclusory allegations, if not supported by facts, do not create an issue which should be reserved for trial. Specific facts showing that there is a genuine issue for trial must be set forth." Vincenty v. Eastern Air Lines, 528 F. Supp. 171, 173 (D.P.R.1981). Accordingly, an order in limine excluding these issues from trial is warranted. It would both simplify this proceeding and avoid unnecessary proof, in accordance with the purpose of Fed. R. Civ. P. 16. See Porter-Cooper v. Dalkon Shield Claimants Trust, 49

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F.3d 1285, 1286 (8th Cir. 1995) (affirming district court's order in limine narrowing issues for trial under Fed. R. Civ. P. 16(c)).

As described below, these principles apply with full force to Conwood's Lanham Act claim and state law defamation claim. USTC is unaware, for example, of any evidence, in the record which even suggests that USTC sales representatives falsely represented that Conwood products contained fiberglass or stems; that USTC misled anyone that Conwood dating methods are unreliable; or that USTC misled anyone with respect to Copenhagen dating practices. Conwood simply never sought to develop these allegations in any fashion. Likewise, USTC is unaware of any evidence that any product defamation took place within the state of Kentucky.

With respect to Conwood's tortious interference with contract claim, USTC is similarly unaware of any evidence in any way suggesting that USTC intentionally and tortiously interfered with a contractual relationship or business relationship that Conwood may have had with anyone. Again, Conwood completely ignored this claim during discovery.

Accordingly, this Court should preclude Conwood from pursuing these claims at trial.

B. Conwood's Theory of A KRS 365.050 Violation Is Insufficient On Its Face To Merit Jury Consideration

With respect to Conwood's claim under KRS 365.050, USTC is unaware of any evidence that it entered into "secret" agreements with any retailers, or for that matter any relationships at all that meet the elements of KRS 365.050 -- i.e., payments or allowances that were not offered to other retailers and that tended to harm retailers. For the first time in this litigation, however, Conwood has presented the evidentiary theory in its trial brief under which it plans to accuse USTC of violating the Kentucky Unfair Competition Law. For this claim, Conwood states that it will put on evidence that USTC "[a]lloted Wal-Mart millions of dollars more in rebates and

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promotions to make up for Wal-Mart's losses." Pls. Tr. Br. at 6. This theory is apparently based on a "buy-down" promotional program offered to Wal-Mart. See Blackburn Dep. at 247-52, Tab 1. From this, Conwood very creatively recharacterizes this industry-wide "buy down" form of promotion as a "secret" payment and extrapolates to "millions of dollars in rebates and promotions." Interestingly, neither of the Wal-Mart witnesses who were deposed were asked any questions about these allegedly "secret" promotions. See Carlson Dep.; Renfro Dep.

For several independent reasons, Conwood should not be able to argue to the jury, in opening statements or otherwise, that USTC has violated KRS 365.050. First, the evidence Conwood relies on in its trial brief is insufficient on its face to constitute a claim. Under express Kentucky law, buy-downs, promotions and other marketing devices cannot constitute "secret payments" within the meaning of the statute. See Warfield Tobacco, Inc. v. R.J. Reynolds Tobacco Co., 34 F.Supp. 2d 1050, 1052 (E.D. Ky. 1999) ("Plaintiff's claim under KRS 365.050 must also be dismissed . . . Plaintiff has failed to show any secret payments or rebates on the part of RJR. RJR's buy-downs are not secrets, but rather simple marketing devices used to meet competition.") (emphasis added). Second, Conwood has failed to identify any conduct whatsoever within the state of Kentucky which could constitute a claim under KRS 365.050. Third, the clear purpose and intent of seeking to prosecute this claim is to gain the ability to argue to the jury that USTC made "secret payments" to retailers, thus allowing Conwood's lawyers to imply sinister conduct, lending credence to the rather thin evidentiary record it has developed in this case. Rule 403 is expressly intended to prevent just such a tactic.

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II. Conwood's Duplicative Monopolization Claims Unnecessarily Complicate This Trial And Should Be Precluded

This Court also should enter a pretrial order precluding Conwood's superfluous attempted monopolization claim. Under both of Conwood's Sherman Act Section 2 claims -- attempted monopolization and monopolization -- Conwood must prove two common elements. First, Conwood must prove that USTC engaged in exclusionary conduct. If Conwood fails to prove that element at trial, both claims will fail. Conwood concedes as much in its trial brief. Pls. Tr. Br. at 10-13.

Similarly, under Conwood's attempted monopolization claim, Conwood must prove at least a "dangerous possibility of achieving monopoly power." If Conwood fails to prove that element at trial, both claims will fail. See United States v. Empire Gas Corp., 537 F.2d 296 (8th Cir. 1976) (a market that, based on non-market share factors, is not susceptible to monopolization, precludes a finding that there can be a dangerous probability of success in an attempted monopolization claim).[1] Indeed, where, as here, a plaintiff's theory of liability on its monopolization claim is that monopoly power is already being exercised to maintain a monopoly, an attempted monopolization claim, which implies that a defendant does not yet possess monopoly power, cannot exist. See Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1020-21 (6th Cir. 1999).

Accordingly, because the disputed issues of fact central to this lawsuit are coextensive in Conwood's monopolization and attempted monopolization claims, presenting both of these claims

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[1] Moreover, if a jury were to find in this case that USTC lacks the power to control prices and exclude competition, any attempted monopolization claim based on the same conduct must likewise fail. See Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1431 (6th Cir. 1990) (explaining that an attempted monopolization claim rests on a determination of whether the defendant will likely obtain the capacity to control prices and exclude competition).

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to the jury is unnecessary, confusing and a waste of judicial resources. It would require the jury to engage in deliberation and to decide factual issues that are, in effect, rendered moot once the issues to Conwood's monopolization claim is decided one way or the other. For these reasons, this Court should issuc an appropriate pretrial order "facilitat[ing] the just, speedy, and inexpensive disposition of the action" Fed. R. Civ. P. 16(c)(16).

CONCLUSION

For the foregoing reasons, this Court should preclude Conwood from presenting its Lanham Act, Kentucky state law, and attempted monopolization claims at trial.

Dated: January 28, 2000

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EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
CIVIL ACTION NO. 5:98 CV-108-R

CONWOOD COMPANY, L.P., CONWOOD :
SALES COMPANY, L.L.P., :
Plaintiffs, :
-vs- :
UNITED STATES TOBACCO COMPANY, :
UNITED STATES TOBACCO SALES AND :
MARKETING COMPANY, INC., UNITED :
STATES TOBACCO MANUFACTURING :
COMPANY, INC. and UST, INC., :
Defendants. :
- - - - - - - - - - - - - - - - - *

Thursday, July 8, 1999
New York, New York

Deposition of DONALD W. BLACKBURN, a witness herein, called for examination by counsel for Plaintiff, in the above-entitled matter, pursuant to notice, the witness being duly sworn by V. DARIO STANZIOLA, a Notary Public and Certified Shorthand Reporter, taken at the offices of SKADDEN, ARPS, SLATE, MEAGHER & FLOM, 919 Third Avenue, New York, New York on Thursday, July 8, 1999, commencing at 9:08 a.m., before V. DARIO STANZIOLA, CSR NO. 1918

MS. MARINER: All right.

Could we take just a short break.

MR. GORSUCH: Yes, Rachel, we can take a short break.

(A BRIEF RECESS WAS TAKEN.)

MR. GORSUCH: If you could mark this in the interim, I'd be grateful.

THE VIDEOGRAPHER: It is 4:26 p.m. We're going off the record.

(BLACKBURN 12: A DOCUMENT DATED 3/29/98 BATES STAMPED USTC/CWD 321056 MARKED FOR IDENTIFICATION, AS OF THIS DATE.)

(A BRIEF RECESS WAS TAKEN.)

THE VIDEOGRAPHER: It is 4:34 p.m. We're going back on the record.

MR. GORSUCH: For the record, I've just handed Mr. Blackburn what's been marked by the court reporter as Exhibit No. 12.

Q. Mr. Blackburn, take your time and just let me know when you're finished.

A. Okay.

Q. Is this an e-mail you wrote to Mr. Untiedt and others on or about March 29, 1998?

A. Yes.

Q. And you did so in the ordinary

course of your business?

A. Yes.

Q. And it concerns a meeting with HEB, which is a grocery chain headquartered in Texas; isn't that correct?

A. Correct.

Q. And you met with them in March 1998, right?

A. Yes.

Q. And they were upset by the March buydown program that U.S. Tobacco was offering Wal*Mart at that time, weren't they?

A. Mr. Callahan, who is the category manager, had expressed his concerns, yes.

Q. And why was he concerned?

A. Well, that he -- his company matched up in 72 markets with Wal*Mart, and that he wanted to be able to compete in those markets and that they looked at Wal*Mart as being a principal competitor.

Q. And they thought by being unable to offer the same buydown program, they were placed at a competitive disadvantage; isn't that correct?

MS. MARINER: Objection, calls for

speculation.

Q. I'm asking if that's what they told you. I don't want your speculation, sir.

A. The quote was that they do not want to be placed at a retail disadvantage and want to be on par with Wal*Mart.

Q. And that's what they told you, isn't it?

A. That's what he said.

Q. And he also said that HEB feels that promotional offers must be equal and proportionate to all trade channels; isn't that correct?

A. That's correct.

Q. And he told you that the offer being available in Wal*Mart Super Center formats creates a basis for a lawsuit, being that they did not receive the same offer, didn't he?

A. He did.

Q. What did you do about it?

A. I wrote this letter.

Q. Other than writing this letter, did you take any action?

A. Personally?

Q. Um-hum.
A. No.
Q. Are you aware of the company taking any action with regard to this letter?
A. In the time frame that I was there, no.
Q. At any point in time were you aware of the company taking any action with regard to this matter?
A. I'm not sure, but I've heard that they have done something with promoting an HEB.
Q. When did you hear that --
A. I'm not aware of the details.
Q. I'm sorry. I didn't mean to interrupt.
When did you hear that, sir?
A. Within the last six months.
Q. Okay. Did you hear that Wal*Marts -- strike that.
Going back to Exhibit 11, which you've looked at already, after being put on notice by Mr. Callahan at HEB that he thought it was unfair that they weren't receiving the same buydown offers that Wal*Mart was, did you offer all competitors of Wal*Mart an

opportunity to participate in the Skoal promotion in August 1998?

MS. MARINER: Objection, mischaracterizes prior testimony.

A. I don't understand your question, sir.

Q. All right. Well, Mr. Callahan indicated to you that he thought it was improper for U.S. Tobacco to offer a buydown program just to Wal*Mart, right?

A. Yes.

Q. Okay. And what I'm asking you is as a result of that, did you take any efforts or do you know of any efforts taken by U.S. Tobacco to offer the Skoal promotion of August 1998 to other competitors?

MS. MARINER: I'm going to object to that question as confusing.

But go ahead.

A. Sir, there wasn't a Skoal promotion in August of '98.

Q. You see the Skoal promotion for August saw a 10.6 percent increase?

A. Let's see.

Okay. I apologize. I'm sorry.

Yes.

Q. Do you know of any efforts taken by U.S. Tobacco to make that promotion of August '98 available to other retailers?

MS. MARINER: I'm going to object, it's an unintelligible question.

A. I don't recall.

Q. How about the November '98 Copenhagen promotion, do you remember any efforts taken to make that available to other retailers?

MS. MARINER: Same objection.

A. I don't recall.

Q. How about the February through March 1999 Copenhagen buydown?

MS. MARINER: Same objection.

A. I don't recall.

Q. And the May Skoal buydown?

A. I don't recall.

Q. The August Skoal buydown?

A. August hasn't happened yet.

Q. Okay. Has there been any effort, though, to make it available to other competitors?

A. I don't know.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE TO PRECLUDE CERTAIN INTENDED TRIAL EXHIBITS AND TESTIMONY OR OTHER REFERENCE TO SUCH MATERIALS

Defendants United States Tobacco Company, et al. ("USTC"), respectfully move this Court for an order in limine to exclude as evidence Pl. Exs. 204, 205, 251, 256, and 261, see Tab 1 – so-called "retail activity" and "unethical activity" reports. These documents are inadmissible for several reasons. First and foremost, they are themselves inadmissible hearsay, and, in addition, they also contain several layers of inadmissible hearsay. The documents also are not based on personal knowledge. Finally, the documents are misleading to the jury and unfairly prejudicial to USTC.

The five documents listed by Conwood as intended trial exhibits are samples of a larger collection of similarly inadmissible documents, including both the remainder of the "unethical activity reports" and the so-called "sworn declarations" of Conwood's sales personnel (which actually are the result of a survey conducted by Conwood's lawyers after this lawsuit was filed). Based on

Conwood's opposition to USTC's motion for summary judgment and on Conwood's trial brief, it has become apparent that Conwood's counsel will attempt to elicit testimony about other inadmissible documents as well, either through its own party witnesses or through the "back door" – i.e., any of its five expert witnesses. Accordingly, USTC also moves this Court for an order prohibiting Conwood from eliciting such testimony from any witness, including Conwood's experts.[1]

ARGUMENT

In its January 21, 2000 filings, Conwood listed five of its so-called "unethical activity reports." Generally, these reports purport not only to record incidents that occur at retail, but to characterize such incidents -- whether or not they actually occurred -- as "unethical activity" by USTC. Indeed, Terry Williams, Conwood's National Sales Manager, testified that these reports are used to:

> allow [Conwood] sales representatives to fill out the form when they came across anything unusual in their territories that might be different from information they had on their store classification cards that they track what's going on in the stores.

See Williams Dep. at 236, Tab 2 (emphasis added). When asked specifically whether the reports included any determination of whether the reported conduct was authorized by the retailer, Mr. Williams stated:

> The guidelines that we just talked about doesn't ask them to make a determination. You know, what's authorized or what's not authorized. They can write in there that this activity was authorized. They can write whatever they want. That's the guidelines that they have available to them when they can fill out that form.

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[1] While an expert witness may rely on inadmissible hearsay evidence in arriving at his or her conclusions, a plaintiff may not simply offer otherwise inadmissible hearsay simply by asking an expert to describe that evidence to the jury. See Advisory Committee Notes to Fed. R. Evid. 703 (cautioning that the "enlargement of permissible data may tend to break down the rules of exclusion," and instructing by way of an example that the testimony of an "accidentologist" based on the hearsay statements of bystanders would not be admissible).

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See id. at 238, Tab 2. When asked about the methodology used to gather the information to be reported, Mr. Williams testified that the reports were made with or without personal knowledge:

> Q. Are Conwood sales representatives, when filling out these forms, are they directed to only report activity that they see themselves?
> A. They are just given the guidelines that they can use that form to report anything. They see it. Hear about it. It's just a general form. It's called retail activity.

See id. at 239, Tab 2. Finally, when asked about the sources that Conwood sales personnel would "[h]car about it," Mr. Williams confirmed that Conwood does not have any contractual or business relationship with its retail customers that would ensure the accuracy of reported information. See id. at 240, Tab 2.

I. The Authors Of Documents Lack Personal Knowledge

Under Fed. R. Evid. 602, a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Web Communication Group, Inc. v. Gateway 2000, Inc., 1995 WL 21625,* (N.D. Ill. 1995) (granting defendants' motion in limine to exclude testimony of witness who lacked personal knowledge of the issues on trial). Personal knowledge admissible under Rule 602 may only include inferences if those inferences are "grounded in observation or first-hand personal experience as opposed to speculation, intuition or hunches." See id. at *3, citing Visser v. Packer Engineering Associates, Inc., 924 F.2d 655, 659 (7th Cir. 1991).

The Conwood unethical activity reports do not document what sales representatives know or sales representatives witnessed; rather, they record, at best, single, double, or even triple hearsay statements of retailers. Indeed, more often they simply record the sales representative's

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speculation as to what they think may have happened. It is precisely this sort of speculation that is prohibited by Rule 602.

II. These Documents Are Themselves Hearsay

Conwood's "unethical activity reports" are themselves inadmissible hearsay and do not fit within any hearsay exception.

For example, the Conwood unethical activity reports and "sworn declarations" are not business records within the hearsay exception because they were created in anticipation of potential litigation against USTC. See Dilley v. Chesapeake & Ohio Railway Co., 327 F.2d 249 (6th Cir. 1964). In Dilley, the Sixth Circuit reversed a plaintiff's verdict, ruling that the district court improperly admitted into evidence an "accident report" filled out by an employee who was not an eye-witness to the accident, but had observed the accident scene prior to filling out his report. The court reasoned that "the intra-company report of the accident made by the foreman of a work gang even though he was required by his employer to make it was not . . . admissible under any suggested rule of evidence." Id. at 253.[2] See also Scheerer v. Hardee's Food Systems Inc., 92 F.3d 702, 706-07 (8th Cir. 1996) (reversing verdict because incident report admitted into evidence "lacks reliability or trustworthiness because it was not made in the ordinary course of business but instead with the knowledge that the incident could result in litigation."); Trout v. Pennsylvania Railroad Co., 300 F.2d 826, 830 (3rd Cir. 1962) (reversing verdict for defendant; court improperly admitted into evidence a summary of car inspection reports and holding: "[F]or a document to come within the

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[2] The "sworn declarations" were not even created in anticipation of litigation; rather, they were created four months after the Complaint in this matter was filed. See also Pl. Exs. 204 and 205, Tab 1 (both dated in April, 1999).

business record rule, it must be made in the systematic conduct of a business . . . . The document should not be calculated for use essentially in litigating a claim.").

Here, Conwood could not reasonably suggest that these reports are the type of systematic reports filled out for actual business reasons that have qualified for the business record exception. To the contrary, the only possible reason for Conwood's "unethical activity" reports is to prosecute this action, or other lawsuits.

III. The Documents Contain Hearsay

Even if the reports themselves were not hearsay, they contain inadmissible hearsay. As stated by Mr. Williams, the information recorded on the unethical activity reports is often based on a conversation with the retailer.[3] Those conversations are being offered up through the Conwood chain of command for the truth of the matter asserted, namely, that USTC employees engaged in "dirty tricks." Accordingly, those unethical activity reports contain at least one level of hearsay and are properly excluded by an order in limine from trial. See Palmer v. Veco, Inc., 68 F.2d 481, 1995 WL 608497 (9th Cir.) (affirming district court's order in limine precluding plaintiff's evidence as inadmissible hearsay and entering judgment in favor of defendant before trial).

Moreover, the law is clear that, in order for hearsay statements incorporated into a business record to be admissible, there must be some business or contractual relationship between

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[3] According to a Conwood sales representatives deposed on the topic, rather than hear from the retailer, sometimes Conwood sales representatives would simply communicate their own interpretation of an unwitnessed event to the retailer and ask for a retailer signature. See Elliott Dep. at 119, Tab 3. In many instances, consistent with Mr. Williams' testimony, the Conwood sales representative filled out an unethical activity report with no knowledge as to whether the retailer had requested or authorized the change in the moist snuff display. See Elliot Dep. at 122, Tab 3 ("Q: Do you know whether or not Mr. Slabbekorn had authorization from the manager to put in U.S. Tobacco's new short profile rack and to put the Conwood products in that rack? A: I don't know; I wasn't present at that time.").

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the declarant and the person creating the business record. According to the Advisory Committee Notes:

> Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail.

See Fed. R. Evid. 803(6), Advisory Committee Notes. The "link" is broken where information is provided voluntarily.

> The reason underlying the business records exception fails if any of the participants is outside the pattern of regularity of activity... The mere fact that recordation of third party statements is routine, taken apart from the source of the information recorded, imports no guaranty of the truth to the statements themselves... The essential link is sometimes broken because the supplier of the data is not acting within the course of a regular business. A recurring situation is that of a "volunteer" offering information to persons conducting an inquiry or investigation. The person to whom the information is offered cannot qualify as the initial person in the chain because he does not have personal knowledge of the underlying event.

See 4 Weinstein's Evidence 803(6)[04] (1996) (emphasis added).

Here, independent retailers do not have a business duty to report accurate and reliable information to Conwood sales representatives. See Broadcast Music, Inc. v. Xanthas, Inc., 855 F.2d 233, 239 (5th Cir. 1988) ("[a]lthough the proprietors doubtless had incentives to keep accurate records of who owned jukeboxes in their establishments, we do not see how they had any incentive to fill out the questionnaires from BMI with precision or completeness."). In Xanthas, the court specifically noted that independent proprietors who complete questionnaires for manufacturers are not recording such information in the regular course of their business activities as proprietors. Both Mr. Williams and his predecessor, Mr. Hardy Taylor, testified that retailers provide information to

Conwood sales personnel voluntarily and that there is not the requisite contractual or business relationship between Conwood and its retail customers. See Williams Dep. at 240, Tab 2; Taylor Dep. at 110-11, Tab 4 ("Q. You had no contract with the retailers where they are supposed to fill these things out, correct? A. No, no. Q. You didn't believe the stores had some business duty to you guys to fill these out, correct? A. That was voluntarily.")

Here, where independent retailers are acting voluntarily in providing information to Conwood sales representatives, without any contractual relationship or "business duty" to do so, reports based on retailer statements are inadmissible hearsay and should be excluded.

IV. Testimony Based On The Conwood Declarations And Unethical Activity Reports Is Similarly Inadmissible

Because the documents themselves are inadmissible evidence, testimony based solely on reading the documents must also be inadmissible. Based on discovery and pleadings to date, it has become apparent that Conwood's lawyers intend to "prove" Conwood's case by simply referring to inadmissible and unverifiable evidence as "proof" of a systematic campaign to injure competition. See, e.g., Pl. Opp. Summ. J. at 15 (citing "226 sworn declarations" of Conwood employees). Such references, whether made during opening statement, during argument, or elicited as testimony completely lacks foundation and is unfairly prejudicial to USTC.

For example, any explicit or implicit reference to "thousands" of reports of USTC's alleged misconduct or to "hundreds" of "sworn declarations" of USTC's alleged misconduct would mislead the jury and be unfairly prejudicial to USTC. This is not a situation where USTC can simply litigate the weight rather than the admissibility of the evidence. In contrast, USTC is faced with the very problem exclusion of hearsay is meant to prevent – the inability to confront and cross-examine

the actual declarants as to their knowledge and perception, their bias, and their motive. Accordingly, this Court should preclude such testimony.

CONCLUSION

For the foregoing reasons, this Court should issue an order in limine precluding the introduction of Conwood "unethical activity reports" and "sworn declarations," as well as any testimony or other reference to such materials.

Dated: January 28, 2000

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WEB COMMUNICATIONS GROUP, INC., Plaintiff,
v.
GATEWAY 2000, INC., and Quebecor Printing (USA) Corp., Defendants.

No. 93 C 6821.

United States District Court, N.D. Illinois, Eastern Division.

Jan. 17, 1995.

MEMORANDUM ORDER

BOBRICK, United States Magistrate Judge.

*1 Before the court are the Motions in Limine of plaintiff Web Communications, Inc. ("Web") for an order precluding the admission of, use of, or reference to certain Dun & Bradstreet ("D & B") reports; and for an order precluding certain testimony of Melissa Montuori.

I. DUN AND BRADSTREET REPORTS

The D & B reports at issue contain false information about Web and its principal, Gary Jacobsen. The false information includes statements that:

1. Gary Jacobsen graduated with a Bachelor's Degree from the University of Illinois and attained an MBA from the University of Chicago; in fact, he attended Triton College but did not graduate;
2. Web holds certain foreign patents; in fact, it holds no such patents;
3. Gary Jacobsen's brother and wife are Web's executive vice president and vice president of finance, respectively; in fact, his brother has never been on the payroll and his wife has only done things, "here and there," on a subcontractor basis;
4. Gary Jacobsen's wife graduated with a degree in finance from the University of Illinois; in fact, she did not.

(Defendants' Response, at 1-2, Exs. A; B; C). There is also inaccurate information regarding the size of Web's staff and its office space, existence of regional sales offices, and Gary Jacobsen's relationship with Dixonweb Printing Company. (Id.). The reports were apparently prepared for an attorney at the firm of Seyfarth, Shaw, Fairweather & Geraldson. (See Final Joint Pretrial Order, C(1), PTE 211-212). At his deposition, Gary Jacobsen testified that he had seen the D & B reports and, at times, had provided the information upon which they were based. (Defendants' Response, Ex. A ("Jacobsen Dep.") at 87). In fact, he had seen the same editions of the reports that included the false information. (Jacobsen Dep. at 87-91). He testified that he "just didn't bother to take it off." (Id. at 88). At her deposition, Robin Gail Steames of D & B testified that information of this nature is generally obtained from the business principal, but that she had no specific knowledge as to how the Web report was compiled. (Defendants' Response, Ex. B; Reply Brief in Support of Plaintiff's Motion, Ex. A). It would appear that, when D & B attempted to verify the information through Gary Jacobsen, he deferred. (Defendants' Response, Ex. B at 29-30; Ex. C).

The parties have briefed the question of the admissibility of the D & B reports, but their efforts have confused, rather than resolved, the issue. First, the reports are listed as Web's trial exhibits--PTE 211 and 212--as opposed to defendants' trial exhibits. Thus, we have the incongruous situation--as defendants describe it--of Web moving to exclude its own proffered evidence. Web provides no explanation of this situation in its submissions. Second, there is no indication of the purpose for the documents' production--whether it was done for Seyfarth, Shaw for the purposes of this litigation or earlier negotiations between Web and Gateway. Third, neither party explains the reason behind the production of such reports in the context of the instant dispute. Ordinarily, it would appear they are intended to aid subscribers--business entities--in their dealings with the companies detailed in the reports. (Plaintiff's Motion in Limine, at 2). To that extent, the reports would appear intended to induce some reliance in those who read them.

*2 Web maintains that the reports are hearsay. Technically, however, they are not. Hearsay is defined as "a statement ... offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). Here, obviously, defendants will not use the reports to prove the truth of the statements therein, but to show that the statements were false. Used in this manner, the reports border on "verbal acts," which do not constitute hearsay. Courts find verbal acts not to be hearsay insofar as the truth of them is irrelevant. Twin City Fire Ins. Co. v. Country Mut. Ins. Co., 23 F.3d 1175, 1182 (7th Cir.1994). Here, the truth--or rather the falsity--of

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the statements is relevant, but the fact that they were made is more relevant. Defendants hope to use the statements to demonstrate Gary Jacobsen's character, especially as that character impinges on his reputation and that of his business. It would seem from the pretrial submissions of the parties that this would be relevant to this case. According to Web, it had a stellar reputation in the industry, and trust and confidentiality were significant aspects of its dealings with Gateway. According to Gateway, those dealings were based on certain misrepresentations on Web's part, especially the manner in which Web completed its assignments. (Final Joint Pretrial Order, I(1) at 1-3; I(2) at 1-4). In such a milieu, the reports should be admissible. Such a determination, however, is better left until trial, when questions of foundation, relevancy, and potential prejudice can be more accurately judged in a proper context. Hawthorne Partners v. AT & T Technologies, Inc, 831 F.Supp. 1398, 1400 (N.D.Ill.1993). Thus, given the manner in which defendants' claim they will use the D & B reports, and the somewhat curious situation involving the reports being part of the plaintiff's exhibit roster, it is best to deny plaintiff's motion at this time, allowing objections that might arise to be entertained at trial. Id. at 1401. [FN1]

II. TESTIMONY OF MELISSA MONTUORI

Plaintiff next moves to exclude certain testimony of Melissa Montuori. Ms. Montuori has been the director of creative services for Viewer's Choice, a pay- per-view television network, since July, 1990. Defendants intend to have Ms. Montuori testify that Viewer's Choice ran a stepped-insert guide in a perfect- bound magazine [FN2] from May 1988 to October 1990. (Defendants' Response to Web's Motion ("Def.Resp."), at 1). Such evidence, defendants argue, would directly refute Web's position that Gary Jacobsen was the initiator of the stepped-insert in the perfect-bound format. (Id.). Plaintiff contends that the evidence proffered is, in fact, irrelevant and inadmissible under Fed.R.Evid. 401 and 402, and that Ms. Montuori's testimony on the subject is based neither on her personal knowledge or perception and is inadmissible under Fed.R.Evid. 602 and 701. After review of Ms. Montuori's deposition testimony, we must agree.

*3 It is telling that, of all the factual assertions defendants make in their response to plaintiff's motion, the one that is unaccompanied by citation to the record is the one they claim Ms. Montuori's testimony proves: that Viewer's Choice began using a stepped insert guide in perfect-bound magazines in May 1988. (Def.Resp., at 2). Instead, defendants submit the following portion of Ms. Montuori's testimony:

Q: Has Viewer's Choice ever used a stepped guide?
A: Yes.
Q: When did Viewer's Choice first use a stepped guide?
A: May I look at my materials?
Q: Yes.
A: Viewer's Choice as Home Premier first began using the stepped guide in May 1988.

* * *

Q: When I asked you the question as to when Viewer's Choice first began using a stepped guide, you looked at a particular page in that notebook [Dep.Exh. 327]. Would you tell us which page that was?
A: This page.

* * *

Q: Why don't we go ahead and have this particular piece marked as Deposition Exhibit 327-A. What is Deposition Exhibit 327-A?
A: It is the Home Premier Television [the former name of Viewer's Choice] monthly guide was used?
Q: Do you know how this guide was used?
A: Yes, I do.
Q: How was it used?
A: It was bound into cable guides, monthly cable guides like TVSM Cable Guide.

* * *

Q: How did you learn that Pay-Per-View guides such as Deposition Exhibit 327- A were bound into magazines?
A: I saw them.
Q: When you began working at Viewer's Choice?
A: Yes.

* * *

(Def.Resp. at 3-4). Ms. Montuori would not have seen the guides in question until July of 1990. She did not actually see the guides bound in perfect-bound magazines prior to that. In fact, she testified elsewhere in her deposition:

Q: This last one was marked, looking at 327-A.

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Had you seen this bound into a magazine?
A: No, I didn't see this one in particular, no.
Q: Do you know which ones you saw and which ones you didn't?
A: Everything from June 1990 on, at least, and scattered other ones.
Q: Everything from June 1990 on you recall seeing in a magazine?
A: Yes, and I gather others were prior to that I saw in the file.

(Reply Brief in Support of Plaintiff's Motion ("Pl.Reply ") at 3). Ms. Montuori's testimony regarding the use of stepped inserts prior to her arrival at Viewer's Choice in July of 1990, then, is not based on personal knowledge or perception, but speculation. Ms. Montuori can only gather how the inserts were used. Her supposed personal knowledge is further undermined by her admissions regarding Exhibit 327-A, which she claimed was bound in perfect-bound magazines:

Q: If 327-A was shipped to a bindery for insertion into a magazine, a perfect bound magazine--
A: Part of the schedule was cut off.
Q: What would happen if there was a grind-off on the calendar?
A: The schedule would be cut off. In other words--

* * *

Q: If 327-A was sent to a bindery for insertion into a perfect bound magazine, the calendar would be destroyed?
*4 A: Yes.

(Pl.Reply at 3-4). Given this testimony, the inserts of which Ms. Montuori claims to have personal knowledge could not be used in perfect-bound magazines. Her testimony, then, is not relevant to the issue at hand.

Both Fed.R.Evid. 602 and 701 require that witnesses base their testimony on personal knowledge. 3 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 343, at 580 (2d ed. 1994). While personal knowledge includes inferences and opinions, those inferences and opinions must be grounded in observation or first-hand personal experience, as opposed to speculation, intuition, or hunches. Visser v. Packer Engineering Associates, Inc., 924 F.2d 655, 659 (7th Cir.1991). Here, defendants proffer Ms. Montuori's testimony to prove that perfect-bound stepped inserts were in use at Viewer's choice as long ago as 1988. Ms. Montuori did not see any such use of inserts until the middle of 1990. Further, she admitted that the inserts that she actually did see could not have been perfect bound in magazines. There is no foundation to demonstrate that she has any personal knowledge of perfect-bound stepped inserts in use prior to July of 1990--she can only "gather" that there were. As such, we must find that defendants have failed to lay an adequate foundation for Ms. Montuori's testimony--at least at this time--and that plaintiff's motion in limine must be granted.

III. CONCLUSION

For the foregoing reasons, the plaintiff's motion in limine regarding the D & B reports is denied, and the plaintiff's motion in limine regarding the testimony of Ms. Montuori is granted.

FN1. We note that defendants also argue in favor of the use of the D & B reports under Fed.R.Evid. 608(b), which allows for the inquiry into specific instances of conduct probative of truthfulness or untruthfulness, for the purpose of attacking a witness' credibility. While the rule allows for inquiry, it does not allow the introduction of extrinsic evidence, which the D & B reports constitute. Thus, the reports themselves are not admissible on the issue of Gary Jacobsen's credibility as a witness. As discussed supra, however, the defendants may demonstrate that the reports bear on Gary Jacobsen's credibility as a substantive issue in this case, as opposed to an impeachment issue. In such an instance, Rule 608(b) would not be applicable. 3 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence, § 268, at 191 (2d ed. 1994).

FN2. A perfect-bound magazine would be one in which the pages are glue- bound to a flat spine as opposed to staple-bound down the center.

END OF DOCUMENT

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(Cite as: 68 F.3d 481, 1995 WL 608497 (9th Cir.(Alaska)))

NOTICE: Ninth Circuit Rule 36-3 provides that dispositions other than opinions or orders designated for publication are not precedential and should not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

(The decision of the Court is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter.)

Carroll D. PALMER, Plaintiff-Appellant,
v.
VECO, INC., an Alaska corporation; Veco, Inc.; William T. Kenyon, an individual; Little Pucker, M/V, Official No. D594248; Seley Corporation; S.C. 262, M/V, Official No. D563795, Defendants-Appellees.

No. 94-35958.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 9, 1995.

Decided Oct. 13, 1995.

Appeal from the United States District Court, for the District of Alaska, D.C. No. CV-92-000548-JAV; James A. von der Heydt, Senior District Judge, Presiding.

D.Alaska

AFFIRMED.

Before: HALL, WIGGINS, and KLEINFELD, Circuit Judges.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

**1 This action was instituted by Carroll Palmer on behalf of her now deceased husband Donald Palmer for injuries Mr. Palmer allegedly suffered in two separate accidents while working on the clean up of the Exxon Valdez oil spill. The district court granted three motions in limine excluding as inadmissible hearsay all of Ms. Palmer's evidence on key issues. It then denied as moot Mr. Kenyon's motion for summary judgment, but entered judgment in his favor. [FN1]

FN1. We note that the appeal as against three of the defendants- appellees (Seley Corporation, m/v Good News Bay, and m/v Little Pucker) was voluntarily dismissed by an order of this Court. Thus the only live issues surround the second accident, in which the remaining defendant-appellee, Mr. Kenyon, was involved.

Two issues remain for consideration on appeal. First, we consider whether the district court erred in granting appellee's motions in limine excluding the evidence. We hold that this evidence was hearsay not within any exception and affirm the district court. Second, we consider whether the district court erred by entering judgment in favor of appellees. Finding in the record no material fact in dispute, we affirm.

I.

Mrs. Palmer claims that her husband fell between Mr. Kenyon's boat, the Little Pucker, and another. Mr. Kenyon does not deny that Mr. Palmer fell from some boat, but claims that the boat involved was not his. Mrs. Palmer offered evidence to show the boat did belong to Mr. Kenyon and the court deemed this evidence inadmissible hearsay.

A.

Donald Palmer's June 13, 1990, Transcribed Statement: Mr. Palmer made this statement to an insurance adjuster for his employer, Veco, Inc., as a step towards compensation. Appellant admits that she would introduce the statement for its truth. The question then becomes whether the statement comes within a hearsay exception. We hold that it does not.

The statement is not within the exception for business records, Fed. R. Evid. 803(6). This exception may apply when the declarant (here, Mr. Palmer and not Veco) makes a statement "in the course of a regularly conducted business activity." Fed. R. Evid. 803(6). In other words, the exception covers only information supplied by a person with a

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business duty to speak with accuracy. See United States v. Pazsint, 703 F.2d 420, 424 (9th Cir. 1983); see also Rock v. Huffco, 922 F.2d 272, 279-83 (5th Cir. 1991). Mr. Palmer was not in the business of filing insurance claims nor did he have any business duty to speak accurately. The business records exception does not apply.

Appellant also argues that the statement is nevertheless admissible under the two residual exceptions for hearsay, Fed. R. Evid. 803(24) & 804(b)(5). Neither residual exception applies unless the statement "h[as] equivalent circumstantial guarantees of trustworthiness." We find no such guarantees in the statement of Mr. Palmer. He did not speak under oath. More to the point, Mr. Palmer had a pecuniary interest in the outcome of the case about which he spoke. The district did not abuse its discretion in excluding this statement.

B.

**2 The Accident Reports: After the September 1989 accident Mr. Palmer filed accident reports with Veco and the Department of Labor. Appellant admits that the reports are hearsay but argues that they nevertheless are admissible as statements against interest by an unavailable witness, under Fed. R. Evid. 804(b)(3). We find it difficult to see how a report that was to lead to Mr. Palmer's financial compensation worked against his interests. Appellant asserts that the reports threatened Mr. Palmer's employment prospects at Veco. Even if true, this remote possibility of adversity would not satisfy Rule 804(b)(3), which requires that the statement be "so far contrary to the declarant's ... interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." See Donovan v. Crisostomo, 689 F.2d 869, 877 (9th Cir. 1982).

Appellant next argues that the reports qualify as business records within Rule 803(6). Again, that claim fails because Mr. Palmer was not in the business of filing accident reports and therefore had no business duty to speak accurately.

Finally, appellant argues that the reports qualify for the residual hearsay exceptions. She points to the signatures of four coworkers to demonstrate the trustworthiness of the report they signed. But it is not clear to us just what these signatures were meant to attest, nor do we know where the loyalties of the signatories lay. None of the signatures was a declaration under oath.

Palmer wrote in his statement that he was injured when he fell between the Good News Bay and the Little Pucker. Three of the four witnesses who cosigned Palmer's statement were deposed. Two of them, Hardy and Johnson, stated under oath that they never saw the alleged accident.

The third, Hoyt, stated that he did not recall the accident, but, unlike the other two, did not state that he never saw it. Hoyt testified at his deposition and verified his signature on Palmer's statement. Hoyt testified that he would not have signed the statement as a witness if he had not been at the accident, read the statement, and believed when signed it, some years prior to his deposition, that it was true. We do not reach the question of whether Hoyt's testimony created a genuine issue of fact, as Hoyt's past recollection recorded under Federal Rule of Evidence 803(5), because Palmer has not argued this proposition, so Kenyon and The Little Pucker have not had a fair opportunity to respond to it.

In our view the signatures do not rise to the level of a circumstantial guarantee of trustworthiness as required by Rules 803(24) and 804(b)(3). We find no abuse of discretion in the district court's exclusion of the reports.

C.

Appellant Carroll Palmer's Deposition Testimony: In her deposition Appellant testified to several statements Mr. Palmer made in her presence. Appellant concedes that her deposition testimony of Mr. Palmer's out-of-court statements would be offered for the truth of what Mr. Palmer told her. This is hearsay within hearsay. She asks, nevertheless, that the testimony be admitted under Fed. R. Evid. 803(24), but directs us to no circumstantial guarantee of trustworthiness. Finding no guarantee of trustworthiness ourselves, we affirm the district court.

II.

**3 Having persuaded the district court to exclude the evidence offered by Mrs. Palmer, Mr. Kenyon filed a motion for summary judgment. The district court found "no admissible evidence to establish the occurrence of the two alleged accidents." Order of

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July 7, 1994, at 4. It denied Mr. Kenyon's motion "as now being moot," but nevertheless entered judgment for him -- presumably under Fed. R. Evid. 54(c). Order of July 7, 1994, at 5. We treat this procedure as an entry of summary judgment for Mr. Kenyon, and review it de novo.

We take the facts in the light most favorable to Plaintiff-Appellant. Even if as between Mrs. Palmer and Mr. Kenyon there were no dispute about the occurrence of the second accident, the record discloses no admissible evidence that Mr. Kenyon's was the boat involved. Accordingly we have no basis upon which to reverse the district court, and we therefore AFFIRM.

END OF DOCUMENT

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EXHIBIT 1

Conwood Sales Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

Four
BFD
EFF

PLAINTIFF'S EXHIBIT
CASE NO. 5:98CV-108-R
EXHIBIT NO. 204

RETAIL ACTIVITY REPORT

DATE: 4-13-99

STORE NAME: Walmart

STREET ADDRESS: 1425 SuperMall Way

CITY, STATE & ZIP: Auburn, Wa. 98002

PHONE: _____

DESCRIBE THE ACTIVITY FOUND AT THIS LOCATION (BE SPECIFIC)

New VST moist rack fixture placed having no slots for authorized Cougar products, which were previously slotted in moist rack replaced.
VST Skoal header cards placed instead of Walmart generic header cards

ADDITIONAL REMARKS: Was able to place authorized cougar at this location with store approval.

IF THERE ARE SUPPORTING MATERIALS, PLEASE SEND ALONG WITH THIS FORM.

STORE EMPLOYEE SIGNATURE _____

STORE MANAGER
OR OWNER'S SIGNATURE _____

CONWOOD COMPANY
EMPLOYEE SIGNATURE _____

DEPOSITION EXHIBIT
18
Carlson

Walmart - Alburquerque, NM.
4-13-99

Conwood Sales Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

Food
TPD
EJF

RETAIL ACTIVITY REPORT

DATE: 4-19-99

STORE NAME: WALMART

STREET ADDRESS: 4617 E. Bell Rd

CITY, STATE & ZIP: Phoenix AZ 85032

PHONE: _____

DESCRIBE THE ACTIVITY FOUND AT THIS LOCATION (BE SPECIFIC)

In This store UST is using their Hooper CANS Across All Mint Items. It is my understanding That only WALMART Hooper CANS ARE TO BE USED.

ADDITIONAL REMARKS: _____

IF THERE ARE SUPPORTING MATERIALS, PLEASE SEND ALONG WITH THIS FORM.

STORE EMPLOYEE SIGNATURE _____

STORE MANAGER
OR OWNER'S SIGNATURE _____

CONWOOD COMPANY
EMPLOYEE SIGNATURE _____

DEPOSITION EXHIBIT 19 Carlson

PLAINTIFF'S EXHIBIT
CASE NO. 5:98CV-196-R
EXHIBIT NO. 265

16diii003419

WALMART 4617 E. Bell Rd 4-19-9
Phoenix, AZ 85032

PLAINTIFF'S EXHIBIT

1 Jinsing

Conwood Sales Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

RETAIL ACTIVITY REPORT

DATE: 6-13-97

STORE NAME: STAX #1265

STREET ADDRESS: 5933 S. HIGH

CITY, STATE & ZIP: OKL., OK.

PHONE: 405-631-8374

DESCRIBE THE ACTIVITY FOUND AT THIS LOCATION (BE SPECIFIC) - - -

U.S.T. REP., TODD PARISH, TOOK OUT OUR (CONWOOD) RACK AND PUT KODIAK & KODIAK STRAIGHT IN HIS U.S.T. RACK. HE PUT HAWKEN & COUGAR PRODUCT UNDER THE COUNTER. HE TOLD MANAGER THAT (BEST) HIS RACK WAS THE ONLY AUTHORIZED RACK TO BE USED IN STAX STORES. PLAN-O-GRAM WAS NOT TO SPEC., IT HAD A ROLLVENDOR IN IT.

ADDITIONAL REMARKS: MANAGER WAS VERY HELPFUL IN RESOLVING PROBLEM

IF THERE ARE SUPPORTING MATERIALS, PLEASE SEND ALONG WITH THIS FORM.

STORE EMPLOYEE SIGNATURE [signature]

STORE MANAGER OR OWNER'S SIGNATURE [signature]

CONWOOD COMPANY EMPLOYEE SIGNATURE K.W. STOCKTON

PLAINTIFF'S EXHIBIT
CASE NO. 5:98CV-108-R
EXHIBIT NO. 251

UNETHICALLY ACTIVITY REPORT — MARCH 11, 199-

REGARDING U.S. TOBACCO

TKM DLS HCT

PLAINTIFF'S EXHIBIT

CASE NO. 5:98CV-106-R

EXHIBIT NO. 256

STORE: DAVE'S COUNTRY STORE
720 IOWA AVENUE
DUNLAP, IOWA 51529
PHONE: 712-643-5852

DAVE, STORE OWNER, INFORMED ME THAT THE U.S. TOBACCO REP HAD BEEN IN HIS STORE IN MID-FEBRUARY AND TOOK OUT OUR 4-STALL TALL PROFILE RACK AND REPLACED IT WITH HIS RACK. DAVE AND CLERK, PAT, BOTH TOLD HIM TO LEAVE MY RACK ALONE, BUT HE TOOK IT OUT ANYWAY. HE LAUGHED AND SAID "IT'S A LITTLE GAME WE PLAY." (UNQUOTE). HE PUT OUR 3 MOISTS (KODIAK, HAWKEN, & KODIAK STRAIGHT) ON THE FAR RIGHT IN A 7-WIDE RACK. DAVE GAVE ME PERMISSION TO PUT MY RACKS BACK IN AND SAID NEXT TIME THE U.S. REP CAME IN HE'D INFORM HIM TO LEAVE THE COMPETITOR RACKS ALONE. I PUT IN AN 8-WIDE TALL PROFILE RACK FOR FOUR U.S. TOB PRODUCTS AND 1-STALL EACH FOR KODIAK, HAWKEN, KODIAK STRAIGHT, AND KODIAK CHOICE. I LEFT U.S.T.'S 7-WIDE WITH DAVE. GAIL, A CLERK FOR DAVE, ALSO WITNESSED THE U.S.T. REP TAKE MY RACKS AND PITCH THEM IN THE DUMPSTER.

Dave Phillips, OWNER

Gail Hicks, CLERK

[illegible], COMPETITOR REP

EXHIBIT Leiner 2 7/10/99 SLC

CWD009361

16diii003424

PLAINTIFF'S EXHIBIT

1 Townsend

Conwood Sales Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

RETAIL ACTIVITY REPORT

DATE: 6-13-97

STORE NAME: STAX #1782

STREET ADDRESS: 4500 S. I-35

CITY, STATE & ZIP: OKC, OK.

PHONE:

PLAINTIFF'S EXHIBIT
CASE NO. 5:98CV-108-R
EXHIBIT NO. 261

DESCRIBE THE ACTIVITY FOUND AT THIS LOCATION (BE SPECIFIC) --

U.S.T. REP., TODD PARISH, TOOK OUT OUR RACK PLUS OUR HAWKEN AND COUGAR PRODUCT, PUT IT IN A SACK UNDER THE COUNTER AND TOLD MANAGER, U.S.T. RACK WAS THE ONLY AUTHORIZED RACK TO BE IN STAX STORES. PLAN-O-GRAM NOT TO SPEC - X-TRA SLOTS FOR COPE L/C & SKOAL L/C WITCHIN.

ADDITIONAL REMARKS: MANAGER WAS VERY HELPFUL IN RESOLVING PROBLEM.

IF THERE ARE SUPPORTING MATERIALS, PLEASE SEND ALONG WITH THIS FORM.

STORE EMPLOYEE SIGNATURE

STORE MANAGER OR OWNER'S SIGNATURE

CONWOOD COMPANY EMPLOYEE SIGNATURE K.W. STOCKTON

176 STAX 62

This has become a big problem and should be dealt with. It will not be solved until all companies are treated equally.

CONFIDENTIAL CONWOOD V UST CA NO. 5:98-CV-108-R-11 CWD0100004936

16diii003426

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

AT PADUCAH

- - - - - - - - - - - - - - - - - X

CONWOOD COMPANY, L.P., :

CONWOOD SALES COMPANY, L.P., :

Plaintiffs, : Civil Action No.

v. : 5:98CV-108-R

UNITED STATES TOBACCO COMPANY, :

UNITED STATES TOBACCO SALES AND:

MARKETING COMPANY INC., UNITED :

STATES TOBACCO MANUFACTURING :

COMPANY INC. and UST INC., :

Defendants. :

- - - - - - - - - - - - - - - - - X

Washington, D.C.

Thursday, August 26 1999

Videotaped deposition of TERRY WILLIAMS, a witness herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice and agreement, the witness being duly sworn by SUSAN L. CIMINELLI, a Notary Public in and for the District of Columbia, taken at the offices of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.,

06:56:23 name has changed, but at what point were using
06:56:26 unethical activity reports, correct?
06:56:28 A. Correct.
06:56:28 Q. And that was a form created by
06:56:30 Conwood, correct?
06:56:32 A. Correct.
06:56:32 Q. And for the purpose of that form was
06:56:34 to report activities out in the field that your
06:56:36 sales representatives believed to be unethical?
06:56:40 A. That was a form that was put out there
06:56:43 in the field and it has been changed, the name
06:56:48 of it to retail activity form to allow our sales
06:56:51 representatives to fill out the form when they
06:56:54 came across anything unusual in their
06:56:56 territories that might be different from
06:56:59 information they had on their store
06:57:02 classification cards that they track what's
06:57:06 going on in the stores.
06:57:15 Q. What guidelines are they given to
06:57:19 determine whether a situation is, was different
06:57:24 than what they believed -- can you read back his
06:57:51 last answer, please?
06:56:40 THE REPORTER: Answer : That was a
06:56:41 form that was put out there in the field and it
06:56:46 has been changed, the name of it to retail

06:58:47 activity was authorized or unauthorized by the
06:58:49 retailer?
06:58:52 A. The guidelines that we just talked
06:58:56 about doesn't ask them to make a determination.
06:58:59 You know, what's authorized or what's not
06:59:02 authorized. They can write in there that this
06:59:05 activity was authorized. They can write
06:59:08 whatever they want. That's the guidelines that
06:59:10 they have available to them when they can fill
06:59:13 out that form.
06:59:14 Q. Okay. So whether or not the activity
06:59:16 is authorized or unauthorized, they can still
06:59:21 fill out the report, no matter what it's called,
06:59:25 to report that to someone in management?
06:59:28 A. Yes, sir.
06:59:39 Q. Well, if one of these reports had a
06:59:41 description of the events and did not say
06:59:43 whether the conduct was authorized or
06:59:44 unauthorized, how does management determine
06:59:47 whether the conduct was in fact authorized or
06:59:49 unauthorized?
06:59:53 A. We can ask for more investigation if
06:59:56 that form comes across our desk, and we wonder
07:00:00 whether, if there is not enough information that
07:00:03 we feel that there is something out there that

07:00:05 we would like, all we have to do is call back
07:00:08 the sales representative and ask him to clarify
07:00:11 the form.
07:00:17 Q. So if the reported activity does not
07:00:20 say in the report whether it was authorized or
07:00:23 unauthorized, there is no way to tell from the
07:00:26 face of the document whether the activity was
07:00:28 authorized or unauthorized, is that fair?
07:00:33 A. I guess I don't understand what you
07:00:38 are, what you are talking about, the face of the
07:00:42 document. If -- are you saying if it doesn't
07:00:46 say whether it was authorized or unauthorized
07:00:48 there is no way to tell whether it was?
07:00:51 Q. From the face of the document?
07:00:52 A. Yes, sir. I agree with that.
07:01:00 Q. Are Conwood sales representatives,
07:01:02 when filling out these forms, are they directed
07:01:05 to only report activity that they see
07:01:07 themselves?
07:01:08 A. They are just given the guidelines
07:01:10 that they can use that form to report anything.
07:01:15 They see it. Hear about it. It's just a
07:01:19 general form. It's called retail activity.
07:01:22 There is no guidelines on what you can or cannot
07:01:25 use that form to report information about.

07:01:30 Q. So if they are told by a retailer that
07:01:33 Pinkerton stole their header card, they could
07:01:36 write that up on a retail activity report?
07:01:40 A. If they wanted to, yes.
07:01:45 Q. Does Conwood have any, any kind of
07:01:50 contractual or business relationship with the
07:01:52 retailers that asks them to provide information
07:01:55 to the sales representatives for purposes of
07:01:58 making these reports?
07:02:02 A. We have a contract with the retailer
07:01:58 that we pay them to provide us --
07:01:58 Q. Not necessarily pay, but that you have
07:01:58 an agreement with the retailers that they will
07:01:58 provide sales representatives with information
07:01:58 as reported on these forms?
07:02:20 A. None that I'm aware of.
07:02:20 Q. Do you have any type of business
07:02:20 relationship?
07:02:21 A. Not that I'm aware of.
07:02:27 Q. Now, to the extent you know, why was
07:02:29 the name of the report changed from an unethical
07:02:31 activity report to a retail activity report?
07:02:37 A. I'm not sure that I was there when the
07:02:39 name changed, but I have been told that we
07:02:43 changed the name on the form to retail activity

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CERTIFIED COPY

CONWOOD COMPANY, L.P., :
CONWOOD SALES COMPANY, L.P., :
Plaintiffs, : Civil Action No.
v. : 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, :
UNITED STATES TOBACCO SALES AND:
MARKETING COMPANY INC., UNITED :
STATES TOBACCO MANUFACTURING :
COMPANY INC. and UST INC., :
Defendants. :

Washington, D.C.
Friday, October 22, 1999

Videotaped deposition of JAMES M. ELLIOTT, a witness herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice and agreement, the witness being duly sworn by FERNITA R. FINKLEY, a Notary Public in and for the District of Columbia, taken at the offices of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., at

Q. Did you know at the time that you filled out this report whether or not Mr. Beyerlein had received authorization from the store manager to pull the three facing Conwood rack and put products in a short profile rack?

A. This particular account was, I addressed myself -- introduced myself and addressed the person that was in charge at the time, explained the situation that we did have a rack previously and that it had been replaced and we are now -- it's gone and now replacing the racks. She had no idea what had happened. I presented her the idea of having two racks for both companies and she was more than happy to accommodate both companies.

Q. Would this person with whom you spoke be the only person at Curtis Drug who could authorize the placement of a rack at retail?

A. I wouldn't have that knowledge.

Q. So you don't know one way or another whether Mr. Beyerlein received authorization at Curtis Drug before he placed his rack in that store?

A. All I know is that the person that I spoke to had no recollection of the situation happening and was fine with me rectifying it.

Q. So you don't know whether, just to answer

locked in new short profile rack. Manager will not allow switch back. And then how the situation was resolved section says, manager allowed decals and Kodiak header card in front of our four facings; is that right?

A. Correct.

Q. Okay. Do you know whether or not Mr. Slabberkorn had authorization from the manager to put in U.S. Tobacco's new short profile rack and to put the Conwood products in that rack?

A. I don't know; I wasn't present at that time.

Q. Is it fair to say you approached the manager about placing your own rack and the manager said that they preferred to keep the products in the U.S. Tobacco rack?

A. At the time I approached them with the idea of having a merchandiser to merchandise Conwood along with the competitors to do theirs, at the time she didn't want anyone to fuss with the rack at all; just to leave it as it is for now.

Q. Do you know whether or not Conwood lost any facings in this transition?

A. This was, again this is quite a while ago but I do not recall losing any of our existing

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, LP,
CONWOOD SALES COMPANY, LP,
Plaintiff,
Vs. Case No. 5:98 CV-108-R

UNITED STATES TOBACCO
COMPANY, et al,
Defendant.

THE DEPOSITION OF HARDY C. TAYLOR

August 19th, 1999

02:53:14 Q. Do you recall receiving copies from
02:53:16 time to time of unethical activity reports
02:53:18 when they were called unethical activity
02:53:18 reports?
02:53:18 A. Yes, sir.
02:53:20 Q. And do you remember instances where
02:53:26 there was -- where it said "signature of
02:53:30 store employees" that there was no signature
02:53:32 at all?
02:53:32 A. Yes.
02:53:38 Q. Did it concern you that you were
02:53:40 getting unethical activity reports where the
02:53:42 store wouldn't sign them?
02:53:44 A. No, because that wasn't mandatory.
02:53:48 Or -- it was liked but not mandatory.
02:53:52 Q. Not mandatory. Obviously from the
02:53:54 store it wasn't mandatory?
02:53:54 A. No.
02:53:58 Q. You had no contractual relationships
02:53:58 with the store where they are supposed to
02:54:02 fill these out, correct?
02:54:02 A. Sir?
02:54:02 Q. You had no contract with the
02:54:06 retailers where they are supposed to fill
02:54:06 these things out, correct?

02:54:06 A. No, no.
02:54:08 Q. You didn't believe the stores had
02:54:10 some business duty to you guys to fill these
02:54:12 out, correct?
02:54:14 A. That was voluntarily.
02:54:22 Q. And yet your sales force, they were
02:54:24 instructed to try to get signatures, correct?
02:54:26 A. Yes.
02:54:38 Q. And did you have any procedure in
02:54:42 place that you recall to ensure that the
02:54:46 person trying to get a signature was talking
02:54:48 to the right person within that retail
02:54:48 organization?
02:54:50 A. I don't recall.
02:54:52 Q. How about in situations where you are
02:54:56 dealing with a chain store where the person
02:54:58 in charge is the buyer at the chain
02:55:02 headquarters, how would that work when a
02:55:04 Conwood sales rep is just showing up to a
02:55:08 store? Do you understand that question?
02:55:10 A. Not totally. Would you please repeat
02:55:10 it?
02:55:14 Q. Yeah. The Conwood sales rep shows up
02:55:18 to the store and wants to fill out a retail
02:55:28 activity report or unethical activity report,

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE TO PRECLUDE ALL EVIDENCE CONCERNING CONDUCT PROTECTED BY NOERR-PENNINGTON IMMUNITY

Defendants United States Tobacco Company, et al. ("USTC") respectfully move this Court for an in limine order precluding Plaintiffs Conwood Company, L.P., et al. ("Conwood"), from introducing any evidence or making any argument concerning conduct by USTC that is protected by the Noerr-Pennington doctrine.

Initially, in its Complaint, Conwood alleged that USTC violated Section 2 of the Sherman Act by participating in the legislative, judicial, and executive processes – conduct that has long been protected from antitrust scrutiny. Specifically, Conwood alleged that USTC:

- "sought to involve itself in the 'Global Settlement' of litigation between cigarette companies and various state attorneys general and plaintiffs' lawyers," ¶ 33;
- "sought to embed the Global Settlement with provisions that would cause disproportionate harm to its moist snuff rivals," id.;

- "promoted a variety of anticompetitive measures, such as a payment structure for the purported settlement amounts that was designed to impose substantial and punitive costs on nonparticipating firms," ¶ 34;

- "proposed an unprecedented blanket antitrust immunity for their private efforts to implement and enforce competitive restrictions," ¶ 36; and

- "sought to lobby in Congress for passage of a proposed federal law that would cost UST hundreds of millions of dollars per year, but would put its three competitors in moist snuff out of business." ¶ 39.

On June 12, 1998, USTC moved to dismiss these allegations under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. In response to that motion, Conwood asserted that it did not intend to base liability on conduct protected by Noerr-Pennington. Throughout discovery, and in the pleadings to date, however, Conwood has continuously reintroduced purported testimony and argument based on conduct protected by the Noerr-Pennington doctrine.[1]

Accordingly, USTC respectfully moves this Court to preclude all evidence and argument at trial concerning conduct by USTC that is so protected. Such evidence and argument is irrelevant to Conwood's claims and thus inadmissible under Fed. R. Evid. 402. Moreover, the introduction of such evidence and argument would be misleading to the jury and unduly prejudicial to USTC and thus inadmissible under Fed. R. Evid. 403.

ARGUMENT

For nearly forty years, lobbying activities such as those allegedly engaged in by USTC have been immune from the antitrust laws. See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961) ("The right of petition is one of the freedoms

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[1] Of course, such testimony and argument are unsupported by actual facts and evidence, but for purposes of this motion, USTC will assume arguendo that it petitioned the government with the intent of gaining an advantage in the alleged moist snuff market.

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protected by the Bill of Rights, and we cannot, of course lightly impute to Congress an intent to invade these freedoms."). The Supreme Court also made clear that such immunity applies even when the participants have a financial interest in the outcome of the matter, reasoning that to hold otherwise would be to "deprive the people of their right to petition in the very instance in which that right may be of the most importance to them." Id. at 139. See also Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612, 620-21 (6th Cir. 1982), cert. denied, 459 U.S. 1208 (1983) (dentists who lobbied "the state legislature against any proposed changes in the law and [lobbied] to encourage the Board of Dentistry to enforce the state law" could not be liable under the antitrust laws).

Similarly, any belief that Noerr would not apply when a lobbying participant is alleged to have sought an anticompetitive result was specifically quelled four years later by the Court in United Mine Workers v. Pennington, 381 U.S. 657, 670 (1965) ("Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose."). The Court elaborated that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." Id. (emphasis added). See also Westmac, Inc. v. Smith, 797 F.2d 313, 319-20 (6th Cir. 1986) (assuming anticompetitive intent and holding that defendants' conduct was immune under the Noerr-Pennington doctrine).

Finally, the Court in Noerr held that allegations of conduct protected by what is now known as the Noerr-Pennington doctrine cannot be unlawful "either standing alone or as part of a broader scheme itself violative of the Sherman Act." Id. See also City of Cleveland v. Cleveland Electric Illuminating Co., 734 F.2d 1157, 1163 (6th Cir. 1984) (even if lawsuit brought by defendant was "designed to eliminate the City as a competitor, such conduct is not illegal either standing alone or as part of a broader scheme") (citation omitted). See also Norcern Energy Resource Ltd. v. Pacific

Gas & Electric Co., 1994-2 Trade Cases ¶ 70,851 (N.D. Cal. 1994) (granting defendants' motion to dismiss with prejudice plaintiff's antitrust claims "to the extent they [we]re based on defendants' actions before" administrative agencies); Mountain Grove Cemetery Assoc'n v. Norwalk Vault Co. Of Bridgeport, Inc., 428 F. Supp. 951, 956 (D. Conn. 1977) (granting motion to dismiss plaintiff's claims "to the extent plaintiff's complaint alleges an antitrust violation on the basis of" protected conduct).

As described below, any evidence that purports to suggest that USTC had an anticompetitive intent in allegedly seeking laws that would require a non-self serve ("NSS") retail environment for moist snuff products is both irrelevant and prejudicial, and should therefor be precluded.

I. EVIDENCE OF PROTECTED CONDUCT IS IRRELEVANT AND THEREFORE INADMISSIBLE UNDER FED. R. EVID. 402

Evidence of conduct protected by the Noerr-Pennington doctrine is irrelevant and therefore inadmissible, unless a plaintiff can show that the evidence is directly relevant to demonstrate the "purpose and character" of conduct not protected by the First Amendment. See United Mine Workers v. Pennington, 381 U.S. 657, 670 n.3 (1965) (evidence of protected conduct "may . . . be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny") (emphasis added); MCI Communications Corp. v. AT&T Co., 708 F.2d 1081, 1160 (7th Cir.) (evidence of protected conduct is admissible only if shown to prove purpose and character of non-protected conduct), cert. denied, 464 U.S. 891 (1983). Evidence of conduct protected by the First Amendment, however, is not admissible simply to show some general notion of "anticompetitive intent." As the Sixth Circuit instructed in City of Cleveland v. Cleveland Electric Illuminating Co., 734 F.2d 1157 (6th Cir. 1984):

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> The City's effort to introduce the evidence was to show the anticompetitive character and nature of Cleveland Electric's conduct in this episode as a part of the alleged broader pattern of conduct condemned by the Sherman Act, and to cast the appellee and its counsel in the role of deceivers. This is not an admissible basis for its introduction in our view.

Id. at 1163 (emphasis added).

Nevertheless, Conwood's claim that USTC violated Section 2 of the Sherman Act by engaging in a regulatory and legislative campaign continues to resurface, even at this late date.[2] For example, Conwood's expert witnesses, most notably Dr. Popper, asserted as a basis for liability in this case that:

- "UST proposed regulations requiring placement of moist snuff in a non-selfserve environment in advance of legislative or administration action."
- "UST alone among smokeless companies chose to participate in the Global Settlement negotiations which resulted in a proposal, rejected by Congress, that would have required all moist snuff (but not all other forms of tobacco, such as cigars) to be placed in a non-self serve environment."

See, e.g., Popper Rebuttal Report, ¶ 11. Moreover, as recently as December 9, 1999, in opposition to USTC's motion for summary judgment, Conwood argued that "UST also engaged in a regulatory and legislative campaign in conjunction with Philip Morris (still ongoing) to bring NSS to the tobacco industry. UST has engaged in these activities with the specific intent to thwart competition." See Pl. Opp. Mem. at 28 n.40. But, Conwood does not even suggest that evidence of protected conduct in any way proves the "purpose and character" of any alleged non-protected conduct.

Accordingly, Conwood has not made any prima facie showing that evidence of USTC's First Amendment activities is of any relevance to Conwood's Section 2 claims. Like the

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[2] As indicated above, USTC will assume arguendo that it exercised its right to petition government with the purpose and effect of restricting competition despite the complete lack of support for this argument in the record.

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plaintiff in City of Cleveland, Conwood merely attempts to cast USTC in the role of the anticompetitive monopolist. This Court, therefore, should preclude Conwood from offering such evidence at trial.

II. EVIDENCE OF PROTECTED CONDUCT IS UNFAIRLY PREJUDICIAL TO USTC AND IS THEREFORE INADMISSIBLE UNDER FED. R. EVID. 403

Even if evidence of protected conduct were marginally relevant to Conwood's claims – which it is not – such evidence would be unfairly prejudicial to USTC and is therefore inadmissible under Fed. R. Evid. 403. See City of Cleveland, 734 F.2d at 1163 (upholding district court's exclusion of evidence of defendant's petitioning activity as unfairly prejudicial, and confusing and misleading to the jury).

At least one court has held that evidence of conduct protected by the Noerr-Pennington doctrine is "presumptively prejudicial." USFL v. NFL, 634 F. Supp. 1155, 1180 (S.D.N.Y. 1986):

> Although Rule 403 requires that evidence should be excluded only if its probative value is "substantially outweighed" by its prejudicial effect, evidence which by its very nature chills the exercise of First Amendment rights . . . is properly viewed as presumptively prejudicial.

Id. at 1180; see also MCI Communications Corp. v. AT&T Corp., 708 F.2d 1081, 1160 (7th Cir. 1983) (evidence of protected conduct is admissible only if shown to be relevant and not overly prejudicial to defendants); Brand Name Prescription Drugs Antitrust Litig., No. 94C 897, MDL 997, 1995 U.S. Dist. LEXIS 12039, at *5 (N.D. Ill. Aug. 17, 1995) (admission of evidence of protected conduct raises "significant evidentiary concerns").

Here, the introduction of evidence or argument concerning USTC's petitioning activities would mislead the jury to believe that such conduct may be unlawful, resulting in unfair

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prejudice to USTC. Moreover, the introduction of such evidence would require USTC to offer evidence demonstrating the true character and purpose of its petitioning activity, requiring a trial within a trial. Introduction of voluminous evidence on such a collateral issue would tend to confuse the issues and mislead the jury. Accordingly, this Court should issue an order in limine precluding the introduction of such evidence and argument at trial.

CONCLUSION

For the foregoing reasons, USTC respectfully requests that this Court issue an in limine order precluding the introduction of any evidence and any argument concerning conduct protected by Noerr-Pennington immunity.

Dated: January 28, 2000

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1995 U.S. Dist. LEXIS 12039 printed in FULL format.

IN RE: BRAND NAME PRESCRIPTION DRUGS ANTITRUST LITIGATION; This Document Relates to: ALL CASES

94 C 897, MDL 997

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1995 U.S. Dist. LEXIS 12039

August 17, 1995, Decided

August 18, 1995, DOCKETED

PRIOR HISTORY: [*1] Original Opinion of June 8, 1995, Reported at: *1995 U.S. Dist. LEXIS 7937.*

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JUDGES: Charles P. Kocoras, United States District Judge

OPINIONBY: Charles P. Kocoras

OPINION: MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on Class Plaintiffs' Motion for Reconsideration of this Court's Order of June 8, 1995 denying Production of certain documents from the Washington D.C. offices of CIBA-Geigy Corporation ("CIBA") and Bristol-Myers Squibb Corporation ("BMS"). For the reasons set forth below, Class Plaintiffs' motion for reconsideration is granted, as is their underlying motion to compel.

DISCUSSION

In April or May of this year the Class Plaintiffs filed a motion seeking to compel CIBA and BMS to produce lobbying documents and other responsive documents stored in the defendants' respective Washington D.C. office. Defendants objected to producing the lobbying documents on two grounds, claiming (1) that searches of the defendants' Washington D.C. offices were beyond

the scope of the parties Rule 12(k) agreements; and (2) that the defendants' production of the documents should be made contingent upon the class plaintiffs' full reciprocal production [*2] of documents concerning lobbying activities conducted by them or on their behalf.

At the time we issued our ruling we failed to see-- as the parties failed to address-- the relevance of such a production. Disturbed by the Class Plaintiffs' failure to explain exactly why they needed these documents, we denied the motion in its entirety based on relevance.

The Class Plaintiffs now seek reconsideration of our decision based on the fact that neither CIBA nor BMS raised the issue of relevance. According to the plaintiffs, because neither of the defendants objected to the discovery request for its relevance, the Class Plaintiffs did not deem it necessary to expound upon the issue. While we do not look upon motions to reconsider favorably, under the circumstances we think that it would only be fair to address Class Plaintiffs' motion.

In moving for reconsideration, Class Plaintiffs do not argue that evidence of the defendants' lobbying activity constitutes a Sherman Act violation-- nor can they, for the United States Supreme Court has made it clear that a concerted effort to influence public officials does not violate antitrust laws, even if such conduct is intended to eliminate competition. [*3] *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965).* Rather, it is the Class Plaintiffs' position that evidence of the defendants' lobbying activity is both relevant and admissible for the purpose of showing that other non-protected activities had an unlawful purpose and character.

Indeed, courts have recognized that evidence of protected lobbying activity may be used to show the purpose and character of other activities, provided that such evidence is probative and not unduly prejudicial to the defendant. *Pennington, 381 U.S. at 670-71 n.3; MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1159 (7th Cir. 1983).* Thus, although evidence of CIBA and BMS' lobbying activities may not form the basis of this lawsuit, it may be used if it "tend[s] to reasonably show the purpose and character of the particular transactions under scrutiny." *Pennington, 381 U.S. at 670-71 n.3.* The admissibility or exclusion of such evidence is within the trial court's discretion. Id. In exercising its discretion the court must [*4] determine whether the probative value of such evidence outweighs the danger of unfair prejudicial effect. *Weit v. Continental ILL. Nat. Bank & Trust Co., 641 F.2d 457 (7th Cir. 1981).*

The defendants argue that documents related to their lobbying activities are not relevant because they could never serve as probative evidence of the "purpose and character" of other non-lobbying acts. However, the mere fact that the documents sought by the plaintiffs relate to or arise from lobbying activity is insufficient to bar their discovery. As the U.S. Supreme Court recognized, an absolute bar of the use of such evidence could have unbridled ramifications:

> We cannot agree with petitioner's absolutist position that the Noerr doctrine immunizes every effort that is genuinely intended to influence government action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports.

Allied Tube Corp. v. Indian Head, 486 U.S. 492, 503, 100 L. Ed. 2d 497, 108 S. Ct. 1931 (1988) (citation omitted).

In light [*5] of the case law presented to us, we conclude that we cannot legally bar the Class Plaintiffs' from exploring CIBA and BMS' lobbying documents based on relevance grounds. While lobbying activity is afforded certain protections under the Noerr-Pennington doctrine, probative evidence of such activity may be used to show the purpose and character of other activities, if such a use is not unduly prejudicial to the defendants. *MCI Communications, 708 F.2d at 1159.* Thus, we cannot hold that as a matter of law evidence lobbying activity can never be relevant to the prosecution of an anti-trust action. We remind the parties, however, that we are presently dealing with the documents' discoverability and not their admissibility. We note that if and when Class Plaintiffs seek to introduce evidence relating to or arising out of CIBA and BMS' lobbying activities, they will need to address significant evidentiary concerns, such as any undue prejudice to the defendants. n1

n1 In the underlying motion to compel, one of the defendants' main arguments in opposition to the motion was that a search of their respective Washington D.C. offices was beyond the scope of the search to which the parties had agreed. We have reviewed the parties' respective prior submissions on this issue and find the defendants' argument to be unavailing. Although the Class Plaintiffs initially agreed to limit their search to the defendants' principal offices, the Class Plaintiffs reserved, and occasionally successfully exercised, the right to insist upon production

from other locations.

[*6]

CONCLUSION

For the reasons set forth above, Class Plaintiffs' motion to reconsider is granted, as is their underlying motion to compel.

Charles P. Kocoras

United States District Judge

Dated: August 17, 1995

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE TO PRECLUDE IRRELEVANT, MISLEADING AND UNFAIRLY PREJUDICIAL STATEMENTS AND REFERENCES

Defendants United States Tobacco Company, et al. ("USTC"), respectfully move this Court for an order in limine precluding Plaintiffs Conwood Company, L.P., et al. ("Conwood"), from making references, either during questioning or during opening statement or in argument, to the well-publicized but legally and factually irrelevant United States v. Microsoft case. USTC also moves for an order in limine precluding Conwood from characterizing any of the alleged misconduct in this case in terms of violent or criminal behavior – such as "kneecapping" USTC's competitors or paying "kickbacks" to USTC's customers – something Conwood's counsel has already proven willing to do before this Court. Finally, USTC also moves for an order in limine precluding Conwood from, beyond legitimate legal argument, simply referring to or labeling USTC as a monopolist, a characterization that is highly disputed in this case and would be misleading and unfairly prejudicial before the jury.

ARGUMENT

Throughout its moving papers in this case, Conwood has employed various metaphors and analogies -- including inaccurate and misleading parallels to the well-publicized United States v. Microsoft case -- in an attempt to label USTC's alleged conduct as unfair, unlawful and exclusionary. Moreover, in an attempt to cast USTC in the worst of lights, Conwood has made references comparing the conduct challenged in this case to violent, criminal behavior. Conwood also has repeatedly characterized USTC as a "monopolist" of the moist snuff market. Specifically, Conwood has asserted that:

> (1) the evidence of USTC's exclusionary conduct is "far more compelling" than that in the Microsoft case, see Pl. Opp. Summ. J. at 3;
>
> (2) USTC's exclusionary acts are the equivalent of "kneecapping" its competitors, Nov. 18, 1999 Sett. Conf.;
>
> (3) USTC paid "kickbacks" to its customers, see Pl. Supp. Part. Summ. J. at 5; and
>
> (4) USTC is a monopolist of the moist snuff market.

Because such characterizations are of no probative value and are unfairly prejudicial to USTC, Conwood should be precluded from making these statements before the jury.

In J.T. Gibbons, Inc. v. Crawford Fitting Co., 565 F. Supp. 167 (E.D. La. 1981), the court commented at length with disapproval on analogous statements made by counsel:

> Defendants were repeatedly referred to, explicitly and implicitly, in terms connoting unsavory and illegal characteristics: "monopolists," "world-wide cartels," "conspiracies," "dominant," "powerful," and "huge company," "this Cleveland group of companies," "bosses," "the head man from Cleveland," and "secret councils of these monopolistic combines."
>
> Defendants were also repeatedly charged with having engaged in various activities wholly unsupported by the evidence in the record: seeking to "crush a little company," "to monopolize the market in the North Sea," "this is the way monopolists always act," "surveillance, espionage, spying on the young man," "boycott,"

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> "monopoly pricing," pressing a "sham counterclaim," "tackling [plaintiff] from the sidelines illegally," possessing "arrogance of power," engaging in an "attempt to buy time so as to proceed at their leisure to throttle this young company," and "cutting off [plaintiff]."

Id. at 191.[1] With the objective being a fair and equitable trial based on admissible evidence as presented to the jury, similar commentary by Plaintiffs' counsel in this case should be precluded.

I. REFERENCES TO UNITED STATES V. MICROSOFT

First, Conwood's attempts to draw parallels between USTC and wholly unrelated entities that may have unfairly excluded or injured rivals should be excluded under Fed R. Evid. 403 as misleading to the jury and unfairly prejudicial to USTC. Conwood's repeated incorporation-by-reference strategy to the vast evidence and commentary in the well-publicized U.S. v. Microsoft case should be precluded. See, e.g., Pl. Opp. Summ. J. at 3 (suggesting that evidence of USTC's exclusionary conduct is "more compelling" than in Microsoft); id. at 43 n. 53 (stating that the government's conclusions of law could "almost be taken for a response" to USTC's arguments). Conwood has even stretched analogy to metaphor by block-quoting Judge Jackson's findings of fact but substituting "[USTC]" in the place of Microsoft. See Pl. Supp. Part. Summ. J. at 6 n.14. Thus,

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[1] Even if USTC had previously been adjudicated a monopolist, such evidence would properly be excluded as more prejudicial than probative under Fed. R. Evid. 403. See e.g., Lightwave Technologies, Inc. v. Corning Glass Works, No. 86 Civ. 759 (KC), 1991 WL 4737, *6 (S.D.N.Y. Jan. 18, 1991) (probative value of such evidence -- though perhaps relevant of the defendant's intent -- is substantially outweighed by the danger of unfair prejudice); United States Football League v. National Football League, 634 F. Supp. 1155, 1171-73 (S.D.N.Y. 1986) (excluding evidence of prior antitrust conspiracy), aff'd, 842 F.2d 1335, 1371-73. Where, as here, there has been no past adjudication of antitrust violations, the basis for excluding Conwood's characterization of USTC as a "monopolist" is even more compelling. See Davis v. Mutual Life Insurance Co. of New York, 6 F.3d 367, 385-86 (6th Cir. 1993) (excluding evidence under Fed. R. Evid. 403 where probative value of evidence was "nil"); see also City of Cleveland v. Peter Kiewit Sons Co., 624 F.2d 749, 756-60 (6th Cir. 1980) (reversing jury verdict because counsel repeatedly referred to defendant as "large" and as a "giant in the field.").

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rather than attempt to prove to the jury that USTC has engaged in exclusionary practices, Conwood has shown that it will attempt to free-ride on the vast media coverage of Microsoft's allegedly exclusionary conduct. Analogizing USTC's alleged conduct to that in the Microsoft case serves no legitimate evidentiary purpose. Accordingly, such references are both legally and factually irrelevant and should be excluded under Fed. R. Evid. 402. They are also misleading and unfairly prejudicial and should be excluded under Fed. R. Evid. 403.

II. REFERENCES TO CRIMINAL BEHAVIOR

Second, Conwood has -- most notably during a settlement conference before this Court -- referred to USTC's allegedly exclusionary conduct as "kneecapping" and has referred to ordinary promotional offerings as "kickbacks" to USTC's customers. Such loose metaphors -- while harmless as mere posturing during a settlement conference -- should not be heard by the jury. References to "kneecapping" or other violent or criminal behavior clearly would not assist the jury in resolving factual issues in this case. Nor would unsupportable suggestions of illegal payments and bribes. They would serve no purpose other than to mislead the jury into believing that USTC's alleged conduct in this case is inherently underhanded, deceitful or criminal in nature. Accordingly, such references should be excluded as irrelevant under Fed. R. Evid. 402 and as misleading and unfairly prejudicial under Fed. R. Evid. 403.

III. CHARACTERIZING USTC AS A "MONOPOLIST"

Finally, Conwood should be required to prove, rather than merely preach, its case to the jury. While it is clear that Conwood can and will argue that USTC is a monopolist, Conwood should be precluded from simply referring to USTC as a monopolist outside the bounds of legitimate legal argument. Clearly, references to USTC as a "monopolist" is unfairly prejudicial to USTC

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because it misleadingly assumes two disputed issues in this case: (i) definition of the relevant market; and (ii) USTC's ability to exclude competitors and control prices in that market. These are both issues that must be decided by the jury.

Further, Conwood's attempt merely to label USTC as a "monopolist" is of absolutely no probative value. Rather, the "monopoly" tag's value to Conwood rests only in its tendency to mislead the jury into assuming the validity of the very issues Conwood is required to prove at trial. Accordingly, such references are legally irrelevant and should be precluded under Fed. R. Evid. 402. Moreover, because the probative value of those characterizations, if any, would be substantially outweighed by the likelihood of misleading the jury to the prejudice of USTC, such characterizations are inadmissable under Fed. R. Evid. 403.

CONCLUSION

For the foregoing reasons, this Court should enter an in limine order precluding Conwood from drawing analogies to the United States v. Microsoft case, from referencing violent or criminal behavior such as "kneecapping" a competitor, and from simply referring to USTC as a "monopolist" beyond the bounds of legitimate legal argument.

Dated: January 28, 2000

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LIGHTWAVE TECHNOLOGIES, INC., Plaintiff,
v.
CORNING GLASS WORKS, Defendant.

No. 86 Civ. 759 (KC).

United States District Court, S.D. New York.

Jan. 18, 1991.

MEMORANDUM AND ORDER

CONBOY, District Judge:

*1 Plaintiff Lightwave Technologies, Inc. ("Lightwave") brought this action against Corning Glass Works, now known as Corning, Inc. ("Corning"), alleging, inter alia, violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, [FN1] and a common law claim for tortious interference with prospective economic advantage. Corning counterclaimed for infringement of its United States patent 3,659,915 (" '915 patent") for optical waveguide fibers. The Court bifurcated the trial, so that the patent issues were tried first, followed immediately by the trial on the antitrust issues. After a five-week trial on the patent issues, the jury returned a verdict in favor of Corning, finding that its '915 patent was valid, enforceable and willfully infringed by Lightwave, and awarding damages in the amount of $403,915 plus interest to date. After a three-week trial on the antitrust issues, the jury again returned a verdict in favor of Corning, finding that it had not monopolized, attempted to monopolize nor conspired to monopolize the relevant market, and that it had not interfered with Lightwave's prospective economic advantage. The Court entered judgment in accordance with the verdicts.

Currently pending before the Court are (1) Lightwave's motion for a partial directed verdict based on Corning's alleged misuse of its patent; (2) Lightwave's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial; and (3) Corning's motion for treble damages and attorneys' fees. Also remaining to be determined is the amount of sanctions to be awarded to Corning in connection with Lightwave's repeated efforts to introduce evidence of Corning's past antitrust violations.

I. MOTION FOR PARTIAL DIRECTED VERDICT

Lightwave moves for a partial directed verdict, finding Corning's '915 patent unenforceable, based on Corning's alleged patent misuse. In support of its motion, Lightwave alleges that

In licenses granted prior to [the expiration of the '915 patent], Corning enforced a mandatory patent package, under which it coupled the '915 patent with other patents and commodities.... The licenses provided for the payment of a continuing royalty, in the form of a percentage of the net selling price of the subject fibers sold by the licenses [sic].... The licenses extended beyond the expiration of the '915 patent.... They did not, however, provide for any reduction of the royalty amount upon the expiration of the '915 patent.

Memorandum in Support of Motion for Partial Directed Verdict ("L. Misuse Mem.") at 1-2. In other words, Lightwave argues that Corning's alleged practice of mandatory patent pooling, which assertedly did not allow for reduced royalty rates when the '915 patent expired, unlawfully extended the monopoly granted Corning by the '915 patent.

Were Lightwave's version of the facts accurate and supported by the record, it would be entitled to a partial directed verdict on its claim of patent misuse. "[C]onditioning the grant of a patent license upon payment of royalties on products which do not use the teaching of the patent does amount to patent misuse." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135 (1969). The same analysis applies to conditioning the grant of the license on payment of royalties on products which use the teaching of patents which have expired. Beckman Instruments, Inc. v. Technical Dev. Corp., 433 F.2d 55, 61 (7th Cir.1970), cert. denied, 401 U.S. 976 (1971). Thus, when direct or indirect conditioning, as opposed to sound business judgment, good faith bargaining, and mutual convenience, governs the grant of a license, the patentholder engages in patent misuse. See Zenith Radio, 395 U.S. at 135-38; Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 834 (1950).

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*2 As Corning convincingly demonstrates, however, Lightwave mischaracterizes the facts. See Corning's Memorandum in Opposition to Lightwave's Motion for Partial Directed Verdict ("C. Misuse Mem.") at 2-4. First, Corning did not engage in mandatory patent packaging; rather, its licensing agreements were the product of mutual negotiations in three unique sets of circumstances. Coercion, or attempted coercion, is an essential element of patent misuse by improper patent packaging. Hull v. Brunswick Corp., 704 F.2d 1195, 1199 (10th Cir.1983); Western Elec. Co. v. Stewart Warner Corp., 631 F.2d 333, 338-39 (4th Cir.1980), cert. denied, 450 U.S. 971 (1981); Beckman Instruments, 433 F.2d at 61; Leesona Corp. v. Varta Batteries, Inc., 522 F.Supp. 1304, 1341 (S.D.N.Y.1981). Because Lightwave failed to present any evidence that Corning's patent licensing practices were coercive, Lightwave cannot establish patent misuse.

Second, royalty payments to Corning are based not upon sales of "subject fibers" as Lightwave asserts (L. Misuse Mem. at 1), but rather upon sales of fibers "made, used or sold ... under the licenses granted." See, e.g., Ex. 93 at 8. [FN2] Thus, in sharp contrast to the arrangement in Rocform Corp. V. Acitelli-Standard Concrete Wall, Inc., 367 F.2d 678 (6th Cir.1966), a case upon which Lightwave relies heavily, royalties are not payable on each and every fiber made by the Corning licensees, but only on fibers made, used or sold under license, that is, on fibers that are covered by an unexpired licensed patent. Thus, after the expiration of the '915 patent, the royalty rate goes to zero unless the licensee chooses to use another licensed, royalty bearing patent. Such licensing practices are entirely appropriate and legal, particularly when they are not accompanied by conditioning or coercion. See Automatic Radio, 339 U.S. at 831, 834; Hull v. Brunswick Corp., 704 F.2d at 1199; Beckman Instruments, 433 F.2d at 61; McCullough Tool Co. v. Well Surveys, Inc., 343 F.2d 281, 409 (10th Cir.1965), cert. denied, 383 U.S. 933 (1966).

For the reasons stated above and for the reasons set forth in Corning's memorandum of law, Lightwave's motion for a partial directed verdict is denied.

II. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR A NEW TRIAL

On numerous grounds, Lightwave moves for judgment notwithstanding the verdict ("judgment n.o.v.") pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, or, in the alternative, for a new trial pursuant to Rule 59, in both the patent and antitrust phases of the trial. "Judgment n.o.v. may be entered only if, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable [persons] could have reached." Heller v. Champion Int'l Corp., 891 F.2d 432, 434 (2d Cir.1989) (quotation marks and citations omitted); see also Orthokinetics, Inc. v. Safety Travel Chairs, Inc., 806 F.2d 1565, 1571 (Fed.Cir.1986). Thus, a motion for judgment n.o.v. should be granted when:

*3 "(1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or

(2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men [and women] could not arrive at a verdict against him."

Katara v. D.E. Jones Commodities, 835 F.2d 966, 970 (2d Cir.1987) (quoting Mattivi v. South African Marine Corp., "Huguenot", 618 F.2d 163, 167-68 (2d Cir.1980)). In ruling on a judgment n.o.v. motion, we must "consider the evidence in the light most favorable to the party against whom the motion was made and ... give that party the benefit of all reasonable inferences that the jury might have drawn in his favor from the evidence." Smith v. Lightning Bolt Productions, 861 F.2d 363, 367 (2d Cir.1988).

A trial court is empowered to grant a new trial to prevent a miscarriage of justice resulting from a jury verdict. Katara v. D.E. Jones Commodities, 835 F.2d at 970. The standard for granting a new trial is considerably less stringent than that applied on a motion for judgment n.o.v. Id. Thus, the court may order a new trial if it believes that the verdict was against the weight of the evidence, Ismail v. Cohen, 712 F.Supp. 416, 419 (S.D.N.Y.1989), although "a court may not substitute its own view for that of the jury's." United States v. Burger, 717 F.Supp. 245, 247 (S.D.N.Y.1989). A new trial may also be appropriate if evidence has been excluded or

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admitted improperly, to the prejudice of the moving party. See, e.g., Marx & Co. v. Diners' Club, Inc., 550 F.2d 505 (2d Cir.), cert. denied, 434 U.S. 861 (1977). Further, the giving of an erroneous jury instruction or the failure to give a proper requested instruction, if prejudicial, may also be a ground for a new trial. See, e.g., Callen v. Pennsylvania R.R., 332 U.S. 625 (1948); Bentley v. Stromberg-Carlson Corp., 638 F.2d 9 (2d Cir.1981). In general, however, the trial court should " 'abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result.' " Bevevino v. Saydjari, 574 F.2d 676, 684 (2d Cir.1978) (quoting 6A J. Moore & J. Lucas, Moore's Federal Practice ¶ 59.08[5] at 59-161 (1973)); see also Fonar Corp. v. Johnson & Johnson, 821 F.2d 627, 633 (Fed.Cir.1987) (new trial obtainable only on showing that error affected substantial rights), cert. denied, 484 U.S. 1027 (1988).

With these standards in mind, we turn to the grounds for Ligtwave's motion for judgment n.o.v. or for a new trial.

A. PATENT PHASE

Lightwave raises eleven grounds for its motion for judgment n.o.v. or for a new trial on the patent issues. These grounds are: (1) admission into evidence of decisions in other cases involving the validity of the '915 patent; (2) exclusion of the Nelson-Barber fibers; (3) exclusion of the Harrington documents; (4) bifurcation of the trial so as to permit Corning to proceed first with its patent infringement counterclaim, prior to the trial of Lightwave's antitrust claims; (5)-(10) insufficiency of the evidence on questions of infringement, best mode, adequacy of disclosure, anticipation, obviousness, and willfulness; and (11) patent misuse. [FN3]

*4 As to the evidentiary issues, the first three grounds listed above, Lightwave presents essentially the same arguments and objections as were made, carefully considered and rejected during the trial. Because the trial record adequately reflects the reasons for the Court's rulings, and because Corning's Memorandum in Opposition to Lightwave's Alternative Motion for Judgment Notwithstanding the Verdict or For a New Trial ("C. JNOV Mem.") adequately summarizes those reasons, id. at 6-26, we will address Lightwave's arguments only briefly.

First, the Court is satisfied that the prior adjudications of the '915 patent's validity were relevant on the question of whether Lightwave willfully infringed the '915 patent, the only ground on which they were admitted. Lightwave suggests that, because a prior adjudication of validity is not binding on a jury in a subsequent infringement action, Lightwave was free to ignore the prior adjudications of validity. That a prior adjudi-cation of validity is not binding in a subsequent action, however, has no bearing on whether an infringer should exercise due care in the face of such an adjudication of validity, especially when the facts and circumstances of that adjudication closely parallel those of the infringer. The fact that Lightwave continued to infringe the '915 patent, despite its awareness of prior adjudications in which most of Lightwave's own affirmative defenses were considered and rejected, is relevant to the issue of whether Lightwave willfully infringed. The prior adjudications were thus properly admitted, solely on the issue of willfulness, with cautionary instructions to the jury to limit their prejudicial impact. We assume, as we must, that the jury heeded these instructions. See United States v. DeLillo, 620 F.2d 939, 947 (2d Cir.), cert. denied, 449 U.S. 835 (1980); United States v. Levy, 578 F.2d 896, 900 (2d Cir.1978); Lifetime Siding, Inc. v. United States, 359 F.2d 657, 661 (2d Cir.), cert. denied, 385 U.S. 921 (1966).

Second, the Nelson-Barber fibers were properly excluded under 35 U.S.C. § 102 and Rules 402 and 403. Lightwave's evidence concerning the availability of the fibers to the public was extremely marginal and uncorroborated, and was therefore entitled to little or no weight. See In re Reuter, 670 F.2d 1015, 1021 n. 8, 1022 (C.C.P.A.1981); Washburn & Mean Mfg. Co. v. Beat 'Em All Barber-Wire Co., 143 U.S. 275, 284 (1892). Thus, Lightwave did not meet its burden of establishing, by clear and convincing evidence, that the Nelson-Barber fibers qualified as prior art under 35 U.S.C. § 102. In addition, there was no persuasive evidence that the fibers had ever been or could be used for practical telecommunications. The fibers therefore did not teach the solution to the problem which was solved by the '915 invention, nor were they ever addressed to that problem. Thus, the fibers did not anticipate the '915 patent and were properly excluded as irrelevant. Even if the fibers

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were marginally relevant, their probative value was outweighed by the prejudice and confusion which would have resulted from the admission of the fibers into evidence.

*5 For similar reasons, the fibers were not admissible on the question of obviousness under 35 U.S.C. § 103. Specifically, because the fibers were not prior art under Section 102, they could not be considered under Section 103. See 2 D. Chisum, Patents § 5.02[3] (1990). Moreover, the result achieved by Dr. Nelson--a glowing, luminescent fiber that exhibits a loss of 75,000-100,000 dB/km--tends to support the non-obviousness, rather than the obviousness, of proceeding with doped fused silica.

Third, the foreign Harrington documents were properly excluded. None of the Harrington patents and applications were published more than a year prior to the filing date of the application for the '915 patent. They are thus not prior art under 35 U.S.C. § 102(b). Nor do they describe the invention of another, that is, someone other than Dr. Maurer, prior to the invention of the '915 patent, so as to qualify as prior art under 35 U.S.C. § 102(a). See C. JNOV Mem. at 24-26. Nor do the Harrington documents, for the reasons set forth by Corning, id. at 26, represent "prior inconsistent statements" by Corning.

Fourth, Lightwave once again challenges the Court's decision, based upon the Federal Circuit's decision in In re Innotron Diagnostics, 800 F.2d 1077 (Fed.Cir.1986), to bifurcate the trial and try the patent issues first. It is not necessary to repeat the reasons for the decision to bifurcate. See C. JNOV Mem. at 27.

Lightwave's fifth through tenth grounds for its motion for judgment n.o.v. or a new trial, as indicated above, are arguments that various parts of the jury's verdict were unsupported by the trial record. As Corning demonstrates, see C. JNOV Mem. at 28-47, the jury's findings with respect to infringement, best mode, adequacy of disclosure, anticipation, obviousness, and willfulness of infringement were more than adequately supported by the evidence presented at trial.

Eleventh and finally, as we have indicated in connection with our discussion of Lightwave's motion for a partial directed verdict, see Part I, supra, Corning's licensing practices did not constitute patent misuse.

B. ANTITRUST PHASE

With regard to Lightwave's antitrust and common law claims against Corning, Lightwave moves for judgment n.o.v. or, in the alternative, for a new trial, on the following grounds: (1) Lightwave's entitlement to judgment n.o.v. or a new trial on Corning's patent claims; (2) insufficiency of the evidence in support of the verdict that Corning did not monopolize, attempt to monopolize, or conspire to monopolize in violation of Section 2 of the Sherman Act; (3) insufficiency of the evidence in support of the verdict that Corning did not interfere with Lightwave's prospective economic advantage; (4) exclusion from evidence of Corning's prior violations of the antitrust laws through the misuse of valid patents, and refusal to instruct the jury with regard to Corning's past violations; (5) Corning's alleged misuse of its patent, in the form of patent grantback arrangements and agreements restricting the output and territories of its licensees; (6) the giving of three assertedly erroneous jury instructions; and (7) the failure to give three jury instructions requested by Lightwave.

*6 As to the first ground, we have already determined that Lightwave is not entitled to judgment n.o.v. or a new trial on the patent issues.

Second, the evidence more than adequately supports the jury's findings that Corning did not monopolize, attempt to monopolize or conspire to monopolize, in violation of the antitrust laws. In support of its arguments to the contrary, Lightwave reviews only evidence that was favorable to it; indeed, Lightwave's review of the facts closely parallels the closing arguments of Lightwave's counsel. On a motion for judgment n.o.v., however, the Court must examine the evidence in a light most favorable to the party against which the motion was made. Smith v. Lightning Bolt Productions, 861 F.2d 363, 367 (2d Cir.1988). Moreover, the court may order a new trial only if the verdict was against the weight of all of the evidence. Ismail v. Cohen, 712 F.Supp. 416, 419 (S.D.N.Y.1989). As set forth in Corning's memorandum of law (C. JNOV Mem. at 48-64), the evidence at trial, considered as a whole, giving Corning the benefit of all reasonable inferences that the jury might have drawn in its favor, supports the jury's verdict on Lightwave's antitrust claims.

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Third, there was ample support in the record for the jury's determination that Corning did not tortiously interfere with Lightwave's prospective economic advantage. As the jury was instructed, Lightwave had to establish, inter alia, that Corning interfered with Lightwave's business relations "for the sole purpose of harming Lightwave or by means that were fraudulent, deceitful or illegal," that "the contract or business relation would have been entered into but for Corning's conduct," and that "Lightwave suffered damages as a direct result of Corning's action." The evidence permitted the jury to conclude that Corning notified Lightwave of its good faith belief that Lightwave was infringing its patent for the legitimate purpose of protecting Corning's patent rights, not for the sole purpose of harming Lightwave. The evidence further permitted the jury to find that Corning's conduct, even if improper, was not the cause of Lightwave's business failures and that Lightwave did not suffer damages from Corning's actions. Accordingly, the jury's finding on Lightwave's tortious interference claim was proper.

Fourth, the Court properly refused to admit evidence of Corning's prior antitrust violations and to instruct the jury with regard to Corning's past violations. As Corning points out, this is Lightwave's fourth attempt to reargue the decision of Judge Weinfeld, in an order dated January 13, 1987, to exclude Hartford-Empire Co. v. United States, 323 U.S. 386 (1945), a case in which Corning was found to have violated the antitrust laws, from this action. [FN4] Lightwave relies heavily on Justice Cardozo's observation that "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." United States v. Swift & Co., 286 U.S. 106, 116 (1932). That observation, however, was initially made in connection with the approval of a consent decree, not a decision to exclude highly prejudicial, marginally relevant (if relevant at all) evidence in a jury trial. More directly on point is United States Football League v. National Football League, 634 F.Supp. 1155, 1171-73 (S.D.N.Y.1986), in which Judge Leisure excluded evidence of the NFL's prior antitrust violations offered as proof of a "long-standing antitrust conspiracy dating back to the 1940's, which casts light on the current antitrust conspiracy." Id. at 1173. The Second Circuit affirmed the decision. 842 F.2d 1335, 1371-73 (2d Cir.1988). In support of our decision to exclude evidence of and all references to Corning's antitrust violations in the 1940's, we simply repeat, once again, the words of Judge Weinfeld: "Actions taken in the distant past are more prejudicial than probative as to Corning's likely intent in August 1984." Order, dated January 13, 1987.

*7 Fifth, Lightwave alleges that, as a matter of law, three provisions included in some of Corning's license agreements violated Section 2 of the Sherman Act and constituted patent misuse: (1) grantbacks of non-exclusive licenses; (2) geographically limited licenses; and (3) quantity limited licenses. As Corning explains and as the jury was instructed, however, these provisions are not per se unlawful. Thus, whether or not Corning used grantbacks, geographically limited licenses, and quantity limited licenses as part of an overall scheme to monopolize the relevant market was a question for the jury about which the jury was fully instructed. Notwithstanding Lightwave's frequent references to the words of Chief Judge Knox and Judge Rifkind, in United States v. General Elec. Co., 80 F.Supp. 989, 1006 (S.D.N.Y.1948) and United States v. National Lead Co., 63 F.Supp. 513, 524 (S.D.N.Y.1945), aff'd, 332 U.S. 319 (1947), respectively, the jury was permitted to find, on the facts before it, that Corning had not engaged in an "industry-wide cartel" in violation of the antitrust laws.

Sixth, Lightwave argues that three of the Court's jury instructions in the antitrust phase of the trial were improper. With respect to the Court's instruction No. 22 that "[y]ou have ... found that Lightwave has willfully infringed Corning's 915 patent" (Tr. 5614), [FN5] we cannot imagine that Lightwave was unfairly or improperly prejudiced by the Court's reminding the jury, by way of introduction, of its finding in the patent phase. With regard to the Court's instruction No. 23 that "as long as a patent holder uses his patents in a lawful manner he will not violate the antitrust laws" (Tr. 5617), the instruction was drawn from the court's language in SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1206 (2d Cir.1981), cert. denied, 455 U.S. 1016 (1982). In the context of lengthy instructions which repeatedly distinguished between lawful and unlawful uses of a patent monopoly, the Court's instruction was neither improper nor prejudicial. Likewise, the instruction No. 30 that "[Monopoly power] may be shown by evidence of a company's reducing or restricting the share of the

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market held by competitors by means other than through the unilateral and lawful exercise of rights granted by a lawful patent" (Tr. 5623), was proper and fair.

Seventh, Lightwave contends that the Court erred in refusing to give three jury instructions requested by Lightwave. With respect to Lightwave's proffered instruction on sham litigation, it was rejected in part because its content was adequately addressed by other instructions relating to Corning's notice of infringement. Moreover, as set forth by Corning, C. JNOV Mem. at 74- 75, Lightwave's instruction was not entirely sound. As to Lightwave's proposed charge on grantbacks, the Court incorporated most of Lightwave's proposal into the Court's charge on grantbacks by eliminating from the charge all references to the exclusiveness or non-exclusiveness of grantbacks as an indication of their legality. The Court's charge on grantbacks was thus fair and accurate, despite its failure to incorporate verbatim the words of Chief Judge Knox. Finally, with regard to Lightwave's suggested charge on misuse of size, this instruction was properly rejected because it invited the jury to find, based merely on Corning's size, that Corning had violated the antitrust laws. [FN6]

*8 C. COURT'S CONDUCT AT TRIAL

Lightwave's final ground for its motion for a new trial is "the bias shown by the [Court] in conducting the trial." Memorandum of Lightwave in Support of Alternative Motion for Judgment Notwithstanding the Verdict or New Trial ("L. JNOV Mem.") at 92, 95. Lightwave charges that the "trial record is replete with instances where the trial judge acted as Corning's advocate" (L. JNOV Mem. at 94) and "took an active role in the presentation of Corning's case" (L. JNOV Mem. at 95). Lightwave further argues that the Court treated Lightwave's president and chief executive officer, Dr. Dabby, "with animosity" and "berated Lightwave's counsel in front of the jury." (L. JNOV Mem. at 95.)

Corning argues that, because this ground for a new trial was not identified as an issue in Lightwave's initial "Alternative Motion ... for Judgment Notwithstanding the Verdict or a New Trial," dated May 24, 1990, it must be rejected as untimely under Rule 59(b) of the Federal Rules of Civil Procedure. C. JNOV Mem. at 84. Although it appears to be the rule in the Third Circuit that a court cannot properly consider newly assigned grounds for a new trial raised after the elapse of the ten day filing period, see Shushereba v. R.B. Industries, Inc., 104 F.R.D. 524, 529-30 (W.D.Pa.1985), this is not the rule in all circuits. See, e.g., Pate v. Seaboard R.R., Inc., 819 F.2d 1074, 1085 (11th Cir.1987) (district court may, in its discretion, consider new grounds raised in amendments to timely new trial motions); Roy v. Volkswagenwerk Aktiengesellschaft, 781 F.2d 670, 671 (9th Cir.1985) (same). In Meriwether v. Coughlin, 879 F.2d 1037 (2d Cir.1989), the Second Circuit determined that a litigant's oral indication at the conclusion of a trial that he wished to move for judgment n.o.v., without specifying any grounds, sufficiently preserved the litigant's rights under Rule 59(b) to submit briefing papers setting forth the grounds of the motion at a later date. We therefore conclude that either we must consider Lightwave's initially unspecified ground for a new trial, or that it is within our discretion to consider it.

Turning to the merits of Lightwave's argument, we note at the outset that the grounds for Lightwave's bias charge are refuted in detail by Corning. C. JNOV Mem. at 88-101. Accordingly, the Court will address Lightwave's arguments only briefly here.

Lightwave presents, in support of its charge of bias, a laundry list of supposed improprieties and abuses of discretion by the Court. Indeed, it seems as if Lightwave has combed the lengthy trial record (nearly 6,000 pages) to locate rulings, comments, or actions by the Court that were in some sense adverse to Lightwave. During an eight week trial, each side unavoidably incurs a number of unfavorable rulings. A charge of bias is not established, however, simply by identifying and comparing the number and significance of rulings adverse to each side. "[A] trial judge must rule on countless objections, and a simple numerical tally of those sustained and overruled, ... is not enough to establish that the scales of justice were tipped...." United States v. Pisani, 773 F.2d 397, 402 (2d Cir.1985). Moreover, Lightwave's examples of alleged abuses by the Court are taken out of context, ignoring preceding testimony or lines of questioning which justified the Court's actions. "[I]f defense counsel pursues an objectionable line of questioning, he can hardly cry 'foul' when the judge sustains a [plaintiff's] objection or even excludes the testimony

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sua sponte." Id. A balanced view of the entire record reveals that the Court's conduct of the trial was fair and appropriate.

*9 Lightwave suggests that the Court in effect acted as Corning's advocate by soliciting objections from Corning's counsel and by unnecessarily and prejudicially clarifying testimony or questioning witnesses. "It is well settled," however, "that a judge is authorized to ask questions of a witness which may aid the understanding of the jury." Johnson v. Celotex Corp., 899 F.2d 1281, 1290 (2d Cir.), cert. denied, 111 S.Ct. 297 (1990); United States v. Lamont, 565 F.2d 212, 220 (2d Cir.1977), cert. denied, 435 U.S. 914 (1978). A judge may therefore properly question witnesses for "purposes of clarifying ambiguities, correcting misstatements, or obtaining information needed to make rulings...." United States v. Bronston, 658 F.2d 920, 930 (2d Cir.1981), cert. denied, 456 U.S. 915 (1982). Lightwave's characterization of the record, not surprisingly, gives the impression that the Court's efforts to expedite the trial and clarify the issues for the jury were uniformly unfavorable to Lightwave. This characterization, as Corning illustrates, is inaccurate. See C. JNOV Mem. at 88-92. In a complex and lengthy trial, the Court acted within its discretion to "insure that the issues [were] clearly presented to the jury." Pisani, 773 F.2d at 403.

Lightwave's attempt to compare Drs. Duke and Dabby, and the Court's treatment of them, is similarly misplaced. Whereas Dr. Duke was generally a cooperative, forthcoming witness, Dr. Dabby was uncooperative and evasive, often giving expansive and nonresponsive answers. Any perceived difference in the Court's treatment of these two witnesses, therefore, stemmed not from the Court's attitude toward them but from the difference between the two witnesses.

In support of its charge that the Court "berated" Lightwave's counsel in front of the jury, Lightwave cites two brief comments (from an eight-week trial) the Court directed at Lightwave's counsel. L. JNOV Mem. at 121. The context of the Court's remarks reveals that they were appropriate under the circumstances.

Even if any of the Court's actions, rulings, and comments were improper, for reasons the Court is unable to fathom, Lightwave does not, and cannot, establish that the Court's behavior was so prejudicial that it denied Lightwave a fair, as opposed to a perfect, trial. See United States v. Pisani, 773 F.2d at 402 (citing United States v. Robinson, 635 F.2d 981, 984 (2d Cir.1980)). Moreover, the members of the jury were instructed numerous times that they were the sole judges of the facts. They were further instructed that the Court had no view or opinion as to the outcome of the trial, and that they were therefore to disregard any perceived indication of the Court's view.

In short, the Court's conduct did not deprive Lightwave of a fair and impartial trial. Because the jury's verdicts were fully supported by the record and because the trial record is free of prejudicial error, Lightwave's motion for judgment n.o.v. or in the alternative for a new trial is denied in all respects.

III. MOTION FOR TREBLE DAMAGES AND ATTORNEY'S FEES

*10 Corning moves, pursuant to 35 U.S.C. § 284, for the damages awarded by the jury to be trebled and, pursuant to 35 U.S.C. § 285, for an award of attorneys' fees with interest.

A. INCREASED DAMAGES

"[T]he court may increase the damages up to three times the amount found or assessed [by the jury]." 35 U.S.C. § 284. In exercising its discretion to increase damages, a Court should consider the policies of the patent laws, as well as the circumstances of the litigation at hand. S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc., 781 F.2d 198, 201 (Fed.Cir.1986). Various policies are furthered by increasing damages, such as the deterrence of deliberate infringement in the future and the consequent protection of the integrity of the patent system. Avia Group Int'l v. L.A. Gear California, 853 F.2d 1557, 1566 (Fed.Cir.1988); Shiley, Inc. v. Bentley Laboratories, Inc., 601 F.Supp. 964, 969 (C.D.Cal.1985), aff'd, 794 F.2d 1561 (Fed.Cir.1986). Such an award is also proper to reflect equitable considerations regarding how best to "recompense the successful litigant." S.C. Johnson & Son, 781 F.2d at 201.

As we have noted, the jury found that Lightwave had willfully infringed the '915 patent. In response to the question, "has Corning proven by clear and convincing evidence that Lightwave's infringement

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has been willful?", the jury answered "yes" on the verdict sheet. A jury's finding of willful infringement is sufficient grounds for an increase in damages. Shiley, 794 F.2d at 1568. Lightwave argues, however, that because "the jury was instructed that it may find for Corning on the issue of willful infringement upon a preponderance of the evidence" (Lightwave's Memorandum in Opposition to Corning's Motion for Treble Damages and Award of Attorney's Fees ("L. Damages Mem.") at 6), the Court must independently assess whether Corning has established, by clear and convincing evidence, entitlement to increased damages and attorney fees. Id. at 6-7, 23.

Although Lightwave correctly states that clear and convincing evidence is required in support of increased damages, E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co., 849 F.2d 1430, 1440 (Fed.Cir.), cert. denied, 488 U.S. 986 (1988), the jury was not instructed in the charge on willfulness that Corning must establish willful infringement by a preponderance of the evidence. (Tr. 2855-56) The charge itself did not refer to a burden of proof, id, and Lightwave did not object to the charge. (Tr. 2416-17) Earlier in the jury instructions, however, the jury was instructed that Corning "has the burden of proving its claims to you by a preponderance of the evidence" while Lightwave "has the burden of proving its affirmative defenses to you by clear and convincing evidence." (Tr. 2815) Thus, it is possible that the jury inferred from the charge that Corning had to establish willfulness by a preponderance of the evidence.

Nevertheless, the verdict sheet clearly required the jury to find willfulness only if Corning established it by clear and convincing evidence. Each juror was given a copy of the verdict sheet for use during deliberations. The jury never asked the Court to clarify any perceived discrepancy between the verdict sheet and the charge, indicating that the jury understood that it should apply the clear and convincing standard of proof to the willfulness issue. In addition, the jury was fully instructed as to the meaning of the clear and convincing standard of proof. (Tr. 2817) Thus, the jury's verdict on willfulness is a sufficient ground to support increased damages (and attorneys' fees).

*11 Even if the jury overlooked the "clear and convincing" language in the question on the verdict sheet, the Court is satisfied that clear and convincing evidence supports the jury's finding of willfulness. Although Lightwave was fully aware of the '915 patent before it began producing its optical waveguide fibers, it did not exercise due care in deciding whether to begin production despite the '915 patent. The test of due care is "whether, under all the circumstances, a reasonable person would prudently conduct himself with any confidence that a court might hold the patent invalid or not infringed." State Indus., Inc. v. Mor-Flo Indus., Inc., 883 F.2d 1573, 1581 (Fed.Cir.1989), cert. denied, 110 S.Ct. 725 (1990). The duty of care "includes ... the duty to seek and obtain competent legal advice from counsel before initiation of any possible infringing activity." Underwater Devices Inc. v. Morrison-Knudsen Co., 717 F.2d 1380, 1390 (Fed.Cir.1983). The degree of requisite care required is heightened when, as here, the infringer appreciates the "technological and commercial significance" of the patented invention and seeks but is denied a license. Spindelfabrik Suessen-Schurr Stahlecker & Grill GmbH v. Schubert & Salzer Maschinen Fabrik Aktiengesellschaft, 829 F.2d 1075, 1084 (Fed.Cir.1987).

Lightwave obtained no written opinion whatsoever before embarking upon its infringing conduct in 1982. The earliest written opinion introduced at trial was not prepared until December 1983. The written opinions Lightwave obtained thereafter were inadequate. Two opinions addressed only validity, not infringement (Exs. 759, 999; Tr. 2149-50) and relied heavily upon art previously considered and rejected by the Patent Office during prosecution of the '915 patent (Tr. 2115-37). A validity and infringement opinion "would generally include an analysis of the file history of the patent." Underwater Devices, Inc. v. Morrison-Knudsen Co., 717 F.2d at 1390. Lightwave's subsequent noninfringement opinion (Ex. 878), which relied on an "off the wall" interpretation (according to Corning's expert, Professor Adelman (Tr. 2541)) of the "on at least an elemental basis" language of the patent claims, was contradicted by an earlier opinion (Ex. 751; Tr. 2138-42). It was therefore not competent. See Shiley, Inc. v. Bentley Laboratories, Inc., 601 F.Supp. at 968 (opinion not competent where it is undercut by another opinion).

Lightwave also obtained the opinion of its antitrust counsel that it had "a submissible antitrust case against Corning, and that a verdict for Lightwave on its antitrust claims would render the '915 patent

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unenforceable." L. Damages Mem. at 2. Given the complexity of antitrust law, having a "submissible antitrust case" is hardly a sound basis for proceeding with patent infringing activities. In any event, conclusory oral opinions do not discharge the duty of care. Bott v. Four Star Corp., 807 F.2d 1567, 1572 (Fed.Cir.1986). Moreover, Lightwave's failure to articulate in clear, specific and concrete terms its patent misuse claims--indeed, Lightwave never asserted a patent misuse defense in any of its pleadings--until the conclusion of the antitrust phase of the trial leads us to doubt that Lightwave seriously considered a defense of patent misuse in deciding whether to infringe the '915 patent.

*12 More damaging to Lightwave's position is its failure to obtain any new opinion of counsel or any written reevaluation of the 1983 opinion, and its failure to cease infringing the '915 patent, despite numerous decisions upholding the validity of the '915 patent. After Lightwave's December 1983 opinion, four different tribunals found the '915 patent or its Canadian counterpart valid, enforceable and infringed by products differing in no material respect from those of Lightwave: the Federal Court of Canada, the United States International Trade Commission, this Court (Judge Conner in Corning Glass Works, Inc. v. Sumitomo Elec. U.S.A., Inc., 671 F.Supp. 1369 (S.D.N.Y.1987)), and the United States Court of Appeals for the Federal Circuit (affirming Judge Conner's decision, 868 F.2d 1251 (Fed.Cir.1989). The duty of care includes an obligation to obtain a further competent opinion of counsel once an adjudication of validity and/or infringement is entered. International Mfg. Co. v. Landon, Inc., 336 F.2d 723, 728 (9th Cir.1964) (prior adjudication involved different infringer); Bott v. Four Star Corp., 229 U.S.P.Q. 241, 253 (E.D.Mich.1985) (prior adjudication involving same infringer "should have at least raised a yellow flag"), aff'd in relevant part, 807 F.2d 1567 (Fed.Cir.1986).

Lightwave's efforts to minimize the importance and relevance of these prior decisions are unavailing. It emphasizes that the Canadian decision was not binding in the United States and that the ITC's findings were eventually vacated, on technical grounds, by the Federal Circuit in 1986, but these facts do not diminish the "yellow flag" Lightwave should have seen after these decisions. Lightwave laments the fact that its trial against Corning did not proceed prior to the Sumitomo trial, but this fact also does not alter the effect Judge Conner's decision should have had on Lightwave, particularly because Lightwave attended the trial before Judge Conner and consulted with representatives of Sumitomo during the trial, and because Judge Conner rejected the affirmative defenses Lightwave planned to offer at its own trial. Lightwave's hope that it could persuade a jury to accept defenses rejected by Judge Conner constituted either "outright defiance or baseless optimism." Corning Glass Works v. Sumitomo, 671 F.Supp. at 1401.

Instead of seeking competent legal advice from patent counsel and/or ceasing infringement of the '915 patent, Lightwave continued to produce infringing fibers. The jury was therefore entitled to find, by clear and convincing evidence, that Lightwave had willfully infringed the '915 patent.

For the same reasons, an increase in the damages awarded by the jury is required. An increase would operate "partly as a deterrent--an economic deterrent to the tort of infringement--and partly as a basis for making economically whole one who has been wronged...." Rite-Hite Corp. v. Kelley Co., 819 F.2d 1120, 1126 (Fed.Cir.1987). The jury was instructed that it should award damages in an amount no "less than the amount of money Corning would have received if Lightwave had been paying a reasonable royalty to them for the use made by Lightwave during the period of infringement." Patent Jury Instruction No. 44. The jury's damage award, $403,915, is based on an 8% royalty rate. If this amount were not increased, Lightwave and other willful infringers would have no incentive not to infringe. To the contrary, knowing that either they would not be held liable or that they could simply pay a reasonable royalty after a finding of infringement, infringers would find it desirable and profitable to infringe.

*13 In addition to acting as a deterrent, an increased amount would more adequately compensate Corning. The unrebutted expert testimony established that the value of the '915 patent is greater than the 8% royalty rate employed by the jury, but exactly how much greater is unavoidably a matter of speculation. (Tr. 1341) Increased damages can properly redress such a situation. Kori Corp. v. Wilco Marsh Buggies and Draglines, Inc., 561 F.Supp. 512, 533 (E.D.La.1982) (doubling damages as compensation for expenses not susceptible of determination),

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aff'd, 761 F.2d 649 (Fed.Cir.), cert. denied, 474 U.S. 902 (1985).

At the same time, however, an increased award may also take into account the financial ability of the losing party to pay an increased damage award. Id.; see also Bott, 229 U.S.P.Q. at 254 (infringer was "no financial giant" and "a threefold increase in damages would severely affect [infringer's] financial condition"); 5 D. Chisum, Patents § 20.03[4][b][vi] (1990) (the amount of the increase should be a function of the size and wealth of the infringer). According to Dr. Dabby, Lightwave's president, Lightwave may not be able to make arrangements for payment of the jury's $403,915 verdict. Affidavit of Franklin W. Dabby, sworn to on May 17, 1990 ("Dabby Aff."), ¶ 4. As Corning points out, however, Dabby does not mention Lightwave's insurance policies or Dabby's own financial resources. [FN7] Corning's Reply Memorandum in Support of Its Motion for Treble Damages and Attorney Fees ("C. Damages Reply") at 14-15. We conclude that Lightwave can withstand some increase in damages, but not treble damages.

For the foregoing reasons, we find that the jury's award of damages to Corning in the amount of $403,915 should be doubled, so that Corning is awarded $807,830 plus interest to date in damages.

B. ATTORNEY FEES

A court is authorized to award attorney fees to the prevailing party in a patent infringement suit "in exceptional cases." 35 U.S.C. § 285. "Allowance of fees only in exceptional cases is based on the premise that courts should attempt to strike a balance between the interest of the patentee in protecting his statutory rights and the interest of the public in confining such rights to their legal limits." Machinery Corp. of America v. Gullfiber AB, 774 F.2d 467, 471 (Fed.Cir.1985). The court may consider many factors in exercising its discretion to award attorney fees, including inequitable conduct, willful infringement, misconduct during litigation, vexatious or unjustified litigation, or a frivolous suit. Rite-Hite Corp. v. Kelley Co., 819 F.2d at 1126 (citing Standard Oil Co. v. American Cyanamid Co., 774 F.2d 448, 449 (Fed.Cir.1985)).

Although a finding of willful infringement is a sufficient basis for finding a case exceptional, it does not compel such a finding. Avia Group Int'l v. L.A. Gear California, 853 F.2d 1557, 1567 (Fed.Cir.1988). Indeed, the purpose of an increase in damages is different from that of an award of attorney fees: whereas an increase in damages based on willful infringement is based on the need to compensate the patentee and to deter and punish infringers, an award of attorney fees is based more appropriately on the conduct of the parties during the litigation. Moreover, "[e]ven an exceptional case does not require in all circumstances the award of attorney fees." S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc., 781 F.2d 198, 201 (Fed.Cir.1986). The trial judge must "weigh considerations such as the closeness of the case, the tactics of counsel, the conduct of the parties, and any other factors that may contribute to a fair allocation of the burdens of litigation as between winner and loser." Id.

*14 Despite the jury's finding that Lightwave's infringement was willful, several considerations persuade us that this is not an exceptional case in which attorney fees should be awarded. First, Lightwave did not, as Corning repeatedly suggests, litigate in bad faith. Rather, Lightwave's trial tactics were the result, we believe, of an aggressive litigation strategy. Second, Lightwave did not present frivolous claims; to the contrary, its claims survived summary judgment and directed verdicts. To the extent that the lack of precision and the substance of the papers on summary judgment prevented the Court from granting summary judgment, the problem lay not only with Lightwave's submissions. Third, Lightwave's patent misuse and antitrust claims had never been presented in any previous litigation. These claims turned on Corning's intent, that is, whether Corning had an "overall scheme to monopolize" or a plan to force "competitors" into becoming "collaborators" (Ex. 437). In presenting these claims, Lightwave's counsel made effective use of numerous documents from which the jury could have drawn inferences in Lightwave's favor.

For the foregoing reasons, we find that the balance between the interest of the patentee and that of the public weighs against awarding attorney fees. Accordingly, Corning's motion for attorney fees is denied.

IV. SANCTIONS ISSUES

Two sanctions issues must be addressed: (1) the

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amount of sanctions to be awarded to Corning in connection with Lightwave's repeated efforts to introduce evidence of Corning's past antitrust violations; and (2) whether to award additional sanctions for Lightwave's "attempt to reargue the admissibility of Hartford-Empire in the guise of an impermissibly omitted jury instruction." C. JNOV Mem. at 81, n.*.

The Court initially awarded sanctions in connection with Lightwave's attempt, in its "Memorandum on Issues of Trial Evidence," to reargue Judge Weinfeld's decision, in an order dated January 13, 1987, to exclude all evidence of and references to United States v. Hartford-Empire Co. from this litigation. See Order dated February 27, 1990. Sanctions were appropriate in light of Lightwave's failure to cite, let alone distinguish, controlling Second Circuit authority, United States Football League v. National Football League, 842 F.2d 1335, 1371-73 (2d Cir.1988).

In its application for attorneys' fees, Corning requested $11,084, which represents the work of three associates, who spent 29.5 hours preparing Corning's response, two partners, who spent 15.5 hours reviewing and editing that response, and one legal assistant who spent 4.5 hours preparing the response for filing. Affidavit of Jeremy G. Epstein in Support of Application for Sanctions ("Epstein Aff."), ¶ 4. Lightwave argues that the amount requested by Corning is excessive, particularly in light of the fact that only one of Lightwave's attorneys spent only three hours preparing Lightwave's argument on the Hartford-Empire issue for its Memorandum on Issues of Trial Evidence. Affidavit of Daniel R. Shulman, dated March 17, 1990 ("Shulman Aff."), ¶ 2.

*15 While we agree with Corning that the amount of time spent by Lightwave's counsel is an inappropriate "yardstick" for measuring the reasonableness of Corning's application (see Letter, dated March 19, 1990, from Jeremy G. Epstein to the Court), Corning's application is unreasonable and excessive. Corning submitted an eleven-page memorandum on the Hartford- Empire issue, a relatively straightforward issue not requiring extensive research or thought because controlling Second Circuit authority was readily available and because Corning had addressed the issue in the past. Having three associates and two partners spend 45 hours on the memorandum may have satisfied Corning's desire to treat the matter thoroughly and seriously. Lightwave need not, however, shoulder the entire burden of that desire. Accordingly, we find that $1,000 is an appropriate sanction.

With respect to Lightwave's requested charge on misuse of size, which made reference to size having been "utilized in the past" and to Corning's past violations of the antitrust laws, Corning's motion for sanctions is denied. Although Lightwave's proposed instruction was rejected in light of the Court's prior rulings, Lightwave was entitled to preserve for appeal the issue of the appropriateness of such an instruction. Moreover, because the issue had been addressed several times, neither Corning nor the Court were burdened by Lightwave's request to its charge on misuse of size.

V. CONCLUSION

Lightwave's motion for a partial directed verdict is denied. Lightwave's motion for judgment n.o.v. or in the alternative for a new trial is denied. Corning's motion for attorneys' fees is denied. Corning's motion for increased damages is granted; Corning is awarded double damages in the amount of $807,830 plus interest to date. Corning is also awarded $1,000 as a sanction for Lightwave's repeated efforts to introduce evidence of Corning's past antitrust violations.

Corning is to submit an amended judgment on notice within 10 days of the date of this order.

SO ORDERED.

FN1. The Section 1 claims were dismissed in an order dated December 29, 1989.

FN2. "Ex. ____" refers to a trial exhibit.

FN3. The question of whether Corning misused its patent, thereby making the patent unenforceable and entitling Lightwave to a directed verdict on the patent issues, is the subject of a separate motion addressed in Part I, supra.

FN4. In an order dated February 28, 1990, the Court sanctioned Lightwave for its second attempt to introduce evidence on Corning's prior antitrust violations. The Court has not yet fixed a dollar amount for the sanction. Corning also moves for sanctions in connection with Lightwave's "attempt to reargue the admissibility of Hartford-Empire in the guise of an impermissibly omitted jury instruction."

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C. JNOV Mem. at 81, n.*; see also L. JNOV Mem. at 91-92 (Lightwave's seventh ground for judgment n.o.v. or a new trial on the antitrust issues is the Court's refusal to instruct jury on past misuse of size). We address these sanctions issues in Part IV, infra.

FN5. "Tr. _____" indicates a reference to the trial transcript.

FN6. As discussed earlier, see supra footnote 4, Corning moves for sanctions in connection with Lightwave's "attempt to reargue the admissibility of Hartford-Empire in the guise of an impermissibly omitted jury instruction." Corning JNOV Mem. at 81, n.*. This motion is addressed, along with the other outstanding sanctions issue, in Part IV, infra.

FN7. Corporate officers may be held "personally liable for 'participating in, inducing, and approving acts of patent infringement' by a corporation." Fromson v. Citiplate, Inc., 886 F.2d 1300, 1303-04 (Fed.Cir.1989) (citing Orthokinetics, Inc. v. Safety Travel Chairs, Inc., 806 F.2d 1565, 1578-79 (Fed.Cir.1986)). The parties have not addressed, nor do we consider, however, whether Dr. Dabby may be added as a party after trial.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' DESIGNATIONS OF DEPOSITIONS

Pursuant to the Court's February 18, 1999 Scheduling Order, Defendants respectfully submit the following objections to Plaintiffs' designated deposition testimony.

January 28, 2000

Respectfully submitted,

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WECKMAN, R.
8/9/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
8:10	8: 15	Colloquy
12:14	12: 25	Lacks personal knowledge - Speculation;
13:1	13: 13	Hearsay
13:14	15: 7	Lacks personal knowledge - Speculation;
15:8	15: 18	Colloquy
15:19	16: 14	Lacks personal knowledge - Speculation;
16:15	17: 17	Hearsay
21:15	21: 24	Lacks personal knowledge - Speculation;
22:3	22: 6	Lacks personal knowledge - Speculation;
22:10	22: 13	Lacks personal knowledge - Speculation;
22:14	23: 9	Colloquy
23:10	23: 16	Lacks personal knowledge - Speculation;
26:20	27: 1	Lacks personal knowledge - Speculation; Hearsay
27:2	27: 3	Colloquy
27:4	27: 4	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
27:5	27: 25	Colloquy
28:1	28: 5	Hearsay; Lacks personal knowledge - Speculation;
28:6	28: 9	Lacks personal knowledge - Speculation;
28:10	28: 18	Hearsay
28:19	29: 15	Hearsay; Lacks personal knowledge - Speculation;
30:1	31: 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge -Speculation;
31:7	31: 17	Colloquy; Answer without Question
31:18	32: 4	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge -Speculation; Hearsay
32:5	32: 8	Colloquy
32:9	32: 14	Lacks personal knowledge - Speculation; Hearsay; Lacks foundation/Assumes fact not in evidence
32:18	32: 24	Lacks personal knowledge - Speculation;
32:25	33: 2	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
33:3	33: 4	Colloquy
33:5	33: 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
33:9	33: 11	Lacks foundation/Assumes fact not in evidence

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From *Page: Line*	Through *Page: Line*	Objections
33:12	33: 13	Colloquy
33:14	33: 14	Lacks foundation/Assumes fact not in evidence
33:16	33: 25	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
34:1	34: 4	Lacks foundation/Assumes fact not in evidence
34:5	34: 6	Colloquy
34:7	34: 7	Lacks foundation/Assumes fact not in evidence; Answer without Question
34:9	34: 18	Lacks foundation/Assumes fact not in evidence
34:19	34: 24	Lacks Foundation; Lacks personal knowledge - Speculation;
34:25	35: 2	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge -Speculation;
35:3	35: 3	Colloquy
35:4	35: 9	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
35:14	35: 15	Asked & Answered; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
35:16	35: 22	Colloquy
35:23	36: 6	Asked & Answered; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
36:7	36: 8	Colloquy
36:9	36: 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Asked & Answered
36:22	37: 9	Lacks foundation/Assumes fact not in evidence
80:23	81: 18	Asked & Answered; Hearsay; Lacks personal knowledge - Speculation;
81:19	81: 22	Colloquy
82:10	82: 13	Leading the witness
82:14	82: 15	Colloquy
82:16	82: 18	Leading the witness
82:19	82: 21	Asked & Answered; Hearsay; Lacks personal knowledge - Speculation;
82:22	82: 25	Colloquy
83:1	83: 19	Lacks personal knowledge - Speculation; Hearsay; Asked & Answered; Mischaracterizes testimony
83:20	83: 22	Colloquy
83:23	84: 4	Lacks personal knowledge - Speculation; Hearsay; Asked & Answered; Mischaracterizes testimony
84:5	84: 6	Colloquy

From *Page: Line*	Through *Page: Line*	Objections
84:7	84: 7	Lacks personal knowledge - Speculation; Hearsay; Asked & Answered; Mischaracterizes testimony
84:8	84: 9	Colloquy
84:14	84: 17	Colloquy
85:18	85: 24	Colloquy

UNTIEDT, D.
7/9/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
7:20	8 : 6	Irrelevant
8:11	8 : 19	Irrelevant
23:11	23 : 15	Lacks foundation/Assumes fact not in evidence
25:15	25 : 17	Asked & Answered
25:25	26 : 2	Asked & Answered
30:2	30 : 4	Unintelligible
30:13	30 : 14	Unintelligible
31:11	31 : 12	Colloquy
31:11	31 : 16	Asked & Answered
32:19	32 : 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
33:1	33 : 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
33:14	33 : 16	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
33:21	33 : 24	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
34:21	34 : 25	Asked & Answered; Misleading
35:1	35 : 13	Asked & Answered; Argumentative; Harassing
39:8	39 : 9	Unintelligible
39:14	39 : 17	Harassing; Argumentative
47:19	47 : 22	Lacks foundation/Assumes fact not in evidence; Asked & Answered; Lacks personal knowledge - Speculation;
47:25	48 : 5	Irrelevant; Lacks foundation/Assumes fact not in evidence; Asked & Answered
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50:23	51 : 1	Mischaracterizes testimony; Misleading; Irrelevant
51:19	52 : 3	Lacks foundation/Assumes fact not in evidence
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56:20	56 : 25	Lacks foundation/Assumes fact not in evidence; Misleading
57:3	57 : 14	Lacks foundation/Assumes fact not in evidence; Misleading
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65:3	65 : 17	Hypothetical; Misleading; Prejudicial more than Probative
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68:3	68 : 6	Colloquy; Irrelevant
69:2	69 : 3	Question without Answer
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70:6	70 : 11	Irrelevant; Lacks foundation/Assumes fact not in evidence
70:14	70 : 18	Irrelevant; Lacks foundation/Assumes fact not in evidence
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77:20	78 : 10	Irrelevant
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101:8	102 : 3	Misleading; Irrelevant
103:16	103 : 23	Attorney testifying
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106:3	106 : 9	Asked & Answered; Lacks personal knowledge - Speculation;
106:10	106 : 21	Lacks personal knowledge - Speculation;
109:4	109 : 12	Irrelevant
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110:9	110 : 16	Prejudicial more than Probative; Harassing; Argumentative
110:17	110 : 19	Asked & Answered
110:20	111 : 3	Prejudicial more than Probative; Harassing; Argumentative
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117:7	117 : 16	Asked & Answered; Harassing; Argumentative; Prejudicial more than Probative
117:19	117 : 25	Harassing; Argumentative; Prejudicial more than Probative
118:1	118 : 9	Hypothetical; Harassing; Argumentative; Prejudicial more than Probative
119:12	120 : 8	Lacks personal knowledge - Speculation;
121:1	121 : 2	Colloquy
121:3	121 : 14	Lacks personal knowledge - Speculation; Misleading
124:6	124 : 14	Prejudicial more than Probative; Argumentative; Harassing; Irrelevant
124:17	125 : 12	Prejudicial more than Probative; Argumentative; Harassing; Irrelevant
126:10	126 : 12	Argumentative; Harassing; Prejudicial more than Probative
126:13	126 : 17	Asked & Answered; Argumentative; Prejudicial more than Probative; Harassing
126:18	126 : 20	Argumentative; Prejudicial more than Probative; Harassing; Lacks personal knowledge - Speculation;
126:23	127 : 2	Argumentative; Prejudicial more than Probative; Harassing; Lacks personal knowledge - Speculation;
127:4	127 : 8	Irrelevant; Colloquy
127:9	127 : 18	Attorney testifying; Prejudicial more than Probative; Harassing; Argumentative
128:2	128 : 5	Misleading; Prejudicial more than Probative
128:6	128 : 7	Irrelevant; Misleading
128:14	128 : 25	Irrelevant; Misleading; Prejudicial more than Probative; Argumentative; Harassing
129:23	129 : 25	Argumentative; Harassing; Prejudicial more than Probative; Irrelevant
130:3	130 : 14	Asked & Answered; Harassing; Irrelevant; Argumentative
130:17	130 : 23	Answer without Question; Attorney testifying; Prejudicial more than Probative; Harassing; Argumentative
131:7	131 : 13	Lacks personal knowledge - Speculation;
135:19	136 : 1	Lacks personal knowledge - Speculation;
136:11	138 : 19	Lacks personal knowledge - Speculation; Hearsay
138:20	140 : 5	Irrelevant
140:8	141 : 8	Irrelevant; Misleading; Lacks personal knowledge - Speculation; Argumentative; Attorney testifying

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145:13	145 : 17	Irrelevant; Misleading; Lacks personal knowledge - Speculation;
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148:12	148 : 22	Lacks foundation/Assumes fact not in evidence; Prejudicial more than Probative; Mischaracterizes testimony; Misleading
148:23	149 : 20	Hearsay
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157:2	157 : 15	Lacks personal knowledge - Speculation; Lacks Foundation; Misleading
158:3	158 : 5	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
158:8	158 : 14	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
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159:5	159 : 8	Lacks foundation/Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation;
159:22	160 : 15	Hearsay
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166:23	167 : 6	Hearsay
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168:17	169 : 11	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Hearsay; Double hearsay
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171:23	172 : 13	Argumentative; Harassing; Prejudicial more than Probative; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
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173:11	173 : 17	Argumentative; Harassing; Prejudicial more than Probative; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Attorney testifying
173:19	174 : 1	Argumentative; Harassing; Prejudicial more than Probative; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Attorney testifying
174:4	174 : 14	Hearsay; Lacks foundation/Assumes fact not in evidence; Prejudicial more than Probative; Double hearsay
174:18	174 : 18	Hearsay; Lacks foundation/Assumes fact not in evidence; Prejudicial more than Probative; Double hearsay
175:13	175 : 17	Hearsay
175:23	176 : 3	Hearsay
176:12	176 : 15	Vague &Ambiguous; Hearsay; Misleading; Mischaracterizes document
176:18	176 : 25	Vague &Ambiguous; Hearsay; Misleading; Mischaracterizes document
177:1	177 : 12	Asked & Answered; Harassing; Argumentative
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177:23	178 : 3	Lacks personal knowledge - Speculation; Mischaracterizes documents; Hearsay
178:6	178 : 13	Lacks personal knowledge - Speculation; Mischaracterizes document; Hearsay
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184:1	184 : 4	Lacks personal knowledge - Speculation; Irrelevant
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184:9	184 : 13	Lacks personal knowledge - Speculation; Irrelevant
185:17	185 : 19	Lacks foundation/Assumes fact not in evidence
186:1	186 : 8	Lacks foundation/Assumes fact not in evidence
186:12	186 : 12	Vague &Ambiguous
186:15	186 : 15	Vague &Ambiguous
186:19	187 : 1	Lacks foundation/Assumes fact not in evidence
193:3	193 : 6	Lacks foundation/Assumes fact not in evidence; Misleading
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193:15	193 : 24	Lacks foundation/Assumes fact not in evidence; Misleading
194:3	194 : 12	Lacks foundation/Assumes fact not in evidence; Misleading
194:15	194 : 15	Lacks foundation/Assumes fact not in evidence; Misleading
195:22	195 : 24	Irrelevant
195:25	196 : 1	Question without Answer
196:9	196 : 11	Irrelevant
196:16	196 : 18	Irrelevant
198:16	199 : 1	Lacks personal knowledge
199:13	199 : 15	Lacks foundation/Assumes fact not in evidence
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200:4	200 : 15	Argumentative; Lacks foundation/Assumes fact not in evidence; Harassing; Misleading
200:18	200 : 21	Argumentative; Lacks foundation/Assumes fact not in evidence; Harassing; Misleading
205:16	205 : 19	Lacks foundation/Assumes fact not in evidence
206:9	206 : 18	Lacks foundation/Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation;
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68:11	68 : 11	Colloquy
68:12	68 : 15	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony; Leading the witness
70:19	71 : 1	Mischaracterizes testimony; Asked & Answered; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
71:3	71 : 3	Mischaracterizes testimony; Asked & Answered; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
71:4	71 : 8	Colloquy
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92:7	92 : 17	Colloquy
93:9	93 : 11	Compound, Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony
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93:19	93 : 22	Colloquy
107:10	107 : 14	Hypothetical; Lacks personal knowledge - Speculation; Lacks foundation
107:15	107 : 22	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge -Speculation;
111:8	111 : 8	Irrelevant
130:18	131 : 1	Lacks foundation/Assumes fact not in evidence; Mischaracterizes document; Mischaracterizes testimony
131:2	131 : 4	Colloquy
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97:18	98: 5	Irrelevant; Calls for Legal Conclusion; Misleading; Vague &Ambiguous
98:24	99: 22	Calls for Legal Conclusion; Lacks personal knowledge - Speculation; Irrelevant; Misleading; Hypothetical
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199:11	199: 17	Vague &Ambiguous; Hypothetical; Asked & Answered
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224:15	224: 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
230:11	230: 12 ending w/"was."	Attorney testimony; Colloquy
232:2	234: 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
262:1	262: 18	Lacks foundation/Assumes fact not in evidence/Assumes fact not in evidence; Misleading
262:19	263: 4	Attorney testimony; Mischaracterizes document; Document speaks for itself
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267:6	267: 7	Colloquy
267:8	267: 12	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
272:1	272: 4	Asked & Answered; Misleading
276:21	276: 25	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
277:22	277: 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Mischaracterizes testimony; Misleading
279:18	280: 8	Argumentative; Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation;
284:15	284: 20	Asked & Answered; Argumentative
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307:19	307: 23	Document speaks for itself
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310:6	310: 23	Argumentative; Lacks foundation/Assumes fact not in evidence
317:17	318: 4	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Document speaks for itself
368:22	369: 6	Lacks foundation/Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation;
372:20	373: 3	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
375:12	375: 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself; Misleading
376:20	376: 25	Question without Answer; Not responsive
380:4	380: 16	Lacks foundation/Assumes fact not in evidence; Hypothetical; Misleading

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438:10	438: 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
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96:15	96 : 17	Vague &Ambiguous; Document speaks for itself; Lacks foundation/Assumes fact not in evidence
96:20	96 : 21	Vague &Ambiguous; Document speaks for itself; Lacks foundation/Assumes fact not in evidence
96:22	97 : 5	Vague &Ambiguous; Document speaks for itself; Lacks foundation/Assumes fact not in evidence
98:4	98 : 5	Colloquy
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99:1	99 : 2	Colloquy
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99:19	99 : 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge -Speculation;
99:24	100 : 2	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony
100:6	100 : 8	Argumentative; Lacks personal knowledge - Speculation; Vague &Ambiguous
100:9	100 : 10	Colloquy
100:11	100 : 14	Argumentative; Lacks personal knowledge - Speculation; Vague &Ambiguous
100:15	100 : 17	Lacks personal knowledge - Speculation; Vague &Ambiguous
100:18	100 : 18	Colloquy
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101:10	101 : 10	Colloquy

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103:10	103 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge -Speculation; Misleading
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120:12	121 : 11	Lacks personal knowledge - Speculation; Document speaks for itself
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122:8	122 : 13	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
122:16	122 : 18	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
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123:8	123 : 15	Compound; Asked & Answered; Argumentative
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124:22	124 : 25	Document speaks for itself
125:1	126 : 9	Document speaks for itself; Lacks personal knowledge - Speculation;
126:12	126 : 18	Lacks personal knowledge - Speculation; Document speaks for itself
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130:3	130 : 6	Document speaks for itself
130:8	130 : 24	Document speaks for itself
133:11	134 : 8	Document speaks for itself
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134:17	134 : 20	Not responsive; Argumentative
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137:4	141 : 25	Colloquy
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140:11	140 : 17	Document speaks for itself; Lacks foundation/Assumes fact not in evidence
141:12	141 : 14	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
141:17	141 : 21	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
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148:24	148 : 24	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge -Speculation; Misleading; Vague &Ambiguous
148:25	148 : 25	Argumentative
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149:14	149 : 17	Misleading; Compound; Argumentative; Unintelligible, confusing ; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation;
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150:4	150 : 9	Lacks personal knowledge - Speculation;
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156:1	156 : 12	Document speaks for itself
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170:3	170 : 3	Document speaks for itself; Lacks personal knowledge - Speculation;
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178:16	178 : 20	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
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179:11	179 : 24	Document speaks for itself; Lacks personal knowledge - Speculation;
180:3	180 : 3	Document speaks for itself; Lacks personal knowledge - Speculation;
180:4	180 : 14	Document speaks for itself; Lacks personal knowledge - Speculation;
180:15	180 : 17	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
180:20	180 : 20	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
180:21	180 : 22	Asked & Answered; Argumentative
180:23	180 : 25	Asked & Answered
181:2	181 : 2	Asked & Answered
181:3	181 : 6	Asked & Answered; Lacks foundation/Assumes fact not in evidence; Misleading

From *Page: Line*	Through *Page: Line*	Objections
181:9	181 : 9	Asked & Answered; Lacks foundation/Assumes fact not in evidence; Misleading
181:10	181 : 11	Asked & Answered; Argumentative
181:12	181 : 15	Lacks personal knowledge - Speculation; Hypothetical; Lacks foundation/Assumes fact not in evidence; Misleading
181:18	181 : 18	Lacks personal knowledge - Speculation; Hypothetical; Lacks foundation/Assumes fact not in evidence; Misleading
181:19	181 : 24	Argumentative
181:25	182 : 3	Lacks personal knowledge - Speculation; Irrelevant; Misleading
182:4	182 : 20	Document speak for itself; Lacks personal knowledge - Speculation;
182:21	182 : 23	Misleading; Prejudicial more than Probative; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Argumentative
183:1	183 : 1	Misleading; Prejudicial more than Probative; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Argumentative
183:10	183 : 22	Lacks personal knowledge - Speculation;
184:16	192 : 16	Colloquy
184:19	184 : 22	Irrelevant
184:24	185 : 5	Irrelevant
186:22	187 : 2	Document speaks for itself
187:3	187 : 22	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge -Speculation; Misleading; Document speaks for itself
188:3	188 : 7	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge -Speculation; Misleading; Document speaks for itself
188:12	188 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge -Speculation; Misleading; Document speaks for itself
189:9	189 : 15	Vague &Ambiguous; Not responsive
189:16	189 : 18	Vague &Ambiguous; Asked & Answered
189:25	190 : 2	Vague &Ambiguous; Asked & Answered
190:3	190 : 6	Unintelligible, confusing ; Vague &Ambiguous
190:10	190 : 14	Unintelligible, confusing ; Vague &Ambiguous
191:20	191 : 23	Vague &Ambiguous; Compound; Irrelevant
192:1	192 : 1	Vague &Ambiguous; Compound; Irrelevant
192:2	192 : 6	Vague &Ambiguous; Irrelevant
192:9	192 : 10	Asked & Answered; Irrelevant
192 11	192 14	Argumentative; Irrelevant
192:15	192 : 16	Irrelevant

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11 : 9	12 : 5	Irrelevant; Prejudicial more than Probative
16 : 8	17 : 14	Irrelevant
16 : 20	16 : 21	Colloquy
17 : 18	17 : 22	Question without Answer
18 : 11	18 : 14	Colloquy
18 : 22	19 : 21	Irrelevant
21 : 18	22 : 15	Lacks foundation/Assumes fact not in evidence; Hypothetical
22 : 2	22 : 8	Colloquy
24 : 9	24 : 13	Colloquy
24 : 17	24 : 20	Argumentative
24 : 21	25 : 1	Misleading
25 : 2	26 : 25	Asked & Answered; privileged
25 : 8	25 : 11	Colloquy
29 : 17	30 : 2	Irrelevant; privileged; Asked & Answered; Misleading
30 : 3	30 : 7	Misleading; Lacks foundation/Assumes fact not in evidence
30 : 8	30 : 13	Colloquy
30 : 19	31 : 14	Privileged
31 : 15	31 : 25	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
31 : 20	31 : 24	Colloquy
32 : 5	32 : 19	Lacks foundation/Assumes fact not in evidence; Misleading
32 : 11	32 : 15	Colloquy
32 : 20	33 : 1	Argumentative; Lacks foundation/Assumes fact not in evidence; Misleading
35 : 1	35 : 19	Lacks foundation/Assumes fact not in evidence; Misleading
35 : 5	35 : 6	Colloquy
35 : 14	35 : 18	Colloquy
37 : 8	37 : 11	Colloquy
37 : 15	37 : 19	Colloquy
38 : 2	38 : 5	Colloquy
38 : 12	38 : 14	Colloquy
39 : 9	39 : 17	Lacks personal knowledge - Speculation;
40 : 9	40 : 10	Colloquy
40 : 16	40 : 21	Asked & Answered; Vague &Ambiguous
40 : 19	40 : 20	Colloquy

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40 : 22	41 : 10	Lacks foundation/Assumes fact not in evidence; Hypothetical; lacks personal knowledge - Speculation
41 : 1	41 : 5	Colloquy
42 : 5	42 : 17	Lacks foundation/Assumes fact not in evidence; Hypothetical
42 : 6	42 : 10	Incomplete Question
42 : 18	43 : 3	Asked & Answered
42 : 20	42 : 23	Colloquy
43 : 4	43 : 11	Lacks foundation/Assumes fact not in evidence
43 : 12	43 : 17	Colloquy
43 : 18	44 : 13	Lacks foundation/Assumes fact not in evidence
45 : 5	45 : 7	Incomplete Question
45 : 12	45 : 13	Colloquy
49 : 14	49 : 19	Colloquy
49 : 23	50 : 1	Colloquy
50 : 4	50 : 7	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
50 : 8	50 : 9	Colloquy
50 : 10	50 : 13	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
50 : 14	50 : 17	Colloquy
50 : 19	51 : 7	Lacks foundation/Assumes fact not in evidence
53 : 15	53 : 19	Vague &Ambiguous; Hypothetical; Lacks foundation/Assumes fact not in evidence
54 : 12	54 : 22	Lacks foundation/Assumes fact not in evidence; lacks personal knowledge - Speculation
54 : 22	54 : 22	Incomplete Question
57 : 23	57 : 23	Answer without Question
57 : 24	58 : 7	Lacks personal knowledge - Speculation; Misleading
58 : 21	59 : 4	Lacks personal knowledge - Speculation Lacks foundation/Assumes fact not in evidence
59 : 5	59 : 8	Colloquy
59 : 9	59 : 18	Lacks personal knowledge - Speculation Lacks foundation/Assumes fact not in evidence
59 : 19	59 : 20	Colloquy
62 : 23	62 : 24	Colloquy
65 : 25	66 : 10	Unintelligible, confusing ; Vague &Ambiguous
66 : 11	66 : 20	Vague &Ambiguous; Limiting
66 : 21	66 : 25	Colloquy
67 : 18	67 : 21	Colloquy
68 : 24	70 : 4	Lacks foundation/Assumes fact not in evidence; Hypothetical

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69 : 24	70 : 3	Colloquy
77 : 8	78 : 11	Lacks personal knowledge - Speculation; Misleading
77 : 16	77 : 18	Colloquy
77 : 24	77 : 25	Colloquy
78 : 7	78 : 10	Colloquy
86 : 1	86 : 20	Lacks foundation/Assumes fact not in evidence; Hypothetical; Lacks personal knowledge - Speculation; Prejudicial more than Probative; Misleading
86 : 25	88 : 25	Lacks foundation/Assumes fact not in evidence; Hypothetical; Lacks personal knowledge - Speculation; Prejudicial more than Probative; Misleading
87 : 13	87 : 14	Colloquy
88 : 24	88 : 24	Colloquy
91 : 18	92 : 8	Lacks personal knowledge - Speculation
91 : 23	92 : 2	Colloquy
92 : 9	92 : 11	Lacks personal knowledge - Speculation; Irrelevant
96 : 20	96 : 24	Colloquy
97 : 1	97 : 3	Lacks personal knowledge - Speculation; Irrelevant; Question without Answer
97 : 4	97 : 5	Colloquy
97 : 6	97 : 6	Not responsive
103 : 16	103 : 25	Misleading; Limiting
119 : 13	120 : 8	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
120 : 9	120 : 14	Colloquy
120 : 15	121 : 10	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
120 : 20	120 : 21	Colloquy
121 : 11	121 : 13	Colloquy
121 : 14	121 : 16	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
121 : 17	121 : 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hypothetical; argumentative
121 : 21	121 : 24	Colloquy
121 : 25	122 : 1	Lacks personal knowledge - Speculation
124 : 20	124 : 23	Vague &Ambiguous; Unintelligible, confusing ; Misleading; Lacks foundation/Assumes fact not in evidence
124 : 24	125 : 1	Colloquy
125 : 4	125 : 5	Irrelevant
131 : 20	131 : 22	Colloquy

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132 : 15	132 : 16	Colloquy
133 : 14	133 : 15	Question without Answer; Not responsive
135 : 2	135 : 8	Lacks personal knowledge - Speculation Lacks foundation/Assumes fact not in evidence
135 : 6	135 : 7	Colloquy
136 : 14	136 : 24	Lacks personal knowledge - Speculation Lacks foundation/Assumes fact not in evidence
137 : 2	137 : 4	Colloquy
141 : 7	141 : 11	Irrelevant; Prejudicial more than Probative
148 : 10	149 : 17	Lacks personal knowledge - Speculation
152 : 7	152 : 19	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
152 : 20	152 : 21	Colloquy
152 : 22	153 : 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
159 : 23	160 : 12	Lacks foundation/Assumes fact not in evidence; Misleading
160 : 13	160 : 22	Lacks personal knowledge - Speculation
161 : 20	161 : 25	Hypothetical; Lacks foundation/Assumes fact not in evidence; Irrelevant
162 : 1	162 : 2	Colloquy
162 : 3	162 : 17	Lacks personal knowledge - Speculation Hypothetical
164 : 7	164 : 8	Colloquy
178 : 11	178 : 11	Colloquy
183 : 21	184 : 5	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
183 : 23	183 : 23	Colloquy
184 : 6	184 : 7	Colloquy
184 : 8	187 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
184 : 12	184 : 13	Colloquy
184 : 22	184 : 23	Colloquy
185 : 3	185 : 4	Colloquy
185 : 18	185 : 18	Colloquy
185 : 23	185 : 23	Colloquy
186 : 3	186 : 5	Colloquy
186 : 23	186 : 24	Colloquy
199 : 1	199 : 7	Colloquy
203 : 18	204 : 12	Hearsay
204 : 1	204 : 1	Colloquy

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204 : 13	204 : 24	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
204 : 25	205 : 2	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hypothetical
205 : 3	205 : 5	Colloquy
205 : 7	205 : 9	Asked & Answered
205 : 10	205 : 11	Colloquy
205 : 15	205 : 15	Colloquy
210 : 15	211 : 17	Lacks foundation/Assumes fact not in evidence; Misleading; Prejudicial more than Probative
211 : 10	211 : 10	Colloquy
224 : 1	224 : 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

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17 : 25	18 : 1	Asked & Answered; Argumentative
18 : 6	18 : 7	Colloquy
18 : 11	18 : 12	Colloquy
21 : 2	21 : 4	Calls for legal conclusion
21 : 5	22 : 1	Colloquy; Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
24 : 21	24 : 24	Question without Answer
24 : 25	25 : 1	Colloquy
25 : 2	25 : 3	Not responsive
25 : 7	25 : 8	Colloquy
27 : 12	27 : 13	Colloquy
27 : 18	27 : 19	Colloquy
27 : 20	27 : 23	Mischaracterizes testimony
27 : 24	27 : 25	Colloquy
28 : 4	28 : 8	Mischaracterizes testimony; Attorney testifying
28 : 9	28 : 21	Colloquy
30 : 24	30 : 25	Colloquy
55 : 17	55 : 20	Colloquy
81 : 5	81 : 7	Vague &Ambiguous
81 : 8	81 : 11	Colloquy
81 : 12	81 : 17	Vague &Ambiguous
81 : 18	81 : 20	Colloquy
82 : 4	82 : 6	Vague &Ambiguous
82 : 7	82 : 20	Colloquy
83 : 9	83 : 13	Asked & Answered; Argumentative
90 : 19	91 : 6	Lacks foundation/Assumes fact not in evidence; Argumentative
91 : 12	92 : 1	Irrelevant
92 : 2	92 : 6	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
92 : 7	92 : 8	Colloquy
92 : 9	92 : 16	Privileged
92 : 17	92 : 23	Colloquy
92 : 24	93 : 3	Irrelevant; Misleading; Lacks foundation/Assumes fact not in evidence
93 : 4	93 : 6	Colloquy
93 : 7	93 : 9	Lacks foundation/Assumes fact not in evidence; Misleading; Irrelevant
93 : 10	93 : 12	Colloquy
93 : 13	93 : 19	Irrelevant; Lacks foundation/Assumes fact not in evidence; Misleading

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From *Page: Line*	Through *Page: Line*	Objections
93 : 20	93 : 22	Question without Answer; Irrelevant; Lacks foundation/Assumes fact not in evidence; Misleading
93 : 23	94 : 02	Colloquy
94 : 3	94 : 15	Irrelevant; Misleading; Lacks foundation/Assumes fact not in evidence; Colloquy
94 : 16	95 : 1	Colloquy; Lacks personal knowledge - Speculation
95 : 20	97 : 9	Irrelevant
96 : 7	96 : 8	Colloquy
96 : 16	96 : 21	Colloquy
97 : 10	97 : 24	Irrelevant; Lacks personal knowledge - Speculation
97 : 14	97 : 15	Colloquy
97 : 23	97 : 23	Colloquy
99 : 12	99 : 13	Colloquy
99 : 16	99 : 16	Colloquy
99 : 21	100 : 12	Lacks foundation/Assumes fact not in evidence; Irrelevant
100 : 13	100 : 15	Colloquy
100 : 22	100 : 22	Unintelligible, confusing
100 : 23	100 : 24	Colloquy
101 : 8	101 : 9	Colloquy
101 : 19	101 : 19	Asked & Answered
101 : 20	101 : 21	Colloquy
101 : 22	101 : 23	Asked & Answered
102 : 1	102 : 2	Colloquy
102 : 4	102 : 8	Lacks foundation/Assumes fact not in evidence; Irrelevant
102 : 9	102 : 11	Colloquy
102 : 13	102 : 15	Lacks foundation/Assumes fact not in evidence; Irrelevant
102 : 16	102 : 20	Colloquy
102 : 21	102 : 24	Lacks foundation/Assumes fact not in evidence; Irrelevant
102 : 25	102 : 25	Lacks foundation/Assumes fact not in evidence
103 : 1	103 : 2	Colloquy
103 : 9	103 : 11	Lacks foundation/Assumes fact not in evidence; Irrelevant
103 : 12	103 : 14	Colloquy
103 : 15	103 : 19	Lacks foundation/Assumes fact not in evidence; Irrelevant
103 : 20	103 : 21	Colloquy
104 : 1	104 : 4	Colloquy
104 : 8	104 : 9	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading
104 : 10	104 : 10	Colloquy
104 : 11	104 : 16	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading

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104 : 17	104 : 18	Colloquy
104 : 20	104 : 22	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading
104 : 23	104 : 24	Colloquy
105 : 1	105 : 3	Lacks foundation/Assumes fact not in evidence; Misleading
105 : 4	105 : 5	Colloquy
105 : 6	105 : 10	Lacks foundation/Assumes fact not in evidence; Misleading
105 : 11	105 : 11	Colloquy
105 : 12	105 : 12	Lacks foundation/Assumes fact not in evidence; Misleading
105 : 18	105 : 18	Vague &Ambiguous
105 : 19	105 : 19	Colloquy
105 : 20	105 : 20	Vague &Ambiguous
106 : 7	106 : 9	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Misleading
106 : 10	106 : 11	Colloquy
106 : 12	106 : 15	Lacks foundation/Assumes fact not in evidence; Misleading
106 : 16	106 : 17	Colloquy
106 : 18	106 : 21	Lacks foundation/Assumes fact not in evidence; Misleading
106 : 22	106 : 22	Colloquy
106 : 23	107 : 2	Irrelevant; Misleading; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
107 : 3	107 : 6	Colloquy
107 : 8	107 : 9	Unintelligible, confusing
107 : 10	107 : 11	Colloquy
107 : 12	107 : 15	Not responsive
107 : 16	107 : 18	Lacks foundation/Assumes fact not in evidence; Misleading
107 : 19	107 : 20	Colloquy
107 : 21	107 : 22	Lacks foundation/Assumes fact not in evidence; Misleading
107 : 23	107 : 23	Colloquy
108 : 1	108 : 17	Lacks foundation/Assumes fact not in evidence; Misleading; Argumentative
108 : 5	108 : 5	Colloquy
108 : 11	108 : 12	Colloquy
108 : 18	109 : 2	Colloquy
109 : 6	109 : 7	Colloquy
109 : 9	109 : 11	Lacks foundation/Assumes fact not in evidence; Asked & Answered; Argumentative
109 : 12	109 : 16	Colloquy
109 : 17	109 : 17	Argumentative; Asked & Answered; Lacks personal knowledge - Speculation

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109 : 18	109 : 19	Colloquy
109 : 20	109 : 22	Argumentative; Asked & Answered; Lacks personal knowledge - Speculation
109 : 23	109 : 23	Colloquy
110 : 1	110 : 3	Lacks personal knowledge - Speculation; Argumentative
110 : 4	110 : 5	Colloquy
110 : 6	110 : 8	Lacks personal knowledge - Speculation
110 : 9	110 : 10	Colloquy
110 : 11	110 : 16	Lacks foundation/Assumes fact not in evidence; Irrelevant; Lacks personal knowledge - Speculation; Compound; Unintelligible, confusing
110 : 17	110 : 20	Colloquy
110 : 21	110 : 21	Lacks personal knowledge - Speculation
118 : 7	118 : 10	Unintelligible, confusing
118 : 18	118 : 19	Colloquy
118 : 24	118 : 24	Colloquy
119 : 4	119 : 4	Colloquy
119 : 12	119 : 18	Lacks personal knowledge - Speculation; Misleading; Hypothetical
119 : 19	119 : 21	Colloquy
119 : 22	119 : 25	Lacks personal knowledge - Speculation; Misleading; Hypothetical
120 : 1	120 : 1	Colloquy
120 : 4	120 : 8	Colloquy
120 : 9	120 : 11	Hypothetical
120 : 12	120 : 13	Colloquy
120 : 14	120 : 14	Hypothetical
134 : 3	134 : 4	Colloquy
134 : 10	134 : 10	Colloquy
134 : 19	134 : 21	Colloquy
135 : 7	135 : 7	Colloquy
135 : 13	135 : 13	Colloquy
135 : 18	135 : 20	Colloquy
136 : 4	136 : 6	Lacks foundation/Assumes fact not in evidence
136 : 7	136 : 8	Colloquy
136 : 9	136 : 11	Lacks foundation/Assumes fact not in evidence
136 : 12	136 : 13	Withdrawn
136 : 14	136 : 16	Colloquy
136 : 24	136 : 25	Colloquy
137 : 5	137 : 5	Colloquy
137 : 19	137 : 22	Lacks foundation/Assumes fact not in evidence
137 : 23	137 : 25	Colloquy

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138 : 4	138 : 10	Argumentative; Asked & Answered
138 : 11	138 : 13	Misleading;
138 : 14	138 : 17	Misleading
140 : 25	141 : 7	Colloquy
174 : 3	174 : 4	Mischaracterizes testimony
174 : 5	174 : 9	Colloquy
197 : 6	197 : 7	Colloquy
198 : 1	198 : 6	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
198 : 7	198 : 10	Colloquy
198 : 11	198 : 25	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
199 : 12	200 : 8	Asked & Answered; Argumentative; Mischaracterizes document
200 : 16	200 : 23	Document speaks for itself
203 : 18	203 : 23	Lacks foundation/Assumes fact not in evidence; Argumentative; Misleading
203 : 24	204 : 1	Colloquy
204 : 7	205 : 5	Compound; Argumentative; Lacks foundation/Assumes fact not in evidence
205 : 10	205 : 16	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
205 : 17	205 : 18	Colloquy
206 : 6	207 : 7	Argumentative; Lacks foundation/Assumes fact not in evidence; Misleading
207 : 12	207 : 19	Mischaracterizes testimony; Mischaracterizes document; Argumentative
207 : 20	207 : 25	Hypothetical; Mischaracterizes document; Mischaracterizes testimony; Argumentative
208 : 1	208 : 3	Colloquy
208 : 4	208 : 13	Hypothetical; Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
208 : 14	208 : 14	Colloquy
208 : 15	209 : 2	Hypothetical; Lacks foundation/Assumes fact not in evidence; Mischaracterizes document
209 : 3	209 : 4	Colloquy
209 : 7	210 : 13	Hypothetical; Mischaracterizes testimony; Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
210 : 14	210 : 15	Colloquy
210 : 16	211 : 4	Hypothetical; Lacks foundation/Assumes fact not in evidence; Mischaracterizes document

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217 : 25	218 : 2	Colloquy
218 : 8	218 : 9	Asked & Answered; Calls for legal conclusion
218 : 10	218 : 11	Colloquy
218 : 12	218 : 12	Asked & Answered; Calls for legal conclusion
218 : 13	218 : 25	Argumentative; Misleading; Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony; Mischaracterizes document
220 : 21	221 : 4	Argumentative; Mischaracterizes testimony; Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
222 : 6	222 : 21	Asked & Answered; Argumentative
222 : 22	223 : 6	Lacks personal knowledge - Speculation
223 : 7	224 : 4	Hearsay; Lacks personal knowledge - Speculation; Mischaracterizes document; Mischaracterizes testimony
224 : 5	224 : 22	Privileged; Calls for legal conclusion
224 : 23	225 : 9	Asked & Answered; Argumentative; Misleading
225 : 10	225 : 20	Asked & Answered; Argumentative; Lacks personal knowledge - Speculation; Harassing
226 : 10	226 : 15	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
226 : 16	226 : 23	Colloquy
226 : 24	227 : 6	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
227 : 7	227 : 9	Privileged; Lacks foundation/Assumes fact not in evidence; Misleading
229 : 25	230 : 6	Calls for legal conclusion
230 : 18	230 : 18	Colloquy
230 : 20	230 : 24	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence
233 : 24	234 : 4	Colloquy
236 : 12	236 : 13	Attorney testifying
236 : 14	236 : 19	Colloquy
237 : 10	238 : 1	Misleading
238 : 8	238 : 14	Colloquy
239 : 14	239 : 14	Attorney testifying
239 : 17	239 : 20	Colloquy
239 : 24	240 : 7	Vague &Ambiguous; Compound; Lacks foundation/Assumes fact not in evidence
240 : 18	240 : 24	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony
241 : 11	241 : 12	Colloquy
243 : 10	243 : 14	Asked & Answered; Misleading

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243 : 15	243 : 20	Misleading; Argumentative
244 : 21	244 : 23	Lacks foundation/Assumes fact not in evidence
244 : 24	244 : 25	Colloquy
245 : 2	245 : 8	Lacks foundation/Assumes fact not in evidence; Mischaracterizes document; Mischaracterizes testimony
246 : 19	246 : 19	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence
246 : 20	246 : 21	Colloquy
246 : 22	246 : 22	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence
249 : 4	249 : 5	Colloquy
283 : 1	283 : 1	Colloquy
285 : 23	285 : 23	Colloquy
309 : 6	309 : 7	Colloquy
309 : 16	309 : 17	Colloquy
310 : 3	310 : 6	Colloquy
310 : 17	311 : 4	Colloquy
311 : 13	311 : 21	Colloquy; Harassing
312 : 24	313 : 5	Mischaracterizes testimony; Mischaracterizes document
313 : 11	313 : 12	Colloquy
321 : 17	321 : 24	Mischaracterizes testimony; Compound
321 : 25	322 : 4	Colloquy
323 : 6	323 : 7	Colloquy
323 : 11	324 : 15	Vague &Ambiguous; Asked & Answered
329 : 5	329 : 21	Lacks personal knowledge - Speculation
330 : 15	330 : 23	Vague &Ambiguous; Unintelligible, confusing; Lacks foundation/Assumes fact not in evidence
331 : 10	331 : 23	Vague &Ambiguous; Question w/out Answer
339 : 1	339 : 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
339 : 8	339 : 8	Colloquy
339 : 9	339 : 23	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
339 : 24	339 : 24	Colloquy
339 : 25	340 : 4	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
340 : 5	340 : 20	Colloquy
340 : 21	340 : 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
340::24	340 : 24	Colloquy

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340 : 25	342 : 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
342 : 8	342 : 25	Argumentative; Irrelevant; Lacks personal knowledge - Speculation
346 : 9	346 : 9	Argumentative
346 : 12	346 : 15	Argumentative
348 : 3	348 : 5	Question w/out Answer; Vague &Ambiguous
348 : 6	348 : 8	Colloquy
348 : 9	348 : 11	Lacks foundation/Assumes fact not in evidence; Mischaracterizes document
348 : 12	348 : 12	Colloquy
349 : 2	349 : 11	Argumentative; Question w/out Answer
350 : 16	350 : 19	Asked & Answered
350 : 20	350 : 23	Colloquy
350 : 24	351 : 2	Mischaracterizes testimony
351 : 4	351 : 13	Asked & Answered; Irrelevant
351 : 14	351 : 15	Colloquy
352 : 12	352 : 13	Colloquy
352 : 15	352 : 16	Colloquy
353 : 10	353 : 17	Mischaracterizes testimony; Misleading
353 : 18	353 : 19	Colloquy
353 : 20	353 : 21	Not responsive
354 : 2	354 : 2	Colloquy
354 : 8	354 : 14	Colloquy
354 : 20	354 : 21	Colloquy
356 : 24	357 : 6	Argumentative; Mischaracterizes testimony; Asked & Answered

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Objections

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32 : 19	33: 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Prejudicial more than Probative; Misleading
35 : 5	35: 13	Prejudicial more than Probative; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
48 : 4	48: 12	Irrelevant; Unprofessional
49 : 9	49: 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hearsay; Prejudicial more than Probative; Misleading

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DILL, D.
8/24/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
29 : 6	29 : 20	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
32 : 9	32 : 16	Hearsay
33 : 10	33 : 13	Colloquy
62 : 3	62 : 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
72 : 8	72 : 24	Privileged; Hearsay

OLDANI, D.
8/12/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
34 : 21	35 : 4	Colloquy
37 : 17	37 : 20	Mischaracterizes testimony
40 : 11	40 : 14	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
41 : 12	41 : 19	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
49 : 3	49 : 5	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
51 : 3	51 : 10	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Prejudicial more than Probative
70 : 15	71 : 3	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence

RUSHING, M.
6/14/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
5 : 4	5 : 5	Incomplete Question
9 : 9	9 : 9	Colloquy
9 : 15	9 : 20	Colloquy; Question without Answer; Irrelevant
10 : 1	10 : 25	Hearsay
11 : 7	11 : 11	Lacks personal knowledge - Speculation; Misleading
12 : 5	12 : 9	Hearsay
12 : 15	12 : 17	Hearsay
13 : 7	13 : 9	Colloquy
15 : 19	16 : 9	Lacks personal knowledge - Speculation
17 : 16	17 : 20	Colloquy
19 : 4	19 : 7 Ending w/ "Question"	Colloquy
21 : 25	22 : 2	Leading the witness
22 : 3	22 : 6	Colloquy
23 : 4	23 : 12	Colloquy; Asked & Answered
24 : 3	24 : 4	Colloquy
25 : 1	25 : 16	Leading the witness
25 : 17	25 : 20	Colloquy
25 : 24	26 : 1	Colloquy
26 : 12	26 : 13	Vague &Ambiguous
26 : 14	26 : 18	Colloquy
26 : 19	26 : 19	Vague &Ambiguous
26 : 20	27 : 15	Hearsay
29 : 22	29 : 24	Lacks foundation/Assumes fact not in evidence
29 : 25	30 : 4	Colloquy
30 : 5	30 : 14	Lacks foundation/Assumes fact not in evidence
30 : 15	30 : 16	Leading the witness
30 : 17	30 : 22	Colloquy
30 : 23	31 : 2	Lacks foundation/Assumes fact not in evidence; Leading the witness
35 : 11	35 : 12	Asked & Answered
35 : 13	35 : 16	Colloquy
35 : 17	35 : 17	Asked & Answered
35 : 18	35 : 19	Asked & Answered

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From *Page: Line*	**Through** *Page: Line*	**Objections**
35 : 20	35 : 22	Colloquy
35 : 23	35 : 25	Asked & Answered
36 : 24	36 : 25	Asked & Answered
37 : 1	37 : 3	Colloquy
37 : 4	37 : 7	Asked & Answered
37 : 8	37 : 13	Hearsay
43 : 12	44 : 16	Hearsay
44 : 17	45 : 1	Misleading; Prejudicial more than Probative

FASANELLI, R.
7/29/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
7:11	8: 21	Irrelevant
9:12	9: 15	Irrelevant
33:7	33: 7	Question without Answer
34:6	34: 9	Irrelevant
40:7	41: 9	Irrelevant
81:11	81: 18	Calls for legal conclusion; Misleading
85:4	85: 7	Question without Answer
85:11	85: 11	Colloquy
85:14	85: 18	Irrelevant; Colloquy
85:23	85: 25	Colloquy
87:11	87: 14	Question without Answer; Not responsive
89:4	89: 6	Question without Answer
89:9	89: 9	Not responsive
89:10	89: 14	Question without Answer
89:16	89: 20	Not responsive
89:21	89: 24	Question without Answer
90:1	90: 10	Not responsive
96:5	96: 9	Lacks personal knowledge - Speculation
111:15	111: 19	Irrelevant
114:2	114: 10	Lacks personal knowledge - Speculation
122:15	122: 17	Unintelligible
124:21	125: 1	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
125:7	125: 21	Lacks personal knowledge - Speculation
126:1	126: 12	Lacks personal knowledge - Speculation
129:22	130: 5	Lacks personal knowledge - Speculation
132:23	133: 11	Lacks personal knowledge - Speculation
134:12	135: 10	Lacks personal knowledge - Speculation
135:23	136: 19	Irrelevant
138:16	138: 24	Lacks personal knowledge - Speculation; Misleading
142:1	142: 2	Irrelevant
142:9	143: 25	Irrelevant
144:5	144: 10	Attorney testifying; Irrelevant
145:7	145: 13	Irrelevant
147:2	147: 25	Lacks personal knowledge - Speculation

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From *Page: Line*	Through *Page: Line*	Objections
148:1	148: 2	Unintelligible
148:10	148: 21	Lacks personal knowledge - Speculation
149:17	150: 20	Lacks personal knowledge - Speculation; Irrelevant
156:19	156: 24	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
157:13	157: 17	Irrelevant; Lacks personal knowledge - Speculation
161:19	161: 22	Not responsive; Colloquy
162:15	162: 16	Argumentative
162:17	162: 25	Lacks foundation/Assumes fact not in evidence; Hypothetical
163:3	163: 3	Hypothetical; Lacks foundation/Assumes fact not in evidence
170:14	170: 17	Colloquy
171:20	172: 1	Lacks personal knowledge - Speculation
177:4	177: 7	Colloquy
177:9	177: 20	Asked & Answered
187:18	188: 7	Question without Answer
193:2	193: 19	Lacks personal knowledge - Speculation; Misleading; Mischaracterizes documents
194:5	194: 12	Attorney testifying; Misleading
208:14	208: 16	Question without Answer
210:14	210: 23	Asked & Answered; Lacks personal knowledge - Speculation
211:5	211: 23	Lacks personal knowledge - Speculation; Asked & Answered
218:15	218: 21	Unintelligible; Colloquy
219:1	219: 5	Not relevant; Colloquy
220:15	220: 20	Colloquy
220:22	221: 6	Irrelevant; Harassing
221:9	221: 22	Irrelevant; Harassing
221:25	223: 16	Irrelevant; Harassing
230:7	230: 10	Question without Answer
230:11	230: 19	Colloquy
237:21	238: 6	Calls for legal conclusion
242:22	243: 12	Lacks personal knowledge - Speculation
243:16	244: 4	Lacks personal knowledge - Speculation; Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
250:3	250: 16	Lacks foundation/Assumes fact not in evidence; Mischaracterizes document
250:17	251: 1	Lacks personal knowledge - Speculation
251:11	251: 24	Question without Answer; Not responsive
252:13	252: 23	Question without Answer; Not responsive
252:25	253: 1	Not responsive

From *Page: Line*	Through *Page: Line*	Objections
253:2	253: 6	Vague &Ambiguous; Question without Answer
253:9	253: 17	Vague &Ambiguous; Not responsive
257:9	257: 19	Question without Answer; Not responsive
257:24	258: 1	Colloquy
260:15	260: 18	Colloquy
261:6	261: 16	Attorney testifying; Irrelevant
270:10	270: 15	Question without Answer
290:16	291: 5	Lacks personal knowledge - Speculation
292:11	292: 14	Unintelligible; Colloquy
308:7	308: 11	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
308:12	308: 13	Colloquy
308:14	308: 14	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
311:17	314: 13	Lacks personal knowledge - Speculation
320:2	320: 7	Lacks personal knowledge - Speculation; Misleading
320:8	320: 11	Colloquy; Lacks personal knowledge - Speculation; Misleading
320:12	320: 12	Lacks personal knowledge - Speculation; Misleading
332:11	333: 4	Document speaks for itself; Lacks personal knowledge - Speculation
336:11	337: 9	Limiting; Hypothetical; Lacks personal knowledge - Speculation
339:1	339: 9	Asked & Answered; Argumentative
341:2	341: 19	Hearsay
341:20	341: 22	Question without Answer; Hearsay
343:12	343: 17	Colloquy
344:8	344: 16	Document speaks for itself; Lacks personal knowledge - Speculation

ULIZIO, S.
9/2/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
9:4	9: 8	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
11:9	11: 12	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
13:10	13: 18	Lacks foundation/Assumes fact not in evidence
17:24	18: 10	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
19:21	19: 25	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
20:1	20: 9	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
21:2	21: 5	Vague &Ambiguous; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
21:13	21: 25	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
22:1	22: 3	Hearsay
22:14	23: 11	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
23:12	23: 14	Mischaracterizes testimony; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
26:5	26: 6	Leading the witness
26:17	27: 2	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
27:15	27: 25	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
29:1	29: 2	Hearsay; Lacks foundation/Assumes fact not in evidence; Misleading
29:22	30: 1	Misleading; Hearsay; Lacks foundation/Assumes fact not in evidence
30:14	31: 16	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
32:21	33: 21	Argumentative; Leading the witness
34:3	34: 7	Lacks foundation/Assumes fact not in evidence
35:8	36: 14	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
36:15	36: 17	Leading the witness; Lacks foundation/Assumes fact not in evidence
40:3	40: 5	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

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From *Page: Line*	**Through** *Page: Line*	**Objections**
40:6	40: 6	Colloquy
40:7	40: 9	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
42:19	43: 6	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Incomplete Question & Answer; Leading the witness
43:18	43: 23	Mischaracterizes testimony; Asked & Answered; Lacks foundation/Assumes fact not in evidence; Leading the witness
46:11	47: 2	Hearsay
47:16	48: 4	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
48:10	48: 19	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
49:8	49: 11	Hearsay
50:1	50: 17	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Irrelevant
50:18	50: 18	Colloquy
50:19	51: 7	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
54:10	54: 18	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
54:25	55: 4	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
55:18	56: 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Prejudicial more than Probative

LATTA, T.
6/3/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
17 : 8	17: 10	Leading the witness; Vague &Ambiguous
17 : 14	17: 24	Leading the witness; Vague &Ambiguous
20 : 5	20: 23	Leading the witness; Vague &Ambiguous
22 : 23	23: 3	Leading the witness
23 : 7	23: 11	Leading the witness
23 : 20	23: 23	Lack of foundation/Assumes fact not in evidence
27 : 5	27: 17	Not authenticated; Lacks personal knowledge - Speculation
28 : 20	29: 10	Not authenticated; Hearsay
30 : 18	30: 21	Hearsay; Not authenticated
31 : 2	31: 6	Leading the witness; Lacks foundation/Assumes fact not in evidence
31 : 11	32: 1	Leading the witness; Lacks foundation/Assumes fact not in evidence; Hearsay; Not authenticated
32 : 17	32: 22	Leading the witness
33 : 8	33: 13	Leading the witness; Lacks foundation/Assumes fact not in evidence
33 : 16	33: 21	Not authenticated; Hearsay; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
33 : 25	34: 2	Hearsay; Not authenticated; Lacks personal knowledge - Speculation
34 : 3	34: 7	Leading the witness
34 : 18	34: 25	Leading the witness; Limiting
35 : 14	36: 6	Leading the witness; Vague &Ambiguous; Asked & Answered
37 : 12	37: 19	Leading the witness; Asked & Answered
38 : 25	39: 1	Mischaracterizes testimony; Leading the witness
39 : 5	39: 12	Mischaracterizes testimony; Leading the witness
39 : 14	39: 16	Leading the witness
39 : 24	39: 24	Leading the witness
41 : 5	41: 17	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
42 : 9	42: 12	Leading the witness
43 : 8	43: 11	Lacks foundation/Assumes fact not in evidence; Leading the witness
43 : 12	43: 15	Leading the witness
43 : 18	43: 20	Lacks personal knowledge - Speculation
46 : 24	46: 25	Lacks personal knowledge - Speculation
47 : 6	47: 9	Lacks personal knowledge - Speculation
47 : 10	48: 4	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

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From *Page: Line*	**Through** *Page: Line*	**Objections**
51 : 7	51: 10	Leading the witness; Vague &Ambiguous
51 : 13	52: 21	Leading the witness; Vague &Ambiguous; Lacks personal knowledge - Speculation
57 : 11	57: 15	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact in evidence; Leading the witness
57 : 19	58: 2	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness

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BALES, R.
4/12/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
7:16	7: 18	Question without Answer
10:22	11: 2	Leading the witness
11:11	11: 13	Leading the witness
11:19	11: 23	Lacks personal knowledge - Speculation
12:2	12: 4	Leading the witness
12:5	12: 9	Vague &Ambiguous
13:19	13: 24	Leading the witness; Lacks personal knowledge - Speculation
13:25	14: 2	Colloquy
14:3	14: 3	Leading the witness; Lacks personal knowledge - Speculation
14:4	14: 6	Colloquy
14:7	14: 15	Lacks foundation/Assumes fact not in evidence
17:10	17: 17	Leading the witness
17:18	17: 25	Hearsay
20:10	20: 16	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
20:17	20: 19	Colloquy
36:5	36: 12	Hearsay
36:17	36: 18	Colloquy
36:25	37: 1	Question without Answer
37:2	37: 3	Colloquy
37:24	38: 9	Hearsay
79:11	80: 2	Irrelevant

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NAIFEH, J.
9/3/99
Objections

From *Page: Line*	Through *Page: Line*	Objections
8:3	8 : 3	Answer without Question
23:14	23 : 23	Leading the witness
23:24	24 : 7	Hearsay
24:8	24 : 16	Hearsay
24:22	24 : 25	Leading the witness; Hearsay
30:7	31 : 5	Hearsay
31:6	32 : 4	Hearsay; Leading the witness
32:14	33 : 16	Hearsay; Leading the witness
34:18	34 : 20	Lacks foundation/Assumes fact not in evidence
34:23	35 : 14	Lacks foundation/Assumes fact not in evidence
35:17	35 : 17	Lacks foundation/Assumes fact not in evidence
35:24	36 : 2	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
36:6	36 : 11	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
36:12	37 : 20	Leading the witness; Hearsay
37:21	37 : 24	Leading the witness
37:25	38 : 4	Colloquy
38:1	38 : 10	Leading the witness
38:7	38 : 7	Colloquy
38:11	38 : 13	Lacks foundation/Assumes fact not in evidence; Compound
38:16	38 : 21	Lacks foundation/Assumes fact not in evidence; Compound
39:6	39 : 10	Lacks personal knowledge - Speculation
42:8	42 : 11	Lacks foundation/Assumes fact not in evidence
42:15	43 : 13	Lacks foundation/Assumes fact not in evidence; Not responsive
43:14	45 : 4	Lacks foundation/Assumes fact not in evidence; Leading the witness; Hearsay
45:5	45 : 8	Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
45:10	45 : 10	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Misleading
45:11	46 : 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Asked & Answered
46:23	46 : 24	Asked & Answered
47:1	47 : 2	Asked & Answered
47:3	47 : 6	Irrelevant

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From *Page: Line*	Through *Page: Line*	Objections
47:7	47 : 10	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Asked & Answered
47:13	47 : 14	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Asked & Answered
47:15	47 : 15	Irrelevant
47:16	47 : 18	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Asked & Answered
47:19	48 : 8	Hearsay; Leading the witness
48:13	49 : 2	Hearsay
49:3	50 : 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
50:7	50 : 16	Leading the witness; Hearsay
50:18	50 : 25	Hearsay
51:18	52 : 1	Hearsay
52:10	53 : 1	Hearsay; Leading the witness
53:15	54 : 7	Lacks foundation/Assumes fact not in evidence; Leading the witness
74:5	74 : 12	Lacks foundation/Assumes fact not in evidence; Misleading; Hearsay
75:13	75 : 18	Hearsay
77:22	78 : 5	Not responsive
79:12	80 : 4	Compound; Misleading; Not responsive
80:7	80 : 7	Compound; Misleading; Not responsive
84:2	84 : 8	Lacks foundation/Assumes fact not in evidence
84:11	85 : 13	Lacks foundation/Assumes fact not in evidence; Hearsay
86:6	86 : 17	Hearsay; Lacks foundation/Assumes fact not in evidence
86:20	87 : 2	Lacks foundation/Assumes fact not in evidence; Hearsay
87:9	87 : 16	Hearsay
87:19	87 : 20	Hearsay
94:20	95 : 2	Hearsay

ENGSTER, R.
7/23/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
21 : 17	22 : 2	Irrelevant; Not responsive
26 : 23	27 : 2	Leading the witness
27 : 12	27 : 17	Leading the witness
27 : 18	28 : 4	Hearsay

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RENFRO, W.
9/28/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
15 : 21	17 : 13 Ending w/ "What –"	Hearsay
18 : 18	18 : 23	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
19 : 17	20 : 5	Lacks foundation/Assumes fact not in evidence
20 : 10	20 : 11	Lacks personal knowledge - Speculation
20 : 12	21 : 1	Hearsay
21 : 17	21 : 24	Hearsay
23 : 1	23 : 15	Hearsay
26 : 2	26 : 20	Hearsay
26 : 22	27 : 3	Hearsay
27 : 4	27 : 13	Lacks foundation/Assumes fact not in evidence
27 : 14	28 : 10	Hearsay
30 : 15	31 : 14	Hearsay
31 : 25	32 : 6	Colloquy
32 : 7	33 : 3	Hearsay
33 : 4	33 : 10	Lacks personal knowledge - Speculation
33 : 11	33 : 25	Hearsay; Double Hearsay
34 : 1	34 : 3	Lacks personal knowledge - Speculation
34 : 14	34 : 19	Hearsay; Double Hearsay
34 : 20	34 : 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
35 : 4	35 : 15	Hearsay
35 : 23	36 : 1	Lacks personal knowledge - Speculation

CARLSON, R.
8/17/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
31 : 4	31 : 6	Answer without Question
93 : 21	94 : 1	Hypothetical; Lacks foundation/Assumes fact not in evidence
95 : 7	95 : 11	Lacks foundation/Assumes fact not in evidence; Hypothetical; Misleading
100 : 12	100 : 15	Hypothetical; Lacks foundation/Assumes fact not in evidence
101 : 13	101 : 17	Lacks personal knowledge - Speculation
121 : 5	121 : 7	Lacks foundation/Assumes fact not in evidence
121 : 17	121 : 21	Lacks foundation/Assumes fact not in evidence; Hypothetical
126 : 2	126 : 2	Colloquy
126 : 15	126 : 15	Colloquy

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FITZMAURICE, B.
8/31/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
11:19	11 : 19	Incomplete Question & Answer; Question without Answer
59:15	59 : 24	Irrelevant; Attorney testifying
62:12	62 : 14	Colloquy
62:22	62 : 24	Mischaracterizes testimony
62:25	62 : 25	Colloquy
63:1	63 : 3	Mischaracterizes testimony
63:22	63 : 25	Incomplete Answer
73:21	73 : 25	Question without Answer
77:6	77 : 9	Lacks foundation/Assumes fact not in evidence; Misleading
78:5	78 : 7	Colloquy
78:21	78 : 22	Colloquy
79:6	79 : 6	Colloquy
82:24	82 : 25	Colloquy
83:3	83 : 3	Attorney testifying
83:4	83 : 6	Vague &Ambiguous
83:7	83 : 8	Colloquy
83:9	83 : 9	Vague &Ambiguous
83:10	83 : 11	Lacks foundation/Assumes fact not in evidence; Compound; Vague &Ambiguous
83:12	83 : 13	Colloquy
83:14	83 : 15	Lacks foundation/Assumes fact not in evidence; Compound; Vague &Ambiguous
83:23	83 : 25	Attorney testifying
84:1	84 : 7	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
84:8	84 : 10	Vague &Ambiguous
84:11	84 : 12	Colloquy
84:13	84 : 13	Vague &Ambiguous
84:14	84 : 18	Argumentative
84:19	84 : 22	Lacks foundation/Assumes fact not in evidence; Misleading
84:23	84 : 24	Colloquy
84:25	85 : 1	Lacks foundation/Assumes fact not in evidence; Misleading
85:2	85 : 9	Mischaracterizes document; Misleading; Argumentative
85:10	85 : 12	Vague &Ambiguous
85:13	85 : 14	Colloquy

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From *Page: Line*	Through *Page: Line*	Objections
85:15	85 : 18	Vague &Ambiguous
88:23	89 : 5	Lacks foundation/Assumes fact not in evidence
89:6	89 : 12	Mischaracterizes testimony; Misleading; Argumentative
91:1	91 : 4	Misleading; Incomplete Question; Mischaracterizes document
92:5	92 : 10	Lacks personal knowledge - Speculation
92:16	92 : 17	Colloquy
92:23	92 : 25	Compound; Question without Answer
93:1	93 : 2	Colloquy
93:3	93 : 4	Not responsive
93:5	93 : 7	Irrelevant
93:8	93 : 10	Compound; Lacks personal knowledge - Speculation
93:11	93 : 11	Colloquy
93:12	93 : 14	Compound; Lacks personal knowledge - Speculation
94:18	94 : 21	Vague &Ambiguous
94:22	94 : 23	Colloquy
94:24	94 : 25	Vague &Ambiguous
108:1	108 : 9	Mischaracterizes document; Argumentative
108:20	108 : 21	Irrelevant
109:18	109 : 19	Vague &Ambiguous
109:20	109 : 21	Colloquy
109:22	109 : 22	Vague &Ambiguous
109:23	109 : 23	Colloquy
110:14	110 : 14	Irrelevant
116:3	116 : 9	Mischaracterizes document
116:10	116 : 12	Vague &Ambiguous
116:13	116 : 13	Colloquy
116:14	116 : 16	Vague &Ambiguous
117:21	117 : 23	Mischaracterizes testimony; Misleading; Argumentative
117:24	118 : 6	Mischaracterizes testimony; Argumentative
118:18	118 : 22	Asked & Answered
118:23	119 : 1	Asked & Answered; Misleading; Argumentative; Hearsay; Attorney testifying
119:2	119 : 3	Colloquy
119:4	119 : 6	Asked & Answered; Misleading; Hearsay; Argumentative; Attorney testifying
119:9	119 : 10	Lacks personal knowledge - Speculation
119:11	119 : 12	Colloquy
119:13	119 : 13	Lacks personal knowledge - Speculation
119:14	119 : 18	Misleading; Argumentative; Lacks personal knowledge - Speculation

From *Page: Line*	Through *Page: Line*	Objections
119:19	120 : 16	Lacks personal knowledge - Speculation
120:17	120 : 19	Lacks personal knowledge - Speculation
120:20	120 : 21	Colloquy
120:22	120 : 23	Lacks personal knowledge - Speculation
120:24	121 : 1	Irrelevant; Colloquy
121:2	121 : 5	Argumentative
121:6	121 : 6	Colloquy
121:7	121 : 19	Lacks personal knowledge - Speculation; Misleading; Argumentative; Lacks foundation/Assumes fact not in evidence
121:20	121 : 22	Argumentative; Mischaracterizes testimony; Misleading; Question without Answer; Lacks foundation/Assumes fact not in evidence
121:23	121 : 25	Colloquy
160:20	198 : 21	Colloquy
161:2	162 : 1	Lacks personal knowledge - Speculation
163:1	163 : 7	Lacks personal knowledge - Speculation
163:8	163 : 14	Attorney testifying; Colloquy
163:15	163 : 16	Irrelevant; Colloquy
164:4	164 : 12	Lacks personal knowledge - Speculation
164:25	165 : 4	Attorney testifying; Irrelevant; Argumentative
165:8	165 : 20	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Argumentative; Limiting
166:8	166 : 14	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge
166:17	166 : 18	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge
166:25	167 : 8	Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
167:11	167 : 13	Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
167:25	168 : 2	Compound; Lacks foundation/Assumes fact not in evidence
168:5	168 : 9	Compound; Lacks foundation/Assumes fact not in evidence
168:24	169 : 11	Lacks personal knowledge - Speculation; Document speaks for itself
169:12	169 : 13	Lacks foundation/Assumes fact not in evidence
169:16	169 : 16	Lacks foundation/Assumes fact not in evidence
169:17	169 : 20	Mischaracterizes testimony; Argumentative; Misleading; Attorney testifying; Asked & Answered; Lacks foundation/Assumes fact not in evidence
169:21	169 : 22	Irrelevant
169:23	170 : 1	Asked & Answered

From *Page: Line*	Through *Page: Line*	Objections
170:2	170 : 7	Misleading; Argumentative; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Unintelligible
170:15	170 : 19	Compound; Argumentative; Attorney testifying; Misleading
170:22	170 : 23	Compound; Argumentative; Attorney testifying; Misleading
170:24	171 : 1	Lacks foundation/Assumes fact not in evidence
171:2	171 : 8	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Misleading; Argumentative
171:15	171 : 15	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Misleading; Argumentative
171:16	171 : 16	Colloquy; Attorney testifying
171:17	171 : 19	Unintelligible; Vague &Ambiguous; Not responsive
171:20	171 : 24	Asked & Answered; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Misleading; Argumentative
171:25	172 : 4	Unintelligible; Vague &Ambiguous; Mischaracterizes document; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Misleading; Argumentative
172:9	172 : 11	Unintelligible; Vague &Ambiguous; Mischaracterizes document; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Misleading; Argumentative
172:12	172 : 14	Mischaracterizes document; Asked & Answered; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading
172:18	172 : 22	Mischaracterizes document; Asked & Answered; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading
172:23	173 : 1	Argumentative
173:2	173 : 5	Hypothetical; Lacks foundation/Assumes fact not in evidence
173:14	173 : 17	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
173:20	173 : 22	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
173:23	174 : 2	Lacks personal knowledge - Speculation
174:5	174 : 6	Lacks personal knowledge - Speculation
174:7	174 : 11	Lacks foundation/Assumes fact not in evidence
174:14	174 : 14	Lacks foundation/Assumes fact not in evidence
174:15	175 : 18	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
175:20	175 : 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

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From *Page: Line*	Through *Page: Line*	Objections
175:25	176 : 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
176:21	176 : 23	Lacks personal knowledge - Speculation; Compound
176:25	176 : 25	Lacks personal knowledge - Speculation; Compound
177:	177 : 4	Vague &Ambiguous; Lacks personal knowledge - Speculation; Misleading
177:7	177 : 9	Vague &Ambiguous; Lacks personal knowledge - Speculation; Misleading
177:10	177 : 17	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
177:20	177 : 24	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
178:1	178 : 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
178:2	178 : 5	Lacks personal knowledge - Speculation; Vague &Ambiguous
178:8	178 : 10	Lacks personal knowledge - Speculation; Vague &Ambiguous
178:11	178 : 18	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
178:21	178 : 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
179:1	179 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
179:10	179 : 16	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Hypothetical
179:19	179 : 23	Not responsive
179:24	180 : 4	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Hypothetical
180:6	180 : 8	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Hypothetical
180:9	180 : 10	Irrelevant; Colloquy
180:11	180 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Hypothetical; Asked & Answered
180:18	180 : 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Hypothetical; Asked & Answered
181:16	182 : 2	Privileged; Prejudicial more than Probative; Irrelevant
182:3	182 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
182:14	182 : 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading

From *Page: Line*	Through *Page: Line*	Objections
182:21	182 : 23	Vague &Ambiguous
183:1	183 : 8	Vague &Ambiguous
183:10	183 : 11	Vague &Ambiguous
183:12	183 : 18	Lacks foundation/Assumes fact not in evidence; Misleading
184:22	184 : 24	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Vague &Ambiguous
185:2	185 : 5	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Vague &Ambiguous
185:6	185 : 10	Hypothetical; Argumentative; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
185:13	185 : 15	Hypothetical; Argumentative; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
185:22	186 : 16	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
186:17	186 : 19	Vague &Ambiguous
186:22	186 : 23	Vague &Ambiguous
186:24	187 : 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
187:21	187 : 21	Attorney testifying
188:3	188 : 5	Asked & Answered
188:8	188 : 10	Asked & Answered
188:11	188 : 13	Asked & Answered
188:16	188 : 17	Asked & Answered
188:18	188 : 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Document speaks for itself
189:1	189 : 4	Lacks foundation/Assumes fact not in evidence; Misleading
189:5	189 : 12	Asked & Answered
189:23	190 : 9	Mischaracterizes testimony
190:10	190 : 17	Document speaks for itself; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
191:14	191 : 21	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
191:22	191 : 24	Lacks foundation/Assumes fact not in evidence
191:25	192 : 5	Mischaracterizes testimony
192:7	192 : 13	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Document speaks for itself
192:14	193 : 2	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Document speaks for itself

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From *Page: Line*	Through *Page: Line*	Objections
193:3	193 : 11	Vague &Ambiguous; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence
193:14	193 : 15	Vague &Ambiguous; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence
193:16	193 : 21	Lacks foundation/Assumes fact not in evidence
193:22	193 : 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Argumentative
194:1	194 : 11	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Argumentative; Hypothetical
194:15	194 : 21	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Argumentative; Hypothetical
194:23	195 : 4	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Argumentative; Hypothetical
195:5	196 : 7	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Argumentative; Document speaks for itself
196:10	197 : 2	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Argumentative; Document speaks for itself
197:3	197 : 6	Lacks personal knowledge - Speculation
197:11	197 : 12	Lacks personal knowledge - Speculation
197:15	197 : 15	Lacks personal knowledge - Speculation
197:16	198 : 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Argumentative; Document speaks for itself
198:6	198 : 11	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Argumentative; Document speaks for itself
198:17	198 : 21	Irrelevant; Attorney testifying
200:10	201 : 4	Lacks personal knowledge - Speculation; Document speaks for itself
201:12	201 : 18	Colloquy
202:5	202 : 14	Lacks personal knowledge - Speculation; Document speaks for itself
202:21	203 : 6	Irrelevant; Colloquy
203:7	203 : 16	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself; Asked & Answered
203:17	203 : 18	Colloquy
203:19	203 : 19	Document speaks for itself; Asked & Answered
203:23	203 : 25	Lacks foundation/Assumes fact not in evidence; Misleading
204:1	204 : 2	Colloquy

From *Page: Line*	Through *Page: Line*	Objections
205:3	205 : 3	Lacks foundation/Assumes fact not in evidence; Misleading
204:11	204 : 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
204:20	204 : 22	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
204:25	204 : 25	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
205:1	205 : 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Document speaks for itself
205:9	205 : 10	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Document speaks for itself
205:11	205 : 13	Mischaracterizes testimony; Attorney testifying; Irrelevant
205:14	205 : 15	Lacks foundation/Assumes fact not in evidence
205:16	205 : 24	Colloquy
205:25	206 : 2	Lacks foundation/Assumes fact not in evidence
206:3	206 : 6	Lacks foundation/Assumes fact not in evidence; Question without Answer
206:7	206 : 7	Colloquy
206:8	206 : 11	Irrelevant; Not responsive
206:12	206 : 16	Asked & Answered
206:17	207 : 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Document speaks for itself; Mischaracterizes document
207:22	207 : 24	Colloquy
207:25	208 : 11	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Document speaks for itself; Mischaracterizes document
208:12	208 : 13	Irrelevant
208:14	208 : 16	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Question without Answer
208:17	208 : 20	Colloquy
208:21	209 : 2	Lacks personal knowledge - Speculation; Document speaks for itself
209:3	209 : 3	Irrelevant; Question without Answer

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LUND, D.
3/31/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
8 : 1	8 : 3	Irrelevant
10 : 15	10 : 17	Colloquy
84 : 3	106 : 15	Colloquy
84 : 3	84 : 8	Misleading; Asked & Answered
84 : 12	84 : 12	Colloquy
84 : 17	84 : 21	Colloquy
85 : 1	85 : 10	Question without Answer; Colloquy; Not responsive
85 : 15	85 : 18	Attorney testifying; Colloquy
85 : 23	86 : 4	Asked & Answered
86 : 8	86 : 9	Colloquy
86 : 15	86 : 16	Colloquy
86 : 20	86 : 21	Colloquy
86 : 23	87 : 6	Question without Answer; Colloquy
87 : 10	87 : 11	Colloquy
87 : 13	87 : 15	Irrelevant; Question without Answer; Colloquy
87 : 18	87 : 19	Colloquy
87 : 23	87 : 24	Colloquy
88 : 3	88 : 9	Colloquy
88 : 13	88 : 17	Colloquy
89 : 9	89 : 10	Colloquy
89 : 17	89 : 19	Colloquy
89 : 21	90 : 5	Asked & Answered; Argumentative; Lacks foundation/Assumes fact not in evidence
90 : 8	90 : 9	Colloquy
90 : 12	90 : 17	Asked & Answered
90 : 15	90 : 16	Colloquy
90 : 18	92 : 3	Irrelevant; Misleading; Prejudicial more than Probative
91 : 5	91 : 7	Colloquy
92 : 4	92 : 23	Colloquy; Question without Answer
92 : 24	93 : 4	Lacks foundation/Assumes fact not in evidence; Misleading
93 : 1	93 : 3	Colloquy
93 : 5	93 : 11	Lacks foundation/Assumes fact not in evidence; Argumentative; Misleading; Lacks knowledge - Speculation
93 : 7	93 : 9	Colloquy
93 : 12	94 : 10	Lacks foundation/Assumes fact not in evidence; Argumentative; Misleading; Lacks knowledge - Speculation

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From *Page: Line*	Through *Page: Line*	Objections
93 : 15	93 : 15	Colloquy
93 : 20	93 : 21	Colloquy
93 : 25	94 : 1	Colloquy
94 : 5	94 : 6	Colloquy
94 : 13	94 : 20	Colloquy
94 : 22	95 : 1	Lacks foundation/Assumes fact not in evidence; Lacks knowledge - Speculation; Asked & Answered
95 : 2	95 : 14	Argumentative
95 : 15	104 : 15	Asked & Answered; Argumentative; Harassing; Misleading; Lacks foundation/Assumes fact not in evidence
104 : 16	106 : 13	Lacks foundation/Assumes fact not in evidence; Asked & Answered; Argumentative; Misleading; Attorney testifying
108 : 11	110 : 5	Colloquy
108 : 14	109 : 1	Colloquy
109 : 9	110 : 2	Colloquy
111 : 20	111 : 21	Colloquy
112 : 2	112 : 5	Colloquy
112 : 10	112 : 10	Colloquy
112 : 12	112 : 17	Lacks foundation/Assumes fact not in evidence; Lacks knowledge - Speculation; Vague &Ambiguous
113 : 10	113 : 10	Colloquy
113 : 13	113 : 24	Colloquy
114 : 4	114 : 9	Question without Answer; Asked & Answered
119 : 23	119 : 25	Colloquy
120 : 9	121 : 5	Question without Answer; Colloquy; Not responsive
121 : 19	122 : 5	Asked & Answered; Argumentative
122 : 11	122 : 11	Colloquy
122 : 22	122 : 22	Colloquy
122 : 25	123 : 19	Asked & Answered; Argumentative
123 : 20	124 : 15	Irrelevant; Argumentative; Harassing
124 : 22	124 : 22	Colloquy
124 : 24	125 : 23	Argumentative; Asked & Answered; Document speaks for itself
126 : 2	126 : 2	Colloquy
126 : 6	126 : 7	Question without Answer; Argumentative
126 : 8	126 : 9	Colloquy
126 : 15	126 : 25	Asked & Answered; Argumentative; Document speaks for itself
127 : 5	127 : 11	Colloquy
127 : 18	127 : 21	Colloquy
128 : 1	128 : 6	Colloquy
128 : 10	128 : 21	Colloquy

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From *Page: Line*	Through *Page: Line*	Objections
130 : 9	130 : 9	Attorney testifying; Colloquy
149 : 13	149 : 18	Misleading; Vague &Ambiguous; Irrelevant; Prejudicial more than Probative
149 : 19	150 : 9	Misleading; Lacks foundation/Assumes fact not in evidence; Question without Answer
150 : 10	152 : 23	Misleading; Vague &Ambiguous; Irrelevant; Prejudicial more than Probative
152 : 24	153 : 15	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony; Vague &Ambiguous; Misleading; Prejudicial more than Probative
153 : 16	153 : 18	Colloquy
154 : 1	154 : 2	Colloquy
154 : 19	154 : 20	Colloquy
155 : 2	155 : 4	Colloquy
155 : 7	156 : 2	Vague &Ambiguous; Misleading
156 : 5	156 : 6	Attorney testifying; Irrelevant
156 : 12	156 : 17	Question without Answer
156 : 22	156 : 24	Colloquy
157 : 10	157 : 11	Colloquy
157 : 13	157 : 16	Asked & Answered; Argumentative
157 : 15	157 : 15	Colloquy
157 : 17	158 : 3	Colloquy
158 : 4	159 : 8	Asked & Answered; Argumentative; Misleading
159 : 22	169 : 23	Misleading; Lacks foundation/Assumes fact not in evidence; Hypothetical; Argumentative; Attorney testifying; Lacks personal knowledge - Speculation
170 : 6	171 : 8	Misleading; Lacks foundation/Assumes fact not in evidence; Hypothetical; Argumentative; Attorney testifying; Lacks personal knowledge - Speculation
171 : 12	172 : 11	Misleading; Lacks foundation/Assumes fact not in evidence; Hypothetical; Argumentative; Attorney testifying; Lacks personal knowledge - Speculation
172 : 21	174 : 5	Misleading; Lacks foundation/Assumes fact not in evidence; Hypothetical; Attorney testifying; Lacks personal knowledge - Speculation
174 : 8	174 : 11	Colloquy
174 : 15	174 : 22	Misleading; Lacks foundation/Assumes fact not in evidence; Hypothetical; Argumentative; Attorney testifying; Lacks personal knowledge - Speculation

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175 : 13	176 : 8	Misleading; Lacks foundation/Assumes fact not in evidence; Hypothetical; Argumentative; Attorney testifying; Lacks personal knowledge - Speculation
176 : 14	178 : 5	Misleading; Lacks foundation/Assumes fact not in evidence; Hypothetical; Argumentative; Attorney testifying; Lacks personal knowledge - Speculation
178 : 13	179 : 1	Misleading; Lacks foundation/Assumes fact not in evidence; Hypothetical; Argumentative; Attorney testifying; Lacks personal knowledge - Speculation
179 : 7	180 : 4	Misleading; Lacks foundation/Assumes fact not in evidence; Hypothetical; Argumentative; Attorney testifying; Lacks personal knowledge - Speculation
180 : 13	181 : 5	Misleading; Lacks foundation/Assumes fact not in evidence; Hypothetical; Argumentative; Attorney testifying; Lacks personal knowledge - Speculation
183 : 16	185 : 9	Misleading; Lacks foundation/Assumes fact not in evidence; Hypothetical; Argumentative; Attorney testifying; Lacks personal knowledge - Speculation
185 : 10	185 : 15	Question without Answer; Incomplete Question
190 : 5	190 : 7	Colloquy
190 : 25	191 : 3	Attorney testifying; Mischaracterizes testimony
191 : 4	191 : 14	Lacks foundation/Assumes fact not in evidence; Misleading; Mischaracterizes document
191 : 15	191 : 21	Colloquy
191 : 22	192 : 2	Lacks foundation/Assumes fact not in evidence; Misleading; Mischaracterizes document
192 : 3	192 : 16	Asked & Answered; Lacks foundation/Assumes fact not in evidence; Misleading; Argumentative
192 : 20	193 : 17	Vague &Ambiguous
193 : 18	194 : 5	Asked & Answered; Harassing; Argumentative
194 : 12	194 : 13	Colloquy
194 : 20	194 : 21	Colloquy
195 : 23	195 : 25	Colloquy
196 : 15	196 : 20	Lacks foundation/Assumes fact not in evidence; Attorney testifying
197 : 8	197 : 9	Colloquy
197 : 12	200 : 15	Mischaracterizes document; Mischaracterizes testimony; Argumentative
200 : 21	200 : 22	Colloquy
200 : 24	201 : 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Vague &Ambiguous

From *Page: Line*	Through *Page: Line*	Objections
209 : 16	211 : 10	Irrelevant; Prejudicial more than Probative; Misleading;
211 : 11	214 : 20	Misleading; ; Unintelligible
215 : 13	217 : 23	Misleading; Attorney testifying; Argumentative; Lacks foundation/Assumes fact not in evidence; Harassing
217 : 24	220 : 10	Misleading; Lacks foundation/Assumes fact not in evidence; Hypothetical; Attorney testifying
220 : 11	220 : 14	Colloquy; Lacks foundation/Assumes fact not in evidence
220 : 15	224 : 4	Misleading; Lacks foundation/Assumes fact not in evidence; Argumentative; Attorney testifying; Mischaracterizes testimony

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IANNUZZI, A.
6/29/99
Objections

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13 : 14	13 : 18	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
13 : 21	14 : 7	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
14 : 9	14 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
17 : 18	17 : 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
18 : 7	18 : 18	Lacks foundation/Assumes fact not in evidence; Leading the witness; Irrelevant
19 : 4	19 : 13	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
19 : 14	19 : 18	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
22 : 11	22 : 22	Leading the witness
22 : 23	23 : 11	Hearsay
23 : 24	25 : 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
25 : 16	25 : 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
25 : 20	25 : 20	Colloquy
25 : 21	25 : 21	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
27 : 2	27 : 17	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
29 : 1	29 : 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
29 : 20	30 : 8	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
30 : 19	31 : 16	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
32 : 24	33 : 10	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
33 : 19	33 : 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

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From *Page: Line*	Through *Page: Line*	Objections
33 : 22	34 : 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
34 : 8	34 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
34 : 15	34 : 17	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
34 : 19	35 : 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness; Prejudicial more than Probative
35 : 7	35 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
35 : 10	35 : 11	Colloquy
35 : 12	35 : 12	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
38 : 6	38 : 14	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
52 : 21	52 : 21	Colloquy
56 : 8	56 : 10	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
56 : 12	56 : 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
64 : 11	64 : 16	Hearsay
64 : 21	64 : 22	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
64 : 23	65 : 10	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
65 : 11	65 : 14	Hearsay
65 : 16	65 : 19	Hearsay
66 : 6	66 : 7	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
66 : 9	66 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
70 : 4	70 : 5	Hearsay
70 : 7	70 : 11	Hearsay
77 : 4	77 : 7	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
78 : 8	78 : 8	Colloquy
81 : 6	82 : 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

From *Page: Line*	Through *Page: Line*	Objections
82 : 8	82 : 14	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
87 : 4	87 : 4	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
87 : 6	87 : 7	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
87 : 9	87 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
87 : 11	87 : 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
94 : 1	94 : 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
107 : 15	107 : 18	Mischaracterizes testimony
108 : 7	108 : 18	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
109 : 5	109 : 7	Leading the witness

SEGELSTROM, D.
8/18/99
Objections

From *Page: Line*	Through *Page: Line*	Objections
7:4	7: 6	Colloquy
7:18	7: 23	Lacks foundation/Assumes fact not in evidence
7:21	7: 22	Colloquy
7:24	8: 6	Argumentative; Harassing; Asked & Answered
8:1	8: 2	Colloquy
8:7	8: 11	Lacks foundation/Assumes fact not in evidence; Argumentative; Harassing
8:9	8: 10	Colloquy
8:20	8: 20	Colloquy
9:1	9: 1	Colloquy
9:7	9: 8	Colloquy
9:13	9: 14	Colloquy
9:18	9: 25	Argumentative; Harassing; Asked & Answered
9:20	9: 21	Colloquy
10:6	10: 7	Colloquy
10:9	10: 15	Argumentative; Harassing; Asked & Answered
10:11	10: 12	Colloquy
10:16	11: 7	Lacks foundation/Assumes fact not in evidence
10:20	10: 22	Colloquy
11:8	11: 17	Lacks foundation/Assumes fact not in evidence
11:13	11: 16	Colloquy
11:18	11: 20	Lacks foundation/Assumes fact not in evidence
11:21	12: 19	Lacks foundation/Assumes fact not in evidence
11:25	12: 2	Colloquy
12:8	12: 8	Colloquy
12:22	13: 4	Asked & Answered; Argumentative; Harassing
12:24	12: 25	Colloquy
13:5	13: 25	Lacks foundation/Assumes fact not in evidence
13:12	13: 16	Colloquy
13:18	13: 20	Colloquy
14:1	14: 7	Argumentative; Harassing; Asked & Answered
14:3	14: 4	Colloquy
14:8	14: 14	Argumentative; Harassing; Asked & Answered
14:12	14: 13	Colloquy
14:20	15: 6	Lacks foundation/Assumes fact not in evidence
14:24	15: 1	Colloquy

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15:11	15: 12	Colloquy
16:8	16: 9	Colloquy
16:19	16: 20	Colloquy
16:22	16: 23	Colloquy
17:5	17: 9	Colloquy
17:10	17: 16	Unintelligible, confusing
17:11	17: 15	Colloquy
17:20	17: 21	Colloquy
18:2	18: 8	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
18:5	18: 6	Colloquy
18:13	18: 14	Colloquy
18:20	18: 20	Colloquy
19:11	19: 11	Colloquy
19:16	19: 17	Colloquy
19:23	20: 16	Lacks foundation/Assumes fact not in evidence; Argumentative; Harassing
20:1	20: 2	Colloquy
20:8	20: 9	Colloquy
20:14	20: 15	Colloquy
20:20	20: 20	Colloquy
34:4	34: 7	Colloquy
34:17	34: 24	Colloquy
37:20	38: 6	Asked & Answered
37:23	37: 24	Colloquy
38:7	38: 12	Colloquy
38:13	38: 15	Unintelligible, confusing
38:16	38: 21	Asked & Answered
38:19	38: 19	Colloquy
40:1	40: 1	Colloquy
40:10	40: 15	Unintelligible, confusing
40:11	40: 13	Colloquy
41:10	41: 11	Colloquy
41:14	41: 24	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
41:18	41: 19	Colloquy
45:24	45: 25	Question without Answer
52:9	65: 3	Colloquy
52:9	52: 21	Mischaracterizes document
52:22	53: 1	Lacks personal knowledge - Speculation

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53:13	54: 9	Irrelevant; Harassing
54:10	54: 17	Hypothetical; Lacks foundation/Assumes fact not in evidence
55:2	55: 7	Lacks foundation/Assumes fact not in evidence
56:3	56: 8	Document speaks for itself
56:10	56: 14	Lacks foundation/Assumes fact not in evidence
56:19	56: 21	Document speaks for itself
56:25	56: 25	Document speaks for itself
57:1	57: 2	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony
57:5	57: 6	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony
57:7	57: 8	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Mischaracterizes testimony; Misleading
57:11	57: 11	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Mischaracterizes testimony; Misleading
57:12	57: 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
58:7	58: 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Document speaks for itself
58:23	58: 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Document speaks for itself
59:10	60: 4	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
60:7	60: 8	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
60:9	60: 9	Question without Answer
60:12	60: 13	Document speaks for itself
60:16	60: 18	Document speaks for itself
60:19	60: 21	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
61:9	61: 10	Document speaks for itself
61:14	62: 6	Document speaks for itself
63:4	63: 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
63:9	63: 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
63:10	63: 10	Lacks foundation/Assumes fact not in evidence; Argumentative
63:13	63: 19	Lacks foundation/Assumes fact not in evidence; Argumentative
63:22	63: 23	Lacks foundation/Assumes fact not in evidence; Argumentative

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63:25	64: 2	Lacks foundation/Assumes fact not in evidence; Document speaks for itself; Asked & Answered; Mischaracterizes testimony
64:5	64: 5	Lacks foundation/Assumes fact not in evidence; Document speaks for itself; Asked & Answered; Mischaracterizes testimony
64:6	64: 9	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony; Argumentative; Compound; Misleading
64:13	64: 13	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony; Argumentative; Compound; Misleading
64:14	64: 15	Lacks foundation/Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation
64:18	64: 19	Lacks foundation/Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation
64:20	64: 21	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation
64:24	64: 25	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation
66:1	73: 24	Colloquy
66:1	66: 1	Irrelevant
66:2	66: 2	Answer without Question
66:3	66: 4	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation
66:6	66: 14	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation
66:15	66: 18	Lacks personal knowledge - Speculation; Vague &Ambiguous
66:21	67: 1	Lacks personal knowledge - Speculation; Vague &Ambiguous
67:3	67: 3	Lacks personal knowledge - Speculation; Vague &Ambiguous
67:4	67: 9	Attorney testifying; Irrelevant; Mischaracterizes testimony; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Compound
67:14	67: 14	Attorney testifying; Irrelevant; Mischaracterizes testimony; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Compound
67:15	67: 18	Mischaracterizes testimony; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
67:22	67: 22	Mischaracterizes testimony; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
67:23	68: 8	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Document speaks for itself

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68:11	68: 19	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Document speaks for itself; Vague &Ambiguous
68:23	69: 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Document speaks for itself; Misleading
69:10	69: 14	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Document speaks for itself; Misleading
69:17	69: 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Document speaks for itself; Misleading
69:23	69: 23	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Document speaks for itself; Misleading
69:24	70: 1	Mischaracterizes testimony
70:5	70: 7	Mischaracterizes testimony
70:8	70: 9	Asked & Answered
70:12	70: 14	Asked & Answered
70:15	70: 15	Attorney testifying
70:16	70: 19	Vague &Ambiguous; Mischaracterizes testimony
70:22	71: 1	Vague &Ambiguous; Mischaracterizes testimony
71:2	71: 2	Attorney testifying
71:3	71: 6	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
71:9	71: 10	Not responsive
71:11	71: 13	Irrelevant
71:22	72: 1	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Document speaks for itself
72:2	72: 3	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
72:7	72: 8	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
72:15	72: 17	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
72:21	72: 22	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
72:23	73: 5	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
73:12	73: 13	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
73:16	73: 21	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
73:24	73: 24	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
91:8	94: 2	Colloquy
91:13	91: 14	Asked & Answered

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91:15	91: 17	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Argumentative
91:20	91: 21	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Argumentative
92:4	92: 6	Attorney testifying
92:14	92: 17	Mischaracterizes testimony; Asked & Answered
93:1	93: 4	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony
93:8	93: 12	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony
93:14	93: 16	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony
93:17	93: 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Vague &Ambiguous
93:22	93: 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Vague &Ambiguous
94:2	94: 2	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Vague &Ambiguous
119:8	129: 6	Colloquy
120:3	120: 7	Document speaks for itself
120:11	120: 11	Document speaks for itself
120:22	121: 3	Document speaks for itself
121:4	121: 12	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
121:13	121: 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
122:3	122: 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
122:8	122: 8	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
122:9	122: 16	Document speaks for itself
122:17	122: 22	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Attorney testifying; Argumentative; Misleading
123:3	123: 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself; Misleading; Argumentative
123:8	123: 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself; Misleading; Argumentative

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123:10	123: 12	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
123:15	123: 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
123:21	124: 7	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Attorney testifying; Misleading; Document speaks for itself, Argumentative
124:15	124: 16	Vague &Ambiguous; Argumentative
124:18	124: 18	Vague &Ambiguous; Argumentative
124:19	125: 1	Lacks personal knowledge - Speculation
125:2	125: 4	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Hypothetical
125:7	125: 13	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Hypothetical
125:14	125: 18	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Hypothetical
125:20	125: 23	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Hypothetical
125:24	126: 2	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Hypothetical; Lacks personal knowledge - Speculation; Asked & Answered; Misleading
126:5	126: 7	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Hypothetical; Lacks personal knowledge - Speculation; Asked & Answered; Misleading
126:8	126: 9	Argumentative
126:12	126: 14	Argumentative
126:15	126: 18	Compound
126:22	126: 22	Compound
126:23	126: 25	Vague &Ambiguous
127:3	127: 5	Vague &Ambiguous
127:6	127: 8	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Hypothetical; Lacks personal knowledge - Speculation; Misleading
127:12	127: 12	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Hypothetical; Lacks personal knowledge - Speculation; Misleading
127:13	127: 16	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Argumentative
127:20	127: 21	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Argumentative

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127:22	127: 23	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Argumentative
127:25	128: 1	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Argumentative
128:2	128: 7	Document speaks for itself; Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
128:11	128: 11	Document speaks for itself; Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
128:12	128: 14	Argumentative; Lacks foundation/Assumes fact not in evidence; Compound
128:18	128: 20	Argumentative; Lacks foundation/Assumes fact not in evidence; Compound; Misleading
128:22	128: 22	Argumentative; Lacks foundation/Assumes fact not in evidence; Compound; Misleading
128:23	128: 25	Argumentative; Lacks foundation/Assumes fact not in evidence; Misleading; Mischaracterizes testimony
129:2	129: 2	Argumentative; Lacks foundation/Assumes fact not in evidence; Misleading; Mischaracterizes testimony
136:18	136: 21	Lacks foundation/Assumes fact not in evidence; Misleading; Unintelligible; Vague &Ambiguous; Hypothetical; Lacks personal knowledge - Speculation
136:22	136: 22	Colloquy
136:23	136: 25	Lacks foundation/Assumes fact not in evidence; Misleading; Unintelligible; Vague &Ambiguous; Hypothetical; Lacks personal knowledge - Speculation
137:6	137: 10	Lacks foundation/Assumes fact not in evidence; Misleading; Unintelligible; Vague &Ambiguous; Hypothetical; Lacks personal knowledge - Speculation
137:11	137: 12	Colloquy
137:13	137: 13	Lacks foundation/Assumes fact not in evidence; Misleading; Unintelligible; Vague &Ambiguous; Hypothetical; Lacks personal knowledge - Speculation
144:18	151: 14	Colloquy
145:6	145: 11	Mischaracterizes document; Attorney testifying
145:23	146: 5	Document speaks for itself
146:6	146: 6	Question without Answer
146:11	146: 12	Question without Answer
146:14	146: 14	Not responsive

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146:15	147: 5	Misleading; Lacks personal knowledge - Speculation; Document speaks for itself; Mischaracterizes document
147:11	147: 16	Document speaks for itself
147:17	147: 19	Vague &Ambiguous; Lacks personal knowledge - Speculation
147:21	147: 24	Vague &Ambiguous; Lacks personal knowledge - Speculation
148:2	148: 7	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
148:8	148: 14	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Lacks personal knowledge - Speculation; Document speaks for itself
148:16	148: 16	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Lacks personal knowledge - Speculation; Document speaks for itself
148:17	148: 24	Lacks foundation/Assumes fact not in evidence
149:2	149: 3	Lacks foundation/Assumes fact not in evidence
149:4	149: 8	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Lacks personal knowledge - Speculation; Mischaracterizes document; Argumentative; Misleading
149:11	149: 16	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Lacks personal knowledge - Speculation; Mischaracterizes document; Argumentative; Misleading
149:18	149: 19	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Lacks personal knowledge - Speculation; Mischaracterizes document; Argumentative; Misleading
149:20	149: 22	Vague &Ambiguous; Hypothetical; Lacks foundation/ Assumes fact not in evidence; Misleading
149:25	149: 25	Vague &Ambiguous; Hypothetical; Lacks foundation/ Assumes fact not in evidence; Misleading
150:1	150: 4	Vague &Ambiguous; Hypothetical; Lacks foundation/ Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation
150:7	150: 12	Vague &Ambiguous; Hypothetical; Lacks foundation/ Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation
150:13	150: 17	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
150:21	150: 23	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
150:24	151: 2	Lacks foundation/Assumes fact not in evidence; Hypothetical; Asked & Answered
151:5	151: 9	Lacks foundation/Assumes fact not in evidence; Hypothetical; Asked & Answered
151:10	151: 11	Argumentative
151:14	151: 14	Argumentative

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Objections

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50 : 13	50 : 13	Colloquy
55 : 4	55 : 21	Vague &Ambiguous
57 : 1	57 : 8	Question without Answer; Lacks foundation/Assumes fact not in evidence; Misleading
57 : 16	57 : 16	Colloquy
57 : 20	57 : 24	Asked & Answered
57 : 25	58 : 1	Colloquy
58 : 2	58 : 20	Lacks foundation/Assumes fact not in evidence; Misleading; Asked & Answered
61 : 15	62 : 9	Asked & Answered; Question without Answer
63 : 16	63 : 25	Asked & Answered; Misleading; Mischaracterizes testimony
64 : 1	64 : 11	Hypothetical; Lacks foundation/Assumes fact not in evidence
79 : 13	79 : 14	Colloquy
80 : 20	80 : 25	Colloquy
81 : 8	81 : 8	Colloquy
81 : 16	81 : 18	Colloquy
82 : 3	82 : 13	Lacks foundation/Assumes fact not in evidence/Assumes fact not in evidence
88 : 17	88 : 20	Not responsive
90 : 24	91 : 3	Question without Answer; Not responsive
91 : 8	91 : 8	Colloquy
91 : 14	91 : 15	Colloquy
91 : 24	91 : 25	Colloquy
92 : 4	92 : 4	Colloquy
103 : 8	103 : 15	Asked & Answered; Question without Answer
104 : 8	104 : 9	Colloquy
104 : 14	104 : 14	Colloquy
105 : 1	105 : 2	Incomplete Question
105 : 3	105 : 11	Question without Answer
106 : 16	107 : 3	Asked & Answered
107 : 10	107 : 10	Colloquy
107 : 12	108 : 2	Mischaracterizes testimony; Misleading
108 : 7	108 : 8	Colloquy
108 : 19	108 : 25	Question without Answer
109 : 3	109 : 3	Colloquy

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109 : 12	109 : 12	Colloquy
109 : 18	110 : 5	Question without Answer; Vague &Ambiguous
110 : 10	110 : 10	Colloquy
110 : 14	110 : 21	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Asked & Answered
110 : 22	111 : 1	Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
111 : 4	111 : 5	Colloquy
111 : 18	111 : 19	Colloquy
111 : 25	112 : 3	Lacks foundation/Assumes fact not in evidence; Argumentative: Mischaracterizes testimony
112 : 4	112 : 6	Colloquy
112 : 9	112 : 24	Question without Answer; Mischaracterizes testimony; Asked & Answered
113 : 1	113 : 1	Colloquy
125 : 11	125 : 13	Colloquy
125 : 19	125 : 22	Asked & Answered
129 : 10	129 : 12	Irrelevant; Vague &Ambiguous; Argumentative; Misleading
131 : 17	131 : 24	Irrelevant
136 : 4	136 : 4	Colloquy
136 : 9	136 : 10	Colloquy
136 : 16	136 : 16	Colloquy
136 : 22	136 : 22	Colloquy
150 : 17	151 : 2	Question without Answer; Colloquy
151 : 23	151 : 24	Asked & Answered; Argumentative; Lacks personal knowledge - Speculation
161 : 8	161 : 12	Hearsay
162 : 1	162 : 21	Hearsay
180 : 24	181 : 6	Hearsay
181 : 9	181 : 20	Colloquy
182 : 2	182 : 5	Colloquy
182 : 8	182 : 19	Question without Answer; Colloquy
182 : 23	182 : 23	Colloquy
183 : 15	183 : 16	Colloquy
185 : 1	185 : 3	Unintelligible, confusing ; Lacks foundation/Assumes fact not in evidence
185 : 4	185 : 5	Colloquy
185 : 6	185 : 11	Lacks foundation/Assumes fact not in evidence; Unintelligible, confusing

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195 : 7	195 : 9	Colloquy
195 : 20	195 : 21	Colloquy
196 : 2	196 : 2	Colloquy
198 : 3	198 : 4	Colloquy
204 : 5	204 : 5	Colloquy
208 : 22	209 : 12	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
209 : 13	210 : 2	Question without Answer; Not responsive
210 : 9	210 : 9	Colloquy
210 : 13	211 : 1	Asked & Answered; Lacks foundation/Assumes fact not in evidence; Misleading
211 : 6	211 : 6	Colloquy
212 : 23	212 : 25	Colloquy
213 : 6	213 : 14	Colloquy
213 : 17	213 : 25	Document speaks for itself; Lacks personal knowledge - Speculation
214 : 9	216 : 18	Mischaracterizes document; Mischaracterizes testimony; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
224 : 2	224 : 14	Hearsay
224 : 25	226 : 5	Hearsay
226 : 18	226 : 21	Hearsay
229 : 21	230 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
234 : 7	234 : 15	Compound
238 : 22	239 : 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
239 : 12	239 : 23	Hearsay
243 : 18	244 : 16	Lacks personal knowledge - Speculation; Hearsay
243 : 21	243 : 23	Colloquy
245 : 24	246 : 4	Mischaracterizes documents; Mischaracterizes testimony; Document speaks for itself; Lacks foundation/Assumes fact not in evidence
248 : 10	249 : 20	Hearsay
250 : 20	251 : 11	Hearsay; Mischaracterizes document; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence
252 : 2	252 : 25	Lacks personal knowledge - Speculation
253 : 10	253 : 21	Hearsay
254 : 21	254 : 25	Hearsay
255 : 20	256 : 3	Lacks personal knowledge - Speculation; Hearsay
256 : 7	256 : 7	Colloquy

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257 : 5	257 : 8	Answer without Question
258 : 15	258 : 21	Lacks personal knowledge - Speculation
259 : 9	259 : 16	Irrelevant
261 : 25	263 : 4	Lacks personal knowledge - Speculation
268 : 15	268 : 21	Lacks personal knowledge - Speculation
268 : 25	269 : 5	Argumentative
272 : 5	273 : 3	Argumentative; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
276 : 25	276 : 25	Colloquy
277 : 5	277 : 5	Colloquy
277 : 13	277 : 23	Colloquy
278 : 18	278 : 19	Colloquy
278 : 24	278 : 24	Colloquy
282 : 23	282 : 23	Colloquy
285 : 11	285 : 19	Colloquy
286 : 5	286 : 6	Colloquy
290 : 7	290 : 10	Lacks personal knowledge - Speculation
290 : 11	290 : 12	Colloquy
290 : 13	290 : 19	Lacks personal
290 : 20	290 : 21	Colloquy
290 : 22	291 : 8	Lacks personal knowledge - Speculation
291 : 9	291 : 10	Colloquy
291 : 11	291 : 16	Lacks personal knowledge - Speculation
291 : 17	291 : 17	Colloquy
291 : 18	291 : 25	Lacks personal knowledge - Speculation
292 : 1	292 : 2	Colloquy
292 : 3	292 : 5	Lacks personal knowledge - Speculation
292 : 8	292 : 8	Colloquy
299 : 19	299 : 23	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
299 : 24	299 : 25	Colloquy
300 : 1	300 : 16	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
318 : 5	318 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Vague &Ambiguous
318 : 18	318 : 20	Colloquy
319 : 1	319 : 8	Asked & Answered; Lacks foundation/Assumes fact not in evidence
323 : 7	324 : 24	Lacks personal knowledge - Speculation
327 : 18	328 : 2	Mischaracterizes testimony

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330 : 21	331 : 6	Mischaracterizes document; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Misleading
331 : 11	331 : 13	Colloquy
331 : 21	332 : 13	Mischaracterizes document; Argumentative; Limiting
336 : 20	336 : 23	Lacks foundation/Assumes fact not in evidence
336 : 24	336 : 25	Colloquy
337 : 1	337 : 7	Lacks foundation/Assumes fact not in evidence
343 : 6	343 : 10	Lacks foundation/Assumes fact not in evidence; Unintelligible, confusing ; Vague &Ambiguous; Misleading
343 : 13	343 : 17	Lacks foundation/Assumes fact not in evidence
355 : 16	355 : 19	Lacks foundation/Assumes fact not in evidence; Misleading
356 : 12	356 : 14	Lacks foundation/Assumes fact not in evidence; Misleading
364 : 18	364 : 21	Hearsay
365 : 17	366 : 8	Hearsay
368 : 18	369 : 2	Argumentative; Asked & Answered
370 : 13	370 : 21	Asked & Answered
372 : 21	372 : 25	Incomplete Answer
377 : 6	379 : 9	Lacks foundation/Assumes fact not in evidence; Misleading
381 : 23	382 : 2	Lacks foundation/Assumes fact not in evidence
387 : 18	388 : 1	Asked & Answered; Lacks foundation/Assumes fact not in evidence; Misleading
391 : 8	391 : 17	Hearsay
396 : 4	398 : 6	Hearsay; Lacks personal knowledge - Speculation
398 : 13	398 : 25	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
399 : 19	400 : 15	Hearsay; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
401 : 17	402 : 13	Hearsay
403 : 13	404 : 3	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
404 : 13	405 : 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Vague &Ambiguous; Misleading
405 : 24	405 : 25	Argumentative; Lacks foundation/Assumes fact not in evidence
406 : 1	406 : 4	Colloquy
406 : 7	406 : 13	Hearsay
414 : 17	414 : 18	Lacks foundation/Assumes fact not in evidence
414 : 19	414 : 20	Colloquy
414 : 21	415 : 5	Lacks foundation/Assumes fact not in evidence

From *Page: Line*	Through *Page: Line*	Objections
415 : 6	415 : 16	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony; Misleading
425 : 23	425 : 24	Colloquy
431 : 7	431 : 8	Colloquy
509 : 15	510 : 11	Hearsay
555 : 14	555 : 19	Argumentative; Limiting

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BORROWDALE, L.
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Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
7 : 4	7 : 8 Ending w/ "record"	Irrelevant; Attorney testifying
8 : 1	8 : 6	Colloquy
8 : 19	8 : 24	Leading the witness
8 : 25	9 : 3	Colloquy
9 : 20	10 : 1	Leading the witness
12 : 17	13 : 5	Hearsay; Vague &Ambiguous
13 : 6	13 : 6	Colloquy
13 : 7	13 : 7	Hearsay; Vague &Ambiguous
13 : 8	13 : 25	Document speaks for itself; Hearsay
14 : 1	14 : 3	Lacks foundation/Assumes fact not in evidence; Document speaks for itself; Hearsay
14 : 4	14 : 14	Lacks foundation/Assumes fact not in evidence; Document speaks for itself; Hearsay; Leading the witness
14 : 16	15 : 1	Lacks foundation/Assumes fact not in evidence; Document speaks for itself; Hearsay; Leading the witness
15 : 2	15 : 2	Colloquy
15 : 3	15 : 6	Lacks foundation/Assumes fact not in evidence; Document speaks for itself; Hearsay; Leading the witness
15 : 7	15 : 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
15 : 14	15 : 16	Leading the witness
15 : 18	15 : 22	Lacks personal knowledge - Speculation
15 : 23	15 : 24	Leading the witness
15 : 25	16 : 16	Hearsay; Document speaks for itself
16 : 17	16 : 18	Vague &Ambiguous
16 : 19	16 : 19	Colloquy
16 : 20	16 : 20	Vague &Ambiguous
16 : 21	16 : 23	Vague &Ambiguous; Hearsay; Misleading; Document speaks for itself
16 : 24	17 : 1	Vague &Ambiguous
17 : 2	17 : 2	Colloquy
17 : 3	17 : 6	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
17 : 7	17 : 8	Lacks personal knowledge - Speculation

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From *Page: Line*	Through *Page: Line*	Objections
17 : 9	17 : 12	Colloquy
17 : 13	17 : 16	Lacks personal knowledge - Speculation
17 : 17	17 : 18	Colloquy
17 : 19	17 : 19	Lacks personal knowledge - Speculation
17 : 20	17 : 23	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading; Question without Answer
17 : 24	18 : 2	Colloquy
18 : 3	18 : 3	Answer without Question
18 : 4	18 : 5	Irrelevant; Colloquy
18 : 6	18 : 9	Unintelligible, confusing ; Misleading; Lacks foundation/Assumes fact not in evidence; Incomplete Question & Answer
18 : 11	18 : 12	Not responsive; Answer without Question
18 : 13	18 : 14	Unintelligible, confusing ; Lacks foundation/Assumes fact not in evidence; Misleading; Irrelevant
18 : 15	18 : 23	Leading the witness; Hearsay; Document speaks for itself
18 : 24	18 : 25	Vague &Ambiguous
19 : 1	19 : 1	Colloquy
19 : 2	19 : 2	Vague &Ambiguous
19 : 3	19 : 4	Leading the witness; Lacks foundation/Assumes fact not in evidence
19 : 5	19 : 5	Colloquy
19 : 6	19 : 6	Leading the witness
19 : 7	19 : 9	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Misleading; Vague &Ambiguous
19 : 13	19 : 14	Colloquy
19 : 15	19 : 18	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
19 : 22	19 : 22	Colloquy
19 : 23	19 : 25	Irrelevant; Vague &Ambiguous; Leading the witness
20 : 1	20 : 1	Colloquy
20 : 2	20 : 6	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Hearsay
20 : 7	20 : 8	Colloquy
20 : 9	20 : 10	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Hearsay

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From *Page: Line*	Through *Page: Line*	Objections
20 : 11	20 : 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading; Leading the witness
20 : 14	20 : 15	Colloquy
20 : 16	20 : 16	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Leading the witness; Misleading
20 : 17	20 : 17	Colloquy
20 : 19	20 : 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
20 : 22	21 : 2	Lacks foundation/Assumes fact not in evidence; Leading the witness; Hearsay; Misleading
21 : 3	21 : 3	Colloquy
21 : 4	21 : 10	Lacks foundation/Assumes fact not in evidence; Leading the witness; Hearsay; Misleading
21 : 11	21 : 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
21 : 14	21 : 15	Colloquy
21 : 16	21 : 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
21 : 22	21 : 24	Vague &Ambiguous; Leading the witness; Lacks personal knowledge - Speculation; Misleading
21 : 25	22 : 1	Colloquy
22 : 2	22 : 2	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading
22 : 3	22 : 3	Colloquy
22 : 4	22 : 4	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading
22 : 23	23 : 1	Colloquy
23 : 2	23 : 2	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
23 : 3	23 : 13	Hearsay; Document speaks for itself; Lacks personal knowledge - Speculation; Misleading
23 : 14	23 : 18	Lacks foundation/Assumes fact not in evidence; Hearsay; Document speaks for itself
23 : 19	23 : 24	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Hearsay

From *Page: Line*	Through *Page: Line*	Objections
23 : 25	24 : 2	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading
24 : 3	24 : 3	Colloquy
24 : 4	24 : 9	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading
24 : 10	24 : 12	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Compound
24 : 13	24 : 13	Colloquy
24 : 14	24 : 14	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Compound
24 : 15	24 : 17	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
24 : 18	24 : 21	Leading the witness
24 : 22	24 : 22	Colloquy
24 : 23	24 : 23	Leading the witness
24 : 24	25 : 6	Leading the witness; Hearsay; Lacks personal knowledge - Speculation; Document speaks for itself
25 : 7	25 : 8	Colloquy
25 : 9	25 : 9	Hearsay; Document speaks for itself; Leading the witness; Lacks personal knowledge - Speculation
25 : 10	25 : 11	Attorney testifying
25 : 12	25 : 12	Answer without Question
26 : 9	26 : 11	Incomplete Question; Leading the witness
26 : 12	26 : 12	Colloquy
26 : 13	26 : 14	Incomplete Question; Leading the witness
26 : 15	26 : 16	Leading the witness
26 : 17	26 : 17	Colloquy
26 : 18	26 : 21	Leading the witness
26 : 22	27 : 3	Leading the witness; Hearsay; Document speaks for itself
27 : 4	27 : 4	Colloquy
27 : 5	27 : 5	Leading the witness; Hearsay; Document speaks for itself
27 : 6	27 : 8	Lacks personal knowledge - Speculation; Misleading
27 : 9	27 : 10	Colloquy
27 : 11	27 : 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
27 : 14	27 : 14	Colloquy

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From *Page: Line*	Through *Page: Line*	Objections
27 : 15	27 : 15	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
27 : 16	27 : 18	Vague &Ambiguous; Lacks personal knowledge - Speculation; Misleading
27 : 19	27 : 19	Colloquy
27 : 20	27 : 23	Vague &Ambiguous; Lacks personal knowledge - Speculation; Misleading; Not responsive
27 : 24	28 : 2	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Misleading; Argumentative; Prejudicial more than Probative
28 : 3	28 : 3	Colloquy
28 : 4	28 : 4	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Misleading; Argumentative; Prejudicial more than Probative
28 : 9	28 : 9	Irrelevant
28 : 10	28 : 15	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Misleading; Argumentative; Prejudicial more than Probative; Mischaracterizes testimony
28 : 16	28 : 24	Hearsay; Document speaks for itself; Lacks personal knowledge - Speculation; Misleading; Prejudicial more than Probative
28 : 25	29 : 4	Leading the witness
29 : 12	29 : 14	Question without Answer
29 : 15	29 : 15	Colloquy
29 : 16	29 : 16	Irrelevant
29 : 17	29 : 19	Compound; Vague &Ambiguous
29 : 20	29 : 20	Colloquy
29 : 21	30 : 5	Compound; Vague &Ambiguous
30 : 6	30 : 6	Colloquy
30 : 7	30 : 10	Lacks personal knowledge - Speculation; Misleading
30 : 11	30 : 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
30 : 14	30 : 15	Colloquy
30 : 16	31 : 4	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
31 : 5	31 : 9	Vague &Ambiguous; Unintelligible, confusing ; Hearsay; Leading the witness; Document speaks for itself

From *Page: Line*	Through *Page: Line*	Objections
31 : 10	31 : 11	Colloquy
31 : 12	31 : 14	Vague &Ambiguous; Unintelligible, confusing ; Hearsay; Leading the witness
31 : 15	31 : 17	Irrelevant; Attorney testifying; Colloquy
31 : 18	31 : 21	Attorney testifying; Colloquy
31 : 22	32 : 2	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Vague &Ambiguous; Hearsay; Document speaks for itself; Misleading
32 : 21	32 : 23	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Leading the witness; Misleading; Prejudicial more than Probative
32 : 24	32 : 24	Colloquy
32 : 25	33 : 4	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Leading the witness; Hearsay; Misleading
33 : 5	33 : 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Attorney testifying; Prejudicial more than Probative; Misleading; Vague &Ambiguous; Unintelligible
33 : 8	33 : 8	Colloquy
33 : 9	33 : 20	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Hearsay; Document speaks for itself; Misleading; Prejudicial more than Probative
33 : 21	33 : 21	Colloquy
33 : 22	33 : 24	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Hearsay; Document speaks for itself; Misleading; Prejudicial more than Probative
33 : 25	34 : 6	Leading the witness
34 : 7	34 : 11	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Hearsay; Document speaks for itself; Misleading; Prejudicial more than Probative
34 : 12	34 : 12	Colloquy
34 : 13	34 : 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness the witness; Hearsay; Document speaks for itself; Misleading; Prejudicial more than Probative

From *Page: Line*	Through *Page: Line*	Objections
34 : 14	34 : 18	Lacks foundation/Assumes fact not in evidence
34 : 19	34 : 20	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
34 : 21	34 : 22	Colloquy
34 : 23	34 : 23	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
34 : 24	35 : 1	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hypothetical; Misleading; Prejudicial more than Probative; Argumentative
35 : 2	35 : 2	Colloquy
35 : 3	35 : 3	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hypothetical; Misleading; Prejudicial more than Probative; Argumentative
35 : 4	35 : 7	Question without Answer; Vague &Ambiguous
35 : 8	35 : 11	Colloquy
35 : 12	35 : 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
35 : 14	35 : 15	Colloquy
35 : 16	35 : 17	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
35 : 18	35 : 18	Lacks personal knowledge - Speculation
35 : 19	35 : 20	Colloquy
35 : 22	35 : 23	Colloquy
35 : 24	35 : 25	Lacks personal knowledge - Speculation
36 : 1	36 : 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Prejudicial more than Probative; Vague &Ambiguous
36 : 8	36 : 8	Colloquy
36 : 9	36 : 9	Answer without Question
36 : 10	36 : 10	Colloquy
36 : 11	36 : 11	Answer without Question
36 : 12	36 : 14	Compound
36 : 15	36 : 17	Colloquy
36 : 18	36 : 19	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
36 : 20	36 : 20	Colloquy
36 : 21	36 : 23	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
36 : 24	36 : 24	Colloquy

From *Page: Line*	Through *Page: Line*	Objections
36 : 25	37 : 1	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
37 : 2	37 : 2	Colloquy
37 : 3	37 : 5	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
37 : 6	37 : 9	Incomplete Answer
37 : 10	37 : 11	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Prejudicial more than Probative; Unintelligible, confusing; Vague &Ambiguous
37 : 12	37 : 13	Colloquy
37 : 14	37 : 14	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Prejudicial more than Probative; Unintelligible, confusing ; Vague &Ambiguous
37 : 15	37 : 16	Attorney testifying
37 : 17	37 : 17	Colloquy
37 : 18	37 : 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
37 : 22	37 : 23	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Prejudicial more than Probative
37 : 24	37 : 25	Colloquy
38 : 1	38 : 1	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Prejudicial more than Probative
38 : 2	38 : 3	Lacks personal knowledge - Speculation
38 : 4	38 : 5	Colloquy
38 : 6	38 : 6	Lacks personal knowledge - Speculation
38 : 10	38 : 19	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Hearsay; Document speaks for itself; Leading the witness
38 : 20	39 : 1	Leading the witness
39 : 2	39 : 2	Colloquy
39 : 3	39 : 17	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Hearsay; Document speaks for itself

From *Page: Line*	Through *Page: Line*	Objections
39 : 18	39 : 21	Lacks personal knowledge - Speculation; Misleading; Hearsay; Document speaks for itself; Hypothetical; Argumentative
39 : 22	39 : 22	Colloquy
39 : 23	40 : 2	Lacks personal knowledge - Speculation; Misleading; Hearsay; Document speaks for itself; Hypothetical; Argumentative
40 : 3	40 : 6	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
40 : 7	40 : 8	Colloquy
40 : 9	40 : 9	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
40 : 10	40 : 15	Hearsay; Lacks personal knowledge - Speculation; Document speaks for itself; Misleading
40 : 19	41 : 6	Hearsay; Lacks personal knowledge - Speculation; Document speaks for itself; Misleading
41 : 7	41 : 16	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Irrelevant; Misleading; Prejudicial more than Probative
41 : 18	41 : 19	Lacks personal knowledge - Speculation; Irrelevant
41 : 20	41 : 25	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Prejudicial more than Probative; Misleading
42 : 1	42 : 4	Lacks personal knowledge - Speculation; Not responsive; Irrelevant
42 : 14	42 : 15	Lacks personal knowledge - Speculation; Not responsive
42 : 16	42 : 18	Lacks personal knowledge - Speculation
42 : 19	43 : 6	Lacks personal knowledge - Speculation; Irrelevant; Misleading
43 : 7	43 : 8	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
43 : 9	43 : 10	Colloquy
43 : 11	43 : 17	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
43 : 18	43 : 19	Irrelevant
43 : 20	43 : 20	Colloquy
43 : 21	43 : 21	Irrelevant
43 : 22	44 : 1	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Prejudicial more than Probative
44 : 2	44 : 3	Lacks personal knowledge - Speculation; Unintelligible, confusing; Asked & Answered; Misleading; Prejudicial more than Probative

From *Page: Line*	Through *Page: Line*	Objections
44 : 4	44 : 5	Lacks personal knowledge - Speculation; Unintelligible, confusing ; Vague &Ambiguous
44 : 6	44 : 6	Incomplete Answer
44 : 8	44 : 15	Lacks personal knowledge - Speculation; Unintelligible, confusing ; Vague &Ambiguous
44 : 16	44 : 20	Colloquy
44 : 21	44 : 24	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading; Prejudicial more than Probative
44 : 25	44 : 25	Colloquy
45 : 1	45 : 1	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading; Prejudicial more than Probative
45 : 2	45 : 2	Colloquy
45 : 3	45 : 5	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading; Prejudicial more than Probative
45 : 6	45 : 7	Colloquy
45 : 8	45 : 11	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading; Prejudicial more than Probative; Argumentative
45 : 12	45 : 13	Colloquy
45 : 14	45 : 16	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading; Prejudicial more than Probative; Argumentative
45 : 17	45 : 17	Colloquy
45 : 18	45 : 18	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading; Prejudicial more than Probative; Argumentative
45 : 19	46 : 3	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay; Document speaks for itself; Prejudicial more than Probative; Argumentative; Misleading
46 : 4	46 : 7	Colloquy
48 : 19	49 : 8	Hearsay; Document speaks for itself; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
76 : 12	76 : 13	Leading the witness; Lacks foundation/Assumes fact not in evidence
76 : 14	76 : 14	Colloquy

From *Page: Line*	Through *Page: Line*	Objections
76 : 15	76 : 16	Not responsive; Irrelevant
76 : 17	76 : 22	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
76 : 23	76 : 24	Lacks personal knowledge - Speculation; Misleading; Vague &Ambiguous
76 : 25	76 : 25	Colloquy
77 : 1	77 : 2	Lacks personal knowledge - Speculation; Misleading; Vague &Ambiguous
77 : 6	77 : 9	Lacks foundation/Assumes fact not in evidence; Misleading; Prejudicial more than Probative
77 : 13	77 : 24	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Prejudicial more than Probative; Vague &Ambiguous
77 : 25	78 : 1	Colloquy
78 : 2	78 : 4	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Prejudicial more than Probative; Vague &Ambiguous
78 : 5	78 : 6	Colloquy
78 : 7	78 : 7	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Prejudicial more than Probative; Vague &Ambiguous
78 : 14	78 : 15	Vague &Ambiguous; Compound
78 : 16	78 : 16	Colloquy
78 : 17	78 : 21	Vague &Ambiguous; Compound
78 : 22	78 : 22	Colloquy
78 : 23	79 : 5	Lacks personal knowledge - Speculation; Prejudicial more than Probative; Misleading

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8/31/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
14 : 2	15 : 17	Hypothetical; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
15 : 18	16 : 25	Calls for legal conclusion
19 : 19	20 : 20	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
21 : 8	21 : 12	Colloquy; Attorney testifying
21 : 22	22 : 18	Lacks personal knowledge - Speculation
22 : 25	23 : 9	Argumentative
26 : 25	27 : 16	Asked & Answered; Lacks personal knowledge - Speculation
38 : 7	39 : 4	Lacks personal knowledge - Speculation; Asked & Answered
41 : 19	42 : 14	Lacks personal knowledge - Speculation; Asked & Answered; Lacks foundation/Assumes fact not in evidence
45 : 24	46 : 14	Vague &Ambiguous; Lacks personal knowledge - Speculation
48 : 25	49 : 1	Colloquy
49 : 23	50 : 14	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
52 : 24	53 : 18	Vague &Ambiguous; Question without Answer
55 : 6	55 : 12	Lacks foundation/Assumes fact not in evidence
59 : 12	59 : 14	Colloquy
60 : 10	60 : 21	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hypothetical
61 : 3	63 : 16	Irrelevant; Hypothetical; Lacks foundation/Assumes fact not in evidence
63 : 25	64 : 3	Vague &Ambiguous
64 : 12	65 : 8	Irrelevant; Asked & Answered
67 : 15	67 : 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
68 : 7	68 : 25	Lacks personal knowledge - Speculation
69 : 5	69 : 13	Irrelevant
69 : 14	70 : 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
71 : 12	71 : 13	Colloquy
71 : 18	72 : 9	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
79 : 7	79 : 14	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Lacks personal knowledge - Speculation

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From *Page: Line*	Through *Page: Line*	Objections
79 : 15	79 : 15	Incomplete Question
79 : 19	81 : 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
84 : 17	85 : 3	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Misleading
88 : 2	88 : 14	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
88 : 15	88 : 15	Incomplete Question
96 : 17	96 : 24	Lacks personal knowledge - Speculation; Irrelevant
103 : 13	103 : 19	Vague &Ambiguous; Question without Answer
103 : 25	104 : 1	Colloquy
104 : 4	104 : 9	Question without Answer; Vague &Ambiguous
104 : 14	104 : 23	Question without Answer
105 : 4	105 : 17	Lacks personal knowledge - Speculation
106 : 16	106 : 23	Colloquy
107 : 1	107 : 7	Lacks foundation/Assumes fact not in evidence; Mischaracterizes document
107 : 14	109 : 3	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
109 : 14	109 : 24	Question without Answer; Vague &Ambiguous; Asked & Answered
112 : 19	112 : 20	Colloquy
112 : 23	113 : 7	Lacks personal knowledge - Speculation
113 : 17	113 : 17	Colloquy
116 : 18	118 : 21	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
119 : 8	122 : 11	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
122 : 23	123 : 18	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
125 : 7	125 : 17	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
128 : 24	129 : 6	Irrelevant; Privileged
135 : 13	135 : 13	Colloquy
135 : 18	135 : 20	Vague &Ambiguous
138 : 24	139 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
145 : 20	145 : 24	Mischaracterizes document
146 : 23	146 : 23	Colloquy

From *Page: Line*	Through *Page: Line*	Objections
147 : 12	149 : 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
149 : 7	149 : 7	Incomplete Question
149 : 21	152 : 3	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
152 : 7	152 : 7	Colloquy
154 : 6	154 : 17	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
159 : 17	159 : 17	Colloquy
162 : 6	162 : 14	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hypothetical
165 : 22	166 : 11	Lacks personal knowledge - Speculation
169 : 18	169 : 18	Incomplete Question
170 : 7	170 : 7	Colloquy
170 : 13	170 : 22	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Asked & Answered; Document speaks for itself
172 : 9	172 : 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Hypothetical
174 : 10	175 : 5	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Vague &Ambiguous
175 : 22	176 : 4	Attorney testifying; Colloquy
177 : 10	177 : 10	Question without Answer
180 : 13	180 : 21	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
188 : 13	189 : 7	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
191 : 10	192 : 4	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hypothetical
193 : 10	194 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
195 : 7	195 : 11	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
198 : 8	198 : 8	Incomplete Question
198 : 18	199 : 12	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
199 : 18	203 : 21	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
204 : 8	206 : 7	Vague &Ambiguous; Hypothetical; Lacks foundation/Assumes fact not in evidence

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From *Page: Line*	Through *Page: Line*	Objections
207 : 11	207 : 16	Irrelevant; Privileged
207 : 20	208 : 16	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
208 : 20	208 : 20	Colloquy
209 : 2	209 : 5	Colloquy; Question without Answer; Not responsive
209 : 25	210 : 21	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
211 : 2	213 : 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Hypothetical
213 : 24	214 : 2	Question without Answer
217 : 5	217 : 16	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Vague &Ambiguous; Misleading
219 : 3	219 : 3	Colloquy
219 : 8	220 : 3	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
220 : 21	220 : 23	Privileged; Irrelevant
221 : 12	222 : 3	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
222 : 13	223 : 11	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
223 : 12	224 : 2	Argumentative; Lacks foundation/Assumes fact not in evidence
225 : 16	226 : 11	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Mischaracterizes document; Mischaracterizes testimony
234 : 7	235 : 25	Argumentative; Irrelevant; Misleading; Lacks foundation/Assumes fact not in evidence
240 : 5	241 : 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
241 : 2	241 : 4	Mischaracterizes testimony
244 : 6	244 : 10	Incomplete Question
245 : 12	248 : 1	Irrelevant; Calls for legal conclusion
248 : 6	252 : 4	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hypothetical
252 : 7	252 : 24	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
253 : 3	253 : 9	Question without Answer
253 : 10	257 : 13	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
258 : 18	259 : 7	Lacks foundation/Assumes fact not in evidence; Mischaracterizes document

From *Page: Line*	Through *Page: Line*	Objections
259 : 20	261 : 22	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hypothetical
265 : 8	265 : 16	Mischaracterizes document; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence
265 : 17	265 : 17	Incomplete Question
267 : 20	267 : 22	Privileged; Irrelevant
269 : 6	269 : 11	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence; Misleading
269 : 12	270 : 8	Argumentative; Misleading
271 : 1	271 : 12	Argumentative; Misleading; Mischaracterizes document
274 : 8	274 : 21	Privileged; Irrelevant
276 : 8	277 : 10	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
277 : 11	279 : 22	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Mischaracterizes document
280 : 2	287 : 7	Argumentative; Misleading; Lacks foundation/Assumes fact not in evidence
289 : 2	289 : 6	Lacks foundation/Assumes fact not in evidence; Misleading
289 : 7	290 : 3	Argumentative; Lacks foundation/Assumes fact not in evidence
290 : 4	290 : 9	Argumentative; Harassing; Asked & Answered; Lacks foundation/Assumes fact not in evidence
290 : 10	291 : 3	Colloquy
291 : 7	291 : 25	Colloquy
292 : 14	293 : 7	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Asked & Answered; Argumentative
293 : 8	297 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hypothetical; Argumentative
309 : 22	309 : 23	Colloquy
309 : 24	310 : 3	Vague &Ambiguous
310 : 17	310 : 20	Colloquy
311 : 18	312 : 11	Misleading; Argumentative; Vague &Ambiguous
314 : 15	314 : 17	Lacks personal knowledge - Speculation; Asked & Answered
321 : 20	322 : 11	Hypothetical
324 : 20	325 : 24	Lacks personal knowledge - Speculation
325 : 25	330 : 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
331 : 3	331 : 5	Irrelevant; Privileged
331 : 6	331 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself

From *Page: Line*	Through *Page: Line*	Objections
331 : 15	332 : 4	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Misleading
332 : 5	333 : 4	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Document speaks for itself
333 : 15	335 : 4	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
346 : 17	346 : 24	Hypothetical; Lacks personal knowledge -Special

ENTWISTLE, T.
7/1/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
47 :17	47 : 20	Vague &Ambiguous; Irrelevant; Misleading
48 : 1	48 : 4	Vague &Ambiguous; Irrelevant; Misleading
48 : 5	49 : 7	Misleading; Irrelevant
49 : 21	49 : 23	Vague &Ambiguous; Misleading
50 : 1	50 : 4	Lacks foundation/Assumes fact not in evidence Misleading; Vague &Ambiguous
50 : 10	50 : 11	Colloquy
50 : 14	50 : 16	Lacks foundation/Assumes fact not in evidence Vague &Ambiguous
50 : 23	50 : 23	Lacks foundation/Assumes fact not in evidence Vague &Ambiguous
50 : 24	51 : 1	Lacks foundation/Assumes fact not in evidence Vague &Ambiguous
51 : 8	51 : 10	Vague &Ambiguous; Lacks foundation
51 : 11	51 : 11	Attorney Testifying
51 : 25	51 : 25	Colloquy
52 : 11	52 : 14	Asked & Answered; Argumentative
52 : 19	53 : 2	Asked & Answered; Argumentative
144 : 21	144 : 23	Colloquy
144 : 24	145 : 2	Asked & Answered
146 : 16	147 : 3	Lacks personal knowledge - Speculation
190 : 16	190 : 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence Misleading
191 : 15	192 : 1	Lacks personal knowledge - Speculation; Lacks foundation
192 : 7	192 : 18	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
193 : 17	193 : 24	Lacks foundation
195 : 1	196 : 7	Lacks foundation
202 : 23	203 : 6	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
203 : 24	205 : 1	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
205 : 21	206 : 3	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
206 : 15	206 : 18	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
207 : 4	207 : 8	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation

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From *Page: Line*	Through *Page: Line*	Objections
207 : 22	208 : 4	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
213 : 5	214 : 13	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
220 : 21	220 : 25	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
221 : 5	222 : 8	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
223 : 20	223 : 25	Question without Answer
228 : 8	229 : 4	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
258 : 17	259 : 14	Mischaracterizes testimony
263 : 17	263 : 20	Vague &Ambiguous; Misleading; Incomplete Question & Answer
264 : 5	264 : 6	Incomplete Question & Answer
272 : 9	272 : 10	Mischaracterizes Document; Lacks foundation
272 : 20	272 : 21	Mischaracterizes Document; Lacks foundation
273 : 8	273 : 22	Lacks foundation/Assumes fact not in evidence Misleading; Argumentative
273 : 25	274 : 6	Misleading; Argumentative; Lacks foundation
274 : 18	275 : 3	Lacks foundation
277 : 22	278 : 3	Lacks foundation/Assumes fact not in evidence Misleading; Argumentative
278 : 6	278 : 6	Lacks foundation/Assumes fact not in evidence Misleading; Argumentative
285 : 1	285 7	Asked & Answered
285 : 8	285 : 15	Asked & Answered; Argumentative
300 : 19	300 : 21	Colloquy
309 : 4	309 : 7	Lacks foundation
309 : 12	309 : 20	Asked & Answered
310 : 10	310 : 22	Lacks foundation/Assumes fact not in evidence Argumentative
310 : 23	311 : 25	Argumentative; Lacks foundation/Assumes fact not in evidence Asked & Answered; Harassing
312 : 3	312 : 7	Attorney Testifying
312 : 8	313 : 17	Argumentative; Harassing; Misleading; Asked & Answered; Lacks foundation
314 : 1	314 : 5	Lacks foundation
322 : 16	322 : 24	Asked & Answered
337 : 2	337 : 5	Lacks foundation/Assumes fact not in evidence Argumentative
337 : 6	337 : 7	Colloquy

From *Page: Line*	Through *Page: Line*	Objections
337 : 8	337 : 9	Lacks foundation/Assumes fact not in evidence Argumentative
337 : 10	337 : 17	Lacks foundation/Assumes fact not in evidence Argumentative
337 : 18	338 : 4	Lacks foundation/Assumes fact not in evidence Vague &Ambiguous; Lacks personal knowledge - Speculation
338 : 5	338 : 21	Lacks personal knowledge - Speculation
343 : 17	344 : 3	Lacks personal knowledge - Speculation
344 : 18	345 : 16	Lacks personal knowledge - Speculation
346 : 11	346 : 20	Lacks personal knowledge - Speculation
346 : 24	347 : 4	Lacks personal knowledge - Speculation
349 : 12	349 : 22	Lacks personal knowledge - Speculation
350 : 4	350 : 18	Irrelevant
356 : 19	358 : 14	Mischaracterizes Document; Lacks personal knowledge - Speculation
360 : 18	361 : 7	Lacks personal knowledge - Speculation
361 : 22	362 : 7	Lacks personal knowledge - Speculation
362 : 8	362 : 11	Lacks personal knowledge - Speculation; Lacks foundation
364 : 4	364 : 6	Privileged
365 : 16	365 : 19	Lacks foundation/Assumes fact not in evidence Mischaracterizes Document
366 : 9	366 : 20	Misleading
371 : 9	371 : 9	Answer without Question
371 : 20	372 : 2	Lacks foundation/Assumes fact not in evidence Mischaracterizes Document
372 : 10	372 : 17	Mischaracterizes Document; Lacks foundation/Assumes fact not in evidence Argumentative
383 : 5	383 : 15	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
383 : 24	384 : 16	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
384 : 24	385 : 13	Lacks personal knowledge - Speculation; Lacks foundation
387 : 1	387 : 4	Lacks foundation/Assumes fact not in evidence Mischaracterizes Document
387 : 8	387 : 18	Lacks foundation/Assumes fact not in evidence Attorney Testifying; Argumentative
387 : 21	388 : 6	Lacks foundation/Assumes fact not in evidence Argumentative
388 : 9	388 : 9	Lacks foundation
388 : 10	388 : 13	Colloquy; Argumentative
388 : 16	389 : 2	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation; Argumentative
394 : 3	394 : 13	Lacks foundation

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From *Page: Line*	Through *Page: Line*	Objections
399 : 9	399 : 17	Lacks personal knowledge - Speculation
403 : 16	404 : 19	Lacks personal knowledge - Speculation
405 : 1	405 : 18	Lacks personal knowledge - Speculation
406 : 4	407 : 4	Lacks personal knowledge - Speculation
409 : 11	409 : 16	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
409 : 20	410 : 5	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
416 : 2	416 : 12	Mischaracterizes Testimony
416 : 13	417 : 6	Mischaracterizes testimony; Lacks foundation
417 : 25	417 : 25	Argumentative; Mischaracterizes Testimony; Lacks foundation
418 : 17	418 : 25	Mischaracterizes Testimony; Argumentative; Lacks foundation
419 : 1	419 : 4	Argumentative
420 : 1	420 : 12	Mischaracterizes Testimony
423 : 16	423 : 21	Attorney Testifying
425 : 16	426 : 14	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
426 : 22	427 : 5	Lacks personal knowledge - Speculation; Lacks foundation
428 : 12	429 : 2	Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation; Attorney Testifying

BEYERLEIN, M.
3/25/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
18 : 23	18 : 23	Incomplete Answer
115 : 2	115 : 4	Compound
115 : 5	115 : 5	Colloquy
115 : 6	115 : 6	Compound
139 : 16	139 : 17	Colloquy
139 : 23	139 : 23	Incomplete Question & Answer
140 : 14	140 : 14	Colloquy
140 : 16	140 : 18	Vague &Ambiguous; Misleading
141 : 5	141 : 7	Vague &Ambiguous; Misleading
144 : 25	144 : 25	Question without Answer; Argumentative; Prejudicial more than Probative
147 : 19	147 : 21	Lacks foundation
147 : 24	148 : 3	Lacks foundation
165 : 4	165 : 4	Colloquy
166 : 10	166 : 13	Colloquy
166 : 17	166 : 18	Incomplete Question & Answer; Lacks personal knowledge - Speculation
166 : 22	166 : 23	Lacks personal knowledge - Speculation
168 : 1	168 : 3	Argumentative; Lacks foundation
168 : 6	168 : 6	Argumentative; Lacks foundation

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JANSING, R.
8/23/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
9 : 22	10 : 16	Hearsay; Not Authenticated
11 : 16	11 : 18	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
12 : 12	12 : 18	Leading the witness
15 : 21	15 : 24	Leading the witness; Mischaracterizes Testimony
36 : 4	36 : 8	Leading the witness

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TOWNSEND, B.
8/18/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
11 : 20	11 : 23	Attorney Testifying; Leading the witness
12 : 17	13 : 17	Vague &Ambiguous
16 : 14	16 : 17	Leading the witness
21 : 6	21 : 13	Lacks personal knowledge - Speculation
23 : 10	23 : 12	Lacks foundation/Assumes fact not in evidence Unintelligible, confusing
23 : 20	24 : 5	Lacks personal knowledge - Speculation
25 : 13	25 : 19	Lacks personal knowledge - Speculation
26 : 17	27 : 3	Leading the witness
30 : 15	30 : 19	Lack personal knowledge - Speculation
32 : 6	33 : 25	Hearsay

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NABI, D.
8/5/99
Objections

From *Page: Line*	Through *Page: Line*	Objections
12 : 5	12 : 5	Colloquy
16 : 6	16 : 7	Colloquy
83 : 2	83 : 4	Colloquy
98 : 2	98 : 8	Argumentative; Lacks foundation
98 : 9	98 : 11	Colloquy
98 : 13	98 : 15	Colloquy
98 : 16	98 : 16	Argumentative; Lacks foundation
98 : 17	98 : 17	Colloquy
99 : 7	99 : 13	Lacks foundation/Assumes fact not in evidence Mischaracterizes Testimony
99 : 14	99 : 14	Colloquy
100 : 17	100 : 25	Misleading; Lacks foundation
101 : 1	101 : 1	Colloquy
103 : 13	103 : 15	Asked & Answered
103 : 16	103 : 17	Colloquy
103 : 18	103 : 18	Asked & Answered
104 : 24	104 : 25	Irrelevant
116 : 25	117 : 7	Hypothetical; Lacks foundation
117 : 8	117 : 10	Colloquy
119 : 6	119 : 7 Ending w/ Question	Colloquy
119 : 7 Beginning w/ "You..."	119 : 10	Lacks foundation
119 : 12	119 : 22	Colloquy
120 : 5	120 : 6	Mischaracterizes Testimony; Vague &Ambiguous; Mischaracterizes document
120 : 7	120 : 8	Colloquy
120 : 10	120 : 10	Vague &Ambiguous
120 : 11	120 : 13	Colloquy
120 : 14	120 : 24	Vague &Ambiguous
121 : 19	121 : 20	Irrelevant
130 : 2	130 : 10	Lacks personal knowledge - Speculation
130 : 11	130 : 15	Lacks foundation
131 : 5	131 : 14	Misleading; Unintelligible, confusing ; ; Mischaracterizes testimony

From *Page: Line*	Through *Page: Line*	Objections
133 : 8	134 : 2	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence Misleading
134 : 3	134 : 4 Ending w/ "Question;"	Colloquy
145 : 11	145 : 23	Lacks personal knowledge - Speculation
145 : 24	145 : 25	Question without Answer
162 : 21	162 : 21	Unintelligible, confusing
162 : 22	162 : 25	Answer without Question
163 : 12	163 : 16	Colloquy
164 : 8	164 : 11	Lacks foundation/Assumes fact not in evidence Mischaracterizes document
164 : 16	164 : 18	Lacks foundation/Assumes fact not in evidence Mischaracterizes testimony; Mischaracterizes document; Question without Answer
164 : 21	165 : 3	Misleading
165 : 4	165 : 10	Mischaracterizes document; Mischaracterizes testimony
166 : 14	166 : 25	Asked & Answered
168 : 6	168 : 6	Colloquy

ZAHRT, G.
3/30/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
130 : 19	130 : 22	Not Authenticated
131 : 10	131 : 13	Not Authenticated; Hearsay
132 : 5	132 : 5	Asked & Answered
132 : 8	132 : 11	Asked & Answered
132 : 14	132 : 14	Asked & Answered
132 : 16	132 : 16	Prejudicial more than Probative; Misleading; Argumentative; Lacks personal knowledge - Speculation
132 : 20	132 : 21	Prejudicial more than Probative; Misleading; Argumentative; Lacks personal knowledge - Speculation
132 : 23	132 : 25	Prejudicial more than Probative; Misleading; Argumentative; Lacks personal knowledge - Speculation; Mischaracterizes testimony; Question without Answer
133 : 4	133 : 5	Asked & Answered; Misleading; Argumentative; Harassing
133 : 7	133 : 9	Asked & Answered; Argumentative; Harassing
133 : 11	133 : 11	Asked & Answered; Argumentative; Harassing
133 : 14	133 : 17	Not Authenticated
133 : 21	133 : 25	Hearsay
134 : 6	134 : 7	Hearsay; Not Authenticated
134 : 12	134 : 15	Lacks foundation
134 : 20	134 : 25	Misleading; Argumentative; Lacks foundation/Assumes fact not in evidence Prejudicial more than Probative
135 : 6	135 : 8	Argumentative; Harassing; Prejudicial more than Probative; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
135 : 11	135 : 14	Argumentative; Harassing; Prejudicial more than Probative; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
135 : 17	135 : 17	Argumentative; Harassing; Prejudicial more than Probative; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
135 : 19	135 : 19	Argumentative; Harassing; Prejudicial more than Probative; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence Lacks personal knowledge - Speculation
136 : 4	136 : 11	Not Authenticated
136 : 12	136 : 20	Hearsay; Not Authenticated

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From *Page: Line*	Through *Page: Line*	Objections
149 : 1	149 : 10	Hearsay; Not authenticated
149 : 11	149 : 12	Argumentative; Harassing; Lacks personal knowledge - Speculation; Prejudicial more than Probative
149 : 14	149 : 17	Argumentative; Harassing; Lacks personal knowledge - Speculation; Prejudicial more than Probative
149 : 19	149 : 22	Argumentative; Harassing; Lacks personal knowledge - Speculation; Prejudicial more than Probative
149 : 25	149 : 25	Argumentative; Harassing; Lacks personal knowledge - Speculation; Prejudicial more than Probative
150 : 1	150 : 3	Prejudicial more than Probative; Lacks personal knowledge - Speculation; Argumentative; Harassing
150 : 4	150 : 9	Not authenticated
150 : 14	150 : 20	Hearsay; Not authenticated
150 : 21	150 : 23	Hearsay; Attorney testifying
150 : 24	151 : 1	Lacks personal knowledge - Speculation; Argumentative; Prejudicial more than Probative
151 : 4	151 : 4	Lacks personal knowledge - Speculation; Argumentative; Prejudicial more than Probative
151 : 6	151 : 10	Not authenticated
151 : 13	151 : 21	Hearsay; Not authenticated
151 : 16	151 : 21	Question without Answer
152 : 3	152 : 5	Vague
152 : 7	152 : 8	Vague
152 : 9	152 : 10	Argumentative; Colloquy
152 : 11	152 : 16	Asked & Answered; Harassing
152 : 19	152 : 19	Asked & Answered; Harassing
152 : 20	152 : 22	Lacks personal knowledge - Speculation; Argumentative; Prejudicial more than Probative; Harassing
152 : 25	153 : 1	Lacks personal knowledge - Speculation; Argumentative; Prejudicial more than Probative; Harassing
153 : 2	153 : 8	Not authenticated
153 : 13	153 : 20	Hearsay; Not authenticated
153 : 21	153 : 22	Lacks personal knowledge - Speculation Prejudicial more than Probative; Argumentative; Harassing
153 : 25	153 : 25	Lacks personal knowledge - Speculation Prejudicial more than Probative; Argumentative; Harassing
154 : 1	154 : 2	Asked & Answered; Lacks personal knowledge - Speculation; Argumentative; Prejudicial more than Probative

From *Page: Line*	**Through** *Page: Line*	**Objections**
154 : 5	154 : 5	Asked & Answered; Lacks personal knowledge - Speculation; Argumentative; Prejudicial more than Probative
154 : 6	154 : 10	Not authenticated
154 : 25	155 : 7	Hearsay; Not authenticated
155 : 8	155 : 10	Mischaracterizes Testimony
155 : 14	155 : 14	Mischaracterizes Testimony
155 : 15	155 : 17	Lacks foundation
155 : 18	155 : 20	Lacks foundation/Assumes fact not in evidence Asked & Answered
155 : 23	156 : 1	Lacks foundation/Assumes fact not in evidence Asked & Answered
156 : 2	156 : 4	Lacks foundation/Assumes fact not in evidence Mischaracterizes Testimony
156 : 6	156 : 6	Lacks foundation/Assumes fact not in evidence Mischaracterizes Testimony
156 : 9	156 : 10	Argumentative; Prejudicial more than Probative; Harassing; Lacks personal knowledge - Speculation
156 : 13	156 : 13	Argumentative; Prejudicial more than Probative; Harassing; Lacks personal knowledge - Speculation
157 : 17	157 : 20	Question without Answer; Asked & Answered; Argumentative; Prejudicial more than Probative; Harassing
159 : 12	159 : 13	Answer without Question; Misleading
161 : 19	161 : 21	Lacks personal knowledge - Speculation; Asked & Answered; Lacks foundation
161 : 24	161 : 25	Lacks personal knowledge - Speculation; Asked & Answered; Lacks foundation
162 : 1	162 : 2	Mischaracterizes document
162 : 5	162 : 5	Mischaracterizes document

WALLER, D.
8/30/99
Objections

From *Page: Line*	Through *Page: Line*	Objections
7:10	7 : 11	Colloquy
8:13	8 : 13 Ending w/ "Mr. Barnett."	Colloquy
11:5	11 : 6	Leading the witness; Compound
11:10	11 : 13	Leading the witness; Compound
11:18	11 : 20	Leading the witness
11:24	12 : 7	Leading the witness
14:22	15 : 4	Lacks personal knowledge - Speculation
15:5	15 : 7	Leading the witness
18:18	18 : 24	Leading the witness; Lacks foundation/Assumes fact not in evidence Hearsay
19:2	19 : 4	Leading the witness
20:4	20 : 4	Colloquy; Irrelevant
20:7	20 : 9	Leading the witness
20:20	20 : 21	Leading the witness; Lacks foundation
20:23	20 : 23	Leading the witness; Lacks foundation
21:7	21 : 7	Answer without Question
21:12	21 : 12	Vague
21:14	21 : 17	Vague
21:23	21 : 25	Lacks personal knowledge - Speculation; Question without Answer
22:10	22 : 14	Answer without Question; Lacks personal knowledge - Speculation
24:13	24 : 18	Leading the witness
24:19	24 : 21	Vague &Ambiguous; Unintelligible, confusing,
24:23	25 : 4	Vague &Ambiguous; Unintelligible, confusing
25:6	25 : 11	Leading the witness
26:5	26 : 14	Answer without Question
26:16	26 : 16	Unintelligible, confusing ; Vague &Ambiguous; Lacks foundation
26:18	26 : 25	Unintelligible, confusing ; Vague &Ambiguous; Lacks foundation
27:12	27 : 13	Vague &Ambiguous; Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

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From *Page: Line*	Through *Page: Line*	Objections
27:15	27 : 18	Vague &Ambiguous; Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
28:1	28 : 3	Leading the witness
29:4	29 : 21	Answer without Question
49:23	49 : 24	Vague &Ambiguous
50:1	50 : 7	Vague &Ambiguous

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FUNK, L.
4/8/99
Objections

From *Page: Line*	Through *Page: Line*	Objections
134 : 18	134 : 20	Mischaracterizes testimony; Misleading; Not authenticated
135 : 1	135 : 4	Mischaracterizes testimony; Misleading
135 : 8	135 : 9	Argumentative
135 : 12	135 : 14	Argumentative
135 : 15	135 : 16	Lacks personal knowledge - Speculation; Asked & Answered; Argumentative
135 : 19	136 : 3	Lacks personal knowledge - Speculation Lacks foundation
136 : 4	136 : 5	Colloquy
137 : 2	137 : 3	Vague &Ambiguous; Argumentative
137 : 5	137 : 6	Vague &Ambiguous; Argumentative
138 : 8	138 : 11	Document speaks for itself; Argumentative; Asked & Answered
138 : 15	139 : 15	Document speaks for itself; Argumentative; Asked & Answered; Harassing
139 : 17	140 : 14	Document speaks for itself; Asked & Answered; Argumentative; Harassing
140 : 17	141 : 7	Asked & Answered; Document speaks for itself; Argumentative; Harassing
141 : 11	141 : 12	Argumentative; Harassing
141 : 20	141 : 21	Attorney testifying; Colloquy; Harassing
142 : 11	142 : 11	Vague &Ambiguous; Argumentative; Harassing
142 : 14	142 : 24	Vague &Ambiguous; Argumentative; Harassing
142 : 25	144 : 12	Harassing
144 : 13	144 : 14	Vague &Ambiguous
145 : 22	145 : 24	Asked & Answered
146 : 16	146 : 23	Answer without Question
146 : 24	148 : 6	Harassing; Argumentative
148 : 19	148 : 20	Document speaks for itself
148 : 24	149 : 3	Document speaks for itself
149 : 4	149 : 10	Argumentative; Document speaks for itself
149 : 17	149 : 19	Argumentative
154 : 2	154 : 3	Vague &Ambiguous
154 : 6	154 : 16	Vague &Ambiguous
155 : 2	155 : 12	Lacks personal knowledge - Speculation; Lacks foundation
155 : 25	156 : 1	Asked & Answered
156 : 4	156 : 4	Asked & Answered
156 : 5	156 : 7	Asked & Answered

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MARCONI, J.
8/17/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
11 : 13	11 : 16	Leading the witness
12 : 8	12 : 10	Lacks foundation
12 : 11	12 : 12	Colloquy
12 : 13	12 : 13	Lacks foundation
12 : 14	12 : 19	Colloquy
12 : 20	12 : 24	Lacks foundation
12 : 25	13 : 2	Lacks foundation
13 : 3	13 : 5	Leading the witness
13 : 6	13 : 8	Leading the witness
13 : 9	13 : 15	Lacks personal knowledge - Speculation; Lacks foundation
13 : 21	14 : 2	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
14 : 13	14 : 15	Lacks foundation
14 : 18	14 : 19	Lacks foundation
15 : 6	15 : 10	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
16 : 21	17 : 1	Lacks foundation/Assumes fact not in evidence; Leading
17 : 15	17 : 17	Vague &Ambiguous
17 : 18	17 : 18	Colloquy
17 : 19	17 : 19	Vague &Ambiguous
18 : 7	18 : 17	Leading the witness; Lacks personal knowledge - Speculation Lacks foundation
18 : 18	18 : 20	Vague &Ambiguous
18 : 21	18 : 21	Colloquy
18 : 22	18 : 25	Vague &Ambiguous
19 : 18	19 : 25	Leading the witness
20 : 1	20 : 3	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Asked & Answered
20 : 14	20 : 16	Lacks foundation
20 : 17	20 : 18	Colloquy
20 : 19	20 : 19	Lacks foundation
21 : 3	21 : 12	Hearsay
21 : 13	21 : 16	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
21 : 17	21 : 18	Colloquy

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21 : 19	21 : 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
21 : 22	21 : 24	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
21 : 25	22 : 3	Lacks personal knowledge - Speculation; Lacks foundation
22 : 4	22 : 5	Colloquy
22 : 6	22 : 9	Lacks personal knowledge - Speculation; Lacks foundation
22 : 10	22 : 12	Vague &Ambiguous
22 : 13	22 : 16	Colloquy
22 : 17	22 : 21	Vague &Ambiguous
22 : 22	22 : 24	Leading the witness
23 : 15	23 : 18	Hearsay
23 : 25	24 : 1	Vague &Ambiguous
24 : 2	24 : 2	Colloquy
24 : 3	24 : 4	Vague &Ambiguous
25 : 11	25 : 15	Leading the witness
25 : 16	25 : 18	Lacks foundation
25 : 19	25 : 20	Colloquy
25 : 21	25 : 24	Lacks foundation
26 : 9	26 : 13	Leading the witness
45 : 8	45 : 10	Vague &Ambiguous
45 : 11	45 : 11	Colloquy
45 : 12	46 : 5	Vague &Ambiguous
46 : 6	46 : 9	Leading the witness
46 : 12	46 : 13	Leading the witness

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Objections

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6:15	6 : 23	Irrelevant
13:21	13 : 22	Colloquy
14:14	14 : 15	Colloquy
18:6	18 : 9	Incomplete Question
21:14	21 : 16	Question without Answer
21:21	21 : 22	Colloquy
25:5	25 : 7	Vague &Ambiguous
25:8	25 : 9	Colloquy
25:10	26 : 8	Vague &Ambiguous
26:9	26 : 10	Colloquy
26:11	26 : 15	Vague &Ambiguous
35:23	36 : 7	Colloquy
42:10	42 : 12	Lacks foundation
42:13	42 : 17	Colloquy
42:18	42 : 21	Lacks foundation
45:1	45 : 5	Vague &Ambiguous
45:6	45 : 7	Colloquy
45:8	45 : 13	Vague &Ambiguous
45:14	45 : 16	Colloquy
45:16	45 : 22	Vague &Ambiguous
46:4	46 : 7	Vague &Ambiguous
46:8	46 : 14	Colloquy
46:20	47 : 1	Colloquy
47:6	47 : 9	Colloquy
49:16	49 : 19	Vague &Ambiguous
49:20	49 : 23	Colloquy
50:12	51 : 11	Vague &Ambiguous
52:2	52 : 6	Vague &Ambiguous
52:7	52 : 8	Colloquy
52:9	52 : 9	Vague &Ambiguous
57:2	57 : 6	Colloquy
57:22	58 : 1	Vague &Ambiguous
58:2	58 : 6	Colloquy
58:7	58 : 14	Mischaracterizes testimony
58:15	59 : 10	Vague &Ambiguous
62:23	62 : 23	Vague &Ambiguous

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62:24	63 : 1	Colloquy
63:17	65 : 20	Irrelevant; Prejudicial more than Probative
66:2	68 : 20	Irrelevant
68:21	69 : 5	Lacks foundation/Assumes fact not in evidence; Irrelevant
69:6	69 : 25	Irrelevant
75:20	75 : 21	Colloquy
76:7	76 : 12	Vague &Ambiguous
76:9	76 : 10	Colloquy
76:17	76 : 21	Mischaracterizes testimony; Lacks foundation
76:22	77 : 8	Colloquy
77:13	77 : 15	Vague &Ambiguous; Lacks personal knowledge - Speculation
77:16	77 : 17	Colloquy
77:18	78 : 3	Vague &Ambiguous; Lacks personal knowledge - Speculation
78:12	78 : 14	Mischaracterizes testimony; Lacks foundation
78:21	79 : 2	Vague &Ambiguous
79:3	79 : 11	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hypothetical
79:12	79 : 14	Colloquy
79:15	79 : 25	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
80:16	80 : 20	Lacks personal knowledge - Speculation; Vague &Ambiguous
81:2	81 : 3	Colloquy
81:8	81 : 8	Colloquy
82:20	82 : 23	Colloquy
82:24	83 : 2	Vague &Ambiguous
83:3	83 : 9	Colloquy
83:10	83 : 13	Vague &Ambiguous
83:14	83 : 24	Colloquy; Not responsive; Vague &Ambiguous; Lacks foundation
84:3	84 : 4	Colloquy
84:7	84 : 13	Lacks foundation/Assumes fact not in evidence; Irrelevant
84:14	84 : 15	Colloquy
84:16	85 : 7	Lacks foundation/Assumes fact not in evidence; Irrelevant; Lacks personal knowledge - Speculation
84:24	84 : 24	Colloquy
85:12	85 : 16	Colloquy
86:6	86 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hypothetical
86:10	86 : 16	Colloquy
86:17	86 : 18	Not responsive
86:19	86 : 25	Colloquy

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88:2	88 : 8	Vague &Ambiguous
88:9	88 : 13	Colloquy
88:14	88 : 17	Lacks foundation
88:18	88 : 22	Colloquy
88:23	89 : 2	Vague &Ambiguous
89:3	89 : 5	Colloquy
89:6	89 : 10	Vague &Ambiguous; Not responsive
89:11	89 : 21	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
89:22	89 : 23	Colloquy
89:24	90 : 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
93:23	94 : 5	Vague &Ambiguous
94:17	94 : 21	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
94:22	95 : 21	Colloquy
95:22	96 : 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Vague &Ambiguous
96:2	96 : 4	Colloquy
96:5	96 : 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Vague &Ambiguous
97:2	97 : 3	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Vague &Ambiguous
97:9	97 : 14	Attorney testifying; Colloquy
97:24	98 : 1	Colloquy
98:2	98 : 21	Lacks personal knowledge - Speculation
98:22	98 : 24	Colloquy
98:25	99 : 4	Mischaracterizes testimony
100:3	100 : 4	Colloquy
100:17	101 : 10	Lacks personal knowledge - Speculation; Vague &Ambiguous
101:20	101 : 24	Colloquy
102:2	102 : 10	Question without Answer; Lacks personal knowledge - Speculation; Vague &Ambiguous
102:20	102 : 23	Vague &Ambiguous
102:24	102 : 25	Colloquy
103:1	103 : 2	Vague &Ambiguous
104:3	104 : 10	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony; Lacks personal knowledge - Speculation
104:19	104 : 23	Limiting; Hypothetical; Lacks foundation/Assumes fact not in evidence
104:24	104 : 25	Colloquy

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105:11	105 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
105:16	105 : 17	Colloquy
105:18	106 : 5	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
106:6	107 : 1	Lacks personal knowledge - Speculation
107:2	107 : 3	Colloquy
107:4	107 : 9	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hypothetical
107:10	107 : 11	Colloquy
107:12	107 : 17	Colloquy
107:18	107 : 24	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
107:25	108 : 1	Colloquy
108:2	108 : 5	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
108:15	109 : 18	Vague &Ambiguous; Unintelligible, confusing ; Lacks foundation/Assumes fact not in evidence
109:19	109 : 20	Colloquy
109:21	110 : 1	Vague &Ambiguous
110:8	110 : 16	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
110:17	110 : 18	Colloquy
110:19	111 : 1	Not responsive; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
111:2	111 : 4	Lacks personal knowledge - Speculation; Hypothetical
111:5	111 : 6	Colloquy
111:7	111 : 10	Lacks personal knowledge - Speculation; Hypothetical
112:5	112 : 8	Lacks foundation/Assumes fact not in evidence
112:9	112 : 15	Colloquy
115:17	115 : 18	Asked & Answered; Vague &Ambiguous; Lacks personal knowledge - Speculation
115:19	115 : 20	Colloquy
115:21	115 : 23	Asked & Answered; Vague &Ambiguous; Lacks personal knowledge - Speculation
116:8	116 : 10	Question without Answer; Asked & Answered
116:11	116 : 15	Colloquy
117:3	117 : 23	Lacks personal knowledge - Speculation
117:24	118 : 6	Attorney testifying; Colloquy
118:7	118 : 20	Lacks personal knowledge - Speculation
118:21	118 : 24	Colloquy

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119:25	120 : 10	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony; Misleading; Prejudicial more than Probative
122:23	123 : 18	Lacks foundation/Assumes fact not in evidence
123:19	124 : 13	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
127:7	129 : 19	Irrelevant; Prejudicial more than Probative; Misleading; Lacks personal knowledge - Speculation
130:3	130 : 4	Colloquy
131:2	131 : 11	Colloquy
131:23	132 : 7	Irrelevant; Prejudicial more than Probative; Misleading; Lacks foundation/Assumes fact not in evidence
132:8	132 : 10	Colloquy
132:11	133 : 23	Irrelevant; Prejudicial more than Probative; Misleading; Lacks foundation/Assumes fact not in evidence
133:24	134 : 1	Colloquy
134:2	134 : 3	Not responsive
135:20	136 : 6	Irrelevant; Prejudicial more than Probative; Misleading
136:7	136 : 11	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
136:12	136 : 15	Colloquy
136:16	136 : 20	Lacks foundation/Assumes fact not in evidence
137:9	138 : 9	Question without Answer; Vague &Ambiguous
138:10	139 : 14	Irrelevant; Lacks personal knowledge - Speculation; Prejudicial more than Probative; Misleading
143:12	143 : 16	Lacks personal knowledge - Speculation
143:17	143 : 24	Irrelevant
143:25	145 : 1	Lacks personal knowledge - Speculation
145:25	146 : 12	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
147:17	154 : 8	Colloquy
147:17	149 : 12	Not responsive; Lacks personal knowledge - Speculation
149:19	149 : 23	Lacks personal knowledge - Speculation
149:24	150 : 13	Irrelevant
150:14	151 : 9	Lacks personal knowledge - Speculation
151:10	152 : 19	Calls for legal conclusion; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
152:20	154 : 8	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
159:9	161 : 25	Colloquy

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159:9	161 : 19	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
161:20	161 : 25	Incomplete Question; Question without Answer
164:3	169 : 19	Colloquy
164:3	165 : 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
166:20	167 : 5	Lacks foundation/Assumes fact not in evidence; Argumentative; Lacks personal knowledge - Speculation
167:6	167 : 18	Lacks foundation/Assumes fact not in evidence; Misleading; Question without Answer
168:5	168 : 18	Question without Answer; Non responsive; Vague &Ambiguous
170:12	170 : 19	Vague &Ambiguous
170:16	170 : 17	Colloquy
177:18	177 : 19	Colloquy
177:23	177 : 24	Colloquy
178:2	178 : 9	Vague &Ambiguous; Colloquy
180:1	180 : 12	Colloquy; Vague &Ambiguous
180:22	181 : 14	Hypothetical; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
181:15	182 : 12	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
182:18	183 : 11	Argumentative; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
184:8	184 : 9	Colloquy
185:7	185 : 9	Incomplete Question
185:20	186 : 4	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Misleading
186:15	186 : 15	Colloquy
212:7	212 : 11	Lacks personal knowledge - Speculation
217:1	221 : 24	Colloquy
217:14	217 : 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
219:3	219 : 7	Misleading
219:8	219 : 18	Argumentative; Question without Answer
220:19	221 : 4	Lacks personal knowledge - Speculation
223:16	223 : 23	Vague &Ambiguous; Question without Answer
224:13	224 : 15	Colloquy
225:8	225 : 16	Question without Answer; Not responsive
225:24	226 : 23	Vague &Ambiguous; Question without Answer
227:3	227 : 5	Irrelevant; Not responsive

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227:7	227 : 18	Question without Answer; Not responsive
231:18	231 : 24	Question without Answer, Not responsive
233:10	233 : 15	Hypothetical; Vague &Ambiguous
235:14	235 : 20	Lacks foundation/Assumes fact not in evidence
236:14	236 : 19	Lacks foundation/Assumes fact not in evidence; Argumentative
236:23	236 : 23	Colloquy
236:25	237 : 3	Asked & Answered
237:13	237 : 17	Vague &Ambiguous; Asked & Answered; Argumentative
238:9	238 : 19	Lacks foundation/Assumes fact not in evidence; Argumentative; Misleading
238:20	239 : 7	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Hypothetical
240:11	240 : 18	Question without Answer; Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony
242:13	242 : 19	Colloquy
243:2	244 : 18	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony; Hypothetical; Mischaracterizes document
247:21	248 : 5	Question without Answer
249:6	249 : 12	Lacks foundation/Assumes fact not in evidence; Hypothetical
249:24	250 : 9	Misleading; Lacks foundation/Assumes fact not in evidence
250:10	250 : 16	Lacks personal knowledge - Speculation
250:17	251 : 2	Vague &Ambiguous
251:12	251 : 12	Colloquy
259:21	266 : 24	Colloquy
259:21	262 : 1	Lacks personal knowledge - Speculation; Irrelevant
262:11	262 : 17	Irrelevant; Misleading; Prejudicial more than Probative
263:13	266 : 24	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
270:25	279 : 6	Colloquy
270:25	277 : 25	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hypothetical; Irrelevant; Misleading; Prejudicial more than Probative
278:1	278 : 9	Lacks personal knowledge - Speculation
282:21	283 : 17	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Mischaracterizes document
283:22	284 : 6	Mischaracterizes document
284:7	284 : 20	Harassing; Calls for legal conclusion; Irrelevant
284:21	284 : 25	Question without Answer; Not responsive
285:1	285 : 22	Calls for legal conclusion; Argumentative; Mischaracterizes document
285:23	286 : 5	Question without Answer

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286:6	286 : 13	Vague &Ambiguous
286:21	287 : 12	Attorney testifying; Question without Answer
288:11	285 : 20	Question without Answer
288:21	288 : 24	Colloquy
288:25	290 : 6	Hypothetical; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
290:23	291 : 20	Argumentative
291:21	292 : 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hypothetical
293:11	303 : 4	Colloquy
293:11	294 : 7	Lacks personal knowledge - Speculation; Lacks foundation
294:8	295 : 23	Lacks foundation/Assumes fact not in evidence; Mischaracterizes document; Mischaracterizes testimony; Lacks personal knowledge - Speculation
295:24	296 : 9	Hypothetical; Lacks foundation/Assumes fact not in evidence
297:9	297 : 24	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
298:11	298 : 23	Question without Answer; Colloquy
300:6	301 : 5	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
301:23	302 : 3	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
302:4	303 : 4	Hypothetical; Vague &Ambiguous; Argumentative
305:10	305 : 16	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Mischaracterizes document
307:18	307 : 19	Colloquy
308:6	309 : 13	Vague &Ambiguous; Asked & Answered; Misleading; Lacks foundation/Assumes fact not in evidence; Compound; Lacks personal knowledge - Speculation
308:14	308 : 14	Colloquy
309:18	310 : 4	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
310:13	311 : 1	Argumentative; Asked & Answered
311:17	313 : 2	Lacks foundation/Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation
313:9	313 : 16	Lacks foundation/Assumes fact not in evidence; Mischaracterizes document; Lacks personal knowledge - Speculation
314:20	315 : 5	Lacks foundation/Assumes fact not in evidence; Argumentative; Misleading; Vague &Ambiguous
315:6	315 : 13	Lacks foundation/Assumes fact not in evidence; Calls for legal conclusion

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315:14	315 : 18	Mischaracterizes document; Attorney testifying
315:19	316 : 3	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
316:13	316 : 22	Question without Answer; Not responsive; Vague &Ambiguous
317:11	317 : 17	Calls for legal conclusion; Argumentative; Lacks foundation/Assumes fact not in evidence
318:23	319 : 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Mischaracterizes document; Misleading
321:10	321 : 18	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in ;
322:16	322 : 22	Lacks foundation/Assumes fact not in evidence
325:5	325 : 20	Question without Answer; Vague &Ambiguous
326:1	326 : 7	Mischaracterizes testimony; Misleading; Lacks foundation/Assumes fact not in evidence
326:8	326 : 13	Colloquy
327:6	327 : 19	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous; Mischaracterizes testimony
329:17	330 : 5	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
335:7	336 : 21	Lacks foundation/Assumes fact not in evidence; Hypothetical; Lacks personal knowledge - Speculation; Misleading
336:22	337 : 2	Misleading; Argumentative; Lacks foundation/Assumes fact not in evidence
337:3	338 : 4	Lacks foundation/Assumes fact not in evidence; Argumentative; Hypothetical
340:8	341 : 9	Lacks foundation/Assumes fact not in evidence; Mischaracterizes document; Misleading; Lacks personal knowledge - Speculation
342:1	349 : 23	Colloquy
342:1	342 : 24	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
344:18	344 : 20	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Attorney testifying
345:22	346 : 18	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Mischaracterizes document
347:2	347 : 6	Lacks personal knowledge - Speculation; Misleading; Lacks foundation/Assumes fact not in evidence
347:13	348 : 4	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Argumentative; Vague &Ambiguous
348:5	348 : 22	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous

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364:24	365 : 9	Calls for legal conclusion; Lacks foundation/Assumes fact not in evidence
365:10	365 : 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
365:20	366 : 4	Hypothetical; Lacks foundation/Assumes fact not in evidence; Question without Answer; Not responsive
366:5	367 : 6	Hypothetical; Lacks foundation/Assumes fact not in evidence
367:7	367 : 13	Hypothetical; Lacks foundation/Assumes fact not in evidence; Argumentative
368:9	368 : 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
368:21	369 : 13	Lacks foundation/Assumes fact not in evidence; Mischaracterizes document; Argumentative; Lacks personal knowledge - Speculation; Hypothetical
372:3	383 : 15	Colloquy
372:3	379 : 2	Hearsay; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Attorney testifying
379:6	381 : 9	Lacks foundation/Assumes fact not in evidence; Hearsay; Lacks personal knowledge - Speculation
381:19	382 : 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hearsay
382:20	383 : 15	Irrelevant
386:2	392 : 22	Irrelevant; Argumentative; Misleading
394:5	394 : 6	Colloquy
394:17	394 : 18	Colloquy
395:1	395 : 14	Lacks foundation/Assumes fact not in evidence; Argumentative; Misleading
395:15	396 : 8	Hypothetical; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Argumentative
397:11	397 : 12	Colloquy
397:18	397 : 20	Mischaracterizes testimony; Mischaracterizes document; Lacks foundation/Assumes fact not in evidence; Misleading
399:3	418 : 3	Colloquy
399:3	399 : 8	Colloquy
399:11	400 : 4	Colloquy
400:16	401 : 11	Argumentative; Mischaracterizes document; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence
401:12	402 : 7	Lacks foundation/Assumes fact not in evidence; Argumentative
402:8	402 : 15	Lacks foundation/Assumes fact not in evidence; Hypothetical; Lacks personal knowledge - Speculation

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402:16	403 : 1	Attorney testifying; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hypothetical
403:2	403 : 22	Attorney testifying; Lacks foundation/Assumes fact not in evidence; Misleading
403:23	405 : 21	Lacks foundation/Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation
405:22	406 : 10	Vague &Ambiguous; Unintelligible, confusing
406:11	407 : 16	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
407:17	408 : 3	Question without Answer; Vague &Ambiguous
408:4	408 : 12	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
408:18	409 : 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Question without Answer; Not responsive
410:6	410 : 20	Lacks foundation/Assumes fact not in evidence; Misleading
411:1	412 : 5	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Irrelevant
413:4	413 : 4	Colloquy
413:10	413 : 18	Asked & Answered
414:19	416 : 9	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
416:21	416 : 22	Question without Answer
416:23	416 : 25	Colloquy
417:7	418 : 3	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
418:21	440 : 1	Colloquy
418:25	419 : 15	Colloquy
420:4	420 : 9	Question without Answer; Not responsive
422:7	422 : 24	Lacks personal knowledge - Speculation
423:18	424 : 10	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
424:11	427 : 17	Argumentative; Harassing; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
429:6	430 : 1	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
431:22	433 : 3	Vague &Ambiguous; Unintelligible, confusing ; Asked & Answered
434:13	434 : 22	Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony
435:14	437 : 10	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

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437:18	438 : 14	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
438:15	438 : 25	Question without Answer; Colloquy
439:3	439 : 16	Colloquy

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57:18	60 : 8	Colloquy
58:18	59 : 9	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
59:10	60 : 8	Mischaracterizes documents; Lacks foundation/Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation; Irrelevant
70:8	70 : 9	Colloquy
70:24	70 : 25	Colloquy
71:18	71 : 19	Colloquy
72:5	73 : 3	Lacks foundation/Assumes fact not in evidence; Mischaracterizes document; Mischaracterizes testimony
119:20	139 : 5	Colloquy
120:21	121 : 9	Mischaracterizes document; Vague &Ambiguous; Misleading; Mischaracterizes testimony
121:17	122 : 11	Asked & Answered; Mischaracterizes document; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence
123:2	124 : 19	Lacks personal knowledge - Speculation; Mischaracterizes document; Mischaracterizes testimony; Argumentative; Asked & Answered
125:1	125 : 5	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence
125:10	125 : 25	Lacks personal knowledge - Speculation; Mischaracterizes document; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence
126:7	128 : 5	Lacks personal knowledge - Speculation; Asked & Answered; Lacks foundation/Assumes fact not in evidence
128:25	129 : 5	Asked & Answered; Lacks foundation/Assumes fact not in evidence
129:11	130 : 15	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony; Mischaracterizes document
131:20	131 : 22	Vague &Ambiguous
131:23	131 : 25	Colloquy
132:17	133 : 21	Asked & Answered; Colloquy
134:15	134 : 21	Vague &Ambiguous
136:3	136 : 11	Question without Answer
137:11	138 : 14	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Mischaracterizes document

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From *Page: Line*	Through *Page: Line*	Objections
138:19	139 : 5	Mischaracterizes document; Mischaracterizes testimony; Asked & Answered
141:1	142 : 25	Question without Answer; Colloquy; Asked & Answered; Argumentative; Mischaracterizes document; Mischaracterizes testimony
143:9	143 : 25	Colloquy; Question without Answer
144:6	144 : 7	Colloquy
144:24	145 : 17	Lacks foundation/Assumes fact not in evidence; Mischaracterizes document; Mischaracterizes testimony; Asked & Answered; Argumentative
146:11	149 : 6	Asked & Answered; Mischaracterizes document; Mischaracterizes testimony; Argumentative
149:14	150 : 17	Asked & Answered; Mischaracterizes document; Mischaracterizes testimony; Argumentative
151:2	151 : 2	Colloquy
151:5	158 : 5	Asked & Answered; Argumentative; Mischaracterizes document; Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence
173:16	174 : 11	Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
174:17	177 : 1	Question without Answer; Colloquy
177:7	178 : 14	Asked & Answered; Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Misleading
178:23	179 : 3	Asked & Answered
179:8	180 : 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Argumentative; Hypothetical; Colloquy; Irrelevant
181:7	181 : 13	Hearsay; Misleading
181:14	182 : 4	Lacks personal knowledge - Speculation
182:20	183 : 16	Lacks foundation/Assumes fact not in evidence; Hypothetical; Argumentative; Misleading; Lacks personal knowledge - Speculation; Irrelevant
184:17	185 : 6	Misleading; Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
186:2	186 : 4	Lacks foundation/Assumes fact not in evidence; Misleading
186:18	188 : 5	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Argumentative
188:19	188 : 19	Colloquy
189:2	189 : 14	Lacks foundation/Assumes fact not in evidence; Misleading; Lacks personal knowledge - Speculation
190:2	190 : 5	Lacks foundation/Assumes fact not in evidence; Misleading

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From *Page: Line*	Through *Page: Line*	Objections
190:18	191 : 8	Asked & Answered; Misleading; Lacks foundation/Assumes fact not in evidence; Hypothetical; Argumentative
193:1	193 : 17	Asked & Answered; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hypothetical
194:4	194 : 9	Attorney testifying; Colloquy
194:23	198 : 23	Lacks foundation/Assumes fact not in evidence; Hypothetical; Lacks personal knowledge - Speculation; Argumentative; Misleading
199:25	200 : 8	Asked & Answered; Lacks foundation/Assumes fact not in evidence; Argumentative
200:12	201 : 1	Asked & Answered; Lacks foundation/Assumes fact not in evidence; Hypothetical; Misleading
206:23	207 : 7	Colloquy
207:8	207 : 13	Answer without Question
207:14	208 : 2	Lacks foundation/Assumes fact not in evidence
208:3	208 : 17	Lacks foundation/Assumes fact not in evidence; Misleading; Asked & Answered
208:18	209 : 1	Attorney testifying; Asked & Answered
209:21	209 : 24	Mischaracterizes document; Misleading; Vague &Ambiguous
209:25	210 : 20	Unintelligible, confusing ; Vague &Ambiguous; Question without Answer
211:9	211 : 12	Irrelevant

LEINEN, P.
7/10/99
Objections

From *Page: Line*	Through *Page: Line*	Objections
13 : 22	14 : 1	Leading the witness; Lacks foundation/Assumes fact not in evidence

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WHEATLEY, J.
9/3/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
31:10	31 : 10	Question without Answer
31:22	32 : 5	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
32:17	32 : 21	Hearsay
33:3	33 : 12	Lacks foundation/Assumes fact not in evidence; Hearsay; Lacks personal knowledge - Speculation
33:17	33 : 22	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
34:13	34 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
34:18	34 : 19	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
34:20	34 : 22	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
34:24	35 : 1	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
35:7	35 : 9	Vague &Ambiguous
35:12	35 : 13	Vague &Ambiguous
35:21	35 : 23	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
36:1	36 : 10	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
38:8	38 : 10	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
38:13	38 : 16	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
38:17	38 : 19	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
38:22	38 : 23	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
38:24	39 : 1	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hypothetical
39:4	39 : 8	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hypothetical

From *Page: Line*	Through *Page: Line*	Objections
42:6	42 : 23	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hearsay; Question without Answer
43:13	44 : 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
44:15	44 : 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
46:17	47 1	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
47:4	47 : 14	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
48:10	48 : 13	Lacks foundation/Assumes fact not in evidence
48:16	48 : 22	Lacks foundation/Assumes fact not in evidence
51:20	52 : 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
52:21	52 : 24	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
53:3	53 : 4	Mischaracterizes document; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
53:21	53 : 24	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
56:17	56 : 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
57:21	58 : 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
76:17	76 : 21	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
77:4	77 : 13	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
81:18	82 : 10	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
85:1	85 : 5	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
85:6	85 : 6	Colloquy
85:7	85 : 22	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
85:23	87 : 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

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From *Page: Line*	Through *Page: Line*	Objections
90:17	90 : 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
90:23	91 : 16	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
93:7	94 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
96:23	96 : 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
97:4	97 : 10	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
97:11	97 : 12	Mischaracterizes document
97:13	97 : 14	Colloquy
97:15	97 : 16	Mischaracterizes document
97:17	98 : 4	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
98:5	98 : 7	Hypothetical
98:10	98 : 15	Hypothetical
99:11	99 : 16	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
99:19	100 : 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
101:18	101 : 19	Vague &Ambiguous
101:22	101 : 22	Vague &Ambiguous
102:24	103 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
108:5	108 : 16	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
109:2	109 : 4	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
109:5	109 : 6	Colloquy
109:7	109 : 8	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
114:10	114 : 19	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
114:22	115 : 13	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
115:16	116 : 6	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

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From *Page: Line*	Through *Page: Line*	Objections
116:9	116 : 12	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
117:1	117 : 5	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
117:8	117 : 8	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
125:7	125 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
125:22	125 : 24	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
127:12	127 : 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
128:2	129 : 3	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
129:12	129 : 17	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
130:6	130 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
130:18	130 : 24	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
132:3	132 : 12	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
133:3	133 : 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
137:7	137 : 10	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
137:15	138 : 5	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
138:9	138 : 11	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
138:15	139 : 1	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
139:4	139 : 4	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
139:5	139 : 19	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
139:22	140 : 11	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

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From *Page: Line*	Through *Page: Line*	Objections
141:11	141 : 22	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
143:10	143 : 16	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
143:22	143 : 24	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
144:1	144 : 4	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
144:5	144 : 5	Colloquy
144:6	144 : 6	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
147:5	147 : 12	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
147:16	148 : 7	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
148:22	149 : 22	Mischaracterizes testimony
149:9	149 : 11	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
149:14	149 : 18	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
150:7	150 : 10	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
150:13	151 : 9	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
151:12	151 : 13	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
165:18	165 : 18	Asked & Answered
165:19	165 : 20	Colloquy
165:21	165 : 22	Asked & Answered
166:1	166 : 18	Asked & Answered
166:19	166 : 20	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
166:23	167 : 9	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
169:13	169 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
170:2	170 : 5	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

From *Page: Line*	Through *Page: Line*	Objections
196:19	196 : 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
197:22	197 : 23	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
198:1	198 : 12	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
198:13	198 : 17	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
198:20	201 : 3	Document speaks for itself; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
201:6	201 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
205:8	205 : 12	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
205:15	205 : 20	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
205:22	205 : 23	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
220:4	220 : 17	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
221:7	221 : 12	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

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LEINEN, P.
7/10/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
13 : 22	14: 1	Leading the witness; Lacks foundation/Assumes fact not in evidence
14 : 24	15: 2	Leading the witness
15 : 8	15: 19	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
17 : 14	17: 18	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
18 : 14	19: 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
19 : 2	19: 21	Hearsay
19 : 22	20: 2	Leading the witness
20 : 3	21: 7	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Hearsay
21 : 8	21: 18	Leading the witness; Lacks foundation/Assumes fact not in evidence
21 : 24	22: 12	Hearsay; Lacks foundation/Assumes fact not in evidence
22 : 16	22: 18	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
22 : 21	21: 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
23 : 8	24: 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
26 : 7	26: 10	Mischaracterizes testimony
26 : 15	26: 15	Mischaracterizes testimony
26 : 16	27: 8	Vague &Ambiguous; Misleading; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
27 : 11	27: 13	Vague &Ambiguous; Misleading; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
38 : 17	38: 25	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
39 : 10	39: 15	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness

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HART, A.
8/30/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
12:11	12: 12	Vague &Ambiguous
12:14	12: 16	Colloquy
12:20	12: 22	Colloquy
13:4	13: 17	Hearsay; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
13:22	13: 22	Colloquy
14:21	14: 25	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
15:1	15: 2	Colloquy
15:3	15: 11	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
15:14	16: 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay
16:8	16: 10	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
16:11	16: 12	Colloquy
16:13	17: 8	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
17:19	17: 23	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
18:2	18: 23	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay; Vague &Ambiguous
18:24	18: 24	Colloquy
18:25	19: 3	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay; Vague &Ambiguous
19:4	20: 17	Leading the witness
20:18	20: 22	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
21:1	21: 2	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
21:3	21: 4	Colloquy
21:5	21: 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
21:8	21: 9	Colloquy

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From *Page: Line*	Through *Page: Line*	Objections
21:10	21: 14	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
21:20	21: 22	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
21:23	21: 25	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
22:1	22: 2	Colloquy
22:3	22: 10	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony
22:15	22: 17	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Mischaracterizes testimony
22:18	22: 22	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Mischaracterizes document
22:23	22: 25	Colloquy
23:1	23: 1	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Mischaracterizes document
23:23	23: 25	Leading the witness
24:6	24: 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
24:9	24: 11	Colloquy
24:12	24: 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
24:14	24: 15	Colloquy
24:16	24: 17	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
24:18	25: 23	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay
25:24	25: 24	Colloquy
25:25	26: 3	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay
26:4	26: 6	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
26:7	26: 8	Colloquy
26:9	26: 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
26:14	26: 15	Colloquy
26:16	26: 17	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence

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26:22	26: 25	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
27:1	27: 2	Colloquy
27:3	27: 3	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
27:4	27: 6	Leading the witness
27:7	27: 7	Colloquy
27:8	27: 10	Leading the witness
27:17	27: 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
27:22	27: 23	Colloquy
27:24	27: 24	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
27:25	28: 5	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
28:11	29: 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay
29:8	29: 9	Colloquy
29:10	29: 12	Lacks foundation/Assumes fact not in evidence
29:14	29: 15	Colloquy
29:16	29: 20	Lacks foundation/Assumes fact not in evidence
29:21	29: 22	Colloquy
29:23	29: 24	Lacks foundation/Assumes fact not in evidence
29:25	30: 4	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay
30:5	30: 8	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
30:9	30: 10	Colloquy
30:11	30: 11	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
30:12	30: 14	Leading the witness
30:15	30: 16	Colloquy
30:17	30: 19	Leading the witness
30:20	31: 17	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay
31:18	31: 19	Colloquy
31:21	31: 24	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay
32:9	32: 10	Vague &Ambiguous

From *Page: Line*	Through *Page: Line*	Objections
32:11	32: 11	Colloquy
32:12	32: 15	Vague &Ambiguous
32:16	32: 19	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
32:20	32: 23	Colloquy
32:24	33: 2	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
33:3	33: 3	Colloquy
33:4	33: 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
33:8	33: 8	Colloquy
33:9	33: 11	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
33:12	33: 14	Colloquy
33:15	33: 16	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
33:17	33: 19	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
33:20	33: 21	Colloquy
33:22	33: 24	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
33:25	33: 25	Colloquy
34:1	34: 1	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
34:6	34: 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay
34:22	34: 23	Colloquy
34:24	35: 3	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay
35:4	35: 4	Colloquy
35:5	35: 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay
50:7	51: 12	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
62:21	63: 5	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
66:14	66: 15	Colloquy
66:18	66: 19	Question without Answer
80:9	80: 11	Vague &Ambiguous; Lacks personal knowledge - Speculation

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From *Page: Line*	Through *Page: Line*	Objections
80:12	80: 12	Colloquy
80:13	80: 16	Vague &Ambiguous; Lacks personal knowledge - Speculation
80:17	80: 18	Colloquy
80:19	80: 19	Lacks personal knowledge - Speculation; Vague &Ambiguous
81:2	81: 5	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
81:6	81: 7	Colloquy
81:8	81: 11	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading
81:12	81: 16	Colloquy
81:17	81: 17	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
81:18	81: 19	Colloquy
81:20	81: 22	Lacks foundation/Assumes fact not in evidence
81:23	82: 3	Colloquy
82:4	82: 8	Lacks foundation/Assumes fact not in evidence
82:9	82: 10	Colloquy
82:11	82: 13	Lacks foundation/Assumes fact not in evidence
82:24	82: 25	Vague &Ambiguous
83:1	83: 1	Colloquy
83:2	83: 2	Vague &Ambiguous
83:9	83: 12	Colloquy
83:19	83: 22	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
84:3	84: 10	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
85:14	86: 3	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
86:5	86: 7	Colloquy
86:10	86: 15	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
86:16	86: 19	Colloquy

ELKINS, G.
6/25/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
16:17	16: 19	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
16:20	16: 21	Leading the witness
17:3	18: 10	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
19:11	20: 11	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
27:24	28: 10	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
31:12	32: 10	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
33:9	35: 13	Misleading; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
36:14	36: 24	Misleading; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
39:19	40: 4	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
40:5	40: 5	Colloquy
40:7	40: 20	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
42:17	42: 25	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence

16diii003616

McCARTHY, J.
3/23/99
Objections

From *Page: Line*	Through *Page: Line*	Objections
215 : 21	216: 10	Not authenticated
216 : 20	217: 6	Not authenticated; Document speaks for itself
217 : 7	217: 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
217 : 20	217: 23	Asked & Answered; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
218 : 1	218: 2	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Asked & Answered
218 : 3	218: 7	Lacks personal knowledge - Speculation; Argumentative
218 : 10	218: 14	Lacks personal knowledge - Speculation; Argumentative
219 : 24	220: 2	Asked & Answered; Lacks personal knowledge - Speculation; Argumentative; Harassing
220 : 5	220: 7	Asked & Answered; Lacks personal knowledge - Speculation; Argumentative; Harassing
220 : 8	220: 12	Irrelevant; Unintelligible, confusing ; Argumentative
220 : 13	220: 14	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Vague &Ambiguous
220 : 16	220: 16	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Vague &Ambiguous
226 : 17	227: 19	Hearsay; Not authenticated; Document speaks for itself
227 : 25	228: 1	Vague &Ambiguous; Unintelligible, confusing
228 : 11	228: 18	Vague &Ambiguous; Unintelligible, confusing
228 : 19	229: 5	Not authenticated; Hearsay; Document speaks for itself
229 : 9	229: 21	Hearsay; Not authenticated; Document speaks for itself
230 : 3	230: 5	Vague &Ambiguous; Unintelligible, confusing
230 : 19	230: 24	Vague &Ambiguous; Unintelligible, confusing
230 : 25	231: 18	Not authenticated; Hearsay; Document speaks for itself
231 : 25	232: 3	Document speaks for itself; Not authenticated; Hearsay
232 : 4	232: 6	Vague &Ambiguous; Unintelligible, confusing
233 : 2	233: 4	Lacks personal knowledge - Speculation; Document speaks for itself; Not authenticated; Hearsay
233 : 5	234: 4	Document speaks for itself; Not authenticated; Hearsay
234 : 5	234: 18	Vague &Ambiguous; Unintelligible, confusing
234 : 19	235: 13	Document speaks for itself; Not authenticated; Hearsay
235 : 18	236: 2	Vague &Ambiguous; Unintelligible, confusing
236 : 4	236: 25	Document speaks for itself; Not authenticated; Hearsay

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From *Page: Line*	Through *Page: Line*	Objections
237 : 5	237: 8	Unintelligible, confusing ; Vague &Ambiguous
237 : 25	238: 14	Document speaks for itself; Not authenticated; Hearsay
238 : 18	239: 1	Vague &Ambiguous; Unintelligible, confusing
239 : 7	240: 8	Document speaks for itself; Not authenticated; Hearsay
240 : 13	240: 19	Vague &Ambiguous; Unintelligible, confusing
240 : 20	241: 11	Document speaks for itself; Not authenticated; Hearsay
241 : 16	241: 23	Vague &Ambiguous; Unintelligible, confusing
241 : 24	242: 14	Document speaks for itself; Not authenticated; Hearsay
242 : 18	243: 4	Unintelligible, confusing ; Vague &Ambiguous
243 : 5	244: 1	Document speaks for itself; Not authenticated; Hearsay
244 : 6	244: 13	Unintelligible, confusing ; Vague &Ambiguous

STEVENS, M.
7/7/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
15 : 19	15 : 21	Hearsay
16 : 1	16 : 11	Hearsay
16 : 15	16 : 20	Hearsay
17 : 2	17 : 14	Lacks foundation/Assumes fact not in evidence, Hearsay, Double Hearsay, Misleading, Privileged
17 : 20	17 : 24	Lacks foundation/Assumes fact not in evidence, Hearsay, Double Hearsay, Misleading, Privileged, Leading the Witness
18 : 2	18 : 4	Lacks foundation/Assumes fact not in evidence
19 : 13	20 : 9	Lacks foundation/Assumes fact not in evidence, Hearsay
20 : 14	20 : 20	Lacks foundation/ Assumes fact not in evidence, Hearsay
20 : 25	21 : 17	Misleading, Lacks foundation/Assumes fact not in evidence
21 : 18	21 : 21	Lacks foundation/Assumes fact not in evidence, Hearsay
22 : 2	23 : 10	Lacks foundation/ Assumes fact not in evidence, Hearsay
23 : 23	23 : 25	Question without Answer, Lacks foundation/Assumes fact not in evidence
24 : 11	24 : 24	Hearsay, Lacks foundation/ Assumes fact not in evidence
25 : 3	25 : 11	Lacks foundation/Assumes fact not in evidence, Hearsay
25 : 18	26 : 12	Lacks foundation/Assumes fact not in evidence, Hearsay
26 : 20	27 : 5	Lacks foundation/ Assumes fact not in evidence, Hearsay
29 : 4	29 : 12	Lacks personal knowledge - Speculation
31 : 13	31 : 15	Question without Answer
35 : 16	35 : 22	Irrelevant
37 : 2	37 : 5	Lacks foundation/Assumes fact not in evidence, Hearsay
37 : 12	37 : 14	Lacks foundation/Assumes fact not in evidence, Hearsay
42 : 18	42 : 22	Irrelevant
43 : 15	43 : 19	Irrelevant
47 : 19	48 : 8	Lacks foundation /Assumes fact not in evidence, Hearsay
49 : 17	49 : 17	Colloquy

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BERKIBILE, T.
7/17/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
44 : 18	44 : 18	Answer without Question
72 : 21	72 : 25	Calls for Legal Conclusion
79 : 9	79 : 18	Calls for Legal Conclusion, Lacks personal knowledge - Speculation
79 : 19	79 : 22	Misleading
80 : 3	80 : 8	Calls for Legal Conclusion
81 : 6	81 : 14	Lacks personal knowledge - Speculation, Lacks foundation/Assumes fact not in evidence, Answer without Question
81 : 17	81 : 17	Lacks personal knowledge - Speculation, Lacks foundation/Assumes fact not in evidence
89 : 3	89 : 3	Incomplete Question
95 : 7	95 : 10	Calls for Legal Conclusion
100 : 8	100 : 12	Calls for Legal Conclusion
107 : 8	107 : 19	Lacks personal knowledge - Speculation
107 : 10	107 : 15	Irrelevant
119 : 22	120 : 1	Calls for Legal Conclusion
132 : 5	132 : 10	Irrelevant
135 : 13	135 : 18	Question without Answer
137 : 18	137 : 18	Incomplete Question
141 : 3	141 : 17	Irrelevant
153 : 15	153 : 18	Lacks personal knowledge - Speculation
161 : 24	162 : 5	Irrelevant
165 : 7	165 : 19	Lacks personal knowledge - Speculation
178 : 7	178 : 12	Lacks personal knowledge - Speculation
178 : 22	179 : 1	Asked & Answered
194 : 1	194 : 3	Lacks foundation / Assumes fact not in evidence
194 : 4	194 : 11	Lacks foundation / Assumes fact not in evidence, Lacks personal knowledge - Speculation
198 : 15	198 : 17	Attorney testifying
198 : 18	198 : 20	Argumentative
198 : 24	199 : 7	Irrelevant, Unintelligible, confusing
199 : 22	199 : 25	Mischaracterizes Testimony
254 : 24	255 : 15	Irrelevant
264 : 12	264 : 13	Question without Answer
264 : 20	265 : 3	Lacks personal knowledge - Speculation, Misleading
268 : 11	268 : 15	Colloquy

From *Page: Line*	Through *Page: Line*	Objections
271 : 20	272 : 8	Misleading, Mischaracterizes Document
279 : 3	279 : 12	Misleading

BALES, R.
4/12/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
7:16	7 : 18	Question without Answer
10:22	11 : 2	Leading the witness
11:11	11 : 13	Leading the witness
11:19	11 : 23	Lacks personal knowledge - Speculation
12:2	12 : 4	Leading the witness
12:5	12 : 9	Vague &Ambiguous
13:19	13 : 24	Leading the witness, Lacks personal knowledge - Speculation
13:25	14 : 2	Colloquy
14:3	14 : 3	Leading the witness, Lacks personal knowledge - Speculation
14:7	14 : 15	Lacks foundation/Assumes fact not in evidence
17:10	17 : 17	Leading the witness
17:18	17 : 25	Hearsay
20:10	20 : 16	Lacks personal knowledge - Speculation, Lacks foundation/Assumes fact not in evidence
20:17	20 : 19	Colloquy
36:5	36 : 12	Hearsay
36:17	36 : 17	Colloquy
36:25	37 : 1	Question without Answer
37:2	37 : 3	Colloquy
37:24	38 : 9	Hearsay
79:11	80 : 2	Irrelevant

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PARISH, B.
3/26/99
Objections

From *Page: Line*	Through *Page: Line*	Objections
13:17	13 : 20	Answer without Question
14:8	14 : 8	Question without Answer
78:25	79 : 1	Lacks personal knowledge - Speculation
79:5	79 : 9	Lacks personal knowledge - Speculation
79:16	79 : 16	Colloquy
80:8	80 : 12	Lacks personal knowledge - Speculation
80:16	80 : 19	Lacks personal knowledge - Speculation
81:9	81 : 17	Lacks personal knowledge - Speculation
81:21	81 : 23	Lacks personal knowledge - Speculation
82:6	82 : 7	Mischaracterizes Document
82:11	82 : 11	Mischaracterizes Document
82:12	82 : 20	Lacks personal knowledge - Speculation
82:24	83 : 4	Lacks personal knowledge - Speculation
90:18	90 : 20	Lacks personal knowledge - Speculation
90:23	90 : 23	Lacks personal knowledge - Speculation
96:6	96 : 6	Answer without Question
96:7	96 : 9	Lacks foundation/Assumes fact not in evidence, Mischaracterizes Document
96:14	96 : 15	Colloquy
96:19	97 : 1	Lacks foundation/Assumes fact not in evidence, Mischaracterizes Document
97:2	97 : 3	Lacks personal knowledge - Speculation
97:5	97 : 5	Lacks personal knowledge - Speculation
104:13	104 : 23	Not Authenticated
105:8	105 : 9	Colloquy, Attorney testifying
120:14	120 : 24	Not Authenticated
122:14	122 : 14	Asked & Answered
122:15	122 : 21	Answer without Question
123:7	123 : 22	Not authenticated, Hearsay, Lacks personal knowledge - Speculation, Lacks foundation / Assumes fact not in evidence
123:25	124 : 3	Not authenticated, Hearsay, Lacks personal knowledge - Speculation, Lacks foundation
124:15	124 : 18	Not authenticated, Hearsay, Misleading, Lacks foundation/Assumes fact not in evidence
124:20	124 : 23	Not authenticated, Hearsay, Misleading, Lacks foundation/Assumes fact not in evidence

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From *Page: Line*	Through *Page: Line*	Objections
130:22	130 : 25	Not authenticated, Misleading, Lacks foundation/Assumes fact not in evidence, Lacks personal knowledge - Speculation
131:1	131 : 1	Not authenticated; Lacks foundation/Assumes fact not in evidence, Lacks personal knowledge - Speculation; Hearsay
149:15	149 : 19	Lacks personal knowledge - Speculation
149:23	150 : 2	Lacks personal knowledge - Speculation
150:23	151 : 1	Mischaracterizes Document, Lacks personal knowledge - Speculation
151:4	151 : 15	Lacks personal knowledge - Speculation, Mischaracterizes document
158:1	158 : 11	Misleading, Lacks personal knowledge - Speculation, Unintelligible, confusing , Mischaracterizes document, Prejudicial more than Probative
158:12	158 : 15	Misleading, Mischaracterizes document, Prejudicial more than Probative
159:8	159 : 10	Lacks personal knowledge - Speculation
159:13	159 : 15	Lacks foundation/Assumes fact not in evidence
175:3	175 : 5	Lacks personal knowledge - Speculation
175:9	175 : 9	Lacks personal knowledge - Speculation
175:20	175 : 21	Lacks foundation/Assumes fact not in evidence, Lacks personal knowledge - Speculation
175:24	175 : 25	Lacks foundation/Assumes fact not in evidence, Lacks personal knowledge - Speculation
202:18	202 : 19	Colloquy

LAESSIG H.
8/25/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
9 : 15	9 : 20	Colloquy
54 : 18	54 : 21	Colloquy
60 : 22	60 : 24	Irrelevant, Attorney Testifying
60 : 25	60 : 25	Incomplete Question, Question without Answer
88 : 7	88 : 8	Colloquy
89 : 16	90 : 24	Irrelevant
98 : 5	98 : 6	Attorney Testifying, Colloquy

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RUSK, G.
5/17/99
Objections

From *Page: Line*	Through *Page: Line*	Objections
6 : 12	7 : 11	Not Authenticated
7 : 12	7 : 18	Hearsay; Not Authenticated
7 : 22	8 : 3	Lacks foundation/Assumes fact not in evidence
8 : 4	8 : 24	Hearsay; Not Authenticated
8 : 25	9 : 2	Leading the witness
9 : 3	9 : 6	Lacks personal knowledge - Speculation
9 : 7	9 : 9	Hearsay
9 : 10	9 : 18	Lacks foundation/Assumes fact not in evidence; Leading the witness
9 : 20	9 : 24	Lacks foundation/Assumes fact not in evidence; Leading the witness
10 : 3	10 : 3	Lacks foundation/Assumes fact not evidence; Leading the witness
10 : 8	10 : 24	Lacks foundation/Assumes fact not in evidence; Leading the witness; Argumentative; Lacks personal knowledge - Speculation; Misleading
11 : 1	11 : 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Argumentative; Leading the witness
11 : 3	11 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Argumentative; Leading the witness
11 : 10	11 : 13	Leading the witness; Lacks foundation/ Assumes fact not in evidence; Misleading
11 : 21	12 : 23	Hearsay
12 : 24	12 : 24	Leading the witness; Argumentative
13 : 1	13 : 1	Leading the witness; Argumentative
13 : 19	13 : 24	Leading the witness; Lacks foundation/Assumes fact not in evidence
14 : 2	14 : 7	Lacks foundation/Assumes fact not in evidence; Misleading
14 : 8	14 : 13	Leading the witness
14 : 14	14 : 20	Lacks foundation/ Assumes fact not in evidence
14 : 21	15 : 13	Hearsay
15 : 14	15 : 16	Leading the witness
16 : 3	16 : 8	Hearsay
16 : 13	16 : 20	Leading the witness
17 : 1	17 : 4	Lacks personal knowledge - Speculation; Lacks foundation/ Assumes fact not in evidence; Misleading
17 : 16	18 : 6	Leading the witness
18 : 11	18 : 21	Hearsay; Lacks foundation/Assumes fact not in evidence; Leading the witness

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From *Page: Line*	Through *Page: Line*	Objections
18 : 22	18 : 23	Lacks foundation/ Assumes fact not in evidence
18 : 24	19 : 3	Leading the witness
19 : 4	19 : 9	Lacks foundation/Assumes fact not in evidence
19 : 10	19 : 14	Vague &Ambiguous; Leading the witness
19 : 22	19 : 23	Lacks foundation/Assumes fact not in evidence; Misleading
20 : 9	20 : 11	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
20 : 13	20 : 19	Vague &Ambiguous; Lacks foundation/ Assumes fact not in evidence
20 : 20	20 : 25	Lacks foundation/ Assumes fact not in evidence
21 : 5	21 : 9	Lacks foundation/ Assumes fact not in evidence; Misleading
21 : 13	21 : 13	Colloquy
21 : 14	21 : 14	Lacks foundation/ Assumes fact not in evidence; Misleading
22 : 10	22 : 13	Leading the witness
22 : 14	22 : 20	Lacks foundation/Assumes fact not in evidence
22 : 21	22 : 23	Leading the witness
22 : 24	23 : 1	Lacks foundation/Assumes fact not in evidence
23 : 2	23 : 6	Leading the witness
23 : 9	23 : 13	Leading the witness
23 : 15	23 : 16	Answer without Question
23 : 22	24 : 2	Lacks foundation/Assumes fact not in evidence
24 : 9	24 : 11	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
24 : 16	24 : 21	Leading the witness; Vague &Ambiguous
25 : 5	25 : 7	Leading the witness;
25 : 9	25 : 9	Leading the witness
25 : 11	25 : 22	Hearsay
25 : 23	26 : 5	Leading the witness
26 : 22	26 : 25	Leading the witness
27 : 22	28 : 1	Hypothetical; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
28 : 21	29 : 2	Hearsay
29 : 8	29 : 11	Lacks foundation/Assumes fact not in evidence
29 : 12	29 : 14	Leading the witness
46 : 21	46 : 21	Colloquy
51 : 5	51 : 15	Hypothetical; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
63 : 23	64 : 4	Not Responsive
70 : 2	70 : 15	Hearsay
72 : 25	73 : 6	Hearsay
75 : 10	76 : 2	Hearsay
76 : 4	76 : 4	Hearsay

From *Page: Line*	Through *Page: Line*	Objections
82 : 5	82 : 10	Misleading; Prejudicial more than Probative; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
83 : 5	83 : 10	Mischaracterizes Testimony; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness; Vague &Ambiguous
83 : 15	83 : 15	Colloquy
83 : 16	83 : 22	Mischaracterizes testimony; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness
84 : 9	84 : 18	Vague &Ambiguous; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
85 : 16	86 : 2	Lacks foundation/Assumes fact not in evidence; Argumentative; Lacks personal knowledge - Speculation; Misleading; Mischaracterizes Testimony; Leading the witness
86 : 3	86 : 4	Colloquy
86 : 5	86 : 7	Leading the witness; Lacks foundation/Assumes fact not in evidence; Misleading; Mischaracterizes Testimony
88 : 3	88 : 13	Irrelevant
88 : 25	89 : 9	Irrelevant
89 : 18	90 : 7	Irrelevant
91 : 21	92 : 2	Irrelevant; Hearsay

STANKE, M.
6/23/99
Objections

From *Page: Line*	Through *Page: Line*	Objections
80 : 19	80: 22	Hypothetical; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
80 : 25	80: 25	Irrelevant
81 : 2	81: 4	Irrelevant
81 : 5	81: 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hypothetical
81 : 12	81: 19	Misleading; Unintelligible, confusing
131 : 16	131: 17	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Question without Answer
131 : 22	131: 25	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence
132 : 10	132: 18	Lacks foundation/Assumes fact not in evidence; Misleading
133 : 9	133: 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
134 : 15	135: 11	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation, Misleading
140 : 2	140: 5	Lacks personal knowledge - Speculation
142 : 9	142: 16	Irrelevant; Misleading; Prejudicial more than Probative; Lacks foundation/Assumes fact not in evidence
145 : 15	145: 21	Lacks personal knowledge - Speculation
147 : 24	148: 2	Argumentative; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
148 : 8	148: 9	Argumentative; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
160 : 2	160: 9	Lacks foundation/Assumes fact not in evidence
166 : 23	167: 2	Lacks personal knowledge - Speculation
171 : 14	171: 16	Lacks personal knowledge - Speculation; Misleading
171 : 19	171: 23	Lacks personal knowledge - Speculation; Misleading
172 : 1	172: 1	Lacks personal knowledge - Speculation; Misleading
179 : 24	180: 8	Lacks personal knowledge - Speculation
217 : 9	217: 25	Attorney Testifying; Lacks foundation/Assumes fact not in evidence; Misleading
229 : 11	229: 20	Misleading; Lacks foundation/Assumes fact not in evidence; Prejudicial more than Probative; Lacks personal knowledge - Speculation; Argumentative
230 : 14	230: 16	Question without Answer

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From *Page: Line*	Through *Page: Line*	Objections
275 : 7	275: 11	Lacks personal knowledge - Speculation
275 : 18	275: 22	Question without Answer
275 : 23	276: 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
283 : 18	283: 25	Hypothetical; Lacks foundation/Assumes fact not in evidence; Misleading
287 : 6	287: 9	Mischaracterizes Document; Lacks Foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading
287 : 22	287: 25	Asked & Answered
288 : 8	288: 25	Asked & Answered; Argumentative

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CARTER, A.
3/1/99
Objections

From *Page: Line*	Through *Page: Line*	Objections
13 : 22	14 : 2	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
14 : 12	14 : 17	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
19 : 6	19 : 17	Hearsay
20 : 1	20 : 4	Hearsay
20 : 5	20 : 19	Hearsay
20 : 23	21 : 2	Hearsay
21 : 3	21 : 21	Irrelevant; Hearsay
22 : 2	22 : 7	Hearsay
22 : 12	22 : 22	Hearsay
23 : 8	24 : 8	Privileged; Hearsay
24 : 21	25 : 6	Privileged; Hearsay
25 : 7	25 : 9	Lacks foundation/Assumes fact not in evidence;
25 : 10	25 : 16	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
26 : 18	27 : 1	Leading the witness; Lacks foundation/Assumes fact not in evidence
29 : 1	29 : 9	Leading the witness
32 : 15	33 : 20	Leading the witness; Lacks foundation/Assumes fact not in evidence
37 : 2	37 : 6	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
37 : 7	37 : 9	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
37 : 13	37 : 15	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
37 : 16	38 : 7	Lacks foundation/Assumes fact not in evidence; Leading the witness
38 : 18	39 : 25	Argumentative; Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
40 : 14	40 : 18	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
41 : 21	43 : 3	Lacks personal knowledge - Speculation; Leading the witness; Lacks foundation/Assumes fact not in evidence; Argumentative; Misleading
43 : 12	43 : 16	Lacks personal knowledge - Speculation; Leading the witness; Lacks foundation/Assumes fact not in evidence; Argumentative; Misleading
46 : 15	46 : 17	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

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From *Page: Line*	Through *Page: Line*	Objections
48 : 2	48 : 6	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
49 : 25	50 : 2	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness; Prejudicial more than Probative
50 : 5	50 : 5	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation Leading the witness; Misleading
50 : 7	50 : 13	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness; Misleading
50 : 23	51 : 15	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Argumentative
52 : 17	52 : 23	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
53 : 2	53 : 4	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading the witness
55 : 12	55 : 15	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
55 : 19	56 : 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Leading
56 : 15	56 : 22	Leading the witness
57 : 5	57 : 7	Leading the witness
57 : 24	58 : 1	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
58 : 5	58 : 20	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
59 : 4	59 : 7	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
59 : 10	59 : 11	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
60 : 7	61 : 10	Mischaracterizes Testimony; Leading the witness; Lacks foundation/Assumes fact not in evidence
61 : 24	63 : 11	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness; Mischaracterizes Testimony
63 : 15	64 : 1	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Leading the witness; Mischaracterizes Testimony
65 : 2	65 : 8	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence

From *Page: Line*	Through *Page: Line*	Objections
66 : 20	66 : 24	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
67 : 2	67 : 2	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
67 : 4	67 : 5	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Answer without Question
67 : 12	67 : 24	Hearsay
74 : 25	75 : 3	Asked & Answered
75 : 9	75 : 15	Asked & Answered
75 : 19	75 : 21	Asked & Answered
80 : 13	80 : 18	Leading the witness
99 : 6	99 : 9	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
99 : 12	99 : 17	Leading the witness; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
102 : 25	103 : 14	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
104 : 4	104 : 12	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
106 : 1	106 : 15	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Asked & Answered
108 : 4	108 : 8	Lacks personal knowledge - Speculation
109 : 6	109 : 8	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
109 : 16	109 : 18	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
109 : 24	110 : 1	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
112 : 17	112 : 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
124 : 4	124 : 11	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
124 : 16	124 : 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
125 : 5	125 : 7	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
125 : 10	125 : 13	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
130 : 24	130 : 25	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence

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From *Page: Line*	Through *Page: Line*	Objections
131 : 2	131 : 2	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
132 : 9	132 : 19	Asked & Answered; Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
134 : 5	135 : 3	Leading the witness
135 : 16	135 : 18	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
135 : 21	135 : 22	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
136 : 14	136 : 18	Leading the witness
136 : 19	136 : 22	Prejudicial more than Probative; Leading the witness
137 : 15	137 : 19	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Prejudicial more than Probative
138 : 1	138 : 4	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Prejudicial more than Probative
138 : 5	138 : 8	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
138 : 10	138 : 10	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
138 : 24	139 : 7	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
171 : 15	172 : 14	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
172 : 22	173 : 8	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
174 : 16	174 : 19	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
174 : 21	174 : 21	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
176 : 23	177 : 2	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
177 : 11	177 : 14	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
177 : 16	177 : 16	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence

BALLARD, C.
5/28/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
11:22	11 : 23	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
12:12	12 : 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
12:25	13 : 1	Asked & Answered
13:2	13 : 2	Colloquy
13:3	13 : 3	Asked & Answered
13:15	13 : 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
14:16	14 : 20	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
15:3	15 : 13	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation

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PIATEK, R.
7/17/99
Objections

From *Page: Line*	Through *Page: Line*	Objections
9 : 2	9 : 9	Hearsay; Document speaks for itself
11 : 14	11 : 23	Hearsay; Document speaks for itself
16 : 18	17 : 3	Hearsay; Document speaks for itself
19 : 10	19 : 17	Lacks foundation/Assumes fact not in evidence; Hearsay; Document speaks for itself
19 : 18	20 : 22	Lacks foundation/Assumes fact not in evidence
22 : 3	22 : 4	Leading the witness; Compound; Vague &Ambiguous; Misleading; Question without Answer; Lacks foundation/Assumes fact not in evidence
22 : 22	23 : 4	Answer without Question; Compound; Vague &Ambiguous; Misleading; Lacks personal knowledge - Speculation; Leading the witness
23 : 5	23 : 19	Hearsay; Leading the witness; Document speaks for itself; Misleading
23 : 20	24 : 10	Lacks foundation/Assumes fact not in evidence
25 : 8	25 : 14	Lacks foundation/Assumes fact not in evidence
27 : 18	27 : 23	Hearsay; Document speaks for itself; Misleading; Answer without a Question
27 : 24	28 : 4	Lacks foundation/Assumes fact not in evidence
28 : 12	29 : 2	Leading the witness
32 : 2	32 : 7	Vague &Ambiguous; Misleading; Lacks personal knowledge - Speculation; Leading the witness
32 : 9	32 : 12	Vague &Ambiguous; Misleading; Lacks personal knowledge - Speculation; Leading the witness
32 : 14	32 : 23	Unintelligible, confusing ; Vague &Ambiguous; Lacks personal knowledge - Speculation; Leading the witness
33 : 1	33 : 11	Unintelligible, confusing ; Vague &Ambiguous; Lacks personal knowledge - Speculation; Leading the witness
33 : 14	33 : 24	Leading the witness

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CUTLER, R.
7/13/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
39 : 21	39 : 23	Colloquy
74 : 23	74 : 23	Colloquy
95 : 5	95 : 9	Colloquy
191 : 4	191 : 11	Not Responsive; Question without Answer; Vague &Ambiguous
209 : 1	209 : 1	Answer without Question
253 : 16	253 : 20	Asked & Answered
253 : 23	254 : 1	Asked & Answered
254 : 2	254 : 7	Argumentative; Vague &Ambiguous; Misleading; Prejudicial more than Probative
254 : 10	254 : 18	Argumentative; Vague &Ambiguous; Misleading; Prejudicial more than Probative

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KEIL, L.
6/5/99
Objections

From *Page: Line*	**Through** *Page: Line*	**Objections**
11:15	11 : 21	Hearsay
11:24	12 : 4	Hearsay
13:23	14 : 4	Hearsay
15:25	17 : 14	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
18:24	19 : 2	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Unintelligible, confusing
19:10	19 : 12	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
19:23	20 : 1	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague &Ambiguous
21:8	22 : 6	Prejudicial more than Probative; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Hearsay
22:19	22 : 25	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Prejudicial more than Probative; Hearsay
23:1	23 : 25	Lacks personal knowledge - Speculation; Lacks foundation; Misleading; Hearsay
24:1	24 : 3	Vague &Ambiguous; Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge; Misleading
24:9	24 : 24	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Vague &Ambiguous
24:25	25 : 12	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation
26:11	26 : 19	Hearsay
28:14	29 : 9	Lacks foundation/Assumes fact not in evidence; Lacks personal knowledge - Speculation; Misleading; Hearsay
30:6	30 : 14	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading
34:15	35 : 1	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Argumentative
35:4	35 : 15	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading; Argumentative
36:11	36 : 21	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Misleading

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From *Page: Line*	Through *Page: Line*	Objections
36:22	37 : 11	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
37:22	38 : 7	Hearsay; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
38:8	38 : 19	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
42:21	43 : 9	Hearsay; Misleading; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
43:16	43 : 24	Hearsay; Misleading; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
46:5	46 : 18	Hearsay
47:19	48 : 2	Hearsay; Misleading; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence

JOHN BONOFFSKI
4/19/99
Objections

From *Page: Line*	Through *Page: Line*	Objections
6 : 17	7 : 14	Irrelevant
28 : 15 Beginning with "That.."	28 : 18	Calls for legal conclusion
37 : 3	37 : 4	Vague & Ambiguous
37 : 9	37 : 9	Not responsive
38 : 8	38 : 11	Leading the witness
39 : 12	39 : 19	Asked & Answered; Leading the witness
39 : 23	40 : 4	Asked & Answered; Leading the witness
40 : 6	40 : 10	Asked & Answered; Leading the witness
41 : 16	41 : 20	Leading the witness
47 : 19	47 : 22	Asked & Answered; Leading the witness
47 : 25	48 : 4	Asked & Answered; Leading the witness
48 : 7	48 : 7	Asked & Answered; Leading the witness
51 : 13	52 : 12	Hearsay; Leading the witness
52 : 20	53 : 7	Hearsay; Leading the witness
53 : 8	53 : 12	Leading the witness; Argumentative; Lacks personal knowledge - Speculation
53 : 17	53 : 18	Leading the witness; Argumentative; Lacks personal knowledge - Speculation
53 : 20	54 : 8	Leading the witness; Argumentative; Lacks personal knowledge - Speculation; Asked & Answered
56 : 22	57 : 10	Hearsay; Leading the witness
59 : 13	60 : 8	Hearsay; Leading the witness; Argumentative; Asked & Answered
61 : 14	61 : 17	Hearsay; Leading the witness
61 : 24	62 : 2	Vague & Ambiguous; Hearsay; Leading the witness
62 : 13	63 : 1	Argumentative; Leading the witness; Lacks personal knowledge - Speculation
63 : 11	64 : 3	Leading the witness; Hearsay; Argumentative
64 : 7	65 : 1	Leading the witness; Hearsay; Argumentative
65 : 16	67 : 14	Leading the witness; Hearsay; Argumentative

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From *Page: Line*	Through *Page: Line*	Objections
72 : 12	73 : 16	Leading the witness; Hearsay; Argumentative; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
76 : 25	77 : 2	Leading the witness; Asked & Answered
84 : 2	84 : 7	Leading the witness; Asked & Answered
93 : 22	93 : 25	Misleading; Leading the witness
98 : 19	100 : 12	Leading the witness; Asked & Answered; Document speaks for itself
100 : 19	101 : 3	Leading the witness; Misleading; Lacks foundation/Assumes fact not in evidence
101 : 5	101 : 16	Leading the witness; Argumentative
108 : 19	109 : 13	Leading the witness; Lacks foundation/Assumes fact not in evidence
109 : 14	109 : 20	Mischaracterizes document; Document speaks for itself
109 : 21	110 : 3	Document speaks for itself; Mischaracterizes document
110 : 10	110 : 13	Irrelevant
110 : 14	112 : 9	Leading the witness; Document speaks for itself
112 : 20	113 : 11	Leading the witness; Document speaks for itself
113 : 15	116 : 7	Leading the witness; Document speaks for itself
116 : 25	117 : 16	Leading the witness; Lacks personal knowledge - Speculation; Document speaks for itself
126 : 23	127 : 12	Leading the witness; Document speaks for itself
128 : 2	128 : 22	Leading the witness; Document speaks for itself; Mischaracterizes the document
133 : 6	133 : 20	Documents speaks for itself; Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
133 : 23	133 : 24	Documents speaks for itself; Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence

From *Page: Line*	Through *Page: Line*	Objections
134 : 1	134 : 7	Documents speaks for itself; Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
134 : 18	135 : 15	Documents speaks for itself; Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
135 : 19	135 : 19	Documents speaks for itself; Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
135 : 21	135 : 22	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
142 : 7	142 : 8	Vague & Ambiguous; Argumentative
142 : 11	142 : 11	Vague & Ambiguous; Argumentative
142 : 13	142 : 14	Vague & Ambiguous; Argumentative
142 : 16	142 : 16	Vague & Ambiguous; Argumentative
142 : 18	142 : 18	Vague & Ambiguous; Argumentative
142 : 20	142 : 20	Vague & Ambiguous; Argumentative
197 : 1	197 : 21	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
198 : 16	198 : 17	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Argumentative
198 : 20	198 : 20	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Argumentative
198 : 22	198 : 25	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
199 : 1	199 : 25	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Document speaks for itself

From *Page: Line*	Through *Page: Line*	Objections
200 : 4	200 : 6	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Document speaks for itself
200 : 14	200 : 16	Argumentative
200 : 18	200 : 20	Argumentative
200 : 22	201 : 4	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
201 : 19	202 : 1	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Vague & Ambiguous; Asked & Answered; Harassing
203 : 12	203 : 14	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Harassing; Mischaracterizes testimony
203 : 19	203 : 19	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Harassing; Mischaracterizes testimony
206 : 6	206 : 15	Mischaracterizes testimony; Document speaks for itself; Asked & Answered; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
207 : 5	207 : 8	Leading the witness
207 : 25	208 : 9	Leading the witness; Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence
212 : 2	212 : 18	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Asked & Answered
212 : 22	212 : 24	Lacks personal knowledge - Speculation; Lacks foundation/Assumes fact not in evidence; Asked & Answered
213 : 7	213 : 9	Vague & Ambiguous; Asked & Answered; Argumentative
213 : 12	213 : 12	Vague & Ambiguous; Asked & Answered; Argumentative

From *Page: Line*	Through *Page: Line*	Objections
213 : 14	213 : 15	Vague & Ambiguous; Asked & Answered; Argumentative

16diii003644

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' COUNTER DESIGNATIONS TO
PLAINTIFFS' DESIGNATIONS OF DEPOSITIONS

Pursuant to the Court's February 18, 1999 Scheduling Order, Defendants respectfully submit the following counter-designations to Plaintiffs' designated deposition testimony.

January 28, 2000

Respectfully submitted,

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16diii003646

WECKMAN, R.
8/9/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
19 : 7	19 : 14
46 : 4	46 : 23
52 : 16	55 : 3
56 : 16	59 : 4
63 : 19	63 : 23
64 : 22	66 : 4
66 : 21	66 : 24
67 : 5	67 : 25
68 : 7	69 : 7
69 : 20	71 : 1
72 : 9	73 : 5
74 : 18	75 : 1
80 : 2	80 : 9

16diii003647

UNTIEDT, D.
7/9/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
8 : 20	8 : 23
37 : 2	37 : 11
37 : 15	37 : 21
99 : 15	99 : 23
101 : 2	101 : 7
118 : 20	118 : 25
129 : 1	129 : 3
151 : 22	152 : 14
152 : 21	152 : 25
197 : 3	197 : 5
198 : 8	198 : 11
211 : 23	212 : 3
212 : 13	212 : 17
213 : 6 Beginning with "And one..."	213 : 22
217 : 13	217 : 19
223 : 23	224 : 1
224 : 12	224 : 24
225 : 2	225 : 10
231 : 23	232 : 2
233 : 2	233 : 16

WALDEN, D.
8/23/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
70 : 10	70 : 18
107 : 23	108 : 15
109 : 6	109 : 16
115 : 13	116 : 12
121 : 18 Beginning with "I just want..."	123 : 10
132 : 11	132 : 23
133 : 7	133 : 10 Ending with "No. No. No."
133 : 18	133 : 20 Ending with "No."

16diii003649

CHIARADIO, R.
6/24/99 & 8/6/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
59 : 17	59 : 23
70 : 12	71 : 11
116 : 3	116 : 6
245 : 23	246 : 5
255 : 23	256 : 9
257 : 2	257 : 17
258 : 12	258 : 19
268 : 14	268 : 18
385 : 1	385 : 8
438 : 14	438 : 21
438 : 24	440 : 3
441 : 11	441 : 14
441 : 20	441 : 25
442 : 6	442 : 15
496 : 16	496 :21
511 : 4	511 : 14
512 : 2	512 : 13
512 : 19	512 : 25
514 : 9	515 : 3
517 : 13	517 : 20
518 : 1	518 : 4
518 : 6	519 : 17

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WELSH, G.
2/26/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
26 : 17	26 : 19
26 : 22	27 : 4
27 : 11	27 : 19
34 : 23	35 : 13
35 : 15	35 : 16
39 : 14	39 : 17
39 : 19	40 : 5
86 : 19	86 : 21
86 : 25	87 : 7
87 : 9	87 : 13
89 : 4	89 : 11
91 : 3	91 : 6

16diii003651

STEVENS, M.
7/7/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
39 : 14	40 : 2
40 : 4	40 : 4
40 : 12	41 : 17
42 : 3	42 : 13
43 : 12	43 : 14
43 : 20	44 : 15
45 : 9	45 : 13
55 : 22	55 : 24
56 : 1	56 : 6
56 : 8	58 : 1
58 : 3	58 : 8
58 : 10	59 : 7
59 : 9	59 : 21
59 : 23	60 : 10
60 : 13	63 : 8

16diii003652

BERKIBILE, T.
7/17/99
Counter Designations

From *Page: Line*	Through *Page: Line*
68 : 16	68 : 23
72 : 8	72 : 16
73 : 15	73 : 19
74 : 11	74 : 16
74 : 23	75 : 2
78 : 12	78 : 17
79 : 23	80 : 2
85 : 17	85 : 20
87 : 19	87 : 22
95 : 11	95 : 16
96 : 2	96 : 12
96 : 17	96 : 18
106 : 21	107 : 1
113 : 18	114 : 4
114 : 24	115 : 6
115 : 14	115 : 17
116 : 15	116 : 18
118 : 5	118 : 12
131 : 12	131 : 14
151 : 9	151 : 10 Ending with "written,..."
159 : 12	160 : 9
162 : 16	162 : 16
162 : 21	163 : 2
163 : 7	163 : 9
200 : 22	201 : 5
227 : 21	228 : 11
228 : 23	229 : 15
231 : 8	231 : 12
238 : 14	238 : 22
240 : 2	240 : 4
261 : 2	261 : 5
267 : 16	267 : 21
271 : 16	271 : 19

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BALES, R.
4/12/99
Counter Designations

From *Page: Line*	Through *Page: Line*
20 : 4	20 : 9
42 : 7	42 : 21

16diii003654

PARISH, B.
3/26/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
94 : 10	94 : 21
150 : 16	150 : 22
153 : 25	154 : 20

16diii003655

LAESSIG, H.
8/25/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
70 : 21	71 : 1
101 : 11	101 : 14
102 : 4	102 : 14

16diii003656

RUSK, G.
5/17/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
10 : 4	10 : 7
42 : 10	42 : 15
47 : 3	47 : 4
47 : 8	47 : 8
47 : 10	47 : 10
52 : 8	52 : 10
52 : 12	52 : 17
58 : 24	60 : 7
60 : 13	61 : 9
62 : 4	62 : 13
63 : 3	63 : 15
63 : 17	63 : 22
64 : 17	65 : 2
65 : 16 Beginning with "When..."	65 : 18
65 : 21	66 : 14
67 : 7	67 : 13
68 : 5	68 : 16
68 : 18	68 : 25
69 : 1	69 : 5
72 : 22	72 : 24

STANKE, M.
6/23/99
Counter Designations

From *Page: Line*	Through *Page: Line*
63 : 7	63 : 9
64 : 16	64 : 19
78 : 9	78 : 11
78 : 13	78 : 20
79 : 14	79 : 23
80 : 3	80 : 8
81 : 8	81 : 11
82 : 7	82 : 18
87 : 15	87 : 25
88 : 14	88 : 22
113 : 1	113 : 18
113 : 24	114 : 9
119 : 11	119 : 18
120 : 24	121 : 2
121 : 17	122 : 1
122 : 8	122 : 14
123 : 5	123 : 9
123 : 21	123 : 24
124 : 22	125 : 1
126 : 7	126 : 22
128 : 5	128 : 13
132 : 19	133 : 1
135 : 16	136 : 3
143 : 25	144 : 8
144 : 25	145 : 6
146 : 13	146 : 19
146 : 23	147 : 2
148 : 15	149 : 1
149 : 7	149 : 18
150 : 18	150 : 24
153 : 2	153 : 4
153 : 23	154 : 1
155 : 14	155 : 17
156 : 5	156 : 7
156 : 12	156 : 19
158 : 5	159 : 1
159 : 7	159 : 11
159 : 15	160 : 1
160 : 17	160 : 25
163 : 8	163 : 23
167 : 19	167 : 25
169 : 22	170 : 1
170 : 8	170 : 23
174 : 9	174 : 24
176 : 22	177 : 24

From *Page: Line*	Through *Page: Line*
178 : 13	178 : 23
180 : 9	180 : 13
180 : 21	180 : 25
182 : 9	182 : 22
183 : 19	184 : 2
184 : 7	184 : 20
185 : 3	185 : 20
188 : 1	188 : 15
190 : 12	190 : 15
205 : 2	205 : 6
208 : 9	208 : 21
210 : 12	211 : 3
211 : 9	211 : 24
212 : 3	212 : 10
212 : 20	212 : 22
231 : 23	232 : 8
239 : 7	239 : 25
242 : 6	242 : 10
242 : 12	242 : 13
242 : 20	243 : 3
243 : 10	243 : 12
244 : 15	244 : 18
250 : 16	250 : 22
278 : 22	278 : 23
284 : 25	285 : 3
289 : 21	291 : 18
297 : 2	297 : 3
297 : 5	297 : 8
297 : 12	297 : 17
298 : 4	298 : 9
299 : 7	299 : 12

CARTER, A.
3/1/99
Counter Designations

From *Page: Line*	Through *Page: Line*
32 : 7	32 : 14
36 : 1	36 : 5
43 : 4	43 : 11
43 : 17	43 : 20
46 : 18	47 : 2
48 : 7	48 : 18
48 : 22	48 : 23
49 : 1	49 : 18
51 : 16	51 : 21
52 : 1	52 : 6
52 : 11	52 : 13
53 : 6	53 : 9
53 : 17	53 : 18
57 : 11	57 : 17
63 : 12	63 : 14
74 : 10	74 : 11
74 : 14	74 : 18
80 : 24	81 : 3
81 : 6	81 : 7
100 : 3	100 : 6
100 : 14	100 : 21
100 : 24	100 : 25
101 : 2	101 : 9
103 : 15	103 : 24
104 : 24	105 : 6
113 : 3	113 : 5
113 : 7	113 : 8
125 : 23	126 : 2
131 : 12	132 : 8
132 : 23	134 : 4
143 : 16	143 : 18
148 : 13	148 : 21
148 : 24	148 : 24
149 : 3	149 : 3
149 : 20	149 : 25
150 : 3	150 : 4
153 : 8	153 : 25
154 : 5	155 : 25
156 : 12	156 : 21
158 : 16	160 : 12
160 : 19	165 : 15
175 : 4	176 : 15
176 : 17	176 : 17

BALLARD, C.
5/28/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
11 : 9	11 : 13
15 : 14	15 : 18
15 : 20	15 : 20
15 : 22	15 : 25
16 : 2	16 : 2
16 : 6	16 : 10
16 : 13	16 : 14
20 : 13	20 : 25

16diii003661

PIATEK, R.
7/17/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
20 : 23	20 : 25
21 : 2	21 : 2
21 : 15	21 : 23
22 : 12	22 : 21
25 : 15	25 : 19
26 : 25	27 : 4
27 : 6	27 : 9
29 : 21	29 : 25
30 : 2	30 : 12
33 : 25	34 : 4
53 : 21	54 : 20
57 : 19	58 : 1
58 : 25	59 : 5
60 : 5 Beginning with "You testified..."	60 : 12 Ending with "no."
60 : 23	60 : 25
73 : 16	74 : 2
74 : 5	74 : 16
75 : 25	76 : 10
77 : 7	77 : 12
78 : 11	78 : 16
78 : 18 Beginning with "If you..."	78 : 23

16diii003662

CUTLER, R.
7/13/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
75 : 24	76 : 4
76 : 6	76 : 7
96 : 17	97 : 25
196 : 8	196 : 21
197 : 5	197 : 14
197 : 18	197 : 21
205 : 10	205 : 19

KEIL, L.
6/5/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
17 : 15	17 : 20
20 : 3	21 : 7
24 : 4	24 : 8
25 : 13	25 : 20
29 : 10	29 : 17
29 : 20	29 : 21
37 : 12	37 : 21
39 : 9	39 : 23
44 : 10	44 : 14
44 : 17	44 : 21
45 : 8	46 : 4
57 : 4	57 : 21
57 : 25	58 : 8
58 : 10	59 : 1
59 : 12	59 : 14
59 : 16	60 : 15
60 : 18	60 : 19
70 : 12	70 : 23
70 : 25	70 : 25
71 : 1	71 : 3
71 : 6	71 : 8
71 : 10	72 : 2
72 : 4	73 : 19
78 : 22	80 : 9
80 : 19	80 : 22
80 : 24	81 : 12
81 : 14	81 : 16

16diii003664

ENTWISTLE, T.
7/1/99
Counter Designations

From *Page: Line*	Through *Page: Line*
80 : 15	80 : 20
111 : 14	111 : 15
113 : 4	114 : 1
114 : 11	114 : 19
136 : 7	136 : 8
138 : 5	138 : 11
139 : 1	139 : 13
153 : 1	153 : 5
197 : 16	198 : 3
198 : 7	198 : 12
198 : 23	199 : 6
202 : 13	202 : 19
219 : 15	219 : 20
223 : 17	223 : 19
226 : 3	226 : 5
271 : 5	271 : 8
271 : 17	271 : 22
274 : 7	274 : 14
275 : 17	276 : 4
282 : 24	283 : 3
283 : 18	283 : 22
321 : 1	321 : 2
323 : 24	324 : 4
324 : 9	324 : 14
328 : 7	328 : 14
328 : 17	328 : 20
332 : 10	332 : 24
350 : 19	350 : 25
354 : 18	354 : 25
355 : 14	355 : 16
355 : 22	355 : 25
363 : 13	364 : 6
366 : 21	366 : 24
368 : 14	368 : 16
369 : 7	369 : 20
373 : 1	373 : 11
379 : 3	379 : 8
396 : 22	397 : 1
398 : 10	398 : 12
423 : 7	423 : 15
424 : 17	424 : 21
429 : 16	429 : 22
430 : 7	430 : 22

16diii003665

BEYERLEIN, M .
3/25/99
Counter Designations

From *Page: Line*	Through *Page: Line*
80 : 20	81 : 2
81 : 24	82 : 4
82 : 6	82 : 17
82 : 20	82 : 23
82 : 25	83 : 3
115 : 8	116 : 18
145 : 4	145 : 6
163 : 25	164 : 3
164 : 17	164 : 20
165 : 10	165 : 14
165 : 16	165 : 17

16diii003666

JANSING, R.
8/23/99
Counter Designations

From *Page: Line*	Through *Page: Line*
9 : 5	9 : 13
10 : 7	10 : 11
12 : 19	12 : 21
14 : 10	14 : 19
14 : 23	14 : 25
15 : 2	15 : 7
18 : 18	19 : 3
19 : 19	22 : 19
24 : 17	25 : 11
26 : 7	28 : 7
28 : 15	28 : 21
28 : 23	30 : 2
30 : 5	30 : 24
34 : 25	35 : 6
36 : 21	36 : 23
37 : 1	37 : 19
38 : 17	39 : 5

16diii003667

TOWNSEND, B.
8/18/99
Counter Designations

From *Page: Line*	Through *Page: Line*
10 : 16	10 : 18 Ending with "person."
17 : 1	17 : 3
17 : 7	17 : 13
17 : 18	18 : 4
18 : 10	18 : 13
19 : 9	19 : 24 Ending with "one."
20 : 9	20 : 25
25 : 20	25 : 25
26 : 11	26 : 12
28 : 3	28 : 12
29 : 13	29 : 16
34 : 22	35 : 25
37 : 16	37 : 21
38 : 1	38 : 6
38 : 10	40 : 1
40 : 16	41 : 8
41 : 15	41 : 22
42 : 18	44 : 2
44 : 10	44 : 19
45 : 5	45 : 13
45 : 21	46 : 2
46 : 5	46 : 11
47 : 11	49 : 2

16diii003668

NABI, D.
8/5/99
Counter Designations

From *Page: Line*	Through *Page: Line*
146 : 1	146 : 5

16diii003669

ZAHRT, G.
3/30/99
Counter Designations

From *Page: Line*	Through *Page: Line*
214 : 14	214 : 22

16diii003670

WALLER, D.
8/30/99
Counter Designations

From *Page: Line*	Through *Page: Line*
22 : 3	22 : 3
22 : 5	22 : 5
62 : 13	63 : 6
63 : 11	64 : 2
64 : 17	64 : 21
65 : 7	66 : 2
68 : 15	69 : 17
70 : 1	70 : 17
100 : 3	100 : 8

16diii003671

MARCONI, J.
8/17/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
10 : 16	11 : 12
20 : 4	20 : 13
26 : 15	26 : 18
26 : 20	27 : 14
27 : 18	27 : 18
31 : 1	32 : 17

16diii003672

SMITH, G.
8/19/99
Counter Designations

From *Page: Line*	Through *Page: Line*
112 : 24	114 : 14
440 : 2	440 : 2

16diii003673

WHEATLEY, J.
9/3/99
Counter Designations

From *Page: Line*	Through *Page: Line*
26 : 11	27 : 13
29 : 9	29 : 11
54 : 22	55 : 5
55 : 10	55 : 17
57 : 16	57 : 20
73 : 5	73 : 13
73 : 18	73 : 20
76 : 22	76 : 24
77 : 14	77 : 17
87 : 7	88 : 14
100 : 15	101 : 10
101 : 13	101 : 17
109 : 9	109 : 12
116 : 13	116 : 15
116 : 17	116 : 18
117 : 9	117 : 15
125 : 10	125 : 13
125 : 25	126 : 3
129 : 18	129 : 24
132 : 13	132 : 17
132 : 20	133 : 2
133 : 20	134 : 14
142 : 20	143 : 9
148 : 14	148 : 21
156 : 12	156 : 18
157 : 13	157 : 17
163 : 13	164 : 13
164 : 16	164 : 21
171 : 20	171 : 21
171 : 23	171 : 23
192 : 22	192 : 23
193 : 1	193 : 11
195 : 13	196 : 12
208 : 3	208 : 8
214 : 22	215 : 10
218 : 6	219 : 7
219 : 9	219 : 18
219 : 21	219 : 21

16diii003674

LEINEN, P.
7/10/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
15 : 23	16 : 1
16 : 15	16 : 18
16 : 20	16 : 23
17 : 9	17 : 12
24 : 19	24 : 25
28 : 5	28 : 14
29 : 2	30 : 23
33 : 22	33 : 24
34 : 10	34 : 12
35 : 13	35 : 16
54 : 9	54 : 17
57 : 12	58 : 10
58 : 13	58 : 17
60 : 6	60 : 11
66 : 18	66 : 22
67 : 1	67 : 13
68 : 2	68 : 5
71 : 5	71 : 14

16diii003675

HART, A.
8/30/99
Counter Designations

From *Page: Line*	Through *Page: Line*
37 : 1	38 : 1
38 : 3	38 : 4
49 : 4	50 : 1
51 : 23	58 : 4
58 : 7	58 : 15
59 : 19	59 : 25
60 : 4	61 : 11
62 : 1	62 : 3
62 : 12	62 : 20
65 : 3	65 : 6
70 : 6	70 : 16
70 : 20	70 : 20
70 : 23	71 : 14
71 : 23	71 : 23
72 : 24	73 : 6
73 : 12	74 : 5
74 : 15	76 : 14
76 : 17	76 : 20
76 : 23	77 : 6

16diii003676

GILL - ELKINS, G.
6/25/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
32 : 11	33 : 8
40 : 21	40 : 25
56 : 8	56 : 15
77 : 6	77 : 8
77 : 10	77 : 10
82 : 10	82 : 19

16diii003677

McCARTHY, J.
3/23/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
247 : 14	251 : 9
251 : 17	268 : 21
268 : 23	268 : 23
268 : 25	273 : 4
273 : 7	273 : 14
273 : 20	273 : 22

16diii003678

FEENEY, F.
9/3/99
Counter Designations

From *Page: Line*	Through *Page: Line*
35 : 23	36 : 13
67 : 12	68 : 3

16diii003679

DILL, D.
8/24/99
Counter Designations

From *Page: Line*	Through *Page: Line*
29 : 21	29 : 24
33 : 19	34 : 7
64 : 25	66 : 10
74 : 24	76 : 6
76 : 9	76 : 15
76 : 20	77 : 5
77 : 8	77 : 12

16diii003680

OLDANI, D.
8/12/99
Counter Designations

From *Page: Line*	Through *Page: Line*
38 : 21	39 : 7
41 : 20	42 : 7
42 : 10	42 : 10
50 : 10	51 : 2
51 : 11	52 : 6
68 : 14	68 : 20
68 : 22	69 : 3
69 : 11	69 : 24
70 : 2	70 : 7
71 : 6	71 : 9

16diii003681

RUSHING, M.
6/14/99
Counter Designations

From *Page: Line*	Through *Page: Line*
31 : 3	31 : 15
33 : 22	34 : 14
36 : 10	36 : 23
66 : 24	67 : 6
71 : 23	72 : 20
73 : 16	74 : 20
79 : 20	81 : 4
82 : 2	82 : 13

16diii003682

FASANELLI, R.
7/29/99
Counter Designations

From *Page: Line*	Through *Page: Line*
51 : 5	51 : 20
79 : 17	80 : 1
87 : 15	88 : 23
89 : 2	89 : 3
95 : 20	96 : 4
114 : 11	115 : 3
159 : 21	160 : 2
160 : 22	160 : 25
164 : 5	164 : 8
166 : 2	166 : 19
171 : 3	171 : 19
177 : 21	177 : 21
181 : 24	182 : 7
182 : 24	183 : 17
185 : 12	185 : 16
186 : 7	187 : 1
188 : 23	189 : 8
191 : 17	191 : 20
191 : 25	192 : 25
225 : 21	226 : 15
236 : 6	236 : 25
249 : 7	249 : 11
253 : 23	254 : 2
255 : 2	255 : 13
258 : 10	258 : 13
258 : 18	259 : 20
260 : 2	260 : 10
262 : 12	262 : 25
267 : 15	268 : 7
268 : 14	269 : 1
269 : 16	269 : 21
287 : 23	288 : 23
289 : 4	289 : 10
290 : 7	290 : 15
306 : 15	307 : 2
333 : 5	333 : 12
333 : 20	334 : 1
334 : 12	334 : 19

16diii003683

ULIZIO, S.
9/2/99
Counter Designations

From *Page: Line*	Through *Page: Line*
13 : 8	13 : 9
13 : 19	14 : 9
17 : 18	17 : 23
18 : 11	18 : 13
19 : 6	19 : 20
20 : 10	20 : 11
20 : 15	20 : 18
20 : 20	21 : 1
24 : 3	24 : 9
24 : 12	26 : 4
28 : 1	28 : 16
31 : 17	32 : 9
34 : 8	34 : 24
36 : 18	36 : 20
37 : 16	37 : 17
37 : 20	38 : 13
41 : 19	42 : 12
43 : 7	43 : 17
43 : 24	43 : 24
44 : 6	44 : 21
45 : 17	46 : 1
48 : 20	49 : 7
51 : 8	51 : 13
51 : 15	51 : 22
59 : 9	60 : 4
60 : 20	60 : 24
61 : 7	61 : 21
62 : 5	62 : 11
63 : 6	64 : 5
65 : 8	65 : 11
66 : 1	68 : 11
83 : 15	83 : 17
84 : 20	86 : 23
87 : 1	87 : 19
88 : 13	88 : 24
89 : 2	89 : 5
90 : 8	90 : 10
90 : 13	90 : 14
90 : 20	91 : 16

16diii003684

LATTA, T.
6/3/99
Counter Designations

From *Page: Line*	Through *Page: Line*
25 : 14	25 : 18
25 : 20	25 : 20
35 : 1	35 : 5
38 : 10	38 : 13
40 : 4	40 : 19
44 : 2	44 : 10
50 : 21	51 : 4 Ending with "knowledge."
59 : 2	59 : 8
59 : 12	59 : 18
62 : 9	62 : 12
62 : 18	62 : 19
66 : 13	66 : 17
67 : 20 Beginning with "It is true..."	68 : 1
68 : 3	68 : 3
68 : 5	68 : 8
68 : 10	68 : 15
68 : 19	68 : 19
68 : 21	68 : 25
69 : 4	69 : 6
69 : 21	69 : 25
70 : 2	70 : 14
70 : 17	70 : 17
70 : 19	71 : 12
74 : 21	75 : 1
75 : 6	75 : 15
76 : 8	76 : 16
77 : 22	78 : 2
78 : 6	78 : 10
79 : 13	79 : 15
93 : 23	94 : 5 Ending with "witnessed it."

16diii003685

BALES, R.
4/12/99
Counter Designations

From *Page: Line*	Through *Page: Line*
20 : 4	20 : 9
42 : 7	42 : 21

16diii003686

NAIFEH, J.
9/3/99
Counter Designations

From *Page: Line*	Through *Page: Line*
48 : 9	48 : 12
70 : 22 Beginning with "I believe..."	71 : 2
72 : 3	72 : 5
72 : 8	72 : 8
76 : 4	76 : 21
78 : 6	78 : 8
78 : 11	78 : 12
79 : 2	79 : 4
79 : 6	79 : 7
79 : 9	79 : 9
81 : 10	81 : 12
82 : 3	82 : 10
82 : 25	83 : 3
83 : 9	83 : 14
83 : 20	83 : 22
83 : 25	84 : 1
87 : 3	87 : 5
87 : 7	87 : 7
95 : 24	96 : 3
96 : 6	96 : 6
99 : 17	100 : 5
101 : 10	103 : 18
103 : 24	104 : 3
104 : 6	104 : 16
104 : 21	104 : 21

16diii003687

ENGSTER, R.
7/23/99
Counter Designations

From *Page: Line*	Through *Page: Line*
25 : 9	25 : 10
25 : 12	25 : 13
76 : 22	77 : 2
77 : 4	77 : 10

16diii003688

CARLSON, R.
8/17/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
62 : 6	62 : 11
63 : 3	64 : 2
64 : 10 Beginning with "It is fair..."	64 : 12
64 : 14	64 : 23
85 : 16	85 : 24
94 : 5	94 : 25
102 : 14	102 : 24
143 : 20	144 : 3

16diii003689

FITZMAURICE, B.
8/31/99
Counter Designations

From *Page: Line*	Through *Page: Line*
93 : 17	93 : 20
93 : 22	93 : 25
95 : 1	95 : 11

16diii003690

IANNUZZI, A.
6/29/99
Counter Designations

From *Page: Line*	Through *Page: Line*
12 : 17	12 : 22
23 : 19	23 : 23
28 : 7	28 : 12
44 : 25	45 : 9
51 : 4	52 : 4
56 : 20	57 : 14
64 : 6	64 : 9
67 : 25	69 : 23
70 : 12	71 : 4
71 : 6	71 : 9 Ending with "bar."
71 : 20	71 : 22
71 : 24	71 : 24
72 : 9	72 : 15
72 : 17	72 : 19
84 : 13	85 : 4
87 : 21	87 : 25
93 : 3	93 : 11
99 : 10	99 : 12
101 : 6	102 : 9
103 : 1	104 : 4
104 : 6	104 : 10
104 : 12	105 : 19
105 : 21	106 : 7

16diii003691

SEGELSTROM, D.
8/18/99
Counter Designations

From *Page: Line*	Through *Page: Line*
35 : 23	36 : 1
36 : 4	36 : 10
36 : 13	36 : 17
36 : 20	36 : 20 Ending "No, I haven't."

16diii003692

BLACKBURN, D.
7/8/99
Counter Designations

From *Page: Line*	Through *Page: Line*
48 : 8	49 : 4
49 : 10	49 : 25
92 : 11	92 : 18
94 : 7	94 : 15
113 : 13	113 : 15
113 : 23	114 : 10
194 : 10	194 : 12
194 : 15	194 : 19
226 : 6	226 : 12
227 : 19	227 : 21
240 : 2	240 : 22
241 : 6	241 : 19
244 : 17	244 : 20
244 : 22	244 : 25
245 : 11	245 : 14
279 : 5	279 : 8
320 : 22	321 : 8
335 : 8	335 : 14
335 : 17	335 : 19
339 : 5	339 : 6
339 : 10	339 : 18
348 : 19	348 : 25
354 : 2	354 : 20
358 : 24	359 : 5
362 : 8	362 : 11
362 : 14	362 : 20
364 : 5	364 : 17
366 : 9	366 : 12
366 : 16	367 : 17
419 : 21	420 : 14
430 : 10	431 : 2
431 : 10	431 : 23
440 : 10	441 : 8
443 : 7	443 : 10
443 : 12	443 : 21
450 : 11	451 : 1
460 : 15	460 : 23
524 : 20	524 : 25
556 : 4	556 : 15
557 : 19	558 : 2
561 : 2	562 : 9
562 : 11	562 : 15
565 : 16	566 : 4
579 : 21	580 : 5
582 : 5	583 : 4

16diii003693

BORROWDALE, L.
8/24/99
Counter Designations

From *Page: Line*	Through *Page: Line*
11 : 18	11 : 20
11 : 23	12 : 3
32 : 12	32 : 13
32 : 20	32 : 20
46 : 20	47 : 16
47 : 19	48 : 4 Ending with "environment."
48 : 7	48 : 18
50 : 5	50 : 9
50 : 11	50 : 16
51 : 17	52 : 12
52 : 15	52 : 15
53 : 6	53 : 10
54 : 6	55 : 19
55 : 22	56 : 25
57 : 2	57 : 16
61 : 19	62 : 2
62 : 7	62 : 7
70 : 11	70 : 13
70 : 16	70 : 16
71 : 10	71 : 12
71 : 15	71 : 17
80 : 17	80 : 22
81 : 3	81 : 4
83 : 23	83 : 25
84 : 14	84 : 19
84 : 22	84 : 25
85 : 2	85 : 2

16diii003694

MILANO, G.
8/31/99
Counter Designations

From *Page: Line*	Through *Page: Line*
28 : 13	28 : 24
73 : 19	74 : 11

16diii003695

GIERER, V.
8/26/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
63 : 3	63 : 11
99 : 21	100 : 17
101 : 14	101 : 18
101 : 23	102 : 3
111 : 24	113 : 2
113 : 5	113 : 12
174 : 18	175 : 5
175 : 18	176 : 10
190 : 3	190 : 7
190 : 10	191 : 5

16diii003696

HEYLMUN, H.
6/16/99
Counter Designations

From *Page: Line*	Through *Page: Line*
26 : 4	26 : 6
26 : 8	26 : 10
34 : 2	34 : 15
41 : 24	42 : 3
67 : 5	67 : 9
71 : 5	71 : 7
71 : 10	71 : 16
72 : 1	72 : 13
249 : 15	250 : 8
378 : 5	382 : 4

16diii003697

JOHN BONOFFSKI
4/19/99
Counter Designations

From *Page: Line*	**Through** *Page: Line*
45 : 24	45 : 25
46 : 2	46 : 2
46 : 4	46 : 4
46 : 7	46 : 7
47 : 16	47 : 18
66 : 17	66 : 20
66 : 23	66 : 23
73 : 22	73 : 23
74 : 2	74 : 3
74 : 10	75 : 8
75 : 17	75 : 25
81 : 19 Beginning with "When..."	82 : 3
82 : 5	82 : 12
82 : 15	82 : 15
83 : 7	83 : 9
83 : 14	83 : 19
84 : 9	84 : 10
84 : 13	84 : 21
84 : 23	85 : 2
141 : 19	141 : 25
142 : 2	142 : 5
142 : 22	142 : 23
142 : 25	143 : 1
156 : 21	157 : 1
157 : 15	157 : 22
158 : 3	158 : 5
158 : 7	158 : 7
159 : 9	159 : 12
159 : 14	159 : 19
159 : 24	160 : 11
160 : 14	161 : 23
162 : 1	162 : 5
162 : 8	162 : 14
162 : 17	162 : 17
162 : 19	162 : 22
163 : 1	164 : 2
164 : 5	164 : 17
164 : 21	165 : 7
171 : 12	171 : 14
171 : 18	172 : 5
173 : 1	173 : 6
173 : 18	174 : 1
174 : 16	175 : 5
175 : 9	175 : 25
176 : 11	176 : 13

16diii003698

From *Page: Line*	Through *Page: Line*
176 : 17	176 : 21
176 : 23	176 : 25
177 : 2	177 : 4
177 : 6	177 : 25
178 : 1	178 : 8
178 : 12	178 : 24
179 : 1	180 : 18
180 : 22	182 : 5
182 : 8	182 : 23
183 : 1	183 : 3
183 : 6	184 : 2
184 : 5	184 : 16
184 : 19	185 : 6
185 : 9	186 : 5
186 : 8	186 : 22
186 : 25	187 : 1
187 : 4	187 : 24
188 : 1	188 : 1
188 : 3	188 : 7
189 : 14	192 : 5
192 : 7	192 : 23
193 : 3	194 : 18
194 : 23	196 : 1
196 : 13	196 : 18
196 : 20	196 : 20
201 : 5	201 : 7
201 : 11	201 : 18
202 : 2	202 : 10
202 : 18	202 : 22
202 : 25	203 : 7
203 : 23	204 : 1
204 : 4	204 : 15
207 : 9	207 : 10
207 : 18	207 : 20
208 : 13	209 : 11
212 : 25	213 : 6
215 : 13	216 : 6

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

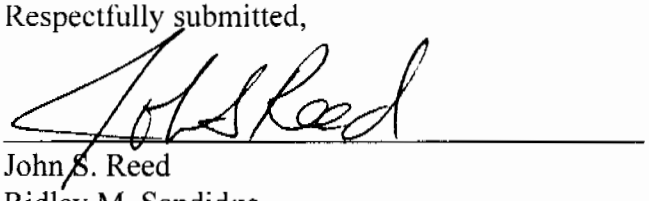
DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' PROPOSED EXHIBITS

Pursuant to the Court's February 18, 1999 Scheduling Order, Defendants respectfully submit the following objections to Plaintiffs' Proposed Exhibits. Defendants reserve the right to amend, modify or supplement the attached objections in response to: (i) the manner and method of introduction of any exhibit; (ii) rulings of the Court on any motions, either now pending or made

prior to or during the course of trial; and/or (iii) upon resolution of certain inconsistencies between Plaintiffs' Exhibits as described in Plaintiffs' List of Trial Exhibits and the copies of Plaintiffs' Proposed Exhibits provided to Defendants.

January 28, 2000

Respectfully submitted,



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Counsel for Defendants

16diii003701

Defendants' Objections to Plaintiffs' Proposed Trial Exhibits

Trial Exhibit Number	Objection(s)
PX 1	Irrelevant, Prejudicial more than Probative, Not within Rule 404(b)
PX 2	
PX 3	
PX 4	
PX 5	
PX 6	
PX 7	Hearsay, Not Authenticated
PX 8	
PX 9	
PX 10	Hearsay
PX 11	
PX 12	
PX 13	
PX 14	
PX 15	
PX 16	
PX 17	
PX 18	
PX 19	
PX 20	Hearsay, Mischaracterizes Document/Incomplete Document
PX 21	Hearsay, Not Authenticated
PX 22	Hearsay
PX 23	
PX 24	
PX 25	Hearsay, Not Authenticated
PX 26	

16diii003702

Trial Exhibit Number	Objection(s)
PX 27	Misleading/Confusing
PX 28	
PX 29	Hearsay, Not Authenticated
PX 30	
PX 31	Hearsay
PX 32	
PX 33	
PX 34	
PX 35	
PX 36	
PX 37	Hearsay
PX 38	Hearsay
PX 39	
PX 40	
PX 41	
PX 42	
PX 43	
PX 44	Hearsay, Not Authenticated
PX 45	
PX 46	
PX 47	Hearsay, Not Authenticated
PX 48	Misleading/Confusion, Mischaracterizes Document/Incomplete Document
PX 49	
PX 50	
PX 51	
PX 52	
PX 53	Not Authenticated
PX 54	

Trial Exhibit Number	Objection(s)
PX 55	Not Authenticated, Lacks Foundation
PX 56	
PX 57	
PX 58	Lacks Foundation
PX 59	
PX 60	Not Authenticated
PX 61	
PX 62	
PX 63	
PX 64	Hearsay
PX 65	
PX 66	
PX 67	Hearsay, Not Authenticated
PX 68	Hearsay, Not Authenticated
PX 69	
PX 70	
PX 71	
PX 72	
PX 73	
PX 74	Hearsay, Not Authenticated
PX 75	Hearsay
PX 76	Hearsay
PX 77	Hearsay
PX 78	
PX 79	
PX 80	Hearsay
PX 81	Hearsay
PX 82	

Trial Exhibit Number	Objection(s)
PX 83	
PX 84	Hearsay
PX 85	
PX 86	
PX 87	
PX 88	
PX 89	Hearsay
PX 90	Hearsay
PX 91	Hearsay, Not Authenticated
PX 92	Hearsay, Mischaracterizes Document/Incomplete Document
PX 93	
PX 94	
PX 95	
PX 96	
PX 97	Hearsay
PX 98	
PX 99	
PX 100	
PX 101	
PX 102	Mischaracterizes Document/Incomplete Document
PX 103	
PX 104	
PX 105	
PX 106	
PX 107	Mischaracterizes Document/Incomplete Document
PX 108	Mischaracterizes Document/Incomplete Document
PX 109	Mischaracterizes Document/Incomplete Document
PX 110	

Trial Exhibit Number	Objection(s)
PX 111	
PX 112 a	Illegible
PX 112 b	
PX 112 c	
PX 112 d	
PX 112 e	
PX 112 f	
PX 112 g	
PX 112 h	
PX 112 i	
PX 112 j	
PX 112 k	
PX 112 l	
PX 112 m	Illegible
PX 112 n	
PX 112 o	
PX 112 p	
PX 113 a	
PX 113 b	
PX 114	
PX 115	
PX 116	
PX 117	
PX 118	
PX 119	
PX 120	Hearsay, Irrelevant
PX 121	Hearsay
PX 122	

16diii003706

Trial Exhibit Number	Objection(s)
PX 123	Hearsay
PX 124	Cumulative
PX 124 a	Cumulative
PX 124 b	Cumulative
PX 124 c	Cumulative
PX 124 d	Cumulative
PX 124 e	Cumulative
PX 124 f	
PX 124 g	
PX 125	Hearsay
PX 126	
PX 127	
PX 128	
PX 129	Not Authenticated
PX 130	
PX 131	
PX 132	
PX 133	Hearsay
PX 134	
PX 135	Hearsay, Illegible
PX 136	Inadmissible under Rule 407
PX 137	
PX 138	Irrelevant, Prejudicial more than Probative, Illegible
PX 139	
PX 140	
PX 141	
PX 142	
PX 143	

Trial Exhibit Number	Objection(s)
PX 144	
PX 145	Irrelevant, Not Best Evidence
PX 146	
PX 147	Hearsay, Not Authenticated
PX 148	Mischaracterizes Document/Incomplete Document
PX 149	
PX 150	
PX 151	Hearsay, Not Authenticated
PX 152	Hearsay, Not Authenticated
PX 153	
PX 154	Hearsay
PX 155	Illegible, Mischaracterizes Document/Incomplete Document
PX 156	Hearsay, Not Authenticated, Irrelevant, Prejudicial more than Probative
PX 157	Hearsay, Not Authenticated
PX 158	
PX 159	
PX 160	Hearsay, Lacks Personal Knowledge/Speculation, Lacks Foundation, Double Hearsay, Prejudicial more than Probative, Not Best Evidence
PX 161	Hearsay, Lacks Personal Knowledge/Speculation, Prejudicial more than Probative, Lacks Foundation, Double Hearsay, Not Best Evidence
PX 162	Mischaracterizes Document/Incomplete Document, Hearsay, Lacks Foundation, Misleading/Confusing, Prejudicial more than Probative, Not Best Evidence
PX 163	Hearsay, Misleading/Confusing, Lacks Personal Knowledge/Speculation, Prejudicial more than Probative, Lacks Foundation, Not Best Evidence
PX 164	Hearsay, Lacks Foundation, Prejudicial more than Probative, Not Best Evidence
PX 165	Hearsay, Lacks Foundation, Prejudicial more than Probative, Lacks Personal Knowledge/Speculation, Misleading/Confusing, Not Best Evidence
PX 166	Hearsay, Lacks Personal Knowledge/Speculation, Misleading/Confusing, Prejudicial more than Probative, Lacks Foundation, Not Best Evidence

Trial Exhibit Number	Objection(s)
PX 167	Hearsay, Lacks Personal Knowledge/Speculation, Lacks Foundation, Prejudicial more than Probative, Misleading/Confusing, Not Best Evidence
PX 168	Hearsay
PX 169	
PX 170	
PX 171	Illegible
PX 172	
PX 173	
PX 174	
PX 175	
PX 176	Illegible
PX 177	Illegible
PX 178	Illegible
PX 179	Hearsay
PX 180	Hearsay
PX 181	Cumulative, Hearsay
PX 182	
PX 183	
PX 184	
PX 185	
PX 186	
PX 187	
PX 188	Not Authenticated
PX 189	Hearsay
PX 190	Hearsay
PX 191	
PX 192	
PX 193	

Trial Exhibit Number	Objection(s)
PX 194	Hearsay
PX 195	Hearsay
PX 196	Hearsay
PX 197	Hearsay, Not Authenticated
PX 198	Lacks Foundation, Not Authenticated
PX 199	
PX 200	
PX 201	
PX 202	Hearsay, Illegible
PX 203	
PX 204	Not Authenticated, Hearsay, Misleading/Confusing, Prejudicial more than Probative, Lacks Foundation, Lacks Personal Knowledge/Speculation
PX 205	Not Authenticated, Hearsay, Misleading/Confusing, Prejudicial more than Probative, Lacks Foundation, Lacks Personal Knowledge/Speculation
PX 206	
PX 207	
PX 208	
PX 209	Hearsay
PX 210	
PX 211	
PX 212	
PX 213	
PX 214	
PX 215	
PX 216	Hearsay
PX 217	
PX 218	
PX 219	
PX 220	

Trial Exhibit Number	Objection(s)
PX 221	
PX 222	
PX 223	
PX 224	Irrelevant
PX 225	
PX 226	
PX 227	Mischaracterizes Document/Incomplete Document
PX 228	
PX 229	
PX 230	Lacks Foundation, Not Authenticated
PX 231	
PX 232	Hearsay
PX 233	Hearsay, Not Authenticated, Illegible
PX 234	Hearsay
PX 235	Illegible
PX 236	
PX 237	Mischaracterizes Document/Incomplete Document
PX 238	
PX 239	
PX 240	Hearsay
PX 241	
PX 242	
PX 243	
PX 244	Irrelevant
PX 245	
PX 246	Hearsay
PX 247	
PX 248	Cumulative

Trial Exhibit Number	Objection(s)
PX 249	
PX 250	Cumulative, Mischaracterizes Document/Incomplete Document
PX 251	Hearsay, Not Authenticated, Lacks Personal Knowledge/Speculation, Prejudicial more than Probative, Lacks Foundation
PX 252	Irrelevant
PX 253	Hearsay, Misleading/Confusing, Prejudicial more than Probative, Lacks Personal Knowledge/Speculation, Lacks Foundation, Not Authenticated, Not Best Evidence
PX 254	Irrelevant
PX 255	Irrelevant
PX 256	Hearsay, Lacks Personal Knowledge/Speculation, Lacks Foundation, Not Authenticated, Misleading/Confusing, Prejudicial more than Probative, Not Best Evidence
PX 257	
PX 258	
PX 259	
PX 260	Irrelevant
PX 261	Hearsay, Lacks Personal Knowledge/Speculation, Lacks Foundation, Not Authenticated, Misleading/Confusing, Prejudicial more than Probative
PX 262	Hearsay
PX 263	Not Authenticated, Hearsay, Misleading/Confusing
PX 264	
PX 265	Irrelevant
PX 266	
PX 267	Irrelevant, Misleading/Confusing
PX 268	
PX 269	
PX 270	
PX 271	
PX 272	

Trial Exhibit Number	Objection(s)
PX 273	
PX 274	
PX 275	Irrelevant
PX 276	
PX 277	
PX 278	
PX 279	
PX 280	Hearsay, Not Authenticated
PX 281	Hearsay
PX 282	
PX 283	
PX 284	
PX 285	
PX 286	
PX 287	
PX 288	
PX 289	Not Authenticated
PX 290	Defendants reserve the right to assert all objections upon inspection
PX 291	Defendants reserve the right to assert all objections upon inspection
PX 292	Defendants reserve the right to assert all objections upon inspection
PX 293	Defendants reserve the right to assert all objections upon inspection
PX 294	Defendants reserve the right to assert all objections upon inspection
PX 295	Defendants reserve the right to assert all objections upon inspection
PX 296	Defendants reserve the right to assert all objections upon inspection
PX 297	Defendants reserve the right to assert all objections upon inspection
PX 298	Defendants reserve the right to assert all objections upon inspection
PX 299	Defendants reserve the right to assert all objections upon inspection
PX 300	Defendants reserve the right to assert all objections upon inspection

Trial Exhibit Number	Objection(s)
PX 301	Defendants reserve the right to assert all objections upon inspection
PX 302	Defendants reserve the right to assert all objections upon inspection
PX 303	Defendants reserve the right to assert all objections upon inspection
PX 304	Defendants reserve the right to assert all objections upon inspection
PX 305	Defendants reserve the right to assert all objections upon inspection
PX 306 a	Not Authenticated, Hearsay, Double Hearsay, Not Best Evidence
PX 306 b	Not Authenticated, Hearsay, Double Hearsay, Not Best Evidence
PX 306 c	Not Authenticated, Hearsay, Double Hearsay, Not Best Evidence, Irrelevant
PX 306 d	Not Authenticated, Hearsay, Double Hearsay, Not Best Evidence, Irrelevant
PX 306 e	Not Authenticated, Hearsay, Double Hearsay, Not Best Evidence, Irrelevant
PX 306 f	Not Authenticated, Hearsay, Double Hearsay, Not Best Evidence, Irrelevant
PX 307 a	Not Authenticated, Hearsay, Double Hearsay
PX 307 b	Not Authenticated, Hearsay, Double Hearsay
PX 307 c	Not Authenticated, Hearsay, Double Hearsay
PX 307 d	Not Authenticated, Hearsay, Double Hearsay
PX 307 e	Not Authenticated, Hearsay, Double Hearsay
PX 307 f	Not Authenticated, Hearsay, Double Hearsay
PX 308	Hearsay, Lacks Foundation, Not Authenticated
PX 309	Vague & Ambiguous, Lacks Foundation, Not Authenticated
PX 310 a	Hearsay, Not Authenticated, Irrelevant
PX 310 b	Irrelevant, Not Authenticated
PX 310 c	Irrelevant, Not Authenticated
PX 311 a	Not Authenticated, Hearsay
PX 311 b	Not Authenticated, Hearsay
PX 311 c	Not Authenticated, Hearsay
PX 311 d	Not Authenticated, Hearsay
PX 311 e	Not Authenticated, Hearsay
PX 311 f	Not Authenticated, Hearsay

Trial Exhibit Number	Objection(s)
PX 312 a	Not Authenticated, Hearsay
PX 312 b	Not Authenticated, Hearsay
PX 312 c	Not Authenticated, Hearsay
PX 312 d	
PX 312 e	
PX 312 f	
PX 312 g	
PX 312 h	
PX 312 i	
PX 312 j	
PX 312 k	
PX 312 l	
PX 312 m	
PX 312 n	
PX 312 o	
PX 312 p	
PX 313	Hearsay, Lacks Foundation, Lacks Personal Knowledge/Speculation, Fed. R. Evid. 702
PX 314	Hearsay, Lacks Foundation, Lacks Personal Knowledge/Speculation, Fed. R. Evid. 702
PX 315	Hearsay, Lacks Foundation, Lacks Personal Knowledge/Speculation, Fed. R. Evid. 702
PX 316	Hearsay, Lacks Foundation, Lacks Personal Knowledge/Speculation, Fed. R. Evid. 702
PX 317	Hearsay, Lacks Foundation, Lacks Personal Knowledge/Speculation, Fed. R. Evid. 702
PX 318 a	Not Authenticated, Hearsay
PX 318 b	Not Authenticated, Hearsay
PX 318 c	Not Authenticated, Hearsay
PX 318 d	Not Authenticated, Hearsay

Trial Exhibit Number	Objection(s)
PX 318 e	Not Authenticated, Hearsay
PX 318 f	Not Authenticated, Hearsay
PX 318 g	Not Authenticated, Hearsay
PX 318 h	Not Authenticated, Hearsay
PX 318 i	Not Authenticated, Hearsay
PX 318 j	Not Authenticated, Hearsay
PX 318 k	Not Authenticated, Hearsay
PX 318 l	Not Authenticated, Hearsay
PX 318 m	Not Authenticated, Hearsay
PX 318 n	Not Authenticated, Hearsay
PX 318 o	Not Authenticated, Hearsay
PX 318 p	Not Authenticated, Hearsay
PX 318 q	Not Authenticated, Hearsay
PX 318 r	Not Authenticated, Hearsay
PX 318 s	Not Authenticated, Hearsay
PX 318 t	Not Authenticated, Hearsay
PX 318 u	Not Authenticated, Hearsay
PX 318 v	Not Authenticated, Hearsay
PX 318 w	Not Authenticated, Hearsay
PX 318 x	Not Authenticated, Hearsay
PX 318 y	Document not provided to Defendants
PX 319	Hearsay, Prejudicial more than Probative, Misleading/Confusing, Lacks Personal Knowledge/Speculation, Lacks Foundation
PX 320	Hearsay, Lacks Foundation, Lacks Personal Knowledge/Speculation
PX 321	Hearsay, Lacks Foundation, Lacks Personal Knowledge/Speculation
PX 322	Hearsay, Lacks Foundation, Lacks Personal Knowledge/Speculation
PX 323	Hearsay, Lacks Foundation, Lacks Personal Knowledge/Speculation
PX 324	Hearsay, Lacks Foundation, Lacks Personal Knowledge/Speculation

Trial Exhibit Number	Objection(s)
PX 325	Hearsay, Lacks Foundation, Lacks Personal Knowledge/Speculation
PX 326	Not disclosed under Fed. R. Civ. P. Rule 26(a)(2)(B), Lacks Foundation
PX 327	Not disclosed under Fed. R. Civ. P. Rule 26(a)(2)(B), Lacks Foundation
PX 328	Not disclosed under Fed. R. Civ. P. Rule 26(a)(2)(B), Lacks Foundation
PX 329	Not disclosed under Fed. R. Civ. P. Rule 26(a)(2)(B), Lacks Foundation
PX 330	Not disclosed under Fed. R. Civ. P. Rule 26(a)(2)(B), Lacks Foundation
PX 331	

16diii003717

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' PROPOSED DEMONSTRATIVE EXHIBITS

Plaintiffs disclosed to Defendants three sets of demonstrative exhibits: (1) to be used during opening; (2) to be used during the direct testimony of William Rosson; and (3) to be used during the direct testimony of Dr. Morton Kamien. Defendants object to certain of these exhibits as detailed below:

1. **Demonstratives For Opening Statement (Tab 1)**

Plaintiffs propose to use 16 demonstrative exhibits during their opening statement to the jury. Defendants object to six of these exhibits as follows:

Exhibit 5: "Monopoly Power." Defendants object to the use of this exhibit and any comments like it because it would invade the province of this Court by instructing the jury on the law.

Exhibit 12: "UST's Exclusionary Agreements Cover The Entire United States." Defendants object to this exhibit because it would mislead the jury by suggesting that any so-called exclusionary agreements are pervasive throughout the United States. Even Plaintiffs' own expert witness has asserted that US Tobacco has so-called exclusive agreements with only 22,000 retail locations out of 300,000 retail locations that sell moist snuff products. Further,

this Court has ruled that Professor Gundlach's study must retain the term "Exclusive Agreements," rather than exclusionary agreements. This exhibit is presumably based on Professor Gundlach's study and, at a bare minimum, should conform to that study.

Exhibit 13: "UST Illegal Tactics." Defendants object to this exhibit because the title is unfairly prejudicial and its use would be legal argument during Plaintiffs' opening statement.

Exhibit 15: "Results of UST Control." Defendants object to this exhibit because it would be misleading to the jury to suggest that "competitors sell less" when it is undisputed in this case that U.S. Tobacco has lost sales share while "competitors" have gained sales shares and that all "competitors" have increased sales over the time period covered by the allegations.

Exhibit 16: "Why Stores Don't Stop UST's Monopolistic Tactics." Defendants object to this exhibit because the title is unfairly prejudicial and its use would be legal argument during Plaintiffs' opening statement.

2. **Demonstratives For Use During The Direct Examination of W. Rosson (Tab 2)**

Exhibits 1-6: Defendants object to the use of these demonstrative exhibits during the direct examination of William Rosson, a fact witness in Plaintiffs' case. The exhibits represent prepared analyses based on FTC reports to Congress, as well as US Tobacco documents produced in this litigation. All such exhibits are beyond the personal knowledge of Mr. Rosson as a fact witness.

3. **Proposed Exhibits For Use During The Direct Examination of Dr. Kamien (Tab 3)**

Plaintiffs disclosed to Defendants that they intent to offer PX 326 into evidence during the direct examination of Dr. Kamien. PX 326, however, is a collection of 55 different exhibits, some of which are directly related to Dr. Leftwich's testimony. Defendants requested that Plaintiffs provide Defendants with a narrowed list from PX 326, designating the exhibits Plaintiffs actually intend to use with Dr. Kamien. Plaintiffs did not respond. Defendants, therefore, object to the following exhibits collected under PX 326 because neither the exhibits, nor the information contained in the exhibits, was included in Dr. Kamien's expert report or his rebuttal report, or any supplemental report. Like the new version of Professor Gundlach's "study," Defendants have had

no opportunity to conduct any investigation or to cross examine Dr. Kamien on any of these exhibits, or with respect to any opinions represented by these exhibits.

PX 326-1: "Moist Snuff Product And Design Introductions Plotted Against UST's Market Share and Moist Snuff Prices." This exhibit purports to demonstrate the relationship between various introductions and USTC's market share and moist snuff prices. Dr. Kamien offered no such opinions, or any basis therefor, at any time.

PX 326-22: "Snuff and All-Item PPIs 1986-1998." This exhibit purports to demonstrate the relationship between moist snuff PPI and all-item PPI. Dr. Kamien offered no such opinion, or any opinion based on PPIs, at any time.

PX 326-39: "UST Moist Snuff Prices Over Time - Key Pricing Events." This exhibit purports to demonstrate the relationship between USTC price increases and certain events. Dr. Kamien offered no such opinions, or any basis therefor, at any time.

PX 326-55: "Growth Rate of Moist Snuff Sales." This exhibit purports to demonstrate the relationship between the growth rate of moist snuff sales and certain variables. Dr. Kamien offered no such opinions, or any basis therefor, at any time.

CONCLUSION

Defendants respectfully request an order excluding each of the above-referenced exhibits.

Respectfully submitted,

Dated: February 27, 2000

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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., counsel for Plaintiffs, this 27th day of February, 2000.

Counsel for Defendants

Monopoly Power

- Power to Raise Price

OR

- Exclude competition

SENT BY: KELLOGG HUBER; 270 450 5119; FEB-27-00 10:23AM; PAGE 15/18 008

UST Illegal Tactics

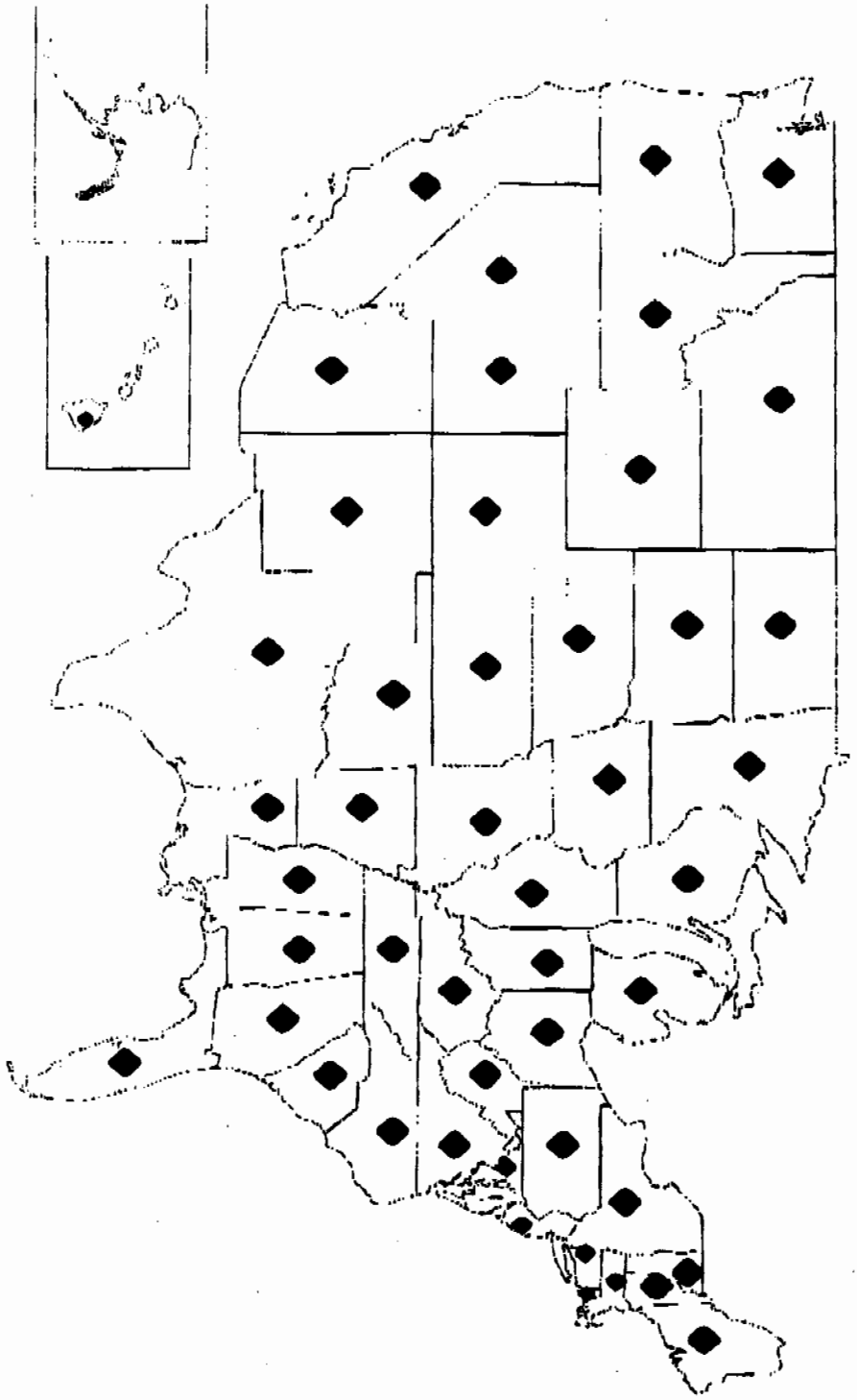
1. Slowed UST loss of market share

2. Maintained UST's monopoly power

3. Increased UST's monopoly profits

16diii003724

UST's Exclusionary Agreements Cover the Entire United States

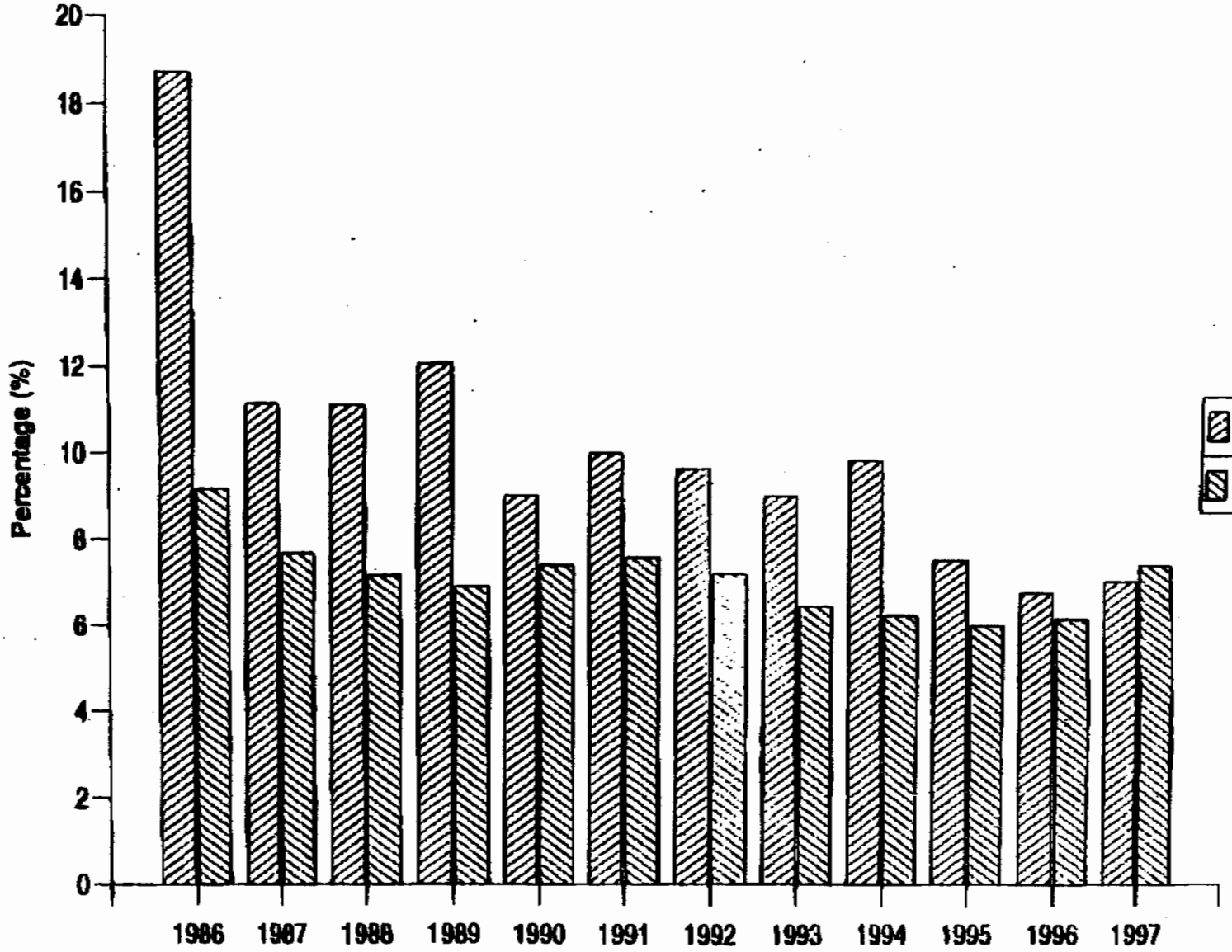


Results of UST Control

1. Competitors sell less
2. Consumers pay more

2.

Advertising and Promotional Expenditures as a Percentage of Moist Snuff Sales

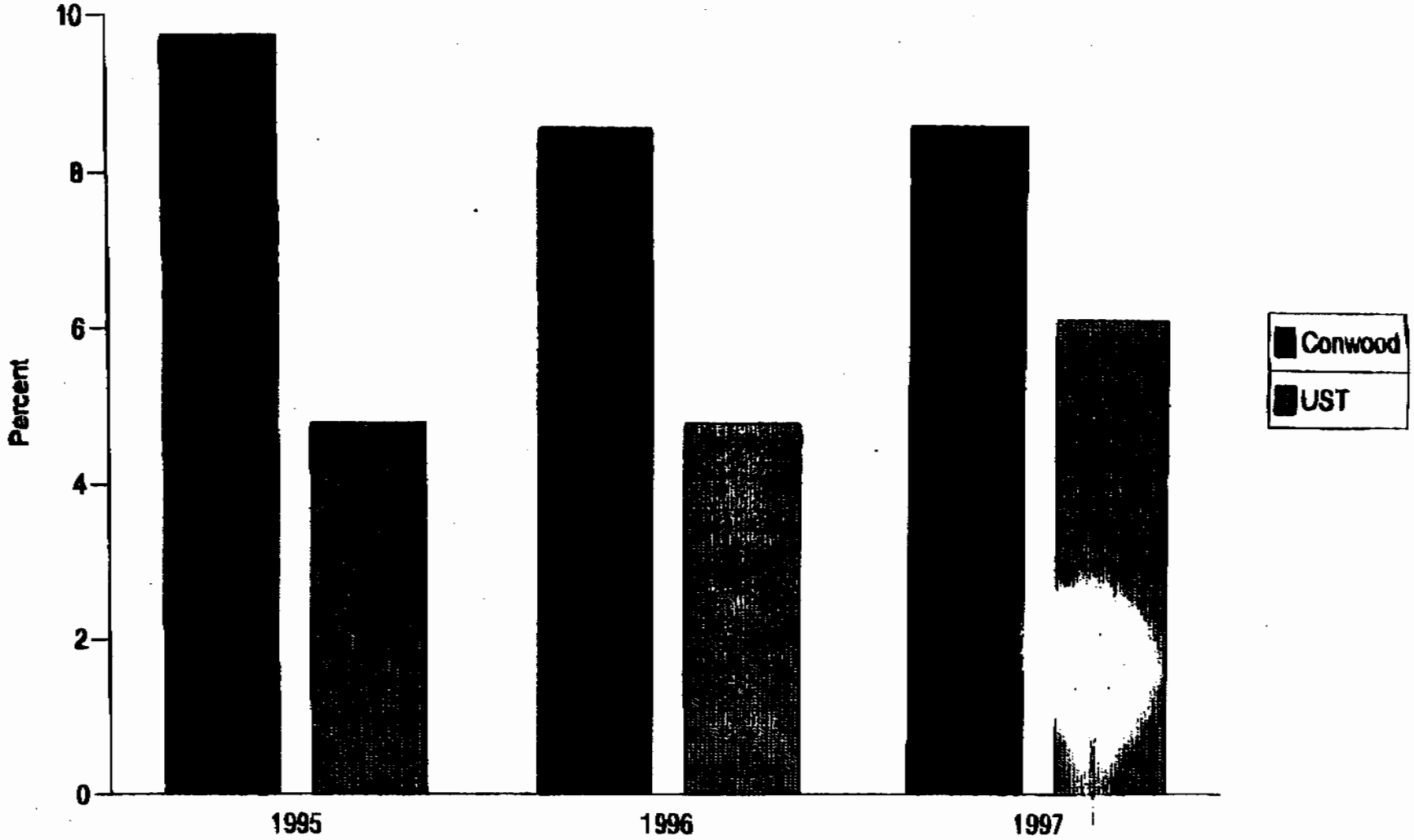


Source: Federal Trade Commission report to Congress for the years 1996 and 1997; Reports from Conwood to the FTC (1986-1997).

02/27/00 SUN 21:55 FAX
SENT BY: KELLOGG HUBER;
270 450 5119;
FEB-26-00 7:23PM;
PAGE 1/2
014

Moist Snuff Selling Expenses as a Percentage of Net Sales
Conwood Compared to US Tobacco

Based on Actual Expenditures on Promotions, Expenditures, Advertising, Development and R & D

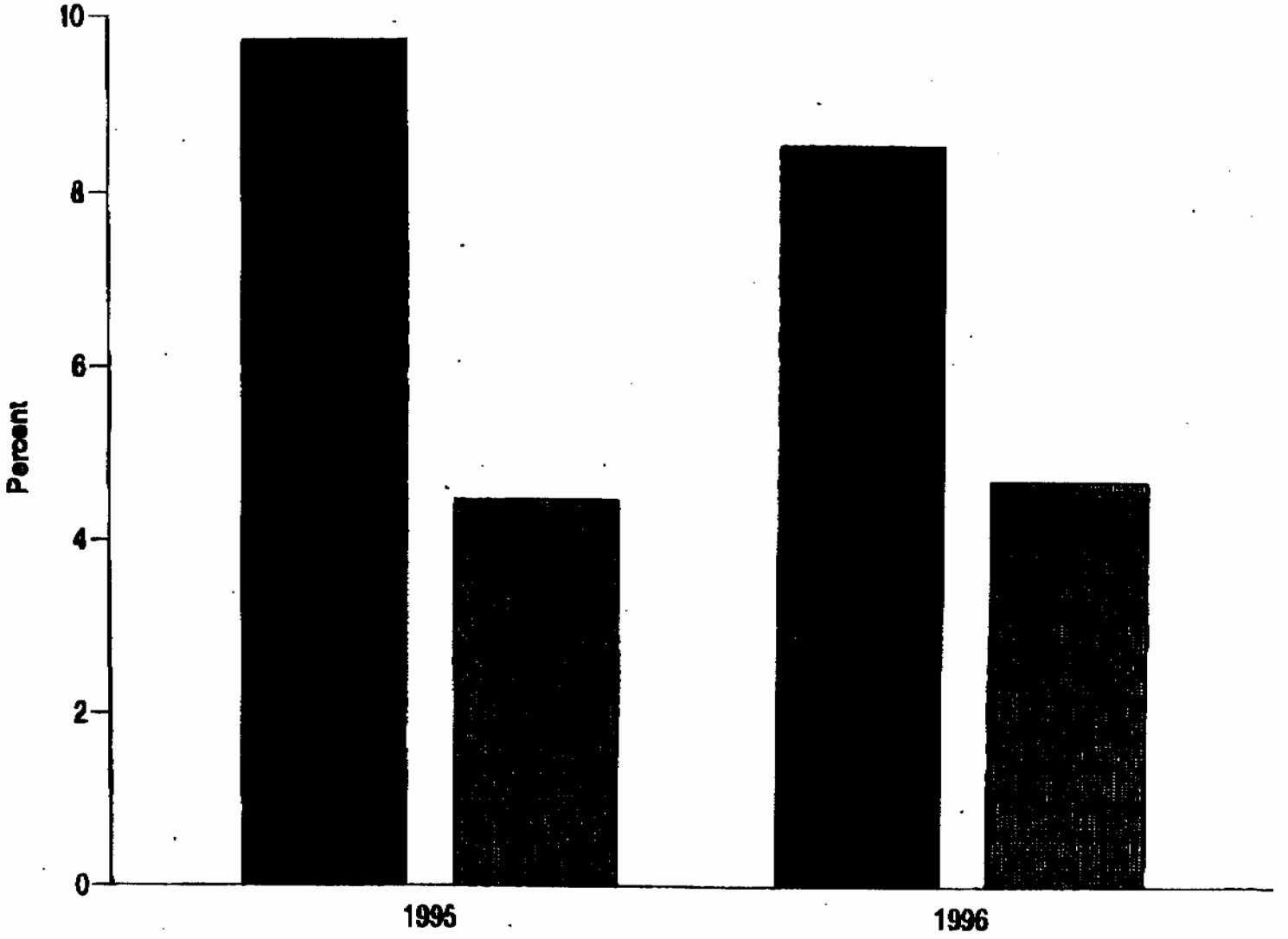


Sources: UST Financial Statement for Smokeless Consolidated, Period Ending 12/31/95 (USTC/CWD 411127–411128);
UST Six Year Business Plan, dated August 13, 1997 (USTC/CWD 094817–094820); UST 1998 Operating Budget (USTC/CWD 081026–081053), smokeless figures
Conwood Moist Snuff Division Actual vs. Planned Statement of Operations for the Period Ending December 31, 1995, December 31, 1996, and December 31, 1997.

Note: UST Promotions includes Wholesale and Retail promotions.UST Marketing includes POS, Consumer and Event Promotions, Special Marketing and Marketing Promotions
* UST does not report development and R & D separately.

16diii003729

Moist Snuff Selling Expenses as a Percentage of Net Sales
Conwood Compared to US Tobacco
Based on Actual Expenditures on Promotions, Marketing, Advertising, Development and R & D for Conwood, Projections for UST



Sources: UST 1996 and 1997 Operating Budgets (USTC/CWD 118383–118413, 118487–118506), smokeless tobacco figures. Conwood Moist Snuff Division Actual vs. Planned Statement of Operations for the Period Ending December 31, 1995.
Note: UST Promotions includes Wholesale and Retail promotions. UST Marketing includes POS, Consumer and Event Promotions, and Co-Op & Trade – Field expenses.
* UST does not report development and R & D separately.

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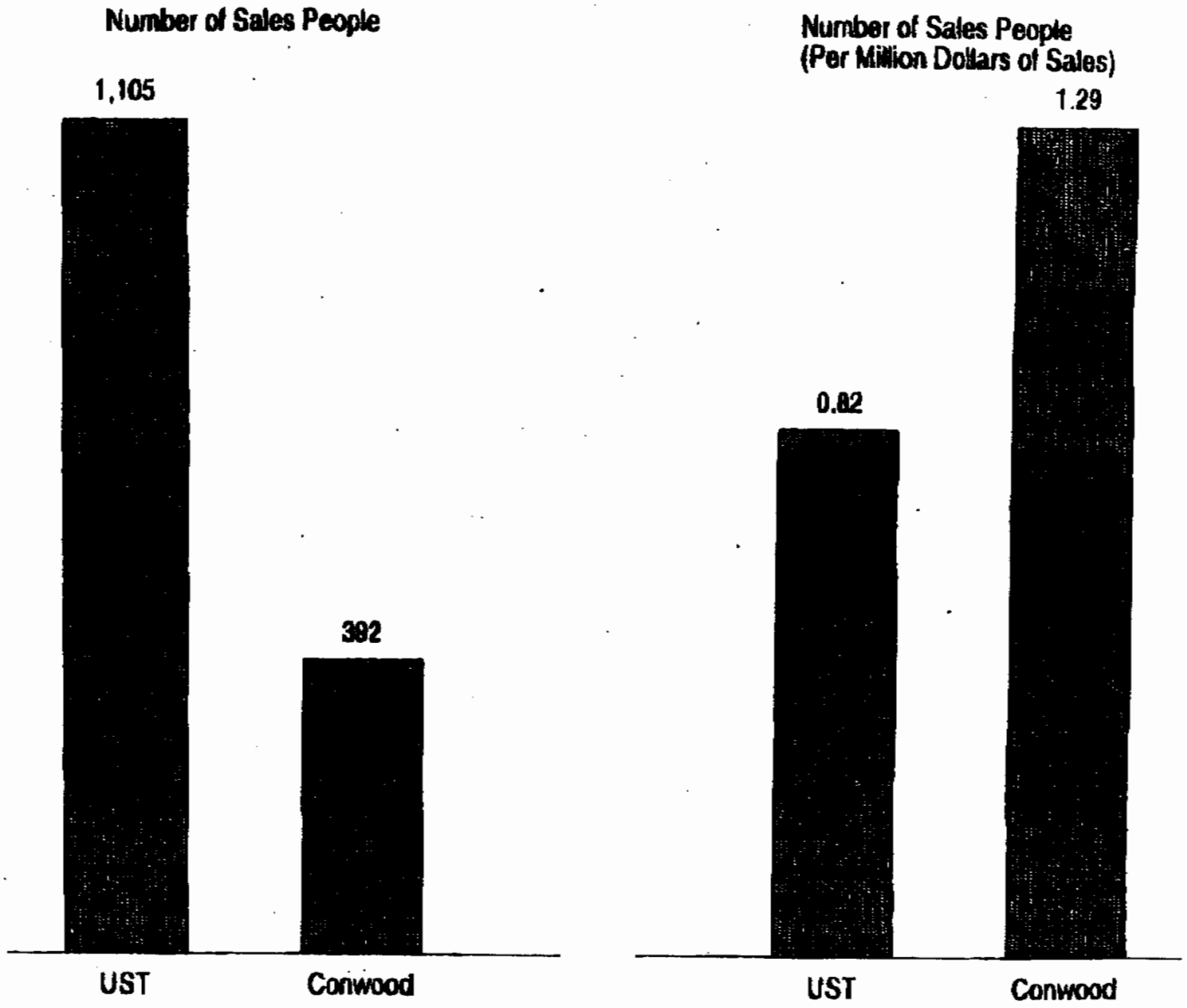
FEB-26-00 7:24PM;
PAGE 3
015
16diii003730

UST and Conwood Sales Forces



Note: Based on total Conwood sales of $306 million and UST non-tobacco sales of $1,350 million.

16diii003731

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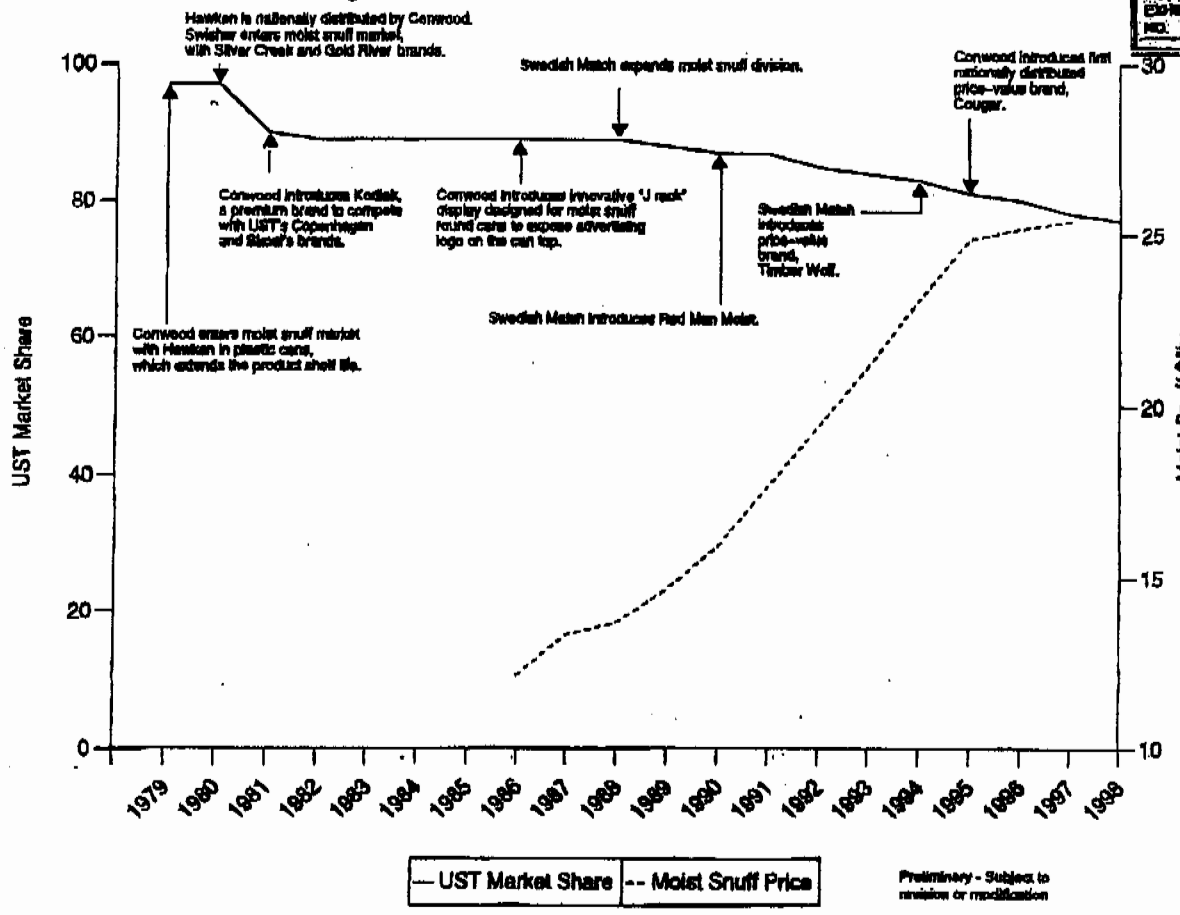
SENT BY: KELLOGG HUBER;

3.

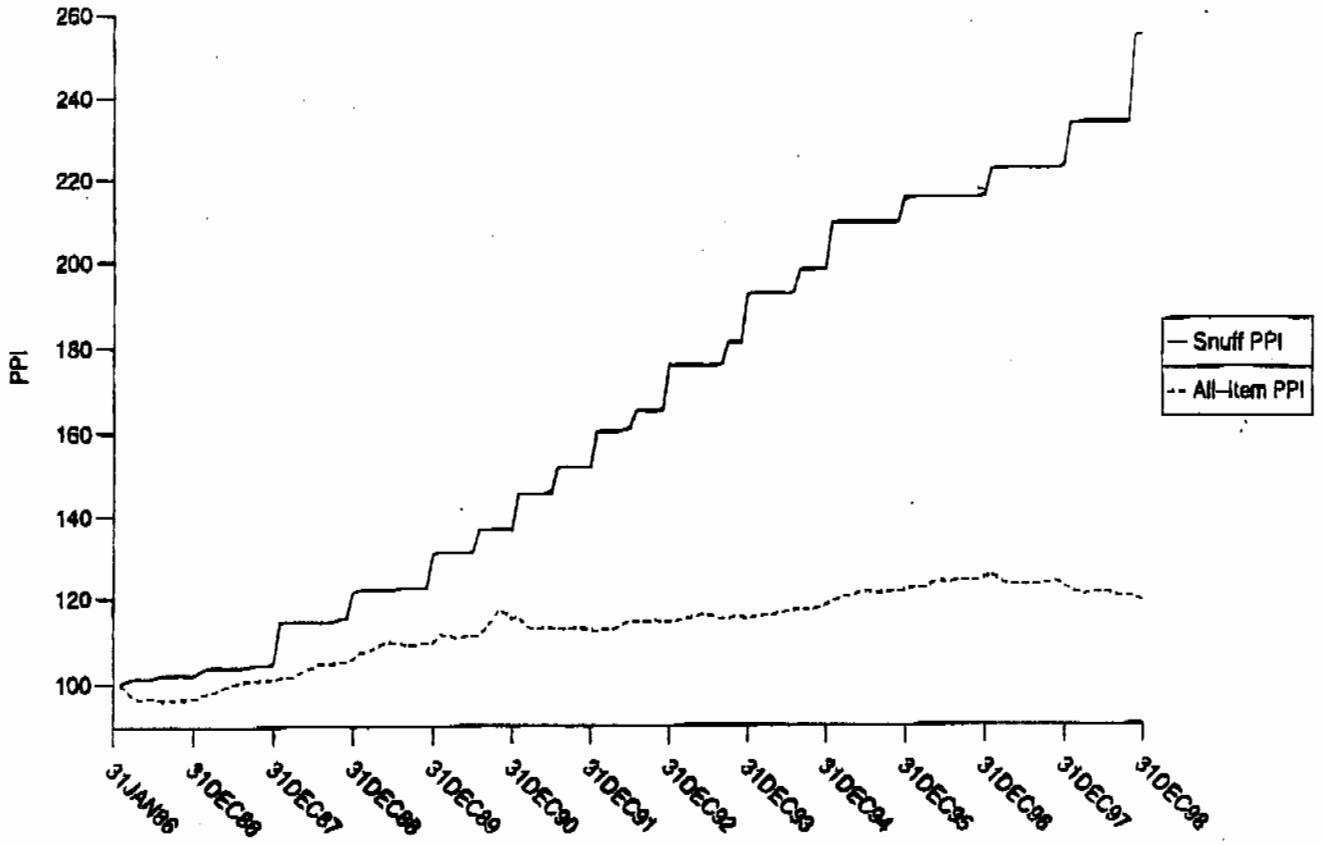
PLAINTIFF'S EXHIBIT
CASE NO. 5:98CV-108-R
EXHIBIT NO. 326



Direct Access

P3260001.000
X7403

Snuff and All-Item PPIs
1986 - 1998
(January 1986 = 100)



Note: Snuff PPI reflects moist and dry snuff.

Preliminary - Subject to revision or modification

22

P3260022.000

X7424

Direct Access

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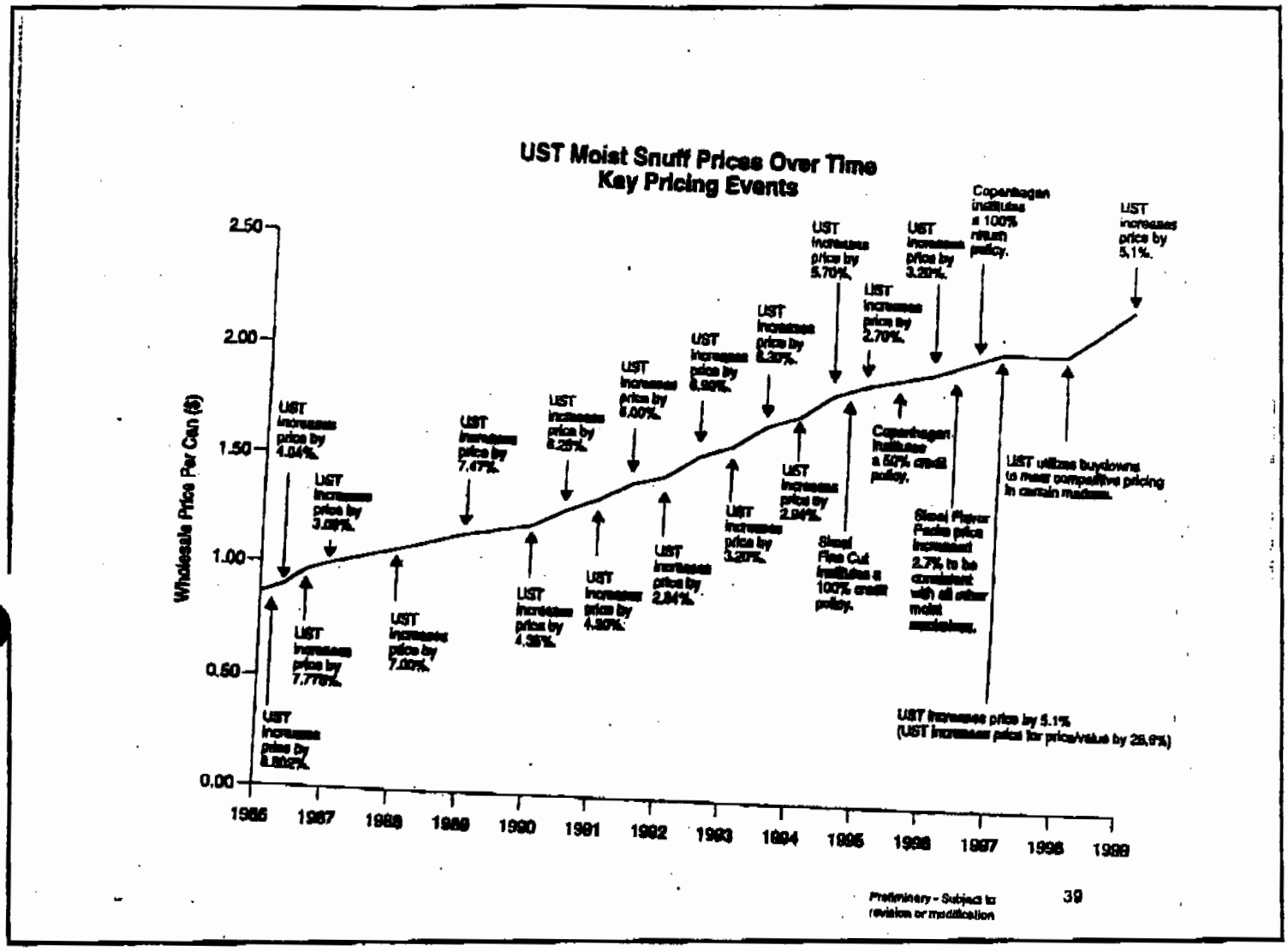

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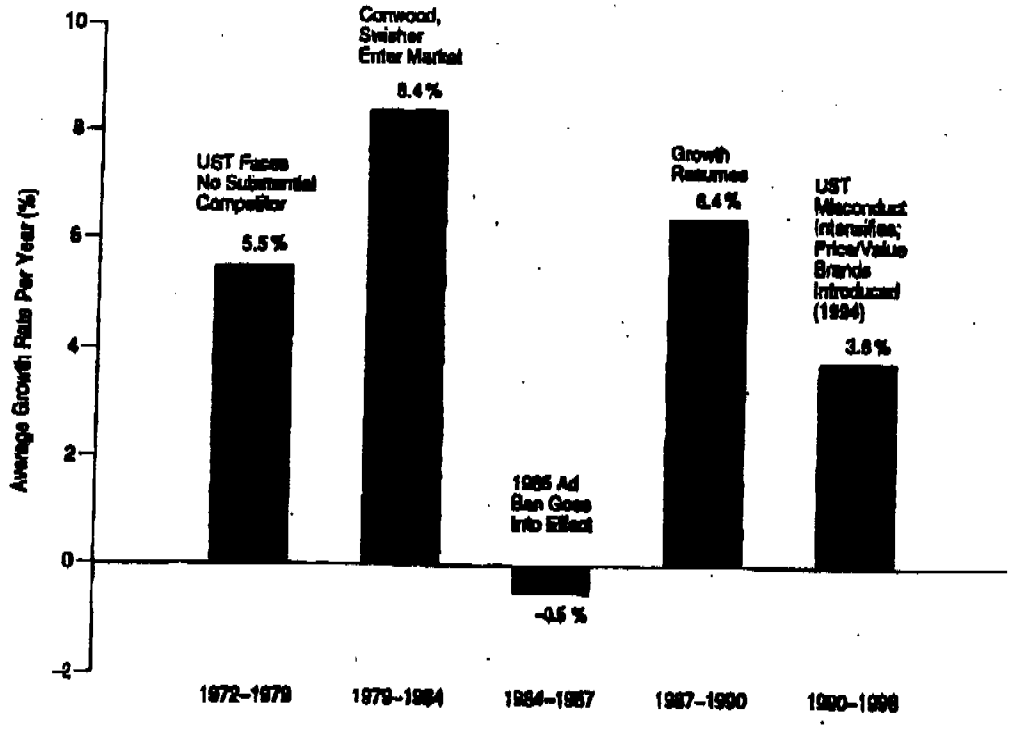
Growth Rate of Moist Snuff Sales



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FACSIMILE TRANSMITTAL SHEET

FROM: James Keyte DATE: February 28, 2000

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2. NAME: Neil Gorsuch FIRM: Kellog, Huber
   CITY: Paducah TELEPHONE NO.:
   FACSIMILE NO.: 270-450-5118

3. NAME: Ben Powell FIRM: Kellogg Huber
   CITY: Paducah TELEPHONE NO.:
   FACSIMILE NO.: 270-450-5118

MESSAGE:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' PROPOSED DEMONSTRATIVE EXHIBITS

Plaintiffs disclosed to Defendants additional demonstrative exhibits for use during the direct examination of Dr. Morton Kamien. Defendants object to the use of these exhibits as described below.

1. **Demonstratives For Use During The Direct Examination of Dr. Kamien Attached**

Plaintiffs propose to use a 14-page exhibit entitled as an outline of the direct examination of Dr. Kamien. Defendants object to certain pages of the exhibit as follows.

Pages 7 & 8: "Cross Elasticity" and "No Cross-Elasticity: Moist Snuff And Loose Leaf." Defendants object to the use of these exhibits. Dr. Kamien offered no opinion on the cross-elasticity of demand in either his expert report or his rebuttal report, or in any supplemental report. In fact, Dr. Kamien testified during his deposition (p. 31) as follows:

"Q. Did you attempt to calculate the cross-elasticities of demand that exist between moist snuff and any other tobacco product?
A. No."

Dr. Kamien should not now be allowed to offer an opinion based on cross-elasticity of demand, either by showing an exhibit or by offering any testimony that there is "no cross-elasticity" between moist snuff and loose leaf products.

Page 11: "UST exclusionary conduct widespread across US." Defendants object to the use of this exhibit because it is an unfair attempt to introduce inadmissible evidence to the jury through an expert witness. Simply listing all documents and statements that are precluded by the rules of evidence is not proper expert testimony under Fed. R. Evid. 702. Moreover, permitting Dr. Kamien to describe or discuss this "evidence" will require cross-examination, which in turn will only exacerbate the problem by bringing more attention to this inadmissible hearsay. Specifically:

- "More than 60 retailer witnesses (live and by declaration)." The jury will see the deposition testimony of certain retailers who have been subject to cross examination. The jury will not see the inadmissible declarations of other retailers who have not been subject to cross-examination. Dr. Kamien may reference the fact that he relied on various retailer declarations for certain exclusionary conduct. It would be unfair to allow him to characterize this as "evidence" or to display this item as part of a list of purportedly proven misconduct.

- "More than 400 signed retailer statements." Defendants assumes that this item refers to 400 of Conwood's "Unethical Activity Reports" purportedly signed by retailers. These reports, however, are misleading (and often inaccurate) on their face. More importantly, they are inadmissible hearsay (which Conwood has conceded numerous times). Permitting Dr. Kamien to discuss this as "evidence" or list it in a demonstrative exhibit unfairly suggests that there is proof in the record that this activity actually took place and that is "unethical." In fact, Conwood's employees have admitted that these reports are filled out for all activity -- authorized or not, "unethical" or not.

- "Testimony from Swedish Match." Plaintiffs could bring Mr. Price as a live witness or could have taken his deposition testimony. Instead, rather than subject Mr. Price to cross-examination, Plaintiffs now attempt to present his declaration through Dr. Kamien.

- "Sworn Declarations of 226 Employees." Even more so that than the "Unethical Activity Reports," this reference leaves the false impression that the "declarations" were part of this proceeding providing rather than a post-litigation survey conducted by Conwood's counsel. We believe it would be more fair to refer to them as a survey of employees conducted after the case was filed.

- "1200 Unethical Activity Reports In Recent Years." First, these reports are objectionable for the same reasons as the Unethical Activity Reports. Second, the descriptive term "in recent years" is untruthful and misleading. Conwood's "Unethical Activity Reports" date back to the late 1980's, over 10 years ago. Finally, the exhibit as a whole double counts these reports, listing the 400 that have retailers' names on them and then listing the total number of reports, 1,200.

Page 14: "7-11: largest US convenience store (15,400 outlets worldwide)." Defendants object to this exhibit because the title over-inflates the number of relevant 7-11 stores. The stipulated geographic market in this case is the United States. Plaintiffs should modify this exhibit to speak to the number of relevant stores, and to conform it to the study of Professor Gundlach, upon which Dr. Kamien relied.

CONCLUSION

Defendants respectfully request an order excluding each of the above-referenced exhibits.

Date: February 28, 2000

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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., counsel for Plaintiffs, this 28th day of February, 2000.

Counsel for Defendants

006
02/28/00 MON 21:27 FAX
SENT BY:COUNTRY HUBER;
270 450 5119;
FEB-28-00 9:04AM;
PAGE 10/17

"Cross-elasticity"

- If price of beef increases 5%, do consumers switch to chicken?
  - Example: 10% beef price increase; 20% increase in sales of chicken. Cross-elasticity = 2.0.
  - Conclusion: chicken is a substitute

007
02/28/00 MON 21:27 FAX
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2/0 450 5119;
FEB-28-00 9:04AM;
PAGE 11/17

No Cross-Elasticity: Moist Snuff and Loose Leaf

- Moist snuff prices rose 8%
- Loose leaf sales *fell*
- *No* positive relationship
- Means: Consumers don't switch to loose leaf when moist snuff prices rise
- Means: Loose leaf not a substitute for moist snuff -- not a concern for UST

UST exclusionary conduct widespread across US

- Extensive evidence in UST business records
- 10 UST former CMRs (Across US)
- More than 60 retailer witnesses (live and by declaration)
- More than 400 signed retailer statements
- Testimony from Swedish Match
- Sworn declarations of 226 Conwood reps
- 1200 Unethical Activity Reports in recent years

02/28/00 MON 21:28 FAX 009

7-11: largest US convenience store (15,400 outlets worldwide)

- Before contract — unauthorized removals by UST (complaint letter)
- After contract:
  - 8.9% drop in 7-11 moist snuff sales ('96 to '97)
  - Conwood down 15.4%

SENT BY:947003744; 2-28-00 9:05AM; 270 450 5119; FEB-28-00 9:05AM; PAGE 17/17

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

FIRST STIPULATIONS OF FACT

Pursuant to the Court's Order of February 18, 1999, the parties hereby stipulate and agree that, for the purpose of this case, the following statements may be accepted as undisputed facts. These stipulations are subject to the rights of the parties to introduce other and further evidence not inconsistent with such stipulated facts. Further, the parties preserve their rights to object, at the time of trial, to any and all portions of such stipulated facts as they may deem to be irrelevant, but not on other grounds.

The parties intend to supplement this filing with further stipulations.

1. United States Tobacco Company is a wholly-owned subsidiary of UST Inc. United States Tobacco Sales and Marketing Company Inc., and United States Tobacco Manufacturing Limited Partnership are wholly-owned subsidiaries of United States Tobacco Company. These three companies are engaged in the manufacture and sale of moist and dry snuff products. UST Inc. is a publicly traded corporation.

2. Dry snuff is responsible for less than 1% of defendants' tobacco sales volume.

3. The Copenhagen brand was first sold in 1822.

4. U.S. Tobacco introduced its first Skoal product in 1934.

5. In January 1984, U.S. Tobacco introduced Skoal Long-Cut and Skoal Long-Cut Wintergreen.

6. In May 1984, U.S. Tobacco introduced Skoal Bandit Mint.

7. In May 1985, U.S. Tobacco introduced Skoal Long-Cut Mint.

8. In March 1986, U.S. Tobacco introduced Skoal Bandit Straight.

9. In March 1987, U.S. Tobacco introduced Skoal Long-Cut Classic.

10. In May 1989, U.S. Tobacco introduced Skoal Bandit Classic.

11. In May 1993, U.S. Tobacco introduced Skoal Long-Cut Cherry and Skoal Long-Cut Spearmint.

12. In March 1997, U.S. Tobacco introduced Copenhagen Long Cut.

13. The relevant geographic market in this case is the United States of America.

Respectfully submitted,

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Neil M. Gorsuch
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Counsel for Plaintiff

Dated: January 28, 2000

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Counsel for Defendants

Dated: January 28, 2000

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John S. Reed

January 28, 2000

Via Federal Express

Hon. Thomas B. Russell
United States District Judge
121 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed are courtesy copies of the following documents which will be filed with the clerk:

1. Defendants' Motions in Limine, with a tendered Order;

2. Memorandum in Support of Defendants' Motion in Limine to Preclude Undisclosed Expert Witness Materials and Related Testimony and Declarations;

3. Memorandum in Support of Defendants' Motion in Limine Requiring Plaintiffs to Prove Exclusionary Conduct and Fact of Injury at Specific Retail Stores and Chains;

4. Memorandum in Support of Defendants' Motion in Limine to Preclude Professor Gundlach's "Study" of Purported "Exclusive Agreements" and Related Testimony;

5. Memorandum in Support of Defendants' Motion in Limine for an Order Simplifying the Issues at Trial and Facilitating the Disposition of this Lawsuit;

6. Memorandum in Support of Defendants' Motion in Limine to Preclude Certain Intended Trial Exhibits and Testimony or Other Reference to Such Materials;

7. Memorandum in Support of Defendants' Motion in Limine to Preclude All Evidence Concerning Conduct Protected by Noerr-Pennington Immunity;

8. Memorandum in Support of Defendants' Motion in Limine to Preclude Irrelevant, Misleading and Unfairly Prejudicial Statements and References;

9. Defendants' Objections to Plaintiffs' Designations of Depositions;

10. Defendants' Counter Designations to Plaintiffs' Designations of Depositions;

11. Defendants' Objections to Plaintiffs' Proposed Exhibits;

12. First Stipulations of Fact;

13. Defendants' Proposed Voir Dire;

14. Defendants' Request for Jury Instructions to be Given at the Close of Evidence; and

15. Defendants' Proposed Verdict Form;

16. the Certificate of Service covering all these documents.

A courtesy copy of these materials will also be sent to Magistrate Judge Moyer.

Respectfully,

John S. Reed

JSR/kmc
Enclosures
cc: Neil M. Gorsuch
Richard C. Roberts
James A. Keyte

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' PROPOSED VOIR DIRE

Defendants respectfully submit the following questions and request that they be asked of prospective jurors during their voir dire examination. Defendants further request that this Court question prospective jurors as to their background, employment and involvement in other juries.

1. Are you familiar with either of the parties in this case, U.S. Tobacco Company or Conwood Company?

2. Conwood is part of a group of companies owned by the Prizker family of Chicago. Another of these companies is Hyatt Hotels. Have you or anyone in your family ever been employed by Hyatt or any other company you believe may have been affiliated in any way with the Prizker family?

3. There are a number of lawyers in this case whose homes and offices are located outside the Commonwealth of Kentucky. Has anyone ever been represented by or worked with any attorneys from New York, Memphis or Washington DC?

4. There are several lawyers in this case who are from Kentucky. Mr. Richard Roberts representing Conwood is from Paducah. He is with the law firm of Whitlow, Roberts, Houston & Straub. Are any of you familiar with Mr. Roberts or any members of his firm?

Is anyone here acquainted with Mr. Roberts either through club or church membership or otherwise?

5. John Reed, Ridley Sandidge and Lynn Fieldhouse are with the Reed, Weitkamp Schell & Vice law firm in Louisville. Are any of you familiar with any of those attorneys or their firm?

6. The majority of the potential witnesses in this case live and work outside the Commonwealth of Kentucky. However, there are a number of potential witnesses from Kentucky. Is anyone here acquainted with any of the following people?

   [List of Kentucky witnesses to be provided]

7. U.S. Tobacco is a corporation involved in the tobacco business. U.S. Tobacco has been sued here for alleged antitrust violations. Do you believe either because U.S. Tobacco is a large corporation or the fact that it has been sued here for alleged antitrust violations that U.S. Tobacco is entitled to anything less than a fair trial?

8. Have you, has any family member or close friend ever been a plaintiff or defendant in a lawsuit (other than a divorce case)?

9. Have you or any member of your family been involved in any way in tobacco farming or the tobacco industry?

10. Does anyone have a negative opinion about tobacco products in general? about any specific tobacco products?

11. Would that opinion prevent you from giving a fair hearing to both sides?

12. Have you or anyone close to you ever been employed by or the owner of a convenience store? a discount tobacco store? a grocery store?

13. Have you or anyone close to you ever been employed by a mass merchandiser, such as K-Mart?

14. Does anyone here have any special knowledge of retailing by education, training, experience or otherwise?

15. Have you or anyone close to you ever been employed as a salesperson?

16. Have you or anyone close to you consumed loose leaf tobacco?

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17. Have you ever heard of Copenhagen? Skoal? Kodiak? Rooster? Silvercreek? Timberwolf? Cougar? Red Seal? Levi Garrett? Taylor's Pride? H.B. Scott?

18. Have you or anyone who close to you consumed any of these brands?

19. Have you or anyone close to you ever had a job that required that you learn about any antitrust law for purposes of compliance or another purpose?

20. Do you think that manufacturers have to compete for display space in retail stores?

21. Do you believe that smaller companies should be given some advantages or special treatment in order to compete with larger companies?

22. Do you agree fairness requires jurors to wait until all of the evidence has been presented by both sides before deciding a case?

23. Do you think you would be able to follow the judge's instructions in this case, even if you do not necessarily agree with the law behind the instruction?

24. Would you be able to decide to award the plaintiffs zero money damages in this case if the evidence and the judge's instructions in this case led you to believe that this was the correct result?

Dated: January 28, 2000

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Counsel for Defendants

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' REQUEST FOR JURY
INSTRUCTIONS TO BE GIVEN AT THE CLOSE OF EVIDENCE

Pursuant to Fed. R. Civ. P. 51 and the case management order, defendants request that the Court instruct the jury at the close of evidence in accordance with the attached proposed instructions. Defendants respectfully request and reserve the right to submit additional instructions and to amend the attached instructions in response to instructions submitted by Plaintiffs, the submission of evidence at trial, and/or the rulings of the Court on any motions, either now pending or made prior to or during the course of trial.

Defendants intend to request a special verdict pursuant to Fed. R. Civ. P. 49(a). Defendants submit herewith a proposed form of verdict with special interrogatories, but

respectfully request and reserve the right to amend the proposed form at the conclusion of the case.

January 28, 2000

Respectfully submitted,

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Counsel for Defendants

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Defendants' Proposed Instruction No. 1

Charge of the Court

Ladies and Gentlemen of the jury:

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

My duty at this point is to instruct you as to the law that will guide your deliberations. It is your duty to accept these instructions of law and apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must accept the law as I give it to you. If any lawyer has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow. You should not single out any instruction as alone stating the law. Instead, you should consider my instructions as a whole when you retire to deliberate in the jury room.

You should not, any of you, be concerned about the wisdom of any rule that I state. Regardless of any opinion that you may have as to what the law may be -- or ought to be -- it would violate your sworn duty to base a verdict upon any other view of the law than that which I give you.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 71.01 at 71-3 (1997); 3 E. Devitt, C. Blackmar, and M. Wolff, Federal Jury Practice and Instructions § 71.01, at 17 (1997); Patapsco Ins. Co. v. Southgate, 30 U.S. 604, 621 (1831).

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Defendants' Proposed Instruction No. 2

The Parties

Conwood Company, L.P. (or "Conwood") is a privately held limited partnership. Conwood, in turn, through various entities, is owned by the Pritzker Organization.

United States Tobacco Company ("U.S. Tobacco") is a wholly-owned subsidiary of UST Inc., a publicly traded corporation.

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Defendants' Proposed Instruction No. 3

Equality of the Parties

You should consider and decide this case as an action between persons of equal standing in the community, of equal worth, and holding the same or similar station in life. It is irrelevant whether a party to a lawsuit is a public corporation, a privately held company, an individual, or something else. All persons, including public corporations and privately held businesses, stand equal before the law, and are to be dealt with as equals in a court of justice.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 72.01 at 72-2 (1997).

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Defendants' Proposed Instruction No. 4

Role of the Jury

As members of the jury, you are the sole and exclusive judges of the facts. You determine which witnesses to believe. You resolve any conflicts there may be in the testimony. You decide what conclusions to reach from the facts as you have determined them. And you determine what evidence is important to you.

Because you are the sole and exclusive judges of the facts, I do not mean to suggest my opinion of the facts or what the verdict should be. The rulings I have made during the trial are not any suggestion of my views of whether or not Conwood has met its burden of proving its claims against U.S. Tobacco or whether U.S. Tobacco has proven its counterclaims against Conwood.

You should not read anything into the fact that I may have asked questions of certain witnesses. These questions were intended only for clarification or to move things along, and were not intended to suggest any opinions on my part as to the verdict you should reach, or whether any witness may have been more believable than any other witnesses. The Court has no opinion as to the verdict you should render in this case.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 71.01 at 71-7 (1997); 3 E. Devitt, C. Blackmar, and M. Wolff, Federal Jury Practice and Instructions § 71.11, at 28 (1997); 3 E. Devitt, C. Blackmar, and M. Wolff, Federal Jury Practice and Instructions § 71.12, at 30 (1997); Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit, Instruction 3.02 (Sept. 1992).

16diii003760

Defendants' Proposed Instruction No. 5

Burden of Proof

In a civil case such as this, the company asserting a claim has the burden of proving that claim by a preponderance of the evidence. In other words, the company asserting the claim must persuade you that each and every fact necessary to establish that claim is more probably true than not true.

I want to emphasize to you that whenever a claim contains a number of different parts or elements, the company asserting the claim must prove each and every part by a preponderance of the evidence.

If you find that each and every part of a particular claim has been proven by a preponderance of the evidence, then the company asserting the claim is entitled to a verdict in its favor on that claim. If, however you find that each and every part or element of a claim has not been proven by a preponderance of the evidence, even if some parts of it have been proven, then you must find for the party opposing that claim.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 73.01 at 73-2 (1997); Ramsey v. United Mine Workers, 401 U.S. 302 (1971); Continental T. V., Inc. v. GTE Sylvania. Inc., 433 U.S. 36, 40 (1977).

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Defendants' Proposed Instruction No. 6

Preponderance of the Evidence

Now I need to instruct you on what constitutes "a preponderance of the evidence."

The term "preponderance of the evidence" means the type of evidence that, when compared with opposing evidence, still makes you believe that what is being proposed is more likely true than not true. It is a question of quality and not of quantity, which is to say that the number of witnesses or documents relating to a certain version of the facts should not determine your answer. Rather, you should consider the believability of the evidence in determining whether each part of a claim has been proven by a preponderance of the evidence.

If you find that the credible evidence on a given issue is evenly divided, or if you find that the credible evidence favors the company opposing the claim, then you must reject the claim. Only if you find that, when all of the evidence is weighed, the scales tip in favor of the company asserting the claim on each and every element of its claim has that company have proven that particular claim by a preponderance of the evidence.

In determining whether any fact in issue has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the relevant testimony of all witnesses, regardless of who called them, and all the relevant exhibits received in evidence, regardless of who may have introduced them.

3 E. Devitt, C. Blackmar, and M. Wolff, Federal Jury Practice and Instructions § 72.01, at 31 (1997); 3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 73.01 at 73.4 (1997).

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Defendants' Proposed Instruction No. 7

Evidence

Your duty is to decide the case based on the evidence. Now let me explain to you what I mean by "evidence":

Evidence is the sworn testimony given by the witnesses, including testimony given by what is called a deposition, as well as documents and other exhibits presented to you at trial. The evidence also includes any stipulations that have been agreed to and received into evidence by the Court. A stipulation is an agreed statement of facts between the parties, and you may regard such stipulated facts as undisputed evidence.

Many statements and actions during the proceeding are not evidence. For example, the statements of the lawyers are not evidence and should not be considered as evidence unless the statements were made as admissions or stipulations confirming the existence of a fact. This includes lawyers' arguments and comments, as well as the tone of their voices and their facial expressions when showing acceptance, approval, belief, disbelief or disdain, whether directed to a witness or to the jury itself during the course of the trial, are not evidence.

In addition, a lawyer's question is not evidence. A question is only significant with respect to evidence when the witness answers the question and the answer incorporates some part of the question. A question that calls for a yes or no answer requires that you look at the question to see what the answer means. In other words, it is the answer of the witness taken together with the question that constitutes evidence.

During the course of the trial, from time to time, counsel have made objections. It is the duty the lawyers on each side of a case to object when the other side offers testimony or other evidence which the lawyers believe is not proper under the applicable legal rules. As judge, I must

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rule on each objection. You are to read nothing into the fact that a lawyer has made an objection or from my ruling sustaining or overruling the objection. However, if, during the course of the trial, I sustained an objection by one lawyer to a question asked by the other lawyer, you are to disregard the question, and you must not speculate as to what the answer would have been. If, after a question was asked and an answer given by the witness, I ruled that the answer should be stricken from the record, you are to disregard both the question and the answer in your deliberations.

Also, if certain testimony was received for a limited purpose – such as for the purpose of considering the believability of a witness – you must follow the limiting instruction I have given.

Exhibits which were marked for identification may not be considered by you as evidence unless they were received in evidence by the Court. If I sustained an objection to an exhibit, or ordered it stricken, it is not evidence and you may not consider it.

I stress the fact that the rulings I made during the trial are not to be taken as an indication of my views, or as to what your decision should be as to Conwood's claims or U.S. Tobacco's counterclaims. Such rulings dealt with matters of law with which you have no concern. Indeed, lawyers not only have a right, but also have a duty, to present whatever legal objections there may be to the admissibility of evidence. The lawyers also have the right to ask for conferences at the bench out of the hearing of the jury. These deal with questions of law which must be decided by me, the Judge. No inferences should be drawn because a lawyer asked for a conference at the bench, out of the hearing of the jury.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 74.01 at 74-3, 74-4 (1997).

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Defendants' Proposed Instruction No. 8

Direct and Circumstantial Evidence

There are two types of evidence that may be considered in your determinations – direct and circumstantial evidence. Direct evidence is the testimony of one who testifies to having actual knowledge of an event, such as the testimony of an eyewitness as to what he saw. Circumstantial evidence is proof of facts and circumstances based on what is implied by the existence or nonexistence of other facts.

Let me give you an example:

If you looked out the window and saw that it was raining, you would have direct evidence that it was raining. If the blinds were drawn but a man came through a door with a wet umbrella, you would have circumstantial evidence that it was raining.

Both types of evidence are equally entitled to your consideration. The law makes no distinction between the weight to be given to either direct or circumstantial evidence presented to you. You should weigh all the evidence in the case and make your determinations based on a preponderance of all the evidence.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 74.01 at 74-2 (1997); 3 E. Devitt, C. Blackmar, and M. Wolff, Federal Jury Practice and Instructions § 72.03, at 35 (1997); Michalic v. Cleveland Tankers Inc., 364 U.S. 325, 330 (1960); Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981).

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Defendants' Proposed Instruction No. 9

Evidence – Inferences

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited solely to exhibits and the statements of witnesses. You are permitted to make reasonable inferences based on facts that have been established by a preponderance of the evidence. An inference is a conclusion that, common sense, experience or logic leads you to make based on other facts that have been proved.

An inference, however, is not a suspicion or a guess. It is a reasoned, logical conclusion that a fact exists based on another fact which has been shown to exist.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 75.01 at 75-1 (1997); Schulz v. Pennsylvania R. Co., 350 U.S. 523, 526 (1956); Lavender v. Kurn, 327 U.S. 645 (1946).

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Defendant's Proposed Instruction No. 10

Sequence of Events Not Circumstantial Evidence

As I just described to you, circumstantial evidence of a factual issue allows you to reach conclusions of one fact based on other facts and circumstances represented by that evidence. However, evidence of facts and circumstances that do not reasonably lead to a conclusion about a different fact is not circumstantial evidence. For example, evidence that one event occurred in a retail store before a second event cannot, by itself, support a conclusion that the first event caused the second event to occur. It would be improper for you to draw such a conclusion in the absence of other evidence establishing, by a preponderance of the evidence, that the first event caused the second event.

Schempp v.. Reniker, 809 F. 2d 541, 542 (8th Cir. 1987); Bussman Mfg. Co. v. N.L.R.B., 111 F.2d 783, 787 (8th Cir. 1940); O.K. Sand and Gravel v. Martin Marietta Techs., 36 F. 3d 565, 574 (7th Cir. 1994).

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Defendants' Proposed Instruction No. 11

Evidence – Charts and Summaries

In connection with the testimony of a witness, charts or summaries may be presented to you for the purpose of explaining or illustrating facts that are disclosed by the evidence. Some of these charts or summaries may also be admitted into evidence. The weight you choose to give such charts or summaries should reflect how accurately charts or summaries portray the materials they are supposed to illustrate or explain.

3 E. Devitt, C. Blackmar, and M. Wolff, Federal Jury Practice and Instructions § 72.09, at 52 (1997); 3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 74.06 at 74-11, 74-12 (1997).

16diii003768

Defendant's Proposed Instruction No. 12

Publicity – Reminder

You must disregard any and all reports about this trial or about events discussed during the trial which you may have read, seen or heard through the news media or from others outside the courtroom. Such matters are not facts in evidence in this case because they are not relevant to the issues which have been developed in this courtroom. You must not permit such matters to influence your judgment in arriving at a true verdict in this case.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 71.01, at 71-26, 71-27 (1997).

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Defendants' Proposed Instruction No. 13

Evidence: Deposition Testimony

During the trial of this case, certain testimony has been read or shown to you by way of deposition. Depositions consist of sworn answers under oath to questions asked of the witness in advance of the trial. That testimony is recorded either by a court reporter, who creates a written transcript, or by video camera. The deposition testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented either by written transcript or, if it has been recorded on videotape, by videotape. Such testimony is entitled to the same consideration, in terms of credibility and weight, as if the witness had been present and had testified from the witness stand. You are not to discount it merely because it comes to you in the form of a deposition.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 74.07 at 74-14 (1997); 3 E. Devitt, C. Blackmar, and M. Wolff, Federal Jury Practice and Instructions § 73.02, at 52 (1997).

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Defendants' Proposed Instruction No. 14

Witness Credibility

You are the sole judges of the credibility of the witnesses who have appeared before you. In other words, you alone are to determine the extent to which each witness is to be believed. If there is any conflict in the testimony, it is your role to resolve the conflict and to determine where the truth lies.

In reaching a conclusion as to the believability of any witness, and in weighing the importance of any testimony, you may consider the demeanor and the behavior of the witness on the witness stand; the witness's manner of testifying; whether the witness impresses you as a truthful individual; whether the witness impresses you as having an accurate memory and recollection; whether the witness has any motive for shading the truth or not telling the truth; whether the witness had the full opportunity to observe the matters that he testified about; and whether the witness, or anyone affiliated with the witness, has any interest in the outcome of the case or has any friendship or animosity toward other persons involved in this case.

If you believe that any witness has shown himself to be biased or prejudiced, either for or against either side in this trial, you may consider and determine whether such bias or prejudice has affected the desire and capability of that witness to tell the truth. That does not mean necessarily that a witness whose credibility has been questioned is to be wholly disbelieved. It only means that you are to take into account factors like the ones I just mentioned in determining whether you will believe that witness.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 76.01 at 76-1 (1997); 3 E. Devitt, C. Blackmar, and M. Wolff, Federal Jury Practice and Instructions

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§ 71.01, at 17 (1997); Davis v. Alaska, 415 U.S. 308 (1974); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627-29 (1944).

Defendants' Proposed Instruction No. 15

Inconsistent Testimony

You have heard evidence of inconsistencies or discrepancies in the testimony of certain witnesses, and the attorneys have argued that such inconsistencies are a reason for you to reject the testimony of those witnesses.

You are instructed that evidence of inconsistencies may be a basis to disbelieve a witness's testimony. On the other hand, inconsistencies in a witness' testimony, or between his testimony and that of others, do not necessarily mean that the witness' entire testimony should be discredited.

People sometimes forget things and even a truthful witness may be nervous and contradict himself or herself. It is also a fact that two people witnessing an event may see or hear it differently. Whether a discrepancy pertains to a fact of importance, or only to a trivial detail, should be considered in weighing the significance of the discrepancy. But a willful falsehood is a matter of great importance and should always be considered seriously.

It is for you to decide, based on your total impression of the witness, how to weigh the discrepancies in his or her testimony. You should, as always, use common sense and your own good judgment.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 76.01 at 76-4 (1997).

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Defendants' Proposed Instruction No. 16

Impeachment/Prior Statements

In this case, some of the witnesses were confronted with prior statements they made under oath, including testimony given in depositions before the trial. The testimony of a witness may be discredited or "impeached" by showing that the witness has previously made statements that are inconsistent with his or her testimony in court.

Except where you have been specifically instructed otherwise, evidence of a prior inconsistent statement is admitted in evidence solely for the limited purpose of helping you decide whether to believe the trial testimony of the witness.

On the other hand, if the witness adopts the prior statement, that statement may be considered by you just as if it were testified to on the witness stand in the first instance.

It is up to you to determine if the witness has been impeached and discredited. If you believe the witness has been impeached and discredited, it is your sole right to give his or her testimony the weight, if any, that you believe it deserves.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 76.01 at 76-5 (1997).

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Defendants' Proposed Instruction No. 17

Experts

Some of the evidence you have heard is what is called expert testimony. The law provides that if a person's specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, training, experience or education may give his opinion on such matters. It is commonplace for an expert to be hired and paid for his time in studying and testifying regarding the subject of his expertise. The mere fact that an expert is paid for his services -- and even the fact that he may be handsomely paid -- should not be held against the expert or against the party. Nor should you read anything into the fact that one party may have used more experts than the other at trial. You should consider each expert opinion and give it the weight you believe it deserves.

In deciding what weight to accord to an expert's testimony, and in resolving conflicts between the experts of the two companies, you may look at the background, knowledge, training, and experience of the expert; the soundness and thoroughness of the expert's reasoning; the expert's prior statements on the issues in dispute; and whether other evidence supports, contradicts, supports, or outweighs his expert testimony. In addition, you may consider the method and analysis used by the expert witness to arrive at his conclusions, and assess the reasonableness and reliability of that method.

In this case, experts have reviewed and expressed opinions on each others' work. You are entitled to accept and give weight to one expert's review of another expert's opinion. How much of an expert's opinion you accept and what weight you give to it are decisions for you to make based on your evaluation of the testimony, your observation of the witness at trial, and facts about each witness' background, experience and each witness' method of study which were brought out at trial.

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The credibility of an expert witness is to be evaluated in the same manner as the testimony of any other witness, and in accordance with the instructions I have previously given you. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case.

You should not, however, accept any witness's testimony merely because he is an expert. Nor should you substitute an expert's view of the facts for you own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 76.01 at 76-9, 76-10 (1997); 3 E. Devitt, C. Blackmar, and M. Wolff, Federal Jury Practice and Instructions § 72.08, at 39 (1997); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627-28 (1944); Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88-89 (1891).

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Defendants' Proposed Instruction No. 18

Contentions of the Parties

1. Conwood

Conwood contends that U.S. Tobacco has violated the antitrust laws by maintaining a monopoly through exclusionary practices in the alleged market for moist snuff products. Conwood contends that U.S. Tobacco's exclusionary practices include exclusive dealing arrangements with retailers, abuses of various marketing practices, and the routine and systematic removal of Conwood products, racks and point-of-sale advertising material without retailer authorization and at the direction of U.S. Tobacco headquarters.

Conwood has also sued U.S. Tobacco under the Lanham Act, which makes it illegal for a competitor to make false statements about another competitor in commercial advertising or promotion that is widely disseminated. Conwood also has sued U.S. Tobacco for violation of state law for allegedly stealing, defacing or destroying Conwood moist snuff products, racks and point-of-sale advertising materials.

2. U.S. Tobacco

U.S. Tobacco denies Conwood's antitrust allegations. First, it contends that Conwood has not proven that moist snuff products is a relevant market by itself or that U.S. Tobacco has monopoly power in such a market. Second, U.S. Tobacco contends that it does not engage in any exclusive dealing arrangements regarding moist snuff products and that Conwood is free to compete for placing products, rack and point-of-sale advertising materials. Third, U.S. Tobacco contends that it only engages in ordinary marketing practices that retailers desire, and that it has a policy of obtaining retail authorization for any removal of a competitor's rack for replacement with a new U.S. Tobacco rack. Further, U.S. Tobacco asserts that there are only sporadic instances of unauthorized

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removal of racks and point-of-sale materials, and that the sales forces of all competitors, including Conwood, engage in such conduct from time to time.

Finally, U.S. Tobacco contends that competition in the moist snuff industry is as vigorous as ever, and that any harm Conwood is suffering results not from exclusionary conduct by U.S. Tobacco, but from the lawful competition of U.S. Tobacco, Swedish Match and others, as well as from Conwood's own business decisions and lack of success in the marketplace.

U.S. Tobacco has also sued Conwood. U.S. Tobacco first claims that Conwood has violated the Lanham Act by widely disseminating false promotional material attacking U.S. Tobacco's category management services that it offers retailers. Second, U.S. Tobacco claims that Conwood has violated state law by removing or destroying U.S. Tobacco racks and point-of-sale materials without retailer authorization.

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Defendants' Proposed Instruction No. 19

Antitrust Claims/Purpose of the Sherman Act

As I told you at the outset, this case involves one of the federal antitrust laws -- the Sherman Act. I instruct you that you should not be prejudiced against U.S. Tobacco merely because Conwood has alleged that U.S. Tobacco violated the Sherman Act. The mere fact that Conwood sued U.S. Tobacco, and the mere fact that the suit has been brought to trial, is no indication that U.S. Tobacco has in fact violated the law.

The purpose of the Sherman Act is to preserve and advance our system of free enterprise by encouraging free and open competition in the marketplace. The antitrust laws do this by protecting the competitive process itself. In other words, the antitrust laws attempt to ensure that all companies have the opportunity to compete against other companies in the marketplace.

It is not the purpose of the antitrust laws to inhibit or to interfere with legitimate business operations, or to force every type of business into a common mold. Nor is it the purpose of the antitrust laws to protect any one participant in the marketplace or to ensure that all competitors succeed or make a profit. The antitrust laws are concerned with the overall competitive process rather than the success of individual competitors.

ABA, Sample Jury Instructions in Civil Antitrust Cases, A-2 (1999); ABA, Antitrust Civil Jury Instructions, 69 (1980). National Society of Professional Engineers v. United States, 435 U.S. 679, 688 (1978); Continental TV Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50 (1977); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); SCM Corp. v. Xerox Corp., 463 F. Supp. 983, 1004 (D. Conn. 1978), remanded on other grounds, 599 F.2d 32 (2d Cir. 1979).

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Defendants' Proposed Instruction No. 20

Purpose of the Sherman Act: Does Not
Cover Overaggressive or Unfair Competition

The antitrust laws recognize that competition is a ruthless process in which companies aggressively attempt to take business away from each other. They are aimed at ensuring that the process of competition is open to all competitors, not that competitors treat each other fairly when engaging in that process. For this reason, the antitrust laws are not directed at preventing competition that is unsavory, unfair or even deceptive. There are other laws that deal directly with overly-aggressive or unfair means of competition.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 80-02 at 80-27 (1997); Nynex Corp. v. Discon, Inc., 119 S. Ct. 493, 498-99 (1998); Brooke Group Ltd. v. Brown Williamson Tobacco Corp., 509 U.S. 209, 225 (1993); Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366, 1374 (9th Cir. 1983); Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 838 F.2d 360, 370 (9th Cir. 1988).

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Defendants' Proposed Instruction No. 21

Elements of Monopolization Claim

The specific law that U.S. Tobacco has violated is called Section 2 of the Sherman Act. It states in relevant part:

> Every person who shall monopolize . . . any part of commerce . . . [has committed an unlawful act].

Section 2 of the Sherman Act makes it unlawful to use monopoly power as a way to avoid having to compete with other companies in the marketplace. As you will see from the instructions that follow, Section 2 of the Sherman Act does not make illegal the fact that a business may, by virtue of its business success, enjoy what is called monopoly power.

Conwood claims that it was injured by U.S. Tobacco's unlawful monopolization of an alleged national market for the sale of moist snuff products. To win on its claim of monopolization, Conwood must prove each of the following elements by a preponderance of the evidence:

First, that U.S. Tobacco had monopoly power in a relevant market;

Second, that U.S. Tobacco willfully maintained that power through means that were not ordinary business practices, but instead were a use of monopoly power to prevent competitors from taking part in the competitive process. In legal terms, this is called "exclusionary" conduct;

Third, that U.S. Tobacco's exclusionary conduct actually harmed the overall competitive process in the relevant market; and

Fourth, that U.S. Tobacco's exclusionary conduct -- as opposed to its lawful competition or other factors -- was in fact a direct and material cause of Conwood's alleged injury.

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If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for U.S. Tobacco and against Conwood on its monopolization claim.

ABA, Sample Jury Instructions in Civil Antitrust Cases, C-2 (1999); 3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 80.01 at 80-3 (1997).

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Defendants' Proposed Instruction No. 22

Monopoly Power Defined

Monopoly power is the power to control prices in, and exclude competition from, the relevant market.

The "power to control prices" means the power of a company to establish significantly higher prices for its products than those charged by competitors without a substantial loss of business. In deciding whether U.S. Tobacco has monopoly power, you should consider whether Conwood has proven that U.S. Tobacco can raise its prices well above the prices charged by Conwood and other competitors without losing significant sales. You should also take into consideration whether there is vigorous price competition in the relevant market, such as promotions and price discounting. The absence of price and promotional competition in the market may indicate the presence of monopoly power, while the presence of such competition indicates a lack of monopoly power.

The "power to exclude competition" means the power of a company to prevent existing competition from taking place in the market or to keep new competition from entering the market, whether from a completely new competitor or from the introduction of new products by existing competitors. The power to exclude competition also means the power to impose your will on customers -- in this case retailers. For example, if U.S. Tobacco has the power to force retailers, against their wishes, not to accept a competitor's products, then that would be an indication that U.S. Tobacco possesses monopoly power. If, however, U.S. Tobacco does not have the power to force retailers to act against their wishes, then this indicates a lack of monopoly power.

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ABA, Sample Jury Instructions in Civil Antitrust Cases, C-4 (1999); Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 (6th Cir. 1982); Ford v. Stroup, 113 F.3d 1234, 1997 WL 201560, at *3 (6th Cir. 1997); Byars v. Bluff City News Co., Inc., 609 F.2d 843, 850-51 (6th Cir. 1979); Western Parcel Express v. United Parcel Service of America, Inc., 65 F. Supp.2d 1052, 1062 (N.D. Cal. 1998).

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Defendants' Proposed Instruction No. 23

Relevant Market - General

In order to determine whether U.S. Tobacco has monopoly power, you must first decide what is called the "relevant market." Only after you make that determination can you decide whether Conwood has proven that U.S. Tobacco has the power to control prices and prevent competition in the relevant market.

There are two aspects you must consider in defining a relevant market. The first is the relevant product market; the second is the relevant geographic market. I instruct you that the parties have agreed that the geographic market is the United States.

Conwood contends that the relevant product market should be limited to all moist snuff products. In other words, Conwood claims that other smokeless tobacco products should not be included in the same relevant market as moist snuff products. It also contends that the relevant market should not be broken into smaller groups of products such as separate types of moist snuff in the same market. U.S. Tobacco disputes Conwood's proposed definition of the relevant market. U.S. Tobacco asserts that the relevant market should either be defined more broadly to include other smokeless tobacco products, such as chewing tobacco or divided into separate types of moist snuff products.

I wish to remind you that Conwood has to prove its proposed market by a preponderance of the evidence. U.S. Tobacco challenges that market, but does not itself have to prove what the relevant market should be.

ABA, Sample Jury Instructions in Civil Antitrust Cases, C-6 (1999).

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Defendants' Proposed Instruction No. 24

Relevant Product Market/Factors

The basic idea of a relevant product market is that it should include all products that may be substitutes from a consumer's point of view. This does not mean that products must be the same to compete against each other. It means that, as a matter of practical fact and the actual behavior of consumers, the products are reasonable substitutes.

There are a number of factors you should consider in determining whether products are reasonable substitutes for each other. One factor is whether changes in the price of one product over time cause a considerable number of consumers to use one product instead of the other. If so, the products should be included in the same relevant market. You should also consider how people in the industry and the public at large view the products; whether the products have the same or similar characteristics or uses; whether the products have similar prices; whether changes in the price of one product are related to changes in the price of the other product; whether the products are sold to similar customers; and whether they are distributed and sold by the same kinds of distributors or dealers.

In sum, to determine the relevant product market, you must decide which products compete with each other. This is a practical determination.

ABA, Sample Jury Instructions in Civil Antitrust Cases, C-7 (1999); United States v. Continental Can Co., 378 U.S. 441, 457 (1964); Olin Corp. v. FTC, 986 F.2d 1295, 1302 (4th Cir. 1993); Commonwealth v. Russell Stover Candies, Inc., No. Civ. A. 93-1972, 1993 WL 145264, at *11 (E.D. Pa. May 6, 1993).

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Defendants' Proposed Instruction No. 25

Relevant Market - Necessity of Proof

If, after considering all the evidence, you find that Conwood has proved that the relevant product market is all moist snuff products, then you must find that it has established the relevant market requirement and you must consider the remaining elements of its monopolization claim. If you find that Conwood has not proven that all moist snuff, alone, constitutes the relevant market, then you must find for U.S. Tobacco and against Conwood on its antitrust claim.

ABA, Sample Jury Instructions in Civil Antitrust Cases, C-13 (1999).

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Defendants' Proposed Instruction No. 26

Monopoly Power/Factors to Consider

If you find that Conwood has proven the relevant market, you should then determine whether Conwood has also proven that U.S. Tobacco in fact has monopoly power in that market. There are a number of factors you should consider in making this determination, none of which by itself necessarily proves this element of Conwood's claim.

For example, you have heard evidence about U.S. Tobacco's market share. Market share is a firm's share of sales of the products in the relevant market given as a percentage of the whole market. If you determine that U.S. Tobacco's share of the relevant market is 80 percent or higher, that suggests the existence of monopoly power. If you determine that defendant's market share is somewhere between 50 percent and 80 percent, you may, but do not have to, infer the existence of monopoly power from that share.

Another factor you should consider is the trend in U.S. Tobacco's market share. A declining market share indicates the absence of monopoly power, while an increasing market share indicates the presence of monopoly power.

Another factor to consider is the number and size of U.S. Tobacco's moist snuff competitors. If U.S. Tobacco's competitors are few, weak, or have small or decreasing market shares, this indicates that U.S. Tobacco may possess monopoly power. If, on the other hand, U.S. Tobacco's competitors are numerous, vigorous, or have increasing shares in that market, this indicates that U.S. Tobacco may not have monopoly power.

You should also consider the history of new entry into the relevant market. By entry, I mean either the entry of a new competitor or the introduction of new moist snuff brands by existing

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competitors. Entry of companies or the introduction of new brands into the market indicate that U.S. Tobacco lacks monopoly power.

The existence of monopoly power also may be shown by evidence that U.S. Tobacco had the power to raise prices well above its competitors without a substantial loss of business to competitors or by evidence that U.S. Tobacco had profit margins that are extraordinarily high and are not justified by the quality of its products. In assessing profit margins, you should consider whether firms with smaller market shares also have high prices or profit margins, which would indicate that U.S. Tobacco is not exercising monopoly power in its pricing.

If you find that U.S. Tobacco had monopoly power, then you must find that Conwood has established this requirement and you must consider the remaining elements of its monopolization claim. If you find that U.S. Tobacco did not have monopoly power, then you must find that U.S. Tobacco did not violate Section 2 of the Sherman Act, and you accordingly must find for U.S. Tobacco and against Conwood on its monopolization claim.

ABA, Sample Jury Instructions in Civil Antitrust Cases, C-14 (1999); Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 (6th Cir. 1982); Ford v. Stroup, 113 F.3d 1234, 1997 WL 201560, at *3 (6th Cir. 1997); RE/MAX International, Inc. v. Realty One, Inc., 173 F.3d 995, 1018 (6th Cir. 1999); Byars v. Bluff City News Co., Inc., 609 F.2d 843, 850-51 (6th Cir. 1979); Western Parcel Express v. United Parcel Service of America, Inc., 65 F. Supp.2d 1052, 1062 (N.D. Cal. 1998).

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Defendants' Proposed Instruction No. 27

Maintenance of Lawfully Acquired Monopoly Power

There is no claim in this case that U.S. Tobacco became a monopolist through unlawful methods. And I instruct you that the mere possession of monopoly power, if you find that U.S. Tobacco has such power, does not violate the antitrust laws.

But it is unlawful for a company that has lawfully obtained monopoly power to use that power to exclude competitors from participating meaningfully in the competitive process. To be considered exclusionary, the conduct in question does not necessarily have to be unlawful by itself. But it does have to be a use of monopoly power. Conwood may show a use of monopoly power by proving that U.S. Tobacco engaged in conduct that makes sense only because it harmed competition rather than because it satisfies retailers. You should not find, however, that U.S. Tobacco is using monopoly power if it merely engages in conduct that is used (or could be used) by other firms in the marketplace.

U.S. Tobacco has not acted unlawfully if it simply has engaged in ordinary competitive behavior, even if it has done so in an aggressive manner. U.S. Tobacco may also engage in conduct that simply takes advantage of its size and efficiency. Such competition, including by firms with large market shares, is encouraged by the antitrust laws and cannot be considered exclusionary even if it harms competitors. To find U.S. Tobacco liable for monopolization, you must determine that U.S. Tobacco actually wielded its monopoly power against retailers to exclude its competitors from participating meaningfully in the competitive process.

ABA, Sample Jury Instructions in Civil Antitrust Cases, C-23 (1999); RE/MAX International, Inc. v. Realty One, Inc., 173 F.3d 995, 1023 (6th Cir. 1999); PSI Repair Services, Inc. v. Honeywell, Inc., 104 F.3d 811, 817, 822 (6th Cir. 1997); Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1428

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(6th Cir. 1990); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983); Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir. 1991); Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300, 304 (5th Cir. 1984); Telex Corp. v. IBM, 510 F.2d 894, 925-26 (10th Cir. 1975).

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Defendants' Proposed Instruction No. 28

Competition on the Merits Defined

It is important to keep in mind that competition on the merits, which the antitrust laws encourage, is not limited simply to the price and quality of the products themselves. In the circumstances of this case, competition on the merits includes providing retailers with related products and services they may desire, such as racks, point of sale advertising materials, suggestions about use of shelf space and products assortment, as well as what you have heard referred to as category management services. It is not the object of the antitrust laws to mold the type of competition that companies engage in, but rather to ensure that companies are not unreasonably prevented from participating in that process.

Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 521-24 (5th Cir. 1999); Jays Foods, Inc. v. Frito-Lay, Inc., 664 F. Supp. 364 (N.D. Ill. 1987), aff'd, 860 F.2d 1082 (7th Cir. 1988); Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300 (5th Cir. 1984); Beverage Management, Inc. v. Coca-Cola Bottling Corp., 653 F. Supp. 1144 (S.D. Ohio 1986); Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129, 1133-36 (S.D.N.Y. 1986); Kellogg Co., 99 F.T.C. 8, 277-78 (1982).

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Defendants' Proposed Instruction No. 29

Role of Intent Evidence

During the trial, you have heard evidence about U.S. Tobacco's alleged intent in engaging in various practices. In a case alleging monopolization such as this, you should assume that U.S. Tobacco willfully engaged in any acts you find occurred. But I instruct you that it is not unlawful, standing by itself, for U.S. Tobacco to have a desire to injure Conwood or take as much business away from Conwood as possible; vigorous competitors using ordinary marketing methods often have that intent, and it is lawful. What you should consider is not U.S. Tobacco's state of mind, but whether its practices were an exercise of monopoly power that excluded competitors from the competitive process.

Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1422 (6th Cir. 1990); Byars v. Bluff City News Co., 609 F.2d 843, 860 (6th Cir. 1979); Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., 784 F.2d 1325, 1337-38 (7th Cir. 1986).

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Defendants' Proposed Instruction No. 30

Exclusionary Conduct/Exclusive Dealing

One form of potentially exclusionary conduct is called exclusive dealing. Under an exclusive dealing arrangement, a customer -- here retailers -- agrees to purchase all of a product for a period of time just from one company. Exclusive dealing arrangements are not unusual or unlawful in and of themselves. Under certain specified circumstances, however, a company with monopoly power can restrict the competitive process using exclusive dealing agreements.

In order for Conwood to establish that U.S. Tobacco has unreasonably excluded competition through the use of exclusive dealing arrangements, it must prove three things:

First, Conwood must prove that U.S. Tobacco in fact has entered into contractual agreements with retailers that prevent the retailers from being able to purchase moist snuff products from any one other than U.S. Tobacco. I should emphasize that exclusive dealing relates only to exclusive agreements for the purchase of products as opposed to displays, racks or in-store advertising materials that support the product. If you find that U.S. Tobacco does not have exclusive dealing agreements with retailers that completely preclude retailers from purchasing competitor's products, then Conwood has not established this type of exclusionary behavior;

Second, Conwood must also prove that any exclusive dealing agreements were for a long period of time – usually two or more years – so that Conwood and other moist snuff competitors had no opportunity to compete for agreements with retailers from time to time or as any U.S. Tobacco agreements expired. If you find that any exclusive dealing agreements that existed were for a relatively short period of time, or were terminable at any time or on short notice by the retailers, then Conwood has not proven that any such agreements are exclusionary; and

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Third, Conwood must also prove that there are so many long-term exclusive dealing agreements between U.S. Tobacco and retailers throughout the country that Conwood and other moist snuff competitors had a limited ability to generate enough profits to remain in the market.

If you find that Conwood has failed to prove anyone of these three elements, then you must find for U.S. Tobacco on Conwood's exclusive dealing allegations.

Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 335 (1961); Western Parcel Express v. United Parcel Serv. of Am., Inc., 190 F.3d 974, 975-76 (9th Cir. 1999); Omega Envt'l, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162 (9th Cir. 1997); Barr Labs, Inc. v. Abbott Labs, 978 F.2d 98, 110 n.24 (3d Cir. 1992); Ryko Mfg. Co. v. Eden Services, 823 F.2d 1215, 1234 (8th Cir. 1987); Jones v. Bordon, 430 F.2d 568, 571 (5th Cir. 1970); Kellman Energy, Inc. v. Duncan, 668 F. Supp. 861, 883 (D. Del. 1987); Beverage Management, Inc. v. Coca-Cola Bottling Corp., 653 F. Supp. 1144, 1148 (S.D. Ohio 1986).

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Defendants' Proposed Instruction No. 31

Evidence of Unfair Competition Or Alleged "Dirty Tricks"

You have heard evidence in this case of alleged unfair competition or so-called "dirty tricks" by U.S. Tobacco, Conwood and others. As I have instructed you, the antitrust laws are not intended to provide a remedy for this type of conduct; other laws, which I will tell you about later, deal with this type of activity. This is because the antitrust laws are concerned with the overall competitive process rather than unfair or tortious acts directed at individual competitors.

Accordingly, I instruct you that alleged instances of U.S. Tobacco being over-aggressive, unfair, or engaging in "dirty tricks" in the field cannot, alone, constitute a use of monopoly power or exclusionary conduct in violation of the Sherman Act.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 80-02 at 80-27 (1997); Nynex Corp. v. Discon, Inc., 119 S.Ct. 493, 498-99 (1998); Brooke Group Ltd. v. Brown Williamson Tobacco Corp., 509 U.S. 209, 225 (1993); Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366, 1374 (9th Cir. 1983); Oahu Gas Serv., Inc. v. Pacific Resources, Inc., 838 F.2d 360, 370 (9th Cir. 1988).

16diii003796

Defendants' Proposed Instruction No. 32

Antitrust Injury/General

Even if Conwood has proven that U.S. Tobacco engaged in conduct that violates the antitrust laws, Conwood must still prove that it has suffered the type of injury that the antitrust laws care about. In legal terms, this type of harm is called "antitrust injury." Only a certain type of injury matters under the antitrust laws because, as I earlier instructed you, the antitrust laws are intended to protect the competitive process rather than individual competitors.

In practical terms, the "antitrust injury" requirement means that Conwood must first prove that U.S. Tobacco's alleged exclusionary conduct harmed the overall competitive process. Conwood must then also prove that the alleged injury to its business flowed directly from the harm to the competitive process rather than from conduct that simply hurt its sales.

Therefore, you should ask yourself two questions: First, whether Conwood has established an injury to the overall competitive process. If you find that U.S. Tobacco's conduct has not had such an effect, there can be no antitrust injury. Only if you find injury to the overall competitive process, do you then have to ask a second question -- whether Conwood's alleged harm to its business results directly from harm to the overall competitive process as opposed to other factors.

Nynex Corp. v. Discon, Inc., 119 S. Ct. 493, 498 (1998); Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1428 (6th Cir. 1990); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 394 (7th Cir. 1984); Tennesseean Truckstop, Inc. v. NTS, Inc., 875 F.2d 86, 88 (6th Cir. 1989).

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Defendants' Proposed Instruction No. 33

Antitrust Injury/Factors in Assessing Injury to Overall Competition

In considering whether any U.S. Tobacco exclusionary conduct has harmed the competitive process in a relevant market, there are a number of factors you should consider.

For example, it is important to consider whether U.S. Tobacco's alleged exclusionary conduct has prevented its moist snuff competitors from having access to retailers to attempt to sell products, place racks or place point of sale advertising material. If U.S. Tobacco's alleged exclusionary conduct substantially prevents competitors from access to retailers, this suggests harm to the overall competitive process. If, however, U.S. Tobacco's competitors have access to retailers, this indicates that competition has not been substantially harmed in the market.

Another factor you should consider in assessing harm to overall competition is the success of U.S. Tobacco's competitors. If U.S. Tobacco's competitors have not been successful in placing new products, or if their sales and profits have been decreasing, this indicates that harm to competition may have taken place. If, however, Conwood and other competitors have been successful in placing new products, or if their sales and profits have been increasing, this indicates that harm to competition has not taken place as a result of any of U.S. Tobacco's alleged exclusionary conduct.

Nynex Corp. v. Discon, Inc., 119 S. Ct. 493, 498 (1998); Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1428 (6th Cir. 1990); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 394 (7th Cir. 1984).

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Defendants' Proposed Instruction No. 34

Antitrust Injury/Harm to Competition, Not to a Competitor

I want to emphasize to you that the antitrust laws were not meant to benefit individual competitors, including Conwood, or protect businesses from the rigors of competition. To show antitrust injury, Conwood must demonstrate that U.S. Tobacco's exclusionary conduct caused an injury to the competitive process in a relevant market. Harm to individual competitors, even through alleged unsavory or unfair tactics, cannot by itself constitute harm to the competitive process.

Brunswick Corp. v. Pueblo Bowl-A-Mat, Inc., 429 U.S. 477, 489 (1977); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990); Tennessean Truckstop, Inc. v. NTS, Inc., 875 F.2d 86, 88 (6th Cir. 1989); Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 532-33 & n.26 (1983); Fischer v. NWA, Inc., 883 F.2d 594, 599 (8th Cir. 1989), cert. denied, 495 U.S. 947 (1990); R.W. Int'l Corp. v. Welch Food, Inc., 13 F.3d 478, 486 (1st Cir. 1994); Anheuser-Busch, Inc. v. G.T. Britts Distrib., Inc., 44 F. Supp. 2d 172, 175 (N.D.N.Y. 1999).

16diii003799

Defendants' Proposed Instruction No. 35

Injury in Fact

If you find that U.S. Tobacco's alleged exclusionary conduct has harmed the competitive process, then you must determine whether that harm to overall competition was the cause of Conwood's claimed damages. This is known as "injury-in-fact."

In order to prove that Conwood's harm is sufficiently related to any harm you find to the competitive process of competition, Conwood must prove three things, and the law requires that it prove each with reasonable certainty:

First, Conwood must prove that "but for," or in the absence of, U.S. Tobacco's alleged exclusionary conduct, Conwood would actually have done better than it did in the market;

Second, Conwood must prove that U.S. Tobacco's alleged exclusionary conduct was the direct cause of Conwood's harm. If, for example, you find that Conwood's harm more directly resulted from lawful competition by U.S. Tobacco or other competitors, from the decisions of retailers, or from Conwood's own decisions and lack of success in the marketplace, then Conwood has not proven that U.S. Tobacco's conduct is directly responsible for its injury.

Third, Conwood must prove that U.S. Tobacco's alleged exclusionary conduct, as opposed to one or more other reasons, was a material or substantial reason for Conwood's lack of success in the relevant market. I will now describe in greater detail how each of these factors relate to this case.

ABA, Sample Jury Instructions in Civil Antitrust Cases, F-2 (1999); Brunswick Corp. v. Pueblo Bowl-A-Mat, Inc., 429 U.S. 477, 489 (1977); Valley Products Co. v. Landmark, 128 F.3d 398, 403 (6th Cir. 1997); Hodges v. WSM, Inc., 26 F.3d 36, 38-39 (6th Cir. 1994); Baum Research & Development Co., 31 F. Supp. 2d 1016 (E.D. Mich. 1998).

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Defendants' Proposed Instruction No. 36

Injury in Fact/"But For" Causation

The first element of injury-in-fact requires Conwood to demonstrate that any U.S. Tobacco exclusionary conduct, and its effects on the market, were a "but for" or actual cause of its claimed injury.

To prove "but for" causation, Conwood must demonstrate that, in the absence of U.S. Tobacco's illegal conduct, Conwood would have sold more moist snuff. In other words, Conwood must prove with reasonable certainty that, all other things being equal, Conwood's share of sales of its moist snuff brands would have increased significantly "but for" U.S. Tobacco's alleged exclusionary conduct and the alleged resulting harm to overall competitive conditions. Conwood cannot recover damages simply because it sold less moist snuff than it hoped to sell or because U.S. Tobacco's lawful competitive conduct took business away from Conwood. If you find that Conwood has not proven by a preponderance of the evidence that U.S. Tobacco's illegal conduct had any significant impact on Conwood sales, then Conwood has not established injury in fact.

Brunswick Corp. v. Pueblo Bowl-A-Mat, Inc., 429 U.S. 477, 489 (1977); Valley Products Co. v. Landmark, 128 F.3d 398, 403 (6th Cir. 1997); Hodges v. WSM, Inc., 26 F.3d 36, 38-39 (6th Cir. 1994); Baum Research & Development Co., 31 F. Supp. 2d 1016 (E.D. Mich. 1998).

Defendants' Proposed Instruction No. 37

Injury in Fact/Direct or "Proximate" Causation

The second element of injury-in-fact requires Conwood to demonstrate that U.S. Tobacco's alleged illegal conduct was a direct cause of its injury. In legal terminology, this is called "proximate causation."

Conwood contends that U.S. Tobacco, contrary to retailers' wishes, caused retailers not to carry as many of the Conwood brands as retailers wanted to carry and not to use as many Conwood racks or P.O.S. material as retailers desired. U.S. Tobacco, on the other hand, contends that retailers were free to choose which products, racks and P.O.S. they wanted, and that these retailer decisions, rather than U.S. Tobacco's alleged exclusionary conduct, are directly responsible for any injury to Conwood.

If Conwood cannot prove with reasonable certainty that U.S. Tobacco's alleged exclusionary conduct, as opposed to the decisions of retailers, was a direct and proximate cause of Conwood's injury, then Conwood has not proven injury in fact caused by an antitrust violation.

ABA, Sample Jury Instructions in Civil Antitrust Cases, F-2 (1999); Valley Products Co. v. Landmark, 128 F.3d 398, 403 (6th Cir. 1997); Hodges v. WSM, Inc., 26 F.3d 36, 38-39 (6th Cir. 1994); Baum Research & Development Co., 31 F. Supp. 2d 1016 (E.D. Mich. 1998).

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Defendants' Proposed Instruction No. 38

Injury in Fact/"Material" Causation

The third element of injury-in-fact requires Conwood to demonstrate that U.S. Tobacco's illegal conduct was a material or substantial cause of Conwood's alleged injury in relation to other causes you have heard about at trial.

Conwood alleges that U.S. Tobacco's alleged exclusionary conduct, and any alleged resulting harm to the overall competitive process, was a material and substantial reason for its alleged slow down in growth for moist snuff in the 1990's.

U.S. Tobacco contends that Conwood's market share performance in the 1990's was primarily, if not solely, caused by other factors, such as retailer decisions regarding space allocation and product selection; Conwood's inability to produce a product to compete directly against U.S. Tobacco's Copenhagen brand; Conwood's decision not to offer innovative racks and P.O.S. to retailers, and its decision, prior to the lawsuit, not to offer a incentive program or category management services to retailers. In relation to these other factors, U.S. Tobacco contends that any alleged exclusionary conduct by it was not a material or substantial cause of Conwood's injury.

If you find that Conwood has proven, with reasonable certainty, that U.S. Tobacco's alleged exclusionary conduct, as opposed to other factors, was a material cause of Conwood's claimed injury, then Conwood has proven this aspect of injury in fact. If you find that Conwood has not made that showing with reasonable certainty, then you must find that U.S. Tobacco's alleged exclusionary conduct was not a material cause of its claimed injury.

Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993); Eichman v. Fotomat Corp., 880 F.2d 149, 163 (9th Cir. 1989); Argus, Inc. v. Eastman Kodak Co., 801 F.2d

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38, 42-46 (2d Cir. 1986); Van Dyk Research Corp. v. Xerox Corp., 631 F.2d 251, 254-56 (3d Cir. 1980).

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Defendants' Proposed Instruction No. 39

Antitrust Damages -- Measure and Purpose

If you find that Conwood has proven each element of its antitrust claim against U.S. Tobacco, you must then measure in dollars and cents the extent, if any, of the injury that Conwood has suffered as a result of the violation of the law. This measurement in dollars and cents is what I shall refer to as "damages." Please note that the fact that I instruct you on "damages" does not indicate any opinion on my part as to whether or not Conwood has satisfied its burden of proving its claim or that I believe Conwood is entitled to any damages.

You should keep in mind the purpose of awarding damages. The purpose of awarding damages in a case like this one, should you determine any damages are warranted, is to put Conwood in as good a position as it would have been in had the unlawful activity not occurred, but in no better position. You should take into consideration, therefore, only the actual injury to Conwood's business caused solely by the U.S. Tobacco conduct, if any, that you find to be exclusionary under the antitrust laws.

3 L. Sand, J. Siffert, W. Loughlin, S. Reiss, and N. Batterman, Modern Federal Jury Instructions ¶ 79.02, at 79-56 (1997).

Defendants' Proposed Instruction No. 40

Plaintiff Must Prove the Causation Aspect of Damages with Reasonable Certainty

I will instruct you in a moment that an antitrust plaintiff is given some leeway in calculating the amount of damages, as long as speculation and guesswork is not involved.

That leeway is not given to Conwood, however, with respect to the requirement that Conwood only be awarded damages that stem solely from any U.S. Tobacco exclusionary conduct. That is, the causation aspect of damages must still be established with reasonable certainty. Accordingly, Conwood is not allowed to recover lost sales that result from lawful competition by U.S. Tobacco and other moist snuff competitors, however vigorous; from the independently lawful decisions of retailers; or from Conwood's own business decisions or lack of success in the marketplace.

I therefore instruct you that, in offering a damages calculation for your consideration, Conwood and its damages expert must still show with reasonable certainty that it is seeking money for lost sales that result solely from U.S. Tobacco's alleged exclusionary conduct rather than other factors.

Greater Rockford Energy & Tech. Corp. v. Shell Oil, 998 F.2d 391, 395 (7th Cir. 1993); Argus v. Eastman Kodak Co., 801 F.2d 38, 42-46 (2d Cir. 1986); Van Dyk Research Corp. v. Xerox Corp., 631 F.2d 251, 254-56 (3d Cir. 1980).

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Defendants' Proposed Instruction No. 41

Plaintiffs' Damages Must Be Based on the Specific Unlawful Conduct of the Defendant

In considering whether Conwood, through its damages expert, is seeking damages solely for U.S. Tobacco exclusionary conduct, you should consider whether Conwood's damages expert connected his calculations to the specific alleged exclusionary practices asserted by Conwood. If you find that Conwood's damages expert has not related his calculations to specific alleged illegal practices, then you should find that Conwood has not proven, with reasonable certainty, that it is seeking damages only for harm caused solely by any conduct that you find to be exclusionary.

McGlinchy v. Shell Chem. Co., 845 F.2d 802, 806 (9th Cir. 1988); City of Vernon v. Southern Cal. Edison Co., 955 F.2d 1361, 1372-73 (9th Cir. 1992); Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 395 (7th Cir. 1993).

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Defendants' Proposed Instruction No. 42

Disaggregation/Antitrust Damages Only For Unlawful Conduct

Conwood is only entitled to recover those damages to its business that were a direct result of the conduct by U.S. Tobacco that you find to harm overall competition. You must remember that you can award plaintiff damages only for injuries caused by a violation of the antitrust laws -- not for the injuries or losses caused by other factors, including lawful competition by U.S. Tobacco and others, the lawful decisions of retailers or Conwood's own business decisions or lack of success in the marketplace.

If Conwood and its damages expert has not provided you with a reasonable basis to determine how much of Conwood's profits were reduced by any other factors you have heard about and that you credited in this case, then you may not award any damages to Conwood.

ABA, Sample Jury Instructions in Civil Antitrust Cases, F-8 (1999); 3 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions ¶ 86.04, at 361-62 (3d ed. 1977); Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-65 (1946).

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Defendants' Proposed Instruction No. 43

Damages Calculation/Certainty and Amount

If you find that Conwood has established with reasonable certainty, that it is only seeking damages to its business that were a direct result of any U.S. Tobacco exclusionary conduct, then you must assess Conwood's proposed calculation of damages. Conwood's right to be fairly compensated should not be affected by any difficulty you may have in determining the precise amount of the recovery so long as there is a reasonable basis in the evidence for your award. You may not, however, calculate damages based only on speculation or guesswork, and you must remember that you can only award Conwood damages for injuries caused solely by a violation of the antitrust laws.

ABA, Sample Jury Instructions in Civil Antitrust Cases, F-8 (1999).

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Defendants' Proposed Instruction No. 44

Damages - Lost Profits

If you find that U.S. Tobacco did not commit an antitrust violation, or that Conwood's expert did not satisfy the causation aspects of damages I have described to you above, then you need not consider any further instruction on damages. If you find that U.S. Tobacco did commit an antitrust violation and that Conwood has met the causation requirements of proving damages, then you must calculate the profits, if any, that Conwood lost as a result of the U.S. Tobacco's antitrust violation. Profit means net profit: the amount by which Conwood's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues.

You have heard evidence of the market share that Conwood contends it would have achieved in the absence of U.S. Tobacco's alleged antitrust violation. You may calculate Conwood's loss of profit by considering market share, evidence of the size of the market, and evidence relating to the profit margin Conwood would have secured on such sales.

I remind you, however, that Conwood must establish that its projected market share, in the absence of U.S. Tobacco's alleged illegal conduct, is based in reality and must still account for other factors affecting Conwood's success that are unrelated to U.S. Tobacco's alleged exclusionary conduct.

I also instruct you that Conwood's expert must offer his own independent analysis of how the market would function in the absence of U.S. Tobacco's alleged exclusionary conduct, and how, why, and to what extent Conwood's market share would improve, if at all, in such a market. Conwood's expert may not merely rely on the beliefs of Conwood executives and employees to determine what Conwood's market share would have been without the presence of U.S. Tobacco's alleged exclusionary dealing.

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If you find that Conwood's expert relied solely on Conwood's beliefs as to its likely market share in the absence of U.S. Tobacco exclusionary conduct, of if you find that any study or analysis of Conwood's damages expert is not based in reality, then you may not award Conwood any lost profits.

ABA, Sample Jury Instructions in Civil Antitrust Cases, F-13 (1999); Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1353 (3rd Cir. 1975); Argus, Inc. v. Eastman Kodak Co., 801 F.2d 38, 42-46 (2d Cir. 1986); Park v. El Paso Board of Realtors, 764 F.2d 1053 (5th Cir. 1985); R.S.E., Inc. v. Pennsy Supply, Inc., 523 F. Supp. 954, 967 (N.D. Pa. 1981).

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Defendants' Proposed Instruction No. 45

U.S. Tobacco's Lanham Act Claim

U.S. Tobacco alleges in its counterclaim against Conwood that Conwood falsely advertised concerning U.S. Tobacco in violation of that same law.

Under the Lanham Act, it is illegal for "any person . . . in commercial advertising or promotion . . . [to] misrepresent[] the nature, characteristics . . . or qualities . . . of another person's goods, services or commercial activities." U.S. Tobacco must prove by a preponderance of the evidence the following elements:

First, that Conwood made false statements concerning Conwood's (U.S. Tobacco's) products or services offered to retailers;

Second, that the false statements were disseminated to the relevant purchasing public sufficiently to constitute "advertisement," rather than isolated occurrences; and

Third, that those statements would likely influence a retailers' purchasing decisions;

Otherwise, you must find for Conwood.

15 U.S.C. § 1051 (1988); American Council of Certified Podiatric Physicians and Surgeons v. American Bd. of Podiatric Surgery, 185 F.3d 606 (6th Cir. 1999); Johnson & Johnson, Inc. v. GAC Int'l, Inc., 862 F.2d 975 (2d Cir. 1988); PPX Enters, Inc. v. Audiofidelity Enters. Inc., 818 F.2d 266, 272 (2d Cir. 1987).

Defendants' Proposed Instruction No. 46

Lanham Act Damages

If you find for U.S. Tobacco on its Lanham Act claims, you may award damages in an amount equal to whatever proportion of Conwood's profits you deem to be fair compensation for the harm of false advertising.

15 U.S.C. § 1117 (1999); American Council of Certified Podiatric Physicians and Surgeons v. American Bd. of Podiatric Surgery, 185 F.3d 606 (6th Cir. 1999); Porous Media Corp. v. Pall Corp., 1997 WL 160148 (8th Cir. 1997); U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034 (9th Cir. 1986); Getty Petroleum Corp. v. Island Transp. Corp., 878 F.2d 650, 656-57 (2d Cir. 1989); Trappey v. McHenrey Co., 12 F.2d 19 (5th Cir. 1926).

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Defendants' Proposed Instruction No. 47

The Parties' State Law Conversion Claims

Both parties have brought a claim of conversion against the other party: Conwood claims that U.S. Tobacco wrongfully took its property from retail locations. U.S. Tobacco claims that Conwood wrongfully took its property from retail locations. You will find for the party bringing the claim if you are satisfied from a preponderance of the evidence:

(a) that U.S. Tobacco (Conwood) representatives took Conwood (U.S. Tobacco) advertising and display racks from retail locations; and

(b) that some or all of the advertising or display racks taken belonged to Conwood (U.S. Tobacco); and

(c) the U.S. Tobacco (Conwood) representatives did not have retailer permission to do so.

Otherwise, you will find for U.S. Tobacco (Conwood).

State Automobile Mut. Ins. Co. v. Chrysler Credit Corp., 792 S.W.2d 626, 627 (Ky Ct. App. 1990); Commercial Credit Corp. v. Tackett, 249 S.W.2d 43 (Ky Ct. App. 1952); 2 John S. Palmore & Ronald W. Eades, Kentucky Instructions to Juries § 29.01 (4th ed. 1989).

Defendants' Proposed Instruction No. 48

State Law Damages

If you find for Conwood (U.S. Tobacco), you will award the fair market value of all property taken by U.S. Tobacco (Conwood) representatives, and all other sums spent by Conwood (U.S. Tobacco) that were incidental and necessary to the purchase and anticipated use of the property that they have demonstrated at trial.

Motors Insurance Corporation v. Singleton, 677 S.W.2d 309, 314-15 (Ky. Ct. App. 1984).

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Defendants' Proposed Instruction No. 49

Rules for Deliberations

You will begin your deliberations in a few minutes. To return a verdict you must be unanimous -- all of you must agree.

Each juror is entitled to his or her own opinion. Each should, however, exchange views with fellow jurors. The very purpose of jury deliberation is to discuss and consider the evidence, to listen to the arguments of fellow jurors, to present your individual views, and to reach your determination based solely and wholly on the evidence.

In the end, each one of you must decide the case for himself or herself. But you should not hesitate to change your opinion, which, after discussion with your fellow jurors, appears incorrect in the light of the discussion and viewed against the evidence and the law that I have instructed you on.

If, after carefully considering all evidence and arguments of your fellow jurors, you entertain a conscientious view that differs from others, you are not to yield your position simply because you are outnumbered or outweighed.

I further instruct you that you should deliberate without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. All the parties to this lawsuit and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by me, and reach a just verdict regardless of the consequences.

When you retire, you should elect one member of the jury as your foreperson. That person will preside over deliberations and speak for you here in open court.

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I will provide you with a form on which to record your verdicts on each of Conwood's claims and each of U.S. Tobacco's counterclaims. That form is prepared to enable you to record any verdict that you could possibly reach. You should not regard the inclusion of the particular questions as any suggestion of what your decision should be. You must answer each question on the form carefully, so we may know the basis of your decisions.

After you have reached a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the marshal outside your door that you are ready to return to the courtroom.

16diii003817

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' PROPOSED VERDICT FORM

SECTION ONE: SHERMAN ACT CLAIM OF MONOPOLIZATION

A. Market Definition and Monopoly Power

1. Have Plaintiffs proven by a preponderance of the evidence that the relevant market consists only of moist snuff products sold throughout the United States?

_____ YES (Please continue with question 2.)

_____ NO (Please complete Verdict Form A and then go directly to Section Two. You do not need to answer questions 2 through 8.)

2. Have Plaintiffs proven by a preponderance of evidence that Defendants possess monopoly power in the relevant market?

____ YES (Please continue with question 3.)

____ NO (Please complete Verdict Form A and then go directly to Section Two You do not need to answer questions 3 through 8.)

B. Unlawful Maintenance of Monopoly Power

3. Have Plaintiffs proven by a preponderance of the evidence that Defendants willfully maintained their monopoly power?

____ YES (Please continue with question 4.)

____ NO (Please complete Verdict Form A and then go directly to Section Two. You do not need to answer questions 4 through 8.)

4. Have Plaintiffs proven by a preponderance of the evidence that Defendants will-fully maintained their monopoly power by "exclusionary conduct" rather than ordinary and competitive business practices?

____ YES (Please continue with question 5.)

____ NO (Please complete Verdict Form A and then go directly to Section Two. You do not need to answer questions 5 through 8.)

C. Harm To Competition

5. Have Plaintiffs proven by a preponderance of the evidence that the "exclusionary conduct" harmed the overall competitive process in the relevant market as opposed to harm to a single competitor?

____ YES (Please continue with question 6.)

____ NO (Please complete Verdict Form A and then go directly to Section Two. You do not need to answer questions 6 through 8.)

D. Direct and Proximate Cause

6. Have Plaintiffs proven by a preponderance of the evidence that the "exclusionary conduct," as opposed to other factors in the marketplace, was a direct and material cause of Plaintiffs' claimed injury?

____ YES (Please continue with question 7.)

____ NO (Please complete Verdict Form A and then go directly to Section Two. You do not need to answer questions 7 or 8.)

16diii003819

E. Damages

7. Have Plaintiffs proven by a preponderance of the evidence an amount of damages linked to specific "exclusionary conduct"?

____ YES (Please continue with question 8.)

____ NO (Please complete Verdict Form A and then go directly to Section Two. You do not need to answer 8.)

8. Have Plaintiffs proven by a preponderance of the evidence an amount of damages that was caused by the "exclusionary conduct" without including lost sales or profits that may have been caused by other factors in the marketplace?

____ YES (Please complete Verdict Form B and then go directly to Section Two.)

____ NO (Please complete Verdict Form A and then go directly to Section Two.)

SECTION TWO: PLAINTIFFS' CONVERSION CLAIM

1. Have Plaintiffs proven by a preponderance of evidence that Defendants wrongfully took Plaintiffs' advertising or racks from retail locations in Kentucky?

____ YES (Please complete Verdict Form C and then go to Section Three.)

____ NO (Please complete Verdict Form D and then go directly to Section Three.)

SECTION THREE: LANHAM ACT CLAIM OF FALSE ADVERTISING

1. Have Defendants proven by a preponderance of the evidence that Plaintiffs made and disseminated false statements likely to influence retailers concerning purchasing Defendants' products or services?

____ YES (Please complete Verdict Form E and then go directly to Section Four.)

____ NO (Please complete Verdict Form F and then go directly to Section Four.)

16diii003820

SECTION FOUR: DEFENDANTS' CONVERSION CLAIM

1. Have Defendants proven by a preponderance of the evidence that Plaintiffs wrongfully took Defendants advertising or racks from retail locations in Kentucky?

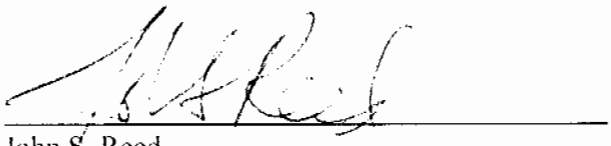
____ YES (Please complete Verdict Form G.)

____ NO (Please complete Verdict Form H.)

Please notify the Marshall when you have completed the Form of Verdict.

January 28, 2000

Respectfully submitted,



John S. Reed
Ridley M. Sandidge
Lynn K. Fieldhouse
REED WEITKAMP SCHELL
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Neal R. Stoll
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MEAGHER & FLOM LLP
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(212) 735-3000

Counsel for Defendants

16diii003822

VERDICT FORM A

We, the jury, find for the Defendants under Section 1: Sherman Act claim of monopolization.

_____ _____

_____ _____

_____ _____

VERDICT FORM B

We, the jury, find for the Plaintiffs under Section 1: Sherman Act claim of monopolization and award damages in the amount of: $_____

(Not to exceed $_____)

_____ _____

_____ _____

_____ _____

VERDICT FORM C

We, the jury, find for the Plaintiffs under Section 2: Plaintiffs' conversion claim and award damages in the amount of: $_____

(not to exceed $_____)

_____ _____

_____ _____

_____ _____

16diii003825

VERDICT FORM D

We, the jury, find for the Defendants under Section 2: Plaintiffs' conversion claim.

_____	_____
_____	_____
_____	_____

16diii003826

VERDICT FORM E

We, the jury, find for the Defendants under Section 3: Lanham Act claim of false advertising and award damages in the amount of $_____

(Not to exceed $_____)

_____ _____

_____ _____

_____ _____

16diii003827

VERDICT FORM F

We, the jury, find for the Plaintiffs under Section 3: Lanham Act claim of false advertising.

_____	_____
_____	_____
_____	_____

16diii003828

VERDICT FORM G

We, the jury, find for the Defendants under Section 4: Defendants' conversion claim and award damages in the amount of: $_____

(Not to exceed $_____)

_____ _____

_____ _____

_____ _____

VERDICT FORM H

We, the jury, find for the Plaintiffs under Section 4: Defendants' conversion claim.

_____	_____
_____	_____
_____	_____

16diii003830

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' SUPPLEMENTAL TRIAL EXHIBIT LIST

Defendants respectfully submit the following supplemental list of exhibits intended to be used at trial.

Respectfully submitted,

Dated: February 3, 2000

John S. Reed
Ridley M. Sandidge
Lynn K. Fieldhouse
REED WEITKAMP SCHELL
& VICE PLLC
2400 Citizens Plaza
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New York, New York 10036
(212) 735-3000

Counsel for Defendants

DEFENDANTS' SUPPLEMENTAL TRIAL EXHIBITS

DX Number	Description	
4251	USTC/CWD 504206	USTC/CWD 504206
4252	USTC/CWD 508045	USTC/CWD 508045
4253	USTC/CWD 504197	USTC/CWD 504197
4254	USTC/CWD 508051	USTC/CWD 508051
4255	USTC/CWD 793725	USTC/CWD 793725
4256	USTC/CWD 504224	USTC/CWD 504224
4257	USTC/CWD 517377	USTC/CWD 517377
4258	USTC/CWD 504202	USTC/CWD 504202
4259	USTC/CWD 508046	USTC/CWD 508046
4260	USTC/CWD 508044	USTC/CWD 508044
4261	USTC/CWD 281003	USTC/CWD 281003
4262	USTC/CWD 508050	USTC/CWD 508050
4263	USTC/CWD 508049	USTC/CWD 508049
4264	USTC/CWD 508047	USTC/CWD 508047
4265	USTC/CWD 508048	USTC/CWD 508048
4266	USTC/CWD 517379	USTC/CWD 517379
4267	USTC/CWD 504250	USTC/CWD 504250
4268	USTC/CWD 950496	USTC/CWD 950496
4269	USTC/CWD 508057	USTC/CWD 508057
4270	USTC/CWD 508056	USTC/CWD 508056
4271	USTC/CWD 508053	USTC/CWD 508053
4272	USCT/CWD 508052	USCT/CWD 508052

DEFENDANTS' SUPPLEMENTAL TRIAL EXHIBITS

DX Number	Description	
4273	USTC/CWD 508058	USTC/CWD 508058
4274	USTC/CWD 508059	USTC/CWD 508059
4275	USTC/CWD 508060	USTC/CWD 508060
4276	USTC/CWD 508061	USTC/CWD 508061
4277	USTC/CWD 508054	USTC/CWD 508054
4278	USTC/CWD 508055	USTC/CWD 508055
4279	USTC/CWD 516996	USTC/CWD 516996
4280	USTC/CWD 517019	USTC/CWD 517019
4281	USTC/CWD 517219	USTC/CWD 517219
4282	USTC/CWD 508043	USTC/CWD 508043
4283	USTC/CWD 517047	USTC/CWD 517047
4284	USTC/CWD 508042	USTC/CWD 508042
4285	USTC/CWD 517051	USTC/CWD 517051
4286	USTC/CWD 517237	USTC/CWD 517237
4287	USTC/CWD 508041	USTC/CWD 508041
4288	USTC/CWD 508040	USTC/CWD 508040
4289	USTC/CWD 504211	USTC/CWD 504211
4290	USTC/CWD 608130	USTC/CWD 608130
4291	USTC/CWD 885088	USTC/CWD 885088
4292	USTC/CWD 517061	USTC/CWD 517061
4293	USTC/CWD 508039	USTC/CWD 508039
4294	USTC/CWD 517036	USTC/CWD 517036

DEFENDANTS' SUPPLEMENTAL TRIAL EXHIBITS

DX Number	Description	
4295	USTC/CWD 517043	USTC/CWD 517043
4296	USTC/CWD 793726	USTC/CWD 793726
4297	USTC/CWD 508038	USTC/CWD 508038
4298	USTC/CWD 508037	USTC/CWD 508037
4299	USTC/CWD 508036	USTC/CWD 508036
4300	USTC/CWD 508035	USTC/CWD 508035
4301	USTC/CWD 508034	USTC/CWD 508034
4302	USTC/CWD 508033	USTC/CWD 508033
4303	USTC/CWD 508032	USTC/CWD 508032

16diii003834

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, on the 3rd day of February, 2000.

Counsel for Defendants

)UNT INFORMATION PAR Control #: 098350

' Name: GLEN'S

ddress: 829 W. MAIN ST. GAYLORD, MI 49735

'ERFORMANCE GOALS

1. *Marketing:* Meet 2 of 4, receive 3¢/roll.

] Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.

☑ Participate in all USTSM test programs presented.

] Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

] Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☑ 'aintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments:

Contact Name: JIM PATCHEN USTSM Rep: Wm. KOZUCH

Title: DIRECTOR, GENERAL MERCHANDISE Signature:

Signature:

INCENTIVE WORKSHEET

1	Estimated Unit Volume	72,090	cans
	Divide Volume by 10 to convert to Rolls	7,209	rolls
).	Applicable Incentive Rate (A+B+C)	8.00	¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ 576.72

DEFENDANT'S EXHIBIT 4251

PENGAD-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 504206
CONFIDENTIAL

16diii003836

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: _____ Period Covered: 2nd Quarter 1998

ACCOUNT INFORMATION PAR Control #: 70477

Account Name: _____

Address: _____

PERFORMANCE GOALS

A. Marketing: Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.

ACCEPT ALL NEW BRANDS

☑ Participate in all USTSM test programs presented.

ACCEPT ALL TEST PROMO'S AND PROGRAMS PRESENTED

☑ Position P.O.S. in accordance with USTSM share of sales.

B. Product Handling: Meet 2 of 3, receive 2¢/roll.

☑ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☑ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

KEEP LOW AMOUNTS OF INVENTORY AND DISTRIBUTION OF UST BRANDS

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

KEEP ALL PRODUCT ROTATED PROPERLY

C. Display: 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

KEEP UST VENDORS IN HIGHLY VISIBLE BACK BAR LOCATION

Comments: _____

Contact Name: _____ USTSM Rep: _____

Title: _____ Signature: _____

Signature: _____

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

PRINCAD-Bayonne, N. J.

DEFENDANT'S EXHIBIT

4252

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 508045
HIGHLY CONFIDENTIA
16diii003837

2-2-98 Period Covered: APRIL 1 1998 - July 1 1998

ACCOUNT INFORMATION PAR Control #: _____

Account Name: MARATHON FLINT OIL COMPANY

Address: 1919 S. DORT HIGHWAY FLINT MI.

PERFORMANCE GOALS

1. *Marketing:* Meet 2 of 4, receive 3¢/roll.

Participate in a USTSM Qualifying Quarterly Promotion.

PROMO 467

Support all USTSM new brand introductions.

Participate in all USTSM test programs presented.

Position P.O.S. in accordance with USTSM share of sales.

UST 70% OF P.O.S.

3. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

AVOID OUT OF STOCKS

Maintain proper rotation of USTSM products to ensure fresh product at retail.

Control BACK STOCK check Prod. Dates

2. *Display:* 3¢/roll.

Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments: _____

Contact Name: Christopher Rose USTSM Rep: FRANK V. MICKE

Title: Supervisor Signature: Frank V. Micke

Signature: _____

INCENTIVE WORKSHEET

Estimated Unit Volume	____	cans
Divide Volume by 10 to convert to Rolls	30	rolls
Applicable Incentive Rate (A+B+C)	208	¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ 125.00

DEFENDANT'S EXHIBIT 4253

USTC/CWD 504197
CONFIDENTIAL

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

16diii003838

141635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: _____ Period Covered: _____

ACCOUNT INFORMATION PAR Control #: _____

Account Name: _____

Address: _____

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

_____

☑ Support all USTSM new brand introductions.

_____

☐ Participate in all USTSM test programs presented.

_____

☐ Position P.O.S. in accordance with USTSM share of sales.

_____

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

_____

☑ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

_____

☐ Maintain proper rotation of USTSM products to ensure fresh product at retail.

_____

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

_____

Comments: _____

_____

_____

Contact Name: _____ USTSM Rep: _____

Title: _____ Signature: _____

Signature: _____

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4254

PENCAD-Bayonne, N.J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

Date: 2.4 98 Period Covered: 2/Pr QUTR

ACCOUNT INFORMATION PAR Control #: 651232

Account Name: Groceries Plus

Address: 1003 N Vine St

PERFORMANCE GOALS

A. Marketing: Meet 2 of 4, receive 3¢/roll.

a. ✓ Participate in a USTSM Qualifying Quarterly Promotion.

Copen 578 Copen cc 579

b. ✓ Support all USTSM new brand introductions.

c. ✓ Participate in all USTSM test programs presented.

d. ✓ Position P.O.S. in accordance with USTSM share of sales.

B. Product Handling: Meet 2 of 3, receive 2¢/roll.

a. ✓ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

b. ✓ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

c. ✓ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. Display: 3¢/roll.

a. ✓ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments: Good Store Vendor may be a problem later (under counter but clearly visible

Contact Name: GARY LACANN

Title: GEN MGR

Signature: Gary Lacann

USTSM Rep: BILL HIGGINS

Signature: Bill Higgins

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4255

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 793725
HIGHLY CONFIDENTIA

16diii003840

2-5-98 Period Covered: APRIL-1-98

ACCOUNT INFORMATION PAR Control #: 099496

Account Name: DAVISON GAS & OIL

Address: 107 MILL ST DAVISON MI

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☒ Participate in a USTSM Qualifying Quarterly Promotion.
Copenhagen Long Cut Promo # 467

☒ Support all USTSM new brand introductions.
- Rooster Promotions Buy 1 Get 1 Free

☐ Participate in all USTSM test programs presented.

☒ Position P.O.S. in accordance with USTSM share of sales.
Penny TRAYS HEADERS Poster ~~Banners~~

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☒ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.
AVOID OUTOF STOCKS

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.
FIRST IN FIRST OUT

C. *Display:* 3¢/roll.

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments:

Contact Name: USTSM Rep: FRANK V. MIELKE

Title: SUPERVISOR Signature: Frank V. Mielke

Signature: Kathy Dowland

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4256

USTC/CWD 504224
CONFIDENTIAL

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

16diii003841

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: Feb. 11, 1998 Period Covered: 2nd Quarter 1998

ACCOUNT INFORMATION PAR Control #: 050470

Account Name: Conv. Store Alliance

Address: 40 W. Twohig, San Angelo, TX 76904

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.

As presented.

☑ Support all USTSM new brand introductions.

☐ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☐ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Back counter - in line of sight at checkout.

Comments:

Contact Name: Linda Eaves

Title: General Partner

Signature: Linda Eaves

USTSM Rep: Rudy K. Lofton - H01

Signature: Rudy K Lofton

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4257

USTC/CWD 517377
CONFIDENTIAL

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

16diii003842

Date: February 16, 1998 Period Covered: 3 months

ACCOUNT INFORMATION PAR Control #: _____

Account Name: JOHNSON & GAYLORD

Address: _____

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.

☐ Support all USTSM new brand introductions.

☐ Participate in all USTSM test programs presented.

☒ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☒ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments: _____

Contact Name: Johnson Oil Co. USTSM Rep: John Vrondran

Title: Store Supervisor Signature: J. E. VRONDRAN

Signature: James D. Wall

INCENTIVE WORKSHEET

..	Estimated Unit Volume	3600	cans
2.	Divide Volume by 10 to convert to Rolls	360	rolls
3.	Applicable Incentive Rate (A+B+C)	8	¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ 28.80

PENGAD-Bayonne, N.J. DEFENDANT'S EXHIBIT 4258

USTC/CWD 504202
CONFIDENTIAL

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

16diii003843

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 2-17-93 Period Covered: 2nd Quarter 1993

ACCOUNT INFORMATION PAR Control #: 224191

Account Name: PLAZA C-MART

Address: 171 WKANER BLVD WENDELL NC 27591

PERFORMANCE GOALS

A. Marketing: Meet 2 of 4, receive 3¢/roll.

☒ Participate in a USTSM Qualifying Quarterly Promotion.

ACCEPT ALL QUARTERLY PROMOS

☒ Support all USTSM new brand introductions.

ACCEPT ALL NEW BRANDS OF UST

☐ Participate in all USTSM test programs presented.

ACCEPT TEST PROMO'S AND PROGRAMS PRESENTED

☐ Position P.O.S. in accordance with USTSM share of sales.

PLAZA C-MART

B. Product Handling: Meet 2 of 3, receive 2¢/roll.

☒ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

ORDER UST BRANDS ON A WEEKLY BASE KEEP ADEQUATE INVENTORY LEVEL

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

WENDELL NC 27591

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.

MAINTAIN PROPER ROTATION OF UST BRANDS

C. Display: 3¢/roll.

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

KEEP UST VENDOR IN HIGHLY VISIBLE BACK BAR LOCATION

Comments: _____

Contact Name: Allison Riddle USTSM Rep: Ronnie Pruitt

Title: Clerk/Owner Signature: Ronnie Pruitt

Signature: Allison Riddle

INCENTIVE WORKSHEET IN

1. Estimated Unit Volume: KDB02 cans
2. Divide Volume by 10 to convert to Rolls: _____ rolls
3. Applicable Incentive Rate (A+B+C): _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4259

PENGAD-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3-15-97 Period Covered: 2nd Quarter 1997

ACCOUNT INFORMATION PAR Control #: 14697

Account Name: D+D Grocery

Address: 1120 Reynolds Hwy Asheville NC 28704

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☒ Participate in a USTSM Qualifying Quarterly Promotion.

☐ Support all USTSM new brand introductions.
Accept all new brands by UST

☒ Participate in all USTSM test programs presented.
Accept all test programs

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.
Keep product in proper rotation

C. *Display:* 3¢/roll.

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.
Keep USTorallo vendor in self-serve visible position

Comments:

Contact Name: Hoyte Dillingham USTSM Rep: Ronnie Pruitt

Title: Owner Signature: Ronnie Pruitt

Signature: Hoyte Dillingham

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4260

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 508044
HIGHLANDS NC 28741

Tobacco036845

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: FEB 24, 1998 Period Covered: 2nd QUARTER 1998

ACCOUNT INFORMATION PAR Control #: 091609

Account Name: [redacted] BECK OIL.

Address: 850 THOMPSON PRINCETON, IL. 61356

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.

PROMO #467 - COPENHAGEN LONG CUT "CATCH A 2-PK"

☐ Support all USTSM new brand introductions.

☐ Participate in all USTSM test programs presented.

☒ Position P.O.S. in accordance with USTSM share of sales.

PROMO #467 - COUNTER MAT

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☒ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

AS REQUIRED

DEFENDANT'S EXHIBIT 4261

Comments: PROGRAM BEGINS APRIL 1, 1998 - ENDS JUNE 30, 1998 (FOR 2nd QTR).
PAYMENT REC'D [redacted] CUSTOMER APPROX 45 DAYS AFTER QUARTER ENDS (MID-AUGUST)
MAILED DIRECTLY [redacted] BECK OIL ALSO GIVES YOU AUTH'N FOR CSDC TO RELEASE SALES FIGURES.

Contact Name: ROBERT BECKER USTSM Rep: STEVE HOFFERKAMP

Title: OWNER Signature: Steven R Hofferkamp

Signature: X Robt Becker

INCENTIVE WORKSHEET

		(ESTIMATED)
1. Estimated Unit Volume		6,240 cans
2. Divide Volume by 10 to convert to Rolls		624 rolls
3. Applicable Incentive Rate (A+B+C)		8 ¢/rolls
Estimated Rolls x Incentive Rate = Potential Payment $		$499.20 FOR THE QTR.

EXAMPLE: YOUR 12 STORES SELL ROUGHLY 40 CANS/WK FOR 13 WKS!

40 CANS/WK
X 13 WKS
X 12 STORES
6240 CANS

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 281003
CONFIDENTIAL 16dlll003846

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 2-13-98 Period Covered: 2nd QUARTER 1998

ACCOUNT INFORMATION PAR Control #: 134414

Account Name: COUNTRY MARKET

Address: _____

PERFORMANCE GOALS

A. Marketing: **Meet 2 of 4, receive 3¢/roll.**

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☒ Support all USTSM new brand introductions.
ACCEPT ALL NEW BRANDS INTRODUCED

☒ Participate in all USTSM test programs presented.
ACCEPT ANY TEST PROMOS AND FLOATS

☐ Position P.O.S. in accordance with USTSM share of sales.

B. Product Handling: **Meet 2 of 3, receive 2¢/roll.**

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.
KEEP INVENTORY LEVELS TO CUSTOMER DEMAND WEEKLY

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.
KEEP PRODUCT ROTATED

C. Display: **3¢/roll.**

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.
KEEP UST VENDED IN VISIBLE LOCATION

Comments: _____

Contact Name: Dan Fricke / Bryce Friesen USTSM Rep: Ronnie Pruitt

Title: Owner Signature: Ronnie Pruitt

Signature: Dan Fricke

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4262

PENCAD-Boyonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 2-25-98 Period Covered: 2nd Qrtr. 1998

ACCOUNT INFORMATION PAR Control #: 13425

Account Name: Kwik As A Wink Dee Tam

Address: 3[illegible] East Henderson Street [illegible]

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☒ Support all USTSM new brand introductions.
Accept any new brands

☒ Participate in all USTSM test programs presented.
Accept all test brands and Programs

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☒ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.
Order Product Weekly on a Six Week Guideline

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.
Keep all UST Products Rotated

C. *Display:* 3¢/roll.

☐ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments:

Contact Name: Kathy Jean freshour USTSM Rep: Ronie Pratt

Title: Owner Signature: Ronie Pratt

Signature: Kathy Jean Freshour

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4263

PENCAD-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 2-26-98 Period Covered: 2nd QUARTER 1998

ACCOUNT INFORMATION PAR Control #: 137219

Account Name: BAKERS MARKET

Address: [illegible] HILL ROAD [illegible] NC 27527

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☒ Support all USTSM new brand introductions.

☒ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments: _____

Contact Name: [illegible] Baker USTSM Rep: Ronnie Pruett

Title: [illegible] Signature: Ronnie Pruett

Signature: [illegible] Baker

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4264

PENGAD-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 2-26-91 Period Covered: 2nd Quarter 1991

ACCOUNT INFORMATION PAR Control #: 712179

Account Name: Glenwood Grocery

Address: Hwy 221 S Marion NC 28752

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☒ Support all USTSM new brand introductions.

☒ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments:

Contact Name: Jean Mitchell USTSM Rep: Kevin Pruitt

Title: Owner Signature: Kevin Pruitt

Signature: Jean Mitchell

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4265

PENCAD-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3/2/98 Period Covered: 1998

ACCOUNT INFORMATION PAR Control #: _____

Account Name: Speedway SuperAmerica LLC

Address: 500 Speedway Drive, Enon, OH 45323

DEFENDANT'S EXHIBIT 4266 PENGAD-Bayonne, N.J.

PERFORMANCE GOALS

A. Marketing: Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.

Display promotion in a prominent, visible location

☑ Support all USTSM new brand introductions.

Regional or National

☐ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

Week 1X2

B. Product Handling: Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

● Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

Proper ordering so as to minimize OOS's + overstocks as per UST Sales Rep + Store Mgr.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

FIFO so as to minimize "stale" goods

C. Display: 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Self-explanatory: Share of Store should equal share of sales. Must be visible to customer

Comments: _____

Contact Name: Steve Kidd

Title: Category Manager

Signature: [signature]

USTSM Rep: Robert J. Colarado, Jr.

Signature: [signature] 5/5/98

INCENTIVE WORKSHEET

USTC/CWD 517379
CONFIDENTIAL

1. Estimated Unit Volume	5MM	cans
Divide Volume by 10 to convert to Rolls	500K	rolls
Applicable Incentive Rate (A+B+C)	8¢	¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ 40,000

to: reps 10/5/98

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

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Date: 3/2/98 Period Covered: 1998

ACCOUNT INFORMATION PAR Control #: _____

Account Name: Speedway SuperAmerica LLC

Address: 500 Speedway Drive, Enon, OH 45323

DEFENDANT'S EXHIBIT 4267

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.

Display promotion in a prominent, visible location

☑ Support all USTSM new brand introductions.

Regional or National

☐ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

Wall: 1X2

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☑ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

Proper ordering so as to minimize OOS's + overstocks as per UST Sales Rep + Store Mgr.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

FIFO so as to minimize returned goods

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Self-explanatory: Share of shelf should equal share of sales. Must be visible & prominent

Comments: _____

Contact Name: Steve Kidd USTSM Rep: Robert J. Ghirardo, Jr.

Title: Category Manager Signature: SKidd 5/5/98

Signature: _____

INCENTIVE WORKSHEET

Estimated Unit Volume	5MM	cans
Divide Volume by 10 to convert to Rolls	500K	rolls
Applicable Incentive Rate (A+B+C)	8¢	¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ 40,000

USTC/CWD 504250
CONFIDENTIAL

16diii003852

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3/2/95 Period Covered: 1995

ACCOUNT INFORMATION PAR Control #: 050343

Account Name: Mobil Oil

Address: 3225 Gallows Rd Fairfax, VA 22037

DEFENDANT'S EXHIBIT 4268

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.

Display promotion in a prominent, visible location

☑ Support all USTSM new brand introductions.

Regional or national

☐ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☑ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

Proper ordering so as to minimize cost of overstocks

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

FIFO so as to minimize returned goods

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Self-explanatory

Comments:

Contact Name: Mike Asmith

Title: Group Category Manager

Signature:

USTSM Rep: Robert J. Chiarello, Jr.

Signature:

ICENTIVE WORKSHEET

1.	Estimated Unit Volume	3 MM	cans
2.	Divide Volume by 10 to convert to Rolls	300K	rolls
3.	Applicable Incentive Rate (A+B+C)	8¢	¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ 24,000

USTC/CWD 950496
HIGHLY CONFIDENTIAL
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171635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3-3-98 Period Covered: 2nd quarter 1998

ACCOUNT INFORMATION PAR Control #: 661602

Account Name: SAFE STOP (ITGO

Address: 7599 Hwy 213 MARS HILL NC 28754

PERFORMANCE GOALS

DEFENDANT'S EXHIBIT 4269 PENGAD-Bayonne, N. J.

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

- ☐ Participate in a USTSM Qualifying Quarterly Promotion.
- ☒ Support all USTSM new brand introductions.
  ACCEPT ANY NEW BRANDS
- ☒ Participate in all USTSM test programs presented.
  ACCEPT ANY TEST PLANS AND PROMOTIONS
- ☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

- ☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.
- ☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.
  KEEP PROPER INVENTORY CONTROL
- ☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.
  KEEP PRODUCT ROTATED

C. *Display:* 3¢/roll.

- ☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.
  KEEP UST UNDER IN HIGHLY VISIBLE LOCATION

Comments:

Contact Name: SAL ANNONE USTSM Rep: RONNIE SMITH

Title: PRESIDENT Signature: Ronnie Smith

Signature: Sal Annone

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
   Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 2-3-93 Period Covered: 2nd Quarter 1993

ACCOUNT INFORMATION PAR Control #: 14462

Account Name: PATRIOT FOOD MART #2

Address: 300 CULEBRA ROAD SAN ANTONIO TX 78201

DEFENDANT'S EXHIBIT 4270

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

- ☐ Participate in a USTSM Qualifying Quarterly Promotion.
- ☒ Support all USTSM new brand introductions.
- ☒ Participate in all USTSM test programs presented.
- ☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

- ☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.
- ☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.
- ☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

- ☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments:

Contact Name: BERNARD L. BRIGGS USTSM Rep: Kevin Pratt

Title: Manager Signature: Kevin Pratt

Signature: Bernard L Briggs

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111695

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3-3-97 Period Covered: 2nd Quarter 1997

ACCOUNT INFORMATION PAR Control #: 13760

Account Name: V+E Grocery

Address: Hwy 19 Mars Hill NC 28754

DEFENDANT'S EXHIBIT 4271

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

- ☐ Participate in a USTSM Qualifying Quarterly Promotion.
- ☒ Support all USTSM new brand introductions.
  accept any new brands
- ☒ Participate in all USTSM test programs presented.
  accept any test promos and planned
- ☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

- ☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.
- ☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.
  keep inventory levels at proper adjustments
- ☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.
  Eg product dated

C. *Display:* 3¢/roll.

- ☐ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments:

Contact Name: David Parker USTSM Rep: Ronnie Pruitt

Title: Owner Signature: Ronnie Pruitt

Signature: David Parker

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3-3-95 Period Covered: 2nd Quarter 95

ACCOUNT INFORMATION PAR Control #: 231-963

Account Name: 23 Country Store

Address: Hwy 23 Mills Hill NC 28754

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☒ Support all USTSM new brand introductions.
ACCEPT ANY NEW BRANDS

☒ Participate in all USTSM test programs presented.
ACCEPT ANY TEST PROMO OR PROGRAM

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.
KEEP PROPER LEVEL OF INVENTORY

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.
KEEP PRODUCT ROTATED

C. *Display:* 3¢/roll.

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.
KEEP UST VENDORS IN VISIBLE SELF SERVE LOCATION

Comments:

Contact Name: Wayne Harrington USTSM Rep: Kevin Pruitt

Title: Manager Signature: Kevin Pruitt

Signature: Wayne Harrington

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4272

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 508052
HIGHLY CONFIDENTI
16diii003857

111635 -

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3-4-95 Period Covered: 2nd QUARTER 1995

ACCOUNT INFORMATION PAR Control #: _____

Account Name: KOUNTY LINE #2

Address: HWY 21 SKYLAND NC

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☒ Support all USTSM new brand introductions.

☒ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments: _____

Contact Name: EARL Johnson USTSM Rep: Ronnie Pruitt

Title: MGR Signature: Ronnie Pruitt

Signature: Earl Johnson

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

PENGAD-Bayonne, N.J. DEFENDANT'S EXHIBIT 4273

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 508058
HIGHLY CONFIDENTIAL
16diii003858

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3-4-95 Period Covered: 2nd QUARTER

ACCOUNT INFORMATION PAR Control #: 138126

Account Name: KOUNTY LINE #1

Address: 4 PORT ROAD ANGOLA, IN 46703

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☒ Support all USTSM new brand introductions.

☒ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments:

Contact Name: EARL Johnson USTSM Rep: Ronnie Pruett

Title: [illegible] Signature: Ronnie Pruett

Signature: [illegible]

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4274

PENCAD-Bayonne, N.J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 508059
HIGHLY CONFIDENTI
16diii003859

1 PM635 —

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3-4-98 Period Covered: 2nd QUARTER 1998

ACCOUNT INFORMATION PAR Control #: _____

Account Name: REYNOLDS KOUNTY LINE

Address: Hwy 74 ASHEVILLE NC

PERFORMANCE GOALS

A. Marketing: Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☒ Support all USTSM new brand introductions.

☒ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

B. Product Handling: Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. Display: 3¢/roll.

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments: _____

Contact Name: EARL JONES USTSM Rep: RONNIE PRUITT

Title: _____ Signature: Ronnie Pruitt

Signature: _____

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4275

PENGAD-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3-4-98 Period Covered: 2nd Quarter 1998

ACCOUNT INFORMATION PAR Control #: _____

Account Name: Fisher Korner Inc

Address: Hwy 25 Ardin NC 28704

PERFORMANCE GOALS

A. Marketing: Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☒ Support all USTSM new brand introductions.

☒ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

B. Product Handling: Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. Display: 3¢/roll.

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments: _____

Contact Name: Donald P. Fender USTSM Rep: Ronnie Pruett

Title: owner Signature: Ronnie Pruett

Signature: Donald P. Fender

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4276

PENGAD-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 508061
HIGHLY CONFIDENTIAL
16diii003861

1T1635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3-5-99 Period Covered: 2nd Quarter

ACCOUNT INFORMATION PAR Control #: New

Account Name: Dan Discount Tobacco Outlet #3

Address: 1624 Blvd Wentzville NC 28627

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.
Accept Any New Brand

☑ Participate in all USTSM test programs presented.
Full Assortment Road Map Program

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☑ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.
Maintain adequate inventory levels

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.
Keep product fresh

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.
Keep at front premium locations

Comments:

Contact Name: Robert Weber USTSM Rep: Kevin Smith

Title: Asst Manager Signature: Kevin Smith

Signature: Robert Weber

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4277

PENGAD-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 2-5-93 Period Covered: 2nd QUARTER

ACCOUNT INFORMATION PAR Control #: _____

Account Name: Dan's Discount #1

Address: 45 Todd Hill Place Canton NC

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☒ Support all USTSM new brand introductions.
ALERT ANY NEW ITEMS

☒ Participate in all USTSM test programs presented.
[illegible] TEST ITEMS AND PROGRAM

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.
MAINTAIN [illegible] INVENTORY LEVELS

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.
[illegible] DATED

C. *Display:* 3¢/roll.

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.
[illegible] AT EYE LEVEL IN PREMIUM LOCATION

Comments: _____

Contact Name: Robert C. Hebert USTSM Rep: Ronnie Pruitt

Title: Store Manager Signature: Ronnie Pruitt

Signature: Robert C. Hebert

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4278

PENCOM-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3/9/98 Period Covered: 2nd Quarter 1998

ACCOUNT INFORMATION PAR Control #: _____

Account Name: Exxon Houston CORS

Address: Houston, TX

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.

As presented.

☐ Support all USTSM new brand introductions.

☐ Participate in all USTSM test programs presented.

☑ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☑ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

In line of sight on back counter at checkout.

Comments: _____

Contact Name: Jim Hebert USTSM Rep: Rudy K. Lofton

Title: Merch. Specialist Signature: Rudy K. Lofton

Signature: Not Entered

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4279

USTC/CWD 516996
CONFIDENTIAL

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

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111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3-9-98 Period Covered: 4-1-98 / 12-31-58

ACCOUNT INFORMATION PAR Control #: 092656

Account Name: EXXON

Address:

DEFENDANT'S EXHIBIT 4280

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

- ☐ Participate in a USTSM Qualifying Quarterly Promotion.
  PROMOTIONS DETERMINED BY EXXON AND UST
- ☐ Support all USTSM new brand introductions.
- ☐ Participate in all USTSM test programs presented.
- ☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

- ☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.
- ☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.
- ☐ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

- ☐ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.
  VENDER TO REMAIN IN DIRECT LINE OF SIGHT OF CUSTOMER WHILE STANDING AT REGISTER. UST WILL PROVIDE VENDING SYSTEM AND HEADERCARD FOR MOST TOBACCO. UST TO RECEIVE MINIMUM 80% OF AVAILABLE SPACE FOR MOST TOBACCO. NEW STORES NOT ELIGIBLE AT THIS TIME.

Comments:

Contact Name: [signature] USTSM Rep: GARY LEMOINE

Title: MERCHANDISING SUPERVISOR Signature: [signature]

Signature: [signature]

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ 3370 ≈

USTC/CWD 517019
CONFIDENTIAL

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

16diii003865

11635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3/9/98 Period Covered: 2nd Quarter 1998

ACCOUNT INFORMATION PAR Control #: 050375

Account Name: Exxon Houston CORS

Address: Houston, TX

DEFENDANT'S EXHIBIT 4281
PENGAD-Bayonne, N. J.

PERFORMANCE GOALS

4. *Marketing:* Meet 2 of 4, receive 3¢/roll.

✓ Participate in a USTSM Qualifying Quarterly Promotion.

As presented.

Support all USTSM new brand introductions.

Participate in all USTSM test programs presented.

✓ Position P.O.S. in accordance with USTSM share of sales.

3. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

✓ Maintain proper rotation of USTSM products to ensure fresh product at retail.

2. *Display:* 3¢/roll.

✓ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

In line of sight on back counter at checkout.

Comments:

Contact Name: Jim Hebert

Title: Merch. Specialist

Signature: Not Entered

USTSM Rep: Rydy K. Lofton

Signature: Rudy K. Lofton

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

USTC/CWD 517219
CONFIDENTIAL

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

11635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 2-9-95 Period Covered: 2nd QUARTER 1998

ACCOUNT INFORMATION PAR Control #: 140176

Account Name: GOSSETT'S GROCERY

Address: _____

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☒ Support all USTSM new brand introductions.

☒ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments: _____

Contact Name: DWAYNE GOSSETT USTSM Rep: Ronnie Powell

Title: _____ Signature: Ronnie Powell

Signature: _____

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4282

PENCAD-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635 —

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3/9/98 Period Covered: 2ND QUARTER

ACCOUNT INFORMATION PAR Control #: 051391

Account Name: SSP / CIRCLE K

Address: 9433 BAYDWIN BLVD. CORPUS CHRISTI TX. 78409

DEFENDANT'S EXHIBIT 4283 PENCAD-Bayonne, N. J.

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.
PROMOTION 467 FOR COASTAL BEND AND TEXOMA DIVISIONS

☐ Support all USTSM new brand introductions.

☐ Participate in all USTSM test programs presented.

☑ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☑ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.
BACK COUNTER VISIBLE AT CHECKOUT

Comments:

Contact Name: CRAIG SCOTTON
Title: CATEGORY MANAGER
Signature: Craig Scotton

USTSM Rep: RUDY K. LOFTON
Signature: Rudy K Lofton

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

USTC/CWD 517047
CONFIDENTIAL

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 2-2-97 Period Covered: 2nd QUARTER 1997

ACCOUNT INFORMATION PAR Control #: 6[illegible]9

Account Name: [illegible]

Address: [illegible]

PERFORMANCE GOALS

DEFENDANT'S EXHIBIT 4284 — PENGAD-Bayonne, N. J.

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

- ☐ Participate in a USTSM Qualifying Quarterly Promotion.
- ☒ Support all USTSM new brand introductions.
- ☒ Participate in all USTSM test programs presented.
- ☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

- ☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.
- ☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.
- ☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

- ☐ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments:

Contact Name: JAMES L. READ USTSM Rep: Ronnie Smith

Title: CASHIER Signature: Ronnie Smith

Signature: James L. Read

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3/11/98 Period Covered: Second Qtr 1998

ACCOUNT INFORMATION PAR Control #: 056641

Account Name: Town & Country Food Stores

Address: San Angelo, TX

DEFENDANT'S EXHIBIT 4285

PERKINS-Bayonne, N.J.

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.
#467 Promotion Ships 6/1/98

☐ Support all USTSM new brand introductions.

☐ Participate in all USTSM test programs presented.

☑ Position P.O.S. in accordance with USTSM share of sales.
Appropriate POS (header card) on merchandiser.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

✓ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments:

Contact Name: David Antle
Title: Merchandising Manager
Signature:

USTSM Rep: Rudy K. Lofton
Signature: Rudy K. Lofton

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 517051
CONFIDENTIAL

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11635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3/12/98 Period Covered: Second Quarter 1998

ACCOUNT INFORMATION PAR Control #: 056638

Account Name: C & W One Stops

Address: 3602 S. Chadbourne, San Angelo, TX

DEFENDANT'S EXHIBIT 4286

PENGAD-Bayonne, N. J.

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.

As presented

☐ Support all USTSM new brand introductions.

☐ Participate in all USTSM test programs presented.

☑ Position P.O.S. in accordance with USTSM share of sales.

USTSM header card

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☑ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

USTSM vendors to remain in visible location at checkout.

Comments:

Contact Name: Lonnie M. Luce

Title: VP Retail

Signature:

USTSM Rep: Rudy K. Lofton

Signature: Rudy K Lofton

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 517237
CONFIDENTIAL
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1 ~~Page~~

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3-12-95 Period Covered: 2nd Quarter 1995

ACCOUNT INFORMATION PAR Control #: "NEW"

Account Name: CAROLINA TOBACCO SHOP

Address: 1500 HENDERSONVILLE ROAD ASHEVILLE, NC 28803

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☒ Support all USTSM new brand introductions.
ACCEPT ANY NEW BRANDS

☒ Participate in all USTSM test programs presented.
ACCEPT ANY TEST PRODUCTS

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.
KEEP RIGHT INVENTORY LEVELS

☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.
KEEP PRODUCT ROTATED

C. *Display:* 3¢/roll.

☐ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments:

Contact Name: BARRY WARWICK USTSM Rep: RONNIE PRUITT

Title: OWNER/OPERATOR Signature: Ronnie Pruitt

Signature: Barry Warwick

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

PENCAD Systems, N.J.
DEFENDANT'S EXHIBIT 4287

1 [illegible]

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 2-12-98 Period Covered: 2nd Quarter 1998

ACCOUNT INFORMATION PAR Control #: 13 [illegible]

Account Name: [illegible]

Address: [illegible]

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.

☑ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☑ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☐ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☐ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments: _____

Contact Name: _____ USTSM Rep: Ronnie Pruitt

Title: _____ Signature: Ronnie Pruitt

Signature: _____

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

PENGAD-Bayonne, N. J.

DEFENDANT'S EXHIBIT

4288

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

ate: 3/23/98 Period Covered: 1997

CCOUNT INFORMATION PAR Control #: 051054

ount Name: GAGE KD 711
ddress: 3925 FORTUNE BLVD. SAGINAW MI 48603

ERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.

☐ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

● Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☐ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments: ITEM 6 SUBJECT TO SOLE RESULTS WHEN SUITABLE IS AVAILABLE.

Contact Name: Wendy Ward USTSM Rep: Wm. Kozuch
Title: SALES MGR. I Signature: Wm. K-S
Signature: Wendy Ward

INCENTIVE WORKSHEET

1. Estimated Unit Volume	173,470	cans
2. Divide Volume by 10 to convert to Rolls	17,347	rolls
3. Applicable Incentive Rate (A+B+C)	.08	¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ 1427.76

DEFENDANT'S EXHIBIT 4289

USTC/CWD 504211
CONFIDENTIAL

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

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111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 3/25/98 Period Covered: 4/1 - 12/31/98

ACCOUNT INFORMATION PAR Control #: 054133

Account Name: ICE SERVICE STORES

Address: 91 THOMSON ST. ASHEVILLE NC 28803

PERFORMANCE GOALS

A. Marketing: Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.

☐ Participate in all USTSM test programs presented.

☑ Position P.O.S. in accordance with USTSM share of sales.

B. Product Handling: Meet 2 of 3, receive 2¢/roll.

☑ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. Display: 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

BACK BAR LOCATION FOR PRIMARY VENDORS, COUNTER LOCATION FOR PROMOTIONAL DISPLAYS

Comments:

Contact Name: Hunt Mallett USTSM Rep: BRENT BLANKENSHIP

Title: President Signature:

Signature:

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) 8 ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4290

PENGAD-Bayonne, N.J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 608130
CONFIDENTIAL

16diii003875

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 03-30 98 Period Covered: _____

ACCOUNT INFORMATION PAR Control #: _____

Account Name: FITZGERALD CONVENIENCE

Address: 2217 DOSWELL RD B-2 MARIETTA, GA 30062

DEFENDANT'S EXHIBIT 4291

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.

☐ Participate in all USTSM test programs presented.

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☑ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☐ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments: _____

Contact Name: JUNIE FERGUSON

Title: _____

Signature: _____

USTSM Rep: JAMES RANDEL FRANKLIN

Signature: James Randel Franklin

INCENTIVE WORKSHEET

1. Estimated Unit Volume 18,500 cans
2. Divide Volume by 10 to convert to Rolls 1850 rolls
3. Applicable Incentive Rate (A+B+C) .08 ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ 148.00

USTC/CWD 885088
HIGHLY CONFIDENTIAL

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

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111635 -

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 4.15.97 Period Covered: 2nd Quarter

ACCOUNT INFORMATION PAR Control #: 056863

Account Name: TETCO Stores, Inc.
Address: San Antonio, TX

PENGAD-Bayonne, N. J. DEFENDANT'S EXHIBIT 4292

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.

☐ Support all USTSM new brand introductions.

☐ Participate in all USTSM test programs presented.

☑ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☑ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.
Vendor in line of sight at checkout as planogrammed.

Comments:

Contact Name: Rick Schrank
Title: Director of Marketing
Signature: Rick Schrank

USTSM Rep: Rudy K. Lofton - 101
Signature: Rudy K Lofton

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

USTC/CWD 517061
CONFIDENTIAL

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: [illegible] Period Covered: [illegible]

ACCOUNT INFORMATION PAR Control #: 45139

Account Name: P+L GENERAL

Address:

DEFENDANT'S EXHIBIT 4293 PENGAD - Bayonne, N. J.

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

- ☐ Participate in a USTSM Qualifying Quarterly Promotion.
- ☒ Support all USTSM new brand introductions.
- ☒ Participate in all USTSM test programs presented.
- ☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

- ☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.
- ☒ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.
- ☒ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

- ☒ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments:

Contact Name: Patrick PHILLIPS USTSM Rep: Kevin Pass

Title: Owner Signature: Kevin Pass

Signature: Patrick Phillips

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls 1 rolls
3. Applicable Incentive Rate (A+B+C) 5¢ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

ite: 4/21/98 Period Covered: Second Quarter 1998

UNT INFORMATION PAR Control #: QS5639

ccount Name: Kent Kwik Stores

ddress: Midland

ERFORMANCE GOALS

DEFENDANT'S EXHIBIT 4294

. *Marketing:* Meet 2 of 4, receive 3¢/roll.

✓ Participate in a USTSM Qualifying Quarterly Promotion.

☐ Support all USTSM new brand introductions.

☐ Participate in all USTSM test programs presented.

☑ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ 'aintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

☑ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Behind counter, visible at checkout

Comments:

Contact Name: Artie Smith USTSM Rep: Rydy K. Lofton

Title: Merchandise Manager Signature: Rudy K Lofton

Signature: Artie Smith

ENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

USTC/CWD 517036

CONFIDENTIAL 103879

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: April 22, 1998 Period Covered: Second Quarter 1998

COUNT INFORMATION PAR Control #: 098692

Account Name: Southwest Convenience Stores

Address: 415 N. Grant, Odessa, TX

DEFENDANT'S EXHIBIT 4295

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☑ Participate in a USTSM Qualifying Quarterly Promotion.

As presented

☐ Support all USTSM new brand introductions.

☐ Participate in all USTSM test programs presented.

☑ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☐ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

● Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Back bar, in line of sight at checkout.

Comments:

Contact Name: Lisa Henry USTSM Rep: Rudy K. Lofton

Title: Category Manager Signature: Rudy K Lofton

Signature: Lisa Henry

INCENTIVE WORKSHEET

● Estimated Unit Volume _____ cans

Divide Volume by 10 to convert to Rolls _____ rolls

3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

USTC/CWD 517043
CONFIDENTIAL

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

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Date: 8/5/98 Period Covered: 4th Qtr

ACCOUNT INFORMATION PAR Control #: _____

Account Name: Stefanich Bros

Address: 435 E Broad St

PERFORMANCE GOALS

A. Marketing: Meet 2 of 4, receive 3¢/roll.

✓ Participate in a USTSM Qualifying Quarterly Promotion.
Code 502 Coil 504 off

✓ Support all USTSM new brand introductions.
Rooster / red Seal

✓ Participate in all USTSM test programs presented.

✓ Position P.O.S. in accordance with USTSM share of sales.

B. Product Handling: Meet 2 of 3, receive 2¢/roll.

✓ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

✓ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

✓ Maintain proper rotation of USTSM products to ensure fresh product at retail.

C. Display: 3¢/roll.

✓ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Comments: _____

Contact Name: Mike Stefanich USTSM Rep: Bill Higgins

Title: Partner Signature: Bill Higgins

Signature: Mike Stefanich

INCENTIVE WORKSHEET

1. Estimated Unit Volume	1200	cans
2. Divide Volume by 10 to convert to Rolls	120	rolls
3. Applicable Incentive Rate (A+B+C)	.08	¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ 960

DEFENDANT'S EXHIBIT 4296

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 793726
HIGHLY CONFIDENTIAL

16diii003881

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 2-27-97 Period Covered: 4th Qtr-96 1997

ACCOUNT INFORMATION PAR Control #: 050671

Account Name: KING FOOD MART

Address: [illegible]

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.

KEEP ALL NEW BRANDS

☐ Participate in all USTSM test programs presented.

☑ Position P.O.S. in accordance with USTSM share of sales.

KEEP ADD INITIAL P.O.S. PLACEMENT

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☑ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

ORDER PRODUCTS WEEKLY AND KEEP PROPER LEVEL OF INVENTORY

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

KEEP ALL PRODUCTS ROTATED

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

KEEP 1ST VENDOR IN VISIBLE LOCATION TO CONSUMER

Comments:

Contact Name: BRENDA WARREN USTSM Rep: RONNIE PRUITT

Title: OP. MGR. Signature: Ronnie Pruitt

Signature: Brenda Warren

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4297

PENGAD-Bayonne, N.J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 9.17.98 Period Covered: 4TH QUARTER

ACCOUNT INFORMATION PAR Control #: 140177

Account Name: Country Food Store #13

Address: Newland Road Lenoir NC 28645

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.
ACCT ALL NEW BRANDS

☑ Participate in all USTSM test programs presented.
ACCT ANY TEST PROGRAM OR PROMOTION OFFERED

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☑ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.
ORDER PRODUCTS WEEKLY AND KEEP PROPER LEVELS OF INVENTORY

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.
KEEP PRODUCTS ROTATED "FIRST IN FIRST OUT"

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.
KEEP UST TOBACCO VENDOR IN VISIBLE LOCATION FOR THE CONSUMER

Comments:

Contact Name: Thomas Church USTSM Rep: Ronnie Pruitt

Title: Signature:

Signature:

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4298

PENGAD-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 9-17-93 Period Covered: 4TH QUARTER

ACCOUNT INFORMATION PAR Control #: _____

Account Name: COUNTRY FOOD STORE #8

Address: 475 WEAVERVILLE HWY ASHEVILLE NC 28804

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.
ACCEPT ALL NEW BRANDS

☑ Participate in all USTSM test programs presented.
ACCEPT ANY TEST PROGRAM OR PROMOTION OFFERED

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☑ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.
ORDER PRODUCTS WEEKLY AND KEEP PROPER LEVEL OF INVENTORY

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.
KEEP PRODUCTS ROTATED "FIRST IN FIRST OUT"

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.
KEEP US TOBACCO VENDOR IN VISIBLE LOCATION FOR THE CONSUMER

Comments: _____

Contact Name: Thomas Church USTSM Rep: Ronnie Pruitt

Title: _____ Signature: Ronnie Pruitt

Signature: Thomas Church

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4299

PENGAD-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 50803

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CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 9-17-97 Period Covered: 4TH QUARTER

ACCOUNT INFORMATION PAR Control #: 13580

Account Name: Country Food Stores #10
Address: 10 Dimmock Road Lenoir NC 28645

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.
ACCEPT ALL NEW BRANDS

☑ Participate in all USTSM test programs presented.
ACCEPT ANY TEST PROGRAM OR PROMOTION OFFERED

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☑ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.
ORDER PRODUCTS WEEKLY AND KEEP PROPER LEVELS OF INVENTORY

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.
KEEP ALL PRODUCTS ROTATED FIFO IN FIRST OUT

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.
KEEP USTOBACCO VENDOR IN VISIBLE LOCATION FOR THE CONSUMER

Comments:

Contact Name: Thomas Church
Title: Mgr
Signature: Thomas Church

USTSM Rep: Ronnie Smith
Signature: Ronnie Smith

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

PERKASIE-Bayonne, N.J.
DEFENDANT'S EXHIBIT
4300

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 6-17-97 Period Covered: 4TH QUARTER

ACCOUNT INFORMATION PAR Control #: 104775

Account Name: Country Food Store #7

Address: 500 Mills Gap Road Asheville NC 28803

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.
ACCEPT ALL NEW BRANDS

☑ Participate in all USTSM test programs presented.
ACCEPT ANY TEST PROGRAM OR PROMOTION OFFERED

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☑ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.
ORDER ALL PRODUCTS WEEKLY AND KEEP PROPER LEVELS OF INVENTORY

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.
KEEP ALL PRODUCTS ROTATED - FIRST IN FIRST OUT

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.
KEEP US TOBACCO VENDOR IN VISIBLE LOCATION FOR THE CONSUMER

Comments:

Contact Name: Thomas Church USTSM Rep: Ronnie Pruitt

Title: Mgr. Signature: Ronnie Pruitt

Signature: Thomas Church

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4301

PENGAD-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 9-17-95 Period Covered: 4th Quarter 1995

ACCOUNT INFORMATION PAR Control #: 14305

Account Name: County Food Store #5

Address: District Rd Black Mtn NC 28711

PERFORMANCE GOALS

A. *Marketing:* Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.

Accept all new brands

☑ Participate in all USTSM test programs presented.

Accept any tests/programs or promotions offered

☐ Position P.O.S. in accordance with USTSM share of sales.

B. *Product Handling:* Meet 2 of 3, receive 2¢/roll.

☑ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

Order products weekly and keep proper levels of inventory

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

Keep all product rotated first in first out

C. *Display:* 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

Keep USTSM vendors in visible location for the consumer

Comments: _____

Contact Name: Thomas Church USTSM Rep: Kamie Pruitt

Title: Manager Signature: Kamie Pruitt

Signature: Thomas C

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

DEFENDANT'S EXHIBIT 4302

PENGAD-Bayonne, N. J.

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

USTC/CWD 508033
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111635

CUSTOMER ALLIANCE PROGRAM RETAIL WORKSHEET

Date: 10-14-98 Period Covered: 1ST QUARTER 1999

ACCOUNT INFORMATION PAR Control #: 14322

Account Name: FASTRAC FOOD MART

Address: 3184 LEICESTER HWY LEICESTER NC 28748

PERFORMANCE GOALS

A. Marketing: Meet 2 of 4, receive 3¢/roll.

☐ Participate in a USTSM Qualifying Quarterly Promotion.

☑ Support all USTSM new brand introductions.

ACCEPT ANY or ALL NEW BRANDS

☑ Participate in all USTSM test programs presented.

ACCEPT ANY TEST PROGRAM or PROMOTION

☐ Position P.O.S. in accordance with USTSM share of sales.

B. Product Handling: Meet 2 of 3, receive 2¢/roll.

☑ Maintain proper weekly ordering of USTSM products and accept and give priority to all shipments of USTSM products.

ORDER US TOBACCO PRODUCTS WEEKLY

☐ Maintain adequate inventory and retail distribution of USTSM products to satisfy local demand.

☑ Maintain proper rotation of USTSM products to ensure fresh product at retail.

KEEP PRODUCTS ROTATED

C. Display: 3¢/roll.

☑ Position USTSM vendors in visible premium locations in accordance with USTSM share of sales.

KEEP US TOBACCO VENDOR IN VISIBLE LOCATION

Comments:

Contact Name: [illegible] USTSM Rep: Ronnie Pruitt

Title: [illegible] Signature: Ronnie Pruitt

Signature: [illegible]

INCENTIVE WORKSHEET

1. Estimated Unit Volume _____ cans
2. Divide Volume by 10 to convert to Rolls _____ rolls
3. Applicable Incentive Rate (A+B+C) _____ ¢/rolls

Estimated Rolls x Incentive Rate = Potential Payment $ _____

WHITE - Retailer CANARY - Immediate Supervisor PINK - USTSM Representative

RENGAO-Boyonne, N.J.

DEFENDANT'S EXHIBIT 4303

REED WEITKAMP
SCHELL & VICE PLLC

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John S. Reed

February 3, 2000

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Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Gentlemen:

Enclosed are Defendants' Supplemental Trial Exhibit List and copies of Defendants' Exhibits 4251-4303.

Sincerely,

John S. Reed

JSR/kmc
Enclosures
cc: Neal Stoll
James A. Keyte
Chris T. Athanasia

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTIONS IN LIMINE

Defendant United States Tobacco Company et al. ("USTC"), respectfully respond to all of the motions in limine filed by Plaintiffs Conwood Company, L.P., et al. ("Conwood"). Conwood's motions in limine are not only baseless as a matter of the evidence, they in fact reconfirm that summary judgment should be granted in this case.

1. Conwood's Motion to Preclude Evidence of "Retailer Permission Evidence" (Pl. Br., No. 4, p. 4)

Conwood has made the inappropriate request to preclude USTC from offering evidence that retailers authorized USTC to remove Conwood products or racks and point of sale ("P.O.S.") materials -- including, presumably, as part of routine store resets requested by retailers -- unless offered to rebut specific alleged instances of unauthorized conduct offered into evidence by Conwood. Apparently, Conwood's theory is that it is irrelevant whether a retailer in fact wanted USTC-suggested plan-o-grams, USTC racks or USTC P.O.S. because (i) any agreements with

retailers are not a "defense" to a Section 2 violation, and (ii) the only "competition" that should be relevant in this case is lower prices and better products for ultimate consumers – i.e., competition to satisfy retail customers is itself irrelevant. Pl. Br. at 4. This in limine request is not only specious on its face, it demonstrates precisely why summary judgment should be granted in this case.

(a) USTC's Retailer Evidence, or Lack Thereof from Conwood, Will Indisputably Demonstrate That USTC Does Not "Control" The Market With Exclusive Agreements

Conwood has apparently forgotten that its theory in this case is that USTC effectively precludes competition in the market through exclusive dealing agreements. (And even that theory would require the Court to extend exclusive dealing principles beyond exclusive product placements to alleged exclusive racks and rack-P.O.S. agreements). Thus, the terms of any agreements between USTC and specific retailers are not only relevant to Conwood's Section 2 claim, Conwood must in fact prove that the terms of any such agreements are exclusionary under exclusive dealing principles. Conversely, if Conwood cannot make that showing, summary judgment should be granted.

Indeed, United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 344-45 (D. Mass. 1953), the most relevant case relied on by Conwood in its motion, actually demonstrates USTC's point. In United Shoe, the evidence established that 90% of all customers – lessees of shoe making machinery – were subjected to 10 year lease agreements that were "not terminable cheaply," and effectively gave United Shoe "control of the market." Id. at 343-45. Unremarkably, the court held that those agreements could violate Section 2, even if desired by the customers themselves, because they resulted in United Shoe controlling the market.

Critically for purposes of this case, however, the court in United Shoe contrasted those exclusionary agreements with the type of contracts that could not harm competition at all under

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Section 2 because they were terminable at will. Thus, in dismissing the government's claim alleging "restrictive agreements" with manufacturers of shoe machinery, the court found that there either was no evidence of exclusive agreements or the agreements were "at will" and therefore of no antitrust concern:

> So far as appears, these arrangements are at will, and do not preclude [the seller] from giving any would-be competitor of United [Shoe] the right to sell hooks or service machines. In short, the arrangement has not excluded, and does not exclude, competition.

Id. at 313. (emphasis added). Accordingly, the only case cited by Conwood that discusses the issue of "retailer consent" confirms that the terms of any alleged exclusionary agreements are, in fact, critical (not just relevant), and that any "at will" contracts or agreements cannot violate Section 2 as a matter of law.[1]

In the face of these legal principles, Conwood cannot argue that retailer approval (or the terms of any alleged retailer agreements) is irrelevant. Conwood must itself prove that USTC has agreements with specific retailers that preclude Conwood from offering products, racks and P.O.S. to retailers. The fact that Conwood cannot offer any evidence establishing any such agreements should compel summary judgment for USTC. And, given the burden that Conwood must meet in this case (a burden it cannot meet), it is odd at best for Conwood to argue that it would

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[1] The other purported customer consent cases cited by Conwood are well off the point. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, (1985) and Byars v. Bluff City News Co., 609 F.2d 843 (6th Cir. 1979), do not involve customer consent at all. Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568 (6th Cir. 1986), expressly involved the "coercion" of customers. Le Page's Inc. v. 3M, No. Civ. A. 97-3983, 1999-1 Trade Cas. (CCH) ¶ 72, 538, 1999 WL 346223, at *4-6 (E.D. Pa. May 14, 1999), involved economic coercion through the bundling of discounts, a form of tying. Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129 (S.D.N.Y. 1986), expressly found that a non-coercive incentive program could not harm competition as a matter of law under Section 1, and did not address the conduct element of Section 2 because Frito-Lay only moved for summary judgment on that claim only on market definition grounds, and eventually prevailed.

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be irrelevant for USTC to present retailer testimony confirming that they are free to choose whatever moist snuff products, racks and P.O.S. they desire at any time.

(b) Retailer Evidence Will Demonstrate That Competition On the Merits is Not Limited to Price and Product Quality, and That USTC Engages In Ordinary Marketing Methods

Although it is unclear, Conwood also appears to be arguing that retailers should be excluded from testifying that moist snuff suppliers (like suppliers in other categories) compete on a number of fronts – recommendations regarding plan-o-grams, space allocation, racks, P.O.S., category strategies and tactics – and that these are ordinary marketing methods which retailers welcome or, in fact, require from suppliers in various categories. Contrary to the undisputed evidence already in the record and to be offered at trial by retailers, Conwood's argument is premised on the proposition that the only type of "competition" that is relevant under the Sherman Act is "lower prices" or "better products" for ultimate consumers. See Pl. Br. at 4.

A similar argument was expressly rejected in Stearns Airport Equipment Co. v. FMC Corp., 170 F3d 518, 522-24 (5th Cir. 1999). In granting summary judgment for the defendant, the court held that the competitive process cannot be limited to price and quality, but instead must include the process of competition approved by the customers themselves. Id. at 524. Likewise, as numerous courts have recognized, there can be no question in this case that the competitive process includes competition among suppliers to persuade retailers to place products, racks and P.O.S. on the retail shelf or elsewhere in the store. See e.g., Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300, 304 (5th Cir. 1984); Jays Foods Inc. v. Frito-Lay, Inc., 664 F. Supp. 364, 371 (N.D. Ill. 1987); Frito-Lay Inc. v. Bachmann Co., 659 F. Supp. 1129, 1133-36 (S.D.N.Y. 1986); Beverage Management, Inc. v. Coca-Cola Bottling Corp., 653 F. Supp. 1144, 1146-47 (S.D. Ohio 1986).

16diii003893

Indeed, Conwood's own experts agree that these are the parameters of competition among moist snuff suppliers.[2] Without exception, distributors and retailers of moist snuff products who were deposed, and who will testify at trial, confirm these are the real-world parameters of competition for moist snuff suppliers.

In sum, Conwood is asking this Court, by motion in limine, to preclude retailer testimony about the very scope of the competitive process itself. Not only should this attempt be rejected out of hand, it is a clear reminder that retailers, not Conwood or USTC, define the scope of the competitive process in the industry, including what they desire and expect from all suppliers seeking to place products, racks and P.O.S. in their stores.

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[2] See, e.g., Blattberg Dep. at 130-31, 155-56 (display space, product facings, P.O.S.), Gundlach Dep. at 66-68, 240-41 (display space, P.O.S.) (Tab 1).

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2. Conwood's Motion to Preclude Evidence of the Unauthorized Conduct of Conwood and Other USTC Competitors (Pl. Br., No. 3, p. 3)

Conwood's motion to preclude evidence of its own unauthorized conduct in retail stores, as well as that of USTC competitors, is equally baseless and equally revealing of the fundamental flaw in Conwood's monopolization claim.

Conwood's initial theory in this case, including up through expert reports and the end of discovery, was that any unauthorized rack or P.O.S. removal by USTC was a "use" of monopoly power because only a monopolist could get away with such conduct. See, e.g., Gundlach Report ¶ 9; Gundlach Rebuttal Report ¶ 4. Conwood had to take this position, of course, because absent of use of monopoly power, any such activity by USTC – even if proven – would only constitute potential state law torts that are common in the retail field and inappropriate for treble damages actions.

As a result of discovery, Conwood has now come clean, actually conceding before this Court that its sales force tampers with authorized USTC racks in order to "restore their own racks for their own products." Pl. Br. at 3. This admission – no doubt precipitated by a landslide of Conwood admissions in documents and depositions – has several serious implications, none of which supports granting Conwood's motion in limine; on the contrary, Conwood's motion is truly unbelievable.

First, Conwood has now conceded the undisputed fact that Conwood and other USTC competitors remove USTC racks and P.O.S. (as well as each others') without retailer authorization. This confirms USTC's argument on summary judgment that any such conduct by USTC is not a use of monopoly power, but instead is indeed a "tit for tat" that occurs at times in the field among all

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moist snuff competitors. See Def. Mem. Supp. Summ. J. at 14-15, 33-34. The idea that the unauthorized conduct in retail stores by Conwood and other USTC competitors is now somehow "irrelevant" to a monopolization claim based on USTC's alleged unique campaign of "dirty tricks" is, to say the least, a bold reversal of position to offer the Court on the eve of trial.

Second, Conwood's concession that its sales force somehow feels entitled to "restore" its products or its racks contrary to the retailers' wishes also is highly relevant proof on USTC's state law conversion claim. It would be ridiculously one-sided for Conwood to put on evidence that USTC personnel removed Conwood's racks from retail locations, but have USTC precluded from putting into evidence that Conwood had placed its racks by removing USTC racks, or hacksawing them, the week before. While Conwood warmly embraces its purported victim status in other contexts, it cannot erase the record on "relevance" grounds when it concedes that its sales force rips USTC racks apart across the country just because Conwood disagrees with the retailers' choices on how to run their moist snuff sections.

Finally, evidence of unauthorized conduct of other competitors must be presented to the jury so they are able to assess whether Conwood has proven by a preponderance of the evidence that there was any tampering with Conwood racks and that the tampering was done by USTC, rather than Swedish Match or Swisher. Thus, USTC is entitled to introduce evidence of conduct of other competitions in order to defend against Conwood's claims on liability, causation and damages grounds.

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3. Evidence as to Conwood's Owners and Their Alleged Wealth (Pl. Br. No. 1, p.1)

Consistent with Conwood's apparent plan to mischaracterize itself as a "David" up against a "Goliath" in USTC, Conwood wishes to keep the jury from knowing who in fact Conwood really is as a company. Thus, Conwood has moved to exclude all evidence that Conwood is owned by one of America's wealthiest families, the Pritzker family. While conceding that evidence about Conwood's profits is relevant, Conwood asserts, without any supporting explanation or authority, that "information about the ultimate beneficiaries of these profits would be inflammatory and prejudicial." Pl. Br. at 1.

Plaintiffs' motion should be rejected for a number of obvious reasons. First, Conwood has directly placed its size and financial strength at issue in this case by attempting to portray itself as a "victimized small competitor" (Pl. Br. at 3) -- the veritable small, independent company just out to make a living for its employees. Accordingly, USTC should be allowed to inform the jury of the contrary and undisputed facts, which include that Conwood is part of a Pritzker conglomerate that, should it choose even to reinvest rather than milk Conwood's profits, could bring enormous wealth to bear on Conwood's competitive efforts and programs in the marketplace.[3]

Second, Conwood is apparently attempting to leave this Court with the impression that the Pritzker organization is a remote and disinterested owner of Conwood. The record evidence,

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[3] Similarly, Conwoods' experts will suggest to the jury that because of its "small" size, Conwood cannot afford to offer category management services. See Blattberg Report ¶ 26. Thus, it is reasonable and fair to allow USTC to inform the jury as to the financial strength of Conwood's actual owner.

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however, establishes that the Pritzker organization -- the ultimate entity -- serves as an active participant in key management decisions regarding the operation and funding of Conwood, and, in fact, was directly involved in the decision to bring this lawsuit. See Stevens Dep. at 24-30, Ingram Dep. at 23-25 (Tab 2). Indeed, as the Court is aware, the Pritzker family, through their representative Harold Handelsman, has taken an active role in the litigation itself.

For these reasons, and because Conwood has failed to offer any support for its belief that the truth regarding the identity and wealth of Conwood would be prejudicial, USTC should be allowed to present the jury with an accurate and complete picture of Conwood. It should be for the jury, not Conwood's counsel, to determine whether Conwood is, as it has pointedly and repeatedly claimed, a "victimized small competitor" unable because of USTC's actions -- rather than unwilling through Conwood's and its owners' own independent decisions -- to compete against USTC.

4. Conwood's Motion to Preclude the Testimony of Dr. Scheffman (Pl. Br., No. 2, p. 2)

Conwood has moved to preclude the testimony of Dr. David T. Scheffman, claiming that Dr. Scheffman submitted a "materially untruthful report about his compensation in this matter." Pl. Br. at 2. Conwood's motion should be denied for at least two reasons.

First, contrary to Conwood's bluster, Dr. Scheffman fully complied with the disclosure requirements of Fed. R. Civ. P. 26(a)(2)(B) and was also fully examined on the issue during his deposition. Fed. R. Civ. P. 26(a)(2)(B) requires that a witness submit an expert report that includes, inter alia, "the compensation to be paid for the study and testimony." (Emphasis added). Pursuant to Rule 26(a)(2)(B), Dr. Scheffman disclosed the rate at which he is paid, and will be paid, for his study and for his time testifying at trial. Dr. Scheffman also disclosed the number of hours

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he worked on this matter as of the date of his Rule 26(a)(2)(B) report. During Dr. Scheffman's deposition, Conwood inquired into a "finder's fee" arrangement Dr. Scheffman has with a consulting firm, Navigant Consulting, Inc. In response to that inquiry, Dr. Scheffman disclosed his finder's fee rate. Accordingly, Dr. Scheffman fully complied with the disclosure requirements of Rule 26(a)(2)(B), and also provided information beyond those disclosure requirements.

Second, Conwood cites no authority whatsoever to gain further discovery or to support its wish that Dr. Scheffman be precluded from testifying at trial. Indeed, Conwood's request for such discovery is currently before Magistrate Judge James D. Moyer.[4] Now, again without citing any authority, Conwood essentially has moved this Court to preclude the testimony of Dr. Scheffman unless Magistrate Judge Moyer rules in Conwood's favor on the prior motion. There is no factual or legal basis for this unorthodox game of judicial leapfrog. Moreover, the very arguments Conwood now makes to by-pass Magistrate Judge Moyer's consideration of the pending discovery motion confirm that Conwood's only purpose in attempting to obtain more information on Dr. Scheffman's compensation than Rule 26 requires is to attack Dr. Scheffman personally, mislead the jury, and avoid having to deal with the substantive testimony that Dr. Scheffman will offer at trial.

5. Conwood's Motion To Exclude Evidence In Support Of USTC's Counterclaims (Pl. Br., No. 5, pp. 4-5)

In what is essentially a repeat of its prior motion for partial summary judgment, Conwood has moved to exclude all evidence of USTC's counterclaims. USTC hereby incorporates its opposition to Conwood's motion, including the itemization of admissions by Conwood personnel

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[4] The parties recently were informed by Magistrate Judge Moyer that the issue was under submission and was actively being researched.

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concerning removal and utter destruction of USTC moist snuff display racks. See Defendants' Motion In Opposition To Plaintiffs' Motion For Partial Summary Judgment.

6. Conwood's Motion To Exclude Hearsay Deposition Testimony And Documents (Pl. Br., No. 6, p. 5)

Without citing any authority, Conwood has moved to exclude the designated deposition testimony of 25 USTC employees. Conwood also has offered the Court its own judicial determination that these witnesses are "available to testify at trial." Pl. Br. at 5. Even a cursory review of the case law, however, indicates that Conwood's motion (and its effort to redefine the availability requirement of Fed. R. Civ. P. 32) are without merit. For example, in Carey v. Bahama Cruise Lines, 864 F.2d 201 (1st Cir. 1988), the court considered the precise issue Conwood raises here. The deponents in question in that case were more than 100 miles from the place of trial. Nevertheless, plaintiff argued that because the deponents were employees of the defendant, deposition excerpts should not have been allowed at trial. The court rejected this argument:

> Under the case law interpreting Rule 32, the mere fact that the deponents are employed by the defendant and that there is an identity of interest between the deponents and their employer is not enough to trigger exclusion. . . .

Id. at 204.

Similarly, in Daigle v. Maine Medical Center, 14 F.3d 684, 691 (1st Cir. 1994), the court rejected plaintiff's contention that deposition testimony should be excluded because the witness "with reasonable efforts [by defendant hospital] might be persuaded to attend." Id. at 691. The court stated that under Fed. R. Civ. P. 32, distance (100 miles) is the decisive criterion: "So long as a witness is shown to be more than one hundred miles from the place of trial, the admissibility of

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deposition testimony under the aegis of Rule 32(a)(3)(B) is not contingent upon a showing that the witness is otherwise unavailable." Id. at 691-92.

Accordingly, the law is clear that, under Fed. R. Civ. P. 32, if a witness is more than 100 miles from the place of trial, the witness is unavailable and his or her deposition may be used at trial. Plaintiffs make no claim that any of the 25 USTC employees in question are within 100 miles of the place of trial. Plaintiffs' motion should therefore be denied.[5]

CONCLUSION

For the foregoing reasons, Conwood's motions in limine should be denied.

Dated: February 4, 2000

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[5] Plaintiffs also have moved to exclude as hearsay certain documents listed by USTC as trial exhibits, but Plaintiffs have not identified any such documents. USTC reserves the right to respond to any hearsay objections concerning trial exhibits once they are made properly with some particularity.

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, on the 4th day of February, 2000.

Counsel for Defendants

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

- - - - - - - - - - - - - - - - - X

CONWOOD COMPANY, L.P., :
CONWOOD SALES COMPANY, L.P., :
Plaintiffs, : Civil Action No.
v. : 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, :
UNITED STATES TOBACCO SALES AND:
MARKETING COMPANY INC., UNITED :
STATES TOBACCO MANUFACTURING :
COMPANY INC. and UST INC., :
Defendants. :

- - - - - - - - - - - - - - - - - X

Washington, D.C.
Friday, November 12, 1999

Deposition of ROBERT BLATTBERG, a witness herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice and agreement, the witness being duly sworn by FERNITA R. FINKLEY, a Notary Public in and for the District of Columbia, taken at the offices of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., at

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A. Having worked with both retailers and manufacturers, almost everybody seems to offer it.
Q. It's common practice?
A. It's common practice but not by everybody.
Q. What is the basis for your statement that it's a common practice for manufacturers to use in-store -- I'm sorry, in-store displays as push vehicles, just to make that complete?
A. Maybe I'm -- since you've worded it, kept moving around, can you just reword your question?
Q. Yeah. Let me do it more -- try to be more precise. What is the basis for your statement that most consumer good manufacturers use in-store displays such as push vehicles?
A. Well, most try to doesn't mean the retailer will automatically use it. But if they can they offer funds to get in-store displays, but it doesn't happen in every segment, doesn't happen with every single company. But most do.
Q. It's common in the industry?
A. It's commonplace.
Q. And what is -- is it commonplace for consumer good manufacturers to make payments for the best display space and increased product facings?
A. It's done.

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Q. You say most consumer good manufacturers do that.
A. They do it in some form but not all do it.
Q. In what categories have you seen that --
A. That being what?
Q. -- done? Payments for the best display space and increased product facings?
A. They use slotting fees because the retailers require slotting fees. They use payments for displays because they want to pay -- because the retailer demands payments for those displays in some situations.
Q. What, if you recall specifically, what types of categories within a retail store do that, where retailers require those things?
A. Paper.
Q. And how about beer?
A. Beer may be an exception.
Q. How about chips?
A. Probably in chips.
Q. How about cigarettes?
A. Cigarettes. There may be legal requirements in some of these categories.
Q. Is it your understanding that given that environment, that competitors compete with each other

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on payments for the best display space and increased product facings?
A. It's one way to compete. It may not be an effective tool for some manufacturers in some circumstances.
Q. But that's a common way that competitors compete?
MR. GUZMAN: Objection. Mischaracterizes testimony.
THE WITNESS: I just answered it by saying it is used but there may be some special circumstances where it doesn't make sense for that manufacturer to do it.
BY MR. KEYTE:
Q. I understand that. I'm trying to understand if that is a common basis for competition, to pay for display space, for the best display space and increased product facings; that's all.
A. It's used and it's fairly common.
MR. KEYTE: Why don't we take a break for lunch.
(Whereupon, at 12:30 p.m., the deposition in the above-entitled matter was recessed, to reconvene at 1:30 p.m., this same day.)

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AFTERNOON SESSION
(1:30 p.m.)
Whereupon,
ROBERT BLATTBERG,
the witness on the stand at the time of recess, having been previously duly sworn, was further examined and testified as follows:
EXAMINATION BY COUNSEL FOR DEFENDANTS (RESUMED)
BY MR. KEYTE:
Q. Professor, I think you testified before, I believe, that you will not work with Wal-Mart; is that correct?
MR. GUZMAN: Objection. That misstates his testimony.
THE WITNESS: As of now.
BY MR. KEYTE:
Q. Yeah as of now. Why is that?
A. Because of conflicts.
Q. Business conflicts?
A. Uh-huh.
Q. What is the nature of the business conflicts?
A. Do I have to divulge this?
Q. Yes. Actually you could do it in general

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for display space placement or rack placement within the CAP program -- how small would it have to be for you to conclude that it was not in any way economically coercive to a retailer?
MR. GUZMAN: Object to the form. It's ambiguous. The hypothetical is incomplete.
THE WITNESS: Well, as I said it's a function of the policies of the retailers. Retailers have certain policies regarding the way they take payments.
BY MR. KEYTE:
Q. I understand that. And is it correct, your testimony is if it's there they'll take it; that's their policy?
MR. GUZMAN: Objection. Totally misstates his testimony.
BY MR. KEYTE:
Q. Is that what you're talking about?
A. What I'm saying is, is that the retailers ask their category managers, buyers et cetera to take these kinds of allowances.
Q. Has anybody to the best of your knowledge testified in this case that if they do not take the CAP payment they cannot compete effectively with other retailers?

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A. I don't remember seeing testimony to that effect.
Q. And am I correct that that was part of the premise in the RJR case, correct?
MR. GUZMAN: Objection. Misstates testimony.
BY MR. KEYTE:
Q. That retailers and I believe there is affidavits, believe they had to take those payments in order to compete effectively against other retailers; correct?
MR. GUZMAN: Same objection.
THE WITNESS: And without those payments the retailers would be at a disadvantage. In that case I think that's partially correct.
BY MR. KEYTE:
Q. I think you also state in paragraph 12 that manufacturers often provide retailers with fixtures for display, correct?
A. Yes.
Q. So is it your experience is that -- it's customary or common for retailers to provide fixtures?
A. I probably shouldn't have said often.
Q. I'm sorry and I misspoke. Suppliers to

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supply fixtures for retailers?
A. I think the word often actually overstates it.
Q. Well, you don't want -- you want to put never?
A. I didn't say that.
Q. What do you want to put there?
A. Sometimes.
Q. Sometimes. It's a lot different than often; isn't it?
A. I agree.
Q. Did you write often?
A. I probably wrote often.
Q. Do you know whether anybody from Kellogg Huber wrote that word instead of you?
A. No.
Q. Do you ever advise suppliers to provide fixtures for retailers?
A. In some very special circumstances, yes.
Q. When have you done that?
A. With a dog food retailer -- pet food.
Q. What kind of fixture was that?
A. Fixture for their brand.
Q. In your view do suppliers compete in providing fixtures that meet the needs and wishes of

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retailers?
A. Not necessarily.
Q. Do they ever?
A. There may be some special circumstances where they do.
Q. Do you think they do in the moist snuff category?
A. I think that they compete to have their own displays, UST competes to exclude the competitors of having their displays.
Q. Let me talk about the displays themselves.
A. I'm sorry; the vendors?
Q. The vendors themselves. Have you -- did you, in reading this record, did you reach any conclusion as to whether U.S. Tobacco satisfies retailers more than Conwood with respect to providing new types of displays for moist snuff products?
MR. GUZMAN: Objection. The question is ambiguous.
THE WITNESS: What I just said was that competitors can each provide fixtures for vendors and that in a lot of categories where that's done multiple manufacturers can provide it, okay.
BY MR. KEYTE:
Q. I understand that. My question is did you

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

- - - - - - - - - - - - - - - - - - X
CONWOOD COMPANY, L.P., :
CONWOOD SALES COMPANY, L.P., :
Plaintiffs, : Civil Action No.
v. : 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, :
UNITED STATES TOBACCO SALES AND:
MARKETING COMPANY, INC., UNITED:
STATES TOBACCO MANUFACTURING :
COMPANY, INC. and UST, INC., :
Defendants. :
- - - - - - - - - - - - - - - - - - X

Washington, D.C.
Friday, October 15, 1999

Deposition of GREGORY T. GUNDLACH, a witness herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice and agreement, the witness being duly sworn by FERNITA R. FINKLEY, a Notary Public in and for the District of Columbia, taken at the offices of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., at

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within the context of the retail store.
Q. And do you find that different manufacturing companies compete for that space by using these payments in promotions for the best display space?
A. Yes, they do in some instances, yes.
Q. Due to the special aspects of say a cooler like you described the refrigeration, would you say that competition is more vigorous -- we were talking about retail space like cooler space that requires refrigeration, special features, something like that, would you say that competition among manufacturers is more vigorous to compete and offer promotions for that display space than in other places in the retail store that don't have the special aspects?
A. Well, I think it depends on the -- it depends more on the individual players who are competing, on one level that particular space is limited and a special type of space, but an instance where there might be only one supplier of that product there wouldn't be a lot of competition obviously, but if you were speaking in terms of an intensely concentrated category of buying for that space, that would be higher levels of competition, yes.

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Q. And what happens to the firms that sort of lose that competition and don't get the space?
A. Well, generally limits their access to consumers and their chosen retailer environments.
Q. What happens if a particular firm chooses not to offer payments and promotions and as a result they don't get the display space and the cooler or the endcap?
MR. GUZMAN: Objection. The question is ambiguous. What do you mean by what happens?
THE WITNESS: Well, it's not clear that these incentive payments are used as a basis for solely choosing allocating space in the retail environment. It's merely one factor. If under those circumstances that you contemplate they are not able to obtain space as a result of whatever their abilities including these incentive arrangements, I imagine as I mentioned before, probably are limited constraints in terms of their chosen retail vendor.
BY MR. ATHANASIA:
Q. Is moist snuff a category that has one of these special or more premium spaces as you described, I think you described cooler space, endcap space or prominent display space. Would moist snuff be a category that's in a prominent display space?

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MR. GUZMAN: Objection. The question is ambiguous.
THE WITNESS: I wouldn't characterize it as one of those areas in the store where -- I'm sorry. I wouldn't characterize the typical arrangement for moist snuff -- I'm sorry. Could you read the question back, please?
THE REPORTER: "Question: Is moist snuff a category that has one of these special or more premium spaces as you described, I think you described cooler space, endcap space or prominent display space. Would moist snuff be a category that's in a prominent display space?"
THE WITNESS: I guess I'd have to answer that by trying to ascertain where the particular space is, if it's a counter display, there obviously is limited space available there. If it's a, for example, a freestanding display unit that might be sitting or housed somewhere in the store in various locations, it could be premium. It may not be.
BY MR. ATHANASIA:
Q. From your review of the materials in this case, what does Conwood do to obtain the best display space in the stores, what types of programs do they use?

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A. Well, I think when you think of what manufacturers do, including those in moist snuff, to obtain the best space it has to start with the types of products they offer, whether or not consumers desire those products. That's certainly important consideration on the part of the retailer. If you're speaking in terms of particular incentive payments that Conwood provides, I think through my review of the materials I've been able to determine that I know they are contemplating an incentive program in the near future in response to the environment that they're experiencing. I imagine in the past they've used basic forms of payments to secure some type of promotional -- the other ones that I spoke of earlier that involved general payments, not along the lines of commercial bribery but just generally payments to reserve some display for signage or POS, not familiar with -- or I can't recall that they're using any type of formalized program along the lines of other manufacturers in the industry at this time.
Q. In your opinion as a marketing and trade channel expert, has that hurt Conwood that they have not had a formal program to use like the other manufacturers in the industry as you just stated?
MR. GUZMAN: Objection, mischaracterizes

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the question without understanding what you mean 09:44:47 AM
by "tobacco," whether or not you're referring to 09:44:49 AM
the various varieties of tobacco products, how 09:44:55 AM
you're using those specific terms. If you have a 09:45:02 AM
document where those terms have been used, we 09:45:07 AM
certainly all can look at that document and 09:45:10 AM
answer your question more pointedly. 09:45:12 AM
BY MR. ATHANASIA:
Q. Let me try to clarify my question. 09:45:23 AM
By "tobacco products," I mean all 09:45:23 AM
tobacco products, such as cigarettes, moist 09:45:23 AM
snuff, other tobacco products, cigars. Okay? 09:45:25 AM
Okay? 09:45:33 AM
MR. GUZMAN: Is there a question? 09:45:34 AM
BY MR. ATHANASIA:
Q. Are you all right with that as a term, 09:45:36 AM
the use of the word "tobacco"? 09:45:38 AM
MR. GUZMAN: If you have a question, 09:45:40 AM
ask him. 09:45:41 AM
THE WITNESS: I think the term 09:45:42 AM
"tobacco" can be used to define all of those 09:45:42 AM
categories. 09:45:45 AM
BY MR. ATHANASIA: 09:45:45 AM
Q. Do you understand that's how I'm using 09:45:46 AM
that term "tobacco products"? 09:45:49 AM

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A. I understand you're using it in a very, 09:45:50 AM
very general sense, yes. 09:45:52 AM
Q. Now, are the purchases of tobacco 09:45:55 AM
products generally considered specifically 09:45:58 AM
planned purchases, generally planned purchases, 09:46:00 AM
or switch purchases? 09:46:03 AM
MR. GUZMAN: Objection, the question is 09:46:05 AM
ambiguous. We don't know whose terms those are. 09:46:06 AM
THE WITNESS: Again, you're lumping a 09:46:10 AM
variety of different tobacco products into one 09:46:11 AM
term. You are using specific terms that 09:46:14 AM
characterize purchase decision processes without 09:46:20 AM
providing meaning to and definition of those 09:46:24 AM
terms. As a result, I hesitate to respond to 09:46:27 AM
your convoluted question. 09:46:31 AM
BY MR. ATHANASIA:
Q. Do you know what the term "brand 09:46:41 AM
loyalty" means? 09:46:42 AM
A. I know the common use of the term, yes. 09:46:43 AM
Q. Can you describe for me your 09:46:45 AM
understanding of the use of the term "brand 09:46:47 AM
loyalty"? 09:46:49 AM
A. It refers to a consumer's desire to 09:46:50 AM
repeatedly purchase the same brand over time. 09:46:55 AM
Q. How did the effect of brand loyalty on 09:47:26 AM

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consumers' decisions figure into the results of 09:47:28 AM
the Point of Purchase Advertising Institute 09:47:32 AM
study? 09:47:34 AM
A. I don't recall their specific 09:47:39 AM
definition associated with brand loyalty. So as 09:47:41 AM
I sit here today, it's difficult for me to recall 09:47:44 AM
how or if it did have an implication for that 09:47:47 AM
study. 09:47:50 AM
Q. When you were reviewing the Point of 09:47:52 AM
Purchase Advertising Institute study, were you 09:47:55 AM
interested in determining how brand loyalty 09:47:58 AM
affected those results? 09:48:02 AM
MR. GUZMAN: Objection to form. 09:48:04 AM
THE WITNESS: When I reviewed that 09:48:07 AM
study, I was interested in its ability to 09:48:08 AM
substantiate my statement that POS communications 09:48:10 AM
have power because many consumers make their 09:48:13 AM
brand decisions while physically in the store. 09:48:16 AM
BY MR. ATHANASIA:
Q. Make their decisions about all 09:48:23 AM
different categories of products? 09:48:25 AM
MR. GUZMAN: Objection, miscategorizes 09:48:27 AM
his testimony. 09:48:30 AM
THE WITNESS: Just as it is read here, 09:48:31 AM
Chris, POS communication have power because many 09:48:32 AM

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consumers make their brand decisions while 09:48:35 AM
physically in the store. 09:48:38 AM
BY MR. ATHANASIA:
Q. And "make their brand decisions," as 09:48:41 AM
it's written there, refer to all different 09:48:44 AM
categories of products? 09:48:46 AM
MR. GUZMAN: Objection, asked and 09:48:48 AM
answered. 09:48:49 AM
THE WITNESS: It refers to consumers' 09:48:50 AM
brand decisions and would include across 09:48:52 AM
different categories. 09:48:54 AM
BY MR. ATHANASIA:
Q. Do you know who Greg Ellis is? 09:49:26 AM
MR. GUZMAN: Objection, the question is 09:49:35 AM
ambiguous. 09:49:36 AM
THE WITNESS: I may or may not. I 09:49:39 AM
don't recall the name at this moment. 09:49:40 AM
BY MR. ATHANASIA:
Q. Do you recall that he's a regional 09:49:44 AM
sales manager for Conwood? 09:49:45 AM
A. I don't recall either way. 09:49:51 AM
Q. Did you review his deposition in this 09:49:53 AM
case, if you recall? 09:49:54 AM
A. I don't recall. As I understand it, 09:50:00 AM
you have a list of materials that I considered. 09:50:02 AM

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., et al.) Civil Action No.
) 5:98CV-108-R
v.)
)
UNITED STATES TOBACCO COMPANY,)
et al.)
)

VIDEOTAPED DEPOSITION OF

MARTI STEVENS

Taken at the Law Offices of Matthew L. Erekson
2409 Arnold Lane, Suite #3
Billings, Montana 59103
Wednesday, July 7, 1999
9:04 a.m. - 10:22 a.m.

APPEARANCES:
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
BY: STEVEN F. BENZ, ESQUIRE
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

Counsel for Plaintiffs

Page 22

question.
A. When I left my store my Conwood rack had 18 slots. I had Copenhagen, Copenhagen Long Cut. I had all my Skoals, and I had all of the Conwood products stocked in my Conwood rack. 18 slots, one flavor per slot.
When I came back from vacation I had a 12-slot UST rack, which carried all of the previous Skoal and Copenhagen products I had in the store the week before, but my Copen -- or my Cougar, which I had six slots for, was now reduced down to three. And they were sitting in individual dispensers behind a cigarette display. They were not visible to the public.
Q. Apart from the -- so there were three facings for slots of Cougar that were no longer displayed in the U.S. Tobacco rack; is that correct?
A. There was no Conwood product displayed in the UST rack.
Q. Where was the Conwood -- the rest of the Conwood product?
A. I had six slots before I went on vacation, six Conwood products displayed. When I got back from vacation I had three Conwood products displayed, but they were not visible to the public. They were in

Page 23

individual dispensers behind the cigarette display.
Q. Were those the three slots of -- of Cougar?
A. Uh-huh.
Q. What happened to --
A. Cougar.
Q. What happened to the Kodiak?
A. There was one Cougar, there was a Cougar Long Cut, and there was a Kodiak sitting behind, I believe they were, the new brand of Kool cigarettes that were out.
Q. And were those Conwood products displayed in a three-facing rack then behind the cigarette counter?
A. No.
Q. How were they displayed?
A. They were in three upright, individual dispensers.
Q. Were they cardboard dispensers?
A. They were plastic.
Q. And when you came back into your store, what hap -- were there any products -- I'm sorry. Strike that.
What happened to the products that had previously been in the Conwood rack that weren't in the upright dispenser?

Page 24

MR. SANDIDGE: Don't you need to establish whether she knows what happened to them?
MR. BENZ: Is that an objection?
MR. SANDIDGE: Yeah.
MR. BENZ: Well, I'd appreciate it if you made a clear, crisp objection and let me move on.
MR. SANDIDGE: Excuse me. I object, clearly and crisply.
BY MR. BENZ:
Q. Ms. Stevens, what -- were there any Conwood products that were placed under the counter in a box, that you remember?
A. Yes.
Q. Can you describe your recollection of what had happened.
A. When I came back in the store from vacation and I noticed the changes had been done, there was a box -- we kept a box of back stock under our Till 1. Now, inside of this larger box of back stock there was a smaller box for returns for staled out product. And I found three Conwood products in that box, in the returns box; the three that were in the display when I left to go on vacation.
Q. Do you remember which three products were

Page 25

in the return box?
A. No, I don't.
Q. Because I just want to make sure the testimony is clear, after the U.S. Tobacco representative had visited the store and removed the Conwood rack, there were -- there was a UST rack in place, correct?
A. Yes.
Q. And previously there had been 18 slots for moist products, is that correct, in the Conwood rack?
A. Yes.
MR. SANDIDGE: She testified about that.
BY MR. BENZ:
Q. And now there were --
MR. SANDIDGE: Objection. Leading the witness.
BY MR. BENZ:
Q. And then there were 12 slots in the U.S. Tobacco rack, correct?
A. Yes.
Q. And there were no Conwood products in the U.S. Tobacco rack; is that correct?
A. That is correct.
Q. And three Conwood products were in an upright dispenser behind the cigarette --

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L.P., et al,

Plaintiffs,

Vs. Case No. 5:98 CV-108-R

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC.,
Defendant.

THE VIDEOTAPE DEPOSITION OF WILLIAM E. INGRAM
August 17, 1999

Page 22

(The requested portion of the record was read by the reporter.)
A. Not yet I don't. I don't even know about them.
Q. When you say "not yet," is there a plan to change that kind of structure of the way business is done at Conwood in terms of assessing whether the budget is going to meet the objectives of increasing sales at Conwood?
A. No, I didn't mean that.
Q. Who do you report to in your responsibilities as president?
A. I report to Mr. Rossen.
Q. And for the record, what is his title?
A. He's the chairman.
Q. And what is your understanding of his responsibilities at Conwood?
A. I am not sure I can tell you what his responsibilities are.
Q. On what matters do you report to him?
A. On -- I keep him informed of just things that I feel like he needs to be aware of. He is definitely informed about things that might have a big dollar consequence.
Q. These primarily again having to do with

Page 23

budgeted numbers that we have been discussing?
A. Yeah.
Q. Anything other than in a sense the numbers, do you talk to him about in terms of, you know, company strategy?
A. No.
Q. Have you discussed the lawsuit with him?
A. We have -- we have not discussed -- we discussed it to the extent that it is happening.
Q. Who was involved in the discussions about whether to bring the lawsuit?
MR. CRADDOCK: Now, let me object at this point. Obviously there were attorneys involved in the decision process to bring the lawsuit. I want to instruct him not to answer to the extent his answer would require that he reveal discussions that took place in the presence of the attorneys for the companies.
Q. (BY MR. KEYTE) Right. All I'm asking is -- I'm not asking what was said. I'm asking who was involved in the decision to bring the lawsuit as far as you know?
A. The -- who was involved by --

Page 24

Q. Within Conwood?
A. By name?
Q. Yeah, by name.
A. The name of the individuals?
Q. Yeah.
A. That were involved?
Q. Yeah.
A. I would say myself, Ed Roberson and Mr. Rossen and Scott Stevens.
Q. What is Mr. Stevens' position?
A. He's one of the committee of managers.
Q. And what is that committee?
A. What is the committee of managers?
Q. Yeah.
A. Committee of managers is the group that has responsibility of Conwood Company and Conwood sales goals.
Q. And does Mr. Stevens have any other role within the company?
A. Not that I'm aware of.
Q. And just so I'm clear, who is Mr. Stevens employed by?
A. I'm not sure who his employer is.
Q. And to the best of your knowledge, was anybody within the Pritzker organization

Page 25

involved in the decision to bring the lawsuit?
A. It's my understanding -- it's not my understanding. It was the committee of managers.
Q. Are there any representatives from the Pritzker organization on the committee of managers?
A. Not that I'm -- you know, I know Mr. Rossen is not, I know I'm not, I know Ed is not. I don't know about Scott Stevens. I don't even know who he reports to or who he works for.
Q. He doesn't work for Conwood to the best of your knowledge?
A. That's correct.
Q. What were -- to the best of your knowledge, what were Conwood's approximate profits in 1998?
MR. CRADDOCK: Let me object on the basis that is vague. I don't know, profits can be defined in a number of ways, and I don't know exactly how you're asking him to define profits.
Q. You may answer the question.
MR. CRADDOCK: If you can answer

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John S. Reed

February 4, 2000

Via Federal Express

Hon. Thomas B. Russell
United States District Judge
121 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed are courtesy copies of Defendants' Memorandum in Opposition to Plaintiffs' Motion for an Appropriate Trial Exhibit List and Appropriate Deposition Designations and Defendants' Memorandum in Opposition to Plaintiffs' Motions in Limine. Courtesy copies of these documents have also been sent to Magistrate Judge Moyer.

Respectfully,

John S. Reed

JSR/kmc
Enclosure
cc: Neil M. Gorsuch
Richard C. Roberts
James A. Keyte

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John S. Reed

February 4, 2000

Via Hand Delivery

Hon. James D. Moyer
United States Magistrate Judge
208 Gene Snyder U.S. Courthouse
601 W. Broadway
Louisville, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

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cc: Neil M. Gorsuch
Richard C. Roberts
James Keyte

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*** TX REPORT ***
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16dii003919

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR AN APPROPRIATE TRIAL EXHIBIT LIST AND APPROPRIATE DEPOSITION DESIGNATIONS

Plaintiffs have moved this Court for an order requiring Defendants to submit what Plaintiffs say are "appropriate" trial exhibit lists and deposition designations. Plaintiffs' motion should be denied for two reasons.

- First, as a practical matter, Conwood over-inflates the number of potential trial exhibits submitted by Defendants and, as a matter of trial practice, confuse the designation of deposition testimony as part of the record with the actual introduction by videotape of such testimony.

- Second, Conwood's strategy of trial-by-surprise has left Defendants somewhat in the dark concerning Conwood's case. Accordingly, Defendants must be prepared to rebut assertions by any number of Conwood witnesses about any number of retail stores and about particular USTC conduct. Similarly, both the nature of Conwood's case and Conwood' continuous strategy of baseless extrapolation make it necessary for Defendants to include several "groups" of documents and a large volume of deposition testimony that, if necessary, will make clear to the jury that Conwood's "evidence" of so-called "exclusive dealing" and USTC "dirty tricks" are sporadic at best in relation to the size of the market and the volume of USTC sales activities.

I. PLAINTIFFS' MOTION IS MISLEADING

Conwood claims that Defendants "threw in the kitchen sink" by listing 4,250 exhibits. See Pls. Mem. at 1. Conwood fails to point out that over 3,000 of the listed exhibits are uniform CAP contracts with retailers and wholesalers, the inclusion of which could not possibly undermine Plaintiffs' "reasonable notice" or "prejudice Conwood's ability to prepare," as Conwood claims.[1] As described below, the remaining 1,000 listed exhibits -- less than 2 boxes of material -- are primarily deposition exhibits which may be needed to defend a lawsuit that, even at this late date, is largely undefined in terms of its scope and its theory of proof. Contrary to its implication, Conwood is intimately familiar with all of these documents, which have been the subject of nearly two years of intensive discovery.

Similarly, Defendants designated relevant testimony from its own employees, from Conwood's employees, and from third party retailers deposed during discovery. Conwood estimates – inaccurately – that "playing UST's 123 video deposition designations would alone consume several weeks." See id. at 1. Conwood fails to note that many factors -- obviously yet to unfold -- will affect whether the designated testimony will actually be introduced at trial, including whether or not a witness is available for trial, and especially whether the designated testimony is necessary to rebut points Conwood may make during their case in chief.[2] In short, Defendants are in a wait-and-see posture with no choice but to cover all bases.

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[1] As explained below in Section III, it was necessary for Defendants to include all of its CAP contracts should the need arise to introduce the one or more CAP contracts that may be required to rebut Conwood's case.

[2] Conwood's ambiguous asterisk system for disclosing its intended trial witnesses -- leaving unclear whether they are to appear "live" at trial -- illustrates the moving target that USTC faces in preparing for trial.

16diii003921

II. DEFENDANTS' EXHIBIT LIST AND DEPOSITION DESIGNATIONS MUST ACCOUNT FOR PLAINTIFFS' IMPROPER EXTRAPOLATION THEORIES AND SELECTIVE PRESENTATION OF FACTS

In its motion, Conwood does not claim that any of the deposition testimony designated by Defendants or any of the documents listed by Defendants are cumulative, nor could they.[3] Conwood's only argument appears to be that Defendants' exhibit list is too long and that Defendants' deposition designations are too voluminous. These are curious assertions, at best, considering Conwood's apparent strategy of asserting nationwide misconduct and effects with little, if any, evidentiary support. If this Court permits Conwood to proceed based on the meager evidentiary record, USTC is prepared to respond with proof that Conwood employee witnesses have no knowledge whatsoever of Conwood's own business practices beyond each employee's particular territory or district[4]; that Conwood's expert witnesses read only a handful of documents, yet concluded that USTC has "exclusive agreements" with retailers throughout the country[5]; that Conwood in fact has its own racks and POS in 80-90% of stores; and that Conwood asserts that USTC has engaged in a systematic campaign of rack removals, yet offers only a literal handful of

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[3] Moreover, in this motion Conwood completely ignores the fact that Defendants' trial exhibit list and deposition designations are subject to any specific and proper objections made by Plaintiffs.

[4] For example, each Conwood field employee who was deposed testified that he or she had no knowledge of Conwood's business practices – including what brands Conwood sold – beyond his or her particular district or territory. This "defense" strategy by Conwood required Defendants to gather testimonial evidence for each different geographical area from a different Conwood employee witness. Conwood's current claim that this evidence should be effectively excluded from trial because Defendants designation are too voluminous is simply untenable.

[5] For example, Plaintiffs' experts, most notably Professor Gundlach, conclude that USTC's CAP contract constitutes "exclusive dealing" based on a handful of CAP worksheets. USTC should retain the ability to confront Professor Gundlach and other witnesses with any number of CAP contracts, as well as evidence that Conwood products, racks, and POS remain in the signatory retail stores.

16diii003922

isolated instances of unauthorized conduct. Again, much of this evidence may be unnecessary if Conwood is required to meets its burden of actually proving that USTC engaged in exclusionary conduct at specific retail establishments, and that such conduct, as opposed to other factors, in fact caused Conwood injury in those retail stores and chains.[6] At this stage, however, Defendants must be prepared to defend against Conwood's nebulous, shifting case.

In sum, this is no ordinary commercial litigation with some pre-set conception of what number of exhibits or deposition designations is reasonable at this stage of the litigation. Instead, this is a case involving four moist snuff competitors, hundreds of thousands of retail stores across the country, and thousands of company sales personnel. While Conwood has taken every opportunity to spin the scant evidence they have collected into an illusion of systematic misconduct and "exclusive dealing," it is an illusion which, if allowed to be conjured up before the jury, can only be rebutted by introduction of record evidence that tells the true story. Given Defendants' position, Conwood should have to contend with the evidentiary record that its own sales force and executives have created and, accordingly, their motion should be denied.

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[6] See Memorandum in Support of Defendants' Motion in Limine Requiring Plaintiffs to Prove Exclusionary Conduct and Fact of Injury at Specific Retail Stores and Chains.

16diii003923

CONCLUSION

For the foregoing reasons, Conwood's motion should be denied.

Dated: February 4, 2000

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Counsel for Defendants

16diii003924

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, on the 4th day of February, 2000.

Counsel for Defendants

16diii003925

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

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16diii003927

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16diii003928

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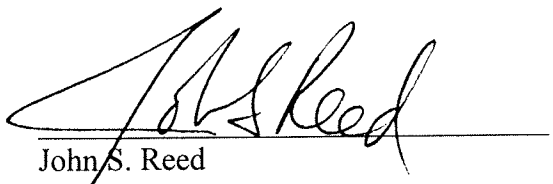
[6] See Memorandum in Support of Defendants' Motion in Limine Requiring Plaintiffs to Prove Exclusionary Conduct and Fact of Injury at Specific Retail Stores and Chains.

16diii003929

CONCLUSION

For the foregoing reasons, Conwood's motion should be denied.

Dated: February 4, 2000



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Counsel for Defendants

16diii003930

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, on the 4th day of February, 2000.

Counsel for Defendants

16diii003931

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

PLAINTIFFS' OPPOSITION TO MOTION TO PRECLUDE "UNDISCLOSED EXPERT WITNESS MATERIALS"

Defendants' latest attempt to preempt injury and damages testimony from Richard Leftwich of the University of Chicago, Graduate School of Business,[1] is a motion *in limine* seeking to bar (i) demonstrative exhibits relating to the testimony of plaintiffs' experts, and (ii) the supplemental report filed by Leftwich pursuant to Fed. R. Civ. P. 26(e) on January 27, 2000 (the "Supplement").

There is no basis for preclusion of either the exhibits or the Supplement. Both were timely filed under Rule 26(e) and the

[1]Defendants previously moved to preclude his testimony on the ground that this recognized authority, whose expertise they do not dispute, fails the Daubert test because of alleged infirmities in his rigorous and well-supported study.

Court's Scheduling Order of February 18, 1999 ("Scheduling Order"). Moreover, defendants concede that the Supplement contains no new opinions[2] and attempt to show no prejudice resulting from either the Supplement or the expert demonstratives.

Defendants also cite no precedent -- and plaintiffs are aware of none -- in which a court has precluded an expert from introducing demonstrative exhibits at trial on the ground that such exhibits were not attached to his or her initial Rule 26 report. And the appropriate supplementation by Leftwich, based on newly-available data, was arguably required by Rule 26(e); it certainly provides no basis to *preclude* him from giving his opinions at trial. The Supplement does not even contain a new opinion, though courts have permitted even that where the opposing party cannot demonstrate prejudice. Here there is no prejudice; defendants have not even attempted to show that the matter cannot be resolved by a further deposition of Leftwich on the material in his four-page Supplement. That alone should suffice to deny the motion to preclude.

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[2]At the February 4 discovery conference, counsel for defendants freely admitted that the supplemental report contained no new opinions.

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BACKGROUND

Leftwich filed his initial report on August 2, 1999. Based on a detailed study and using accepted econometric techniques to estimate Conwood's market share absent UST's anticompetitive conduct, he concluded Conwood had been damaged in the amount of $291 to $483 million. Leftwich Report at 11.

UST's expert, David Scheffman, filed his report on September 15, 1999, taking issue with Leftwich's use of accepted methodology and his conclusions. He claimed, based on studies described in his report (using methodologies similar to those used by Leftwich), that Conwood had not been damaged, or that any harm was trivial. Scheffman Report at 101.

Leftwich filed a timely rebuttal report on October 1, 1999, defending his methodology and conclusions. In addition, he explained in this report how Scheffman's methodology (with appropriate refinements, which he also described) not only failed to disprove plaintiffs' damages, but instead *corroborated* Leftwich's conclusions. Leftwich Rebuttal at 8-12.

Leftwich was deposed on November 2, 1999. During the deposition, counsel for defendants questioned the accuracy of moist snuff sales data that he had used in his analysis: industry-wide information generated annually by Peat Marwick and published by the Smokeless Tobacco Council ("STC"). This information is generally recognized as the industry standard.

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After his deposition, Leftwich asked researchers working under his direction to contact the STC to confirm the accuracy of the published data. The STC confirmed that the data he had used were in fact those published by the STC in its 1997 annual report. The STC also agreed to ask Peat Marwick to further examine the published data.

Upon review, Peat Marwick determined that there were errors in the published data relating to certain states. Peat Marwick provided another set of data. Upon review, however, it appeared that data were still incorrect. Accordingly, Peat Marwick again provided corrected data to Leftwich's assistant on December 9, 1999. Because of the uncertainty surrounding the data and the importance of ensuring their accuracy, a researcher working under Leftwich's direction spent considerable time ensuring that the corrected data were in fact accurate. In January 2000, after confirming the accuracy of the corrected 1997 sales data, Leftwich repeated his prior analyses using the corrected data. Plaintiffs then filed and served the Leftwich supplemental report on January 27, 2000. In this report, Leftwich set forth the results of his analyses using the new data and reaffirmed his previous opinions.

As part of this analysis, Leftwich incorporated the newly available data into his previously described application of the Scheffman model. The output of this analysis -- again, using an

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economic model he had described in his rebuttal report -- produced the described range of damages. Supplement at 3. This further corroborated Leftwich's opinion on the range of damages.

On January 21, 2000, plaintiffs filed and served expert demonstrative exhibits for introduction into evidence at trial, in accordance with the Court's scheduling order. These demonstratives consisted of textual or graphic summaries of opinions and analysis from the reports of all of plaintiffs' experts. Like the supplemental report, the proposed demonstrative exhibits contain no new opinions.

ARGUMENT

A. The Demonstrative Exhibits Were Timely Filed

The expert demonstratives are both timely and admissible.[3] Defendants cite no authority for their construction of Rule 26(a) -- that any demonstrative exhibits intended to be used during the expert's trial testimony must have been filed months before trial and concurrent with the expert reports. Plaintiffs are likewise unaware of any case in which demonstrative exhibits, otherwise admissible, were precluded on the theory adopted by defendants. On the contrary, the Scheduling Order set forth the operative

[3]Defendants' motion seeks to exclude the exhibits relating to *all* five of plaintiffs' designated experts. UST thus seeks to enmesh the Magistrate Judge in the minutiae of trial management.

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deadline,[4] requiring that *all* "exhibits intended to be used at trial" be filed and produced by January 21. See Order of February 18, 1999. Conwood filed and produced on January 21, and thus complied fully.[5]

In any event, defendants do not even attempt to show prejudice arising from Conwood's compliance with the Court's Order. The proposed demonstratives contain no new opinions, methodologies or analysis. They simply summarize for the jury, in textual and graphic form, salient points that were explained in the expert reports. Defendants seek to preclude materials that will permit efficient presentation of the evidence, make the evidence clearer for the jury, and thus streamline the trial.

B. The Supplemental Report Affords No Basis for Preclusion

The Supplement was an appropriate and timely correction. See Fed. R. Civ. P. 26(e). Indeed, Leftwich arguably was required to provide this additional information after his post-deposition inquiries led to corrected STC data.

---

[4]In the absence of a scheduling order, Fed. R. Civ. P. 26(a)(3) provides the operative mechanism, requiring "identification of each document or other exhibit, including summaries of other evidence . . . . at least 30 days before trial."

[5]Defendants apparently believe the Court-ordered deadlines are more elastic as applied to their own exhibits. They filed approximately fifty additional trial exhibits on February 4, 2000 -- two weeks after the ordered deadline and on the very day they were pressing their untimeliness claims with respect to plaintiffs' supplemental expert report and expert demonstratives.

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Defendants cite no authority for their claim of untimeliness. Rule 26(e) provides that "supplemental expert information should be disclosed by the time the pretrial disclosures are made under Rule 26(a)(3)" – January 28, 2000 in this case. The Supplement, filed on January 21, 2000, was therefore timely under Rule 26(e).

Defendants' speculation that the supplemental report *could* have been filed a week or two earlier, because Leftwich received new data on December 9, is both unfounded and irrelevant. Given the initial confusion surrounding the STC data, it was entirely appropriate for Leftwich and his staff to spend all the time necessary to ensure that the corrected data were accurate before making a supplemental report. Defendants cite to no instance where a court has precluded an expert's testimony based on a supplement under Rule 26(e), more than a month before trial, to account for new data and without a change of opinion. The cases cited by defendants simply do not support their argument.[6]

---

[6]In United Phosphorus, Ltd v. Midland Fumigant, Inc., 173 F.R.D. 675, 677 (D. Kan. 1997), defendant had *never* supplemented under Rule 26(e) when it "attempt[ed] to recast and restate" expert opinion *less than one week* before the scheduled Daubert hearing and less than thirty days before trial. Id. That effort to change opinions, after plaintiff had prepared for a hearing to challenge the old opinions, bears no relation to Leftwich's supplement to account for corrected data. Likewise, in Boardman v. National Medical Enterprises, 106 F.3d 840 (8th Cir. 1996), the court excluded plaintiffs' expert because *no* report had ever been submitted and *no* explanation had been proffered for missing either of the two applicable deadlines.

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While defendants -- mindful of their Daubert challenge -- call the Supplement "sandbagging," their concession that Leftwich's opinions are unchanged strips that argument of any merit. Indeed, defendants have not claimed unfair prejudice from either of the points made in the Supplement.[7] The use of corrected data affords no basis for complaint; the echoing of Leftwich's prior conclusion that Scheffman's work, properly applied, also supports his damages range is likewise no surprise. Nor have defendants even sought to explain why a supplemental deposition cannot serve whatever legitimate interests they seek to protect. Defendants received the Supplement more than five weeks before trial and with ample time to conduct such examination (though they had no interest in doing so until the Magistrate Judge suggested it last Friday). Courts have routinely rejected attempts to strike even *new* opinions where, as here, the opposing party has failed to demonstrate serious prejudice. E.g., Tucker v. Ohtsu Tire & Rubber Co., 49 F. Supp. 2d 456 (D. Md. 1999) (denying motion to exclude supplemental expert report containing two new opinions because the report was

[7]Their claim is that if Leftwich could be restricted to only some of his prior analyses, and specifically to a single regression based on new data, that might reduce their potential exposure. Because they understand that Leftwich's opinion is to the contrary, and the reasons why, they can fairly challenge Leftwich's conclusions at trial; they cite no authority that supports the drastic remedy of precluding an expert from giving his actual opinions based on newly-discovered data.

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filed timely and defendant had no credible claim of prejudice); State of New York v. Westwood-Squibb Pharmaceutical Co., 981 F. Supp 768, 779 (W.D.N.Y 1997) (denying motion to exclude new opinion that *contradicted* the expert's previous deposition testimony and was revealed only four days before trial).

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CONCLUSION

For all of the foregoing reasons, UST's Motion in Limine to Preclude Undisclosed Expert Witness Materials should be denied. A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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Counsel for Plaintiffs

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I certify that on this 6th day of February, 2000, a copy of the foregoing was sent by facsimile and overnight mail to:

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John S. Reed, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Michael J. Guzman

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Having considered Defendants' Motion in Limine to Preclude Undisclosed Expert Witness Materials and Related Testimony and Declarations and being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' Motion is hereby DENIED.

SO ORDERED.

Dated this ____ day of February 2000.

HONORABLE THOMAS B. RUSSELL
DISTRICT COURT JUDGE

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February 6, 2000

Via Hand Delivery

Jeffery A. Apperson
Clerk of the Court
322 Federal Building
501 Broadway
Paducah, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Plaintiffs' Opposition to Motion to Preclude Undisclosed Expert Witness Materials.

These reports and exhibits have also been served on opposing counsel via facsimile and overnight mail.

I have also enclosed an additional copy. Please date stamp and return this copy in the attached self-addressed, postage pre-paid envelope.

Thank you for your attention to this matter.

Respectfully,

Michael J. Guzman

Enclosures

cc: Neal R. Stoll
James A. Keyte
Chris T. Athanasia
John S. Reed

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February 6, 2000

Via Facsimile & Overnight Mail

Honorable James D. Moyer
208 Snyder U.S. Courthouse
601 W. Broadway
Louisville, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Judge Moyer:

Enclosed is courtesy copy of Plaintiffs' Opposition to Motion to Preclude Undisclosed Expert Witness Materials. This Opposition has also been filed with the Clerk.

Respectfully,

Michael J. Guzman

Enclosure

cc: Neal R. Stoll
John S. Reed

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February 6, 2000

Via Facsimile & Overnight Mail

Honorable Thomas B. Russell
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed is courtesy copy of Plaintiffs' Opposition to Motion to Preclude Undisclosed Expert Witness Materials. The Opposition has also been filed with the Clerk.

Respectfully,

Michael J. Guzman

Enclosure

cc: Neal R. Stoll
John S. Reed

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,

Defendants.

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Civil Action No. 5:98CV-108-R

JURY TRIAL DEMANDED

PLAINTIFFS' REPLY IN SUPPORT OF MOTIONS IN LIMINE

1. The Court should preclude reference to the alleged wealth of Conwood's owners. Conwood does not dispute the relevance of *Conwood's* financial performance; UST is free to argue -- whether wisely or not -- that Conwood (with about 13% of the market) is no "David" or "victimized competitor" up against the "Goliath" UST (with its 77% market share). See UST Mem. in Opp'n at 8. But it is not free to argue that Conwood's ultimate owners are rich from unrelated businesses (through what UST terms the "Pritzker conglomerate," id.).[1] Stated simply, the alleged wealth of Conwood's owners has no bearing on whether Conwood was damaged by UST's Section 2 violations, or the amount of damages that should be awarded to compensate Conwood.

[1]UST's factual characterization of Conwood's ownership is wrong on all counts, and they have no witness with personal knowledge to explain it. The accurate description of ownership would require far more time and explanation before the jury than this irrelevant matter could possibly justify.

The fact that representatives of Conwood's owners may have taken an interest in this litigation is likewise of no consequence to the jury. See id. at 8-9. The wealth and identity of Conwood's owners is no more relevant to this lawsuit than the identity and wealth of UST's owners. The parties in this case are corporations, and their shareholders have nothing to do with the issues to be decided by the jury.[2]

As for the prejudicial nature of the evidence UST seeks to introduce, UST's Memorandum speaks for itself: UST seeks to argue that "Conwood is owned by one of America's wealthiest families," and that the "Pritzker conglomerate" simply "milk[ed]" Conwood's profits. Id. at 8. Such characterizations point out precisely the prejudicial nature of the (irrelevant and unsupported) allegations UST seeks to make.

2. UST's expert Scheffman should be permitted to testify only upon condition that he disclose his entire compensation for work on this case. The Court has ruled on this issue by Order dated February 9, 2000 (Magistrate Judge Moyer).

3. The Court should preclude "tit for tat" evidence that companies other than UST engaged in misconduct at stores. UST admits that it seeks to defend its misconduct at trial by claiming "everyone does it." UST Mem. in Opp'n at 6. This is the same (misguided) argument it made on summary judgment. But as a monopolist, UST cannot engage in exclusionary conduct and

---

[2]There is, moreover, no evidence in the record (or otherwise) to support the bold claim that Conwood's owners decided to "milk" the company of cash needed to invest in the business. Id. at 8. On the contrary, the evidence is uniformly that Conwood's management made all decisions regarding expenditures, investment, and distributions.

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cannot defend itself by claiming that Conwood "did it too." Indeed, courts have routinely rejected such a defense. See, e.g., Paschall v. Kansas City Star Co., 695 F.2d 322, 333 (8th Cir. 1982) (discussing caselaw concerning exclusion effected by publisher and cooperating carriers), rev'd on other grounds, 727 F.2d 692 (8th Cir. 1984); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274-75 (2d Cir. 1979).[3]

UST's efforts to tar even smaller moist snuff sellers (Swisher and Swedish Match), is just as farfetched and irrelevant. UST Mem. in Opp'n at 7. There is no record evidence, and UST can cite none even outside the record, that those companies could or did engage in a systematic campaign of exclusionary conduct that harmed competition. There is no evidence that these companies could or did seek "exclusive vending," in order to constrict space for moist snuff and eliminate rivals' point of sale advertising ("POS"). There is no evidence that either of these sellers could or did use "category management" to skew the stores' product mix to their advantage. Were this a case about isolated acts of vandalism, the conduct of their representatives might be examined.[4] Because the case is

---

[3]Moreover, Conwood did not "do it too." While UST trumpets the supposed admission that "[Conwood's] sales force tampers with authorized USTC racks," UST Mem. in Opp'n at 6 (emphasis in original), it does so by distorting the record. Conwood made no such statement. Conwood simply restored its racks when and where it was able legitimately to do so. Conwood's response to UST's exclusion in violation of the antitrust laws has no bearing on the issues the jury must decide. It is UST's exclusion the jury must consider, not Conwood's efforts to maintain its presence in the face of that exclusion.

[4]Conwood is aware of little, if any, evidence that representatives of Swedish Match or Swisher excluded Conwood racks, brands or POS from stores.

about something entirely different -- systematic exclusion practiced by a monopolist -- the introduction of evidence regarding field misconduct by the excluded UST rivals can only confuse the issues and waste the jury's time.

4. The Court should exclude "retailer permission" evidence. UST argued in its Motion for Summary Judgment that Conwood must "make a specific and competent showing that [its] racks were removed

. . . without authorization of retailers." UST Mem. in Supp. of Mot. for Summ. J. at 36. Conwood's Motion in Limine explained that, as a matter of law, retailer authorization is irrelevant to Conwood's claims under Section 2. All that matters is UST's exclusion, with or without retailer consent.

UST articulates two arguments in opposition to Conwood's motion. First, UST claims that "the terms of any agreements . . . are relevant to Conwood's Section 2 claim" in that "Conwood must . . . prove that the terms of any agreements are exclusionary." UST Mem. in Opp'n at 2. This virtually concedes Conwood's motion. UST here admits that the proper legal test is whether its conduct was *exclusionary*; whether UST succeeded in obtaining unlawful exclusion with or without the consensual involvement of a third party is wholly immaterial. UST should therefore have no objection to Conwood's motion on this score.

Second, UST argues that the concern of Section 2 is not solely to promote "lower prices" or "better products" for consumers, but "to satisfy" retailers. Id. This argument betrays a profound misunderstanding of antitrust law. The Supreme Court has declared with unmistakable clarity that "Congress designed the Sherman Act as a 'consumer welfare

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prescription.'" Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citation omitted). "A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law." NCAA v. Board of Regents, 468 U.S. 85, 107 (1984). As the Sixth Circuit recognized, competition is about "reduc[ing] costs" and "expand[ing] sales." Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1422 (6th Cir. 1990) (internal quotation marks omitted). UST's remarkable defense -- that it may conspire with retailers to inflict deliberate harm on consumers, so long as the retailers welcome such an arrangement -- sets antitrust law on its head, and reinforces Conwood's point that evidence of retailer consent is irrelevant to the issue before the jury -- that is, whether UST's conduct was exclusionary.

Indeed, many retailers may welcome exclusionary arrangements, because they may keep retail prices high (and thus increase profits for the retailer) and may also provide an opportunity to share in monopoly rents. For example, in LePage's Inc. v. 3M, No. Civ. A. 97-3983, 1999-1 Trade Cas. (CCH) ¶ 72,538, 1999 WL 346223, at *4-6 (E.D. Pa. May 14, 1999), retailers consented to 3M's exclusionary rebate program, because it provided them with a share of the manufacturer's monopoly profits. Because the arrangement did not benefit consumers, it was held to state a triable claim. Likewise, in R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 60 F. Supp. 2d 502 (M.D.N.C. 1999), there was no doubt that retailers would "choose to sign a Retail Leaders contract" because of the scope of "promotional payments." Id. at 507. The arrangement was enjoined, however,

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because it posed "a serious threat to interbrand competition" and would "have an adverse effect on consumer choice." Id. at 511 (emphasis added). Conwood will prove to the jury that UST's activities have had the same effect, and the question whether retailers like or dislike them is beside the point.

UST's Opposition places defendants' theory of the case in sharp relief: UST may deliberately harm consumers and competition so long as its retail distributors are kept happy, through maintenance of high retail prices or with a share of monopoly profits kicked back by UST. Precisely because this position is antithetical to the deepest values of the antitrust laws, and because the jury should not be misled as to the supposed curative power of retailer consent to UST exclusion, the Court should grant Conwood's motion and preclude evidence of retailer permission from the case.

5. The Court should exclude any evidence offered in support of UST's counterclaims. UST mischaracterizes Conwood's motion as entirely tied to the resolution of Conwood's motion for partial summary judgment. UST Mem. in Opp'n at 10. Not so. Here, Conwood seeks only to preclude certain evidence based on UST's disregard of the Federal Rules of Civil Procedure and direct Court orders concerning disclosure of its damages and witnesses. See Feb. 5, 1999 Order (Magistrate Judge Moyer); May 11, 1999 Order at 3 (Magistrate Judge Moyer).

Under settled law, failure to provide a Rule 26(a)(1)(C) computation of damages routinely results in the exclusion of related testimony. See, e.g., Indiana Ins. Co. v. Hussey Seating Co., 176 F.R.D. 291, 293 (S.D. Ind. 1997); Salgado v. General Motors Co., No. 93C1427, 1996 WL 284971, at *1 (N.D. Ill. May 24,

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1996); Moore v. Kaye Ins. Assocs., No. 94CV6559, 1995 WL 600244, at *4 (S.D.N.Y. Aug. 8, 1995). Likewise, under Rule 37(c)(1) "[a] party that without substantial justification fails to disclose [witnesses as] required by Rule 26(a) . . . shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion any witness . . . not so disclosed." And, it goes without saying that UST's disregard of direct court orders requiring production of damages calculations and witness lists provides yet another basis for excluding unproduced testimony or evidence. See, e.g., Fed. R. Civ. P. 37(b)(2); Carlson v. Grobman, 133 F.R.D. 5, 7-8 (D.N.H. 1990) ("The Magistrate's Scheduling Order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.") (internal quotation marks omitted).

6. The Court should exclude hearsay deposition testimony and documents. Under Rule 32, UST should not be permitted to procure the absence of its senior employees in order to avoid cross examination and play their discovery depositions instead. Instead, UST should be permitted to introduce deposition testimony of its own senior employees only upon a proper showing that the witness is genuinely unable to board the UST jet for the trip from Greenwich to Paducah. As the Fifth Circuit has noted, "[a] deposition is an acceptable substitute for oral testimony when in-court observation of the witness is extremely difficult or virtually impossible." Jauch v. Corley, 830 F.2d 47, 50 (5th Cir. 1987). The trial court "may consider all the circumstances of why the party is away from the trial and determine in light of these factors whether to allow use of the deposition." 8A Charles A. Wright, et al., Federal Practice and Procedure § 2147,

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at 181-82 (2d ed. 1994). There are no circumstances in this case indicating that defendants' senior employees are unable to testify live at the trial.[5]

Similarly, UST cannot identify any basis for the introduction into evidence of its own hearsay documents. See UST Mem. in Opp'n at 12 n.5. In fact, one of UST's motions in limine seeks the exclusion of five Conwood business records on hearsay grounds; there is certainly no basis for treating the hundreds of self-serving hearsay documents on UST's exhibit list any differently. See Def. Exhs. 147-166, 171-281, 303-386.

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[5]The cases cited by UST are distinguishable. In Carey v. Bahama Cruise Lines, 864 F.2d 201, 204 (1st Cir. 1988), the court explained that the deposed defense employees were sailors at sea and their depositions had been noticed by defendants, a fact that should have signaled to plaintiffs that their depositions were likely to be used at trial. In Daigle v. Maine Medical Center, 14 F.3d 684, 691 (1st Cir. 1994), the witness expressly stated during his deposition that he was moving to another state and would be unavailable for trial.

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Respectfully submitted,

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Counsel for Plaintiffs

February 14, 2000

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CERTIFICATE OF SERVICE

I certify that, on this 14th day of February, 2000, a copy of the foregoing was sent via overnight delivery to:

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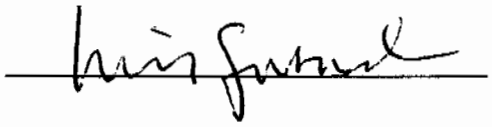

FILED
MAR 7 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

SUPPLEMENTAL DECLARATION OF RICHARD LEFTWICH

1. I am the Fuji Bank/Heller Professor of Accounting and Finance at the Graduate School of Business at the University of Chicago. I previously filed an expert report and an expert rebuttal report on behalf of Conwood Company, L.P. and Conwood Sales Company, L.P. (collectively, "Conwood") in this litigation. In this supplemental declaration, I report the results of analyses based on information that recently became available to me.

2. At my deposition, counsel for UST raised questions about the reliability of some of the information I relied on in my expert report. In particular, I was asked about the reliability of information on total moist snuff sales in 1997 for several states. The information I relied on is contained in annual reports of the Smokeless Tobacco Council ("STC"). The information contained in these reports was compiled for the STC by Peat Marwick. Shortly after my deposition, an employee of Lexecon Inc., a consulting firm that assisted me in the collection of information for my analysis, contacted, at my request, the STC and inquired about the reliability of the 1997 information on moist snuff sales by state. I understand that the STC confirmed that the information I used was derived from an STC report that was disseminated to its members. The STC also agreed to ask Peat Marwick to confirm the reliability of the information.

3. I understand that when Peat Marwick reviewed the 1997 information, it discovered that the information it had provided to the STC contained errors. On learning this, I asked for and recently received the revised 1997 information.[1]

1. A copy of the information I received is attached as Appendix A.

4. Using the revised 1997 information, I repeated the damage analysis contained in my expert report.[2] Based on the revised 1997 information, I estimate that Conwood suffered damages of between $155 million and $238 million as a result of UST's misconduct.[3]

5. As I explained in my expert report, my analysis is based on a variety of conservative assumptions. (See, for example, Leftwich Report ¶¶ 3, 9, 12.) In particular, my analysis is based on the assumption that UST misconduct in 1997 did not affect Conwood's 1997 sales. However, as I discussed in my rebuttal report, information relied on by Professor David Scheffman, UST's economic witness, allows me to estimate the effect of UST's misconduct on Conwood's sales in a recent year. (Leftwich Rebuttal, ¶¶ 23-26.) (Professor Scheffman's information was not available to me at the time I filed my expert report.)

6. In particular, I used Professor Scheffman's data and model – supplemented by a more reliable measure of UST's "bad acts" (conduct with the purpose and effect of excluding rivals) – to estimate the impact of UST's misconduct in a recent year on Conwood's share by state. These results were reported in Tables 1-3 of my rebuttal report.[4]

---

2. Tables 1 – 10 in Appendix B correspond to the tables in my expert report.
3. This estimate does not include pre- or post-judgment interest, attorneys' fees, or statutory trebling. These estimates are based on the same regression model as in my expert report. As in my expert and rebuttal reports, I also analyze the extent to which the change in Conwood's share of moist snuff sales by state between 1990 and 1997 was associated with regional differences; changes in certain demographic variables; or measures of Conwood's marketing presence in a state. I find no statistically significant relation between the change in Conwood's share of moist snuff sales by state between 1990 and 1997 and regional differences, or changes in demographic variables; I also do not find a positive and statistically significant relation between the change in Conwood's state share and Conwood's marketing presence in a state.
4. As I explained in my rebuttal report, I do not endorse the use of certain "area" dummies that Professor Scheffman includes in his model. I have repeated my analysis after excluding these variables from the analysis. The results of this analysis are reported in Appendix C.

7. This information allows me to incorporate information on the effect of UST's misconduct by state in a recent year into my analysis. In particular, I repeat my analysis under the assumption that, absent UST's recent misconduct, Conwood's state share of moist snuff sales in 1997 would have equaled its actual share in 1997 plus the effect of UST's recent misconduct. For example, Conwood's share of moist snuff sales in Georgia was 10.3 percent in 1990 and 12.4 percent in 1997. If UST's recent misconduct reduced Conwood's share by 1.2 share points in Georgia (see Table 2 of Appendix C), then I assume that Conwood's Georgia share in 1997 would have been 13.6 (i.e., 12.4 plus 1.2) absent UST's recent misconduct.[5] That is, Conwood's share in Georgia would have increased from 10.3 in 1990 to 13.6 in 1997 absent UST's recent misconduct.[6]

8. I repeat my damage analysis based on these estimates of Conwood's share by state in 1997 – that is, Conwood's share by state in 1997 absent UST's recent misconduct. Based on these estimates, I estimate that Conwood suffered damages of between $313 million and $488 million as a result of UST's misconduct.[7]

---

5. For a few states, information on bad acts is not available. For the purpose of this analysis, I assume that UST committed no bad acts in those states.
6. These estimates may not, however, reflect the effect on Conwood of all UST actions that Conwood claims are exclusionary (e.g., these estimates may not reflect the effect of UST's "CAP" program on Conwood).
7. See Tables 1-2 – 10-2 in Appendix D. These estimates are based on bad acts "measure 2" in a model that excludes the Scheffman "area" dummies. If I include the Scheffman area dummies, my estimates are $464 million for "scenario 1" and $288 million for "scenario 2." Using the other measures of bad acts ("measure 1" or "measure 3") and excluding the Scheffman "area" dummies, my estimates vary between $461 million and $537 million for "scenario 1." For "scenario 2" and the other bad acts measures, my estimates vary between $299 and $344 million. If the Scheffman "area" dummies are included in the analysis, my damages estimates for "scenario 1" vary between $442 million and $623 million. For "scenario 2," my estimates vary between $275 million and $382 million for "scenario 2" if the Scheffman "area" dummies are included.

   All of these results are based on the same regression model as used in my expert report – a model that excludes regional effects. In these analyses (i.e., where I take account of UST's recent misconduct), I find a statistically significant relation between a measure of regional

(...continued)
effects (i.e., based on four Census regions) and the change in Conwood's share between 1990 and 1997. However, I find no such relation using a second measure of regional effects (based on nine Census divisions). If I include the first measure of regional effects in my regression model, my estimate of the damages suffered by Conwood as a result of UST's misconduct falls by roughly $140 million for "scenario 1" and roughly $80 million for "scenario 2." The regressions underlying each damage estimate are attached as Exhibit E.

Under penalty of perjury, I declare that the foregoing is true and correct.

Richard Leftwich

1/27/2000
Date

EXHIBIT A

kpmg LLP

Exempt Organizations Tax Practice

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Subject	**Survey 97 and 98**

Please see the attached pages.

Thank you.

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SMOKELESS TOBACCO COUNCIL — TOTALS
COMPILATION OF MEMBER SURVEY DATA--1997
SCHEDULE 5: SALES IN POUNDS — STCPM904

STATE	CHEWING	DRY SNUFF	MOIST SNUFF	TOTALS
ALABAMA	3,182,941	562,518	1,803,569	5,549,028
ALASKA	9,995	120	138,724	148,839
ARIZONA	165,310	5,159	757,544	928,013
ARKANSAS	1,256,848	141,541	1,030,039	2,428,428
CALIFORNIA	552,808	39,762	2,320,542	2,913,112
COLORADO	298,313	2,169	1,694,734	1,995,216
CONNECTICUT	23,070	4,518	64,685	92,273
DELAWARE	52,798	2,197	23,339	78,334
DIST OF COL	14,617	7,676	17,219	39,512
FLORIDA	2,068,294	238,006	1,961,789	4,268,089
GEORGIA	4,373,998	412,698	2,062,840	6,849,536
HAWAII	14,152	24	84,640	98,816
IDAHO	24,807	283	265,261	290,351
ILLINOIS	1,309,281	45,115	2,110,030	3,464,426
INDIANA	1,013,410	22,453	1,194,067	2,229,930
IOWA	195,186	1,217	890,068	1,086,471
KANSAS	522,999	16,596	954,691	1,494,286
KENTUCKY	5,158,151	100,089	2,517,490	7,775,730
LOUISIANA	1,627,725	92,347	1,781,480	3,501,552
MAINE	122,599	19,871	131,921	274,391
MARYLAND	263,057	18,271	201,396	482,724
MASSACHUSETTS	128,558	4,957	353,236	486,751
MICHIGAN	466,827	34,904	1,375,564	1,877,295
MINNESOTA	81,822	876	851,680	934,378
MISSISSIPPI	2,704,240	242,692	2,088,101	5,035,033
MISSOURI	650,037	28,445	1,144,116	1,822,598
MONTANA	27,010	74	317,145	344,229
NEBRASKA	73,166	1,026	363,522	437,714
NEVADA	22,248	1,302	152,948	176,498
NEW HAMPSHIRE	30,357	0	55,278	85,635
NEW JERSEY	199,538	21,055	252,219	472,812
NEW MEXICO	54,014	1,521	282,727	338,262
NEW YORK	937,705	40,543	1,662,619	2,640,867
NORTH CAROLINA	7,875,639	1,156,854	2,588,006	11,620,499
NORTH DAKOTA	16,895	0	194,163	211,058
OHIO	1,895,827	36,495	1,628,139	3,560,461
OKLAHOMA	883,198	52,674	1,319,333	2,255,205
OREGON	90,264	4,280	938,695	1,033,239
PENNSYLVANIA	2,105,435	44,627	2,845,019	4,995,081
RHODE ISLAND	2,101	3	9,950	12,054
SOUTH CAROLINA	2,159,869	308,048	622,988	3,090,905
SOUTH DAKOTA	15,201	0	218,011	233,212
TENNESSEE	3,171,710	279,202	1,597,208	5,048,120
TEXAS	3,325,306	210,920	5,433,621	8,969,847
UTAH	14,566	160	278,175	292,901
VERMONT	54,238	0	74,424	128,662
VIRGINIA	3,111,657	121,446	1,606,944	4,840,047
WASHINGTON	127,753	2,431	1,296,130	1,426,314
WEST VIRGINIA	1,830,659	42,723	1,230,410	3,103,792
WISCONSIN	229,090	15,250	959,433	1,203,773
WYOMING	3,589	113	79,512	83,214
TOTALS	54,538,878	4,385,251	53,825,384	112,749,513

TOTALS MAY VARY SLIGHTLY DUE TO ROUNDING

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COMPARISON OF MANUFACTURER'S SALES (POUNDS) MFLBSTM
BY STATE 1996-1997

MOIST SNUFF

	1996	1997	CHANGE (LBS)	CHANGE (%)
ALABAMA	1,789,053	1,803,569	14,516	0.81%
ALASKA	146,765	138,724	(8,041)	-5.48%
ARIZONA	778,485	757,544	(20,941)	-2.69%
ARKANSAS	957,701	1,030,039	72,338	7.55%
CALIFORNIA	2,254,498	2,320,542	66,044	2.93%
COLORADO	1,709,524	1,694,734	(14,790)	-0.87%
CONNECTICUT	70,157	64,685	(5,472)	-7.80%
DELAWARE	19,124	23,339	4,215	22.04%
DIST OF COLUMBIA	17,965	17,219	(746)	-4.15%
FLORIDA	1,996,042	1,961,789	(34,253)	-1.72%
GEORGIA	2,218,312	2,062,840	(155,472)	-7.01%
HAWAII	88,339	84,640	(3,699)	-4.19%
IDAHO	287,446	265,261	(22,185)	-7.72%
ILLINOIS	2,018,551	2,110,030	91,479	4.53%
INDIANA	1,205,423	1,194,067	(11,356)	-0.94%
IOWA	870,678	890,068	19,390	2.23%
KANSAS	980,264	954,691	(25,573)	-2.61%
KENTUCKY	2,342,718	2,517,490	174,772	7.46%
LOUISIANA	1,692,012	1,781,480	89,468	5.29%
MAINE	126,541	131,921	5,380	4.25%
MARYLAND	235,833	201,396	(34,437)	-14.60%
MASSACHUSETTS	344,173	353,236	9,063	2.63%
MICHIGAN	1,406,595	1,375,564	(31,031)	-2.21%
MINNESOTA	864,105	851,680	(12,425)	-1.44%
MISSISSIPPI	2,074,883	2,088,101	13,218	0.64%
MISSOURI	1,164,983	1,144,116	(20,867)	-1.79%
MONTANA	341,504	317,145	(24,359)	-7.13%
NEBRASKA	380,661	363,522	(17,139)	-4.50%
NEVADA	206,640	152,948	(53,692)	-25.98%
NEW HAMPSHIRE	61,245	55,278	(5,967)	-9.74%
NEW JERSEY	245,130	252,219	7,089	2.89%
NEW MEXICO	246,335	282,727	36,392	14.77%
NEW YORK	1,629,228	1,662,619	33,391	2.05%
NORTH CAROLINA	2,139,771	2,588,006	448,235	20.95%
NORTH DAKOTA	196,959	194,163	(2,796)	-1.42%
OHIO	1,679,386	1,628,139	(51,247)	-3.05%
OKLAHOMA	1,254,449	1,319,333	64,884	5.17%
OREGON	1,047,987	938,695	(109,292)	-10.43%
PENNSYLVANIA	2,782,309	2,845,019	62,710	2.25%
RHODE ISLAND	10,591	9,950	(641)	-6.05%
SOUTH CAROLINA	586,972	622,988	36,016	6.14%
SOUTH DAKOTA	228,218	218,011	(10,207)	-4.47%
TENNESSEE	1,529,665	1,597,208	67,543	4.42%
TEXAS	5,646,361	5,433,621	(212,740)	-3.77%
UTAH	273,241	278,175	4,934	1.81%
VERMONT	74,026	74,424	398	0.54%
VIRGINIA	1,551,243	1,606,944	55,701	3.59%
WASHINGTON	1,208,161	1,296,130	87,969	7.28%
WEST VIRGINIA	1,245,448	1,230,410	(15,038)	-1.21%
WISCONSIN	931,889	959,433	27,544	2.96%
WYOMING	73,505	79,512	6,007	8.17%
TOTALS	53,231,094	53,825,384	594,290	1.12%

TOTALS MAY VARY SLIGHTLY DUE TO ROUNDING

16diii003970

SMOKELESS TOBACCO COUNCIL
COMPARISON OF MANUFACTURER'S SALES (POUNDS)
BY MAGNITUDE 1996-1997

FILENAME: MFLBMAG
MFLBMAGM

MOIST SNUFF

	1996	1997	CHANGE (LBS)	CHANGE (%)
TEXAS	5,646,361	5,433,621	(212,740)	-3.77%
PENNSYLVANIA	2,782,309	2,845,019	62,710	2.25%
CALIFORNIA	2,254,498	2,320,542	66,044	2.93%
NORTH CAROLINA	2,139,771	2,588,006	448,235	20.95%
KENTUCKY	2,342,718	2,517,490	174,772	7.46%
MISSISSIPPI	2,074,883	2,088,101	13,218	0.64%
GEORGIA	2,218,312	2,062,840	(155,472)	-7.01%
FLORIDA	1,996,042	1,961,789	(34,253)	-1.72%
ILLINOIS	2,018,551	2,110,030	91,479	4.53%
ALABAMA	1,789,053	1,803,569	14,516	0.81%
NEW YORK	1,629,228	1,662,619	33,391	2.05%
COLORADO	1,709,524	1,694,734	(14,790)	-0.87%
TENNESSEE	1,529,665	1,597,208	67,543	4.42%
LOUISIANA	1,692,012	1,781,480	89,468	5.29%
VIRGINIA	1,551,243	1,606,944	55,701	3.59%
OKLAHOMA	1,254,449	1,319,333	64,884	5.17%
WEST VIRGINIA	1,245,448	1,230,410	(15,038)	-1.21%
OHIO	1,679,386	1,628,139	(51,247)	-3.05%
KANSAS	980,264	954,691	(25,573)	-2.61%
MICHIGAN	1,406,595	1,375,564	(31,031)	-2.21%
WASHINGTON	1,208,161	1,296,130	87,969	7.28%
INDIANA	1,205,423	1,194,067	(11,356)	-0.94%
ARKANSAS	957,701	1,030,039	72,338	7.55%
MISSOURI	1,164,983	1,144,116	(20,867)	-1.79%
OREGON	1,047,987	938,695	(109,292)	-10.43%
IOWA	870,678	890,068	19,390	2.23%
MINNESOTA	864,105	851,680	(12,425)	-1.44%
ARIZONA	778,485	757,544	(20,941)	-2.69%
MASSACHUSETTS	344,173	353,236	9,063	2.63%
WISCONSIN	931,889	959,433	27,544	2.96%
IDAHO	287,446	265,261	(22,185)	-7.72%
NEW MEXICO	246,335	282,727	36,392	14.77%
SOUTH CAROLINA	586,972	622,988	36,016	6.14%
NORTH DAKOTA	196,959	194,163	(2,796)	-1.42%
SOUTH DAKOTA	228,218	218,011	(10,207)	-4.47%
NEBRASKA	380,661	363,522	(17,139)	-4.50%
MONTANA	341,504	317,145	(24,359)	-7.13%
VERMONT	74,026	74,424	398	0.54%
UTAH	273,241	278,175	4,934	1.81%
MARYLAND	235,833	201,396	(34,437)	-14.60%
NEW JERSEY	245,130	252,219	7,089	2.89%
NEVADA	206,640	152,948	(53,692)	-25.98%
RHODE ISLAND	10,591	9,950	(641)	-6.05%
ALASKA	146,765	138,724	(8,041)	-5.48%
MAINE	126,541	131,921	5,380	4.25%
HAWAII	88,339	84,640	(3,699)	-4.19%
NEW HAMPSHIRE	61,245	55,278	(5,967)	-9.74%
WYOMING	73,505	79,512	6,007	8.17%
CONNECTICUT	70,157	64,685	(5,472)	-7.80%
DELAWARE	19,124	23,339	4,215	22.04%
DIST OF COLUMBIA	17,965	17,219	(746)	-4.15%
TOTALS	53,231,094	53,825,384	594,290	1.12%

TOTALS MAY VARY SLIGHTLY DUE TO ROUNDING

16diii003971

SMOKELESS TOBACCO COUNCIL
COMPARISON OF MANUFACTURER'S SALES (POUNDS)
BY STATE 1997-1998

FILENAME: MFLBST
MFLBSTM

MOIST SNUFF

	1997	1998	CHANGE(LBS)	CHANGE (%)
ALABAMA	1,803,569	1,803,609	40	0.00%
ALASKA	138,724	126,857	(11,867)	-8.55%
ARIZONA	757,544	822,846	65,302	8.62%
ARKANSAS	1,030,039	1,073,187	43,148	4.19%
CALIFORNIA	2,320,542	2,371,374	50,832	2.19%
COLORADO	1,694,734	1,761,829	67,095	3.96%
CONNECTICUT	64,685	62,004	(2,681)	-4.14%
DELAWARE	23,339	21,198	(2,141)	-9.17%
DIST OF COLUMBIA	17,219	21,984	4,765	27.67%
FLORIDA	1,961,789	1,942,782	(19,007)	-0.97%
GEORGIA	2,062,840	2,209,815	146,975	7.12%
HAWAII	84,640	97,571	12,931	15.28%
IDAHO	265,261	296,132	30,871	11.64%
ILLINOIS	2,110,030	2,132,809	22,779	1.08%
INDIANA	1,194,067	1,286,997	92,930	7.78%
IOWA	890,068	991,863	101,795	11.44%
KANSAS	954,691	814,910	(139,781)	-14.64%
KENTUCKY	2,517,490	2,601,374	83,884	3.33%
LOUISIANA	1,781,480	1,903,998	122,518	6.88%
MAINE	131,921	145,466	13,545	10.27%
MARYLAND	201,396	240,252	38,856	19.29%
MASSACHUSETTS	353,236	377,522	24,286	6.88%
MICHIGAN	1,375,564	1,439,791	64,227	4.67%
MINNESOTA	851,680	804,238	(47,442)	-5.57%
MISSISSIPPI	2,088,101	2,071,038	(17,063)	-0.82%
MISSOURI	1,144,116	1,178,315	34,199	2.99%
MONTANA	317,145	297,598	(19,547)	-6.16%
NEBRASKA	363,522	379,495	15,973	4.39%
NEVADA	152,948	159,389	6,441	4.21%
NEW HAMPSHIRE	55,278	57,006	1,728	3.13%
NEW JERSEY	252,219	275,030	22,811	9.04%
NEW MEXICO	282,727	271,452	(11,275)	-3.99%
NEW YORK	1,662,619	1,797,149	134,530	8.09%
NORTH CAROLINA	2,588,006	2,680,085	92,079	3.56%
NORTH DAKOTA	194,163	217,227	23,064	11.88%
OHIO	1,628,139	1,688,067	59,928	3.68%
OKLAHOMA	1,319,333	1,365,094	45,761	3.47%
OREGON	938,695	850,750	(87,945)	-9.37%
PENNSYLVANIA	2,845,019	2,792,581	(52,438)	-1.84%
RHODE ISLAND	9,950	9,187	(763)	-7.67%
SOUTH CAROLINA	622,988	645,548	22,560	3.62%
SOUTH DAKOTA	218,011	119,563	(98,448)	-45.16%
TENNESSEE	1,597,208	1,638,722	41,514	2.60%
TEXAS	5,433,621	5,263,840	(169,781)	-3.12%
UTAH	278,175	276,785	(1,390)	-0.50%
VERMONT	74,424	76,098	1,674	2.25%
VIRGINIA	1,606,944	1,737,777	130,833	8.14%
WASHINGTON	1,296,130	1,250,450	(45,680)	-3.52%
WEST VIRGINIA	1,230,410	1,171,586	(58,824)	-4.78%
WISCONSIN	959,433	1,029,360	69,927	7.29%
WYOMING	79,512	83,415	3,903	4.91%
TOTALS	53,825,384	54,733,015	907,631	1.69%

TOTALS MAY VARY SLIGHTLY DUE TO ROUNDING

16diii003972

SMOKELESS TOBACCO COUNCIL
COMPARISON OF MANUFACTURER'S SALES (POUNDS)
BY MAGNITUDE 1997-1998

FILENAME: MFLBMAG
MFLBMAGM

MOIST SNUFF

	1997	1998	CHANGE(LBS)	CHANGE (%)
TEXAS	5,433,621	5,263,840	(169,781)	-3.12%
PENNSYLVANIA	2,845,019	2,792,581	(52,438)	-1.84%
NORTH CAROLINA	2,588,006	2,680,085	92,079	3.56%
KENTUCKY	2,517,490	2,601,374	83,884	3.33%
CALIFORNIA	2,320,542	2,371,374	50,832	2.19%
GEORGIA	2,062,840	2,209,815	146,975	7.12%
ILLINOIS	2,110,030	2,132,809	22,779	1.08%
MISSISSIPPI	2,088,101	2,071,038	(17,063)	-0.82%
FLORIDA	1,961,789	1,942,782	(19,007)	-0.97%
LOUISIANA	1,781,480	1,903,998	122,518	6.88%
ALABAMA	1,803,569	1,803,609	40	0.00%
NEW YORK	1,662,619	1,797,149	134,530	8.09%
COLORADO	1,694,734	1,761,829	67,095	3.96%
VIRGINIA	1,606,944	1,737,777	130,833	8.14%
OHIO	1,628,139	1,688,067	59,928	3.68%
TENNESSEE	1,597,208	1,638,722	41,514	2.60%
MICHIGAN	1,375,564	1,439,791	64,227	4.67%
OKLAHOMA	1,319,333	1,365,094	45,761	3.47%
INDIANA	1,194,067	1,286,997	92,930	7.78%
WASHINGTON	1,296,130	1,250,450	(45,680)	-3.52%
MISSOURI	1,144,116	1,178,315	34,199	2.99%
WEST VIRGINIA	1,230,410	1,171,586	(58,824)	-4.78%
ARKANSAS	1,030,039	1,073,187	43,148	4.19%
WISCONSIN	959,433	1,029,360	69,927	7.29%
IOWA	890,068	991,863	101,795	11.44%
OREGON	938,695	850,750	(87,945)	-9.37%
ARIZONA	757,544	822,846	65,302	8.62%
KANSAS	954,691	814,910	(139,781)	-14.64%
MINNESOTA	851,680	804,238	(47,442)	-5.57%
SOUTH CAROLINA	622,988	645,548	22,560	3.62%
NEBRASKA	363,522	379,495	15,973	4.39%
MASSACHUSETTS	353,236	377,522	24,286	6.88%
MONTANA	317,145	297,598	(19,547)	-6.16%
IDAHO	265,261	296,132	30,871	11.64%
UTAH	278,175	276,785	(1,390)	-0.50%
NEW JERSEY	252,219	275,030	22,811	9.04%
NEW MEXICO	282,727	271,452	(11,275)	-3.99%
MARYLAND	201,396	240,252	38,856	19.29%
NORTH DAKOTA	194,163	217,227	23,064	11.88%
NEVADA	152,948	159,389	6,441	4.21%
MAINE	131,921	145,466	13,545	10.27%
ALASKA	138,724	126,857	(11,867)	-8.55%
SOUTH DAKOTA	218,011	119,563	(98,448)	-45.16%
HAWAII	84,640	97,571	12,931	15.28%
WYOMING	79,512	83,415	3,903	4.91%
VERMONT	74,424	76,098	1,674	2.25%
CONNECTICUT	64,685	62,004	(2,681)	-4.14%
NEW HAMPSHIRE	55,278	57,006	1,728	3.13%
DIST OF COLUMB	17,219	21,984	4,765	27.67%
DELAWARE	23,339	21,198	(2,141)	-9.17%
RHODE ISLAND	9,950	9,187	(763)	-7.67%
TOTALS	53,825,384	54,733,015	907,631	1.69%

TOTALS MAY VARY SLIGHTLY DUE TO ROUNDING

16diii003973

EXHIBIT B

Table 1

Conwood's Share of U.S. Moist Snuff in Pounds by State
Ranked by Share in 1990
1990 and 1997

State	Share (%) 1990	Share (%) 1997	Difference (%)
MAINE	24.2	27.2	3.0
MICHIGAN	24.0	32.1	8.0
NEW HAMPSHIRE	21.5	26.9	5.5
OREGON	18.9	24.3	5.4
ILLINOIS	18.0	20.4	2.5
MASSACHUSETTS	17.6	24.7	7.1
KENTUCKY	17.6	19.9	2.4
WISCONSIN	17.2	27.7	10.5
SOUTH CAROLINA	17.1	23.0	5.9
WASHINGTON	16.7	21.3	4.5
INDIANA	16.0	21.1	5.1
MINNESOTA	15.4	28.1	12.6
OHIO	15.3	19.2	3.8
MISSOURI	15.0	14.1	-0.9
DELAWARE	14.8	18.8	4.0
VERMONT	14.0	18.0	4.0
VIRGINIA	12.4	14.8	2.4
NEW JERSEY	12.3	18.9	6.6
NEW YORK	12.2	17.0	4.8
NORTH CAROLINA	11.9	15.9	3.9
MARYLAND	10.4	14.8	4.4
LOUISIANA	10.3	8.7	-1.6
GEORGIA	10.3	12.4	2.1
TENNESSEE	9.9	10.4	0.5
IOWA	9.9	12.4	2.5
CONNECTICUT	9.8	16.9	7.1
KANSAS	9.7	8.0	-1.7
NEBRASKA	8.5	8.0	-0.5
ALABAMA	7.7	8.1	0.4

Table 1

Conwood's Share of U.S. Moist Snuff in Pounds by State
Ranked by Share in 1990
1990 and 1997

State	Share (%) 1990	Share (%) 1997	Difference (%)
CALIFORNIA	7.7	9.3	1.6
ARKANSAS	7.6	8.2	0.6
MISSISSIPPI	7.4	8.1	0.7
DISTRICT OF COLUMBIA	7.2	17.6	10.3
COLORADO	7.0	7.9	0.9
FLORIDA	6.3	7.7	1.4
SOUTH DAKOTA	5.8	7.0	1.2
NORTH DAKOTA	5.8	10.2	4.4
PENNSYLVANIA	5.3	7.5	2.1
IDAHO	5.3	8.6	3.4
ARIZONA	5.2	6.3	1.0
MONTANA	5.1	5.4	0.3
WEST VIRGINIA	5.0	5.1	0.1
OKLAHOMA	4.9	5.1	0.3
UTAH	4.6	5.3	0.7
NEVADA	4.5	5.7	1.2
TEXAS	4.5	4.8	0.3
NEW MEXICO	3.0	3.0	-0.0
WYOMING	2.4	2.0	-0.3
RHODE ISLAND	1.4	15.2	13.7
U.S.	**10.2**	**12.8**	**2.7**

Source: Conwood summaries of Peat Marwick Reports, as attached to a fax addressed to Chip Bamberger from Edward Foster dated July 23, 1999. 1997 total moist snuff sales in pounds were faxed directly from Peat Marwick on December 9, 1999 to Deborah Dobrusin.

January 2000

Table 2

Summary of Regression Results

(t- statistic in parenthesis)

Intercept	0.01 (8.40)
1990 Share (b)	0.22 (2.68)
Adjusted R^2	0.1139
F Statistic	7.168

(a) The dependent variable is equal to the difference in shares in 1997 and 1990.

(b) 1990 Share is equal to Conwood's sales of moist snuff, in pounds, divided by total U.S. sales, in pounds.

Table 3

Conwood's Share of Moist Snuff Sales in the But-For World, By State Ranked by Share (in Pounds) in 1990

State	1990 (%)	Conwood's But-For World 1997 Share (%)	
		Scenario One (a)	Scenario Two (b)
MAINE	24.2	27.2	27.2
MICHIGAN	24.0	32.1	32.1
NEW HAMPSHIRE	21.5	26.9	26.9
OREGON	18.9	24.2	24.3
ILLINOIS	18.0	23.3	20.4
MASSACHUSETTS	17.6	22.9	24.7
KENTUCKY	17.6	22.9	19.9
WISCONSIN	17.2	22.5	27.7
SOUTH CAROLINA	17.1	22.4	23.0
WASHINGTON	16.7	22.0	21.3
INDIANA	16.0	21.3	21.1
MINNESOTA	15.4	20.7	28.1
OHIO	15.3	20.6	19.2
MISSOURI	15.0	20.3	19.2
DELAWARE	14.8	20.1	19.0
VERMONT	14.0	19.3	18.2
VIRGINIA	12.4	17.7	16.6
NEW JERSEY	12.3	17.6	16.5
NEW YORK	12.2	17.5	16.4
NORTH CAROLINA	11.9	17.3	16.1
MARYLAND	10.4	15.7	14.6
LOUISIANA	10.3	15.6	14.5
GEORGIA	10.3	15.6	14.4
TENNESSEE	9.9	15.2	14.1
IOWA	9.9	15.2	14.1
CONNECTICUT	9.8	15.1	14.0
KANSAS	9.7	15.0	13.9
NEBRASKA	8.5	13.8	12.7
ALABAMA	7.7	13.0	11.9
CALIFORNIA	7.7	13.0	11.9
ARKANSAS	7.6	12.9	11.8
MISSISSIPPI	7.4	12.7	11.6
DISTRICT OF COLUMBIA	7.2	12.5	11.4
COLORADO	7.0	12.3	11.2
FLORIDA	6.3	11.6	10.5
SOUTH DAKOTA	5.8	11.1	10.0
NORTH DAKOTA	5.8	11.1	9.9

Table 3

Conwood's Share of Moist Snuff Sales in the But-For World, By State Ranked by Share (in Pounds) in 1990

State	1990 (%)	Conwood's But-For World 1997 Share (%)	
		Scenario One (a)	Scenario Two (b)
PENNSYLVANIA	5.3	10.6	9.5
IDAHO	5.3	10.6	9.5
ARIZONA	5.2	10.5	9.4
MONTANA	5.1	10.4	9.3
WEST VIRGINIA	5.0	10.4	9.2
OKLAHOMA	4.9	10.2	9.1
UTAH	4.6	9.9	8.8
NEVADA	4.5	9.8	8.7
TEXAS	4.5	9.8	8.6
NEW MEXICO	3.0	8.3	7.2
WYOMING	2.4	7.7	6.5
RHODE ISLAND	1.4	6.7	5.6
U.S.	10.2	15.9	15.0

(a) Scenario one assumes that Conwood's share increased by 5.31 share points between 1990 and 1997 in states with a 1990 share of less than or equal to 20 percent.

(b) Scenario two assumes that Conwood's share increased by 4.19 share points between 1990 and 1997 1997 in states with a 1990 share of less than or equal to 15 percent.

January 2000

Table 4A

Comparison of Actual and But-For World
1994 - 1999
Scenario One (a)

	1994	1995	1996	1997	1998 (e)	1999 (e)
Conwood's Share (b)						
But-For World (%)	13.45	14.27	15.08	15.90	16.72	17.53
Actual World (%)	12.08	12.41	12.82	12.85	12.85	12.85
Average Price Per Pound (c)						
But-For World ($)	20.15	21.73	22.04	21.92	23.14	24.43
Actual World ($)	20.61	22.36	22.81	22.81	24.22	25.71
Incremental Costs Per Pound (d)						
But-For World ($)	8.61	8.64	8.58	8.65	9.01	9.38
Actual World ($)	8.61	8.64	8.58	8.65	9.01	9.38

(a) Scenario one assumes that Conwood's share increased by 5.31 share points between 1990 and 1997 in states with a 1990 share of less than 15 percent.

(b) Conwood's share is calculated using Conwood's summary of Peat Marwick Reports, as attached to a fax addressed to Chip Bamberger from Edward Foster dated July 23, 1999. 1997 total moist snuff sales in pounds were faxed directly by Peat Marwick on December 9, 1999 to Deborah Dobrusin.

(c) Average price per pound is calculated using Conwood financial statements titled, using 1996 as an example: "Conwood Company, L.P., Moist Snuff Division, Period Ending December 31, 1996, Actual Vs. Planned Statement of Operations." Average price per pound is equal to Net Sales divided by Conwood's moist snuff sales in pounds (as taken from the source in (b)).

(d) Incremental costs per pound comes from the same source as described in (c). The costs are calculated as Net Sales minus Operating Profit, divided by Conwood's moist snuff sales in pounds (as taken from the source described in footnote (b)).

(e) 1998 and 1999 figures are projections. Conwood's But-For share is projected to grow at .82% a year, based on actual 1990 to 1997 growth. Conwood's Actual share is projected to equal 1997 share. Average price per pound is projected to grow at 7.0% for the Actual and 6.42% for the But-For Worlds (based on historical growth of 6.2% per year, but allowing But-For price to equal 95% of Actual price by 1999).

January 2000

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Table 4B

Comparison of Actual and But-For World
1994 - 1999
Scenario Two (a)

	1994	1995	1996	1997	1998 (e)	1999 (e)
Conwood's Share (b)						
But-For World (%)	12.94	13.63	14.31	15.00	15.69	16.37
Actual World (%)	12.08	12.41	12.82	12.85	12.85	12.85
Average Price Per Pound (c)						
But-For World ($)	20.15	21.73	22.04	21.92	23.14	24.43
Actual World ($)	20.61	22.36	22.81	22.81	24.22	25.71
Incremental Costs Per Pound (d)						
But-For World ($)	8.61	8.64	8.58	8.65	9.01	9.38
Actual World ($)	8.61	8.64	8.58	8.65	9.01	9.38

(a) Scenario two assumes that Conwood's share increased by 4.19 share points between 1990 and 1997 in states with a 1990 share of less than 20 percent.

(b) Conwood's share is calculated using Conwood's summary of Peat Marwick Reports, as attached to a fax addressed to Chip Bamberger from Edward Foster dated July 23, 1999. 1997 total moist snuff sales in pounds were faxed directly by Peat Marwick on December 9, 1999 to Deborah Dobrusin.

(c) Average price per pound is calculated using Conwood financial statements titled, using 1996 as an example: "Conwood Company, L.P., Moist Snuff Division, Period Ending December 31, 1996, Actual Vs. Planned Statement of Operations." Average price per pound is equal to Net Sales divided by Conwood's moist snuff sales in pounds (as taken from the source in (b)).

(d) Incremental costs per pound comes from the same source as described in (c). The costs are calculated as Net Sales minus Operating Profit, divided by Conwood's moist snuff sales in pounds (as taken from the source described in footnote (b)).

(e) 1998 and 1999 figures are projections. Conwood's But-For share is projected to grow at .7% a year, based on actual 1990 to 1997 growth. Conwood's Actual share is projected to equal 1997 share. Average price per pound is projected to grow at 7.0% for the Actual and 6.42% for the But-For Worlds (based on historical growth of 6.2% per year, but allowing But-For price to equal 95% of Actual price by 1999).

January 2000

16diii003981

Table 5A

Conwood's Lost Profits
1994 - 1999
Scenario One (a)

	1994	1995	1996	1997	1998 (b)	1999 (b)	Total
Total Moist Snuff Sales (Pounds)	49,698,919	50,747,692	52,995,990	53,602,020	55,446,377	57,354,196	319,845,194
Conwood's Sales (Pounds)							
But-For World	6,686,459	7,241,334	7,994,256	8,522,721	9,268,059	10,054,599	49,767,429
Actual World	6,002,873	6,295,480	6,794,702	6,886,084	7,123,023	7,368,114	40,470,276
Conwood's Revenues ($)							
But-For World	134,728,835	157,387,547	176,191,417	186,825,741	214,471,828	245,623,102	1,115,228,470
Actual World	123,744,000	140,785,000	154,963,000	157,093,000	172,523,009	189,468,587	938,576,596
Conwood's Costs ($)							
But-For World	57,581,843	62,552,537	68,599,494	73,728,189	83,470,260	94,274,750	440,207,073
Actual World	51,695,000	54,382,000	58,306,000	59,570,000	64,151,571	69,085,515	357,190,086
Conwood's Profits ($)							
But-For World	77,146,992	94,835,009	107,591,923	113,097,552	131,001,568	151,348,352	675,021,397
Actual World	72,049,000	86,403,000	96,657,000	97,523,000	108,371,438	120,383,072	581,386,510
Conwood's Lost Profits ($)	5,097,992	8,432,009	10,934,923	15,574,552	22,630,130	30,965,280	93,634,887

(a) Scenario one assumes that Conwood's share increased by 5.31 share points between 1990 and 1997 in states with a 1990 share of less than 20 percent.

(b) 1998 and 1999 are projections. Based on the assumptions described in table 4A, Conwood's sales are calculated as projected share multiplied by projected total moist snuff pounds. Conwood's revenues are calculated as projected Conwood sales (pounds) multiplied by projected price per pound. Conwood's costs are calculated as projected Conwood sales multiplied by projected cost per pound. Conwood's profits are calculated as projected revenues less projected costs. Finally, lost profits are calculated as projected But-For World profits less projected Actual World profits.

January 2000

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Table 5B

Conwood's Lost Profits
1994 - 1999
Scenario Two (a)

	1994	1995	1996	1997	1998 (b)	1999 (b)	Total
Total Moist Snuff Sales (Pounds)	49,698,919	50,747,692	52,995,990	53,602,020	55,446,377	57,354,196	319,845,194
Conwood's Sales (Pounds)							
But-For World	6,430,864	6,915,099	7,585,430	8,040,303	8,697,754	9,390,929	47,060,379
Actual World	6,002,873	6,295,480	6,794,702	6,886,084	7,123,023	7,368,114	40,470,276
Conwood's Revenues ($)							
But-For World	129,578,733	150,296,954	167,180,989	176,250,690	201,274,407	229,410,354	1,053,992,137
Actual World	121,744,000	140,785,000	154,963,000	157,093,000	172,523,009	189,468,587	938,576,596
Conwood's Costs ($)							
But-For World	55,380,738	59,734,433	65,091,316	69,554,895	78,333,958	88,051,993	416,147,333
Actual World	51,695,000	54,382,000	58,306,000	59,570,000	64,151,571	69,085,515	357,190,086
Conwood's Profits ($)							
But-For World	74,197,995	90,562,521	102,089,673	106,695,804	122,940,449	141,358,361	637,844,804
Actual World	72,049,000	86,403,000	96,657,000	97,523,000	108,371,438	120,383,072	581,386,510
Conwood's Lost Profits ($)	2,148,995	4,159,521	5,432,673	9,172,804	14,569,011	20,975,289	56,458,294

(a) Scenario two assumes that Conwood's share increased by 4.19 share points between 1990 and 1997 in states with a 1990 share of less than 15 percent.

(b) 1998 and 1999 are projections. Based on the assumptions described in table 4B, Conwood's sales are calculated as projected share multiplied by projected total moist snuff pounds. Conwood's revenues are calculated as projected Conwood sales (pounds) multiplied by projected price per pound. Conwood's costs are calculated as projected Conwood sales multiplied by projected cost per pound. Conwood's profits are calculated as projected revenues less projected costs. Finally, lost profits are calculated as projected But-For World profits less projected Actual World profits.

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Table 6A

Comparison of Actual and But-For World
2000 - 2009
Scenario One (a)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Conwood's Share - % (b):										
But-For World	17.53	17.53	17.53	17.53	17.53	17.53	17.53	17.53	17.53	17.53
Actual World	13.32	13.78	14.25	14.72	15.19	15.66	16.13	16.59	17.06	17.53
Average Price Per Pound - $ (c)										
But-For World	26.07	27.82	29.69	31.68	33.81	36.08	38.50	41.09	43.85	46.79
Actual World	27.30	28.99	30.77	32.67	34.69	36.83	39.10	41.51	44.07	46.79
Incremental Costs Per Pound - $ (d)										
But-For World	9.76	10.16	10.58	11.01	11.47	11.94	12.43	12.94	13.47	14.03
Actual World	9.76	10.16	10.58	11.01	11.47	11.94	12.43	12.94	13.47	14.03

(a) Scenario one assumes that Conwood's But-For World share in 1997 was 15.9 percent.

(b) Conwood's share for the Actual World is projected to grow at a rate of .47% per year in order to reach the But-For World share of 17.53 percent by 2009.

(c) Assuming prices grow at a rate of 6.2 percent per year, as explained in the text, the average price per pound in 2009 would be 46.79. The But-For price in 1999 is assumed to equal 95% of the predicted Actual 1999 price. The But-For price then grows at a rate of 6.72 percent per year in order to equal the Actual price by 2009.

(d) Incremental costs per pound are assumed to grow at the historical (1990-1997) real rate of 2.1% per year, plus the expected future inflation rate of 2% per year, for a total of 4.1% per year.

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Table 6B

Comparison of Actual and But-For World
2000 - 2009
Scenario Two (a)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Conwood's Share - % (b):										
But-For World	16.37	16.37	16.37	16.37	16.37	16.37	16.37	16.37	16.37	16.37
Actual World	13.20	13.55	13.90	14.26	14.61	14.96	15.32	15.67	16.02	16.37
Average Price Per Pound - $ (c)										
But-For World	26.07	27.82	29.69	31.68	33.81	36.08	38.50	41.09	43.85	46.79
Actual World	27.30	28.99	30.77	32.67	34.69	36.83	39.10	41.51	44.07	46.79
Incremental Costs Per Pound - $ (d)										
But-For World	9.76	10.16	10.58	11.01	11.47	11.94	12.43	12.94	13.47	14.03
Actual World	9.76	10.16	10.58	11.01	11.47	11.94	12.43	12.94	13.47	14.03

(a) Scenario two assumes that Conwood's But-For World share in 1997 was 15.0 percent.

(b) Conwood's share for the Actual World is projected to grow at a rate of .35% per year in order to reach the But-For World share of 16.37 percent by 2009.

(c) Assuming prices grow at a rate of 6.2 percent per year, as explained in the text, the average price per pound in 2009 would be 46.79. The But-For price in 1999 is assumed to equal 95% of the predicted Actual 1999 price. The But-For price then grows at a rate of 6.72 percent per year in order to equal the Actual price by 2009.

(d) Incremental costs per pound are assumed to grow at the historical (1990-1997) real rate of 2.1% per year, plus the expected future inflation rate of 2% per year, for a total of 4.1% per year.

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Table 7B

Conwood's Lost Profits
2000 - 2009
Scenario Two (a)

	2000 (b)	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total
Total Moist Snuff Sales (Pounds)	59,327,659	61,369,026	63,480,633	65,664,897	67,924,317	70,261,481	72,679,063	75,179,829	77,766,643	80,442,465	694,096,013
Conwood's Sales (Pounds)											
But-For World	9,714,055	10,048,300	10,394,045	10,751,687	11,121,635	11,504,312	11,900,156	12,309,621	12,733,175	13,171,303	113,648,289
Actual World	7,830,881	8,316,770	8,826,825	9,362,133	9,923,830	10,513,096	11,131,165	11,779,321	12,458,901	13,171,303	103,314,224
Conwood's Revenues ($)											
But-For World	253,239,149	279,543,036	308,579,100	340,631,132	376,012,402	415,068,714	458,181,796	505,773,023	558,307,539	616,298,801	4,111,634,693
Actual World	213,791,107	241,063,732	271,631,340	305,878,095	344,231,842	387,168,977	435,219,859	488,974,814	549,090,801	616,298,801	3,853,349,368
Conwood's Costs ($)											
But-For World	94,824,135	102,117,128	109,971,029	118,428,980	127,537,438	137,346,433	147,909,846	159,285,698	171,536,476	184,729,469	1,353,686,632
Actual World	76,441,452	84,520,231	93,389,528	103,123,155	113,801,598	125,512,615	138,351,872	152,423,642	167,841,565	184,729,469	1,240,135,126
Conwood's Profits ($)											
But-For World	158,415,014	177,425,908	198,608,071	222,202,153	248,474,964	277,722,281	310,271,950	346,487,325	386,771,063	431,569,332	2,757,948,062
Actual World	137,349,655	156,543,502	178,241,812	202,754,941	230,430,244	261,656,361	296,867,987	336,551,172	381,249,236	431,569,332	2,613,214,242
Conwood's Lost Profits ($)	21,065,359	20,882,406	20,366,259	19,447,212	18,044,720	16,065,920	13,403,964	9,936,153	5,521,827	0	144,733,820

(a) Scenario two assumes that Conwood's But-For World share in 1997 was 15.0 percent.

(b) Table 6B describes the growth rate assumptions for 2000 through 2009. Conwood's revenues, costs, profits, and lost profits are calculated as in table 5B.

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Table 9

Present Value as of December 31, 1999 of Conwood's Lost Profits
2000 - 2009
Discount Rate = 10.2 (a)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total
Scenario One (b)	28,182,098	25,319,456	22,361,247	19,371,239	16,293,084	13,150,317	9,946,362	6,684,535	3,368,045	0	144,898,381
Scenario Two (c)	19,115,570	17,195,601	15,218,312	13,188,544	11,103,047	8,970,487	6,791,443	4,568,414	2,303,819	0	98,453,238

(a) The discount rate is calculated in Table 8.

(b) Scenario one assumes that Conwood's But-For share in 1997 was 15.9 percent

(c) Scenario two assumes that Conwood's But-For share in 1997 was 15.0 percent

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Table 7A

Conwood's Lost Profits
2000 - 2009
Scenario One (a)

	2000 (b)	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total
Total Moist Snuff Sales (Pounds)	59,327,659	61,369,026	63,480,633	65,664,897	67,924,317	70,261,481	72,679,063	75,179,829	77,766,643	80,442,465	694,096,013
Conwood's Sales (Pounds):											
But-For World	10,400,561	10,758,427	11,128,607	11,511,524	11,907,616	12,317,338	12,741,157	13,179,559	13,633,046	14,102,137	121,679,972
Actual World	7,899,531	8,458,795	9,047,193	9,666,068	10,316,821	11,000,912	11,719,866	12,475,271	13,268,785	14,102,137	107,955,378
Conwood's Revenues ($)											
But-For World	271,135,912	299,298,730	330,386,613	364,704,008	402,585,720	444,402,197	490,562,140	541,516,705	597,763,908	659,853,493	4,402,209,627
Actual World	215,665,339	245,180,377	278,412,826	315,808,199	357,863,667	405,133,903	458,237,585	517,864,615	584,784,147	659,853,493	4,038,804,150
Conwood's Costs ($)											
But-For World	101,525,489	109,333,887	117,742,834	126,798,520	136,550,685	147,052,897	158,362,840	170,542,640	183,659,197	197,784,557	1,449,353,546
Actual World	77,111,587	85,963,583	95,721,070	106,470,971	118,308,222	131,336,493	145,668,968	161,428,195	178,752,013	197,784,557	1,298,546,659
Conwood's Profits ($):											
But-For World	169,610,423	189,964,843	212,643,979	237,905,487	266,035,035	297,349,300	332,199,300	370,974,065	414,104,711	462,068,936	2,952,856,081
Actual World	138,553,752	159,216,795	182,691,756	209,337,228	239,555,445	273,797,410	312,568,617	356,435,420	406,032,134	462,068,936	2,740,257,492
Conwood's Lost Profits ($)	31,056,672	30,748,049	29,952,223	28,568,259	26,479,590	23,551,891	19,630,683	14,538,645	8,072,577	0	212,598,589

(a) Scenario one assumes that Conwood's But-For World share in 1997 was 15.9 percent.

(b) Table 6A describes the growth rate assumptions for 2000 through 2009. Conwood's revenues, costs, profits, and lost profits are calculated as in table 5A.

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Table 10

Summary of Conwood's Lost Profits

	Lost Profits		
	Past (a)	Future (b)	Total
Scenario One (c)	93,634,887	144,696,381	238,331,268
Scenario Two (d)	56,458,294	98,453,238	154,911,532

(a) Past lost profits are in nominal dollars because prejudgement interest is not included.

(b) Future lost profits are present value as of December 31, 1999.

(c) Scenario one assumes that Conwood's But-For World share in 1997 was 15.9 percent.

(d) Scenario two assumes that Conwood's But-For World share in 1997 was 15.0 percent.

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EXHIBIT C

Table 1

Analysis of the Effect of UST's Bad Acts On Conwood's and UST's Share of Moist Snuff Sales

Based on Professor Scheffman's Methodology and "Definition 1" of UST "Bad Acts"

State	Conwood's Predicted Share			UST's Predicted Share		
	With "Bad Acts"	Without "Bad Acts"	Difference	With "Bad Acts"	Without "Bad Acts"	Difference
AL	8.4	8.6	0.3	80.1	79.8	-0.3
AR	7.0	8.5	1.5	79.2	76.9	-2.3
AZ	5.5	7.0	1.4	88.6	87.0	-1.6
CA	6.0	7.0	1.0	89.5	88.4	-1.0
CO	12.0	13.7	1.7	84.3	83.0	-1.3
CT	16.0	23.9	7.9	81.1	75.6	-5.4
FL	6.5	7.0	0.5	85.0	84.4	-0.7
GA	8.9	9.6	0.7	83.6	82.9	-0.7
IA	13.7	13.8	0.1	76.8	76.7	-0.1
ID	9.1	9.6	0.5	85.4	84.9	-0.5
IL	13.5	15.9	2.4	75.3	73.0	-2.2
IN	15.4	17.7	2.3	73.6	71.5	-2.0
KS	11.2	14.8	3.6	79.1	75.6	-3.5
KY	8.2	8.5	0.3	80.4	80.1	-0.4
LA	9.6	11.1	1.5	76.9	75.0	-1.9
MA	16.3	24.9	8.7	81.9	76.4	-5.5
MD	10.7	11.0	0.3	82.5	82.2	-0.3
ME	15.8	17.1	1.3	72.5	71.3	-1.2
MI	20.2	24.5	4.3	75.0	71.9	-3.1
MN	25.1	28.0	2.9	71.5	69.5	-2.0
MO	13.2	13.9	0.7	72.5	71.8	-0.7
MS	9.4	9.4	0.0	69.3	69.2	-0.1
MT	9.0	13.6	4.6	88.1	84.7	-3.4
NC	12.8	13.2	0.4	79.8	79.4	-0.4
ND	8.0	9.0	1.1	87.6	86.7	-1.0
NE	9.3	12.5	3.1	81.8	78.6	-3.2
NM	3.9	7.0	3.1	91.5	87.9	-3.6
NY	10.5	13.8	3.3	84.2	81.5	-2.8
OH	17.9	19.1	1.2	73.6	72.6	-1.0
OK	8.9	10.9	2.0	73.2	70.5	-2.7
OR	13.2	14.0	0.8	80.5	79.8	-0.7
PA	11.7	13.6	1.9	77.7	75.7	-1.9
SC	13.7	14.1	0.3	78.4	78.1	-0.3
SD	12.0	12.2	0.2	83.5	83.3	-0.2
TN	10.2	10.3	0.1	78.0	77.8	-0.1

Table 1

Analysis of the Effect of UST's Bad Acts
On Conwood's and UST's Share of Moist Snuff Sales

Based on Professor Scheffman's Methodology and "Definition 1" of UST "Bad Acts"

State	Conwood's Predicted Share			UST's Predicted Share		
	With "Bad Acts"	Without "Bad Acts"	Difference	With "Bad Acts"	Without "Bad Acts"	Difference
TX	5.2	6.4	1.2	84.3	82.5	-1.8
UT	15.7	18.7	3.0	80.8	78.6	-2.2
VA	11.1	12.7	1.6	74.9	73.1	-1.8
VT	22.4	30.3	8.0	73.5	68.1	-5.4
WA	22.4	24.2	1.8	73.5	72.2	-1.3
WI	16.4	20.9	4.5	79.0	75.7	-3.3
WV	4.9	5.6	0.7	82.5	81.2	-1.2
TOTAL U.S.	10.9	12.3	1.5	78.7	77.2	-1.5

Note: Based on regression excluding area dummies.

Table 2

Analysis of the Effect of UST's Bad Acts
On Conwood's and UST's Share of Moist Snuff Sales

Based on Professor Scheffman's Methodology and "Definition 2" of UST "Bad Acts"

State	Conwood's Predicted Share			UST's Predicted Share		
	With "Bad Acts"	Without "Bad Acts"	Difference	With "Bad Acts"	Without "Bad Acts"	Difference
AL	8.3	8.8	0.5	80.2	79.7	-0.5
AR	7.3	8.6	1.3	78.6	76.9	-1.7
AZ	5.3	7.0	1.7	88.9	87.0	-1.8
CA	5.6	7.0	1.4	89.8	88.5	-1.3
CO	12.6	13.9	1.4	83.9	83.0	-1.0
CT	16.7	24.1	7.4	80.3	75.6	-4.7
FL	6.3	7.2	0.8	85.2	84.2	-1.0
GA	8.7	9.8	1.2	83.9	82.8	-1.1
IA	14.1	14.1	0.0	76.6	76.6	0.0
ID	8.8	9.8	1.0	85.7	84.9	-0.9
IL	13.8	16.0	2.2	75.0	73.1	-1.9
IN	15.2	17.9	2.7	73.7	71.5	-2.2
KS	11.5	14.9	3.3	78.7	75.7	-3.0
KY	8.0	8.5	0.5	80.8	80.1	-0.6
LA	9.3	11.3	2.0	77.1	74.8	-2.3
MA	17.5	25.3	7.9	80.9	76.3	-4.6
MD	10.5	11.0	0.6	82.9	82.4	-0.5
ME	14.1	17.2	3.1	74.0	71.3	-2.7
MI	20.9	24.9	4.1	74.4	71.8	-2.7
MN	25.0	29.0	4.0	71.6	69.0	-2.6
MO	13.0	14.1	1.1	72.8	71.8	-1.1
MS	9.8	9.8	0.0	68.8	68.8	0.0
MT	9.2	14.1	4.8	87.8	84.5	-3.3
NC	13.1	13.6	0.5	79.6	79.2	-0.4
ND	7.3	9.1	1.8	88.2	86.7	-1.5
NE	10.7	12.5	1.8	80.4	78.7	-1.7
NM	4.6	7.2	2.6	90.5	87.8	-2.7
NY	10.5	14.0	3.5	84.1	81.4	-2.7
OH	18.3	19.5	1.2	73.4	72.4	-0.9
OK	8.1	11.2	3.1	74.4	70.3	-4.0
OR	13.1	14.5	1.4	80.7	79.6	-1.1
PA	11.5	13.9	2.4	77.8	75.5	-2.3
SC	14.1	14.6	0.5	78.1	77.7	-0.4
SD	12.5	12.5	0.0	83.2	83.2	0.0
TN	10.4	10.5	0.1	77.8	77.7	-0.1

Table 2

Analysis of the Effect of UST's Bad Acts
On Conwood's and UST's Share of Moist Snuff Sales

Based on Professor Scheffman's Methodology and "Definition 2" of UST "Bad Acts"

State	Conwood's Predicted Share			UST's Predicted Share		
	With "Bad Acts"	Without "Bad Acts"	Difference	With "Bad Acts"	Without "Bad Acts"	Difference
TX	5.1	6.5	1.4	84.3	82.4	-2.0
UT	15.9	19.3	3.4	80.7	78.4	-2.2
VA	11.4	12.8	1.4	74.6	73.2	-1.4
VT	24.2	31.2	7.0	72.0	67.6	-4.3
WA	22.4	25.3	2.9	73.5	71.7	-1.9
WI	16.2	21.5	5.3	79.0	75.4	-3.6
WV	5.1	5.5	0.4	82.1	81.4	-0.8
TOTAL U.S.	10.8	12.5	1.7	78.7	77.1	-1.6

Note: Based on regression excluding area dummies.

Table 3

Analysis of the Effect of UST's Bad Acts
On Conwood's and UST's Share of Moist Snuff Sales

Based on Professor Scheffman's Methodology and "Definition 3" of UST "Bad Acts"

State	Conwood's Predicted Share			UST's Predicted Share		
	With "Bad Acts"	Without "Bad Acts"	Difference	With "Bad Acts"	Without "Bad Acts"	Difference
AL	8.3	9.2	0.9	80.3	79.3	-1.0
AR	7.2	9.2	2.0	78.7	76.3	-2.4
AZ	5.5	7.3	1.8	88.6	86.9	-1.7
CA	5.8	7.2	1.4	89.7	88.5	-1.2
CO	12.8	14.3	1.5	83.9	83.0	-0.9
CT	19.7	25.4	5.8	78.3	75.1	-3.2
FL	6.4	7.4	1.0	85.2	84.1	-1.0
GA	8.5	10.2	1.7	84.0	82.6	-1.4
IA	12.7	14.7	2.0	77.8	76.3	-1.6
ID	7.5	10.3	2.8	86.9	84.7	-2.2
IL	13.0	16.5	3.5	75.7	73.0	-2.7
IN	15.8	18.8	3.0	73.2	71.0	-2.2
KS	12.0	15.4	3.5	78.3	75.6	-2.7
KY	8.1	9.3	1.2	80.5	79.3	-1.2
LA	9.3	11.9	2.5	77.0	74.5	-2.5
MA	20.4	26.4	6.0	79.1	76.0	-3.1
MD	9.8	11.4	1.6	83.6	82.3	-1.2
ME	14.8	18.3	3.5	73.4	70.8	-2.6
MI	20.3	25.6	5.4	74.8	71.7	-3.1
MN	25.6	29.8	4.3	71.2	68.8	-2.4
MO	12.9	15.0	2.0	72.9	71.2	-1.8
MS	9.6	10.0	0.5	69.2	68.7	-0.6
MT	10.7	14.5	3.8	86.7	84.5	-2.2
NC	12.7	14.2	1.4	79.9	78.9	-1.0
ND	7.0	9.6	2.6	88.4	86.4	-2.0
NE	11.3	13.1	1.8	79.9	78.5	-1.5
NM	5.3	7.3	2.0	89.6	87.8	-1.8
NY	10.8	14.5	3.7	83.8	81.3	-2.5
OH	18.1	20.1	2.0	73.6	72.2	-1.4
OK	8.5	11.5	3.0	73.8	70.3	-3.5
OR	11.9	15.2	3.3	81.6	79.3	-2.3
PA	11.8	14.7	2.9	77.5	75.1	-2.4
SC	14.3	15.1	0.8	78.1	77.5	-0.6
SD	9.6	12.9	3.4	85.4	83.1	-2.4
TN	10.2	11.2	1.1	78.1	77.1	-1.0

Table 3

Analysis of the Effect of UST's Bad Acts
On Conwood's and UST's Share of Moist Snuff Sales

Based on Professor Scheffman's Methodology and "Definition 3" of UST "Bad Acts"

State	Conwood's Predicted Share			UST's Predicted Share		
	With "Bad Acts"	Without "Bad Acts"	Difference	With "Bad Acts"	Without "Bad Acts"	Difference
TX	5.2	6.7	1.4	84.2	82.3	-1.8
UT	17.0	19.5	2.5	80.1	78.6	-1.5
VA	11.2	13.3	2.1	74.8	72.9	-1.9
VT	27.3	32.5	5.3	69.9	67.1	-2.9
WA	21.0	25.8	4.7	74.4	71.7	-2.8
WI	16.9	22.1	5.2	78.4	75.3	-3.1
WV	5.0	6.1	1.1	82.2	80.6	-1.7
TOTAL U.S.	10.9	13.1	2.2	78.7	76.8	-1.9

Note: Based on regression excluding area dummies.

EXHIBIT D

Table 1-2

Conwood's Share of U.S. Moist Snuff in Pounds by State
Ranked by Share in 1990
1990 and 1997

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

State	Share (%)		Difference (%)
	1990	1997	
MAINE	24.2	30.3	6.1
MICHIGAN	24.0	36.2	12.1
NEW HAMPSHIRE	21.5	26.9	5.5
OREGON	18.9	25.7	6.8
ILLINOIS	18.0	22.6	4.7
MASSACHUSETTS	17.6	32.6	15.0
KENTUCKY	17.6	20.4	2.9
WISCONSIN	17.2	33.0	15.8
SOUTH CAROLINA	17.1	23.5	6.4
WASHINGTON	16.7	24.2	7.4
INDIANA	16.0	23.8	7.8
MINNESOTA	15.4	32.1	16.6
OHIO	15.3	20.4	5.0
MISSOURI	15.0	15.2	0.2
DELAWARE	14.8	18.8	4.0
VERMONT	14.0	25.0	11.0
VIRGINIA	12.4	16.2	3.8
NEW JERSEY	12.3	18.9	6.6
NEW YORK	12.2	20.5	8.3
NORTH CAROLINA	11.9	16.4	4.4
MARYLAND	10.4	15.4	5.0
LOUISIANA	10.3	10.7	0.4
GEORGIA	10.3	13.6	3.3
TENNESSEE	9.9	10.5	0.6
IOWA	9.9	12.4	2.5
CONNECTICUT	9.8	24.3	14.5
KANSAS	9.7	11.3	1.6

Table 1-2

Conwood's Share of U.S. Moist Snuff in Pounds by State
Ranked by Share in 1990
1990 and 1997

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

State	Share (%) 1990	Share (%) 1997	Difference (%)
NEBRASKA	8.5	9.8	1.3
ALABAMA	7.7	8.6	0.9
CALIFORNIA	7.7	10.7	3.0
ARKANSAS	7.6	9.5	1.9
MISSISSIPPI	7.4	8.1	0.7
DISTRICT OF COLUMBIA	7.2	17.6	10.3
COLORADO	7.0	9.3	2.3
FLORIDA	6.3	8.5	2.2
SOUTH DAKOTA	5.8	7.0	1.2
NORTH DAKOTA	5.8	12.0	6.2
PENNSYLVANIA	5.3	9.9	4.5
IDAHO	5.3	9.6	4.4
ARIZONA	5.2	8.0	2.7
MONTANA	5.1	10.2	5.1
WEST VIRGINIA	5.0	5.5	0.5
OKLAHOMA	4.9	8.2	3.4
UTAH	4.6	8.7	4.1
NEVADA	4.5	5.7	1.2
TEXAS	4.5	6.2	1.7
NEW MEXICO	3.0	5.6	2.6
WYOMING	2.4	2.0	-0.3
RHODE ISLAND	1.4	15.2	13.7
U.S.	**10.2**	**14.3**	**4.2**

Source: Conwood summaries of Peat Marwick Reports, as attached to a fax addressed to Chip Bamberger from Edward Foster dated July 23, 1999. 1997 total moist snuff sales in pounds were faxed directly from Peat Marwick on December 9, 1999 to Deborah Dobrusin.

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Table 2-2

Summary of Regression Results

1997 Share Adjusted Using Scheffman-type Analysis
Bad Acts Measure 2
(t-statistic in parentheses)

Intercept	0.02 (1.44)
1990 Share (b)	0.31 (3.06)
Adjusted R^2	0.1481
F Statistic	9.347

(a) The dependent variable is equal to the 1997 share, adjusted using Scheffman-type analysis, minus the 1990 share.

(b) 1990 Share is equal to Conwood's sales of moist snuff, in pounds, divided by total U.S. sales, in pounds.

Table 3-2

Conwood's Share of Moist Snuff Sales in the But-For World, By State Ranked by Share (in Pounds) in 1990

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

State	1990 (%)	Conwood's But-For World 1997 Share (%)	
		Scenario One (a)	Scenario Two (b)
MAINE	24.2	27.2	27.2
MICHIGAN	24.0	32.1	32.1
NEW HAMPSHIRE	21.5	26.9	26.9
OREGON	18.9	26.9	24.3
ILLINOIS	18.0	26.0	20.4
MASSACHUSETTS	17.6	25.6	24.7
KENTUCKY	17.6	25.6	19.9
WISCONSIN	17.2	25.3	27.7
SOUTH CAROLINA	17.1	25.2	23.0
WASHINGTON	16.7	24.8	21.3
INDIANA	16.0	24.1	21.1
MINNESOTA	15.4	23.5	28.1
OHIO	15.3	23.4	19.2
MISSOURI	15.0	23.1	21.5
DELAWARE	14.8	22.9	21.3
VERMONT	14.0	22.0	20.5
VIRGINIA	12.4	20.5	18.9
NEW JERSEY	12.3	20.4	18.8
NEW YORK	12.2	20.3	18.7
NORTH CAROLINA	11.9	20.0	18.4
MARYLAND	10.4	18.4	16.9
LOUISIANA	10.3	18.3	16.8
GEORGIA	10.3	18.3	16.7
TENNESSEE	9.9	18.0	16.4
IOWA	9.9	17.9	16.4
CONNECTICUT	9.8	17.8	16.3
KANSAS	9.7	17.7	16.2
NEBRASKA	8.5	16.6	15.0
ALABAMA	7.7	15.8	14.2
CALIFORNIA	7.7	15.7	14.2
ARKANSAS	7.6	15.7	14.1
MISSISSIPPI	7.4	15.5	13.9
DISTRICT OF COLUMBIA	7.2	15.3	13.7
COLORADO	7.0	15.1	13.5
FLORIDA	6.3	14.3	12.8

Table 3-2

Conwood's Share of Moist Snuff Sales in the But-For World, By State Ranked by Share (in Pounds) in 1990

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

State	1990 (%)	Conwood's But-For World 1997 Share (%)	
		Scenario One (a)	Scenario Two (b)
SOUTH DAKOTA	5.8	13.8	12.3
NORTH DAKOTA	5.8	13.8	12.2
PENNSYLVANIA	5.3	13.4	11.8
IDAHO	5.3	13.3	11.8
ARIZONA	5.2	13.3	11.7
MONTANA	5.1	13.2	11.6
WEST VIRGINIA	5.0	13.1	11.5
OKLAHOMA	4.9	12.9	11.4
UTAH	4.6	12.7	11.1
NEVADA	4.5	12.6	11.0
TEXAS	4.5	12.5	10.9
NEW MEXICO	3.0	11.1	9.5
WYOMING	2.4	10.4	8.8
RHODE ISLAND	1.4	9.5	7.9
U.S.	10.2	**18.6**	**16.7**

(a) Scenario one assumes that Conwood's share increased by 8.06 share points between 1990 and 1997 in states with a 1990 share of less than or equal to 20 percent.

(b) Scenario two assumes that Conwood's share increased by 6.49 share points between 1990 and 1997 in states with a 1990 share of less than or equal to 15 percent.

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Table -A-2

Comparison of Actual and But-For World
1994 - 1999
Scenario One (a)

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

	1994	1995	1996	1997	1998 (e)	1999 (e)
Conwood's Share (b)						
But-For World (%)	14.99	16.19	17.39	18.59	19.79	20.99
Actual World (%)	12.08	12.41	12.82	12.85	12.85	12.85
Average Price Per Pound (c)						
But-For World ($)	20.15	21.73	22.04	21.92	23.14	24.43
Actual World ($)	20.61	22.36	22.81	22.81	24.22	25.71
Incremental Costs Per Pound (d)						
But-For World ($)	8.61	8.64	8.58	8.65	9.01	9.38
Actual World ($)	8.61	8.64	8.58	8.65	9.01	9.38

(a) Scenario one assumes that Conwood's share increased by 8.06 share points between 1990 and 1997 in states with a 1990 share of less than 15 percent.

(b) Conwood's share is calculated using Conwood's summary of Peat Marwick Reports, as attached to a fax addressed to Chip Bamberger from Edward Foster dated July 23, 1999. 1997 loal moist snuff sales in pounds were faxed directly from Peat Marwick on December 9, 1999 to Deborah Dobrusin.

(c) Average price per pound is calculated using Conwood financial statements titled, using 1996 as an example: "Conwood Company, L.P., Moist Snuff Division, Period Ending December 31, 1996, Actual Vs. Planned Statement of Operations." Average price per pound is equal to Net Sales divided by Conwood's moist snuff sales in pounds (as taken from the source in (b)).

(d) Incremental costs per pound comes from the same source as described in (c). The costs are calculated as Net Sales minus Operating Profit, divided by Conwood's moist snuff sales in pounds (as taken from the source described in footnote (b)).

(e) 1998 and 1999 figures are projections. Conwood's But-For share is projected to grow at 1.2% a year, based on actual 1990 to 1997 growth. Conwood's Actual share is projected to equal 1997 share. Average price per pound is projected to grow at 7.0% for the Actual and 6.42% for the But-For Worlds (based on historical real growth of 6.2% per year, allowing But-For price to equal 95% of Actual price by 1999).

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Table 3-2

Comparison of Actual and But-For World
1994 - 1999
Scenario Two (a)

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

	1994	1995	1996	1997	1998 (e)	1999 (e)
Conwood's Share (b)						
But-For World (%)	13.92	14.85	15.78	16.71	17.64	18.57
Actual World (%)	12.08	12.41	12.82	12.85	12.85	12.85
Average Price Per Pound (c)						
But-For World ($)	20.15	21.73	22.04	21.92	23.14	24.43
Actual World ($)	20.61	22.36	22.81	22.81	24.22	25.71
Incremental Costs Per Pound (d)						
But-For World ($)	8.61	8.64	8.58	8.65	9.01	9.38
Actual World ($)	8.61	8.64	8.58	8.65	9.01	9.38

(a) Scenario two assumes that Conwood's share increased by 6.49 share points between 1990 and 1997 in states with a 1990 share of less than 20 percent.

(b) Conwood's share is calculated using Conwood's summary of Peat Marwick Reports, as attached to a fax addressed to Chip Bamberger from Edward Foster dated July 23, 1999. 1997 total moist snuff sales in pounds were faxed directly by Peat Marwick on December 9, 1999 to Deborah Dobrusin.

(c) Average price per pound is calculated using Conwood financial statements titled, using 1996 as an example: "Conwood Company, L.P., Moist Snuff Division, Period Ending December 31, 1996, Actual Vs. Planned Statement of Operations." Average price per pound is equal to Net Sales divided by Conwood's moist snuff sales in pounds (as taken from the source in (b)).

(d) Incremental costs per pound comes from the same source as described in (c). The costs are calculated as Net Sales minus Operating Profit, divided by Conwood's moist snuff sales in pounds (as taken from the source described in footnote (b)).

(e) 1998 and 1999 figures are projections. Conwood's But-For share is projected to grow at .93% a year, based on actual 1990 to 1997 growth. Conwood's Actual share is projected to equal 1997 share. Average price per pound is projected to grow at 7.0% for the Actual and 6.42% for the But-For Worlds (based on historical growth of 6.2% per year, but allowing But-For priceto equal 95% of Actual price by 1999).

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Table 5A-2

Conwood's Lost Profits
1994 - 1999
Scenario One (a)

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

	1994	1995	1996	1997	1998 (b)	1999 (b)	Total
Total Moist Snuff Sales (Pounds)	49,698,919	50,747,692	52,995,990	53,602,020	55,446,377	57,354,196	319,845,194
Conwood's Sales (Pounds)							
But-For World	7,450,402	8,216,415	9,216,193	9,964,616	10,972,639	12,038,235	57,858,499
Actual World	6,002,873	6,295,480	6,794,702	6,886,084	7,123,023	7,368,114	40,470,276
Conwood's Revenues ($)							
But-For World	150,121,916	178,560,540	203,122,584	218,433,366	253,917,454	294,081,206	1,298,257,066
Actual World	123,744,000	140,785,000	154,963,000	157,093,000	172,523,009	189,468,587	938,576,596
Conwood's Costs ($)							
But-For World	64,160,702	70,975,539	79,085,047	86,201,700	98,822,098	112,873,878	512,118,963
Actual World	51,695,000	54,382,000	58,306,000	59,570,000	64,151,571	69,085,515	357,190,086
Conwood's Profits ($)							
But-For World	85,961,214	107,605,001	124,037,537	132,231,666	155,095,356	181,207,328	786,138,103
Actual World	72,049,000	86,403,000	96,657,000	97,523,000	108,371,438	120,383,072	581,386,510
Conwood's Lost Profits ($)	13,912,214	21,202,001	27,380,537	34,708,666	46,723,918	60,824,255	204,751,593

(a) Scenario one assumes that Conwood's share increased by 8.06 share points between 1990 and 1997 in states with a 1990 share of less than 20 percent.

(b) 1998 and 1999 are projections. Based on the assumptions described in table 4A-2, Conwood's sales are calculated as projected share multiplied by projected total moist snuff pounds. Conwood's revenues are calculated as projected Conwood sales (pounds) multiplied by projected price per pound. Conwood's costs are calculated as projected Conwood sales multiplied by projected cost per pound. Conwood's profits are calculated as projected revenues less projected costs. Finally, lost profits are calculated as projected But-For World profits less projected Actual World profits.

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Table 5B-2

Conwood's Lost Profits
1994 - 1999
Scenario Two (a)

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

	1994	1995	1996	1997	1998 (b)	1999 (b)	Total
Total Moist Snuff Sales (Pounds)	49,698,919	50,747,692	52,995,990	53,602,020	55,446,377	57,354,196	319,845,194
Conwood's Sales (Pounds)							
But For World	6,916,494	7,534,946	8,362,200	8,956,898	9,781,334	10,651,902	52,203,774
Actual World	6,002,873	6,295,480	6,794,702	6,886,084	7,123,023	7,368,114	40,470,276
Conwood's Revenues ($)							
But For World	139,363,926	163,769,080	184,300,802	196,343,279	226,349,507	260,214,576	1,170,341,170
Actual World	123,744,000	140,785,000	154,963,000	157,093,000	172,523,009	189,468,587	938,576,596
Conwood's Costs ($)							
But-For World	59,562,838	65,088,831	71,756,854	77,484,153	88,092,933	99,875,231	461,860,839
Actual World	51,695,000	54,382,000	58,306,000	59,570,000	64,151,571	69,085,515	357,190,086
Conwood's Profits ($):							
But-For World	79,801,088	98,680,249	112,543,948	118,859,126	138,256,575	160,339,345	708,480,330
Actual World	72,049,000	86,403,000	96,657,000	97,523,000	108,371,438	120,383,072	581,386,510
Conwood's Lost Profits ($)	7,752,088	12,277,249	15,886,948	21,336,126	29,885,137	39,956,273	127,093,820

(a) Scenario two assumes that Conwood's share increased by 6.49 share points between 1990 and 1997 in states with a 1990 share of less than 15 percent.

(b) 1998 and 1999 are projections. Based on the assumptions described in table 4B-2, Conwood's sales are calculated as projected share multiplied by projected total moist snuff pounds. Conwood's revenues are calculated as projected Conwood sales (pounds) multiplied by projected price per pound. Conwood's costs are calculated as projected Conwood sales mulliplied by projected cost per pound. Conwood's profits are calculated as projected revenues less projected costs. Finally, lost profits are calculated as projected But-For World profits less projected Actual World profits.

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Table 6A-2

Comparison of Actual and But-For World
2000 - 2009
Scenario One (a)

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Conwood's Share - % (b):										
But-For World	20.99	20.99	20.99	20.99	20.99	20.99	20.99	20.99	20.99	20.99
Actual World	13.66	14.48	15.29	16.10	16.92	17.73	18.55	19.36	20.18	20.99
Average Price Per Pound - $ (c)										
But For World	26.07	27.82	29.69	31.68	33.81	36.08	38.50	41.09	43.85	46.79
Actual World	27.30	28.99	30.77	32.67	34.69	36.83	39.10	41.51	44.07	46.79
Incremental Costs Per Pound - $ (d)										
But-For World	9.76	10.16	10.58	11.01	11.47	11.94	12.43	12.94	13.47	14.03
Actual World	9.76	10.16	10.58	11.01	11.47	11.94	12.43	12.94	13.47	14.03

(a) Scenario one assumes that Conwood's But-For World share in 1997 was 18.6 percent.

(b) Conwood's share for the Actual World is projected to grow at a rate of .81% per year in order to reach the But-For World share of 20.99 percent by 2009.

(c) Assuming prices grow at a rate of 6.2 percent per year, as explained in the text, the average price per pound in 2009 would be 46.79. The But-For price in 1999 is assumed to equal 95% of the predicted Actual price. The But-For price then grows at a rate of 6.72 percent per year in order to equal the Actual price by 2009.

(d) Incremental costs per pound are assumed to grow at the historical (1990-1997) real rate of 2.1% per year, plus the expected future inflation rate of 2% per year, for a total of 4.1% per year.

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Table 6B-2

Comparison of Actual and But-For World
2000 - 2009
Scenario Two (a)

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Conwood's Share - % (b):										
But-For World	18.57	18.57	18.57	18.57	18.57	18.57	18.57	18.57	18.57	18.57
Actual World	13.42	13.99	14.56	15.14	15.71	16.28	16.85	17.43	18.00	18.57
Average Price Per Pound - $ (c)										
But For World	26.07	27.82	29.69	31.68	33.81	36.08	38.50	41.09	43.85	46.79
Actual World	27.30	28.99	30.77	32.67	34.69	36.83	39.10	41.51	44.07	46.79
Incremental Costs Per Pound - $ (d)										
But-For World	9.76	10.16	10.58	11.01	11.47	11.94	12.43	12.94	13.47	14.03
Actual World	9.76	10.16	10.58	11.01	11.47	11.94	12.43	12.94	13.47	14.03

(a) Scenario two assumes that Conwood's But-For World share in 1997 was 16.7 percent.

(b) Conwood's share for the Actual World is projected to grow at a rate of .57% per year in order to reach the But-For World share of 18.57 percent by 2009.

(c) Assuming prices grow at a rate of 6.2 percent per year, as explained in the text, the average price per pound in 2009 would be 46.79. The But-For price in 1999 is assumed to equal 95% of the predicted Actual price in 1999. The But-For price then grows at a rate of 6.72 percent per year in order to equal the Actual price by 2009.

(d) Incremental costs per pound are assumed to grow at the historical (1990-1997) rate of 2.1% per year, plus the expected future inflation rate of 2% per year, for a total of 4.1% per year.

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Table 7A-2

Conwood's Lost Profits
2000 - 2009
Scenario One (a)

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

2000 (b)	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total
59,327,659	61,369,026	63,480,633	65,664,897	67,924,317	70,261,481	72,679,063	75,179,829	77,766,643	80,442,465	694,096,013
12,452,450	12,880,919	13,324,130	13,782,591	14,256,827	14,747,381	15,254,814	15,779,707	16,322,661	16,884,297	145,685,778
8,104,720	8,883,293	9,705,850	10,574,495	11,491,426	12,458,938	13,479,426	14,555,389	15,689,439	16,884,297	121,827,273
324,627,346	358,346,306	395,567,646	436,655,157	482,010,417	532,076,717	587,343,390	648,350,599	715,694,611	790,033,629	5,270,705,817
221,267,208	257,484,572	298,681,934	345,488,176	398,607,676	458,829,071	527,035,010	604,213,021	691,467,594	790,033,629	4,593,107,889
121,555,089	130,903,978	140,971,897	151,814,147	163,490,282	176,064,436	189,605,679	204,188,387	219,892,663	236,804,765	1,735,291,322
79,114,547	90,277,601	102,689,788	116,477,221	131,778,020	148,743,417	167,538,955	188,345,793	211,362,133	236,804,765	1,473,132,240
203,072,257	227,442,328	254,595,749	284,841,010	318,520,135	356,012,280	397,737,712	444,162,212	495,801,949	553,228,864	3,535,414,495
142,152,661	167,206,971	195,992,145	229,010,955	266,829,656	310,085,653	359,496,055	415,867,228	480,105,461	553,228,864	3,119,975,649
60,919,596	60,235,357	58,603,604	55,830,055	51,690,479	45,926,627	38,241,656	28,294,984	15,696,488	0	415,438,845

hat Conwood's But-For World share in 1997 was 18.6 percent.

e growth rate assumptions for 2000 through 2009. Conwood's revenues, costs, profits, and lost profits are calculated as in

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Table 7B-2

Conwood's Lost Profits
2000 - 2009
Scenario Two (a)

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

2000 (b)	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total
59,327,659	61,369,026	63,480,633	65,664,897	67,924,317	70,261,481	72,679,063	75,179,829	77,766,643	80,442,465	694,096,013
11,018,416	11,397,542	11,789,712	12,195,377	12,615,000	13,049,061	13,498,058	13,962,503	14,442,930	14,939,888	128,908,486
7,961,317	8,586,618	9,245,525	9,939,609	10,670,512	11,439,946	12,249,696	13,101,626	13,997,681	14,939,888	112,132,417
287,242,998	317,078,855	350,013,755	386,369,595	426,501,707	470,802,331	519,704,450	573,686,019	633,274,640	699,052,716	4,663,727,067
217,352,147	248,885,358	284,516,163	324,745,292	370,132,309	421,302,336	478,953,538	543,865,436	616,908,159	699,052,716	4,205,713,455
107,556,707	115,828,970	124,737,459	134,331,107	144,662,608	155,788,713	167,770,535	180,673,887	194,569,645	209,534,136	1,535,453,769
77,714,709	87,262,599	97,819,457	109,484,005	122,364,184	136,577,983	152,254,354	169,534,193	188,571,417	209,534,136	1,351,117,038
179,686,291	201,249,885	225,276,296	252,038,489	281,839,099	315,013,618	351,933,915	393,012,132	438,704,995	489,518,580	3,128,273,299
139,637,438	161,622,759	186,696,706	215,261,287	247,768,125	284,724,353	326,699,184	374,331,243	428,336,742	489,518,580	2,854,596,417
40,048,853	39,627,127	38,579,590	36,777,202	34,070,973	30,289,265	25,234,731	18,680,888	10,368,253	0	273,676,882

nat Conwood's But-For World share in 1997 was 16.7 percent.

e growth rate assumptions for 2000 through 2009. Conwood's revenues, costs, profits, and lost profits are calculated as in

16diii004010

Table 9-2

Present Value as of December 31, 1999 of Conwood's Lost Profits
2000 - 2009
Discount Rate = 10.2 (a)

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

	2001	2002	2003	2004	2005	2006	2007	2008	2009	Total
0	49,600,756	43,790,463	37,856,606	31,805,526	25,643,363	19,376,063	13,009,383	6,548,897	0	282,911,997
'2	32,630,926	28,827,888	24,937,465	20,964,117	16,912,163	12,785,789	8,589,043	4,325,848	0	186,315,210

ılated in Table 8.

ıat Conwood's But-For share in 1997 was 18 6 percent

ıat Conwood's But-For share in 1997 was 16.7 percent

16diii004011

Table 10-2

Summary of Conwood's Lost Profits

1997 Share Adjusted Using Scheffman-Type Analysis
(Bad Acts Measure 2)

	Lost Profits		
	Past (a)	Future (b)	Total
Scenario One (c)	204,751,593	282,911,997	487,663,590
Scenario Two (d)	127,093,820	186,315,210	313,409,030

(a) Past lost profits are in nominal dollars because prejudgement interest is not included.

(b) Future lost profits are present value as of December 31, 1999.

(c) Scenario one assumes that Conwood's But-For World share in 1997 was 18.6 percent.

(d) Scenario two assumes that Conwood's But-For World share in 1997 was 16.7 percent.

January 2000

EXHIBIT E

Exhibit E

First Difference in Moist Snuff Share 1997 - 1990

Model: MODEL1

Dependent Variable: DIFF9790 Change in Share 1990-1997

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	1	0.00791	0.00791	7.168	0.0102
Error	47	0.05187	0.00110		
C Total	48	0.05978			

Root MSE	0.03322	R-square	0.1323
Dep Mean	0.03234	Adj R-sq	0.1139
C.V.	102.72571		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > |T|	Variable Label
INTERCEP	1	0.008477	0.01009767	0.840	0.4054	Intercept
SHARE90	1	0.222902	0.08325627	2.677	0.0102	Share 1990

Source: Peat Marwick Data.

16diii004014

Exhibit E
First Difference in Moist Snuff Share 1997 - 1990
1997 Share Adjusted Using Scheffman-Type Analysis
Bad Acts Measure 1

l: MODEL1
ndent Variable: DIF9790A Change in Share 1990-1997, Adjusted

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	1	0.01609	0.01609	10.007	0.0027
Error	47	0.07557	0.00161		
C Total	48	0.09166			

Root MSE	0.04010	R-square	0.1755
Dep Mean	0.04622	Adj R-sq	0.1580
C.V.	86.76287		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > |T|	Variable Label
INTERCEP	1	0.012186	0.01218831	1.000	0.3225	Intercept
SHARE90	1	0.317894	0.10049384	3.163	0.0027	Share 1990

Source: Peat Marwick Data & Scheffman Data.

Exhibit E
First Difference in Moist Snuff Share 1997 - 1990
1997 Share Adjusted Using Scheffman-Type Analysis
Bad Acts Measure 1, Excluding Scheffman Area Indicators

l: MODEL1
ependent Variable: DF9790A2 Change in Share 1990-1997, Adjusted

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	1	0.01401	0.01401	8.234	0.0061
Error	47	0.07994	0.00170		
C Total	48	0.09395			

Root MSE	0.04124	R-square	0.1491
Dep Mean	0.05005	Adj R-sq	0.1310
C.V.	82.39594		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > |T|	Variable Label
INTERCEP	1	0.018304	0.01253574	1.460	0.1509	Intercept
SHARE90	1	0.296583	0.10335842	2.869	0.0061	Share 1990

Source: Peat Marwick Data & Scheffman Data.

16diii004016

Exhibit E
First Difference in Moist Snuff Share 1997 - 1990
1997 Share Adjusted Using Scheffman-Type Analysis
Bad Acts Measure 2

el: MODEL1
pendent Variable: DIF9790B Change in Share 1990-1997, Adjusted

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	1	0.01762	0.01762	11.189	0.0016
Error	47	0.07401	0.00157		
C Total	48	0.09162			

Root MSE	0.03968	R-square	0.1923
Dep Mean	0.04699	Adj R-sq	0.1751
C.V.	84.44036		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > |T|	Variable Label
INTERCEP	1	0.011382	0.01206109	0.944	0.3502	Intercept
SHARE90	1	0.332646	0.09944489	3.345	0.0016	Share 1990

Source: Peat Marwick Data & Scheffman Data.

Exhibit E
First Difference in Moist Snuff Share 1997 - 1990
1997 Share Adjusted Using Scheffman-Type Analysis
Bad Acts Measure 2, Excluding Scheffman Area Indicators

Model: MODEL1
Dependent Variable: DF979082 Change in Share 1990-1997, Adjusted

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	1	0.01562	0.01562	9.347	0.0037
Error	47	0.07854	0.00167		
C Total	48	0.09416			

Root MSE	0.04088	R-square	0.1659
Dep Mean	0.05146	Adj R-sq	0.1481
C.V.	79.43450		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > |T|	Variable Label
INTERCEP	1	0.017932	0.01242518	1.443	0.1556	Intercept
SHARE90	1	0.313212	0.10244681	3.057	0.0037	Share 1990

Source: Peat Marwick Data & Scheffman Data.

Exhibit E
First Difference in Moist Snuff Share 1997 - 1990
1997 Share Adjusted Using Scheffman-Type Analysis
Bad Acts Measure 3

Model: MODEL1
Dependent Variable: DIF9790C Change in Share 1990-1997, Adjusted

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	1	0.02718	0.02718	16.641	0.0002
Error	47	0.07678	0.00163		
C Total	48	0.10396			

Root MSE	0.04042	R-square	0.2615
Dep Mean	0.05724	Adj R-sq	0.2458
C.V.	70.61236		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > |T|	Variable Label
INTERCEP	1	0.013004	0.01228480	1.059	0.2952	Intercept
SHARE90	1	0.413189	0.10128938	4.079	0.0002	Share 1990

Source: Peat Marwick Data & Scheffman Data.

Exhibit E
First Difference in Moist Snuff Share 1997 - 1990
1997 Share Adjusted Using Scheffman-Type Analysis
Bad Acts Measure 2, Excluding Scheffman Area Indicators

Model: MODEL1
Dependent Variable: DF9790C2 Change in Share 1990-1997, Adjusted

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	1	0.01753	0.01753	12.216	0.0010
Error	47	0.06744	0.00143		
C Total	48	0.08496			

Root MSE	0.03788	R-square	0.2063
Dep Mean	0.05520	Adj R-sq	0.1894
C.V.	68.62459		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > |T|	Variable Label
INTERCEP	1	0.019678	0.01151329	1.709	0.0940	Intercept
SHARE90	1	0.331783	0.09492821	3.495	0.0010	Share 1990

Source: Peat Marwick Data & Scheffman Data.

Exhibit E
First Difference in Moist Snuff Share 1997 - 1990
1997 Share Adjusted Using Scheffman-Type Analysis
Bad Acts Measure 1, Including Census Regions

l: MODEL1
ndent Variable: DIF9790A Change in Share 1990-1997, Adjusted

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	4	0.03224	0.00806	5.969	0.0006
Error	44	0.05942	0.00135		
C Total	48	0.09166			

Root MSE	0.03675	R-square	0.3518
Dep Mean	0.04622	Adj R-sq	0.2928
C.V.	79.51320		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > |T|	Variable Label
INTERCEP	1	0.006696	0.01329923	0.503	0.6171	Intercept
SHARE90	1	0.213884	0.10154835	2.106	0.0409	Share 1990
WEST	1	0.006172	0.01442868	0.428	0.6709	West Region Dummy
MIDWEST	1	0.022954	0.01434607	1.600	0.1168	Midwest Region Dummy
NORTH	1	0.052363	0.01554280	3.369	0.0016	North Region Dummy

Source: Peat Marwick Data & Scheffman Data.

Exhibit E
First Difference in Moist Snuff Share 1997 - 1990
1997 Share Adjusted Using Scheffman-Type Analysis
Bad Acts Measure 1, Excluding Scheffman Area Indicators
Including Census Regions

el: MODEL1
Dependent Variable: DF9790A2 Change in Share 1990-1997, Adjusted

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	4	0.03435	0.00859	6.340	0.0004
Error	44	0.05960	0.00135		
C Total	48	0.09395			

Root MSE	0.03680	R-square	0.3656
Dep Mean	0.05005	Adj R-sq	0.3080
C.V.	73.52714		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > |T|	Variable Label
INTERCEP	1	0.011376	0.01331894	0.854	0.3977	Intercept
SHARE90	1	0.182680	0.10169881	1.796	0.0793	Share 1990
WEST	1	0.008501	0.01445006	0.588	0.5594	West Region Dummy
MIDWEST	1	0.025949	0.01436732	1.806	0.0777	Midwest Region Dummy
NORTH	1	0.059117	0.01556583	3.798	0.0004	North Region Dummy

Source: Peat Marwick Data & Scheffman Data.

Exhibit E
First Difference in Moist Snuff Share 1997 - 1990
1997 Share Adjusted Using Scheffman-Type Analysis
Bad Acts Measure 2, Including Census Regions

el: MODEL1
pendent Variable: DIF9790B Change in Share 1990-1997, Adjusted

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	4	0.03206	0.00802	5.921	0.0007
Error	44	0.05956	0.00135		
C Total	48	0.09162			

Root MSE	0.03679	R-square	0.3499
Dep Mean	0.04699	Adj R-sq	0.2908
C.V.	78.29381		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > |T|	Variable Label
INTERCEP	1	0.005400	0.01331501	0.406	0.6870	Intercept
SHARE90	1	0.237503	0.10166885	2.336	0.0241	Share 1990
WEST	1	0.007467	0.01444580	0.517	0.6078	West Region Dummy
MIDWEST	1	0.021755	0.01436309	1.515	0.1370	Midwest Region Dummy
NORTH	1	0.049887	0.01556124	3.206	0.0025	North Region Dummy

Source: Peat Marwick Data & Scheffman Data.

Exhibit E
First Difference in Moist Snuff Share 1997 - 1990
1997 Share Adjusted Using Scheffman-Type Analysis
Bad Acts Measure 2, Excluding Scheffman Area Indicators
Including Census Regions

el: MODEL1
Dependent Variable: DF979082 Change in Share 1990-1997, Adjusted

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	4	0.03407	0.00852	6.237	0.0005
Error	44	0.06009	0.00137		
C Total	48	0.09416			

Root MSE	0.03696	R-square	0.3618
Dep Mean	0.05146	Adj R-sq	0.3038
C.V.	71.81015		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > |T|	Variable Label
INTERCEP	1	0.010480	0.01337386	0.784	0.4375	Intercept
SHARE90	1	0.209451	0.10211822	2.051	0.0462	Share 1990
WEST	1	0.009894	0.01450965	0.682	0.4989	West Region Dummy
MIDWEST	1	0.024180	0.01442658	1.676	0.1008	Midwest Region Dummy
NORTH	1	0.056717	0.01563002	3.629	0.0007	North Region Dummy

Source: Peat Marwick Data & Scheffman Data.

Exhibit E
First Difference in Moist Snuff Share 1997 - 1990
1997 Share Adjusted Using Scheffman-Type Analysis
Bad Acts Measure 3, Including Census Regions

L: MODEL1
Dependent Variable: DIF9790C Change in Share 1990-1997, Adjusted

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	4	0.03883	0.00971	6.559	0.0003
Error	44	0.06513	0.00148		
C Total	48	0.10396			

Root MSE	0.03847	R-square	0.3735
Dep Mean	0.05724	Adj R-sq	0.3166
C.V.	67.21599		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > |T|	Variable Label
INTERCEP	1	0.005267	0.01392315	0.378	0.7070	Intercept
SHARE90	1	0.324805	0.10631239	3.055	0.0038	Share 1990
WEST	1	0.011307	0.01510559	0.749	0.4581	West Region Dummy
MIDWEST	1	0.027122	0.01501910	1.806	0.0778	Midwest Region Dummy
NORTH	1	0.043657	0.01627197	2.683	0.0102	North Region Dummy

Source: Peat Marwick Data & Scheffman Data.

Exhibit E
First Difference in Moist Snuff Share 1997 - 1990
1997 Share Adjusted Using Scheffman-Type Analysis
Bad Acts Measure 3, Excluding Scheffman Area Indicators
Including Census Regions

Model: MODEL1
Dependent Variable: DF9790C2 Change in Share 1990-1997, Adjusted

Analysis of Variance

Source	DF	Sum of Squares	Mean Square	F Value	Prob>F
Model	4	0.03099	0.00775	6.317	0.0004
Error	44	0.05397	0.00123		
C Total	48	0.08496			

Root MSE	0.03502	R-square	0.3648
Dep Mean	0.05520	Adj R-sq	0.3071
C.V.	63.44937		

Parameter Estimates

Variable	DF	Parameter Estimate	Standard Error	T for H0: Parameter=0	Prob > |T|	Variable Label
INTERCEP	1	0.013083	0.01267432	1.032	0.3076	Intercept
SHARE90	1	0.231078	0.09677673	2.388	0.0213	Share 1990
WEST	1	0.008618	0.01375070	0.627	0.5341	West Region Dummy
MIDWEST	1	0.028015	0.01367197	2.049	0.0464	Midwest Region Dummy
NORTH	1	0.046715	0.01481246	3.154	0.0029	North Region Dummy

Source: Peat Marwick Data & Scheffman Data.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

January 27, 2000

Via Federal Express

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James A. Keyte, Esquire
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Meagher & Flom, L.L.P.
919 Third Avenue
New York, NY 10022

John S. Reed, Esquire
Ridley M. Sandidge, Esquire
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Re: Conwood Co., et al. v. United States Tobacco Co., et al.

Dear Counsel:

Enclosed please find a Supplemental Declaration from Professor Leftwich. Please feel free to call with any questions you might have about this matter.

Very truly yours,

Neil M. Gorsuch

Enclosure

16diii004027

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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COURTNEY SIMMONS ELWOOD

January 27, 2000

Jeffrey A. Apperson, Clerk
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Supplemental Declaration of Richard Leftwich.

Also enclosed is an additional copy. I would be grateful if you would date-stamp and return this copy in the enclosed self-addressed, stamped envelope.

Many thanks for your assistance.

Respectfully,

Neil M. Gorsuch

Enclosures

16diii004028

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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COURTNEY SIMMONS ELWOOD

January 27, 2000

Honorable James D. Moyer
208 Snyder U.S. Courthouse
601 W. Broadway
Louisville, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Magistrate Judge Moyer:

Enclosed is a courtesy copy of a Supplemental Declaration of Professor Richard Leftwich which we are filing with the Clerk today.

Respectfully,

Neil M. Gorsuch

Enclosure

16diii004029

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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SEAN A. LEV
COURTNEY SIMMONS ELWOOD

January 27, 2000

Honorable Thomas B. Russell
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

Dear Judge Russell:

Enclosed is a courtesy copy of a Supplemental Declaration of Professor Richard Leftwich which we are filing with the Clerk today.

Respectfully,

Neil M. Gorsuch

Enclosure

16diii004030

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

COPY

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 FEB -8 A10:27 FILED US DISTRICT COURT Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' CONDITIONAL OBJECTIONS AND COUNTERDESIGNATIONS TO CERTAIN OF DEFENDANTS' DEPOSITION DESIGNATIONS

Plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood") previously filed a motion in limine to preclude defendants from using the depositions of their own employees at trial on hearsay grounds. Plaintiffs' Motions in Limine ¶ 6. At that time, plaintiffs expressly reserved the right to provide objections and counterdesignations in the event the motion is denied. To provide defendants as much advance notice as possible, however, plaintiffs herewith submit conditional objections and counterdesignations to defendants' proposed employee deposition excerpts in the event the Court permits them. Plaintiffs reserve the right to make additional objections and counterdesignations as review continues.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
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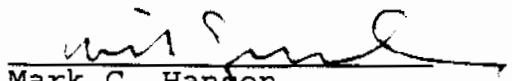

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Counsel for Plaintiffs

February 7, 2000

OBJECTIONS TO DESIGNATIONS

Ambiguous (AMB)
Argumentative (ARG)
Asked and Answered (A/A)
Assumes Facts Not In Evidence (AFNE)
Compound (COMP)
Calls for Conclusion (CONC)
Designated Portion Contains Discussions Among Lawyers (DISC)
Hearsay (either contains hearsay or asks for hearsay response) (HRY)
Incomplete/Interrupted Question or Answer (INCOMP/INC/INTERRUPT)
Lawyer Testifying (LT)
Lack of Foundation/Business Record (FD/BR)
Lack of Foundation/Expert or Witness (FD)
Leading Question (LD)
Calls for Speculation (SPEC)
Lack of Personal Knowledge (NPK)
Misstatement of Prior Testimony (MIST)
Question/Answer contains matters raised in Motions in Limine (ML)
Non-responsive Answer (NR)
Prejudice, Confusion, Waste of Time, Cumulative (PREJ)
Relevance (REL)
Outside the Scope of Direct (OUT/SCOPE)
Attorney-Client, Work Product (PRIV)
Questions Designated With No Answer (Q-No-A)
No Question Pending (No Q Put)
Motion to Strike (STRIKE)
Vague (VAG)

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Arlie Anundson
4/7/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
46:16	47:4	REL			
48:9	48:25	REL			
49:1	49:10	REL			
49:22	50:3	REL			
53:2	53:7	REL			
54:16	54:19	REL			
61:1	62:11	REL			
64:12	64:24	REL			
65:1	65:18	REL			
73:4 73:8	73:5 73:9		73:10	82:12	
73:4 73:8	73:5 73:9		82:24	83:16	
90:21 92:11	91:13 93:12		91:14	92:10	
95:7 95:15 95:22	95:12 95:19 96:14		95:1	95:6	
110:2	110:12		110:13	112:4	
221:8	221:13	LD			
221:18	221:22	LD			
222:14	222:17	LD,SPEC			
222:21	223:2	VAG,AMB			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Arlie Anundson
4/7/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
220:12 221:8 223:5	221:4 223:2 223:5		223:19	226:2	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Thomas Berkebile
6/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
12:17	15:17	REL			
16:12	16:13	REL			
16:16	16:17	REL			
16:24	17:1	REL			
17:2	17:4	REL			
23:15	23:24	REL			
24:13	24:19	REL			
25:22	26:2	REL			
28:16	28:17	REL			
34:20	34:23	REL			
35:2	35:23	REL			
36:2	36:6	REL			
53:8	53:14	REL,ML			
54:19	55:1	NR			
54:19	55:1		55:8	55:12	
65:20	66:4		66:5	66:19	
65:20	66:4		66:24	66:25	
65:20	66:4		67:9	67:12	
74:17	74:19		74:20 75:3	74:22 75:6	
76:22	77:2		77:3 77:11	77:5 77:18	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Thomas Berkebile 6/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
77:23	78:7		77:11	77:18	
89:9 89:18	89:12 89:22		89:15	89:17	
91:8	91:13	PREJ,VAG			
91:8	91:13		91:14	92:1	
91:8	91:13		92:9	92:23	
91:8	91:13		93:7	93:10	
98:21 99:2	98:23 99:4		98:24	99:1	
98:21 99:2	98:23 99:4		99:5	99:10	
106:6	106:8		106:9	106:12	
109:22	110:5		109:10	109:12	
109:22	110:5		109:19	109:22	
111:2	111:18		111:19	111:21	
112:9	113:2		112:5	112:8	
112:24	113:2	NR,SPEC,ML, PREJ,REL			
124:22	124:23	REL,DISC			
126:17 127:6	126:22 129:5		126:23	126:24	
126:17 127:6	126:22 129:5		127:2	127:5	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Thomas Berkebile
6/17/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
127:15	127:18	NR			
180:5	180:12	INCOMP,PREJ			
180:5	180:19		180:5	180:5	
198:7	198:14	NR,NPK,FD			
204:9	204:20		203:2	203:6	
204:9	204:20		203:10	203:17	
204:9	204:20		203:21	204:8	
204:9	204:20		204:22	205:1	
204:9	204:20		205:4	205:6	
204:9	204:20		205:8	205:13	
204:9	204:20		205:16	205:21	
209:8	209:11	NPK,FD			
209:2	209:11		209:25	210:5	
210:14	211:2	NR, PREJ, VAG, NPK, FD			
269:7	269:14	REL,ML,HSY			
284:3	284:13	HSY			
287:21	287:24	Q-NO-A			
288:12	288:15	NO-Q-PUT			
288:16	288:24	DISC,INCOMP PREJ,VAG			

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Michael Beyerlein
3/25/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
10:16	11:10	REL			
13:23	13:24	PREJ			
19:3	19:21	REL			
32:9	32:17	REL, ML			
50:8	50:10	REL, ML, NR			
50:21	50:23	NPK, NR, PREJ, FD			
51:8	51:13	NPK, FD, REL			
54:20	54:25	NR, PREJ, FD, NPK			
56:20	56:23 ending with "brand."	NR			
67:20	67:24	ML, NR, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald W. Blackburn
7/8/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
12:18	13:3		13:4	13:4	
12:18	13:20	REL			
25:24	26:4		25:8	25:11	
25:24	26:4		25:20	25:23	
26:15	27:17		27:18	28:8	
28:22	29:1	NR			
28:11	29:1		29:11	29:20	
30:14	30:16	NR			
30:7	30:16		30:17	30:21	
30:24	31:11		31:12	32:10	
35:9	35:12		34:24	35:8	
35:9	35:12		35:13	36:8	
36:16	36:22	NR			
37:19	41:6		41:7	41:14	
			42:6	42:10	
			43:2	43:15	
46:4	46:9	NR			
47:24	48:4	A/A			
47:1	48:4		49:16 **Beginning with "In both"**	49:24 **Ending with "at times"**	
			50:1	50:20	
			52:18	52:21	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald W. Blackburn
7/8/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
			54:11	56:14	
			58:21	59:1	
			59:4	59:6	
			59:12	59:17	
			60:3	60:7	
			61:2	61:9	
			62:15	63:15	
			64:1	64:11	
			65:11	65:20	
			73:4	73:6	
			73:22	74:4	
			74:16	74:21	
71:9	72:3	NR; SPEC			
76:8	76:11	NR			
75:13 75:21	75:18 76:11		75:13	75:18	
			75:21	76:11	
			76:20	77:5	
			77:16	77:18	
			77:21	78:15	
90:1	90:9		90:10	90:19	
			91:12	91:13	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald W. Blackburn
7/8/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
			91:16	91:17	
			91:22	91:23	
			94:16	94:22	
			96:16	96:22	
			102:17	113:12	
			125:23	126:15	
120:3	121:24		121:25	122:3	
			122:19	123:2	
123:13	124:9		125:7	126:15	
128:14	128:20	NR			
144:10 **Beginning with "doesn't U.S. Tobacco"** 144:14	144:12 144:14	FD, SPEC, NPK			
			157:18	158:12	
			162:1	162:21	
			163:8	163:17	
			169:22	170:4	
			171:1	171:13	
			171:19	171:25	
			172:3	173:8	
			193:3	194:9	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald W. Blackburn
7/8/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
188:3	188:20		186:16	187:3	
			188:23	189:9	
			189:23	190:3	
			190:11	190:14	
			191:3	191:14	
193:12	193:18	NR	193:20	194:9	
			195:3	195:10	
			211:8	212:11	
			213:17	216:18	
219:5	219:9	HRY			
219:13	220:5	HRY			
227:13	227:18	HRY			
			222:17	223:22	
			224:2	224:114	
			224:25	226:5	
			226:18	226:21	
			227:22	228:2	
			228:19	230:19	
			233:14	233:25	
265:12	266:24	HRY			
			257:4	258:21	
			259:9	259:16	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald W. Blackburn
7/8/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
			261:13	262:4	
			265:2	265:8	
265:12	268:5		268:6	268:10	
			268:15	269:5	
			269:12	269:17	
			272:5	273:3	
267:16	268:1	SPEC, NR	269:12	269:17	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald Blackburn
8/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
317:9 318:16 318:21	318:4 318:17 318:25		318:5	318:6	
317:9 318:16 318:21	318:4 318:17 318:25		318:9	318:13	
317:9 318:16 318:21	318:4 318:17 318:25		318:15	318:15	
317:9 318:16 318:21	318:4 318:17 318:25		319:1	319:13	
483:23	484:21	SPEC,NPK			
483:3	485:15		485:16	485:17	
489:2	489:19	SPEC,NPK			
490:18	491:11	SPEC,NPK			
493:13	494:9	SPEC,NPK			
493:13	494:9		495:21	496:14	
493:13	494:9		500:23	501:2	
542:17 543:6	542:23 543:25		544:1	544:4	
542:17 543:6 544:15	542:23 543:25 545:8		545:9	546:4	
542:17 543:6 544:15	542:23 543:25 545:8		547:2	548:6	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald Blackburn
8/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
587:4	587:7	FD			
587:8	587:13	SPEC,FD,NPK			
587:17 588:3	587:24 588:10	REL,PREJ			
588:11 588:17	588:14 588:19	FD,SPEC,VAG AMB			
588:21	588:25	SPEC,NPK, A/A,VAG, AMB			
589:1	589:7	SPEC,NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert J. Chiaradio 6/24/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
5:12	5:15		5:10	5:11	
20:23 21:19	21:8 21:19		21:9 20:12	21:18 20:15	
23:3	23:10	HRY			
22:15 23:19	23:10 23:23		23:11	23:18	
23:19	23:23	HRY	25:3	25:9	
27:25	28:13		28:20	29:12	
30:5	30:10	NR			
30:2	30:10		30:11	30:21	
30:22	30:24	SPEC, CONC, VAG	30:11 30:25 31:16 32:2	30:21 31:5 31:19 32:7	
39:1	40:6		40:19 42:13	41:4 42:16	
54:8	54:18		55:6	55:17	
57:25 59:13	59:6 59:16		59:7	59:12	
63:1	63:17		63:25	64:4	
71:20	71:24	SPEC, FD			
71:21 72:1	71:24 72:4	SPEC, FD	72:5 72:11 72:18 72:25	72:8 72:15 72:20 73:2	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert J. Chiaradio 6/24/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
74:2	75:1		73:22 75:2	74:1 75:15	
76:8 76:25	76:16 77:1		76:21	76:24	
77:20 78:1 78:13 79:4 79:19	77:22 78:9 78:20 79:17 79:25		80:1 80:13 80:17 81:19	80:3 80:15 80:25 81:25	
93:19 95:10	94:4 95:23		88:9 89:13 90:19 92:3 92:14	88:18 90:4 91:3 92:7 93:9	
95:10	95:23	A/A, CUM			
123:12 123:25 124:5 124:11	123:20 124:2 124:9 125:15		125:16 126:15	126:6 127:10	
129:18 **Beginning with "How many"** 129:21 130:10	129:19 129:23 130:13		129:24	130:9	
131:24	132:1		132:12	132:14	
132:19	132:22		132:23	132:25	
133:24	134:1		134:2	134:8	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert J. Chiaradio
6/24/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
134:9	134:12		134:2 134:22 137:5	134:8 135:5 137:12	
144:17 145:5	144:20 145:14		144:21	145:4	
146:23	146:25		147:1	147:8	
147:9	147:13		147:1 147:14	147:8 147:16	
147:17	147:20		147:14 147:24	147:16 148:3	
148:4	148:8		147:24 148:9	148:3 148:11	
149:9	149:11		149:12	149:23	
149:23	150:8		149:12 150:9	149:23 150:17	
150:18	150:25		150:9 151:1	150:17 151:20	
151:21	151:23		151:1 151:24	151:20 152:6	
152:7	152:11		151:24 152:12	152:6 152:14	
153:10	153:12		153:13	153:20	
153:21	154:3		153:13	153:20	
158:13	158:22		158:2	158:25	
160:15 161:1	160:19 161:8		160:20	160:25	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert J. Chiaradio 6/24/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
180:7	181:16		184:2	184:15	
187:2	190:10		190:19	190:22	
190:2	190:3	PREJ-WASTE			
190:23	191:14		190:19 191:15	190:22 191:17	
192:3	192:21	SPEC	197:7 198:2 199:11 204:24	197:17 198:10 199:17 205:19	
206:9	206:25		207:13 207:18	207:16 207:18	
208:8	208:16	NR			
236:5	236:13		225:15 229:13 230:11 232:2 236:18	225:25 229:19 230:24 236:4 236:25	
243:16	243:24		246:6	246:10	
248:2 248:10	248:7 249:23		263:12 266:18 276:21 277:22 279:18	263:20 267:12 267:25 277:25 280:8	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert J. Chiaradio
8/6/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
346:10 347:1	346:18 247:6		347:15 348:3 348:17 350:11	347:20 348:13 349:13 350:23	
384:20	384:25	SPEC, FD, NPK	385:19 378:15 379:15	386:5 379:2 379:18	
389:11	389:13	PREJ	388:22	389:10	
423:1	423:10		423:11 423:16 424:14	423:13 424:6 424:18	
430:12	430:15		430:16 437:15	431:12 438:13	
460:18	461:2		457:3 458:10 459:3 459:20 461:9	457:18 458:17 459:9 460:17 461:11	
462:11 Beginning with "but..."	462:15	NR			
463:4	464:2		464:3 465:3	464:25 465:3	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Richard Cutler
7/13/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
28:6	30:15		30:16	31:23	
31:24	32:22		30:16	31:23	
40:21	41:6		41:7	41:22	
42:19	43:9		42:3 42:12 42:18	42:9 42:16 42:18	
43:11	43:18		42:3 42:12 42:18	42:9 42:16 42:18	
46:1	46:17		45:1 45:19 45:25	45:14 45:22 45:25	
49:16	49:25		47:24	49:10	
52:9	53:9		53:10	53:12	
63:9	63:12		62:23 63:6	63:3 63:8	
63:9	63:12		63:13 63:20	63:18 63:22	
63:23	63:25		63:13 63:20	63:18 63:22	
64:2	64:2		63:13 63:20	63:18 63:22	
63:23	63:25		64:3 64:15 65:1 65:9	64:13 64:24 65:7 65:10	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Richard Cutler
7/13/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
64:2	64:2		64:3 64:15 65:1 65:9	64:13 64:24 65:7 65:10	
65:11	65:15		64:3 64:15 65:1 65:9	64:13 64:24 65:7 65:10	
65:18	65:21		64:3 64:15 65:1 65:9	64:13 64:24 65:7 65:10	
65:23	66:2		64:3 64:15 65:1 65:9	64:13 64:24 65:7 65:10	
66:6	66:6		64:3 64:15 65:1 65:9	64:13 64:24 65:7 65:10	
66:8	66:11		64:3 64:15 65:1 65:9	64:13 64:24 65:7 65:10	
66:14	66:14		64:3 64:15 65:1 65:9	64:13 64:24 65:7 65:10	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Richard Cutler
7/13/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
72:13	73:4		73:11 73:17 74:18	73:13 74:11 74:18	
189:19	189:21		186:7 187:14 188:4 189:14	187:7 188:1 189:12 189:18	
190:5	190:18		186:7 187:14 188:4 189:14	187:7 188:1 189:12 189:18	
189:19	189:21		190:19 190:22	190:20 191:3	
190:5	190:18		190:19 190:22	190:20 191:3	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Timothy Entwistle 07/1/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
10:11	12:11	PREJ			
12:17	14:1	PREJ			
14:17	15:5	PREJ			
44:20	44:25	NR			
45:15	45:17	NR			
46:2 46:13 47:8	46:6 47:2 47:16		47:17	47:20	
46:2 46:13 47:8	46:6 47:2 47:16		48:1 49:13	49:10 49:23	
54:8 55:13 56:8 56:23 57:10	54:19 55:16 56:11 57:1 57:10		49:13 50:1 50:7 50:20 51:5 52:1 52:18 57:17	49:23 50:3 50:16 51:1 51:21 52:14 53:2 58:1	
58:2 58:11 59:9	58:4 58:12 59:11		57:17	58:1	
60:2	60:6	HRY			
60:15	60:18	HRY			
66:1	66:19	HRY, SPEC, FD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Timothy Entwistle 07/1/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
66:25	67:6		67:7 68:5 **Beginning with "did you"**	67:13 68:9	
69:23	70:1	SPEC, FD			
71:23	72:2		71:4	71:22	
72:14	72:23		72:3	72:13	
122:11	122:15		110:22 112:12	111:13 113:4	
125:21	126:7	HRY			
122:11 125:21	122:15 126:7		123:22 135:20 136:20 137:15 138:12	124:11 136:6 136:24 137:16 138:17	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Richard Fasanelli 07/29/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
11:13	12:4	REL			
14:25	15:18	REL			
16:3	16:15	REL			
18:13	18:19	REL			
30:3	30:8	NR,ML			
52:19 53:11	53:6 53:18		53:7	53:8	
65:22	65:24		65:25	66:4	
66:5	66:12		66:13 66:18	66:15 66:19	
69:2	69:12	NR,REL,ML			
71:12	71:19	NR,REL,ML			
77:12	77:23	REL,ML,HRY			
99:6	100:17		100:18 102:8	101:25 102:20	
106:12	107:1	SPEC,FD,NPK			
115:4	115:11	REL,ML			
118:10	118:17	REL,ML	118:18	119:23	
165:12	165:25		166:8	169:2	
196:7	196:11		196:12 196:16	196:13 196:16	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert Fasanelli 07/30/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
234:11	235:14		233:4	233:16	
234:11	235:14		233:22	233:25	
281:8	281:24	REL,ML,NR			
282:9	282:10	ML,REL,NR			
282:11	282:13	REL,ML			
284:19	285:6	NR,REL,ML			
285:11	285:16	NR			
289:24	290:6	NR			
296:13	296:20	NR			
298:7	298:14	NR			
303:5	303:10	NR,REL,ML			
303:17	303:22	NR,ML,REL			
303:24	304:1		304:2	304:5	
304:6	304:12	NPK,NR,SPEC			
304:15	304:17	SPEC,NPK,FD			
304:20	304:20	SPEC, NPK			
304:25	305:3	FD,SPEC,NPK			
305:9	305:11	NPK,NR,REL, SPEC			
321:25	321:3		321:4	321:7	
321:8	321:11	NR,REL,ML			
321:20	321:22	NR,REL,ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Robert Fasanelli 07/30/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
322:1	322:3	REL,ML			
322:1	322:3		322:4	322:8	
322:1	322:3		322:11	322:17	
322:18	322:21		322:22	322:25	
323:3	323:15	FD,NPK,SPEC			
323:1	323:15		323:16	324:8	
323:1	323:15		324:14	324:23	
344:17	344:19		344:20	344:23	
344:24	345:2	NR,REL,ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Doug Faas
06/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
13:20	16:1	REL, PREJ			
16:5	16:6	REL, PREJ			
16:11	16:14	REL, PREJ			
17:3	17:4	REL, PREJ			
29:3	29:5		29:6	29:25	
30:1	31:14		29:6	29:25	
31:23	32:1		32:2	33:9	
34:23	35:10		36:8 38:23 39:23	38:20 39:18 40:7	
35:18	36:7		36:8 38:23 39:23	38:20 39:18 40:7	
41:12	41:17		36:8 38:23 39:23	38:20 39:18 40:7	
57:1	59:8		59:9	61:8	
61:9	62:9		59:9	61:8	
66:1	66:12		66:13	67:15	
67:24	68:22		66:13 68:23 69:14 70:11	67:15 69:5 69:23 72:3	
72:4	75:5		68:23 69:14 70:11	69:5 69:23 72:3	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Doug Faas
06/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
75:14	77:3		77:4	77:15	
78:9	78:21		80:4	80:19	
83:11	84:2		84:3	84:12	
84:20	85:7		84:3 90:8	84:12 90:8	
85:10	85:23		84:3 90:8	84:12 90:8	
86:1	90:7		84:3 90:8	84:12 90:8	
86:21	88:13	NR			
90:22	92:18		92:25 93:5 94:24 95:4 95:23	93:2 93:11 95:1 95:13 96:4	
93:12	94:7		92:25 93:5 94:24 95:4 95:23	93:2 93:11 95:1 95:13 96:4	
95:14	95:22		94:24 95:4 95:23	95:1 95:13 96:4	
99:1	99:13		97:6 99:14 100:4	98:16 99:24 101:7	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Doug Faas 06/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
99:25	100:3		99:14 100:4 101:15 103:21	99:24 101:7 102:6 104:4	
101:8	101:14		100:4 101:15 103:21	101:7 102:6 104:4	
106:11	106:19		106:20 106:24 107:4 107:21	106:21 106:24 107:18 107:23	
106:25	107:3		106:20 106:24 107:4 107:21	106:21 106:24 107:18 107:23	
108:16	109:12		109:13	109:18	
109:19	110:12		109:13 110:13	109:18 110:22	
111:19	111:21		110:13	110:22	
111:25	113:9		110:13	110:22	
113:12	114:10		114:11	114:20	
114:21	116:1		114:11 116:2	114:20 116:11	
116:12	118:17		116:2 118:18	116:11 120:23	
141:19	142:13		143:24 144:4	144:1 144:14	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Doug Faas 06/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
142:15	143:7		143:24 144:4	144:1 144:14	
143:10	143:21		143:24 144:4	144:1 144:14	
144:15	145:14		143:24 144:4	144:1 144:14	
144:15	145:14		145:15	145:17	
145:18	146:6	SPEC, NR			
145:18	146:6		146:9 146:17 147:1	146:14 146:22 147:3	
147:4	147:8		147:9 148:2	147:24 148:11	
152:22	153:3		153:4	153:9	
153:10	154:13		153:4	153:9	
157:10	157:11		156:1 156:10 156:19	156:7 156:17 157:9	
157:14	157:17		156:1 156:10 156:19	156:7 156:17 157:9	
159:22	160:4		160:5 160:9	160:6 160:11	
160:12	160:18		160:19	161:4	
161:5	161:17		160:19	161:4	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Doug Faas 06/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
169:14	170:14		170:15 170:25	171:21 172:2	
172:3	172:8		170:25	172:2	
172:11	172:21		170:25	172:2	
172:24	173:20		170:25	172:2	
173:16	173:20	SPEC, CONC			
173:23	174:5		170:25	172:2	
173:23	174:5	SPEC, CONC			
177:14	177:19	NR, SPEC, NPK			
177:22	178:22	NR, SPEC, NPK			
179:1	179:4	NR, SPEC, NPK			
179:19	181:6	NR, SPEC, NPK			
179:19	181:8		184:13 184:18	184:15 184:18	
181:13	182:6		184:13 184:18	184:15 184:18	
182:9	183:4		184:13 184:18	184:15 184:18	
183:14	183:15		184:13 184:18	184:15 184:18	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Doug Faas 06/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
183:18	184:3		184:13 184:18	184:15 184:18	
184:6	184:12		184:13 184:18	184:15 184:18	
184:19	184:22		184:13 184:18	184:15 184:18	
184:25	185:8		184:13 184:18	184:15 184:18	
184:19	184:22		189:13 189:21	189:18 190:10 ending with "circumstances"	
184:25	185:8		189:13 189:21	189:18 190:10 ending with "circumstances"	
187:8	187:24		189:13 189:21	189:18 190:10 ending with "circumstances"	
188:8	188:14		189:13 189:21	189:18 190:10 ending with "circumstances"	
189:2	189:12		189:13 189:21	189:18 190:10 ending with "circumstances"	
185:20	185:23	AFNE, SPEC			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Doug Faas 06/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
185:25	186:10	AFNE, SPEC			
190:10 beginning with "what..."	190:21		189:13 189:21 190:22	189:18 190:10 ending with "circumstances" 190:23	
191:18	192:19		191:13 192:20	191:17 192:22	
192:23	193:1		192:20 193:18 196:15 196:19	192:22 195:5 196:16 198:14	
201:10	201:14		193:18 196:15 196:19 201:15	195:5 196:16 198:14 201:16	
201:17	203:12		201:15 203:17 208:10 210:8 211:16 214:1	201:16 206:9 209:15 211:6 212:5 216:3	
216:4	216:8		203:17 208:10 210:8 211:16 214:1 216:9	206:9 209:15 211:6 212:5 216:3 216:17	
253:24	256:21		257:3	260:5	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Bob Fitzmaurice 08/31/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
40:10	40:22		40:23	42:8	
43:23	43:25		43:18 44:19	43:22 46:10	
44:4	44:9		43:18 44:19	43:22 46:10	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Lonnie Funk
04/08/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
9:19	10:4	REL, PREJ			
11:7	12:1	REL, PREJ			
12:11	12:15	REL, PREJ			
12:21	13:2	REL, PREJ			
13:5	13:21	REL, PREJ			
15:2	15:3	REL, PREJ			
15:10	15:21	REL, PREJ			
16:25	17:1	REL, PREJ			
56:8	56:10	ML, REL			
56:14	56:20	ML, REL			
84:2	84:5	ML, REL			
84:7	84:9	ML, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Lonnie Funk
04/08/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
88:12	88:17		87:6 88:10 88:18 88:24 89:8 89:24 91:2 91:11 91:15 92:15 94:11 94:20 95:15 95:25 96:13 96:23 97:4 97:18 97:20 98:6	88:4 88:11 88:21 88:25 89:11 90:15 91:7 91:12 92:6 92:16 94:17 95:9 95:21 96:7 96:21 97:1 97:16 97:18 97:21 98:9	
119:22	120:9		120:11 120:18	120:15 120:18	
120:19	120:21		120:11 120:18 121:1 121:11 121:17 121:23	120:15 120:18 121:7 121:15 121:20 121:23	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Lonnie Funk
04/08/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
120:23	120:25		120:11 120:18 121:1 121:11 121:17 121:23	120:15 120:18 121:7 121:15 121:20 121:23	
121:24	122:12		121:1 121:11 121:17 121:23 122:13 122:18 123:7	121:7 121:15 121:20 121:23 122:15 123:5 123:8	
123:9	123:13		122:13 122:18 123:7 123:14 123:21	122:15 123:5 123:8 123:16 123:21	
123:22	124:7		123:14 123:21 124:10 124:16	123:16 123:21 124:12 124:16	
124:9	124:9		123:14 123:21 124:10 124:16	123:16 123:21 124:12 124:16	
124:17	124:19		124:10 124:16 124:21	124:12 124:16 124:22	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Lonnie Funk
04/08/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
124:23	125:2		124:21 125:3 125:8	124:22 125:5 125:8	
125:9	125:22		125:3 125:8 125:23 126:2	125:5 125:8 125:24 126:7	
126:8	126:22		127:17 127:23	127:20 128:2	
128:3	128:15		127:17 127:23 128:16 128:20	127:20 128:2 128:17 128:24	
129:3	129:8		128:16 128:20 129:9	128:17 128:24 129:11	
129:12	129:15		129:9 129:22 130:4 130:20	129:11 130:1 130:7 130:21 ending with "though"	
129:17	129:19		129:9 129:22 130:4 130:20	129:11 130:1 130:7 130:21 ending with "though"	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Lonnie Funk
04/08/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
129:21	129:21		129:9 129:22 130:4 130:20	129:11 130:1 130:7 130:21 ending with "though"	
130:21 beginning with "Mr. Funk.."	131:7		129:22 130:4 130:20	130:1 130:7 130:21 ending with "though"	
210:3	210:5		210:6	210:19	
211:2	212:6		210:6	210:19	
212:10	212:13		210:6	210:19	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Vincent Gierer
08/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
6:18	7:25	REL, PREJ			
36:5	36:6		36:21	37:4	
36:10	36:20		36:21	37:4	
45:21	45:25		46:25	47:2	
46:5	46:19		46:25	47:2	
47:3	48:12		46:25	47:2	
49:4	49:13		51:8 51:14	51:12 52:8	
52:9	52:11		51:8 51:14	51:12 52:8	
52:16	52:24		51:8 51:14	51:12 52:8	
113:24	117:11		118:5 118:9	118:6 119:1	
117:15	118:4		118:5 118:9	118:6 119:1	
138:5	138:9		137:24	138:4	
138:16	139:5		137:24	138:4	
156:9	156:23		155:22	156:8	
157:4	157:11		155:22	156:8	
157:14	157:15		155:22	156:8	
158:21	159:2		158:8	158:20	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Vincent Gierer 08/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
193:8	193:23		192:22 193:24 194:14	193:7 194:11 194:16	
213:14	214:4	FD, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Howard Heylmun 6/16/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
23:6	23:11	SPEC,HRY			
24:1	24:3	VAG,AMB			
24:15	24:20	NR			
32:8	32:17	NR,REL,SPEC, HRY			
40:1	40:3	SPEC,HRY			
41:5	41:12	REL			
42:18	42:23	NR,SPEC,NPK			
42:4	42:23		42:24	43:5	
83:6	83:8	REL,SPEC,ML			
88:7	88:15	REL,SPEC,ML			
89:9	89:25	REL,SPEC,ML			
113:8 113:21 114:17	113:18 114:5 115:3		114:6	114:16	
115:10 115:14 117:14	115:12 115:20 117:21		115:21	117:13	
154:20	124:24	REL,NR,ML			
155:16	155:21	REL,NR,ML			
185:1	186:8	REL,SPEC,ML			
184:8	186:23		186:24	188:15	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Howard Heylmun 8/10/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
287:14	288:14		287:1	287:13	
287:18	287:25	SPEC,NPK, REL			
292:6	292:22		292:1	292:5	
294:10	295:5	SPEC, REL, NR			
294:4	295:5		295:6	296:4	
296:5	296:19		295:6	296:4	
297:1	297:13		297:14	298:14	
297:5	297:13	NPK,SPEC, REL			
332:11	332:21	NR,SPEC,NPK			
332:11	332:21		332:22	334:5	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Harvey Jaffer
8/13/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
28:5	28:24		28:25	30:12	
48:8	48:15		41:24	42:15	
48:8	48:15		48:16	48:18	
48:19	49:14		48:16 49:15	48:18 49:19	
49:20	49:25		49:15 50:1	49:19 50:9	
50:10	50:21		50:1 50:22	50:9 51:16	
51:17	52:1		50:22	51:16	
59:11	59:18		59:20	59:22	
59:11 59:23 60:8	59:18 59:24 60:9		59:25	60:7	
64:24	65:11		65:12	66:5	
79:2	79:14		79:15	79:25	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of David R. Lund 3/31/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
83:22	83:24	HRY			
84:2	84:2	HRY			
145:9	145:12		144:12	145:8	
145:18	146:2		144:12	145:8	
145:9	145:12		145:15	145:17	
145:18	146:2		145:15	145:17	
146:15	146:18	HRY			
146:21	146:25	NR			
246:16	246:20	LD			
247:24	248:2	LD			
253:16	254:11	SPEC, NPK			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of James McCarthy 3/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
10:5	11:1	REL/PREJ			
14:9 15:3	14:25 16:5	REL/PREJ			
20:7	20:22		20:23	21:24	
37:15	37:19		37:20 38:19 39:17	38:15 39:2 39:19	
39:20	40:5		37:20 38:19 39:17	38:15 39:2 39:19	
62:15	62:24		62:10 63:5	62:14 64:18	
77:9 77:22	77:17 78:5	NR			
77:9 77:22	77:17 79:9		79:10	80:11	
85:2	86:22		84:19 86:23	85:1 87:1	
88:25 89:16 89:25	89:8 89:22 90:24		91:13 91:19	91:15 91:20	
91:21 92:2	91:24 92:8		91:13 91:19 92:9	91:15 91:20 92:15	
92:16	93:13		92:9 93:14 94:7	92:15 93:20 94:7	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of James McCarthy 3/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
94:8	94:12		93:14 94:7 94:18 94:22 95:6	93:20 94:7 94:19 95:3 95:6	
95:7	95:25		94:18 94:22 95:6	94:19 95:3 95:6	
101:11 101:20 102:11	101:16 101:24 103:1		101:2	101:7	
101:11 101:20 102:11	101:16 101:24 103:1		103:2 104:15 105:16 105:24 106:7 106:20	104:11 105:12 105:20 106:4 106:17 107:14	
119:24 120:17	120:7 120:24		120:25	121:2	
121:3	121:17		120:25 123:3	121:2 123:13	
123:14	123:20		123:3 123:21 124:21 128:13	123:13 124:13 125:19 128:18	
136:2	136:12		136:13 136:18	136:15 138:12	
138:13	138:22		136:13 136:18 138:23	136:15 138:12 139:4	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of James McCarthy
3/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
139:15 139:19	139:17 139:25	NR			
176:13 176:19	176:16 177:24		174:23 176:10 177:25	176:5 176:12 178:2	
178:15 180:4	180:2 180:4		177:25 180:5 180:9 181:6	178:2 180:6 180:17 181:7	
181:8	181:9		180:5 180:9 181:6 181:10 181:25	180:6 180:17 181:7 181:14 182:3	
181:15	181:24		181:10 181:25	181:14 182:3	
182:21	183:1		181:25 183:4	182:3 183:7	
183:9	184:16		183:4 184:17 186:5	183:7 185:21 187:20	
204:21	206:19		207:3	207:20	
207:21 208:6	208:3 209:24		207:3 209:25	207:20 210:3	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary Milano 8/31/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
6:5 6:24 7:23	6:17 7:16 8:10		7:17	7:22	
9:15 10:7	10:4 10:11		10:12	10:22	
112:8	112:13	NR,REL,ML			
208:21	208:23	ML,NR,NPK REL,SPEC			
216:20	216:25	REL,ML			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald R. Nabi
8/5/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
32:1	32:10	SPEC,NR			
52:8 52:15	52:11 53:9		52:12	52:14	
52:8 52:15 54:6	52:11 53:9 55:2		53:10	54:5	
70:1	70:3	SPEC,NPK, REL,ML			
76:5 77:24	77:8 77:25		77:9	77:23	
78:4 78:24	78:5 81:3		78:6	78:22	
84:24	85:3		84:15	84:23	
84:24 85:23	85:3 86:15		85:5	85:22	
85:23 86:21	86:15 87:11		86:16	86:20	
87:1	87:8	REL,SPEC, NPK			
136:8 136:24	136:19 138:7		136:20	136:23	
138:11	139:9		139:10	140:10	
140:11	141:9		139:10 141:10	140:10 142:3	
142:4	143:3		141:10 143:4	142:3 143:16	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald R. Nabi
8/5/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
143:17	143:21		143:4	143:16	
144:6	145:10		144:6	144:8	
148:1 149:17	148:14 149:24		148:15	149:16	
150:15 151:5	150:23 151:16		151:17	153:9	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Byron T. Parish 03/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
20:16 22:1	21:22 22:3		22:6	23:7	
60:11	61:3		61:4	61:11	
60:11	61:3		61:16	62:1	
60:11	61:3		62:6	62:18	
139:12	139:22		139:4 139:10	139:7 139:11	
139:12 143:7 144:8	139:22 143:13 144:24		140:22 141:3	140:25 141:4	
180:10	181:13		177:10	178:13	
180:10	181:13		183:18	184:23	
180:10	181:13		185:4	186:1	
195:13	195:23	LD,REL,PREJ			
195:25 197:2	196:24 198:14		199:4	199:10	
196:15	196:18	LD			
197:24	198:2	SPEC,FD,NPK			
198:3	198:7	LD,SPEC,FD,NPK			
204:7	204:19	HSY			
205:21	206:7		206:8	207:4	
205:21	206:7		207:9	207:12	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Byron T. Parish
03/26/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
205:7 205:21	205:14 206:7		207:15	208:8	
208:13	208:24		208:11	208:12	
208:13	208:24		208:25	209:22	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Donald D. Segelstrom 8/18/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
29:15 31:1	30:12 31:13		30:13 30:17	30:14 30:24	
39:8 39:12 39:17 39:22	39:10 39:12 39:19 39:25		38:22 39:13	39:7 39:16	
41:4	41:5	NR			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Mike Slabbekoorn
6/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
11:9	11:22	REL, PREJ			
12:1	12:9	REL, PREJ			
15:20	16:11		16:12	16:16	
16:17	17:3		16:12 17:4	16:16 17:9	
17:10	18:1		17:4 18:2	17:9 18:15	
18:16	19:2		18:2 19:3	18:15 19:5	
19:6	20:7		19:3 20:8	19:5 20:11	
20:12	21:2		20:8 21:3	20:11 21:5	
21:6	21:7		21:3	21:5	
22:14 22:23	22:18 23:9		22:19	22:22	
33:1	34:20		34:21	34:24	
35:1	35:6		34:21 35:7	34:24 35:9	
35:10	36:10		35:7 36:11	35:9 36:15	
36:16	36:18		36:11 36:19	36:15 37:8	
38:15 39:14	38:20 39:18		38:21	39:13	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Mike Slabbekoorn
6/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
51:3	51:24	ML, REL	51:25	52:10	
56:6	57:23	ML, REL	57:24	58:9	
58:10	59:4		57:24	58:9	
62:12	62:24		62:25	63:7 ending with "deposition"	
62:20	62:24	ML, REL			
63:7 beginning with "But do..."	64:14	ML, REL			
63:7 beginning with "But do..."	64:14		62:25 64:25 66:21 73:8 73:14	63:7 ending with "deposition" 66:2 67:23 73:10 73:21	
62:12	62:24		62:25	63:7 ending with "deposition"	
62:5 62:12	62:8 62:24		62:9	62:11	
74:7	75:10		74:4	74:6	
76:22	77:2		77:3 77:15 78:20	77:12 77:17 78:25	
87:22	88:5	ML, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Mike Slabbekoorn
6/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
86:25	88:16		88:17	89:10	
89:11	90:14		88:17	89:10	
93:13	93:22		93:9 93:23	93:12 94:5	
93:13	93:17	ML, REL			
94:6	94:9		93:23 94:10	94:5 95:23	
96:4	96:8		96:9 97:6 97:13	97:3 97:10 98:11	
98:12 99:15 beginning with "do you..."	98:22 100:4		98:23	99:15 ending with "simply."	
100:11	101:17	ML, REL			
104:7	104:11	ML, REL			
110:3	110:14		110:15	110:17	
110:18	111:3		110:15 111:4 111:17	110:17 111:15 111:24	
111:25	115:11		111:4 111:17 115:12	115:15 111:24 115:17	
115:18	116:13	ML, REL	116:14	116:21	
116:22	117:13	ML, REL	116:14 118:21 120:8	116:21 120:2 120:11	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Mike Slabbekoorn
6/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
120:14	120:23		120:24 121:17 121:25 122:6 122:10 123:5 123:10 124:19 125:13 125:23	121:4 121:22 122:4 122:7 122:12 123:8 123:15 125:9 125:18 125:23	
125:25	126:15		126:16 126:22 129:23 130:10 130:17 130:23 131:4 131:10	126:18 126:22 129:25 130:14 130:21 131:1 131:6 131:17	
132:3 beginning with "I want to..."	133:16		133:17	134:1	
134:2	134:13		133:17 134:14 135:7	134:1 134:24 135:11	
135:12	135:14	ML, REL	135:7 136:23	135:11 137:7	
141:4	141:15	ML, REL			
143:14	143:19		143:20	143:22	
143:23	144:1		143:20 144:2	143:22 144:24	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Mike Slabbekoorn
6/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
146:11	146:24	ML, REL	146:8	146:10	
147:6	147:11	ML, REL			
149:23	149:3	ML, REL			
152:18	153:7	FD, PREJ, NPK			
154:10 156:21	156:10 158:14		156:17	156:20	
157:7	157:24	ML, REL			
166:1 167:2 168:8	166:24 168:5 168:11		169:3 169:7 169:22	169:5 169:11 170:12	
171:13	171:21		173:20	173:25	
179:17 180:7 183:2	180:4 182:8 183:17		182:9 182:15	182:12 183:1	
185:11	186:25		187:1	187:7	
187:8	187:11		187:1 187:12 188:8 188:15	187:7 188:6 188:12 188:17	
188:18	189:8		187:12 188:8 188:15 189:9	188:6 188:12 188:17 190:24	
195:15 195:20 197:9	195:17 195:20 197:12		196:9	197:8	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Mike Slabbekoorn
6/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
197:9 197:15	197:12 198:6		196:9 198:7 198:24 199:12 200:25 201:23 202:10 202:24	197:8 198:21 199:7 200:21 200:25 202:6 202:19 204:24	
203:15 203:23	203:20 204:13		205:11	205:20	
213:9 214:19	213:23 216:13		213:24	214:18	
216:18	217:6		217:7 217:17	217:12 218:1	
218:2 220:14	219:15 221:22		217:17 219:16 219:21 220:11	218:1 219:18 219:25 220:13	
223:4	223:17	CONC, NR			
224:1	225:3		225:4	225:7	
225:8	225:21		225:4 225:22 226:2	225:7 225:24 226:4	
226:5	226:20		225:22 226:2 227:4 227:8	225:24 226:4 227:6 227:11	
227:12	228:16		227:4 227:8	227:6 227:11	

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Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Mike Slabbekoorn
6/22/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
232:3 232:16	232:13 232:17	NR, A/A, ML			
247:12	247:18		247:24 249:25 250:8 251:1 251:6 252:9	249:21 250:5 250:8 252:2 252:6 252:9	
253:2 254:1	253:17 254:15		253:18 253:22	253:19 253:25	
257:23	258:15	ML, REL			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary Smith 8/19/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
8:17 9:16	9:2 9:22		9:3	9:15	
31:23	32:1		31:9	31:22	
34:7	34:20		33:16	34:6	
34:7	34:20		36:3	36:9	
38:22 39:4	39:1 39:5		39:13	39:16	
40:7, starting with "did you"	40:13		39:13	39:16	
62:9 62:15	62:12 62:22		63:2	63:11	
130:23 131:12 131:23	131:1 131:18 132:1		128:14	130:2	
130:23 131:12 131:23	131:1 131:18 132:1		130:5	130:22	
130:23 131:12 131:23	131:1 131:18 132:1		131:4	131:11	
130:23 131:12 131:23	131:1 131:18 132:1		131:19	131:22	
130:23 131:12 131:23	131:1 131:18 132:1		132:2	132:7	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary Smith 8/19/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
130:23 131:12 131:23 134:16	131:1 131:18 132:1 135:19		132:11	133:23	
131:23 134:16	132:1 135:19		134:2	134:15	
167:19	167:22		165:23 167:13 167:17 167:23 168:10	166:1 167:15 167:18 168:7 169:19	
185:10	185:17		177:20 177:25 178:10 185:18 185:25 186:16	177:22 178:1 178:24 185:22 186:14 186:24	
216:6 218:1	216:10 218:14	NR	217:1 217:18	217:15 217:25	
218:1 218:18	218:14 219:2		218:15	218:17	
218:18 222:3	219:2 222:20		219:3	221:24	
222:3	222:20	NR			
222:3 223:24 224:16	222:20 224:12 225:10		222:21	222:23	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary Smith 8/19/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
222:3 223:24 224:16	222:20 224:12 225:10		223:13	223:15	
223:24 224:16	224:12 225:10		225:8	225:23	
230:2	230:11		228:24	230:1	
230:2 231:25 233:1	230:11 232:23 233:9		230:12	230:17	
231:25 233:1	232:23 233:9		233:16	234:10	
240:25	241:23		238:3	238:8	
240:25	241:23		241:24 242:9 242:20 244:19	242:7 242:12 243:14 245:14	
246:15	247:8		246:10 248:24 249:10	246:14 249:7 249:23	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gary Smith
8/20/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
298:4 298:24	298:10 299:14		299:15 300:13	300:10 300:17	
299:10	299:14	NR			
320:5	320:22		319:17 320:23	320:4 321:16	
322:23	323:9		323:10	323:25	
324:1	325:4		323:10 325:21 327:20	323:25 325:25 328:6	
324:19	324:25	NR			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Mike Stanke 6/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
30:3	30:7		29:8	29:10	
30:3	30:7		29:14	29:16	
38:6	38:17		38:18	39:1	
64:25	65:7	NR			
66:9	66:13	REL,ML			
68:2	68:3	NR,SPEC,FD, PREJ,NPK			
72:11	72:15	NR,REL,ML			
73:10 73:18 74:3	73:14 73:25 74:13		73:15 74:1	73:17 74:2	
78:3 (And that...)	78:8	NR,REL,ML			
77:11	78:8		78:9 79:6	78:25 79:13	
91:11	91:13	ML,REL,NR			
91:16	91:24	ML,REL,NR			
92:5	92:9	NR			
92:16	92:22	NR,REL,ML			
186:3	186:3	REL,NR,PREJ			
186:5	186:12	NR,REL,PREJ			
186:16	186:19	NPK,SPEC,FD			
186:25	187:2	HSY			
190:2	190:11		188:20	188:24	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Mike Stanke
6/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
190:10 (And Mr. Spurling...)	190:11	REL,ML,PREJ			
190:2	190:11		190:12	190:15	
190:2	190:11		190:21	191:20	
204:8 204:18	204:13 205:1		205:2	205:6	
219:8	219:12		220:20	221:1	
219:20	220:3		220:20	221:1	
232:9	232:12		233:13 234:5	233:17 234:8	
232:17	233:12		233:13	233:17	
232:17	233:12		234:5	234:8	
291:21	295:12		289:20	289:25	
292:15	292:23	LD			
293:4	293:7	LD			
293:9	293:12	LD			
293:13	293:14	LD			
293:17	293:19	LD			
294:1	294:6	LD			
294:8	294:9	LD			
294:11	294:13	LD			
294:15	294:20	LD			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Mike Stanke
6/23/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
294:22	294:23	LD			
294:25	295:2	LD			
295:4	295:11	LD,MIS,VAG			
295:18	295:19	LD			
295:21	295:25	LD,VAG,MIST			
296:6	296:6	LD,MIST,VAG			
296:11	296:15	LD			
296:16	296:19	LD			
291:21 295:18 296:8 296:11	295:12 295:25 296:9 296:19		299:17	300:14	
291:21 295:18 296:8 296:11	295:12 295:25 296:9 296:19		301:3	301:17	
291:21 295:18 296:8 296:11	295:12 295:25 296:9 296:19		302:16	302:23	
291:21 295:18 296:8 296:11	295:12 295:25 296:9 296:19		303:2	303:6	

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of James Wheatley 9/3/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
50:6	50:11	PREJ,REL,ML			
110:18 110:25 111:16 112:5	110:23 111:13 112:2 112:8		112:11	112:16	
216:5	216:18		214:21	215:2	
216:14	216:18	LD,FD,VAG			

Plaintiffs' Counterdesignations and Objections to Defendants' Designation of Gregory A. Zahrt 03/30/99

Defendants' Start - Page:Line	Defendants' End - Page:Line	Objection	Counter Start - Page:Line	Counter End - Page:Line	Basis for Counter-designation
83:1 83:19	83:17 83:22		84:17 84:21	84:18 85:15	
83:15 83:19	83:17 83:22	ML/REL/NR/ VAG/AMB			
85:16 86:2	85:23 86:3		84:17 84:21 86:4 86:17	84:18 85:15 86:7 87:2	
96:16 96:22	96:19 96:25	A&A/NR			

CERTIFICATE OF SERVICE

I certify that on this 7th day of February, 2000, a copy of the foregoing was sent by overnight mail to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P.,c/o Medea Ansari, Rm 10-207, 1460 Broadway, New York, NY 10036

John S. Reed, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Michael J. Guzman

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NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD
EVAN T. LEO

February 7, 2000

Via Overnight Mail

Honorable Thomas B. Russell
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed is a courtesy copy of Plaintiffs' Counterdesignations and Objections. These Counterdesignations and Objections have also been filed with the Clerk.

Respectfully,

Michael J. Guzman

Enclosure

cc: Neal R. Stoll
John S. Reed

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
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EVAN T. LEO

February 7, 2000

Via Hand Delivery

Jeffery A. Apperson
Clerk of the Court
322 Federal Building
501 Broadway
Paducah, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Mr. Apperson:

Enclosed for filing is an original and one copy of Plaintiffs' Counterdesignations and Objections.

These documents have also been served on opposing counsel via overnight mail.

I have also enclosed an additional copy. Please date stamp and return this copy in the attached self-addressed, postage pre-paid envelope.

Thank you for your attention to this matter.

Respectfully,

Michael J. Guzman

Enclosures

cc: Neal R. Stoll
James A. Keyte
Chris T. Athanasia
John S. Reed

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REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD
EVAN T. LEO

February 7, 2000

Via Overnight Mail

Honorable James D. Moyer
208 Snyder U.S. Courthouse
601 W. Broadway
Louisville, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Judge Moyer:

Enclosed is a courtesy copy of Plaintiffs' Counterdesignations and Objections. These Counterdesignations and Objections have also been filed with the Clerk.

Respectfully,

Michael J. Guzman

Enclosure

cc: Neal R. Stoll
John S. Reed

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., ET AL. **PLAINTIFFS**

vs. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC. **DEFENDANT**

ORDER

The Magistrate Judge held a teleconference at 9:00 a.m. on Tuesday, February 8, 2000, with counsel in this matter. Present on behalf of Conwood were Neil Gorsuch, and Messrs. Guzman, Powell, and Roberts. Present on behalf UST were Neal Stoll, John Reed, Messrs. Athanasia and Keyte, and Ms. Weiss.

The Magistrate Judge announced the following rulings:

1. UST is granted leave to file a supplemental brief today with respect to the Leftwich in limine issues.

2. UST is granted leave to depose Dr. Leftwich with respect to his supplemental declaration, but such deposition should not await a definitive ruling by Judge Russell on the pending Daubert motions. Instead, it should proceed as soon as reasonably possible.

Date: February 8, 2000

JAMES D. MOYER
UNITED STATES DISTRICT COURT

ENTERED
FEB 8 2000
JEFFREY APPERSON, CLERK

Copies to: Counsel of Record (Via Facsimile)

16diii004108

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Clerk of Court

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Neal Stoll
William Geiger
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY L. P., ET AL. **PLAINTIFFS**

v. **NO. 5:98CV-108-R**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. **DEFENDANT**

ORDER

This matter came before the court on oral motion of plaintiff Conwood to compel defendant UST to produce the full compensation received by defense expert Dr. David Scheffman for his work on this case.

According to plaintiff, Dr. Sheffman stated in his expert report that he is compensated at a rate of $400 per hour. At his deposition he testified that he also received approximately 14% of the billing from LECG/Navigant staff members who work on this case. LECG/Navigant is a non-testifying expert employed by defendant to assist testifying experts, collect and analyze information, and perform other services.

Under Rule 26(a)(2)(B), a testifying expert, such as Dr. Sheffman, must the disclose the "compensation to be paid for the study and testimony" that he renders. Plaintiff argues that it is entitled to the following information: (i) all compensation received in this matter for any source; (ii) any and all remuneration he has or may receive as a result of his "affiliation" with Navigant; and, (iii) his total income from litigation consulting work.

Defendant relies on a number of decisions of the Sixth Circuit which hold that the work of non-testifying experts, such as LECG/Navigant, is not discoverable except for certain specific exceptions, not alleged to be present in the this case. Rule 26(b)(4)(B). *See, e.g.*, Zvolensky

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v. Ametek, Inc., 142 F.3d 438, 1998 WL 124047 (6th Cir. 1998); USM Corp. v. American Aerosols, Inc., 631 F.2d 420, 424-25 (6th Cir. 1980); Toledo Edison Co. v. G.A. Technologies, Inc., 847 F.2d 335, 340 (6th Cir. 1988). Defendant contends that the work product, scope of work, and, most important, the compensation received by LECG/Navigant is not discoverable. To require Dr. Sheffman to reveal his income from LECG/Navigant will, in effect, reveal the compensation received by LECG/Navigant. Defendant also argues that the compensation received by Dr. Sheffman from LECG/Navigant is not compensation for Dr. Sheffman's "study and testimony" and therefore is not covered by the disclosure requirement of Rule 26(a)(2)(B).

Dr. Sheffman has greater financial income from this case than merely his hourly rate of compensation. If his hourly compensation is relevant and discoverable, his financial stake in other aspects of the case is also relevant and discoverable. His total benefit from the litigation is a factor which the jury and the trial court may properly take into account in weighing the credibility of his testimony. To permit disclosure of only the hourly fee income would be incomplete and possibly misleading as to Dr. Sheffman's stake in the controversy and his objectivity in rendering his opinions.

The fact that disclosure of his income from LECG/Navigant attributable to this case may implicitly disclose the compensation received by LECG/Navigant for its services in this matter is unfortunate but unavoidable. It is not plaintiff who set up the financial relationship between Dr. Sheffman and LECG/Navigant or plaintiff that chose Dr. Sheffman to serve as an expert in this case. Plaintiff's legitimate discovery requests should not be denied because of decisions made by defendant or Dr. Sheffman.

Plaintiff has not shown that information regarding Dr. Sheffman's total annual income from consultation work or his total income from his affiliation with LECG/Navigant is necessary or

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warranted in this instance.

IT IS HEREBY ORDERED that plaintiff's motion to compel is **GRANTED** to the extent that, within 7 days of the entry of this order, defendant shall provide plaintiff with information regarding Dr. Sheffman's total income generated from this litigation, either directly or indirectly through LECG/Navigant.

Date: February 9, 2000

JDMoyer

JAMES D. MOYER
UNITED STATES MAGISTRATE JUDGE

Copies to:
Counsel of Record

ENTERED
FEB 9 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii004112

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Clerk of Court

William W. Clark
Chief Deputy Clerk

Divisional Office Fax Nos:
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Owensboro 502-685-4601
Paducah 502-442-1919

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TO: Mark Hansen
Richard Roberts
John Reed
Neal Stoll
William Geiger
Martha Weiss

DATE: 9/7/99

FROM: Michelle Goetzinger

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Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

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TO: Edward J. Foster, Esq.
Tripp Wilson, Esq.
Bob Craddock, Esq.

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CLIENT NO.: **97718**

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FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: February 9, 2000
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TO: DAVID SIMPSON, ESQ.
EDDIE FOSTER, ESQ
TRIPP WILSON, ESQ.

FAX NO.: 901-682-1223

CLIENT NO. 97718

FROM: NEIL M. GORSUCH

PHONE: (202) 326-7978

DATE: February 9, 2000

RE:

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Geoffrey M. Klineberg
Reid M. Figel
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Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO: Hank Handelsman

FAX NO.: (312) 920-2470 **CLIENT NO.:** 97718

PHONE: (312) 750-8400

FROM: Neil M. Gorsuch
PHONE: (202) 326-7978
DATE: February 9, 2000
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16diii004116

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 FEB -9 A10:00 FILED US DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

PLAINTIFFS' MOTION TO PRECLUDE UST EMPLOYEES FROM TESTIFYING LIVE IF UST REFUSES TO MAKE THEM AVAILABLE DURING PLAINTIFFS' CASE-IN-CHIEF

Pursuant to 611(a) of Fed. R. Evid. plaintiffs hereby move the Court for an order requiring defendants to make selected key officers and employees available to testify live during plaintiff's case-in-chief or forgo any right to testify live for the defense.

A memorandum in support of and this motion and a proposed order are attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on this 8th day of February, 2000, a copy of the foregoing was sent by facsimile and overnight mail to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P.,c/o Medea Ansari, Rm 10-207, 1460 Broadway, New York, NY 10036

John S. Reed, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Michael J. Guzman

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 FEB -9 A10:00 FILED US DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO PRECLUDE UST EMPLOYEES FROM TESTIFYING LIVE IF UST REFUSES TO MAKE THEM AVAILABLE DURING PLAINTIFFS' CASE-IN-CHIEF

Central among the issues in this litigation is the decision defendants made at the highest corporate levels to engage in practices designed to hamper competitive distribution. Since this case focuses on the intentionally anticompetitive corporate policies of defendants, it is not surprising that certain officers and employees of United States Tobacco ("UST") will be important witnesses in plaintiffs' case-in-chief. More than one court has noted the reality that "[i]n complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1961). See also A-Barr Sales Co. v. Coca-Cola Co., 1981 U.S. Dist. LEXIS 14166*2 (N.D.IL.

January 13, 1981) (same). The demeanor and comportment of these individuals at trial will be as critical as the substance of their testimony.

Conwood, accordingly, included the key UST officers and employees on its trial witness list. Conwood then requested that defendants accept service of trial subpoenas on behalf of certain of these individuals.[1] Counsel for defendants have categorically refused to accept service -- even though these same employees appear on UST's witness list.[2]

Conwood now asks this Court to exercise its authority under Federal Rule of Evidence 611(a) to order defendants' key employees to testify live during plaintiff's case-in-chief or, in the alternative, forgo their right to testify live for the defense. To require plaintiffs to impart UST employee testimony through depositions, yet allow UST the luxury of rebutting that testimony live would impede the jury's ability to evaluate the

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[1]Conwood made the request by a letter to counsel for defendants dated January 26, 2000. See Attachment "A". Defendants respond by a letter to Magistrate Judge Moyer dated February 1, 2000 stating, "[b]y copy of this letter, we advise Conwood's counsel that we will not accept service of trial subpoenas." See Attachment "B". Upon receipt of the letter stating UST's position, Conwood began serving trial subpoenas directly on thirteen UST employees who are listed on Attachment "C". Conwood will, of course, make every effort to be solicitous of the schedules and commitments of these thirteen individuals in the event that they testify live during plaintiffs' case-in-chief.

[2]Each of these individuals appears on defendants' trial witness filed on January 21, 2000 and on plaintiffs' trial witness list filed the same date.

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credibility, demeanor and quality of these witnesses to the likely detriment of Conwood.

ARGUMENT

The Court should use its inherent authority over the conduct of the trial to ensure a balanced and efficient presentation of the evidence by requiring the key UST officers and employees to testify live at trial for both parties or for neither. It is well established that Rule 611(a) provides broad authority to control when and how a witness may testify.[3] See Martin v. Weaver, 666 F.2d 1013, 1020 (6th Cir.), cert. denied, 456 U.S. 962 (1982) (As the "governor of the trial for the purpose of assuring its proper conduct," the district court exercises broad powers.); United States v. Dent, 984 F.2d 1453, 1463 (7th Cir.), cert. denied, 510 U.S. 875 (1993) ("The district court has substantial discretion in its control of the presentation of evidence at trial.").

Relying on this authority, courts have repeatedly held that defendants may be precluded from calling defense witnesses during their own presentations, if defendants failed to produce those witnesses during plaintiff's case-in-chief. In Matthews, Inc. v. Transamerica Transportation Services, Inc., 945 F.2d 269, 272-73, 9th Cir. 1991), for example, the Ninth Circuit upheld a trial

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[3]Federal Rule of Evidence 611(a) grants a court the power to control "the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

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court's refusal to allow two of defendant's employees to testify live in the defense case when the defendant had earlier refused to make them available for use in the plaintiff's case-in-chief. Expressing a clear preference for live testimony, the court condemned defendant's "gamesmanship," stating "[i]f [defendant] had truly wished to present the live testimony of [its employees], it could have done so by making those witnesses available when [plaintiff] requested that they be produced." Id. at 273. Likewise, in Maran Coal Corp. v. Societe Generale de Serveillance S.A., No. 92 CIV. 8728, 1996 U.S. Dist. LEXIS 172 (S.D.N.Y. Jan. 10, 1996), defendant asserted that it would not make available certain nonparty witnesses "affiliated with" the defendant until its own case-in-chief. Id. at *2. The defendant argued that these witnesses were foreign nonparty witnesses not subject to the court's subpoena power. Id. at *1-2. The court however invoked its authority under Rule 611(a) to order defendants to "produce [the witnesses] for plaintiff's case or be precluded from calling them as live witnesses in their own case." Id. at *7. The court expressly tied its holding to the purposes of Rule 611(a): "[The defendant's] gamesmanship will not assist the ascertainment of truth and will needlessly consume the jury's time by requiring [plaintiff] to read to the jury the witnesses' deposition testimony." Id. at *5 (footnote omitted). See also In re Gulf Oil/Cities Service Tender Offer Litigation, 776 F. Supp. 838, 839 (S.D.N.Y. 1991) (Ordering defendant under 611(a) to produce former officer and director live for plaintiffs' case

or forgo his live testimony entirely; "[i]f he elects to absent himself during plaintiffs' case, he will not testify at all, and plaintiffs will be free to comment upon his absence.").

The Manual for Complex Litigation -- written by a panel of the nation's most distinguished jurists -- endorses the course of action adopted by these courts. The Manual states that to prevent "substantial interference with the conduct of the trial," "courts have used their discretion under Fed. R. Evid. 611 to preclude parties who refuse to honor a reasonable request for production of a key witness subject to their control, and thereby force an opponent to use a deposition, from calling the witness to testify personally during their presentation of evidence." Manual for Complex Litigation 2d § 22.23, at 132 (2d ed. 1985).[4]

The Court should follow the practice of these courts in the present case. These witnesses are integral to plaintiffs' presentation of corporate policy. In addition, it would deprive the jury of the ability to see the witnesses' demeanor and assess their credibility during this critical testimony, while at the same time oppressing the jury with the monotony of viewing videotaped depositions (some of which suffer from poor sound or

---

[4]The Manual's Third Edition reiterates the point:

> A party may . . . be unwilling to make available employees who are beyond the court's subpoena power. Though the court probably lacks authority to compel their appearance, it may encourage cooperation by precluding that party from later calling such witness itself.

Manual for Complex Litigation 3d § 22.23, at 134 (3d ed. 1995).

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visual quality for reasons entirely beyond the control of the parties). To effectuate the "ascertainment of truth" and "avoid needless consumption of time," the Court should grant plaintiff's motion to preclude these witnesses from testifying if they refuse to testify during plaintiff's case-in-chief.

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CONCLUSION

For all of the foregoing reasons, Conwood's Motion to Preclude UST Employees from Testifying Live if UST Refuses to Make Them Available During Plaintiffs' Case-in-chief should be granted. A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/S/

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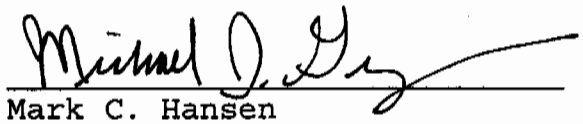

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Counsel for Plaintiffs

February 8, 2000

16diii004125

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Having considered Plaintiffs' Motion to Preclude UST Employees From Testifying Live If UST Refuses to Make Them Available During Plaintiffs' Case-in-Chief and being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' Motion is hereby GRANTED. Defendants shall make every effort to facilitate the appearance of the specified UST officer and employee witnesses at trial during the plaintiffs' case-in-chief. Any of the specified witnesses who does not appear live during plaintiffs' case-in-chief, if called, shall not appear live during defendants' case.

SO ORDERED.

Dated this ____ day of February 2000.

HONORABLE THOMAS B. RUSSELL
DISTRICT COURT JUDGE

EXHIBIT A

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

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NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD

January 26, 2000

Via Facsimile and Federal Express

John S. Reed, Esquire
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
Four Times Square
New York, New York 10036

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al. - Acceptance of Service of Process

Gentlemen:

Will you please let me know, by next Wednesday, whether you are authorized to accept service of process for the following witnesses: Vincent Gierer, Gary Milano, Gary Smith, Arlie Annundson, Tom Berkebile, Michael Beyerlein, Donald Blackburn, Robert Chiaradio, Richard Cutler, Tim Entwistle, Doug Faas, Richard Fasanelli, Bob Fitzmaurice, Lonnie Funk, Howard Heylmun, Harvey Jaffer, David Lund, James McCarthy, Donald Nabi, Byron Parish, Donald Segelstrom, Mike Slabbekorn, Mike Stanke, David Untiedt, James Wheatley, Gregory Zahrt, and UST Custodian of Records.

We understand, of course, that each of these witnesses has a busy schedule, and we will work to accommodate them so that their attendance at trial does not cause any unnecessary disruption. When you respond you can tell us about any scheduling conflicts that we should try to work around.

If you do not advise that you can accept service by next Wednesday, we will effect service through other means. Please note that we will seek to compel the attendance of each of the above-listed current employees of UST, as they are party witnesses subject to the Court's power. Alternatively, we will

seek to preclude any UST employee who was not made available for testimony during plaintiffs' case from testifying during defendants' case.

Very truly yours,

Mark C. Hansen

cc: Richard C. Roberts, Esq.

EXHIBIT B

REED WEITKAMP
SCHELL & VICE PLLC

2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000
Facsimile (502) 562-2200
jreed@rwscv.com

John S. Reed

February 1, 2000

Via Facsimile Transmission

Hon. James D. Moyer
United States Magistrate Judge
208 Gene Snyder U.S. Courthouse
601 W. Broadway
Louisville, KY 40202

Re: Conwood Co., et al. v. United States Tobacco Co., et al.
February 4, 2000 Telephone Conference Issues

Dear Magistrate Judge Moyer:

In anticipation of our scheduled telephone conference on Friday, February 4, 2000, and in light of the numerous pretrial issues raised by and in the parties' filings on January 21 and 28, 2000, we wish to call to the Court's attention several matters of particular and more immediate concern to Defendants.

(1) Conwood's damages expert.

The testimony of Conwood's proffered damages expert, Dr. Richard Leftwich, is the subject of a Daubert motion which was fully briefed in December 1999. One of Defendants' motions in limine seeks to exclude, as too late and unfairly prejudicial to Defendants, a new damages approach that Conwood and Dr. Leftwich have been preparing since at least early December 1999 in apparent response to Defendants' criticism and Daubert motion. This new approach was revealed to Defendants and the Court only in Conwood's proposed exhibit list on January 21, 2000 and the "Supplemental Declaration of Richard Leftwich" we received a week later on January 28, 2000. We will be prepared, if necessary, to supplement the Daubert motion to show why Dr. Leftwich's latest approach is equally defective as a matter of law. We will seek the Court's guidance on Friday as to whether it is now necessary or appropriate to make such a supplemental filing. For obvious reasons, it is imperative, in light of Conwood's latest tack, for us to understand as soon as possible how the Court wishes to handle this matter.

(2) Conwood's previously undesignated field witnesses.

Conwood's January 21, 2000 trial witness list contains the names of ten persons who, we learned on January 27, 2000, include three sportsman's show promoters, two former employees of a private investigation firm that worked for Kellogg Huber in this case, two Kellogg Huber paralegals, a Conwood key account manager, and two Conwood sales representatives.

By copy of this letter, we are asking Conwood to confirm that none of these persons will be called at trial as witnesses with "alleged direct personal knowledge of UST's 'in the field' anti-competitive behavior" as outlined in the Court's May 11, 1999 Order (Dkt. 100) requiring listing of such trial witnesses by September 21, 1999. None of the ten were so listed at that time. To the extent we have not been satisfied by the time of the Friday telephone conference call that none of these witnesses will be called to so testify, we plan to raise this matter with the Court and seek enforcement of the May 11, 1999 Order.

(3) Conwood's efforts to preclude or coopt live trial appearances of Defendants' employees.

Defendants plan to respond expeditiously to Conwood's motions in limine filed January 28, 2000. One matter does require even more immediate attention.

In one of its motions in limine, Conwood seeks to preclude Defendants from showing or reading to the jury in Defendants' case in chief the deposition testimony of any of Defendants' employees from anywhere in the country on the unsupported theory that all such persons are in the control of Defendants and should, therefore, be compelled to appear live at trial.

In a related ploy, on January 26, 2000, Conwood's counsel sent us the attached letter identifying 27 of Defendants' employees or officers from around the country, asking if we will accept service of trial subpoenas for them, and stating Conwood's intention to compel their appearance at trial. The letter further announced Conwood's intention to seek to preclude the testimony in Defendants' case not only of these enumerated persons but "any UST employee who was not made available for testimony during plaintiffs' case." Conwood sought a response by Wednesday, February 2, 2000.

By copy of this letter, we advise Conwood's counsel that we will not accept service of trial subpoenas. Defendants also oppose any such attempt as outlined in the January 26, 2000 letter or the referenced Conwood motion in limine to complicate the trial and interfere with Defendants' right

REED WEITKAMP
SCHELL & VICE PLLC

to organize and present their case as they deem appropriate. Indeed, Defendants' strategy may very well depend upon how Conwood's case goes into the record.

We believe that this matter can and should be resolved by the summary rejection of Conwood's motion and the contents of its attached letter. Accordingly, we will seek the Court's guidance at the Friday conference on how this matter may be most expeditiously put to rest.

* * *

We welcome a dialog with Conwood's counsel to focus or resolve these issues between now and Friday. Given the lateness of the hour and the urgency of these issues to an entire range of trial preparation activities, we have taken the liberty of advising the Court of these matters now so as to be sure to have them at the top of the agenda for Friday as necessary.

Sincerely,

John S. Reed

JSR/kmc
cc: Mark C. Hansen, et al.
Richard C. Roberts
Neal R. Stoll, et al

EXHIBIT C

16diii004136

KEY UST WITNESSES IN PLAINTIFFS' CASE-IN-CHIEF

Name	Title	Participation in Exclusion	PX No.
Timothy Entwistle	Manager of National Accounts	With the Wal-mart agreement, "[w]e have severely cut back on their [competitors'] ability to market products."	PX 232
Richard Fasanelli	Vice-President	"Key Competitive Strategies: 1. UST needs to have more than their fair share of smokeless inventory at wholesale/retail..."	PX 63
Robert Fitzmaurice	Senior Vice-President of Strategic Planning and Business Development	"Agreed P/V goal: We will slow down the growth of price/value competition in order to protect our market share within the framework of desired financial growth."	PX 45
Gary Milano	Vice-President of Sales (USTC)	Post-lawsuit memo to subordinates: terms such as "we have eliminated competitive brands, we have had Timberwolf discontinued, our chain manager has had Conwood facings reduced by X number" should not be used.	PX 124A-G
Gary Smith	President (USTC)	Congratulated subordinates for achieving exclusive vending and restrictions on competitive POS in Southland stores (7/11)	PX 68
David Untiedt	Director of National Accounts	Post-lawsuit memo: "Guys, it is absolutely critical that any reference to category management actions in any of our chains, and any reference to any product SKU changes are delivered as retailer initiated."	PX 127
Thomas Berkebile	Regional Key Account Manager	"By doing this [discontinuing old competitive product at retail] we have been able to increase our share of fixture and improve our retail presence."	PX 30

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Michael Beyerlein	Sales Representative	From his performance review: "Continue to offer vendor exclusivity and category management where feasible."	PX 186
Donald Blackburn	Key Account Manager for Wal-Mart and Sam's	Secured exclusive vending and competitive POS restrictions for UST at Southland.	PX 68
Robert Chiaradio	National Accounts Manager, Retail	"Granted, this system is not for use in every store. On the contrary, it is simply another tool to have in our arsenal to help us lock up space in the NWO."	PX 141
Byron Parish	Sales Representative	From his performance review: "Pay close attention to every opportunity to gain extra facings and placing roll vendors. These area are critical to increasing business and keeping competition under control."	PX 258
James Wheatley	Department Manager	"The result of having new merchandisers on controlled bases could be increased sales volume from the expanded roll capabilities, increased presence, and improved market share from having tighter control of our competitor's vending and distribution."	PX 71
UST Custodian of Records		Identify UST-produced documents	

EXHIBIT D

4TH CASE of Level 1 printed in FULL format.

MARAN COAL CORPORATION, Plaintiff, -v- SOCIETE GENERALE DE SURVEILLANCE S.A.; COMMERCIAL TESTING & ENGINEERING CO., Defendants.

92 CIV. 8728 (DLC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1996 U.S. Dist. LEXIS 172

January 9, 1996, Dated
January 10, 1996, FILED

COUNSEL: [*1] For MARAN COAL CORPORATION, plaintiff: Michael G. Davies, Coudert Brothers, New York, NY.

For SOCIETE GENERALE DE SURVEILLANCE S.A., defendant: Charles B. Updike, Schoeman, Marsh & Updike, New York, NY. For COMMERCIAL TESTING & ENGINEERING CO. dba SGS Commercial Testing & Engineering Co., defendant: Kenneth Y. Choy, Buxbaum & Choy, New York, NY.

JUDGES: DENISE COTE, United States District Judge

OPINIONBY: DENISE COTE

OPINION: MEMORANDUM OPINION & ORDER

DENISE COTE, District Judge:

Plaintiff Maran Coal Corp. ("Maran") seeks an order that defendant Societe Generale de Surveillance, S.A. ("SGS") make Messrs. Kailas Chati and John Walker, witnesses who were responsible for overseeing inspections of cargo that [illegible] the subject of the litigation, available for examination at trial during [illegible]intiff's case in chief. In the alternative, if the Court declines to order SGS to produce the witnesses and Maran is therefore forced to introduce their deposition testimony in lieu of live testimony, Maran seeks an Order precluding SGS from introducing the live testimony of the witnesses. SGS, on the other hand, argues that Messrs. Chati and Walker are foreign nonparty witnesses not subject to the [*2] subpoena power of the court, that it is not required to produce these witnesses because they are not officers, directors or managing agents of SGS, and that it produced the two witnesses for deposition and plaintiff is therefore free to introduce their depositions if it wishes in lieu of live testimony. At a conference call on January 7, 1995, and after review of the parties' written submissions of that date, the Court notified the parties that it would preclude SGS from introducing the live testimony of Messrs. Chati and Walker if they are not produced to testify live for Maran. The reasons for that ruling follow.

In this case, Maran has sued SGS over tests conducted by SGS on Maran's behalf in Pakistan on 4 shiploads of coke prior to their transportation to Europe. Maran contends that SGS failed to conduct the tests in a workmanlike manner. Messrs. Chati and Walker were the bulk commodity inspectors affiliated with SGS responsible for supervision and direction of the tests in Pakistan.

As SGS described in its trial memorandum, Mr. Chati travelled from India on behalf of SGS to oversee the inspection of the two cargoes at issue in this lawsuit. Also according to SGS's memorandum, [*3] Mr. Walker travelled from [redacted] and on behalf of SGS to oversee the inspection of the two additional cargoes.

Neither party disputes that testimony from Messrs. Chati and Walker is critical to this case. By a letter dated August 17, 1995, counsel for SGS sought and received an adjournment of this trial from October 16, 1995 to now based in large measure on the unavailability of Mr. Walker. In the letter, counsel for SGS represented to the Court that

two of the coke shipments at issue were inspected under the supervision of John Walker. Mr. Walker is listed as a witness by both sides. Mr. Walker was responsible for planning and executing the inspections properly and, with minor exceptions, will be the only eyewitness to the manner in which the inspections were conducted . . . . Although Mr. Walker's deposition has been taken, his importance as a witness is such that it would be fairer to both sides to have him appear live.

In the Joint Pretrial Order, Maran listed Messrs. Chati and Walker as trial witnesses it intended to call. In December 1995, Maran notified SGS that it would want the two witnesses available to testify during the first three days of trial. Maran asserts that [*4] it learned for the first time on January 4, 1996 that SGS would not produce these two witnesses until its own case. The trial would have started on January 8, 1996 but for the closing of the courthouse due to a winter storm.

Under Rule 611(a) of the Federal Rules of Evidence, trial judges

shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, [and] (2) avoid needless consumption of time . . . .

[redacted]rts have used their discretion under this Rule

to preclude parties who refuse to honor a reasonable request for production of a key witness subject to their control, and thereby force an opponent to use a deposition, from calling the witness to testify personally during their presentation of evidence.

In re Gulf Oil/Cities Service Tender Offer Litigation, 776 F. Supp. 838, 839 (S.D.N.Y. 1991) (MBM) (internal quotation marks and citation omitted).

Mere, although the testimony of these two witnesses is critical to the jury's understanding of the issues, SGS wishes to hold back their live testimony, from which [*5] the jury will be able to evaluate their demeanor and better assess their credibility, until its own case. This gamesmanship n1 will not assist the ascertainment of truth and will needlessly consume the jury's time by requiring Maran to read to the jury the witnesses' deposition testimony.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 In opposing this application, SGS notes "there is nothing plaintiff would like to know better than whether defendants will or will not be able to produce Mr. Walker and Mr. Chati at trial."

- - - - - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - - - -

Although SGS argues that it does not have control over the witnesses, control over the witnesses is not dispositive of the issue presented in the instant motion. Gulf Oil, 776 F. Supp. at 839. SGS further argues that these witnesses are beyond the 100 mile radius of the subpoena power of the Court under Rule 45(b)(2), Fed.R.Civ.P., and that, because they are neither officers nor managing agents of SGS, the Court lacks the power to compel SGS to produce the witnesses at trial. As to Mr. Walker, SGS represents to the Court that he [*6] is a British citizen who was a consultant for SGS at the time of the testing, was a semiretired consultant at the time of his deposition in January of 1995, and that it is SGS's understanding that he is now fully retired. SGS maintains that Mr. Walker's contract with SGS ended in 1991. According to SGS, Mr. Chati is the area manager of an SGS affiliate, SGS India Limited, and was retained as an outside consultant in connection with the inspections at issue in this litigation.

SGS's arguments ring hollow in light of its own representation to the Court in its letter of August 17, 1995 that "although Mr. Walker's deposition has been taken, his importance as a witness is such that it would be fairer to both sides to have him appear live." The Court agrees with SGS's assessment of Mr. Walker's importance as a witness, and that fairness requires his production as a live witness for both sides. The same analysis of importance and fairness applies to the production of Mr. Chati. To the extent that the defendants lack the power to produce the witnesses at trial, Maran will have to rely on their deposition testimony. To the extent defendants are able to produce them as trial witnesses, however, [*7] defendants should not be allowed to withhold from the jury testimony from such critical witnesses the two men who managed the entirety of SGS's work on behalf of Maran until the defense case. Therefore, under the Court's inherent power to control the conduct of trials, as well as Rules 1 and 611(a), Fed.R.Civ.P., it is hereby

ORDERED that defendants must produce Messrs. Chati and Walker for plaintiff's case or be precluded from calling them as live witnesses in their own case.

SO ORDERED:

Dated: New York, New York
January 9, 1996

DENISE COTE

United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION AND MEMORANDUM TO COMPEL WITHDRAWAL OF TRIAL SUBPOENAS ISSUED TO DEFENDANTS' EMPLOYEES AND TO PRECLUDE ISSUANCE OF ADDITIONAL SUBPOENAS

Defendants United States Tobacco Company, et al. ("USTC"), respectfully move this Court for an order, pursuant to Federal Rule of Civil Procedure 45, compelling Plaintiffs Conwood Company, L.P. et al. ("Conwood"), to withdraw the trial subpoenas that were improperly issued to USTC employees who are beyond the subpoena power of this Court. Defendants also move this Court to preclude Conwood from issuing further improper and harassing subpoenas or, in the alternative, to order Conwood to pay all reasonable expenses incurred by USTC and its employees as a result of Conwood's improper trial subpoenas issued to witnesses who reside and work outside Kentucky and more than 100 miles from Paducah.

BACKGROUND

By January 26, 2000 letter, Conwood: (i) inquired whether USTC would voluntarily accept service of trial subpoenas on behalf of twenty-seven USTC employees who are beyond the

subpoena power of this Court; and (ii) disclosed its intention to compel their attendance at trial "through other means" should USTC refuse to accept service. By letter to the Court on February 1, 2000, USTC declined Conwood's invitation to accept service on behalf of those employees. On February 7 and 8, 2000, Plaintiffs attempted to serve at least nine trial subpoenas on USTC employees -- all of whom reside and work outside Kentucky and more than 100 miles from Paducah. At least seven of those subpoenas -- one served on Byron "Todd" Parish, a USTC sales representative in Oklahoma and six attempted to be served on USTC employees working in Greenwich, Connecticut -- were issued from a court without power under Fed. R. Civ. P. 45(a)(2) (first sentence) to issue subpoenas for a trial in this Court. In these particular cases, the subpoenas issued from the United States District Courts for the Western District of Oklahoma and for Connecticut. See Tab A.

ARGUMENT

1. Plaintiffs' Subpoenas Are Invalid Under Federal Rule 45

Plaintiffs' attempted service of trial subpoenas upon USTC's officers and employees -- all of whom are beyond the subpoena power of this Court -- are invalid and must be withdrawn for several reasons. First, under Federal Rule 45(a)(2), "[a] subpoena commanding appearance at trial or hearing shall issue from the court for the district in which the hearing or trial is to be held." This rule must be read in conjunction with Federal Rule 45(b)(2), which limits a court's subpoena power to any place within the state or within 100 miles of the place of trial (see infra). Plaintiffs obviously cannot avoid the limitations of Rule 45(b)(2) by issuing trial subpoenas from another district. Such subpoenas would be valid only to compel attendance of witnesses at a trial within *that* district, e.g., the Western District of Oklahoma, not the Western District of Kentucky. Amgen Inc. v. Kidney

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Center of Delaware County, 879 F. Supp. 878, 882 (N.D. Ill. 1995), case dismissed on other grounds, 101 F.3d 110 (7th Cir. 1996) (under rule, trial subpoena shall issue from trial court); Steel, Inc. v. Atchison, Topeka and Santa Fe Ry., 41 F.R.D. 337, 339 (D. Kan. 1967) (even plaintiff cannot be compelled to testify at trial in court where he filed suit unless he is within the Rule 45 geographical range of subpoena issued from that trial court). See also Kupritz v. Savannah College of Art & Design, 155 F.R.D. 84, 88-89 (E.D. Penn. 1994) (holding invalid under Rule 45(a)(2) a subpoena issued by court outside of district where deposition is to be taken.

Second, even if Plaintiffs have attempted to comply with Rule 45(a)(2) by issuing trial subpoenas from this Court, they also must be withdrawn because the Federal Rules simply do not provide this Court with the power to compel attendance of witnesses that neither live nor work within the Western District of Kentucky or within 100 miles of Paducah. Under Fed. R. Civ. P. 45(b)(2), "a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the hearing, trial, production or inspection specified in the subpoena . . . ."[1] Rule 45(b) clearly does not enable the issuance of subpoenas to persons not within Kentucky or within 100 miles of the place of trial. See, e.g., Johnson v. Land O' Lakes, Inc., 181 F.R.D. 388, 396-97 (N.D. Iowa 1998) (invalidating subpoena to defendants' officer who lived and worked outside 100-mile bulge); In re Air Crash Disaster at Detroit Metropolitan Airport, 130 F.R.D. 647, 650-51 (E.D. Mich. 1989) ("a nonparty witness outside the state in which the district court sits, and not within [the] 100-mile bulge, may not

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[1] In addition, Rule 45(b)(2) allows service of a trial subpoena "at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting at the place of the ... trial." Ky. R. Civ. P. 45.05(1) allows such service any place within the state of Kentucky.

be compelled to attend a hearing or trial"); Price Waterhouse v. First American Corp., 182 F.R.D. 56 (S.D.N.Y. 1998) (quashing subpoenas to plaintiff's partners and employees who did not live or work in New York). Accordingly, any trial subpoena served on a USTC employee not within Kentucky, or within 100 miles of Paducah, must be withdrawn under Fed. R. Civ. P. 45(b).[2]

2. This Court Should Compel Plaintiffs to Withdraw the Subpoenas

Plaintiffs' subpoenas to USTC employees and officers clearly are invalid under the Federal Rules. In fact, Rule 45(c)(3)(A)(ii) expressly mandates that courts quash subpoenas that would compel a non-party witness to travel from outside the state of Kentucky and more than 100 miles to testify.[3] However, Plaintiffs should not be allowed -- with frivolous subpoenas served on the eve of trial -- to force Defendants to move to individually quash twenty-seven improperly subpoenas in myriad district courts across the nation.[4] Rather, this Court should, in the interests of

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[2] Plaintiffs' attempt to extend the subpoena power of the Court would render meaningless the Federal Rules of Civil Procedure and rules of evidence expressly providing for the unavailability of witnesses that are more than 100 miles from the place of trial. See, e.g., Regents of University of California v. Kohne, 166 F.R.D. 463, 464 (S.D. Cal. 1996) (nonparty witness is "unavailable" for purposes of Federal Rule of Evidence 804(a)(5) and Federal Rule of Civil Procedure 32(a)(3) if one neither resides, is employed or conducts business within 100 miles of place of trial).

[3] Although Fed. R. Civ. P. 45(c)(3)(A)(ii) expressly excepts "a party or an officer of a party," that rule does not, by negative implication, extend the subpoena power of the Court under Rule 45(b)(2). Accordingly, courts also have invalidated trial subpoenas to parties and officers of parties that are beyond the 100-mile provision of Rule 45(c)(3)(A)(ii). See Land O' Lakes, 181 F.R.D. at 397 ("There simply is no 'negative implication' . . . that Rule 45(c)(3)(A)(ii) subjects to subpoena officers of parties who are more than 100 miles from the place of trial whether or not they are within the range of the subpoena power defined in Rule 45(b)(2)"); Smith v. Chason, No. 96-10788-PBS, 1997 WL 298254, *9 & n.4 (D.Mass. Apr. 10, 1997) (no power to compel appearance of party who neither resides nor works within 100 miles from place of trial); Steel, Inc. v. Atchison, Topeka and Santa Fe Ry., 41 F.R.D. 337, 339 (D.Kan. 1967).

[4] In fact, "where a subpoena purports to require [attendance of] a non-party beyond the territorial limits of Rule 45, witnesses can disobey the subpoena 'without any preliminary motion for (continued...)

fairness and efficiency, compel Plaintiffs to withdraw all subpoenas improperly issued to USTC employees and officers from both this Court and other district courts throughout the nation.[5]

3. This Court Should Preclude Plaintiffs From Obtaining Trial Subpoenas For Additional Witnesses Beyond This Court's Subpoena Power

Plaintiffs' misdirected attempts to serve trial subpoenas upon USTC employees and officers has been extremely disruptive of USTC's business. Several of USTC's employees already have been contacted by process servers and have been forced to expend valuable time and resources to determine how to respond.[6] Further, of the additional eighteen USTC officers and employees whom Conwood apparently intends to serve, none lives or is employed within Kentucky or within 100 miles of the place of trial. Accordingly, to prevent Conwood from abusing the subpoena process and further harassing USTC's employees who are beyond this Court's subpoena power, this Court should enter an order precluding Conwood from improperly serving trial subpoenas and further

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[4] (...continued)
a court ruling on the matter.'" McAuslin v. Grinnell Corp., No. 97-775 & 97-803, 1999 WL 24617 (E.D.La. Jan. 19, 1999); see Kupritz, 155 F.R.D. at 88. Defendants make this motion in an exercise of caution, and to avoid further disruptions to its employees and officers.

[5] Alternatively, Plaintiffs should be forced to pay the amount of the reasonable expenses incurred because of its improperly issued subpoenas, including attorneys fees. See Rule 45(c)(1) (court shall impose sanctions that may include reasonable attorneys fee and lost earnings); see also 1991 Advisory Committee Notes to Rule 45(c)(1) ("Paragraph (c)(1) give specific application to the principle stated in Rule 26(g) and specifies liability for [damages] by a non-party witness as a result of a misuse of the subpoena.").

[6] Conwood already has attempted to serve trial subpoenas upon at least nine USTC employees who neither live nor work in the Western District of Kentucky or within 100 miles of Paducah: Tom Berkebile (West Virginia resident), Don Blackburn (Arkansas resident), Byron "Todd" Parish (Oklahoma resident), Gary Smith, Gary Milano, Richard Fasanelli, David Untiedt, Robert Fitzmaurice (Connecticut residents) and Tim Entwistel (New Jersey resident). See, e.g., Declaration of Thomas Berkebile (a chain account manager from West Virginia); Copy of Subpoena served on Byron "Todd" Parrish (a sales representative from Oklahoma), Tab A.

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harassing any USTC employees not within the subpoena power of this Court.[7] Because the Federal Rules afford Conwood absolutely no basis for compelling the attendance of these USTC employees at trial, all of the subpoenas thus far issued should be withdrawn. Apparently, Conwood's counsel is issuing subpoenas from United States District Courts in other states for all of these twenty-seven witnesses,[8] but even if issued from this Court, subpoenas to these witnesses should still be withdrawn because they are beyond the geographic subpoena power of this Court.

CONCLUSION

For the foregoing reasons, USTC respectfully requests that this Court compel Plaintiffs to withdraw all outstanding trial subpoenas issued to USTC employees who neither reside nor work in Kentucky or within 100 miles of the Court, and preclude the issuance of any further trial subpoenas to USTC employees not within this Court's subpoena power.

Dated: February 8, 2000

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Ridley M. Sandidge
Lynn K. Fieldhouse
REED WEITKAMP SCHELL
& VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
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[7] Conwood's abuse of this Court's subpoena power is an actionable tort and a potential violation of Model Rule of Professional Conduct 4.4. See 1991 Advisory Committee Notes to Rule 45(c).

[8] The one subpoena that was actually served on a USTC employee and is in the possession of USTC's counsel was issued out of the United States District Court in the Western District of Oklahoma, purporting to compel the employee's attendance at trial in the Western District of Kentucky. See Tab A. A process server appeared at USTC's Greenwich, Connecticut facility on February 8, 2000 with six subpoenas (not served there) which were reported to be from the United States District Court for the District of Connecticut. All these subpoenas are so drastically at odds with the Federal Rules of Civil Procedure that USTC seeks the Court's guidance on how to proceed.

16diii004147

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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission and by overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, on the 8th day of February, 2000.

Counsel for Defendants

16diii004148

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

Defendants United States Tobacco Company, et al. ("USTC") having moved the Court for an order directing Plaintiffs Conwood Company, L.P., et al. ("Conwood") to withdraw the trial subpoenas that were improperly issued to USTC employees and any other persons who are beyond the subpoena power of this Court and precluding Conwood from issuing further improper and harassing subpoenas, and the Court being fully and sufficiently advised:

IT IS HEREBY ORDERED that:

1. Conwood shall cease and desist from:

(a) serving trial subpoenas issued under authority of courts other than this Court, and

(b) serving trial subpoenas on witnesses who live and work beyond the geographical trial subpoena power of this Court, defined as the Commonwealth of Kentucky and 100 miles from Paducah; and

2. Conwood shall:

(a) formally withdraw all trial subpoenas it has caused to be issued from any court and served upon any witness beyond the geographic trial subpoena power of this Court; and

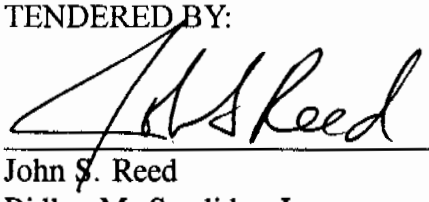
(b) provide the Court and USTC notice and proof of such withdrawal within 24 hours after issuance of this Order; and

3. To the extent that Conwood shall fail to comply with paragraph 2 of this Order, Conwood shall pay all reasonable legal fees and expenses incurred by USTC and any nonparty in seeking in other courts to quash, or obtain protective orders or other relief against, such subpoenas.

Entered this _____ day of _____, 2000.

_____
Thomas B. Russell, Judge
United States District Court

TENDERED BY:



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Counsel for Defendants

EXHIBIT A

United States District Court

FOR THE WESTERN DISTRICT OF OKLAHOMA

CONWOOD COMPANY, L.P., et al.

v.

UNITED STATES TOBACCO COMPANY, et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: Civil Action No.5:98CV-108-R In the United States District Court for the Western District of Kentucky at Paducah

TO: Byron Parish
8610 Northeast 129th
Jones, OK 73049

☒ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM / DATE AND TIME
United States District Court Western District of Kentucky 307 Federal Building 501 Broadway Paducah, Kentucky 42001	Second Floor Courtroom February 28, 2000, 9:00 a.m. and continuing daily through to the conclusion of trial.

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below:

PREMISES	DATE AND TIME

ISSUING OFFICER SIGNATURE AND TITLE. INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT	DATE
Attorney for Plaintiffs Neil M. Gorsuch /BAH	2/4/00

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Neil M. Gorsuch
Steven F. Benz
(202) 326-7900

Kellogg Huber Hansen Todd & Evans, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005

Declaration of Thomas Berkebile

1. My name is Thomas Berkebile. I am employed as a chain account manager for U.S. Tobacco in Weirton, West Virginia. I was deposed in the matter Conwood Company, L.P., et al v. U.S. Tobacco Co., et al.

2. Today February 7, 2000, I was working in my office in Weirton, West Virginia when, at approximately 2:30 p.m., I checked the messages on my home answering machine by calling the machine from my office. Sometime today, I received a message from Juliet Hoffman. Her message stated that she had something to deliver to me and asked that I call her. She left a number, 412.531.8966.

3. I called the number. I asked what she had to deliver and she said it was a subpoena and that it had something to do with the Conwood lawsuit, but that she did not know specifics. She asked for directions to my home so that she could go there to deliver it. I gave her directions, and told her that I would be home around 7:00 p.m. tonight.

I declare under penalty of perjury that the foregoing is true and correct.

Thomas Berkebile

February 7, 2000

COMMAND #147

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001	2/09	09:27	1	901 682 1223	EC--S	04' 40"	014	OK

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1301 K Street, N.W.
Suite 1000 West
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Michael K. Kellogg
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Steven F. Benz
Neil M. Gorsuch
Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO:	DAVID SIMPSON, ESQ. EDDIE FOSTER, ESQ TRIPP WILSON, ESQ.
FAX NO.:	901-682-1223
CLIENT NO.	97718
FROM:	NEIL M. GORSUCH
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Reid M. Figel
Henk Brands
Sean A. Lev
Courtney Simmons Elwood

FACSIMILE TRANSMISSION

TO:	Edward J. Foster, Esq. Tripp Wilson, Esq. Bob Craddock, Esq.
FAX NO.:	**(901) 537-1010**
CLIENT NO.:	**97718**
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Courtney Simmons Elwood

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TO: Harold S. Handelsman
Pritzker & Pritzker

FAX NO.: **312-750-8545** CLIENT NO.: 97718

PHONE: 312-750-8102

FROM: Neil M. Gorsuch

PHONE: 202-326-7978

DATE: February 8, 2000

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JESSICA

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TELECOPIER COVER SHEET

February 8, 2000

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RE: *Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R*

MESSAGE: Joan Moore has advised that Judge Russell will hear us on this motion at 10 am C time, tomorrow, Wednesday, Feb. 9. We will circulate a call-in number.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	'00 FEB 14 A10:00 Civil Action No. 5:98CV-108-R FILED JURY TRIAL DEMANDED

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE TO PRECLUDE CERTAIN INTENDED TRIAL EXHIBITS AND TESTIMONY OR OTHER REFERENCE TO SUCH MATERIALS

Under the guise of asking for an inch, defendants United States Tobacco Company, et al. ("UST") want to take a mile. They ask the Court to preclude five of plaintiffs' retail activity reports, yet their motion is devoid of any discussion of the specifics of each report. That is because what UST truly seeks is to preclude Conwood's experts from testifying about the basis for their opinions where those opinions rely on field reports of misconduct and/or Conwood representatives' sworn declarations. Defs.' Proposed Order at 2. The Court should not countenance UST's overreaching.

In fact, Conwood agrees with UST that Conwood's internal documents are inadmissible hearsay when offered by Conwood -- a point that applies with equal force to hundreds of UST's intended exhibits. (Point I, infra). However, it is well-settled that an expert may not only rely on documents containing inadmissible hearsay in forming his or her opinions, but that such documents may be put before the jury to explain the basis of the expert's opinion. (Point II, infra). UST cannot cite a single case

suggesting otherwise. Indeed, UST's designated expert, David Scheffman, relied on thousands of such documents in developing his own opinions. In addition, Scheffman relied on documents for his regression model that he does not understand and cannot explain. UST's suggested double standard for Conwood's experts should be rejected. (Point III, infra).

I. The Five Exhibits Will Not Be Offered in Evidence

UST claims that Conwood intends to offer in evidence a supposedly large collection of "unethical activity reports" and sworn declarations, which constitute hearsay when offered by Conwood. Defs.' Mem. at 1. Conwood agrees. Conwood placed five such exhibits on its exhibit list because these five documents were the subject of extensive deposition testimony (of third-party witnesses) that the jury may not understand without having the documents before them -- with appropriate limiting instruction. Conwood will not offer these documents into evidence, just as UST cannot offer into evidence the hundreds of UST hearsay documents listed on defendants' trial exhibit list. See, e.g., DXs 147-66, 171-281, 303-86.

II. Experts Are Permitted to Rely on Inadmissible Hearsay

UST demands preclusion of any testimony by any witness, including Conwood's experts, regarding "unethical activity reports" or sworn declarations from over 200 Conwood sales representatives. UST cites no authority in support of this argument. In fact, it concedes (in a footnote) that such testimony is permissible. UST Mem. at 2 n.1.[1] Instead, UST

[1]UST's Motion makes no challenge to the documents under Rule 703. Apparently, UST chose to place that argument in its supplemental briefing concerning Conwood's damages model — thus allowing it to challenge the same documents over and over. In

makes unfounded, speculative charges that Conwood will seek to "back-door" such documents — despite the fact that both Conwood's and UST's own experts are completely open about their reliance on such documents as part of the basis of their opinions. Id. at 2.

It is well-settled that (a) an expert may rely on documents containing hearsay — even inadmissible hearsay — in forming his opinions[2]; and (b) such documents are admissible to explain the basis of the expert's opinion. See, e.g., Trepel v. Roadway Express, Inc., 194 F.3d 708, 717 (6th Cir. 1999) (abuse of discretion requiring reversal where district court precluded experts from testifying about the basis of their opinions, even though basis was inadmissible hearsay). UST's expert made extensive use of, and relies on, the very same kind of Conwood reports. See Expert Report of David T. Scheffman ¶¶ 99, 100 at 30 (Sept. 15, 1999) (referring to Scheffman's review of 1,171 Conwood unethical activity reports).

UST asserts that any reference to declarations or activity reports will be unfairly prejudicial because UST has not cross-examined the declarants or the experts. This is simply wrong. UST had full opportunity to cross-examine and confront both the declarants and the experts regarding the retail activity reports and declarations. Indeed, UST deposed virtually every Conwood sales manager. Tellingly, UST decided to refrain from any

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any event, Conwood will respond to that argument in its response to UST's supplemental brief.

[2] 4 Weinstein's Federal Evidence § 703.4, at 703-10 (Matthew Bender 2d ed. 1999) ("Under Rule 703, the facts or data on which the expert bases his or her testimony need not be admissible in evidence. Therefore, an expert opinion will not be excluded solely because the expert has relied on hearsay or other evidence generally inadmissible in court proceedings.").

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questions regarding its exclusionary conduct, the declarations, or the retail activity reports, in its day-long depositions of over 50 Conwood witnesses.

III. UST's Expert Relies on Inadmissible Mystery Documents

While demanding that the Court enter an unprecedented order precluding any reference by Conwood's experts to clearly identified and detailed retail reports and declarations, UST fails to note that its own expert relies on documents that, quite literally, he knows nothing about.

For example, Scheffman rests one of his central analyses on a one-page document (from Conwood's production). He claims in his report that this represents Conwood's belief about states where the most "bad acts" occurred over some unspecified period. See, e.g., Scheffman Report, Attach. 76. But when asked about this document, Scheffman could not explain, e.g., who wrote it, what anything on the page meant, or whether the data had anything to do with Conwood:

> Q. Do you understand what the reference in the columns to numbers is? For example, what 35 -- negative 35.6 for New Mexico is in 1987?
> A. In New Mexico?
> Q. In the column of red states. Tell me what that means. [Obj. omitted]
> A. This is -- I don't -- my guess was, and I don't have a basis, my guess is this was probably a measure of -- attempt to estimate change in market share. Or maybe it was -- it's my -- you know, it's what I -- most likely it is. But I don't know for sure what it is . . .
>
> * * * *
>
> Q. How do you know it's a business document?
> A. I don't.
> Q. You don't know who prepared it, right?
> A. Correct.
>
> * * * *
>
> Q. You don't know what the numbers refer to, correct?
> A. Correct.
>
> * * * *

Q. And what is your basis for saying this is Conwood's belief?
A. I said, I don't know whether it's Conwood's belief.

Scheffman Dep. at 324-30.

For UST, an expert can rely on almost anything; for Conwood, however, the rules require the suppression of clearly identified and explained data from across the country, which Conwood's experts understood and relied upon. UST is, of course, free to challenge any expert's opinions at trial. Conwood is free to challenge UST's expert. That is the proper course here.

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Conclusion

The Court should deny UST's motion. A proposed order is attached.

Respectfully submitted,

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February 11, 2000

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of defendants' Motion in Limine to Preclude Certain Intended Trial Exhibits and Testimony or Other Reference to Such Materials, plaintiffs' opposition thereto, and for good cause shown, said motion is hereby DENIED.

Dated this ___ day of _____, 2000.

_____
HONORABLE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

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I certify that, on this 11th day of February, 2000, a copy of the foregoing was sent via facsimile and overnight delivery to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,

Defendants.

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Civil Action No. 5:98CV-108-R

JURY TRIAL DEMANDED

PLAINTIFFS' REPLY IN SUPPORT OF MOTIONS IN LIMINE

1. The Court should preclude reference to the alleged wealth of Conwood's owners. Conwood does not dispute the relevance of *Conwood's* financial performance; UST is free to argue -- whether wisely or not -- that Conwood (with about 13% of the market) is no "David" or "victimized competitor" up against the "Goliath" UST (with its 77% market share). See UST Mem. in Opp'n at 8. But it is not free to argue that Conwood's ultimate owners are rich from unrelated businesses (through what UST terms the "Pritzker conglomerate," id.).[1] Stated simply, the alleged wealth of Conwood's owners has no bearing on whether Conwood was damaged by UST's Section 2 violations, or the amount of damages that should be awarded to compensate Conwood.

[1]UST's factual characterization of Conwood's ownership is wrong on all counts, and they have no witness with personal knowledge to explain it. The accurate description of ownership would require far more time and explanation before the jury than this irrelevant matter could possibly justify.

The fact that representatives of Conwood's owners may have taken an interest in this litigation is likewise of no consequence to the jury. See id. at 8-9. The wealth and identity of Conwood's owners is no more relevant to this lawsuit than the identity and wealth of UST's owners. The parties in this case are corporations, and their shareholders have nothing to do with the issues to be decided by the jury.[2]

As for the prejudicial nature of the evidence UST seeks to introduce, UST's Memorandum speaks for itself: UST seeks to argue that "Conwood is owned by one of America's wealthiest families," and that the "Pritzker conglomerate" simply "milk[ed]" Conwood's profits. Id. at 8. Such characterizations point out precisely the prejudicial nature of the (irrelevant and unsupported) allegations UST seeks to make.

2. UST's expert Scheffman should be permitted to testify only upon condition that he disclose his entire compensation for work on this case. The Court has ruled on this issue by Order dated February 9, 2000 (Magistrate Judge Moyer).

3. The Court should preclude "tit for tat" evidence that companies other than UST engaged in misconduct at stores. UST admits that it seeks to defend its misconduct at trial by claiming "everyone does it." UST Mem. in Opp'n at 6. This is the same (misguided) argument it made on summary judgment. But as a monopolist, UST cannot engage in exclusionary conduct and

---

[2]There is, moreover, no evidence in the record (or otherwise) to support the bold claim that Conwood's owners decided to "milk" the company of cash needed to invest in the business. Id. at 8. On the contrary, the evidence is uniformly that Conwood's management made all decisions regarding expenditures, investment, and distributions.

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cannot defend itself by claiming that Conwood "did it too." Indeed, courts have routinely rejected such a defense. See, e.g., Paschall v. Kansas City Star Co., 695 F.2d 322, 333 (8th Cir. 1982) (discussing caselaw concerning exclusion effected by publisher and cooperating carriers), rev'd on other grounds, 727 F.2d 692 (8th Cir. 1984); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274-75 (2d Cir. 1979).[3]

UST's efforts to tar even smaller moist snuff sellers (Swisher and Swedish Match), is just as farfetched and irrelevant. UST Mem. in Opp'n at 7. There is no record evidence, and UST can cite none even outside the record, that those companies could or did engage in a systematic campaign of exclusionary conduct that harmed competition. There is no evidence that these companies could or did seek "exclusive vending," in order to constrict space for moist snuff and eliminate rivals' point of sale advertising ("POS"). There is no evidence that either of these sellers could or did use "category management" to skew the stores' product mix to their advantage. Were this a case about isolated acts of vandalism, the conduct of their representatives might be examined.[4] Because the case is

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[3]Moreover, Conwood did not "do it too." While UST trumpets the supposed admission that "[Conwood's] sales force tampers with authorized USTC racks," UST Mem. in Opp'n at 6 (emphasis in original), it does so by distorting the record. Conwood made no such statement. Conwood simply restored its racks when and where it was able legitimately to do so. Conwood's response to UST's exclusion in violation of the antitrust laws has no bearing on the issues the jury must decide. It is UST's exclusion the jury must consider, not Conwood's efforts to maintain its presence in the face of that exclusion.

[4]Conwood is aware of little, if any, evidence that representatives of Swedish Match or Swisher excluded Conwood racks, brands or POS from stores.

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about something entirely different -- systematic exclusion practiced by a monopolist -- the introduction of evidence regarding field misconduct by the excluded UST rivals can only confuse the issues and waste the jury's time.

4. The Court should exclude "retailer permission" evidence. UST argued in its Motion for Summary Judgment that Conwood must "make a specific and competent showing that [its] racks were removed

. . . without authorization of retailers." UST Mem. in Supp. of Mot. for Summ. J. at 36. Conwood's Motion in Limine explained that, as a matter of law, retailer authorization is irrelevant to Conwood's claims under Section 2. All that matters is UST's exclusion, with or without retailer consent.

UST articulates two arguments in opposition to Conwood's motion. First, UST claims that "the terms of any agreements . . . are relevant to Conwood's Section 2 claim" in that "Conwood must . . . prove that the terms of any agreements are exclusionary." UST Mem. in Opp'n at 2. This virtually concedes Conwood's motion. UST here admits that the proper legal test is whether its conduct was *exclusionary*; whether UST succeeded in obtaining unlawful exclusion with or without the consensual involvement of a third party is wholly immaterial. UST should therefore have no objection to Conwood's motion on this score.

Second, UST argues that the concern of Section 2 is not solely to promote "lower prices" or "better products" for consumers, but "to satisfy" retailers. Id. This argument betrays a profound misunderstanding of antitrust law. The Supreme Court has declared with unmistakable clarity that "Congress designed the Sherman Act as a 'consumer welfare

prescription.'" Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citation omitted). "A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law." NCAA v. Board of Regents, 468 U.S. 85, 107 (1984). As the Sixth Circuit recognized, competition is about "reduc[ing] costs" and "expand[ing] sales." Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1422 (6th Cir. 1990) (internal quotation marks omitted). UST's remarkable defense -- that it may conspire with retailers to inflict deliberate harm on consumers, so long as the retailers welcome such an arrangement -- sets antitrust law on its head, and reinforces Conwood's point that evidence of retailer consent is irrelevant to the issue before the jury -- that is, whether UST's conduct was exclusionary.

Indeed, many retailers may welcome exclusionary arrangements, because they may keep retail prices high (and thus increase profits for the retailer) and may also provide an opportunity to share in monopoly rents. For example, in LePage's Inc. v. 3M, No. Civ. A. 97-3983, 1999-1 Trade Cas. (CCH) ¶ 72,538, 1999 WL 346223, at *4-6 (E.D. Pa. May 14, 1999), retailers consented to 3M's exclusionary rebate program, because it provided them with a share of the manufacturer's monopoly profits. Because the arrangement did not benefit consumers, it was held to state a triable claim. Likewise, in R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 60 F. Supp. 2d 502 (M.D.N.C. 1999), there was no doubt that retailers would "choose to sign a Retail Leaders contract" because of the scope of "promotional payments." Id. at 507. The arrangement was enjoined, however,

because it posed "a serious threat to interbrand competition" and would "have an adverse effect on consumer choice." Id. at 511 (emphasis added). Conwood will prove to the jury that UST's activities have had the same effect, and the question whether retailers like or dislike them is beside the point.

UST's Opposition places defendants' theory of the case in sharp relief: UST may deliberately harm consumers and competition so long as its retail distributors are kept happy, through maintenance of high retail prices or with a share of monopoly profits kicked back by UST. Precisely because this position is antithetical to the deepest values of the antitrust laws, and because the jury should not be misled as to the supposed curative power of retailer consent to UST exclusion, the Court should grant Conwood's motion and preclude evidence of retailer permission from the case.

5. The Court should exclude any evidence offered in support of UST's counterclaims. UST mischaracterizes Conwood's motion as entirely tied to the resolution of Conwood's motion for partial summary judgment. UST Mem. in Opp'n at 10. Not so. Here, Conwood seeks only to preclude certain evidence based on UST's disregard of the Federal Rules of Civil Procedure and direct Court orders concerning disclosure of its damages and witnesses. See Feb. 5, 1999 Order (Magistrate Judge Moyer); May 11, 1999 Order at 3 (Magistrate Judge Moyer).

Under settled law, failure to provide a Rule 26(a)(1)(C) computation of damages routinely results in the exclusion of related testimony. See, e.g., Indiana Ins. Co. v. Hussey Seating Co., 176 F.R.D. 291, 293 (S.D. Ind. 1997); Salgado v. General Motors Co., No. 93C1427, 1996 WL 284971, at *1 (N.D. Ill. May 24,

1996); Moore v. Kaye Ins. Assocs., No. 94CV6559, 1995 WL 600244, at *4 (S.D.N.Y. Aug. 8, 1995). Likewise, under Rule 37(c)(1) "[a] party that without substantial justification fails to disclose [witnesses as] required by Rule 26(a) . . . shall not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a motion any witness . . . not so disclosed." And, it goes without saying that UST's disregard of direct court orders requiring production of damages calculations and witness lists provides yet another basis for excluding unproduced testimony or evidence. See, e.g., Fed. R. Civ. P. 37(b)(2); Carlson v. Grobman, 133 F.R.D. 5, 7-8 (D.N.H. 1990) ("The Magistrate's Scheduling Order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.") (internal quotation marks omitted).

6. The Court should exclude hearsay deposition testimony and documents. Under Rule 32, UST should not be permitted to procure the absence of its senior employees in order to avoid cross examination and play their discovery depositions instead. Instead, UST should be permitted to introduce deposition testimony of its own senior employees only upon a proper showing that the witness is genuinely unable to board the UST jet for the trip from Greenwich to Paducah. As the Fifth Circuit has noted, "[a] deposition is an acceptable substitute for oral testimony when in-court observation of the witness is extremely difficult or virtually impossible." Jauch v. Corley, 830 F.2d 47, 50 (5th Cir. 1987). The trial court "may consider all the circumstances of why the party is away from the trial and determine in light of these factors whether to allow use of the deposition." 8A Charles A. Wright, et al., Federal Practice and Procedure § 2147,

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at 181-82 (2d ed. 1994). There are no circumstances in this case indicating that defendants' senior employees are unable to testify live at the trial.[5]

Similarly, UST cannot identify any basis for the introduction into evidence of its own hearsay documents. See UST Mem. in Opp'n at 12 n.5. In fact, one of UST's motions in limine seeks the exclusion of five Conwood business records on hearsay grounds; there is certainly no basis for treating the hundreds of self-serving hearsay documents on UST's exhibit list any differently. See Def. Exhs. 147-166, 171-281, 303-386.

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[5]The cases cited by UST are distinguishable. In Carey v. Bahama Cruise Lines, 864 F.2d 201, 204 (1st Cir. 1988), the court explained that the deposed defense employees were sailors at sea and their depositions had been noticed by defendants, a fact that should have signaled to plaintiffs that their depositions were likely to be used at trial. In Daigle v. Maine Medical Center, 14 F.3d 684, 691 (1st Cir. 1994), the witness expressly stated during his deposition that he was moving to another state and would be unavailable for trial.

Respectfully submitted,

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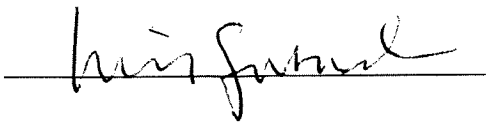

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FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'00 FEB 14 A10:00

FILED
US DISTRICT COURT
W.D. KENTUCKY

PLAINTIFFS' OPPOSITION TO MOTION TO PRECLUDE INTENT EVIDENCE ("NOERR-PENNINGTON")

Defendants United States Tobacco Company, et al. ("UST") argue that evidence of UST's efforts to secure legislation designed to destroy competition in the moist snuff industry is inadmissible at trial. UST contends first that these allegations are irrelevant to the claims made by plaintiffs Conwood Company, L.P., et al. ("Conwood"). Next, UST argues that the evidence of its anticompetitive litigation and lobbying efforts is unduly prejudicial.

Both points are incorrect. Evidence of this activity is admissible to prove that UST acted with anticompetitive intent. Here, the evidence of UST's lobbying and litigation effortswill provde that UST had the intent to suppress competition in the market for moist snuff. (Point I). Moreover, there is no risk that the evidence of UST's activity will be prejudicial. UST's effort to secure anticompetitive legislation through promotion of

a "Global Settlement" that would have locked in its dominant market share ultimately failed. There is thus no risk that the jury will wrongly infer that any of Conwood's damages flowed from UST's lobbying or legislation. (Point II).

ARGUMENT

I. EVIDENCE OF UST'S EFFORTS TO SUPPRESS COMPETITION THROUGH LEGISLATION WILL HELP TO SHOW THE ANTICOMPETITIVE CHARACTER OF ITS MARKETPLACE ACTIVITY AND IS THEREFORE HIGHLY PROBATIVE

Under law as old as the Noerr and Pennington themselves, "petitioning activity" may be admitted in evidence to show anticompetitive intent:

> [U]nder the 'established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.'

United Mine Workers v. Pennington, 381 U.S. 657, 670 n.3 (1965) (emphasis added) (citations omitted). "While not illegal because of the [Noerr-Pennington] exemption," the Eighth Circuit has explained, petitioning activity "does have evidentiary value as to the purpose and concerted character of [defendants] contemporaneous non-exempt activities." Alexander v. National Farmers Org., 687 F.2d 1173, 1196 (8th Cir. 1982). See also, e.g., MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1160 (7th Cir. 1983) (petitioning activity shows "purpose and character of business decisions which had already been made"); United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29, 47 (N.D. Ga. 1977) ("court may consider all of defendants' arguably exempt activities

associated with the petitioning process which are relevant and admissible as purpose and character evidence to prove the anticompetitive intent of defendants' nonexempt conduct as well as the overall anticompetitive scheme").

In this case, Conwood will prove at trial that UST succeeded in preserving its monopoly share of the moist snuff market by choking competitive distribution and by restricting competitors' opportunities to promote their products at the point of sale; in addition, UST systematically raised rivals' costs. UST's efforts to promote the "Global Settlement" of litigation among cigarette manufacturers, state attorneys general, and plaintiffs' lawyers were designed to pursue these same anticompetitive ends through legislative means. For example:

- UST sought legislation restricting distribution of moist snuff products to a "non-self-service" environment — that is, behind the counter — in order to limit distribution space available to competitors;
- UST sought legislation restricting competitors' promotional opportunities by limiting the types and number of advertisements permitted, even as it sought to preserve greater opportunities for itself;
- UST sought to enact a settlement payment structure that would impose disproportionate costs on its competitors.

UST admits for purpose of this motion that these measures were sought with the intent of gaining an advantage in the moist snuff market. UST Mot. at 2 n.1. And the measures it sought to impose are directly parallel to its systematic exclusionary conduct in the marketplace. UST's contrary assertion that evidence of its lobbying and legislative campaign does not "in any way prove[] the

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'purpose and character' of any alleged non-protected conduct" (Id. at 5) is flatly wrong.

UST's claim that City of Cleveland v. Cleveland Electric Illuminating Co., 734 F.2d 1157 (6th Cir. 1984) makes this evidence inadmissible (because irrelevant) is wholly misplaced. In that case, the Court ruled that evidence of anticompetitive litigation was inadmissible where a plaintiff sought to introduce "this episode as a part of the alleged broader pattern of conduct condemned by the Sherman Act." Id. at 1163. This simply follows the rule that anticompetitive litigation is generally not unlawful "'either standing alone or as a part of a broader scheme.'" Id. (quoting Pennington, 381 U.S. at 670). But the Court did not and could not rule that the evidence was irrelevant to the defendants' anticompetitive intent.

UST's relevance challenge to its effort to enact anticompetitive legislation at the same time that it systematically excluded rivals, is thus contrary to common sense and without support in law.

II. EVIDENCE OF UST'S EFFORTS TO SUPPRESS COMPETITION THROUGH LEGISLATION WILL NOT BE UNDULY PREJUDICIAL

UST argues that evidence of its efforts to cripple its competitors by promoting anticompetitive legislation would be unfairly prejudicial because it "would mislead the jury to believe that such conduct may be unlawful." UST Mot. at 6. But courts have routinely admitted such evidence in circumstances like these — including in at least one case prominently relied upon by UST.

See MCI Communications, 708 F.2d at 1160; National Farmers Org., 687 F.2d at 1196; Webb v. Utah Tour Brokers Ass'n, 568 F.2d 670, 672 (10th Cir. 1977) (evidence of petitioning conduct had "evidentiary value"); Household Goods Carriers' Bureau v. Terrell, 452 F.2d 152, 158 (5th Cir. 1971) (evidence concerning efforts to influence government agencies "properly admissible" as intent evidence). Here, there is no risk that a jury might improperly impose liability based on protected petitioning activity, for the simple reason that UST's lobbying efforts have not borne fruit.[1]

In some cases, introduction of anticompetitive petitioning activity may risk unfair prejudice because a jury might mistakenly impose liability based on activity that is immune from antitrust liability. In this case, however, there is no risk of unfair prejudice, since UST's efforts to secure passage of the "Global Settlement" legislation were unsuccessful. Conwood does not argue that it has been harmed by UST's petitioning activity and will present no evidence to that effect. There is thus no risk that the

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[1] This case is unlike United States Football League v. National Football League, 634 F. Supp. 1155 (S.D.N.Y. 1986) ("USFL"), where the court ruled that the lawsuit would likely "become dominated by a digressive element" if the plaintiff were permitted to introduce evidence of defendant's petitioning activity. Id. at 1181. There is no similar possibility here: the evidence of UST's "Global Settlement" activities will not consume disproportionate trial time. Moreover, in USFL — and in the only other case cited by UST in which evidence was excluded under Rule 403 — the plaintiff had sought to introduce the evidence of petitioning activity to support its claims of unlawful behavior, not merely to prove anticompetitive intent. See id at 1176-80; City of Cleveland, 734 F.2d at 1161-63. Here, UST concedes that Conwood has made clear that it does not seek to establish substantive liability based on protected conduct. See UST Mot. at 2 (recognizing that Conwood has stated that it does not "intend to base liability on conduct protected by Noerr-Pennington").

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jury will erroneously conclude that UST's petitioning activity caused actionable harm. Where a plaintiff refers to a defendant's petitioning activity "only as evidence of the purpose and character of business decisions which had already been made and which were relevant to charges other than" the petitioning activity, such evidence should be admitted. MCI Communications, 708 F.2d at 1160 (cited in UST Mot. at 4, 6).

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Conclusion

The Court should deny UST's Motion in Limine to Preclude All Evidence Concerning Conduct Protected by Noerr-Pennington Immunity. A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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Counsel for Plaintiffs

Dated: February 11, 2000

16diii004183

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	

ORDER

Upon consideration of Defendants' Motion in Limine To Preclude All Evidence Concerning Conduct Protected by Noerr-Pennington Immunity, the opposition thereto, and for good cause shown, the motion is DENIED.

Honorable Thomas B. Russell
United States District Judge

Dated this ___ day of _____, 2000.

CERTIFICATE OF SERVICE

I certify that on this __ day of February, 2000, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., 919 Third Avenue, New York, NY 10022.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 FEB 14 A10:00 FILED US DISTRICT COURT WESTERN DISTRICT KENTUCKY Civil Action No. 5:98CV-108-R

PLAINTIFFS' OPPOSITION TO MOTION TO PRECLUDE PROFESSOR GUNDLACH'S STUDY OF EXCLUSIONARY AGREEMENTS AND RELATED TESTIMONY

Defendants seek to preclude the study of exclusionary contracts prepared by Professor Gregory Gundlach of the University of Notre Dame and all related evidence. Gundlach determined that UST's various agreements excluding competitive racks and POS cover more than 28,000 retail outlets across the United States.[1] The motion is UST's the latest attempt to sweep this evidence under the rug. Throughout discovery, UST fought to hide those agreements -- claiming that it had no idea how many there were or even where they might be found.

[1]As of October 1, 1999, the study listed approximately 22,000 stores; Gundlach continued to review UST's voluminous document production, however, and has determined that UST's exclusionary reach exceeded his earlier estimates.

Gundlach has demonstrated the widespread exclusion UST achieved through those rack and POS restrictions.[2] UST's assertion that his analysis lacks foundation is specious. And UST's insistence that the agreements are not archetypal "exclusive dealings" contracts is irrelevant. The Gundlach study is powerful evidence that UST willfully sought to maintain its monopoly through the exclusion of rivals.

BACKGROUND

From the earliest stages of discovery, Conwood sought a listing of all UST's agreements with retailers relating to racks, slot allotment or point-of-sale material. Defendants resisted, first denying the existence of any such "agreements" and later claiming that there was no such list. (See, e.g., Transcript of Hearing of January 14, 1999 at 20-28 (Attachment "A"). Conwood pressed the point, and UST was ordered to disclose whether and how such agreements were kept in an effort to facilitate their discovery and compilation. See id. at 26:2-27:14.

Defendants responded with the affidavit of Gary Milano, Vice President of Sales, who swore that UST had no idea which agreements it had or even where the agreements could be located.[3]

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[2]UST's own documents candidly acknowledge that: "Our objective with exclusive vending rights . . . is to control expanded competitive distribution and competitive POS." PX 4. Indeed, how well its sales representatives achieved exclusive vending often became an item of evaluation in their performance reviews. See, e.g., PX 186 (Attachment "D")("Continue to offer vendor exclusivity and category management where feasible").

[3]In relevant part, Mr. Milano's affidavit states, "[a]fter a diligent and thorough search of the files of all personnel who

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Mr. Milano further averred that to compile a listing of existing agreements, "[d]efendants would have to research the documents already produced from the files" of any UST employee who may have had dealings with retailers. Milano Aff. of January 26, 1999, at ¶4. Under these circumstances, defendants argued, Conwood could create the list just as easily as UST.

So Conwood did. Conwood asked Gundlach to study UST's exclusionary agreements with retailers. After the agreements were extracted from among the hundreds of thousands of UST-produced documents, Gundlach compiled and analyzed them. He concluded that UST had exclusive vending and/or restrictive POS agreements with retailers covering approximately 22,000 stores (now up to approximately 28,000 stores). Professor Gundlach made that compilation available to UST, and was examined about it extensively during his deposition. Professor Gundlach has since continued his review to ensure its accuracy.

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may have such a list, and after all reasonable inquiries were made concerning Plaintiffs' request, Defendants have determined that a list of retailers with whom USTC has or has had an 'agreement,' within the meaning of Plaintiffs' request, does not exist." Milano Aff. of January 26, 1999, at ¶3. See Attachment "B".

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ARGUMENT

A. UST's Claim that the Study Lacks Foundation Flies in the Face of the Record

In the first instance, UST argues that Gundlach's compilation must be excluded for lack of foundation. This argument is baseless. UST miscites Gundlach's testimony about what he included on his list. UST claims he included agreements in the compilation if they contained "an indicia of some form, type of exclusion." UST Memo at 3 (citing Gundlach Dep. at 151-52). In fact, the cited testimony refers Gundlach's view of UST's Customer Alliance Program Agreements ("CAP") -- entirely different agreements, *none* of which is listed in his study.[4] Likewise, UST mischaracterizes Gundlach's testimony by claiming he "readily admitted" that an agreement was put in his listing "where a retailer chooses to use multiple display racks from the

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[4] Q: Is it fair to say that you did not do anything quantitatively to separate out the different exclusionary features you identify in your report? Mr. Guzman: **Objection, ambiguous, you're still referring to exclusive in the CAP?** Mr. Athanasia: **Uh-huh.** The Witness: Again I looked at the different documents that were available to me in the contracts as they represented the number of retail institutions where these features if one assumes that when one signs a contract the parties agree to the particular attributes of the arrangement, felt in rendering my opinion that was sufficient enough to be **an indicia of some form, type of exclusion.** (Emphasis added). Tr. at 151:22-152:10. Gundlach testified that UST's CAP contracts also contain numerous exclusionary features, as UST has also admitted. See, e.g., PX 113b (United Dairy Farmers reset "calls for exclusive UST vending and POS as part of the Customer Alliance Program"); PX 120 (CAP "has become a great incentive in securing space for our vendors and for the elimination of competitive products"). But Gundlach did not include UST's approximately 35,000 CAP agreements in his study.

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different moist snuff companies, but chooses to place USTC's display rack in the number one position." UST Memo at 3. Professor Gundlach's cited answer says nothing of the sort.[5]

In truth, Gundlach carefully included only agreements for which there was clear evidence that UST had secured exclusive vending rights and/or significant POS restrictions. See Gundlach Depo. 154:18-155:8 (Oct. 15, 1999)("The common themes that come through in these arrangements and agreements generally are exclusive vending . . . and exclusive POS on that rack and typically also adherence to required plan-o-grams for use in those racks."). See Attachment "C". In many cases, the agreements secured both.

UST's attempt to suggest that it does not have exclusive vending agreements at Wal-mart or 7/11 stores, as examples, is disingenuous -- and belied by its own documents. UST picks at the supposed thinness of the proof upon which Professor Gundlach relied before concluding that UST has an exclusive vending agreement with significant POS restrictions at Wal-mart. Tellingly, however, UST never flatly denies that since mid-1997 it has provided the only vendors to Wal-marts nationwide. Nor

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[5]Instead, he simply states, "I would have to look at the, you know, the context of the specific circumstance and this gets to your point of identifying the particular features segregating them into components because in this particular case what we're looking at is often a combination of a variety of exclusionary features that in isolation may mean one thing but in aggregate may mean something entirely different." Jan. 14, 1999 Tr. at 156:23-157:6.

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could it. The fact has been proved beyond dispute.[6]

B. **Whether Each and Every Agreement Meets the Legal Requirements of an Exclusive Dealing Contract is Irrelevant**

UST continues to insist that Conwood must show pure "exclusive dealing" under Clayton Section 3 in order to prevail on its monopolization claims under Section 2 of the Sherman Act. In an extension of this logic, UST argues that Professor Gundlach's study necessarily assumes a legal conclusion and therefore must be stricken under Fed. R. Evid. 702. According to UST, none of Conwood's experts can reference the term "exclusive agreements" without "improperly using terms that have a 'separate, distinct and specialized meaning in the law.'" Memo at 9.

The only term that has a separate and specialized meaning at law is the irrelevant concept of "exclusive dealing." See, e.g., Conwood's Opposition to UST's Motion for Summary Judgment at 48-53 (explaining why UST's "exclusive dealing" argument is a straw man). Gundlach will not improperly tell the jury how to decide the ultimate issues in the case by his description of the exclusionary effects of UST's agreements. Gundlach's expertise in marketing makes his opinion that UST's rack and POS agreements tend unnecessarily to exclude competition entirely appropriate.

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[6]See, e.g., PX 47 at 041350(UST/Wal-mart reset program installation guidelines: after installing UST vendor, "remove all competitive vendors and place in the back room"); PX 232 (UST e-mail: with the Wal-mart reset, "[w]e have severely cut back on their ability to market products."). Attachment "D".

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In any event, the most basic problem with UST's argument is that its own documents and employees make regular use of the term "exclusive." To take just one example, Rich Fasanelli, a UST vice president, reports to Gary Smith, UST's president, that after two meetings with Southland's new buyer, "we won exclusive vending . . . ." See USTC/CWD 025956 (attached as tab 7 to UST Memo.). UST cites no authority for the proposition that Conwood's experts cannot use the same words in the same sense.[7]

C. No Unfair Prejudice Will Result from an Exposition of the Facts Regarding UST's Agreements

Finally, UST argues that the study should be excluded under Fed. R. Evid. 403 because its "unfair prejudice" exceeds its probative value. This argument is based yet again on a mistaken notion that only "exclusive dealing" contracts can serve as evidence of anticompetitive behavior. UST, however, identifies no unfair prejudice; the study is powerful only because it is probative. It further proves the extent of UST's efforts to exclude. See UST Memo. at 9-10.

---

[7] Torres v. County of Oakland, 758 F.2d 147 (6th Cir. 1985), on which UST principally relies, is inapposite. In Torres, the court found it inappropriate to ask a lay witness a question that tracked precisely the statutory standard for liability. Id. at 151. The narrow circumstances of that case do not provide authority to neuter mention of terms like "exclusive" and "exclusionary" -- particularly since UST employees and documents repeatedly use the same terms.

CONCLUSION

UST's Motion in Limine to Preclude Professor Gundlach's Study of Exclusive Agreements should be denied. A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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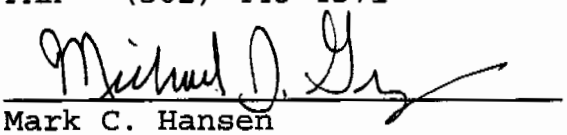

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16diii004193

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of defendants' Motion in Limine to Preclude Professor Gundlach's "Study" of Purported "Exclusive Agreements" and Related Testimony, plaintiffs' opposition thereto, and for good cause shown, said motion is hereby DENIED.

Dated this ___ day of _____, 2000.

HONORABLE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

EXHIBIT A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P., ET AL.,	)	Case No. 5:98-CV-108-R
	)	
Plaintiffs,	)	
	)	
VS.	)	
	)	
UNITED STATES TOBACCO COMPANY, ET AL.,	)	
	)	
	)	January 14, 1999
Defendants.	)	Louisville, Kentucky

****

TRANSCRIPT OF HEARING
BEFORE U.S. MAGISTRATE JUDGE JAMES D. MOYER

****

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer.

APPEARANCES (Continued):

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Now, on the issues to be argued -- by the way, I don't know whether it was easy or hard to put the joint agenda together. It's a useful document for me. So I thank you for doing that.

Under issues to be argued, item number 1 is agreements. Mr. Gorsuch, you want to tell me what that encompasses? Then I'll hear from the UST side.

MR. GORSUCH: Very briefly, Your Honor, it pertains to Interrogatory Number 4 where we have asked UST to list their agreements that they have with retailers and distributors.

THE COURT: Okay. I've got it right in front of me.

MR. GORSUCH: Now, I'm happy to report that some progress has been made, and I'm very pleased about that. We understand what agreements we are talking about now.

MR. KEYTE: Well, I'll respond later.

MR. GORSUCH: I thought we did. Agreements affecting racks and --

MR. KEYTE: Right, in terms of scope.

MR. GORSUCH: In terms of scope. We know what an agreement is.

THE COURT: Okay.

MR. GORSUCH: So that we don't have to argue about it. We also have received a list of participants in one of

defendant's programs called a Customer Alliance Program, CAP program. We have gotten a partial list.

There's also no dispute between the parties that additional agreements between UST and retailers and distributors exists. As to those additional agreements, here are the parties' positions. UST has said we reference 33(d), the option to produce business records, go look at our document production. That's their position with regard to all agreements.

Our position, Your Honor, very succinctly is that you can rely on 33(d) only if two conditions are met: One, you produce all the agreements; and two, you specify where they are in your production. As it is, UST has not so far done either one of those two things.

There are agreements that have not been produced in their production so far. I can hand up a dozen different kind of agreements, different species of agreements with retailers and distributors. I've appended them to my motion. I've appended them to my December 16th letter. They know what I'm talking about. There's not any question anymore about those agreements. They're unproduced agreements, and there's no specificity. You can't say go fish in a hundred box production. You have to specify by Bates number and location where they are.

In the 1980 amendments, Your Honor, I see you are

going to the book --

THE COURT: Shocking.

MR. GORSUCH: 33(d) is at page 164.

THE COURT: You're right.

MR. GORSUCH: The 1980 amendments are at 167. Subdivision (c) talks about --

THE COURT: It says here the parties occasionally respond by directing the interrogating party to a mass of business records.

MR. GORSUCH: That's our problem. That's our problem. It specifically says such practices are an abuse of the option.

So if they're going to rely on this option, Your Honor, we think you should order them to do two simple things: One, provide all the contracts; two, specify by Bates number where they're located. I'm prepared to hand up a half dozen different cases which say if you are going to do 33(d), you got to produce all and you got to specify by Bates number where they're at. So that's the ruling we are after, Your Honor.

THE COURT: Okay. Mr. Keyte.

MR. KEYTE: Yes, a couple of things. First, what is an agreement of course will I think be saved for another day. Second, I think we obviously have a different view of both the facts here and as well as Rule 33.

We are not taking the -- first of all, we have produced what lists are available and what lists we could practically derive from information we have. We have made those inquiries, and there is no practical way to derive lists of anything other than from the CAP program. These agreements, and I will again use that word in quotes, are often on an ad hoc basis. There's not a set group of you sign up to this agreement and then we have a list.

So we are faced with the issue under Rule 33 of how then -- if they need a list and want a list, how is it put together. Under Mr. Gorsuch's suggestion now, he's essentially asking for an order that we review our entire document production to identify the Bates numbers of where agreements are found within the document production. That is no different than simply saying you put the list together -- even though you have no way of putting the list together, it's not a, quote, option, you have no way of putting it together other than this way we would put it together, and they no doubt will put it together anyway, we want you to do that for us.

The burden issue is the same under Rule 33 with respect to having to specify where they are as it would be to put the list together from the beginning. And so what we are really talking about is a very simple question of in a large document production, if the only way of putting a list

together is to review the entire document production, which the plaintiffs are going to do anyway, should the defendant have to do that for them and provide them with a list. I think it fits squarely within the burden exception in Rule 33, and I think it's a very simple proposition that they are going to do it anyway, we are in no different position to do it, and that it's unduly burdensome to have us review our entire document production to make such a list.

THE COURT: Tell me what lists, if any, you have produced. I'm starting from ground zero on this.

MR. KEYTE: We have produced the CAP list, which is --

THE COURT: CAP stands for what?

MR. KEYTE: The Customer Alliance Program. We have produced that list. That is the only list that exists or can be derived to produce them with respect to, quote, agreements.

THE COURT: Okay.

MR. KEYTE: I should also note, Your Honor, we are producing the documents as they are kept. With respect to the point of all documents, we of course are in the process of producing documents from the division and department levels, but they are being produced as they are kept. There is no practical way to derive another list for them.

THE COURT: Let me ask this. Let's assume that

there's some agreements sprinkled in various places. You say that the only way to tell for sure exactly where they are is to look at every document. Is there some intermediate way of searching for them that is neither a specific list nor a document-by-document search, such as we know that these documents are generally filed in the following areas and that they would be in the regional marketing files or they would be in the sales managers' quarterly report files, so that even if there's not a list and even if you couldn't say with ultimate specificity exactly where they are, you could point them to areas that would allow them to search intelligently, just as your business people would know generally where to go, even if they didn't know exactly where it was? Am I being clear?

MR. KEYTE: I understand. Our inquiries are that there is no -- whether you call it a central depository of agreements, whether within a region, our understanding is that that is not the case. If it is the case, of course they do already have those produced and kept that way, which would be -- one thing we have to step back and say here is -- there's no magic to, quote, having a list if one doesn't exist. They're looking for the agreements, which we are producing. We don't believe as a practical matter there is any intermediate step here and they believe we should have to go piece-by-piece through our production and create a list

for them, and I think that's not --

THE COURT: In the spirit of moving along, I'm going to give you a ruling. My ruling is that an appropriately knowledgeable higher level sales or marketing executive of UST provide a detailed narrative description in affidavit form to counsel for Conwood within the next week that would provide a description to the best of that person's ability of where in the overall document production agreements, in quotes, as the parties understand it, would be found and that would be as helpful as one could reasonably expect to the other side.

I see Chris shaking his head. My point is that you probably have somebody who can provide some assistance as to where to look rather than saying look at every piece of paper.

MR. ATHANASIA: We should be clear about what kind of things we are talking about here. We are talking about authorization letters and ad hoc is the -- they're all over. They're scattered. There's no systematic --

THE COURT: If some of them are scattered and some of them are somewhat more systematic, describe it that way. I just want -- I want you to in a narrative way give them the best reasonable road map that somebody can, and if the answer is that it is utterly random and no one knows where they are, if that's factually true, you can say that. I have a hunch

that business people have some practical sense of I know where to go to look for that, and just as they might tell you where to go to look for that, I want someone in a forthright way to tell them where they can go to look for it, even if it's not either a list or a specific Bates number.

MR. KEYTE: For example, Your Honor, if at the regional office a certain custodian -- if this is the case -- collects or if they go to them, we will --

THE COURT: That might be the way to do it. My point is you people know where to go to look for information. What I'm ordering is that you all provide an appropriate narrative that will be helpful to them in knowing where to look. I think it's a practical recordkeeping problem. Let's try that.

MR. KEYTE: We will do that, Your Honor.

THE COURT: If that proves to be either impossible for your people or useless to Neil, then we can talk some more about what to do.

MR. GORSUCH: Your Honor, by way of clarification, that solves half my problem. My two problems with relying on 33(d), one is I didn't know where to look, and this helps on that. The other part of the problem, though, is if you are going to rely on 33(d), you have to make all the documents available. That's still unresolved here. There are agreements that have not been produced.

From my point of view, they can either give me a list, or if they're going to rely on 33(d), if they're going to use their business records, they got to make sure they give me them all. I would just ask as an addendum to that order that you order production of all agreements, all of them, just very simply that.

THE COURT: I'm going to hold off on doing that. I want the narrative description to describe where they all are. Let's see what that narrative -- I'm giving them a week to do this. That's not a huge amount of time. If that narrative description comes back and says that -- I don't know what it's going to say about where all of them are. Let's see what it says about where all of them are. If it says that we don't know where all of them are or they are in just a huge number of places that are impossible to find, then let's take that up. I don't want to order them in a vacuum to produce them all when I don't know what they're going to say about how difficult that is. I'm going to bird dog this. I'm going to stay on top of it. If there are problems, I'll take them up.

MR. KEYTE: If I could note, Mr. Gorsuch's kind of last request seemed to be an attempt to sidestep the dispute we are having now with respect to the sales rep search. As you know, we provided --

THE COURT: I'm not sure it was a sidestepping,

EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, -against- UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98 CV-108-R

AFFIDAVIT OF GARY MILANO

I, Gary Milano, upon being duly sworn, do depose and state as follows:

1. I am currently the Vice President of Sales for United States Tobacco Sales and Marketing Company Inc. ("USTC"). The statements made herein are based upon my own personal knowledge of the structure and organization of the sales organization, as well as the practices, policies, and procedures that apply to all sales personnel in the ordinary conduct of their duties and responsibilities.

2. As I understand, Plaintiffs have requested a list of retailers with whom USTC allegedly has or has had an "agreement" that affects moist snuff racks, slot allotment, or point of sale advertising. It also is my understanding that Plaintiffs intend to include within the meaning of this request all store authorization letters, plan-o-grams, and other routine documents permitting

placement of moist snuff products, racks, and/or point of sale advertising.

3. After a diligent and thorough search of the files of all personnel who may have such a list, and after all reasonable inquiries were made concerning Plaintiffs' request, Defendants have determined that a list of retailers with whom USTC has or has had an "agreement," within the meaning of Plaintiffs' request, does not exist.

4. In order to create such a list, Defendants would have to research the documents already produced from the files of each person who may have communications or dealings with each direct or indirect retail customer, or of all those persons who may have received copies of documents containing information within the meaning of Plaintiffs' request. Such documents, however, are not systematically collected in any one central location; rather, they may be kept by different personnel according to the type of retailer, the location of the retailer, and other factors differentiating one retail account from another.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and recollection.

Gary Milano
Vice President,
United States Tobacco Sales & Marketing Co. Inc.

Sworn to and subscribed before me
this 26th day of January, 1999

Notary Public

My Commission Expires: 11/30/2002

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EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

- - - - - - - - - - - - - - - - - X
CONWOOD COMPANY, L.P., :
CONWOOD SALES COMPANY, L.P., :
Plaintiffs, : Civil Action No.
v. : 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, :
UNITED STATES TOBACCO SALES AND:
MARKETING COMPANY, INC., UNITED:
STATES TOBACCO MANUFACTURING :
COMPANY, INC. and UST, INC., :
Defendants. :
- - - - - - - - - - - - - - - - - X

Washington, D.C.
Friday, October 15, 1999

Deposition of GREGORY T. GUNDLACH, a witness herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice and agreement, the witness being duly sworn by FERNITA R. FINKLEY, a Notary Public in and for the District of Columbia, taken at the offices of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., at

earlier you made a distinction and corrected me because you said you used the term exclusionary while I was using the term exclusive. Do you see the term exclusive agreements in the sentence I just read?

A. Yes, I do.

Q. Do you want to change that to exclusionary?

A. No. As I mentioned earlier in the beginning of our day today that the term is used somewhat interchangeably. The distinction might be viewed something along these lines. Exclusive would refer to the mechanism through which the outcome is derived with that outcome being exclusionary. So in a sense they're hand in glove type of terminology with some loose use of both in particular areas. So here I'm referring to the particular agreements and the fact that they contain exclusive features.

Q. And what exclusive features do these exclusive agreements include? I'd just like a complete list of what you're talking about, exclusive features.

MR. GUZMAN: Objection. The question is ambiguous.

THE WITNESS: Common theme -- and again what we're talking to here now apart from the CAP are

a variety of different types of agreements that are obtained by UST and arrangements with retailers. The common themes that come through in these arrangements and agreements generally are exclusive vending referring to the rack or vending modular and exclusive POS on that rack and typically also adherence to required plan-o-grams for use in those racks.

BY MR. ATHANASIA:

Q. Now out of the 22,000 retail locations, just let me clarify that would include if there were say 2,000 locations in a retail chain would that be -- count as one or as 2,000 in this 22,000 number?

A. That would count as a retail location meaning one.

Q. So a whole chain of 2,000 stores would count as one out of this 22,000?

A. No. Clarification.

Q. Each store would be one location?

A. Each store would count as one of that 22,000, each retail location.

Q. Out of the 22,000 retail locations, how many have exclusive vending from your study?

A. Again my point of reference was not necessarily to characterize the different types of

EXHIBIT D

U·S·TOBACCO

INTRA-COMPANY CORRESPONDENCE

DATE December 6, 1991

TO Dwayne Owens, Department KDO Manager, Mooresville, N. C.

FROM Dwight E. Little, Chain Accounts Manager, Mooresville, N. C.

SUBJECT Weekly Activity Report—Week Ending December 6, 1991

I. Time Spent

Monday - Office/Administrative Duties

Tuesday - Office/Administrative Duties

Wednesday - Sick

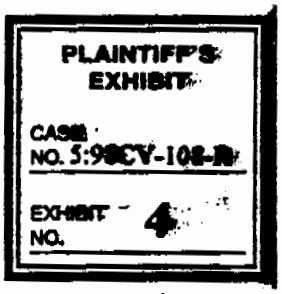
Thursday - Sick

Friday - Sick

Sat./Sun. - Off Duty

II. Condition of Marketplace, Problems, and Action Plans

Quality Marts (29 stores) recently agreed to the Multi-Can Program and a year-long series of quarterly displays. This week I received from Harry Alexander, the buyer, an authorization for exclusive vending rights utilizing our plastic home. Our objective with exclusive vending rights with this and other chains is to control expanded competitive distribution and competitive P.O.S. Department KDO personnel have been persistent and successful in obtaining authorizations of this nature. We will continue to focus on merchandising rights to promote the growth of our product line and inhibit competitive growth (to the best of our ability).



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III. Follow-Up Plans for Chain Accounts

n/a

IV. Competitive Activity

n/a

V. Evaluation and Effect of Programs

n/a

VI. Smoking Tobacco/Accessories

n/a

VII. Plans for Next Week

Monday - Office/Administrative Duties

Tuesday - Appointment at Winn-Dixie (Charlotte)

Wednesday - Office/Administrative Duties

Thursday - Office/Administrative Duties

Friday - Office/Administrative Duties

Sat./Sun. - Off Duty

cc: R. D. Haas
C. LaMonte

DEL:pw

D Wright

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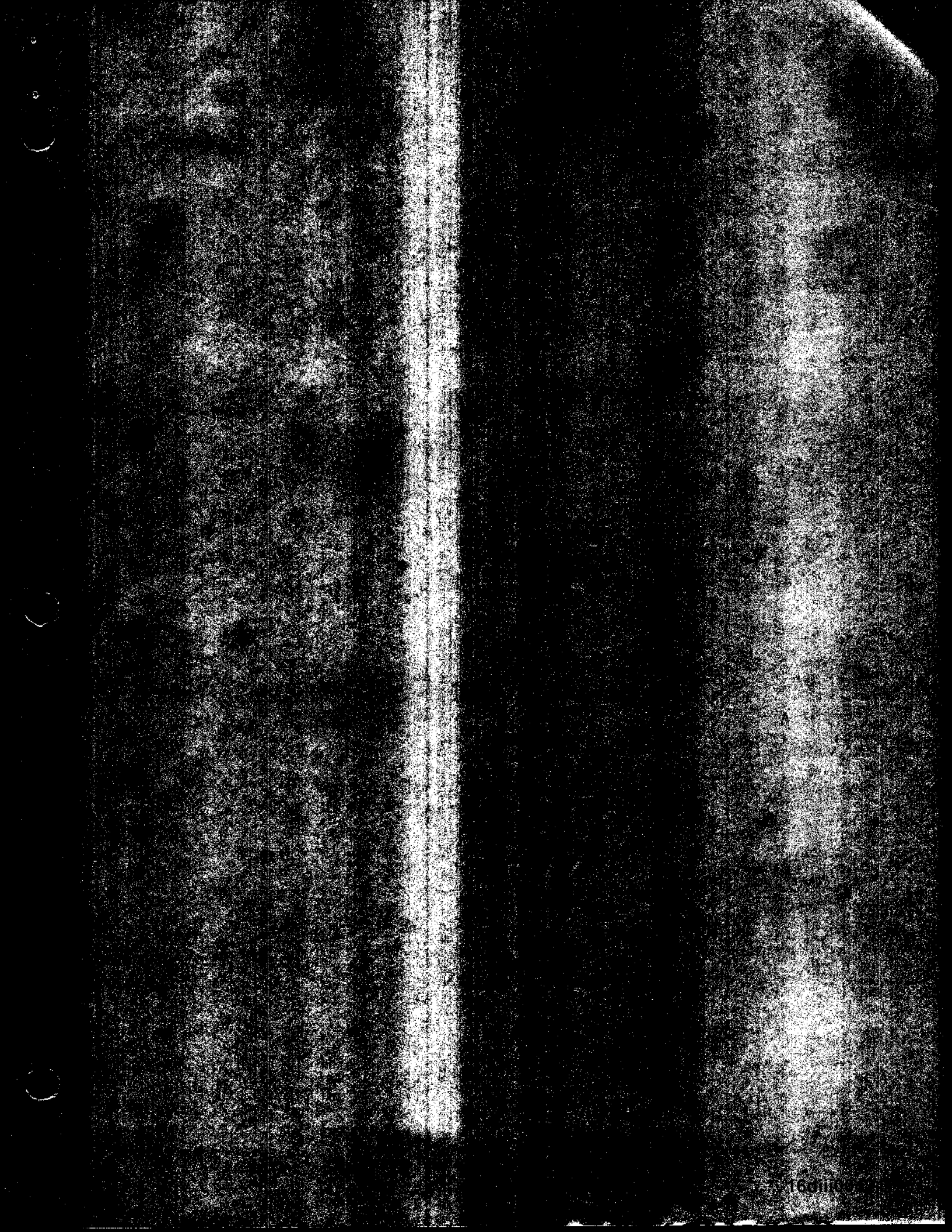

USTSM
WAL★MART

RESET PROGRAM

Installation Guidelines

USTC/CWD 041347
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UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC.
100 WEST PUTNAM AVENUE, GREENWICH, CONNECTICUT 06830

DATE: May 8, 1997

TO: All Field Sales Personnel

FROM: Gary Smith, Senior Vice President

SUBJECT: **Walmart**

As you are aware, United States Tobacco Sales and Marketing Company Inc. (USTSM) has formed an agreement with Wal-Mart to reset their stores in conjunction with Philip Morris and Swisher during the months of June, July and August.

Wal-Mart has agreed to allow USTSM personnel to place either a custom Wal-Mart vending unit or a #3101 vendor with the in-line roll facings. The vendor selection was based upon the size and sales velocity of each OTP section.

Set-Up\Placement:

1. Cabinets have been shipped in advance and will be in the back room.
2. Each unit should be inspected for damages.
3. Our new vendors will always be placed directly next to the left or right of the Philip Morris Cigarette units (see attached photos).
4. Once placement has been determined, shelving must be affixed and should be no higher than 35" from the floor, due to adequate leverage for loading capability.
5. Instruction sheets are included with each unit.
6. Complete the job sheet checklist provided with this Plan of Work.

Any questions or problems should be communicated as follows:

1. General program questions: Contact your immediate supervisor.
2. Installation issues: Contact Tim Entwistle at National Accounts at 1-800-243-8536 (ext. 3426).
3. Replacement parts: call Sales Administration (i.e. header card damaged, etc.).

WHEN? INSTALLATION DATES

Your department manager and supervisor have been forwarded the installation and reset schedules for all Wal-Mart store locations. The start date for resets is June 9th and continues through the middle of August. Your supervisor will be contacting you to communicate this information and help you to organize and meet the schedules guidelines. All of your support and enthusiasm in helping to make this reset come to life is greatly appreciated. Please direct all install date issues to your supervisor.

WHO? RESET TEAMS

- U.S. Tobacco - Co-captain of OTP reset. Arrival time requested is 8:00 a.m. Responsibility includes completion of the moist smokeless category reset by removing and replacing both product and vendors according to the authorized Wal-Mart Corporation planogram. Again, our job is exclusively to complete the moist section only!

- Philip Morris - Third party installers will be arriving at each store location between 6:00 a.m and 7:00 a.m. They will be installing new cigarette racks for the entire cigarette category.

- Swisher/Helme - Co-captains of OTP reset. They are instructed to work jointly with U.S. Tobacco in resetting the OTP section. Their specific responsibilities include cigars, loose-leaf, pipe tobacco, lighter fluid, and other miscellaneous items included in the set. They will be arriving at 8:00 a.m.

WHAT? INSTALLATION INSTRUCTIONS

- All vending cabinets for moist smokeless products will be shipped in advance, directly to the store approximately 5 business days prior to the actual reset date. It is suggested that you call a few days in advance or stop by to verify delivery.

- Any Wal-Mart store showing a 4 foot OTP section or one that does not meet volume requirements for the large cabinets, will have installed a custom #3101 vendor, including roll vendors and 2 for 1 systems. All components will come shipped in one master carton and will have the header card included.

- The volume stores requiring larger OTP sets will be using the new custom cabinets. Again, cabinets will only be shipped to stores that show sufficient volume.

HOW? STORE PROCEDURES

- Upon arrival at each store, locate the other reset teams and introduce yourself. Locate the cartons in the back room and bring the boxes out front to where the reset is in progress. You will need to find a cart to help with the move. Open the fold-away cartons and inspect each unit for quality. *(See photos attached).*

- Philip Morris installers should be well into their reset, and you will need to verify with one of the installers where the cigarette racks will end, as this will be the point where our rack placement will begin. The cabinets will always be placed on either the right or left side of the finished cigarette racks, for maximum exposure. *(See photos attached).*

- Once the location point is confirmed, find a straight shelf and place into position. The placement should be no higher than 35" from the floor to the base of the cabinets (for adequate height when stocking product). *(See enclosed pictures for better visual).* Two additional shelves will need to be placed below the cabinet shelf for loose leaf products.

- Set and lock shelf into position and begin to place cabinets accordingly. Please read the installation directions thoroughly prior to implementation. A trouble shooting guide is in the back of this booklet for easy reference questions.

- The customized header cards come already equipped on the units. Next, find the designated planogram selection for your region and OTP size and begin to label accordingly.

- Always keep in mind while the reset is in progress, that the customer still needs to shop the tobacco category. Your help in keeping an orderly surroundings will eliminate unnecessary friction from both customers and store personnel.

- Find the Wal-Mart Telzon Gun with label printer, and print out both single can and roll pricing labels for all brands (competitive included).

- Bag any additional products that are not included in the planogram, and remove to the back room. Also, remove all competitive vendors and place in the back room at direction of Wal-Mart department head.

- An Installation Job Checklist is included for each of you to fill out for each reset. This was created to help you organize your responsibilities and for us to track and ensure program uniformity. Please make sure all steps have been accomplished before leaving the store. A comment section is included and highly advised to be filled in. Distribute form copies according to the distribution at the bottom of the form. Checklists should be distributed as each reset is complete - do not hold them until all are completed.

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EDUCATION

- An important step in the process is to demonstrate the use of, and educate the appropriate Wal-Mart personnel regarding the operation of the cabinets. Please find the tobacco manager, store manager and other key personnel who work the department and fully explain all operational functions. This includes door latch locations (see example 4 in setup procedures), inventory rotations, planogram assignments, etc. Please discuss and define with the tobacco manager specific inventory levels and how much inventory to initially set in new vending system. Post/tape planogram copy on inside door to help with compliance.

AUTHORIZATION LETTERS

- Included in this booklet, are two Wal-Mart authorization letters. One specifies that the new customized vending units are the only authorized units allowed to market Wal-Mart's moist smokeless products. The second letter qualifies that only U.S. Tobacco is allowed to place point-of-sale material on this merchandising system. The only authorized items, at this time, is the Wal-Mart header card and the Cope/Skoal embossed face plate included with cabinets. Please keep these copies as documentation should non-compliance situations occur.

PLANOGRAMS

- There are 8-regional planograms inside this booklet, each with its own OTP size planogram. Please use the colored map enclosed, to locate your stores specific region, and then pick from the assigned OTP size for specific planogram. Remember, this is the only authorized planogram from Wal-Mart Corporate, and U.S. Tobacco products have high visibility (65% share on single can and 80% share of roll facings). Please <u>do not</u> allow for any non-compliance to occur. Refer always to your booklets documentation letters and plans for reference should any deviations from the controlled plan occur. Should situations arise, please address the store management with this documentation prior to phoning National Accounts.

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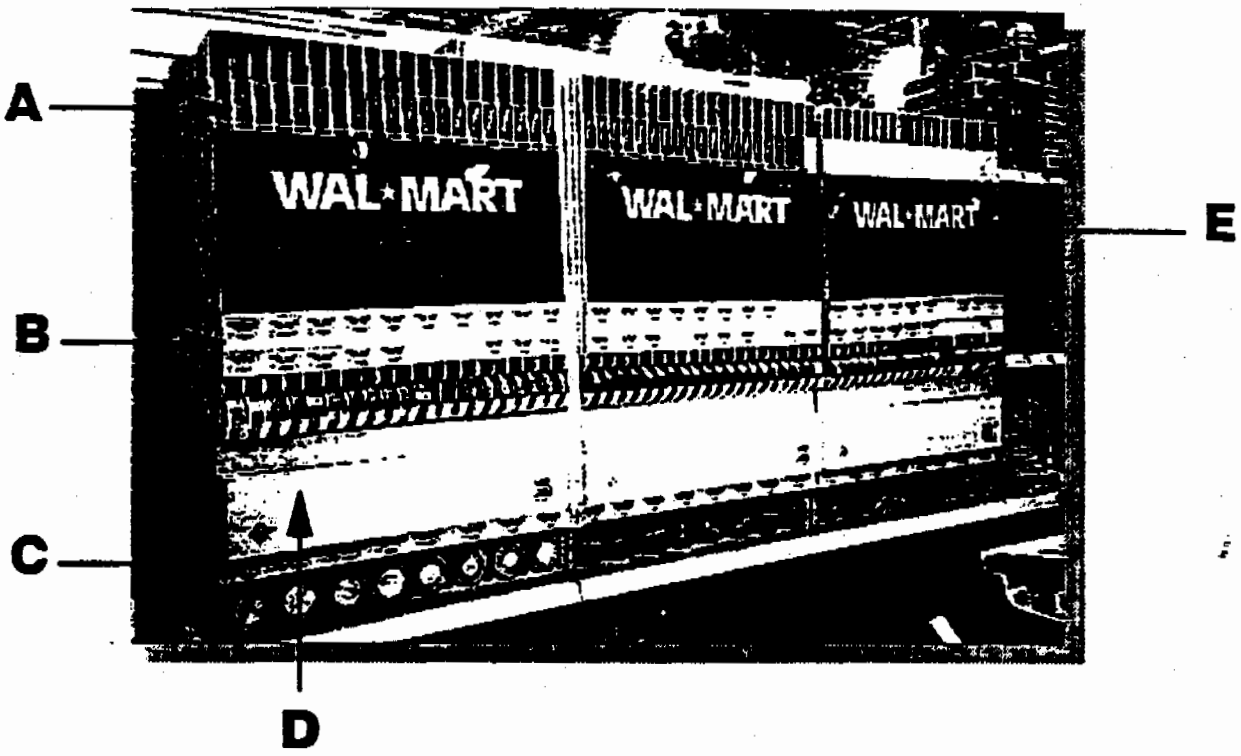
PICTORIAL OF 3-CABINET UNIT



A Product ID stickers (see designated planogram)

B Single can UPC & pricing stickers, to be provided through the use of the Walmart Telzon Gun

C Roll UPC & pricing stickers

D Exclusive US Tobacco header plate

E Walmart header card (comes attached with unit)

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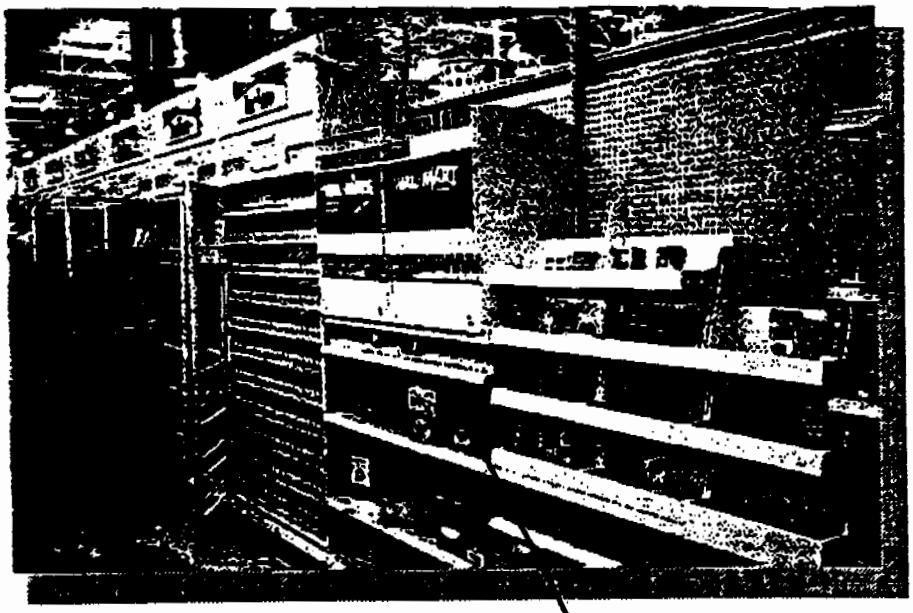
Work in process. Cabinet will always be up next to cigarette racks.



Maximum height 35" from floor for adequate stocking.

Cartons (located) in back stock room. Use hand cart to bring to floor.

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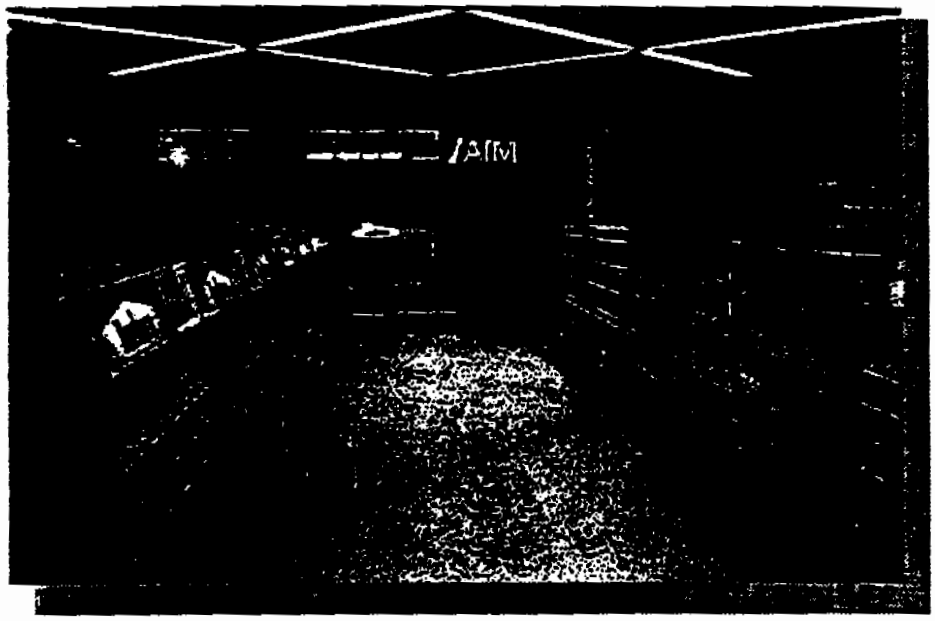
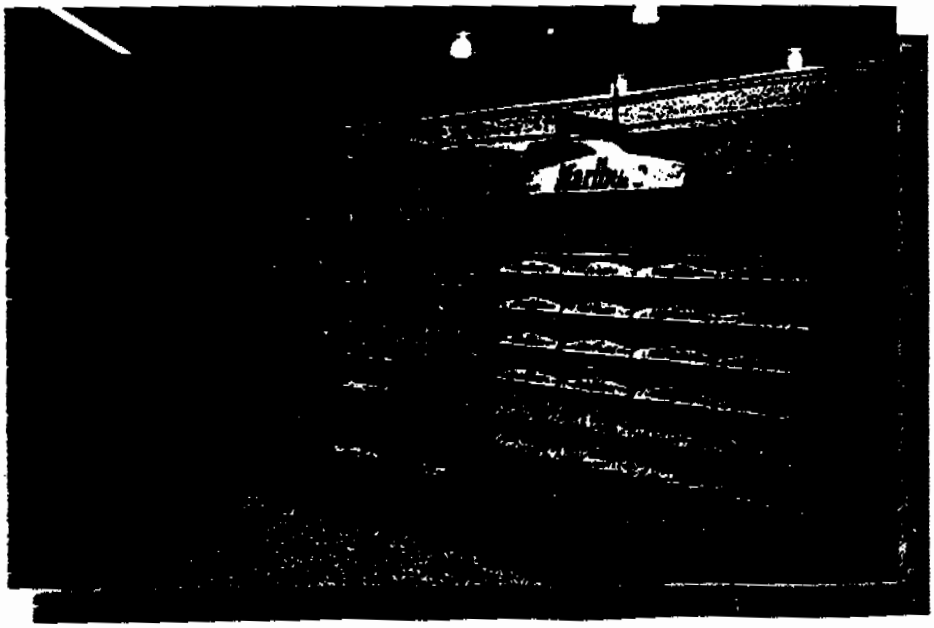
WALMART - BULLPEN STYLE





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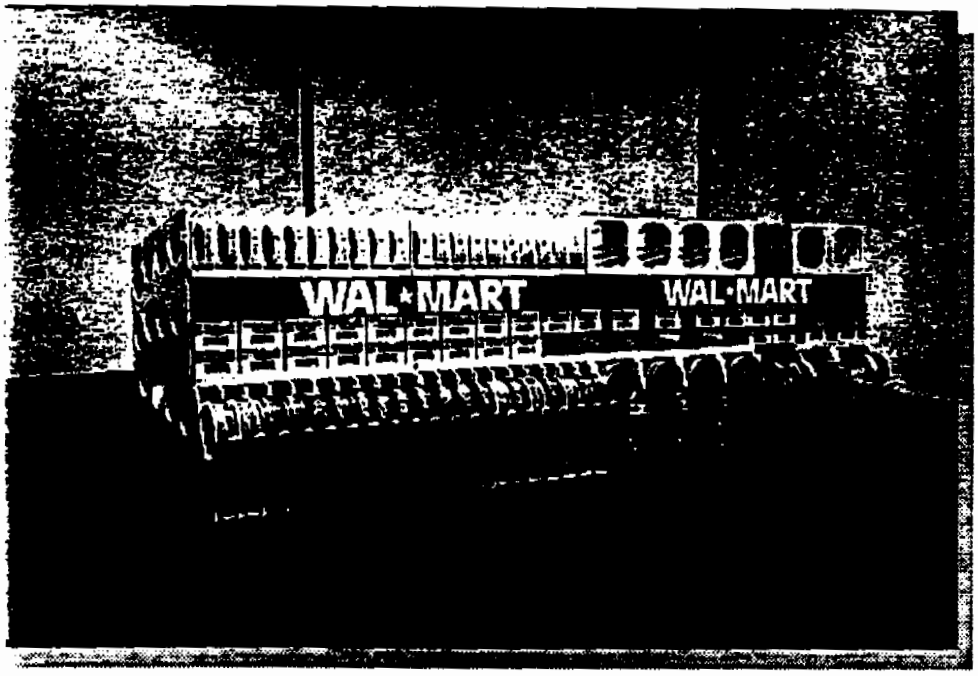
WALMART - CUSTOM 3101 UNIT

With roll vendors and (2 for 1 system)



* See planogram for specific sequence.
* Affix pricing and UPC labels as shown.

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TROUBLE SHOOTING GUIDE

Question
What if you are unable to make the scheduled set for what ever reason?
Answer...
Someone must be there...Call your Division Manager as soon as possible to work out a replacement to take your place.

Question
What if upon arrival the cabinets are not in the store?
Answer...
Call UST Logistics Department at 1-800-243-8536 (ext. 5278) for tracking.

Question
What if upon arrival you find a cabinet broken and not useable?
Answer...
Call Sales Administration at 1-800-243-8536 (ext. 3426).

Question
What if upon arrival you find a cabinet broken, but still useable?
Answer...
Install, make notation on Installation Job Check List, call Sales Administration at 1-800-243-8536 (ext. 3426) to order a replacement part to be installed during your next routine visit.

Question
What if store management refused to allow you to place the cabinets?
Answer...
Keep Cool and Calm...Call National Accounts at 1-800-243-8536 (ext. 3462).

Question
What if there are disagreements with the set up parties in reference to the location or space for the cabinets?
Answer...
Call National Accounts Greenwich...for consultation.

Question

What if there is no peg board to back up section?

Answer...

Contact the store manager for assistance. If there is none in the store, call 1-800-243-8536 (ext. 3462).

Question

What if you have difficulties with the Cabinet Installation or are Missing Hardware or anything that prevents you from completing the installation?

Answer...

Be sure that you have read the instructions packed with each cabinet thoroughly. If you still have problems, call National Accounts at 1-800-243-8536 (ext. 3462).

Question

What if you would like to make minor adjustments to the USTSM brand placements in the plan-o-gram?

Answer...

You can make minor adjustments to the amount of facings for each brand, as long as you work with the authorized brands listed and keep within the authorized number of plan-o-gram USTSM facings.

Question

What if the Wal-Mart Department Manager is not in agreement with the Wal-Mart corporate plan-o-gram and the changes that they request are not in the best interest of USTSM?

Answer...

Tell them that you were instructed to set the section by the approved Wal-Mart Corporate Plan-O-Gram. If they still want to make the changes, tell them that you will check into it for further clarification and instructions. Call National Accounts at 1-800-243-8536 (ext. 3462) for assistance.

Question

What if the new shelf tags have not been made and 960 Unit (Telzon unit) with label printer is not available for tagging the smokeless?

Answer...

You should not leave without all moist smokeless tagged properly. Ask the store's management to assist you in tagging the section.

Wal*Mart Stores, Inc.
Merchandising Division
702 Southwest 8th Street
Bentonville, AR 72716

DATE: April 4th, 1997
TO: Department 01/Department 82 Tobacco Manager, Assistant Manager, and Store Manager
FROM: Debbie L. Huskey, Cigarette and Tobacco Buyer
SUBJECT: New Moist Smokeless Tobacco Racks

As you are aware, during the months of June, July, and August of this year, each store will be receiving a new tobacco modular.

Within this modular, U. S. Tobacco will be providing the new fixtures that will house all cans and rolls of moist smokeless tobacco (i.e. Skoal and Copenhagen). These fixtures have been especially designed for Wal*Mart in order to maximize sales, profits, and to greatly reduce out of stocks. Based on the modular size that your store will be traited, you will be approved for one of the following types of fixtures:

a) 4 ft. modular: U. S. Tobacco plastic vendor rack
b) 8 ft. modular: U. S. Tobacco 2- door cabinet rack
c) 12 ft. or 20 ft. modular: U. S. Tobacco 3-door cabinet rack

THESE 3 TYPES OF RACK FIXTURES, WILL BE THE ONLY APPROVED RACKS BY THE WAL*MART HOME OFFICE FOR MOIST SMOKELESS TOBACCO.

All other current plastic vending racks, that have been provided in the past by Conwood, Pinkerton, Smokey Mountain Chew, or Swisher International, will need to be picked up from your store by these other vendor partners after the completion of your new modular.

As a continuing effort, after your modular has been completed, please do not allow any additional plastic vendor racks to be placed or added to your new existing moist smokeless tobacco section.

Thank you in advance, for your cooperation, support, and joint effort in reorganising your tobacco department.

Thank you,

Debbie L. Huskey

Debbie L. Huskey
McLane Operations/Department 01

USTC/CWD 041358
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WAL*MART STORES, INC.
Merchandising Division
702 Southwest 8th Street
Bentonville, AR 72716-9055

November 15th, 1996

Richard M. Fasanelli
Director of Sales Development
United States Tobacco
Sales and Marketing Company Inc.
100 West Putnam Avenue
Greenwich, CT 06830

Dear Rich,

I would like to take this opportunity to respond back to the letter that was sent to Beth Schommer on October 1st, 1996 regarding the "New Moist Smokeless Tobacco Merchandising System". I have discussed all the different points that were covered in the letter with Beth. Our McLane Category Merchandising Group will continue to work together with U. S. Tobacco in a joint venture for the further development of the best possible merchandising selection for the Wal*Mart planograms.

Together we recognize the following points:

1. U. S. Tobacco owns the moist merchandising racks.

2. U. S. Tobacco agrees to replace any shop-worn or damaged fixtures on a timely basis.

3. Wal*Mart will feature their store name on the large message area on this display, and U. S Tobacco will be allowed to feature their brand names in a repeating manner in the background area of the pricing billboard.

4. Only Wal*Mart and U. S. Tobacco will be allowed to place point-of-sale material or any other type of communication on this merchandising system. All point-of-sale material must be approved by Wal*Mart.

5. The placement of these merchandising systems will begin February 17, 1997, and will include all the Wal*Mart stores with 8 foot, 12 foot, 16 foot, and 20 foot sections.

The conditions stated above will allow us jointly to enhance the growth of moist smokeless tobacco sales, and bring a greater level of satisfaction to the Wal*Mart customer.

Thank you,

Debbie L. Huskey
McLane Operations

Beth Schommer
Wal*Mart Merchandising

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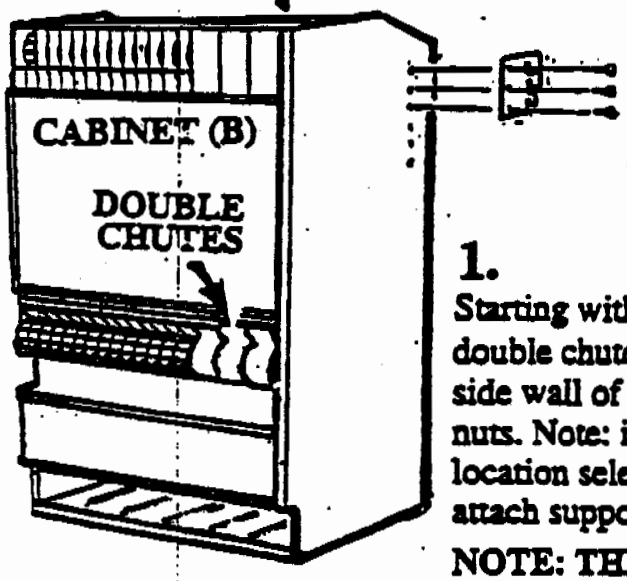
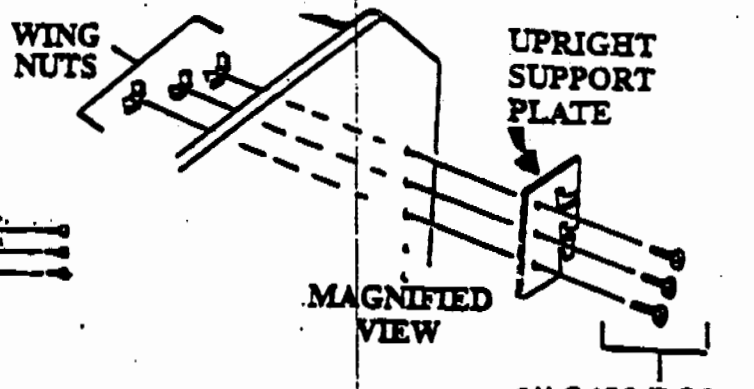
UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC.

HOW TO SET UP THE U. S. T. WAL-MART FIXTURE PROGRAM

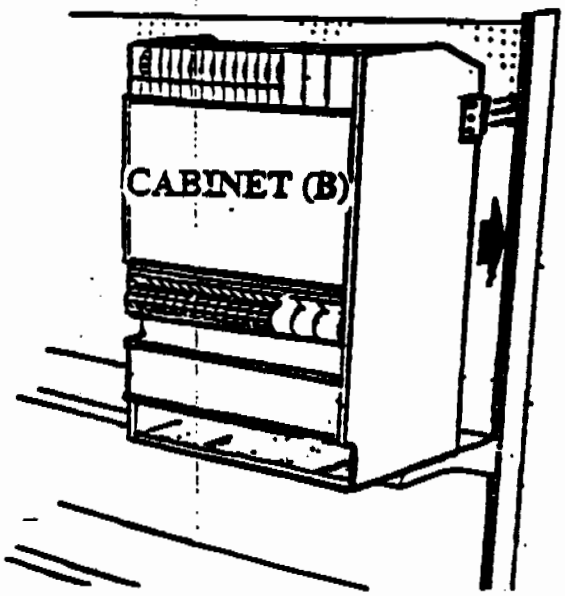




1.

Starting with the right hand cabinet (B) (cabinet with three double chutes) attach gondola upright support plate to side wall of cabinet using three 1" 8/32 bolts and wing nuts. Note: if a neighboring shelf interferes with plate location select the most convient other hole location to attach support plate.

NOTE: THE SUPPORT PLATE IS ALWAYS PLACED ON THE HINGED SIDE OF CABINET !



MAGNIFIED VIEW

2.

Lift cabinet and place on gondola shelf inserting tabs of support plate into slots of gondola upright. **BE SURE ALL TABS OF SUPPORT PLATE ARE ALL THE WAY IN AND SEATED IN SLOTS OF GONDOLA UPRIGHT.** See magnified view.

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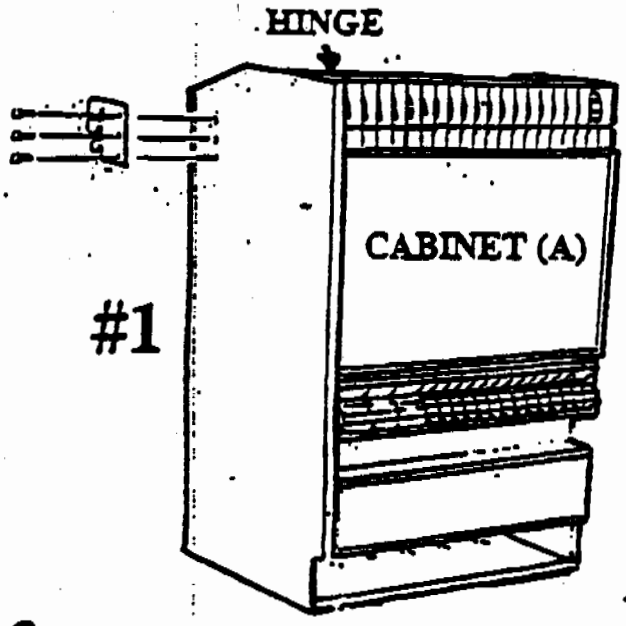
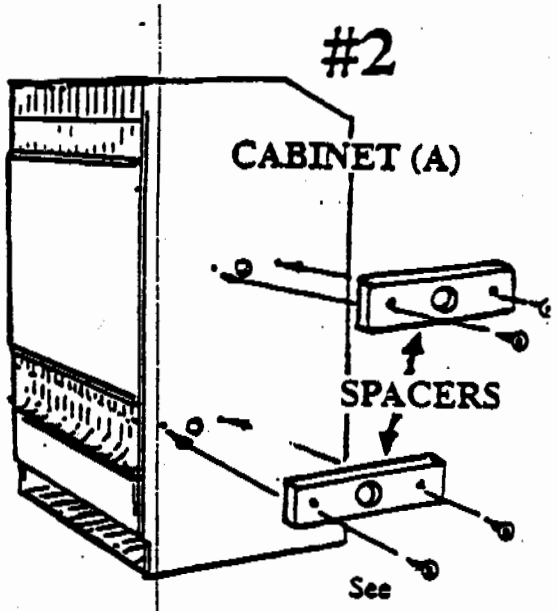
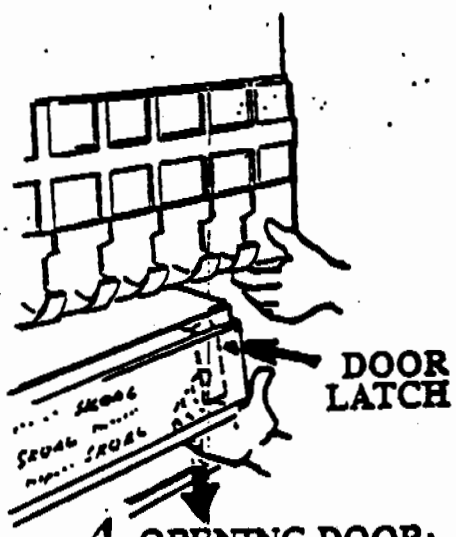


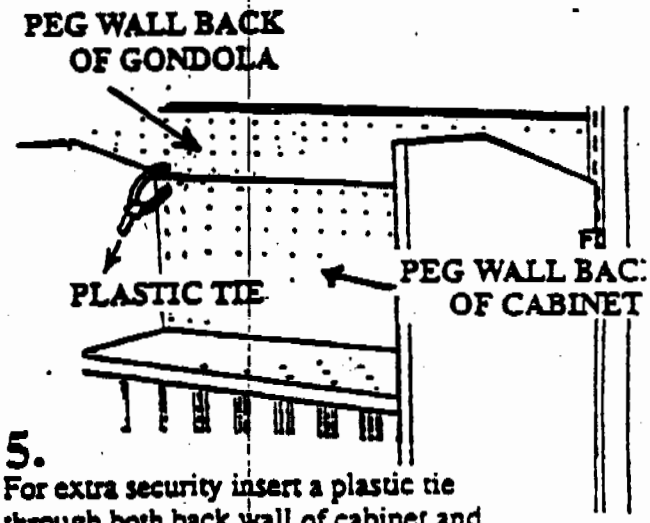


3.

Next attach another upright support plate to the hinge side of the left hand cabinet A. see Illustration #1. Using wood screws attach two spacers on the outside right wall of this cabinet in the locations shown. Make sure center hole of spacer lines up with hole of side wall see Illustration #2
NOTE: IF SPACERS ARE NOT USED DOOR OF CABINET WILL NOT CLOSE PROPERLY.
Lift and place this cabinet on shelf next to cabinet already in place. Insert tabs of support plate into slots of gondola upright as shown in step #1. Be sure all tabs of support plate are all the way in and seated in slots of gondola upright.



4. OPENING DOOR;
Reach under product feed tray and gently pull down hidden door latch while at the same time pull door outward.



5.
For extra security insert a plastic tie through both back wall of cabinet and peg wall of gondola, bring tie back through both surfaces and pull to secure.
Note: The door section was left out of drawing so a clearer view can be shown.

USTC/CWD 041361
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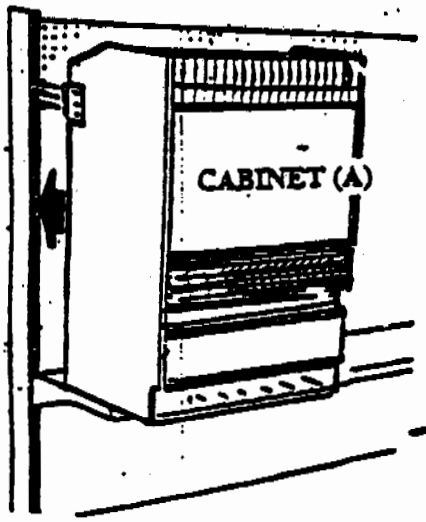
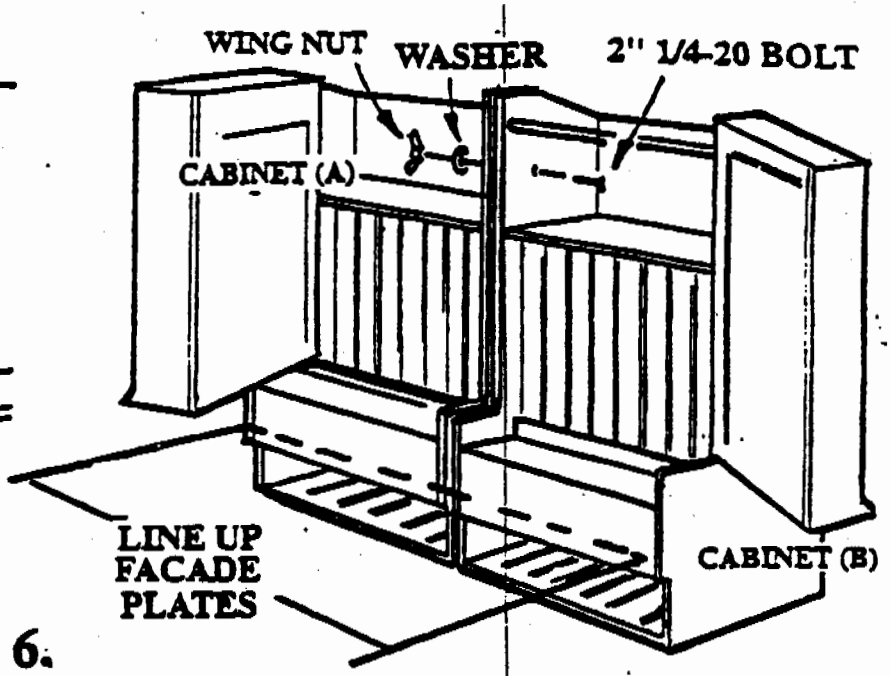
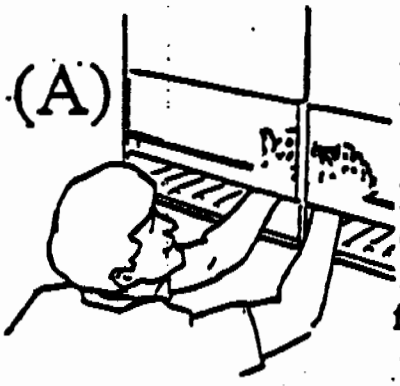
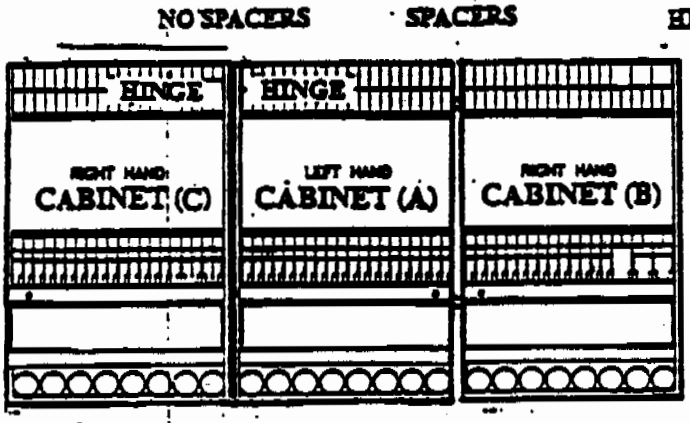


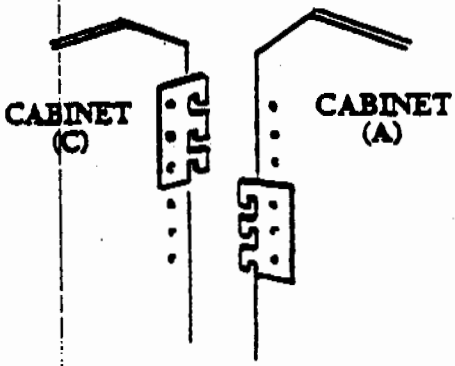




6. With cabinets A and B next to each other (against the spacers adjust the front facade plate of each cabinet so they are lined up. Insert a 2" 1/4-20 bolt through top hole of both cabinet side walls, secure with washer and wing nut. Repeat with bottom side wall holes by reaching under facade panel. This is the easiest way to make this bottom connection see drawing (A).

THREE CABINET WIDE CONFIGURATION





6a When installing a third cabinet (cabinet C) always be sure to align the third cabinet (cabinet C) to the left of cabinet (A), see illustration above. Note: Their are no spacers necessary between cabinet (C) and cabinet (A).
to align the third cabinet (cabinet C) to the left of cabinet (A).

NOTE 1: Cabinets will not share the same mounting holes in the gondola, please make the proper adjustments (see step #1) so that the two brackets are aligned one on top of the other see illustration.

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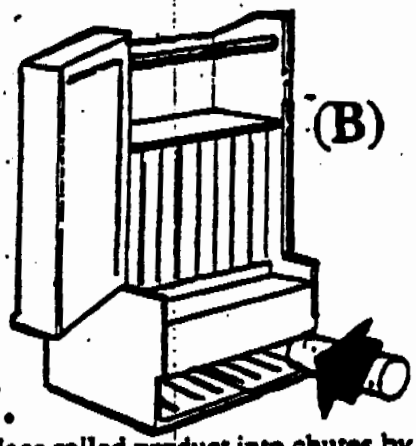
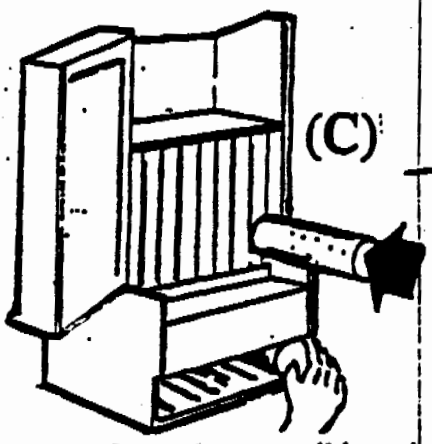
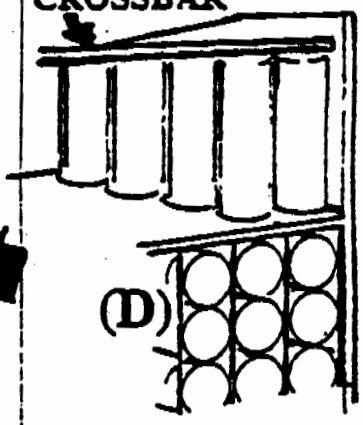
ROLL PRODUCT LOADING:



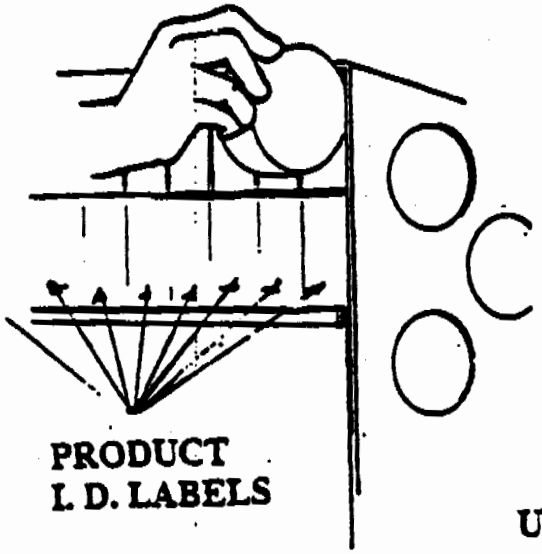




7.

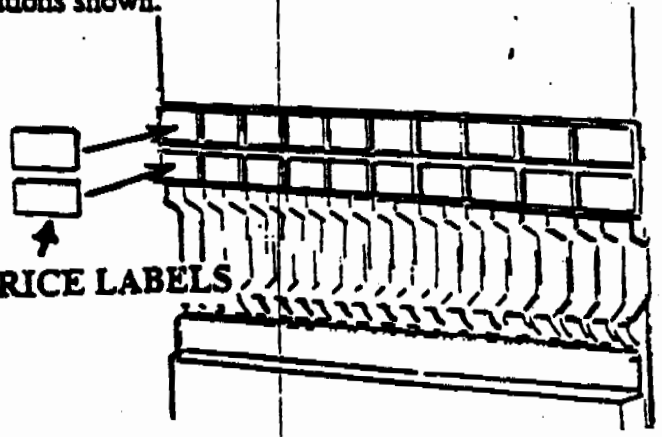
Place rolled product into chutes by inserting the first or bottom roll into chute from the front see (B). While holding the first roll in place insert the second roll into chute from top see (C). Make sure the second roll falls flat on top of the roll already in place. **HOLD THE FIRST ROLL ALREADY IN PLACE WHEN INSERTING THE SECOND ROLL FROM TOP. (IF NOT HELD, THE FIRST ROLL MAY BE PUSHED OUT OF CHUTE.** Load all remaining rolls into chutes from top, top shelf is for additional stock. Product should be placed upright on ends, do not store above the cross bar of cabinet see (D). Product will not dispence properly if door is not closed. Periodically check rolled product inside chutes for any misfeeding.

SINGLE CAN PRODUCT LOADING



8.

Single Can product = Once door is closed insert cans of product into top openings. Place product I. D. labels below openings.
Place UPC price labels on front side of cabinets in the locations shown.



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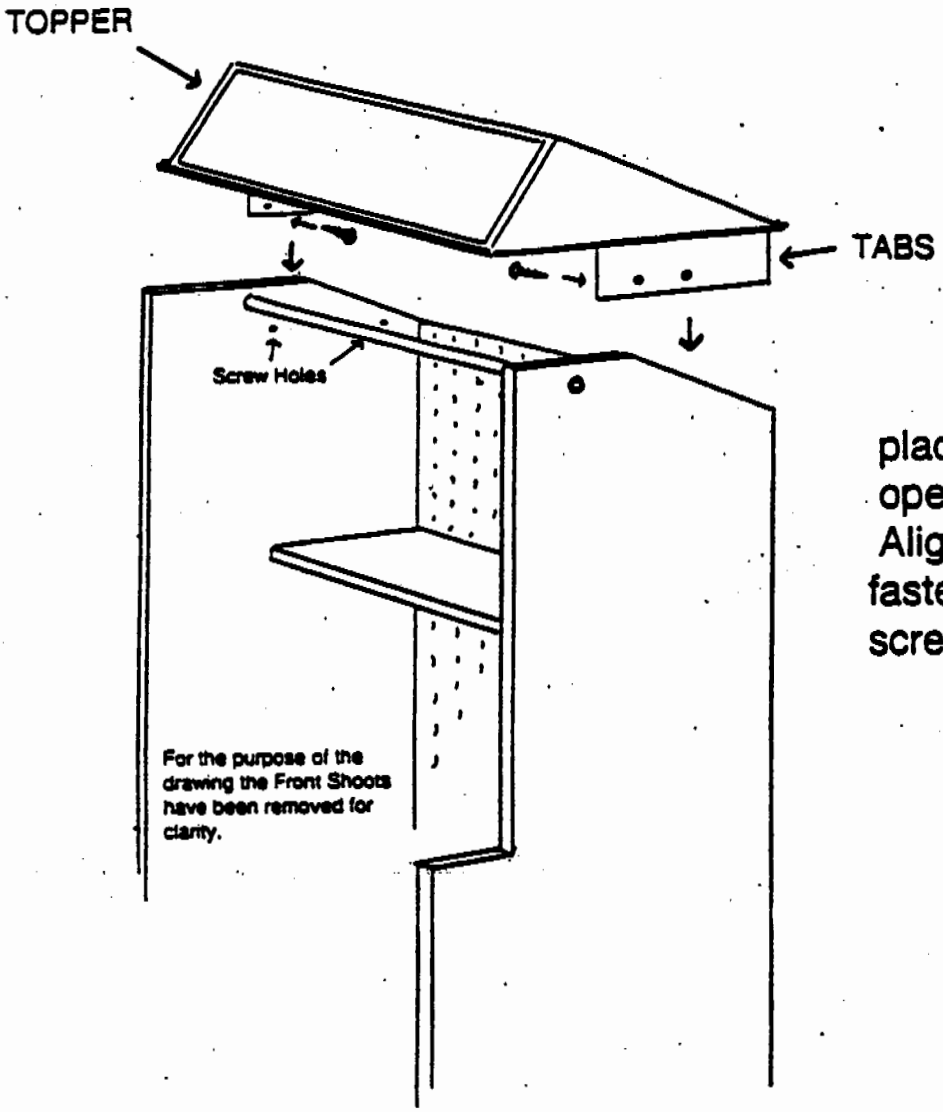
WALMART TOPPER

ASSEMBLY INSTRUCTIONS



place two tabs into opening of main body. Align screw holes and fasten to the body with screws provided.

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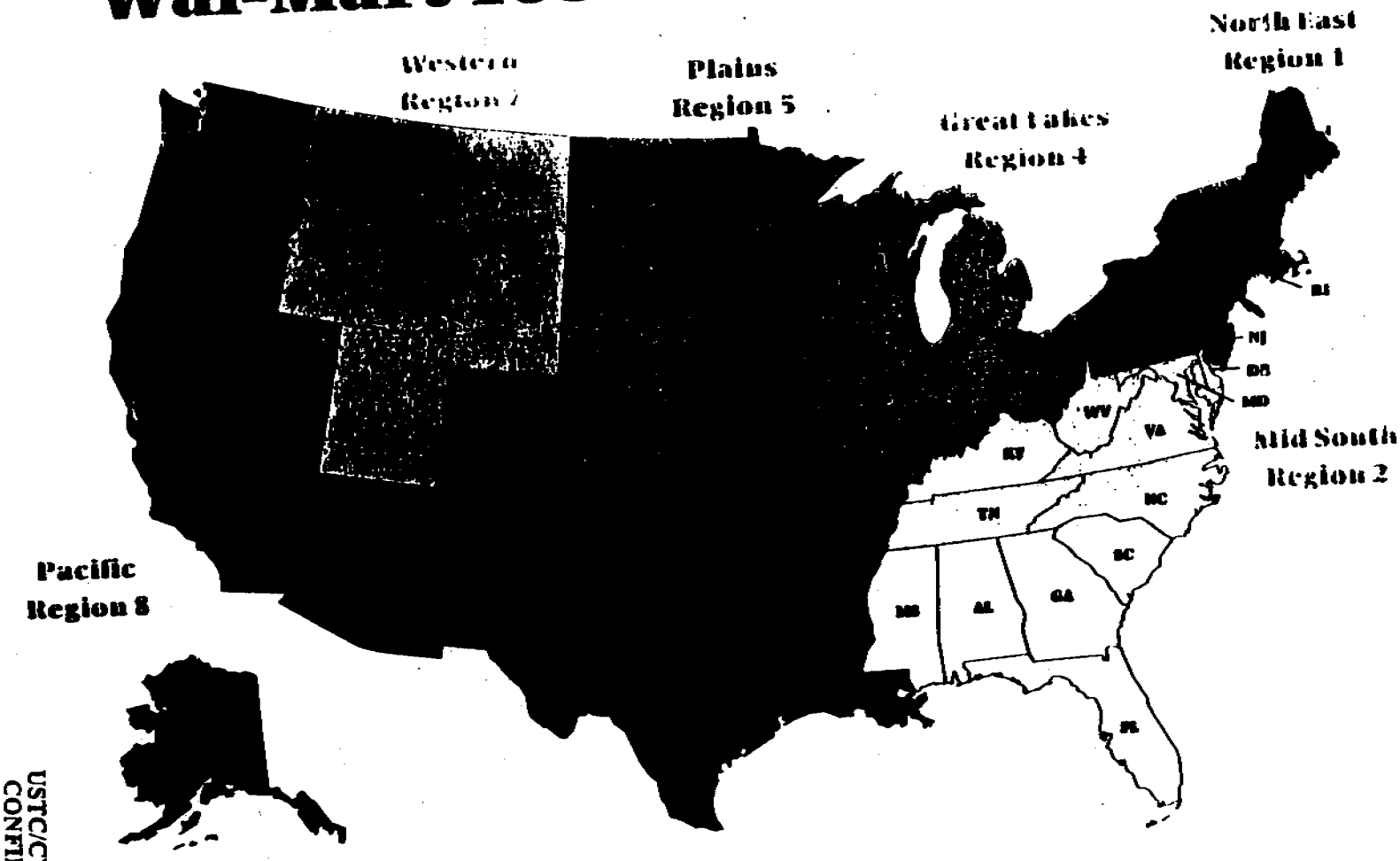
Wal-Mart Tobacco Modular Area's



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WALMART/REGIONS BY STATE

REGION I	*Northeast*	Connecticut Maine	Massachusetts New Hampshire	New Jersey New York	Pennsylvania Rhoce Island Vermont
REGION II	*Mid-South*	Delaware Kentucky	Maryland North Carolina	Tennessee Virginia	West Virginia
REGION III	*Southeast*	Alabama Florida	Georgia Mississippi	South Carolina	
REGION IV	*Great Lakes*	Illinois Indiana	Michigan Ohio	Wisconsin	
REGION V	*Plains*	Colorado Iowa	Kansas Minnesota	Missouri Nebraska	North Dakota South Dakota
REGION VI	*South Central*	Arkansas Louisiana	New Mexico Oklahoma	Texas	
REGION VII	*Western*	Idaho Montana	Utah Wyoming		
REGION VIII	*Pacific*	Alaska Arizona	California Nevada	Oregon Washington	

REGION 1 - Plan-O-Gram
Northeast - 4 Foot Section (#3101 VENDOR)

SINGLE CAN\BRAND	# OF FACINGS
SKOAL FLVR. CINN.	1
SKOAL FLVR. MINT	1
COPENHAGEN	3
COPENHAGEN LONG CUT	1
SKOAL FINE CUT	2
SKOAL FINE CUT STRAIGHT	1
SKOAL LONG CUT MINT	1
SKOAL LONG CUT WINTERGREEN	3
SKOAL LONG CUT STRAIGHT	2
SKOAL LONG CUT CLASSIC	1
SKOAL LONG CUT SPEARMINT	1
SKOAL LONG CUT CHERRY	1
SKOAL BANDIT WINTERGREEN	1
SKOAL BANDIT MINT	1
KODIAK WINTERGREEN	2
HAWKEN	1
TIMBERWOLF LC WINTERGREEN	1
REDWOOD (2 FOR 1)	1
SILVERCREEK LONG CUT (2 FOR 1)	1

ROLLS\BRAND	# OF FACINGS
COPENHAGEN	1
SKOAL FINE CUT	1
SKOAL LONG CUT WINTERGREEN	1
KODIAK	1

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REGION 2 - Plan-O-Gram
Mid-South - 4 Foot Section (#3101 VENDOR)

SINGLE CAN\BRAND	# OF FACINGS
SKOAL FLVR. CINN.	1
SKOAL FLVR. MINT	1
COPENHAGEN	2
COPENHAGEN LONG CUT	1
SKOAL FINE CUT	2
SKOAL FINE CUT STRAIGHT	1
SKOAL LONG CUT MINT	1
SKOAL LONG CUT WINTERGREEN	2
SKOAL LONG CUT STRAIGHT	2
SKOAL LONG CUT CLASSIC	1
SKOAL LONG CUT SPEARMINT	1
SKOAL LONG CUT CHERRY	1
SKOAL BANDIT WINTERGREEN	1
SKOAL BANDIT MINT	1
KODIAK WINTERGREEN	2
KODIAK STRAIGHT	1
HAWKEN	1
RENEGADES	1
TIMBERWOLF LC WINTERGREEN	1
REDWOOD (2 FOR 1)	1
SILVERCREEK LONG CUT (2 FOR 1)	1

ROLLS\BRAND	# OF FACINGS
COPENHAGEN	1
SKOAL FINE CUT	1
SKOAL LONG CUT WINTERGREEN	1
KODIAK	1

REGION 3 - Plan-O-Gram
Southeast - 4 Foot Section (#3101 VENDOR)

SINGLE CAN\BRAND	# OF FACINGS
SKOAL FLVR. CINN.	1
SKOAL FLVR. MINT	1
COPENHAGEN	3
COPENHAGEN LONG CUT	1
SKOAL FINE CUT	2
SKOAL FINE CUT STRAIGHT	1
SKOAL LONG CUT MINT	1
SKOAL LONG CUT WINTERGREEN	2
SKOAL LONG CUT STRAIGHT	2
SKOAL LONG CUT CLASSIC	1
SKOAL LONG CUT SPEARMINT	1
SKOAL LONG CUT CHERRY	1
SKOAL BANDIT WINTERGREEN	1
SKOAL BANDIT MINT	1
KODIAK WINTERGREEN	2
KODIAK STRAIGHT	1
HAWKEN	1
TIMBERWOLF LC WINTERGREEN	1
REDWOOD (2 FOR 1)	1
SILVERCREEK LONG CUT (2 FOR 1)	1

ROLLS\BRAND	# OF FACINGS
COPENHAGEN	1
SKOAL FINE CUT	1
SKOAL LONG CUT WINTERGREEN	1
KODIAK	1

REGION 4 - Plan-O-Gram
Northeast - 4 Foot Section (#3101 VENDOR)

SINGLE CAN\BRAND	# OF FACINGS
SKOAL FLVR. CINN.	1
SKOAL FLVR. MINT	1
COPENHAGEN	3
COPENHAGEN LONG CUT	1
SKOAL FINE CUT	2
SKOAL FINE CUT STRAIGHT	1
SKOAL LONG CUT MINT	1
SKOAL LONG CUT WINTERGREEN	2
SKOAL LONG CUT STRAIGHT	1
SKOAL LONG CUT CLASSIC	1
SKOAL LONG CUT SPEARMINT	1
SKOAL LONG CUT CHERRY	1
SKOAL BANDIT WINTERGREEN	1
SKOAL BANDIT MINT	1
SKOAL KEY	1
KODIAK WINTERGREEN	2
KODIAK STRAIGHT	1
HAWKEN	1
TIMBERWOLF LC WINTERGREEN	1
REDWOOD (2 FOR 1)	1
SILVERCREEK LONG CUT (2 FOR 1)	1

ROLLS\BRAND	# OF FACINGS
COPENHAGEN	1
SKOAL FINE CUT	1
SKOAL LONG CUT WINTERGREEN	1
KODIAK	1

REGION 5 - Plan-O-Gram
Plains - 4 Foot Section (#3101 VENDOR)

SINGLE CAN\BRAND	# OF FACINGS
SKOAL FLVR. CINN.	1
SKOAL FLVR. MINT	1
COPENHAGEN	2
COPENHAGEN LONG CUT	1
SKOAL FINE CUT	2
SKOAL FINE CUT STRAIGHT	1
SKOAL LONG CUT MINT	1
SKOAL LONG CUT WINTERGREEN	2
SKOAL LONG CUT STRAIGHT	1
SKOAL LONG CUT CLASSIC	1
SKOAL LONG CUT SPEARMINT	1
SKOAL LONG CUT CHERRY	1
SKOAL BANDIT WINTERGREEN	1
SKOAL BANDIT MINT	1
SKOAL BANDIT STRAIGHT	1
SKOAL KEY	1
KODIAK WINTERGREEN	1
KODIAK STRAIGHT	1
HAWKEN	1
TIMBERWOLF FINE CUT	1
TIMBERWOLF LC WINTERGREEN	1
REDWOOD (2 FOR 1)	1
SILVERCREEK LONG CUT (2 FOR 1)	1

ROLLS\BRAND	# OF FACINGS
COPENHAGEN	1
SKOAL FINE CUT	1
SKOAL LONG CUT WINTERGREEN	1
KODIAK	1

REGION 6 - Plan-O-Gram
South Central - 4 Foot Section (#3101 VENDOR)

SINGLE CAN\BRAND	# OF FACINGS
SKOAL FLVR. CINN.	1
SKOAL FLVR. MINT	1
COPENHAGEN	2
COPENHAGEN LONG CUT	1
SKOAL FINE CUT	2
SKOAL FINE CUT STRAIGHT	1
SKOAL LONG CUT MINT	2
SKOAL LONG CUT WINTERGREEN	2
SKOAL LONG CUT STRAIGHT	2
SKOAL LONG CUT CLASSIC	1
SKOAL LONG CUT SPEARMINT	1
SKOAL LONG CUT CHERRY	1
SKOAL BANDIT WINTERGREEN	1
KODIAK WINTERGREEN	1
KODIAK STRAIGHT	1
HAWKEN	1
COUGAR FULL	1
TIMBERWOLF LC WINTERGREEN	1
TIMBERWOLF FINE CUT	1
REDWOOD (2 FOR 1)	1
SILVERCREEK LONG CUT (2 FOR 1)	1

ROLLS\BRAND	# OF FACINGS
COPENHAGEN	1
SKOAL FINE CUT	1
SKOAL LONG CUT WINTERGREEN	1
KODIAK	1

REGION 7 - Plan-O-Gram
Western - 4 Foot Section (#3101 VENDOR)

SINGLE CAN\BRAND	# OF FACINGS
SKOAL FLVR. CINN.	1
SKOAL FLVR. MINT	1
COPENHAGEN	2
COPENHAGEN LONG CUT	1
SKOAL FINE CUT	2
SKOAL FINE CUT STRAIGHT	1
SKOAL LONG CUT MINT	1
SKOAL LONG CUT WINTERGREEN	2
SKOAL LONG CUT STRAIGHT	1
SKOAL LONG CUT CLASSIC	1
SKOAL LONG CUT SPEARMINT	1
SKOAL LONG CUT CHERRY	1
SKOAL BANDIT WINTERGREEN	1
SKOAL BANDIT MINT	1
SKOAL BANDIT STRAIGHT	1
SKOAL KEY	1
KODIAK WINTERGREEN	2
KODIAK STRAIGHT	1
HAWKEN	1
COUGAR FULL FLAVOR	1
REDWOOD (2 FOR 1)	1
SILVERCREEK LONG CUT (2 FOR 1)	1

ROLLS\BRAND	# OF FACINGS
COPENHAGEN	1
SKOAL FINE CUT	1
SKOAL LONG CUT WINTERGREEN	1
KODIAK	1

REGION 8 - Plan-O-Gram
Northeast - 4 Foot Section (#3101 VENDOR)

SINGLE CAN\BRAND	# OF FACINGS
SKOAL FLVR. CINN.	1
SKOAL FLVR. MINT	1
COPENHAGEN	3
COPENHAGEN LONG CUT	1
SKOAL FINE CUT	2
SKOAL FINE CUT STRAIGHT	1
SKOAL LONG CUT MINT	1
SKOAL LONG CUT WINTERGREEN	2
SKOAL LONG CUT STRAIGHT	1
SKOAL LONG CUT CLASSIC	1
SKOAL LONG CUT SPEARMINT	1
SKOAL LONG CUT CHERRY	1
SKOAL BANDIT WINTERGREEN	1
SKOAL BANDIT MINT	1
SKOAL BANDIT STRAIGHT	1
KODIAK WINTERGREEN	2
KODIAK STRAIGHT	1
HAWKEN	1
COUGAR FULL	1
REDWOOD (2 FOR 1)	1
SILVERCREEK LONG CUT (2 FOR 1)	1

ROLLS\BRAND	# OF FACINGS
COPENHAGEN	1
SKOAL FINE CUT	1
SKOAL LONG CUT WINTERGREEN	1
KODIAK	1

REGION 1– Plan-O-Gram- Northeast 8 Foot Section (2-Cabinets)

BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flavor Pack Cinn	1	7310000292		
Skoal Flavor Pack. Mint	1	7310000290		
Copenhagen	4	7310000107	2	7310000150
Copenhagen Long Cut	2	7310000121	1	7310001320
Skoal Fine Cut	4	7310000137	1	7310000138
Skoal Fine Cut Straight	1	7310000105	1	7310011738
Skoal Long Cut Mint	2	7310000088	1	7310000089
Skoal Long Cut Wintergreen	3	7310000148	2	7310000149
Skoal Long Cut Straight	3	7310000060	1	7310000061
Skoal Long Cut Classic	1	7310000541	1	7310000542
Skoal Long Cut Spearmint	1	7310000288	1	7310000289
Skoal Long Cut Cherry	2	7310000286	1	7310000287
Skoal Bandit Wintergreen	1	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Kodiak Wintergreen	2	4210000294	1	4210000304
Kodiak Straight	1	4210000793		
Kodiak Choice	1	4210000338		
Hawken	1	4210000289		
Renegades	1	7019562101		
Timberwolf Long Cut Wintergreen	1	76244600002		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009		

REGION 2 - Plan-O-Gram Mid-South 8 Foot Section (2-Cabinets)				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	4	7310000107	2	7310000150
Copenhagen Long Cut	2	7310000121	1	7310001320
Skoal Fine Cut	4	7310000137	2	7310000138
Skoal Fine Cut Straight	1	7310000105	1	7310011738
Skoal Long Cut Mint	1	7310000088	1	7310000089
Skoal Long Cut Wintergreen	3	7310000148	1	7310000149
Skoal Long Cut Straight	2	7310000060	1	7310000061
Skoal Long Cut Classic	1	7310000541	1	7310000542
Skoal Long Cut Spearmint	1	7310000288	1	7310000289
Skoal Long Cut Cherry	1	7310000286	1	7310000287
Skoal Bandit Wintergreen	1	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Skoal Bandit Straight	1	731000066		
Kodiak Wintergreen	3	4210000294	1	4210000304
Kodiak Straight	1	4210000793		
Kodiak Choice	1	4210000338		
Hawken	1	4210000289		
Renegades	1	7019562101		
Timberwolf Fine Cut	1	76244600001		
Timberwolf Long Cut Wintergreen	1	76244600002		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009		

REGION 3 - Plan-O-Gram Northeast 8 Foot Section (2-Cabinets)				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	5	7310000107	2	7310000150
Copenhagen Long Cut	2	7310000121	1	7310001320
Skoal Fine Cut	4	7310000137	2	7310000138
Skoal Fine Cut Straight	1	7310000105	1	7310011738
Skoal Long Cut Mint	2	7310000088	1	7310000089
Skoal Long Cut Wintergreen	2	7310000148	1	7310000149
Skoal Long Cut Straight	2	7310000060	1	7310000061
Skoal Long Cut Classic	1	7310000541	1	7310000542
Skoal Long Cut Spearmint	1	7310000288	1	7310000289
Skoal Long Cut Cherry	1	7310000286	1	7310000287
Skoal Bandit Wintergreen	1	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Skoal Bandit Straight	1	7310000066		
Kodiak Wintergreen	2	4210000294	1	4210000304
Kodiak Straight	1	4210000793		
Kodiak Choice	1	4210000338		
Hawken	1	4210000289		
Garrett	1	4210000803		
Cougar Full Flavor	0	7019562101		
Timberwolf Fine Cut	1	76244600001		
Timberwolf Long Cut Wintergreen	1	76244600002		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009		

REGION 4 - Plan-O-Gram
Great Lakes 8 Foot Section
(2-Cabinets)

BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	5	7310000107	2	7310000150
Copenhagen Long Cut	1	7310000121	1	7310001320
Skoal Fine Cut	4	7310000137	2	7310000138
Skoal Fine Cut Straight	1	7310000105	1	7310011738
Skoal Long Cut Mint	1	7310000088	1	7310000089
Skoal Long Cut Wintergreen	3	7310000148	1	7310000149
Skoal Long Cut Straight	2	7310000060	1	7310000061
Skoal Long Cut Classic	1	7310000541	1	7310000542
Skoal Long Cut Spearmint	1	7310000288	1	7310000289
Skoal Long Cut Cherry	1	7310000286	1	7310000287
Skoal Bandit Wintergreen	1	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Skoal Bandit Straight	1	7310000066		
Skoal Key	1	7310000123		
Kodiak Wintergreen	3	4210000294	1	4210000304
Kodiak Straight	1	4210000793		
Kodiak Choice	1	4210000338		
Hawken	1	4210000289		
Renegades	1	7019562101		
Timberwolf Long Cut Wintergreen	1	76244600001		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009		

REGION 5 - Plan-O-Gram Plains 8 Foot Sections (2-Cabinets)				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	5	7310000107	3	7310000150
Copenhagen Long Cut	1	7310000121	1	7310001320
Skoal Fine Cut	4	7310000137	1	7310000138
Skoal Fine Cut Straight	1	7310000105	1	7310011738
Skoal Long Cut Mint	2	7310000088	1	7310000089
Skoal Long Cut Wintergreen	2	7310000148	1	7310000149
Skoal Long Cut Straight	2	7310000060	1	7310000061
Skoal Long Cut Classic	1	7310000541	1	7310000542
Skoal Long Cut Spearmint	1	7310000288	1	7310000289
Skoal Long Cut Cherry	1	7310000286	1	7310000287
Skoal Bandit Wintergreen	1	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Skoal Bandit Straight	1	7310000066		
Skoal Kev	1	7310000123		
Kodiak Wintergreen	2	4210000294	1	4210000304
Kodiak Straight	1	4210000793		
Hawken	1	4210000289		
Cougar Full Flavor	1	4210000816		
Cougar Wintergreen	1	4210000818		
Timberwolf Fine Cut	1	76244600001		
Timberwolf Long Cut Wintergreen	1	76244600002		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009		

REGION 6 - Plan-O-Gram Southeast 8 Foot Section (2-Cabinets)				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	5	7310000107	2	7310000150
Copenhagen Long Cut	2	7310000121	1	7310001320
Skoal Fine Cut	3	7310000137	2	7310000138
Skoal Fine Cut Straight	1	7310000105	1	7310011738
Skoal Long Cut Mint	2	7310000088	1	7310000089
Skoal Long Cut Wintergreen	3	7310000148	1	7310000149
Skoal Long Cut Straight	2	7310000060	1	7310000061
Skoal Long Cut Classic	1	7310000541	1	7310000542
Skoal Long Cut Spearmint	1	7310000288	1	7310000289
Skoal Long Cut Cherry	1	7310000286	1	7310000287
Skoal Bandit Wintergreen	1	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Skoal Bandit Straight	1	7310000066		
Kodiak Wintergreen	1	4210000294	1	4210000304
Kodiak Straight	1	4210000793		
Kodiak Choice	1	4210000338		
Hawken	1	4210000289		
Cougar Full Flavor	1	4210000816		
Cougar Wintergreen	1	4210000818		
Timberwolf Fine Cut	1	76244600001		
Timberwolf Long Cut Wintergreen	1	76244600002		
Timberwolf Cool Wintergreen	1	76244670300		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009		

REGION 7 - Plan-O-Gram Western 8 Foot Section (2-Cabinets)				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	5	7310000107	3	7310000150
Copenhagen Long Cut	1	7310000121	1	7310001320
Skoal Fine Cut	3	7310000137	1	7310000138
Skoal Fine Cut Straight	1	7310000105	1	7310011738
Skoal Long Cut Mint	2	7310000088	1	7310000089
Skoal Long Cut Wintergreen	3	7310000148	1	7310000149
Skoal Long Cut Straight	2	7310000060	1	7310000061
Skoal Long Cut Classic	1	7310000541	1	7310000542
Skoal Long Cut Spearmint	1	7310000288	1	7310000289
Skoal Long Cut Cherry	1	7310000286	1	7310000287
Skoal Bandit Wintergreen	1	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Skoal Bandit Straight	1	7310000066		
Skoal Key	1	7310000123		
Kodiak Wintergreen	2	4210000294	1	4210000304
Kodiak Straight	1	4210000793		
Kodiak Choice	1	4210000338		
Hawken	1	4210000289		
Cougar Full Flavor	1	4210000816		
Cougar Wintergreen	1	4210000818		
Timberwolf Fine Cut	1	76244600001		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009		

REGION 8 – Plan-O-Gram – Pacific 8 Foot Section (2 – Cabinets)				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	5	7310000107	3	7310000150
Copenhagen Long Cut	2	7310000121	1	7310001320
Skoal Fine Cut	3	7310000137	1	7310000138
Skoal Fine Cut Straight	1	7310000105	1	7310011738
Skoal Long Cut Mint	2	7310000088	1	7310000089
Skoal Long Cut Wintergreen	3	7310000148	1	7310000149
Skoal Long Cut Straight	2	7310000060	1	7310000061
Skoal Long Cut Classic	1	7310000541	1	7310000542
Skoal Long Cut Spearmint	1	7310000288	1	7310000289
Skoal Long Cut Cherry	1	7310000286	1	7310000287
Skoal Bandit Wintergreen	1	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Skoal Bandit Straight	1	7310000066		
Kodiak Wintergreen	2	4210000294	1	4210000304
Kodiak Straight	1	4210000793		
Kodiak Choice	1	4210000338		
Hawken	1	4210000289		
Cougar Full Flavor	1	4210000816		
Cougar Wintergreen	1	4210000818		
Timberwolf Fine Cut	1	76244600001		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009		

REGION I - Plan-O-Gram Northeast 12-20 Foot Sections (3-Cabinets)				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	5	7310000107	4	7310000150
Copenhagen Long Cut	2	7310000121	1	7310001320
Skoal Fine Cut Straight	1	7310000137	1	7310000138
Skoal Fine Cut	5	7310000105	3	7310011738
Skoal Long Cut Mint	3	7310000088	1	7310000089
Skoal Long Cut Wintergreen	5	7310000148	2	7310000149
Skoal Long Cut Straight	4	7310000060	2	7310000061
Skoal Long Cut Classic	2	7310000541	1	7310000542
Skoal Long Cut Spearmint	2	7310000288	1	7310000289
Skoal Long Cut Cherry	3	7310000286	1	7310000287
Skoal Bandit Wintergreen	2	7310000190	1	7310000292
Skoal Bandit Mint	1	7310000090		7310000290
Skoal Bandit Straight	1	7310000066		7310000107
Kodiak Wintergreen	3	4210000294	2	4210000304
Kodiak Straight	2	4210000793		
Kodiak Chews	1	4210000338		
Hawken	1	4210000289	1	4210000290
Cougar Full Flavor	1	4210000816		
Cougar Wintergreen	1	4210000818		
Cougar Long Cut Wintergreen	1	4210000838		
Renegades	1	7019562101		
Timberwolf Fine Cut	1	76244600001		
Timberwolf Long Cut Wintergreen	1	76244600002		
Timberwolf Cool Wintergreen	1	76244670300		
Bowie Natural	1	3330000002		
Bowie Wintergreen	1	3330000003		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009	1	3330000072

REGION 2 - Plan-O-Gram - Mid-South 12-20 Foot Sections (3 Cabinets)				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	7	7310000107	4	7310000150
Copenhagen Long Cut	2	7310000121	1	7310001320
Skoal Fine Cut	5	7310000137	3	7310011738
Skoal Fine Cut Straight	1	7310000105	1	7310000138
Skoal Long Cut Mint	3	7310000088	1	7310000089
Skoal Long Cut Wintergreen	4	7310000148	3	7310000149
Skoal Long Cut Straight	4	7310000060	1	7310000061
Skoal Long Cut Classic	2	7310000541	1	7310000542
Skoal Long Cut Spearmint	2	7310000288	1	7310000289
Skoal Long Cut Cherry	2	7310000286	1	7310000287
Skoal Bandit Wintergreen	2	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Skoal Bandit Straight	1	7310000066		
Kodiak Wintergreen	4	4210000294	2	4210000304
Kodiak Straight	1	4210000793		
Kodiak Choice	1	4210000338		
Hawken	1	4210000289	1	4210000290
Cougar Full Flavor	1	4210000816		
Cougar Wintergreen	1	4210000818		
Cougar Long Cut Natural	1			
Renegades	1	7019562101		
Timberwolf Fine Cut	1	76244600001		
Timberwolf Long Cut Wintergreen	1	76244600002		
Timberwolf Cool Wintergreen	1	76244670300		
Bowie Natural	1	3330000002		
Bowie Wintergreen	1	3330000003		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009		

REGION 3 - Plan-O-Gram Southeast 17-20 Foot Sections (3-Cabinets)				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	9	7310000107	4	7310000150
Copenhagen Long Cut	2	7310000121	1	7310001320
Skoal Fine Cut	5	7310000137	3	7310011738
Skoal Fine Cut Straight	1	7310000105	1	7310000138
Skoal Long Cut Mint	2	7310000088	1	7310000089
Skoal Long Cut Wintergreen	5	7310000148	2	7310000149
Skoal Long Cut Straight	4	7310000060	1	7310000061
Skoal Long Cut Classic	2	7310000541	1	7310000542
Skoal Long Cut Spearmint	1	7310000288	1	7310000289
Skoal Long Cut Cherry	2	7310000286	1	7310000287
Skoal Bandit Wintergreen	2	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Skoal Bandit Straight	1	7310000066		
Kodiak Wintergreen	3	4210000294	2	4210000304
Kodiak Straight	1	4210000793	1	4210000794
Kodiak Choice	1	4210000338		
Hawken	1	4210000289	1	4210000290
Garrett	1	4210000803		
Cougar Full Flavor	1	4210000816		
Cougar Wintergreen	1	4210000818		
Cougar Long Cut Natural	1			
Renegades	1	7019562101		
Timberwolf Fine Cut	1	76244600001		
Timberwolf Long Cut Wintergreen	1	76244600002		
Bowie Natural	1	3330000002		
Bowie Wintergreen	1	3330000003		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009	1	3330000072

REGION 4 - Plan-O-Gram - Great Lakes 12-20 Foot Sections (3-Shelf - 72" Cabinets)				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	7	7310000107	4	7310000150
Copenhagen Long Cut	2	7310000121	1	7310001320
Skoal Fine Cut	5	7310000137	3	7310011738
Skoal Fine Cut Straight	1	7310000105	1	7310000138
Skoal Long Cut Mint	3	7310000088	2	7310000089
Skoal Long Cut Wintergreen	5	7310000148	2	7310000149
Skoal Long Cut Straight	3	7310000060	1	7310000061
Skoal Long Cut Classic	2	7310000541	1	7310000542
Skoal Long Cut Spearmint	1	7310000288	1	7310000289
Skoal Long Cut Cherry	2	7310000286	1	7310000287
Skoal Bandit Wintergreen	2	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Skoal Bandit Straight	1	7310000066		
Skoal Key	1	7310000158		
Kodiak Wintergreen	4	4210000294	2	4210000304
Kodiak Straight	1	4210000793		
Kodiak Choice	1	4210000338		
Hawken	1	4210000289	1	4210000290
Cougar Full Flavor	1	4210000803		
Cougar Wintergreen	1	4210000816		
Cougar Long Cut Wintergreen	1	4210000818		
Renegades	1	7019562101		
Timberwolf Fine Cut	1	76244600001		
Timberwolf Long Cut Wintergreen	1	76244600002		
Timberwolf Cool Wintergreen	1	76244670300		
Bowie Natural	1	3330000002		
Bowie Wintergreen	1	3330000003		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009	1	3330000072

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REGION 5 – Plan-O-Gram Plano 12-20 Foot Sections C- Cabinets				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	7	7310000107	4	7310000150
Copenhagen Long Cut	2	7310000121	1	7310001320
Skoal Fine Cut	5	7310000137	3	7310011738
Skoal Fine Cut Straight	1	7310000105	1	7310000138
Skoal Long Cut Mint	3	7310000088	1	7310000089
Skoal Long Cut Wintergreen	4	7310000148	2	7310000149
Skoal Long Cut Straight	4	7310000060	2	7310000061
Skoal Long Cut Classic	2	7310000541	1	7310000542
Skoal Long Cut Spearmint	1	7310000288	1	7310000289
Skoal Long Cut Cherry	2	7310000286	1	7310000287
Skoal Bandit Wintergreen	2	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Skoal Bandit Straight	1	7310000066		
Skoal Key	2	7310000158		
Kodiak Wintergreen	3	4210000294	1	4210000304
Kodiak Straight	1	4210000793	1	4210000794
Kodiak Choice	1	4210000338		
Hawken	1	4210000289	1	4210000290
Cougar Full Flavor	1	4210000803		
Cougar Wintergreen	1	4210000816		
Cougar Long Cut Natural	1			
Cougar Long Cut Wintergreen	1	4210000818		
Timberwolf Fine Cut	1	76244600001		
Timberwolf Long Cut Wintergreen	1	76244600002		
Timberwolf Cool Wintergreen	1	76244670300		
Bowie Natural	1	3330000002		
Bowie Wintergreen	1	3330000003		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009	1	3330000072

REGION 6—Plan-O-Gram—Southcentral 2-20 Foot Sections (3—Cabinets)				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	8	7310000107	4	7310000150
Copenhagen Long Cut	2	7310000121	1	7310001320
Skoal Fine Cut	5	7310000137	3	7310011738
Skoal Fine Cut Straight	1	7310000105	1	7310000138
Skoal Long Cut Mint	3	7310000088	1	7310000089
Skoal Long Cut Wintergreen	4	7310000148	3	7310000149
Skoal Long Cut Straight	4	7310000060	1	7310000061
Skoal Long Cut Classic	2	7310000541	1	7310000542
Skoal Long Cut Spearmint	2	7310000288	1	7310000289
Skoal Long Cut Cherry	2	7310000286	1	7310000287
Skoal Bandit Wintergreen	2	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Skoal Bandit Straight	1	7310000066		
Kodiak Wintergreen	3	4210000294	2	4210000304
Kodiak Straight	1	4210000793	1	4210000794
Kodiak Choice	1	4210000338		
Hawken	2	4210000289		
Cougar Full Flavor	1	4210000803		
Cougar Wintergreen	1	4210000816		
Cougar Long Cut Natural	1			
Timberwolf Fine Cut	1	76244600001		
Timberwolf Long Cut Wintergreen	1	76244600002		
Timberwolf Cool Wintergreen	1	76244670300		
Bowie Natural	1	3330000002		
Bowie Wintergreen	1	3330000003		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009	1	3330000072

REGION 1 – Plan-O-Gram – Western 12-20 Foot Sections (3 Cabinets)				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	9	7310000107	4	7310000150
Copenhagen Long Cut	2	7310000121	1	7310001320
Skoal Fine Cut	5	7310000137	3	7310011738
Skoal Fine Cut Straight	1	7310000105	1	7310000138
Skoal Long Cut Mint	2	7310000088	1	7310000089
Skoal Long Cut Wintergreen	5	7310000148	2	7310000149
Skoal Long Cut Straight	4	7310000060	2	7310000061
Skoal Long Cut Classic	3	7310000541	1	7310000542
Skoal Long Cut Spearmint	1	7310000288	1	7310000289
Skoal Long Cut Cherry	1	7310000286	1	7310000287
Skoal Bandit Wintergreen	1	7310000190	1	7310000191
Skoal Bandit Mint	1	7310000090		
Skoal Bandit Straight	1	7310000066		
Skoal Key	1	7310000158		
Kodiak Wintergreen	3	4210000294	2	4210000304
Kodiak Straight	1	4210000793		
Kodiak Choice	1	4210000338		
Hawken	2	4210000289	1	4210000290
Cougar Full Flavor	1	4210000803		
Cougar Wintergreen	1	4210000816		
Cougar Long Cut Natural	1			
Renegades	1	7019562101		
Timberwolf Fine Cut	1	76244600001		
Timberwolf Long Cut Wintergreen	1	76244600002		
Bowie Natural	1	3330000002		
Bowie Wintergreen	1	3330000003		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009	1	3330000072

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REGION 8 - Plan-O-Gram [illegible] Pacific 12-20 Foot Sections (3 - [illegible] Cabinets)				
BRAND	SINGLE CAN FACINGS	CAN UPC	ROLL FACINGS	ROLL UPC
Skoal Flvr. Cinn.	1	7310000292		
Skoal Flvr. Mint	1	7310000290		
Copenhagen	8	7310000107	4	7310000150
Copenhagen Long Cut	2	7310000121	1	7310001320
Skoal Fine Cut	5	7310000137	3	7310011738
Skoal Fine Cut Straight	1	7310000105	1	7310000138
Skoal Long Cut Mint	2	7310000088	1	7310000089
Skoal Long Cut Wintergreen	5	7310000148	2	7310000149
Skoal Long Cut Straight	4	7310000060	2	7310000061
Skoal Long Cut Classic	2	7310000541	1	7310000542
Skoal Long Cut Spearmint	2	7310000288	1	7310000289
Skoal Long Cut Cherry	2	7310000286	1	7310000287
Skoal Bandit Wintergreen	2	7310000190	1	7310000191
Skoal Bandit Mint	2	7310000090		
Skoal Bandit Straight	1	7310000066		
Kodiak Wintergreen	3	4210000294	2	4210000304
Kodiak Straight	1	4210000793		
Kodiak Choice	1	4210000338		
Hawkens	2	4210000289	1	4210000290
Cougar Full Flavor	1	4210000803		
Cougar Wintergreen	1	4210000816		
Timberwolf Fine Cut	1	76244600001		
Timberwolf Long Cut Wintergreen	1	76244600002		
Timberwolf Cool Wintergreen	1			
Bowie Natural	1	3330000002		
Bowie Wintergreen	1	3330000003		
Redwood	1	3330000014	1	3330000087
Silvercreek Long Cut	1	3330000011	1	3330000082
Cooper	1	3330000009	1	3330000072

DATE: February 19, 1998

TO: J.F. Wheatley, Department Manager BOO

FROM: Tom Berkebile, Chain Accounts Manager BO1

SUBJECT: WEEKLY ACTIVITY LETTER- *WEEK ENDING 2/13/98*

I. TIME SPENT

SAT- Off Duty
SUN- Off Duty
MON- Office, Admin. Duties
TUE- Worked w/ D.M. Jim Pearson, Cogo's store audits and Appointment
WED- Traveled to Newark, Oh - Store Audits with Pat Webb and Susan Pater
THU - Worked with Pat Webb and Susan Pater, store audits and Tobacco Discount Appointment
FRI - Office, Admin. Duties (Duke & Duchess appointment canceled)

II. CONDITION OF MARKETPLACE, EVALUATION OF PROGRAMS

Division Manager Jim Pearson and I had a very good meeting with Ray Kostrycki, Director of Marketing with Cogo's this week. Cogo's was up 2.3% in 1997 with over 400,000 units sold. These stores are high volume outlets, averaging 133 cans / wk / store. During our meeting Ray agreed to continue the Frequent Buyer Program through 1998, including the quarterly consumer incentive drawing that was previously set up. An issue was raised about the inconsistency of program support materials in some stores. Part of the problem has been lack of store level coverage due to vacancies. This problems is being addressed with Jim's new hires and we agreed to report back to Ray on locations that are not properly supporting the program. We addressed the "over merchandising" of smokeless tobacco products. Cogo's has 30 moist items with the top 15 accounting for over 95% cumulative share. Ray made it clear that he wants all customer's to have their brand of choice despite the additional carrying costs of slow moving products. We recommended exclusive UST vending, along with eliminating products with 0.7 share or lower. This will be incorporated into our CAP contract that will be revisited at our next meeting on March 16. Ray did accepted the second quarter promotion for all his stores.

Pat, Susan and I had an excellent meeting with Tobacco Discount - Supervisor Randy Milam and G.M. Wholesale Jim Bretz. Tobacco Discount has been in business for only 2 years and have grown to 11 stores, with at least 3 more scheduled to open this year. During our meeting we received approval to ship the second quarter promotion and place our roll

PLAINTIFF'S EXHIBIT
CASE NO. 5:98CV-108-R
EXHIBIT NO. 113b

EXHIBIT ID
Berkebile 3
DL 6/17/99

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knockdown displays. Also, we agreed to test the cabinet rack two stores stores and received neon sign placement approval (if these pieces are available). A request was made for direct status. They now receive direct shipment from Lane Ltd., some smaller cigar companies and have applications pending for Swisher, Middleton and General. They will pursue cigarette direct status at a later date. Pat discussed with you the pro's and con's of placing this account on direct. We agreed the benefits of a lower price and fresher dates, along with their willingness to work with us will benefit both our companies. Pat will inspect the ship-to facility and review invoices before submitting the application. The potential of this account is tremendous and we have laid the groundwork for an excellent working relationship.

II. FOLLOW UP PLANS

Jay Scherer, Category Manager at United Dairy Farmers finally signed off on a chain wide reset. This reset calls for exclusive UST vending and POS as part of the Customer Alliance Program. Discontinued products include S/B Straight, Kodiak Choice and Hawken. Kodiak and Kodiak Straight are the only competitive products now authorized. Also, UST reps. have the flexibility to eliminate our slower movers at store level at the time of the reset. We have secured premium back bar locations in the majority of their stores. This reset may take time away from the normal routing of our reps. with no area PTSTs, but the benefits at store level are worth the effort.

IV. COMPETITIVE ACTIVITY

Nothing to report.

V. OPPORTUNITIES AND RECOMMENDATIONS

It would be very helpful to have a MF sheet for the cabinet rack.

VI. PLANS FOR NEXT WEEK

SAT- Off Duty
SUN- Off Duty
MON- Office, Administrative Duties, Travel to Syracuse, NY
TUE- Work with Aiden Dockery, P&C Appointment return to headquarters
WED- Office in am, Travel to Dayton, OH
THU- Work with Mark Tomlinson, Super Valu Appointment, return to headquarters
FRI- Office, Admin. Duties

=

cc: R. Huth
L. Autry
B. Chiaradio
D. Cunningham
H. Heylmun
J. Greathouse

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JOHN : GOOD LETTER
I LIKED THE ARTICLES
THEY WERE INFORMATIVE.

TO: J. F. WHEATLEY
FROM: J. A. ROHALY
SUBJECT: MONTHLY COMPETITIVE LETTER
DATE: MARCH 27, 1998

THE CUSTOMER ALLIANCE PROGRAM HAS BECOME A GREAT INCENTIVE IN SECURING SPACE FOR OUR VENDORS AND FOR THE ELIMINATION OF COMPETITIVE PRODUCTS. AT ROAD RUNNER, SCOTTDALE, PA AND L AND B QUIK MART IN MANOR, PA, UST VENDING HAS BEEN SECURED ON THE FRONT COUNTERS WHILE ALL COMPETITIVES ARE BEING SOLD FROM UNDER THE COUNTER. SPEE D MART, GREENSBURG, PA, DISCONTINUED SILVER CREEK, REDWOOD AND FOUR COUGAR BRANDS IN AGREEMENT WITH THE CUSTOMER ALLIANCE CONTRACT SIGNED BY THE SPEE D MART BUYER, SHIRLEY MOORE.

ON MARCH 3, 1998, TWO DAYS AFTER THE WAL-MART PROMOTION STARTED, I CALLED ON THE GREENSBURG, PA STORE. CHAR, THE TOBACCO MANAGER TOLD ME SHE SOLD 90 ROLLS OF COPENHAGEN ALONE IN THE FIRST TWO DAYS OF THIS $4.00 A ROLL PROMOTION.

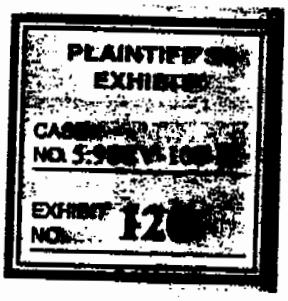
CAMPBELLS SUNOCO, NEW STANTON, PA, IS AN ACCOUNT THAT SELLS RED SEAL, BUT DOESN'T TAKE MANUFACTURERS COUPONS. I CALLED BILL BIELTZ ON THIS MATTER AND HIS ANSWER WAS THAT THIS STORE WILL BE OUT OF STOCK FOR THE NEXT COUPLE OF MONTHS AND THERE IS NOTHING WE CAN DO.

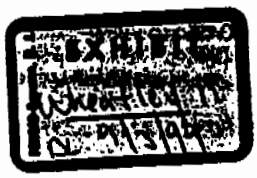
PANTRY STORE, JEANNETTE, PA HAS A SILVER CREEK AND REDWOOD ROLL DISPLAY. ALL ROLLS HAVE A $1.00 INSTANT REBATE COUPON, $14.32 TAX INCLUDED.

CUSTOMER APPRECIATION DAYS WERE CONDUCTED ON FEBRUARY 27, 1998 AT DENUNZIOS SUNOCO, IRWIN, PA, AND TOBACCO OUTLET, GREENSBURG, PA ON MARCH 6, 1998. A TOTAL OF 53 COMPETITIVE CARDS WERE GATHERED. FUTURE DATES AND SITES HAVE BEEN ATTAINED FOR THE NEXT THREE MONTHS WITH THE NEXT ONE AT DANS SERVICE, GREENSBURG, PA, APRIL 3, 1998.

I RECEIVED A PHONE CALL FROM SHIRLEY MOORE, SPEE D MART BUYER ON MARCH 20, 1998 INFORMING ME THAT THEIR CHAIN WAS BOUGHT OUT BY HONEY BEAR MINI MARKETS. THE TRANSFER WILL OFFICIALLY TAKE PLACE ON APRIL 1, 1998. BOTH SHIRLEY MOORE AND PRESIDENT GENE CHERBRIER WILL BE UNEMPLOYED RESULTING FROM THE ABOVE PURCHASE.

CC: J. PEARSON





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White House cautions against cigarette-ad ban

By The Los Angeles Times

WASHINGTON — The White House is raising a red flag to deter Congress from imposing sweeping restrictions on cigarette advertising, arguing in a memorandum scheduled for release today that broad legislative curbs would "raise significant constitutional problems."

The memo, a copy of which was obtained Sunday by the Los Angeles Times, casts doubt on the legality of legislating new curbs on industry advertising practices in the absence of a comprehensive settlement acceptable to both sides. It implicitly tells lawmakers that a broad ban on advertising is possible only if tobacco companies voluntarily agree to it.

Therein lies a legislative dilemma. The industry has made clear that the price of a voluntary agreement to curtail advertising is legislation shielding tobacco companies from future class-action lawsuits brought by people who claim their health has been harmed by the companies' products.

If Congress rejects that quid pro quo and maintains the right to allow such legal actions, lawmakers may have to settle for passage of more modest advertising restrictions that would not infringe on the industry's free speech rights.

The White House memo provides detailed answers to questions on tobacco advertising and marketing submitted by Arizona Republican Sen. John McCain, chairman of a committee with jurisdiction over tobacco legislation.

On another key issue, the Clinton administration said it would oppose any effort by Congress to exempt the industry from antitrust laws so tobacco companies could consult with each other about cigarette prices.

"An antitrust exemption that allowed tobacco firms to set prices jointly could be used by firms to increase prices beyond what is necessary to deter youth smoking and thereby increase profits at the expense of consumers," the memo states.

In addition, the memo says the administration strongly supports the right of states to enact tobacco marketing and advertising restrictions stronger than federal curbs approved by Congress.

Both points undermine the legislative objectives of the industry, which has been seeking a broad antitrust exemption as well as the pre-emption of state tobacco laws.

The memo largely ignores McCain's repeated invitation to make suggestions that would help Congress craft legislation that would move beyond current Food and Drug Administration regulation of tobacco advertising and marketing. Lawmakers have repeatedly criticized the White House for refusing to say specifically what it would accept in a tobacco bill.

Neither McCain nor the White House would comment on the memo.

Congressional interest in new tobacco regulation ... s prompted by a proposed settlement reached last summer between the industry and the attorneys general of 40 states. The agreement, if adopted, would require tobacco companies to pay the states hundreds of billions of dollars over 25 years and accept a virtual moratorium on tobacco advertising, especially ads aimed at teen-agers. In exchange, the industry would receive protection from future class-action lawsuits and limits on the amount of future liability payments.

MARCH 2ND, 1998

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Tribune Review COMMENTARY January 26th 1998

Ever since the tobacco settlement, trial lawyers have been salivating

By Doug Bandow
COPLEY NEWS SERVICE

You'd think a few hundred million dollars would be enough. But not for attorneys in the ongoing tobacco litigation. Mississippi trial lawyer Richard Scruggs says the fees could run as much as $18 billion, which might look "a little obscene." And he's right. Yet the liability sweepstakes keeps expanding: legislators in Maryland and Vermont are pushing to rig the law to hold cigarette-makers liable for Medicaid costs. And, not so incidentally, to give local attorneys a huge windfall.

Two years ago, state attorneys general, mostly governor wannabees who never let principle stand between them and higher office, began filing lawsuits against tobacco companies over the Medicaid costs of providing tobacco-related health care for the poor. But the odds didn't look good. Only one lawsuit against cigarette-makers had ever resulted in a judgment, and that case is on appeal.

SHARE IN THE SPOILS

So states signed up leading trial lawyers and promised them a share in the spoils — 25 percent of the take in Florida, Maryland and Texas. States also began changing the rules in order to improve their chance of victory. Florida blazed the trail, approving legislation that denied cigarette companies the right to assert any of the usual defenses, authorized the use of aggregate statistics to "prove" causation and allowed damages to be assessed based on a company's market share.

In essence, Florida said: The tobacco companies have money, we want it, and we aren't going to let traditional liability rules or due process protections stand in the way. Short of ordering the courts to rule in its favor, Florida did all that it could to guarantee the result.

Which helped push the tobacco companies to settle nationally for $368.5 billion. The roughly 300 attorneys involved in the litigation have been salivating over their potentially obscene fees ever since.

In essence, Florida said: The tobacco companies have money, we want it, and we aren't going to let traditional liability rules or due process protections stand in the way.

Then states began reconsidering their generosity. For example, the lawyers who represented Florida stood to collect an astonishing $2.8 billion — about $14,000 per hour, assuming they spent every hour since they filed the suit working on the case. Florida Gov. Lawton Chiles decided that his state had done most of the heavy lifting by rewriting the law, so he suggested renegotiating the fees. The lawyers sued. A state judge declared that the requested $200 million per attorney shocked "the conscience of this court."

A similar squabble has erupted in Texas, where the lawyers want $2.3 billion. Gov. George Bush is resisting their demands, arguing that too much money, supposedly collected to promote Texans' health, will go to the trial bar.

The biggest battle, however, is at the national level. President Bill Clinton, generously supported by plaintiffs' attorneys, does not object to obscene legal fees. But several GOP House members, led by Rep. Chris Cox, R-Calif., propose holding payments to $150 per hour, with a maximum payout of 0.01 percent of any settlement. Sen. Lauch Faircloth, R-N.C., wants to limit the fees to $125 an hour.

The lawyers are naturally screaming about the sanctity of contracts, but there's no reason Congress should rubber-stamp a tobacco deal that is bad on every count. There's certainly no reason to approve a massive welfare payment for trial attorneys.

Going after lawyers' fees after deals are struck isn't enough, however. States like Maryland and Vermont should not seek easy money by perverting state tort law. Such proposals violate due process and property rights. They ratify government-organized looting of unpopular companies and industries. And they establish a principle that has no end point.

After all, why not sue the alcohol industry for the ravages of alcoholism? Why not blame ski producers for skiers' accidents? Why not hit the makers of cholesterol-, fat-, and sugar-rich foods? Make the Mars Co. pay its fair share of Medicaid costs resulting from M&M's consumption!

The potential for abuse is real. The American Legislative Exchange Council has inaugurated a program to warn state lawmakers of the dangerous Pandora's box they are opening.

POSSIBILITIES ARE ENDLESS

For instance, private attorneys in Florida have sued alcohol-makers, trial lawyers involved in Maryland's cigarette litigation are targeting chemical manufacturers for the harm suffered by children who ate lead paint and legislators in Missouri have considered introducing a measure to allow the state to sue over the health effects of any "hazardous" product. Additional possibilities are endless, especially when profit-minded trial attorneys team up with ambitious state attorneys general.

The tobacco-makers are a convenient target, but that doesn't justify states twisting their laws to grab cash to which they aren't entitled. Nor does it warrant allowing entrepreneurial lawyers to loot literally everyone — consumer, industry and government — in the name of health. Lawmakers at both the state and federal levels should shut down the liability sweepstakes.

—

Doug Bandow is a senior fellow at the Cato Institute, a libertarian think-tank based in Washington, D.C.

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Saturday	9:00-8:30
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MARCH 25TH, 1998

TRIBUNE-REVIEW

COMMENTARY

If approved, the tobacco deal will trample business, individual rights

By James K. Glassman
The Washington Post

Having just about completed its No. 1 legislative task of the year — providing nearly $200 billion to the states in a pork-greased transportation bill — Congress is now ready to tackle task No. 2: the tobacco settlement.

Watch out. Politicians see the $368.5 billion deal as a huge pile of cash for new spending projects. But far worse is the idea on which the settlement is founded: that individuals aren't responsible for their own actions. They are too stupid or crazed or manipulated to realize that smoking is dangerous.

FLAT-OUT WRONG

This view, so satisfying to elitists of all political stripes, is flat-out wrong. Americans know that smoking kills, as Kip Viscusi of Harvard meticulously shows in his book, "Smoking: Making the Risky Decision." In fact, they think that smoking is *worse* than it really is.

Lifetime risks of getting lung cancer through smoking are roughly 1 in 10, but smokers see them as 3.7 in 10, Viscusi found. The risk of dying prematurely from smoking is between 18 percent and 36 percent, but survey respondents put it at 54 percent. Also, he writes, "There is certainly no evidence of greater neglect of smoking risks by the very young. Indeed, the opposite is the case."

Viscusi has also found that, far from costing the rest of us money, "smokers save society 32 cents a pack," mainly through reduced nursing home and Social Security costs (since they die earlier), plus another 53 cents in taxes.

But for anti-smoking zealots, it's not enough. President Clinton put the case perfectly and chillingly last September: "This is about changing the behavior of the United States ... the behavior of the American people."

Fully informed for many years that smoking can kill, about one-fourth of Americans smoke, anyway. Are they nuts? No, they are making what they believe is a reasonable decision — the pleasures of smoking outweigh its dangers.

> **There is not the slightest doubt that, after they have finished with smokers, the health police will proceed to drinkers, chubbies, sport-utility drivers and on and on.**

We make decisions all the time that seek to balance pleasure with the risk of harm — having another piece of pecan pie even though it will raise cholesterol and perhaps kill us quicker, skipping exercise to watch a TV show, drinking more coffee or alcohol than we should.

Speaking of drink, the Centers for Disease Control calculates that alcohol, since it kills people in their prime, deprives Americans of 1.5 million years of life before age 65, compared with 1.2 million years for smoking. Worse, drinking kills and injures *other* people.

Smoking, like drinking, can be addictive, and some people have a hard time quitting. But people do it. There are now as many ex-smokers as active smokers. It seems to be easier to stop smoking than to lose weight and keep it off.

There is not the slightest doubt that, after they have finished with smokers, the health police will proceed to drinkers, chubbies, sport-utility drivers and on and on.

Sure, there's a role for government in protecting the public health, but as the Economist said Dec. 20, "Smoking is not like tuberculosis or air pollution or drunken driving; it is not, strictly speaking, a public-health or public-safety problem at all. Rather, like motorcycling or overeating or skiing, it is a private health problem."

In his superb new book "For Your Own Good," Jacob Sullum writes: "The true nature of the crusade for a smoke-free society is an attempt by one group of people to impose their tastes and preferences on another." No matter what Congress decides, he writes, the crusade will continue "because it is aimed at the behavior of individuals, not the behavior of corporations."

Exactly. I have no sympathy for the companies. First they dissembled; now they're acting in a cowardly fashion. Rather than standing up for the principle of individual choice and responsibility, they are leaping to pay a finite penalty, however huge, so they can boost their languishing stock prices.

CHANGED THE RULES

Meanwhile, the anti-smoking hysteria is laying waste to basic protections and principles. For example, juries for decades denied claims against tobacco companies, since smokers knew what they were doing was risky. So the states, led by Florida, simply changed the rules.

"In a stroke," writes Sullum, "the (Florida) law eliminated the industry's most effective defenses. The state did not have to prove that a single case of illness was actually caused by a defendant's product, and the tobacco companies could not point out that people voluntarily choose to smoke." Maryland is pushing similar changes.

But where's the outrage? Every business in America is threatened by the precedent of the tobacco settlement. Every individual is threatened, too, as the liberal ideals on which this country was founded — freedom of choice, personal accountability, limited government — are trampled in a stampede by some to get others to behave the way they want.

Let's kill the settlement and end the hysteria now.

James K. Glassman is a fellow at the American Enterprise Institute.

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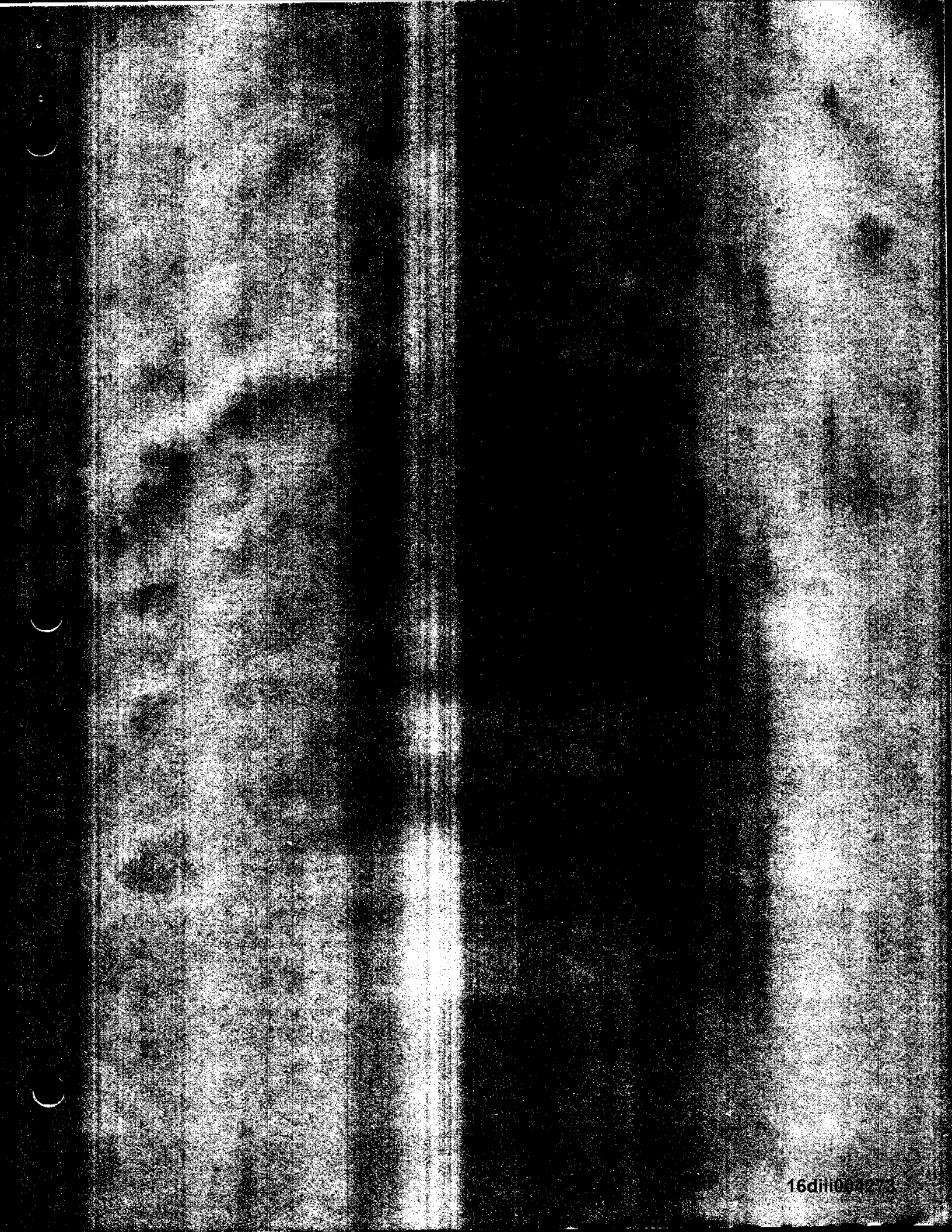

Mission Statement

The **Mission and Vision** of US Tobacco Company is to Grow the Smokeless Tobacco Business and Become the Primary Type of Tobacco Consumed by Adults in the 21st Century.

The **overall sales goal** for 1998 is to Grow our Unit Volume by 5%.

The **sales force** will pursue the following **strategies** to accomplish our organizational goal.

- Develop the market segment share of adult smokers who consume our products.
- Develop the market segment share of 20-25 year old adults who consume our products.
- Implement retention strategies to recognize and reward our most loyal adult consumers.
- Effectively manage national/key accounts in order to maximize the impact of our products and services in the marketplace.
- Demonstrate effective selling skills for product promotions, programs and concepts.

As a U.S. Tobacco Company sales team member, you play a critical role in the accomplishment of our organizational objectives.

This performance plan and review document represents the key responsibility areas for your position and the objectives and core competencies we agree to pursue in support of our organizational strategies and goals.

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Performance Objectives

The manager and employee should use this section of the Performance Plan and Review to record key objectives that they have agreed to within each key responsibility area and to comment on the performance of those objectives. Good performance objectives describe the what of performance and are established in a collaborative discussion between manager and employee. They clarify what needs to be accomplished and by when and should be quantifiable and measurable in some way. Objectives should be relevant to the specific job assignment and focused on what needs to be done within each key responsibility area to achieve organizational strategic goals.

Sampling *Building brand awareness and generating trial among adults consumers is a key focus area of all sales employees. Identifying new opportunity sites to generate consumer interest, quality one-on-one sampling, and sponsoring events, are just some of the ways we generate trial and build brand awareness with our adult consumers. Below are some key sampling objectives that we agree will help grow the business in your job assignment*

Objectives

1. Identify Retail Sampling Sites from MSA data, where strongest competitive sales are evident and focus adult sampling efforts in and around these accounts.

2. Identify and set up 8 Bar Events for signage and/or possible event promotions.

3. Utilize adult consumer survey cards while conducting opportunity or event adult sampling. Report distribution of cards during opportunity sampling accurately on PAR, and on week ending voice mail recaps.

4. Demonstrate team work by participating in a minimum of 3 Division Special Events (excludes bar events).

5. Follow 1998 adult sampling plan of work.

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Comments on Performance

During the course of the review period, the manager should use this section to record observations and data to describe performance on each objective. It is important to include dates to document significant discussions and milestones regarding performance. Following completion of a specific objective or at the end of the review period, the manager should comment on the performance results achieved in the space provided. The manager should summarize results for each objective by assigning one of the following descriptors: Exceeds Expectations (E), Meets Expectations (M), or Below Expectations (B). This results summary should be supported by the manager's comments.

Sampling

E = Exceeds Expectations
M = Meets Expectations
B = Below Expectations

Comments on Performance and Review Dates

1 9-24-98 Rooster Y-TD Samples - 491, Cape Long Cut - 17, Long Cuts - 100, only one offsite remodel sampling Ban in Ingham County severely impairs one on one adult sampling efforts

2. 6-2-98 Mike has three venues active for 21+ Events. At the Silver Dollar 21+ Event, Mike demonstrated excellent on-site management.
9-24-98 OUTSTANDING PERFORMANCE With 21+ Events Mike has organized & worked 9 events in 1998

3 Adult Survey Cards Used Year to Date is 24

4 Total # of Division Events Worked in 1998 - 2 Sport Shows, 2 NASCAR events, and one Short Track. Organized with Nascar Events and a Ken Schrader Autograph night at a local venue.

5 1995 Adult Sampling Plan-of-Work Followed

Performance Objectives

Retail Merchandising

The work we do at retail helps insure that our products are always fresh and available to adult consumers. It is also important to insure that distribution goals are achieved, displays are well designed, and POS materials are current and effectively utilized to maximize our sales and the customers' profits. Below are some key retail merchandising objectives we agree will help you grow the business in your Job assignment.

Objectives

1. Utilize retail promotion monies to secure highly visible counter displays and preferential retail pricing. Preferential pricing goal of 10 retail accounts per week. Budget of $500 per month.

2. Consistently place quarterly and new brand POS at vendor and elsewhere in retail accounts.

3. Obtain 85% distribution on Rooster, with permanent facings.

4. Adjust product facings and distribution to meet local demand. Optimize shelf space with top producing brands.

SBS- 20% SBM- 60% SLCSP- 60%

SLCC- 40% SFCS- 20%

5. Place promotional display units according to allocations and specified time periods.

6. Maintain updated and clean vending systems in a highly visible store location in accordance with all local, state, and federal guidelines.

7. Continue to offer vendor exclusivity and category management where feasible.

8. Properly rotate all inventory including backstock, assuring product freshness. Educate retailers on proper category maintenance.

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Comments on Performance

Retail Merchandising

E = Exceeds Expectations
M = Meets Expectations
B = Below Expectations

Comments on Performance and Review Dates

1. 9-24-98 Retail Promotions Budget is under-spent 5.1% Top Disc + 410 Units have built in savings, so there is less opportunity. However, buy plans + preferential pricing could use augmenting. [B]

2. 4-16-98 Rooster POS well represented in assigned DED. [M]
   8-11-98 Rooster Mint/Wintergreen POS is plentiful. Signage away from Vending is well represented.

3. 6-2-98 Rooster Distribution - 85 % [M]
   9-24-98 Rooster Distribution [Wintergreen 85 % / Mint 36 %]

4. Distribution Results on Targeted Brands:
   SISS - 4 % SBN - 65 % SICSF 13 % [M]
   SICC - 24 % SECS - 7 %
   10% Qms of LC-SF in returns, indicates need for further cart distribution.

5. 6-2-98 Total # of 57¢s placed is 81, with 27% on Counters [M]
   8-11-98 Rooster Top Disc Units worked and now into 470 Units
   ~~9-24-98 470s, 2 packs of 4-Packs worked thru to depletion~~

6. 9-24-98 OF 34¢s Retail Calls profiled. [E]
   There are 311 - 3201 vending systems and 10 - 3205 systems. 2/3 of the 3200 series vendors are on counters. 93% of vending in the assignment is 3200 series.

7. 9-24-98 Vendor Exclusivity not offered due to corporate directives. Category Management demonstrated with controlled distribution and facings average. [M]

8. 6-2-98 Work-withs and Spot Checks show persistency in product freshness. Like continues to eliminate distribution on unproductive Brands. [M]

9-24-98. All Spot Checks indicate proper rotation and product freshness

Performance Objectives

Account Management

Getting to know our customers and seeking to understand how our products can help achieve their business goals is a key focus of the sales force. Educating retailers about our quality tobacco products, helping them insure freshness and showing them how to maximize profits are just some of the ways we partner with our customers. Below are some key account management objectives we agree will help you grow the business in your job assignment

Objectives

1. Maintain a 8 week retail call cyle
2. Maintain a daily call average of 10.5 calls per day.
3. Contact Wal-Mart and Sam's locations once per month.
4. Solicit CAP to chain and independent accounts.
5. Establish and carry out year long marketing plans with chains and key independents.
6. Follow through on requests in a timely and professional manner.
7. Attend direct account and chain meetings when possible.
8. Present promotions to direct accounts under your responsibility.

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Comments on Performance

Account Management

E = Exceeds Expectations
M = Meets Expectations
B = Below Expectations

Comments on Performance and Review Dates

1. 4-16-98 Year to Date Call Total is 385, 2nd highest in division — M
   8-11-98 Year to Date Call Total is 922
   9-24-98 1008 calls Y-T-D, through August Cycle time is 10 weeks
   Several events and nine management calls make it quite difficult.
2. 9-24-98 Call Average Through August is 10. — M
3. 6-2-98 Accurate follow through with return goods procedures need to be better followed at Sam's Credit Department reported a discrepancy at the Lansing CDC — M
   9-24-98 Wal-Mart called on monthly, Sams contacted monthly
4. 4-16-98 Presentations made to Buddy's Mini-Marts & PS Food Marts with Division Manager — M
   6-2-98 CAP presentations to independents not necessary per Corporate direction
5. 4-16-98 464 & 467 pre-sold to Perky Pantry, Quality Dairy, PS Food Marts, & Buddy's — M
   6-2-98 476, 582, & 578 sold to assigned chains
   9-24-98 Promotional Car Snack Haven Through retail
6. 9-24-98 Special Retail Requests handled in a timely fashion. — M
7. 9-24-98 Limited opportunity to attend meetings this year. Mike has excellent rapport with chain supervisors encountered at retail. — M
8. 8-11-98 Quality Dairy, Capital, and Heartland have been presented with all applicable promotions. — M

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Performance Objectives

PTST Management

Effective utilization and management of Part Time Sales Trainees to achieve organizational goals is a critical component of the job of a Sales Representative. Hiring, training, assigning work, and monitoring performance are just some of the requirements within this key responsibility area. Below are some specific actions we agree you can take to utilize the PTST program to grow the business in your job assignment.

Objectives

1. Maintain PTST manpower at [ ] employees.
2. Utilize PTSTs in all 21+ events within assignment.
3. Maintain a monthly universe of retail calls that are assigned to the PTST.
4. Delegate retail requests , chain programs, damaged goods, and special retail projects to PTST as often as feasible.
5. Schedule PTSTs for division events.
6. Submit PTST administrative work correctly and timely.

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Comments on Performance

PTST Management

E = Exceeds Expectations
M = Meets Expectations
B = Below Expectations

Comments on Performance and Review Dates

4-16-98 Campus PTST Todd Craffey active at LSU, and handles retail assignments as well as 21+ event. M

9-24-98 PTST Craffey has begun 3rd Year with LSTSM

2. 9-24-98 PTST Craffey used at 9 21+ events in Assignment DFD E

3 9-24-98 PTST is currently responsible for 22 retail calls. M

4 4-16-98 Per DM's instructions PTST is handling returns at 3 direct accounts in assignment DFD handles campus vicinity of MSU with respect to retail M

5 4-16-98 PTST Craffey used at Lansing Spirit Stell event E

9-24-98 PTST worked 5 division events during 1998.

6. 9-24-98 All PTST administrative work submitted timely & accurately M

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Performance Objectives

Administration *Successfully managing your territory requires attention to the administrative aspects of your job to insure timely and effective documentation and communication of your activities and results. Below are some specific administrative objectives we agree to focus on during this performance period*

Objectives

1. Meet all assigned deadlines.
2. Perpetually update, review, and correct PAR system.
3. Report competitive information weekly on voice mail and monthly in written form.
4. Record attendance/ work activity form daily and submit to division office monthly.
5. Correctly utilize repidrafts and keep check ledger
6. Follow through on all chain correspondence and CAP administrative work
7. Maintain adequate inventory of supplies and product at all time
8. Keep manuals and files updated and orderly
9. Preserve storage facilities in a clean and orderly fashion with current materials.

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Comments on Performance

Administration

E = Exceeds Expectations
M = Meets Expectations
B = Below Expectations

Comments on Performance and Review Dates

1. 9-24-98 All Deadlines Met — M

2. 9-24-98 Year to date PAR results show one account with an incomplete profile, and five maintenance calls remaining. Best Results in the Division — E

3. 9-24-98 Competitive information is forwarded in Voice mail and on monthly competitive letter. — M

4. 9-24-98 Work activity form completed and submitted to division office monthly — M

5. 9-24-98 Rapidrafts and ledger reviewed and found to be accurate. — M

6. 9-16-98 4164 4461 Chain Correspondence Complete 6-2-98 4470, 588, and 578 correspondence complete. CAP administrative work handled by Division Manager — M

7. 9-24-98 Inventory of Product and Supplies has been sufficient in all work-worths. — M

8. Manuals are updated regularly — M

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9. 9-24-98 Storage Facility inspected 3 times in 1998 and found to be in acceptable condition — M

Performance Competencies

The Manager and Employee should use this section of the Performance Plan and Review to clarify and measure performance competencies for the position. Performance Competencies describe the *how* of performance: the skills, behaviors, and attitudes that must be applied in accomplishing objectives in key responsibility areas.

Managers can also use this section throughout the year to provide feedback and coaching on the skills and behaviors that drive performance. At the end of the review period, the manager should consider the extent to which each performance competency was demonstrated.

Managers should summarize performance in each competency area by assigning one of the following descriptors: Exceeds Expectations (E), Meets Expectations (M), or Below Expectations (B). An overall results summary should be recorded for each competency area. The manager should also document any comments about demonstrated strengths development needs.

Adult Sampling: *The extent to which this Sales Representative follows USTSMC sampling guidelines in approaching adult consumers to generate interest and trial of our smokeless tobacco products.*

E = Exceeds Expectations
M = Meets Expectations
B = Below Expectations

M Seeks out new sampling opportunities to attract new adult consumers through normal retail activities.

M Uses effective sampling tools and techniques describing product attributes and demonstrating product use.

M Effectively qualifies consumers and their preferences through appropriate questions.

M Demonstrates a thorough understanding of USTSMC sampling guidelines.

E Identifies/supports event opportunities to reach 20-25 year old adult consumers.

Comments on Performance:

- Results with the 21+ program are outstanding Mike set up and worked 9- 21+ events in his assignment.

Selling Skills: *Extent to which this Sales Representative applies professional selling skills toward the accomplishment of his/her objectives.*

E = Exceeds Expectations
M = Meets Expectations
B = Below Expectations

E Applies effective sales techniques (POPS and Presentation Skills).

E Cultivates enthusiasm for USTSMC programs and promotions.

M Demonstrates ability to sell programs, promotions and concepts to customers (Caps, Multican Promotions and Pricing, Freshness).

E Follows through to ensure customer satisfaction

Comments on Performance:

Mike's enthusiasm is ever-present when working retail. Retailers and chain contacts are always receptive to his ideas and sales techniques. He shows great pride in promoting USTSMC products

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Merchandising/Marketing: *Extent to which this Sales Representative optimizes USTSMC marketing material and product positioning to achieve the stated objective.*

E = Exceeds Expectations
M = Meets Expectations
B = Below Expectations

M Plans/maintains/monitors year long objectives for all accounts.

E Achieves preferred placement of POS and merchandising systems

M Stays abreast of new products/promotions/programs.

M Implements market specific approach in placement of CPC items.

M Consistently educates store personnel on proper ordering and rotation, appropriate product distributions and facings

M Familiar with local, state and federal regulations concerning display placement, advertising and age access.

Comments on Performance:

Vending systems (93% of Universe is 3200 series) are in excellent condition

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Performance Competencies

Partnering with Customers: *Partnering with customers implies working with them in a collaborative manner to improve both USTSMC's and the customer's profitability.*

E = Exceeds Expectations
M = Meets Expectations
B = Below Expectations

M Demonstrates the ability to see the customer's business through their eyes.

M Shares market information and ways to increase sales with customers.

M Demonstrates sincere interest in learning customer's needs.

M Responds quickly and positively to customer requests.

M Participates in customer sales meetings and related activities.

Comments on Performance:

Rapport with retailers and chains continues to be strong.

Administrative Duties: *The extent to which this Sales Representative accomplishes the administrative responsibilities of the position.*

E = Exceeds Expectations
M = Meets Expectations
B = Below Expectations

E Effectively utilizes PAR and MSA information to manage territory.

M Communicates effectively in both oral and written forms.

M Orders and maintains proper inventory of samples and sales materials.

M Reports required administrative information accurately and within agreed upon time frames.

Comments on Performance:

Maintenance of PAR System is the best in the division

Management Responsibilities: *The extent to which this Sales Rep. effectively manages the job assignment towards the accomplishment of organizational objectives.*

E = Exceeds Expectations
M = Meets Expectations
B = Below Expectations

E Properly utilizes and manages part-time manpower and budget.

M Ensures consistent coverage of assigned retail/ management accounts.

M Effectively analyzes sales trends to develop a market specific approach within the territory.

M Ensures proper use and maintenance of company vehicle and funds

M Abides by the Code of Corporate Responsibility

Comments on Performance:

PIST Coffey has been instrumental in the success of the 21+ program and division events

Additional Competencies and/or Comments

Mike Beyerlein has ten years with the company and continues to demonstrate himself as management potential

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Action Planning and Employee Comments

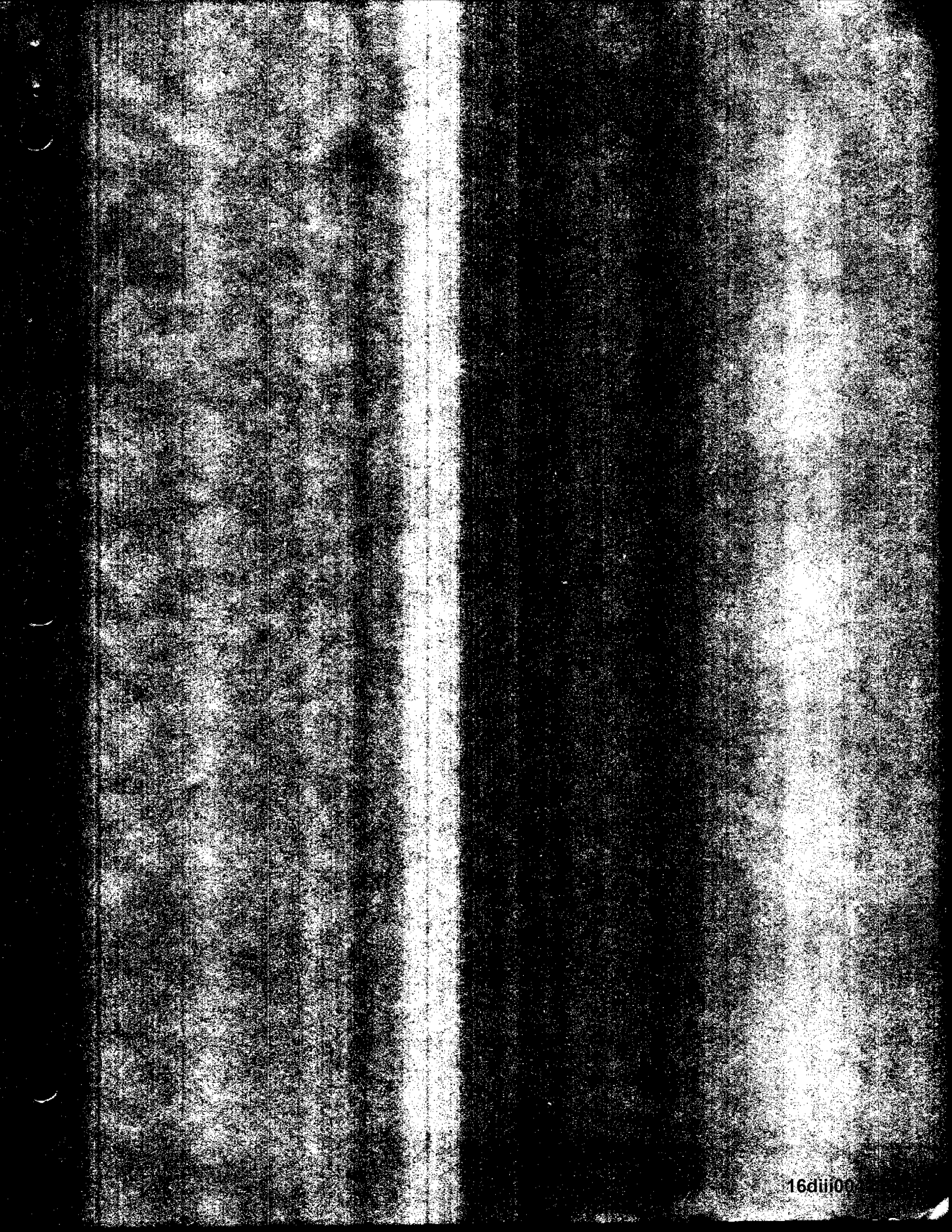
The manager should use this section to summarize and clarify key developmental actions that need to be taken to enhance performance on objectives or within particular competency areas. The manager and employee should discuss these developmental areas, agree on specific action steps that need to be taken, and establish time frames for those actions. At the end of the review period, the manager should summarize performance by assigning one of the following descriptors: Exceeds Expectations (E), Meets Expectations (M), Below Expectations (B).

Developmental Objectives/Action Plan	Target Dates	Results
Augment Booster Distribution to 35% on both Hunts & Whitecross	ongoing	
Use Retail Promotions Budget more liberally to gain counter space and preferential pricing	ongoing	
Increase opportunity sampling sites and usage of Survey Cards. Record correctly on PAR	ongoing	

Employee Comments on Performance

My reviews for 1998 was fair and accurate. Most of my client sampling is done at retail sites during lunch hours where adult consumers don't have the time to fill out survey cards. Close to 1,200 completed survey cards have been filled out during five events and of 21 events this I received no credit because they aren't tracked on PAR.

Employee Signature:	Date: 9-25-98
Supervisor Signature:	Date: 9-25-98
Manager Signature:	Date: 10-20-98



Author: Stephen R. Rofferkamp at Region_V
Date: 04/6/97 11:21
Priority: Normal
Receipt Requested
TO: William L. Kozuch at UST_Fastech, Al H. Story at UST_Fastech,
Ralph J. Militello at UST_Fastech, Robert D. Coughlin at UST_Fastech,
William J. Hodgen at UST_Fastech, Ron Felton at UST_Fastech,
Geoffrey A. Reinig at UST_Fastech
CC: Brian A. Chariper, Robert P. Polinsky, Timothy C. Entwistle at U.S.T.-Greenwich(Jo)
Subject: Wal-Mart Resets

Guys:

For your information; any battles out there during the re-sets, please let Tim Entwistle know.

Thanks,

Steve

---------- Forward Header ----------

Subject: Wal-Mart Resets
Author: Timothy C. Entwistle at U.S.T.-Greenwich(Jo)
Date: 6/4/97 11:46 AM

Please print out the complete cc:mail note, and I ask you to please read the bottom part first. Thank you

I think the appropriate tools have been included in the plan of work booklet for our guys to police and secure our positions.

Swisher management has already been reprimanded and warned of non-compliance to this project.

I encourage hearing about any non-compliance issues in the field, as I will strongly demand attention by Walmart on disciplines and actions.

If I'm the competition, I would take the same approach -- so lets recognize this up front, and be prepared to go to war. We have severely cut back on their ability to market products.

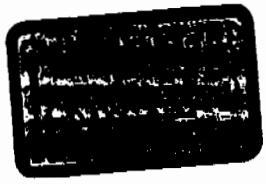
Remember one thing, McLanes is behind us to keep policy. Should the project and controls go too far.... we can and will stock only US Tobacco products in the cabinets, and also put up a huge Copenhagen header card. I do not envision this happening. Beth Schommer , the VP at Walmart is very much in favor of eliminating the extra vendors and garbage POS that exist today, and she will be continually communicated on which specific manufacturers do not seem to adhere to her policy on the new merchandising racks. Let the competition cut off their own heads I say.

I'm ready for war--- how 'bout you?

---------- Forward Header ----------

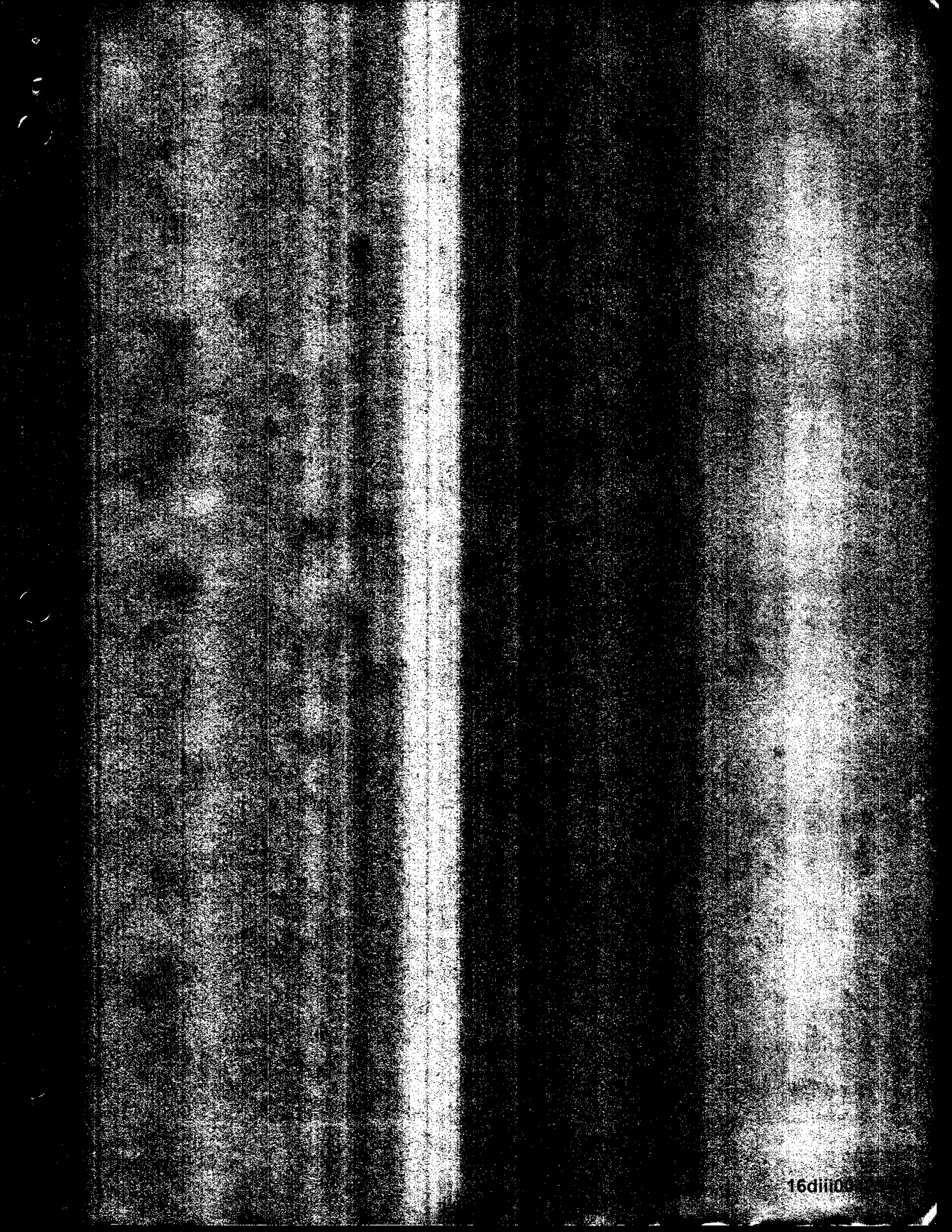
Subject: Wal-Mart Resets
Author: Amy R. Bost at Region_III
Date: 6/4/97 9:20 AM

USTC/CWD 318619
CONFIDENTIAL



From Greg Germany's (div. mgr. San Antonio, West Texas) activity letter, w/e 5/30/97:

"I have run across reps. from Swisher/Helme, Pinkerton and Conwood over the past two weeks. They are all very displeased with the Wal-Mart reset plan. The Swisher/Helme rep. stated that they plan on placing an additional vendor for their other brands. Rep. said that the attitude that they are taking is that the store managers have always had the final say and that they could get things changed on a store by store basis."



CERTIFICATE OF SERVICE

I certify that on this 11th day of February, 2000, a copy of the foregoing was sent by facsimile and overnight mail to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P.,c/o Medea Ansari, Rm 10-207, 1460 Broadway, New York, NY 10036

John S. Reed, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Michael J. Guzman

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	'00 FEB 14 A10:01 FILED US DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO PRECLUDE PLAINTIFF FROM USING CERTAIN "IRRELEVANT, MISLEADING AND UNFAIRLY PREJUDICIAL" WORDS

Defendants ("UST") seek an advance ruling to preclude plaintiffs ("Conwood") from using certain words at trial that they deem "irrelevant, misleading, and unfairly prejudicial." But defendants identify no authority for the pre-trial adoption of a prior restraint on the speech of counsel or witnesses; the few cases they cite distinguish themselves at a glance.[1] Trials

[1]Some of defendants' cases merely recite the rule that past antitrust violations, like past criminal convictions, are not generally admissible in a new case about different conduct. See Lightwave Technologies, Inc. v. Corning Glass Works, No. 86 Vic. 759, 1991 WL 4737, *6 (S.D.N.Y. Jan. 18, 1991); United States Football League v. National Football League, 634 F. Supp. 1155, 1171-73 (S.D.N.Y. 1986) (same). In another of UST's cases, the court found that counsel (Joseph Alioto) made arguments in closing not supported by the record, but the court never issued an advance restraint against counsel's speech and it found his arguments harmless because the jury was adequately instructed about the difference between evidence and argument. Nor was any objection to counsel's closing apparently ever made. J.T. Gibbons, Inc. v. Crawford Fitting Co., 565 F. Supp. 167 (E.D. La. 1981). From outside the antitrust context, defendants purport to

are about persuasion and allegory. Metaphors, similes and adjectives all play a legitimate role.

Some of the words defendants dislike, moreover, were used in the November 18, 1999 settlement conference at which Magistrate Judge Moyer admonished the parties that nothing said was to be used by either side in the litigation. Tellingly, the word defendants seem most perturbed about is actually an element in this case. How Conwood could possibly be expected to prove that UST is a "monopolist" (as it must under Section 2) without ever mentioning the word is unfathomable. No doubt, that is exactly why UST brings this motion. But if something looks like a duck, walks like a duck, and quacks like a duck, justice is hardly served by an unprecedented prior restraint against calling it a duck.

---

rely on the familiar rule that hearsay not relevant to any issue or element in dispute generally should not be admitted, see Davis v. Mutual Life Ins. Co., 6 F.3d 367, 385-86 (6th Cir. 1993), and the rule that the wealth of the defendant is not relevant in a negligence action, City of Cleveland v. Peter Kiewitt Sons & Co., 624 F.2d 749, 760 (6th Cir. 1980).

16diii004294

Conclusion

The Court should deny UST's motion in limine. A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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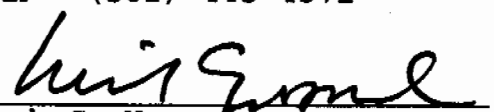

Mark C. Hansen
Neil M. Gorsuch
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Counsel for Plaintiffs

February 11, 2000

16diii004295

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of Defendants' Motion in Limine to Preclude Irrelevant, Misleading, and Unfairly Prejudicial Statements and References, the opposition thereto, and for good cause shown, said motion is hereby DENIED.

Dated this ___ day of February, 2000.

HONORABLE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that, on this 11th day of February, 2000, a copy of the foregoing was sent via facsimile and overnight delivery to:

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John S. Reed
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Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
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CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	'00 FEB 14 A10:01 FILED U.S. DISTRICT COURT CLERK PADUCAH, KENTUCKY Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

MEMORANDUM IN OPPOSITION TO MOTION TO REQUIRE PLAINTIFFS TO PROVE EXCLUSIONARY CONDUCT AND FACT OF INJURY ON A STORE-BY-STORE BASIS

Defendants ("UST") argue that plaintiffs ("Conwood") must prove with minute particularity each individual store from which they were excluded, and that Conwood may recover damages only for those specific stores and no others. As there are some 300,000 outlets nationwide (according to UST's expert), the motion seeks an endless trial with stupefying detail. Defendants base their demand, moreover, on a factual assertion contradicted by overwhelming record evidence and on a single, 1979 California trial court decision contradicted by subsequent Sixth Circuit and other uniform authority.

There is No Requirement of Store-by-Store Proof

Defendants argue their motion is justified because Conwood has just "one example" of each species of misconduct it has alleged -- e.g., "[one] unauthorized rack removal"; "[one]

instance of a purported 'ruse' to remove a rival's rack through seeking permission." Def. Mem. at 2-3. This is no more than wishful thinking. The evidentiary record adduced on summary judgment is replete with evidence of defendants' systematic exclusionary conduct; no amount of rhetoric otherwise can make it vanish. See Pls.' Mem. in Opp'n to Mot. for Summ. J. at 7-29.

Defendants' motion also rests on a misperception of antitrust law, particularly in the Sixth Circuit. Under the "broad" and "expansive" antitrust standing statute, Conwood need only show that it has been "'injured in [its] business or property'" as a result of defendants' exclusionary conduct. County of Oakland v. City of Detroit, 866 F.2d 839, 847 (6th Cir. 1989) (quoting 15 U.S.C. § 15), cert. denied, 497 U.S. 1003 (1990). Once Conwood shows the existence of any such injury, "it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) (emphasis added).

As the Supreme Court has put it, "[plaintiff's] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of some damage, . . . inquiry beyond this minimum point goes only to the amount and not the fact of damages." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1968).

The Sixth Circuit has driven the point home in a case that applies here foursquare. In Elyria-Lorain Broadcasting Co. v.

Lorian Journal Co., 358 F.2d 790 (6th Cir. 1966), plaintiff radio station proved at trial that the defendant had induced retailers in Lorain, Ohio to stop advertising on plaintiff's station in violation of the Sherman Act. At trial, 16 retailers admitted that they had been induced by defendant to cancel their agreements with plaintiff. The trial court awarded compensatory damages for these 16 canceled contracts. But, as UST proposes here, the court refused to award any further damages. It did so despite a damages model prepared by plaintiff's expert (one not nearly as rigorous as Dr. Leftwich's) showing that plaintiff had lost substantially more (eight times) in advertising marketwide based on a benchmark comparison with plaintiff's contemporaneous advertising performance in a nearby unaffected market, Elyria, Ohio.

The Sixth Circuit reversed. Plaintiff was entitled not just to "specific" damages established by the sixteen trial witness retailers; the Court held that "general damages" were also "clearly shown by the evidence" from plaintiff's expert. Id. at 791. Indeed, the Sixth Circuit explained that

> [i]t is not the rule that in an action for damages for violation of the antitrust laws plaintiff is limited to recover only the specific items of damage which he can prove with reasonable certainty. On the contrary, the trier of the facts may make a just and reasonable estimate of the damage based on relevant data and may act upon probable and inferential as well as direct and positive proof. the wrongdoer should bear the risk of the uncertainty which his own wrong has created.

Id. at 793.

UST's motion overlooks similar antitrust precedent. For example, in Rossi v. Standard Roofing, Inc., 156 F.3d 452, 484-85 (3rd Cir. 1998), plaintiff presented evidence showing that it lost five transactions as a result of defendant's exclusionary conduct; in addition, plaintiff presented an expert witness who estimated total marketwide lost profits using accepted economic modeling techniques. Defendant argued that plaintiff failed to prove injury in fact and the trial court threw out plaintiff's case. Id. at 484. The Third Circuit reversed. The court of appeals explained that this was hardly a case where plaintiff "could not show that it lost even a single contract based upon the alleged unlawful practices of the defendant." Id. Instead, the court "f[ou]nd two sources of evidence sufficient . . . to demonstrate fact of injury": the five "specific lost transactions" plus the expert's "damage report" estimating marketwide losses. Id. The Second Circuit likewise affirmed the use of an economist's damages model to estimate marketwide losses in Litton Systems, Inc. v. AT&T, 700 F.2d 785, 822-26 (2d Cir. 1983), cert. denied, 464 U.S. 1073 (1984), and nowhere suggested that customer-by-customer proof of injury was required.

UST not only bypasses such precedent, it relies on a single 20 year-old California trial court decision that, to our knowledge, no later court has even mentioned -- much less cited favorably -- for the proposition that a plaintiff can recover antitrust damages only where it proves each specific transaction. See In re Airport Car Rental Antitrust Litig., 474 F. Supp. 1072,

1110 (N.D. Cal. 1979). And even that case is readily distinguishable on its facts.

First, Conwood's experts (as in Elyria-Lorain, Rossi and Litton) have used accepted econometric techniques to measure the marketwide impact of UST's exclusionary conduct; no such evidence was presented in In re Airport.[1] Second, "voluminous" evidence there suggested that plaintiff's exclusion was caused by factors having nothing to do with defendants' behavior. Id. at 1110. Here, by contrast, there is no evidence that other factors caused Conwood's exclusion; in fact, Dr. Leftwich ruled out other potential explanations of Conwood's losses. Third, In re Airport involved rental car operations at just 140 airports, and the alleged exclusion in each case was embodied in a written contract; the best and simplest evidence was, thus, held to be the written contracts themselves. Here, by contrast, hundreds of thousands of outlets are implicated and there is no single document that tells the tale of them all.[2] What may have been possible in In re Airport is impossible here; no doubt that is why UST suggests it.

---

[1]There, plaintiff sought damages by simply extrapolating from a handful of specific airports in which it lost a franchise. No such crude approach has been offered in this case.

[2]Even where UST has used written contracts to perfect its exclusion of rivals, its demands for exacting proof about their terms are ironic at best. UST previously admitted that it has failed to retain pertinent records (Pls.' Mem. in Opp'n to Mot. for Summ. J. at 26) and it is long settled law that, in such circumstances, "[t]he wrongdoer should bear the risk of the uncertainty which his own wrong has created." Elyria-Lorain Broadcasting Co., 358 F.2d at 793.

16diii004302

Conclusion

The Court should deny UST's motion in limine. A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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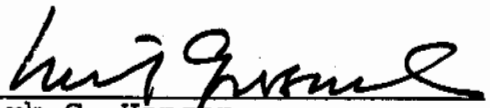

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Counsel for Plaintiffs

February 11, 2000

16diii004303

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of Defendants' Motion in Limine Requiring Plaintiffs to Prove Exclusionary Conduct and Fact of Injury at Specific Retail Stores and Chains, the opposition thereto, and for good cause shown, said motion is hereby DENIED.

Dated this ___ day of February, 2000.

HONORABLE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that, on this 11th day of February, 2000, a copy of the foregoing was sent via facsimile and overnight delivery to:

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IN THE UNITED STATES DISTRICT COURT
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CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	'00 FEB 14 A9:56 FILED IN DISTRICT COURT CLERK WESTERN DIST. KENTUCKY Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE FOR AN ORDER SIMPLIFYING THE ISSUES AT TRIAL AND FACILITATING THE DISPOSITION OF THIS LAWSUIT

Having failed to seek summary judgment on Conwood's attempted monopolization, Lanham Act and state law claims, UST belatedly submits a summary judgment motion in the guise of a motion in limine seeking to "simplify" issues at trial. Tellingly, UST makes no mention of eliminating its "me-too" state law counterclaims despite demanding a separate trial of Conwood's state law claims. Apparently, the "simplification" is a one way street.

Once untimely summary judgment arguments are stripped from UST's motion,[1] all that is left of the motion is an assertion that a single trial for Conwood's claims would somehow waste judicial resources. But UST cannot explain how multiple trials

[1]If the Court wants summary judgment briefing on these issues, Conwood stands ready to respond with specific evidence in contrast to UST's bare assertions. UST essentially seeks summary judgment against Conwood's pretrial brief. However, as the Court Order made clear, the pretrial brief was to "succinct[ly]" discuss Conwood's claims, not function as a brief in opposition to an (unfiled and unknown) summary judgment motion. Order of Feb. 18, 1999.

would be more efficient.

The same facts and witnesses support Conwood's federal and state law claims and therefore a single trial is appropriate. (Point I, infra). A single trial is also appropriate on Conwood's attempted monopolization claim. The claim is not duplicative and it is routine to try monopolization and attempted monopolization claims together. (Point II, infra).

I. A Single Trial is Appropriate for Conwood's Claims

Conwood diligently pursued persuasive evidence of UST's misconduct under the Lanham Act and state law, and this pursuit bore fruit. Conwood's case of monopolization includes evidence of top-down instructions by the officers of UST to exclude competitors by myriad means. Among those means — but far from the only means — were UST's disparaging of Conwood's products and removing Conwood's racks, products, and advertising. This same evidence supports Conwood's claims pursuant to the Lanham Act and state law. The only "just, inexpensive, and speedy" option is a single trial, not multiple trials involving the same parties and overlapping evidence. UST Mot. at 7 (citing Fed. R. Civ. P. 16(c)(16)).

A. Conwood Diligently Pursued its Lanham Act and State Law Claims

Conwood exerted great effort and funds to gather evidence of UST's violations of the Lanham Act and state law. Indeed, one need look no further than one of the first depositions in this case for evidence of UST employees misrepresenting to consumers that Conwood's products contain stems and other imperfections.[2] Similarly wrong is the claim that Conwood abandoned its state law

[2]Carter Dep. at 104-06 (attached as Exh. A).

claims, such as the claim that UST violated Kentucky Revised Statute § 365.050. A number of non-party and party witnesses testified that, in substance, UST's payoffs to Wal-Mart allowed UST to continue to exclude competitors' facings, racks, and advertising. See Pls.' Mem. Opp. Summ. J. at 24-25.

It is ironic that UST argues that the payments to Wal-Mart were not "secret" given the uniform failure of its employees to recall the purpose of the payments or whether they were offered to other retailers (even though these same employees authored documents discussing the danger of other retailers becoming aware of the payments).[3] Indeed, even the best testimony UST could find to attach to its motion undercuts its assertion that its payments to Wal-Mart were standard "industry-wide buy-downs." UST Mot. at 5. The excerpt confirms that a major retailer competing against Wal-Mart in 72 markets threatened a lawsuit when it learned of the payments to Wal-Mart.[4] On this and all other issues surrounding these state law claims, there are

---

[3]See UST Mot., Exh. 1 at 252 (UST key account manager "can't recall" or "do[esn't] know" if other retailers were offered payments despite authoring e-mail documenting retailer threat of lawsuit over the illegal activity); Entwistle Dep. at 117-19 (attached as Exh. B).

[4]See UST Mot., Exh 1 at 248; PX 121 (e-mail discussing retailer threat of lawsuit)(attached as Exh. C). UST seeks blanket immunity for its payoffs to Wal-Mart in reliance on Warfield Tobacco, Inc. v. R.J. Reynolds Tobacco Co., 34 F. Supp. 2d 1050 (E.D. Ky. 1999). This summary judgment argument has no place in a motion in limine. In any event, the plaintiff in Warfield "failed to show any secret payments or rebates on the part of RJR" — an issue of hotly disputed fact in this case. Id. at 1052. The deposition excerpt submitted by UST only serves to demonstrate the corporate-wide amnesia at UST with respect to every issue in this case — in this particular situation a lack of recall with respect to whether UST's so-called "industry-wide" buy-downs were actually offered to any other retailers. See UST Mot., Exh 1.

16diii004308

disputed issues of fact, as UST recognized when it chose not to seek summary judgment.

B. A Single Trial is Appropriate and UST Failed to Satisfy the Requirements of Federal Rule of Civil Procedure 42(b)

Separate trials on Conwood's Lanham Act and state law claims would waste judicial resources. Separate trials are appropriate under Federal Rule of Civil Procedure 42(b) only in furtherance of convenience, avoiding prejudice, or when conducive to expedition and economy. UST does not even attempt to satisfy the requirements of Rule 42(b). Instead, UST relies on Rule 16(c)(16) — a catch-all rule for what may be considered at pretrial conferences — ignoring the fact that Rule 16(c)(13) expressly states that the Court should consider under Rule 42(b) whether a separate trial is appropriate.

"The piecemeal trial of separate issues in a single lawsuit . . . is not to be the usual course." 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2388, at 474 (2d ed. 1995). If a separate trial requires "extensive proof and substantially the same facts or witnesses as [] other issues, or if any saving in time and expense is wholly speculative, a separate trial will be denied." Id. at 477. In this case, many of the same facts and witnesses support Conwood's federal and state law claims. For example, facts concerning UST's payoffs to Wal-Mart to maintain its exclusionary position are relevant to Conwood's monopolization claims and Kentucky § 365.050 claim. UST simply fails to explain how separate, duplicative trials involving the same witnesses and facts would promote judicial economy. Separate trials would only impose great expense on the parties and consume additional judicial resources.

II. There is No Basis for a Separate Trial on Conwood's Attempted Monopolization Claim.

UST also asks the Court to "preclud[e] Conwood's superfluous attempted monopolization claim." UST Mot. at 6. But, as UST virtually concedes, the claim is not superfluous, and UST has no grounds for barring Conwood from pursuing it.

First, UST argues that the exclusionary conduct that supports Conwood's monopolization claim also supports Conwood's attempted monopolization claim. Id. Fine: the evidence that UST has engaged in a pattern of exclusionary conduct is thus relevant to both claims; this strongly *supports* trying the claims together rather than separately. Second, UST argues that both monopolization and attempted monopolization involve proof of market power. Id. Again, this observation *supports* trying both claims together. Moreover, UST tacitly concedes that the offense of attempted monopolization requires a lower degree of market power than the offense of monopolization: a "dangerous probability of achieving monopoly power" rather than actual monopoly power. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993). Under the uncontested legal standards, UST may be liable under section 2 for the attempt offense, even if it is absolved of monopolization.[5]

As for UST's argument that presentation of both claims could be confusing or waste judicial resources, this is hollow rhetoric. Monopolization and attempted monopolization claims are routinely tried together. See, e.g. Arthur S. Langenderfer,

---

[5]Nor is this case like Re/Max, where the defendant's anticompetitive strategy depended on having already achieved direct control over prices. See Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1020-21 (6th Cir. 1999).

Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1416 (6th Cir. 1990); Litton Sys., Inc. v. Honeywell, Inc., CV 90-4823-MRP (D.C. Cal. 1996) (Instruction no. 13) (on file with Court); LePage's Inc. v. 3M, No. 97-3983 (E.D. Pa. 1999) (Instructions at 22) (on file with Court). By contrast, UST cannot cite a *single case* in which a court has granted the type of relief that UST seeks here.

Conclusion

The Court should deny UST's motion and permit Conwood to present its claims in a single trial. A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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Counsel for Plaintiffs

February 11, 2000

16diii004311

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of defendants' Motion in Limine for an Order Simplifying the Issues at Trial and Facilitating the Disposition of this Lawsuit, plaintiffs' opposition thereto, and for good cause shown, said motion is hereby DENIED.

Dated this ___ day of _____, 2000.

HONORABLE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DIVISION OF KENTUCKY

AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P.,	:	
Plaintiffs,	:	Civil Action No. 5:98CV-108-R
V.	:	
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,	:	
Defendants.	:	

Video Deposition of ANDY LEE CARTER

(Taken by Plaintiffs)

Dallas, Texas

March 1, 1999

Reported by: Charity J. Parker, CSR No. 6610

but you seem to suggest to talk about Conwood products being stemmy as commonplace, right?

A. Yeah.

Q. Okay. And I'm just asking you, in your commonplace discussions with consumers at sampling events, did you ever mention that you thought Conwood products were stemmy?

A. I probably did.

Q. Okay. And did other U.S. Tobacco representatives make similar comments?

A. If I would have to make something, they probably did.

Q. Okay. I mean, you were around them at various sampling events and you've heard other U.S. Tobacco rep --

MR. GORSUCH: If I could just finish my question, and you make your objection.

MR. REED: Okay. Sorry.

BY MR. GORSUCH:

Q. You attended other sampling events with many other U.S. Tobacco representatives, didn't you?

A. Yes.

Q. Okay. And that was a common part of your job, wasn't it?

A. Yes.

Q. Okay. In the course of those sampling events, you heard other U.S. Tobacco representatives call Conwood products stemmy, right?

A. I don't know --

MR. REED: Object to the form of the question.

BY MR. GORSUCH:

Q. Okay. Go ahead and answer it.

MR. REED: Mr. Carter, if you'll pause just a moment after Mr. Gorsuch's question if there's an objection, then we won't be talking over each other.

THE WITNESS: Okay.

MR. REED: Thank you.

MR. GORSUCH: I apologize, Mr. Carter, and I apologize, Mr. Reed.

BY MR. GORSUCH:

Q. That's one of my instructions that I neglected to mention at the outset of the deposition. We all have to let each other finish speaking. And Mr. Reed and your counsel obviously have to have an opportunity to get in there before you do.

Just to back up, when you attended these sampling events and called the products stemmy to other consumers, did other U.S. Tobacco representatives make similar comments?

A. I'm sure they did. As far as if they said it was stemmy, you know, I don't know. I don't know if I've ever used that word or not, but that would be a word today that I'd use to describe the product.

Q. Okay. So they might have used other words to the same effect?

A. Yes.

Q. Okay. But they did use -- they did try to communicate that idea to consumers?

A. Yeah.

Q. Okay. Did you ever talk to consumers about the date codes on Conwood cans?

A. No, because I'll be honest with you, I still can't read it, but I do know, and I have told people out in the field, Conwood's product on the back says no date needed, and I know good and well that there's a code to it and they pick their product up, so it's not always fresh.

Q. Okay. I move to strike that as non-responsive, Mr. Carter.

EXHIBIT B

C O N F I D E N T I A L

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
CIVIL ACTION NO. 5:98 CV-108-R

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.L.P.,

Plaintiffs,

-vs-

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY, INC. and UST, INC.,

Defendants.

Thursday, July 1, 1999
New York, New York

Deposition of TIM ENTWISTLE, a witness herein, called for examination by counsel for Plaintiff, in the above-entitled matter, pursuant to notice, the witness being duly sworn by DANIELLE LORENZO, a Notary Public and Certified Shorthand Reporter, taken at the offices of SKADDEN, ARPS, SLATE, MEAGHER & FLOM, 919 Third Avenue, New York, New York on Thursday, July 1, 1999, commencing at 9:00 a.m., before DANIELLE LORENZO, CSR NO. 2018.

11:45:18 Q. Were you aware of it being offered
11:45:20 to anyone other than Wal-Mart?
11:45:22 A. I don't know.
11:45:24 Q. Did you provide points that other
11:45:28 people at U.S. Tobacco might use to cool off
11:45:32 irate wholesalers and retailers who weren't
11:45:34 being offered the same program?
11:45:36 A. I remember speaking to some
11:45:38 department managers on their concerns.
11:45:40 Q. When was that?
11:45:42 A. During the promotion.
11:45:42 Q. And what did you say?
11:45:52 A. To what?
11:45:54 Q. To the department managers, Mr.
11:45:56 Entwistle?
11:46:04 A. I explained the program again to
11:46:08 them to help them understand what we were
11:46:10 testing at Wal-Mart.
11:46:12 Q. And what were the points that you
11:46:16 offered that could be used to cool off irate
11:46:18 wholesalers and retailers?
11:46:20 MR. STOLL: I'm going to object to
11:46:20 the form of the question and the
11:46:22 characterization.
11:46:24 A. Could I have that repeated,

11:46:24 please?
11:46:32 Q. What points did you make that were
11:46:32 used to cool off irate wholesalers and
11:46:32 retailers?
11:46:32 MR. STOLL: Object to the form of
11:46:36 the question. It characterizes testimony that
11:46:38 hasn't even been given.
11:46:40 A. Could I have that repeated one more
11:46:40 time?
11:46:42 Q. Sure.
11:46:44 What did you say that could be used
11:46:48 to cool off irate wholesalers and retailers
11:46:50 subject to Mr. Stoll's objections?
11:46:56 A. My conversations with any of the
11:47:04 department managers involved the explanation of
11:47:06 the program as it was happening.
11:47:08 Q. Why were the department managers
11:47:08 concerned?
11:47:40 A. I think the sales were -- being the
11:47:42 first time that we were doing a promotion with
11:47:44 Wal-Mart created a tension.
11:47:46 Q. It created a tension because other
11:47:50 wholesalers and retailers weren't being offered
11:47:52 the same promotion, correct?
11:47:52 A. I don't know.

11:47:54 Q. Why did it create a tension then,
11:47:56 sir?
11:48:00 A. Because Wal-Mart is the most
11:48:02 visible retailer in the country.
11:48:04 Q. And they were getting a promotion
11:48:06 that no one else was getting, right?
11:48:06 A. No.
11:48:08 Q. Who else was getting that program?
11:48:10 A. I don't know.
11:48:12 Q. You testified earlier that it was a
11:48:12 quote "test program," right?
11:48:14 A. That's correct.
11:48:16 Q. Are you aware of any other
11:48:18 participants in the test program?
11:48:22 A. No.
11:48:24 Q. Isn't it true that the department
11:48:28 managers -- some department managers may have
11:48:30 come to you because they were concerned that
11:48:34 other wholesalers and retailers weren't
11:48:36 participating in the test program?
11:48:38 A. Could have.
11:48:40 Q. And isn't it true that the
11:48:42 wholesalers and retailers were concerned
11:48:46 because four dollars off per roll would provide
11:48:50 Wal-Mart with a competitive advantage over

EXHIBIT C

EXHIBIT
Blackburn 12
7-3-99 DS

Author: Donald W. Blackburn at UST-Dial_In
Date: 3/29/98 9:02 PM
Priority: Normal
TO: David J. Untiedt at U.S.T.-Greenwich(Jo)
CC: Don S. Segelstrom at Region_III, R. Dan Custred at UST-Dial_In, Larry E. Glass at Region_III, Rudy K. Loftan at UST-Dial_In, Burton W. Thibodeaux at UST_Fastech, Gary M. Lemoine at Region_III, Craig Jones at Region_III, Edward Knell at UST_Fastech, Shawn M. Mitchell at UST_Fastech, Amy K. Bost at Region_III, Mark Buhler at UST_Fastech, Thomas P. Thibodeaux at UST_Fastech, Timothy C. Entwistle at U.S.T.-Greenwich(Jo)
Subject: K-E-B MEETING : 3-20-98

Dave,

In follow up to our discussion on Monday, March 23, I am writing to provide you with details of my meeting with Bob Callahan, Category Manager, H. E. Butt Grocery, Company, San Antonio, Texas on March 20.

Mr. Callahan voiced his company's concern of the $4.00 roll savings on Copenhagen brands and the Red Seal, 10 cents savings programs currently in Wal-Mart locations and the lack of availability of the same to his company.

Here are the facts:

- K-E-B considers Wal-Mart to be their principal competitor as they match up store locations in 72 markets.

- Quote- " They do not want to be placed at a retail disadvantage and want to be on par with Wal Mart"

- Quote- " They feel promotional offers must be equal and proportionate to all trade channels"

"Quote -" These offers being available in Wal-Mart Supercenter formats creates a basis for a law suit being they did not receive the same offer"

Mr. Callahan went on to say that they are currently suing General Electric for similar practices and have removed their light bulb selections from their stores. Additionally he mentioned they are in the process of suing another company over same practices, but he would not divulge this companies name.

He went on to threaten a discontinuance of the Red Seal brands at this point. However with further discussion and information on Red Seal and the introduction of the 10 cents Instant Redeemable Coupon offer now on their inventories he seemed satisfied with our efforts and dropped the threat. Our only concern here will be this threat could resurface based on the fact that plans to run the Wal-Mart buydown run to August and as you know IRC's are set to go through mid May.

Concerning the roll savings program. They currently do not offer a significant roll savings in any of their locations (Core or Pantry). The savings is only a few pennies. They have been reluctant to offer roll savings in the past based on my experiences because we did not offer dollars to support an offer. One of the issues we have to overcome is their lack of authorizing a roll facing and vendor. We were able to overcome this in there 72 Pantry locations in Houston this summer as a roll facing and vendor for Copenhagen was authorized in a new planogram execution. Field Sales force did a great job in securing our vendor facing. He told me that he would go ahead and authorize appropriate roll facings and vendor for the Core stores and Smoke Shops (150) as plans are underway to develop new planograms at this time. We are schedule to participate in a vendor meeting to develop this planogram in April.

To make this happen and based on his comments I feel we must come to some arrangement to support savings on a proportionate basis. I recommend we get back to him with a plan as soon as possible. No promises were made. I only mentioned to him that I would recommend consideration to his concerns.

Thank you for your consideration of these concerns. Please advise.

Don

USTC/CWD 321056
HIGHLY CONFIDENTIAL

PLAINTIFF'S EXHIBIT
CASE NO. 5:98CV-108-R
EXHIBIT NO. 121

16diii004325

CERTIFICATE OF SERVICE

I certify that, on this 11th day of February, 2000, a copy of the foregoing was sent via facsimile and overnight delivery to:

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James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher
& Flom, L.L.P.
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New York, New York 10036

John S. Reed
Ridley M. Sandidge
Reed Weitkamp Schell Cox & Vice
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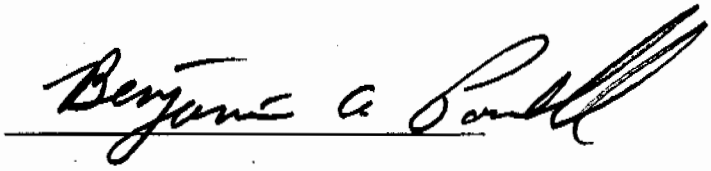
Louisville, KY 40202



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James A. Keyte, Esq.
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Jed Goldfarb, Esq.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98-CV-108-R

CONWOOD COMPANY, L.P., ET AL. PLAINTIFFS

v.

UNITED STATES TOBACCO COMPANY, ET AL. DEFENDANTS

MEMORANDUM OPINION & ORDER

This matter is before the court on Plaintiffs' motion to preclude UST employees from testifying live if UST refuses to make them available during Plaintiffs' case-in-chief (doc. # 283).

A telephonic conference was held on Wednesday, February 9, 2000 at 10:00 AM. Appearing for the parties were:

Plaintiffs: David Simpson
Richard Roberts
Mark Hansen
Hank Handlesman

Defendants: John Reed
Neal Stoll
James Keyte
Martha Wiess

Conwood claims that several officers and employees of UST are key witnesses to its antitrust claims. Conwood requested the UST accept service of trial subpoenas on behalf of those employees. UST refused to accept service. Plaintiffs then attempted to serve trial subpoenas on several UST employees who reside and work outside of Kentucky and more than 100 miles from Paducah. UST then filed a motion to compel withdrawal of trial subpoenas and

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to preclude issuance of additional subpoenas (doc. #284) on the grounds that those witnesses are beyond the subpoena power of the court, pursuant to Fed.R.Civ.P. 45. Conwood filed its motion to preclude UST employees from testifying live if UST refuses to make them available for Plaintiffs' case in chief.

Fed.R.Evid. 611 gives courts the authority to control the presentation of evidence and the interrogation of witnesses so as to "make the interrogation and presentation effective for the ascertainment of the truth." UST's refusal to produce witnesses for Conwood's case-in-chief and then calling those witnesses for live testimony during its own case does not promote the ascertainment of truth. It is merely gamesmenship on the part of UST, and will not be allowed in this trial. *See Matthews, Inc. v. Transamerica Transportation Services, Inc.*, 945 F.2d 269, 273 (9th Cir. 1991).

IT IS ORDERED:

Plaintiff's have agreed to withdraw their subpoenas. Therefore, Defendants' motion to compel withdrawal of trial subpoenas and to preclude issuance of additional subpoenas (doc. #284) is MOOT.

Plaintiffs' motion to preclude UST employees from testifying live if UST refuses to make them available during Plaintiffs' case-in-chief (doc. # 283) is GRANTED. UST is precluded from calling their current employees to testify live during their case-in-chief if UST refuses to produce those same employees to testify during Conwood's case-in-chief. This holding is subject to the following conditions:

This holding applies only to the twelve UST employees named in the motion, the designated UST records custodian, and five other UST employees whose names are to be

submitted to UST by Monday, February 14, 2000.

Conwood shall give notice to UST of the employee they wish to call live three days prior to that employee's testimony.

Conwood shall present the witness on the day which it has identified to UST .

Within 24 hours of notice, UST shall inform Conwood whether it will produce the employee or not. If UST does not produce that employee, then it is precluded from calling that witness during its case in chief, and must rely on the deposition. If UST does not respond to Conwood's notice within 24 hours, then it is precluded from calling that witness and must use his or her deposition testimony. UST is bound by its decision.

The same rules also apply to Conwood's current employee witnesses.

Conwood shall pay all costs of any UST employee's appearance during its case-in-chief, including normal per diem and travel costs.

UST shall pay all costs of any Conwood employee's appearance during its case-in-chief, including normal per diem and travel costs.

The final pre-trial conference is rescheduled to 1:00 P.M. CST, Thursday, February 17, 2000.

This is the 11 day of February 2000.

Thomas B. Russell
Judge, United States District Court

cc: Counsel

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BY DEPUTY CLERK

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,

Defendants.

'00 FEB 16 P2:33

Civil Action No.
5:98CV-108-R

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JURY TRIAL DEMANDED

PLAINTIFFS' REPLY TO DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR MOTION TO EXCLUDE THE DAMAGES STUDY AND FUTURE TESTIMONY OF DR. RICHARD LEFTWICH

BACKGROUND

As Conwood has previously explained in its Opposition to UST's Motion to Preclude "Undisclosed Expert Witness Materials," Dr. Leftwich filed a Supplemental Report on January 27, 2000 in order to correct data upon which he had relied in his original and rebuttal reports.[1] In full compliance with the ongoing duty imposed by Federal Rule of Civil Procedure 26 to update expert testimony when necessary, Leftwich filed a Supplemental Report

[1]UST appears to fault Leftwich for not confirming the data independently from the outset. UST Suppl. Mem. at 4. There was no reason for Leftwich to do so, given that the data was generated by a highly regarded accounting firm, Peat Marwick, for publication by the primary industry organization, the Smokeless Tobacco Council ("STC"). UST recognizes that it cannot challenge Leftwich's reliance upon such data as a general principle, instead framing its complaint as an assertion that Leftwich should have second-guessed the data at an earlier date. In questioning the data as soon as the issue arose and making prompt modifications through his Supplemental Report, Leftwich fully complied with the Federal Rules and this Court's discovery orders.

with the Court in a timely fashion.[2] Rhetoric aside, UST in fact concedes that it has no legitimate complaint that Leftwich's Supplemental Report was disclosed to the Court in an untimely fashion. See UST Suppl. Mem. at 5 (conceding that UST would have no claim of delay under Federal Rule of Civil Procedure 26(e)).

Instead, UST attempts to parse Leftwich's Supplemental Report into two segments — the correction and an alleged "new Leftwich damages opinion." Id. at 5. This view entirely misses the fact that, in his Supplemental Report, Leftwich has done nothing more than update the statistical analyses found in his original and rebuttal reports in order to fully incorporate the revised data, and reaffirm his prior opinions as to the nature and extent of Conwood's damages. UST has had full knowledge of the methodologies incorporated into Leftwich's Supplemental Report throughout the discovery period.[3] Leftwich's Supplemental Report presents nothing new, is timely, and has not caused any delay that prejudices UST. There is therefore no ground for its exclusion.

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[2]The full circumstances surrounding Leftwich's search for and receipt of revised data are discussed in Plaintiffs' Opposition to Motion to Preclude "Undisclosed Expert Witness Materials," which was filed on February 6, 2000. In the interest of brevity, Conwood will not repeat the details in this pleading, but will note that Leftwich promptly sought verification of the data after his deposition on November 2, 1999, and filed his supplemental report shortly after confirming that revised data received from Peat Marwick and the STC were correct.

[3]Leftwich filed his initial Report on August 2, 1999. His Rebuttal Report was filed on October 1, 1999. On November 2, 1999, UST deposed Leftwich, and had ample opportunity to question him about all information and analyses contained in his reports, including his critique of Scheffman's study. Moreover, Conwood has repeatedly offered to make Leftwich available for further deposition, an offer UST accepted only yesterday.

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UST also, for the fourth time, attacks Leftwich's methodology under Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993). That issue has already been fully briefed to the Court. UST tries to make old arguments seem new by referencing Federal Rule of Evidence 703 and asserting that Leftwich has now used different and assertedly unreliable data to support his damages opinion. But that is incorrect: UST admits that Leftwich used the same data in analyses incorporated in his Rebuttal Report. UST Suppl. Mem. at 2 n.1. As plaintiffs have previously argued, there is no ground to exclude Leftwich's testimony and reports under Daubert. Nothing in his Supplemental Report changes that conclusion.

UST should not prevail on either of its asserted grounds for the exclusion of Leftwich's Supplemental Report in Conwood's case-in-chief. In any event, this controversy is essentially a sideshow of UST's creation, because Leftwich should be allowed to testify in rebuttal to UST's expert, David Scheffman, at which time the same data will be presented to the jury.

ARGUMENT

I. Leftwich Has Not Presented a New Damages Opinion

UST devotes six pages of its Memorandum to arguing why Leftwich's Supplemental Report should be considered late. The fact is that Leftwich promptly corrected his report after receiving revised data, consistent with the requirements of Rule 26(e). And contrary to UST's assertions, Leftwich did not present a new opinion.

In his Supplemental Report, Leftwich repeated the analyses found in his initial and rebuttal reports. See Leftwich Suppl. Rep. ¶¶ 4-8; Leftwich Rebuttal Rep. ¶¶ 23-26; Leftwich Rep.

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¶¶ 18-25. Upon recomputation with the revised data from the STC, estimated damages using one methodology were reduced. But the analysis based on the Scheffman model and data was not affected by the revised data.

While Leftwich did not specifically quantify -- in dollars -- the damages from the analysis of Scheffman's methodology in his Rebuttal Report, Leftwich did provide detailed information regarding the methodology he used and the results he obtained. See Leftwich Rebuttal Rep. ¶¶ 20-27 & Tables 1-3. He provided detailed information about changes in market shares (which are the basis for his ultimate quantification of damages). See id. Leftwich also made clear that Scheffman's analysis, when correctly applied, supported the damages that Leftwich found Conwood to have suffered. See, e.g., id. ¶ 24 ("Scheffman's data . . . and methodology show that UST's exclusionary conduct has precisely the effect that Conwood claims.").

There are, therefore, no new opinions in Leftwich's Supplemental Report -- and there is no reason to exclude any portion of the report. None of the cases cited by UST support its position. In Tucker v. Ohtsu Tire & Rubber Co., 49 F. Supp. 2d 456 (D. Md. 1999), an expert mentioned that he had formulated new opinions at his deposition and sought to support them with evidence that he disclosed approximately six months later, shortly before the discovery cutoff. Id. at 459. The court allowed the evidence and expert testimony, because the defendants were aware of the expert's opinions and the supporting evidence was proper supplementation under Rule 26(e). Id. at 459, 461-63. Moreover, defendants had time to depose the expert before trial. Id. at 461. The situation here is analogous:

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- UST was aware from Leftwich's Rebuttal Report (filed before Leftwich's deposition) that his opinions incorporated an application of Scheffman's methodology to demonstrate the harm inflicted on Conwood;
- Leftwich's Supplemental Report does nothing more than provide support for that previous opinion in light of Rule 26(e); and
- UST had the opportunity to question Leftwich about his application of Scheffman's methodology at Leftwich's deposition (an opportunity that UST took some advantage of), and Conwood offered to make Leftwich available for additional questioning on the Supplemental Report.

Under these circumstances, UST has no claim of prejudice or violation of the Federal Rules.[4]

This case is also very different from those in which expert opinions have been excluded. See, e.g., Reliance Ins. Co. v. Louisiana Land & Exploration Co., 110 F.3d 253, 256-58 (5th Cir. 1997) (expert not allowed to present new opinion as to causation of accident after deadline for expert reports); Shalley v. City of Philadelphia, No. 94-5883, 1996 WL 210795, at *2 (E.D. Pa. Apr. 30, 1996) (excluding supplemental expert report that contained "many detailed test results, opinions, and statements" not in initial report); Shelter Mut. Ins. Co. v. Culbertson's Ltd., No. 97-1609, 1999 WL 135297, at *4 (E.D. La. Mar. 11, 1999) (excluding supplemental expert opinion that improperly opined as

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[4]New York v. Westwood-Squibb Pharmaceutical Co., 981 F. Supp. 768 (W.D.N.Y. 1997), also does not support UST's claims. There, the court found no prejudice in an expert's opinion that was completely changed at trial, based on information that the expert obtained while preparing for trial. Id. at 779. The court found no prejudice -- even though the expert had not supplemented his opinion under Rule 26(e) -- because the changed testimony was adequately explored on cross-examination and did not prejudice the opposing party. Id. In this case, UST cannot assert any prejudice -- not only has it had Leftwich's opinion for several months, but it also has had particular reason to explore that opinion because it directly criticizes UST's own expert.

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to an ultimate legal issue in the case and "touche[d] upon nothing . . . even mentioned in the first report"); Schweizer v. DEKALB Swine Breeders, Inc., 954 F. Supp. 1495, 1509-10 (D. Kan. 1997) (striking portions of expert report that were untimely supplements under Rule 26(e) and were fundamentally different from the expert's previous reports).

Here, Leftwich has provided no new opinion, but rather a bottom-line quantification of the results of part of his analysis in dollars, as opposed to market share. He has consistently criticized Scheffman, for the same reasons, in both his Rebuttal and Supplemental Reports, as well as at his deposition. His revisions constitute a timely supplementation under Rule 26(e), not a means to present a new opinion to the Court.[5]

Moreover, even if UST's argument had some merit, the Court should decline to impose the harsh sanction of exclusion of Leftwich's testimony for two reasons. See K.M.C. Co. v. Irving Trust Co., 757 F.2d 752, 765 (6th Cir. 1985) ("[W]e observe that exclusion of evidence is a drastic sanction."). First, UST has suffered no prejudice. Conwood has offered to make Leftwich available for a supplemental deposition and, in fact, the Magistrate Judge has ordered UST to take Leftwich's deposition at the earliest possible date. Second, Scheffman's model, which is the underpinning of Conwood damages of approximately $560 million, will be explored during cross-examination of Scheffman.

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[5]UST also asserts that the basis of the alleged new opinion is particularly "outrageous." UST Suppl. Mem. at 11. But UST is fully aware that Leftwich's criticism of Scheffman in his Rebuttal Report was based on the same information. See UST Suppl. Mem. at 2 n.1. It is UST's complaint regarding that information that is tardy in this instance.

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Thus, the same information may be adduced from UST's expert. Alternatively, if Scheffman declines to acknowledge the damages consequences of his own model, Leftwich's application of UST's own proof to support Conwood's damages can be used in Conwood's rebuttal case. See, e.g., K.M.C., 757 F.2d at 765 (rejecting argument that testimony of plaintiff's expert should have been excluded; noting defendant's cross-examination of expert and presentation of rebuttal expert evidence that was "repeatedly emphasized to the jury"). Conwood submits that it will be fairer to all parties, and easier for the jury to understand, if Leftwich is permitted fully to explain his analysis in plaintiffs' case-in-chief. Therefore, little but confusion and delay will be accomplished by the exclusion of Leftwich's testimony demanded by UST.

II. There Is No Basis To Exclude Leftwich's Testimony or Reports Under Federal Rule of Evidence 703 or Daubert

Despite much briefing on the application of Daubert to Leftwich's methodology, UST now seeks one more bite of that apple, throwing in a claim under Federal Rule of Evidence 703 for good measure.[6] Since Leftwich's Rebuttal Report (and deposition) months ago, it has been clear that he relied on Conwood's reports of UST's anticompetitive acts in critiquing Scheffman's analysis. UST never complained about that. Indeed, it is particularly curious that UST would now make such a complaint, in light of their own expert's reliance on a single page of information of

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[6]UST refers to Daubert throughout its Memorandum, but fails to articulate a basis for the exclusion of any part of Leftwich's Supplemental Report under that decision. It is Conwood's position that Leftwich's reports, testimony, and methodology are admissible under Daubert, and that the relevant issues have already been fully briefed to this Court.

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unidentified origin that, according to his own testimony, he did not understand. See Scheffman Dep., 319-31; Plaintiffs' Opp'n to Mot. to Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 10-11 & n.7.[7]

A. The Fact That the Anticompetitive Acts Reports May Be Hearsay Does Not Preclude Leftwich's Reliance on Them

The Sixth Circuit has made clear that experts must be permitted to rely on hearsay statements to support their opinions. See Trepel v. Roadway Express, Inc., 194 F.2d 708, 716-17 (6th Cir. 1999). This is the case even when the statements are made by an interested party. See Mannino v. International Mfg. Co., 650 F.2d 846, 853 (6th Cir. 1981) (approving expert's reliance on "information furnished him by plaintiff's attorney"); see also Kingsley Assocs., Inc. v. Del-Met, Inc., 918 F.2d 1277, 1287 (6th Cir. 1990) (approving of Mannino). The comments to Fed. R. Evid. 703 also contemplate such reliance. See Fed. R. Evid. 703 Advisory Committee's Notes ("a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives").

Thus, UST errs in saying that there is a blanket prohibition on potentially biased survey data. See, e.g., Slaughter v. Southern Talc, 919 F.2d 304, 306-07 & nn. 1 & 5 (5th Cir. 1990) (expert's use of medical survey data received from plaintiffs was "not questioned," but particular data were excluded because they were sloppily compiled and refuted by the expert who relied on them); Soden v. Freightliner Corp., 714 F.2d 498, 503 (5th Cir. 1983) ("standing alone," the fact that statistics relied upon by

[7]A copy of this document is attached at Exhibit A.

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expert that were unpublished, not given to the adverse party, "prepared strictly in anticipation of litigation," and "based on information received from a sister company" did not "suffice to impugn the reliability of the statistics;" additional circumstances supported exclusion, including lack of memorialization of what expert had relied on).[8]

Contrary to UST's assertion (UST Suppl. Mem. at 16), the Sixth Circuit's opinion in Dallas & Mavis Forwarding Co. v. Stegall, 659 F.2d 721, 722 (6th Cir. 1981), does not support the proposition that experts may never rely on "biased eyewitnesses." In Stegall, an accident victim sought to introduce the testimony of a state trooper, as an accident expert, about what a biased eyewitness had reported. Id. at 722. In a brief opinion, the court rejected the proposed opinion of the trooper, noting that "[t]he trial process is better served when a biased eyewitness declarant is required to testify directly," and that permitting the eyewitness's "opinion to be heard through the testimony of an official would cloak it with an undeserved authority that could unduly sway a jury." Id. Although the court referenced Federal Rule of Evidence 703 in its opinion, its holding also stemmed from other concerns.[9]

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[8]UST cites In re Agent Orange Product Liability Litigation, 611 F. Supp. 1223 (E.D.N.Y. 1985), for the proposition that surveys completed by plaintiffs that constitute "specific anecdotal evidence" cannot be relied upon by experts. UST Suppl. Mem. at 16. That summary oversimplifies the court's holding, in which the court noted that the medical expert could "have obtained more persuasive medical and other records" and that the plaintiffs had no incentive to fill out the surveys truthfully. Agent Orange Litig., 611 F. Supp. at 1247.

[9]Likewise in Law v. NCAA, 185 F.R.D. 324 (D. Kan. 1999), in which a proffered expert called people throughout the industry to

B. The Anticompetitive Acts Reports Are Reliable

UST also asserts that the reports used by Leftwich are inherently unreliable. But UST errs as a matter of fact and law. Factually, there were no built in assumptions in Conwood's survey: in reporting misconduct by UST, "never" and "none" were options; indeed, UST purports to point to eleven such examples (out of 226). See UST Suppl. Mem. at 14-15 & App. D. As the declarations indicate on their face, moreover, all reported misconduct is based upon the declarant's knowledge or belief.

More significantly still, even assuming UST's (unsupported) suggestion that Conwood representatives "overreported" UST's misconduct to be true, see UST Suppl. Mem. at 12, that has no bearing on Leftwich's analysis. Leftwich used the Conwood survey only to show that a statistical correlation exists between UST's level of exclusionary conduct in a state and Conwood's market share. In states with high levels of reported UST exclusionary activity, Conwood's share is lower, and vice versa. For UST's theory about misreporting to call into question Leftwich's study, UST would have to show that Conwood representatives systematically overreported UST misconduct in states where Conwood share is low and underreported UST misconduct in states where Conwood share is high. There is simply no way that Conwood representatives could have skewed their anticompetitive conduct

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seek their input for his damages computations. The court concluded that no evidence was presented to indicate that the proffered expert had behaved like an expert economist and upheld a ruling that he could only testify as a lay witness. Id. at 341. Here, Leftwich is providing expert analysis of many factors, including data he received from Conwood, using standard economic methodologies. There is no basis for excluding his opinions because of that data.

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reports in such a baroque manner, and certainly no record basis for suggesting they did. To the contrary, the testimony of another Conwood expert, Morton Kamien, and Scheffman's own analysis, confirm that where Conwood had fewer facings -- such as in areas subject to more anticompetitive conduct -- Conwood's sales were lower.

Legally, UST cites no decisions that support the conclusion it seeks. As is explained above, Slaughter and Soden did not exclude evidence for the reasons that UST asserts in this case -- just because it is survey evidence prepared by a potentially interested party. Ricciardi v. Children's Hospital Medical Center, 811 F.2d 18, 25 (1st Cir. 1987), concerned an expert's reliance on "a handwritten comment from an unknown source buried in a three-page [medical] consultation report" that was so unusual that the expert himself "characteriz[ed]" it "as `bizarre.'" That accurately characterizes the obscure handwritten note relied on by Scheffman, but it does not apply to Leftwich's survey data. In Marcel v. Placid Oil Co., 11 F.3d 563, 567-68 (5th Cir. 1994), the court's major complaint with the worklife expectancy study upon which defendant's expert relied was that it provided no comparison by which to judge if plaintiff's worklife was average. The opinion cannot be read to suggest that the survey itself was inherently inadmissible. See id. at 567 (noting that if defendant had adequately developed expert's "discussion of the . . . study in the context of relevant general economic evidence," there would be a "closer question" whether the district court abused its discretion in excluding the survey).

The Conwood sales force survey is reliable for the purpose

for which Leftwich has employed it. UST has presented no valid argument why Leftwich's Supplemental Report should not be admitted. Therefore, Conwood requests that UST's Motion in Limine to exclude portions of Leftwich's Supplemental Report be denied, and that the Court also deny UST's requests that Leftwich's testimony or reports be excluded under Federal Rule of Evidence 703 and Daubert. Conwood has previously submitted Proposed Orders to this effect. See Pls.' Opp'n to Mot. to Preclude "Undisclosed Expert Witness Materials" (filed Feb. 6, 2000); Pls.' Opp'n to Mot. To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich (filed Dec. 10, 1999).

Respectfully submitted,

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/s/

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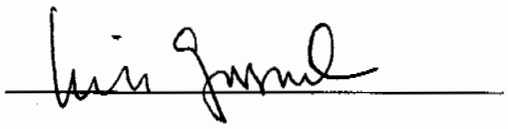

EXHIBIT A

CW Volume % change.

Total CW % change Nationally

JULY 17, 1992

RED STATES ARE THOSE WHICH HAVE HAD THE ~~GREATEST~~ MOST INCIDENTS OF RACK REMOVAL BY UST PERSONNEL.

YELLOW STATES ARE THOSE WHICH HAVE HAD THE ~~GREATEST~~ LEAST INCIDENTS OF RACK REMOVAL BY UST PERSONNEL

RED STATES	1987	1988	✓1989	✓1990	✓1991	5-YEAR	
CALIFORNIA	10.7%	10.2%	1.1%	2.2%	7.1%	21.9%	
MONTANA	29.8%	54.0%	2.1%	-32.6%	3.5%	9.7%	
WYOMING	-3.3%	8.5%	-9.6%	7.9%	1.6%	7.5%	
NEW MEXICO	-35.6%	-2.4%	-5.9%	-11.6%	-4.6%	-22.5%	
KANSAS	-0.2%	10.4%	1.0%	15.2%	-7.3%	19.1%	
MISSOURI	6.0%	4.4%	0.5%	1.4%	1.7%	8.2%	
WISCONSIN	14.3%	25.1%	1.1%	15.5%	6.4%	55.4%	
FLORIDA	14.5%	15.0%	2.6%	17.6%	-0.4%	38.2%	
MASSACHUETTS	33.3%	26.1%	2.5%	10.8%	7.1%	53.5%	
CONNECTICUTT	26.1%	29.2%	2.0%	9.1%	23.3%	77.1%	
TOTALS:	9.6%	18.0%	-0.3%	3.6%	3.8%	26.79%	6.9%

YELLOW STATES	1987	1988	1989	1990	1991	5-YEARS	
NEVADA	27.8%	13.2%	-2.6%	-13.0%	9.2%	4.8%	
UTAH	-1.1%	9.0%	-2.4%	7.9%	3.8%	19.1%	
ARIZONA	-18.1%	4.8%	-0.9%	1.4%	5.1%	10.7%	
NORTH DAKOTA	0.9%	3.2%	1.4%	4.8%	12.0%	22.9%	
SOUTH DAKOTA	0.6%	-9.2%	-4.0%	20.4%	-6.1%	-1.5%	
NEBRASKA	11.1%	-5.3%	3.7%	-15.2%	2.1%	-14.9%	
ALABAMA	6.2%	16.5%	1.1%	19.5%	-3.3%	36.1%	
WEST VIRGINIA	-2.7%	8.0%	-0.8%	-5.3%	7.8%	9.3%	
MAINE	9.2%	39.0%	2.0%	16.4%	22.5%	102.2%	
TOTALS:	3.8%	8.8%	-0.3%	4.1%	5.9%	21.0%	4.5%

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nfidential

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. AND CONWOOD SALES COMPANY, L.P.,	)	
Plaintiffs	)	
v.	)	Civil Action No: 5:98-CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. UNITED STATES TOBACCO MANUFACTURING COMPANY, INC. and UST INC.,	)	
Defendants	)	

DEFENDANTS SUPPLEMENTAL TRIAL WITNESS LIST

Defendants United States Tobacco Company, et al. ("USTC") respectfully supplement their Trial Witness List to add the name of the following witness who may be called to testify to defend against the claims of Plaintiffs Conwood Company, L.P., et al. ("Conwood") or to prove USTC's counterclaims against Conwood. At present, USTC plans to offer this additional witness in place of Randy Pickett, the witness identified at No. 19 in Defendants Trial Witness List, but reserves the right to call Mr. Pickett at trial.

Greg Rainey
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February 15, 2000

Respectfully Submitted,

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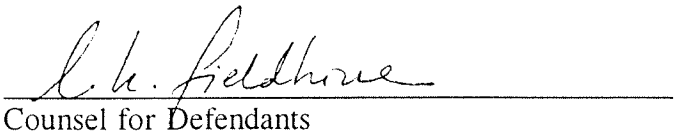

Counsel for Defendants

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, -against- UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	:	Civil Action No. 5:98 CV-108-R

DEFENDANTS' SUPPLEMENTAL TRIAL EXHIBIT LIST

Defendants respectfully supplement their list of exhibits intended to be used at trial with the following list of exhibits marked for identification.

Respectfully submitted,

Dated: February ___, 2000

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DEFENDANTS' SUPPLEMENTAL TRIAL EXHIBIT LIST

DX Number	Description	
4304	Conwood Sales Incentive Program	
4305	CWD 1001002044	CWD 1001002050
4306	CWD 1037194220	CWD 1037194221
4307	CWD 1037003691	CWD 1037003693
4308	CWD 1030032430	CWD 1030032432
4309	CWD 1030032438	CWD 1030032440
4310	CWD 1030032418	CWD 1030032420
4311	CWD 1037160582	CWD 1037160584
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4315	CWD 1030032127	CWD 1030032129
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4325	CWD 1037154228	CWD 1037154231

DEFENDANTS' SUPPLEMENTAL TRIAL EXHIBIT LIST

DX Number	Description	
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4327	CWD 1035000247	CWD 1035000249
4328	CWD 1035002013	CWD 1035002014
4329	CWD 1037175680	CWD 1037175684

CONWOOD SALES CO., L.P.

EST. fm-t. 12 amend

Retail Incentive Program

Date: 1/5/2000

PLEASE PRINT ALL INFORMATION

Golden Gallon
Retailer Name

P.O. Box 181600
Address

Chattanooga, TN 37416
City, State & Zip Code

135
Number of Stores

Rebate period: 1/2000 (Month - Year) through 12/200 (Month - Year)

Primary Supplier _____

QUALIFICATION REQUIREMENTS

- ✓ Kodiak Wintergreen
- ✓ Kodiak Ice
- ___ Kodiak Long Cut Straight
- ✓ Hawken
- ✓ Cougar
- ___ Cougar Fine Cut Wintergreen
- ✓ Long Cut Cougar Natural
- ___ Long Cut Cougar Wintergreen

Other

___ _____
___ _____
___ _____
___ _____

- Utilize and maintain Conwood moist snuff vendors for all authorized Conwood moist snuff ite with Conwood POS materials on venders.
- Maintain adequate inventory to prevent excessive out-of-stock conditions on Conwood brand
- Product and vendors prominently located in moist snuff section.
- All authorized Conwood items are to be stocked and properly listed in your order guides for re order by your retail stores.
- Provide documented quarterly total sales volume for Conwood brands by the 25th of the mont after the end of the quarter (sales information must be in amount of five-can rolls for each Conwood brand).
- Participate in at least two Conwood moist snuff consumer oriented promotions during the calendar year.

ANY REDUCTION IN KODIAK WINTERGREEN FACINGS TO ACCOMPLISH A HIGHER PLAN LEVEL DOES NOT QUALIFY

PLAN 1 - 10c Per 5-Can Roll Sold	PLAN 2 - 8c Per 5-Can Roll Sold	PLAN 3 - 5c Per 5-Can Roll Sold
1. Minimum of 7-facing Conwood vendor for Conwood moist snuff brands.	1. Minimum of 6-facing Conwood vendor for Conwood moist snuff brands.	1. Minimum of 4-facing Conwood vendo for Conwood moist snuff brands.
2. Minimum of 6 Conwood moist snuff brands authorized and stocked.	2. Minimum of 5 Conwood moist snuff brands authorized and stocked.	2. Minimum of 4 Conwood moist snuff brands authorized and stocked.

*The retailer listed above agrees to all qualification requirements as outlined per plan 2; payment to be made quarterly X, semi-annually ____, annually ____. Payments are subject to full performance of all requirements. Conwood reserves the right to conduct such audits as may be necessary to verify performance. Conwood further reserves the right to terminate the program upon notice to retailer.

PLAN NO.	NO. OF ROLLS SOLD		CENTS PER ROLL		REBATE PAYMENT
____	_____	X	_____	=	$_____
____	_____	X	_____	=	$_____

ABOVE MOVEMENT IS FOR THE PERIOD _____ (Month - Year) **Through** _____ (Month - Year)

Payment made by: Draft _____ Draft # _____
Billback X
Other _____

Make check payable to: Golden Gallon

Keith Clinard
Conwood Sales Representative

Retail Buyer Signature

_____
Regional Sales Manager
(Binding upon execution by Conwood Regional Sales Manager)

DEFENDANT'S EXHIBIT 4304

16diii004357

CUSTOMER

September 26, 1994

Mr. Ray Bryant
Quality Control Manager
Conwood Company, L.P.
P.O. Box 217
Memphis, TN 38101
Fax #901-526-3527

Dear Mr. Bryant:

I found two insects (beetles) in the four pieces of tape and the tobacco in the can of Kodiak brand smokeless tobacco which you sent for examination. One beetle is larger than the other and may represent a male and female of the same species. They are a species of weevil not known as a stored product pest. They probably normally are found on flowers and probably fly to lights. I will send these insects to the Smithsonian Institution in Washington D.C. as soon as I obtain the required paperwork which must accompany them. The paperwork will state that the insects were sent by a buyer in the northeastern U.S. as contaminants of a product made in Tennessee, and will request the identification and information on the geographic distribution of the species involved. It often takes a while to receive the information back. I will notify you as soon as I receive it.

If you have any questions, call me at 601-977-8000.

Sincerely,

9/27 - these insects are from the complaint that's attached. RB

Thomas E. Rogers
Director of Technical Services
Medical Entomologist

TER/ty

pc: B. Ingram
B. Krumb
B. Rogers
P. Price

Confidential

DEFENDANT'S EXHIBIT 4305
16diii004358

THC
~~EJF~~

Insect

DEPT: EC
NO: KD-138 yr
DATE: 94/08/04
PRODUCT: Kodiak
CATEGORY: Known
COMPLAINT: Foreign Matr
SPECIFICS: Insect
CUSTOMER: Mollica, Todd
CODE: 2CRTF
MFG: MPK5
COMMENTS:

To Whom it May Concern,

On August 3, 1994 I purchased a tin of KODIAK Chewing tobacco. I have been using your product for Almost five years and feel it is one of the best Chewing tobaccos on the market. But I feel Sore Should Step up your quality control. The reason I Say this is because I found 2 Live beatles in my tin of KODIAK Wintergreen after I Spotted the 2 Live beatles in the tin I Checked the D.p that was in my mouth and found one very large beatle. Now like I Said I Love your product. I feel KODIAK Wintergreen is the best tasting chewing tobacco but I think it will be a few Days before I consider chewing again.

Thank you for your Time,

TODD J. MOLLICA

Todd J Mollica

P.O. Box 443
Middlebury CT
06762

Samples given to Field Rep Arthol 8/22/94 to E.D. to file

RECEIVED
AUG 10 1994
Ans'd.....

If you Have any questions you can contact me @ ~~756~~-9905 or 755-9007 (203) Home

RECEIVED
AUG 29 1994
Ans'd.....

8-16-94

To Whomit May Ccern,

I wrote to you about two weeks Ago in regards to finding 4 Beatles in my tin of Chewing tobacco. I was very impressed at your immediate reply to the situation. Your Sales Representative was in my business one day after telephone Contact with you. However after further thought I feel the matter was not properly handled by your company. I feel there was no consideration on your company's behalf for the mental anguish I have suffered from the fact that I had Live Tobacco beatles in my tin of Chewing tobacco. This incident has not only caused me to vomit, and have an upset Stomach, It has made me not only question what I put In mouth, I constantly check my food or drink for fear of Eating bugs. I do not think it is fear for your company to feel that by giving free samples of Chewing tobacco that I will forget about this matter. In fact your free samples went into the trash. I have no desire to Chew tobacco anymore. This

7-16 99

was something I once enjoyed but how can I enjoy it anymore knowing that there may be beatle eggs or beatle fragments in the chewing tobacco. Please try and picture what it would be like to have a live insect crawl out of your mouth, then to remove the contents of the chewing tobacco from your mouth and find 3 large beatles that were between my cheek and gum. No where on your tin does it state that this product may contain insects. I feel a monetary settlement would be appropriate for me to get over this incident which occured to me. I have spoken to my attourney in regards to this incident and he suggested to write you again in this incident to settle this matter. If we can settle this matter amongst ourselves that will be fine with me. However if you choose not to, he would be more than happy to resolve this matter for me. This incident is by no means understandable it is just Disgusting.

Thank you for your Time

Home phone # 203-755-9007
Business Phone # 203-756-9505
or 203 754-1033

TODD J. MOLLICA.
Todd J Mollica

THC
~~EJF~~

Insect

DEPT: EC
NO: KD-138
DATE: 94/08/04
PRODUCT: Kodiak
CATEGORY: Crown
COMPLAINT: Foreign Matrl
SPECIFICS: Insect
CUSTOMER: Mollica, Todd
CODE: ACBF4
MFG: MPHS
COMMENTS:

To Whom it May Cocern,

On August 3, 1994 I purchased a tin of KODIAK Chewing tobacco. I have been using your product for Almost five years and feel it is one of the best Chewing tobaccos on the market. But I feel sure should step up your quality control. The reason I say this is because I found 2 Live beatles in my tin of KODIAK Wintergreen. after I Spotted the 2 Live beatles in the tin I Checked the Dip that was in my mouth and found one very large beatle. Now like I Said I Love your product. I feel KODIAK Wintergreen is the best tasting chewing tobacco but I think it will be a few Days before I consider chewing again.

Thank you for your Time,

TODD J. MOLLICA

Todd J Mollica

P.O. Box 443
Middlebury CT
06762

Sample given to Todd Post Control 8/22 to J.D. RB

RECEIVED
AUG 10 1994
Ans'd.....

If you Have any questions you can contact me @ 756-9905 or (203) 755-9007 Home

CONWOOD COMPANY, L.P.

Gary W. Ryan
P.O. Box 261
Sikeston MO. 63801

May 31, 1996

TO: Tommy H. Combs

RE: Consumer complaint

Tommy,

I visited with Mr. Davis this week about the problem he had with Kodiak long cut. He said that the ten cans he purchased all tasted the same. He said that the product tasted like burnt wood and it made his tongue swell up and he had to go to the hospital emergency room. He didn't say how long his tongue stayed swollen. He gave me two can of this back and he said that he purchased this at Rhodes 101 there in St. Gen.
This gentleman dips two cans a day and his only concern was that there was a problem with our Kodiak and we were going to change this or take it off the market.
I told Mr. Davis that I appreciated his letter and that we were not going to take this off the market. I also gave Mr. Davis some samples of Kodiak to take care of the ones that he sent in to the office and the ones that he gave me.

After I visited with Mr. Davis I visited the convenience store that he purchased this at. I talked with the Debbie the manager and she said that Mr. Davis brought back eight cans of this back and she had these under the counter in a sack. The two cans that I got from him do not match the eight cans in the sack at the store. I picked all eight cans up and I am sending this to the office along with the two cans from Mr. Davis.

If you need something else on this please let me know.

Sincerely,

G.W. Ryan

DEFENDANT'S EXHIBIT 4306

Davis

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

Office of
CONSUMER RELATIONS

May 14, 1996

MR JAY DAVIS
747 ROIZER
STE GENEVIEVE MO 63670

Dear Mr. Davis:

Thank you for your letter describing the problem you have recently encountered with our Kodiak. We appreciate your taking the time to let us know that this has occurred so we can correct the problem.

Your letter is being forwarded to the people in our company who are responsible for manufacturing and quality control, and they will investigate this complaint thoroughly.

Our company realizes the importance of supplying our customers with only the cleanest, best tasting tobacco that money can buy; therefore, we are constantly striving for quality improvements. When a complaint like yours is brought to our attention, we can take immediate steps to correct the problem.

I am also asking our sales representative to contact you concerning this problem. Please save any unused portion of this product for our representative so he may forward a sample to me.

As a small token of our appreciation for your interest, we are sending you a complimentary package of Kodiak for your enjoyment. This is being sent under separate cover; please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

C: G. W. Ryan, L. E. Hynes, B. R. Davis

Dear Mr. Ryan:

Please contact this consumer immediately in regard to the problem he has experienced. Be sure to pick up unused portion of the tobacco this consumer has described and record any comments that the consumer has to make in regard to the complaint. This should be forwarded to my attention as soon as possible. Please advise when this has had your attention. Thank you.

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101

Larry E. Haynes
District Sales Manager
P.O. Box 6099
Sherwood, AR 72124

June 7, 1996

Mr. T.H. Combs
Senior Product Manager
Tobacco Products

RE: Consumer Complaint-Mr. Jay Davis

Tommy,

As requested, we contacted Mr. Jay Davis about his complaint on our Kodiak Moist. Enclosed you will find a letter from Gary Ryan explaining his findings.

If we can be of any further assistance, please let us know.

Sincerely,

L.E. Haynes

C/Mr. H.C. Taylor
Mr. B.R. Davis

Complaint

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

August 20, 1993

Office of
CONSUMER RELATIONS

MR DUANE E WAMPLES
232 W MAIN AVE
MYERSTOWN PA 17067

Dear Mr. Wamples:

It was good of you to take the time to let us know in your recent letter that you encountered a problem of foreign material with a can of our Kodiak wintergreen-flavored smokeless tobacco. It is only when customers like you have the interest to call problems to our attention that we can correct them. You can be assured that your letter will be turned over to our quality control manager.

Supplying only a product meeting the highest quality standards is our number one goal at all times. To ensure this high quality, Kodiak is made from a blend of the finest tobaccos selected by experts. Special leaf processing machines and highly skilled tobacco graders inspect the tobacco to ensure that you receive a good, clean product, free of any foreign objects.

We take pride in providing our customers with the highest quality tobacco products on the market, and are continually making improvements to make them even better.

We thank you for your interest in Kodiak and sincerely hope we can warrant your business for many years to come. As a small token of our appreciation for your taking the time to write, I have sent, under separate cover, two complimentary cans for your enjoyment. Please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

DEFENDANT'S EXHIBIT 4307

Confidential

CWD1037003691

Dear Person's

I felt I should send back this Kodiak package. Inside you will find what appears to be a finger nail. After seeing this I could not finish This can of snuff.

I thought you would be interested, so you may investigate into how this may have happened in the refining or packaging proceedure

Sincerly a;
Kodiak enjoyer

Duane E. Wamplers
232 W. Main Ave
Myerstown PA. 17067

Confidential

CUSTOMER LETTER CODE FORM

Form Letter Code: 35A ____ ____

Product: Kodiak

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: 2 pouch/(can) _____ carton _____ case

Changes:

Insert the _____¶ of letter _____ between ¶'s _____

and _____. Bumper Sticker

_____

_____

Other: _____

_____

_____

Note to SLSM: Code #_____ Sls _____

DSM-_____ RSM-_____

Confidential

Complaint

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

January 26, 1993

MR JASON GREER
8788 W CO RD 400 N
MIDDLETON IN 47356

Dear Mr. Greer:

It was good of you to take the time to let us know in your recent letter that you encountered a problem of foreign material with a can of our Kodiak Straight smokeless tobacco. It is only when customers like you have the interest to call problems to our attention that we can correct them. You can be assured that your letter will be turned over to our quality control manager.

Supplying only a product meeting the highest quality standards is our number one goal at all times. To ensure this high quality, Kodiak Straight is made from a blend of the finest tobaccos selected by experts. Special leaf processing machines and highly skilled tobacco graders inspect the tobacco to ensure that you receive a good, clean product, free of any foreign objects.

We take pride in providing our customers with the highest quality tobacco products on the market, and are continually making improvements to make them even better.

We thank you for your interest in Kodiak Straight and sincerely hope we can warrant your business for many years to come. As a small token of our appreciation for your taking the time to write, I have sent, under separate cover, two complimentary cans for your enjoyment. Please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

DEFENDANT'S EXHIBIT 4308

JAN 11

Dear Sirs

Enclosed please find a container of Indian complete with free rat hair.

Imagine the look on my face when I opened a brand new container and found the surprise gift! I have used your product for several years and will probably continue to do so (against the wishes of my stomach) after this. It would be advisable to show this to your sleeping quality control people.

Jason Greer
3788 W. Co Rd 400 N
Middletown, In
47356

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

March 22, 1993

Office of
CONSUMER RELATIONS

MR RICK GOORSKY
219 S HELENA
ARLINGTON HTS IL 60005

Dear Mr. Goorsky:

It was good of you to take the time to let us know in your recent letter that you encountered a problem of foreign material with a can of our Kodiak wintergreen-flavored smokeless tobacco. It is only when customers like you have the interest to call problems to our attention that we can correct them. You can be assured that your letter will be turned over to our quality control manager.

Supplying only a product meeting the highest quality standards is our number one goal at all times. To ensure this high quality, Kodiak is made from a blend of the finest tobaccos selected by experts. Special leaf processing machines and highly skilled tobacco graders inspect the tobacco to ensure that you receive a good, clean product, free of any foreign objects.

We take pride in providing our customers with the highest quality tobacco products on the market, and are continually making improvements to make them even better.

We thank you for your interest in Kodiak and sincerely hope we can warrant your business for many years to come. As a small token of our appreciation for your taking the time to write, I have sent, under separate cover, two complimentary cans for your enjoyment. Please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

PENCAD-Bayonne, N. J.
DEFENDANT'S EXHIBIT
4309

CUSTOMER LETTER CODE FORM

Form Letter Code: 35A. ____ ____

Product: Kodiak

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: 2 pouch (can) ____ carton ____ case

Changes:

Insert the ____ ¶ of letter ____ between ¶'s ____

and ____. Bumper Sticker

_____

_____

Other: _____

_____

_____

Note to SLSM: Code #____ Sls _____

DSM-_____ RSM-_____

Confidential

Unpublished

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

March 9, 1993

Office of
CONSUMER RELATIONS

MR PATRICK G HALE
2215 MELODY DRIVE
JEFFERSON CITY MO 65109

Dear Mr. Hale:

It was good of you to take the time to let us know in your recent letter that you encountered a problem of foreign material with a can of our Kodiak wintergreen-flavored smokeless tobacco. It is only when customers like you have the interest to call problems to our attention that we can correct them. You can be assured that your letter will be turned over to our quality control manager.

Supplying only a product meeting the highest quality standards is our number one goal at all times. To ensure this high quality, Kodiak is made from a blend of the finest tobaccos selected by experts. Special leaf processing machines and highly skilled tobacco graders inspect the tobacco to ensure that you receive a good, clean product, free of any foreign objects.

We take pride in providing our customers with the highest quality tobacco products on the market, and are continually making improvements to make them even better.

We thank you for your interest in Kodiak and sincerely hope we can warrant your business for many years to come. As a small token of our appreciation for your taking the time to write, I have sent, under separate cover, two complimentary cans for your enjoyment. Please allow a few weeks for delivery.

Sincerely,

Tommy H Combs

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

PENGAD-Bayonne, N. J.
DEFENDANT'S EXHIBIT
4310

March 5, 1993

Conwood Company, L.P.
Memphis, TN 38101

Gentlemen:

My name is Patrick Hale. I'm an avid chewer of Kodiak snuff and have been chewing this product for approximately 10 years. I average a can a day. I am a vendor for Central Dairy Company of this city. Today while I was on my route and just finished eating my lunch and my mouth was watering for a chew of Kodiak, like it always does, (I opened a new can of Kodiak this morning and had two chews out of the can) but when I reached for my third, I felt something in the bottom of my can of Kodiak. I dug around and found this horrifying object. I still don't know what it is. That's why I'm sending it to you. Hopefully I won't find objects like this anymore or I'll be forced to switch brands of snuff.

Sincerely,

Patrick Hale

Patrick G. Hale
2215 Melody Drive
Jefferson City, MO 65109
(314) 636-4740

CUSTOMER LETTER CODE FORM

Form Letter Code: 35A. ____ ____

Product: Kodiak

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: 2 pouch/(can) ____ carton ____ case

Changes:

Insert the ____¶ of letter ____ between ¶'s ____

and ____. Send bumper Stickers & Pin

_____

_____

Other: _____

_____

_____

Note to SLSM: Code #____ SIs _____

DSM-_____ RSM-_____

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

Office of
CONSUMER RELATIONS

July 1, 1993

MR JOHN FRITZE
RED BAND MOTORS
P O BOX 227
HOWELL MI 48844

Dear Mr. Fritze:

It was good of you to take the time to let us know in your recent letter that you encountered a problem of foreign material with a can of our Kodiak wintergreen-flavored smokeless tobacco. It is only when customers like you have the interest to call problems to our attention that we can correct them. You can be assured that your letter will be turned over to our quality control manager.

Supplying only a product meeting the highest quality standards is our number one goal at all times. To ensure this high quality, Kodiak is made from a blend of the finest tobaccos selected by experts. Special leaf processing machines and highly skilled tobacco graders inspect the tobacco to ensure that you receive a good, clean product, free of any foreign objects.

We take pride in providing our customers with the highest quality tobacco products on the market, and are continually making improvements to make them even better.

We thank you for your interest in Kodiak and sincerely hope we can warrant your business for many years to come. As a small token of our appreciation for your taking the time to write, I have sent, under separate cover, two complimentary cans for your enjoyment. Please allow a few weeks for delivery.

Sincerely,

Ted R. Coatney

Ted R. Coatney
Assistant Product Manager
Tobacco Products

TRC:gt

DEFENDANT'S EXHIBIT 4311
FENICAD-Bayonne, N. J.

To whom it may Concern: 6-15-93

I recently purchased a can of your Wintergreen Flavored Kodiak product and to my Disnay I Found a Fingernail lying Inside Among The Tabacco. Ive been using this brand for years now and now I Find myself going through each can before I Even Think ~~of~~ Taking a Dip. Im not trying To sound boge but I do Think This matter should be looked into unless youve had this complaint before. especially when Im now paying 2.60 a CAN

I would Appreciate a Response To this letter!!

PS: I Threw The Nail away along with The whole can.

Sincerly
John Fritze
John Fritze

ROADWAY
Working Expressly for You

SP-120

CUSTOMER LETTER CODE FORM

Form Letter Code: 35A ____ ____

Product: Kodiak

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: 2 pouch (can) ____ carton ____ case

Changes:

Insert the ____¶ of letter ____ between ¶'s ____

and ____. Bumper Sticker

_____

_____

Other: _____

_____

_____

Note to SLSM: Code #____ Sls _____

DSM-_____ RSM-_____

Complaint Record

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

November 1, 1996

Office of
CONSUMER RELATIONS

MR DENNIS NEVINS
4217 WEST CO RD 1200 NORTH
BRAZIL IN 47834

Dear Mr. Nevins:

Thank you for your letter describing the problem you have recently encountered with our Kodiak. We appreciate your taking the time to let us know that this has occurred so we can correct the problem.

Your letter is being forwarded to the people in our company who are responsible for manufacturing and quality control, and they will investigate this complaint thoroughly.

Our company realizes the importance of supplying our customers with only the cleanest, best tasting tobacco that money can buy; therefore, we are constantly striving for quality improvements. When a complaint like yours is brought to our attention, we can take immediate steps to correct the problem.

I am also asking our sales representative to contact you concerning this problem. Please save any unused portion of this product for our representative so he may forward a sample to me.

As a small token of our appreciation for your interest, we are sending you a complimentary package of Kodiak for your enjoyment. This is being sent under separate cover; please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

C: C. D. Wickman, Glenn O'Neal, Terry Williams

Dear Mr. Wickman:

Please contact this consumer immediately in regard to the problem he has experienced. Be sure to pick up unused portion of the tobacco this consumer has described and record any comments that the consumer has to make in regard to the complaint. This should be forwarded to my attention as soon as possible. Please advise when this has had your attention. Thank you.

PENGAD-Bayonne, N. J.
DEFENDANT'S EXHIBIT
4312

26 October, 1996

Dear Sir/Ma'am;

I am a long time user of your KODIAK brand wintergreen smokeless tobacco. I have used this brand with total satisfaction for ten years now. None of the other brands of wintergreen smokeless have as good a flavor or texture, or satisfy as well.

However, today I found what appeared to be part of a worm in my can of KODIAK. Now, I am a farmer and necessarily not squeamish, but I found this just a bit disagreeable. Knowing as I do where tobacco comes from, I can see the possibility of this happening. Nonetheless, maybe a little more care needs to be taken in the sorting process.

Now before you get alarmed, I don't want any compensation, and am not going to sue anyone. Personally, I consider people who react to everything with a lawsuit or a demand for money to be crazy as a pet 'coon and good candidates for the loony bin. I just wanted to bring a potential problem to your attention.

Thank you for your kind consideration.

Cordially,
Dennis Nevins, Brazil, IN.

Dennis

RECEIVED
OCT 31 1996

Confidential

CUSTOMER LETTER CODE FORM

Form Letter Code: 32A ____ ____ ____

Product: Kodiak

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: 2 pouch/(can) ____ carton ____ case

Changes:

Insert the ____ ¶ of letter ____ between ¶'s ____

and ____. Bumper Sticker

Other: _____

Note to SLSM: Code #5A. SIs C.D. Wickware

DSM- Glen O'Neal RSM- T. Williams

Brazil, Dr. Clay

3-35-93

Confidential

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

November 1, 1996

Office of
CONSUMER RELATIONS

MR DENNIS NEVINS
4217 WEST CO RD 1200 NORTH
BRAZIL IN 47834

Dear Mr. Nevins:

Thank you for your letter describing the problem you have recently encountered with our Kodiak. We appreciate your taking the time to let us know that this has occurred so we can correct the probiem.

Your letter is being forwarded to the people in our company who are responsible for manufacturing and quality control, and they will investigate this complaint thoroughly.

Our company realizes the importance of supplying our customers with only the cleanest, best tasting tobacco that money can buy; therefore, we are constantly striving for quality improvements. When a complaint like yours is brought to our attention, we can take immediate steps to correct the problem.

I am also asking our sales representative to contact you concerning this problem. Please save any unused portion of this product for our representative so he may forward a sample to me.

As a small token of our appreciation for your interest, we are sending you a complimentary package of Kodiak for your enjoyment. This is being sent under separate cover; please allow a few weeks for delivery.

Sincerely,

Tommy - Chuck was able to get Kodiak samples to this man and apologized for the problem. The man seemed very satisfied!

Thanks,
Glenn O'Neal

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

C: C. D. Wickman, Glenn O'Neal, Terry Williams

Dear Mr. Wickman:

Please contact this consumer immediately in regard to the problem he has experienced. Be sure to pick up unused portion of the tobacco this consumer has described and record any comments that the consumer has to make in regard to the complaint. This should be forwarded to my attention as soon as possible. Please advise when this has had your attention. Thank you.

Complaint
Baumgarten

Conwood Sales Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

Office of
CONSUMER RELATIONS

February 3, 1997

MR KEVIN BAUMGARTEN
236 OAKHILL ST
MICHIGAN STATE UNIVERSITY
EAST LANSING MI 48823

Dear Mr. Baumgarten:

Thank you for your letter describing the problem you have recently encountered with our Kodiak. We appreciate your taking the time to let us know that this has occurred so we can correct the problem.

Your letter is being forwarded to the people in our company who are responsible for manufacturing and quality control, and they will investigate this complaint thoroughly.

Our company realizes the importance of supplying our customers with only the cleanest, best tasting tobacco that money can buy; therefore, we are constantly striving for quality improvements. When a complaint like yours is brought to our attention, we can take immediate steps to correct the problem.

I am also asking our sales representative to contact you concerning this problem. Please save any unused portion of this product for our representative so he may forward a sample to me.

As a small token of our appreciation for your interest, we are sending you a complimentary package of Kodiak for your enjoyment. This is being sent under separate cover; please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

C: J. M. Elliot, G. P. Ellis, W. P. Ludwig

Dear Mr. Elliot:

Please contact this consumer immediately in regard to the problem he has experienced. Be sure to pick up unused portion of the tobacco this consumer has described and record any comments that the consumer has to make in regard to the complaint. This should be forwarded to my attention as soon as possible. Please advise when this has had your attention. Thank you.

DEFENDANT'S EXHIBIT
4313

DEAR KODIAK DIVISION - CONWOOD COMPANY,

I AM A 22 YEAR OLD COLLEGE STUDENT AND A FOUR YEAR LOYAL USER OF YOUR PRODUCT. I HAVE BEEN VERY SATISFIED WITH YOUR PRODUCT IN THE PAST, BUT RECENTLY I HAVE COME ACROSS 4 OR 5 CANS THAT WERE FULL OF STEMS, DRY AND UNFLAVORFUL! I NEVER TOOK THE TIME TO WRITE UNTIL NOW, I AM VERY DISPLEASED AND QUESTION MY FURTHER USE OF YOUR PRODUCT.

YOU HAVE RECENTLY CHANGE THE SERIAL CODE ON THE BOTTOM OF YOUR CANS. CAN YOU EXPLAIN THIS CODE, AND DOES IT HAVE ANYTHING TO DO WITH THE CUT OR MOISTURE CONTENT OF THE CAN?

I WOULD APPRECIATE YOUR RESPONSE TO MY QUESTIONS.. I FEEL MY FRIENDS AND I DESERVE SOME ANSWERS!

THANK YOU,

A FEW CONCERNED CHEWERS

Kevin Baughn
Todd Lucas
Adam Cowell

P.S.. HERE ARE SOME SERIAL CODES FROM NOT SATISFACTORY CANS: 110M6, N16M6

FROM THE DESK OF...

Carla Martz

Eddie White (SLS)

Cougar – Full Flavor purchased
Strong Amonia Smell
Caused Blisters in one man's mouth.

Linda Kauffman
P. O. Box 248
Christoval, TX 76935
915/255-2519

BATCH 110A7
210A7

Conwood Company, L.P.

813 RIDGE LAKE BLVD. • MEMPHIS, TENNESSEE 38120 • 901/761-2050

DEFENDANT'S EXHIBIT 4314

Complaint Kauffman

OFFICE OF CONSUMER RELATIONS

Route to:	Please return within two weeks of date.
☐ Legal _____ ☐ Manufacturing _____ ☐ Q. Control _____ ☐ Sales National _____ ☐ ☐ ☐ From: ☐ THC ☐	Action Taken: _____ _____ _____ _____ _____ _____

Date: February 20, 1997

Consumer Name: Linda Kauffman

Address: P O Box 298

City, State & Zip Code: Christoval, TX 76935

Telephone Number: 915/255-2519

Received Product 2/24/97 Ack to Consumer

Are You of Legal Age (over age 18) to Purchase Smokeless Tobacco Products?: Yes

Complaint: Purchased some Cougar Full Flavor for some friends. The Cougar had a strong ammonia smell and caused blisters in one man's mouth. Ms. Kauffman came in a store to return this tobacco and it just so happened that our rep, Eddie White, was in the store at the time. Eddie handled the situation and replaced to tobacco for her and she seemed satisfied. Eddie is returning the tobacco to Tommy Comb's attention. The batch numbers were 110A7 and 210A7.

Inquiry:

Information taken by: Carla Martz

RSM: _____ DSM: _____ SLS: _____

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

February 10, 1993

MR DARRELL SHULER
RT 1 BOX 256
THOMASVILLE NC 27360

Dear Mr. Shuler:

Thank you for your letter regarding the problem you encountered with our chewing tobacco. Complaints are quite disturbing; however, we sincerely appreciate the interest you have shown by bringing this problem to our attention.

We certainly regret that you experienced a problem with stems in our tobacco. Your complaint has been forwarded to our Quality Control Department. We use both special leaf processing machines and highly skilled tobacco graders to remove stems. We are continuing to take every practical measure possible to eliminate this problem. We want you know that we will do our best to see that the tobacco you receive is as free of stems as we can possibly make it.

We believe that our experience over many years in the tobacco industry justifies our belief that we produce the highest quality tobacco products available. We are, nevertheless, continually reevaluating and upgrading our quality control program. Reports from consumers like you are of great assistance in this effort.

If you will be kind enough to write us again and tell us which of our tobacco brands you were referring to in your letter, we will be happy to send you some complimentary samples of that brand. Your comments are always welcomed.

Sincerely,

Kenneth R. Schultz
Product Manager
Tobacco Products

KRS:gt

DEFENDANT'S EXHIBIT 4315

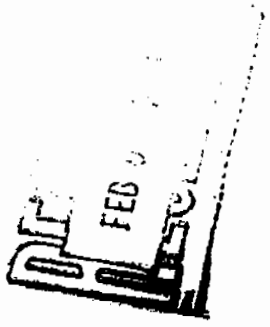
COMPLAINT: STEMS
BRAND: NO NAME
REC'D 2/5/93

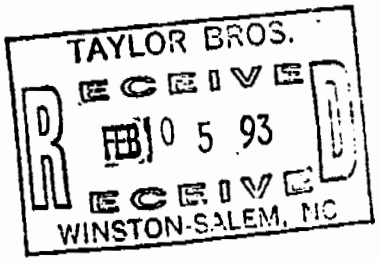
To Whom it may concern:

I really hate to bother you with this problem, but with the cost of tobacco and everything else going up, I think you really need to know. enclosed is a large stem, that is to big to be packaged. I have also found strings and twine, hair ect in this product before. Please check your product a little closer. Do you ever have any discount coupons or something.

Thank you very much

DARRell Shuler
Rt 1 Box 256
Thomasville, N.C.
27360





CUSTOMER LETTER CODE FORM

Form Letter Code: 11A ___ ___ ___

Product: ?

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: _____ pouch/can _____ carton _____ case

Changes:

Insert the _____ ¶ of letter _____ between ¶'s _____

___ and ____. omit last paragraph and

___ Replace with letter 45A.

___ _____

___ Other: _____

___ _____

___ _____

___ Note to SLSM: Code #_____ Sls _____

___ DSM-_____ RSM-_____

Confidential

Conwood Sales Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

Office of
CONSUMER RELATIONS

February 21, 1997

MR ERIC W OWEN
10 PENSTEMON
LITTLETON CO 80127

Dear Mr.Owen:

Thank you for your letter describing the problem you have recently encountered with our Hawken moist smokeless tobacco. We appreciate your taking the time to let us know that this has occurred so we can correct the problem.

Your letter is being forwarded to the people in our company who are responsible for manufacturing and quality control, and they will investigate this complaint thoroughly.

Our company realizes the importance of supplying our customers with only the cleanest, best tasting tobacco that money can buy; therefore, we are constantly striving for quality improvements. When a complaint like yours is brought to our attention, we can take immediate steps to correct the problem.

As a small token of our appreciation for your interest, we are sending you a complimentary package of Hawken for your enjoyment. This is being sent under separate cover; please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

DEFENDANT'S EXHIBIT 4316

ERIC W. OWEN

February 12, 1997

Conwood Company, L.P.
Memphis, TN 38101

Dear Customer Service:

As a devoted Hawken user, I have been disturbed as of late to find an increasing amount of course stem and other "woody" material in your product. I'm not sure that this is the correct channel for expressing this concern, but I felt someone needed to know.

Sincerely,

Eric W. Owen

RECEIVED
FEB 18 1997

10 PENSTEMON • LITTLETON, CO • 80127
PHONE: 303-978-9041

Quinter

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

May 23, 1996

Office of
CONSUMER RELATIONS

MR STEVE QUINTER
309 BRIARWOOD DR
COLDWATER OH 45828

Dear Mr. Quinter:

It was good of you to take the time to let us know in your recent letter of the problem you encountered with a partially-filled can of Kodiak wintergreen-flavored smokeless tobacco. It is only when customers like you have the interest to call problems to our attention that we can correct them, and you can be assured that your letter will be turned over to our quality control manager.

Supplying only a product meeting the highest quality standards is our number one goal at all times. To ensure this high quality, each can of Kodiak is weighed on highly accurate electronic scales to ensure that the weight is correct. All cans should contain 1.2 ounces of tobacco, but some settling may occur in shipping.

If you still have the can in your possession, please forward it to my attention. Also, if this should occur again in the future, please send the can in question to me and it will be forwarded to our quality control manager.

We take pride in providing our customers with the highest quality tobacco products on the market, and are continually making improvements to make them even better.

We thank you for your interest in Kodiak and sincerely hope we can warrant your business for many years to come. As a small token of our appreciation for your taking the time to write, I have sent, under separate cover, two complimentary cans for your enjoyment. Please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

DEFENDANT'S EXHIBIT
4317

RECEIVE

MAY 15 199

Dear Kodiak

I am an eighteen year old Senior From Coldwater High School.

I've enjoyed your product For about three years now and lately I've noticed that the cans havent been as full as usual. I've also notices that there have been bigger stems and the product hasnt been as moist as usual.

I expect that you will work harder on your quality control oF the product.

Thanks For taking time out oF your busy day to read my letter.

Sincerely
Steve Quinten

Confidential

CUSTOMER LETTER CODE FORM

Form Letter Code: 33A

Product: Kodiak

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: 2 pouch/(can) _____ carton _____ case

Changes:

Insert the _____ ¶ of letter _____ between ¶'s _____

___ and _____. Bumper Sticker

___ _____

___ _____

___ Other: _____

___ _____

___ _____

___ Note to SLSM: Code #_____ Sls _____

___ DSM-_____ RSM-_____

Sceurman

Conwood Sales Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

Office of
CONSUMER RELATIONS

February 21, 1997

MR JOSEPH SCEURMAN
VTR CAPITAL INC
11000 PROSPERITY FARMS RD SUITE 200
PALM BEACH GARDENS FL 33410

Dear Mr. Sceurman:

It was good of you to take the time to let us know in your recent letter that you encountered a problem of foreign material with a can of our Kodiak wintergreen-flavored smokeless tobacco. It is only when customers like you have the interest to call problems to our attention that we can correct them. You can be assured that your letter will be turned over to our quality control manager.

Supplying only a product meeting the highest quality standards is our number one goal at all times. To ensure this high quality, Kodiak is made from a blend of the finest tobaccos selected by experts. Special leaf processing machines and highly skilled tobacco graders inspect the tobacco to ensure that you receive a good, clean product, free of any foreign objects.

We take pride in providing our customers with the highest quality tobacco products on the market, and are continually making improvements to make them even better.

We thank you for your interest in Kodiak and sincerely hope we can warrant your business for many years to come. As a small token of our appreciation for your taking the time to write, I have sent, under separate cover, two complimentary cans for your enjoyment. Please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

DEFENDANT'S EXHIBIT
4318

To Whom it May Concern:

My name is Joseph Scourman and I have been a loyal patron of your products for years. Never have I experienced the low level of quality as when the enclosed "twig" pierced my lip. As a result of your product, I have been thoroughly turned off.

I have no intentions of not using snuff in the future but will be looking for alternatives to your product.

I hope this letter helps you better serve your future patrons in the future and look forward to hearing your response.

Joseph W Scourman

CUSTOMER LETTER CODE FORM

Form Letter Code: 35A. ___ ___ ___ ___

Product: Kodiak

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: 2 pouch (can) ____ carton _____ case

Changes:

Insert the _____¶ of letter _____ between ¶'s _____

and _____. _____

_____

_____

Other: _____

_____

_____

Note to SLSM: Code #_____ SIs _____

DSM-_____ RSM-_____

Confidential

Complaint - LaFrancois

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

Office of
CONSUMER RELATIONS

March 26, 1996

MR SCOTT LAFRANCOIS
P O BOX 501
EAST DORSET VT 05253

Dear Mr. LaFrancois:

Thank you for your letter describing the problem you have recently encountered with our Kodiak moist smokeless tobacco. We appreciate your taking the time to let us know that this has occurred so we can correct the problem.

Your letter is being forwarded to the people in our company who are responsible for manufacturing and quality control, and they will investigate this complaint thoroughly.

Our company realizes the importance of supplying our customers with only the cleanest, best tasting tobacco that money can buy; therefore, we are constantly striving for quality improvements. When a complaint like yours is brought to our attention, we can take immediate steps to correct the problem.

As a small token of our appreciation for your interest, we are sending you a complimentary package of Kodiak for your enjoyment. This is being sent under separate cover; please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

DEFENDANT'S EXHIBIT 4319

ECEIVE
MAR 20 199
d.....

Scott LaFrancois
Po Box 501 E. Dorset VT
MARch 9, 1996

Conwood Company, L.P.
Memphis, TN 38101

To Whom It My Concern,

I have Been useing your product Kodiak, for ten years. Up until Now I have never had a problem with it. Lately the Cut of the toBacco has Not Been real good. Im finding Stick Like pieces. I dont know If it BAd TOBACCO or BAd quality Control. Im Just hopeing That this proBlem CAN Be Corrected.

Im Not trying to Be a Complainer I Just WANT you to know Their is a proBlem. I Like yourproduct amd I would Like to Continue To use it.

Thank you very much for taking Time to Read my letter.

Sincerly Yours
Scott Lafrancois

CUSTOMER LETTER CODE FORM

Form Letter Code: 31A ____ ____

Product: Kodiak

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: 2 pouch/can ____ carton ____ case

Changes:

Insert the ____¶ of letter ____ between ¶'s ____

and ____. Bumper Sticker

_____

_____

Other: _____

_____

_____

Note to SLSM: Code #____ SIs _____

DSM-_____ RSM-_____

dential

5/19/93

RECEIVED
MAY 24 1993

Sir,

For the past six years I have used Kodiak long cut straight snuff. I use approximately a sleeve every other week. Last week I purchased a sleeve from Food Lion (best price) that had 6-15 pieces per can of what appeared to be wood. Experienced discomfort to say the least from dipping, would like to have this sleeve replaced The # on the bottom of the cans were 2 A23 B6

Sincerely yours
G. Duane Blanks

Gerald Duane Blanks
Rt. 1 Box 1745
Spout Spring, Va. 24593
DOB 11/26/62
Telephone # (804) 352-5770

CUSTOMER LETTER CODE FORM

Form Letter Code: 32A ___ ___

Product: Kodiak Longcut Straight

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: 2 pouch (can) ___ carton ___ case

Changes:

Insert the ___ ¶ of letter ___ between ¶'s ___

___ and ___. Bumper Sticker

___ _____

___ _____

___ Other: _____

___ _____

___ _____

___ Note to SLSM: Code # 5A SIs L. E. Steele

___ DSM- Open RSM- T. W. Williams

Spout Spring VA - Appomattox

3-28-88

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

Larry E. Steele
P.O. Box 11112
Lynchburg, Va. 24506

June 12, 1996

Mr. Tommy Combs
Senior Product Manager
Tobacco Products
P.O. Box 217
Memphis, TN 38101

Dear Mr. Combs,

This is a written follow-up to our telephone conversation on Tuesday, June 11, 1996. This is in reference to your letter dated May 30, 1996 regarding a consumer complaint. The consumer's name is Mr. Gerald Duane Blanks, Rte. 1 Box 1745, Spout Spring, Va.

I contacted Mr. Blanks by telephone on June 5, 1996 and visited with him on Monday, June 10, 1996. Mr. Blanks told me that there were some small pieces of what appeared to be wood mixed in with the snuff. He said that it caused some discomfort, but he really did not pay much attention to it until the last can. He said that this can had a couple of pieces that were approximately one half of an inch long and one quarter of an inch wide. That was when he decided to write his letter of complaint. He discarded all but one can, which I am forwarding to you. He said that he sent in the two pieces of wood in a plastic bag along with his letter to Memphis.

I gave Mr. Blanks some samples and he was very appreciative. He said that he was not upset with Conwood, just concerned with the problem and thought Conwood would like to know. He assured me that he will continue to use Kodiak Straight and enjoys it greatly.

This was a very pleasant conversation.

Sincerely,

Larry Steele

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

Office of
CONSUMER RELATIONS

May 24, 1994

MS CASSY M SICKLES AND MR JOHN PECK
P O BOX 423
STRAWBERRY PT LA 52076

Dear Ms. Sickles and Mr Peck:

Thank you for your letter describing the problem you have recently encountered with our Kodiak moist smokeless tobacco. We appreciate your taking the time to let us know that this has occurred so we can correct the problem.

Your letter is being forwarded to the people in our company who are responsible for manufacturing and quality control, and they will investigate this complaint thoroughly.

Our company realizes the importance of supplying our customers with only the cleanest, best tasting tobacco that money can buy; therefore, we are constantly striving for quality improvements. When a complaint like yours is brought to our attention, we can take immediate steps to correct the problem.

As a small token of our appreciation for your interest, we are sending you a complimentary package of Kodiak for your enjoyment. This is being sent under separate cover; please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

DEFENDANT'S EXHIBIT
4321

RECEIVED
MAY 20 1994
Ins'd.....

May 12, 1994

To Whom It May Concern;

I am writing on behalf of myself, and my boyfriend. He chews 3-4 cans of Kodiak a week. He has done this for the past six years.

Up until now Kodiak has been a good brand. His last three cans has had substances like twigs in them. It tears his inner lip and hurts. We have purchased four cans in the past day and a half. I am very disappointed. We consider our-selves valued customers, and are very let down.

Please respond soon!

Cappy M. Sickler
John Peck

Kodiak
wintergreen flavored
smokeless tobacco
net wt. 1.2 oz.
IIIIII 422941
(bottom of can) 1 D31C4

BOUGHTEN AT: Pronto
Strawberry Pt. IA
52076

CUSTOMER LETTER CODE FORM

Form Letter Code: 31A ____ ____

Product: Kodiak

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: 2 pouch/can ____ carton ____ case

Changes:

Insert the ____ ¶ of letter ____ between ¶'s ____

and ____. Bumper Sticker

_____

_____

Other: _____

_____

_____

Note to SLSM: Code #____ Sls _____

DSM-_____ RSM-_____

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

Office of
CONSUMER RELATIONS

July 15, 1996

MR JASON DIXON
6875 S W PRICESS AVE
BEAVERTON OR 97008

Dear Mr. Dixon:

It was good of you to take the time to let us know in your recent letter that you encountered a problem of foreign material with a can of our Kodiak wintergreen-flavored smokeless tobacco. It is only when customers like you have the interest to call problems to our attention that we can correct them. You can be assured that your letter will be turned over to our quality control manager.

Supplying only a product meeting the highest quality standards is our number one goal at all times. To ensure this high quality, Kodiak is made from a blend of the finest tobaccos selected by experts. Special leaf processing machines and highly skilled tobacco graders inspect the tobacco to ensure that you receive a good, clean product, free of any foreign objects.

We take pride in providing our customers with the highest quality tobacco products on the market, and are continually making improvements to make them even better.

We thank you for your interest in Kodiak and sincerely hope we can warrant your business for many years to come. As a small token of our appreciation for your taking the time to write, I have sent, under separate cover, two complimentary cans for your enjoyment. Please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

DEFENDANT'S EXHIBIT
4322

ECEIVE
JL 10 199
's'd.....

Jason Dixon
6875 S.W.Princess Ave.
Beaverton,Ore 97008

To Conwood Company,

I am a long time user of your product, Kodiak smokeless tobacco, and I don't usually complain but I feel a need to here. Enclosed is a sharp stick found in my can of tobacco that cut my lip pretty good. I know that sometimes things get by but this is the second time its happened with in a month. I don't know if the cans serial number will help in solving the problem I've never had a problem before with your product, I hope I just got a couple of unlucky cans. serial # :422941

Sincerely,

Jason M. Dixon

CUSTOMER LETTER CODE FORM

Form Letter Code: 354. ____ ____

Product: Kodiak

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: 2 pouch (can) _____ carton _____ case

Changes:

Insert the _____ ¶ of letter _____ between ¶'s _____

and _____. Bumper Sticker

_____

_____

Other: _____

_____

_____

Note to SLSM: Code #_____ Sls _____

DSM-_____ RSM-_____

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

May 18, 1992

Mr. Dave Ganz
U.C. Forestry Camp
Meadow Valley, CA 95956

Dear Mr. Ganz:

We received your letter of May 11 concerning our Kodiak smokeless tobacco and we certainly appreciate your taking the time to write. It is always a pleasure to hear from one of our fine loyal customers like you.

I will attempt to answer the question you have posed regarding the contents of our Kodiak smokeless tobacco. While I am not familiar with all of the ingredients of Kodiak since the formulation is of a confidential nature, I can assure you that Kodiak contains no Fiberglas particles. Our manufacturing process consists of many stringent procedures to eliminate foreign materials. Our efforts, therefore, are directed toward removing foreign materials and certainly do not include the addition of any foreign materials.

I would be most appreciative if you could provide me with any information as to the original source of this rumor.

Again, I certainly want to stress to you that our Kodiak product does not contain Fiberglas and also, extend to you our appreciation for your loyalty and interest in Kodiak.

Sincerely,

Tommy H. Combs
Product Manager
Tobacco Products

THC:crm

DEFENDANT'S EXHIBIT 4323

Conwood Company, L.P.
813 Ridge Lake Blvd • P O Box 217 • Memphis, Tennessee 38101-0217
MEMPHIS, TN 381
PM
19 MAY
1992
TN
H METER 2383096
RETURN TO
DAVE GANZ
UC FORESTRY CAMP
MEADOW VALLY CA 95956

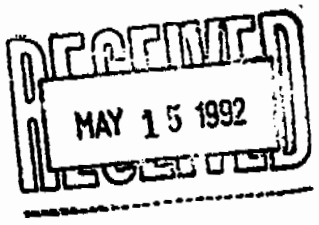
May 11, 1992

To whom it may concern,

Concerning your product "Kodiak Smokeless Tobacco", I was wondering what goes into each tin. I have an outstanding bet going with a friend that Kodiak contains fiberglass particles to enhance the chewing pleasure. We are very satisfied with your product, regardless of contents, but could you please help us solve this dispute? Also I am very pleased with the fullness of each tin, many other companies only partially fill the tins, ripping me off. Keep up the good work.

Thanks,

Dave Ganz
U.C. Forestry Camp
Meadow Valley, CA 95956



Ferrebee

Conwood Sales Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

Office of
CONSUMER RELATIONS

February 7, 1997

MR DAVID FERREBEE
404 SUMMERSET DR
WESTON MO 64098

Dear Mr. Ferrebee:

It was good of you to take the time to let us know in your recent letter that you encountered a problem of foreign material with a can of our Kodiak wintergreen-flavored smokeless tobacco. It is only when customers like you have the interest to call problems to our attention that we can correct them. You can be assured that your letter will be turned over to our quality control manager.

Supplying only a product meeting the highest quality standards is our number one goal at all times. To ensure this high quality, Kodiak is made from a blend of the finest tobaccos selected by experts. Special leaf processing machines and highly skilled tobacco graders inspect the tobacco to ensure that you receive a good, clean product, free of any foreign objects.

We take pride in providing our customers with the highest quality tobacco products on the market, and are continually making improvements to make them even better.

We thank you for your interest in Kodiak and sincerely hope we can warrant your business for many years to come. As a small token of our appreciation for your taking the time to write, I have sent, under separate cover, two complimentary cans for your enjoyment. Please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

DEFENDANT'S EXHIBIT 4324

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

October 21, 1992

MR TOM PERKINS
340 E BURKE #5
ARLINGTON WA 98223

Dear Mr. Perkins:

Thank you for your letter describing the problem you have recently encountered with our Kodiak. We appreciate very much your taking the time to let us know that this has occurred so that we can take the necessary steps to see that your problem will be corrected.

Your inquiry is being forwarded to the people in our company who are responsible for manufacturing and quality control, and they will investigate this complaint thoroughly.

Our company realizes the importance of supplying our customers with only the cleanest, best tasting product that money can buy; therefore, we are constantly striving for quality improvements. When a complaint like yours is brought to our attention, we can take immediate action to remedy the situation.

I am sorry to inform you that at this time we no longer have Kodiak Caps or T-Shirts available.

We do want to inform you that we may in the future be offering Kodiak promotional items, so please keep an eye out at your neighborhood store. We will place advertising materials near the merchandisers or shelves to promote the special offers.

I am also asking our sales representative to contact you concerning this problem. Please save any unused portion of this product for our representative so he may forward a sample to me.

As a small token of our appreciation for your interest, we are sending you a complimentary package of Kodiak for your enjoyment. This is being sent under separate cover; please allow a few weeks for delivery.

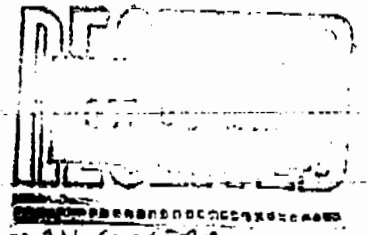
Sincerely,

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

(OVER)

DEFENDANT'S EXHIBIT 4325



9-26-92

TO WHOM IT MAY CONCERN,

I HAVE chewed KODIAK FOR 10 YEARS AND IT HAS ALWAYS BEEN the best there IS, MY FATHER HAS chewed KODIAK FOR AS LONG AS I CAN Remember. we both HAVE noticed LATELY that the snoose tastes AND smells LIKE FORMALDEHYDE. THIS is not ANY KIND OF ALLEGATION, I AM JUST concerned ABOUT WHAT HAPPENED to the WONDERFUL taste. MY DAD AND I ARE Both LOG TRUCK DRIVERS AND ALL OF OUR CO-WORKERS noticed this too. Some think maybe it's THE CAN OR maybe some TYPE OF PRESERVATIVE? Who knows - maybe someone could look INTO it. For us, it would BE Deeply APPRECIATED. I ALSO wondered IF you HAD ANY CATALOGS FOR T-SHIRTS AND HATS? IF NOT maybe send A PRICE FOR AN X-LARGE SHIRT ATLEAST! BE GLAD TO BUY one. THANK YOU FOR YOUR TIME.

SINCERELY,

Tom Perkins

ARLINGTON, WASHINGTON

"THE SNOOSE ARLINGTON MADE #1"

P.S. SORRY ABOUT the CRAYON MARKS - my 2 YEAR OLD is trying ART AS A new CAREER. HA. HA.

Confidential

CUSTOMER LETTER CODE FORM

TC 4410 10/5

Form Letter Code: 32A ___ ___

Product: Kodiak

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: 2 pouch/can ___ carton ___ case

Changes:

Insert the ___ ¶ of letter ___ between ¶'s ___ and ___. Insert between 3rd & 4th paragraphs ⇒ I am sorry to inform you that at this time we no longer have ~~other~~: Kodiak Caps or T-shirts available. We do want to inform you that we may in the future be offering kodiak promotional items, so

Note to SLSM: Code #5A SIs _____

DSM-_____ RSM-_____

Please keep an eye out at your neighborhood store. We will place advertising materials near the merchandisers or shelves to promote the special offers.

September 27, 1996

Keith Junot
P.O. Box 7
Scott, LA 70583-0007

Mr. Hardy Taylor
P.O. Box 217
Memphis, TN 38101

Dear Hardy:

On Thursday September 26, 1996, I got a call from Ken Washer, my DSM. He informed that Mr. Tommy Combs had contacted him about a compliant that he had received from a consumer. I took all the information and phoned that gentleman on Thursday night and spoke with him and set up a time to meet him on Friday morning.

I meet with Mr. Michael Bishop in his home town on Friday September 27, 1996. The complaint that he had was on Garrett Moist snuff. He had several cans that he had saved for me. The cans were coded 122H6. The product has a slight ammonia smell to them and the taste has a bad after taste. I took a dip out of some of the cans and confirmed that it did have a bad after taste. He claims that he has been having this problem for a little while. I am sending you one of the cans so the lab can run a test or do whatever they do to it, to help find the problem.

This man likes the product but, he does not like finding these problems. This is the second time this year that I have talked to this man about this problem.

He would like for the office to contact him and tell him what they have found. He does not know if it just a string of bad luck finding these cans or if his taste buds are failing him. I am sending you one of his business cards, in case Mr. Combs or you need to speak to him.

Sincerely;

Keith Junot
Lafayette, LA Territory
Shreveport District

cc: Ken Washer

April 23, 1996

Mr. Hardy Taylor
Conwood Company, L.P.
P.O. Box 217
Memphis, TN 38101

Re; Consumer complaint on Kodiak

Dear Hardy,

Today, I was making calls in Emmett Idaho, while making my first call a consumer came into the store and asked for a can of Kodiak. The store was out of stock and I told the consumer to hold up while I went to get a roll out of my van so the store would not lose the sale. When I came back in the store, the consumer asked me if I worked for Kodiak, which I replied I did. He said what great timing. He said he had purchased a can of Kodiak down the street at the Maverick Store yesterday. and took a chew and noticed that it didn't taste or smell the same as past cans. He said with in a few minutes, he felt something wasn't right with the can of chew so he proceeded to spit the chew out and became light headed and felt like he was going to get sick to his stomach. He said he took the can home and did not chew any more that day. He told me he had planned to send the can to us to see if there was a problem with the product and was wondering if we had changed the formulation on Kodiak. He proceeded to open the can of chew which he just purchased from this store I was in and didn't take a dip, but smelled it and said that it smells exactly the same as the can from yesterday that almost made him sick.

I asked him for the can he had purchased yesterday at Maverick and he said it was at home. I asked him if we could go get it and I would send it in and have it checked. He said he was on his way to Boise. I said I would really appreciate it if we could go to your home and pickup the can in question. I offered to drive him back to his house to get it and he said that was okay, he would run home and get it. He seemed as if he didn't want me to go with him, so I told him I would wait for him at this store and finish my call while he went and got the can of Kodiak. He was gone about five minutes and then returned with the can. I met him outside at my van and got the can. He wanted me to smell it and see if I could tell if something was wrong. I smelled it and did notice a different smell compared to the can he had just purchased, but I didn't let him know I thought anything was different between the two cans. He said it had a vitamin E type of smell to it. In smelling it I felt it had a strong ammonia smell to it, which I didn't smell in the other can. He was afraid to take a dip of the new can he had just purchased because he felt that both cans had the same smell. I opened up my van because I knew I had some saleable manufactured in January and

DEFENDANT'S EXHIBIT 4328

(con't)

opened up a can and had him see if he could tell the difference. He said the January product smelled right and then proceeded to take a dip and said now this is the Kodiak I'm used to. He said I think you guys have changed the formulation haven't you. I assured him we didn't change the formulation on Kodiak. I explained that Kodiak is the top selling Wintergreen and as the old saying goes "If it ain't broke don't fix it". I had about 6 cans of the January saleable and gave it all to him in exchange for the two cans in questions and for his troubles. I also gave him my business card and assured him that I would send the cans in question to our office today to have them checked out. I got his name, address and telephone number and also told him I would put a Kodiak T-Shirt and Coffee Mug in the mail to him.

Throughout this entire ordeal he was very pleasant and was not upset, just more concerned that maybe we had changed the formulation on Kodiak. He said he had chewed Kodiak for years and this was the first time he had ever had a can that made him feel sick. I told him I was not aware of any other consumer complaints but I appreciated him giving me the can and letting me now of his concern and I would defiantly send the product in today and have it checked out. I told him he had my name and number and if he had any further problems to please let me now.

His name, address and phone number is: Steve Kono, 2246 E Locust, Emmett Idaho, (208) 365-1582. I would say he was in his middle to late 40's in age and his demeanor was very pleasant and cooperative.

The can that he said made him almost sick to his stomach, I have placed a black X by the K in Kodiak on top of the can and the code on the bottom of the can reads 2 Y A28C6, the can he purchased today from stock I took into the store that he says smells the same, has a code of 2 Y B21C6. I'm also sending you a can of the same code as the 6 cans I gave him which he said was ok, and that code is 1 C31A6.

If you have or need any additional information, please let me know.

Sincerely,

Ed Caron III
Boise Territory

CONWOOD COMPANY, L.P.
COMPLAINT ANALYSIS REPORT

NUMBER :	169	**PRODUCT :**	Fine Cut
ITEM :	Cougar Natural		
CODE :	10A7	**DATE :**	970226
L. NAME :	Denson	**F. NAME :**	Clint
STREET :	P.O. Box 298	**CITY :**	Christoval
ST :	TX	**ZIP :**	76935

COMPLAINT : Customer complained that product had a strong ammonia smell, and alleged that product "caused sickness to stomach and some blisters on inside of mouth".

ANALYSIS : Analyzed retain samples from all batches packaged on 1-10-97 and four returned cans for pH, salt, ammonia, and qualitatively for flavor. All ingredients were within normal limits. Nicotine level indicated that tobacco blend was PVN.

REMARKS : Returned letters to Bill Rosson. Product retained by R&D Department.

ANALYST LL, MB **APPROVED** CV **DATE** 2-28-97

DIST. MGR'S. INITIALS/DATE

QUALITY CONTROL REPORT FORM

NWOOD SALES REPRESENTATIVE: Eddie White

Damaged Product (Marked "A") Cougar Full Flavor Size 1.2 oz Comparison Product (Marked "B")

. Code Date 110A7 210A7 Approximate date of consumer purchase 2-15-97

. Location of retailer San Angelo Tx Type of retail outlet Discount Tobacco Shop

. Monthly movement 8 rolls How often called on? once every 6 weeks

5. Nature of product failure Strong ammonia smell Quantity 3 rolls

6. Was product exposed to any contamination? No Explain

7. Was retail store air conditioned, open-air, etc.? Normal air temp

8. Was product in a carton ____, Loose on shelf ____, Or in a rack in pack and on shelf in roll

9. Has retail and supplying wholesale stock been rotated Yes

0. Consumer's comments Strong ammonia smell, caused sickness to stomach + some blisters on inside of mouth

1. Store Personnel's comments Exchanged product for Cougar w/ different batch #

CONWOOD representative's comments Picked up bad product + exchanged for different batch # Apologized to consumer + gave free samples for inconvenience.

3. Has movement decreased and if so, why? No.

ARKETING DEPARTMENT DATE RECEIVED

)ate forwarded to Production Department

)ate returned from Production Department and sent to Salesman

COMMENTS

PRODUCTION DEPARTMENT DATE RECEIVED

Analysis, comments and recommendation

Signed

ate returned to Marketing Department

(IF ADDITIONAL SPACE IS NEEDED, WRITE ON BACK)

HighlyConfidential

16diii004422

CWD1035000248

Name + address of Consumers who bought Cougar Full Flavor @ Smoker's Discount in San Angelo Tx.

P.O. Box 298
Christoval, TX
76935

CLAY Dorsey

* LINDA KAUFFMAN
915-255-2519

STRONG Ammonia
SMELL.

Batch # 210A7
110A7

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

September 23, 1992

MR JOHN CONROY II
4 COED LANE
FARMINGVILLE NY 11738

Dear Mr. Conroy:

Thank you for your letter describing the problem you have recently encountered with our Kodiak. We appreciate very much your taking the time to let us know that this has occurred so that we can take the necessary steps to see that your problem will be corrected.

Your inquiry is being forwarded to the people in our company who are responsible for manufacturing and quality control, and they will investigate this complaint thoroughly.

Our company realizes the importance of supplying our customers with only the cleanest, best tasting product that money can buy; therefore, we are constantly striving for quality improvements. When a complaint like yours is brought to our attention, we can take immediate action to remedy the situation.

I am also asking our sales representative to contact you concerning this problem. Please save any unused portion of this product for our representative so he may forward a sample to me.

As a small token of our appreciation for your interest, we are sending you a complimentary package of Kodiak for your enjoyment. This is being sent under separate cover; please allow a few weeks for delivery.

Sincerely,

Tommy H. Combs
Senior Product Manager
Tobacco Products

THC:gt

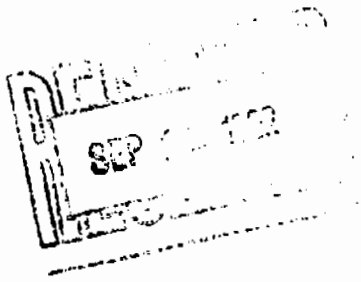
CC: A. M. Langhorne, J. B. Quirk, W. P. Ludwig

Dear Mr. Langhorne:

Would you please contact this consumer to assist in making the above brand available to him. Please advise when this matter has had your attention. Thank you.

DEFENDANT'S EXHIBIT 4329

4 Coed Lane
Farmingville, NY 11738-2202
September 7, 1992



Att: Management/Customer Service
Conwood Company, L.P.
Memphis, TN 38101

Dear Management:

A recent purchase of your Kodiak Wintergreen Smokeless Tobacco was quite disappointing. It was purchased about a month ago at the Seventh Street Stationary store in Garden City, Long Island. Unfortunately, I didn't get the lot number off the product.

Kodiak has been a brand favorite of mine for six years and I've always enjoyed the consistency in the product. This particular tin had it's seal intact, but upon opening it, I noticed it was only about three quarters full and smelled and tasted like rubbing alcohol.

Since distribution on Long Island is so limited, and just finding Kodiak is an accomplishment, then to have the tin I bought be so bad, I now consider purchasing one of the more widely available Skoal products.

Please be more attentive over quality control and try to increase distribution here on the island. Thank you for your time.

Sincerely,

John W. Conroy II

CUSTOMER LETTER CODE FORM

Form Letter Code: ~~35A~~ 32A

Product: Kodiak

Blank: (1) _____

(2) _____

(3) _____

(4) _____

Samples: 2 pouch/~~can~~ _____ carton _____ case

Changes:

Insert the _____ ¶ of letter _____ between ¶'s _____

and _____. _____

_____

_____

Other: A.M. Langhorne J.B. Quick
2C 4S
Millburn NJ West Chester PA
CAC-11 19382

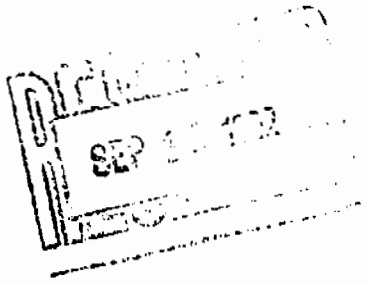
_____

Note to SLSM: Code #40A Sls A.M. Langhorne

DSM- J.B. Quick RSM- J.F. Pitbull
Jamesville, NY - Buffalo
2-29-97

4 Coed Lane
Farmingville, NY 11738-2202
September 7, 1992

Att: Management/Customer Service
Conwood Company, L.P.
Memphis, TN 38101



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Please be more attentive over quality control and try to increase distribution here on the island. Thank you for your time.

Sincerely,

John W. Conroy II

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

FOUR TIMES SQUARE
NEW YORK 10036-6522

TEL: (212) 735-3000
FAX: (212) 735-2000
http://www.skadden.com

DIRECT DIAL
(212) 735-2375

FIRM/AFFILIATE OFFICES
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RESTON
SAN FRANCISCO
WASHINGTON, D.C.
WILMINGTON
BEIJING
BRUSSELS
FRANKFURT
HONG KONG
LONDON
MOSCOW
PARIS
SINGAPORE
SYDNEY
TOKYO
TORONTO

February 15, 2000

By Federal Express

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq
Benjamin Powell, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Re: Conwood Company L.P., et al. v. U.S. Tobacco Co., et al.

Gentlemen:

Enclosed please find supplemental trial exhibits, marked for identification, as well as a non-filed copy of Defendants' supplemental trial exhibit list. A filed copy will follow in due course.

If you have any questions, please do not hesitate to call.

Very truly yours,

Chris T. Athanasia

RECEIVED
FEB 16 2000
By

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' SECOND SUPPLEMENTAL TRIAL EXHIBIT LIST

Defendants respectfully supplement their list of exhibits intended to be used at trial with the following list of exhibits marked for identification.

Respectfully submitted,

Dated: February 15, 2000

John S. Reed
Ridley M. Sandidge
Lynn K. Fieldhouse
REED WEITKAMP SCHELL
& VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Rachel A. Mariner
Chris T. Athanasia
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, New York 10036
(212) 735-3000

Counsel for Defendants

DEFENDANTS' SECOND SUPPLEMENTAL TRIAL EXHIBIT LIST

DX Number	Description	
4304	Conwood Sales Incentive Program	
4305	CWD 1001002044	CWD 1001002050
4306	CWD 1037194220	CWD 1037194221
4307	CWD 1037003691	CWD 1037003693
4308	CWD 1030032430	CWD 1030032432
4309	CWD 1030032438	CWD 1030032440
4310	CWD 1030032418	CWD 1030032420
4311	CWD 1037160582	CWD 1037160584
4312	CWD 1037201667	CWD 1037201670
4313	CWD 1037198894	CWD 1037198896
4314	CWD 1037195329	CWD 1037195328
4315	CWD 1030032127	CWD 1030032129
4316	CWD 1037194739	CWD 1037194741
4317	CWD 1037194814	CWD 1037194816
4318	CWD 1037194947	CWD 1037194949
4319	CWD 1037132899	CWD 1037132901
4320	CWD 1037193892	CWD 1037193895
4321	CWD 1037064141	CWD 1037064143
4322	CWD 1037194260	CWD 1037194262
4323	CWD 0100009741	CWD 0100009744
4324	CWD 1037194332	CWD 1037194334
4325	CWD 1037154228	CWD 1037154231

DEFENDANTS' SECOND SUPPLEMENTAL TRIAL EXHIBIT LIST

DX Number	Description	
4326	CWD 1226000407	CWD 1226000408
4327	CWD 1035000247	CWD 1035000249
4328	CWD 1035002013	CWD 1035002014
4329	CWD 1037175680	CWD 1037175684

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, on the 15th day of February, 2000.

L. K. Fieldhouse

Counsel for Defendants

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. — PLAINTIFFS

v. **MEMORANDUM, OPINION AND ORDER**

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC. — DEFENDANTS

INTRODUCTION

This antitrust case is before the court on the motion for summary judgment of defendant United States Tobacco ("UST") (Docket#208) and the cross-motion for partial summary judgment of Conwood Company (Docket #207). In this extensively litigated case, Conwood has challenged the moist snuff marketing practices of its rival UST. For the reasons set out below, the court concludes that only through the development at trial of a full factual record can there be an appropriate determination of whether UST's practices concerning exclusive racks and exclusive point-of-sale advertising constitute the illegal maintenance of monopoly power through anticompetitive practices. Likewise, market definition issues cannot be decided without a trial. Accordingly, the court will deny the motions for summary judgment.

FACTUAL BACKGROUND OF THE ANTITRUST LITIGATION

This case involves moist snuff,[1] a form of tobacco used orally by consumers by placing a small amount between the cheek and gum. The product is generally sold in round cans in retail stores, including convenience markets, mass merchandisers such as Wal-mart, and other outlets where snacks, sodas, cigarettes, and other convenience items can be readily bought. The cans are typically kept by the retailer in a gravity-fed rack, so that cans drop down through slots, also

[1]There is an issue at trial concerning product market definition, but for purposes of this analysis, the court will restrict itself to a discussion of moist snuff. See opinion below at 15-16.

called "facings." These racks are often located by the check-out counter. The racks, in addition to storing the cans, also provide a place for point-of-sale advertising, sometimes referred to as "header cards." The number of slots in a rack is significant, as it affects not only the overall of the rack but the number of products which a customer will see. As is common in cons product merchandising, the placement of the rack, the arrangement of the point-of-sale advertising, and the display of competing products within the racks are all areas of co among moist snuff manufacturers. Each manufacturer wants its product displayed most prominently and strategically, and wants to maximize its point-of-sale advertising.

Point-of-sale advertising is commonplace in convenience merchandising, whether it involves colas, beer, snack foods, or other products. According to Conwood, however, it assumes an unusual importance in the tobacco industry, because of the significant limitations which state and federal law place on media advertising of tobacco products. While consumers can enjoy the antics of the Budweiser lizards or the Energizer bunny, there is no comparable television and radio exposure for tobacco companies. Thus, in the Conwood theory, point-of-sale advertising is especially critical because it represents the principal means of communicating with consumers. In the plaintiff's view, any restrictions on point-of-sale advertising are likely to have a seriously dampening effect on competition.

Conwood asserts that it moved from being a small player in the moist snuff market to presenting a significant challenge to UST, through the introduction of new "rough-cut" and "long-cut" products, through the introduction of different product packaging in the form of plastic cans with longer shelf lives, and through the introduction of price-competitive "price-value" products. These facts, if proven at trial, would tend to show the kind of "merits" competition which markets ideally provide, in which price and product innovation drive competition and provide benefits to consumers.

16diii004434

Conwood's proof developed in discovery, to some extent, tends to show that, in response to growth in the price-value market, UST engaged in a campaign, directed by high-level management, to "actively pursue strategies to limit the growth of the price-value market." Arguably, the strategy selected by UST management was not to compete on price (a strategy which apparently caused a stunning one-day drop in the market valuation of Philip Morris stock when it cut cigarette prices), but to limit the distribution at retail outlets of competing brands of moist snuff. This strategy, as Conwood paints it, was designed to "eliminate competitive distribution" and to seek "exclusive vending" and "vendor exclusivity."

Of course, generalized statements by corporate executives in internal documents do not by themselves constitute antitrust law violations. However, the proof which Conwood has developed through discovery could show that a highly focused UST campaign sought to have its vending racks be the exclusive outlet for all moist snuff in retail stores. The effect of such rack exclusivity would be to give UST control over the point-of-sale advertising, since all header cards would have to be displayed on UST racks. In addition, such an arrangement, in which all products from all manufacturers are dispensed from UST racks, would tend to allow UST to reduce significantly the kinds and numbers of competitive products displayed by the retailer.

Conwood's discovery proof arguably demonstrates that UST's efforts to eliminate competing racks were significantly successful. This elimination of competing racks was accomplished through a variety of sophisticated techniques, including "crew drives," the use of the alleged subterfuge of "category management" services to small retailers as a method to elbow out Conwood and other competing products, and unilateral conduct such as UST sales personnel "cleaning up" the display areas. Conwood has developed evidence that it was the practice of UST sales personnel to obtain nominal permission to remove racks from harried and inexperienced convenience store employees who might lack the knowledge or gumption to resist

16diii004435

the control which UST sales personnel exerted over the displays. Conwood also used explicit contractual agreements with retailers.

Conwood's proof further tends to demonstrate that the effect of these "exclusive vending" practices was to reduce the space allocated to moist snuff in retail outlets, to exclude competing advertisements at the point-of-sale, to increase slot width in the racks so as to make fewer consumer choices available, and to manage the presentation of products in the UST racks so that slow-moving UST products would "crowd out" price-value products by occupying scarce slots in the racks. In addition to an organized category management program, UST also pursued a Customer Alliance Program ("CAP") which arguably required preferred positioning for UST products and POS advertising.

The court emphasizes that it does not here find that Conwood will succeed in proving that these events occurred, or that they occurred to the extent alleged, but only that Conwood has raised sufficient factual basis for the issues to be presented at trial rather than rejected through summary judgment.

AN OVERVIEW OF THE PARTIES' ARGUMENTS

In a carefully and vigorously argued series of pleadings which focus on certain specific antitrust issues, UST asserts that Conwood has failed to make out a triable § 2 antitrust case against it. For purposes of the summary judgment motion only, UST does not challenge many of Conwood's factual predicates. UST, for example, does not contest in this motion that it possesses monopoly power, although it seriously disputes that it has acquired and maintained it willfully. (UST memorandum in support of summary judgment at p. 14.) Likewise, in its reply memorandum, UST does not contest that it has acted with the intent to eliminate as much competitive distribution as possible; that it has acted to obtain exclusive rack and rack-P.O.S. agreements with retailers; or that its conduct has made it difficult for Conwood to place its products and to increase its sales. (UST reply memorandum at pp. 5-6).

16diii004436

Instead of contesting directly many of the principal factual assertions, UST rather argues that, even under the best view of these facts which Conwood might prove, Conwood cannot establish either an antitrust violation or antitrust injury. UST contends that Conwood cannot establish any "exclusionary" conduct in violation of § 2 of the Sherman Act. (UST memorandum at p. 14). Rather than directly meet Conwood's factually detailed assertions of willful exercise of monopoly power, UST characterizes its practices as failing to meet a narrow test of § 2 violations. For example, UST argues that its exclusionary rack practices cannot be illegal because they do not constitute the kind of exclusive dealing which would be condemned under other sections of the antitrust laws (see memorandum in opposition at pp. 17-21), and asserts that the other misconduct is nothing more than "ordinary business practices" (UST memorandum in opposition at pp. 25-37). UST continues this line of argument in its reply memorandum, contending that Conwood's case is a fatally thin "monopoly broth" which fails to prove any independent antitrust violation (UST reply memorandum at pp. 18 et seq.).

Conwood, in response to the UST motion, has prepared a highly detailed and possibly credible factual case based on extensive discovery, both documentary and by deposition. While it remains to be seen whether Conwood's assertion of the facts will be proven persuasively at trial to the jury, its factual chronology, if true, appears to assert an abuse – a willful exercise – of monopoly power by UST.

Conwood's case centers on a variety of interrelated practices which, in its view, constitute a coordinated, effective course of action by a monopolist which already enjoys a very high market share, profit margins among the highest in American industry, and limited competition without new market entrants. Most importantly, Conwood's version of the facts, if proven, could be interpreted by the jury to constitute a serious effort by a monopolist to suppress a competitor, not through competition on price, product innovation, or other merits, but based on exclusionary practices which are uniquely available to UST because of its longstanding market dominance.

16diii004437

Moreover, Conwood contends, UST's practice of excluding Conwood from point-of-sale advertising is unusually effective because of the many restrictions which federal and state law place on the advertising of tobacco products; thus, restricting or eliminating point-of-sale advertising by Conwood arguably has an unusually restrictive impact on Conwood's ability to compete based on price, product innovation and design, and the like.

The court is very careful to note that it does not adopt or endorse Conwood's view of the facts. Whether Conwood can persuade a jury, after a trial with witnesses and experts, of the truth of its case theory is not for the court to say on summary judgment. The issue before the court now is whether a trial is the appropriate procedure to resolve these factually intensive and hotly disputed claims.

LEGAL STANDARDS AND ANALYSIS

Both Conwood and UST point to the same general standard to applied to § 2 claims, stemming from the venerable Grinnell decision of the Supreme Court. As the Sixth Circuit recently observed,

> The offense of monopolization under Section 2 has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

Re/Max International, Inc. v. Realty One, Inc., 173 F.3d 995 (6th Cir. 1999). Only the "willful acquisition or maintenance" part of the test is at issue, as UST assumes *arguendo* for summary judgment purposes that it possesses monopoly power. (UST memorandum at p. 14.)

It is the application of the Grinnell-Re/Max standard to these facts which is in dispute. UST vigorously argues that Conwood falls far short of the mark, and that its "monopoly broth" is really nothing more than "stone soup." In pressing this argument, UST repeatedly asserts that

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Conwood has not proven exclusive dealing by UST, that isolated incidents of bad behavior and "dirty tricks" in handling Conwood racks are not the stuff of antitrust lawsuits, and that Conwood has pointed to nothing more than vigorous competition of the kind invited, not condemned, by the antitrust laws.

There are two shortcomings in UST's argument. First, its abstract treatise on antitrust laws sidesteps the carefully developed, thoroughly documented record which Conwood has amassed. Whether Conwood can prevail at trial on its theories is uncertain, but Conwood has marshalled a significant amount of proof that UST engaged in a concerted campaign, directed from the highest levels of UST, designed to shut Conwood out from effective competition at retail outlets through the elimination of Conwood racks, the elimination of Conwood point-of-sale advertising, all in an unusual market for tobacco products where point-of-sale is the central marketplace battleground. Second, as discussed below, UST's attempts to pick apart Conwood's arguments would have the court examine the leaves and ignore the forest, something not mandated by the antitrust laws.

"'Anticompetitive conduct' can come in too many forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." Carribean Broadcasting System, Ltd. v. Cable & Wireless, 148 F.3d 1080, 1087 (D.C. Cir. 1998). Thus, UST's "deconstruction" of the Conwood claims into a series of discrete antitrust theories, which UST then individually seeks to knock down, does not compel the summary judgement dismissal of this case. Caldera , Inc. v. Microsoft Corp., Case No. 2:96-CV-645(B), 1999 WL 1067490 (D. Utah Nov. 3, 1999). Instead, the court should use as its touchstone well-accepted principles of § 2 law.

The key to the second prong of the Grinnell test is the use by a defendant of anticompetitive conduct "to foreclose competition, to gain a competitive advantage, or to destroy a competitor." Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 482-83

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(1992) (quoting United States v. Griffith, 334 U.S. 100, 107 (1948)). The Supreme Court has directed the trial courts to condemn "exclusionary" or "anticompetitive" or "predatory" conduct, *see*, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985); the court must distinguish the improper "exclusionary" conduct from the permitted competition by a monopolist based on "superior product" and "business acumen," as permitted by Grinnell.

The distinction between the impermissible anticompetitive conduct by a monopolist and the lawful maintenance of its market share is based on determining if the defendant "has been 'attempting to exclude rivals on some basis other than efficiency.'" Aspen, 472 U.S. at 605, (quoting R. Bork, The Antitrust Paradox 138 (1978)). The Supreme Court in Aspen went on to quote from Professors Areeda and Turner:

> Thus, 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.

III P. Areeda & D. Turner, Antitrust Law 78 (1978). An important part of the inquiry, as directed by the Eastman Kodak Court, is whether conduct which impairs a rivals' opportunities can be justified by "valid business reasons." Eastman Kodak, 504 U.S. at 483, (quoting Aspen, 472 U.S. at 605). In Eastman, the Court held that there were triable issues of monopolization where there were reasons to doubt the validity and sufficiency of the business justifications asserted for the conduct.

Here, UST does not, at the summary judgment stage of the proceedings, attempt to show conclusively that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could never constitute violations at all. This falls short of the proof which would be required to prevail on the § 2 claims, particularly in view of the numerous record comments from high level UST personnel which arguably show an anticompetitive intent rather than a business justification for the exclusionary POS practices.

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Other circuits have focused on the issue whether the defendant's conduct served a legitimate purpose and whether it impaired the opportunity of rivals more than necessary to serve such a legitimate purpose. See, e.g., Data General Corp. v. Grumman Syst. Support Corp., 36 F. 3d 1147 (1st Cir. 1994); Instructional Syst. Devel. Corp. v. Aetna Casualty & Surety Co., 817 F.2d 639 (10th Cir. 1987).

At a minimum, these issues require the development of proof at trial, not summary disposition. While UST is correct that there is no rule which makes summary judgment improper in all circumstances in antitrust cases, their factual nuances and complexity may require a full rather than a truncated inquiry, for monopolization as well as other claims.

Recent Sixth Circuit case law demonstrates the need of the district court to apply careful restraint in using summary judgment to reject antitrust claims. In Re/Max Int'l. Inc. v. Realty One, Inc., 173 F.3d 995 (6th Cir. 1999), the court overturned a grant of summary judgment to the defendants which had been entered by the trial court.. The challenged trade practice in the Re/Max decision was significantly different from this case; the plaintiff realty firm disputed the "adverse split" policy of the defendants with respect to the division of real estate commissions between buyers' agents and sellers' agents. The lengthy opinion discusses a number of § 1 problems, but also addresses the issue whether summary judgment was appropriately entered on behalf of the defendants on plaintiff's § 2 monopolization claim. In a detailed discussion of the factors which may be used to prove the relevant geographic market and what a plaintiff must show alternatively to prove exclusion of competition in a monopolization case , the Sixth Circuit held that there was a question of fact whether there had been "actual, sustained adverse effects on competition." Id. at 1019. Similarly, the present case presents complex questions of fact, which can be resolved only through trial, as to whether the sustained effects on competition which are preliminarily suggested by plaintiff's proof in the discovery record can be proven sufficiently before a jury.

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> [V]isibility and advertising at the point of purchase are uniquely critical to competition in the cigarette industry as competitors lack significant alternative advertising channels to compensate for the lack of visibility at the point of purchase.

Id. at 511. Thus, other trial courts have found that point-of-sale restrictions may have an unusually strong exclusionary effect in the tobacco industry because of restrictions on broadcast media advertising.

UST also argues that summary judgment is appropriate in its favor because Conwood's case is flawed in its attempt to prove that antitrust injury flowed from the supposed violations of the Sherman Act; alternatively, it argues that the damages asserted are speculative and are not caused by the actions of UST.

This theory, like the summary judgment argument on the question whether the Sherman Act was violated, must fail because of the fact-intensive nature of the dispute at bar. Multiple issues concerning injury, damage, and causation remain for trial. Included in these topics are the issue whether the damage claimed by Conwood is caused by UST, or instead is the result of independent, uncoerced decisions by retailers; whether the damage theory of Professor Leftwich, plaintiff's expert, can withstand challenge under Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), or other antitrust damage law principles; whether the effects on competition and on Conwood which plaintiff claims are the result of actions by UST at all, or other market forces; and other matters.

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None of these topics is susceptible to resolution on the current record, without the testing of facts which a jury trial presents. The law in the Sixth Circuit does not require the district court to "short circuit" such a potentially complex inquiry without a trial. Plaintiff need only show an injury of the type which the antitrust laws were drafted to prevent and which flows from defendant's unlawful practices. *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Arthur S. Lengenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050 (6th Cir.1984); Chrysler Corp. v. Fedders Corp., 643 F.2d 1229 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981). The court does not wish to underemphasize the burden which plaintiff must meet at trial, but only to indicate that the detailed record on discovery prevents the summary disposition of issues.

The court re-emphasizes that the questions of whether these practices took place, how extensive they were, how much they were orchestrated by top management and how much by sporadic local efforts by "rogue" sales personnel, how effective they were in restraining or eliminating competition, whether they were eagerly sought by retailers or imposed by fast-talking, experienced UST representatives on sleepy seventeen year old nighttime sales clerks – all these are issues which can be resolved only by a jury. The court does not presume to determine how they will be resolved – only that they present serious issues of material fact.

CONWOOD MOTION FOR PARTIAL SUMMARY JUDGMENT

Conwood itself has moved for partial summary judgment with respect to the issues of whether the relevant market is moist snuff in the United States, and whether UST possesses monopoly power in that market. In addition, Conwood seeks summary disposition of UST's counterclaims under the Lanham Act and state law.

Just as there are many "hotly disputed" questions of fact on the § 2 liability claims of Conwood, so too are there many "hotly disputed" questions of fact on market definition which prevent a summary ruling. (See UST memorandum in opposition to plaintiff's motion for summary judgment at p. 3.) While UST agrees that the relevant geographic market is the entire

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United States (see fn. 2 at p. 2 of its memorandum in opposition), UST seriously disputes the product definition offered by Conwood. UST asserts that there are questions of fact for the jury as to whether the relevant product market is broader than Conwood asserts, perhaps including all smokeless tobacco products, such as loose leaf chewing tobacco; alternatively, UST suggests that the product market could be segmented into separate product markets for natural and flavored moist snuff.

It is undisputed that Conwood, as plaintiff, has the burden of proving market definition. Given the extensive nature of discovery and conflicting factual accounts of the marketplace, the prevalence of serious expert opinion disagreements, and the obvious factor that the court is denying UST's summary judgment motion and setting the matter for trial, it would be unwarranted (and inconsistent) for this court to rule in a summary fashion on the product market. *See* Telecomm. Tech. Servs., Inc. v. Siemens Rolm Communications, Inc., 66 F. Supp.2d 1306 (N.D.Ga. 1998). Indeed, virtually everything about this litigation is, in UST's accurate characterization, "hotly disputed," and only a trial can resolve these issues.

Finally, in light of the denial of summary judgment both on the section two liability and product market motions, there is no basis for granting summary judgment to Conwood on UST's Lanham Act and state law claims. They may indeed prove out to be minor "tag along" theories, but the court will overrule Conwood's motion and permit them to proceed to trial with the vastly more extensive antitrust issues.

Ultimately, the present issue for the court is whether it should step into this complex, extensive litigation and call it to a halt without a trial. In order to do so, the court would have to conclude that there is no dispute of *material* fact. UST's argument concedes, for summary judgment purposes only, many of the facts which Conwood would have to prove at trial, thus nimbly taking many disputed issues out of the analysis. Instead, argues UST, taking the best version of the facts which the record might show for Conwood, there still is lacking any antitrust

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violation. However, this is simply too narrow a view of this dispute, and the court cannot say with certainty that no trial should take place in order to measure the extent, purpose, effect, and competitive impact of the broad exclusionary campaign which Conwood seeks to prove. Whether Conwood can carry this significant burden at trial is not for the court to say on summary judgment; however, the court concludes that on a cold summary judgment record it cannot resolve this matter fairly or within the meaning of Rule 56 and applicable case law on summary judgment practice. Likewise, the issues of product market definition cannot be determined summarily.

A trial is unavoidable; indeed, a trial is the very device which the law contemplates for the resolution of this kind of dispute.

CONCLUSION

Skillful counsel for both sides have vigorously presented the court with a broad range of briefing on critical issues in this case. While each case is unique on its facts, the factual bases asserted by Conwood here are sufficiently within the range of conduct which, if proven at trial, may form the basis for a jury determination of § 2 liability. Whether a jury, with the benefit of a full factual presentation, will assess UST's conduct as justified, vigorous competition in the marketplace, or an impermissible, unjustified series of exclusionary acts by a monopolist, is an issue which this court cannot decide on summary judgment. The case abounds with material factual issues, it presents an adequate legal foundation to withstand motion practice, and it will be judged at trial and not on briefs alone. The motions for summary judgment of both UST and Conwood are denied. (Docket #s207 & 208)

IT IS SO ORDERED.

This 17 day of February, 2000.

Thomas B. Russell

Thomas B. Russell, Judge.
United States District Court

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called "facings." These racks are often located by the check-out counter. The racks, in addition to storing the cans, also provide a place for point-of-sale advertising, sometimes referred to as "header cards." The number of slots in a rack is significant, as it affects not only the overall of the rack but the number of products which a customer will see. As is common in cons product merchandising, the placement of the rack, the arrangement of the point-of-sale advertising, and the display of competing products within the racks are all areas of co among moist snuff manufacturers. Each manufacturer wants its product displayed most prominently and strategically, and wants to maximize its point-of-sale advertising.

Point-of-sale advertising is commonplace in convenience merchandising, whether it involves colas, beer, snack foods, or other products. According to Conwood, however, it assumes an unusual importance in the tobacco industry, because of the significant limitations which state and federal law place on media advertising of tobacco products. While consumers can enjoy the antics of the Budweiser lizards or the Energizer bunny, there is no comparable television and radio exposure for tobacco companies. Thus, in the Conwood theory, point-of-sale advertising is especially critical because it represents the principal means of communicating with consumers. In the plaintiff's view, any restrictions on point-of-sale advertising are likely to have a seriously dampening effect on competition.

Conwood asserts that it moved from being a small player in the moist snuff market to presenting a significant challenge to UST, through the introduction of new "rough-cut" and "long-cut" products, through the introduction of different product packaging in the form of plastic cans with longer shelf lives, and through the introduction of price-competitive "price-value" products. These facts, if proven at trial, would tend to show the kind of "merits" competition which markets ideally provide, in which price and product innovation drive competition and provide benefits to consumers.

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Conwood's proof developed in discovery, to some extent, tends to show that, in response to growth in the price-value market, UST engaged in a campaign, directed by high-level management, to "actively pursue strategies to limit the growth of the price-value market." Arguably, the strategy selected by UST management was not to compete on price (a strategy which apparently caused a stunning one-day drop in the market valuation of Philip Morris stock when it cut cigarette prices), but to limit the distribution at retail outlets of competing brands of moist snuff. This strategy, as Conwood paints it, was designed to "eliminate competitive distribution" and to seek "exclusive vending" and "vendor exclusivity."

Of course, generalized statements by corporate executives in internal documents do not by themselves constitute antitrust law violations. However, the proof which Conwood has developed through discovery could show that a highly focused UST campaign sought to have its vending racks be the exclusive outlet for all moist snuff in retail stores. The effect of such rack exclusivity would be to give UST control over the point-of-sale advertising, since all header cards would have to be displayed on UST racks. In addition, such an arrangement, in which all products from all manufacturers are dispensed from UST racks, would tend to allow UST to reduce significantly the kinds and numbers of competitive products displayed by the retailer.

Conwood's discovery proof arguably demonstrates that UST's efforts to eliminate competing racks were significantly successful. This elimination of competing racks was accomplished through a variety of sophisticated techniques, including "crew drives," the use of the alleged subterfuge of "category management" services to small retailers as a method to elbow out Conwood and other competing products, and unilateral conduct such as UST sales personnel "cleaning up" the display areas. Conwood has developed evidence that it was the practice of UST sales personnel to obtain nominal permission to remove racks from harried and inexperienced convenience store employees who might lack the knowledge or gumption to resist

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the control which UST sales personnel exerted over the displays. Conwood also used explicit contractual agreements with retailers.

Conwood's proof further tends to demonstrate that the effect of these "exclusive vending" practices was to reduce the space allocated to moist snuff in retail outlets, to exclude competing advertisements at the point-of-sale, to increase slot width in the racks so as to make fewer consumer choices available, and to manage the presentation of products in the UST racks so that slow-moving UST products would "crowd out" price-value products by occupying scarce slots in the racks. In addition to an organized category management program, UST also pursued a Customer Alliance Program ("CAP") which arguably required preferred positioning for UST products and POS advertising.

The court emphasizes that it does not here find that Conwood will succeed in proving that these events occurred, or that they occurred to the extent alleged, but only that Conwood has raised sufficient factual basis for the issues to be presented at trial rather than rejected through summary judgment.

AN OVERVIEW OF THE PARTIES' ARGUMENTS

In a carefully and vigorously argued series of pleadings which focus on certain specific antitrust issues, UST asserts that Conwood has failed to make out a triable § 2 antitrust case against it. For purposes of the summary judgment motion only, UST does not challenge many of Conwood's factual predicates. UST, for example, does not contest in this motion that it possesses monopoly power, although it seriously disputes that it has acquired and maintained it willfully. (UST memorandum in support of summary judgment at p. 14.) Likewise, in its reply memorandum, UST does not contest that it has acted with the intent to eliminate as much competitive distribution as possible; that it has acted to obtain exclusive rack and rack-P.O.S. agreements with retailers; or that its conduct has made it difficult for Conwood to place its products and to increase its sales. (UST reply memorandum at pp. 5-6).

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Instead of contesting directly many of the principal factual assertions, UST rather argues that, even under the best view of these facts which Conwood might prove, Conwood cannot establish either an antitrust violation or antitrust injury. UST contends that Conwood cannot establish any "exclusionary" conduct in violation of § 2 of the Sherman Act. (UST memorandum at p. 14). Rather than directly meet Conwood's factually detailed assertions of willful exercise of monopoly power, UST characterizes its practices as failing to meet a narrow test of § 2 violations. For example, UST argues that its exclusionary rack practices cannot be illegal because they do not constitute the kind of exclusive dealing which would be condemned under other sections of the antitrust laws (see memorandum in opposition at pp. 17-21), and asserts that the other misconduct is nothing more than "ordinary business practices" (UST memorandum in opposition at pp. 25-37). UST continues this line of argument in its reply memorandum, contending that Conwood's case is a fatally thin "monopoly broth" which fails to prove any independent antitrust violation (UST reply memorandum at pp. 18 et seq.).

Conwood, in response to the UST motion, has prepared a highly detailed and possibly credible factual case based on extensive discovery, both documentary and by deposition. While it remains to be seen whether Conwood's assertion of the facts will be proven persuasively at trial to the jury, its factual chronology, if true, appears to assert an abuse – a willful exercise – of monopoly power by UST.

Conwood's case centers on a variety of interrelated practices which, in its view, constitute a coordinated, effective course of action by a monopolist which already enjoys a very high market share, profit margins among the highest in American industry, and limited competition without new market entrants. Most importantly, Conwood's version of the facts, if proven, could be interpreted by the jury to constitute a serious effort by a monopolist to suppress a competitor, not through competition on price, product innovation, or other merits, but based on exclusionary practices which are uniquely available to UST because of its longstanding market dominance.

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Moreover, Conwood contends, UST's practice of excluding Conwood from point-of-sale advertising is unusually effective because of the many restrictions which federal and state law place on the advertising of tobacco products; thus, restricting or eliminating point-of-sale advertising by Conwood arguably has an unusually restrictive impact on Conwood's ability to compete based on price, product innovation and design, and the like.

The court is very careful to note that it does not adopt or endorse Conwood's view of the facts. Whether Conwood can persuade a jury, after a trial with witnesses and experts, of the truth of its case theory is not for the court to say on summary judgment. The issue before the court now is whether a trial is the appropriate procedure to resolve these factually intensive and hotly disputed claims.

LEGAL STANDARDS AND ANALYSIS

Both Conwood and UST point to the same general standard to applied to § 2 claims, stemming from the venerable Grinnell decision of the Supreme Court. As the Sixth Circuit recently observed,

> The offense of monopolization under Section 2 has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966).

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There are two shortcomings in UST's argument. First, its abstract treatise on antitrust laws sidesteps the carefully developed, thoroughly documented record which Conwood has amassed. Whether Conwood can prevail at trial on its theories is uncertain, but Conwood has marshalled a significant amount of proof that UST engaged in a concerted campaign, directed from the highest levels of UST, designed to shut Conwood out from effective competition at retail outlets through the elimination of Conwood racks, the elimination of Conwood point-of-sale advertising, all in an unusual market for tobacco products where point-of-sale is the central marketplace battleground. Second, as discussed below, UST's attempts to pick apart Conwood's arguments would have the court examine the leaves and ignore the forest, something not mandated by the antitrust laws.

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Just as there are many "hotly disputed" questions of fact on the § 2 liability claims of Conwood, so too are there many "hotly disputed" questions of fact on market definition which prevent a summary ruling. (See UST memorandum in opposition to plaintiff's motion for summary judgment at p. 3.) While UST agrees that the relevant geographic market is the entire

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United States (see fn. 2 at p. 2 of its memorandum in opposition), UST seriously disputes the product definition offered by Conwood. UST asserts that there are questions of fact for the jury as to whether the relevant product market is broader than Conwood asserts, perhaps including all smokeless tobacco products, such as loose leaf chewing tobacco; alternatively, UST suggests that the product market could be segmented into separate product markets for natural and flavored moist snuff.

It is undisputed that Conwood, as plaintiff, has the burden of proving market definition. Given the extensive nature of discovery and conflicting factual accounts of the marketplace, the prevalence of serious expert opinion disagreements, and the obvious factor that the court is denying UST's summary judgment motion and setting the matter for trial, it would be unwarranted (and inconsistent) for this court to rule in a summary fashion on the product market. *See* Telecomm. Tech. Servs., Inc. v. Siemens Rolm Communications, Inc., 66 F. Supp.2d 1306 (N.D.Ga. 1998). Indeed, virtually everything about this litigation is, in UST's accurate characterization, "hotly disputed," and only a trial can resolve these issues.

Finally, in light of the denial of summary judgment both on the section two liability and product market motions, there is no basis for granting summary judgment to Conwood on UST's Lanham Act and state law claims. They may indeed prove out to be minor "tag along" theories, but the court will overrule Conwood's motion and permit them to proceed to trial with the vastly more extensive antitrust issues.

Ultimately, the present issue for the court is whether it should step into this complex, extensive litigation and call it to a halt without a trial. In order to do so, the court would have to conclude that there is no dispute of *material* fact. UST's argument concedes, for summary judgment purposes only, many of the facts which Conwood would have to prove at trial, thus nimbly taking many disputed issues out of the analysis. Instead, argues UST, taking the best version of the facts which the record might show for Conwood, there still is lacking any antitrust

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violation. However, this is simply too narrow a view of this dispute, and the court cannot say with certainty that no trial should take place in order to measure the extent, purpose, effect, and competitive impact of the broad exclusionary campaign which Conwood seeks to prove. Whether Conwood can carry this significant burden at trial is not for the court to say on summary judgment; however, the court concludes that on a cold summary judgment record it cannot resolve this matter fairly or within the meaning of Rule 56 and applicable case law on summary judgment practice. Likewise, the issues of product market definition cannot be determined summarily.

A trial is unavoidable; indeed, a trial is the very device which the law contemplates for the resolution of this kind of dispute.

CONCLUSION

Skillful counsel for both sides have vigorously presented the court with a broad range of briefing on critical issues in this case. While each case is unique on its facts, the factual bases asserted by Conwood here are sufficiently within the range of conduct which, if proven at trial, may form the basis for a jury determination of § 2 liability. Whether a jury, with the benefit of a full factual presentation, will assess UST's conduct as justified, vigorous competition in the marketplace, or an impermissible, unjustified series of exclusionary acts by a monopolist, is an issue which this court cannot decide on summary judgment. The case abounds with material factual issues, it presents an adequate legal foundation to withstand motion practice, and it will be judged at trial and not on briefs alone. The motions for summary judgment of both UST and Conwood are denied. (Docket #s207 & 208)

IT IS SO ORDERED.

This 17 day of February, 2000.

Thomas B. Russell

Thomas B. Russell, Judge.
United States District Court

Copies to: Counsel of Record

ENTERED

FEB 17 2000

JEFFREY A. APPERSON, CLERK
BY 16
DEPUTY CLERK

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
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TRIAL OFFICE
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PADUCAH, KY 42001
PHONE: (270) 450-5107
FAX: (270) 450-5118

February 22, 2000

Honorable Thomas B. Russell
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed is a courtesy copy of Plaintiffs' Revised List of Trial Exhibits, which has also been filed with the Clerk.

Respectfully,

Benjamin A. Powell

Enclosure

cc: Neal R. Stoll
John S. Reed

16diii004458

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February 22, 2000

Jeffrey A. Apperson, Clerk
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Plaintiffs' Revised List of Trial Exhibits.

Also enclosed is an additional copy. I would be grateful if you would date-stamp and return this copy in the enclosed self-addressed envelope.

Many thanks for your assistance.

Respectfully,

Benjamin A. Powell

Enclosures

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

'00 FEB 22 A10:14
FILED
US DISTRICT COURT
WESTN DIST KENTUCKY

PLAINTIFFS' REVISED LIST OF TRIAL EXHIBITS

Plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood") respectfully submit the attached revised list of exhibits plaintiffs may offer in evidence during their case-in-chief ("Exhibit "A"). The sole new addition to this list is PX332, a business record of defendants that was transmitted today to counsel for defendants.

Plaintiffs reserve the right to modify or supplement this list as they continue to prepare their case for trial, to offer enlargements of exhibits in evidence, to offer additional exhibits identified and discussed during deposition testimony designated by plaintiffs for potential use at trial (which designations are incorporated herein by reference), and to modify demonstrative exhibits plaintiffs expect to offer during testimony by expert witnesses in order to conform such exhibits to the proof. Plaintiffs further reserve their right to offer additional exhibits, not listed herein, in rebuttal.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

February 22, 2000

CERTIFICATE OF SERVICE

I certify that on this 22nd day of February, 2000, a copy of the foregoing was sent by facsimile, and overnight mail, to:

John S. Reed, Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, U.S. Tobacco Trial Offices, Mercantile Bank Building, 10th Floor, 333 Broadway, Paducah, KY 42001.

Benjamin A. Powell

EXHIBIT A

4. Deposition of R. Engster - Page 19, line 21 to line 25; page 26, line 23 to page 27, line 4; page 27, line 10; and page 27, line 12 to line 17.

A binder containing the proposed exhibits and deposition excerpts is attached. See Exhibit A. Plaintiffs informed defendants on February 14, 2000 and February 20, 2000 that plaintiffs may use these exhibits and deposition excerpts in their opening statement. Defendants have not informed us of their objections, if any.

Plaintiffs reserve the right to modify or supplement this motion as they continue to prepare their opening statement.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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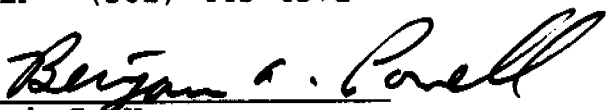

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Counsel for Plaintiffs

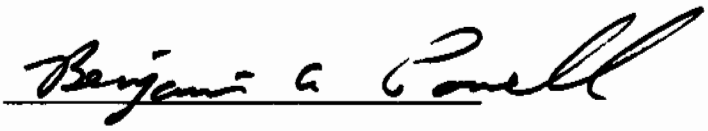
February 22, 2000

16diii004464

CERTIFICATE OF SERVICE

I certify that on this 22nd day of February, 2000, a copy of the foregoing was sent by facsimile (without Exhibit A), and hand delivery (with Exhibit A), to:

John S. Reed, Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, U.S. Tobacco Trial Offices, Mercantile Bank Building, 10th Floor, 333 Broadway, Paducah, KY 42001.



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of plaintiffs' Motion to Pre-Admit Exhibits for Use in Opening Statement, any opposition thereto, and for good cause shown, said motion is hereby GRANTED and the exhibits and testimony therein are hereby admitted in evidence.

SO ORDERED.

Dated this ___ day of _____, 2000.

HONORABLE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' MOTION TO PRE-ADMIT EXHIBITS FOR USE IN OPENING STATEMENT

Plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood") respectfully request the admission at the pretrial conference of proposed plaintiffs' exhibits 4, 5, 7, 9, 14, 16, 19, 20, 24, 28, 32, 33, 39, 45, 51, 53, 61, 63, 68, 79, 84, 96, 104, 113a, 120, 124a, 130, 139, 140, 143, 144, 148, 149, 156, 173, 208, and 270. Plaintiff wishes to use these exhibits in its opening statement. These exhibits are business records of the defendant produced in this litigation. Plaintiffs also request the admission at the pretrial conference of the following deposition excerpts for use in its opening statement:

1. Deposition of L. Borrowdale - Page 17, line 20 to page 18, line 14.

2. Deposition of G. Smith - Page 420, line 10 to line 25; page 421, line 2 to line 7; page 421, line 9; and page 421, line 20 to page 422, line 6.

3. Deposition of G. Milano - Page 289, line 2 to line 6; page 293, line 8 to line 10; page 293, line 14 to line 23; page 294, line 11 to line 15; and page 294, line 17 to line 20.

4. Deposition of R. Engster - Page 19, line 21 to line 25; page 26, line 23 to page 27, line 4; page 27, line 10; and page 27, line 12 to line 17.

A binder containing the proposed exhibits and deposition excerpts is attached. See Exhibit A. Plaintiffs informed defendants on February 14, 2000 and February 20, 2000 that plaintiffs may use these exhibits and deposition excerpts in their opening statement. Defendants have not informed us of their objections, if any.

Plaintiffs reserve the right to modify or supplement this motion as they continue to prepare their opening statement.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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Counsel for Plaintiffs

February 22, 2000

16diii004468

CERTIFICATE OF SERVICE

I certify that on this 22nd day of February, 2000, a copy of the foregoing was sent by facsimile (without Exhibit A), and hand delivery (with Exhibit A), to:

John S. Reed, Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, U.S. Tobacco Trial Offices, Mercantile Bank Building, 10th Floor, 333 Broadway, Paducah, KY 42001.

Benjamin A Powell

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

ORDER

Upon consideration of plaintiffs' Motion to Pre-Admit Exhibits for Use in Opening Statement, any opposition thereto, and for good cause shown, said motion is hereby GRANTED and the exhibits and testimony therein are hereby admitted in evidence.

SO ORDERED.

Dated this ___ day of _____, 2000.

_____
HONORABLE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

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3. Deposition of G. Milano - Page 289, line 2 to line 6; page 293, line 8 to line 10; page 293, line 14 to line 23; page 294, line 11 to line 15; and page 294, line 17 to line 20.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98CV-108-R

CONWOOD COMPANY, L.P. and
CONWOOD SALES COMPANY, L.P. PLAINTIFFS,

v.

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC., and UST INC. DEFENDANTS.

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendants' Motion in Limine for an Order Simplifying the Issues at Trial and Facilitating the Disposition of this Lawsuit (Doc. #264). This Court **DENIES** that motion.

Defendants move that this Court utilize Fed. R. Civ. P. 16 to remove four of Plaintiffs' claims from this action: (1) Lanham Act; (2) Kentucky state law standard for product defamation; (3) Kentucky state law standard for tortious interference with contract/tortious interference with prospective business relations; and (4) Kentucky Revised Statute 365.050. It is Defendants' position that Plaintiffs have failed to pursue and develop these claims and that some are duplicative and would confuse the jury.

This Court has carefully considered well drafted memoranda from both parties on motions for summary judgment. This motion is an attempt to circumvent that process and to reassert claims that were or should have been made in those motions. Parties should not use the rules to relitigate issues already decided or to present evidence which could have been previously

submitted through the exercise of reasonable diligence. *See Keweenaw Bay Indian Community v. State of Mich.*, 152 F.R.D. 562 (W.D.Mich.1992), *aff'd* 11 F.3d 1341 (6th Cir. 1993). Contrary to Defendants assertion, even if these claims could not have been made, the elimination of these issues would do little to ensure the "just, speedy, and inexpensive disposition of the action." Fed.R.Civ.Pro. 16(c)(16). These claims are obviously tag along claims and by the end of the day some may well perish. However, the claims will not be dismissed in a motion in limine that is no more than a thinly veiled alternative motion for summary judgment.

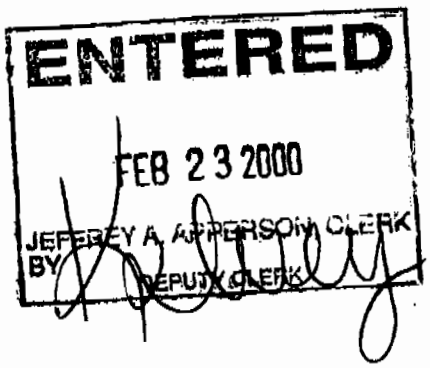
Accordingly, the motion is **DENIED.**

This is a final and appealable order. There is no just cause for delay.

This is the 23 day of February, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98-CV-108-R

CONWOOD COMPANY, L.P., ET AL. PLAINTIFFS

v.

UNITED STATES TOBACCO COMPANY, ET AL. DEFENDANTS

MEMORANDUM OPINION & ORDER

This matter is before the court on Defendants' motion to exclude the damages study and future testimony of Dr. Richard Leftwich (doc. #210). This motion is closely related to Defendants' motion in limine to preclude undisclosed expert witness materials and related testimony and declarations (doc. #260 and #261).

I.

Defendants want the court to exclude Leftwich's testimony pursuant to Fed.R.Evid. 104(a), 403 and 702. Defendants do not challenge Leftwich's qualifications as an expert, but they argue that his testimony on damages is too speculative and unreliable. Plaintiffs claim that Defendants' antitrust violations reduced Conwood's market share after 1990. Plaintiffs argue that UST's conduct was more effective in reducing the growth of Conwood's market share in those states where Conwood had a relatively low market share in 1990.

Leftwich applied a regression analysis to test Conwood's hypothesis. He determined that Conwood's share in a state in 1990 is statistically significantly related to the change in Conwood's market share between 1990 and 1997. The regression model predicts that where

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Conwood had a higher market share (e.g., 15-20 %) in 1990, Conwood's market share grew during the period from 1990 to 1997. In contrast, in states where Conwood had a lower market share, the regression predicts that its share would grow very little. He concluded that but for UST's exclusionary conduct, Plaintiff's market share would have grown between 5.7% and 8.4% from 1990-1997 in low share states, as it did in states where Plaintiff had an estimated market share of 15-20% in 1990. Leftwich considered other factors to rule out the possibility that statistical relationship was caused by other factors than UST's conduct. He considered changes in average per capita income in the states and regional differences and found no association between Conwood's market share and these factors. In his rebuttal he also found no statistically significant relationship between market growth and median age, racial composition, educational levels, and unemployment rates in the states. He also used the same methodology to analyze Conwood's share growth in the seven-year period prior to 1990 and determined that correlation for the 1990-1997 period was not present in the earlier period. This methodology is referred to as a "before and after" test. He also applied a "yardstick" measurement, by analyzing the analogous market for looseleaf tobacco, in which UST did not interfere. Conwood competes in this market using the same sales force as for moist stuff. He found that Conwood's growth in the looseleaf market was not positively associated with its share in 1990. Leftwich concluded that the statistical analysis supported Conwood's factual allegations. Leftwich estimated the amount of damages in lost profits as a result of UST's misconduct to be between $313 million and $488 million.

II.

Defendants argue that Leftwich's analysis is fatally flawed as a mater of law for several

reasons. First, he relied on the opinions of Conwood personnel, based on their "general experience," for the critical assumptions underlying his analysis, without doing any economic analysis of the evidence in the case. Second, Leftwich does not relate the alleged loss to specific allegedly unlawful acts. Also, he does not account for or explain away in any respect other factors having an adverse effect on Conwood's sales during the time period, including UST's lawful competitive activities and competition from other competitors. Finally, his "before and after" and "yardstick" models are not useful in assisting the jury because they fail to control for significant factors affecting the marketplace.

The admissibility of Leftwich's testimony under Fed.R.Evid. 702 is governed by the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Although *Daubert* applied to scientific expert testimony, its principles apply to all scientific testimony, to the extent relevant. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Under *Daubert* and Rule 702, the court must "decide if the proffered testimony is based upon valid economic, statistical or econometric methodologies and reasoning that can properly be applied to the facts of this case." *Ohio ex rel Montgomery v. Louis Trauth Dairy, Inc.*, 925 F. Supp. 1247, 1252 (S.D. Ohio 1996).

In *Ohio ex rel Montgomery v. Louis Trauth Dairy, Inc., supra*, the state filed suit against 13 dairies alleging a price-fixing and market-allocation conspiracy in violation of §1 of the Sherman Act. For its principal evidence against the dairies, the state relied upon expert testimony regarding statistical and econometric analyses of the Ohio milk market and the defendants' bidding practices. Defendants sought to exclude, under *Daubert*, the state's experts on the grounds that they were not qualified to testify, their methodologies were flawed, and their

conclusions were not relevant. The court denied the plaintiff's motion and held that the experts, all of whom were economists or statisticians, had conducted econometric and regression analyses that were testable, generally acceptable, and reproducible. Moreover, the court noted that the claimed deficiencies in the databases prepared by the experts "bear on the weight of the testimony, not its admissibility." *Id.* at 1253.

Leftwich's testimony satisfies *Daubert*. His methodologies are generally acceptable. *See id.* at 1252. Defendant's expert also used them. Leftwich relied on data that was compiled by the Smokeless Tobacco Council, an independent industry trade association, and that was assembled by the accounting firm of Peat Marwick. The methodologies are testable. UST argues that Leftwich did not account for other significant causal factors that may have affected Conwood's sales, such as the success of other competitor's products. Leftwich claims that those other factors are reflected in the real world market. The credibility of the expert and his opinions is an issue for the jury.

UST also argues that Leftwich's testimony should be excluded under Fed.R.Evid. 403 because it does not have any probative value and would be misleading and confusing to a jury. Defendants challenge the factual assumptions that Leftwich tested. A damage theory may be based on assumptions so long as the assumptions are reasonable in light of the record evidence. Only where there is no basis for critical assumptions or the assumptions are shown to be false, should the damage evidence be excluded. *See McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 806 (9th Cir. 1988). At this time the court cannot say that Leftwich's assumptions have no basis, especially in light of the fact that the court overruled Defendants' motion for summary judgment. Defendants may prove differently at a full trial. At this time, Dr. Leftwich's testimony survives a

preliminary *Daubert* analysis

III.

Defendants filed a motion in limine to preclude the supplemental testimony and exhibits of Leftwich. Leftwich filed his initial report on August 2, 1999. UST's expert filed his report on September 15, 1999, drawing the opposite conclusion of Leftwich. Leftwich filed a timely rebuttal report prior to his deposition. Leftwich later discovered that the data contained errors. On December 9, 1999, Peat Marwick provided updated, and allegedly more accurate, data to Leftwich. He repeated his prior analysis using the corrected data. Plaintiffs then filed a supplemental report on January 27, 2000. The supplement was appropriate under Fed.R.Civ.P. 26 (e). Plaintiffs claim that Leftwich did not present new opinions. He merely analyzed corrected data, using the same methodologies. Defendants object to paragraphs 5 through 8 of Leftwich's supplemental report, claiming that it contains new opinions. Those opinions are not new, and were discussed in Leftwich's rebuttal report. Likewise, the exhibits related to Leftwich's supplemental memorandum were timely filed and are admissible.

However, to avoid any possible prejudice to Defendants, Defendants may take Leftwich's deposition again prior to his testimony at trial. In his February 8, 2000 order, Magistrate Judge Moyer already granted leave for Defendants to take Leftwich's deposition.

IV.

In conjunction with their motion in limine, Defendants also supplement their motion to exclude Leftwich's testimony to challenge paragraphs 5-8 of his supplemental report. They claim that the new damages figure is based on unreliable data and should be excluded under Fed.R.Evid. 703. Leftwich updated his damages estimate by using the results of approximately

200 surveys completed by Conwood salespeople. The surveys asked the salespeople if they had observed or experienced rack removal by UST and where it occurred. These surveys are inadmissible hearsay. Defendants argue that they are highly biased and are not reliable.

An expert may rely on data that is inadmissible "[i]f of a type reasonably relied upon by experts in the particular field." Rule 703.

> The trial court is to use "[g]reat liberality" in determining the basis of an expert's opinions, and the trial court may not decide whether the opinion itself should be accepted. Rule 703 permits experts to testify without personal knowledge of the underlying facts or data and permits them to testify on the basis of hearsay or unadmitted evidence, as long as the evidence is of a kind reasonably relied upon by experts in the particular field. The rule has been interpreted as merely requiring that experts' scientific knowledge be based on sound methodology.

United States v. Bonds, 12 F.3d 540, 566 (6th Cir. 1993)(citations omitted). It is for the jury to decide any weight to give to the testimony of these experts, along with all the other evidence. Clearly, economists and statisticians often rely on evidence that is not based on their own observations. Merely because there may be bias in the data does not exclude Leftwich's testimony. The surveys are not "replete with so many obvious errors as to be of no value to the trier of fact." *See Slaughter v. Southern Talc Co.*, 919 F.2d 304, 306 (5th Cir. 1990).

Leftwich's testimony passes the admissibility test, even though Defendants have raised legitimate arguments concerning his deficiencies. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

IT IS ORDERED:

Defendants' motion to exclude the damages study and future testimony of Dr. Richard Leftwich (doc. #210) is **DENIED**.

Defendants' motion in limine to preclude undisclosed expert witness materials and related testimony and declarations (doc. #260 and #261) is **DENIED**.

This is the 23 day of February 2000.

Thomas B. Russell
Judge, United States District Court

cc: Counsel

ENTERED
FEB 23 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98-CV-108-R

CONWOOD COMPANY, L.P., ET AL. PLAINTIFFS

v.

UNITED STATES TOBACCO COMPANY, ET AL. DEFENDANTS

MEMORANDUM OPINION & ORDER

This matter is before the court on Defendants' motion in limine to preclude Professor Gundlach's "study" of purported "exclusive agreements" and related testimony (doc. #260 and #263). This Court DENIES that motion.

Gundlach determined that UST's various agreements excluded competitive racks and POS cover at more than 28,000 retail outlets in the United States. He relied on documents provided by UST.

UST objects to Conwood's use of Gundlach's testimony for several reasons. First, UST complains that Gundlach did not study the specific type of exclusive dealing agreements that are forbidden by antitrust law– those which preclude a competitor's products from the market. Nor did he study any other type of exclusive agreement. They argue that Gundlach's testimony lacks foundation in the record and should be excluded under Fed.R.Evid. 702. Second, UST argues that Gundlach makes a legal conclusion by characterizing documents as "exclusive agreements" with retailers. Finally, UST claims that the testimony should be excluded under Rule 403, because it would mislead the jury into thinking that just because a retailer does not carry all Conwood products or does not use Conwood racks, an exclusive agreement exists between UST

and the retailer. The underlying argument to all of these points is that Conwood must show "exclusive dealing" under Clayton § 3 to prevail on its Sherman § 2 claim. UST's argument that only "exclusive dealing" contracts can serve as evidence of anticompetitive behavior was rejected by the denial of Defendant's motion for summary judgment.

Furthermore, Defendants mischaracterize Gundlach's testimony regarding the agreements. Gundlach did not include the types of agreements that contained merely "an indicia of some form, type of exclusion" in his study. (See Gundlach Deposition pp. 151-52)

UST does not challenge Gundlach's qualifications. His testimony is probative and will assist the jury in understanding the alleged widespread anticompetitive behavior of UST. UST's remaining arguments go to the weight of Gundlach's testimony, not its admissibility.

THEREFORE, IT IS ORDERED:

Defendants' motion in limine to preclude Professor Gundlach's "study" of purported "exclusive agreements" and related testimony (doc. #260 and #263) is **DENIED**.

This is the 23 day of February 2000.

Thomas B. Russell
Judge, United States District Court

cc: Counsel

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98CV-108-R

CONWOOD COMPANY, L.P. and
CONWOOD SALES COMPANY, L.P. PLAINTIFFS,

v.

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC., and UST INC. DEFENDANTS.

MEMORANDUM OPINION & ORDER

This case is before the Court on Defendants' Motion in Limine to Preclude Certain Intended Trial Exhibits and Testimony or Other Reference to Such Material (Doc. #265). This Court **DENIES** that motion.

Defendants urge this Court to enter an order excluding Plaintiffs' Exhibits 204, 205, 251, 256 and 261 and like documents from evidence and to exclude any witness from mentioning or discussing them. The documents at issue include retail activity reports taken at various retail establishments by investigators and list comments made by store employees to the investigators. Defendants claim that the documents are themselves hearsay and contain additional hearsay. Plaintiffs respond that the exhibits will not be offered into evidence and that their experts are permitted to rely on inadmissible evidence to explain the origin of their opinions to the jury.

305

Experts may rely on documents containing hearsay, even inadmissible hearsay, in forming their opinions. *See Trepel v. Roadway Express Inc.*, 194 F.3d 708, 717 (6th Cir. 1999). Rule 703 of the Federal Rules of Evidence states that if facts or data are the type that are "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." The Sixth Circuit has interpreted this rule to allow into evidence hearsay statements. *See id.* Such evidence is not admitted for the truth of the matter asserted, but to establish the basis for the expert's opinion. *Id.* The court should focus on whether the material sought to be introduced is of the type reasonably relied upon by experts in the field. *Id.* Neither party argues in this motion that the documents here are not the type reasonably relied upon by experts in this field. Here, it appears that experts for both sides have relied on documents similar to those at issue.

Defendants also argue that the evidence should be excluded as it is highly prejudicial and unfair as Defendants have not had an opportunity to confront and cross-examine the actual declarants as to their knowledge and perception, their bias, and their motive. The loss of an opportunity to confront witnesses is a key concern any time hearsay testimony is allowed at trial. The Sixth Circuit was certainly aware of this consequence when it allowed expert witnesses to rely upon and discuss hearsay. Accordingly, this Court finds little merit in Defendants' argument. Furthermore, this Court does not find that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Fed. R. Ev. 403.

Upon Defendants' Motion in Limine to Preclude Certain Intended Trial Exhibits and Testimony or Other Reference to Such Material (Doc. #265) and this Court being sufficiently advised,

IT IS ORDERED that Defendants' motion is **DENIED**.

This is a final and appealable order. There is no just cause for delay.

This is the 23 day of February, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED
FEB 23 2000
JEFFREY A. APPERSON, CLERK
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98CV-108-R

CONWOOD COMPANY, L.P. and
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v.

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC., and UST INC. DEFENDANTS.

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendants' Motion in Limine Requiring Plaintiffs to Prove Exclusionary Conduct and Fact of Injury at Specific Retail Stores and Chains (Doc. #262). This Court **DENIES** that Motion.

DISCUSSION

Defendants urge this Court to require Plaintiffs to "offer evidence sufficient for a jury to conclude that USTC engaged in 'exclusionary' conduct with respect to specific retail establishments and that any such conduct in fact caused injury to Conwood." (Doc. #262 at 1). Defendants maintain that "where the alleged misconduct and resulting injury is nationwide, an antitrust plaintiff may not make that showing through purported representative sampling." Essentially, Defendants maintain that Plaintiffs must demonstrate specific injury and specific damages at each retail location from which they seek to recover damages. (Doc. #262 at 4). To support their position, Defendants cite *In re Airport Car Rental Antitrust Lit*, 474 F.Supp. 1072 (N.D.Cal. 1979).

Airport involved allegations that Hertz and Avis had violated antitrust laws by obtaining

exclusive contracts with airports across the country through acts of misrepresentation, bribery and inducements. One of the plaintiffs attempted to prove damages through a representative sampling of airports. The court rejected the plaintiff's assertion that it could meet its burden by establishing a national conspiracy and a resulting pattern of exclusion. Rather, the court held that before the plaintiff could recover damages for losses incurred at a specific airport, the plaintiff would have to prove damages at that airport. Defendants argue that this Court adopt a similar position.

The facts of this case are quite dissimilar from those in *Airport* and *Airport* is not binding on this Court. *Airport* involved contracts with roughly 140 airports. The scope of the suit made obtaining and analyzing those contracts a reasonable and effective manner of proving damages in light of the varying conduct that allegedly occurred at different airports. This case involves more than 300,000 retail establishments and allegations more difficult to substantiate than by the cursory review of a contract. Both Plaintiffs and Defendants would incur astronomical expenses if this Court required them to investigate 300,000 separate retail establishments. Indeed, each side would expend $30 million if each investigation cost only $100. This is neither prudent nor reasonable and such a requirement would effectively end this suit. Denying damages because they are of the nature that cannot be easily measured would encourage the very behavior antitrust suits seek to deter. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564, 51 S.Ct. 248, 251, 75 L.Ed. 544 (1931). It is the allegedly widespread activity of the defendants that has made proving specific damages unreasonable to measure. "[J]ustice and public policy alike require that [they] should bear the risk of the uncertainty thus produced." *Id.*

Based on these factual distinctions, the Sixth Circuit does not limit an antitrust plaintiff to

specific damages or prohibit the use of estimates and inferences. *See Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, 358 F.2d 790, 792 (6th Cir. 1966). The nature of antitrust litigation often produces situations where one party would be unable to reasonably determine specific damages. *See id.* at 792.

> It is not the rule that in an action for damages for violation of the antitrust laws plaintiff is limited to recover only the specific items of damage which he can prove with reasonable certainty. On the contrary, the trier of facts may make a just and reasonable estimate of the damage based on relevant data and may act upon probable and inferential as well as direct and positive proof. The wrongdoers should bear the risk of the uncertainty which his own wrong has created. *Bigelow v. RKO Radio-Pictures*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1945); *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *Eastman Kodak Co. v. Souther Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927); *Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798 (1st Cir. 1964).

Id. at 793.

Plaintiffs' expert has utilized various calculations and theories to project the damages in this suit. It is the responsibility of the parties to argue the merits of these damages and to offer alternative explanations for their origin. The Court has no doubt each side can provide the jurors with the information necessary for them to exercise good sense and sound judgment to determine an amount, if any, that will produce adequate compensation and that will, in turn, remove speculation and guesswork from the decisionmaking process. Simply put, Plaintiffs are not required to prove what damage occurred at each of the 300,000 separate retail establishments in order to prove the fact of injury. Defendants argument to the contrary is not well taken.

CONCLUSION

Upon Defendants' Motion in Limine Requiring Plaintiffs to Prove Exclusionary Conduct and Fact of Injury at Specific Retail Stores and Chains (Doc. #262) and this Court being sufficiently advised,

IT IS ORDERED that Defendants' Motion is **DENIED**.

This is the 23 day of February, 2000. This is a final and appealable order.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

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FEB 23 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98CV-108-R

CONWOOD COMPANY, L.P. and
CONWOOD SALES COMPANY, L.P. PLAINTIFFS,

v.

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC., and UST INC. DEFENDANTS.

MEMORANDUM OPINION & ORDER

This case is before the Court on Defendants' Motion in Limine to Preclude All Evidence Concerning Conduct Protected by Noerr-Pennington Immunity (Doc. #266). Assuming Plaintiffs' accusations as true, this Court finds that admission of such evidence to show the purpose and character of other activity would be cumulative, likely to confuse the jury and overly prejudicial to the defendants. Accordingly, this Court **GRANTS** Defendants' motion.

DISCUSSION

Eastern Railroad Presidents Conf. v. Noeer Motor Freight, Inc., served as the springboard for four decades of judicial efforts to define the circumstances in which courts grant private efforts to elicit rivalry-suppressing government action antitrust immunity. 365 U.S. 127 (1961). The Supreme Court expanded this doctrine to include efforts to influence government administrative processes and judicial or adjudicatory processes in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). It is activity protected by this body of caselaw that is now before the

Court.

Although not actionable, courts have admitted *Noerr-Pennington* evidence to establish the defendant's anticompetitive intent in engaging in other behavior that may be actionable, provided that any prejudicial effect does not outweigh the probative value of the evidence. *See Alexander v. National Farmers Org.*, 687 F.2d 1173, 1197-98 (8th Cir. 1982), *cert. denied*, 461 U.S. 937 (1983).

> It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny."

Pennington, 381 at 670 n.3.. Under the probative/prejudice inquiry, a court looks at the prejudice to a party's First Amendment rights. *See Feminist Women's Health Center, Inc v. Mohammad.*, 586 F.2d 530, 543 n.7 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

At trial, Plaintiffs hope to show that UST preserved its "monopoly share of the moist snuff market by choking competitive distribution and by restricting competitors' opportunities to promote their products at the point of sale." (Pls.' Opp'n to Mot. To Preclude Intent Ev. at 3). Plaintiffs assert that "UST's efforts to promote the 'Global Settement' of litigation among cigarette manufacturers, state attorneys general, and plaintiffs' lawyers were designed to pursue these same anticompetitive ends through legislative means." *Id.* Plaintiffs seek to introduce *Noeer-Pennington* evidence in this case to show intent including evidence that Defendants sought (1) legislation restricting the sale of moist-tobacco to a non-self-service environment (behind the counter); (2) legislation restricting competitors' promotional opportunities by

limiting the type and number of advertisements permitted; and (3) a settlement payment structure that would impose disproportionate costs on its competitors. In support of admission, Plaintiffs contend that the information may be admitted to show intent and will not be unduly prejudicial. Since the legislation did not pass, Plaintiffs argue the jury could not infer damages arose from this activity and, accordingly, that Defendants will suffer no punishment for protected activity. Defendants argue that all *Noeer-Pennington* activity should be barred from admission in this case.

Courts subject the introduction of protected *Noeer-Pennington* evidence to illustrate the purpose or character of unprotected conduct to analysis under Fed. R. Evid. 403. *See City of Cleveland v. Cleveland Elec. Illuminating Co.*, 734 F.2d 1157, 1163 (6th Cir.), *cert. denied*, 469 U.S. 884 (1984). Since *Noeer-Pennington* aims to protect the exercise of a defendant's First Amendment rights, "admissibility should be governed by a test that weighs the probativeness of and the plaintiff's need for the evidence against the danger that admission of the evidence will prejudice the defendant's first amendment rights." *Feminist Women's Health Center,* 586 F.2d at 543 n.7.

Excluding "purpose and character" evidence consisting of conduct protected by *Noerr-Pennington* should be the rule rather than an exception. *See United States Football League v. National Football League*, 634 F.Supp. 1155, 1181 (S.D.N.Y. 1986). Some courts have gone as far as to note that "evidence which by its very nature chills the exercise of First Amendment rights" should be presumed prejudicial under Fed. R. Ev. 403. *See id.* Although the Court here would be required to instruct the jury that the *Noeer-Pennington* conduct is entirely lawful, the instruction may be quickly overwhelmed by the admission of "purpose or character" evidence

designed to place Defendants in the harshest light. *See Cleveland,* 734 F.2d at 1163. "This is not an admissable basis for its introduction. . . . Judicial self-restraint is appropriate in these circumstances." *Id.*

After reviewing the evidence and performing a Fed. R. Ev. 403 analysis, this Court believes that admitting the evidence would be unfairly prejudicial to Defendants' First Amendment Rights. Plaintiffs attempt to introduce this evidence, in part, for the improper purpose of disparaging Defendants. *See id.* at 1163. Plaintiffs have survived hard-fought dispositive motions by demonstrating the existence of ample evidence to present their case. *Noeer-Pennington* evidence would only be cumulative in its efforts to demonstrate intent and would ultimately create an unnecessary risk of exposing the jury to the danger of considering that proof for the improper purpose of an anti-competitive act. *See Id.* at 1165. If the parties' and court's estimations are correct, this trial will be both long and complicated. An inquiry into the protected activity and the true motives behind it will add an unnecessary layer to the trial. Even though the legislation was not passed and no recoverable damage could extend from the protected activity, the danger is too great that the jury will believe that Defendants can be punished for this protected activity. Admitting the evidence would chill Defendants' First Amendment rights.

Upon Defendants' Motion in Limine to Preclude All Evidence Concerning Conduct Protected by Noerr-Pennington Immunity (Doc. #266) and this Court being sufficiently advised,

IT IS ORDERED that Defendants motion is **GRANTED**. *Noeer-Pennington* evidence should be excluded under Fed. R. Ev. 403. The evidence's probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury and by

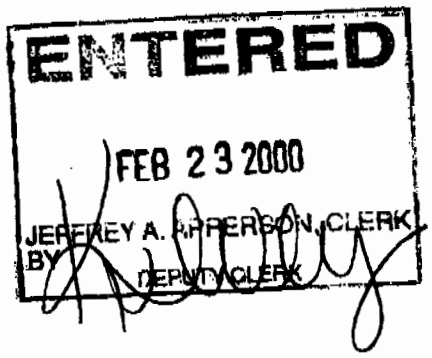
considerations of undue delay, waste of time, and needless presentation of cumulative evidence.

This is a final and appealable order. There is no just cause for delay.

This is the 23 day of February, 2000.

Thomas B. Russell, Judge
Untied States District Court

cc: Counsel



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February 22, 2000

Honorable Thomas B. Russell
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed is a courtesy copy of Plaintiffs' Revised List of Trial Exhibits, which has also been filed with the Clerk.

Respectfully,

Benjamin A. Powell

Benjamin A. Powell

Enclosure

cc: Neal R. Stoll
John S. Reed

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February 22, 2000

Jeffrey A. Apperson, Clerk
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Plaintiffs' Revised List of Trial Exhibits.

Also enclosed is an additional copy. I would be grateful if you would date-stamp and return this copy in the enclosed self-addressed envelope.

Many thanks for your assistance.

Respectfully,

Benjamin A. Powell

Benjamin A. Powell

Enclosures

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

Civil Action No.
5:98CV-108-R

JURY TRIAL DEMANDED

'00 FEB 22 A10:14
FILED
U.S. DISTRICT COURT
WESTN. DIST. KENTUCKY

PLAINTIFFS' REVISED LIST OF TRIAL EXHIBITS

Plaintiffs Conwood Company, L.P., and Conwood Sales Company, L.P. (collectively, "Conwood") respectfully submit the attached revised list of exhibits plaintiffs may offer in evidence during their case-in-chief ("Exhibit "A"). The sole new addition to this list is PX332, a business record of defendants that was transmitted today to counsel for defendants.

Plaintiffs reserve the right to modify or supplement this list as they continue to prepare their case for trial, to offer enlargements of exhibits in evidence, to offer additional exhibits identified and discussed during deposition testimony designated by plaintiffs for potential use at trial (which designations are incorporated herein by reference), and to modify demonstrative exhibits plaintiffs expect to offer during testimony by expert witnesses in order to conform such exhibits to the proof. Plaintiffs further reserve their right to offer additional exhibits, not listed herein, in rebuttal.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

February 22, 2000

16diii004498

EXHIBIT A

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
1	1357714	1357714
2	1349445	1349447
3	105025	105026
4	1302006	1302007
5	215638	215639
6	215629	215631
7	986131	986132
8	1309416	1309418
9	1144389	1144854
10	1380676	1380677
11	1502105	1502106
12	032324	032377
13	986056	986064
14	173402	173430
15	1376761	1376771
16	223514	223516
17	554804	554806
18	1069304	1069311
19	1285459	1285460
20	105883	105900
21	258683	258695
22	648553	648555
23	1285631	1285636
24	648480	648482
25	640697	640699
26	225075	225076
27	648880	648882
28	048283	048350
29	145699	145702
30	227150	227151
31	150285	150430
32	404732	404732
33	052101	052123
34	154940	154951
35	227119	227120
36	226357	226359
37	400650	400654
38	411822	411822
39	932900	932906
40	644405	644406
41	109424	109441
42	786278	786279
43	416756	416760
44	012829	012830
45	078568	078586

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
46	407002	407005
47	041347	041390
48	705077	705090
49	521355	521357
50	241128	241178
51	241726	241777
52	066396	066432
53	868781	868781
54	109014	109014
55	117719	117733
56	118811	118829
57	229149	229170
58	106325	106327
59	704986	704990
60	1028000066	1028000066
61	877411	877413
62	107587	107642
63	025913	025916
64	432049	432050
65	262796	262798
66	351930	351931
67	159185	159186
68	025956	025970
69	020570	020578
70	034191	034195
71	734483	734484
72	411699	411701
73	297464	297472
74	952249	952251
75	297211	297211
76	261739	261740
77	025912	025912
78	026979	026994
79	672530	672531
80	253700	253701
81	251071	251073
82	024537	024537
83	404679	404691
84	415580	415581
85	411776	411777
86	813387	813387
87	521295	521297
88	411711	411712
89	557001	557002
90	705216	705222

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
91	041564	041624
92	255217	255222
93	158114	158116
94	734408	734410
95	033233	033244
96	263027	263028
97	Blackburn Deposition Exh. 21	
98	263116	263117
99	254777	254779
100	206047	206049
101	556461	556479
102	301114	301220
103	193470	193485
104	820775	820776
105	734373	734375
106	209839	209840
107	014936	014936
108	014946	014946
109	015275	015275
110	157108	157109
111	202768	202770
112A	825819	825819
112B	249109	249121
112C	509668	509668
112D	825828	825828
112E	825829	825829
112F	896758	896758
112G	517019	517019
112H	509661	509661
112I	249095	249095
112J	127467	127467
112K	1380257	1380257
112L	1380256	1380256
112M	1380259	1380259
112N	821547	821547
112O	821537	821537
112P	1380258	1380258
113A	734588	734590
113B	888479	888481
114	209794	209794
115	037480	037509
116	512477	512478
117	604187	604188
118	512475	512476
119	282636	282639

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
120	825801	825807
121	321056	321056
122	825832	825832
123	432492	432507
124A	347835	347835
124B	417472	417472
124C	417473	417473
124D	318229	318330
124E	318081	318282
124F	347209	347210
124G	314496	314496
125	1257004168	1257004168
126	411831	411832
127	940455	940455
128	416416	416419
129	259272	259278
130	286194	286196
131	205280	205281
132	209653	209653
133	034050	034053
134	205979	205982
135	1004007812	1004007813, 1257004168
136	209125	209127
137	201648	201657
138	034016	034040
139	298006	298008
140	109520	109535
141	415952	415953
142	996351	996352
143	094547	094550
144	821608	821609
145	Intentionally Left Blank	
146	Customer Alliance Program Enhancements	
147	Memo from Thibodeaux & Bonfiglio re: Racks	
148	106816	106817
149	109185	109189
150	672309	672311
151	055094	055115
152	042217	042218
153	042223	042260
154	693132	693133
155	217787	217788
156	186413	186419
157	403300	403350

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
158	173906	173908
159	1380036	1380041
160	Declaration of John Naifeh	
161	Declaration of Alan Hart	
162	Declaration of John Bonoffski	
163	Declaration of John Bonoffski	
164	Declaration of Ronald Piatek	
165	Declaration of Borrowdale	
166	Declaration of Leroy Keil	
167	Ulizo Exh. 1	
168	1011022959	1011022971
169	023272	023294
170	534465	534466
171	536138	536160
172	588165	588167
173	305859	305861
174	556987	556988
175	734333	734334
176	132239	132241
177	914378	914383
178	825724	825724
179	227192	227192
180	888816	888818
181	734373	734375
182	154397	154398
183	318185	318186
184	733782	733784
185	912319	912319
186	1002665	1002679
187	141379	141381
188	026970	026971
189	404749	404750
190	404899	404899
191	411834	411834
192	201739	201741
193	251053	251067
194	326041	326048
195	251068	251070
196	251074	251074
197	251427	251430
198	Deposition photos	
199	560594	560610
200	250035	250041
201	249984	249994
202	669844	669864

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
203	529213	529214
204	Carlson Dep. Exh. 18	
205	Carlson Dep. Exh. 19	
206	Carlson Dep. Exh. 20	
207	416671	416676
208	257015	257017
209	404746	404747
210	322221	322224
211	205974	205977
212	205966	205971
213	205979	205982
214	974600	974603
215	153076	153094
216	206570	206573
217	732229	732237
218	416697	416699
219	416809	416812
220	298204	298224
221	Chiaradio Dep. Exh. 26	
222	416783	416786
223	Chiaradio Dep. Exh. 28	
224	Engster Dep. Exh. 1	
225	Engster Dep. Exh. 2	
226	229361	229362
227	147149	147149
228	012829	012830
229	024274	024275
230	202247	202267
231	109389	109415
232	318619	318620
233	149368	149371
234	024544	024544
235	155229	155235
236	201771	201771
237	159231	159235
238	278897	278920
239	331658	331659
240	025912	025912
241	149373	149373
242	512487	512488
243	512483	512484
244	Gill-Elkins Dep. Exh. 1	
245	772155	772158
246	772168	772178
247	556594	556613

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
248	556987	556988
249	210847	210848
250	169908	169908
251	010012592	010012592
252	Keil Exh. 1	
253	Declaration of Leroy Keil	
254	Latta Exh. 1	
255	Leinen Exh. 1	
256	Leinen Exh. 2	
257	1076746	1076760
258	106772	106781
259	1060686	1060700
260	Piatek Exh. 1	
261	Townsend Exh. 1	
262	1169002526	1169002530
263	1169002525	1169002525
264	734422	734424
265		Walsh Dep. Exh. 1
266	250018	250019
267	510926	510926
268	513072	513073
269	UST Reports Fourth Quarter 1999 E.P.S. Up 23%, http://www.shareholder.com/ust/news20000120-13389.htm	
270	404107	404109
271	634433	634434
272	870559	870560
273	589126	589126
274	217796	217797
275	Notice of Deposition of Alan Hart	
276	556997	556998
277	032379	032398
278	640534	640538
279	666185	666186
280	672004	672004
281	254143	254145
282	158372	158374
283	869879	869880
284	262433	262438
285	666183	666183
286	069783	0679786
287	512796	512798
288	109093	109094
289	321002	321003

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
Group Exhibit 290	Misc. Conwood moist snuff products – Available for inspection	
Group Exhibit 291	Misc. Conwood loose-leaf products – Available for inspection	
Group Exhibit 292	Misc. Conwood moist plug products – Available for inspection	
Group Exhibit 293	Misc. Conwood twist products - Available for inspection	
Group Exhibit 294	Misc. Conwood dry snuff products – Available for inspection	
Group Exhibit 295	Conwood J racks - Available for inspection	
Group Exhibit 296	Conwood short profile racks with accessories - Available for inspection	
Group Exhibit 297	Conwood tall profile racks with accessories - Available for inspection	
Group Exhibit 298	Conwood wire racks - Available for inspection	
Group Exhibit 299	Conwood counter and shelf display materials - Available for inspection	
Group Exhibit 300	Conwood header and side panel cards – Available for inspection	
Group Exhibit 301	Conwood price promotional POS – Available for inspection	
Group Exhibit 302	Conwood specialty rack - Available for inspection	
Group Exhibit 303	Defaced Conwood racks/materials – Available for inspection	
Group Exhibit 304	Swedish Match merchandising materials - Available for inspection	
Group Exhibit 305	Exemplar UST racks, merchandising materials and product – Available for inspection	
Group Exhibit 306A	Transcript of UST teleconference 3/17/97 Tape Cassette USTC/CWD 408150A	
Group Exhibit 306B	Transcript of UST teleconference 7/24/97 Tape Cassette USTC/CWD 408150B	
Group Exhibit 306C	Transcript of UST teleconference 10/16/97 Tape Cassette USTC/CWD 408150C	
Group Exhibit 306D	Transcript of UST teleconference 1/22/98 Tape Cassette USTC/CWD 408150D	
Group Exhibit 306E	Transcript of UST teleconference 10/21/98 Tape Cassette USTC/CWD 408150E	
Group Exhibit 306F	Transcript of UST teleconference 7/22/98 Tape Cassette USTC/CWD 408150F	
Group Exhibit 307A	Audiocassette of UST teleconference 3/17/97 USTC/CWD 408150A	
Group Exhibit 307B	Audiocassette of UST teleconference 7/24/97 USTC/CWD 408150B	

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
Group Exhibit 307C	Audiocassette of UST teleconference 10/16/97 USTC/CWD 408150C	
Group Exhibit 307D	Audiocassette of UST teleconference 1/22/98 USTC/CWD 408150D	
Group Exhibit 307E	Audiocassette of UST teleconference 10/21/98 USTC/CWD 408150E	
Group Exhibit 307F	Audiocassette of UST teleconference 7/22/98 USTC/CWD 408150F	
308	Conwood Complaint Exhibit C Videocassette	
309	Replica of generic retail display shelf space with rolling casters for courtroom use. Will be made available for inspection at Paducah when completed.	
310A	Distributor invoice	
310B	UST shipping carton panel for COPE LC	
310C	UST shipping carton panel for COPE LC	
311A	Photos of UST signage	
311B	Photo of UST Green Neon Rack	
311C	Photo of store set	
311D	Photo of store set	
311E	Wal*mart photo	
311F	Wal*mart photo	
Group Exhibit 312A	Photo of Conwood rack	
Group Exhibit 312B	Photo of Conwood rack	
Group Exhibit 312C	Photo of Conwood floor display	
Group Exhibit 312D	Photo of Conwood rack POS	
Group Exhibit 312E	Photo of Conwood rack POS	
Group Exhibit 312F	Photo of Conwood rack POS	
Group Exhibit 312G	Photo of Conwood rack POS	
Group Exhibit 312H	Photo of Conwood rack POS	
Group Exhibit 312I	Photo of Conwood rack POS	
Group Exhibit 312J	Photo of Conwood rack POS	
Group Exhibit 312K	Photo of Conwood rack POS	
Group Exhibit 312L	Photo of Conwood rack POS	
Group Exhibit 312M	Photo of Conwood rack POS	

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
Group Exhibit 312N	Photo of Conwood rack POS	
Group Exhibit 312O	Photo of Conwood rack POS	
Group Exhibit 312P	Photo of Conwood rack POS	
313	Report of Morton I. Kamien and all attachments and supplements thereto.	
314	Rebuttal Report of Morton I. Kamien and all attachments and supplements thereto.	
315	Supplemental Report of Morton I. Kamien and all attachments and supplements thereto.	
316	Report of Richard Leftwich and all attachments and supplements thereto.	
317	Rebuttal Report of Richard Leftwich and all attachments and supplements thereto.	
Group Exhibit 318A	Photo of Convenience Store rack	
Group Exhibit 318B	UST POS	
Group Exhibit 318C	Photo of Store set	
Group Exhibit 318D	Photo of Convenience Store rack	
Group Exhibit 318E	Photo of Convenience Store rack	
Group Exhibit 318F	Photo of Convenience Store rack	
Group Exhibit 318G	Photo of Convenience Store rack	
Group Exhibit 318H	Photo of Convenience Store rack	
Group Exhibit 318I	Photo of Convenience Store rack	
Group Exhibit 318J	Conwood POS	
Group Exhibit 318K	UST POS	
Group Exhibit 318L	Photo of Store set	
Group Exhibit 318M	Photo of Convenience Store rack	
Group Exhibit 318N	Photo of Convenience Store rack	
Group Exhibit 318O	Photo of Convenience Store rack	
Group Exhibit 318P	Photo of Wal*Mart set	

PX NUMBER	DESCRIPTION/ BEGINNING BATES	ENDING BATES
Group Exhibit 318Q	Photo of Wal*Mart set	
Group Exhibit 318R	UST Rack photo	
Group Exhibit 318S	UST Rack photo	
Group Exhibit 318T	UST Rack photo	
Group Exhibit 318U	UST Rack photo	
Group Exhibit 318V	UST Rack photo	
Group Exhibit 318W	UST Rack photo	
Group Exhibit 318X	Photo of Store set	
Group Exhibit 318Y	Photo of Store set	
319	Declaration of Waynell Renfro	
320	Report of Edward T.L. Popper and all attachments and supplements thereto.	
321	Rebuttal Report of Edward T.L. Popper and all attachments and supplements thereto.	
322	Report of Gregory T. Gundlach and all attachments and supplements thereto.	
323	Rebuttal Report of Gregory T. Gundlach and all attachments and supplements thereto.	
324	Report of Robert C. Blattberg and all attachments and supplements thereto.	
325	Rebuttal Report of Robert C. Blattberg and all attachments and supplements thereto.	
326	Expert Demonstratives of Morton I. Kamien	
327	Expert Demonstratives of Richard Leftwich	
328	Expert Demonstratives of Edward T.L. Popper	
329	Expert Demonstratives of Gregory T. Gundlach	
330	Expert Demonstratives of Robert C. Blattberg	
331	Multi-part PAR scanner sheet	
332	Maximum Profit-A Strategic Approach to the Moist Smokeless Tobacco Business (1999-2000)	

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98CV-108-R

CONWOOD COMPANY, L.P. and
CONWOOD SALES COMPANY, L.P. PLAINTIFFS,

v.

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC., and UST INC. DEFENDANTS.

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defandants' Motion in Limine to Preclude Irrelevant, Misleading and Unfairly Prejudicial Statements and References (Doc. #267). This Court grants that motion in part and denies that motion in part. Plaintiffs are prohibited from analogizing to *United States v. Microsoft*, using the word "kneecapping" and are admonished from using similar language that is argumentative and connotative of violent behavior.

DISCUSSION

I. *United States v. Microsoft* Case

This Court grants Defendants request for an order in limine precluding Plaintiffs from referencing the highly publicized *United States v. Microsoft* case. Fed.R.Evid. 403 allows a court to exclude relevant evidence on grounds of prejudice, confusion and waste of time. Reference to the *Microsoft* case serves no probative value and the Court can imagine no legitimate harm Plaintiffs' counsel will suffer by being unable to mention the case. Conversely, the reference is highly prejudicial to Defendants. Accordingly, Plaitiffs' counsel should not

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reference this case before the jury.

II. "Kneecapping"

Like reference to the *Microsoft* case, highly charged words of violence serve no probative value and can only stand to prejudice Defendants; they are argumentative. Plaintiffs can reach the same result by describing the activity in which they allege Defendants engaged. The use of loaded buzzwords is not crucial. Accordingly, this Court grants Defendants' motion.

III. "Kickbacks"

Although quite similar to the word "kneecapping," this Court finds a distinction nonviolent criminal words like "kickbacks." Here, Plaintiffs allege that Defendants used underhanded tactics in achieving their goals. Kickbacks merely refers to those tactics and, therefore, has probative value. Although it may be prejudicial, it is only prejudicial in the sense that it describes activities a jury would find reprehensible. If a jury believes that Defendants engaged in this activity, it is their own activity, not the word that describes it, that will ultimately impact Defendants.

IV. Monopolist

This Court denies Defendants' request to prohibit Plaintiffs' from referring to Defendants as "monopolists." It is this very activity that is at issue. The Court believes the use of "monopolist" at trial will not unfairly prejudice Defendants and that it does have probative value.

CONCLUSION

Upon Defendants' Motion in Limine to Preclude Irrelevant, Misleading and Unfairly Prejudicial Statements and References,

IT IS ORDERED that Defendants' motion is **DENIED in part and GRANTED in part.** Plaintiffs are prohibited from analogizing to *United States v. Microsoft*, using the word

[illegible] are prohibited from analogizing to *United States v. Microsoft*, using the word "kneecapping" and are admonished from using similar language that is argumentative and connotative of violent behavior.

This is a final and appealable order. There is no just cause for delay.

This is the 23 day of February, 2000.

Thomas B. Russell, Judge
Untied States District Court

cc: Counsel

ENTERED

FEB 23 2000

JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98CV-108-R

CONWOOD COMPANY, L.P. and
CONWOOD SALES COMPANY, L.P. PLAINTIFFS,

v.

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC., and UST INC. DEFENDANTS.

MEMORANDUM OPINION & ORDER

This case is before the Court on Plaintiffs' Motions in Limine (Doc. #255). Plaintiffs bring six motions in limine before the Court. This Court **GRANTS** motion 1, **DENIES** motions 3, 4 and 6 and finds motions 2 and 5 **MOOT**.

DISCUSSION

1. **Evidence as to Conwood's Owners and Their Wealth**

Plaintiffs move that this Court prohibit evidence regarding the owners of Conwood and their individual wealth. Plaintiffs argue the evidence is irrelevant and prejudicial. Defendants maintain that Plaintiffs' case rests, in part, on its David versus Goliath portrayal and that the owners and their wealth break down this facade. Furthermore, they argue that the owners' participation in preparation for this trial opens their individual ownership and wealth into issue. This Court disagrees. Even if ownership and wealth are somehow relevant, a Fed.R.Evid. 403 analysis demonstrates that the probative nature of the inquiry is substantially outweighed by the potential prejudice to Plaintiffs, while causing no harm to Defendants' case. Evidence of

Plaintiffs' profits and size can be fairly offered without revealing information about the ultimate beneficiaries of the profits. Accordingly, this Court grants Plaintiffs' motion to exclude evidence of Conwood's owners, the Pritzker family, and their wealth.

2. Testimony of Expert Sheffman

This motion was made moot by the Court order dated February 9, 2000.

3. Evidence That Companies Other than UST Engaged in Misconduct at Stores

Plaintiffs move the Court to prohibit the introduction of alleged evidence that Plaintiffs and others engaged in inappropriate behavior at stores in addition to the alleged behavior of Defendants. This Court denies that motion.

The definition of monopolizing conduct necessarily implies that not all conduct deemed unlawfully exclusionary for the party with substantial market power is improper for the party that does not have a strong market share. *See* 3A, Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, 337 (1996). Conduct that would have significant anticompetitive behavior when coupled with substantial market power may have little or no effect when the market power is slight. *See id.* Here, the Court is faced with that situation. The behavior used by Defendants is allegedly unlawfully exclusionary. The behavior of Plaintiffs, however, is not. As such, Plaintiffs' behavior is not an affirmative defense. In a vacuum, the evidence would not be proper.

This case presents the Court with broader issues. Much of Defendants alleged behavior paints Defendants in a very negative light aside from its allegedly monopolistic aspect. Excluding evidence of similar actions by Plaintiffs and others would unfairly prohibit Defendants from defending their corporate character. If true, evidence of other actions tends to

show that the activity was not localized to Defendants, but is reflective of a corporate culture that permeates the moist tobacco industry. Although it may not show that the actions were lawful for Defendants, it may show that unethical behavior is not exclusive to Defendants. Because the evidence has some probative value as to characterizing the nature of the conduct, it is permissible.

4. "Retailer Permission" Evidence

Plaintiffs move this court to exclude evidence that retailers permitted or agreed to UST's exclusion of rival racks, products, and advertising, except as necessary to rebut any claim by Plaintiffs that, in specific instances, Defendants effect such exclusion against the wishes of the retailer. This Court denies that motion

Plaintiffs have taken this motion out of context. They seem to argue that permitting the evidence condones the activity and holds it lawful. It does not. Allowing Defendants to present evidence of retailer consent or of specific agreements does not mean that evidence demonstrates lawful activity. Rather, the evidence paints a picture of the overall atmosphere and activity of Defendants. Plaintiffs are alleging a widespread pattern of activity that cumulatively resulted in unlawful, anticompetitive behavior. It would be unfair for this Court to allow Plaintiffs to piece together various aspects to show a complete picture while holding Defendants to a stricter and more restrictive standard. Defendants should be allowed to develop their case in the same fashion, to rebut allegations of an intent to monopolize, and to demonstrate how their behavior was or was not unlawful.

Plaintiffs maintain that introduction of the evidence will serve only to confuse jurors. The Court disagrees. This evidence will serve to provide jurors a complete picture. Counsel for

both Defendants and Plaintiffs have already exhibited excellent advocacy skills. These same skills will serve counsel well in explaining and advocating both the factual and legal portions of this case.

5. Any Evidence Offered in Support of UST's Counterclaims

This motion is mooted by this Court's order discussing summary judgment.

6. Hearsay Deposition Testimony and Documents

Plaintiffs argue that Defendants should not be allowed to have any of the 25 listed employees testify by deposition. They assert this serves only to prevent the jury from making an accurate evaluation of their credibility. Plaintiffs also argue that Defendants should be prohibited from introducing hundreds or thousands of hearsay statements. This Court denies both portions of this motion.

Plaintiffs blanket request for a prohibition on deposition testimony is denied. This Court has already ruled that if a witness appears live for one party that party must ensure that the witness is live for the other party. Plaintiffs have failed to identify any specific portion of Fed.R.Civ.P. 32 that prohibits deposition testimony here and have not moved regarding the specific circumstances of any particular witness. A blanket ruling would be inappropriate considering the various factors that determine when a witness should or should not be allowed to testify by deposition. Similarly, Plaintiffs have not identified any specific documents or identified the hearsay portions of those documents. As both parties are surely aware, hearsay is a broad and complicated doctrine. It is not the responsibility of this Court to cull through hundreds or thousands of documents searching for hearsay and then determining whether applicable exceptions exist. In light of Plaintiffs' generalist approach, this Court holds that hearsay issues

will be more appropriately raised when a party seeks to introduce hearsay evidence at trial.

CONCLUSION

Upon Plaintiffs' Motions in Limine (Doc.#255) and this Court being sufficiently advised,

IT IS ORDERED that this Court **GRANTS** motion 1, **DENIES** motions 3, 4 and 6 and finds motions 2 and 5 **MOOT**.

This is a final and appealable order. There is no just cause for delay.

This is the 23 day of February, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED
FEB 23 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii004518

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION OF DEFENDANTS TO PRECLUDE PLAINTIFFS' PROPOSED NEW VERSION OF THE GUNDLACH "STUDY" OF "EXCLUSIONARY AGREEMENTS AND ANY RELATED EXHIBITS OR TESTIMONY

Defendants move the Court for an order precluding Plaintiffs' proposed new version of the Gundlach study of exclusionary agreements and any related exhibits or testimony. A memorandum of law in support of this motion and a tendered order are being filed simultaneously with this motion.

Respectfully submitted,

Dated: February 23, 2000

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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing motion, the acompanying memorandum in support and the tendered order were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., counsel for Plaintiffs, this 23rd day of February, 2000

Counsel for Defendants

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

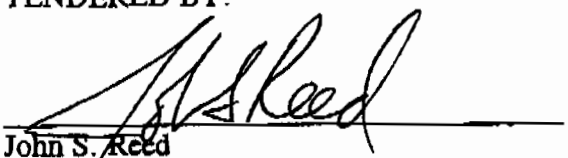
Defendants having moved the Court for an order precluding Plaintiffs' proposed new version of the Gundlach study of exclusionary agreements and any related exhibits or testimony, and the Court being well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted.

Entered this _____ day of _____, 2000.

_____
UNITED STATES DISTRICT JUDGE

TENDERED BY:



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO PRECLUDE PLAINTIFFS' PROPOSED NEW VERSION OF THE THE GUNDLACH "STUDY" OF "EXCLUSIONARY" AGREEMENTS AND ANY RELATED EXHIBITS OR TESTIMONY

Discovery in this case began with document production in December of 1998, followed by deposition discovery beginning in April of 1999. Plaintiffs hired five experts and submitted expert reports under Fed. R. Civ. P. 26(a)(2)(B), which requires a party to disclose "a complete statement of all opinions to be expressed and the basis and reasons therefor . . . ." (emphases added). Pursuant to this Court's February 18, 1999 Scheduling Order, those reports were due and were filed on August 1, 1999.

Subsequently, Plaintiffs had a second opportunity to meet the requirements of Rule 26(a)(2)(B) when, again pursuant to this Court's Scheduling Order, Plaintiffs submitted

rebuttal expert reports on October 1, 1999, a full eight weeks after their original expert reports were submitted. For the first time, on rebuttal, Plaintiffs included Professor Gundlach's "study" of so-called "exclusive agreements," a "study" that was simultaneously incorporated by reference into several of Plaintiffs' other expert rebuttal reports. Expert depositions were taken, and despite Plaintiffs' disclosure on "rebuttal" of that which should have been disclosed in their affirmative expert reports, Defendants were able to take meaningful discovery and to create a deposition record for trial.

Now, at 10:30 at night, on February 21, 2000 -- less than one week before this trial is scheduled to begin -- Plaintiffs have offered a new version of Professor Gundlach's "study" of so-called "exclusive agreements," as well as a new basis for the study -- both under the guise of a "proposed demonstrative exhibit for use in Professor Gundlach's testimony."[1] (Tab A) This time, the new version of the so-called "study": (1) includes 9,318 new retail locations (48 new chains), (2) eliminates -- without explanation -- approximately 1,000 retail locations (14 retail chains) previously listed as having "exclusive agreements" with U.S. Tobacco,[2] and (3)

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[1] Plaintiffs' cover letter maintains that the new study results and new bases are not even "clarifications" of Gundlach's earlier study. That transparency is resolved by the fact that Plaintiffs are offering a proposed "demonstrative" exhibit one week before trial even though the parties are only obligated to provide potential demonstrative exhibits 48 hours before the witness will be called.

[2] Tellingly, several retail chains were apparently eliminated from Professor Gundlach's original "study" because Plaintiffs – and presumably Professor Gundlach – reviewed U.S. Tobacco's Trial Witness List and discovered that the retailer that purportedly had an "exclusive agreement" with U.S. Tobacco (according to Professor Gundlach's original "study") would be

(continued...)

offers completely new bases for Professor Gundlach's conclusions -- apparently, more expert (or Plaintiffs' counsel) phone calls with Conwood personnel summarized under the headings "Cwd. Sales Force Comment" and "Cwd. Contact." This is after Plaintiffs proclaimed to this Court less than two weeks ago that Professor Gundlach "carefully included only agreements for which there was clear evidence that UST had secured exclusive vending rights and/or significant POS restrictions." Pl. Opp. Mem. at 5. Apparently, Plaintiffs were not referring to "clear evidence" for the Bradford Oil, Buy N Fly, CV's IGA, CWX Max Mart, Exit 76 Corp. (Mobil Mart), Express Mart, Express Mart (FINA), EZ Mart, Fill Zone, Gate Food Post/Gate Petroleum, Kroger (Dallas Division), Mapco (Memphis), Meijer, and Toot N Scoot chains, all of which have inexplicably been dropped from Professor Gundlach's "study" less than one week before trial.[3]

The first hint of a modified study came on February 11, 2000, when Plaintiffs responded to Defendants' motion in limine to preclude the Gundlach "study." It was only then that Defendants learned for the first time that Professor Gundlach's "study" had taken on new and different dimensions. See Pl. Opp. Mem. at 1 (disclosing that Professor Gundlach's study now encompassed 29,000 rather that 22,000 retail locations, but not disclosing that the new "study"

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[2](...continued)
coming to Paducah to tell a different story.

[3] The Toot N Scoot chain was included in original study despite the existence of a Conwood letter – a record evidence document – recording the fact that Mr. McGuire, owner of the Toot N Scoot chain, "was emphatic about not being on a U.S. Tobacco program," hardly "clear evidence" of an agreement. Gundlach Dep. at 322-24, Ex. 12. The Toot N Scoot chain was dropped from the study after Plaintiffs learned that Mr. McGuire would be offering testimony at trial.

eliminated 14 of the original 81 retail chains on the list and added 48 completely new retail chains). Defendants requested an immediate Rule 26(e) disclosure of any modification to Professor Gundlach's "study," and the reasons and bases therefor. See Letter of February 17 (Tab B). Plaintiffs informed Defendants by letter that Plaintiffs did not have a duty to make any disclosures under Rule 26(e) because Professor Gundlach's "further work is neither clarification nor correction of prior data relied on by Professor Gundlach, and contains no new opinion." See Letter of February 22. (Tab A) To the contrary, the addition of 48 retail chains and the deletion of 14 retail chains constitute at least a "correction" or "clarification" of his opinion.

Accordingly, Plaintiffs have offered, on the eve of trial, a proposed demonstrative exhibit that is not only highly and unfairly prejudicial on its face as a "demonstration," but also encompasses new opinions, new bases and reasons therefor, and new data or other information considered by Professor Gundlach. Defendants have no opportunity to subject Professor Gundlach's new "study" and new "bases" to any type of cross-examination, and Defendants have no opportunity to interview personnel from any of the 48 retail chains added to Professor Gundlach's new list to procure their attendance at trial. If Rule 26(a)(2)(B) was meant to do anything, it was meant to prevent this type of sandbagging and to prevent the admission of unexamined, and highly prejudicial, expert testimony (and accompanying demonstrative exhibits) at trial.

ARGUMENT

One thing is clear at this point – a key issue in this case is whether retailers are subject to coercive agreements with U.S. Tobacco resulting in the exclusion of U.S. Tobacco's competitors from the stores or whether retailers make "independent, uncoerced decisions." See Summ. J. Opp. at 10. Conwood has spent almost two years attempting to gather retailer testimony. Now, after the dust from the discovery trail has settled, Conwood will be able to show a video tape of a single-store retailer from Liberty, Texas who testified about a single incident involving the removal of a Conwood rack (which was replaced within 15 minutes). Conwood also will be able to show a video tape of a single-store retailer from Mishawaka, Indiana to testify about a tussle she got into with the U.S. Tobacco sales representative over faulty product ordering procedures. This is the type of evidence the jury will hear.

What Conwood cannot do, however, is bring a single retailer to testify that it has entered into an exclusive agreement of any kind with U.S. Tobacco rather than make its own, uncoerced decisions about what product, rack and P.O.S. are best for its stores. Because the new version of the Gundlach study is untimely, however, it should be precluded under Fed. R. Civ. P. 37(c) and Fed. R. Evid. 702. At a minimum, the "demonstration" should be excluded as demonstrably inaccurate and misleading to the jury in violation of Rule 403.

I. THE NEW GUNDLACH "STUDY" IS UNTIMELY AND SHOULD BE PRECLUDED

Defendants previously have moved to preclude Plaintiffs' use of expert exhibits and related testimony that were not properly disclosed under Fed. R. Civ. P. 26(a)(2)(B) or as

part of a timely supplementation under Fed. R. Civ. P. 26(e). See Def. Mot. to Preclude Undisclosed Expert Witness Materials. Today, the Court denied Defendants' motion, reasoning that the proposed expert exhibits did not contain new opinions and were timely filed.

The same is not true here. As discussed below, Professor Gundlach's study includes new evidence and new conclusions. Accordingly, Plaintiffs should not be allowed to use the new version of Professor Gundlach's "study." See United Phosphorous, Ltd. v. Midland Fumigant, Inc., 173 F.R.D. 675, 677 (D. Kan. 1997) (failure to disclose exhibits resulted in prejudice because the exhibits "recast[ed] and restat[ed]" the expert's opinion and would, if admitted, defeat the purpose of the disclosure requirements and would encourage "sandbagging").

There can be no doubt that the new version of the Gundlach "study" recasts and restates Professor Gundlach's opinion -- to the tune of minus 1,000 retail stores, but plus 9,318 stores. It also relies on previously undisclosed "commentary" from numerous Conwood sales people. In these circumstances, there is no doubt that the admission of the "study" would reward and encourage sandbagging to the unfair prejudice of U.S. Tobacco. Accordingly, this previously undisclosed "study," as well as any related testimony, previously undisclosed sources, and exhibits, should be precluded.

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II. THE GUNDLACH "STUDY" – EITHER VERSION – IS NOT PROPER EXPERT TESTIMONY BECAUSE IT IS NOT SUPPORTED, AND IS IN FACT CONTRADICTED, BY THE RECORD EVIDENCE

Defendants moved in limine to exclude the Gundlach "study" that was initially proffered by Plaintiffs. Defendants established that, based on the record evidence in this case, there is absolutely no foundation for Professor Gundlach to conclude that U.S. Tobacco has any exclusive agreements with any retailers. Defendants demonstrated – using several of the larger chains such as Wal-Mart, K-Mart, Circle-K, and 7-Eleven – that the cited documentary evidence did not even remotely suggest any "exclusive agreements" with these or any other retailers as opposed to the unilateral decisions of the retailers themselves.

The new version of the Gundlach study attempts to buttress Professor Gundlach's shaky foundation. First, it changes the title of the document to "exclusionary" rather than "exclusive" agreements in an apparent attempt to lower the bar. Second, it adds references to anecdotes of Conwood sales personnel with no reference to how, when or on what basis that commentary originates. These comments themselves are of highly questionable probative value and are very misleading. For example, observations by Conwood sales personnel that a particular retail chain "went UST exclusive in Spring 1997 for 1 year" does nothing to support Professor Gundlach's "study" because it says nothing about why the retailer chose to use U.S. Tobacco racks and whether the choice was the result of an agreement or was an uncoerced, unilateral retailer decision.

Plaintiffs only hope of persuading a jury otherwise is to present misleading expert testimony and "demonstrations" that will leave the jury guessing as to what is really going on in these relatively few retail chains.

III. THE NEW GUNDLACH "STUDY" IS MISLEADING TO THE JURY AND UNFAIRLY PREJUDICIAL TO U.S. TOBACCO

Professor Gundlach's methodology, analysis and conclusions are highly suspect and of little probative value. But, perhaps more significantly, there can be no doubt that however effective U.S. Tobacco is at cross-examining Professor Gundlach at trial and proving the negative with respect to each retailer on Professor Gundlach's list, allowing Plaintiffs to present the new Gundlach "study," either through direct examination testimony or by displaying an exhibit to the jury that reads "UST Exclusionary Agreements" will mislead the jury and be highly prejudicial to U.S. Tobacco.

Moreover, allowing counsel for Plaintiffs to walk Professor Gundlach through his recall of the previously undisclosed anecdotes from Conwood sales personnel that are summarized and listed on the new version of the Gundlach "study" would put before the jury unsworn and self-serving testimony that can never and will never be cross-examined. Indeed, the use of such expert testimony would render completely unnecessary the introduction of documents and the offer of sworn testimony about alleged conduct of U.S. Tobacco and alleged agreements of any sort – precisely Plaintiffs' goal.

CONCLUSION

For the foregoing reasons, this Court should preclude the use of the new version of the Gundlach "study" and any related exhibits or testimony.

Dated: February 23, 2000

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TAB A

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February 22, 2000

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Re: Professor Gundlach's compilation of UST exclusionary agreements

Gentlemen:

Enclosed please find a proposed demonstrative exhibit for use in Professor Gundlach's testimony. This reflects additional exclusionary agreements he has identified based on his continuing review of documents produced by UST in this action.

Because this further work is neither clarification nor correction of prior data relied on by Professor Gundlach, and contains no new opinion, we disagree with your suggestion that he has a duty to provide a Rule 26(e) supplemental report. We believe the enclosed demonstrative provides the additional information developed by Professor Gundlach since his deposition.

Sincerely,

Michael J. Guzman

Enclosure

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UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Albertson's, N. California	48	1999 Chain Store Guide directory, p. 75	1/24/98		x vendor (3101)	USTC/CWD 564037-51	*UST exclusive for a "couple years;" Cwd. Racks and POS back in a year ago*	Foster
Albertson's, S. California	*123*	*D. Foster*	*1998*	*1998*	*x vendor*		*1 Yr. UST exclusive; Now Cwd. Racks and POS back in as of a year ago*	*Foster*
Albertson's (Tulsa)	*10*	*Foster*			*x vendor*		*UST exclusive racks; Cwd. POS allowed*	*Foster*
Allsups	309	USTC/CWD 040670	9/9/98	*9/98-*	x vendor, x header	CWD 0100020483	*Cwd. 2-facing racks placed Nov. 1999*	Lynch
Altheimer Oil	15	IRM Data	6/7/96		x vendor	USTC/CWD 523029	*3 stores in Altheimer, AR never UST exclusive. Note: not in store count.*	Ellis
AM/PM	400	UST/CWD 261479	1998	*1998 - present*	x vendor; 3-facing Cwd. Header allowed; No Other Cwd. POS (No. Cwd. Side POS or vending labels)	USTC/CWD 158601 - 603	*Corp. stores are UST exclusive. Franchises allow Cwd. Racks (NOTE: Citation for number of stores includes only the 400 corp. stores)*	Foster
Amar Oil	15	USTC/CWD 532034	3/5/96		x vendor	USTC/CWD 532033		
American Gas & Oil	15	IRM Data	3/26/96	1996 - 1998	x vendor	USTC/CWD 933957	*UST exclusive racks and POS until late 1998*	Mikey/ Forrest

Italic = Info. based on Cwd. sales force comments

UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Amoco	580	UST/CWD 281479	1997	*1996 - present*	x vendor	USTC/CWD 888200	*Exclusive UST racks and POS for "long time" (Foster) Merged with BP Express – exclusivity may change (Miley); (Long-term exclusive from 1996 to present based on UST prod.; SEE 1996 x vendor agreement at USTC/CWD 933531 - 35)*	Foster/ Miley
A-Plus Mini Market (Sunoco)	261	1999 Chain Store Guide directory, p. 951	1996	*1996 - present*	x vendor	USTC/CWD 912675 - 77	*Corp. stores have been UST exclusive for a long time. Franchise stores not presently exclusive. Note: # of exclusive stores derived by subtracting franchise stores from total stores as listed in Chain Store Guide*	Balk
Auto Stop	36	USTC/CWD 331829	As of 11/13/98		x vendor	USTC/CWD 331829-832	*Today, they have 40-45 stores and were exclusive for most of '96 and into '97.*	Doug Hynek
Blue Sky Petroleum	32	USTC/CWD 969651	1998	*early 1997 - early 1999*	x vendor	USTC/CWD 969648 - 51	*from early 1997-early 1999, UST had exclusive racks & Cwd lost distribution. As of early 1999 Cwd. racks back in*	Hettinger
BP Express	184 (BP AMOCO Plc)	1999 Chain Store Guide directory, p. 817	1997	*1997 - 1998*	x vendor (except Helme)	USTC/CWD 254391	*merged with Amoco; went UST exclusive in Spring 1997 for 1 year; Now Cwd. has racks, POS again*	Balk/ Parker
Bradford Oil (Go Go Marts)	11	CWD 1025006231	3/16/98		x vendor	USTC/CWD 1380255	*Went exclusive as part of CAP*	
Carmichael Mgmt. Group (Charleston, SC)	*6*	*Gotheridge*		*Unknown - present*	*x vendor*		*UST exclusive "for years"*	*Gotheridge*

Italic = Info. based on Cwd. sales force comments

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UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

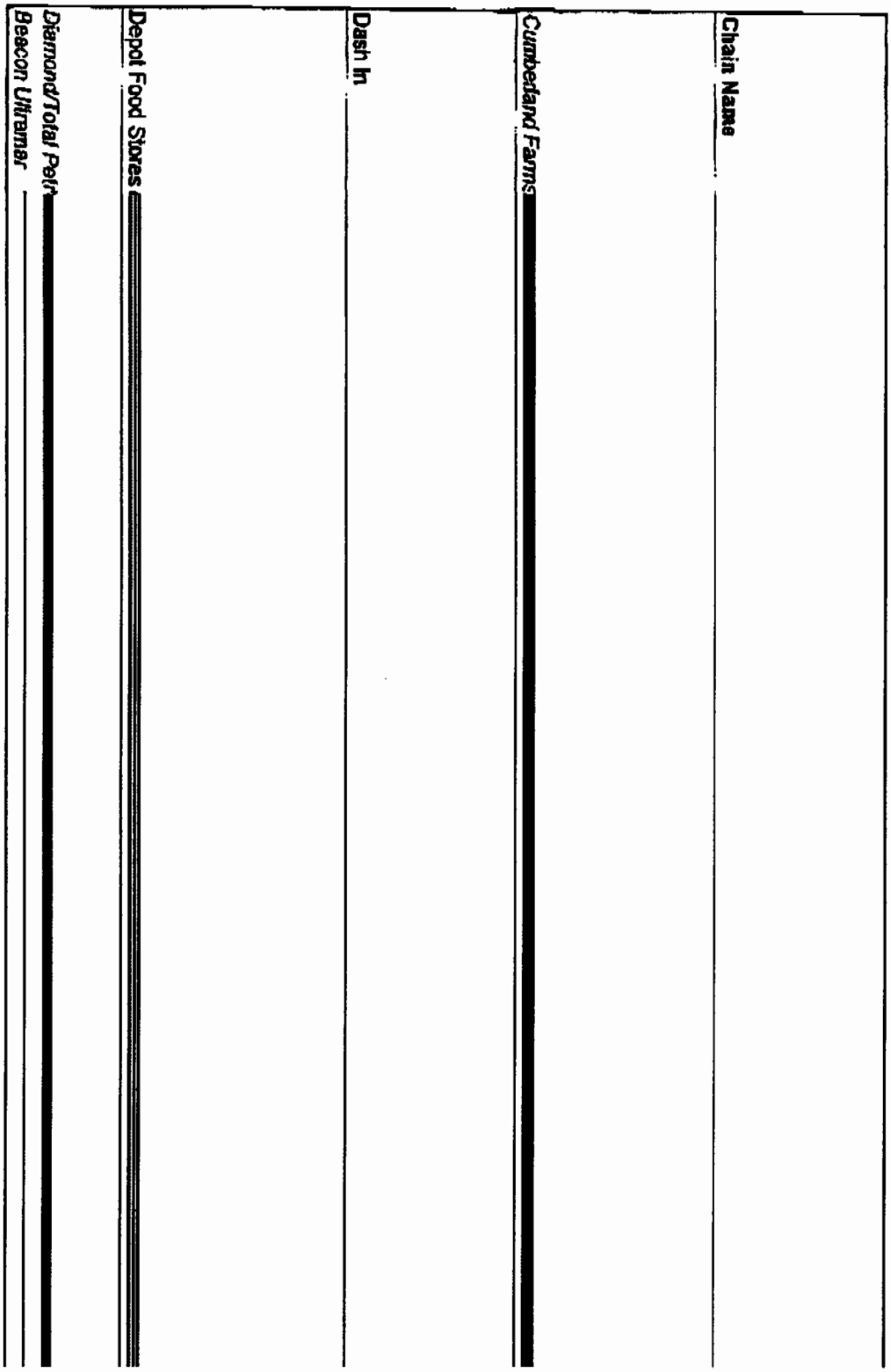
Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Cenex County Co-op (Baraboo, WI)	*13*	*K. Miley*			*x vendor*		*As of May 1998 UST exclusive (racks and POS); Cwd. lost all other distribution, now has only Kodiak*	*Miley/ Buschke*
Chico's Dairy Mart (Morgantown, WV)	*36*	*Balk/Perry*			*x vendor, x POS*		*UST exclusive for last 1.5 years; Cwd. has vendor labels only, lost distribution per agreement*	*Balk/ Perry*
Circle K (SSP)	172	USTC/CWD 040670 and USTC/CWD 325015	11/12/98	11/98 - 12/99		USTC/CWD 517073	*As of Jan. 2000, using UST vendors and flr. Racks; Cwd. 4-facing racks in also*	Lynch
Circle K (TOSCO)	2400	www.tosco.com	7/3/98	*1998 - present*	*x vendor, x POS*	USTC/CWD 436584	*(Long-term exclusive from 1998 to present based on UST prod.; SEE 1/29/98 x vendor agreement at USTC/CWD 969509)*	Foster
Circle N	6	USTC/CWD 532474	6/10/96		x vendor	USTC/CWD 532474-76	*No longer exclusive*	Ellis
Co Go's	60	IRM Data	3/24/98	*1998 - present*	*x vendor, x POS*	USTC/CWD 825722 - 26	*UST exclusive for the last 2 years (vendors and POS); Cwd. lost racks and distribution; went exclusive pursuant to CAP; (Long-term exclusive from at least 1998 to present based on UST prod.; SEE also 1996 x reset, x vendor agreement at USTC/CWD 913486 - 88; AND 1994 (unsigned) x vendor agreement at USTC/CWD 984558 - 66)*	Balk/Nasa
Coastal Mart	600	UST/CWD 261479	3/12/97		x vendor	USTC/CWD 577007-15	*UST exclusive, Kodiak is only approved brand in stores*	S. Johnson

Italic = Info. based on Cwd. sales force comments

UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Coastal Maverick	135	USTC/CWD 325015	6/8/98	*6/8/98 - present*	x vendor	USTC/CWD 517323-324	*UST exclusive, Kodiak is only approved brand in stores*	B. Jones, Lynch
Conoco	300	UST/CWD 261479	6/4/96		x vendor, x header	USTC/CWD 969469	*UST exclusive, vendors and POS*	Foster
Cracker Barrel	57	USTC/CWD 532492-95	3/13/96		x vendor	USTC/CWD 532491-95	*No longer exclusive. Cwd.has racks back in these stores*	Lynch
Crockett Oil	11	IRM Data	5/2/96	*5/2/96 - 1999*	x vendor	USTC/CWD 532552-562	*Fall 1998 Cwd. lost all racks; Cwd. getting in racks, POS, store-by-store as of late '99*	Ellis
Crown Central Petroleum	222	6/16/99 Depo. of H. Heylmun at 44.	1996-1998	1996 - 1998	x vendor, until sometime in 1998	6/16/99 Depo. of H. Heylmun at 43-45.	*UST exclusive racks for over 3 years; Cwd. header cards allowed; (Long-term exclusive from at least 1994 to 1998 based on UST production; SEE 1994 x vendor agreement at USTC/CWD 969332 - 36, Feb. 1995 x vendor agreement at USTC/CWD 969329 -30, Oct. 1995 x vendor, x POS agreement at USTC/CWD 969320 - 23, and 1997 x vendor agreement at USTC/CWD 969305 - 11); SEE also 1988 x vendor agreement at 969360 - 61);*	Balk/ Powell
Crystal Flash	27	IRM Data	1995-1998	1995 - 5/98	x vendor (2908), until Cwd. Lawsuit	USTC/CWD 286194-196	*UST exclusive at the corp. level, but Cwd. racks in all stores since lawsuit; (Long-term exclusive from 1995 to 1998 based on UST prod.)*	Pallen

Italic = Info. based on Cwd. sales force comments


Chain Name
Cumberland Farms
Dash In
Depot Food Stores
Diamond/Total Petr
Beacon Ultramar

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UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Duke & Duchess (Englefield Oil)	74	1999 Chain Store Guide Directory, p. 934	10/15/98	*1993 - present*	x vendor (except Helme)	USTC/CWD 913092 - 094 USTC/CWD 732613 - 618	*UST exclusive since at least 1994; Cwd. POS allowed; SEE 9/28/98 CAP Retail Worksheet (x vendor) at USTC/CWD 516489; AND 2/7/98 x vendor (except Helme) agreement at USTC/CWD 604196 - 97)*	Parker
Eagle Food Centers	107	IRM Data	8/12/98	1998	x vendor (except Helme)	USTC/CWD 808707	*exclusive until 10/98 when Cwd. regained racks. Cwd. continues to encounter regular unethical activity*	Miley/ Schneider
EnMark (Savannah)	30		*1999*	*1999 - present*	*x vendor, x POS*		*Went UST exclusive in 1999*	*Hettinger/ Rogers*
Exxon, BHT	15	USTC/CWD 532058	4/12/96		x vendor	USTC/CWD 532056		
Exxon, USA	390	UST/CWD 261479	1996		x vendor	USTC/CWD 760486	*Because it appears that enforcement of the Exxon exclusive agreements has not been universal, only one half of the total Exxon stores are counted.*	Glenn
E-Z Mart	410	IRM Data	7/8/97	*1997- present*	x vendor; x POS	USTC/CWD 576985; USTC/CWD 576982	*exclusive since at least 1998*	Ellis
Farmer Jack's (Livonia, MI)	*100*	*Forrest*		*Unknown - present*	*x vendor*		*UST exclusive racks, Cwd. headercard allowed*	*Forrest*

Italic = Info. based on Cwd. sales force comments

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SENT BY: KELLOGG HUBER;
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UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Fas Mart	89	1999 Chain Store Guide directory, p. 1013	7/17/98	*1993 - present*	x vendor	USTC/CWD 210772	*"UST exclusive for ages; Spring 1999 Cwd. got header card, still no racks;" (Long-term exclusive from 1993 to present, based on UST prod.; SEE 1995 x vendor, x POS agreement at USTC/CWD 613178; AND 2/23/93 x vendor agreement at USTC/CWD 1380462 - 70).*	Balkd Powell
Fast Lane (LA, MS, TN)	45	1999 Chain Store Guide Directory, p. 883	4/26/96		x vendor (except Helme)	USTC/CWD 532980 and USTC/CWD 532978 - 979	*80% of stores are UST exclusive; Cwd. racks allowed in other stores. Note: used only 80% of stores listed in Chain Store Guide.*	Dowdy
Favorite Markets (Dalton, GA)	*129*	*Chastain*	*07/00/99*	*July 1999 - present*	*x vendor, x POS*		*UST exclusive as of July 1999; lost racks, POS, all Cougar distribution, and multiple facings for Kodiak*	*Chastain*
Flash Foods	*200*				*x vendor*		*UST exclusive racks for over 10 years (Cwd. POS headercard allowed)*	*Hettinger*
Flash Market	36	USTC/CWD 533021	4/24/96		x vendor	USTC/CWD 533020	*Not exclusive since at least 1997; 45-50 stores W. Memphis: UST placed floor racks in 1999, tried for exclusive racks; Cwd. has 8/99 ltr. to allow racks back in*	Ellis
Food Chief Stores	29	USTC/CWD 500258	1998	1997 - 1998	x vendor; x header	USTC/CWD 500245-258	*Bought by the Pantry, Inc. (NC) in approximately early 1999; UST exclusive until buyout*	Ham
Freedom Oil (Bloomington, IL)	*30*	*K. Miley*			*x vendor*		*UST rack exclusive "for quite a while"*	*Miley/ Parker*

Italic = Info. based on Cwd. sales force comments

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UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Fry's Arizona Grocery	*93*	*D. Foster*		*1999 - present*	*x vendor*		*Went UST exclusive last year; recently Swedish Match has gotten racks in*	*Foster*
Gas City	41	IRM Data	10/8/96	*10/8/96 - 10/97*	x vendor	USTC/CWD 517428	*exclusive until mid/late 1997*	Miley/ Pope
Giant Foods	175	www. giantfood. com	pre-April 1998		x vendor	USTC/CWD 210723 - 725	*(Harrisburg, PA; 140 stores): 3 - 5 years UST exclusive racks and POS*	Balk/ Byrum
Golden Pantry	88	USTC/CWD 968584	7/14/98	*1996 - present*	x vendor; x header	USTC/CWD 968584	*UST exclusive racks for at least 2.5 years, lost Cougar, K. Straight; Cwd. header card allowed in some stores recently; (Long-term exclusive from 1996 to present based on UST prod.; SEE 2/23/96 x vendor, x header agreement at USTC/CWD 968589 - 99)*	Hettinger/ Keane
Griffin Petroleum	14	USTC/CWD 533174	5/6/96		x vendor	USTC/CWD 533173	*In Russellville, AR Cwd. racks back in as of May 1999*	Ellis
High's of Baltimore	119	IRM Data	1998	*1998 - present*	x vendor; 10 UST facings, 3 Cwd.	USTC/CWD 582108 - 111	*exclusive racks beginning at least Spring 1996 (sold on "uniformity"). (Note: CAP worksheet incorporates exclusive vendor via planogram.*	Balk/ Degraw
Huber Oil	25	USTC/CWD 533512 - 513	3/11/96	- present	x vendor	USTC/CWD 533511	*UST exclusive for at least past year*	Washer

Italic = Info. based on Cwd. sales force comments

UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Ingle's	200	www.Ingles-markets.com	1/29/98	*1991 - late 1998*	x vendor (except Helme)	USTC/CWD 608190	*Long-term exclusive from at least 1991 through 1998 based on UST prod.; SEE 5/16/95 x vendor (except Helme) agreement at USTC/CWD 968358 - 81; AND 5/17/91 x vendor agreement at USTC/CWD 968428 - 38*	Hettinger/ Steele
J and L Oil (Vernon Hills, IL)	*15*	*K. Miley*			*x vendor*		*UST rack exclusive at least 2 yrs.; Cwd. lost distribution: K. Straight, K. Ice, Hawken*	*Miley/ Gehl*
Jet 24	18	1999 Chain Store Guide Directory, p. 852	4/19/96		x vendor	USTC/CWD 533727	*Presently UST exclusive. Has een for past 5-6 years.*	Washer
Kelly Williamson Mobil (Rockford, IL)	*44*	*K. Miley*			*x vendor*		*UST rack exclusive since June 1998*	*Miley/ Kren*
Kimbrough Oil (Nashville)	*30*	*Ellis*		*1997 - present*	*x vendor*		*2-3 years UST exclusive racks; only carry Kodiak in this account*	*Ellis*
Kmart	2160	www.Kmart.com	1997		x vendor; x POS	USTC/CWD 157844 - 46 and 157849-50; USTC/CWD 331267 and 331291 - 9; USTC/CWD 159184; Entwistle 25; Entwistle 29	*UST exclusive Nov. 1997 to May 1999*	Miley

Italic = Info. based on Cwd. sales force comments

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UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Kroger, Atlanta	155	1999 Chain Store Guide directory, p. 149	7/31/98	7/31/98 - Early 1999	x vendor, x header	USTC/CWD 884436 -441	Cwd. lost much distribution/ facings during UST reset two years ago: x racks, x POS	Hetlinger/ Mankin
Kroger, Nashville	50	Ellis	Spring 1999	Spring 1999 - present	x vendor, x POS		Cwd. Racks removed in Spring 1999, lost Cougar distribution; now Kroger specific UST POS, UST vendors have empty roll racks (wasted space) but buyer doesn't want to change set (Kroger Memphis not exclusive)	Ellis
Kum & Go	125	UST/CWD 261479	1998	1998 - present	x vendor	USTC/CWD 800236-238	Exclusive since June 1998; Cwd lost distribution	Foster/ Stickley/ Knol
Kwik Shop	180			1995-1999	x vendor		UST exclusive for last 4 years	Foster/ Knol
Lacefield Oil	16	USTC/CWD 534051 - 052	7/19/96		x vendor	USTC/CWD 534050		
Lassus Oil /Handy Dandy (Ft. Wayne)	28	Parker		1997 - present	x vendor, x POS		UST exclusive for at least 2.5 years	Parker
Litco Express (Tupelo, MS)	25	Ellis		Unknown - present	x vendor		Cwd. has no racks in stores at present	Ellis
Lucky's, N. and S. California	447	D. Foster			x vendor		UST exclusive (267 S. Cal. Stores, 180 N. Cal.)	Foster
Matthews Exxon	10	USTC/CWD 534231	5/3/96		x vendor	USTC/CWD 534229 - 230	(Jonesboro, AR) UST exclusive racks; Cwd. POS allowed	Ellis
Miller Mart (VA Beach)	60	Florence	12/00/99	12/99 -present	x vendor, x POS		UST exclusive as of Dec. 1999 (racks and POS)	Florence

Italic = Info. based on Cwd. sales force comments

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UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Minit Chek Food Stores	8	1999 Chain Store Guide directory, p. 803	4/29/96		x vendor; x header; x POS	USTC/CWD 885246 and 885247	*Helme 2/1 is also allowed.*	
Missile Mart	6	USTC/CWD 534264	5/28/96	5/28/96 - 11/97	x vendor	USTC/CWD 534263	*Cwd. racks back in as of Nov. 1997 (prior to that, no racks)*	Ellis
Mobil	600	UST/CWD 261479	9/6/96	*1996-10/1999*	x vendor	USTC/CWD 948431-433	*Cwd. racks being placed 10/99*	Balk/ Wadkins
Moto Mart/F.K.G.Oil (Belleville, IL)	25	*Bauman/ Knol*		*1996 - present*	*x vendor, x POS*		*UST exclusive for last 4 years*	*Bauman/ Knol*
Odessa Corp. (Champlain Farms, Fast Stop)	49	CWD 1025006231	3/2/98	*3/2/98 - present*	x vendor	USTC/CWD 1380254	*exclusive racks and POS for at least last three years.*	Balk/ Fleming
One Stop	27	6/16/99 Depo. Of H. Heylmun at 43.	1998	6/98 - present	x vendor x header	6/16/99 Depo. Of H. Heylmun at 30-31, 43.	*Exclusive for at least last two years, racks and POS*	Balk/ Waters
PDQ Convenience Stores	45	USTC/CWD 331829 (appears to be misdated)	1996 est. Context of report indicates doc. was written in 1998.	*1996 - 5/98*	x vendor	USTC/CWD 331829-832	*exclusive until 5/98 – Mn. stores (14 stores) are still exclusive; 27 stores Madison/Minneapolis, were UST exclusive (racks & POS) until June 1999.*	Hynek/ Ellis/Lynch
Pelican State Fina	35	USTC/CWD 536126	4/2/96	*1996 - present*	x vendor	USTC/CWD 536122	*still exclusive*	Lynch
Pit Row	10	IRM Data	1997	1997-present	x vendor, x header	USTC/CWD 688459 - 461	*Chain remains exclusive.*	Balk
Quality Q-Mart (Quality State Oil)	30	*K. Miley*			*x vendor; x POS*		*UST exclusive for past 3 years; No Cwd. POS allowed*	*Miley/ Falevsky*

Italic = Info. based on Cwd. sales force comments

UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Quik Shop (Manhattan, KS)	*12*	*Stewart*	*1996*	*1996 - present*	*x vendor, x POS*		*UST exclusive for 4 years*	*Stewart*
QuikTrip	329	1999 Chain Store Guide directory, p. 944	6/17/98	1998	x vendor (3201)	USTC/CWD 609441 - 48	*Lost racks, Cougar distribution, approximately two years ago; Now no longer UST exclusive*	Lynch
Racetrac Petroleum	322	Keane	10/00/1999	9/99 - present	x vendor; x header		*UST exclusive racks and POS; Lost all distribution except Kodiak*	Keane
Rainbow Foods	41	1999 Chain Store Guide directory, p. 347		*1996 - present*	x vendor; x header	7/9/99 Depo. Of D. Blackburn at 26-28.	*Exclusive since 1996 (racks and POS)*	Hynek
Ralph's	304	1999 Chain Store Guide directory, p. 59	6/13/97	*6/13/97 - present*	x vendor	USTC/CWD 293571 - 293582	*Ralph's So. Cal. 8-10 yrs. UST exclusive (304 stores; 224 grocery, 80 superstore); Cwd. POS allowed*	Foster
Rapid Roberts	19	USTC/CWD 512652	10/16/97	*10/16/97 - present*	x vendor	USTC/CWD 512649 - 652	*Still exclusive*	
Rite Aid	3873	www.riteaid.com	01/01/98	*1998 - present*	x vendor; x POS	USTC/CWD 914780	*UST exclusive racks and POS for approx. 3 years; SEE also 12/12/97 Memo at USTC/CWD 734386 - 88; Francis Depo. at 74 - 80.*	Balk/ McKeon
Ronnie's (Richmond, VA)	*16*	*Wadkins*	*12/00/99*	*12/99 - Present*	*x vendor, x POS*		*UST exclusive as of Dec. 1999 (racks and POS)*	*Wadkins*
Safeway, N. California	*283*	*Foster*			*x vendor*		*UST exclusive; recently Timberwolf has gotten its racks in; Cwd. POS allowed*	*Foster*
Sand Fly (Savannah)	*6*	*Rogers/ Waldo*		*Unknown - present*	*x vendor, x POS*		*UST exclusive*	*Rogers/ Waldo*

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UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Scot Oil (Nashville)	*15*	*Ellis*	*1999*	*1999 - present*	*x vendor, x POS*		*UST exclusive at present*	*Ellis*
Sentry Food Mart (VA)			4/4/96	*5/18/94 - 1999*	x vendor	USTC/CWD 760370 - 74	*Long-term exclusive from 1994 to sometime in 1999 based on UST prod.; SEE 2/17/95 x vendor (except Heime) agreement at USTC/CWD 692645 - 50; AND 5/19/94 x vendor (except Heime) agreement at USTC/CWD 553789; No longer UST exclusive*	Balk/ Florance/ Furman
Sentry Food Mart (WI)	100	USTC/CWD 331829	3/10/97	*1995 - present*	x vendor (2908)	USTC/CWD 331829 USTC/CWD 808017 - 21	*UST exclusive racks and POS since 1995; (Long-term exclusive from 1995 to present based on UST prod.; SEE 1995/1996 x vendor agreement at USTC/CWD 331829 --NOTE: There is a date code error in UST production--context of report indicates it was written in 1995 or 1996)*	Miley/ Falevsky
Southland (7-Eleven)	2500	UST/CWD 261479	4/1/97	*1997 - present*	x vendor; x header; No competitive double facings	USTC/CWD 025958 - 964; 7/9/99 Depo of D. Untiedt at 103-105.	*2500 corp. stores are exclusive*	Lynch
Spectrum Stores	46	USTC/CWD 970961	9/13/96	*1996 - present*	x vendor	USTC/CWD 970960; CWD	*Has been exclusive "forever", recently new UST racks put in; Exclusive racks and POS for at least 3-5 years*	Hetlinger/ Rogers
Spee D Foods	13	IRM Data	May 1997 to May 1998		x vendor	USTC/CWD 985245 - 249		

Italic = Info. based on Cwd. sales force comments

UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
		1999 Chain Store Guide directory pp. 928-929 (for StaMart MN, ND)				USTC/CWD 033183 - 033190		
Sta Mart	11		1997	*1997 - 2/99*	x vendor		*UST exclusive until Feb. 1999*	Hynek
Stanley J. Clarke (Cayuga, IN)	*16*	*Parker*	*Jan. 2000*		*x vendor, x POS*		*went UST exclusive Jan. 2000, No Cwd. POS allowed*	*Parker*
Stater Brothers							*Unusual tray racks; UST exclusive (40-80 stores) 120 stores*	*Foster*
Stop In Food Stores	63	IRM Data	1996	*1996 - 1998*	x vendor	USTC/CWD 952558-60	*No longer UST exclusive; Cwd paid to restore its racks.*	Bald Abbott
Sun Up Convenience (Service Oil Co.)	7	IRM Data	4/9/96		x vendor	USTC/CWD 985389	*No longer exclusive*	
Swatek Sales (Express Lane)	*12 - 15*	*K. Miley*		*unknown - 5/99*	*x vendor*		*UST rack exclusive for 5-6 years until May-June 1999.*	*Miley/ Bamberger*
The Pantry	915	USTC/CWD 888769-71	3/22/96	*3/22/96 - 1/98*	x vendor; x header (except Helme)	USTC/CWD 704636 - 37	*UST exclusive until Jan. 1998.*	Lynch/ Cohsen
Thrifty Liquor	12	USTC/CWD 536470	3/10/96	*3/10/96 - 10/99*	x vendor	USTC/CWD 536469-71	*Cwd. racks placed 10/98*	Lynch
Tiger Mart (Memphis)	*25*	*Ellis*		*Unknown - present*	*x vendor, x POS*		*UST exclusive racks and POS, although occasionally able to get Cwd. POS authorized.*	*Ellis*

Italic = Info. based on Cwd. sales force comments

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UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Tom Thumb	149	USTC/CWD 254389	5/9/97	*5/9/97 - 1998*	x vendor (all Helme discont. & only 3 Cwd. Brands)	USTC/CWD 254389 - 390	*UST exclusive from '97-'98.*	Hynek
Turkey Hill Minit Markets	230	USTC/CWD 984429	7/3/97	1997	x vendor	USTC/CWD 984432-433	*UST exclusive for 5-8 years prior to 1997.*	Balk/ Begrowicz
Uncle Joe's (MS)	*17*	*Ellis*		*Unknown - present*	*x vendor, x POS*		*UST exclusive. Cwd lost racks and POS, lost Cougar distribution*	Ellis
United Dairy Farmers	209	IRM Data	1/29/98	1/29/98 - 10/99	x vendor; x POS	USTC/CWD 888816 - 17;USTC/CWD 734222 - 228; see also USTC/CWD 888480	*Spring 1998 went UST exclusive; Oct. 1999 Cwd. Racks, POS back in*	Pallen/ Parker
Waco Oil	18	USTC/CWD 516673	1998	*01/01/1998 - 12/31/1998*	x vendor (most have 3203)	USTC/CWD 516673-80	*UST exclusive for 1998*	Pallen/ Parker
Wal*Mart	2300	UST/CWD 261479	11/15/96	1997 - present	x vendor; x POS	7/8/99 Depo. Of D. Blackburn at 32; 7/9/99 Depo of D. Untiedt at 222-225; USTC/CWD 274518	*Still exclusive; NOTE: At least for LA stores, UST sought exclusive vendors since 1993: SEE 9/1/93 x vendor agreement at USTC/CWD 948639 - 41*	Lynch

Italic = Info. based on Cwd. sales force comments

UST EXCLUSIONARY AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Period of Agreement	Details of Agreement	Citation for Exclusivity	Cwd. Sales Force Comment	Cwd. Contact
Walgreen's	2200	*Miley*	1997	*1997 - present*	x vendor; x POS	USTC/CWD 517580	*Corporate planogram is UST exclusive. Cwd. racks allowed at managers' discretion, however, UST removes racks regularly, particularly in Chicago area; (Long-term exclusive from 1997 to present based on UST prod.)*	Miley
Wawa	500	USTC/CWD 297457	4/1/97	*1993 - present*	x Moist Smokeless POS on cigarette rack (Do not use moist racks)	USTC/CWD 297451-457	*For last 5-6 years, UST exclusive; some Cwd. Headercards, coupons, starbursts allowed (600 stores)*	Balk/Quirk
Winn Dixie, Atlanta	84	1999 Chain Store Guide directory, p. 149	3/25/97	*3/25/97 - present*	x vendor	USTC/CWD 254584	*No longer UST exclusive; Cwd. lost much distribution/facings during UST reset two years ago--went UST exclusive; Cwd. Regained racks, distribution, POS, early 1999*	Hattinger/ Keane
TOTAL	29816							

Italic = Info. based on Cwd. sales force comments

TAB B

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TORONTO

February 17, 2000

By Facsimile

Mark C. Hansen, Esq.
Neil M. Gorsuch, Esq
Benjamin Powell, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005-3317

Re: Conwood Company L.P., et al. v. U.S. Tobacco Co., et al.

Gentlemen:

Thank you for your letter of yesterday. We do seem to be in agreement on most issues, but we do have minor differences of opinion on the following.

U.S. Tobacco Employee Witnesses. We did not mean to modify the Court's Order in any way, or suggest that the parties proceed otherwise.

Trial Exhibits. Our suggestion was meant to enable the parties to present issues to the Court the night before, as the Court requested. We understand that any identification of exhibits will be subject to modification, but we have no reason to believe that the majority of exhibits to be used during the direct examination of a party's own witnesses cannot be disclosed (again, subject to modification) two days before a witness will be called. However, if Plaintiffs believe this is unreasonable, we propose that such disclosures be made by 2:00 p.m. on the preceding day. This will enable opposing counsel to determine what objections will be made and to present any issues to the Court the night before the exhibit will be used.

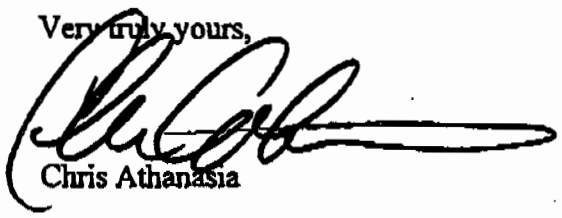
Opening Statement Exhibits And Testimony. Our prior agreement regarding demonstrative aids is fine. We look forward to specific designations for Mr. Borrowdale and Mr. Smith.

Deposition Designations. We look forward to your narrowed deposition designations; we will provide counter-designations and any objections in response, and we will follow the same procedure when we begin our defense and affirmative case.

Professor Gundlach. Plaintiffs provided U.S. Tobacco with a compilation of documents and testimony that Professor Gundlach relied on for his opinion that U.S. Tobacco had "exclusive agreements" with 22,000 retail locations. You state in your letter that "his opinion has not changed in any respect." We were recently informed, however, that Professor Gundlach now believes that U.S. Tobacco has "exclusive agreements" with 28,000 retail locations. It is our opinion that this is a material change in his opinion, and we again request that the complete basis for this opinion be provided consistent with Plaintiffs' obligations under Fed. R. Civ. P. 26(e) -- presumably Dr. Gundlach completed his analysis before asserting this new number, therefore, there should be no reason why Dr. Gundlach cannot provide the underlying data and analysis for this change immediately.

Professor Leftwich. Please provide additional and more reasonable dates and times for Professor Leftwich's deposition. There can be no doubt that the materials provided to U.S. Tobacco on January 28, 2000, as well as the knowledge that such materials would be forthcoming, was in Plaintiffs' (and presumably in Professor Leftwich's) possession long before any disclosures were made to U.S. Tobacco. Accordingly, the offer to make Professor Leftwich available only on Monday beginning at 6:30 p.m. is patently unreasonable.

Very truly yours,



Chris Athanasia

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98-CV-108-R

CONWOOD COMPANY, L.P., ET AL. PLAINTIFFS

v.

UNITED STATES TOBACCO COMPANY, ET AL. DEFENDANTS

ORDER

The Court held a final pre-trial conference on February 24, 2000 at 1:00 P.M. CST. Appearing for the parties were:

Plaintiffs: David Simpson
Dick Roberts
Mark Hansen
Hank Handelsman
Neil Gorsuch
Mike Guzman
Ben Powell

Defendants: John Reed
Neal R. Stoll
James Keyte
Martha Weiss
Ridley Sandidge
Rachel Mariner
Chris Athanasia
Robert Greenbaum

Jerry Roppel, Court Reporter, recorded the hearing.

This is the 24th day of February 2000.

Thomas B. Russell
Judge, United States District Court

cc: Counsel

ENTERED
FEB 25 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

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309

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. PLAINTIFFS

v. **ORDER**

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC. DEFENDANTS

The Court was presented with the depositions of Byron T. Parish, Joseph Marconi and Robert Bales. The Court was informed plaintiff's designated portion was highlighted in yellow, defendant's in blue and objections by any party were marked with red ink.

IT IS ORDERED that the following objections are sustained.

Byron T. Parish - No objections were highlighted

Joseph Marconi - No objections were highlighted

Robert Bales - Page 11, Lines 19- 25

Page 12, Lines 1- 4

This 25th day of February, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED
FEB 25 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

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310

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' EX PARTE DISCLOSURE OF WITNESSES AND EXHIBITS

Plaintiffs respectfully submit the instant disclosure of the witnesses they presently intend to call, the exhibits they intend to introduce through each such witness, the anticipated order of witnesses, and the estimated length (in very rough approximation) of direct examination for each witness. These represent plaintiffs' best current estimates and are subject to modification as trial proceeds.

1. Conwood's "Will Call" List

Conwood presently expects to call the following witnesses in the following order:

Witness	Length of Direct	Anticipated Testimony	Exhibits Anticipated to be Introduced*
Lou Marano Conwood Sales Rep. (PA)	1-2 hours Live	Mr. Marano will explain, from perspective of field representative, how moist snuff is sold and advertised. He will discuss importance of point of sale advertising ("POS"), and the effect of "exclusive vending" and "category management." He will testify to his experiences with these UST practices, and about admissions made to him by his UST counterpart. This UST sales representative admitted, in substance, that if he wanted to be promoted he would have to exclude Conwood racks.	None expected at this time. May use PX 290-304 (retail counter, racks, POS)
William Rosson Chairman, Conwood	1-2 hours Live	Mr. Rosson will, based on 45 years experience in the smokeless tobacco business, testify about the different smokeless products, Conwood's history and entry into the moist snuff market, and the problems created for Conwood by UST's systematic and nationwide practices of exclusive vending and category management to impair Conwood's distribution. He will contrast that with Conwood's relative ease in obtaining distribution for its other smokeless products, which take up more space than moist snuff.	Demonstrative comparing smokeless products - e.g., differences between markets for loose leaf, plug, twist, and moist snuff; demonstrative concerning relative spending of UST and Conwood on competitive activities

*Introduced documents may also be used by subsequent witnesses.

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Morton Kamien Professor, Northwestern University Kellogg Graduate School of Business	1 1/2 days Live	Professor Kamien will testify, as an expert, that in his opinion (1) moist snuff constitutes the relevant product market for this case; (2) UST has monopoly power in this market; and (3) UST has used its power to exclude competitors and hurt consumers. He will show, *inter alia*, that there is no evidence of switching away from moist snuff to other products in response to price increases, and that UST has demonstrated its power through regular price increases, exclusion of competitors and the maintenance of a high market share. He will discuss the various practices UST has used to harm competition, and the economic evidence demonstrating the harm to consumers in the form of higher prices, restricted choices, and reduced output. Professor Kamien's testimony will be lengthy because he has relied upon numerous UST business records in forming his opinions, and plaintiffs expect that he will assist the jury in understanding most if not substantially all of the most important documents supporting plaintiffs' claims.	PX: 4,5,6,9,13,14,16,19, 20,23,24,28,32,33,35, 38,39,40,42,44,45,47, 48,49,53,55,59,61,63, 68,69,70,71,72,76,79, 80,84,85,86,88,94,96, 101,103,104,106,107, 108,112c,113a,113b, 114,117,120,124a,124f, 126,127,128,129,130, 136,137,139,140,141, 143,144,147,149,152, 156,157,158,159,173, 176,177,178,180,187, 188,189,191,194,196, 197,199,208,220,221, 223,230,232,235,245, 258,266,267,268,270, 274,280,285,288,313, 314,315,326
James Wheatley UST Dept. Manager	1 hour Video-UST would not provide witness live	Mr. Wheatley will discuss his attempts to obtain exclusive vending, including efforts through UST's Customer Alliance Program ("CAP"). He will be unable to give any explanation for the report, made to him, that at a meeting he and his subordinates had "stressed the importance of cutting competitive distribution."	PX 5, 6, 9, 28, 71, 106, 113b & Dep. Exhs. 3, 7

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Richard Fasanelli UST Vice President	1 hour Video-UST would not provide witness live	Mr. Fasanelli is the author of many key documents: trade channel strategy of exclusive vending; retail incentive for chains with exclusive vending. Also he suggested producing larger slots to limit the number of brands carried by retailers.	PX 14, 63, 68, 69, 149 & Dep. Exhs. 4, 16
Robert Fitzmaurice UST Vice President	1 hour Video-UST would not provide witness live	Mr. Fitzmaurice will testify about documents -- that he prepared or assisted in preparing -- that establish UST's efforts to prevent price-value competition, its unwillingness to reduce prices to meet competition, and its fear of "Marlboro Friday" -- on which Philip Morris reduced price in response to competition and sustained a market capitalization loss of $13 billion.	PX 45,55
Timothy Entwistle UST Director of National Accounts	1 hour Video-UST would not provide witness live	Mr. Entwistle will testify about UST's exclusionary agreement with Walmart. He will testify about efforts to enforcee Walmart's compliance with the exclusionary terms of the agreement, the payments (in form of promotions) made to Walmart after Walmart complained about the reduced moist snuff sales it sustained after implementing UST's exclusionary agreement. He will also testify about his recommended deletion of competitive price/value brands in Walmart despite evidence about their high growth rates.	PX 47,85,88,126,127, 157,187,191,230, 232,235

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Don Blackburn UST National Key Account Manager	45 minutes Video-UST would not provide witness live	Mr. Blackburn will testify that he recommended deleting competitive and price/value brands from 7/11, Walmart and other stores, and that he can't remember ever recommending the addition of adding competitors' racks or products when he served as "category captain." He will also testify that he sought to gain exclusive vending and often succeeded -- "I was glad I could meet some of the job descriptions in my job performance evaluations." He will describe how Walmart sales went down after Walmart entered into exclusionary UST agreement. He will also testify about UST's similarly exclusionary agreement with Southland ("7-11").	PX 38,44,68,101,147, 194,196,197,199,221 & Dep. Exh. 21
Tom Berkebile UST Chain Account Manager	1 hour Video	Mr. Berkebile will testify that he obtained exclusive vending in numerous stores (specified and identified by name/chain). This resulted in the "de-listing" of competitive products. He made presentations to suggest this to stores. He will also testify that the CAP worksheet sometimes is used to reflect exclusive vending arrangements, but that UST has no system of keeping them or forwarding them to headquarters. He wrote that (re: obtaining exclusive vending) "by doing this, we can restrict competitive distribution to two products." He denied knowledge regarding statements in documents sent or received by him. He received monthly letter stating "I feel it is better for them [competitors] to be lost in our vending then to have their own and no point of sale on the vendor," but did not know what this meant. He will testify that Conwood "may" sell less if in UST vending and not able to place POS.	PX 35,176,177,178,180

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Gayleen Rusk Retailer	1/2 hour Video	Manager of the Amoco Pronto Express, an Iowa gas and convenience store. Ms. Rusk will testify that every time UST representative Ken Drass serviced her store, about four times a year, he removed Conwood racks and point-of-sale and reduced Conwood facings. Ms. Rusk will testify that Mr. Drass committed these acts without her approval. Mr. Drass threatened that if Ms. Rusk removed him from her store then he would make sure that her wholesaler did not accept her outdated products.	None expected at this time.
Gary Milano UST Vice President of Sales	1 hour Live	Mr. Milano will testify about the practices of UST's sales force, including use of the CAP contract. He will also be asked about UST documents, which he wrote or received, indicating the exclusionary purpose and/or effect of UST's exclusive vending and category management. He will also be asked about his direction to the field, two weeks before this lawsuit was filed, that accurate descriptions of exclusionary conduct no longer be memorialized.	PX 8,23,28,37, 82,108,124A
Gary Smith President, U.S. Tobacco	1 hour Video- UST would not provide witness live	Mr. Smith will testify about the importance of header cards (as the most effective form of POS), UST's high market share and profits, and lack of product innovation. He will be asked about documents, written or received by him, concerning UST's exclusionary conduct. Mr. Smith will claim lack of understanding about many such documents.	To be provided

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Glen O'Neal Conwood District Manager (KY)	45 mins. Live	Mr. O'Neill will discuss Conwood's relative success in Kentucky, where UST's tactics have not resulted in widespread exclusion of Conwood's racks and/or POS. He will further testify that, where Conwood has managed to maintain its racks and POS, it often has a high market share (as in Kentucky, where its share is approximately 30%). He will also testify, however, that in Walmart, Conwood sales have been decreased dramatically as a consequence of UST's exclusionary agreement. The chain was responsible for 40% of his sales before it entered into its contract with UST; presently Conwood sales in Walmarts located in his territory are minimal.	None expected at this time.
Gary Ryan Conwood Sales Rep. (MO)	45 mins. Live	Mr. Ryan will discuss the exclusionary UST tactics he encountered, including conduct of former UST representative Alan Hart. He will also testify that Hart and another UST representative admitted that their supervisors made them exclude Conwood racks from stores.	None expected at this time.
Alan Hart Former UST Sales Rep. (MO)	30 mins. Video	Mr. Hart will testify that he excluded Conwood racks and POS pursuant to his supervisor's instructions. He was ordered by supervisors in the field and at department and regional meetings (including G. Milano, currently Executive Vice President of Sales, UST) to control the moist section by using exclusive vending and/or remove Conwood racks. He will further testify that decreased shelf space and exposure for Conwood brands hurt their sales; that he witnessed his supervisors removing Conwood racks; that he was evaluated by his supervisors based on his success in obtaining 90% of the shelf space; that during a "crew drive," UST representatives would remove and replace (with UST exclusive vending) as many Conwood racks as possible.	To be provided

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Doug Hynek Conwood District Manager (MN)	45 mins. Live	Mr. Hynek will testify about systematic UST efforts in his district to exclude Conwood from stores. He will also testify about admissions made to him by UST employees, and about his suggestions to Conwood management for ways to improve performance.	None expected at this time.
John Bonnoffski Former UST Sales Rep. (PA)	15 mins. Video	Mr. Bonnoffski will admit that he removed Conwood racks, with and without store permission, during his employment at UST	None expected at this time.
Ronald Piatek Former UST Sales Rep (GA)	15 mins. Video	Mr. Piatek will testify that, at a regional sales meeting in 1993, a UST Department Manager instructed the sales representatives to dismantle Conwood's sales racks and give them to the store manager and then replace them with UST's racks. He was also instructed to remove Conwood's POS, and to place Conwood products on the shelves but not in UST's rack. Since he left in 1995, he has spoken with UST representatives who have told him that they are now more aggressive.	To be provided
Guy Wilding Conwood Sales Rep (AR)	45 mins. Live	Mr. Wilding will testify about UST practices in his sales territory, including an incident in which UST eliminated all Conwood racks in a town. He will also testify about admissions made by his UST counterpart, who told him he removed racks because his supervisor required him to do so.	None expected at this time.

16diii004562

John Naifeh Former UST Sales Rep (TN)	30 mins. Video	Mr. Nafieh will testify that, while a UST sales representative, he was instructed by his Division Manager, Tom Buie, to remove Conwood POS if "it was in our way." This was done usually without store authorization. UST representatives were evaluated on their success in increasing UST facings/decreasing Conwood facings. Mr. Naifeh will also testify that it was UST's highest priority to have its fixtures installed -- with competitors' products in inconvenient locations inside UST's fixtures.	PX 160
Don Foster Conwood Regional Vice President (Western Region)	1 hour Live	Mr. Foster will testify about the pervasive and systematic UST efforts to exclude Conwood from his region through exclusive vending and related UST tactics. He will also testify about his suggestions to Conwood management that, to combat such tactics, Conwood should attempt to offer "category management" services, among other things.	None expected at this time.
Sean Ulizio Former UST Division Manager (CA)	45 mins. Video	Mr. Ulizio will testify about his efforts and those of his division manager to remove Conwood POS and facings. He did so in part to reduce Conwood's market exposure. He will also testify about the benefits to UST of having Conwood products in UST racks.	PX 167
Joseph Marconi Former UST Sales Rep.	15 minutes Video	Mr. Marconi will testify that, with the permission of the store owner, he would place the Conwood vendor in the back room and merchandise all products in a UST rack; that this was encouraged by his supervisor; that he was encouraged by his supervisors to increase UST facings at the expense of competitors; and that he told his Conwood counterpart that he was removing racks only because he was following orders.	To be provided

16diii004563

Gregory Gundlach Professor, Notre Dame Business School	3 hours Live	Professor Gundlach will testify about the heightened importance of POS in tobacco marketing in light of the pervasive governmental restrictions on tobacco advertising. He will also testify about UST exclusionary agreements, providing for UST exclusive vending and other restrictions on competition at approximately 21,000 retail locations. Finally, Professor Gundlach will testify about UST's Customer Alliance Program ("CAP"), which also contains exclusionary features and is used to create or perpetuate exclusive vending.	PX 25,31,75,82,105, 122,123,169,171,175, 183,226,249,264,278, 281,287,289,329, Affidavit of Gary Milano (1/26/99), and other demonstratives
Robert Blattberg Professor, Northwestern Graduate Business School	3 hours Live	Professor Blattberg, one of America's leading experts on category management for retail outlets, will testify as an expert about proper standards for category management, and the requirement that it be used to increase overall sales for the category. He will testify that, in his opinion, moist snuff is an underdeveloped category, in that it requires more space rather than less in stores in light of its high level of profitability and minimal space needs. He will further testify that UST's actions were inconsistent with category management, and represented an effort to benefit the dominant firm at the expense of its smaller rivals. UST efforts to limit shelf space for moist snuff hurt the category. Similarly, UST efforts to prevent competitive POS hurt the category, as the information is critical to consumers in the ad-restricted retail environment for tobacco.	PX 65,66,83,86,89,93, 105,112,150,169, 184,193,211,230, 232,262,263,311f, 332,328,329,330 and powerpoint demonstratives

16diii004564

Terry Williams, Conwood National Sales Manager	1 hour Live	Mr. Williams will testify about the systematic nature and pervasiveness of the problems created for Conwood's sales force by UST's exclusionary practices. He will testify that Conwood has a constant problem with distribution for moist snuff, when its other products (all of which require more space in stores than moist snuff) have no such problems. He will further testify that Conwood field representatives report these problems on a daily basis, and that a survey of the approximately 240 Conwood sales representatives revealed that the representatives spend up to half their time on efforts to remediate the exclusion effected by UST. Mr. Williams will also testify about his own experience with UST's exclusionary tactics during his years in the field.	None expected at this time.
Paul Naseth, Conwood Sales Rep. (ND)	45 mins. Live	Mr. Naseth will testify that, in his territories, he encounters pervasive rack removal and exclusive vending problems. He will further testify that his counterpart UST representative taunted Naseth by telling him that if he was not able to get around to the stores in a reasonable time, UST would remove Conwood's racks.	None expected at this time.

16diii004565

Andy Carter Former UST Sales Rep. (TX)	30 minutes Video	Mr. Carter will testify that he was notified of job openings at UST after he let his former boss know that we had contacted him regarding the suit. He will also testify that he often removed Conwood racks after asking the store if it wanted a "new look," and would put old Conwood racks in the dumpster. He placed Conwood products in a UST rack without POS; recalls his supervisor instructing him to put Conwood racks in the back room. He will testify that it was normal practice for other UST reps to remove racks; that POS is important for sales, especially in a tobacco-restrictive environment; that by placing all products in one UST rack, he could dictate how many facings competitive products would receive; that he cut down Pinkerton (Swedish-Match) facings; that he and other UST reps told consumers Conwood products were "stemmy;" and that he threatened to revoke retailer credit when he was displeased with retailers.	None expected at this time.
Richard Leftwich Professor, University of Chicago Graduate School of Business	1.5 hours Live	Professor Leftwich will testify that, in his opinion, Conwood has been damaged in an amount of lost profits in the range of $280-480 million, as set forth in his original, rebuttal and supplemental reports.	PX 316, 317, 327
Jeff Dring Conwood Sales Rep. (SD)	45 mins. Live	Mr. Dring will testify about pervasive and systematic UST exclusive vending and rack removal in his district. He will also testify to particular incidents, including one in which UST representative Stanke and UST then-Department Manager (now Regional VP) Segelstrom removed Conwood racks at Lewis Drug store. Mr. Dring will also testify that, when he succeeded on one occasion in getting exclusive Conwood racks in one chain, UST responded by refusing to call on that account, and Mr. Dring's UST counterpart admitted that to him.	None expected at this time.

16diii004566

Don Segelstrom, UST Regional Vice President	5 mins. Video	Mr. Segelstrom will testify that he is unable to recall or to deny above-recounted incident at Lewis Drug.	None expected at this time.
Lawrence Borrowdale Former UST Part Time Sales Rep (NM)	30 mins. Video	Mr. Borrowdale will testify, based on his 27 years as a tobacco representative, that UST's actions harmed competition; that his supervisor removed Conwood racks two or three times a day when they were together, which hurt Conwood sales; that his boss removed Conwood POS on nearly every store call, reduced competitive facings, bagged fresh Conwood product, and engaged in other pervasive misconduct. UST representatives competed to remove the most competitive POS; they could do this because store managers didn't care what was going on. Store clerks are often young and inexperienced, which allows UST to engage in these forms of misconduct.	PX 165

16diii004567

William McClure Retired CEO of Swedish Match *and/or* Harold Price Vice President -Sales, Swedish Match	1 hour Live	Mr. McClure and/or current Mr. Price will testify that the practices of UST (specifically exclusive vending and category management) caused Swedish Match significant problems, and impaired distribution for its products. They will corroborate the testimony of Conwood executives and sales personnel, and demonstrate that the UST practices harm competition in moist snuff and not just a single competitor. They will testify that, in their view, UST's action limited the growth of Swedish Match's moist snuff products, and specifically Timberwolf. Without UST's interference, Swedish Match has been able to obtain adequate distribution and fair opportunity to sell its products in the loose leaf market, but in moist snuff the presence and the monopolist, and its exclusionary tactics, has restricted the ability of the smaller firms to compete. Mr. McClure will also testify that he chose not to have his company join this action as a plaintiff, because he feared that vindictive and anticompetitive retaliation by UST might put Swedish Match's moist snuff division out of business, and he was unwilling to bear the risk.	None expected at this time.
David Untiedt UST Director of National Accounts	45 mins. Video	Mr. Untiedt will testify about UST activities with national chain stores. He will testify that he cannot explain many of the documents regarding UST elimination of competitive brands and exclusive vending. In general, he will testify that he doesn't know or recall in response to almost every question.	To be provided

16diii004568

Rob Engster Majority owner of six Discount Tobacco shops in Fort Smith and Little Rock, Arkansas.	20 mins. Video	UST offered Engster exclusive vending. Engster believes that POS does affect a customers choice of moist snuff brands. He states that a customer will either be looking for a specific brand or they will be looking for the best price and POS will help them find the cheapest snuff. On one occasion Vincent Gierer, CEO of UST, visited Engster in one of his shops. Gierer asked him whether he'd be interested in a contract that would pay him to allow UST to have the number one moist snuff position in the store. Gierer went on to inquire if Engster would consider not carrying some of his slower moving brands such as Kodiak Choice or Timberwolf Long Cut Straight in exchange for a payment from UST.	PX 225
Nell Renfro Former Wal-Mart category manager.	30 mins. Video	Opposed Wal-Mart exclusive with UST, because she thought it would hurt overall sales, which turned out to be true. She thought that each manufacturer should be permitted POS and adequate space in Wal-Marts, and UST should not be given preference. UST fought her over this. Moist snuff is very profitable for Wal-Mart, and deserves plenty of space. It's a separate product category unlike any other form of smokeless.	PX 125, 133, 319
Patricia Leinen Convenience store clerk at Dave's Country Store in Dunlap, Iowa for nine years.	20 mins. Video	Witnessed persistent removal by UST of Conwood racks without authorization, She witnessed Conwood racks being thrown in the dumpster by UST. She witnessed Conwood header card removal by UST at least twice a year. She believes that increased advertising leads to higher moist retail sales.	None expected at this time.

16diii004569

David Waller Owner of Pelcian State Wholesale serving 650 stores in northeastern Louisiana.	15 mins. Video	He feels that UST uses national Nielsen figures to skew statistics away from local trends. He knows that UST has the local figures since he supplies that same data to UST under CAP. "If you use Nielsen data you're not going to have true tracking and a true picture of what's going on in northeast Louisiana." Waller says UST's report to HardeMart is misleading to the extent that it deletes Cougar and other price value brands with triple digit growth rates, while Skoal's growth rate is minus 9%. UST's portion packs are moist snuff items. Part of the category, as are mint and cherry brands, and should not be placed in their own category for ranking purposes. Any business review that ignores growth rates does not present a complete picture for the retailer and is not to the retailer's advantage. The success of price value brands has caused Copenhagen overstocks and Waller faces credit problems with UST as a result. He cannot afford to lose $2000 credit each week on Copenhagen. Loss of distribution on price value brands causes brand-loyal customers to go to another store, causing an unexpected out-of-stock at that new location. At his warehouse, Waller faces out-of-stock problems on price value brands due to their gaining popularity. Prior to the introduction of competitive price value brands, UST never competed on price. Waller had been excluded recently from buy-downs and B1G1F promotions that place him at a competitive disadvantage with his competitor Roy Jones. POS and header cards are important for price value customers and for new product introductions.	PX 262, 263

16diii004570

Georgia Gill-Elkins Manager of Berreth Oil, located at 12495 McKinley Highway, Mishawaka, Indiana.	20 mins. Video	Within her store UST, Conwood and Swedish Match all sell product in their own vendors, with their own POS. In approximately November 1998, a UST sales rep rearranged the moist snuff section, removing a number of Conwood and UST facings. When Gill-Elkins questioned the sales reps' actions, she was told that the products were in UST racks, and that they were outdated. The rep proceeded to place the product in a box. The UST rep reduced the number of Kodiak Wintergreen facings from 3 to 1, despite the fact that this brand was her number one seller. During this reset, the UST rep placed two facings of Rooster, despite the fact that Gill-Elkins had said that she did not want the product in the store. Gill-Elkins observed that as a result of UST's unauthorized set changes that the store lost sales throughout the moist snuff category. However, since the set was returned to the proper arrangement, Conwood snuff products have been really moving. This she attributes to more Kodiak facings, product visibility and advertising. She believes that the UST rep hurt sales of moist snuff, and was not acting in the best interest of the customers.	PX 244

16diii004571

Tommy Latta Owner of two tobacco stores in Texas.	20 mins. Video	Point of sale advertising is important to the sale of tobacco products. Latta participated in the UST Copenhagen Incentive Program and indicates that one of the guidelines of the program involved not participating in a competitor's promotion that offered more savings than the Copenhagen Incentive Program. In addition, UST had primary POS positioning and Mr. Latta could not take on any additional competitive sampling or programs. As compensation for the Copenhagen Incentive Program, Mr. Latta was paid approximately $150 to $200 per week by UST Division Manager Mr. Thibodeaux on Mr. Thibodeaux's personal checks. Mr. Latta states that a UST representative also pitched what he thinks was the Customer Alliance Program to him in which money would be given to Mr. Latta in exchange for UST rack and POS exclusivity. Mr. Latta indicates he turned this program down because he felt that there would be no place for generic products, which are strong in his area, on the UST rack. Mr. Latta believes that if Conwood products were placed in a UST rack this would have a major impact on Conwood's ability to promote buy-downs of its products. Finally, when asked about the relationship of freshness to sales, Mr. Latta states that UST is the only company to use a manufactured date on the can and that he does not understand UST's method of dating as the manufactured date is usually the date that the cans are already in his stores.	PX 60

16diii004572

Patricia Leinen	30 mins. video	Convenience store clerk at Dave's Country Store in Dunlap, Iowa for nine years (1987-1997) and witnessed persistent removal by UST of Conwood racks without authorization, She witnessed Conwood racks being thrown in the dumpster by UST. She witnessed Conwood header card removal by UST at least twice a year. She believes that increased advertising leads to higher moist retail sales.	PX 255, 256
Carolyn Ballard Manager at D & R Grocery for eleven years.	20 mins. Video	It is her responsibility to order moist snuff for the store. As manager, she has the authority to decide which racks may be placed in the store. Ballard recalls at least three instances when UST representatives removed Conwood racks without permission. The racks were removed, they were placed in storage room with POS material still attached to them. Ballard prefers the Conwood rack because it allows her to display other merchandise on top of the rack.	None expected at this time.

16diii004573

Albert Ianuzzi Owner of a Citgo gas station in Springfield, MA.	20 mins. Video	UST paid $10/month for putting UST rack on counter. The UST rep's boss visited his store, saw a Conwood rack next to the UST rack, told him he would have to stop paying him unless the Conwood rack went back-bar, and then the UST mgr took the Conwood rack and moved it back bar. Ianuzzi didn't approve it, but he was very busy at the time and didn't have time to deal with it, so he just let him move the Conwood rack. Resulted in lower Conwood sales and lower overall moist sales. "It deterred sales." Testified "it is critical" for each company to advertise on its own racks and it "increases sales." Testified moist sells better in its own racks. He also explained that it was critical to have the header card and price "all together" in moist section because a sign on the door or in another area was not as effective. There is a "big impact" on sales if you can't put ads on rack.	None expected at this time.
Maudie Rushing Owner of the Rushing Tobacco Shop near Liberty, Texas since 1995.	20 mins. Video	She witnessed removal of Conwood's rack by the UST rep. Her sales clerk called and the rack was returned. Outdoor Cougar promotional banner was taken at the same time but she did not see who removed it. She testified that POS is important for price comparison shoppers. The UST rep reduced Kodiak facings by one, causing out of stock problems for the most popular Conwood product in early-1995 without authorization. The UST rep removed Cougar facings at a time when Cougar sales were accelerating in 1995 without authorization. He removed Conwood POS when UST had a large promotion underway without authorization. UST removed POS from only the better-selling competitive products, Conwood and Timberwolf, leaving the slow-selling Superior brand alone.	None expected at this time.

16diii004574

Robert Jansing EZ-Mart store manager in Oklahoma City, Oklahoma.	10 mins. Video	Vendors are not allowed to change the store without his permission. In 1997 Jansing recalls UST representative Todd Parish coming into his store and placing Kodiak and Kodiak Straight into the UST rack. Parish also put other Conwood products beneath the counter. Jansing says this occurred two or three times over two or three months. This resulted in lost sales for the store. He knows this because he orders the moist snuff, and the moist snuff order went down.	None expected at this time.
Bonnie Townsend Store manager for EZ-Mart in Oklahoma City, OK and has sixteen years experience in c-store business	10 mins. Video	She testified that Todd Parish showed an old schematic in 1997 and removed Cougar racks and bagged Cougar product. The bagged product was the most-recently introduced competitive product, including Cougar and Timberwolf. This happened four or five times. Conwood had been attempting to use the correct planogram which deleted a number of slow-selling Skoal Bandit products, making room for the new competitive brands. POS is very important, particularly to get the price point message across. She lost sales when this product was bagged and out of view in the cigarette room.	PX 261
Marti Stevens KwikWay convenience store in Billings, MT	20 mins. Video	The UST rep, Terry Idstrom, removed the Conwood rack without authorization and hid Conwood product behind a cigarette display. Stevens testified that customers like to see the product, POS and price information. UST's removal of the Conwood rack was not in the store's interest, it was in UST's interest.	None expected at this time.
Robert Weckman Front-end manager, Super Saver (NE)	20 mins. Video	UST repreesntatives removed Conwood racks, POS, and products wihtout permission and placed remaining Conwood products in an exclusive UST rack.	None expected at this time.

16diii004575

Robert Chiaradio UST National Key Account Manager	20 minutes Video	In role as "category captain", never recommended adding competitor racks or POS (except vendor labels) Retailers put a lot of trust in cat captains. Generally retailers want 'top dog' running the category. Adding facings can create freshness and overstock problems, esp. for Copenhagen. Recommended deleting all price/value brands in Dairy Mart in 1997 despite internal UST docs showing they had highest growth rates of all moist products there. Cannot explain recommendation now. Sought more space in Sheetz when it already had 97% share. Unable to explain why 97% share wasn't enough. UST tries to obtain exclusive vending. Underlings report success in "eliminating comp brands" and he has no idea what this means.	PX 24, 83, 207, 208, 212, 214, 215, 216, 218, 219, 222
Byron Todd Parrish UST Sales Rep.	10 mins. Video	Admits there was "plenty of room" for competitor products/racks. Documents show he was ordered to, and rated on, "control[] competition" through, e.g., category management. Supposed to "increase share of space and cut down on competitive facings." No idea what this meant.	None expected at this time.
Michael Beyerlein UST Sales Rep.	15 mins. Video	Admits exclusive agreement (Admiral Petroleum stores, 1995 or 1996), testified he cut Conwood slots in the 4 Perky Pantry stores in his area in 1996. He was following an old buyer's direction even though the stores had a new buyer who had authorized the additional Conwood slots. He admitted he didn't discuss the cutting of the slots with anyone at the stores prior to doing it.	None expected at this time.
Howard Heylmun UST Chain Account Manager	30 mins. Video	Describes a number of exclusive vending agreements with chains. Describes corporate initiatives to seek same.	PX 174, 245

16diii004576

Respectfully submitted,

CONWOOD COMPANY, L.P.
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/s/

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Counsel for Plaintiffs

February 28, 2000

16diii004577

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

'00 FEB 29 A8:27
FILED
US DISTRICT COURT
WESTN DIST. KENTUCKY

PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO PROPOSED DEMONSTRATIVES AND EXHIBITS

Defendants ("UST") object to three of Dr. Kamien's proposed demonstrative aids and three of his proposed exhibits on the grounds that they reflect "new" opinions. Plaintiffs respectfully respond as follows:

Demonstratives

Pages 7 & 8. "Cross Elasticity" and "No Cross-Elasticity: Moist Snuff and Looseleaf." These demonstratives illustrate Dr. Kamien's opinion that "consumers have not responded to moist snuff price increases by shifting to other types of smokeless tobacco." Report ¶ 17. See also id. ¶¶ 18-24 (explaining evidence that moist snuff users do not switch to looseleaf when moist snuff prices rise); Rebuttal ¶¶ 6-12; Depo. at 130:15-23

(using almost identical language as demonstrative).[1]

Page 11. "UST Exclusionary Conduct Widespread Across US." The Court overruled UST's objections to this demonstrative.

Page 14. "7-Eleven: Largest US Convenience Store." To avoid needless dispute, Conwood will revise the demonstrative to reflect the number of 7-Eleven outlets nationwide, rather than worldwide.

Exhibits

PX 326-1. "Moist Snuff Product and Design Introductions Plotted Against UST's Market Share and Moist Snuff Prices." This graph illustrates three background facts all referenced in Dr. Kamien's reports and deposition:

- the history of moist snuff prices (see Report ¶¶ 18, 20 ("between 1986 and 1997, the average price per pound of moist snuff increased by 109.5 percent"), 29, 37, Tab 2 at Tables 3A-3D, Tab 12 at Table 5; Depo. at 37, 53, 260-262);
- the history of UST's moist snuff market share (see Report ¶¶ 7, 26, 36; Rebuttal Report ¶¶ 14-15; Depo. at 197-200);
- a few prominent events in industry history - e.g., Conwood's entry, the advent of the plastic can and J rack, Swedish Match's entry and Conwood's introduction

[1]UST miscites Dr. Kamien's deposition testimony. Dr. Kamien stated merely that he did not *calculate* the exact cross-elasticities of demand between moist and looseleaf -- i.e., run a regression model to estimate precisely how many consumers will switch to looseleaf products in response to a given incremental increase in moist snuff prices. Depo. at 131. But immediately before and after the passage UST cites Dr. Kamien expresses his opinion, fully explained in his report, that the economic evidence shows that moist users do not switch to looseleaf even in the face of UST's disproportionate moist snuff price increases. Id. at 129-135 (discussing Report ¶¶ 17-24).

of a price value brand (see Report ¶ 7-11; Depo. at 52 (plastic can, J-rack), 55, 185 (Swedish Match entry)).

PX 326-22 & PX 326-39 "Snuff and All-Item PPIs, 1986-1998"; "UST Moist Snuff Prices Over Time - Key Pricing Events." These graphs illustrate Dr. Kamien's opinion that UST's ability to sustain large and frequent price increases is evidence of, inter alia, (i) UST's market power and (ii) the fact that moist snuff is a distinct product market. See Report ¶¶ 18, 20, 29-33, 37-38, 52-55; Rebuttal Report ¶¶ 18-20, 32; Depo. at 37, 53, 216, 260-62. To avoid needless dispute and juror confusion, Conwood will delete text entries along the graph line in PX 326-39.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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Counsel for Plaintiffs

February 29, 2000

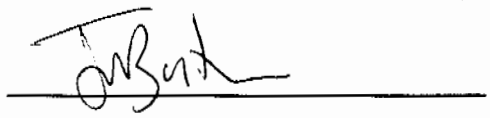
16diii004581

CERTIFICATE OF SERVICE

I certify that on this 29th day of February, 2000, a copy of the foregoing was sent by facsimile service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., Four Times Square, New York, NY 10036-6522.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. PLAINTIFFS

v. **ORDER**

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC. DEFENDANTS

The Court was presented with several depositions with plaintiff's designation highlighted in yellow, defendant's in blue and the objections in red.

IT IS ORDERED that all of plaintiff's counterdesignations which they claim are included for "completeness" may be shown to the jury.

IT IS FURTHER ORDERED that the following objections are sustained.

1. Timothy Entwistle - July 1, 1999
   Page 47 - Lines 20-25
   Page 48 - Lines 1-3
   Page 204- Lines 16-19

2. Timothy Entwistle - August 13, 1999
   No objections noted

3. Richard Fasanelli

4. Lawrence Borrowdale
   Page 19 - Lines 3-4
   - Lines 6-9

5. Shawn Ulizio
   Page 4 - Lines 15-25
   Page 5 - Lines 1-7

6. Carolyn Ballard

7. Georgia Gill-Elkins

8. Thomas H. Latta

9. Gayleen F. Rusk
Page 12 - Lines 24-25
Page 13 - Line 1
- Lines 19-24
Page 23 - Lines 2-6

10. Donald Blackburn
Page 391 - Lines 8-17
Page 396 - Lines 4-25
Page 397 - Lines 1-24
Page 399 - Lines 16-25
Page 400 - Lines 1-13
Page 429 - Line 4

This 29 day of February, 2000.

Thomas B. Russell, Judge
United States District Court

COPY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. PLAINTIFFS

v. **ORDER**

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC. DEFENDANTS

The Court has reviewed additional depositions. After objections by defendants, the plaintiffs withdrew the designations in several instances. Those objections were not considered.

IT IS ORDERED that the following objections were sustained.

1. David Waller - None
2. Andy Carter - None
3. Rob Engster - None
4. Bonita Townsend - None

This 2nd day of March, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED
MAR 02 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii004585

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. PLAINTIFFS

v. **ORDER**

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC. DEFENDANTS

The Court was presented with designated depositions. Objections were shown with responses and counter-designations. After objections, some designated testimony was withdrawn Of the remaining designated testimony the following objections are sustained.

1. Marti Stevens
   Page 18 - Lines 1- 4
   Page 23 - Lines 23-25
   Page 47 - Lines 19-25
   Page 48 - Lines 1-8

2. Patricia Leinen
   None

3. Robert Jansing
   None

4. Robert Weckman
   Page 22 - Lines 10-16
   Page 23 - Lines 1-12

5. James Wheatley
   None

IT IS SO ORDERED.

This 3rd day of March, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED
MAR 0 3 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. — PLAINTIFFS

v. **ORDER**

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC. — DEFENDANTS

The Court has been provided several depositions with designated portions highlighted.

IT IS ORDERED that the following objections are sustained.

1. Gary Smith - None

2. John Binoffski
   Page 66 - Line 2
   Page 83 - Lines 22-23
   Page 84 - Lines 5-6
   Page 84 - Lines 11-12

3. David J. Untiedt
   Page 119 - Lines 12-23 — also cut 119:24-120:17
   Page 121 - Lines 3-10 out 121:11-14

4. Alan Hart
   None

5. John Naifeh
   None

6. Waynell Renfro
   None

This 3rd day of March, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED
MAR - 3 2000
JEFFREY A. APPLEGATE, CLERK
BY
004587

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. PLAINTIFFS

v. **ORDER**

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC. DEFENDANTS

The Court was presented with designated depositions. Objections were shown with responses and counter-designations. After objections, some designated testimony was withdrawn Of the remaining designated testimony the following objections are sustained.

1. Marti Stevens
   Page 18 - Lines 1- 4
   Page 23 - Lines 23-25
   Page 47 - Lines 19-25
   Page 48 - Lines 1-8

2. Patricia Leinen
   None

3. Robert Jansing
   None

4. Robert Weckman
   Page 22 - Lines 10-16
   Page 23 - Lines 1-12

5. James Wheatley
   None

IT IS SO ORDERED.

This 3rd day of March, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED
MAR 03 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

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317

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. PLAINTIFFS

v. **ORDER**

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC. DEFENDANTS

The Court was presented with designated depositions. Objections were shown with responses and counter-designations. After objections, some designated testimony was withdrawn Of the remaining designated testimony the following objections are sustained.

1. Robert Fitzmaurice.

Page 59 - Lines 15-18
Page 92 - Lines 23 -25
Page 93 - Lines 1-7
Page 93 - Line 11
Page 166 - Lines 15-16
Page 169 - Lines 14-15
Page 170 - Lines 20-21
Page 175 - Lines 19-20
Page 178 - Lines 19-20
Page 182 - Lines 10-13
Page 196 - Line 89

IT IS SO ORDERED.

This 6th day of March, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED
MAR 06 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii004589 318

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STEVEN F. BENZ

NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
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EVAN T. LEO

TRIAL OFFICE
121 NORTH 5th STREET
PADUCAH, KY 42001
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FAX: (270) 450-5118

March 3, 2000

Honorable Thomas B. Russell
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed is a courtesy copy of Plaintiffs' Objections to Defendants' Proposed Exhibits and Demonstratives for Gary Milano, which has also been filed with the Clerk.

Respectfully,

Michael J. Guzman

Enclosure

cc: Neal R. Stoll
John S. Reed

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March 3, 2000

Jeffrey A. Apperson, Clerk
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Plaintiffs' Objections to Defendants' Proposed Exhibits and Demonstratives for Gary Milano.

Also enclosed is an additional copy. I would be grateful if you would date-stamp and return this copy in the enclosed self-addressed envelope.

Many thanks for your assistance.

Respectfully,

Michael J. Guzman

Enclosures

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 MAR -3 P4:12 FILED Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' OBJECTIONS TO DEFENDANTS' PROPOSED EXHIBITS AND DEMONSTRATIVES FOR GARY MILANO

Defendants have disclosed that they intend to use certain exhibits and demonstratives with Gary Milano, U.S. Tobacco Vice President of Sales, on Monday, March 6, 2000. Plaintiffs respectfully object to the introduction or use of the following materials:

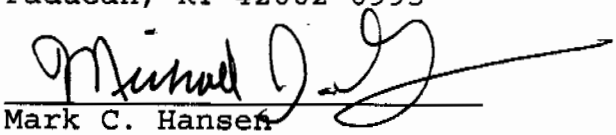
Exhibit	Objection
DX 146	Hearsay
DX 4192-4237	Plaintiffs have not yet had an opportunity to review these POS materials. Plaintiffs, therefore, reserve the right to object after viewing them.
DX 4330-4385	Plaintiffs' reserve a foundation objection to these exhibits until a proper foundation is laid with Mr. Milano.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/S/

Richard C. Roberts
Whitlow, Roberts,
Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995



Mark C. Hansen
Neil M. Gorsuch
Benjamin A. Powell
Michael J. Guzman
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005

Counsel for Plaintiffs

March 3, 2000

16diii004593

CERTIFICATE OF SERVICE

I certify that on this 3rd day of March, a copy of the foregoing was hand delivered to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., U.S. Tobacco Trial Office, 333 Broadway, 10th Floor, Paducah, KY 42001.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, U.S. Tobacco Trial Office, 333 Broadway, 10th Floor, Paducah, KY 42001.

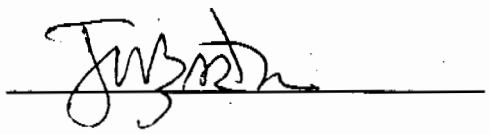


EXHIBIT 1

1999

Best of Class

DEFENDANT'S
EXHIBIT
146

Saluting industry leaders and innovators.

THANKS

TO THE RETAILERS OF THE CONVENIENCE STORE
INDUSTRY FOR VOTING ANHEUSER-BUSCH THE #1 SUPPLIER
IN BEER CATEGORY MANAGEMENT

WE WILL CONTINUE TO WORK WITH YOU TO MAKE YOUR BEER CATEGORY GROW

FROM YOUR FRIENDS AND PARTNERS AT ANHEUSER-BUSCH

Source: CSN Category Captains Survey, 1996
http://www.budweiser.com
©1997 Anheuser-Busch, Inc., Budweiser® Beer, St. Louis, MO

A Class Act

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Best-of-Class Retailers.....Page 32

SPECIAL ACKNOWLEDGMENTS

Marketing Editor: Mike Browne.

Art Director: Ana Rodrigues

Contributing Editor: Donna Hood Crecca

Contributing Editor: Tom DiNome

In this, the second annual *Convenience Store News* Category Captains supplement, industry retailers, suppliers and distributors nominated companies they view as exemplary practitioners of category management. In a questionnaire sent to industry players, retailers nominated supplier and distributor Category Captains, while suppliers and distributors nominated their most proficient retail partners.

Congratulations to all of this year's Category Captains. As a group and individually, these companies have taken a leadership position in the industry with an eye toward excellence. They believe in category management, they practice and implement category-management strategies and they are reaping the rewards in the form of increased sales, profits and turns, reduced out-of-stocks and improved operational efficiency.

This year we especially recognize three suppliers who received Top Honors, based on the overwhelming number of nominations they received from retailers. This year's top honorees are Anheuser-Busch Inc., The Coca-Cola Co. and R. J. Reynolds Tobacco Co.

The entire staff of *Convenience Store News* salutes this year's Category Captains for their vision, hard work and leadership, and for sharing their successes and lessons learned with the industry in the pages of this supplement. Not only are these companies the Best of Class, they're a class act.

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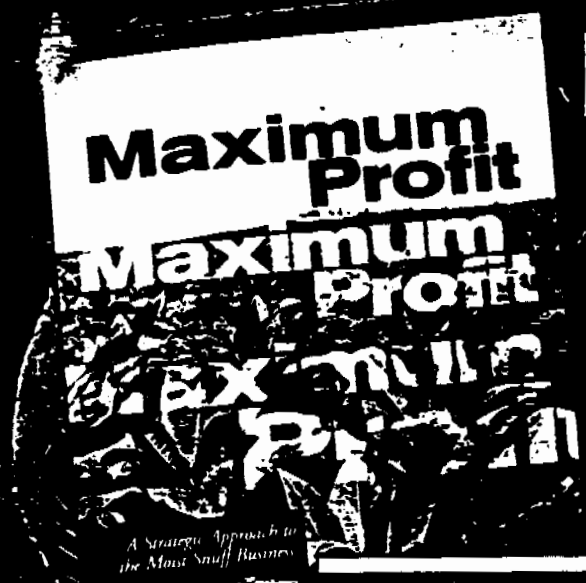
COMPANY



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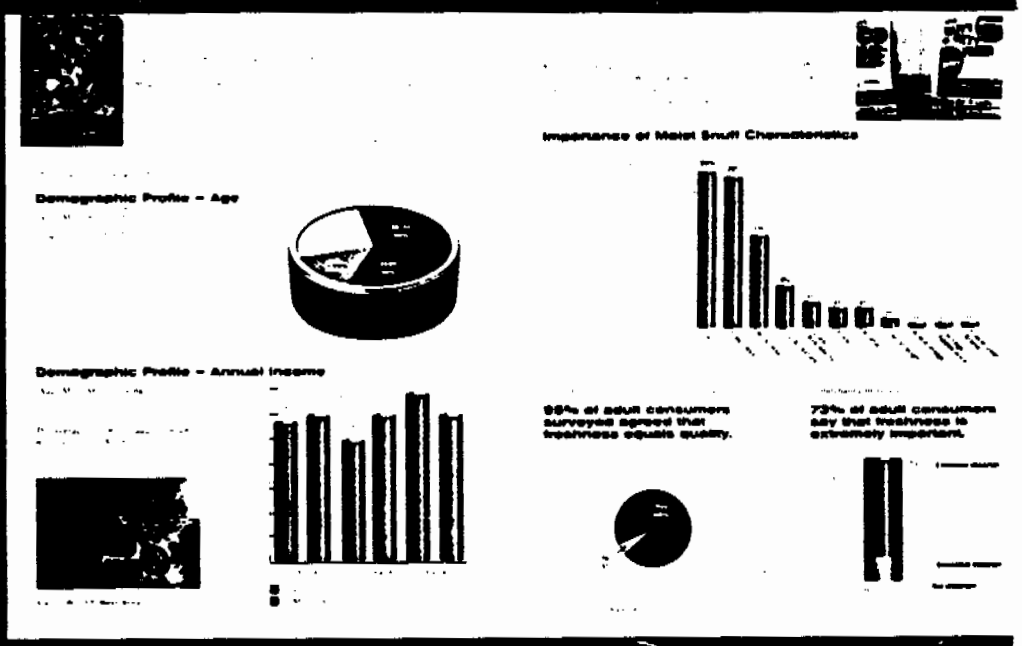

CALL 1-800-421-EARN
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UNITED STATES TOBACCO COMPANY

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Honor Roll

Congratulations to this year's Category Captains!

The following companies were cited as exemplary practitioners of category management. Suppliers were nominated by retailers as Best of Class, and retailers were nominated by their suppliers as outstanding category management partners. All of the companies appearing on this honor roll have earned the privilege to use the Category Captains' seal in their public relations and advertising materials.

SUPPLIERS

Bakery
Pillsbury Bakery & Foodservice

Beer
Anheuser-Busch Inc.
Miller Brewing Co.

Candy
M&M/Mars
Lifesavers Co. (Nabisco)

Carbonated Beverages
The Coca-Cola Co.
Pepsi-Cola Co.

Coffee
S&D Coffee

Foodservice
Orion Food Systems International Inc.

Grocery
Procter & Gamble

Health & Beauty Care
Procter & Gamble

Frozen Desserts
Nestle USA Ice Cream Division

Isotonic Beverages
Gatorade

Juice/Juice Drinks
Tropicana North America
Veryfine Products Inc.

Prepackaged Cakes/Cookies
Keebler Co.

Salty Snacks
Frito-Lay Inc.
Planters Inc. (Nabisco)

Tobacco
R.J. Reynolds Tobacco Co.
Swisher International
United States Tobacco Co.

WHOLESALERS & BROKERS

Convenience Marketing Inc.
Core-Mark International Inc.
Douglas Distributing
Eby-Brown Co. L.P.
Fleming Cos. Inc.
H.T. Hackney Co.
McLane Co. Inc.

RETAILERS

7-Eleven Inc.
A.T. Williams Oil Co.
BP Amoco Plc
Casey's General Stores Inc.
Chevron Products Co.
Conoco Inc.
Dairy Mart Convenience Stores Inc.
Equiva Services LLC
Giant Industries Inc.
Marsh Village Pantry
Mobil Oil Corp.
The Pantry Inc.
R.R. Morrison & Sons
Spectrum Stores Inc.
Speedway/SuperAmerica LLC
Tosco Corp.
Turkey Hill Minit Market

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Top Honorees

In the eyes of retailers who voted for this year's Category Captains, three manufacturers—Anheuser Busch Inc., Coca-Cola Co. and R.J. Reynolds Tobacco Co.—stand head and shoulders above the rest. These Best-of-Class companies received the most nominations from retailer respondents, making them this year's top honorees.

Anheuser-Busch Inc.

As category leader, Anheuser-Busch works to facilitate category management in two ways, according to Joe Patti, senior director, retail planning and category management. The first is to support industry initiatives such as Anheuser-Busch's active sponsorship of the National Association of Convenience Stores' (NACS) category-management work. The company was also a sponsor of the *Convenience Store News* Out-of-Stock Study. The second element is working closely with retail customers to address their category management needs.

"On both levels, we take our direction from the retailers themselves," said Patti. "Especially when working directly with our retail customers. Our role is to take the best of what we've learned across the country and across channels, drill down to the consumer and industry insights to apply to a particular retailer's needs, and create a plan that helps them achieve their goals. The bottom line is that it's their plan."

Step one in Anheuser-Busch's process is to identify the convenience store retailer's goals and objectives, as well as the issues relevant to their operations. This is determined by dedicated Anheuser-Busch personnel and its wholesaler network. The brewer's extensive resources and tools are then applied to the process. One such tool is Eagle Eye, a micro-marketing system built around the Spectra program. A customized version of the Spaceman program is also used for creating planograms.

Anheuser-Busch, based in St. Louis, brings added value to the process in the form of data. In addition to market-level syndicated data, the company supplies proprietary research on cross-channel shopping behavior. "Anheuser-Busch expends many resources to understand the dynamics of the category, the marketplace and the convenience store shopper. We have developed detailed insights into how shoppers think and behave when shopping in and outside the convenience channel," Patti explained. "This helps us identify things that will drive profitability for the retailer."

Larry Lytle, buyer for Salem, N.C.-based A.T. Williams Oil Co., said he values Anheuser-Busch for its extensive resources. "[The company] has brought in the needed manpower and resources to analyze our total category and assist in implementation," he said. "It's a total effort."

Patti acknowledged that while the increasing availability of convenience store data drives more efficient and effective category management in the channel, Anheuser-Busch approaches the process as sound business practice. "With or without data, at the end of the day, you have to make sound business decisions. We focus our efforts on how

> "Anheuser-Busch doesn't monopolize the case with their products when they develop a set. They compile all the relevant information and develop fair layouts. It's truly a partnership."
>
> Silvio Federighi
> Convenient Food Mart

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to make the best business decisions to reach the defined goals and objectives of the retailer. With that position, the process becomes intuitive and logical, rather than intimidating," he said.

An element of the Anheuser-Busch category management process lauded by retailers is objectivity. "The company is very fair in the layouts it develops," said Silvio Federighi, general manager of Convenient Food Mart of Painesville, Ohio. "Anheuser-Busch doesn't monopolize the case with their products when they develop a set. They compile all the relevant information and develop fair layouts. It's truly a partnership."

"Anheuser-Busch understands that the whole category must grow to sustain growth of their products," said Jeff DeJesse, category manager for ARCO am/pm stores. "They've been very responsive, and provide the necessary resources for all our projects."

"We realize that we're in this for the long run, so we're not looking to make a quick hit at a cost to our retail customers," Patti said. "This approach allows us to be objective and focus on the quality of our products and our information."

The most important step in the category-management process, according to Patti, is to begin. "It's really important for retailers to get started, no matter where they are in terms of their own automation and data-collection capabilities. Talk to your lead suppliers, start the dialogue and start the process. The sales results and profit increases will show your return on the investment."

The Coca-Cola Co.

Dr. Glen Stoops

"Category management is all about opportunity—the ability to locate it, plan for it, execute it and capture it," observed Dr. Glenn Stoops, managing director, market research and category management for The Coca-Cola Co. "The category-management mission of the Coca-Cola system is to help convenience store operators locate opportunities for growing the size and value of the beverage category."

To assist retailers in capitalizing on the opportunities within the non-alcohol beverage segment, Coca-Cola provides an extensive category-management toolbox. However, the company emphasizes the expertise of its category-management personnel as a crucial element of the process. "Tools within themselves are not very powerful. It is the people behind them who release the tools' full potential," said Stoops.

> **"The company has a department within its organization set up specifically for category management. They have the resources in place to analyze and recommend specific sets as they relate to our business."**
>
> -- Stephen Monaco
> Tedeschi Food Shops Inc.

Coca-Cola category managers combine their personal base of knowledge and experience with market research insights to assist retailers in developing appropriate plans. Consumer insights are the key to achieving profitable growth, according to Stoops. To speed the delivery of such insights to retail, Coca-Cola's market research and category-management functions are linked. Coca-Cola's bottling system is also an important component of the process. "Our commitment to retail is clearly seen in the increasing number of Coca-Cola bottlers who are designating more category-management personnel solely to the convenience side of the business," Stoops said.

That commitment is evident to retailers doing business with Coca-Cola. "The company has a department within its organization set up specifically for category management," said Stephen Monaco, buyer at 130-store Tedeschi Food Shops Inc., based in Rockland, Mass. "They have the resources in place to analyze and recommend specific sets as they relate to our business."

Rather than focus solely on software systems and tools, Coca-Cola identifies eight areas of category-management expertise that are applied to the process. They include advanced consumer insights, market analysis, financial analysis, pricing analysis, promotional analysis, efficient assortment, advanced merchandising and efficient replenishment.

In addition to applying the NACS process and utilizing syndicated research, Coca-Cola employs proprietary systems that enable activity-based-costing studies, basket-level analysis of scan data and store services, as well as profitability recaps. The market-basket analysis capability has been implemented over the past year, and reveals beverage purchase dynamics. "The retailer is able to gain insights to important areas such as the interaction between categories, between different gasoline grades and store purchases. We'll also use it as a new approach in determining out-of-stock situations," Stoops explained. "This allows the retailer to look at other categories outside of non-alcohol beverages and apply fact-based decision-making."

Atlanta-based Coca-Cola also assists retailers in maintaining and measuring the effectiveness of category-management programs. A detailed process of conducting assortment review has been developed that is based in obtaining the proper buy-in to ensure the set's longevity and provides the ability to track progress, Stoops said. "Assortment is the backbone of any successful beverage business and must be done to satisfy

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the needs of the consumer."

Mapco Express Inc. of Nashville, Tenn., has had positive experiences with Coca-Cola's process, according to Larry Pedigo, category manager for the 256-store chain. "Our Coca-Cola representative was willing to not only wear a Coca-Cola hat, but when necessary put on a Mapco hat. The company is very good at doing what is best for the consumer, and has data that can be trusted," he said. "Coca-Cola works to grow the entire category."

R.J. Reynolds Tobacco Co.

Jim Maguire

Mary McCombs, category manager for the 200-unit Sheetz Inc., based in Altoona, Pa., had this to say about R.J. Reynolds Tobacco Co.'s category-management support: "R.J. Reynolds's [representatives] keep their finger on the pulse of the [tobacco] industry, as well as the convenience store industry. They consider the overall category needs in our stores, not just their own products. They work with customized programs that fit our needs as well as theirs. Top-down personnel are readily available at all hours. They provide us with the detailed data we request in a timely manner. Also, they are continually looking for ways to help us, which could involve developing fixtures to maximize space or developing direct mailers for our markets."

That type of involved, unbiased, total-store approach is the backbone of R.J. Reynolds's category-management process for convenience stores. "A category advisor is a manufacturer that understands the values of all brands in the category, as well as how the category affects other product sales, and structures all of their recommendations accordingly," explained Jim Maguire, senior vice president of sales.

The total-store strategy for the tobacco category is important for the success of convenience stores, Maguire said. "Adult smoker foot traffic is critical to the c-store industry's profits. According to the *Convenience Store News* Out-of-Stock Study, the average adult smoker visits a convenience store 5.6 times per week and spends an average of $5.12 per visit," he noted. "This $28.67 in sales per week, per adult smoker speaks for itself relative to the importance of maximizing store profitability."

R.J. Reynolds, based in Winston-Salem, N.C., brings a range of resources to the tobacco category-management process. "We use real-time data provided by direct accounts on shipments to each retail outlet and, whenever we can, retail scan data to provide our total category recommendation," Maguire said.

Field personnel are equipped with automated tools that enable them to advise retailers in three important areas. The first is determining the brand-style selection required to satisfy a target percentage of adult smokers in a specific geography. The second is identifying the manufacturer programs that should be combined to maximize adult smoker needs relative to promotion levels and maximizing the number of brands that can be promoted. The third area is merchandising the category from the standpoint of "presentation to the consumer," said Maguire. "What is the ideal capacity for maximum turns/minimal out-of-stocks? How can the manufacturer-program requirements be incorporated into the available space?"

> "R.J. Reynolds considers the overall category needs in our stores, not just their own products. They are continually looking for ways to help us, which could involve developing fixtures to maximize our space or direct mailers for our markets."
>
> Mary McCombs
> Sheetz Inc.

Determining product selection and developing the appropriate SKU mix for a convenience store outlet requires examination of all brands. "We would point out that several smaller share brands—those that are seldom, if ever, promoted—have the highest level of brand loyalty. Consequently, adult smokers who can no longer find their brand will quickly take their $28.67 per week contribution to another store that carries their brand," Maguire explained. "Reducing inventory costs has to start with getting proper inventory levels on each brand style in line versus simply discontinuing everything that doesn't sell a carton a week."

R.J. Reynolds has also studied the impact of tobacco products on other categories. Maguire outlined that retailers must consider the impact of increased cigarette sales on their five other top sales/margin items. Another question to ask is whether the retailer can afford to trade off margin on cigarettes to drive foot traffic on higher-margin items and drive a higher overall profit for the store.

"We'd like to thank the retailers who have valued our contribution enough to nominate R.J. Reynolds for this recognition," Maguire said. "We will continue to provide all of our expertise to those business partners who are truly committed to growing their total business and to providing R.J. Reynolds a fair chance in their stores to grow our business. It's a win-win situation!"

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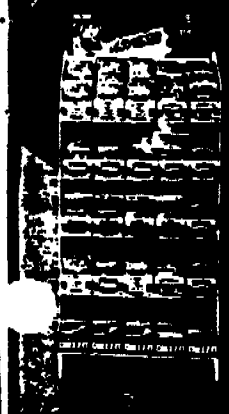
Your profits soar when you offer more.



Multiple-unit pricing does more than offer your customers a good deal. It's also an excellent way to get your sales flying. Usually in the neighborhood of up to 32%.* That's why Keebler offers a variety of products packaged especially for multi-unit sales, as well as plenty of attractive displays to promote these outstanding values.

Like all Keebler products, our highly successful 2 for $1 lineup features widely recognized brands and Keebler's unique Elfin Equity. And we offer a wide selection of other equally tempting products and price points.

Contact your Keebler distributor and discover all the ways Keebler can help get your sales off the ground.

Keebler

The Only Cookie & Cracker Company to Be Named Category Captain.

*"An Anchoring and Adjustment Model of Purchase Quantity Decisions" from Journal of Marketing Research Vol. XXXV (February 1998), 71-81.

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Best-of-Class Suppliers

The following Best-of-Class category-management partners nominated by convenience store retailers share their experience and some of the secrets of their success.

Convenience Marketing Inc.

Convenience Marketing has a department dedicated to category management, according to vice president, sales development, Bill Price, who added that the Austin, Texas-based food broker's entire organization assists in the process. "The organization provides a resource to facilitate linking manufacturers and retailers," said Price.

Utilizing syndicated data and industry resources, Convenience Marketing determines core-item selection that can be customized by market. State-of-the-art planogram systems are then used to develop photo-quality shelf sets for retailer implementation. Business development managers oversee each project and provide support in the form of consumer research and brand information. The field sales organization works with buyers and category managers to finalize the product-selection process and ensure implementation of the planograms. "It's a team effort in partnership with the customer," said Price.

"Convenience Marketing has consistently and promptly offered assistance," said Rebekah Ensley, category management analyst at H.T. Hackney Co., a wholesale distributor based in Knoxville, Tenn. "They provide complete, live-image planograms and their recommendations are valid and supported."

Core-Mark International

Core-Mark International is committed to objective category management, according to Chris Walsh, vice president of merchandising. "We start with fact-based, consumer-driven schematics," he said. But that is only the foundation of the company's category-management process.

"We partner with retailers in maximizing their real estate," said Walsh. "Especially with the recent dynamics of the tobacco industry, we try to help retailers understand measurements of profitability, how certain categories are driven more by impulse and the value of activity-based costing."

> "If we help a retailer eliminate a half dozen suppliers, we afford that store over $10,000 in activity-based savings per year, while increasing sales and profits."
>
> Chris Walsh
> Core Mark International

While manufacturers and distributors have made considerable gains in ECR-driven logistical efficiencies in recent years, Walsh stated that the benefits of the processes for retailers are largely untapped. "One consultant estimated it 'costs' a retailer $35 per week to transact business with each supplier. If we help a retailer eliminate a half dozen suppliers, we afford that store over $10,000 in activity-based savings per year, while increasing sales and profits," he explained, adding that savings can be realized on the bottom line or used to increase customer service and store cleanliness.

Core-Mark's primary program for achieving these objectives is SmartStock, which enrolled 3,000 retailers in 1998. The results have been positive. "For example, we worked with Quik Stop Markets [Freemont, Calif.], which has over 100 franchisees making independent buying decisions at every store. We utilized SmartStock and our category-merchandising tools to provide consistency, increase sales across commodi-

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ties and eliminate 500 transactions per week from the stores," Walsh said.

Van Tarver, president of Quik Stop Markets Inc., acknowledged Core-Mark's contribution. "The company really cooperated with us in our recent remerchandising program. Core-Mark helped to eliminate slow-moving items through category management and improved the out-of-stock situation in our stores," he said. "The result has been a positive move in sales. One store, in fact, experienced sales increases at double the rate of stores that had not yet been remerchandised. Core-Mark has been a flexible and cooperative partner."

Based in South San Francisco, Core-Mark's approach is to go beyond the textbook definition of category management. "Whether it's helping to implement POS, reduce tobacco inventories or stimulate sales through promotion or merchandising, we are committed to partnerships that assist retailers in being more profitable operators," said Walsh.

Douglas Distributing

Ron Feulner

For family-owned Douglas Distributing, based in Salt Lake City, Utah, keeping up with coffee trends and the specific needs of its convenience store customers is the key to successful category management. "Our strength lies in maintaining a complete focus in one convenience store category—coffee," said Ron Feulner, owner. "We can focus directly on this category in this market [Utah and surrounding states]."

Douglas Distributing utilizes a sophisticated computer system to track retail customer activity at the store level, and combines that up-to-the-minute information with its local store knowledge. "We have six people in the field, and hold fast to a hands-on approach to serving our customers and creating programs that serve their needs best," said Feulner, who himself visits stores twice a month. "I want to rub shoulders with the people who work the stores every day. It's a great way to measure customer satisfaction and find out exactly what the consumer wants."

"Douglas accepts responsibility for equipment, service and product," said Bill McGregor, foodservice director of 140-store Maverik Country Stores in Afton, Wyo. "They offer unbiased, professional advice, current category information, price protection and rapid response. Douglas Distributing is my coffee category expert."

Eby-Brown Co. L.P.

"Eby-Brown services retailers of all sizes, from the mega-chain to the individually owned store," observed Tom Oktavec, vice president, marketing of Kocolene Marketing Corp., operator of 43 Fast Max stores, based in Seymour, Ind. "Each of their customers is treated with care and respect. Eby-Brown is a true partner to our industry."

That ability to service both large and small retailers stems from Eby-Brown's approach to customer service, and also its technical capabilities. Convenience store operators that are scanning benefit from Eby-Brown's item-information database and assistance in POS setup, and ongoing support in the format of the POS software selected by the retailer, according to Ron Coppel, vice president, business development. For retailers who are not scanning or do not have data-mining capabilities, Eby-Brown has developed IRIS (Intelligent Reporting Information System), which provides subscribers with secured access to their velocity information 24 hours a day, seven days a week via the Internet.

Naperville, Ill.-based Eby-Brown also has developed category-management practices to maximize consumer value and category asset performance, said Coppel. "We assist retailers by integrating our category expertise into our customers' strategic business process, providing the exchange of information and the willingness to share pertinent data, and jointly identifying with retailers and manufacturers opportunities to grow category sales and profits," he said. Eby-Brown then utilizes Spaceman tools to develop planograms.

Frito-Lay Inc.

"Frito-Lay is progressive and cooperative on category management," observed Arnold Kimmel, CEO of Quickie Convenience Stores of Ottawa, Canada. "They have the tools and execute their commitments and obligations well. Frito-Lay has a complete product line, but respects their competitors."

That depth of commitment, resources and objectivity stems from Frito-Lay's approach to category-management for convenience stores. "Category management is a journey, an evolving and ongoing process," said Dave Boissevain, director of category management for the Dallas-based company. "We take a fact-based, results-oriented approach. We work with retailers to build an integrated category-management plan that maximizes the key drivers and fits into the retailer's overall strategy. Partnership with the retailer is critical in developing a category plan that can be implemented."

Frito-Lay's category-management process is grounded in the consumer, and Boissevain defined several channel-specific drivers: Right Assortment, variety optimization; Right Presence, landmark merchandising; Rich Promotion, bundled tie-ins; and Right Service, direct-store-delivery (DSD) system. A proprietary software program, Right Set, has been developed to maximize the assortment and landmark merchandising drivers.

"Right Set is a consumer-centered, fact-based approach that maximizes

> "They have the tools and execute their commitments and obligations well. Frito-Lay has a complete product line, but respects their competitors."
>
> —Arnold Kimmel
> Quickie Convenience Stores

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salty-snack sales and profits for convenience stores," said Linda Seatvet, convenience store channel category manager. "The flexibility and targeted nature of the Right Set program is key because it reflects retailing realities. The population diversity across a chain's marketing area can be enormous, running the gamut from highly affluent suburbs to blue-collar neighborhoods, and c-store chains may have a wide variety of store formats. Right Set assortment and merchandising solutions can be custom targeted on a store-by-store basis."

Frito-Lay continues to be committed to fact-based, consumer-led, ECR-smart category management. "Our approach is grounded in the consumer, with the objective to build a category plan that leverages the expandable nature of snacks," said Boissevain.

Gatorade North America

Gatorade North America's proprietary category-management system, Cooler P.R.O., is gaining wide acceptance by convenience store retailers, according to Jim Brooks, assistant manager, capability development. The system incorporates analysis of consumer insights with a review of convenience store retailers' promotions, pricing, product assortment and available space to develop assortment recommendations and planograms for the non-alcohol beverage segment.

Adding to the strength of the system, Gatorade, a division of Chicago-based Quaker Oats Co., recently initiated a new structure that enables more field support for category management in convenience stores. Six regional customer business centers and a national accounts customer business center have been established, and the manpower behind Cooler P.R.O. has been tripled in the past year.

"The category-management expertise for Cooler P.R.O. really lies in our field-based category-management teams," said Brooks. "Our strategy is to sit down with the retailer, determine their goals and source their data across the beverage category. Then, we use the Cooler P.R.O. system to develop unbiased recommendations to maximize retailer sales through the cooler door."

"We completed a major cold-vault reset in 1997, and Gatorade was the category partner for the entire non-alcohol cooler," said Tamara Fowler, associate category manager at Wawa Inc., a 470-store chain based in Wawa, Pa. "Gatorade is one of the most knowledgeable and dedicated category-management companies in the industry."

Syndicated data on consumers and convenience stores, as well as custom market reports on the local competitive set, are utilized by Gatorade in the category management process. Custom consumer audits and assessments of out-of-stock situations are another tool.

Gatorade's process focuses mainly on the cooler door and addresses all non-alcohol beverages, not just sports drinks, Brooks explained. "Cooler P.R.O. is designed to analyze and create recommendations for the entire category. Taking a broad approach is the best way for convenience retailers to maximize sales and profitability of all non-alcohol beverages."

H.T. Hackney Co.

Rebekah Ensley

"Our role is to provide our customers with the best data resources and space-management tools to identify efficient product assortments and develop strategies to effectively compete in their marketplace," said Nancy Tucker, director of marketing. "Our goal is to provide category information, recommendations and customized planograms."

H.T. Hackney, based in Knoxville, Tenn., utilizes several tools in the process, including syndicated and internal data, Spaceman planogram systems and store-level reports. Planogram development is supported by product-mix analysis, pricing analysis and programs focused on increasing total category sales and profitability.

A full-time category-management analyst, Rebekah Ensley, is dedicated to administering the process for retail customers. Each of Hackney's 24 distribution centers is provided a complete category planogram guide and is staffed with merchandising experts to conduct analysis of store activity.

"H.T. Hackney has formed a great partnership with both its customers and manufacturers, and bridges that partnership on a win-win basis," said Dan Fleming, director of operations for Knoxville, Tenn.-based Pilot Corp. "Their strength is in customer service. They also have a wealth of information at easy access and are current with the latest and greatest."

Keebler Co.

"Keebler has provided good support and been very active in the category. Theirs is a comprehensive category-management program that looks at the entire category, and the Keebler people are always available to conduct analysis, create planograms and do resets," said Randy Meyer, senior vice president of Krause Gentle Corp., operator of 158 Kum and Go stores based in West Des Moines, Iowa. "We've enjoyed an excellent long-term relationship with Keebler. It's a positive partnership."

Krause Gentle's experience is the result of Keebler's efforts to focus on the goals of the convenience retailer in the cookie and cracker category. "We work closely with the retailer to understand their objectives and establish plans that meet those objectives," said Mark Clark, business development manager for the convenience division at Keebler. "In light of the number of categories and nature of the convenience

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store business, we simplify the process and attempt to make it easy for the retailer to execute against."

Elmhurst, Ill.-based Keebler deploys more than 35 field personnel and a broker sales force of 600 to facilitate category management with its convenience store partners. Culling data from syndicated and proprietary resources, Keebler then applies its own knowledge of the cookie and cracker category and develops planograms using state-of-the art space-management tools.

Cookies and crackers present a unique challenge to convenience store operators that Keebler assists retailers in addressing, according to Clark. "In convenience stores, this category is not the top-of-mind snack option for the consumer entering the store. There's a big opportunity to grab the consumer, however, with placement and pricing," he said. "Cookies and crackers are typically merchandised in the center aisles. By adding secondary placements and offering attractive value pricing, you can move the consumer to the category as they make their snacking decision."

To that point, Keebler's two-for-$1 program is merchandised with counter and floor racks. "Two-for-$1 can increase the purchase frequency by as much as 32 percent because it creates multiple purchases," said Clark. "The rack and value offer makes these products top-of-mind because the consumer anticipates the availability. The presentation drives impulse sales as well."

Clark explained that Keebler's category-management strategy involves developing solid working relationships with retailers and objective analysis and recommendations. "While it may drive immediate results, our category management strategy is very long-term focused," he said.

McLane Co. Inc.

"McLane Co.'s approach to category management is to give the consumer what they are looking for: well-known, well-recognized, high-quality products at a retail that allows them to purchase now and repurchase in the future," said Bill Fendrick, vice president, merchandising for Temple, Texas-based McLane. "The consumers' needs have to be focused on in a way that enables them to choose and purchase the key, core items within a category. Our focus is to make the retailer aware of the key national and regional core items within each category, and then offer these items with sound, fair pricing backed up by retail support from the vendor."

To facilitate that strategy, McLane has developed a decision-support system (DSS) that allows its merchandising experts to zero in on each category. "We then use this information in conjunction with our demographic-profiling system to present fact-based recommendations," said Fendrick. "Using these tools, we are able to work with and support both the vendor and the retailer in their businesses."

Each of McLane's 15 distribution centers has a merchandising team dedicated to providing category-management support. The merchandising teams are supported by merchandising managers located at the McLane corporate-support center. "Our role is to be an unbiased presenter of the facts and category statistics that are now available in the industry," added Fendrick.

In conjunction with the DSS system, McLane has developed its Stars and Star Gazer programs to allow retailers quick and convenient access to their item and category information. The commitment to category management and sophistication of the tools utilized in the process has made fans of convenience store retailers.

"The use of McLane's Stars and Star Gazer tools allows us great ability to look at all McLane product categories," sa Artie Smith, marketing manager for Ke Oil Inc., a 25-store operator based Midland, Texas. "We can reset muc faster to adjust to trends and change pro lem areas quickly. We feel McLane support really gives us the advantage

> "We can reset much faster to adjust to trends and change problem areas quickly. We feel McLane's support really gives us the advantage."
>
> Artie Smith
> Kent Oil Inc.

Miller Brewing Co.

"Miller has re ly teamed with c-stores in *The Miller Advantage* said Kendra Kuehl buyer/merchandising manager fo Bosselman's Pum & Pantry, Gran Island, Neb. "Mill is publishing information on categor management for us, the retailers. Th know that without category manag ment, we will not be viable competito in the future."

The Miller Advantage, a publicatio featuring consumer insights and k category-management issues, position the brewer to collaborate with retaile on solid business strategies and obje tive plans, according to Jeff Schoute Miller's director of category manag ment. "Category management is som thing we do with, not for, the retaile he said. "That type of collaborativ effort becomes a win-win-win, benefi ing the manufacturer, the retailer a the consumer."

Milwaukee-based Miller not on brings category-planning expertise to t process, but also several tools to spe analysis and deliver insights, includi the CoolerMAX multi-category coole simulation software. Recently, a pri elasticity model was created to d monstrate effective pricing in a giv market. A proprietary outlet-level an lysis tool identifies distribution voi and ensures core items are stocked each store.

A new element of the brewer's repe toire is Miller Tag Manager. The prop etary program generates precut sh tags displaying the shelf set develop for the space that can be affixed to t

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front and/or back of the cooler. "One of the biggest issues we've identified is the failure to follow up and implement the plans." Schouten explained. "Tag Manager enables implementation at the store level so that the set meets the plan volumes."

All Miller chain account managers are trained in category-management analysis and plan development, a valued resource for retailers. "Jim Ebert [our Miller representative] put talk into action by implementing five crucial category-management steps in one of our major markets to pilot the program," said Gregg Wingert, senior vice president of marketing for Houston-based Coastal Mart Inc. "He succinctly summarized and documented each step, applying top-notch category management activity. It is an excellent effort!"

Miller's approach is to customize the category-management process to objectively meet the business needs of the individual retailer. "Objectivity is a big issue," Schouten explained. "When we're objective, we're gaining sales for the category. We all win."

M&M/Mars

M&M/Mars works with its retail partners to better understand consumer shopping behavior, an effort that proved vital in identifying opportunities within the confection category at Equilon Enterprises' stores. "With innovation and participation in our 1998/1999 advertising promotion, M&M/Mars helped increase our candy category sales by 12 percent," said Robb Harling, Ohio ETD franchise representative, Equilon Enterprises. "The company's representatives call on our stores frequently and they participate in our monthly special programs. M&M/Mars provides excellent planogram support, and they are very involved and active in our markets."

Harling's 140 stores in the Cleveland and Columbus, Ohio regions are enjoying the benefits of M&M/Mars's comprehensive approach to category management. "We're striving to be the primary source for confectionery category management in convenience stores," explained Steve Collins, national sales director, category leadership for M&M/Mars, based in Hackettstown, N.J. "We work as a true partner with retailers, helping them identify and capitalize on opportunities to grow their confectionery sales and profits."

M&M/Mars brings a wealth of resources to the process. First and foremost is its category leadership team, whose 45 field associate members are certified through a 38-day training program. Ten members of the team are dedicated to collecting consumer information, conducting trade-channel research and developing category-management tools, which the teams' field associates then customize to meet the needs of retail customers. "The quality of our certification process and the significant size of our Category Leadership Team speaks to the commitment M&M/Mars has to this ECR initiative," said Collins.

M&M/Mars soon will expand its portfolio of category-management tools with the addition of a major proprietary convenience store study. "We conducted a statistical analysis of the conditions in the marketplace to identify top-performing stores and determine what distinguishes them from average and below-average performing stores," Collins explained.

More than 600 convenience and petroleum stores were involved in the study. M&M/Mars investigated several issues. Where should the primary confectionery selling location be? What items should be carried? How should they be merchandised? What is the role of promotion in increasing confection sales? "The findings will cover some impactful best practices, and we'll share those and more during this year's NACS convention," Collins said.

> "With innovation and participation in our 1998/1999 advertising promotion, M&M/Mars helped increase our candy category sales by 12 percent."
>
> Robb Harling
> Equilon Enterprises

M&M/Mars's category-management strategy is based in its commitment to partnering with its retail customers. "Success in category management is realized when joint efforts between our customers and us result in improved category sales, profits, return on investment and consumer satisfaction," Collins explained. "Each customer has specific objectives they need to meet to optimize category productivity and meet the needs of their consumer, and we're dedicated to assisting in that effort."

Nabisco Inc. (Planters Inc. and Lifesavers Co.)

Nabisco's dedicated convenience store channel marketing teams have a singular goal —to help operators maximize total store profitability and productivity. The strategy for achieving that involves a hands-on approach that leverages Nabisco's understanding of consumer behavior in convenience stores against its category management and merchandising expertise, according to Billy Henry, director of marketing for Planter's immediate consumption and Cornnuts businesses. "The approach is to transform data into actionable solutions that drive total store productivity for the retailer," he said.

Those actionable solutions involve increasing transaction size by applying Nabisco's extensive consumer insights. "We focus on shopper tendencies versus demographics," Henry said, adding that Nabisco has developed insights into shopper behavior based on frequency of visits to convenience stores and traffic patterns. From this, Nabisco has developed what it calls its "Double D" strategy of linking destination categories—such as beverages and the checkout station—with discretionary categories, which include snacks and confections.

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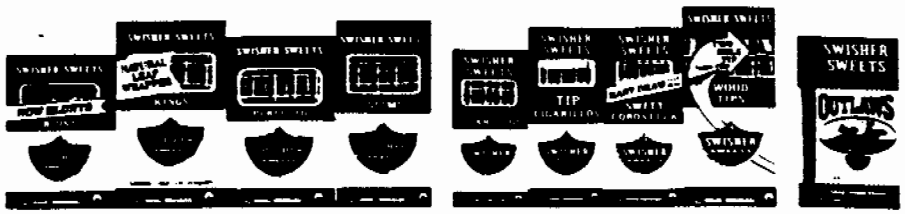
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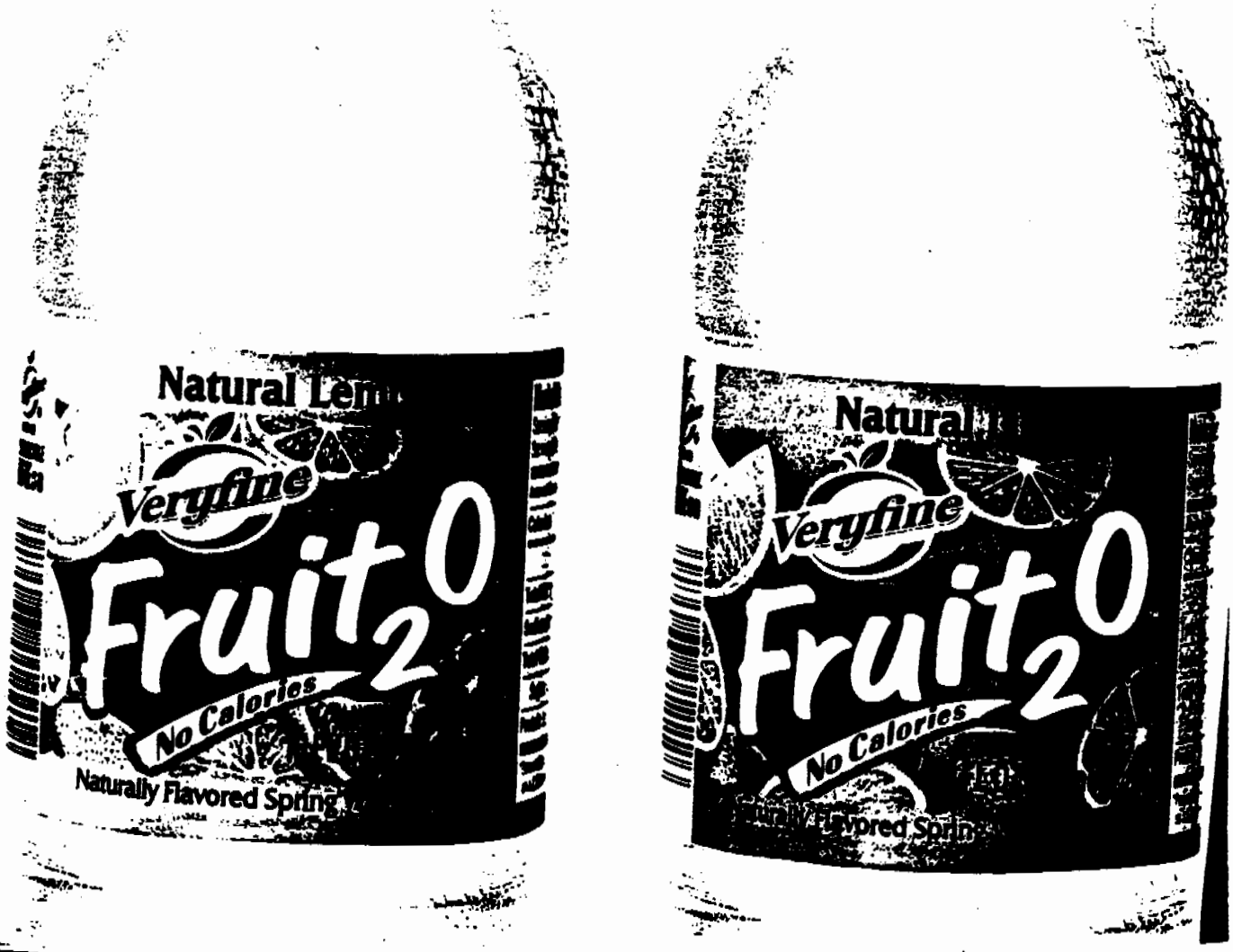

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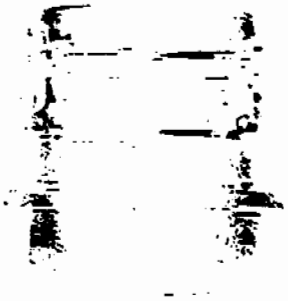

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that foundation of applying consumer insights to driving increased transactions. The first is Lifesavers Co.'s SMART (Successful Merchandising Assures Rapid Transactions). SMART addresses the confections category with learnings garnered from alliances with eight convenience store companies, combined with Nabisco's understanding of shopper behavior. "We link the high-traffic zones with consumer behavior indicative of that zone," said Mary Jean Longo, senior manager, category management for Lifesavers Co. "For example, beverage is a destination category, and we know 70 percent of beverages are purchased in combination with a snack. So we advocate placing confections next to destination categories such as beverages to drive that impulse sale and increase transaction size."

Secondary placements play a key role the process, and Nabisco studies show that sales of confections can increase as much as 43 percent when the products are moved from the aisle to the checkout. An increasingly important destination/discretionary product match is the coffee station and breath-freshening mints and gum. "The value of placing confections in high-traffic and destination locations is unmistakable," Longo said.

Placing salty snacks in high-traffic retail locations is also a key strategy for the Planters' Pacesetter 2000 program. In tests, front-end merchandising units for Planters products generated a 62 percent increase in sales for Planters and an 8-percent increase for the total snack category overall, according to Henry. "Pacesetter 2000 focuses on reducing duplication and adding variety. The next step is to increase transaction size by linking the category with destination categories in cross-promotional activity and secondary placements," said Henry.

Retailers such as Kendra Kuehl, buyer/merchandising manager at Bosselman's Pump & Pantry, based in Grand Island, Neb., have found Nabisco's category-management personnel and programs to be valuable. "[Nabisco representatives] are willing to come in and evaluate the categories with us, looking at our movement and national numbers, and put together planograms accordingly," she said. "They set up the section with us and we continually evaluate the area. [Nabisco personnel] are objective and include all products [participating] in the category in the evaluation and planograms."

Nabisco's cross-promotional strategy is now being taken to the next level through two 1999 promotions with The Coca-Cola Co. This spring and summer, the Ice Breakers gum brand will be linked with Nestea Cool in a promotional tie-in program called "Cool to the Core." Ice Breakers will be merchandised in custom display units near beverage coolers. Nestea Cool bottles will include instant win sweepstakes pieces. Prizes include 35 cents off Ice Breaker products. Planters products will join Coca-Cola in the "Refreshing Combo" program, which brings together Planters Super Tube nuts packages with 32-ounce fountain Coca-Cola drinks. A pre-pack display and in-store signage will support the "Refreshing Combo" promotion at retail.

"These elements all come out of our ongoing research and efforts to stay in touch with the convenience store consumer," said Henry. "Then we build plans that satisfy their needs and the needs of the retailer."

Nestle USA Ice Cream Division

The category-management process undertaken by the Nestle USA Ice Cream Division begins with a solid understanding of the convenience store customer obtained through independent research, secondary research and syndicated data. "Key components of our program include use of our powerful Nestle brand name and its lineup of premium-quality products, careful selection of products that are well-suited for the individual store locations, strong advertising and promotional support, as well as an impactful merchandising program," explained Kelly Atkins, director of impulse marketing.

Nestle sales teams, including the impulse or "alternative channel" team, work closely with convenience store retailers to tailor product selection to meet their shoppers' needs and their business needs. Nestle's exclusive distributor network also plays a crucial role. "Part of the process involves joint development of a planogram, which helps to target kids, teens, adults and the entire family. Distributors are adept at managing the process in a comprehensive fashion," said Atkins. "We also address opportunities through a variety of programs, including account-specific promotions."

Dick Kolberg, sales consultant for Houston-based Equilon Enterprises, has experienced a productive partnership with his Nestle sales representative, John Artesi. "He does a great job assessing appropriate product selection and helping determine the most effective location for the freezer box. And, he is a master at promotions," he said. "We have come up with some ideas, and he has just run with them. The full Nestle merchandising program, as John implemented it, drove a sales increase in one location of 300 percent. We also have an excellent Nestle distributor in Rock Island. Few companies do as good a job. Nestle is a first-class operation."

Nestle prides itself on a hands-on approach to category management. "We view our role as that of a partner with the retailer," said Atkins. "Our mutual goal is to optimize ice cream category sales and profits."

Orion Food Systems International Inc.

Orion Food Systems has proved its excellence in foodservice, according to Corey Burgin, vice president of Joe Bob's Inc. of Sulphur Springs, Texas. "Orion provides high-quality products for

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their franchise partners, whether you are an independent or a multistore chain operator," he explained. "Orion provides us with excellent operational support through knowledgeable people, practices and ideas. They have developed high-quality marketing materials to build brand identity from in-store POS to exterior signage, while still allowing us to 'own' our food-court concept. All of this, and a great return, results in excellent category management."

Retailer satisfaction with the five Orion foodservice brands stems not only from the product quality but also from operations support. A key point of differentiation for Orion, according to executive director of marketing Greg Breukelman, is its guaranteed operational support system.

"We have territory consultants assigned to each Orion location, and we guarantee that they will visit that location every 21 days or we will issue the retailer a check for $1,000," he explained. "Convenience retailers have a complex business to run, and need support every step of the way, so we make sure they get it."

In addition to field personnel support, Orion develops training videos, operations manuals and POS systems for their retail franchise partners. Another resource is promotion, which occurs on the national level and via local store marketing. "Part of the role of the territory consultant is to develop local store marketing that helps the retailer get involved with their community," Breukelman said.

The foundation of Orion's category management is its vertically integrated structure. The company manufactures, warehouses and ships all product. "This gives us incredible control of product quality, and enables us to be flexible in introducing new products," said Breukelman. "We take a lot of pride in our products so our retail partners can do the same."

Pepsi-Cola Co.

Pepsi-Cola took its commitment to consumer-based programming to the next level when the company integrated its customer marketing and category management efforts into one business practice last year. "Historically, suppliers have helped develop category plans in isolation of marketing program, which are developed on an opportunistic basis," said Greg McIntee, vice president, customer marketing and category management. "We've brought these two functions together. As result, the category plan, which must reflect and support the retailer's overall business plan, and the customer marketing solution we build can effectively address the strategic needs of that business."

The organizational change reflects Pepsi-Cola's position that category management must be focused against the consumer. "We have a fundamental belief that satisfied consumers drive category growth," McIntee said. "This new structure allows us to work against that principle."

> **"Pepsi has been proactive with new concepts and quick response to our needs. The company goes the extra mile to offer competitive intelligence."**
>
> --Tony Bandiera
> Chevron Products Co.

"Pepsi has been proactive with new concepts and quick response to our needs," said Tony Bandiera of Chevron Products Co. Inc., based in San Francisco. "The company goes the extra mile to offer competitive intelligence."

Pepsi-Cola's consumer-insights toolbox includes E-Lab, a video study of consumer behavior, and frequent merchandising audits of convenience stores. "We have a real dedication to really understanding the c-store shopping experience. Then, we work objectively with customers in partnership to develop consumer-based solutions to drive the entire category," said McIntee. "The approach is to wed consumer insights with

technology to optimize the cold vault."

The Right Choice is the primary optimization tool applied by the soft-drink marketer, and is utilized by category managers and sales representatives in the field, according to Jodi Rumble, channel strategy and marketing manager, convenience stores. "Research tells us that 75 percent of consumers know what brand of soft drink they want before they walk into the store. Knowing that, we look to maximize the cold-vault area—optimizing it against the SKUs that turn the greatest profit—so consumers can find what they want quickly," she explained.

Product and package development is another element of category management that is consumer driven. Pepsi-Cola's recent introduction of Pepsi One is an example of the company applying consumer insights and an understanding of retailer needs, according to McIntee. "Pepsi One shows our understanding of what consumers want, and developing a product that creates an opportunity for retailers," he said. "The majority of the sales achieved thus far by the brand have been incremental."

Retailers are appreciative of Pepsi-Cola's consumer-focused approach. "Pepsi's service and promotions have led this company to a leadership position in this market," observed Steve Hayward, retail supervisor for Salt Lake City, Utah-based Sinclair Marketing.

Pillsbury Bakery & Foodservice

Identifying retail customer goals and developing recommendations and product matches to help them meet those needs is the strategy employed by Pillsbury Bakery & Foodservice in assisting convenience store operators with cate-

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gory management. "We look at their approach across foodservice categories and determine where they are trying to grow and where the opportunities lie," explained Keith Dozier, marketing manager. "Then we identify the products, training and equipment that will facilitate that strategy."

Pillsbury personnel provide analysis of profits and margins, and serve as consultants for proprietary foodservice program development efforts. One area of concentration is controlling labor costs. "Often, additional labor is not needed to develop new and profitable programs," Dozier said. "For example, we might recommend to a retailer several ways to use the same product to generate additional revenue without increasing labor costs."

Much of Pillsbury's new product development is geared toward helping retailers hold down operating costs. For example, the recently introduced freezer-to-oven cinnamon rolls do not have to be thawed or proofed, reducing the prep process by two steps, Dozier said.

"Pillsbury offers quality products, promotional support and reliable technical knowledge and assistance," observed Bill McGregor, foodservice director for Maverik Country Stores, based in Afton, Wyo. "The company is an excellent partner."

Procter & Gamble

"We see our role as an objective facilitator of the NACS category-management process," said David Lane, corporate convenience industry representative for customer business development at Procter & Gamble. "We bring proprietary tools for analysis, resources in the form of people and expertise, and benchmarks industry-wide and outside the convenience channel."

Procter & Gamble was nominated as a Category Captain in both the grocery and health and beauty aids categories.

Grocery

Procter & Gamble's Grocery College is a workshop that walks retailers through the NACS six-step category-management process, assisting them in identifying the role of grocery and develop strategies and tactics for improving performance. According to Bill Traywick, operations manager, category management, 80 percent of grocery volume typically comes from 170 to 200 items. "However, most convenience retailers have 500 to 800 SKUs on the grocery shelves," he explained. "Consumer data shows 10 categories drive fill-in shopping. What Grocery College does is focus retailers on the fill-in shopping products, their role and the strategies and tactics to drive growth."

Nice N Easy Grocery Shoppes Inc. of Canastota, N.Y., realized immediate results after attending Procter & Gamble's Grocery College, according to Matt Paduano, director of purchasing. "Bill Traywick helped us focus and develop a mission statement for grocery. We developed power categories," he explained. Nice N Easy has reduced grocery SKUs by increasing facings of power category items, and is the in the process of re-merchandising its 100 stores. "We've seen faster turns within a week or two. The results are positive."

Procter & Gamble is working with Kellogg's and also the dairy industry to provide retailers with additional data to drive the milk, bread and cereal categories. "Milk and bread are immediate indicators of the grocery business a retailer is doing and can do," said Lane. "But those are problematic categories, so we are bringing in fullness of data to help retailers maximize the entire opportunity." The company is now developing College programs for the cooler door and salty snacks.

> "Procter & Gamble has moved the health and beauty aids category ahead light years for c-store retailers."
>
> —Fran Duskiewicz
> Nice N Easy Grocery Shoppes Inc.

Health & Beauty Aids

"This is a category that has not been maximized by convenience operators through the years. Procter & Gamble has moved it ahead light years for convenience retailers," said Fran Duskiewicz, vice president of operations for Nice N Easy.

The chain has utilized the Procter & Gamble HBA College program to increase the efficiency and productivity of the health and beauty aids category. Using a workbook format, HBA College is based on the NACS six-step category management program, and provides guidelines for retailers to manage the category.

HBA College assists retailers in addressing key issues for the category —identifying its role, assortment, item duplication and pricing strategies. "For example, if you have eight different versions of pain relievers, HBA College asks if you should have such duplication or look to variety," explained Traywick. "Then we look at the fact that consumers are aware of cross-channel pricing on HBA. We look at the appropriate pricing strategy."

"HBA is an arena most in the industry is not comfortable with and has little knowledge of because there are so many SKUs and so much competition," said Lane. "If it is strategically correct for the retailer to develop the category, they can attract consumers with selection and competitive pricing. The opportunity exists."

S&D Coffee

"For years, vendors to this industry were salespeople. At S&D Coffee, we're now consultants. When you sell

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the account, that's when the work really begins," said Dale Lozier, vice president of the convenience store division at S&D Coffee. "Our job today is to aid in the development of programs designed to grow the coffee category, continually interjecting new life and keeping the interest of the convenience store customer."

S&D Coffee's category-management efforts are supported by an interactive approach to the process. According to Lozier, a task force comprised of S&D Coffee sales and marketing managers conduct evaluations of each account's coffee program as the basis of program development. "We survey the store owners and managers, analyze the customer base and competitive environment, evaluate the various footprints in a chain and determine the appropriate program for each type of store involved," Lozier said. "Using our own sales and marketing team's expertise, we develop programs that address issues and opportunities unique to that operation."

Areas examined include the total hot beverage program, coffee-product selection, merchandising, branding, coffee-station logistics and traffic flow in the store. "Convenience store retailers constantly ask, 'How can I improve my coffee sales?' You can provide the best coffee in the world, but if the station is set up inefficiently or the traffic flow from the station to the register is not easy, you can lose that customer," Lozier explained. "We work to make the entire coffee program work efficiently and with impact."

Equipment is a crucial element of successful coffee programs, and S&D Coffee extends its expertise to equipment selection and maintenance. That complete approach to managing the coffee category has proved beneficial to convenience retailers. "S&D Coffee has worked with us on store-specific promotions, and assists with equipment calibrations to provide a consistent product profile," said Ernie Howard, director of marketing for Favorite Markets, a 121-store chain based in Dalton, Ga. "We are very proud of our program—The Coffee Corner—and S&D has helped us maintain quality and grow the program."

Swisher International Inc.

As changes in tobacco product retailing regulations continue to restrict merchandising options, convenience store retailers must be vigilant in managing the category, according to Bill Dunn, director of national accounts for Swisher International. "Category management of cigars, moist snuff and chewing tobacco is now playing a bigger role in the success of the category. It's crucial that the selection, pricing and presentation is right, because space is increasingly limited," said Dunn.

To maximize the profitability of the space devoted to tobacco products, Swisher International's field sales force takes a very hands-on approach to assisting convenience retail customers. Analysis of syndicated data, supplier sales movement and retail account data, when available, is combined with Swisher representatives' knowledge of the local market and the retailer's needs to develop a customized planogram, utilizing the Spaceman program. Key elements of the program are developing the appropriate product mix for the store's customer base, maintaining inventory levels to prevent out-of-stocks, establishing competitive pricing and developing strategic product placement, according to Dunn. Another element supplied by Swisher is merchandising racks.

Swisher International continues to assist retailers well beyond planogram implementation, which has proved beneficial to retailers. "Swisher conducts a quarterly review based on our sales so we can see what's working and what's not," said Richard Mione, director of marketing of Worsley Cos. Inc., based in Wilmington, N.C. "With that review, we can make adjustments to the planogram or product selection to keep the category fresh. This has been an extremely important part of our category-management program."

In today's environment, aggressive category management of tobacco products is the most effective means of ensuring category profitability and productivity, said Dunn. "There really is no room for mistakes today, and that's how we approach the process," he said.

Tropicana North America

James Powers

"To be a powerful resource to the retailer, we must be impartial and let the consumer dictate the basis for our recommendations," said James Powers, vice president, retail sales for the immediate consumables division at Tropicana North America. "In-store real estate is very valuable, and allocating that space with the right SKU's to maximize the retailer's profits is the appropriate focus."

Tropicana's hands-on approach begins with the interaction between retailers and the company's customer managers and broker account managers. Manager of category-management Jamie Reid is then brought in to develop category-management plans based on the needs of the retailer. Reid applies the proprietary TrueView system to the process, which incorporates retailer data, syndicated data and Tropicana's channel expertise. The process involves six phases: information gathering and goal setting; cooler space to sales evaluation; SKU optimization model development; planogram development; consumer demographic analysis against the planogram; and finally, store resets by the field personnel. The process takes 60 to 90 days to complete.

Tropicana TrueView process is constantly evolving with the industry. "Today's TrueView is not tomorrow's TrueView. Retailers are automating at a

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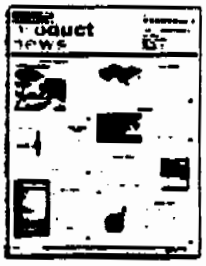

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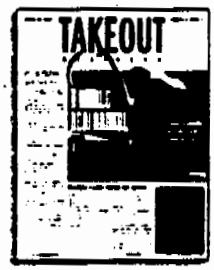

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Nominated for their category management prowess and program-execution skills by industry suppliers, the Best-of-Class retailers highlight the reasons for their success.

7-Eleven Inc.

"We take a macro-to-micro approach regarding category management," said David Podeschi, vice president of processed foods and non-foods for 7-Eleven. "We start with national industry consumer trends and seasonal change, and their impact on product sales. From there we drill down to individual item sales on an average per-store basis, also taking into account our internal analysis of category trends."

The benefits for 7-Eleven are a direct, positive impact on sales; reduced out-of-stocks; and improved display. "It makes the store easier to shop," he said. "Customers can find the fast-selling items easier. It also reduces out-of-stocks, because you're focusing your efforts on the fast-selling items."

Dallas-based 7-Eleven Inc. operates approximately 5,600 stores in the United States and Canada and, like most retailers, it has stepped up its use of scan data, especially over the past year. According to Podeschi, vendor alliances are also integral to an effective category-management model. The company doesn't establish "category captains" in the traditional sense, rather it partners with each supplier in a category. "For example, with soft drinks," Podeschi said, "we take our scan data, then we work with Pepsi-Cola, Coca-Cola and Cadbury to analyze results and develop appropriate action plans."

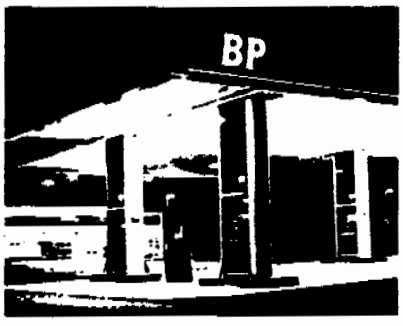
Podeschi added, "Forming supplier alliances provides you with a broader perspective on industry and consumer trends. We can identify certain trends that we might not have been able to see with just our own data, for example, if a certain subsegment is growing in the industry or if consumer trends show that a certain flavor type is trendy."

Establishing a network of suppliers also facilitates one of the most difficult aspects of category management: accommodating regional differences in product selection. "Through a combination of our centralized category managers working with our field merchandising staff and suppliers, we've been able to analyze the data centrally and regionally to implement the most effective strategies," Podeschi said.

A.T. Williams Oil Co.

A.T. Williams, based in Winston-Salem, N.C., is the parent company of Wilco Convenience Stores, operator of 120 stores. A.T. Williams devotes extensive energy to its market development and looks at every opportunity and profit center. That philosophy led one supplier to applaud A.T. Williams for its efforts in category management: "With several different store formats, the company is constantly changing. The company uses information from brokers and manufacturers' effectively to design planograms depending on each store's format."

BP Amoco Plc.



The recent merger between BP Oil and Amoco Corp. resulted in the formation of a new company—BP Amoco Plc.—but when it comes to category manage-

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ment, the proven rules still apply. "Our method combines the customer's point of view with a fact-based approach," said Marla Braswell, a manager of convenience store marketing at BP Amoco. "Each category is viewed as a strategic business unit, but there is also a strong focus on the customer, not solely on products."

The company has implemented several techniques for performing effective category management, including the use of scan data, syndicated data and vendor-supplied data for its 2,500 convenience stores.

BP Amoco also holds regular partnership meetings with its suppliers, bringing together each company's category managers, merchandisers and field personnel in an effort to develop effective, ongoing relationships. According to Braswell, establishing these alliances is invaluable. "Only suppliers can inform you about what your competition is doing and what the industry landscape is like," she said. "We only have our data, so if we're doing something wrong, we're going to continue to do it wrong. They are able to show us missed opportunities."

According to Braswell, since this category-management process was put in place, significant sales and margin increases have been realized, as well as a reduction in out-of-stocks. "Essentially, you're giving the right products the space they deserve for peak period sales."

Casey's General Stores Inc.

Casey's General Stores is making the most of all resources available in its approach to category management. According to one of the company's key suppliers, "Casey's has implemented a complex system to disseminate both its internal and industry data in order to make more effective category decisions.

"They believe in using as many proof sources as possible when adding a new item or promoting an existing one, and they believe in carrying a limited number of SKUs that turn very quickly. This approach helps keep inventory dollars to a minimum, while also maximizing turns." Headquartered in Ankeny, Iowa, Casey's operates 1,175 stores.

Chevron Products Co.

Data analysis and vendor alliances are the keys to Chevron Product Co.'s category-management approach. A division of Chevron Corp., based in San Francisco, the company owns and operates approximately 670 Chevron Food Marts, and views category management as an effective way to manage its c-store product offerings from a promotion, pricing and product selection standpoint.

The company rolled out POS scanning in 1998 and the information it collects is fed into a data warehouse, allowing category managers, category buyers and field merchandisers to analyze it and then develop recommendations. "Using this method, we can monitor movement of a specific item in a store," said Carlton B. Dallas, manager of convenience store retailing for Chevron. "We can carve out specific areas to analyze and we can also overlay a matrix of space allocation in terms of return on inventory investment."

According to Dallas, Chevron's approach has resulted in an upward sales trend. "Since implementing scanning last year, we've seen nearly 20 percent same-store gains in gross profit sales and dollars," he said.

Chevron also relies heavily on vendor partnerships. "Vendors are key elements of our category-management strategy," Dallas said. "Forming alliances allows for the mutual sharing of ideas to improve the efficiency of the supply chain. For example, we can begin to take a much broader look at what opportunities exist to increase both consumer service and sales."

Chevron works closely with the National Distributors Alliance and key partners such as Core-Mark and, according to Dallas, these relationships are constantly being strengthened. "The integration of data throughout the organization and between the vendors and Chevron is something that can always improve," he said. "It's also very important that we, as a retailer, develop alliances with key suppliers, and that there's an element of trust and mutual intention to develop strategies that work best for both companies, and for the consumer."

Conoco Inc.

Category management is not something you do once and then walk away, according to Jim Macari and Sam Farace, who are responsible for category management at 275-store Conoco Inc., Houston. "For Conoco, it comes down to defining who we want to be in the marketplace, what categories are going to drive our business and what strategies we're going to put in place to achieve the desired results," said Farace.

A key element of the company's market strategy was developing a centralized approach to category management and, according to Conoco's suppliers, this helps the company consistently carry the right product mix in a particular region. Conoco's category-management team in Houston monitors store operations, inventory and product movement. "There are some things we still handle on a local field level, but it just makes sense to manage a vast majority of category management from a centralized location," said Farace. "For example, if we're doing a planogram for candy, we can do that more effectively from Houston using our regional scan data. We don't need to do it six different times out in the field."

The result has been a more effective link between corporate headquarters and the field, as well as a more streamlined process for analyzing data and sending it back out to the stores. Since Conoco first started down this centralized path three years ago, the company has seen strong double-digit growth in both revenue and margin dollars on a same-store basis.

In 1998, Conoco also conducted monthly "supplier roundtables," bringing

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together 15 of its key suppliers. "We spent a day with them, asking them where they saw the industry headed and where they saw consumer trends moving in the next three to five years," said Macari.

Conoco also is driving continuous improvement in its stores. A "mystery shopper" is sent to stores once a month, monitoring customer service, merchandising, cleanliness and out-of-stocks. Also, the company's market merchandisers survey Conoco stores quarterly for planogram compliance, promotional implementation and correct pricing. "As of late 1997, when we implemented this program, our in-stock rate was 78 percent," said Macari. "We're now approaching 90 percent as of fourth quarter of 1998."

Dairy Mart Convenience Stores Inc.

Dairy Mart Convenience Stores is celebrating its 60th anniversary with a variety of events, among them a renewed focus on category management. Headquartered in Hudson, Ohio, Dairy Mart operates 600 convenience stores in seven states. According to Jay Ross, vice president of marketing and merchandising, as the company keeps growing, "we have to become more proactive in how we approach category management if we're going to continue to be successful."

A key element of this strategy, according to Ross, is spending more time listening to Dairy Mart customers in an effort to learn what they want from a convenience store, why they shop there and what categories are driving the business. To help accomplish this objective, the company has conducted several customer focus groups during the past year. Ross noted that maintaining an emphasis on customer needs and buying habits will help keep the company on the right track as it develops its category-management model for the future.

Ross also added that since the company presently does not scan, it relies heavily on its supplier partners to provide direction as far as category and product trends. One such supplier is Heinz Frozen Foods, which is working with Dairy Mart to develop store-specific planograms for the frozen-food category.

"Dairy Mart is very active in pursuing frozen-food sales and marketing opportunities," said Mark Kroll, associate product manager, channel development at Heinz Frozen Foods. "They are working to put together demographically specific planograms which are appropriate to their stores."

Equiva Services LLC

"Our category-management model centers on several elements," said Bill Pitocco, category manager, grocery, for Houston-based Equiva Services, operator of approximately 1,000 c-stores. "We analyze market-share data, consumer trends, competitive pressures, our information-technology capabilities and the financial realities of putting the right products in the stores."

Equiva Services uses space-management software to set its stores, including Spectra and InterCept. Suppliers noted that the company is very active in working with wholesalers and manufacturers to gather fact-based information for the development of planograms. Equiva acknowledges that it taps its supplier relationships for input. "Suppliers offer their own unique category-management expertise, especially regarding subcategories," Pitocco said. "I use the top two or three suppliers in a particular category to help me formulate strategies and to bounce planogram ideas off them."

Ultimately, however, retail turns are the deciding factor. "Category managers have to control their share of the company's assets," Pitocco said. "But they also have to be tied into what's happening with our operations personnel at the store level and with the customer. The customers' needs have to be fulfilled, from a product and inventory standpoint. I've got to be carrying the products the customer wants, with enough space dedicated to those products so they're in stock. The ultimate result is increased sales and margin."

Giant Industries Inc.

Giant Industries, headquartered in Scottsdale, Ariz., is taking a branded approach to category management, according to Pam Brady at Convenience Marketing Inc., a grocery wholesaler that works closely with the company. Giant operates 54 stores under the banners Giant, Giant Express and Mustang.

"It's a very different approach," she said. "Over the course of three months, I spent a lot of time working with Giant to analyze and carefully plan out a 3-foot-by-4-foot section for all the stores operated by the company. They are taking each category one by one, and making an effort to manage categories in such a way that will achieve the maximum impact."

According to Brady, the end result will be a more pleasant shopping experience for the customer. "By making the top-selling brands more visible throughout every category, Giant is making its stores easier to shop," said Brady. "This will lead to an overall increase in customer service and sales."

Marsh Village Pantry

Marsh Village Pantry, a division of Marsh Supermarkets, based in Indianapolis, operates approximately 180 Village Pantry convenience stores. Recently, Village Pantry was very active in implementing more effective methods of driving customer traffic. According to Bob Dalton, regional sales manager for Modern Aids, one of Village Pantry's suppliers, the chain is a very active partner as far as working to continually update its shelf sets.

"They ask us for industry data, and for other companies' success stories," said Dalton. "They're also very interested in staying current with family pricing, as well as adding new items

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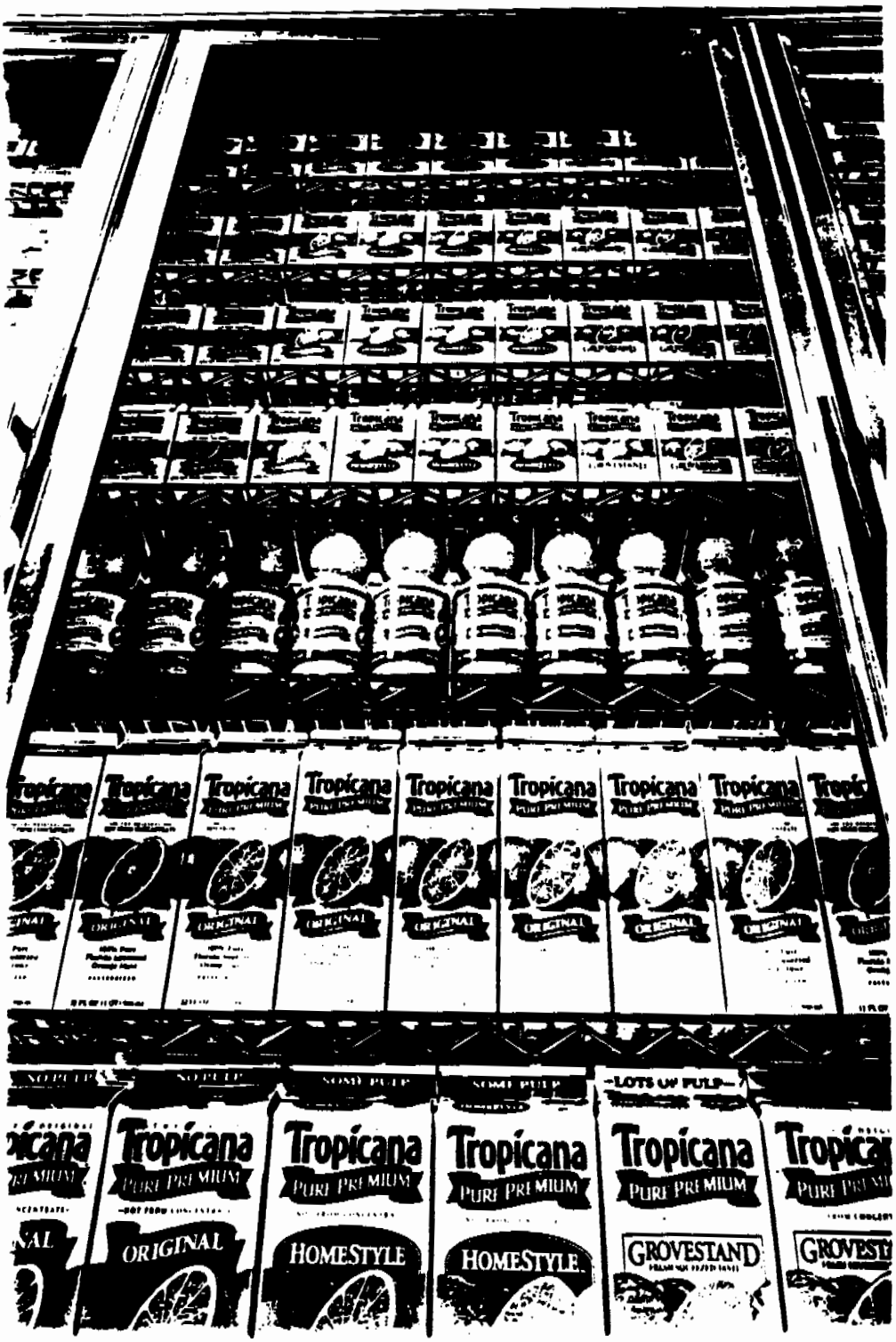

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that could be fast-selling, and deleting items that aren't."

Mobil Corp.

Mobil relies on a comprehensive, fact-based decision-making process when implementing category management at its 400 Mobil Marts and 226 On The Run convenience stores.

"A product must justify its space in a store in order to remain in the store, in terms of both retail sales and gross profit," said Barry Shull, group category director for Mobil, based in Fairfax, Va. "From Mobil's perspective, that should all be predicated on fact-based decision-making. We look at market-share data in all retail channel segments and our own internal data, as well as data gathered by the major vendors in each category segment. The goal is to implement balanced category strategies that aren't biased toward any one product and that allow us to paint an accurate picture of the marketplace."

Key to developing this picture clearly is Mobil's recently established "Beverage Vendor Category Captain" program. Mobil's criteria for awarding this status is based on a vendor's category-management philosophy, as well as having a process that "covers all the key components required for us to make a fact-based decision about putting the right products in the right slots," said Shull. For example, in the non-carbonated beverage segment, Mobil's selection for category captain is Coca-Cola Co., which in turn noted Mobil's "consumer-engineered" category approach and its understanding of the power of its brands as keys to building the entire beverage category.

For Mobil, the main benefits of working with its category captains are having access to that company's market data, as well as receiving invaluable feedback from an industry standpoint. Mobil works closely with its chosen vendors to do field and store surveys, develop timelines, make assortment presentations to its field merchandising staff and hold regular briefings regarding store-layout resets. This is all to ensure that the right products are displayed effectively to improve store operations—for both Mobil and the supplier.

The Pantry Inc.

At The Pantry, product facings are not necessarily determined by scientific analysis of the number one, two or three items in a particular market. "The items you select and the programs you execute in the stores are ultimately judged by the customer," said Kent Raphael, director of purchasing for The Pantry Inc., based in Sanford, N.C. "In the convenience store industry, your customers are somewhat of a captive audience. You need to carry branded, quality items, but not necessarily the number-one item. For example, people shop at a c-store usually out of a fairly definite need. If somebody comes in to buy air freshener, as long as a quality, brand item is in stock they'll be satisfied."

The company operates approximately 1,200 stores under the banners The Pantry, Quick Stop, Zip Mart, Dash-N, Express Stop, Lil' Champ, Quick Mart and Handy Way. Raphael noted that with such a large network of stores, he finds it useful to implement a four-tiered approach, tying together the manufacturer, broker, store and customer.

"After you select an item to carry, and you know the level of support from the manufacturer or broker, the next step is getting the product into the stores and getting the planogram done," he said. "With 1,200 locations, it's difficult to make that all happen effectively. That's why having supplier alliances is important, almost as important as what products you select."

Raphael noted that establishing alliances also provides the ability to more easily make changes at store level mid-year. "If you want to change two items in a particular section, how do you go to eight states and change that item? With a network of alliances in place, it's not as difficult," he said. "Without it, you would be stuck doing it annually or twice a year."

R.R. Morrison & Sons

At R.R. Morrison & Sons, the Vicksburg, Miss.-based operator of Fast Lane stores, the approach to category management is closely connected to its overall initiatives in customer service and store design, as well as its supplier and vendor relationships. This philosophy has helped Fast Lane realize several benefits, such as reduced out-of-stocks and the elimination of unnecessary SKUs.

"We view category management from a broad, industry perspective first, and then we narrow our approach by partnering with particular suppliers in particular categories," said Mark Tate, marketing manager of Fast Lane's 53 stores in Mississippi, Louisiana and Tennessee. "For example, in our juice set, we look at which supplier is leading the market in our area, and we work with them to make sure we have the right mix and the right amount of space dedicated to whatever product they carry."

One company upon which Fast Lane relies heavily is McLane Co. Inc.'s southern division. "They provide updated purchase information through their warehouse, and that tells me what other retailers are pulling," said Tate. "It's not chain-specific, but rather, they tell me, 'We're moving 400 cases of Tropicana grape juice a week and you're not carrying that in your mix so you might want to consider it.' That information is very helpful."

Ken Hudson, area sales manager for McLane Southern, noted Fast Lane's use of technology to set its stores as one example of effective category management. "They're actually tied into our mainframe," said Hudson. "From their headquarters, they can download data by category or item to see what was sold in a certain period. Then they can analyze that data, and compare the stores that are doing well against the ones that aren't and actually update their schematics in real time."

Looking forward, Tate noted that the company's goal is to further improve its

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use of technology to be able to make more accurate category decisions on a store-by-store basis. As part of this initiative, Fast Lane recently updated its point-of-sale equipment, and also upgraded its store registers to better capture its scan data.

Spectrum Stores Inc.

Spectrum Stores is moving into the new century with a new approach to category management. With 56 stores in eastern Alabama and western Georgia, the West Point, Ga.-based company is currently in the process of upgrading its stores to capture scan data. The rollout started in April, and Spectrum expects to have all stores completed by the end of the year.

> **"We're looking forward to having scanning data, which will allow us to make more effective decisions on categories and specific items within categories."**
>
> —Chuck Vires
> Spectrum Stores Inc.

"Currently, our main method of reviewing category performance is through the use of purchase information," said Chuck Vires, vice president of marketing. "We're looking forward to having scanning data, which will allow us to make more effective decisions on categories and specific items within categories."

As Spectrum continues to revise its category management methodology, the company is relying heavily on its wholesalers and suppliers to provide support and guidance. Spectrum also is following the NACS category management guidelines, tailoring them to meet its stores' specific needs. Having such a varied approach is important, according to Vires, to accommodate different store layouts and different customer buying habits in various regions.

Spectrum's long-term goal is ultimately to serve its customers better by having a better understanding of their needs and simply having product available when they're ready to buy. "Obviously, the more we know about a category, the better we can decide which stores should or should not carry a certain product," Vires said. "Then, by eliminating products that we now know won't sell in a certain store, more space can be allocated for the appropriate product sets. As a result, out-of-stocks are reduced, products turn faster and the customers' needs are more closely met."

Speedway SuperAmerica LLC

Based in Enon, Ohio, Speedway SuperAmerica operates 2,220 stores. One of Speedway SuperAmerica's key suppliers cited the company as an early user of scan data to drive the implementation of Apollo planograms. Speedway SuperAmerica and the supplier worked in concert to communicate that information in the planograms to the store level.

Speedway SuperAmerica is comprised of the downstream assets of Marathon Ashland Petroleum LLC, which includes the former SuperAmerica Group and Marathon Oil's Enro Marketing Co.

Tosco Marketing Co.

"Category management is an ongoing process that involves how you go about your day-to-day business with a strong consumer focus," said John Zikias, vice president of field and corporate marketing for Tosco Marketing Co., the retail marketing division of Tosco Corp., and operator of 2,200 Circle K stores. "Simply setting up the process is not enough. You need to continually review information."

Headquartered in Phoenix, Tosco Marketing Co.'s category management approach is based on the NACS guidelines. Through this process, Tosco and suppliers share internal category sales data, customer knowledge and their corporate marketing strategies, as well as ways to optimize market information and supply-chain efficiencies.

"We are in the process of tailoring the NACS category-management templates to meet our specific needs, for example, modifying the vendor questionnaires to fit Tosco's model," Zikias said. "We're really trying to work within the framework, however. It makes it easier for the suppliers if they know that the information they have to provide is similar and consistent with other convenience retailers."

Tosco has also established several strategic partnerships with key suppliers such as Coca-Cola, Anheuser-Busch and Dean Foods. According to Zikias, these alliances help streamline the data-gathering process. "They provide a consistent form of data," he said. "As an example, for categories with products that are direct-store-delivered, without scanning you're heavily reliant on suppliers to provide you with information. The suppliers have been able to help us organize our data in a consolidated form that's easier to work with, and they've also given us valuable category information from a total market perspective."

Turkey Hill Minit Markets

Each of the 232 Turkey Hill Minit Markets is designed from the perspective of the customer, according to Victoria Paul, business development manager, eastern region for broker Convenience Marketing Inc. By working closely with Turkey Hill and its wholesale distributor, Miller-Hartman, Paul is eyewitness to the positive changes taking place within the company.

"They are building state-of-the-art stores, from the concept of what the customer sees when they walk in," she said. "Everything is arranged in the most effective manner for the customer in a particular region."

Turkey Hill, based in Lancaster, Pa., is a division of Dillon Cos. Paul describes the way she and Turkey Hill's Brian Kurtz work together as a true partnership. "For example, if they don't have one of our retailer programs in their stores, I explain why they should," she said. "In turn, Brian has a background in buying for a wholesaler, which is very valuable to us. Ultimately, we're all partnering to get the best products in the stores and to serve the customer better.

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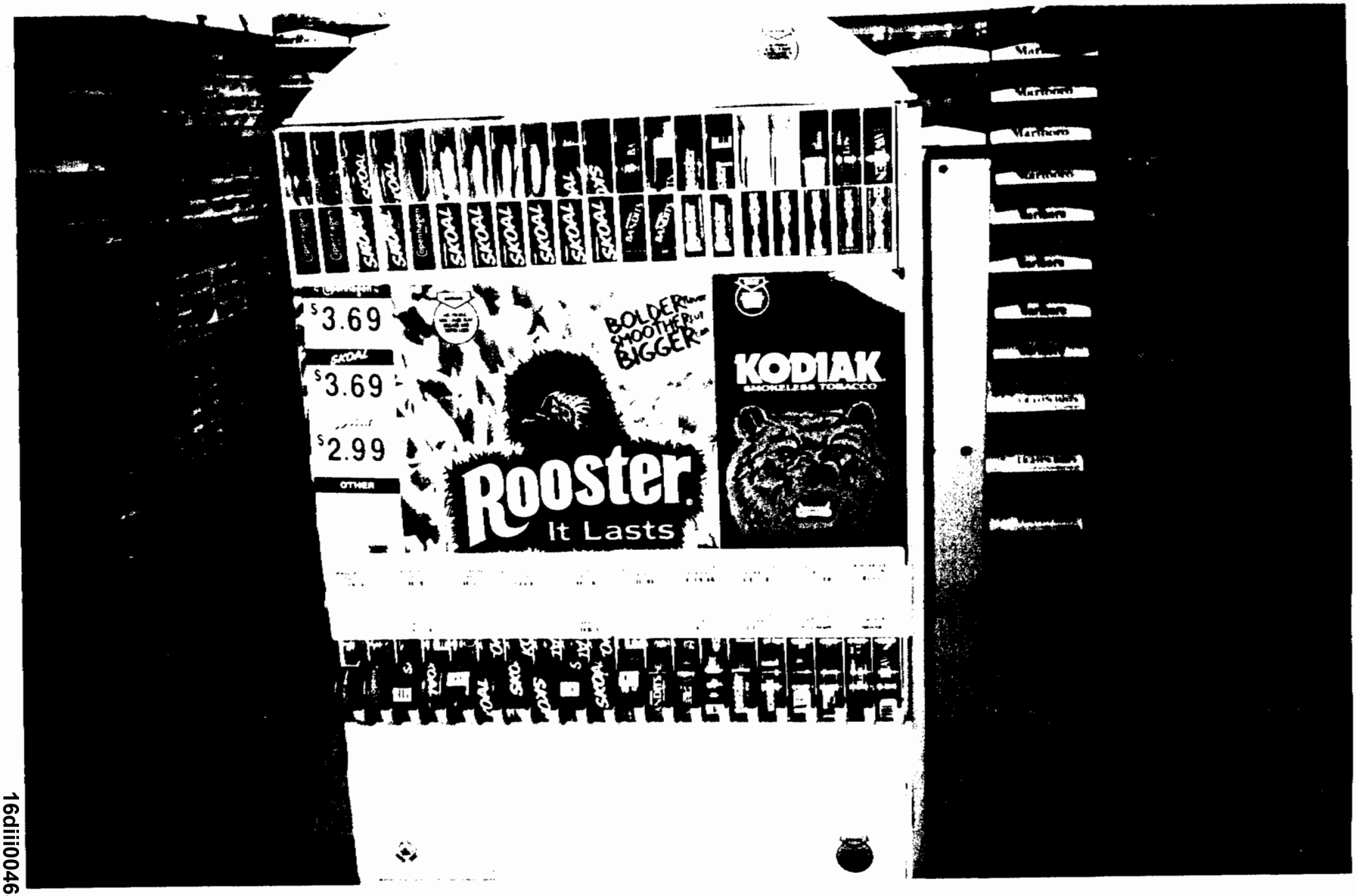

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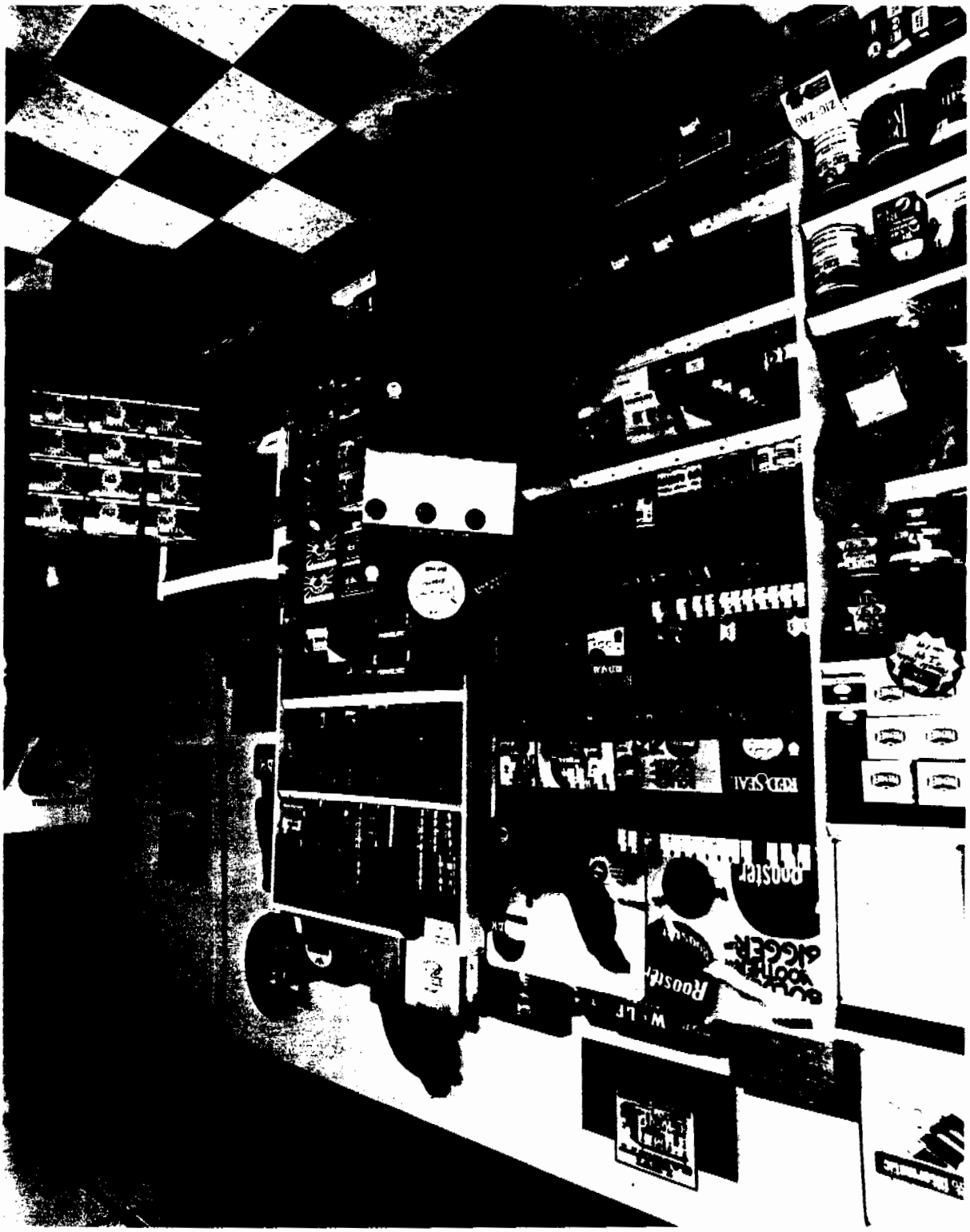
ZIG-ZAG
Roosters

4334

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REDWOOD

4339

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DORAL

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RED SEAL
Cougar
$2.77
$1.49
RED SEAL
¡SKOAL
MINI THIN
$3.50

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Store # 25

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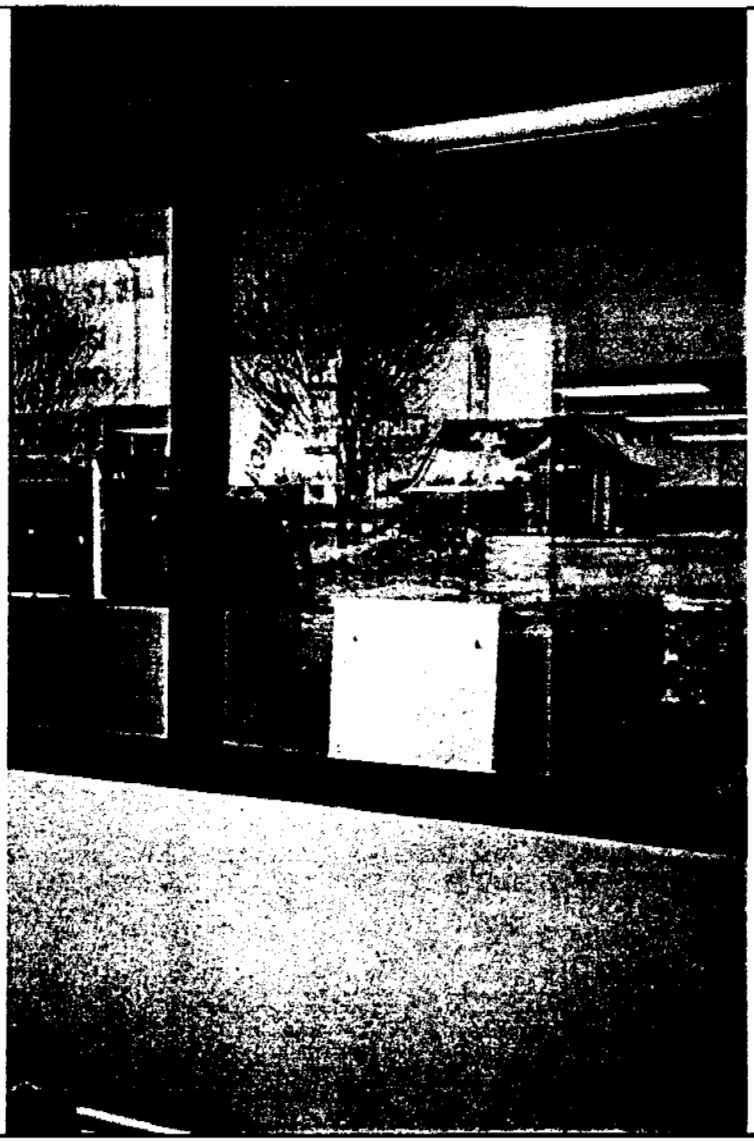

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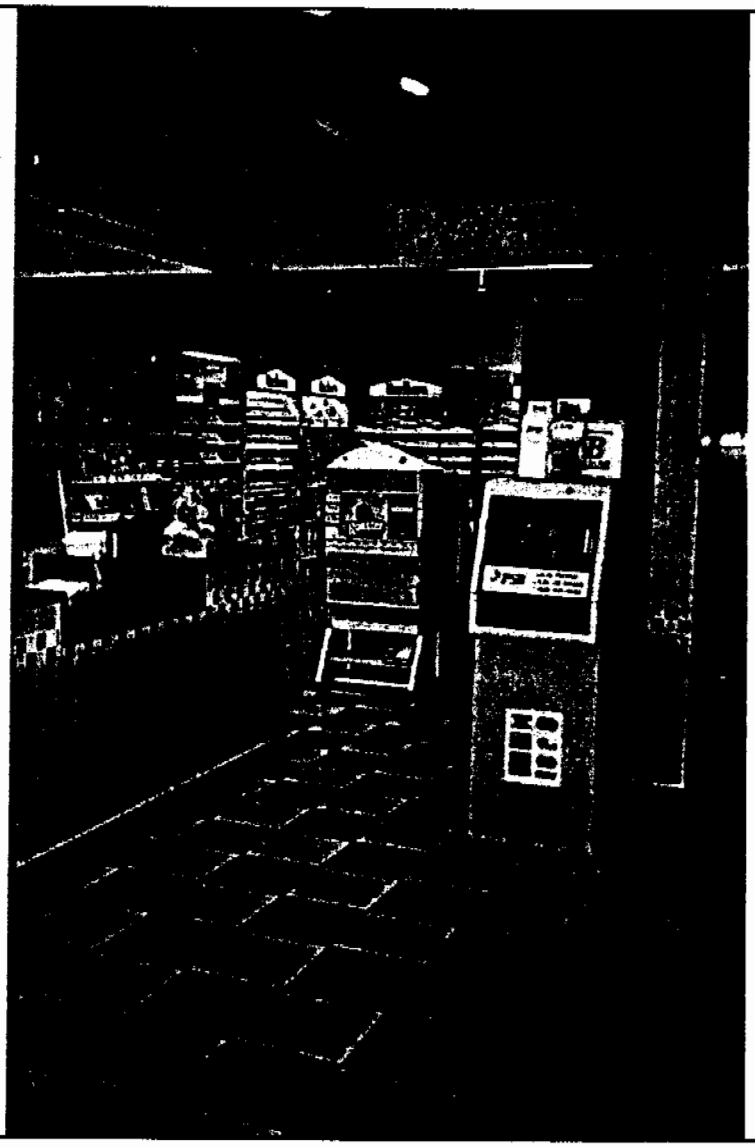

Store #47

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Kroger's 2440 Bardstown Rd. Louisville, KY 40205 (502) 459-9805

X8210

Kroger's 2440 Bardstown Rd. Louisville, KY 40205 (502) 459-9805

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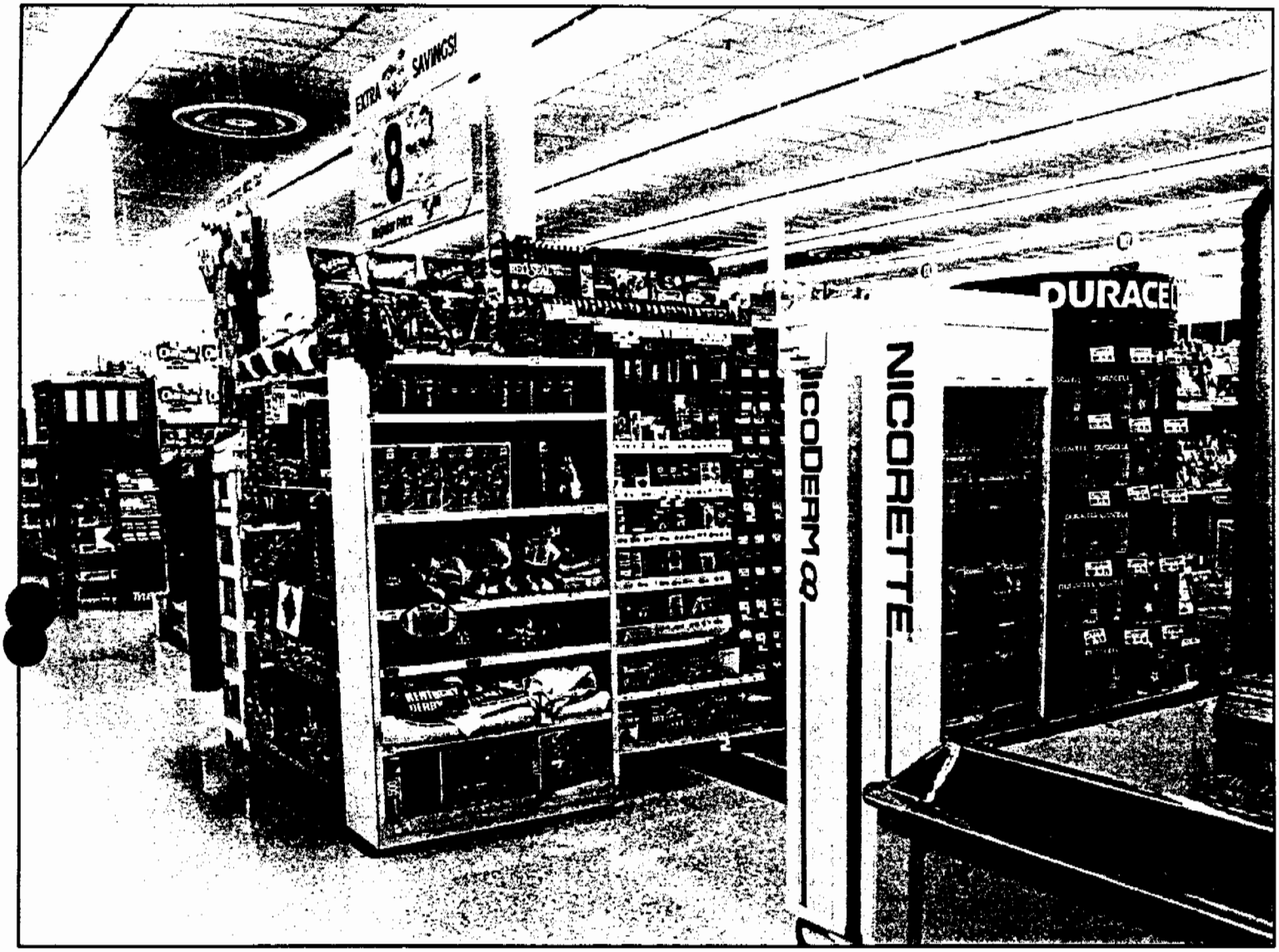

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KY 40205 (502) 459-9805

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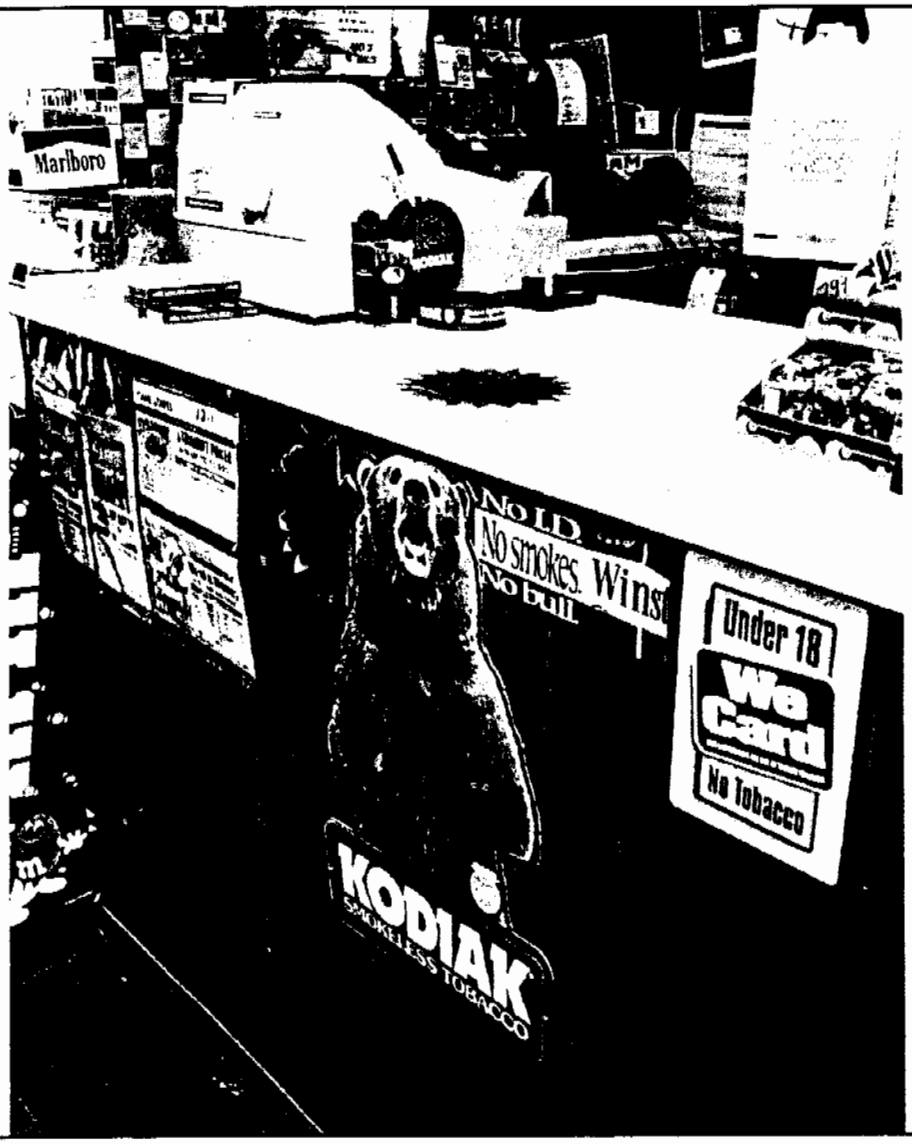

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Hartford, KY 42347

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Bo's Smoke Shop 1127 S. Main Street
Hartford, KY 42347

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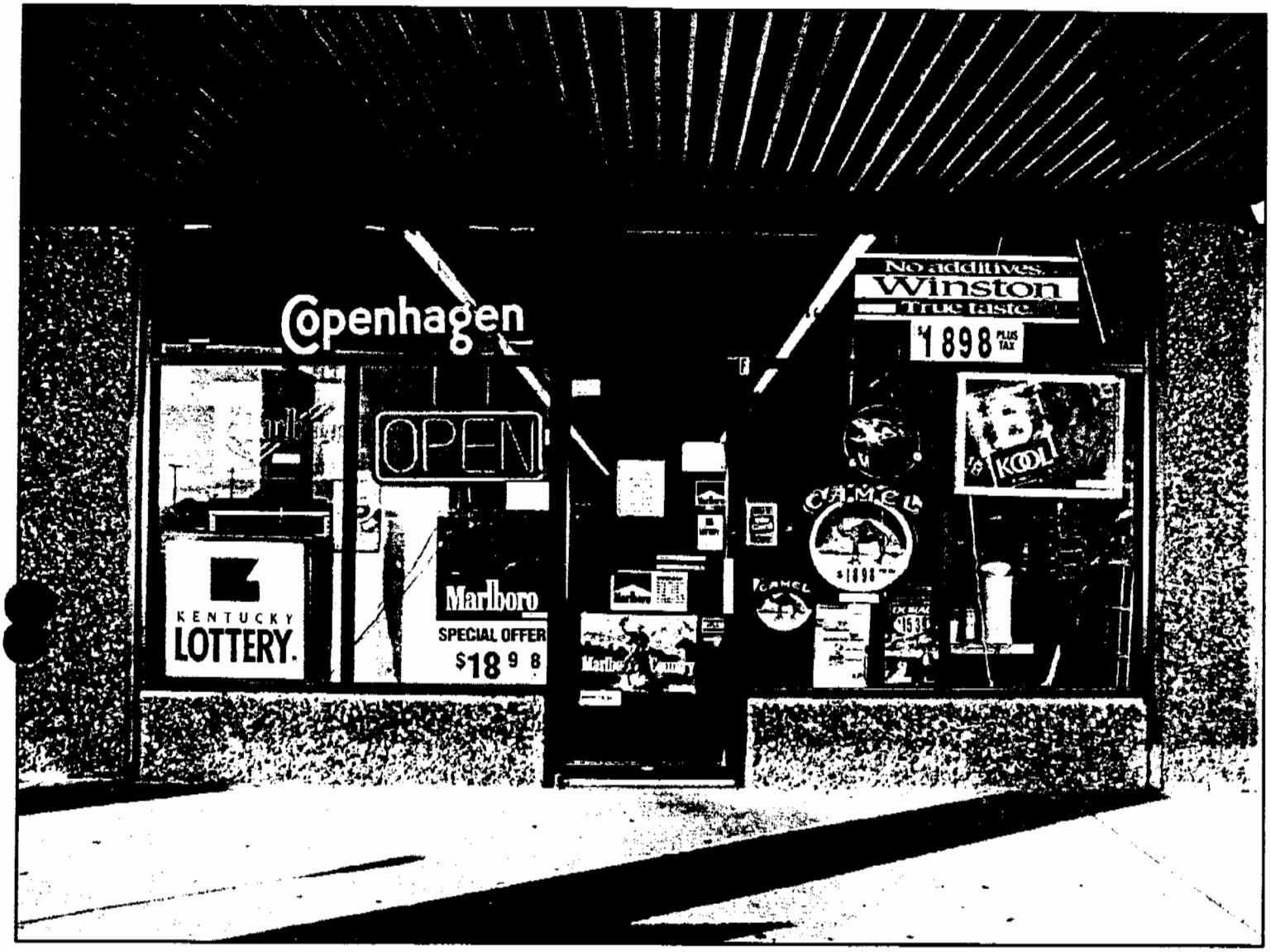

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owensboro, KY 42301

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owensboro, KY 42301

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Tobacco Patch 1027 W. Main Street
Princeton, KY 42445 (270) 365-0532

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Princeton, KY 42445 (270) 365-0532

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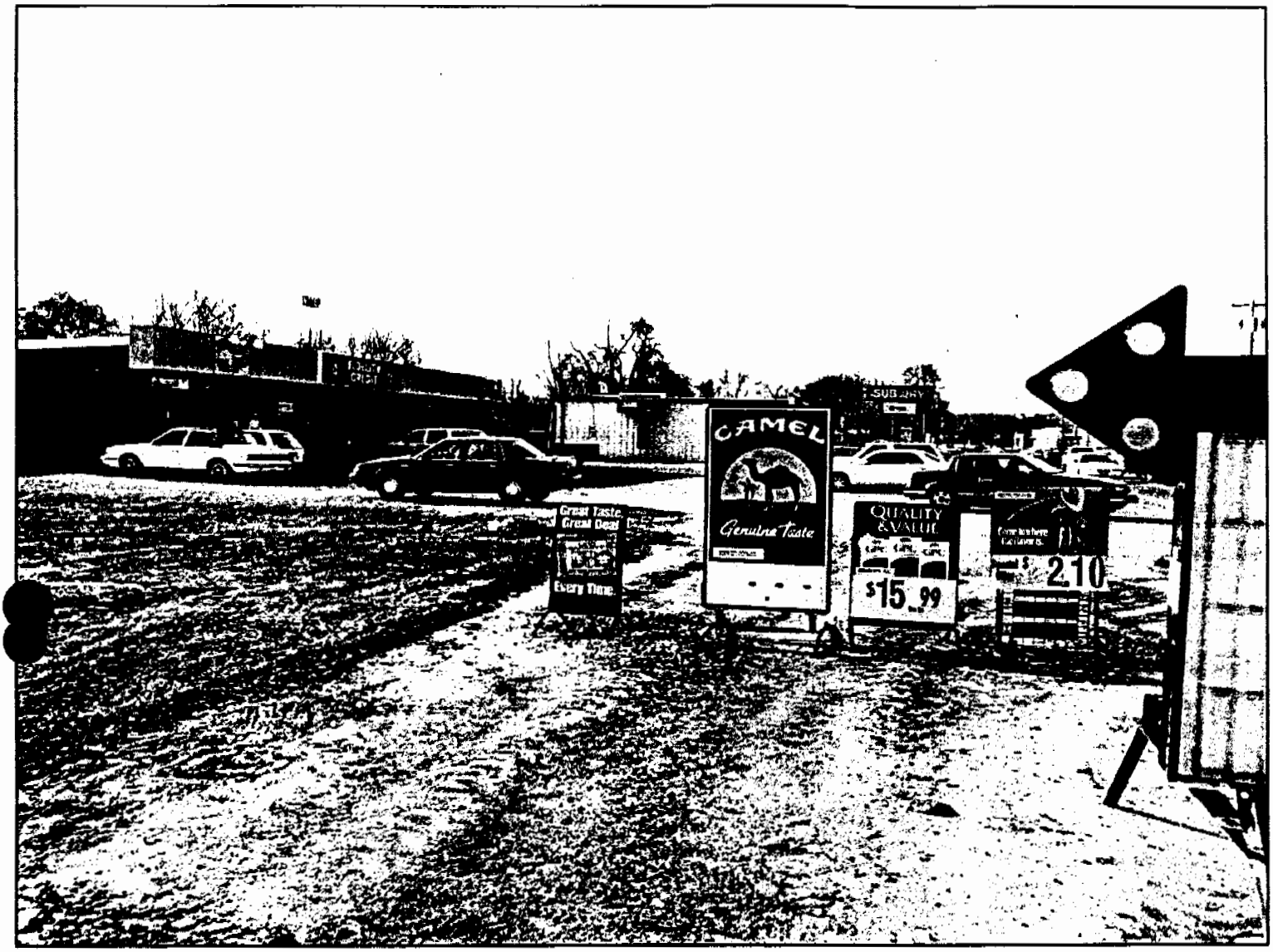

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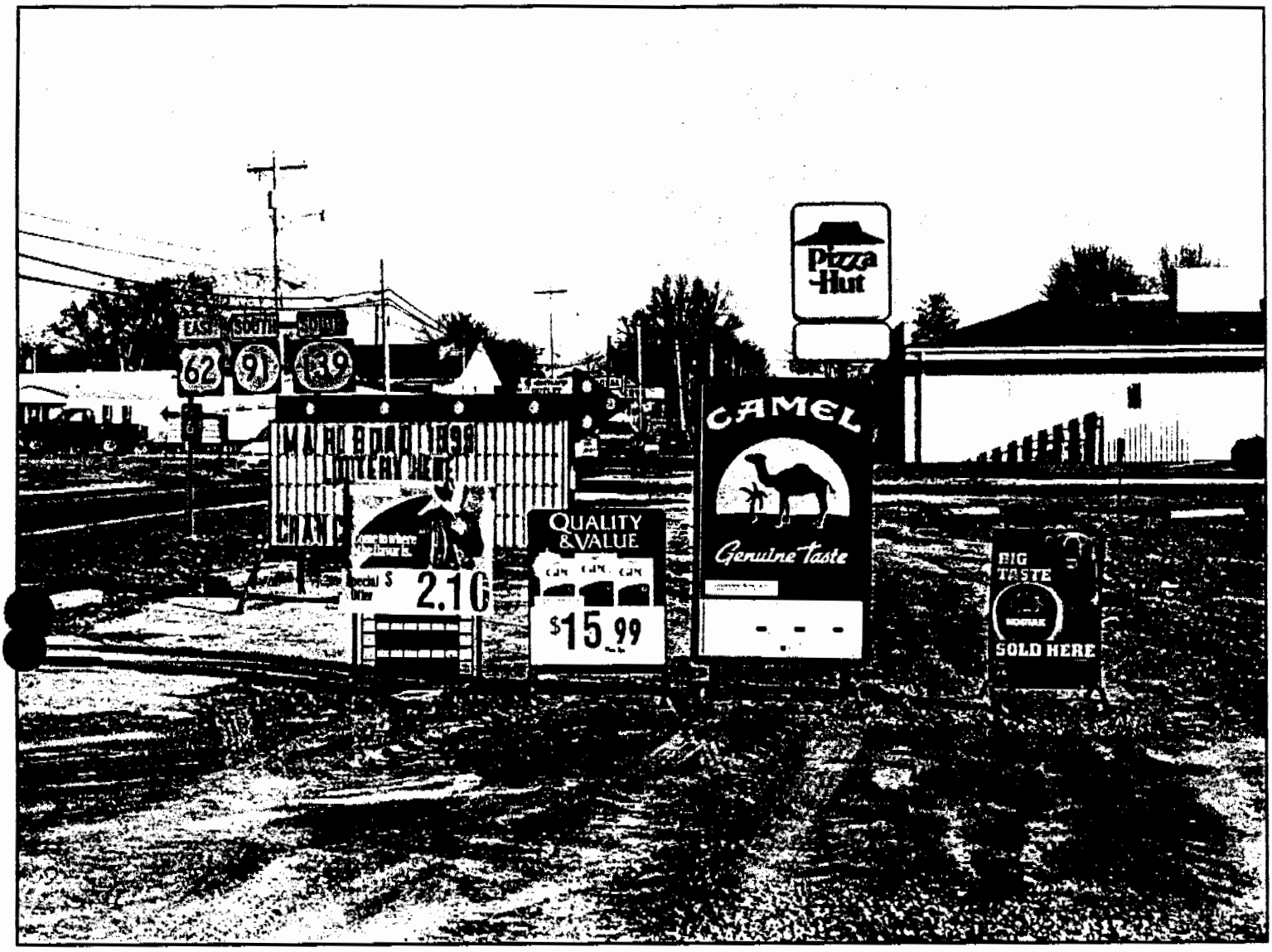

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Princeton, KY 42445 (270) 365-0532

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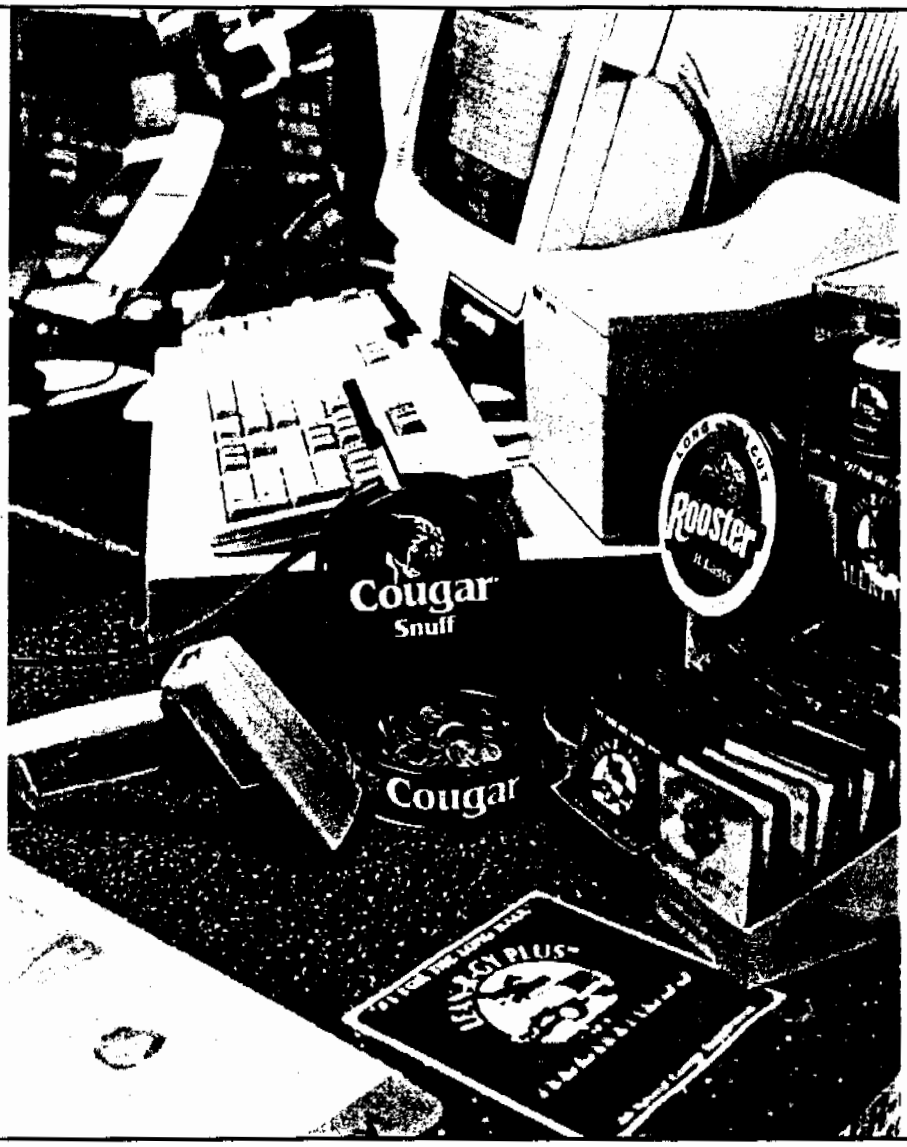

Cigarettes For Less, Inc. 120 Cave Thomas Drive Paducah, KY 42001 (270) 534-0534

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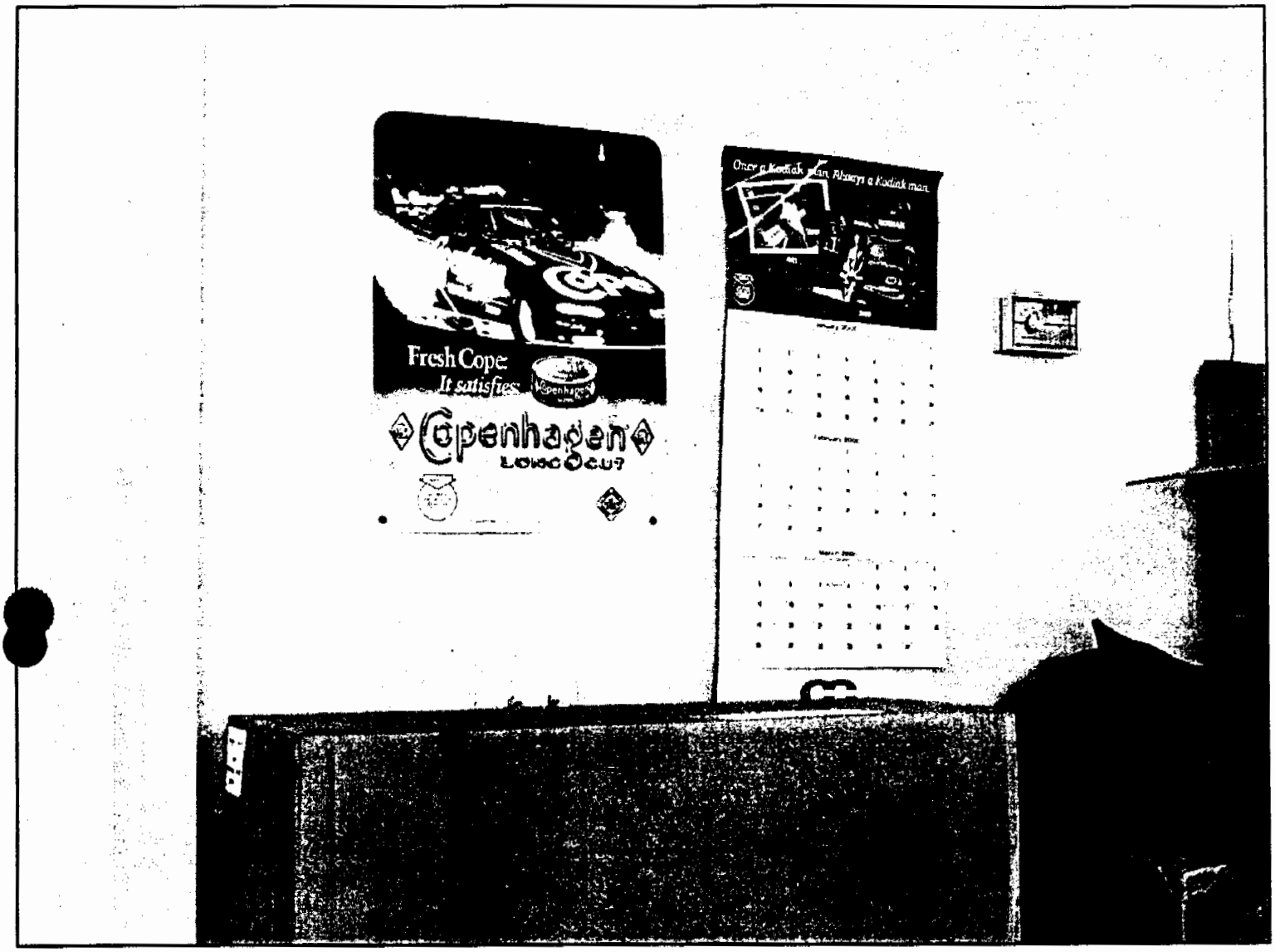

Cigarettes For Less, Inc. 2517 Bridge Street
#E paducah, KY 42003 (270) 443-5105

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Discount Tobacco & Lottery 200 N. 12th Street Murray, KY 42071 (270) 753-3086

0670001.PCX

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Discount Tobacco & Lottery 200 N. 12th Street Murray, KY 42071 (270) 753-3086

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D & T Warehouse Foods 623 South 4th Street Murray, KY 42071 (270) 759-1144

D & T Warehouse Foods 623 South 4th Street Murray, KY 42071 (270) 759-1144

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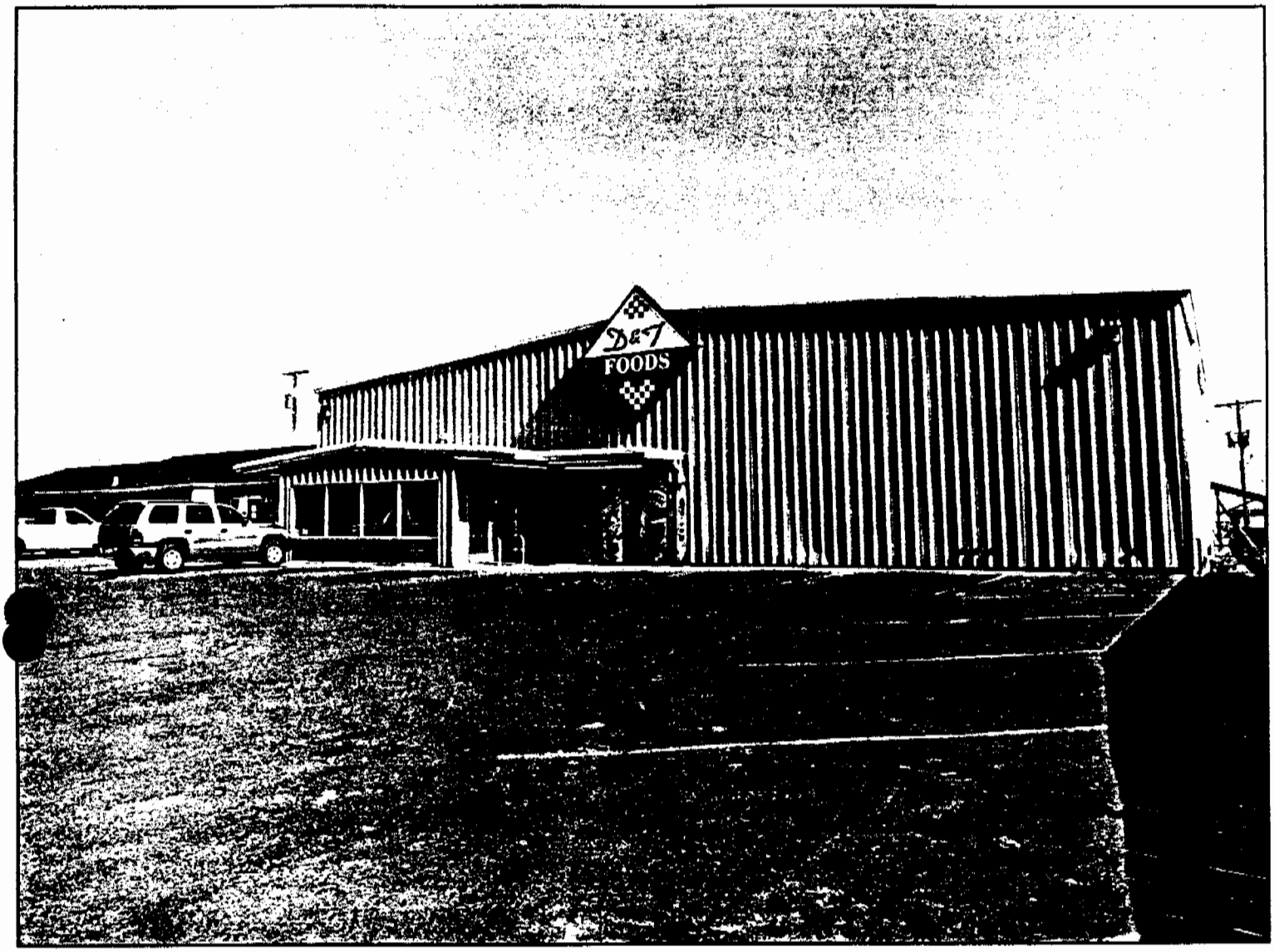

D & T Warehouse Foods 623 South 4th Street Murray, KY 42071 (270) 759-1144

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Golden Pantry Store #4 Wadkinsville, GA

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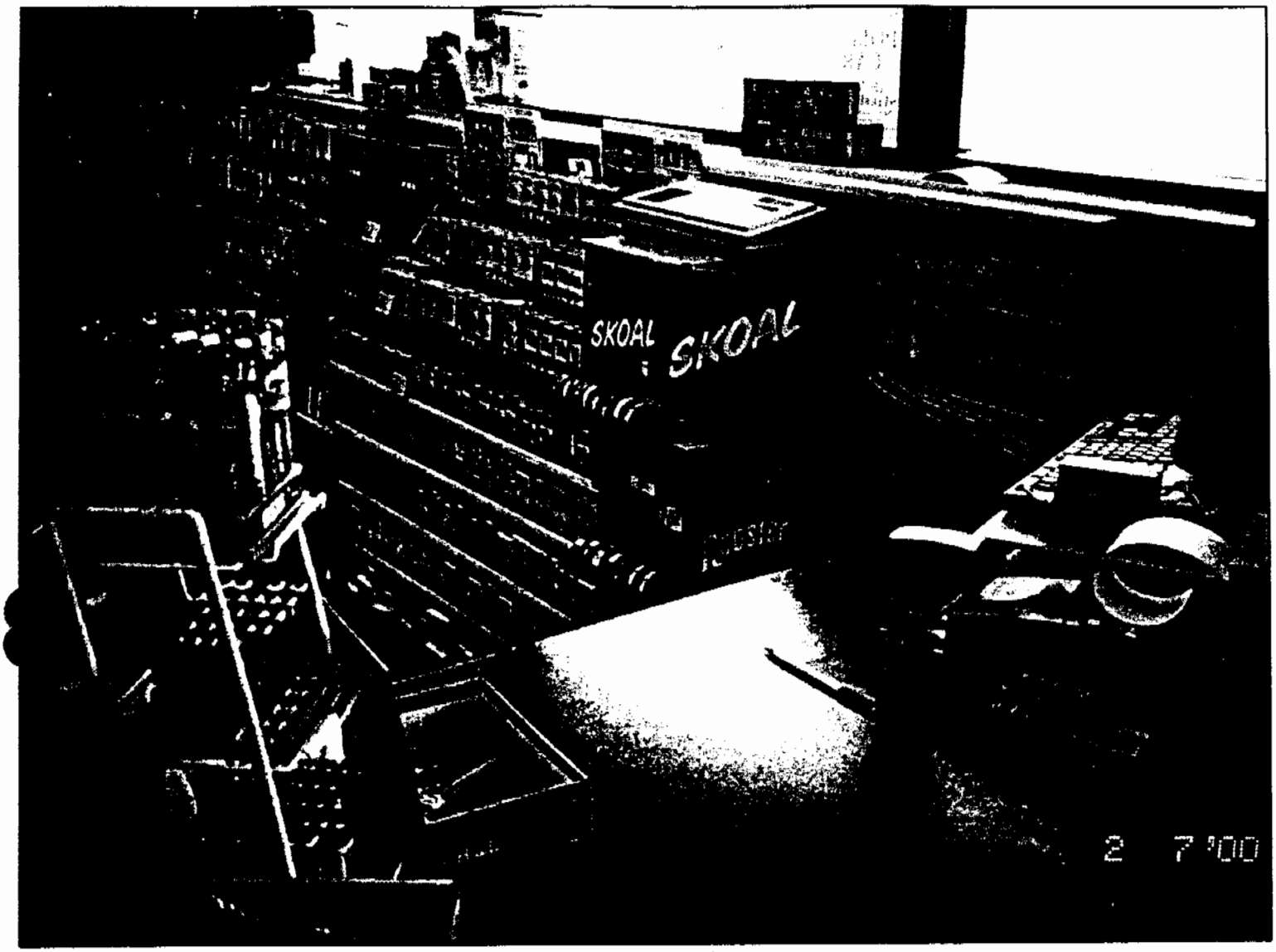

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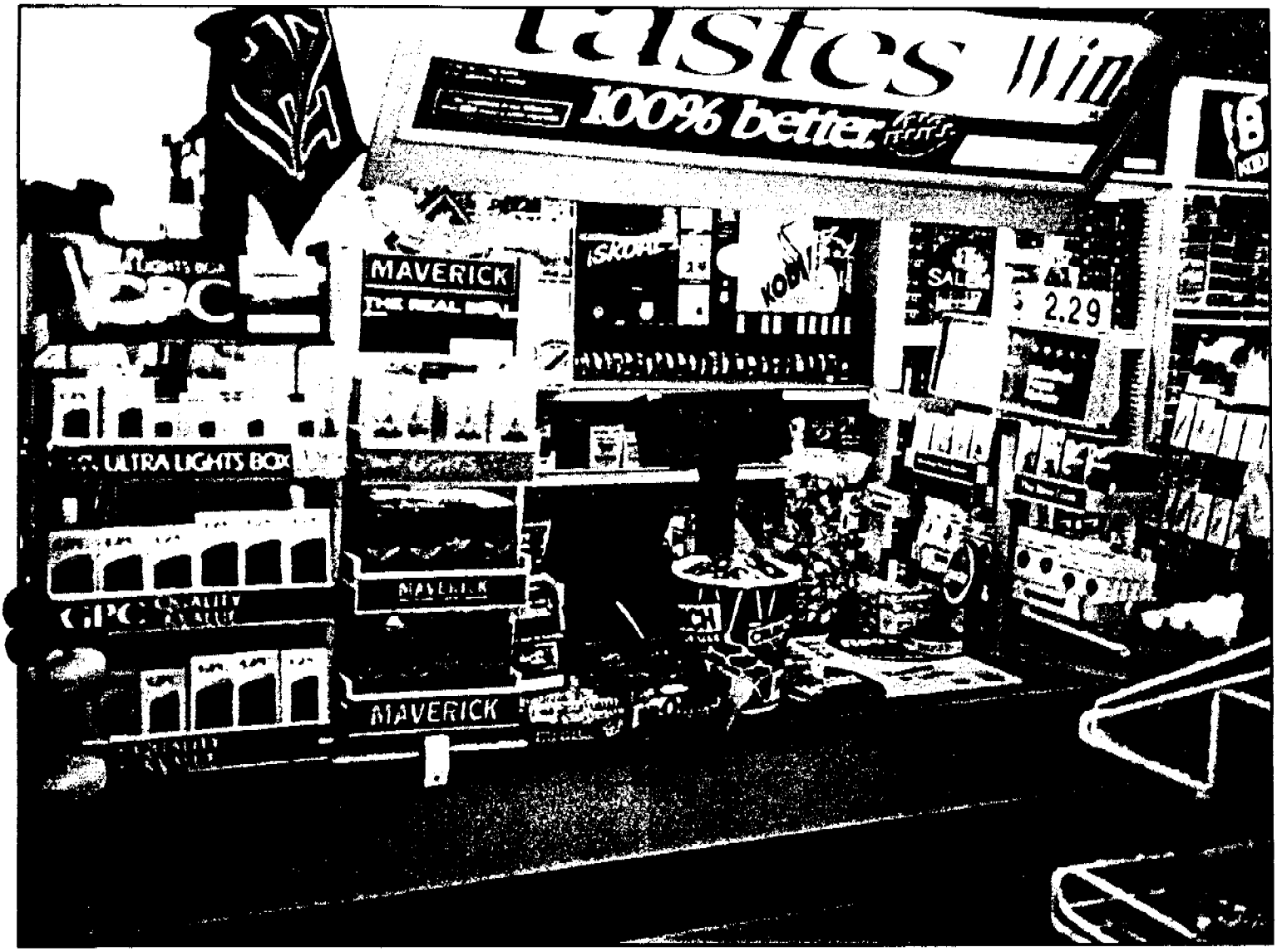

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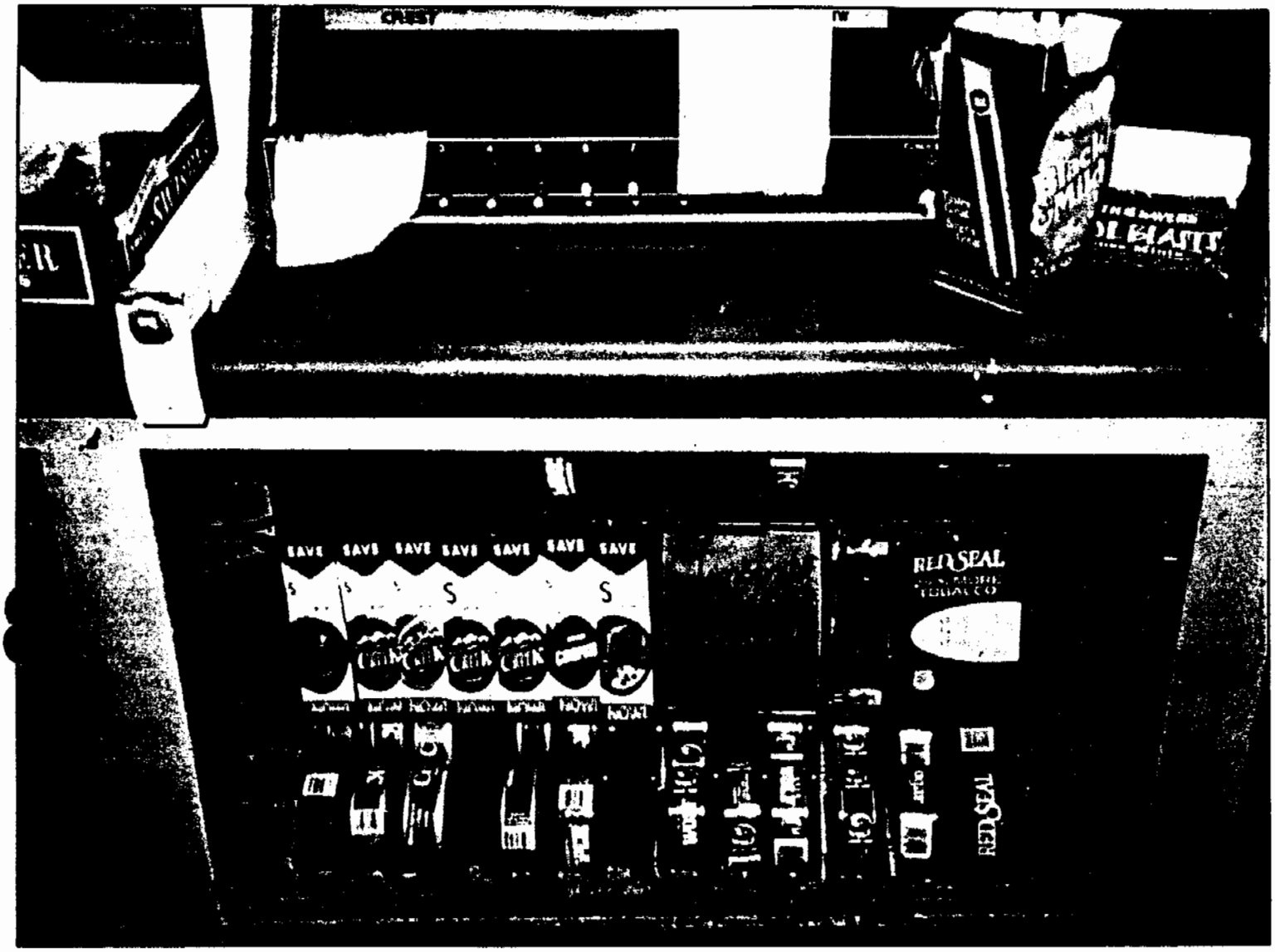

Beeline Food Store Store #612 803 U.S. Highway 2315 Troy, AL 36081 (334) 566-7660

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X8252

16diii004690

Beeline Food Store Store #612 803 U.S. Highway 2315 Troy, AL 36081 (334) 566-7660

0710004.PCX

X8253

16diii004691

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P.	)	
Plaintiffs,	)	
v.	)	Civil Action No. 5:98-CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,	)	
Defendants.	)	

Defendants' Response to Plaintiffs' Objections To
Gary Milano's Exhibits and Demonstratives

Defendants respectfully respond to Plaintiffs' objections as follows:

DX 146	*Convenience Store News* is a business periodical regularly relied upon by manufacturers to convey information about convenience store sales practices. Under Fed. R. Evid. 803(17), DX 146 is not excluded by the hearsay rule because it is a commercial publication "generally used and relied upon by the public or by persons in particular occupations."
DX 4192-4237	No response is required.
DX 4330-4385	Defendants may show Mr. Milano these exhibits in order to demonstrate his knowledge of the different ways moist snuff is marketed; Defendants will lay the foundation for admission of these photographs with other witnesses.

Date: March 3, 2000

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Lynn K. Fieldhouse
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Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Rachel A. Mariner
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, counsel for Plaintiffs, this 3rd day of March, 2000.

Counsel for Defendants

16diii004694

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FIRM: Conwood Trial Office

CITY: Paducah, KY DATE: Mar. 3, 2000

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FACSIMILE NO.: (270)444-0186/0877

FACSIMILE TRANSMITTAL SHEET

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NAME: Honorable Thomas B. Russell

FIRM: United States District Court

CITY: Paducah, KY DATE: Mar. 3, 2000

TELEPHONE NO.:

FACSIMILE NO.: 270-575-0400

FROM: Rachel A. Mariner FLR/RM.:

DIRECT DIAL: 270-444-6339

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March 3, 2000

Honorable Thomas B. Russell
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al.,
Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Attached is a copy of Defendants' Response to Plaintiffs' Objections to Defendant's Proposed Exhibits and Demonstratives for Gary Milano.

Respectfully,

Rachel A. Mariner

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED EXHIBITS FOR GARY MILANO

Defendants respectfully object to 11 of 72 of Plaintiffs' proposed exhibits for Gary Milano as follows:

PX 37	Hearsay.
PX 38	Hearsay.
PX 92	Hearsay.
PX 97	Hearsay.
PX 107 - PX 109	Defendants object to PX 107-109 as three pages selected from the U.S. Tobacco Sales Procedure Manual that mischaracterize the manual and are necessarily incomplete. Defendants have marked the complete Sales Operation Manual as DX 4386 and have no objection to Plaintiffs showing pages of DX 4386 to Mr. Milano.

PX 112 a-112p	PX 112a and 112m are objectionable only because the copies provided are illegible.
PX 122	Defendants seek clarification on this exhibit. Plaintiffs indicated that they may introduce PX 122 "and subnumbers". PX 122 does not have subnumbers.
PX 152	PX 152 is an undated draft of "1999 CAP Goals". In both instances, the documents do not reflect the position ultimately adopted by the Defendants. It is therefore insufficiently trustworthy to fall within Fed. R. Evid. 803(6). See Lloyd v. Professional Realty Services, 734 F.2d 1428 (11th Cir. 1984) (affirming exclusion of a draft document under Rule 803(6) because the document "was quite different from the final copy . . . which had been previously entered into evidence.") PX 146 is a final copy of the 1999 CAP Contract. We have no objection to the use of that document. "The reason for the unusual reliability of business records is invariably said 'to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate report as a part of a continuing job or occupation.'" Thomas P. Egan, Admission of Business Records Into Evidence: Using the Business Record Exception and Other Techniques, 30 Duq. L. Rev. 205, 209 (1992). This document does not record facts reliably, in fact, it is by its nature speculative. For this reason they are not "statements" of a party opponent. Finally, given the number of documents available in this litigation, their probative value is outweighed by unfair prejudice. Any presumption Plaintiffs chose to draw from them cannot be rebutted by the testimony of Mr. Milano, who has not seen one of them before, and has not likely seen the other. See Milano Dep. 330-331 (Mr. Milano does not remember seeing PX 152 before).
PX 279	Hearsay.

Copies of the exhibits for which objections are made are attached.

Defendants respectfully seek to raise an additional issue for the Court. A number of exhibits Plaintiffs have listed do not have any indication on their face that they are documents

16diii004699

Mr. Milano has ever seen before, or would have reason to see in the scope of his job responsibilities at the time the document was created. These exhibits include the following:

PX 2	PX 2 is a March 11, 1987 Memorandum from the Director of Product Development and Research to an Executive Vice President about national sales figures. In 1987, Mr. Milano was the Eastern Field Sales Manager.
PX6	PX 6 is a letter from a Regional Chain Account Manager in Region I written in 1992. In 1992, Mr. Milano was the Director of Sales in the Midwest, Region V.
PX 15	PX 15 is a letter from the Senior V.P. Sales to Bob Rothenberg in 1994, both in Greenwich. In 1994, Mr. Milano was Regional VP for Region V.
PX 25	PX 25 is apparently a letter from a Region 1 employee received in 1995. In 1995, Mr. Milano was Regional VP for Region V.
PX 26	Same as PX 25.
PX 27	Same as PX 25.
PX 30	Same as PX 25.
PX 31	David Untiedt testified that he put together this document along with an intern to illustrate the character of some chain retailers who sold U.S. Tobacco products in 1996. (Untiedt Dep. at 196-97). Mr. Milano was at that time a Regional VP and did not have national responsibility.
PX 35	Same as PX 25.
PX 38	This document, which is otherwise objectionable, concerns a national account and was written in 1996. Mr. Milano at that time was Regional VP and did not have national responsibility.
PX 41	Same as PX 38.
PX 44	Same as PX 38.
PX 46	Same as PX 38.

16diii004700

PX 55	Same as PX 38.
PX 218	Same as PX 25.
PX 228	Same as PX 38.

While we do not object to the admission of these documents into evidence (except as otherwise noted), we expect to object to questions concerning these documents, subject to Plaintiffs establishing a foundation, as lacking in sufficient probative value to be of use to the jury during an adverse direct examination. In fact, of the 72 documents plaintiffs seek to introduce into evidence through Gary Milano, only 7 have his name on them as a recipient, sender, or copied recipient.

Date: March 4, 2000

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New York, New York 10036
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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, Ben Powell and Mike Guzman, counsel for Plaintiffs, this 4th day of March, 2000.

Counsel for Defendants

16diii004702

Author: Herbert Young at U S T -Greenwich(Jo)
Date: 4-29-96 11:16 AM
Normal

TO: Robert B Novack CC: Richard M Fasanelli CC: David J Uniedt CC: Robert J Curan at UST-Dial_In CC: Gary Milano at Region_VCC: Gary J Gajsiewicz at Region_VCC: Teeguarden at Region_VCC: Martin J Fettig TO: Donald W Blackburn at UST-Dial_In TO: Joseph P Bertolas TO: Laurence B Glasser TO: Garnis W Hagen at U S T -Greenwich4 TO: Greg A Harkonen TO: Edward G Koban TO: Brendan J Murphy TO: Gary F Rogers TO: Lorella Salvati Subject: Re: PRICE VALUE PRESENTATION

---------- Message Contents

Don, I appreciate your perspective on the importance of utilization of fact based information in accomplishing blocking of competitive price/value distribution. You're using consumer, sales, and profitability information to present the real perspective in helping these retailers to make the right decision to maintain a win-win partnership approach to building the business. Thanks. Herb

---------- Reply Separator ----------
Subject: PRICE VALUE PRESENTATION
Author: Donald W. Blackburn at UST-Dial_In
Date: 4-27-96 9:11 AM

Bob, The purpose of this note is two fold, first to say thank you for your support in preparing the Price Value presentation and second to let you know how it is working.

As you know, last year you initially prepared this report for us to use in a presentation with Casey's General Stores (980) to hopefully dampen their interest in taking on a price value or generic brand as the buyer had expressed concern over our price increase. At that time they were also in the process of testing a generic brand in selected locations. The results of their test apparently were not positive enough for them to be convinced that they needed an alternative for their customers. At the time of their test on the generic we went in with the PV presentation. To date, they have not shown additional interest in PV brands. Naturally I would like to think that this presentation played an instrumental part in affecting this continued attitude.

Additionally last year we went on to use this presentation with Kum & Go convenience stores, Des Moines, Iowa (125) at the prompting of interest shown by their buyer of taking on a PV. To date they have not taken on a PV brand. Again we would like to think that this presentation played a big part in this decision.

Recently in a meeting with the buyer at Kwik Trip, Lacrosse, Wisconsin (245) she told me that Conwood and Pinkerton had presented respective PV brands. Kwik Trip had declined both but indicated they would revisit if they felt necessary to meet their customers needs. This presented an opportunity to get in with an updated version of the PV presentation. The plan was to share what information was available with hopes of ultimately dampening their interest in reconsidering future PV offers.

Currently Kwik Trip does not offer a PV but at one time had BIG I Swisher line. I felt the buyer showed an interest in the information and assured me she would present to their buying committee. Again based on the buyers response I would like to think we have done what we can to influence their thinking.

We plan on representing this updated version to Casey's and Kum & Go in the near future. Additionally we are currently scheduled to present this to three other customers which include: Oneida Indian Smokeshops, Green Bay, Wisconsin (7), Oasis Markets, Mpls/St.Paul (72) and Auto Stop, Hudson, Wisconsin (37).

I feel the combination of a consumer and retailer perspective on PV's contained in this presentation is impactful. The content of the presentation is not lengthy and overwhelming. In my opinion it is an effective proactive selling tool.

Please let me know if you have any questions.

Don

PLAINTIFF'S EXHIBIT
CASE NO. 5:98CV-108-R
EXHIBIT NO. 37

USTC/CWD 400650
CONFIDENTIAL

Author: Donald W. Blackburn at UST-Dial_in
Date: 4/22/96 9:11 AM
Normal

TO: Robert B. Novack at U.S.T.-Greenwich3oICC; Herbert Young at U.S.T.-Greenwich3oICC; Richard M. Fasanelli at U.S.T.-Greenwich3oICC; David J. Corbett at Greenwich3oICC; Robert J. Curan at UST-Dial_InCC; Gary Milano at Region_VCC; Gary J. Gajsiewicz at Region_VCC; Sherry L. Teeguarden at Region_VCC; Martin J. Fa; U.S.T.-Greenwich3oiSubject: PRICE VALUE PRESENTATION———————————————— Message Contents

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I feel the combination of a consumer and retailer perspective on PV's contained in this presentation is impactful. The content of the presentation is not lengthy and overwhelming. In my opinion it is an effective proactive selling tool.

Please let me know if you have any questions.

Don.

USTC/CWD 400651
CONFIDENTIAL

Author: Robert B Novack at U.S T -Greenwich 30)
Date: 11/11/96 10:15 AM
Normal
TO: [illegible] PRIDE [illegible]

Message Contents

let me know if you have any questions. bob

Author: Martin L. Jennes at U.S.T.-Greenwich301
Date: 3/17/97 8:38 AM
Normal

TO: Barbara Borrelli at R&DBCC: Robert B. NovackSubject: Re[3]: Competitor Research---------- Message Content-Contents

I'll try to get it to you by 4-15

Martin

---------- Reply Separator ----------
Subject: Re[2]: Competitor Research
Author: Barbara Borrelli at R&D
Date: 3/17/97 7:09 AM

Martin

The report needs to be completed by May 1, so I'll need the information a couple of weeks before that. Could we shoot for some time in mid-April? BB

---------- Reply Separator ----------
Subject: Re: Competitor Research
Author: Martin L. Jennes at U.S.T.-Greenwich301
Date: 3/15/97 9:44 AM

Barbara

As we discussed I will only be able to supply you with information covering the first two points below. We will isolate competitors Conwood, Pinkerton and Helme and limit the anlysis to moist smokeless.

You mentioned that you would like to have this info by 5/1/97. I don't see a problem with that. Please call with any questions.

---------- Reply Separator ----------
Subject: Competitor Research
Author: Barbara Borrelli at R&D
Date: 3/12/97 10:19 AM

Martin

Just to follow up on our conversation of yesterday morning. Manufacturing Engineering has requested my assistance in compiling a report for upper management for the purpose of comparing our manufacturing capabilities with those of our competitors. With this in mind, we are searching for the following types of public information:

1. Sales in $, units and pounds sold
2. Brands manufactured including can sizes, type of packaging, sales volumes etc. Also, products being manufactured to compete directly with one or more of our products.
3. Estimated number of employees - production and total.
4. Plant locations and estimated capacities
5. What is commonly known about their manufacturing processes.
6. What is known, if anything, about future plant expansions, brand introductions etc

I realize that you can't provide all of this, but any information that you can provide will be helpful. Thanks

Barbara Borrelli
R&D Librarian

USTC/CWD 400653
CONFIDENTIAL

Author: Robert B Novack at U S T -Greenwich(3o)
Date: 10 22 96 1 49 PM
Normal
Subject: Re: Kodiak Market Share ——— Message Contents

coupon, we cannot track actual sales from this promotion. However, we can trend Kodiak sales over a period of time to see if there is any correlation between their running the promotion and increased sales

Let's discuss when you have a chance

Bob

——— Reply Separator ———
Subject: Re: Kodiak Market Share
Author: Martin L. Jennes at U.S T -Greenwich(3o)
Date: 10/21/96 9:53 AM

In addition to $.30 off promotion couponing, I believe Kodiak has also implemented a lot of $.55 off couponing.

While I can't recall hard and true data off the top of my head, it seems logical to think that it has helped them grow or at least limit their vulnerability to the price/value brands.

I'll check with Bob Novack to see if he has any data on hand that shows any correlation between growth rates and couponing activity

If nothing specific is on hand, we will need to discuss priority and timing

Mj

——— Reply Separator ———
Subject: Kodiak Market Share
Author: Edward G Koban at U.S.T -Greenwich(3o)
Date: 10/21/96 09:42 AM

Martin,

Has the $.30 off a can promotional units that Conwood has utilized over the past few years helped to increase their share? Helped to stop the erosion of Kodiak share?

Any thoughts you might have

Thanks.

Ed

Author: Janice Sarto at UST-Dial_In
Date: 5/3/96 1:39 PM
Priority: Normal
TO: Donald W. Blackburn at UST-Dial_In, Robert J. Chiaradio at UST-Dial_In, David S. Crutcher at UST-Dial_In, David F. Cunningham at Region_I, Curtis J. Farkas at UST-Dial_In, Howard Heylmun at UST-Dial_In, Stephen R. Hofferkamp at Region_V, Gary M. Lemoine at Region_III, Dwight E. Little at Region_II, Rudy K. Lofton at UST-Dial_In, John J. Miller at Region_IV, Don R. Nabi at UST-Dial_In, Carl Orth at UST-Dial_In, Phil P. Rinkoski at UST-Dial_In, Steve R. Towle at UST-Dial_In
CC: David J. Untiedt at U.S.T.-Greenwich(3o), Mark Lawson at UST-Dial_In, Scott D. Atwood at UST_Fastech, George G. Boggan at UST_Fastech, Fred M. Dunavant at UST_Fastech, John J. Hazard at UST_Fastech, Wendy P. Kennard at UST-Dial_In, Lane P. Simmons at UST_Fastech, Pete Thompson at UST_Fastech
Subject: Wal-Mart Competitive Product and Racks

I just got a call from Wal-Mart corporate complaining that our reprs were taking out competitive racks from Wal*Mart stores stating that they were not authorized.

They have asked us to please Stop this practice. Timberwolf, Cougar and Silver Creek Cherry have been authorized Nationally since the plan-o-gram was issued and also they are allowed to place their fixtures in their allotted space for those brands. Just as we are allowed to place Flavor Packs and our Vendors in our allotted space.

If a repr finds that a competitive company has infringed on our space in Wal*Mart as per the plan-o-gram they need to call it to the attention of the Department One Manager and they (Wal*Mart) should be the ones to make the adjustments. Or if they want us to remove the competitors rack, I would suggest that they ask the Department One Manager to sign a transaction form stating that they gave us permission. That way when our friendly competitor complains, the Department One Manager at Wal-Mart can't blame us saying that they knew nothing about it. I also can assist in getting problems corrected in this area through the Wal*Mart corporate office's.

Most of our problems have arisen since new brands both competitive and ours have come out since the plan-o-gram was issued last year. A new plan-o-gram is being considered and we are making recommendations for changes that should eliminate most of these issues.

As always, if I can be of assistance, please do not hesitate to let me know.

Thanks,,

Janice

INTER OFFICE

MEMO

To: Larry Glass - Department Manager LOO
cc:DS,DU,AB,MN

From: Gary M. Lemoine - Chain Account Manager LOO

Subject: **WEEKLY ACTIVITY LETTER**

Date: September 4, 1997

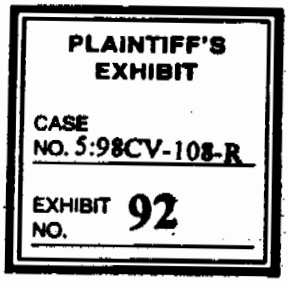
TIME SPENT

8-25-97	Administrative Duties.
8-26-97	Retail Review.
8-27-97	Furr's Appointment.
8-28-97	Retail Review.
8-29-97	Administrative Duties.

Direct / Chain Accounts

Furrs Supermarkets, Alb, NM (70 stores) - I met with Jack Brannock and presented the Copenhagen 175th promotions. I also did a business review. Mr. Brannock accepted the 48 can Cope FC promotion and the 24 can Cope LC promotion. He will ship one display of each to all stores. I have attached a copy of the business review. UST is 81.3% of the units and 84.2% of the profits. UST has nine of the top ten and thirteen of the top fifteen items. The top fifteen is 89.9% of his business. Mr. Brannock agreed to delete the following items, Kodiak Straight, Cougar LC Wintergreen, Cougar LC Natural, Flavor Pack Cinnamon, Cougar FC Natural, Cougar FC Wintergreen and Kodiak Choice. He told me he would notify General Distributing and inform them these items are not authorized any longer. This could present some problems. General has never been very cooperative and they may fight this. I mentioned this to Jack and he said he would handle this. I talked to Division Manager David Todd and he agreed. If we can get General to cooperate, we will be resetting the stores and getting more shelve space for UST brands. David will be working closely with General to help this process along.

Jack told me Pinkerton had been in and bought down his inventory of Timber Wolf. His retail is now $1.39. He just deleted all Cougar brands. Timber Wolf products are new to Furr's. Even



though they did not show well in the business review, Jack did not want to delete them now. We will do another review in a few months and hopefully get them deleted at that time. With the price value brands being reduced at retail all over the country, this is a situation we need to watch closely. David Todd pointed out in his activity letter, the price difference between price value and premium brands is around $2.00 a can in New Mexico. If we start to see these items pick up we made need to think about getting Red Seal in these places. In Allsup's and Giant we could probably lock Timber Wolf out by getting Red Seal in. I will monitor the situation closely and notify you if I feel we need to act.

Git-N-Go, Tulsa Ok. (110 stores) - As I mentioned last week, these guy's were upset they were not going to get Red Seal. Their major concern was the Indian Smokeshop's in Oklahoma having this product and they would not. I have talked to Dave McCaslin and I am going to take him and Duff Thompson, Vice President of Operatious to lunch next week. I will talk to them again and present both sides of the coin and see what they say. The bottom line is I would rather see them with Red Seal than put Timber Wolf back in their stores. My gut feeling is we will need to put Red Seal in this account. I will let you know what happens.

PLANS FOR NEXT WEEK

9-1-97	Holiday.
9-2-97	Office.
9-3-97	Texaco and Git-N-Go appointments, Tulsa, Ok.
9-4-97	Work with Tim Entwhistle.
9-5-97	Work with Tim Entwhistle.

Sincerely,

Gary Lemoine

Smokeless Tobacco Rank Report

Furr's Supermarkets

Week of 7/27/97

Rank	Brand	$ Profit	Profit Share	Cumulative Share
1	Copenhagen	$9,448	38.1	38.1
2	Skoal Original Wgreen	$2,493	10.1	48.2
3	Skoal LC Wintergreen	$1,901	7.7	55.8
4	Copenhagen Long Cut	$1,455	5.9	61.7
5	Skoal LC Straight	$1,300	5.2	66.9
6	Skoal LC Mint	$873	3.5	70.5
7	Redwood 2/1	$745	3.0	73.5
8	Skoal LC Classic	$728	2.9	76.4
9	Silver Creek FC Wgreen 2/1	$592	2.4	78.8
10	Skoal LC Cherry	$582	2.3	81.1
11	Skoal Bandit Wintergreen	$485	2.0	83.1
12	Kodiak	$466	1.9	85.0
13	Skoal LC Spearmint	$466	1.9	86.9
14	Flavor Pack - Mint	$427	1.7	88.6
15	Cooper 2/1	$326	1.3	89.9
16	Hawken	$243	1.0	90.9
17	Skoal Bandit Mint	$233	0.9	91.8
18	Timberwolf LC WG	$226	0.9	92.7
19	Kodiak Straight	$204	0.8	93.5
20	Skoal FC Straight	$184	0.7	94.3
21	Skoal Bandit Straight	$175	0.7	95.0
22	Timberwolf FC Natural	$168	0.7	95.7
23	Cougar LC Wintergreen	$146	0.6	96.3
24	Cougar LC Natural	$136	0.5	96.8
25	Flavor Pack - Cinnamon	$136	0.5	97.4
26	Cougar FC Natural	$132	0.5	97.9
27	Cougar FC Wintergreen	$127	0.5	98.4
28	Kodiak Choice	$116	0.5	98.9
29	Timberwolf Cool WG	$116	0.5	99.3
30	Timberwolf FC WG	$104	0.4	99.8
31	Silver Creek LC Straight 2/1	$61	0.2	100.0
	Total Smokeless Tobacco	$24,791		

USTC/CWD 255219
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Furr's Supermarkets

Moist Smokeless Tobacco Brands Market Segment Overview

Sales Info -Week Ending 7/27/97

LONG CUTS

LONG CUTS FLAVORED — 25.4%

	Units	Share	Cumulative Share
Skoal L C Wintergreen	1,960	30.3%	30.3%
Skoal L C Mint	900	13.9%	44.2%
Skoal L C Cherry	600	9.3%	53.5%
Silver Creek L C B1G1F	580	9.0%	62.4%
Kodiak L C Wintergreen	480	7.4%	69.8%
Skoal L C Spearmint	480	7.4%	77.3%
Timber Wolf L C Wintergreen	390	6.0%	83.3%
Cooper B1G1F	320	4.9%	88.3%
Cougar L C Wintergreen	310	4.8%	93.0%
Hawken L C Wintergreen	250	3.9%	96.9%
Timber Wolf Cool Wintergreen	200	3.1%	100.0%
Totals	6,470		

LONG CUTS NON FLAVORED — 18.9%

	Units	Share	Cumulative Share
Copenhagen L C	1,500	36.7%	36.7%
Skoal L C Straight	1,340	32.8%	69.4%
Skoal L C Classic	750	18.3%	87.8%
Cougar L C Natural	290	7.1%	94.9%
Kodiak Straight	210	5.1%	100.0%
Total	4,090		

FLAVORED — **NON FLAVORED**

FINE CUTS FLAVORED — 14.6%

	Units	Share	Cumulative Share
Skoal F C Wintergreen	2,570	69.1%	69.1%
Silver Creek F C B1G1F	580	15.6%	84.7%
Cougar Wintergreen	270	7.3%	91.9%
Timber Wolf F C Wintergreen	180	4.8%	96.8%
Kodiak Choice	120	3.2%	100.0%
Totals	3,720		

FINE CUTS NON-FLAVORED — 44.0%

	Units	Share	Cumulative Share
Copenhagen F C	9,740	86.7%	86.7%
Redwood B1G1F	730	6.5%	93.2%
Timber Wolf FC Natural	290	2.6%	95.8%
Cougar Natural	280	2.5%	98.3%
Skoal F C Straight	190	1.7%	100.0%
Total	11,230		

FINE CUTS

UST/C/CWD 255220
CONFIDENTIAL

interoffice
MEMORANDUM

to: Tom Kemper-Department Manager FOO
from: Michael R. Stanke-Chain Account Manager FO1-05
subject: Weekly Letter for Week Ending August 15, 1997
date: September 4, 1997

Time Spent

Monday- ½ Day Administrative & Travel
Tuesday- Hy-Vee appointment & Travel
Wednesday-Brainerd NHRA Race
Thursday- Brainerd NHRA Race
Friday- Brainerd NHRA Race

Chain Accounts

Hy-Vee Food Stores 238 locations-Met with Bernerd Beary Tobacco buyer at Hy-Vee Food Stores. Presented him up to date industry data on smokeless tobacco and the food store trade class. Bernerds main purpose for setting up the meeting was to inquire about going on direct. Currently they order from five different distributors and have no set planogram and have not taken any consumer promotions from a headquarter standpoint. They have nobody in place as a category manager but intend to have somebody in place in the next month. Bernerd mentioned he was going to go on direct that it was just a matter of time before this happens. He has no initial intention of reducing price, addressing promotions, or developing a planogram. He even mentioned charging the same costs as distributors charge to the stores making money at both the distributor level and retail level keeping the money in the same company. I plan on sitting on this to see if he is really interested in growing the business.

Tom Thumb 150 locations-continued resetting the stores. This project should be completed in two weeks.

Direct Accounts

None this week.

Competition

None this week.

USTC/CWD 255221
CONFIDENTIAL

Store Observations

Hy-Vee stores observed were interesting in terms of average total facings were 16 USTSM, 10 Conwood, 6 Helm, and 4 Pinkerton. Roll pricing varied from store to store along with retail pricing. The stores have their own discretion as to setting pricing.

Plans for Next Week

Monday- Administrative & Travel to Wisconsin
Tuesday- PDQ Appointment and work with CMR Craig Reiman
Wednesday-Stop N Go appointment & work with Division Manager Mike Churches
Thursday- Work with CMR Craig Reiman and Travel back to Minneapolis
Friday- Cenex Appointment & Administrative

Sincerely,

Michael R. Panke

copies: Autry
Gajsiewicz
Teeguarden
Ferguson

To: TOM BONFIGLIO
Fax #: 214-828-7671

FACSIMILE

Re: SMOKELESS MERCHANDISING

Date: November 6, 1997
Pages: 2, including this cover sheet.

Tom,

Per your direction attached please find a letter to appropriate U. S. Tobacco field managers that addresses your concerns regarding smokeless tobacco merchandising. I hope you find this satisfactory.

Sincerely,

Don Blackburn

From the desk of...

DON BLACKBURN
KEY ACCOUNT MANAGER
UNITED STATES TOBACCO SALES & MKT. CO.
7801 MESQUITE BEND DRIVE, SUITE #101
IRVING, TEXAS 75063

972-831-8171
Fax: 972-831-8170

PLAINTIFF'S EXHIBIT
CASE NO. 5:98CV-108-R
EXHIBIT NO. 97

EXHIBIT
Blackburn 21
DL 5/15/98

USTC/CWD 251031
CONFIDENTIAL

Author Donald W Blackburn at Region_III
Date 11/6/97 6:40 PM
Priority: Normal
TO Larry S. Glass, Jim R. Burns at UST_Fastech, Jose M. Martinez at UST_Fastech, Gary M. Lemoine, R. Dan Custred at UST-Dial_In, Edward Knoll at UST_Fastech, Don B. Segelstrom
CC: David J Untiedt at U.S.T.-Greenwich(Jo
Subject SOUTHLAND SMOKELESS TOBACCO MERCHANDISING

The purpose of this letter is to follow up with my voice mail of this afternoon regarding Southland smokeless tobacco merchandising.

Mr Tom Bonfiglio, Corporate Category Manager called today to express his concern with reports from his stores regarding merchandising. Effective immediately please instruct your respective Consumer Marketing Representative with 7 Eleven responsibility, to discontinue any activity related to altering a smokeless tobacco vendor. This also applies regardless of a store managers request. Specifically leave all product facings as is. do not add facings or delete facings of any manufacturers brand, including ours until further notice.

Please have CMR's continue with routine coverage and servicing of Southland accounts as it relates to product exchanges, rotation and vendor cleaning.

Your cooperation is appreciated.

Sincerely,

Don Blackburn

cc: Tom Bonfiglio

* * * TRANSMISSION RESULT REPORT (NOV. 6.1997 9:17PM) * * *

TTI US TOBACCO REGION 3

DATE	TIME	ADDRESS	MODE	TIME	PAGE	RESULT	PERS. NAME	FILE
NOV. 6.	9:16PM	214 828 7671	TES	0'43"	P. 2	OK		623

* : BATCH
M : MEMORY
S : STANDARD

C : CONFIDENTIAL
L : SEND LATER
D : DETAIL

$: TRANSFER
@ : FORWARDING
F : FINE

P : POLLING
E : ECM
> : REDUCTION

USTC/CWD 251033
CONFIDENTIAL

16diii004717

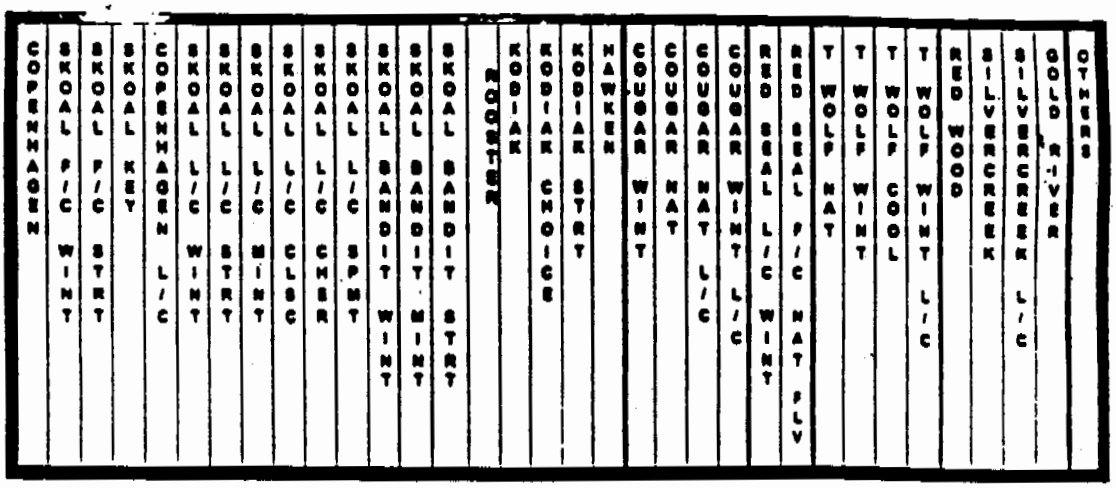
Building Business for the Retailer (cont.)

PLAN-O-GRAM FOR MOIST SMOKELESS VENDING SYSTEMS

The standard plan-o-gram for our moist smokeless vending systems should feature the following brands in a left to right sequence:

Effective 2/1/97

PLAN-O-GRAM



ROOSTER POSITIONED TO COMPETE DIRECTLY AGAINST KODIAK. RED SEAL POSITIONED TO COMPETE DIRECTLY AGAINST OTHER PRICE VALUE BRANDS.

Depending upon Merchandise position in-store, Plan-O-Gram may be right to left beginning with Copenhagen.

PLAINTIFF'S EXHIBIT
CASE NO. 5:98CV-108-R
EXHIBIT NO. 107

USTC/CWD 014936
HIGHLY CONFIDENTIAL
OUTSIDE COUNSEL ONLY

16diii004718

TERRITORY MANAGEMENT

What If?

A retailer asks why should I give you increased facings and shelf space?

- Increase sales.
- Increase profits.
- Eliminate O.O.S. potential.
- Refer to Partners in Profit/Neilsen information.

What If?

A retailer wants to merchandise competitive products in our vending systems?

- Merchandise only products that are selling.
- Gain an agreement to control the display.
- Cooperation must be secured for POS exclusivity.
- Utilize Plan-O-Gram Vendor decal.

What If?

A competitive company tampers with our displays in a retail outlet?

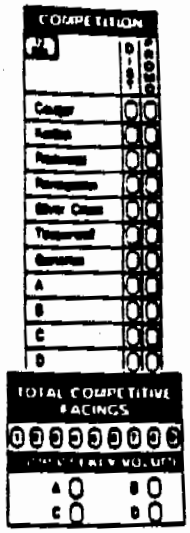
- Advise retailer.
- Re-establish appropriate merchandising for Company products.
- Ensure adequate Company facings.
- Report incidents through Regional Office/Chain Manager.
- Refer to Fair Competition Policy.

PLAINTIFF'S EXHIBIT
CASE NO. 5:98CV-108-R
EXHIBIT NO. 108

USTC/CWD 014946
HIGHLY CONFIDENTIAL
OUTSIDE COUNSEL ONLY

16diii004719

COMPETITION - BLOCK 13-R/M



- Marking Requirements:
  - ➤ Not a required response. Can be marked for retail and management accounts.
- Competition
  - Distribution: Mark this section to indicate distribution of competitive products listed.
  - Promotion: Mark this section to indicate that a competitive promotion is present in the account. If promotion is marked, you must mark distribution.
- Total Competitive Facing: Mark this block to indicate number of total facings for competitive brands. Multiple bubbles can be marked, with a range 1 through 9. (Beginning October 1, 1997)

  Facings can be defined as a slot (row) in a vending system, not the total # of products.

  Exception: In the case of no vending systems: If no permanent vendor is used but the product is permanently carried in the store (window shelf, cooler), please consult your immediate supervisor for proper determination of facings.
- Competitive Weekly Volume: Mark this section to indicate competitive volume of product being sold in the account.
  - A = High Volume Accounts: 21 Rolls or more per week or 201 Cans or more per week
  - B = Medium/High Volume Accounts: 11-20 Rolls per week or 101 to 200 Cans per week
  - C = Medium Volume Accounts: 5-10 Rolls per week or 41 to 100 Cans per week
  - D = Low Volume Accounts: 4 Rolls or less per week or 40 Cans or less

Note: On management chain or distributor accounts volume and facings are not required. On retail accounts, a response should be indicated for volume and facings.

- Error Conditions:
  - ➤ If promo is marked dist must be marked. If it is not, an * will show in this section of the callbook.
  - ➤ Only one volume (A, B, C, or D) may be selected at a time. If more than one is selected an * will show in this section of the callbook.
  - ➤ If facings or volume are not marked on a management account, a blank will show on a retail account an * will show in this section of the callbook.

PLAINTIFF'S EXHIBIT
CASE NO.5:98CV-108-R
EXHIBIT NO. 109

USTC/CWD 015275
HIGHLY CONFIDENTIAL
OUTSIDE COUNSEL ONLY

DRAFT

1999 CAP GOALS

The goals that are currently under consideration are shown in the grid below. It is our belief that these represent goals that are achievable with the current program. They have been listed in what we perceive as priority order for retailers and wholesalers and, of course, are subject to input from management and legal.

	WHOLESALE	RETAIL
– DISPLAY - SHARE OF SPACE	N/A	1
– SHARE of SALES*	2	2
–PRICE MIX	3	3
– DATA COMPONENTS	1	N/A

DISPLAY

The display goal would be to make sure that USTSM's share of fixture was in proportion to its share of sales in the account.

SHARE OF SALES

The share of sales goals would be based upon the greater of either the retailer's historical percentage of USTSM sales or the goal for USTSM sales in the area that the retailer is located.

Share of sales was chosen as the primary benchmark for accounts, because it provides the most fair and flexible way to determine goals for an account. This approach allows us to ask the retailer to be the best that he can be with the things that he can control. There are many things that are beyond a retailer's control that could affect its performance in achieving a volume goal:

An increase in competition - A new store opens across the street.

A downturn in the local economy - A factory closes.

These could affect a retailer's volume and are caused by factors that are beyond the retailers control. Goals based on a retailer's share of sales would automatically and fairly compensate for these changes in the environment that are beyond the retailers control.

We want the retailer to focus on improving the things that are in his control.

EXHIBIT
3-31-99

PLAINTIFF'S EXHIBIT
CASE NO. 5:98CV-108-R
EXHIBIT NO. 152

USTC/CWD 042217
HIGHLY CONFIDENTIAL

PRICE MIX

Price mix would be a sales ratio of Premium Products (PP) V. Price Value (PV) products.

The target PP/PV ratio might be something like 85/15 (85% PP sales and 15% PV sales).

DATA COMPONENT

The primary focus for wholesalers would be to make sure that they are providing quality data in a timely fashion. This includes all aspects of the data reporting requirements including units, dollars, promotional units, inventories.

*DETERMINATION SHARE OF SALES PERCENTAGES

A) Accounts with 1 year of history

Share goal will be the greater of an accounts share of sales for the same period of time in the previous year or the area's goal for share of sales.

B) Accounts with less than 1 year of history

Share goal will be the greater of the accounts share of sales for the last quarter or the area's goal for share of sales.

C) Accounts with less than 1 quarter of history

Share goal will be the goal for the area the account is in. This will be the average share for the area during the same time period of the previous year.

FOR EXAMPLE:

In department COO the average share of USTSM sales is XX.X%. This would be the percentage that an account without an established benchmark would have to achieve until they had established one for themselves

D) Chain Accounts

The average for the chain would be used.

The same criteria as above would be used to establish share of sales goals for the chain. In the case of a chain that had less than a quarter of history, the average share for all of the areas that the chain operates retail stores in would be used.

USTC/CWD 042218
HIGHLY CONFIDENTIAL

U.S. TOBACCO

INTERCOMPANY CORRESPONDENCE

DATE: 3-12-98

TO: Ed Wallon. Division Manager. ACO

FROM: David M Rusnak. CMR. ACC

SUBJECT: Monthly Letter

Retail Work

I have been selling promos 477 and 467. People are taking it but do not seem to be to excited about them Because 4 packs did not do that well and Cope long cut is not a good seller.

I have been cutting products along with updating PAR. I will need a print out of my distribution to see how many products I have to cut in order to achieve my objective. The stores in my territory are not in good shape due to my absence.

Red Barrel and Tier 1 Stop are doing very well with the frequent buyer program. I will start a mystery shopper program with both in the summer. I would like to run a program with Quickway. They want to work with us in any way they can to increase sales. Quickway has picked up a lot of competitors brands. As soon as we can get some reading off cap I will start to address the situation. Velocity reports will not work because they used to be with herkimer. I will most likely keep the top 12 brands in the stores. It depends who is 11 and 12.

PLAINTIFF'S EXHIBIT

CASE NO. 5:98CV-108-R

EXHIBIT NO. 279

USTC/CWD 666185
CONFIDENTIAL

I will have a problem with product for the next two weeks because Alan did order for my return. I have talked with him and he bumped up his order.

Sampling

Sampling has been going well. I have had two Bar night already and I am working on setting up my third at the Dark Horse in Cortland.

Competitive

Conwood reps have been doing a good job. There are 3 conwood reps in my new Territory. Dan has Cortland county the new rep out of Binghamton has Broome and Chenango. The rep out of Utica has Otego and Delaware. I am getting hit from all sides. I have never seen their work look this good.

Cougar natural is starting to sell in my rural areas. I was also told by Alan that Kodiak Ice (mint) is on its way and the packaging is very appealing.

I sampled a customer in Cortland and he said he has been alternating between long cut wintergreen and timber wolf. He asked me why it is so expensive and I really was lost for words.

cc: P.A.R.

David M Rusnak

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

Civil Action No. 5:98CV-108-R

JURY TRIAL DEMANDED

00 MAR -6 A8:30
FILED
US DISTRICT COURT
WESTN. DIST. KENTUCKY

PLAINTIFFS' REPLY TO DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED EXHIBITS FOR GARY MILANO

Plaintiffs respectfully respond as follows to defendants' objections to the introduction in evidence of certain exhibits through Gary Milano:

PX 37	Internal UST memo. Plaintiffs intend to introduce this document for the purpose of showing UST's self-described plan to "block[] competitive price/value distribution," not for the truth of any incidental hearsay.
PX 92	Same.
PX 107	Already admitted.
PX 112a-p	Copies are as produced by defendants. Plaintiffs will substitute any clearer copies provided by UST.
PX 122	There are no sub-numbers.
PX 38, 97, 108, 109, 152, 279	After further consideration, plaintiffs do not intend to offer these documents through Mr. Milano. While plaintiffs believe there to be no basis for excluding these UST business records, no ruling is required at this time. As to PX 152, plaintiffs would further note that it is already admitted in evidence.

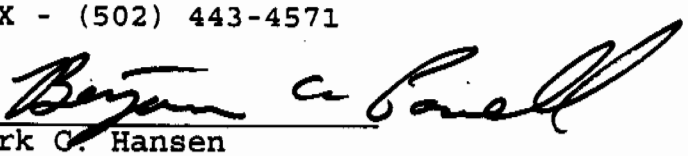
Defendants object to the use of certain additional documents with Mr. Milano. They do not contest the admissibility of these documents, but argue only that the use of these materials with Mr. Milano lacks "sufficient probative value." However, Mr. Milano is an officer who speaks for the company and serves as Executive Vice President in charge of defendants' sales operation and field sales force; the materials plaintiffs seek to use with him involve the activities of his subordinates and colleagues and were, in many instance, circulated to him. Mr. Milano is, moreover, the sole witness UST has agreed to supply live to explain the company's plans, actions, and documents. Any supposed lack of "sufficient probative value" can be assessed only in the context of plaintiffs' examination.

16diii004726

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts
Whitlow, Roberts, Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995
(502) 443-4516
FAX - (502) 443-4571



Mark C. Hansen
Neil M. Gorsuch
Benjamin A. Powell
Michael J. Guzman
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

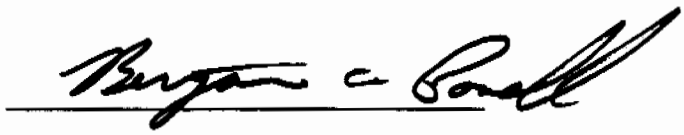
March 5, 2000

16diii004727

CERTIFICATE OF SERVICE

I certify that on this 5th day of March, 2000, a copy of the foregoing was sent by facsimile to:

John S. Reed, Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, U.S. Tobacco Trial Offices, Mercantile Bank Building, 10th Floor, 333 Broadway, Paducah, KY 42001.



KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
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WASHINGTON, D.C. 20005-3317

(202) 326-7900
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MICHAEL K. KELLOGG
PETER W. HUBER
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K. CHRIS TODD
MARK L. EVANS
AUSTIN C. SCHLICK
STEVEN F. BENZ

NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD
EVAN T. LEO

TRIAL OFFICE
121 NORTH 5th STREET
PADUCAH, KY 42001
PHONE: (270) 450-5107
FAX: (270) 450-5118

March 5, 2000

Jeffrey A. Apperson, Clerk
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Plaintiffs' Reply to Defendants' Objections to Plaintiffs' Proposed Exhibits for Gary Milano.

Also enclosed is an additional copy. I would be grateful if you would date-stamp and return this copy in the enclosed self-addressed envelope.

Many thanks for your assistance.

Respectfully,

Benjamin A. Powell

Enclosures

HP LASERJET 3150
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SEND CONFIRMATION REPORT FOR
KELLOGG HUBER
270 450 5119
MAR-5-00 7:25PM

JOB	START TIME	USAGE	PHONE NUMBER/ADDRESS	TYPE	PAGES	MODE	STATUS
317	3/ 5 [redacted]	1'04"	270 575 0400	SEND.....	5/ 5	EC144	COMPLETED.....

TOTAL 1'04" PAGES SENT [redacted] PAGES PRINTED: 0

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121 N. 5th Street
Paducah, Kentucky 42001
(270) 450-5107

Facsimile: (270) 450-5118
(270) 450-5119

Michael K. Kellogg
Peter W. Huber
Mark C. Hansen
K. Chris Todd
Mark L. Evans
Austin C. Schlick
Steven F. Benz
Neil M. Gorsuch

Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney S. Elwood
Evan Leo

FACSIMILE TRANSMISSION

DATE: March 5, 2000

TO: The Honorable Thomas B. Russell

FROM: Neil M. Gorsuch

FAX NO.: (270) 575-0400

TELEPHONE NO.: (270) 443-1225

CLIENT NO.: 97718

TOTAL NUMBER OF PAGES: 5 (INCLUDING THIS SHEET)

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KELLOGG HUBER
270 450 5119
MAR-5-00 7:38PM

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Facsimile: (270) 450-5118
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Michael K. Kellogg
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Steven F. Benz
Neil M. Gorsuch

Geoffrey M. Klineberg
Reid M. Figel
Henk Brands
Sean A. Lev
Courtney S. Elwood
Evan Leo

FACSIMILE TRANSMISSION

DATE: March 5, 2000

TO: John Reed, Esq.
Reed Weitkamp Schell Cox & Vice

Neal R. Stoll, Esq.
James A. Keyte, Esq.
Chris T. Athanasia, Esq.
Matthew S. Barnett, Esq.
Jed Goldfarb, Esq.
Rachel Mariner, Esq.
Skadden, Arps, Slate, Meagher & Flom

FROM: Neil M. Gorsuch

FAX NO.: (270) 444-0186
(270) 444-0877

TELEPHONE NO.: (270) 444-6339

CLIENT NO.: 97718

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REED WEITKAMP SCHELL & VICE PLLC

Jessica

TELECOPIER COVER SHEET

March 6, 2000

TO: Mark C. Hansen

TELECOPIER NO.: 270-450-5118

FROM: John S. Reed

NUMBER OF PAGES *(including cover sheet)*: 16

IF ANY PROBLEMS ARISE, PLEASE CONTACT: Karen Childers
(270) 444-6339

RE: *Conwood Company, L.P., et al. v. United Stated tobacco Company, et a., United States District Court, Western District of Kentucky, Paducah Division, No. 5:98-CV-108-R*

MESSAGE:

NOTE: This facsimile contains CONFIDENTIAL information intended only for the use of the specific individual or entity named above. If you or your employer is not the intended recipient of this facsimile or any employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any unauthorized dissemination or copying of this facsimile or the information contained in it is strictly prohibited. If you have received this facsimile in error, please immediately notify the person named above at once by telephone and return the original facsimile to us at the above address via the U.S. Postal Service. Thank you.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' PROPOSED EXHIBITS

Plaintiffs disclosed to Defendants certain demonstrative and trial exhibits for use during the direct examination of Dr. Richard Leftwich. Defendants object to a collection of exhibits that purport to demonstrate the relationship between Conwood's claimed damages and U.S. Tobacco's "gross profits" from 1994-1998. See Attachments.

First, these exhibits represent entirely new opinions, never before offered by Plaintiffs or by Dr. Leftwich at any time, including in Dr. Leftwich's initial, rebuttal and supplemental expert reports.

Second, and more importantly, these exhibits represent information that is irrelevant and would be unfairly prejudicial to U.S. Tobacco if shown to the jury. Dr. Leftwich is offered as a damages expert to quantify Conwood's alleged lost sales that resulted from U.S.

Tobacco's alleged misconduct. Under Fed. R. Evid. 702, it would not assist the jury for Dr. Leftwich to ~~them~~ compare his damages estimates to U.S. Tobacco's profits. That comparison is irrelevant to the issue. Plaintiffs' clear intent for the use of the exhibits is to Robin Hood the jury into taking money from the "big, wealthy monopolist" and give it to the "small, victimized company." That is not a measure of damages; it is not relevant to any measure of damages; and it would be unfairly prejudicial to U.S. Tobacco, especially in light of Plaintiffs' continued efforts to represent Conwood as a small company with limited resources, rather than a highly-profitable arm of a huge multi-national conglomerate that dwarfs U.S. Tobacco.

CONCLUSION

Defendants respectfully request an order excluding each of the above-referenced exhibits.

Date: March 6, 2000

John S. Reed
Ridley M. Sandidge, Jr.
Lynn K. Fieldhouse
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Rachel A. Mariner
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., counsel for Plaintiffs, this 6th day of March, 2000.

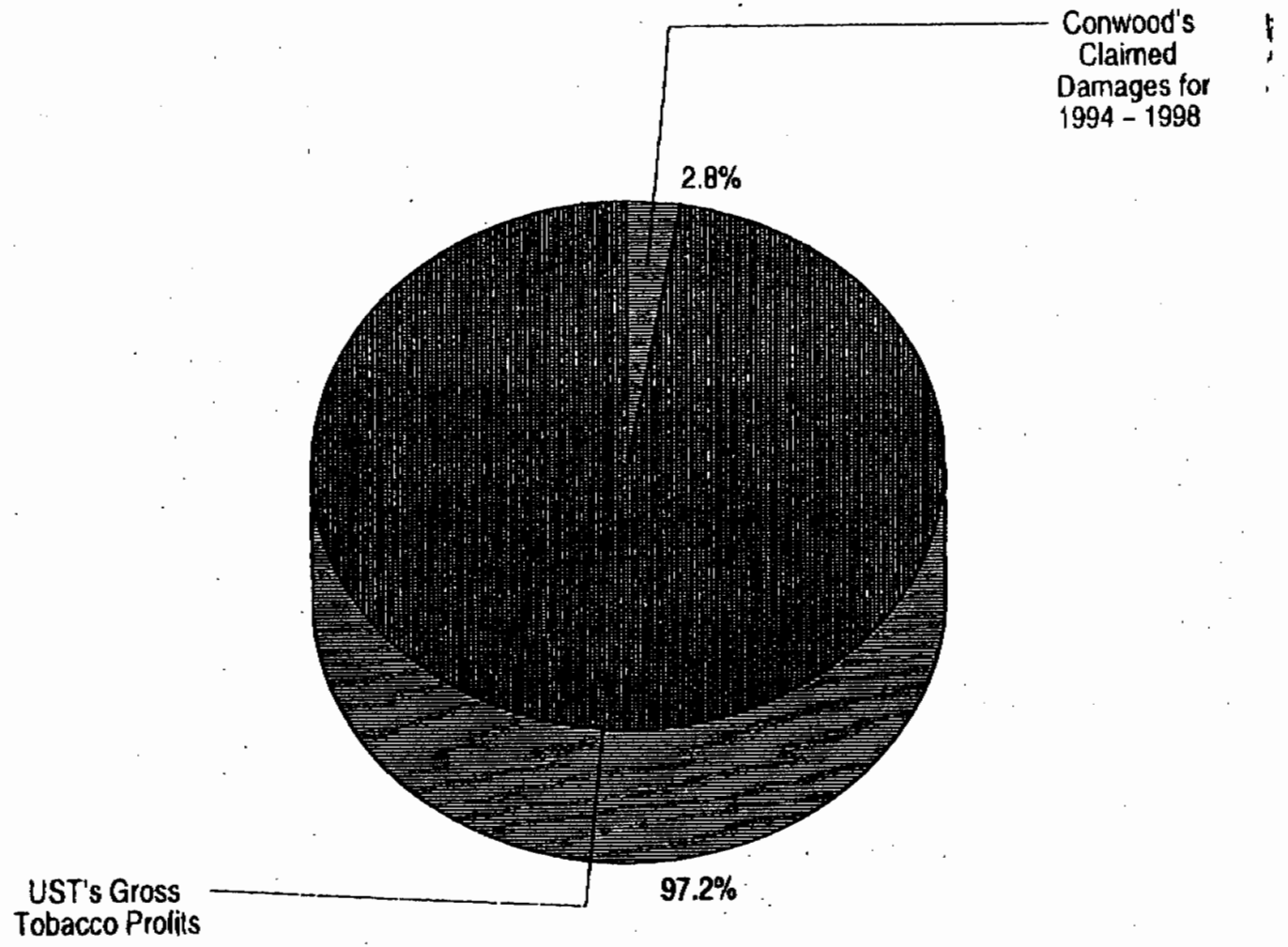
Counsel for Defendants

16diii004735

03/06/00 MON 15:01 FAX 005

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario One



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

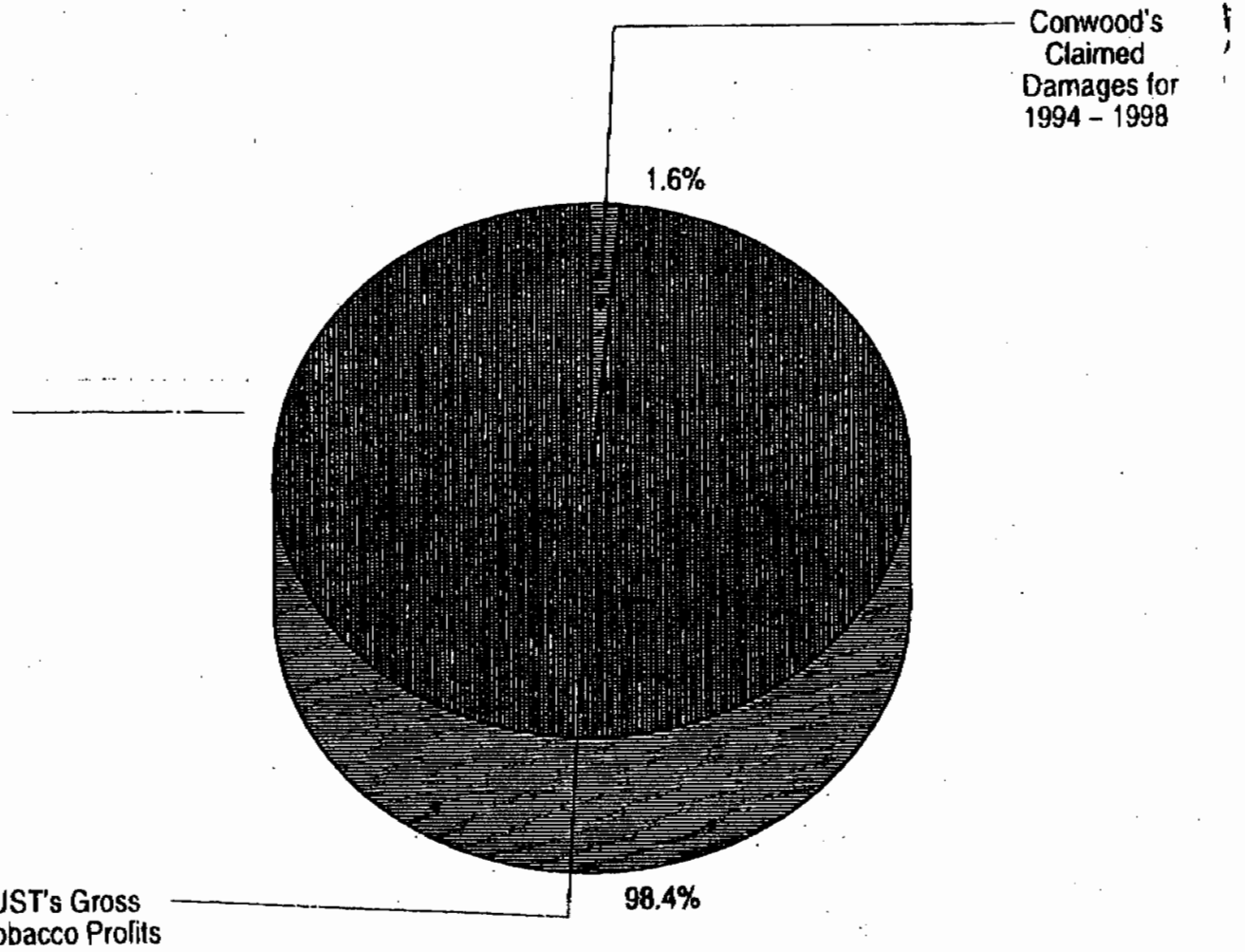
Preliminary - Subject to revision or modification

16diii004736

03/06/00 MON 15:02 FAX

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario Two



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

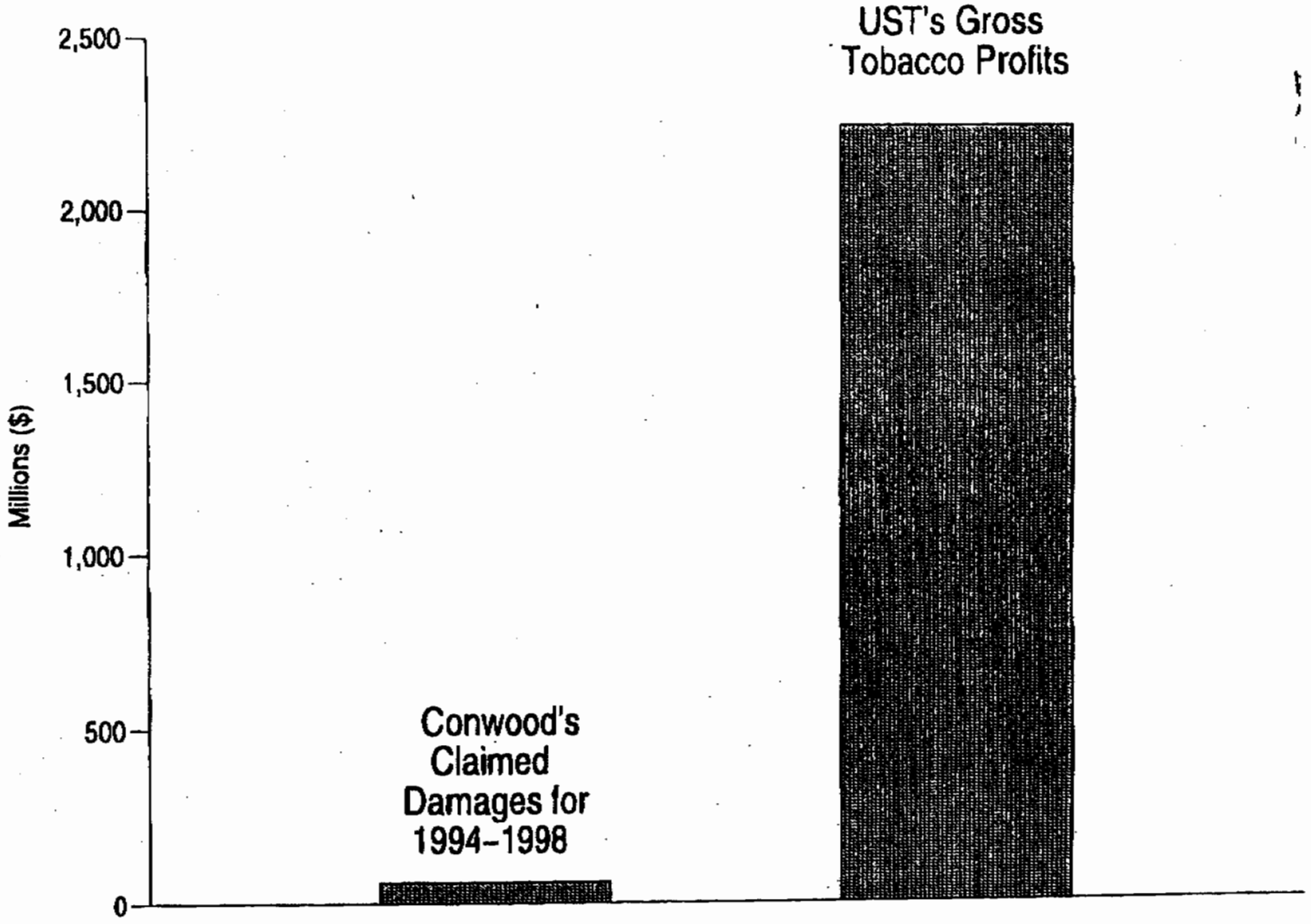
Preliminary - Subject to revision or modification

006

16diii004737

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario One



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

Preliminary - Subject to revision or modification

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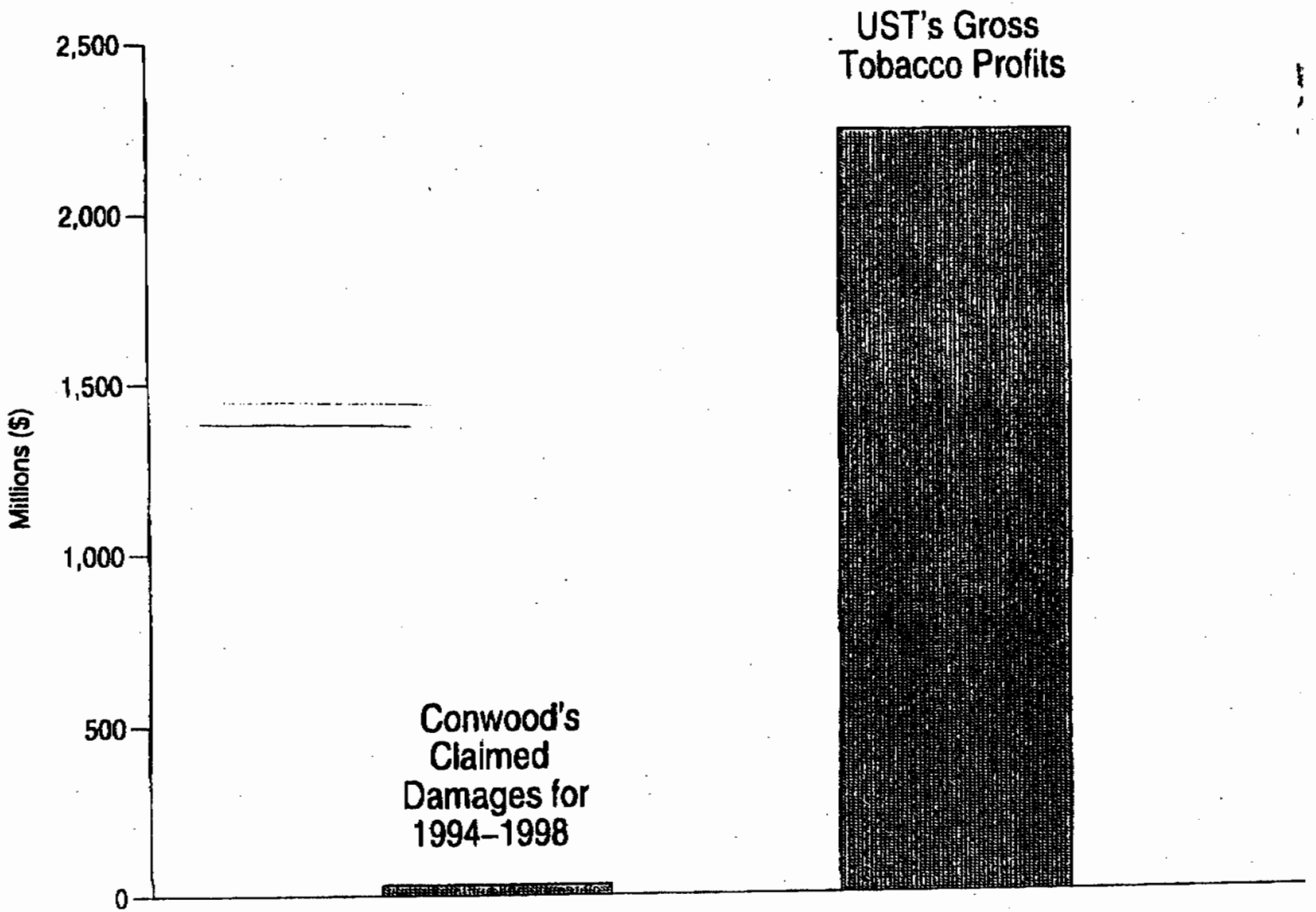
Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario Two



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

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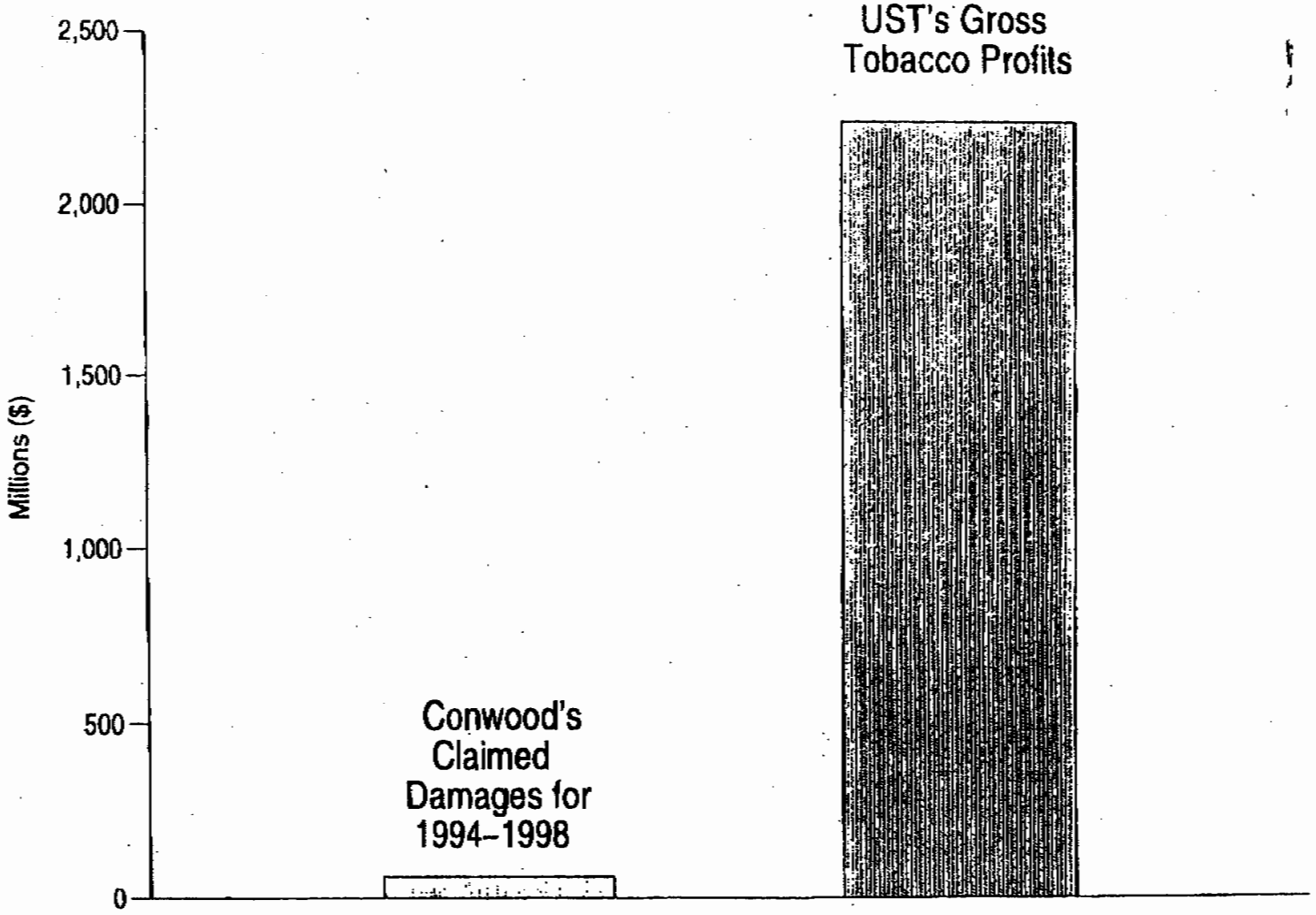
Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Revised 1997 Data



Note: Gross profit defined as revenue minus cost of goods sold.

Preliminary - Subject to revision or modification

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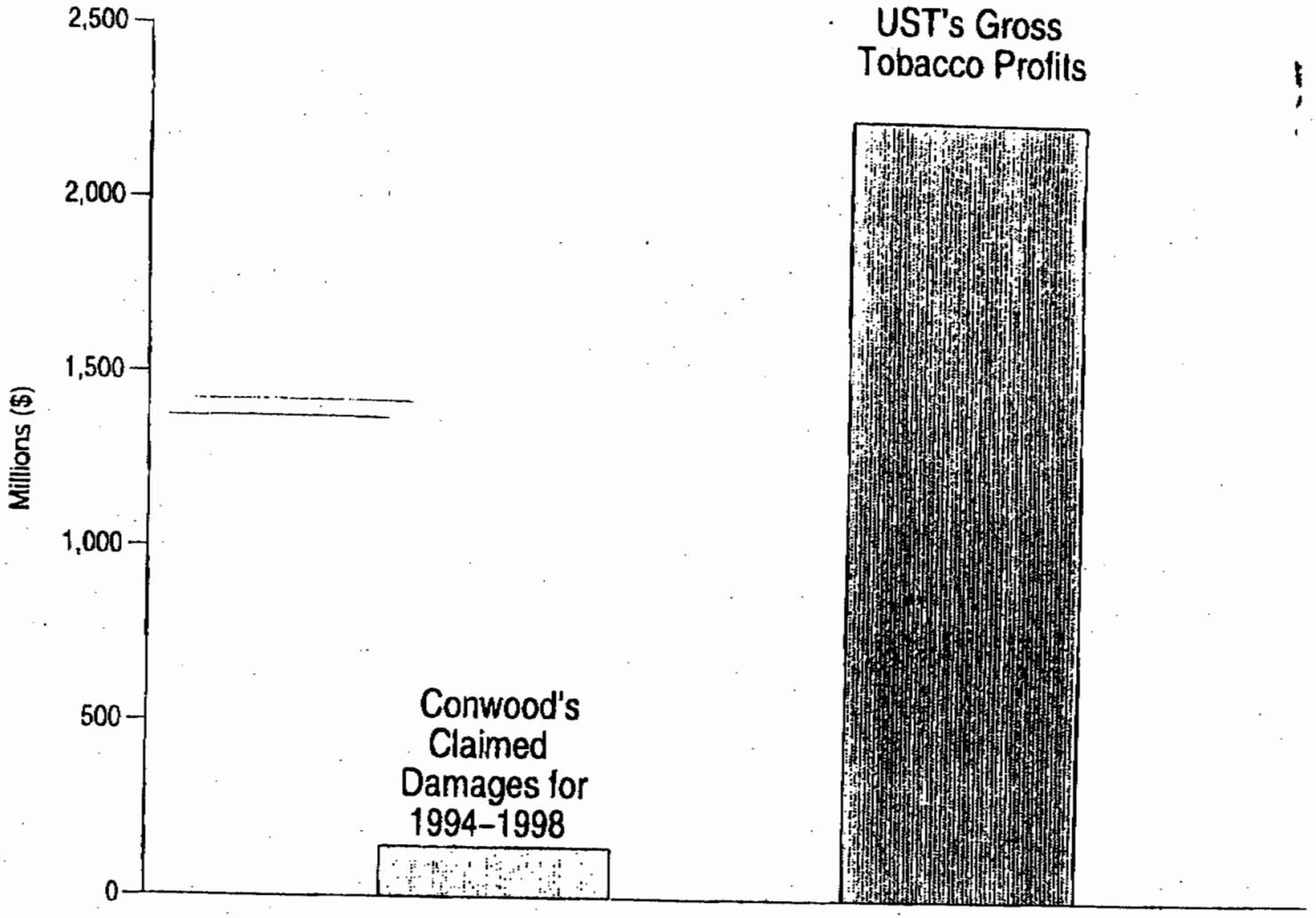
Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998



Note: Gross profit defined as revenue minus cost of goods sold.

Preliminary - Subject to revision or modification

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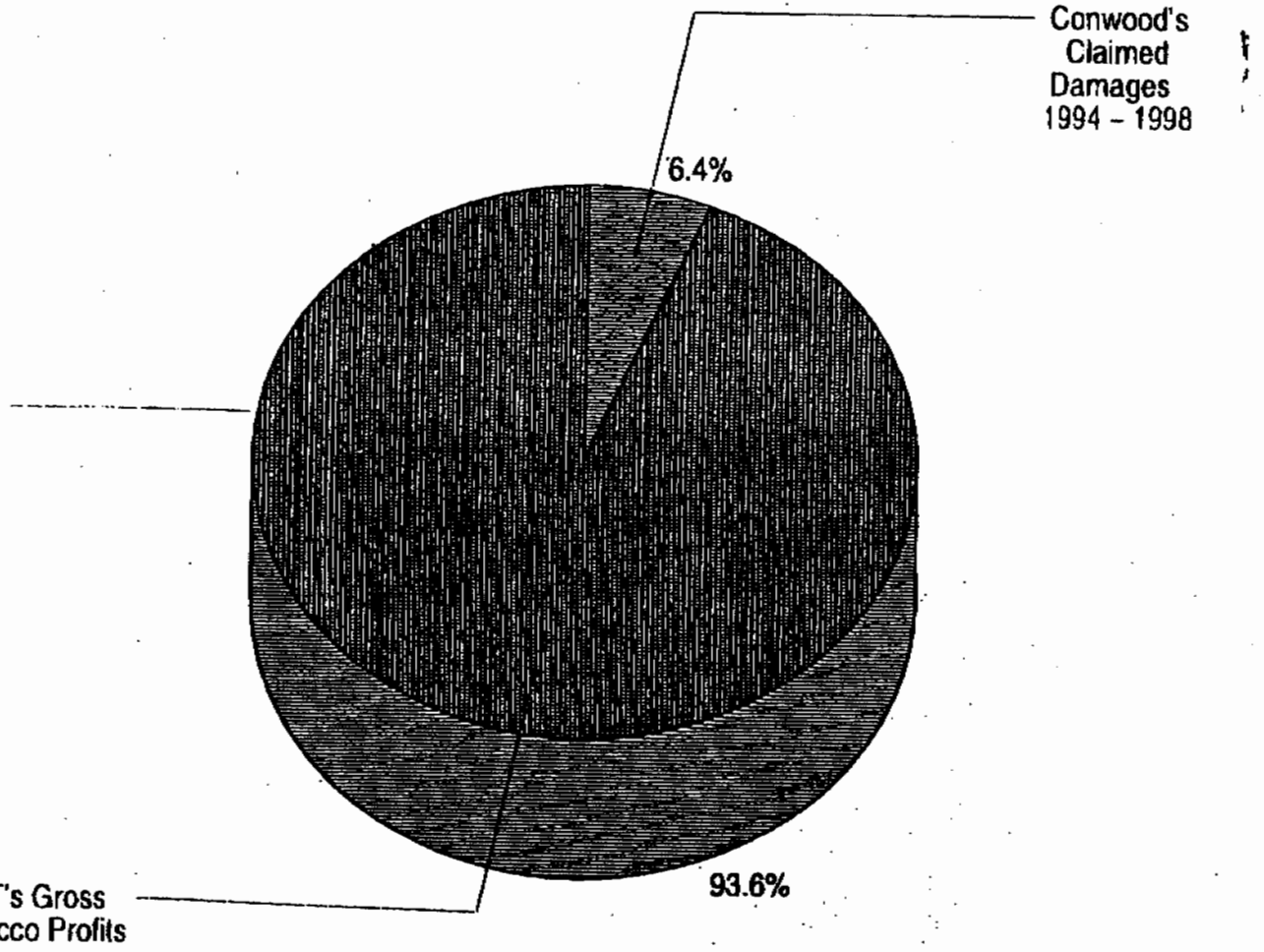
Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario One
1997 Share Adjusted Using Scheffman–Type Analysis
(Bad Acts Measure 2)



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

Preliminary - Subject to revision or modification

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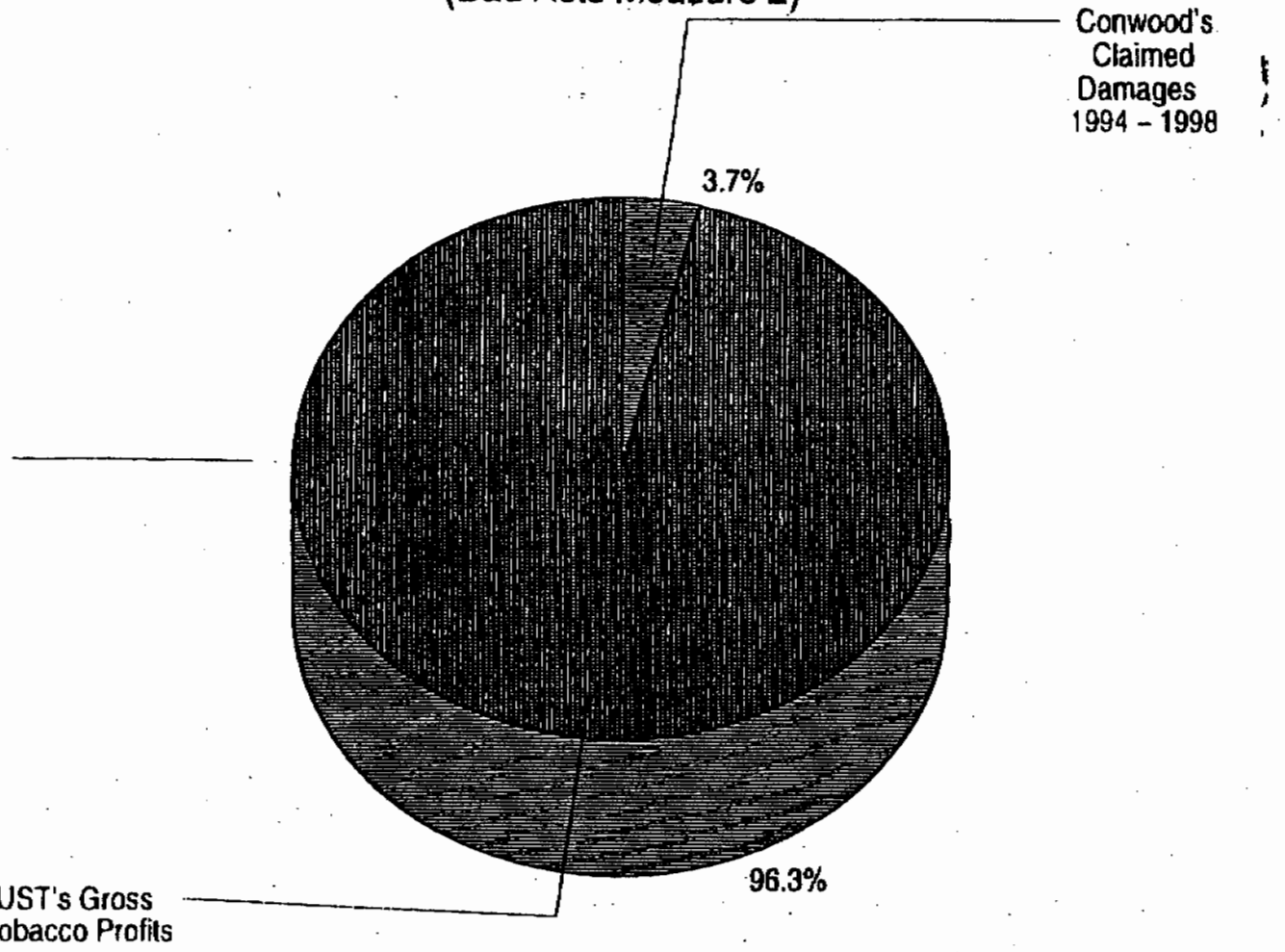
Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario Two
1997 Share Adjusted Using Scheffman–Type Analysis
(Bad Acts Measure 2)



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

Preliminary - Subject to revision or modification

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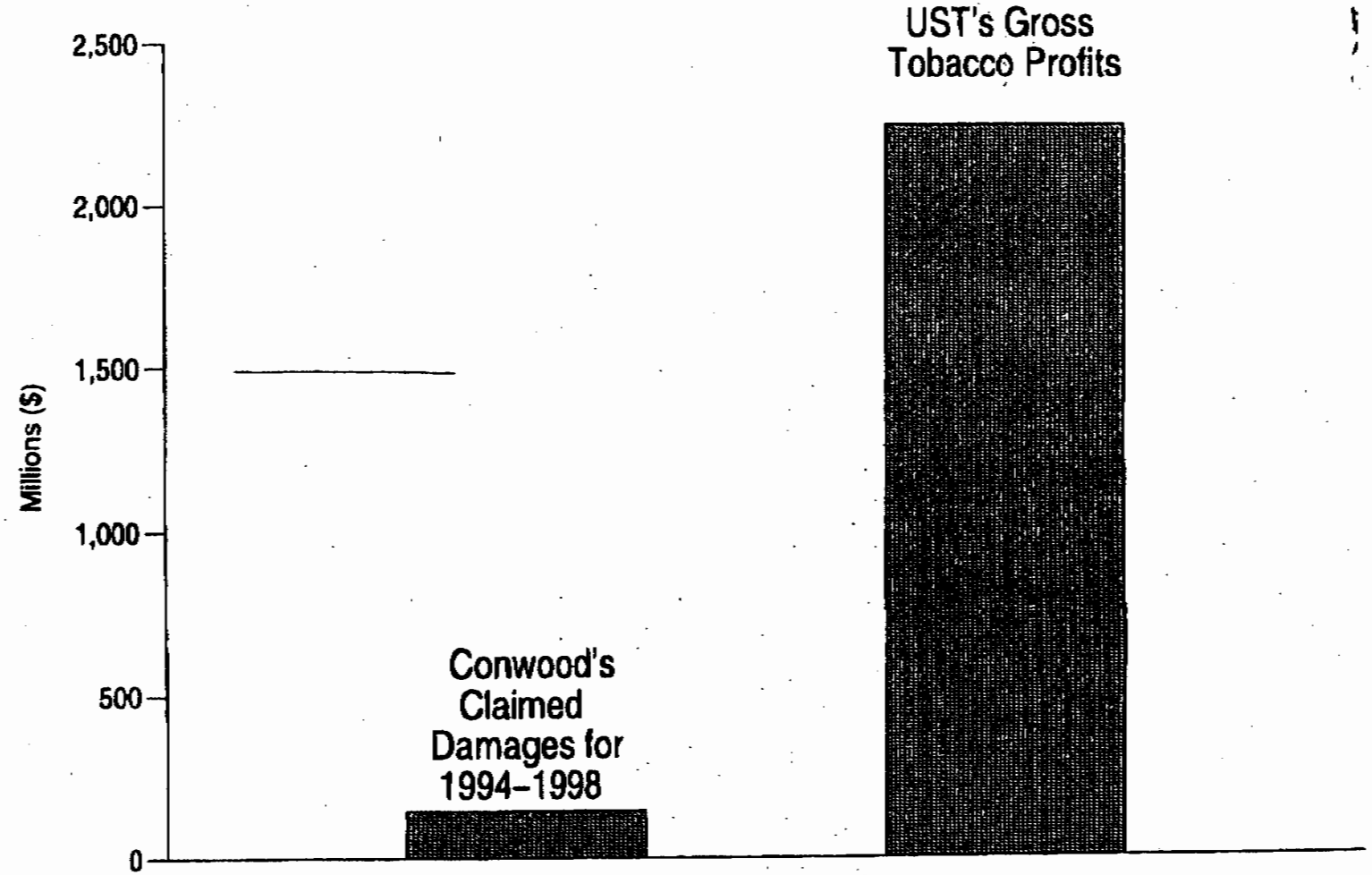
Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario One
1997 Share Adjusted Using Scheffman–Type Analysis
(Bad Acts Measure 2)



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

Preliminary - Subject to revision or modification

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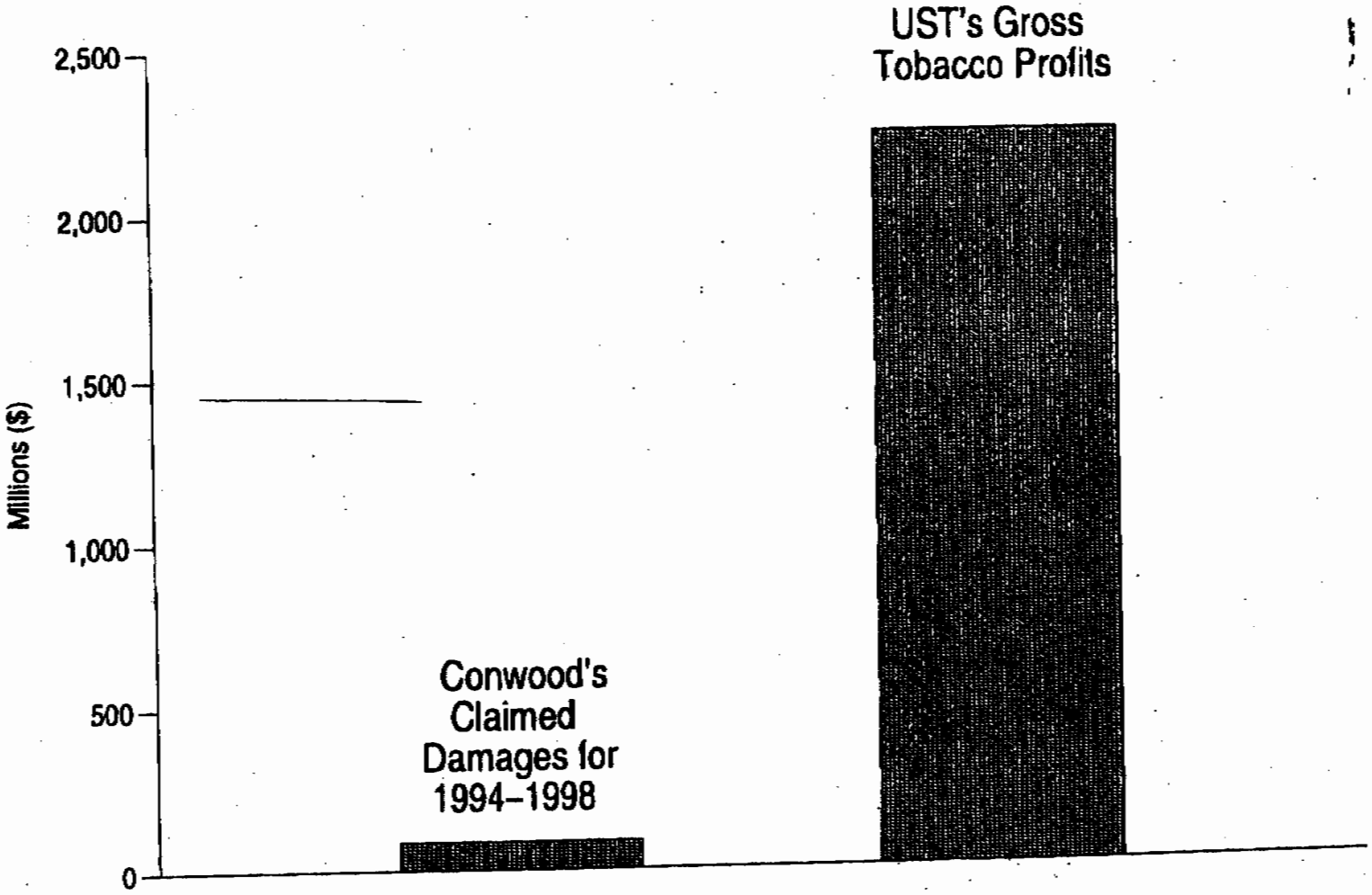
Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario Two
1997 Share Adjusted Using Scheffman–Type Analysis
(Bad Acts Measure 2)



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

Preliminary - Subject to revision or modification

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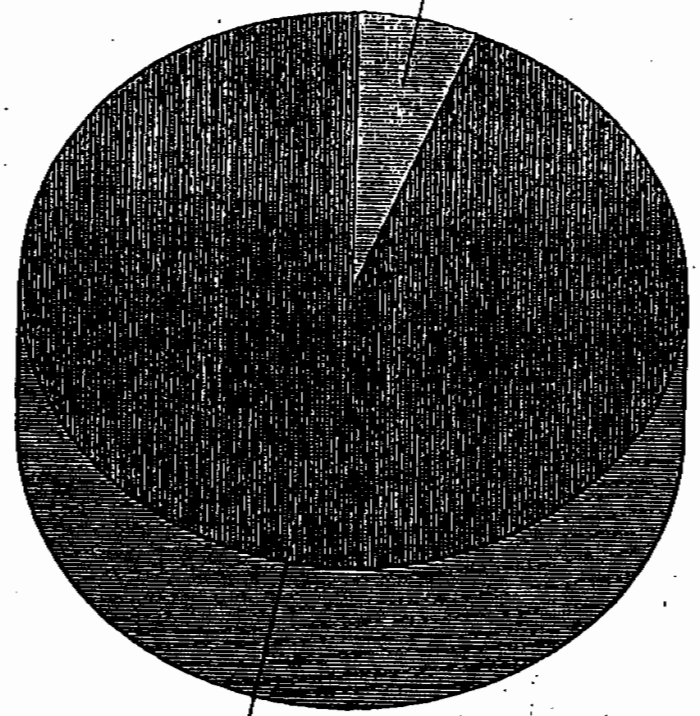
Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

1997 Share Adjusted Using Scheffman–Type Analysis (Bad Acts Measure 2, Excluding Geographical Indicator Variables)



Note: Gross profit defined as revenue minus cost of goods sold.

Preliminary - Subject to revision or modification

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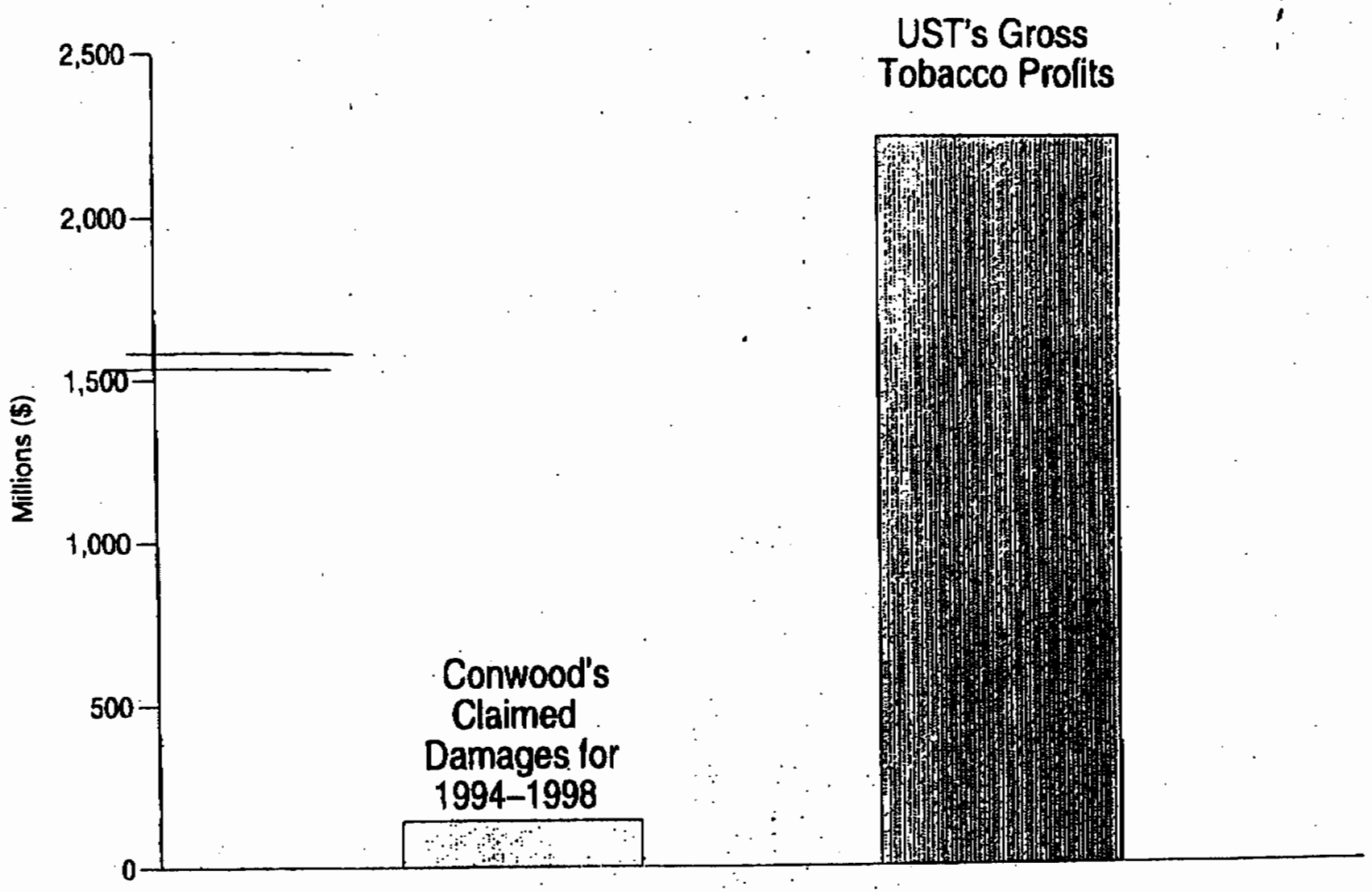
Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

1997 Share Adjusted Using Schelfman–Type Analysis (Bad Acts Measure 2, Excluding Geographical Indicator Variables)



Note: Gross profit defined as revenue minus cost of goods sold.

Preliminary - Subject to revision or modification

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REED WEITKAMP SCHELL & VICE PLLC

TELECOPIER COVER SHEET

March 7, 2000

TO: Mark C. Hansen / Jessica

TELECOPIER NO.: 270-450-5118

FROM: John S. Reed

NUMBER OF PAGES *(including cover sheet)*: 19

IF ANY PROBLEMS ARISE, PLEASE CONTACT: Karen Childers
(270) 444-6339

RE: *Conwood Company, L.P., et al. v. United Stated tobacco Company, et a., United States District Court, Western District of Kentucky, Paducah Division, No. 5:98-CV-108-R*

MESSAGE:

NOTE: This facsimile contains CONFIDENTIAL information intended only for the use of the specific individual or entity named above. If you or your employer is not the intended recipient of this facsimile or any employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any unauthorized dissemination or copying of this facsimile or the information contained in it is strictly prohibited. If you have received this facsimile in error, please immediately notify the person named above at once by telephone and return the original facsimile to us at the above address via the U.S. Postal Service. Thank you.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' PROPOSED EXHIBITS

Plaintiffs disclosed to Defendants demonstrative and trial exhibits for use during the direct examinations of Dr. Gregory Gundlach. Defendants object to certain of these exhibits, as described below See Attachments.

Memorandum In Support of Defendants' Motion For Summary Judgment.

Plaintiffs intend to have Dr. Gundlach, a marketing professor, discuss a memorandum of law filed by U.S. Tobacco in support of their motion for summary judgment. Any such discussion is irrelevant to Dr. Gundlach's opinions (primarily that U.S. Tobacco has "exclusive agreements" with certain retailers), and would not assist the jury in deciding any factual issues. See Fed. R. Evid. 702. The obvious intent of this tactic is to put before the jury those facts that U.S. Tobacco

assumed arguendo for purposes of arguing for summary judgment, a distinction that may be lost on the jury. Such disclosure would be misleading and unfairly prejudicial to U.S. Tobacco.

Choking Competitive Distribution. Defendants object to this exhibit because the title is unduly inflammatory and unfairly prejudicial to U.S. Tobacco.

The Gundlach Study. Plaintiffs also submitted a third version of Dr. Gundlach's study, this time including a column entitled "details of agreement," under which Dr. Gundlach describes the purported agreement with terms such as "x vendor" or "x header." Plaintiffs also submit separate charts tabulating the number of each type of agreements. During his deposition, however, when asked which agreements listed in his study pertained to exclusive vending, which pertained to exclusive POS, and which pertained to exclusive planograms, Dr. Gundlach testified that he did not "characterize the different types of exclusionary features." See Gundlach Dep. 155-56. Dr. Gundlach should not be allowed to avoid a question, effectively preventing cross-examination, and then present the opinion to the jury.

CONCLUSION

Defendants respectfully request an order excluding each of the above-referenced exhibits.

Date: March 7, 2000

John S. Reed
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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., counsel for Plaintiffs, this 7th day of March, 2000.

Counsel for Defendants

005
03/07/00 TUE 16:11 FAX
SENT BY: KELLOGG RUBEN;
MAR-8-00
670 450 5113;

Choking Competitive Distribution

- **Internal UST documents**
  - Describe rack and POS removal
- **Former UST employees**
  - Explain company policy of removing racks and POS by any means necessary
  - Current UST employees
  - Do not deny that they removed racks and POS or encouraged others
- **Retailers**
  - Testify to the pervasive nature
  - At least 1171 written complaints
- **Conwood Employees**
  - Executives testify that unauthorized rack removal is frequent, pervasive and nationwide
  - Field employees complain that they spend up to 50% of their time replacing racks and POS removed by UST.

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UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
Albertson's, N. California	48	1999 Chain Store Guide directory, p. 75	1/24/98	x vendor (3101)	USTC/CWD 564037-51
Allsups	309	USTC/CWD 040670	9/9/98	x vendor, x header	CWD 0100020483
Altheimer Oil	15	IRM Data	8/7/96	x vendor	USTC/CWD 523029
AM/PM	400	UST/CWD 261479	1998	x vendor; 3-facing Cwd. Header allowed; No Other Cwd. POS (No. Cwd. Side POS or vending labels)	USTC/CWD 158601 - 603
Amar Oil	15	USTC/CWD 532034	3/5/98	x vendor	USTC/CWD 532033
American Gas & Oil	15	IRM Data	3/26/96	x vendor	USTC/CWD 933957
Amoco	580	UST/CWD 261479	1997	x vendor	USTC/CWD 688200
A-Plus Mini Market (Sunoco)	415	1999 Chain Store Guide directory, p. 951	1996	x vendor	USTC/CWD 912675 - 77
Blue Sky Petroleum	32	USTC/CWD 969651	1998	x vendor	USTC/CWD 969648 - 51

UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
BP Express	184 (BP AMOCO Plc)	1999 Chain Store Guide directory, p. 817	1997	x vendor (except Helme)	USTC/CWD 254391
Bradford Oil (Go Go Marts)	11	CWD 1025006231	3/16/98	x vendor	USTC/CWD 1380255
Circle K (SSP)	172	USTC/CWD 040670 and USTC/CWD 325015	11/12/98		USTC/CWD 517073
Circle K (TOSCO)	2400	www.tosco.com	1/29/98	x vendor	USTC/CWD 969509
Circle N	6	USTC/CWD 532474	6/10/96	x vendor	USTC/CWD 532474-76
Co Go's	60	IRM Data	3/24/98	x vendor	USTC/CWD 825722 - 26
Coastal Mart	600	UST/CWD 261479	3/12/97	x vendor	USTC/CWD 577007-15
Coastal Maverick	155	USTC/CWD 325015	6/8/98	x vendor	USTC/CWD 517323-324
Conoco	300	UST/CWD 261479	6/4/98	x vendor; x header	USTC/CWD 969469
Cracker Barrel	57	USTC/CWD 532492-95	3/13/96	x vendor	USTC/CWD 532491-95
Crockett Oil	11	IRM Data	5/2/96	x vendor	USTC/CWD 532562-582

UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
Crown Central Petroleum	222	6/16/99 Depo. of H. Heylmun at 44.	1996-1998	x vendor, until sometime in 1998	6/16/99 Depo. of H. Heylmun at 43-45.
Crystal Flash	27	IRM Data	1995-1998	x vendor (2908), until Cwd. Lawsuit	USTC/CWD 288194-196
Dash In	25	IRM Data	4/15/98	x vendor; x header	USTC/CWD 772155 - 58
Depot Food Stores	52	1999 Chain Store Guide directory, p. 958	3/8/95	x vendor	USTC/CWD 969192 - 193
Eagle Food Centers	107	IRM Data	8/12/98	x vendor (except Helme)	USTC/CWD 808707
Exxon, BHT	15	USTC/CWD 532058	4/12/96	x vendor	USTC/CWD 532056
Exxon, USA	780	UST/CWD 261479	1996	x vendor	USTC/CWD 760486

UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
E-Z Mart	410	IRM Data	7/8/97	x vendor; x POS	USTC/CWD 576985; USTC/CWD 576982
Fas Mart	89	1999 Chain Store Guide directory, p. 1013	1995	x vendor, x POS	USTC/CWD 613178
Food Chief Stores	29	USTC/CWD 500258	1998	x vendor; x header	USTC/CWD 500245-258
Gas City	41	IRM Data	10/8/98	x vendor	USTC/CWD 517428
Giant Foods	175	www.giantfood.com	pre-April 1998	x vendor	USTC/CWD 210723 - 725
Golden Pantry	88	USTC/CWD 968584	7/14/98	x vendor; x header	USTC/CWD 968584
High's of Baltimore	119	IRM Data	1998	x vendor; 10 UST facings, 3 Cwd.	USTC/CWD 582106 - 111
Ingle's	200	www.ingles-markets.com	1/29/98	x vendor (except Heime)	USTC/CWD 808190

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UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
Kmart	2180	www.Kmart.com	1997	x vendor; x POS	USTC/CWD 157844 - 46 and 157849-50; Deposition of Entwistle at 57-58
Kroger, Atlanta	155	1999 Chain Store Guide directory, p. 149	7/31/98	x vendor; x header	USTC/CWD 884436 -441
Kum & Go	125	UST/CWD 261479	1998	x vendor	USTC/CWD 800236-238
Minit Chek Food Stores	8	1999 Chain Store Guide directory, p. 803	4/29/96	x vendor; x header; x POS	USTC/CWD 885246 and 885247
Mobil	600	UST/CWD 261479	9/6/96	x vendor	USTC/CWD 948431-433
Odessa Corp. (Champlain Farms, Fast Stop)	49	CWD 1025006231	3/2/98	x vendor	USTC/CWD 1380254
One Stop	27	6/16/99 Depo. Of H. Heylmun at 43.	1998	x vendor x header	6/16/99 Depo. Of H. Heylmun at 43.
PDQ Convenience Stores	45	USTC/CWD 331829 (appears to be misdated)	1996 est. Context of report indicates doc. was written in 1996.	x vendor	USTC/CWD 331829-832
Pelican State Fina	35	USTC/CWD 536125	4/2/96	x vendor	USTC/CWD 536122
Pit Row	10	IRM Data	1997	x vendor, x header	USTC/CWD 688459 - 461
QuikTrip	329	1999 Chain Store Guide directory, p. 944	5/17/98	x vendor (3201)	USTC/CWD 609441 - 48
Rainbow Foods	41	1999 Chain Store Guide directory, p. 347		x vendor; x header	7/9/99 Depo. Of D. Blackburn at 26-28.

16diii004757

UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
Rapid Roberts	19	USTC/CWD 512852	10/16/97	x vendor	USTC/CWD 512849 - 852
Sentry Food Mart (VA)	59	1999 Chain Store Guide directory, p.	4/4/96	x vendor	USTC/CWD 760370 - 74
Sentry Food Mart (WI)	100	USTC/CWD 331829	3/10/97	x vendor (2908)	USTC/CWD 808017
Southland (7-Eleven)	2500	UST/CWD 261479	4/1/97	x vendor; x header; No competitive double facings	USTC/CWD 025956 - 964; 7/9/99 Depo of D. Untiedt at 103-105.
Spectrum Stores	48	USTC/CWD 970981	9/13/96	x vendor	USTC/CWD 970980
Spee D Foods	13	IRM Data	May 1997 to May 1998	x vendor	USTC/CWD 986245 - 249
Stop In Food Stores	83	IRM Data	1996	x vendor	USTC/CWD 952558-60
Sun Up Convenience (Service Oil Co.)	7	IRM Data	4/9/96	x vendor	USTC/CWD 985389
The Pantry	915	USTC/CWD 888769-71	3/22/96	x vendor; x header (except Helme)	USTC/CWD 704636 - 37
Thrifty Liquor	12	USTC/CWD 536470	3/10/98	x vendor	USTC/CWD 536469-71
Tom Thumb	149	USTC/CWD 254389	5/9/97	x vendor (all Helme discont. & only 3 Cwd. Brands)	USTC/CWD 254389 - 390

UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
Turkey Hill Minit Markets	230	USTC/CWD 984429	7/3/97	x vendor	USTC/CWD 984432-433
United Dairy Farmers	209	IRM Data	1/29/98	x vendor; x POS	USTC/CWD 888616 - 17;USTC/CWD 734222 - 226; see also USTC/CWD 888480
Waco Oil	18	USTC/CWD 516673	1998	x vendor (most have 3203)	USTC/CWD 516673-80
Wal*Mart	2300	UST/CWD 261479	11/15/96	x vendor; x POS	7/8/99 Depo. Of D. Blackburn at 32; 7/9/99 Depo of D. Untiedt at 222-225; USTC/CWD 274518
Walgreen's	2200	USTC/CWD 040871	1997	x vendor; x POS	USTC/CWD 517580
Wawa	500	USTC/CWD 297457	4/1/97	x Moist Smokeless POS on cigarette rack (Do not use moist racks)	USTC/CWD 297451-457
Winn Dixie, Atlanta	94	1998 Chain Store Guide directory, p. 149	3/25/97	x vendor	USTC/CWD 254584
TOTAL	21184				

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UST's Exclusive Vending Agreements

(Top Chains by Number of Stores)

Chain	Number of Stores	Exclusionary Features
• Southland	2500 locations	Exclusive single can rack, no competitive double facings
• Wal Mart	2300 locations	Exclusive rack
• Circle K	2400 locations	Exclusive rack
• Walgreens	2200 locations	Exclusive rack
• Exxon	780 locations	Exclusive rack
• Mobil	600 locations	Exclusive rack (except Helme)
• Coastal Mart	600 locations	Exclusive rack

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UST's Exclusive Vending Agreements

(Top Chains by Sales)

Chain	1997 Units Sold	Exclusionary Features
• Wal Mart	43,400,000 cans	Exclusive rack
• Southland	14,300,000 cans	Exclusive rack, no competitive double facings
• Circle K	9,000,000 cans	Exclusive rack
• Exxon	2,000,000 cans	Exclusive rack
• Coastal Mart	1,400,000 cans	Exclusive rack
• Mobil	995,000 cans	Exclusive rack (except Helme)

16diii004761

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P.,	Plaintiffs,	Civil Action No. 5:98CV-108-R
v.		
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY, INC. and UST, INC.,	Defendants.	

Washington, D.C.
Friday, October 15, 1999

Deposition of GREGORY T. GUNDLACH, a witness herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice and agreement, the witness being duly sworn by FERNITA R. FINKLEY, a Notary Public in and for the District of Columbia, taken at the offices of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., at

Page 150

A. Well, if the CAP contract calls for exclusive vending and both parties had signed the CAP contract, agreed to those terms, I imagine normal course that's what would happen in the retail institution. I would say probably utilize a somewhat conservative approach based on the documents that were provided and also representations made by UST employees. If the contract says exclusive vending that would be in my mind sufficient to suggest that that's what's going to occur in the marketplace given UST's dominant position ability to enforce that contract.

Q. Is it your testimony today that 35,000 locations have a CAP contract that require exclusive vending?

A. It's my understanding that upwards towards that vicinity have exclusionary features, yes.

Q. That wasn't quite my question. I was talking about exclusive vending specifically.

A. Again I haven't focused my -- in deriving that number I was focusing mainly on exclusionary features, not necessarily just the use of exclusive vending.

Q. What did you do to determine the number of CAP participants that had exclusive racks?

Page 151

A. Well, again I didn't necessarily attempt to determine as a counting criteria the number of particular forms of exclusion, but more or less I was looking to the end result of whether or not exclusion was occurring as a result of the -- as represented by the documents that I had looked at.

Q. And what kind of quantitative analysis did you do to assess the number of CAP participants that had exclusive United States Tobacco point-of-sale materials in their stores?

A. Again I looked at the various representations as evidence in the contracts themselves, UST documents, UST memoranda, and derived from there an understanding of the overall level of exclusion, and my criteria more focused on that level than trying to make a distinction between whether or not it was a rack or whether or not it was POS on a rack or whether or not it was a rack and POS or whether or not it was a display versus a rack versus a modular. My focus was mainly on the exclusionary forms of agreements.

Q. Is it fair to say that you did not do anything quantitatively to separate out the different exclusionary features you identify in your report?

MR. GUZMAN: Objection, ambiguous, you're

Page 152

still referring to exclusive in the CAP?

MR. ATHANASIA: Uh-huh.

THE WITNESS: Again I looked at the different documents that were available to me in the contracts as they represented the number of retail institutions where these features if one assumes that when one signs a contract the parties agree to the particular attributes of the arrangement, felt in rendering my opinion that was sufficient enough to be an indicia of some form, type of exclusion.

BY MR. ATHANASIA:

Q. I'm just trying to get a sense of if I were to separate exclusive vending from exclusive point-of-sale materials from what you call adherence to plan-o-grams, what work did you do within the CAP universe, CAP participants, did you do to separate those out and quantify each?

A. Well, as I mentioned I focused mainly on the level of exclusion and accepted the particular documents as they related to different forms of exclusion. After all the criteria of interest here is not whether or not a competitor has been injured by exclusion of a competitor's rack or POS. The important criteria is whether or not exclusionary outcomes have impacted competition.

Page 153

Q. So if I'm understanding you is aggregate all of the different types of exclusion as sort of one limit of exclusionary feature?

A. In a sense I looked at the various arrangements, identified whether or not they contained exclusionary features and considered various indicia to make that determination including agreements, contracts, memoranda, discussing those agreements, I used that as my basis then as far as obtaining whether or not exclusion was present. I then identified the number of retail locations of which those particular features would apply.

Q. In paragraph 15 of your rebuttal report I think you refer to this number you have alluded to of 22,000 retail locations?

A. Find my rebuttal report here.

Q. You see that reference to the 22,000?

A. I actually see two references, which one are you speaking to.

Q. The one on page 7?

A. I do see that.

Q. Actually the first reference, the 22,000, I'm sorry you state based upon the available record it appears that UST has exclusive agreements with retailers representing nearly 22,000 locations. Now

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earlier you made a distinction and corrected me because you said you used the term exclusionary while I was using the term exclusive. Do you see the term exclusive agreements in the sentence I just read?
A. Yes. I do.
Q. Do you want to change that to exclusionary?
A. No. As I mentioned earlier in the beginning of our day today that the term is used somewhat interchangeably. The distinction might be viewed something along these lines. Exclusive would refer to the mechanism through which the outcome is derived with that outcome being exclusionary. So in a sense they're hand in glove type of terminology with some loose use of both in particular areas. So here I'm referring to the particular agreements and the fact that they contain exclusive features.
Q. And what exclusive features do these exclusive agreements include? I'd just like a complete list of what you're talking about, exclusive features.
MR. GUZMAN: Objection. The question is ambiguous.
THE WITNESS: Common theme -- and again what we're talking to here now apart from the CAP are

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a variety of different types of agreements that are obtained by UST and arrangements with retailers. The common themes that come through in these arrangements and agreements generally are exclusive vending referring to the rack or vending modular and exclusive POS on that rack and typically also adherence to required plan-o-grams for use in those racks.
BY MR. ATHANASIA:
Q. Now out of the 22,000 retail locations, just let me clarify that would include if there were say 2,000 locations in a retail chain would that be -- count as one or as 2,000 in this 22,000 number?
A. That would count as a retail location meaning one.
Q. So a whole chain of 2,000 stores would count as one out of this 22,000?
A. No. Clarification.
Q. Each store would be one location?
A. Each store would count as one of that 22,000, each retail location.
Q. Out of the 22,000 retail locations, how many have exclusive vending from your study?
A. Again my point of reference was not necessarily to characterize the different types of

Page 156

exclusionary features but merely to determine whether or not exclusion was present or not.
Q. And would that be the same answer for if I tried to ask you just the number that had exclusive possible features?
A. Yes, it would.
Q. And also the third thing you described, adherence to require plan-o-grams?
A. Yes, it would.
Q. How about what we talked about earlier about a company getting the number one position and as you said excluding the -- another company from the number one position, would that be included in this 22,000?
MR. GUZMAN: Objection. The question is ambiguous.
THE WITNESS: To the extent that I've characterized three major themes, the positioning of an exclusive display as you characterize it or a display in the number one position or the number two position, to the extent that I would view that as being exclusionary, it may or may not have been considered to be exclusionary. I would have to look at the, you know, the context of the specific circumstance and this gets to your point of

Page 157

identifying the particular features segregating them into components because in this particular case what we're looking at is often a combination of a variety of exclusionary features that in isolation may mean one thing but in aggregate may mean something entirely different.
BY MR. ATHANASIA:
Q. The third common theme you referred to is adherence to required plan-o-grams. Can you tell me what you mean by that? Are you referring to a retailer who cedes control of the product mix decisions in the stores to United States Tobacco?
A. What I'm describing here in terms of adherence to exclusionary plan-o-grams would be through some mechanism through some approach or process the -- UST is able to obtain the agreement of the retailer to utilize and implement a plan-o-gram that results in exclusionary outcomes.
Q. And can you just describe to me what you mean by exclusionary outcomes?
A. These would be arrangements where the number of products were reduced in terms of facings for a competitor product where the number of total products may have been reduced along with and part of the reduction of the number of facings of the

Page 158

competitive product. Those would be two examples of what I mean by plan-o-gram that contains exclusionary features.

Q. Do you know of any retailer that has implemented a plan-o-gram that completely excluded all Conwood products from the store?

A. If I recall correctly and I'm having to reach here because there's so many different retailers, but I believe Eckerd drugs has and does carry only UST product. As I sit here today whether or not my recollection is as based on some derived plan-o-gram or some other arrangement reflective of the number of products being reduced, I think that's a representation of a circumstance that's resulted in a plan-o-gram that has excluded other competitive product.

Q. Now would it surprise you if I told you that Eckerd Drugs actually carries only Conwood products?

A. It would be informative and it would be in contrast to what my understanding of the record was. It would be useful information, sure.

Q. Now have you ever seen a plan-o-gram that did in fact reduce the total number of products carried in the store?

Page 159

MR. GUZMAN: Objection. The question is ambiguous.

THE WITNESS: I do recall documents, internal memoranda discussing on the part of UST representatives their ability to obtain plan-o-grams that did in fact reduce the number of products in the store, product facings. As I recall I do or did or have seen plan-o-grams that resulted in the reduction of a number of facings for all products and reduction in the number of facings for Conwood's products. There's a variety of evidence that has led me to believe that there are plan-o-grams, many instances that have reduced -- I'll say this, I haven't seen one that asked for a number of increases in the number of facings.

BY MR. ATHANASIA:

Q. Have you seen evidence of plan-o-grams that reduce the number of United States Tobacco facings?

A. Yes. I have, yes, I have.

Q. Is that exclusionary to United States Tobacco?

A. Again I think the -- to determine whether or not it's exclusionary, here's where we keep getting confused, we need to determine what the result is in the competitive marketplace. What we're focusing on now is the mechanism. The determination of exclusionary really refers to what's happening in terms of competition, so we focus on a particular plan-o-gram is really half the story.

Q. Well, if a plan-o-gram reduces the number of United States Tobacco products in the rack and a consumer can't find, I don't know, Skoal Key, is that exclusionary?

A. Again if we use the term exclusionary to mean what is the competitive result and whether or not competition has been dampened or constrained or limited, it's difficult to tell without characterizing the entirety of the circumstance.

Q. Are all plan-o-grams that reduce the total number of products that are available on the shelf exclusionary?

A. Again to make a general statement that all plan-o-grams that reduce the number of facings in the entire universe of plan-o-grams, I imagine not. I imagine there are some instances where they're not.

Q. Are all plan-o-grams that are recommended by U.S. Tobacco exclusionary?

A. Again, without looking at the particular plan-o-gram that you're prescribing and the

Page 161

circumstances. I can envision a plan-o-gram on the part of UST that expands the number of brands and adds competitive product, not necessarily being anticompetitive or exclusionary.

Q. Well, are all plan-o-grams recommended by U.S. Tobacco that reduce the total number of facings and reduce competitive products exclusionary?

A. I think given UST's market dominance we can make that assumption here, and considering that a plan-o-gram that resulted in the number of facings of a competitor's products were reduced and UST's products were preserved in terms of prior to that plan-o-gram, if that plan-o-gram resulted in preservation of the status quo of UST's dominant position without some acceptable business justification, might find that to be an exclusionary arrangement.

Q. With all those factors you still might find that to be exclusionary?

A. Again we'd need to know what were the particular effects for competition. That certainly is a mechanism by which UST could accomplish an exclusionary outcome. Instances where that has occurred where competitors' products have been reduced does result in exclusion and can have

Page 162

exclusionary outcomes.
Q. When you refer to business justifications, can you describe to me what you mean or give me some examples of business justification?
A. UST often will offer its programs as a basis for a retailer to freshen up their rack, present a more uniform appearance and a variety of proposed advantages to the retailer that are presented in a way that are suggested to enhance the competitive implications for consumers.
Q. And based on those business justifications the retailer makes the decision to implement the plan-o-gram, that would indicate to you that it would not be exclusionary?
A. I mean after all what the retailer does certainly is their decision. My interest would be in focusing on what the competitive implications are to the consumer. Whether or not that's retailer's acquiescence to that arrangement was based on the fact that they were provided information that they accepted about what the future would hold or simply felt as though they were compelled to accept the plan-o-gram that restricted the number of brands, competitor brands because of UST's dominance, there would be a variety of reasons I can think of as to

Page 163

why a retailer would accept something so -- not necessarily that we understand certainly one factor, it's one particular piece of information that more important is the competitive implications.
Q. Want to talk a little bit about those 22,000 locations just with respect to exclusive vending. You refer to exclusive agreements, just so we're clear are you referring to agreements between U.S. Tobacco and the retailer?
A. Yes, with retailers.
Q. Now assuming that United States Tobacco has an agreement with a retailer for exclusive vending, do you know of instances where Conwood racks were removed pursuant to those agreements?
A. I know of instances where Conwood racks were removed, yes. The particulars of whether or not they were pursuant to a specific agreement it's hard for me to recall, there's so many different agreements that I've considered. If one does call for an exclusive rack agreement or exclusive vendor agreement, I have understood that Conwood racks have been removed.
Q. And have you done any work to quantify the number of Conwood racks that had been removed as a result of these exclusive vending agreements between

Page 164

U.S. Tobacco and retailers?
A. Well, the evidence is quite pervasive, suggest a widespread removal of those racks. The quantification is very difficult given the nature of evidence, for example, I recall one particular ex-UST rep Art Hale describing.
Q. I'm sorry I didn't catch the name?
A. Art Hale. I'm sorry it's Al Hart. What am I thinking. It's Al Hart, describing a circumstance where he was part of a crew drive to remove upwards towards 500 racks in his area, interesting enough this was corroborated by a Conwood rep who was working in the vicinity who indicated he had spent upwards toward 50 percent of his time replacing those racks. So the evidence does suggest some numbers but oftentimes that type of quantification isn't offered in the record. So to extrapolate those numbers to come up with a quantity is quite difficult given the evidence at hand.
Q. What was the name of the Conwood rep that you just referred to?
A. You know I think I actually made reference to this individual inside my report, might be useful for me to look to refresh my memory there, but as I sit here I don't recall exactly the name of that

Page 165

individual.
Q. I'll save you some time. You do not refer to the Conwood rep by name in your report. You did refer to Alan Hart by name. That's okay. Now did you review the testimony of Alan Hart in his deposition?
A. I did review I recall I reviewed his declaration and I believe he also was deposed. I believe he was.
Q. And as you sit here today do you know what his testimony was regarding whether those rack removals you referred to on the crew yard were with store authorization or not?
A. As I recall he spoke of not only engaging in unauthorized rack removal being encouraged to engage if that rack removal on the part of his supervisors, those supervisors being with him and participating in that rack removal, his being instructed to remove racks while operating as a regional sales manager, his feeling and sentiment that removal of racks was common, frequent, and something that was made part of his role as a UST representative. I remember Al Hart because of his -- no longer with UST but I think as a result of injury and I think what struck me being at the University of

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' PROPOSED EXHIBITS

Plaintiffs disclosed to Defendants demonstrative and trial exhibits for use during the direct examination of Dr. Blattberg. Defendants object to certain of these exhibits, as described below See Attachments.

Defendants object to exhibits Plaintiffs intend to use with Dr. Blattberg that do nothing more than publish to the jury excerpts from depositions that have not been played to the jury as designated by both sides. Moreover, displaying any selected deposition testimony to the jury is not expert opinion; nor would it assist the jury in determining any factual issue in this case. Plaintiffs should not be allowed to channel in what it believes to be favorable testimony through Dr. Blattberg's demonstrative charts.

CONCLUSION

Defendants respectfully request an order excluding each of the above-referenced exhibits.

Date: March 9, 2000

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., counsel for Plaintiffs, this 9th day of March, 2000.

Counsel for Defendants

UST Knows the Retailer Is Too Busy

"One thing is certain, however. Key supermarket and convenience chains do not have the time to properly manage categories on their own. They need the assistance of their key manufacturer."

Robert Chiaradio, UST Key Account Manager (PX 39).

03/09/00 THU 20:05 FAX 004

WHY RETAILERS DELEGATE TO MANUFACTURERS

- Manufacturer Has Product Knowledge
  - "My experience in dealing with the decision makers and those that deal specifically with tobacco, non cigarette tobacco, sometimes they are not as informed on the specifics of the category. That could be anywhere from basic product knowledge to profitability or product handling or product education."
    - » Donald Blackburn, UST Key Account Manager, Depo. at 282.

03/09/00 THU 20:06 FAX
MAR-8-00 9:02PM;
PAGE 10
005

UST's Market Share Makes it the Category Management "Top Dog"

"Most retailers want the 'top dog' running things . . . Because of our dominant share of market, customers look to us for leadership"

Robert Chiaradio
UST Key Account Manager (PX 39)

03/09/00 THU 20:06 FAX 006

16diii004771

Gary Smith, President

- Q: Would it be inappropriate if your U.S. Tobacco representatives sought, as part of category management, to persuade the store or the chain to discontinue one or more moist snuff brands?

- A: I think that that is not the right thing to do.

» Depo. Pages 249-50

02/09/00 THU 20:06 FAX
PAGE 24/28 007

REED WEITKAMP SCHELL & VICE PLLC

TELECOPIER COVER SHEET

March 9, 2000

TO: Mark C. Hansen
Neil M. Gorsuch
Benjamin A. Powell

TELECOPIER NO.: 270-450-5118

FROM: John S. Reed

NUMBER OF PAGES *(including cover sheet)*: 7

IF ANY PROBLEMS ARISE, PLEASE CONTACT: Karen Childers
(270) 444-6339

RE: *Conwood Company, L.P., et al. v. United Stated tobacco Company, et a., United States District Court, Western District of Kentucky, Paducah Division, No. 5:98-CV-108-R*

MESSAGE:

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Jessica

TELECOPIER COVER SHEET

March 6, 2000

TO: Mark C. Hansen

TELECOPIER NO.: 270-450-5118

FROM: John S. Reed

NUMBER OF PAGES *(including cover sheet)*: 16

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RE: *Conwood Company, L.P., et al. v. United Stated tobacco Company, et a., United States District Court, Western District of Kentucky, Paducah Division, No. 5:98-CV-108-R*

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' PROPOSED EXHIBITS

Plaintiffs disclosed to Defendants certain demonstrative and trial exhibits for use during the direct examination of Dr. Richard Leftwich. Defendants object to a collection of exhibits that purport to demonstrate the relationship between Conwood's claimed damages and U.S. Tobacco's "gross profits" from 1994-1998. See Attachments.

First, these exhibits represent entirely new opinions, never before offered by Plaintiffs or by Dr. Leftwich at any time, including in Dr. Leftwich's initial, rebuttal and supplemental expert reports.

Second, and more importantly, these exhibits represent information that is irrelevant and would be unfairly prejudicial to U.S. Tobacco if shown to the jury. Dr. Leftwich is offered as a damages expert to quantify Conwood's alleged lost sales that resulted from U.S.

Tobacco's alleged misconduct. Under Fed. R. Evid. 702, it would not assist the jury for Dr. Leftwich to ~~them~~ compare his damages estimates to U.S. Tobacco's profits. That comparison is irrelevant to the issue. Plaintiffs' clear intent for the use of the exhibits is to Robin Hood the jury into taking money from the "big, wealthy monopolist" and give it to the "small, victimized company." That is not a measure of damages; it is not relevant to any measure of damages; and it would be unfairly prejudicial to U.S. Tobacco, especially in light of Plaintiffs' continued efforts to represent Conwood as a small company with limited resources, rather than a highly-profitable arm of a huge multi-national conglomerate that dwarfs U.S. Tobacco.

CONCLUSION

Defendants respectfully request an order excluding each of the above-referenced exhibits.

Date: March 6, 2000

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CERTIFICATE OF SERVICE

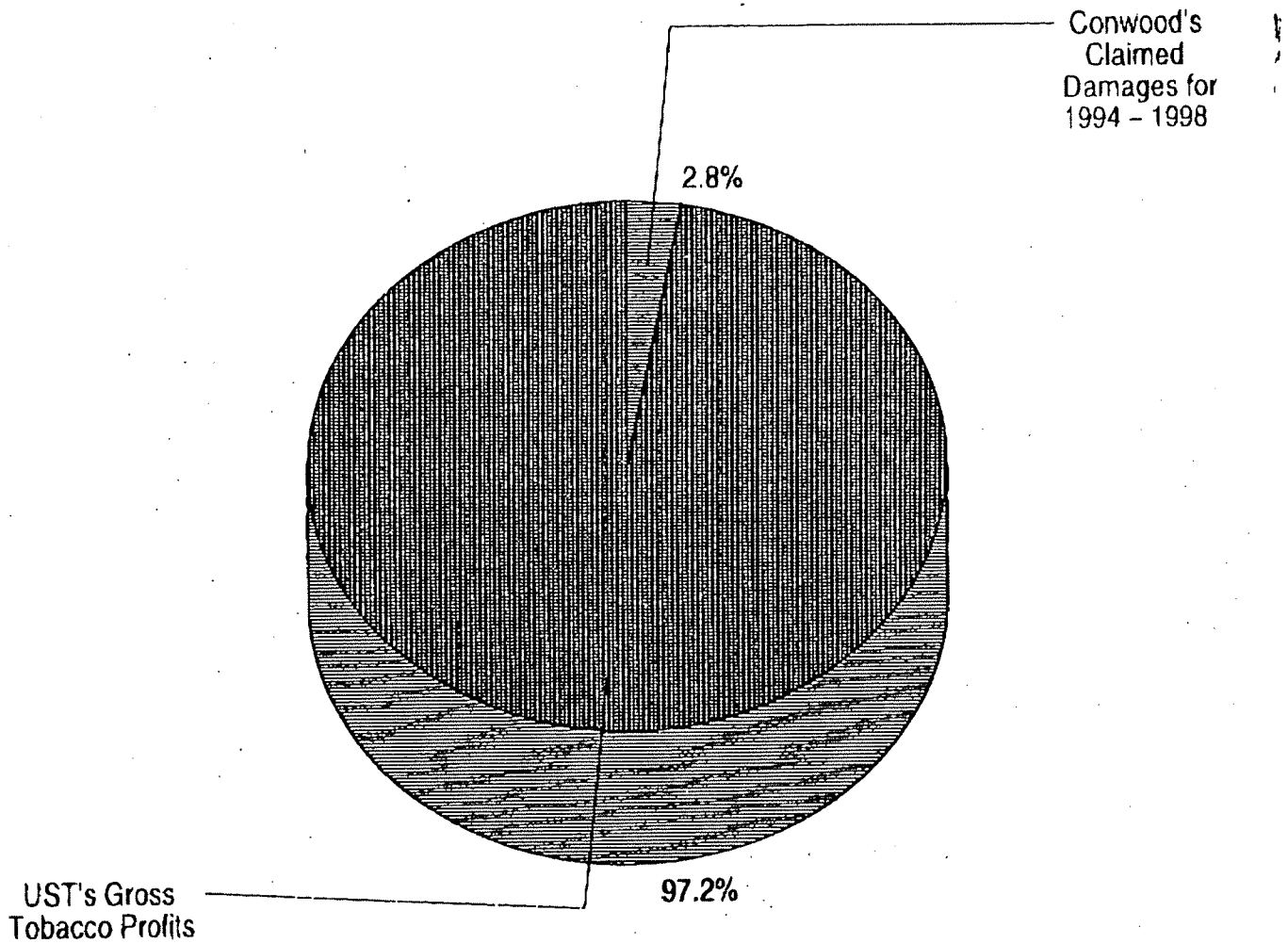
I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., counsel for Plaintiffs, this 6th day of March, 2000.

Counsel for Defendants

16diii004777

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario One



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

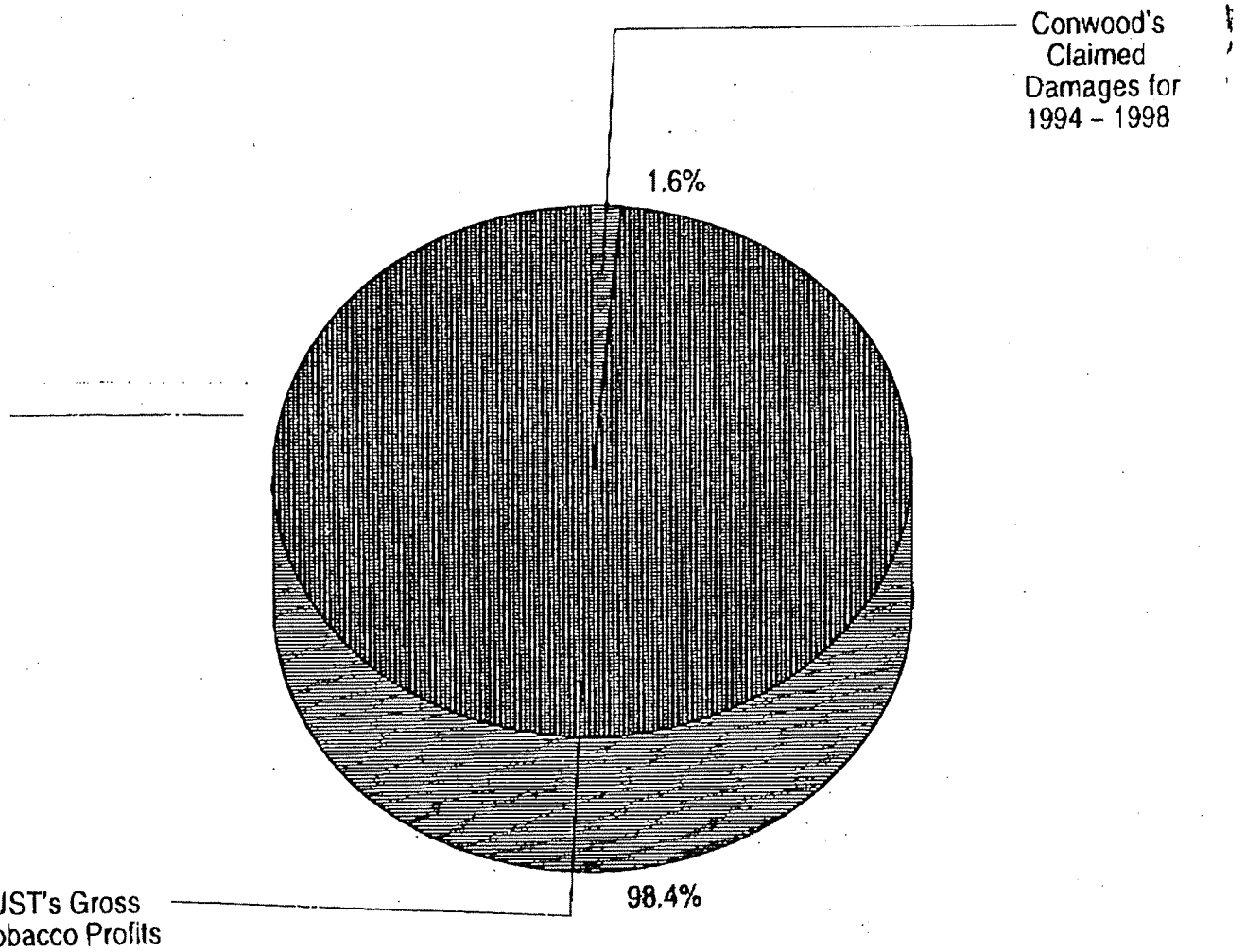
Preliminary - Subject to revision or modification

16diii004778

03/06/00 MON 15:02 FAX

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario Two



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

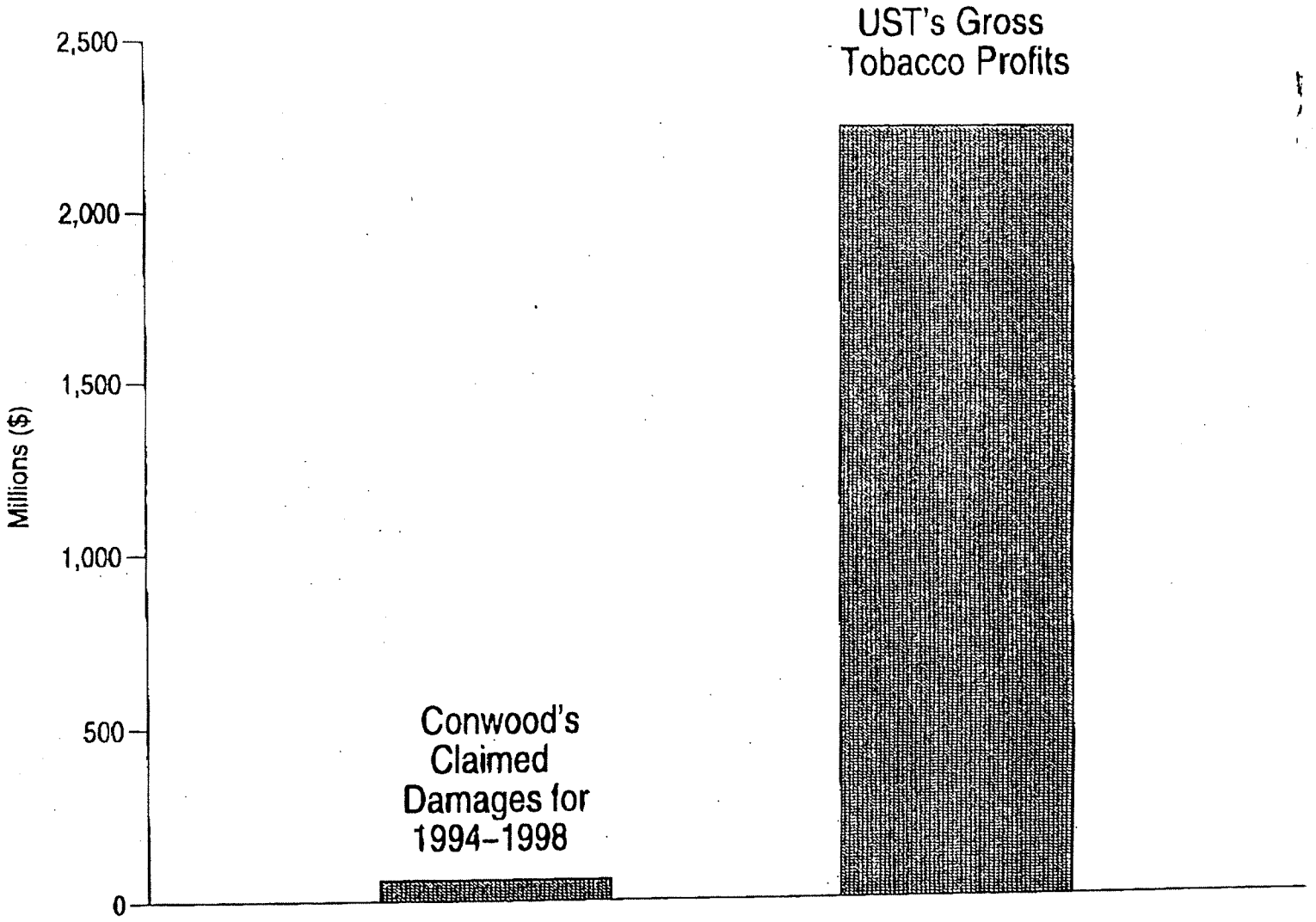
Preliminary - Subject to revision or modification

16diii004779

008

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario One



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

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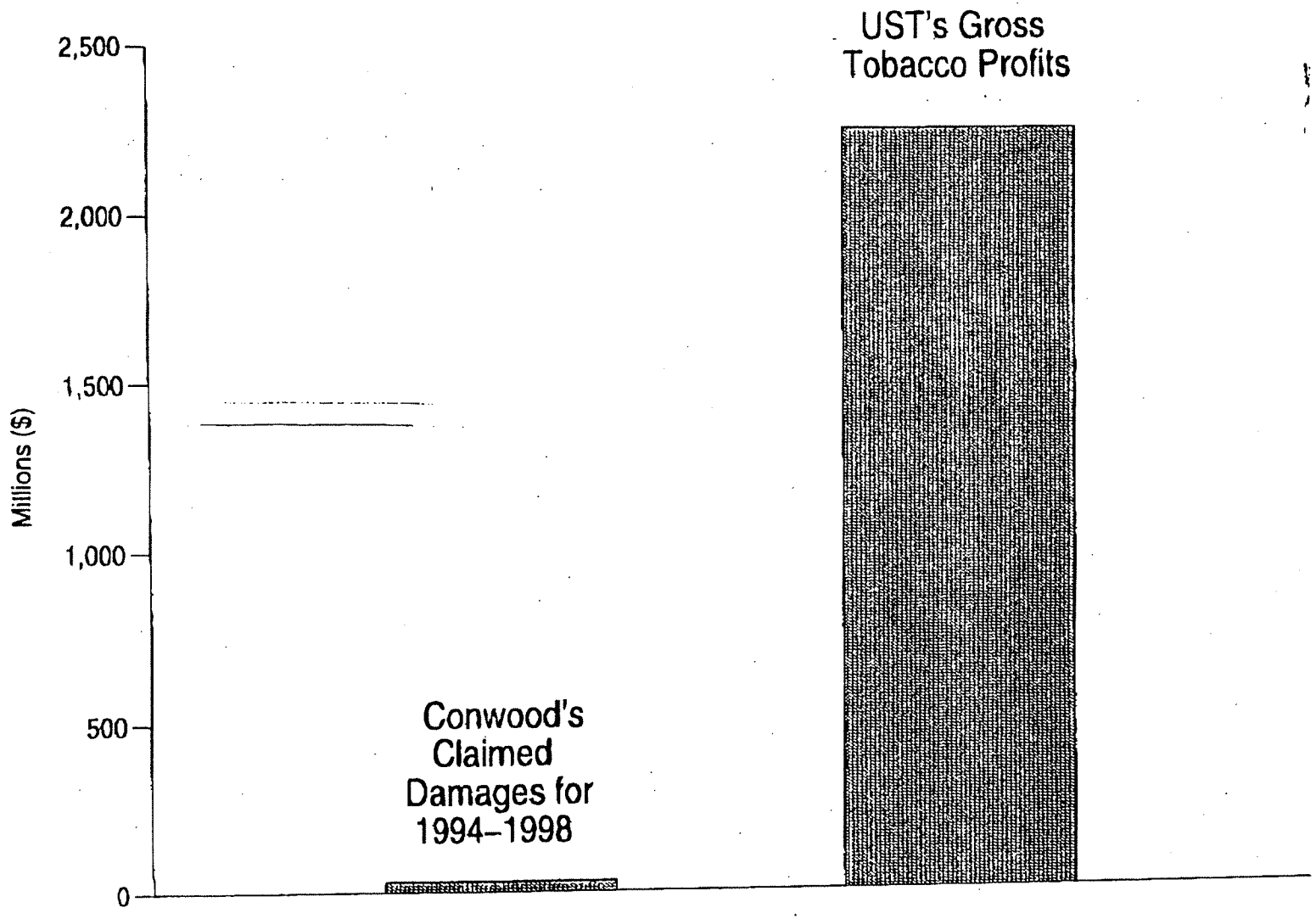
03/06/00 MON 15:03 FAX

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario Two



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

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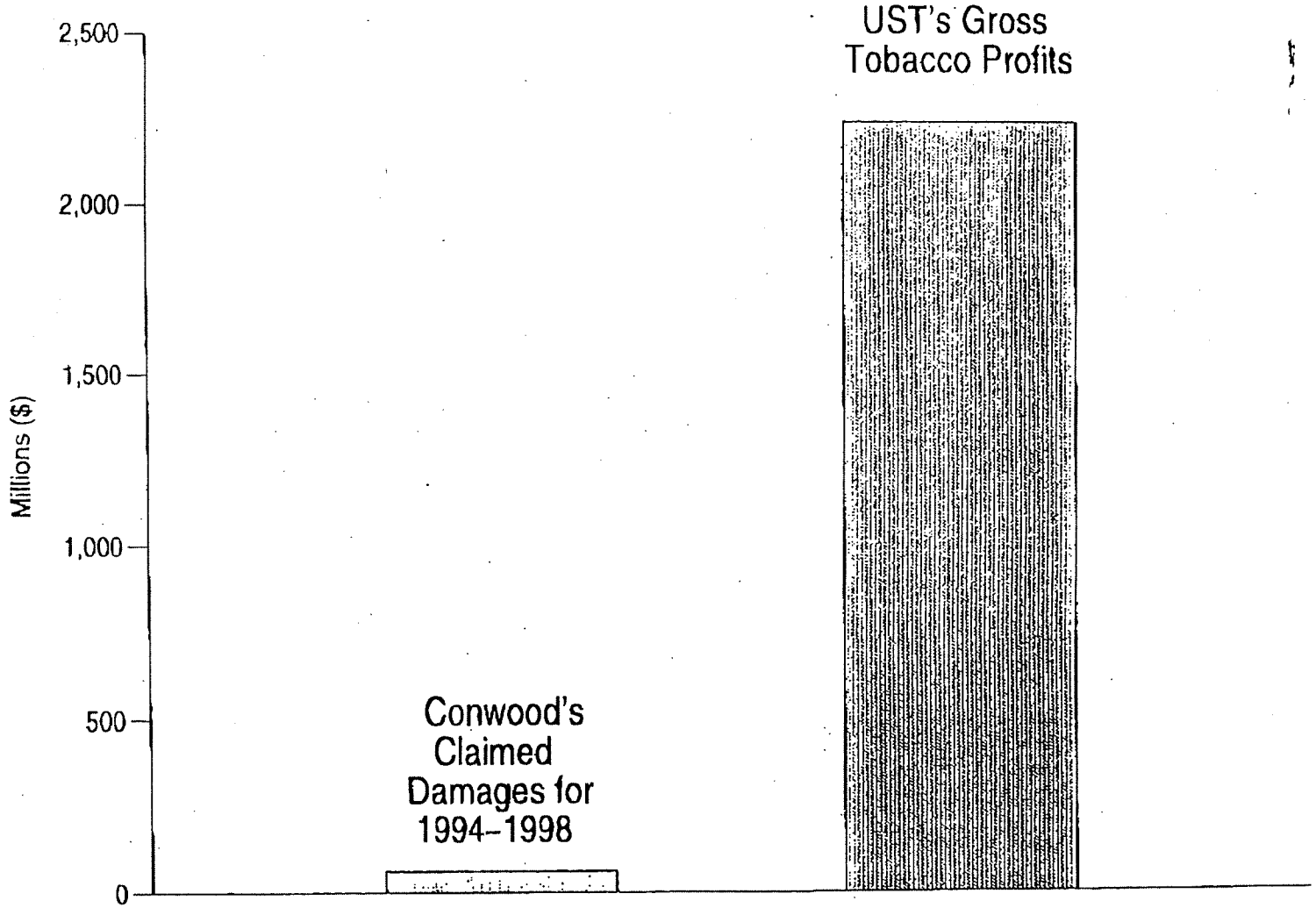
Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Revised 1997 Data



Note: Gross profit defined as revenue minus cost of goods sold.

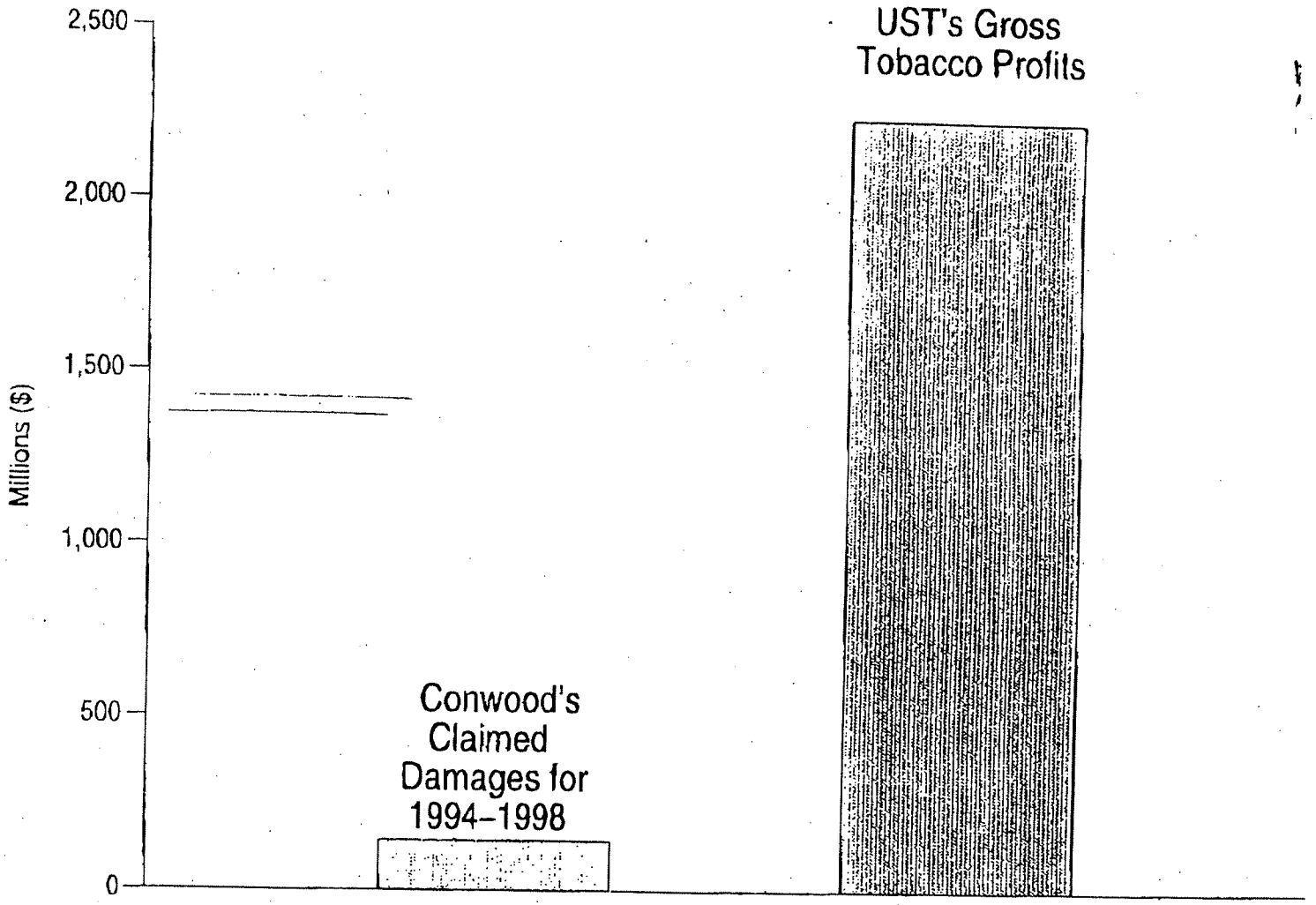
Preliminary - Subject to revision or modification

16diii004782

009

03/06/00 MON 15:04 FAX

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

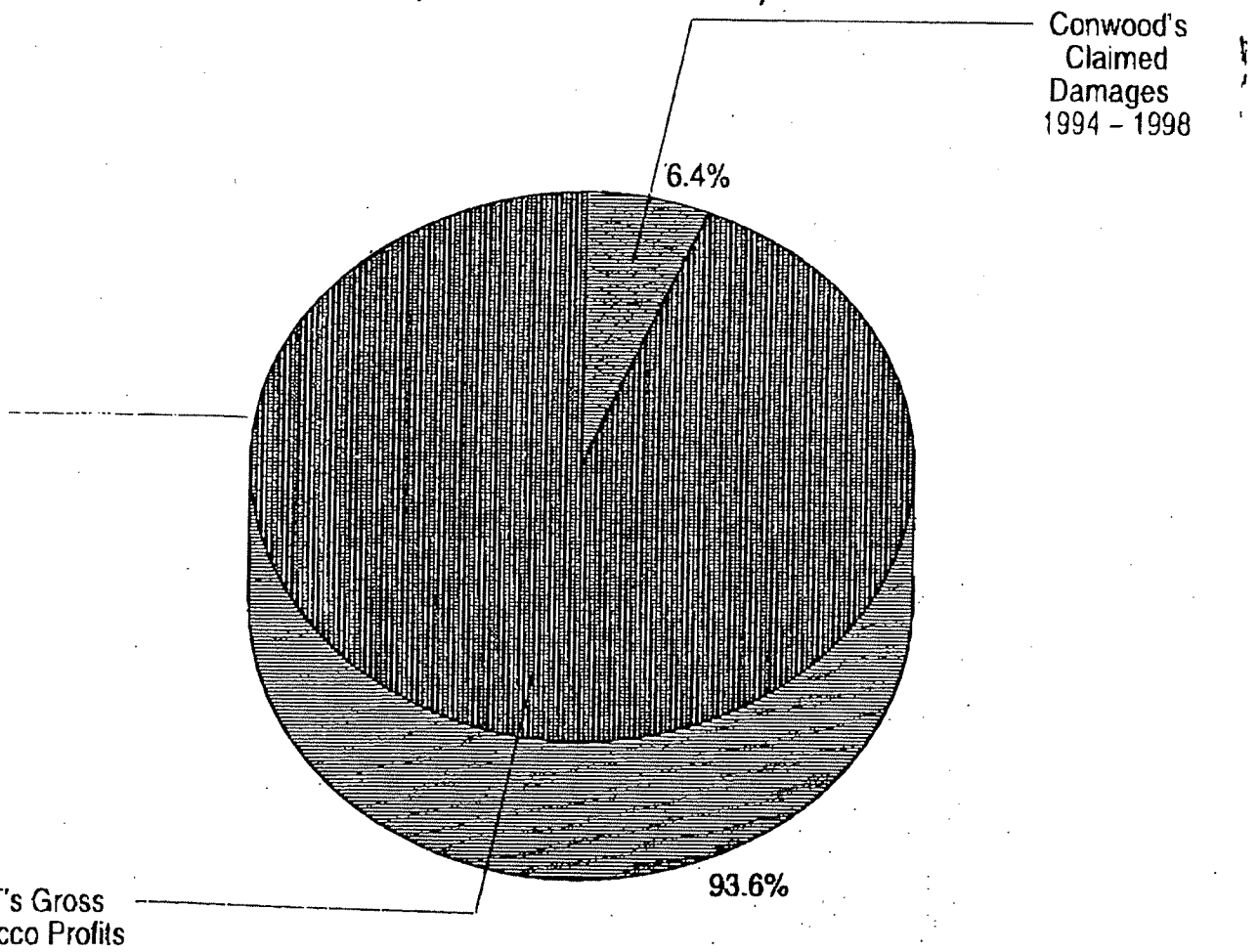


Note: Gross profit defined as revenue minus cost of goods sold.

16diii004783 010

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario One
1997 Share Adjusted Using Scheffman–Type Analysis
(Bad Acts Measure 2)



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

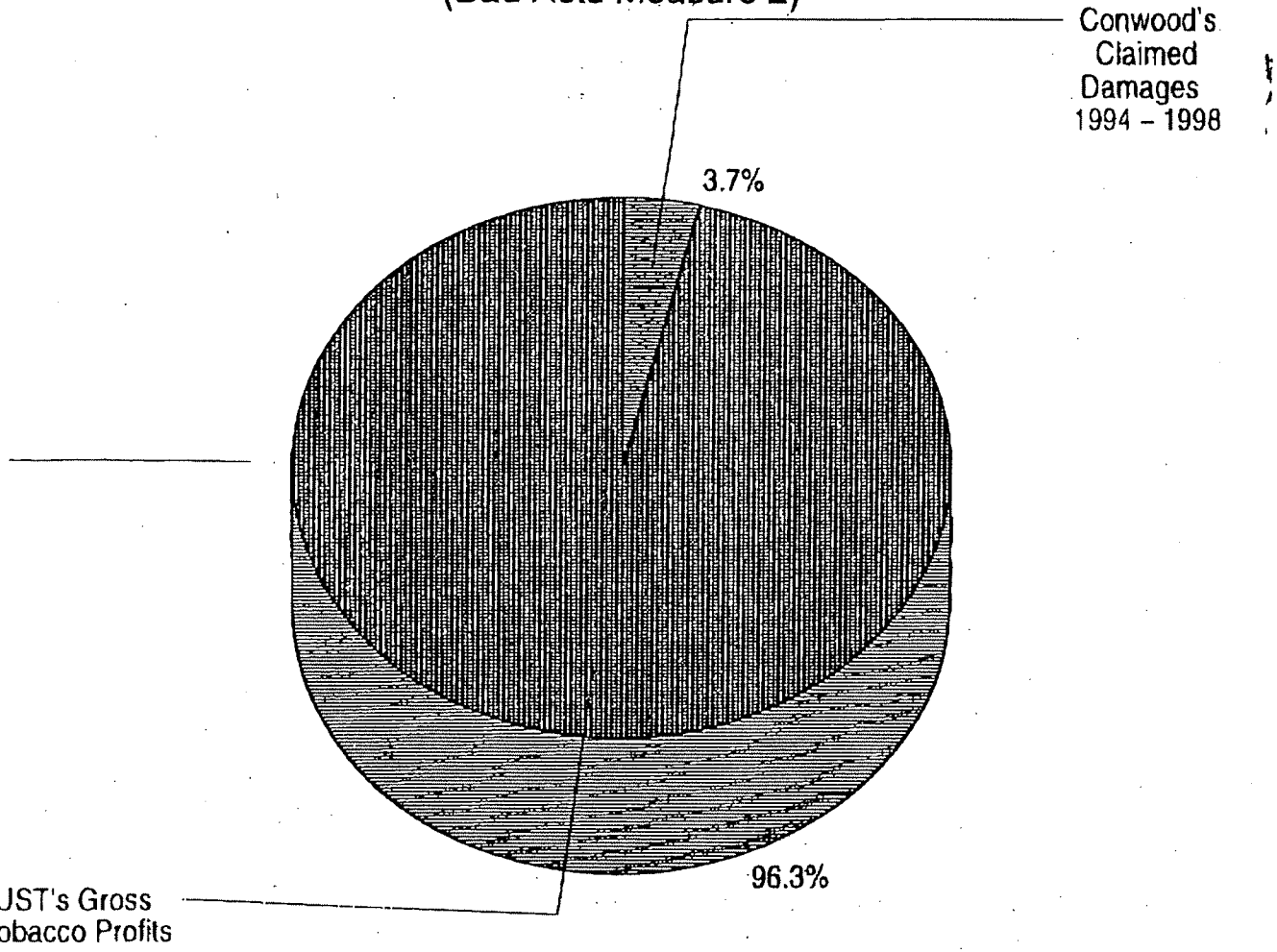
Preliminary - Subject to revision or modification

16diii004784

03/06/00 MON 15:04 FAX 011

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario Two
1997 Share Adjusted Using Scheffman–Type Analysis
(Bad Acts Measure 2)



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

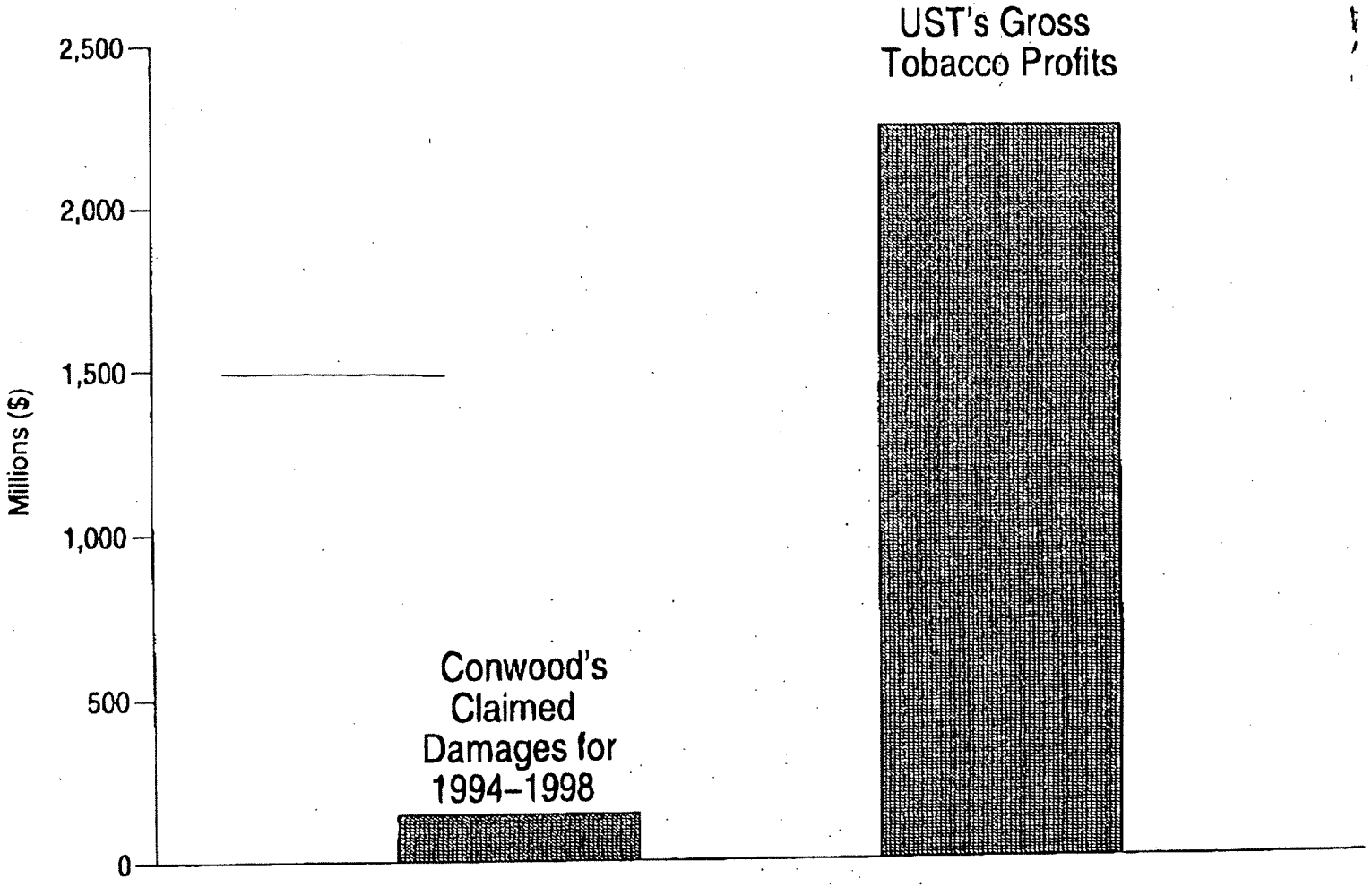
Preliminary - Subject to revision or modification

16diii004785

03/08/00 MON 15:04 FAX 012

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario One
1997 Share Adjusted Using Scheffman–Type Analysis
(Bad Acts Measure 2)



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

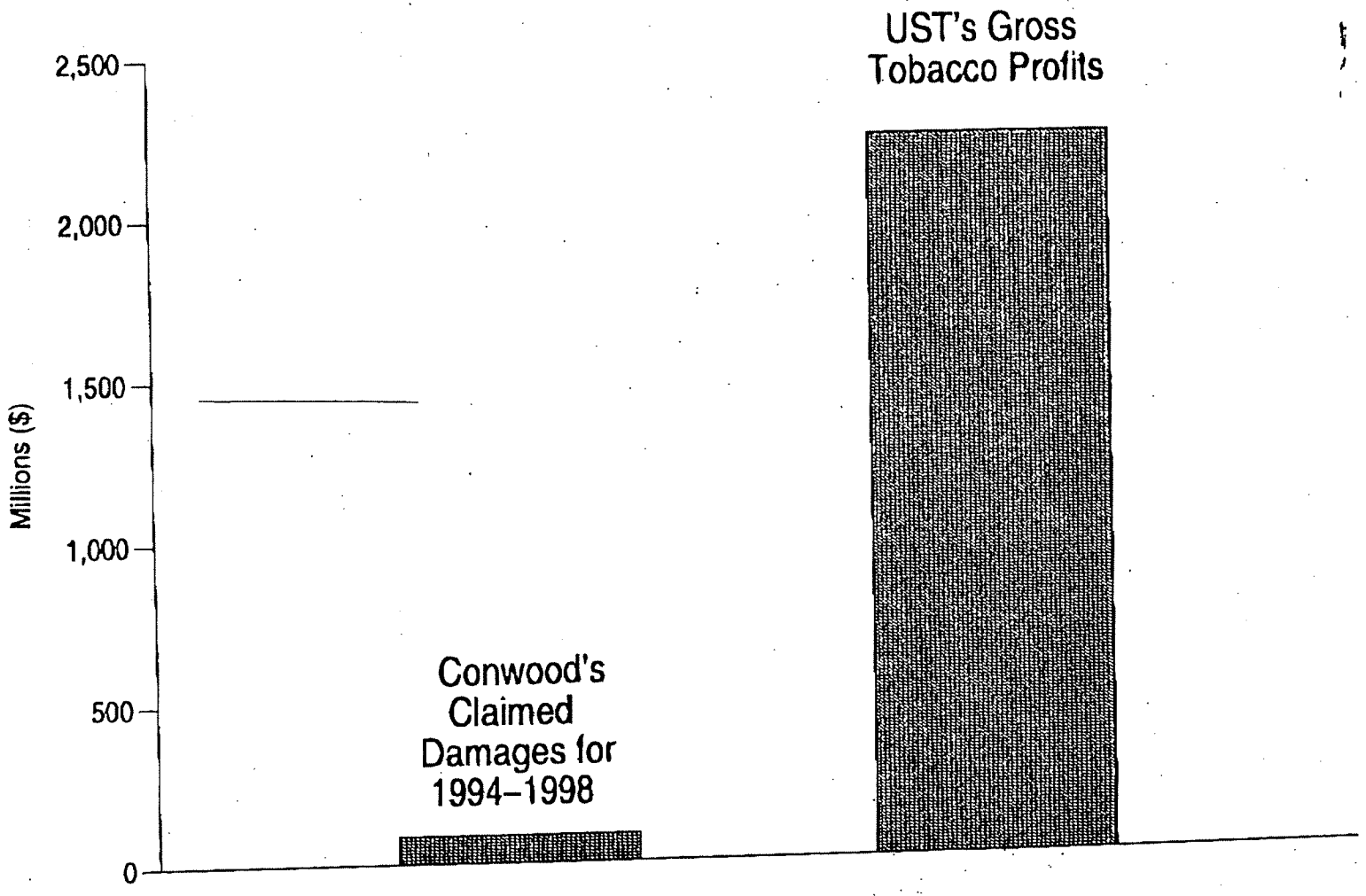
Preliminary - Subject to revision or modification

16diii004786

03/06/00 MON 15:05 FAX 013

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

Scenario Two
1997 Share Adjusted Using Scheffman–Type Analysis
(Bad Acts Measure 2)



Note: Gross profit defined as revenue minus cost of goods sold.

Prepared: January 2000

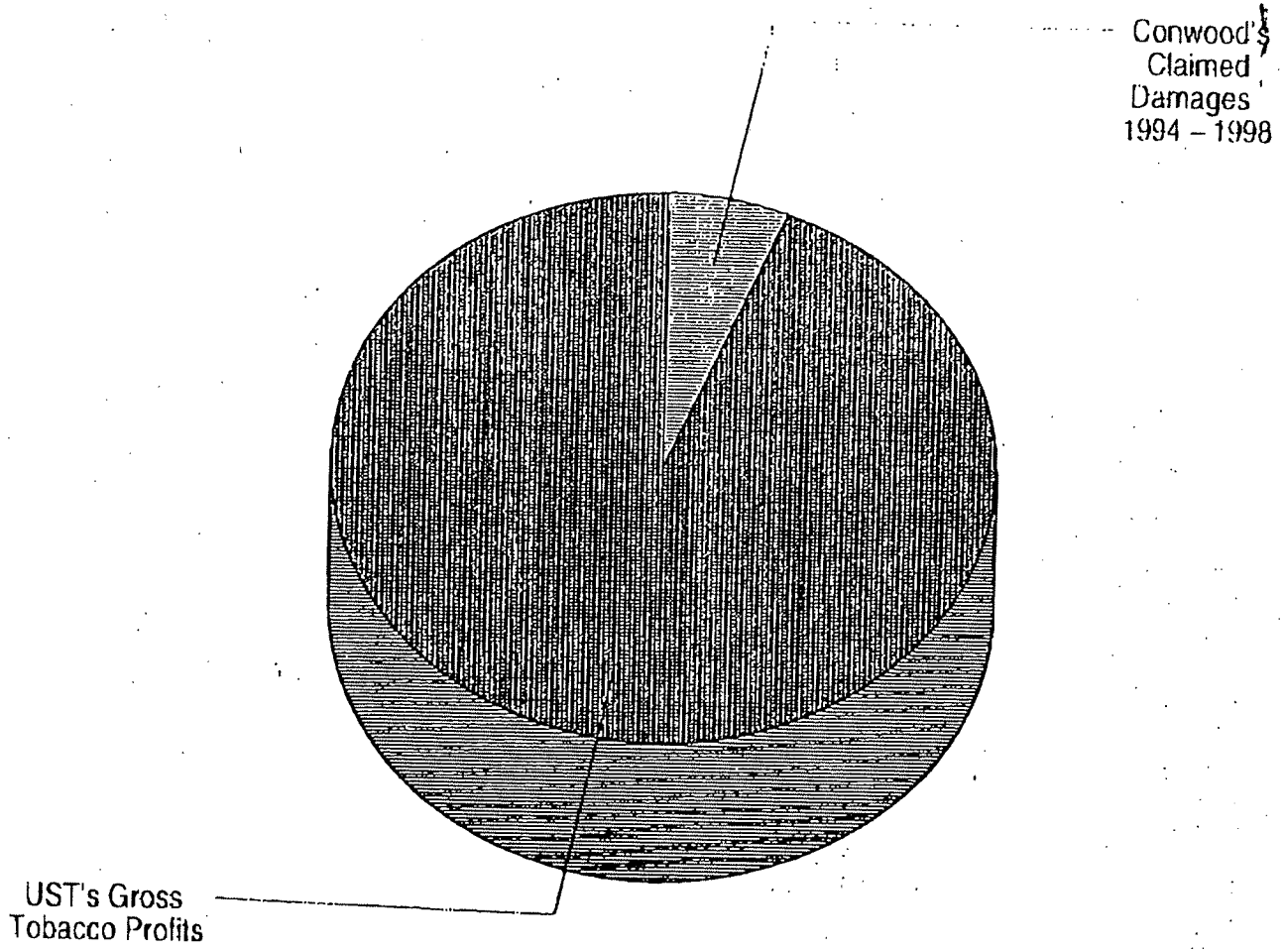
Preliminary - Subject to revision or modification

16diii004787

03/06/00 MON 15:05 FAX 014

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

1997 Share Adjusted Using Scheffman–Type Analysis (Bad Acts Measure 2, Excluding Geographical Indicator Variables)



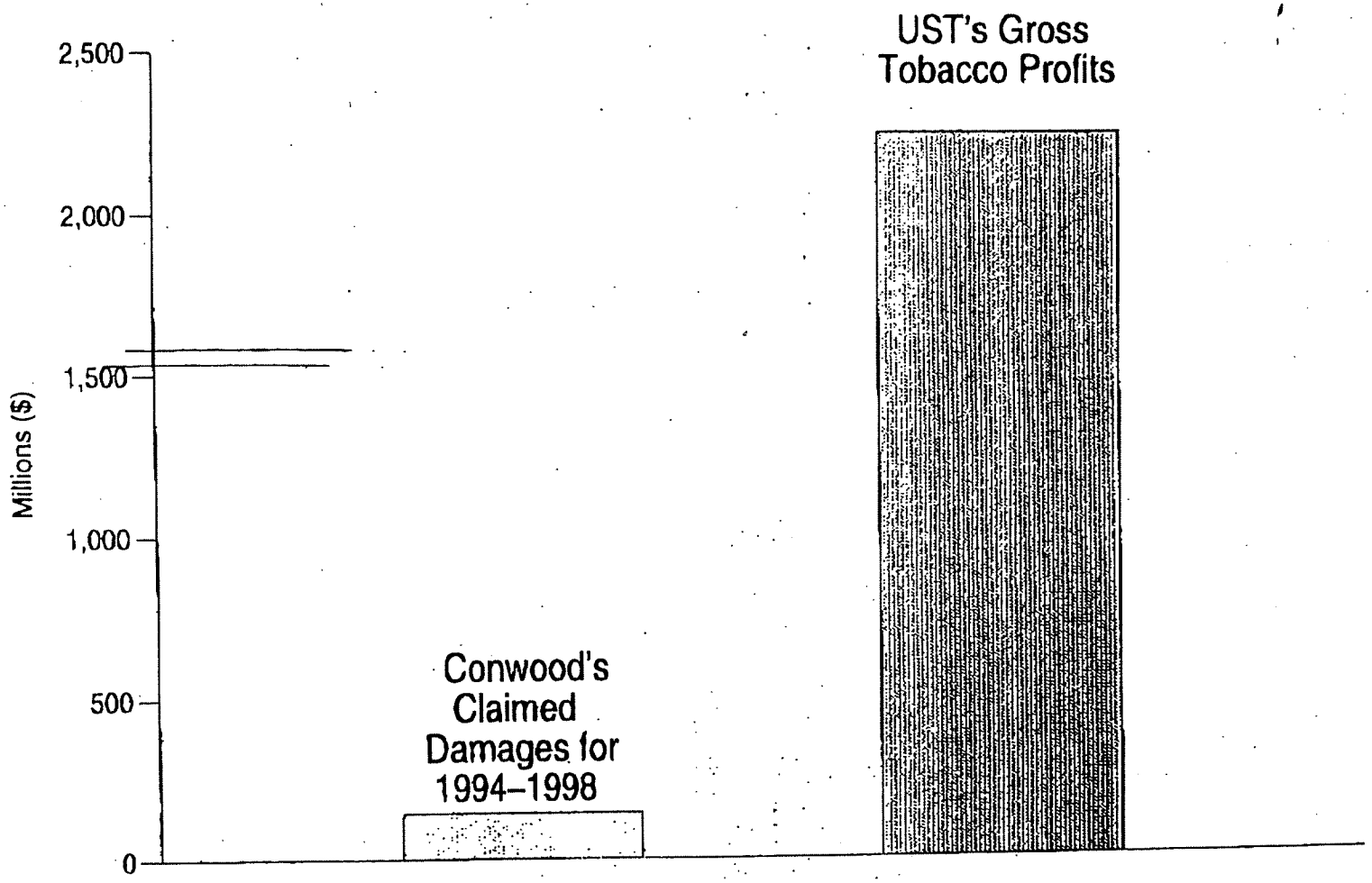
Note: Gross profit defined as revenue minus cost of goods sold.

Preliminary - Subject to revision or modification

03/06/00 MON 15:06 FAX 015

Conwood's Claimed Damages Compared to UST's Gross Profits 1994–1998

1997 Share Adjusted Using Schelfman–Type Analysis (Bad Acts Measure 2, Excluding Geographical Indicator Variables)



Note: Gross profit defined as revenue minus cost of goods sold.

Preliminary - Subject to revision or modification

REED WEITKAMP SCHELL & VICE PLLC

TELECOPIER COVER SHEET

March 7, 2000

TO: Mark C. Hansen / Jessica

TELECOPIER NO.: 270-450-5118

FROM: John S. Reed

NUMBER OF PAGES *(including cover sheet)*: 19

IF ANY PROBLEMS ARISE, PLEASE CONTACT: Karen Childers
(270) 444-6339

RE: *Conwood Company, L.P., et al. v. United Stated tobacco Company, et a., United States District Court, Western District of Kentucky, Paducah Division, No. 5:98-CV-108-R*

MESSAGE:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' PROPOSED EXHIBITS

Plaintiffs disclosed to Defendants demonstrative and trial exhibits for use during the direct examinations of Dr. Gregory Gundlach. Defendants object to certain of these exhibits, as described below See Attachments.

Memorandum In Support of Defendants' Motion For Summary Judgment.

Plaintiffs intend to have Dr. Gundlach, a marketing professor, discuss a memorandum of law filed by U.S. Tobacco in support of their motion for summary judgment. Any such discussion is irrelevant to Dr. Gundlach's opinions (primarily that U.S. Tobacco has "exclusive agreements" with certain retailers), and would not assist the jury in deciding any factual issues. See Fed. R. Evid. 702. The obvious intent of this tactic is to put before the jury those facts that U.S. Tobacco

assumed arguendo for purposes of arguing for summary judgment, a distinction that may be lost on the jury. Such disclosure would be misleading and unfairly prejudicial to U.S. Tobacco.

Choking Competitive Distribution. Defendants object to this exhibit because the title is unduly inflammatory and unfairly prejudicial to U.S. Tobacco.

The Gundlach Study. Plaintiffs also submitted a third version of Dr. Gundlach's study, this time including a column entitled "details of agreement," under which Dr. Gundlach describes the purported agreement with terms such as "x vendor" or "x header." Plaintiffs also submit separate charts tabulating the number of each type of agreements. During his deposition, however, when asked which agreements listed in his study pertained to exclusive vending, which pertained to exclusive POS, and which pertained to exclusive planograms, Dr. Gundlach testified that he did not "characterize the different types of exclusionary features." See Gundlach Dep. 155-56. Dr. Gundlach should not be allowed to avoid a question, effectively preventing cross-examination, and then present the opinion to the jury.

CONCLUSION

Defendants respectfully request an order excluding each of the above-referenced exhibits.

Date: March 7, 2000

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., counsel for Plaintiffs, this 7th day of March, 2000.

Counsel for Defendants

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Choking Competitive Distribution

- **Internal UST documents**
  - Describe rack and POS removal
- **Former UST employees**
  - Explain company policy of removing racks and POS by any means necessary
  - Current UST employees
  - Do not deny that they removed racks and POS or encouraged others
- **Retailers**
  - Testify to the pervasive nature
  - At least 1171 written complaints
- **Conwood Employees**
  - Executives testify that unauthorized rack removal is frequent, pervasive and nationwide
  - Field employees complain that they spend up to 50% of their time replacing racks and POS removed by UST.

UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
Albertson's, N. California	48	1999 Chain Store Guide directory, p. 75	1/24/98	x vendor (3101)	USTC/CWD 564037-51
Allsups	309	USTC/CWD 040670	9/9/98	x vendor, x header	CWD 0100020483
Altheimer Oil	15	IRM Data	6/7/96	x vendor	USTC/CWD 523029
AM/PM	400	UST/CWD 261479	1998	x vendor; 3-facing Cwd. Header allowed; No Other Cwd. POS (No. Cwd. Side POS or vending labels)	USTC/CWD 158601 - 603
Amar Oil	15	USTC/CWD 532034	3/5/98	x vendor	USTC/CWD 532033
American Gas & Oil	15	IRM Data	3/26/98	x vendor	USTC/CWD 933957
Amoco	580	UST/CWD 261479	1997	x vendor	USTC/CWD 688200
A-Plus Mini Market (Sunoco)	415	1999 Chain Store Guide directory, p. 951	1996	x vendor	USTC/CWD 912675 - 77
Blue Sky Petroleum	32	USTC/CWD 969651	1998	x vendor	USTC/CWD 969648 - 51

UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
BP Express	184 (BP AMOCO Plc)	1999 Chain Store Guide directory, p. 817	1997	x vendor (except Helme)	USTC/CWD 254391
Bradford Oil (Go Go Marts)	11	CWD 1025006231	3/16/98	x vendor	USTC/CWD 1380255
Circle K (SSP)	172	USTC/CWD 040670 and USTC/CWD 325015	11/12/98		USTC/CWD 517073
Circle K (TOSCO)	2400	www.tosco.com	1/29/98	x vendor	USTC/CWD 969509
Circle N	6	USTC/CWD 532474	6/10/96	x vendor	USTC/CWD 532474-76
Co Go's	60	IRM Data	3/24/98	x vendor	USTC/CWD 825722 - 26
Coastal Mart	600	UST/CWD 261479	3/12/97	x vendor	USTC/CWD 577007-15
Coastal Maverick	155	USTC/CWD 325015	6/8/98	x vendor	USTC/CWD 517323-324
Conoco	300	UST/CWD 261479	6/4/96	x vendor; x header	USTC/CWD 969469
Cracker Barrel	57	USTC/CWD 532492-95	3/13/96	x vendor	USTC/CWD 532491-95
Crockett Oil	11	IRM Data	5/2/96	x vendor	USTC/CWD 532552-582

UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
Crown Central Petroleum	222	6/16/99 Depo. of H. Heylmun at 44.	1996-1998	x vendor, until sometime in 1998	6/16/99 Depo. of H. Heylmun at 43-45.
Crystal Flash	27	IRM Data	1995-1998	x vendor (2908), until Cwd. Lawsuit	USTC/CWD 286194-196
Dash In	25	IRM Data	4/15/96	x vendor; x header	USTC/CWD 772155 - 58
Depot Food Stores	52	1999 Chain Store Guide directory, p. 958	3/6/95	x vendor	USTC/CWD 969192 - 193
Eagle Food Centers	107	IRM Data	8/12/98	x vendor (except Helme)	USTC/CWD 808707
Exxon, BHT	15	USTC/CWD 532058	4/12/96	x vendor	USTC/CWD 532056
Exxon, USA	780	UST/CWD 261479	1996	x vendor	USTC/CWD 760486

UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
E-Z Mart	410	IRM Data	7/8/97	x vendor, x POS	USTC/CWD 576985; USTC/CWD 576982
Fas Mart	89	1998 Chain Store Guide directory, p. 1013	1995	x vendor, x POS	USTC/CWD 613178
Food Chief Stores	29	USTC/CWD 500258	1998	x vendor; x header	USTC/CWD 500245-258
Gas City	41	IRM Data	10/8/98	x vendor	USTC/CWD 517428
Giant Foods	175	www.giantfood.com	pre-April 1998	x vendor	USTC/CWD 210723 - 725
Golden Pantry	88	USTC/CWD 968584	7/14/98	x vendor; x header	USTC/CWD 968584
High's of Baltimore	119	IRM Data	1998	x vendor; 10 UST facings, 3 Cwd.	USTC/CWD 582106 - 111
Ingle's	200	www.ingles-markets.com	1/29/98	x vendor (except Helme)	USTC/CWD 608190

UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
Kmart	2180	www.Kmart.com	1997	x vendor; x POS	USTC/CWD 157844 - 48 and 157849-50; Deposition of Entwistle at 57-58
Kroger, Atlanta	155	1999 Chain Store Guide directory, p. 149	7/31/98	x vendor; x header	USTC/CWD 884436 -441
Kum & Go	125	UST/CWD 261479	1998	x vendor	USTC/CWD 800236-238
Minit Chek Food Stores	8	1999 Chain Store Guide directory, p. 803	4/29/96	x vendor; x header; x POS	USTC/CWD 885246 and 885247
Mobil	600	UST/CWD 261479	9/6/96	x vendor	USTC/CWD 948431-433
Odessa Corp. (Champlain Farms, Fast Stop)	49	CWD 1025006231	3/2/98	x vendor	USTC/CWD 1380254
One Stop	27	6/16/99 Depo. Of H. Heylmun at 43.	1998	x vendor x header	6/16/99 Depo. Of H. Heylmun at 43.
PDQ Convenience Stores	45	USTC/CWD 331829 (appears to be misdated)	1996 est. Context of report indicates doc. was written in 1996.	x vendor	USTC/CWD 331829-832
Pelican State Fina	35	USTC/CWD 536126	4/2/96	x vendor	USTC/CWD 536122
Pit Row	10	IRM Data	1997	x vendor, x header	USTC/CWD 688459 - 461
QuikTrip	329	1999 Chain Store Guide directory, p. 944	6/17/98	x vendor (3201)	USTC/CWD 609441 - 48
Rainbow Foods	41	1999 Chain Store Guide directory, p. 347		x vendor; x header	7/9/99 Depo. Of D. Blackburn at 26-28.

UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
Rapid Roberts	19	USTC/CWD 512852	10/16/97	x vendor	USTC/CWD 512649 - 652
Sentry Food Mart (VA)	59	1999 Chain Store Guide directory, p.	4/4/96	x vendor	USTC/CWD 760370 - 74
Sentry Food Mart (WI)	100	USTC/CWD 331829	3/10/97	x vendor (2908)	USTC/CWD 808017
Southland (7-Eleven)	2500	UST/CWD 261479	4/1/97	x vendor; x header; No competitive double facings	USTC/CWD 025956 - 964; 7/9/99 Depo of D. Untiedt at 103-105.
Spectrum Stores	48	USTC/CWD 970961	9/13/96	x vendor	USTC/CWD 970980
Spee D Foods	13	IRM Data	May 1997 to May 1998	x vendor	USTC/CWD 985245 - 249
Stop In Food Stores	63	IRM Data	1996	x vendor	USTC/CWD 952556-60
Sun Up Convenience (Service Oil Co.)	7	IRM Data	4/9/96	x vendor	USTC/CWD 985389
The Pantry	915	USTC/CWD 888769-71	3/22/96	x vendor; x header (except Helme)	USTC/CWD 704636 - 37
Thrifty Liquor	12	USTC/CWD 536470	3/10/98	x vendor	USTC/CWD 536469-71
Tom Thumb	148	USTC/CWD 254389	5/9/97	x vendor (all Helme discont. & only 3 Cwd. Brands)	USTC/CWD 254388 - 390

UST EXCLUSIVE AGREEMENTS (1995 - PRESENT)

Chain Name	Number of Stores	Citation for Number of Stores	Agreement Date referenced	Details of Agreement	Citation for Exclusivity
Turkey Hill Minit Markets	230	USTC/CWD 984429	7/3/97	x vendor	USTC/CWD 984432-433
United Dairy Farmers	209	IRM Data	1/29/98	x vendor; x POS	USTC/CWD 888816 - 17;USTC/CWD 734222 - 228; see also USTC/CWD 888480
Waco Oil	18	USTC/CWD 516673	1998	x vendor (most have 3203)	USTC/CWD 516673-80
Wal*Mart	2300	UST/CWD 261479	11/15/96	x vendor; x POS	7/8/99 Depo. Of D. Blackburn at 32; 7/9/99 Depo of D. Untiedt at 222-225; USTC/CWD 274518
Walgreen's	2200	USTC/CWD 040871	1997	x vendor; x POS	USTC/CWD 517580
Wawa	500	USTC/CWD 297457	4/1/97	x Moist Smokeless POS on cigarette rack (Do not use moist racks)	USTC/CWD 297451-457
Winn Dixie, Atlanta	94	1999 Chain Store Guide directory, p. 149	3/25/97	x vendor	USTC/CWD 254584
TOTAL	21184				

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UST's Exclusive Vending Agreements

(Top Chains by Number of Stores)

Chain	Number of Stores	Exclusionary Features
• Southland	2500 locations	Exclusive single can rack, no competitive double facings
• Wal Mart	2300 locations	Exclusive rack
• Circle K	2400 locations	Exclusive rack
• Walgreens	2200 locations	Exclusive rack
• Exxon	780 locations	Exclusive rack
• Mobil	600 locations	Exclusive rack (except Helme)
• Coastal Mart	600 locations	Exclusive rack

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UST's Exclusive Vending Agreements

(Top Chains by Sales)

Chain	1997 Units Sold	Exclusionary Features
• Wal Mart	43,400,000 cans	Exclusive rack
• Southland	14,300,000 cans	Exclusive rack, no competitive double facings
• Circle K	9,000,000 cans	Exclusive rack
• Exxon	2,000,000 cans	Exclusive rack
• Coastal Mart	1,400,000 cans	Exclusive rack
• Mobil	995,000 cans	Exclusive rack (except Helme)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

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CONWOOD COMPANY, L.P., :
CONWOOD SALES COMPANY, L.P., :
Plaintiffs, : Civil Action No.
v. : 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, :
UNITED STATES TOBACCO SALES AND :
MARKETING COMPANY, INC., UNITED :
STATES TOBACCO MANUFACTURING :
COMPANY, INC. and UST, INC., :
Defendants. :

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Washington, D.C.
Friday, October 15, 1999

Deposition of GREGORY T. GUNDLACH, a witness herein, called for examination by counsel for Defendants in the above-entitled matter, pursuant to notice and agreement, the witness being duly sworn by FERNITA R. FINKLEY, a Notary Public in and for the District of Columbia, taken at the offices of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., at

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A. Well, if the CAP contract calls for exclusive vending and both parties had signed the CAP contract, agreed to those terms. I imagine normal course that's what would happen in the retail institution. I would say probably utilize a somewhat conservative approach based on the documents that were provided and also representations made by UST employees. If the contract says exclusive vending that would be in my mind sufficient to suggest that that's what's going to occur in the marketplace given UST's dominant position ability to enforce that contract.

Q. Is it your testimony today that 35,000 locations have a CAP contract that require exclusive vending?

A. It's my understanding that upwards towards that vicinity have exclusionary features, yes.

Q. That wasn't quite my question. I was talking about exclusive vending specifically.

A. Again I haven't focused my -- in deriving that number I was focusing mainly on exclusionary features, not necessarily just the use of exclusive vending.

Q. What did you do to determine the number of CAP participants that had exclusive racks?

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A. Well, again I didn't necessarily attempt to determine as a counting criteria the number of particular forms of exclusion, but more or less I was looking to the end result of whether or not exclusion was occurring as a result of the -- as represented by the documents that I had looked at.

Q. And what kind of quantitative analysis did you do to assess the number of CAP participants that had exclusive United States Tobacco point-of-sale materials in their stores?

A. Again I looked at the various representations as evidence in the contracts themselves, UST documents, UST memoranda, and derived from there an understanding of the overall level of exclusion, and my criteria more focused on that level than trying to make a distinction between whether or not it was a rack or whether or not it was POS on a rack or whether or not it was a rack and POS or whether or not it was a display versus a rack versus a modular. My focus was mainly on the exclusionary forms of agreements.

Q. Is it fair to say that you did not do anything quantitatively to separate out the different exclusionary features you identify in your report?

MR. GUZMAN: Objection, ambiguous, you're still referring to exclusive in the CAP?

MR. ATHANASIA: Uh-huh.

THE WITNESS: Again I looked at the different documents that were available to me in the contracts as they represented the number of retail institutions where these features if one assumes that when one signs a contract the parties agree to the particular attributes of the arrangement, felt in rendering my opinion that was sufficient enough to be an indicia of some form, type of exclusion.

BY MR. ATHANASIA:

Q. I'm just trying to get a sense of if I were to separate exclusive vending from exclusive point-of-sale materials from what you call adherence to plan-o-grams, what work did you do within the CAP universe, CAP participants, did you do to separate those out and quantify each?

A. Well, as I mentioned I focused mainly on the level of exclusion and accepted the particular documents as they related to different forms of exclusion. After all the criteria of interest here is not whether or not a competitor has been injured by exclusion of a competitor's rack or POS. The important criteria is whether or not exclusionary outcomes have impacted competition.

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Q. So if I'm understanding you is aggregate all of the different types of exclusion as sort of one limit of exclusionary feature?

A. In a sense I looked at the various arrangements, identified whether or not they contained exclusionary features and considered various indicia to make that determination including agreements, contracts, memoranda, discussing those agreements, I used that as my basis then as far as obtaining whether or not exclusion was present. I then identified the number of retail locations of which those particular features would apply.

Q. In paragraph 15 of your rebuttal report I think you refer to this number you have alluded to of 22,000 retail locations?

A. Find my rebuttal report here.

Q. You see that reference to the 22,000?

A. I actually see two references, which one are you speaking to.

Q. The one on page 7?

A. I do see that.

Q. Actually the first reference, the 22,000, I'm sorry you state based upon the available record it appears that UST has exclusive agreements with retailers representing nearly 22,000 locations. Now

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earlier you made a distinction and corrected me because you said you used the term exclusionary while I was using the term exclusive. Do you see the term exclusive agreements in the sentence I just read?
A. Yes, I do.
Q. Do you want to change that to exclusionary?
A. No. As I mentioned earlier in the beginning of our day today that the term is used somewhat interchangeably. The distinction might be viewed something along these lines. Exclusive would refer to the mechanism through which the outcome is derived with that outcome being exclusionary. So in a sense they're hand in glove type of terminology with some loose use of both in particular areas. So here I'm referring to the particular agreements and the fact that they contain exclusive features.
Q. And what exclusive features do these exclusive agreements include? I'd just like a complete list of what you're talking about, exclusive features.
MR. GUZMAN: Objection. The question is ambiguous.
THE WITNESS: Common theme -- and again what we're talking to here now apart from the CAP are

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a variety of different types of agreements that are obtained by UST and arrangements with retailers. The common themes that come through in these arrangements and agreements generally are exclusive vending referring to the rack or vending modular and exclusive POS on that rack and typically also adherence to required plan-o-grams for use in those racks.
BY MR. ATHANASIA:
Q. Now out of the 22,000 retail locations, just let me clarify that would include if there were say 2,000 locations in a retail chain would that be -- count as one or as 2,000 in this 22,000 number?
A. That would count as a retail location meaning one.
Q. So a whole chain of 2,000 stores would count as one out of this 22,000?
A. No. Clarification.
Q. Each store would be one location?
A. Each store would count as one of that 22,000, each retail location.
Q. Out of the 22,000 retail locations, how many have exclusive vending from your study?
A. Again my point of reference was not necessarily to characterize the different types of

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exclusionary features but merely to determine whether or not exclusion was present or not.
Q. And would that be the same answer for if I tried to ask you just the number that had exclusive possible features?
A. Yes, it would.
Q. And also the third thing you described, adherence to require plan-o-grams?
A. Yes, it would.
Q. How about what we talked about earlier about a company getting the number one position and as you said excluding the -- another company from the number one position, would that be included in this 22,000?
MR. GUZMAN: Objection. The question is ambiguous.
THE WITNESS: To the extent that I've characterized three major themes, the positioning of an exclusive display as you characterize it or a display in the number one position or the number two position, to the extent that I would view that as being exclusionary, it may or may not have been considered to be exclusionary. I would have to look at the, you know, the context of the specific circumstance and this gets to your point of

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identifying the particular features segregating them into components because in this particular case what we're looking at is often a combination of a variety of exclusionary features that in isolation may mean one thing but in aggregate may mean something entirely different.
BY MR. ATHANASIA:
Q. The third common theme you referred to is adherence to required plan-o-grams. Can you tell me what you mean by that? Are you referring to a retailer who cedes control of the product mix decisions in the stores to United States Tobacco?
A. What I'm describing here in terms of adherence to exclusionary plan-o-grams would be through some mechanism through some approach or process the -- UST is able to obtain the agreement of the retailer to utilize and implement a plan-o-gram that results in exclusionary outcomes.
Q. And can you just describe to me what you mean by exclusionary outcomes?
A. These would be arrangements where the number of products were reduced in terms of facings for a competitor product where the number of total products may have been reduced along with and part of the reduction of the number of facings of the

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competitive product. Those would be two examples of what I mean by plan-o-gram that contains exclusionary features.

Q. Do you know of any retailer that has implemented a plan-o-gram that completely excluded all Conwood products from the store?

A. If I recall correctly and I'm having to reach here because there's so many different retailers, but I believe Eckerd drugs has and does carry only UST product. As I sit here today whether or not my recollection is as based on some derived plan-o-gram or some other arrangement reflective of the number of products being reduced, I think that's a representation of a circumstance that's resulted in a plan-o-gram that has excluded other competitive product.

Q. Now would it surprise you if I told you that Eckerd Drugs actually carries only Conwood products?

A. It would be informative and it would be in contrast to what my understanding of the record was. It would be useful information, sure.

Q. Now have you ever seen a plan-o-gram that did in fact reduce the total number of products carried in the store?

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MR. GUZMAN: Objection. The question is ambiguous.

THE WITNESS: I do recall documents, internal memoranda discussing on the part of UST representatives their ability to obtain plan-o-grams that did in fact reduce the number of products in the store, product facings. As I recall I do or did or have seen plan-o-grams that resulted in the reduction of a number of facings for all products and reduction in the number of facings for Conwood's products. There's a variety of evidence that has led me to believe that there are plan-o-grams, many instances that have reduced -- I'll say this, I haven't seen one that asked for a number of increases in the number of facings.

BY MR. ATHANASIA:

Q. Have you seen evidence of plan-o-grams that reduce the number of United States Tobacco facings?

A. Yes. I have, yes, I have.

Q. Is that exclusionary to United States Tobacco?

A. Again I think the -- to determine whether or not it's exclusionary, here's where we keep getting confused, we need to determine what the

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result is in the competitive marketplace. What we're focusing on now is the mechanism. The determination of exclusionary really refers to what's happening in terms of competition, so we focus on a particular plan-o-gram is really half the story.

Q. Well, if a plan-o-gram reduces the number of United States Tobacco products in the rack and a consumer can't find, I don't know, Skoal Key, is that exclusionary?

A. Again if we use the term exclusionary to mean what is the competitive result and whether or not competition has been dampened or constrained or limited, it's difficult to tell without characterizing the entirety of the circumstance.

Q. Are all plan-o-grams that reduce the total number of products that are available on the shelf exclusionary?

A. Again to make a general statement that all plan-o-grams that reduce the number of facings in the entire universe of plan-o-grams, I imagine not. I imagine there are some instances where they're not.

Q. Are all plan-o-grams that are recommended by U.S. Tobacco exclusionary?

A. Again, without looking at the particular plan-o-gram that you're prescribing and the

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circumstances, I can envision a plan-o-gram on the part of UST that expands the number of brands and adds competitive product, not necessarily being anticompetitive or exclusionary.

Q. Well, are all plan-o-grams recommended by U.S. Tobacco that reduce the total number of facings and reduce competitive products exclusionary?

A. I think given UST's market dominance we can make that assumption here, and considering that a plan-o-gram that resulted in the number of facings of a competitor's products were reduced and UST's products were preserved in terms of prior to that plan-o-gram, if that plan-o-gram resulted in preservation of the status quo of UST's dominant position without some acceptable business justification, might find that to be an exclusionary arrangement.

Q. With all those factors you still might find that to be exclusionary?

A. Again we'd need to know what were the particular effects for competition. That certainly is a mechanism by which UST could accomplish an exclusionary outcome. Instances where that has occurred where competitors' products have been reduced does result in exclusion and can have

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exclusionary outcomes.
Q. When you refer to business justifications, can you describe to me what you mean or give me some examples of business justification?
A. UST often will offer its programs as a basis for a retailer to freshen up their rack, present a more uniform appearance and a variety of proposed advantages to the retailer that are presented in a way that are suggested to enhance the competitive implications for consumers.
Q. And based on those business justifications the retailer makes the decision to implement the plan-o-gram, that would indicate to you that it would not be exclusionary?
A. I mean after all what the retailer does certainly is their decision. My interest would be in focusing on what the competitive implications are to the consumer. Whether or not that's retailer's acquiescence to that arrangement was based on the fact that they were provided information that they accepted about what the future would hold or simply felt as though they were compelled to accept the plan-o-gram that restricted the number of brands, competitor brands because of UST's dominance, there would be a variety of reasons I can think of as to

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why a retailer would accept something so -- not necessarily that we understand certainly one factor, it's one particular piece of information that more important is the competitive implications.
Q. Want to talk a little bit about those 22,000 locations just with respect to exclusive vending. You refer to exclusive agreements, just so we're clear are you referring to agreements between U.S. Tobacco and the retailer?
A. Yes, with retailers.
Q. Now assuming that United States Tobacco has an agreement with a retailer for exclusive vending, do you know of instances where Conwood racks were removed pursuant to those agreements?
A. I know of instances where Conwood racks were removed, yes. The particulars of whether or not they were pursuant to a specific agreement it's hard for me to recall, there's so many different agreements that I've considered. If one does call for an exclusive rack agreement or exclusive vendor agreement, I have understood that Conwood racks have been removed.
Q. And have you done any work to quantify the number of Conwood racks that had been removed as a result of these exclusive vending agreements between

Page [illegible]

U.S. Tobacco and retailers?
A. Well, the evidence is quite pervasive, suggest a widespread removal of those racks. The quantification is very difficult given the nature of evidence, for example, I recall one particular ex-UST rep Art Hale describing.
Q. I'm sorry I didn't catch the name?
A. Art Hale. I'm sorry it's Al Hart. What am I thinking. It's Al Hart, describing a circumstance where he was part of a crew drive to remove upwards towards 500 racks in his area, interesting enough this was corroborated by a Conwood rep who was working in the vicinity who indicated he had spent upwards toward 50 percent of his time replacing those racks. So the evidence does suggest some numbers but oftentimes that type of quantification isn't offered in the record. So to extrapolate those numbers to come up with a quantity is quite difficult given the evidence at hand.
Q. What was the name of the Conwood rep that you just referred to?
A. You know I think I actually made reference to this individual inside my report, might be useful for me to look to refresh my memory there, but as I sit here I don't recall exactly the name of that

Page 165

individual.
Q. I'll save you some time. You do not refer to the Conwood rep by name in your report. You did refer to Alan Hart by name. That's okay. Now did you review the testimony of Alan Hart in his deposition?
A. I did review I recall I reviewed his declaration and I believe he also was deposed. I believe he was.
Q. And as you sit here today do you know what his testimony was regarding whether those rack removals you referred to on the crew yard were with store authorization or not?
A. As I recall he spoke of not only engaging in unauthorized rack removal being encouraged to engage if that rack removal on the part of his supervisors, those supervisors being with him and participating in that rack removal, his being instructed to remove racks while operating as a regional sales manager, his feeling and sentiment that removal of racks was common, frequent, and something that was made part of his role as a UST representative. I remember Al Hart because of his -- no longer with UST but I think as a result of injury and I think what struck me being at the University of

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. PLAINTIFFS

v. **ORDER**

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC. DEFENDANTS

The Court was presented with designated depositions. Objections were shown with responses and counter-designations. After objections, some designated testimony was withdrawn Of the remaining designated testimony the following objections are sustained.

1. Maudie Rushing

Page 9 - Lines 15-20.

IT IS SO ORDERED.

This 8th day of March, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel
Hand delivered

ENTERED
MAR 08 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

32

16diii004809

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. PLAINTIFFS

v. **ORDER**

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC. DEFENDANTS

The Court was presented with designated depositions. Objections were shown with responses and counter-designations. After objections, some designated testimony was withdrawn Of the remaining designated testimony the following objections are sustained.

1. Leroy Keil

None

IT IS SO ORDERED.

This 9th day of March, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED
MAR 09 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii004810

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. AND UST INC.,

Defendants.

'00 MAR 13 A8:30

Civil Action No.
5:98CV130-R

U.S. DISTRICT COURT
WESTN. DIST. KENTUCKY

JURY TRIAL DEMANDED

PLAINTIFFS' OBJECTIONS TO DEFENDANTS' PROPOSED EXHIBITS FOR DeWAYNE BIDDY, ROBERT CARLSON, GREG GERMANY, MORGAN JONES AND LUNDY EDWARDS

Defendants have disclosed that they intend to use certain exhibits and demonstratives for DeWayne Biddy, Robert Carlson, Greg Germany, Morgan Jones and Lundy Edwards beginning Tuesday, March 14, 2000. Plaintiffs respectfully object to the introduction or use of the following materials:

Witness	Exhibit	Objection
D. Biddy	DX 680	Lack of Foundation
R. Carlson	DX 130	Hearsay
	DX 131	Hearsay
	DX 139	Hearsay
	DX 141	Hearsay
	DX 499	Lack of Foundation
	DX 500	Lack of Foundation
G. Germany	DX 258	Hearsay
	DX 270	Hearsay
	DX 281	Hearsay

Witness	Exhibit	Objection
M. Jones	DX 95	Lack of Foundation
	DX 103	Lack of Foundation
	DX 146	Excluded per prior order of Court
L. Edwards	DX 539-542	Hearsay
	DX 465-467	Lack of Foundation
	DX 538	Hearsay

16diii004812

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts
Whitlow, Roberts,
Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995

Mark C. Hansen
Neil M. Gorsuch
Benjamin A. Powell
Michael J. Guzman
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005

Counsel for Plaintiffs

March 11, 2000

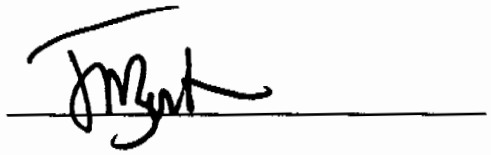
16diii004813

CERTIFICATE OF SERVICE

I certify that on this 11th day of March, a copy of the foregoing was hand delivered to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., U.S. Tobacco Trial Office, 333 Broadway, 10th Floor, Paducah, KY 42001.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, U.S. Tobacco Trial Office, 333 Broadway, 10th Floor, Paducah, KY 42001.



BIDDY

16diii004815

SALES INCENTIVE PROGRAM

CONWOOD FIELD SALES FORCE

FISCAL YEAR FEBRUARY 1, 1996, THROUGH JANUARY 31, 1997

OBJECTIVES

This Sales Incentive Plan ("The Plan") has been designed to achieve three specific goals; to generate more sales and profits for the company, to serve as an incentive for our field salespeople, and to give our management personnel another tool to derive the best possible performance from their salespeople.

The Plan will allow sales representatives, district sales supervisors, or district sales managers, through his or her performance in all areas of work, to impact the amount of incentive monies they will make. They are assured of always making incentive monies if the company makes profits, but they can certainly determine how much by their personal performance.
Top performance by all sales personnel throughout the year, as well as balanced selling is encouraged and rewarded on an individual basis by the Plan.

This performance is determined by annual appraisals of each sales representative, district sales manager, and district sales supervisor. The district sales managers will appraise each sales representative for whom they are responsible. The district sales manager and regional sales manager will perform jointly the appraisals of the district sales supervisors for whom they are responsible. The regional sales manager will appraise the district sales managers for whom they are responsible.

ELIGIBILITY

All district sales managers, district sales supervisors, and sales representatives will be participants in the Plan. To be eligible each participant must be on active duty the last day of the fiscal year, or have taken early retirement, disability retirement, or normal retirement during the year. Should a normal retirement occur effective December 31st of the Fiscal year, the participant will receive credit for the full year.

DEFENDANT'S EXHIBIT 680

12274229

Those employed less than 31 days prior to the end of the fiscal year will not be eligible. Proportionate payments computed to the nearest day service will be paid to retirees and participants employed over 31 days but less than one year. The Plan Year will start Febraury 1, 1996, and end January 31, 1997.

APPRAISALS

1. Sales representatives will be appraised by their district sales manager prior to the end of each fiscal year. The attached Sales Representative Appraisal Form will be used by the district sales manager for the purpose of this appraisal.

2. The sales representative will be appraised on each area of performance listed in the Sales Representative Appraisal Form. Each district sales manager must make a maximum effort to be accurate, fair, and impartial in the appraisal of his or her sales representatives.

3. Each appraisal will be discussed with the sales representative privately, prior to being sent to the regional sales manager.

4. It is mandatory that each sales representative be appraised, and the appraisal forms mailed to the regional sales manager prior to the last working day of JANUARY.

5. District sales managers will be appraised by their regional sales manager prior to the end of the fiscal year. The attached District Sales Manager Appraisal Form will be used by the regional sales manager for the purpose of this appraisal.

6. The district sales managers will be appraised on each area of performance listed in the District Sales Manager Appraisal Form.

7. The regional sales managers must make a maximum effort to be accurate, fair, and impartial in appraising their district sales managers. They are also responsible for determining and assuring the accuracy, fairness, and impartiality of the appraisals performed by the district sales managers for whom they are responsible.

8. District sales supervisors will be appraised jointly by their regional sales manager and their district sales manager prior to the end of the fiscal year. The attached District Sales Supervisor Appraisal Form will be used for the purpose of this appraisal.

9. A district sales supervisor who has the total responsibility of a district should be appraised using the District Manager Appraisal Form.

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10. Each appraisal will be discussed with the district sales manager and district sales supervisor, and signed by them prior to being sent to the national sales manager.

11. The regional sales managers must complete all appraisals of the district sales managers and the joint appraisal of the district sales supervisors for whom they are responsible.

12. All District Sales Manager Appraisal Forms, District Sales Supervisor Appraisal Forms, and Sales Representative Appraisal Forms must be in the mail no later than the 10th day of FEBRUARY.

13. Each time a district sales manager works with a sales representative, or each time a regional sales manager works with a district sales manager or sales supervisor, a trip appraisal will be completed. The appropriate Trip Appraisal Form will be used for this purpose. Weaknesses will be identified and training methods suggested on the trip appraisal form. This trip appraisal will be discussed with the person who is being appraised prior to leaving the assignment or district, giving him or her a copy of the trip appraisal. The district sales manager will send copies of all appraisals which he performs to his regional manager.

The annual appraisals mentioned above should be based on the good, fair and impartial judgment of the appraisers, and the accumulated trip appraisals. It is mandatory that the trip appraisals be completed each time the sales person or district sales manager has been worked with. The appraisal form should be discussed, in person, with each one who is being appraised prior to leaving the assignment or district.

14. All personnel involved in performing appraisals must carry out their duties with integrity and in such a manner that the incentive plan serves as motivation to our salespeople.

STANDARD OF PERFORMANCE

15. When the appraisal forms are received in the Memphis office, the scores will be entered into the computerized incentive program, computed and recorded into the data file under each district sales manager's, district sales supervisor's, and sales representative's record.

16. The score for each sales representative will be divided by the combined scores of all salespeople in the district, to determine the percentage of the total score contributed by each sales person to the entire district.

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17. The score for each district sales manager and district sales supervisor will be divided by the combined scores of all district sales managers and district sales supervisors in the region, to determine the percentage of the total score contributed by each person to the entire region.

AMOUNT OF INCENTIVE MONIES

18. When the total incentive monies have been established, as described in the FUNDING section, it will be divided equally to all employees participating in the plan according to the following share schedule:

District Sales Managers	2 shares each
District sales Supervisors	1 1/2 shares each
Sales Representatives	1 share each

The share or shares for each participant will be placed into their district or region, according to their title.

19. The employees who will receive proportionate payments will have their shares reduced according to their time of service during the year. The shares of anyone having less than 31 days service at the end of the bonus period will be removed. Those participants having greater than 31 days service, but less than 365 days service, will receive 1/365 of their allotted share or shares for each days service. Those participants which have greater than 364 days service will receive their full amount of shares.

20. The following procedures will be used to determine the amount of bonus monies to be received by salespeople who have been promoted, transferred or otherwise moved between districts. The transferred or promoted people will be appraised by the district sales manager or regional sales manager with whom they spent the longer amount of time during the fiscal year. They will be included in the district or region in which they were evaluated. One half of the share which their title receives will be added to the District or Region where they were evaluated. The single evaluation will then be compared with the others in that district or region, giving them half of their bonus monies from each place. In the case of transferred people being in their past and present district the exact same amount of time during the fiscal year, they will be evaluated and compared in the district in which they finish the fiscal year.

16diii004819

21. Once the proper amount of shares have been time adjusted using the procedures outlined in paragraphs 19 and 20, each individual's share will be multiplied by his or her score percentage as outlined in paragraphs 16 and 17. This will determine the share percentage of the district monies the individual sales person should receive, and the share percentage of the region monies the individual district sales manager or district sales supervisor should receive.

22. At this time the total monies available to the plan as described in paragraph 27 should be divided by the combined share percentages of all participating employees. This will determine the value of one share.

23. To determine the bonus monies for each individual sales person the following steps are taken: All share percentages in the district are combined and multiplied by the share dollar value. This places the correct amount of dollars into the district. Those same dollars are now divided by the total share percentages of the district to determine the value of one share percentage. The value of one share percentage is then multiplied by the share percentage contributed by each sales person to determine the bonus dollars that individual is to receive, rounded to the nearest cent.

24. To determine the bonus monies for each individual district sales manager and district sales supervisor the following steps are taken: All management share percentages in the region are combined and multiplied by the share dollar value. This places the correct amount of dollars into the region. Those same dollars are now divided by the total share percentages of the region to determine the value of one share percentage. The value of one share percentage is then multiplied by the share percentage contributed by each district sales manager and district sales supervisor to determine the bonus dollars that individual is to receive, rounded to the nearest cent.

FUNDING

25. At the completion of the fiscal year, the COMPANY'S INDEPENDENT AUDITORS will determine the amount of dollars of profit which was contributed by the following product lines: **DRY SNUFF, PLUG, TWIST, LOOSE LEAF, AND FINE CUT.** These profits will be combined, and .89 percent of them will be allocated to fund this sales incentive program.

16diii004820

PAYMENT

26. One payment will be made after the end of the fiscal year, when the Dollars Per Pound Contribution numbers are made available. The payment should be made approximately April 1, 1997.

AMENDMENT AND TERMINATION

27. The Company reserves the full right, in its sole discretion at any time and from time to time, to amend, revise, or alter the plan in any manner, or to terminate it at any time.

CARLSON

Waynnell Renfro

To:	United States T - Tim Entwistle
Cc:	United States T - Don Blackburn
Subject:	Modular 1998 Update

Instead of faxing to you the paper changes that have been made,(there are no hard copy proofs available) until late next week, I will spell it out to you as simply as possible. The only changes made on moist at this time are as follows.

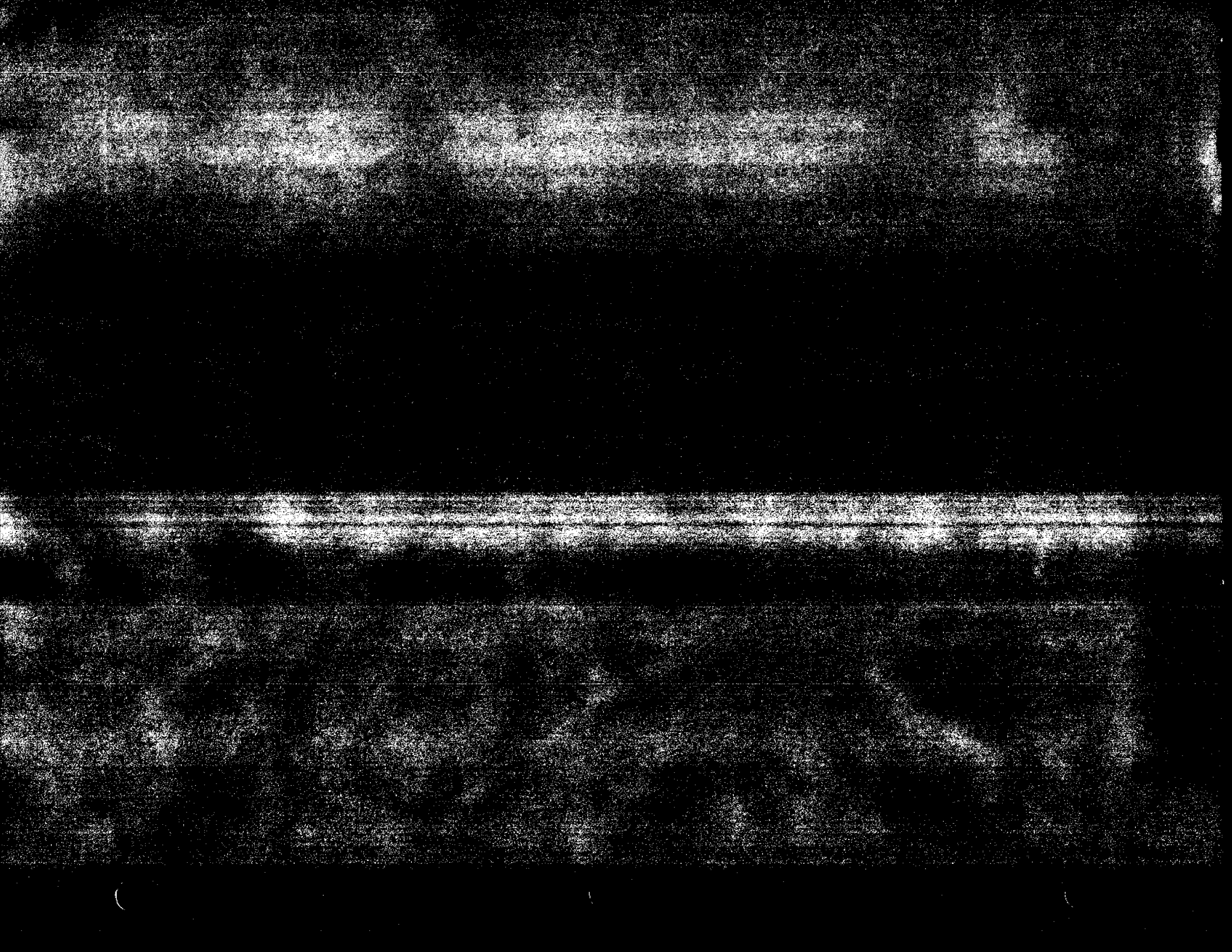
All Regions:
We have deleted the Skoal Flavor Packs from the single can spacing, and in it's place have added 1 single can space each Local Sales Discretion for UST and Conwood. Also the Bowie Natural and Bowie Wintergreen have been deleted and 1 single can space for Local Sales Discretion for Swisher and Conwood have been added.
Region 1: 4Ft High and Low, 8Ft low all changes are mentioned above.
Region 1: 8Ft High
We have moved the roll of Skoal Bandit Wintergreen into the place of the Skoal FC Straight , deleted the Skoal FC Straight and replaced it with Kodiak Straight..... The Kodiak Straight was a better mover in this region.
Region 1: 12Ft:
Same changes on the Skoal Flavor Packs, and the Bowie Moist and Wntrg.
Deleted can and roll on Skoal Straight for Kodiak Straight.
Region 1: 20Ft:
Same as above >>>>>Changes are made on the 8ft High, 12Ft, and 20Ft on the Skoal Straight for the Kodiak Straight.....

Region 2: 4Ft Low and 4Ft High, Deleted Flvr Pks, added 1 single can space for Local Sales Discretion ,1 can space for UST and Conwood.
Region 2: 8Ft High and Low,same as above.....
Region 2: 12 and 20Ft. Delete Flvr Pks, add (LSD) 1 single can facing each UST and Conwood. Deleted Bowie Natural and Bowie Wntrg.single can facing add 1 single can space (LSD), Swisher and Conwood. Delete 1 Roll facing Skoal Flvr Pks Mint, add 1 roll facing Conwood (LSD), delete Skoal LC Spearmint add 1 UST (local sales discretion) Roll.
Region 3: Moist changes are only on the flavor pk deletion adding (LSD) and the Bowie Moist deletion adding (LSD). Same Local Sales Discretion will be used throughout the plan-o-gram.
Region 4: 4Ft low ,4Ft High ,Flvr Pk Changes to Local Sales Discretion. Also deleted Single can facing of Skoal Key and added 1 can facing for Conwood (LSD). 8ft High and 8ft Low..... Same changes.....12Ft. Deleted the Flvr Pks Cinnamon single facing and added 1 single can facing UST (LSD). Also keep in mind the Local sales discretion added in place of the wie Moist items. These will be done on all of the flavor pks and all of the Bowie moist items on all sets.
All remaining regions 5,6,7 and 8 will only have the local sales discretion changes. Another change reflected on the moist category. All Oregon Mint Product has been deleted and Smokey Mountain Chew has been expanded... This of course will be the Non-Nicotine changes.

[illegible] tegory Manager
[illegible] Nicotine Operations
[illegible]) 277-9467
[illegible]) 277-8295
[illegible]@wal-mart.com

DEFENDANT'S EXHIBIT 130

16diii004823



UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC.
100 WEST PUTNAM AVENUE, GREENWICH, CONNECTICUT 06830

TIM ENTWISTLE
Manager of National Accounts

(203) 622-3462
Fax (203) 661-0256

December 20, 1997

Mr. Bobby Carlson
Director- Tobacco
Walmart Stores, Inc
702 Southwest 8th Street
Bentonville, AR 72716-9055

Dear Bobby:

Please find enclosed, the new 1998 Customer Alliance Program pamphlet, including contract and programming details.

The program itself is very simple and easy to understand. The benefits are all customer focused:

A. Optimize inventory through focused store level activity
B. Build store specific merchandise and promotional strategies
C. Provide incentive payments to reward participation and build profits
D. Build your smokeless tobacco volume

Here's how:

Earn up to .08 cents a roll for meeting established marketing, product handling and display performance goals.

We analyze the category and make business building recommendations.

By signing the enclosed contract (MSA), Walmart agrees to allow McLanes (wholesaler) to provide USTSM with Walmarts store by store data on all moist smokeless tobacco snuff sold in round cans purchased by Walmart.

McLanes has provided US Tobacco with a verbal commitment of the program, as we anticipate receiving their signed contract before the first of the year.

Other elements of the program are more clearly defined inside the booklet enclosed. A potential dollar value to Walmart would be over $350,000. . based upon a review of '97 numbers on 1st and 2nd quarter statistics.

DEFENDANT'S
EXHIBIT
131

16diii004825

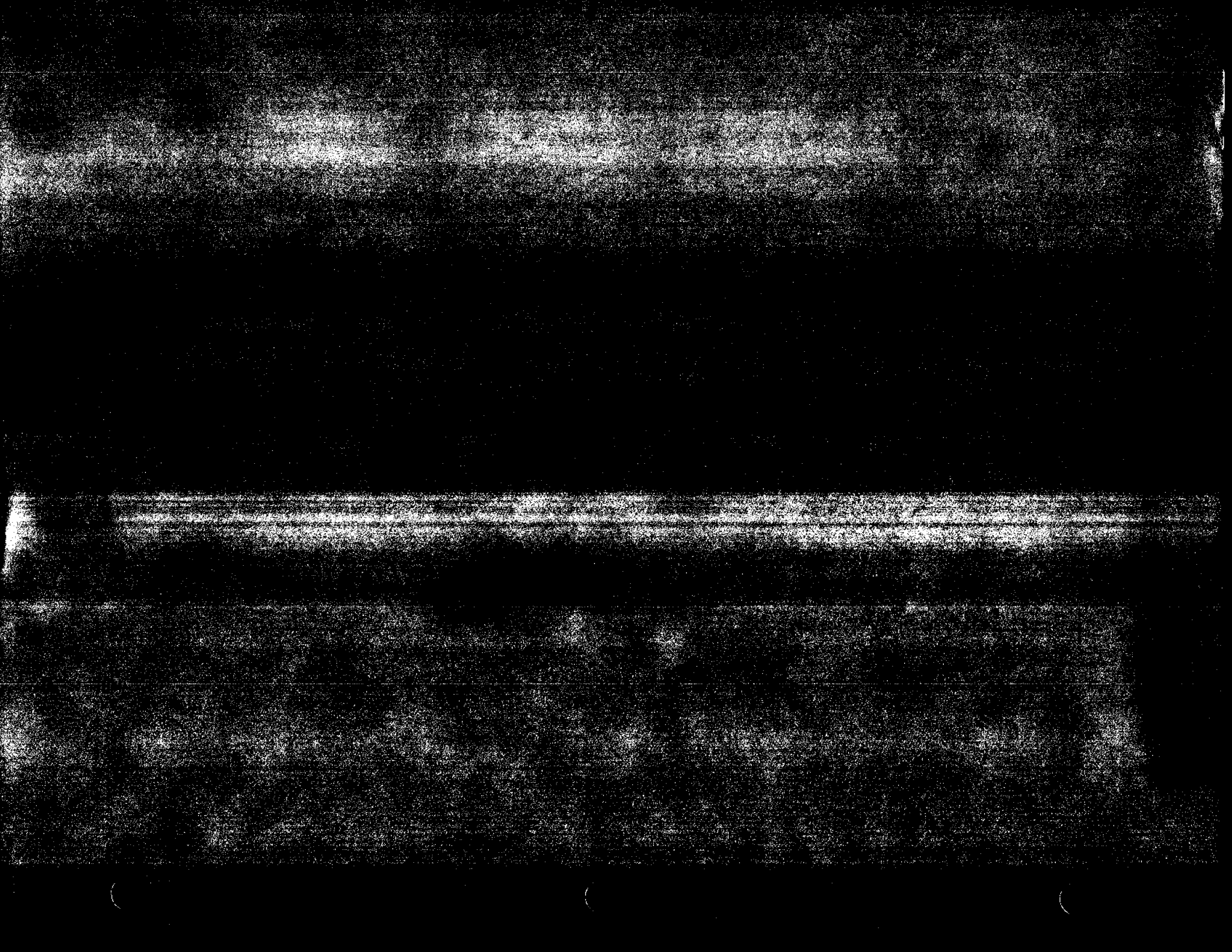
Bobby, please feel free to call me should you have any further questions, concerns, or anything with regards to the above program. We are excited to be offering the first of its kind program in the smokeless business, and hope that you can see the real benefits it has to offer.

I would like to wish you and your family a special Holiday Season.

Thankas for all your continued support.

Best regards,

Tim Entwistle



UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC.
1003 McCLAIN ROAD, SUITE 612, BENTONVILLE, AR 72712

DON BLACKBURN
KEY ACCOUNT MANAGER

(501) 271-0521
FAX (501) 271-0979

January 11, 1999

Bobby Carlson
Director,
Wal-Mart Business Development
708 S. W. 8th Street
Bentonville, AR 72716

Dear Mr. Carlson,

Per your phone discussion with Tim Entwistle on Friday, January 8, 1999 I am writing to provide for your review and approval, the attached monthly calendar of proposed U. S. Tobacco promotional and awareness Point of Sale.

The promotional and awareness Point of Sale will be custom printed, replacing the custom POS strips currently being used. These are to be placed on the smokeless cabinet areas we have been discussing and in place of the standard header card on the #3201 white custom four-foot vendor set (low profile vendor).

Please note that with the attached formulation we have remained consistent regarding our current space share in all smokeless modulars, which is 67 %. This is well below our overall market share. We hope that this fair and equitable approach meets with your approval.

Thank you for your consideration, should you have any questions please give me a call. In the meantime I am looking forward to discussing this with you or Rob Frederking . I will give you or Rob a call to follow up on Wednesday, January 13.

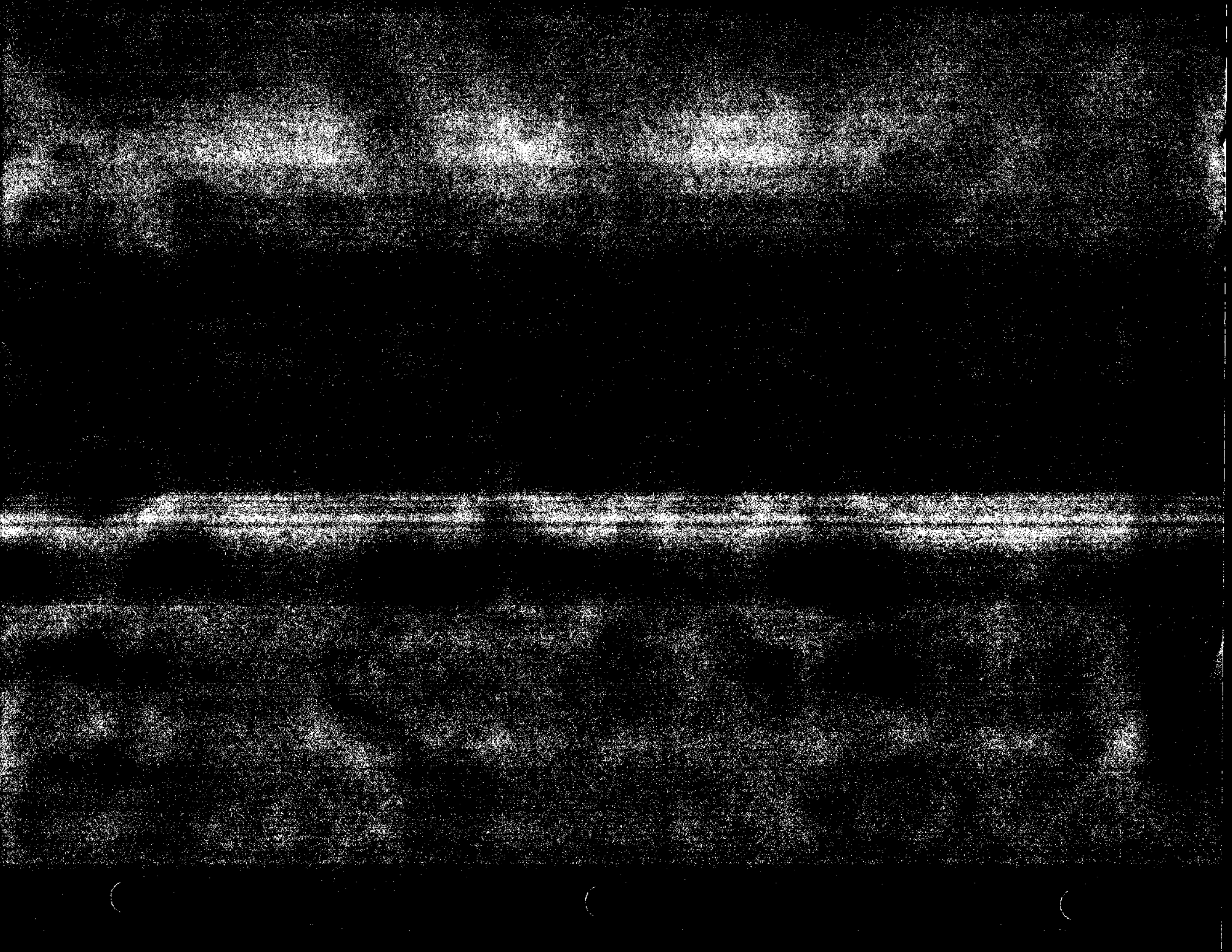
Sincerely,

Don Blackburn

cc: Rob Frederking
Tim Entwistle

DEFENDANT'S EXHIBIT 139

16diii004828



UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC.
1000 McCLAIN ROAD, SUITE 612, BENTONVILLE, ARKANSAS 72712

June 15, 1998

To: Bobby Carlson
Rob Frederking
Nell Renfro

RE: Texas T-set stores

Attached are copies of graphs showing POS sales data retrieved from Retail Link for the two T-set stores in Texas. Store #381 has been reset for a full 8 weeks but store #1129 in Austin was not set until 5/6/98 and will not have a full 8-week post-reset comparison until wk 9823.

In the comparison both stores have shown increases in their quantities after the reset. Store #381 in Copperas Cove has increased 10.3% and store #1129 in Austin has increased 4.8% in the 5 weeks time. The graphs show the weekly totals for the stores and the dates that they were reset marked with an arrow.

We will continue to monitor the sales for these stores and update you with the results.

Don

Don Blackburn

United States Tobacco Sales and Marketing Company

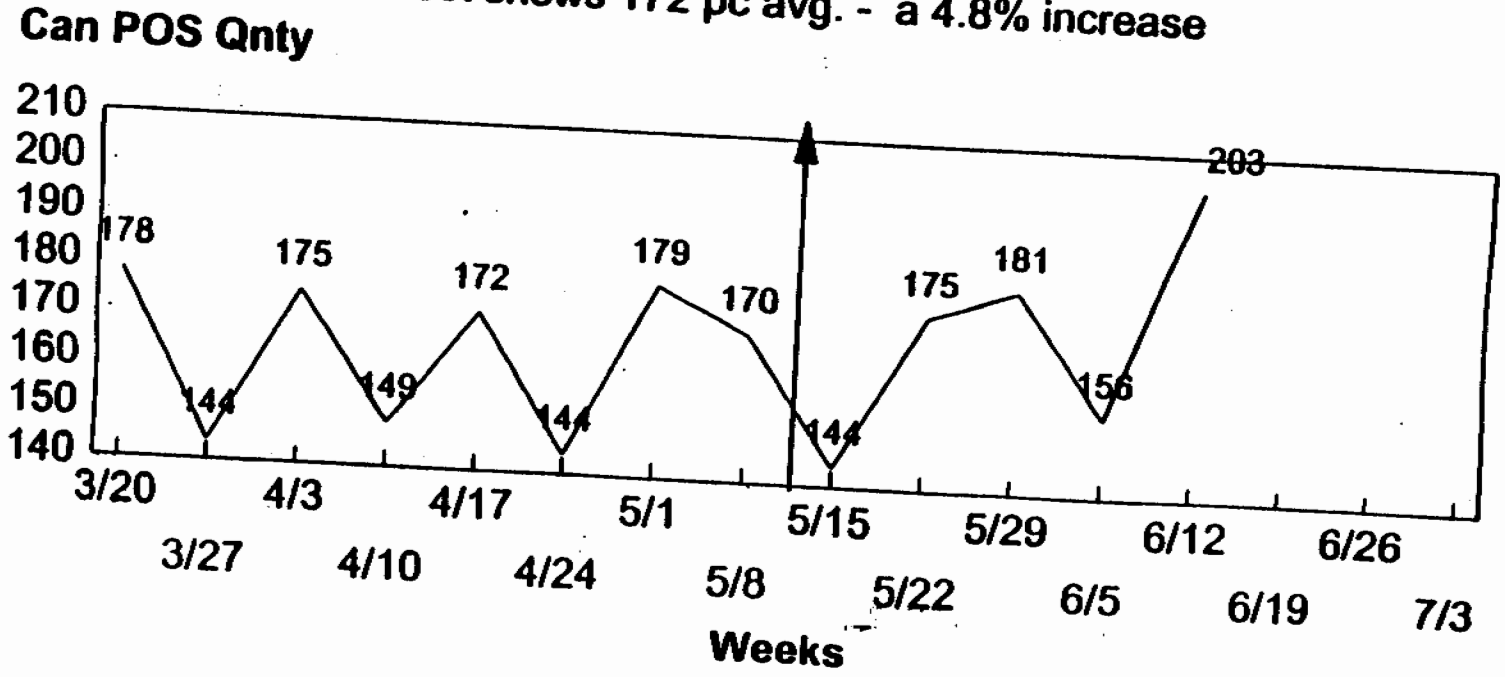
cc: Tim Entwistle

DEFENDANT'S EXHIBIT 141

Wal-Mart Store #1129 - Austin, TX
T-set

Reset 5/6/98

8 wks prior to reset shows an avg of 164 pcs, 5 wks after reset shows 172 pc avg. - a 4.8% increase

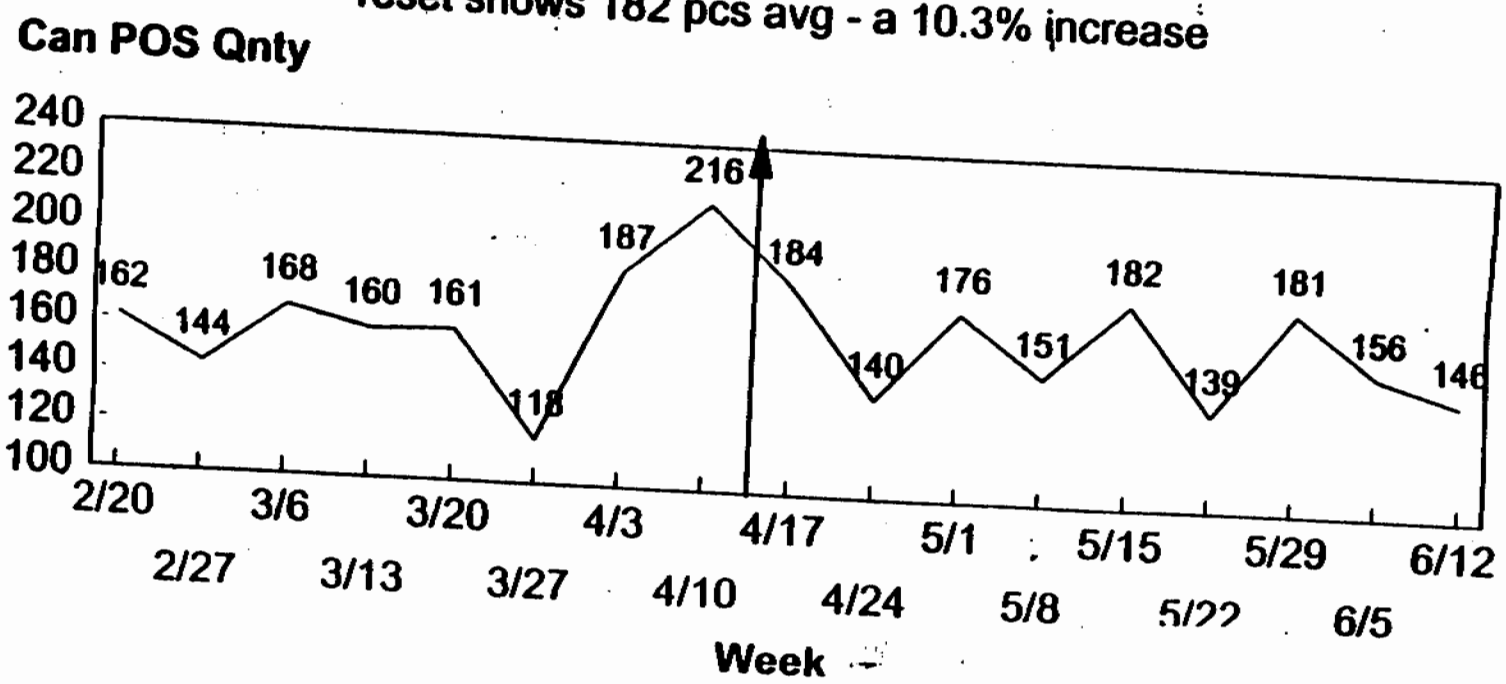


16diii004831

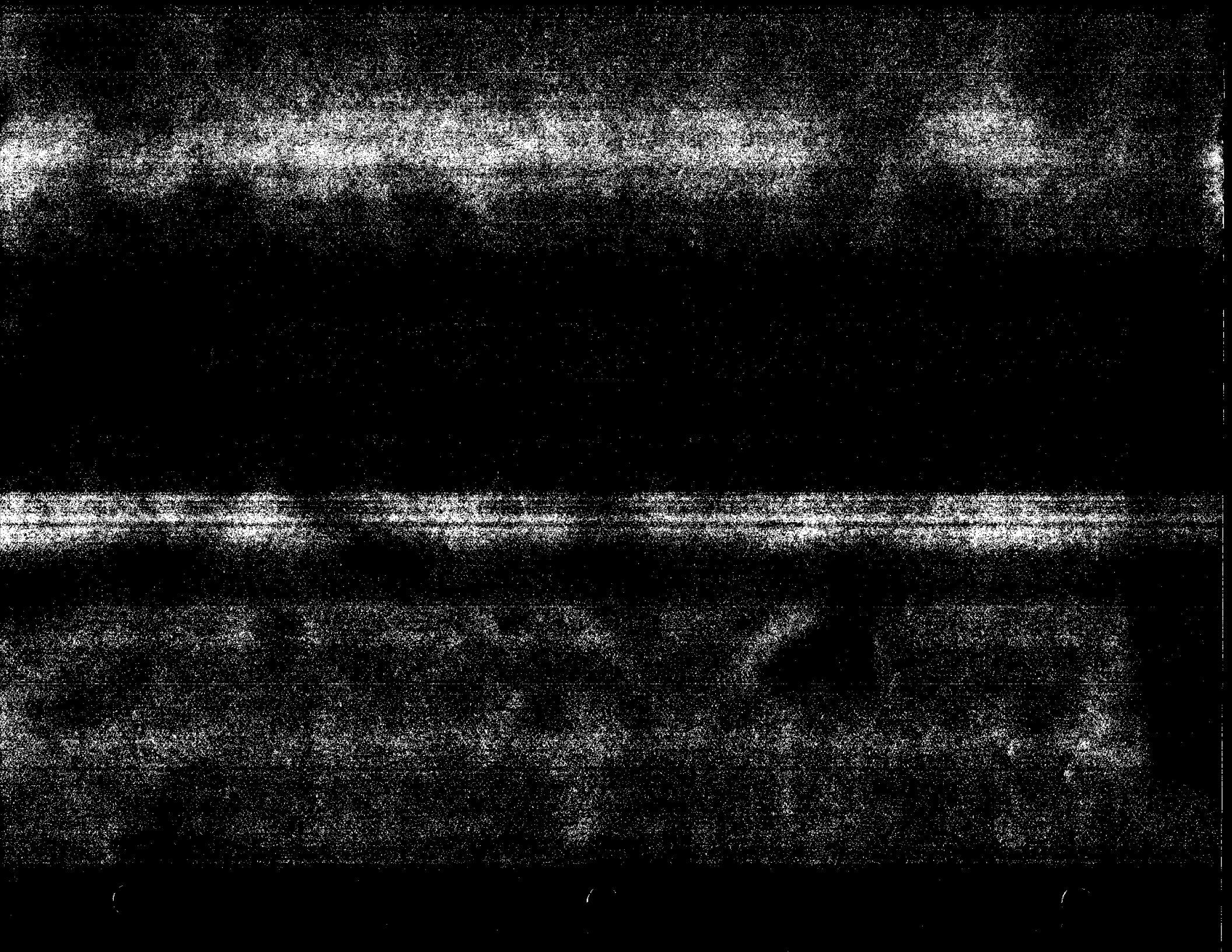
Store #381 - Copperas Cove, TX
T-set

Reset 4/14/98

8 wks prior to reset shows an avg of 165 pcs, 8 wk after reset shows 182 pcs avg - a 10.3% increase

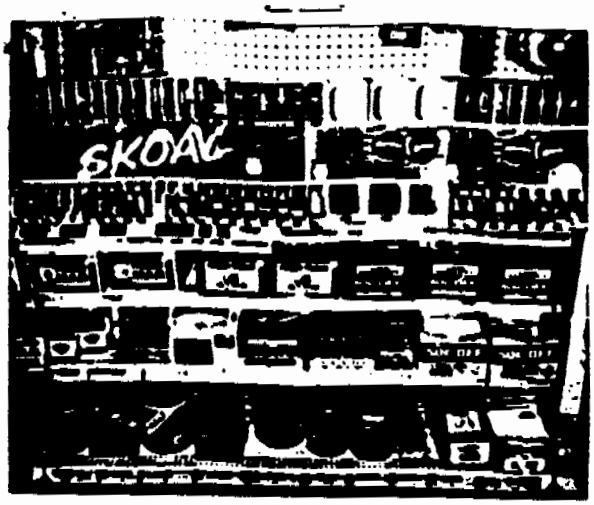


16diii004832



Conwood

813 Ridge Lake Blvd. • P.O. Box 217



RETAIL ACTIV

DATE: 4-19-99

STORE NAME: WALM

STREET ADDRESS: 4617 E. Be WAIMART 4617 E. Bell Rd 4-19-9

CITY, STATE & ZIP: Phoenix PHOENIX, AZ 85032

PHONE: _____

DESCRIBE THE ACTIVITY FOUND AT THIS LOCATION (BE SPECIFIC)

IN THIS STORE UST IS USING THEIR HEADER CARDS ACROSS ALL MULT ITEMS. IT IS MY UNDERSTANDING THAT ONLY WALMART HEADER CARDS ARE TO BE USED.

ADDITIONAL REMARKS: _____

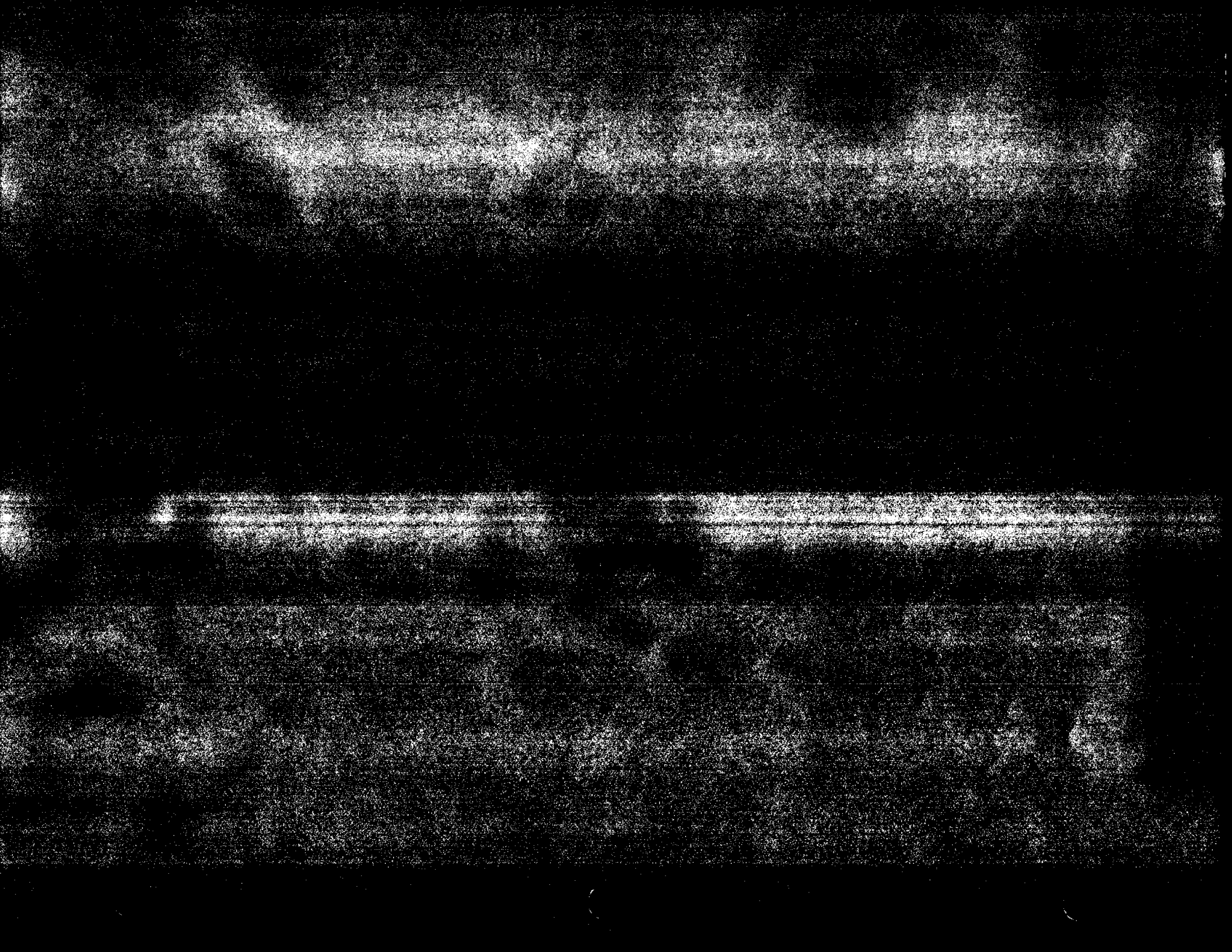
IF THERE ARE SUPPORTING MATERIALS, PLEASE SEND ALONG WITH THIS FORM.

STORE EMPLOYEE SIGNATURE _____

STORE MANAGER OR OWNER'S SIGNATURE _____

CONWOOD COMPANY EMPLOYEE SIGNATURE _____

DEFENDANT'S EXHIBIT 499



Conwood Sales

813 Ridge Lake Blvd. • P.O. Box 217 • Memph

RETAIL ACTIVITY F

DATE: 4-13-99

STORE NAME: Walmart

STREET ADDRESS: 1475 Sugarmill Dr

CITY, STATE & ZIP: Auburn, Wa 9 Walmart - Auburn Wa. 4-13-99

PHONE: _____

DESCRIBE THE ACTIVITY FOUND AT THIS LOCATION (BE SPECIFIC)

New UST moist rack fixture placed having no slots for authorized Conwood products, which were previously slotted in moist rack replaced.
UST Skoal header cards placed instead of Walmart generic header cards

ADDITIONAL REMARKS: Need okay to place authorized Conwood at this location with store approval

IF THERE ARE SUPPORTING MATERIALS, PLEASE SEND ALONG WITH THIS FORM.

STORE EMPLOYEE SIGNATURE _____

STORE MANAGER OR OWNER'S SIGNATURE _____

CONWOOD COMPANY EMPLOYEE SIGNATURE _____

DEFENDANT'S EXHIBIT 500

GERMANY

16diii004837

DEPARTMENT MANAGER:

WEEKLY ACTIVITY REPORT FOR WEEK ENDING: August 28, 1998

NAME: Greg Germany

TERRITORY: GOO-02

UPCOMING APPOINTMENTS:

I. TIME SPENT (Include Day & Date)	CMR/TERR	# of calls/ SC or WW
Mon: Travel to Wichita, KS. Spot ck. GJO retail.		SC-8
Tue: GJO division meeting		
Wed: Work with Cory Ferguson, travel to KC in p.m.		
Thu: ROA		
Fri: ROA		

Key: ROA: Routine Office Administrative; PE: Performance Evaluation; SC: Spot Check; MC: Management Calls; WW: Work With; OTH: Other; AP: Action Plan

II. DIRECT ACCOUNTS

We got the news this week that we have four direct accounts in KS. that have merged with Harrison Co. out of Bossier City, LA. Three Hagmans and FS Edwards which is also considered a Hagmans account will completely shut down. Two houses will close in mid Sept. and two at the end of Sept. I have sent a four-week order broken down by house, week and brand to department manager Mark Lawson as well as other UST personnel. These four houses have a combined weekly average of approximately 32,000 cans per week. Division manager Nancy Kenner explained that Harrison Co. has a large minimum order per account and that the majority of the Hagmans accounts will not meet their minimum order. Unless Harrison Co. lowers their minimum we will more than likely keep a good part of this business that will simply shift to other area jobbers. DM's have been directed to follow the schedule that was given to us by Riccio so that this is a smooth transition and returns are processed beforehand. Due to the fact that one house is a CSJ we are in the process of looking at options for the SR. Lamone Candy and Tobacco out of Salina, KS. currently delivers product to two cigarette reps. in Hays, KS. Therefore, we will set up the same process with the SR. We are also getting a storage facility set up to receive shipments of pos. and vendors for this SR. Mark Lawson stated that Harrison Co. does carry both RS and Rooster which will be important for the GOO accounts. Mark is in the process of getting the item numbers to me.

We have recently added the following direct accounts for RS distribution:
*Center Dist. Topeka, KS.
*AB Coker Inc. Lawrence, KS.
*Barber & Sons KC, MO.

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Merchants Who. returns for the four week period were as follows: 10,632 total cans of which 3,708 or 35% were from promotional units. These units did not die on the floor, they were shipped back from retail. Merchants is not a CSJ. Rick Davis is in the process of trying to find out what retail accounts are responsible for sending back promo. units.

McLanes Midwest returns were down considerably for the last four week period. We were averaging 8,700 cans per month. For the month of August returns were 4,700 cans of which 14% were from promotional units. YTD promo. units account for 12% of McLanes Midwest returns. This is not a CSJ and units did not die on the floor, they were shipped back from retail.

III. CHAIN ACTIVITY

Wal-Mart: SR's report that there has been no OOS on RS. During the conversion from a ten can to a five can roll we were experiencing many OOS situations. However, those have been corrected for sometime now.

IV. MARKETING

Rooster Wintergreen continues to move well throughout GOO. Mint continues to be slow at best. There are only a few isolated instances where Mint is moving fairly well. At this point we still don't have a handle on where the Rooster business is coming from. Due to the lower price point in most accounts we would like to think that some is coming from competitive PV and some from competitive premium. However, we all know that a good part of it is also coming from trial usage from our consumers as well.

Lou Brockman of Brockman Who. reports that Rooster is moving much better than he expected. He has had to bump up his order on straight stock. We have also ordered him some additional #470 units. The movement is primarily on Rooster Wintergreen with Mint being much slower.

V. COMPETITIVE

SR Barry Wentz reports that Conwood reps. have started buying down Kodiak Wint. an additional .40 cents per can on top of the original .40 cents off. They are only doing this in selected accounts and their focus is to combat Rooster.

Conwood reps. continue to blitz the placement of Kodiak Ice pos. throughout GOO. They continue to place this pos. in accounts whether they carry Ice or not. They also continue to use unethical practices in getting Ice distribution at retail. For the most part they are trying to discontinue one or two of our brands so that there is room for Ice placement. We have been successful in getting most of these corrected. Their reps. have also been asked not to return to some accounts due to this practice.

TW FCST continues to move well in pockets throughout GOO. They still do not have high distribution on this brand. They have lost several reps. over the past few months and have a manpower shortage at this time.

VI. MISCELLANEOUS/SUGGESTIONS/COMMENTS

Rooster: We are in need of Rooster special event materials, event wear, giveaway items, sample

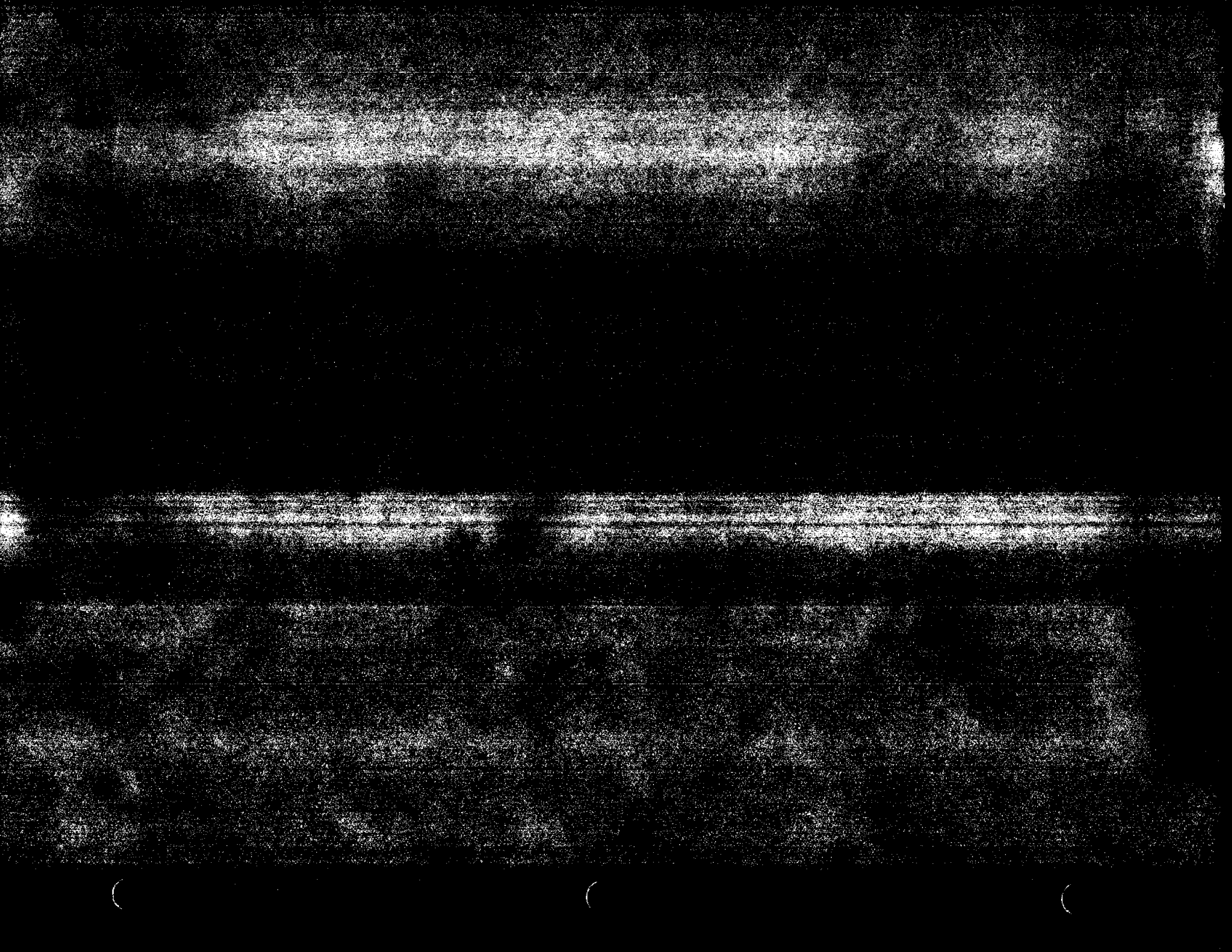
tent covers, etc. We have college students returning at this time but are told that these materials are either not available or are in very limited quantities. In the interim we have instructed college PTST's to bag sample bars, frat. parties, campus events, campus retail, etc.

VII. PLANS FOR NEXT WEEK

Mon - Legislative Golf Outing.
Tue - W/W Trent Cooper
Wed - W/W Trent Cooper
Thu - ROA
Fri - ROA

Thanks,

Greg



DEPARTMENT MANAGER:

WEEKLY ACTIVITY REPORT FOR WEEK ENDING: August 14, 1998

NAME: Greg Germany

TERRITORY: GOO-02

UPCOMING APPOINTMENTS:

I. TIME SPENT (Include Day & Date)		CMR/TERR	# of calls/ SC or WW
Mon:	ROA		
Tue:	ROA - Catching up after managers meeting, secretary on vacation, taking care of her normal duties.		
Wed:	Checked retail throughout GJO, checking on Rooster and RS movement as well as general retail.		18-Retail
Thu:	W/W Phil Rinkoski, called on QT, Red X, discussed chain work, 1999 promotional plan as well as other topics.		1-Direct 2-Retail
Fri:	ROA		

Key: ROA: Routine Office Administrative SC: Sport Check WW: Work With AP: Action Plan
PE: Performance Evaluation MC: Management Calls OTH: Other

II. DIRECT ACCOUNTS

Phil Rinkoski and I called on QT to check #470 shipments. Units were shipping out to retail and should be completed by the end of this week. Due to the recent problem with the vendor shipments going into the wrong areas we have all reset info. going out to all DM's, also faxed a copy to Tom Ventimiglia for his info.

So far so good on our shipper change from Holmes Freight Lines to Clark Bros. Transfer for Iowa & Nebraska. We have had no complaints from jobbers. Wayne Greenwood also stated that they have received no negative comments. So far this has been a very smooth transition.

III. CHAIN ACTIVITY

Due to the fact that both QT and Cum & Go accounts in Kansas (GJO) were shipped Rooster #470 units, we are going to have to have SR's in Kansas carrying Rooster car stock. I would say that this opens up Rooster to all of GJO. I'm sure that we are going to have additional accounts contacting us for distribution. I think that we all knew that it would work its way into GJO, just not this soon.

Wal-Mart LCW & FCW buydown program is going good. SR's report that product is scanning properly. Accounts have experienced sales increases from a few rolls of each brand per week to double the normal sales. SR's also point out that Wal-Mart personnel are very pleased with the

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program. At this point the only problems have been very minor and easily corrected. Hope to see programs such as this in the future with Wal-Mart. At this point we have not received any negative reaction to the Wal-Mart buydowns from our discount tobacco accounts. When we ran the buydown earlier in the year we received negative responses from both retailers as well as jobbers.

IV. MARKETING

Rooster movement is about the same throughout the department. Wintergreen sales are good throughout while Mint sales are slow at best. For those accounts that have had the displays since the first shipment, Wintergreen is sold out and Mint is still full or partially full. SR's are conducting a good deal of adult sampling on this brand which should begin to show some positive signs in the future.

Due to the large number of buydown programs that we are implementing at this time it's very important that we have an ample supply of pricing ovals on hand for SR use. These have become a very necessary part of the program.

V. COMPETITIVE

We continue to get reports that Conwood reps. are defacing our vendors, getting retailers to discontinue our brands so that they can gain distribution on Ice, placing their pos. on top of ours and tearing down our pos. DM's as well as SR's have been instructed to document all occurrences on competitive incident reports as well as send examples to region office.

It looks as though Conwood has stepped up their efforts on Ice. Product continues to show very poor movement throughout GOO. They are giving retailers five to ten cans of free Ice to gain distribution at retail. Ice pos. is very prevalent throughout GOO.

Swedish Match reps. are adult sampling TW on a weekly basis at the Red X account in KC. This is a high volume discount tobacco shop. TW sales continue to do very well in many areas of GOO.

Swisher Helme: Single can format is now showing up in the Kansas market. This was about the last market in GOO to go to the single can format. However, we are still seeing both BIG1 as well as single can format throughout department.

VI. MISCELLANEOUS/SUGGESTIONS/COMMENTS

SR Todd Griffin purchased one case of Rooster Wintergreen regular stock from Guy Chicon in Marion, IL. this week that had sample cans inside of case instead of regular product. We have the situation handled with both Todd and the jobber. I instructed Todd to hand onto the original box in case someone might want to take a look at it. Product was dated 28/8.

VII. PLANS FOR NEXT WEEK

Mon - ROA
Tue - W/W Randy Kreisel
Wed - Travel to Salina, KS., W/W Cory Ferguson.
Thu - W/W Cory Ferguson
Fri - Set in on performance review on Chris Temple. Travel to KC.

Thanks,

Greg

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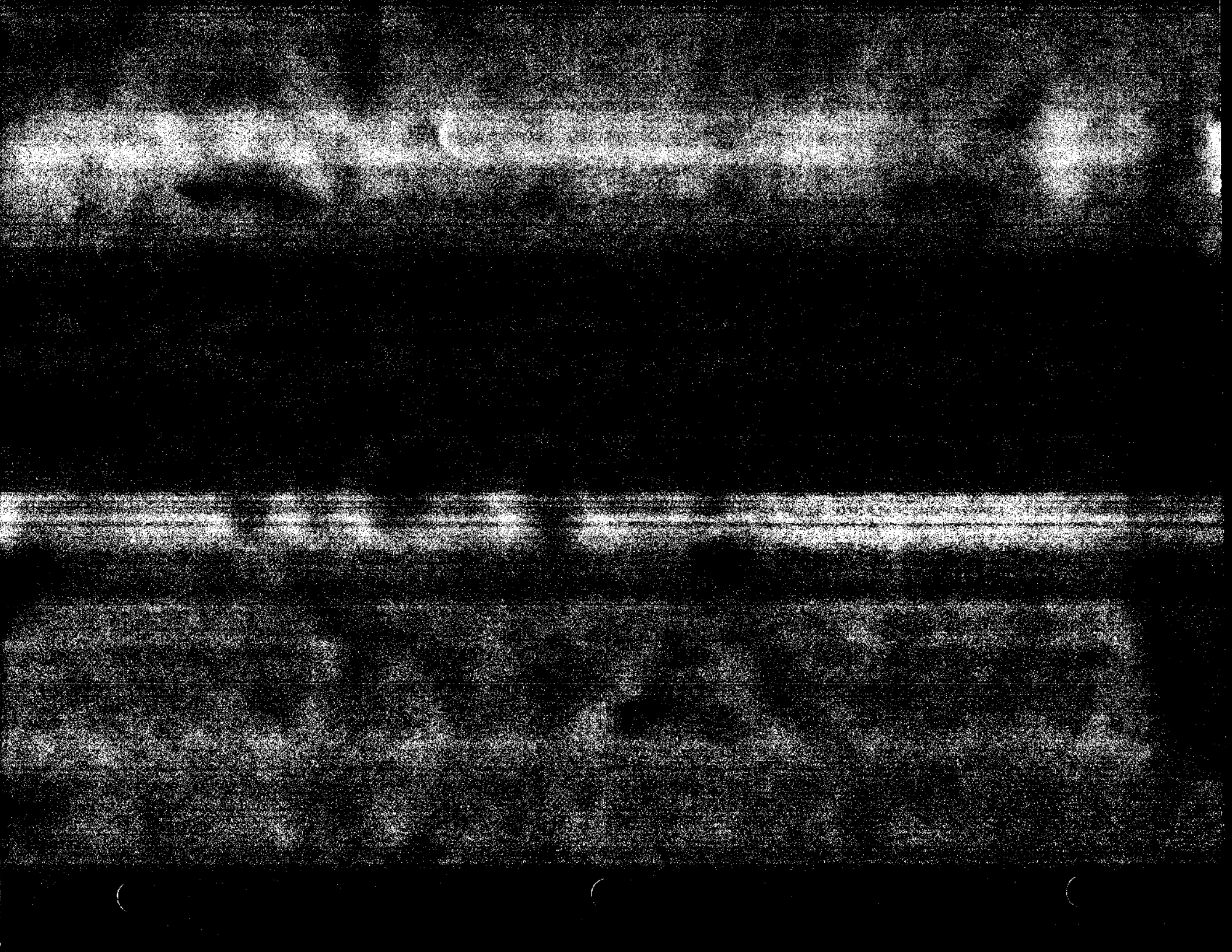

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DEPARTMENT MANAGER:

WEEKLY ACTIVITY REPORT FOR WEEK ENDING: June 19, 1998

NAME: Greg Germany

TERRITORY: GOO-02

UPCOMING APPOINTMENTS:

I. TIME SPENT (Include Day & Date)		CMR/TERR	# of calls/ SC or WW
Mon:	W/W Cory Ferguson in am. (set perf. obj.) ROA in pm.		
Tue:	ROA in am., Travel to Columbia, MO. to meet up with Kenny Wall, Travel to St. Louis in pm.		
Wed:	W/W Dave Carr & Phil Rinkoski, retail and management calls.		4 - Mngt. 6 - Retail
Thu:	St. Louis Candy and Tobacco Golf Outing and Banquet		
Fri:	Travel to KC in am., ROA in pm.		

Key: ROA: Routine Office Administrative SC: Spot Check WW: Work With AP: Action Plan
PE: Performance Evaluation MC: Management Calls OTH: Other

II. DIRECT ACCOUNTS

Dave Carr and I met new general warehouse manager of Amcon, St. Louis, Mike Lamone. Seems like he will be a good person to deal with in the future.

Randy Kreisel has been successful in getting RS distribution in the AWG warehouses in KC and OKC. RS is already in the Springfield house. This could help solve the problem of the KC reps. not having access to RS for car stock.

III. CHAIN ACTIVITY

Phil Rinkoski and I met with Linda Watts of Amcon concerning the Schnucks resets. Phil was successful in getting Rooster distribution in all stores. We will have to give up LCC in order to do so.

All GOO personnel have been successful in using movement reports to get the slower moving brands discontinued from some chain accounts. This has already been a great help in the area of returned goods. In certain areas brands such as LCC & SK. FCST simply don't need a high distribution. This has also helped in freeing up slots for Rooster.

IV. MARKETING

Rooster pos. has arrived and looks to be great pos. Reps. will began placing at retail soon. This should remain our primary piece for the remainder of 98.

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We are doing our best to move around some #477 promotions at this time. No matter how much we try to preplan and make sure that made dated promotions get out to retail the first week we always seems to run into various problems. In some cases we have had to cancel the chain order and get the promos. on the reps. vans so that we can get them into the higher volume accounts before dating becomes a big issue. We should think long and hard before putting another made dated product into a prepacked promotion.

V. COMPETITIVE

Swisher Helme moist brands have now shown up in the KC market in the single can format. Single can format showed up in Nebraska a couple of weeks ago. In most cases they have both single can and two packs available. They are utilizing free goods to try to get the single can price down to that of the PV brands. In the KC market it looks as if they are only targeting the very high volume accounts at this time.

There is no doubt that Conwood has taken off the gloves and are being very aggressive at the retail level. In some cases they have become down right dirty. SR Kenny Wall was approached by a Conwood division manager at a retail call this past week at a Breaktime chain store. The store manager of Breaktime wrote up a signed statement stating how rude and unprofessional the Conwood manager acted in her store and that she never wanted him back in her account. Conwood reps. are also discontinuing our brands in selected accounts and replacing them with their brands. These reports are being documented and sent to the RS office.

Presta Oil in Garden City, KS. (21 stores) received a one year payment of $38.00 per store from Conwood for a four facing vendor. Before this payment we had the only authorized vendor in the accounts.

Conwood has also placed their free standing floor display in the J&J Fastrac C store chain in KS. We had just finished placing our 2908's in all stores. They now have two free standing displays in all stores.

VI. MISCELLANEOUS/SUGGESTIONS/COMMENTS

We have been able to utilize Rooster samples at several recent events. Rooster has been very well received by the Kodiak consumers. We have had several adult consumers state that they would seriously consider making the switch, especially with a price advantage. Retailers are also starting to get requests for Rooster. We have received several reports that retailers are calling their jobbers and asking how they can get the product. We are going to stir up the marketplace with this one.

We have already received comments from a few jobbers that the new returned goods shipment schedule would not work in their houses. During inventory time in several of these houses they want the returned goods shipped directly prior to their inventory. This will not always fit our schedule. I have instructed the DM's to let us know well in advance when these situations arise.

VII. PLANS FOR NEXT WEEK

Mon - ROA
Tue - Travel to St. Louis, w/w Rick Davis
Wed - McLanes Who. appt. w/Davis & Polinsky
Thu - Merchants Who. appt. w/Davis & Polinsky, Travel to KC
Fri - ROA

Thanks,

Greg

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JONES

16diii004849

Ronnie Elms
District Sales Manager
P. O. Box 360305
Dallas, TX. 75336-0305

Date: 3/30/98

Scot Elsik
District Sale Supervisor

TO: Mr. Terry Williams
National Sales Manager

Subject: Competitive Activity

Terry:

Most of the problems that we have had with our competitors paying for space or their racks only, has been in the independent type stores. This has mainly been down in the Waco, TX. area. Only a few other individual stores in other territories has been noticed.

Listed below are some of the chains of 10 stores or more that UST paid to get their racks in or space bought.

Minyards - Dallas TX. 85 stores. Minyards cut their sections down when the new law went into effect. When resetting the stores, UST had went to their office and paid Minyards for 50% of the space. In most cases, the stores were three foot racks. This means everyone else lost space. Before the resets, we had 2 facings on Kodiak, 1KST, 1H., 1KC, 1CN, 1CW. We now have 1K, 1H, 1KST, 1CN, 1CW. We lost 1 facing on Kodiak and Kodiak Choice deleted. Some stores Kodiak Straight or Hawken was deleted based on sales and space.

Krogers - Dallas TX. - Kroger no longer has their office here in Dallas. They moved all operations to Houston. When they were here, UST went in during the reset period for the new regulations, and got their racks only approved. They have all of their brands authorize including the new Red Seal. The only items authorize for Conwood were 1Facing on Kodiak and 1facing on Cougar Natural. The moist rack size was different in each store before the resets based on the size of section. We had at least 2 facings on Kodiak in each store, 1KST, 1KC, 1H, 1CN, 1CW. We lost 4 brands plus 5 or more facings including our racks.

The only other chain we lost products and racks were in the E-Z Mart chain. They have a total of 414 stores. They have roughly 150 here in Texas. UST has their racks only approved for the Texas stores. The only items kept in the sets where, Kodiak, K ST. and Hawken. We lost Kodiak Choice and a extra slot on Kodiak. Some stores, K. ST. and Hawken was taken out.

EXHIBIT
Williams 31
5/27/99 SIC

DEFENDANT'S
EXHIBIT
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UST had made presentations to Kidd Jones stores (25 stores), Kirby's (13), and Food Fast (26 stores). They all had turned them down. Food Fast is pending, but gave us authorization for our racks for now. He said he would call us before making a decision if he decides to make a change.

Sincerely,

R. J. Elms

CC: Mr. Frank Lynch

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16chiot

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101

Paul A. Pallen
District Sales Manager
P.O. Box 3
Hilliard, OH 43026-0003

To: Mr. Terry Williams, National Sales Manager

Date: March 20, 1998

Re: Chain Accounts With Exclusive UST Merchandising

Mr. Williams:

The following is a list of chain accounts who have gone to utilizing UST racks only. Each entry details the size of the chain, before and after descriptions of our product mix, and any available details of how UST accomplished the one rack system.

Dairy Mart (470 corporate stores)

Racks Lost: 5 Facings Lost: 0
Distribution Lost: None P.O.S. Lost: All
Current Situation: 5 facings in UST rack, premium's only

We were notified in December that we had lost racks in this chain. The buyer was concerned about upcoming FDA legislation and reset all stores to non self-serve. He made decisions about merchandising and product mix, then asked manufacturers to help pay for the new set fixtures. The idea of payment was brought up after the new set was decided upon. It was rumored that UST had offered to pay $400 per store to help offset reset costs. Word on the street is that they may have paid $200 per store, which is what Dairy Mart requested. I'm sure that the $400 original offer was tied in to an exclusive merchandising agreement. The buyer for Dairy Mart, Rich Frank, would not give us any specific details about UST's role. Another concern of his was not having too many vendors involved in the reset, which may have been a UST selling point.

BP Oil (500 total stores, 200 Express stores)

Racks Lost: 0 Facings Lost: n/a
Distribution Lost: n/a P.O.S. Lost: n/a
Current Situation: 5-7 Facings in a UST racks, P.O.S. authorized
5 Premium Facings, Cougar allowed in optional facings

BP Oil is included in this list because they are unique. We had our

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Conwood Company, L.P.

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Paul A. Pallen
District Sales Manager
P.O. Box 3
Hilliard, OH 43026-0003

racks in their stor s up until two years ago, when the Express locations only were remodeled. This reset did not effect the other 300 stores, where w still have rack and premium distribution. When the Express Marts w-re remodeled, snuff vendors were removed in favor of a store supplied shelf with wire dividers. At this time, we lost all brands except one facing of Kodiak on the new shelf. With the prodding of myself nd UST, the buyer realized that this new system wasted space. Thus six months after the reset, the stores were reset again. The only reason the buyer went with a one rack system was ease of set implementation (see above-could be a trend). However, in order to accomodate our wishes, Conwood P.O.S. is allowed above our facings in the UST rack, and this has worked surprisingly well. Moreover, the new set provided optional facings, with Long Cut Cougar's being a store manager option. Thus, we went from one facing of Kodiak to 2 Kodiak, 1 each of other premiums, optional Cougar, and P.O.S. I am sure that this is not what UST intended, but this was one situation where a strong chain buyer got exactly what she wanted, and we didn't come out of it too badly.

United Dairy Farmers (200 stores)

Racks Lost: 5 Facings Lost: 1
Distribution Lost: Choice P.O.S Lost: All
Current Situation: 1-4 facings in UST rack, no P.O.S.

UDF just informed us of their new set last month. Choice and Hawken were eliminated originally, but we managed to get Hawken back in. The reset was done to accomodate a cigarette reset, which ate up some space. Thus, the buyer had to eliminate some facings and brands. Since the UST racks already in the store were about the right size, he threw our snuff in the UST rack. We are still negotiating with the buyer about getting our racks back in, and I am hopefull. UST pitched him on the fact that P.O.S. was no big deal. Since speaking with me, he is starting to realize that burying his number one brand (Kodiak has 38% market share in this chain) was not the best idea. Now with Ice in the mix, he is going to have to make a decision.

Englefield Oil (85 stores)

We have never had official authorization for racks in this chain, although we have worked them in. However, we were just informed that they were going to all UST fixtures, and Kodiak is the only Conwood

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101

Paul A Pallen
District Sales Manager
P.O Box 3
Hilliard, OH 43026-0003

brand on the set. Some of these stores carried Hawken , Straight, and Choice, but distribution was sporadic. UST has been in their corner forever, working the frequent buyer program and other promotions. The buyer told us that the main decision for going to a specific set is that UST is providing floor racks to all stores. In return, Englefield granted UST exclusive merchandising. The buyer wanted the floor racks because they are on wheels, and if a settlement takes place he can just wheel the whole section behind the counter.

Big Bear (60 grocery stores)

This is one chain where we have never had racks. Snuff sales are extremely poor, and the buyer is anti-tobacco. They just carry a few brands as a convenience. We are trying to get some of our leaf items off the set because they sell so poorly, and they return most of it to the distributor. Lack of racks in this chain has no effect.

Handy Dandy (28 stores)

This is another chain where we have never had racks for any period of time. About two years ago, we got racks back in for a brief time, but UST had a fit and they came back out. We do have some sopradic distribution on our secondary brands, but not much. Our biggest problem here is that UST is extremely aggressive with promotions with this chain, and they threaten to stop if our merchandisers are allowed. UST does the frequent buyer program, pump top advertising, local event partnering, etc. Through it all, Kodiak is still the number one selling brand in the chain, but the buyer just can't afford to break ties with UST.

Thus, these are the major chains where we have either lost racks, or have not had success getting racks authorized in the first place. There seems to be two major tools UST uses to prevent Conwood merchandising; threatening to stop promotions in accounts where they do more promotion than usual, and stressing that resets are easier to implement when you do not have too many vendors involved. Our biggest problem is not having a set quarterly promotion schedule to use as bait. When we threaten to pull Kodiak Displays, buyers act like it is no big deal since it only effects the stores twice a year. Please contact me if you have questions, I hope that this is helpful.

Respectfully, Paul A Pallen

16dhn00

1999

Best of Class

CATEGORY CAPTAINS

CONVENIENCE STORE NEWS

BEST OF CLASS

DEFENDANT'S EXHIBIT 146

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A Class Act

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SPECIAL ACKNOWLEDGMENTS

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Contributing Editor: Tom DiNorne

In this, the second annual *Convenience Store News* Category Captains supplement, industry retailers, suppliers and distributors nominated companies they view as exemplary practitioners of category management. In a questionnaire sent to industry players, retailers nominated supplier and distributor Category Captains, while suppliers and distributors nominated their most proficient retail partners.

Congratulations to all of this year's Category Captains. As a group and individually, these companies have taken a leadership position in the industry with an eye toward excellence. They believe in category management, they practice and implement category-management strategies and they are reaping the rewards in the form of increased sales, profits and turns, reduced out-of-stocks and improved operational efficiency.

This year we especially recognize three suppliers who received Top Honors, based on the overwhelming number of nominations they received from retailers. This year's top honorees are Anheuser-Busch Inc., The Coca-Cola Co. and R. J. Reynolds Tobacco Co.

The entire staff of *Convenience Store News* salutes this year's Category Captains for their vision, hard work and leadership, and for sharing their successes and lessons learned with the industry in the pages of this supplement. Not only are these companies the Best of Class, they're a class act.

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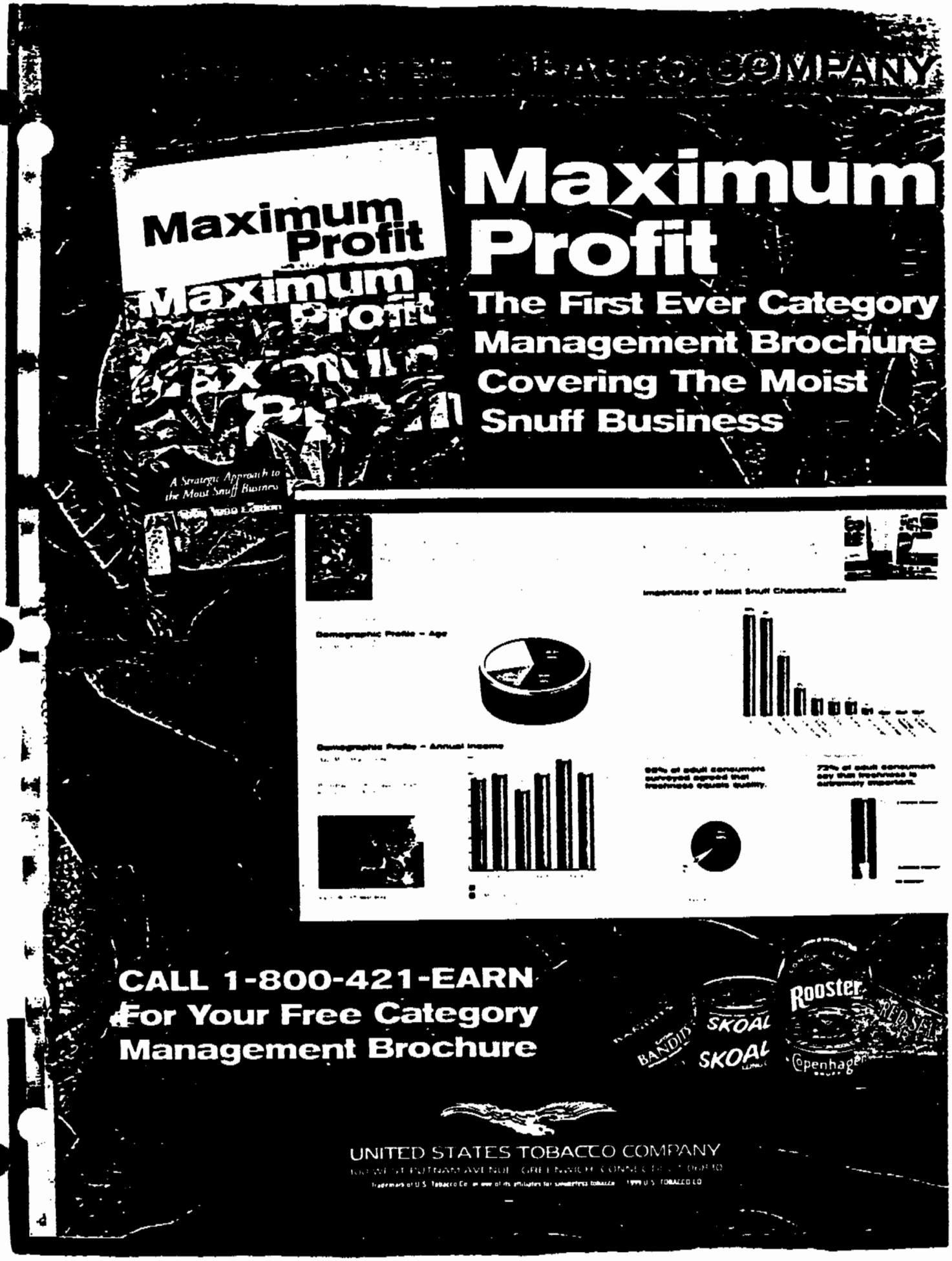

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Honor Roll

Congratulations to this year's Category Captains!

The following companies were cited as exemplary practitioners of category management. Suppliers were nominated by retailers as Best of Class, and retailers were nominated by their suppliers as outstanding category management partners. All of the companies appearing on this honor roll have earned the privilege to use the Category Captains' seal in their public relations and advertising materials.

SUPPLIERS

Bakery
Pillsbury Bakery & Foodservice

Beer
Anheuser-Busch Inc.
Miller Brewing Co.

Candy
M&M/Mars
Lifesavers Co. (Nabisco)

Carbonated Beverages
The Coca-Cola Co.
Pepsi-Cola Co.

Coffee
S&D Coffee

Foodservice
Orion Food Systems International Inc.

Grocery
Procter & Gamble

Health & Beauty Care
Procter & Gamble

Frozen Desserts
Nestle USA Ice Cream Division

Isotonic Beverages
Gatorade

Juice/Juice Drinks
Tropicana North America
Veryfine Products Inc.

Prepackaged Cakes/Cookies
Keebler Co.

Salty Snacks
Frito-Lay Inc.
Planters Inc. (Nabisco)

Tobacco
R.J. Reynolds Tobacco Co.
Swisher International
United States Tobacco Co.

WHOLESALERS & BROKERS

Convenience Marketing Inc.
Core-Mark International Inc.
Douglas Distributing
Eby-Brown Co. L.P.
Fleming Cos. Inc.
H.T. Hackney Co.
McLane Co. Inc.

RETAILERS

7-Eleven Inc.
A.T. Williams Oil Co.
BP Amoco Plc
Casey's General Stores Inc.
Chevron Products Co.
Conoco Inc.
Dairy Mart Convenience Stores Inc.
Equiva Services LLC
Giant Industries Inc.
Marsh Village Pantry
Mobil Oil Corp.
The Pantry Inc.
R.R. Morrison & Sons
Spectrum Stores Inc.
Speedway/SuperAmerica LLC
Tosco Corp.
Turkey Hill Minit Market

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Top Honorees

In the eyes of retailers who voted for this year's Category Captains, three manufacturers—Anheuser Busch Inc., Coca-Cola Co. and R.J. Reynolds Tobacco Co.—stand head and shoulders above the rest. These Best-of-Class companies received the most nominations from retailer respondents, making them this year's top honorees.

Anheuser-Busch Inc.

As category leader, Anheuser-Busch works to facilitate category management in two ways, according to Joe Patti, senior director, retail planning and category management. The first is to support industry initiatives such as Anheuser-Busch's active sponsorship of the National Association of Convenience Stores' (NACS) category-management work. The company was also a sponsor of the *Convenience Store News* Out-of-Stock Study. The second element is working closely with retail customers to address their category management needs.

"On both levels, we take our direction from the retailers themselves," said Patti. "Especially when working directly with our retail customers. Our role is to take the best of what we've learned across the country and across channels, drill down to the consumer and industry insights to apply to a particular retailer's needs, and create a plan that helps them achieve their goals. The bottom line is that it's their plan."

Step one in Anheuser-Busch's process is to identify the convenience store retailer's goals and objectives, as well as the issues relevant to their operations. This is determined by dedicated Anheuser-Busch personnel and its wholesaler network. The brewer's extensive resources and tools are then applied to the process. One such tool is Eagle Eye, a micro-marketing system built around the Spectra program. A customized version of the Spaceman program is also used for creating planograms.

Anheuser-Busch, based in St. Louis, brings added value to the process in the form of data. In addition to market-level syndicated data, the company supplies proprietary research on cross-channel shopping behavior. "Anheuser-Busch expends many resources to understand the dynamics of the category, the marketplace and the convenience store shopper. We have developed detailed insights into how shoppers think and behave when shopping in and outside the convenience channel," Patti explained. "This helps us identify things that will drive profitability for the retailer."

Larry Lytle, buyer for Salem, N.C.-based A.T. Williams Oil Co., said he values Anheuser-Busch for its extensive resources. "[The company] has brought in the needed manpower and resources to analyze our total category and assist in implementation," he said. "It's a total effort."

Patti acknowledged that while the increasing availability of convenience store data drives more efficient and effective category management in the channel, Anheuser-Busch approaches the process as sound business practice. "With or without data, at the end of the day, you have to make sound business decisions. We focus our efforts on how

> "Anheuser-Busch doesn't monopolize the case with their products when they develop a set. They compile all the relevant information and develop fair layouts. It's truly a partnership."
>
> —Silvio Federighi
> Convenient Food Mart

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to make the best business decisions to reach the defined goals and objectives of the retailer. With that position, the process becomes intuitive and logical, rather than intimidating," he said.

An element of the Anheuser-Busch category management process lauded by retailer is objectivity. "The company is very fair in the layouts it develops," said Silvio Federighi, general manager of Convenient Food Mart of Painesville, Ohio. "Anheuser-Busch doesn't monopolize the case with their products when they develop a set. They compile all the relevant information and develop fair layouts. It's truly a partnership."

"Anheuser-Busch understands that the whole category must grow to sustain growth of their products," said Jeff DeJesse, category manager for ARCO am/pm stores. "They've been very responsive, and provide the necessary resources for all our projects."

"We realize that we're in this for the long run, so we're not looking to make a quick hit at a cost to our retail customers," Patti said. "This approach allows us to be objective and focus on the quality of our products and our information."

The most important step in the category-management process, according to Patti, is to begin. "It's really important for retailers to get started, no matter where they are in terms of their own automation and data-collection capabilities. Talk to your lead suppliers, start the dialogue and start the process. The sales results and profit increases will show your return on the investment."

The Coca-Cola Co.

Dr. Glen Stoops

"Category management is all about opportunity—the ability to locate it, plan for it, execute it and capture it," observed Dr. Glenn Stoops, managing director, market research and category management for The Coca-Cola Co. "The category-management mission of the Coca-Cola system is to help convenience store operators locate opportunities for growing the size and value of the beverage category."

To assist retailers in capitalizing on the opportunities within the non-alcohol beverage segment, Coca-Cola provides an extensive category-management toolbox. However, the company emphasizes the expertise of its category-management personnel as a crucial element of the process. "Tools within themselves are not very powerful. It is the people behind them who release the tools' full potential," said Stoops.

> **"The company has a department within its organization set up specifically for category management. They have the resources in place to analyze and recommend specific sets as they relate to our business."**
>
> — Stephen Monaco
> Tedeschi Food Shops Inc.

Coca-Cola category managers combine their personal base of knowledge and experience with market research insights to assist retailers in developing appropriate plans. Consumer insights are the key to achieving profitable growth, according to Stoops. To speed the delivery of such insights to retail, Coca-Cola's market research and category-management functions are linked. Coca-Cola's bottling system is also an important component of the process. "Our commitment to retail is clearly seen in the increasing number of Coca-Cola bottlers who are designating more category-management personnel solely to the convenience side of the business," Stoops said.

That commitment is evident to retailers doing business with Coca-Cola. "The company has a department within its organization set up specifically for category management," said Stephen Monaco, buyer at 130-store Tedeschi Food Shops Inc., based in Rockland, Mass. "They have the resources in place to analyze and recommend specific sets as they relate to our business."

Rather than focus solely on software systems and tools, Coca-Cola identifies eight areas of category-management expertise that are applied to the process. They include advanced consumer insights, market analysis, financial analysis, pricing analysis, promotional analysis, efficient assortment, advanced merchandising and efficient replenishment.

In addition to applying the NACS process and utilizing syndicated research, Coca-Cola employs proprietary systems that enable activity-based-costing studies, basket-level analysis of scan data and store services, as well as profitability recaps. The market-basket analysis capability has been implemented over the past year, and reveals beverage purchase dynamics. "The retailer is able to gain insights to important areas such as the interaction between categories, between different gasoline grades and store purchases. We'll also use it as a new approach in determining out-of-stock situations," Stoops explained. "This allows the retailer to look at other categories outside of non-alcohol beverages and apply fact-based decision-making."

Atlanta-based Coca-Cola also assists retailers in maintaining and measuring the effectiveness of category-management programs. A detailed process of conducting assortment review has been developed that is based in obtaining the proper buy-in to ensure the set's longevity and provides the ability to track progress, Stoops said. "Assortment is the backbone of any successful beverage business and must be done to satisfy

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the needs of the consumer."

Mapco Express Inc. of Nashville, Tenn., has had positive experiences with Coca-Cola's process, according to Larry Pedigo, category manager for the 256-store chain. "Our Coca-Cola representative was willing to not only wear a Coca-Cola hat, but when necessary put on a Mapco hat. The company is very good at doing what is best for the consumer, and has data that can be trusted," he said. "Coca-Cola works to grow the entire category."

R.J. Reynolds Tobacco Co.

Jim Maguire

Mary McCombs, category manager for the 200-unit Sheetz Inc., based in Altoona, Pa., had this to say about R.J. Reynolds Tobacco Co.'s category-management support: "R.J. Reynolds's [representatives] keep their finger on the pulse of the [tobacco] industry, as well as the convenience store industry. They consider the overall category needs in our stores, not just their own products. They work with customized programs that fit our needs as well as theirs. Top-down personnel are readily available at all hours. They provide us with the detailed data we request in a timely manner. Also, they are continually looking for ways to help us, which could involve developing fixtures to maximize space or developing direct mailers for our markets."

That type of involved, unbiased, total-store approach is the backbone of R.J. Reynolds's category-management process for convenience stores. "A category advisor is a manufacturer that understands the values of all brands in the category, as well as how the category affects other product sales, and structures all of their recommendations accordingly," explained Jim Maguire, senior vice president of sales.

The total-store strategy for the tobacco category is important for the success of convenience stores, Maguire said. "Adult smoker foot traffic is critical to the c-store industry's profits. According to the *Convenience Store News* Out-of-Stock Study, the average adult smoker visits a convenience store 5.6 times per week and spends an average of $5.12 per visit," he noted. "This $28.67 in sales per week, per adult smoker speaks for itself relative to the importance of maximizing store profitability."

R.J. Reynolds, based in Winston-Salem, N.C., brings a range of resources to the tobacco category-management process. "We use real-time data provided by direct accounts on shipments to each retail outlet and, whenever we can, retail scan data to provide our total category recommendation," Maguire said.

Field personnel are equipped with automated tools that enable them to advise retailers in three important areas. The first is determining the brand-style selection required to satisfy a target percentage of adult smokers in a specific geography. The second is identifying the manufacturer programs that should be combined to maximize adult smoker needs relative to promotion levels and maximizing the number of brands that can be promoted. The third area is merchandising the category from the standpoint of "presentation to the consumer," said Maguire. "What is the ideal capacity for maximum turns/minimal out-of-stocks? How can the manufacturer-program requirements be incorporated into the available space?"

> "R.J. Reynolds considers the overall category needs in our stores, not just their own products. They are continually looking for ways to help us, which could involve developing fixtures to maximize our space or direct mailers for our markets."
>
> —Mary McCombs
> Sheetz Inc.

Determining product selection and developing the appropriate SKU mix for a convenience store outlet requires examination of all brands. "We would point out that several smaller share brands—those that are seldom, if ever, promoted—have the highest level of brand loyalty. Consequently, adult smokers who can no longer find their brand will quickly take their $28.67 per week contribution to another store that carries their brand," Maguire explained. "Reducing inventory costs has to start with getting proper inventory levels on each brand style in line versus simply discontinuing everything that doesn't sell a carton a week."

R.J. Reynolds has also studied the impact of tobacco products on other categories. Maguire outlined that retailers must consider the impact of increased cigarette sales on their five other top sales/margin items. Another question to ask is whether the retailer can afford to trade off margin on cigarettes to drive foot traffic on higher-margin items and drive a higher overall profit for the store.

"We'd like to thank the retailers who have valued our contribution enough to nominate R.J. Reynolds for this recognition," Maguire said. "We will continue to provide all of our expertise to those business partners who are truly committed to growing their total business and to providing R.J. Reynolds a fair chance in their stores to grow our business. It's a win-win situation."

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*"An Anchoring and Adjustment Model of Purchase Quantity Decisions" from Journal of Marketing Research Vol. XXXV (February 1998), 71-81

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Best-of-Class Suppliers

The following Best-of-Class category-management partners nominated by convenience store retailers share their experience and some of the secrets of their success.

Convenience Marketing Inc.

Convenience Marketing has a department dedicated to category management, according to vice president, sales development, Bill Price, who added that the Austin, Texas-based food broker's entire organization assists in the process. "The organization provides a resource to facilitate linking manufacturers and retailers," said Price.

Utilizing syndicated data and industry resources, Convenience Marketing determines core-item selection that can be customized by market. State-of-the-art planogram systems are then used to develop photo-quality shelf sets for retailer implementation. Business development managers oversee each project and provide support in the form of consumer research and brand information. The field sales organization works with buyers and category managers to finalize the product-selection process and ensure implementation of the planograms. "It's a team effort in partnership with the customer," said Price.

"Convenience Marketing has consistently and promptly offered assistance," said Rebekah Ensley, category management analyst at H.T. Hackney Co., a wholesale distributor based in Knoxville, Tenn. "They provide complete, live-image planograms and their recommendations are valid and supported."

Core-Mark International

Core-Mark International is committed to objective category management, according to Chris Walsh, vice president of merchandising. "We start with fact-based, consumer-driven schematics," he said. But that is only the foundation of the company's category-management process.

"We partner with retailers in maximizing their real estate," said Walsh. "Especially with the recent dynamics of the tobacco industry, we try to help retailers understand measurements of profitability, how certain categories are driven more by impulse and the value of activity-based costing."

> "If we help a retailer eliminate a half dozen suppliers, we afford that store over $10,000 in activity-based savings per year, while increasing sales and profits."
>
> — Chris Walsh
> Core-Mark International

While manufacturers and distributors have made considerable gains in ECR-driven logistical efficiencies in recent years, Walsh stated that the benefits of the processes for retailers are largely untapped. "One consultant estimated it 'costs' a retailer $35 per week to transact business with each supplier. If we help a retailer eliminate a half dozen suppliers, we afford that store over $10,000 in activity-based savings per year, while increasing sales and profits," he explained, adding that savings can be realized on the bottom line or used to increase customer service and store cleanliness.

Core-Mark's primary program for achieving these objectives is SmartStock, which enrolled 3,000 retailers in 1998. The results have been positive. "For example, we worked with Quik Stop Markets [Freemont, Calif.], which has over 100 franchisees making independent buying decisions at every store. We utilized SmartStock and our category-merchandising tools to provide consistency, increase sales across commodi-

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ties and eliminate 500 transactions per week from the stores," Walsh said.

Van Tarver, president of Quik Stop Markets Inc., acknowledged Core-Mark's contribution. "The company really cooperated with us in our recent remerchandising program. Core-Mark helped to eliminate slow-moving items through category management and improved the out-of-stock situation in our stores," he said. "The result has been a positive move in sales. One store, in fact, experienced sales increases at double the rate of stores that had not yet been remerchandised. Core-Mark has been a flexible and cooperative partner."

Based in South San Francisco, Core-Mark's approach is to go beyond the textbook definition of category management. "Whether it's helping to implement POS, reduce tobacco inventories or stimulate sales through promotion or merchandising, we are committed to partnerships that assist retailers in being more profitable operators," said Walsh.

Douglas Distributing

Ron Feulner

For family-owned Douglas Distributing, based in Salt Lake City, Utah, keeping up with coffee trends and the specific needs of its convenience store customers is the key to successful category management. "Our strength lies in maintaining a complete focus in one convenience store category—coffee," said Ron Feulner, owner. "We can focus directly on this category in this market [Utah and surrounding states]."

Douglas Distributing utilizes a sophisticated computer system to track retail customer activity at the store level, and combines that up-to-the-minute information with its local store knowledge. "We have six people in the field, and hold fast to a hands-on approach to serving our customers and creating programs that serve their needs best," said Feulner, who himself visits stores twice a month. "I want to rub shoulders with the people who work the stores every day. It's a great way to measure customer satisfaction and find out exactly what the consumer wants."

"Douglas accepts responsibility for equipment, service and product," said Bill McGregor, foodservice director of 140-store Maverik Country Stores in Afton, Wyo. "They offer unbiased, professional advice, current category information, price protection and rapid response. Douglas Distributing is my coffee category expert."

Eby-Brown Co. L.P.

"Eby-Brown services retailers of all sizes, from the mega-chain to the individually owned store," observed Tom Oktavec, vice president, marketing of Kocolene Marketing Corp., operator of 43 Fast Max stores, based in Seymour, Ind. "Each of their customers is treated with care and respect. Eby-Brown is a true partner to our industry."

That ability to service both large and small retailers stems from Eby-Brown's approach to customer service, and also its technical capabilities. Convenience store operators that are scanning benefit from Eby-Brown's item-information database and assistance in POS setup, and ongoing support in the format of the POS software selected by the retailer, according to Ron Coppel, vice president, business development. For retailers who are not scanning or do not have data-mining capabilities, Eby-Brown has developed IRIS (Intelligent Reporting Information System), which provides subscribers with secured access to their velocity information 24 hours a day, seven days a week via the Internet.

Naperville, Ill.-based Eby-Brown also has developed category-management practices to maximize consumer value and category asset performance, said Coppel. "We assist retailers by integrating our category expertise into our customers' strategic business process, providing the exchange of information and the willingness to share pertinent data, and jointly identifying with retailers and manufacturers opportunities to grow category sales and profits," he said. Eby-Brown then utilizes Spaceman tools to develop planograms.

Frito-Lay Inc.

"Frito-Lay is progressive and cooperative on category management," observed Arnold Kimmel, CEO of Quickie Convenience Stores of Ottawa, Canada. "They have the tools and execute their commitments and obligations well. Frito-Lay has a complete product line, but respects their competitors."

That depth of commitment, resources and objectivity stems from Frito-Lay's approach to category-management for convenience stores. "Category management is a journey, an evolving and ongoing process," said Dave Boissevain, director of category management for the Dallas-based company. "We take a fact-based, results-oriented approach. We work with retailers to build an integrated category-management plan that maximizes the key drivers and fits into the retailer's overall strategy. Partnership with the retailer is critical in developing a category plan that can be implemented."

Frito-Lay's category-management process is grounded in the consumer, and Boissevain defined several channel-specific drivers: Right Assortment, variety optimization; Right Presence, landmark merchandising; Rich Promotion, bundled tie-ins; and Right Service, direct-store-delivery (DSD) system. A proprietary software program, Right Set, has been developed to maximize the assortment and landmark merchandising drivers.

"Right Set is a consumer-centered, fact-based approach that maximizes

> "They have the tools and execute their commitments and obligations well. Frito-Lay has a complete product line, but respects their competitors."
>
> —Arnold Kimmel
> Quickie Convenience Stores

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salty-snack sales and profits for convenience stores," said Linda Seatvet, convenience store channel category manager. "The flexibility and targeted nature of the Right Set program is key because it reflects retailing realities. The population diversity across a chain's marketing area can be enormous, running the gamut from highly affluent suburbs to blue-collar neighborhoods, and c-store chains may have a wide variety of store formats. Right Set assortment and merchandising solutions can be custom targeted on a store-by-store basis."

Frito-Lay continues to be committed to fact-based, consumer-led, ECR-smart category management. "Our approach is grounded in the consumer, with the objective to build a category plan that leverages the expandable nature of snacks," said Boissevain.

Gatorade North America

Gatorade North America's proprietary category-management system, Cooler P.R.O., is gaining wide acceptance by convenience store retailers, according to Jim Brooks, assistant manager, capability development. The system incorporates analysis of consumer insights with a review of convenience store retailers' promotions, pricing, product assortment and available space to develop assortment recommendations and planograms for the non-alcohol beverage segment.

Adding to the strength of the system, Gatorade, a division of Chicago-based Quaker Oats Co., recently initiated a new structure that enables more field support for category management in convenience stores. Six regional customer business centers and a national accounts customer business center have been established, and the manpower behind Cooler P.R.O. has been tripled in the past year.

"The category-management expertise for Cooler P.R.O. really lies in our field-based category-management teams," said Brooks. "Our strategy is to sit down with the retailer, determine their goals and source their data across the beverage category. Then, we use the Cooler P.R.O. system to develop unbiased recommendations to maximize retailer sales through the cooler door."

"We completed a major cold-vault reset in 1997, and Gatorade was the category partner for the entire non-alcohol cooler," said Tamara Fowler, associate category manager at Wawa Inc., a 470-store chain based in Wawa, Pa. "Gatorade is one of the most knowledgeable and dedicated category-management companies in the industry."

Syndicated data on consumers and convenience stores, as well as custom market reports on the local competitive set, are utilized by Gatorade in the category management process. Custom consumer audits and assessments of out-of-stock situations are another tool.

Gatorade's process focuses mainly on the cooler door and addresses all non-alcohol beverages, not just sports drinks, Brooks explained. "Cooler P.R.O. is designed to analyze and create recommendations for the entire category. Taking a broad approach is the best way for convenience retailers to maximize sales and profitability of all non-alcohol beverages."

H.T. Hackney Co.

Rebekah Ensley

"Our role is to provide our customers with the best data resources and space-management tools to identify efficient product assortments and develop strategies to effectively compete in their marketplace," said Nancy Tucker, director of marketing. "Our goal is to provide category information, recommendations and customized planograms."

H.T. Hackney, based in Knoxville, Tenn., utilizes several tools in the process, including syndicated and internal data, Spaceman planogram systems and store-level reports. Planogram development is supported by product-mix analysis, pricing analysis and programs focused on increasing total category sales and profitability.

A full-time category-management analyst, Rebekah Ensley, is dedicated to administering the process for retail customers. Each of Hackney's 24 distribution centers is provided a complete category planogram guide and is staffed with merchandising experts to conduct analysis of store activity.

"H.T. Hackney has formed a great partnership with both its customers and manufacturers, and bridges that partnership on a win-win basis," said Dan Fleming, director of operations for Knoxville, Tenn.-based Pilot Corp. "Their strength is in customer service. They also have a wealth of information at easy access and are current with the latest and greatest."

Keebler Co.

"Keebler has provided good support and been very active in the category. Theirs is a comprehensive category-management program that looks at the entire category, and the Keebler people are always available to conduct analysis, create planograms and do resets," said Randy Meyer, senior vice president of Krause Gentle Corp., operator of 158 Kum and Go stores based in West Des Moines, Iowa. "We've enjoyed an excellent long-term relationship with Keebler. It's a positive partnership."

Krause Gentle's experience is the result of Keebler's efforts to focus on the goals of the convenience retailer in the cookie and cracker category. "We work closely with the retailer to understand their objectives and establish plans that meet those objectives," said Mark Clark, business development manager for the convenience division at Keebler. "In light of the number of categories and nature of the convenience

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store business, we simplify the process and attempt to make it easy for the retailer to execute against."

Elmhurst, Ill.-based Keebler deploys more than 35 field personnel and a broker sales force of 600 to facilitate category management with its convenience store partners. Culling data from syndicated and proprietary resources, Keebler then applies its own knowledge of the cookie and cracker category and develops planograms using state-of-the art space-management tools.

Cookies and crackers present a unique challenge to convenience store operators that Keebler assists retailers in addressing, according to Clark. "In convenience stores, this category is not the top-of-mind snack option for the consumer entering the store. There's a big opportunity to grab the consumer, however, with placement and pricing," he said. "Cookies and crackers are typically merchandised in the center aisles. By adding secondary placements and offering attractive value pricing, you can move the consumer to the category as they make their snacking decision."

To that point, Keebler's two-for-$1 program is merchandised with counter and floor racks. "Two-for-$1 can increase the purchase frequency by as much as 32 percent because it creates multiple purchases," said Clark. "The rack and value offer makes these products top-of-mind because the consumer anticipates the availability. The presentation drives impulse sales as well."

Clark explained that Keebler's category-management strategy involves developing solid working relationships with retailers and objective analysis and recommendations. "While it may drive immediate results, our category management strategy is very long-term focused," he said.

McLane Co. Inc.

"McLane Co.'s approach to category management is to give the consumer what they are looking for: well-known, well-recognized, high-quality products at a retail that allows them to purchase now and repurchase in the future," said Bill Fendrick, vice president, merchandising for Temple, Texas-based McLane. "The consumers' needs have to be focused on in a way that enables them to choose and purchase the key, core items within a category. Our focus is to make the retailer aware of the key national and regional core items within each category, and then offer these items with sound, fair pricing backed up by retail support from the vendor."

To facilitate that strategy, McLane has developed a decision-support system (DSS) that allows its merchandising experts to zero in on each category. "We then use this information in conjunction with our demographic-profiling system to present fact-based recommendations," said Fendrick. "Using these tools, we are able to work with and support both the vendor and the retailer in their businesses."

Each of McLane's 15 distribution centers has a merchandising team dedicated to providing category-management support. The merchandising teams are supported by merchandising managers located at the McLane corporate-support center. "Our role is to be an unbiased presenter of the facts and category statistics that are now available in the industry," added Fendrick.

In conjunction with the DSS system, McLane has developed its Stars and Star Gazer programs to allow retailers quick and convenient access to their item and category information. The commitment to category management and sophistication of the tools utilized in the process has made fans of convenience store retailers.

"The use of McLane's Stars and Star Gazer tools allows us great ability to look at all McLane product categories," said Artie Smith, marketing manager for Kent Oil Inc., a 25-store operator based in Midland, Texas. "We can reset much faster to adjust to trends and change problem areas quickly. We feel McLane's support really gives us the advantage."

> **"We can reset much faster to adjust to trends and change problem areas quickly. We feel McLane's support really gives us the advantage."**
>
> —Artie Smith
> Kent Oil Inc.

Miller Brewing Co.

Jeff Schouten

"Miller has re... ly teamed ... with c-stores in T... *Miller Advantage*," said Kendra Kuehl, buyer/merchandising manager for Bosselman's Pump & Pantry, Grand Island, Neb. "Miller is publishing information on category management for us, the retailers. The know that without category management, we will not be viable competitors in the future."

The Miller Advantage, a publication featuring consumer insights and key category-management issues, positions the brewer to collaborate with retailers on solid business strategies and objective plans, according to Jeff Schouten, Miller's director of category management. "Category management is something we do with, not for, the retailer," he said. "That type of collaborative effort becomes a win-win-win, benefiting the manufacturer, the retailer and the consumer."

Milwaukee-based Miller not only brings category-planning expertise to the process, but also several tools to speed analysis and deliver insights, including the CoolerMAX multi-category cooler simulation software. Recently, a price elasticity model was created to demonstrate effective pricing in a given market. A proprietary outlet-level analysis tool identifies distribution voids and ensures core items are stocked in each store.

A new element of the brewer's repertoire is Miller Tag Manager. The proprietary program generates precut shelf tags displaying the shelf set developed for the space that can be affixed to the

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front and/or back of the cooler. "One of the biggest issues we've identified is the failure to follow up and implement the plans," Schouten explained. "Tag Manager enables implementation at the store level so that the set meets the plan volumes."

All Miller chain account managers are trained in category-management analysis and plan development, a valued resource for retailers. "Jim Ebert [our Miller representative] put talk into action by implementing five crucial category-management steps in one of our major markets to pilot the program," said Gregg Wingert, senior vice president of marketing for Houston-based Coastal Mart Inc. "He succinctly summarized and documented each step, applying top-notch category management activity. It is an excellent effort!"

Miller's approach is to customize the category-management process to objectively meet the business needs of the individual retailer. "Objectivity is a big issue," Schouten explained. "When we're objective, we're gaining sales for the category. We all win."

M&M/Mars

M&M/Mars works with its retail partners to better understand consumer shopping behavior, an effort that proved vital in identifying opportunities within the confection category at Equilon Enterprises' stores. "With innovation and participation in our 1998/1999 advertising promotion, M&M/Mars helped increase our candy category sales by 12 percent," said Robb Harling, Ohio ETD franchise representative, Equilon Enterprises. "The company's representatives call on our stores frequently and they participate in our monthly special programs. M&M/Mars provides excellent planogram support, and they are very involved and active in our markets."

Harling's 140 stores in the Cleveland and Columbus, Ohio regions are enjoying the benefits of M&M/Mars's comprehensive approach to category management. "We're striving to be the primary source for confectionery category management in convenience stores," explained Steve Collins, national sales director, category leadership for M&M/Mars, based in Hackettstown, N.J. "We work as a true partner with retailers, helping them identify and capitalize on opportunities to grow their confectionery sales and profits."

M&M/Mars brings a wealth of resources to the process. First and foremost is its category leadership team, whose 45 field associate members are certified through a 38-day training program. Ten members of the team are dedicated to collecting consumer information, conducting trade-channel research and developing category-management tools, which the teams' field associates then customize to meet the needs of retail customers. "The quality of our certification process and the significant size of our Category Leadership Team speaks to the commitment M&M/Mars has to this ECR initiative," said Collins.

M&M/Mars soon will expand its portfolio of category-management tools with the addition of a major proprietary convenience store study. "We conducted a statistical analysis of the conditions in the marketplace to identify top-performing stores and determine what distinguishes them from average and below-average performing stores," Collins explained.

More than 600 convenience and petroleum stores were involved in the study. M&M/Mars investigated several issues. Where should the primary confectionery selling location be? What items should be carried? How should they be merchandised? What is the role of promotion in increasing confection sales? "The findings will cover some impactful best practices, and we'll share those and more during this year's NACS convention," Collins said.

M&M/Mars's category-management strategy is based in its commitment to partnering with its retail customers. "Success in category management is realized when joint efforts between our customers and us result in improved category sales, profits, return on investment and consumer satisfaction," Collins explained. "Each customer has specific objectives they need to meet to optimize category productivity and meet the needs of their consumer, and we're dedicated to assisting in that effort."

> "With innovation and participation in our 1998/1999 advertising promotion, M&M/Mars helped increase our candy category sales by 12 percent."
>
> —Robb Harling
> Equilon Enterprises

Nabisco Inc. (Planters Inc. and Lifesavers Co.)

Nabisco's dedicated convenience store channel marketing teams have a singular goal —to help operators maximize total store profitability and productivity. The strategy for achieving that involves a hands-on approach that leverages Nabisco's understanding of consumer behavior in convenience stores against its category management and merchandising expertise, according to Billy Henry, director of marketing for Planter's immediate consumption and Cornnuts businesses. "The approach is to transform data into actionable solutions that drive total store productivity for the retailer," he said.

Those actionable solutions involve increasing transaction size by applying Nabisco's extensive consumer insights. "We focus on shopper tendencies versus demographics," Henry said, adding that Nabisco has developed insights into shopper behavior based on frequency of visits to convenience stores and traffic patterns. From this, Nabisco has developed what it calls its "Double D" strategy of linking destination categories—such as beverages and the checkout station—with discretionary categories, which include snacks and confections.

Two Nabisco programs are built on

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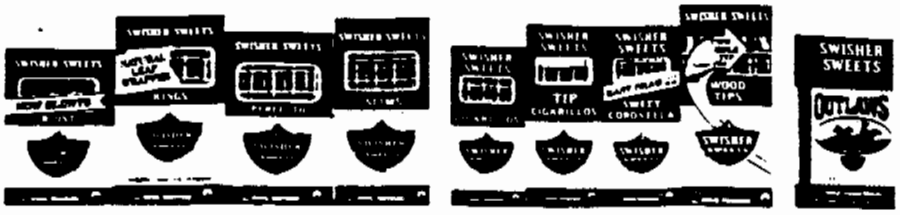

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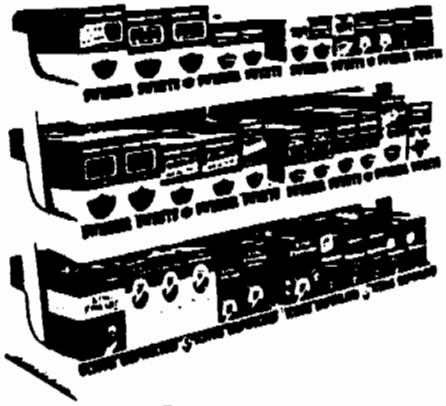

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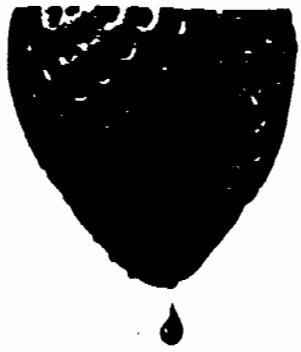
(with a twist)

(and a squeeze)



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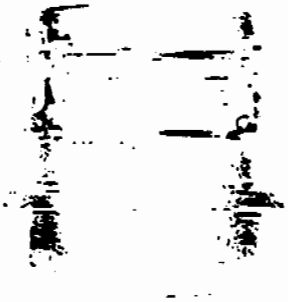

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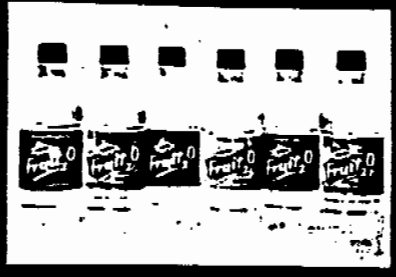

Clearly, spring water is where the action is. Already bottled water represents 23% of the non-carbonated, single-serve segment in c-stores and sales are up +16%! And, like water, Fruit$_2$O also has all-day, anytime consumption appeal.

Fruit$_2$O comes in six cool, crisp flavors – lemon, lime, orange, cherry, raspberry and strawberry – all wrapped up in vibrant, eye-catching foil labels and bright blue caps.

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that foundation of applying consumer insights to driving increased transactions. The first is Lifesavers Co.'s SMART (Successful Merchandising Assures Rapid Transactions). SMART addresses the confections category with learnings garnered from alliances with eight convenience store companies, combined with Nabisco's understanding of shopper behavior. "We link the high-traffic zones with consumer behavior indicative of that zone," said Mary Jean Longo, senior manager, category management for Lifesavers Co. "For example, beverage is a destination category, and we know 70 percent of beverages are purchased in combination with a snack. So we advocate placing confections next to destination categories such as beverages to drive that impulse sale and increase transaction size."

Secondary placements play a key role the process, and Nabisco studies show that sales of confections can increase as much as 43 percent when the products are moved from the aisle to the checkout. An increasingly important destination/discretionary product match is the coffee station and breath-freshening mints and gum. "The value of placing confections in high-traffic and destination locations is unmistakable," Longo said.

Placing salty snacks in high-traffic retail locations is also a key strategy for the Planters' Pacesetter 2000 program. In tests, front-end merchandising units for Planters products generated a 62 percent increase in sales for Planters and an 8-percent increase for the total snack category overall, according to Henry. "Pacesetter 2000 focuses on reducing duplication and adding variety. The next step is to increase transaction size by linking the category with destination categories in cross-promotional activity and secondary placements," said Henry.

Retailers such as Kendra Kuehl, buyer/merchandising manager at Bosselman's Pump & Pantry, based in Grand Island, Neb., have found Nabisco's category-management personnel and programs to be valuable. "[Nabisco representatives] are willing to come in and evaluate the categories with us, looking at our movement and national numbers, and put together planograms accordingly," she said. "They set up the section with us and we continually evaluate the area. [Nabisco personnel] are objective and include all products [participating] in the category in the evaluation and planograms."

Nabisco's cross-promotional strategy is now being taken to the next level through two 1999 promotions with The Coca-Cola Co. This spring and summer, the Ice Breakers gum brand will be linked with Nestea Cool in a promotional tie-in program called "Cool to the Core." Ice Breakers will be merchandised in custom display units near beverage coolers. Nestea Cool bottles will include instant win sweepstakes pieces. Prizes include 35 cents off Ice Breaker products. Planters products will join Coca-Cola in the "Refreshing Combo" program, which brings together Planters Super Tube nuts packages with 32-ounce fountain Coca-Cola drinks. A pre-pack display and in-store signage will support the "Refreshing Combo" promotion at retail.

"These elements all come out of our ongoing research and efforts to stay in touch with the convenience store consumer," said Henry. "Then we build plans that satisfy their needs and the needs of the retailer."

Nestle USA Ice Cream Division

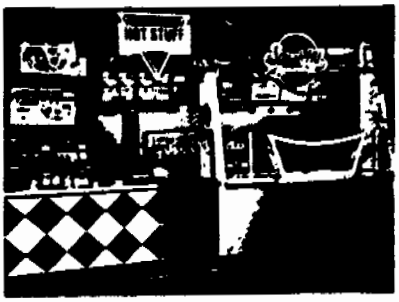
The category-management process undertaken by the Nestle USA Ice Cream Division begins with a solid understanding of the convenience store customer obtained through independent research, secondary research and syndicated data. "Key components of our program include use of our powerful Nestle brand name and its lineup of premium-quality products, careful selection of products that are well-suited for the individual store locations, strong advertising and promotional support, as well as an impactful merchandising program," explained Kelly Atkins, director of impulse marketing.

Nestle sales teams, including the impulse or "alternative channel" team, work closely with convenience store retailers to tailor product selection to meet their shoppers' needs and their business needs. Nestle's exclusive distributor network also plays a crucial role. "Part of the process involves joint development of a planogram, which helps to target kids, teens, adults and the entire family. Distributors are adept at managing the process in a comprehensive fashion," said Atkins. "We also address opportunities through a variety of programs, including account-specific promotions."

Dick Kolberg, sales consultant for Houston-based Equilon Enterprises, has experienced a productive partnership with his Nestle sales representative, John Artesi. "He does a great job assessing appropriate product selection and helping determine the most effective location for the freezer box. And, he is a master at promotions," he said. "We have come up with some ideas, and he has just run with them. The full Nestle merchandising program, as John implemented it, drove a sales increase in one location of 300 percent. We also have an excellent Nestle distributor in Rock Island. Few companies do as good a job. Nestle is a first-class operation."

Nestle prides itself on a hands-on approach to category management. "We view our role as that of a partner with the retailer," said Atkins. "Our mutual goal is to optimize ice cream category sales and profits."

Orion Food Systems International Inc.



Orion Food Systems has proved its excellence in foodservice, according to Corey Burgin, vice president of Joe Bob's Inc. of Sulphur Springs, Texas. "Orion provides high-quality products for

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their franchise partners, whether you are an independent or a multistore chain operator," he explained. "Orion provides us with excellent operational support through knowledgeable people, practices and ideas. They have developed high-quality marketing materials to build brand identity from in-store POS to exterior signage, while still allowing us to 'own' our food-court concept. All of this, and a great return, results in excellent category management."

Retailer satisfaction with the five Orion foodservice brands stems not only from the product quality but also from operations support. A key point of differentiation for Orion, according to executive director of marketing Greg Breukelman, is its guaranteed operational support system.

"We have territory consultants assigned to each Orion location, and we guarantee that they will visit that location every 21 days or we will issue the retailer a check for $1,000," he explained. "Convenience retailers have a complex business to run, and need support every step of the way, so we make sure they get it."

In addition to field personnel support, Orion develops training videos, operations manuals and POS systems for their retail franchise partners. Another resource is promotion, which occurs on the national level and via local store marketing. "Part of the role of the territory consultant is to develop local store marketing that helps the retailer get involved with their community," Breukelman said.

The foundation of Orion's category management is its vertically integrated structure. The company manufactures, warehouses and ships all product. "This gives us incredible control of product quality, and enables us to be flexible in introducing new products," said Breukelman. "We take a lot of pride in our products so our retail partners can do the same."

Pepsi-Cola Co.

Pepsi-Cola took its commitment to consumer-based programming to the next level when the company integrated its customer marketing and category management efforts into one business practice last year. "Historically, suppliers have helped develop category plans in isolation of marketing programs, which are developed on an opportunistic basis," said Greg McIntee, vice president, customer marketing and category management. "We've brought these two functions together. As result, the category plan, which must reflect and support the retailer's overall business plan, and the customer marketing solution we build can effectively address the strategic needs of that business."

The organizational change reflects Pepsi-Cola's position that category management must be focused against the consumer. "We have a fundamental belief that satisfied consumers drive category growth," McIntee said. "This new structure allows us to work against that principle."

> **"Pepsi has been proactive with new concepts and quick response to our needs. The company goes the extra mile to offer competitive intelligence."**
>
> —Tony Bandiera
> Chevron Products Co.

"Pepsi has been proactive with new concepts and quick response to our needs," said Tony Bandiera of Chevron Products Co. Inc., based in San Francisco. "The company goes the extra mile to offer competitive intelligence."

Pepsi-Cola's consumer-insights toolbox includes E-Lab, a video study of consumer behavior, and frequent merchandising audits of convenience stores. "We have a real dedication to really understanding the c-store shopping experience. Then, we work objectively with customers in partnership to develop consumer-based solutions to drive the entire category," said McIntee. "The approach is to wed consumer insights with

technology to optimize the cold vault."

The Right Choice is the primary optimization tool applied by the soft-drink marketer, and is utilized by category managers and sales representatives in the field, according to Jodi Rumble, channel strategy and marketing manager, convenience stores. "Research tells us that 75 percent of consumers know what brand of soft drink they want before they walk into the store. Knowing that, we look to maximize the cold-vault area—optimizing it against the SKU's that turn the greatest profit—so consumers can find what they want quickly," she explained.

Product and package development is another element of category management that is consumer driven. Pepsi-Cola's recent introduction of Pepsi One is an example of the company applying consumer insights and an understanding of retailer needs, according to McIntee. "Pepsi One shows our understanding of what consumers want, and developing a product that creates an opportunity for retailers," he said. "The majority of the sales achieved thus far by the brand have been incremental."

Retailers are appreciative of Pepsi-Cola's consumer-focused approach. "Pepsi's service and promotions have led this company to a leadership position in this market," observed Steve Hayward, retail supervisor for Salt Lake City, Utah-based Sinclair Marketing.

Pillsbury Bakery & Foodservice

Identifying retail customer goals and developing recommendations and product matches to help them meet those needs is the strategy employed by Pillsbury Bakery & Foodservice in assisting convenience store operators with cate-

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gory management. "We look at their approach across foodservice categories and determine where they are trying to grow and where the opportunities lie," explained Keith Dozier, marketing manager. "Then we identify the products, training and equipment that will facilitate that strategy."

Pillsbury personnel provide analysis of profits and margins, and serve as consultants for proprietary foodservice program development efforts. One area of concentration is controlling labor costs. "Often, additional labor is not needed to develop new and profitable programs," Dozier said. "For example, we might recommend to a retailer several ways to use the same product to generate additional revenue without increasing labor costs."

Much of Pillsbury's new product development is geared toward helping retailers hold down operating costs. For example, the recently introduced freezer-to-oven cinnamon rolls do not have to be thawed or proofed, reducing the prep process by two steps, Dozier said.

"Pillsbury offers quality products, promotional support and reliable technical knowledge and assistance," observed Bill McGregor, foodservice director for Maverik Country Stores, based in Afton, Wyo. "The company is an excellent partner."

Procter & Gamble

"We see our role as an objective facilitator of the NACS category-management process," said David Lane, corporate convenience industry representative for customer business development at Procter & Gamble. "We bring proprietary tools for analysis, resources in the form of people and expertise, and benchmarks industry-wide and outside the convenience channel."

Procter & Gamble was nominated as a Category Captain in both the grocery and health and beauty aids categories.

Grocery

Procter & Gamble's Grocery College is a workshop that walks retailers through NACS six-step category-management process, assisting them in identifying the role of grocery and develop strategies and tactics for improving performance. According to Bill Traywick, operations manager, category management, 80 percent of grocery volume typically comes from 170 to 200 items. "However, most convenience retailers have 500 to 800 SKUs on the grocery shelves," he explained. "Consumer data shows 10 categories drive fill-in shopping. What Grocery College does is focus retailers on the fill-in shopping products, their role and the strategies and tactics to drive growth."

Nice N Easy Grocery Shoppes Inc. of Canastota, N.Y., realized immediate results after attending Procter & Gamble's Grocery College, according to Matt Paduano, director of purchasing. "Bill Traywick helped us focus and develop a mission statement for grocery. We developed power categories," he explained. Nice N Easy has reduced grocery SKUs by increasing facings of power category items, and is the in the process of remerchandising its 100 stores. "We've seen faster turns within a week or two. The results are positive."

Procter & Gamble is working with Kellogg's and also the dairy industry to provide retailers with additional data to drive the milk, bread and cereal categories. "Milk and bread are immediate indicators of the grocery business a retailer is doing and can do," said Lane. "But those are problematic categories, so we are bringing in fullness of data to help retailers maximize the entire opportunity." The company is now developing College programs for the cooler door and salty snacks.

> "Procter & Gamble has moved the health and beauty aids category ahead light years for c-store retailers."
>
> —Fran Duskiewicz
> Nice N Easy Grocery Shoppes Inc.

Health & Beauty Aids

"This is a category that has not been maximized by convenience operators through the years. Procter & Gamble has moved it ahead light years for convenience retailers," said Fran Duskiewicz, vice president of operations for Nice N Easy.

The chain has utilized the Procter & Gamble HBA College program "to increase the efficiency and productivity of the health and beauty aids category. Using a workbook format, HBA College is based on the NACS six-step category management program, and provides guidelines for retailers to manage the category.

HBA College assists retailers in addressing key issues for the category —identifying its role, assortment, item duplication and pricing strategies. "For example, if you have eight different versions of pain relievers, HBA College asks if you should have such duplication or look to variety," explained Traywick. "Then we look at the fact that consumers are aware of cross-channel pricing on HBA. We look at the appropriate pricing strategy."

"HBA is an arena most in the industry is not comfortable with and has little knowledge of because there are so many SKUs and so much competition," said Lane. "If it is strategically correct for the retailer to develop the category, they can attract consumers with selection and competitive pricing. The opportunity exists."

S&D Coffee

"For years, vendors to this industry were salespeople. At S&D Coffee, we're now consultants. When you sell

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the account, that's when the work really begins," said Dale Lozier, vice president of the convenience store division at S&D Coffee. "Our job today is to aid in the development of programs designed to grow the coffee category, continually interjecting new life and keeping the interest of the convenience store customer."

S&D Coffee's category-management efforts are supported by an interactive approach to the process. According to Lozier, a task force comprised of S&D Coffee sales and marketing managers conduct evaluations of each account's coffee program as the basis of program development. "We survey the store owners and managers, analyze the customer base and competitive environment, evaluate the various footprints in a chain and determine the appropriate program for each type of store involved," Lozier said. "Using our own sales and marketing team's expertise, we develop programs that address issues and opportunities unique to that operation."

Areas examined include the total hot beverage program, coffee-product selection, merchandising, branding, coffee-station logistics and traffic flow in the store. "Convenience store retailers constantly ask, 'How can I improve my coffee sales?' You can provide the best coffee in the world, but if the station is set up inefficiently or the traffic flow from the station to the register is not easy, you can lose that customer," Lozier explained. "We work to make the entire coffee program work efficiently and with impact."

Equipment is a crucial element of successful coffee programs, and S&D Coffee extends its expertise to equipment selection and maintenance. That complete approach to managing the coffee category has proved beneficial to convenience retailers. "S&D Coffee has worked with us on store-specific promotions, and assists with equipment calibrations to provide a consistent product profile," said Ernie Howard, director of marketing for Favorite Markets, a 121-store chain based in Dalton, Ga. "We are very proud of our program—The Coffee Corner—and S&D has helped us maintain quality and grow the program."

Swisher International Inc.

As changes in tobacco product retailing regulations continue to restrict merchandising options, convenience store retailers must be vigilant in managing the category, according to Bill Dunn, director of national accounts for Swisher International. "Category management of cigars, moist snuff and chewing tobacco is now playing a bigger role in the success of the category. It's crucial that the selection, pricing and presentation is right, because space is increasingly limited," said Dunn.

To maximize the profitability of the space devoted to tobacco products, Swisher International's field sales force takes a very hands-on approach to assisting convenience retail customers. Analysis of syndicated data, supplier sales movement and retail account data, when available, is combined with Swisher representatives' knowledge of the local market and the retailer's needs to develop a customized planogram, utilizing the Spaceman program. Key elements of the program are developing the appropriate product mix for the store's customer base, maintaining inventory levels to prevent out-of-stocks, establishing competitive pricing and developing strategic product placement, according to Dunn. Another element supplied by Swisher is merchandising racks.

Swisher International continues to assist retailers well beyond planogram implementation, which has proved beneficial to retailers. "Swisher conducts a quarterly review based on our sales so we can see what's working and what's not," said Richard Mione, director of marketing of Worsley Cos. Inc., based in Wilmington, N.C. "With that review, we can make adjustments to the planogram or product selection to keep the category fresh. This has been an extremely important part of our category-management program."

In today's environment, aggressive category management of tobacco products is the most effective means of ensuring category profitability and productivity, said Dunn. "There really is no room for mistakes today, and that's how we approach the process," he said.

Tropicana North America

James Powers

"To be a powerful resource to the retailer, we must be impartial and let the consumer dictate the basis for our recommendations," said James Powers, vice president, retail sales for the immediate consumables division at Tropicana North America. "In-store real estate is very valuable, and allocating that space with the right SKU's to maximize the retailer's profits is the appropriate focus."

Tropicana's hands-on approach begins with the interaction between retailers and the company's customer managers and broker account managers. Manager of category-management Jamie Reid is then brought in to develop category-management plans based on the needs of the retailer. Reid applies the proprietary TrueView system to the process, which incorporates retailer data, syndicated data and Tropicana's channel expertise. The process involves six phases: information gathering and goal setting; cooler space to sales evaluation; SKU optimization model development; planogram development; consumer demographic analysis against the planogram; and finally, store resets by the field personnel. The process takes 60 to 90 days to complete.

Tropicana TrueView process is constantly evolving with the industry. "Today's TrueView is not tomorrow's TrueView. Retailers are automating at a

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Best-of-Class Retailers

Nominated for their category management prowess and program-execution skills by industry suppliers, the Best-of-Class retailers highlight the reasons for their success.

7-Eleven Inc.

"We take a macro-to-micro approach regarding category management," said David Podeschi, vice president of processed foods and non-foods for 7-Eleven. "We start with national industry consumer trends and seasonal change, and their impact on product sales. From there we drill down to individual item sales on an average per-store basis, also taking into account our internal analysis of category trends."

The benefits for 7-Eleven are a direct, positive impact on sales: reduced out-of-stocks; and improved display. "It makes the store easier to shop," he said. "Customers can find the fast-selling items easier. It also reduces out-of-stocks, because you're focusing your efforts on the fast-selling items."

Dallas-based 7-Eleven Inc. operates approximately 5,600 stores in the United States and Canada and, like most retailers, it has stepped up its use of scan data, especially over the past year. According to Podeschi, vendor alliances are also integral to an effective category-management model. The company doesn't establish "category captains" in the traditional sense, rather it partners with each supplier in a category. "For example, with soft drinks," Podeschi said, "we take our scan data, then we work with Pepsi-Cola, Coca-Cola and Cadbury to analyze results and develop appropriate action plans."

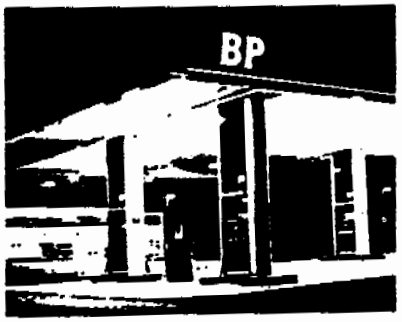
Podeschi added, "Forming supplier alliances provides you with a broader perspective on industry and consumer trends. We can identify certain trends that we might not have been able to see with just our own data, for example, if a certain subsegment is growing in the industry or if consumer trends show that a certain flavor type is trendy."

Establishing a network of suppliers also facilitates one of the most difficult aspects of category management: accommodating regional differences in product selection. "Through a combination of our centralized category managers working with our field merchandising staff and suppliers, we've been able to analyze the data centrally and regionally to implement the most effective strategies," Podeschi said.

A.T. Williams Oil Co.

A. T. Williams, based in Winston-Salem, N.C., is the parent company of Wilco Convenience Stores, operator of 120 stores. A.T. Williams devotes extensive energy to its market development and looks at every opportunity and profit center. That philosophy led one supplier to applaud A.T. Williams for its efforts in category management: "With several different store formats, the company is constantly changing. The company uses information from brokers and manufacturers' effectively to design planograms depending on each store's format."

BP Amoco Plc.



The recent merger between BP Oil and Amoco Corp. resulted in the formation of a new company—BP Amoco Plc.—but when it comes to category manage-

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ment, the proven rules still apply. "Our method combines the customer's point of view with a fact-based approach," said Marla Braswell, a manager of convenience store marketing at BP Amoco. "Each category is viewed as a strategic business unit, but there is also a strong focus on the customer, not solely on products."

The company has implemented several techniques for performing effective category management, including the use of scan data, syndicated data and vendor-supplied data for its 2,500 convenience stores.

BP Amoco also holds regular partnership meetings with its suppliers, bringing together each company's category managers, merchandisers and field personnel in an effort to develop effective, ongoing relationships. According to Braswell, establishing these alliances is invaluable. "Only suppliers can inform you about what your competition is doing and what the industry landscape is like," she said. "We only have our data, so if we're doing something wrong, we're going to continue to do it wrong. They are able to show us missed opportunities."

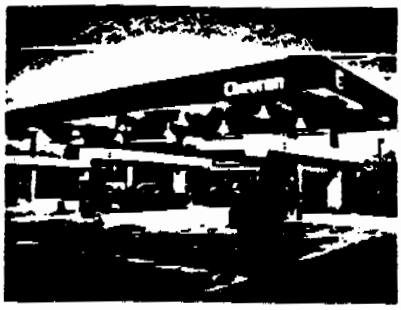
According to Braswell, since this category-management process was put in place, significant sales and margin increases have been realized, as well as a reduction in out-of-stocks. "Essentially, you're giving the right products the space they deserve for peak period sales."

Casey's General Stores Inc.

Casey's General Stores is making the most of all resources available in its approach to category management. According to one of the company's key suppliers, "Casey's has implemented a complex system to disseminate both its internal and industry data in order to make more effective category decisions.

"They believe in using as many proof sources as possible when adding a new item or promoting an existing one, and they believe in carrying a limited number of SKUs that turn very quickly. This approach helps keep inventory dollars to a minimum, while also maximizing turns." Headquartered in Ankeny, Iowa, Casey's operates 1,175 stores.

Chevron Products Co.



Data analysis and vendor alliances are the keys to Chevron Product Co.'s category-management approach. A division of Chevron Corp., based in San Francisco, the company owns and operates approximately 670 Chevron Food Marts, and views category management as an effective way to manage its c-store product offerings from a promotion, pricing and product selection standpoint.

The company rolled out POS scanning in 1998 and the information it collects is fed into a data warehouse, allowing category managers, category buyers and field merchandisers to analyze it and then develop recommendations. "Using this method, we can monitor movement of a specific item in a store," said Carlton B. Dallas, manager of convenience store retailing for Chevron. "We can carve out specific areas to analyze and we can also overlay a matrix of space allocation in terms of return on inventory investment."

According to Dallas, Chevron's approach has resulted in an upward sales trend. "Since implementing scanning last year, we've seen nearly 20 percent same-store gains in gross profit sales and dollars," he said.

Chevron also relies heavily on vendor partnerships. "Vendors are key elements of our category-management strategy," Dallas said. "Forming alliances allows for the mutual sharing of ideas to improve the efficiency of the supply chain. For example, we can begin to take a much broader look at what opportunities exist to increase both consumer service and sales."

Chevron works closely with the National Distributors Alliance and key partners such as Core-Mark and, according to Dallas, these relationships are constantly being strengthened. "The integration of data throughout the organization and between the vendors and Chevron is something that can always improve," he said. "It's also very important that we, as a retailer, develop alliances with key suppliers, and that there's an element of trust and mutual intention to develop strategies that work best for both companies, and for the consumer."

Conoco Inc.

Category management is not something you do once and then walk away, according to Jim Macari and Sam Farace, who are responsible for category management at 275-store Conoco Inc., Houston. "For Conoco, it comes down to defining who we want to be in the marketplace, what categories are going to drive our business and what strategies we're going to put in place to achieve the desired results," said Farace.

A key element of the company's market strategy was developing a centralized approach to category management and, according to Conoco's suppliers, this helps the company consistently carry the right product mix in a particular region. Conoco's category-management team in Houston monitors store operations, inventory and product movement. "There are some things we still handle on a local field level, but it just makes sense to manage a vast majority of category management from a centralized location," said Farace. "For example, if we're doing a planogram for candy, we can do that more effectively from Houston using our regional scan data. We don't need to do it six different times out in the field."

The result has been a more effective link between corporate headquarters and the field, as well as a more streamlined process for analyzing data and sending it back out to the stores. Since Conoco first started down this centralized path three years ago, the company has seen strong double-digit growth in both revenue and margin dollars on a same-store basis.

In 1998, Conoco also conducted monthly "supplier roundtables," bringing

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together 15 of its key suppliers. "We spent a day with them, asking them where they saw the industry headed and where they saw consumer trends moving in the next three to five years," said Macari.

Conoco also is driving continuous improvement in its stores. A "mystery shopper" is sent to stores once a month, monitoring customer service, merchandising, cleanliness and out-of-stocks. Also, the company's market merchandisers survey Conoco stores quarterly for planogram compliance, promotional implementation and correct pricing. "As of late 1997, when we implemented this program, our in-stock rate was 78 percent," said Macari. "We're now approaching 90 percent as of fourth quarter of 1998."

Dairy Mart Convenience Stores Inc.

Dairy Mart Convenience Stores is celebrating its 60th anniversary with a variety of events, among them a renewed focus on category management. Headquartered in Hudson, Ohio, Dairy Mart operates 600 convenience stores in seven states. According to Jay Ross, vice president of marketing and merchandising, as the company keeps growing, "we have to become more proactive in how we approach category management if we're going to continue to be successful."

A key element of this strategy, according to Ross, is spending more time listening to Dairy Mart customers in an effort to learn what they want from a convenience store, why they shop there and what categories are driving the business. To help accomplish this objective, the company has conducted several customer focus groups during the past year. Ross noted that maintaining an emphasis on customer needs and buying habits will help keep the company on the right track as it develops its category-management model for the future.

Ross also added that since the company presently does not scan, it relies heavily on its supplier partners to provide direction as far as category and product trends. One such supplier is Heinz Frozen Foods, which is working with Dairy Mart to develop store-specific planograms for the frozen-food category.

"Dairy Mart is very active in pursuing frozen-food sales and marketing opportunities," said Mark Kroll, associate product manager, channel development at Heinz Frozen Foods. "They are working to put together demographically specific planograms which are appropriate to their stores."

Equiva Services LLC

"Our category-management model centers on several elements," said Bill Pitocco, category manager, grocery, for Houston-based Equiva Services, operator of approximately 1,000 c-stores. "We analyze market-share data, consumer trends, competitive pressures, our information-technology capabilities and the financial realities of putting the right products in the stores."

Equiva Services uses space-management software to set its stores, including Spectra and InterCept. Suppliers noted that the company is very active in working with wholesalers and manufacturers to gather fact-based information for the development of planograms. Equiva acknowledges that it taps its supplier relationships for input. "Suppliers offer their own unique category-management expertise, especially regarding subcategories," Pitocco said. "I use the top two or three suppliers in a particular category to help me formulate strategies and to bounce planogram ideas off them."

Ultimately, however, retail turns are the deciding factor. "Category managers have to control their share of the company's assets," Pitocco said. "But they also have to be tied into what's happening with our operations personnel at the store level and with the customer. The customers' needs have to be fulfilled, from a product and inventory standpoint. I've got to be carrying the products the customer wants, with enough space allocated to those products so they're in stock. The ultimate result is increased sales and margin."

Giant Industries Inc.

Giant Industries, headquartered in Scottsdale, Ariz., is taking a branded approach to category management, according to Pam Brady at Convenience Marketing Inc., a grocery wholesaler that works closely with the company. Giant operates 54 stores under the banners Giant, Giant Express and Mustang.

"It's a very different approach," she said. "Over the course of three months, I spent a lot of time working with Giant to analyze and carefully plan out a 3-foot-by-4-foot section for all the stores operated by the company. They are taking each category one by one, and making an effort to manage categories in such a way that will achieve the maximum impact."

According to Brady, the end result will be a more pleasant shopping experience for the customer. "By making the top-selling brands more visible, throughout every category, Giant is making its stores easier to shop," said Brady. "This will lead to an overall increase in customer service and sales."

Marsh Village Pantry

Marsh Village Pantry, a division of Marsh Supermarkets, based in Indianapolis, operates approximately 180 Village Pantry convenience stores. Recently, Village Pantry was very active in implementing more effective methods of driving customer traffic. According to Bob Dalton, regional sales manager for Modern Aids, one of Village Pantry's suppliers, the chain is a very active partner as far as working to continually update its shelf sets.

"They ask us for industry data, and for other companies' success stories," said Dalton. "They're also very interested in staying current with family pricing, as well as adding new items

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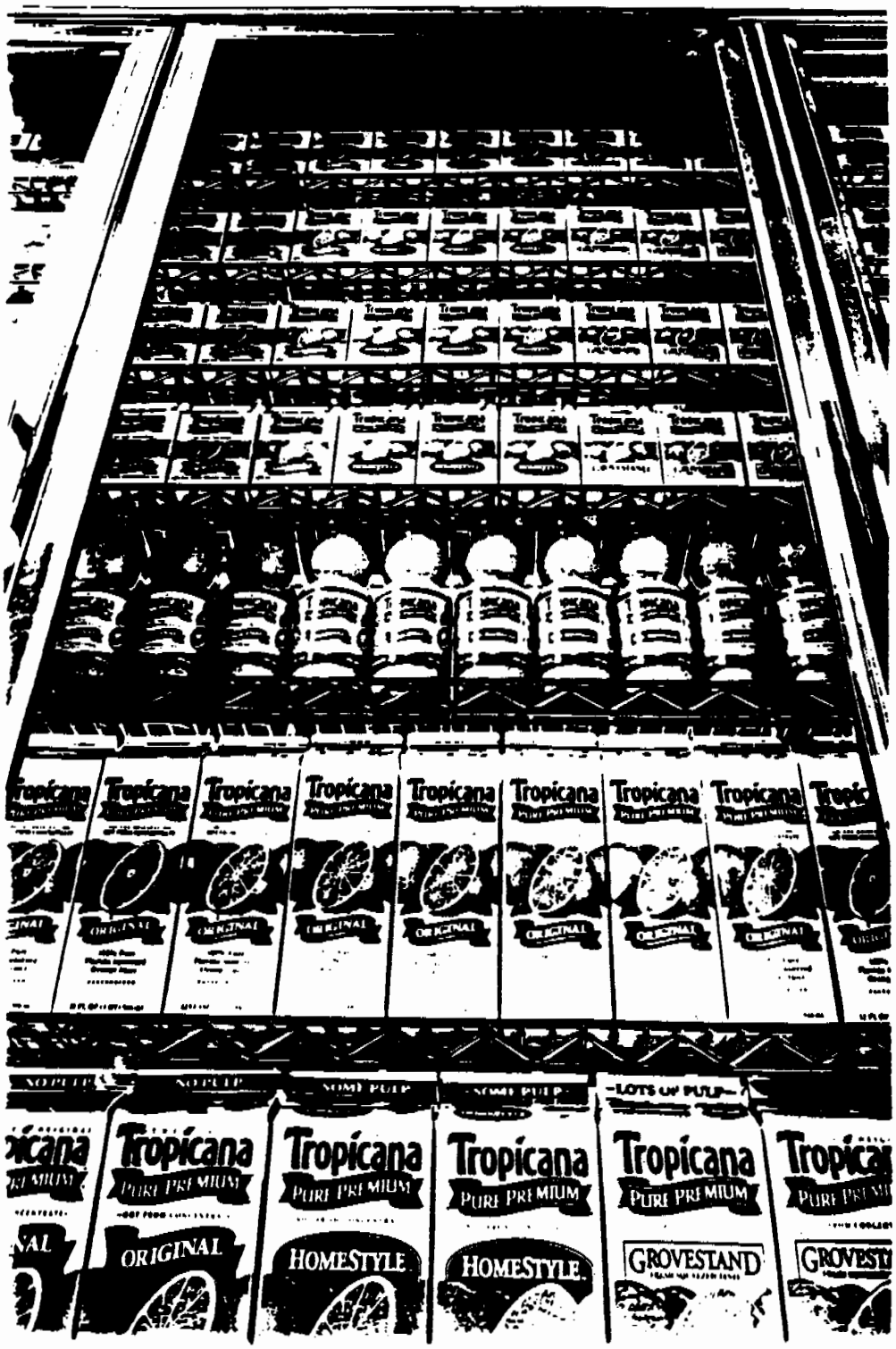

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that could be fast-selling, and deleting items that aren't."

Mobil Corp.

Mobil relies on a comprehensive, fact-based decision-making process when implementing category management at its 400 Mobil Marts and 226 On The Run convenience stores.

"A product must justify its space in a store in order to remain in the store, in terms of both retail sales and gross profit," said Barry Shull, group category director for Mobil, based in Fairfax, Va. "From Mobil's perspective, that should all be predicated on fact-based decision-making. We look at market-share data in all retail channel segments and our own internal data, as well as data gathered by the major vendors in each category segment. The goal is to implement balanced category strategies that aren't biased toward any one product and that allow us to paint an accurate picture of the marketplace."

Key to developing this picture clearly is Mobil's recently established "Beverage Vendor Category Captain" program. Mobil's criteria for awarding this status is based on a vendor's category-management philosophy, as well as having a process that "covers all the key components required for us to make a fact-based decision about putting the right products in the right slots," said Shull. For example, in the non-carbonated beverage segment, Mobil's selection for category captain is Coca-Cola Co., which in turn noted Mobil's "consumer-engineered" category approach and its understanding of the power of its brands as keys to building the entire beverage category.

For Mobil, the main benefits of working with its category captains are having access to that company's market data, as well as receiving invaluable feedback from an industry standpoint. Mobil works closely with its chosen vendors to do field and store surveys, develop timelines, make assortment presentations to its field merchandising staff and hold regular briefings regarding store-layout resets. This is all to ensure that the right products are displayed effectively to improve store operations—for both Mobil and the supplier.

The Pantry Inc.

At The Pantry, product facings are not necessarily determined by scientific analysis of the number one, two or three items in a particular market. "The items you select and the programs you execute in the stores are ultimately judged by the customer," said Kent Raphael, director of purchasing for The Pantry Inc., based in Sanford, N.C. "In the convenience store industry, your customers are somewhat of a captive audience. You need to carry branded, quality items, but not necessarily the number-one item. For example, people shop at a c-store usually out of a fairly definite need. If somebody comes in to buy air freshener, as long as a quality, brand item is in stock they'll be satisfied."

The company operates approximately 1,200 stores under the banners The Pantry, Quick Stop, Zip Mart, Dash-N, Express Stop, Lil' Champ, Quick Mart and Handy Way. Raphael noted that with such a large network of stores, he finds it useful to implement a four-tiered approach, tying together the manufacturer, broker, store and customer.

"After you select an item to carry, and you know the level of support from the manufacturer or broker, the next step is getting the product into the stores and getting the planogram done," he said. "With 1,200 locations, it's difficult to make that all happen effectively. That's why having supplier alliances is important, almost as important as what products you select."

Raphael noted that establishing alliances also provides the ability to more easily make changes at store level mid-year. "If you want to change two items in a particular section, how do you go to eight states and change that item? With a network of alliances in place, it's not as difficult," he said. "Without it, you would be stuck doing it annually or twice a year."

R.R. Morrison & Sons

At R.R. Morrison & Sons, the Vicksburg, Miss.-based operator of Fast Lane stores, the approach to category management is closely connected to its overall initiatives in customer service and store design, as well as its supplier and vendor relationships. This philosophy has helped Fast Lane realize several benefits, such as reduced out-of-stocks and the elimination of unnecessary SKUs.

"We view category management from a broad, industry perspective first, and then we narrow our approach by partnering with particular suppliers in particular categories," said Mark Tate, marketing manager of Fast Lane's 53 stores in Mississippi, Louisiana and Tennessee. "For example, in our juice set, we look at which supplier is leading the market in our area, and we work with them to make sure we have the right mix and the right amount of space dedicated to whatever product they carry."

One company upon which Fast Lane relies heavily is McLane Co. Inc.'s southern division. "They provide updated purchase information through their warehouse, and that tells me what other retailers are pulling," said Tate. "It's not chain-specific, but rather, they tell me, 'We're moving 400 cases of Tropicana grape juice a week and you're not carrying that in your mix so you might want to consider it.' That information is very helpful."

Ken Hudson, area sales manager for McLane Southern, noted Fast Lane's use of technology to set its stores as one example of effective category management. "They're actually tied into our mainframe," said Hudson. "From their headquarters, they can download data by category or item to see what was sold in a certain period. Then they can analyze that data, and compare the stores that are doing well against the ones that aren't and actually update their schematics in real time."

Looking forward, Tate noted that the company's goal is to further improve its

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use of technology to be able to make more accurate category decisions on a store-by-store basis. As part of this initiative, Fast Lane recently updated its point-of-sale equipment, and also upgraded its store registers to better capture its scan data.

Spectrum Stores Inc.

Spectrum Stores is moving into the new century with a new approach to category management. With 56 stores in eastern Alabama and western Georgia, the West Point, Ga.-based company is currently in the process of upgrading its stores to capture scan data. The rollout started in April, and Spectrum expects to have all stores completed by the end of the year.

> **"We're looking forward to having scanning data, which will allow us to make more effective decisions on categories and specific items within categories."**
>
> —Chuck Vires
> Spectrum Stores Inc.

"Currently, our main method of reviewing category performance is through the use of purchase information," said Chuck Vires, vice president of marketing. "We're looking forward to having scanning data, which will allow us to make more effective decisions on categories and specific items within categories."

As Spectrum continues to revise its category management methodology, the company is relying heavily on its wholesalers and suppliers to provide support and guidance. Spectrum also is following the NACS category management guidelines, tailoring them to meet its stores' specific needs. Having such a varied approach is important, according to Vires, to accommodate different store layouts and different customer buying habits in various regions.

Spectrum's long-term goal is ultimately to serve its customers better by having a better understanding of their needs and simply having product available when they're ready to buy. "Obviously, the more we know about a category, the better we can decide which stores should or should not carry a certain product," Vires said. "Then, by eliminating products that we now know won't sell in a certain store, more space can be allocated for the appropriate product sets. As a result, out-of-stocks are reduced, products turn faster and the customers' needs are more closely met."

Speedway SuperAmerica LLC

Based in Enon, Ohio, Speedway SuperAmerica operates 2,220 stores. One of Speedway SuperAmerica's key suppliers cited the company as an early user of scan data to drive the implementation of Apollo planograms. Speedway SuperAmerica and the supplier worked in concert to communicate that information in the planograms to the store level.

Speedway SuperAmerica is comprised of the downstream assets of Marathon Ashland Petroleum LLC, which includes the former SuperAmerica Group and Marathon Oil's Emro Marketing Co.

Tosco Marketing Co.

"Category management is an ongoing process that involves how you go about your day-to-day business with a strong consumer focus," said John Zikias, vice president of field and corporate marketing for Tosco Marketing Co., the retail marketing division of Tosco Corp., and operator of 2,200 Circle K stores. "Simply setting up the process is not enough. You need to continually review information."

Headquartered in Phoenix, Tosco Marketing Co.'s category management approach is based on the NACS guidelines. Through this process, Tosco and suppliers share internal category sales data, customer knowledge and their corporate marketing strategies, as well as ways to optimize market information and supply-chain efficiencies.

"We are in the process of tailoring the NACS category-management templates to meet our specific needs, for example, modifying the vendor questionnaires to fit Tosco's model," Zikias said. "We're really trying to work within the framework, however. It makes it easier for the suppliers if they know that the information they have to provide is similar and consistent with other convenience retailers."

Tosco has also established several strategic partnerships with key suppliers such as Coca-Cola, Anheuser-Busch and Dean Foods. According to Zikias, these alliances help streamline the data-gathering process. "They provide a consistent form of data," he said. "As an example, for categories with products that are direct-store-delivered, without scanning you're heavily reliant on suppliers to provide you with information. The suppliers have been able to help us organize our data in a consolidated form that's easier to work with, and they've also given us valuable category information from a total market perspective."

Turkey Hill Minit Markets

Each of the 232 Turkey Hill Minit Markets is designed from the perspective of the customer, according to Victoria Paul, business development manager, eastern region for broker Convenience Marketing Inc. By working closely with Turkey Hill and its wholesale distributor, Miller-Hartman, Paul is eyewitness to the positive changes taking place within the company.

"They are building state-of-the-art stores, from the concept of what the customer sees when they walk in," she said. "Everything is arranged in the most effective manner for the customer in a particular region."

Turkey Hill, based in Lancaster, Pa., is a division of Dillon Cos. Paul describes the way she and Turkey Hill's Brian Kurtz work together as a true partnership. "For example, if they don't have one of our retailer programs in their stores, I explain why they should," she said. "In turn, Brian has a background in buying for a wholesaler, which is very valuable to us. Ultimately, we're all partnering to get the best products in the stores and to serve the customer better."

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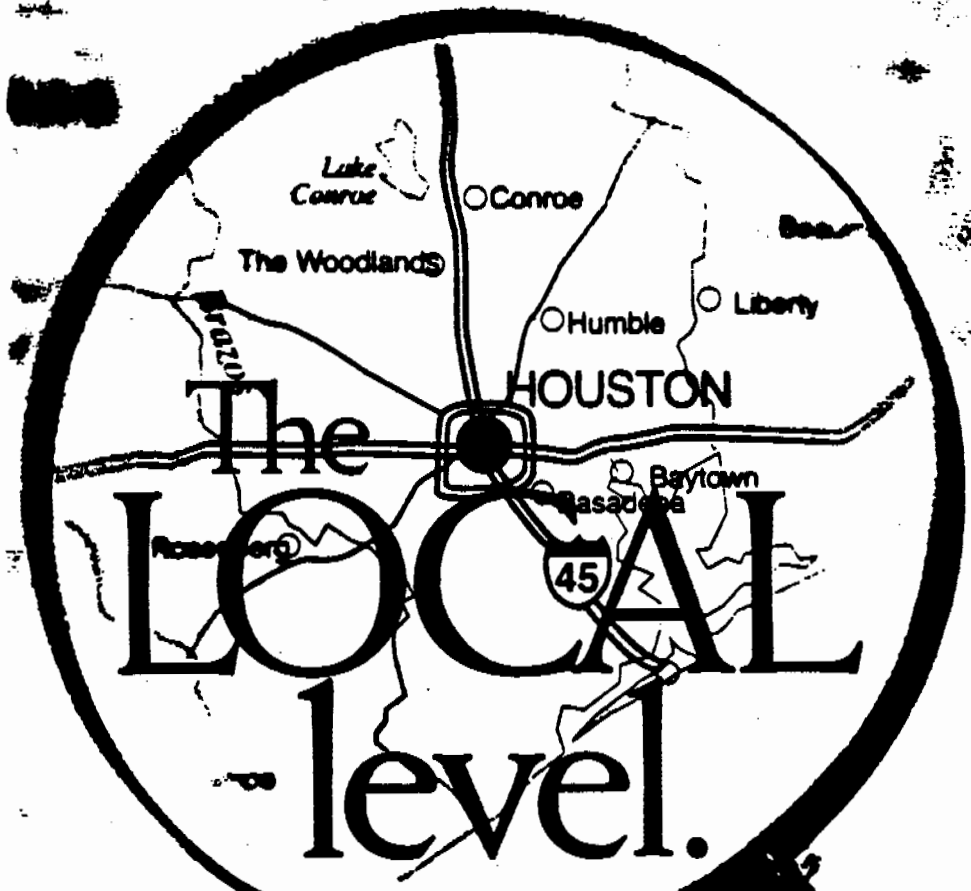

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DEFENDANT'S EXHIBIT 539

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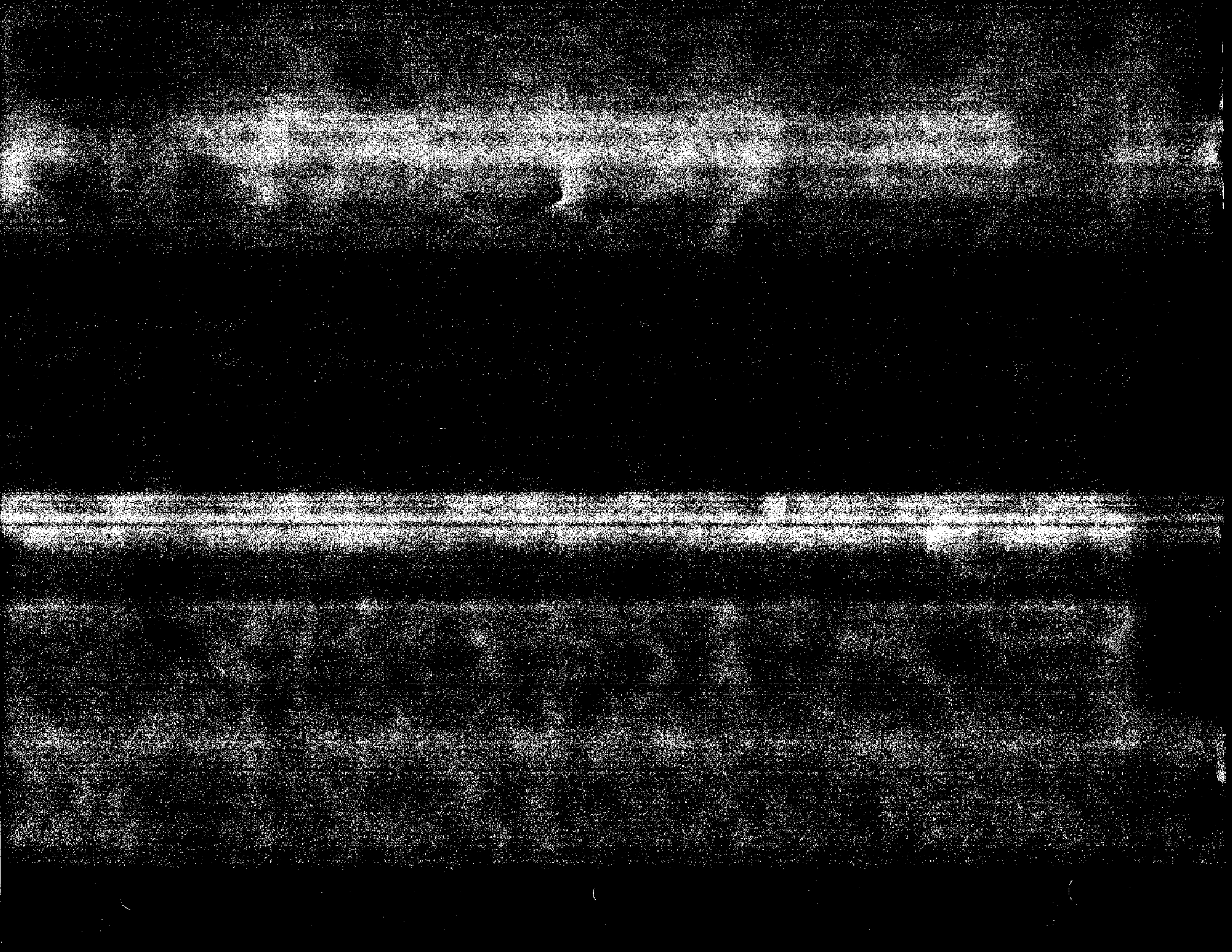


Lundy's:

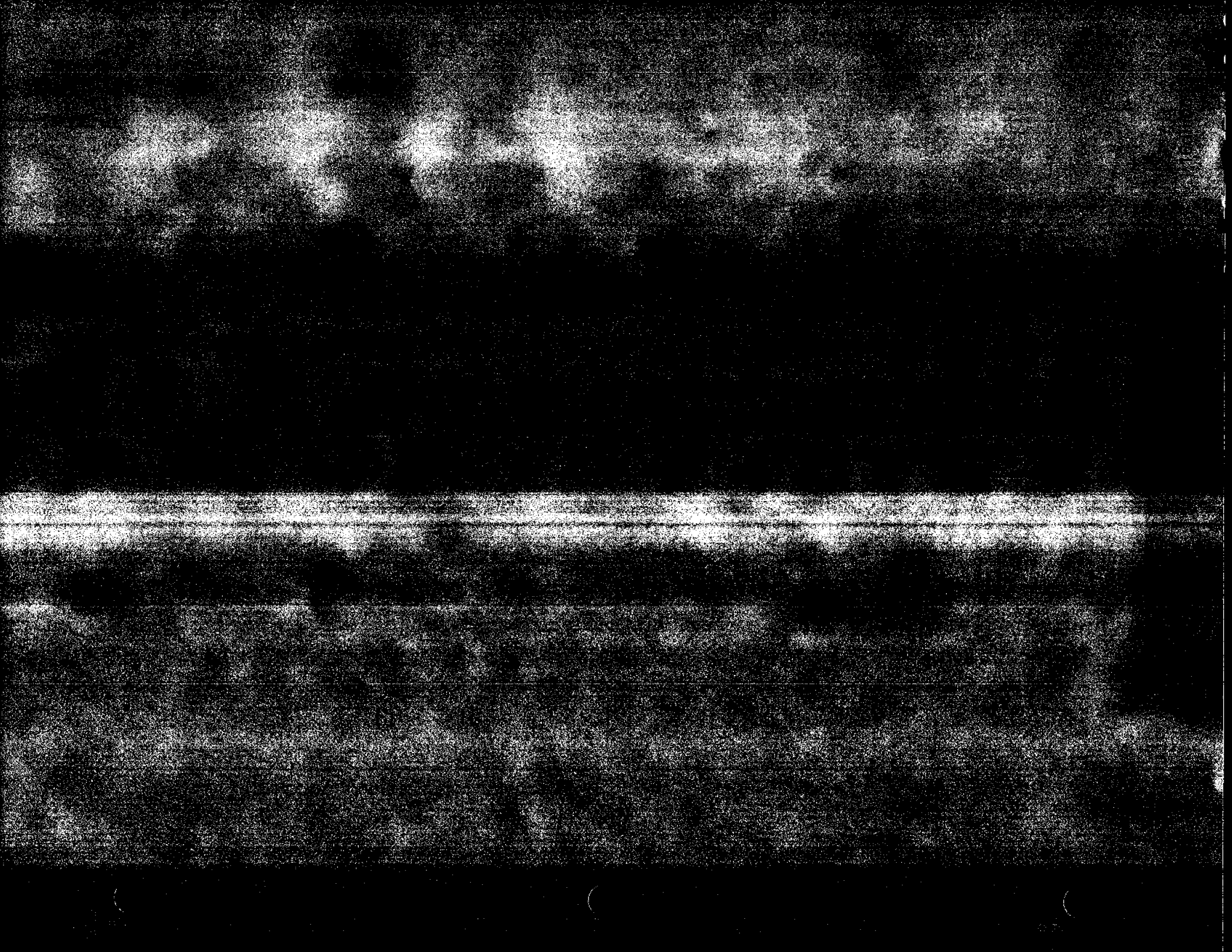
In explanation as to why I signed the unethical incident report with the Conwood representative

I was led to believe that it was just a report stating that the racks were combined and the rep did not feel it was right. He need me to sign as a witness that the incident had happened. At no time did I have a complaint that the racks had been combined. Kodiak did not lose any facings nor did any product leave my store. The old rack was not destroyed.

In fact I appreciate the fact that the product was put in one rack because the Kodiak and Skoal reps have been coming in every month and rearranging and constantly complaining about the other reps. I feel it was in the best interest of the store, it looks much better and I don't have to listen to the complaints any more.

Kathy Archuleta
Forward Corporation
Unit 26

DEFENDANT'S EXHIBIT 540



5-17-94

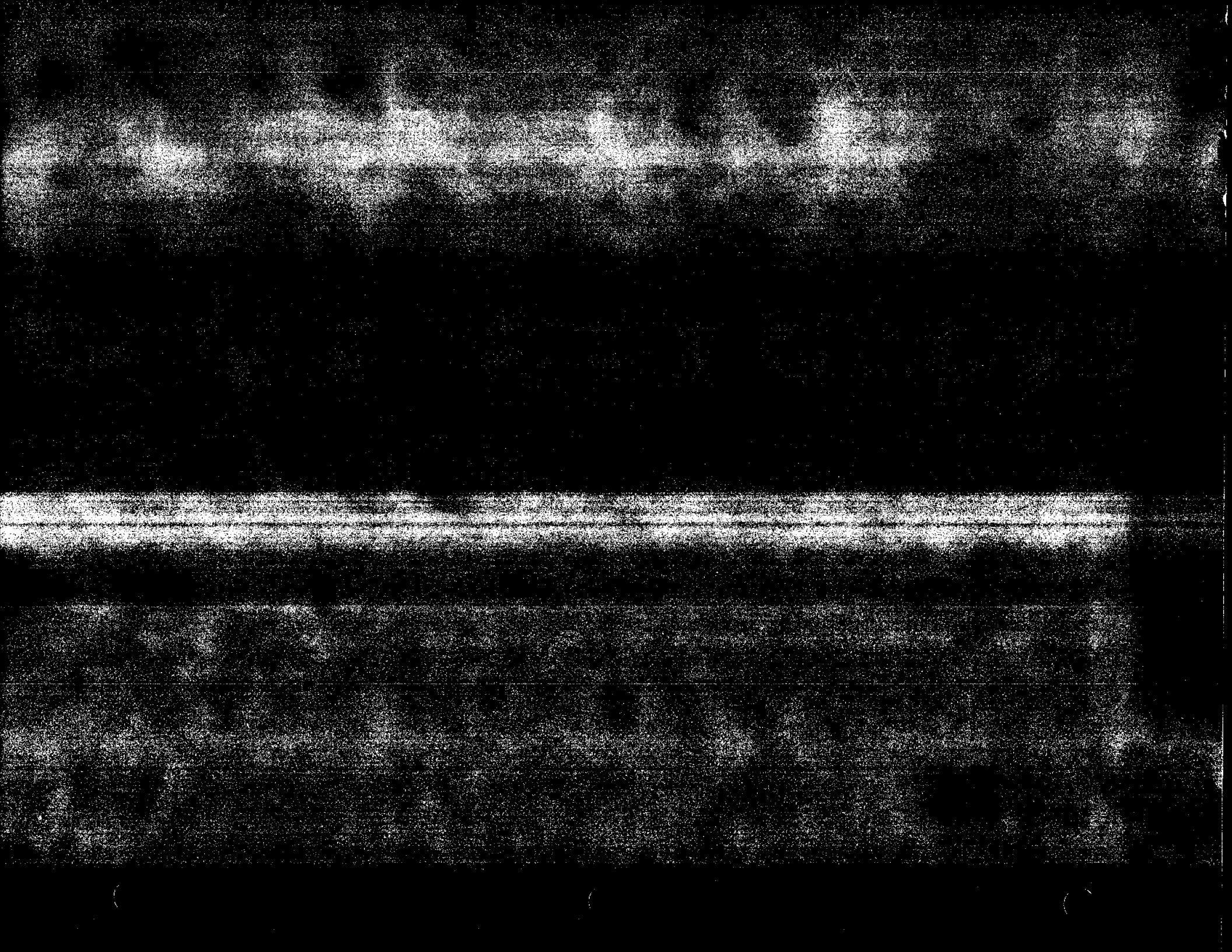
Attention Burdy:

This is regarding the letter I signed for Conwood Company, L.P. David came in and told me that the Skoal Company had no right to put this product in a Skoal display. He also told me this book had spoken to you (Burdy) and it was okay for him to put this product back into this own rack. From what I can remember, David told me that this letter I signed was just in a file at his Main Office letting them know he had put this own product back in this own racks.

Respectfully

Joanne [illegible] Buck
Manager

DEFENDANT'S EXHIBIT 541



5-16-94

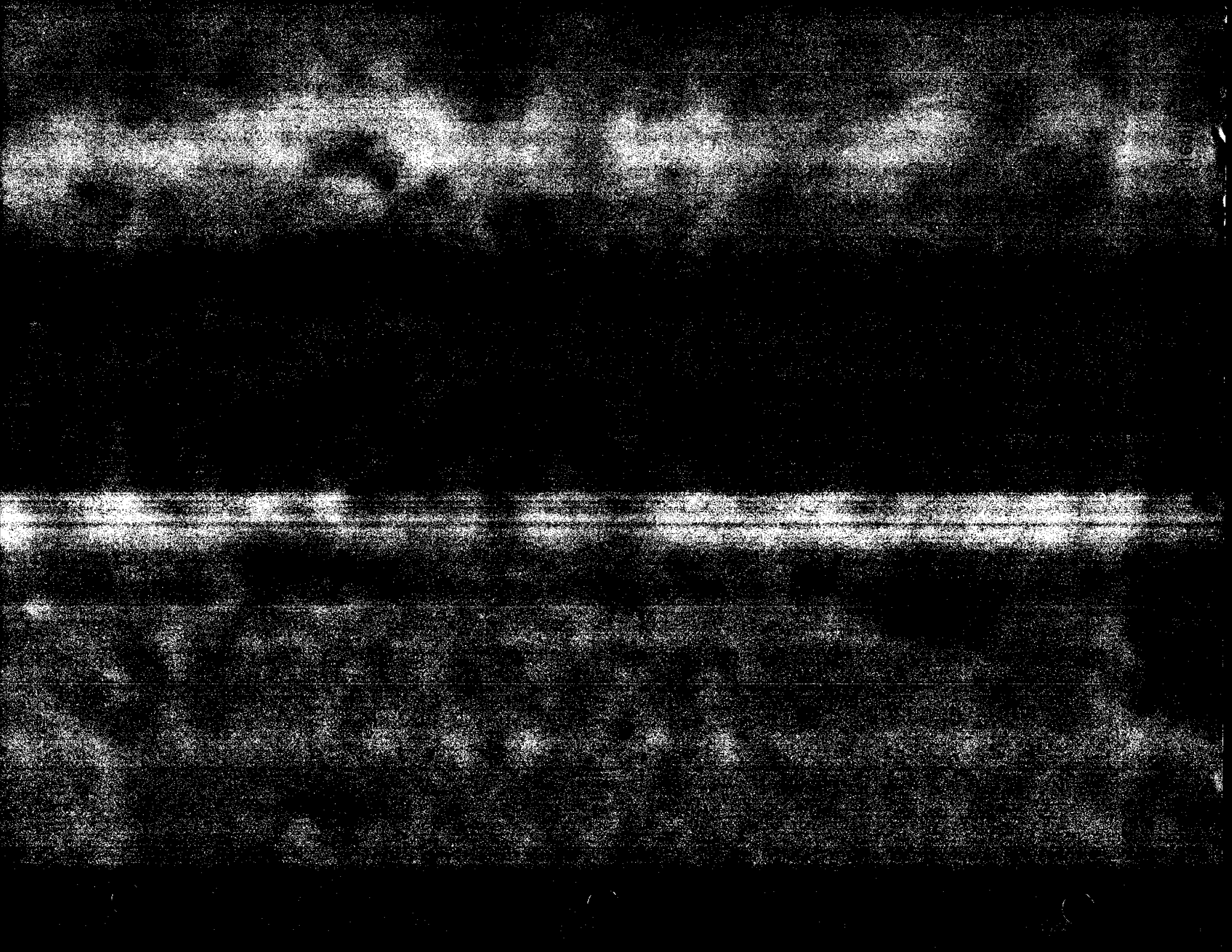
Dear Mr. Edwards,

I Jim Ritelle of Howard Corporation recently signed a unethical report that was not a true statement. The salesman from Kodiak informed me that it was just a Incident report to show that his Kodiak rack was pulled out of my store. However, all of Kodiaks product remained in my store placed in the shoal rack. To the best of my knowledge there was nothing unethical done to this product and that I had no right to sign such a statement. The salesman from Kodiak totally mislead me to believe that it was just a Incident Report and not an unethical report.

Sincerely,

Jim Ritelle
Manager, #13

DEFENDANT'S EXHIBIT 542



Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

UNETHICAL ACITVITY REPORTING FORM

DATE: 4-22-94

STORE NAME: FOUNDS #44

STREET ADDRESS: 2070 OLD S. US-27

CITY, STATE & ZIP: GAYLORD MI. 49735

PHONE: (517) 732-7716

DESCRIBE THE UNETHICAL ACTIVITY FOUND AT THIS LOCATION (BE SPECIFIC)

UST. REP HAD PULLED ALL 5 SP LACE RACK FACINGS OF CONWOOD LACE AND LEFT CONWOOD PRODUCTS IN 5 UST. LACE FACINGS. ALL CONWOOD P.O.'S HAD BEEN PULLED AND WAS NOT ALLOWED ON UST LACE. MANAGER ALLOWED ME TO REPLACE RACKS AND P.O.S TO THEIR ORIGINAL PLACEMENT.

ADDITIONAL REMARKS: _____

IF THERE ARE SUPPORTING MATERIALS, PLEASE SEND ALONG WITH THIS FORM.

STORE EMPLOYEE SIGNATURE _____

STORE MANAGER OR OWNER'S SIGNATURE Jeanne Kunz

CONWOOD COMPANY EMPLOYEE SIGNATURE David Austin

DEFENDANT'S EXHIBIT 465

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Tennessee 38101-0217

UNETHICAL ACITVITY REPORTING FORM

DLS
EJS

DATE: 4-8-94

STORE NAME: FILINGIOS MINI-MART

STREET ADDRESS: 2900 S. COOK RD.

CITY, STATE & ZIP: WEST BRANCH, MI 48661

PHONE: (517) 345-3503

DESCRIBE THE UNETHICAL ACTIVITY FOUND AT THIS LOCATION (BE SPECIFIC)

FOUND ALL 5 TP RACK FACINGS FILLED. UST REP PLACED 5 NEW SLOTS FOR LONGCUT PRODUCTS IN UST RACK, HOWEVER NO TAG WAS LEFT IN KODIAK CIRCLE SLOT. A SIGNED FORM WAS LEFT ATTACHED TO RACK, STATING THAT NO COMPETITIVE P.O.S COULD BE PLACED ON RACK. STORE MGR. SIGNED ME TO REPLACE LONGCUT TP RACK FACINGS ALONG WITH MY P.O.S

ADDITIONAL REMARKS: IT WAS MY FEELING, THAT UST MISREPRESENTED HIMSELF TO THE STORE MGR. ALLOWING OUR RACKS TO BE FILLED WITHOUT US KNOWING HE HAD AUTHORIZATION FOR US TO REPLACE

IF THERE ARE SUPPORTING MATERIALS, PLEASE SEND ALONG WITH THIS FORM.

STORE EMPLOYEE SIGNATURE _____

STORE MANAGER OR OWNER'S SIGNATURE [signature] 4-8-94

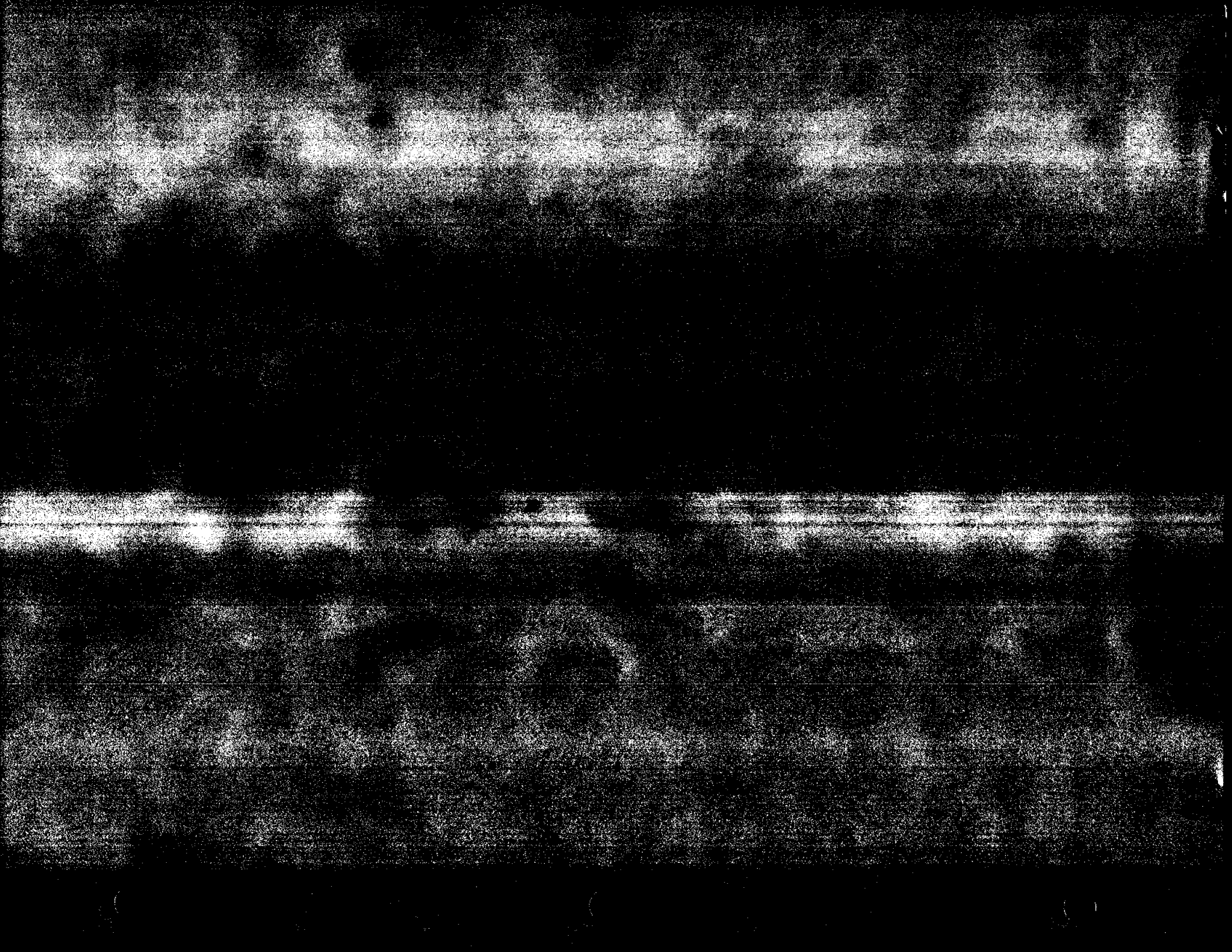
CONWOOD COMPANY EMPLOYEE SIGNATURE David Austin

DEFENDANT'S EXHIBIT 466

Confidential

CWD0100012699

16diii004907



TFM · DLS
~~HGF~~ EJF

Conwood Company, L.P.

813 Ridge Lake Blvd. • P.O. Box 217 • Memphis, Te[illegible]217

UNETHICAL ACITVITY REPORTING FORM

DATE: 4-8-94

STORE NAME: FINLANDS MINI PLAZA

STREET ADDRESS: 600 W. HOUGHTON

CITY, STATE & ZIP: WEST BRANCH MI. 48661

PHONE: (517) 345-1697

DESCRIBE THE UNETHICAL ACTIVITY FOUND AT THIS LOCATION (BE SPECIFIC)
FOUND THAT UST REP HAD PULLED U CONWOOD TP RACK FACINGS AND PLACED OUR PRODUCT IN A LESS COMPETITIVE POSITION IN THE UST RACK. SAME NUMBER OF FACINGS WERE GIVEN BUT PRODUCT LOCATION IS POOR AND HARDER TO BE SEEN BY THE CONSUMER. STORE MANAGER WAS OUT WHEN THIS TOOK PLACE, BUT STATED THAT IT WAS PART OF A "FREQUENT BUYER PROGRAM". UST STATED THAT IT WAS AUTHORIZED TO PULL CONWOOD RACK.
ADDITIONAL REMARKS: UST REP. LEFT PLACEMENT AGREEMENT ATTACHED TO RACK, STATING THAT NO CONWOOD P.O.S IS AUTHORIZED AND THAT THE PLACEMENT OF RACKS IS PERMANENT. AT THIS TIME I WAS UNABLE TO RETURN RACKS TO ARGUST PLACEMENT.
IF THERE ARE SUPPORTING MATERIALS, PLEASE SEND ALONG WITH THIS FORM.

STORE EMPLOYEE SIGNATURE _____

STORE MANAGER
OR OWNER'S SIGNATURE K Archuleta

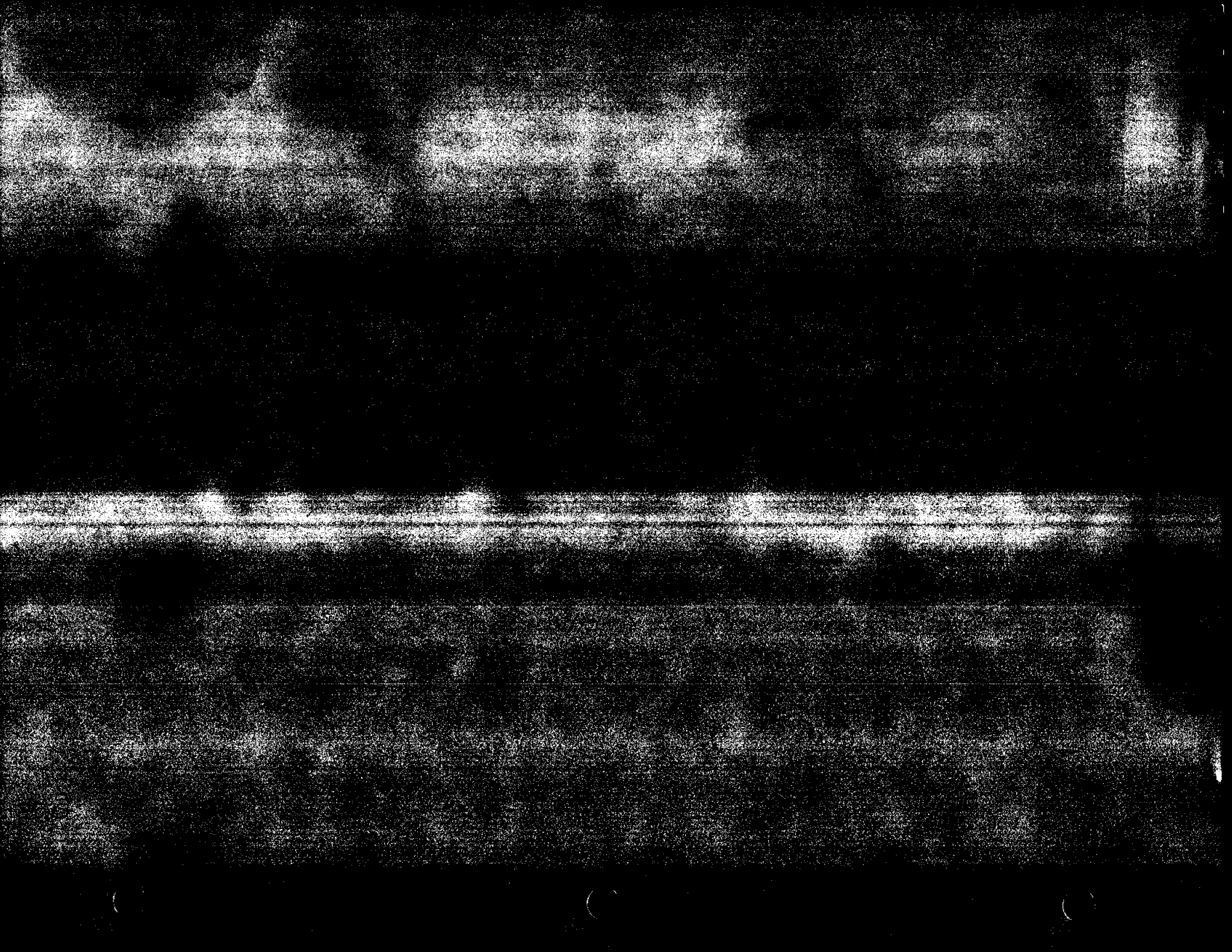
CONWOOD COMPANY
EMPLOYEE SIGNATURE David Austad

DEFENDANT'S EXHIBIT 467

Confidential

CWD0100012701

16diii004909



FORWARD CORPORATION
Ph. (517) 846-4891
215 N. Front - Box 548
Standish, MI 48658

Alan Forest
Conwood Tobacco
P.O. Box 264
Bay City, Michigan 48707

May 20, 1994

Dear Alan,

After our conversation on Friday, May 13th, I had a meeting with the four managers that signed the letters to Conwood on the unethical practices of the U.S. Tobacco reps in their stores. At that meeting I asked the managers if there had been any unauthorized removal of any Conwood product or racks from the store and all four of them said that none had been removed. The racks at the stores were not removed by UST as they and you had informed me. In fact all the managers said they liked the single rack program much better. As I related to you U.S. Tobacco has partnered with us for two years on our billboard campaign and for the last 5 at the River Rear in Bay City. Conwood has declined to enter into the billboard campaign for the same two year period, leaving little choice in who we should use as our primary vender in the smokeless tobacco category.

As I told you in our meeting I want a one rack program and I feel that the rack has to be the Skoal rack because of all the past and present participation they have done with Forward Corporation.

THIS WAS NOT ADDRESSED IN PHONE CONVERSATIONS OF IN THE MEETING

I would now like to address the problem of managers signing any documents for Forward Corporation, other than receipts or invoices for deliveries. Any letters of complaint or unethical practices will be written from the chain headquarters in Standish. Our managers do not have the authority to sign such a document, will not do so again. In the future before asking managers to sign letters of intent from your company you should talk with Terry Mc Taggart (President), Austin Buttrick (Chairman of the Board) or myself. We are the only authorized personnel to sign such statements in the Convenience Store Division.

The last item I would like to address is the statement you made about me being offered

DEFENDANT'S EXHIBIT 538

money or incentives to change these racks. I take personnel offense to that. After all the time we have been doing business together I can't believe that you would think that of me. I chose programs for Forward Corporation on the basis of their merit or advertising quality and that alone. That is why you don't see every cigarette display and program in our stores. The smokeless tobacco rack program was changed because managers were tired of both reps bothering them on a monthly basis concerning the position of these racks. Going to a one rack program solved this situation that was caused by your rep.

Attached you will find letters from the managers stating to me how these letters of complaint came to be signed and why I was not made aware of it at the time. If you have any questions concerning this incident please contact me at your earliest convenience at (517) 846-4501 ext. 120. Please forward all of the original letters of unethical practices to me that were signed in our name by the four managers, enclosed you will find the letters that you should have gotten.

Sincerely Yours,

Lundy Edwards

Lundy Edwards
General Manager Convenience Store Div.
Forward Corporation

cc: Austin Buttrick *(Chairman of the Board)*
Terry McTaggart *(President)*

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 MAR 13 A9:00 Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' SUPPLEMENTAL OBJECTION TO DEFENDANTS' PROPOSED EXHIBIT FOR DeWAYNE BIDDY

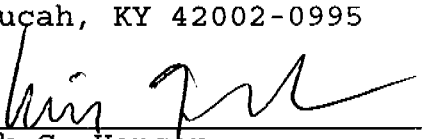
Defendants have disclosed that they intend to use Defendants' exhibit 4250 for witness DeWayne Biddy. Plaintiffs respectfully object to the introduction or use of this exhibit on the grounds of hearsay.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

Richard C. Roberts
Whitlow, Roberts,
Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995



Mark C. Hansen
Neil M. Gorsuch
Benjamin A. Powell
Michael J. Guzman
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005

Counsel for Plaintiffs

March 13, 2000

CERTIFICATE OF SERVICE

I certify that on this 13th day of March, a copy of the foregoing was sent via facsimile to:

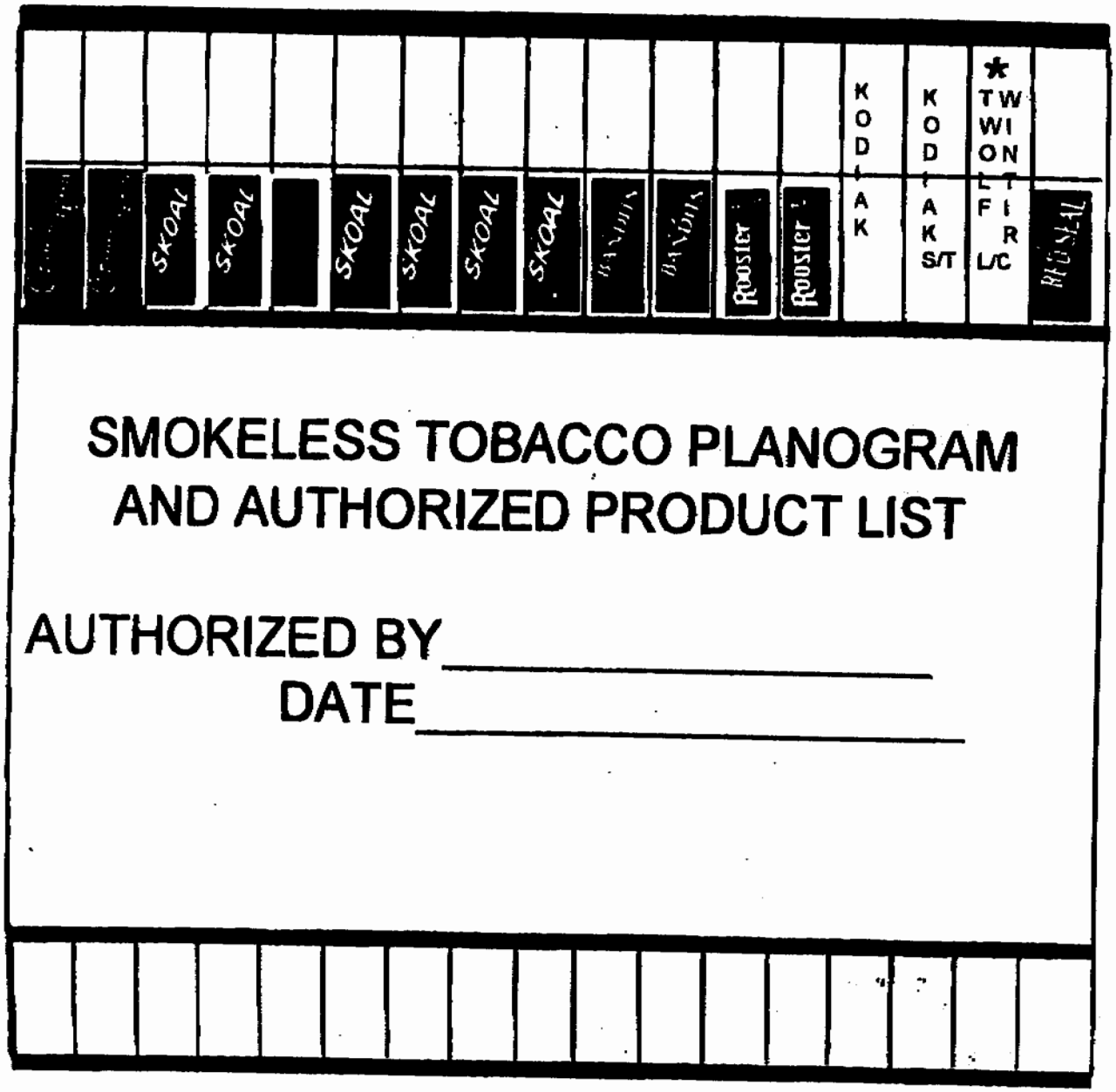
Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., U.S. Tobacco Trial Office, 333 Broadway, 10th Floor, Paducah, KY 42001.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, U.S. Tobacco Trial Office, 333 Broadway, 10th Floor, Paducah, KY 42001.

166ii0043

DEFENDANT'S EXHIBIT 4250

SCOT Markets



SMOKELESS TOBACCO PLANOGRAM AND AUTHORIZED PRODUCT LIST

AUTHORIZED BY _____

DATE _____

AUTHORIZED PRODUCTS:

- ◆COPENHAGEN (2 FACINGS)
- ◆SKOAL FINE CUT (2 FACINGS)
- ◆COPENHAGEN LONG CUT
- ◆SKOAL LONG CUT WINTERGRI
- ◆SKOAL LONG CUT STRAIGHT
- ◆SKOAL LONG CUT MINT
- ◆SKOAL LONG CUT CHERRY
- ◆SKOAL BANDIT WINTERGREEI
- ◆ROOSTER WINTERGREEN
- ◆ROOSTER ICY MINT
- ◆KODIAK
- ◆KODIAK STRAIGHT
- ◆TIMBERWOLF LONG CUT WINTERGREEN
- ◆RED SEAL LONG CUT WINTERGREEN

proposed 1999 Plan
Conwood will evaluate
& provide input

USTC/CSVD 550416
CONFIDENTIAL
1800110004917

03/12/00 SUN 23:56 FAX 003

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' REPLY TO PLAINTIFFS' OBJECTIONS TO PROPOSED EXHIBITS: DeWayne Biddy, Robert Carlson, Greg Germany, Morgan Jones and Lundy Edwards

Defendants respectfully respond to Plaintiffs' objections as follows:

Dewayne Biddy — Defendants withdraw DX 680.

Robert Carlson — Defendants withdraw DX 130, 141, 499, 500

DX 131 and 139 fall within an exception to the rule against hearsay: they are business records of both the deponent and defendants.

Greg Germany

DX 258: Defendants agree that there is inconsequential hearsay on USTC/CWD 277588 and 277589. (277588: "Division Manager Nancy Kenner explained that Harrison Co. has a large minimum order per account and that the majority of the Hagmans accounts will not meet their minimum order"; 277589: "SR Barry Wentz reports that Conwood reps. have started buying down Kodiak Wint. an additional .40 cents per can on top of the original .40 cents off."). This hearsay is not being offered for the truth of the matter asserted. Defendants respectfully suggest, however,

that the hearsay is too inconsequential and nonprejudicial to merit redaction or a limiting instruction.

DX 270: Beyond two observations that "SR[sales representativies]'s report that product is scanning properly" and "SR's point out that Wal-mart personnel are very pleased with the program", there is no indication on this weekly activity report that any fact Mr. Germany reports is outside his personal knowledge. This hearsay is not being offered for the truth of the matter asserted. Defendants respectfully suggest that redaction or a limiting instruction would cure any prejudice.

M. Jones

DX 95, 103: Plaintiffs object to DX 95 and 103 as lacking in foundation. The propriety of that objection is contingent on the foundation laid during Mr. Jones' direct examination and is not properly ruled on in advance.

DX 146: Defendants will not use DX 146 in their direct examination of Mr. Jones. Defendants, however, disagree that DX 146 has been excluded from evidence per prior Order of the Court. This issue of *Convenience Store News* may yet be introduced into evidence through the testimony of another witness.

L. Edwards

DX 539-42: These exhibits are not hearsay; they are admissions of a party opponent.

DX 465-467: Defendants will not seek to offer into evidence DX 465-467 after the testimony of Mr. Edwards.

DX 538: This is a business record of Mr. Edwards and for that reason falls into an exception to the hearsay rule.

Date: March 13, 2000

John S. Reed
Ridley M. Sandidge, Jr.
Lynn K. Fieldhouse
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Rachel A. Mariner
Chris T. Athanasia

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were hand-delivered to Mark C. Hansen, Neil M. Gorsuch, counsel for Plaintiffs, this 13th day of March, 2000.

Counsel for Defendants

16diii004921

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' OBJECTIONS TO EXHIBITS

In accordance with this Court's Order at the pre-trial conference concerning the reconciling of exhibits, Plaintiffs and Defendants have been communicating regularly concerning exhibits in evidence. Attached at Tab 1 is a list of all exhibits Defendants believe have been offered and admitted into evidence. Defendants dispute only the admission of PX 152. Defendants are waiting for a transcript of the Court proceedings of March 2, 2000 concerning a possible objection to PX 333.

PX 152 (Attached as Tab 2)

PX 152 is an unsigned, undated document entitled "DRAFT: 1999 CAP Goals". This draft does not reflect the position ultimately adopted by U.S. Tobacco. The revised CAP agreement is PX 146, to which Defendants have no objection. When a prior draft varies

considerably from the final version, it is insufficiently trustworthy to fall within Fed. R. Evid. 803(6). See Lloyd v. Professional Realty Services, 734 F.2d 1428 (11th Cir. 1984) (affirming exclusion of a draft document under Rule 803(6) because the document "was quite different from the final copy . . . which had been previously entered into evidence."). This document does not record facts reliably, in fact, it is by its nature speculative. No record testimony establishing the context, purpose or publication of this draft exists. For these reasons, it cannot be a "statement" of a party opponent.

Date: March 13, 2000

John S. Reed
Ridley M. Sandidge, Jr.
Lynn K. Fieldhouse
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Rachel A. Mariner
Chris T. Athanasia

SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000

Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were hand-delivered to Mark C. Hansen, Neil M. Gorsuch, counsel for Plaintiffs, this 13th day of March, 2000.

Counsel for Defendants

16diii004925

PLAINTIFF'S EXHIBITS IN EVIDENCE
Current as of 3/13/00

PX 4
PX 5
PX 8
PX 9
PX 10
PX 11
PX 13
PX 14
PX 16
PX 19
PX 20
PX 23
PX 24
PX 25
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PX 27
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PX 84
PX 84a
PX 86
PX 88
PX 92
PX 94
PX 96
PX 103
PX 104
PX 106
PX 107
PX 108
PX 112c
PX 112d
PX 112f
PX 112o
PX 113a
PX 114
PX 116
PX 117
PX 120
PX 122
PX 123
PX 124a
PX 124d

PX 124f
PX 126
PX 128
PX 130
PX 136
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PX 288
PX 289
PX 290a-290d
PX 291a-291d
PX 292a-292b
PX 293a-293c
PX 294a-294d
PX 326.2
PX 326.3
PX 326.4
PX 326.9
PX 326.17
PX 326.20
PX 326.21
PX 326.34
PX 326.39
PX 327.21
PX 327.26
PX 327.27
PX 333*
PX 334
PX 335 (329 sub)
PX 336 (329 sub)
PX 337 (329 sub)
PX 338 (329 sub)

* Disputed, or may be disputed.

DEFENDANT'S EXHIBITS IN EVIDENCE
Current as of 3/13/00

DX 220
DX 346
DX 364
DX 393
DX 521
DX 557
DX 592
DX 625
DX 644
DX 682
DX 688
DX 697
DX 712
DX 714
DX 719
DX 724
DX 731
DX 734
DX 744
DX 749
DX 753
DX 759
DX 762
DX 782
DX 792
DX 804
DX 808
DX 813
DX 814
DX 825
DX 834
DX 836
DX 848
DX 856
DX 859
DX 877
DX 883
DX 885
DX 888
DX 892
DX 904
DX 922
DX 1939
DX 4304
DX 4386
DX 4388

16diii004928

DRAFT

1999 CAP GOALS

The goals that are currently under consideration are shown in the grid below. It is our belief that these represent goals that are achievable with the current program. They have been listed in what we perceive as priority order for retailers and wholesalers and, of course, are subject to input from management and legal.

	WHOLESALE	RETAIL
– DISPLAY - SHARE OF SPACE	N/A	1
– SHARE of SALES*	2	2
– PRICE MIX	3	3
– DATA COMPONENTS	1	N/A

DISPLAY

The display goal would be to make sure that USTSM's share of fixture was in proportion to its share of sales in the account.

SHARE OF SALES

The share of sales goals would be based upon the greater of either the retailer's historical percentage of USTSM sales or the goal for USTSM sales in the area that the retailer is located.

Share of sales was chosen as the primary benchmark for accounts, because it provides the most fair and flexible way to determine goals for an account. This approach allows us to ask the retailer to be the best that he can be with the things that he can control. There are many things that are beyond a retailer's control that could affect its performance in achieving a volume goal:

An increase in competition - A new store opens across the street.

A downturn in the local economy - A factory closes.

These could affect a retailer's volume and are caused by factors that are beyond the retailers control. Goals based on a retailer's share of sales would automatically and fairly compensate for these changes in the environment that are beyond the retailers control.

We want the retailer to focus on improving the things that are in his control.

EXHIBIT
3-31-99 DS

PLAINTIFF'S EXHIBIT
CASE NO. 5:98CV-108-R
EXHIBIT NO. 152

PRICE MIX

Price mix would be a sales ratio of Premium Products (PP) V. Price Value (PV) products.

The target PP/PV ratio might be something like 85/15 (85% PP sales and 15% PV sales).

DATA COMPONENT

The primary focus for wholesalers would be to make sure that they are providing quality data in a timely fashion. This includes all aspects of the data reporting requirements including units, dollars, promotional units, inventories.

*DETERMINATION SHARE OF SALES PERCENTAGES

A) Accounts with 1 year of history

Share goal will be the greater of an accounts share of sales for the same period of time in the previous year or the area's goal for share of sales.

B) Accounts with less than 1 year of history

Share goal will be the greater of the accounts share of sales for the last quarter or the area's goal for share of sales.

C) Accounts with less than 1 quarter of history

Share goal will be the goal for the area the account is in. This will be the average share for the area during the same time period of the previous year.

FOR EXAMPLE:

In department COO the average share of USTSM sales is XX.X%. This would be the percentage that an account without an established benchmark would have to achieve until they had established one for themselves

D) Chain Accounts

The average for the chain would be used.

The same criteria as above would be used to establish share of sales goals for the chain. In the case of a chain that had less than a quarter of history, the average share for all of the areas that the chain operates retail stores in would be used.

REED WEITKAMP SCHELL & VICE PLLC

TELECOPIER COVER SHEET

March 13, 2000

TO: Mark C. Hansen
Neil M. Gorsuch
Benjamin A. Powell

TELECOPIER NO.: 270-450-5118

FROM: John S. Reed

NUMBER OF PAGES *(including cover sheet)*: 15

IF ANY PROBLEMS ARISE, PLEASE CONTACT: Karen Childers
(270) 444-6339

RE: *Conwood Company, L.P., et al. v. United Stated Tobacco Company, et al., United States District Court, Western District of Kentucky, Paducah Division, No. 5:98-CV-108-R*

MESSAGE:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P.	)	
Plaintiffs,	)	
v.	)	Civil Action No. 5:98-CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM REGARDING DEFENDANTS' USE OF DEPOSITION TESTIMONY OF CONWOOD EMPLOYEES

Plaintiffs refuse to provide counterdesignations for the designated deposition testimony of Conwood employees. For the first time, Plaintiffs assert that because all Conwood employees will be available to testify at trial, Defendant cannot use their deposition testimony in their case. This argument is baseless. It contradicts the express language of Fed. R. Civ. P. 32(a)(2), and it is contrary to the Sixth Circuit's holding in Black v. United Parcel Service, 797 F.2d 290 (6th Cir. 1986).

In the interest of time and efficiency, Defendants plan to use limited deposition testimony from several Conwood witnesses that is narrow in scope and directly relevant to Defendants' affirmative case. Apparently with the hope of disrupt-

ing Defendants' presentation, Plaintiffs seek to prevent the use of such deposition testimony simply by refusing, over the weekend, to provide counterdesignations to Defendants' designations. Defendants respectfully request that this Court order Plaintiffs to provide counterdesignations without further delay, or in the alternative, to have Defendants' designation presented to the jury without them.

The law is clear that the deposition testimony of a party, or of an officer, director, or managing agent of a party, may be used at trial for any purpose regardless of whether the witness is available to testify. See Fed. R. Civ. P. 32(a)(2). The rule has nothing to do with the witness' availability. The Sixth Circuit left little question that deposition testimony may be presented at trial pursuant to Rule 32(a)(2), even if the witness is physically present in the courtroom. See Black, 797 F.2d at 293 (Rule 32(a)(2) permits deposition testimony of UPS preloading manager to be used at trial for any purpose).

Here, Plaintiffs do not argue – nor could they – that any of the Conwood employees for whom deposition testimony has been designated is not – at the very least – a "managing agent" of Conwood within the meaning of Rule 32(a)(2). See Stearns v. Paccar, Inc., 986 F.2d 1429, 1993 WL 17084, *4 (10th Cir. Jan. 22, 1993) (factors considered in determining whether an individual is a "managing agent" are whether the agent's interests are identified with those of principal, the nature and extent of the agent's functions, responsibilities and duties, the extent of the agents

power to exercise judgment and discretion, and whether any person or persons higher in authority than deponent were in charge of the particular matter or possessed all of the necessary information sought in the deposition.) Conwood employees for whom deposition testimony has been, and will be, designated by Defendants include Conwood's president, Conwood's vice president of marketing, Conwood's regional and district sales managers, and other Conwood management employees. By comparison, the employee in Black was a relatively low-level "loading manager" for UPS. Thus, under Stearns, under Black, and under the plain meaning of Fed. R. Civ. P. 32(a)(2), the deposition testimony of these employees may be used at trial for any purpose. Accordingly, there is no tenable argument that Defendants cannot present the designated deposition testimony to the jury.

Further, judicial efficiency would best be served by the presentation of narrowed and focused deposition testimony, rather than the presentation of numerous live witnesses. This is precisely the reason each party expended much time, effort and resources traveling around the country taking, defending and video-taping the depositions of over one hundred witnesses. Plaintiffs should not now be allowed, on the eve of Defendants' case, to announce its unwillingness to provide counterdesignations in

an effort to prevent Defendants from presenting its case according to procedures expressly provided for by the Federal Rules of Civil Procedure.

Date: March 13, 2000

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., counsel for Plaintiffs, this 13th day of March, 2000.

Counsel for Defendants

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REED WEITKAMP SCHELL & VICE PLLC

TELECOPIER COVER SHEET

March 13, 2000

TO: Mark C. Hansen
Neil M. Gorsuch
Benjamin A. Powell

TELECOPIER NO.: 270-450-5118

FROM: John S. Reed

NUMBER OF PAGES *(including cover sheet)*: 6

IF ANY PROBLEMS ARISE, PLEASE CONTACT: Karen Childers
(270) 444-6339

RE: *Conwood Company, L.P., et al. v. United Stated Tobacco Company, et al., United States District Court, Western District of Kentucky, Paducah Division, No. 5:98-CV-108-R*

MESSAGE:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98CV-108-R

CONWOOD COMPANY, L.P. and
CONWOOD SALES COMPANY, L.P. PLAINTIFFS,

v.

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC., and UST INC. DEFENDANTS.

MEMORANDUM OPINION & ORDER

This case is before the Court on Defendants' Memorandum Regarding Defendants' Use of Deposition Testimony of Conwood Employees. This Court orders Plaintiffs to provide Defendants with counterdesignations to deposition testimony of officers, directors, or managing agents Defendants intend to play at trial.

Defendants assert that Plaintiffs refuse to counterdesignate deposition testimony on the basis that witnesses availability for live testimony prohibits Defendants from using deposition testimony. This argument is baseless. Fed.R.Civ.P. 32(a)(2) states that, "[t]he deposition of a party or of anyone who at the time of taking the deposition was an officer, director or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose." The Sixth Circuit has previously allowed deposition testimony under this rule even when the witness is present in the courtroom. *See Black v. United Parcel Serv.*, 797 F.2d 290 (6th Cir. 1986).

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This Court **ORDERS** Plaintiffs to provide deposition counterdesignations to those witnesses who are officers, directors, or managing agents under Fed.R.Civ.P. 32(a)(2) that Defendants plan to use at trial, regardless of their availability.

This is a final and appealable order. There is no just cause for delay.

This is the 13 day of March, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED

MAR 13 2000

JEFFERSON, CLERK
BY DEPUTY CLERK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. PLAINTIFFS

v. **ORDER**

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC. DEFENDANTS

The Court was presented with designated depositions. Objections were shown with responses and counter-designations. After objections, some designated testimony was withdrawn Of the remaining designated testimony the following objections are sustained.

1. Gary Jones

   Page 29 - Lines 22-25
   Page 30 - Lines 1- 25
   Page 31 - Line 1
   Page 31 - Lines 11-25
   Page 32 - Lines 1-8

2. David Dill

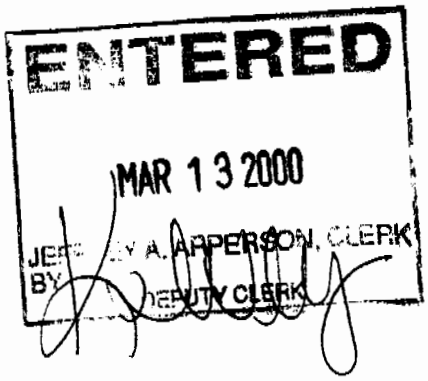
   Page 54 - Lines 24-25
   Page 55 - Lines 1-8

IT IS SO ORDERED.

This 13th day of March, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MEMORANDUM CONCERNING THE APPLICABILITY OF RULE 32(a)(1) WHERE THE MANAGING AGENT HAS RETIRED

There is no authority for Plaintiffs' position that the deposition of an employee who was a managing agent at the time of his or her deposition cannot be used in accordance with Fed. R. Civ. P. 32(a)(2) simply because that employee no longer works for the party.

The express language of Rule 32(a)(1) provides that "[t]he deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent . . . may be used by an adverse party for any purpose." Fed. R. Civ. P. 32(a)(2) (emphasis added). See Reed Paper Company v. Procter & Gamble Distributing Co., 144 F.R.D. 2 (D. Maine 1992) (relevant inquiry under Fed. R. Civ. P. 32(a)(2) is whether the deponent was a managing agent at the time of the taking of his or her deposition); Charles A. Wright & Arthur R. Miller, Federal

Practice and Procedure §§ 2103, 2145 (same). Plaintiffs argue that certain of Conwood's employees who were managing agents at the time of their deposition are now retired. Plaintiffs, however, do not argue – nor could they – that any of the retired persons were not managing agents of Conwood at the time of taking the deposition. Accordingly, despite the fact that certain of Conwood's managing agents have retired since the taking of their depositions, Rule 32(a)(1) applies with full force.

In addition, in an effort to provide the Court with sufficient factual background to

Practice and Procedure §§ 2103, 2145 (same). Plaintiffs argue that certain of Conwood's employees who were managing agents at the time of their deposition are now retired. Plaintiffs, however, do not argue – nor could they – that any of the retired persons were not managing agents of Conwood at the time of taking the deposition. Accordingly, despite the fact that certain of Conwood's managing agents have retired since the taking of their depositions, Rule 32(a)(1) applies with full force.

In addition, in an effort to provide the Court with sufficient factual background to make a determination of whether Conwood District Sales Managers are managing agents within the definition of Rule 32(a)(2), Defendants note the following:

- Each District Sales Manger is in charge of a Conwood sales district, a designated geographic territory that invariably covers several states;
- Each District Sales Manager does business on behalf of Conwood with any number of retailers within his or her district;
- Each District Sales Manager supervises six to eight full-time sales representatives, as well as a varying number of part-time sales representatives; and
- Each District Sales Manager exercises discretion in allocating promotional expenditures, buy-down funds, and advertising supplies within his or her district.

In short, each Conwood District Sales Manager exercises more discretion in the interests of Conwood than the UPS "loading manager" found to be a "managing agent" in the Black case. There can be no doubt that Rule 32(a)(2) should apply with equal force to Conwood District Sales Managers.

CONCLUSION

For the foregoing reasons, this Court should order Plaintiffs to provide counterdesignations for Conwood Regional Sales Managers who have retired since the time of their deposition, as well as for all Conwood District Sales Managers.

Respectfully submitted,

Date: March 13, 2000

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, counsel for Plaintiffs, this 3rd day of March, 2000.

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MESSAGE:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

Pursuant to Fed. R. Civ. P. 50(a)(1), Defendants ("U.S. Tobacco") respectfully move this Court to grant judgment as a matter of law against Plaintiffs ("Conwood") on their Sherman Act §2, Lanham Act, and state law claims.

> "The purpose of these [antitrust] laws is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."

Plaintiffs' Proposed Jury Instructions, LePages, Inc. v. 3M, p. 19. (Tab 1)

I. IT IS UNDISPUTED THAT THE COMPETITIVE PROCESS IS OPEN TO CONWOOD AND OTHERS

As the evidence has come in before the jury, there is no dispute that the "working of the market" that is at issue in this case is the competitive process between and among moist snuff manufacturers to place products, racks and POS with retailers. There also is no dispute that this competitive process is wide open to all companies that choose to take part in that process, which all moist snuff companies do in varying degrees. Although Plaintiffs may argue that certain conduct by U.S. Tobacco prevents or hinders Conwood's ability to place items at retail, any such argument misconstrues the undisputed nature of the "working of the market" for the display and sale of moist snuff products. The retail industry in this country is not a series of flea markets where merchants are free to throw down a blanket and display their wares at will. The retail industry is predicated on the decisions of retailers – decisions to spend their own money to purchase products from retailers, decisions to organize their stores and use their own space in the manner that they see fit, and the decisions to display products with the hopes of faring well in their own competition against other retailers.

A. There Is No Evidence Of Any Agreements That Restrict The Competitive Process

"If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against the party and may grant a motion for judgment as a matter of law. . . ." Fed. R. Civ. P. 50(a)(1). Because Plaintiffs have not offered, and have not even

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attempted to offer, evidence concerning the competitive process itself, this Court should determine the issue and grant judgment as a matter of law for U.S. Tobacco.

In this case, Plaintiffs have not offered a single piece of evidence that the competitive process – aside from Conwood's ability and/or willingness to compete in that process – is impaired by the conduct of U.S. Tobacco. Instead, Plaintiffs have simply declared that the decisions of retailers – even the independent, uncoerced decisions of retailers – are irrelevant.[1] As a result, Plaintiffs have not even suggested that a single retailer was coerced in any way, never mind meeting its burden to prove by a preponderance of evidence that a substantial amount of the retail industry was foreclosed from competition by Conwood or any other moist snuff manufacturer.

Plaintiffs have not offered a single retailer from over 300,000 retail locations to testify that it had entered an agreement with U.S. Tobacco that restricted in any way the retailer's ability to do business with other manufacturers. Plaintiffs have offered only a literal handful of retailers – far fewer than the "scores" they promised – to testify about a literal handful of isolated incidents of "bad acts." That is the extent of Plaintiffs' proof about what actually happens in the retail environment.

---

[1] But see February 17, 2000 Order on Summary Judgment, at 10 (holding that multiple issues remain for trial, including "whether the damages claimed by Conwood is caused by UST, or instead is the result of the independent uncoerced decisions by retailers").

1. Conwood's Evidence of "Agreements" Is Itself Fatally Flawed

Party A agrees to do X in exchange for Party B doing Y: That is an agreement. Here, the only evidence is a retailer makes decisions to use a U.S. Tobacco racks because he or she prefers the look, design, or functionality of that rack, and that U.S. Tobacco provides that rack to service its customer. That is not an agreement, even when it results in a retailer authorizing only the U.S. Tobacco rack. Plaintiffs have completely ignored this distinction and, as a result, have failed to offer sufficient evidence of any actual agreements that would support its claim that Conwood is excluded from competition.

Indeed, Plaintiffs did not offer the testimony of a single retailer suggesting that the retailer had an agreement with U.S. Tobacco that prevented the retailer from doing business however, and with whomever, it wanted. Instead, the bulk of Plaintiffs' "exclusive agreements" evidence was channeled in through the testimony of Dr. Gregory Gundlach. Dr. Gundlach's testimony, however, is revealing:

> Q. Did you study whether any retailers selected the United States Tobacco rack based on a contractual obligation to U.S. Tobacco rather than their own independent choice to have a uniform rack or just because they liked U.S. Tobacco better?
> A. Again, I was not interested in the specific deliberations that went on in the retailer's mind. . . . Tr., March 9, at 148. (Tab 2)
>
> Q. So, as far as you know, the competitive [process] to use one rack or multiple rack, someone else's rack, is wide open; is that correct?
> A. Again, the focus was whether or not there was an agreement. Not necessarily whether and how it was reached. . . . Id. at 156. (Tab 2)

That testimony illustrates the full extent of Plaintiffs' theory and Plaintiffs' evidence of the claim that U.S. Tobacco injures competition by entering into exclusive agreements. More importantly,

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the entirety of the evidence offered during Plaintiffs' case in chief warrants judgment as a matter of law:

- Every "agreement" that was literally highlighted by Plaintiffs is terminable at will, see Plaintiffs' Proposed Jury Instructions, LePage's, p. 48. (Tab 1)
- No "agreement" highlighted by Plaintiffs prevented or even hindered a retailer from carrying a Conwood product, if it chose to do so, see id., pp. 43-44 (Tab 1);
- No "agreement" highlighted by Plaintiffs was "exclusionary" beyond the physical rack or fixture provided to the retailer by U.S. Tobacco. In other words, any "exclusive" POS term of any "agreement" referred only to the rack or fixture, not to the store; and
- At all times, Conwood has remained free to sell its products, racks, and POS into any store in this country.

At a minimum, consistent with this Court's prior rulings, Plaintiffs had the burden of offering a legally sufficient evidentiary basis that: (1) U.S. Tobacco and retailers reached agreements; (2) the agreements were not the result of the independent, uncoerced decisions of retailers; and (3) the agreements prevented Conwood from doing business. Plaintiffs have offered no such evidentiary basis, and judgment as a matter of law is warranted.

B. Plaintiffs Offered Evidence of a Handful of Isolated Incidents of Unauthorized "Bad Acts"

Similarly, Plaintiffs have not offered a legally sufficient evidentiary basis for its claim that U.S. Tobacco sales representatives engage in a systematic campaign to remove Conwood racks, POS materials and products from retail stores. Instead, Plaintiffs have relied on evidence where a retailer has chosen a U.S. Tobacco rack to replace Conwood's or on anecdotal evidence of isolated incidents of unauthorized rack removal. The evidentiary record makes it

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clear that any unauthorized incidents occur between and among all of the different sales forces that do business in the moist snuff industry. Swedish Match takes Conwood racks; Conwood takes U.S. Tobacco racks; the tit-for-tat goes on. It is not the stuff of the antitrust laws.

If there were, in fact, a systematic campaign to remove Conwood racks to the extent necessary to affect competition in the overall moist snuff market alleged by Plaintiffs, the frequency of rack removal would be a repeating point of concern for nearly every retailer in this country. Instead, Plaintiffs have offered the jury the following retailer testimony:

- Gayleen Rusk, a manager of a single-store Amoco Pronto Express store in Sioux City, Iowa, testified that a U.S. Tobacco representative removed a Cougar rack in August of 1998.
- Georgia Gill-Elkins, a manager of a single-store Berreth Oil minimart in Mishawaka, Indiana, testified that a U.S. Tobacco rack removed a U.S. Tobacco rack, and the Conwood POS on that rack, in November of 1998.
- Patricia Lienen, a former employee of a single-store Dave's Country Store in Dunlap, Iowa, testified that a U.S. Tobacco sales representative removed Conwood racks, but always put the Conwood product in a U.S. Tobacco rack.
- Marti Stevens, a manager of a single-store Qwik Way store in Billings, Montana, testified that a U.S. Tobacco sales representative removed a Conwood rack – the exclusive Conwood rack – in August, 1997.

If this is a legally sufficient evidentiary basis for a $1.3 billion antitrust claim, then every manufacturer that employs a sales force – including Conwood – must be certain that in over 7.69 million sales calls over ten years, see Tr., March 7, at 91-93 (Tab 3), none of its sales personnel commit any "bad acts" in the field. The antitrust laws, which were intended to promote and foster competition, were not meant to snap into effect when the very market conditions created by that competition do, in fact, exist in the real world.

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II. PLAINTIFFS DID NOT ESTABLISH CAUSATION AND DAMAGES

Plaintiffs have not offered any evidence whatsoever – not even expert testimony – that Conwood lost any sales as a result of not having a rack, not having a particular piece of POS, or not having its entire product line in any retail store. No consumer has testified that he or she could not "find" a Conwood product that was "lost" in a U.S. Tobacco rack. No retailer has testified that it lost sales as a result of any U.S. Tobacco conduct, and that is not even the inquiry. In fact, Plaintiffs would have to show that Conwood lost the sale – i.e., that the consumer did not or could not purchase the product at all from any retail store. In any event, Plaintiffs have not laid the injury-in-fact foundation for their expert's damages conclusions.

Dr. Leftwich's testimony and damages estimates were exposed as pure fantasy. Dr. Leftwich's own data demonstrated vividly that in the 25 lowest of the low-share states – states where Conwood did not have a "foothold" as the theory goes – Conwood's share saw no abrupt change in 1990 or thereafter. Dr. Leftwich's own data also demonstrated that Conwood's overall share rose steadily, again with no abrupt change in 1990 or thereafter. See Tr. March 8, at 63-70 (Tab 4). Accordingly, Dr. Leftwich's damages study bears no relation to Conwood's own theory of liability.

Moreover, Dr. Leftwich's damages study makes no attempt to disaggregate the effects of lawful conduct by U.S. Tobacco – e.g., increased promotional activity – or any conduct having nothing to do with U.S. Tobacco – e.g., the promotional activity or even rack removal attributable to other moist snuff companies. See Tr., March 8, at 76-91 (Tab 4). Indeed, Dr. Leftwich testified that, despite the fact that Dr. Gundlach re-evaluated his conclusions concerning

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whether U.S. Tobacco had "exclusive agreements" with 14 different chains, his damages calculations did not change. See id. at 76-77 (Tab 4).

Finally, Dr. Leftwich offers the jury the equivalent of a dart and the side of a barn to render a verdict on damages. Dr. Leftwich's "range" of damages is from $155 to $438 Million, or in other words, anywhere over $155 Million. See id. at 42 (Tab 4). The expert opinion that Conwood's lost profits from lost sales over the past four years is "somewhere" between $155 and $488 Million is indicative of two things: (1) the analysis is really not measuring anything; and (2) the analysis is not helpful to the jury in awarding damages.

The antitrust laws do not allow a jury to render a damages verdict based on their own speculation and guesswork. They also do not allow a jury to render a verdict based on the speculation and guesswork of a hired expert witness.

III. LANHAM ACT CLAIM

Plaintiffs' elusive Lanham Act claim seems to have taken on a whole new basis during trial. Plaintiffs' focus now appears to be on the allegation that the "Made" date on a Copenhagen can is somehow misleading to consumers. Assuming Plaintiffs prove that is true, which they cannot, Conwood would have no standing to bring what essentially is a consumer claim against U.S. Tobacco.

After searching the trial record for evidence of Plaintiffs' original Lanham Act claim, which was based on product defamation, the only evidence offered by Plaintiffs seems to be the testimony of Andrew Carter. Mr. Carter, a former U.S. Tobacco sales representative who has not worked for the company since 1994 testified that he has told consumers that the

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Conwood product is "stemmy." He also testified, however, that if one were to open a can of Conwood product, the product is, in fact, stemmy. Whereas the truth of the "stemmy" quality of Conwood's products may be left up to the jury, the fact that Mr. Carter has not even worked for U.S. Tobacco within the statute of limitations period is not.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court enter judgment as a matter of law against Plaintiffs.

Date: March 14, 2000

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by hand delivery to Mark C. Hansen, Neil M. Gorsuch, counsel for Plaintiffs, this 14th day of March, 2000.

Counsel for Defendants

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EXHIBIT 1

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February 2, 2000

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Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al. - Sample Jury Instructions

Gentlemen:

Enclosed are jury instructions from three recent federal cases which were filed with the Court along with Plaintiffs' Proposed Jury Instructions. These were inadvertently omitted from our service package to you on Friday, January 28, 2000. We regret the error and apologize for any inconvenience.

Sincerely,

Michael J. Guzman

Enclosure

cc: M. Hansen D. Roberts
N. Gorsuch B. Powell

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LE PAGE'S INCORPORATED., et al.,

Plaintiffs,

vs.

3M (MINNESOTA MINING AND MANUFACTURING CO.),

Defendant.

CIVIL ACTION No. 98-3983

FILED

OCT 12 1999

MICHAEL E. KUNZ, Clerk

By _____ Dep. Clerk

Jury Instructions

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Purpose of Antitrust Laws

The purposes and goals of the antitrust laws at issue are to preserve and promote competition. The antitrust laws encourage, to the fullest extent practicable, free and open competition in the marketplace by preventing unreasonable restraint or unlawful monopolization of any business or industry. The purpose of these laws is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.

The purpose of the antitrust laws is to preserve and advance our system of free enterprise by encouraging, to the fullest extent practicable, free and open competition in the marketplace, and by preventing unreasonable restraint or unlawful monopolization of any business or industry, so that the consuming public may receive better goods and services at lower cost.

1. Elements--Count III--Unlawful Exclusive Dealing

Le Page's alleges that they were injured by 3M's unlawful exclusive dealing. To win on their claim of exclusive dealing, Le Page's must prove each of the following elements by a preponderance of the evidence:

First, 3M made sales of goods, or entered into contracts for sale of goods for use, consumption, or resale within the United States.

Second, in these sales or contracts for sale of goods, 3M set a price, discount or rebate, on the condition, agreement, or understanding that the purchaser would not deal in the goods of a competitor or competitors of 3M's;

Third, the effect of such sales, or contracts for sale or such condition, agreement, or understanding was to substantially lessen competition in the relevant market; and

Fourth, Le Page's was injured in its business or property as a proximate result of 3M's conduct.

I will now explain these elements in greater detail. I will instruct you on the last element after I have given you my instructions on all four of Le Page's claims.

2. Exclusive Dealing Defined

Le Page's claims that 3M paid rebates, offered market development funds, and made other payments to customers in return for the customers' agreements not to deal with Le Page's.

An exclusive dealing arrangement, in whatever form it takes, requires that there be a "meeting of the minds;" the buyer must actually agree to limit its purchases to one seller for some period of time. The agreement may be either expressly stated in a contract or inferred from the circumstances. On the other hand, the law does not prohibit a buyer from making a unilateral decision to deal exclusively with a single supplier. The primary inquiry is whether or not the buyer has committed itself, either expressly or by an implied agreement, to limit its purchases for some period of time to one seller in exchange for some benefit.

5. Rule of Reason

If you find that Le Page's has proven that the exclusive dealing agreement(s) have in the past, do now, or will in the future substantially lessen competition in the relevant market, you must then consider whether the exclusive dealing agreement(s) are "unreasonable."

In deciding this issue, you must decide whether the exclusive dealing agreement(s) help competition or harm competition. Your task is to balance any aspects of the exclusive dealing agreement(s) that were helpful to competition against any aspects that were harmful to it. In doing so, you should consider such factors as

(1) the length of the agreement(s). You should consider how long any exclusive dealing agreement(s) were, or will be in effect. If an agreement will last a relatively short time, and will not significantly limit the opportunities for competing sellers to enter or remain in the market, then it is less likely to be unreasonable.

(2) 3M's reasons for setting up the exclusive dealing agreement(s), and the circumstances surrounding the agreement(s). A purpose or intent to harm competition, by itself, is not sufficient to establish that an exclusive dealing agreement was unreasonable. Effect, not intent, is the ultimate test. However, consideration of purpose of the agreement may help you determine if it likely would have a harmful effect on competition. You may consider, for example, whether 3M entered the exclusive dealing agreement(s) to achieve a legitimate business

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P., ET AL.,
Plaintiffs

VS.

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., ET AL.,
Defendants

Case No. 5:98-CV-00108

COPY

MARCH 9, 2000

****

VOLUME VIII
TRANSCRIPT OF JURY TRIAL
BEFORE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

****

CAROLA G. STRIJEK, RPR
RUTH E POTAMI, RPR
Official Court ReporterS
United States Courthouse
501 Broadway, Suite 133
Paducah, KY 42001

my opinions in this case.
Q. Well, are you aware at all that Mr. Metz reported to Mr. Towel, to Mr. Williams, the store that he was reported about had a 2908 agreement, but Conwood was perfectly free to set up a rack somewhere else in the store. He reported that the Kodiak sales were doing well in that store. Do you recall that testimony?
A. Again, I'm having trouble recalling Mr. Metz's testimony, so I wouldn't have an understanding of that.
Q. Did you study whether any retailers selected the United States Tobacco rack based on a contractual obligation to U.S. Tobacco rather than their own independent choice to have a uniform rack or just because they liked U.S. Tobacco better?
A. Again, I was not interested in the specific deliberations that went on in the retailer's mind. In my review of the evidence the opinions that I reached were that in many instances almost all the instances that identify UST stated objective and their approach in terms of these they were soliciting retailers for these agreements. They were providing incentives for these agreements. They were the ones that were compelling retailers to engage in these agreements.
Q. So you weren't interested in what was going on in the retailer's minds when they were making those decisions?
A. My focus all along was what was good for consumers and my

EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P., ET AL, Plaintiff	)	5:98-CV-00108
vs	)	PADUCAH, KENTUCKY MARCH 7, 2000
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., Defendants	)	VOLUME 6

TRANSCRIPT OF JURY TRIAL
TAKEN BEFORE THE HONORABLE THOMAS B. RUSSELL,
JUDGE, UNITED STATES DISTRICT COURT

A P P E A R A N C E S

For the Plaintiff: Mark Hanson
Richard C. Roberts

For the Defendant: John S. Reed
Neil Stoll
Ridley M. Sandidge
James A. Keyte

Court Reporter: Jerome F. Roppel, Jr.
Carola G. Strijek
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Official Court Reporters
133 Federal Bldg.
501 Broadway
Paducah, KY 42001
(270) 443-1225

A Yes.

MR. REED: Can we put up the chart, please?

BY MR. REED:

Q Mr. Milano, what I'd like you to do is explain to the jury what this chart represents. Let's just start with the title and the concept. What does this chart represent?

A It's just an estimated number of retail calls made by sales representatives over a 10-year period.

Q And these are not supposed to be accurate figures; is that correct; in other words, not down to the last sales call?

A No; this is just an estimate.

Q All right, sir. Now, across the top we have ten years, from 1990 to 1999; is that correct?

A That's correct.

Q Now, where did the number come from in the first line under the years where it says "number of sales reps at year-end"? Where did that come from?

A That would just come from an organizational chart at the end of the year of how many sales reps were actually in position at the end of each of these years.

Q So is that a fair approximation of about how many sales reps U.S. Tobacco had during that year?

A Yes.

Q And let's look at the second -- the next line down. "Number of days worked for year approximate." What does that

number represent?
A That's just an approximate number of days, taking, you know, weekends into consideration, taking vacations and holidays off of a -- working days in a year, subtracting that and come up with an average working days per year.
Q Mr. Milano, the last line says "Number of calls made per day worked, average," and it's 8 all the way across.
A Correct.
Q How did you come up with that number?
A That would just be the average, taking the average of the calls made times the days they worked and come up with an average. And the average was about eight; eight calls a day.
Q Now, it's all the way at the bottom -- let's start with 1990. There's a number, 678,690. Do you see that?
A Correct.
Q What does that represent?
A All these numbers across the bottom are just using that formula, or the amount of retail calls that were made in that particular year. It's just an estimate.
Q So in other words the 678,000 number would be 369 times 230 times 8; is that correct?
A Correct.
Q And what is the 7,696,720 in regard to?
A That's just an of the calls made over a ten-year period. So it estimated about seven and a half million calls.

Q Is that for the total 10-year period?
A Over a 10-year period.
Q And you think that's a good estimate for working purposes here of how many different times sales reps went into retail stores on behalf of U.S. Tobacco between 1990 and 1999?
A I think as an estimate, on average eight calls a day per sales rep would be as accurate as you could get.
Q Now, what sort of investment by U.S. Tobacco in dealing with retailers does that represent?
A That's hundreds of millions of dollars in investment.
Q And what is the purpose generally of sales reps going into the retail store? Well let me back up and let me ask you another question first.

After a chain account manager has met with a buyer for a chain account and the chain buyer has approved a Plan-O-Gram and whatever rack situation he wants, do U.S. Tobacco sales reps still call on those chain stores?
A Yes.
Q Why do they do that?
A To -- if -- let's say a chain manager met with a buyer and the buyer would want to reset his stores. He wants to use a different vending system, and would want it done, you know, in a specific amount of time.

Our sales representatives would have the materials that they would need to reset those stores. They would have a

EXHIBIT 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P., ET AL., Plaintiffs	Case No. 5:98-CV-00108
VS.	
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., ET AL., Defendants	MARCH 8, 2000

COPY

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VOLUME VII-A
TRANSCRIPT OF JURY TRIAL
BEFORE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

****

RUTE POTAMI, RPR
Official Court Reporter
United States Courthouse
501 Broadway, Suite 133
Paducah, KY 42001

Conwood based on your analysis that you told us about?
A Yes, I did.
Q And that involves -- go to the next slide please -- the additional Conwood sales at a reduced price minus the additional Conwood cost associated with selling this additional moist snuff?
A That's correct.
Q What were the damages you came to as a result of your analysis?
A That depended on which method I used and which scenario I used.
Q When you included an effect for misconduct in 1997, or anticompetitive conduct in 1997, what damages did you conclude Conwood sustained?
A The damages range from $488 million to $313 million, depending on whether one uses Scenario 1 or Scenario 2.
Q What happened when you, instead of including the 1997 anticompetitive conduct, assumed that there was no anticompetitive conduct in 1997? What did that do to your damages calculation?
A Those numbers ranged then from $155 million to $238 million, depending on which scenario you assume.
Q And are those, in your opinion, Professor Leftwich, fair and reasonable estimates of the damages Conwood sustained as a result of the conduct of UST in this case?

right?
A. No, that's not my testimony. I did different starting dates other than 1990 a long time ago. You asked specifically about the 1989 start date. I did that sometime ago and I redid it again, had it redone again this week.
Q. Professor, before we talked about your regressions, let me ask you about your 1994-1990 period. It was relatively unaffected by that, that alleged bad conduct, okay? Isn't it correct, professor, that you didn't do any simple comparison of the 1984-1990 period with the 1990-1997 period where the alleged misconduct occurred?
A. I don't think I understand your question. My testimony is I did look at 1994 to 1998, or excuse me, to the 1990 period, I testified to that before.
Q. Well, my question, professor, is simply you didn't attempt to chart the data you relied on to give Conwood's market shares showed any significant changes in 1990 when these bad acts allegedly intensified?
A. I did the tests that I testified, you seem to suggest I did other tests. I'm not sure what you're suggesting.
Q. I'm sorry, professor. I'm just asking whether you did a chart and data, just a line that slows where the data falls for Conwood's share before 1990 and after 1990? That's a very simple chart, right?
A. That is it may have some uses and it may have many faults

attached to it.
Q. You didn't do it, right?
A. No, I did not.
Q. Well, let's look quickly at all 25 states with the lowest relative shares where all that alleged misconduct was supposed to have most effect starting with 1990 to see if there was any bumps along the road for this share. Let me start with Alabama, you see 1990 there?
A. Yes, I did do.
Q. Okay. Is that going down after 1990?
A. There is a slight increase after 1990. The point follows 1990, appears to higher in 1991.
Q. Well, that's going up after 1990 is not consistent with Conwood's, the belief that Conwood puts in their personnel phone call, is that right?
A. Not necessarily.
Q. Now let's look at Arizona. Is there an abrupt change in Arizona in 1990?
A. It doesn't appear to be.
Q. Look at Arkansas. An abrupt change in 1990?
A. No, but do you, question your portion of your --
Q. I'm asking you whether there's an abrupt change in 1990 when the alleged misconduct was supposed to have intensified?
A. I agree with the factual premise, I'm disputing that it has very much relevance for issue at hand.

Q. So if I told you all 25 and there was no abrupt -- well, let me show you, let's do a few more, let's look at Arkansas, I'm sorry, that's already done. Let's look at California, an abrupt change in 1990?

A. '90 and '91 seems to be higher, but 1990, 1989 fell somewhat.

Q. And it keeps going up, doesn't it? Correct?

A. The end point is higher than 1990, I agree with that.

Q. Colorado, abrupt change?

A. No,I'd give the same answer I gave before.

Q. Connecticut. Wow! Connecticut was going way up in 1990, isn't that right?

A. Connecticut was higher in 1990 than it was in 1989, yes sir.

Q. DC, going up in 1990 during this time of alleged intensifying of misconduct, is that correct?

A. That's correct.

Q. Florida, going up in 1990 and continuing to go up, right?

A. It, very little. I mean it goes about what 1990, 1990 was lower than 1989 and rose again in 1991.

Q. So, professor, we can go through the rest of these 25, your testimony is not it's not significant to you in any way that in real life in actuality in 1990 the shares were unaffected by US Tobacco's alleged misconduct, correct?

A. That's not my testimony and I can explain it to you if

you'd like me to.

Q. Sure, go ahead.

A. Firstly, just looking at a series of observations it's nothing more than a series of antidotes, it doesn't demonstrate the effect of what is in the data, that's why I can use statistical evidence. And the other reason is this several levels here. The other is that the testimony as to the intensity increased, it didn't say it was there before, intensity increased over this time period, and these data do not show what the sale would have been but for, but for UST's acts. It doesn't say, there's nothing in the hypothesis that says UST wasn't able to dispute that Conwood wasn't able to grow, it just says but for UST's acts it would have grown at a much higher rate. That's the hypothesis. That's what it's saying. It's not saying they were unable to grow. They were unable to grow at the same rate as they would have had but for UST's conduct.

Q. Professor, whether you want to call it antidotal evidence on not, isn't it a fact that in the lower states shares the pre-1990 period and the post 1990 period in the actual world were unaffected?

A. No, that is not my testimony. That is not my testimony and those data points do not prove that. Those data points do not prove that at all.

Q. They're just antidotes?

A. Firstly, you give me a sample of the 50 other states, carefully selected sample, I suspect. And the other issue is that, the other issue is that you've, you are, you're not showing me what the share would be but for the bad acts.

Q. Professor, I'm just trying to measure, shoe first of all, professor, who put up the prep, you the prep, the 25 states you say are ones most affected. We'll go back through it again, if you like. Those are the ones you chose and I'm not asking you not what would have happened but for, I'm asking you whether there was an actual effect before 1990 and after 1990, and it's not changed. That's all I'm asking you.

MR. HANSEN: Objection, argument.

THE COURT: I'll overrule it, I think, if you ask a question.

MR. KEYTE: I'm sorry, Your Honor.

THE COURT: Did you understand the question?

THE WITNESS: If you could repeat the question again.

THE COURT: Yes, why don't you. I think it was about half statement.

MR. KEYTE: I'll move on, Your Honor.

Q. Professor, if the beliefs of Conwood's personnel were correct, you would expect to see some change in Conwood's share beginning in 1990 in these low share states, is that right?

A. As I've testified, the beliefs suggested that but for

Conwood, that USTs bad acts, the share would have been higher. That doesn't mean they weren't able to grow, it's simply they wouldn't have been able to grow at a higher rate.

Q. So you disagree with the proposition if there were a lot of tense bad acts after '90, that might actually effect Conwood's share going down, they grew anyway, is that your testimony?

A. No, that's not my testimony. My testimony is that there's not, there is not, it is not a one-to-one relationship, the hypothesis does not necessarily suggest that Conwood's share fell. One could be half, what, my understanding of damages is that Conwood was deprived of an opportunity, opportunity to grow. The fact the cost is the claim of damages is my understanding.

Q. I'm just trying to understand whether you actually charted, whether in the actual world Conwood's sales and market shares actually grew after 1990, did you do that? Did you chart that?

A. I measured, I reflected that in the table and the table I testified to and as I testified to you, I'm questioning the relevance of doing that. It doesn't, it does not speak to the hypothesis at hand.

Q. Professor, if you look at, backward, professor, if you look at Conwood sales, they grew steadily from the period you say, from 1984 to 1997, isn't that correct?

A. If by increased steadily you mean for sales across the whole company, but not on a state by state basis, no.
Q. Let's look at the actual market shares to see whether there was a steady increase after 1990. You see that on your screen?
A. If this is a Conwood's average market share, yes, I see that.
Q. That's a pretty steady increase after 1990, isn't it?
A. Whether you want to characterize it that way or not is in the eye of the beholder, yes, but the increase in the market share. My understanding, though, is that even if you were successful you can still be harmed, you don't have to be, you don't have to be punished, you don't have to be a wholly performing company where it's behind or ahead in business.
Q. Professor, I'm simply asking you whether in this real world they were actually increasing market share after 1990 versus before 1990, the after period being the period of this alleged intensified misconduct? That's all I'm asking.
A. As I've testified, I agree, I'm agreeing that is what the data show. But I'm questioning the relevance of that question at hand.
Q. So if you insist wholly irrelevant that in the real world after 1990 Conwood's share grew at a steady pace?
A. No, it's not irrelevant, the relevant issue is how much it would have grown but for UST's acts.

Q. Well, let's also look at the actual sales. You see that?
A. Yes, I do.
Q. Looking again at the pre-1990 period and the post 1990 period when there is supposed to be intensified misconduct, Conwood's sales were steadily increasing, isn't that right?
A. Yes, that's your characterization. But, yes, they increased the market in this time period, were growing at a pretty good clip.
Q. And would you characterize that, don't take my characterization, would you characterize that as a steady increase in sales?
A. I would characterize the sales were higher in the end than in the beginning, by a large amounts. But again that doesn't speak to whether or not they would have been higher but for UST's acts.
Q. Professor, I'm simply asking you is it before the 1990 period and th post 1990 period, whether they actually were increasing sales significantly? That's all.
A. Yes. The, I, the question significantly, but the numbers are much higher after that that they were before, yes, I agree with that.
Q. You agree that after it was significantly higher then before 1990, correct?
A. No, I didn't use the term significant agreement. I wouldn't use the term significantly, I wouldn't use the term

study, you had no idea that Conwood's other experts had made conclusion about exclusive racks, isn't that right?

A. I don't believe I had read Conwood's other expert's reports with the exception of Professor Kamien's.

Q. In fact, when you made your original analysis you were only vaguely aware of the allegation in regard to this rack arrangement, isn't that right?

A. I don't, I don't recall the vague characterization, but I had no focus on them, no.

Q. Well, professor, are you aware that another professor, Professor Gundlach is slotted to testify about the alleged exclusive agreement in this case?

A. I've seen his name, but I'm not specifically aware of what the subject matter of his testimony is.

Q. Didn't you testify earlier in this case in a deposition, that when Mr., Dr. Gundlach had made mistakes about the number of number of exclusive agreements, it would not effect your damages calculations?

A. I don't specifically recall that, I will accept your representation. But since I didn't use his calculations it just follows as a matter of logic that it wouldn't effect my calculations.

Q. So a professor is going to get up here and talk about numbers what he believes are exclusive rack agreements, you don't rely on him, right, as far as your analysis?

A. That's my testimony, yeah, I have not read his report.
Q. Well, in fact, professor, if Dr. Gundlach took the stand in this case and said okay, none of these alleged exclusive agreements are anticompetitive, that wouldn't change your analysis at all, would it?
A. I have not used his analysis, that would not change my numbers, no.
Q. In fact, professor, you testified in discovery confirmed in this case that there were no bad acts, they're all in the record, the results of you model would still not change, isn't that correct?
A. If you, that's correct to the extent you refer to the model before, before I take into account the effects that your expert pointed out.
Q. I'm talking about when you originally started. I'll clarify it. I'm talking about your original analysis that you did and signed the report. Let me ask you again. Isn't it a fact in your original analysis that if discovery reconfirmed that there were no bad acts at all in the record in this case, none whatsoever, the result of your model would still be the same?
A. My understanding is a determination of a what's a bad act is a legal issue and that's a matter for the jury to decide.
Q. I'm just asking whether in your original analysis all this, this money that you seek is connected to whether or not

there's actual bad acts in the record? It's not, is it?
A. Yes, it is. It presumes that the activities that were engaged in by UST were illegal. If the jury decides those were not legal, it's my understanding, I'm not a lawyer, my understanding is the jury decides they are not illegal then there are no damages.
Q. Well, professor, if the jury decides that exclusive rack arrangements are desired by many retailers and they're fine, do you have an adjusted number for the jury be to show the jury?
A. As I testified, I did not, was not able to, was not able because of the disaggregating effect of the particular types of bad acts.
Q. And if the jury decides that the way US Tobacco practices category management is what is desired by retailers or that everybody else has their chance to make their pitch, then you back that out of your damages number?
A. I was not able to detect the damages as I've said before.
Q. In fact, professor, you can't -- well, explain what this act is? Explain what disaggregated means to the jury, you just said disaggegated for a particular act of alleged misconduct on?
A. My understanding is multiple bad acts alleged by antibehavior alleged by UST, my results take in effected all these anticompetitive results, if you will, rolled up into one

ball of wax and given the world of nature of those acts, it's difficult to disentangle them, to assess data and for me to disentangle. That's bad acts, excuse me, anticompetitive acts.

Q. Professor, in your original analysis you didn't run any variability for rack removal, is that correct?

A. No, my original analysis I did not have that data available to me.

Q. Well, you didn't, in your original analysis you didn't run regression for POS removal, correct?

A. That's correct.

Q. Professor, you didn't use Professor Scheffman's method, as you characterize it, to calculate a damages number that you were going to post in front of this jury until after you learned that your original damages estimates were off by $245,000,000, isn't that right?

A. I, I used that after his supplemental, I received his supplemental report and after my deposition, that very soon after the deposition I learned that there were some potential errors, I don't recall specifically whether I knew the magnitude of the data errors at the time, or the impact of those data errors on my damages.

Q. Let me ask you again, I was not a clear. Isn't it a fact you didn't run any model on what you characterized as the Scheffman methodology, that you calculate damages, the actual

numbers that have been put in front of the jury, until af-- you learned that your original damages estimates were incorrect by $245,000,000?

A. I did it, I used the Sheffman analysis after I knew what my original errors were, my original estimates were incorrect. I don't recall whether I did it before or after I knew the magnitude of those errors.

Q. Now, professor your revised data using the Sheffman methodology, did not distinguish whether any rack or POS removal was done with or without retailer authorization, isn't that true?

A. That's correct.

Q. And your revised data using the method to be what you say is the Scheffman methodology, did not have any information about other competitors removing Conwood's racks or POS, isn't that right?

A. That's correct.

Q. Are you aware, professor, that Mr. Price, from Swedish Mash, yesterday and in this court, testified that Swedish Mash removed Conwood racks?

A. I wasn't specifically aware of that fact.

Q. And your revised data wouldn't capture that, as you said, correct?

A. I don't believe that that's, I don't believe that's correct with respect to the Sheffman analysis we're talking

about.

Q. Well, my question is whether you assess, you made a independent assessment of the effects of other competitors removing Conwood's racks with or without authorization, whether you would accept that effect on Conwood sales?

A. No, I knew that, I assessed UST's impact, the impact that UST's rack removal on Conwood's sales, using Scheffman's analysis, using Professor Scheffman's analysis.

Q. My question is did you assess how the rack removal by other competitors, whether authorized or not, were impacting Conwood's sales?

A. No, I did not.

Q. Professor, you're not testifying here today that all US Tobacco actions that effect Conwood sales, constitute misconduct, are you?

A. No. I understand there's a difference between legal, legally competitive, legally competitive behavior and illegally.

Q. For example, you testified that you only meant to include the anticompetitive aspects of category management in your damage assessment, is that correct?

A. That's correct.

Q. Even though you couldn't disaggregate it, as you explained to the jury, procompetitive aspects of that versus anticompetitive aspects, correct?

A. I think my testimony to the jury was I couldn't disentangle the effects of the various types of anticompetitive acts.

Q. Well, then I assume you clearly can't disentangle what goes, what you studied results will leave our procompetitive aspects of category management versus anticompetitive, you didn't look at that, did you?

A. I didn't look at category management specifically.

Q. And you testified when attempting tot measure damages you did not intend to include the effects of rack removal that were authorized or directed by retailers, isn't that right?

A. That, that's correct, to the extent that those were independent to the extent that they were coerced or encouraged by UST. My understanding is that, that those belonged as part of the damages calculation.

Q. So it's your testimony that if the retailer makes uncoercioned independent decision to have just a US Tobacco rack, it can be no basis for damages on that issue?

MR. HANSEN: Excuse me, Your Honor, it's asking a legal basis of this witness.

MR. KEYTE: He's testified about it.

THE COURT: Repeat the question for me.

Q. The question is your testimony as the damages expert that you did not perceive for Conwood any damages based on the independent uncoerced decisions of retailers about using a US

Tobacco rack for their store?
A. No. My statement about that was purely a statement, a reflection of the information given to me by attorneys. This is a legal issue as to whether or not there was an independent uncoerced action were allowable, were anticompetitive.
Q. Well, is the number, in your damages number, you do not intend to include, do you, I'm asking as a matter of fact in your damages, rack removals of Conwood by US Tobacco that represent the independent uncoerced decision of retailers to have US Tobacco racks in their store?
A. That's my understanding.
Q. You also testified in this case that it was not your intention to include POS removals that was authorized and directed by retailers, correct?
A. Again, that's an independent retailer's decisions, I would give the same answer.
Q. And, professor, from your study you are aware that there are instances, many instances where retailers direct the removal of a competitor's rack as part of a reset, something like that, right?
A. I'm, I'm aware that there is a dispute as to whether that's independent or not. I don't have a view one way or another as to whether it was coerced or uncoerced.
Q. So you have no view about when ever Wal-Mart decides to have a certain rack in their store, Wal-Mart's making that

decision?

MR. HANSEN: Objections, Your Honor.

THE COURT: Overruled.

THE WITNESS: I have no study the coercions or non-coercion involved in the Wal-Mart decision.

Q. You'd have, you'd have to hear that from Wal-Mart, correct?

A. I -- there are -- there are other way of learning that same data, that same information. I have not studied it.

Q. In fact, you haven't talked to any retailers in this case, correct?

A. That's correct.

Q. Would you agree that unless you hear from the retailer you can't determine whether they made an independent uncoerced decision to choose the US Tobacco rack?

A. No. There would other ways of learning it.

Q. Don't you think that's the best way, professor?

A. I, I have, as I did the study I didn't think the best way to investigate coercion.

Q. And professor, you did not intend to include in your analysis the removal of Conwood's products that were part of the approved planning for a retailer, did you?

A. Again, I give the same answer to the extent that approved means what uncoerced and a independent decision.

Q. In respect for example the Wal-Mart plan-o-gram would you

be interested in Wal-Mart's testimony on that?
A. Ir I were trying to determine whether that was independent or uncoerced, but I did not study the question.
Q. So you didn't, you didn't, in seeking damages or putting up the number for Conwood's damages, you didn't really care what Wal-Mart had to say about their decision about racks and plan-o-grams and POS, is that right?
A. It's not that I didn't care, it's that I used a method that did not require me to have that information.
Q. Well, maybe you didn't care, but you didn't, it wasn't part of your analysis, is that right?
A. That's right, it was not part of my analysis.
Q. Professor, would you agree that related promotional activities is not a bad act in your opinion?
A. Some promotional activity I understand is illegal, some others acts are legal, I'm not sure which is legal and which is not. Disparagement, for example, I understand is illegal, but I have a clear view in my mind to which is legal and which is illegal.
Q. Professor, did you intend to include the effects of increased promotional activity in be the 1990's on Conwood's sales in your analysis?
A. No, I did not.
Q. So the promotional activities by other moist snuff companies increased after 1990, how did your study account for

the effect of those promotions, Timber Wolf, for example, on Conwood's sales?

A. I didn't, I did not take that into account specifically.

Q. So, just so the jury understands this, you did not take into account the increased promotional activity of the Timber Wolf brands in the 1990s in your analysis, is that right?

A. No, but that would require a very strange set of facts to make that relevant to the analysis.

Q. Just asking you whether you took that into account.

A. I'm telling you why I didn't.

Q. And you would agree, professor, wouldn't you, that the introduction of new products aren't bad acts?

A. I would agree with that.

Q. Okay. And you did not intend to include any of the effects of new products introductions, how those effected Conwood's sales in your analysis, correct?

A. That's correct.

Q. So if new products were successfully introduced by other moist snuff companies, they the new product introduction increased after 1990, you did not account for that in your analysis, correct?

A. I did not account for it because it would require a strange pattern to this products introduction to explain the results that I found.

Q. I'm asking whether you accounted for it, sir?

A. I'm telling you why it's not relevant to account for it.
Q. So it's not relevant, with all the new products that came in the market after 1990, it was not relevant to use your stats whether they had an impact on Conwood sales?
A. If I could explain that to you?
Q. Sure.
A. All of the facts, it is not just that one that you're talking about, but other factors might effect the level of Conwood sales, whether Conwood's sales were high or low in terms of total market share. The results in my, in my study don't give me systematic patterns across states. It would require that those new products introductions systematically varied across states in the same way that the bad acts varied to explain the pattern that I observed in the data, that is not plausible in my view.
Q. So therefore you didn't have to take any individual products like Timber Wolf and assess how that impacted Conwood's, is that your testimony?
A. Yes. Again, that would effect my, might effect the level of Conwood sales, but not the pattern that I observed across states when I ran my regression and when I used your expert's damages calculations, your expert's regression.
Q. I'm just asking whether you did an independent assessment of the impact of the Timber Wolf brand on Conwood sales, that's simple.

A. I did an independent assessment because I analyzed and discussed it with many people in Lexicon, I did the analysis and the analysis suggests, the analysis demonstrates that one does not need to control the things, other things unless they vary systematically across states in the same pattern of the bad acts theory.

Q. Professor, I understand that you reached a conclusion that you did not need to control for that in a regression analysis, but my question is did you, independent of your regression analysis, or tell me what you included or not included, did you assess directly what the impact of the Timber Wolf brands in 1990 was on Conwood sales?

A. As I testified, I did not do to it, I explained why I didn't do it.

Q. In fact, at the time you did your study you weren't aware that Conwood marketing documents reported that Timber Wolf was taking sales from Kodiak, were you?

A. I don't specifically recall that document, or those documents.

Q. Professor, advertising restrictions in the moist snuff industry increased after 1997, is that right?

A. They changed throughout this time period, they were increased in snuff in 1990, yes.

Q. You didn't assess the impact of that on Conwood sales because you didn't have the data, isn't that right?

A. No, that is not correct. If I could explain why?
Q. Well, did you not testify on your deposition that you did not consider advertising restrictions because that was something you were not able to obtain data for, do you remember that?
A. I don't specifically recall that. If I gave that answer it was incomplete, but I was not able to obtain data for it, but that's an incomplete answer.
Q. Well, have you since obtained data for advertising restrictions under your effect on Conwood's sales after 1990?
A. No, I have, even before my deposition I knew why it wasn't relevant, but I didn't give that answer when I was deposed, but I knew why it wasn't relevant the same reason I described to you before. Those advertising restrictions would effect the level of Conwood's sales, not the pattern across states, it would have to be that there was a systematic statements, a difference where the restrictions were more severe and binding in the low foothold states than in the high foothold states. There's a pattern of data that if a change like that just cannot explained.
Q. Well, did you assess whether restrictions on advertising effected Conwood more in low share states?
A. Again, that I did not have the data for, but that, but I did, but I did do the analysis to suggest that that could not explain the pattern in the data.

Q. I know this is somewhat of confusing area, it is for me. Can you explain again, you did not have the data to assess whether in the low share states, they would have, the shares would have grown, you didn't have the data to assess whether advertising restrictions effected Conwood's sales in the low share states, correct?

A. I didn't have the data, but suggested that advertising restrictions differ across the states.

Q. Well, professor, are you aware there are huge differences in ad restrictions among various states and localities across the country?

A. I am aware that are huge, I can accept that characterization, yes. I am aware when I wrote my, when I drew up my report.

Q. Professor, do you agree that the number of products offered by Conwood would have an effect on Conwood's sales?

A. Yes, it's a possibility.

Q. Did you do any studies to determine the number of products Conwood had in the market during any time period covered by your study?

A. No, I did not for the same reason that I have explained to you before that it would not explain the systematic pattern in the data.

Q. Well, you didn't do any study to determine how the failure of several Conwood products introduced effected Conwood's

sales, did you?
A. No. And again I would give the same answer.
Q. Are you aware that Conwood discontinued Kodiak Choice?
A. I'm aware they, I'm aware that some of their brands did not meet great success, I don't recall which ones.
Q. Are you aware that Conwood discontinued Garrett Moist?
A. I heard that, I heard that, that refreshes my recollection.
Q. Are you aware that Conwood discontinued the Big Horn brands?
A. I don't specifically recall that brand.
Q. And you didn't -- so you didn't study, out of failure of those brands or other marketing efforts of Conwood effected their own sales, is that right?
A. Again, I did not study it because it would have to be very systematically across states to do, to explain the pattern.
Q. Professor, you looked at the loose leaf industry as what you call the yardstick markets, model, is that right?
A. That's correct.
Q. And the purpose of the yardstick model is to look at an industry that's free of the alleged misconduct by US Tobacco, is that right?
A. That's one purpose of the yardstick model, yes.
Q. And US Tobacco doesn't sell those new products you use loose leaf in the yardstick answer, right?

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. PLAINTIFFS

v. **ORDER**

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC. DEFENDANTS

The Court was presented with designated depositions. Objections were shown with responses and counter-designations. After objections, some designated testimony was withdrawn Of the remaining designated testimony the following objections are sustained.

1. Robert K. Carlson

None

IT IS SO ORDERED.

This 14th day of March, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED
MAR 14 2000
JEFFERSON, CLERK
BY DEPUTY CLERK

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98CV-108-R

CONWOOD COMPANY, L.P. and
CONWOOD SALES COMPANY, L.P. PLAINTIFFS,

v.

UNITED STATES TOBACCO COMPANY,
UNITED STATES TOBACCO SALES AND
MARKETING COMPANY INC., UNITED
STATES TOBACCO MANUFACTURING
COMPANY INC., and UST INC. DEFENDANTS.

MEMORANDUM OPINION & ORDER

This case is before the Court on Defendants' Memorandum Regarding Defendants' Use of Deposition Testimony of Conwood Employees. This supplements the Court's earlier ruling on this issue. This Court holds that district managers are "managing agents" for the purpose of Fed.R.Civ.P. 32(a)(2) and also holds that those officers, directors and managing agents who were employees at the time of the deposition but who are no longer employees fall under Fed.R.Civ.P. 32(a)(2). This Court orders Plaintiffs to provide Defendants with counterdesignations to deposition testimony for these deponents.

1. District Managers

Fed.R.Civ.P. 32(a)(2) allows a party to use the deposition testimony of one who was a "managing agent" for any purpose. "Whether an individual has the status of managing agent depends on several factors, including whether the interests of the individual 'are identified with those of his principal and on the nature of his functions, responsibilities and authority....'" *Crimm v. Missouri Pacific Railroad Co.*, 750 F.3d 703 (8th Cir. 1984), citing *Terry v. Modern Woodmen*, 57 F.R.D. 141, 143 (W.D.Mo.1972). Courts also consider, how the functions,

responsibilities and authority effect the subject matter of the litigation, "whether the deponent could be relied upon to give testimony, at his principal's direction, in response to the demand of a party engaged in litigation with the principal," and "whether any person or persons in higher authority than the deponent are in charge of the particular matter or possessed of the information as to which the examination is sought." *Terry v. Modern Woodmen of America*, 57 F.R.D. 141 (W.D.Miss. 1972). After considering these factors, this Court finds that district managers in this case meet the criteria to qualify as a "managing agent." Each district manager manages a number of employees in a large geographic area. The district managers have the interest of the company at stake as they seek to increase market share and competitiveness in the moist snuff market. As these goals are issues of litigation in this case, their duties and responsibilities directly concern the litigation at hand. Due the more direct contact the district managers have with stores and with the employees under them, they possess information and insight that could not be elicited from regional managers. For these reasons, the district managers each qualify as "managing agents" under Fed.R.Civ.P. 32(a)(2).

2. Current Employment Status

Fed.R.Civ.P. 32(a)(2) specifically provides that "[t]he deposition of a party or of anyone who ***at the time of taking the deposition*** was an officer, director or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose." (emphasis added). Accordingly, the status of the deponent at the time of trial is irrelevant.

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CONCLUSION

Upon Defendants' Memorandum Regarding Defendants' Use of Deposition Testimony of Conwood Employees and this Court being fully advised,

IT IS ORDERED that:

1. District managers are "managing agents" for the purpose of Fed.R.Civ.P. 32(a)(2) and their deposition testimony can be used for any purpose at trial;

2. The depositions of those deponents who were officers, directors or managing agents for the purposes of Fed.R.Civ.P. 32(a)(2) at the time of their deposition can be used for any purpose at trial regardless of the current employment status of the deponents;

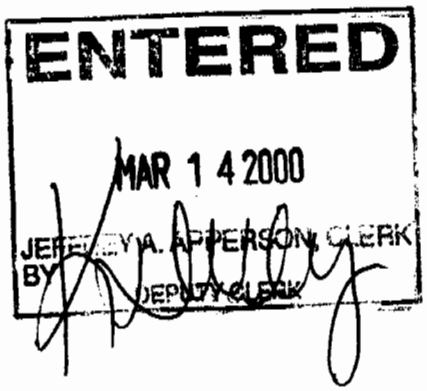
3. Plaintiffs are to provide Defendants with counterdesignations for the deposition testimony of those included in this ruling.

This is a final and appealable order. There is no just cause for delay.

This is the 14 day of March, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

Pursuant to Fed. R. Civ. P. 50(a)(1), Defendants ("U.S. Tobacco") respectfully move this Court to grant judgment as a matter of law against Plaintiffs ("Conwood") on their Sherman Act §2, Lanham Act, and state law claims.

> "The purpose of these [antitrust] laws is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."

Plaintiffs' Proposed Jury Instructions, LePages, Inc. v. 3M, p. 19. (Tab 1)

I. IT IS UNDISPUTED THAT THE COMPETITIVE PROCESS IS OPEN TO CONWOOD AND OTHERS

As the evidence has come in before the jury, there is no dispute that the "working of the market" that is at issue in this case is the competitive process between and among moist snuff manufacturers to place products, racks and POS with retailers. There also is no dispute that this competitive process is wide open to all companies that choose to take part in that process, which all moist snuff companies do in varying degrees. Although Plaintiffs may argue that certain conduct by U.S. Tobacco prevents or hinders Conwood's ability to place items at retail, any such argument misconstrues the undisputed nature of the "working of the market" for the display and sale of moist snuff products. The retail industry in this country is not a series of flea markets where merchants are free to throw down a blanket and display their wares at will. The retail industry is predicated on the decisions of retailers – decisions to spend their own money to purchase products from retailers, decisions to organize their stores and use their own space in the manner that they see fit, and the decisions to display products with the hopes of faring well in their own competition against other retailers.

A. There Is No Evidence Of Any Agreements That Restrict The Competitive Process

"If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against the party and may grant a motion for judgment as a matter of law. . . ." Fed. R. Civ. P. 50(a)(1). Because Plaintiffs have not offered, and have not even

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attempted to offer, evidence concerning the competitive process itself, this Court should determine the issue and grant judgment as a matter of law for U.S. Tobacco.

In this case, Plaintiffs have not offered a single piece of evidence that the competitive process – aside from Conwood's ability and/or willingness to compete in that process – is impaired by the conduct of U.S. Tobacco. Instead, Plaintiffs have simply declared that the decisions of retailers – even the independent, uncoerced decisions of retailers – are irrelevant.[1] As a result, Plaintiffs have not even suggested that a single retailer was coerced in any way, never mind meeting its burden to prove by a preponderance of evidence that a substantial amount of the retail industry was foreclosed from competition by Conwood or any other moist snuff manufacturer.

Plaintiffs have not offered a single retailer from over 300,000 retail locations to testify that it had entered an agreement with U.S. Tobacco that restricted in any way the retailer's ability to do business with other manufacturers. Plaintiffs have offered only a literal handful of retailers – far fewer than the "scores" they promised – to testify about a literal handful of isolated incidents of "bad acts." That is the extent of Plaintiffs' proof about what actually happens in the retail environment.

---

[1] But see February 17, 2000 Order on Summary Judgment, at 10 (holding that multiple issues remain for trial, including "whether the damages claimed by Conwood is caused by UST, or instead is the result of the independent uncoerced decisions by retailers").

1. Conwood's Evidence of "Agreements" Is Itself Fatally Flawed

Party A agrees to do X in exchange for Party B doing Y: That is an agreement. Here, the only evidence is a retailer makes decisions to use a U.S. Tobacco racks because he or she prefers the look, design, or functionality of that rack, and that U.S. Tobacco provides that rack to service its customer. That is not an agreement, even when it results in a retailer authorizing only the U.S. Tobacco rack. Plaintiffs have completely ignored this distinction and, as a result, have failed to offer sufficient evidence of any actual agreements that would support its claim that Conwood is excluded from competition.

Indeed, Plaintiffs did not offer the testimony of a single retailer suggesting that the retailer had an agreement with U.S. Tobacco that prevented the retailer from doing business however, and with whomever, it wanted. Instead, the bulk of Plaintiffs' "exclusive agreements" evidence was channeled in through the testimony of Dr. Gregory Gundlach. Dr. Gundlach's testimony, however, is revealing:

> Q. Did you study whether any retailers selected the United States Tobacco rack based on a contractual obligation to U.S. Tobacco rather than their own independent choice to have a uniform rack or just because they liked U.S. Tobacco better?
> A. Again, I was not interested in the specific deliberations that went on in the retailer's mind. . . . Tr., March 9, at 148. (Tab 2)
>
> Q. So, as far as you know, the competitive [process] to use one rack or multiple rack, someone else's rack, is wide open; is that correct?
> A. Again, the focus was whether or not there was an agreement. Not necessarily whether and how it was reached. . . . Id. at 156. (Tab 2)

That testimony illustrates the full extent of Plaintiffs' theory and Plaintiffs' evidence of the claim that U.S. Tobacco injures competition by entering into exclusive agreements. More importantly,

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the entirety of the evidence offered during Plaintiffs' case in chief warrants judgment as a matter of law:

- Every "agreement" that was literally highlighted by Plaintiffs is terminable at will, see Plaintiffs' Proposed Jury Instructions, LePage's, p. 48. (Tab 1)
- No "agreement" highlighted by Plaintiffs prevented or even hindered a retailer from carrying a Conwood product, if it chose to do so, see id., pp. 43-44 (Tab 1);
- No "agreement" highlighted by Plaintiffs was "exclusionary" beyond the physical rack or fixture provided to the retailer by U.S. Tobacco. In other words, any "exclusive" POS term of any "agreement" referred only to the rack or fixture, not to the store; and
- At all times, Conwood has remained free to sell its products, racks, and POS into any store in this country.

At a minimum, consistent with this Court's prior rulings, Plaintiffs had the burden of offering a legally sufficient evidentiary basis that: (1) U.S. Tobacco and retailers reached agreements; (2) the agreements were not the result of the independent, uncoerced decisions of retailers; and (3) the agreements prevented Conwood from doing business. Plaintiffs have offered no such evidentiary basis, and judgment as a matter of law is warranted.

B. Plaintiffs Offered Evidence of a Handful of Isolated Incidents of Unauthorized "Bad Acts"

Similarly, Plaintiffs have not offered a legally sufficient evidentiary basis for its claim that U.S. Tobacco sales representatives engage in a systematic campaign to remove Conwood racks, POS materials and products from retail stores. Instead, Plaintiffs have relied on evidence where a retailer has chosen a U.S. Tobacco rack to replace Conwood's or on anecdotal evidence of isolated incidents of unauthorized rack removal. The evidentiary record makes it

clear that any unauthorized incidents occur between and among all of the different sales forces that do business in the moist snuff industry. Swedish Match takes Conwood racks; Conwood takes U.S. Tobacco racks; the tit-for-tat goes on. It is not the stuff of the antitrust laws.

If there were, in fact, a systematic campaign to remove Conwood racks to the extent necessary to affect competition in the overall moist snuff market alleged by Plaintiffs, the frequency of rack removal would be a repeating point of concern for nearly every retailer in this country. Instead, Plaintiffs have offered the jury the following retailer testimony:

- Gayleen Rusk, a manager of a single-store Amoco Pronto Express store in Sioux City, Iowa, testified that a U.S. Tobacco representative removed a Cougar rack in August of 1998.
- Georgia Gill-Elkins, a manager of a single-store Berreth Oil minimart in Mishawaka, Indiana, testified that a U.S. Tobacco rack removed a U.S. Tobacco rack, and the Conwood POS on that rack, in November of 1998.
- Patricia Lienen, a former employee of a single-store Dave's Country Store in Dunlap, Iowa, testified that a U.S. Tobacco sales representative removed Conwood racks, but always put the Conwood product in a U.S. Tobacco rack.
- Marti Stevens, a manager of a single-store Qwik Way store in Billings, Montana, testified that a U.S. Tobacco sales representative removed a Conwood rack – the exclusive Conwood rack – in August, 1997.

If this is a legally sufficient evidentiary basis for a $1.3 billion antitrust claim, then every manufacturer that employs a sales force – including Conwood – must be certain that in over 7.69 million sales calls over ten years, see Tr., March 7, at 91-93 (Tab 3), none of its sales personnel commit any "bad acts" in the field. The antitrust laws, which were intended to promote and foster competition, were not meant to snap into effect when the very market conditions created by that competition do, in fact, exist in the real world.

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II. PLAINTIFFS DID NOT ESTABLISH CAUSATION AND DAMAGES

Plaintiffs have not offered any evidence whatsoever – not even expert testimony – that Conwood lost any sales as a result of not having a rack, not having a particular piece of POS, or not having its entire product line in any retail store. No consumer has testified that he or she could not "find" a Conwood product that was "lost" in a U.S. Tobacco rack. No retailer has testified that it lost sales as a result of any U.S. Tobacco conduct, and that is not even the inquiry. In fact, Plaintiffs would have to show that Conwood lost the sale – i.e., that the consumer did not or could not purchase the product at all from any retail store. In any event, Plaintiffs have not laid the injury-in-fact foundation for their expert's damages conclusions.

Dr. Leftwich's testimony and damages estimates were exposed as pure fantasy. Dr. Leftwich's own data demonstrated vividly that in the 25 lowest of the low-share states – states where Conwood did not have a "foothold" as the theory goes – Conwood's share saw no abrupt change in 1990 or thereafter. Dr. Leftwich's own data also demonstrated that Conwood's overall share rose steadily, again with no abrupt change in 1990 or thereafter. See Tr. March 8, at 63-70 (Tab 4). Accordingly, Dr. Leftwich's damages study bears no relation to Conwood's own theory of liability.

Moreover, Dr. Leftwich's damages study makes no attempt to disaggregate the effects of lawful conduct by U.S. Tobacco – e.g., increased promotional activity – or any conduct having nothing to do with U.S. Tobacco – e.g., the promotional activity or even rack removal attributable to other moist snuff companies. See Tr., March 8, at 76-91 (Tab 4). Indeed, Dr. Leftwich testified that, despite the fact that Dr. Gundlach re-evaluated his conclusions concerning

whether U.S. Tobacco had "exclusive agreements" with 14 different chains, his damages calculations did not change. See id. at 76-77 (Tab 4).

Finally, Dr. Leftwich offers the jury the equivalent of a dart and the side of a barn to render a verdict on damages. Dr. Leftwich's "range" of damages is from $155 to $438 Million, or in other words, anywhere over $155 Million. See id. at 42 (Tab 4). The expert opinion that Conwood's lost profits from lost sales over the past four years is "somewhere" between $155 and $488 Million is indicative of two things: (1) the analysis is really not measuring anything; and (2) the analysis is not helpful to the jury in awarding damages.

The antitrust laws do not allow a jury to render a damages verdict based on their own speculation and guesswork. They also do not allow a jury to render a verdict based on the speculation and guesswork of a hired expert witness.

III. LANHAM ACT CLAIM

Plaintiffs' elusive Lanham Act claim seems to have taken on a whole new basis during trial. Plaintiffs' focus now appears to be on the allegation that the "Made" date on a Copenhagen can is somehow misleading to consumers. Assuming Plaintiffs prove that is true, which they cannot, Conwood would have no standing to bring what essentially is a consumer claim against U.S. Tobacco.

After searching the trial record for evidence of Plaintiffs' original Lanham Act claim, which was based on product defamation, the only evidence offered by Plaintiffs seems to be the testimony of Andrew Carter. Mr. Carter, a former U.S. Tobacco sales representative who has not worked for the company since 1994 testified that he has told consumers that the

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Conwood product is "stemmy." He also testified, however, that if one were to open a can of Conwood product, the product is, in fact, stemmy. Whereas the truth of the "stemmy" quality of Conwood's products may be left up to the jury, the fact that Mr. Carter has not even worked for U.S. Tobacco within the statute of limitations period is not.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court enter judgment as a matter of law against Plaintiffs.

Date: March 14, 2000

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Counsel for Defendants

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by hand delivery to Mark C. Hansen, Neil M. Gorsuch, counsel for Plaintiffs, this 14th day of March, 2000.

Counsel for Defendants

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EXHIBIT 1

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February 2, 2000

Via Facsimile and Federal Express

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Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al. - Sample Jury Instructions

Gentlemen:

Enclosed are jury instructions from three recent federal cases which were filed with the Court along with Plaintiffs' Proposed Jury Instructions. These were inadvertently omitted from our service package to you on Friday, January 28, 2000. We regret the error and apologize for any inconvenience.

Sincerely,

Michael J. Guzman

Enclosure

cc: M. Hansen D. Roberts
N. Gorsuch B. Powell

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LE PAGE'S INCORPORATED., et al.,

Plaintiffs,

vs.

3M (MINNESOTA MINING AND MANUFACTURING CO.),

Defendant.

CIVIL ACTION No. 98-3983

FILED

OCT 12 1999

MICHAEL E. KUNZ, Clerk

By _____ Dep. Clerk

Jury Instructions

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Purpose of Antitrust Laws

The purposes and goals of the antitrust laws at issue are to preserve and promote competition. The antitrust laws encourage, to the fullest extent practicable, free and open competition in the marketplace by preventing unreasonable restraint or unlawful monopolization of any business or industry. The purpose of these laws is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.

The purpose of the antitrust laws is to preserve and advance our system of free enterprise by encouraging, to the fullest extent practicable, free and open competition in the marketplace, and by preventing unreasonable restraint or unlawful monopolization of any business or industry, so that the consuming public may receive better goods and services at lower cost.

1. Elements--Count III--Unlawful Exclusive Dealing

Le Page's alleges that they were injured by 3M's unlawful exclusive dealing. To win on their claim of exclusive dealing, Le Page's must prove each of the following elements by a preponderance of the evidence:

First, 3M made sales of goods, or entered into contracts for sale of goods for use, consumption, or resale within the United States.

Second, in these sales or contracts for sale of goods, 3M set a price, discount or rebate, on the condition, agreement, or understanding that the purchaser would not deal in the goods of a competitor or competitors of 3M's;

Third, the effect of such sales, or contracts for sale or such condition, agreement, or understanding was to substantially lessen competition in the relevant market; and

Fourth, Le Page's was injured in its business or property as a proximate result of 3M's conduct.

I will now explain these elements in greater detail. I will instruct you on the last element after I have given you my instructions on all four of Le Page's claims.

2. Exclusive Dealing Defined

Le Page's claims that 3M paid rebates, offered market development funds, and made other payments to customers in return for the customers' agreements not to deal with Le Page's.

An exclusive dealing arrangement, in whatever form it takes, requires that there be a "meeting of the minds;" the buyer must actually agree to limit its purchases to one seller for some period of time. The agreement may be either expressly stated in a contract or inferred from the circumstances. On the other hand, the law does not prohibit a buyer from making a unilateral decision to deal exclusively with a single supplier. The primary inquiry is whether or not the buyer has committed itself, either expressly or by an implied agreement, to limit its purchases for some period of time to one seller in exchange for some benefit.

5. Rule of Reason

If you find that Le Page's has proven that the exclusive dealing agreement(s) have in the past, do now, or will in the future substantially lessen competition in the relevant market, you must then consider whether the exclusive dealing agreement(s) are "unreasonable."

In deciding this issue, you must decide whether the exclusive dealing agreement(s) help competition or harm competition. Your task is to balance any aspects of the exclusive dealing agreement(s) that were helpful to competition against any aspects that were harmful to it. In doing so, you should consider such factors as

(1) the length of the agreement(s). You should consider how long any exclusive dealing agreement(s) were, or will be in effect. If an agreement will last a relatively short time, and will not significantly limit the opportunities for competing sellers to enter or remain in the market, then it is less likely to be unreasonable.

(2) 3M's reasons for setting up the exclusive dealing agreement(s), and the circumstances surrounding the agreement(s). A purpose or intent to harm competition, by itself, is not sufficient to establish that an exclusive dealing agreement was unreasonable. Effect, not intent, is the ultimate test. However, consideration of purpose of the agreement may help you determine if it likely would have a harmful effect on competition. You may consider, for example, whether 3M entered the exclusive dealing agreement(s) to achieve a legitimate business

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P., ET AL.,
Plaintiffs

VS.

UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., ET AL.,
Defendants

Case No. 5:98-CV-00108

COPY

MARCH 9, 2000

****

VOLUME VIII
TRANSCRIPT OF JURY TRIAL
BEFORE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

****

CAROLA G. STRIJEK, RPR
RUTH E POTAMI, RPR
Official Court ReporterS
United States Courthouse
501 Broadway, Suite 133
Paducah, KY 42001

my opinions in this case.
Q. Well, are you aware at all that Mr. Metz reported to Mr. Towel, to Mr. Williams, the store that he was reported about had a 2908 agreement, but Conwood was perfectly free to set up a rack somewhere else in the store. He reported that the Kodiak sales were doing well in that store. Do you recall that testimony?
A. Again, I'm having trouble recalling Mr. Metz's testimony, so I wouldn't have an understanding of that.
Q. Did you study whether any retailers selected the United States Tobacco rack based on a contractual obligation to U.S. Tobacco rather than their own independent choice to have a uniform rack or just because they liked U.S. Tobacco better?
A. Again, I was not interested in the specific deliberations that went on in the retailer's mind. In my review of the evidence the opinions that I reached were that in many instances almost all the instances that identify UST stated objective and their approach in terms of these they were soliciting retailers for these agreements. They were providing incentives for these agreements. They were the ones that were compelling retailers to engage in these agreements.
Q. So you weren't interested in what was going on in the retailer's minds when they were making those decisions?
A. My focus all along was what was good for consumers and my

EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P., ET AL, Plaintiff	5:98-CV-00108
vs	PADUCAH, KENTUCKY MARCH 7, 2000
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., Defendants	VOLUME 6

TRANSCRIPT OF JURY TRIAL
TAKEN BEFORE THE HONORABLE THOMAS B. RUSSELL,
JUDGE, UNITED STATES DISTRICT COURT

A P P E A R A N C E S

For the Plaintiff: Mark Hanson
Richard C. Roberts

For the Defendant: John S. Reed
Neil Stoll
Ridley M. Sandidge
James A. Keyte

Court Reporter: Jerome F. Roppel, Jr.
Carola G. Strijek
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133 Federal Bldg.
501 Broadway
Paducah, KY 42001
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A Yes.

MR. REED: Can we put up the chart, please?

BY MR. REED:

Q Mr. Milano, what I'd like you to do is explain to the jury what this chart represents. Let's just start with the title and the concept. What does this chart represent?

A It's just an estimated number of retail calls made by sales representatives over a 10-year period.

Q And these are not supposed to be accurate figures; is that correct; in other words, not down to the last sales call?

A No; this is just an estimate.

Q All right, sir. Now, across the top we have ten years, from 1990 to 1999; is that correct?

A That's correct.

Q Now, where did the number come from in the first line under the years where it says "number of sales reps at year-end"? Where did that come from?

A That would just come from an organizational chart at the end of the year of how many sales reps were actually in position at the end of each of these years.

Q So is that a fair approximation of about how many sales reps U.S. Tobacco had during that year?

A Yes.

Q And let's look at the second -- the next line down. "Number of days worked for year approximate." What does that

number represent?
A That's just an approximate number of days, taking, you know, weekends into consideration, taking vacations and holidays off of a -- working days in a year, subtracting that and come up with an average working days per year.
Q Mr. Milano, the last line says "Number of calls made per day worked, average," and it's 8 all the way across.
A Correct.
Q How did you come up with that number?
A That would just be the average, taking the average of the calls made times the days they worked and come up with an average. And the average was about eight; eight calls a day.
Q Now, it's all the way at the bottom -- let's start with 1990. There's a number, 678,690. Do you see that?
A Correct.
Q What does that represent?
A All these numbers across the bottom are just using that formula, or the amount of retail calls that were made in that particular year. It's just an estimate.
Q So in other words the 678,000 number would be 369 times 230 times 8; is that correct?
A Correct.
Q And what is the 7,696,720 in regard to?
A That's just an of the calls made over a ten-year period. So it estimated about seven and a half million calls.

Q Is that for the total 10-year period?
A Over a 10-year period.
Q And you think that's a good estimate for working purposes here of how many different times sales reps went into retail stores on behalf of U.S. Tobacco between 1990 and 1999?
A I think as an estimate, on average eight calls a day per sales rep would be as accurate as you could get.
Q Now, what sort of investment by U.S. Tobacco in dealing with retailers does that represent?
A That's hundreds of millions of dollars in investment.
Q And what is the purpose generally of sales reps going into the retail store? Well let me back up and let me ask you another question first.

After a chain account manager has met with a buyer for a chain account and the chain buyer has approved a Plan-O-Gram and whatever rack situation he wants, do U.S. Tobacco sales reps still call on those chain stores?
A Yes.
Q Why do they do that?
A To -- if -- let's say a chain manager met with a buyer and the buyer would want to reset his stores. He wants to use a different vending system, and would want it done, you know, in a specific amount of time.

Our sales representatives would have the materials that they would need to reset those stores. They would have a

EXHIBIT 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P., ET AL., Plaintiffs	)	Case No. 5:98-CV-00108
VS.	)	
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., ET AL., Defendants	)	MARCH 8, 2000

COPY

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VOLUME VII-A
TRANSCRIPT OF JURY TRIAL
BEFORE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

****

RUTE POTAMI, RPR
Official Court Reporter
United States Courthouse
501 Broadway, Suite 133
Paducah, KY 42001

Conwood based on your analysis that you told us about?
A Yes, I did.
Q And that involves -- go to the next slide please -- the additional Conwood sales at a reduced price minus the additional Conwood cost associated with selling this additional moist snuff?
A That's correct.
Q What were the damages you came to as a result of your analysis?
A That depended on which method I used and which scenario I used.
Q When you included an effect for misconduct in 1997, or anticompetitive conduct in 1997, what damages did you conclude Conwood sustained?
A The damages range from $488 million to $313 million, depending on whether one uses Scenario 1 or Scenario 2.
Q What happened when you, instead of including the 1997 anticompetitive conduct, assumed that there was no anticompetitive conduct in 1997? What did that do to your damages calculation?
A Those numbers ranged then from $155 million to $238 million, depending on which scenario you assume.
Q And are those, in your opinion, Professor Leftwich, fair and reasonable estimates of the damages Conwood sustained as a result of the conduct of UST in this case?

right?
A. No, that's not my testimony. I did different starting dates other than 1990 a long time ago. You asked specifically about the 1989 start date. I did that sometime ago and I redid it again, had it redone again this week.
Q. Professor, before we talked about your regressions, let me ask you about your 1994-1990 period. It was relatively unaffected by that, that alleged bad conduct, okay? Isn't it correct, professor, that you didn't do any simple comparison of the 1984-1990 period with the 1990-1997 period where the alleged misconduct occurred?
A. I don't think I understand your question. My testimony is I did look at 1994 to 1998, or excuse me, to the 1990 period, I testified to that before.
Q. Well, my question, professor, is simply you didn't attempt to chart the data you relied on to give Conwood's market shares showed any significant changes in 1990 when these bad acts allegedly intensified?
A. I did the tests that I testified, you seem to suggest I did other tests. I'm not sure what you're suggesting.
Q. I'm sorry, professor. I'm just asking whether you did a chart and data, just a line that slows where the data falls for Conwood's share before 1990 and after 1990? That's a very simple chart, right?
A. That is it may have some uses and it may have many faults

attached to it.
Q. You didn't do it, right?
A. No, I did not.
Q. Well, let's look quickly at all 25 states with the lowest relative shares where all that alleged misconduct was supposed to have most effect starting with 1990 to see if there was any bumps along the road for this share. Let me start with Alabama, you see 1990 there?
A. Yes, I did do.
Q. Okay. Is that going down after 1990?
A. There is a slight increase after 1990. The point follows 1990, appears to higher in 1991.
Q. Well, that's going up after 1990 is not consistent with Conwood's, the belief that Conwood puts in their personnel phone call, is that right?
A. Not necessarily.
Q. Now let's look at Arizona. Is there an abrupt change in Arizona in 1990?
A. It doesn't appear to be.
Q. Look at Arkansas. An abrupt change in 1990?
A. No, but do you, question your portion of your --
Q. I'm asking you whether there's an abrupt change in 1990 when the alleged misconduct was supposed to have intensified?
A. I agree with the factual premise, I'm disputing that it has very much relevance for issue at hand.

Q. So if I told you all 25 and there was no abrupt -- well, let me show you, let's do a few more, let's look at Arkansas, I'm sorry, that's already done. Let's look at California, an abrupt change in 1990?

A. '90 and '91 seems to be higher, but 1990, 1989 fell somewhat.

Q. And it keeps going up, doesn't it? Correct?

A. The end point is higher than 1990, I agree with that.

Q. Colorado, abrupt change?

A. No,I'd give the same answer I gave before.

Q. Connecticut. Wow! Connecticut was going way up in 1990, isn't that right?

A. Connecticut was higher in 1990 than it was in 1989, yes sir.

Q. DC, going up in 1990 during this time of alleged intensifying of misconduct, is that correct?

A. That's correct.

Q. Florida, going up in 1990 and continuing to go up, right?

A. It, very little. I mean it goes about what 1990, 1990 was lower than 1989 and rose again in 1991.

Q. So, professor, we can go through the rest of these 25, your testimony is not it's not significant to you in any way that in real life in actuality in 1990 the shares were unaffected by US Tobacco's alleged misconduct, correct?

A. That's not my testimony and I can explain it to you if

you'd like me to.

Q. Sure, go ahead.

A. Firstly, just looking at a series of observations it's nothing more than a series of antidotes, it doesn't demonstrate the effect of what is in the data, that's why I can use statistical evidence. And the other reason is this several levels here. The other is that the testimony as to the intensity increased, it didn't say it was there before, intensity increased over this time period, and these data do not show what the sale would have been but for, but for UST's acts. It doesn't say, there's nothing in the hypothesis that says UST wasn't able to dispute that Conwood wasn't able to grow, it just says but for UST's acts it would have grown at a much higher rate. That's the hypothesis. That's what it's saying. It's not saying they were unable to grow. They were unable to grow at the same rate as they would have had but for UST's conduct.

Q. Professor, whether you want to call it antidotal evidence on not, isn't it a fact that in the lower states shares the pre-1990 period and the post 1990 period in the actual world were unaffected?

A. No, that is not my testimony. That is not my testimony and those data points do not prove that. Those data points do not prove that at all.

Q. They're just antidotes?

A. Firstly, you give me a sample of the 50 other states, carefully selected sample, I suspect. And the other issue is that, the other issue is that you've, you are, you're not showing me what the share would be but for the bad acts.

Q. Professor, I'm just trying to measure, shoe first of all, professor, who put up the prep, you the prep, the 25 states you say are ones most affected. We'll go back through it again, if you like. Those are the ones you chose and I'm not asking you not what would have happened but for, I'm asking you whether there was an actual effect before 1990 and after 1990, and it's not changed. That's all I'm asking you.

MR. HANSEN: Objection, argument.

THE COURT: I'll overrule it, I think, if you ask a question.

MR. KEYTE: I'm sorry, Your Honor.

THE COURT: Did you understand the question?

THE WITNESS: If you could repeat the question again.

THE COURT: Yes, why don't you. I think it was about half statement.

MR. KEYTE: I'll move on, Your Honor.

Q. Professor, if the beliefs of Conwood's personnel were correct, you would expect to see some change in Conwood's share beginning in 1990 in these low share states, is that right?

A. As I've testified, the beliefs suggested that but for

Conwood, that USTs bad acts, the share would have been higher. That doesn't mean they weren't able to grow, it's simply they wouldn't have been able to grow at a higher rate.

Q. So you disagree with the proposition if there were a lot of tense bad acts after '90, that might actually effect Conwood's share going down, they grew anyway, is that your testimony?

A. No, that's not my testimony. My testimony is that there's not, there is not, it is not a one-to-one relationship, the hypothesis does not necessarily suggest that Conwood's share fell. One could be half, what, my understanding of damages is that Conwood was deprived of an opportunity, opportunity to grow. The fact the cost is the claim of damages is my understanding.

Q. I'm just trying to understand whether you actually charted, whether in the actual world Conwood's sales and market shares actually grew after 1990, did you do that? Did you chart that?

A. I measured, I reflected that in the table and the table I testified to and as I testified to you, I'm questioning the relevance of doing that. It doesn't, it does not speak to the hypothesis at hand.

Q. Professor, if you look at, backward, professor, if you look at Conwood sales, they grew steadily from the period you say, from 1984 to 1997, isn't that correct?

A. If by increased steadily you mean for sales across the whole company, but not on a state by state basis, no.
Q. Let's look at the actual market shares to see whether there was a steady increase after 1990. You see that on your screen?
A. If this is a Conwood's average market share, yes, I see that.
Q. That's a pretty steady increase after 1990, isn't it?
A. Whether you want to characterize it that way or not is in the eye of the beholder, yes, but the increase in the market share. My understanding, though, is that even if you were successful you can still be harmed, you don't have to be, you don't have to be punished, you don't have to be a wholly performing company where it's behind or ahead in business.
Q. Professor, I'm simply asking you whether in this real world they were actually increasing market share after 1990 versus before 1990, the after period being the period of this alleged intensified misconduct? That's all I'm asking.
A. As I've testified, I agree, I'm agreeing that is what the data show. But I'm questioning the relevance of that question at hand.
Q. So if you insist wholly irrelevant that in the real world after 1990 Conwood's share grew at a steady pace?
A. No, it's not irrelevant, the relevant issue is how much it would have grown but for UST's acts.

Q. Well, let's also look at the actual sales. You see that?
A. Yes, I do.
Q. Looking again at the pre-1990 period and the post 1990 period when there is supposed to be intensified misconduct, Conwood's sales were steadily increasing, isn't that right?
A. Yes, that's your characterization. But, yes, they increased the market in this time period, were growing at a pretty good clip.
Q. And would you characterize that, don't take my characterization, would you characterize that as a steady increase in sales?
A. I would characterize the sales were higher in the end than in the beginning, by a large amounts. But again that doesn't speak to whether or not they would have been higher but for UST's acts.
Q. Professor, I'm simply asking you is it before the 1990 period and th post 1990 period, whether they actually were increasing sales significantly? That's all.
A. Yes. The, I, the question significantly, but the numbers are much higher after that that they were before, yes, I agree with that.
Q. You agree that after it was significantly higher then before 1990, correct?
A. No, I didn't use the term significant agreement. I wouldn't use the term significantly, I wouldn't use the term

study, you had no idea that Conwood's other experts had made conclusion about exclusive racks, isn't that right?

A. I don't believe I had read Conwood's other expert's reports with the exception of Professor Kamien's.

Q. In fact, when you made your original analysis you were only vaguely aware of the allegation in regard to this rack arrangement, isn't that right?

A. I don't, I don't recall the vague characterization, but I had no focus on them, no.

Q. Well, professor, are you aware that another professor, Professor Gundlach is slotted to testify about the alleged exclusive agreement in this case?

A. I've seen his name, but I'm not specifically aware of what the subject matter of his testimony is.

Q. Didn't you testify earlier in this case in a deposition, that when Mr., Dr. Gundlach had made mistakes about the number of number of exclusive agreements, it would not effect your damages calculations?

A. I don't specifically recall that, I will accept your representation. But since I didn't use his calculations it just follows as a matter of logic that it wouldn't effect my calculations.

Q. So a professor is going to get up here and talk about numbers what he believes are exclusive rack agreements, you don't rely on him, right, as far as your analysis?

A. That's my testimony, yeah, I have not read his report.
Q. Well, in fact, professor, if Dr. Gundlach took the stand in this case and said okay, none of these alleged exclusive agreements are anticompetitive, that wouldn't change your analysis at all, would it?
A. I have not used his analysis, that would not change my numbers, no.
Q. In fact, professor, you testified in discovery confirmed in this case that there were no bad acts, they're all in the record, the results of you model would still not change, isn't that correct?
A. If you, that's correct to the extent you refer to the model before, before I take into account the effects that your expert pointed out.
Q. I'm talking about when you originally started. I'll clarify it. I'm talking about your original analysis that you did and signed the report. Let me ask you again. Isn't it a fact in your original analysis that if discovery reconfirmed that there were no bad acts at all in the record in this case, none whatsoever, the result of your model would still be the same?
A. My understanding is a determination of a what's a bad act is a legal issue and that's a matter for the jury to decide.
Q. I'm just asking whether in your original analysis all this, this money that you seek is connected to whether or not

there's actual bad acts in the record? It's not, is it?
A. Yes, it is. It presumes that the activities that were engaged in by UST were illegal. If the jury decides those were not legal, it's my understanding, I'm not a lawyer, my understanding is the jury decides they are not illegal then there are no damages.
Q. Well, professor, if the jury decides that exclusive rack arrangements are desired by many retailers and they're fine, do you have an adjusted number for the jury be to show the jury?
A. As I testified, I did not, was not able to, was not able because of the disaggregating effect of the particular types of bad acts.
Q. And if the jury decides that the way US Tobacco practices category management is what is desired by retailers or that everybody else has their chance to make their pitch, then you back that out of your damages number?
A. I was not able to detect the damages as I've said before.
Q. In fact, professor, you can't -- well, explain what this act is? Explain what disaggregated means to the jury, you just said disaggegated for a particular act of alleged misconduct on?
A. My understanding is multiple bad acts alleged by antibehavior alleged by UST, my results take in effected all these anticompetitive results, if you will, rolled up into one

ball of wax and given the world of nature of those acts, it's difficult to disentangle them, to assess data and for me to disentangle. That's bad acts, excuse me, anticompetitive acts.

Q. Professor, in your original analysis you didn't run any variability for rack removal, is that correct?

A. No, my original analysis I did not have that data available to me.

Q. Well, you didn't, in your original analysis you didn't run regression for POS removal, correct?

A. That's correct.

Q. Professor, you didn't use Professor Scheffman's method, as you characterize it, to calculate a damages number that you were going to post in front of this jury until after you learned that your original damages estimates were off by $245,000,000, isn't that right?

A. I, I used that after his supplemental, I received his supplemental report and after my deposition, that very soon after the deposition I learned that there were some potential errors, I don't recall specifically whether I knew the magnitude of the data errors at the time, or the impact of those data errors on my damages.

Q. Let me ask you again, I was not a clear. Isn't it a fact you didn't run any model on what you characterized as the Scheffman methodology, that you calculate damages, the actual

numbers that have been put in front of the jury, until af-- you learned that your original damages estimates were incorrect by $245,000,000?

A. I did it, I used the Sheffman analysis after I knew what my original errors were, my original estimates were incorrect. I don't recall whether I did it before or after I knew the magnitude of those errors.

Q. Now, professor your revised data using the Sheffman methodology, did not distinguish whether any rack or POS removal was done with or without retailer authorization, isn't that true?

A. That's correct.

Q. And your revised data using the method to be what you say is the Scheffman methodology, did not have any information about other competitors removing Conwood's racks or POS, isn't that right?

A. That's correct.

Q. Are you aware, professor, that Mr. Price, from Swedish Mash, yesterday and in this court, testified that Swedish Mash removed Conwood racks?

A. I wasn't specifically aware of that fact.

Q. And your revised data wouldn't capture that, as you said, correct?

A. I don't believe that that's, I don't believe that's correct with respect to the Sheffman analysis we're talking

about.

Q. Well, my question is whether you assess, you made a independent assessment of the effects of other competitors removing Conwood's racks with or without authorization, whether you would accept that effect on Conwood sales?

A. No, I knew that, I assessed UST's impact, the impact that UST's rack removal on Conwood's sales, using Scheffman's analysis, using Professor Scheffman's analysis.

Q. My question is did you assess how the rack removal by other competitors, whether authorized or not, were impacting Conwood's sales?

A. No, I did not.

Q. Professor, you're not testifying here today that all US Tobacco actions that effect Conwood sales, constitute misconduct, are you?

A. No. I understand there's a difference between legal, legally competitive, legally competitive behavior and illegally.

Q. For example, you testified that you only meant to include the anticompetitive aspects of category management in your damage assessment, is that correct?

A. That's correct.

Q. Even though you couldn't disaggregate it, as you explained to the jury, procompetitive aspects of that versus anticompetitive aspects, correct?

A. I think my testimony to the jury was I couldn't disentangle the effects of the various types of anticompetitive acts.

Q. Well, then I assume you clearly can't disentangle what goes, what you studied results will leave our procompetitive aspects of category management versus anticompetitive, you didn't look at that, did you?

A. I didn't look at category management specifically.

Q. And you testified when attempting tot measure damages you did not intend to include the effects of rack removal that were authorized or directed by retailers, isn't that right?

A. That, that's correct, to the extent that those were independent to the extent that they were coerced or encouraged by UST. My understanding is that, that those belonged as part of the damages calculation.

Q. So it's your testimony that if the retailer makes uncoercioned independent decision to have just a US Tobacco rack, it can be no basis for damages on that issue?

MR. HANSEN: Excuse me, Your Honor, it's asking a legal basis of this witness.

MR. KEYTE: He's testified about it.

THE COURT: Repeat the question for me.

Q. The question is your testimony as the damages expert that you did not perceive for Conwood any damages based on the independent uncoerced decisions of retailers about using a US

Tobacco rack for their store?
A. No. My statement about that was purely a statement, a reflection of the information given to me by attorneys. This is a legal issue as to whether or not there was an independent uncoerced action were allowable, were anticompetitive.
Q. Well, is the number, in your damages number, you do not intend to include, do you, I'm asking as a matter of fact in your damages, rack removals of Conwood by US Tobacco that represent the independent uncoerced decision of retailers to have US Tobacco racks in their store?
A. That's my understanding.
Q. You also testified in this case that it was not your intention to include POS removals that was authorized and directed by retailers, correct?
A. Again, that's an independent retailer's decisions, I would give the same answer.
Q. And, professor, from your study you are aware that there are instances, many instances where retailers direct the removal of a competitor's rack as part of a reset, something like that, right?
A. I'm, I'm aware that there is a dispute as to whether that's independent or not. I don't have a view one way or another as to whether it was coerced or uncoerced.
Q. So you have no view about when ever Wal-Mart decides to have a certain rack in their store, Wal-Mart's making that

decision?

MR. HANSEN: Objections, Your Honor.

THE COURT: Overruled.

THE WITNESS: I have no study the coercions or non-coercion involved in the Wal-Mart decision.

Q. You'd have, you'd have to hear that from Wal-Mart, correct?

A. I -- there are -- there are other way of learning that same data, that same information. I have not studied it.

Q. In fact, you haven't talked to any retailers in this case, correct?

A. That's correct.

Q. Would you agree that unless you hear from the retailer you can't determine whether they made an independent uncoerced decision to choose the US Tobacco rack?

A. No. There would other ways of learning it.

Q. Don't you think that's the best way, professor?

A. I, I have, as I did the study I didn't think the best way to investigate coercion.

Q. And professor, you did not intend to include in your analysis the removal of Conwood's products that were part of the approved planning for a retailer, did you?

A. Again, I give the same answer to the extent that approved means what uncoerced and a independent decision.

Q. In respect for example the Wal-Mart plan-o-gram would you

be interested in Wal-Mart's testimony on that?
A. Ir I were trying to determine whether that was independent or uncoerced, but I did not study the question.
Q. So you didn't, you didn't, in seeking damages or putting up the number for Conwood's damages, you didn't really care what Wal-Mart had to say about their decision about racks and plan-o-grams and POS, is that right?
A. It's not that I didn't care, it's that I used a method that did not require me to have that information.
Q. Well, maybe you didn't care, but you didn't, it wasn't part of your analysis, is that right?
A. That's right, it was not part of my analysis.
Q. Professor, would you agree that related promotional activities is not a bad act in your opinion?
A. Some promotional activity I understand is illegal, some others acts are legal, I'm not sure which is legal and which is not. Disparagement, for example, I understand is illegal, but I have a clear view in my mind to which is legal and which is illegal.
Q. Professor, did you intend to include the effects of increased promotional activity in be the 1990's on Conwood's sales in your analysis?
A. No, I did not.
Q. So the promotional activities by other moist snuff companies increased after 1990, how did your study account for

the effect of those promotions, Timber Wolf, for example, on Conwood's sales?

A. I didn't, I did not take that into account specifically.

Q. So, just so the jury understands this, you did not take into account the increased promotional activity of the Timber Wolf brands in the 1990s in your analysis, is that right?

A. No, but that would require a very strange set of facts to make that relevant to the analysis.

Q. Just asking you whether you took that into account.

A. I'm telling you why I didn't.

Q. And you would agree, professor, wouldn't you, that the introduction of new products aren't bad acts?

A. I would agree with that.

Q. Okay. And you did not intend to include any of the effects of new products introductions, how those effected Conwood's sales in your analysis, correct?

A. That's correct.

Q. So if new products were successfully introduced by other moist snuff companies, they the new product introduction increased after 1990, you did not account for that in your analysis, correct?

A. I did not account for it because it would require a strange pattern to this products introduction to explain the results that I found.

Q. I'm asking whether you accounted for it, sir?

A. I'm telling you why it's not relevant to account for it.
Q. So it's not relevant, with all the new products that came in the market after 1990, it was not relevant to use your stats whether they had an impact on Conwood sales?
A. If I could explain that to you?
Q. Sure.
A. All of the facts, it is not just that one that you're talking about, but other factors might effect the level of Conwood sales, whether Conwood's sales were high or low in terms of total market share. The results in my, in my study don't give me systematic patterns across states. It would require that those new products introductions systematically varied across states in the same way that the bad acts varied to explain the pattern that I observed in the data, that is not plausible in my view.
Q. So therefore you didn't have to take any individual products like Timber Wolf and assess how that impacted Conwood's, is that your testimony?
A. Yes. Again, that would effect my, might effect the level of Conwood sales, but not the pattern that I observed across states when I ran my regression and when I used your expert's damages calculations, your expert's regression.
Q. I'm just asking whether you did an independent assessment of the impact of the Timber Wolf brand on Conwood sales, that's simple.

A. I did an independent assessment because I analyzed and discussed it with many people in Lexicon, I did the analysis and the analysis suggests, the analysis demonstrates that one does not need to control the things, other things unless they vary systematically across states in the same pattern of the bad acts theory.

Q. Professor, I understand that you reached a conclusion that you did not need to control for that in a regression analysis, but my question is did you, independent of your regression analysis, or tell me what you included or not included, did you assess directly what the impact of the Timber Wolf brands in 1990 was on Conwood sales?

A. As I testified, I did not do to it, I explained why I didn't do it.

Q. In fact, at the time you did your study you weren't aware that Conwood marketing documents reported that Timber Wolf was taking sales from Kodiak, were you?

A. I don't specifically recall that document, or those documents.

Q. Professor, advertising restrictions in the moist snuff industry increased after 1997, is that right?

A. They changed throughout this time period, they were increased in snuff in 1990, yes.

Q. You didn't assess the impact of that on Conwood sales because you didn't have the data, isn't that right?

A. No, that is not correct. If I could explain why?
Q. Well, did you not testify on your deposition that you did not consider advertising restrictions because that was something you were not able to obtain data for, do you remember that?
A. I don't specifically recall that. If I gave that answer it was incomplete, but I was not able to obtain data for it, but that's an incomplete answer.
Q. Well, have you since obtained data for advertising restrictions under your effect on Conwood's sales after 1990?
A. No, I have, even before my deposition I knew why it wasn't relevant, but I didn't give that answer when I was deposed, but I knew why it wasn't relevant the same reason I described to you before. Those advertising restrictions would effect the level of Conwood's sales, not the pattern across states, it would have to be that there was a systematic statements, a difference where the restrictions were more severe and binding in the low foothold states than in the high foothold states. There's a pattern of data that if a change like that just cannot explained.
Q. Well, did you assess whether restrictions on advertising effected Conwood more in low share states?
A. Again, that I did not have the data for, but that, but I did, but I did do the analysis to suggest that that could not explain the pattern in the data.

Q. I know this is somewhat of confusing area, it is for me. Can you explain again, you did not have the data to assess whether in the low share states, they would have, the shares would have grown, you didn't have the data to assess whether advertising restrictions effected Conwood's sales in the low share states, correct?

A. I didn't have the data, but suggested that advertising restrictions differ across the states.

Q. Well, professor, are you aware there are huge differences in ad restrictions among various states and localities across the country?

A. I am aware that are huge, I can accept that characterization, yes. I am aware when I wrote my, when I drew up my report.

Q. Professor, do you agree that the number of products offered by Conwood would have an effect on Conwood's sales?

A. Yes, it's a possibility.

Q. Did you do any studies to determine the number of products Conwood had in the market during any time period covered by your study?

A. No, I did not for the same reason that I have explained to you before that it would not explain the systematic pattern in the data.

Q. Well, you didn't do any study to determine how the failure of several Conwood products introduced effected Conwood's

sales, did you?
A. No. And again I would give the same answer.
Q. Are you aware that Conwood discontinued Kodiak Choice?
A. I'm aware they, I'm aware that some of their brands did not meet great success, I don't recall which ones.
Q. Are you aware that Conwood discontinued Garrett Moist?
A. I heard that, I heard that, that refreshes my recollection.
Q. Are you aware that Conwood discontinued the Big Horn brands?
A. I don't specifically recall that brand.
Q. And you didn't -- so you didn't study, out of failure of those brands or other marketing efforts of Conwood effected their own sales, is that right?
A. Again, I did not study it because it would have to be very systematically across states to do, to explain the pattern.
Q. Professor, you looked at the loose leaf industry as what you call the yardstick markets, model, is that right?
A. That's correct.
Q. And the purpose of the yardstick model is to look at an industry that's free of the alleged misconduct by US Tobacco, is that right?
A. That's one purpose of the yardstick model, yes.
Q. And US Tobacco doesn't sell those new products you use loose leaf in the yardstick answer, right?

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 MAR 15 A10:22 Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

FILED
U.S. DISTRICT COURT
WESTN DIST. KENTUCKY

PLAINTIFFS' REPLY TO DEFENDANTS' OBJECTIONS TO EXHIBITS

The Court should reject defendants' tardy challenge to PX 152. On February 26, 2000, we disclosed to defendants our intention to introduce PX 152 during the testimony of Dr. Kamien. See Tab A. Defendants did not object and Dr. Kamien discussed PX 152 in his testimony. See Tab B (Trial Tr. March 3, 2000 at 21-24). PX 152 was admitted without objection. See Tab B (Trial Tr. March 3, 2000 at 33). On March 8, 2000, we responded to defendants' notice that they may, at some point, object to PX 152. See Tab C. Now, at the end of plaintiffs' case in chief, defendants seek to challenge the admissibility of PX 152. Defendants' failure to object to PX 152 prior to its introduction violates the Court's Order requiring the parties to raise objections prior to testimony concerning the exhibit.

In any event, defendants' argument is meritless. Defendants claim that the exhibit is insufficiently trustworthy to fall within the exception to the hearsay rule contained at Fed. R.

Evid. 803(6). But defendants fail to realize that the document is simply not hearsay under Rule 801(d)(2) because it is an admission by a party-opponent. The document was produced from the files of Gary Milano, U.S. Tobacco's Vice President of Sales. The document discusses defendants' Customer Alliance Program ("CAP") for 1999. Whether the CAP goals discussed in this document are contained in defendants' CAP contract/worksheets and/or implemented through various tactics employed by defendants is an issue of hotly disputed fact for the jury to determine. Plaintiffs presented significant evidence that defendants implemented strategies through CAP and other activities designed to achieve the exact goals discussed in PX 152.[1]

Finally, plaintiffs are prejudiced by defendants' tardy objection. Defendants waited until after Dr. Kamien and Mr. Milano testified to raise this objection, thereby preventing plaintiffs from eliciting additional testimony concerning the admissibility of PX 152.

---

[1] Lloyd v. Professional Realty Servs., 734 F.2d 1428 (11th Cir. 1984), does not support defendants' argument. The statements at issue in Lloyd were not admissible as an admission because the statements were not made by a person with authority. Defendants do not claim that PX 152 -- produced from Mr. Milano's files -- contains statements made by people other than defendants' high level employees. Moreover, unlike the statements at issue in Lloyd, there is a significant factual dispute in this case over whether the goals reflected in PX 152 are in fact exactly what defendants accomplish through the use of its CAP program.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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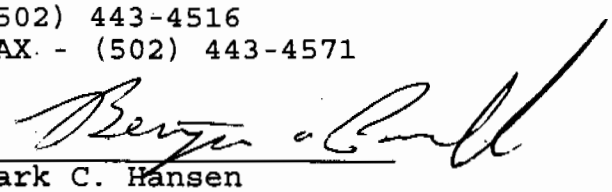

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Counsel for Plaintiffs

March 15, 2000

16diii005059

CERTIFICATE OF SERVICE

I certify that on this 15th day of March, 2000, a copy of the foregoing was sent by facsimile to:

John S. Reed, Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, U.S. Tobacco Trial Offices, Mercantile Bank Building, 10th Floor, 333 Broadway, Paducah, KY 42001.

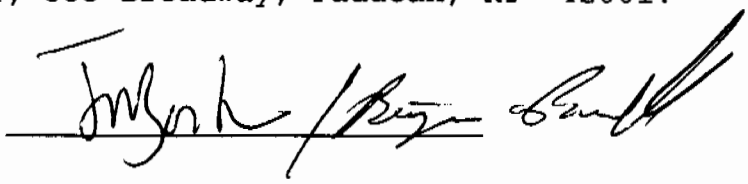

EXHIBIT A

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February 26, 2000

Via Facsimile

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Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
Skadden, Arps, Slate,
Meagher & Flom, L.L.P.
Four Times Square
New York, New York 10036

Re: Conwood Company, L.P., et al. v.
United States Tobacco Company, et al.

Counsel:

We have Ms. Mariner's letter stating that you have added two new designations for opening statements. It appears that you have also deleted portions of Mr. Keane's deposition, including 211:4-8, which we understood the Court to have ordered you to play. Accordingly, this passage should be included. With regard to your alterations to pages 70 and 71 of Mr. Rosson's deposition, we understand that you will play the following: 70:20 (Beginning with "You understand") through 70:25; 71:3 through 71:8; and 71:11 through 71:18. Please let us know immediately if this is incorrect.

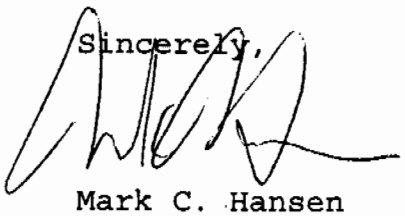
Listed below are the witnesses we now expect to call and the exhibits we expect to introduce for the entire week of February 28 through March 3. While this represents our current plans, our plans may change (in part based on rulings on what we consider to be gross overdesignation of counter-sections of the deposition testimony of UST employees, which we expect to raise with the Court on Monday morning). Plaintiffs reserve the right to alter their proof, and we will notify you of any additional witnesses or exhibits.

Witness	Exhibits to Be Introduced
Lou Marano	None expected at this time.
William Rosson	We expect to prepare a demonstrative during Mr. Rosson's examination comparing characteristics of different smokeless products. In addition, we may introduce during Mr. Rosson's testimony certain demonstrative exhibits (copies enclosed herewith).
Morton Kamien	Plaintiffs' Exhibits: 4,5,9,13,14,16,19,20,23,24,28,32, 33,39,40,42,45,48,49,53,59,61,63, 68,70,72,76,79,80,84,86,88,94,96, 103,104,107,108,112c,113a,114,117, 120,124a,124f,127,128,129,130,136, 137,139,140,141,143,144,149,152, 156,158,159,173,188,189,208,220, 223,245,258,266,267,268,270,274, 280,285,288,326.[1] All documents discussed in plaintiffs' deposition designations for the following witnesses: Fasanelli, Fitzmaurice, Wheatley, Berkebile, Entwistle, Blackburn, Chiaradio, Parish
James Wheatley	Only documents discussed in plaintiffs' deposition designations.
Richard Fasanelli	Same.
Robert Fitzmaurice	Same.
Timothy Entwistle	Same.

[1]Today we noticed that, due to a photocopying error, one slide is in some, but not all, of our copy sets of Plaintiffs' Exhibit 326. Because this slide may or may not be in your copy set, we enclose it here.

Donald Blackburn	Same.
Robert Chiaradio	Same.
Byron Todd Parish	Same.
Tom Berkebile	Same.
Gayleen Rusk	None expected at this time.

Sincerely,



Mark C. Hansen

EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

CONWOOD COMPANY, L.P., ET AL., Plaintiffs	)	Case No. 5:98-CV-00108
vs.	)	
UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., ET AL., Defendants	)	MARCH 3, 2000

****

VOLUME IV
TRANSCRIPT OF JURY TRIAL
BEFORE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

****

JEROME F. ROPPEL
CAROLA G. STRIJEK, RPR
H. RUTHE POTAMI, RPR
Official Court Reporters
United States Courthouse
501 Broadway, Suite 133
Paducah, KY 42001

Q Could you explain why?
A Yes. This is -- this just extends and makes explicit what is meant by monitoring by the sales rep and what compliance represents.
Q So, in your opinion, if the sales rep wants to obtain exclusive vending, how does that happen pursuant to CAP --
MR. STOLL: Objection, your Honor; very leading.
MR. HANSEN: How, your Honor?
THE COURT: I'm going to overrule it.
BY MR. HANSEN:
Q Professor, in your opinion, if the sales rep wants to achieve, for example, exclusive vending with one of the retail accounts, how does that happen under CAP?
A It happens under CAP because he has the discretion of reporting of -- of reporting whether you get a payment back for the -- for selling rolls. In other words, he has the discretion that -- whether you're going to get a payment or not. Okay?
Now, if he has that discretion, it also gives him sort of the ability to say, well, you know, if we have exclusive vending, it makes it easier for me to get you the money under the customer alliance program.
Q Let me hand you Exhibit 152. Is Exhibit 152 another U.S. Tobacco Company business record you've relied on in forming your opinion?

A Yes.
Q What is it?
A It's a draft, and it's dated 1999, and it says "CAP Goals." This is consumer alliance.
Q Let's highlight that. Is this the CAP program you've just been telling us about?
A Yes.
Q Let's look under the first half of the page and see if we can enlarge that.
Do you see where at the bottom of that first half there's the word "Display" in the center of the page?
A Yes.
Q I'll read it. "The display goal would be to make sure that USTSM's share of fixture was in proportion to its share of sales in the account."
Do you have an understanding as to what USTSM refers to here?
A U.S. Tobacco. I think "SM" is sales and marketing.
Q And is the display goal, one of goals, CAP, one of the enumerated goals of the CAP program?
A Yes.
Q Is this an item you found of significance in forming your opinion?
A Yes. It's -- you see, it goes in hand with the prominence of display, but it also goes a little bit beyond it

in saying that, you know, not only do we want prominence of display, but we want that the share of fixture be in proportion to the share of sales.

Q So if a retailer wants to get this CAP program, what compliance is required, in your opinion, with respect to the display goal?

A Well, again, did -- this becomes part of the compliance requirement and part of the requirement in order for you to get paid under the customer alliance program.

Q Do you know whether this particular set of goals was implemented in the field?

A I believe it was, yes. I think we even had a document to that effect.

Q Let's look at "Share of Sales," the next paragraph down. It said in the prior paragraph that part of the display goal is to make sure that USTSM share of fixtures is in proportion to the share of sales. Let me just read "Share of Sales."

"The share of sales goals would be based upon the greater of either the retailer's historical percentage of USTSM sales or the goal for USTSM sales in the area that the retailer is located."

Is that an item you found of significance?

A Yes.

Q Could you explain why?

A Well, the interesting thing here is that it says the

larger of two. So share -- so if it so happened that UST's products' historical percentage was below what UST would like to have had, then it says, well, you know, what we're looking at is what we would like to have, not simply what we have had. So if we would like to have even a larger share than we presently have, that is the operative standard, not the standard of what used to be historically.

Q So just to illustrate your point, if UST's goal for a particular area was at 100% of the market, what would be the consequence here?

A Well, that means that if it were 100%, it means, you know, we eliminate everybody else.

Q Let me hand you what we've marked as Exhibit 266. Is Exhibit 266 another U.S. Tobacco Company business record that you've relied on in forming your opinion?

A Yes.

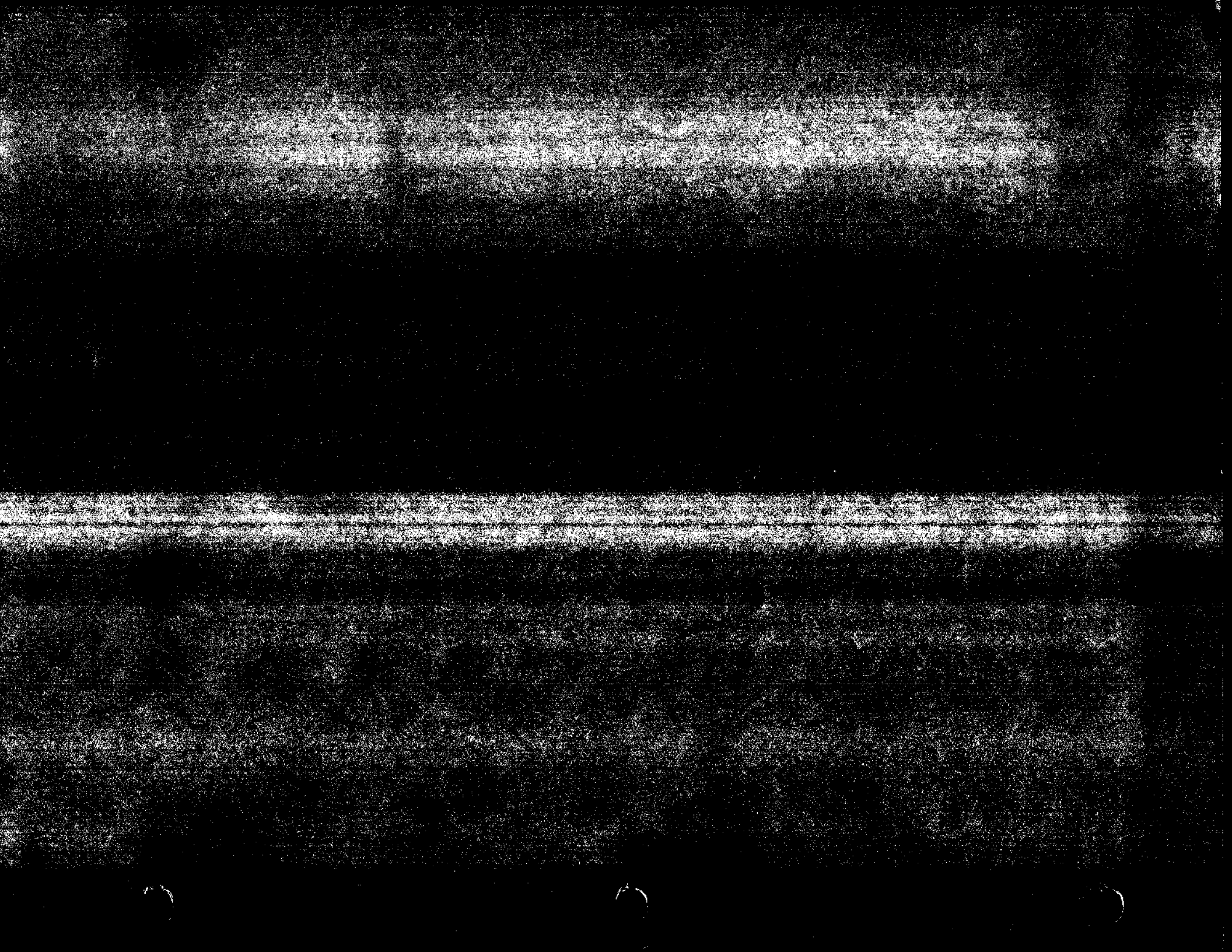
Q Can you tell us what this is?

A This is a statement regarding -- the subject is E-Z Serve Plan-O-Gram opportunity, and it's to a Mr. Blackburn and it is from a Steve Towle, and it's dated November 25th, 1997.

Q And was this an item you found of significance?

A Yes.

Q Let's go down to the one, two, three, four, fifth paragraph and enlarge it, if we could, please. I'll just read that aloud. This is about a store named E-Z Serve, by the



(Plaintiffs' Exhibit No. 103, received into evidence.)
(Plaintiffs' Exhibit No. 152, received into evidence.)
(Plaintiffs' Exhibit No. 266, received into evidence.)
(Plaintiffs' Exhibit No. 285, received into evidence.)
(Plaintiffs' Exhibit No. 274, received into evidence.)
(Plaintiffs' Exhibit No. 220, received into evidence.)
(Plaintiffs' Exhibit No. 156, received into evidence.)
(Plaintiffs' Exhibit No. 143, received into evidence.)
(Plaintiffs' Exhibit No. 326.2, received into evidence.)
(Plaintiffs' Exhibit No. 326.3, received into evidence.)
(Plaintiffs' Exhibit No. 326.4, received into evidence.)
(Plaintiffs' Exhibit No. 326.17, received into evidence.)
(Plaintiffs' Exhibit No. 326.20, received into evidence.)
(Plaintiffs' Exhibit No. 326.21, received into evidence.)
(Plaintiffs' Exhibit No. 326.34, received into evidence.)
(Plaintiffs' Exhibit No. 326.39, received into evidence.)

MR. HANSEN: With that, my examination is complete, your Honor.

MR. STOLL: Your Honor, may we approach?

THE COURT: Yes, you may.

(Sidebar discussion.)

MR. STOLL: If possible, I'd like to take the morning break now so my cross wouldn't be interrupted.

THE COURT: Okay.

MR. STOLL: And, secondly, it's customary -- I

EXHIBIT C

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March 8, 2000

Via Facsimile

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Neal R. Stoll, Esquire
James A. Keyte, Esquire
Chris T. Athanasia, Esquire
U.S. Tobacco Trial Offices
Mercantile Bank Building
10th Floor
333 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v.
United States Tobacco Company, et al.

Gentlemen:

I have your letter of March 8, 2000 discussing the list of admitted exhibits we transmitted to you. While we do not yet have a transcript of the Court proceedings of March 2, 2000, PX 333 and PX 84a were disclosed in our February 26, 2000 letter and discussed during the Fasanelli testimony shown to the jury. I believe I moved the admission of those exhibits on March 2, 2000 and will verify when we receive the transcripts. Moreover, PX 84a is a copy of PX 84 with a different Bates number and slightly different format to the e-mail.

On February 14, 2000, we disclosed that we intended to introduce PX 148. PX 148 was included in our motion of February 22, 2000 and you did not object to its admission. PX 148 was properly admitted.

We disagree that you can challenge the admission of PX 152. On February 26, 2000, we disclosed our intention to introduce PX 152 during the testimony of Dr. Kamien and received no objection. The exhibit was discussed and admitted without objection. PX 152

was properly admitted.

As for DX 4389, we reserve our right to object to the admission of that exhibit if you use the testimony of Mr. Walden.

Please do not hesitate to call with any questions or concerns.

Sincerely,

Benjamin A. Powell

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March 15, 2000

Jeffrey A. Apperson, Clerk
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Plaintiffs' Reply to Defendants' Objections to Exhibits.

Also enclosed is an additional copy. I would be grateful if you would date-stamp and return this copy in the enclosed self-addressed envelope.

Many thanks for your assistance.

Respectfully,

Benjamin A. Powell

Enclosures

HP LASERJET 3150
PRINTER/FAX/COPIER/SCANNER

SEND CONFIRMATION REPORT FOR
KELLOGG HUBER
270 450 5119
MAR-15-00 10:35AM

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DATE: March 15, 2000

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 MAR 15 A8:36 Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

FILED
US DISTRICT COURT
WESTN. DIST. KY

PLAINTIFFS' OBJECTIONS TO DEFENDANTS' PROPOSED EXHIBITS FOR WINSTON WEBER AND KEVIN FREUDENTHAL

Defendants have disclosed that they intend to use Defendants' exhibit 146 for witness Winston Weber, and Defendants' exhibit 195 for Kevin Freudenthal. Plaintiffs respectfully object to the introduction or use of these exhibits on the following grounds:

Witness	Exhibit	Plaintiffs' Objection
K. Fruedenthal	195	Hearsay
W. Weber	146	Hearsay, Lack of Foundation, Relevance

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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Suite 1000 West
Washington, D.C. 20005

Counsel for Plaintiffs

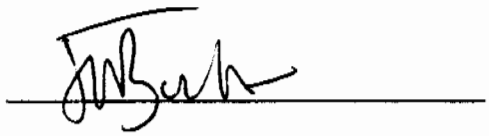
March 14, 2000

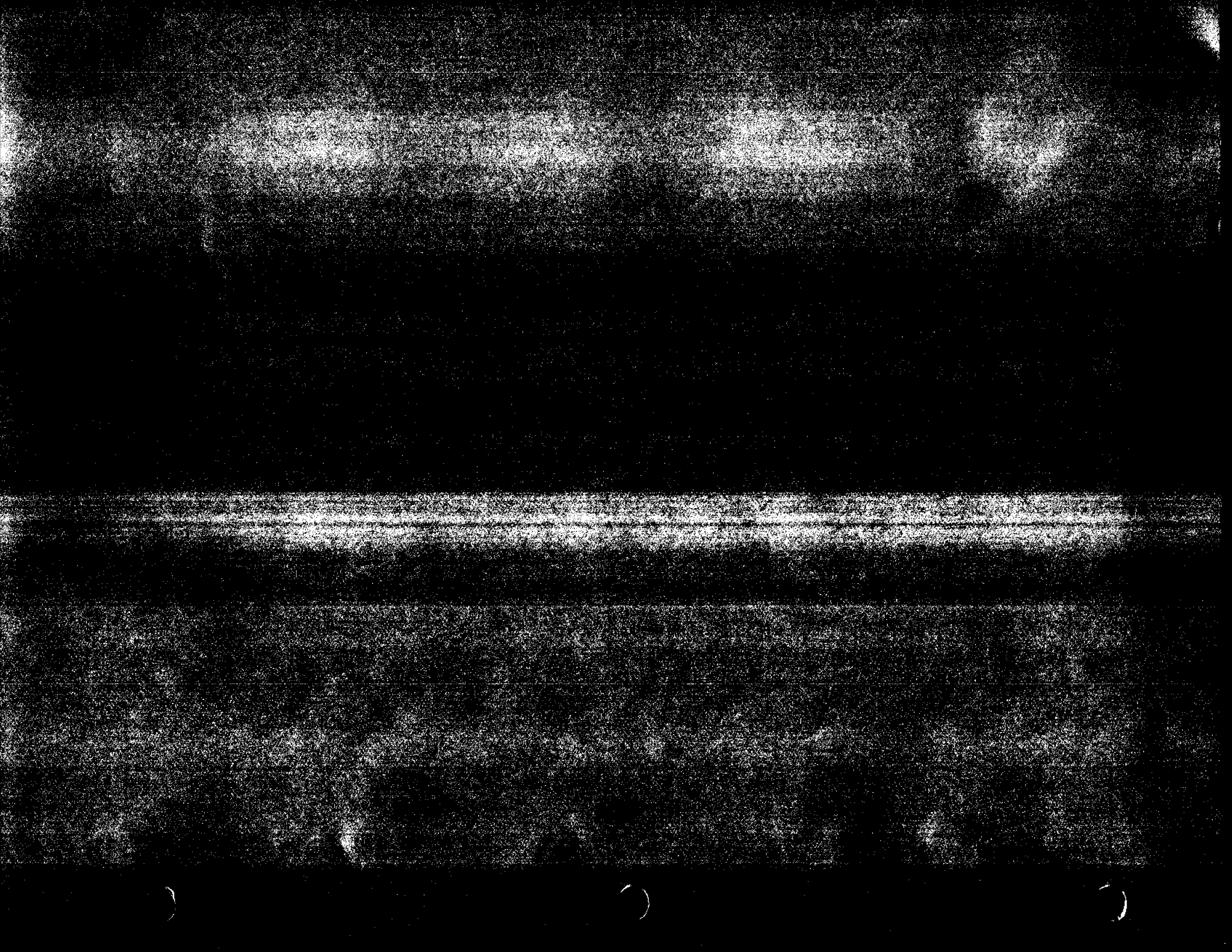
CERTIFICATE OF SERVICE

I certify that on this 14th day of March, a copy of the foregoing was hand-delivered to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., U.S. Tobacco Trial Office, 333 Broadway, 10th Floor, Paducah, KY 42001.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, U.S. Tobacco Trial Office, 333 Broadway, 10th Floor, Paducah, KY 42001.





Super Quick
1400 E. 9th
Winfield, Ks

USTC/CWD 343300
CONFIDENTIAL

UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC.

DATE: January 24, 1992

TO: Gary A. Milano, Director of Sales - Midwest

FROM: Richard L. Tanner, CMR-GJD01, Parsons, Kansas

SUBJECT: Conwood Rep Removing UST Vendors

The Conwood Representative, W.S. "Steve" Yager P.O. Box 16305 Wichita, Kansas, is cutting our vendors apart and removing them from retail. He is then replacing them with their version of our plastic home and replacing our product labels on his vendors. This is to gain the appearance of at least 50% of the vendor.

Mr. Yager, in his quest for shelf space, is not obtaining permission from store management. For example, The One Stop Convenient Store, 301 West Main, Sedan, Ks. had a 15 column UST plastic home with three columns for Conwood. This is the way the store manager and the owner wanted their smokeless tobacco merchandised. On his last visit to this store, Mr. Yager removed a 7 column section from our vendor and replaced it with his. (He did remove our vendor from the store). As you can see from the vendor enclosed he replaced our product labels on his vendor, with the exception of Skoal Bandit Straight, as to gain two facings for Kodiak.

With approval of the manager I reset the above store back to the way it was. If need be the clerk, Pat Sanders, witnessed the removal of our vendor and can be reached at 316-725-5713. The store manager, Cheryl Catlin, can also be contacted at the above number for conformation.

This store is just one example out of the sixty calls I made this week. Approximately 85% of these stores Mr. Yager conducted the same activities as in the above store.

The two header cards with the warning label cut off is also the doings of Mr. Yager in his retail work.

If I can be of any further assistance concerning this subject please feel free to contact me at your convenience.

Sincerely,

Richard L. Tanner

Richard Tanner

cc:jrc,jlg,file

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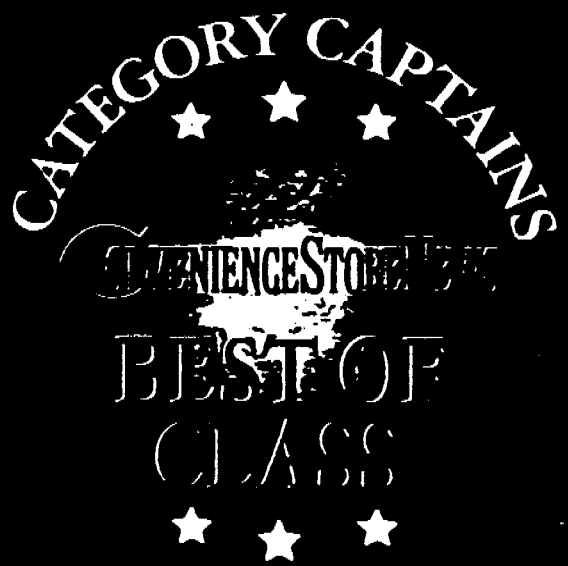
1999

Best of Class



DEFENDANT'S
EXHIBIT
146

Saluting industry leaders and innovators.

THANKS

TO THE RETAILERS OF THE CONVENIENCE STORE
INDUSTRY FOR VOTING ANHEUSER-BUSCH THE #1 SUPPLIER
IN BEER CATEGORY MANAGEMENT

WE WILL CONTINUE TO WORK WITH YOU TO MAKE YOUR BEER CATEGORY GROW

FROM YOUR FRIENDS AND PARTNERS AT ANHEUSER-BUSCH

Source: CSN Category Captains Survey, 1995
http://www.budweiser.com
©1997 Anheuser-Busch, Inc., Budweiser® Beer, St. Louis, MO

A Class Act

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SPECIAL ACKNOWLEDGMENTS

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In this, the second annual *Convenience Store News* Category Captains supplement, industry retailers, suppliers and distributors nominated companies they view as exemplary practitioners of category management. In a questionnaire sent to industry players, retailers nominated supplier and distributor Category Captains, while suppliers and distributors nominated their most proficient retail partners.

Congratulations to all of this year's Category Captains. As a group and individually, these companies have taken a leadership position in the industry with an eye toward excellence. They believe in category management, they practice and implement category-management strategies and they are reaping the rewards in the form of increased sales, profits and turns, reduced out-of-stocks and improved operational efficiency.

This year we especially recognize three suppliers who received Top Honors, based on the overwhelming number of nominations they received from retailers. This year's top honorees are Anheuser-Busch Inc., The Coca-Cola Co. and R. J. Reynolds Tobacco Co.

The entire staff of *Convenience Store News* salutes this year's Category Captains for their vision, hard work and leadership, and for sharing their successes and lessons learned with the industry in the pages of this supplement. Not only are these companies the Best of Class, they're a class act.

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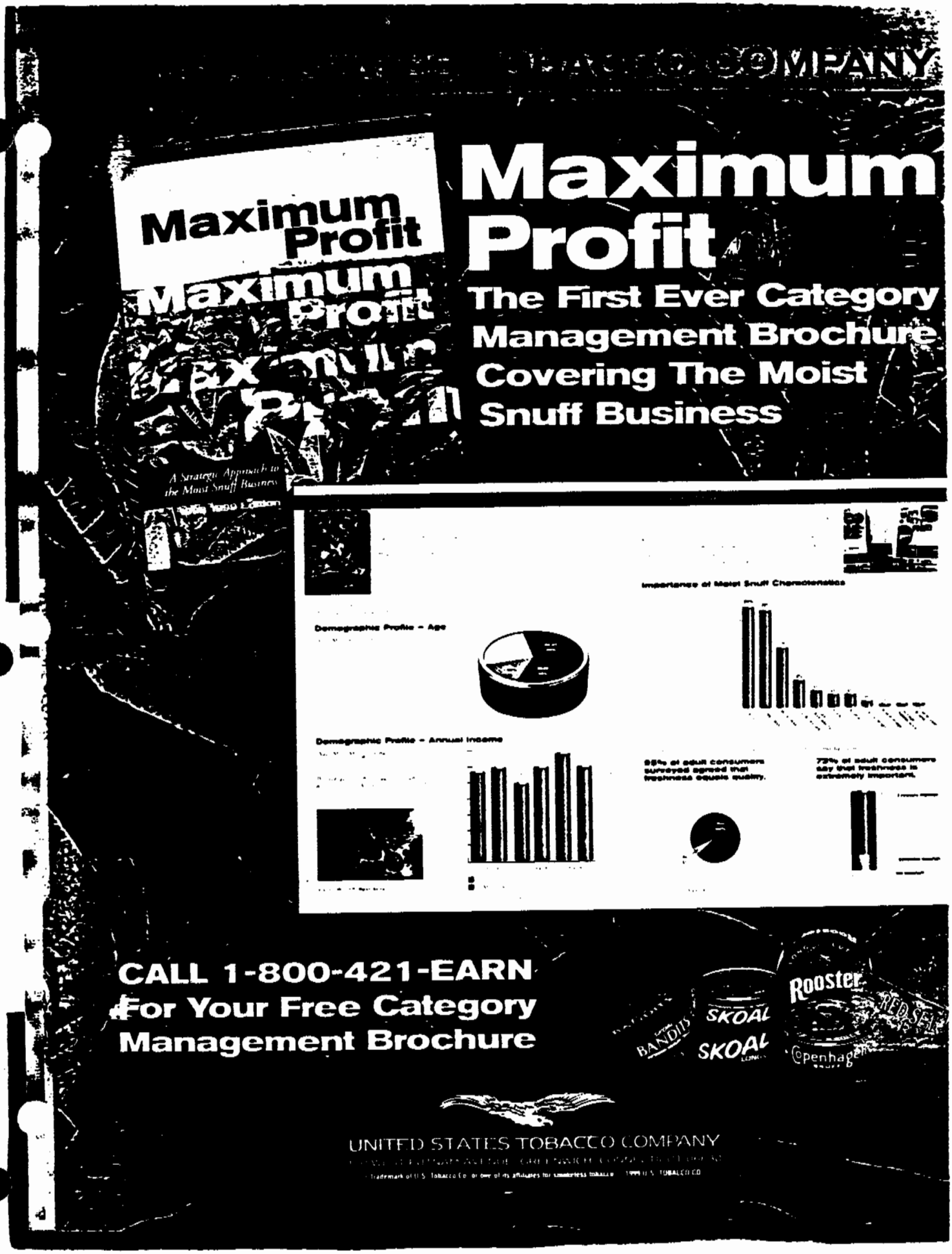

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Honor Roll

Congratulations to this year's Category Captains!

The following companies were cited as exemplary practitioners of category management. Suppliers were nominated by retailers as Best of Class, and retailers were nominated by their suppliers as outstanding category management partners. All of the companies appearing on this honor roll have earned the privilege to use the Category Captains' seal in their public relations and advertising materials.

SUPPLIERS

Bakery
Pillsbury Bakery & Foodservice

Beer
Anheuser-Busch Inc.
Miller Brewing Co.

Candy
M&M/Mars
Lifesavers Co. (Nabisco)

Carbonated Beverages
The Coca-Cola Co.
Pepsi-Cola Co.

Coffee
S&D Coffee

Foodservice
Orion Food Systems International Inc.

Grocery
Procter & Gamble

Health & Beauty Care
Procter & Gamble

Frozen Desserts
Nestle USA Ice Cream Division

Isotonic Beverages
Gatorade

Juice/Juice Drinks
Tropicana North America
Veryfine Products Inc.

Prepackaged Cakes/Cookies
Keebler Co.

Salty Snacks
Frito-Lay Inc.
Planters Inc. (Nabisco)

Tobacco
R.J. Reynolds Tobacco Co.
Swisher International
United States Tobacco Co.

WHOLESALERS & BROKERS

Convenience Marketing Inc.
Core-Mark International Inc.
Douglas Distributing
Eby-Brown Co. L.P.
Fleming Cos. Inc.
H.T. Hackney Co.
McLane Co. Inc.

RETAILERS

7-Eleven Inc.
A.T. Williams Oil Co.
BP Amoco Plc
Casey's General Stores Inc.
Chevron Products Co.
Conoco Inc.
Dairy Mart Convenience Stores Inc.
Equiva Services LLC
Giant Industries Inc.
Marsh Village Pantry
Mobil Oil Corp.
The Pantry Inc.
R.R. Morrison & Sons
Spectrum Stores Inc.
Speedway/SuperAmerica LLC
Tosco Corp.
Turkey Hill Minit Market

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Top Honorees

In the eyes of retailers who voted for this year's Category Captains, three manufacturers—Anheuser Busch Inc., Coca-Cola Co. and R.J. Reynolds Tobacco Co.—stand head and shoulders above the rest. These Best-of-Class companies received the most nominations from retailer respondents, making them this year's top honorees.

Anheuser-Busch Inc.

As category leader, Anheuser-Busch works to facilitate category management in two ways, according to Joe Patti, senior director, retail planning and category management. The first is to support industry initiatives such as Anheuser-Busch's active sponsorship of the National Association of Convenience Stores' (NACS) category-management work. The company was also a sponsor of the *Convenience Store News* Out-of-Stock Study. The second element is working closely with retail customers to address their category management needs.

"On both levels, we take our direction from the retailers themselves," said Patti. "Especially when working directly with our retail customers. Our role is to take the best of what we've learned across the country and across channels, drill down to the consumer and industry insights to apply to a particular retailer's needs, and create a plan that helps them achieve their goals. The bottom line is that it's their plan."

Step one in Anheuser-Busch's process is to identify the convenience store retailer's goals and objectives, as well as the issues relevant to their operations. This is determined by dedicated Anheuser-Busch personnel and its wholesaler network. The brewer's extensive resources and tools are then applied to the process. One such tool is Eagle Eye, a micro-marketing system built around the Spectra program. A customized version of the Spaceman program is also used for creating planograms.

Anheuser-Busch, based in St. Louis, brings added value to the process in the form of data. In addition to market-level syndicated data, the company supplies proprietary research on cross-channel shopping behavior. "Anheuser-Busch expends many resources to understand the dynamics of the category, the marketplace and the convenience store shopper. We have developed detailed insights into how shoppers think and behave when shopping in and outside the convenience channel," Patti explained. "This helps us identify things that will drive profitability for the retailer."

Larry Lytle, buyer for Salem, N.C.-based A.T. Williams Oil Co., said he values Anheuser-Busch for its extensive resources. "[The company] has brought in the needed manpower and resources to analyze our total category and assist in implementation," he said. "It's a total effort."

Patti acknowledged that while the increasing availability of convenience store data drives more efficient and effective category management in the channel, Anheuser-Busch approaches the process as sound business practice. "With or without data, at the end of the day, you have to make sound business decisions. We focus our efforts on how

> "Anheuser-Busch doesn't monopolize the case with their products when they develop a set. They compile all the relevant information and develop fair layouts. It's truly a partnership."
>
> —Silvio Federighi
> Convenient Food Mart

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to make the best business decisions to reach the defined goals and objectives of the retailer. With that position, the process becomes intuitive and logical, rather than intimidating," he said.

An element of the Anheuser-Busch category management process lauded by retailer is objectivity. "The company is very fair in the layouts it develops," said Silvio Federighi, general manager of Convenient Food Mart of Painesville, Ohio. "Anheuser-Busch doesn't monopolize the case with their products when they develop a set. They compile all the relevant information and develop fair layouts. It's truly a partnership."

"Anheuser-Busch understands that the whole category must grow to sustain growth of their products," said Jeff DeJesse, category manager for ARCO am/pm stores. "They've been very responsive, and provide the necessary resources for all our projects."

"We realize that we're in this for the long run, so we're not looking to make a quick hit at a cost to our retail customers," Patti said. "This approach allows us to be objective and focus on the quality of our products and our information."

The most important step in the category-management process, according to Patti, is to begin. "It's really important for retailers to get started, no matter where they are in terms of their own automation and data-collection capabilities. Talk to your lead suppliers, start the dialogue and start the process. The sales results and profit increases will show your return on the investment."

The Coca-Cola Co.

Dr. Glen Stoops

"Category management is all about opportunity—the ability to locate it, plan for it, execute it and capture it," observed Dr. Glenn Stoops, managing director, market research and category management for The Coca-Cola Co. "The category-management mission of the Coca-Cola system is to help convenience store operators locate opportunities for growing the size and value of the beverage category."

To assist retailers in capitalizing on the opportunities within the non-alcohol beverage segment, Coca-Cola provides an extensive category-management toolbox. However, the company emphasizes the expertise of its category-management personnel as a crucial element of the process. "Tools within themselves are not very powerful. It is the people behind them who release the tools' full potential," said Stoops.

> **"The company has a department within its organization set up specifically for category management. They have the resources in place to analyze and recommend specific sets as they relate to our business."**
>
> — Stephen Monaco
> Tedeschi Food Shops Inc.

Coca-Cola category managers combine their personal base of knowledge and experience with market research insights to assist retailers in developing appropriate plans. Consumer insights are the key to achieving profitable growth, according to Stoops. To speed the delivery of such insights to retail, Coca-Cola's market research and category-management functions are linked. Coca-Cola's bottling system is also an important component of the process. "Our commitment to retail is clearly seen in the increasing number of Coca-Cola bottlers who are designating more category-management personnel solely to the convenience side of the business," Stoops said.

That commitment is evident to retailers doing business with Coca-Cola. "The company has a department within its organization set up specifically for category management," said Stephen Monaco, buyer at 130-store Tedeschi Food Shops Inc., based in Rockland, Mass. "They have the resources in place to analyze and recommend specific sets as they relate to our business."

Rather than focus solely on software systems and tools, Coca-Cola identifies eight areas of category-management expertise that are applied to the process. They include advanced consumer insights, market analysis, financial analysis, pricing analysis, promotional analysis, efficient assortment, advanced merchandising and efficient replenishment.

In addition to applying the NACS process and utilizing syndicated research, Coca-Cola employs proprietary systems that enable activity-based-costing studies, basket-level analysis of scan data and store services, as well as profitability recaps. The market-basket analysis capability has been implemented over the past year, and reveals beverage purchase dynamics. "The retailer is able to gain insights to important areas such as the interaction between categories, between different gasoline grades and store purchases. We'll also use it as a new approach in determining out-of-stock situations," Stoops explained. "This allows the retailer to look at other categories outside of non-alcohol beverages and apply fact-based decision-making."

Atlanta-based Coca-Cola also assists retailers in maintaining and measuring the effectiveness of category-management programs. A detailed process of conducting assortment review has been developed that is based in obtaining the proper buy-in to ensure the set's longevity and provides the ability to track progress, Stoops said. "Assortment is the backbone of any successful beverage business and must be done to satisfy

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the needs of the consumer."

Mapco Express Inc. of Nashville, Tenn., has had positive experiences with Coca-Cola's process, according to Larry Pedigo, category manager for the 256-store chain. "Our Coca-Cola representative was willing to not only wear a Coca-Cola hat, but when necessary put on a Mapco hat. The company is very good at doing what is best for the consumer, and has data that can be trusted," he said. "Coca-Cola works to grow the entire category."

R.J. Reynolds Tobacco Co.

Jim Maguire

Mary McCombs, category manager for the 200-unit Sheetz Inc., based in Altoona, Pa., had this to say about R.J. Reynolds Tobacco Co.'s category-management support: "R.J. Reynolds's [representatives] keep their finger on the pulse of the [tobacco] industry, as well as the convenience store industry. They consider the overall category needs in our stores, not just their own products. They work with customized programs that fit our needs as well as theirs. Top-down personnel are readily available at all hours. They provide us with the detailed data we request in a timely manner. Also, they are continually looking for ways to help us, which could involve developing fixtures to maximize space or developing direct mailers for our markets."

That type of involved, unbiased, total-store approach is the backbone of R.J. Reynolds's category-management process for convenience stores. "A category advisor is a manufacturer that understands the values of all brands in the category, as well as how the category affects other product sales, and structures all of their recommendations accordingly," explained Jim Maguire, senior vice president of sales.

The total-store strategy for the tobacco category is important for the success of convenience stores, Maguire said. "Adult smoker foot traffic is critical to the c-store industry's profits. According to the *Convenience Store News* Out-of-Stock Study, the average adult smoker visits a convenience store 5.6 times per week and spends an average of $5.12 per visit," he noted. "This $28.67 in sales per week, per adult smoker speaks for itself relative to the importance of maximizing store profitability."

R.J. Reynolds, based in Winston-Salem, N.C., brings a range of resources to the tobacco category-management process. "We use real-time data provided by direct accounts on shipments to each retail outlet and, whenever we can, retail scan data to provide our total category recommendation," Maguire said.

Field personnel are equipped with automated tools that enable them to advise retailers in three important areas. The first is determining the brand-style selection required to satisfy a target percentage of adult smokers in a specific geography. The second is identifying the manufacturer programs that should be combined to maximize adult smoker needs relative to promotion levels and maximizing the number of brands that can be promoted. The third area is merchandising the category from the standpoint of "presentation to the consumer," said Maguire. "What is the ideal capacity for maximum turns/minimal out-of-stocks? How can the manufacturer-program requirements be incorporated into the available space?"

> "R.J. Reynolds considers the overall category needs in our stores, not just their own products. They are continually looking for ways to help us, which could involve developing fixtures to maximize our space or direct mailers for our markets."
>
> — Mary McCombs
> Sheetz Inc.

Determining product selection and developing the appropriate SKU mix for a convenience store outlet requires examination of all brands. "We would point out that several smaller share brands—those that are seldom, if ever, promoted—have the highest level of brand loyalty. Consequently, adult smokers who can no longer find their brand will quickly take their $28.67 per week contribution to another store that carries their brand," Maguire explained. "Reducing inventory costs has to start with getting proper inventory levels on each brand style in line versus simply discontinuing everything that doesn't sell a carton a week."

R.J. Reynolds has also studied the impact of tobacco products on other categories. Maguire outlined that retailers must consider the impact of increased cigarette sales on their five other top sales/margin items. Another question to ask is whether the retailer can afford to trade off margin on cigarettes to drive foot traffic on higher-margin items and drive a higher overall profit for the store.

"We'd like to thank the retailers who have valued our contribution enough to nominate R.J. Reynolds for this recognition," Maguire said. "We will continue to provide all of our expertise to those business partners who are truly committed to growing their total business and to providing R.J. Reynolds a fair chance in their stores to grow our business. It's a win-win situation!"

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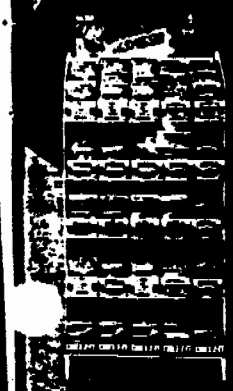
Your profits soar when you offer more.



Multiple unit pricing does more than offer your customers a good deal. It's also an excellent way to get your sales flying. Usually in the neighborhood of up to 32%.* That's why Keebler offers a variety of products packaged especially for multi-unit sales, as well as plenty of attractive displays to promote these outstanding values.

Like all Keebler products, our highly successful 2 for $1 lineup features widely recognized brands and Keebler's unique Elfin Equity. And we offer a wide selection of other equally tempting products and price points.

Contact your Keebler distributor and discover all the ways Keebler can help get your sales off the ground.

Keebler

The only cookie & cracker company to be named Category Captain.

*"An Anchoring and Adjustment Model of Purchase Quantity Decisions" from Journal of Marketing Research Vol. XXXV (February 1998), 71-81

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Best-of-Class Suppliers

The following Best-of-Class category-management partners nominated by convenience store retailers share their experience and some of the secrets of their success.

Convenience Marketing Inc.

Convenience Marketing has a department dedicated to category management, according to vice president, sales development, Bill Price, who added that the Austin, Texas-based food broker's entire organization assists in the process. "The organization provides a resource to facilitate linking manufacturers and retailers," said Price.

Utilizing syndicated data and industry resources, Convenience Marketing determines core-item selection that can be customized by market. State-of-the-art planogram systems are then used to develop photo-quality shelf sets for retailer implementation. Business development managers oversee each project and provide support in the form of consumer research and brand information. The field sales organization works with buyers and category managers to finalize the product-selection process and ensure implementation of the planograms. "It's a team effort in partnership with the customer," said Price.

"Convenience Marketing has consistently and promptly offered assistance," said Rebekah Ensley, category management analyst at H.T. Hackney Co., a wholesale distributor based in Knoxville, Tenn. "They provide complete, live-image planograms and their recommendations are valid and supported."

Core-Mark International

Core-Mark International is committed to objective category management, according to Chris Walsh, vice president of merchandising. "We start with fact-based, consumer-driven schematics," he said. But that is only the foundation of the company's category-management process.

"We partner with retailers in maximizing their real estate," said Walsh. "Especially with the recent dynamics of the tobacco industry, we try to help retailers understand measurements of profitability, how certain categories are driven more by impulse and the value of activity-based costing."

> "If we help a retailer eliminate a half dozen suppliers, we afford that store over $10,000 in activity-based savings per year, while increasing sales and profits."
>
> — Chris Walsh
> Core-Mark International

While manufacturers and distributors have made considerable gains in ECR-driven logistical efficiencies in recent years, Walsh stated that the benefits of the processes for retailers are largely untapped. "One consultant estimated it 'costs' a retailer $35 per week to transact business with each supplier. If we help a retailer eliminate a half dozen suppliers, we afford that store over $10,000 in activity-based savings per year, while increasing sales and profits," he explained, adding that savings can be realized on the bottom line or used to increase customer service and store cleanliness.

Core-Mark's primary program for achieving these objectives is SmartStock, which enrolled 3,000 retailers in 1998. The results have been positive. "For example, we worked with Quik Stop Markets [Freemont, Calif.], which has over 100 franchisees making independent buying decisions at every store. We utilized SmartStock and our category-merchandising tools to provide consistency, increase sales across commodi-

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ties and eliminate 500 transactions per week from the stores," Walsh said.

Van Tarver, president of Quik Stop Markets Inc., acknowledged Core-Mark's contribution. "The company really cooperated with us in our recent remerchandising program. Core-Mark helped to eliminate slow-moving items through category management and improved the out-of-stock situation in our stores," he said. "The result has been a positive move in sales. One store, in fact, experienced sales increases at double the rate of stores that had not yet been remerchandised. Core-Mark has been a flexible and cooperative partner."

Based in South San Francisco, Core-Mark's approach is to go beyond the textbook definition of category management. "Whether it's helping to implement POS, reduce tobacco inventories or stimulate sales through promotion or merchandising, we are committed to partnerships that assist retailers in being more profitable operators," said Walsh.

Douglas Distributing

Ron Feulner

For family-owned Douglas Distributing, based in Salt Lake City, Utah, keeping up with coffee trends and the specific needs of its convenience store customers is the key to successful category management. "Our strength lies in maintaining a complete focus in one convenience store category—coffee," said Ron Feulner, owner. "We can focus directly on this category in this market [Utah and surrounding states]."

Douglas Distributing utilizes a sophisticated computer system to track retail customer activity at the store level, and combines that up-to-the-minute information with its local store knowledge. "We have six people in the field, and hold fast to a hands-on approach to serving our customers and creating programs that serve their needs best," said Feulner, who himself visits stores twice a month. "I want to rub shoulders with the people who work the stores every day. It's a great way to measure customer satisfaction and find out exactly what the consumer wants."

"Douglas accepts responsibility for equipment, service and product," said Bill McGregor, foodservice director of 140-store Maverik Country Stores in Afton, Wyo. "They offer unbiased, professional advice, current category information, price protection and rapid response. Douglas Distributing is my coffee category expert."

Eby-Brown Co. L.P.

"Eby-Brown services retailers of all sizes, from the mega-chain to the individually owned store," observed Tom Oktavec, vice president, marketing of Kocolene Marketing Corp., operator of 43 Fast Max stores, based in Seymour, Ind. "Each of their customers is treated with care and respect. Eby-Brown is a true partner to our industry."

That ability to service both large and small retailers stems from Eby-Brown's approach to customer service, and also its technical capabilities. Convenience store operators that are scanning benefit from Eby-Brown's item-information database and assistance in POS setup, and ongoing support in the format of the POS software selected by the retailer, according to Ron Coppel, vice president, business development. For retailers who are not scanning or do not have data-mining capabilities, Eby-Brown has developed IRIS (Intelligent Reporting Information System), which provides subscribers with secured access to their velocity information 24 hours a day, seven days a week via the Internet.

Naperville, Ill.-based Eby-Brown also has developed category-management practices to maximize consumer value and category asset performance, said Coppel. "We assist retailers by integrating our category expertise into our customers' strategic business process, providing the exchange of information and the willingness to share pertinent data, and jointly identifying with retailers and manufacturers opportunities to grow category sales and profits," he said. Eby-Brown then utilizes Spaceman tools to develop planograms.

Frito-Lay Inc.

"Frito-Lay is progressive and cooperative on category management," observed Arnold Kimmel, CEO of Quickie Convenience Stores of Ottawa, Canada. "They have the tools and execute their commitments and obligations well. Frito-Lay has a complete product line, but respects their competitors."

That depth of commitment, resources and objectivity stems from Frito-Lay's approach to category-management for convenience stores. "Category management is a journey, an evolving and ongoing process," said Dave Boissevain, director of category management for the Dallas-based company. "We take a fact-based, results-oriented approach. We work with retailers to build an integrated category-management plan that maximizes the key drivers and fits into the retailer's overall strategy. Partnership with the retailer is critical in developing a category plan that can be implemented."

Frito-Lay's category-management process is grounded in the consumer, and Boissevain defined several channel-specific drivers: Right Assortment, variety optimization; Right Presence, landmark merchandising; Rich Promotion, bundled tie-ins; and Right Service, direct-store-delivery (DSD) system. A proprietary software program, Right Set, has been developed to maximize the assortment and landmark merchandising drivers.

"Right Set is a consumer-centered, fact-based approach that maximizes

> **"They have the tools and execute their commitments and obligations well. Frito-Lay has a complete product line, but respects their competitors."**
>
> Arnold Kimmel
> Quickie Convenience Stores

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salty-snack sales and profits for convenience stores," said Linda Seatvet, convenience store channel category manager. "The flexibility and targeted nature of the Right Set program is key because it reflects retailing realities. The population diversity across a chain's marketing area can be enormous, running the gamut from highly affluent suburbs to blue-collar neighborhoods, and c-store chains may have a wide variety of store formats. Right Set assortment and merchandising solutions can be custom targeted on a store-by-store basis."

Frito-Lay continues to be committed to fact-based, consumer-led, ECR-smart category management. "Our approach is grounded in the consumer, with the objective to build a category plan that leverages the expandable nature of snacks," said Boissevain.

Gatorade North America

Gatorade North America's proprietary category-management system, Cooler P.R.O., is gaining wide acceptance by convenience store retailers, according to Jim Brooks, assistant manager, capability development. The system incorporates analysis of consumer insights with a review of convenience store retailers' promotions, pricing, product assortment and available space to develop assortment recommendations and planograms for the non-alcohol beverage segment.

Adding to the strength of the system, Gatorade, a division of Chicago-based Quaker Oats Co., recently initiated a new structure that enables more field support for category management in convenience stores. Six regional customer business centers and a national accounts customer business center have been established, and the manpower behind Cooler P.R.O. has been tripled in the past year.

"The category-management expertise for Cooler P.R.O. really lies in our field-based category-management teams," said Brooks. "Our strategy is to sit down with the retailer, determine their goals and source their data across the beverage category. Then, we use the Cooler P.R.O. system to develop unbiased recommendations to maximize retailer sales through the cooler door."

"We completed a major cold-vault reset in 1997, and Gatorade was the category partner for the entire non-alcohol cooler," said Tamara Fowler, associate category manager at Wawa Inc., a 470-store chain based in Wawa, Pa. "Gatorade is one of the most knowledgeable and dedicated category-management companies in the industry."

Syndicated data on consumers and convenience stores, as well as custom market reports on the local competitive set, are utilized by Gatorade in the category management process. Custom consumer audits and assessments of out-of-stock situations are another tool.

Gatorade's process focuses mainly on the cooler door and addresses all non-alcohol beverages, not just sports drinks, Brooks explained. "Cooler P.R.O. is designed to analyze and create recommendations for the entire category. Taking a broad approach is the best way for convenience retailers to maximize sales and profitability of all non-alcohol beverages."

H.T. Hackney Co.

Rebekah Ensley

"Our role is to provide our customers with the best data resources and space-management tools to identify efficient product assortments and develop strategies to effectively compete in their marketplace," said Nancy Tucker, director of marketing. "Our goal is to provide category information, recommendations and customized planograms."

H.T. Hackney, based in Knoxville, Tenn., utilizes several tools in the process, including syndicated and internal data, Spaceman planogram systems and store-level reports. Planogram development is supported by product-mix analysis, pricing analysis and programs focused on increasing total category sales and profitability.

A full-time category-management analyst, Rebekah Ensley, is dedicated to administering the process for retail customers. Each of Hackney's 24 distribution centers is provided a complete category planogram guide and is staffed with merchandising experts to conduct analysis of store activity.

"H.T. Hackney has formed a great partnership with both its customers and manufacturers, and bridges that partnership on a win-win basis," said Dan Fleming, director of operations for Knoxville, Tenn.-based Pilot Corp. "Their strength is in customer service. They also have a wealth of information at easy access and are current with the latest and greatest."

Keebler Co.

"Keebler has provided good support and been very active in the category. Theirs is a comprehensive category-management program that looks at the entire category, and the Keebler people are always available to conduct analysis, create planograms and do resets," said Randy Meyer, senior vice president of Krause Gentle Corp., operator of 158 Kum and Go stores based in West Des Moines, Iowa. "We've enjoyed an excellent long-term relationship with Keebler. It's a positive partnership."

Krause Gentle's experience is the result of Keebler's efforts to focus on the goals of the convenience retailer in the cookie and cracker category. "We work closely with the retailer to understand their objectives and establish plans that meet those objectives," said Mark Clark, business development manager for the convenience division at Keebler. "In light of the number of categories and nature of the convenience

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store business, we simplify the process and attempt to make it easy for the retailer to execute against."

Elmhurst, Ill.-based Keebler deploys more than 35 field personnel and a broker sales force of 600 to facilitate category management with its convenience store partners. Culling data from syndicated and proprietary resources, Keebler then applies its own knowledge of the cookie and cracker category and develops planograms using state-of-the art space-management tools.

Cookies and crackers present a unique challenge to convenience store operators that Keebler assists retailers in addressing, according to Clark. "In convenience stores, this category is not the top-of-mind snack option for the consumer entering the store. There's a big opportunity to grab the consumer, however, with placement and pricing," he said. "Cookies and crackers are typically merchandised in the center aisles. By adding secondary placements and offering attractive value pricing, you can move the consumer to the category as they make their snacking decision."

To that point, Keebler's two-for-$1 program is merchandised with counter and floor racks. "Two-for-$1 can increase the purchase frequency by as much as 32 percent because it creates multiple purchases," said Clark. "The rack and value offer makes these products top-of-mind because the consumer anticipates the availability. The presentation drives impulse sales as well."

Clark explained that Keebler's category-management strategy involves developing solid working relationships with retailers and objective analysis and recommendations. "While it may drive immediate results, our category management strategy is very long-term focused," he said.

McLane Co. Inc.

"McLane Co.'s approach to category management is to give the consumer what they are looking for: well-known, well-recognized, high-quality products at a retail that allows them to purchase now and repurchase in the future," said Bill Fendrick, vice president, merchandising for Temple, Texas-based McLane. "The consumers' needs have to be focused on in a way that enables them to choose and purchase the key, core items within a category. Our focus is to make the retailer aware of the key national and regional core items within each category, and then offer these items with sound, fair pricing backed up by retail support from the vendor."

To facilitate that strategy, McLane has developed a decision-support system (DSS) that allows its merchandising experts to zero in on each category. "We then use this information in conjunction with our demographic-profiling system to present fact-based recommendations," said Fendrick. "Using these tools, we are able to work with and support both the vendor and the retailer in their businesses."

Each of McLane's 15 distribution centers has a merchandising team dedicated to providing category-management support. The merchandising teams are supported by merchandising managers located at the McLane corporate-support center. "Our role is to be an unbiased presenter of the facts and category statistics that are now available in the industry," added Fendrick.

In conjunction with the DSS system, McLane has developed its Stars and Star Gazer programs to allow retailers quick and convenient access to their item and category information. The commitment to category management and sophistication of the tools utilized in the process has made fans of convenience store retailers.

"The use of McLane's Stars and Star Gazer tools allows us great ability to look at all McLane product categories," said Artie Smith, marketing manager for Kent Oil Inc., a 25-store operator based in Midland, Texas. "We can reset much faster to adjust to trends and change problem areas quickly. We feel McLane's support really gives us the advantage."

> **"We can reset much faster to adjust to trends and change problem areas quickly. We feel McLane's support really gives us the advantage."**
>
> —Artie Smith
> Kent Oil Inc.

Miller Brewing Co.

Jeff Schouten

"Miller has recently teamed with c-stores in *The Miller Advantage*," said Kendra Kuehl, buyer/merchandising manager for Bosselman's Pump & Pantry, Grand Island, Neb. "Miller is publishing information on category management for us, the retailers. They know that without category management, we will not be viable competitors in the future."

The Miller Advantage, a publication featuring consumer insights and key category-management issues, positions the brewer to collaborate with retailers on solid business strategies and objective plans, according to Jeff Schouten, Miller's director of category management. "Category management is something we do with, not for, the retailer," he said. "That type of collaborative effort becomes a win-win-win, benefiting the manufacturer, the retailer and the consumer."

Milwaukee-based Miller not only brings category-planning expertise to the process, but also several tools to speed analysis and deliver insights, including the CoolerMAX multi-category cooler simulation software. Recently, a price elasticity model was created to demonstrate effective pricing in a given market. A proprietary outlet-level analysis tool identifies distribution voids and ensures core items are stocked in each store.

A new element of the brewer's repertoire is Miller Tag Manager. The proprietary program generates precut shelf tags displaying the shelf set developed for the space that can be affixed to the

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front and/or back of the cooler. "One of the biggest issues we've identified is the failure to follow up and implement the plans." Schouten explained. "Tag Manager enables implementation at the store level so that the set meets the plan volumes."

All Miller chain account managers are trained in category-management analysis and plan development, a valued resource for retailers. "Jim Ebert [our Miller representative] put talk into action by implementing five crucial category-management steps in one of our major markets to pilot the program," said Gregg Wingert, senior vice president of marketing for Houston-based Coastal Mart Inc. "He succinctly summarized and documented each step, applying top-notch category management activity. It is an excellent effort."

Miller's approach is to customize the category-management process to objectively meet the business needs of the individual retailer. "Objectivity is a big issue," Schouten explained. "When we're objective, we're gaining sales for the category. We all win."

M&M/Mars

M&M/Mars works with its retail partners to better understand consumer shopping behavior, an effort that proved vital in identifying opportunities within the confection category at Equilon Enterprises' stores. "With innovation and participation in our 1998/1999 advertising promotion, M&M/Mars helped increase our candy category sales by 12 percent," said Robb Harling, Ohio ETD franchise representative, Equilon Enterprises. "The company's representatives call on our stores frequently and they participate in our monthly special programs. M&M/Mars provides excellent planogram support, and they are very involved and active in our markets."

Harling's 140 stores in the Cleveland and Columbus, Ohio regions are enjoying the benefits of M&M/Mars's comprehensive approach to category management. "We're striving to be the primary source for confectionery category management in convenience stores," explained Steve Collins, national sales director, category leadership for M&M/Mars, based in Hackettstown, N.J. "We work as a true partner with retailers, helping them identify and capitalize on opportunities to grow their confectionery sales and profits."

M&M/Mars brings a wealth of resources to the process. First and foremost is its category leadership team, whose 45 field associate members are certified through a 38-day training program. Ten members of the team are dedicated to collecting consumer information, conducting trade-channel research and developing category-management tools, which the teams' field associates then customize to meet the needs of retail customers. "The quality of our certification process and the significant size of our Category Leadership Team speaks to the commitment M&M/Mars has to this ECR initiative," said Collins.

M&M/Mars soon will expand its portfolio of category-management tools with the addition of a major proprietary convenience store study. "We conducted a statistical analysis of the conditions in the marketplace to identify top-performing stores and determine what distinguishes them from average and below-average performing stores," Collins explained.

More than 600 convenience and petroleum stores were involved in the study. M&M/Mars investigated several issues. Where should the primary confectionery selling location be? What items should be carried? How should they be merchandised? What is the role of promotion in increasing confection sales? "The findings will cover some impactful best practices, and we'll share those and more during this year's NACS convention," Collins said.

> "With innovation and participation in our 1998/1999 advertising promotion, M&M/Mars helped increase our candy category sales by 12 percent."
>
> Robb Harling
> Equilon Enterprises

M&M/Mars's category-management strategy is based in its commitment to partnering with its retail customers. "Success in category management is realized when joint efforts between our customers' and us result in improved category sales, profits, return on investment and consumer satisfaction," Collins explained. "Each customer has specific objectives they need to meet to optimize category productivity and meet the needs of their consumer, and we're dedicated to assisting in that effort."

Nabisco Inc. (Planters Inc. and Lifesavers Co.)

Nabisco's dedicated convenience store channel marketing teams have a singular goal —to help operators maximize total store profitability and productivity. The strategy for achieving that involves a hands-on approach that leverages Nabisco's understanding of consumer behavior in convenience stores against its category management and merchandising expertise, according to Billy Henry, director of marketing for Planter's immediate consumption and Cornnuts businesses. "The approach is to transform data into actionable solutions that drive total store productivity for the retailer," he said.

Those actionable solutions involve increasing transaction size by applying Nabisco's extensive consumer insights. "We focus on shopper tendencies versus demographics," Henry said, adding that Nabisco has developed insights into shopper behavior based on frequency of visits to convenience stores and traffic patterns. From this, Nabisco has developed what it calls its "Double D" strategy of linking destination categories—such as beverages and the checkout station—with discretionary categories, which include snacks and confections.

Two Nabisco programs are built on

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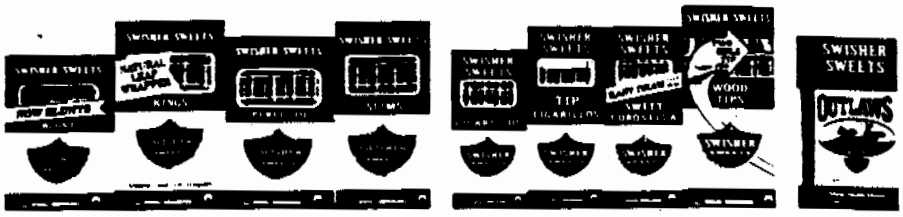

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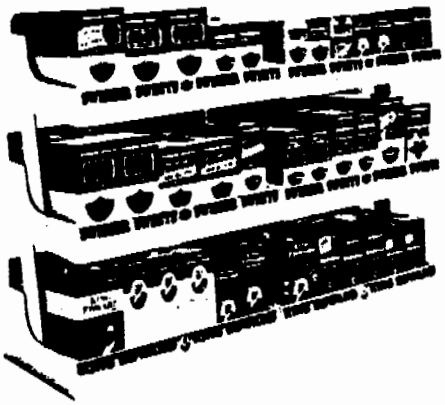

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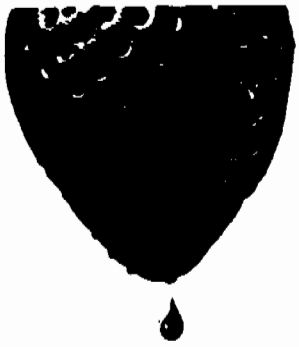

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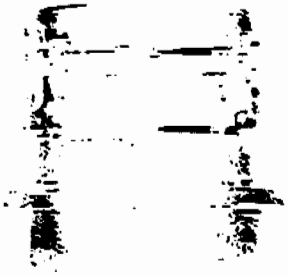

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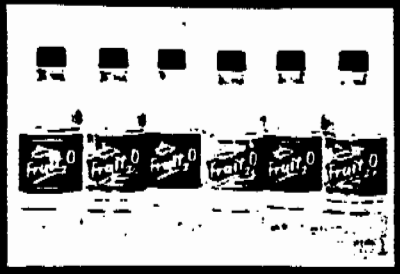

Clearly, spring water is where the action is. Already bottled water represents 23% of the non-carbonated, single-serve segment in c-stores and sales are up +16%! And, like water, Fruit$_2$O also has all-day, anytime consumption appeal.

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that foundation of applying consumer insights to driving increased transactions. The first is Lifesavers Co.'s SMART (Successful Merchandising Assures Rapid Transactions). SMART addresses the confections category with learnings garnered from alliances with eight convenience store companies, combined with Nabisco's understanding of shopper behavior. "We link the high-traffic zones with consumer behavior indicative of that zone," said Mary Jean Longo, senior manager, category management for Lifesavers Co. "For example, beverage is a destination category, and we know 70 percent of beverages are purchased in combination with a snack. So we advocate placing confections next to destination categories such as beverages to drive that impulse sale and increase transaction size."

Secondary placements play a key role the process, and Nabisco studies show that sales of confections can increase as much as 43 percent when the products are moved from the aisle to the checkout. An increasingly important destination/discretionary product match is the coffee station and breath-freshening mints and gum. "The value of placing confections in high-traffic and destination locations is unmistakable," Longo said.

Placing salty snacks in high-traffic retail locations is also a key strategy for the Planters' Pacesetter 2000 program. In tests, front-end merchandising units for Planters products generated a 62 percent increase in sales for Planters and an 8-percent increase for the total snack category overall, according to Henry. "Pacesetter 2000 focuses on reducing duplication and adding variety. The next step is to increase transaction size by linking the category with destination categories in cross-promotional activity and secondary placements," said Henry.

Retailers such as Kendra Kuehl, buyer/merchandising manager at Bosselman's Pump & Pantry, based in Grand Island, Neb., have found Nabisco's category-management personnel and programs to be valuable. "[Nabisco representatives] are willing to come in and evaluate the categories with us, looking at our movement and national numbers, and put together planograms accordingly," she said. "They set up the section with us and we continually evaluate the area. [Nabisco personnel] are objective and include all products [participating] in the category in the evaluation and planograms."

Nabisco's cross-promotional strategy is now being taken to the next level through two 1999 promotions with The Coca-Cola Co. This spring and summer, the Ice Breakers gum brand will be linked with Nestea Cool in a promotional tie-in program called "Cool to the Core." Ice Breakers will be merchandised in custom display units near beverage coolers. Nestea Cool bottles will include instant win sweepstakes pieces. Prizes include 35 cents off Ice Breaker products. Planters products will join Coca-Cola in the "Refreshing Combo" program, which brings together Planters Super Tube nuts packages with 32-ounce fountain Coca-Cola drinks. A pre-pack display and in-store signage will support the "Refreshing Combo" promotion at retail.

"These elements all come out of our ongoing research and efforts to stay in touch with the convenience store consumer," said Henry. "Then we build plans that satisfy their needs and the needs of the retailer."

Nestle USA Ice Cream Division

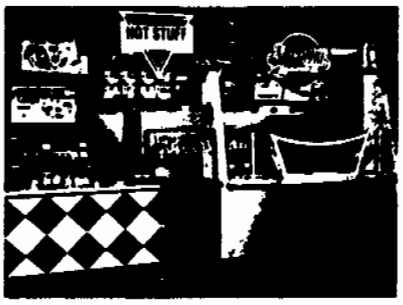
The category-management process undertaken by the Nestle USA Ice Cream Division begins with a solid understanding of the convenience store customer obtained through independent research, secondary research and syndicated data. "Key components of our program include use of our powerful Nestle brand name and its lineup of premium-quality products, careful selection of products that are well-suited for the individual store locations, strong advertising and promotional support, as well as an impactful merchandising program," explained Kelly Atkins, director of impulse marketing.

Nestle sales teams, including the impulse or "alternative channel" team, work closely with convenience store retailers to tailor product selection to meet their shoppers' needs and their business needs. Nestle's exclusive distributor network also plays a crucial role. "Part of the process involves joint development of a planogram, which helps to target kids, teens, adults and the entire family. Distributors are adept at managing the process in a comprehensive fashion," said Atkins. "We also address opportunities through a variety of programs, including account-specific promotions."

Dick Kolberg, sales consultant for Houston-based Equilon Enterprises, has experienced a productive partnership with his Nestle sales representative, John Artesi. "He does a great job assessing appropriate product selection and helping determine the most effective location for the freezer box. And, he is a master at promotions," he said. "We have come up with some ideas, and he has just run with them. The full Nestle merchandising program, as John implemented it, drove a sales increase in one location of 300 percent. We also have an excellent Nestle distributor in Rock Island. Few companies do as good a job. Nestle is a first-class operation."

Nestle prides itself on a hands-on approach to category management. "We view our role as that of a partner with the retailer," said Atkins. "Our mutual goal is to optimize ice cream category sales and profits."

Orion Food Systems International Inc.



Orion Food Systems has proved its excellence in foodservice, according to Corey Burgin, vice president of Joe Bob's Inc. of Sulphur Springs, Texas. "Orion provides high-quality products for

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their franchise partners, whether you are an independent or a multistore chain operator," he explained. "Orion provides us with excellent operational support through knowledgeable people, practices and ideas. They have developed high-quality marketing materials to build brand identity from in-store POS to exterior signage, while still allowing us to 'own' our food-court concept. All of this, and a great return, results in excellent category management."

Retailer satisfaction with the five Orion foodservice brands stems not only from the product quality but also from operations support. A key point of differentiation for Orion, according to executive director of marketing Greg Breukelman, is its guaranteed operational support system.

"We have territory consultants assigned to each Orion location, and we guarantee that they will visit that location every 21 days or we will issue the retailer a check for $1,000," he explained. "Convenience retailers have a complex business to run, and need support every step of the way, so we make sure they get it."

In addition to field personnel support, Orion develops training videos, operations manuals and POS systems for their retail franchise partners. Another resource is promotion, which occurs on the national level and via local store marketing. "Part of the role of the territory consultant is to develop local store marketing that helps the retailer get involved with their community," Breukelman said.

The foundation of Orion's category management is its vertically integrated structure. The company manufactures, warehouses and ships all product. "This gives us incredible control of product quality, and enables us to be flexible in introducing new products," said Breukelman. "We take a lot of pride in our products so our retail partners can do the same."

Pepsi-Cola Co.

Pepsi-Cola took its commitment to consumer-based programming to the next level when the company integrated its customer marketing and category-management efforts into one business practice last year. "Historically, suppliers have helped develop category plans in isolation of marketing program, which are developed on an opportunistic basis," said Greg McIntee, vice president, customer marketing and category management. "We've brought these two functions together. As result, the category plan, which must reflect and support the retailer's overall business plan, and the customer marketing solution we build can effectively address the strategic needs of that business."

The organizational change reflects Pepsi-Cola's position that category management must be focused against the consumer. "We have a fundamental belief that satisfied consumers drive category growth," McIntee said. "This new structure allows us to work against that principle."

> **"Pepsi has been proactive with new concepts and quick response to our needs. The company goes the extra mile to offer competitive intelligence."**
>
> —Tony Bandiera
> Chevron Products Co.

"Pepsi has been proactive with new concepts and quick response to our needs," said Tony Bandiera of Chevron Products Co. Inc., based in San Francisco. "The company goes the extra mile to offer competitive intelligence."

Pepsi-Cola's consumer-insights toolbox includes E-Lab, a video study of consumer behavior, and frequent merchandising audits of convenience stores. "We have a real dedication to really understanding the c-store shopping experience. Then, we work objectively with customers in partnership to develop consumer-based solutions to drive the entire category," said McIntee. "The approach is to wed consumer insights with

technology to optimize the cold vault."

The Right Choice is the primary optimization tool applied by the soft-drink marketer, and is utilized by category managers and sales representatives in the field, according to Jodi Rumble, channel strategy and marketing manager, convenience stores. "Research tells us that 75 percent of consumers know what brand of soft drink they want before they walk into the store. Knowing that, we look to maximize the cold-vault area—optimizing it against the SKU's that turn the greatest profit—so consumers can find what they want quickly," she explained.

Product and package development is another element of category management that is consumer driven. Pepsi-Cola's recent introduction of Pepsi One is an example of the company applying consumer insights and an understanding of retailer needs, according to McIntee. "Pepsi One shows our understanding of what consumers want, and developing a product that creates an opportunity for retailers," he said. "The majority of the sales achieved thus far by the brand have been incremental."

Retailers are appreciative of Pepsi-Cola's consumer-focused approach. "Pepsi's service and promotions have led this company to a leadership position in this market," observed Steve Hayward, retail supervisor for Salt Lake City, Utah-based Sinclair Marketing.

Pillsbury Bakery & Foodservice

Identifying retail customer goals and developing recommendations and product matches to help them meet those needs is the strategy employed by Pillsbury Bakery & Foodservice in assisting convenience store operators with cate-

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gory management. "We look at their approach across foodservice categories and determine where they are trying to grow and where the opportunities lie," explained Keith Dozier, marketing manager. "Then we identify the products, training and equipment that will facilitate that strategy."

Pillsbury personnel provide analysis of profits and margins, and serve as consultants for proprietary foodservice program development efforts. One area of concentration is controlling labor costs. "Often, additional labor is not needed to develop new and profitable programs," Dozier said. "For example, we might recommend to a retailer several ways to use the same product to generate additional revenue without increasing labor costs."

Much of Pillsbury's new product development is geared toward helping retailers hold down operating costs. For example, the recently introduced freezer-to-oven cinnamon rolls do not have to be thawed or proofed, reducing the prep process by two steps, Dozier said.

"Pillsbury offers quality products, promotional support and reliable technical knowledge and assistance," observed Bill McGregor, foodservice director for Maverik Country Stores, based in Afton, Wyo. "The company is an excellent partner."

Procter & Gamble

"We see our role as an objective facilitator of the NACS category-management process," said David Lane, corporate convenience industry representative for customer business development at Procter & Gamble. "We bring proprietary tools for analysis, resources in the form of people and expertise, and benchmarks industry-wide and outside the convenience channel."

Procter & Gamble was nominated as a Category Captain in both the grocery and health and beauty aids categories.

Grocery

Procter & Gamble's Grocery College is a workshop that walks retailers through the NACS six-step category-management process, assisting them in identifying the role of grocery and develop strategies and tactics for improving performance. According to Bill Traywick, operations manager, category management, 80 percent of grocery volume typically comes from 170 to 200 items. "However, most convenience retailers have 500 to 800 SKUs on the grocery shelves," he explained. "Consumer data shows 10 categories drive fill-in shopping. What Grocery College does is focus retailers on the fill-in shopping products, their role and the strategies and tactics to drive growth."

Nice N Easy Grocery Shoppes Inc. of Canastota, N.Y., realized immediate results after attending Procter & Gamble's Grocery College, according to Matt Paduano, director of purchasing. "Bill Traywick helped us focus and develop a mission statement for grocery. We developed power categories," he explained. Nice N Easy has reduced grocery SKUs by increasing facings of power category items, and is the in the process of re-merchandising its 100 stores. "We've seen faster turns within a week or two. The results are positive."

Procter & Gamble is working with Kellogg's and also the dairy industry to provide retailers with additional data to drive the milk, bread and cereal categories. "Milk and bread are immediate indicators of the grocery business a retailer is doing and can do," said Lane. "But those are problematic categories, so we are bringing in fullness of data to help retailers maximize the entire opportunity." The company is now developing College programs for the cooler door and salty snacks.

> "Procter & Gamble has moved the health and beauty aids category ahead light years for c-store retailers."
>
> —Fran Duskiewicz
> Nice N Easy Grocery Shoppes Inc.

Health & Beauty Aids

"This is a category that has not been maximized by convenience operators through the years. Procter & Gamble has moved it ahead light years for convenience retailers," said Fran Duskiewicz, vice president of operations for Nice N Easy.

The chain has utilized the Procter & Gamble HBA College program to increase the efficiency and productivity of the health and beauty aids category. Using a workbook format, HBA College is based on the NACS six-step category management program, and provides guidelines for retailers to manage the category.

HBA College assists retailers in addressing key issues for the category —identifying its role, assortment, item duplication and pricing strategies. "For example, if you have eight different versions of pain relievers, HBA College asks if you should have such duplication or look to variety," explained Traywick. "Then we look at the fact that consumers are aware of cross-channel pricing on HBA. We look at the appropriate pricing strategy."

"HBA is an arena most in the industry is not comfortable with and has little knowledge of because there are so many SKUs and so much competition," said Lane. "If it is strategically correct for the retailer to develop the category, they can attract consumers with selection and competitive pricing. The opportunity exists."

S&D Coffee

"For years, vendors to this industry were salespeople. At S&D Coffee, we're now consultants. When you sell

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the account, that's when the work really begins," said Dale Lozier, vice president of the convenience store division at S&D Coffee. "Our job today is to aid in the development of programs designed to grow the coffee category, continually interjecting new life and keeping the interest of the convenience store customer."

S&D Coffee's category-management efforts are supported by an interactive approach to the process. According to Lozier, a task force comprised of S&D Coffee sales and marketing managers conduct evaluations of each account's coffee program as the basis of program development. "We survey the store owners and managers, analyze the customer base and competitive environment, evaluate the various footprints in a chain and determine the appropriate program for each type of store involved," Lozier said. "Using our own sales and marketing team's expertise, we develop programs that address issues and opportunities unique to that operation."

Areas examined include the total hot beverage program, coffee-product selection, merchandising, branding, coffee-station logistics and traffic flow in the store. "Convenience store retailers constantly ask, 'How can I improve my coffee sales?' You can provide the best coffee in the world, but if the station is set up inefficiently or the traffic flow from the station to the register is not easy, you can lose that customer," Lozier explained. "We work to make the entire coffee program work efficiently and with impact."

Equipment is a crucial element of successful coffee programs, and S&D Coffee extends its expertise to equipment selection and maintenance. That complete approach to managing the coffee category has proved beneficial to convenience retailers. "S&D Coffee has worked with us on store-specific promotions, and assists with equipment calibrations to provide a consistent product profile," said Ernie Howard, director of marketing for Favorite Markets, a 121-store chain based in Dalton, Ga. "We are very proud of our program—The Coffee Corner—and S&D has helped us maintain quality and grow the program."

Swisher International Inc.

As changes in tobacco product retailing regulations continue to restrict merchandising options, convenience store retailers must be vigilant in managing the category, according to Bill Dunn, director of national accounts for Swisher International. "Category management of cigars, moist snuff and chewing tobacco is now playing a bigger role in the success of the category. It's crucial that the selection, pricing and presentation is right, because space is increasingly limited," said Dunn.

To maximize the profitability of the space devoted to tobacco products, Swisher International's field sales force takes a very hands-on approach to assisting convenience retail customers. Analysis of syndicated data, supplier sales movement and retail account data, when available, is combined with Swisher representatives' knowledge of the local market and the retailer's needs to develop a customized planogram, utilizing the Spaceman program. Key elements of the program are developing the appropriate product mix for the store's customer base, maintaining inventory levels to prevent out-of-stocks, establishing competitive pricing and developing strategic product placement, according to Dunn. Another element supplied by Swisher is merchandising racks.

Swisher International continues to assist retailers well beyond planogram implementation, which has proved beneficial to retailers. "Swisher conducts a quarterly review based on our sales so we can see what's working and what's not," said Richard Mione, director of marketing of Worsley Cos. Inc., based in Wilmington, N.C. "With that review, we can make adjustments to the planogram or product selection to keep the category fresh. This has been an extremely important part of our category-management program."

In today's environment, aggressive category management of tobacco products is the most effective means of ensuring category profitability and productivity, said Dunn. "There really is no room for mistakes today, and that's how we approach the process," he said.

Tropicana North America

James Powers

"To be a powerful resource to the retailer, we must be impartial and let the consumer dictate the basis for our recommendations," said James Powers, vice president, retail sales for the immediate consumables division at Tropicana North America. "In-store real estate is very valuable, and allocating that space with the right SKU's to maximize the retailer's profits is the appropriate focus."

Tropicana's hands-on approach begins with the interaction between retailers and the company's customer managers and broker account managers. Manager of category-management Jamie Reid is then brought in to develop category-management plans based on the needs of the retailer. Reid applies the proprietary TrueView system to the process, which incorporates retailer data, syndicated data and Tropicana's channel expertise. The process involves six phases: information gathering and goal setting; cooler space to sales evaluation; SKU optimization model development; planogram development; consumer demographic analysis against the planogram; and finally, store resets by the field personnel. The process takes 60 to 90 days to complete.

Tropicana TrueView process is constantly evolving with the industry. "Today's TrueView is not tomorrow's TrueView. Retailers are automating at a

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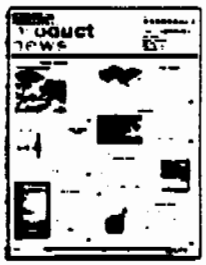

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Best-of-Class Retailers

Nominated for their category management prowess and program-execution skills by industry suppliers, the Best-of-Class retailers highlight the reasons for their success.

7-Eleven Inc.

"We take a macro-to-micro approach regarding category management," said David Podeschi, vice president of processed foods and non-foods for 7-Eleven. "We start with national industry consumer trends and seasonal change, and their impact on product sales. From there we drill down to individual item sales on an average per-store basis, also taking into account our internal analysis of category trends."

The benefits for 7-Eleven are a direct, positive impact on sales; reduced out-of-stocks; and improved display. "It makes the store easier to shop," he said. "Customers can find the fast-selling items easier. It also reduces out-of-stocks, because you're focusing your efforts on the fast-selling items."

Dallas-based 7-Eleven Inc. operates approximately 5,600 stores in the United States and Canada and, like most retailers, it has stepped up its use of scan data, especially over the past year. According to Podeschi, vendor alliances are also integral to an effective category-management model. The company doesn't establish "category captains" in the traditional sense, rather it partners with each supplier in a category. "For example, with soft drinks," Podeschi said, "we take our scan data, then we work with Pepsi-Cola, Coca-Cola and Cadbury to analyze results and develop appropriate action plans."

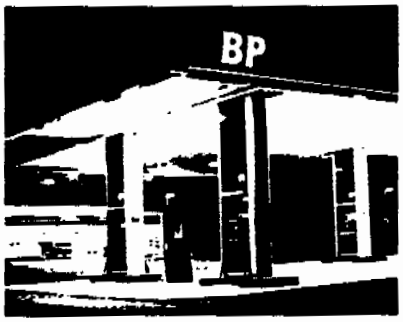
Podeschi added, "Forming supplier alliances provides you with a broader perspective on industry and consumer trends. We can identify certain trends that we might not have been able to see with just our own data, for example, if a certain subsegment is growing in the industry or if consumer trends show that a certain flavor type is trendy."

Establishing a network of suppliers also facilitates one of the most difficult aspects of category management: accommodating regional differences in product selection. "Through a combination of our centralized category managers working with our field merchandising staff and suppliers, we've been able to analyze the data centrally and regionally to implement the most effective strategies," Podeschi said.

A.T. Williams Oil Co.

A.T. Williams, based in Winston-Salem, N.C., is the parent company of Wilco Convenience Stores, operator of 120 stores. A.T. Williams devotes extensive energy to its market development and looks at every opportunity and profit center. That philosophy led one supplier to applaud A.T. Williams for its efforts in category management: "With several different store formats, the company is constantly changing. The company uses information from brokers and manufacturers' effectively to design planograms depending on each store's format."

BP Amoco Plc.



The recent merger between BP Oil and Amoco Corp. resulted in the formation of a new company—BP Amoco Plc.—but when it comes to category manage-

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ment, the proven rules still apply. "Our method combines the customer's point of view with a fact-based approach," said Marla Braswell, a manager of convenience store marketing at BP Amoco. "Each category is viewed as a strategic business unit, but there is also a strong focus on the customer, not solely on products."

The company has implemented several techniques for performing effective category management, including the use of scan data, syndicated data and vendor-supplied data for its 2,500 convenience stores.

BP Amoco also holds regular partnership meetings with its suppliers, bringing together each company's category managers, merchandisers and field personnel in an effort to develop effective, ongoing relationships. According to Braswell, establishing these alliances is invaluable. "Only suppliers can inform you about what your competition is doing and what the industry landscape is like," she said. "We only have our data, so if we're doing something wrong, we're going to continue to do it wrong. They are able to show us missed opportunities."

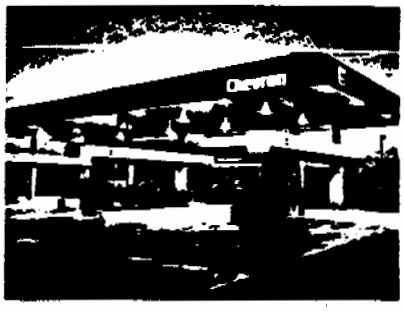
According to Braswell, since this category-management process was put in place, significant sales and margin increases have been realized, as well as a reduction in out-of-stocks. "Essentially, you're giving the right products the space they deserve for peak period sales."

Casey's General Stores Inc.

Casey's General Stores is making the most of all resources available in its approach to category management. According to one of the company's key suppliers, "Casey's has implemented a complex system to disseminate both its internal and industry data in order to make more effective category decisions.

"They believe in using as many proof sources as possible when adding a new item or promoting an existing one, and they believe in carrying a limited number of SKUs that turn very quickly. This approach helps keep inventory dollars to a minimum, while also maximizing turns." Headquartered in Ankeny, Iowa, Casey's operates 1,175 stores.

Chevron Products Co.



Data analysis and vendor alliances are the keys to Chevron Product Co.'s category-management approach. A division of Chevron Corp., based in San Francisco, the company owns and operates approximately 670 Chevron Food Marts, and views category management as an effective way to manage its c-store product offerings from a promotion, pricing and product selection standpoint.

The company rolled out POS scanning in 1998 and the information it collects is fed into a data warehouse, allowing category managers, category buyers and field merchandisers to analyze it and then develop recommendations. "Using this method, we can monitor movement of a specific item in a store," said Carlton B. Dallas, manager of convenience store retailing for Chevron. "We can carve out specific areas to analyze and we can also overlay a matrix of space allocation in terms of return on inventory investment."

According to Dallas, Chevron's approach has resulted in an upward sales trend. "Since implementing scanning last year, we've seen nearly 20 percent same-store gains in gross profit sales and dollars," he said.

Chevron also relies heavily on vendor partnerships. "Vendors are key elements of our category-management strategy," Dallas said. "Forming alliances allows for the mutual sharing of ideas to improve the efficiency of the supply chain. For example, we can begin to take a much broader look at what opportunities exist to increase both consumer service and sales."

Chevron works closely with the National Distributors Alliance and key partners such as Core-Mark and, according to Dallas, these relationships are constantly being strengthened. "The integration of data throughout the organization and between the vendors and Chevron is something that can always improve," he said. "It's also very important that we, as a retailer, develop alliances with key suppliers, and that there's an element of trust and mutual intention to develop strategies that work best for both companies, and for the consumer."

Conoco Inc.

Category management is not something you do once and then walk away, according to Jim Macari and Sam Farace, who are responsible for category management at 275-store Conoco Inc., Houston. "For Conoco, it comes down to defining who we want to be in the marketplace, what categories are going to drive our business and what strategies we're going to put in place to achieve the desired results," said Farace.

A key element of the company's market strategy was developing a centralized approach to category management and, according to Conoco's suppliers, this helps the company consistently carry the right product mix in a particular region. Conoco's category-management team in Houston monitors store operations, inventory and product movement. "There are some things we still handle on a local field level, but it just makes sense to manage a vast majority of category management from a centralized location," said Farace. "For example, if we're doing a planogram for candy, we can do that more effectively from Houston using our regional scan data. We don't need to do it six different times out in the field."

The result has been a more effective link between corporate headquarters and the field, as well as a more streamlined process for analyzing data and sending it back out to the stores. Since Conoco first started down this centralized path three years ago, the company has seen strong double-digit growth in both revenue and margin dollars on a same-store basis.

In 1998, Conoco also conducted monthly "supplier roundtables," bringing

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together 15 of its key suppliers. "We spent a day with them, asking them where they saw the industry headed and where they saw consumer trends moving in the next three to five years," said Macari.

Conoco also is driving continuous improvement in its stores. A "mystery shopper" is sent to stores once a month, monitoring customer service, merchandising, cleanliness and out-of-stocks. Also, the company's market merchandisers survey Conoco stores quarterly for planogram compliance, promotional implementation and correct pricing. "As of late 1997, when we implemented this program, our in-stock rate was 78 percent," said Macari. "We're now approaching 90 percent as of fourth quarter of 1998."

Dairy Mart Convenience Stores Inc.

Dairy Mart Convenience Stores is celebrating its 60th anniversary with a variety of events, among them a renewed focus on category management. Headquartered in Hudson, Ohio, Dairy Mart operates 600 convenience stores in seven states. According to Jay Ross, vice president of marketing and merchandising, as the company keeps growing, "we have to become more proactive in how we approach category management if we're going to continue to be successful."

A key element of this strategy, according to Ross, is spending more time listening to Dairy Mart customers in an effort to learn what they want from a convenience store, why they shop there and what categories are driving the business. To help accomplish this objective, the company has conducted several customer focus groups during the past year. Ross noted that maintaining an emphasis on customer needs and buying habits will help keep the company on the right track as it develops its category-management model for the future.

Ross also added that since the company presently does not scan, it relies heavily on its supplier partners to provide direction as far as category and product trends. One such supplier is Heinz Frozen Foods, which is working with Dairy Mart to develop store-specific planograms for the frozen-food category.

"Dairy Mart is very active in pursuing frozen-food sales and marketing opportunities," said Mark Kroll, associate product manager, channel development at Heinz Frozen Foods. "They are working to put together demographically specific planograms which are appropriate to their stores."

Equiva Services LLC

"Our category-management model centers on several elements," said Bill Pitocco, category manager, grocery, for Houston-based Equiva Services, operator of approximately 1,000 c-stores. "We analyze market-share data, consumer trends, competitive pressures, our information-technology capabilities and the financial realities of putting the right products in the stores."

Equiva Services uses space-management software to set its stores, including Spectra and InterCept. Suppliers noted that the company is very active in working with wholesalers and manufacturers to gather fact-based information for the development of planograms. Equiva acknowledges that it taps its supplier relationships for input. "Suppliers offer their own unique category-management expertise, especially regarding subcategories," Pitocco said. "I use the top two or three suppliers in a particular category to help me formulate strategies and to bounce planogram ideas off them."

Ultimately, however, retail turns are the deciding factor. "Category managers have to control their share of the company's assets," Pitocco said. "But they also have to be tied into what's happening with our operations personnel at the store level and with the customer. The customers' needs have to be fulfilled, from a product and inventory standpoint. I've got to be carrying the products the customer wants, with enough space dedicated to those products so they're in stock. The ultimate result is increased sales and margin."

Giant Industries Inc.

Giant Industries, headquartered in Scottsdale, Ariz., is taking a branded approach to category management, according to Pam Brady at Convenience Marketing Inc., a grocery wholesaler that works closely with the company. Giant operates 54 stores under the banners Giant, Giant Express and Mustang.

"It's a very different approach," she said. "Over the course of three months, I spent a lot of time working with Giant to analyze and carefully plan out a 3-foot-by-4-foot section for all the stores operated by the company. They are taking each category one by one, and making an effort to manage categories in such a way that will achieve the maximum impact."

According to Brady, the end result will be a more pleasant shopping experience for the customer. "By making the top-selling brands more visible, throughout every category, Giant is making its stores easier to shop," said Brady. "This will lead to an overall increase in customer service and sales."

Marsh Village Pantry

Marsh Village Pantry, a division of Marsh Supermarkets, based in Indianapolis, operates approximately 180 Village Pantry convenience stores. Recently, Village Pantry was very active in implementing more effective methods of driving customer traffic. According to Bob Dalton, regional sales manager for Modern Aids, one of Village Pantry's suppliers, the chain is a very active partner as far as working to continually update its shelf sets.

"They ask us for industry data, and for other companies' success stories," said Dalton. "They're also very interested in staying current with family pricing, as well as adding new items

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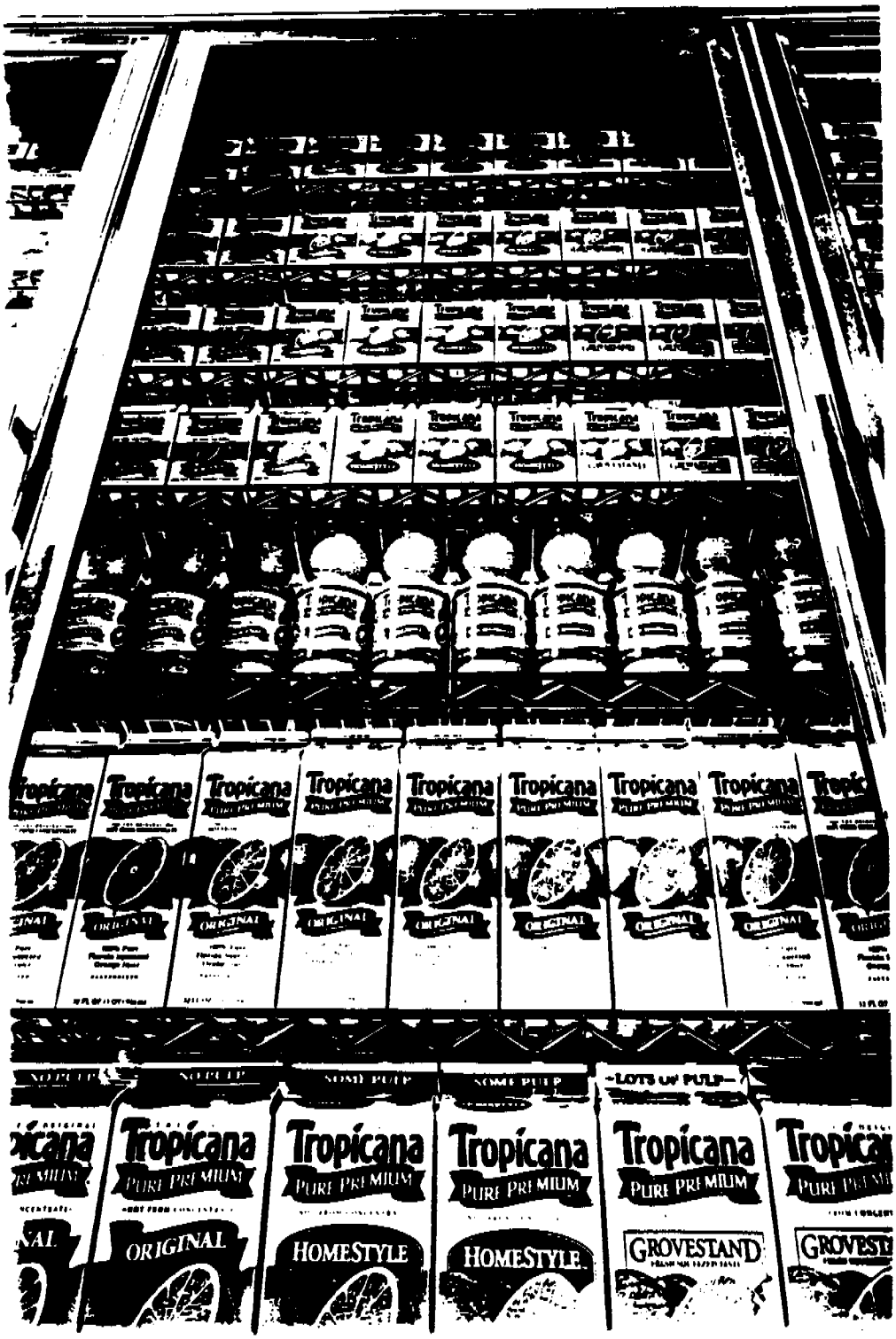

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Tropicana

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that could be fast-selling, and deleting items that aren't."

Mobil Corp.

Mobil relies on a comprehensive, fact-based decision-making process when implementing category management at its 400 Mobil Marts and 226 On The Run convenience stores.

"A product must justify its space in a store in order to remain in the store, in terms of both retail sales and gross profit," said Barry Shull, group category director for Mobil, based in Fairfax, Va. "From Mobil's perspective, that should all be predicated on fact-based decision-making. We look at market-share data in all retail channel segments and our own internal data, as well as data gathered by the major vendors in each category segment. The goal is to implement balanced category strategies that aren't biased toward any one product and that allow us to paint an accurate picture of the marketplace."

Key to developing this picture clearly is Mobil's recently established "Beverage Vendor Category Captain" program. Mobil's criteria for awarding this status is based on a vendor's category-management philosophy, as well as having a process that "covers all the key components required for us to make a fact-based decision about putting the right products in the right slots," said Shull. For example, in the non-carbonated beverage segment, Mobil's selection for category captain is Coca-Cola Co., which in turn noted Mobil's "consumer-engineered" category approach and its understanding of the power of its brands as keys to building the entire beverage category.

For Mobil, the main benefits of working with its category captains are having access to that company's market data, as well as receiving invaluable feedback from an industry standpoint. Mobil works closely with its chosen vendors to do field and store surveys, develop timelines, make assortment presentations to its field merchandising staff and hold regular briefings regarding store-layout resets. This is all to ensure that the right products are displayed effectively to improve store operations—for both Mobil and the supplier.

The Pantry Inc.

At The Pantry, product facings are not necessarily determined by scientific analysis of the number one, two or three items in a particular market. "The items you select and the programs you execute in the stores are ultimately judged by the customer," said Kent Raphael, director of purchasing for The Pantry Inc., based in Sanford, N.C. "In the convenience store industry, your customers are somewhat of a captive audience. You need to carry branded, quality items, but not necessarily the number-one item. For example, people shop at a c-store usually out of a fairly definite need. If somebody comes in to buy air freshener, as long as a quality, brand item is in stock they'll be satisfied."

The company operates approximately 1,200 stores under the banners The Pantry, Quick Stop, Zip Mart, Dash-N, Express Stop, Lil' Champ, Quick Mart and Handy Way. Raphael noted that with such a large network of stores, he finds it useful to implement a four-tiered approach, tying together the manufacturer, broker, store and customer.

"After you select an item to carry, and you know the level of support from the manufacturer or broker, the next step is getting the product into the stores and getting the planogram done," he said. "With 1,200 locations, it's difficult to make that all happen effectively. That's why having supplier alliances is important, almost as important as what products you select."

Raphael noted that establishing alliances also provides the ability to more easily make changes at store level mid-year. "If you want to change two items in a particular section, how do you go to eight states and change that item? With a network of alliances in place, it's not as difficult," he said. "Without it, you would be stuck doing it annually or twice a year."

R.R. Morrison & Sons

At R.R. Morrison & Sons, the Vicksburg, Miss.-based operator of Fast Lane stores, the approach to category management is closely connected to its overall initiatives in customer service and store design, as well as its supplier and vendor relationships. This philosophy has helped Fast Lane realize several benefits, such as reduced out-of-stocks and the elimination of unnecessary SKUs.

"We view category management from a broad, industry perspective first, and then we narrow our approach by partnering with particular suppliers in particular categories," said Mark Tate, marketing manager of Fast Lane's 53 stores in Mississippi, Louisiana and Tennessee. "For example, in our juice set, we look at which supplier is leading the market in our area, and we work with them to make sure we have the right mix and the right amount of space dedicated to whatever product they carry."

One company upon which Fast Lane relies heavily is McLane Co. Inc.'s southern division. "They provide updated purchase information through their warehouse, and that tells me what other retailers are pulling," said Tate. "It's not chain-specific, but rather, they tell me, 'We're moving 400 cases of Tropicana grape juice a week and you're not carrying that in your mix so you might want to consider it.' That information is very helpful."

Ken Hudson, area sales manager for McLane Southern, noted Fast Lane's use of technology to set its stores as one example of effective category management. "They're actually tied into our mainframe," said Hudson. "From their headquarters, they can download data by category or item to see what was sold in a certain period. Then they can analyze that data, and compare the stores that are doing well against the ones that aren't and actually update their schematics in real time."

Looking forward, Tate noted that the company's goal is to further improve its

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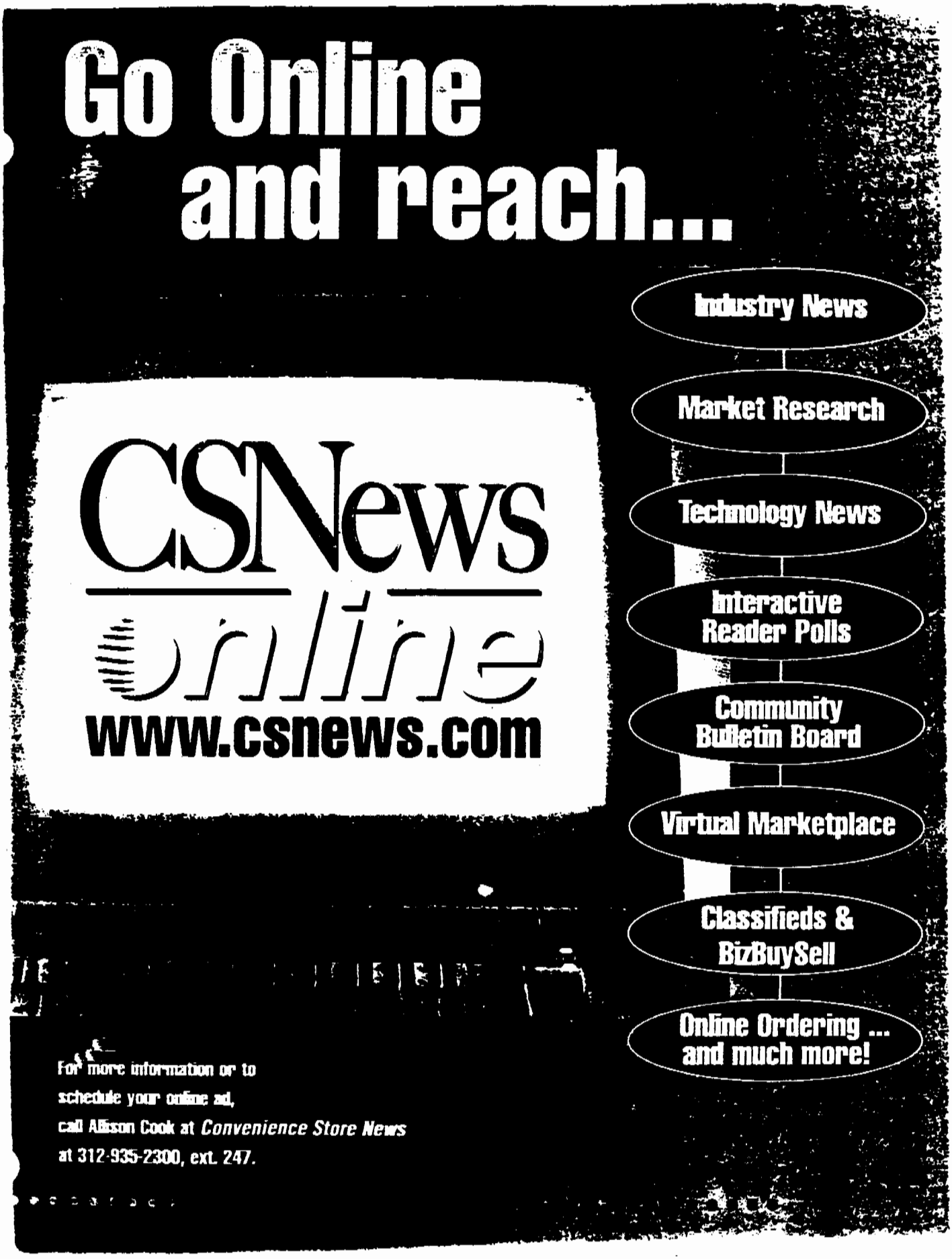

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use of technology to be able to make more accurate category decisions on a store-by-store basis. As part of this initiative, Fast Lane recently updated its point-of-sale equipment, and also upgraded its store registers to better capture its scan data.

Spectrum Stores Inc.

Spectrum Stores is moving into the new century with a new approach to category management. With 56 stores in eastern Alabama and western Georgia, the West Point, Ga.-based company is currently in the process of upgrading its stores to capture scan data. The rollout started in April, and Spectrum expects to have all stores completed by the end of the year.

> **"We're looking forward to having scanning data, which will allow us to make more effective decisions on categories and specific items within categories."**
>
> —Chuck Vires
> Spectrum Stores Inc.

"Currently, our main method of reviewing category performance is through the use of purchase information," said Chuck Vires, vice president of marketing. "We're looking forward to having scanning data, which will allow us to make more effective decisions on categories and specific items within categories."

As Spectrum continues to revise its category management methodology, the company is relying heavily on its wholesalers and suppliers to provide support and guidance. Spectrum also is following the NACS category management guidelines, tailoring them to meet its stores' specific needs. Having such a varied approach is important, according to Vires, to accommodate different store layouts and different customer buying habits in various regions.

Spectrum's long-term goal is ultimately to serve its customers better by having a better understanding of their needs and simply having product available when they're ready to buy. "Obviously, the more we know about a category, the better we can decide which stores should or should not carry a certain product," Vires said. "Then, by eliminating products that we now know won't sell in a certain store, more space can be allocated for the appropriate product sets. As a result, out-of-stocks are reduced, products turn faster and the customers' needs are more closely met."

Speedway SuperAmerica LLC

Based in Enon, Ohio, Speedway SuperAmerica operates 2,220 stores. One of Speedway SuperAmerica's key suppliers cited the company as an early user of scan data to drive the implementation of Apollo planograms. Speedway SuperAmerica and the supplier worked in concert to communicate that information in the planograms to the store level.

Speedway SuperAmerica is comprised of the downstream assets of Marathon Ashland Petroleum LLC, which includes the former SuperAmerica Group and Marathon Oil's Emro Marketing Co.

Tosco Marketing Co.

"Category management is an ongoing process that involves how you go about your day-to-day business with a strong consumer focus," said John Zikias, vice president of field and corporate marketing for Tosco Marketing Co., the retail marketing division of Tosco Corp., and operator of 2,200 Circle K stores. "Simply setting up the process is not enough. You need to continually review information."

Headquartered in Phoenix, Tosco Marketing Co.'s category management approach is based on the NACS guidelines. Through this process, Tosco and suppliers share internal category sales data, customer knowledge and their corporate marketing strategies, as well as ways to optimize market information and supply-chain efficiencies.

"We are in the process of tailoring the NACS category-management templates to meet our specific needs, for example, modifying the vendor questionnaires to fit Tosco's model," Zikias said. "We're really trying to work within the framework, however. It makes it easier for the suppliers if they know that the information they have to provide is similar and consistent with other convenience retailers."

Tosco has also established several strategic partnerships with key suppliers such as Coca-Cola, Anheuser-Busch and Dean Foods. According to Zikias, these alliances help streamline the data-gathering process. "They provide a consistent form of data," he said. "As an example, for categories with products that are direct-store-delivered, without scanning you're heavily reliant on suppliers to provide you with information. The suppliers have been able to help us organize our data in a consolidated form that's easier to work with, and they've also given us valuable category information from a total market perspective."

Turkey Hill Minit Markets

Each of the 232 Turkey Hill Minit Markets is designed from the perspective of the customer, according to Victoria Paul, business development manager, eastern region for broker Convenience Marketing Inc. By working closely with Turkey Hill and its wholesale distributor, Miller-Hartman, Paul is eyewitness to the positive changes taking place within the company.

"They are building state-of-the-art stores, from the concept of what the customer sees when they walk in," she said. "Everything is arranged in the most effective manner for the customer in a particular region."

Turkey Hill, based in Lancaster, Pa., is a division of Dillon Cos. Paul describes the way she and Turkey Hill's Brian Kurtz work together as a true partnership. "For example, if they don't have one of our retailer programs in their stores, I explain why they should," she said. "In turn, Brian has a background in buying for a wholesaler, which is very valuable to us. Ultimately, we're all partnering to get the best products in the stores and to serve the customer better.

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March 15, 2000

Jeffrey A. Apperson, Clerk
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

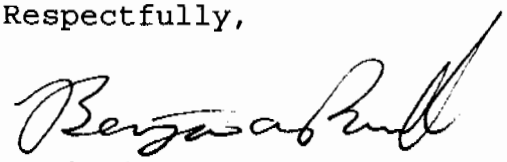
Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Plaintiffs' Objections to Defendants' Proposed Exhibits for Winston Weber and Kevin Freudenthal.

Also enclosed is an additional copy. I would be grateful if you would date-stamp and return this copy in the enclosed self-addressed envelope.

Many thanks for your assistance.

Respectfully,



Benjamin A. Powell

Enclosures

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
Civil Action No. 5:98CV-108-R

CONWOOD COMPANY, L.P., et al. PLAINTIFFS

v. **NOTICE OF FILING RECENT AUTHORITY**

UNITED STATES TOBACCO COMPANY, et al. DEFENDANTS

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Filed herewith is memorandum opinion by Hon. John R. Padova in LePage's Incorporated, et al. v. 3M, E.D. Pa., Civil Action No. 97-3983. Undersigned counsel has seen a faxed copy of the memorandum and order showing that same were dated and entered March 14, 2000, but chose to use this printed copy because it is clearer.

WHITLOW, ROBERTS, HOUSTON & STRAUB
Attorneys for Plaintiffs, Conwood Company, L.P., et al.

BY Richard C Roberts
Richard C. Roberts
P.O. Box 995
Paducah, KY 42002-0995
270-443-4516

CERTIFICATE OF SERVICE

A true copy of the above notice of filing recent authority was served on defendants' counsel by delivering same to defendants' trial headquarters at 10th Floor, Citizens Bank Building, Paducah, KY, and by faxing same to Neal Stoll at (212) 735-2000, and to John Reed at (502) 562-2200.

This the 17th day of March, 2000.

R C Roberts
Richard C. Roberts

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LE PAGE'S INCORPORATED, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION No. 97-3983
	)	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	)	
	)	
	)	
Defendant.	)	

MEMORANDUM

Padova, J. March , 2000

This matter arises on Defendant's Motion for Judgment as a Matter of Law, and Motion for a New Trial. For the reasons that follow, the Court will grant in part and deny in part Defendant's Motion for Judgment as a Matter of Law. The Court further will deny Defendant's Motion for a New Trial.

I. BACKGROUND

Plaintiffs Le Page's Incorporated and Le Page's Management Company ("Le Page's") brought this action against Defendant Minnesota Mining and Manufacturing Company ("3M"), alleging that 3M engaged in unlawful restraint of trade in violation of Section 1 of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. §1; anti-competitive exclusive dealing in violation of Section 3 of the Clayton Antitrust Act, 15 U.S.C. §14; and unlawful maintenance of a monopoly and attempted maintenance of a monopoly in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

On September 17, 1999, Defendant filed a Motion for Judgment as a Matter of Law at the close of Plaintiffs' case. Defendant renewed this Motion at the close of its case. At the conclusion of a two month trial, the Court submitted all four counts to the jury.

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On October 13, 1999, the jury returned a verdict in favor of Le Page's and against 3M on Count I (unlawful maintenance of monopoly power) and Count II (unlawful attempted maintenance of monopoly power), in the amount of $22, 828, 899.00. The jury found in favor of Defendant on Count III (exclusive dealing) and Count IV (restraint of trade). Defendant 3M now moves for judgment as a matter of law, or in the alternative for a new trial, on Counts I and II.

II. STANDARD

Rule 50(b) of the Federal Rules of Civil Procedure provides in relevant part:

> If, for any reason, the Court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the Court is considered to have submitted the action to the jury subject to the Court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the Court may:
> (1) if a verdict was returned:
> (A) allow judgment to stand,
> (B) order a new trial, or
> (C) direct entry of judgment as a matter of law.

Fed. R. Civ. P. 50(b)(1).

III. MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendant moves for entry of judgment in its favor as a matter of law on Counts I and II. "[J]udgment as a matter of law should be granted sparingly." Walter v. Holiday Inns, Inc., 985 F.2d 1232, 1238 (3d Cir.1993). A motion for judgment as a matter of law "should be granted only if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury could reasonably find liability." Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir.1993)(citing Wittekamp v. Gulf & Western Inc., 991 F.2d 1137, 1141 (3d Cir.1993)). Although a scintilla of evidence is not enough to sustain a verdict of liability, Walter, 985 F.2d at 1238, the question is "

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'whether there is evidence upon which a jury could properly find a verdict for [the prevailing] party.'" Lightning Lube, Inc., 4 F.3d at 1166 (quoting Patzig v. O'Neil, 577 F.2d 841, 846 (3d Cir.1978)).

A. COUNT II

In Count II, Plaintiff proceeded under a unique "attempted maintenance of monopoly power" theory. The Court submitted the following charge to the jury:

> Count 2 is the unlawful attempt to maintain monopoly power. And Le Page's alleges that it was injured by 3M's unlawful attempt to maintain its monopoly.
>
> And to win on its attempted monopolization, Le Page's must prove each of the following elements by a preponderance of the evidence.
>
> First, that 3M engaged in predatory or exclusionary conduct.
>
> Secondly, that 3M had a specific intent to maintain monopoly power in a relevant market.
>
> Thirdly, that there was a dangerous probability that 3M would achieve its goal of maintaining monopoly power in the relevant market.
>
> And fourthly, that Le Page's was injured in its business or properly by 3M's predatory or exclusionary conduct.

Trial Transcript ("Tr.") Vol. No. 34 at 140-141. Defendant argues that the Sherman Act does not provide a cause of action for "attempt to maintain a monopoly." The Court agrees.

Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

15 U.S.C. §2 (1994). As construed by the courts, Section 2 encompasses two causes of action: monopolization and attempted monopolization. The offense of monopolization under Section 2 has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power. . . " Eastman Kodak Co. v. Image Tech. Servs., Inc., 504

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U.S. 451, 481 (1992)(internal citations and quotations omitted). On the other hand, the offense of attempted monopolization requires that the defendant "(1) had engaged in predatory conduct or anti-competitive conduct with (2) specific intent to monopolize and with (3) a dangerous probability of achieving monopoly power." Ideal Dairy Farms, Inc. v. John Labatt, Ltd., 90 F.3d 737, 750 (3d Cir. 1996).

The Court declines to create a new third cause of action: attempted maintenance of monopoly power. First, the Court has found no case law, nor has Plaintiff cited any case which supports an "attempted maintenance of monopoly power" claim. Furthermore, the Court does not discern any support in the legislative history of the Sherman Act for creating such a cause of action. Moreover, the Court finds "an attempted maintenance of monopoly power" inherently illogical. Any "attempt claim" rests on the underlying theory that the defendant has failed to achieve its goal, which in this case is maintenance of monopoly power. But, if the defendant has failed to achieve its goal of maintaining monopoly power, then it follows that the defendant lacks monopoly power. Lacking any monopoly power to maintain, the defendant cannot be held liable for "attempted maintenance of monopoly power."

Thus, this "attempted maintenance" concept in fact presents a standard attempted monopolization claim. The attempted monopolization cause of action readily embodies this scenario by requiring proof that there was a dangerous probability that the defendant would eventually succeed in achieving monopoly power. See Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 454 (1993). This language, thus, recognizes that the defendant does not have monopoly power, but would eventually achieve monopoly power if it continued to engage in predatory conduct.

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Because neither the statutory language nor the case law support an "attempted maintenance of monopoly power" claim, the Court declines to create such a cause of action. The Court, therefore, will enter judgment in favor of Defendant on Count II.

B. COUNT I

In Count I, Plaintiff brought a monopolization claim under Section 2 of the Sherman Act, 15 U.S.C. §2. The Court instructed the jury as follows:

> . . . Count I in this case is unlawful maintenance of monopoly power.
> Le Page's alleges that it was injured by 3M's unlawful monopolization in the United States market for invisible and transparent tape for home and office use. To win on their claim of monopolization, Le Page's must prove each of the following elements by a preponderance of the evidence.
> First, that 3M had monopoly power in the relevant market.
> Secondly, that 3M willfully maintained that power through predatory or exclusionary conduct. . .
> And thirdly, that Le Page's was injured in its business or property because of 3M's restrictive or exclusionary conduct.

Tr. Vol. No. 34 at 131-132. The jury verdict form then asked the jurors to answer the following three questions related to Count I:

> (1) Do you find that Le Page's has proven, by a preponderance of the evidence, that the relevant market is invisible and transparent tape for home and office use in the United States?;
> (2) Do you find that Le Page's has proven, by a preponderance of the evidence, that 3M unlawfully maintained monopoly power as defined under the instructions for Count I?; and
> (3) Do you find that Le Page's has proven, as a matter of fact and with a fair degree of certainty, that 3M's unlawful maintenance of monopoly power injured Le Page's business or property as defined in these instructions?

The jury answered each question in the affirmative.

1. Relevant Market

Defendant first argues that Plaintiff failed to prove that the relevant geographic market is the United States because Plaintiff failed to present evidence of entry barriers. To the contrary, the Court

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finds that Plaintiff introduced sufficient evidence from which the jury could properly find that the relevant market is the United States. First, Plaintiff's economic expert, Mr. Kenneth Baseman, opined that the United States is a separate market for tape sales than the rest of the world. Tr. Vol. 21 at 61. Similarly, Defendant's economic expert found the relevant market defined by Mr. Baseman was " . . . reasonable." Tr. Vol. 32 at 71-72. Moreover, the evidence produced at trial showed that new entrants in the tape market have been negligible. Tr. Vol. 27 at 124-25; PX 365, 366. Furthermore, Plaintiff introduced evidence that distributors' inventory and "just in time" delivery requirements make it infeasible for them to utilize foreign manufacturers. Tr. Vol. 17 at 11; Tr. Vol. 20 at 124. The record thus supports a reasonable conclusion that the relevant geographic market for invisible and transparent tape is the United States.

2. Exclusionary Conduct

Defendant advances several arguments directed at the second element of Count II, namely whether 3M willfully maintained its monopoly power through predatory or exclusionary conduct. The Court instructed the jury as follows:

> [P]redatory or exclusionary conduct is conduct that has the effect of preventing or excluding competition, or frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in maintaining 3M's monopoly power. You should consider the following factors in determining whether 3M's conduct was predatory or exclusionary: its effect on its competitors, such as Le Page's, its impact on consumers, and whether it has impaired competition in an unnecessarily restrictive way. You may also consider that behavior that might otherwise not be of concern to the antitrust laws, or that might be viewed as pro-competitive, [can] take on an exclusionary connotation when practiced by a firm with monopoly power. Thus, exclusionary conduct and predatory conduct comprehends, at the most, behavior that not only, one, tends to impair the opportunity of its rivals, but also, number two, either does not further competition on the merits, or does so in an unnecessarily restrictive way. If 3M has been attempting to exclude rivals on some basis other than efficiency, you may characterize that behavior as predatory.

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> However, you may not find that a company willfully maintained monopoly power, if that company has maintained that power, solely through the exercise of superior foresight or skill in industry, or because of economy of technological efficiencies, or because of size, or because of changes in customer and consumer preferences, or simply because the market is so limited that it is impossible to efficiently produce the product, except by a plan large enough to supply the whole demand.
>
> The acts or practices that result in the maintenance of monopoly power must represent something other than the conduct of business that is part of the normal competitive process, or even extraordinary commercial success. They must represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

Tr. Vol. 34 at 138-39. Viewing the evidence and inferences drawn therefrom in the light most favorable to Plaintiff, the Court finds that the jury's verdict that Defendant willfully maintained monopoly power through predatory or exclusionary conduct was supported by sufficient evidence adduced at trial.

a. Economic Coercion

First, Defendant submits that Le Page's was required under SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3d Cir. 1978)("SmithKline"), but failed to prove, that (1) Scotch tape is a monopoly product, and (2) that 3M's bundled rebate program effectively required 3M's customers to forego purchasing Le Page's private label tape if they wished to obtain rebates on 3M's monopoly product.

Tying cases under Section 1 of the Sherman Act require proof of monopoly power in the first product and economic coercion. See e.g. Marts v. Xerox, Inc., 77 F.3d 1109, 1113 (8th Cir. 1996). This action, however, has not proceeded under a tying theory. Rather, this case presents a unique bundled rebate program that the jury found had an anti-competitive effect.

Moreover, Plaintiff introduced evidence that Scotch is a monopoly product, and that 3M's bundled rebate programs caused distributors to displace Le Page's entirely, or in some cases,

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drastically reduce purchases from Le Page's. Tr. Vol. 30 at 105-106; Vol. 27 at 30. Under 3M's rebate programs, 3M set overall growth targets for unrelated product lines. In the distributors' view, 3M set these targets in a manner which forced the distributor to either drop any non-Scotch products, or lose the maximum rebate. PX 24 at 3M 48136. Thus, in order to qualify for the maximum rebate under the EGF/PGF programs, the record shows that most customers diverted private label business to 3M at 3M's suggestion. Tr. Vol. 28 at 74-75; PX23, 28, 32, 34, 715. Similarly, under the newer Brand Mix rebate program, 3M set higher rebates for tape sales which produced a shift from private label tape to branded tape. Tr. Vol. 31 at 79. PX 393 at 534906.

Furthermore, Plaintiff introduced evidence of customized rebate programs that similarly caused distributors to forego purchasing from Le Page's if they wished to obtain rebates on 3M's products. Specifically, the trial record establishes that 3M offered Kmart a customized growth rebate and Market Development Funds payment. In order to reach the $15 million sales target and qualify for the $1 million rebate, however, Kmart had to increase its consumer stationary purchases by $5.5 million. Kmart substantially achieved this "growth" by dropping Le Page's and another private label manufacturer, Tesa. PX 51 at 3M 102175, PX 121 at 156838. Likewise, 3M customized a program with Staples that provided for an extra 1% bonus rebate on Scotch tape sales "if Le Page's business is given to 3M." PX 98 at 3M 149794. Finally, 3M provided a similar discount on Scotch tape to Venture Stores "based on the contingency of Venture dropping private label." PX 712 at 3M 450738. Thus, the jury could have reasonably concluded that 3M's customers were forced to forego purchasing Le Page's private label tape in order to obtain the rebates on Scotch tape.

b. Efficiency

Second, Defendant contends that Plaintiff was required, but failed to prove that Le Page's approaches 3M's level of efficiency as a competitor. 3M reads SmithKline as imposing an equivalent

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efficiency standard. The Court disagrees with this construction, and finds that under the law of this Circuit, a plaintiff does not need to establish equal or equivalent efficiency to succeed under Section 2 of the Sherman Act. Rather, "[i]f a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory." Aspen Skiing Company v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985)(internal quotation and citation omitted).

Following Aspen and its progeny, the Court thus instructed the jury as follows: "if 3M has been attempting to exclude rivals on some basis other than efficiency, you may characterize its behavior as predatory." Tr. Vol. 34 at 138: 19-21. Accordingly, the jury properly distinguished between 3M's technological and economical efficiencies, and 3M's other exclusionary conduct.

c. Injury to Competition

Third, Defendant argues that Plaintiff failed to show that 3M's rebate programs injured competition. Nevertheless, "a finding of no anti-competitive market effect would not suffice to dispose of [plaintiff's] claim under section 2 of the Sherman Act." Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 276 n. 5 (3d Cir. 1999)(citing Mahone v. Addicks Util. Dist., 836 F.2d 921, 939 (5th Cir.1988)("[P]roving an injury to competition is not an element of a monopolization-based antitrust claim.")). Accordingly, this argument does not state a basis for judgment as a matter of law. Rather, as one of several factors to consider in determining whether 3M's conduct was predatory, the jury was properly instructed to evaluate "whether [3M's conduct] impaired competition in an unnecessarily restrictive way." Tr. Vol. 34 at 138: 8-9.

Moreover, the trial record supports a finding that 3M's conduct did impair competition in an unnecessarily restrictive way. As discussed supra, Plaintiff introduced evidence that the growth targets of 3M's rebate programs caused distributors to displace competitors. The record fully supports the jury's verdict on this element.

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d. Recoupment

Defendant claims that under SmithKline Corp. v. Eli Lilly & Co., 427 F.Supp. 1089 (E.D. Pa. 1976), aff'd, 575 F.2d 1056 (3d Cir. 1978), Advo, Inc. v. Philadelphia Newspapers, Inc., 51 F.3d 1191 (3d Cir. 1995), and Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993), Plaintiff was required to prove that if Le Page's was eliminated, 3M would be able to recoup the revenues and profits it sacrificed through its rebate program without attracting new entrants into the market which would check its pricing behavior. The Court does not find this argument persuasive.

First, the Court does not construe these cases as imposing a separate "recoupment" element in Section 2 cases. Rather, the definition of monopoly power includes a recoupment component. The Court explained to the jury that "monopoly power is. . . the power to control prices or exclude competition in a relevant market." Tr. Vol. 34 at 132: 18-19. The Court instructed:

> The power to control prices is the power of a company to establish appreciably higher prices for its equivalent goods, without a substantial loss of business to its competitor. That's the power to control prices.
>
> The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from that market, or by preventing new competition from entering that market.
>
> . . .
>
> The existence of monopoly power may also be shown by evidence that 3M has the power to raise prices appreciably without substantially losing business to competitors. . .

Tr. Vol. 34 at 132:22-133:4, 135: 8-10. Thus, under this definition, by finding that 3M possessed monopoly power, the jury implicitly determined that 3M enjoyed the power to control prices or exclude competition in the invisible and transparent tape market.

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Moreover, 3M's recoupment argument rests on the assumption that "a wave of new entrants who will drive prices down to competitive levels," Advo, Inc., 51 F.3d at 1203, will enter the market. As discussed supra Plaintiff, however, introduced substantial evidence at trial that significant entry barriers prevent competitors from entering the invisible and transparent tape market in the United States. Thus, this case presents a situation in which a monopolist remains unchecked in the market.

Finally, Plaintiff presented evidence that 3M succeeded in eliminating the availability of the lower priced, private label tape at Hooks drug stores. PX130. The jury could reasonably infer that 3M's planned elimination of the lower priced private label tape, as well as the lower priced Highland brand, would channel consumer selection to the higher priced Scotch brand and lead to higher profits for 3M. Indeed, Defendant concedes that "3M could later recoup the profits it has forsaken on Scotch tape and private label tape by selling more higher priced Scotch tape. . . if there would be no competition by others in the private label tape segment when 3M abandoned that part of the market to sell only higher-priced Scotch tape." Def. Mem. at 30.

e. Other Proof

Finally, Defendant contends that because the jury did not find for Le Page's under Section 1 of the Sherman Act or Section 3 of the Clayton Act, the evidence surrounding exclusive dealing cannot be used to support the jury verdict on Count I. As the law of the case makes clear, conduct that does not violate Section 1 may still be "sufficient to establish the offense of monopolization under §2 of the Sherman Act." Le Page's Inc. v. 3M, No. Civ-97-3983, 1997 WL 734005, at *9 (E.D. Pa. Nov. 14, 1997); accord United States v. Microsoft Corp., No. Civ-A-98-1233 (TPJ), 1998 WL 614485, at *23 (D. D.C. Sept. 14, 1998)(holding that "a monopolist's conduct that does not give rise to the level of a §1 violation may nevertheless violate §2 if it 'impair[s] competition in an unnecessarily restrictive way.'" Accordingly, the Court rejects this argument.

16diii005136

3. Injury in Fact and Antitrust Injury

Defendant contends that Plaintiff failed to prove that Le Page's suffered injury in fact and antitrust injury. The Court charged the jury that to establish injury, "Le Page's must have offered evidence that established as a matter of fact and with a fair degree of certainty that 3M's alleged illegal conduct was a material cause of Le Page's injury." Tr. Vol. 34 at 155: 6-8. Evidence that a plaintiff lost customers and that this loss was a result of the defendants' antitrust violations is sufficient to prove injury and causation under Section 2 of the Sherman Act. Callahan v. A.E.V., Inc., 182 F.3d 237, 253 (3d Cir. 1999). Plaintiff introduced substantial evidence that the anti-competitive effects of 3M's rebate programs caused Le Page's losses. Tr. Vol. 17 at 24-25, 46; Vol. 2 at 72, 95, Vol. 17 at 46.; Vol. 5 at 167-68. Moreover, the record amply reflects that 3M's rebate programs did not benefit the ultimate consumer. Tr. Vol. 15 at 13-14, 148-149; PX 76 at 3M 126048; PX 26 at 3M 048169. Accordingly, the jury could reasonably find injury and causation under Section 2 of the Sherman Act.

4. Amount of Damages

Finally, 3M argues that the jury's damage calculation was too speculative to uphold the award, and challenges the damages model of Plaintiff's expert, Mr. Terry Musika. The Court, however, concludes that there is no basis for rejecting the jury award. The Court specifically instructed the jury that it could only award damages to Le Page's for "injuries caused by a violation of the antitrust laws." Tr. Vol. 34 at 157: 9-10. The Court clearly charged the jury to disregard losses not caused by 3M:

> [Y]ou may not calculate damages based only on speculation or guessing. . . [Y]ou may not award damages for injuries or losses caused by other factors.

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Tr. Vol. 34 at 157:7-11. The record further demonstrates that Mr. Musika's assumptions were grounded in the past performances of Scotch, Highland and Le Page's tapes, as well as 3M's own internal projections of future growth. Tr. Vol. 19 at 74:9-18, 81:10-19, 86-89, 124:18-25. Accordingly, this argument does not provide a basis for judgment as a matter of law.

In accordance with the foregoing, the Court will grant Defendant's Motion for Judgment as a Matter of Law on Count II, but deny the Motion with respect to Count I.

IV. MOTION FOR A NEW TRIAL

In the alternative, Defendant moves for a new trial, pursuant to Rule 59 of the Federal Rules of Civil Procedure. "A new trial is appropriate only when the verdict is contrary to the great weight of the evidence or errors at trial produce a result inconsistent with substantial justice." Sandrow v. United States, 832 F.Supp. 918, 918 (E.D.Pa.1993) (citing Roebuck v. Drexel Univ., 852 F.2d 715, 735-36 (3d Cir.1988)). When the basis of the motion for a new trial is an alleged error involving a matter within the sound discretion of the trial court, such as the court's evidentiary rulings or points of charge to the jury, the trial court has wide latitude in ruling on the motion. Griffiths v. CIGNA Corp., 857 F.Supp. 399, 410 (E.D.Pa.1994) (citing Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918, 921-22 (3d Cir.1986); Lind v. Schenley Indus., Inc., 278 F.2d 79, 90 (3d Cir.), cert. denied, 364 U.S. 835 (1960); Lightning Lube v. Witco Corp., 802 F.Supp. 1180, 1185 (D.N.J. 1992), aff'd, 4 F.3d 1153 (3d Cir.1993)), aff'd without opinion, 60 F.3d 814 (3d Cir.1995).

The trial court's discretion to grant a new trial, however, is more limited when the asserted ground is that the verdict is against the weight of the evidence. In that instance, the motion should be granted only where permitting the verdict to stand would result in a miscarriage of justice. Sandrow, 832 F.Supp. at 918 (citing Klein v. Hollins, 992 F.2d 1285, 1290 (3d Cir.1993)); Griffiths, 857 F.Supp. at 411 (citing Williamson v. Conrail, 926 F.2d 1344, 1353 (3d Cir.1991)). In reviewing

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a motion for a new trial, the Court must " 'view all the evidence and inferences reasonably drawn therefrom in the light most favorable to the party with the verdict.' " Marino v. Ballestas, 749 F.2d 162, 167 (3d Cir.1984) (citation omitted).

A. POINTS OF CHARGE

Defendant challenges eight points in the jury instructions. First, Defendant argues that the "conduct element" of the jury charge was "too general" in that it does not reveal which of its actions violated the antitrust laws. Section 2 of the Sherman Act does not require individualized or truncated transgressions, such as tying, leveraging, or predatory pricing, so long as the overall conduct is exclusionary or predatory. The Court adequately defined exclusionary or predatory conduct in the instructions. Tr. Vol. 34 at 137:21-139:11. Accordingly, this argument is rejected.

Second, 3M complains that the instructions failed to sufficiently define Plaintiff's theory of the case. See Tr. Vol. 34 at 123:15-125:13. Similarly, 3M claims that the jury was not adequately charged on its own theory of the case. See Tr. Vol. 34 at 125:14-126:11. To the extent that Defendant challenges the Court's view of the law of the case, this argument has been fully discussed and rejected. See supra §III.B. To the extent that 3M disagrees with the manner in which the Court framed the factual approach of each side, the Court is under no obligation to restate the parties' factual theory in the charge to the jury. The Court, therefore, rejects these two grounds.

Fourth, 3M challenges the "Scalia charge," Tr. Vol. 34 at 138: 10-14, on the ground that this charge vested too much discretion in the jury to determine for itself what conduct was exclusionary. In reviewing a claim of error in the charge to the jury, the Court evaluates the instructions as a whole. Malley-Duff & Associates, Inc. v. Crown Life Ins., 734 F.2d 133, 147 (3d Cir. 1984). Indeed, the Court charged the jury to consider the entire charge as a whole:

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> [Y]ou should not single out any instruction[], but instead you should consider my instructions as a whole, including the instructions that I gave you at the beginning of this case when you retire to deliberate in the jury room.

Tr. Vol. 34 at 114:9-13. Furthermore, the Court charged that no one instruction surpassed any other instruction in terms of its importance:

> Now, you are instructed that the Court does not intend to stress the relative importance of any question of fact or law, either by the number of instructions given upon a particular proposition or by the order in which the instructions were given.

Tr. Vol. 34 at 164-65. The Court fully defined the term "predatory or exclusionary conduct" for the jury. Tr. Vol. 34 137:21-139:11. Accordingly, the Court dismisses this ground for relief.

Next, Defendant objects to the verdict form language stating "use in the United States," arguing that this language implied that the relevant criterion was the area in which the tape was used. The Court adequately instructed the jury on this aspect of the case:

> Question No. 1 on your verdict form deals with relevant market. There are two aspects that you must consider in defining relevant market. The fist is the relevant product market. The second is the relevant geographic market. Now, Le Page's bases its case entirely on the relevant market being invisible and transparent home and office tape in the United States. You must determine whether Le Page's has proved by a preponderance of the evidence that the relevant market is invisible and transparent tape for home and office use in the United States in order for Le Page's to proceed on any of its claims.
>
> . . .
>
> . . .
>
> There is no big problem with respect to what the product market, the relevant product market, is in this case, because the parties agree that the relevant product market is transparent and invisible tape for home and office use, which includes by agreement of the parties acetate, cellophane and polypropylene tape, and you should use this definition of relevant product market throughout these instructions.
>
> . . .
>
> . . .

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The second aspect of relevant market, however, is in significant contest in this case, and the second part of relevant market is the relevant geographic market. Now, this aspect of relevant market is the geographic area is which the products compete. Le Page's contends that the relevant geographic market is the United States. Now, the relevant geographic market is the area in which, (1) a potential tape customer may rationally look for the goods it seeks and also the area in which (2) other businesses effectively compete with 3M for the distribution of the relevant product.

Consequently, the geographic market is not comprised of the region in which the seller attempts to sell its product, but rather is comprised of the area where its customers would look to buy such products, and in this case when we use the term "customers," customers refers to the retailers and distributors of tape, not the ultimate consumer.

Real quickly, for you again, that part. We're talking about relevant geographic market. And the relevant geographic market is the area in which a potential tape customer-- now, of course, you know we're talking about the distributors like Kmart, etc.-- a potential tape customer may rationally look for the goods it seeks, and the area in which other businesses effectively compete with 3M for the distribution of the relevant product.

Now, you may consider where customers -- and when we use the word customers, we're talking about the distributors like Kmart, Staples -- you may consider where customers, as a practical matter, can and do buy the product. That is, whether customers residing in one area buy from the same sources as customers residing in another area, or if they buy from local sources rather than more distant sources, because they find it more convenient or practical to do so.

In this regard, you may consider whether an increase in price charged by suppliers in one location would cause a substantial number of purchasers to turn to more remote sources of supply. And if so, the locations are and would be part of the same geographic market.

Tr. Vol. 34 at 128-130. This extensive instruction properly instructed the jury that the relevant criterion was the area in which distributors rationally looked for tape, and in which other businesses effectively compete with 3M for the distribution of the tape. Accordingly, this argument is rejected.

Sixth, Defendant submits that the Court erred in refusing Defendant's Proposed Instruction No. 9 which stated that "a high share of sales in a relevant market may be achieved through traditional means of competition and is not itself determinative that there is monopoly power within

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that market." Defendant further argues that the definition of monopoly power failed to consider potential future competitors and the strength of customers. The Court's charge amply covered the definition of monopoly power:

> Monopoly power is defined as the power to control prices or exclude competition in a relevant market. Therefore, you must determine whether 3M could control prices or exclude competition in the relevant market.
>
> The power to control prices is the power of a company to establish appreciably higher prices for its equivalent goods, without a substantial loss of business to its competitor. That's the power to control prices. The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from that market, or by preventing new competition from entering the market.
>
> In making these determinations, you may consider the following factors in determining whether 3M had monopoly power in the market: the size of 3M's market share, the number, size and strength of competing firms, the freedom of entry into the field, pricing trends and practices in the industry, the ability of consumers to substitute comparable goods or services from outside the market, and consumer demand.
>
> Now, you have head evidence about 3M's market share. You may infer whether or not monopoly power exists from 3M's share of the relevant market. Market share is a firm's share of total industry sales, shipments and products, capacities or reserves, expressed as a percentage of the whole. And there's been evidence on market share in the United Sates.
>
> Now, there are a variety of ways to measure market share, but whatever measure you use must be reasonably and consistently applied.
>
> You have heard evidence regarding 3M's market share after June 11, 1993. If you determine that 3M's share of the relevant market is less than 50 percent, that market share, less than 50 percent, by itself does not permit you to infer that 3M has monopoly power. If you determine that 3M's share of the relevant market is 80 percent or higher, well, that is strong evidence of the existence of monopoly power. And if you determine that 3M's market share is somewhere between 50 percent and 80 percent, then you may infer the existence of monopoly power from that share. And the inference is stronger, the higher 3M's market share is within that 50 to 80 percent range.

You may also consider the trend in 3M's market share. A declining market share may indicate the absence of monopoly power, though it does not foreclose such a finding, while an increasing market share may indicate the opposite.

And another factor is the number and size of 3M's competitors. If these are few, weak, or have small or decreasing market shares so that they do not offer substantial competition to 3M in the relevant market, then this may tend to indicate that 3M has monopoly power in that market. If, on the other hand, if those competitors are numerous, and vigorous, or have large or increasing shares of that market, this may be evidence that 3M does not have monopoly power.

And you may also consider the history of entry and exit from that market by other companies. Entry of companies into the market may indicate that 3M lacks monopoly power. On the other hand, departure of companies from the market, or the failure of companies to enter the market may indicate that 3M has monopoly power.

These are all circumstances for your consideration. The existence of monopoly power also may be shown by evidence that 3M has the power to raise prices appreciably, without substantially losing business to competitors, or by evidence that 3M has profit margins that were extraordinarily high, or maintained high rates of return over a long period of time.

Tr. Vol. 34 at 132:18-135:13. Accordingly, the Court rules against Defendant on this point.

In addition, Defendant argues that the Court erred in refusing to give Proposed Instruction No. 30 (Mitigation). This proposed instruction, however, was not supported by the evidence. Accordingly, the absence of this instruction does not provide grounds for relief.

Finally, 3M submits that the Court erred in refusing a variety of its Proposed Instructions[1]: (1) Proposed Instruction Nos. 2 and 7 (Purpose of Antitrust Laws); (2) Proposed Instruction No. 12 (Antitrust Injury); (3) Proposed Instruction No. 13 (Lost Profits); (4) Proposed Instruction No. 22 (Unlawful Monopolization), and (5) Proposed Instruction No. 25 (Injury to Competition). The Court adequately covered all of these areas of the law in its charge to the jury. See Tr. Vol. 34 at 122-23

[1]All citations are to Defendant's Proposed Jury Instructions, filed July 23, 1999. (Docket #186).

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(Purpose of the Antitrust Laws); 153-54 (Antitrust Injury); 155-57 (Damages); 139-40 (Unlawful Monopolization), and 137-38 (Injury to Competition). Accordingly, the Court rejects this argument.

The Court has considered the aforementioned alleged instruction errors, and all other objections raised in Defendant's Motion for A New Trial, and concludes that none of these grounds support a new trial under Rule 59 of the Federal Rules of Civil Procedure.

B. EVIDENTIARY ISSUES

Defendant raises three evidentiary issues. Specifically, 3M contends that (1) the Court improperly allowed hearsay testimony from Jim Kowieski concerning 3M's "upfront payments" at Kmart; (2) the Court improperly excluded evidence of the Kodak Growth Incentive Plan, and the Ponder & Best Rebate Program; and (3) the Court improperly excluded DX 1667, a glossy original catalog promoting Ross products, as evidence of a comparative restraint imposed on 3M by potential competitors. The Court has reviewed the three challenged rulings, and upholds the Court's decision. Even assuming these evidentiary rulings were erroneous, the Court finds that these three rulings did not produce "a result inconsistent with substantial justice." Sandrow, 832 F.Supp. at 918.

Finally, Defendant argues that the verdict is against the weight of the evidence. Viewing all the evidence and inferences reasonably drawn therefrom in the light most favorable to Plaintiff, the Court cannot conclude that the jury's verdict in this action results in a miscarriage of justice. Accordingly, the Court will deny Defendant's Motion for a New Trial.[2]

An appropriate Order follows.

---

[2]Because the Court has reached the merits of Defendant's argument, the Court expresses no opinion on whether Defendant has waived any of the various grounds asserted in support of its Motion for Judgment as a Matter of Law, and Motion for A New Trial.

16diii005144

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LE PAGE'S INCORPORATED, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION No. 97-3983
	)	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	)	
	)	
	)	
Defendant.	)	

ORDER

AND NOW, this day of March, 2000, upon consideration of Defendant's Motion for Judgment As A Matter of Law, and Motion for A New Trial, and the briefing thereon, **IT IS HEREBY ORDERED** that

1. Defendant's Motion for Judgment As A Matter of Law (docket # 343) is **GRANTED** as to Count II and **DENIED** in all other respects;

2. The parties submit a proposed Judgment within ten (10) days of the date of this Order; and

3. Defendant's Motion for A New Trial (docket #345) is **DENIED**.

BY THE COURT:

_____

John R. Padova

16diii005145

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 MAR 20 A8:31 Civil Action No. 5:98CV-108-R FILED US DISTRICT COURT CLERK WESTN DIST. KENTUCKY JURY TRIAL DEMANDED

PLAINTIFFS' OBJECTIONS TO PROPOSED DEMONSTRATIVES OF VINCENT GIERER

Plaintiffs respectfully submit the following objections to demonstrative exhibits defendants intend to use in the direct examination of Vincent Gierer:

1.	"Swedish Match"	No foundation for testimony by Mr. Gierer on Swedish Match's unit volume and unit share for FYE 1990-1999. Also, no foundation for data because no source is identified. Mr. Gierer was not disclosed as an expert. The Court should preclude testimony concerning industry comparisons and trends.
2.	"Conwood"	No foundation for testimony by Mr. Gierer on Conwood's unit volume and unit share for FYE 1978-1999. Also, no foundation for data because no source is identified. Mr. Gierer was not disclosed as an expert. The Court should preclude testimony concerning industry comparisons and trends

Copies of the proposed Swedish Match and Conwood charts are attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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Counsel for Plaintiffs

March 20, 2000

CERTIFICATE OF SERVICE

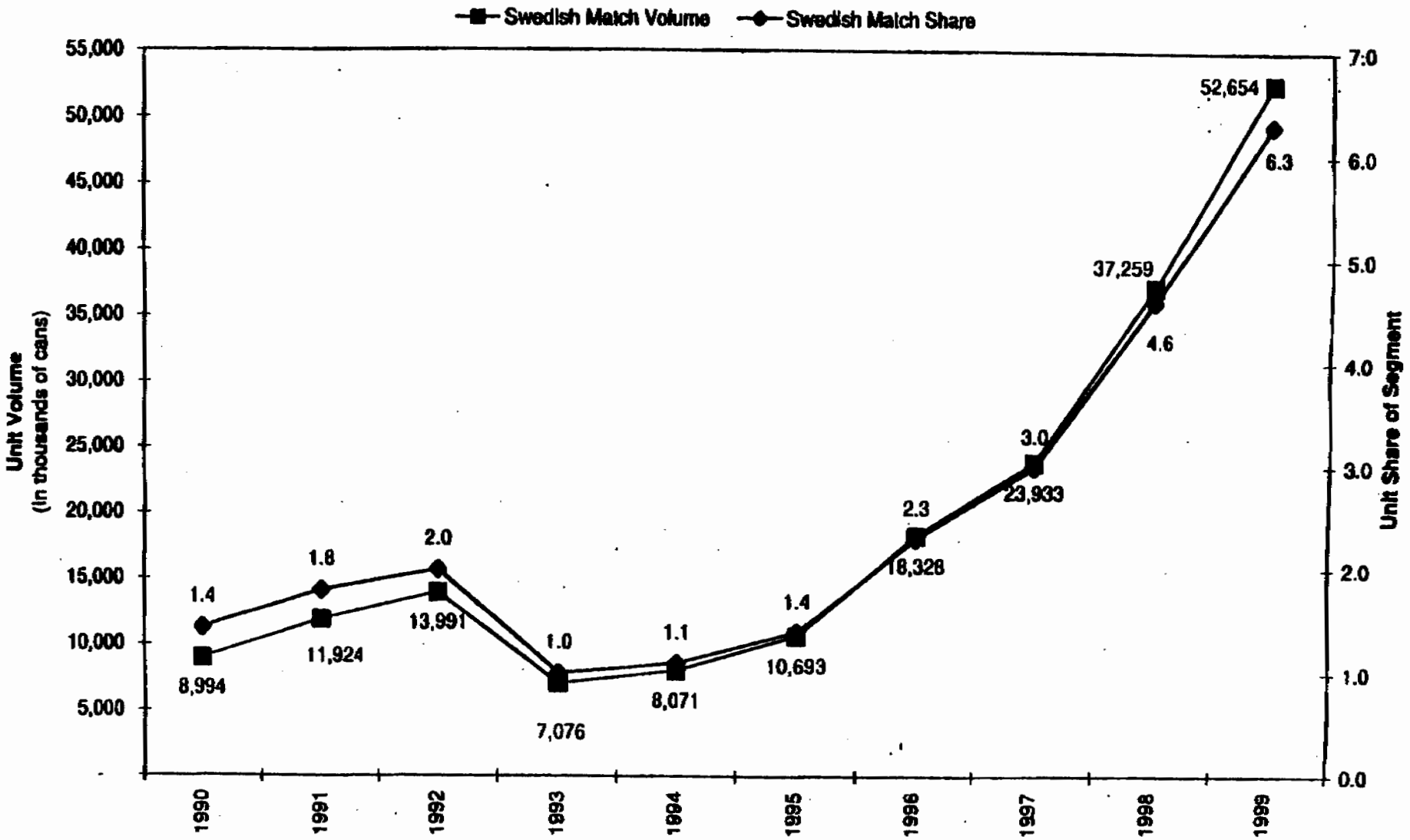
I certify that on this 20th day of March, 2000, a copy of the foregoing was sent by facsimile to:

John S. Reed, Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, U.S. Tobacco Trial Offices, Mercantile Bank Building, 10th Floor, 333 Broadway, Paducah, KY 42001.

Swedish Match

Moist Smokeless Unit Volume and Unit Share of Segment

FYE 1990 - 1999



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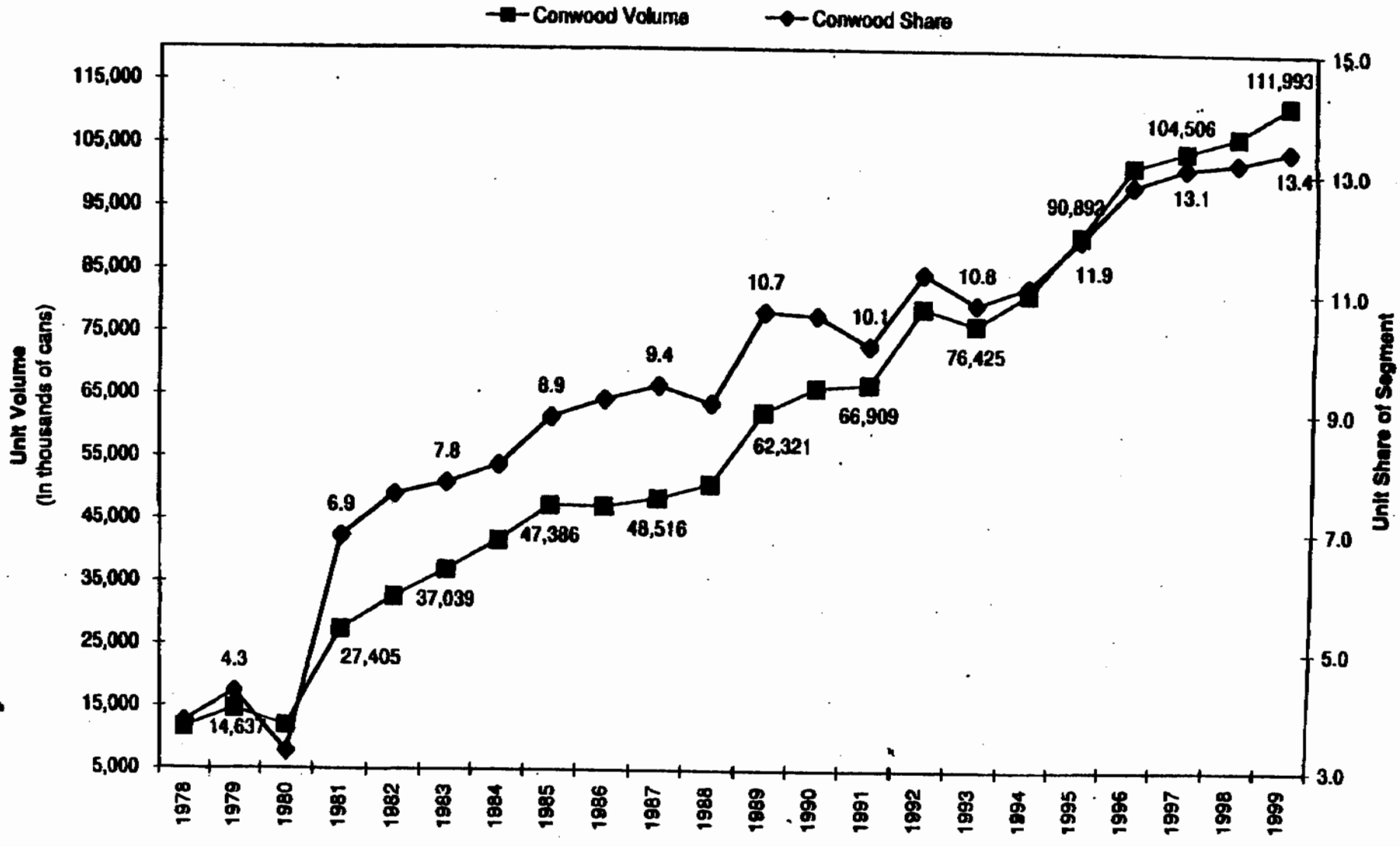
Conwood

Moist Smokeless Unit Volume and Unit Share of Segment

FYE 1978 - 1999



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DATE: March 20, 2000

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

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PLAINTIFFS' SUPPLEMENT TO PROPOSED JURY INSTRUCTION NO. 14

In light of the proof offered by defendants at trial, plaintiffs respectfully submit the attached supplement to their Proposed Instruction No. 14 concerning injury and causation.

Respectfully submitted,

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/s/

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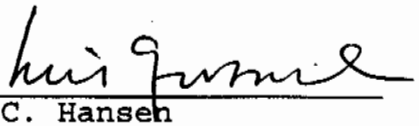

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Counsel for Plaintiffs

March 20, 2000

16diii005153

Plaintiffs' Supplement to Proposed Jury Instruction No. 14

(Injury/Causation)

UST may be held liable for a retailer's decision to exclude Conwood's products, racks, or point-of-sale advertising if you find that the retailers' decision was materially affected by UST's conduct. The burden is on UST to show that its conduct did not materially affect such decisions.

Sources:

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9 (1969) ("It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4.").

Allied Accessories and Auto Parts Co. v. General Motors Corp., 825 F.2d 971 (6th Cir. 1987) (Allied I) (reversing district court's holding that plaintiff must show defendants' misconduct was sole cause of its antitrust injuries and approving Seventh Circuit jury instruction providing that "The plaintiff does not claim nor is he obligated to prove that the violation was the sole and only cause of the loss of profit. It must, however, show that the violation played a substantial part in bringing about or causing the loss of sales and the loss of profit . . . . Plaintiff need not show that the price discrimination was a more substantial cause of injury than any other," Bohack Corp. v. Iowa Beef Processors, Inc., 715 F.2d 703, 711 n.9 (7th Cir. 1983)).

Allied Accessories and Auto Parts Co. v. General Motors Corp., 901 F.2d 1322 (6th Cir. 1990) (Allied II) (rejecting defendants' claim that plaintiff must show it would have obtained contract in a "violation free environment" and holding that plaintiff "need only show" that defendant's unlawful conduct "materially affected" retailer's decision)

Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 786 F. Supp. 1518, 1532 (C.D. Cal. 1991), rev'd on other grounds, 17 F.3d 295 (9th Cir, 1994) ("where plaintiff proves that it has suffered financial loss in the wake of the defendant's unlawful action, the defendant who raises what can be referred to as an 'intervening cause defense' bears the burden of proving the existence of that intervening cause").

CERTIFICATE OF SERVICE

I certify that on this 20th day of March, a copy of the foregoing was hand-delivered to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., U.S. Tobacco Trial Office, 333 Broadway, 10th Floor, Paducah, KY 42001.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, U.S. Tobacco Trial Office, 333 Broadway, 10th Floor, Paducah, KY 42001.

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March 20, 2000

Jeffrey A. Apperson, Clerk
United States District Court
Western District of Kentucky
127 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Plaintiffs' Supplement To Proposed Jury Instruction No. 14.

Also enclosed is an additional copy. I would be grateful if you would date-stamp and return this copy in the enclosed self-addressed envelope.

Many thanks for your assistance.

Respectfully,

Neil M. Gorsuch

Enclosures

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. PLAINTIFFS

v. **ORDER**

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC. DEFENDANTS

The Court was presented with designated depositions. Objections were shown with responses and counter-designations. After objections, some designated testimony was withdrawn Of the remaining designated testimony the following objections are sustained.

1. Russell Frank
   Page 129 - Line 25
   Page 130 - Lines 1-15
   Page 131 - Lines 2 - 12

2. Thomas Balk
   Page 216 - Line 4 - Page 218 - Line 6

3. Calvin Knol
   None

IT IS SO ORDERED.

This 20th day of March, 2000.

Thomas B. Russell, Judge
United States District Court

cc: Counsel

ENTERED
MAR 20 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

348

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COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 MAR 20 P3:25 Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

FILED
US DISTRICT COURT
WESTN DIST KENTUCKY

PLAINTIFFS' FILING OF VIDEOTAPES PLAYED FOR JURY DURING TRIAL

Enclosed for filing are the videotapes played at trial for the jury on the following dates:

1. Lawrence Borrowdale, played on March 2, 2000 for the jury.
2. Andy Carter, played on March 3, 2000 for the jury.
3. Rob Engster, played on March 3, 2000 for the jury.
4. Richard Fasanelli (2 videotapes), played on March 2, 2000 for the jury.
5. Georgia Gill-Elkins, played on March 2, 2000 for the jury.
6. Alan Hart, played on March 6, 2000 for the jury.
7. Leroy Keil, played on March 13, 2000 for the jury.
8. Patricia Leinen, played on March 8, 2000 for the jury.
9. Joseph Marconi, played on March 2, 2000 for the jury.
10. John Naifeh, played on March 10, 2000 for the jury.

11. Waynell Renfro, played on March 9, 2000 for the jury.

12. Gayleen Rusk, played on March 2, 2000 for the jury.

13. Gary Smith (2 videotapes), played on March 6, 2000 for the jury.

14. Marti Stevens, played on March 10, 2000 for the jury.

15. Shawn Ulizio, played on March 3, 2000 for the jury.

16. David Untiedt, played on March 14, 2000 for the jury.

17. David Waller, played on March 10, 2000 for the jury.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

Richard C. Roberts
Whitlow, Roberts,
Houston & Straub
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Paducah, KY 42002-0995

Benjamin A. Powell

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Kellogg, Huber, Hansen,
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Counsel for Plaintiffs

March 20, 2000

CERTIFICATE OF SERVICE

I certify that on this 20th day of March, a copy of the foregoing was sent via facsimile to:

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John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, U.S. Tobacco Trial Office, 333 Broadway, 10th Floor, Paducah, KY 42001.

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Courtney S. Elwood
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FACSIMILE TRANSMISSION

DATE: March 20, 2000

TO: John Reed, Esq.
Reed Weitkamp Schell Cox & Vice

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

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Conwood has disclosed that it intends to call two live rebuttal witnesses (Messrs. Williams and Ingram) and to play excerpts from the depositions of two other witnesses (Messrs. Borrowdale and Ulizio). Testimony from all four of these witnesses has (or will have) been presented to the jury.

Under controlling authority, this is improper rebuttal. Courts repeatedly have confined the scope of rebuttal testimony to evidence intended to rebut new evidence or new theories proffered in the defendant's case in chief. Rebuttal testimony is improper where, as here, defendants have presented no new or unforeseen theories or evidence. Accordingly, Conwood's proposed rebuttal testimony should be excluded.

ARGUMENT

The primary purpose of rebuttal testimony is "to permit a litigant to counter new, unforeseen facts brought out in the other side's case." Faigin v. Kelly, 184 F.3d 67, 85 (1st Cir. 1999); see also In re Air Crash Disaster, 86 F.3d 498, 528 (6th Cir. 1996); Martin v. Weaver, 666 F.2d 1013, 1020 (6th Cir. 1981). In keeping with this objective, trial courts have broad discretion to limit the scope of rebuttal testimony "to that which is directed to rebut new evidence or new theories proffered in the defendant's case-in-chief." Martin v. Weaver, 666 F.2d 1013, 1020 (6th Cir. 1981).

In determining the proper scope of rebuttal evidence, a trial court must weed out evidence that either: (1) concerns issues the plaintiff knew (or should have known) would be contested by defendants at the time of its case in chief, but elected not to pursue; or (2) recasts or expands on issues already pursued in the plaintiff's case in chief. See Faigin, 184 F.3d at 85-86; In re Air Crash Disaster, 86 F.3d at 528. Such evidence may be excluded as cumulative or unfairly prejudicial under Federal Rule of Evidence 403, or under Federal Rule 611(a)'s mandate to control the mode and order of interrogating witnesses and presenting evidence. See Martin, 666 F.2d at 1020.

Numerous courts have recognized the unfairness in allowing a plaintiff to use a rebuttal case to offer evidence that should have been presented in its case-in-chief. For example, in Faigin v. Kelly, a sports agent sought to buttress his defamation case by offering rebuttal evidence that he did not cause his former client, former NFL star Jim Kelly, to suffer investment losses of $800,000. See 184 F.3d at 85. The Fifth Circuit affirmed the trial court's refusal to "give [Faigin] a second nibble at the cherry":

> This proffer was too late. Faigin had the burden of proving that Kelly's statements were false. . . . He also knew through pretrial discovery that this aspect of the case would be hotly contested. . . . Indeed, Faigin called Kelly during his case in chief and inquired pointedly about the investment losses. Faigin likewise pursued [this] theory during his case in chief. Thus, Faigin had enough notice of the dimensions of the battlefield that he could – and should – have brought in his heavy artillery . . . prior to resting. . . . This principle has particular bite where, as here, nothing new or unanticipated surfaced during the defense case that even arguably changed the topography of the battlefield.

184 F.3d at 85-86. Accord Braun v. Lorillard Inc., 84 F.3d 230, 237 (7th Cir. 1996) (Posner, J.) (plaintiff knew that defendant would contest "an issue that is germane to plaintiff's prima facie case); In re Air Crash Disaster, 86 F.3d at 528 (subject of defendant's testimony was "not new" because it was raised in scheduling order and included in trial exhibits); Ellis v. Ficano, 73 F.3d 361, 1995 WL 764127, *15 (6th Cir. 1995) (it was "no secret" what defendants would assert in their case in chief); Apex Oil Co. v. Clark Oil & Refining Corp., 958 F.2d 243, 245 (8th Cir. 1992) (plaintiff "knew of should have known content" of defendant's testimony).

Rebuttal testimony is improper in this case because defendants have presented no new theories or evidence that were not (or should not have been) anticipated by Conwood. Indeed, since at least the summary judgment stage, Conwood has been fully aware of the issues that would be hotly contested by USTC in its defense case: (1) whether defendants' conduct was anticompetitive or exclusionary; (2) whether retailers desired the services offered by defendants; (3) whether defendants' own conduct caused Conwood any damages; and (4) whether Conwood's purported measure of damages was accurate or reliable. Conwood's apparent concern that it did

16diii005165

not properly address these issues -- which were part of its prima facie case -- should not be rewarded by allowing it to reverse the order of proof and have the last word before the jury.[1]

1. **Proposed Live Testimony of Williams and Ingram**

Conwood intends to call Terry Williams (Conwood's former National Sales Manager) and William Ingram (Conwood's President) to testify live in rebuttal. The live testimony of Mr. Williams and the videotaped deposition of Mr. Ingram have already been presented to the jury. Conwood could have called Mr. Ingram in its case-in-chief, but chose not to, knowing full well about what Mr. Ingram had testified to in his deposition. Because USTC has presented no new or unforeseen facts or theories in its defense, there can be no appropriate rebuttal testimony by Conwood.

This case is no different from Cates v. Sears, Roebuck & Co., where a consumer brought a products liability action against Sears for injuries suffered while operating a radial arm saw. 928 F.2d 679, 685 (5th Cir. 1991). On rebuttal, the consumer sought to introduce testimony by his expert witness – who had already testified during the consumer's case-in-chief – that would have rebutted Sears's claim of comparative negligence. See id.. The Fifth Circuit affirmed the exclusion of the proffered rebuttal testimony:

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[1] The Sixth Circuit has distinguished cases where a plaintiff seeks to rebut evidence pertaining to a defendant's affirmative defense. In such cases, rebuttal evidence is allowed because the plaintiff does not bear the initial burden of negating a defendant's affirmative defense. See Martin, 666 F.2d at 1020.

Conwood was well aware of the issues that would be raised by USTC in its defense, and had ample opportunity to counter these issues as part of its case-in-chief. Any failure by Conwood to fully develop its desired testimony during its case-in-chief should not be rewarded by allowing it to undermine the Court's duty to control the mode and order of presenting evidence under Rule 611(a). Further, to the extent Conwood intends to revisit with Messrs. Williams or Ingram certain issues already pursued in its case-in-chief, such testimony would be cumulative and unfairly prejudicial under Rule 403.

2. Borrowdale and Ulizio Videotaped Testimony

Conwood also intends to play excerpts from the depositions of two former USTC employees, Messrs. Borrowdale and Ulizio. Both excerpts are intended to suggest that USTC preys on retailers who either have no decision-making power or are unconcerned about the actions taken by USTC sales representatives in their stores. [2]

This is completely improper rebuttal testimony. Conwood already has presented evidence on this issue in its own case-in-chief, including the depositions of the very witnesses it now seeks to recall in rebuttal. If it wanted to play some more of their testimony, it should have. Moreover, Conwood also has pursued this very point through the testimony of Professor Blattberg, and has published three demonstratives to the jury suggesting that retailers are too busy, unconcerned or gullible to make independent, profit-maximizing decisions. Any

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additional opportunity for Conwood to recast these issues on rebuttal is cumulative, unfairly prejudicial under Rule 403, and merely intended to give Conwood the last word.

Conwood should not benefit by its failure to adequately address this issue in its case-in-chief. As stated by Judge Posner,

> The plaintiff who knows that the defendant means to contest an issue that is germane to the prima facie case (as distinct from an affirmative defense) must put in his evidence on the issue as part of his case in chief. . . . Otherwise the plaintiff could reverse the order of proof, in effect requiring the defendants to put in their evidence before the plaintiff put on his.

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Conwood's proposed rebuttal testimony can be divided into two categories: (1) evidence intended to buttress positions that were necessary for Conwood's prima facie case but not adequately pursued in its case-in-chief; and (2) evidence that is cumulative of testimony already elicited in Conwood's case-in-chief. Neither category is proper rebuttal testimony. If Conwood wishes to highlight these points further, it should do so in closing arguments.[3]

---

[3] In the event that Conwood is allowed to present deposition testimony in rebuttal, USTC should of course be permitted to counterdesignate.

16diii005168

CONCLUSION

For the foregoing reasons, this Court should exclude the live testimony of Messrs. Ingram and Williams, the videotaped testimony of Messrs. Borrowdale and Ulizio, and any other proposed rebuttal evidence that is not intended to counter new, unforeseen evidence elicited in defendants' case-in-chief.

Date: March 21, 2000

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Counsel for Defendants

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., counsel for Plaintiffs, this 20th day of March, 2000.

Counsel for Defendants

16diii005170

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

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Date: March 21, 2000

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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., counsel for Plaintiffs, this 20th day of March, 2000.

Counsel for Defendants

16diii005178

REED WEITKAMP SCHELL & VICE PLLC

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March 21, 2000

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Benjamin A. Powell

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IF ANY PROBLEMS ARISE, PLEASE CONTACT: Karen Childers
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RE: *Conwood Company, L.P., et al. v. United Stated Tobacco Company, et al., United States District Court, Western District of Kentucky, Paducah Division, No. 5:98-CV-108-R*

MESSAGE:

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PRELIMINARY INSTRUCTIONS

Members of the Jury:

Now that you have heard all of the evidence and the argument of the attorneys, it is my duty to give you instructions as to the law applicable in this case.

It is your duty as jurors to follow the law as stated in the instructions, and to apply that law to the facts you find from the evidence.

You are not to single out one instruction alone as stating the law. You must consider the instructions as a whole. The fact I have given an instruction or any element does not mean you should find one way or the other as to that element.

You are not to be concerned with the wisdom of any rule of law stated by the Court. You must apply the law given in these instructions whether you agree with it or not.

It is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record. It is your own interpretation and recollection of the evidence that controls.

You are permitted to draw reasonable inferences, deductions, and conclusions from the testimony and exhibits which you feel are justified in the light of your own common sense.

In saying that you must consider all the evidence, I do not mean to suggest that you must necessarily accept all of the evidence as true or accurate. You are the sole judges of the credibility or believability of each witness and the weight to be given to the testimony of each witness.

In determining the credibility of any witness, you may properly consider the demeanor of the witness while testifying, frankness or lack of it, and his or her interest in the outcome of the case, if any.

In deciding the facts of this case you must not be swayed by bias or prejudice or sympathy or public opinions. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. The law is not a respecter of persons, a corporation and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

INSTRUCTION NO. 1.

ANTITRUST CLAIMS

The plaintiff in this case, Conwood Company, seeks damages for injury to its business and property, claimed to have been suffered or sustained as a result of alleged violations by the defendant, United States Tobacco Company, of the antitrust laws of the United States.

Section 2 of the Sherman Antitrust Act states that every person who shall monopolize, or attempt to monopolize, any part of the trade or commerce shall be guilty of a violation of the antitrust laws. Conwood claims that U.S. Tobacco unlawfully monopolized the market for moist snuff and also attempted to monopolize the moist snuff market, injuring Conwood. U.S. Tobacco denies these claims.

The word "person" includes not only every individual, but also every corporation, partnership and every other organization, of any kind.

The purpose of the Sherman Antitrust Act is to preserve and advance our system of free, competitive enterprise; to encourage, to the fullest extent practicable, free and open competition in the market place; and to prevent the accomplishment of a monopoly in any business or industry; all to the end that the consuming public may receive better goods and services at a lower cost.

The antitrust laws were enacted for the protection of competition, not competitors. Therefore, Conwood must prove that U.S. Tobacco's acts injured not only Conwood itself, but injured competition in the relevant market.

INSTRUCTION NO. 2.

ANTITRUST: Elements of Monopoly Claim

Conwood claims that U.S. Tobacco unlawfully monopolized the moist snuff industry and thereby injured Conwood.

There are four essential elements which Conwood must prove by a preponderance of the evidence in order to establish its claim that U.S. Tobacco has monopolized within the meaning of the antitrust laws:

1) That U.S. Tobacco possessed monopoly power in a relevant market;

2) That U.S. Tobacco willfully maintained that power through restrictive or exclusionary conduct;

3) That U.S. Tobacco's activities occurred in or affected interstate commerce; and

4) That Conwood was injured in its business or property because of U.S. Tobacco's restrictive or exclusionary conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for U.S. Tobacco and against Conwood on Conwood's monopolization claim.

INSTRUCTION NO. 2.1

ANTITRUST: Definition of Monopoly Power

Monopoly power is the power to control prices in or to exclude competition from the relevant market.

The power to control prices is the power of a company to establish appreciably higher prices for its goods than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a company that has raised prices eventually has to lower its prices to the level of prices charged by its competitors , it may not have monopoly power in the sense of power to control prices.

The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from the market or by preventing new competition from entering the market.

To establish the possession of monopoly power, Conwood need not prove that prices were raised or that competition actually was excluded, but only that U.S. Tobacco had the power to raise prices or exclude competition.

Further, to conclude that U.S. Tobacco had monopoly power , you need not find that U.S. Tobacco could sell at any price it desired or that it had no competition whatsoever. A company may face some competition in the relevant market and still have monopoly power. On the other hand, if you find that U.S. Tobacco did not have the power to control prices or exclude competition, then you must conclude that it did not have monopoly power.

The mere possession of monopoly power is not sufficient to support a finding of monopolization, unless it is also determined that the monopoly power was willfully and intentionally acquired and maintained. A person who acquires monopoly power through normal

growth and development, as a consequence of having a superior product, or business acumen, or through historical accident, is not guilty of monopolization as defined in this charge.

INSTRUCTION NO. 2.2

ANTITRUST: Relevant Market

Before it can be determined whether a person has monopolized a field of competition in a particular line of trade or commerce, it must first be determined what is the "area of effective competition" applicable in this case. In antitrust law, this is known as defining what is called the "relevant market."

Charges of monopolization can only be judged in the framework of the relevant market. The relevant market which plaintiff claims is applicable in this claim is as follows: all moist snuff brands. Plaintiff must, therefore, prove by a preponderance of the evidence that the relevant market applicable in this case is all moist snuff brands.

In determining the relevant market, the "area of effective competition" must be determined by reference to: (1) a product market and, (2) a geographic market. The parties agree that the relevant geographic market is the entire United States.

In determining the product market, the basic idea is that the products within it are interchangeable as a practical matter from the buyer's point of view. This does not mean that products must be identical to be in the same relevant market. It means that they must be, as a matter of practical fact and the actual behavior of consumers, substantially or reasonably interchangeable to fill the same consumer needs or purposes. Two products are within a single market if one item could suit buyers' needs substantially as well as the other.

Conwood claims that the relevant market includes all moist snuff brands. U.S. Tobacco argues that the relevant market either includes all tobacco products, including cigarettes, cigars, and other smokeless tobacco products or is divided into separate types of moist snuff products. In sum, what you are being asked to do is to decide which products compete with each other.

INSTRUCTION NO. 2.3

ANTITRUST: Existence of Monopoly Power

If you find that a relevant market has been proved, you should then determine whether U.S. Tobacco possesses monopoly power in that market. There are a number of factors you should consider, none of which is necessarily controlling.

For example, you have heard evidence about U.S. Tobacco's market share. You may infer whether or not monopoly power exists from U.S. Tobacco's share of the relevant market. Market share is a firm's share of total industry sales, shipments, production, capacity, or reserves, expressed as a percentage of the whole. There are a variety of ways to measure market share, but whatever measure you use must be reasonable and consistently applied.

If you determine that U.S. Tobacco's share of the relevant market is less than 50 %, that market share by itself does not permit you to infer that U.S. Tobacco possesses monopoly power. If you determine that U.S. Tobacco's share of the relevant market is 80 % or higher, that is strong evidence of the existence of monopoly power. If you determine that U.S. Tobacco's market share is somewhere between 50% and 80%, you may infer the existence of monopoly power from that share, and the inference is stronger the higher U.S. Tobacco's market share is within that range.

You may also consider the trend in U.S. Tobacco's market share. A declining market share may indicate the absence of monopoly power, though it does not foreclose such a finding, while an increasing market share may indicate the opposite.

Another factor is the number and size of U.S. Tobacco's competitors. If these are few, weak, or have small or decreasing market shares, so that they do not offer substantial competition to U.S. Tobacco in the relevant market, this may tend to indicate that U.S. Tobacco has

monopoly power. If, on the other hand, they are numerous, vigorous, or have large or increasing shares in that market, this may be evidence that U.S. Tobacco does not have monopoly power.

You also may consider the history of entry into and exit from the market by other companies. Entry of companies into the market may indicate that U.S. Tobacco lacks monopoly power. On the other hand, departure of companies from the market, or the failure of companies to enter the market, may indicate the existence of monopoly power.

The existence of monopoly power also may be shown by evidence that defendant had the power to raise prices appreciably without a substantial loss of business to competitors or by evidence that U.S. Tobacco had profit margins that were extraordinarily high or maintained high rates of return over a long period of time.

If you find that U.S. Tobacco had monopoly power, then you must find that Conwood has established this requirement and you must consider the remaining elements of its monopolization claim. If you find that U.S. Tobacco did not have monopoly power, then you must find that U.S. Tobacco did not violate Section 2 of the Sherman Act.

INSTRUCTION NO. 2.4

ANTITRUST: Willful Maintenance of Monopoly Power

The next element that Conwood must prove is that U.S. Tobacco willfully maintained monopoly power through predatory or exclusionary acts or practices, rather than by supplying better products or services, or by exercising superior business judgment, or just by chance.

Predatory or exclusionary conduct is conduct that has the effect of preventing or excluding competition or frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in maintaining U.S. Tobacco's monopoly power.

To prove U.S. Tobacco acted willfully, Conwood must prove either that U.S. Tobacco engaged in predatory or exclusionary acts or practices with the conscious object of furthering the dominance of U.S. Tobacco in the relevant market or that this was the necessary direct consequence of U.S. Tobacco's conduct or business arrangements.

You may not find that a company willfully maintained monopoly power if it has maintained that power solely through the exercise of superior foresight and skill; or because of natural advantages, such as unique geographic access to raw materials or markets; or because of economic or technological efficiency, including efficiency resulting from scientific research; or by obtaining a lawful patent; or because of a change in cost or taste has driven out all but one supplier; or simply because the market is so limited that it is impossible to efficiently produce the product except by a plant large enough to supply the whole demand. The acts or practices that result in the maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or extraordinary commercial success. They must represent conduct that has made it very difficult or impossible for competitors to

engage in fair competition.

Mere possession of monopoly power, if lawfully acquired, does not violate the antitrust laws. But it is unlawful to use monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor. Therefore, a company that has lawfully acquired monopoly power may not use that power to maintain or tighten its hold on the market. Such use may be shown by conduct that depends for its success on the company's monopoly power, as distinguished from conduct that could be successfully employed by firms without monopoly power in the relevant market.

In determining whether there has been an unlawful exercise of monopoly power, you must bear in mind that a company has not acted unlawfully simply because it has engaged in ordinary competitive behavior that would have been an effective means of competition if it were engaged in by a firm without monopoly power, or simply because it is large and efficient. To find U.S. Tobacco liable for monopolization because of the maintenance of lawfully acquired monopoly power through the use of that power, you must determine that U.S. Tobacco actually exercised monopoly power to maintain or tighten its control of the market.

If you find that U.S. Tobacco willfully maintained monopoly power, then you must find that Conwood has established this element and you must consider the remaining elements of its monopolization claim. If you find that U.S. Tobacco did not willfully maintain monopoly power, then you must find that U.S. Tobacco did not violate Section 2 of the Sherman Act, and you must find for U.S. Tobacco and against Conwood on this claim.

INSTRUCTION NO. 2.5

ANTITRUST: Interstate Commerce

To violate the Sherman Act, the alleged conduct must be imposed directly on goods or services in the flow of interstate commerce or must affect interstate commerce. Interstate commerce refers to transactions in goods or services between one or more persons in one state and one or more persons in another state.

The conduct alleged by Conwood or the activities of U.S. Tobacco that were affected by the unlawful acts must have had some effect upon interstate commerce.

INSTRUCTION NO. 2.6

ANTITRUST: Injury and Causation

If you find that U.S. Tobacco has violated Section 2 of the Sherman Act as alleged by Conwood, then you must decide if Conwood is entitled to recover damages from U.S. Tobacco.

The law provides that anyone who is injured by an antitrust violation may recover damages for any injury to its business or property caused by the violation.

For Conwood to establish that it is entitled to recover damages, it must prove that it was injured as a result of U.S. Tobacco's alleged violation of antitrust laws. This is sometimes referred to as proving "causation" or "fact of damage." Proving causation does not require Conwood to prove the dollar value of its injury. It requires only that Conwood prove that it was in fact injured by U.S. Tobacco's alleged antitrust violation. If you find that Conwood has established that it was in fact injured, you may then consider the amount of Conwood's damages. It is important to understand, however, that injury and amount of damage are different concepts and that you cannot consider the amount of damage unless and until you have concluded that Conwood has established that it was in fact injured.

To establish injury, Conwood must have offered evidence that establishes as a matter of fact and with a fair degree of certainty that U.S. Tobacco's alleged illegal conduct was a material cause of Conwood's injury. This means that Conwood must have proved that some damage flowed to it as a result of U.S. Tobacco's alleged antitrust violation. Conwood is not required to prove that U.S. Tobacco's alleged antitrust violation was the sole cause of its injury; nor need Conwood eliminate all other possible causes of injury. It is enough if Conwood has proved that the alleged antitrust violation was a material cause of its injury. Injury may be established by inference or circumstantial evidence. However, if you find that Conwood's injury was caused

solely by something other than the alleged antitrust violation, then you must find that Conwood has failed to prove that it is entitled to recover damages from U.S. Tobacco.

INSTRUCTION NO. 3.

ANTITRUST: Elements of Attempt to Monopolize Claim

Conwood also claims that U.S. Tobacco has violated the federal antitrust laws by attempting to monopolize interstate trade and commerce in the moist snuff industry.

There are five essential elements which Conwood must prove in order to establish that U.S. Tobacco was liable for attempted monopolization within the meaning of the antitrust laws:

1) That U.S. Tobacco engaged in predatory or exclusionary conduct;

2) That U.S. Tobacco had a specific intent to monopolize in the relevant market of all moist snuff brands in the United States;

3) That there was a dangerous probability that U.S. Tobacco would achieve its goal of monopoly power in the relevant market;

4) That U.S. Tobacco's conduct occurred in or affected interstate commerce, and

5) That Conwood was injured in its business or property by U.S. Tobacco's predatory or exclusionary conduct.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for U.S. Tobacco and against Conwood on the attempt to monopolize claim.

The definitions of "monopoly power," "relevant market," "interstate commerce," and "injury and damages" are the same in this claim as they are in the monopoly claim.

INSTRUCTION NO. 3.1

ANTITRUST: Exclusionary or Restrictive Conduct

I have previously instructed you on exclusionary conduct. That instruction applies here as well.

INSTRUCTION NO. 3.2

ANTITRUST: Intent

There are several ways in which Conwood may prove that U.S. Tobacco had the specific intent to monopolize. There may be evidence of direct statements of U.S. Tobacco's intent to obtain a monopoly in the relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of defendant. You must be careful, however, to distinguish between a U.S. Tobacco's intent to compete aggressively (which is lawful) and an intent to acquire monopoly power by using illegal or exclusionary means.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for you to decide what facts have been established by the evidence.

INSTRUCTION NO. 3.3

ANTITRUST: Dangerous Probability of Success

If you find that U.S. Tobacco had the specific intent to achieve a monopoly and engaged in significant exclusionary or restrictive conduct, you also must determine if the evidence shows the next element of attempt to monopolize: namely, that there was a dangerous probability that U.S. Tobacco would sooner or later succeed in achieving monopoly power if it continued to engage in the same or similar conduct. In determining whether there was a dangerous probability of success, you should consider the following factors:

1) the market share and power of defendant as compared to its competitors;

2) whether U.S. Tobacco's share of the relevant market was increasing or decreasing;

3) the actual or probable impact on competition of U.S. Tobacco's restrictive or exclusionary acts or practices; and

4) whether the barriers to entry into the market made it difficult for competitors to enter the market.

A dangerous probability of success need not mean that success was nearly certain. It means that the chance of success was substantial and real: that is, that there was a reasonable likelihood that defendant would ultimately achieve its goal of monopoly power.

INSTRUCTION NO. 4.

ANTITRUST: Damages

If you find that U.S. Tobacco either monopolized or attempted to monopolize in accordance with these instructions, the law provides that Conwood should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful. A defendant's violations of the antitrust laws often create a situation in which it is hard to determine the precise amount of damages suffered by the plaintiff. Conwood's right to be fairly compensated should not be affected by any difficulty you may have in determining the precise amount of the recovery so long as there is a reasonable basis in the evidence for your award. You may not, however, calculate damages based only on speculation or guesswork, and you must remember that you can award Conwood damages only for injuries caused by a violation of the antitrust laws. You may not award damages for injuries or losses caused by other factors.

If you find that U.S. Tobacco violated the antitrust laws and that this violation caused injury to Conwood, then you must determine the amount of damages, if any, Conwood is entitled to recover. Damages may include lost profits, lost goodwill, destruction of a business or deprivation of the opportunity to engage in a business, overcharges, or increased costs incurred because of a violation.

If you find that U.S. Tobacco did commit an antitrust violation, then you must calculate the profits, if any, that Conwood lost as a result of U.S. Tobacco's antitrust violation. Profit means net profit: the amount by which Conwood's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues. You may calculate net profit in the following way.

You have heard evidence of the market share that Conwood would have had in the absence of U.S. Tobacco's antitrust violation. You may calculate U.S. Tobacco's loss of profit by considering market share, evidence of the size of the market, and evidence relating to the profit margin Conwood would have secured on such sales.

INSTRUCTION NO. 5.0

LANHAM ACT CLAIM

Conwood also alleges that U.S. Tobacco falsely advertised concerning Conwood in violation of the Lanham Act.

Under the Lanham Act, it is illegal for any person to misrepresent the nature, characteristics, or qualities of another person's goods, services or commercial activities in commercial advertising or promotion .

Conwood must prove by a preponderance of the evidence the following elements:

1) That U.S. Tobacco made false or misleading statements of fact about its own products or Conwood's;

2) That those statements were publically disseminated;

3) That retailers and consumers were deceived or were likely to have been deceived by U.S. Tobacco's statements;

4) That statements were material in the sense that it was likely to influence the deceived retailer's or consumer's purchasing decisions;

5) That the statements had a substantial effect on interstate commerce; and

6) That U.S. Tobacco's statements caused harm to Conwood.

Otherwise, you will find for U.S. Tobacco.

If you believe from the evidence that U.S. Tobacco violated the Lanham Act and injury to Conwood resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 6.

LANHAM ACT COUNTERCLAIM

U.S. Tobacco alleges in its counterclaim against Conwood that Conwood falsely advertised concerning U.S. Tobacco in violation of that same law.

Under the Lanham Act, it is illegal for any person to misrepresent the nature, characteristics or qualities of another person's goods, services or commercial activities in commercial advertising or promotion .

U.S. Tobacco must prove by a preponderance of the evidence the following elements:

1) That Conwood made false or misleading statements of fact concerning Conwood's and U.S. Tobacco's products or services offered to retailers;

2) That those statements were publically disseminated;

3) That retailers and consumers were deceived or were likely to have been deceived by U.S. Tobacco's statements;

4) That statements were material in the sense that it was likely to influence the deceived retailer's or consumer's purchasing decisions;

5) That the statements had a substantial effect on interstate commerce; and

6) That Conwood's statements caused harm to U.S. Tobacco.

Otherwise, you will find for Conwood.

If you believe from the evidence that U.S. Tobacco violated the Lanham Act and injury to Conwood resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 7.

CONVERSION

Conwood has brought a claim of conversion against U.S. Tobacco. Conwood claims that U.S. Tobacco wrongfully took its property from retail locations.

You will find for Conwood if you are satisfied from the evidence:

1) That U.S. Tobacco representatives took Conwood advertising and display racks from retail locations; and

2) That all of the advertising or display racks taken belonged to Conwood; and

3) That Conwood was damaged thereby.

Otherwise, you will find for U.S. Tobacco.

If you find for Conwood, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 8.

CONVERSION COUNTERCLAIM

U.S. Tobacco has brought a claim of conversion against Conwood. U.S. Tobacco claims that Conwood wrongfully took its property from retail locations.

You will find for U.S. Tobacco if you are satisfied from the evidence:

1) That Conwood representatives took U.S. Tobacco advertising and display racks from retail locations; and

2) That all of the advertising or display racks taken belonged to U.S. Tobacco ; and

3) That U.S. Tobacco was damaged thereby.

Otherwise, you will find for Conwood.

If you find for U.S. Tobacco, you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 9.

UNJUST ENRICHMENT

Conwood claims that U.S. Tobacco was unjustly enriched.

You will find for Conwood if you are satisfied from the evidence:

1) That Conwood conferred a benefit upon U.S. Tobacco; and

2) That U.S. Tobacco accepted the benefit from Conwood under such circumstances that it would be impossible for it to retain the benefit without paying the value thereof.

Otherwise, you will find for U.S. Tobacco.

A "benefit" may be services, goods, or monies. A loss by Conwood without an actual benefit to U.S. Tobacco is not recoverable as unjust enrichment.

It is not necessary to prove that the recipient of the benefit was at fault or guilty of wrongdoing in any way, but it must be established that as between the parties it would be unjust and unconscionable for the recipient to retain the benefit without paying the reasonable value thereof.

If you find for Conwood, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 10.

PRODUCT DEFAMATION

Conwood claims that U.S. Tobacco made false and misleading statements about the quality of Conwood's moist snuff products when U.S. Tobacco sales representatives stated that Conwood products contained stems, twigs, and fiberglass.

You will find for Conwood if you are satisfied from the evidence:

1) That U.S. Tobacco made statements about Conwood products that would reasonably have been understood to imply that Conwood products were inferior or defective;

2) That such statements would tend to injure Conwood's business and reputation;

3) That such statements were not true and gave a false impression of Conwood and its products;

4) That a reasonably prudent person would not have made statements similar to those made by U.S. Tobacco about Conwood products; and

5) That Conwood suffered harm to its reputation or economic loss as a direct result of U.S. Tobacco's statements.

If you believe from the evidence that U.S. Tobacco defamed Conwood or its products and injury to Conwood resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 11.

UNFAIR COMPETITION

Conwood claims that U.S. Tobacco has violated Kentucky Revised Statute § 265.050, which prohibits unfair trade practices, by making secret payments to certain retailers but not others.

You will find for Conwood if you are satisfied from the evidence:

1) That U.S. Tobacco made secret payments to retailers or distributors in the form of allowances, rebates, refunds, commissions, discounts or the like; and

2) That U.S. Tobacco's payments in fact caused injury to Conwood or competition.

If you find for Conwood, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 12.

INTERFERENCE WITH CONTRACTUAL RELATIONS

Conwood claims that U.S. Tobacco improperly interfered with various of Conwood's contractual relationships with retailers.

To prevail on this claim, Conwood must prove the following:

1) The existence of a contract between Conwood and retailers which granted Conwood _____;

2) U.S. Tobacco knew about these contracts;

3) U.S. Tobacco intentionally caused Conwood's contracts with retailers to be breached;

4) Conwood's contracts with those retailers were actually breached;

5) U.S. Tobacco's actions resulted in damages to Conwood;

6) U.S. Tobacco had no privilege or justification to excuse its conduct.

Otherwise, you must find for U.S. Tobacco

In determining whether intentional interference with a contract of another is improper or unjustified, you must consider all the facts and circumstances in the case and balance the following factors:

(1) The nature of U.S. Tobacco's conduct;

(2) U.S. Tobacco's motive;

(3) The interests of Conwood with which the conduct interfered;

(4) The interests sought to be advanced by the U.S. Tobacco's conduct;

(5) The social interests in protecting the freedom of action of U.S. Tobacco and the contractual interests of Conwood;

(6) The proximity or remoteness of U.S. Tobacco's conduct to the alleged interference;

(7) The relations between Conwood and U.S. Tobacco.

If you believe, from the evidence, that U.S. Tobacco acted in good faith to assert or protect a legitimate, legally protected interest of its own, then you may find U.S. Tobacco's conduct, in interfering with a contract between Conwood and any retailer, was privileged or justified.

If you find that U.S. Tobacco's conduct was justified, you should find for U.S. Tobacco on this claim. If you find for Conwood, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 13.

INTERFERENCE WITH BUSINESS EXPECTANCY

Conwood claims that U.S. Tobacco interfered with various of its potential agreements with retailers.

You will find for Conwood if you are satisfied from the evidence:

1) The existence of a valid business relationship or its expectancy between Conwood and retailers;

2) U.S. Tobacco knew about these relationships;

3) U.S. Tobacco intentionally interfered with Conwood's relationships with retailers;

4) U.S. Tobacco had an improper motive;

5) U.S. Tobacco's interference caused injury to Conwood; and

6) Conwood suffered damages.

Otherwise, you must find for U.S. Tobacco That U.S. Tobacco improperly interfered with Conwood's business expectancy;

In determining whether intentional interference with business expectancy of another is improper or unjustified, you must consider all the facts and circumstances in the case and balance the following factors:

(1) The nature of U.S. Tobacco's conduct;

(2) U.S. Tobacco's motive;

(3) The interests of Conwood with which the conduct interfered;

(4) The interests sought to be advanced by the U.S. Tobacco's conduct;

(5) The social interests in protecting the freedom of action of U.S. Tobacco and the contractual interests of Conwood;

INSTRUCTION NO. 14.

AGENCY

As a general rule, whatever any person is legally capable of doing himself can be done through another as agent. So, if the acts of an employee or other agent are voluntarily and intentionally ordered or directed, or authorized or consented to by a person, then the law holds that person responsible for such acts, the same as if the acts had in fact been done by such person.

A corporation is in law a person, but of course it cannot act otherwise than through its directors, or officers, or employees, or other agents. The law therefore holds a corporation responsible for all unlawful acts of its directors, or officers, or employees, or other agents, provided such unlawful acts are done within the scope of their authority, as would usually be the case if done in the ordinary course of their employment, or in the ordinary course of the corporation's business.

Authority to act for a corporation in a particular matter, or in a particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in the case. That is to say, authority to act for a corporation, like any other fact in issue in a civil case, need not be established by direct evidence, but may be established by indirect or circumstantial evidence.

Every act of every director, or officer, or employee, or other agent, on behalf of, or in the name of a corporation, if done within the scope of his authority, is in law the act of the corporation itself.

INSTRUCTION NO. 15.

VERDICT MUST BE UNANIMOUS

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to the verdict. Your verdict must be unanimous in that all of you must agree to it.

INSTRUCTION NO. 16

NOTES

Now I would like to say something about the notes that you have taken during the trial. Your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you have not taken notes, you should rely upon your own in independent recollection of the proceedings and you should not be unduly influenced by the notes of other jurors.

Notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been. Whether you have taken notes or not, each of you must form and express your own opinion as to the facts of the case.

You will notice that we do have an official court reporter making a record of the trial. However, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

INSTRUCTION NO. 17.

It is your duty as jurors, to consult with one another, and to deliberate with a view to reach an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do no hesitate to reexamine your own views and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesman her in Court.

You will take these forms to the jury room and, when you have reached unanimous agreement you will have reached unanimous agreement you will have your foreperson fill in and sign the forms which set forth the verdict upon which you unanimously agree with respect to each issue in this case; you will then return with your decision to the courtroom.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MOTION TO INTRODUCE EXHIBITS INTO EVIDENCE

Defendants respectfully move to introduce the following exhibits into evidence.

Plaintiffs did not object to any of these documents on January 28, 2000.

DX 548	DX 777
DX 554	DX 780
DX 555	DX 790
DX 613	DX 811
DX 690	DX 931
DX 694	DX 934
DX 756	DX 938
DX 760	DX 941
DX 774	

Dated: March 22, 2000

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Counsel for Defendants

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, counsel for Plaintiffs, this 22nd day of March, 2000.

Counsel for Defendants

16diii005218

US TOBACCO TRIAL OFFICE
FIRSTAR BANK BUILDING
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TELEPHONE NO.: (270) 444-6339
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FACSIMILE TRANSMITTAL SHEET

PLEASE DELIVER THE FOLLOWING PAGE(S) TO:

NAME: Marie Hanson; Neil Gorsuch; Ben Powell

FIRM: Kellogg Huber

CITY: _____ DATE: 3/22/00

TELEPHONE NO.: _____

FACSIMILE NO.: 450-5118

FROM: Chris Athanasia

TOTAL NUMBER OF PAGES INCLUDING COVER(S): 4

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MOTION TO INTRODUCE EXHIBITS INTO EVIDENCE [AMENDED]

Defendants respectfully move to introduce the following exhibits into evidence subject to any objections Plaintiffs may make.

DX 548	DX 777
DX 554	DX 780
DX 555	DX 790
DX 613	DX 811
DX 690	DX 931
DX 694	DX 934
DX 756	DX 938
DX 760	DX 941
DX 774	

Dated: March 22, 2000

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CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, counsel for Plaintiffs, this 22nd day of March, 2000.

Counsel for Defendants

16diii005222

REED WEITKAMP SCHELL & VICE PLLC

TELECOPIER COVER SHEET

March 22, 2000

TO: Mark C. Hansen
Neil M. Gorsuch
Benjamin A. Powell

TELECOPIER NO.: 270-450-5118

FROM: John S. Reed

NUMBER OF PAGES *(including cover sheet)*: 4

IF ANY PROBLEMS ARISE, PLEASE CONTACT: Karen Childers
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RE: *Conwood Company, L.P., et al. v. United Stated Tobacco Company, et al., United States District Court, Western District of Kentucky, Paducah Division, No. 5:98-CV-108-R*

MESSAGE:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' *EX PARTE* PROFFER REGARDING REBUTTAL PROOF

Pursuant to the Court's direction, plaintiffs ("Conwood") respectfully submit the following *ex parte* disclosure of their intended rebuttal proof.

Conwood intends to offer two live witnesses:

William Ingram
Conwood's CEO is expected to testify for five minutes. Mr. Ingram will testify that he was prepared to appear and testify in defendants' case and that he directed every Conwood employee to appear if requested by defendants.

Terry Williams
Conwood's National Sales Director is expected to testify for 15 minutes. Mr. Williams will testify that several of the retailers whose depositions were played by defendants in their case-in-chief allow Conwood racks, POS, and products without restriction and that Conwood performs well in these accounts. He will testify that other deposed retailers have agreements with UST for exclusive vending and POS and that Conwood's share in these chains has suffered as a result. A demonstrative summarizing much of Mr. Williams' expected testimony is attached.

Plaintiffs intend to offer two short, previously unplayed excerpts (less than 5 minutes in total) from the testimony of Messrs. Borrowdale and Ulizio, both former UST representatives. This testimony, which is attached, rebuts defendants' "retailer decides" defense by explaining the reality of how UST obtains "retailer permission."

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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Whitlow, Roberts,
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Counsel for Plaintiffs

March 23, 2000

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05:21P 1 Do they understand -- in your experience,
2 do these store employees understand there are
3 different manufacturers of moist snuff products?
4 A Many of them didn't. They're just clerks.
05:22P 5 Q Can you describe the average clerk to me?
6 A The average clerk would -- that's hard to
7 describe an average clerk, but they're usually -- if
8 it's not the manager, if it's just the clerk, usually
9 somebody who hates standing behind the counter and
05:22P 10 hated their job and always thought they were
11 underpaid.
12 Or they were just people who weren't really
13 into what they were doing. They were just clerks and
14 really didn't seem to care about too much of
05:22P 15 anything.
16 Q Did they seem to care too much about what
17 you did with the moist snuff section?
18 MR. GOLDFARB: Object to the form.
19 THE WITNESS: They would care to the extent that
05:22P 20 they would be worried that we'd be doing something
21 wrong if their boss or if the manager came back into
22 work and saw that we switched. So there was some
23 concern.
24 "What are you doing?"
05:23P 25 "Don't worry about it. We're just checking

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05:23P 1 the dates, checking your skoal, checking your
2 Copenhagen."
3 It was -- you know. Just tell them this is
4 pretty normal. Here's my card. You started getting
05:23P 5 a rapport with a lot of them, and they would let you
6 do basically what you needed to do most of the time,
7 you know.
8 Q When you got a rapport with them, would
9 they basically let you do what you wanted to do with
05:23P 10 the moist snuff section?
11 A Usually, yeah, yeah.
12 Q Was it easy to mislead or confuse or dupe
13 them?
14 MR. GOLDFARB: Object to the form.
05:23P 15 THE WITNESS: I personally would never really
16 try to mislead them or dupe them. If they don't
17 really care, there was really no misleading that
18 would be going on. They didn't care.
19 "Hey, I'm just going to switch this out,"
05:24P 20 and they didn't give a -- they didn't give a crap
21 about who Conwood was, who their competitor was, who
22 UST was, what our objectives were. They didn't care.
23 I mean, so there was really -- we didn't
24 really need to mislead.
05:24P 25 Q BY MR. GORSUCH: Take a look at paragraph

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05:24P 1 7. Just read that into the record.
2 A "I routinely had my sales representatives
3 throw away thousands of units of stale product in
4 order to make its market share appear better."
05:24P 5 Q What does that mean?
6 A Doesn't make sense to me, basically.
7 Q What were you trying to communicate in this
8 paragraph, to the best of your recollection?
9 MR. GOLDFARB: Assumes facts. Assume he was
05:25P 10 trying to communicate something at all.
11 Q BY MR. GORSUCH: You read this declaration,
12 right?
13 A Yes.
14 Q You tried to be accurate with this
05:25P 15 declaration, right?
16 A Yes.
17 Q What were you trying to communicate in
18 paragraph 7?
19 A I think what I was trying to communicate
05:25P 20 was at that time I think I was asked about --
21 possibly asked about damages and stales and things
22 like that. And I was making the statement of
23 basically what we used to do with our damages at that
24 time.
05:25P 25 And I guess what I was trying to make a

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05:25P 1 point of was that we would take product that was
2 damaged and throw it away, write it off as a sample
3 instead of writing it off as a damage. It was just a
4 practice. There was forms that you filled out and
05:26P 5 checked the box. Take them to Oxnard landfill.
6 And I think what I was asked at that
7 point -- and I don't even remember how this came up.
8 I don't think I volunteered this information, however
9 it came up, was what was the end result of that.
05:26P 10 And in my opinion, and what my previous
11 manager used to tell me that it accomplished -- this
12 was a practice that went on for years -- and what my
13 previous manager told me when I used to ask him, why
14 am I throwing all this away, the response from him
05:26P 15 was that, well, if you write it off as damages, it
16 goes against sales in unit volume. It's backed out
17 of that distributor's volume.
18 So at the end of the year the books will
19 show that we sold that many less cans. It was backed
05:27P 20 off. If you write it off as samples, something
21 you're going to sample out to consumers, and you go
22 throw it away, it counts as sales.
23 So that's what I was trying to convey, I
24 guess. Not, I guess. That's what I was trying to
05:27P 25 convey is what I had been told by management, my

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Q. Well, could you explain that a little bit more?
A. The nature of the beast. 90 percent of the business will take whatever space we want to take.
Q. Was that the attitude that Mr. Todd took in meetings that you saw?
A. I never attended a meeting with Mr. Todd.
Q. Okay. That was the attitude you heard expressed from Mr. Fowler?
A. Uh-huh, yes. He didn't -- no. He didn't say that he heard that David Todd told him to go in and remove displays --
Q. Uh-huh.
A. -- or POS. But it was the way they practiced doing business.
Q. Who is the "they"? You said "They" -- that's "the way they practiced doing business." Who --
A. UST.
Q. You were a division manager once, right?
A. Yes.
Q. Did you know what kind of activities your sales representatives were up to?
A. Yes.
Q. Why is that?
A. Because I worked behind them. I worked with

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them.
Q. Is that part of your job?
A. I worked in front of them.
Q. Was part of your job to know what they were up to?
A. Yes.
Q. Did you understand it was part of Mr. Todd's job to know what Fowler and Valdez and you were up to?
MR. BARNETT: Objection, calls for speculation.
THE WITNESS: As far as I know, nobody ever worked behind me. I mean, you could tell where I had been. Now, David Todd did work with each of the reps. I don't know how many reps he has, four or five -- five, I think. He works with them all, periodically, maybe once a month, once every six weeks. He knows what's going on.
Q. (By Mr. Gorsuch) And you think that based on your 30 years of experience in this industry?
MR. BARNETT: Objection.
THE WITNESS: Yes.
Q. (By Mr. Gorsuch) You indicate that Mr. Todd's instructions was to get space by whatever means necessary. What do you mean there?
A. If you need more space for your product, take

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it.
Q. Don't ask?
A. Take it.
Q. How about -- do you take it only when you can maximize retailer's profits?
A. No, when you say --
MR. BARNETT: Objection as to form.
THE WITNESS: When I say "take it," I'm talking chain stores. You don't go into an independent and tell a store owner, "Hey, I'm taking his display down." It doesn't work for an independent. But in chains, when you have some little girl in there, the store manager, some guy -- the store manager don't give a damn anyway, you just go for it. Well, I shouldn't be swearing.
Q. (By Mr. Gorsuch) I'm not going to tell you how to give your testimony. You're doing fine.
MR. BARNETT: We can do without the editorial comments.
MR. GORSUCH: All right, Matt.
Q. (By Mr. Gorsuch) Mr. Borrowdale, was it your understanding that Mr. Todd's instruction was to take space only when it would maximize the retailer's profits?
MR. BARNETT: Objection, vague --

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THE WITNESS: No.
MR. BARNETT: -- calls for speculation.
Q. (By Mr. Gorsuch) Was it your understanding that his instruction was to take space only when consumer demand required it?
MR. BARNETT: Objection, vague, calls for speculation.
THE WITNESS: No.
Q. (By Mr. Gorsuch) Was it your understanding that you were to take space only when sales data showed that U.S. Tobacco needed more space?
MR. BARNETT: Objection, vague, calls for speculation.
THE WITNESS: No.
Q. (By Mr. Gorsuch) Was it your understanding that you were supposed to take space no matter what?
MR. BARNETT: Objection as to form.
THE WITNESS: Pretty much so.
Q. (By Mr. Gorsuch) In the last sentence you indicate, "I believe, based on my experience, that such unethical conduct is the normal practice for UST." Is that your belief sitting here today?
A. Yes.
Q. Did your understanding of -- well -- and, again, is that belief and understanding the result of

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Gagnon, Dennis	Happy Stores (42)	No	No	All brands authorized
Jones, Gary	Ritz Foods (34)	No	No	All brands authorized
Walden, Dan	Beeline Stores (__)	No	No	All brands authorized
Barger, Jack	Convenience King (22)	No	No	All brands authorized
Dill, David	Gate Petroleum (100)	Yes	Yes	Only Kodiak
McGuire, Paul	Toot 'N Scoot (19)	Yes	Yes	Only Kodiak
Carlson, Bobby	Wal-Mart (2400)	Yes	Yes	Cougar restricted
Laesig, Kay	Golden Pantry (85)	Yes	Yes	

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98-CV-108-R

CONWOOD COMPANY, L.P., ET AL. PLAINTIFFS

v.

UNITED STATES TOBACCO COMPANY, ET AL. DEFENDANTS

ORDER

This matter is before the court on Plaintiffs' motion for a directed verdict on Defendants' counterclaim of conversion. Plaintiffs have agreed to dismiss all of their state law claims, as well as their Lanham Act claim. Defendants have agreed to dismiss their Lanham Act counterclaim.

IT IS ORDERED:

Upon careful consideration, Plaintiffs' motion for a directed verdict on Defendants' conversion counterclaim is **DENIED**.

Plaintiffs' antitrust claims and Defendants' conversion counterclaim shall proceed.

This is the 27th day of March 2000.

Thomas B. Russell
Judge, United States District Court

cc: Counsel by fax

ENTERED
MAR 27 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

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JURY INSTRUCTIONS

PRELIMINARY INSTRUCTIONS

1. ANTITRUST CLAIMS

2. Elements of Monopoly Claim

2.1 Definition of Monopoly Power

2.2 Relevant Market

2.3 Existence of Monopoly Power

2.4 Willful Maintenance of Monopoly Power

2.5 Injury and Causation

3. Elements of Attempt to Monopolize Claim

3.1 Exclusionary or Restrictive Conduct

3.2 Intent

3.3 Dangerous Probability of Success

4. Damages

5. CONVERSION COUNTERCLAIM

6. AGENCY

7. VERDICT MUST BE UNANIMOUS

8. NOTES

9. DELIBERATION

INSTRUCTION NO. 4.

ANTITRUST: Damages

If you find that U.S. Tobacco either monopolized or attempted to monopolize in accordance with these instructions, the law provides that Conwood should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful. A defendant's violations of the antitrust laws often create a situation in which it is hard to determine the precise amount of damages suffered by the plaintiff. Conwood's right to be fairly compensated should not be affected by any difficulty you may have in determining the precise amount of the recovery so long as there is a reasonable basis in the evidence for your award. You may not, however, calculate damages based only on speculation or guesswork, and you must remember that you can award Conwood damages only for injuries caused by a violation of the antitrust laws. You may not award damages for injuries or losses caused by other factors.

If you find that U.S. Tobacco violated the antitrust laws and that this violation caused injury to Conwood, then you must determine the amount of damages, if any, Conwood is entitled to recover. Damages may include lost profits, destruction of a business or deprivation of the opportunity to engage in a business, or increased costs incurred because of a violation.

If you find that U.S. Tobacco did commit an antitrust violation, then you must calculate the profits, if any, that Conwood lost as a result of U.S. Tobacco's antitrust violation. Profit means net profit: the amount by which Conwood's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues. You may calculate net profit in the following way.

You have heard evidence of the market share that Conwood would have had in the

absence of U.S. Tobacco's antitrust violation. You may calculate Conwood's loss of profit by considering market share, evidence of the size of the market, and evidence relating to the profit margin Conwood would have secured on such sales.

You should not interpret the fact that I have given instructions about Conwood's damages as an indication in any way that I believe that Conwood should, or should not, win this claim.

INSTRUCTION NO. 45.

LANHAM ACT COUNTERCLAIM

U.S. Tobacco alleges in its counterclaim against Conwood that Conwood falsely advertised in violation of the Lanham Act.

Under the Lanham Act, it is illegal for any person to misrepresent the nature, characteristics or qualities of his or its goods, services or commercial activities in commercial advertising or promotion .

U.S. Tobacco must prove by a preponderance of the evidence the following elements:

1) That Conwood made false or misleading statements of fact about its own products or U.S. Tobacco's products;

2) That those statements were publically disseminated;

3) That retailers or consumers were deceived or were likely to have been deceived by U.S. Tobacco's statements;

4) That the statements were material in the sense that they were likely to influence the deceived retailer's or consumer's purchasing decisions; and

5) That Conwood's statements caused harm to U.S. Tobacco.

Otherwise, you will find for Conwood.

If you believe from the evidence that Conwood violated the Lanham Act and injury to U.S. Tobacco resulted, then you may award damages in an amount that will reasonably and fairly compensate U.S. Tobacco.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R JURY TRIAL DEMANDED

NOTICE OF FILING: DEFENDANTS' VIDEOTAPED DEPOSITION TESTIMONY

Enclosed for filing are the videotapes of deposition testimony played during Defendants' case as noted below:

1. Paul McGuire; 3/15/00
2. Dan Walden; 3/15/00
3. Jack Barger; 3/15/00
4. David Dill; 3/16/00
5. Dennis Gagnon; 3/16/00
6. Gary Jones; 3/16/00
7. Robert Carlson; 3/16/00
8. Woody Cothren; 3/20/00

9. Ted Coatney; 3/20/00
10. David Cash; 3/20/00
11. William Ingram; 3/22/00
12. W.P. Ludwig; 3/22/00
13. James Dowdy; 3/22/00
14. Harold Kay Laessig; 3/22/00
15. Calvin Knol; 3/23/00
16. Russell Frank; 3/23/00
17. Thomas Balk; 3/24/00
18. Steve Johnson; 3/27/00

Dated: March 27, 2000

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****
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TOTAL NUMBER OF PAGES: 3 **(INCLUDING THIS SHEET)** 16diii005237

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 MAR 27 P4:05 Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

FILED
US DISTRICT COURT
WESTN DIST KENTUCKY

PLAINTIFFS' FILING OF VIDEOTAPE PLAYED FOR JURY DURING TRIAL

Enclosed for filing is a videotape played at trial for the jury on the following date:

1. Lawrence Borrowdale and Shawn Ulizio, March 27, 2000

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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Whitlow, Roberts,
Houston & Straub
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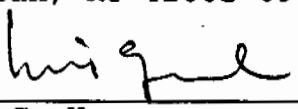

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March 27, 2000

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I certify that on this 27th day of March, a copy of the foregoing was sent via facsimile to:

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JURY INSTRUCTIONS

PRELIMINARY INSTRUCTIONS

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PRELIMINARY INSTRUCTIONS

Members of the Jury: Now that you have heard all of the evidence and the argument of the attorneys, it is my duty to give you instructions as to the law applicable in this case.

It is your duty as jurors to follow the law as stated in the instructions, and to apply that law to the facts you find from the evidence.

You are not to single out one instruction alone as stating the law. You must consider the instructions as a whole. The fact I have given an instruction on any issue does not mean you should find one way or the other as to that issue.

You are not to be concerned with the wisdom of any rule of law stated by the Court. You must apply the law given in these instructions whether you agree with it or not.

It is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record. It is your own interpretation and recollection of the evidence that controls.

You are permitted to draw reasonable inferences, deductions, and conclusions from the testimony and exhibits which you feel are justified in the light of your own common sense.

In saying that you must consider all the evidence, I do not mean to suggest that you must necessarily accept all of the evidence as true or accurate. You are the sole judges of the credibility or believability of each witness, including expert witnesses and the weight to be given to the testimony of each witness.

In determining the credibility of any witness, you may properly consider the demeanor of the witness while testifying, frankness or lack of it, and his or her interest in the outcome of the case, if any.

In deciding the facts of this case you must not be swayed by bias or prejudice or sympathy or public opinions. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. The law is not a respecter of persons, a corporation and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

INSTRUCTION NO. 1.

ANTITRUST CLAIMS

The plaintiff in this case, Conwood Company, seeks damages for injury to its business and property, claimed to have been suffered or sustained as a result of alleged violations by the defendant, United States Tobacco Company, of the antitrust laws of the United States.

Section 2 of the Sherman Antitrust Act states that every person who shall monopolize, or attempt to monopolize, any part of the trade or commerce shall be guilty of a violation of the antitrust laws. Conwood claims that U.S. Tobacco unlawfully monopolized the market for moist snuff and also attempted to monopolize the moist snuff market, injuring Conwood. U.S. Tobacco denies these claims.

The word "person" includes not only every individual, but also every corporation, partnership and every other organization, of any kind.

The purpose of the Sherman Antitrust Act is to preserve and advance our system of free, competitive enterprise; to encourage, to the fullest extent practicable, free and open competition in the market place; and to prevent the accomplishment of a monopoly in any business or industry; all to the end that the consuming public may receive better goods and services at a lower cost.

The antitrust laws were enacted for the protection of competition, not competitors. Therefore, Conwood must prove that U.S. Tobacco's acts injured not only Conwood itself, but injured competition in the relevant market.

INSTRUCTION NO. 2.

ANTITRUST: Elements of Monopoly Claim

Conwood claims that U.S. Tobacco unlawfully monopolized the moist snuff industry and thereby injured Conwood.

There are three essential elements which Conwood must prove by a preponderance of the evidence in order to establish its claim that U.S. Tobacco has monopolized within the meaning of the antitrust laws:

1) That U.S. Tobacco possessed monopoly power in a relevant market;

2) That U.S. Tobacco willfully maintained that power through restrictive or exclusionary conduct; and

3) That Conwood was injured in its business or property because of U.S. Tobacco's restrictive or exclusionary conduct.

Conwood must prove that each one of these elements is more likely true than not. That is called a preponderance of evidence. If Conwood fails to persuade you on every essential element of Conwood's monopolization claim, then you must find for U.S. Tobacco.

INSTRUCTION NO. 2.1

ANTITRUST: Definition of Monopoly Power

Monopoly power is the power to control prices in or to exclude competition from the relevant market.

The power to control prices is the power of a company to establish appreciably higher prices for its goods than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a company that has raised prices eventually has to lower its prices to the level of prices charged by its competitors , it may not have monopoly power in the sense of power to control prices.

The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from the market or by preventing new competition from entering the market.

To establish the possession of monopoly power, Conwood need not prove that prices were raised or that competition actually was excluded, but only that U.S. Tobacco had the power to raise prices or exclude competition.

Further, to conclude that U.S. Tobacco had monopoly power , you need not find that U.S. Tobacco could sell at any price it desired or that it had no competition whatsoever. A company may face some competition in the relevant market and still have monopoly power. On the other hand, if you find that U.S. Tobacco did not have the power to control prices or exclude competition, then you must conclude that it did not have monopoly power.

The mere possession of monopoly power is not sufficient to support a finding of monopolization, unless it is also determined that the monopoly power was willfully and intentionally maintained. A person who maintains monopoly power through normal growth and

development, as a consequence of having a superior product, or business acumen, or through historical accident, is not guilty of monopolization as defined in this charge.

INSTRUCTION NO. 2.2

ANTITRUST: Relevant Market

Before it can be determined whether a person has monopolized a field of competition in a particular line of trade or commerce, it must first be determined what is the "area of effective competition" applicable in this case. In antitrust law, this is known as defining what is called the "relevant market."

Charges of monopolization can only be judged in the framework of the relevant market. The relevant market which plaintiff claims is applicable in this claim is as follows: all moist snuff brands in the United States. Plaintiff must, therefore, prove by a preponderance of the evidence that the relevant market applicable in this case is all moist snuff brands.

In determining the relevant market, the "area of effective competition" must be determined by reference to: (1) a product market and, (2) a geographic market. The parties agree that the relevant geographic market is the entire United States.

In determining the product market, the basic idea is that the products within it are interchangeable as a practical matter from the buyer's point of view. This does not mean that products must be identical to be in the same relevant market. It means that they must be, as a matter of practical fact and the actual behavior of consumers, substantially or reasonably interchangeable to fill the same consumer needs or purposes. Two products are within a single market if one item could suit buyers' needs substantially as well as the other.

Conwood claims that the relevant market includes all moist snuff brands. U.S. Tobacco denies that this is the relevant market. In sum, you must decide which products compete with each other.

If you find that the relevant market is all moist snuff brands in the United States, then you

must find that Conwood has established this requirement and you must consider the remaining elements of its monopolization claim. Otherwise, you must find for U.S. Tobacco.

INSTRUCTION NO. 2.3

ANTITRUST: Existence of Monopoly Power

If you find that a relevant market of moist snuff has been proved, you should then determine whether U.S. Tobacco possesses monopoly power in that market. There are a number of factors you should consider, none of which is necessarily controlling.

For example, you have heard evidence about U.S. Tobacco's market share. You may infer whether or not monopoly power exists from U.S. Tobacco's share of the relevant market. Market share is a firm's share of total industry sales, shipments, production, capacity, or reserves, expressed as a percentage of the whole. There are a variety of ways to measure market share, but whatever measure you use must be reasonable and consistently applied.

If you determine that U.S. Tobacco's share of the relevant market is less than 50 %, that market share by itself does not permit you to infer that U.S. Tobacco possesses monopoly power. If you determine that U.S. Tobacco's share of the relevant market is 80 % or higher, that is strong evidence of the existence of monopoly power. If you determine that U.S. Tobacco's market share is somewhere between 50% and 80%, you may infer the existence of monopoly power from that share, and the inference is stronger the higher U.S. Tobacco's market share is within that range.

You may also consider the trend in U.S. Tobacco's market share. A declining market share may indicate the absence of monopoly power, though it does not foreclose such a finding, while an increasing market share may indicate the opposite.

Another factor is the number and size of U.S. Tobacco's competitors. If these are few, weak, or have small or decreasing market shares, so that they do not offer substantial competition to U.S. Tobacco in the relevant market, this may tend to indicate that U.S. Tobacco has

monopoly power. If, on the other hand, they are numerous, vigorous, or have large or increasing shares in that market, this may be evidence that U.S. Tobacco does not have monopoly power.

You also may consider the history of entry into and exit from the market by other companies. Entry of companies into the market may indicate that U.S. Tobacco lacks monopoly power. On the other hand, departure of companies from the market, or the failure of companies to enter the market, may indicate the existence of monopoly power.

The existence of monopoly power also may be shown by evidence that defendant had the power to raise prices appreciably without a substantial loss of business to competitors or by evidence that U.S. Tobacco had profit margins that were extraordinarily high or maintained high rates of return over a long period of time.

If you find that U.S. Tobacco had monopoly power, then you must find that Conwood has established this requirement and you must consider the remaining elements of its monopolization claim. Otherwise, you must find for U.S. Tobacco.

INSTRUCTION NO. 2.4

ANTITRUST: Willful Maintenance of Monopoly Power

The next element that Conwood must prove is that U.S. Tobacco willfully maintained monopoly power through predatory or exclusionary acts or practices, rather than by supplying better products or services, or by exercising superior business judgment, or just by chance.

Predatory or exclusionary conduct is conduct that has the effect of preventing or excluding competition or frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in maintaining U.S. Tobacco's monopoly power.

To prove U.S. Tobacco acted willfully, Conwood must prove either that U.S. Tobacco engaged in predatory or exclusionary acts or practices with the conscious object of furthering the dominance of U.S. Tobacco in the relevant market or that this was the necessary direct consequence of U.S. Tobacco's conduct or business arrangements.

You may not find that a company willfully maintained monopoly power if it has maintained that power through the exercise of superior foresight and skill; or because of economic or technological efficiency, including efficiency resulting from scientific research; or because of a change in cost or taste has driven out all but one supplier. The acts or practices that result in the maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or extraordinary commercial success. They must represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

Mere possession of monopoly power, if lawfully acquired, does not violate the antitrust laws. But it is unlawful to use monopoly power, however lawfully acquired, to foreclose

competition, to gain a competitive advantage, or to destroy a competitor. Therefore, a company that has lawfully acquired monopoly power may not use that power to maintain or tighten its hold on the market. Such use may be shown by conduct that depends for its success on the company's monopoly power, as distinguished from conduct that could be successfully employed by firms without monopoly power in the relevant market.

In determining whether there has been an unlawful exercise of monopoly power, you must bear in mind that a company has not acted unlawfully simply because it has engaged in ordinary competitive behavior that would have been an effective means of competition if it were engaged in by a firm without monopoly power, or simply because it is large and efficient. To find U.S. Tobacco liable for monopolization because of the maintenance of lawfully acquired monopoly power through the use of that power, you must determine that U.S. Tobacco actually exercised monopoly power to maintain or tighten its control of the market.

If you find that U.S. Tobacco willfully maintained monopoly power, then you must find that Conwood has established this element and you must consider the remaining elements of its monopolization claim. Otherwise, you must find for U.S. Tobacco.

INSTRUCTION NO. 2.5

ANTITRUST: Injury and Causation

If you find that U.S. Tobacco has violated Section 2 of the Sherman Act as alleged by Conwood, then you must decide if Conwood is entitled to recover damages from U.S. Tobacco.

The law provides that anyone who is injured by an antitrust violation may recover damages for any injury to its business or property caused by the violation.

For Conwood to establish that it is entitled to recover damages, it must prove that it was injured as a result of U.S. Tobacco's alleged violation of antitrust laws. This is sometimes referred to as proving "causation" or "fact of damage." Proving causation does not require Conwood to prove the dollar value of its injury. It requires only that Conwood prove that it was in fact injured by U.S. Tobacco's alleged antitrust violation. If you find that Conwood has established that it was in fact injured, you may then consider the amount of Conwood's damages. It is important to understand, however, that injury and amount of damage are different concepts and that you cannot consider the amount of damage unless and until you have concluded that Conwood has established that it was in fact injured.

To establish injury, Conwood must have offered evidence that establishes as a matter of fact and with a fair degree of certainty that U.S. Tobacco's alleged illegal conduct was a material cause of Conwood's injury. This means that Conwood must have proved that some damage flowed to it as a result of U.S. Tobacco's alleged antitrust violation. Conwood is not required to prove that U.S. Tobacco's alleged antitrust violation was the sole cause of its injury; nor need Conwood eliminate all other possible causes of injury. It is enough if Conwood has proved that the alleged antitrust violation was a material cause of its injury. Injury may be established by inference or circumstantial evidence. However, if you find that Conwood's injury was caused

solely by something other than the alleged antitrust violation or if you find that Conwood was not injured, then you must find that Conwood has failed to prove that it is entitled to recover damages from U.S. Tobacco.

INSTRUCTION NO. 3.

ANTITRUST: Elements of Attempt to Monopolize Claim

Conwood also claims that U.S. Tobacco has violated the federal antitrust laws by attempting to monopolize the moist snuff industry in the United States.

There are four essential elements which Conwood must prove in order to establish that U.S. Tobacco was liable for attempted monopolization within the meaning of the antitrust laws:

1) That U.S. Tobacco engaged in predatory or exclusionary conduct;

2) That U.S. Tobacco had a specific intent to monopolize in the relevant market of all moist snuff brands in the United States;

3) That there was a dangerous probability that U.S. Tobacco would achieve its goal of monopoly power in the relevant market; and

4) That Conwood was injured in its business or property by U.S. Tobacco's predatory or exclusionary conduct.

Conwood must prove that each one of these elements is more likely true than not. That is called a preponderance of evidence. If Conwood fails to persuade you on every essential element of the attempt to monopolize claim, then you must find for U.S. Tobacco.

The definitions of "monopoly power," "relevant market," and "injury and damages" are the same in this claim as they are in the monopoly claim.

INSTRUCTION NO. 3.1

ANTITRUST: Exclusionary or Restrictive Conduct

I have previously instructed you on exclusionary conduct. That instruction applies here as well.

INSTRUCTION NO. 3.2

ANTITRUST: Intent

There are several ways in which Conwood may prove that U.S. Tobacco had the specific intent to monopolize. There may be evidence of direct statements of U.S. Tobacco's intent to obtain a monopoly in the relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of defendant. You must be careful, however, to distinguish between a U.S. Tobacco's intent to compete aggressively (which is lawful) and an intent to acquire monopoly power by using illegal or exclusionary means.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for you to decide what facts have been established by the evidence.

If you find that U.S. Tobacco had the specific intent to monopolize in the relevant market, then you must find that Conwood has established this requirement and you must consider the remaining elements of its attempt to monopolize claim. Otherwise, you must find for U.S. Tobacco.

INSTRUCTION NO. 3.3

ANTITRUST: Dangerous Probability of Success

If you find that U.S. Tobacco had the specific intent to achieve a monopoly and engaged in significant exclusionary or restrictive conduct, you also must determine if the evidence shows the next element of attempt to monopolize: namely, that there was a dangerous probability that U.S. Tobacco would sooner or later succeed in achieving monopoly power if it continued to engage in the same or similar conduct. In determining whether there was a dangerous probability of success, you should consider the following factors:

1) the market share and power of defendant as compared to its competitors;

2) whether U.S. Tobacco's share of the relevant market was increasing or decreasing;

3) the actual or probable impact on competition of U.S. Tobacco's restrictive or exclusionary acts or practices; and

4) whether the barriers to entry into the market made it difficult for competitors to enter the market.

A dangerous probability of success need not mean that success was nearly certain. It means that the chance of success was substantial and real: that is, that there was a reasonable likelihood that defendant would ultimately achieve its goal of monopoly power.

If you find that there was a dangerous probability of success, then you must find that Conwood has established this requirement and you must consider the remaining elements of its attempt to monopolize claim. Otherwise, you must find for U.S. Tobacco.

INSTRUCTION NO. 4.

ANTITRUST: Damages

If you find that U.S. Tobacco either monopolized or attempted to monopolize in accordance with these instructions, the law provides that Conwood should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful. A defendant's violations of the antitrust laws often create a situation in which it is hard to determine the precise amount of damages suffered by the plaintiff. Conwood's right to be fairly compensated should not be affected by any difficulty you may have in determining the precise amount of the recovery so long as there is a reasonable basis in the evidence for your award. You may not, however, calculate damages based only on speculation or guesswork, and you must remember that you can award Conwood damages only for injuries caused by a violation of the antitrust laws. You may not award damages for injuries or losses caused by other factors.

If you find that U.S. Tobacco violated the antitrust laws and that this violation caused injury to Conwood, then you must determine the amount of damages, if any, Conwood is entitled to recover. Damages may include lost profits, destruction of a business or deprivation of the opportunity to engage in a business, or increased costs incurred because of a violation.

If you find that U.S. Tobacco did commit an antitrust violation, then you must calculate the profits, if any, that Conwood lost as a result of U.S. Tobacco's antitrust violation. Profit means net profit: the amount by which Conwood's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues. You may calculate net profit in the following way.

You have heard evidence of the market share that Conwood would have had in the

absence of U.S. Tobacco's antitrust violation. You may calculate Conwood's loss of profit by considering market share, evidence of the size of the market, and evidence relating to the profit margin Conwood would have secured on such sales.

INSTRUCTION NO. 5.

LANHAM ACT CLAIM

Conwood also alleges that U.S. Tobacco falsely advertised in violation of the Lanham Act.

Under the Lanham Act, it is illegal for any person to misrepresent the nature, characteristics, or qualities of his or its goods, services or commercial activities in commercial advertising or promotion .

Conwood must prove by a preponderance of the evidence the following elements:

1) That U.S. Tobacco made false or misleading statements of fact about its own products;

2) That those statements were publically disseminated;

3) That retailers or consumers were deceived or were likely to have been deceived by U.S. Tobacco's statements;

4) That statements were material in the sense that they were likely to influence the deceived retailer's or consumer's purchasing decisions; and

5) That U.S. Tobacco's statements caused harm to Conwood.

Otherwise, you will find for U.S. Tobacco.

If you believe from the evidence that U.S. Tobacco violated the Lanham Act and injury to Conwood resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 6.

LANHAM ACT COUNTERCLAIM

U.S. Tobacco alleges in its counterclaim against Conwood that Conwood falsely advertised in violation of the Lanham Act.

Under the Lanham Act, it is illegal for any person to misrepresent the nature, characteristics or qualities of his or its goods, services or commercial activities in commercial advertising or promotion .

U.S. Tobacco must prove by a preponderance of the evidence the following elements:

1) That Conwood made false or misleading statements of fact about its own products or U.S. Tobacco's products;

2) That those statements were publically disseminated;

3) That retailers or consumers were deceived or were likely to have been deceived by U.S. Tobacco's statements;

4) That statements were material in the sense that they were likely to influence the deceived retailer's or consumer's purchasing decisions; and

5) That Conwood's statements caused harm to U.S. Tobacco.

Otherwise, you will find for Conwood.

If you believe from the evidence that Conwood violated the Lanham Act and injury to U.S. Tobacco resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 7.

CONVERSION

Conwood has brought a claim of conversion against U.S. Tobacco. Conwood claims that U.S. Tobacco wrongfully took its property from retail locations.

You will find for Conwood if you are satisfied from a preponderance of the evidence:

1) That U.S. Tobacco representatives wrongfully took Conwood advertising and display racks from retail locations; and

2) That all of the advertising or display racks taken belonged to Conwood; and

3) That Conwood was damaged thereby.

Otherwise, you will find for U.S. Tobacco.

If you find for Conwood, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 8.

CONVERSION COUNTERCLAIM

U.S. Tobacco has brought a claim of conversion against Conwood. U.S. Tobacco claims that Conwood wrongfully took its property from retail locations.

You will find for U.S. Tobacco if you are satisfied from a preponderance of the evidence:

1) That Conwood representatives wrongfully took U.S. Tobacco advertising and display racks from retail locations; and

2) That all of the advertising or display racks taken belonged to U.S. Tobacco ; and

3) That U.S. Tobacco was damaged thereby.

Otherwise, you will find for Conwood.

If you find for U.S. Tobacco, you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 9.

AGENCY

As a general rule, whatever any person is legally capable of doing himself can be done through another as agent. So, if the acts of an employee or other agent are voluntarily and intentionally ordered or directed, or authorized or consented to by a person, then the law holds that person responsible for such acts, the same as if the acts had in fact been done by such person.

A corporation is in law a person, but of course it cannot act otherwise than through its directors, or officers, or employees, or other agents. The law therefore holds a corporation responsible for all unlawful acts of its directors, or officers, or employees, or other agents, provided such unlawful acts are done within the scope of their authority, as would usually be the case if done in the ordinary course of their employment, or in the ordinary course of the corporation's business.

Authority to act for a corporation in a particular matter, or in a particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in the case. That is to say, authority to act for a corporation, like any other fact in issue in a civil case, need not be established by direct evidence, but may be established by indirect or circumstantial evidence.

Every act of every director, or officer, or employee, or other agent, on behalf of, or in the name of a corporation, if done within the scope of his authority, is in law the act of the corporation itself.

INSTRUCTION NO. 10.

VERDICT MUST BE UNANIMOUS

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to the verdict. Your verdict must be unanimous in that all of you must agree to it.

INSTRUCTION NO. 11.

NOTES

Now I would like to say something about the notes that you have taken during the trial. Your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you have not taken notes, you should rely upon your own in independent recollection of the proceedings and you should not be unduly influenced by the notes of other jurors.

Notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been. Whether you have taken notes or not, each of you must form and express your own opinion as to the facts of the case.

You will notice that we do have an official court reporter making a record of the trial. However, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

INSTRUCTION NO. 12.

DELIBERATION

It is your duty as jurors, to consult with one another, and to deliberate with a view to reach an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do no hesitate to reexamine your own views and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesman her in Court.

You will take these forms to the jury room and, when you have reached unanimous agreement you will have reached unanimous agreement you will have your foreperson fill in and sign the forms which set forth the verdict upon which you unanimously agree with respect to each issue in this case; you will then return with your decision to the courtroom.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98-CV-108-R

CONWOOD COMPANY, L.P., ET AL. PLAINTIFFS

v.

UNITED STATES TOBACCO COMPANY, ET AL. DEFENDANTS

VERDICT FORM

SECTION ONE: SHERMAN ACT CLAIM OF MONOPOLIZATION

1) Has Conwood proven by a preponderance of the evidence that the relevant market consists only of all moist snuff brands sold throughout the United States?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

2) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco possesses monopoly power in the relevant market?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

3) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco willfully maintained their monopoly power through restrictive or exclusionary conduct?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

4) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco's restrictive or exclusionary conduct caused Conwood's injury?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

Sherman Act (Verdict Form B or D), you should award Conwood a sum of money that will fairly compensate it for such damages as you believe from the evidence the Conwood has sustained directly by reason of its injuries: $_____

_____ _____
FOREPERSON DATE

Please continue to the next section.

SECTION FOUR: LANHAM ACT CLAIMS

1) On Conwood's claim of violation of the Lanham Act against U.S. Tobacco, we the jury find as follows:

For Conwood _____
For U.S. Tobacco _____

_____ _____
FOREPERSON DATE

If you find for U.S. Tobacco you should proceed to question number 3. If you find for Conwood against U.S. Tobacco please proceed to the next question.

2) If you found against U.S. Tobacco, you should award Conwood a sum of money that will fairly compensate it for such damages as you believe from the evidence that Conwood has sustained directly by reason of its injuries: $_____

_____ _____
FOREPERSON DATE

Please continue to the next question.

3) On U.S. Tobacco's counterclaim of violation of the Lanham Act against Conwood, we the jury find as follows:

For U.S. Tobacco _____
For Conwood _____

_____ _____
FOREPERSON DATE

If you find for Conwood you should proceed to Section 4. If you find for U.S. Tobacco against Conwood please proceed to the next question.

4) If you found against Conwood, you should award U.S. Tobacco a sum of money that will fairly compensate it for such damages as you believe from the evidence that U.S. Tobacco has sustained directly by reason of its injuries: $_____

_____ _____
FOREPERSON DATE

Please continue to the next Section.

SECTION FIVE: CONVERSION CLAIMS

1) On Conwood's claim of conversion against U.S. Tobacco, we the jury find as follows:

For Conwood _____
For U.S. Tobacco _____

_____ _____
FOREPERSON DATE

If you find for U.S. Tobacco you should proceed to question number 3. If you find for Conwood against U.S. Tobacco please proceed to the next question.

2) If you found against U.S. Tobacco, you should award Conwood a sum of money that will fairly compensate it for such damages as you believe from the evidence that Conwood has sustained directly by reason of its injuries: $_____

_____ _____
FOREPERSON DATE

Please continue to the next question.

3) On U.S. Tobacco's counterclaim of conversion against Conwood, we the jury find as follows:

For U.S. Tobacco _____
For Conwood _____

FOREPERSON DATE

If you find for Conwood, please return to the courtroom. If you find for U.S. Tobacco against Conwood please proceed to the next question.

4) If you found against Conwood, you should award U.S. Tobacco a sum of money that will fairly compensate it for such damages as you believe from the evidence that U.S. Tobacco has sustained directly by reason of its injuries: $_____

FOREPERSON DATE

Please return to the courtroom.

VERDICT FORM A

We, the jury find for U.S. Tobacco on Plaintiff Conwood's claim of monopolization in violation of § 2 of the Sherman Act.

_____ _____

FOREPERSON DATE

VERDICT FORM B

We, the jury, find for Conwood on Plaintiff Conwood's claim of monopolization in violation of § 2 of the Sherman Act.

_____ _____

FOREPERSON DATE

VERDICT FORM C

We, the jury find for U.S. Tobacco on Plaintiff Conwood's claim of attempt to monopolize in violation of § 2 of the Sherman Act.

_____ _____

FOREPERSON DATE

VERDICT FORM D

We, the jury, find for Conwood on Plaintiff Conwood's claim of attempt to monopolize in violation of § 2 of the Sherman Act.

_____ _____

FOREPERSON DATE

PRELIMINARY INSTRUCTIONS

Members of the Jury: Now that you have heard all of the evidence and the argument of the attorneys, it is my duty to give you instructions as to the law applicable in this case.

It is your duty as jurors to follow the law as stated in the instructions, and to apply that law to the facts you find from the evidence.

You are not to single out one instruction alone as stating the law. You must consider the instructions as a whole. The fact I have given an instruction on any issue does not mean you should find one way or the other as to that issue.

You are not to be concerned with the wisdom of any rule of law stated by the Court. You must apply the law given in these instructions whether you agree with it or not.

It is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record. It is your own interpretation and recollection of the evidence that controls.

Under the Federal Rules of Evidence, experts are permitted to rely on a variety of materials in forming their opinions, including materials that are not in evidence in this case. Evidence does not include documents that may have been seen or considered by experts, or about which experts were examined or cross-examined at trial, unless those documents are also admitted as exhibits in the record. Therefore, while an expert's testimony is evidence in this case, some of the materials on which the expert relied are not evidence in this case, although an expert is entitled to rely upon them in making his opinion.

You are permitted to draw reasonable inferences, deductions, and conclusions from the testimony and exhibits which you feel are justified in the light of your own common sense.

In saying that you must consider all the evidence, I do not mean to suggest that you must necessarily accept all of the evidence as true or accurate. You are the sole judges of the credibility or believability of each witness, including expert witnesses and the weight to be given to the testimony of each witness.

In determining the credibility of any witness, you may properly consider the demeanor of the witness while testifying, frankness or lack of it, and his or her interest in the outcome of the case, if any.

In deciding the facts of this case you must not be swayed by bias or prejudice or sympathy or public opinions. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. The law is not a respecter of persons, a corporation and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

JURY INSTRUCTIONS

PRELIMINARY INSTRUCTIONS

1. ANTITRUST CLAIMS

2. Elements of Monopoly Claim

2.1 Definition of Monopoly Power

2.2 Relevant Market

2.3 Existence of Monopoly Power

2.4 Willful Maintenance of Monopoly Power

2.5 Injury and Causation

3. Elements of Attempt to Monopolize Claim

3.1 Exclusionary or Restrictive Conduct

3.2 Intent

3.3 Dangerous Probability of Success

4. Damages

5. LANHAM ACT CLAIM

6. LANHAM ACT COUNTERCLAIM

7. CONVERSION CLAIM

8. CONVERSION COUNTERCLAIM

9. AGENCY

10. VERDICT MUST BE UNANIMOUS

11. NOTES

12. DELIBERATION

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It is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record. It is your own interpretation and recollection of the evidence that controls.

You are permitted to draw reasonable inferences, deductions, and conclusions from the testimony and exhibits which you feel are justified in the light of your own common sense.

In saying that you must consider all the evidence, I do not mean to suggest that you must necessarily accept all of the evidence as true or accurate. You are the sole judges of the credibility or believability of each witness, including expert witnesses and the weight to be given to the testimony of each witness.

In determining the credibility of any witness, you may properly consider the demeanor of the witness while testifying, frankness or lack of it, and his or her interest in the outcome of the case, if any.

In deciding the facts of this case you must not be swayed by bias or prejudice or sympathy or public opinions. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. The law is not a respecter of persons, a corporation and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

INSTRUCTION NO. 1.

ANTITRUST CLAIMS

The plaintiff in this case, Conwood Company, seeks damages for injury to its business and property, claimed to have been suffered or sustained as a result of alleged violations by the defendant, United States Tobacco Company, of the antitrust laws of the United States.

Section 2 of the Sherman Antitrust Act states that every person who shall monopolize, or attempt to monopolize, any part of the trade or commerce shall be guilty of a violation of the antitrust laws. Conwood claims that U.S. Tobacco unlawfully monopolized the market for moist snuff and also attempted to monopolize the moist snuff market, injuring Conwood. U.S. Tobacco denies these claims.

The word "person" includes not only every individual, but also every corporation, partnership and every other organization, of any kind.

The purpose of the Sherman Antitrust Act is to preserve and advance our system of free, competitive enterprise; to encourage, to the fullest extent practicable, free and open competition in the market place; and to prevent the accomplishment of a monopoly in any business or industry; all to the end that the consuming public may receive better goods and services at a lower cost.

The antitrust laws were enacted for the protection of competition, not competitors. Therefore, Conwood must prove that U.S. Tobacco's acts injured not only Conwood itself, but injured competition in the relevant market.

INSTRUCTION NO. 2.

ANTITRUST: Elements of Monopoly Claim

Conwood claims that U.S. Tobacco unlawfully monopolized the moist snuff industry and thereby injured Conwood.

There are three essential elements which Conwood must prove by a preponderance of the evidence in order to establish its claim that U.S. Tobacco has monopolized within the meaning of the antitrust laws:

1) That U.S. Tobacco possessed monopoly power in a relevant market;

2) That U.S. Tobacco willfully maintained that power through restrictive or exclusionary conduct; and

3) That Conwood was injured in its business or property because of U.S. Tobacco's restrictive or exclusionary conduct.

Conwood must prove that each one of these elements is more likely true than not. That is called a preponderance of evidence. If Conwood fails to persuade you on every essential element of Conwood's monopolization claim, then you must find for U.S. Tobacco.

INSTRUCTION NO. 2.1

ANTITRUST: Definition of Monopoly Power

Monopoly power is the power to control prices in or to exclude competition from the relevant market.

The power to control prices is the power of a company to establish appreciably higher prices for its goods than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a company that has raised prices eventually has to lower its prices to the level of prices charged by its competitors , it may not have monopoly power in the sense of power to control prices.

The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from the market or by preventing new competition from entering the market.

To establish the possession of monopoly power, Conwood need not prove that prices were raised or that competition actually was excluded, but only that U.S. Tobacco had the power to raise prices or exclude competition.

Further, to conclude that U.S. Tobacco had monopoly power , you need not find that U.S. Tobacco could sell at any price it desired or that it had no competition whatsoever. A company may face some competition in the relevant market and still have monopoly power. On the other hand, if you find that U.S. Tobacco did not have the power to control prices or exclude competition, then you must conclude that it did not have monopoly power.

The mere possession of monopoly power is not sufficient to support a finding of monopolization, unless it is also determined that the monopoly power was willfully maintained. A person who maintains monopoly power through normal growth and development, as a

consequence of having a superior product, or business acumen, or through historical accident, is not guilty of monopolization as defined in this charge.

INSTRUCTION NO. 2.2

ANTITRUST: Relevant Market

Before it can be determined whether a person has monopolized a field of competition in a particular line of trade or commerce, it must first be determined what is the "area of effective competition" applicable in this case. In antitrust law, this is known as defining what is called the "relevant market."

Charges of monopolization can only be judged in the framework of the relevant market. The relevant market which plaintiff claims is applicable in this claim is as follows: all moist snuff brands in the United States. Plaintiff must, therefore, prove by a preponderance of the evidence that the relevant market applicable in this case is all moist snuff brands.

In determining the relevant market, the "area of effective competition" must be determined by reference to: (1) a product market and, (2) a geographic market. The parties agree that the relevant geographic market is the entire United States.

In determining the product market, the basic idea is that the products within it are interchangeable as a practical matter from the buyer's point of view. This does not mean that products must be identical to be in the same relevant market. It means that they must be, as a matter of practical fact and the actual behavior of consumers, substantially or reasonably interchangeable to fill the same consumer needs or purposes. Two products are within a single market if one item could suit buyers' needs substantially as well as the other.

Conwood claims that the relevant market includes all moist snuff brands. U.S. Tobacco denies that this is the relevant market. In sum, you must decide which products compete with each other.

If you find that the relevant market is all moist snuff brands in the United States, then you

must find that Conwood has established this requirement and you must consider the remaining elements of its monopolization claim. Otherwise, you must find for U.S. Tobacco.

INSTRUCTION NO. 2.3

ANTITRUST: Existence of Monopoly Power

If you find that a relevant market of moist snuff has been proved, you should then determine whether U.S. Tobacco possesses monopoly power in that market. There are a number of factors you should consider, none of which is necessarily controlling.

For example, you have heard evidence about U.S. Tobacco's market share. You may infer whether or not monopoly power exists from U.S. Tobacco's share of the relevant market. Market share is a firm's share of total industry sales, shipments, production, capacity, or reserves, expressed as a percentage of the whole. There are a variety of ways to measure market share, but whatever measure you use must be reasonable and consistently applied.

If you determine that U.S. Tobacco's share of the relevant market is less than 50 %, that market share by itself does not permit you to infer that U.S. Tobacco possesses monopoly power. If you determine that U.S. Tobacco's share of the relevant market is 80 % or higher, that is strong evidence of the existence of monopoly power. If you determine that U.S. Tobacco's market share is somewhere between 50% and 80%, you may infer the existence of monopoly power from that share, and the inference is stronger the higher U.S. Tobacco's market share is within that range.

You may also consider the trend in U.S. Tobacco's market share. A declining market share may indicate the absence of monopoly power, though it does not foreclose such a finding, while an increasing market share may indicate the opposite.

Another factor is the number and size of U.S. Tobacco's competitors. If these are few, weak, or have small or decreasing market shares, so that they do not offer substantial competition to U.S. Tobacco in the relevant market, this may tend to indicate that U.S. Tobacco has

monopoly power. If, on the other hand, they are numerous, vigorous, or have large or increasing shares in that market, this may be evidence that U.S. Tobacco does not have monopoly power.

You also may consider the history of entry into and exit from the market by other companies. Entry of companies into the market may indicate that U.S. Tobacco lacks monopoly power. On the other hand, departure of companies from the market, or the failure of companies to enter the market, may indicate the existence of monopoly power.

The existence of monopoly power also may be shown by evidence that defendant had the power to raise prices appreciably without a substantial loss of business to competitors or by evidence that U.S. Tobacco had profit margins that were extraordinarily high or maintained high rates of return over a long period of time.

If you find that U.S. Tobacco had monopoly power, then you must find that Conwood has established this requirement and you must consider the remaining elements of its monopolization claim. Otherwise, you must find for U.S. Tobacco.

INSTRUCTION NO. 2.4

ANTITRUST: Willful Maintenance of Monopoly Power

The next element that Conwood must prove is that U.S. Tobacco willfully maintained monopoly power through restrictive or exclusionary acts or practices, rather than by supplying better products or services, or by exercising superior business judgment, or just by chance.

Restrictive or exclusionary conduct is conduct that has the effect of preventing or excluding competition or frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in maintaining U.S. Tobacco's monopoly power.

To prove U.S. Tobacco acted willfully, Conwood must prove either that U.S. Tobacco engaged in restrictive or exclusionary acts or practices with the conscious object of furthering the dominance of U.S. Tobacco in the relevant market or that this was the necessary direct consequence of U.S. Tobacco's conduct or business arrangements.

You may not find that a company willfully maintained monopoly power if it has maintained that power through the exercise of superior foresight and skill; or because of economic or technological efficiency, including efficiency resulting from scientific research; or because of a change in cost or taste has driven out all but one supplier. The acts or practices that result in the maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or extraordinary commercial success. They must represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

Mere possession of monopoly power, if lawfully acquired, does not violate the antitrust laws. But it is unlawful to use monopoly power, however lawfully acquired, to foreclose

competition, to gain a competitive advantage, or to destroy a competitor. Therefore, a company that has lawfully acquired monopoly power may not use that power to maintain or tighten its hold on the market. Such use may be shown by conduct that depends for its success on the company's monopoly power, as distinguished from conduct that could be successfully employed by firms without monopoly power in the relevant market.

In determining whether there has been an unlawful exercise of monopoly power, you must bear in mind that a company has not acted unlawfully simply because it has engaged in ordinary competitive behavior that would have been an effective means of competition if it were engaged in by a firm without monopoly power, or simply because it is large and efficient. To find U.S. Tobacco liable for monopolization because of the maintenance of lawfully acquired monopoly power through the use of that power, you must determine that U.S. Tobacco actually exercised monopoly power to maintain or tighten its control of the market.

If you find that U.S. Tobacco willfully maintained monopoly power, then you must find that Conwood has established this element and you must consider the remaining elements of its monopolization claim. Otherwise, you must find for U.S. Tobacco.

INSTRUCTION NO. 2.5

ANTITRUST: Injury and Causation

If you find that U.S. Tobacco has violated Section 2 of the Sherman Act as alleged by Conwood, then you must decide if Conwood is entitled to recover damages from U.S. Tobacco.

The law provides that anyone who is injured by an antitrust violation may recover damages for any injury to its business or property caused by the violation.

For Conwood to establish that it is entitled to recover damages, it must prove that it was injured as a result of U.S. Tobacco's alleged violation of antitrust laws. This is sometimes referred to as proving "causation" or "fact of damage." Proving causation does not require Conwood to prove the dollar value of its injury. It requires only that Conwood prove that it was in fact injured by U.S. Tobacco's alleged antitrust violation. If you find that Conwood has established that it was in fact injured, you may then consider the amount of Conwood's damages.

It is important to understand, however, that injury and amount of damage are different concepts and that you cannot consider the amount of damage unless and until you have concluded that Conwood has established that it was in fact injured.

To establish injury, Conwood must have offered evidence that establishes as a matter of fact and with a fair degree of certainty that U.S. Tobacco's alleged illegal conduct was a material cause of Conwood's injury. This means that Conwood must have proved that some damage flowed to it as a result of U.S. Tobacco's alleged antitrust violation. Conwood is not required t prove that U.S. Tobacco's alleged antitrust violation was the sole cause of its injury; nor need Conwood eliminate all other possible causes of injury. It is enough if Conwood has proved the alleged antitrust violation was a material cause of its injury. Injury may be established inference or circumstantial evidence. However, if you find that Conwood's injury was cau

solely by something other than the alleged antitrust violation or if you find that Conwood was not injured, then you must find that Conwood has failed to prove that it is entitled to recover damages from U.S. Tobacco.

INSTRUCTION NO. 3.

ANTITRUST: Elements of Attempt to Monopolize Claim

Conwood also claims that U.S. Tobacco has violated the federal antitrust laws by attempting to monopolize the moist snuff industry in the United States.

There are four essential elements which Conwood must prove in order to establish that U.S. Tobacco was liable for attempted monopolization within the meaning of the antitrust laws:

1) That U.S. Tobacco engaged in restrictive or exclusionary conduct;

2) That U.S. Tobacco had a specific intent to monopolize in the relevant market of all moist snuff brands in the United States;

3) That there was a dangerous probability that U.S. Tobacco would achieve its goal of monopoly power in the relevant market; and

4) That Conwood was injured in its business or property by U.S. Tobacco's restrictive or exclusionary conduct.

Conwood must prove that each one of these elements is more likely true than not. That is called a preponderance of evidence. If Conwood fails to persuade you on every essential element of the attempt to monopolize claim, then you must find for U.S. Tobacco.

The definitions of "monopoly power," "relevant market," and "injury and damages" are the same in this claim as they are in the monopoly claim.

INSTRUCTION NO. 3.1

ANTITRUST: Exclusionary or Restrictive Conduct

I have previously instructed you on exclusionary conduct. That instruction applies here as well.

INSTRUCTION NO. 3.2

ANTITRUST: Intent

There are several ways in which Conwood may prove that U.S. Tobacco had the specific intent to monopolize. There may be evidence of direct statements of U.S. Tobacco's intent to obtain a monopoly in the relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of defendant. You must be careful, however, to distinguish between U.S. Tobacco's intent to compete aggressively (which is lawful) and an intent to acquire monopoly power by using illegal or exclusionary means.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for you to decide what facts have been established by the evidence.

If you find that U.S. Tobacco had the specific intent to monopolize in the relevant market, then you must find that Conwood has established this requirement and you must consider the remaining elements of its attempt to monopolize claim. Otherwise, you must find for U.S. Tobacco.

INSTRUCTION NO. 3.3

ANTITRUST: Dangerous Probability of Success

If you find that U.S. Tobacco had the specific intent to achieve a monopoly and engaged in significant exclusionary or restrictive conduct, you also must determine if the evidence shows the next element of attempt to monopolize: namely, that there was a dangerous probability that U.S. Tobacco would sooner or later succeed in achieving monopoly power if it continued to engage in the same or similar conduct. In determining whether there was a dangerous probability of success, you should consider the following factors:

1) the market share and power of defendant as compared to its competitors;

2) whether U.S. Tobacco's share of the relevant market was increasing or decreasing;

3) the actual or probable impact on competition of U.S. Tobacco's restrictive or exclusionary acts or practices; and

4) whether the barriers to entry into the market made it difficult for competitors to enter the market.

A dangerous probability of success need not mean that success was nearly certain. It means that the chance of success was substantial and real: that is, that there was a reasonable likelihood that defendant would ultimately achieve its goal of monopoly power.

If you find that there was a dangerous probability of success, then you must find that Conwood has established this requirement and you must consider the remaining elements of its attempt to monopolize claim. Otherwise, you must find for U.S. Tobacco.

INSTRUCTION NO. 4.

ANTITRUST: Damages

If you find that U.S. Tobacco either monopolized or attempted to monopolize in accordance with these instructions, the law provides that Conwood should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful. A defendant's violations of the antitrust laws often create a situation in which it is hard to determine the precise amount of damages suffered by the plaintiff. Conwood's right to be fairly compensated should not be affected by any difficulty you may have in determining the precise amount of the recovery so long as there is a reasonable basis in the evidence for your award. You may not, however, calculate damages based only on speculation or guesswork, and you must remember that you can award Conwood damages only for injuries caused by a violation of the antitrust laws. You may not award damages for injuries or losses caused by other factors.

If you find that U.S. Tobacco violated the antitrust laws and that this violation caused injury to Conwood, then you must determine the amount of damages, if any, Conwood is entitled to recover. Damages may include lost profits, destruction of a business or deprivation of the opportunity to engage in a business, or increased costs incurred because of a violation.

If you find that U.S. Tobacco did commit an antitrust violation, then you must calculate the profits, if any, that Conwood lost as a result of U.S. Tobacco's antitrust violation. Profit means net profit: the amount by which Conwood's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues. You may calculate net profit in the following way.

You have heard evidence of the market share that Conwood would have had in the

absence of U.S. Tobacco's antitrust violation. You may calculate Conwood's loss of profit by considering market share, evidence of the size of the market, and evidence relating to the profit margin Conwood would have secured on such sales.

INSTRUCTION NO. 5.

LANHAM ACT CLAIM

Conwood also alleges that U.S. Tobacco falsely advertised in violation of the Lanham Act.

Under the Lanham Act, it is illegal for any person to misrepresent the nature, characteristics, or qualities of his or its goods, services or commercial activities in commercial advertising or promotion .

Conwood must prove by a preponderance of the evidence the following elements:

1) That U.S. Tobacco made false or misleading statements of fact about its own products;

2) That those statements were publically disseminated;

3) That retailers or consumers were deceived or were likely to have been deceived by U.S. Tobacco's statements;

4) That the statements were material in the sense that they were likely to influence the deceived retailer's or consumer's purchasing decisions; and

5) That U.S. Tobacco's statements caused harm to Conwood.

Otherwise, you will find for U.S. Tobacco.

If you believe from the evidence that U.S. Tobacco violated the Lanham Act and injury to Conwood resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 6.

LANHAM ACT COUNTERCLAIM

U.S. Tobacco alleges in its counterclaim against Conwood that Conwood falsely advertised in violation of the Lanham Act.

Under the Lanham Act, it is illegal for any person to misrepresent the nature, characteristics or qualities of his or its goods, services or commercial activities in commercial advertising or promotion .

U.S. Tobacco must prove by a preponderance of the evidence the following elements:

1) That Conwood made false or misleading statements of fact about its own products or U.S. Tobacco's products;

2) That those statements were publically disseminated;

3) That retailers or consumers were deceived or were likely to have been deceived by U.S. Tobacco's statements;

4) That the statements were material in the sense that they were likely to influence the deceived retailer's or consumer's purchasing decisions; and

5) That Conwood's statements caused harm to U.S. Tobacco.

Otherwise, you will find for Conwood.

If you believe from the evidence that Conwood violated the Lanham Act and injury to U.S. Tobacco resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 7.

CONVERSION

Conwood has brought a claim of conversion against U.S. Tobacco. Conwood claims that U.S. Tobacco wrongfully took its property from retail locations.

You will find for Conwood if you are satisfied from a preponderance of the evidence:

1) That U.S. Tobacco representatives wrongfully took Conwood advertising and display racks from retail locations; and

2) That all of the advertising or display racks taken belonged to Conwood; and

3) That Conwood was damaged thereby.

Otherwise, you will find for U.S. Tobacco.

If you find for Conwood, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 8.

CONVERSION COUNTERCLAIM

U.S. Tobacco has brought a claim of conversion against Conwood. U.S. Tobacco claims that Conwood wrongfully took its property from retail locations.

You will find for U.S. Tobacco if you are satisfied from a preponderance of the evidence:

1) That Conwood representatives wrongfully took U.S. Tobacco advertising and display racks from retail locations; and

2) That all of the advertising or display racks taken belonged to U.S. Tobacco ; and

3) That U.S. Tobacco was damaged thereby.

Otherwise, you will find for Conwood.

If you find for U.S. Tobacco, you may award damages in an amount that will reasonably and fairly compensate U.S. Tobacco.

INSTRUCTION NO. 9.

AGENCY

As a general rule, whatever any person is legally capable of doing himself can be done through another as agent. So, if the acts of an employee or other agent are voluntarily and intentionally ordered or directed, or authorized or consented to by a person, then the law holds that person responsible for such acts, the same as if the acts had in fact been done by such person.

A corporation is in law a person, but of course it cannot act otherwise than through its directors, or officers, or employees, or other agents. The law therefore holds a corporation responsible for all unlawful acts of its directors, or officers, or employees, or other agents, provided such unlawful acts are done within the scope of their authority, as would usually be the case if done in the ordinary course of their employment, or in the ordinary course of the corporation's business.

Authority to act for a corporation in a particular matter, or in a particular way or manner, may be inferred from the surrounding facts and circumstances shown by the evidence in the case. That is to say, authority to act for a corporation, like any other fact in issue in a civil case, need not be established by direct evidence, but may be established by indirect or circumstantial evidence.

Every act of every director, or officer, or employee, or other agent, on behalf of, or in the name of a corporation, if done within the scope of his authority, is in law the act of the corporation itself.

INSTRUCTION NO. 10.

VERDICT MUST BE UNANIMOUS

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to the verdict. Your verdict must be unanimous in that all of you must agree to it.

INSTRUCTION NO. 11.

NOTES

Now I would like to say something about the notes that you have taken during the trial. Your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of the evidence. If you have not taken notes, you should rely upon your own in independent recollection of the proceedings and you should not be unduly influenced by the notes of other jurors.

Notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been. Whether you have taken notes or not, each of you must form and express your own opinion as to the facts of the case.

You will notice that we do have an official court reporter making a record of the trial. However, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

INSTRUCTION NO. 12.

DELIBERATION

It is your duty as jurors, to consult with one another, and to deliberate with a view to reach an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do no hesitate to reexamine your own views and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesman here in Court.

You will take these forms to the jury room and, when you have reached unanimous agreement your foreperson fill in and sign the forms which set forth the verdict upon which you unanimously agree with respect to each issue in this case; you will then return with your decision to the courtroom.

PRELIMINARY INSTRUCTIONS

Members of the Jury: Now that you have heard all of the evidence and the argument of the attorneys, it is my duty to give you instructions as to the law applicable in this case.

It is your duty as jurors to follow the law as stated in the instructions, and to apply that law to the facts you find from the evidence.

You are not to single out one instruction alone as stating the law. You must consider the instructions as a whole. The fact I have given an instruction on any issue does not mean you should find one way or the other as to that issue.

You are not to be concerned with the wisdom of any rule of law stated by the Court. You must apply the law given in these instructions whether you agree with it or not.

It is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record. It is your own interpretation and recollection of the evidence that controls.

Under the Federal Rules of Evidence, experts are permitted to rely on a variety of materials in forming their opinions, including materials that are not in evidence in this case. Evidence does not include documents that may have been seen or considered by experts, or about which experts were examined or cross-examined at trial, unless those documents are also admitted as exhibits in the record. Therefore, while an expert's testimony is evidence in this case, some of the materials on which the expert relied are not evidence in this case, although an expert is entitled to rely upon them in making his opinion.

You are permitted to draw reasonable inferences, deductions, and conclusions from the testimony and exhibits which you feel are justified in the light of your own common sense.

In saying that you must consider all the evidence, I do not mean to suggest that you must necessarily accept all of the evidence as true or accurate. You are the sole judges of the credibility or believability of each witness, including expert witnesses and the weight to be given to the testimony of each witness.

In determining the credibility of any witness, you may properly consider the demeanor of the witness while testifying, frankness or lack of it, and his or her interest in the outcome of the case, if any.

In deciding the facts of this case you must not be swayed by bias or prejudice or sympathy or public opinions. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. The law is not a respecter of persons, a corporation and all persons stand equal before the law and are to be dealt with as equals in a court of justice.

INSTRUCTION NO. 2.1

ANTITRUST: Definition of Monopoly Power

Monopoly power is the power to control prices in or to exclude competition from the relevant market.

The power to control prices is the power of a company to establish appreciably higher prices for its goods than those charged by competitors for equivalent goods without a substantial loss of business to competitors. Thus, if a company that has raised prices eventually has to lower its prices to the level of prices charged by its competitors , it may not have monopoly power in the sense of power to control prices.

The power to exclude competition means the power of a company to dominate a market by eliminating existing competition from the market or by preventing new competition from entering the market.

To establish the possession of monopoly power, Conwood need not prove that prices were raised or that competition actually was excluded, but only that U.S. Tobacco had the power to raise prices or exclude competition.

Further, to conclude that U.S. Tobacco had monopoly power , you need not find that U.S. Tobacco could sell at any price it desired or that it had no competition whatsoever. A company may face some competition in the relevant market and still have monopoly power. On the other hand, if you find that U.S. Tobacco did not have the power to control prices or exclude competition, then you must conclude that it did not have monopoly power.

The mere possession of monopoly power is not sufficient to support a finding of monopolization, unless it is also determined that the monopoly power was willfully maintained. A person who maintains monopoly power through normal growth and development, as a

consequence of having a superior product, or business acumen, or through historical accident, is not guilty of monopolization as defined in this charge.

INSTRUCTION NO. 2.4

ANTITRUST: Willful Maintenance of Monopoly Power

The next element that Conwood must prove is that U.S. Tobacco willfully maintained monopoly power through restrictive or exclusionary acts or practices, rather than by supplying better products or services, or by exercising superior business judgment, or just by chance.

Restrictive or exclusionary conduct is conduct that has the effect of preventing or excluding competition or frustrating or impairing the efforts of other firms to compete for customers within the relevant market. It is not necessary that such conduct be unlawful in and of itself, apart from its effect in maintaining U.S. Tobacco's monopoly power.

To prove U.S. Tobacco acted willfully, Conwood must prove either that U.S. Tobacco engaged in restrictive or exclusionary acts or practices with the conscious object of furthering the dominance of U.S. Tobacco in the relevant market or that this was the necessary direct consequence of U.S. Tobacco's conduct or business arrangements.

You may not find that a company willfully maintained monopoly power if it has maintained that power through the exercise of superior foresight and skill; or because of economic or technological efficiency, including efficiency resulting from scientific research; or because of a change in cost or taste has driven out all but one supplier. The acts or practices that result in the maintenance of monopoly power must represent something more than the conduct of business that is part of the normal competitive process or extraordinary commercial success. They must represent conduct that has made it very difficult or impossible for competitors to engage in fair competition.

Mere possession of monopoly power, if lawfully acquired, does not violate the antitrust laws. But it is unlawful to use monopoly power, however lawfully acquired, to foreclose

competition, to gain a competitive advantage, or to destroy a competitor. Therefore, a company that has lawfully acquired monopoly power may not use that power to maintain or tighten its hold on the market. Such use may be shown by conduct that depends for its success on the company's monopoly power, as distinguished from conduct that could be successfully employed by firms without monopoly power in the relevant market.

In determining whether there has been an unlawful exercise of monopoly power, you must bear in mind that a company has not acted unlawfully simply because it has engaged in ordinary competitive behavior that would have been an effective means of competition if it were engaged in by a firm without monopoly power, or simply because it is large and efficient. To find U.S. Tobacco liable for monopolization because of the maintenance of lawfully acquired monopoly power through the use of that power, you must determine that U.S. Tobacco actually exercised monopoly power to maintain or tighten its control of the market.

If you find that U.S. Tobacco willfully maintained monopoly power, then you must find that Conwood has established this element and you must consider the remaining elements of its monopolization claim. Otherwise, you must find for U.S. Tobacco.

INSTRUCTION NO. 3.

ANTITRUST: Elements of Attempt to Monopolize Claim

Conwood also claims that U.S. Tobacco has violated the federal antitrust laws by attempting to monopolize the moist snuff industry in the United States.

There are four essential elements which Conwood must prove in order to establish that U.S. Tobacco was liable for attempted monopolization within the meaning of the antitrust laws:

1) That U.S. Tobacco engaged in restrictive or exclusionary conduct;

2) That U.S. Tobacco had a specific intent to monopolize in the relevant market of all moist snuff brands in the United States;

3) That there was a dangerous probability that U.S. Tobacco would achieve its goal of monopoly power in the relevant market; and

4) That Conwood was injured in its business or property by U.S. Tobacco's restrictive or exclusionary conduct.

Conwood must prove that each one of these elements is more likely true than not. That is called a preponderance of evidence. If Conwood fails to persuade you on every essential element of the attempt to monopolize claim, then you must find for U.S. Tobacco.

The definitions of "monopoly power," "relevant market," and "injury and damages" are the same in this claim as they are in the monopoly claim.

INSTRUCTION NO. 3.2

ANTITRUST: Intent

There are several ways in which Conwood may prove that U.S. Tobacco had the specific intent to monopolize. There may be evidence of direct statements of U.S. Tobacco's intent to obtain a monopoly in the relevant market. Such proof of specific intent may be established by documents prepared by responsible officers or employees of defendant. You must be careful, however, to distinguish between U.S. Tobacco's intent to compete aggressively (which is lawful) and an intent to acquire monopoly power by using illegal or exclusionary means.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer a person's intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue, and all other facts and circumstances which indicate his state of mind.

You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for you to decide what facts have been established by the evidence.

If you find that U.S. Tobacco had the specific intent to monopolize in the relevant market, then you must find that Conwood has established this requirement and you must consider the remaining elements of its attempt to monopolize claim. Otherwise, you must find for U.S. Tobacco.

INSTRUCTION NO. 5.

LANHAM ACT CLAIM

Conwood also alleges that U.S. Tobacco falsely advertised in violation of the Lanham Act.

Under the Lanham Act, it is illegal for any person to misrepresent the nature, characteristics, or qualities of his or its goods, services or commercial activities in commercial advertising or promotion .

Conwood must prove by a preponderance of the evidence the following elements:

1) That U.S. Tobacco made false or misleading statements of fact about its own products;

2) That those statements were publically disseminated;

3) That retailers or consumers were deceived or were likely to have been deceived by U.S. Tobacco's statements;

4) That the statements were material in the sense that they were likely to influence the deceived retailer's or consumer's purchasing decisions; and

5) That U.S. Tobacco's statements caused harm to Conwood.

Otherwise, you will find for U.S. Tobacco.

If you believe from the evidence that U.S. Tobacco violated the Lanham Act and injury to Conwood resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 6.

LANHAM ACT COUNTERCLAIM

U.S. Tobacco alleges in its counterclaim against Conwood that Conwood falsely advertised in violation of the Lanham Act.

Under the Lanham Act, it is illegal for any person to misrepresent the nature, characteristics or qualities of his or its goods, services or commercial activities in commercial advertising or promotion .

U.S. Tobacco must prove by a preponderance of the evidence the following elements:

1) That Conwood made false or misleading statements of fact about its own products or U.S. Tobacco's products;

2) That those statements were publically disseminated;

3) That retailers or consumers were deceived or were likely to have been deceived by U.S. Tobacco's statements;

4) That the statements were material in the sense that they were likely to influence the deceived retailer's or consumer's purchasing decisions; and

5) That Conwood's statements caused harm to U.S. Tobacco.

Otherwise, you will find for Conwood.

If you believe from the evidence that Conwood violated the Lanham Act and injury to U.S. Tobacco resulted, then you may award damages in an amount that will reasonably and fairly compensate Conwood.

INSTRUCTION NO. 8.

CONVERSION COUNTERCLAIM

U.S. Tobacco has brought a claim of conversion against Conwood. U.S. Tobacco claims that Conwood wrongfully took its property from retail locations.

You will find for U.S. Tobacco if you are satisfied from a preponderance of the evidence:.

1) That Conwood representatives wrongfully took U.S. Tobacco advertising and display racks from retail locations; and

2) That all of the advertising or display racks taken belonged to U.S. Tobacco ; and

3) That U.S. Tobacco was damaged thereby.

Otherwise, you will find for Conwood.

If you find for U.S. Tobacco, you may award damages in an amount that will reasonably and fairly compensate U.S. Tobacco.

INSTRUCTION NO. 12.

DELIBERATION

It is your duty as jurors, to consult with one another, and to deliberate with a view to reach an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do no hesitate to reexamine your own views and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Upon retiring to the jury room, you will select one of your number to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesman here in Court.

You will take these forms to the jury room and, when you have reached unanimous agreement your foreperson fill in and sign the forms which set forth the verdict upon which you unanimously agree with respect to each issue in this case; you will then return with your decision to the courtroom.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98-CV-108-R

CONWOOD COMPANY, L.P., ET AL. PLAINTIFFS

v.

UNITED STATES TOBACCO COMPANY, ET AL. DEFENDANTS

VERDICT FORM

SECTION ONE: SHERMAN ACT CLAIM OF MONOPOLIZATION

1) Has Conwood proven by a preponderance of the evidence that the relevant market consists only of all moist snuff brands sold in the United States?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

2) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco possesses monopoly power in the relevant market?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

3) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco willfully maintained its monopoly power through restrictive or exclusionary conduct?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

4) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco's restrictive or exclusionary conduct caused Conwood's injury?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

the Sherman Act (Verdict Form B or D), you should award Conwood a sum of money that will fairly compensate it for all damages to its business or property that were a direct result or likely consequence of the conduct that you have found to be unlawful:

$_____

_____ _____
FOREPERSON DATE

Please continue to the next section.

SECTION FOUR: LANHAM ACT CLAIMS

1) On Conwood's claim of violation of the Lanham Act against U.S. Tobacco, we the jury find as follows:

For Conwood _____
For U.S. Tobacco _____

_____ _____
FOREPERSON DATE

If you find for U.S. Tobacco you should proceed to question number 3. If you find for Conwood against U.S. Tobacco please proceed to the next question.

2) If you found against U.S. Tobacco, you should award Conwood a sum of money that will fairly compensate it for such damages as you believe from the evidence that Conwood has sustained directly by reason of its injuries: $_____

_____ _____
FOREPERSON DATE

Please continue to the next question.

3) On U.S. Tobacco's counterclaim of violation of the Lanham Act against Conwood, we the jury find as follows:

For U.S. Tobacco _____
For Conwood _____

_____ _____
FOREPERSON DATE

If you find for Conwood you should proceed to Section 4. If you find for U.S. Tobacco against Conwood please proceed to the next question.

4) If you found against Conwood, you should award U.S. Tobacco a sum of money that will fairly compensate it for such damages as you believe from the evidence that U.S. Tobacco has sustained directly by reason of its injuries: $_____

_____ _____
FOREPERSON DATE

Please continue to the next Section.

SECTION FIVE: CONVERSION CLAIMS

1) On Conwood's claim of conversion against U.S. Tobacco, we the jury find as follows:

For Conwood _____
For U.S. Tobacco _____

_____ _____
FOREPERSON DATE

If you find for U.S. Tobacco you should proceed to question number 3. If you find for Conwood against U.S. Tobacco please proceed to the next question.

2) If you found against U.S. Tobacco, you should award Conwood a sum of money that will fairly compensate it for such damages as you believe from the evidence that Conwood has sustained directly by reason of its injuries: $_____

_____ _____
FOREPERSON DATE

Please continue to the next question.

3) On U.S. Tobacco's counterclaim of conversion against Conwood, we the jury find as follows:

For U.S. Tobacco _____
For Conwood _____

FOREPERSON DATE

If you find for Conwood, please return to the courtroom. If you find for U.S. Tobacco against Conwood please proceed to the next question.

4) If you found against Conwood, you should award U.S. Tobacco a sum of money that will fairly compensate it for such damages as you believe from the evidence that U.S. Tobacco has sustained directly by reason of its injuries: $_____

FOREPERSON DATE

Please return to the courtroom.

VERDICT FORM A

We, the jury find for U.S. Tobacco on Plaintiff Conwood's claim of monopolization in violation of § 2 of the Sherman Act.

_____ _____

FOREPERSON DATE

VERDICT FORM B

We, the jury, find for Conwood on Plaintiff Conwood's claim of monopolization in violation of § 2 of the Sherman Act.

_____ _____

FOREPERSON DATE

VERDICT FORM C

We, the jury find for U.S. Tobacco on Plaintiff Conwood's claim of attempt to monopolize in violation of § 2 of the Sherman Act.

_____ _____

FOREPERSON DATE

VERDICT FORM D

We, the jury, find for Conwood on Plaintiff Conwood's claim of attempt to monopolize in violation of § 2 of the Sherman Act.

_____ _____

FOREPERSON DATE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' SUPPLEMENTAL
PROPOSED JURY INSTRUCTION

Defendants request that the following proposed supplement to the verdict form be provided to the jury. The subject matter, which was included in Defendants' original submission, has been modified to make it consistent with the current draft from the Court:

4. Has Conwood proven by a preponderance of the evidence that any restrictive or exclusionary conduct by U.S. Tobacco caused harm to overall competition rather than only to Conwood:

_____ Yes (Please continue to next question)

_____ No (Please complete Verdict Form A and then go directly to Section 2).

Date: March 27, 2000

Respectfully submitted,

John S. Reed
Ridley M. Sandidge, Jr.
Lynn K. Fieldhouse
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Counsel for Defendants

16diii005329

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., counsel for Plaintiffs, this 27th day of March, 2000.

Counsel for Defendants

16diii005330

REED WEITKAMP SCHELL & VICE PLLC

TELECOPIER COVER SHEET

March 27, 2000

TO: Mark C. Hansen
Neil M. Gorsuch
Benjamin A. Powell

TELECOPIER NO.: 270-450-5118

FROM: John S. Reed

NUMBER OF PAGES *(including cover sheet)*: 4

IF ANY PROBLEMS ARISE, PLEASE CONTACT: Karen Childers
(270) 444-6339

RE: *Conwood Company, L.P., et al. v. United Stated Tobacco Company, et al., United States District Court, Western District of Kentucky, Paducah Division, No. 5:98-CV-108-R*

MESSAGE:

NOTE: This facsimile contains CONFIDENTIAL information intended only for the use of the specific individual or entity named above. If you or your employer is not the intended recipient of this facsimile or any employee or agent responsible for delivering it to the intended recipient, you are hereby notified that any unauthorized dissemination or copying of this facsimile or the information contained in it is strictly prohibited. If you have received this facsimile in error, please immediately notify the person named above at once by telephone and return the original facsimile to us at the above address via the U.S. Postal Service. Thank you.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98-CV-108-R

CONWOOD COMPANY, L.P., ET AL. PLAINTIFFS

v.

UNITED STATES TOBACCO COMPANY, ET AL. DEFENDANTS

VERDICT FORM

SECTION ONE: SHERMAN ACT CLAIM OF MONOPOLIZATION

1) Has Conwood proven by a preponderance of the evidence that the relevant market consists only of all moist snuff brands sold in the United States?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

2) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco possesses monopoly power in the relevant market?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

3) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco willfully maintained its monopoly power through restrictive or exclusionary conduct?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

4) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco's restrictive or exclusionary conduct caused Conwood's injury?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

If you answered yes to all of the above questions, please complete Verdict Form B

Please continue to the next section.

SECTION TWO: SHERMAN ACT CLAIM OF ATTEMPT TO MONOPOLIZE

1) Has Conwood proven by a preponderance of the evidence that the relevant market consists only of all moist snuff brands sold in the United States?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form C and then go directly to Section 3)

2) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco engaged in restrictive or exclusionary conduct?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form C and then go directly to Section 3)

3) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco had a specific intent to monopolize in the relevant market?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form C and then go directly to Section 3)

4) Has Conwood proven by a preponderance of the evidence that there was a dangerous probability that U.S. Tobacco would achieve its goal of monopoly power in the relevant market?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form C and then go directly to Section 3)

5) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco's restrictive or exclusionary conduct caused Conwood's injury?

_____ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form C and then go directly to Section 3)

If you answered yes to all of the above questions, please complete Verdict Form D.

Please continue to the next section.

SECTION THREE: ANTITRUST DAMAGES

If you found for Conwood on either of Conwood's claims of violation of § 2 of the

Sherman Act (Verdict Form B or D), you should award Conwood a sum of money that will fairly compensate it for all damages to its business or property that were a direct result or likely consequence only of the conduct that you have found to be unlawful:

$_____

_____ _____

FOREPERSON DATE

Please continue to the next section.

SECTION FOUR: CONVERSION COUNTERCLAIM

1) On U.S. Tobacco's counterclaim of conversion against Conwood, we the jury find as follows:

For U.S. Tobacco _____

For Conwood _____

_____ _____

FOREPERSON DATE

If you find for Conwood, please return to the courtroom. If you find for U.S. Tobacco against Conwood please proceed to the next question.

2) If you found against Conwood, you should award U.S. Tobacco a sum of money that will fairly compensate it for such damages as you believe from the evidence that U.S. Tobacco has sustained directly by reason of its injuries: $_____

_____ _____

FOREPERSON DATE

Please return to the courtroom.

VERDICT FORM A

We, the jury find for U.S. Tobacco on Plaintiff Conwood's claim of monopolization in violation of § 2 of the Sherman Act.

_____ _____

FOREPERSON DATE

VERDICT FORM B

We, the jury, find for Conwood on Plaintiff Conwood's claim of monopolization in violation of § 2 of the Sherman Act.

_____ _____

FOREPERSON DATE

VERDICT FORM C

We, the jury find for U.S. Tobacco on Plaintiff Conwood's claim of attempt to monopolize in violation of § 2 of the Sherman Act.

_____ _____

FOREPERSON DATE

VERDICT FORM D

We, the jury, find for Conwood on Plaintiff Conwood's claim of attempt to monopolize in violation of § 2 of the Sherman Act.

_____ _____

FOREPERSON DATE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98-CV-108-R

CONWOOD COMPANY, L.P., ET AL. PLAINTIFFS

v.

UNITED STATES TOBACCO COMPANY, ET AL. DEFENDANTS

JUDGMENT

IT IS ORDERED:

Pursuant to 15 U.S.C. § 15(a), the Court enters judgment in favor of the Plaintiffs, Conwood Company, L.P. and Conwood Sales Company, L.P., in the amount of $1,050,000,000, treble the jury verdict of $350,000,000.

This is the 29th day of March 2000.

Thomas B. Russell
Judge, United States District Court

cc: Counsel

ENTERED
MAR 29 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii005337 3

CERTIFICATE OF SERVICE

I certify that copies of the foregoing were sent by facsimile transmission to Mark C. Hansen, Neil M. Gorsuch, counsel for Plaintiffs, this 27th day of March, 2000.

Counsel for Defendants

16diii005338

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:98-CV-108-R

FILED
MAR 28 2000
JEFFREY A. [illegible], CLERK
BY
DEPUTY CLERK

CONWOOD COMPANY, L.P., ET AL. PLAINTIFFS

v.

UNITED STATES TOBACCO COMPANY, ET AL. DEFENDANTS

VERDICT FORM

SECTION ONE: SHERMAN ACT CLAIM OF MONOPOLIZATION

1) Has Conwood proven by a preponderance of the evidence that the relevant market consists only of all moist snuff brands sold in the United States?

✓ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

2) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco possesses monopoly power in the relevant market?

✓ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

3) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco willfully maintained its monopoly power through restrictive or exclusionary conduct?

✓ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

4) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco's restrictive or exclusionary conduct caused Conwood's injury?

✓ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form A and then go directly to Section 2)

If you answered yes to all of the above questions, please complete Verdict Form B

Please continue to the next section.

SECTION TWO: SHERMAN ACT CLAIM OF ATTEMPT TO MONOPOLIZE

1) Has Conwood proven by a preponderance of the evidence that the relevant market consists only of all moist snuff brands sold in the United States?

__✓__ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form C and then go directly to Section 3)

2) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco engaged in restrictive or exclusionary conduct?

__✓__ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form C and then go directly to Section 3)

3) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco had a specific intent to monopolize in the relevant market?

__✓__ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form C and then go directly to Section 3)

4) Has Conwood proven by a preponderance of the evidence that there was a dangerous probability that U.S. Tobacco would achieve its goal of monopoly power in the relevant market?

__✓__ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form C and then go directly to Section 3)

5) Has Conwood proven by a preponderance of the evidence that U.S. Tobacco's restrictive or exclusionary conduct caused Conwood's injury?

__✓__ YES (Please continue to the next question)
_____ NO (Please complete Verdict Form C and then go directly to Section 3)

If you answered yes to all of the above questions, please complete Verdict Form D.

Please continue to the next section.

SECTION THREE: ANTITRUST DAMAGES

If you found for Conwood on either of Conwood's claims of violation of § 2 of the

Sherman Act (Verdict Form B or D), you should award Conwood a sum of money that will fairly compensate it for all damages to its business or property that were a direct result or likely consequence only of the conduct that you have found to be unlawful: $ 350,000,000

Scott E. Sawyer 28 MAR 00
FOREPERSON DATE

Please continue to the next section.

SECTION FOUR: CONVERSION COUNTERCLAIM

1) On U.S. Tobacco's counterclaim of conversion against Conwood, we the jury find as follows:

For U.S. Tobacco _____
For Conwood ✓

Scott E. Sawyer 28 MAR 00
FOREPERSON DATE

If you find for Conwood, please return to the courtroom. If you find for U.S. Tobacco against Conwood please proceed to the next question.

2) If you found against Conwood, you should award U.S. Tobacco a sum of money that will fairly compensate it for such damages as you believe from the evidence that U.S. Tobacco has sustained directly by reason of its injuries: $_____

_____ _____
FOREPERSON DATE

Please return to the courtroom.

VERDICT FORM A

We, the jury find for U.S. Tobacco on Plaintiff Conwood's claim of monopolization in violation of § 2 of the Sherman Act.

FOREPERSON _____ DATE _____

VERDICT FORM B

We, the jury, find for Conwood on Plaintiff Conwood's claim of monopolization in violation of § 2 of the Sherman Act.

Judith E. Santerre 28 Mar 00

FOREPERSON DATE

VERDICT FORM C

We, the jury find for U.S. Tobacco on Plaintiff Conwood's claim of attempt to monopolize in violation of § 2 of the Sherman Act.

FOREPERSON _____ DATE _____

VERDICT FORM D

We, the jury, find for Conwood on Plaintiff Conwood's claim of attempt to monopolize in violation of § 2 of the Sherman Act.

Scott E. Sweeney 28 MAR 00

FOREPERSON DATE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
CASE NO. 5:98CV-108-R

CONWOOD COMPANY L.P., ET AL. PLAINTIFFS

v. **ORDER**

UNITED STATES TOBACCO SALES
AND MARKETING COMPANY, INC., ET AL. DEFENDANTS

A telephonic conference was held March 29, 2000.
Appearances:
For the plaintiffs: Mark Hansen, Esq.
For the defendants: John Reed, Esq.

Defendants made an oral motion to extend the automatic stay provided by FRCP 62 to allow the parties to brief the issues of any conditions for the security. Defendants agreed that during the stay it would not enter into any corporate transactions that would jeopardize any security responsible for the judgment. Plaintiff has no objection.

The parties agreed on scheduling order for filing motions for attorneys' fees, bill of costs, and injunctions and for permission to interview jurors.

IT IS ORDERED:

1. The automatic stay provided by FRCP 62 is extended to allow the parties to brief the issues. Defendant shall not enter into or conduct any corporate transactions that would jeopardize any security responsible for the judgment.

2. Defendants shall file a brief on the issues of conditions for the security by **April 19, 2000**. Plaintiffs shall respond 7 days thereafter and defendants are granted 7 days thereafter to file a reply.

3. Motions for attorneys' fees, bill of cost, and injunctions shall be filed within 21 days, with 14 days to respond, and 7 days to reply.

This 29th day of March, 2000.

Thomas B. Russell, Judge
United States District Court

ENTERED
MAR 29 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

16diii005344

364

AO 133 (Rev. 9/89) Bill of Costs

United States District Court

WESTERN DISTRICT OF KENTUCKY

CONWOOD COMPANY, L. P., et al.

V.

UNITED STATES TOBACCO COMPANY, et al.

BILL OF COSTS

Case Number: 5:98-CV-108-R

Judgment having been entered in the above entitled action on March 29,2000 (Date) against Defendants,

the Clerk is requested to tax the following as costs:

Fees of the Clerk	$ 125.00	Exhibi
Fees for service of summons and subpoena	275.00	
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	43,921.95	"A"
Fees and disbursements for printing	0.00	
Fees for witnesses (itemize on reverse side)	14,929.46	"B"
Fees for exemplification and copies of papers necessarily obtained for use in the case	1,378.30	"C"
Docket fees under 28 U.S.C. 1923	0.00	
Costs as shown on Mandate of Court of Appeals	0.00	
Compensation of court-appointed experts	0.00	
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828	0.00	
Other costs (please itemize)	0.00	
(1) TOTAL $	60,629.71	

(1) Subject to supplementation.

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

DECLARATION

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill was mailed today with postage prepaid to: Mailed overnight.

John Reed, Esq., Reed, Weitkamp, Schell, Cox & Vice, 2400 Citizens Plaza, Louisville,KY 40202;
Neal R. Stoll, Skadden, Arps, Slate, Meagher, & Flom, LLP, Four Times Square, New York, NY 10036

Signature of Attorney: Richard C. Roberts

Name of Attorney: Richard C. Roberts

For: Conwood Company, LP (Name of Claiming Party) Date: April 19, 2000

Costs are taxed in the amount of _____ and included in the judgement.

_____ By: _____
Clerk of Court Deputy Clerk Date

16dji005345

Exhibit A

Fees of Court Reporter

Trial Date	Witness	Court Reporter Costs
02/28/00;03/03/00	Engster	$ 771.55
02/28/00;03/06/00	Smith, G.	$ 5,025.50
02/28/00;03/03/00	Borrowdale	$ 973.35
03/02/00	Gill-Elkins	$ 1,073.00
03/02/00	Rusk	$ 769.75
03/02/00	Marconi	$ 613.50
03/02/00	Fasanelli	$ 4,220.65
03/03/00	Carter	$ 1,309.25
03/03/00	Ulizio	$ 880.00
03/06/00	Hart	$ 865.25
03/08/00	Leinen	$ 851.95
03/09/00	Renfro	$ 925.50
03/10/00	Stevens	$ 675.50
03/10/00	Waller	$ 809.20
03/10/00	Naifeh	$ 1,054.50
03/13/00	Keil	$ 800.00
03/14/00	Untiedt	$ 2,758.45
03/15/00	Barger	$ 113.50
03/16/00	Carlson	$ 358.00
03/16/00	Dill	756.75
03/16/00	Jones, G.	$ 109.25
03/20/00	Coatney	$ 553.35
03/20/00	Cash	$ 449.75
03/20/00	Cothren, J	$ 646.65
03/22/00	Ingram	$ 593.40
03/22/00	Ludwig	$ 1,013.15
03/22/00	Dowdy	$ 567.35
03/22/00	Laessig	$ 304.55
03/23/00	Knol	$ 941.90
03/23/00	Frank. R.	$ 711.50
03/24/00	Balk	$ 873.83
	Daily Trial Transcript Invoices Paid through Mar 31, 2000	$ 11,552.12 [1]
	Total	$ 43,921.95

[1] Final amounts to be determined as soon as practicable

Exhibit B

Witness Fees

Trial Date	Witness	Travel	Lodging	Witness Total	Travel Calculation
02/28/2000	Marano	$ 883.50	$ 87.02	$ 970.52	Airfare
02/29/2000	Rosson	$ 117.80	$ 87.02	$ 204.82	R/T 380 miles @$ .31
02/29/2000	Kamien	[1]	$ 87.02		
03/01/2000	Kamien	[1]	$ 87.02		
03/03/2000	Kamien	[1]	$ 87.02		
			Kamien total	$ 261.06	
03/03/2000	Willding	$ 199.64	$ 87.02	$ 286.66	R/T 644 miles @$.31
03/07/2000	Price	-	$ 87.02	$ 87.02	No travel expense paid
03/08/2000	Leftwich	$ 818.00	$ 87.02	$ 905.02	Airfare
03/08/2000	Ryan	$ 39.06	$ -	$ 39.06	R/T 126 miles @$.31
03/08/2000	Dring	$ 2,101.00	$ 87.02	$ 2,188.02	Airfare
03/08/2000	Hynek	$ 1,031.00	$ 87.02		Airfare
03/09/2000	Hynek		$ 87.02		
			Hynek total	$ 1,205.04	
03/09/2000	Gundlach	$ 1,835.00	$ 87.02	$ 1,922.02	Airfare
03/09/2000	Hettinger	$ 1,056.00	$ 87.02	$ 1,143.02	Airfare
03/10/2000	Falevsky	$ 1,799.28	$ 87.02	$ 1,886.30	Airfare
03/10/2000	Jeffrey	$ 829.50	$ 87.02	$ 916.52	Airfare
03/10/2000	Williams, T.	$ 117.80	$ 87.02		R/T 380 miles @$.31
03/27/2000	Williams, T.	$ 117.80	$ 87.02		R/T 380 miles @$.31
			Williams total	$ 409.64	
03/13/2000	Blattberg	$ 1,784.66	$ 87.02		Airfare;car rental
03/14/2000	Blattberg		$ 87.02		
			Blattberg total	$ 1,958.70	
03/13/2000	Larsen	-	$ 87.02	$ 87.02	No travel expense paid
03/13/2000	McClure	$ 372.00	$ 87.02	$ 459.02	Airfare
			Total	$ 14,929.46	

[1] Final transportation expenses will be provided as soon as practicable.

Exhibit C

Fees for Exemplication and Copies of Papers

Jury sets	Pages/set	Fee per page	Total
11	1,253	$0.10	$1,378.30

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MOTIONS FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE, FOR A NEW TRIAL, OR IN THE ALTERNATIVE, FOR A REDUCED DAMAGES AWARD

Defendants UST Inc., et al. ("U.S. Tobacco") move the Court pursuant to Fed. R. Civ. P. 50(b) for entry of judgment as a matter of law. Alternatively, U.S. Tobacco moves the Court pursuant to Fed. R. Civ. P. 59 for a new trial by jury. As a further alternative, U.S. Tobacco moves the Court to enter a remittitur to reduce the damages award.

In support of these motions, U.S. Tobacco has submitted two separate memoranda, one in support of the motion for judgment as a matter of law, and the other in support of the alternative motions for a new trial or a reduced damages award. U.S. Tobacco has also tendered three proposed Orders.

Respectfully submitted,

Dated: April 12, 2000

John S. Reed
Ridley M. Sandidge, Jr.
Lynn K. Fieldhouse
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2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Jed Goldfarb
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
919 Third Avenue
New York, New York 10022
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing and the supporting memoranda and tendered orders were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 12th day of April, 2000.

Counsel for Defendants

16diii005350

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

JUDGMENT

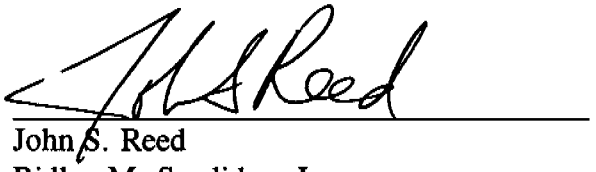
On motion of Defendants UST Inc., et al. ("U.S. Tobacco") for entry of judgment as a matter of law under Fed. R. Civ. P. 50(b) as to Plaintiffs' claims under Section 2 of the Sherman Act, 15 U.S.C. § 2; Plaintiffs having been fully heard at trial on the issues under Section 2 of the Sherman Act, and there being no legally sufficient evidentiary basis for a reasonable jury to find for the Plaintiffs on those issues; and the Court being fully and sufficiently advised,

IT IS HEREBY ORDERED that judgment is entered in favor of U.S. Tobacco on all matters at issue under Section 2 of the Sherman Act.

Entered this _____ day of _____, 2000.

_____
Thomas B. Russell, Judge
United States District Court

TENDERED BY:



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Counsel for Defendants

16diii005352

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

On motion of Defendants UST Inc., et al. ("U.S. Tobacco") for a new trial by jury under Fed. R. Civ. P. 59, and the Court being fully and sufficiently advised,

IT IS HEREBY ORDERED that U.S. Tobacco's motion is granted and, following a conference with counsel, the case shall be scheduled on the Court's docket for a new trial as to Plaintiffs' claim under Section 2 of the Sherman Act, 15 U.S.C. § 2.

In advance of the new trial, the Court will enter an order identifying which specific conduct of U.S. Tobacco can be considered illegal under applicable antitrust precedent and requiring Plaintiffs to demonstrate at trial (1) that the alleged conduct was in fact an exclusionary use of monopoly power; (2) that the alleged conduct caused harm to competition itself; (3) that the alleged conduct caused harm to Conwood; and (4) that Conwood suffered damages of a fair and reasonable amount flowing from that conduct and nothing else.

In advance of the new trial, the Court will enter specific in limine rulings governing the following matters: (a) evidence as to Conwood's owners, their wealth and their ability to compete

if they chose, (b) Dr. Leftwich's damages analysis, (c) Dr. Gundlach's "exclusive agreement" study; (d) the requirement that Conwood prove the fact of injury at specific retail stores, (5) the publication of hearsay documents and statements to the jury through Conwood's expert witnesses, (6) Plaintiffs' use of fact witnesses as expert witnesses, (7) the enforcement of Magistrate Judge Moyer's order of May 11, 1999 governing testimony relating to "field" misconduct, (8) Plaintiffs' comments and questions concerning the availability of U.S. Tobacco employee witnesses, (9) matters relating to jury instructions relating to predatory versus restrictive conduct and an instruction on nominal damages.

Entered this _____ day of _____, 2000.

_____

Thomas B. Russell, Judge
United States District Court

16diii005354

TENDERED BY:

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Counsel for Defendants

16diii005355

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., ET AL. — PLAINTIFFS

vs. — NO. 5:98CV-108-R

UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC. — DEFENDANT

ORDER

The Magistrate Judge held a teleconference in this matter at 8:30 a.m. on Wednesday, August 16, 2000. Counsel for plaintiff Conwood were Michael J. Guzman, Richard C. Roberts and Michael Zuckman; participating for defendant UST were John S. Reed and Lynn K. Fieldhouse.

The Magistrate Judge reviewed generally with counsel the status of issues related to Conwood's motion for attorneys' fees and costs (Docket No. 375), and the motion by UST requesting production of further records (Docket No. 422). Following this discussion, the Magistrate Judge scheduled a further telephonic conference for **Monday, August 28, 2000, at 2:00 p.m.**

Counsel for UST will arrangements for the conference call.

Date: August 16, 2000

JAMES D. MOYER
UNITED STATES DISTRICT COURT

ENTERED
AUG 16 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

Copies to:
Counsel of Record

RECEIVED
AUG 21 2000
By

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., ET AL. — PLAINTIFFS

vs. — NO. 5:98CV-108-R

UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC. — DEFENDANT

ORDER

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The Magistrate Judge reviewed generally with counsel the status of issues related to Conwood's motion for attorneys' fees and costs (Docket No. 375), and the motion by UST requesting production of further records (Docket No. 422). Following this discussion, the Magistrate Judge scheduled a further telephonic conference for **Monday, August 28, 2000, at 2:00 p.m.**

Counsel for UST will arrangements for the conference call.

Date: August 16, 2000

JAMES D. MOYER
UNITED STATES DISTRICT COURT

ENTERED
AUG 16 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

Copies to:
Counsel of Record

16diii00535743

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., ET AL. — PLAINTIFFS

vs. — NO. 5:98CV-108-R

UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC. — DEFENDANT

ORDER

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Counsel for UST will arrangements for the conference call.

Date: August 16, 2000

JAMES D. MOYER
UNITED STATES DISTRICT COURT

ENTERED
AUG 16 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

Copies to:
Counsel of Record

16diii005358

443

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER AND JUDGMENT

On motion of Defendants UST Inc., et al. ("U.S. Tobacco") for an order and judgment of remittitur to reduce the damages award of the jury to an amount more consistent with the record evidence, and the Court being fully and sufficiently advised,

IT IS HEREBY ORDERED AND ADJUDGED that the amount of actual damages reflected in the jury's verdict at $350 million shall be reduced to the amount of $_____ and that judgment shall be entered in favor of Plaintiffs, after trebling, in the amount of $_____, plus reasonable attorney fees and costs.

Entered this _____ day of _____, 2000.

_____
Thomas B. Russell, Judge
United States District Court

TENDERED BY:

John S. Reed
Ridley M. Sandidge, Jr.
Lynn K. Fieldhouse
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Counsel for Defendants

16diii005360

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

Defendants having moved the Court for leave to file a memorandum in support of their motion for judgment as a matter of law in excess of forty pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted and the Clerk is instructed to file the memorandum tendered by the Defendants with their motion for leave.

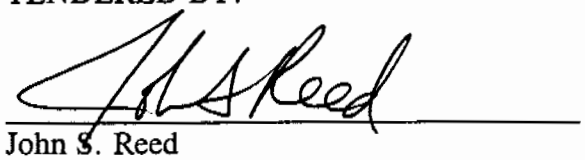
Entered this 14 day of April, 2000.

Thomas B. Russell, Judge
United States District Court

ENTERED
APR 14 2000
JEFFREY A. APPERSON, CLERK
BY DEPUTY CLERK

RECEIVED
APR 18 2000
By

TENDERED BY:



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Counsel for Defendants

16diii005362

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

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Attorneys for Defendants

16diii005363

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TABLE OF AUTHORITIES . . . . .

PRELIMINARY STATEMENT 1

ARGUMENT 6

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendants UST Inc., et al. ("U.S. Tobacco"), respectfully request that the Court direct entry of judgment as a matter of law in favor of U.S. Tobacco pursuant to Fed. R. Civ. P. 50(b).

PRELIMINARY STATEMENT

After less than four hours of deliberation, the jury in this case returned an astonishing verdict for Conwood which, after trebling, is one of the largest damages awards in the history of the antitrust laws.[1] The jury reached that result in the face of undisputed evidence that U.S. Tobacco –

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[1] The only larger post-trebling award of which U.S. Tobacco is aware is the initial $1.8 billion verdict in MCI Communications v. AT&T, 708 F.2d 1081 (7th Cir. 1982), an award that was overturned on appeal based on unsupportable assumptions in plaintiff's damages analysis as well as the failure of plaintiff's expert to dissaggregate the effects on plaintiff caused by lawful competition and other factors. Id. at 1159-68. The overwhelming majority of other Section 2 cases, which involve well-established abuses of monopoly power, involve awards in the of tens of millions to $150 million dollar range after trebling. In short, this Court is dealing with an unprecedented award that, for reasons described in detail below, warrants close and careful scrutiny.

whatever its "intent" – engages only in ordinary business practices that are available to all moist snuff manufacturers and, indeed, are fundamental to the efficient operation of the manufacturer/retailer relationship across all consumer product categories.

The jury also reached that result in the face of undisputed evidence that the moist snuff "market" was more competitive during the 1990s than in prior years, growing substantially in terms of both the number and variety of products, and in terms of overall sales. Indeed, it is undisputed that the most recent entrants into the moist snuff marketplace, Swedish Match and Swisher, grew rapidly in the 1990s – through the introduction of price-value brands – and that Conwood's sales and substantial profits also grew continuously and without interruption during this alleged period of marketwide competitive harm.

Finally, the jury reached its verdict relying on a damages expert who concededly never attempted to measure any actual lost sales resulting from U.S. Tobacco's alleged misconduct; never attempted to link damages to any particular "exclusionary" conduct; never considered the effects on Conwood sales of "independent, uncoerced decisions of retailers," which this Court specifically highlighted as important in its summary judgment opinion; never considered the effects on Conwood sales from the dramatic growth of competitive products such as Swedish Match's Timberwolf brand; and, in fact, offered a damages analysis that would not change if some or even all of U.S. Tobacco's conduct were found to be lawful. Indeed, by his own admission, all Dr. Leftwich did in this case was construct a one-variable "regression" model that was consistent with the "hypothesis" that U.S. Tobacco's misconduct – however defined – kept Conwood's share low in the 1990s in states where its share had already been low prior to 1990. He did not analyze why or how those shares would have dramatically increased absent U.S. Tobacco's alleged misconduct.

Equally important, he did not analyze why or how those shares had come to be so low prior to 1990 when, under Conwood's own theory, U.S. Tobacco's conduct was not substantially affecting Conwood's performance in the marketplace.

As a matter of law, this cursory analysis cannot stand as the basis of antitrust liability and does not constitute the type of "evidence" required to support a $1 billion antitrust award. On the contrary, if left to stand by this Court, the verdict and award would condemn the very process of competition itself in the retail industry, a process that the antitrust laws are supposed to foster no matter how rough it gets for individual competitors. It would also encourage more litigation aimed at stifling, rather than protecting, the competitive process. And, it would directly contravene the directive of the Supreme Court and the Sixth Circuit to exercise caution in condemning unilateral conduct under Section 2 of the Sherman Act. As the Sixth Circuit explained in Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413 (6th Cir. 1990):

> [S]ection 2 "must be used with the greatest caution. Action that injures rivals may ultimately injure consumers, but it is also perfectly consistent with competition, and to deter aggressive conduct is to deter competition. . . . '[A]n efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster.'"

Id. at 1422 (quoting Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986) (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984))).

If the verdict and award in this case had truly been about redressing harm to the "rule of the marketplace" – the competitive process – then there would have been sufficient evidence that U.S. Tobacco had the power to control prices and exclude competition in a relevant market. There

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was not. There would have been sufficient evidence that U.S. Tobacco actually used monopoly power by engaging in predatory and exclusionary conduct rather than normal competitive behavior, albeit "unsavory" or "unfair" from Conwood's perspective. There was not. There would have been sufficient evidence that any exclusionary conduct harmed overall competition in the relevant market. There was not; in fact, the evidence strongly supported just the opposite conclusion. There would have been substantial evidence that Conwood actually suffered harm flowing from injury to competition rather than from retailer decisions and other causes. There was not. And, finally, there would have been sufficient evidence and expert testimony supporting a fair and reasonable measure of damages without resort to speculation and guesswork. Again, there was not.

On the contrary, it became obvious early in the case that Conwood's "evidence" would be less about attempting to establish these essential Section 2 elements and more about trying to make the jury detest U.S. Tobacco executives and employees, including those who testified (live and by videotape) and those whom Conwood elected not to depose yet condemned extensively for their absence at trial. Indeed, as presented to the jury, this case began and ended with the impressions created by a string of expert witnesses who essentially read portions of documents to the jury and offered ungrounded "interpretations" that were unfairly prejudicial to U.S. Tobacco and, ultimately, to the integrity of the trial itself. In fact, the relevant antitrust issues were effectively discarded by the third day of trial in favor of a single inquiry bearing little relationship to the substance in this case: that is, whether U.S. Tobacco's documents and testimony demonstrated malevolence toward Conwood and other competitors in the retail marketplace. That, however, is not a concern of the antitrust laws.

By employing such a strategy, Conwood's counsel gave themselves the luxury of ignoring the very "marketplace" at issue in this case: the competition among moist snuff manufacturers to sell products to retailers and to place racks and POS in retail stores. Retailers are the customers of packaged goods manufacturers; therefore, retailers must be the focal point for assessing what is or is not a common, ordinary or desired marketing practice by manufacturers. Conwood, however, told the jury that it could and should simply ignore evidence relating to retailers in this case. Or, as counsel for Conwood put it to the jury during closing argument: "This case isn't about the stores." Tr. 3/28 at 51. Thus, Conwood essentially took the tack of not even challenging the overwhelming evidence that retailers desire innovative racks, including "exclusive" uniform racks from one manufacturer; that retailers expect and desire competition amongst manufacturers to provide suggestions and recommendations regarding space allocation, product selection and product and rack placement, including collaborative "category management" relationships with manufacturers; and that retailers do, in fact, make their own "independent, uncoerced decisions" after each manufacturer has had its chance to make its best sales pitch regarding what products, racks and POS should be displayed in the store.

In assessing whether to grant judgment as a matter of law, however, this Court must assess the undisputed evidence concerning these economic realities of the marketplace in which U.S. Tobacco, Conwood, and other companies operate. That means the retail environment is, indeed, critically important. For example, the Court must consider the unchallenged testimony about how retailers make decisions; about what U.S. Tobacco and all competitors do to influence those decisions as part of the normal competitive process; about what U.S. Tobacco does not and could not do to influence those decisions; about what retailers want, request, need, and demand from

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manufacturers; and about what U.S. Tobacco and other competitors do or do not do to meet those needs and desires. In short, had Conwood supported the elements of its antitrust case with proper economic evidence rather than emotional appeals to some vague notion of "fairness" foreign to the antitrust laws, its case would have been seen by the jury as the frontal attack on competition that it truly is. As it stands, the Court must now make that assessment.

ARGUMENT

I. U.S. TOBACCO IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

"If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law . . . ." Fed. R. Civ. P. 50(a). Accordingly, judgment as a matter of law is warranted where (1) plaintiff presented insufficient evidence to meet its burden of proof; or (2) the evidence was sufficiently favorable to the defendant that no reasonable jury could have found for plaintiff on that issue.

In antitrust cases, the Court's role in considering judgment as a matter of law is especially significant:

> "In the antitrust context, determining what amount of evidence will support a jury verdict and assessing the quality of the evidence from which [an] inference of illegal action may be drawn takes on a special importance. For a number of reasons, 'antitrust law limits the range of permissible inferences from ambiguous evidence [in antitrust cases].' . . . Consequently, the court must closely scrutinize the evidence in a given case to avoid the danger of improper antitrust condemnations."

Albani v. Southern Ariz. Anesthesia Servs., P.D., No. Civ. 91-588 TUC, 1997 WL 718499, at *1 (D. Ariz. Jan. 27, 1997) (Section 2) (quoting Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1152 (9th Cir. 1988) (Section 1)).

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Applying these standards to the full trial record in this case, judgment as a matter of law is mandated for several separate and independent reasons.

- First, the evidence presented at trial was insufficient to establish that U.S. Tobacco possesses monopoly power in a relevant market.
- Second, the evidence presented at trial was insufficient to establish that U.S. Tobacco engaged in any conduct that was a use of monopoly power rather than ordinary competitive methods available to all in the marketplace.
- Third, the evidence presented at trial was insufficient to establish that there was any harm to competition in the overall market.
- Fourth, the evidence presented at trial was insufficient to establish any harm to Conwood – with the requisite "reasonable certainty" or otherwise.
- Finally, the evidence presented at trial, including expert testimony, was insufficient to provide a basis upon which a reasonable jury could make a fair and reasonable estimate of antitrust damages.

Judgment as a matter of law on any one of these issues requires the entry of judgment in favor of U.S. Tobacco on Conwood's Sherman Act Section 2 claim.

A. The Evidence is Insufficient to Establish that U.S. Tobacco Possesses Monopoly Power in a Relevant Market

Conwood failed to establish that U.S. Tobacco possesses monopoly power in a relevant antitrust market.[2] Monopoly power is the power to control prices or exclude competition. See Tarrant Serv. Agency, Inc. v. American Standard, Inc., 12 F.3d 609, 615-16 (6th Cir. 1993) (affirming grant of judgment as a matter of law after adverse jury verdict because plaintiff did not

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[2] Conwood also failed to prove by a preponderance of evidence that the relevant market for antitrust purposes included only moist snuff products. Conwood offered no economic analysis concerning the substitutability of various smokeless tobacco products. Moreover, an independent third-party competitor, called by Conwood, testified that the relevant market included all smokeless tobacco products. Tr. 3/7 at 259-60. Even Conwood's own National Sales Manager recognized that U.S. Tobacco targets its promotions at loose leaf customers and that, as a result, consumers switch to moist snuff. See Tr. 3/10 at 102.

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demonstrate that defendant had the power to control prices or exclude competition in a relevant market). As the Court instructed the jury, factors that should have been considered in determining whether U.S. Tobacco possesses monopoly power included: (1) the trend in U.S. Tobacco's market share; (2) the number and size of U.S. Tobacco's competitors; (3) the trend in the market shares of U.S. Tobacco's competitors; and (4) entry into and exit from the market by other companies. See Tr. 3/28 at 103.[3]

It is well-established that where, as here, there is undisputed evidence of entry and expansion by other competitors, a plaintiff cannot establish that the defendant had the power to exclude competition. See Omega Envt'l, Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1164 (9th Cir. 1997) (fact that new competitor entered the market during the relevant period and grew from a 6% to 8% market share precluded finding that exclusive dealing contracts were an entry barrier that foreclosed competition), cert. denied, 119 S. Ct. 46 (1998); Barr Labs., Inc. v. Abbott Labs., 978 F.2d 98, 113-15 (3d Cir. 1992) (increased number of manufacturers of erythromycin over six-year period compelled finding of no significant entry barriers at summary judgment stage) (following International Distrib. Ctrs., Inc. v. Walsh Trucking Co., 812 F.2d 786, 792 (2d Cir. 1987)). Similarly, consistent with the Court's instruction to the jury, the ability to control prices and exclude competition cannot exist in a market characterized by increased price competition and a defendant's declining market share. See Magnus Petroleum Co. v. Skelly Oil Co., 599 F.2d 196, 201-02 (7th Cir. 1979) (plaintiff's concession that the market was characterized by numerous price wars and evidence

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[3] While a firm's market share may be one factor to consider, it is not sufficient to establish monopoly power. See Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826-27 (6th Cir. 1982) ("Market share alone . . . is not enough to determine a firm's capacity to achieve monopoly. The real test is whether [defendant] possessed sufficient market power to achieve its aims.") (citation omitted).

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that defendant's share of the market decreased during the relevant period confirmed that defendant's "competitors were not foreclosed significantly from the retail market").[4]

Applying these factors here, the uncontroverted evidence in this case established that U.S. Tobacco did not have the ability to exclude competition or control prices. On the contrary, it is undisputed that: (1) all manufacturers were able to, and in fact did, introduce new products and gain distribution for those products, Tr. 3/23 at 52-55 (DX 28); Tr. 3/20 at Coatney, pp. 98-100 (Conwood marketing department reported in 1997 that Conwood had achieved "too much distribution" on secondary brand); (2) price competition increased, both through increased promotional activities by all competitors, as well as through the introduction and rapid expansion of the price-value segment, Tr. 3/7 at 276-81; Tr. 3/23 at 55-57; (3) the overall market continued to grow in terms of total sales, Tr. 3/23 at 46-48 (DX 3); (4) all moist snuff manufacturers increased sales and profits, Tr. 3/23 at 48-49 (DX 9); and (5) U.S. Tobacco's sales share – and only U.S. Tobacco's sales share – declined, while the sales share of all other moist snuff companies increased, Tr. 3/23 at 20-21; 60-63; 69 (DX 12).[5]

Conwood offered no evidence that U.S. Tobacco was able to prevent entry into the market. Conwood offered no evidence that U.S. Tobacco was able to prevent the expansion of Conwood,

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[4] The fact that the defendant has increased prices on its own products and has high profit margins cannot, standing alone, provide the basis to establish the ability to control prices and exclude competition. Indeed, under that criteria, Conwood would also have monopoly power because Conwood sells its products at the same prices as USTC does and enjoys comparable profit margins. See Tr. 3/23 at 59-60 (evidence demonstrates that Conwood chose to increase prices in line with U.S. Tobacco rather than compete on price).

[5] See Richter Concrete, 691 F.2d at 826 ("The fact that [defendant's] share of the market was declining also belies whatever inference of capacity to monopolize that may be drawn from the size of its market share.").

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Swisher, or Swedish Match through their introduction of new products. Conwood offered no evidence whatsoever that U.S. Tobacco was able to control prices by eliminating promotions, by reducing output of moist snuff, or by preventing the growth of the price-value segment. Indeed, the undisputed evidence is that retailers were at all times free to decide what products to carry, whether or not to offer price-value brands, and whether or not to offer any variety of new products and promotions they desired. Tr. 2/29 at 216-17 (Conwood's Chairman testified that retailers invariably retained the right to make final decisions). Irrespective of U.S. Tobacco's "intent," these uncontroverted market facts establish that there was no evidentiary basis to find that U.S. Tobacco possessed monopoly power in the moist snuff "market."

B. Conwood Did Not Prove U.S. Tobacco Used Monopoly Power or Engaged in Anything But Ordinary Business Conduct

1. Proof of Intent To Eliminate Rivals or Dominate the Marketplace Is Not Sufficient to Support Liability

In considering whether Conwood offered sufficient evidence of "exclusionary" conduct by U.S. Tobacco, it is important, as a threshold matter, to remember what cannot suffice to prove such conduct – the mere intent to injure competitors, to maintain share or even to dominate the marketplace. The Sixth Circuit has reiterated the well-established principle that it is not "exclusionary" for an alleged monopolist to compete vigorously, even if its objective is to "injure" its rivals and maintain or increase its market share. As the court explained in Langenderfer:

> "[C]ompetition is a ruthless process. A firm that reduces costs and expands sales injures rivals – sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are by-products of vigorous competition, and the antitrust laws are not balm for the rivals' wounds."

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Langenderfer, 917 F.2d at 1422 (emphasis added) (quoting Ball Mem. Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986)). While the Langenderfer court made those comments in the context of aggressive pricing, it is no less true in the context of non-price competition. See Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 524-26 (5th Cir. 1999) (competition through attempts to persuade customers using biased bidding specifications).

Indeed, "[t]he intent to achieve or maintain a monopoly is no more unlawful than the possession of a monopoly." Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1481 (7th Cir. 1991). Accordingly, a monopolist is free, as a matter of law, to devise strategies and programs specifically aimed at maintaining its monopoly as long as they are practices that smaller competitors can or do use as well. See Telex Corp. v. IBM Corp., 510 F.2d 894, 904, 926-28 (10th Cir. 1975) (reversing district court that had based Section 2 liability on IBM's specific scheme to use long-term leasing arrangements to suppress competition and maintain its monopoly); see also Trace X Chem. Inc. v. Canadian Indus., Ltd., 738 F.2d 261, 265-67 (8th Cir. 1984) ("ordinary business practices" and "ordinary commercial conduct" cannot support Section 2 liability even assuming express anticompetitive intent; Section 2 must be based on anticompetitive "behavior" rather the valid exercise of business judgment). It is only the use of monopoly power without any valid business purpose that can violate Section 2. Trace X, 738 F.2d at 266.

For these reasons, courts have long held that the "intent" to harm a competitor or maintain a monopoly cannot "transform" otherwise legitimate business activities into monopolistic conduct. Trace X, 738 F.2d at 268. As Judge Easterbrook observed: "Who says that competition is supposed to be fair, that we judge the behavior of the marketplace by the ethics of the courtroom? Real competition is bruising rivalry, in which people go out of business under intense pressure....

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[C]ompetition is a 'gale of creative destruction.'" Fishman v. Estate of Wirtz, 807 F.2d 520, 577 (7th Cir. 1986) (Easterbrook, J., dissenting). Similarly, the Sixth Circuit has made very clear that "what should matter is not the monopolist's state of mind, but the overall impact of the monopolist's practices." Byars v. Bluff City News Co., 609 F.2d 843, 860 (6th Cir. 1979); see also Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338-39 (7th Cir. 1986) ("'[I]ntent to harm rivals' is not a useful standard in antitrust. . . . Vigorous competitors intend to harm rivals, to do all the business if they can. To penalize this intent is to penalize competition.").

For these reasons, courts routinely reject as a matter of law antitrust claims that are premised on "bad" intent as reflected in a defendant's internal business documents. See, e.g. Pacific Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 817 (9th Cir. 1992)("'Direct evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation.'") (citation omitted); Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield, 883 F.2d 1101, 1113 (1st Cir. 1989) (defendant's president's "none-too-polite . . . desire to emasculate" plaintiff and put it out of business was "irrelevant"; defendant was "no more guilty of an antitrust violation than a boxer who delivers a perfectly legal punch – hoping that it will kill his opponent – is guilty of attempted murder."); Taylor Publ'g Co. v. Jostens, Inc., 36 F. Supp. 2d 360, 368-72 (E.D. Tex. 1999) (intent to monopolize market and evidence of deception could not establish the requisite "predatory conduct" under Section 2); Delaware & Hudson Ry. Co. v. Consolidated Rail Corp., 724 F. Supp. 1073, 1077 (N.D.N.Y. 1989) ("'[T]he desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws.'") (quoting Ocean State Physicians, 883 F.2d at 1113), rev'd on other grounds, 902 F.2d 174 (2d Cir. 1990).

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Equally important, Section 2 liability cannot be based on ordinary business practices that are carried out unfairly or even fraudulently. See, e.g., Concord Boat Corp. v. Brunswick Corp., No. 98-3732, 98-4042, 2000 WL 303035, at *2 (8th Cir. Mar. 24, 2000) (no Section 2 liability in face of evidence that defendant "fraudulently concealed" special deals with certain of its customers); Taylor Publ'g Co. v. Jostens, 36 F. Supp. 2d at 368-69 ("sham pricing" scheme was best characterized as fraud or misrepresentation not predatory conduct). Otherwise, any alleged tortious or unfair conduct, no matter how ordinary the business or marketing practice involved, could form the basis of Section 2 liability, essentially federalizing state tort law. See, e.g., Havoco of America Ltd. v. Shell Oil Co., 626 F.2d 549, 557-58 (7th Cir. 1980).

Conwood's evidence in this case was all about U.S. Tobacco's "intent" and allegedly tortious conduct, rather than whether U.S. Tobacco's actual marketing practices were uses of monopoly power or anything other than ordinary competitive practices in the retail industry. In Judge Easterbrook's words, Conwood was successful in having the jury assess U.S. Tobacco's internal documents according to the "ethics of the courtroom" rather than the "bruising rivalry" of the marketplace. To be sure, it may have been troubling for the jury to hear about "eliminating competitive distribution"; it may have been offensive for the jury to hear about "using exclusive vending to control competition"; and it was probably overwhelming for the jury to see a U.S. Tobacco sales representative reporting "F_ _ k Conwood!" That clearly was Conwood's intended effect in parading these documents in front of the jury, an effect that obviously was achieved. It would be inviting reversible error, however, for Conwood now to suggest that these types of documents, rather than U.S. Tobacco's actual marketing practices and programs, can support the jury's finding of Section 2 liability. And, as described below, stripped of Conwood's counsels' and

Conwood's experts' incendiary, if uninformed, characterizations of U.S. Tobacco's documents and employee testimony, the trial record contains no evidence that U.S. Tobacco used any monopoly power or engaged in any pervasive conduct that was outside the normal boundaries of competition in the retail industry.

2. The Antitrust Laws Require Proof of a Use of Monopoly Power

In sharp contrast to mere evidence of anticompetitive intent, Section 2 of the Sherman Act requires proof that the defendant in fact used monopoly power in the marketplace to harm competition. By "use" of monopoly power, courts require proof of conduct that is "'possible or effective only if taken by a firm that dominates its smaller rivals.'" Langenderfer, 917 F.2d at 1428 (quoting Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979)). That is, the defendant must in fact employ practices

> that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits.

Neumann v. Reinforced Earth Co., 786 F.2d 424, 427 (D.C. Cir. 1986) (emphasis added). For example, a use of monopoly power may be supported with evidence that the defendant "coerced" customers into accepting products or programs that were not desired. See, e.g., R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 60 F. Supp.2d 502 (M.D.N.C. 1999) (preliminary injunction issued where retailers testified that Philip Morris incentive program was coercive and left them with no alternative but to comply in order to receive large conditional promotional monies)[6]; LePage's Inc.

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[6] Among the retailers who offered testimony in R.J. Reynolds was Jack Barger. Mr. Barger (continued...)

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v. 3M, No. CIV. A. 97-3983, 1999 WL 346223 (E.D. Pa. May 14, 1999) (economically coercive program requiring the complete exclusion of competitive products); see also Tr. 3/23 at 35 (expert testimony distinguishing Conwood's allegations from "long-term contracts" with "a substantial percentage of the stores" that "foreclose the ability of competitors to compete"). A use of monopoly power also can be supported with evidence that the conduct lacks any legitimate business justification whatsoever. See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 588-95, 605-11 (1985) (refusal to deal, after long course of cooperation, with no efficiency justification or normal business purpose).

As a matter of law, conduct that would make economic sense for smaller firms in the marketplace, or is a common business practice in the industry, cannot be a use of monopoly power or "predatory." See Northeastern Tel. Co. v. AT&T Co., 651 F.2d 76, 93 (2d Cir. 1981) (two-tier pricing system created to maintain market share and "lock in" customers could not violate Section 2 and could not be exclusionary because it was an "'ordinary marketing method []'" and because it was not "'possible or effective only if taken by a firm that dominates its smaller rivals'") (citations omitted); Panhandle Eastern Pipe Line, 935 F.2d at 1481-82.

Recognizing that it could not meet its burden of proof on this fundamental Section 2 requirement, Conwood offered the jury prejudicial rhetoric rather than evidence of a use of monopoly power by U.S. Tobacco. Specifically, Conwood argued to the jury that U.S. Tobacco was an "800 pound gorilla" wielding monopoly power to harm Conwood – a suggestion made no fewer

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[6] (...continued)
also testified in this case that U.S. Tobacco's CAP program was not coercive, that the amount of dollars offered through CAP was "not worthy" of any extra effort to comply, and that the CAP program was in sharp contrast to the incentive program offered by Philip Morris. Tr. 3/15 at Barger, pp. 11-12, 26.

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than 28 times during opening and closing. While Conwood was obviously effective in making the jury believe that U.S. Tobacco acted like a large, wild animal in the marketplace, there is no concrete evidence in the record to support any such assertion. Conwood did not offer any evidence that U.S. Tobacco threatened, coerced, refused to deal, or engaged in any other conduct implicating its alleged monopoly power with any retail customer. In fact, Conwood's own economic expert, Dr. Kamien, conceded that U.S. Tobacco did not coerce retailers. Tr. 3/3 at 65-67. Nevertheless, he testified that U.S. Tobacco's mere size was intimidation enough. Tr.3/3 at 76-77. That, too, is an invitation to error: permitting a jury to infer a "use" of monopoly power based solely on a defendant's alleged status as a monopolist is to suggest a per se standard for Section 2 liability, a notion no court would ever entertain.

Conwood's only remaining argument is that U.S. Tobacco used monopoly power by taking part in the competitive process itself, but with bad intent and allegedly "unfair" or "deceptive" tactics. As described below, however, each of the practices challenged by Conwood is a standard industry practice and a normal part of business dealings between manufacturers and retailers. And any ruling that these practices can be considered predatory under Section 2, for example, because they were done "unfairly" or too aggressively for Conwood's liking, would either condemn the very essence of competition in the retail industry or, at a minimum, federalize state tort law with an open invitation for competitors of "monopolists" to seek treble damages for every type of tortious conduct they can imagine. Conwood's intent to achieve this result was starkly revealed by its decision to drop its tort claim against U.S. Tobacco, leaving the jury only one liability option.

3. Suggestions Regarding Product Mix and Space Allocations

(a) Shelf Space Recommendations

The antitrust laws do not prevent a competitor – no matter what its size or market share – from making shelf space recommendations to retailers. In Jays Foods, Inc. v. Frito-Lay, Inc., 664 F. Supp. 364 (N.D. Ill. 1987), aff'd mem., 860 F.2d 1082 (7th Cir. 1988), the court held that it was not "anticompetitive" or exclusionary for Frito-Lay to make shelf-space recommendations to retailers, even where Frito-Lay allegedly presented retailers with "misleading" and "incomplete" shelf-space studies. Granting summary judgment to Frito-Lay, the court found that competition to influence shelf space decisions of retailers was "'normal commercial behavior'" in the grocery industry. 664 F. Supp. at 370 ((emphasis added) quoting Kellogg Co., 99 F.T.C. 8, 277 (1982) (statement of Commissioner Clanton)). The court found that, absent a coercive exclusive dealing agreement with retailers, and even in the face of "overzealous" documents, Frito-Lay's conduct was not "exclusionary":

> The documents [plaintiff] relies on show that Frito-Lay is a hard-nosed, arguably over-zealous competitor. They do not, however, support the inference that Frito-Lay's shelf-space practices were exclusionary. There is nothing in the record, for example, indicating that [retailers were] contractually bound to deal only with Frito-Lay, that Frito-Lay was able to coerce [retailers] into some sort of exclusive arrangement, or that Frito-Lay was otherwise able to prevent [retailers] from dealing with Frito-Lay's competitors.

664 F. Supp. at 371 (emphasis added). Again, the proper focus is on conduct, not intent. See Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129, 1133-36 (S.D.N.Y. 1986) (shelf-space recommendations made as part of shelf-space incentive program was "a commonplace tool for competitors"; even in the face of allegedly misleading presentations, retailers were free not to

participate in the program; also plaintiff could implement its own competing program; in such circumstances there could be no "injury to competition") (emphasis added); Stearns Airport Equip., 170 F.3d at 524-26, 536 (affirming summary judgment in favor of defendants on Section 2 claim where manufacturer excluded competitor by convincing municipalities to adopt specifications in its favor).

Nothing in the record of this trial would distinguish the conduct in this case from the conduct in the Frito Lay cases. Whether in the context of category management or otherwise, U.S. Tobacco's attempts to influence retailer decisions about product selection and space allocation are core aspects of competition in the packaged goods industry and have been for many decades. This fact was readily conceded by Conwood's Chairman, William Rosson; its National Sales Manager, Terry Williams; and the head of sales for Swedish Match, Harold Price. See Tr. 2/29 at 157-59, 163-65; Tr. 3/10 at 93, 109, 115-17; Tr. 3/7 at 274-76, 286-87. 289-90. Category management experts for both parties also agreed that recommendations regarding space and assortment are standard industry practices. See Tr. 3/16 at 20-24; Tr. 3/14 at 63-67. Further, all of the evidence in this case regarding competition for shelf space confirms that U.S. Tobacco, Conwood, and other companies participate in this intense competition, albeit with the usual accusations of unfair and misleading tactics. Notably, Conwood, like U.S. Tobacco, has documents that tout the victories of its sales force in these daily competitive struggles. See, e.g., DX 613, DX 625, DX 688, DX 790, DX 808, DX 888, DX 934. According to Mr. Rosson, claims by Conwood sales persons that they had eliminated competitive distribution was just "competition." See Tr. 2/29 at 163 (DX 688), 164-65 (DX 888) ("It happens everyday, somebody gets discontinued.").

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Accordingly, if the Court were to permit Section 2 liability to stand on evidence of U.S. Tobacco's "influence" over retailers, then the Court would in fact be condemning U.S. Tobacco for its size or market share alone. See, e.g., Telex Corp., 510 F.2d at 902, 904. Moreover, it would reward Conwood threefold for its failure to participate more effectively in this fundamental aspect of competition in the retail industry.

(b) U.S. Tobacco's Requests That Retailers Provide Share Of Shelf Space Equal To Its Share Of "Market"(SOF=SOM) Is Not Exclusionary

Conwood also has launched a frontal attack on U.S. Tobacco's "pursuit" of SOF=SOM. Conwood, of course, failed to prove that U.S. Tobacco ever required retailers to agree to this space-allocation strategy, and it is undisputed that U.S. Tobacco never achieved any such space allocation goal in the overall marketplace. See Tr. 3/23 at 29-30 (large manufacturers request SOF-SOM; none get it); Tr. 3/16 at 24-25 (no evidence that SOF=SOM was ever required; retailers would not accept any such requirement from a manufacturer). The inquiry for the Court, however, is whether the pursuit or even the achievement of SOF=SOM, assuming U.S. Tobacco has monopoly power, would be an unlawful use of that power under the antitrust laws. Again, as a matter of law, the answer is a resounding "no."

Whether seeking SOF=SOM is anticompetitive or "exclusionary" is not a question of first impression. Such an ordinary marketing practice as SOF=SOM has long been accepted as procompetitive conduct that promotes the efficient allocation of shelf space to products that are profitable for retailers because they are products desired by consumers. For example, in Kellogg Co., 99 F.T.C. 8 (1982), the Administrative Law Judge expressly found that space-to-sales marketing

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strategies were well-established methods used by retailers to avoid out-of-stocks and overstocks. As the ALJ explained nearly two decades ago:

> Kellogg did not invent the principle of allocating shelf space by sales volume. Sales volume is, and has been, the basic method of space allocation throughout grocery stores. A retailer's profitability is directly related to its sales turnover. The allocation of shelf space according to sales volume reduces the likelihood that a product will be out of stock, maximizes turnover and return on investment and minimizes lost sales and lost profits both to the retailer and the manufacturer.

Id. at 144 (emphasis added) (citation omitted) (vacated on other grounds and complaint dismissed by final order). Again, the ALJ did not determine that such conduct is merely "passable" or "not exclusionary"; the ALJ determined that such conduct is procompetitive. To this day, in fact, Kellogg still pursues the same objectives at retail. See Tr. 3/16 at 24.

Soon after the Kellogg decision, the Fifth Circuit, in Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300 (5th Cir. 1984), held that it cannot constitute antitrust injury for Dr. Pepper actually to obtain, never mind pursue, shelf space according to its sales levels. Upholding summary judgment for defendants, the court explained:

> [Plaintiff] acknowledges that store owners apportion their shelf space on the basis of sales . . . . But [plaintiff] implies an antitrust injury and suggests an entitlement to more shelf space than its market share would justify. The district court correctly rejected this asserted antitrust injury.

725 F.2d at 304. The record in this case confirms that Conwood, in the words of the Bayou Bottling court, believes it has "an entitlement to more shelf space than its market share would justify." Id. Indeed, Counsel for Conwood elicited testimony from Dr. Kamien that all competitors, including Conwood, should be allocated shelf space equal to U.S. Tobacco's, despite the fact that U.S. Tobacco products outsell Conwood products by a magnitude of 5 or 6 to 1. See Tr. 3/1 at 79. Under Bayou Bottling, such an entitlement theory cannot form the basis of Conwood's claim of antitrust injury.

Bayou Bottling was followed by Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129 (S.D.N.Y. 1986). Frito-Lay had a specific incentive program ("TOP") to pay retailers guaranteed profits if they brought Frito-Lay's share of shelf space up to its share of sales. Moreover, Frito-Lay expressly "recommended that the additional shelf space to be allocated to its products come from space previously allocated to competitors." Id. at 1132. A number of Frito-Lay's key accounts – large chain grocery stores – signed up for the TOP program.

Finding that Frito-Lay was doing nothing more than attempting to "increase its shelf space in those stores that did not have space-to-sales allocated shelves," the court ruled that this was ordinary marketing activity. Id. at 1134. Moreover, the court ruled that space-to-sales shelf allocation was procompetitive and therefore Bachman could not establish antitrust injury absent proof that, as a result of TOP, Frito-Lay "obtained a greater share of shelf space than that equivalent to its share of the market or, conversely, that [Bachman]'s percentage of shelf space fell below its market share." Id. Finally, recognizing the significance of retailer choice, which Conwood told the jury to ignore, the court held that Bachman would also need to prove that the TOP program was not optional, but rather resulted from "coercive or threatening behavior." Id. (emphasis added).

Following this well-established line of authority, the court in Jays Foods rejected a claim that Frito-Lay violated the antitrust laws by seeking – again, through alleged deception of retailers – SOF=SOM. See Jays Foods, 664 F. Supp. at 367-72. Specifically, plaintiff alleged that "Frito-Lay urged retailers to allocate shelf space based on total snack food sales but . . . failed to use the shelf space . . . in a profit maximizing manner [and presented] retailers with misleading and incomplete shelf-space studies." Id. at 366. The court held, as a matter of law, that such shelf space

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"tactics" were part of the competition for shelf space and, in fact, were practiced by plaintiff as well. Id. at 370-71. Accordingly, the court granted summary judgment in favor of Frito-Lay. Id. at 372.[7]

Nothing in this case distinguishes U.S. Tobacco's activities from those recognized as ordinary, procompetitive marketing activities in the above-cited antitrust cases. U.S. Tobacco therefore is perfectly entitled to seek SOF=SOM, even at the "expense" of what Conwood and other companies in the marketplace may believe to be their entitlement to equal space. Any pursuit of that goal by U.S. Tobacco, therefore, is part of competition itself, not anticompetitive or "exclusionary" conduct, see Kellogg Co., 99 F.T.C. at 144. It is a normal business practice aimed at achieving a normal business objective, even if it may result in less space for a competitor's products. As the Fifth Circuit stated in Stearns Airport Equipment:

> [T]he business justification – independent of harm to competitors – for [defendant's] actions is obvious: it was trying to sell its product. While [plaintiff] may feel very much aggrieved at their success, the tactics it complains of were all fairly simple attempts to generate sales by "touting the virtues" of its bridges. "Acts which are ordinary business practices typical of those used in a competitive market do not constitute anti-competitive conduct violative of Section 2."

170 F.3d at 524 (quoting Trace-X Chem., 738 F.2d at 266).

Here, again, the only way to convert any efforts by U.S. Tobacco to achieve SOF=SOM into a Section 2 violation would be to deprive U.S. Tobacco of using, without coercion, this standard marketing practice that has been used for decades by all types of manufacturers in the retail industry, and that remains one of the common efficiency-enhancing tools in the retail industry for deciding what products are carried in stores.

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[7] The Jay Foods court also held that plaintiffs could not establish anticompetitive effects based on the theory that Frito-Lay failed to maximize its own profits in arranging its shelf space displays, analogizing this conduct to a firm giving larger discounts than cost savings would justify, but without engaging in predatory pricing. See 664 F. Supp. at 372.

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4. The Offering And Provision Of Exclusive Display Racks

The undisputed evidence offered at trial also establishes that many retailers – often large chains – do not want to use multiple racks for merchandising moist snuff products. See, e.g., Tr. 3/16 at Carlson, p. 22; Tr. 3/15 at Walden, pp. 16-17; see also PX 84 ("Beth Schommer, the VP at Wal-Mart, is very much in favor of eliminating the extra vendors and garbage POS that exists today . . . ."). Whether it be aesthetics, logistical considerations when performing a reset, better use of space, or just wanting everything in one place, the evidence is uncontroverted that many retailers prefer a single rack provided by one moist snuff manufacturer. See Tr. 2/28 at 210 (Conwood sales representative testified that retailers want uniformity); Tr. 3/10 at 88-89; 135-36 (DX 856); Tr. 3/10 at Stevens, pp. 11-13 (retailer testified that she "didn't care" for the "big conglomeration" of little racks, so she opted for one exclusive rack from Conwood). It also is undisputed that retailers prefer single merchandising set-ups in other categories as well. See Tr. 3/14 at 105 (retailer testifying that he prefers to use display provided by Oral B for all toothbrushes); see also Tr. 3/16 at 27-29; Tr. 3/23 at 30-34. These are market realities that cannot be denied, or ignored, by manufacturers or reasonable juries or courts.

It is not surprising, then, that all moist snuff companies can and do participate in the competition either to offer a uniform rack or to try to persuade the retailer to use multiple racks. For those manufactures that choose to offer a uniform rack, the competition to supply an "exclusive" rack is won by the company that devotes the most time, effort, and resources to meeting a particular retailer's needs. See, e.g., Tr. 3/10 at 88-90 (DX 856) (Swisher wins rack placement at all K-Mart stores with innovative two-tier rack system.). Further, to the extent that exclusive racks lead to exclusive header cards in some instances, that too cannot violate Section 2. See Beverage

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Management, Inc. v. Coca-Cola Bottling Corp., 653 F. Supp. 1144, 1146, 1155-56 (S.D. Ohio 1986) (exclusive advertising arrangement could not violate Sections 1 or 2 where plaintiffs were free to use same ordinary marketing methods; Sections 1 and 2 of the Sherman Act do not equate "business frustrations stemming from rival's competitive practices with violations of the antitrust laws").[8]

There is absolutely no evidence in the record that U.S. Tobacco does anything to exclude competitors from the competitive process with respect to the development or placement of moist snuff racks. There is no evidence that U.S. Tobacco coerces retailers into rack selection in any manner, or that it enters into any agreements that preclude retailers from choosing another competitor's rack or using multiple racks at any time. On the contrary, even Conwood's primary example – Wal-Mart – accepted presentations by Swisher and Swedish Match and considered using those companies' uniform racks, see Tr. 3/16 at Carlson, pp. 104, 143; Tr. 3/9 at Renfro, pp. 50-51. In fact, the uncontroverted testimony from Wal-Mart is that if Conwood were to offer a rack tomorrow that better served Wal-Mart's needs, there would be nothing preventing Wal-Mart from switching racks immediately. See Tr. 3/16 at Carlson, p. 24. That too, precludes a finding of exclusionary conduct under Section 2 as a matter of law. See Concord Boat, 2000 WL 303035, at *21 (Section 2 could not be violated by discount scheme tied to market share where retail customers were free to walk away at any time and at times did so).

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[8] It should also be noted that Conwood did not offer a single piece of evidence indicating that U.S. Tobacco required any retailers to accept U.S. Tobacco's "exclusive" header cards. To the contrary, every witness who was asked testified that U.S. Tobacco requests, but does not require, U.S. Tobacco POS materials on U.S. Tobacco racks. See, e.g, Tr. 3/15 at 46-47, 54-55, 59-60. Accordingly, this case is unlike RJR or 3M where substantial numbers of retail customers were in fact economically "locked in" to certain programs that excluded competitors. Where, however, there are no such "golden handcuffs," and customers are free to deal with other suppliers, Section 2 cannot be violated as a matter of law. See Concord Boat, 2000 WL 303035, at *21.

Given this competition, evidence that U.S. Tobacco actually sought to place uniform racks in some retail chains does not make the conduct "exclusionary," even if Conwood could have proven that the intent was to harm Conwood, maintain share, or "control" competition. U.S. Tobacco is free to engage in this ordinary and important aspect of competition, even if one of the benefits is to gain a competitive advantage in the display of its products; that is the nature and objective of competition on the merits. Likewise, reports from the field that state "we won exclusive vending" – "Excellent Job! Gary," see PX 68, do not make this competition anticompetitive. See Stearns Airport Equip., 170 F.3d at 524 n.4 ("[P]laintiff continually refers back to [defendant's] documents which indicate that [defendant] was aware that a certain specification would prevent [plaintiff] from bidding, and was pleased by this fact. Writing a memo saying that you are winning a competition on the merits does not change the fact that it is a competition on the merits."). The fact remains: the undisputed evidence offered at trial established that many retailers desire uniform racks and make the decision whether or not to use one. Manufacturers then compete either to offer a uniform rack or to try to persuade the retailer to use multiple racks.

In the context of this ongoing rack competition, Professor Gundlach's conclusions concerning U.S. Tobacco's so-called "exclusive agreements" ring especially hollow. First, even assuming that Professor Gundlach truly identified restrictive agreements, the retail locations implicated amount to little more than 7% of the total retail outlets that sell moist snuff (or, accepting Conwood's distinction between high and low volume stores, 14% of those high-volume locations). See Tr. 3/9 at 78-80, 117. Second, not a single document relied upon by Professor Gundlach demonstrates anything more than a retailer's consideration of all presentations made to it, and then making an independent, uncoerced decision to use a U.S. Tobacco rack. See Tr. 3/9 at 66-71, 77-85.

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Third, not a single document relied upon by Professor Gundlach demonstrates any continuing obligation on behalf of any retailer to use U.S. Tobacco racks, and there is no retailer testimony to the contrary. See Tr. 3/9 at 66-71, 77-85. In the end, neither the documents relied upon by Professor Gundlach, nor his extremely limited "analysis," provided a legally sufficient evidentiary basis for a jury to find any exclusion of Conwood from competing in the "market."

In sum, the evidence in this case regarding exclusive rack arrangements again confirms that Conwood is out to change the way many retailers wish to run their businesses. Conwood does not – "at present"– wish to enter the fray for developing uniform racks for those retailers who desire them. See Tr. 2/29 at 186-87 (Conwood Chairman testified that Conwood decided not to spend money on uniform racks to compete against Swisher and U.S. Tobacco); see also DX 671 (developing innovative racks "may force Conwood into the position of furnishing fixtures for all moist brands and, therefore, additionally increase our rack expenditures"); Tr. 3/10 at 80-81. Yet Conwood wants the Court to permit the jury to base antitrust liability on the decisions of retailers who simply wish to use U.S. Tobacco racks for their moist snuff sections. To permit liability to stand on that basis would be to condemn innovation itself, a core value protected by the antitrust laws. See California Computer Prods., Inc. v. IBM, 613 F.2d 727, 743-44 (9th Cir. 1979) (design changes to make products more attractive for buyers, including achieving better use of space, could not be predatory as a matter of law). It would also allow Conwood to be rewarded threefold for its own business decisions not to spend some of its $150 million per year in profits on rack

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innovation, and not to compete aggressively for rack placement like U.S. Tobacco and its other competitors.[9]

5. CAP and Other Incentive/Promotional Programs

Of similar ilk is Conwood's strained effort to demonstrate anticompetitive conduct by its characterization of U.S. Tobacco's Customer Alliance Program ("CAP") as exclusionary and unlawful. There is no reconciling this position with the case law directly on point or with the abundance of undisputed testimony by retailers that (1) the CAP program is not coercive, see, e.g., Tr. 3/15 at Walden pp. 57-60, 111; (2) the CAP program does not restrict in any way the way any retailer does business, see, e.g., Tr. 3/16 at Dill p.18; and (3) the CAP program is a typical incentive program offered by any number of manufacturers, regardless of size, in the retail industry, see, e.g., Tr. 3/15 at McGuire, p.26. In short, CAP is about as ordinary as it gets in the retail industry; it clearly cannot constitute a use of monopoly power.

In Beverage Management, the court rejected a competitor's challenge to Coca-Cola's Cooperative Merchandising Agreement ("CMA") under both Section 1 and Section 2 of the Sherman Act. Like U.S. Tobacco's CAP program, the CMA offered retailers a sliding scale of sales-based incentives. Unlike the CAP program, the CMA required that Coca-Cola's feature advertisements be exclusive. See 653 F. Supp. at 1146. Nevertheless, the Beverage Management court recognized Coca-Cola's CMA program for what it was – one facet of vigorous competition among suppliers "to obtain sales to retailers . . . by offering price discounts and promotional allowances for feature advertising." Id. at 1147. Significantly, the court found that: (1) the CMA program "is one which

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[9] Indeed, Conwood did not come out with an incentive program for rack placement until January, 2000, nearly two years after filing this case and many years after its sales force requested one. Tr. 3/10 at 127-31.

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could have been offered by Plaintiff," id.; (2) plaintiff made "no showing that Defendant's program [was] coercive," id.; and (3) the CMA program simply did not foreclose competitors – i.e., as a factual matter, "[t]he CMA . . . does not commit [the retailer] to any specific number of weeks of feature advertising. [The retailer] is free to decide which [products] it will feature on a week to week basis . . . . [The retailer] is free to take advantage of the promotional offer or to not do so as it chooses." Id. at 1146. In these respects, CAP is no different from CMA. See also Concord Boat, 2000 WL 303035, at *21 (discount scheme aimed at selling more product than rivals was "normal competitive tool" in the industry).

Professor Gundlach's testimony concerning CAP best illustrated Conwood's faulty legal position. Professor Gundlach's testimony, as presented to the jury, suggested that U.S. Tobacco should be found liable under the antitrust laws for engaging in ordinary marketing methods available to all competitors in the moist snuff industry. Professor Gundlach testified, for example, that because the CAP program provides incentives for retailers to participate in U.S. Tobacco's new product introductions, it is "on its face" exclusionary. Tr. 3/9 at 101-02. It is undisputed, however, that no term of the CAP contract provides any incentive for a retailer not to conduct business with any other manufacturer. And it is undisputed that the CAP program provides a maximum rebate of 3 cents per 10-can roll of product (approximate price to retailer of 10-can roll: $27) to a retailer who selects two of four marketing components, only one of which is to participate in U.S. Tobacco's new product introductions. DX 1939; see also Tr. 3/22 at Laessig, pp. 79-80.

Under the logic of Professor Gundlach's opinion, it would be "exclusionary" for U.S. Tobacco to offer any new products simply because acceptance of these new products may make retailers less inclined to accept new products from other manufacturers. In Professor Gundlach's

own words: "Requiring the retailer to participate in all of these new brand introductions provides limited opportunity in many instances for competitors to provide new products, new brand opportunities at the marketplace." Tr. 3/9 at 102. Perhaps recognizing the fallacy of this position, Professor Gundlach also testified that the CAP program is "usually" implemented with additional requirements of exclusive vending and the elimination of competitive distribution. Tr. 3/9 at 102-16. But the complete factual record presented in this case – as opposed to the handful of documents interpreted by Professor Gundlach – makes clear that CAP, as designed and implemented, does not require exclusive vending or the reduction of competitive distribution.

Exclusive Vending and CAP. Conwood's attempt to establish exclusive vending through CAP is also without basis in the record. First, the great weight of undisputed evidence indicates that a relatively small percentage of CAP participants actually use only U.S. Tobacco display racks. See Tr. 3/16 at 93-94 (U.S. Tobacco Department Manager testified that 1 retailer out of 125 CAP participants uses only U.S. Tobacco racks); Tr. 3/15 at 55-73 (U.S. Tobacco Chain Account Manager testified that CAP does not require exclusive vending); Tr. 3/21 at 11, 14-15 (U.S. Tobacco Sales Representatives testified that only 20% of CAP participants happen to use only U.S. Tobacco rack; CAP does not require exclusive vending); Tr. 3/3 at 84 (Conwood sales representative testified that Conwood racks authorized in 90% of stores in territory); Tr. 3/8 at 137 (same); Tr. 3/8 at 175 (same).

Second, not one retailer – none – testified that he or she chose to use a U.S. Tobacco rack to display all moist snuff products because of the CAP program. In the absence of such evidence, no reasonable inference would indicate otherwise.

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Third, the display component of the CAP program allows for the same maximum 3-cent per 10-can roll payment as the marketing component. See DX 1939; Tr. 3/22 Laessig, pp. 85-87. Even accepting for purposes of argument the significance Conwood attributes to rack selection, no retailer making that decision would place much weight on a 3-cent rebate on a $27 item. Conwood has offered no evidence otherwise, and no reasonable inference could possibly weigh in Conwood's favor.

Finally, evidence regarding Conwood's Retail Incentive Program ("RIP") only serves to confirm that CAP does not result in exclusive vending for U.S. Tobacco. For example, any retailer participating in CAP remained free to forego CAP moneys at any time or to accept Conwood's new RIP Program, which pays more money than CAP for placement of Conwood racks and products. See DX 4304; see also Tr. 3/10 at 148-49 (nothing prevents a retailer from participating simultaneously in CAP and in Conwood's "RIP"). And, Conwood's success in signing up participating CAP retailers for its RIP program – which requires use of a Conwood rack – further confirms that CAP does not require exclusive vending.

In any event, the undisputed facts are that CAP is an ordinary marketing program both on its face and in any ad hoc use of the program to obtain exclusive racks. It is the type of competition that takes place throughout the retail industry and, now, has finally been joined by Conwood with its RIP program (albeit without gathering movement figures for use in presentations to retailers).

Competitive Distribution. The evidence was even more scant concerning any relationship between the CAP program and the reduction of competitive distribution, i.e., the number of competitive facings. See Tr. 3/9 at 112-16 (Gundlach discussion of PX 96). At most, the

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evidence demonstrates isolated instances of a use of the CAP program for which it was not designed, a fact that is legally insufficient to establish any exclusionary effect in the marketplace. See, e.g., Ocean State Physicians, 883 F.2d at 1112-13 (isolated instances of misapplication of marketing program cannot prove that policy was used in an exclusionary manner).

In any event, even taking the evidence offered at trial at face value, the document selected by Conwood indicates only that the U.S. Tobacco sales representative sought a fair share of shelf space for U.S. Tobacco products, not the indiscriminate elimination of competitive products. In fact, PX 96 – on its face – indicates that the U.S. Tobacco sales representative suggested to the buyer that the buyer allow U.S. Tobacco to have its fair share of shelf space by discontinuing only two brands that, together, accounted for only 5 can-sales per week. The choice remained with the retailer, and the opportunity remained for any other company that wanted to persuade the retailer to carry its products. This, too, is ordinary competition. See Frito-Lay, 659 F. Supp. at 1134 (shelf-space recommendations made as part of shelf-space incentive program was "a commonplace tool for competitors").

Retailer Testimony. Finally, Professor Gundlach's "analysis" also completely overlooks the uncontroverted testimony of every retailer who testified about the CAP program. Why? In Professor Gundlach's own words: "I was not interested in the specific deliberations that went on in the retailer's mind." Tr. 3/9 at 148. But the deliberations that went on in the retailer's mind tell the whole story. Of those retailers who participated in CAP, some used U.S. Tobacco racks only; some used all companies' racks; some carried 12 moist snuff products; some carried over 40; some used every companies' POS materials on the racks; some used only U.S. Tobacco POS materials on the racks. But none of these decisions bore any relationship to the CAP program itself.

Without exception, the retailers – no matter what their product or rack choices were – received equal payments under CAP and they all testified that they made the choices for their stores, and that the CAP program did not restrict those choices in any way:

- Dan Walden testified that CAP is a "non-binding" program that rewards you for "things you were already doing" and that CAP was not tied in any way to his decisions concerning racks, product mix, promotions, or any interaction with other companies. Tr. 3/15 at Walden, pp. 49-51, 57-60, 62-63, 76-78, 111, 115.

- Paul McGuire testified that CAP is a "typical" incentive program not tied in any way to his decisions concerning racks and/or product mix. Tr. 3/15 at McGuire, p.26.

- Jack Barger testified that CAP was one of over 100 accrual-type programs in which he participates. Mr. Barger also testified that the amount of dollars offered through CAP was "not worthy" of any extra effort to comply. Tr. 3/15 at Barger, pp. 11-12, 26. Mr. Barger also sharply contrasted CAP with the incentive program offered by Philip Morris. Id.

- David Dill testified that CAP did not require exclusive racks and had nothing to do with his decisions concerning racks, product mix, and/or POS and did not prevent any interaction with other companies. Tr. 3/16 at Dill, pp. 18, 43-44, 75.

- Dennis Gagnon testified that CAP did not require exclusive racks or POS and did not prevent any interaction with other companies. Tr. 3/16 at Gagnon, p. 20.

- Kay Laessig testified that CAP encourages visibility for the whole category, not just U.S. Tobacco, that CAP was not tied in any way to his decisions concerning racks, product mix, and/or POS, and that CAP did not prevent him from interacting in any way with other companies. Tr. 3/22 at Laessig, pp. 29-30, 79-80, 83-89.

- Gary Jones testified that CAP had nothing to do with his decisions concerning racks or POS, and that U.S. Tobacco did not get the "most POS" or even the #1 spot under the program. Mr. Jones also testified that CAP was very simple and required him to do "what [he] would normally do as good business practice anyway." Tr. 3/16 at Jones, pp. 17-18, 23-25, 33.

- Robert Carlson testified that CAP had nothing to do with Wal-Mart's choice to use the U.S. Tobacco cabinet, that CAP was not tied in any way to his decisions concerning product mix, selection of U.S. Tobacco as Category Captain or promotions, and that CAP did not prevent him from interacting in any way with other companies. Tr. 3/16 at Carlson, pp. 54-57.

Conwood offered no testimony to the contrary from any retailer.

Thus, Conwood made no showing that would distinguish this case from Beverage Management: (1) the CAP program "is one which could have been offered by Plaintiff," 653 F. Supp. at 1147; (2) plaintiff made "no showing that Defendant's program [was] coercive," id.; and (3) the CAP program simply did not foreclose competitors – i.e., as a factual matter, "[the retailer] is free to take advantage of the promotional offer or to not do so as it chooses." Id. at 1146.

6. U.S. Tobacco's Alleged Tortious Conduct In The Field Is Not Exclusionary Under Section 2

Finally, Conwood offered the jury a hodgepodge of evidence, and inadmissible hearsay displayed through experts, to suggest the existence of a pervasive and systematic campaign by U.S. Tobacco to remove the racks of its competitors without retailer authorization. Consistent with its transparent strategy throughout this case, Conwood's chosen trial strategy was to attempt to blur the critical distinction between activity that was desired and authorized by retailers and that which was not.

That distinction is important, of course, because acts that merely constitute some form of unfair competition cannot form the basis of antitrust liability. As the Supreme Court most recently observed in NYNEX Corp. v. Discon, Inc., 119 S. Ct. 493 (1998): "[O]ther laws, for example, 'unfair competition' laws, business tort laws, or regulatory laws, provide remedies for various 'competitive practices thought to be offensive to proper standards of business morality.'" Id. at 499 (citation omitted); cf. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993); Langenderfer, 917 F.2d at 1426-27.

In fact, where, as here, it is undisputed that manufacturers are not foreclosed from dealing with retailers, unfair competition is – from an antitrust perspective – still competition, however unseemly. As Judge Easterbrook explained in Stamatakis Industries, Inc. v. King, 965 F.2d 469 (7th Cir. 1992):

> [Plaintiff] established a decline in sales, to be sure, but a producer's loss is no concern of the antitrust laws, which protect consumers from suppliers rather than suppliers from each other. If [the conduct in question] should be called unfair competition, it is nonetheless competition. "Competition is ruthless, unprincipled, uncharitable, unforgiving – and a boon to society, Adam Smith reminds us, precisely because of these qualities that make it a bane to other producers."

Id. at 471 (emphasis added) (citation omitted); see also Cascade Cabinet Co. v. Western Cabinet & Millwork Inc., 710 F.2d 1366, 1374 (9th Cir. 1983) ("[The Sherman Act] was not designed, and has never been interpreted, to reach all business practices, unfair or otherwise, damaging to individual companies.") (emphasis added); Oahu Gas Serv., Inc. v. Pacific Resources Inc., 838 F.2d 360, 370 (9th Cir. 1988) ("A campaign to harm or destroy rivals through deceptive marketing smacks of unfair competition, whose hallmark is harm to competitors. . . . The goal of the antitrust laws, however, unlike that of business tort or unfair competition laws, is to safeguard general competitive conditions, rather than to protect specific competitors.").

Even assuming arguendo that tortious conduct can constitute a violation of Section 2 in this case, Conwood would have had to offer evidence establishing that Conwood and other moist snuff companies were in fact foreclosed from competing in the marketplace as a result of such conduct. Sporadic or episodic activity is insufficient as a matter of law. As the Fourth Circuit cautioned in Abcor Corp. v. AM Int'l Inc., 916 F.2d 924 (4th Cir. 1990):

> Even if [defendant] has engaged in some unfair competition . . . "'courts should be circumspect in converting ordinary business torts into violations of antitrust laws.

> To do so would be to "create a federal common law of unfair competition" which was not the intent of the antitrust laws.'" The "sporadic activity" identified by the plaintiffs does not amount to an antitrust violation.

Id. at 931 (footnote omitted). See also Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 394 (7th Cir. 1984) ("The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself.") (emphasis added); NYNEX Corp., 119 S. Ct. at 498 ("[Plaintiff] must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to competition itself.").

Reviewing the trial record for truly unauthorized activity confirms that U.S. Tobacco's conduct could not have foreclosed anyone else from the competitive process. Conwood's own employees had no basis in personal knowledge to suggest anything other than authorized conduct by U.S. Tobacco in the field; anything else was pure speculation or impermissible hearsay. As expected, therefore, most of those witnesses testified about presumably authorized "corporate" resets and continued to blur, or merely speculate, about other instances of rack removals.[10] Similarly, at least half of the former U.S. Tobacco sales representatives who testified confirmed that they only removed racks or POS with explicit retail authorization, for example as part of a store reset. See, e.g., Tr. 3/2 at Marconi, pp. 11-16.

Indeed, if Conwood had met its burden of proving sufficient tortious conduct to harm the competitive process itself – rather than just "sporadic activity" that allegedly harmed Conwood in isolated instances – one would have expected a courtroom full of retailers, each of whom had

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[10] Nor, as described more fully in U.S. Tobacco's motion for a new trial, can Conwood prove "pervasive" unauthorized conduct or foreclosure simply by offering "expert" opinions on these factual questions for the jury; and clearly Conwood cannot make such a factual showing for the jury by having these same experts rely on self-serving hearsay "declarations" and "unethical" activity reports that are neither evidence in the case nor even relevant to a proper subject of expert testimony.

moist snuff racks removed from his or her store time and time again by U.S. Tobacco sales representatives. No such evidence was presented to the jury.[11] In sum total, four retailers testified about unauthorized conduct by U.S. Tobacco, and it clearly was sporadic:

- Georgia Gill-Elkins, a manager of a single-store Berreth Oil minimart in Mishawaka, Indiana, testified that a U.S. Tobacco rack removed a U.S. Tobacco rack, and the Conwood POS on that rack, in November of 1998. Tr. 3/2 at Gill-Elkins.

- Patricia Lienen, a former employee of a single-store Dave's Country Store in Dunlap, Iowa, testified that a U.S. Tobacco sales representative removed Conwood racks, but always put the Conwood product in a U.S. Tobacco rack. Tr. 3/8 at Lienen.

- Gayleen Rusk, a manager of a single-store Amoco Pronto Express store in Sioux City, Iowa, testified that a U.S. Tobacco representative removed empty facings for Conwood's Cougar products because there was no Cougar product ordered by the store. The U.S. Tobacco representative did not touch Conwood's Kodiak, Kodiak Ice, or Hawken brands that were in the store. Tr. 3/2 at Rusk.

- Marti Stevens, a manager of a single-store Qwik Way store in Billings, Montana, testified that a U.S. Tobacco sales representative removed a Conwood rack – the exclusive Conwood rack – in August, 1997. Tr. 3/10 at Stevens.

Conwood abandoned all of its state law claims with good reason: given the option, the jury might have properly concluded that this case actually is nothing more than a tort and unfair competition dispute, not an antitrust matter. The Court, however, should not now permit sporadic tortious conduct carried out in the context of otherwise normal, competitive dealings to support a

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[11] Conwood's 225 "sworn declarations," which Mr. Hansen published to the jury under cover and with great dramatic effect during cross-examination of Dr. Scheffman, would not even have established pervasiveness -- even had they been actual evidence for the jury's consideration. According to those declarations, over 85% of the Conwood sales personnel encounter less than four rack removals each week – including any rack removals that may have been requested or directed by the retailer. Over 80% encounter less than four instances each week where Conwood POS has been removed, again irrespective of retailer authorization. Yet, these "sworn declarations" were improperly allowed to be used by Dr. Leftwich in his damages study, see, infra, Section E.4, and were improperly published to the jury by Conwood's counsel during Dr. Scheffman's cross-examination. See Tr. 3/23 at 164-83.

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billion dollar jury verdict. To do so would truly federalize state tort law and make every alleged "monopolist" the target of antitrust litigation for aggressive, but not exclusionary, competition.

C. CONWOOD DID NOT ESTABLISH OVERALL HARM TO THE MOIST SNUFF MARKET, OR HARM TO ITSELF

On the critical antitrust requirement of harm to competition, the evidence supporting Conwood's claim becomes all but nonexistent. In fact, Conwood did not even attempt to establish any economic harm to the overall market.

As described below, Conwood did not attempt to rebut, much less actually refute, the compelling economic evidence that unequivocally demonstrated that competition in the moist snuff market was not harmed by U.S. Tobacco's alleged misconduct. Any serious economic analysis of the factors for assessing harm to competition demonstrates beyond question in this case that any moist snuff "market" is highly competitive and became increasingly competitive during the period it was supposedly being "monopolized" by U.S. Tobacco. Moreover, Conwood also failed to establish any injury in fact to itself beyond the suggestion to the jury that it "could have done better," a proposition that cannot constitute "antitrust injury" to Conwood in the first place and which, in any event, is supported only by the speculation and anecdotal observations of Conwood's employees.

1. Conwood Did Not Establish Harm To Competition

A fundamental requirement of an antitrust case is that the plaintiff prove harm to competition, not just to itself. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (an antitrust plaintiff must show injury "that flows from that which makes defendant's acts unlawful"-- i.e., harm to competition); Anheuser-Busch, Inc. v. G.T. Britts Distrib., Inc., 44 F. Supp.

2d 172, 175 (N.D.N.Y. 1999) (antitrust claim deficient because it alleged injury only to competitor's own business interests, not market-wide competition). Accordingly, judgment as a matter of law is especially appropriate and required where the competitive process in the market remains free and open. See NYNEX Corp., 119 S. Ct. at 498 ("[Plaintiff] must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to competition itself.").

For example, where output in a market actually increases during the alleged period of illegal monopolization, the market is not being injured. Indeed, Conwood's own expert economist, Dr. Kamien, testified that, in the moist snuff "market," output is increasing, to the benefit of consumers. See Tr. 3/1 at 49-50 (more product being sold is "a symptom that consumers are benefitting"). In order to lend support to Conwood's case, however, Dr. Kamien focused on sales at Wal-Mart and 7-Eleven, while unwittingly conceding that "there was an 8% increase in moist snuff sales overall in the U.S." Tr. 3/1 at 53; see also Tr. 3/1 at 59 (same conclusion with respect to 7-Eleven). Thus, in his enthusiasm to conclude that "Wal-Mart sales were reduced," Dr. Kamien established that output is increasing in the overall moist snuff "market" – a "symptom" that consumers are benefitting and that competition is alive and well.

Moreover, courts routinely grant judgment as a matter of law in monopolization cases where a plaintiff cannot dispute that other firms have entered the market and expanded successfully. See Campus Ctr. Discount Den, Inc. v. Miami Univ., 114 F.3d 1186 (6th Cir. 1997) (per curiam) (table decision; text on WESTLAW 1997 WL 271742, at **1-2).[12] For example, in the recent case

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[12] Expansion by, or even excess capacity of, existing market participants is the functional equivalent of "entry" as a factor of determining monopoly power. See Ford v. Stroup, 113 F.3d 1234, 1997 WL 201560, *3 (6th Cir. 1997) ("[e]xcess capacity, thereby, deprives a relatively large 'market share' of its normal 'market power'") (citing Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d (continued...)

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of Western Parcel Express v. United Parcel Service of America, Inc., 190 F.3d 974 (9th Cir. 1999), the court considered a claim that UPS abused its alleged monopoly power through exclusive dealing contracts and volume discounts. The court affirmed the district court's granting summary judgment, in part, because it found that UPS had offered uncontroverted evidence that the market was competitive:

> UPS has presented evidence that during the time period in which WPX alleges antitrust injury, the market has actually expanded; other carriers . . . have entered the market.

Id. at 976 (finding also that plaintiff had experienced an increase in profits and growth during the relevant period); see also R.W. Int'l Corp. v. Welch Food, Inc., 13 F.3d 478, 486-88 (1st Cir. 1994) (alleged exclusive dealing and other misconduct did not prevent plaintiff from placing products in 80% of stores; successful entry demonstrated that "'competition has not been injured'").

Here, the undisputed facts at trial in this case confirmed that the overall moist snuff market is highly competitive, growing both in size and in the number and of type of brands – including an entirely new and rapidly expanding price-value segment. For example, two companies entered the moist snuff segment prior to 1990, and each of them continued to gain in market share and, more importantly, in sales and profits during the entire 1990's. See Tr. 3/23 at 51-53 (DX 14, DX 15, DX 18). Moreover, since 1990, and especially after 1994, all companies have successfully introduced new products, readily gaining distribution throughout the country. Tr. 3/23 at 52-55 (DX

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[12] (...continued)
1421, 1441 (9th Cir. 1995) (summary judgment for defendant based on excess capacity even with evidence of a large market share and barriers to entry)); William Inglis & Sons Baking Co. v. Continental Baking Co., 942 F.2d 1332, 1348 (9th Cir. 1991) (entry barrier irrelevant where excess capacity exists).

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28); Tr. 3/7 at 276-81.[13] Overall moist snuff sales have increased steadily throughout the time period. Tr. 3/23 at 46-48 (DX 3). Competitive activity, such as promotional activities and price competition, increased during the time period. Tr. 3/23 at 55-57 (DX 19, DX 27). All four moist snuff companies have successfully introduced several price-value products. Id.

In short, the competitive process in the moist snuff industry is open and vibrant, and consumer choices – in terms of flavor, cut, packaging, and price – have all increased dramatically during the time period. This is indisputable evidence of a market that is functioning competitively – clear evidence that there was no basis for the jury to conclude that any conduct by U.S. Tobacco harmed overall competition.

It is equally well-established that market-wide injury cannot be established by proof of injury to the plaintiff as an individual competitor. See D.E. Rogers Assocs., Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1439 (6th Cir. 1983) (loss of business and profits as a result of defendant's predatory actions are insufficient to establish harm to competition; such a loss "is as likely the result of honest competition as it is the result of illegal conduct"); Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 558 (7th Cir. 1980) (loss of single customer cannot show harm to the market; "[o]therwise the mere fact that one party bid successfully . . . would be equivalent to an anticompetitive effect and would raise the specter of an antitrust action being used as a remedy for any tortious conduct during the course of the competition"). Of course, that is all Conwood tried to prove in this case – harm to itself because it believed that it could have done better absent U.S.

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[13] It is undisputed that, despite the testimony of Messrs. McClure and Price, Swedish Match's Timberwolf line of products has achieved greater success in five years than Conwood achieved during the entire 1980's – the period of time that Conwood holds out as its ideal of free access to distribution and its resultant success.

Tobacco's alleged misconduct. Tr. 2/29 at 115-20. This, however, is precisely the type of competitor "harm" that cannot constitute antitrust injury as a matter of law. See Western Parcel Express v. United Parcel Service of America, Inc., 65 F. Supp. 2d 1052, 1055-56, 1064-65 (N.D. Cal. 1998) (antitrust injury to plaintiff could not be shown as a matter of law where its sales increased during the allegedly restrained period; claims of lower profit margins cannot constitute antitrust injury because that would be protecting a competitor, not competition), aff'd, 190 F.3d 974 (9th Cir. 1999).

2. In any Event, Conwood's "Evidence" of Injury To Itself Is Insufficient as a Matter of Law

Finally, Conwood's assertion – whether from Mr. Rosson or Conwood sales representatives -- that it would have done better had it been "left alone" by U.S. Tobacco also is insufficient as a matter of law to establish injury in fact. Indeed, all such testimony was little more than rank speculation with no factual basis in the record whatsoever.

For example, Mr. Rosson offered no explanation as to why Conwood's share was already low in numerous regions of the country before U.S. Tobacco's alleged misconduct or why those factors would not continue to have the same effect on Conwood's share after 1990. Mr. Rosson merely surmised that because Conwood's national share grew from 0 to 10% during the 1980's, it should have grown an additional 10% in the 1990's. Mr. Rosson offered no benchmark industry upon which to base this opinion. Similarly, Mr. Rosson offered no explanation of how Conwood, absent any new, innovative product (like Kodiak which was responsible for Conwood's growth in the 1980's), or any other business development, would have accomplished over 10 points of share growth in the 1990's. During the relevant time period, Conwood's "secondary brands" – i.e., all brands but Kodiak – had topped out, according to Conwood's Vice President of Marketing. Tr. 3/20

at W. Cothren, pp. 124-26. In fact, Conwood had stopped running promotions on these products for that reason. Id. The evidence established that there was simply no basis, other than pure conjecture, for anyone, including Mr. Rosson, to conclude that Conwood could have grown its share in the face of ever increasing competition from Swedish Match, Swisher and U.S. Tobacco.

Significantly, neither Mr. Rosson, other Conwood employees nor Conwood's experts offered any evidence of a reduction in Conwood moist snuff sales during the alleged period of exclusion. On the contrary, the uncontroverted evidence is that Conwood prospered in the marketplace that was allegedly being monopolized. Specifically, the uncontroverted evidence in this case established that: Conwood's flagship product, Kodiak, is in over 80% of the stores, Tr. 3/23 at 50-51 (DX 28); its secondary products, according to Conwood's own marketing department, have "too much distribution," Tr. 3/20 at Coatney, pp. 98-100 (DX 684); its racks are in 70% - 90% of the stores, Tr. 3/3 at 84; Tr. 3/8 at 137; Tr. 3/8 at 175; its sales have increased steadily and without interruption since the early 1980's, Tr. 3/23 at 48-49 (DX 9); and its profits have increased every year, Tr. 3/23 at 41-43 (DX 40, DX 57). In the face of this uncontroverted evidence, there was no basis to conclude that Conwood suffered any injury at all – and certainly not antitrust injury.

If all an antitrust plaintiff had to do to meet this requirement is put its employees on to say,"we could have done better," then every antitrust plaintiff could easily claim that it has suffered an antitrust injury no matter how well it was in fact doing in the alleged monopolized market. That result, too, would turn the antitrust laws on their head.

D. CONWOOD FAILED TO ESTABLISH CAUSATION

Even assuming that Conwood did establish some slowing of growth – however measured – judgment would still have to be entered against Conwood because it failed to establish

with the requisite "reasonable certainty" that its sales or its sales share was in fact being affected by U.S. Tobacco misconduct as opposed to (1) the independent uncoerced decisions of retailers; or (2) several other factors in the marketplace indisputably affecting Conwood's performance and sales share. As the Court instructed the jury: "Conwood must have offered evidence that established as a matter of fact and with a fair degree of certainty that U.S. Tobacco's alleged illegal conduct was a material cause of Conwood's injury." Tr. 3/28 at 106 (emphasis added). Conwood did not meet this burden.

Under Sixth Circuit law, judgment as a matter of law should be granted if the alleged injury, even if "linked to an alleged violation of the antitrust laws, flows directly from conduct that is not itself an antitrust violation." Valley Prods. Co. v. Landmark, 128 F.3d 398, 403 (6th Cir. 1997); see id. at 404 (violation not "necessary predicate" where losses would have resulted from lawful cancellation); Axis, S.p.A. v. Micafil, Inc., 870 F.2d 1105, 1111-12 (6th Cir. 1989) (illegal acquisition not necessary predicate where lawful patents resulted in foreclosure from market); Hodges v. WSM, Inc., 26 F.3d 36, 38-39 (6th Cir. 1994) (alleged conspiracy not "necessary predicate" where foreclosure resulted from lawful right to exclude plaintiff from property). In each of these cases, the Sixth Circuit found that the alleged misconduct was not a "necessary predicate" to plaintiff's injury because the injury flowed directly from conduct that was not itself unlawful.

Applying this strict Sixth Circuit standard, the court in Baum Research & Development Co. v. Hillerich & Bradsby Co., 31 F. Supp. 2d 1016 (E.D. Mich. 1998), dismissed plaintiff's claim that the defendants had conspired with – not just "influenced" – the NCAA to adopt baseball bat standards that clearly would harm plaintiff's business. See id. at 1020. The court held that under the controlling Sixth Circuit standard, the claimed misconduct – a de facto exclusive

supply arrangement – could not be the "necessary predicate" of plaintiff's claimed injury. As the court reasoned, irrespective of whether there was an exclusionary agreement, plaintiff's "injury stem[med] from the NCAA's lawful authority to regulate the rules for baseball bats." Id. at 1023-24.

Applying the Sixth Circuit standard to this case, no reasonable jury could conclude that any U.S. Tobacco "exclusionary" conduct was in fact a material cause of Conwood's lost business. Instead, Conwood's real problem is with the lawful conduct of retailers – much like that of the NCAA in Baum – and with the rigors of competition itself.

1. The Independent, Uncoerced Decisions of Retailers

In denying summary judgment to U.S. Tobacco, this Court highlighted the fact that Conwood was required to establish that its harm did not result from the "independent, uncoerced decisions of retailers" or "other market forces." See Summary Judgment Op. at 10. The undisputed evidence at trial, however, established that any injury claimed by Conwood stemmed from the retailers' lawful authority to make decisions about what products, racks and POS to have in their own stores. It is no wonder counsel for Conwood told the jury that this case is not about the stores.

In this case, however, U.S. Tobacco offered overwhelming and uncontroverted evidence that retailers make the decisions about what products to carry and not carry, what display racks to use and not use, and what POS materials to display and not display. See, Tr. 3/14 at 99, 103-04, 111; Tr. 3/22 at 11, 17-22; Tr. 3/16 at Carlson 24-25, 28, 52-53; Tr. 3/22 at Laessig 14-15, 21-22, 24-25; see also Tr. 2/29 at 216-17 (Conwood Chairman testified that no retailer gave up decision-making authority to any manufacturer). Wal-Mart, for example, made its own decision to use display racks from U.S. Tobacco rather than from all companies. Tr. 3/16 at Carlson, p. 22; PX 84 ("Beth Schommer, the VP at Wal-Mart is very much in favor of eliminating the extra vendors").

It follows that once Wal-Mart makes a decision to use a neat, organized, uniform display rack, Wal-Mart's lawful right not to use Conwood's rack precludes U.S. Tobacco's conduct from being the "necessary predicate" to Conwood's harm. And the same analysis applies to the rack decisions of other retailers as well as all retailers' decisions about what products and POS to carry and use in their stores.

In response to this fatal defect in its case, Conwood did not offer a single piece of evidence that any retailer was coerced, threatened, or pressured in any way by U.S. Tobacco. Conwood did not even offer a single piece of evidence that any retailer was, in fact, misled by U.S. Tobacco. Conwood simply argued that, because U.S. Tobacco is a "big" moist snuff company (though relatively small as manufacturers go), retailers' decisions must have been materially affected. Under the Sixth Circuit's (or any circuit's) causation standard, this "Kamien intimidating-stature theory," Tr. 3/3 at 76-77, is not a legally sufficient evidentiary basis for a reasonable jury to determine causation, especially where not a single retailer – not one – offered any supporting testimony.

Conwood's alternative argument that no retailer decision can be "independent" of influence by U.S. Tobacco is equally misplaced. Under that self-declared standard, retailers would be incapable of ever making independent decisions about products and racks because there is always input from manufacturers as part of the normal competitive process in the retail industry. Indeed, under Conwood's theory, Hodges and Baum would effectively be overruled. These cases involved defendants who allegedly conspired with, not just influenced, the person who lawfully exercised rights that harmed the plaintiff. It would be inviting reversible error for Conwood to ask this Court to side-step these controlling cases.

In sum, Conwood should not be allowed to by-pass the Sixth Circuit's unequivocal standard, as well as the sworn testimony of every retailer in this case, simply by declaring over and over again that the decisions of retailers do not matter or by suggesting, without proof, that retailers are bought off with "kickbacks." On the undisputed record, Conwood's alleged harm – indeed its entire competitive complaint – flows directly from the lawful decisions of retailers to choose the products, racks and POS of U.S. Tobacco, Swedish Match and/or Swisher over those offered by Conwood. Under these circumstances, no antitrust liability can attach to U.S. Tobacco for "influencing" retailer decisions.

2. Other Factors In The Marketplace

Consistent with the Sixth Circuit's standard, the "material cause" requirement also demands that Conwood establish that its claimed injury was caused by U.S. Tobacco's illegal conduct as opposed to other factors in the marketplace, such as increased competition from U.S. Tobacco and other competitors, and Conwood's own business decisions. See generally Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 402-04 (7th Cir. 1993) (enumerating possible causes of harm other than alleged exclusionary practices); Eichman v. Fotomat Corp., 880 F.2d 149, 163 (9th Cir. 1989) (demonstrable reduction in sales must be shown to be the result of an antitrust violation rather than other factors); Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 42-46 (2d Cir. 1986) (plaintiff failed to establish that defendant's conduct, rather than plaintiff's independent financial difficulties, caused plaintiff's business to fail); Van Dyk Research Corp. v. Xerox Corp., 631 F.2d 251, 254-56 (3d Cir. 1980) (plaintiff failed to prove causation where its injury was caused by cash flow problems, inability to raise money through new stock offerings and failure of marketing arrangement). MCI Communications Corp. v. AT&T Co., 708 F.2d 1081,

1162-1164 (7th Cir.) (rejecting damages theory where plaintiff improperly attributed all losses to defendant's illegal acts "despite the presence of significant other factors" and court found that only 7 of 22 claimed acts were illegal), cert. denied, 464 U.S. 891 (1983). Here, Conwood offered no evidentiary basis in the record to refute the clear impact that other factors were having on Conwood's performance and sales in the 1990's.

(a) Increased Competition From U.S. Tobacco and Other Competitors

For example, Conwood failed to offer any evidence to account for the effects on Conwood of the advent and rapid growth of price-value products, see Tr. 3/23 at 55-57 (DX 19, DX 27); Tr. 3/7 at 276-81; the increased number of products offered by all manufacturers which collectively intensified the competition for retail shelf space, see Tr. 3/23 at 52-55 (DX 28); the increased promotional activities of U.S. Tobacco and other competitors, see DX 592; Tr. 3/7 at 276-81; and the dramatic success of the Timberwolf line of products offered by Swedish Match. Tr. 3/23 at 51-53 (DX 14, DX 15, DX 18). This evidence is dispositive on the issue of whether U.S. Tobacco's alleged misconduct was materially causing harm to the marketplace. See, e.g., R.W. Int'l Corp., 13 F.3d at 486-88 (undisputed fact that new grape juice product successfully entered the market during the period of alleged unlawful activity confirmed, as a matter of law, that the alleged misconduct was not causing antitrust injury). And, it precludes any finding in this case that U.S. Tobacco materially caused antitrust harm to Conwood.

Nor is it adequate, as described in more detail below, for Dr. Leftwich simply to assert that these factors are "captured in data" of Conwood's actual sales results and thus in his damages calculation; that simply avoids the causation issue altogether. Under that approach, the jury is left

with absolutely no basis to assess whether these other factors were keeping Conwood's sales levels where they were, irrespective of U.S. Tobacco's alleged misconduct. For example, Conwood made no showing that where consumer demand for Timberwolf was affecting the sales of Cougar, or even Kodiak, having more Conwood racks or header cards would reverse or even slow that trend. The evidence that was presented on these questions suggests just the opposite. Tr. 3/23 at 81-83 (DX 88) (study demonstrating that, where all companies have increased shelf space, or "facings," Conwood's share is relatively low). Indeed, the record is replete with evidence that Timberwolf and other new products were affecting Conwood's sales. See, e.g., Tr. 3/20 at Cothren, pp. 164-67 (DX 592); Tr. 3/22 at Ludwig, pp. 115-18 (DX 759).[14] Only the pure speculation of Mr. Rosson and other Conwood employees suggests that Conwood could have overcome the impact of Timberwolf and other competitors on Conwood's sales, and that hardly meets the "reasonable certainty" standard for proving causation.

Indeed, Conwood's entire theory of causation is directly at odds with the undisputed evidence that the moist snuff "market" has become increasingly competitive and that smaller competitors – Swedish Match and Swisher – have collectively increased their sales share to nearly 10 percent. Conwood's entire claim of injury is based, not on declining sales or profits, but on the purported stagnation of Conwood's sales share in the 1990's. But Conwood offered no evidence to refute the clear evidence that the dramatic share growth of Swedish Match and Swisher were causing Conwood's stagnation. Indeed, in Wal-Mart, Swedish Match and Swisher brands grew dramatically

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[14] The evidence at trial also was undisputed that the increased regulation of the tobacco industry had a negative impact on each company's ability to advertise and promote its products. Conwood did not offer any evidence whatsoever to account for the effects tobacco regulation had on Conwood sales.

in the late 1990's even though displayed in a rack provided by U.S. Tobacco. See Tr. 3/7 at 268. Thus, there was no evidence presented to the jury to establish that U.S. Tobacco's "exclusionary" conduct was even a cause of Conwood's harm, let alone a material cause.

(b) Conwood's Failure To Compete

Finally, at trial, Conwood candidly admitted that it has only now begun to respond to the needs and demands of retailers. In January of 2000 Conwood launched an incentive program. Tr. 3/10 at 127-31. In March of 2000 Conwood introduced a display rack to vend rolls of moist snuff products. Compare Tr. 3/20 at 74 and Tr. 3/20 at Coatney, pp. 57-59. In March of 2000 Conwood invested in a shelving system to provide to retailers. Tr. 3/10 at 131-32. Prior to the year 2000 Conwood did not have any of these items to offer to retailers. How did the decisions by Conwood's management not to have these items affect Conwood's ability to products, display racks, and/or POS materials in the 1990s? Conwood does not attempt to account for the effects of these decisions on its relationships with retailers, on its success in placing products, racks and POS, and/or on Conwood's sales. Only pure speculation can support the inference that U.S. Tobacco's "exclusionary" conduct was the material cause of Conwood's claimed injury.

For all of these reasons, it would directly contravene Sixth Circuit law, as well as established principles regarding what constitutes adequate proof of causation and injury in fact, to find that the jury had a sufficient basis to conclude that U.S. Tobacco's conduct was a material cause of Conwood's alleged injury.

E. DR. LEFTWICH'S DAMAGES ESTIMATES WERE MERE SPECULATION AND GUESSWORK

The final reason that judgment as a matter of law should be granted in this case is the wildly speculative nature of Conwood's "evidence" regarding damages. Conwood's theory of damages in this case was the epitome of rank speculation and "guesswork" -- all, however, stamped with the imprimatur of expert testimony.

Judgment as a matter of law is appropriate on the issue of damages where an antitrust plaintiff offers only speculation and guesswork, even if offered in the guise of expert testimony. See Concord Boat, 2000 WL 303035 at *11-14 (reversing denial of JMOL where expert's one-variable model was based on a "hypothetical market" that ignored market reality and "inconvenient evidence"; did not incorporate the economic reality of the marketplace; did not relate damages to specific anticompetitive conduct; and was not capable of separating lawful from unlawful conduct.) "Unless the amount sought to be recovered is shown to be 'definitely attributable' to defendant's wrongful conduct, there is no basis for making a 'just and reasonable estimate.'" Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co., 467 F. Supp. 841, 863 (N.D. Cal. 1979), aff'd sub nom. Murphy Tugboat Co. v. Crowley, 658 F.2d 1256 (9th Cir. 1981).

In this case, it is clear that no reasonable jury could have based a $350 million antitrust verdict on the damages analysis presented through the testimony of Dr. Leftwich. Dr. Leftwich's testimony does not provide the jury with any basis to determine that Conwood lost sales by reason of U.S. Tobacco's conduct, much less to quantify any lost sales. Indeed, Dr. Leftwich does not offer any measure of lost sales; nor does he attempt to link his damages estimates to any U.S. Tobacco conduct or to demonstrate by any means that his "damages" estimates are not, in fact,

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measures of the results of other marketplace factors on Conwood's sales. Instead, Dr. Leftwich's analysis is a patchwork of baseless assumptions, unreliable data, and lawyer-created "evidence."

1. Dr. Leftwich's Analysis Does Not Reflect Lost Sales, But Merely Makes Assumptions About Lost Share

Dr. Leftwich readily conceded in this case that he never attempted to assess any lost sales by Conwood, not one dollar. Tr. 3/8 at 68-70. Based on the record, that is understandable. As discussed above in Section C.2, and according to Dr. Leftwich's own data, Conwood's sales have increased steadily and without interruption from the early 1980's to present. Tr. 3/23 at 48-49 (DX 9); see also Tr. 3/8 at 70 (Dr. Leftwich acknowledges that Conwood sales "were growing to a pretty good clip."). In fact, Conwood's sales trends showed no change on or about 1990 – the focus date of Conwood's theory of liability. Id.

Because Conwood suffered no demonstrable harm that comports with its theory of liability, Dr. Leftwich concocted a damages theory based on its own sales share and the "beliefs" of Conwood personnel that U.S. Tobacco's alleged misconduct "intensified" after 1990 and prevented Conwood from getting off the ground in states where it was already doing poorly. This "methodology" enabled Dr. Leftwich to ignore the glaring fact that, prior to 1990, there were only two companies competing significantly in moist snuff, while after 1990 there were four companies competing in moist snuff. Given this increased competition, it is no surprise that Conwood's sales share did not maintain pace in the 1990s (neither did U.S. Tobacco's). See McGlinchy v. Shell Chem. Co., 845 F.2d 802, 807 (9th Cir. 1988) (as a "'before and after' assessment" of damages, plaintiff's damages "study was hopelessly flawed. . . . [plaintiffs' expert] did not confirm that relevant market conditions were the same before and after the time the injury was alleged to have

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occurred"). With his regression analysis, Dr. Leftwich simply measured the relationship between Conwood's sales share in 1990 and Conwood's sales share in 1997. As one would expect, there is such a relationship: Conwood did better after 1990 in the same states in which it did better before 1990, and continued to do poorly after 1990 in the same states in which it was already doing poorly before 1990. Thus, there is no magic to Dr. Leftwich's analysis or his purported conclusions.

Further, even assuming that the "beliefs" of Conwood personnel – as opposed to actual sales trends – were a proper starting point for a damages analysis, Dr. Leftwich did nothing to confirm these "beliefs" with facts. For example, Dr. Leftwich recognizes that – prior to 1990 – Conwood failed to establish a so-called "foothold" in many states. Tr. 3/8 at 12-13. But without even attempting to assess why, prior to 1990, Conwood achieved little success in these states, Dr. Leftwich concludes that, after 1990, Conwood's share would have dramatically increased in these same states absent certain undefined conduct by U.S. Tobacco. But how? Conwood offered no new, innovative products. Conwood did not significantly increase manpower. Conwood did not significantly increase promotional spending. In short, there are no reasons either offered by Dr. Leftwich or demonstrated by any evidence why Conwood could have or would have grown share after 1990 in those states where it failed to grow share prior to 1990. As a result, Dr. Leftwich was forced simply to assume -- arbitrarily -- that absent U.S. Tobacco misconduct (whatever it may be), Conwood's shares in all states would tend to equalize. See Concord Boat, 2000 WL 303035 at *14 (reversing denial of JMOL where expert's model did not incorporate other factors affecting market share). This, too, is a totally unsupportable assumption, and in fact is contrary to the wide range of shares for Conwood's looseleaf products, a "yardstick" industry in which U.S. Tobacco has no

products. Tr. 3/23 at 75-77. Moreover, the evidence is undisputed that, unlike in the moist snuff segment, Conwood's sales in the loose leaf industry were declining since 1990. Tr. 3/10 at 87-88.

As a result of this abstract and unsupported analysis -- coupled literally with no analysis of lost sales -- there is no way on the record for the jury to reconcile Dr. Leftwich's damages estimates with Conwood's theories of how it purportedly was harmed by U.S. Tobacco's conduct; the jury's guess, which it clearly was, is as good or as bad as Dr. Leftwich's.

2. Dr. Leftwich's Analysis Is Based On Assumptions That Are Unreliable As a Matter Of Law.

Under established law, Dr. Leftwich was not permitted to use as a starting point the unsupported "beliefs" or "hypothesis" of Conwood's executives and employees. Indeed, that is precisely the type of self-serving short-cut that renders a damages opinion defective as a matter of law. See, e.g., McGlinchy, 845 F.2d at 807 (affirming exclusion of damages study and future testimony that included assumption based on "'experience plus inflation'"); Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 582 (5th Cir. 1982) (excluding under Bigelow a damages study based on "[s]elf-serving and unsupported assumptions" as insufficient to sustain a verdict; "hypothesized effect" on business not sufficient where expert did not document assumptions or consider local market conditions); Park v. El Paso Bd. of Realtors, 764 F.2d 1053, 1067-68 & n.23 (5th Cir. 1985) (excluding damages testimony based on projections of "but for" market share without evidence of consumer behavior or a study of comparable markets), cert. denied, 474 U.S. 1102 (1986); R.S.E., Inc. v. Pennsy Supply, Inc., 523 F. Supp. 954, 967-71 (M.D. Pa. 1981) (damages analysis using "base years" based on testimony of president of plaintiff company, without further consideration of the evidence, was mere speculation and guesswork); Pacific Mailing Equip. Corp.

v. Pitney Bowes, Inc., 499 F. Supp. 108, 119 (N.D. Cal. 1980) (opinion based on experience of businessmen properly excluded in the absence of "supporting studies, analyses, comparisons, or other factual, objective, observed or verifiable data of any kind"); Argus Inc. v. Eastman Kodak Co., 612 F. Supp. 904, 925 (S.D.N.Y. 1985) ("[Business] plan . . . based on speculative and unfounded assumptions [was] not probative of [plaintiff's] losses and is not admissible evidence of damages."), aff'd, 801 F.2d 38 (2d Cir. 1986). Accordingly, opinions based on "general experience" and unfounded assumptions are not substitutes for economic analysis.

Dr. Leftwich originally testified that he based his damages study on two telephone calls with Conwood personnel. Leftwich Dep. at 63-66. At trial, however, an attempt was made to bolster the foundation for Dr. Leftwich's damages estimates by having Mr. Rosson testify that, in his opinion, Conwood's share would have been 10 points higher absent U.S. Tobacco's misconduct. From there, to repeat a phrase used by Conwood's counsel, it was all simple math: 10 share points each year, four years, $10 million per share point, equals $400 million. Tr. 3/28 at 61 (displaying exhibit to jury). But, Mr. Rosson's speculation provides no more foundation for Dr. Leftwich's "analysis" than the phone calls upon which Dr. Leftwich originally relied.[15] Indeed, Mr. Rosson's own testimony clearly demonstrates that he had no foundation to offer the opinions he was allowed to offer. See Tr. 2/29 at 201-05 (Mr. Rosson testified that he couldn't say why Conwood's "market" share differed in different areas; "there are too many variables for me to give you a sensible answer

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[15] Even looking past the obvious foundational problems of Mr. Rosson's testimony, such testimony could not support Dr. Leftwich's damages estimates. Mr. Rosson concluded that Conwood had suffered $400 million in damages in four years. See Tr. 3/28 at 61. Dr. Leftwich, however, concluded that Conwood would suffer a maximum of $488 million, but not only for four years, but also extending 10 years into the future. This disparity demonstrates the complete and utter lack of support for either of these opinions.

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to that question.") Yet, Dr. Leftwich, like Mr. Rosson, concluded without any real basis that Conwood's share would have been higher and calculated damages from there. This type of speculation and guesswork, offered in the guise of expert testimony, cannot substitute for proof on antitrust causation. As the court stated in Argus:

> Expert opinion, "unsupported by facts, that but for the defendants' conduct plaintiff would not have suffered losses does not convert the evidence of operating losses into evidence of damage flowing from defendants' antitrust violation."

612 F. Supp. at 926 (quoting Murphy Tugboat, 467 F. Supp. at 864).[16]

For this reason, as well, Dr. Leftwich's damages study could not have provided the jury with a basis for determining a fair and reasonable estimate of damages.

3. Dr. Leftwich Does Not Attribute Damages To Specific Acts of Defendants

It also is axiomatic that, in calculating antitrust damages, an expert witness must attribute the damages solely to specific unlawful acts of the defendants. See McGlinchy, 845 F.2d at 806 (damages study properly excluded at summary judgment stage because expert "did not relate the loss to specific acts" of the defendants). Accordingly, a damages study is defective if it may include losses attributable to other causal factors, including the lawful conduct of the defendants and other factors affecting the marketplace. Concord Boat, 2000 WL 303035 at *14 (finding that such a defect makes the expert's opinion mere speculation as a matter of law); City of Vernon v. Southern Cal. Edison Co., 955 F.2d 1361, 1372-73 (9th Cir. 1992) (damages study properly excluded at

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[16] Indeed, in holding that Dr. Leftwich's analysis "survives a preliminary Daubert analysis," see Feb. 23 Op. at 4-5, this Court emphasized that damages evidence would be inadequate at trial if the underlying assumptions of the analysis were not proven at trial. Given Mr. Rosson's admitted speculation regarding the starting "hypotheses" for Dr. Leftwich's entire analysis, see supra Section E.2, Daubert should now compel the complete rejection of Dr. Leftwich's analysis.

summary judgment stage where damages study failed to account for lawful conduct by defendants); MCI Communications, 708 F.2d at 1161-63; Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1353 (3d Cir. 1975) (damages evidence inadequate where it failed to "account for significant factors bearing upon [plaintiff's] diminished market share"); Argus Inc., 612 F. Supp. at 924-25; R.S.E., Inc., 523 F. Supp. at 966 (same); ILC Peripherals Leasing Corp. v. International Business Mach. Corp., 458 F. Supp. 423, 435 (N.D. Cal. 1978) (same), aff'd sub nom. Memorex Corp. v. IBM, 636 F.2d 1188 (9th Cir. 1980).

As the Eighth Circuit recently stated in Blue Dane Simmental Corp. v. American Simmental Ass'n, 178 F.3d 1035 (8th Cir. 1999):

> Although [plaintiff's expert] utilized a method of analysis typical within his field, that method is not typically used to make statements regarding causation without considering all independent variables that could affect the conclusion.

Id. at 1040-41 (upholding district court's exclusion of expert testimony as "'simplistic,'" noting that "at least one other independent variable contributed" to the alleged injury) see also Manual For Complex Litigation (1997), at 348 (generally impossible to determine causal relationship between the independent variable and dependent variable without analyzing "confounding variables"); id. at 424-26 (discussing selection of explanatory variables; "omitted variables that are correlated with the dependent variable reduce the probative value of the regression analysis"); EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 348-51 (7th Cir. 1988) (affirming district court's findings that plaintiff's overly simplistic regression analysis lacked any probative value).

The damages testimony offered by Dr. Leftwich at trial does not properly account for any other factors that may have affected Conwood's sales during this time period. For example, even assuming the reliability of the mechanics of Dr. Leftwich's regression, Dr. Leftwich's damages

projections do not properly measure the effects of the specific alleged misconduct. Thus, Dr. Leftwich's regression "results" would verify and prove that Conwood actually suffered all of the same alleged "harm" by reason of: (1) regulation of the tobacco industry increased after 1990; (2) the number of new product introductions increased after 1990; (3) the marketing and promotional activities of Conwood's competitors increased after 1990; (4) the introduction of price-value brands, including Swedish Match's very successful Timberwolf products, occurred after 1990; (5) the fact that Conwood's flagship Kodiak brand had been on the shelves for 9 years as of 1990, and that Conwood had not introduced another successful premium brand until Kodiak Ice in 1997; and (6) the fact that the retail environment changed significantly, in terms of shelf space allocations, after 1990. This is because, as Dr. Leftwich conceded at trial, the results are the same no matter what causal variable is assumed or hypothesized; that, of course, is the epitome of a damages analysis totally divorced from any U.S. Tobacco misconduct or from any other variable affecting Conwood sales in the marketplace.

That his methodology is incapable of disaggregating the effect of these other factors was effectively conceded by Dr. Leftwich during cross-examination. Tr. 3/8 at 78-79 (damages study measures effects "rolled up into one ball of wax"). Indeed, when asked about numerous specific other factors that may have affected Conwood's sales, Dr. Leftwich could offer no explanation as to how the effects of any of those factors were reflected in or accounted for by his model. See Tr. 3/8 at 81 (rack removal by other competitors); 81-82 (procompetitive category management); 82-85 (independent, uncoerced decisions of retailers); 85-86 (lawful promotional activities); 86-87 (new product introductions); 87-88 (Timberwolf); 88-89 (advertising restrictions).

Critically, it is insufficient, as a matter of law, for a damages expert simply to declare that the effects of other factors were properly accounted for in the "data." As the court stated in ILC Peripherals:

> Although another Memorex witness testified that the effect of these factors was implicit in [the damages] forecasts, the jury would have had to take Memorex at its word that their influence was properly reflected.

458 F. Supp. at 435 (emphasis added). See also Concord Boat, 2000 WL 303035 at *11-13 (reversing denial of JMOL where, despite plaintiff's counsel's pretrial assurances, the expert's model remained incapable at trial of disaggregating lawful and unlawful conduct). But that is all that Dr. Leftwich could offer here. Tr. 3/8 at 78-86. Accordingly, there can be no doubt that Dr. Leftwich's testimony was improper expert testimony and therefore inadmissible under Fed. R. Evid. 702. More importantly, it is clear now, at the close of evidence, that Dr. Leftwich's testimony improperly gave the jury an "expert" basis simply to ignore all the other causes of Conwood's alleged harm, thus rendering the jury's award baseless as a matter of law.

4. Dr. Leftwich Improperly Relied On Faulty Data and Conwood Surveys Created Solely For Litigation

Finally, after realizing that his original study included a $250 million mistake ($750 million after trebling) because of bad data, Dr. Leftwich attempted to revamp his damages to reach the original overstated estimates by factoring in a quantification of the so-called "sworn declarations" of Conwood personnel created by Conwood's lawyers for purposes of litigation. Tr. 3/8 at 81. Dr. Leftwich's supplemental analysis, however, has two basic flaws. First, Dr. Leftwich's quantification of the surveys was a blatant manipulation of "data" to compensate for his own $250 million mistake and thus cannot constitute a legally sufficient evidentiary basis for a jury to determine damages. Second, it is well established that biased hearsay, like speculative conjecture, cannot form the basis

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Ultimately, Dr. Leftwich's damages estimates are a combination of: (1) a methodology that avoided any attempt to prove lost sales, relying instead on the unremarkable hypothesis that when a product performed poorly in one period (1990) it continued to perform poorly through another period (1997); (2) assumptions about the effects of U.S. Tobacco misconduct (however defined), which assumptions are themselves based on rank speculation; (3) a methodology that neither linked damages to unlawful conduct nor accounted for a number of other causal factors clearly present on the record; and (4) a last-ditch effort to override a glaring data error and to fill the $250 million gap caused by that error. While, at the end of the day, such "simple math" may have enabled Conwood's counsel to post an astronomical damages range for the jury's consideration, it is also precisely the type of defective damages analysis that enabled a jury to return a $1 billion award without Conwood ever proving or demonstrating that U.S. Tobacco's exclusionary conduct -- and nothing else -- caused Conwood to lose any sales at all. For all of these reasons, the Court should not permit Dr. Leftwich's "model" -- or Mr. Rosson's bald assertions -- to substitute for actual proof of harm to the moist snuff marketplace or to Conwood.

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CONCLUSION

For the foregoing reasons, U.S. Tobacco respectfully requests that the Court enter judgment as a matter of law in favor of U.S. Tobacco.

Dated: April 12, 2000

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR A NEW TRIAL, OR, IN THE ALTERNATIVE, A REDUCED DAMAGES AWARD

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR A NEW TRIAL, OR, IN THE ALTERNATIVE, A REDUCED DAMAGES AWARD

Defendants UST Inc., et al. ("U.S. Tobacco"), respectfully request that the Court order a new trial under Fed. R. Civ. P. 59, or in the alternative, enter a remittitur to reduce the damages award to an amount, if any, supported by the record evidence.

I. THE VERDICT WAS AGAINST THE GREAT WEIGHT OF THE EVIDENCE, AND THE DAMAGES WERE EXCESSIVE

Defendants respectfully request that, in the alternative to granting U.S. Tobacco's motion for judgment as a matter of law, the Court grant a new trial pursuant to Fed. R. Civ. P. 59. A new trial is warranted under Rule 59 when a jury has reached an erroneous result as evidenced by (1) the verdict being against the great weight of evidence, (2) the damages being excessive, or (3) the trial being unfair to the moving party. See Holmes v. City of Massillon, 78 F.3d 1041, 1045-46 (6th Cir. 1996). All three reasons fully apply here.

A. **The Verdict was Contrary to the Weight of the Evidence**

As described more completely in U.S. Tobacco's memorandum in support of its motion for the judgment as a matter of law, the overwhelming weight of the evidence in this case, at a very minimum, confirms the following:

1) U.S. Tobacco lacks "monopoly power" under the instructions given to the jury;

2) U.S. Tobacco did not "use" or wield monopoly power in the marketplace, but rather engaged in ordinary marketing practices either used by or available to all competitors;

3) The moist snuff "market" was not harmed by any of U.S. Tobacco's alleged misconduct, and in fact was characterized by significantly increased competition during the 1990's under all relevant measures;

4) Conwood prospered in terms of sales and profits during the same time period; and

5) Conwood did not offer evidence, beyond mere "beliefs" and speculation of its own employees, that U.S. Tobacco's "exclusionary" conduct was a material cause of it "not doing better." In fact, the overwhelming evidence shows that the actual sources of Conwood's share stagnation were (a) the independent, uncoerced decisions of retailers, (b) competition from other competitors and new brands, and (c) Conwood's own decisions not to compete in the ways desired by retailers.

While U.S. Tobacco strongly believes that these undisputed facts, and others, require judgment as a matter of law, they at minimum warrant a new trial. Indeed, the manner in which Conwood chose to present its case essentially conceded its lack of evidence on these points, and instead played on the jury's emotions and desire to penalize the "800 pound gorilla" for trying to maintain a monopoly – an objective that is perfectly permissible under the antitrust laws. This led to the jury's obviously less than thorough consideration of the evidence, particularly in light of the Court's jury instructions which, by the very nature of this type of case, are long and complex. The

jury simply could not have objectively discussed and weighed the evidence on all of the issues, and considered all of the factors, in less than four hours. For the reasons described herein, however, the great weight of the evidence on all of these critical antitrust issues – when fully considered – requires granting a new trial to ensure that any jury verdict is based on the weight of the evidence rather than passion or prejudice.

B. The Damages Were Excessive

Notwithstanding the clear lack of evidence on all of the fundamental elements of any antitrust case, this jury, infused with an obvious desire to penalize U.S. Tobacco for what it believed was "unethical" misconduct or "unfair" competition, slapped U.S. Tobacco with what may be the largest verdict in the history of the antitrust laws – including even those civil damages cases following the break-up of AT&T.

Indeed, permitting any part of this enormous damages award to stand would be particularly outrageous in light of the direct attack on the retail industry that this case represents. No retailer testified that it was coerced or threatened by U.S. Tobacco in any respect, and no retailer testified that it has any agreement – regarding products, racks or P.O.S. – that prevents or restricts it from dealing with Conwood or other competitors at any time. Moreover, every retailer who testified in this case confirmed that all of the U.S. Tobacco practices in question are part of the competitive process and are ordinary business practices used by everyone in the retail industry. For Conwood to be compensated at all for any of U.S. Tobacco's alleged "exclusionary" conduct is unjust enough; to allow a billion dollar verdict to stand on that record would be a true perversion of the antitrust laws.

Finally, courts routinely grant motions for new trials where the plaintiff's expert fails to limit damages to injury flowing solely from the exclusionary conduct or offers an otherwise defective damages analysis to the jury. See, e.g., Image Technical Services Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997); Litton Systems, Inc. v. Honeywell, Inc., No. CV 90-4823, 1996 WL 634213 (C.D. Cal. 1996); MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983). As described in detail in U.S. Tobacco's memorandum in support of its motion for judgment as a matter of law, Dr. Leftwich's testimony suffers several-fold from a number of fatal defects for an antitrust damages analysis, none of which can be cured simply be asserting: "yes I did consider x" or "it's captured in the data." The antitrust laws are too important, and the stakes are too high, to permit that ipse dixit to substitute for analysis. See Concord Boat Corp. v. Brunswick Corp., _ F.3d. _, 2000 WL 303035, *13 (8th Cir. (Ark.) 2000) (rejecting damages analysis where expert's damages opinion was connected to the facts in the case only through the ipse dixit of the expert).

To be sure, this was a long, complicated trial, and a new trial would likely be no different. It is clear, however, that the jury, for a variety of reasons already discussed, based this shocking damages award on passion and prejudice rather than on facts and the antitrust law. Accordingly, in keeping with the Sixth Circuit's discretion to exercise "caution" in Section 2 cases, see Langenderfer, Inc. v. S.E. Johnson & Co., 917 F.2d 1413 (6th Cir. 1990), this Court should order a new trial so that U.S. Tobacco's conduct may truly be judged under the antitrust laws and the rough and tumble of the marketplace, rather than the "ethics of the courtroom."

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C. The Trial Was Unfair To U.S. Tobacco

Defendants also respectfully request that the Court grant a new trial because several of the Court's rulings were in error and unfairly prejudiced Defendants' right to a fair trial and a just verdict.

1. The Court's Rulings on Summary Judgment

On February 17, 2000, the Court issued an opinion denying U.S. Tobacco's motion for summary judgment, concluding that the issues concerning U.S. Tobacco's alleged "exclusionary" practices required the development of proof at trial. Id. at 9. In arriving at this conclusion, the Court rejected undisputed evidence that – regardless of U.S. Tobacco's intent – all of the conduct alleged by Conwood to have violated Section 2 of the Sherman Act: (1) was not and could not have been a use of monopoly power, (2) was ordinary competitive business practice used by all manufacturers in the moist snuff and other industries; (3) did not unreasonably foreclose market-wide competition;[1] and/or (4) was, at most, unfair -- but not anticompetitive -- competition. See, supra, Section I.

Instead, the Court focused on "intent," rather than conduct:

> Here, UST does not, at the summary judgment stage of the proceedings, attempt to show conclusively that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could

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[1] The Court rejected, for example, established case law to the effect that if an exclusive arrangement cannot violate Section 3 of the Clayton Act, then a fortiori it must be "lawful under [S]ection[s] 1 and 2 of the Sherman Act." Smith v. Northern Mich. Hosps., Inc., 703 F.2d 942, 953 (6th Cir. 1983) (citing Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327-29 (1961)); CDC Techs., Inc. v. IDEXX Labs., Inc., 186 F.3d 74, 79 (2d Cir. 1999) ("'[A] greater showing of anticompetitive effect is required to establish a Sherman Act violation than a section 3 Clayton Act violation in exclusive-dealing cases.'") (citation omitted). That principle was recently confirmed by the holding in Concord Boat Corp. v. Brunswick Corp., 2000 WL 303035, *15-17, 21 (8th Cir. (Ark.) March 24, 2000) (where volume discount contracts were terminable at will and boat builder customers were free to reject defendant's discounts at any time, the program could not be unreasonable under Section 1 or exclusionary under Section 2).

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> never constitute violations at all. This falls short of the proof which would be required to prevail on the § 2 claims, particularly in view of the numerous record comments from high level UST personnel which arguably show an anticompetitive intent rather than a business justification . . . .

Op. at 8. At that time, the Court did not discuss any of the cases cited by U.S. Tobacco, including those that directly addressed specific marketing practices challenged by Conwood – e.g., Beverage Management, which addressed incentive programs analogous to CAP; Kellogg, which addressed SOF=SOM recommendations; and Frito-Lay, which addressed shelf-space recommendations. All of these cases concluded that these practices – whether considered separately or in the aggregate – were ordinary, procompetitive business conduct, and in fact were the norm in the retail industry. At Conwood's suggestion, however, the Court appeared to begin and end its analysis with evidence of U.S. Tobacco's intent. Op. at 8.

Further, the Court did not discuss how U.S. Tobacco's CAP program could possibly be found to be an "exclusionary" use of monopoly power under any applicable law, especially given that other moist snuff manufacturers use similar incentive programs. The Court did not discuss how shelf-space and product mix recommendations to retailers could be found to be an "exclusionary" use of monopoly power under any legal standard, especially given that all moist snuff manufacturers, including Conwood, make suggestions to retailers. The Court did not discuss how providing category management services, requested by retailers and standard in the industry for years, could be found to be an "exclusionary" use of monopoly power, especially given that all moist snuff manufacturers can – and all but Conwood do – provide category management services to retailers. The Court did not discuss how the provision of uniform racks capable of holding all moist snuff products could be found to be an "exclusionary" use of monopoly power, especially given that all

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moist snuff manufacturers can, and even the smallest moist snuff manufacturer does, provide such racks to retailers. The Court did not discuss how tortious conduct – conduct that can be expected, though not condoned, in a competitive sales environment – could be found to be an "exclusionary" use of monopoly power, especially given that sporadic instances of reciprocal rack and/or POS removal occur by all companies' sales representatives. And, finally, the Court appeared to accept the notion that even if none of U.S. Tobacco's conduct could independently violate Section 2 of the Sherman Act, U.S. Tobacco's conduct could still be "exclusionary" as some type of monopoly "broth." The Court thereby implicitly adopted an extremely broad application of Section 2 of the Sherman Act which has been consistently rejected by courts or has been applied only where some explicit exclusionary conduct was present. See, e.g., Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295, 1297-1305, 1309 (D. Utah 1999). No such conduct exists here.

The Court's denial of U.S. Tobacco's motion for summary judgment was in error. U.S. Tobacco's intent to beat its rivals in the competition to sell moist snuff, even if carried out aggressively or "unfairly" in the view of Conwood and its experts, is not a violation of the antitrust laws. Accordingly, the Court should grant a new trial, first identifying which specific conduct can be illegal under applicable antitrust precedent and then requiring Conwood to demonstrate (1) that the alleged conduct was in fact an exclusionary use of monopoly power; (2) that the alleged conduct caused harm to competition itself; (3) that the alleged conduct caused harm to Conwood; and (4) that Conwood suffered damages of a fair and reasonable amount flowing from that conduct and nothing else.

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2. The Court's In Limine Rulings

Several of the Court's evidentiary rulings on motions in limine filed by both parties were erroneous as a matter of law and resulted in an erroneous jury verdict. Accordingly, the Court should grant a new trial.

(a) Evidence As To Conwood's Owners, Their Wealth, And Their Ability to Compete if They Chose

Under Fed. R. Evid. 403, the Court granted Conwood's motion to preclude U.S. Tobacco from informing the jury that Conwood is owned by a privately-held, multi-national conglomerate many times the size of U.S. Tobacco. The Court concluded that "the probative nature of the inquiry is substantially outweighed by the potential prejudice to Plaintiffs, while causing no harm to Defendants' case." Feb. 23 Op. at 1. Nevertheless, at trial, Conwood's case was all about "BIG" versus small. Conwood argued, on dozens of occasions, that U.S. Tobacco is an "800 pound gorilla," Tr. 2/28 at 105-36 (14 times during opening statement); Tr. 3/28 at 51-93 (14 times during closing argument); that Conwood does not have the resources to compete against U.S. Tobacco, see, e.g., Tr. 2/29 at 104-05, 110; Tr. 3/10 at 69-70, 77-78; and that U.S. Tobacco alone has the ability to influence retailers because of its size, see, e.g., Tr. 3/3 at 76-77. Even the Court recognized the inaccurate picture Conwood was painting for the jury – a large, wealthy company bringing all of its resources to bear in an effort to crush the small, poor, pioneering company started by the war hero in his garage. Tr. 2/29 at 124-31.

Accordingly, the Court's decision based on the "potential prejudice to Plaintiffs" was used at trial by Conwood as a sword instead of a shield. And, because the unfair prejudice to U.S. Tobacco from Conwood's characterizations cannot possibly be overestimated, the Court's

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observation that its in limine decision would "cause] no harm to Defendants' case" was, in retrospect, not borne out at trial. Indeed, during trial, the Court recognized the inequity its ruling had allowed, but yielding to the persistence of Conwood's counsel, did not permit U.S. Tobacco to inquire into Conwood's ownership. Tr. 2/29 at 124-31. First, the Court commented that counsel for Conwood had given an impression to the jury, during Mr. Rosson's direct examination, that required clarification:

> I think you have played, Mr. Hansen, attempting to play on big more than you needed to make your point about the difference in market share, and to establish, well, establish monopolistic power, I think you did it for purposes of other advocacy. I will allow you [U.S. Tobacco counsel] to ask the question isn't it true that Conwood is some form of subsidiary of companies which are as big or bigger than UST.

Tr. 2/29 at 128. Within two pages of trial transcript, however, the Court reversed itself and did not allow counsel for U.S. Tobacco to ask the critical question of the relative sizes of Conwood and U.S. Tobacco. Tr. 2/29 at 131.[2]

A jury verdict based on only half the story is, by definition, erroneous. A new trial is warranted to tell the whole story.

(b) Dr. Leftwich's Damages Analysis

Defendants moved in limine to preclude the expert damages testimony of Dr. Leftwich. Defendants stated several grounds for the exclusion of this evidence: (1) without doing any economic analysis of the evidence in this case, Dr. Leftwich relied on the "beliefs" of Conwood personnel and on data not used by Conwood for any business purpose; (2) Dr. Leftwich did not relate his damages estimates to any wrongful conduct; (3) Dr. Leftwich did not account for other causal

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[2] Counsel for Conwood, of course, continued to "play on big" throughout the case, eliciting testimony about the "800 pound gorilla" from Mr. McClure, a third-party competitor witness. Tr. 3/13 at 102. Again, the Court would not allow U.S. Tobacco to set the record straight. Id.

factors demonstrated to have affected Conwood's sales; (4) Dr. Leftwich's "supplemental" damages analysis – the only analysis that could account for a jury verdict of $350 million – was not disclosed as required by Fed. R. Civ. P. 26(a)(2)(B); and (5) Dr. Leftwich's "supplemental" damages analysis relied on, as its only basis, the self-serving "surveys" of Conwood sales personnel that were created by Conwood lawyers. The Court denied Defendants' motion. Grounds (1) through (3) are discussed fully in Defendants' Memorandum In Support of Motion for Judgment as a Matter of Law. For the reasons discussed in that memorandum, the denial of Defendants' motion based on each of these grounds was error.

With respect to Dr. Leftwich's "supplemental" analysis, the Court's denial of Defendants' supplemental motion to preclude Dr. Leftwich's testimony was also error. First, the Court incorrectly concluded that the opinions expressed in paragraphs 5 through 8 of Dr. Leftwich's supplemental expert report "did not present new opinions." In paragraphs 5 through 8, for the first time, Dr. Leftwich used the "surveys" of Conwood personnel to calculate damages, resulting in damages estimates approximately $250 million in excess of what Dr. Leftwich's original methodology produced with corrected data. That is a new analysis, a new basis for damages, and a new conclusion to the tune of an additional $250 million, all undisclosed until January 28, 2000, approximately 5 months after Plaintiffs' expert reports were due to be filed. The disclosure requirements of Rule 26(a)(2)(B) should have applied to the "supplemental" analysis, and allowing U.S. Tobacco to take Dr. Leftwich's deposition on the eve of trial did not provide U.S. Tobacco with adequate time to develop economic analysis responding to Dr. Leftwich's last minute testimony and, therefore, did not "avoid any possible prejudice to Defendants" in allowing Dr. Leftwich to present these new opinions to the jury. See Op. at 5.

Second, with respect to the Conwood employee surveys themselves, the Court recognized the Sixth Circuit's requirement that, under Rule 703, an expert may rely on hearsay, "as long as the evidence is of a kind reasonably relied upon by experts in the particular field." Op. at 6 (quoting United States v. Bonds, 12 F.3d 540, 566 (6th Cir. 1993)). The Court, however, made no determination whether experts giving opinions on antitrust damages reasonably rely upon surveys of a plaintiff's employees as a basis for their opinions. The answer is they do not, and in fact, the Sixth Circuit has affirmed the preclusion of expert testimony based on biased hearsay. See Dallas & Mavis Forwarding Co. v. Stegall, 659 F.2d 721, 722 (6th Cir. 1981) (affirming district court's exclusion of expert testimony when the opinion to be offered was hearsay based on story of biased eyewitness).[3] The Court's denial of U.S. Tobacco's motion, and its statement that "[i]t is for the jury to decide any weight to give to the testimony of these experts," did not, in retrospect, fulfill a district court's gate-keeping role under Fed. R. Evid. 702 and 703 as instructed and required by the Supreme Court's Daubert decision. Accordingly, the Court's decision to admit the expert testimony of Dr. Leftwich was error and requires, at a minimum, the grant of a new trial.

(c) Dr. Gundlach's "Exclusive Agreement" Study

U.S. Tobacco also moved in limine to preclude the testimony of Dr. Gundlach pertaining to his compiled list of so-called "exclusive agreements." U.S. Tobacco argued that Dr. Gundlach's "study" lacked foundation because most, if not all, of the documents cited by Dr.

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[3] Moreover, the Court concluded – so far as U.S. Tobacco is aware, without any review of the surveys – that the "surveys are not replete with so many obvious errors as to be of no value to the trier of fact." Op. at 6 (quotations omitted). The Court did not discuss the basis of its conclusion, and given Dr. Leftwich's complete non-involvement in the preparation of these self-serving, lawyer-created surveys, Conwood essentially received a free pass through the Daubert gate. See Manual for Complex Litigation (1997), § 21.493.

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Gundlach were not agreements of any kind and did not represent the type of agreement that would be considered "exclusionary" either under Section 3 of the Clayton Act or under Section 2 of the Sherman Act. U.S. Tobacco also argued that Dr. Gundlach's characterization of these documents as "exclusive agreements" was misleading to the jury and unfairly prejudicial to U.S. Tobacco.

The Court denied U.S. Tobacco's motion, reasoning that Dr. Gundlach was not limited by the requirements of Section 3 of the Clayton Act and that Dr. Gundlach's testimony "is probative and will assist the jury in understanding the alleged widespread anticompetitive behavior of UST." Feb. 23 Op. at 2. Accordingly, Dr. Gundlach was allowed to take the stand at trial and publish to the jury documents that he and Conwood deemed to be "exclusive agreements."

Dr. Gundlach, like Conwood's other liability experts, simply was used by Conwood's counsel as a vehicle to publish and characterize a group of documents to the jury. Dr. Gundlach did not lend any expertise to the "analysis." He is not, and did not claim to be, an expert in determining whether certain documents constituted agreements; nor did he offer any comparative analysis based on his work with either retailers or manufacturers in the retail industry. Nor did he interview, or even review the depositions of, retailers on his list. Tr. 3/9 at 129-32. Indeed, Dr. Gundlach testified that he was not even concerned with the "specific deliberations that went on in the retailers' minds." Tr.3/9 at 148. Dr. Gundlach's testimony is improper expert testimony that should have been excluded by the Court under Fed. R. Evid. 702 and 403. See also, infra, Section 3(a). See Berry v. City of Detroit, 25 F.3d 1342, 1352, 1356 (6th Cir. 1994) (reversing jury verdict for plaintiff based, in part, on the testimony of an expert witness who reviewed defendant's reports, without reviewing the underlying facts to make relevant determinations). The Court's failure to preclude the testimony of Dr. Gundlach was error and requires a new trial.

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Finally, after the Court allowed Dr. Gundlach to publish documents concerning Wal-Mart to the jury and to characterize such documents as "exclusive agreements," counsel for U.S. Tobacco was not allowed to confront Dr. Gundlach with the deposition testimony of Robert Carlson, Wal-Mart's decision-maker with respect to the moist snuff category. Tr. 3/9 at 152.[4] Mr. Carlson testified that Wal-Mart had no agreement whatsoever with U.S. Tobacco. Tr. 3/16 at Carlson pp. 22-25. This ruling by the Court, in light of the Court's decision to allow Dr. Gundlach to read and characterize documents as "exclusive agreements," was unfairly prejudicial to U.S. Tobacco.

(d) Conwood Is Required To Prove Fact Of Injury At Specific Retail Stores

U.S. Tobacco also moved in limine to require Conwood to make some specific showing of fact of injury. Thus, U.S. Tobacco sought an order requiring Conwood to show that it actually lost sales at specific retail locations. U.S. Tobacco's motion clearly focused on fact of injury, not on the amount of damages. The Court denied U.S. Tobacco's motion under the reasoning that Conwood should not be required – because of time and expense – to show specific lost sales at over 300,000 retail locations nationwide to prove damages.

At a minimum, the Court should have required Conwood to prove actual fact of injury a subset of stores, whether based on sales volume, on locations specifically identified by Dr. Gundlach as having "exclusive agreements" with U.S. Tobacco, or on some other appropriate cross-section. In fact, the top five retailers on Dr. Gundlach's chart of "exclusive agreements," all of whom easily could have been deposed by Conwood, accounted for over one-half of the retail locations

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[4] On redirect examination, counsel for Conwood was then allowed, over objection, to elicit further testimony from Dr. Gundlach concerning "indicia" of an agreement between U.S. Tobacco and Wal-Mart. Tr. 3/9 at 167.

covered by Dr. Gundlach's entire study. See Tr. 3/9 at 156-59. From a proper cross-section of retailers, injury in fact arguably could have been demonstrated by some reasonable extrapolation methodology. No such analysis was done.

The Court's decision therefore completely freed Conwood of its obligation to prove fact of injury with a "fair degree of certainty." Tr. 3/28 at 106. As discussed above, Conwood failed to present evidence at trial of any lost sales at any retail location, relying instead on (1) the inference that the "800 pound gorilla" must have had some effect on Conwood's sales and (2) a damages study that was devoid of any evidentiary foundation. See supra, Section 2(b). The result of that decision was a $1 billion antitrust verdict – despite the fact that Conwood's sales had increased continuously and without interruption each and every year since the early 1980's, and despite the fact that Conwood's profits had increased each and every year extending back at least into the early 1990's. The Court's denial of U.S. Tobacco's motion was error and requires a new trial during which Conwood should be required actually to prove injury in fact with a fair degree of certainty.

(e) Motion To Preclude Certain Trial Exhibits

U.S. Tobacco moved to preclude the publication of voluminous hearsay statements and documents to the jury through Conwood's expert witnesses. U.S. Tobacco also moved on the ground that such publication would be unfairly prejudicial to U.S. Tobacco. Most of these materials were "declarations" or "unethical activity reports" which, if anything, would be relevant to the purely factual question of the extent of U.S. Tobacco's alleged misconduct; they were not the proper subject of "expert" opinion.

The Court denied U.S. Tobacco's motion, reasoning that Conwood had expressed that it would not try to introduce this evidence at trial, that expert witnesses are allowed to rely on

hearsay in forming their opinions, and that the probative value of the evidence was not outweighed by the danger of unfair prejudice. See Feb. 23 Op. at 2 (citing Trepel v. Roadway Express, Inc., 194 F.3d 708, 717 (6th Cir. 1999)). Thus, the Court dismissed U.S. Tobacco's concern that inadmissible hearsay would nevertheless find its way to the jury without any opportunity for U.S. Tobacco to cross-examine the declarants:

> The loss of an opportunity to confront witnesses is a key concern any time hearsay testimony is allowed at trial. The Sixth Circuit was certainly aware of this consequence when it allowed expert witnesses to rely upon and discuss hearsay. Accordingly, the Court finds little merit in Defendants' argument.

Feb. 23 Op. at 2.

Of course, Conwood did not merely mention hearsay evidence to the jury because Conwood's experts happened to rely on it. Instead, as described further below, Conwood affirmatively, and quite strategically, relied on its "experts" to present the jury with hearsay evidence, and only to present the jury with hearsay evidence. This issue was revisited many times over the course of the trial, and should not be understood to be limited in scope to U.S. Tobacco's motion in limine. In any event, the denial of U.S. Tobacco's motion itself was in error and requires a new trial.[5]

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[5] U.S. Tobacco also moved to preclude counsel for Conwood from using prejudicial terms connoting unlawful behavior where there was no evidence of any such behavior on the record. The Court denied U.S. Tobacco's motion, specifically with regard to the term "kickback." Accordingly, counsel for Conwood was free to use the term at will, describing ordinary promotions and buy downs as illegal "kickbacks" paid to Wal-Mart. Conwood had no evidence of any quid pro quo exchanged by Wal-Mart for promotional monies; nor did Conwood even attempt to refute the direct testimony of Robert Carlson from Wal-Mart that U.S. Tobacco promotional monies were not tied in any way to Wal-Mart's decisions with respect to rack, POS, and/or product placements. See Tr. 3/16 at Carlson, pp. 53-54. Again, innuendo and inflammatory comments ruled the day. See, e.g., Tr. 3/28 at 59 (Conwood's closing argument) ("[T]hat did involve kickbacks"; "I don't care if you call it promotions or buybacks or whatever. . . .").

3. The Court's Evidentiary Rulings During Trial

Several of the Court's evidentiary rulings during trial were erroneous as a matter of law and resulted in an erroneous jury verdict. Accordingly, the Court should grant a new trial.

(a) Plaintiffs' Use of "Expert Witnesses"

Conwood retained five expert witnesses, four of whom testified at trial. Throughout the trial, Conwood used its expert witnesses primarily for two improper purposes: (1) to display and read documents to the jury with editorial comments and interpretation, but with little or no factual development or expert analysis; and (2) to present to the jury the existence of inadmissible evidence with the implied, if not express, message to the jury that such evidence was probative of Conwood's case. Conwood's use of expert witnesses extended well beyond the bounds of Rules 702 and 703 and reached well within the bounds of Rule 403.

(i) "Human Highlighters"

Even a cursory review of the testimony of Drs. Kamien, Gundlach and Blattberg – Conwood's three "liability expert witnesses" – indicates that Conwood's purpose in calling these "experts" was to channel in its documentary evidence. Rule 702 requires "scientific, technical, or other specialized knowledge" that "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Hiring university professors to read documents and to highlight certain inflammatory language to the jury is not within the ambit of Rule 702.

Dr. Kamien, an expert economist, read documents to the jury for well over five hours on his first and second days of testimony. The Court so noted. Tr. 3/1 at 146-47. Dr. Kamien continued for several more hours when he returned to the stand on March 3, 2000. See Tr. 3/3. Conwood conducted this aspect of Dr. Kamien's direct examination under the guise of presenting

the basis for Dr. Kamien's opinions. Dr. Kamien's complete testimony, however, was all basis and few, if any, opinions. U.S. Tobacco objected to the factual and cumulative nature of such "foundation" testimony and the transparency of its obvious intent to prejudice U.S. Tobacco. Tr. 3/1 at 5. Nevertheless, Dr. Kamien was allowed to wade through volumes of documents while the jury followed along with multi-colored highlighters in binder sets which Conwood prepared and made available to the jury. See Tr. 3/1 and 3/3. Dr. Kamien – again, supposedly testifying as an expert economist – also was allowed to testify as to the authors' state of mind when they wrote the documents being reviewed. See, e.g., Tr. 2/29 at 277-80 (testifying about what U.S. Tobacco personnel were "talking about" when writing certain phrases in documents).

Similarly, as discussed above, Dr. Gundlach – supposedly testifying as a marketing professor – did little more than read documents and tell the jury that the documents represented "exclusive agreements." Dr. Gundlach did not lend any expertise. He did not do any studies; he did not draw any comparisons to the dealings of manufacturers of other packaged products. The depth of Dr. Gundlach's analysis – and its detachment from his claimed expertise – is perhaps best exemplified by his "expert" opinion that, because a retailer's letter to its own stores was distributed on U.S. Tobacco letterhead, it indicated that U.S. Tobacco was in control of the particular retailer's decision. Tr. 3/9 at 82; 150-51.

Finally, Dr. Blattberg – supposedly testifying as an expert in category management – waxed on at length about what authors meant when they wrote documents relating to category management, including that they felt "guilty" about it. Tr. 3/13 at 248-49, 256. Dr. Blattberg then proceeded to testify that, under his interpretation of U.S. Tobacco's documents and testimony, U.S. Tobacco was "violating" his principles of category management. Id. Conwood, of course, had every

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opportunity to depose the authors of these documents, but in nearly every instance chose not to for what are now obvious strategic reasons.

In sum, rather than presenting competent evidence through witnesses with personal knowledge, Conwood chose to use hired experts to say what they wanted the jury to hear. Thus, rather than presenting opinions to "assist the trier of fact," Conwood presented its expert witnesses as factual surrogates, complete with summaries and interpretations that, predictably, were perfectly consistent with Conwood's theories in this case. This is improper expert testimony. Accordingly, a new trial should be granted.

(ii) Hearsay Through Experts

Conwood did not stop at using its experts to read admissible documents. Conwood also channeled inadmissible evidence through its experts. The use of Dr. Leftwich – Conwood's damages expert – for this purpose is discussed in full above. Conwood's primary channels of inadmissible evidence, however, were Dr. Kamien and the theatrical performance of Conwood's lead trial counsel during the cross-examination of Dr. Scheffman.

Through Dr. Kamien, Conwood was allowed, over U.S. Tobacco's objections, to inform the jury by expert testimony and by demonstrative aid that (1) over 226 Conwood employees gave "sworn declarations" that U.S. Tobacco's "conduct was widespread across the United States"; (2) over 60 retailers gave "sworn testimony" that U.S. Tobacco's "conduct was widespread across the United States"; (3) over 400 retailers signed "statements" that U.S. Tobacco's "conduct was widespread across the United States"; and (4) Conwood employees submitted over 1,200 "unethical activity reports" that U.S. Tobacco's "conduct was widespread across the United States." See Tr. 2/28 at 264-65; Tr. 2/29 at 7-9; Tr. 3/1 at 36-37. None of this information, of course, was in

evidence in this case at any time, and none was relevant to what would be a proper expert opinion in the case.

The dramatic publication of this "sworn testimony" was even more prejudicial when presented through the questioning of Dr. Scheffman by Conwood's counsel. While telling the Court throughout the case that he merely wished to ask Dr. Scheffman whether he considered these materials, Conwood's counsel obviously had something very different in mind: dropping large binders of "evidence" on U.S. Tobacco's counsel table and, with a flourish, on the witness stand in front of Dr. Scheffman; publishing the content of the Conwood employee declarations through his questions; trying to get Dr. Scheffman to refer to Conwood employees as "liars;" and, ultimately at closing referring to these declarations as "testimony" that Dr. Scheffman ignored like a "dead cat" dropped in his lap. See Tr. 3/23 at 164-70, 176-78, 187-88; Tr. 3/28 at 77-78. All of these highly calculated theatrics were improper and unfairly prejudicial to U.S. Tobacco.

There can be no doubt that the presentation of this inadmissible evidence to the jury was unfairly prejudicial to U.S. Tobacco. And, the Court's limiting instruction, see Tr. 3/1 at 37, was insufficient to unring the bell that Conwood's counsel rang with Dr. Kamien, rang again during the cross-examination of Dr. Scheffman, Tr. 3/23 at 164-70, 176-78, 187-88, and rang again during closing argument. Tr. 3/28 at 77-78. This is not the proper use of expert testimony contemplated by the Sixth Circuit in Trepel v. Roadway Express, Inc., 194 F.3d 708, 717 (6th Cir. 1999). The Court's decision to allow the presentation was error and, for this reason, a new trial is warranted.

(b) Plaintiffs' Use of "Fact" Witnesses as Expert Witnesses

Conwood also was allowed to introduce expert opinion testimony through its fact witnesses. First, Mr. Rosson, Conwood's Chairman, was allowed to testify about financials and other

U.S. Tobacco documents based on studies prepared by "staff" and, according to Conwood's counsel at side bar, by Kellogg Huber attorneys. See Tr. 2/28 at 236-46. This could not constitute proper subject matter for a lay witness. Indeed, prior to his testimony, Conwood's counsel argued to the Court that Mr. Rosson intended to testify that Conwood's share of the "market" would have been 6% to 10% higher, and that Mr. Rosson is "the greatest expert of tobacco I've ever seen." Tr. 2/29 at 115. Conwood's counsel also revealed that Conwood's purpose in presenting this testimony was essentially to use Mr. Rosson as a damages expert: "it's a piece of [the damages] puzzle that we need to have fit." Tr. 2/29 at 116. Thus, with this lawyer-prepared "basis," Mr. Rosson was allowed to render his opinion concerning what Conwood's market share would have been in the absence of U.S. Tobacco's misconduct, as well as what the relevant product market is for antitrust purposes in this case. See id.; Tr. 2/29 at 115-19. Further, over U.S. Tobacco's objection, Conwood's counsel was allowed to present Mr. Rosson's testimony in the form of a simple damages chart for use in opening and closing arguments. Tr. 3/28 at 6-7; Tr. 3/28 at 60-61. Again, this was a blatant – and successful – effort to use Mr. Rosson as a damages expert, even though he was not offered as one prior to trial, was therefore never cross-examined on these issues before trial, and had no basis but pure speculation to claim $400 million in damages from U.S. Tobacco.

Similarly, Mr. McClure, the former Executive Vice President of Swedish Match, was allowed to testify regarding what Swedish Match's sales share would have been "in the absence of UST tactics." See Tr. 3/13 at 41-43. No basis was given for this testimony other than Mr. McClure's having previously worked for Swedish Match. The Court sustained U.S. Tobacco's objection consistent with its ruling regarding Mr. Price's earlier attempt to give the same testimony. Tr. 3/13 at 42. Nonetheless, immediately after that side bar, the Court permitted counsel for Conwood to

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proceed with the same line of questioning and to elicit the objectionable opinion testimony. Tr. 3/13 at 42-43. U.S. Tobacco moved to strike the testimony and the Court overruled the motion. Tr. 3/13 at 43. Mr. McClure also was allowed to testify that it was simply a "figment of somebody's imagination" that a retailer could make an independent decision – a critical issue in this case. This testimony, too, was exploited by Conwood's counsel during closing. Tr. 3/28 at 89.[6]

In both of these instances, Conwood was attempting to bolster the woefully deficient damages testimony of Dr. Leftwich, or in Conwood's own words, it was "a piece of the puzzle [they] needed to have fit." See Tr. 2/29 at 16. U.S. Tobacco has, in prior motions, referred to Dr. Leftwich's damages analysis as a "house of cards." A more accurate description would be a pre-fabricated house that was created and then transported to Paducah with the hope of laying some proper foundation there. Antitrust damages, however, should be calculated from a proper foundation. A foundation should not be retrofitted to a damages calculation.

(c) Plaintiffs' Comments and Questions Concerning "Availability" of U.S. Tobacco Employee Witnesses

The Court also allowed Conwood's counsel to question and comment about the "availability" of U.S. Tobacco employee witnesses, reaching a crescendo during closing argument where a long list of U.S. Tobacco employees was scrolled on a video screen before the jury. See Tr. 3/28 at 81-82. Such questions and comments were irrelevant, misleading, and unfairly prejudicial to U.S. Tobacco. As an initial matter, "availability" has a specific legal meaning under Fed. R. Civ.

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[6] In addition, over numerous objections by U.S. Tobacco, the Court permitted Mr. McClure, as well as Mr. Price, to testify about alleged pervasive misconduct by U.S. Tobacco "in the field." Not only was such testimony without foundation, it was in direct contravention of Magistrate Judge Moyer's May 11, 1999 Order precluding testimony concerning "field" misconduct from witnesses not disclosed in September 1999 pursuant to that Order.

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P. 32 – a witness is unavailable if he or she resides more than 100 miles from the place of trial. Fed. R. Civ. P. 32(a)(3)(B). It does not mean, as Conwood counsel repeatedly implied, that a witness' schedule happens to be free. Moreover, Conwood chose Paducah, Kentucky as the forum in which to try this case with full knowledge that Greenwich, Connecticut is more than 100 miles from Paducah. By filing in a forum near U.S. Tobacco's headquarters, Conwood could have ensured its ability to call any live witnesses from Greenwich it desired. Finally, for over two years, Conwood had unlimited access to all U.S. Tobacco personnel for the purposes of deposition, and the videotapes could have been played at trial. Accordingly, questions and comments about a person's availability were improper and intended only to create the misleading and unfairly prejudicial impression before the jury that U.S. Tobacco was somehow hiding witnesses.

The Court recognized the intention of Conwood's counsel, as well as the prejudicial nature of the questions and comments, and ruled accordingly:

> But I don't think it's fair comment for you to say, "We asked them to bring them here and they didn't bring them." Because you chose the forum. For some reason the unlikely place of Paducah, Kentucky, was chosen to try this case and I think it would be improper to say that we asked them to bring them here and they didn't bring them. I'm not going to allow you to do that.

Tr. 2/28 at 16. Nevertheless, counsel for Conwood repeatedly, over objection and without admonition, was allowed to ask U.S. Tobacco live witnesses about the "availability" of other witnesses. See, e.g., Tr. 3/6 at 48; Tr. 3/16 at 54; Tr. 3/20 at 56-57; Tr 3/21 at 116-17. Moreover, Conwood counsel was allowed to argue in closing that Mr. Segelstrom, a U.S. Tobacco employee, was "hiding up in Greenwich with the rest of them," Tr. 3/28 at 79-80, and that U.S. Tobacco "is a company that wouldn't bring the top executives who hatched the plan and made sure it was carried out." Tr. 3/28 at 91. Conwood's counsel made these arguments in spite of the Court's ruling that it

would be improper to emphasize that U.S. Tobacco didn't bring witnesses to Paducah. See Tr. 2/28 at 16.

There can be no doubt that questions, comments, and arguments concerning the unavailability of U.S. Tobacco witnesses were unfairly prejudicial to U.S. Tobacco. That was Conwood's intention. That was the effect. Accordingly, a new trial is warranted.

4. The Court's Jury Instructions

During trial, U.S. Tobacco made several objections to the Court's jury instructions. First, U.S. Tobacco objected to the removal of the word "predatory" from the Court's Instruction 2.4: Willful Maintenance of Monopoly Power. Second, U.S. Tobacco objected to the Court's refusal to include U.S. Tobacco's proffered instruction on nominal damages.

(a) Removal of "Predatory"

Upon suggestion by Conwood's counsel, the Court replaced the word "predatory" with "restrictive" in its instruction to the jury on Willful Maintenance of Monopoly Power – i.e., its instruction on conduct. This change was highly significant given the importance in this case of the jury's consideration of specific conduct and the jury's determination of whether any conduct was competitive or anticompetitive. "Predatory" is a proper instruction. "Restrictive" does not say enough.

As described in detail in U.S. Tobacco's memorandum in support of its motion for judgment as a matter of law, conduct that is "predatory" includes only conduct that would be irrational absent its effect of eliminating competition. Predatory conduct violates the antitrust laws. On the other hand, conduct that is "restrictive" may include conduct that is procompetitive, but nevertheless "restricts" competition. Thus, restrictive conduct may or may not violate the antitrust

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laws. This is a critical distinction, prevalent in antitrust jurisprudence. For example, predatory pricing is unlawful because there is no rational, legitimate business reason for pricing below cost. Promotional pricing that may affect competitors, however, may be "restrictive," and may have (in the words of the Court's instruction to the jury), "the effect of preventing or excluding competition or frustrating or impairing the efforts of other firms to compete for customers within the relevant market." Tr. 3/28 at 103. But, promotional pricing, even if restrictive, is perfectly legitimate and procompetitive conduct.

Accordingly, the Court's omission of the word "predatory" and the substitution of "restrictive" was in error and requires the grant of a new trial.

(b) Instruction on Nominal Damages

After moving in limine and twice for a directed verdict on the issue of antitrust damages, U.S. Tobacco moved the Court to include in its jury instructions a charge on nominal damages. The Court, however, refused to include a nominal damages instruction.

After the close of Conwood's case, U.S. Tobacco moved for judgment as a matter of law. At that time, the Court commented that "if [the Court] thought there was a weakness in the plaintiff's case, it's more in the damages issue." Tr. 3/14 at 95. Nevertheless, the Court declined to include a nominal damages instruction to the jury. As a result, the jury was left with the impression that, if it found U.S. Tobacco liable under the antitrust laws, it was compelled to award Conwood damages in spite of the lack of evidence supporting any fair and reasonable damages award. In addition, the only damage amounts the jury had as a reference were the astronomical figures proposed by Conwood. Accordingly, and especially in light of the enormous verdict, the Court's omission of a nominal damages instruction was in error and requires a new trial.

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II. IN THE ALTERNATIVE, THE COURT SHOULD ENTER A REMITTITUR

Defendants respectfully request that, in the alternative to granting U.S. Tobacco's motion for judgment as a matter of law or to granting a new trial, the Court should enter a remittitur, reducing the damages award to an amount at least arguably supported by the evidence. As described above, U.S. Tobacco's position is that Conwood completely failed to prove damages, and the jury's verdict represents mere speculation and guesswork. Accordingly, no damages award whatsoever would be supported by the evidence. In the alternative, however, the Court should enter a remittitur that, at a minimum, attempts to account for the growth of Swisher and Swedish Match, and other demonstrable causes of Conwood's claim of stagnation.

"[E]xcessiveness of a verdict is primarily a matter for the trial court and the judge's conscience . . . ." Katch v. Speidel, 746 F.2d 1136, 1143 (6th Cir. 1984); see id. at 1143-44 (further reducing damages award where the court concluded that the damages award, even after remittitur, exceeded the maximum amount supported by established facts). In antitrust cases, it is appropriate for a district court to reduce a damages award by an amount sufficient to account for causes other than the conduct found to violate the antitrust laws. See Tennessee Consol. Coal Co. v. United Mine Workers of America, 416 F.2d 1192, 1195, 1203 (6th Cir. 1969) (affirming district court's remittitur of $500,000 from a $977,500 damages award because it "fully took into account [defendant's] claims that causes other than its violations of the anti-trust laws may have contributed to the damage").

Remittitur has also been found to be appropriate where the damages estimates offered by an expert witness were too speculative to support the jury's damages award, and where there was insufficient expert testimony to establish a causal link between the alleged violation and the damages award. See, e.g., Parkway Garage, Inc. v. City of Philadelphia, Civ. A. No. 90-7752, 1994 WL

412430, *7 (E.D. Pa. Aug. 3, 1994). In Parkway Garage, the jury awarded plaintiff $5 million. The court, however, found that the testimony of plaintiff's expert witness was unreliable to establish causation and, as a result, the expert's calculations of damages were too speculative to support the jury's verdict. Accordingly, the court concluded that the evidence supported a damages award of no more than $53,002.83 and remitted the balance, $4,946,997.20. See id. at *8-9.

An appropriate remittitur is warranted here. Conwood's own failure to associate its damages estimates with any alleged misconduct, or even with any actual demonstration of lost sales, however, makes it difficult to determine the amount of such a remittitur. Given the many flaws in Dr. Leftwich's analysis, the Court should, at a bare minimum, enter a remittitur adjusting the jury's damages award to the minimum range offered by Dr. Leftwich in his original damages study after he adjusted for data errors: $113 million.

In the alternative, U.S. Tobacco respectfully requests that the Court consider Conwood's own theory based on market share. As discussed in more detail above, Conwood argues that its share would have been approximately 10 share points higher absent U.S. Tobacco's misconduct, or conversely, that U.S. Tobacco unlawfully maintained 10 share points through exclusionary conduct. This estimate is based on Conwood's performance prior to 1990, the year U.S. Tobacco's alleged campaign of exclusionary conduct supposedly began. Conwood and Dr. Leftwich, however, completely ignore the effects of the growth of Swisher and Swedish Match, which this Court can and should take into account.

Accordingly, using Conwood's 10 share points as a basis, this Court should attempt to determine how much of the 10 share points would have been captured by the growth of Swisher and Swedish Match. Thus, the Court should reduce Conwood's damages award by a dollar amount

representative of the fraction of those 10 share points. During the relevant four-year damages period, the combined share of Swisher and Swedish Match grew from 4.5% to over 9% of the moist snuff segment, or, in other words, they captured an average of 6.8% of sales in the marketplace. So, rather than determine damages based on a speculative guess that Conwood's share would have been 10 points higher, this Court should consider the evidence of the growth of Swisher and Swedish Match and adjust the damages accordingly; 6.8 share points out of 10 share points leaves 3.2 share points for Conwood. The amount of the remittitur – based on this measured proven success of Swisher and Swedish Match alone – would be therefore .68 x $350 million or $238 million, yielding a modified damages verdict in the amount of $112 million. It should be noted that the amount of that remittitur would be conservative given the fact that, according to the logic if not the proof of Conwood's own theory, Swisher and Swedish Match would have gained more share absent the alleged exclusionary conduct by U.S. Tobacco. See Tr. 3/7 at 248-49, 252-53; Tr. 3/13 at 42-43.[7]

In addition, other causal factors such as the independent decisions of retailers would support a further remittitur of the damages award. For example, according to Conwood, Wal-Mart accounts for approximately 8-10% of all moist snuff sales. Based on the undisputed evidence that Wal-Mart made all decisions with respect to the display and sale of moist snuff in Wal-Mart stores, a further remittitur of 8-10% is warranted. Accordingly, using an average of 9% and the $112 million figure that accounts for the growth of Swisher and Swedish Match, the Court should modify the damages further by $10.8 million to $101,020,000.[8]

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[7] This, too, was something Dr. Leftwich never considered. See Leftwich Dep. at 193-96.

[8] In addition, Conwood's own documents indicate that perfectly legal pricing promotions run by U.S. Tobacco were adversely affecting Conwood's sales. See, e.g., DX 592. Thus, further (continued...)

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Wal-Mart, of course, is just one example of a chain store. Similar adjustments to the jury's damages award would be necessary for all chain stores that made independent decisions that may have affected Conwood's sales. As Conwood's counsel pointed out during Conwood's closing argument, 60% of the nation's retail outlets employ sophisticated buyers that make reasoned decisions. Tr. 3128 at 102. An adjustment to the damages award to account for these decisions would result in damages of $40,408,000. Moreover, according to Conwood's theory, Conwood also was excluded from K-Mart – Conwood racks were not authorized and its distribution was limited to one facing of Kodiak. Tr. 3/10 at 88-89, 135-36 (DX 856). But Swisher, not U.S. Tobacco, worked with K-Mart to develop that store set and plan-o-gram. Id. To the extent Conwood sales suffer a similar decline when Swisher provides input to a retailer, a further remittance to account for K-Mart (and the Tom Thumb chain, which also uses Swisher racks exclusively, Tr. 3/10 at 136-37) is warranted.

These, of course, are merely crude attempts to capture the effects of causal factors that were not accounted for by Conwood or by Dr. Leftwich, and thus were included in the jury's damages award. Another approach to determining an appropriate remittitur would be affirmatively to evaluate all of the evidence offered by Conwood to demonstrate its claimed lost sales as a result of U.S. Tobacco's alleged misconduct. U.S. Tobacco is confident that any effort on behalf of the Court to do so would reveal that there is no legally sufficient evidentiary basis for a reasonable jury, or the Court, to determine a fair and reasonable amount of damages.

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[8] (...continued)
remittitur would be warranted.

CONCLUSION

For the foregoing reasons, U.S. Tobacco respectfully requests that as an alternative to granting judgment as a matter of law, the Court order a new trial, or in the alternative, enter a remittitur, reducing the damages award to an amount, if any, supported by the record evidence.

Dated: April 12, 2000

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DATE: April 13, 2000

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION OF DEFENDANTS FOR LEAVE TO FILE MEMORANDUM IN EXCESS OF FORTY PAGES

Pursuant to LR 7.1(d), Defendants seek leave to file the attached memorandum in support of their motion for judgment as a matter of law. A memorandum in excess of the forty-page limit is necessary to enable Defendants to address in detail the law and trial record relevant to Defendants' motion.

A tendered order directing the Clerk to accept the attached memorandum for filing is attached hereto.

Respectfully submitted,

Dated: April 12, 2000

John S. Reed
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919 Third Avenue
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Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 12th day of April, 2000.

Counsel for Defendants

16diii005472

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

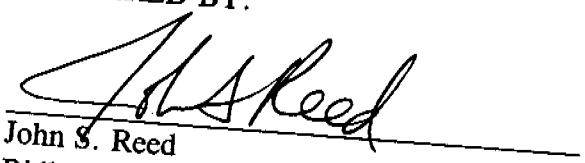
Defendants having moved the Court for leave to file a memorandum in support of their motion for judgment as a matter of law in excess of forty pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted and the Clerk is instructed to file the memorandum tendered by the Defendants with their motion for leave.

Entered this _____ day of _____, 2000.

Thomas B. Russell, Judge
United States District Court

TENDERED BY:



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P.	)	
Plaintiffs,	)	
v.	)	Civil Action No. 5:98-CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,	)	
Defendants.	)	

DEFENDANTS' MOTION FOR PERMISSION TO CONDUCT POST-VERDICT JUROR INTERVIEWS

Defendants United States Tobacco Company, et al. ("U.S. Tobacco") respectfully move the Court for permission to interview jurors in this case. At trial, numerous U.S. Tobacco marketing practices were challenged as "exclusionary" and violative of Section 2 of the Sherman Act. In order to communicate more effectively with its shareholders, insurers and other constituents, U.S. Tobacco needs a clearer understanding of which of its marketing practices were perceived by the jury as exclusionary.

ARGUMENT

The decision whether to allow interviews of jurors after a verdict is within the sound discretion of the trial judge. See Wilkerson v. Johnson, 699 F.2d 326, 330 (6th Cir. 1983); United States v. Franks, 511 F.2d 25, 38 (6th Cir. 1975); see also LR 47.1 (court's permission must be obtained for post-verdict juror interview). Although juror interviews may be refused when intended as a fishing expedition to ultimately challenge the basis for the verdict, they clearly

are allowed if sought for a proper purpose. See McCullough v. Consolidated Rail Corp., 937 F.2d 1167, 1168 (6th Cir. 1991) (clarification of verdict sought); cf. Wilkerson, 699 F.2d at 330 (request denied because defendants sought only to demonstrate lack of evidence to support verdict); Franks, 511 F.2d at 37 (same).

The jury's verdict in this case does not shed any light on what conduct was found to be in violation of Section 2 of the Sherman Act. U.S. Tobacco therefore seeks to interview the jurors in this case solely to gain an understanding of which marketing practices were perceived as unlawfully exclusionary. This process will help U.S. Tobacco to: (i) comply with its disclosure obligations as a publicly held company under the securities laws; (ii) provide necessary information to its insurers and sureties; and (iii) better understand which marketing practices the jury perceived as unlawful under the antitrust laws. U.S. Tobacco has no intention of securing specific information on which to base a challenge to the jury's verdict.

U.S. Tobacco recognizes the difficulty in reconvening the entire jury to be interviewed. U.S. Tobacco therefore moves this Court for permission to interview the foreman if he is willing, in addition to any other jurors who agree to be interviewed. In this regard, U.S. Tobacco wishes to report to the Court that after the trial one of the jurors contacted one of its attorneys by telephone, wanting to discuss the deliberations, the verdict and the judgment. The attorney did not seek to interview the juror at that time. From this contact, however, it is apparent that at least one juror would not object to the interviews U.S. Tobacco seeks.

16diii005476

CONCLUSION

For the foregoing reasons, U.S. Tobacco respectfully requests that this Court permit post-verdict interviews of jurors willing to be interviewed.

Respectfully submitted,

Dated: April 17, 2000

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Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by facsimile transmission and overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 17th day of April, 2000.

Counsel for Defendants

16diii005477

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

Defendants having moved the Court for permission to interview jurors who may be willing to be interviewed, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted and counsel for Defendants may seek to schedule interviews with individuals who served on the jury in this case. The initial requests for interviews shall be by letter mailed to the jurors. Counsel for Defendants may learn the names and addresses of the jurors by contacting _____.

Entered this _____ day of _____, 2000.

_____
Thomas B. Russell, Judge
United States District Court

TENDERED BY:

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Courtney Simmons Elwood

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Eddie Foster Tripp Wilson	Wyatt, Tarrant & Combs	(901) 537-1010	(901) 537-1000
Hank Handelsman	Pritzker & Pritzker	(312) 920-2470	(312) 750-8400

MATTER: Conwood Company, L.P. v. UST, et al. Civil Action No. 5:98-CV-108-R

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John S. Reed

April 17, 2000

Via Federal Express

Hon. Thomas B. Russell
United States District Judge
121 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed is a courtesy copy of Defendants' Motion for Permission to Conduct Post-Verdict Juror Interviews.

Respectfully,

John S. Reed

JSR/kmc
Enclosure
cc: Neil M. Gorsuch
Richard C. Roberts
James A. Keyte

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST, INC., Defendants.	Civil Action No. 5:98CV-108-R

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PERMANENT INJUNCTIVE RELIEF

Plaintiffs Conwood Company, L.P. and Conwood Sales Company, L.P. ("Conwood") move pursuant to Section 16 of the Clayton Act (15 U.S.C. § 26) and Section 2 of the Sherman Act (15 U.S.C. § 2) for a permanent injunction to provide relief from the effects of defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company, Inc., United States Tobacco Manufacturing Company, Inc., and UST, Inc.'s ("UST") illegal conduct in monopolizing the moist snuff market. The injunction is also necessary to end UST's illegal conduct once and for all -- as defendants have promised that it will continue, without change, in their recent post-trial communications with customers. See UST Letter to All Customers, March 30, 2000 (attached hereto as Exh. A).

It is well-established that a trial court should grant appropriate injunctive relief following a finding that defendants violated the antitrust laws. The injunctive relief remedies continuing and threatened harm from defendants' conduct. See Stone v. William Beaumont Hosp., 782 F.2d 609, 617 (6th Cir. 1986) ("plaintiff may obtain injunctive relief simply by demonstrating a 'significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur'") (quoting Bender v. Southland Corp., 749 F.2d 1205, 1214 (6th Cir. 1984)).

Such an injunction is necessary here to serve at least three critical purposes that the jury's damage award cannot fulfill because there is no adequate remedy at law. As the Sixth Circuit has recognized, "Section 16 injunctive relief has three primary purposes: '(1) putting an end to illegal conduct, (2) depriving violators of the benefits of their illegal conduct, and (3) restoring competition in the marketplace.'" Arthur S. Langenderfer v. S.E. Johnson Co., 729 F.2d 1050, 1059 (6th Cir. 1984) (quoting In re Multidistrict Vehicle Air Pollution, 538 F.2d 231, 234 (9th Cir. 1976)), cert. denied, 469 U.S. 1036 (1984); see also United States v. United Shoe Machinery Corp., 391 U.S. 244, 250 (1968) (same); Ford Motor Co. v. United States, 405 U.S. 562, 573-75 (1972); International Boxing Club v. United

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States, 358 U.S. 242, 253 (1959); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 607-08 (1957).

I. CONWOOD IS ENTITLED TO PERMANENT INJUNCTIVE RELIEF

Under Section 16 of the Clayton Act "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26. The eleven-person jury verdict in this case establishes that "loss or damage" to Conwood from an antitrust violation was not merely threatened; it in fact occurred. UST's conduct has been found to violate the antitrust laws. The only remaining question is the need for an injunction to protect consumers from the effects of such unlawful conduct in the future. See, e.g., Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130 (1969) (injunctive relief appropriate under Section 16 to enjoin "a contemporary violation [that is] likely to continue or recur").

Once the finder of fact has determined that a violation of Section 2 has been proved, it is the duty of the Court to ensure that the anticompetitive conduct ceases:

> It is of course established that, in a Section 2 case, upon appropriate findings of violation, it is the duty of the Court to prescribe relief which will terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization

> in the future . . . . The trial court is charged with inescapable responsibility to achieve this objective. United States v. United Shoe Machinery Corp., 391 U.S. 244, 250 (1968) (emphasis added and citations omitted).

Under the antitrust laws, "courts are authorized, indeed required, to decree relief effective to redress the violations." United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 326 (1961) (emphasis added). Accordingly, "[t]he courts have an obligation, once a violation of the antitrust laws has been established, to protect the public from a continuation of the harmful and unlawful activities." United States v. Parke, Davis & Co., 362 U.S. 29, 48 (1960) (emphasis added).

These principles are equally applicable to private actions under the antitrust laws. "The purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws," and "Section 16 should be construed and applied with this purpose in mind." Zenith Radio, 395 U.S. at 130-31. See also California v. American Stores Co., 495 U.S. 271, 284 (1990) (same). Private actions are no different from government actions: they "serve the public interest in that 'they effectively pry open to competition a market that has been closed by defendants' illegal restraints.'" Id. at 133 (quoting International Salt Co. v. United States, 332 U.S. 392, 401 (1947)). Conwood's proposed injunctive relief

protects the public as well as Conwood from anticompetitive conduct that UST has vowed it will continue unless enjoined.[1]

II. THE ORDER PROPOSED BY CONWOOD WILL ACHIEVE THE THREE PURPOSES FOR SECTION 16 INJUNCTIVE RELIEF

The proposed injunction serves each of the three primary purposes for section 16 relief. Arthur S. Langenderfer, 729 F.2d at 1059. Each of these purposes will be aided by entry of the narrowly tailored order proposed by Conwood.

A. Only Permanent Injunctive Relief Will Put an End to UST's Illegal Conduct

UST has pursued a calculated policy of anticompetitive activity for years. At its 1993 "Top Gun" meeting of executives and high level sales personnel, for example, UST touted a "Chain Strategy" to "eliminate competitive distribution" and pursue "exclusive vending." PX 9. In 1996, UST executives adopted a written goal to combat competitive price value brands by

---

[1]Courts have fashioned broad and permanent injunctive relief in a variety of contexts after a private plaintiff prevailed at trial. See, e.g., Image Technical Servs., Inc. v. Eastman Kodak Co., 1996 U.S. Dist. LEXIS 2386 (N.D. Ca. February 26, 1996) (five-year injunction requiring Kodak to sell all manner of repair parts to independent service organizations and to notify Kodak customers henceforth these third-parties will have full access to Kodak parts); Coleman v. Cannon Oil Co., 911 F. Supp. 510 (M.D. Ala. 1995) (requiring defendants to provide all of their customers with a copy of the court's injunction and provide antitrust training for all employees); International Distribution Centers, Inc. v. Walsh Trucking Co., Inc., 1986 U.S. Dist. LEXIS 30701 (S.D. N.Y. January 8, 1986) (prohibiting defendants from hiring plaintiff's employees, making false or misleading representations about plaintiff, and imposing tariff and price restrictions on defendants' provision of certain trucking services)

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controlling their growth through, among other things, choking their distribution. PX 45. UST even made plans to give Conwood a "serious whack" where Kodiak was doing well and to get aggressive with Helme once Helme reached a 5 percent market share threshold. PX 14. Of course, UST supplemented these programs and strategies with a healthy dose of simply ripping out competitors' racks and POS at retail. See, e.g., Trial testimony of Bill Rosson at 226-28 (Feb. 29, 2000); Terry Williams at 44-48 (Mar. 10, 2000); Lou Marano at 222-23 (Feb. 28, 2000); Doug Hynek at 206 (Mar. 8, 2000); Gary Ryan at 126-33 (Mar. 8, 2000). All of these strategies were premeditated at the highest corporate levels. See, e.g., PX 68 (UST President Gary Smith praising sales personnel for winning exclusive vending at corporate 7-11 stores); PX 123 (memo to Gary Milano reporting that CAP program is being used to push competitors' displays under the counter at retail).[2]

Both before and after the verdict, UST publicly stated that it has no intention of changing its conduct in any way. On the witness stand, Chairman of the Board Vincent Gierer testified that UST has no plans to change **any** of the ways it deals with retailers or competitors in the marketplace. Trial Tr. at 88-89

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[2]In the wake of this lawsuit, Mr. Smith has "retired effective immediately citing personal reasons." UST Press Release, Apr. 3, 2000 <http://www.shareholder.com/ust/news/releases.htm

(Mar. 21, 2000). Even after the verdict, Mr. Gierer remained defiant. He stated publicly that the magnitude of the damages "was completely unjustified given the evidence presented. . . . [O]ur conduct did not violate the antitrust laws." UST Press Release, Mar. 29, 2000 (attached hereto as Exh. B). In an open letter to all customers, UST reiterated its intention to continue with business as usual: "[T]he actions complained of by Conwood are nothing more than part of normal, lawful, competitive conduct. . . . We will continue to provide you with the same level of service, the same fine products and the same fine programs that you have come to expect of us." UST Letter to All Customers, Mar. 30, 2000 (Exh. A).

Such denial of wrongdoing weighs heavily in favor of permanent injunctive relief. See Blue Cross & Blue Shield United v. Marshfield Clinic, 883 F. Supp. 1247, 1263 (W.D. Wisc. 1995) (defendants' continuing denials of wrongdoing means that "[c]onsequently, there is a threat that defendants will continue to violate the antitrust laws"), rev'd on other grounds and remanded, 65 F.3d 1406 (7th Cir.), reh'g denied, 1995 U.S. App. LEXIS 29056 (7th Cir.), cert. denied, 516 U.S. 1184 (1996). See also Wilk v. American Medical Association, 895 F.2d 352, 367 (7th Cir. 1990) (defendant's refusal to acknowledge wrongdoing significant in court's determination that no adequate remedy at

law existed). UST's statements and actions to date demonstrate that none of its illegal conduct will stop absent an injunction.[3]

B. The Entry of Permanent Injunctive Relief Will Deprive UST of the Benefits of its Conduct

UST should not be allowed to benefit from its existing exclusive vending agreements and other exclusionary programs.[4] Even if UST were to refrain from entering into exclusive/exclusionary agreements in the future, it would continue to benefit from arrangements already in place. Thus, a

---

[3]The Court is not limited to enjoining conduct found to be illegal. The Court has the discretion to issue a permanent injunction to restore competition, even if that injunction prohibits practices that would otherwise be legal. E.g., United States v. Loew's, Inc., 371 U.S. 38, 53 (1962) ("to ensure . . . that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined").

[4]Permanent injunctive relief is appropriate to prohibit the execution or continuation of agreements or contracts that are unlawful under the antitrust laws. In United States v. National Lead Co., 332 U.S. 319 (1947), the Supreme Court upheld a District Court injunction which mandated the cancellation and enjoined enforcement of contracts that violated Sherman Act § 1. The decree enjoined the defendants from "entering into, adhering to, maintaining or furthering, directly or indirectly, any contract, agreement, undertaking, plan or program" that resulted in a restraint of trade. 332 U.S. at 328-29. In Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975), cert. denied, 425 U.S. 959 (1976), the Ninth Circuit upheld the district court's injunction terminating the defendants' exclusive sales agreement. Similarly, in Zenith Radio, the Supreme Court restored an injunction proscribing the defendant from "[e]ntering into, adhering to, enforcing or claiming any rights under any contract, agreement, understanding, plan or program" that resulted in a restraint on the plaintiff. 395 U.S. at 130 n.23.

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permanent injunction is necessary to prevent UST from profiting from its past illegal successes.

C. The Entry of Permanent Injunctive Relief Will Restore Competition to the Marketplace

Permanent injunctive relief to protect competition and the interests of consumers is a critical component of private antitrust actions.[5] Here, a permanent injunction is necessary to promote unrestrained competition in the market for the benefit of consumers. UST maintained its monopoly by means the jury has found to be unlawful. The unrefuted evidence at trial demonstrated that UST's practices did not benefit consumers, but harmed them by limiting actual product choice and raising prices. See, e.g., Testimony of R. Blattberg, Tr. at 230-31 (fewer alternatives to UST products actually in stores); PX 326.4 (showing higher prices where UST has a greater percentage of facings). For full and unfettered competition to develop, UST's exclusionary practices must be enjoined to allow Conwood and others to compete fairly and freely.

---

[5]In entering a permanent injunction "[t]he essential consideration is that the remedy shall be effective and fair as possible in preventing continued or future violations of the Antitrust Act in the light of the facts of the particular case." United States v. National Lead Co., 332 U.S. at 335.

16diii005492

Conclusion

For the foregoing reasons, the injunctive relief requested by Conwood should be granted in its entirety.

Date: April 19, 2000

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/ Richard C. Roberts

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/s/ Mark C. Hansen
By Richard C. Roberts

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Counsel for Plaintiffs

16diii005493

CERTIFICATE OF SERVICE

I certify that on this 19th day of April, 2000, a copy of the foregoing was sent by Federal Express to:

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John S. Reed, Esq., and Ridley M. Sandidge, Esq., Reed, Weitkamp, Schell, Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

This 19th day of April, 2000.

Richard C. Roberts

EXHIBIT "A"

UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC.
100 WEST PUTNAM AVENUE, GREENWICH, CONNECTICUT 06830

March 30, 2000

TO OUR CUSTOMERS:

As many of you may already know, on Tuesday, March 28, 2000, a Kentucky jury rendered a verdict against United States Tobacco and awarded $350 million to the plaintiff, Conwood Company, L.P., for its claims under federal antitrust laws. The verdict, as required by the antitrust laws, has been trebled, resulting in a total award of over $1 billion.

United States Tobacco believes strongly that our moist snuff marketing and promotion programs do not violate the antitrust laws and we have already begun the steps necessary to have the award overturned or reversed on appeal. We believe that United States Tobacco, Conwood and other companies in the moist snuff business compete in a highly competitive marketplace, and that the actions complained of by Conwood are nothing more than part of normal, lawful, competitive conduct. In light of the evidence of this presented at trial, we believe the award was completely unjustified.

As this process continues, we will continue to provide you with the same level of service, the same fine products, and the same fine programs that you have come to expect of us. We appreciate your continued support, and will provide you with additional information as it becomes available.

EXHIBIT "B"

UST

KENTUCKY JURY RENDERS VERDICT AGAINST U. S. TOBACCO CO. IN ANTITRUST CASE

GREENWICH. Conn.. March 29, 2000 – UST Inc. announced today that a Kentucky jury had rendered a verdict against its subsidiary, United States Tobacco Company, awarding $350 million in damages to Conwood Company, L.P., for its claims under federal antitrust laws that U. S. Tobacco had engaged in exclusionary and anticompetitive conduct in the marketing and promotion of moist smokeless tobacco products. The verdict, when entered as a judgment, will be subject to trebling under the federal antitrust laws.

"We are extremely disappointed by the jury's verdict. We believe that the plaintiff failed to prove its case under applicable law, especially in light of the voluminous evidence which clearly shows that U.S. Tobacco and Conwood compete in a highly competitive marketplace. We also believe that the size of the award was completely unjustified given the evidence presented at trial."

"We continue to believe that our conduct did not violate the antitrust laws and intend to take all steps to have the award overturned or reversed on appeal," stated Vincent A. Gierer, Jr., Chairman and Chief Executive Officer.

The Company intends to file motions with the Court in the next ten days to overturn the verdict by seeking a judgment as a matter of law or, in the alternative, a new trial. If the District Court fails to enter a judgment in the Company's favor as a matter of law or order a new trial, the Company intends to appeal the judgment to the Sixth Circuit Court of Appeals. The Company also has begun taking the steps to enable it to satisfy any bonding which may be required.

###

UST, through its subsidiaries, is a leading producer and marketer of moist smokeless tobacco products including Copenhagen, Copenhagen Long Cut, Skoal, Skoal Long Cut, Skoal Bandits, Rooster and Red Seal. Other consumer products marketed by UST subsidiaries include premium wines sold nationally through the Chateau Ste. Michelle, Columbia Crest and Villa Mt. Eden wineries as well as sparkling wine produced under the Domaine Ste. Michelle label and premium cigars including Don Tomás, Don Tomás Special Edition, Astral and Habano Primero.

###

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Return to UST News Index

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16dlii005496

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

PROPOSED ORDER FOR PERMANENT INJUNCTIVE RELIEF

Pursuant to 15 U.S.C. § 26, the Court orders that defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company Inc., United States Tobacco Manufacturing Company Inc. and UST Inc. and all persons acting in concert with defendants (collectively, "UST") shall be enjoined for a period of five (5) years as follows:

I. UST shall not:

(a) eliminate, remove, deface, alter, obscure or otherwise manipulate any competitor's smokeless tobacco products, vending systems, counter displays or other advertising (including, but not limited to, "point of sale" advertising such as "header cards"), except with the prior written consent of the relevant competitor, such consent not to be unreasonably withheld.

(b) induce, influence, materially cause or seek to cause any other persons, by agreement, through financial incentives, misrepresentations or otherwise to remove, deface, alter or otherwise

adversely affect the placement or selection of any competitor's smokeless tobacco products, vending systems, counter displays or other advertising (including but not limited to "point of sale" advertising such as "header cards").

II. UST shall be required to appoint a three-person Committee of its board of directors to be comprised of independent (non-employee) persons with plenary power to monitor and to enforce (with the approval of the Court) compliance with the Order. This Committee shall appoint independent counsel to assist in its efforts. The Committee shall be appointed by the UST board of directors within thirty (30) days after the date of the entry of this Order. UST shall:

(a) within thirty (30) days after the date of entry of this Order, provide a copy of this Order to each distributor and retailer that purchases or sells UST products in the United States;

(b) within thirty (30) days after the date of entry of this Order, and annually thereafter for a period of five (5) years, provide a copy of this Order to each UST employee responsible for or involved in sales, marketing or pricing of smokeless tobacco products in the United States, and cause each such employee to participate in a training program designed to ensure compliance with this Order and to submit a signed statement certifying that the employee has read, understands, and will comply with the provisions of this Order;

(c) within sixty (60) days after the entry of this Order, submit a written report to the Court and counsel for Conwood describing the procedures taken and to be taken by UST and the Compliance Committee to ensure compliance with all provisions of this Order, including the requirements of this Paragraph relating to compliance;

16diii005498

(d) maintain and preserve documentation sufficient to demonstrate UST's compliance with this Order for a period of five (5) years after the date of entry hereof, and upon such reasonable notice and upon a showing of good cause, make such documentation available during such period for inspection and copying by the Court and/or by counsel for Conwood;

(e) annually for a period of five (5) years after the date of entry of this Order, submit a written report to the Court and counsel for Conwood describing the manner in which UST has complied with all provisions of this Order and certifying that UST is in compliance with all provisions of this Order.

UST shall bear all costs and expenses incurred in complying with the terms of this Order, including but not limited to, reasonable fees and expenses for those serving on the Committee required to be appointed under Part II hereof and for those designated by such Committee to assist in carrying out its duties, including but not limited to, reasonable attorneys' fees and expenses for the independent counsel whose appointment is contemplated by the terms of this Order.

Any party may seek modification of this Order, at any time, by written motion and for good cause based on changed circumstances or otherwise.

This Order is based on 15 U.S.C. § 26, the accompanying Memorandum in Support of Plaintiffs' Motion for Permanent Injunctive Relief, the jury verdict, the trial record, the pleadings and files in this matter, and upon such other evidence or argument as may be presented at a hearing on this motion.

16diii005499

This Court shall retain jurisdiction to enforce this Order. This Order will be enforceable against all defendants in this lawsuit, and any and all other persons, affiliated or acting in concert with those persons. In the event that any part of this Order is violated by any of the named defendants or other persons, the plaintiff may, by motion with notice to the attorneys for the defendants, apply for sanctions or other relief that may be appropriate.

SO ORDERED

_____

HONORABLE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

Dated this ___ day of April, 2000.

16diii005500

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES AND COSTS

Plaintiffs Conwood Company, L.P. and Conwood Sales Company, L.P. ("Conwood") respectfully move the Court for an award of attorneys' fees and costs pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15(a) and Fed. R. Civ. P. 54(d). A federal jury has determined that Conwood suffered antitrust injury and damages by reason of unlawful monopolization and attempted monopolization of the moist snuff market by defendants United States Tobacco Company, United States Tobacco Sales and Marketing Company, Inc., United States Tobacco Manufacturing Company, Inc., and UST, Inc. (collectively, "UST"). See Verdict Form (Mar. 28, 2000). As such, Conwood has been "injured in [its] business or property by reason of [conduct] forbidden in the antitrust laws," and is

entitled to recover "the cost of suit, including a reasonable attorney's fee" under the Clayton Act. 15 U.S.C. § 15(a).

In aggregate, plaintiffs request $19,170,652.86 in fees and costs.[1] In support of this Motion, plaintiffs rely on the accompanying Memorandum in Support and exhibits, including the Declarations of Mark C. Hansen, Richard C. Roberts, Robert E. Craddock, Jr., David L. Simpson; all pleadings, files and records in this action; material that may be judicially noticed by this Court; the presentations and arguments of counsel, if any; and other such matters that the Court may properly consider.

A proposed order is attached.

---

[1]This amount does not include costs covered by Plaintiffs' Bill of Costs which is being filed concurrently with this Motion. This amount also does not include fees and expenses for performed but as-yet unbilled work. Likewise, it does not include fees and expenses associated with future work on post-trial motions or any appeal. Accordingly, plaintiffs anticipate filing a supplemental motion for additional fees and expenses at a later date.

16diii005502

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts

Richard C. Roberts
Whitlow, Roberts,
Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

/s/ Mark Hansen
by Richard C. Roberts

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Neil M. Gorsuch
Steven F. Benz
Benjamin A. Powell
Michael J. Guzman
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
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(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

April 19, 2000.

16diii005503

CERTIFICATE OF SERVICE

I certify that, on this 19th day of April, 2000, a copy of the foregoing was sent via overnight delivery to:

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Richard C. Roberts

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STEVEN F. BENZ

NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD
EVAN T. LEO

April 24, 2000

Via Federal Express

Jeffrey A. Apperson, Clerk
United States District Court
Western District of Kentucky
450 Snyder U.S. Courthouse
601 W. Broadway
Paducah, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98CV-108-R

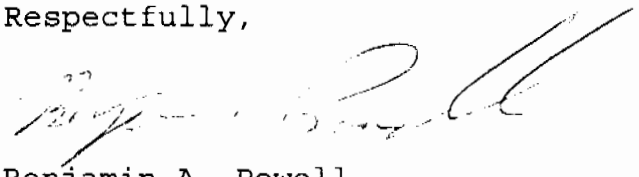
Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Plaintiffs' Opposition to Motion for Post-Verdict Juror Interviews.

I have also enclosed an additional copy. I would be grateful if you would date-stamp and return this copy in the self-addressed, stamped envelope provided.

Many thanks for your assistance.

Respectfully,



Benjamin A. Powell

Enclosure

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 APR 25 A10:10 FILED U.S. DISTRICT COURT CLERK WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R JURY TRIAL DEMANDED

PLAINTIFFS' OPPOSITION TO MOTION FOR POST-VERDICT JUROR INTERVIEWS

It is settled that the "integrity of jury proceedings must not be jeopardized by unauthorized invasions." Remmer v. United States 347 U.S. 227, 229 (1954). Jury deliberations are kept secret for good reasons: "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." Tanner v. United States, 483 U.S. 107, 120 (1987).[1]

[1] For these reasons jurors cannot be asked to testify about the deliberations that led to their verdict. "Federal Rule of Evidence 606(b) recognizes the necessity of limiting inquiry into a jury's decisions, as it prohibits post-verdict testimony about intra-jury influences such as allegedly occurred here." United States v. Holloway, No. 98-5175, 1998 WL 833767, at 5 (6th Cir. Nov. 19, 1998) (Exh. C hereto) (Table decision reported at 166 F.3d 1215) (affirming district court refusal to permit post-verdict interviews based on specific allegations of juror misconduct). These policies are also embodied in LR 47.1, which

As the Eastern District of Kentucky explained:

> [I]t is a 'cardinal principle' of our legal system that the deliberations of the jury shall remain private and secret in every case. . . . This rule of the privacy of jury deliberations, in conjunction with the rules that jurors shall not impeach their verdicts and that their arguments and votes in the jury room are privileged, furthers the laudable policies of the law that jurors should be free in their deliberations to discuss the case frankly and without fear, that the jurors should not be subjected to harassment after their discharge, and that there should be an end to litigation.

Pessin v. Keeneland Ass'n, 298 F. Supp. 593, 596 (E.D. Ky. 1969)(citation omitted).

The Court has discretion to permit the intrusion of post-verdict interviews based on a particularized showing of improper outside influence, McCoy v. Goldston, 652 F.2d 654, 657 (6th Cir. 1981), or -- in very limited circumstances -- to clarify a mistake in the amount of the verdict announced, McCullough v. Consolidated Rail Corp., 937 F.2d 1167, 1172 (6th Cir. 1991). But, where defendants "simply [seek] to inquire as to the reasons for the verdict," there is no valid basis for interviews. Wilkerson v. Johnson, 699 F.2d 325, 330 (6th Cir. 1983).

Defendants candidly admit they seek to inquire into the reasons for the verdict. They make no claim of any improper outside influence, or any mistake in the reported verdict. They claim only that they need a "better understanding" of what led the jury to decide as it did. "This is not a proper subject of inquiry." Id.

---

flatly prohibits post-verdict interviews without leave of the Court.

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Defendants point to *no* court that has authorized post-verdict interviews based on the supposed need to probe jury decisionmaking in order to make public disclosure under the securities laws, to notify "insurers and sureties," or to identify which evidence the jury found most persuasive with respect to their anticompetitive business practices. Motion at 2. Were any of these valid reasons for breaching the "cardinal principle" of jury secrecy, post-verdict interviews would be the norm in all cases involving verdicts against corporate defendants. But the law is to the contrary; the jurors' thought processes and deliberations are off-limits. Wilkerson, 699 F.2d at 330.

In addition, defendants' proffered reasons make no sense. They cite to no provision of the securities laws that requires them to obtain and disclose the mental impressions of jurors; they do not identify any information about the deliberations that they are required to provide to the unidentified insurers and sureties; and they are not entitled to debrief jurors on their reactions to the extensive evidentiary record that was before them. The Court has before it plaintiffs' motion for permanent injunctive relief. The Court -- not the results of juror interviews -- will determine whether defendants may carry out their defiant post-trial vow to continue without change all of their anticompetitive practices. See UST Press Release, Mar. 29, 2000 (verdict "was completely unjustified given the evidence presented. . . . [O]ur conduct did not violate the antitrust

16diii005508

laws") (Exh. A hereto); UST Letter to Our Customers, Mar. 30, 2000 ("[T]he actions complained of by Conwood are nothing more than part of normal, lawful, competitive conduct. . . . We will continue to provide you with the same level of service, the same fine products and the same fine programs that you have come to expect of us.") (Exh. B hereto).

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts
Whitlow, Roberts,
Houston & Straub
Old National Bank Building
300 Broadway
P.O. Box 995
Paducah, KY 42002-0995

Mark C. Hansen
Neil M. Gorsuch
Benjamin A. Powell
Michael J. Guzman
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005

Counsel for Plaintiffs

April 24, 2000

16diii005509

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

Upon consideration of defendants' Motion for Post-Verdict Juror Interviews, plaintiffs' opposition thereto, any reply, and for good cause shown, said motion is hereby DENIED.

SO ORDERED,

HONORABLE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

Dated this ___ day of _____, 2000.

CERTIFICATE OF SERVICE

I certify that, on this 24th day of April, 2000, a copy of the foregoing was sent by Federal Express to:

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher
& Flom, L.L.P.
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New York, New York 10036

John S. Reed
Ridley M. Sandidge
Reed Weitkamp Schell Cox & Vice
2400 Citizens Plaza
Louisville, KY 40202

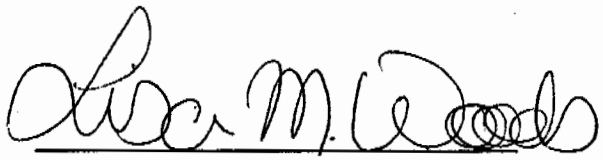

EXHIBIT A

UST

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"We are extremely disappointed by the jury's verdict. We believe that the plaintiff failed to prove its case under applicable law, especially in light of the voluminous evidence which clearly shows that U.S. Tobacco and Conwood compete in a highly competitive marketplace. We also believe that the size of the award was completely unjustified given the evidence presented at trial."

"We continue to believe that our conduct did not violate the antitrust laws and intend to take all steps to have the award overturned or reversed on appeal," stated Vincent A. Gierer, Jr., Chairman and Chief Executive Officer.

The Company intends to file motions with the Court in the next ten days to overturn the verdict by seeking a judgment as a matter of law or, in the alternative, a new trial. If the District Court fails to enter a judgment in the Company's favor as a matter of law or order a new trial, the Company intends to appeal the judgment to the Sixth Circuit Court of Appeals. The Company also has begun taking the steps to enable it to satisfy any bonding which may be required.

# # #

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###

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16diii005513

UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC.
100 WEST PUTNAM AVENUE, GREENWICH, CONNECTICUT 06830

March 30, 2000

TO OUR CUSTOMERS:

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As this process continues, we will continue to provide you with the same level of service, the same fine products, and the same fine programs that you have come to expect of us. We appreciate your continued support, and will provide you with additional information as it becomes available.

EXHIBIT C

Copr. © West 2000 No Claim to Orig. U.S. Govt. Works

166 F.3d 1215 (Table)
Unpublished Disposition

(Cite as: 166 F.3d 1215, 1998 WL 833767 (6th Cir.(Tenn.)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the publication and citation of unpublished opinions.)

UNITED STATES of America, Plaintiff-Appellee,
v.
Timothy Lynn HOLLOWAY, Defendant-Appellant.

No. 98-5175.

United States Court of Appeals,
Sixth Circuit.

Nov. 19, 1998.

On Appeal from the United States District Court for the Middle District of Tennessee.

Before KENNEDY and BOGGS, Circuit Judges; and WEBER, [FN*] District Judge.

FN* The Honorable Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

PER CURIAM.

**1 Timothy Lynn Holloway appeals his conviction on four federal drug and firearm offenses: conspiracy to distribute methamphetamine, use of a firearm during and in relation to drug trafficking, and two counts of conspiracy to attempt to possess methamphetamine with intent to distribute. The district court sentenced Holloway to a term of 360 months on the drug counts, and a consecutive term of 60 months on the firearm count, for a total of 420 months. Holloway challenges his conviction and sentence, presenting eleven issues for review. We affirm his conviction, but vacate his sentence and remand for further consideration of the amount of drugs for which Holloway was responsible.

I

For the second time this year, Timothy Lynn Holloway appeals a federal conviction to this court. See United States v. Holloway, 142 F.3d 437, No. 96-6344, 1998 WL 109987 (6th Cir. Mar.4, 1998) (unpublished) (affirming Holloway's conviction on federal firearms charges). The instant appeal stems from Holloway's involvement in a methamphetamine ("meth") distribution ring. From 1992 to January 1996, Paul Tula, a resident of La Puente, California, shipped meth via United Parcel Service to Earl and Peggy Frye of Macon County, Tennessee. Tula and Robert Carney concealed the meth in plastic clocks and shipped it to the Frye residence and to other locations designated by Earl Frye. The government estimates that the Fryes imported into Tennessee at least 135 pounds of meth over four years.

Holloway participated in the Fryes' drug ring, receiving packages at Brooks Used Cars in Lebanon, Tennessee. Although the defense challenges this assumption, as we discuss in Part III, infra, the government estimates that Holloway received 120 pounds of meth over fifteen months. On July 19, 1994, a UPS package sent to Tula by Holloway "broke open," revealing $21,000 in cash. UPS apparently returned the money to Holloway. In August 1995, the government seized two shipments to Brooks Used Cars that contained a total of 4 .87 pounds of meth.

In November 1996, the Grand Jury in the Middle District of Tennessee indicted seven people, including Holloway, on seventeen conspiracy, drug, firearm, and forfeiture counts. [FN1] Over the next ten months, the government filed two superseding indictments, removing a recently-deceased co-defendant, Earl Frye, and adding three co-defendants, Ronnie Dixon, Morris Parks, and Paul Tula. In the second superseding indictment, which had twenty counts, five counts implicated Holloway: count one, for conspiracy to distribute one or more kilogram of

meth, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(A); count two, for use and possession of a firearm, as that term is defined in 18 U.S.C. § 921(a)(3), during and in relation to the drug trafficking crime of count one, in violation of 18 U.S.C. § 924(c)(1) and (2); count fourteen, attempt to possess with intent to distribute meth, in violation of 21 U.S.C. § 841(a)(1); count fifteen, attempt to possess with intent to distribute meth, in violation of 21 U.S.C. § 841(a)(1); and count sixteen, a forfeiture provision relating to count one, under 21 U.S.C. § 853.

FN1. In addition to Holloway, the Grand Jury indicted Earl and Peggy Frye, Steve Nicely, John "Jack" William Parks, Robert Carney, and Mike Mingle.

**2 Holloway pled not guilty and was tried by a jury along with co- defendants Peggy Frye, Steve Nicely, John "Jack" William Parks, Robert Carney, Morris Parks, and Ronnie Dixon. A month-long trial resulted in Holloway's conviction on all five counts. [FN2] The district court denied Holloway's motion for a new trial, and it sentenced Holloway to 420 months in prison. Holloway was already serving time for the unrelated 1996 firearms conviction, and he now faces a murder trial for his involvement in the slaying of Denise Rogers, a prospective witness in the meth trial.

FN2. The jury acquitted Steve Nicely, Morris Parks, Ronnie Dixon, and Robert Carney on all counts. The jury acquitted Peggy Frye and John "Jack" William Parks on some counts and convicted them on others. The jury did not acquit Holloway on any counts.

II

Holloway seeks review of eleven issues. We have carefully studied the record and the partie arguments, and we believe that seven of his contentions do not merit discussion. We affirm the district court's disposition of the following claims: (1) that the government improperly withheld the names of confidential informants; (2) that a search warrant for Holloway's home was invalid; (3) that the district court erred in admitting evidence of Holloway's threats to witnesses; (4) that the district court should not have applied an obstruction of justice sentencing enhancement for Holloway's threats to witnesses; (5) that pre-indictment delay by the government unfairly prejudiced Holloway's defense; (6) that the district court erroneously permitted John Dalton Harris to testify; and (7) that the district court should have followed the Tenth Circuit's vacated decision in United States v. Singleton, 144 F.3d 1343 (10th Cir.1998), vacated and reh'g en banc granted, 144 F.3d 1343 (10th Cir. July 10, 1998), and found that the prosecution improperly offered leniency to cooperating accomplices. We will focus on Holloway's remaining four contentions, turning first to three challenges to his conviction.

A

Holloway believes that the district court erroneously failed to suppress evidence obtained through the interception of wire communications. In order to investigate the meth ring, the government applied for and received permission to install wiretaps on Earl and Peggy Frye's two residential telephone lines. FBI Special Agent Harcum submitted an affidavit to establish the necessity of relying on wiretaps. Holloway did not challenge the wiretaps below; he now relies on a motion by his co-defendant, Peggy Frye, who unsuccessfully challenged the validity of the wiretap application and order, and moved to suppress evidence resulting from the taps. [FN3] The district court denied the motion because Frye offered no proof for her many allegations. Holloway claims that Special Agent Harcum misled the district court in his affidavit, and that the application did not establish "necessity" because other investigative techniques could have acquired the information sought by wiretap. He supports these contentions with selective excerpts from Harcum's affidavit.

FN3. On appeal, Holloway contends that he may properly appeal the denial of Frye's motion, and he refers to an ambiguous September 30, 1997 bench ruling by the district court that, "Everybody can have the benefit of everybody's motions." In context, this ruling responded to the request of co-defendant Dixon, who was first indicted in a superseding indictment and thus could not participate in the filing or arguing of motions that preceded the superseding indictment. By contrast, Holloway was indicted in the original indictment, and he does

not explain why he could not have filed a separate motion challenging the wiretap affidavit. For this appeal, however, we will assume that Holloway may also benefit from this ruling.

"In considering a district court's denial of a motion to suppress, we review its conclusions of law and application of the law to the facts, such as its finding of probable cause, de novo." United States v. Kincaide, 145 F.3d 771, 779 (6th Cir.1998) (citation omitted). We review for clear error the district court's findings of fact, and will uphold the denial of the motion if any grounds support the district court's decision. See, e.g., United States v. Pasquarille, 20 F.3d 682, 685 (6th Cir.), cert. denied, 513 U.S. 986, 115 S.Ct. 481, 130 L.Ed.2d 394 (1994); cf. United States v. Alfano, 838 F.2d 158, 162 (6th Cir.1988) ("Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination.") (quoting United States v. Leon, 468 U.S. 897, 914 (1984) (quoting Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969))).

**3 The district court properly denied Frye's unsupported motion to suppress the evidence, and Holloway's appeal does not offer any new reason to revisit the suppression. The wiretap law

> [does] not require that the police officials exhaust every conceivable non- wiretap investigative technique. All that is required is that the investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate.

United States v. Lambert, 771 F.2d 83, 91 (6th Cir.), cert. denied, 474 U.S. 1034 (1985); see also Alfano, 838 F.2d at 163 (quoting Lambert). Harcum's affidavit reflects serious consideration. Harcum's affidavit devotes a section to other investigative techniques, mentioning the shortcomings that accompany each (the section has the appropriate title, "Exhaustion of Other Investigative Methods"). The limitations on other techniques ranged from the conspirators' counter-surveillance techniques to the insularity of the Frye drug ring. (Trial testimony and seized evidence gave post hoc corroboration of the reality of these limitations: Harcum testified that one informant refused to serve undercover, and law enforcement agents recovered sophisticated counter-surveillance devices from Holloway's home). Holloway's excerpts show only that other investigative techniques had provided valuable information; the excerpts do not establish that the other techniques would suffice for the purposes the wiretap was meant to serve. The district court did not err, and we uphold its decision not to suppress the evidence that resulted from the wiretaps. [FN4]

> FN4. While we uphold the validity of the application for the warrant, we observe in passing that the good faith exception recognized in United States v. Leon, 468 U.S. 897, 923-25 (1984), may also apply to evidence obtained by wiretap. See, e.g., United States v. Moore, 41 F.3d 370, 376 (8th Cir.1994) (applying Leon good faith exception to evidence acquired by wiretap), cert. denied, 514 U.S. 1121, 115 S.Ct. 1985, 131 L.Ed.2d 872 (1995); cf. United States v. Baranek, 903 F.2d 1068, 1071- 72 (6th Cir.1990) (recognizing that Congress intended federal wiretap law to incorporate Fourth Amendment evidence suppression doctrines). Were the affidavit technically invalid, the evidence may have properly been received under the good faith exception to the exclusionary rule.

B

We next examine Holloway's argument that a witness's answer required the granting of a mistrial. During the government's case-in-chief, Larry Campbell took the stand. Prosecutor Wendy Goggin questioned him, eliciting background information for a short time until the judge halted questioning after one of Campbell's answers. Through a series of questions, Goggin had Campbell identify himself and his occupation; she next established that Campbell was serving a six-year state sentence for vehicular homicide. Goggin then asked a series of questions about Campbell's car accident, culminating in the following exchange:

Q: Where were you going?
A: I was going to a funeral.
Q: Whose funeral.
A: It was my dad's.
Q: Okay. And you were involved in an accident?

A: Yes, ma'am.
Q: And people in the other car were killed?
A: Were killed, yes.
Q: And why, sir, were you charged with vehicular homicide?
A: Because I was intoxicated with methamphetamine.
Q: Okay, sir.
Mr. Drake [Holloway's trial counsel]: Your Honor, may we approach the bench?
[Questioning ends].

At the bench conference, the attorneys and judge recognized the prejudice to the co-defendants, including Holloway, because prior testimony implied that Holloway sold meth to Campbell. The jury might blame Holloway for causing the car accident and resulting deaths, which were not at issue in Holloway's trial. The judge first reacted by saying, "I'm going to excuse this witness, and he's not going to say another word unless you all want to cross-examine him." Defense counsel declined to cross-examine, and the judge continued: "I'm going to excuse him right now. You are not going to put any more proof on by this witness. I'm going to have to declare a mistrial. This is inexcusable." The judge then excused the jury for the day, asking them to return the next morning.

**4 The next morning, the judge held a hearing, where Goggin denied purposefully eliciting Campbell's use of meth. She contended that she discussed the vehicular homicide conviction to defuse it and to preempt a withering cross-examination by the co-defendants. The government also observed that nineteen witnesses had testified about their meth use and that defense counsel had cross-examined three witnesses about the witnesses' use of meth while driving. No attorney objected to the elicitation of testimony that three witnesses had driven while intoxicated with meth, although no other witness testified to causing harm while intoxicated, much less to causing death.

The judge denied the motion for a mistrial, finding the prejudice insufficient and ameliorated with a curative instruction:

I've had the ... court reporter read the witness's testimony back to me. You were in error, Mr. Drake [Holloway's trial counsel]. There were no questions asked of this witness about any Defendant, including Mr. Holloway, about their use of methamphetamine or from this witness about any knowledge that he had of any of the Defendants.
This happened very early on in the testimony. It was for that reason that yesterday afternoon I felt that any prejudice or prejudicial inference that might be drawn from the testimony was cured by the termination of his testimony at that point. I'm still of that opinion.
I intend, however, to give the Jury an instruction that they are to totally disregard and diffuse [sic] their mind of Mr. [Campbell's] testimony.
And I'll hear you if you have any further suggestions as to what the admonishment to the Jury should contain.

When the jury entered, the judge immediately issued a curative instruction, twice questioning the jury to ensure that they could disregard Campbell's testimony.

This court reviews a denial of a mistrial for abuse of discretion. See, e.g., United States v. Chambers, 944 F.2d 1253, 1263 (6th Cir.1991) (discussing standard of review), cert. denied, 502 U.S. 1112, 112 S.Ct. 1217, 117 L.Ed.2d 455 (1992). Appellate review focuses on the fairness to the defendant, but it affords a strong presumption that prompt curative instructions and striking of testimony will ameliorate any harm. See ibid. (quoting United States v. Greene, 400 F.2d 847, 848 (6th Cir.1968)). [FN5] Chambers involved a trial for conspiracy to distribute cocaine; the Chambers court upheld the district court's denial of a mistrial despite thirty minutes of testimony from a witness who later recanted (outside the presence of the jury). See ibid. Chambers held that the curative instruction issued the next day avoided undue prejudice, especially given other evidence of the defendant's involvement in the conspiracy. Here, too, ample evidence existed of Holloway's involvement, so it seems unlikely that a jury would convict Holloway merely to punish him for (perhaps) supplying meth to a man who killed two people while driving. Also, Holloway's co-defendants' counsel established--without objection--that Holloway had sold drugs to people who then drove under the influence. Granted, the district court raised Holloway's hopes one day and dashed them the next. The judge implied, however, that a night of reflection convinced him of the rashness of the impulse to declare a mistrial, and that a curative instruction would solve the problem. Here, this did not constitute an abuse of discretion.

FN5. Holloway cites United States v.

Solivan, 937 F.2d 1146, 1157 (6th Cir.1991), for the proposition that curative instructions must issue within twenty minutes, and that, by implication, the night's delay in Holloway's case resulted in undue prejudice. Solivan involved a prosecutor's direct statements to the jury in closing argument, asking for a conviction of drug defendants to send a message to other drug dealers and impliedly to support the war on drugs. The court found that the dilatory curative instruction did not solve the extreme prejudice. Hollway did not face similar prejudice.

C

**5 Holloway's final challenge to his conviction relies on allegations that jurors discussed the case prior to deliberations, and that the district court therefore erred in denying his co-defendant Peggy Frye's motion to conduct post-verdict interrogation of the jurors. [FN6] Frye's motion relied on the report of a self-styled "private investigator" who interviewed at least three jurors one month after the verdict. Apparently, an acquitted co-defendant hired the investigator to approach the jurors. The investigator offered three brief, unsworn "reports" based on his November 1997 meetings with three jurors at their Nashville residences. The reports, filed with the motion, allege that two jurors said that the jurors "compared notes" during the trial, one juror said that the jurors discussed issues during the trial, and one juror said she saw Holloway outside the courtroom in a prison uniform and handcuffs. Holloway emphasizes that the trial included several co-defendants and twenty counts. The jury returned its verdict in "only a few hours," according to the defendant, who believes that the investigative reports and the quick decision, combined with the allegation of a sighting of him in handcuffs and prison clothing, merit a remand for post-verdict interviews.

FN6. See note 3 supra. Holloway's trial counsel made an oral motion to "poll or interview" the jurors, which the court denied, ruling that it would only consider written motions. Trial counsel said he would file a written motion, but apparently did not do so.

The district court did not abuse its discretion in denying the motion for post-verdict interrogation. Cf. United States v. Franks, 511 F.2d 25, 38 (6th Cir.) (applying this standard of review), cert. denied, 422 U.S. 1042 (1975); cf. also United States v. Bertoli, 40 F.3d 1384, 1394 (3d Cir.1994) ("[I]ntra-jury communications pose a less serious threat to a defendant's right to an impartial trial than do extra-jury influences, and therefore district courts are entitled to even greater deference in their responses to them than in responses to outside influences."). Local Rule 12(h) of the United States District Court for the Middle District of Tennessee requires parties or their representatives to gain court approval to conduct post-verdict interrogations of jurors, a condition clearly violated here when the acquitted co-defendant had an agent approach jurors without permission from the district court. Rewarding this conduct by opening an investigation offers a gaping loophole in the requirement of judicial approval of post-verdict interrogation, greatly encouraging future unsanctioned post-verdict interrogations. We will not lightly permit circumvention of a district court's authority to maintain the integrity of its trials. Federal Rule of Evidence 606(b) recognizes the necessity of limiting inquiry into a jury's decisions, as it prohibits post-verdict juror testimony about intra-jury influences such as allegedly occurred here. See, e.g., Tanner v. United States, 483 U.S. 107, 117-25, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); United States v. Resko, 3 F.3d 684, 695 n. 9 (3d Cir.1993), cert. denied, 510 U.S. 1205, 114 S.Ct. 1326, 127 L.Ed.2d 674 (1994).

Further, Holloway and his co-defendants did not produce the investigator for questioning concerning his qualifications, reasons for investigating (especially in the absence of judicial approval), method of investigation, or whether he interviewed other jurors and did not include their reports. There is no evidence that the jurors discussed anything that was not properly introduced at trial, and no juror report contends that any juror's mind was changed based on the discussions or on the sight of the handcuffed Holloway in an elevator outside the courtroom. [FN7] While Holloway directs our attention to United States v. Resko, that court explicitly distinguished its situation from those akin to the present one. In Resko, every juror admitted to participating in pre-deliberation discussions; the deliberations came to light when a juror--not a party--approached the judge; and the judge learned of the improper deliberations before the jury returned its

verdict. Even with these factors, the Resko court admitted that it faced a "difficult case" before it vacated the conviction and ordered a new trial. Resko limited its holding to instances where "unequivocal" evidence of misconduct arises mid-trial, see id. at 694, and it noted the increased practical and doctrinal problems that militate against post-verdict investigation of intra-jury discussions. See id. at 693 n. 5, 694-95, 695 n. 9.

> FN7. This circuit requires defendants to show prejudice when they allege that jurors saw them in restraints. See, e.g., United States v. Barger, 931 F.2d 359, 371 (6th Cir.1991). Barger also distinguishes between the prejudice that arises from extraordinary security procedures and routine procedures (such as the handcuffs on Holloway, who, apart from his drug and firearm charges, was also a murder suspect), and between the prejudice from shackles worn in the courtroom and those worn outside the courtroom (as here). See ibid.

**6 Granted, the district court here did not call the jurors for requestioning, but the defendants' weak proffer of misconduct did not merit the burden of reconvening a dismissed jury. See id. at 694-95 (distinguishing investigations into intra-jury deliberations that are uncovered mid-trial and those that are revealed post-verdict). As for the duration of the deliberations, we note that the outcome was as consistent with clarity of the evidence as it was with pre-deliberation consultations, and we decline to recognize the implications of Holloway's argument and enforce a minimum time limit for deliberation. [FN8]

> FN8. Presumably, the minimum time limit would vary depending on the number of co-defendants, the tally of different issues, and the complexity of each issue. This subject seems ill suited for judicial micromanagement.

Finding no merit to Holloway's challenges to his conviction, we turn to Holloway's sentence.

III

The district court sentenced Holloway to 360 months in prison on the drug counts. On appeal, Holloway argues that the trial court erred in concluding that all the methamphetamine at issue in this case was d-methamphetamine, which receives harsh treatment under the Sentencing Guidelines. However, he never objected to this finding at sentencing. A defendant may not raise objections to his sentence for the first time on appeal; objections that are not raised at the sentencing hearing are deemed waived. See United States v. Cullens, 67 F.3d 123, 124 (6th Cir.1995); United States v. Nagi, 947 F.2d 211, 213 (6th Cir.1991), cert. denied, 504 U.S. 958 (1992).

Second, Holloway contends that the trial court erred in charging him, for sentencing purposes, with responsibility for over 30 kilograms of methamphetamine. [FN9] This finding relates to Holloway's eligibility to be sentenced under U.S.S.G. § 2D1.1, which states that "30 KG or more of Methamphetamine" requires a base offense level of 38. U.S.S.G. § 2D1.1(c)(1) (1995). The district court enhanced this offense level by two for obstruction of justice, resulting in an overall offense level of 40. Holloway's previous crimes qualified him for criminal history category IV, resulting in a Guideline sentencing range of imprisonment for 360 months to life. [FN10]

> FN9. The district court and presentence investigation report applied the 1995 Guidelines rather than the 1997 Guidelines; the report explains that, because meth guidelines became more punitive in 1997, this approach avoided ex post facto problems.

> FN10. In his written objections to the presentence report, Holloway argued that he deserved a base offense level of 36; at sentencing and on appeal, Holloway seeks a lower base offense level. Section 2D1.1(c)(2) provides for a base offense level of 36 for quantities of 10 kilograms to less than 30 kilograms of meth, § 2D1.1(c)(3) gives a base level of 34 for a range of 3 kilograms to less than 10 kilograms of meth, and § 2D1.1(c)(4) requires a base level of 32 for a range of 1 kilogram to less than 3 kilograms. Adding the obstruction of justice enhancement results in offense levels of 38 (324-405 months at criminal history category IV), 36 (262-327 months

at criminal history category IV), and 34 (210-262 months at criminal history category IV), respectively.

At sentencing, the district court adopted the findings and conclusions of a presentence investigation report, which estimated the quantity of drugs for which Holloway was responsible. Courts properly may rely on approximations of drug quantities. A sentencing court may properly estimate quantities of drugs for a specified period and multiply by the length of time a defendant participated in a conspiracy, for example. See, e.g., United States v. Elder, 90 F.3d 1110, 1126 (6th Cir.1996), cert. denied, 519 U.S. 1131, 117 S.Ct. 993, 136 L.Ed.2d 873 (1997); see also U.S.S.G. § 2D1.1 n. 12 ("Where ... the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance."). When precise measurement of the drugs is impossible, as in this case, the sentencing court must approximate the amount charged to defendants. See United States v. Jennings, 83 F.3d 145, 150 (6th Cir.1996). The district court may sentence the defendant based upon quantities of drugs attributable to other members of a conspiracy, provided the court finds that those quantities were known to defendant or were reasonably foreseeable to him. See ibid. "A court may hold a defendant responsible for an amount of drugs only if the court finds that it is more likely than not that the defendant actually was responsible for at least that amount." United States v. Ward, 68 F.3d 146, 149 (6th Cir.1995), cert. denied, 516 U.S. 1151, 116 S.Ct. 1028, 134 L.Ed.2d 106 (1996). Here, however, the report only relied on shipments of methamphetamine made to Holloway--not to the other conspirators--for the purposes of determining his base offense level. The report, and the government, repeatedly emphasized that its approximation represented a conservative estimate of the quantity of the drugs received by Holloway, and that this figure did not attribute to Holloway the receipt of shipments by co-conspirators.

**7 We review the court's approximation of the amount of drugs involved to determine if its estimate is clearly erroneous--that is, if it is unsupported by competent evidence in the record. See Jennings, 83 F.3d at 149. The authorities recovered two packages of drugs shipped to Holloway by UPS--one totaling 894.5 grams of methamphetamine, the other containing 1,321 grams. Incomplete UPS records indicate that Holloway received at least ten other shipments at the Brooks salvage yard from February 24, 1995 to August 29, 1995--i.e., approximately two shipments per month. The UPS driver who delivered packages on the Brooks route testified that he had delivered similar packages to that address for "a year" of the fifteen-month conspiracy.

The report estimated the applicable quantity of drugs at 120 pounds, or 51 kilograms. This was based on an estimate of receipt by Holloway of a 2-pound package of drugs once a week for fifteen months. At the sentencing hearing, Holloway's counsel objected to the report's use of a fifteen-month time frame. No "reasoning" for this estimate was provided in the report, which was summarily cited as authority for the district court's sentencing decision. The district court did not elaborate, stating that, "The Court will adopt the factual findings and guideline applications in the presentence report."

While the Sentencing Guidelines permit the estimation of the quantity of drugs, the court and presentence report must base the approximation on verifiable evidence. See, e.g., United States v. Milledge, 109 F.3d 312, 316 (6th Cir.1997). The report--summarily adopted by the court--made two assumptions that do not appear to have any support in the record: it assumed shipments to the Brooks salvage yard for fifteen months, despite the UPS driver's testimony that he had only worked the route for one year; and the report assumed weekly, rather than bimonthly shipments. As a panel of this court noted in United States v. Baro, 15 F.3d 563 (6th Cir.), cert. denied, 513 U.S. 912, 115 S.Ct. 285, 130 L.Ed.2d 201 (1994):

> The district court, without making any factual findings to support the one- kilogram increase, sentenced Danilo and Ramon Baro according to the fifty- kilogram calculation.
>
> In doing so, the district court failed to err on the side of caution. Especially where, as here, the district court's determination of the quantity of cocaine involved results in a two-level increase in the base offense level, the sentencing judge may not, without further findings, simply sentence a defendant based on conjecture. In reaching this conclusion, which increased the defendants' potential term of incarceration by at least forty-seven months, the district court failed to identify the evidence on which it relied to find both defendants responsible for the increased amount or to address testimony in the record that Dupont traveled to Miami during this period for legitimate reasons. Thus, we must remand.

Id. at 569. In United States v. Gaitan-Acevedo, 148 F.3d 577, 593 (6th Cir.), cert. denied, --- U.S. ----, 119 S.Ct. 256, 142 L.Ed.2d 210 (1998), we re-emphasized the importance of relying on findings, rather than conjecture.

**8 We believe this result may have been merely a short-cut by the district court, which could have supported the 30-kilogram figure in several ways. When it revisits this issue, the court is at liberty to consider other evidence in the record. Whatever its rationale, and whatever the support in the record, the district court must explain its reasoning and source of findings in order for an appellate court to review sentencing decisions. See United States v. Tucker, 90 F.3d 1135, 1145 (6th Cir.1996) (remanding for resentencing to ensure "an adequate record for appellate review of the evidence used to calculate [a defendant's] sentence"). The district court did not cite to the record; instead, it adopted a presentence report containing two assumptions that are not supported by the record, one of which (the UPS driver's tenure) appears to be contradicted by testimony. While a district court may adopt a presentence investigation report's findings, it must explain why it does so when the defendant raises specific objections to the report's method of estimating drug quantities. Cf. United States v.. Vargas, 16 F.3d 155, 159 (7th Cir.1994) (remanding for resentencing when a defendant objected to a presentence report's finding concerning restitution, and the district court did not discuss the objection or the specific section of the presentence report). We thus remand for either a re-estimation of the quantity of drugs attributable to Holloway, or for an explanation of the legitimacy of the present approximation.

IV

We have considered Holloway's eleven claims and we AFFIRM his conviction. We VACATE his sentence and REMAND for further proceedings in light of this opinion.

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COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

'00 APR 25 A10:10

FILED
U.S. DISTRICT COURT
WESTN. DIST. KENTUCKY

Civil Action No. 5:98CV-108-R

JURY TRIAL DEMANDED

PLAINTIFFS' OPPOSITION TO MOTION FOR POST-VERDICT JUROR INTERVIEWS

It is settled that the "integrity of jury proceedings must not be jeopardized by unauthorized invasions." Remmer v. United States 347 U.S. 227, 229 (1954). Jury deliberations are kept secret for good reasons: "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of postverdict scrutiny of juror conduct." Tanner v. United States, 483 U.S. 107, 120 (1987).[1]

[1] For these reasons jurors cannot be asked to testify about the deliberations that led to their verdict. "Federal Rule of Evidence 606(b) recognizes the necessity of limiting inquiry into a jury's decisions, as it prohibits post-verdict testimony about intra-jury influences such as allegedly occurred here." United States v. Holloway, No. 98-5175, 1998 WL 833767, at 5 (6th Cir. Nov. 19, 1998) (Exh. C hereto) (Table decision reported at 166 F.3d 1215) (affirming district court refusal to permit post-verdict interviews based on specific allegations of juror misconduct). These policies are also embodied in LR 47.1, which

As the Eastern District of Kentucky explained:

> [I]t is a 'cardinal principle' of our legal system that the deliberations of the jury shall remain private and secret in every case. . . . This rule of the privacy of jury deliberations, in conjunction with the rules that jurors shall not impeach their verdicts and that their arguments and votes in the jury room are privileged, furthers the laudable policies of the law that jurors should be free in their deliberations to discuss the case frankly and without fear, that the jurors should not be subjected to harassment after their discharge, and that there should be an end to litigation.

Pessin v. Keeneland Ass'n, 298 F. Supp. 593, 596 (E.D. Ky. 1969)(citation omitted).

The Court has discretion to permit the intrusion of post-verdict interviews based on a particularized showing of improper outside influence, McCoy v. Goldston, 652 F.2d 654, 657 (6th Cir. 1981), or -- in very limited circumstances -- to clarify a mistake in the amount of the verdict announced, McCullough v. Consolidated Rail Corp., 937 F.2d 1167, 1172 (6th Cir. 1991). But, where defendants "simply [seek] to inquire as to the reasons for the verdict," there is no valid basis for interviews. Wilkerson v. Johnson, 699 F.2d 325, 330 (6th Cir. 1983).

Defendants candidly admit they seek to inquire into the reasons for the verdict. They make no claim of any improper outside influence, or any mistake in the reported verdict. They claim only that they need a "better understanding" of what led the jury to decide as it did. "This is not a proper subject of inquiry." Id.

---

flatly prohibits post-verdict interviews without leave of the Court.

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Defendants point to *no* court that has authorized post-verdict interviews based on the supposed need to probe jury decisionmaking in order to make public disclosure under the securities laws, to notify "insurers and sureties," or to identify which evidence the jury found most persuasive with respect to their anticompetitive business practices. Motion at 2. Were any of these valid reasons for breaching the "cardinal principle" of jury secrecy, post-verdict interviews would be the norm in all cases involving verdicts against corporate defendants. But the law is to the contrary; the jurors' thought processes and deliberations are off-limits. Wilkerson, 699 F.2d at 330.

In addition, defendants' proffered reasons make no sense. They cite to no provision of the securities laws that requires them to obtain and disclose the mental impressions of jurors; they do not identify any information about the deliberations that they are required to provide to the unidentified insurers and sureties; and they are not entitled to debrief jurors on their reactions to the extensive evidentiary record that was before them. The Court has before it plaintiffs' motion for permanent injunctive relief. The Court -- not the results of juror interviews -- will determine whether defendants may carry out their defiant post-trial vow to continue without change all of their anticompetitive practices. See UST Press Release, Mar. 29, 2000 (verdict "was completely unjustified given the evidence presented. . . . [O]ur conduct did not violate the antitrust

laws") (Exh. A hereto); UST Letter to Our Customers, Mar. 30, 2000 ("[T]he actions complained of by Conwood are nothing more than part of normal, lawful, competitive conduct. . . . We will continue to provide you with the same level of service, the same fine products and the same fine programs that you have come to expect of us.") (Exh. B hereto).

Respectfully submitted,

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Counsel for Plaintiffs

April 24, 2000

16diii005527

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

Upon consideration of defendants' Motion for Post-Verdict Juror Interviews, plaintiffs' opposition thereto, any reply, and for good cause shown, said motion is hereby DENIED.

SO ORDERED,

HONORABLE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

Dated this ___ day of _____, 2000.

CERTIFICATE OF SERVICE

I certify that, on this 24th day of April, 2000, a copy of the foregoing was sent by Federal Express to:

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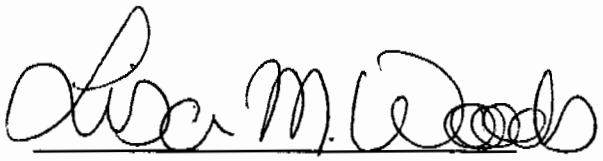

EXHIBIT A

UST

KENTUCKY JURY RENDERS VERDICT AGAINST U. S. TOBACCO CO. IN ANTITRUST CASE

GREENWICH, Conn., March 29, 2000 – UST Inc. announced today that a Kentucky jury had rendered a verdict against its subsidiary, United States Tobacco Company, awarding $350 million in damages to Conwood Company, L.P., for its claims under federal antitrust laws that U. S. Tobacco had engaged in exclusionary and anticompetitive conduct in the marketing and promotion of moist smokeless tobacco products. The verdict, when entered as a judgment, will be subject to trebling under the federal antitrust laws.

"We are extremely disappointed by the jury's verdict. We believe that the plaintiff failed to prove its case under applicable law, especially in light of the voluminous evidence which clearly shows that U.S. Tobacco and Conwood compete in a highly competitive marketplace. We also believe that the size of the award was completely unjustified given the evidence presented at trial."

"We continue to believe that our conduct did not violate the antitrust laws and intend to take all steps to have the award overturned or reversed on appeal," stated Vincent A. Gierer, Jr., Chairman and Chief Executive Officer.

The Company intends to file motions with the Court in the next ten days to overturn the verdict by seeking a judgment as a matter of law or, in the alternative, a new trial. If the District Court fails to enter a judgment in the Company's favor as a matter of law or order a new trial, the Company intends to appeal the judgment to the Sixth Circuit Court of Appeals. The Company also has begun taking the steps to enable it to satisfy any bonding which may be required.

# # #

UST, through its subsidiaries, is a leading producer and marketer of moist smokeless tobacco products including Copenhagen, Copenhagen Long Cut, Skoal, Skoal Long Cut, Skoal Bandits, Rooster and Red Seal. Other consumer products marketed by UST subsidiaries include premium wines sold nationally through the Chateau Ste. Michelle, Columbia Crest and Villa Mt. Eden wineries as well as sparkling wine produced under the Domaine Ste. Michelle label and premium cigars including Don Tomás, Don Tomás Special Edition, Astral and Habano Primero.

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EXHIBIT B

UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC.
100 WEST PUTNAM AVENUE, GREENWICH, CONNECTICUT 06830

March 30, 2000

TO OUR CUSTOMERS:

As many of you may already know, on Tuesday, March 28, 2000, a Kentucky jury rendered a verdict against United States Tobacco and awarded $350 million to the plaintiff, Conwood Company, L.P., for its claims under federal antitrust laws. The verdict, as required by the antitrust laws, has been trebled, resulting in a total award of over $1 billion.

United States Tobacco believes strongly that our moist snuff marketing and promotion programs do not violate the antitrust laws and we have already begun the steps necessary to have the award overturned or reversed on appeal. We believe that United States Tobacco, Conwood and other companies in the moist snuff business compete in a highly competitive marketplace, and that the actions complained of by Conwood are nothing more than part of normal, lawful, competitive conduct. In light of the evidence of this presented at trial, we believe the award was completely unjustified.

As this process continues, we will continue to provide you with the same level of service, the same fine products, and the same fine programs that you have come to expect of us. We appreciate your continued support, and will provide you with additional information as it becomes available.

EXHIBIT C

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166 F.3d 1215 (Table)
Unpublished Disposition

(Cite as: 166 F.3d 1215, 1998 WL 833767 (6th Cir.(Tenn.)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the publication and citation of unpublished opinions.)

UNITED STATES of America, Plaintiff-Appellee,
v.
Timothy Lynn HOLLOWAY, Defendant-Appellant.

No. 98-5175.

United States Court of Appeals,
Sixth Circuit.

Nov. 19, 1998.

On Appeal from the United States District Court for the Middle District of Tennessee.

Before KENNEDY and BOGGS, Circuit Judges; and WEBER, [FN*] District Judge.

FN* The Honorable Herman J. Weber, United States District Judge for the Southern District of Ohio, sitting by designation.

PER CURIAM.

**1 Timothy Lynn Holloway appeals his conviction on four federal drug and firearm offenses: conspiracy to distribute methamphetamine, use of a firearm during and in relation to drug trafficking, and two counts of conspiracy to attempt to possess methamphetamine with intent to distribute. The district court sentenced Holloway to a term of 360 months on the drug counts, and a consecutive term of 60 months on the firearm count, for a total of 420 months. Holloway challenges his conviction and sentence, presenting eleven issues for review. We affirm his conviction, but vacate his sentence and remand for further consideration of the amount of drugs for which Holloway was responsible.

I

For the second time this year, Timothy Lynn Holloway appeals a federal conviction to this court. See United States v. Holloway, 142 F.3d 437, No. 96-6344, 1998 WL 109987 (6th Cir. Mar.4, 1998) (unpublished) (affirming Holloway's conviction on federal firearms charges). The instant appeal stems from Holloway's involvement in a methamphetamine ("meth") distribution ring. From 1992 to January 1996, Paul Tula, a resident of La Puente, California, shipped meth via United Parcel Service to Earl and Peggy Frye of Macon County, Tennessee. Tula and Robert Carney concealed the meth in plastic clocks and shipped it to the Frye residence and to other locations designated by Earl Frye. The government estimates that the Fryes imported into Tennessee at least 135 pounds of meth over four years.

Holloway participated in the Fryes' drug ring, receiving packages at Brooks Used Cars in Lebanon, Tennessee. Although the defense challenges this assumption, as we discuss in Part III, infra, the government estimates that Holloway received 120 pounds of meth over fifteen months. On July 19, 1994, a UPS package sent to Tula by Holloway "broke open," revealing $21,000 in cash. UPS apparently returned the money to Holloway. In August 1995, the government seized two shipments to Brooks Used Cars that contained a total of 4 .87 pounds of meth.

In November 1996, the Grand Jury in the Middle District of Tennessee indicted seven people, including Holloway, on seventeen conspiracy, drug, firearm, and forfeiture counts. [FN1] Over the next ten months, the government filed two superseding indictments, removing a recently-deceased co-defendant, Earl Frye, and adding three co-defendants, Ronnie Dixon, Morris Parks, and Paul Tula. In the second superseding indictment, which had twenty counts, five counts implicated Holloway: count one, for conspiracy to distribute one or more kilogram of

meth, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(A); count two, for use and possession of a firearm, as that term is defined in 18 U.S.C. § 921(a)(3), during and in relation to the drug trafficking crime of count one, in violation of 18 U.S.C. § 924(c)(1) and (2); count fourteen, attempt to possess with intent to distribute meth, in violation of 21 U.S.C. § 841(a)(1); count fifteen, attempt to possess with intent to distribute meth, in violation of 21 U.S.C. § 841(a)(1); and count sixteen, a forfeiture provision relating to count one, under 21 U.S.C. § 853.

FN1. In addition to Holloway, the Grand Jury indicted Earl and Peggy Frye, Steve Nicely, John "Jack" William Parks, Robert Carney, and Mike Mingle.

**2 Holloway pled not guilty and was tried by a jury along with co- defendants Peggy Frye, Steve Nicely, John "Jack" William Parks, Robert Carney, Morris Parks, and Ronnie Dixon. A month-long trial resulted in Holloway's conviction on all five counts. [FN2] The district court denied Holloway's motion for a new trial, and it sentenced Holloway to 420 months in prison. Holloway was already serving time for the unrelated 1996 firearms conviction, and he now faces a murder trial for his involvement in the slaying of Denise Rogers, a prospective witness in the meth trial.

FN2. The jury acquitted Steve Nicely, Morris Parks, Ronnie Dixon, and Robert Carney on all counts. The jury acquitted Peggy Frye and John "Jack" William Parks on some counts and convicted them on others. The jury did not acquit Holloway on any counts.

II

Holloway seeks review of eleven issues. We have carefully studied the record and the partie arguments, and we believe that seven of his contentions do not merit discussion. We affirm the district court's disposition of the following claims: (1) that the government improperly withheld the names of confidential informants; (2) that a search warrant for Holloway's home was invalid; (3) that the district court erred in admitting evidence of Holloway's threats to witnesses; (4) that the district court should not have applied an obstruction of justice sentencing enhancement for Holloway's threats to witnesses; (5) that pre-indictment delay by the government unfairly prejudiced Holloway's defense; (6) that the district court erroneously permitted John Dalton Harris to testify; and (7) that the district court should have followed the Tenth Circuit's vacated decision in United States v. Singleton, 144 F.3d 1343 (10th Cir.1998), vacated and reh'g en banc granted, 144 F.3d 1343 (10th Cir. July 10, 1998), and found that the prosecution improperly offered leniency to cooperating accomplices. We will focus on Holloway's remaining four contentions, turning first to three challenges to his conviction.

A

Holloway believes that the district court erroneously failed to suppress evidence obtained through the interception of wire communications. In order to investigate the meth ring, the government applied for and received permission to install wiretaps on Earl and Peggy Frye's two residential telephone lines. FBI Special Agent Harcum submitted an affidavit to establish the necessity of relying on wiretaps. Holloway did not challenge the wiretaps below; he now relies on a motion by his co-defendant, Peggy Frye, who unsuccessfully challenged the validity of the wiretap application and order, and moved to suppress evidence resulting from the taps. [FN3] The district court denied the motion because Frye offered no proof for her many allegations. Holloway claims that Special Agent Harcum misled the district court in his affidavit, and that the application did not establish "necessity" because other investigative techniques could have acquired the information sought by wiretap. He supports these contentions with selective excerpts from Harcum's affidavit.

FN3. On appeal, Holloway contends that he may properly appeal the denial of Frye's motion, and he refers to an ambiguous September 30, 1997 bench ruling by the district court that, "Everybody can have the benefit of everybody's motions." In context, this ruling responded to the request of co-defendant Dixon, who was first indicted in a superseding indictment and thus could not participate in the filing or arguing of motions that preceded the superseding indictment. By contrast, Holloway was indicted in the original indictment, and he does

not explain why he could not have filed a separate motion challenging the wiretap affidavit. For this appeal, however, we will assume that Holloway may also benefit from this ruling.

"In considering a district court's denial of a motion to suppress, we review its conclusions of law and application of the law to the facts, such as its finding of probable cause, de novo." United States v. Kincaide, 145 F.3d 771, 779 (6th Cir.1998) (citation omitted). We review for clear error the district court's findings of fact, and will uphold the denial of the motion if any grounds support the district court's decision. See, e.g., United States v. Pasquarille, 20 F.3d 682, 685 (6th Cir.), cert. denied, 513 U.S. 986, 115 S.Ct. 481, 130 L.Ed.2d 394 (1994); cf. United States v. Alfano, 838 F.2d 158, 162 (6th Cir.1988) ("Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination.") (quoting United States v. Leon, 468 U.S. 897, 914 (1984) (quoting Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969))).

**3 The district court properly denied Frye's unsupported motion to suppress the evidence, and Holloway's appeal does not offer any new reason to revisit the suppression. The wiretap law

> [does] not require that the police officials exhaust every conceivable non- wiretap investigative technique. All that is required is that the investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate.

United States v. Lambert, 771 F.2d 83, 91 (6th Cir.), cert. denied, 474 U.S. 1034 (1985); see also Alfano, 838 F.2d at 163 (quoting Lambert). Harcum's affidavit reflects serious consideration. Harcum's affidavit devotes a section to other investigative techniques, mentioning the shortcomings that accompany each (the section has the appropriate title, "Exhaustion of Other Investigative Methods"). The limitations on other techniques ranged from the conspirators' counter-surveillance techniques to the insularity of the Frye drug ring. (Trial testimony and seized evidence gave post hoc corroboration of the reality of these limitations: Harcum testified that one informant refused to serve undercover, and law enforcement agents recovered sophisticated counter-surveillance devices from Holloway's home). Holloway's excerpts show only that other investigative techniques had provided valuable information; the excerpts do not establish that the other techniques would suffice for the purposes the wiretap was meant to serve. The district court did not err, and we uphold its decision not to suppress the evidence that resulted from the wiretaps. [FN4]

> FN4. While we uphold the validity of the application for the warrant, we observe in passing that the good faith exception recognized in United States v. Leon, 468 U.S. 897, 923-25 (1984), may also apply to evidence obtained by wiretap. See, e.g., United States v. Moore, 41 F.3d 370, 376 (8th Cir.1994) (applying Leon good faith exception to evidence acquired by wiretap), cert. denied, 514 U.S. 1121, 115 S.Ct. 1985, 131 L.Ed.2d 872 (1995); cf. United States v. Baranek, 903 F.2d 1068, 1071- 72 (6th Cir.1990) (recognizing that Congress intended federal wiretap law to incorporate Fourth Amendment evidence suppression doctrines). Were the affidavit technically invalid, the evidence may have properly been received under the good faith exception to the exclusionary rule.

B

We next examine Holloway's argument that a witness's answer required the granting of a mistrial. During the government's case-in-chief, Larry Campbell took the stand. Prosecutor Wendy Goggin questioned him, eliciting background information for a short time until the judge halted questioning after one of Campbell's answers. Through a series of questions, Goggin had Campbell identify himself and his occupation; she next established that Campbell was serving a six-year state sentence for vehicular homicide. Goggin then asked a series of questions about Campbell's car accident, culminating in the following exchange:

Q: Where were you going?
A: I was going to a funeral.
Q: Whose funeral.
A: It was my dad's.
Q: Okay. And you were involved in an accident?

A: Yes, ma'am.
Q: And people in the other car were killed?
A: Were killed, yes.
Q: And why, sir, were you charged with vehicular homicide?
A: Because I was intoxicated with methamphetamine.
Q: Okay, sir.
Mr. Drake [Holloway's trial counsel]: Your Honor, may we approach the bench?
[Questioning ends].

At the bench conference, the attorneys and judge recognized the prejudice to the co-defendants, including Holloway, because prior testimony implied that Holloway sold meth to Campbell. The jury might blame Holloway for causing the car accident and resulting deaths, which were not at issue in Holloway's trial. The judge first reacted by saying, "I'm going to excuse this witness, and he's not going to say another word unless you all want to cross-examine him." Defense counsel declined to cross-examine, and the judge continued: "I'm going to excuse him right now. You are not going to put any more proof on by this witness. I'm going to have to declare a mistrial. This is inexcusable." The judge then excused the jury for the day, asking them to return the next morning.

**4 The next morning, the judge held a hearing, where Goggin denied purposefully eliciting Campbell's use of meth. She contended that she discussed the vehicular homicide conviction to defuse it and to preempt a withering cross-examination by the co-defendants. The government also observed that nineteen witnesses had testified about their meth use and that defense counsel had cross-examined three witnesses about the witnesses' use of meth while driving. No attorney objected to the elicitation of testimony that three witnesses had driven while intoxicated with meth, although no other witness testified to causing harm while intoxicated, much less to causing death.

The judge denied the motion for a mistrial, finding the prejudice insufficient and ameliorated with a curative instruction:

I've had the ... court reporter read the witness's testimony back to me. You were in error, Mr. Drake [Holloway's trial counsel]. There were no questions asked of this witness about any Defendant, including Mr. Holloway, about their use of methamphetamine or from this witness about any knowledge that he had of any of the Defendants.
This happened very early on in the testimony. It was for that reason that yesterday afternoon I felt that any prejudice or prejudicial inference that might be drawn from the testimony was cured by the termination of his testimony at that point. I'm still of that opinion.
I intend, however, to give the Jury an instruction that they are to totally disregard and diffuse [sic] their mind of Mr. [Campbell's] testimony.
And I'll hear you if you have any further suggestions as to what the admonishment to the Jury should contain.

When the jury entered, the judge immediately issued a curative instruction, twice questioning the jury to ensure that they could disregard Campbell's testimony.

This court reviews a denial of a mistrial for abuse of discretion. See, e.g., United States v. Chambers, 944 F.2d 1253, 1263 (6th Cir.1991) (discussing standard of review), cert. denied, 502 U.S. 1112, 112 S.Ct. 1217, 117 L.Ed.2d 455 (1992). Appellate review focuses on the fairness to the defendant, but it affords a strong presumption that prompt curative instructions and striking of testimony will ameliorate any harm. See ibid. (quoting United States v. Greene, 400 F.2d 847, 848 (6th Cir.1968)). [FN5] Chambers involved a trial for conspiracy to distribute cocaine; the Chambers court upheld the district court's denial of a mistrial despite thirty minutes of testimony from a witness who later recanted (outside the presence of the jury). See ibid. Chambers held that the curative instruction issued the next day avoided undue prejudice, especially given other evidence of the defendant's involvement in the conspiracy. Here, too, ample evidence existed of Holloway's involvement, so it seems unlikely that a jury would convict Holloway merely to punish him for (perhaps) supplying meth to a man who killed two people while driving. Also, Holloway's co-defendants' counsel established--without objection--that Holloway had sold drugs to people who then drove under the influence. Granted, the district court raised Holloway's hopes one day and dashed them the next. The judge implied, however, that a night of reflection convinced him of the rashness of the impulse to declare a mistrial, and that a curative instruction would solve the problem. Here, this did not constitute an abuse of discretion.

FN5. Holloway cites United States v.

Solivan, 937 F.2d 1146, 1157 (6th Cir.1991), for the proposition that curative instructions must issue within twenty minutes, and that, by implication, the night's delay in Holloway's case resulted in undue prejudice. Solivan involved a prosecutor's direct statements to the jury in closing argument, asking for a conviction of drug defendants to send a message to other drug dealers and impliedly to support the war on drugs. The court found that the dilatory curative instruction did not solve the extreme prejudice. Hollway did not face similar prejudice.

C

**5 Holloway's final challenge to his conviction relies on allegations that jurors discussed the case prior to deliberations, and that the district court therefore erred in denying his co-defendant Peggy Frye's motion to conduct post-verdict interrogation of the jurors. [FN6] Frye's motion relied on the report of a self-styled "private investigator" who interviewed at least three jurors one month after the verdict. Apparently, an acquitted co-defendant hired the investigator to approach the jurors. The investigator offered three brief, unsworn "reports" based on his November 1997 meetings with three jurors at their Nashville residences. The reports, filed with the motion, allege that two jurors said that the jurors "compared notes" during the trial, one juror said that the jurors discussed issues during the trial, and one juror said she saw Holloway outside the courtroom in a prison uniform and handcuffs. Holloway emphasizes that the trial included several co-defendants and twenty counts. The jury returned its verdict in "only a few hours," according to the defendant, who believes that the investigative reports and the quick decision, combined with the allegation of a sighting of him in handcuffs and prison clothing, merit a remand for post-verdict interviews.

FN6. See note 3 supra. Holloway's trial counsel made an oral motion to "poll or interview" the jurors, which the court denied, ruling that it would only consider written motions. Trial counsel said he would file a written motion, but apparently did not do so.

The district court did not abuse its discretion in denying the motion for post-verdict interrogation. Cf. United States v. Franks, 511 F.2d 25, 38 (6th Cir.) (applying this standard of review), cert. denied, 422 U.S. 1042 (1975); cf. also United States v. Bertoli, 40 F.3d 1384, 1394 (3d Cir.1994) ("[I]ntra-jury communications pose a less serious threat to a defendant's right to an impartial trial than do extra-jury influences, and therefore district courts are entitled to even greater deference in their responses to them than in responses to outside influences."). Local Rule 12(h) of the United States District Court for the Middle District of Tennessee requires parties or their representatives to gain court approval to conduct post-verdict interrogations of jurors, a condition clearly violated here when the acquitted co-defendant had an agent approach jurors without permission from the district court. Rewarding this conduct by opening an investigation offers a gaping loophole in the requirement of judicial approval of post-verdict interrogation, greatly encouraging future unsanctioned post-verdict interrogations. We will not lightly permit circumvention of a district court's authority to maintain the integrity of its trials. Federal Rule of Evidence 606(b) recognizes the necessity of limiting inquiry into a jury's decisions, as it prohibits post-verdict juror testimony about intra-jury influences such as allegedly occurred here. See, e.g., Tanner v. United States, 483 U.S. 107, 117-25, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987); United States v. Resko, 3 F.3d 684, 695 n. 9 (3d Cir.1993), cert. denied, 510 U.S. 1205, 114 S.Ct. 1326, 127 L.Ed.2d 674 (1994).

Further, Holloway and his co-defendants did not produce the investigator for questioning concerning his qualifications, reasons for investigating (especially in the absence of judicial approval), method of investigation, or whether he interviewed other jurors and did not include their reports. There is no evidence that the jurors discussed anything that was not properly introduced at trial, and no juror report contends that any juror's mind was changed based on the discussions or on the sight of the handcuffed Holloway in an elevator outside the courtroom. [FN7] While Holloway directs our attention to United States v. Resko, that court explicitly distinguished its situation from those akin to the present one. In Resko, every juror admitted to participating in pre-deliberation discussions; the deliberations came to light when a juror--not a party--approached the judge; and the judge learned of the improper deliberations before the jury returned its

verdict. Even with these factors, the Resko court admitted that it faced a "difficult case" before it vacated the conviction and ordered a new trial. Resko limited its holding to instances where "unequivocal" evidence of misconduct arises mid-trial, see id. at 694, and it noted the increased practical and doctrinal problems that militate against post-verdict investigation of intra-jury discussions. See id. at 693 n. 5, 694-95, 695 n. 9.

> FN7. This circuit requires defendants to show prejudice when they allege that jurors saw them in restraints. See, e.g., United States v. Barger, 931 F.2d 359, 371 (6th Cir.1991). Barger also distinguishes between the prejudice that arises from extraordinary security procedures and routine procedures (such as the handcuffs on Holloway, who, apart from his drug and firearm charges, was also a murder suspect), and between the prejudice from shackles worn in the courtroom and those worn outside the courtroom (as here). See ibid.

**6 Granted, the district court here did not call the jurors for requestioning, but the defendants' weak proffer of misconduct did not merit the burden of reconvening a dismissed jury. See id. at 694-95 (distinguishing investigations into intra-jury deliberations that are uncovered mid-trial and those that are revealed post-verdict). As for the duration of the deliberations, we note that the outcome was as consistent with clarity of the evidence as it was with pre-deliberation consultations, and we decline to recognize the implications of Holloway's argument and enforce a minimum time limit for deliberation. [FN8]

> FN8. Presumably, the minimum time limit would vary depending on the number of co-defendants, the tally of different issues, and the complexity of each issue. This subject seems ill suited for judicial micromanagement.

Finding no merit to Holloway's challenges to his conviction, we turn to Holloway's sentence.

III

The district court sentenced Holloway to 360 months in prison on the drug counts. On appeal, Holloway argues that the trial court erred in concluding that all the methamphetamine at issue in this case was d-methamphetamine, which receives harsh treatment under the Sentencing Guidelines. However, he never objected to this finding at sentencing. A defendant may not raise objections to his sentence for the first time on appeal; objections that are not raised at the sentencing hearing are deemed waived. See United States v. Cullens, 67 F.3d 123, 124 (6th Cir.1995); United States v. Nagi, 947 F.2d 211, 213 (6th Cir.1991), cert. denied, 504 U.S. 958 (1992).

Second, Holloway contends that the trial court erred in charging him, for sentencing purposes, with responsibility for over 30 kilograms of methamphetamine. [FN9] This finding relates to Holloway's eligibility to be sentenced under U.S.S.G. § 2D1.1, which states that "30 KG or more of Methamphetamine" requires a base offense level of 38. U.S.S.G. § 2D1.1(c)(1) (1995). The district court enhanced this offense level by two for obstruction of justice, resulting in an overall offense level of 40. Holloway's previous crimes qualified him for criminal history category IV, resulting in a Guideline sentencing range of imprisonment for 360 months to life. [FN10]

> FN9. The district court and presentence investigation report applied the 1995 Guidelines rather than the 1997 Guidelines; the report explains that, because meth guidelines became more punitive in 1997, this approach avoided ex post facto problems.

> FN10. In his written objections to the presentence report, Holloway argued that he deserved a base offense level of 36; at sentencing and on appeal, Holloway seeks a lower base offense level. Section 2D1.1(c)(2) provides for a base offense level of 36 for quantities of 10 kilograms to less than 30 kilograms of meth, § 2D1.1(c)(3) gives a base level of 34 for a range of 3 kilograms to less than 10 kilograms of meth, and § 2D1.1(c)(4) requires a base level of 32 for a range of 1 kilogram to less than 3 kilograms. Adding the obstruction of justice enhancement results in offense levels of 38 (324-405 months at criminal history category IV), 36 (262-327 months

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at criminal history category IV), and 34 (210-262 months at criminal history category IV), respectively.

At sentencing, the district court adopted the findings and conclusions of a presentence investigation report, which estimated the quantity of drugs for which Holloway was responsible. Courts properly may rely on approximations of drug quantities. A sentencing court may properly estimate quantities of drugs for a specified period and multiply by the length of time a defendant participated in a conspiracy, for example. See, e.g., United States v. Elder, 90 F.3d 1110, 1126 (6th Cir.1996), cert. denied, 519 U.S. 1131, 117 S.Ct. 993, 136 L.Ed.2d 873 (1997); see also U.S.S.G. § 2D1.1 n. 12 ("Where ... the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance."). When precise measurement of the drugs is impossible, as in this case, the sentencing court must approximate the amount charged to defendants. See United States v. Jennings, 83 F.3d 145, 150 (6th Cir.1996). The district court may sentence the defendant based upon quantities of drugs attributable to other members of a conspiracy, provided the court finds that those quantities were known to defendant or were reasonably foreseeable to him. See ibid. "A court may hold a defendant responsible for an amount of drugs only if the court finds that it is more likely than not that the defendant actually was responsible for at least that amount." United States v. Ward, 68 F.3d 146, 149 (6th Cir.1995), cert. denied, 516 U.S. 1151, 116 S.Ct. 1028, 134 L.Ed.2d 106 (1996). Here, however, the report only relied on shipments of methamphetamine made to Holloway--not to the other conspirators--for the purposes of determining his base offense level. The report, and the government, repeatedly emphasized that its approximation represented a conservative estimate of the quantity of the drugs received by Holloway, and that this figure did not attribute to Holloway the receipt of shipments by co-conspirators.

**7 We review the court's approximation of the amount of drugs involved to determine if its estimate is clearly erroneous--that is, if it is unsupported by competent evidence in the record. See Jennings, 83 F.3d at 149. The authorities recovered two packages of drugs shipped to Holloway by UPS--one totaling 894.5 grams of methamphetamine, the other containing 1,321 grams. Incomplete UPS records indicate that Holloway received at least ten other shipments at the Brooks salvage yard from February 24, 1995 to August 29, 1995--i.e., approximately two shipments per month. The UPS driver who delivered packages on the Brooks route testified that he had delivered similar packages to that address for "a year" of the fifteen-month conspiracy.

The report estimated the applicable quantity of drugs at 120 pounds, or 51 kilograms. This was based on an estimate of receipt by Holloway of a 2-pound package of drugs once a week for fifteen months. At the sentencing hearing, Holloway's counsel objected to the report's use of a fifteen-month time frame. No "reasoning" for this estimate was provided in the report, which was summarily cited as authority for the district court's sentencing decision. The district court did not elaborate, stating that, "The Court will adopt the factual findings and guideline applications in the presentence report."

While the Sentencing Guidelines permit the estimation of the quantity of drugs, the court and presentence report must base the approximation on verifiable evidence. See, e.g., United States v. Milledge, 109 F.3d 312, 316 (6th Cir.1997). The report--summarily adopted by the court--made two assumptions that do not appear to have any support in the record: it assumed shipments to the Brooks salvage yard for fifteen months, despite the UPS driver's testimony that he had only worked the route for one year; and the report assumed weekly, rather than bimonthly shipments. As a panel of this court noted in United States v. Baro, 15 F.3d 563 (6th Cir.), cert. denied, 513 U.S. 912, 115 S.Ct. 285, 130 L.Ed.2d 201 (1994):

> The district court, without making any factual findings to support the one- kilogram increase, sentenced Danilo and Ramon Baro according to the fifty- kilogram calculation.
>
> In doing so, the district court failed to err on the side of caution. Especially where, as here, the district court's determination of the quantity of cocaine involved results in a two-level increase in the base offense level, the sentencing judge may not, without further findings, simply sentence a defendant based on conjecture. In reaching this conclusion, which increased the defendants' potential term of incarceration by at least forty-seven months, the district court failed to identify the evidence on which it relied to find both defendants responsible for the increased amount or to address testimony in the record that Dupont traveled to Miami during this period for legitimate reasons. Thus, we must remand.

Id. at 569. In United States v. Gaitan-Acevedo, 148 F.3d 577, 593 (6th Cir.), cert. denied, --- U.S. ----, 119 S.Ct. 256, 142 L.Ed.2d 210 (1998), we re-emphasized the importance of relying on findings, rather than conjecture.

**8 We believe this result may have been merely a short-cut by the district court, which could have supported the 30-kilogram figure in several ways. When it revisits this issue, the court is at liberty to consider other evidence in the record. Whatever its rationale, and whatever the support in the record, the district court must explain its reasoning and source of findings in order for an appellate court to review sentencing decisions. See United States v. Tucker, 90 F.3d 1135, 1145 (6th Cir.1996) (remanding for resentencing to ensure "an adequate record for appellate review of the evidence used to calculate [a defendant's] sentence"). The district court did not cite to the record; instead, it adopted a presentence report containing two assumptions that are not supported by the record, one of which (the UPS driver's tenure) appears to be contradicted by testimony. While a district court may adopt a presentence investigation report's findings, it must explain why it does so when the defendant raises specific objections to the report's method of estimating drug quantities. Cf. United States v.. Vargas, 16 F.3d 155, 159 (7th Cir.1994) (remanding for resentencing when a defendant objected to a presentence report's finding concerning restitution, and the district court did not discuss the objection or the specific section of the presentence report). We thus remand for either a re-estimation of the quantity of drugs attributable to Holloway, or for an explanation of the legitimacy of the present approximation.

IV

We have considered Holloway's eleven claims and we AFFIRM his conviction. We VACATE his sentence and REMAND for further proceedings in light of this opinion.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'00 MAY -1 A8:46

FILED
U.S. DISTRICT COURT
W.D. DIST. KENTUCKY

MOTION OF PLAINTIFFS FOR LEAVE TO FILE MEMORANDUM IN EXCESS OF FORTY PAGES

Pursuant to LR 7.1(d), plaintiffs seek leave to file Plaintiffs' Consolidated Opposition to Motions For Judgment as a Matter of Law, New Trial or Reduced Damages. The memorandum is in excess of the forty-page limit because additional pages are necessary to enable plaintiffs to address fully and to set forth adequately the law and facts in reply to Defendants' Memorandum in Support of Defendants' Motion for A New Trial, Or, In the Alternative, A Reduced Damages Award.

A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

/s/

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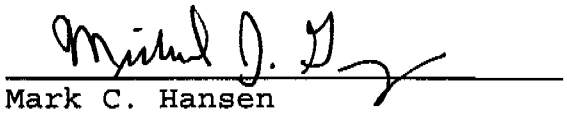

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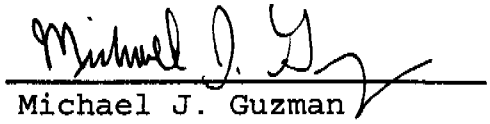
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on this 30th day of April, 2000, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., Four Times Square, New York, NY 10036.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.



Michael J. Guzman

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

Plaintiffs having moved the Court for leave to file their Plaintiffs' Consolidated Opposition to Motions For Judgment as a Matter of Law, New Trial or Reduced Damages in excess of forty pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that plaintiffs' motion is hereby granted and the Clerk is instructed to file the memorandum tendered by the plaintiffs with their motion for leave.

Entered this ___ day of May, 2000.

THOMAS B. RUSSELL, JUDGE
UNITED STATES DISTRICT COURT

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 MAY -1 A8:46 U.S. DISTRICT COURT WESTN. DIST. KENTUCKY Civil Action No. 5:98CV-108-R

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Respectfully submitted,

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CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

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Michael J. Guzman

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UNITED STATES DISTRICT COURT

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CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

Civil Action No.
5:98CV-108-R

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IT IS HEREBY ORDERED that plaintiffs' motion is hereby granted and the Clerk is instructed to file the memorandum tendered by the plaintiffs with their motion for leave.

Entered this 1 day of May, 2000.

THOMAS B. RUSSELL, JUDGE
UNITED STATES DISTRICT COURT

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BY DEPUTY CLERK

16diii005549

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COURTNEY SIMMONS ELWOOD
EVAN T. LEO

April 30, 2000

Honorable Thomas B. Russell
United States District Court
Western District of Kentucky
307 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed are courtesy copies of (i) Plaintiffs' Consolidated Opposition to Motions For Judgment as a Matter of Law, New Trial or Reduced Damages, and (ii) Motion of Plaintiffs For Leave to File Memorandum in Excess of Forty Pages, both of which have been filed with the Clerk.

Respectfully,

Neil M. Gorsuch

Enclosure

cc: Neal R. Stoll, Esq.
John S. Reed, Esq.

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May 1, 2000

Honorable James D. Moyer
208 Snyder U.S. Courthouse
601 W. Broadway
Louisville, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Magistrate Judge Moyer:

Enclosed are courtesy copies of (i) Plaintiffs' Consolidated Opposition to Motions For Judgment as a Matter of Law, New Trial or Reduced Damages, and (ii) Motion of Plaintiffs For Leave to File Memorandum in Excess of Forty Pages, both of which have been filed with the Clerk.

Respectfully,

Neil M. Gorsuch

Enclosure

cc: Neal R. Stoll, Esq.
John S. Reed, Esq.

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SEAN A. LEV
COURTNEY SIMMONS ELWOOD
EVAN T. LEO

April 30, 2000

Via Hand Delivery

Jeffery A. Apperson
Clerk of the Court
322 Federal Building
501 Broadway
Paducah, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Plaintiffs' Consolidated Opposition to Motions For Judgment as a Matter of Law, New Trial or Reduced Damages and the Motion of Plaintiffs For Leave to File Memorandum in Excess of Forty Pages.

I have also enclosed an additional copy of each. Please date stamp and return these copies in the attached self-addressed, postage pre-paid envelope.

Thank you for your attention to this matter.

Respectfully,

Neil Gorsuch

Neil M. Gorsuch

Enclosures

SUREWAY WORLDWIDE
A CONSOLIDATED DELIVERY AND LOGISTICS COMPANY

2500 Oakville Street, Alexandria, VA 22301
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SHIPPER'S RECEIPT

SHIPPER'S RECEIPT

SUREWAY WORLDWIDE
A SCHNEIDER DELIVERY AND LOGISTICS COMPANY

2500 Oakville Street, Alexandria, VA 22301
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1-800-237-0271

SERVICE REQUEST FORM

BILL TO ACCT #

DCA E 675817

AIRBILL PACKAGE TRACKING NUMBER

DATE 4/30/00 ☐ COLLECT ☐ PREPAID ☐ 3rd PARTY

DECLARED VALUE

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FROM

SERVICE AUTHORIZED BY (TEL #)
B. Murphy 202-326-7947

SHIPPER
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TO

CONSIGNEE
Clerk of Court

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Jeffry A Apperson 502-443-1357

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Received by SUREWAY WORLDWIDE DATE TIME
Thomas C. Dalton 4-30-00 5 PM

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F200-11/98

SHIPPER'S RECEIPT

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CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

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Defendants.

'00 MAY -1 P3:04

Civil Action No.
5:98CV-108-R

PLAINTIFFS' CONSOLIDATED OPPOSITION TO MOTIONS FOR JUDGMENT AS A MATTER OF LAW, NEW TRIAL, AND REDUCED DAMAGES

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Introduction

Defendants (collectively, "UST") argue for almost 100 pages that the Court should ignore the verdict of the properly instructed jury and enter judgment for them as a matter of law. Alternatively, they ask the Court to order a new trial, or reduce the damages award to the low end of the range supported by the evidence (and perhaps even lower based on supposed adjustments defendants failed to argue to the jury). In virtually all respects, however, defendants simply repeat old arguments. These arguments, supported (or not) by the very same cases, all were urged on the Court in support of their successive motions for summary judgment and for directed verdict, or in motions *in limine*. The Court's rulings on those points are law of the case, and need not be reconsidered absent significant new facts, change in law, or a showing of clear error -- none of which UST even attempts to demonstrate. (Point I).

Motion for Judgment as a Matter of Law. Defendants have no serious quarrel with the Court's instructions to the jury; they effectively concede that the jury decided the case on the proper legal standards. Nor can they plausibly argue -- although they do -- that there was a lack of evidence to support the jury's verdict on each element of the causes of action. There *is* ample evidence that UST possessed monopoly power in the U.S. moist snuff market, engaged in exclusionary conduct, and thereby harmed competition and Conwood.

While UST disagrees with this evidence and suggests that there was some contrary evidence, it makes no meaningful effort to grapple with the actual trial record, which fully supported the jury's verdict. UST's submission that the evidence compels judgment for defendants as a matter of law repeats word-for-word claims made to and rejected by the Court on summary judgment, on a far less extensive factual record. UST gives the Court no persuasive reason to reverse its prior rulings, which in any event are plainly correct. (Point II).

Motion for New Trial. While UST makes perfunctory arguments that the verdict was against the weight of the evidence and that the damages were "excessive" by some undefined measure, it principally (re)argues that the Court was wrong to deny summary judgment, wrong to deny some of its motions *in limine*, and wrong in failing to sustain evidentiary objections that in many instances UST did not even make. But it is UST that is wrong -- wrong to demand endless reconsideration of the same arguments. UST makes no showing that any of the Court's rulings constitutes error, much less error that deprived it of a fair trial. (Point III).

Motion for Reduced Damages. Finally, after deriding Dr. Leftwich's study in numerous pre-trial, trial, and post-trial motions, UST closes with a demand for a reduced damages award based on the low end of the range established by his analysis. It asks the Court to override the jury's determination of damages

in the middle of that range -- a reasonable conclusion supported by a wealth of independent evidence from other witnesses, including UST witnesses. That amount, UST argues, should be further reduced based on adjustments that it chose not to present to the jury, and that are unsupported by any evidence. UST elected to offer no damages testimony, other than testimony that Conwood had suffered no damages. UST cannot now credibly complain that the jury failed to weigh evidence UST decided not to present, or that the jury was required by law to award only the low end of the range supported by the evidence. (Point IV).

UST simply refuses to acknowledge that an attentive jury listened carefully for a month to all of the evidence and argument that the parties could muster. It refuses to acknowledge that the jury considered the demeanor and credibility of dozens of witnesses as well as hundreds of documents offered by both sides. It refuses to acknowledge that the jury reached a considered and reasonable judgment based on indisputably proper legal instructions and fully supported by the evidence. UST received a fair trial. Its post-trial motions should be denied.

I. THE COURT'S PRIOR RULINGS CONSTITUTE LAW OF THE CASE THAT UST HAS OFFERED NO REASON TO RECONSIDER

As the attached chart (Attachment "A") demonstrates, the Court has previously ruled on virtually every one of UST's post-trial arguments, which were previously made in the same words and based on the same proffered authority. UST seeks to relitigate issues already fully briefed, considered, and decided by the

Court on summary judgment or on directed verdict (twice), or *in limine* before and during trial.[1]

The Court does not have to entertain such rote repetition. "Under the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation." United States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994). The rule is based on "the sound public policy that litigation be decided and then put to an end." In re United States Steel Corp., 479 F.2d 489, 494 (6th Cir. 1973). See also Hanover Ins. Co. v. American Eng'g Co., 105 F.3d 306, 310 (6th Cir. 1997) (refusing appeal on defendant's motion for judgment as a matter of law after trial because it had heard and decided the *same* legal issues pressed by the *same* defendant in an interlocutory appeal concerning its summary judgment motion).

The law of the case does not prevent the Court from reconsidering its prior rulings. But "to maintain consistency and avoid reconsideration of matters once decided during the

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[1]Indeed, UST's brief in support of its motion for judgment as a matter of law ("JMOL") tracks its summary judgment memorandum virtually page for page. For example, on UST's "ordinary" business practice defense, compare UST JMOL Mem. at 17-33 with UST Summ. J. Mem. at 25-33; UST Directed Verdict Mem. at 2-5. On its argument that tortious conduct cannot be exclusionary, compare UST JMOL Mem. at 33-37 with UST Summ. J. Mem. at 34-37; UST Directed Verdict Mem. at 5-6. On harm to competition, compare UST JMOL Mem. at 37-41 with UST Summ. J. Mem. at 38-40. On harm to Conwood, compare UST JMOL Mem. at 42-50 with UST Summ. J. Mem. at 40-50; UST Directed Verdict Mem. at 7-8. On the claim that damages are "speculative," compare UST JMOL Mem. at 50-60 with UST Summ. J. Mem. at 46-48.

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course of a single continuing lawsuit," 18 Charles Alan Wright et al., Federal Practice and Procedure § 4478, at 788 (1981 & 1999 Supp.), once an issue is decided, it is typically reopened "only in limited circumstances." United States ex. rel. Stevens v. McGinnis, Inc., No. C-1-93-442, 1996 U.S. Dist. LEXIS 22122, at *19-*20 (S.D. Ohio Feb. 16, 1996). "The major grounds that justify reconsideration involve an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Cale v. Johnson, 861 F.2d 943, 947 (6th Cir. 1988) (citation omitted).

None of these circumstances remotely applies here. The evidence at trial was by no means "substantially different" from the summary judgment record. It was stronger and more extensive. There has been no change of controlling law. And UST does not (and cannot credibly) claim that any of the Court's rulings was clearly erroneous or manifestly unjust. Accordingly, UST has provided no basis for what is, in substance, a motion for reconsideration of the Court's summary judgment and other rulings.

II. THE PROPERLY INSTRUCTED JURY'S VERDICT IS SUPPORTED BY THE EVIDENCE, AND UST'S CONTRARY ARGUMENTS FOR JUDGMENT AS A MATTER OF LAW ARE WITHOUT MERIT

It is settled that judgment as a matter of law should be granted only "cautiously and sparingly" since it negates a determination of the facts by the jury. 9A Charles Alan Wright et al., Federal Practice and Procedure § 2524, at 252 (2d ed. 1995). In considering a Rule 50(a) motion, a court must refrain

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from weighing the evidence or making credibility determinations. See Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55 (1990); Jackson v. Quanex Corp., 191 F.3d 647, 657 (6th Cir. 1999). The jury verdict must be respected unless "there is a complete absence of pleading or proof on an issue material to the cause of action or when no disputed issues of fact exist." Jackson, 191 F.3d at 657 (internal quotation marks omitted); see also Sawchik v. E.I. DuPont Denemours & Co., 783 F.2d 635, 636 (6th Cir. 1986). In considering a motion for judgment as a matter of law, moreover, the Court must consider the evidence in a light most favorable to the nonmovant, giving that party the benefit of all reasonable inferences. See Tuck v. HCA Health Servs. of Tennessee, Inc., 7 F.3d 465, 469 (6th Cir. 1993).[2]

Because UST concedes (with two trivial exceptions) that the Court's instructions to the jury were correct, the only issue is whether there was a "complete absence of proof" on any of the necessary elements of Conwood's Section 2 claim. Jackson, 191

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[2]Albani v. Southern Arizona Anesthesia Services, P.D., No. 91-588, 1997 WL 718499, at *1 (D. Ariz. Jan. 27, 1997), does not stand for the proposition that an antitrust verdict deserves heightened scrutiny under Rule 50. In upholding the attempted monopoly verdict, the court noted that the defendants' Rule 50 motion "fails to account for the reasonable inferences the jury could have taken, and asks that we ignore them as well." Id. at *2. The court in Albani did begin its analysis expressing "serious concerns with the jury's result" because the jury found no conspiracy, combination, or contract in restraint of trade, yet concluded that the same conduct constituted attempted monopoly. Id. at *1. No such split verdict exists here. Moreover, the Albani court found its reservations insufficient to grant judgment for the defendants under Rule 50.

F.3d at 657.[3] UST does not attempt to clear that high hurdle; nor could it. The trial record brims with evidence on each element. While UST focuses on the limited evidence that supported its arguments, its failure to address the extensive and inconvenient contrary proof is fatal to its motion.

A. The Jury's Finding That UST Had Monopoly Power in the U.S. Moist Snuff Market Was Supported by the Evidence

The jury was properly instructed on the applicable legal standard for assessing whether UST had monopoly power. Jury Instructions 2.1, 2.3.[4] UST does not contend otherwise. The Court's instructions precisely tracked controlling Sixth Circuit authority.[5] The jury properly found, based on undisputed

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[3]UST does not even address the elements of attempted monopolization, except insofar as they overlap with the elements of actual monopolization.

[4]The Court first defined monopoly power directly, instructing that "[m]onopoly power is the power to control prices in or to exclude competition from the relevant market." Jury Instruction 2.1. The Court then listed a number of factors indicative of monopoly power, including: (i) UST's market share, (ii) the trend of UST's market share, (iii) the number and size of UST's competitors, (iv) competitors' share trends, (v) the history of entry into and exit from the market of other competitors, (vi) UST's ability to raise price without losing business, and (vii) UST's profit margins. See Jury Instruction 2.3. All such instructions were given with no objection from UST.

[5]See Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999)("There are two ways to establish . . . that the defendant holds monopoly power. The first is by presenting direct evidence 'showing the exercise of actual control over prices or the actual exclusion of competitors.' The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market.") (quoting Byars v. Bluff City News Co., 609 F.2d 843, 850 (6th Cir. 1979)), petition for cert. filed, No. 99-294, 68 U.S.L.W. 3138 (Aug. 17, 1999).

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evidence, that UST had monopoly power in accordance with the Court's instructions.

UST Admissions. Remarkably, and unmentioned by UST, the jury needed to look no further than UST's own admissions to determine that it had market power. In several strategic documents, the company candidly acknowledged its market power (and, indeed, its abuse).[6] UST did not attempt to address or dispute this proof at trial, and it does not come to grips with it now.[7] The jury was entitled to credit UST's admissions about its position in the market, and that evidence alone was sufficient to support the finding of market power.[8]

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[6] See, e.g., PX 156 ("80% market share gives UST 'market power' -- this means we cannot legally use that market power to prevent competition from selling their products"); PX 33 ("UST does not deal on price -- we don't have to"); id. ("Our market power allows this [stated barrier to entry created by Copenhagen return policy] to exist"); PX 79 ("This is our arena"); PX 94 ("leverage our market share").

[7] UST did not call any of the authors of these documents to explain them, or otherwise dispute the statements. The sole attempted explanation came from its expert, Dr. Scheffman, who testified that he knew better than the executives, and that the "flaming" documents represented incautious and uninformed statements (from people he didn't bother to speak with). 3/23/00 Tr. at 115-16. Dr. Scheffman, however, did not even attempt to do what his own report said was required as a prerequisite to proper analysis of whether UST had market power. Id. at 155-56. The jury was free to accept or reject Dr. Scheffman's view that UST lacked market power, but there is no substance to UST's post-trial contention that they were forced to agree with it as a matter of law.

[8] See, e.g., Cassidy v. Spectrum Rents, 959 F. Supp. 823, 828 (E.D. Tenn. 1997) (admissions from defendant's own documents sufficient to sustain adverse verdict under Rule 50).

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Direct Evidence of Controlling Price and Excluding Competition. UST's admissions were the tip of the iceberg of proof. It was uncontroverted that UST not only had the power to control prices, but did so year after year. UST's Chairman, Vincent Gierer, conceded in cross-examination that UST had raised prices every year in the 1990s. 3/21/00 Tr. at 131. UST's relentless annual price increases exceeded any increased costs and produced profit margins that were among the highest in corporate America. 2/29/00 Tr. at 253 (Kamien); 3/23/00 Tr. at 159-60 (Scheffman); 2/29/00 Tr. at 85-86 (Rosson); Smith Dep. at 83-97; 3/21/00 Tr. at 130 (Gierer); 3/13/00 Tr. at 13 (McClure); PXs 326.17, 326.20, 326.34. UST freely acknowledged this pricing power: "[we] don't deal on our product's prices, we don't have to." PX 33. Dr. Kamien testified, without challenge on cross-examination, that UST's control of prices, its increasing margins, and its unparalleled profits, could be explained *only* by UST's monopoly power. See 2/29/00 Tr. at 277-78 (Kamien); 3/1/00 Tr. at 15-17 (Kamien).[9]

It was equally plain that UST had the power to exclude competition and that it successfully did so. UST's own strategic documents -- unmentioned in its pleadings -- discussed how UST

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[9]While UST's expert offered an alternative explanation for the fact that consumers paid roughly double for moist snuff as a result of UST's price increases from 1986 to 1996 -- that is, UST "shifted the demand curve" through advertising and the like, 3/23/00 Tr. at 47-48 (Scheffman) -- the jury was not compelled to accept it. It was, rather, permitted to weigh the evidence and credit UST's undisputed control of pricing as evidence of monopoly power.

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created "barriers to entry" that prevented new entrants. E.g., PXs 32, 33, 37. Dr. Kamien testified without challenge that *only* UST's monopoly power explained the lack of new entrants to compete for UST's extraordinary profits, and the limited expansion of existing firms such as Conwood and Swedish Match. 2/29/00 Tr. at 278-79 (Kamien). Not a single new firm entered the moist snuff market after 1990,[10] and in the preceding decade two of the largest tobacco companies in the world tried and failed to surmount the barriers to entry. 3/1/00 Tr. at 20 (Kamien); 3/23/00 Tr. at 161-62 (Scheffman). There was also evidence that the existing competitors, including Conwood and Swedish Match, were actually restricted as a result of UST's anticompetitive tactics. E.g., 3/13/00 Tr. at 42-44 (testimony of former CEO of Swedish Match re UST tactics curtailing its growth); 2/29/00 Tr. at 103 (testimony of William Rosson discussing UST tactics curtailing Conwood's growth). The direct evidence of UST's exclusion of competition provided ample support for the jury's finding.[11]

Indirect Factors Indicative of Monopoly Power. UST's admissions and Conwood's direct proof of UST's monopoly power made superfluous the *indirect* factors the jury could consider.

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[10]And the two that entered after Conwood's 1979 entry did so by acquisition of an existing competitor, not by actual new entry. 3/23/00 Tr. at 161-62 (Scheffman).

[11]The record is filled with other direct evidence of UST's "actual exclusion." See Point II.B, infra.

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Jury Instruction 2.3. But there was ample evidence to support the jury's finding on those as well.

UST mistakenly suggests that the various factors are like elements, and that plaintiffs must establish *each* factor in order to prevail. UST JMOL Mem. at 8-9. That is not the law. No single factor is dispositive. So long as there was evidence to support the jury's finding, the alleged lack of, or conflicting evidence on, one or more of the factors affords no basis to overturn the verdict. Jackson, 191 F.3d at 657 (judgment as a matter of law appropriate only when "there is a complete absence of pleading or proof on an issue material to the cause of action or when no disputed issues of fact exist such that reasonable minds would not differ") (internal quotation marks omitted).

Of the seven factors identified in Jury Instruction 2.3, UST does not now contest three; the undisputed evidence established them beyond argument (UST's market share of close to 80%,[12] the small number and size of UST's competitors in moist snuff,[13] and UST's truly eye-popping profits[14]). The jury was entitled to infer, strongly so, that UST had monopoly power based on its

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[12]See, e.g., 3/6/00 Tr. at 76 (Milano); 3/21/00 Tr. at 129 (Gierer); 3/23/00 Tr. at 61-62 (Scheffman).

[13]Only three other competitors participate in the market, and none has a share greater than 13.5%. 2/29/00 Tr. at 50 (Rosson).

[14]UST's profit margins are without parallel among public companies. Neither UST's Chairman, Vincent Gierer, nor UST's economist, David Scheffman, could even think of another company with similar high margins. 3/21/00 Tr. at 130 (Gierer); 3/23/00 at 161-62 (Scheffman).

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admitted 78% share of the market. See PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 821 (6th Cir.) ("the Supreme Court has concluded that . . . over two-thirds of the market . . . constitute[s] monopoly power under § 2"), cert. denied, 520 U.S. 1265 (1997). The undisputed evidence on these factors was itself sufficient for the jury to return a finding of monopoly power irrespective of any disputes regarding the remaining factors. But there was ample consistent evidence with regard to the other factors as well.[15]

First, while UST's share declined marginally (less than 1% per year from 1980 to 1998, 3/1/00 Tr. at 21 (Kamien)), the Court properly instructed -- with the concurrence of UST -- that such decline did not necessarily demonstrate lack of market power. Id. at 22-24 ("a declining market share may indicate the absence of monopoly power thought it does not foreclose such a finding"). And Dr. Kamien found it significant that UST's share had declined so *little* given UST's relentless price increases and its lack of product improvement or other consumer welfare benefit. Id. at 22-24. Dr. Kamien testified that, without market power, UST would have experienced a sharp decline similar to that suffered by IBM in the face of unrestrained competition in the personal computer market. Id. The jury was entitled to credit Conwood's

[15]They were: (i) the trend of UST's market share, (ii) competitors' share trends, (iii) the history of entry into and exit from the market of other competitors, and (iv) UST's ability to raise price without losing business. See Jury Instruction 2.3.

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evidence that UST's share movement was consistent with its possession of monopoly power.

Second, it was undisputed that Conwood's share growth was cut to one-third of the growth it had sustained in unrestrained competition during the period from 1980 to 1990. 3/1/00 Tr. at 15-17 (Kamien). Senior executives of Swedish Match likewise testified that its growth was substantially curtailed as a result of UST's anticompetitive scheme. 3/13/00 Tr. at 42-43 (McClure); 3/7/00 Tr. at 251-52 (Price). The significance of the fact that both Conwood and Swedish Match managed to grow in absolute terms from 1990 on (albeit at a restrained rate) was argued to the jury and was something the jury was entitled to consider. But the jury was also entitled to consider the evidence that UST successfully restrained the growth of competitors, and to resolve the dispute in favor of plaintiffs.

Third, the history of entry plainly supported plaintiffs. UST mistakenly conflates introduction of *brands* with new entry by *competitors* -- it is the latter that spurs competition and on which the Court's instruction focused properly and without objection.[16] The astonishing and undisputed fact with regard to entry is that after 1990 no company even attempted to enter the

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[16]See Jury Instruction 2.3 ("You may consider the history of entry into and exit from the market by other companies"). Further, while UST offered a long list of brands introduced and nominally in production, it offered no evidence regarding the market shares of those brands or their breadth of distribution. The proof was therefore meaningless as a measure of competition in the moist snuff market, and the jury could reasonably have found it unpersuasive.

moist snuff market, UST's unparalleled profits notwithstanding.[17] Two tobacco giants tried and failed in the 1980s, and exited. This cannot be explained absent market power. 3/1/00 Tr. at 20 (Kamien). The jury was, again, entitled to credit this evidence, and UST cannot credibly argue otherwise.

Finally, UST's ability to raise price without losing business was established by the undisputed evidence of its price hikes and corresponding increases in revenue and profits. 3/21/00 Tr. at 131 (Gierer). UST did not and could not explain its price increases by claims of innovation or other consumer benefit. And UST admitted that its price hikes exceeded any increased costs. UST's de minimis loss of market share is fully consistent with the consequences of rational pricing decisions by a monopolist. 2/29/00 Tr. at 278-79 (Kamien: only a company "with . . . substantial monopoly power, market power" can do this). The jury was entitled to credit the undisputed evidence that UST raised prices, increased revenues and profits, and maintained a monopoly share of the moist snuff market, and to

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[17]The two cases UST cites for the proposition that entry into the market precludes a finding of market power under Section 2 do not support its claim. UST JMOL Mem. at 8. In Omega Environmental, Inc. v. Gilbarco, Inc., 127 F.3d 1157 (9th Cir. 1997), cert. denied, 525 U.S. 812 (1998), which was a Clayton Act Section 3 case, there was undisputed evidence of a significant new entrant within three years of the filing of the complaint. In Barr Laboratories, Inc. v. Abbott Laboratories, 978 F.2d 98 (3d Cir. 1992), there had been six new competitors in the six years immediately preceding the suit. Those factual records present a stark contrast with the undisputed record here of no new entrants in 10 years.

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accept the opinion of Dr. Kamien that only a company with market power could do that. Id.

B. The Jury Correctly Determined that UST Maintained its Monopoly Power Through Restrictive or Exclusionary Conduct

Other than its quibble over the use of the word "restrictive" in lieu of "predatory" (see pp. 67-68, infra), UST agreed in all respects with the Court's instruction on willful maintenance of monopoly power. Jury Instruction 2.4. Accordingly, the only question is whether there was evidence to support the finding of the properly instructed jury.

Here the witnesses were legion, and the documents (from UST itself) extensive. UST curbed rivals' growth by eliminating competitive distribution, obscuring the presence of rival products and advertising, using its "clout" and misleading data to convince retailers to restrict competitive distribution, and paying retailers to exclude, among other tactics. 3/13/00 Tr. at 228-31, 233-39, 247-51 (Blattberg); 3/21/00 Tr. at 208-09 (Gierer telling stock analysts that UST needs to limit competitive distribution); PXs 59, 113A, 215. UST's own documents established the company's unlawful plan to maintain its monopoly by impairing distribution for rivals. E.g., PX 9 ("Chain strategies . . . Eliminate Comp. Distribution"); PXs 28, 61, 289. These documents also recorded the success of the program in stark language. E.g., PXs 96, 120, 139.

Eight former UST sales representatives testified that they were ordered by their supervisors systematically to eliminate

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rival products, displays, facings, and point of sale ("POS") advertising from stores. See note 37, infra. Eleven Conwood representatives gave accounts of the daily exclusion they encountered in the field. See id. Six store witnesses gave corroborating accounts of their own run-ins with the self-proclaimed "top dog," PX 39.[18] This misconduct was widespread and systematic, as senior Conwood executives testified and as representatives of Swedish Match and expert witnesses (Dr. Kamien, Dr. Gundlach, and Dr. Blattberg) corroborated. See 2/29/00 Tr. at 105-06 (Rosson); 3/1/00 Tr. at 166 (Kamien); 3/10/00 Tr. at 46-47 (Williams); 3/7/00 Tr. at 256 (Price); 3/13/00 at 41 (McClure); 3/9/00 Tr. at 77-80 (Gundlach); 3/13/00 Tr. at 224 (Blattberg).

UST does not dispute this evidence now and made virtually no effort to challenge it at trial. Neither does UST contend that the evidence fails in the aggregate to support the jury's finding of exclusionary conduct. Instead, UST begins by claiming that to prove a Section 2 violation Conwood was required to show that UST

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[18] See, e.g., Rusk Dep. at 10-12 (UST's rack removal not approved by manager or any other store personnel); Gill-Elkins Dep. at 15-16 (UST representative removed Conwood racks from store and placed product in box); Leinen Dep. at 19-22 (UST representative told store manager that it was his job to remove Conwood racks, despite being told to leave rack alone); Renfro Dep. at 16-17 (UST acting as category captains for Wal-Mart developed plan-o-gram providing very limited selection of price value brands despite analysis showing price value growth in the industry); Waller Dep. at 11-12 (UST provided skewed data to wholesaler); Stevens Dep. at 19-21 (UST removed Conwood rack while store manager was on vacation despite knowledge that all changes must be approved by manager); Engster Dep. at 26-27 (UST CEO offered store owner money to discontinue competitors' brands).

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"*used monopoly power* in the marketplace to harm competition." UST JMOL Mem. at 14-16. However, UST does not dispute that the Court properly instructed the jury on this score. See Jury Instruction 2.4. Neither can it seriously contest the existence of evidence from which jurors could have made the requisite finding. See, e.g., 3/13/00 Tr. at 210-13 (Blattberg: only UST can credibly become category captain because of its market power; UST used that power to exclude); Kiel Dep. at 22-23 (UST able to engage in systematic tortious conduct because it was the big dog and let everyone know it); Borrowdale Dep. at 27-28; PX 39 (Chiaradio: retailers typically want the big dog running things); 3/10/00 Tr. at 78 (Williams: only UST, by virtue of its market power, could obtain permission to house all competitive products and pursue exclusive vending to eliminate competition); 3/13/00 Tr. at 44 (McClure: same); 3/21/00 Tr. at 129 (Gierer); 2/29/00 Tr. at 62, 109 (Rosson); 3/13/00 Tr. at 39 (McClure) 3/6/00 Tr. at 76 (Milano); PXs 23, 137, 268, 280, 288.

UST is similarly wrong to suggest that evidence of its intent had no proper role in the jury's determination of whether its conduct was exclusionary. UST JMOL Mem. at 10-14. Under long-settled law, evidence regarding intent is critical in determining whether the business tactics are procompetitive or anticompetitive.[19] UST's supposedly controlling authority

[19] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985) (intent may *determine* "whether the challenged conduct [was] fairly characterized as 'exclusionary' or 'anticompetitive'"); United States v. United States Gypsum Co.,

holding otherwise is nothing of the sort.[20] And, in any event, UST points to no instruction on intent or evidence of intent to which it objected, or the admission of which supposedly was erroneous.

Ultimately, UST is left to resort to the same tactic it used on summary judgment -- plucking out separate strands of evidence (e.g., shelf space "recommendations," SOF=SOM, exclusive racks, CAP, and its admittedly tortious conduct) for separate consideration and then complaining that each strand, viewed in

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438 U.S. 422, 436 n.13 (1978) ("consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct"); Board of Trade v. United States, 246 U.S. 231, 238 (1918) ("knowledge of intent may help . . . to interpret facts and to predict consequences"); Association for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577, 583 (D.C. Cir. 1984) (intent relevant "insofar as it helps predict the probable competitive impact of a disputed practice") (citation omitted); see U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 596 (1st Cir. 1993) ("[m]otive can, of course, be a guide to expected effects").

[20]UST cites Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1422 (6th Cir. 1990), for the proposition that "it is not 'exclusionary' for an alleged monopolist to compete vigorously, even if its objective is to 'injure' its rivals." UST JMOL Mem. at 10. Of course, in making that statement, the court in Langenderfer had explicitly found that the defendant's low-bidding practices were entirely lawful. Id. UST's reliance on Byars, 609 F.2d at 860, in support of its contention that intent is irrelevant likewise misconstrues the case. Byars specifically acknowledged that "a general intent to monopolize is all that is ordinarily required to find a § 2 violation." Id. at 859 (citing United States v. Griffith, 334 U.S. 100, 105 (1948)). Since the challenged conduct in Byars was a monopolist's alleged unlawful refusal to deal, the court needed to find a specific intent to monopolize under prevailing law and only in that context noted its concern with the "overall impact of the monopolist's practices." Id. at 860. Overturning the district court's dismissal of the plaintiff's case, the Sixth Circuit remanded for "explicit factfinding" regarding the monopolist's intent -- namely, whether "business reasons justified the refusal to deal." Id. at 864.

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isolation, fails to constitute the whole. Each species of conduct, UST insists, is merely "ordinary" competition beyond the reach of Section 2.[21]

UST's claim of "ordinary" business conduct is seriously misconceived. The jury was properly instructed on this defense. See Jury Instructions 2.1, 2.4. And there can be little wonder why the jurors rejected it: the top executives of UST testified that none of the conduct at issue in the case was, in their opinion, ordinary or appropriate in any respect. E.g., 3/6/00 Tr. at 75-76 (Vice President of Sales Milano: removal of racks and POS, exclusive vending, and reduction of competitor facings inappropriate); Smith Dep. at 249 (President Smith: eliminating competitive brand not "the right thing"; unaware of meaning of words "exclusive vending"); 3/21/00 Tr. at 91, 117-18, 120, 190 (Chairman and Chief Executive Officer Gierer: UST conduct "astound[ing]," "embarass[ing]," "disappoint[ing]," and requiring an "investigation"); 3/7/00 Tr. at 36 (Vice President of Sales

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[21]This exercise is even less valid now, after a jury trial based on a full factual record, than it was at summary judgment. Feb. 17, 2000 Order at 7 ("UST's 'deconstruction' of the Conwood claims into a series of discrete antitrust theories, which UST then individually seeks to knock down, does not compel the summary judgment dismissal of this case."); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962) ("plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each"). See also Pls.' Mem. in Opp. to Mot. for Summ. J. at 46-47.

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Milano stating that eliminating competitive brands "inappropriate").[22]

Proceeding through UST's artificial (and improper) piecemeal review further confirms the conclusion of its executives:

Shelf Space "Recommendations." UST engages in fantasy to suggest that its representatives merely "recommended" to stores what might go where. UST JMOL Mem. at 17-19. With or without store permission, UST routinely excluded competitors' display racks, advertising, and products for the specific purpose of making it more difficult for them to distribute and sell their products. E.g., Borrowdale Dep. at 18 ("no exposure no sales, Q: It's that simple? A: Uh-huh"); Hart Dep. at 28-29 (Milano instructed at UST sales meeting -- attended by 125 representatives -- to eliminate competitors' racks and place products in UST racks to reduce the competitors' visibility in stores and make it harder for them to sell their products).

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[22]In addition, UST's witnesses, Messrs. Biddy, Germany, and Jones, testified without exception that they personally did not engage in any of the challenged and concededly inappropriate practices. They did not remove competitors products, racks, or advertising, promote exclusive vending, or attempt to persuade stores to reduce competitor facings. 3/15/00 Tr. at 34-35, 102 (Biddy); 3/16/00 Tr. at 90-91 (Germany); 3/21/00 Tr. at 23-24 (Jones). In sharp contrast, however, Dr. Scheffman opined that UST did in fact engage in such activities, that they were all part of the normal competitive process, and that he thought UST could go much farther -- as far as blowing up Conwood's plants -- without violating the antitrust laws. 3/23/00 Tr. at 193-94. Needless to say, the jury was not required to resolve the dispute between Dr. Scheffman and his own clients in favor of Dr. Scheffman. It was entitled to find that the challenged conduct was exclusionary.

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Where UST engaged in "category management," the evidence demonstrated that it abused its position of trust as category captain or manager -- a position uniquely available to it as the dominant monopolist -- in order to exclude rival racks, POS, and products, and often did so by using false or misleading information. 3/13/00 Tr. at 210-13, 247-51, 253-56, 260-62 (Blattberg); PXs 39, 59, 63, 139. There is no support for UST's claim that it merely made "recommendations" desired by stores as part of the competitive process. That argument was properly rejected by the jury based on the contrary evidence. Similarly shopworn is the fourth iteration of UST's argument that its "recommendations" are lawful per se.[23]

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[23]The Court previously considered all of UST's citations on summary judgment. Not one so much as suggests the sweeping approval that UST claims, and none involves a factual backdrop even remotely similar to the extensive record of exclusionary conduct developed at the trial of the instant case. For example, in In re Kellogg Co., 99 F.T.C. 8, 144-45 (1982), an administrative law judge decided that the efforts of the leading cereal manufacturers (none of which had more than 45% of the market) to obtain shelf space in proportion to market share did not constitute unlawful collusion, a claim not even at issue here. In Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129, 1137 (S.D.N.Y. 1986), the court dismissed complaints about the defendant's restrictive shelf space practices under Section 1, but *approved* the plaintiff's Section 2 monopolization claim for the same conduct, and did so where the defendant had a much lower (50%) market share than here. In Bayou Bottling, Inc. v. Dr Pepper Co., 725 F.2d 300, 303 (5th Cir.), cert. denied, 469 U.S. 833 (1984), the court decided that particular practices in a particular market at that particular time did not constitute unlawful activity. And Jays Foods, L.L.C. v. Chemical & Allied Product Workers' Union, Local 20, No. 97 C 6227, 1998 WL 265098 (N.D. Ill. May 13, 1998), aff'd, No. 99-2807, 2000 WL 336902 (7th Cir. Mar. 31, 2000), was a case brought under an Illinois consumer fraud statute, *not* Section 2 of the Sherman Act.

SOF=SOM. According to its Vice President of Sales, there was no legitimate reason for UST to seek share of fixture equal to its monopoly share of sales. 3/6/00 Tr. at 99-100 (Milano). In fact, by pursuing that formula UST subjected itself to return problems, as its dated product (Copenhagen) often went stale when too many facings were allotted to it. Id. The testimony was uniform and uncontested that UST did not *need* SOF=SOM in order to display its wares adequately. Indeed, several UST witnesses testified that UST already had *too much* retail space in many locations, which led to excessive returns. See, e.g., 3/16/00 Tr. at 91-92 (Germany); Borrowdale Dep. at 28-30. Others flatly denied that UST pursued a strategy of seeking SOF=SOM. See, e.g., 3/6/00 Tr. at 79-80 (Milano).

The *only* reason for UST's use of SOF=SOM was what its internal documents flatly conceded: "Control competition/ SOF=SOM." PX 28 (Top Gun 1995).[24] The pernicious purpose and

[24] See also PX 61 ("It is imperative that we continue with this category management action plan to eliminate competitive products."); PX 63 (UST can achieve more than 80% of merchandising space through SOF=SOM); id. ("Do not discontinue any slow selling brands on a national level"); PX 104 ("[W]hen reducing distribution, it may [be] necessary to have a smaller vendor. You definitely need to reduce the competitive facings in these locations in order for us to have a fair share of the section.").

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effect of this tactic were explained in detail by Dr. Kamien and Dr. Blattberg.[25]

The attempt to defend the company's use of SOF=SOM as an ordinary and sensible business practice thus runs afoul of the trial testimony of UST executives, its own documents, and the credible opinion of leading experts. Nor can UST point to any authority suggesting that a monopolist is permitted as a matter of law to command the percentage of shelf space that equals its market share. The jury properly considered the evidence surrounding UST's use of SOF=SOM in making its finding of exclusionary conduct.[26]

Exclusive Vending. According to UST's own documents, "exclusive vending" (the requirement that all moist snuff be sold from UST's vendor or rack) was the linchpin of its anticompetitive strategy, not a mere accommodation to retailers who wanted "uniform" racks. PX 9 ("Chain Strategy -- Control Comp. Distribution . . . Exclusive Vending"). Former UST

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[25]For example, Dr. Blattberg explained that he was aware of no space management theory or study suggesting SOF=SOM to be an optimal retail strategy and that in his opinion SOF=SOM leads to overstocks, assortment problems, and serves only to reinforce market share status quo. 3/13/00 Tr. at 252-53, 259. Dr. Blattberg further testified that UST pursued SOF=SOM to diminish the space available to competitors. Id. at 224.

[26]Tellingly, UST revised the CAP program to drop all reference to SOF=SOM as a baseline for measuring compliance after the lawsuit was commenced. Whereas the original CAP contract required the placement of POS and vendors "in accordance with share of market" in order to earn the monetary incentives, the 1999 (post-lawsuit) version of the CAP contract dropped all such references. 3/15/00 Tr. at 142-43 (Biddy); PX 146.

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employees confirmed that they were directed to obtain exclusive vending specifically as a means of exclusion. Hart Dep. at 15-16; Marconi Dep. at 12-13; Borrowdale Dep. at 16; Ulizio Dep. at 23; 3/10/00 Tr. at 18-20 (Jeffrey); Naifeh Dep. at 30-32; Keil Dep. at 15-17. Field sales personnel regularly reported they solicited, and succeeded in obtaining, agreements with stores in order to exclude. PX 68 (7-Eleven); PX 4 (Quality Marts); PX 113A (United Dairy Farms). And, where stores did not agree, UST often imposed exclusive vending and/or POS anyway. See notes 35, 37, infra.

Through exclusive vending, UST imposed "artificial scarcity" that required the allocation of slots (in the UST rack) among competitors, and thus gave UST a choke point against competitive distribution. 3/13/00 Tr. at 238-39 (Blattberg).[27] It also provided the platform from which UST could reduce facings for competitors through "category management" abuses such as "cutting the tail" just below the last UST product, wider (and thus fewer) slots in the rack, and other restrictive means. And it eliminated the critical point-of-sale location for competitors to advertise lower prices, innovative products, or existing products

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[27]Where each competitor had its own rack, there was no such choke point. Nor was exclusive vending necessary for this profitable and space-efficient product. The evidence was undisputed that other tobacco products, such as loose leaf, found ample room in stores even though they were far less profitable for the stores than moist snuff. See 2/29/00 Tr. at 51-53 (Rosson); 3/9/00 Tr. at 188 (Hettinger); 2/28/00 Tr. at 174-76 (Marano).

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to interested consumers; on this score, UST's documents could not be clearer. PXs 23, 53, 48, 80, 139.[28]

UST does not and cannot defend these as "ordinary" business practices. Its top three executives denied that the company sought exclusive vending -- despite testimony from its former representatives and hundreds of its own documents to the contrary. E.g., 3/21/00 Tr. at 189 (Gierer); 3/6/00 Tr. at 75-76 (Milano); Smith Dep. at 225. Indeed, Mr. Milano testified that it would be inappropriate to put competitive products in UST racks to control shelf space and advertising. 3/6/00 Tr. at 75. Remarkably, UST's President and its National Key Accounts Manager claimed not to know what the words "exclusive vending" mean. Untiedt Dep. at 109; Smith Dep. at 421. There simply was *no* evidence from which the jury could have concluded that exclusive vending, as practiced by UST, constituted appropriate business conduct.[29]

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[28]The harm from this conduct is greatly increased in a market where advertising is severely restricted by law. 3/15/00 Tr. at 263-64 (Blattberg).

[29]UST documents also show that, once the Conwood lawsuit was filed, UST stopped offering exclusive vending, speaking volumes to the supposed "ordinariness" of its practice. See, e.g., PX 130 (Division Manager re Crystal Flash: "Given the pending Conwood lawsuit, we explained that vendor exclusivity was no longer a requirement of our company."); PX 136 (Division Manager re Lake County Dairy chain: "This is also the chain that would like to go to US Tobacco exclusive if we are willing to pay a little. I have been told due to the recent Conwood lawsuit not to pursue exclusive right now."); PX 140 (UST Sales Representative Performance Evaluation pre-printed form has the following objective: "Continue to offer vendor exclusivity and category management where feasible." Comment on performance of one sales representative: "vendor exclusivity is not being

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UST was free to offer testimony from a few store witnesses that they preferred exclusive vending and to argue from that to the jury. It cannot plausibly suggest that its tactics were lawful per se in light of the mountains of evidence demonstrating that the purpose and effect of its exclusive vending practices were to disadvantage rivals by limiting their distribution and advertising and thereby maintain UST's monopoly.

CAP Program. The evidence at trial established that UST designed and implemented its Customer Alliance Program ("CAP") as a tool of exclusion. PX 120 ("CAP has been a great means of reducing competition"); PX 94 ("[T]he inception of the Customer Alliance Program will be utilized to leverage our market share toward improved merchandising presence. This will come at the expense of slow moving competitive products."); PX 144 (UST division manager uses CAP to secure exclusive vending and header cards); PX 113A (exclusive vending and elimination of competitive product incorporated into CAP contract).

Dr. Gundlach testified, without contradiction, that CAP was used by UST, first, to eliminate competitive products, racks, and advertising;[30] second, as a basis for entering into exclusive vending agreements on the "worksheets" used by the sales representatives to determine compliance with, and hence

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offered due to corporate directives.").

[30] 3/9/00 Tr. at 101-02. See PX 96 (discussing how CAP required deletion of competitive brands, but its payments would offset lost revenues from deletion of those brands).

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eligibility for, CAP payments;[31] and, third, as a tool for imposing other restrictions harmful to competition.[32]

At trial, UST disavowed these exclusionary uses insisting that CAP was merely a way to gather retail movement figures. 3/7/00 Tr. at 139 (Milano); 3/16/00 Tr. at 108-09 (Germany). The jury was of course permitted to accept or reject that explanation in the light of all the evidence. But there is no substance to or authority for UST's sweeping argument, that because CAP is denominated an "incentive program," its use by a monopolist to exclude competition cannot be challenged as exclusionary conduct under Section 2. See, e.g., R.J. Reynolds Tobacco. Co. v. Philip Morris Inc. 60 F. Supp. 2d 502, 511-12 (M.D.N.C. 1999) (enjoining "Retail Leaders" incentive program as likely violation of Sections 1 and 2); LePage's Inc. v. 3M, No. 97-3983, 1999 WL 346223, at *6-*7 (E.D. Pa. May 14, 1999) (denying 3M's summary

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[31] See, e.g., PX 120 (CAP incentive for eliminating competitive products); PX 175 (Berkebile discussing CAP goals); PX 112C ("All smokeless moist snuff in UST vendor[;] No competition"); PX 112D ("[B]ut [UST is] not going to vend Renegades or Kodiak Straight. They are under the counter."); PX 112F (exclusive vending); PX 112O (exclusive vending and exclusive header cards). Dr. Gundlach testified that, exclusive of the many CAP agreements that provided for such exclusivity, there were more than 21,000 stores covered by exclusive vending agreements with UST. 3/9/00 Tr. at 80.

[32] E.g., PX 114 (CAP used to place competitive displays under the counter in as many places as possible with the explicit approval of management); PX 139 (UST's control over merchandising and POS placement will make customer awareness of price differential difficult); PX 187 (CAP requires USTSM vendors and displays be placed in premium locations).

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judgment motion defending its retail rebate programs).[33] The jury properly considered UST's *actual use* of the CAP program as part of its overall campaign of unlawful exclusion.

Admittedly Tortious Conduct. UST repeats again its argument, first made on motion for judgment under Federal Rule of Civil Procedure 12(c) and then repeated several times thereafter, that tortious conduct cannot also be exclusionary. UST JMOL Mem. at 34 (from "an antitrust perspective," tortious conduct is mere "competition, however unseemly"). But there is no "safe harbor" under antitrust law for exclusionary conduct that also happens to be tortious. See Feb. 17, 2000 Order at 7; Pls.' Mem. in Opp. to Mot. for Summ. J. at 55-58. [34] There was, moreover, substantial evidence to support the finding that UST maintained its market share through exclusionary tactics that included the outright,

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[33]Defendants find no support in Beverage Management, Inc. v. Coca-Cola Bottling Corp., 653 F. Supp 1144 (S.D. Ohio 1986). There the court decided only that a particular program in a particular market did not amount to exclusionary conduct because it did nothing more than promote the sale of one competitor's products without any exclusion of other competitors. Id. at 1154. In short, there was no evidence that Coca-Cola there used the incentive program to do what the evidence overwhelmingly established that UST used CAP and other programs to do here: exclude competition.

[34]The Sixth Circuit in Byars vacated the district court's ruling for the defendant -- on just this argument -- and remanded for further findings of fact on whether the defendant had engaged in "dirty tricks." 609 F.2d at 864. The court of appeals instructed the district court to "carefully examine the alleged 'dirty tricks.' Predatory conduct on [the defendant's] part would go a long way toward establishing a § 2 violation." Id. at 863 (footnote omitted). Defendants' remaining cases are inapt for reasons already fully briefed. See Pls' Opp. to Motion for Sum. J. at 55-58.

tortious theft of competitors' products, racks, and/or POS from stores. This misconduct was widespread across the country and premeditated at the highest levels of the company.[35] UST's contention that this evidence could not be considered as part of the jury's examination of the record finds no support in law or logic.

C. The Jury's Verdict Was Supported by Ample Evidence of Harm to Competition and Conwood

The jury was properly instructed on the element of injury in fact. Jury Instruction 2.5. The only remaining issue, therefore, is whether there was evidence to support the finding of the jury that Conwood suffered injury in fact. There was extensive evidence that UST's exclusionary campaign to limit distribution of competitors' moist snuff harmed competition and consumers as well as Conwood. UST ignores that evidence and

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[35] See, e.g., 3/1/00 Tr. at 166 (Kamien); see, e.g., Marconi Dep. at 12-13; Borrowdale Dep. at 16; Hart Dep. at 18; Carter Dep. at 37; Ulizio Dep. at 22-25; 3/10/00 Tr. at 18-20 (Jeffrey); Naifeh Dep. at 30-32; Keil Dep. at 15-17 (eight former UST employees testifying that they routinely removed competitors' products, racks, and/or POS at the direction of their supervisors); Rusk Dep. at 10-12; Gill-Elkins Dep. at 15-16; Leinen Dep. at 19-22; Renfro Dep. at 16-17; Waller Dep. at 11-12; Stevens Dep. at 19-20; Engster Dep. at 26-27 (retailers offering same testimony); 2/28/00 Tr. at 222-23 (Marano); 3/3/00 Tr. at 88, 93 (Wilding); 3/8/00 Tr. at 128, 133 (Ryan); id. at 154, 161 (Dring); id. at 202-09 (Hynek); 3/9/00 Tr. at 197-98 (Hettinger); 3/10/00 Tr. at 8 (Falevsky); 3/10/00 Tr. at 19 (Jeffrey); 3/13/00 Tr. at 7-8 (Larsen); 3/10/00 Tr. at 63-64 (Williams); 2/29/00 Tr. at 95-99 (Rosson) (nearly a dozen current and former Conwood employees testifying that racks and POS in entire cities and States being wiped out); 3/13/00 at 41 (McClure); 3/7/00 Tr. at 256 (Price) (Swedish Match executives testifying to being excluded on massive scale).

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bases its arguments, impermissibly, on assertedly contrary evidence that the jury justifiably found unconvincing.

As to competition, UST's documents established that it sought to harm competition by impeding distribution for rivals -- and thereby frustrating their ability to undercut UST with procompetitive products like price-value brands. PXs 14, 268, 288, 45. The purpose and effect of these practices were indisputably to harm competition, and they did so. Indeed, representatives of two of UST's three moist snuff competitors testified that the monopolist's restrictive tactics substantially impaired their ability to compete effectively in the market and significantly limited their growth. 2/29/00 Tr. at 116-20 (Rosson); 3/13/00 Tr. at 42-43 (McClure). This testimony, while ridiculed by UST, came from the most knowledgeable witnesses called at trial -- men with a combined total of more than 75 years in the tobacco business, one a neutral third-party. It was, moreover, fully corroborated by UST's own documents, e.g., PX 84 ("we have severely cut back on their ability to market products"), and former employees, e.g., Borrowdale Dep. at 18 (goal was "no exposure, no sales," and confirming effect on competitors' sales).[36]

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[36]UST's position is that, because competitors did not go bankrupt, there has been no harm to competition. But UST's repeated mantra that competition in moist snuff was "vigorous" is belied by the uncontroverted evidence of supra-competitive prices, no innovation, huge monopoly profits and increasing margins, no entry in the contested period, regressions showing higher consumer prices and lower rival market shares where UST's predation succeeded in reducing competitive share of fixture, restricted output in chains where UST obtained exclusionary

Equally dispositive is the evidence, ignored by UST at trial and still today, that where UST succeeded in controlling more facings in stores -- the stated goal of its anticompetitive scheme, PX 23 ("our objective is to control the smokeless home, present the category and velocity, provide facings for competitive, control facings and positioning") -- *consumers* were harmed. Dr. Kamien established a direct, linear relationship between the number of facings controlled by UST and higher prices for consumers. This was direct evidence of consumer harm at the hands of UST, and UST did not even question, much less attempt to

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agreements, as well as indefensible predation practiced by the monopolist against its smaller rivals to maintain its grip. This is the essence of harm to competition.

Moreover, UST's "controlling legal authority" for judgment as a matter of law on this score is, at best, wildly off-point. See, e.g., Western Parcel Express v. United Parcel Serv. of America, Inc., 190 F.3d 974, 977 (9th Cir. 1999) (affirming summary judgment where "uncontradicted evidence in the record" showed "low entry barriers," defendant's "inability to control prices or exclude competitors," and no "unnatural market barriers precluding robust competition") (citation omitted); R.W. Int'l Corp. v. Welch Food, Inc., 13 F.3d 478, 486-88 (1st Cir. 1994) (affirming summary judgment on similar, uncontradicted record); D.E. Rogers Assocs., Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1439 (6th Cir. 1983) (affirming district court where "there is no evidence of anticompetitive effect, direct or inferential, in the record," and plaintiff mistakenly claimed that its own lost profits could suffice to "evidence[] the requisite effect on competition"); Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 558 (7th Cir. 1980) (affirming dismissal where plaintiff failed to include in its complaint "any supporting factual allegations" of harm to competition); Western Parcel Express v. United Parcel Serv. of America, Inc., 65 F. Supp. 2d 1052, 1065 (N.D. Cal. 1998) (granting summary judgment on exclusive dealing claim because plaintiff could not show that the contracts at issue were exclusive dealing contracts, and noting the continued and very recent entry of numerous other competitors in recently degregulated industry), aff'd, 190 F.3d 974 (9th Cir. 1999).

disprove, this evidence. 2/29/00 Tr. at 264-65 (Kamien); PX 326.2.

The very same conduct that harmed consumers also harmed Conwood. It cannot be gainsaid that the systemic exclusion (and in many instances destruction) of Conwood racks, POS, and products constituted harm to Conwood.[37] UST's own witnesses -- who claimed that they did not practice the exclusionary tactics -- provided further evidence of the harmful effect of the

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[37]For example: 11 Conwood employees from across the country testified that UST representatives systematically ransacked Conwood racks, POS, and products; used misleading or false information in their "category management" efforts to exclude Conwood; and paid retailers, through CAP and other contracts, to do the same. See 2/28/00 Tr. at 222-23 (Marano); 3/3/00 Tr. at 88, 93 (Wilding); 3/8/00 Tr. at 128, 133 (Ryan); id. at 154, 161 (Dring); id. at 202-09 (Hynek); 3/9/00 Tr. at 197-98 (Hettinger); 3/10/00 Tr. at 8 (Falevsky); id. at 19 (Jeffrey); id. (vol. X-B) at 7-8 (Larsen); id. at 63-64 (Williams); 2/29/00 Tr. at 95-99 (Rosson).

Eight former UST representatives admitted that they deliberately excluded Conwood at the behest of their management. See Marconi Dep. at 12-13; Borrowdale Dep. at 16; Hart Dep. at 18; Carter Dep. at 37; Ulizio Dep. at 22-25; 3/10/00 Tr. at 18-20 (Jeffrey); Naifeh Dep. at 30-32; Keil Dep. at 15-17.

Six retailers and one wholesaler testified that UST representatives eliminated Conwood racks, POS, and products; presented false or misleading numbers as part of their category management efforts; and, even through UST's chairman, offered cash to exclude. See Rusk Dep. at 10-12; Gill-Elkins Dep. at 15-16; Leinen Dep. at 19-22; Renfro Dep. at 16-17; Waller Dep. at 11-12; Stevens Dep. at 19-20; Engster Dep. at 26-27.

UST's expert, David Scheffman, admitted that there is a direct correlation between Conwood losing racks and losing sales. 3/23/00 Tr. at 133.

Literally scores of UST's own documents attested to the successful implementation of their illegal efforts to eliminate Conwood racks, POS, and products. See, e.g., PXs 19, 24, 84, 106, 112C, 112D, 112F, 112O, 159, 272.

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practices. E.g., 3/14/00 Tr. at 174-75 (Luckett: where no exclusive vending or "category management" reducing Conwood facings, Conwood has approximately 26% market share); 3/15/00 Tr. at 102 (Biddy: where no exclusion, Conwood has 26% market share); 3/21/00 Tr. at 23-24 (Jones: where no exclusion, Conwood has 20%-25% market share). UST's expert witness, Dr. Scheffman, confirmed in a statistical regression that where UST succeeded in reducing Conwood's facings Conwood sold less moist snuff. 3/23/00 Tr. at 133-34 (Scheffman).[38]

In addition, Conwood introduced evidence that, in two of America's largest chains (Wal-Mart and 7-Eleven), UST's success in excluding Conwood racks and POS led to sharply reduced sales for Conwood (harm to Conwood), and overall reduction in sales of moist snuff (reduced output indicating harm to competition and consumers). 3/1/00 Tr. at 51-54, 57-58 (Kamien); 3/13/00 Tr. at 275-78 (Blattberg); PX 327.21.

The jury was also entitled to credit the undisputed evidence that Conwood's growth was cut by two-thirds after UST began using its "clout" to exclude,[39] and the evidence that Conwood's state-by-state growth was differentially affected in a manner

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[38]This testimony is consistent with UST's internal projections, which in 1997 estimated that competing price-value brands could be expected to gain as much as 18% of the market in just three years if left unrestrained. PX 45.

[39]From 1980 to 1990, Conwood grew from 0 to 11%; from 1990 to trial, Conwood grew from 11% to approximately 13.5%. 2/29/00 Tr. at 103 (Rosson). Conwood's growth in the decade following the commencement of UST's concerted exclusion was less than one-third of the growth it sustained in the preceding decade.

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consistent only with the upsurge of UST's exclusionary conduct after 1990. 3/8/00 Tr. at 30 (Leftwich); PX 327.21.

UST's "no harm, no foul" theory ignores all this evidence and asks the Court to rule, as a matter of law, that an antitrust plaintiff cannot establish injury to competition unless it can establish that the market contracted *and* that its sales decreased in absolute terms. That is not the law.[40] UST's successful efforts to arrest Conwood's (and Swedish Match's) growth through exclusionary tactics that increased prices for consumers (undisputedly so) is fully cognizable under the antitrust laws.

D. The Jury's Verdict Was Supported by Ample Evidence of Causation

The properly instructed jury was required to determine, in order to find that Conwood had established injury in fact, that *some* harm to Conwood had been caused by UST's exclusionary conduct. As the Court explained -- with no objection from UST -- Conwood was "*not* required to prove that U.S. Tobacco's alleged antitrust violation was the sole cause of its injury; nor need Conwood eliminate all other possible causes of injury." Jury

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[40] See Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 753-54 (1st Cir. 1994) (reversing district court's dismissal of complaint because dealer's loss of additional profits due to alleged maximum resale price constraints constitutes antitrust injury); Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 429 (3d Cir. 1993) ("lost profits (or increased losses)" constitute antitrust injury); Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 67 (2d Cir. 1988) (reversing dismissal of complaint because allegation that anticompetitive conspiracy caused tennis events "to be less profitable than [those] events otherwise would have been" was sufficient to establish antitrust injury).

Instruction 2.5 (emphasis added). Instead, Conwood needed to show only that UST's "illegal conduct was a material cause of Conwood's injury. This means that Conwood must have proved that *some* damage flowed to it as a result of U.S. Tobacco's alleged antitrust violation." Id. (emphasis added).[41]

There is no serious dispute that Conwood met this test. For example, the former UST representatives established injury to Conwood by admitting their concerted removal of Conwood racks, POS, and products pursuant to company policy. And of course there was far more and corroborative evidence of harm from

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[41]UST did not object to this instruction at trial, does not do so now, and cannot sensibly do so under long-settled law nowhere addressed by defendants. See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969) ("It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4."); Allied Accessories & Auto Parts Co. v. General Motors Corp., 825 F.2d 971, 973 (6th Cir. 1987) ("Allied I") (reversing district court's holding that plaintiff must show defendants' misconduct was sole cause of its antitrust injuries and approving Seventh Circuit jury instruction providing: "'The plaintiff does not claim nor is he obligated to prove that the violation was the sole and only cause of the loss of profit. It must, however, show that the violation played a substantial part in bringing about or causing the loss of sales and the loss of profit. . . . Plaintiff need not show that the price discrimination was a more substantial cause of injury than any other.'") (quoting Bohack Corp. v. Iowa Beef Processors, Inc., 715 F.2d 703, 711 n.9 (7th Cir. 1983)); LePage's Inc. v. 3M, No. 97-3983, slip op. at 12 (E.D. Pa. Mar. 14, 2000) (rejecting motion for judgment notwithstanding verdict on causation grounds because plaintiff had established that 3M's conduct "was a material cause of LePage's injury"); Allied Accessories & Auto Parts Co. v. General Motors Corp., 901 F.2d 1322, 1325-26 (6th Cir. 1990) ("Allied II") (rejecting defendants' claim that plaintiff must show it would have obtained contract in a "violation free environment" and holding that plaintiff "need only show" that defendants' unlawful conduct "materially affected" retailer's decision).

Conwood's own representatives, store witnesses, and scores of UST documents. See, e.g., notes 35, 37, supra. Remarkably, UST does not even mention the proof from its own former employees and its own documents, which establish that UST intended to harm Conwood through exclusionary tactics and that it did so routinely and systematically. Id.

UST's argument is based solely on the notion that other factors might also have caused Conwood to lose sales." UST JMOL Mem. at 44. UST undoubtedly had theories of what halted Conwood's growth (e.g., "the independent, uncoerced decisions of retailers," "other factors in marketplace," "additional competition from UST and other competitors," and "Conwood's failure to compete"). Id. at 46. All of these arguments were given the weight they deserved by the jury. The jury's decision not to credit UST's alternative theories of harm affords no colorable basis for granting judgment to UST as a matter of law.[42]

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[42]As previously briefed (see Pls.' Mem. in Opp. to Mot. for Summ. J. at 62 n.78), defendants' citation to Valley Products Co. v. Landmark, 128 F.3d 398 (6th Cir. 1997); Axis, S.p.A. v. Micafil, Inc., 870 F.2d 1105 (6th Cir.), cert. denied, 493 U.S. 823 (1989); Hodges v. WSM, Inc., 26 F.3d 36 (6th Cir. 1994); and Baum Research & Development Co. v. Hillerich & Bradsby Co., 31 F. Supp. 2d 1016 (E.D. Mich. 1998), does nothing to change this conclusion. In each case, the uniform proof was that the plaintiff's injuries resulted *solely* from the defendant's *lawful* acts of exclusion -- in Axis by control over a patent, in Valley Products by control over licensing rights, in Hodges by control over physical premises, and in Baum Research by control over eligibility rules. By contrast, on the record adduced at trial there can be no serious claim here that Conwood's injuries were caused *solely* by fair competition and not at all by UST's unlawful conduct.

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E. The Jury's Award of Damages Affords No Basis for Judgment As a Matter of Law

Here, as with the elements of liability addressed above, there is no dispute that the Court gave the jury proper legal instruction. Indeed, with respect to damages, the jury instructions and verdict form language were in significant part proposed by UST.

Nor is there any dispute that there is sufficient record evidence to support Conwood's claimed damages. Conwood introduced a wealth of damages evidence. Dr. Leftwich presented a detailed study based on accepted economic method establishing Conwood's damages from UST's anticompetitive acts within the range of $155 to $488 million. Based on his 45 years of experience in the tobacco business, Conwood's historical performance in moist snuff, and Conwood's performance in adjacent smokeless markets, Conwood's Chairman, Mr. Rosson, testified that Conwood would have attained a market share in the mid-20s but for UST's misconduct. 2/29/00 Tr. at 119-20 (Rosson). And it was undisputed (and corroborated independently by Mr. Price of Swedish Match) that each additional share point is worth $10 million in *net profit*. 3/7/00 Tr. at 116-20 (Price). In contrast, UST decided to offer *no* evidence with respect to Conwood's damages, other than to sponsor an expert who opined that Conwood had not been damaged at all. 3/23/00 Tr. at 140-41 (Scheffman).

The jury determined that Conwood's actual damages "only" from UST's antitrust violation amounted to $350,000,000. This

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fell near the mid-point of the range to which Dr. Leftwich testified, and was far less than the jury could properly have awarded by application of Mr. Rosson's estimation of "but for" market share (the mid-20s) to the undisputed figure of $10 million per additional share point.

UST challenges the admissibility of some but by no means all of the damages evidence, maintains that the damages are "excessive" by some undefined standard, and suggests that the Court should rejigger the figures. But these arguments have *nothing* to do with judgment as a matter of law. (Point 1). Passing that, UST's recycled complaints provide no reasoned basis for intruding upon the determination made by a properly instructed jury based on competent evidence, from several sources, that UST did little if anything at trial to dispute. (Point 2).

1. On a motion for judgment as a matter of law, the element of damages "is satisfied by [the plaintiff's] proof of *some* damage flowing from [the defendant's actions]; inquiry beyond this minimum point goes only to the amount and not the fact of damage." Zenith Radio, 395 U.S. at 114 n.9; Allied I, 825 F.2d at 973-75; Broan Mfg. Co. v. Associated Distribs., Inc., 923 F.2d 1232, 1235 (6th Cir. 1991) (recovery prevented "only where the *fact* of damage is uncertain," not the amount of damages); Grantham & Mann, Inc. v. American Safety Prods., Inc., 831 F.2d 596, 601-02 (6th Cir. 1987) (rule that remote and

speculative damages are not recoverable "serves to preclude recovery . . . only where the fact of damage is uncertain . . . not where the amount of damage alone is uncertain"). See also Pls.' Mem. in Opp. to Mot. for Summ. J. at 65; Pls.' Opp. to Mot. To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 14-15. UST does not challenge the fact that Conwood provided proof from which a reasonable juror could find at least *some* damage (e.g., one lost sale) flowing from its misconduct. Nor, on this record, could it plausibly do so. Accordingly, judgment for UST is unavailable as a matter of black letter law.

2. Even if UST's arguments concerning the *amount* of Conwood's damages were pertinent on a motion for judgment (and they are not), there is nothing new here. UST simply restates the same arguments and recites the same authorities previously detailed in its pre-trial motion to exclude Dr. Leftwich's testimony. Each of its points were exhaustively addressed by Conwood and the Court at that time. See Pls.' Opp. to Mot. To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich; Pls.' Mem. in Opp. to Mot. for Summ. J. at 63-67; Feb. 23, 2000 Order. UST offers no persuasive reason to retread this familiar territory. For example:

(a) UST complains that Dr. Leftwich's analysis "does not reflect lost sales, but merely makes assumptions about lost share." UST JMOL Mem. at 51-53. In fact, Dr. Leftwich did not make assumptions about lost share, but rather tested Conwood's hypothesis that its growth was particularly stymied by UST's

anticompetitive tactics in markets where it had not attained a "foothold" by 1990. The economic evidence confirmed the validity of the hypothesis, and from that Dr. Leftwich estimated the growth that Conwood would have attained "but for" UST's unlawful conduct. 3/8/00 Tr. at 30-32. In any event, there was testimony regarding lost sales as a result of UST's misconduct. See, e.g., p. 29 & note 35, supra (citing testimony regarding lost sales). And UST has not cited (and cannot cite) any authority for the proposition that a damages expert must directly measure lost sales instead of lost market share.

(b) UST complains, as it did in pre-trial motions, that Dr. Leftwich's analysis began with a hypothesis derived from conversations with Conwood executives and employees. UST JMOL Mem. at 53-55. Contrary to UST's intimations, however, Dr. Leftwich did not *rely* on Conwood's perceptions to generate a damages number, he *tested* them using industry-standard data and accepted statistical techniques. He found that the empirical evidence supported Conwood's experience: the data demonstrated that UST's acts after 1990 had a disproportionate adverse impact on Conwood in states where Conwood had not already attained sufficient market share to protect itself from attack. See 3/8/00 Tr. at 20-21; Pls.' Opp. to Mot. To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 5-12, 26-27 (discussing argument and facts in further detail). The use of hypotheses, as Dr. Leftwich testified without challenge from UST, is the cornerstone of the scientific method. UST cites no court

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that has required experts to forgo hypotheses, or limited the sources from which experts may obtain them.

(c) UST complains that Dr. Leftwich's study did not rule out all other possible causes for the effect he observed in the data. UST JMOL Mem. at 55-58. As was fully briefed before trial, however, Dr. Leftwich considered a host of possible "confounding variables," including *every single variable* proposed by defendants' expert in his report. Pls.' Opp. to Mot. To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 20 n.15. These include changes in average state per capita income; median age; racial composition; educational levels; unemployment rates; regional preferences; and trends found in related smokeless tobacco markets (including looseleaf) that are unaffected by UST interference but similarly affected by increasing government regulation and other factors. Id. at 6-7, 11. From the empirical data, Dr. Leftwich concluded that *none* of these factors could explain Conwood's different level of share growth between 1990 and 1997. The *only* factor that could explain this empirical phenomenon was UST's misconduct. 3/8/00 Tr. at 30 (Leftwich).

This was more than sufficient under settled law -- which does not require a damages expert to exclude all hypothetical possibilities imagined by counsel after the fact.[43] Indeed, the

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[43]Allied I, 825 F.2d at 973 ("'plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury'") (quoting Zenith Radio,

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cases defendants rely upon have excluded damages estimates only where, unlike here, plaintiffs admit to having made literally *no* effort to exclude potential lawful causes of the claimed damages that could easily have been considered. See Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1353 (3d Cir. 1975)("[p]laintiff's own experts conceded that the damage figures they tendered were attributable at least in part to the lawful competition of [defendants]"); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 435 (N.D. Cal. 1978) (plaintiff presented testimony that "adverse factors other than [defendant's] alleged antitrust violations" were "implicit in" forecasts used to compute damages), aff'd, 636 F.2d 1188 (9th Cir. 1980), cert. denied, 452 U.S. 972 (1981); McGlinchy v. Shell Chem. Co., 845 F.2d 802, 806-07 (9th Cir. 1988) (plaintiff's expert could not identify *any* specific illegal acts committed by defendants, did *nothing* to confirm relevant market conditions, and based his damages estimate on *all* of plaintiff's gross sales even though defendants' conduct was directed only to "particular product

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395 U.S. at 114 n.9); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566-68 (1981) (antitrust plaintiff carries a "lightened" burden in establishing damages because "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation"); Callahan v. A.E.V., Inc., 182 F.3d 237, 258 (3d Cir. 1999) (denying judgment despite argument that plaintiffs' expert failed to consider "to the degree that the defendants might prefer . . . certain specific factors that might have affected the plaintiffs' business success, such as general economic conditions, changes in their operations during the relevant time period, or changes in costs"); Pls.' Opp. to Mot. to Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 18-21.

lines and in particular overseas countries and territories"); Concord Boat Corp. v. Brunswick Corp., Nos. 98-3732 & 98-4042, 2000 WL 303035, at *14 (8th Cir. Mar. 24, 2000) (plaintiff's expert admitted that important, "inconvenient" facts "*could have been incorporated* into his model" but were not) (emphasis added).[44] See also Pls.' Opp. to Mot. To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 17-21.

Where a plaintiff has provided a plausible economic model using the available data, alternative causal explanations proposed by the defendant are for the jury to decide. See, e.g., In re Corrugated Container Antitrust Litig., 756 F.2d 411, 418 (5th Cir. 1985) ("[P]laintiffs offered evidence which attributed price increases to price fixing. Defendants countered with evidence that the price increases were caused by increases in the cost of linerboard, fuel, and labor. The jury could reasonably have believed either explanation."). The jury was properly allowed to resolve the dispute over what caused Conwood's damages.

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[44]Concord Boat is distinguishable on yet other grounds. The expert's but-for model there, unlike here, depended on unsupported assumptions that the parties' products "would be viewed as equal in quality" by consumers. 2000 WL 303035, at *14. Further, unlike here, there was apparently no damages evidence on which the jury could have relied beyond the expert's opinion. Id. at *15. Here, by contrast, there was substantial evidence that corroborated the expert's opinion, including evidence from defendants' own witnesses as to the market share Conwood was able to attain in areas unaffected by the unlawful and exclusionary UST campaign. See p. 45, infra.

(d) Defendants complain that Dr. Leftwich should not have been permitted to rely on sworn declarations from Conwood employees attesting to the scope and nature of UST's exclusionary practices. UST JMOL Mem. at 58-59. However, UST's contention that experts cannot rely on hearsay materials is simply wrong. Trepel v. Roadway Express, Inc., 194 F.3d 708, 717 (6th Cir. 1999) (abuse of discretion to preclude expert from discussing basis of opinion, even if basis was otherwise inadmissible hearsay).[45]

(e) In any event, the jury's verdict cannot be vacated (let alone reversed) when other record evidence supports it. Sawchik, 783 F.2d at 636; Kabealo v. Huntington Nat'l Bank, 17 F.3d 822, 827 (6th Cir.) (noting that plaintiffs' "own projections and their actual experience during four years of operation" would provide factfinder with reasonable basis for damages), cert. denied, 513 U.S. 812 (1994). Here the jury's verdict is supported by substantial evidence in addition to -- and corroborative of -- Dr. Leftwich. Indeed, the jury verdict is fully supported even in the absence of evidence from Dr. Leftwich.

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[45]UST's alternative evidentiary argument under Federal Rule of Evidence 703 that the sworn declarations are not the sort of material "reasonably relied on by experts" is unsupported by record evidence. It is also undermined by the decision of UST's own expert to place heavy reliance on materials of a similar nature, such as Conwood activity reports and -- as the very bedrock of his analysis -- a one-page document that he literally knew nothing about. 3/23/00 Tr. at 183-88 (Scheffman). In any event, such evidentiary cavils are not by a long shot a valid basis for judgment as a matter of law. See p. 62, infra.

For example, Mr. Rosson's testimony provided painstaking detail about the smokeless tobacco markets. This gave the jury a fully reasonable basis, grounded in actual past performance in moist snuff as well as adjacent markets, for estimating the "but for" share Conwood would have attained. 2/29/00 Tr. at 119-20 (Rosson). Mr. Price, corroborating Mr. Rosson's testimony, stated that each additional share point is worth $10 million in net profits in the moist snuff market. 3/7/00 Tr. at 116-20 (price). Several witnesses -- all called by UST -- testified that where Conwood was unrestrained by UST's exclusionary conduct it easily attained market shares as high as 30%.[46] Similar testimony was provided by Conwood's sales manager, Mr. Williams. 3/10/00 Tr. at 84 (Conwood has approximately 30% market share in Paducah area and chains unaffected by UST misconduct). UST itself predicted that Conwood and other makers of "price value" brands had the potential to gain as much as 18.1% of the market in three years. PX 45.

From all this evidence, the jury was plainly entitled to determine -- without engaging in speculation -- that Conwood would have continued on its growth trajectory after 1990, would have attained substantial additional market share, and

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[46] See, e.g., 3/14/00 Tr. at 174-75 (Luckett); 3/15/00 Tr. at 133 (Biddy); 3/16/00 Tr. at 94 (Germany); 3/21/00 Tr. at 23-24 (Jones); 3/22/00 Tr. at 29 (Overby).

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consequently (at $10 million per additional share point) would have earned $350 million in additional profits.[47]

To UST, of course, no damages proof could be sufficient, because the attempt to model a market purged of its antitrust violation necessarily involves predictions and estimates that can always be challenged as unanchored in the actual facts. For this reason, the law provides wide latitude to wronged antitrust plaintiffs; jury awards may be challenged only when they are supported by nothing more than "total[] speculat[ion]." Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 150 (6th Cir. 1972). That is not the case here.

III. DEFENDANTS ARE NOT ENTITLED TO A NEW TRIAL

The verdict in this case resulted from a trial that even UST concedes was virtually error-free. Indeed, it states that a new trial would differ little if at all from the trial just completed. UST New Trial Mem. at 4. UST further concedes that the Court gave instructions that were proper statements of the law. And UST's handful of quibbles regarding the conduct of the trial, many of which they failed to register during trial, do not remotely approach the denial of its substantial rights. UST has no legitimate basis for asking the Court, and another jury, to

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[47]While seemingly large in appearance, the jury award represents slightly less than an additional nine market share points over four years. The moist snuff market operations of UST produced almost a billion dollars in gross profits last year alone. UST Inc., 1999 Annual Report (2000) <http//www.ust.shareholder.com>.

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set aside another month to repeat the same arguments that a jury has already considered fully and rejected.

A new trial is warranted under Rule 59 only "when a jury has reached a 'seriously erroneous result.'" Holmes v. City of Massillon, 78 F.3d 1041, 1045-46 (6th Cir. 1996) (reversing district court's grant of new trial); Morvay v. Maghielse Tool & Die Co., 708 F.2d 229, 233 (6th Cir. 1983) (new trial denied where party failed to demonstrate "manifest errors of law or fact"). Defendants must demonstrate that (1) the verdict was against the weight of the evidence; (2) the damages were excessive; or (3) the trial was unfair to defendants. Holmes, 78 F.3d at 1046. UST can demonstrate none of the above.

A. Overwhelming Evidence Supported the Verdict

A new trial is not appropriate "'unless th[e] verdict was unreasonable.'" Barnes v. Owens-Corning Fiberglas Corp., 201 F.3d 815, 820-21 (6th Cir. 2000) (quoting Holmes, 78 F.3d at 1047). "'[C]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'" Id. at 821 (citation omitted).

The verdict here was eminently reasonable, and was supported by numerous witnesses and exhibits on each essential element of Conwood's antitrust claims. In many critical respects, the

evidence was undisputed. See Point II, supra.[48] UST does not seriously argue otherwise, devoting less than one and a half pages to this point and offering not a single case citation that supports the grant of a new trial based on a jury's allegedly incorrect resolution of disputed Section 2 factual issues. UST New Trial Mem. at 2-3. While it laments the jury's failure to endorse the defense arguments, UST gives no reason to think a second jury would disagree with the first. The alleged haste with which the jury returned its verdict suggests no lack of reasoned consideration, but rather the absence of any genuine disagreement over the proper decision. The jury's deliberations and verdict were "consistent with [the] clarity of the evidence." United States v. Holloway, No. 98-5175, 1998 WL 833767, at *6 n.8 (6th Cir. Nov. 19, 1998).[49] There is no basis for suggesting

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[48]For example, Conwood's market definition, see Jury Instruction 2.2, was the only market definition offered by either party; UST's market share, history of price and margin increases, and the lack of new entrants into the market after 1990 were all undisputed; the accounts of the eight former UST salesmen, the six store employees, and the twelve Conwood field sales representatives went unchallenged in any material respect; UST's own records documenting their anticompetitive practices were undisputed; the lack of any benefit to consumers from UST's practices was undisputed, and indeed the economic evidence that proved the relationship between UST's command of facings and higher prices to consumers was effectively conceded; and only Conwood offered evidence regarding the amount of damages.

[49]To the extent that it reacted to the evidence, the jury was not alone. UST's Chief Executive Officer testified that the proof variously "astounded," "embarrassed," and "troubled" him. 3/21/00 Tr. at 91, 117-18, 120, 190 (Gierer). But see UST Letter to Our Customers, Mar. 30, 2000 (after trial, UST apparently retracting promise to investigate and change conduct, insisting to retailers that it will not alter its conduct and stating: "[T]he actions complained of by Conwood are nothing more than part of normal, lawful competitive conduct . . . . We will

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that a second jury would decide otherwise, and no authority for giving UST a second chance to make the same unpersuasive arguments.

B. UST Cannot Show That the Damage Award Was Excessive

The jury's award of $350,000,000 in actual damages was based solidly on the evidence. See Point II.E, supra. UST cannot plausibly call the damages "excessive" when they were far less than the maximum the jury could appropriately have awarded,[50] and when UST decided for tactical reasons not to offer any damages evidence of its own. Portis v. Grand Trunk Western R.R., No. 93-1721, 1994 WL 362110, at *2-*3 (6th Cir. July 12, 1994) (damages not excessive where defendant "chose to defend" solely on theory that claim was a fraud and presented no alternative calculations of economic loss; award "was within the range permitted by the evidence presented at trial, and therefore not so large as to shock the conscience of the court"); Farber v. Massillon Bd. of Educ., 917 F.2d 1391, 1395 (6th Cir. 1990) (damages not excessive unless beyond maximum damages presented at trial); Jenkins v. Associated Transport, Inc., 330 F.2d 706, 712 (6th Cir. 1964)

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continue to provide you with the same level of service, the same fine products and the same fine programs that you have come to expect of us.").

[50]Dr. Leftwich estimated damages of up to $488 million, and he testified that he believed the evidence warranted an award at the high end of his range. 3/8/00 Tr. at 103-04 (Leftwich); PX 327.21. Mr. Rosson's testimony that Conwood, based on past performance and market conditions, could have attained market share in the mid-20s would also have fully supported damages of close to $500 million (12 additional share points x $10 million per year x four years). The jury's award was just about 65% of these amounts.

("[jury's] decision is not subject to interference by the trial judge unless so excessive . . . as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury") (internal quotations marks omitted). The damages were appropriately scaled to Conwood's lost profits in a market characterized by enormous profits. As the Court stated, Conwood was "entitled to the damages that you're entitled -- entitled to receive, no matter what they are in relation to anything else." 3/27/00 Tr. at 93.

The damages are excessive only in the sense that UST believes the jury should not have awarded them. But that is no basis for the grant of a new trial, and UST does not seriously argue it is. UST cites no authority to support its subjective challenge to the amount of damages, and indeed the cases that it does cite all turn not on "excessiveness" but on a jury's patent award on impermissible grounds -- an issue not present here.[51]

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[51]Thus, in Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1225 (9th Cir. 1997), a new trial was required because the jury concededly awarded damages based on claims that had been dismissed on the merits before the case was submitted. In MCI Communications Corp. v. AT&T Corp., 708 F.2d 1081, 1163 (7th Cir. 1983), a new trial was required because the damages study included damages for 22 counts of alleged monopolization, liability was established only on 7 of the 22 counts, and there was no way -- based on the evidence presented to it -- the jury could have limited the award to the counts on which liability was established. In Litton Systems, Inc. v. Honeywell, No. 90-4823, 1996 WL 634213, at *3 (C.D. Cal. July 24, 1996), similarly, the jury was presented with a damages model that relied on six categories of conduct that the Court had expressly excluded from the jury's consideration. No such issue is present here. The jury found against UST on both actual and attempted monopolization, the damages evidence from, e.g., Dr. Leftwich and Mr. Rosson was tied to evidence of UST exclusionary conduct that the jury was entitled to consider, and the jury was

There is simply no reasoned basis on which the jury's verdict can be rejected, and a new trial ordered, where the jury awarded substantial damages supported by the evidence.[52]

C. The Trial Was Fair

The four-week trial of this major case was a model of efficiency and fairness to all parties, and UST does not actually contend otherwise. Far from making the requisite showing that its "substantial rights" were trampled, Fed. R. Civ. P. 61; Morales v. American Honda Motor Co., 151 F.3d 500, 514 (6th Cir. 1998) (question is whether supposed error "caused a different outcome"); Gandy v. Sullivan County, 24 F.3d 861, 866 (6th Cir. 1994)("substantial rights" must be affected), UST finds surprisingly little to complain about.

UST's continued protests that it should have been granted summary judgment, that the Court should have granted all of its motions *in limine*, that the Court should have excluded some and allowed other evidence, and that the Court should have made the two inconsequential (and inaccurate) modifications to the jury instructions that UST requested, are both wrong and beside the point: UST does not argue, and cannot argue, that these claimed "errors" singly or together deprived it of a fair trial.

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properly instructed to award damages, if any, for injuries caused "only" by UST's unlawful conduct. Jury Instruction 4.

[52]UST engages in irrelevant hyperbole when it calls the damages award a "direct attack" on the retail industry itself. UST JMOL Mem. at 3.

1. The Court's Ruling on Summary Judgment Was Correct

UST asserts that the Court erred as a matter of law in its summary judgment ruling. Nothing could be farther from the truth.

First, UST asserts that the Court impermissibly relied on its "intent" and not its "conduct." But evidence of intent is highly probative in a Section 2 case and may even *determine* whether the conduct is "exclusionary" or "anticompetitive." See pp. 17-18, supra. Besides, the Court's ruling passed "intent" and discussed the "highly detailed" and "carefully developed, thoroughly documented record" of UST's actual misconduct and the resulting harm to consumers and competition. Feb. 17, 2000 Order at 5, 7. The Court held that credible evidence demonstrated that UST's intent was actually carried out through widespread anticompetitive conduct -- all of which conduct was later proved, in even greater detail, at trial. See, e.g., id. at 3 (efforts to eliminate competitive racks were "significantly successful"); id. at 4 (excluded competitive POS); id. (increase slot width to reduce consumer choice); id. (reduce distribution of lower-priced price-value products); id. at 7 (concerted campaign at highest levels of UST to shut Conwood out from effective competition at retail level).

Second, UST asserts that the Court erred when it held that UST's marketing practices are not immunized from review as a matter of law. As was fully briefed at the time, however, the cases that UST believes "immunize" its marketing practices are at

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best unhelpful, and often even damaging, to its claim that its conduct is ordinary and procompetitive. See note 23, supra; Pls.' Opp. to Motion for Summ. J. at 49-50, 54 n.64. UST's assertion that its practices are ordinary and not exclusionary was properly held a disputed issue of material fact, and the Court correctly reserved the determination of this and other disputed factual issues for the jury. The properly instructed jury decided that UST's practices were *neither* ordinary nor procompetitive. UST has given the Court no good reason to reverse its decision to deny summary judgment. That decision was fully informed by "well-accepted principles of § 2 law." Feb. 17, 2000 Order at 7. UST's repetitive carping sheds no new light on the subject.[53]

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[53]The only new twist is UST's incorrect parsing of Concord Boat, and in particular its suggestion that Concord Boat supports its argument that Conwood should have been held to the standards of the Clayton Act. Concord Boat involved price cutting in the boat engine market. The court did not suggest that exclusionary conduct under Section 2 is judged under the same standards as a Clayton Act claim. The court did mention in passing some of the characteristics of defendants' discount programs that lowered prices -- "the 'very essence of competition.'" 2000 WL 303035, at *21 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)). But the Eighth Circuit's approval in passing of price competition does not help UST; the evidence was undisputed that UST does not compete on price. 3/21/00 Tr. at 131 (Gierer) (UST raised price every year for last ten years); Smith Dep. at 26 (admitting that UST does not engage in price competition; denying knowledge of what "price competition" is); PX 33 ("UST doesn't 'deal' on its product's prices. We don't have to").

2. The Court's *In Limine* Rulings Were Correct

(a) The Court Properly Excluded Evidence of Owner Wealth.

Before trial, the Court issued a written ruling that excluded evidence regarding the identity of Conwood's ultimate beneficial owners and their claimed wealth. This ruling was entirely correct. The identity of the owners, and the unrelated assets they have or do not have, is both irrelevant and unfairly prejudicial -- offered solely to suggest to the jury that Conwood was owned by rich people and hence was undeserving of any recovery notwithstanding its legal entitlement.

Familiarly, UST claims severe prejudice in having been unable "to tell the whole story" of Conwood's chain of ownership.[54] But the parties in this case were corporations, and the wealth of Conwood's ultimate beneficial owners was no more relevant than evidence that the majority of UST's stockholders are financial institutions with vast wealth far exceeding that of Conwood's owners. UST does not point to a single authority or new argument suggesting otherwise.

The Court's ruling did not prevent UST from making any proper argument. It was free to elicit evidence, and to argue,

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[54]In two years of discovery, however, UST never established that Conwood had access to additional funds from its ultimate owners or that the owners involved themselves in any way in Conwood's expenditures, investments, and distributions. Had it attempted to establish these matters in discovery, moreover, it would have found the facts very different than what it now claims.

that Conwood had ample financial resources and could easily use those resources in its business rather than distribute them to its owners.[55] Conwood never claimed otherwise. UST elicited and argued that Conwood was a subsidiary of another corporation, despite the Court's statement that "I'm not even sure of the relevance." 2/29/00 Tr. at 131, 145 (Rosson). It fully explored Conwood's substantial participation in, and income from, smokeless tobacco markets other than moist snuff. See 3/23/00 Tr. at 75-76 (Scheffman). What it was not allowed to do -- offer proof of unrelated wealth of beneficial owners uninvolved in management and far up the chain of ownership, to unfairly prejudicial effect -- it has no coherent argument that it was entitled to do so, much less an argument that the failure of the Court to permit this obvious sideshow constituted a deprivation of its substantial rights or affected the outcome.

(b) The Court Properly Permitted Testimony Concerning Dr. Leftwich's Supplemental Report.

UST claims the Court erred by allowing testimony concerning Dr. Leftwich's supplemental report.[56] But this matter, too, was

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[55] See, e.g., 2/29/00 Tr. at 145 (UST cross-examination of Rosson establishing that Conwood made $150 million in free cash flow last year and this was distributed to owners); id. (available free cash flow); 3/23/00 Tr. at 42 (Scheffman testimony on amount of money distributed to owners); DX 57 (showing Conwood profits and percent distributed to owners -- used in Scheffman testimony); see also PX 14 (Conwood part of a conglomerate -- under "competition" heading of UST marketing plan).

[56] UST also submits that other damages-related arguments discussed in its JMOL motion warrant a new trial. The Court previously rejected each of these arguments and, as discussed

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exhaustively briefed and argued prior to trial. See Pls.' Opp.to UST's Mot. to Preclude "Undisclosed Expert Materials" at 6-9; Pls.' Reply to Defs.' Suppl. Mem. To Exclude Dr. Richard Leftwich at 1-7. After full consideration, the Court ruled that the supplemental material was appropriate. Feb. 23, 2000 Order at 5 ("supplementation was appropriate" under Rule 26(e); the opinions were not new and were discussed in rebuttal report). UST offers no new legal argument, let alone a compelling one, for reopening this settled issue.

Neither can UST claim prejudice from this appropriate evidentiary ruling. Instead, UST simply asserts that allowing Dr. Leftwich's deposition on the eve of trial did not permit "adequate time" to respond. UST New Trial Mem. at 10. But the timing of Dr. Leftwich's deposition was UST's decision, as it waited *four weeks* after receiving Dr. Leftwich's supplemental report before seeking to depose him. See Feb. 23, 2000 Order at 5 (noting that Magistrate had already granted leave on February 8 to take Dr. Leftwich's deposition). Tellingly, UST made no motion for a continuance and no objection to Dr. Leftwich's testimony at trial on the grounds that its attorneys were unprepared to examine him.[57]

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above, the arguments remain meritless. See Point II.E, supra.

[57] 11 Charles Alan Wright et al., Federal Practice and Procedure § 2805, at 56-57 (2d ed. 1995) (under Rule 59, "relief [for unfair surprise] will be denied if the party failed to seek a continuance"); United States v. Walton, 909 F.2d 915, 924 (6th Cir. 1990) (must show "'error was so fundamental that gross injustice would result'" if grounds for new trial were not raised at trial) (quoting Wright § 2805). The Court's previous ruling

(c) The Court Properly Admitted Professor Gundlach's Study.

UST's challenge to Dr. Gundlach's testimony is also a mere repetition of rejected pre-trial arguments. See Pls.' Opp. to Mot. to Preclude Prof. Gundlach's Study of Exclusionary Agreements and Related Testimony. Defendants' recycled claim that Dr. Gundlach did not offer any expertise, moreover, remains dead wrong. The trial record utterly undercuts UST's pre-trial assertion.[58] See, e.g., 3/9/00 Tr. at 65-66 (importance of advertising location); id. at 68 (UST aggressively seeking exclusive vending agreements); id. at 85 (outcome of agreements was reduction in competitive facings); id. at 91 (effect of agreements is to limit information to consumers, especially in light of tobacco advertising restrictions); id. at 101-16 (exclusionary features of CAP); id. at 150 (exclusive agreements solicited and gained by UST; often involved payments). Contrary to UST's claim, moreover, Dr. Gundlach comprehensively reviewed the record, including the testimony of retailers and employees.

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that "any possible prejudice" was avoided by the additional deposition remains correct. Feb. 23, 2000 Order at 5. UST's remaining Rule 703 argument is fully discussed in Point II.E, supra.

[58]UST can hardly complain, moreover, that Dr. Gundlach's study was unnecessary when UST repeatedly took the position that it had *no idea* how many exclusive vending agreements it had or where they could be located. See Milano Aff. ¶ 4; Untiedt Dep. at 110 (no idea if UST has exclusive vending agreements with top accounts, though he is responsible for them); 3/7/00 Tr. at 42 (Milano) (denying any agreement with Wal-Mart) compare with PX 47 (UST "has formed an agreement with Wal-Mart"); PX 230 (letter detailing agreement). Indeed, it was UST's professed ignorance about its own agreements that necessitated Dr. Gundlach's study.

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Id. at 74 (detailing specific UST deposition testimony supporting his opinion on 2908 agreements); id. at 93 (discussing out-of-stock problems and testimony of Wal-Mart tobacco category manager as part of basis of his opinion); id. at 131-32 (discussions with retailers). UST has no support for its renewed argument that Dr. Gundlach should not have been permitted to testify.[59]

UST also complains that it was "unable to confront" Dr. Gundlach with a video deposition excerpt from Mr. Carlson's testimony. See id. at 153 (Court: "I'm [n]ot going to let you show the deposition. Just like I didn't allow [plaintiffs] during some of their testimony earlier and you all objected to them. Exactly the same thing."). UST, however, identifies no authority that permits -- much less requires -- the playing of one witness's deposition in the middle of the testimony of another witness. Nor can it claim any prejudice from this run-of-the-mill evidentiary ruling falling well within the Court's discretion. UST was free to "confront" Dr. Gundlach with the substance of Mr. Carlson's testimony, and in fact did so. See id. (questioning Dr. Gundlach about Mr. Carlson's assertion that there was "no agreement" between UST and Wal-Mart, despite documentary evidence and testimony to the contrary). UST was also permitted to play Mr. Carlson's deposition in full at the

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[59] Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994), is inapposite. Unlike Dr. Gundlach, who personally reviewed the agreements underlying his study, see 3/9/00 Tr. at 124, the expert in Berry used a one-page summary sheet in his testimony, see 25 F.3d at 1352. The only expert in this case who used a mystery one-page summary sheet as the basis for his opinion was UST's expert, Dr. Scheffman.

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appropriate time. The Court's decision on the manner of cross-examination was entirely correct. It would be difficult to imagine anything farther from error affecting substantial rights.

(d) Sixth Circuit Law Does Not Require Store-by-Store Proof or a "Cross Section."

UST insists that a new trial is required because Conwood should have shown injury at the store level through a "cross-sectional" analysis. But UST never made any objection on this score at trial that might have allowed the Court to address this supposed error. Indeed, before trial UST took the *opposite* position, arguing that Conwood could *not* establish injury by any such "representative sampling," but only on a store-by-store basis. Mem. in Supp. of Mot. To Require Pls.' To Prove Exclusionary Conduct and Fact of Injury at Specific Retail Stores and Chains at 2.

Moreover, UST cites no legal support for its new position and simply bypasses controlling Sixth Circuit law. See Mem. in Opp. to Mot. To Require Pls. To Prove Exclusionary Conduct and Fact of Injury on Store-by-Store Basis at 2-4. As the Court recognized in denying UST's motion *in limine*, the Sixth Circuit "does not limit an antitrust plaintiff to specific damages or prohibit the use of estimates and inferences." See Feb. 23, 2000 Order at 3; Elyria-Lorain Broad. Co. v. Lorain Journal Co., 358 F.2d 790, 792-93 (6th Cir. 1966) ("It is not the rule that in an action for damages for violation of the antitrust laws plaintiff

is limited to recover only the specific items of damage which he can prove with reasonable certainty."). UST was free to argue to the jury that Conwood's experts should have used different methodologies, but instead it chose to wait until after trial to present the argument that Conwood must use a methodology specified by UST. The Court's correct ruling on the motion *in limine* leaves no room for this tactic:

> Plaintiffs' expert has utilized various calculations and theories to project the damages in this suit. It is the responsibility of the parties to argue the merits of these damages and to offer alternative explanations for their origin. The Court has no doubt each side can provide the jurors with the information necessary for them to exercise good sense and sound judgment to determine an amount, if any, that will produce adequate compensation and that will, in turn, remove speculation and guesswork from the decisionmaking process.

Feb. 23, 2000 Order at 3. See also Mem. in Opp. to Mot. To Require Pls. To Prove Exclusionary Conduct and Fact of Injury on Store-by-Store Basis at 2-4.[60]

3. The Court's Evidentiary Rulings Were Correct

At trial, the Court made a number of evidentiary rulings, some of which UST objected to, many of which it did not.[61] UST fails to demonstrate that a single one constitutes error, much

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[60]UST's claim that there was no evidence at trial of the fact of injury through lost sales at any retail location simply turns a blind eye to inconvenient evidence. See, e.g., PX 326.2 (chart showing decrease in Wal-Mart sales); PX 326.3 (chart showing decrease in 7-Eleven sales). See Point II, supra.

[61]Any objection to the admission of testimony unobjected to at trial is now waived. Walton, 909 F.2d at 924 (absent objection, error must be "so fundamental that gross injustice would result" to qualify for reversal).

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less error so grave that it trenched on UST's substantial rights and accordingly warrants the extraordinary relief of a new trial. Leonard v. Uniroyal, Inc., 765 F.2d 560, 567 (6th Cir. 1985) (no error in the admission or exclusion of evidence is grounds for overturning jury verdict unless ruling is inconsistent with substantial justice); Morales, 151 F.3d at 154 (evidentiary ruling not grounds for reversal unless it "would have caused a different outcome").

(a) Conwood's Expert Witnesses Properly Explained Highly Relevant Opinions to the Jury.

(i) Conwood's Expert Testimony Assisted the Jury. UST disparages Conwood's experts, respected full-time professors at Northwestern University, Notre Dame University, and the University of Chicago, as "human highlighters." Essentially, UST criticizes plaintiffs' experts for providing evidentiary support for their views instead of just announcing a blizzard of opinions without explanation. UST might have preferred that Conwood's experts not rely on highly detailed and credible record evidence to support and illustrate their opinions. But UST can point to no authority for its novel view that experts are not permitted to explain the bases of their opinions.[62]

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[62]Nor can UST's complaint that experts simply "read[] documents" stand as a factual matter. For example, Dr. Kamien presented opinions about, and the results of his studies on, the relevant market, UST's possession of market power, and the effects of UST's pervasive exclusionary conduct. See 2/29/00 Tr. at 246-58, 279-80; 3/1/00 Tr. at 14-23; id. at 39-44. He presented *undisputed* studies showing UST's ability to charge higher prices when it occupies more facings and the output

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(ii) Conwood's Used Proper Materials with Experts. UST objects (on hearsay grounds) to a demonstrative exhibit that itemized some of the bases for the opinions of Dr. Kamien. UST New Trial Mem. at 18. But the demonstrative was not hearsay; it was merely a summary of testimony Dr. Kamien was indisputably entitled to give, and gave without objection.

Moreover, UST failed to object to the demonstrative when it was presented. Instead, UST's counsel stated only that "I think a limiting instruction . . . would be appropriate." 2/29/00 Tr. at 8. UST both authored and agreed to the limiting instruction that the Court readily agreed to read to the jury. See id. at 124 (UST's counsel noting that "we have an agreement"); 3/1/00 Tr. at 35 (discussing instruction); id. at 37 (court giving limiting instruction to jury). UST's assertion that the Court engaged in fatal error by doing *exactly* what defendants asked at trial is both representative of its evidentiary challenges and entirely without substance.

On a related matter, UST argues that it was (somehow) improper for plaintiffs' counsel to ask Dr. Scheffman why he chose to *ignore* more than 200 sworn declarations detailing UST's

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effects of UST's agreements at the largest chain stores and mass merchandisers in the country. See PX 326.4 (price/facing chart); PX 326.2 (Wal-Mart sales drop); PX 326.3 (7-Eleven sales drop). Similarly, Dr. Blattberg explained to the jury his opinion that UST's category management practices are not "ordinary," but an abuse of accepted industry category management norms and standards. See 3/13/00 Tr. at 288-89. And Dr. Gundlach presented a number of opinions and a study discussed elsewhere. See pp. 57-59, supra.

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exclusionary conduct and instead base his conclusions on a piece of paper that he knew *absolutely nothing* about. 3/23/00 Tr. at 183-89. But questions about the bases of an expert's opinion are surely proper cross-examination. Counsel's questions were made all the more pertinent when Dr. Scheffman first claimed that the sworn declarations had not been available to him, and later admitted that they had been.[63] Here, too, UST was content at trial with a limiting instruction that it authored and the Court read.[64] It ill suits UST to charge the Court with committing fatal error for doing *precisely* what it asked at trial.

(b) Plaintiffs' Use of Fact Witnesses Was Proper.

First, UST claims that Mr. Rosson improperly presented testimony concerning the qualities and differences among Conwood's various smokeless products, even though he is the Chairman of the company and has worked in the tobacco business virtually his entire life. UST claims that Mr. Rosson improperly based his testimony on staff-prepared analyses of UST documents. But UST cites no such testimony from Mr. Rosson, only a discussion among counsel. In fact, the Court required Mr. Rosson

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[63]In his trial testimony, Dr. Scheffman first claimed that "I didn't have this at the time of my report." 3/23/00 Tr. at 166, 176, 177. When confronted with contrary deposition testimony, however, he eventually *admitted* that he in fact did have the material at the time of his report. Id. at 178-79.

[64]3/23/00 Tr. at 198 ("no questions" if court reads limiting instruction); id. at 199 (court reading instruction requested by UST); see also 3/24/00 Tr. at 34, 36 (UST requesting supplemental jury instruction and saying "that's fine"); 3/28/00 Tr. at 95-96 (jury instruction authored by UST and given by Court).

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to demonstrate personal knowledge and a proper foundation. See 2/29/00 Tr. at 4. Conwood then proceeded to do so at length, a fact UST cannot dispute. See id. at 79-80, 83 (Rosson). Indeed, UST sat on its hands after this foundation was laid, making only a single objection to Mr. Rosson's testimony in this area. As it recognized at the time, UST has literally nothing to complain about, let alone error affecting its substantial rights. Cf. note 66, infra.[65]

Second, Mr. Rosson's testimony on trends in Conwood's market share and the effect of UST's misconduct on that market share was likewise appropriate. As Chairman of Conwood, it was "very critical" to his job to track Conwood's market share and analyze factors affecting its market share. See 2/29/00 Tr. at 116-17 (Rosson). Mr. Rosson's testimony with respect to Conwood's market share growth was based on his personal knowledge of the industry and more than 45 years with Conwood, as well as Conwood's prior performance in moist snuff, and its performance in analogous smokeless markets (such as looseleaf). UST cites no case suggesting that a witness with such experience is barred from testifying about his knowledge of the industry and factors

[65]In any event, UST can hardly complain when its CEO and Chairman, Mr. Gierer, repeatedly testified based on "staff" prepared charts and data regarding industry expenditures and market share. See 3/21/00 Tr. at 81-82 (testifying on charts he "asked [his] staff to prepare").

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affecting sales in the industry. Indeed, the law authorizes precisely this kind of testimony.[66]

Third, UST complains that Mr. McClure should not have been permitted to testify about the effects of UST's tactics on Swedish Match. UST describes the basis for his testimony as merely "having previously worked for Swedish Match" as a Vice President. UST New Trial Mem. at 20. This is wrong. Mr. McClure served as President of Swedish Match, Manager of North America, and eventually became the Chief Operating Officer of Swedish Match worldwide. 3/13/00 Tr. at 6. Mr. McClure was deeply involved in the development and marketing of Swedish Match's moist snuff products. Id. at 16-17, 21-22, 28-29. There was a solid basis for his testimony in his knowledge and experience. UST was fully able to cross-examine Mr. McClure on his familiarity with the industry. Its decision not to do so reflects its recognition that Mr. McClure well knew what he was talking about.

UST's Chairman offered exactly the same sort of testimony defendants now claim to have been objectionable when given by Mr.

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[66] See Fed. R. Evid. 701 (allowing witnesses to testify to opinions and inferences rationally based on their perception and helpful to determination of fact in issue or understanding of witness's testimony); See Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1174 (3d Cir. 1993) (businessman's "experience in the quick-lube business" made him "qualified to predict how well [plaintiff] could have been expected to do"); In re Merritt Logan, Inc., 901 F.2d 349 (3d Cir. 1990) (principal shareholder's "personal knowledge of his business . . . [was] sufficient to make [this] witness eligible under Rule 701 to testify as to how lost profits could be calculated"). The Court's decision to admit Mr. Rosson's testimony on this point is unassailable.

Rosson and Mr. McClure. In fact, Mr. Gierer went beyond Mr. Rosson's description of the characteristics of different types of smokeless tobacco and opined about consumer switching behavior between cigarettes and moist snuff. He also testified about market share trends, changes in market share, projections of market share growth, and factors affecting changes in market share of moist snuff companies. He even opined as a matter of economics that it was "not feasible" to limit distribution and suppress Conwood's growth. 3/21/00 Tr. at 228. The notion that Mr. Rosson and Mr. McClure were not allowed to offer more modest testimony about matters plainly within their competence is both illogical and unsupported in law.

(c) Plaintiffs' Inquiries About the Availability of UST Witnesses Were Appropriate.

UST next complains about counsel's questions concerning the location and availability of UST witnesses.[67] But it is settled that "counsel in a civil trial may comment on the failure of a party to call an available witness whose testimony the party would naturally be expected to produce if favorable to him." Downriver Internists v. Harris Corp., 929 F.2d 1147, 1151 (6th Cir. 1991) (citation omitted). Accordingly, there can be no objection to counsel's eliciting the fact that the witnesses

[67]Contrary to UST's suggestion in its motion, the Court did not permit Conwood to inform the jury that UST refused to make 18 critical executives available for live testimony at trial.

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were, in fact, available. Not surprisingly, UST cites no case in which admission of such testimony has been held to be error.[68]

4. The Court's Jury Instructions Were Proper

(a) "Restrictive" Was the Correct Instruction.

UST argues that the use of the term "restrictive" instead of "predatory" was "highly significant" and requires a new trial. UST is incorrect. The term "restrictive" and other such synonyms are commonly used in the Sixth Circuit and elsewhere to describe conduct proscribed by Section 2. See, e.g, Riverview Inv., Inc. v. Ottawa Community Improvement Corp., 769 F.2d 324, 328 (6th Cir. 1985) ("Regarding Section 2 of the Sherman Act, what matters is that the freedom to compete is restrained."); Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 575 (6th Cir. 1986) (conduct that "'either does not further competition on the merits or does so in an unnecessarily restrictive way'" violates Section 2) (quoting Aspen Skiing, 472 U.S. at 615 n.32); Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. at 695 (jury

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[68]UST's chairman testified that he was angry about the deposition testimony of UST senior executives. See 3/21/00 Tr. at 91, 117-18, 120 (Gierer). He testified about the investigation he was going to do when he returned to Greenwich. See id. at 190. He testified about his plan to "have a sit-down" with the President of UST and that he "would deal" with UST's director of its largest accounts, after viewing their "astonishing" deposition testimony at trial. Id. at 118, 190. It was entirely appropriate to ask UST witnesses whether or not these same senior executives planned to appear at trial to discuss their actions. The Court properly concluded that the questions and comments in closing were appropriate: "I think [Mr. Gierer] opened that door, saying he was troubled and he was going to investigate. I think it's fair game." See 3/27/00 Tr. at 91.

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question whether "defendant's monopolistic and restrictive practices" harmed plaintiff).

Besides, UST must concede that the real question is not the particular word chosen but the substance conveyed. See, e.g., United States v. Kendrick, 853 F.2d 492, 495 (6th Cir. 1988) (defendant has "no right to select particular wording of jury instruction") (citation omitted); United States v. Baker, Nos. 84-5216, 84-5217, 84-5223, 84-5234, 1984 U.S. App. LEXIS 13437, at *8 (6th Cir. Dec. 20, 1984) (court has "broad discretion in wording its jury instructions" and is reversible only if the instruction is "substantively" incorrect). And UST has no objection to the substance of the Court's detailed definition of "restrictive" or "exclusionary" conduct: "conduct that has the effect of preventing or excluding competition or frustrating or impairing the efforts of other firms to compete for customers within the relevant market." Jury Instruction 2.4. Having made no objection to the *substance* of the Court's instruction at trial, it cannot seriously complain now. Fed. R. Civ. P. 51 (party cannot assign error to jury instruction absent objection at trial).

(b) The Court's Damages Instruction Was Complete and Proper.

UST's argument that the Court should have included a nominal damages instruction is without substance for a host of reasons:

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First, as the Court noted at trial, there is no authority requiring a nominal damages instruction, or holding its absence error. See 3/27/00 Tr. at 69.

Second, the proposed instruction was, as the Court observed, essentially "a reargument of causation." Id.; see Jury Instruction 2.5: Injury and Causation (instructing jury that Conwood must prove "some damage flowed to it" as a result of UST's antitrust violations).

Third, UST's complaint that the jury had only Conwood's damages figure is the result solely of UST's tactical decision not to present *any* alternative damages figure to the jury. See Portis, 1994 WL 362110, at *2, *3 (defendant presented no alternative damages and relied solely on theory that claim was a fraud, thus jury had "no evidence of economic loss to consider except that presented by plaintiff"). UST cannot now ask the Court to protect it from its own strategy.

Finally, the jury was properly instructed -- using language proposed by UST -- that it need not find *any* damages. Hence, a nominal damages instruction was superfluous. Jury Instruction 4 ("amount of damages, if any"); 3/28/00 Tr. at 112 ("You should not interpret the fact that I've given instructions about Conwood's damages as an indication in any way that I believe Conwood should or should not win this claim").

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IV. THERE IS NO LEGAL OR FACTUAL BASIS FOR REDUCING THE JURY'S AWARD

Controlling Sixth Circuit precedent holds that "'[a] jury verdict will not be set aside or reduced as excessive unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss.'" Farber, 917 F.2d at 1395 (citations omitted). See also Jackson v. City of Cookeville, 31 F.3d 1354, 1359 (6th Cir. 1994) (ordering reinstatement of verdict at higher level because there was evidence upon which jury could have awarded maximum amount); In re Lewis, 845 F.2d 624, 635 (6th Cir. 1988) ("A motion for remittitur should only be granted if the award *clearly* exceeds the amount which, under the evidence in the case, was the maximum that a jury reasonably could find to be compensatory for the plaintiff's loss.") (internal quotation marks omitted); Green v. Francis, 705 F.2d 846, 850 (6th Cir. 1983) (affirming refusal to set aside or reduce verdict because it was not beyond the maximum damages supported by the evidence).

Indeed, "[a] trial court is within its discretion in remitting a verdict only when, after reviewing all evidence in the light most favorable to the awardee, it is convinced that the verdict is *clearly* excessive, resulted from passion, bias or prejudice; or is so excessive or inadequate as to shock the conscience of the court." Farber, 917 F.2d at 1395 ("If there is

any credible evidence to support a verdict, it should not be set aside.") (emphasis added).[69]

UST's various proposed recalculations do not come within miles of meeting this standard:

First, UST asks the Court (without any hint of irony) to *rely* on Dr. Leftwich's testimony and simply award damages at the low end of his range, rather than in the middle, as the jury did. But such an action would run foursquare into the Sixth Cicuit's holdings that remittitur of a jury award at the *high* end of the range supported by the evidence is a reversible abuse of discretion. See Farber, 917 F.2d at 1395; Jackson, 31 F.3d at 1359; In re Lewis, 845 F.2d at 635; Green, 705 F.2d at 850.

Second, UST asks the Court to rely on Mr. Rosson's testimony that Conwood would have grown at least 10 share points absent UST's misconduct. UST argues only that the jury should have taken into account the possibility that some of these 10 points *could* have come at Swedish Match's or Swisher's expense, not UST's. Of course, so long as it was UST's conduct that prevented Conwood from gaining this share, it is *irrelevant* where it would

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[69]The two cases cited by UST do nothing to help its cause. Tennessee Consolidated Coal Co. v. United Mine Workers, 416 F.2d 1192, 1203 (6th Cir. 1969), does not even discuss when remittitur is appropriate and actually *denies* the defendant's argument that an additional reduction of a remitted award was appropriate. Parkway Garage, Inc. v. City of Philadelphia, No. 90-7752, 1994 WL 412430, at *8 (E.D. Pa. Aug. 3, 1994), is similarly unhelpful. Unlike here, in Parkway there was a complete absence of *any* evidence that the closure of a parking garage for six weeks by the City resulted in damages beyond the date of closure.

have come from. But UST was, of course, entirely free to argue this theory to the jury. It simply made the decision not to do so. See Portis, 1994 WL 362110, at *2, *3 (defendant presented no alternative damages and thus jury had "no evidence of economic loss to consider except that presented by plaintiff"). The jury was entitled to find that Conwood's gain through unimpaired competition would have amounted to $350 million, and accordingly the verdict is not appropriately subject to reduction.[70]

Third, UST returns once again to the "retailer decides" defense. It asks the Court to assume that the jury awarded damages for certain "sophisticated" chains that made "reasoned decisions" to exclude Conwood entirely independent of influence from UST. UST then asks the Court to remit some (unspecified) amount of damages attributable to these chains. Of course, UST neglects to cite any evidentiary basis for its presumption that the jury's award included money for independent conduct.[71] UST offers the Court no basis in the evidence, or even in principle, for figuring remitted damages. And UST blithely bypasses the

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[70]This also impermissibly asks the Court to disregard Dr. Leftwich's study (on which UST's prior argument for remittitur expressly relies), which found damages of as much as $488 million. See Farber, 917 F.2d at 1395 (court cannot substitute its judgment if "any credible evidence" exists to support award).

[71]Moreover, the record is replete with evidence that their paradigmatical "independent" retailer, Wal-Mart, actually *relied* on UST to act as its category manager, that UST consciously exploited that trust to exclude Conwood and other price-value competition, that rival sales and Wal-Mart sales suffered as a result, and that UST had to resort to unprecedented "promotional" payments to make up Wal-Mart's lost profits. 3/13/00 Tr. at 264-89 (Blattberg).

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fact that the Sixth Circuit has made plain that such an exercise in fantasy would constitute reversible error. Jackson, 31 F.3d at 1361 (trial court abused its discretion in remitting award when court simply presumed that the jury did not account for present value); Farber, 917 F.2d at 1395.

Conclusion

UST's motions for judgment as a matter of law, new trial, and remittitur should be denied. A proposed order is attached.

Respectfully submitted,

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April 30, 2000

16diii005638

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

Upon consideration of defendants' motions for judgment as a matter of law, for a new trial, and for remittitur, plaintiffs' opposition thereto, the entire record in this case, and good cause shown, it is hereby ordered that said motions are DENIED.

This the ___ day of _____, 2000.

HONORABLE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that on this 30th day of April, 2000, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., Four Times Square, New York, NY 10036.

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Bernadette Murphy

EXHIBIT A

ATTACHMENT A

U.S. TOBACCO NOW ARGUES IN ITS JMOL/NEW TRIAL MOTION	U.S. TOBACCO'S PRIOR ARGUMENT ON THE ISSUE	CONWOOD'S PRIOR RESPONSE	COURT'S PRIOR RULING ON THE ISSUE
U.S. Tobacco did not wield monopoly power, but rather engaged in ordinary marketing practices The alleged anticompetitive activity by UST (e.g., shelf space recommendations, SOF=SOM, recommending exclusive racks, CAP) is nothing more than ordinary competitive marketing practices. (UST JMOL Mem, throughout)	"USTC's Other Alleged Misconduct Involves Ordinary Business Practices" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 25-37 (11/15/99)) (UST Directed Verdict Mem. at 2-5 (3/14/00))	"There Is Ample Evidence From Which a Jury Could Conclude That UST's 'Ordinary' Business Practices Are Exclusionary" (Pls.' Mem. in Opp. to Mot. for Summ. J. at 53-54 (12/9/99))	UST does not argue that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could never constitute violations at all. This falls short of the proof which would be required to prevail on the § 2 claims, particularly in view of the numerous record comments from high level UST personnel which arguably show an anitcompetitive intent rather than a business justification. (Feb. 17, 2000 Order at 8)
Shelf space recommendations are an ordinary marketing practice and cannot be found to be anticompetitive "Whether in the context of category management or otherwise, U.S. Tobacco's attempts to influence retailer decisions about product selection and space allocations are core aspects of competition in the packaged goods industry and have been for many decades." (UST JMOL Mem at 17-19)	"USTC's Shelf Space Suggestions and Recommendations Are Not Exclusionary" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 26-27 (11/15/99))	Professor Blattberg indicated that UST abused category management to suppress competition. (Pls.' Mem. in Opp. to Mot. for Summ. J. at 18 (12/9/99))	UST does not argue that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could never constitute violations at all. (Feb. 17, 2000 Order at 8)

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U.S. TOBACCO NOW ARGUES IN ITS JMOL/NEW TRIAL MOTION	U.S. TOBACCO'S PRIOR ARGUMENT ON THE ISSUE	CONWOOD'S PRIOR RESPONSE	COURT'S PRIOR RULING ON THE ISSUE
SOF=SOM is an ordinary marketing practice, and cannot be found to be anticompetitive (UST JMOL Mem at 19-22)	"USTC's Requests That Retailers Give USTC Share Of Shelf Space Equal To Share Of 'Market' Are Not Exclusionary" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 28-30 (11/15/99))	"UST used the SOF=SOM formula not to obtain needed room for its products, but to exclude competition." (Pls.' Mem. in Opp. to Mot. for Summ. J. at 20 (12/9/99))	UST does not argue that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could never constitute violations at all. (Feb. 17, 2000 Order at 8)
Offering exclusive racks to retailers is an ordinary marketing practice and cannot be found to be anticompetitive (UST JMOL Mem at 23-27)	"USTC Offering 'Category Management' Services Is Not Exclusionary" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 30-31 (11/15/99))	"Beginning in 1995, UST entered into agreements covering 22,000 stores that expressly excluded rival racks, products, facings, or POS." (Pls.' Mem. in Opp. to Mot. for Summ. J. at 23 (12/9/99))	UST does not argue that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could never constitute violations at all. (Feb. 17, 2000 Order at 8)
CAP is an ordinary marketing practice and cannot be found to be anticompetitive (UST JMOL Mem at 27-33)	"USTC's 'CAP' Incentive Program Is Not Exclusionary" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 32-33 (11/15/99))	"CAP paid retailers to participate in *all* UST new brand tests or introductions, even for its 'slow selling' product lines, thus ensuring that UST could exert pressure on the space available for rivals and their new products." (Pls.' Mem. in Opp. to Mot. for Summ. J. at 27 (12/9/99))	UST does not argue that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could never constitute violations at all. (Feb. 17, 2000 Order at 8)

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U.S. TOBACCO NOW ARGUES IN ITS JMOL/NEW TRIAL MOTION	U.S. TOBACCO'S PRIOR ARGUMENT ON THE ISSUE	CONWOOD'S PRIOR RESPONSE	COURT'S PRIOR RULING ON THE ISSUE
U.S. Tobacco's alleged tortious conduct cannot be found to be anticompetitive (UST JMOL Mem at 33-37)	"USTC's Alleged Tortious Conduct In The Field Is Not Exclusionary, And Is Neither A 'Corporate Policy' Nor 'Systematic and Routine'" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 33-37 (11/15/99)) (UST Directed Verdict Mem. at 5-6)	The evidence that UST engaged pervasively and systematically in this misconduct comes from a wealth of sources: former UST representatives, retailers, Swedish Match, and Conwood representatives. (Pls.' Mem. in Opp. to Mot. for Summ. J. at 11-16 (12/9/99))	"[T]he questions of whether these anticompetitive practices took place, how extensive they were, how much they were orchestrated by top management and how much by sporadic local efforts by 'rogue' sales personnel, how effective they were in restraining or eliminating competition, . . . -- all these are issues which can be resolved only by a jury." (Feb. 17, 2000 Order at 11)
The Court's improper focus on U.S. Tobacco's intent, rather than its exclusionary conduct (UST JMOL Mem at 10-14)	"Evidence Of Alleged 'Anticompetitive' Intent Cannot Save Conwood" (Reply Mem. in Supp. of Defs.' Mot. for Summ. J. at 26-28 (12/23/99))	"[E]vidence of UST's intent may determine whether 'the challenged conduct is fairly characterized as exclusionary or anticompetitive.'" (Pls.' Mem. in Opp. to Mot. for Summ. J. at 3 (12/9/99))	"[N]umerous record comments from high level UST personnel . . . arguably show an anticompetitive intent rather than a business justification for the exclusionary POS practices." (emphasis added) (Feb. 17, 2000 Order at 8)
The moist snuff "market" was not harmed by U.S. Tobacco's alleged misconduct (UST JMOL Mem at 14-16, 37-41)	"Conwood Cannot Establish That USTC Has Reduced Market-Wide Competition in the Moist Snuff Industry" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 38-40 (11/15/99))	"UST's Exclusionary Conduct Harmed Conwood, Competition, and Consumers" (Pls.' Mem. in Opp. to Mot. for Summ. J. at 30 (12/9/99))	"Multiple issues concerning injury, damage, and causation remain for trial. Included in these [is]. . .whether the effects on competition and on Conwood which plaintiff claims are the result of actions by UST at all." (Feb. 17, 2000 Order at 10)

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U.S. TOBACCO NOW ARGUES IN ITS JMOL/NEW TRIAL MOTION	U.S. TOBACCO'S PRIOR ARGUMENT ON THE ISSUE	CONWOOD'S PRIOR RESPONSE	COURT'S PRIOR RULING ON THE ISSUE
Conwood failed to prove retailers were coerced by U.S. Tobacco (UST JMOL Mem at 14-16, 21-22, 44-46)	"The Independent Decisions Of Retailers" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 41-42 (11/15/99))	"In any event, whether retailers agree to exclusion is legally irrelevant: the essence of any Section 2 claim is not harm to retailers; it is harm to competition and consumers." (Pls.' Mem. in Opp. to Mot. for Summ. J. at 62 (12/9/99))	"Multiple issues concerning injury, damage, and causation remain for trial. Included in these are the. . .uncoerced decisions by retailers." (Feb. 17, 2000 Order at 10)
The Court improperly granted Conwood's motion to preclude disclosure of Pritzker family ownership of Conwood (UST Mot. for New Trial at 8-9)	Conwood has attempted to portray itself as a "victimized, small competitor" and the Pritzkers are a disinterested owner of Conwood. (UST Opp. to Conwood Mot. in Limine at 8-9)	"[I]nformation about the ultimate beneficiaries of these profits would be inflammatory and prejudicial." (Pls.' Mots. in Limine at 1 (1/28/00))	"[T]he probative nature of the inquiry is substantially outweighed by the potential prejudice to Plaintiffs, while causing no harm to Defendants' case." (Feb. 23, 2000 Order at 1)
Dr. Leftwich's damages study is "speculative" "Conwood's theory of damages in this case was the epitome of rank speculation and 'guesswork' -- all, however, stamped with the imprimatur of expert testimony.'" "Dr. Leftwich's testimony does not provide the jury with any basis to determine that Conwood lost sales by reason of U.S. Tobacco's conduct, much less to quantify any lost sales." (UST JMOL Mem at 50-60)	"It is axiomatic that, in calculating antitrust damages, an expert witness must attribute the damages solely to the unlawful acts of the defendants." (Mem. in Supp. of Defs.' Mot. To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 11 (11/15/99))	Dr. Leftwich's analysis meets all relevant criteria for the admission of expert testimony. UST may challenge Leftwich's opinions before the jury, but has offered no valid reason to preclude his testimony. (Pls.' Opp. to Mot. To Exclude Damages Study and Future Testimony of Dr. Richard Leftwich at 5 (12/9/99))	"Leftwich's testimony satisfies *Daubert*. His methodologies are generally acceptable. (Citation omitted) Defendant's expert also used them. . . . The credibility of the expert and his opinion is an issue for the jury." (Feb. 23, 2000 Order at 4)

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U.S. TOBACCO NOW ARGUES IN ITS JMOL/NEW TRIAL MOTION	U.S. TOBACCO'S PRIOR ARGUMENT ON THE ISSUE	CONWOOD'S PRIOR RESPONSE	COURT'S PRIOR RULING ON THE ISSUE
Dr. Leftwich's supplemental disclosure of his damages report was untimely In Dr. Leftwich's supplemental report, he used the surveys of Conwood personnel to add $250 million to his damages estimate; allowing UST to take his deposition on the "eve of trial" prejudiced defendants. (UST Mot. for New Trial at 10)	Dr. Leftwich's supplemental opinion is both a new expert opinion and untimely. (Mem. in Supp. of Defs.' Motion To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 7-18 (2/8/00))	"Leftwich's Supplemental Report presents nothing new, is timely, and has not caused any delay that prejudices UST." (Pls.' Reply to Defs.' Suppl. Mem. in Supp. of Their Motion To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 2 (2/16/00))	"[Leftwich's supplemental opinions] are not new, and were discussed in Leftwich's rebuttal report. . . . However, to avoid any possible prejudice to Defendants, Defendants may take Leftwich's deposition again prior to his testimony at trial." (Feb. 23, 2000 Order at 5)
Prof. Gundlach's lack of foundation for his exclusivity study "He is not, and did not claim to be, an expert in determining whether certain documents constitututed agreements; nor did he offer any comparative analysis based on his work with either retailers or manufacturers in the retail industry." (UST Mot. for New Trial at 11-12)	"The Gundlach 'study' is nothing more than a table of retailers with whom USTC purportedly has had exclusive agreements since 1995." (Mem. in Supp. of Defs.' Mot. in Limine to Preclude Professor Gundlach's "Study" of Purported "Exclusive Agreements" and Related Testimony at 4 (1/28/00))	These agreements require exclusive racks and POS on their face. (Pls.' Opp. to Mot. To Preclude Professor Gundlach's Study of Exclusionary Agreements and Related Testimony at 5 (2/11/00))	"Defendants mischaracterize Gundlach's testimony regarding the agreements. Gundlach did not include the types of agreements that contained merely 'an indicia of some form, type of exclusion' in his study." (Citation omitted) (Feb. 23, 2000 Order at 2)

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U.S. TOBACCO NOW ARGUES IN ITS JMOL/NEW TRIAL MOTION	U.S. TOBACCO'S PRIOR ARGUMENT ON THE ISSUE	CONWOOD'S PRIOR RESPONSE	COURT'S PRIOR RULING ON THE ISSUE
Failure of Conwood to prove specific injury at store level "At a minimum, the Court should have required Conwood to prove actual fact of injury [at] a subset of stores. . . . Conwood failed to present evidence at trial of any lost sales at any retail location." (UST Mot. for New Trial at 13, 14)	Conwood should be ordered to prove "(i) that USTC engaged in some form of exclusionary behavior in every retail establishment in which Conwood was purportedly injured; and (ii) that Conwood sales were reduced by this conduct as opposed to other causes." (UST Mot. in Limine at 6 (1/28/00))	Antitrust precedent does not require specific damages; rather, "general" damages may be assessed. (Conwood Mem. in Opp. to Mot. to Require Pls. To Prove Exclusionary Conduct and Fact of Injury on a Store-by-Store Basis at 2-4 (2/11/00))	"Simply put, Plantiffs are not required to prove what damage occurred at each of the 300,000 separate retail establishments in order to prove fact of injury. Defendants argument to the contrary is not well taken." (Feb. 23, 2000 Order at 3)
The Court's acceptance of a monopoly "broth" theory (UST JMOL Mem at 10-37)	"A 'Monopoly Broth' Without Any Independent Antitrust Violations Cannot Survive" (Reply Mem. in Supp. of Defs.' Mot. for Summ. J. at 18-21 (12/23/99))	The amalgam of UST's misconduct is mandated by the antitrust laws. (Pls.' Mem. in Opp. to Mot. for Summ. J. at 45-52 (12/9/99))	"UST's 'deconstruction' of the Conwood claims into a series of discrete antitrust theories, which UST then individually seeks to knock down, does not compel the summary judgment dismissal of this case." (Citation omitted) (Feb. 17, 2000 Order at 7)
Conwood made improper comments about the availability of U.S. Tobacco employee witnesses Questions and comments on the availability of U.S. Tobacco witnesses were, "irrelevant, misleading, and unfairly prejudicial." (UST Mot. for New Trial at 21-23)	Conwood chose the forum, and chose not to depose authors of documents. (3/27/00 Tr. at 89-90)	The UST witnesses chose not to appear. UST could have brought witnesses to Paducah who had personal knowledge of the issues in this case. (3/27/00 Tr. at 88-89)	Plaintiff's comments about UST employees not brought to Paducah is a fair comment. (3/27/00 Tr. at 90)

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COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC.,

Defendants.

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Civil Action No.
5:98CV-108-R

FILED
U.S. DISTRICT COURT
W.D.K.Y.

PLAINTIFFS' CONSOLIDATED OPPOSITION TO MOTIONS FOR JUDGMENT AS A MATTER OF LAW, NEW TRIAL, AND REDUCED DAMAGES

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Introduction

Defendants (collectively, "UST") argue for almost 100 pages that the Court should ignore the verdict of the properly instructed jury and enter judgment for them as a matter of law. Alternatively, they ask the Court to order a new trial, or reduce the damages award to the low end of the range supported by the evidence (and perhaps even lower based on supposed adjustments defendants failed to argue to the jury). In virtually all respects, however, defendants simply repeat old arguments. These arguments, supported (or not) by the very same cases, all were urged on the Court in support of their successive motions for summary judgment and for directed verdict, or in motions *in limine*. The Court's rulings on those points are law of the case, and need not be reconsidered absent significant new facts, change in law, or a showing of clear error -- none of which UST even attempts to demonstrate. (Point I).

Motion for Judgment as a Matter of Law. Defendants have no serious quarrel with the Court's instructions to the jury; they effectively concede that the jury decided the case on the proper legal standards. Nor can they plausibly argue -- although they do -- that there was a lack of evidence to support the jury's verdict on each element of the causes of action. There *is* ample evidence that UST possessed monopoly power in the U.S. moist snuff market, engaged in exclusionary conduct, and thereby harmed competition and Conwood.

While UST disagrees with this evidence and suggests that there was some contrary evidence, it makes no meaningful effort to grapple with the actual trial record, which fully supported the jury's verdict. UST's submission that the evidence compels judgment for defendants as a matter of law repeats word-for-word claims made to and rejected by the Court on summary judgment, on a far less extensive factual record. UST gives the Court no persuasive reason to reverse its prior rulings, which in any event are plainly correct. (Point II).

Motion for New Trial. While UST makes perfunctory arguments that the verdict was against the weight of the evidence and that the damages were "excessive" by some undefined measure, it principally (re)argues that the Court was wrong to deny summary judgment, wrong to deny some of its motions *in limine*, and wrong in failing to sustain evidentiary objections that in many instances UST did not even make. But it is UST that is wrong -- wrong to demand endless reconsideration of the same arguments. UST makes no showing that any of the Court's rulings constitutes error, much less error that deprived it of a fair trial. (Point III).

Motion for Reduced Damages. Finally, after deriding Dr. Leftwich's study in numerous pre-trial, trial, and post-trial motions, UST closes with a demand for a reduced damages award based on the low end of the range established by his analysis. It asks the Court to override the jury's determination of damages

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in the middle of that range -- a reasonable conclusion supported by a wealth of independent evidence from other witnesses, including UST witnesses. That amount, UST argues, should be further reduced based on adjustments that it chose not to present to the jury, and that are unsupported by any evidence. UST elected to offer no damages testimony, other than testimony that Conwood had suffered no damages. UST cannot now credibly complain that the jury failed to weigh evidence UST decided not to present, or that the jury was required by law to award only the low end of the range supported by the evidence. (Point IV).

UST simply refuses to acknowledge that an attentive jury listened carefully for a month to all of the evidence and argument that the parties could muster. It refuses to acknowledge that the jury considered the demeanor and credibility of dozens of witnesses as well as hundreds of documents offered by both sides. It refuses to acknowledge that the jury reached a considered and reasonable judgment based on indisputably proper legal instructions and fully supported by the evidence. UST received a fair trial. Its post-trial motions should be denied.

I. THE COURT'S PRIOR RULINGS CONSTITUTE LAW OF THE CASE THAT UST HAS OFFERED NO REASON TO RECONSIDER

As the attached chart (Attachment "A") demonstrates, the Court has previously ruled on virtually every one of UST's post-trial arguments, which were previously made in the same words and based on the same proffered authority. UST seeks to relitigate issues already fully briefed, considered, and decided by the

Court on summary judgment or on directed verdict (twice), or *in limine* before and during trial.[1]

The Court does not have to entertain such rote repetition. "Under the doctrine of law of the case, findings made at one point in the litigation become the law of the case for subsequent stages of that same litigation." United States v. Moored, 38 F.3d 1419, 1421 (6th Cir. 1994). The rule is based on "the sound public policy that litigation be decided and then put to an end." In re United States Steel Corp., 479 F.2d 489, 494 (6th Cir. 1973). See also Hanover Ins. Co. v. American Eng'g Co., 105 F.3d 306, 310 (6th Cir. 1997) (refusing appeal on defendant's motion for judgment as a matter of law after trial because it had heard and decided the *same* legal issues pressed by the *same* defendant in an interlocutory appeal concerning its summary judgment motion).

The law of the case does not prevent the Court from reconsidering its prior rulings. But "to maintain consistency and avoid reconsideration of matters once decided during the

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[1]Indeed, UST's brief in support of its motion for judgment as a matter of law ("JMOL") tracks its summary judgment memorandum virtually page for page. For example, on UST's "ordinary" business practice defense, compare UST JMOL Mem. at 17-33 with UST Summ. J. Mem. at 25-33; UST Directed Verdict Mem. at 2-5. On its argument that tortious conduct cannot be exclusionary, compare UST JMOL Mem. at 33-37 with UST Summ. J. Mem. at 34-37; UST Directed Verdict Mem. at 5-6. On harm to competition, compare UST JMOL Mem. at 37-41 with UST Summ. J. Mem. at 38-40. On harm to Conwood, compare UST JMOL Mem. at 42-50 with UST Summ. J. Mem. at 40-50; UST Directed Verdict Mem. at 7-8. On the claim that damages are "speculative," compare UST JMOL Mem. at 50-60 with UST Summ. J. Mem. at 46-48.

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course of a single continuing lawsuit," 18 Charles Alan Wright et al., Federal Practice and Procedure § 4478, at 788 (1981 & 1999 Supp.), once an issue is decided, it is typically reopened "only in limited circumstances." United States ex. rel. Stevens v. McGinnis, Inc., No. C-1-93-442, 1996 U.S. Dist. LEXIS 22122, at *19-*20 (S.D. Ohio Feb. 16, 1996). "The major grounds that justify reconsideration involve an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Cale v. Johnson, 861 F.2d 943, 947 (6th Cir. 1988) (citation omitted).

None of these circumstances remotely applies here. The evidence at trial was by no means "substantially different" from the summary judgment record. It was stronger and more extensive. There has been no change of controlling law. And UST does not (and cannot credibly) claim that any of the Court's rulings was clearly erroneous or manifestly unjust. Accordingly, UST has provided no basis for what is, in substance, a motion for reconsideration of the Court's summary judgment and other rulings.

II. THE PROPERLY INSTRUCTED JURY'S VERDICT IS SUPPORTED BY THE EVIDENCE, AND UST'S CONTRARY ARGUMENTS FOR JUDGMENT AS A MATTER OF LAW ARE WITHOUT MERIT

It is settled that judgment as a matter of law should be granted only "cautiously and sparingly" since it negates a determination of the facts by the jury. 9A Charles Alan Wright et al., Federal Practice and Procedure § 2524, at 252 (2d ed. 1995). In considering a Rule 50(a) motion, a court must refrain

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from weighing the evidence or making credibility determinations. See Lytle v. Household Mfg., Inc., 494 U.S. 545, 554-55 (1990); Jackson v. Quanex Corp., 191 F.3d 647, 657 (6th Cir. 1999). The jury verdict must be respected unless "there is a complete absence of pleading or proof on an issue material to the cause of action or when no disputed issues of fact exist." Jackson, 191 F.3d at 657 (internal quotation marks omitted); see also Sawchik v. E.I. DuPont Denemours & Co., 783 F.2d 635, 636 (6th Cir. 1986). In considering a motion for judgment as a matter of law, moreover, the Court must consider the evidence in a light most favorable to the nonmovant, giving that party the benefit of all reasonable inferences. See Tuck v. HCA Health Servs. of Tennessee, Inc., 7 F.3d 465, 469 (6th Cir. 1993).[2]

Because UST concedes (with two trivial exceptions) that the Court's instructions to the jury were correct, the only issue is whether there was a "complete absence of proof" on any of the necessary elements of Conwood's Section 2 claim. Jackson, 191

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[2]Albani v. Southern Arizona Anesthesia Services, P.D., No. 91-588, 1997 WL 718499, at *1 (D. Ariz. Jan. 27, 1997), does not stand for the proposition that an antitrust verdict deserves heightened scrutiny under Rule 50. In upholding the attempted monopoly verdict, the court noted that the defendants' Rule 50 motion "fails to account for the reasonable inferences the jury could have taken, and asks that we ignore them as well." Id. at *2. The court in Albani did begin its analysis expressing "serious concerns with the jury's result" because the jury found no conspiracy, combination, or contract in restraint of trade, yet concluded that the same conduct constituted attempted monopoly. Id. at *1. No such split verdict exists here. Moreover, the Albani court found its reservations insufficient to grant judgment for the defendants under Rule 50.

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F.3d at 657.[3] UST does not attempt to clear that high hurdle; nor could it. The trial record brims with evidence on each element. While UST focuses on the limited evidence that supported its arguments, its failure to address the extensive and inconvenient contrary proof is fatal to its motion.

A. The Jury's Finding That UST Had Monopoly Power in the U.S. Moist Snuff Market Was Supported by the Evidence

The jury was properly instructed on the applicable legal standard for assessing whether UST had monopoly power. Jury Instructions 2.1, 2.3.[4] UST does not contend otherwise. The Court's instructions precisely tracked controlling Sixth Circuit authority.[5] The jury properly found, based on undisputed

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[3]UST does not even address the elements of attempted monopolization, except insofar as they overlap with the elements of actual monopolization.

[4]The Court first defined monopoly power directly, instructing that "[m]onopoly power is the power to control prices in or to exclude competition from the relevant market." Jury Instruction 2.1. The Court then listed a number of factors indicative of monopoly power, including: (i) UST's market share, (ii) the trend of UST's market share, (iii) the number and size of UST's competitors, (iv) competitors' share trends, (v) the history of entry into and exit from the market of other competitors, (vi) UST's ability to raise price without losing business, and (vii) UST's profit margins. See Jury Instruction 2.3. All such instructions were given with no objection from UST.

[5]See Re/Max Int'l, Inc. v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999)("There are two ways to establish . . . that the defendant holds monopoly power. The first is by presenting direct evidence 'showing the exercise of actual control over prices or the actual exclusion of competitors.' The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market.") (quoting Byars v. Bluff City News Co., 609 F.2d 843, 850 (6th Cir. 1979)), petition for cert. filed, No. 99-294, 68 U.S.L.W. 3138 (Aug. 17, 1999).

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evidence, that UST had monopoly power in accordance with the Court's instructions.

UST Admissions. Remarkably, and unmentioned by UST, the jury needed to look no further than UST's own admissions to determine that it had market power. In several strategic documents, the company candidly acknowledged its market power (and, indeed, its abuse).[6] UST did not attempt to address or dispute this proof at trial, and it does not come to grips with it now.[7] The jury was entitled to credit UST's admissions about its position in the market, and that evidence alone was sufficient to support the finding of market power.[8]

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[6] See, e.g., PX 156 ("80% market share gives UST 'market power' -- this means we cannot legally use that market power to prevent competition from selling their products"); PX 33 ("UST does not deal on price -- we don't have to"); id. ("Our market power allows this [stated barrier to entry created by Copenhagen return policy] to exist"); PX 79 ("This is our arena"); PX 94 ("leverage our market share").

[7] UST did not call any of the authors of these documents to explain them, or otherwise dispute the statements. The sole attempted explanation came from its expert, Dr. Scheffman, who testified that he knew better than the executives, and that the "flaming" documents represented incautious and uninformed statements (from people he didn't bother to speak with). 3/23/00 Tr. at 115-16. Dr. Scheffman, however, did not even attempt to do what his own report said was required as a prerequisite to proper analysis of whether UST had market power. Id. at 155-56. The jury was free to accept or reject Dr. Scheffman's view that UST lacked market power, but there is no substance to UST's post-trial contention that they were forced to agree with it as a matter of law.

[8] See, e.g., Cassidy v. Spectrum Rents, 959 F. Supp. 823, 828 (E.D. Tenn. 1997) (admissions from defendant's own documents sufficient to sustain adverse verdict under Rule 50).

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Direct Evidence of Controlling Price and Excluding Competition. UST's admissions were the tip of the iceberg of proof. It was uncontroverted that UST not only had the power to control prices, but did so year after year. UST's Chairman, Vincent Gierer, conceded in cross-examination that UST had raised prices every year in the 1990s. 3/21/00 Tr. at 131. UST's relentless annual price increases exceeded any increased costs and produced profit margins that were among the highest in corporate America. 2/29/00 Tr. at 253 (Kamien); 3/23/00 Tr. at 159-60 (Scheffman); 2/29/00 Tr. at 85-86 (Rosson); Smith Dep. at 83-97; 3/21/00 Tr. at 130 (Gierer); 3/13/00 Tr. at 13 (McClure); PXs 326.17, 326.20, 326.34. UST freely acknowledged this pricing power: "[we] don't deal on our product's prices, we don't have to." PX 33. Dr. Kamien testified, without challenge on cross-examination, that UST's control of prices, its increasing margins, and its unparalleled profits, could be explained *only* by UST's monopoly power. See 2/29/00 Tr. at 277-78 (Kamien); 3/1/00 Tr. at 15-17 (Kamien).[9]

It was equally plain that UST had the power to exclude competition and that it successfully did so. UST's own strategic documents -- unmentioned in its pleadings -- discussed how UST

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[9]While UST's expert offered an alternative explanation for the fact that consumers paid roughly double for moist snuff as a result of UST's price increases from 1986 to 1996 -- that is, UST "shifted the demand curve" through advertising and the like, 3/23/00 Tr. at 47-48 (Scheffman) -- the jury was not compelled to accept it. It was, rather, permitted to weigh the evidence and credit UST's undisputed control of pricing as evidence of monopoly power.

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created "barriers to entry" that prevented new entrants. E.g., PXs 32, 33, 37. Dr. Kamien testified without challenge that *only* UST's monopoly power explained the lack of new entrants to compete for UST's extraordinary profits, and the limited expansion of existing firms such as Conwood and Swedish Match. 2/29/00 Tr. at 278-79 (Kamien). Not a single new firm entered the moist snuff market after 1990,[10] and in the preceding decade two of the largest tobacco companies in the world tried and failed to surmount the barriers to entry. 3/1/00 Tr. at 20 (Kamien); 3/23/00 Tr. at 161-62 (Scheffman). There was also evidence that the existing competitors, including Conwood and Swedish Match, were actually restricted as a result of UST's anticompetitive tactics. E.g., 3/13/00 Tr. at 42-44 (testimony of former CEO of Swedish Match re UST tactics curtailing its growth); 2/29/00 Tr. at 103 (testimony of William Rosson discussing UST tactics curtailing Conwood's growth). The direct evidence of UST's exclusion of competition provided ample support for the jury's finding.[11]

Indirect Factors Indicative of Monopoly Power. UST's admissions and Conwood's direct proof of UST's monopoly power made superfluous the *indirect* factors the jury could consider.

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[10]And the two that entered after Conwood's 1979 entry did so by acquisition of an existing competitor, not by actual new entry. 3/23/00 Tr. at 161-62 (Scheffman).

[11]The record is filled with other direct evidence of UST's "actual exclusion." See Point II.B, infra.

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Jury Instruction 2.3. But there was ample evidence to support the jury's finding on those as well.

UST mistakenly suggests that the various factors are like elements, and that plaintiffs must establish *each* factor in order to prevail. UST JMOL Mem. at 8-9. That is not the law. No single factor is dispositive. So long as there was evidence to support the jury's finding, the alleged lack of, or conflicting evidence on, one or more of the factors affords no basis to overturn the verdict. Jackson, 191 F.3d at 657 (judgment as a matter of law appropriate only when "there is a complete absence of pleading or proof on an issue material to the cause of action or when no disputed issues of fact exist such that reasonable minds would not differ") (internal quotation marks omitted).

Of the seven factors identified in Jury Instruction 2.3, UST does not now contest three; the undisputed evidence established them beyond argument (UST's market share of close to 80%,[12] the small number and size of UST's competitors in moist snuff,[13] and UST's truly eye-popping profits[14]). The jury was entitled to infer, strongly so, that UST had monopoly power based on its

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[12] See, e.g., 3/6/00 Tr. at 76 (Milano); 3/21/00 Tr. at 129 (Gierer); 3/23/00 Tr. at 61-62 (Scheffman).

[13] Only three other competitors participate in the market, and none has a share greater than 13.5%. 2/29/00 Tr. at 50 (Rosson).

[14] UST's profit margins are without parallel among public companies. Neither UST's Chairman, Vincent Gierer, nor UST's economist, David Scheffman, could even think of another company with similar high margins. 3/21/00 Tr. at 130 (Gierer); 3/23/00 at 161-62 (Scheffman).

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admitted 78% share of the market. See PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 821 (6th Cir.) ("the Supreme Court has concluded that . . . over two-thirds of the market . . . constitute[s] monopoly power under § 2"), cert. denied, 520 U.S. 1265 (1997). The undisputed evidence on these factors was itself sufficient for the jury to return a finding of monopoly power irrespective of any disputes regarding the remaining factors. But there was ample consistent evidence with regard to the other factors as well.[15]

First, while UST's share declined marginally (less than 1% per year from 1980 to 1998, 3/1/00 Tr. at 21 (Kamien)), the Court properly instructed -- with the concurrence of UST -- that such decline did not necessarily demonstrate lack of market power. Id. at 22-24 ("a declining market share may indicate the absence of monopoly power thought it does not foreclose such a finding"). And Dr. Kamien found it significant that UST's share had declined so *little* given UST's relentless price increases and its lack of product improvement or other consumer welfare benefit. Id. at 22-24. Dr. Kamien testified that, without market power, UST would have experienced a sharp decline similar to that suffered by IBM in the face of unrestrained competition in the personal computer market. Id. The jury was entitled to credit Conwood's

[15]They were: (i) the trend of UST's market share, (ii) competitors' share trends, (iii) the history of entry into and exit from the market of other competitors, and (iv) UST's ability to raise price without losing business. See Jury Instruction 2.3.

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evidence that UST's share movement was consistent with its possession of monopoly power.

Second, it was undisputed that Conwood's share growth was cut to one-third of the growth it had sustained in unrestrained competition during the period from 1980 to 1990. 3/1/00 Tr. at 15-17 (Kamien). Senior executives of Swedish Match likewise testified that its growth was substantially curtailed as a result of UST's anticompetitive scheme. 3/13/00 Tr. at 42-43 (McClure); 3/7/00 Tr. at 251-52 (Price). The significance of the fact that both Conwood and Swedish Match managed to grow in absolute terms from 1990 on (albeit at a restrained rate) was argued to the jury and was something the jury was entitled to consider. But the jury was also entitled to consider the evidence that UST successfully restrained the growth of competitors, and to resolve the dispute in favor of plaintiffs.

Third, the history of entry plainly supported plaintiffs. UST mistakenly conflates introduction of *brands* with new entry by *competitors* -- it is the latter that spurs competition and on which the Court's instruction focused properly and without objection.[16] The astonishing and undisputed fact with regard to entry is that after 1990 no company even attempted to enter the

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[16]See Jury Instruction 2.3 ("You may consider the history of entry into and exit from the market by other companies"). Further, while UST offered a long list of brands introduced and nominally in production, it offered no evidence regarding the market shares of those brands or their breadth of distribution. The proof was therefore meaningless as a measure of competition in the moist snuff market, and the jury could reasonably have found it unpersuasive.

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moist snuff market, UST's unparalleled profits notwithstanding.[17] Two tobacco giants tried and failed in the 1980s, and exited. This cannot be explained absent market power. 3/1/00 Tr. at 20 (Kamien). The jury was, again, entitled to credit this evidence, and UST cannot credibly argue otherwise.

Finally, UST's ability to raise price without losing business was established by the undisputed evidence of its price hikes and corresponding increases in revenue and profits. 3/21/00 Tr. at 131 (Gierer). UST did not and could not explain its price increases by claims of innovation or other consumer benefit. And UST admitted that its price hikes exceeded any increased costs. UST's de minimis loss of market share is fully consistent with the consequences of rational pricing decisions by a monopolist. 2/29/00 Tr. at 278-79 (Kamien: only a company "with . . . substantial monopoly power, market power" can do this). The jury was entitled to credit the undisputed evidence that UST raised prices, increased revenues and profits, and maintained a monopoly share of the moist snuff market, and to

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[17]The two cases UST cites for the proposition that entry into the market precludes a finding of market power under Section 2 do not support its claim. UST JMOL Mem. at 8. In Omega Environmental, Inc. v. Gilbarco, Inc., 127 F.3d 1157 (9th Cir. 1997), cert. denied, 525 U.S. 812 (1998), which was a Clayton Act Section 3 case, there was undisputed evidence of a significant new entrant within three years of the filing of the complaint. In Barr Laboratories, Inc. v. Abbott Laboratories, 978 F.2d 98 (3d Cir. 1992), there had been six new competitors in the six years immediately preceding the suit. Those factual records present a stark contrast with the undisputed record here of no new entrants in 10 years.

accept the opinion of Dr. Kamien that only a company with market power could do that. Id.

B. The Jury Correctly Determined that UST Maintained its Monopoly Power Through Restrictive or Exclusionary Conduct

Other than its quibble over the use of the word "restrictive" in lieu of "predatory" (see pp. 67-68, infra), UST agreed in all respects with the Court's instruction on willful maintenance of monopoly power. Jury Instruction 2.4. Accordingly, the only question is whether there was evidence to support the finding of the properly instructed jury.

Here the witnesses were legion, and the documents (from UST itself) extensive. UST curbed rivals' growth by eliminating competitive distribution, obscuring the presence of rival products and advertising, using its "clout" and misleading data to convince retailers to restrict competitive distribution, and paying retailers to exclude, among other tactics. 3/13/00 Tr. at 228-31, 233-39, 247-51 (Blattberg); 3/21/00 Tr. at 208-09 (Gierer telling stock analysts that UST needs to limit competitive distribution); PXs 59, 113A, 215. UST's own documents established the company's unlawful plan to maintain its monopoly by impairing distribution for rivals. E.g., PX 9 ("Chain strategies . . . Eliminate Comp. Distribution"); PXs 28, 61, 289. These documents also recorded the success of the program in stark language. E.g., PXs 96, 120, 139.

Eight former UST sales representatives testified that they were ordered by their supervisors systematically to eliminate

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rival products, displays, facings, and point of sale ("POS") advertising from stores. See note 37, infra. Eleven Conwood representatives gave accounts of the daily exclusion they encountered in the field. See id. Six store witnesses gave corroborating accounts of their own run-ins with the self-proclaimed "top dog," PX 39.[18] This misconduct was widespread and systematic, as senior Conwood executives testified and as representatives of Swedish Match and expert witnesses (Dr. Kamien, Dr. Gundlach, and Dr. Blattberg) corroborated. See 2/29/00 Tr. at 105-06 (Rosson); 3/1/00 Tr. at 166 (Kamien); 3/10/00 Tr. at 46-47 (Williams); 3/7/00 Tr. at 256 (Price); 3/13/00 at 41 (McClure); 3/9/00 Tr. at 77-80 (Gundlach); 3/13/00 Tr. at 224 (Blattberg).

UST does not dispute this evidence now and made virtually no effort to challenge it at trial. Neither does UST contend that the evidence fails in the aggregate to support the jury's finding of exclusionary conduct. Instead, UST begins by claiming that to prove a Section 2 violation Conwood was required to show that UST

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[18] See, e.g., Rusk Dep. at 10-12 (UST's rack removal not approved by manager or any other store personnel); Gill-Elkins Dep. at 15-16 (UST representative removed Conwood racks from store and placed product in box); Leinen Dep. at 19-22 (UST representative told store manager that it was his job to remove Conwood racks, despite being told to leave rack alone); Renfro Dep. at 16-17 (UST acting as category captains for Wal-Mart developed plan-o-gram providing very limited selection of price value brands despite analysis showing price value growth in the industry); Waller Dep. at 11-12 (UST provided skewed data to wholesaler); Stevens Dep. at 19-21 (UST removed Conwood rack while store manager was on vacation despite knowledge that all changes must be approved by manager); Engster Dep. at 26-27 (UST CEO offered store owner money to discontinue competitors' brands).

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"*used monopoly power* in the marketplace to harm competition." UST JMOL Mem. at 14-16. However, UST does not dispute that the Court properly instructed the jury on this score. See Jury Instruction 2.4. Neither can it seriously contest the existence of evidence from which jurors could have made the requisite finding. See, e.g., 3/13/00 Tr. at 210-13 (Blattberg: only UST can credibly become category captain because of its market power; UST used that power to exclude); Kiel Dep. at 22-23 (UST able to engage in systematic tortious conduct because it was the big dog and let everyone know it); Borrowdale Dep. at 27-28; PX 39 (Chiaradio: retailers typically want the big dog running things); 3/10/00 Tr. at 78 (Williams: only UST, by virtue of its market power, could obtain permission to house all competitive products and pursue exclusive vending to eliminate competition); 3/13/00 Tr. at 44 (McClure: same); 3/21/00 Tr. at 129 (Gierer); 2/29/00 Tr. at 62, 109 (Rosson); 3/13/00 Tr. at 39 (McClure) 3/6/00 Tr. at 76 (Milano); PXs 23, 137, 268, 280, 288.

UST is similarly wrong to suggest that evidence of its intent had no proper role in the jury's determination of whether its conduct was exclusionary. UST JMOL Mem. at 10-14. Under long-settled law, evidence regarding intent is critical in determining whether the business tactics are procompetitive or anticompetitive.[19] UST's supposedly controlling authority

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[19] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985) (intent may *determine* "whether the challenged conduct [was] fairly characterized as 'exclusionary' or 'anticompetitive'"); United States v. United States Gypsum Co.,

holding otherwise is nothing of the sort.[20] And, in any event, UST points to no instruction on intent or evidence of intent to which it objected, or the admission of which supposedly was erroneous.

Ultimately, UST is left to resort to the same tactic it used on summary judgment -- plucking out separate strands of evidence (e.g., shelf space "recommendations," SOF=SOM, exclusive racks, CAP, and its admittedly tortious conduct) for separate consideration and then complaining that each strand, viewed in

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438 U.S. 422, 436 n.13 (1978) ("consideration of intent may play an important role in divining the actual nature and effect of the alleged anticompetitive conduct"); Board of Trade v. United States, 246 U.S. 231, 238 (1918) ("knowledge of intent may help . . . to interpret facts and to predict consequences"); Association for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577, 583 (D.C. Cir. 1984) (intent relevant "insofar as it helps predict the probable competitive impact of a disputed practice") (citation omitted); see U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 596 (1st Cir. 1993) ("[m]otive can, of course, be a guide to expected effects").

[20]UST cites Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1422 (6th Cir. 1990), for the proposition that "it is not 'exclusionary' for an alleged monopolist to compete vigorously, even if its objective is to 'injure' its rivals." UST JMOL Mem. at 10. Of course, in making that statement, the court in Langenderfer had explicitly found that the defendant's low-bidding practices were entirely lawful. Id. UST's reliance on Byars, 609 F.2d at 860, in support of its contention that intent is irrelevant likewise misconstrues the case. Byars specifically acknowledged that "a general intent to monopolize is all that is ordinarily required to find a § 2 violation." Id. at 859 (citing United States v. Griffith, 334 U.S. 100, 105 (1948)). Since the challenged conduct in Byars was a monopolist's alleged unlawful refusal to deal, the court needed to find a specific intent to monopolize under prevailing law and only in that context noted its concern with the "overall impact of the monopolist's practices." Id. at 860. Overturning the district court's dismissal of the plaintiff's case, the Sixth Circuit remanded for "explicit factfinding" regarding the monopolist's intent -- namely, whether "business reasons justified the refusal to deal." Id. at 864.

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isolation, fails to constitute the whole. Each species of conduct, UST insists, is merely "ordinary" competition beyond the reach of Section 2.[21]

UST's claim of "ordinary" business conduct is seriously misconceived. The jury was properly instructed on this defense. See Jury Instructions 2.1, 2.4. And there can be little wonder why the jurors rejected it: the top executives of UST testified that none of the conduct at issue in the case was, in their opinion, ordinary or appropriate in any respect. E.g., 3/6/00 Tr. at 75-76 (Vice President of Sales Milano: removal of racks and POS, exclusive vending, and reduction of competitor facings inappropriate); Smith Dep. at 249 (President Smith: eliminating competitive brand not "the right thing"; unaware of meaning of words "exclusive vending"); 3/21/00 Tr. at 91, 117-18, 120, 190 (Chairman and Chief Executive Officer Gierer: UST conduct "astound[ing]," "embarass[ing]," "disappoint[ing]," and requiring an "investigation"); 3/7/00 Tr. at 36 (Vice President of Sales

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[21]This exercise is even less valid now, after a jury trial based on a full factual record, than it was at summary judgment. Feb. 17, 2000 Order at 7 ("UST's 'deconstruction' of the Conwood claims into a series of discrete antitrust theories, which UST then individually seeks to knock down, does not compel the summary judgment dismissal of this case."); Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962) ("plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each"). See also Pls.' Mem. in Opp. to Mot. for Summ. J. at 46-47.

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Milano stating that eliminating competitive brands "inappropriate").[22]

Proceeding through UST's artificial (and improper) piecemeal review further confirms the conclusion of its executives:

Shelf Space "Recommendations." UST engages in fantasy to suggest that its representatives merely "recommended" to stores what might go where. UST JMOL Mem. at 17-19. With or without store permission, UST routinely excluded competitors' display racks, advertising, and products for the specific purpose of making it more difficult for them to distribute and sell their products. E.g., Borrowdale Dep. at 18 ("no exposure no sales, Q: It's that simple? A: Uh-huh"); Hart Dep. at 28-29 (Milano instructed at UST sales meeting -- attended by 125 representatives -- to eliminate competitors' racks and place products in UST racks to reduce the competitors' visibility in stores and make it harder for them to sell their products).

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[22]In addition, UST's witnesses, Messrs. Biddy, Germany, and Jones, testified without exception that they personally did not engage in any of the challenged and concededly inappropriate practices. They did not remove competitors products, racks, or advertising, promote exclusive vending, or attempt to persuade stores to reduce competitor facings. 3/15/00 Tr. at 34-35, 102 (Biddy); 3/16/00 Tr. at 90-91 (Germany); 3/21/00 Tr. at 23-24 (Jones). In sharp contrast, however, Dr. Scheffman opined that UST did in fact engage in such activities, that they were all part of the normal competitive process, and that he thought UST could go much farther -- as far as blowing up Conwood's plants -- without violating the antitrust laws. 3/23/00 Tr. at 193-94. Needless to say, the jury was not required to resolve the dispute between Dr. Scheffman and his own clients in favor of Dr. Scheffman. It was entitled to find that the challenged conduct was exclusionary.

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Where UST engaged in "category management," the evidence demonstrated that it abused its position of trust as category captain or manager -- a position uniquely available to it as the dominant monopolist -- in order to exclude rival racks, POS, and products, and often did so by using false or misleading information. 3/13/00 Tr. at 210-13, 247-51, 253-56, 260-62 (Blattberg); PXs 39, 59, 63, 139. There is no support for UST's claim that it merely made "recommendations" desired by stores as part of the competitive process. That argument was properly rejected by the jury based on the contrary evidence. Similarly shopworn is the fourth iteration of UST's argument that its "recommendations" are lawful per se.[23]

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[23]The Court previously considered all of UST's citations on summary judgment. Not one so much as suggests the sweeping approval that UST claims, and none involves a factual backdrop even remotely similar to the extensive record of exclusionary conduct developed at the trial of the instant case. For example, in In re Kellogg Co., 99 F.T.C. 8, 144-45 (1982), an administrative law judge decided that the efforts of the leading cereal manufacturers (none of which had more than 45% of the market) to obtain shelf space in proportion to market share did not constitute unlawful collusion, a claim not even at issue here. In Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129, 1137 (S.D.N.Y. 1986), the court dismissed complaints about the defendant's restrictive shelf space practices under Section 1, but *approved* the plaintiff's Section 2 monopolization claim for the same conduct, and did so where the defendant had a much lower (50%) market share than here. In Bayou Bottling, Inc. v. Dr Pepper Co., 725 F.2d 300, 303 (5th Cir.), cert. denied, 469 U.S. 833 (1984), the court decided that particular practices in a particular market at that particular time did not constitute unlawful activity. And Jays Foods, L.L.C. v. Chemical & Allied Product Workers' Union, Local 20, No. 97 C 6227, 1998 WL 265098 (N.D. Ill. May 13, 1998), aff'd, No. 99-2807, 2000 WL 336902 (7th Cir. Mar. 31, 2000), was a case brought under an Illinois consumer fraud statute, *not* Section 2 of the Sherman Act.

SOF=SOM. According to its Vice President of Sales, there was no legitimate reason for UST to seek share of fixture equal to its monopoly share of sales. 3/6/00 Tr. at 99-100 (Milano). In fact, by pursuing that formula UST subjected itself to return problems, as its dated product (Copenhagen) often went stale when too many facings were allotted to it. Id. The testimony was uniform and uncontested that UST did not *need* SOF=SOM in order to display its wares adequately. Indeed, several UST witnesses testified that UST already had *too much* retail space in many locations, which led to excessive returns. See, e.g., 3/16/00 Tr. at 91-92 (Germany); Borrowdale Dep. at 28-30. Others flatly denied that UST pursued a strategy of seeking SOF=SOM. See, e.g., 3/6/00 Tr. at 79-80 (Milano).

The *only* reason for UST's use of SOF=SOM was what its internal documents flatly conceded: "Control competition/ SOF=SOM." PX 28 (Top Gun 1995).[24] The pernicious purpose and

[24] See also PX 61 ("It is imperative that we continue with this category management action plan to eliminate competitive products."); PX 63 (UST can achieve more than 80% of merchandising space through SOF=SOM); id. ("Do not discontinue any slow selling brands on a national level"); PX 104 ("[W]hen reducing distribution, it may [be] necessary to have a smaller vendor. You definitely need to reduce the competitive facings in these locations in order for us to have a fair share of the section.").

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effect of this tactic were explained in detail by Dr. Kamien and Dr. Blattberg.[25]

The attempt to defend the company's use of SOF=SOM as an ordinary and sensible business practice thus runs afoul of the trial testimony of UST executives, its own documents, and the credible opinion of leading experts. Nor can UST point to any authority suggesting that a monopolist is permitted as a matter of law to command the percentage of shelf space that equals its market share. The jury properly considered the evidence surrounding UST's use of SOF=SOM in making its finding of exclusionary conduct.[26]

Exclusive Vending. According to UST's own documents, "exclusive vending" (the requirement that all moist snuff be sold from UST's vendor or rack) was the linchpin of its anticompetitive strategy, not a mere accommodation to retailers who wanted "uniform" racks. PX 9 ("Chain Strategy -- Control Comp. Distribution . . . Exclusive Vending"). Former UST

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[25]For example, Dr. Blattberg explained that he was aware of no space management theory or study suggesting SOF=SOM to be an optimal retail strategy and that in his opinion SOF=SOM leads to overstocks, assortment problems, and serves only to reinforce market share status quo. 3/13/00 Tr. at 252-53, 259. Dr. Blattberg further testified that UST pursued SOF=SOM to diminish the space available to competitors. Id. at 224.

[26]Tellingly, UST revised the CAP program to drop all reference to SOF=SOM as a baseline for measuring compliance after the lawsuit was commenced. Whereas the original CAP contract required the placement of POS and vendors "in accordance with share of market" in order to earn the monetary incentives, the 1999 (post-lawsuit) version of the CAP contract dropped all such references. 3/15/00 Tr. at 142-43 (Biddy); PX 146.

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employees confirmed that they were directed to obtain exclusive vending specifically as a means of exclusion. Hart Dep. at 15-16; Marconi Dep. at 12-13; Borrowdale Dep. at 16; Ulizio Dep. at 23; 3/10/00 Tr. at 18-20 (Jeffrey); Naifeh Dep. at 30-32; Keil Dep. at 15-17. Field sales personnel regularly reported they solicited, and succeeded in obtaining, agreements with stores in order to exclude. PX 68 (7-Eleven); PX 4 (Quality Marts); PX 113A (United Dairy Farms). And, where stores did not agree, UST often imposed exclusive vending and/or POS anyway. See notes 35, 37, infra.

Through exclusive vending, UST imposed "artificial scarcity" that required the allocation of slots (in the UST rack) among competitors, and thus gave UST a choke point against competitive distribution. 3/13/00 Tr. at 238-39 (Blattberg).[27] It also provided the platform from which UST could reduce facings for competitors through "category management" abuses such as "cutting the tail" just below the last UST product, wider (and thus fewer) slots in the rack, and other restrictive means. And it eliminated the critical point-of-sale location for competitors to advertise lower prices, innovative products, or existing products

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[27]Where each competitor had its own rack, there was no such choke point. Nor was exclusive vending necessary for this profitable and space-efficient product. The evidence was undisputed that other tobacco products, such as loose leaf, found ample room in stores even though they were far less profitable for the stores than moist snuff. See 2/29/00 Tr. at 51-53 (Rosson); 3/9/00 Tr. at 188 (Hettinger); 2/28/00 Tr. at 174-76 (Marano).

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to interested consumers; on this score, UST's documents could not be clearer. PXs 23, 53, 48, 80, 139.[28]

UST does not and cannot defend these as "ordinary" business practices. Its top three executives denied that the company sought exclusive vending -- despite testimony from its former representatives and hundreds of its own documents to the contrary. E.g., 3/21/00 Tr. at 189 (Gierer); 3/6/00 Tr. at 75-76 (Milano); Smith Dep. at 225. Indeed, Mr. Milano testified that it would be inappropriate to put competitive products in UST racks to control shelf space and advertising. 3/6/00 Tr. at 75. Remarkably, UST's President and its National Key Accounts Manager claimed not to know what the words "exclusive vending" mean. Untiedt Dep. at 109; Smith Dep. at 421. There simply was *no* evidence from which the jury could have concluded that exclusive vending, as practiced by UST, constituted appropriate business conduct.[29]

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[28]The harm from this conduct is greatly increased in a market where advertising is severely restricted by law. 3/15/00 Tr. at 263-64 (Blattberg).

[29]UST documents also show that, once the Conwood lawsuit was filed, UST stopped offering exclusive vending, speaking volumes to the supposed "ordinariness" of its practice. See, e.g., PX 130 (Division Manager re Crystal Flash: "Given the pending Conwood lawsuit, we explained that vendor exclusivity was no longer a requirement of our company."); PX 136 (Division Manager re Lake County Dairy chain: "This is also the chain that would like to go to US Tobacco exclusive if we are willing to pay a little. I have been told due to the recent Conwood lawsuit not to pursue exclusive right now."); PX 140 (UST Sales Representative Performance Evaluation pre-printed form has the following objective: "Continue to offer vendor exclusivity and category management where feasible." Comment on performance of one sales representative: "vendor exclusivity is not being

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UST was free to offer testimony from a few store witnesses that they preferred exclusive vending and to argue from that to the jury. It cannot plausibly suggest that its tactics were lawful per se in light of the mountains of evidence demonstrating that the purpose and effect of its exclusive vending practices were to disadvantage rivals by limiting their distribution and advertising and thereby maintain UST's monopoly.

CAP Program. The evidence at trial established that UST designed and implemented its Customer Alliance Program ("CAP") as a tool of exclusion. PX 120 ("CAP has been a great means of reducing competition"); PX 94 ("[T]he inception of the Customer Alliance Program will be utilized to leverage our market share toward improved merchandising presence. This will come at the expense of slow moving competitive products."); PX 144 (UST division manager uses CAP to secure exclusive vending and header cards); PX 113A (exclusive vending and elimination of competitive product incorporated into CAP contract).

Dr. Gundlach testified, without contradiction, that CAP was used by UST, first, to eliminate competitive products, racks, and advertising;[30] second, as a basis for entering into exclusive vending agreements on the "worksheets" used by the sales representatives to determine compliance with, and hence

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offered due to corporate directives.").

[30] 3/9/00 Tr. at 101-02. See PX 96 (discussing how CAP required deletion of competitive brands, but its payments would offset lost revenues from deletion of those brands).

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eligibility for, CAP payments;[31] and, third, as a tool for imposing other restrictions harmful to competition.[32]

At trial, UST disavowed these exclusionary uses insisting that CAP was merely a way to gather retail movement figures. 3/7/00 Tr. at 139 (Milano); 3/16/00 Tr. at 108-09 (Germany). The jury was of course permitted to accept or reject that explanation in the light of all the evidence. But there is no substance to or authority for UST's sweeping argument, that because CAP is denominated an "incentive program," its use by a monopolist to exclude competition cannot be challenged as exclusionary conduct under Section 2. See, e.g., R.J. Reynolds Tobacco Co. v. Philip Morris Inc. 60 F. Supp. 2d 502, 511-12 (M.D.N.C. 1999) (enjoining "Retail Leaders" incentive program as likely violation of Sections 1 and 2); LePage's Inc. v. 3M, No. 97-3983, 1999 WL 346223, at *6-*7 (E.D. Pa. May 14, 1999) (denying 3M's summary

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[31] See, e.g., PX 120 (CAP incentive for eliminating competitive products); PX 175 (Berkebile discussing CAP goals); PX 112C ("All smokeless moist snuff in UST vendor[;] No competition"); PX 112D ("[B]ut [UST is] not going to vend Renegades or Kodiak Straight. They are under the counter."); PX 112F (exclusive vending); PX 112O (exclusive vending and exclusive header cards). Dr. Gundlach testified that, exclusive of the many CAP agreements that provided for such exclusivity, there were more than 21,000 stores covered by exclusive vending agreements with UST. 3/9/00 Tr. at 80.

[32] E.g., PX 114 (CAP used to place competitive displays under the counter in as many places as possible with the explicit approval of management); PX 139 (UST's control over merchandising and POS placement will make customer awareness of price differential difficult); PX 187 (CAP requires USTSM vendors and displays be placed in premium locations).

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judgment motion defending its retail rebate programs).[33] The jury properly considered UST's *actual use* of the CAP program as part of its overall campaign of unlawful exclusion.

Admittedly Tortious Conduct. UST repeats again its argument, first made on motion for judgment under Federal Rule of Civil Procedure 12(c) and then repeated several times thereafter, that tortious conduct cannot also be exclusionary. UST JMOL Mem. at 34 (from "an antitrust perspective," tortious conduct is mere "competition, however unseemly"). But there is no "safe harbor" under antitrust law for exclusionary conduct that also happens to be tortious. See Feb. 17, 2000 Order at 7; Pls.' Mem. in Opp. to Mot. for Summ. J. at 55-58. [34] There was, moreover, substantial evidence to support the finding that UST maintained its market share through exclusionary tactics that included the outright,

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[33]Defendants find no support in Beverage Management, Inc. v. Coca-Cola Bottling Corp., 653 F. Supp 1144 (S.D. Ohio 1986). There the court decided only that a particular program in a particular market did not amount to exclusionary conduct because it did nothing more than promote the sale of one competitor's products without any exclusion of other competitors. Id. at 1154. In short, there was no evidence that Coca-Cola there used the incentive program to do what the evidence overwhelmingly established that UST used CAP and other programs to do here: exclude competition.

[34]The Sixth Circuit in Byars vacated the district court's ruling for the defendant -- on just this argument -- and remanded for further findings of fact on whether the defendant had engaged in "dirty tricks." 609 F.2d at 864. The court of appeals instructed the district court to "carefully examine the alleged 'dirty tricks.' Predatory conduct on [the defendant's] part would go a long way toward establishing a § 2 violation." Id. at 863 (footnote omitted). Defendants' remaining cases are inapt for reasons already fully briefed. See Pls' Opp. to Motion for Sum. J. at 55-58.

tortious theft of competitors' products, racks, and/or POS from stores. This misconduct was widespread across the country and premeditated at the highest levels of the company.[35] UST's contention that this evidence could not be considered as part of the jury's examination of the record finds no support in law or logic.

C. The Jury's Verdict Was Supported by Ample Evidence of Harm to Competition and Conwood

The jury was properly instructed on the element of injury in fact. Jury Instruction 2.5. The only remaining issue, therefore, is whether there was evidence to support the finding of the jury that Conwood suffered injury in fact. There was extensive evidence that UST's exclusionary campaign to limit distribution of competitors' moist snuff harmed competition and consumers as well as Conwood. UST ignores that evidence and

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[35] See, e.g., 3/1/00 Tr. at 166 (Kamien); see, e.g., Marconi Dep. at 12-13; Borrowdale Dep. at 16; Hart Dep. at 18; Carter Dep. at 37; Ulizio Dep. at 22-25; 3/10/00 Tr. at 18-20 (Jeffrey); Naifeh Dep. at 30-32; Keil Dep. at 15-17 (eight former UST employees testifying that they routinely removed competitors' products, racks, and/or POS at the direction of their supervisors); Rusk Dep. at 10-12; Gill-Elkins Dep. at 15-16; Leinen Dep. at 19-22; Renfro Dep. at 16-17; Waller Dep. at 11-12; Stevens Dep. at 19-20; Engster Dep. at 26-27 (retailers offering same testimony); 2/28/00 Tr. at 222-23 (Marano); 3/3/00 Tr. at 88, 93 (Wilding); 3/8/00 Tr. at 128, 133 (Ryan); id. at 154, 161 (Dring); id. at 202-09 (Hynek); 3/9/00 Tr. at 197-98 (Hettinger); 3/10/00 Tr. at 8 (Falevsky); 3/10/00 Tr. at 19 (Jeffrey); 3/13/00 Tr. at 7-8 (Larsen); 3/10/00 Tr. at 63-64 (Williams); 2/29/00 Tr. at 95-99 (Rosson) (nearly a dozen current and former Conwood employees testifying that racks and POS in entire cities and States being wiped out); 3/13/00 at 41 (McClure); 3/7/00 Tr. at 256 (Price) (Swedish Match executives testifying to being excluded on massive scale).

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bases its arguments, impermissibly, on assertedly contrary evidence that the jury justifiably found unconvincing.

As to competition, UST's documents established that it sought to harm competition by impeding distribution for rivals -- and thereby frustrating their ability to undercut UST with procompetitive products like price-value brands. PXs 14, 268, 288, 45. The purpose and effect of these practices were indisputably to harm competition, and they did so. Indeed, representatives of two of UST's three moist snuff competitors testified that the monopolist's restrictive tactics substantially impaired their ability to compete effectively in the market and significantly limited their growth. 2/29/00 Tr. at 116-20 (Rosson); 3/13/00 Tr. at 42-43 (McClure). This testimony, while ridiculed by UST, came from the most knowledgeable witnesses called at trial -- men with a combined total of more than 75 years in the tobacco business, one a neutral third-party. It was, moreover, fully corroborated by UST's own documents, e.g., PX 84 ("we have severely cut back on their ability to market products"), and former employees, e.g., Borrowdale Dep. at 18 (goal was "no exposure, no sales," and confirming effect on competitors' sales).[36]

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[36]UST's position is that, because competitors did not go bankrupt, there has been no harm to competition. But UST's repeated mantra that competition in moist snuff was "vigorous" is belied by the uncontroverted evidence of supra-competitive prices, no innovation, huge monopoly profits and increasing margins, no entry in the contested period, regressions showing higher consumer prices and lower rival market shares where UST's predation succeeded in reducing competitive share of fixture, restricted output in chains where UST obtained exclusionary

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Equally dispositive is the evidence, ignored by UST at trial and still today, that where UST succeeded in controlling more facings in stores -- the stated goal of its anticompetitive scheme, PX 23 ("our objective is to control the smokeless home, present the category and velocity, provide facings for competitive, control facings and positioning") -- *consumers* were harmed. Dr. Kamien established a direct, linear relationship between the number of facings controlled by UST and higher prices for consumers. This was direct evidence of consumer harm at the hands of UST, and UST did not even question, much less attempt to

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agreements, as well as indefensible predation practiced by the monopolist against its smaller rivals to maintain its grip. This is the essence of harm to competition.

Moreover, UST's "controlling legal authority" for judgment as a matter of law on this score is, at best, wildly off-point. See, e.g., Western Parcel Express v. United Parcel Serv. of America, Inc., 190 F.3d 974, 977 (9th Cir. 1999) (affirming summary judgment where "uncontradicted evidence in the record" showed "low entry barriers," defendant's "inability to control prices or exclude competitors," and no "unnatural market barriers precluding robust competition") (citation omitted); R.W. Int'l Corp. v. Welch Food, Inc., 13 F.3d 478, 486-88 (1st Cir. 1994) (affirming summary judgment on similar, uncontradicted record); D.E. Rogers Assocs., Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1439 (6th Cir. 1983) (affirming district court where "there is no evidence of anticompetitive effect, direct or inferential, in the record," and plaintiff mistakenly claimed that its own lost profits could suffice to "evidence[] the requisite effect on competition"); Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 558 (7th Cir. 1980) (affirming dismissal where plaintiff failed to include in its complaint "any supporting factual allegations" of harm to competition); Western Parcel Express v. United Parcel Serv. of America, Inc., 65 F. Supp. 2d 1052, 1065 (N.D. Cal. 1998) (granting summary judgment on exclusive dealing claim because plaintiff could not show that the contracts at issue were exclusive dealing contracts, and noting the continued and very recent entry of numerous other competitors in recently degregulated industry), aff'd, 190 F.3d 974 (9th Cir. 1999).

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disprove, this evidence. 2/29/00 Tr. at 264-65 (Kamien); PX 326.2.

The very same conduct that harmed consumers also harmed Conwood. It cannot be gainsaid that the systemic exclusion (and in many instances destruction) of Conwood racks, POS, and products constituted harm to Conwood.[37] UST's own witnesses -- who claimed that they did not practice the exclusionary tactics -- provided further evidence of the harmful effect of the

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[37]For example: 11 Conwood employees from across the country testified that UST representatives systematically ransacked Conwood racks, POS, and products; used misleading or false information in their "category management" efforts to exclude Conwood; and paid retailers, through CAP and other contracts, to do the same. See 2/28/00 Tr. at 222-23 (Marano); 3/3/00 Tr. at 88, 93 (Wilding); 3/8/00 Tr. at 128, 133 (Ryan); id. at 154, 161 (Dring); id. at 202-09 (Hynek); 3/9/00 Tr. at 197-98 (Hettinger); 3/10/00 Tr. at 8 (Falevsky); id. at 19 (Jeffrey); id. (vol. X-B) at 7-8 (Larsen); id. at 63-64 (Williams); 2/29/00 Tr. at 95-99 (Rosson).

Eight former UST representatives admitted that they deliberately excluded Conwood at the behest of their management. See Marconi Dep. at 12-13; Borrowdale Dep. at 16; Hart Dep. at 18; Carter Dep. at 37; Ulizio Dep. at 22-25; 3/10/00 Tr. at 18-20 (Jeffrey); Naifeh Dep. at 30-32; Keil Dep. at 15-17.

Six retailers and one wholesaler testified that UST representatives eliminated Conwood racks, POS, and products; presented false or misleading numbers as part of their category management efforts; and, even through UST's chairman, offered cash to exclude. See Rusk Dep. at 10-12; Gill-Elkins Dep. at 15-16; Leinen Dep. at 19-22; Renfro Dep. at 16-17; Waller Dep. at 11-12; Stevens Dep. at 19-20; Engster Dep. at 26-27.

UST's expert, David Scheffman, admitted that there is a direct correlation between Conwood losing racks and losing sales. 3/23/00 Tr. at 133.

Literally scores of UST's own documents attested to the successful implementation of their illegal efforts to eliminate Conwood racks, POS, and products. See, e.g., PXs 19, 24, 84, 106, 112C, 112D, 112F, 112O, 159, 272.

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practices. E.g., 3/14/00 Tr. at 174-75 (Luckett: where no exclusive vending or "category management" reducing Conwood facings, Conwood has approximately 26% market share); 3/15/00 Tr. at 102 (Biddy: where no exclusion, Conwood has 26% market share); 3/21/00 Tr. at 23-24 (Jones: where no exclusion, Conwood has 20%-25% market share). UST's expert witness, Dr. Scheffman, confirmed in a statistical regression that where UST succeeded in reducing Conwood's facings Conwood sold less moist snuff. 3/23/00 Tr. at 133-34 (Scheffman).[38]

In addition, Conwood introduced evidence that, in two of America's largest chains (Wal-Mart and 7-Eleven), UST's success in excluding Conwood racks and POS led to sharply reduced sales for Conwood (harm to Conwood), and overall reduction in sales of moist snuff (reduced output indicating harm to competition and consumers). 3/1/00 Tr. at 51-54, 57-58 (Kamien); 3/13/00 Tr. at 275-78 (Blattberg); PX 327.21.

The jury was also entitled to credit the undisputed evidence that Conwood's growth was cut by two-thirds after UST began using its "clout" to exclude,[39] and the evidence that Conwood's state-by-state growth was differentially affected in a manner

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[38]This testimony is consistent with UST's internal projections, which in 1997 estimated that competing price-value brands could be expected to gain as much as 18% of the market in just three years if left unrestrained. PX 45.

[39]From 1980 to 1990, Conwood grew from 0 to 11%; from 1990 to trial, Conwood grew from 11% to approximately 13.5%. 2/29/00 Tr. at 103 (Rosson). Conwood's growth in the decade following the commencement of UST's concerted exclusion was less than one-third of the growth it sustained in the preceding decade.

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consistent only with the upsurge of UST's exclusionary conduct after 1990. 3/8/00 Tr. at 30 (Leftwich); PX 327.21.

UST's "no harm, no foul" theory ignores all this evidence and asks the Court to rule, as a matter of law, that an antitrust plaintiff cannot establish injury to competition unless it can establish that the market contracted *and* that its sales decreased in absolute terms. That is not the law.[40] UST's successful efforts to arrest Conwood's (and Swedish Match's) growth through exclusionary tactics that increased prices for consumers (undisputedly so) is fully cognizable under the antitrust laws.

D. The Jury's Verdict Was Supported by Ample Evidence of Causation

The properly instructed jury was required to determine, in order to find that Conwood had established injury in fact, that *some* harm to Conwood had been caused by UST's exclusionary conduct. As the Court explained -- with no objection from UST -- Conwood was "*not* required to prove that U.S. Tobacco's alleged antitrust violation was the sole cause of its injury; nor need Conwood eliminate all other possible causes of injury." Jury

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[40] See Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 753-54 (1st Cir. 1994) (reversing district court's dismissal of complaint because dealer's loss of additional profits due to alleged maximum resale price constraints constitutes antitrust injury); Gulfstream III Assocs., Inc. v. Gulfstream Aerospace Corp., 995 F.2d 425, 429 (3d Cir. 1993) ("lost profits (or increased losses)" constitute antitrust injury); Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 67 (2d Cir. 1988) (reversing dismissal of complaint because allegation that anticompetitive conspiracy caused tennis events "to be less profitable than [those] events otherwise would have been" was sufficient to establish antitrust injury).

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Instruction 2.5 (emphasis added). Instead, Conwood needed to show only that UST's "illegal conduct was a material cause of Conwood's injury. This means that Conwood must have proved that *some* damage flowed to it as a result of U.S. Tobacco's alleged antitrust violation." Id. (emphasis added).[41]

There is no serious dispute that Conwood met this test. For example, the former UST representatives established injury to Conwood by admitting their concerted removal of Conwood racks, POS, and products pursuant to company policy. And of course there was far more and corroborative evidence of harm from

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[41]UST did not object to this instruction at trial, does not do so now, and cannot sensibly do so under long-settled law nowhere addressed by defendants. See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969) ("It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4."); Allied Accessories & Auto Parts Co. v. General Motors Corp., 825 F.2d 971, 973 (6th Cir. 1987) ("Allied I") (reversing district court's holding that plaintiff must show defendants' misconduct was sole cause of its antitrust injuries and approving Seventh Circuit jury instruction providing: "'The plaintiff does not claim nor is he obligated to prove that the violation was the sole and only cause of the loss of profit. It must, however, show that the violation played a substantial part in bringing about or causing the loss of sales and the loss of profit. . . . Plaintiff need not show that the price discrimination was a more substantial cause of injury than any other.'") (quoting Bohack Corp. v. Iowa Beef Processors, Inc., 715 F.2d 703, 711 n.9 (7th Cir. 1983)); LePage's Inc. v. 3M, No. 97-3983, slip op. at 12 (E.D. Pa. Mar. 14, 2000) (rejecting motion for judgment notwithstanding verdict on causation grounds because plaintiff had established that 3M's conduct "was a material cause of LePage's injury"); Allied Accessories & Auto Parts Co. v. General Motors Corp., 901 F.2d 1322, 1325-26 (6th Cir. 1990) ("Allied II") (rejecting defendants' claim that plaintiff must show it would have obtained contract in a "violation free environment" and holding that plaintiff "need only show" that defendants' unlawful conduct "materially affected" retailer's decision).

Conwood's own representatives, store witnesses, and scores of UST documents. See, e.g., notes 35, 37, supra. Remarkably, UST does not even mention the proof from its own former employees and its own documents, which establish that UST intended to harm Conwood through exclusionary tactics and that it did so routinely and systematically. Id.

UST's argument is based solely on the notion that other factors might also have caused Conwood to lose sales." UST JMOL Mem. at 44. UST undoubtedly had theories of what halted Conwood's growth (e.g., "the independent, uncoerced decisions of retailers," "other factors in marketplace," "additional competition from UST and other competitors," and "Conwood's failure to compete"). Id. at 46. All of these arguments were given the weight they deserved by the jury. The jury's decision not to credit UST's alternative theories of harm affords no colorable basis for granting judgment to UST as a matter of law.[42]

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[42]As previously briefed (see Pls.' Mem. in Opp. to Mot. for Summ. J. at 62 n.78), defendants' citation to Valley Products Co. v. Landmark, 128 F.3d 398 (6th Cir. 1997); Axis, S.p.A. v. Micafil, Inc., 870 F.2d 1105 (6th Cir.), cert. denied, 493 U.S. 823 (1989); Hodges v. WSM, Inc., 26 F.3d 36 (6th Cir. 1994); and Baum Research & Development Co. v. Hillerich & Bradsby Co., 31 F. Supp. 2d 1016 (E.D. Mich. 1998), does nothing to change this conclusion. In each case, the uniform proof was that the plaintiff's injuries resulted *solely* from the defendant's *lawful* acts of exclusion -- in Axis by control over a patent, in Valley Products by control over licensing rights, in Hodges by control over physical premises, and in Baum Research by control over eligibility rules. By contrast, on the record adduced at trial there can be no serious claim here that Conwood's injuries were caused *solely* by fair competition and not at all by UST's unlawful conduct.

E. The Jury's Award of Damages Affords No Basis for Judgment As a Matter of Law

Here, as with the elements of liability addressed above, there is no dispute that the Court gave the jury proper legal instruction. Indeed, with respect to damages, the jury instructions and verdict form language were in significant part proposed by UST.

Nor is there any dispute that there is sufficient record evidence to support Conwood's claimed damages. Conwood introduced a wealth of damages evidence. Dr. Leftwich presented a detailed study based on accepted economic method establishing Conwood's damages from UST's anticompetitive acts within the range of $155 to $488 million. Based on his 45 years of experience in the tobacco business, Conwood's historical performance in moist snuff, and Conwood's performance in adjacent smokeless markets, Conwood's Chairman, Mr. Rosson, testified that Conwood would have attained a market share in the mid-20s but for UST's misconduct. 2/29/00 Tr. at 119-20 (Rosson). And it was undisputed (and corroborated independently by Mr. Price of Swedish Match) that each additional share point is worth $10 million in *net profit*. 3/7/00 Tr. at 116-20 (Price). In contrast, UST decided to offer *no* evidence with respect to Conwood's damages, other than to sponsor an expert who opined that Conwood had not been damaged at all. 3/23/00 Tr. at 140-41 (Scheffman).

The jury determined that Conwood's actual damages "only" from UST's antitrust violation amounted to $350,000,000. This

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fell near the mid-point of the range to which Dr. Leftwich testified, and was far less than the jury could properly have awarded by application of Mr. Rosson's estimation of "but for" market share (the mid-20s) to the undisputed figure of $10 million per additional share point.

UST challenges the admissibility of some but by no means all of the damages evidence, maintains that the damages are "excessive" by some undefined standard, and suggests that the Court should rejigger the figures. But these arguments have *nothing* to do with judgment as a matter of law. (Point 1). Passing that, UST's recycled complaints provide no reasoned basis for intruding upon the determination made by a properly instructed jury based on competent evidence, from several sources, that UST did little if anything at trial to dispute. (Point 2).

1. On a motion for judgment as a matter of law, the element of damages "is satisfied by [the plaintiff's] proof of *some* damage flowing from [the defendant's actions]; inquiry beyond this minimum point goes only to the amount and not the fact of damage." Zenith Radio, 395 U.S. at 114 n.9; Allied I, 825 F.2d at 973-75; Broan Mfg. Co. v. Associated Distribs., Inc., 923 F.2d 1232, 1235 (6th Cir. 1991) (recovery prevented "only where the *fact* of damage is uncertain," not the amount of damages); Grantham & Mann, Inc. v. American Safety Prods., Inc., 831 F.2d 596, 601-02 (6th Cir. 1987) (rule that remote and

speculative damages are not recoverable "serves to preclude recovery . . . only where the fact of damage is uncertain . . . not where the amount of damage alone is uncertain"). See also Pls.' Mem. in Opp. to Mot. for Summ. J. at 65; Pls.' Opp. to Mot. To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 14-15. UST does not challenge the fact that Conwood provided proof from which a reasonable juror could find at least *some* damage (e.g., one lost sale) flowing from its misconduct. Nor, on this record, could it plausibly do so. Accordingly, judgment for UST is unavailable as a matter of black letter law.

2. Even if UST's arguments concerning the *amount* of Conwood's damages were pertinent on a motion for judgment (and they are not), there is nothing new here. UST simply restates the same arguments and recites the same authorities previously detailed in its pre-trial motion to exclude Dr. Leftwich's testimony. Each of its points were exhaustively addressed by Conwood and the Court at that time. See Pls.' Opp. to Mot. To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich; Pls.' Mem. in Opp. to Mot. for Summ. J. at 63-67; Feb. 23, 2000 Order. UST offers no persuasive reason to retread this familiar territory. For example:

(a) UST complains that Dr. Leftwich's analysis "does not reflect lost sales, but merely makes assumptions about lost share." UST JMOL Mem. at 51-53. In fact, Dr. Leftwich did not make assumptions about lost share, but rather tested Conwood's hypothesis that its growth was particularly stymied by UST's

anticompetitive tactics in markets where it had not attained a "foothold" by 1990. The economic evidence confirmed the validity of the hypothesis, and from that Dr. Leftwich estimated the growth that Conwood would have attained "but for" UST's unlawful conduct. 3/8/00 Tr. at 30-32. In any event, there was testimony regarding lost sales as a result of UST's misconduct. See, e.g., p. 29 & note 35, supra (citing testimony regarding lost sales). And UST has not cited (and cannot cite) any authority for the proposition that a damages expert must directly measure lost sales instead of lost market share.

(b) UST complains, as it did in pre-trial motions, that Dr. Leftwich's analysis began with a hypothesis derived from conversations with Conwood executives and employees. UST JMOL Mem. at 53-55. Contrary to UST's intimations, however, Dr. Leftwich did not *rely* on Conwood's perceptions to generate a damages number, he *tested* them using industry-standard data and accepted statistical techniques. He found that the empirical evidence supported Conwood's experience: the data demonstrated that UST's acts after 1990 had a disproportionate adverse impact on Conwood in states where Conwood had not already attained sufficient market share to protect itself from attack. See 3/8/00 Tr. at 20-21; Pls.' Opp. to Mot. To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 5-12, 26-27 (discussing argument and facts in further detail). The use of hypotheses, as Dr. Leftwich testified without challenge from UST, is the cornerstone of the scientific method. UST cites no court

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that has required experts to forgo hypotheses, or limited the sources from which experts may obtain them.

(c) UST complains that Dr. Leftwich's study did not rule out all other possible causes for the effect he observed in the data. UST JMOL Mem. at 55-58. As was fully briefed before trial, however, Dr. Leftwich considered a host of possible "confounding variables," including *every single variable* proposed by defendants' expert in his report. Pls.' Opp. to Mot. To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 20 n.15. These include changes in average state per capita income; median age; racial composition; educational levels; unemployment rates; regional preferences; and trends found in related smokeless tobacco markets (including looseleaf) that are unaffected by UST interference but similarly affected by increasing government regulation and other factors. Id. at 6-7, 11. From the empirical data, Dr. Leftwich concluded that *none* of these factors could explain Conwood's different level of share growth between 1990 and 1997. The *only* factor that could explain this empirical phenomenon was UST's misconduct. 3/8/00 Tr. at 30 (Leftwich).

This was more than sufficient under settled law -- which does not require a damages expert to exclude all hypothetical possibilities imagined by counsel after the fact.[43] Indeed, the

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[43] Allied I, 825 F.2d at 973 ("'plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury'") (quoting Zenith Radio,

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cases defendants rely upon have excluded damages estimates only where, unlike here, plaintiffs admit to having made literally *no* effort to exclude potential lawful causes of the claimed damages that could easily have been considered. See Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1353 (3d Cir. 1975)("[p]laintiff's own experts conceded that the damage figures they tendered were attributable at least in part to the lawful competition of [defendants]"); ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 435 (N.D. Cal. 1978) (plaintiff presented testimony that "adverse factors other than [defendant's] alleged antitrust violations" were "implicit in" forecasts used to compute damages), aff'd, 636 F.2d 1188 (9th Cir. 1980), cert. denied, 452 U.S. 972 (1981); McGlinchy v. Shell Chem. Co., 845 F.2d 802, 806-07 (9th Cir. 1988) (plaintiff's expert could not identify *any* specific illegal acts committed by defendants, did *nothing* to confirm relevant market conditions, and based his damages estimate on *all* of plaintiff's gross sales even though defendants' conduct was directed only to "particular product

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395 U.S. at 114 n.9); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566-68 (1981) (antitrust plaintiff carries a "lightened" burden in establishing damages because "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation"); Callahan v. A.E.V., Inc., 182 F.3d 237, 258 (3d Cir. 1999) (denying judgment despite argument that plaintiffs' expert failed to consider "to the degree that the defendants might prefer . . . certain specific factors that might have affected the plaintiffs' business success, such as general economic conditions, changes in their operations during the relevant time period, or changes in costs"); Pls.' Opp. to Mot. to Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 18-21.

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lines and in particular overseas countries and territories"); Concord Boat Corp. v. Brunswick Corp., Nos. 98-3732 & 98-4042, 2000 WL 303035, at *14 (8th Cir. Mar. 24, 2000) (plaintiff's expert admitted that important, "inconvenient" facts "*could have been incorporated* into his model" but were not) (emphasis added).[44] See also Pls.' Opp. to Mot. To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 17-21.

Where a plaintiff has provided a plausible economic model using the available data, alternative causal explanations proposed by the defendant are for the jury to decide. See, e.g., In re Corrugated Container Antitrust Litig., 756 F.2d 411, 418 (5th Cir. 1985) ("[P]laintiffs offered evidence which attributed price increases to price fixing. Defendants countered with evidence that the price increases were caused by increases in the cost of linerboard, fuel, and labor. The jury could reasonably have believed either explanation."). The jury was properly allowed to resolve the dispute over what caused Conwood's damages.

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[44]Concord Boat is distinguishable on yet other grounds. The expert's but-for model there, unlike here, depended on unsupported assumptions that the parties' products "would be viewed as equal in quality" by consumers. 2000 WL 303035, at *14. Further, unlike here, there was apparently no damages evidence on which the jury could have relied beyond the expert's opinion. Id. at *15. Here, by contrast, there was substantial evidence that corroborated the expert's opinion, including evidence from defendants' own witnesses as to the market share Conwood was able to attain in areas unaffected by the unlawful and exclusionary UST campaign. See p. 45, infra.

(d) Defendants complain that Dr. Leftwich should not have been permitted to rely on sworn declarations from Conwood employees attesting to the scope and nature of UST's exclusionary practices. UST JMOL Mem. at 58-59. However, UST's contention that experts cannot rely on hearsay materials is simply wrong. Trepel v. Roadway Express, Inc., 194 F.3d 708, 717 (6th Cir. 1999) (abuse of discretion to preclude expert from discussing basis of opinion, even if basis was otherwise inadmissible hearsay).[45]

(e) In any event, the jury's verdict cannot be vacated (let alone reversed) when other record evidence supports it. Sawchik, 783 F.2d at 636; Kabealo v. Huntington Nat'l Bank, 17 F.3d 822, 827 (6th Cir.) (noting that plaintiffs' "own projections and their actual experience during four years of operation" would provide factfinder with reasonable basis for damages), cert. denied, 513 U.S. 812 (1994). Here the jury's verdict is supported by substantial evidence in addition to -- and corroborative of -- Dr. Leftwich. Indeed, the jury verdict is fully supported even in the absence of evidence from Dr. Leftwich.

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[45]UST's alternative evidentiary argument under Federal Rule of Evidence 703 that the sworn declarations are not the sort of material "reasonably relied on by experts" is unsupported by record evidence. It is also undermined by the decision of UST's own expert to place heavy reliance on materials of a similar nature, such as Conwood activity reports and -- as the very bedrock of his analysis -- a one-page document that he literally knew nothing about. 3/23/00 Tr. at 183-88 (Scheffman). In any event, such evidentiary cavils are not by a long shot a valid basis for judgment as a matter of law. See p. 62, infra.

For example, Mr. Rosson's testimony provided painstaking detail about the smokeless tobacco markets. This gave the jury a fully reasonable basis, grounded in actual past performance in moist snuff as well as adjacent markets, for estimating the "but for" share Conwood would have attained. 2/29/00 Tr. at 119-20 (Rosson). Mr. Price, corroborating Mr. Rosson's testimony, stated that each additional share point is worth $10 million in net profits in the moist snuff market. 3/7/00 Tr. at 116-20 (price). Several witnesses -- all called by UST -- testified that where Conwood was unrestrained by UST's exclusionary conduct it easily attained market shares as high as 30%.[46] Similar testimony was provided by Conwood's sales manager, Mr. Williams. 3/10/00 Tr. at 84 (Conwood has approximately 30% market share in Paducah area and chains unaffected by UST misconduct). UST itself predicted that Conwood and other makers of "price value" brands had the potential to gain as much as 18.1% of the market in three years. PX 45.

From all this evidence, the jury was plainly entitled to determine -- without engaging in speculation -- that Conwood would have continued on its growth trajectory after 1990, would have attained substantial additional market share, and

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[46] See, e.g., 3/14/00 Tr. at 174-75 (Luckett); 3/15/00 Tr. at 133 (Biddy); 3/16/00 Tr. at 94 (Germany); 3/21/00 Tr. at 23-24 (Jones); 3/22/00 Tr. at 29 (Overby).

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consequently (at $10 million per additional share point) would have earned $350 million in additional profits.[47]

To UST, of course, no damages proof could be sufficient, because the attempt to model a market purged of its antitrust violation necessarily involves predictions and estimates that can always be challenged as unanchored in the actual facts. For this reason, the law provides wide latitude to wronged antitrust plaintiffs; jury awards may be challenged only when they are supported by nothing more than "total[] speculat[ion]." Elder-Beerman Stores Corp. v. Federated Dep't Stores, Inc., 459 F.2d 138, 150 (6th Cir. 1972). That is not the case here.

III. DEFENDANTS ARE NOT ENTITLED TO A NEW TRIAL

The verdict in this case resulted from a trial that even UST concedes was virtually error-free. Indeed, it states that a new trial would differ little if at all from the trial just completed. UST New Trial Mem. at 4. UST further concedes that the Court gave instructions that were proper statements of the law. And UST's handful of quibbles regarding the conduct of the trial, many of which they failed to register during trial, do not remotely approach the denial of its substantial rights. UST has no legitimate basis for asking the Court, and another jury, to

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[47]While seemingly large in appearance, the jury award represents slightly less than an additional nine market share points over four years. The moist snuff market operations of UST produced almost a billion dollars in gross profits last year alone. UST Inc., 1999 Annual Report (2000) <http//www.ust.shareholder.com>.

set aside another month to repeat the same arguments that a jury has already considered fully and rejected.

A new trial is warranted under Rule 59 only "when a jury has reached a 'seriously erroneous result.'" Holmes v. City of Massillon, 78 F.3d 1041, 1045-46 (6th Cir. 1996) (reversing district court's grant of new trial); Morvay v. Maghielse Tool & Die Co., 708 F.2d 229, 233 (6th Cir. 1983) (new trial denied where party failed to demonstrate "manifest errors of law or fact"). Defendants must demonstrate that (1) the verdict was against the weight of the evidence; (2) the damages were excessive; or (3) the trial was unfair to defendants. Holmes, 78 F.3d at 1046. UST can demonstrate none of the above.

A. Overwhelming Evidence Supported the Verdict

A new trial is not appropriate "'unless th[e] verdict was unreasonable.'" Barnes v. Owens-Corning Fiberglas Corp., 201 F.3d 815, 820-21 (6th Cir. 2000) (quoting Holmes, 78 F.3d at 1047). "'[C]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'" Id. at 821 (citation omitted).

The verdict here was eminently reasonable, and was supported by numerous witnesses and exhibits on each essential element of Conwood's antitrust claims. In many critical respects, the

evidence was undisputed. See Point II, supra.[48] UST does not seriously argue otherwise, devoting less than one and a half pages to this point and offering not a single case citation that supports the grant of a new trial based on a jury's allegedly incorrect resolution of disputed Section 2 factual issues. UST New Trial Mem. at 2-3. While it laments the jury's failure to endorse the defense arguments, UST gives no reason to think a second jury would disagree with the first. The alleged haste with which the jury returned its verdict suggests no lack of reasoned consideration, but rather the absence of any genuine disagreement over the proper decision. The jury's deliberations and verdict were "consistent with [the] clarity of the evidence." United States v. Holloway, No. 98-5175, 1998 WL 833767, at *6 n.8 (6th Cir. Nov. 19, 1998).[49] There is no basis for suggesting

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[48]For example, Conwood's market definition, see Jury Instruction 2.2, was the only market definition offered by either party; UST's market share, history of price and margin increases, and the lack of new entrants into the market after 1990 were all undisputed; the accounts of the eight former UST salesmen, the six store employees, and the twelve Conwood field sales representatives went unchallenged in any material respect; UST's own records documenting their anticompetitive practices were undisputed; the lack of any benefit to consumers from UST's practices was undisputed, and indeed the economic evidence that proved the relationship between UST's command of facings and higher prices to consumers was effectively conceded; and only Conwood offered evidence regarding the amount of damages.

[49]To the extent that it reacted to the evidence, the jury was not alone. UST's Chief Executive Officer testified that the proof variously "astounded," "embarrassed," and "troubled" him. 3/21/00 Tr. at 91, 117-18, 120, 190 (Gierer). But see UST Letter to Our Customers, Mar. 30, 2000 (after trial, UST apparently retracting promise to investigate and change conduct, insisting to retailers that it will not alter its conduct and stating: "[T]he actions complained of by Conwood are nothing more than part of normal, lawful competitive conduct . . . . We will

that a second jury would decide otherwise, and no authority for giving UST a second chance to make the same unpersuasive arguments.

B. UST Cannot Show That the Damage Award Was Excessive

The jury's award of $350,000,000 in actual damages was based solidly on the evidence. See Point II.E, supra. UST cannot plausibly call the damages "excessive" when they were far less than the maximum the jury could appropriately have awarded,[50] and when UST decided for tactical reasons not to offer any damages evidence of its own. Portis v. Grand Trunk Western R.R., No. 93-1721, 1994 WL 362110, at *2-*3 (6th Cir. July 12, 1994) (damages not excessive where defendant "chose to defend" solely on theory that claim was a fraud and presented no alternative calculations of economic loss; award "was within the range permitted by the evidence presented at trial, and therefore not so large as to shock the conscience of the court"); Farber v. Massillon Bd. of Educ., 917 F.2d 1391, 1395 (6th Cir. 1990) (damages not excessive unless beyond maximum damages presented at trial); Jenkins v. Associated Transport, Inc., 330 F.2d 706, 712 (6th Cir. 1964)

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continue to provide you with the same level of service, the same fine products and the same fine programs that you have come to expect of us.").

[50]Dr. Leftwich estimated damages of up to $488 million, and he testified that he believed the evidence warranted an award at the high end of his range. 3/8/00 Tr. at 103-04 (Leftwich); PX 327.21. Mr. Rosson's testimony that Conwood, based on past performance and market conditions, could have attained market share in the mid-20s would also have fully supported damages of close to $500 million (12 additional share points x $10 million per year x four years). The jury's award was just about 65% of these amounts.

("[jury's] decision is not subject to interference by the trial judge unless so excessive . . . as to be indicative of prejudice, passion, partiality, or corruption on the part of the jury") (internal quotations marks omitted). The damages were appropriately scaled to Conwood's lost profits in a market characterized by enormous profits. As the Court stated, Conwood was "entitled to the damages that you're entitled -- entitled to receive, no matter what they are in relation to anything else." 3/27/00 Tr. at 93.

The damages are excessive only in the sense that UST believes the jury should not have awarded them. But that is no basis for the grant of a new trial, and UST does not seriously argue it is. UST cites no authority to support its subjective challenge to the amount of damages, and indeed the cases that it does cite all turn not on "excessiveness" but on a jury's patent award on impermissible grounds -- an issue not present here.[51]

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[51]Thus, in Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1225 (9th Cir. 1997), a new trial was required because the jury concededly awarded damages based on claims that had been dismissed on the merits before the case was submitted. In MCI Communications Corp. v. AT&T Corp., 708 F.2d 1081, 1163 (7th Cir. 1983), a new trial was required because the damages study included damages for 22 counts of alleged monopolization, liability was established only on 7 of the 22 counts, and there was no way -- based on the evidence presented to it -- the jury could have limited the award to the counts on which liability was established. In Litton Systems, Inc. v. Honeywell, No. 90-4823, 1996 WL 634213, at *3 (C.D. Cal. July 24, 1996), similarly, the jury was presented with a damages model that relied on six categories of conduct that the Court had expressly excluded from the jury's consideration. No such issue is present here. The jury found against UST on both actual and attempted monopolization, the damages evidence from, e.g., Dr. Leftwich and Mr. Rosson was tied to evidence of UST exclusionary conduct that the jury was entitled to consider, and the jury was

There is simply no reasoned basis on which the jury's verdict can be rejected, and a new trial ordered, where the jury awarded substantial damages supported by the evidence.[52]

C. The Trial Was Fair

The four-week trial of this major case was a model of efficiency and fairness to all parties, and UST does not actually contend otherwise. Far from making the requisite showing that its "substantial rights" were trampled, Fed. R. Civ. P. 61; Morales v. American Honda Motor Co., 151 F.3d 500, 514 (6th Cir. 1998) (question is whether supposed error "caused a different outcome"); Gandy v. Sullivan County, 24 F.3d 861, 866 (6th Cir. 1994)("substantial rights" must be affected), UST finds surprisingly little to complain about.

UST's continued protests that it should have been granted summary judgment, that the Court should have granted all of its motions *in limine*, that the Court should have excluded some and allowed other evidence, and that the Court should have made the two inconsequential (and inaccurate) modifications to the jury instructions that UST requested, are both wrong and beside the point: UST does not argue, and cannot argue, that these claimed "errors" singly or together deprived it of a fair trial.

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properly instructed to award damages, if any, for injuries caused "only" by UST's unlawful conduct. Jury Instruction 4.

[52]UST engages in irrelevant hyperbole when it calls the damages award a "direct attack" on the retail industry itself. UST JMOL Mem. at 3.

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1. The Court's Ruling on Summary Judgment Was Correct

UST asserts that the Court erred as a matter of law in its summary judgment ruling. Nothing could be farther from the truth.

First, UST asserts that the Court impermissibly relied on its "intent" and not its "conduct." But evidence of intent is highly probative in a Section 2 case and may even *determine* whether the conduct is "exclusionary" or "anticompetitive." See pp. 17-18, supra. Besides, the Court's ruling passed "intent" and discussed the "highly detailed" and "carefully developed, thoroughly documented record" of UST's actual misconduct and the resulting harm to consumers and competition. Feb. 17, 2000 Order at 5, 7. The Court held that credible evidence demonstrated that UST's intent was actually carried out through widespread anticompetitive conduct -- all of which conduct was later proved, in even greater detail, at trial. See, e.g., id. at 3 (efforts to eliminate competitive racks were "significantly successful"); id. at 4 (excluded competitive POS); id. (increase slot width to reduce consumer choice); id. (reduce distribution of lower-priced price-value products); id. at 7 (concerted campaign at highest levels of UST to shut Conwood out from effective competition at retail level).

Second, UST asserts that the Court erred when it held that UST's marketing practices are not immunized from review as a matter of law. As was fully briefed at the time, however, the cases that UST believes "immunize" its marketing practices are at

best unhelpful, and often even damaging, to its claim that its conduct is ordinary and procompetitive. See note 23, supra; Pls.' Opp. to Motion for Summ. J. at 49-50, 54 n.64. UST's assertion that its practices are ordinary and not exclusionary was properly held a disputed issue of material fact, and the Court correctly reserved the determination of this and other disputed factual issues for the jury. The properly instructed jury decided that UST's practices were *neither* ordinary nor procompetitive. UST has given the Court no good reason to reverse its decision to deny summary judgment. That decision was fully informed by "well-accepted principles of § 2 law." Feb. 17, 2000 Order at 7. UST's repetitive carping sheds no new light on the subject.[53]

[53]The only new twist is UST's incorrect parsing of Concord Boat, and in particular its suggestion that Concord Boat supports its argument that Conwood should have been held to the standards of the Clayton Act. Concord Boat involved price cutting in the boat engine market. The court did not suggest that exclusionary conduct under Section 2 is judged under the same standards as a Clayton Act claim. The court did mention in passing some of the characteristics of defendants' discount programs that lowered prices -- "the 'very essence of competition.'" 2000 WL 303035, at *21 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)). But the Eighth Circuit's approval in passing of price competition does not help UST; the evidence was undisputed that UST does not compete on price. 3/21/00 Tr. at 131 (Gierer) (UST raised price every year for last ten years); Smith Dep. at 26 (admitting that UST does not engage in price competition; denying knowledge of what "price competition" is); PX 33 ("UST doesn't 'deal' on its product's prices. We don't have to").

2. The Court's *In Limine* Rulings Were Correct

(a) The Court Properly Excluded Evidence of Owner Wealth.

Before trial, the Court issued a written ruling that excluded evidence regarding the identity of Conwood's ultimate beneficial owners and their claimed wealth. This ruling was entirely correct. The identity of the owners, and the unrelated assets they have or do not have, is both irrelevant and unfairly prejudicial -- offered solely to suggest to the jury that Conwood was owned by rich people and hence was undeserving of any recovery notwithstanding its legal entitlement.

Familiarly, UST claims severe prejudice in having been unable "to tell the whole story" of Conwood's chain of ownership.[54] But the parties in this case were corporations, and the wealth of Conwood's ultimate beneficial owners was no more relevant than evidence that the majority of UST's stockholders are financial institutions with vast wealth far exceeding that of Conwood's owners. UST does not point to a single authority or new argument suggesting otherwise.

The Court's ruling did not prevent UST from making any proper argument. It was free to elicit evidence, and to argue,

[54] In two years of discovery, however, UST never established that Conwood had access to additional funds from its ultimate owners or that the owners involved themselves in any way in Conwood's expenditures, investments, and distributions. Had it attempted to establish these matters in discovery, moreover, it would have found the facts very different than what it now claims.

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that Conwood had ample financial resources and could easily use those resources in its business rather than distribute them to its owners.[55] Conwood never claimed otherwise. UST elicited and argued that Conwood was a subsidiary of another corporation, despite the Court's statement that "I'm not even sure of the relevance." 2/29/00 Tr. at 131, 145 (Rosson). It fully explored Conwood's substantial participation in, and income from, smokeless tobacco markets other than moist snuff. See 3/23/00 Tr. at 75-76 (Scheffman). What it was not allowed to do -- offer proof of unrelated wealth of beneficial owners uninvolved in management and far up the chain of ownership, to unfairly prejudicial effect -- it has no coherent argument that it was entitled to do so, much less an argument that the failure of the Court to permit this obvious sideshow constituted a deprivation of its substantial rights or affected the outcome.

(b) The Court Properly Permitted Testimony Concerning Dr. Leftwich's Supplemental Report.

UST claims the Court erred by allowing testimony concerning Dr. Leftwich's supplemental report.[56] But this matter, too, was

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[55] See, e.g., 2/29/00 Tr. at 145 (UST cross-examination of Rosson establishing that Conwood made $150 million in free cash flow last year and this was distributed to owners); id. (available free cash flow); 3/23/00 Tr. at 42 (Scheffman testimony on amount of money distributed to owners); DX 57 (showing Conwood profits and percent distributed to owners -- used in Scheffman testimony); see also PX 14 (Conwood part of a conglomerate -- under "competition" heading of UST marketing plan).

[56] UST also submits that other damages-related arguments discussed in its JMOL motion warrant a new trial. The Court previously rejected each of these arguments and, as discussed

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exhaustively briefed and argued prior to trial. See Pls.' Opp.to UST's Mot. to Preclude "Undisclosed Expert Materials" at 6-9; Pls.' Reply to Defs.' Suppl. Mem. To Exclude Dr. Richard Leftwich at 1-7. After full consideration, the Court ruled that the supplemental material was appropriate. Feb. 23, 2000 Order at 5 ("supplementation was appropriate" under Rule 26(e); the opinions were not new and were discussed in rebuttal report). UST offers no new legal argument, let alone a compelling one, for reopening this settled issue.

Neither can UST claim prejudice from this appropriate evidentiary ruling. Instead, UST simply asserts that allowing Dr. Leftwich's deposition on the eve of trial did not permit "adequate time" to respond. UST New Trial Mem. at 10. But the timing of Dr. Leftwich's deposition was UST's decision, as it waited *four weeks* after receiving Dr. Leftwich's supplemental report before seeking to depose him. See Feb. 23, 2000 Order at 5 (noting that Magistrate had already granted leave on February 8 to take Dr. Leftwich's deposition). Tellingly, UST made no motion for a continuance and no objection to Dr. Leftwich's testimony at trial on the grounds that its attorneys were unprepared to examine him.[57]

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above, the arguments remain meritless. See Point II.E, supra.

[57] 11 Charles Alan Wright et al., Federal Practice and Procedure § 2805, at 56-57 (2d ed. 1995) (under Rule 59, "relief [for unfair surprise] will be denied if the party failed to seek a continuance"); United States v. Walton, 909 F.2d 915, 924 (6th Cir. 1990) (must show "'error was so fundamental that gross injustice would result'" if grounds for new trial were not raised at trial) (quoting Wright § 2805). The Court's previous ruling

(c) The Court Properly Admitted Professor Gundlach's Study.

UST's challenge to Dr. Gundlach's testimony is also a mere repetition of rejected pre-trial arguments. See Pls.' Opp. to Mot. to Preclude Prof. Gundlach's Study of Exclusionary Agreements and Related Testimony. Defendants' recycled claim that Dr. Gundlach did not offer any expertise, moreover, remains dead wrong. The trial record utterly undercuts UST's pre-trial assertion.[58] See, e.g., 3/9/00 Tr. at 65-66 (importance of advertising location); id. at 68 (UST aggressively seeking exclusive vending agreements); id. at 85 (outcome of agreements was reduction in competitive facings); id. at 91 (effect of agreements is to limit information to consumers, especially in light of tobacco advertising restrictions); id. at 101-16 (exclusionary features of CAP); id. at 150 (exclusive agreements solicited and gained by UST; often involved payments). Contrary to UST's claim, moreover, Dr. Gundlach comprehensively reviewed the record, including the testimony of retailers and employees.

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that "any possible prejudice" was avoided by the additional deposition remains correct. Feb. 23, 2000 Order at 5. UST's remaining Rule 703 argument is fully discussed in Point II.E, supra.

[58]UST can hardly complain, moreover, that Dr. Gundlach's study was unnecessary when UST repeatedly took the position that it had *no idea* how many exclusive vending agreements it had or where they could be located. See Milano Aff. ¶ 4; Untiedt Dep. at 110 (no idea if UST has exclusive vending agreements with top accounts, though he is responsible for them); 3/7/00 Tr. at 42 (Milano) (denying any agreement with Wal-Mart) compare with PX 47 (UST "has formed an agreement with Wal-Mart"); PX 230 (letter detailing agreement). Indeed, it was UST's professed ignorance about its own agreements that necessitated Dr. Gundlach's study.

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Id. at 74 (detailing specific UST deposition testimony supporting his opinion on 2908 agreements); id. at 93 (discussing out-of-stock problems and testimony of Wal-Mart tobacco category manager as part of basis of his opinion); id. at 131-32 (discussions with retailers). UST has no support for its renewed argument that Dr. Gundlach should not have been permitted to testify.[59]

UST also complains that it was "unable to confront" Dr. Gundlach with a video deposition excerpt from Mr. Carlson's testimony. See id. at 153 (Court: "I'm [n]ot going to let you show the deposition. Just like I didn't allow [plaintiffs] during some of their testimony earlier and you all objected to them. Exactly the same thing."). UST, however, identifies no authority that permits -- much less requires -- the playing of one witness's deposition in the middle of the testimony of another witness. Nor can it claim any prejudice from this run-of-the-mill evidentiary ruling falling well within the Court's discretion. UST was free to "confront" Dr. Gundlach with the substance of Mr. Carlson's testimony, and in fact did so. See id. (questioning Dr. Gundlach about Mr. Carlson's assertion that there was "no agreement" between UST and Wal-Mart, despite documentary evidence and testimony to the contrary). UST was also permitted to play Mr. Carlson's deposition in full at the

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[59] Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994), is inapposite. Unlike Dr. Gundlach, who personally reviewed the agreements underlying his study, see 3/9/00 Tr. at 124, the expert in Berry used a one-page summary sheet in his testimony, see 25 F.3d at 1352. The only expert in this case who used a mystery one-page summary sheet as the basis for his opinion was UST's expert, Dr. Scheffman.

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appropriate time. The Court's decision on the manner of cross-examination was entirely correct. It would be difficult to imagine anything farther from error affecting substantial rights.

(d) Sixth Circuit Law Does Not Require Store-by-Store Proof or a "Cross Section."

UST insists that a new trial is required because Conwood should have shown injury at the store level through a "cross-sectional" analysis. But UST never made any objection on this score at trial that might have allowed the Court to address this supposed error. Indeed, before trial UST took the *opposite* position, arguing that Conwood could *not* establish injury by any such "representative sampling," but only on a store-by-store basis. Mem. in Supp. of Mot. To Require Pls.' To Prove Exclusionary Conduct and Fact of Injury at Specific Retail Stores and Chains at 2.

Moreover, UST cites no legal support for its new position and simply bypasses controlling Sixth Circuit law. See Mem. in Opp. to Mot. To Require Pls. To Prove Exclusionary Conduct and Fact of Injury on Store-by-Store Basis at 2-4. As the Court recognized in denying UST's motion *in limine*, the Sixth Circuit "does not limit an antitrust plaintiff to specific damages or prohibit the use of estimates and inferences." See Feb. 23, 2000 Order at 3; Elyria-Lorain Broad. Co. v. Lorain Journal Co., 358 F.2d 790, 792-93 (6th Cir. 1966) ("It is not the rule that in an action for damages for violation of the antitrust laws plaintiff

is limited to recover only the specific items of damage which he can prove with reasonable certainty."). UST was free to argue to the jury that Conwood's experts should have used different methodologies, but instead it chose to wait until after trial to present the argument that Conwood must use a methodology specified by UST. The Court's correct ruling on the motion *in limine* leaves no room for this tactic:

> Plaintiffs' expert has utilized various calculations and theories to project the damages in this suit. It is the responsibility of the parties to argue the merits of these damages and to offer alternative explanations for their origin. The Court has no doubt each side can provide the jurors with the information necessary for them to exercise good sense and sound judgment to determine an amount, if any, that will produce adequate compensation and that will, in turn, remove speculation and guesswork from the decisionmaking process.

Feb. 23, 2000 Order at 3. See also Mem. in Opp. to Mot. To Require Pls. To Prove Exclusionary Conduct and Fact of Injury on Store-by-Store Basis at 2-4.[60]

3. The Court's Evidentiary Rulings Were Correct

At trial, the Court made a number of evidentiary rulings, some of which UST objected to, many of which it did not.[61] UST fails to demonstrate that a single one constitutes error, much

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[60]UST's claim that there was no evidence at trial of the fact of injury through lost sales at any retail location simply turns a blind eye to inconvenient evidence. See, e.g., PX 326.2 (chart showing decrease in Wal-Mart sales); PX 326.3 (chart showing decrease in 7-Eleven sales). See Point II, supra.

[61]Any objection to the admission of testimony unobjected to at trial is now waived. Walton, 909 F.2d at 924 (absent objection, error must be "so fundamental that gross injustice would result" to qualify for reversal).

less error so grave that it trenched on UST's substantial rights and accordingly warrants the extraordinary relief of a new trial. Leonard v. Uniroyal, Inc., 765 F.2d 560, 567 (6th Cir. 1985) (no error in the admission or exclusion of evidence is grounds for overturning jury verdict unless ruling is inconsistent with substantial justice); Morales, 151 F.3d at 154 (evidentiary ruling not grounds for reversal unless it "would have caused a different outcome").

(a) Conwood's Expert Witnesses Properly Explained Highly Relevant Opinions to the Jury.

(i) Conwood's Expert Testimony Assisted the Jury. UST disparages Conwood's experts, respected full-time professors at Northwestern University, Notre Dame University, and the University of Chicago, as "human highlighters." Essentially, UST criticizes plaintiffs' experts for providing evidentiary support for their views instead of just announcing a blizzard of opinions without explanation. UST might have preferred that Conwood's experts not rely on highly detailed and credible record evidence to support and illustrate their opinions. But UST can point to no authority for its novel view that experts are not permitted to explain the bases of their opinions.[62]

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[62]Nor can UST's complaint that experts simply "read[] documents" stand as a factual matter. For example, Dr. Kamien presented opinions about, and the results of his studies on, the relevant market, UST's possession of market power, and the effects of UST's pervasive exclusionary conduct. See 2/29/00 Tr. at 246-58, 279-80; 3/1/00 Tr. at 14-23; id. at 39-44. He presented *undisputed* studies showing UST's ability to charge higher prices when it occupies more facings and the output

(ii) Conwood's Used Proper Materials with Experts. UST objects (on hearsay grounds) to a demonstrative exhibit that itemized some of the bases for the opinions of Dr. Kamien. UST New Trial Mem. at 18. But the demonstrative was not hearsay; it was merely a summary of testimony Dr. Kamien was indisputably entitled to give, and gave without objection.

Moreover, UST failed to object to the demonstrative when it was presented. Instead, UST's counsel stated only that "I think a limiting instruction . . . would be appropriate." 2/29/00 Tr. at 8. UST both authored and agreed to the limiting instruction that the Court readily agreed to read to the jury. See id. at 124 (UST's counsel noting that "we have an agreement"); 3/1/00 Tr. at 35 (discussing instruction); id. at 37 (court giving limiting instruction to jury). UST's assertion that the Court engaged in fatal error by doing *exactly* what defendants asked at trial is both representative of its evidentiary challenges and entirely without substance.

On a related matter, UST argues that it was (somehow) improper for plaintiffs' counsel to ask Dr. Scheffman why he chose to *ignore* more than 200 sworn declarations detailing UST's

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effects of UST's agreements at the largest chain stores and mass merchandisers in the country. See PX 326.4 (price/facing chart); PX 326.2 (Wal-Mart sales drop); PX 326.3 (7-Eleven sales drop). Similarly, Dr. Blattberg explained to the jury his opinion that UST's category management practices are not "ordinary," but an abuse of accepted industry category management norms and standards. See 3/13/00 Tr. at 288-89. And Dr. Gundlach presented a number of opinions and a study discussed elsewhere. See pp. 57-59, supra.

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exclusionary conduct and instead base his conclusions on a piece of paper that he knew *absolutely nothing* about. 3/23/00 Tr. at 183-89. But questions about the bases of an expert's opinion are surely proper cross-examination. Counsel's questions were made all the more pertinent when Dr. Scheffman first claimed that the sworn declarations had not been available to him, and later admitted that they had been.[63] Here, too, UST was content at trial with a limiting instruction that it authored and the Court read.[64] It ill suits UST to charge the Court with committing fatal error for doing *precisely* what it asked at trial.

(b) Plaintiffs' Use of Fact Witnesses Was Proper.

First, UST claims that Mr. Rosson improperly presented testimony concerning the qualities and differences among Conwood's various smokeless products, even though he is the Chairman of the company and has worked in the tobacco business virtually his entire life. UST claims that Mr. Rosson improperly based his testimony on staff-prepared analyses of UST documents. But UST cites no such testimony from Mr. Rosson, only a discussion among counsel. In fact, the Court required Mr. Rosson

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[63]In his trial testimony, Dr. Scheffman first claimed that "I didn't have this at the time of my report." 3/23/00 Tr. at 166, 176, 177. When confronted with contrary deposition testimony, however, he eventually *admitted* that he in fact did have the material at the time of his report. Id. at 178-79.

[64]3/23/00 Tr. at 198 ("no questions" if court reads limiting instruction); id. at 199 (court reading instruction requested by UST); see also 3/24/00 Tr. at 34, 36 (UST requesting supplemental jury instruction and saying "that's fine"); 3/28/00 Tr. at 95-96 (jury instruction authored by UST and given by Court).

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to demonstrate personal knowledge and a proper foundation. See 2/29/00 Tr. at 4. Conwood then proceeded to do so at length, a fact UST cannot dispute. See id. at 79-80, 83 (Rosson). Indeed, UST sat on its hands after this foundation was laid, making only a single objection to Mr. Rosson's testimony in this area. As it recognized at the time, UST has literally nothing to complain about, let alone error affecting its substantial rights. Cf. note 66, infra.[65]

Second, Mr. Rosson's testimony on trends in Conwood's market share and the effect of UST's misconduct on that market share was likewise appropriate. As Chairman of Conwood, it was "very critical" to his job to track Conwood's market share and analyze factors affecting its market share. See 2/29/00 Tr. at 116-17 (Rosson). Mr. Rosson's testimony with respect to Conwood's market share growth was based on his personal knowledge of the industry and more than 45 years with Conwood, as well as Conwood's prior performance in moist snuff, and its performance in analogous smokeless markets (such as looseleaf). UST cites no case suggesting that a witness with such experience is barred from testifying about his knowledge of the industry and factors

[65]In any event, UST can hardly complain when its CEO and Chairman, Mr. Gierer, repeatedly testified based on "staff" prepared charts and data regarding industry expenditures and market share. See 3/21/00 Tr. at 81-82 (testifying on charts he "asked [his] staff to prepare").

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affecting sales in the industry. Indeed, the law authorizes precisely this kind of testimony.[66]

Third, UST complains that Mr. McClure should not have been permitted to testify about the effects of UST's tactics on Swedish Match. UST describes the basis for his testimony as merely "having previously worked for Swedish Match" as a Vice President. UST New Trial Mem. at 20. This is wrong. Mr. McClure served as President of Swedish Match, Manager of North America, and eventually became the Chief Operating Officer of Swedish Match worldwide. 3/13/00 Tr. at 6. Mr. McClure was deeply involved in the development and marketing of Swedish Match's moist snuff products. Id. at 16-17, 21-22, 28-29. There was a solid basis for his testimony in his knowledge and experience. UST was fully able to cross-examine Mr. McClure on his familiarity with the industry. Its decision not to do so reflects its recognition that Mr. McClure well knew what he was talking about.

UST's Chairman offered exactly the same sort of testimony defendants now claim to have been objectionable when given by Mr.

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[66] See Fed. R. Evid. 701 (allowing witnesses to testify to opinions and inferences rationally based on their perception and helpful to determination of fact in issue or understanding of witness's testimony); See Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1174 (3d Cir. 1993) (businessman's "experience in the quick-lube business" made him "qualified to predict how well [plaintiff] could have been expected to do"); In re Merritt Logan, Inc., 901 F.2d 349 (3d Cir. 1990) (principal shareholder's "personal knowledge of his business . . . [was] sufficient to make [this] witness eligible under Rule 701 to testify as to how lost profits could be calculated"). The Court's decision to admit Mr. Rosson's testimony on this point is unassailable.

Rosson and Mr. McClure. In fact, Mr. Gierer went beyond Mr. Rosson's description of the characteristics of different types of smokeless tobacco and opined about consumer switching behavior between cigarettes and moist snuff. He also testified about market share trends, changes in market share, projections of market share growth, and factors affecting changes in market share of moist snuff companies. He even opined as a matter of economics that it was "not feasible" to limit distribution and suppress Conwood's growth. 3/21/00 Tr. at 228. The notion that Mr. Rosson and Mr. McClure were not allowed to offer more modest testimony about matters plainly within their competence is both illogical and unsupported in law.

(c) Plaintiffs' Inquiries About the Availability of UST Witnesses Were Appropriate.

UST next complains about counsel's questions concerning the location and availability of UST witnesses.[67] But it is settled that "counsel in a civil trial may comment on the failure of a party to call an available witness whose testimony the party would naturally be expected to produce if favorable to him." Downriver Internists v. Harris Corp., 929 F.2d 1147, 1151 (6th Cir. 1991) (citation omitted). Accordingly, there can be no objection to counsel's eliciting the fact that the witnesses

[67]Contrary to UST's suggestion in its motion, the Court did not permit Conwood to inform the jury that UST refused to make 18 critical executives available for live testimony at trial.

were, in fact, available. Not surprisingly, UST cites no case in which admission of such testimony has been held to be error.[68]

4. The Court's Jury Instructions Were Proper

(a) "Restrictive" Was the Correct Instruction.

UST argues that the use of the term "restrictive" instead of "predatory" was "highly significant" and requires a new trial. UST is incorrect. The term "restrictive" and other such synonyms are commonly used in the Sixth Circuit and elsewhere to describe conduct proscribed by Section 2. See, e.g, Riverview Inv., Inc. v. Ottawa Community Improvement Corp., 769 F.2d 324, 328 (6th Cir. 1985) ("Regarding Section 2 of the Sherman Act, what matters is that the freedom to compete is restrained."); Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 575 (6th Cir. 1986) (conduct that "'either does not further competition on the merits or does so in an unnecessarily restrictive way'" violates Section 2) (quoting Aspen Skiing, 472 U.S. at 615 n.32); Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. at 695 (jury

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[68]UST's chairman testified that he was angry about the deposition testimony of UST senior executives. See 3/21/00 Tr. at 91, 117-18, 120 (Gierer). He testified about the investigation he was going to do when he returned to Greenwich. See id. at 190. He testified about his plan to "have a sit-down" with the President of UST and that he "would deal" with UST's director of its largest accounts, after viewing their "astonishing" deposition testimony at trial. Id. at 118, 190. It was entirely appropriate to ask UST witnesses whether or not these same senior executives planned to appear at trial to discuss their actions. The Court properly concluded that the questions and comments in closing were appropriate: "I think [Mr. Gierer] opened that door, saying he was troubled and he was going to investigate. I think it's fair game." See 3/27/00 Tr. at 91.

question whether "defendant's monopolistic and restrictive practices" harmed plaintiff).

Besides, UST must concede that the real question is not the particular word chosen but the substance conveyed. See, e.g., United States v. Kendrick, 853 F.2d 492, 495 (6th Cir. 1988) (defendant has "no right to select particular wording of jury instruction") (citation omitted); United States v. Baker, Nos. 84-5216, 84-5217, 84-5223, 84-5234, 1984 U.S. App. LEXIS 13437, at *8 (6th Cir. Dec. 20, 1984) (court has "broad discretion in wording its jury instructions" and is reversible only if the instruction is "substantively" incorrect). And UST has no objection to the substance of the Court's detailed definition of "restrictive" or "exclusionary" conduct: "conduct that has the effect of preventing or excluding competition or frustrating or impairing the efforts of other firms to compete for customers within the relevant market." Jury Instruction 2.4. Having made no objection to the *substance* of the Court's instruction at trial, it cannot seriously complain now. Fed. R. Civ. P. 51 (party cannot assign error to jury instruction absent objection at trial).

(b) The Court's Damages Instruction Was Complete and Proper.

UST's argument that the Court should have included a nominal damages instruction is without substance for a host of reasons:

First, as the Court noted at trial, there is no authority requiring a nominal damages instruction, or holding its absence error. See 3/27/00 Tr. at 69.

Second, the proposed instruction was, as the Court observed, essentially "a reargument of causation." Id.; see Jury Instruction 2.5: Injury and Causation (instructing jury that Conwood must prove "some damage flowed to it" as a result of UST's antitrust violations).

Third, UST's complaint that the jury had only Conwood's damages figure is the result solely of UST's tactical decision not to present *any* alternative damages figure to the jury. See Portis, 1994 WL 362110, at *2, *3 (defendant presented no alternative damages and relied solely on theory that claim was a fraud, thus jury had "no evidence of economic loss to consider except that presented by plaintiff"). UST cannot now ask the Court to protect it from its own strategy.

Finally, the jury was properly instructed -- using language proposed by UST -- that it need not find *any* damages. Hence, a nominal damages instruction was superfluous. Jury Instruction 4 ("amount of damages, if any"); 3/28/00 Tr. at 112 ("You should not interpret the fact that I've given instructions about Conwood's damages as an indication in any way that I believe Conwood should or should not win this claim").

IV. THERE IS NO LEGAL OR FACTUAL BASIS FOR REDUCING THE JURY'S AWARD

Controlling Sixth Circuit precedent holds that "'[a] jury verdict will not be set aside or reduced as excessive unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss.'" Farber, 917 F.2d at 1395 (citations omitted). See also Jackson v. City of Cookeville, 31 F.3d 1354, 1359 (6th Cir. 1994) (ordering reinstatement of verdict at higher level because there was evidence upon which jury could have awarded maximum amount); In re Lewis, 845 F.2d 624, 635 (6th Cir. 1988) ("A motion for remittitur should only be granted if the award *clearly* exceeds the amount which, under the evidence in the case, was the maximum that a jury reasonably could find to be compensatory for the plaintiff's loss.") (internal quotation marks omitted); Green v. Francis, 705 F.2d 846, 850 (6th Cir. 1983) (affirming refusal to set aside or reduce verdict because it was not beyond the maximum damages supported by the evidence).

Indeed, "[a] trial court is within its discretion in remitting a verdict only when, after reviewing all evidence in the light most favorable to the awardee, it is convinced that the verdict is *clearly* excessive, resulted from passion, bias or prejudice; or is so excessive or inadequate as to shock the conscience of the court." Farber, 917 F.2d at 1395 ("If there is

any credible evidence to support a verdict, it should not be set aside.") (emphasis added).[69]

UST's various proposed recalculations do not come within miles of meeting this standard:

First, UST asks the Court (without any hint of irony) to *rely* on Dr. Leftwich's testimony and simply award damages at the low end of his range, rather than in the middle, as the jury did. But such an action would run foursquare into the Sixth Cicuit's holdings that remittitur of a jury award at the *high* end of the range supported by the evidence is a reversible abuse of discretion. See Farber, 917 F.2d at 1395; Jackson, 31 F.3d at 1359; In re Lewis, 845 F.2d at 635; Green, 705 F.2d at 850.

Second, UST asks the Court to rely on Mr. Rosson's testimony that Conwood would have grown at least 10 share points absent UST's misconduct. UST argues only that the jury should have taken into account the possibility that some of these 10 points *could* have come at Swedish Match's or Swisher's expense, not UST's. Of course, so long as it was UST's conduct that prevented Conwood from gaining this share, it is *irrelevant* where it would

---

[69]The two cases cited by UST do nothing to help its cause. Tennessee Consolidated Coal Co. v. United Mine Workers, 416 F.2d 1192, 1203 (6th Cir. 1969), does not even discuss when remittitur is appropriate and actually *denies* the defendant's argument that an additional reduction of a remitted award was appropriate. Parkway Garage, Inc. v. City of Philadelphia, No. 90-7752, 1994 WL 412430, at *8 (E.D. Pa. Aug. 3, 1994), is similarly unhelpful. Unlike here, in Parkway there was a complete absence of *any* evidence that the closure of a parking garage for six weeks by the City resulted in damages beyond the date of closure.

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have come from. But UST was, of course, entirely free to argue this theory to the jury. It simply made the decision not to do so. See Portis, 1994 WL 362110, at *2, *3 (defendant presented no alternative damages and thus jury had "no evidence of economic loss to consider except that presented by plaintiff"). The jury was entitled to find that Conwood's gain through unimpaired competition would have amounted to $350 million, and accordingly the verdict is not appropriately subject to reduction.[70]

Third, UST returns once again to the "retailer decides" defense. It asks the Court to assume that the jury awarded damages for certain "sophisticated" chains that made "reasoned decisions" to exclude Conwood entirely independent of influence from UST. UST then asks the Court to remit some (unspecified) amount of damages attributable to these chains. Of course, UST neglects to cite any evidentiary basis for its presumption that the jury's award included money for independent conduct.[71] UST offers the Court no basis in the evidence, or even in principle, for figuring remitted damages. And UST blithely bypasses the

---

[70]This also impermissibly asks the Court to disregard Dr. Leftwich's study (on which UST's prior argument for remittitur expressly relies), which found damages of as much as $488 million. See Farber, 917 F.2d at 1395 (court cannot substitute its judgment if "any credible evidence" exists to support award).

[71]Moreover, the record is replete with evidence that their paradigmatical "independent" retailer, Wal-Mart, actually *relied* on UST to act as its category manager, that UST consciously exploited that trust to exclude Conwood and other price-value competition, that rival sales and Wal-Mart sales suffered as a result, and that UST had to resort to unprecedented "promotional" payments to make up Wal-Mart's lost profits. 3/13/00 Tr. at 264-89 (Blattberg).

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fact that the Sixth Circuit has made plain that such an exercise in fantasy would constitute reversible error. Jackson, 31 F.3d at 1361 (trial court abused its discretion in remitting award when court simply presumed that the jury did not account for present value); Farber, 917 F.2d at 1395.

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Conclusion

UST's motions for judgment as a matter of law, new trial, and remittitur should be denied. A proposed order is attached.

Respectfully submitted,

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April 30, 2000

16diii005730

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

Upon consideration of defendants' motions for judgment as a matter of law, for a new trial, and for remittitur, plaintiffs' opposition thereto, the entire record in this case, and good cause shown, it is hereby ordered that said motions are DENIED.

This the ___ day of _____, 2000.

_____
HONORABLE THOMAS B. RUSSELL
UNITED STATES DISTRICT JUDGE

EXHIBIT A

ATTACHMENT A

U.S. TOBACCO NOW ARGUES IN ITS JMOL/NEW TRIAL MOTION	U.S. TOBACCO'S PRIOR ARGUMENT ON THE ISSUE	CONWOOD'S PRIOR RESPONSE	COURT'S PRIOR RULING ON THE ISSUE
U.S. Tobacco did not wield monopoly power, but rather engaged in ordinary marketing practices The alleged anticompetitive activity by UST (e.g., shelf space recommendations, SOF=SOM, recommending exclusive racks, CAP) is nothing more than ordinary competitive marketing practices. (UST JMOL Mem, throughout)	"USTC's Other Alleged Misconduct Involves Ordinary Business Practices" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 25-37 (11/15/99)) (UST Directed Verdict Mem. at 2-5 (3/14/00))	"There Is Ample Evidence From Which a Jury Could Conclude That UST's 'Ordinary' Business Practices Are Exclusionary" (Pls.' Mem. in Opp. to Mot. for Summ. J. at 53-54 (12/9/99))	UST does not argue that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could never constitute violations at all. This falls short of the proof which would be required to prevail on the § 2 claims, particularly in view of the numerous record comments from high level UST personnel which arguably show an anitcompetitive intent rather than a business justification. (Feb. 17, 2000 Order at 8)
Shelf space recommendations are an ordinary marketing practice and cannot be found to be anticompetitive "Whether in the context of category management or otherwise, U.S. Tobacco's attempts to influence retailer decisions about product selection and space allocations are core aspects of competition in the packaged goods industry and have been for many decades." (UST JMOL Mem at 17-19)	"USTC's Shelf Space Suggestions and Recommendations Are Not Exclusionary" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 26-27 (11/15/99))	Professor Blattberg indicated that UST abused category management to suppress competition. (Pls.' Mem. in Opp. to Mot. for Summ. J. at 18 (12/9/99))	UST does not argue that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could never constitute violations at all. (Feb. 17, 2000 Order at 8)

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U.S. TOBACCO NOW ARGUES IN ITS JMOL/NEW TRIAL MOTION	U.S. TOBACCO'S PRIOR ARGUMENT ON THE ISSUE	CONWOOD'S PRIOR RESPONSE	COURT'S PRIOR RULING ON THE ISSUE
SOF=SOM is an ordinary marketing practice, and cannot be found to be anticompetitive (UST JMOL Mem at 19-22)	"USTC's Requests That Retailers Give USTC Share Of Shelf Space Equal To Share Of 'Market' Are Not Exclusionary" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 28-30 (11/15/99))	"UST used the SOF=SOM formula not to obtain needed room for its products, but to exclude competition." (Pls.' Mem. in Opp. to Mot. for Summ. J. at 20 (12/9/99))	UST does not argue that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could never constitute violations at all. (Feb. 17, 2000 Order at 8)
Offering exclusive racks to retailers is an ordinary marketing practice and cannot be found to be anticompetitive (UST JMOL Mem at 23-27)	"USTC Offering 'Category Management' Services Is Not Exclusionary" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 30-31 (11/15/99))	"Beginning in 1995, UST entered into agreements covering 22,000 stores that expressly excluded rival racks, products, facings, or POS." (Pls.' Mem. in Opp. to Mot. for Summ. J. at 23 (12/9/99))	UST does not argue that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could never constitute violations at all. (Feb. 17, 2000 Order at 8)
CAP is an ordinary marketing practice and cannot be found to be anticompetitive (UST JMOL Mem at 27-33)	"USTC's 'CAP' Incentive Program Is Not Exclusionary" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 32-33 (11/15/99))	"CAP paid retailers to participate in *all* UST new brand tests or introductions, even for its 'slow selling' product lines, thus ensuring that UST could exert pressure on the space available for rivals and their new products." (Pls.' Mem. in Opp. to Mot. for Summ. J. at 27 (12/9/99))	UST does not argue that the restrictions on the use of Conwood racks and Conwood POS were justified by business reasons; rather, it argues that the restrictions could never constitute violations at all. (Feb. 17, 2000 Order at 8)

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U.S. TOBACCO NOW ARGUES IN ITS JMOL/NEW TRIAL MOTION	U.S. TOBACCO'S PRIOR ARGUMENT ON THE ISSUE	CONWOOD'S PRIOR RESPONSE	COURT'S PRIOR RULING ON THE ISSUE
U.S. Tobacco's alleged tortious conduct cannot be found to be anticompetitive (UST JMOL Mem at 33-37)	"USTC's Alleged Tortious Conduct In The Field Is Not Exclusionary, And Is Neither A 'Corporate Policy' Nor 'Systematic and Routine'" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 33-37 (11/15/99)) (UST Directed Verdict Mem. at 5-6)	The evidence that UST engaged pervasively and systematically in this misconduct comes from a wealth of sources: former UST representatives, retailers, Swedish Match, and Conwood representatives. (Pls.' Mem. in Opp. to Mot. for Summ. J. at 11-16 (12/9/99))	"[T]he questions of whether these anticompetitive practices took place, how extensive they were, how much they were orchestrated by top management and how much by sporadic local efforts by 'rogue' sales personnel, how effective they were in restraining or eliminating competition, . . . -- all these are issues which can be resolved only by a jury." (Feb. 17, 2000 Order at 11)
The Court's improper focus on U.S. Tobacco's intent, rather than its exclusionary conduct (UST JMOL Mem at 10-14)	"Evidence Of Alleged 'Anticompetitive' Intent Cannot Save Conwood" (Reply Mem. in Supp. of Defs.' Mot. for Summ. J. at 26-28 (12/23/99))	"[E]vidence of UST's intent may determine whether 'the challenged conduct is fairly characterized as exclusionary or anticompetitive.'" (Pls.' Mem. in Opp. to Mot. for Summ. J. at 3 (12/9/99))	"[N]umerous record comments from high level UST personnel . . . arguably show an anticompetitive intent rather than a business justification for the exclusionary POS practices." (emphasis added) (Feb. 17, 2000 Order at 8)
The moist snuff "market" was not harmed by U.S. Tobacco's alleged misconduct (UST JMOL Mem at 14-16, 37-41)	"Conwood Cannot Establish That USTC Has Reduced Market-Wide Competition in the Moist Snuff Industry" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 38-40 (11/15/99))	"UST's Exclusionary Conduct Harmed Conwood, Competition, and Consumers" (Pls.' Mem. in Opp. to Mot. for Summ. J. at 30 (12/9/99))	"Multiple issues concerning injury, damage, and causation remain for trial. Included in these [is]. . .whether the effects on competition and on Conwood which plaintiff claims are the result of actions by UST at all." (Feb. 17, 2000 Order at 10)

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U.S. TOBACCO NOW ARGUES IN ITS JMOL/NEW TRIAL MOTION	U.S. TOBACCO'S PRIOR ARGUMENT ON THE ISSUE	CONWOOD'S PRIOR RESPONSE	COURT'S PRIOR RULING ON THE ISSUE
Conwood failed to prove retailers were coerced by U.S. Tobacco (UST JMOL Mem at 14-16, 21-22, 44-46)	"The Independent Decisions Of Retailers" (Mem. in Supp. of Defs.' Mot. for Summ. J. at 41-42 (11/15/99))	"In any event, whether retailers agree to exclusion is legally irrelevant: the essence of any Section 2 claim is not harm to retailers; it is harm to competition and consumers." (Pls.' Mem. in Opp. to Mot. for Summ. J. at 62 (12/9/99))	"Multiple issues concerning injury, damage, and causation remain for trial. Included in these are the. . .uncoerced decisions by retailers." (Feb. 17, 2000 Order at 10)
The Court improperly granted Conwood's motion to preclude disclosure of Pritzker family ownership of Conwood (UST Mot. for New Trial at 8-9)	Conwood has attempted to portray itself as a "victimized, small competitor" and the Pritzkers are a disinterested owner of Conwood. (UST Opp. to Conwood Mot. in Limine at 8-9)	"[I]nformation about the ultimate beneficiaries of these profits would be inflammatory and prejudicial." (Pls.' Mots. in Limine at 1 (1/28/00))	"[T]he probative nature of the inquiry is substantially outweighed by the potential prejudice to Plaintiffs, while causing no harm to Defendants' case." (Feb. 23, 2000 Order at 1)
Dr. Leftwich's damages study is "speculative" "Conwood's theory of damages in this case was the epitome of rank speculation and 'guesswork' -- all, however, stamped with the imprimatur of expert testimony.'" "Dr. Leftwich's testimony does not provide the jury with any basis to determine that Conwood lost sales by reason of U.S. Tobacco's conduct, much less to quantify any lost sales." (UST JMOL Mem at 50-60)	"It is axiomatic that, in calculating antitrust damages, an expert witness must attribute the damages solely to the unlawful acts of the defendants." (Mem. in Supp. of Defs.' Mot. To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 11 (11/15/99))	Dr. Leftwich's analysis meets all relevant criteria for the admission of expert testimony. UST may challenge Leftwich's opinions before the jury, but has offered no valid reason to preclude his testimony. (Pls.' Opp. to Mot. To Exclude Damages Study and Future Testimony of Dr. Richard Leftwich at 5 (12/9/99))	"Leftwich's testimony satisfies *Daubert*. His methodologies are generally acceptable. (Citation omitted) Defendant's expert also used them. . . . The credibility of the expert and his opinion is an issue for the jury." (Feb. 23, 2000 Order at 4)

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U.S. TOBACCO NOW ARGUES IN ITS JMOL/NEW TRIAL MOTION	U.S. TOBACCO'S PRIOR ARGUMENT ON THE ISSUE	CONWOOD'S PRIOR RESPONSE	COURT'S PRIOR RULING ON THE ISSUE
Dr. Leftwich's supplemental disclosure of his damages report was untimely In Dr. Leftwich's supplemental report, he used the surveys of Conwood personnel to add $250 million to his damages estimate; allowing UST to take his deposition on the "eve of trial" prejudiced defendants. (UST Mot. for New Trial at 10)	Dr. Leftwich's supplemental opinion is both a new expert opinion and untimely. (Mem. in Supp. of Defs.' Motion To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 7-18 (2/8/00))	"Leftwich's Supplemental Report presents nothing new, is timely, and has not caused any delay that prejudices UST." (Pls.' Reply to Defs.' Suppl. Mem. in Supp. of Their Motion To Exclude the Damages Study and Future Testimony of Dr. Richard Leftwich at 2 (2/16/00))	"[Leftwich's supplemental opinions] are not new, and were discussed in Leftwich's rebuttal report. . . . However, to avoid any possible prejudice to Defendants, Defendants may take Leftwich's deposition again prior to his testimony at trial." (Feb. 23, 2000 Order at 5)
Prof. Gundlach's lack of foundation for his exclusivity study "He is not, and did not claim to be, an expert in determining whether certain documents constitututed agreements; nor did he offer any comparative analysis based on his work with either retailers or manufacturers in the retail industry." (UST Mot. for New Trial at 11-12)	"The Gundlach 'study' is nothing more than a table of retailers with whom USTC purportedly has had exclusive agreements since 1995." (Mem. in Supp. of Defs.' Mot. in Limine to Preclude Professor Gundlach's "Study" of Purported "Exclusive Agreements" and Related Testimony at 4 (1/28/00))	These agreements require exclusive racks and POS on their face. (Pls.' Opp. to Mot. To Preclude Professor Gundlach's Study of Exclusionary Agreements and Related Testimony at 5 (2/11/00))	"Defendants mischaracterize Gundlach's testimony regarding the agreements. Gundlach did not include the types of agreements that contained merely 'an indicia of some form, type of exclusion' in his study." (Citation omitted) (Feb. 23, 2000 Order at 2)

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U.S. TOBACCO NOW ARGUES IN ITS JMOL/NEW TRIAL MOTION	U.S. TOBACCO'S PRIOR ARGUMENT ON THE ISSUE	CONWOOD'S PRIOR RESPONSE	COURT'S PRIOR RULING ON THE ISSUE
Failure of Conwood to prove specific injury at store level "At a minimum, the Court should have required Conwood to prove actual fact of injury [at] a subset of stores. . . . Conwood failed to present evidence at trial of any lost sales at any retail location." (UST Mot. for New Trial at 13, 14)	Conwood should be ordered to prove "(i) that USTC engaged in some form of exclusionary behavior in every retail establishment in which Conwood was purportedly injured; and (ii) that Conwood sales were reduced by this conduct as opposed to other causes." (UST Mot. in Limine at 6 (1/28/00))	Antitrust precedent does not require specific damages; rather, "general" damages may be assessed. (Conwood Mem. in Opp. to Mot. to Require Pls. To Prove Exclusionary Conduct and Fact of Injury on a Store-by-Store Basis at 2-4 (2/11/00))	"Simply put, Plantiffs are not required to prove what damage occurred at each of the 300,000 separate retail establishments in order to prove fact of injury. Defendants argument to the contrary is not well taken." (Feb. 23, 2000 Order at 3)
The Court's acceptance of a monopoly "broth" theory (UST JMOL Mem at 10-37)	"A 'Monopoly Broth' Without Any Independent Antitrust Violations Cannot Survive" (Reply Mem. in Supp. of Defs.' Mot. for Summ. J. at 18-21 (12/23/99))	The amalgam of UST's misconduct is mandated by the antitrust laws. (Pls.' Mem. in Opp. to Mot. for Summ. J. at 45-52 (12/9/99))	"UST's 'deconstruction' of the Conwood claims into a series of discrete antitrust theories, which UST then individually seeks to knock down, does not compel the summary judgment dismissal of this case." (Citation omitted) (Feb. 17, 2000 Order at 7)
Conwood made improper comments about the availability of U.S. Tobacco employee witnesses Questions and comments on the availability of U.S. Tobacco witnesses were, "irrelevant, misleading, and unfairly prejudicial." (UST Mot. for New Trial at 21-23)	Conwood chose the forum, and chose not to depose authors of documents. (3/27/00 Tr. at 89-90)	The UST witnesses chose not to appear. UST could have brought witnesses to Paducah who had personal knowledge of the issues in this case. (3/27/00 Tr. at 88-89)	Plaintiff's comments about UST employees not brought to Paducah is a fair comment. (3/27/00 Tr. at 90)

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR PERMISSION TO CONDUCT POST-VERDICT JUROR INTERVIEWS

In its effort to prevent U.S. Tobacco from interviewing willing jurors, Conwood misstates the purpose of U.S. Tobacco's request. U.S. Tobacco seeks the Court's permission to interview one or more of jurors in order to clarify the meaning of their verdict. Clarification of a verdict is a permissible basis for post-verdict juror interviews. McCullough v. Consol. Rail Corp., 937 F.2d 1167, 1172 (6th Cir. 1991).

The McCullough court distinguished an inquiry that seeks to understand what the jury intended by its verdict from one in which the litigants inquire into the reasons behind a verdict. It approved the district court's questions to a jury panel because "[t]he judge in this case inquired only as to the intended verdict and did not elicit any testimony about the process by which the jury reached its verdict." Id. at 1170

Conwood incorrectly states in its response that U.S. Tobacco seeks to inquire into the "reasons" for the verdict. Response at 2. Conwood relies on Wilkerson v. Johnson, 699 F.2d 325, 330 (6th Cir. 1983), which prohibits inquiries into the reasons for a verdict when the movant bases the request for juror interviews on the belief that evidence supporting the verdict inquired into was insufficient. But Wilkerson affirms the trial court's discretion to allow interviews where appropriate. Here, unlike the movant in Wilkerson, U.S. Tobacco does not seek to obtain juror testimony in order to demonstrate lack of evidence to support the jury verdict. The proposed interviews are simply not designed to inquire into the "thought processes or emotional reactions of the jurors," and therefore the inquiry is permissible. McCullough, 937 F.2d at 1169, 1172. The proposed inquiry merely asks for clarification of the verdict. Id. at 1172.

In this situation, the stability and finality of the verdicts are not threatened and U.S. Tobacco's request presents no danger of harassment of the jurors as prohibited by Fed. R. Evid. 606(b); See also McCullough, 937 F.2d at 1170, 1172. Given that the stability and finality of the verdicts are not threatened by mere voluntary interviews of jurors, it is difficult to understand how the interviews can unfairly prejudice Conwood.

CONCLUSION

For the foregoing reasons, U.S. Tobacco respectfully requests that this Court permit post-verdict interviews of jurors willing to be interviewed.

Respectfully submitted,

Dated: May 2, 2000

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MATTER: Conwood Company, L.P. v. UST, et al. Civil Action No. 5:98-CV-108-R

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEY FEES AND COSTS

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
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CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION FOR ATTORNEY FEES AND COSTS

In seeking compensation for "the cost of suit, including a reasonable attorney's fee," 15 U.S.C. § 15(a), Conwood has deliberately chosen not to support its request with the detailed submission required by the case law. Consequently, U.S. Tobacco has had no effective opportunity to examine and challenge the request, and the Court does not have before it a record upon which it can discharge its duty to determine the reasonableness of the request. On the present record, neither form of scrutiny is reasonably possible. Accordingly, the Court is under no obligation even to consider Conwood's request and should, in fact, deny it outright.

Alternatively, if the Court chooses to examine Conwood's bare-bones request, it should deny it because it is unreasonable on its face. Even without the required detailed documentation, U.S. Tobacco will demonstrate in this memorandum the patent unreasonableness of Conwood's request. One example, which should lead to the closest scrutiny of the entire request and all backup material in detail, is Conwood's attempt to recover its expert witness fees in this antitrust case, a notion rejected by the United States Supreme Court ten years ago.

If, despite Conwood's efforts to avoid the requisite scrutiny of its request, the Court decides to seek from Conwood the necessary detail that it should already have produced, this should not delay the consideration of U.S. Tobacco's post-trial motions. The appropriate procedure would be to defer a determination of the specific amount of any award until after the Court has ruled on U.S. Tobacco's post-trial motions and until after the conclusion of any subsequent appeal and further proceedings. This is particularly appropriate in light of the following:

1. Conwood has indicated it intends to claim costs and fees through the end of the proceeding such that a final determination of the award cannot be determined at this time;
2. subsequent proceedings may obviate Conwood's entitlement to any award of costs and fees;
3. Conwood has delayed effective scrutiny of its request; and
4. taking the time to consider a fully supported request on Conwood's schedule would delay the ultimate resolution of issues on appeal.

ARGUMENT

Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a).

A. THE COURT SHOULD DENY CONWOOD'S REQUEST FOR ATTORNEY FEES AND COSTS BECAUSE OF CONWOOD'S FAILURE TO SUPPORT AND PROVE ITS CLAIM.

In determining a reasonable attorney fee, the Court is to use the "lodestar" approach to calculate "'the number of hours reasonably expended on the litigation multiplied by a reasonable

hourly rate.'" Wayne v. Village of Sebring, 36 F.3d 517, 531 (6th Cir. 1994) (quoting Hensley v. Eckerhart, 461 U.S. 424, 429 (1983)). Under this approach, the Court should "exclude excessive, redundant, or otherwise unnecessary hours." Id. (citing Hensley, 461 U.S. at 434)[1]

A party seeking an award of fees "bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." Hensley, 461 U.S. at 437. Applications for attorney fees must specify, for each attorney, the date, the hours expended, and the nature of the work done. Cruz v. Local Union No. 3 of the Int'l Bhd. of Elec. Workers, 34 F.3d 1148 (2d Cir. 1994). The Sixth Circuit has been very explicit on this point, stating that "[n]ot only must attorneys exclude unnecessary hours from their bill, they must also maintain billing time records that are sufficiently detailed to enable the courts to review the reasonableness of the hours expended." Wooldridge v. Marlene Indus. Corp., 898 F.2d 1169, 1177 (6th Cir. 1990). Otherwise, "it is impossible to tell what portion of the claimed hours were 'excessive, redundant, or otherwise unnecessary. . . .'" Id. at 1177 (quoting Hensley, 461 U.S. at 434.)

Similarly, a party seeking an award of costs must document its expenses in detail, not merely by category, to allow a full examination and determination that such expenditures were necessary and reasonable. Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 684 F. Supp. 953, 960-61 (N.D. Ohio 1988); Apple Corps Ltd. v. Int'l Collectors Soc'y, 25 F. Supp. 2d 480, 497 (D.N.J. 1998).

In flagrant disregard of these strict requirements, Conwood offers absolutely no proof in support of its claimed fees and costs that would enable the Court to determine a reasonable award. Instead, Conwood purports to justify its request for over $19 million in attorney fees and costs

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[1] The principles governing an award of attorney fees and costs pursuant to 42 U.S.C. § 1988 apply to fee determinations in other types of equally complex litigation, including antitrust cases. See Northcross v. Bd. of Educ., 611 F.2d 624, 633 (6th Cir. 1979).

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(which, it claims, are still accruing) with the self-serving declarations of three of its own trial attorneys and its general counsel and a one-page summary of costs and expenses (which is practically illegible). Conwood offers absolutely no itemized billing statements or detailed cost information to support the specific attorney fees and costs claimed. The Court should deny Conwood's request on this basis alone.

Rather than providing the information and addressing the reasonableness of its request as required by the case law, Conwood (a) cites irrelevant common-fund, class action cases (that involve a different reasonableness standard inapplicable here); (b) emphasizes the jury award of $350 million and the trebled amount of $1.05 billion; and (c) asserts that this result could warrant a higher fee recovery than the multi-million dollar amount requested. (Conwood Mem. p. 2) Conwood's attempt to focus the Court's attention on the trebled damage award, which is exorbitant by any standard, is an obvious and inappropriate attempt to sidestep the real standards governing its request for over $19 million in fees and costs.

In Transworld Airlines, Inc. v. Hughes, 312 F. Supp. 478 (D.C.N.Y. 1970), aff'd as modified on other grounds, 449 F.2d 51 (2d Cir. 1971), rev'd on other grounds, 409 U.S. 463 (1973), the court stated that an award of attorney fees under Section 4 of the Clayton Act based on a percentage of the recovery is not a satisfactory test of whether the requested fee is adequate because a percentage fee gives undue weight to the size of the recovery. In cases with small recoveries, it ignores the professional skill and the complexity of the work involved, and could result in an insufficient award. Conversely, where the recovery is extraordinarily high, as here, it could result in an excessive award. Id. at 484.

In addition to its improper attempt to misdirect the Court's attention to the size of the judgment, Conwood has submitted a request for fees and costs that the Court simply cannot properly

consider because it does not include the detailed documentation required by the Supreme Court, Hensley, 461 U.S. at 437; the Sixth Circuit, Wooldridge, 898 F.2d at 1177, and trial courts, e.g., Langenderfer, 684 F. Supp. at 960-61; Apple Corps, 25 F. Supp. 2d at 497. "[T]he documentation [in support of a request for attorney fees and costs] must be sufficient for the court to verify that the applicant has met its burden. 'In determining the amount of an attorney fee award, courts customarily require the applicant to produce contemporaneous billing records or other sufficient documentation so that the district court can fulfill its duty to examine the application for noncompensable hours.'" Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 324 (5th Cir. 1995) (internal citation omitted); see Bode v. United States, 919 F.2d 1044, 1047 (5th Cir. 1990) ("[T]he party seeking reimbursement of attorneys' fees . . . has the burden of establishing the number of attorney hours expended, and can meet that burden only by presenting evidence that is adequate for the court to determine what hours should be included in the reimbursement.")

Conwood has not submitted a single billing record or a single detail of its costs in support of its request. Furthermore, while each of its three law firms has disclosed a total of hours that were allegedly expended and ranges of hourly rates for partners, associates, legal assistants and the like (one firm even talked about a "blended rate"), there is no indication of what any individual lawyer charged for his or her time. Nor does the request include detailed descriptions of the work done or of costs beyond broad categories – descriptions necessary to allow a review and analysis by U.S. Tobacco and the Court. Among other things, neither the Court nor U.S. Tobacco can tell whether and to what extent Conwood is seeking to recover fees or costs associated with its abandoned state law or Lanham Act claims.

Further, this Court could not possibly fulfill its duty to determine a reasonable award based on Conwood's skeletal submission, which is completely lacking in detailed support and

documentation. The district court "is not only required to determine whether the total hours claimed are reasonable, but also whether particular hours claimed were reasonably expended." Louisiana Power & Light, 50 F.3d at 324 (emphasis supplied). Any award to Conwood in the absence of the required documentation would be clear error. Id. at 323 (district court's determination of reasonable hours and reasonable rates are determination of fact reviewed for clear error).

Conwood's remark, buried in a footnote, that, "[if] the Court wishes, Conwood will provide the Court, in camera, with the billing and expense records that underlie [its] calculations," does not cure or even begin to ameliorate the deficiency of Conwood's proof. Even assuming that documentation of Conwood's requested fees and costs exists and is provided to the Court, U.S. Tobacco must have an opportunity to raise objections to the specific fees and costs claimed. See Wooldridge, 898 F.2d at 1176. The Sixth Circuit has recognized this right, which is necessary to the Court's proper determination of any fee and costs award. "Where a party raises specific objections to a fee award, a district court should state why it is rejecting them. . . . Ideally, a party should raise objections with specificity, pointing out particular items, rather than making generalized objections to the reasonableness of the bill as a whole." Id. at 20; at n.14. Without the detailed documentation, U.S. Tobacco cannot raise specific objections to particular items as required.

Conwood's unsupported fee request is an obvious attempt to prevent U.S. Tobacco from evaluating and objecting to the request as it is rightfully allowed to do. See Fed. R. Civ. P. 54(d)(2)(C) ("On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion [for attorneys' fees and related nontaxable expenses]"). Rule 54(d)(2)(C) "assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services. . . . The court may determine that discovery under Rules 26 through 37 would be useful to the parties." Fed. R. Civ.

P. 54(d)(2)(C) advisory committee note. See also Nat'l Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.D.C. 1982) (party opposing fee request is entitled to the information it requires to appraise the reasonableness of the fee requested and in order that it may present any legitimate challenges to the application of the district court); Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087 (5th Cir. 1982) (if reasonableness of the hours claimed in fee request becomes an issue, applicant should voluntarily make his time charges available for inspection by the court and opposing counsel), overruled sub nom. on other grounds Int'l Woodworkers of Am. v. Champion Int'l Corp., 790 F.2d 1174 (5th Cir. 1986) and J.T. Gibbons, Inc. v. Crawford Fitting Co., 790 F.2d 1193 (5th Cir. 1986).

Conwood's arrogant disregard of controlling case law and normal practice and its deliberate attempts to circumvent the rights of U.S. Tobacco and the duties of this Court, should not be tolerated, much less rewarded. Accordingly, the Court should deny Conwood's request for an award of attorney fees and costs based on its complete lack of appropriate proof, including supporting documentation.

B. THE COURT SHOULD DENY CONWOOD'S REQUEST FOR FEES AND COSTS BECAUSE IT IS UNREASONABLE ON ITS FACE.

The Sixth Circuit has made it clear that attorney fee claims that appear unreasonable on their face are to be denied. Wooldridge, 898 F.2d at 1176-77; see also Sun Publ'g Co. v. Mecklenburg News, Inc., 823 F.2d 818 (4th Cir. 1987) (affirming the district court's outright denial of plaintiff's antitrust attorney fee petition on grounds that the petition was so unreasonable and exorbitant that it shocked the conscience of the court); Johnson v. State, No. C.A. 98-266T, 2000 WL 303305 (D.R.I. March 22, 2000) (holding that total disallowance of a fee petition may be justified when the application is grossly and intolerably exaggerated, or manifestly filed in bad faith). As discussed

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below, it can be determined, even from its bare-bones request, that Conwood obviously is requesting fees and costs that are unreasonable.

1. Conwood's Request for Attorney Fees Is Unreasonable on its Face Both as to Hourly Rates and Number of Hours

The Sixth Circuit has explained that, in determining an award of attorney fees, the primary concern is that the fees awarded be "reasonable." Reed v. Rhodes, 179 F.3d 453, 471 (6th Cir. 1999). The Sixth Circuit defines a "reasonable fee" as "one that 'is adequate to attract competent counsel, but . . . [does] not produce windfalls to attorneys.'" Id. (quoting Blum v. Stenson, 465 U.S. 886, 887 (1984)).

The Sixth Circuit has specified that statutorily-mandated attorney fees provisions do not guarantee plaintiffs the best counsel in the country, only counsel that is competent. Consequently, in assessing a reasonable attorney fee award, the hourly rate used in the lodestar formula "should not exceed what is necessary to encourage competent lawyers within the relevant community to undertake legal representation." Hadix v. Johnson, 65 F.3d 532, 535-36 (6th Cir. 1995); Reed, 179 F.3d at 471. This same principle applies regardless of whether a renowned or out-of-town attorney has been retained in the case, unless the fee petitioner can prove that competent counsel was not locally available at a lower charge or rate. Id.; See also Coulter v. Tennessee, 805 F.2d 146, 149-50 (6th Cir. 1986) (affirming district court's reduction of higher attorney rate to lower local prevailing rate); Langenderfer, 684 F. Supp. at 958-59 (applying lower local rate where prevailing antitrust plaintiff failed to show it had contacted all qualified local firms to determine whether conflicts existed before hiring more expensive Cleveland firm); Apple Corps, 25 F. Supp. 2d at 493-96 (finding that relevant market is the community where the case was litigated and accordingly reducing

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out-of-town attorney rates); Westenfelder v. Ferguson, No. CA 97-478L, 2000 WL 303301 (D.R.I. Feb. 17, 2000) (reducing out-of-town hourly rate to local prevailing rate).

Before this case began, Conwood was already represented by counsel competent and available to represent it in this case in this District; yet Conwood took another, more expensive, course for which U.S. Tobacco should not have to pay. For years, the widely known and well-respected, multi-state law firm of Wyatt, Tarrant & Combs (and its predecessor in Memphis) ("Wyatt") has been Conwood's regular outside counsel. Conwood is based in Memphis, and lawyers in Wyatt's Memphis office regularly work for Conwood and, thus, should be familiar with Conwood's business and the industry in which it participates. Wyatt's principal office is in Louisville, Kentucky, and its attorneys regularly practice in this District. As explained on its web site found at www.wyattfirm.com, Wyatt offers clients "resources and experiences equal to those found in the nation's largest firms" and has "a comprehensive practice which includes all aspects of business and litigation matters including . . . Antitrust." (See Ex. A)

Indeed, it is beyond dispute that the Wyatt firm is quite competent in handling the litigation of antitrust matters at both the trial and appellate level. See, e.g., Tarrant Serv. Agency, Inc. v. Am. Standard, Inc., 12 F.3d 609 (6th Cir. 1993) (where Wyatt and co-counsel were successful in securing affirmance of judgment notwithstanding the verdict for its client, defendant/appellant in Sherman Act § 2 monopoly case.) In fact, of the three law firms ultimately retained by Conwood to handle this case, the Wyatt firm, which traces its roots back to the 1800s (even before the enactment in 1890 of the Sherman Act), seems to have the most antitrust litigation experience. The co-chair of Wyatt's group of more than fifty commercial litigators is Memphis-based J. Richard Buchignani, whose practice includes antitrust litigation. Similarly, Robert E. Craddock, who took and defended depositions in this case, is a Memphis commercial litigation partner in the Wyatt firm who lists

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antitrust as his first area of emphasis in the firm web site. John S. Wilson, III, who worked on the case, is also in Wyatt's Memphis office and has a practice emphasis in antitrust. Wyatt has a number of other commercial litigators who have worked in antitrust litigation. In comparison, Kellogg Huber was not even in existence until the spring of 1993, and none of its attorneys graduated from law school before 1982.

The Wyatt firm, which not only is familiar with Conwood's business from having been its regular counsel, but also has antitrust expertise, charges associate rates between $90 and $160 and partner rates between $135 and $300. This can be compared with Kellogg Huber's substantially higher rates of $205 to $250 for associates and $275 to $495 for partners.

Nevertheless, for some reason known only to them, Conwood, or its owners in the Pritzker Organization, passed over Conwood's regular law firm and decided to retain Kellogg Huber as lead counsel in this case. As a result of this decision, Conwood not only had to familiarize Kellogg Huber with its business but also needed to retain local counsel. Neither of these things would have been necessary had Wyatt been handling the case. Once again, however, Conwood or its Pritzker owners passed over Wyatt as potential local counsel and decided to retain Whitlow Roberts as local counsel in the Western District. Even so, for reasons of their own, Conwood or its Pritzker owners still decided to use the services of the Wyatt firm in ways not disclosed in Conwood's fee request, but known to have included taking and defending depositions. In addition, at least one Wyatt attorney was present during all or part of the trial.

In light of these facts and the controlling law, it is patently unreasonable for Conwood to request that it be compensated, at Washington, D.C. rates of up to $495 per hour, for 106,107 hours of "Professional Fees" charged by Kellogg Huber, as well as expenses for travel between the District of Columbia and both Conwood's Memphis headquarters and the Kentucky forum chosen by

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Conwood. (See Hansen Decl. ¶¶ 5-7). In essence, Conwood is asking this Court for a "windfall" in many ways. See Reed, 179 F.3d at 471. Indeed, the convoluted counsel arrangement that Conwood or its Pritzker owners ultimately constructed for this case, and for which Conwood is now claiming fees and costs, included such wasteful practices as bringing Conwood executives from Memphis to Washington, D.C. for their depositions, in which they were represented by Wyatt lawyers also flown from Memphis to Washington for that purpose.

Conwood has offered no proof, and there is none, that it was necessary to use three different law firms and twenty-five different attorneys in this case. More specifically, Conwood has failed to offer any explanation as to why it was necessary, much less justified under the Sixth Circuit standards applicable to fee requests, to use Kellogg Huber with its much higher hourly rates instead of Conwood's regular counsel, Wyatt, or any other qualified, competent, nonconflicted firm in the region. In the absence of some believable proof by Conwood that neither Wyatt, its knowledgeable, qualified and competent regular counsel, nor any other nonconflicted law firm in this region, could have competently handled a case such as this in the Western District of Kentucky, a forum chosen by Conwood, the record made by Conwood supports hourly rates no higher than those Wyatt rates disclosed in the declaration of Mr. Craddock.

Equally important, Conwood has failed to meet its burden of proving that the requested attorney and paralegal rates of any of its three firms are in line with those prevailing in the community for similar services by attorneys and paralegals of reasonably comparable skill, experience, and reputation. The Supreme Court has expressly noted that a petitioner must submit evidence "in addition to [its] attorney's own affidavits" regarding its requested rates. See Blum, 465 U.S. at 895 n.11; see also Fauri v. Exec. Branch Ethics Comm'n, 20 F. Supp. 2d 1071, 1074 n.1 (E.D. Ky. 1997), aff'd, 162 F.3d 1161 (6th Cir. 1998). Conwood has simply failed to meet this

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standard. Conwood has not submitted any evidence besides that of its own attorney declarations regarding the alleged reasonableness of any of its attorneys or paralegals requested rates, and certainly not those of Kellogg Huber.

Thus, in order to calculate a reasonable fee, the Wyatt firm's rates (assuming they are reasonable) would have to be applied to the Kellogg firm's reasonable hours. But both the Kellogg firm's reported 106,000 hours and Conwood's overall request for fees relating to approximately 110,000 hours (or about fifty-five 2,000-hour work years) are staggering given that this case lasted less than two years and Conwood is also claiming costs or fees for temporary service workers. Obviously, neither the Court nor U.S. Tobacco can begin to address the reasonableness of these 110,000 hours, nor can they mechanically apply Wyatt rates to specific Kellogg time, without detailed billing records from all three firms. Nor can U.S. Tobacco and the Court begin to address the quantification of the reduction of travel costs claimed by the Kellogg firm that will be appropriate for the same reason. Nor, with Wyatt, a Louisville-based law firm, in the case, would Conwood have needed to hire the Whitlow Roberts firm as local counsel, nor would Kellogg Huber have had to learn Conwood's business from scratch. These two sources of duplication of fees and expenses would have been avoided had Conwood, or the Pritzkers, chosen Wyatt in the first place instead of using it only in a limited fashion in the case.

In the end, Conwood has completely failed to meet the requisite standard for justifying any of its requested attorney and paralegal rates as well the requisite standard for using out-of-town counsel when competent local counsel was readily available at a lower charge. Moreover, Conwood has failed to give the Court a basis to determine the reasonableness of the number of hours of work for which it requests fees. Conwood's fee request is, therefore, unreasonable on its face and should be denied.

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2. **Conwood's Request for Numerous Expenses Is Also Unreasonable on its Face.**

In Northcross v. Bd. of Educ., 611 F.2d 624 (6th Cir. 1979), the Sixth Circuit held that certain out-of-pocket expenses such as reasonable photocopying, paralegal expenses, travel, and telephone costs are recoverable as part of a "reasonable attorney fee." Other out-of-pocket expenses like docket fees, investigation expenses, deposition expenses, witness expenses, and charts and maps may also be recovered, although "on a different footing" under 28 U.S.C. § 1920. Id. at 639.

Applying the principles set forth in Northcross to a Section 4 Clayton Act case, the court in Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 684 F. Supp. 953 (N.D. Oh. 1988), held that out-of-pocket costs such as telephone charges, court cost, trial transcripts, and photocoying costs, if reasonable, are recoverable. Postage, supplies, and computer research such as LEXIS and WESTLAW, however, are not. Id. at 959-61. Moreover, absent a showing from the plaintiff that the depositions were reasonably necessary to the case even though they were not used as evidence at trial, the costs related to those depositions are not recoverable. Id. at 961. Likewise, claimed expert costs are strictly limited to the witness fee, travel and subsistence allowance set forth in 28 U.S.C. § 1821. Id. at 961-62.

More recently, the Supreme Court has made it clear that, absent specific statutory language, expert witness fees are not to be considered as part of an attorney fee, "but as a distinct category of litigation expense." West Va. Univ. Hosp., Inc. v. Casey, 499 U.S. 83, 92 (1991). In reaching this decision under a civil rights attorney fee statute (which at that time did not make reference to expert fees), the Supreme Court specifically noted that the fee-shifting provision of the Clayton Act does not permit a court to shift expert witness fees to a losing party. Id. at 94 (recognizing, among other cases, Sixth Circuit case law holding the same in Ott v. Speedwriting Publ'g Co., 518 F.2d 1143, 1148-49 (6th Cir. 1975)). Instead, recoverable expert witness fees in antitrust cases are "costs" and

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are strictly limited to the statutory $40 per day witness fee plus the travel expense and subsistence allowance for all witnesses provided in 28 U.S.C. § 1821 and made recoverable under 28 U.S.C. § 1920. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987). See also Data Gen. Corp. v. Grumman Sys. Support Corp., 825 F. Supp. 361, 366-67 (D.C. Mass. 1993), aff'd, 36 F.3d 1147 (1st Cir. 1994) (same in copyright case), and Bonilla v. Trebol Motors Corp., No. 92-1795 (JP), 1997 WL 178861 (D.C. Puerto Rico March 27, 1997), rev'd and vac'd in part on other grounds, 150 F.3d 88 (1st Cir. 1998) (applying Casey and Crawford Fitting principles in RICO case with fee-shifting statute worded like antitrust statute).

Similar to its request for attorney fees, in this case Conwood has asked this Court to award it an unauthorized "windfall" with respect to its claimed out-of-pocket expenses. Aside from the obvious fact that neither U.S. Tobacco nor this Court can even begin to assess the reasonableness of any of Conwood's expenses due to the lack of adequate documentation, Conwood expects U.S. Tobacco and this Court to magically understand what is included in its "Reproduction" and "Miscellaneous" costs claims. In addition, Conwood expects to be compensated for expenses such as postage, office supplies, software license, electronic research, and document scanning and production which are clearly unrecoverable "costs of suit." See Langenderfer, 684 F. Supp. at 959-62. Conwood also expects to receive costs related to the taking of dozens of depositions in this case without offering even a shred of evidence showing that such depositions were necessary even though they were not used at trial. Conwood also wants this Court to believe that in addition to all of the manpower from three different law firms, including twenty five different attorneys, numerous paralegals and other support staff, it was somehow necessary for Conwood to employ a temporary agency at a cost of $392,834.48 to perform unspecified work on this case and that U.S. Tobacco should pay for it.

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By far the most egregious example of overreaching on costs, whether by dollar amount or disregard of controlling case law, is Conwood's request for over $2 million in unspecified and unrecoverable "Consultant and Expert Fees" which clearly includes expert witness fees disallowed by the Supreme Court as either attorney fees or costs in Casey and Crawford Fitting. The inclusion of such a request would cast doubt on the entirety of an otherwise well-supported fee and costs request; here it shows exactly why the entire unsupported request is without credibility.

These are but a few examples clearly discernable from Conwood's bare-bones filing that show the unreasonableness of its overall request to recover its "costs of suit." Conwood's request for costs should be denied as unreasonable in its entirety or Conwood should be required to submit a complete justification for U.S. Tobacco's review and comment and the Court's subsequent examination.

C. AT THE VERY LEAST, ANY DETERMINATION REGARDING THE AMOUNT OF FEES TO BE AWARDED SHOULD BE DEFERRED OR STAYED PENDING THE OUTCOME OF U.S. TOBACCO'S POST-TRIAL MOTIONS AND APPEAL, IF ANY.

As discussed in the preceding sections of this memorandum, the Court has ample basis to deny Conwood's request for an award of fees and expenses – both because Conwood's request is totally lacking in proper documentation and other support, and, independently, because the skeletal information provided demonstrates that Conwood's request is unreasonable on its face. Nevertheless, should the Court be inclined for any reason not to deny Conwood's request on either of these bases, a determination of the amount of fees certainly cannot be made at this time and should be deferred or stayed pending the outcome of U.S. Tobacco's post-trial motions and any appeal.

A judgment on the merits is final for purposes of appeal even though the amount of fees has not yet been determined. The Sixth Circuit will consolidate an appeal on the merits with an appeal

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on the determination of liability for fees, and has jurisdiction to decide both the merits issue and the liability for fees, even though the amount of fees has not yet been determined. Loudermill v. Cleveland Bd. of Educ., 844 F.2d 304, 308 (6th Cir. 1988); Morgan v. Union Metal Mfg., 757 F.2d 792, 795 (6th Cir. 1985).

In this case, there are multiple reasons for deferring any determination of the amount of fees and costs to be awarded to Conwood. First, the necessary proof is not before the Court. As discussed in preceding sections of this brief, Conwood failed to provide the required documentation and other support for the attorney fees and costs claimed. Even assuming that such information exists and is provided both to the Court and to U.S. Tobacco, U.S. Tobacco must then be allowed a fair opportunity to raise objections to the specific amounts claimed. See Wooldridge, 898 F.2d at 1169; Nat'l Assoc. of Concerned Veterans, 675 F.2d at 1319. Then, in all likelihood, discovery will be necessary to allow U.S. Tobacco, as well as the Court, to fully understand and assess the reasonableness (or lack thereof) of the requested attorney fees and costs. U.S. Tobacco would likely request an evidentiary hearing on this matter pursuant to Fed. R. Civ. P. 54(d)(2)(C). Rule 54(d)(2)(C) "assures the parties of an opportunity to make an appropriate presentation with respect to issues involving the evaluation of legal services; . . . the court may determine that discovery under Rules 26-37 would be useful to the parties." Fed. R. Civ. P. 54(d)(2)(C) Advisory Committee Note. See also O'Bryan v. County of Saginaw, 722 F.2d 313, 314 (6th Cir. 1983) (stating that the district court is required, if necessary, to conduct an evidentiary hearing to inform itself of the facts on the question of attorney fees under 42 U.S.C. § 1988).

Second, at this point, the Court is not in a position to determine the specific fees and costs which Conwood may be entitled to recover, even assuming that adequate documentation does exist and is later provided. Now pending before the Court are U.S. Tobacco's motions for judgment as

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a matter of law, or in the alternative, for a new trial, or, in the alternative, for a reduced damages award. Conwood takes the position it will be seeking additional fees and expenses after resolution of these motions and again after appeal. Yet, these motions raise serious legal issues for the trial court to consider and resolve before any review of this case on appeal, and the outcome of these motions may be that Conwood is entitled to no merits relief and thus not entitled to attorney fees pursuant to Section 4 of the Clayton Act. Similarly, the appeal process could lead to Conwood's not being entitled to an award of fees and costs at all.

CONCLUSION

For the foregoing reasons, the Court should deny or defer Conwood's request for determination of an amount of fees and costs. To the extent the Court is considering any other course of action, U.S. Tobacco respectfully requests a conference with the Court to schedule Conwood's disclosure of complete, detailed fee and costs records and to schedule such further proceedings, including discovery and a hearing, as may be necessary to make a proper record upon which the Court can resolve these disputed issues.

Respectfully submitted,

Dated: May 3, 2000

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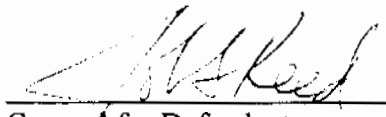
Certificate of Service

I certify that copies of the foregoing and a tendered order were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 3rd day of May, 2000.



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

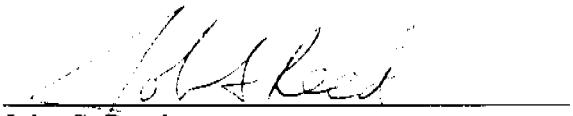
Plaintiffs having moved the Court for an award of attorney fees and costs, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs' motion for fees and expenses is hereby DENIED because Plaintiffs have failed properly to support their claims and the claims are unreasonable on their face.

Entered this _____ day of _____, 2000.

Thomas B. Russell, Judge
United States District Court

TENDERED BY:



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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' REQUEST FOR PERMANENT INJUNCTIVE RELIEF

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COUNTERSTATEMENT OF POINTS AND AUTHORITIES

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I. THIS COURT IS NOT "REQUIRED" TO GRANT PERMANENT INJUNCTIVE RELIEF, AND MAY DENY RELIEF FOR LACK OF IRREPARABLE HARM ALONE 7

Concord Boat Corp. v. Brunswick Corp., Nos. 98-3732, 98-4042, 2000 WL 303035 (8th Cir. March 24, 2000) 7

Barrett v. Fields, 941 F. Supp. 980 (D. Kan. 1996) 8

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11A Charles A. Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE, § 2955 (2d ed. 1995) 9

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B. Conduct That May "Adversely Affect" The Placement of Competitors' Products, Racks, Counter Displays and P.O.S. 11

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Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404 (S.D.N.Y. 1978) aff'd in part, rev'd in part, 603 F.2d 263 (2d Cir. 1979) 13

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Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, Order ¶¶ 23-24 (E.D. Ark. Oct. 16, 1998) 14

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Calnetics Corp. v. Volkswagen of Am., Inc., 532 F.2d 674 (9th Cir. 1976) 15

Volasco Products Co. v. Fry Roofing Co., 346 F.2d 661 (6th Cir. 1965) 15

Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 684 F. Supp. 950 (N.D. Ohio 1987), aff'd, 917 F.2d 1413 (6th Cir. 1990) 15

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Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, Order ¶ 19 (E.D. Ark. Oct. 16, 1998) 18

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Coleman v. Cannon Oil Co., 911 F. Supp. 510 (M.D. Ala. 1995) 20

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Reynolds v. Int'l Amateur Athletic Fed'n, No. 92-3596, 1992 WL 157545 (6th Cir. June 19, 1992) 22

Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150 (6th Cir.1991) 22, 23

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MEMORANDUM IN OPPOSITION TO PLAINTIFFS' REQUEST FOR PERMANENT INJUNCTIVE RELIEF

Having persuaded the jury that the demands, wishes and preferences of retail customers can be ignored in this case, Plaintiffs Conwood Company, L.P. and Conwood Sales Company, L.P. ("Conwood") now continues that ruse in seeking what it grossly mischaracterizes as "narrowly tailored" permanent injunctive relief. (Pl. Mem. at 5) Conwood's request for injunctive relief creates an imaginary marketplace in which moist snuff manufacturers must "compete": (1) without making suggestions and recommendations on product assortment, including, as Mr. Price of Swedish Match testified, suggesting which slow-moving products of competitors "don't deserve to be on the shelf," see Tr. 3/7 at 286-87; (2) without offering plan-o-gram and category management services to retailers; (3) without designing innovative racks, including racks for those retailers that desire one uniform rack to house all moist snuff products; (4) without offering standard incentive programs to retailers in exchange for the retailer providing movement figures, trying new products,

participating in promotions and giving the manufacturer preferential vendor placement; and (5) without offering the manpower to execute programs and store resets out in the field. Under Conwood's sweeping proposed permanent injunction, this Court would put an end to these and other competitive practices "once and for all" – but only from U.S. Tobacco Company, et al. ("U.S. Tobacco").

The proposed order also would have Conwood and its lawyers essentially exercise veto power over thousands of retailers across the country by requiring Conwood's written approval – "not to be unreasonably withheld" – before a retailer could ask U.S. Tobacco to undertake a common, ordinary reset of the category. Conwood's approval would be required before U.S. Tobacco, with retailer authorization, could simply remove a piece of Conwood P.O.S., not authorized by a retailer, from a U.S. Tobacco rack. Conwood's approval would be required if a retailer accepted a new U.S. Tobacco product and chose to replace a Conwood product, even if the retailer sold one can of that Conwood product per week. The list goes on. Apparently, Conwood's working premise is that if it cannot succeed in the marketplace by satisfying the demands of retailers, maybe the Court will give Conwood both the power to prevent U.S. Tobacco from doing so, and the power to dictate how and when retailers can operate their stores.

Indeed, in the imaginary marketplace that Conwood proposes, retailers would become "persons" who would be in contempt of court if they act "in concert" with U.S. Tobacco, or "persons" who are precluded from receiving any input or programs from U.S. Tobacco that may "adversely affect the placement or selection of any competitor's smokeless tobacco products, vending systems, counter displays or other [P.O.S.] such as 'header cards.'" (Proposed Order at 1-2) The proposed injunction thus would set the moist snuff category apart as a unique section of the store in

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which retailers cannot seek the type of standard input and collaboration that they desire and demand from manufacturers.[1] Conwood's claim that the purpose of the proposed injunction is the "restoration" of "full and unfettered competition" (see Pl. Mem. at 9) is as ludicrous as it is anticompetitive.

Conwood's use of the judicial process to seek refuge from the rigors of competition and to restrict its own retail customers should offend this Court as much as it offends the underlying policies of the antitrust laws, which are to protect competition, not competitors. And at this point in the proceedings, the Court is not dealing with abstract antitrust principles or discrete portions of the record. On the contrary, there now is a full trial record in this case that establishes, without dispute, the nature and scope of competition that retailers desire and expect from all moist snuff suppliers, including what U.S. Tobacco and other moist snuff manufacturers do to participate fully in that competition and what Conwood does not do. Conwood, however, obviously views the jury verdict, together with Section 16 of the Clayton Act, as an opportunity to ask this Court to prevent U.S. Tobacco from employing the competitive tools and programs that retailers have demanded for years, and that Conwood is now scrambling to develop. Indeed, had Conwood taken a fraction of the nearly $20 million it claims to have spent in bringing this case and reinvested that money in the products, racks and programs that retailers desire, it may have fared much better in the marketplace during the 1990s. Instead, the Pritzker Organization obviously prefers the venture-capital-like opportunities of treble damage cases to the rigors of competition.

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[1] In fact, since the jury's verdict, U.S. Tobacco has received complaints from retailers that the Conwood sales force is actively using the jury verdict itself to try to force and coerce retailers to accept Conwood racks, products or P.O.S. that the retailers do not want. Should the Court desire, U.S. Tobacco will ask these retailers to sign affidavits regarding Conwood's conduct, but at a minimum we believe the Court should be made aware of Conwood's actions.

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Of course, to the extent the Court grants either U.S. Tobacco's motion for judgment as a matter of law or a new trial – as it should – Conwood's request for injunctive relief will be moot. Whatever that outcome, this Court should not allow itself to be used by Conwood as an anticompetitive tool to redefine the competitive process among retailers and moist snuff manufacturers, and to prevent U.S. Tobacco from engaging in basic competitive practices available to all competitors in all packaged-goods categories of the retail industry. Indeed, as described below, well-established law under Section 16 of the Clayton Act mandates the complete rejection of Conwood's requested relief for numerous reasons.

First, as a threshold matter, Conwood cannot establish the requisite irreparable harm or inadequate remedy at law to justify permanent injunctive relief; its moist snuff business continues to be highly profitable, and it may seek damages at a future date if U.S. Tobacco continues to engage in conduct, if any, that is ultimately found to violate Section 2.

Second, a more vague and sweeping permanent injunction could hardly have been imagined by Conwood; no person could say in advance precisely what conduct is or is not allowed under the proposed Order, including something as procompetitive as offering new moist snuff brands to retailers. Conwood's proposed injunction thus violates the basic standards of precision required for any injunction under Fed. R. Civ. P. 65(d), including a request for permanent injunctive relief under Section 16 of the Clayton Act.

Third, if read literally, the proposed injunction would essentially stop U.S. Tobacco from competing by subjecting retailers and U.S. Tobacco's entire marketing and sales operations to Conwood's written approval to conduct day-to-day business. Requiring U.S. Tobacco to not seek to "influence" retailer decisions regarding product, rack and P.O.S. selection that may "adversely

affect" Conwood and other competitors means nothing less than requiring U.S. Tobacco to stop competing. Under well-established case law, however, such an injunction would improperly (i) prohibit procompetitive conduct by U.S. Tobacco that was not even claimed to be "exclusionary" at trial, (ii) prohibit conduct that cannot be exclusionary as a matter of law, and is in fact procompetitive on this trial record, and (iii) bind non-party retailers to this sweeping injunction. Indeed, in rolling up all of U.S. Tobacco's conduct that affects Conwood -- procompetitive or not -- into one "ball of wax" for purposes of the proposed injunction, it is clear that Conwood's counsel, like Dr. Leftwich, has totally ignored the critical concept of disaggregation of lawful and unlawful conduct in antitrust cases. See Tr. 3/8 at 78-79.

Fourth, Conwood's proposed injunction completely ignores the fundamental principle that only the exclusionary aspects of any particular "agreement" or program may be enjoined. This is particularly true where the agreements or programs in question are not "naked" restraints, but rather legitimate practices desired by the customers in the marketplace. It is no answer to treat all U.S. Tobacco "agreements" or programs as if they are per se Section 1 violations, as Conwood attempts to do. Instead, even the cases cited by Conwood confirm that any "exclusive" agreements desired by retail customers – if they even exist based on the evidence or can be anticompetitive as a matter of law – should simply be made non-exclusive or shortened in duration in accordance with well-established Section 2 case law. Thus, for example, to the extent the Court decides that a reasonable jury could have found that U.S. Tobacco had rack "agreements," or incentive programs with exclusionary provisions, the appropriate relief would be to purge only those provisions – i.e., provisions, if any, that have foreclosed other manufacturers from participating in the competitive process.

Fifth, the proposed injunction in no way lends itself, as it must, to effective and efficient judicial administration. On the contrary, the proposed injunction would result in ongoing disputes concerning the "reasonableness" of Conwood's veto power over the day-to-day conduct of U.S. Tobacco and retailers in the field as well as disputes concerning Conwood's quasi-regulatory role in "monitoring" U.S. Tobacco's "influence" over retailer decisions. The Court, of course, would then have to micromanage these inevitable disputes.[2] Further, the judicial quagmire invited by Conwood would only be exacerbated by requiring U.S. Tobacco to set up a Board of Directors "Compliance Committee" to ensure that U.S. Tobacco employees are properly trained to stop competing against Conwood, that U.S. Tobacco periodically submits written compliance reports to Conwood and the Court, and that Conwood's counsel be permitted to rummage through U.S. Tobacco's business documents at its leisure. On its face, that proposal is grossly intrusive on U.S. Tobacco's business, is highly inefficient as a matter of judicial oversight and, in fact, would have Conwood's lawyers function in a regulatory capacity that would make the Federal Trade Commission envious – and all for the purpose of reducing competition in the marketplace. In short, the proposal is as baseless in law as it is overreaching in scope.

Finally, should the Court grant any injunctive relief in this case, U.S. Tobacco would seek a stay of that relief, first in this Court and, if necessary, in the Sixth Circuit. Accordingly, U.S.

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[2] Ironically, in Conwood's opposition to U.S. Tobacco's motion to reduce the bond for any appeal, Conwood highlights the need to avoid embroiling the Court in the micromanagement of U.S. Tobacco's day-to-day business activities. See Pl. Opp.(Bond) at 11. Reducing the bond would not require that type of Court supervision; Conwood's proposed injunction no doubt would.

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Tobacco requests that, with the entry of any injunctive relief, the Court simultaneously enter an order temporarily staying the injunction for a minimum of thirty (30) business days.[3]

For all of these reasons, Conwood's proposed injunctive relief should be seen for what it is: a stark concession that Conwood's case is and always has been premised on the erroneous theory that anything U.S. Tobacco does to compete for the retailers' business is "exclusionary" if it adversely effects Conwood, and that Conwood is somehow entitled under the antitrust laws to place whatever products, racks and P.O.S. it desires in retail stores without having to compete for that privilege.

ARGUMENT

I. THIS COURT IS NOT "REQUIRED" TO GRANT PERMANENT INJUNCTIVE RELIEF, AND MAY DENY RELIEF FOR LACK OF IRREPARABLE HARM ALONE

As a threshold matter, Plaintiffs are simply wrong in suggesting that this Court is "required" or "obligated" as a matter of law to grant Conwood some form of injunctive relief in this case. (See Pl. Mem. at 4) Indeed, where, as here, a plaintiff asks for incredibly vague and overbroad injunctive relief, courts can and should reject the relief in full. See, e.g., Concord Boat Corp. v. Brunswick Corp., Nos. 98-3732, 98-4042, 2000 WL 303035 at *5 (8th Cir. March 24, 2000)(to be published in F.3d)(observing that the district court rejected plaintiff's proposed injunctive relief because it was "imprecise, impossible to monitor and enforce, and so broad that it potentially could preclude Brunswick from engaging in legitimate business activity") (See Appendix A).

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[3] To the extent the Court may consider ordering any injunctive relief, U.S. Tobacco also respectfully requests that this Court first entertain oral argument on the issues raised by Plaintiffs' motion, their proposed injunction, and Defendants' opposition.

Moreover, courts have rejected proposed injunctive relief on the simple basis that a financially healthy plaintiff, who already has been awarded damages for the alleged violation, is not at risk of suffering irreparable harm and can sue again if the practices ultimately found to be illegal continue to persist in the future. See, e.g., Barrett v. Fields, 941 F. Supp. 980, 983 (D. Kan. 1996) ("[E]ven if the evidence established that defendants' unlawful conduct would likely continue, plaintiff has not demonstrated that he faces a threat of irreparable injury or that he lacks an adequate legal remedy . . . . The evidence establishes that plaintiff's business survived more than four years of defendants' unlawful conduct . . . . If faced with similar conduct in the future, plaintiff is free to again file suit and recover damages against defendants.").

Here, of course, Conwood will have been compensated (to the extent the jury's verdict stands) for past and future harm purportedly caused by U.S. Tobacco's alleged exclusionary conduct. Further, Conwood's moist snuff business not only "survived" but prospered during the alleged period of exclusion. Finally, the Pritzker Organization is quite obviously fully capable of seeking damages for Conwood if any conduct ultimately found to be unlawful is continued by U.S. Tobacco. Thus, the lack of irreparable harm, as well as the availability of any necessary future damages action by Conwood, should preclude permanent injunctive relief in this case at the outset.

As described in detail below, however, there are numerous other reasons that require the complete rejection, or severe cutting back, of the incredibly broad injunctive relief sought by Conwood.

II. THE PROPOSED INJUNCTION IS IMPERMISSIBLY VAGUE

Rule 65(d) of the Federal Rules of Civil Procedure provides that every injunction shall be "specific in its terms" and shall describe in "reasonable detail" the acts sought to be restrained. The common sense standard under Rule 65 "is that the ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." 11A Charles A. Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE, § 2955, at 308-09 (2d ed. 1995) (emphasis added).

Applying that standard to antitrust cases, courts routinely reject proposed injunctions that do not precisely detail the specific conduct to be proscribed. See Hartford-Empire Co. v. United States, 323 U.S. 386, 410 (1945) ("The decree must not be 'so vague as to put the whole of the defendants' business at the peril of a summons for contempt'. . . .") (citation omitted); see also City of Mishawaka v. Am. Elec. Power Co., 616 F.2d 976, 991-92 (7th Cir. 1980) (vacating injunction prohibiting defendant, and all persons acting in concert with it, from "taking any action that will have the effect" of discriminating against certain customers – i.e., conduct that "would be difficult to ascertain in advance"); Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, Order ¶¶ 17-18 (E.D. Ark. Oct. 16, 1998) (See Appendix B) (rejecting proposed injunctive relief "against any policy or program the purpose or intent of which is to cause any buying group to break up" or "against any policy the purpose or intent of which is to create artificial barriers to entry or expansion of any rivals").

Conwood's counsel obviously did not have this fundamental requirement in mind when it drafted the proposed permanent injunction in this case.

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A. Conduct That Apparently Involves Handling Competitors' Products, Racks, Counter Displays or P.O.S.

First, although unwilling simply to say so, Conwood is asking for an injunction that precludes U.S. Tobacco from acting upon the request or authorization of a retailer – for example, in performing a store reset, one of the central functions of manufacturers in all product categories. See Tr. 3/10 at 135-36 (Conwood's National Sales Manager testifies that during a reset, it is typical for a retailer to direct a manufacturer to take a competitor's rack off the shelf and to dispose of it in whatever way the retailer wants). Indeed, based on Conwood's memorandum of law, it appears that Conwood seeks an order requiring retailers that chose "exclusive" U.S. Tobacco racks to remove them, including such retailers as Wal-Mart and Golden Pantry, who testified during trial that they make their own, independent decisions to use a U.S. Tobacco rack to house all moist snuff products in the store. See Tr. 3/16 at Carlson, pp. 16-18; Tr. 3/22 at Laessig, pp. 22-25. Again, it is impossible to tell if something as outrageous and anticompetitive as this is what Conwood has in mind. Perhaps that is why Conwood chose not to state its proposed relief plainly and precisely and then see if it could hold up under judicial scrutiny.

Of course, there is a wide variety of ordinary, procompetitive that takes place in stores every day and necessarily involves the handling of competitive products, racks or P.O.S. These include, for example:

- performing store resets;
- removing damaged or shop-worn racks and/or P.O.S.;
- removing out-of-date or stale products from store shelves; and
- moving an entire moist snuff or smokeless tobacco category to comply with new state or local ordinances, such as the recent self-serve display ban in the State of Texas.

Conwood's proposed injunction, however, does not specify whether it is asking the Court to put an end to any of this ordinary, everyday conduct, let alone acknowledge that it is asking the Court to let Conwood, not retailers, make the decisions regarding what competitive conduct will be permitted. Accordingly, this part of the proposed injunction should be rejected.

B. Conduct That May "Adversely Affect" The Placement of Competitors' Products, Racks, Counter Displays and P.O.S.

The second part of Conwood's proposed injunction is even more vague. It seeks to proscribe any conduct that can be characterized (by Conwood, no doubt) as seeking to cause any "other person" – read retailer or wholesaler – to "adversely affect the placement or selection of any competitor's smokeless tobacco products, vending systems, counter displays or other advertising including but not limited to 'point of sale' advertising such as 'header cards.'" Proposed Order at 1-2.

The proposed language does not even hint at the precise conduct by U.S. Tobacco that would be enjoined, including U.S. Tobacco's ordinary business dealings with retailers (or "other persons"). Indeed, such an injunction is so patently vague on its face that one can hardly conceive of conduct by U.S. Tobacco that would not be covered. For example, a U.S. Tobacco marketing or sales person could hardly carry out any aspect of his or her job – including, for example, simply designing a suggested plan-o-gram (or even commenting on one) in response to a retailer's request – without violating the proposed Order.

Under the well-established case law discussed above, Conwood's intentionally vague injunction must be rejected. No reasonable person could know from this proposed language what U.S. Tobacco could or could not do in competing in the marketplace without putting the whole of its business at risk of a summons for contempt.

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III. THE PROPOSED INJUNCTION IS GROSSLY OVERBROAD AND, IN FACT, ANTICOMPETITIVE

If the Court does not completely reject Conwood's proposed injunctive relief for vagueness, then the proposed injunction runs into equally serious problems of overbreadth. It is axiomatic that every request for injunctive relief under Section 16 of the Clayton Act must be narrowly tailored to prohibit only the precise anticompetitive conduct which, if permitted to continue, will injure competition in the marketplace. See United States v. Grinnell Corp., 384 U.S. 563, 579-80 (1966); see also United States v. Loew's, Inc., 371 U.S. 38, 52 (1962).[4]

In considering whether to grant any request for injunctive relief, this Court is free to make its own findings of fact on the trial record, including determining what conduct was not at issue in the case, what conduct was not sufficiently proven to be anticompetitive and what conduct cannot, as a matter of law, be considered exclusionary. See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404, 433-36 (S.D.N.Y. 1978) (rejecting relief that "extends well beyond the wrongs affecting [plaintiff] proved to the satisfaction of the jury or the court"; prohibiting conduct that "was a modest aspect of the wrongful conduct which the jury might have found"; prohibiting conduct that could not be "deemed wrongful" as a matter of law; and "would forbid all kinds of conduct outside the dimensions, or even broadest penumbra, of what was proved" in the case) (emphasis added), aff'd in part, rev'd in part, 603 F.2d 263 (2d Cir. 1979) (vacating injunctive relief as overbroad); see also Bigelow v. RKO Radio Pictures, Inc., 162 F.2d 520, 522-23 (7th Cir. 1947).

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[4] While a court may enjoin lawful conduct that could be used indirectly to replicate the exclusionary conduct, see, e.g., Loew's, 371 U.S. at 106, it may not enjoin competitive conduct even if it harms plaintiff. (See part B below.)

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This fundamental limitation on permanent injunctive relief has several facets, all of which are blatantly ignored by Conwood's proposed injunction.

A. The Proposed Injunction Would Be Violated By Conduct Not At Issue In This Case Or Which Completely Lacks Evidentiary Support

Initially, of course, an injunction that would preclude conduct that was not even claimed to be illegal, or for which scant evidence was offered at trial, must be rejected out of hand. See Berkey Photo, 457 F. Supp. at 433-36; see also Langenderfer, Inc. v. S.E. Johnson, Co., 917 F.2d 1413, 1448 (6th Cir. 1990) (upholding refusal to mandate that defendants charge captive companies the same prices as independent customers where there was no evidence that plaintiffs did anything differently).

Representative examples of this threshold defect in Conwood's proposed injunction are not difficult to identify on this record. For example, any of the following conduct could easily fit within the proposed injunction, yet was not challenged, and could not have been challenged, in this case:

- the continued development of new, innovative racks to meet retailers' needs and desires, especially in the changing regulatory environment;
- the continued development of new, innovative P.O.S. materials that would compete for display space in retail stores;
- the introduction of new products that would compete against existing products for limited retail and wholesale shelf space;
- the introduction of price-value and mid-tier priced products, as well as couponing and other price promotions, to compete for consumer sales; and
- the provision of an incentive program to encourage proper product ordering, handling, and merchandising.

Given the breadth of Conwood's proposed injunction, the above list of improperly-included conduct is only a starting point.

B. The Proposed Injunction Would Be Violated By Ordinary Competitive Behavior of U.S. Tobacco

Further, a permanent injunction may not be so broad that it would enjoin legitimate business activity that was challenged at trial or otherwise interfere with ordinary business activity. See Concord Boat, No. LR-C-95-781 at ¶ 19 ("Equity requires that injunctive relief . . . be carefully tailored to prevent competitive injury . . . without reaching too broadly to prevent or interfere with legitimate business activity") (emphasis added); Blue Cross & Blue Shield v. Marshfield Clinic, 883 F. Supp. 1247, 1266 (W.D. Wis. 1995) (refusing to enjoin HMO from contracting with its own doctors, which is the "very essence" of what HMO's do; "[t]here is no justification for such an anti-competitive policy as requested by plaintiffs"); Coleman v. Cannon Oil Co., 849 F. Supp. 1458, 1473 (M.D. Ala. 1993) ("[p]laintiffs' proposed injunction is too vague and covers conduct that is not only clearly legal but could conceivably be procompetitive."). Such activity would include the provision of an innovative or specialized product display rack, even if Conwood mischaracterizes such activity as "exclusive dealing." See Concord Boat, Order ¶¶ 23-24 (in Section 2 case, refusing to enter an injunction limiting long term contracts to one year or more -- unless cancellable without penalty on reasonable notice -- because such relief would prohibit, inter alia, contracts initiated by the customer as well as contracts that justify a longer term because the defendant was "asked to develop a specialized, custom-specific product").

The trial record is replete with the legitimate competitive activity that Conwood's proposed injunction would prohibit, but a few critical categories should suffice to illustrate the point:

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- providing display racks to accommodate all moist snuff products to respond to the needs, desires, and requests of retailers;

- offering targeted product introductions and promotional activities to meet the marketplace activities of competitors;

- seeking product arrangements that are in accordance with the well-accepted marketing concept, SOF=SOM;

- making product recommendations, based on industry sales data, resulting in the elimination of slow-moving products of all companies;

- providing an incentive program to encourage the acceptance of new products and promotions and to encourage preferential rack, P.O.S. and product placement.

Again, it is clear that Conwood's counsel, contrary to established law, has chosen to aggregate in one "ball of wax" any conduct by U.S. Tobacco that might adversely affect Conwood. The antitrust laws – as they relate both to liability and injunctive relief – are not so generous.

C. The Proposed Injunction Would Restrict Competition and Improperly Shelter Conwood From The Basic Competitive Processes In The Marketplace

Similarly, a proposed injunction must be rejected as overbroad if it actually seeks to alter the normal competitive forces of the marketplace in question. See Calnetics Corp. v. Volkswagen of Am., Inc., 532 F.2d 674, 693-94 (9th Cir. 1976) (rejecting proposed injunction banning certain car imports and setting quotas because it would be "anticompetitive," would "create[] the antithesis of an open market" and would "displace the competitive forces of the marketplace" and transform it into a "regulated industry"); see also Volasco Products Co. v. Fry Roofing Co., 346 F.2d 661, 667 (6th Cir. 1965) (rejecting part of injunction that would prevent defendant from meeting competition); See Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 684 F. Supp. 950, 952 (N.D. Ohio 1987) (requested relief that would prevent defendant from bidding on certain contracts would not be in the "public interest" and "may result in less competition"), aff'd, 917 F.2d 1413 (6th Cir. 1990). For the

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same reasons, courts routinely reject proposed injunctions that would effectively protect plaintiff from the rigors of the marketplace or place competitors at a competitive advantage over the defendant. See Bigelow, 162 F.2d at 524 (plaintiffs "have a right to compete . . . but they have no right to be awarded and protected by decree in any certain position" and may not "obtain a decree vesting them and protecting them in a privileged position"); Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1225 (9th Cir. 1997) (striking "unnecessary and anticompetitive" provisions of proposed injunction that would require Kodak to provide plaintiffs with parts that plaintiffs could obtain from other sources; injunctions should not allow plaintiffs to "free rid[e]" on defendants); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 349 (D. Mass. 1953) (rejecting proposed injunction that would result in competitors being able to offer customers desired leasing programs, but not the defendant).

Here, the proposed injunction would, without question, fundamentally alter the competitive process in the marketplace. For example, the injunction would deprive retailers of the opportunity to decide what company will best serve their needs at any point in time with respect to the provision of category management services (except from Swedish Match and Swisher); exclusive racks (except from Swisher, or Swedish Match and Conwood when they decide to compete on this basis)[5]; standard incentive programs (except for Conwood, Swedish Match and Swisher); and manpower capabilities for resets. Moreover, as a further impediment to competition, Conwood's proposed injunction would require U.S. Tobacco to consult with, and seek approval from, its

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[5] The testimony of Conwood executives illustrates this point. For example, Conwood's Chairman, Mr. Rosson, testified that Conwood was not willing to design uniform display racks to accommodate all companies' moist snuff products. See Tr. 2/29 at 185-87. If U.S. Tobacco is prohibited from doing so by an injunction issued by this Court, a retailer who wants a uniform rack would be prevented from using one or would be forced to use one provided by Swisher.

competitor prior to conducting certain normal competitive business practices, even when conducted at the behest of retailers. Again, the list could go on and on. For the antitrust laws to be used to force collusion among competitors prior to dealing with customers would create a perverse result.[6] It is not within the purpose and intent of the antitrust laws to allow an injunction that would limit retailers' choices by reducing competition among their suppliers.

D. The Proposed Injunction Would Improperly Bind Retailers and Other Non-Parties

Finally, consistent with Rule 65, permanent injunctions should not bind persons who are neither parties to the action nor properly viewed as co-conspirators. See Calnetics Corp., 532 F.2d at 694 (rejecting injunctive relief that would ban imports of Porsche automobiles: "[e]lementary fairness requires that Porsche be given a chance to be heard before its importation agreement with VW is, in effect, partially voided by judicial decree); Weiss v. York Hosp., 548 F. Supp. 1048, 1060 (M.D. Pa. 1982) (rejecting portion of proposed relief that would bind non-parties to the lawsuit where they are not acting in concert with defendants).

In this case Conwood obviously knew it would be preposterous to claim that retailers are acting as "conspirators" with U.S. Tobacco with regard to every decision regarding products, racks or P.O.S. that Conwood does not like. On the contrary, the trial record confirms without any dispute whatsoever that retailers gather information and suggestions as part of the normal competitive process and then make their own, independent, uncoerced decisions on all of these subjects. See, e.g., Tr. 3/2 at 43-44 (Rusk); Tr. 3/9 at 62-67 (Renfro); Tr. 3/14 at 99,104-05, 109 (Luckett); Tr. 3/15 at 18 (Butler); Tr. 3/15 at 8-9, 15-17 (McGuire); Tr. 3/15 at 16-24 (Walden).

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[6] Conwood's proposed injunction also would require the Court to monitor and evaluate, on an ongoing basis, the particular circumstances in the retail environment in order to determine, according to some unarticulated standard, whether Conwood's approval was "unreasonably withheld."

The proposed injunction, however, would now treat all of the decisions as conspiratorial agreements that may be enjoined, and apparently would subject any number of retailers – for example, every one that has U.S. Tobacco as a category captain – to sanctions. The right of retailers to make their own decisions regarding their moist snuff sections were not challenged at trial; this Court should not award any injunctive relief that would impinge in any respect on the retailers' independent decisions – decisions the Court has recognized as being beyond the scope of Conwood's lawsuit. See February 17, 2000 Order (as a matter of causation, Conwood could not recover damages for claimed lost sales that may have been caused by the independent, uncoerced decisions of retailers). At a minimum, this Court should allow retailers to be heard – by a hearing or otherwise – before awarding any injunctive relief that affects their standard way of doing business.

* * * * *

In sum, Conwood no doubt realized that it must at least pay lip service to the prohibition against overbroad injunctions, which is why its memorandum declares that it is offering a "narrowly tailored order." (Pl. Mem. at 5) The incredibly overbroad injunction proposed by Conwood, however, is neither narrow nor tailored, but instead violates every one of these basic principles and should be summarily rejected.

IV. AT MOST, THIS COURT SHOULD REMOVE ANY "EXCLUSIONARY" FEATURES OF U.S. TOBACCO'S "AGREEMENTS" WITH RETAILERS OR PROGRAMS

As this Court is fully aware, U.S. Tobacco continues to hold firm to the position that none of its conduct violates Section 2 of the Sherman Act. That includes any "rack exclusives" which, on the full trial record, are provided in response to retailers' wishes and are perfectly justified to meet retailer and consumer needs. See Concord Boat, Order ¶ 19. Nevertheless, if this Court finds that

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any of U.S. Tobacco's alleged "agreements" or marketing programs contain "exclusionary" features, the appropriate relief is to "purge" those agreements or programs of their offensive terms rather than prohibit these desired practices altogether.[7]

The very cases relied on by Conwood prove the point. For example, in the well-known case of United States v. United Shoe Machinery Corp, 110 F. Supp. 295 (D. Mass. 1953), the court found that United Shoe had violated Section 2 based in part on 10-year leases of shoe machinery equipment that foreclosed competitors from the reasonable opportunity to compete for that business. At the same time, however, numerous customers testified that they preferred a leasing system over having to purchase the machinery. See id. at 349. In "purging" the leases of the "restrictive features," the court's solution, upheld by the Supreme Court, was to cut back the 10-year leases to a maximum 5-year term coupled with the right of customers to return the leased equipment without penalty after one year. See id. at 349-52. See also Pacific Coast Agriculture Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1209 (9th Cir. 1975) (Pl. Mem. at 8 n.4) (striking exclusivity provision of import agency agreement, but not the agency agreement itself).

Based on United Shoe, this Court, at most, should limit the relief to purging the provisions of any agreements – whether relating to plan-o-grams, racks or CAP – that purportedly require retailers not to purchase (or use) the products, racks or P.O.S. of other competitors for an unreasonable term; or the Court should simply make any such agreements completely non-exclusive. While Conwood obviously seeks much more than this – no doubt because there are no such exclusive agreements impairing Conwood's ability to compete – this is all the law could even

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[7] The few cases cited by Conwood in which the entire agreements were enjoined involved per se illegal, horizontal restraints such as price-fixing, market divisions or group boycotts. See, e.g., United States v. Nat'l Lead Co., 332 U.S. 319 (1947).

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theoretically require. Any more relief than that would actually restrict the type of competition retailers desire, including their desire to use uniform racks to house all moist snuff products and to participate in CAP.

V. THE PROPOSED INJUNCTION IS UNDULY INTRUSIVE

Another fundamental defect in Conwood's proposed injunction is the elaborate mechanisms it suggests for implementing and policing the proposed injunction, including the proposed requirement that U.S. Tobacco clear resets or any other "manipulation" of competitive products, racks, and P.O.S. through Conwood first – again, "permission not to be unreasonably withheld." Conwood also would have this Court set up a new Board of Directors committee that would "monitor and enforce" the communication of the injunction to wholesalers and retailers; the training of employees to comply with its terms; the creation and submission of a written "compliance" plan to the Court and Conwood; the creation of a document bank so that Conwood's counsel can inspect U.S. Tobacco's documents for compliance whenever it wishes; and an annual submission of a written compliance report to the Court and Conwood's counsel.

Conwood offers no relevant support for this highly intrusive policing scheme, nor could it in a case of this nature.[8] Indeed, courts have rejected attempts to impose far less onerous

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[8] Plaintiffs cite two inapposite cases for the proposition that U.S. Tobacco should be required to notify its customers of any injunction ultimately issued and provide antitrust compliance training for its employees. The injunction in Image Technical Servs., Inc. v. Eastman Kodak Co., 1996 U.S. Dist. LEXIS 2386 (N.D. Cal. Feb. 26, 1996), a tying case, simply required Kodak to notify its customers that Kodak would now be required to sell replacement parts to third-party service providers. See Image Technical Servs., 125 F.3d at 1226-27 (modifying injunction). The injunction in Coleman v. Cannon Oil Co., 911 F. Supp. 510 (M.D. Ala. 1995), required only that defendants provide antitrust training for its employees who had engaged in a per se price fixing scheme, the type of naked restraints that are not at issue in this case. See id. at 512; see also Coleman v. Cannon Oil

(continued...)

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requirements on a defendant, even when the plaintiff was not seeking a blatantly anticompetitive injunction such as that proposed here. See Langenderfer, 684 F. Supp. at 952 (finding that a proposed injunction "requiring the circulation of [the] injunction to actual or potential customers [and the] compilation of [an] annual list of . . . jobs bid on by defendants to be distributed[,] to the Court" and plaintiffs counsel, was "not effectively designed to ensure free competition in [the] marketplace"); see also Weiss, 548 F. Supp. at 1060 (finding that injunction requesting the defendant hospital to amend its By-Laws to be "grossly intrusive upon the autonomy of that body").

In short, this is not a Section 1 conspiracy case, and Conwood is not an antitrust regulatory agency – even if its lawyers would like nothing more than to police U.S. Tobacco's day-to-day operations to ensure that Conwood is protected from the rigors of even the most basic and ordinary forms of competition.

VI. THE COURT SHOULD STAY ANY INJUNCTIVE RELIEF IT MAY ORDER

If the Court enters a permanent injunction, U.S. Tobacco anticipates that it will need to seek a suspension or stay of the injunction pending appeal so as to avoid the inevitable and irreparable injury that will result to its business prior to the conclusion of the case. A motion for suspension or stay of the injunction may be filed in either the district court, pursuant to Fed. R. Civ. P. 62(c), or in the Court of Appeals pursuant to FRAP 8 (a). Should it be necessary, U.S. Tobacco will file in this Court a motion to stay any injunction pending appeal. Should this Court decline the request for stay pending appeal, U.S. Tobacco would then need to file an emergency petition for

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[8] (...continued)
Co., No. CIV. A. 90-T-414-S, 1995 WL 841999, at *1 (M.D. Ala. Nov. 2, 1995) (modifying injunction).

temporary stay in the Court of Appeals, followed by a motion for stay pending appeal. See, e.g., Chambers v. Ohio Dep't. of Human Serv., 145 F.3d 793, 796 (6th Cir. 1998); Reynolds v. Int'l Amateur Athletic Fed'n, No. 92-3596, 1992 WL 15754 (6th Cir. June 19, 1992) (granting stay of injunction pending appeal).

As the foregoing discussion regarding Conwood's requested injunction demonstrates, U.S. Tobacco will be irreparably harmed by the entry of any permanent injunction that restricts its competitive participation in the marketplace. Should the Court enter an order in any way approaching the scope demanded by Conwood, U.S. Tobacco's relationships with its wholesale and retail customers will be irreparably and irretrievably harmed. The likelihood that an applicant for stay of injunction pending appeal will be irreparably harmed absent a stay is a factor for the Court to consider in ruling on the stay request. See Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir.1991) (citing Hilton v. Braunskill, 481 U.S. 770, 776 (1987)).

A second factor requires the Court to consider the likelihood that U.S. Tobacco will prevail on the appeal. Griepentrog, 945 F.2d at 153. U.S. Tobacco has demonstrated in its motions for judgment as a matter of law and for a new trial that serious issues have been preserved for appeal, if they are not corrected by this Court. The erroneous admission of significant portions of Dr. Leftwich's testimony alone amounts to a "serious question going to the merits" as is necessary under Griepentrog. See id. at 153-54 (citations omitted).

The third and fourth Griepentrog factors require the Court to assess the possible harm to others if the stay is granted and the interest of the public in a stay. Id. The Griepentrog court

required that all four factors for consideration of a stay of injunction be addressed by affidavits from the movant. Id. at 154.

Given that U.S. Tobacco expects to file a comprehensive motion for stay pending appeal following entry of any permanent injunction, U.S. Tobacco requests that, with entry of any injunction, the Court simultaneously enter an order temporarily staying the injunction for a minimum of thirty (30) business days. The 30 day temporary stay will allow U.S. Tobacco the time necessary to obtain the affidavits and any other supporting documents required to address the four Griepentrog issues as they relate to the specifics of any injunction, which obviously will not be known to U.S. Tobacco until the Court enters its order. The Griepentrog factors are not to be applied rigidly. The Court's analysis under Griepentrog contemplates an individualized judgment, specific to U.S. Tobacco's situation. See Hilton v. Braunskill, 481 U.S. 770, 777 (1987). This Court, obviously familiar with the parties and the relevant facts, will thereafter have the opportunity for a meaningful review of a motion for stay pending appeal. The alternative to this suggested procedure will be to force the parties to litigate a rushed emergency stay petition in the Sixth Circuit.

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CONCLUSION

For the foregoing reasons, Plaintiffs' Request for Permanent Injunctive Relief should be denied in full. If the Court is inclined to enter any injunctive relief, U.S. Tobacco respectfully requests oral argument in advance.

Dated: May 3, 2000

Respectfully submitted,

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Certificate of Service

I certify that copies of the foregoing and a tendered order were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 3rd day of May, 2000.

Counsel for Defendants

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

Plaintiffs having moved the Court for a permanent injunction, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Plaintiffs' motion for a permanent injunction is hereby DENIED.

Entered this _____ day of _____, 2000.

_____
Thomas B. Russell, Judge
United States District Court

TENDERED BY:

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EXHIBIT A

(To be reported at: 207 F.3d 1039)
2000-1 Trade Cases P 72,836
(Cite as: 2000 WL 303035 (8th Cir.(Ark.)))

CONCORD BOAT CORPORATION; Galaxie Boat Works, Inc.; Sea Arrow Marine, Inc.; Mariah Boats, Inc.; Harris Kayot, Inc.; Armada Manufacturing Company, Inc.; Baha Cruisers/FRP Industries, Inc.; Campion Marine, Inc.; Caravelle Boats; KCS International/Cruisers, Inc.; Mirage Holdings, Inc.; Play Time Manufacturing By Ohio Marine Distributor, Inc.; Powerquest Boats, Inc.; Silverton Marine Corporation; Independent Boat Builders, Inc.; WTYS No. 4 Inc., doing business as Thompson Boat Co.; Century Craft Industries, Ltd., formerly known as Vanguard Industries; Avenger Manufacturing; G W Invader; Malibu Boats West; Maverick Boat Company, Inc.; Weeres Industries Corporation; Doral International, Inc.; Albermarle Boats, Inc., Plaintiffs--Appellees,

v.

BRUNSWICK CORPORATION, a Delaware corporation, Defendant--Appellant, National Association of Manufacturers, Amicus on Behalf of Appellant.

Concord Boat Corporation; Galaxie Boat Works, Inc.; Sea Arrow Marine, Inc.; Mariah Boats, Inc.; Harris Kayot, Inc.; Armada Manufacturing Company, Inc.; Baha Cruisers/FRP Industries, Inc.; Campion Marine, Inc.; Caravelle Boats, Inc.; KCS International/Cruisers, Inc.; Mirage Holdings, Inc.; Play Time Manufacturing By Ohio Marine Distributor, Inc.; Powerquest Boats, Inc.; Silverton Marine Corporation; Thompson Boat Company; Independent Boat Builders, Inc.; WTYS No. 4 Inc., doing business as Thompson Boat Company; Century Craft Industries, Ltd., formerly known as Vanguard Industries; Avenger Manufacturing; G W Invader; Malibu Boats West; Maverick Boat Company, Inc.; Weeres Industries Corporation; Doral International, Inc.; Albermarle Boats, Incorporated, Plaintiffs--Appellants,

v.

Brunswick Corporation, a Delaware corporation, Defendant--Appellee, National Association of Manufacturers, Amicus on Behalf of Appellee.

Nos. 98-3732, 98-4042.

United States Court of Appeals, Eighth Circuit.

Submitted Sept. 15, 1999.

Decided March 24, 2000.

Boat builders brought antitrust action against stern drive engine manufacturer. Following judgment for boat builders, the United States District Court for the Eastern District of Arkansas, James M. Moody, J., 21 F.Supp.2d 923, denied engine manufacturer's motion for judgment as a matter of law or new trial, and 34 F.Supp.2d 1125, trebled boat builders' damages. Both sides appealed. The Court of Appeals, Diana E. Murphy, Circuit Judge, held that: (1) boat builders' Clayton Act claim that engine manufacturer's purchases of other boat builders lessened competition or tended to create monopoly was barred by statute of limitations; (2) plaintiffs' expert's opinion should have been excluded; and (3) and evidence was insufficient to support finding that engine manufacturer's discount programs restrained trade and monopolized market.

Reversed, vacated and remanded.

[1] FEDERAL COURTS ⚿776
170Bk776
Court of Appeals reviews de novo the denial of motion for judgment as matter of law, using same standards as district court. Fed.Rules Civ.Proc.Rule 50(a)(1), 28 U.S.C.A.

[2] FEDERAL CIVIL PROCEDURE ⚿2608.1
170Ak2608.1
On motion for judgment as a matter of law, court must assume as proven all facts that nonmoving party's evidence tended to show, give her benefit of all reasonable inferences, and assume that all conflicts in evidence were resolved in her favor; applying this standard, motion must be granted when non-movant's case rests solely upon speculation and conjecture lacking in probative evidentiary support or when, without weighing credibility of witnesses, there can be but one reasonable conclusion as to verdict. Fed.Rules Civ.Proc.Rule 50(a)(1), 28 U.S.C.A.

[2] FEDERAL CIVIL PROCEDURE ⚿2609

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170Ak2609
On motion for judgment as a matter of law, court must assume as proven all facts that nonmoving party's evidence tended to show, give her benefit of all reasonable inferences, and assume that all conflicts in evidence were resolved in her favor; applying this standard, motion must be granted when non-movant's case rests solely upon speculation and conjecture lacking in probative evidentiary support or when, without weighing credibility of witnesses, there can be but one reasonable conclusion as to verdict. Fed.Rules Civ.Proc.Rule 50(a)(1), 28 U.S.C.A.

[3] FEDERAL CIVIL PROCEDURE ⚖2127
170Ak2127
On motion for judgment as matter of law, non-moving party, while entitled to all supportable inferences, is not given benefit of unreasonable inferences or those at war with undisputed facts. Fed.Rules Civ.Proc.Rule 50(a)(1), 28 U.S.C.A.

[3] FEDERAL CIVIL PROCEDURE ⚖2609
170Ak2609
On motion for judgment as matter of law, non-moving party, while entitled to all supportable inferences, is not given benefit of unreasonable inferences or those at war with undisputed facts. Fed.Rules Civ.Proc.Rule 50(a)(1), 28 U.S.C.A.

[4] FEDERAL COURTS ⚖825.1
170Bk825.1
Court of Appeals reviews denial of motion for new trial for abuse of discretion. Fed.Rules Civ.Proc.Rule 50(a)(1), 28 U.S.C.A.

[5] LIMITATION OF ACTIONS ⚖58(1)
241k58(1)
Antitrust cause of action generally accrues and statute of limitations begins to run when defendant commits act that injures plaintiff's business. Clayton Act, § 4B, as amended, 15 U.S.C.A. § 15b.

[6] LIMITATION OF ACTIONS ⚖58(1)
241k58(1)
Clayton Act claim challenging initial acquisition of another company's stocks or assets as lessening competition or tending to create monopoly accrues at time of the merger or acquisition. Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

[7] MONOPOLIES ⚖20(1)
265k20(1)
Holding as well as obtaining assets is potentially violative of Clayton Act's proscription against acquisitions and mergers that lessen competition or tend to create monopoly. Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

[8] LIMITATION OF ACTIONS ⚖58(1)
241k58(1)
Limitation period for Clayton Act suit challenging the holding or use of assets as lessening competition or tending to create monopoly starts to run at point the act first causes injury. Clayton Act, §§ 4B, 7, as amended, 15 U.S.C.A. §§ 15b, 18.

[9] LIMITATION OF ACTIONS ⚖58(1)
241k58(1)
Statute of limitations on antitrust claim can be tolled where defendant has engaged in fraudulent concealment, or where plaintiff's damages are only speculative during limitations period. Clayton Act, § 4B, as amended, 15 U.S.C.A. § 15b.

[9] LIMITATION OF ACTIONS ⚖104(1)
241k104(1)
Statute of limitations on antitrust claim can be tolled where defendant has engaged in fraudulent concealment, or where plaintiff's damages are only speculative during limitations period. Clayton Act, § 4B, as amended, 15 U.S.C.A. § 15b.

[10] LIMITATION OF ACTIONS ⚖95(17)
241k95(17)
Boat builders' Clayton Act claim that stern drive engine manufacturer's purchases of other boat builders and its continuing holding of them served "substantially to lessen competition, or to tend to create a monopoly" accrued no later that date boat builders' cooperative advised its members to declare engine manufacturer's practices "in violation of the Sherman Anti-Trust Act." Clayton Act, §§ 4B, 7, as amended, 15 U.S.C.A. §§ 15b, 18.

[11] LIMITATION OF ACTIONS ⚖58(1)
241k58(1)
Statute of limitations on boat builders' Clayton Act claim that stern drive engine manufacturer's purchases of other boat builders lessened competition or tended to create monopoly was not tolled on basis of engine manufacturer's holding and use of the acquisitions, since those purchases were public information at time of acquisition and were well known throughout boat manufacturing industry, and any damages resulting from any injury

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based on engine manufacturer's holding and use of the acquisitions could have been quantified in year of purchase. Clayton Act, §§ 4B, 7, as amended, 15 U.S.C.A. §§ 15b, 18.

[11] LIMITATION OF ACTIONS ⚖95(17)
241k95(17)
Statute of limitations on boat builders' Clayton Act claim that stern drive engine manufacturer's purchases of other boat builders lessened competition or tended to create monopoly was not tolled on basis of engine manufacturer's holding and use of the acquisitions, since those purchases were public information at time of acquisition and were well known throughout boat manufacturing industry, and any damages resulting from any injury based on engine manufacturer's holding and use of the acquisitions could have been quantified in year of purchase. Clayton Act, §§ 4B, 7, as amended, 15 U.S.C.A. §§ 15b, 18.

[12] LIMITATION OF ACTIONS ⚖58(1)
241k58(1)
Continuing violation analysis did not apply to boat builders' Clayton Act claim that stern drive engine manufacturer's ongoing holding of other boat builders it had purchased lessened competition or tended to create monopoly, but even if continuing violation analysis applied, there was no overt act that would restart limitations period. Clayton Act, § § 4B, 7, as amended, 15 U.S.C.A. §§ 15b, 18.

[13] FEDERAL CIVIL PROCEDURE ⚖2336
170Ak2336
Because verdict form did not ask jury to allocate damages to each type of antitrust claim or to consider what damages were caused by each type of violation, upon reversal of judgment for plaintiffs on Clayton Act claim, defendant would be entitled at the very least to new damages trial on Sherman Act claims. Sherman Act, §§ 1, 2, as amended, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

[13] FEDERAL COURTS ⚖945
170Bk945
Because verdict form did not ask jury to allocate damages to each type of antitrust claim or to consider what damages were caused by each type of violation, upon reversal of judgment for plaintiffs on Clayton Act claim, defendant would be entitled at the very least to new damages trial on Sherman Act claims. Sherman Act, §§ 1, 2, as amended, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

[14] MONOPOLIES ⚖28(9)
265k28(9)
In order to prevail on anti-trust claim for treble damages, plaintiff must prove antitrust violation, fact of damage or injury, causal relationship between violation and injury, and amount of damages. Clayton Act, § 4, as amended, 15 U.S.C.A. § 15.

[15] EVIDENCE ⚖555.2
157k555.2
In Daubert hearing, district court must make preliminary assessment of whether reasoning or methodology underlying expert testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to facts in issue; among factors to consider is whether the testimony is sufficiently tied to facts of case that it will aid jury in resolving factual dispute.

[16] EVIDENCE ⚖555.2
157k555.2
If party believes that expert opinion has not considered all relevant facts, objection to its admission is appropriate.

[17] EVIDENCE ⚖555.2
157k555.2
Even theory that might meet certain Daubert factors, such as peer review and publication, testing, known or potential error rate, and general acceptance, should not be admitted if it does not apply to specific facts of case.

[18] EVIDENCE ⚖555.2
157k555.2
Plaintiffs' expert's opinion on antitrust liability did not incorporate all aspects of economic reality of the market or separate lawful from unlawful conduct, and thus should have been excluded. Sherman Act, § § 1, 2, as amended, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

[19] EVIDENCE ⚖570
157k570
Expert opinion cannot sustain jury's verdict when it is not supported by sufficient facts to validate it in eyes of law, or when indisputable record facts contradict or otherwise render opinion unreasonable.

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[20] FEDERAL COURTS ⚖900
170Bk900
Error in admission of plaintiffs' expert's opinion on antitrust liability was reversible, where that opinion was basis of plaintiffs' damage case and jury clearly relied on opinion in awarding damages which were identical to detailed figures expert had calculated. Sherman Act, §§ 1, 2, as amended, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

[21] MONOPOLIES ⚖28(7.5)
265k28(7.5)
Antitrust plaintiffs must prove antitrust violation by preponderance of evidence.

[22] MONOPOLIES ⚖12(1.10)
265k12(1.10)
Under per se standard of determining whether restraint of trade is unreasonable, conduct that is manifestly anticompetitive or would always or almost always tend to restrict competition is conclusively presumed to restrain competition unreasonably without elaborate inquiry as to precise harm it has caused or business excuse for its use. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[23] MONOPOLIES ⚖12(1.10)
265k12(1.10)
Rule of reason anti-trust analysis focuses on particular facts disclosed by record.

[24] MONOPOLIES ⚖17(2.2)
265k17(2.2)
Sherman Act restraint of trade claims that allege only de facto exclusive dealing may be viable. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[25] MONOPOLIES ⚖12(1.10)
265k12(1.10)
Principle criteria used to evaluate reasonableness of contractual arrangement under rule of reason antitrust analysis include extent to which competition has been foreclosed in substantial share of relevant market, duration of any exclusive arrangement, and height of entry barriers. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[26] MONOPOLIES ⚖17(1.3)
265k17(1.3)
Stern drive marine engine manufacturer's program offering boat builders and dealers discount if they agreed to purchase certain percentage of their engine requirements from manufacturer for fixed period of time was not unreasonable restraint of trade; there was insufficient evidence that manufacturer had foreclosed substantial share of the market through anticompetitive conduct, that discount program was in any way exclusive or that there were significant barriers to entry. Sherman Act, § 1, as amended, 15 U.S.C.A. § 1.

[27] MONOPOLIES ⚖12(1.3)
265k12(1.3)
To establish monopolization or attempted monopolization claim, plaintiff must show that 1) defendant possessed monopoly power in relevant market, and 2) defendant willfully acquired or maintained this monopoly power by anticompetitive conduct as opposed to gaining that power as result of superior product, business acumen, or historical accident. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

[28] MONOPOLIES ⚖12(1.3)
265k12(1.3)
"Monopoly power," in context of monopolization or attempted monopolization claim, is defined as power to control prices or exclude competition. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.
See publication Words and Phrases for other judicial constructions and definitions.

[29] MONOPOLIES ⚖12(1.3)
265k12(1.3)
Stern drive marine engine manufacturer's program offering boat builders and dealers discount if they agreed to purchase certain percentage of their engine requirements from manufacturer for fixed period of time was not anticompetitive, as required to support boat builders' monopolization claim, where discounts did not result in price below engine manufacturer's costs, engine manufacturer was motivated by desire to attract additional business and boat builders and dealers could walk away from the discounts at any time. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

[29] MONOPOLIES ⚖12(2)
265k12(2)
Stern drive marine engine manufacturer's program offering boat builders and dealers discount if they agreed to purchase certain percentage of their engine requirements from manufacturer for fixed period of time was not anticompetitive, as required to support boat builders' monopolization claim, where

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discounts did not result in price below engine manufacturer's costs, engine manufacturer was motivated by desire to attract additional business and boat builders and dealers could walk away from the discounts at any time. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

[30] MONOPOLIES ⚖17(1.8)
265k17(1.8)
"Predatory pricing" occurs when single firm, having dominant share of relevant market, cuts its prices in order to force competitors out of market, or perhaps to deter potential entrants from coming in.
See publication Words and Phrases for other judicial constructions and definitions.

[31] MONOPOLIES ⚖17(1.8)
265k17(1.8)
If firm has discounted prices to level that remains above firm's average variable cost, plaintiff asserting that firm achieved monopoly power by anticompetitive conduct must overcome strong presumption of legality by showing other factors indicating that price charged is anticompetitive. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

[32] MONOPOLIES ⚖12(1.3)
265k12(1.3)
Sherman Act monopolization claims cannot succeed if defendant's dominant market share resulted from superior product, business acumen, or historical accident; on the other hand, if the conduct has no rational business purpose other than its adverse effects on competitors, inference that it is exclusionary is supported. Sherman Act, § 2, as amended, 15 U.S.C.A. § 2.

Stephen M. Shapiro, Chicago, IL, argued (Robert F. Finke, Mark McLaughlin, and Andrew S. Marovitz, Chicago, IL, Thomas C. Walsh, St. Louis, MO, William H. Sutton and James M. Simpson, Jr., Little Rock, AR, on the brief), for appellant.

K. Craig Wildfang, Minneapolis, MN, argued (Brooks F. Poley, Christopher W. Madel, and Steven E. Uhr, Minneapolis, MN, Jerry C. Jones and Amy L. Stewart, Little Rock, AR, on the brief), for appellee.

Before McMILLIAN and MURPHY, Circuit Judges, and BOGUE, [FN1] District Judge.

DIANA E. MURPHY, Circuit Judge.

*1 A number of boat builders [FN2] brought this antitrust action against stern drive engine manufacturer Brunswick Corporation (Brunswick) for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1994), and of Section 7 of the Clayton Act, 15 U.S.C. § 18 (1994). Brunswick counterclaimed, arguing that the boat builders had themselves conspired to restrain trade in violation of Section 1 of the Sherman Act. The case was tried to a jury for ten weeks, and a verdict was returned in favor of the boat builders for $44,371,761. Post trial motions were filed by both sides, and judgment was eventually entered for the boat builders in the amount of $133,115,283, plus $7,783,224 in attorney fees and $1,267,424 in costs. The district court granted Brunswick's motion for judgment as a matter of law on its counterclaim, but denied its motions for a new trial and for judgment as a matter of law on the boat builders' claims. It also denied the boat builders' motion for equitable relief. Both sides appeal, and we reverse.

I.
A.

Neither side contests the finding of the jury that the relevant market is the market for inboard and stern drive marine engines. Since the early 1980s there have been a number of manufacturers in the market, including inboard manufacturers PCM, Indmar, Crusader, Volvo, Marine Power, MTU, Caterpillar, Detroit Diesel, Cummins, and Toyota, and stern drive manufacturers Brunswick, Outboard Marine Corporation (OMC), Volvo Penta of the Americas (Volvo), and Yamaha. In this opinion we employ the term "stern drive engines" to include both types of engines.

The manufacturers use standard automobile engine blocks to make stern drive engines for motor boats. They "marinize" the automobile engines and equip them with a drive system and then sell them to boat builders who may be affiliated with the manufacturer or may be independent buyers. The boat builders install the engines in their brand name boats and sell the completed boats to dealers. Stern drive engines are used primarily in recreational power boats known as runabouts, which are typical water skiing boats, and in cruising boats, which are larger and more expensive boats and usually have cabins. Runabouts and cruising boats together make up about 40% of all recreational power boats.

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Brunswick has been the market leader in stern drive engine manufacturing for many years, and by 1983 it had earned a 75% market share. Beginning in 1982 it employed McKinsey & Company (McKinsey) to provide consulting services to its engine business. McKinsey consultants suggested various ways for Brunswick to increase the sales of its engines. In 1984 Brunswick began to offer market share discounts to boat builders and dealers. Several of its competitors, including Volvo and OMC, also offered market share discounts at about the same time. Under the Brunswick programs, boat builders and dealers could agree to purchase a certain percentage of their engine requirements from Brunswick for a fixed period of time in exchange for a discount off the list price of the engine. From 1984 to 1994, Brunswick offered a 3% discount to boat builders who bought 80% of their engines from the company, a 2% discount for 70% of all purchases, and a 1% discount for those who took 60% of their needs from Brunswick. For the 1995 to 1997 model year program, the market share requirements were reduced so that the maximum 3% discount could be earned by buying 70% from Brunswick; customers could receive a 2% discount for 65% market share and 1% for 60% market share. Another feature was added to the program in 1989 to offer long term discounts of an additional 1 or 2% to anyone who signed a market share agreement for two to three years. [FN3] Boat builders also could receive a volume discount of up to 5% based on the quantity of engines purchased. Brunswick attempted to increase its market share requirement to 95% in its proposed 1994 "Industry Growth Program," but was unsuccessful due to serious backlash from boat builders. The market share discounts were eliminated entirely in the middle of 1997.

*2 Neither the regular market share discount program, the long term program, nor the volume discount program obligated boat builders and dealers to purchase engines from Brunswick, and none of the programs restricted the ability of builders and dealers to purchase engines from other engine manufacturers. Builders and dealers were able to buy up to 40% of their engines from other manufacturers and still obtain a discount from Brunswick. Several boat builders chose to take a higher percentage of their engines from Brunswick than necessary to qualify for its largest market share discount; some purchased 95 or 100% of their engines from Brunswick.

In the year after Brunswick and other stern drive engine manufacturers instituted market share discount programs, Brunswick's largest domestic competitor, OMC, introduced a new stern drive engine called the "Cobra." The Cobra engine registered solid early sales, which increased OMC's stern drive engine market share and simultaneously reduced Brunswick's market share to approximately 50%. Brunswick began exploring its competitive options, and in December 1986 it purchased two of the largest boat builders, U.S. Marine (Bayliner) and Ray Industries (Sea Ray). [FN4] These purchases were noted throughout the boating industry. Brunswick hoped this vertical integration would enable it to synthesize engine manufacturing and boat building, leading to a higher quality and less expensive product.

Other events occurred about this time which improved Brunswick's competitive position. OMC's success with the Cobra was short lived because the company began receiving complaints that the engine's shift cable was defective. After a year investigating complaints, OMC was forced to recall all of its Cobra engines in 1989. This resulted in significant market share gains by Brunswick. Brunswick also experienced a market share gain in 1993 as a result of mistakes made by Volvo and OMC when they merged, leading to decreased consumer confidence in their products. In 1994 Yamaha, another stern drive engine manufacturer, left the market. The price of Brunswick's stern drive engine increased between 1986 and 1997 from $4775 to $4984, fluctuating both upward and downward in the interim.

B.

The boat builders filed this antitrust suit in 1995, more than ten years after Brunswick and other stern drive engine manufacturers first instituted market share discount programs, and over nine years after Brunswick acquired Bayliner and Sea Ray. They alleged that Brunswick had violated Section 7 of the Clayton Act by acquiring Bayliner and Sea Ray in 1986 and subsequently holding them, enabling Brunswick to create a monopoly in the stern drive engine market. They contended that Brunswick had used its market share discounts, volume discounts, and long term discounts and contracts, coupled with the market power it had achieved in purchasing Bayliner and Sea Ray, to restrain trade and to

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monopolize the market in violation of Sections 1 and 2 of the Sherman Act. According to the boat builders, Brunswick's monopolization of the market enabled it to charge supracompetitive high prices for their engines, which drove other engine manufacturers out of business. The boat builders also claimed that Brunswick had fraudulently concealed both the special deals that they gave to certain boat builders and the stern drive engine that Bayliner was developing.

*3 Brunswick denied the allegations and counterclaimed against several of the boat builders, alleging that they had conspired to boycott Brunswick engines at industry boat shows and to price Brunswick engines higher than competitors' engines in violation of Section 1 of the Sherman Act. Brunswick also brought three state law counterclaims against two of the boat builders, alleging that they had submitted falsified market share affidavits.

Both sides filed pretrial motions, including Brunswick's motion in limine to limit the testimony of Dr. Robert Hall, the expert witness for the boat builders. Brunswick argued that Dr. Hall's economic model was unreliable and did not have the capacity to distinguish between lawful and unlawful market behavior; his opinion therefore could not provide the jury with an adequate basis to assess antitrust liability or damages. At a pretrial Daubert hearing, [FN5] the boat builders assured the district court that Dr. Hall's testimony and economic model would segregate unlawful conduct by Brunswick from lawful behavior that had contributed to its market share. The district court did not make specific findings regarding Dr. Hall's methodology or the bases of his opinions, but it ruled that the jury could draw its own conclusions about the value of his testimony.

During the course of the ten week trial, both parties called numerous witnesses and presented over 800 exhibits, including voluminous economic data, charts and graphs made in the course of business and for trial purposes, internal business memoranda, consultants' reports, deposition testimony, and much more. The boat builders called over 30 witnesses, many of whom testified by videotaped deposition. Among these witnesses were owners of some of the plaintiff boat building companies, as well as several current and former Brunswick employees. Brunswick called some 15 witnesses, including its own employees and owners of boat building companies and boat dealerships. Expert witnesses presented differing interpretations of stern drive engine market events and of Brunswick's conduct in that market.

The boat builders' primary evidence to establish Brunswick's antitrust liability was presented by their sole expert, Dr. Hall, a professor of economics at Stanford University. He testified that Brunswick had monopoly power in the stern drive market that enabled it to use its market share discount programs to impose a "tax" on boat builders and dealers who chose to purchase engines from other manufacturers. He defined the "tax" as the discount these purchasers gave up by not buying from Brunswick. He stated that Brunswick's program effectively required its competitors to charge substantially lower prices in order to convince customers to purchase from them and forgo the discount. Dr. Hall further testified that the discount programs, combined with the market power Brunswick acquired by purchasing Bayliner and Sea Ray, enabled Brunswick to capture 78% of the stern drive engine market. According to Dr. Hall, other manufacturers could not enter into stern drive engine manufacturing as a result of Brunswick's having such a high percentage of the market. He concluded that the discount programs were anticompetitive.

*4 In support of the boat builders' damage claim, Dr. Hall relied on the Cournot model of economic theory that posits that a firm "maximizes its profits by assuming the observed output of other firms as a given, and then equating its own marginal cost and marginal revenue on that assumption." 4 Phillip E. Areeda et al., Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 925a (rev. ed.1998). Dr. Hall postulated that in a stern drive engine market that was competitive, Brunswick and some other firm would each maintain a 50% market share. Under this theory, any market share over 50% would be evidence of anticompetitive conduct on Brunswick's part. Since Brunswick at various points in time had garnered a market share as large as 78% percent, Dr. Hall concluded that it had engaged in anticompetitive conduct and that the boat builders had been overcharged at the moment Brunswick's market share surpassed the 50% threshold.

Brunswick moved for judgment as a matter of law at the close of the boat builders' case. The district

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court heard arguments on the motion but declined to rule on it at that stage. Brunswick then called its various witnesses, including two expert witnesses. Dr. Frederick Warren-Boulton, former chief economist for the Antitrust Division of the United States Department of Justice, testified that Brunswick's discount programs served efficiency and business purposes by improving the predictability of engine demand and by helping to keep manufacturing costs to a minimum. He explained that the discount programs encouraged competition in the boat building industry by providing discounts to smaller boat builders who otherwise would not be able to order sufficient quantities of engines to qualify for strict volume discounts. Dr. Richard Rapp, an economist who is president of National Economic Research Associates, testified that there was no rational basis by which Dr. Hall's model could identify alleged overcharges. He pointed out that the Hall model used a mechanical formula to determine Brunswick's alleged overcharge percentage for any year. The only independent variable in the formula was Brunswick's stern drive market share. See Tr. at 5288-91. According to the formula, an overcharge was calculated anytime Brunswick's market share surpassed 50%. See id. The price at which Brunswick sold its engines was therefore irrelevant for purposes of the formula because the overcharge amount was related solely to Brunswick's market share. See id.

The case was submitted to the jury with a detailed verdict form divided into a number of sections. [FN6] The jury deliberated for a day and a half before returning its verdict. It found that Brunswick had violated three antitrust statutes, Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The jury awarded a total of $44,371,761 in answer to a question that asked it to assess the individual damages suffered by each boat builder as a result of Brunswick's "antitrust violation or violations." Although the jury found liability for all three antitrust claims, the form of the verdict did not require it to specify what amount of damages was caused by each type of antitrust violation. The jury was asked, however, to consider damages for three separate time periods: one ending December 7, 1991, [FN7] one from that date to the day of the verdict, and one for the post verdict period. It found damages only for the period starting December 7, 1991, and running to June 19, 1998, the date of the verdict. It rejected the boat builders' fraudulent concealment claim, which would have extended the four year limitations period, by awarding no damages for the period before December 7, 1991. The jury also found for the boat builders on Brunswick's counterclaim for unreasonable restraint of trade in violation of Section 1 of the Sherman Act and for state law violations.

C.

*5 Both sides filed post trial motions. Brunswick moved for judgment as a matter of law on Count 1 of its counterclaim, alleging that the boat builders had engaged in a per se unlawful conspiracy to boycott its engines at industry boat shows and to price its engines at a disadvantage to its competitors. The boat builders filed a protective motion for judgment as a matter of law on Brunswick's counterclaim in the event the court were to overturn the jury verdict. The district court granted Brunswick's motion on Count 1 of its counterclaim, concluding as a matter of law that the boat builders had committed a per se violation of Section 1 of the Sherman Act. It awarded Brunswick only nominal damages of $1, however, because of a failure of proof. The boat builders filed a renewed motion for judgment as a matter of law, or alternatively for reconsideration of the order granting Brunswick judgment on its antitrust counterclaim. This motion was denied, and neither side has appealed the final resolution of Brunswick's counterclaim.

Brunswick also filed a renewed motion for judgment as a matter of law and for a new trial on the boat builders' claims. In support of its motion for judgment, Brunswick attacked both the jury's finding of liability and its calculation of damages. It contended that Dr. Hall's testimony should have been limited by the court because his opinion had no basis in the economic reality of the stern drive engine market. Brunswick further claimed that his model was flawed because it failed to account for market share gains that resulted from lawful competitive activity and from market events unrelated to its conduct. Brunswick argued that the jury adopted all aspects of Dr. Hall's presentation and theory and thus awarded damages for losses due to factors other than any anticompetitive conduct. Brunswick also argued that its market share discount programs were not anticompetitive because they were above cost and were not unlawfully exclusionary. Finally, Brunswick contended that the boat builders had not presented sufficient evidence to sustain the jury's verdict on any of their claims

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and that the Clayton Act claims were barred by the statutory limitations period. Brunswick's motion for a new trial raised many of the same issues. It argued that the jury verdict went against the weight of the evidence, that the damages awarded were grossly excessive, that Dr. Hall's testimony was unfairly prejudicial, and that the plaintiffs were awarded damages for conduct that was not anticompetitive. The district court denied both motions.

The boat builders filed a motion for equitable relief seeking orders to divest Brunswick of Bayliner and Sea Ray, [FN8] to proscribe Brunswick's use of market share discount programs, and to prohibit it from further violation of the antitrust laws. The district court also denied this motion. It ruled that the boat builders' request for divestiture was barred by laches in light of the jury's finding of no damages prior to December 7, 1991 and that the balance of equities precluded any order to divest. It also refused to enjoin market share discount programs, again citing laches and no showing of irreparable harm. Finally, the court rejected the boat builders' request to enjoin Brunswick from violating assorted antitrust laws on the grounds that such an injunction would be imprecise, impossible to monitor and enforce, and so broad that it potentially could preclude Brunswick from engaging in legitimate business activity.

*6 Following its rulings on the various post trial motions, the district court trebled the damages found by the jury and awarded the boat builders $7,783,223.94 in attorney fees and $1,267,424.18 in costs. See Concord Boat Corp. v. Brunswick Corp., 34 F.Supp.2d 1125, 1134 (E.D.Ark.1998). The final award totaled $142,165,931.12.

II.

Brunswick argues on appeal that it is entitled to judgment as a matter of law because the boat builders' Clayton Act claims were barred by the statute's four year limitations period and because the evidence was insufficient as a matter of law to enable a reasonable jury to find that Brunswick's discount programs and acquisitions restrained trade and monopolized the market in violation of the Sherman Act. Brunswick contends that above cost discounting and vertical integrations constitute competitive business behavior that should be encouraged because of the resulting benefits for consumers and purchasers. [FN9] It also claims that Dr. Hall's testimony should not have been admitted because his approach did not provide a reasonable basis for either liability or damages. His opinion that competitive conduct would have resulted in a "50-50 lockstep duopoly" in the market was without factual support, wholly speculative, and methodologically unsound according to Brunswick. See Def.'s Br. at 61. In support of its motion for a new trial Brunswick says that the boat builders' Clayton Act claims were not timely filed, that it is not possible to know what part of the antitrust damages awarded by the jury resulted from the Clayton violations it found, and that Dr. Hall's expert opinion should not have been admitted.

The boat builders contend that their evidence was sufficient to permit a reasonable jury to find that Brunswick had used its discounts and acquisitions to restrain trade and monopolize the market in violation of the Sherman Act. They claim that they proved that Brunswick's monopolization of the engine market resulted in higher engine prices which forced its primary rivals, Volvo and OMC, to merge in 1993 and resulted in Yamaha's departure from the market in 1994. They also argue that the statute of limitations does not bar their Clayton Act claims because Brunswick's purchases of Bayliner and Sea Ray were part of a continuing violation and because their damages were only speculative during the limitations period. They also contend that there was no need for the jury to be asked to tie any damages to a particular type of antitrust violation and that the damage award can be sustained if any of their antitrust claims are upheld. Finally, the boat builders cross appeal from the denial of their motion for equitable relief, but they do not appeal the jury's rejection of their fraudulent concealment claim.

[1][2][3][4] We review de novo the denial of a motion for judgment as a matter of law, using the same standards as the district court. See Amerinet, Inc. v. Xerox Corp., 972 F.2d 1483, 1505 (8th Cir.1992), cert. denied, 506 U.S. 1080, 113 S.Ct. 1048, 122 L.Ed.2d 356 (1993). Judgment as a matter of law is appropriate "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party ...." Fed.R.Civ.P. 50(a)(1). We "must assume as proven all facts that the nonmoving party's evidence tended to show, give her the benefit of all reasonable inferences, and assume that all conflicts in the evidence were resolved in her favor." Hathaway v..

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Runyon, 132 F.3d 1214, 1220 (8th Cir.1997). Applying this standard, the motion "must be granted when the non-movant's case rests solely upon speculation and conjecture lacking in probative evidentiary support." Johnson v. Niagara Mach. & Tool Works, 666 F.2d 1223, 1225 (8th Cir.1981) (internal quotations and citation omitted). This is because the non-moving party, while entitled to all supportable inferences, is not given "the benefit of unreasonable inferences or those at war with the undisputed facts." Sip-Top, Inc. v. Ekco Group, Inc., 86 F.3d 827, 830 (8th Cir.1996) (citations and internal quotations omitted). A motion for judgment as a matter of law should be granted if, when considering the evidence in this manner, " 'without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict.' " McGreevy v. Daktronics, Inc., 156 F.3d 837, 840 (8th Cir.1998) (citing Sip-Top, Inc., 86 F.3d at 830); see also Ryther v. KARE 11, 108 F.3d 832, 844 (8th Cir.) (en banc), cert. denied, 521 U.S. 1119, 117 S.Ct. 2510, 138 L.Ed.2d 1013 (1997). We review the denial of a motion for a new trial under an abuse of discretion standard. See Wood v. Minnesota Mining & Mfg. Co., 112 F.3d 306, 311 (8th Cir.1997).

III.

A.

*7 The boat builders claim that Brunswick's purchases of Bayliner and Sea Ray in December 1986 and its continuing holding of them served "substantially to lessen competition, or to tend to create a monopoly" in violation of Section 7 of the Clayton Act. 15 U.S.C. § 18 (1994). Brunswick argues that these claims are barred by the statute's limitations period and that its acquisitions were not anticompetitive as a matter of law. Section 7 of the Clayton Act protects against more than one type of anticompetitive conduct, but all cases are governed by the limitations period in Section 4B that requires that an action be commenced "within four years after the cause of action accrued." 15 U.S.C. § 15b (1994).

[5][6] Section 7 "is primarily aimed at arresting, at their incipiency, acquisitions and mergers that substantially lessen competition or tend to create a monopoly." Midwestern Mach., Inc. v. Northwest Airlines, Inc., 167 F.3d 439, 442 (8th Cir.1999) (citing United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 589, 77 S.Ct. 872, 1 L.Ed.2d 1057 (1957)). An antitrust cause of action generally "accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971). A Section 7 action challenging the initial acquisition of another company's stocks or assets accrues at the time of the merger or acquisition. See Midwestern Mach., Inc., 167 F.3d at 442-43. Brunswick acquired Bayliner and Sea Ray in December 1986, and the cause of action for these widely publicized transactions accrued at that time. The statute's four year limitations period for the initial acquisitions therefore expired in 1990. Since this action was not filed until 1995, Section 7 claims based on Brunswick's initial acquisitions are time barred.

[7] Clayton Act claims are not limited to challenging the initial acquisition of stocks or assets, however, since " 'holding as well as obtaining assets' is potentially violative of section 7." Midwestern Mach., Inc., 167 F.3d at 443 (quoting United States v. ITT Continental Baking Co., 420 U.S. 223, 240, 95 S.Ct. 926, 43 L.Ed.2d 148 (1975)). A Clayton Act violation may occur " 'at or any time after the acquisition, depending upon the circumstances of the particular case .' " Id. (quoting E.I. du Pont de Nemours & Co., 353 U.S. at 597, 77 S.Ct. 872). "[W]hile the primary thrust of § 7 is to prohibit and thus to forestall anti-competitive and monopolistic acquisitions," completed acquisitions and "post-acquisition conduct may amount to a violation of § 7." Id. (internal quotations and citations omitted). The rationale for extending Section 7 liability beyond the acquisition itself is that " 'as a practical matter it often may be difficult to foresee and evaluate the real impact and effect of an acquisition until the transaction has been completed and the aggregate combine is operating.' " Id. at 442-43 (quoting Carlson Cos. v. Sperry & Hutchinson Co., 507 F.2d 959, 962 (8th Cir.1974)).

*8 [8][9] Section 7 actions challenging the holding or use of assets remain subject to the four year limitations period, and the normal antitrust accrual rule applies. The limitations period thus starts to run at "the point the act first causes injury." Klehr v. A.O. Smith Corp., 521 U.S. 179, 190- 91, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997) (citing Zenith Radio Corp., 401 U.S. at 339-40, 91 S.Ct. 795); E.I. du Pont de Nemours & Co., 353 U.S. at 598,

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77 S.Ct. 872 (action accrues when "threat of the prohibited effects is evident"); ITT Continental Baking Co., 420 U.S. at 242, 95 S.Ct. 926 (antitrust action accrues later when there is "no realistic threat of restraint of commerce or creation of a monopoly" at the initial acquisition); Midwestern Mach., Inc., 167 F.3d at 442 n. 3 (sweep of Section 7 claims restricted by the statute of limitations, laches, and problems of proof and causation). The statute can be tolled under certain circumstances, such as where a defendant has engaged in fraudulent concealment, see Kansas City, Mo. v. Federal Pacific Elec. Co., 310 F.2d 271 (8th Cir.), cert. denied, 371 U.S. 912, 83 S.Ct. 256, 9 L.Ed.2d 171 (1962), or where a plaintiff's damages are only speculative during the limitations period, see Zenith Radio Corp., 401 U.S. at 338-42, 91 S.Ct. 795.

[10][11] The record indicates that the boat builders did not prove that the statute of limitations was tolled or that the limitations period was extended, unlike the plaintiffs in Midwestern Machinery, E.I. du Pont de Nemours & Company, and ITT Continental Baking Company . The limitations period in this case cannot be extended on the basis of the holding and use of the acquisitions because the evidence at trial showed that the boat builders' injury accrued in 1986. Brunswick's purchases of Bayliner and Sea Ray were public information at the time of acquisition and were well known throughout the boat manufacturing industry. See Tr. at 1929. At trial the boat builders provided the jury with damage calculations for each year beginning in 1986, and these calculations were based solely on Brunswick's market share. This showed that the damages resulting from any injury based on Brunswick's holding and use of Bayliner and Sea Ray could have been quantified as early as 1986. Brunswick's market share was the only independent variable in the boat builders' damage formula, and it was easily calculable at that time. Moreover, in 1990 the boat builders' buying cooperative, Independent Boat Builders, Incorporated (IBBI), advised its members to declare Brunswick's practices "in violation of the Sherman Anti- Trust Act." Def.'s Ex. 318. This advice would have alerted the boat builders to investigate whatever violations of the antitrust laws might have been committed by Brunswick's holding and use of the companies it had acquired.

Thus, by 1990 at the very latest the boat builders were aware of their alleged injuries and of their potential Section 7 claims with regard to Brunswick's holding and use of Bayliner and Sea Ray. As the Seventh Circuit has noted,

> *9 the statute of limitations is not tolled simply in order to wait and see just how well the defendant does in the market from which he excluded the plaintiff. Otherwise it would be tolled indefinitely in a very large class of antitrust suits.

Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261, 271 (7th Cir.1984), cert. denied, 472 U.S. 1018, 105 S.Ct. 3480, 87 L.Ed.2d 615 (1985). If the rule were different, a merger or acquisition could be subject to continual challenge under Section 7. See Midwestern Mach., Inc., 167 F.3d at 442 n. 3.

[12] The boat builders also claim that Brunswick's holding of Bayliner and Sea Ray resulted in a continuing violation, but they cite no appellate decision applying that concept in a Section 7 case. Continuing violations typically arise in the context of Sherman Act or RICO [FN10] claims where multiple defendants are alleged to be part of an ongoing conspiracy. See, e.g., Zenith Radio Corp., 401 U.S. at 338, 91 S.Ct. 795 (Sherman Act conspiracy); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 502 n. 15, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) (Sherman Act refusal to deal); Grand Rapids Plastics, Inc. v. Lakian, 188 F.3d 401, 406 (6th Cir.1999), petition for cert. filed, 68 U.S.L.W. 3491 (U.S. Nov. 10, 1999) (No. 99-1232) (Robinson- Patman price discrimination scheme); Hugh Chalmers Motors, Inc. v. Toyota Motor Sales U.S.A., Inc., 184 F.3d 761, 763 (8th Cir.1999), cert. denied, --- U.S. ----, 120 S.Ct. 1162, --- L.Ed.2d ---- (1999) (No. 99-934) (antitrust conspiracy involving product tying, price discrimination, restraint of trade, and monopolization). In such a situation, the statute of limitations runs from the last "overt act ." Grand Rapids Plastics, Inc., 188 F.3d at 406 (internal quotations and citation omitted). Continuing violations have not been found outside the RICO or Sherman Act conspiracy context, however, because acts that "simply reflect or implement a prior refusal to deal or acts that are merely unabated inertial consequences (of a single act) do not restart the statute of limitations." DXS, Inc. v. Siemens Med. Sys., Inc., 100 F.3d 462, 467-68 (6th Cir.1996) (citations and internal quotations omitted).

Even if a continuing violation analysis were applicable to the Section 7 claims here, the boat

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builders have not shown any overt act that would restart the limitations period. The holding or use of assets is by its nature an "unabated inertial consequence[ ]" of the initial acquisition. DXS, Inc., 100 F.3d at 467 (internal quotations and citations omitted). Where a company is merely holding or using assets in the same manner as at the time of acquisition, there is no "separate new overt act" to restart the limitations period as is found, for example, in each new sale by a Sherman Act price fixing defendant. Cf. Klehr, 521 U.S. at 189, 117 S.Ct. 1984. Rather than engaging in another sale or overt act, this type of defendant simply continues to hold or use an asset. If this were enough to make out a continuing violation, there would in effect be no statute of limitations since a Section 7 challenge to the holding or use of assets could be brought at any time. The policy reasons for the four year statutory limitations period for acquisition claims have been discussed by the Ninth Circuit:

> *10 [t]he four-year limitation of Clayton Act § 4B for private antitrust actions for damages is long enough to enable potential plaintiffs to observe the actual effects of a possible antitrust violation and to calculate its potential effects. The abuses which would occur if plaintiffs were permitted to search the history of other firms and challenge at their pleasure any possible violations, no matter how old, seem apparent.

International Tel. & Tel. Corp. v. General Tel. & Elecs. Corp., 518 F.2d 913, 929 (9th Cir.1975), overruled on other grounds, California v. American Stores Co., 495 U.S. 271, 110 S.Ct. 1853, 109 L.Ed.2d 240 (1990).

The boat builders rely on a civil RICO case and two district court cases in arguing that a continuing violation can be found in the Section 7 context. See Klehr, 521 U.S. at 189, 117 S.Ct. 1984; see also Telectronics Proprietary, Ltd. v. Medtronic, Inc., 687 F.Supp. 832, 842-44 (S.D.N.Y.1988); Julius Nasso Concrete Corp. v. DIC Concrete Corp., 467 F.Supp. 1016, 1022- 25 (S.D.N.Y.1979). In Klehr the Supreme Court considered the four year antitrust limitations period in deciding when a RICO cause of action accrues and the limitations period starts to run:

> Antitrust law provides that, in the case of a "continuing violation," say, a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that injures the plaintiff," e.g., each sale to the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times."

Id. at 189, 117 S.Ct. 1984 (internal quotations and citations omitted). The Court cited only Sherman Act cases, however, and did not discuss Section 7 Clayton claims. Although the boat builders contend that "[n]umerous courts have applied Zenith to Clayton § 7 actions and held that the cause of action accrues each time an injury is incurred," Pls.' Br. at 58, neither of the cited district court cases discussed continuing injuries. Those plaintiffs instead alleged that merged companies began holding or using assets differently at some time after the acquisitions and that this subsequent change affected the running of the limitations period. Here, however, the boat builders never pointed to evidence showing that Brunswick was holding or using Bayliner and Sea Ray differently than when it originally acquired them, and the continuing violation exception to the limitations period does not apply to save their Section 7 claims from being time barred.

Giving the boat builders the benefit of all reasonable inferences from the evidence, their alleged Section 7 injuries accrued at the latest in 1990 and their damages were then calculable. The four year statute of limitations started to run at that time and expired no later than 1994. Their action was not filed until December 7, 1995, and they have not shown that the statute was tolled or that the continuing violation exception applies. Their Section 7 claims are therefore time barred. Since the statute of limitations had run on the Section 7 claims, they should not have been submitted to the jury and Brunswick is entitled to judgment as a matter of law with respect to them.

B.

*11 [13] The parties disagree about what impact dismissal of the Clayton Act claims should have on the case on appeal since the verdict form did not ask the jury to allocate damages to each type of antitrust claim or to consider what damages were caused by each type of violation.

Brunswick believes it is entitled to a new trial on any remaining claims because the jury was not asked to specify the damages attributable to the individual theories of liability. It cites several Supreme Court and appellate decisions in support. In Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459-60,

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113 S.Ct. 884, 122 L.Ed.2d 247 (1993), the Supreme Court overturned a Section 2 antitrust judgment because there was no way to know whether the jury had relied on an erroneously submitted claim in setting damages. Similarly in Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co., 370 U.S. 19, 29-30, 82 S.Ct. 1130, 8 L.Ed.2d 305 (1962), the Court set aside an antitrust judgment where one theory of liability should not have been submitted to the jury. Many other cases have reached similar results if a jury might have relied on erroneously submitted claims. See, e.g., Robertson v. Norton Co., 148 F.3d 905, 908 (8th Cir.1998); Dakota Indus., Inc. v. Ever Best Ltd., 28 F.3d 910, 912 (8th Cir.1994); Dudley v. Dittmer, 795 F.2d 669, 673 (8th Cir.1986); Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76, 94-95 (2d Cir.1981), cert. denied, 455 U.S. 943, 102 S.Ct. 1438, 71 L.Ed.2d 654 (1982); see also Barber v. Whirlpool Corp., 34 F.3d 1268, 1278 (4th Cir.1994).

The boat builders argue that the entire damage award may be upheld even when based on Brunswick's Sherman Act liability alone, but they provide no persuasive authority for their theory. They cite a civil rights case dealing only with alternate grounds for summary judgment, see Duffy v. Wolle, 123 F.3d 1026, 1035 n. 5 (8th Cir.1997), cert. denied, 523 U.S. 1137, 118 S.Ct. 1839, 140 L.Ed.2d 1090 (1998), and a distinguishable antitrust case, see General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 800-01 (8th Cir.1987). Hartz upheld a judgment on Section 2 grounds despite the erroneous submission of a Section 1 claim to the jury, but there the appellant had not challenged the form of special verdict or objected to it at trial. See Hartz, 810 F.2d at 801. Here, Brunswick alerted the district court at trial to the problems with the general verdict form and specifically objected to it on the grounds that it did not "account for the disaggregation principles that need to be addressed by the jury in order that the Court and, if necessary, the Court of Appeals can determine which conduct the jury thought was lawful versus which conduct was unlawful ...." Tr. at 6316-26. Moreover, the claims in Hartz were all brought under the Sherman Act; Section 7 of the Clayton Act was not implicated.

This case is like Spectrum Sports and Sunkist Growers, in that the jury considered an erroneously submitted claim in determining its verdict on damages. It found Brunswick liable for violating Section 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act, but it is not possible to know what damages it found to have been caused by the acquisitions upon which the Section 7 claims were based. The verdict form did not require the jury to consider what damages resulted from each type of violation. See Barber, 34 F.3d at 1278. The jury could have assigned millions of dollars in damages to a claim that should not have been submitted in the first instance because of the statute of limitations. Had the verdict form included a damage question for each of the three statutory claims, it would have been possible to deduct from the total damage figure the amount awarded for the Section 7 claim. See Mueller v. Hubbard Milling Co., 573 F.2d 1029, 1038 n. 13 (8th Cir.), cert. denied, 439 U.S. 865, 99 S.Ct. 189, 58 L.Ed.2d 174 (1978) (special verdicts especially suited to multiple theories of liability).

*12 Because there is no way to know what damages the jury assigned to the Section 7 claims based on the verdict form that was used, Brunswick would be entitled at the very least to a new damages trial on the boat builders' Sherman Act claims.

IV.

Brunswick argues that another trial on the boat builders' Sherman Act claims is not required because it is entitled to judgment as a matter of law on those claims and the district court erred in not granting its motion for judgment. Brunswick contends that its discount programs and acquisitions represented pro competitive business conduct that did not unreasonably restrain trade or monopolize the market. The boat builders therefore did not suffer any antitrust injury, and they have not shown causation or damages. The boat builders respond that Brunswick's discount programs amounted to de facto exclusive dealing and its acquisitions enabled it to foreclose a substantial share of the stern drive engine market and to charge supracompetitive high prices for its engines.

[14] The boat builders' antitrust allegations claim damages based on the combined effect of Brunswick's market behavior over some ten years. Under federal law treble damages are available to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws ...." 15 U.S.C. § 15 (1994). In order

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to prevail plaintiffs must prove for each claim " 'an antitrust violation, the fact of damage or injury, a causal relationship between the violation and the injury, and the amount of damages.' " Amerinet, Inc., 972 F.2d at 1490 (quoting Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n, 666 F.2d 1130, 1146 (8th Cir.1981), cert. denied, 457 U.S. 1111, 102 S.Ct. 2915, 73 L.Ed.2d 1321 (1982)); see also Green v. Associated Milk Producers, Inc., 692 F.2d 1153, 1157 (8th Cir.1982). Antitrust injury, causation, and damages all are necessary parts of the proof because "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 n. 14, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972).

Because the boat builders presented the same evidence for their Section 1 and 2 claims, relying primarily on Dr. Hall to present the key evidence to support their theories of liability and causation, we examine Dr. Hall's presentation first and then turn to the separate antitrust claims.

A.

Brunswick argues that Dr. Hall's expert opinion should have been excluded because it was contrary to undisputed record evidence and because it did not separate lawful from unlawful conduct. The district court recognized that

> the task Dr. Hall faced in analyzing this case was an enormous one. Notwithstanding the complex nature of the conduct at issue, Dr. Hall was required to construct a hypothetical market, a "but for" market, free of the restraints and conduct alleged to be anticompetitive. The difficulty of such a task has long been recognized by courts in antitrust cases ....

*13 Concord Boat Corp. v. Brunswick Corp., 21 F.Supp.2d 923, 927 (E.D.Ark.1998). Despite the inherent difficulty of the task, counsel for the boat builders assured the district court before trial that Dr. Hall's model would reflect the reality of the market and would segregate any lawful acts and unrelated market events that might have contributed to Brunswick's market share from any anticompetitive conduct in order to enable the jury to assign damages only for illegal actions taken by Brunswick.

[15] Counsel's assurances did not eliminate the need for a thorough analysis of the expert's economic model and his proffered opinion. Under Daubert the district court is to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Daubert, 509 U.S. at 592-93, 113 S.Ct. 2786. Among the factors to consider is whether the " 'expert testimony proffered in the case is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.' " Id. at 591, 113 S.Ct. 2786 (quoting United States v. Downing, 753 F.2d 1224, 1242 (3d Cir.1985)). The Court referred to this requirement as "fit," meaning that the expert testimony must not only be based on reliable science but must also "fit" the particular facts of the case. See id.

In recent years the Supreme Court has put renewed emphasis on the importance of the "fit" of an expert's opinion to the data or facts in the case:

> [C]onclusions and methodology are not entirely distinct from one another.... [N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytic gap between the data and the opinion proffered.

General Elec. Co. v. Joiner, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); see also Jaurequi v. Carter Mfg. Co., 173 F.3d 1076, 1082 n. 3 (8th Cir.1999). A court must focus on the "reasonableness of using such an approach, along with [the expert's] particular method of analyzing the data thereby obtained, to draw a conclusion regarding the particular matter to which the expert testimony was directly relevant." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 154, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (emphasis in original).

[16][17] The district court commented that because Brunswick had not challenged the Cournot model as a scientific theory, its "criticisms are reduced to complaints about how Dr. Hall applied the Cournot model to the facts of this case." Concord Boat Corp., 21 F.Supp.2d at 934. If a party believes that an expert opinion has not considered all of the relevant facts, an objection to its admission is appropriate. See Kumho Tire Co., 526 U.S. at 154, 119 S.Ct. 1167; Joiner, 522 U.S. at 146, 118 S.Ct.

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512. Even a theory that might meet certain Daubert factors, such as peer review and publication, testing, known or potential error rate, and general acceptance, [FN11] should not be admitted if it does not apply to the specific facts of the case. See Kumho Tire Co., 526 U.S. at 154, 119 S.Ct. 1167; Joiner, 522 U.S. at 146, 118 S.Ct. 512.

*14 [18] Not all relevant circumstances were incorporated into the expert's method of analysis related to antitrust liability. Dr. Hall's opinion that Brunswick's discount programs imposed a tax on boat builders who chose to purchase engines from other manufacturers is not supported by the evidence that some boat builders chose to purchase 100% of their engines from Brunswick when they only needed to purchase 80% to qualify for the maximum discount. [FN12] If Brunswick's market share had enabled it to charge supracompetitive high prices for its engines, presumably none of the boat builders would have chosen to purchase more than the minimum percentage required to receive the discount. There was other evidence that the boat builders were not unable to forgo Brunswick's discounts. For example, the boat builders wielded sufficient power over Brunswick to force it to scuttle its 1994 "Industry Growth Program," which would have raised the market share requirement to 95%, and their reaction led to a reduction in market share levels for the 1995 to 1997 model year program.

Dr. Hall used the Cournot model to construct a hypothetical market which was not grounded in the economic reality of the stern drive engine market, for it ignored inconvenient evidence. The basis for his model was a theoretical situation in which some other manufacturer's engine would be viewed as equal in quality to Brunswick's. See Tr. at 1351. In this hypothetical market, Dr. Hall assessed an overcharge on each engine sold at any point where Brunswick possessed over the 50% market share he deemed permissible. The overcharge was described as the difference between the actual price paid by the boat builders and the price that would theoretically have existed in a more competitive market. This approach was not affected by the actual price at which Brunswick's engines were sold since the overcharge percentage was applied any time its market share surpassed 50%. As Dr. Hall testified but his opinion did not reflect, Brunswick had achieved a 75% share in the mid 1980s, before it started the market share discounts and before it acquired Bayliner and Sea Ray. See Tr. at 1392.

The model also failed to account for market events that both sides agreed were not related to any anticompetitive conduct, such as the recall of OMC's Cobra engine and the problems associated with the Volvo/OMC merger. Dr. Hall admitted on cross examination that such facts could have been incorporated into his model but that he had not done so:

> I did not numerically attribute--in other words, it wasn't some specific adjustment that you'll see in my computer spread sheet saying, "Here's what I did because of OMC." And that's because of the framework that I was working in. Remember, I was stepping back and saying, "What's a reasonable benchmark for what a freer market would have been?" .... Within that framework, there isn't a slot ... [to get] down into the year by year details.
>
> *15 ... What I want to do is stand back and say what averaged over the years, with, of course, ups and downs.

Tr. at 1417-18. Dr. Hall testified about OMC's recall of its Cobra engine and admitted that the "decline in OMC's market share and the corresponding increase during this time period of Brunswick's market share is very much related to the switch-over in engines previously supplied by OMC ...." Tr. at 1249. The OMC/Volvo joint venture alone increased Brunswick's market share by as much as 10%. See Def.'s Ex. 1207 (letter dated May 21, 1993 from David Ball to IBBI members: Brunswick "picked up over 10 unearned market share points this past year due to the chaos created by the Volvo/OMC joint venture announcement"); Tr. at 4954 (testimony of David Ball, President of IBBI). There was also evidence that the boat builders did not hesitate to switch to OMC and Volvo when they offered superior discounts. Cf. SMS Sys. Maintenance Servs., Inc. v. Digital Equip. Corp., 188 F.3d 11, 19-20 (1st Cir.1999), cert. denied, --- U.S. ----, 120 S.Ct. 1241, --- L.Ed.2d ---- (1999) (No. 99-995) (actual behavior of customers more important than "self-serving testimony" of plaintiffs).

Dr. Hall's expert opinion should not have been admitted because it did not incorporate all aspects of the economic reality of the stern drive engine market and because it did not separate lawful from unlawful conduct. Because of the deficiencies in the foundation of the opinion, the expert's resulting conclusions were "mere speculation." Virgin

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Atlantic Airways Ltd. v. British Airways PLC, 69 F.Supp.2d 571, 580 (S.D.N.Y.1999) (summary judgment appropriate on Section 1 and 2 claims because "an expert's opinion is not a substitute for a plaintiff's obligation to provide evidence of facts that support the applicability of the expert's opinion to the case"). Expert testimony that is speculative is not competent proof and contributes "nothing to a 'legally sufficient evidentiary basis.' " Weisgram v. Marley Co., --- U.S. ----, 120 S.Ct. 1011, 1015, 1020, --- L.Ed.2d ----, (2000) (citing Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993)). "Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them." Brooke Group Ltd., 509 U.S. at 242, 113 S.Ct. 2578; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 n. 19, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) ("[E]xpert opinion evidence ... has little probative value in comparison with the economic factors ....").

[19][20] An expert opinion cannot sustain a jury's verdict when it "is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable ...." Brooke Group Ltd., 509 U.S. at 242, 113 S.Ct. 2578; see also Wright v. Willamette Indus., Inc., 91 F.3d 1105, 1108 (8th Cir.1996) (motion for judgment should have been granted because the expert opinion on causation was speculative). An error in admission of evidence is reversible if the ruling affected a substantial right of a party. See Fed. R. Ev. 103(a); see also White v. Honeywell, Inc., 141 F.3d 1270, 1275 (8th Cir.1998); cf. Fed.R.Civ.P. 61. Here Dr. Hall's expert opinion was the basis of the boat builders' damage case, and the jury clearly relied on his opinion in reaching its verdict because the damages it awarded to the individual boat builders were identical to the detailed figures Dr. Hall had calculated. Compare Pls.' Ex. 2556, and Tr. at 2608-46, with Appendix to this opinion. It cannot be said that the verdict would have been the same without the expert testimony, and its admission affected Brunswick's substantial rights. Brunswick's motion for judgment should have therefore been granted. See Weisgram, --- U.S. at ----, 120 S.Ct. at 1015.

B.

***16** [21] Brunswick argues that it is entitled to judgment as a matter of law on the boat builders' Sherman Act claims because of the improper expert testimony and because the other evidence presented by the boat builders was insufficient to demonstrate antitrust injury, causation, and damage. The boat builders argue that there is more than sufficient evidence in the trial record of Brunswick's anticompetitive conduct to support the jury's finding of liability and damages. Antitrust plaintiffs must prove an antitrust violation by a preponderance of the evidence. Cf. Herman & MacLean v. Huddleston, 459 U.S. 375, 390, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983). After a thorough examination of the record, we find that the boat builders failed to carry their burden of proof and Brunswick's motion for judgment should have been granted for this reason.

1.

[22] Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1 (1994). To prove a Section 1 violation, a plaintiff must show an agreement in the form of a contract, combination, or conspiracy that imposes an unreasonable restraint on trade. See Willman v. Heartland Hosp. E., 34 F.3d 605, 610 (8th Cir.1994), cert. denied, 514 U.S. 1018, 115 S.Ct. 1361, 131 L.Ed.2d 218 (1995). The unreasonableness of a restraint is determined using either a per se standard or a standard that examines all of the circumstances, the so-called rule of reason test. See Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). Under the per se standard, conduct that is "manifestly anticompetitive" or "would always or almost always tend to restrict competition," id. (internal quotations and citation omitted), is conclusively presumed to restrain competition unreasonably " 'without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use.' " Rossi v. Standard Roofing, Inc., 156 F.3d 452, 461 (3d Cir.1998) (quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)). Practices that have been held to be illegal per se include price fixing, division of markets, group boycotts, and tying arrangements. See Arizona v. Maricopa County Med. Soc., 457 U.S. 332, 344 n. 15, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 558 (8th Cir.1998).

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[23] Because the boat builders have not alleged that Brunswick engaged in activity that would trigger a per se analysis, we apply the rule of reason analysis that focuses on the "particular facts disclosed by the record," Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 467, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992) (internal quotations and citation omitted), and "weigh[ ] all of the circumstances ... in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition," Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

The boat builders' Section 1 theory is that Brunswick violated the law by means of its agreements or contracts. They argue that Brunswick's market share discount programs created an unreasonable restraint of trade in violation of Section 1. See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961); Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). It is undisputed that the market share discounts were not exclusive contracts. At most the programs were de facto exclusive dealing arrangements. Dr. Hall testified at trial that the discount programs were "voluntary contracts. Nobody forced the boatmakers individually to accept these. They accepted these contracts because they individually got a deal from it. They got their discounts if they bought a lot of Brunswick engines." Tr. at 1173-74.

*17 [24][25] Section 1 claims that allege only de facto exclusive dealing may be viable. See Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1301-02 (9th Cir.), cert. denied, 459 U.S. 1009, 103 S.Ct. 364, 74 L.Ed.2d 400 (1982). The principle criteria used to evaluate the reasonableness of a contractual arrangement include the extent to which competition has been foreclosed in a substantial share of the relevant market, the duration of any exclusive arrangement, and the height of entry barriers. See Tampa Elec. Co., 365 U.S. at 327, 81 S.Ct. 623; Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1233-35 (8th Cir.1987), cert. denied, 484 U.S. 1026, 108 S.Ct. 751, 98 L.Ed.2d 763 (1988); see also Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984) (O'Connor, J., concurring) (reasonableness of the restraint on trade in exclusive dealing cases depends upon whether a "significant fraction of buyers or sellers are frozen out of a market").

[26] The boat builders failed to produce sufficient evidence to demonstrate that Brunswick had foreclosed a substantial share of the stern drive engine market through anticompetitive conduct. They also did not demonstrate that Brunswick's discount program was in any way exclusive. The programs did not require the boat builders to commit to Brunswick for any specified period of time. See Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir.1984) (contracts terminable in less than a year presumptively lawful). They were free to walk away from the discounts at any time, and they in fact switched to OMC engines at various points when that manufacturer offered superior discounts. One of the boat builders' witnesses testified, for example, that he had switched from 80% Brunswick engines to 70-80% OMC engines between 1988 and 1991 because OMC was offering better prices. See Tr. at 327. Another witness testified in his deposition that his boat building employer had switched from 90% Brunswick to 80% OMC in 1993 because of OMC's favorable pricing. See Def.'s Ex. 3466; cf. SMS Sys. Maintenance Servs., Inc., 188 F.3d at 19-20 (rejecting Sherman Act Section 2 monopolization claim that defendant used generous warranty contracts to lock in customers where the customers' actual behavior indicated they were willing and able to switch to other suppliers).

The boat builders also did not show that significant barriers to entry existed in the stern drive engine market. If entry barriers to new firms are not significant, it may be difficult for even a monopoly company to control prices through some type of exclusive dealing arrangement because a new firm or firms easily can enter the market to challenge it. Cf. Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 597-98 (8th Cir.1987), cert. denied, 484 U.S. 1010, 108 S.Ct. 707, 98 L.Ed.2d 658 (1988) (predatory price claim rejected where there was no evidence of a "drastically declining price structure" or of increasing concentration in the market (internal quotations and citation omitted)). If there are significant entry barriers in the market, a potential competitor would have difficulty entering in order to challenge a firm that is charging supracompetitive high prices. See id. A significant barrier to entry may exist when large amounts of capital would be required. See Mississippi River Corp. v. F.T.C., 454 F.2d 1083,

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1092 (8th Cir.1972). The boat builders presented scant evidence that firms have difficulty entering the stern drive engine manufacturing market. They suggest that engine manufacturing is a capital intensive business, but Dr. Hall testified that various companies are capable of assembling stern drive engines and of overcoming whatever entry barriers might exist. He noted that Toyota had entered the market recently and was on its way to competing with established manufacturers like Brunswick and OMC/Volvo. Brunswick's discounts, because they were significantly above cost, left ample room for new competitors such as Toyota to enter the engine manufacturing market and to lure customers away by offering superior discounts.

*18 In sum, the boat builders failed to establish Section 1 violations or a sufficient causal connection between the alleged violations and their injuries. In order to make out their case they had to produce evidence to show that Brunswick's market share discount programs were an unreasonable contractual arrangement, based on the amount of market foreclosure, exclusivity, and the erection of entry barriers. See Tampa Elec. Co., 365 U.S. at 325-29, 81 S.Ct. 623. The boat builders have not shown that a reasonable jury could have found that Brunswick's programs, which were not exclusionary, caused harm in the first instance, or that they were a "material cause" of any harm allegedly suffered. National Ass'n of Review Appraisers & Mortgage Underwriters, Inc. v. Appraisal Found., 64 F.3d 1130, 1135 (8th Cir.1995), cert. denied, 517 U.S. 1189, 116 S.Ct. 1676, 134 L.Ed.2d 779 (1996) (summary judgment affirmed where defendant's allegedly anticompetitive conduct was not a material cause of plaintiff's injury); see also Amerinet, 972 F.2d at 1494 (summary judgment affirmed where plaintiff failed to provide sufficient evidence of antitrust injury, causation, and damages). The boat builders also failed to account for "numerous intervening economic and market factors which ... may have been the actual cause of the plaintiffs' injuries," such as market share gains related to competitors' mistakes. Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391, 402 (7th Cir.1993), cert. denied, 510 U.S. 1111, 114 S.Ct. 1054, 127 L.Ed.2d 375 (1994) (summary judgment affirmed where "as a matter of law, plaintiffs have failed to show with a fair degree of certainty that the antitrust violation was a material and substantial factor causing their alleged injuries").

2.

[27][28] Section 2 of the Sherman Act prohibits "monopoliz[ing], or attempt[ing] to monopolize ... any part of the trade or commerce among the several States ...." 15 U.S.C. § 2 (1994). To establish a Section 2 violation, plaintiffs must show that 1) the defendant possessed monopoly power in the relevant market and 2) the defendant willfully acquired or maintained this monopoly power by anticompetitive conduct as opposed to gaining that power as a result "of a superior product, business acumen, or historical accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966); see also Morgan v. Ponder, 892 F.2d 1355, 1358 (8th Cir.1989). Monopoly power is defined as "the power to control prices or exclude competition." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956).

[29] The boat builders argue that the discount programs and acquisitions were part of a deliberate plan to exclude competitors from the stern drive engine market, and that this exclusion enabled Brunswick to charge supracompetitive high prices for its engines. As with the Section 1 claim, the boat builders point to evidence they say shows that when Brunswick was threatened in the mid-1980s with OMC's new Cobra engine and with increasing competition from other engine manufacturers, it offered market share discounts and acquired Bayliner and Sea Ray in an effort to avoid competition on the merits. They also allege that Brunswick attempted to erect and maintain barriers to entry and to place its customers in "golden handcuffs," such that boat builders and dealers had no choice but to purchase engines from it.

*19 [30] The Supreme Court "has urged great caution and a skeptical eye when dealing with unfair pricing claims." Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 343 (8th Cir.1995). This is because "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. Hence, they cannot give rise to antitrust injury." Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) (rejecting Section 1 claim that a maximum price fixing conspiracy caused antitrust injury when the prices were fixed above a

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predatory level). In the absence of predatory prices, [FN13] any losses caused by pricing "cannot be said to stem from an anticompetitive aspect of the defendant's conduct. It is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." Id. at 340-41, 110 S.Ct. 1884 (emphasis in original) (internal quotations and citations omitted).

[31] Because cutting prices in order to increase business often is the very essence of competition, which antitrust laws were designed to encourage, it "is beyond the practical ability of a judicial tribunal to control [above cost discounting] without courting intolerable risks of chilling legitimate price cutting." Brooke Group Ltd., 509 U.S. at 223, 113 S.Ct. 2578 (citation omitted); see also Matsushita Elec. Indus. Co., 475 U.S. at 594, 106 S.Ct. 1348 (emphasizing the pro-competitive effect of above cost discounting); Morgan, 892 F.2d at 1359-63; Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230-36 (1st Cir.1983). To hold otherwise "would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result ...." Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 116, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986). If a firm has discounted prices to a level that remains above the firm's average variable cost, "the plaintiff must overcome a strong presumption of legality by showing other factors indicating that the price charged is anticompetitive." Morgan, 892 F.2d at 1360. This is because a firm's ability to offer above cost discounts is attributable to "the lower cost structure of the alleged predator, and so represents competition on the merits ...." Brooke Group Ltd., 509 U.S. at 223, 113 S.Ct. 2578.

The decisions of the Supreme Court in Brooke Group and Matsushita illustrate the general rule that above cost discounting is not anticompetitive. In Brooke Group Ltd. the trial court had granted the defendants' motion for judgment overturning a $49.6 million verdict after a 115 day trial with nearly 3000 exhibits. See Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 748 F.Supp. 344, 348 (M.D.N.C.1990), aff'd, 964 F.2d 335, 336 (4th Cir.1992), aff'd sub nom., Brooke Group Ltd., 509 U.S. at 219, 113 S.Ct. 2578. The plaintiff had failed to demonstrate that the defendants had caused injury to competition. See Brooke Group Ltd., 509 U.S. at 243, 113 S.Ct. 2578. The Court pointed out that

> *20 [a]lthough [the plaintiff's] theory of liability, as an abstract matter, is within the reach of the statute .... [The plaintiff] was not entitled to submit its case to the jury.... The record in this case demonstrates that the anticompetitive scheme [the plaintiff] alleged, when judged against the realities of the market, does not provide an adequate basis for a finding of liability.

Id. at 230, 113 S.Ct. 2578 (citations omitted). In Matsushita the Court remanded a predatory pricing conspiracy case for entry of summary judgment for the defendants unless

> there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that [the defendants] conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must "ten[d] to exclude the possibility" that [the defendants] underpriced [the plaintiffs] to compete for business rather than to implement an economically senseless conspiracy.

Matsushita, 475 U.S. at 597-98, 106 S.Ct. 1348. In both of these cases the Supreme Court put the focus on the actual facts or realities of the marketplace rather than on hypotheticals.

No one argues in this case that Brunswick's discounts drove the engine price below cost, and Brunswick contends that its discounts were therefore per se lawful. The district court questioned Brunswick's per se legality theory, since the boat builders' claim was that Brunswick's conduct as a whole, including the discounts and acquisitions, enabled it to "charge[ ] anticompetitive high prices for its engines." Concord Boat Corp., 21 F.Supp.2d at 929 (emphasis in original). The court examined several cases that had "rejected the argument that any pricing practice that leads to above costs prices is per se lawful under the antitrust laws." Id. (emphasis in original); see LePage's Inc. v. 3M, No. Civ.A 97-3983, 1997 WL 734005 (E.D.Pa. Nov.14, 1997) (bundling discounts on several product purchased together); SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3d Cir.), cert. denied, 439 U.S. 838, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978) (pricing scheme linking monopolistic product with another competitive product violated Section 2); Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc., 920 F.Supp. 455, 467 (S.D.N.Y.1996) (refusing to dismiss Section 2 bundling claims even though defendant not accused of pricing below cost because "average variable cost is the controlling standard in this Circuit [only for] single product

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cases"). The cases examined by the district court all involve bundling or tying, however, which "cannot exist unless two separate product markets have been linked." Jefferson Parish Hosp. Dist. No. 2, 466 U.S. at 21, 104 S.Ct. 1551. Because only one product, stern drive engines, is at issue here and there are no allegations of tying or bundling with another product, we do not find these cases persuasive.

[32] The boat builders also have not shown that Brunswick's superior market share was achieved or maintained "by means other than the competition on the merits ...." Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 522 (5th Cir.1999) (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985)); see also Grinnell Corp., 384 U.S. at 570-71, 86 S.Ct. 1698. A Section 2 defendant's proffered business justification is the most important factor in determining whether its challenged conduct is not competition on the merits. See Stearns Airport Equip. Co., 170 F.3d at 522; see also Grinnell Corp., 384 U.S. at 570-71, 86 S.Ct. 1698. Section 2 claims cannot succeed if a defendant's dominant market share resulted from "a superior product, business acumen, or historical accident." Grinnell Corp., 384 U.S. at 571, 86 S.Ct. 1698. On the other hand, if the conduct "has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported." Stearns Airport Equip. Co., 170 F.3d at 522.

*21 Brunswick's business justification in this case is that it was trying to sell its product. Cf. id. at 524. Cutting prices is the "very essence of competition." Matsushita Elec. Indus. Co., 475 U.S. at 594, 106 S.Ct. 1348. Brunswick's competitors also cut prices in order to attract additional business, confirming that such a practice was a normal competitive tool within the stern drive manufacturing industry. See id.; see also Trace X Chem., Inc. v. Canadian Indus., Ltd., 738 F.2d 261, 266 (8th Cir.1984), cert. denied, 469 U.S. 1160, 105 S.Ct. 911, 83 L.Ed.2d 925 (1985) ("Acts which are ordinary business practices typical of those used in a competitive market do not constitute anti-competitive conduct violative of Section 2."). In addition, Brunswick's discount programs were not exclusive dealing contracts and its customers were not required either to purchase 100% from Brunswick or to refrain from purchasing from competitors in order to receive the discount (and in fact could purchase up to 40% of requirements from other sellers without forgoing the discount). See Western Parcel Express v. United Parcel Serv. of Am., Inc., 190 F.3d 974, 976 (9th Cir.1999) (affirming summary judgment for defendant in Section 2 predatory pricing and exclusive dealing case where the challenged volume discount contracts were terminable "for any reason with very little notice" and did not foreclose customers from entering into contracts with the defendant's competitors). Boat builders and dealers were free to walk away from Brunswick's discounts at any time, see id., and the evidence showed that they did so when Brunswick's competitors offered better discounts, thus discrediting the boat builders' theory that the discounts created "golden handcuffs" and entry barriers for other engine manufacturers.

C.

Giving the boat builders the benefit to which they are entitled of all legitimate inferences, they did not offer sufficient evidence to enable a jury to determine that Brunswick's market share discount programs and acquisitions were anticompetitive. Even considering the erroneously admitted testimony of Dr. Hall, the boat builders failed to offer a "legally sufficient evidentiary basis for a reasonable jury to find for [them]." Weisgram, --- U.S. at ----, 120 S.Ct. at 1020 (internal quotations and citation omitted). They did not establish antitrust injury or causation with respect to either Sherman Act claim. The boat builders had a "full and fair opportunity to present [their] case," and the record evidence was insufficient to justify the verdict. Id. 120 S.Ct. at 1015. Brunswick is therefore entitled to judgment as a matter of law on the Sherman Act claims.

V.

After a careful review of the voluminous record in this case, we conclude that the judgment for the boat builders cannot be upheld and that Brunswick is entitled to entry of judgment in its favor. Since the boat builders did not file their case until more than four years after the accrual of their cause of action under the Clayton Act and no exception to the running of the limitations period applies, the Section 7 claims should have been dismissed rather than submitted to the jury. We also conclude that the boat builders did not make out submissible Sherman Act

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claims. We therefore reverse and vacate the judgment in favor of the boat builders, including the award of fees and costs, and remand for entry of judgment in favor of Brunswick. [FN14]

APPENDIX

*22 The relevant portion of the verdict form with the jury's answers follows:

PART I Plaintiffs' Antitrust Claims

1. Do you find from a preponderance of the evidence that Plaintiffs have proved a relevant product market?
YES / NO____

2. If you answered "NO" to Question 1 then go to PART II. If you answered "YES" to Question 1, place an "X" next to the following engines that you find by a preponderance of the evidence to be in the relevant product market:

/ stern drive engines

____ outboard engines
/ inboard engines

____ jet engines

3. Do you find from a preponderance of the evidence that Brunswick monopolized that market in violation of Section 2 of the Sherman Act?
YES / NO____

4. Do you find from a preponderance of the evidence that Brunswick engaged in an unreasonable restraint of trade in that market in violation of Section 1 of the Sherman Act?
YES / NO____

5. Do you find from a preponderance of the evidence Brunswick engaged in acquisitions which had the effect of substantially lessening competition in that market, or tending to create a monopoly in that market, in violation of Section 7 of the Clayton Act?
YES / NO____

6. If you answered YES to either question 3, or question 4, or question 5 (or answered yes to more than one of those questions) what, if any, damages did the Plaintiffs suffer (or will suffer) as a result of Brunswick's antitrust violation or violations in that market? Use Chart 1 to fill in the damages, if any, suffered (or to be suffered) by each of the Plaintiffs during each of the following time periods:

a. From December 7, 1991 through the date of verdict; and
b. After the date of verdict.

CHART 1

Plaintiff	For Time Period to December 7, 1991	For Time Period December 7, 1991 Through the Date of Verdict	For Time Period After the Date of Verdict

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Albemarle Boats, Inc.	$0	$83,282	$0
Armada Manufacturing	$0	$2,646,611	$0
Caravelle Boats, Inc.	$0	$4,887,179	$0
Campion Marine, Inc.	$0	$1,196,286	$0
Century Craft Industries (Vanguard Industries)	$0	$39,168 Vanguard $19,348 Century	$0
Concord Boat Corp.	$0	$106,459	$0
F R P Industries	$0	$468,163	$0
G.W. Invader	$0	$460,597	$0
Galaxie Boatworks	$0	$395,362	$0
Harris Kayot	$0	$1,644,706	$0
KCS International	$0	$3,389,006	$0
Malibu Boats	$0	$5,036,468	$0
Mariah Boats, Inc.	$0	$16,626,171	$0
Mirage Boats, Inc.	$0	$824,028	$0
Ohio Marine Dist. (Play Time)	$0	$6,428	$0
Powerquest Boats, Inc.	$0	$2,618,335	$0
Sea Arrow Marine, Inc.	$0	$15,065	$0
Silverton Mar. Corp.	$0	$1,566,672	$0
Thompson Boat Co.	$0	$2,324,365	$0
Weeres Industries	$0	$18,062	$0

7. Do you find by a preponderance of the evidence that one or more Plaintiffs are entitled to recover damages for the time period prior to December 7, 1991?
YES____ NO/

....

PART II Brunswick's Section 1 Counterclaim

10. Do you find by a preponderance of the evidence that any of the

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Plaintiffs engaged in an unreasonable restraint of trade in violation of Section 1 of the Sherman Act?
YES____ NO/

FN1. The Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota, sitting by designation.

FN2. The plaintiffs include twenty four corporations that manufacture and sell recreational boats; they are located in various states, including Arkansas, California, Florida, Illinois, Indiana, Kentucky, Texas, Michigan, Minnesota, New Jersey, North Carolina, Ohio, Washington, Wisconsin, and Canada. An additional party plaintiff is an Illinois buying cooperative composed of recreational boat manufacturers.

FN3. Four financially troubled boatbuilders--Baja, Porter, Pro-Line, and Fountain--entered into long term contracts with Brunswick in exchange for financial assistance. The contracts were for three to five years and, in the case of Baja and Porter, they contained some provisions extending beyond five years. The Baja and Fountain contracts required those companies to purchase 100% of their engines from Brunswick. Porter was required to purchase 99%, and Pro-Line's contract contained a 50% market share threshold. The boat builders' expert testified that these companies made up about 5% of the stern drive engine market. See Tr. at 1179.

FN4. Brunswick also made several other acquisitions that were not part of the main focus of the boat builders' Clayton Act claims. In 1987 it made a small asset purchase from BMW Marine Diesel, a European diesel engine manufacturer; Brunswick hoped this would enable it to compete with Volvo in Europe. See Tr. at 4552. In 1990 it acquired Kiekhaefer Aeromarine, which annually produced about sixty high performance stern drive engines that were priced at more than $50,000. Neither of these acquisitions involved products that competed in the relevant market, nor did they occur during the limitations period. See discussion Part III.A. The boat builders characterized both companies as "small players" in their closing argument at trial. See Tr. at 6632. In 1995 Brunswick bought boat builder Baja Cruisers which had 2.8% of the stern drive engine market; the boat builders' expert testified that Baja was not really a significant player in the market. See id. at 1178, 1189.

FN5. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

FN6. A copy of the verdict form with the jury's answers is attached to this opinion. See Appendix.

FN7. December 7, 1991 was four years before the day on which this action was filed, December 7, 1995.

FN8. In denying equitable relief to the boat builders, the district court indicated that they had asked for an "order that Brunswick divest itself within twelve months of its U.S. Marine [Bayliner] and Sea Ray boat manufacturing divisions ...." Order of Oct. 16, 1998 at 7. The boat builders apparently had not specifically requested divestiture of Baja, which was being operated as part of the Sea Ray division. The court held that "[i]n light of the record as a whole, the balance of equities precludes any award of divestiture, including the divestiture by Brunswick of Baja ...." Id. at 13 (emphasis in original).

FN9. The National Association of Manufacturers (NAM) has submitted an amicus curiae brief supporting Brunswick's position that this type of discount program results in lower prices for consumers. NAM's 14,000 member companies and subsidiaries, which include 10,000 small manufacturers, employ approximately 85% of all manufacturing workers in the United States and produce over 80% of the nation's manufactured goods. See Amicus Curiae Br. for the National Association of Manufacturers at 1. It states that this case has significant implications for potential antitrust liability for its members should they choose to offer above cost, non exclusive discounts to consumers. See id. at 2.

FN10. See Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68 (1994).

FN11. It is not clear how often the Cournot model has been employed in antitrust cases; a Westlaw search on February 3, 2000 did not find any other federal antitrust case discussing its application.

FN12. The owner of Mariah Boats, for example, which was found by the jury to have suffered $16 million of the damages awarded to the boat builders, testified that when Brunswick lowered its market share discount level to 70% in 1994, "it was of no significance [to Mariah] because we were 90-plus anyway." Tr. at 2129.

FN13. Predatory pricing occurs when " 'a single firm, having a dominant share of the relevant market, cuts its prices in order to force competitors out of the market, or perhaps to deter potential entrants from coming in.' " Morgan, 892 F.2d at 1358 (quoting Matsushita Elec. Indus. Co., 475

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> U.S. at 584 n. 8, 106 S.Ct. 1348). Determining whether price cutting is

predatory is not a simple inquiry:

> The difficulty, of course, is distinguishing highly competitive pricing from predatory pricing. A firm that cuts its prices or substantially reduces its profit margin is not necessarily engaging in predatory pricing. It may simply be responding to new competition, or to a downturn in market demand. Indeed, there is a real danger in mislabeling such

FN14. This resolution moots Brunswick's motion for a new trial, as well as the cross appeal of the boat builders from the denial of their motion for equitable relief, and we need not address these issues further.

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practices as predatory, because consumers generally benefit from the low prices resulting from aggressive price competition.

Morgan, 892 F.2d at 1358-59 (citing Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 231 (1st Cir.1983)). There is no allegation that Brunswick engaged in predatory pricing.

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EXHIBIT B

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
OCT 16 1998
JAMES W MCCORMACK, CLERK
By: _____ DEP. CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

CONCORD BOAT CORPORATION, et al PLAINTIFFS

V. NO. LR-C-95-781

BRUNSWICK CORPORATION DEFENDANT

ORDER

Presently before the Court are Plaintiffs' Claims for Equitable Relief Related to Plaintiffs' First, Second and Sixth Claims for Relief. On September 8, 1998, Plaintiffs filed a memorandum in support of their claims for equitable relief along with proposed findings of fact and conclusions of law. Brunswick filed a memorandum in opposition to Plaintiffs' requests for equitable relief and a separate set of proposed findings of fact and conclusions of law on September 16, 1998. Plaintiffs filed a rebuttal submission on September 21, 1998.

On October 16, 1998, the Court granted Plaintiffs' motion to strike two affidavits submitted in support of Brunswick's response, as well as any references to those affidavits in the supporting materials. The Court also denied Brunswick's motion to update the record with an additional affidavit. The Court has not considered the affidavits in making the findings of fact and conclusions of law set forth herein.

After careful consideration of the parties' submissions, the relevant case law, and the record as a whole, the Court makes the following findings of fact and conclusions of law.

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FINDINGS OF FACT

1. Plaintiff Albemarle Boats Inc. is a North Carolina corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

2. Plaintiff Armada Manufacturing Company, Inc. is a Kentucky corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

3. Plaintiff Caravelle Boats, Inc. is a Georgia corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

4. Plaintiff Campion Marine, Inc. is a Canadian corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

5. Plaintiff Century Craft Industries, f/k/a Vanguard Industries, is a Canadian corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

6. Plaintiff Concord Boat Corporation is an Arkansas corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

7. Plaintiff F.R.P. Industries, d/b/a Baha Cruisers, is a Florida corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

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8. Plaintiff G.W. Invader is an Indiana corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

9. Plaintiff Galaxie Boat Works, Inc., is a Texas corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

10. Plaintiff Harris Kayot, Inc., is an Indiana corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

11. Plaintiff KCS International, Inc. is a Wisconsin corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

12. Plaintiff Malibu Boats West, Inc. is a California corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

13. Plaintiff Mariah Boats, Inc. is an Illinois corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

14. Plaintiff Mirage Manufacturing LLC is a Washington corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

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15. Plaintiff Play Time Mfg. by Ohio Marine Distributors, Inc. is an Ohio corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

16. Plaintiff Powerquest Boats, Inc. is a Michigan corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

17. Plaintiff Sea Arrow Marine, Inc. is a Texas corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

18. Plaintiff Silverton Marine Corporation is a New Jersey corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

19. Plaintiff Thompson Marine Products, Inc. is a Michigan corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines.

20. Plaintiff Weeres Industries Corporation is a Minnesota corporation, the business of which includes the manufacture and sale of recreational boats that are equipped with stern drive engines and/or inboard engines. The Plaintiffs identified in findings 1 through 20 will be referred to hereafter as the "boat manufacturer Plaintiffs."

21. Plaintiff Independents Boat Builders, Inc. ("IBBI") is an Illinois corporation, all of the members of which are manufacturers of recreational boats. IBBI negotiates agreements on behalf of its members with vendors of equipment and materials used in the manufacture of

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recreational boats, but does not itself buy such equipment or materials. All of the boat manufacturer Plaintiffs are members of IBBI.

22. Defendant Brunswick Corporation ("Brunswick") is a Delaware corporation, the business of which includes the manufacture and sale of recreational products, including recreational boats, engines for recreational boats and recreational boats equipped with engines.

23. A stern drive engine is one type of marine engine used in recreational boats. A stern drive engine includes an engine block within the hull of the boat, and a drive system which extends through the stern or transom of the boat.

24. An inboard engine is one type of marine engine used in recreational boats. An inboard engine is entirely enclosed within the hull of the boat, and drives a propeller shaft that passes through the hull.

25. An outboard engine is one type of marine engine used in recreational boats. An outboard engine, including engine, drive, and propeller, is attached to the stern transom of the boat, and is substantially external to the boat's hull.

26. A jet pump is one type of marine engine used in recreational boats. A jet pump propels a boat by taking water in through an intake and expelling the water through a nozzle at the rear of the boat.

27. Stern drive and inboard engines are the types of engines with respect to which Plaintiffs seek equitable relief on the claims previously tried to the jury.

28. This action was initially filed on December 7, 1995.

29. In connection with their antitrust claims, the boat manufacturer Plaintiffs sought damages based on the alleged amounts of overcharges they claimed to have paid on stern drive

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and inboard engines that they bought from Brunswick, beginning in calendar year 1986 and extending through calendar year 2000.

30. The parties agreed that the relevant geographic market consisted of the United States and Canada, so that engines in the relevant product market are ones sold or intended for sale in the United States or Canada.

31. The jury returned its verdict on June 19, 1998.

32. The jury found the relevant product market to include stern drive and inboard engines and not to include outboard or jet engines.

33. The jury found that Brunswick monopolized the relevant market in violation of Section 2 of the Sherman Act; engaged in an unreasonable restraint of trade in violation of Section 1 of the Sherman Act; and engaged in acquisitions which had the effect of substantially lessening competition in the relevant market, or tending to create a monopoly in that market, in violation of section 7 of the Clayton Act.

34. The jury awarded damages (before trebling) to the boat manufacturer Plaintiffs in the amount of $44,371,761 for the period from December 1991, to June 1998, and allocated those damages among those Plaintiffs as detailed in Chart 1 of the Verdict Form. The Court had instructed the jury that the Plaintiffs' antitrust claims were subject to a four-year statute of limitations. The jury awarded no damages to any plaintiff for the time period prior to December 7, 1991, and awarded no damages to any plaintiff for the time period after June 1998, through calendar year 2000.

35. On September 14, 1998 the Court entered a Judgment on the Jury's verdict trebling the damages awarded by the Jury to $133,115,283.

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36. Plaintiffs seek additional equitable relief for the violations by Brunswick of Section 2 of the Sherman Act, Section 1 of the Sherman Act, and Section 7 of the Clayton Act. Plaintiffs, as more fully set forth in their submission of September 15, 1998, ask the Court, sitting as a chancellor, to order that Brunswick divest itself within twelve months of its US Marine and Sea Ray boat manufacturing divisions (the assets of which are used to manufacture or sell boats powered by stern drive or inboard engines). Plaintiffs further ask the Court to enjoin market share related programs; policies designed to cause any buying group to break up; policies designed to create barriers to entry into the relevant market; joint ventures; long term contracts; Brunswick's acquisition of any interest in stern drive and/or inboard engine manufacturers; and Brunswick's acquisition of any interest in builders of stern drive and/or inboard boats.

37. In response to the prayer for additional equitable relief summarized in finding 36, Brunswick has denied that Plaintiffs are entitled to any equitable relief and has raised defenses including estoppel, laches and unclean hands.

38. Brunswick has at all relevant times manufactured and sold stern drive and inboard engines for use in recreational boats under the brand name MerCruiser.

39. Brunswick offers MerCruiser stern drive and inboard engines for sale to independent manufacturers of recreational boats, including the Plaintiffs, for incorporation in boats built by such manufacturers, and has done so at all relevant times.

40. In December 1986, Brunswick acquired Bayliner Marine Corporation, a manufacturer of recreational boats. Brunswick, through its US Marine Division, sells recreational boats under the Bayliner name and other brand names.

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41. The fact that Brunswick acquired Bayliner Marine Corporation in December, 1986, was public information at the time, and was generally known throughout the recreational boat manufacturing industry in North America. Trial Tr. at 1929.

42. In December 1986, Brunswick acquired Ray Industries, Inc., a manufacturer of recreational boats. Brunswick, through its Sea Ray division, sells recreational boats under the Sea Ray name and other brand names.

43. The fact that Brunswick acquired Ray Industries, Inc., in December 1986, was public information at the time, and was generally known throughout the recreational boat manufacturing industry in North America. Trial Tr. at 1929.

44. Since its acquisitions of Bayliner and Sea Ray in December 1986, Brunswick has generally used MerCruiser engines in boats manufactured by its US Marine and Sea Ray divisions that employed stern drive or inboard engines to the extent permitted by contractual commitments that existed at the time of the acquisitions. Since approximately 1989, a very large proportion of the stern drive and inboard engines used in the relevant market in boats built by Brunswick's US Marine and Sea Ray divisions have been MerCruiser engines.

45. Beginning no later than 1990, IBBI, which was established in 1989, expressed dissatisfaction with Brunswick's ownership of US Marine and Sea Ray and advanced the contention that boat manufacturers not affiliated with an engine manufacturer should not have to compete with boat manufacturing operations owned by engine manufacturers. D. Ball 8/4/97 dep. at 47 and J. Fulks 9/8/97 dep. at 100; DX 1010.

46. In 1995 Brunswick acquired Baja Boats, Inc. ("Baja") a manufacturer of recreational boats equipped with stern drive marine engines. Since the acquisition (as well as

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before, pursuant to a long-term supply agreement) Baja has used MerCruiser engines in the boats it built. Trial Tr. at 2934, 3989.

47. Baja is the only boat building operation bought by Brunswick after the 1986 Bayliner Marine Corporation and Ray Industries, Inc. acquisitions that Brunswick still owns or controls and that builds stern drive or inboard boats. Exhibit "C" to 8/28/97 affidavit of A. Romersa.

48. At various times Brunswick has offered programs to boat manufacturer customers which included discounts from the price of MerCruiser stern drive and inboard engines which were based on market share; i.e., on the percentage of a customer's total stern drive and inboard engine purchases that were MerCruiser engines during a particular period of time.

49. The term "model year" is widely used in the recreational marine industry, and refers to a business year that begins on or about July 1 of a given calendar year, and ends on or about June 30 of the succeeding calendar year. A model year bears the number of the calendar year in which it ends; e.g., model year 1998 began on or about July 1, 1997, and ended on or about June 30, 1998.

50. Beginning with model year 1987, Brunswick offered "market share" discounts to all boat manufacturer buyers of MerCruiser stern drive engines and inboard engines.

51. Beginning no later than 1990, IBBI, which was established in 1989, circulated documents to its membership complaining about Brunswick "market share" discount programs for boat manufacturers.

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52. For model year 1998, Brunswick ceased offering "market share"-based discounts in its programs for the sale of MerCruiser stern drive engines and inboard engines to boat manufacturers. PX 1516A.

53. Since the discontinuation referred to in finding 52, Brunswick has made no attempt to re-institute "market share" discounts in its programs for the sale of MerCruiser stern drive and inboard engines to boat manufacturers, and has no intent to do so. Affidavit of D. Sheller at ¶2; Trial Tr. at 3306.

54. Typically, manufacturers of recreational boats, including boat manufacturing operations run by defendant Brunswick and by Plaintiffs, sell their boats through dealers rather than directly to consumers.

55. During part or all of model year 1992, model year 1995 and model year 1996, Brunswick offered programs that included various "market share"-based rebates to dealers in stern drive and inboard boats, based on the ratio of the number of boats such a dealer sold equipped with MerCruiser stern drive and inboard engines to the total number of boats they sold which used engines of those types.

56. Brunswick has not offered "market share"-based rebate programs for MerCruiser stern drive and inboard engines to recreational boat dealers since the end of model year 1996. Trial Tr. at 1184, 3292, 3294.

57. Since the discontinuation referred to in finding 56, Brunswick has made no attempt to re-institute "market share"-based rebates in its programs for recreational boat dealers that use MerCruiser stern drive and inboard engines, and has no intent to do so. Affidavit of D. Sheller at ¶2.

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58. Brunswick is not a party to any Joint Venture, defined by Plaintiffs as "any agreement or arrangement, whether denominated a joint venture or otherwise, which involves any substantial integration of the manufacturing, marketing or sales efforts of Brunswick and any other seller or purchaser in the relevant market," which involves its stern drive or inboard engine businesses. Affidavit of D. Sheller at ¶4.

59. Beginning with model year 1998, the MerCruiser sales and marketing program no longer contained a long-term contract component. PX 1516A.

60. The multi-year supply agreements with Baja, Porter, Pro-Line and Fountain that Brunswick entered in 1991 or 1992 all have ended, and there are no similar supply agreements that fall within plaintiff's definition of "Long Term Engine Supply Contract" with other MerCruiser customers. Brunswick's outboard engine supply agreement with Tracker Marine allows Tracker to buy MerCruiser stern drive engines from Brunswick, but does not contractually require Tracker to do so. The vast majority of the marine engines that Tracker purchases are outboard engines. Affidavit of D. Sheller at ¶5.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1337.

2. Venue in this District is proper pursuant to 28 U.S.C. § 1391(b).

3. The relevant geographic market for purposes of this action consists of the United States and Canada, so that engines in the relevant product market are ones sold or intended for sale in the United States or Canada.

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4. In considering the equitable relief sought by the Plaintiffs, the Court is bound by the jury's finding that the relevant product market includes stern drive engines and inboard engines, but does not include outboard engines or jets.

5. In considering the equitable relief sought by the Plaintiffs, the Court is bound by the jury's finding that Brunswick engaged in a course of conduct violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 7 of the Clayton Act, 15 U.S.C. § 18.

6. The award of injunctive relief to a private antitrust plaintiff under Section 16 of the Clayton Act, 15 U.S.C.§ 26, requires more than a showing of a statutory violation on the part of the defendant. The plaintiff must satisfy all of the applicable standards that are applied generally when a court considers whether or not to award equitable relief.

7. Among the questions which the Court must consider in deciding whether or not to award a particular form of equitable relief are:

a. Whether in the absence of the equitable remedy sought, the plaintiff will suffer irreparable harm;

b. Whether the plaintiff that seeks equitable relief has an adequate remedy at law;

c. Whether the injury to the plaintiff outweighs the injury to the other party if the relief is granted, and whether the award of the relief is in the public interest;

d. Whether the relief sought lends itself to effective judicial administration;

e. Whether the relief sought is broader than necessary to achieve the desired goals of that relief; and

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f. Whether equitable defenses such as laches and unclean hands prevent the granting of the equitable relief the plaintiff seeks.

8. Plaintiffs claims for injunctive relief are not barred by the doctrine of unclean hands.

9. Divestiture is an extraordinary equitable remedy. Divestiture should not be awarded except in extreme circumstances.

10. The equitable principles of laches require Plaintiffs that seek the aid of equity to act promptly to enforce their claimed rights, and not rest on those rights. By deciding to award Plaintiffs no damages for the period more than four years before the filing of this lawsuit on December 7, 1995, the jury rejected Plaintiffs' claim of fraudulent concealment with respect to Brunswick's principal acquisitions of boat manufacturers, those of Ray Industries, Inc. and Bayliner Marine Corporation, in December 1986. In determining a period within which Plaintiffs should reasonably assert their claimed rights, equity will generally look to the statutory limitations period for an analogous action at law, which in this instance is four years. Brunswick has not engaged in conduct that would deny it the benefit of the equitable principles of laches. Plaintiffs' claim for the extraordinary relief of divestiture of the stern drive and inboard boat businesses of the Sea Ray and US Marine divisions is barred by application of the equitable doctrine of laches.

11. In light of the record as a whole, the balance of the equities precludes *any* award of divestiture, including the divestiture by Brunswick of Baja (now operated as part of Sea Ray division), which builds boats that use stern drive and/or inboard engines and which Brunswick acquired in 1995.

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12. For the reasons stated in conclusions 8 through 11, the Court will not order the divestiture sought by Plaintiffs.

13. Equity may only enter an injunction to prevent irreparable harm to the party that seeks it. As set forth in findings 52, 53, 56 and 57, Brunswick has discontinued market share-based discount programs, has made no attempt to re-institute such programs, and has no intent to do so. Plaintiffs have not shown that injunctive relief is required, because they have not shown that they will suffer irreparable harm.

14. The equitable principles of laches set forth in conclusion 10 apply to Plaintiffs' request for an injunction against market share discount programs for boat manufacturers, which were generally used by MerCruiser in model year 1987, nine years before the filing of this lawsuit.

15. For the reasons stated in conclusions 13 and 14, the Court will not enjoin market share-based programs.

16. An injunction must lend itself to effective judicial administration. Equity requires that injunctive relief not be broader than necessary to achieve the desired goals of that relief, and that it be sufficiently exact in its terms that the subject of the injunction can comply with reasonable certainty. The Plaintiffs' request for an injunction against any policy or program the purpose or intent of which is to cause any buying group to break up does not satisfy the standards of precision required of an injunction to be monitored and enforced in the future.

17. For the reasons stated in conclusion 16 the Court will not enjoin any policy or program the purpose or intent of which is to cause any buying group to break up.

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18. Plaintiffs' request for an injunction against any policy or program the purpose or intent of which is to create artificial barriers to entry or expansion of any rivals of Brunswick in the relevant market does not satisfy the standards of precision required of an injunction to be monitored and enforced in the future. For this reason the Court will not enjoin any policy or program the purpose or intent of which is to create artificial barriers to entry or expansion of any rivals of Brunswick in the relevant market.

19. Equity requires that injunctive relief not be broader than necessary to achieve the goals of that relief, and that it be carefully tailored to prevent competitive injury in the relevant market without reaching too broadly, to prevent or interfere with legitimate business activity that will or may benefit consumers. Plaintiffs' request for an injunction against any Joint Venture, as that term defined in Plaintiffs' submissions, is too broad to satisfy the foregoing standard, in that it does not permit accounting for the alleged anticompetitive impact, if any, of a particular joint venture, or the potential benefits of such a joint venture.

20. Joint ventures affecting Brunswick's position in the relevant product market were not among the claimed exclusionary acts on which Plaintiffs relied at trial, and there has not been any showing of irreparable harm from any joint venture that is required for an injunction to issue.

21. For the reasons identified in conclusions 19 and 20 the Court will not enjoin Brunswick participation in any Joint Venture.

22. Equity may only enter an injunction to prevent irreparable harm to the party that seeks it. As set forth in findings 59 and 60, Brunswick does not now have "Long Term Supply Agreements" in place in the relevant product market and in the relevant geographic market.

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Plaintiffs have not shown that injunctive relief is required, because they have not shown that they will suffer irreparable harm.

23. Plaintiffs' request for an injunction against any agreement for the purchase or sale in the relevant product market and relevant geographic market of Brunswick-manufactured stern drive or inboard engines which has a term of one year or more (unless the agreement is cancelable without penalty on reasonable notice) is too broad to satisfy equitable standards, in that it would prohibit:

a. Contracts even of exactly one year's duration;

b. Contracts without reference to the volumes of engines involved;

c. Contracts without reference to the party initiating a proposed duration of one year or more;

d. Contracts subject to special considerations that justify a duration of one year or more; for example, Brunswick might be asked to develop a specialized, customer-specific product, under circumstances in which the cost of development can only be justified by a purchase commitment of one year or more.

24. For the reasons identified in conclusions 22 and 23, the Court will not enjoin Long-Term Supply Agreements.

25. Plaintiffs' request for an injunction against any acquisition by Brunswick of any part of the stock or assets of any firm engaged in the manufacture of:

a. stern drive and/or inboard marine engines;

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b. recreational power boats designed to be powered by stern drive or inboard marine engines.

is too broad to satisfy equitable standards, in that it does not take into account the extent of any possible stock ownership, the size of firm acquired, or the potential competitive impact of the hypothetical acquisition.

26. The injunction requested by plaintiffs would usurp and defeat the purpose of offices and agencies specifically empowered to examine and evaluate the competitive impact (if any) of proposed mergers and acquisitions, including but not limited to the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission.

27. For the reasons identified in conclusions 25 and 26 the Court will not enjoin acquisitions by Brunswick.

28. The jury awarded no damages to any plaintiff for alleged future harm in the time period following June 1998, through calendar year 2000. The jury's finding on this issue is inconsistent with Plaintiffs' claim of future irreparable harm which requires equitable relief, and gives an additional, independent reason for the Court to deny the Plaintiffs' claims for an order of divestiture and the injunctive relief described in finding 36.

29. The Court, sitting in equity, has the obligation to consider a variety of factors in determining whether to award Plaintiffs the relief they seek in the form of an order of divestiture and injunctions. In deciding not to grant such relief, the Court has weighed the testimony at trial and the exhibits admitted into evidence, and has considered the following factors in reaching its conclusions:

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a. The extraordinary nature of equitable relief, which is not available based simply on proof of a statutory violation;

b. The large sum of damages awarded to Plaintiffs by the jury's verdict;

c. The penalty that would undoubtedly be imposed on Brunswick's shareholders by a forced "fire sale" of Brunswick boat building operations;

e. The long and unjustified delay between the acquisitions of which plaintiff complain and the filing of this lawsuit;

f. The relative hardships and benefits that award of the relief sought would give rise to for the parties;

g. The fact that substantial parts of the conduct complained of, including market share discounts for boat manufacturers and dealers, and the long-term contract component of the MerCruiser marketing program, have been dropped, and that there is no evidence of intent to resume them;

h. The jury's decision not to award any damages claimed for the period after June 1998;

i. The breadth of the injunctive remedies sought;

j. The difficulty in administering the broad injunctive remedies sought; and

k. The availability of administrative safeguards against anticompetitive acquisitions and mergers.

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CONCLUSION

For the reasons set forth above, Plaintiffs' requests for equitable relief related to Plaintiffs' First, Second and Sixth Claims for relief are hereby DENIED. The Court will promptly enter an amended final judgment.

IT IS SO ORDERED this 16 day of October, 1998.

James M. Moody
United States District Judge

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October 19, 1998

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 MAY 15 A10:21 FILED Civil Action No. 5:98CV-108-R

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs,	)	
v.	)	Civil Action No. 5:98CV-108-R
UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	)	

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

Ignoring the law of the Sixth and other Circuits that "[a]n award of attorney's fees as part of the cost of a successful antitrust suit is mandatory,"[1] defendants ("UST") invite error in urging the Court to deny Conwood the recovery of its attorneys' fees and expenses. Since at least 1968, the Sixth Circuit has recognized that the express provision of Section 4 of the Clayton Act trumps the court's discretion to deny the successful plaintiff attorneys' fees and expenses under Rule 54(d).[2]

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[1] Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1312 (9th Cir.), cert. denied, 459 U.S. 1009 (1982).

[2] See White & White Inc. v. American Hosp. Supply Corp., 786 F.2d 728, 731 n.1 (6th Cir. 1986); Lewis v. Pennington, 400 F.2d 806, 819 (6th Cir. 1968) (Section 4 "makes 'express provision' for costs, and a district court would be powerless under Rule 54(d) to deny such plaintiff his costs in the exercise of discretion.").

The award is thus mandatory, and UST's desire to avoid paying it is hardly reason for the Court to ignore the statute. Nor should it be the occasion for another month-long trial. While UST suggests that Conwood's billing statements and invoices must be litigated in granular detail, the law is expressly to the contrary. See Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

Conwood's fee submission complies fully with Federal Rule of Civil Procedure 54(d)(2)(B) and Local Rule 54.4. Conwood has provided ample proof -- comparable to the proof provided by successful plaintiffs in other large antitrust cases -- in support of its motion for attorneys' fees and costs. (Point I, infra). Conwood's requested attorneys' fees, expenses and expert fees in this nationwide, complex antitrust case are reasonable as to hourly rates and number of hours. The Court would have discretion to award a *multiple* of those fees, but should award at least the actual fees and expenses as "costs of suit" to fully compensate Conwood for what it has already incurred and paid. (Point II, infra).

I. CONWOOD HAS PROVIDED SUFFICIENT PROOF IN SUPPORT OF ITS MOTION AND HAS OFFERED TO PROVIDE ADDITIONAL DETAIL IN CAMERA SHOULD THE COURT SO REQUEST

A. Conwood's Motion and Memorandum in Support Specify the Judgment and Grounds for an Award of Attorneys' Fees and Costs and Provide a Fair Estimate of the Amount Sought.

Federal Rule of Civil Procedure 54(d)(2)(B) requires only that a motion for attorneys' fees "specify the judgment and the

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statute, rule or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought." Conwood has met -- and exceeded -- the Rule 54(d)(2)(B) requirements. Conwood has provided the Court with (a) a motion for attorneys' fees and expenses and memorandum in support specifying the judgment and statute entitling Conwood to its award and the amounts sought; (b) four affidavits from counsel attesting to the amounts sought and reasonableness of the requested fees and expenses; (c) a summary of the amounts sought as requested fees and expenses. Conwood has also offered to provide to the Court actual billing records and invoices for in camera review in the event the Court determines that such review is necessary.

This information matches, and in some instances exceeds, the information provided by successful plaintiffs in at least two other recent antitrust cases. Attached as Exhibit A is Litton's Notice of Motion and Motion for the Award of Attorney's Fees and Litigation Expenses (Mar. 8, 1999) in Litton Systems, Inc. and Litton Systems Canada, Ltd. v. Honeywell, Inc., No. CV 90-4823 MRP (Ex) (C.D. Cal.). As is evident from Exhibit A, the information submitted by Litton consisted of only a motion, spreadsheets summarizing fees and expenses, and supporting declarations.[3] Unlike Litton, see Exh. A at 15-16, Conwood has not asked to be compensated for the thousands of hours its in-house counsel -- David L. Simpson and Edward J. Foster -- have

[3]Litton's supporting declarations were filed under seal.

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worked on this litigation. Similarly, while the quality of the work, the degree of success, and size of the damages award given by the jury would warrant a quality adjustment above the market rate lodestar Conwood has requested,[4] Conwood has not asked this Court for a quality of work adjustment or a lodestar multiplier. Litton did. Cf. Exh. A at 14.

Attached as Exhibit B is Plaintiffs LePage's, Inc. and LePage's Management Company, L.L.C.'s Petition for Attorney's Fees Including Expenses Not Covered by the Bill of Costs (Nov. 23, 1999) in LePage's, Inc., et al. v. 3M (Minnesota Mining and Manufacturing Co.), No. 97-CV-3983 (E.D. Pa.). Like Conwood, LePages submitted a motion, memorandum in support, a spreadsheet summarizing its fees and expenses, and supporting affidavits. While UST complains about Conwood's 14-page "bare-bones request," Defendants' Memorandum in Opposition to Plaintiffs' Motion for Attorney Fees and Costs at 1 (May 3, 2000) ("Opp."), LePage's memorandum in support of its fees motion consists of nine pages.

While UST cites repetitively to civil rights, Title VII, and NLRA fee award cases, in which a court's fee award is discretionary, those decisions apply a standard far more limiting than 15 U.S.C. § 15.[5] The discretionary fee award statutes have

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[4]See Pitchford v. PEPI, Inc., 531 F.2d 92, 110 (3d Cir. 1975), cert. denied, 426 U.S. 935 (1976) and Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees and Costs of Suit at 9 (Apr. 19, 2000).

[5]See Opp. at 3. Wayne v. Village of Sebring, 36 F.3d 517, 531 (6th Cir. 1994), cert. denied, 514 U.S. 1127 (1995) involved a discretionary award of fees and costs to a successful plaintiff in a civil rights action under 42 U.S.C. § 1988, while Wooldridge v. Marlene Industries Corp., 898 F.2d 1169 (6th Cir. 1990), addressed a discretionary award in a Title VII case under 42

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differing and often heightened proof requirements. They cannot properly be used to chisel away at a successful antitrust plaintiff's entitlement.[6] UST has shown no respect in which Conwood's petition for fees is deficient.

B. Conwood's Detailed Billing Records and Invoices Contain Work Product and Privileged Communications, to Which UST is Not Entitled.

Conwood has not provided its detailed billing statements and invoices to opposing counsel for good reason: the billing statements and invoices are replete with recitations of attorney client communications and attorney work product. They provide an hour-by-hour "road-map" to the prosecution of this case. UST is not entitled to this information, particularly while the case remains unresolved.

U.S.C. § 2000e-5(k). In Cruz v. Local Union No. 3 of the International Board of Electric Workers, 34 F.3d 1148 (2d Cir. 1994), the Second Circuit considered a discretionary award of fees to a successful plaintiff in a National Labor Relations Act claim, and actually remanded the case for "a more generous appraisal" of the fee award. 34 F.3d at 1161.

[6]See, e.g., Tic-X-Press, Inc. v. Omni Promotions Co. of Ga., 815 F.2d 1407, 1423 n.25 (11th Cir. 1987) ("the principles guiding attorney's fee awards in other cases, such as civil rights suits under 42 U.S.C.A. § 1983, should not be applied mechanically to antitrust cases"); Black Gold, Ltd. v. Rockwool Indus., Inc., 529 F. Supp. 272, 274 (D. Colo. 1981) ("A successful plaintiff in an antitrust action is entitled to attorney fees as a matter of right under the Clayton Act § 4, 15 U.S.C. § 15. It is this entitlement as a matter of right which distinguishes the award of attorneys fees in antitrust cases from civil rights cases and most other statutory actions which provide that the award of attorneys fees is discretionary."); 10 Charles A. Wright, et al., Federal Practice and Procedure § 2675.2, at 405-06 (1998) (comparing mandatory fee statutes, such as 15 U.S.C. § 15, which "direct the court to award a reasonable attorney's fee to a prevailing litigant" with "others [such as 42 U.S.C. § 1988 which] grant the court discretion to make an award").

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For these same reasons, Litton declined to provide its detailed fee records, including daily time entries, to opposing counsel in support of its motion for attorney's fees and expenses. Litton's counsel aptly noted that

> Litton has not included the detailed diary entries prepared by each timekeeper that are supplied with each statement. Provision of these unredacted diary entries to Honeywell's counsel at this state in the litigation is problematic, as there is a possibility of disclosure of confidential information that could be used to Honeywell's advantage in subsequent trial proceedings.

Exh. A at 5 n.3. The same holds true here. UST cites no authority that requires the submission of privileged, tactically sensitive information as a condition of obtaining the mandatory award of fees and expenses required by the Clayton Act.[7]

C. The Materials Before the Court Are Sufficient.

The materials before the Court are, as a matter of law, sufficient support for the mandatory award. UST has no authority to the contrary. Rule 54(d)(2)(C) merely offers UST the opportunity for "adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78." Rules 43(e) and 78 are purely discretionary: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition." (emphasis added). Rule 78 allows district courts to rule on motions for attorneys' fees on a "motions day," or

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[7]If the Court finds it necessary to delve into the minutiae of the supporting documentation, however, Conwood will provide detailed billing statements and invoices for in camera review.

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"without oral hearing upon brief written statements of reasons in support and opposition." (emphasis added).

The Advisory Committee Notes to Rule 54(d)(2)(C) confirm that the time-consuming and onerous additional proof, discovery and evidentiary hearings requested by UST, see Opp. at 6-7, 16, are unnecessary.[8] While UST seeks to create obstacles to deny Conwood the award of fees and expenses to which the Clayton Act entitles it, nothing in the Clayton Act, the Federal Rules, or the cases requires the elaborate, expensive, and time-consuming procedure UST urges on the Court.

II. THE ATTORNEYS' FEES AND EXPENSES INCURRED BY CONWOOD IN THIS NATIONWIDE ANTITRUST CASE ARE REASONABLE

A. Conwood's Request for Attorneys' Fees in this Nationwide, Complex Antitrust Case is Reasonable as to Hourly Rates and Number of Hours.

Conwood incurred and paid hourly fees and related expenses to prosecute this case. The recovery of those out-of-pocket payments would in no sense be a "windfall." Opp. at 8, 11. It would merely "insulate [Conwood's] treble damages recovery from expenditures for legal fees, consistent with section 4's purpose to encourage private persons to undertake enforcement of antitrust laws." Twin City Sportservice, 676 F.2d at 1312. The very purpose of the Clayton Act's provision for the mandatory

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[8] "In some cases, an evidentiary hearing may be needed, but this is not required in every case. . . . On rare occasion, the court may determine that discovery under Rules 26-37 would be useful to the parties." Fed. R. Civ. P. 54(d)(2)(C) advisory committee note (Amendments 1993) (emphasis added).

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award of fees and expenses is to shift the cost of counsel from plaintiff to the defendant.[9]

Of course, UST's New York and Louisville counsel argue that Conwood should have been limited in this high-stakes, complex, nationwide antitrust litigation to Memphis counsel, and therefore should recover only at Memphis rates. See Opp. at 12. No case so holds. The determination of the appropriate rate is "fact-intensive and is best guided by what attorneys earn from paying clients for similar services in similar circumstances." Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 175 (4th Cir. 1994).

This litigation was not a Paducah or even a Kentucky litigation. It was a complex, national antitrust litigation, involving parties, witnesses, experts and counsel from numerous states. Discovery was conducted throughout the country, because the case involved the actions of UST sales representatives and managers in nearly every state. While the Western District of Kentucky was the forum, it was by no means the only locus from which jurors heard testimony. Conwood brought witnesses to Paducah from such far-ranging places as Spokane, Washington, Worthing, South Dakota and Atlanta, Georgia. The case sought a recovery for UST misconduct that was truly nationwide.

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[9] E.g., Tic-X-Press, Inc., 815 F.2d at 1423-24 ("Section 4's purpose is three-fold: 1) to encourage private citizens to undertake enforcement of the antitrust laws; 2) to insure that the cost of doing so does not diminish the plaintiff's treble damages award; and 3) to require a losing defendant to pay the plaintiff's attorney's fees as part of the penalty for violating the antitrust laws.").

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Even in civil rights cases, where recovery of fees and expenses is discretionary and hence more narrowly cabined, the Sixth Circuit has held that "[d]istrict courts are free to look to a national market, an area of specialization market or any other market they believe appropriate to fairly compensate particular attorneys in individual cases." Louisville Black Police Officers Ass'n, Inc. v. City of Louisville, 700 F.2d 268, 278 (6th Cir. 1983); Sigley v. Kuhn, Nos. 98-3977, 99-3531, 2000 WL 145187, **7 (6th Cir. Jan. 21, 2000)(same).

In this case, both parties chose to use counsel with particular expertise in nationwide antitrust litigation. Courts in similar circumstances have rejected defendant efforts to cap fees at local rates rather than the rates actually used by the particular firm or firms that represented plaintiff. For example, in National Wildlife Federation v. Hanson, 859 F.2d 313 (4th Cir. 1988), the Fourth Circuit upheld a district court's decision to use Washington D.C. counsel's rates to compute the lodestar in a complex environmental litigation tried in Raleigh, N.C. The Fourth Circuit rejected defense counsel's argument that "the court should have used rates charged in Raleigh, North Carolina, because that is the community in which the court sat." Id. at 317. Here too, "where it is reasonable to retain attorneys from other communities. . . , the rates in those communities may also be considered." Rum Creek, 31 F.3d at 175.

UST cannot plausibly claim it was unreasonable for Conwood to retain Washington, D.C. antitrust counsel, at prevailing Washington, D.C. rates, when UST found it reasonable and

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necessary to employ as principal counsel a New York firm with rates substantially higher than those charged by Kellogg, Huber.[10] Conwood does not question UST's decision to retain Skadden Arps, its cost notwithstanding, given the enormous stakes for all parties in this case; neither should UST be permitted to question Conwood's choice of counsel. The Court should not penalize Conwood, by forcing it to abjure recovery of fees, because it chose counsel it reasonably believed was necessary to bring the case to successful conclusion against determined, skillful, well-financed opposition. No principle of law required Conwood to look no further than Memphis for its lawyers.[11]

B. Conwood Should be Awarded All of Its Expenses as Costs of Suit Under 15 U.S.C. § 15.

Numerous district courts view the Clayton Act's "costs of suit" as encompassing all expenses incurred in bringing an antitrust case to a successful conclusion:

> 15 U.S.C. § 15 does not award merely court costs to a successful antitrust plaintiff, but "the cost of suit". This is a more comprehensive term, evidently embracing

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[10]A recent article stated that "[n]ot surprisingly, larger firms tend to charge the higher rates. New York's Skadden, Arps, Slate, Meagher & Flom L.L.P. -- No. 2 on the NLJ 250, with 1,403 attorneys -- lists a range of $380 to $590 for partners and $190 to $365 for associates." Ruth Singleton, Rates Aren't Skyrocketing, But They Do Keep Going Up, Nat'l L.J., Dec. 27, 1999, at B11 (attached hereto as Exh. C).

[11]In Langenderfer, the district court determined that for a case involving only the Toledo area it was appropriate to cap fees at the prevailing Toledo rate; here, in contrast, the case was not localized to Memphis or any other area, and accordingly Langenderfer -- even if correct on its facts -- does not support the principle UST urges on the Court. Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 684 F. Supp. 953, 956 (N.D. Ohio 1988).

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> "the expense of prosecuting the suit to a successful conclusion". The court costs in the technical sense are of course included in the "cost of suit", but other necessary and reasonable expenses are also included (except the attorney's fee, which is specified separately as an additional item to be paid to plaintiff).

Pitchford Scientific Instrument Corp. v. PEPI Inc., 440 F. Supp. 1175, 1178-79 (W.D. Pa. 1977), aff'd, 582 F.2d 1275 (3d Cir. 1978), cert. denied, 440 U.S. 981 (1979). Unlike discretionary fee award statutes, "the award of cost of suit and attorney fees in an antitrust case is designed to afford the plaintiff the relief to which he is entitled without any diminution by reason of the financial burden of making the judicial machinery work in his behalf." Id. at 1179 (emphasis added).

Similarly, in Refuse & Environmental Systems v. Industrial Services of America, 732 F. Supp. 1209 (D. Mass. 1990), aff'd in part, rev'd in part on other grounds, 932 F.2d 37 (1st Cir. 1991), the court based its decision "on case law in the first, fifth, eighth and eleventh circuits under both 15 U.S.C. § 15 and 42 U.S.C. § 1988" and held "that [successful antitrust] plaintiffs must be awarded the reasonable costs of bringing the antitrust lawsuit, beyond those costs allowed by Rule 54(d) and section 1920." Id. at 1220-21 (emphasis added).[12]

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[12]UST concedes that in Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980) -- a civil rights action -- the Sixth Circuit held that photocopying, paralegal expenses, travel, and telephone costs were recoverable as part of the plaintiff's attorneys' fees. Opp. at 13. UST also concedes that the plaintiffs' docket fees, investigation expenses, deposition expenses, witness expenses, and charts and maps were also recoverable. Id. But it argues that this recovery was limited to civil rights actions. While a district court in Ohio 12 years ago found that "Northcross does provide

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C. Conwood Should Be Awarded the Fees and Expenses It Has Paid for Economic Experts.

UST cites to no decisions from this district or to the Sixth Circuit that restrict a prevailing antitrust plaintiff's economic experts to the statutory $40 per day witness fee provided in 28 U.S.C. § 1821 and expenses provided for by 28 U.S.C. § 1920. The two main cases cited by UST, West Virginia University Hospital, Inc. v. Casey, 499 U.S. 83 (1991) and Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) both involved expert fee awards in civil rights cases under 42 U.S.C. § 1988.

At least one district court judge since West Virginia University Hospitals and Crawford has granted a successful antitrust plaintiff its request for expert fees and expenses and has explicitly held that Crawford did not apply.[13] In Automotive Products P.L.C. v. Tilton Engineering, Inc., 855 F. Supp. 1101, 1107 (C.D. Cal.), appeal dismissed, 36 F.3d 1109 (Fed. Cir. 1994), the district judge granted the successful plaintiff's request for expert fees, finding that the expert's testimony "was necessary to provide the jury with a factual basis from which to ascertain the damages." Id. The court also specifically held

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guidance for [an] award of attorney's fees in antitrust litigation," and read that case to support limits on recovery of expenses, Langenderfer, 684 F. Supp. 956, the weight of authority across the United States holds that the prevailing plaintiff in an antitrust case should recoup all expenses reasonably required to bring the case to judgment. See Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees and Costs of Suit at 11-13.

[13]The plaintiffs in Litton also moved for recovery of their expert fees and expenses. See Exh. A at 19.

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that Crawford does not limit a prevailing antitrust plaintiff to statutory expert fees:

> Tilton has cited Ninth Circuit authority providing for the award of expert witness fees if the expert was necessary to the litigation and if the expert's fees are reasonable. . . . AP cites no contradictory Ninth Circuit cases limiting such an award to statutory damages only, and the Court has already held that Crawford does not specifically limit a prevailing antitrust *plaintiff* to statutory damages only.

Id.

Similarly, in Hasbrouck v. Texaco, Inc., 631 F. Supp. 258, 268 (E.D. Wash. 1986), aff'd in relevant part, rev'd in part, 879 F.2d 632 (9th Cir. 1989), the district court noted the defendant's "strident defense posture" and held that "the retention by plaintiffs of the experts . . . was necessary due to the defenses interposed by [defendant]." Id. at 268. The court went on to find that the plaintiffs' expert fees were "reasonable" and awarded plaintiffs their requested expert fees. Id.

The same holds true here. There can be no question that the testimony of the experts called by plaintiffs was necessary to overcome the defenses raised by defendants. Each such expert specifically addressed and refuted those defenses, and that proof was concededly of critical importance. Indeed UST has moved for a new trial based on its contention that, for at least one expert (Dr. Leftwich), the proof determined the outcome.

UST asks the Court to find that Conwood's expert expenses, like all of the other fees and expenses Conwood has claimed, were not reasonably necessary to the successful prosecution of this

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case. But Conwood chose to incur and pay all these costs, with no certainty of any recovery; that more than anything establishes that these costs were both reasonable and necessary. And UST has given the Court no valid basis for challenging Conwood's decisions. UST is hardly in a position to determine what was or was not required to win this case.[14]

---

[14]UST asks that the fee and expense award be stayed, but cites no authority for the stay of a mandatory award of attorneys' fees and expenses under 15 U.S.C. § 15. The two discretionary fee award cases to which UST cites in support of its argument for a stay are inapposite. Loudermill v. Cleveland Board. of Education, 844 F.2d 304 (6th Cir.), cert. denied, 488 U.S. 946 (1988), involved yet another discretionary award of attorneys' fees in a civil rights action under 42 U.S.C. § 1988. In Morgan v. Union Metal Manufacturing, 757 F.2d 792 (6th Cir. 1985), there was not even a trial on the merits in the underlying case; the court dismissed the plaintiff's complaint and "awarded attorneys' fees on the common law ground that [plaintiff's] suit had been maintained in bad faith" after dismissing plaintiff's complaint. Id. at 796. Conwood counsel are unaware of any support for postponing the mandatory award of fees and expenses under 15 U.S.C. § 15 until after all appeals have been exhausted.

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Conclusion

For the foregoing reasons, plaintiffs' request for attorneys' fees and expenses in the aggregate amount of $19,170,652.86 should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on this 13th day of May, 2000, a copy of the foregoing was sent via overnight delivery to:

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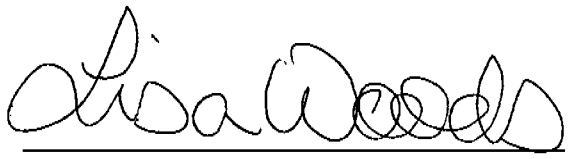

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

LITTON SYSTEMS, INC. and LITTON SYSTEMS CANADA, LIMITED,

Plaintiffs,

v.

HONEYWELL, INC.,

Defendant.

Case No. CV 90-4823 MRP (Ex)

LITTON'S NOTICE OF MOTION AND MOTION FOR THE AWARD OF ATTORNEY'S FEES AND LITIGATION EXPENSES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[DECLARATIONS IN SUPPORT FILED SEPARATELY]

Date: May 3, 1999, or date set by the Court
Time: 10:00, or time set by the Court
Place: Courtroom of the Honorable Mariana R. Pfaelzer

FILED UNDER SEAL

3-4-99

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TO DEFENDANT HONEYWELL, INC., AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that as soon as this matter may be heard, in the Courtroom of the Honorable Mariana R. Pfaelzer, United States District Court for the Central District of California, 312 North Spring Street, Los Angeles, California, Plaintiffs Litton Systems, Inc. and Litton Systems Canada, Ltd. (collectively "Litton") will and hereby do move this court for the award of attorney's fees and costs of suit pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15(a) and Fed. R. Civ. P. 54(d). Litton respectfully submits this motion pursuant to the Court's January 27, 1998 Order Re Entry of Judgment, providing that plaintiffs may file and serve their bill of costs and motion for attorneys' fees within 40 days following the entry of judgment.

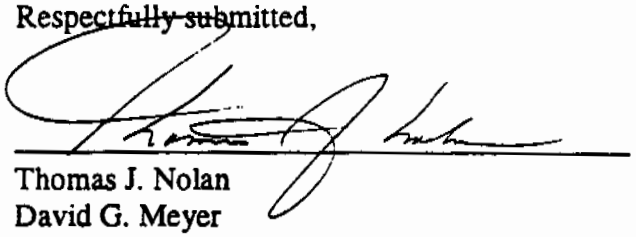
Litton's motion for attorney's fees and costs of suit is based on the ground that a federal jury has determined that Litton has suffered antitrust injury and damages by reason of Honeywell's unlawful monopolization and attempted monopolization of the global RLG-IRS market. *See* February 29, 1996 General Verdict Forms and December 9, 1998 General Verdict Forms. As such, Litton has been "injured in [its] business or property by reason of [conduct] forbidden in the antitrust laws," and is entitled to recover "the cost of suit, including a reasonable attorney's fee" under the Clayton Act. 15 U.S.C. § 15(a).

Litton's motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities In Support Thereof, the Declarations of Thomas J. Nolan, Thomas N. Heyer, Frederick A. Lorig, Victoria T. McGhee, Theodore F.Craver, Newton D. Lesh II, Jeannie M. Crowley, William Christopher Black and Thomas E. Evans; all

pleadings, files and records in this action, material that may be judicially noticed by this Court, the arguments of counsel, if any, and such other matters that the Court may properly consider.

Dated: March 8, 1999

Respectfully submitted,



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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Litton's attorneys' fee petition follows the successful nine year prosecution of this complex, hard fought and immensely time-consuming litigation. As the jury's verdict reflects, the stakes were large. At issue was the illegal conduct of Honeywell, Inc. ("Honeywell") in a $6 billion worldwide market for a product line with only two competitors — Honeywell and Litton. Honeywell's determination to engage highly qualified counsel from at least four major law firms and to commit apparently limitless resources, brought with it the almost certain prospect that, should it not succeed in defending against Litton's antitrust claim, it would be responsible for payment of fees and expenses commensurate with the effort it was undertaking. After nearly a decade of litigation, Litton has prevailed on its antitrust complaint. In accordance with the jury verdict, the Court has entered judgment assessing treble damages in the aggregate amount of $750 million. As the Clayton Act provides, the Court also has entered judgment for attorneys' fees and costs and has retained jurisdiction to modify its final judgment to include the specific amount of such fees and costs.

Litton now petitions for an award of $ as a lodestar, adjusted upward for delay to). In addition, Litton petitions for an award of fees for work performed by in-house counsel of $. ; fees for contract paralegals and economic analysts of $ fees and expenses for Litton's expert witnesses of $ and litigation expenses of $ exclusive of amounts in Litton's bill of costs. The total award amounts to $, including an additional $ in reproduction costs that were alternatively included in taxable costs. *See* Exhibit A to the Declaration of Thomas J. Nolan in Support of Litton's Motion for the Award of Attorney's Fees and Litigation Expenses ("Nolan Decl.") filed under separate cover.

Consistent with the direction of the Supreme Court in this area, Litton has already approached Honeywell to attempt to reach agreement regarding Litton's reasonable fees and

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expenses and thereby avoid needless, full-scale litigation regarding the award of attorneys' fees. It is Litton's hope and expectation that the parties will be able to reach an agreement at least to narrow the issues, mindful of the Supreme Court's admonition that determination of the reasonable attorneys' fees should be something to which the parties can stipulate. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

This Memorandum, along with the supporting declarations and exhibits, establishes that Litton is entitled to the full amount of its requested fees, expenses, and costs, including an enhancement as allowed under the statute and governing case law. Litton does not seek any compensation beyond that to which it is entitled. The prosecution of an antitrust action such as this is costly and time-consuming. Litton's requested reimbursement does not even include millions of dollars in unrecoverable out-of-pocket expenses and thousands of hours of management and employee time that were necessary to pursue this litigation over nine long years.

For Honeywell, the fees and expenses covered by this motion should come as no surprise. The breadth and scope of this litigation find few parallels in private antitrust litigation. Viewed in the context of the magnitude of this litigation, the hours expended and the rates charged by Litton's attorneys are eminently reasonable. Litton's counsel worked hard, efficiently and effectively. Litton should therefore be awarded the full amount of its fees, adjusted to account for delay of up to nine years.

The reasonableness of Litton's fees and expenses is shown by the observations of Honeywell's experienced counsel, Maxwell Blecher, who was recently quoted as stating that Litton's petition would be "monstrous" and would be in the range of $50 million or more.[1] Mr. Blecher is a knowledgeable antitrust plaintiff's counsel, and he is intimately familiar with the market conditions in Los Angeles and the effort required to bring a case of this type to a

---

[1] Mr. Blecher's statement about Litton's expected costs and attorney's fees appeared in a recent newspaper article. Mr. Blecher observed that "[w]e expect they'll be monstrous, in the medium-to-high eight figures." *The National Law Journal*, Special Suppl., Feb. 22, 1999.

successful conclusion. As one of several lead counsel among Honeywell's four law firms, Mr. Blecher no doubt has a fair understanding of the fees and costs that Honeywell incurred in the course of defending itself (and that Honeywell will be required to disclose should Litton's petition be opposed). That Litton's fees are actually lower than those projected by Mr. Blecher is a testament to the disciplined and efficient work of Litton's counsel and provides support for an award of the full amount of fees and expenses that Litton requests.

This fee petition seeks reimbursement of Litton's fees and allowable expenses from the inception of the case in 1990 through December 31, 1998, with the exception of the work on the fee petition and cost bill in late 1998. Litton will continue to incur significant reimbursable attorney's fees through the post-trial phase, including its fees and expenses for this petition and the cost bill for the post-trial motions, and for the appeal. Litton will supplement this petition to cover fees and expenses incurred after December 31, 1998, either following entry of orders on the post-trial motions or at such time as the Court may direct.

II. THE LAW ENTITLES LITTON TO RECOVER ITS ATTORNEYS FEES AND LITIGATION EXPENSES INCURRED OVER THIS NINE YEAR LITIGATION

A. Statute and Its Purpose

Section 4 of the Clayton Act states that "any person . . . injured . . . by reason of anything forbidden in the antitrust laws . . . shall recover . . . the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). "An award of attorney's fees as part of the cost of a successful antitrust suit is mandatory. . . ." *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1312 (9th Cir.), *cert. denied*, 459 U.S. 1009, 103 S. Ct. 364, 74 L. Ed. 2d 400 (1982) (citations omitted). The purpose of such a mandatory award is "to insulate treble damages recovery from expenditures for legal fees, consistent with Section 4's purpose to encourage private persons to undertake enforcement of antitrust laws." *Id. See also Perkins v. Standard Oil Co.*, 474 F.2d 549, 553 (9th Cir.) (citation omitted), *amended on other grounds*, 487 F.2d 672 (9th Cir. 1973), *cert. denied*, 412 U.S. 940, 93 S. Ct. 2778, 37 L. Ed. 2d 400

(1973); *see also Image Technical Services, Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1357 (9th Cir. 1998).

B. The Lodestar Is Presumptively The Reasonable Attorney's Fee Recoverable Under The Clayton Act

The Supreme Court has adopted the lodestar as the "the guiding light of our fee-shifting jurisprudence. We have established a 'strong presumption' that the lodestar represents the 'reasonable' fee . . . ." *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S.Ct. 2638, 120 L.Ed. 2d 449 (1992) (citations omitted). The "lodestar" amount, *i.e.*, "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," has been found to be the "most useful starting point for determining the amount of a reasonable fee." *Hensley v. Eckerhart*, 461 at 433.[2] The lodestar "is more than a mere 'rough guess' or initial approximation of the final award to be made. Instead . . . [it] '*is presumed* to be the reasonable fee to which counsel is entitled." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986) (citation omitted) (emphasis in original).

In all determinations of a reasonable fee, the amount involved in the lawsuit and the results obtained are important factors. *Hensley v. Eckerhart*, 461 U.S. at 434-36. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. *Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.*" *Id.* at 435 (emphasis

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[2]Although *Hensley* and *Dague* were civil rights actions, the Court noted that the "standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " *Hensley*, 461 U.S. at 433, n.7; *see also Thorne v. City of El Segundo*, 802 F.2d 1131, 1141, n. 10 (9th Cir. 1986). While the standards set forth in *Hensley* and its progeny are generally applied in antitrust cases, the Ninth Circuit has also cautioned that "there should not be an automatic transference of rulings interpreting [the civil rights and other fee statutes]" to an antitrust case where this would lead to "an incorrect application of the philosophy of full recovery of attorney's fees for successful treble damages plaintiffs." *Twin City Sportservice*, 676 F.2d at 1314, 1316.

added); *Blum v. Stenson*, 465 U.S. 886, 897, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984) (emphasis added).

The law also recognizes the need to account for delay in arriving at an award of reasonable fees. For example, *In Re Washington Public Power Supply Sys. Lit.*, 19 F.3d 1291, 1305 (9th Cir. 1994) involved a seven year delay between the time the prevailing party paid its attorneys and the time it was reimbursed. In that case, the Ninth Circuit held that it was an abuse of discretion for the district court to fail to include a delay adjustment calculated by using current rates or adding a prime rate adjustment. As discussed below, the delay present in this case similarly warrants an adjustment.

III. LITTON IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES ADJUSTED FOR DELAY

Over the nine years of this litigation, Litton incurred more than $ in outside counsel attorneys' fees. This represents the largest component of Litton's cost of suit which it is entitled to recover. As described below, Litton has computed the attorneys' fee portion of its request using the lodestar method adjusted for delay by the prime interest rate method. Litton petitions for an award of $ as its lodestar, adusted upward for delay to $. The relevant computational tables are included as Exhibits B, D, E and Y of the Nolan Decl.

A. Litton's Modified Lodestar For Attorney's Fees Is Based On The Below Market Hourly Rates And Reasonable Hours Actually Charged To And Paid By Litton

The contemporaneous billing records maintained by counsel and submitted to Litton as the basis for payment provide a solid framework for computation of the lodestar.[3] In computing

[3] Litton is submitting with this petition actual billing statements for Howrey & Simon by month from the inception of the litigation, exclusive of the detailed diary entries. Nolan Decl., Ex. C. For ease of presentation, the information on rates, hours and expenses have been restated in spread sheet format and included as exhibits to Mr. Nolan's declaration. *Id.* at B. Litton has not included the detailed diary entries prepared by each timekeeper that are supplied with each statement. Provision of these unredacted diary entries to Honeywell's counsel at this state in the litigation is problematic, as there is a possibility of disclosure of confidential information that could be used to Honeywell's advantage in subsequent trial proceedings.

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the lodestar, Litton has used both the actual hours expended and the actual rates charged, as extracted from these records.[4] Through daily diary entries, Litton's counsel have kept accurate and complete records of the time expended on this matter. This time was billed to Litton and paid on an ongoing basis. In addition, Litton has used the actual rates it was charged — not the prevailing market rate in Los Angeles — because this results in lower fees. *See* Nolan Decl., Ex. B (summarizing the hours and fees of the Howrey & Simon attorneys); Ex. D (summarizing the hours and fees for the Bright & Lorig attorneys).

1. Litton Retained Experienced and Capable Counsel To Represent It In This Litigation

When Litton began investigating its antitrust claim against Honeywell, it realized the scope and complexity of the litigation with which it was faced. Litton wished to retain a leading law firm with specialized knowledge and experience in antitrust litigation that could effectively and efficiently present the case. Litton's choice of Howrey & Simon was reasonable. In addition to Howrey & Simon's experience litigating antitrust cases in general, the firm had previously represented Litton in antitrust and other matters and was therefore already familiar with Litton, its management and its employees.

Howrey & Simon's work began in May 1990. The firm has continued to represent Litton throughout comprehensive discovery and two trials spanning a nine-year period. Initially, the primary partners working on this matter were John Bodner and Thomas Heyer, assisted by several associates. In 1994-95 they were joined by Thomas Nolan of the Los Angeles office, along with various associates, some of whom later became partners. Litton also retained the law firm of Bright & Lorig to conduct an initial investigation of the claims in this matter, to assist in discovery and at trial, and to serve as local counsel before Howrey & Simon had a Los Angeles office. Bright & Lorig has also represented Litton in the patent case.

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[4] The hours covered by Litton's petition do not include time expended in connection with the related patent case.

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Honeywell has been represented by four nationally-known law firms during the course of this litigation. Initially, the law firm of Sheppard, Mullin, Richter & Hampton was the principal firm representing Honeywell, led by attorneys Joseph Coyne and Carlton Varner. Sheppard, Mullin was then joined by Sullivan & Cromwell in New York, with Richard Carlton as the principal partner. Honeywell later added the firm of Gibson, Dunn & Crutcher, including partners Robert Cooper, Arthur Sherwood, J. Edd Stepp, Mark Weber, Mary Laura Davis and Daniel Swanson, and a large group of associates. Most recently, Honeywell engaged the law firm of Blecher & Collins, represented by partners Maxwell Blecher and Gary Joye. Also, as did Litton, Honeywell has from time to time used other law firms to provide assistance on particular issues over the long course of this litigation.

Litton's counsel were and are experienced antitrust litigators. At Howrey & Simon, Mr. Bodner is an experienced antitrust trial attorney who has represented Litton for over thirty years in various antitrust and commercial matters. Mr. Nolan is an experienced federal court litigator and a Fellow of the American College of Trial Lawyers. Mr. Lorig is also an experienced trial attorney who has represented Litton both in this matter and the related patent case.[5]

2. Counsel Charged Reasonable Rates

Litton calculated the lodestar using the rates that Howrey & Simon and Bright & Lorig actually charged and that Litton paid monthly over the course of the litigation. These rates easily satisfy the reasonability requirement. *Blum*, 465 U.S. at 888; *Hensley*, 461 U.S. at 434. A law firm's hourly rates are presumptively reasonable if equivalent to (or lower than) the market rate for comparable attorneys. *See Student Pub. Interest Research Group v. AT&T Bell Labs.*, 842 F.2d 1436, 1445 (3d Cir. 1988) ("in most cases, billing rates reflect market rates — they provide

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[5] Mr. Lorig submits a declaration in support of this motion that describes the qualifications of the attorneys from Bright & Lorig who worked on the case. This declaration has been filed concurrently under separate cover. *See* Notice of Filing Declarations of Frederick A. Lorig, Victoria T. McGhee, Theodore F. Craver, Newton D. Lesh II, Jeannie M. Crowley, William Christopher Black and Thomas E. Evans ("Notice of Filing").

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an efficient and fair shortcut for determining the market rate"); *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 590-91 (3d Cir. 1984).

The reasonableness of the rates charged is also shown by a calculation of the overall rates for both Howrey & Simon and Bright & Lorig. The overall average charge per hour was $ for Howrey & Simon attorneys and $ for Bright & Lorig attorneys.

a. Counsel's Rates Actually Charged and Included In the Lodestar Were Discounted from Counsel's Normal Rates

Under its normal billing practices, Howrey & Simon charges clients hourly rates that differ by attorney depending on the attorney's experience and the office in which the attorney is resident. For associates, the rates generally are determined by the law school class year to which the associate belongs. For partners, the rates are based on a combination of experience, success, standing in the legal community and attractiveness to clients. These rates periodically are adjusted to account for greater attorney experience, inflation, and marketplace factors.

Initially, Howrey & Simon charged Litton its customary District of Columbia rates for all timekeepers. These rates were substantially lower than Los Angeles market rates. Negotiations over the period 1991-1993 led to the adoption of a discounted blended rate beginning in August 1994.

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b. The Rates Actually Paid By Litton and Included In The Lodestar Are Below Market Rates Charged By Comparable Firms and Attorneys

The reasonableness of Howrey & Simon's rates is demonstrated by a comparison of the hourly rates of other firms in Los Angeles. Available data for the going market rates in these cities show that counsel's rates are clearly within the market rate range and thus are reasonable. *See* Nolan Decl. at ¶ 38, 39, and Ex. Z attached thereto. For much of the litigation Litton paid fees based upon the Washington, D.C. legal market, where rates are lower than Los Angeles. In 1990, at the outset of the litigation, Howrey & Simon only had offices in the District of Columbia. It charged Litton hourly rates of $ for a relatively junior associate, $ for a junior partner and $ for a senior partner. During the 1998 trial, the rates for associates working out of the District of Columbia office ranged from $ to $. Howrey & Simon's blended partner rates were well within the market range for comparable national law firms in the District of Columbia. Because rates in the District of Columbia generally are substantially less than those in Los Angeles, Howrey & Simon's rates were substantially lower than Los Angeles market rates throughout the litigation (particularly prior to 1994).

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[6] This estimate of what Litton's fees would have been using regular fees has been calculated using District of Columbia rates where the attorney is or was based in that office; those rates are substantially lower than Los Angeles office rates. Thus, had the comparison used all Los Angeles rates, as the case law suggests, the difference would be greater.

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Because counsel's hourly rates are within or below the range of market rates charged by other firms in the same geographic market with similar practices, counsel's rates are presumptively reasonable.

3. Litton's Counsel Expended A Reasonable Number of Hours Litigating This Case Over a Nine-Year Period.

This was and is a large complex case that required intensive and continuous effort over the course of the litigation, which has included two trials. The hours expended are entirely consistently with the effort required to bring this case to a successful close. In total, the actual billing records show that Litton's outside counsel worked over 97,000 hours since 1990. The total for Howrey & Simon is 95,127.5 hours. Bright & Lorig has worked 2,108.5 hours.

Counsel's pretrial and trial work was critical to Litton's success at trial. The declarations accompanying this Motion summarize the qualifications of Litton's counsel and describe the

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work counsel performed. *See, e.g.*, Nolan Decl. ¶¶ 2, 11; Heyer Decl. ¶¶ 4-30; Lorig Decl. ¶ 2. These declarations attest to the facts that the hours billed were reasonably expended on the litigation or on closely-related matters where the work was useful and of a type ordinarily necessary to secure the final result.

Such work generally included fact investigation; preparation and filing of the Complaint and other initial pleadings, preparing and responding to numerous motions; conducting ongoing factual and legal research; reviewing hundreds of thousands of pages of documents; receiving, processing and organizing millions of pages of documents produced in discovery; creating and maintaining full-text document database and imaging systems; deposing and defending the depositions of hundreds of witnesses; requesting and responding to voluminous discovery; overseeing the work of expert witnesses; trying issues of liability and damages before two juries; and participating in out-of-court mediation.

For a case of this size, complexity and duration, the hours expended to accomplish these tasks were reasonable. Throughout, Honeywell mounted a vigorous defense, raising every available issue, both legal and factual, in an effort to defeat Litton's claims. Honeywell employed scores of highly capable, experienced lawyers from several major law firms. Litton's counsel ably, effectively, and expeditiously litigated this case to a successful conclusion.

In addition, Litton's representation was characterized by continuity. Litton benefited from the continuous representation of its lead counsel Messrs. Bodner, Nolan and Heyer, whose time jointly accounts for more than 30 percent of the hours included in this petition.

4. Litton Excluded Substantial Hours from the Fee Petition

In accordance with its billing practices, Litton's outside counsel excluded time that was unproductive, unnecessary, or duplicative. Counsel carefully reviewed each Howrey & Simon bill before it was sent to Litton, including each individual task entry and the time spent, as well as all expenses. Any entries deemed duplicative, unproductive or otherwise unnecessary were eliminated.

. None of those hours are included here. Further, in-house counsel at Litton carefully reviewed the bills and, in some cases, further deleted time considered duplicative, excessive, unnecessary or otherwise objectionable. *See* the Declaration of Victoria T. McGhee, attached to Litton's Notice of Filing and filed concurrently herewith.

In summary, Litton has excluded from its petition timekeeper hours that come within the following categories: (1) time absorbed by Howrey & Simon and not included in the bill; (2) time written off by Howrey & Simon prior to billing; and (3) time written off by Litton after billing.[7]

The hours that Litton has excluded from its fee petition reinforce the conclusion that the attorneys' fees for which Litton is seeking reimbursement are only those which were reasonable and necessary. Accordingly, Litton is entitled to recover the entire amount of its fees set forth in this petition.

B. Litton Is Entitled to Upward Adjustments of the Modified Lodestar to Account For Delay

Once a petitioner establishes that counsel's hours and rates are reasonable, the lodestar is presumed to be correct and fully awardable. *See Blum*, 465 U.S. at 897. There is an additional step, however, where there has been substantial delay between the time a prevailing party pays

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[7] In addition to the attorney's fees included here, Litton incurred fees from other outside counsel in 1990 for which records have not been located. If and when Litton locates those records, it will supplement this petition to include them.

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the fees and expenses and the time it is reimbursed. *In re Washington Public Power Supply Sys. Lit.*, 19 F.3d at 1305 (holding it was an abuse of discretion for the district court to fail to include a delay adjustment where there was a seven year delay before recovery of fees and expenses). The Supreme Court has also recognized that "courts may adjust [the] lodestar calculation" if the lodestar does not reflect the reasonable worth of counsel's services. *Blanchard v. Bergeron*, 489 U.S. 87, 94, 109 S. Ct. 939, 103 L.Ed.2d 67 (1989). For example, under the fee-shifting provisions of the Civil Rights Act, 42 U.S.C. § 1988, the Court noted "[a]n adjustment for delay in payment is . . . an appropriate factor in the determination of what constitutes a reasonable attorney's fee...." *Missouri v. Jenkins*, 491 U.S. 274, 284, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989). Such adjustment may be "by the application of current rather than historic hourly rates or otherwise...." *Id.*

The Ninth Circuit has explained that there are two ways to account for delay in making an upward adjustment to the lodestar:

> (1) by applying the attorneys' current rates to all hours billed during the course of the litigation; or (2) by using the attorneys' historical rates and adding a prime rate enhancement.

In re Washington Pub. Power Supply Sys. Litig., 19 F.3d at 1305. In accordance with these suggested methodologies, Litton is requesting a delay adjustment of at least $.

An upward adjustment for delay is appropriate not only in contingency fee cases but also in cases where the attorneys' fees have been paid by the client on a regular basis. In *Gulfstream III Associates v. Gulfstream Aerospace Corp.*, 995 F.2d 414 (3d Cir. 1993), the Third Circuit explained:

> Although the principal justification for delay enhancements is to compensate attorneys who have had to wait for their fees, we believe this does not preclude such an award in every case where the attorneys are paid on time. The overriding purpose of a delay enhancement is to compensate for the lost use of money during the time before statutorily mandated attorneys' fees are awarded. The fact that the cost is borne by the client and not the attorney does not alleviate the hardship of waiting for attorneys' fees until the

> end of the litigation. Any other result would create an incentive for plaintiffs not to pay their attorneys until the conclusion of the litigation.

Id. at 425 (awarding antitrust plaintiff a delay adjustment); *see also Brown v. Pro Football, Inc.*, 846 F. Supp. 108, 118 (D.D.C. 1994), ("Plaintiffs, if not their counsel, were deprived for three to four years of the use of the funds that they paid to counsel.")

Here, Litton has computed the delay adjustment under both methods and will seek Honeywell's agreement as to the most appropriate. Both methods yield a result that is fairly close when applied to the lodestar for Howrey & Simon fees and Bright & Lorig fees. Under the current rate method, the total adjustment comes to $ for Howrey & Simon fees and $ for Bright & Lorig fees. The computation of the lodestar fees at current rates is contained in Exhibits B and D of Mr. Nolan's declaration. Under the interest method using the Federal Reserve Average Prime Rate, the adjustment totals $. These analyses are presented in Exhibit Y to the Nolan Decl. Litton has not computed a delay adjustment for the amounts included in this petition for in-house attorneys, contract paralegals and economic analysts, or litigation expenses. Only those fees contained in the lodestar are the subject of adjustment. Litton would accept a delay adjustment under either method, but suggests that the prime rate approach may best compensate Litton for the lost use of money paid monthly over this nine year litigation.

Whichever method is chosen, Litton is entitled to a delay enhancement of at least $.

C. Litton Is Entitled to a Quality Adjustment of the Lodestar

The quality of the work of Litton's counsel and the degree of success also warrant a quality adjustment above the market rate lodestar. Litton submits that the amount of such an adjustment may be best be determined after Litton has fully briefed its responses to whatever challenges Honeywell may raise in its post-trial motions. Accordingly, Litton will address this item of recovery more fully.

IV. LITTON IS ENTITLED TO AN AWARD FOR TIME SPENT BY IN-HOUSE ATTORNEYS IN PROSECUTING THIS SUIT

Litton petititons for an award of $. for work performed by Litton's in-house counsel. Just as outside counsel's fees are compensable, so is the time of certain in-house counsel. *National Gypsum Co. v. Steel Sys. Int'l, Inc.*, 9 U.S.P.Q.2d (BNA) 2073 (D. Or. 1988); *Zacharias v. Shell Oil Co.*, 627 F. Supp. 31, 35 (E.D.N.Y. 1984); *see generally, Milgard Tempering, Inc. v. Selas Corp. of America*, 761 F.2d 553, 558 (9th Cir. 1985) (permitting district court, using Washington law, to examine modern trend toward providing fees for in-house counsel).

A court should award fees for work performed by in-house counsel when he or she actively participated in the case. *Milgard Tempering*, 761 F.2d at 558. In short, the Court should compensate Litton for the time of in-house counsel for all substantive work that was not client work, (*e.g.*, not monitoring the litigation and consulting with outside counsel). In this case, Litton's experienced in-house counsel took on various case responsibilities, including: the review and analysis of discovery materials, preparation of witnesses and defense of depositions, and the review and production of documents responsive to discovery demands. These tasks are properly compensable as part of the fee award.

In awarding attorneys' fees for work performed by in-house counsel, courts commonly use an hourly rate to determine the proper compensation. *Zacharias*, 627 F. Supp. at 34 (citing *Pittsburgh Plate Glass Co. v. Fidelity & Cas. Co.*, 281 F.2d 538, 542 (3d Cir. 1960) and *Brisbane v. Port Auth. of New York & New Jersey*, 550 F. Supp. 222, 224 (S.D.N.Y. 1982)). This practice is based on the rationale that "work performed by in-house counsel reduces the workload and, consequently, the fee of the [outside] counsel and '[t]here is no reason in law or in equity why the [losing party] should benefit from [the prevailing party's] choice to proceed with some of the work through its own legal department.'" *Id.* To determine a reasonable hourly rate for in-house counsel, courts often look to the going market rate. *In re Public Serv. Co.*, No. 91-0536M, 1992 U.S. Dist. LEXIS 16326, at *15 (S.D. Cal. 1992) ("Generally, the relevant

community is one in which the District Court sits.") (citing *Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir. 1991)).

The declarations of Ms. McGhee, Mr. Craver, Mr. Lesh, Mr. Black, and Ms. Crowley describe the work each of these in-house attorneys performed and how they determined their reasonable hours. In addition, Exhibit L to the Nolan Decl. presents a summary of all of the in-house counsel time and fees calculated at the rates actually paid for comparable Howrey & Simon attorneys. The total hours expended are , and the requested fees are $.

V. LITTON SHOULD BE AWARDED FEES OF CONTRACT PARALEGALS AND OTHER NON-LAWYER LITIGATION ASSISTANTS

The fees award properly encompasses not only attorneys' fees, but also fees for all litigation-related work performed by counsel's non-lawyer staff. The term ["reasonable attorney's fee"] refers to a reasonable fee for the *work product* of an attorney, not just the fees for the attorney's work, thus, the fee must "take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit." *Missouri v. Jenkins*, 491 U.S. at 285. This is particularly so under the Clayton Act, which broadly provides for the recovery of "costs of suit."

Litton has incurred costs for both paralegals and accounting and economic analysts. The fees for paralegals employed by Howrey & Simon are in the lodestar computation above. The remaining fees of paralegals and analysts are a cost of suit not included in the lodestar. Litton requests that it be awarded the sum of $. for contract paralegals and $ for economic and accounting analysts.

A. Paralegal Fees

Attorneys on both sides have relied extensively on paralegals to perform substantive and case management tasks in this litigation. In addition to paralegals employed by Howrey & Simon (whose time is already in the lodestar), Litton engaged paralegals in three general

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categories: those who were (a) employed directly by Litton in Washington, D.C. as temporary paralegals ("Lit Temps") in the Howrey & Simon office and were paid only for the hours expensed on case-related tasks through the submission of daily time cards; (b) employed elsewhere as such temporary paralegals ("Lit Temps"); and (c) employed by third party temporary help agencies but worked under the direction of counsel either at a Litton site or at counsel's office.

These paralegals all assisted in the review, production and organization hundreds of thousands of documents; created and maintained document and deposition databases; prepared witness files and deposition digests; managed case files; checked citations and organized exhibits for court submissions; and assisted in the preparation and control of exhibits and pleadings during trial. These are the kinds of tasks the Supreme Court has described as appropriate paralegal work. *Missouri v. Jenkins*, 491 U.S. at 288. These tasks were performed more efficiently and more economically by delegating them to non-attorneys with lower billing rates and specialized expertise. These costs were further controlled by the extensive use of Litton temporary employees and contract paralegals whose time was billed directly to Litton. Also, Howrey & Simon used other litigation support personnel such as computer specialists, librarians and clerks to assist as necessary. Their time, which is not large, is included as litigation support within the Howrey & Simon paralegal time.

As with the attorneys, Litton has kept records of the time billed by these paralegals. These bills were submitted to and paid by Litton on an ongoing basis. The declarations of Thomas N. Heyer and Thomas E. Evans[8] describe the paralegals and litigation support staff and their qualifications, the work they did, how their time was kept and rates determined, and time that was excluded from this petition. *See* Heyer Decl. ¶ 38; Evans Decl. ¶ 5-8. The hours and rates of these paralegals are shown on Exhibits E, F, G, and H to the Nolan Decl. for Howrey &

[8] The declaration of Thomas E. Evans ("Evans Decl.") is attached to Litton's Notice of Filing, filed concurrently herewith; the Declaration of Thomas N. Heyer ("Heyer Decl.") in support has been filed under separate cover.

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Simon paralegals and litigation support personnel, for the Lit Temps that worked only in Howrey & Simon's District of Columbia office, and for Lit Temps and agency paralegals, respectively, that worked at Litton document sites in the Los Angeles area.

B. Accounting and Economic Analysts

As is necessary in a case of this type and magnitude, the attorneys have used the assistance of accounting and economic analysts for their specialized expertise. The support that these analysts have provided includes such tasks as assembling discovery materials relevant to the assessment of damages, analyzing the reports of Honeywell's expert witnesses, assisting the attorneys in preparing for depositions of those expert witnesses, assisting at the depositions, and assisting in preparing for cross-examination at trial of Honeywell's witnesses, both expert and otherwise.

All of the work was done at the instruction of and under the supervision of attorneys and was useful, necessary, not duplicative, and not excessive. These analysts were acting in support of Howrey & Simon attorneys in the same capacity as other litigation support staff including paralegals. For the same reasons as noted above for paralegals, their time is compensable.

VI. LITTON SHOULD BE AWARDED THE FEES AND EXPENSES IT HAS PAID FOR ECONOMIC EXPERTS

Litton also requests an award of the fees and expenses in the amount of $ for economic experts as part of its "cost of suit" under the Clayton Act. These experts were absolutely essential to the presentation of both liability and damages issues. Indeed, the second trial on damages revolved primarily around the testimony of these economic experts. Both sides recognized the importance of economic experts in this litigation and retained several such experts. Thus, Litton retained Dr. John Beyer, Dr. James Langenfeld, and Dr. Robert Hall to testify concerning market definition and damages. In addition, Litton retained Dr. Edward Leamer and Mr. Roger Schlonsky to provide consultation and possible testimony during the damages retrial. Moreover, both Dr. Leamer and Mr. Schlonsky were designated and prepared to

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testify as rebuttal witnesses. Honeywell retained Professor William Baumol, Dr. Joe Pace, Dr. Gary Dorman, Profession Richard Schmalensee, Professor Joseph Kalt, and accountant J. Duross O'Bryan to testify on liability and damages issues.

Recent antitrust decisions have awarded expert witness fees and expenses to prevailing antitrust plaintiffs as a component of the "costs of suit" pursuant to Section 4 of the Clayton Act. For example, in *Hasbrouck v. Texaco, Inc.*, 631 F. Supp. 258, 268 (E.D. Wash. 1986), *aff'd in relevant part, rev'd in part*, 879 F.2d 632, 639 (9th Cir. 1989), the district court awarded the plaintiffs all of their requested expert witness fees, ruling that "the retention by plaintiffs of the experts . . . was necessary due to the defenses interposed by [defendant]. *See also Automotive Products PLC v. Tilton Engineering, Inc.*, 855 F. Supp. 1101, 1107 (C.D. Cal. 1994) *appeal dismissed*, 36 F.3d 1109 (Fed. Cir. 1994) (court granted antitrust plaintiff's request for expert fees, finding that the expert's testimony "was necessary to provide the jury with a factual basis from which to ascertain the damages").

The testimony and advice of Litton's economic experts was necessary to the litigation of this case, and the fees and expenses that Litton has incurred in retaining these experts are reasonable. The experts submitted detailed reports and were the subject of extensive and costly deposition discovery. Furthermore, Litton's damages expert Dr. Beyer (as well as Honeywell's expert Dr. Pace) was the subject of a special evidentiary hearing before the trial commenced. The fees for this work were billed to and paid by Litton on an ongoing basis, and the detailed records of these bills have been maintained. These records fully support the amounts which Litton is seeking to recover, as set forth in the accompanying declarations and exhibits.

VII. LITTON'S OUT-OF-POCKET LITIGATION EXPENSES ARE EITHER COMPENSABLE AS PART OF ITS COST BILL, OR ARE COMPENSABLE AS PART OF ATTORNEY'S EXPENSES UNDER THE CLAYTON ACT

To the extent that the attorneys for the prevailing plaintiff incur out-of-pocket (such as travel, telephone, photocopying, and computerized research expenses) that are billed to the

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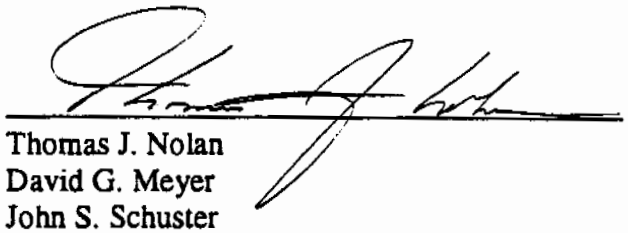
client, are not part of the general overhead of the office, and are not recoverable as part of the bill of costs, Litton is entitled to recover those litigation expenses as part of the mandatory costs and fees award under Section 4 of the Clayton Act. Recovery of these costs is necessary to give effect to the purpose of the statute, which is to ensure that a successful plaintiff's treble damage recovery is not diminished by the payment to the attorney, and thereby to encourage private enforcement of the antitrust laws. *See Perkins*, 474 F.2d at 553; *Image Technical*, 136 F.3d at 1357.

In accordance with this mandatory award of fees and costs, courts have routinely awarded the prevailing plaintiff its out-of-pocket litigation expenses. *See Automotive Products*, 855 F. Supp. at 1106 (prevailing antitrust plaintiff entitled to an award of reasonable "out-of-pocket" expenses such as "facsimile expenses, Lexis charges, long distance telephone charges, Federal Express charges, secretarial overtime charges, trial supply expenses, postage, messenger fees, hotel and travel expenses, parking expenses, teleconference expenses, and mock trial expenses"); *Brown v. Pro Football, Inc.*, 839 F. Supp. 905, 916 (D.D.C. 1993) ("[p]laintiffs' out-of-pocket costs for telephone, telecopier, air and local couriers, postage, photocopying, WESTLAW research, secretarial overtime, and counsels' travel expenses are routinely billed to fee-paying clients, and thus are all compensable as part of a reasonable attorney's fee" award under the antitrust laws).

Each of the categories of Litton's out-of-pocket litigation expenses are fully set forth in the supporting declarations submitted with this memorandum, along with the amount for each broken out separately. These litigation expenses include: LEXIS charges, photocopying not recoverable under the cost bill, database creation and management, travel expenses, courier charges, postage, long-distance telephone charges and expenses incurred in connection with Court-ordered mediation. The total amount of these expenses, exclusive of amounts included in the cost bill, are $6,035,141. All of these expenses are taken from monthly records of amounts billed to and paid by Litton. These expenses were reasonably and necessarily incurred for the preparation and presentation of this case and, as such, are fully recoverable.

Dated: March 8, 1999

Respectfully submitted,



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PROOF OF SERVICE

I, Marta Martin, declare as follows:

I am employed in the County of Los Angeles, California. I am over the age of eighteen years and not a party to the within action. My business address is 550 South Hope Street, 14th Floor, Los Angeles, California 90071. Upon this day, I served a copy of **LITTON'S NOTICE OF MOTION FOR THE AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [DECLARATIONS IN SUPPORT FILED SEPARATELY]** on all interested parties through their attorneys of record listed below in the manner shown below:

☐ **VIA FIRST CLASS MAIL** (CCP §§ 1012, et seq.). I am readily familiar with the firm's practice of collection and processing for mailing. Under that practice it would be deposited with the U.S. postal service on that same day as shown on this declaration with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

☒ **VIA HAND DELIVERY/PERSONAL SERVICE** (CCP §§ 1011, et seq.). I directed a courier to personally deliver said document(s) to each addressee.

Maxwell M. Blecher, Esq.
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☐ **VIA FEDERAL EXPRESS OVERNIGHT/NEXT BUSINESS DAY DELIVERY SERVICE** (CCP §§ 1013). I placed in an envelope, properly labeled, and caused to be deposited into a Federal Express pick-up receptacle as per the regular practice of this office.

Executed on **MARCH 8, 1999** at Los Angeles, California.

☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I certify under penalty of perjury that the foregoing is true and correct

Marta Martin

Marta Martin

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEPAGE'S INCORPORATED, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 97-CV-3983
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	:	
Defendant.	:	

PLAINTIFFS LEPAGE'S, INC. AND LEPAGE'S MANAGEMENT COMPANY, L.L.C.'s PETITION FOR ATTORNEYS' FEES INCLUDING EXPENSES NOT COVERED BY THE BILL OF COSTS

Plaintiffs LePage's, Inc. and LePage's Management Company, L.L.C. petition the Court for an award of attorneys' fees (including expenses not covered by the Bill of Costs) to Mayer Brown & Platt in the amount of $2,728,756.93; to Pepper Hamilton LLP in the amount of $2,179,151.67; and to Peter Hearn in the amount of $587,395.44.[1] In total, plaintiffs request $5,495,304.04. In support of this Petition, plaintiffs rely on the accompanying memorandum of law.

Respectfully submitted,

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[1]These amounts do not include fees and expenses incurred subsequent to the jury's verdict, including fees and costs incurred in connection with the preparation of this Petition.

Peter Hearn (04447)
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ATTORNEYS FOR PLAINTIFFS
LEPAGE'S INCORPORATED and
LEPAGE'S MANAGEMENT COMPANY, LLC

Date: November 23, 1999

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEPAGE'S INCORPORATED, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 97-CV-3983
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS LEPAGE'S, INC. AND LEPAGE'S MANAGEMENT COMPANY, L.L.C.'s PETITION FOR ATTORNEYS' FEES INCLUDING EXPENSES NOT COVERED BY THE BILL OF COSTS

I. INTRODUCTION.

Plaintiffs LePage's, Inc. and LePage's Management Company, L.L.C. (collectively referred to as "LePage's") petition the Court for an award of attorneys' fees under Section 4 of the Clayton Act, 15 U.S.C. § 15(a).[1] In total, plaintiffs seek $5,495,304.04 in attorneys' fees and recoverable expenses not covered by plaintiffs' Bill of Costs[2] broken down as follows: $2,728,756.93 for Mayer Brown & Platt ("Mayer Brown"); $2,179,151.67 for Pepper Hamilton LLP ("Pepper");and $587,395.44 for Peter Hearn, Esquire.[3]

[1] 15 U.S.C. § 15(a) provides, in pertinent part, that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2]Plaintiffs' Bill of Costs will be filed with the Clerk of the Court in the near future.

[3]The supporting documentation for the fee and expense requests is being submitted in (continued...)

Section 4 of the Clayton Act mandates an award of attorneys' fees to any person who is injured in his business or property by reason of anything forbidden by the antitrust laws. 15 U.S.C. § 15(a). Counsel for LePage's have made a good faith effort to eliminate redundant and duplicative hours and otherwise inapplicable charges and to present the Court with a complete description and itemization of fees and expenses recoverable under the Clayton Act. These are the fees and expenses necessarily and reasonably incurred in achieving the result in this case: a determination by the jury that 3M violated the antitrust laws, and a damages award in the amount of $22,828,899 (trebled by this Court to $68,486,697).

II. PROCEDURAL HISTORY.

The reasonableness of the efforts of plaintiffs' lawyers devoted to this litigation is best understood in light of the resistance LePage's faced at every step of the way. First, 3M moved for a more specific complaint or, in the alternative, to dismiss Count Four of the complaint, to which LePage's responded by amending its complaint. In the meantime, 3M unsuccessfully moved to transfer venue from Philadelphia to either Minnesota or the Western District of Pennsylvania. 3M next moved to dismiss the amended complaint or, alternatively, for a more definite statement of claims. 3M's request was again denied, following briefing and oral argument. Not satisfied with the Court's decision, 3M unsuccessfully moved for reconsideration or, in the alternative, for certification of an appeal of this Court's ruling, once again requiring substantial efforts on the part of LePage's attorneys.

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[3](...continued)
volumes: Volumes IA and IB for Mayer Brown; Volumes IIA and IIB for Pepper; and Volume III for Peter Hearn. A chart summarizing each firm's fees and expenses is attached to this memorandum as Exhibit "A."

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In another series of motions, 3M moved to dismiss LePage's as a plaintiff, to require joinder of LePage's Management's members to the case as plaintiffs, and (twice) to eliminate LePage's right to a jury trial. None of these attempts were successful.

3M's insistence that it could not understand LePage's theory of the case prompted this Court to order LePage's to prepare and file a statement of its claims, which required LePage's attorneys to conduct an extensive review of the discovery that was available to date, and to prepare a comprehensive paper explaining LePage's theories of the case. Preparation of this statement of claims consumed numerous hours of partners, associates, legal assistants and secretaries alike.

On February 1, 1999, 3M again sought dismissal of plaintiffs' claims with a motion for summary judgment backed by numerous exhibits and affidavits, and again requiring a comprehensive response. In preparation for trial, 3M listed 83 witnesses whom it expected to call, thereby requiring plaintiffs to prepare for that possibility. Together, the parties filed 22 motions in limine addressed to trial evidence. Trial itself consumed 33 days, many of which were committed to defendant's cross-examination.

III. DISCUSSION.

A. Plaintiffs Have Met the Threshold Requirements for An Attorneys' Fee Award.

In order to qualify for an attorneys' fee award under Section 4 of the Clayton Act, the Third Circuit requires only that plaintiffs prove a violation of the antitrust laws and that as a result, plaintiffs suffered damages. If these two requirements are satisfied, a plaintiff is entitled to a mandatory award of attorneys' fees. Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp., 995 F.2d 414, 418-19 (3d Cir. 1993) ("[a]n antitrust plaintiff who has proven to the satisfaction of the factfinder that

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defendant violated the antitrust laws and has established the fact of damage has established the prerequisites for defendant's liability and its own entitlement to attorneys' fees.").

There can be no doubt that plaintiffs qualify for an attorneys' fees award. The jury's responses to Questions 1 through 3.1 of the Jury Verdict Form indicate that the jury found that 3M unlawfully maintained monopoly power and attempted to unlawfully maintain monopoly power in the market consisting of invisible and transparent tape for home and office use in the United States. The jury then assessed damages in the amount of $22,828,899 for monopolization, and for attempted monopolization. Since the jury found that 3M violated the antitrust laws and that LePage's suffered damages as a result, plaintiffs are entitled to an award of attorneys fees.

B. Plaintiffs' Attorneys' Fees are Reasonable.

Once a plaintiff establishes entitlement to an attorneys' fees award, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). This figure is referred to as the "lodestar," which is "strongly presumed to yield a reasonable fee." Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1035 (3d Cir. 1996)(citing City of Burlington v. Dague, 505 U.S. 557 (1992)). Once the lodestar amount of attorneys' fees is determined, the district court has discretion to make upward or downward adjustments. U.S. ex rel. John Doe I v. Pennsylvania Blue Shield, 54 F.Supp.2d 410 (M.D. Pa. 1999). The lodestar in this case is calculated in the sections immediately below.[4]

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[4]The lodestar approach is the "only reasonably objective basis for valuing an attorney's services," Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973), judgment vacated on other grounds, 540 F.2d 102 (3d Cir. 1976), and has become the standard method for calculating attorney fee awards. Gulfstream III, (continued...)

16diii005910

1. Plaintiffs' lodestar calculation is based only on hours reasonably expended on the case.

The first step in calculating the lodestar is to determine the number of hours reasonably expended by plaintiffs' attorneys in pursuing the litigation to judgment. To ensure claims are made only for time "reasonably expended," the Hensley decision requires counsel to make "a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." Hensley, 461 U.S. at 434.

This has been done. Counsel has carefully reviewed all of the time records to arrive at the number of hours that can reasonably be charged for the work performed. Time has been eliminated for education time of lawyers assigned to the case because of associate turnover. The records have been reviewed to eliminate time spent on particular tasks which proved irrelevant to the case as tried. See Declarations of Barbara Mather, Peter Hearn and Mark Ryan, attached as Exhibits "B," "C," and "D," respectively. In light of these reductions, the total hours claimed to have been reasonably expended are not excessive.

The second and final step in determining the lodestar is to determine the reasonable billing rate of the attorneys involved in the litigation. The Third Circuit has stated that a reasonable hourly rate "generally is reflected in [an individual attorney's] normal billing rate." Lindy Bros., 487 F.2d at 167. Additionally, the Supreme Court has directed that "'reasonable fees' ... are to be calculated according to the prevailing market rates in the relevant community...." Blum v. Stenson, 465 U.S. 886, 895 (1984).

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[4](...continued)
995 F.2d at 421.

16diii005911

Mayer Brown and Pepper partner rates range from $250 per hour to $350 per hour, associate rates range from $125 per hour to $285 per hour, and legal assistant rates range from $50 per hour to $130 per hour. Peter Hearn's fee ranged from $300 per hour to $350 per hour. The hourly rates claimed by plaintiffs' counsel are their usual rates and are consistent with the rates normally charged by counsel in this district. Plaintiffs have attached the declaration of William T. Hangley, Esquire as Exhibit "E" attesting that the rates of the Pepper and Mayer Brown attorneys and legal assistants, as well as Peter Hearn's rates, are reasonable in light of the character and complexity of the issues presented in this case.[5] Mr. Hangley states that Ms. Mather's, Mr. Ryan's and Mr. Hearn's billing rates are in line with those prevailing in Philadelphia for antitrust litigation services by lawyers of comparable skill, experience and reputation.

2. Calculation of the lodestars.

Calculating the lodestar figure "requires multiplying the number of hours reasonably expended by the reasonable hourly rate." Pennsylvania Environmental Defense Foundation v. Canon-McMillan School Dist., 152 F.3d 228, 231 (3d Cir. 1998). The total counsel fees claimed in this case, including expenses, are $5,480,703.23. Each firm has performed its lodestar calculation by multiplying the number of hours claimed per attorney or legal assistant by that person's billing rate. The calculations are attached to the front of the supporting documentation volumes being submitted with this fee petition. See Volume IA for Mayer Brown, Volume IIA for Pepper, and Volume III for Peter Hearn.

---

[5]Mr. Hangley's declaration comports with the rule in the Third Circuit that, "[t]he plaintiff bears the burden of producing sufficient evidence of what constitutes a reasonable market rate for the essential character and complexity of the legal services rendered...." Hurley v. Atlantic City Police Department, 174 F.3d 95, 131 (3d Cir. 1999) (citing Smith v. Philadelphia Housing Authority, 107 F.3d 223, 225 (3d Cir. 1997)).

16diii005912

3. No downward adjustments to the lodestars are warranted.

LePage's was successful in proving that 3M violated the antitrust laws in two respects. First, LePage's proved that 3M unlawfully maintained monopoly power in violation of Section 2 of the Sherman Act. Second, LePage's proved that 3M unlawfully attempted to maintain monopoly power, also in violation of Section 2 of the Sherman Act.

Notwithstanding LePage's lack of success in proving the Section 1 (unlawful restraint of trade) and Section 3 (exclusive dealing) claims, no downward adjustment to the lodestar is warranted. In Hensley, the Supreme Court was asked to decide whether a partially prevailing plaintiff may recover attorneys' fees for services performed with respect to unsuccessful claims. Two rules were effectively established by the Court: one governing loss of a claim related to the winning claim; and another rule governing the loss of a claim that is unrelated or wholly independent of the winning claim. See Dobbs, *Reducing Attorneys' Fees for Partial Success: A Comment on Hensley and Blum*, 1986 Wis. L. Rev. 835, 838-89. The first rule (related claims rule) will apply if the plaintiffs' claims for relief involve a common core of facts or are based on related legal theories. See id. at 839. In effect, the related claims should be treated as a single unit so that the plaintiff is entitled to recover all of its attorneys' fees regardless of whether one of the related claims was ultimately unsuccessful at trial. The second rule will apply only if a plaintiff presents two unrelated claims and loses on one of them, for example, where an antitrust plaintiff's claims included a count under the RICO statute. See id. at 839-40.

In the present case, LePage's four antitrust claims were all based on a common core set of facts. LePage's theories were also legally interrelated, for example, all of plaintiffs' claims required plaintiffs to prove the existence of a relevant market, the market for invisible and transparent tape for

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plaintiffs to prove the existence of a relevant market, the market for invisible and transparent tape for home and office use in the United States. That common element was proved, as indicated by the jury's response to Question 1 of the Verdict Form. It makes no difference that plaintiffs did not prevail on every theory, or for the full amount of the damages sought. What does matter is that plaintiffs prevailed on their central claims – that 3M monopolized and attempted to monopolize the market for invisible and transparent tape for home and office use in the United States – both of which are inimical to the antitrust laws. Since plaintiffs prevailed on the litigation as a whole and the claims involved many overlapping issues of fact and law, the fee award should not be reduced.

C. Plaintiffs are Permitted To Add Costs Not Covered in the Bill of Costs.

LePage's has claimed total expenses of $302,193.64 in the lodestar amounts to account for costs not recoverable under 28 U.S.C. § 1920, but which are properly included in the attorney fee petition as having been necessarily incurred in the litigation of the action.[6] See, e.g., Abrams v. Lightolier, Inc., 50 F.3d 1204, 1225 (3d Cir. 1995) (reproduction expenses, travel time and expenses, and postage recoverable under § 1988 if attorneys in the community bill separately for these charges); Planned Parenthood of Southeastern Pennsylvania v. Casey, 869 F.Supp. 1190, 1202 n. 9 (E.D. Pa. 1994) (charges for court liason, electronic research services, messengers, report services, faxes and transportation allowed); Midnight Sessions, Ltd. v. City of Phila., 755 F.Supp. 652, 663 (E.D. Pa.) (payment for meals and travel allowed when indication of to whom various expenses are attributable is provided), rev'd and vacated on other grounds, 945 F.2d 667 (3d Cir. 1991), cert. denied, 503 U.S. 984

[6]These costs include charges for: electronic legal research; delivery service, including FedEx, UPS and other courier charges; business meals; postage; supplies, such as binders and tabs; facsimile transmissions (labeled "telecopy" charges on Pepper's supporting documentation); telephone calls; and attorney travel and local transportation, including airfare, taxi cabs, parking, tolls and mileage.

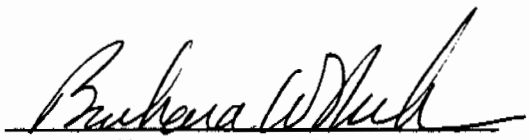
16diii005914

(1992); Rank v. Balsky, 590 F.Supp. 787, 803 (E.D. Pa. 1984) (transportation and food expenses allowed "to the extent that such expenses were reasonably and necessarily incurred"). As with the lodestars, the expenses have been carefully reviewed to ensure that only proper items are claimed.[7]

IV. CONCLUSION.

For all of the foregoing reasons, plaintiffs LePage's, Inc. and LePage's Management Company, L.L.C. request an award of attorneys' fees (including expenses not covered by the Bill of Costs) to Mayer Brown & Platt in the amount of $2,728,756.93; to Pepper Hamilton in the amount of $2,179,151.67; and to Peter Hearn in the amount of $587,395.44.

Respectfully submitted,



Barbara W. Mather (04509)
Elizabeth A. Duffy (75761)
PEPPER HAMILTON LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

Peter Hearn (04447)
PETER HEARN, P.C.
123 S. Broad Street, Suite 1827
Philadelphia, PA 19109-1097
(215) 545-1400

[7] For example, all word processing fees have been eliminated. Planned Parenthood, 869 F.Supp. at 1202 (word processing fees are normal part of attorneys' overhead costs).

16diii005915

Mark W. Ryan
Kerry Lynn Edwards
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, D.C. 20006-1101
(202) 263-3211

ATTORNEYS FOR PLAINTIFFS
LEPAGE'S INCORPORATED and
LEPAGE'S MANAGEMENT COMPANY, LLC

Date: November 23, 1999

16diii005916

EXHIBIT A

Attorney Fee Petition Summary Sheet				
Fee Category	**Peter Hearn, P.C.**	**Mayer, Brown & Platt**	**Pepper Hamilton LLP**	**Category Total**
Attorney Fees	557,612.50	2,598,948.45	2,036,549.45	5,193,110:40
Electronic Research	-	10,062.42	55,268.89	65,331.31
Delivery Services	781.52	-	8,828.22	9,609.74
Meals	818.28	7,074.13	5,954.15	13,846.56
Other Disbursements	-	5,105.71	-	5,105.71
Other Professional Services	-	-	14,600.81	14,600.81
Postage	-	73.02	720.33	793.35
Supplies	-	-	5,792.35	5,792.35
Telecopy	45.00	9,983.01	12,461.00	22,489.01
Telephone	7,529.78	4,223.33	2,748.19	14,501.30
Travel/Local Transportation	20,608.36	93,286.86	36,228.28	150,123.50
	Peter Hearn P.C. Total Fees:	**Mayer, Brown & Platt Total Fees:**	**Pepper Hamilton LLP Total Fees:**	**Total Attorney Fee Amount:**
	$ 587,395.44	$ 2,728,756.93	$ 2,179,151.67	$ 5,495,304.04

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEPAGE'S INCORPORATED, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 97-CV-3983
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	:	
Defendant.	:	

DECLARATION OF BARBARA W. MATHER

I, Barbara W. Mather, certify as follows in support of Plaintiffs' Petition for Attorneys' Fees Including Expenses Not Covered By the Bill of Costs:

1. I am a 1968 graduate of the University of Chicago Law School, and a partner in the law firm of Pepper Hamilton LLP since 1973. Throughout my years with the Firm, my practice has included a substantial volume of antitrust litigation.

2. A partial list of the major cases in which I have served as counsel includes:

- Massachusetts School of Law at Andover, Inc. v. American Bar Association, Civil Action No. 93-6206 (E.D. PA.) (co-counsel)
- John J. Wallace v. Systems & Computer Technology Corporation, et al., Civil Action No. 95-CV-6303 (E.D. PA)
- Blanche Road Corporation, et. al v. Bensalem Township, et al., Civil Action No. 89-9040 (E.D. PA)

3. Within Pepper, I have served as Executive Partner of the firm (1993-94) and as Chair of the Litigation and Dispute Resolution Department (1998-present).

4. I am a Fellow in the American College of Trial Lawyers.

5. I serve as a Lecturer in Law for Antitrust at The Law School of the University of Pennsylvania (1995-96, 1998-present).

6. I am admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Third Circuit, and the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania.

7. Pepper's partner rates range from $270-$350; associates' rates range from $125-$195; and legal assistants' rates range frm $50-$110. These rates represent the customary billing rates charged for their time during the relevant years.

8. My firm devoted a total of 14,556 hours to its representation of the plaintiffs. Summaries of the activities conducted by the firm's lawyers and legal assistants and the hours spent by each attorney and legal assistant on this matter are set forth in Volume IIA of this submission.

9. Based upon the rates identified above, multiplied by the hours attributable to each firm member, plaintiffs' total fee request for Pepper Hamilton is $2,036,549.45. As explained more fully in the Memorandum, I have reviewed the time records for this matter and attest that the time was reasonably expended in support of plaintiffs' case.

10. In addition, my firm incurred expenses which are not accounted for in the bill of costs in the amount of $142,602.22. An itemization of these expenses is set forth in Volume IIB of this submission and discussed at pages 8 and 9 of the Memorandum.

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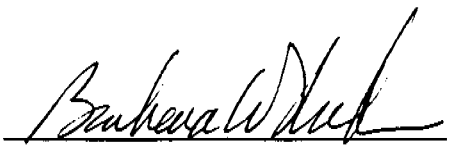
11. Accordingly, the total request for Pepper Hamilton's fees and expenses in this matter is $2,179,151.67.



Barbara W. Mather

Date: November 23, 1999

16diii005922

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEPAGE'S INCORPORATED, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION NO. 97-CV-3983
	:	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	:	
	:	
Defendant.	:	
	:	

DECLARATION OF PETER HEARN

I, Peter Hearn, declare as follows in support of Plaintiffs' Petition for Attorneys' Fees Including Expenses Not Covered By the Bill of Costs:

1. I am a graduate of Cornell University (1956) and the University of Pennsylvania Law School (1961).

2. I joined the law firm of Pepper Hamilton in 1961 and was elected partner in 1968. I was a member of the Pepper firm until 1996.

3. In April, 1996, I established the Philadelphia firm of Peter Hearn, P.C. I continue to practice with this firm.

4. Throughout my years of practice, I have specialized in litigation. Included in this work has been a substantial volume of antitrust matters.

5. Attached hereto is a current copy of my personal biography.

6. I am admitted to practice before the Supreme Court of the United States, the Courts of Appeals for the Third and Eleventh Circuits, and the District Court for the Eastern District of

Pennsylvania. I am also admitted to practice before the trial and appellate courts of the Commonwealth of Pennsylvania.

7. I devoted a total of 1674.5 hours representing the plaintiffs in the above-captioned action. My activities are described in a narrative summary located at Volume III of this submission.

8. My hourly rate was $300 for the period through December 31, 1997, $325 for the 1998 calendar year, and $350 for the 1999 calendar year.

9. Based on the above rates multiplied by the number of hours attributable to my representation, plaintiffs' total fee request for my services is $557,612.50. As explained more fully in the Memorandum of Law in Support of Plaintiffs' Petition for Attorneys' Fees, these billing memoranda have been extensively edited to eliminate any time not directly related to the representation.

10. In addition, my firm incurred expenses which are not accounted for in the bill of costs in the amount of $29,782.94. An itemization of these expenses and services is located at Volume III of this submission.

11. Accordingly, my firm's portion of the total request for plaintiff's fees and expenses in this matter is $587,395.44.

Peter Hearn

Date: November 23, 1999

PETER HEARN
Peter Hearn, PC
123 South Broad Street
Suite 1827
Philadelphia, PA 19109-1097

Biography

Background: Cornell University (AB, 1956); U.S. Army (Captain, 1956-58); University of Pennsylvania Law School (LLB, 1961); Pepper, Hamilton & Scheetz (Associate 1962-68, partner 1968-96; twice elected to firm's executive committee; four years as chair of firm's finance committee); Chancellor of Philadelphia Bar Association (1989); President of Philadelphia Bar Foundation (1985); Trustee, Philadelphia Foundation (1980-90); candidate for mayor of Philadelphia (1991); Co-chair of Free Library of Philadelphia $60 million (public and private funds) capital campaign (1995-97); Co-Chair of Third Circuit Judicial Conference; Fellow, American College of Trial Lawyers; member, American Law Institute; member American, Pennsylvania and Philadelphia Bar Associations.

Awards: University of Pennsylvania Law School Award of Merit (1989); American Jewish Committee Judge Learned Hand Award (1990).

Selected litigation matters:

- Currently representing LePage's Incorporated in a suit brought under Section 2 of the Sherman Act against 3M.

- Represented John Labatt, Ltd. of Canada in its antitrust work (both litigation and advice) in the United States.

- Represented American Safety Razor Company in a federal court against action brought by U.S. Department of Justice for violation of Section 7 of the Clayton Act.

- Defended Time Magazine in a federal court libel action: Medico v. Time Incorporated.

- Appeared three times (two oral arguments) before the Supreme Court of the United States.

- Represented family patriarch G. Stockton Strawbridge in connection with his opposition to the 1996 sale of Strawbridge & Clothier of Philadelphia to the May Company.

Selected non-litigation matters:

- Currently representing FastShip Incorporated, an ocean transport logistics firm, seeking to initiate container service between Philadelphia and Cherbourg. This representation has involved negotiating a contract with the Delaware River Port Authority for the Authority to construct an $80 million intermodal terminal in South Philadelphia.

- Represented Browning-Ferris, Inc. in obtaining and negotiating a multi-year contract beginning in 1993 for the disposal of Philadelphia's solid waste.

- Served as consultant to the German shipbuilder Jos. L. Meyer GmBH & Co. in its attempts to open a shipbuilding facility at the Philadelphia Naval Shipyard.

- Represented a board member of a Philadelphia hospital (now part of the Temple System) in connection with an internal investigation of claimed misuse of hospital funds. Representation was carried out in parallel with the State Attorney General's office.

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- Served as a mediator in a sexual harassment claim against a major Philadelphia law firm.

- Served as an arbitrator in a 1997 dispute between the University of Pennsylvania Health System and Medical Professional Liability Catastrophe Loss Fund.

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EXHIBIT D

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

LEPAGE'S INCORPORATED and LEPAGE'S MANAGEMENT COMPANY, LLC, Plaintiffs, v. 3M (MINNESOTA MINING AND MANUFACTURING COMPANY), Defendant.	CIVIL ACTION NO. 97-CV-3983

DECLARATION OF MARK W. RYAN

I, Mark W. Ryan, declare as follows in support of Plaintiffs' Petition for Attorneys' Fees Including Expenses Not Covered By the Bill of Costs:

1. I am a 1977 graduate of Syracuse University, a 1981 graduate of Duke University Law School and a partner in the law firm of Mayer, Brown & Platt.

2. I joined Mayer, Brown & Platt in 1981 and, throughout my career, antitrust law has been the principal focus of my practice. This work has included both litigation and non-litigation antitrust matters.

3. A partial list of the cases in which I have served as counsel includes:

- In re Citric Acid Antitrust Litigation, MDL Dkt. 1092 (N.D. Cal.)
- In re High Fructose Corn Syrup Antitrust Litigation, MDL No. 1087 (C.D. Il.)

- In re Airline Ticket Commission Antitrust Litigation, MDL No. 1058, (D. Minn.)
- Cooter & Gell v. Hartmarx, 396 U.S. 384 (1990) (and related litigation)

4. I am admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the D.C. Circuit and various other federal and state courts. I have been admitted pro hac vice in the Eastern District of Pennsylvania for purposes of this case.

5. The other Mayer, Brown & Platt attorney who was principally responsible for our representation of the plaintiffs in these proceedings is Kerry Edwards. Ms. Edwards is a graduate of Georgetown University Law School. She joined Mayer, Brown & Platt in 1986 and became a partner in 1995. Her practice focuses on antitrust and litigation.

6. Mayer, Brown & Platt is seeking payment for 17,219.15 hours of representation of the plaintiffs. This include the time of attorneys, legal assistants and document clerks for the period March 1, 1997 through October 8, 1999. Detailed billing records describing the firm's activities are set forth in Volume IA of this submission, with a summary of the hours spent by each Mayer, Brown & Platt attorney and legal assistant attached to the front of the volume.

7. Mayer, Brown & Platt annually reviews and adjusts attorney billing rates as of each July 1st. During the period March 1, 1997 through October 8, 1999, my hourly rate ranged from $300-$350 and Ms. Edwards' rate ranged from $250-$325. Associate hourly rates ranged from $135-$285. Legal assistant rates ranged from $75-$130. These rates represent the customary billing rates charged for their time during the relevant time period.

8. Based upon the above rates multiplied by the hours attributable to each firm member, the total fee request relating to work performed by Mayer, Brown & Platt is $2,598,948.45. As explained more fully in the Memorandum of Law in Support of Plaintiffs' LePage's, Inc. and LePage's Management Company, L.L.C.'s Petition for Attorneys' Fees, these billing records have been edited to eliminate unreasonable and duplicative time.

9. In addition, Mayer, Brown & Platt incurred expenses which are not accounted for in the bill of costs in the amount of $129,808.48. An itemization of these expenses is located at Volume IB of this submission.

10. Accordingly, the total request for Mayer, Brown & Platt related fees and costs in this matter is $2,728,756.93.

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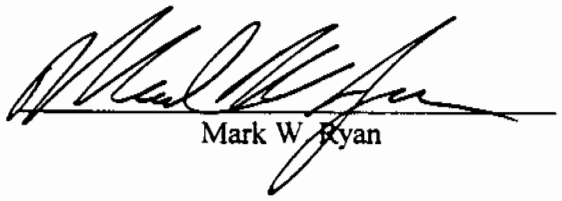
I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 22, 1999



Mark W. Ryan

EXHIBIT E

IN THE UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LePAGE'S INCORPORATED, et al	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	NO. 97-CV-3983
v.	:	
	:	
3M (MINNESOTA MINING AND MANUFACTURING CO.)	:	
	:	
Defendant	:	

DECLARATION OF WILLIAM T. HANGLEY

I, William T. Hangley, declare as follows in support of Plaintiff's Motion for Attorneys' Fees and Costs:

1. I am a 1966 graduate of The Law School of the University of Pennsylvania.

2. I have practiced law in Philadelphia, primarily as a trial lawyer, since my graduation from law school, and the majority of my work has been in federal court. I am a member of the Pennsylvania Bar and am admitted to practice before the United States Court of Appeals for the Third Circuit and Federal Circuit and the United States District Court for the Eastern District of Pennsylvania and other districts. I am Chairman of the law firm of Hangley Aronchick Segal & Pudlin, which I co-founded in 1994. My areas of specialty include antitrust litigation.

3. I am a Fellow of the American College of Trial Lawyers and the American Bar Foundation, a Master of the Bench of the University of Pennsylvania Inn of Court, and a member of the American Law Institute. My memberships in bar associations include the American Bar Association (Co-Chair of the ABA Litigation Section Task Force on the Merit Selection of Judges, 1995-1997; Co-Chair of the Section's Federal Procedure Committee, 1990-1995; and Member of the Section's Task Forces on Discovery, 1997-1998 and on the Judiciary, 1998-present), the Philadelphia Bar Association and the Pennsylvania Bar Association (Member of the House of Delegates 1989-1992). I am also a Member of the Advisory Board for the Public Interest Law Center of Philadelphia, and served on its Board of Directors from 1982-1988.

4. I am familiar with rates customarily charged by attorneys in litigation in the federal courts and particularly with rates typically charged by partners and associates in the major firms in Philadelphia. Rates for senior lawyers range from $300 to $435, depending on experience and reputation, and rates for associates typically range from $100 to $200.

5. I have reviewed the rates charged by Pepper Hamilton LLP, Peter Hearn, P.C. and Mayer, Brown & Platt in their Motion for Attorneys' Fees and Costs.

6. Pepper's partner rates range from $270-$350; associates' rates range from $125-$195, and legal assistants' rates range from $50-$110. Peter Hearn's rates range from $300-$350. Mayer, Brown & Platt's partner rates range from $250-$350, associates' rates range from $135-$285, and legal assistants' rates range from $75-$130. The rates claimed by Pepper Hamilton LLP, Peter Hearn, P.C. and Mayer, Brown & Platt are reasonable given the attorneys' experience and background, and are in line with rates usually and customarily charged by comparable law firms in this geographic area and, I believe, nationally.

16diii005936

7. I state under penalty of perjury that the foregoing information is true and correct to the best of my knowledge, information and belief.

William T. Hangley

Dated: November 23, 1999

16diii005937

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of November, 1999, a true and correct copy of Plaintiffs' Petition for Attorneys' Fees Including Expenses Not Covered by the Bill of Costs, was served as follows:

Via Facsimile (brief only) and Hand Delivery (11/24/99)
John G. Harkins, Jr., Esquire
Harkins Cunningham
2800 One Commerce Square
2005 Market Street
Philadelphia, PA 19103

Via Facsimile (brief only) and Federal Express
William Daniel Sullivan, Esquire
Collier, Shannon, Rill & Scott, PLLC
3050 K Street, N.W.
Washington, D.C. 20007

Elizabeth A. Duffy

SUBMISSION OF

GUN-EI CHEMICAL INDUSTRY CO., LTD.

PROMOTIONAL MATERIALS, VOLUME V

TO

UNITED STATES ATTORNEY'S OFFICE
FOR THE SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

COMMODITY FUTURES TRADING COMMISSION

CONFIDENTIAL TREATMENT REQUESTED BY
GUN-EI CHEMICAL INDUSTRY CO., LTD.

May 12, 2000

16diii005939

EXHIBIT C

Rates aren't skyrocketing, but they do keep going up

Many corporate clients are willing to pay the increasing hourly cost of top legal talent, especially in hot practice areas.

BY RUTH SINGLETON

NATIONAL LAW JOURNAL STAFF REPORTER

The National Law Journal (p. B11)
Monday, December 27, 1999

As the economy continues to flourish, law firm billing rates keep climbing. Information provided by law firms responding to the billing portion of The National Law Journal's 1999 survey of the nation's 250 largest law firms indicates that the increases were somewhat more substantial this year than last.

At the high end, Hollywood has beaten out the Beltway. Bertram Fields, a partner who practices entertainment law at Los Angeles' Greenberg Glusker Fields Claman & Machtinger L.L.P., charges a rate of $750 an hour, $140 more than the $610 charged by lobbying partner Thomas Hale Boggs, of Washington, D.C.'s Patton Boggs L.L.P., frequently a top-biller in past NLJ surveys. Houston's Andrews & Kurth L.L.P., whose highest rate is $650, came in second. Twenty firms list partners who charge $500 an hour or more.

There were 141 law firms that provided a range of billing rates for partners and associates, 111 of which responded to last year's survey. Of these 111 firms, 105 raised rates for at least some attorneys, but many held the line on some parameters of their billing rates. For example, 25 firms kept their high rates for partners the same. At the same time, 20 raised them by $5 to $10; seven by $15 to $20; 13 by $25; 21 by $26 to $50; seven by $51 to $99; and four by $100 or more. (Of course, some large jumps can be attributed to the arrival of one high-priced partner.) Only 14 firms lowered their highest rates. Thus 72 firms, or about 65%, of the responding firms raised their highest rates.

The low rates for associates also showed a general upward trend. Although 31 out of the 111 law firms, or 28%, kept their entry-level associate rate the same, 19 firms raised their low-associate rates by $5; 22 by $10; nine by $15; nine by $20; 10 by between $20 and $50; and three by more than $50. Only eight firms lowered their lowest associate rates. Thus, 72 out of 111 firms, or about 65%, raised their entry-level associate rates.

Only 26 of the 141 responding firms now offer an associate rate under $100. Firms charging the lower rates were mostly located in the Midwest (Detroit; Grand Rapids, Mich.; Louisville, Ky.; Kansas City, Mo.; St. Louis) or smaller municipalities (Baltimore; Buffalo, N.Y.; Norfolk, Va.; Uniondale, N.Y.; Woodbridge, N.J.), although lower rates could also be found at a few Chicago, Philadelphia, New Orleans and Seattle firms.

Not surprisingly, larger firms tend to charge the higher rates. New York's Skadden, Arps, Slate, Meagher & Flom L.L.P.--No. 2 on the NLJ 250, with 1,403 attorneys--lists a range of $380 to $590 for partners and $190 to $365 for associates. In contrast, St. Louis' Husch & Eppenberger L.L.C. charges $140 to $275 for partners, a lower range than Skadden's associate rate. The firm--No. 199 on the NLJ 250, with 183 attorneys--charges

Alternative billing methods continue to be popular, but they still don't pose a threat to the billable hour. Firms that generate sizable percentages of their income from alternative billing methods include Brooklyn, N.Y.'s Cullen & Dykman (50%); Woodbridge, N.J.'s Wilentz, Goldman & Spitzer (47%); Chicago's D'Ancona & Pflaum (40%); Buffalo, N.Y.'s Hodgson, Russ, Andrews, Woods & Goodyear L.L.P. (40%); Hunton & Williams (40%); Philadelphia's Schnader Harrison Segal & Lewis L.L.P. (39%); Philadelphia's Saul, Ewing, Remick & Saul L.L.P. (36%); Detroit's Butzel Long (30%); and Holland & Knight L.L.P. (30%).

The alternative billing methods such firms listed include task-based billing, contingency fees, fixed fees and blended rates. Mr. Altonji observed that many firms use "value-based billing for the bigger stuff....For a lot of basic things, such as loans, a lot of [law firms use] fixed fees."

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	'00 MAY 15 A10:21 FILED Civil Action No. 5:98CV-108-R

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND COSTS

Ignoring the law of the Sixth and other Circuits that "[a]n award of attorney's fees as part of the cost of a successful antitrust suit is mandatory,"[1] defendants ("UST") invite error in urging the Court to deny Conwood the recovery of its attorneys' fees and expenses. Since at least 1968, the Sixth Circuit has recognized that the express provision of Section 4 of the Clayton Act trumps the court's discretion to deny the successful plaintiff attorneys' fees and expenses under Rule 54(d).[2]

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[1] Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1312 (9th Cir.), cert. denied, 459 U.S. 1009 (1982).

[2] See White & White Inc. v. American Hosp. Supply Corp., 786 F.2d 728, 731 n.1 (6th Cir. 1986); Lewis v. Pennington, 400 F.2d 806, 819 (6th Cir. 1968) (Section 4 "makes 'express provision' for costs, and a district court would be powerless under Rule 54(d) to deny such plaintiff his costs in the exercise of discretion.").

The award is thus mandatory, and UST's desire to avoid paying it is hardly reason for the Court to ignore the statute. Nor should it be the occasion for another month-long trial. While UST suggests that Conwood's billing statements and invoices must be litigated in granular detail, the law is expressly to the contrary. See Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

Conwood's fee submission complies fully with Federal Rule of Civil Procedure 54(d)(2)(B) and Local Rule 54.4. Conwood has provided ample proof -- comparable to the proof provided by successful plaintiffs in other large antitrust cases -- in support of its motion for attorneys' fees and costs. (Point I, infra). Conwood's requested attorneys' fees, expenses and expert fees in this nationwide, complex antitrust case are reasonable as to hourly rates and number of hours. The Court would have discretion to award a *multiple* of those fees, but should award at least the actual fees and expenses as "costs of suit" to fully compensate Conwood for what it has already incurred and paid. (Point II, infra).

I. CONWOOD HAS PROVIDED SUFFICIENT PROOF IN SUPPORT OF ITS MOTION AND HAS OFFERED TO PROVIDE ADDITIONAL DETAIL IN CAMERA SHOULD THE COURT SO REQUEST

A. Conwood's Motion and Memorandum in Support Specify the Judgment and Grounds for an Award of Attorneys' Fees and Costs and Provide a Fair Estimate of the Amount Sought.

Federal Rule of Civil Procedure 54(d)(2)(B) requires only that a motion for attorneys' fees "specify the judgment and the

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statute, rule or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought." Conwood has met -- and exceeded -- the Rule 54(d)(2)(B) requirements. Conwood has provided the Court with (a) a motion for attorneys' fees and expenses and memorandum in support specifying the judgment and statute entitling Conwood to its award and the amounts sought; (b) four affidavits from counsel attesting to the amounts sought and reasonableness of the requested fees and expenses; (c) a summary of the amounts sought as requested fees and expenses. Conwood has also offered to provide to the Court actual billing records and invoices for in camera review in the event the Court determines that such review is necessary.

This information matches, and in some instances exceeds, the information provided by successful plaintiffs in at least two other recent antitrust cases. Attached as Exhibit A is Litton's Notice of Motion and Motion for the Award of Attorney's Fees and Litigation Expenses (Mar. 8, 1999) in Litton Systems, Inc. and Litton Systems Canada, Ltd. v. Honeywell, Inc., No. CV 90-4823 MRP (Ex) (C.D. Cal.). As is evident from Exhibit A, the information submitted by Litton consisted of only a motion, spreadsheets summarizing fees and expenses, and supporting declarations.[3] Unlike Litton, see Exh. A at 15-16, Conwood has not asked to be compensated for the thousands of hours its in-house counsel -- David L. Simpson and Edward J. Foster -- have

[3]Litton's supporting declarations were filed under seal.

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worked on this litigation. Similarly, while the quality of the work, the degree of success, and size of the damages award given by the jury would warrant a quality adjustment above the market rate lodestar Conwood has requested,[4] Conwood has not asked this Court for a quality of work adjustment or a lodestar multiplier. Litton did. Cf. Exh. A at 14.

Attached as Exhibit B is Plaintiffs LePage's, Inc. and LePage's Management Company, L.L.C.'s Petition for Attorney's Fees Including Expenses Not Covered by the Bill of Costs (Nov. 23, 1999) in LePage's, Inc., et al. v. 3M (Minnesota Mining and Manufacturing Co.), No. 97-CV-3983 (E.D. Pa.). Like Conwood, LePages submitted a motion, memorandum in support, a spreadsheet summarizing its fees and expenses, and supporting affidavits. While UST complains about Conwood's 14-page "bare-bones request," Defendants' Memorandum in Opposition to Plaintiffs' Motion for Attorney Fees and Costs at 1 (May 3, 2000) ("Opp."), LePage's memorandum in support of its fees motion consists of nine pages.

While UST cites repetitively to civil rights, Title VII, and NLRA fee award cases, in which a court's fee award is discretionary, those decisions apply a standard far more limiting than 15 U.S.C. § 15.[5] The discretionary fee award statutes have

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[4]See Pitchford v. PEPI, Inc., 531 F.2d 92, 110 (3d Cir. 1975), cert. denied, 426 U.S. 935 (1976) and Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees and Costs of Suit at 9 (Apr. 19, 2000).

[5]See Opp. at 3. Wayne v. Village of Sebring, 36 F.3d 517, 531 (6th Cir. 1994), cert. denied, 514 U.S. 1127 (1995) involved a discretionary award of fees and costs to a successful plaintiff in a civil rights action under 42 U.S.C. § 1988, while Wooldridge v. Marlene Industries Corp., 898 F.2d 1169 (6th Cir. 1990), addressed a discretionary award in a Title VII case under 42

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differing and often heightened proof requirements. They cannot properly be used to chisel away at a successful antitrust plaintiff's entitlement.[6] UST has shown no respect in which Conwood's petition for fees is deficient.

B. Conwood's Detailed Billing Records and Invoices Contain Work Product and Privileged Communications, to Which UST is Not Entitled.

Conwood has not provided its detailed billing statements and invoices to opposing counsel for good reason: the billing statements and invoices are replete with recitations of attorney client communications and attorney work product. They provide an hour-by-hour "road-map" to the prosecution of this case. UST is not entitled to this information, particularly while the case remains unresolved.

U.S.C. § 2000e-5(k). In Cruz v. Local Union No. 3 of the International Board of Electric Workers, 34 F.3d 1148 (2d Cir. 1994), the Second Circuit considered a discretionary award of fees to a successful plaintiff in a National Labor Relations Act claim, and actually remanded the case for "a more generous appraisal" of the fee award. 34 F.3d at 1161.

[6]See, e.g., Tic-X-Press, Inc. v. Omni Promotions Co. of Ga., 815 F.2d 1407, 1423 n.25 (11th Cir. 1987) ("the principles guiding attorney's fee awards in other cases, such as civil rights suits under 42 U.S.C.A. § 1983, should not be applied mechanically to antitrust cases"); Black Gold, Ltd. v. Rockwool Indus., Inc., 529 F. Supp. 272, 274 (D. Colo. 1981) ("A successful plaintiff in an antitrust action is entitled to attorney fees as a matter of right under the Clayton Act § 4, 15 U.S.C. § 15. It is this entitlement as a matter of right which distinguishes the award of attorneys fees in antitrust cases from civil rights cases and most other statutory actions which provide that the award of attorneys fees is discretionary."); 10 Charles A. Wright, et al., Federal Practice and Procedure § 2675.2, at 405-06 (1998) (comparing mandatory fee statutes, such as 15 U.S.C. § 15, which "direct the court to award a reasonable attorney's fee to a prevailing litigant" with "others [such as 42 U.S.C. § 1988 which] grant the court discretion to make an award").

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For these same reasons, Litton declined to provide its detailed fee records, including daily time entries, to opposing counsel in support of its motion for attorney's fees and expenses. Litton's counsel aptly noted that

> Litton has not included the detailed diary entries prepared by each timekeeper that are supplied with each statement. Provision of these unredacted diary entries to Honeywell's counsel at this state in the litigation is problematic, as there is a possibility of disclosure of confidential information that could be used to Honeywell's advantage in subsequent trial proceedings.

Exh. A at 5 n.3. The same holds true here. UST cites no authority that requires the submission of privileged, tactically sensitive information as a condition of obtaining the mandatory award of fees and expenses required by the Clayton Act.[7]

C. The Materials Before the Court Are Sufficient.

The materials before the Court are, as a matter of law, sufficient support for the mandatory award. UST has no authority to the contrary. Rule 54(d)(2)(C) merely offers UST the opportunity for "adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78." Rules 43(e) and 78 are purely discretionary: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition." (emphasis added). Rule 78 allows district courts to rule on motions for attorneys' fees on a "motions day," or

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[7]If the Court finds it necessary to delve into the minutiae of the supporting documentation, however, Conwood will provide detailed billing statements and invoices for in camera review.

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"without oral hearing upon brief written statements of reasons in support and opposition." (emphasis added).

The Advisory Committee Notes to Rule 54(d)(2)(C) confirm that the time-consuming and onerous additional proof, discovery and evidentiary hearings requested by UST, see Opp. at 6-7, 16, are unnecessary.[8] While UST seeks to create obstacles to deny Conwood the award of fees and expenses to which the Clayton Act entitles it, nothing in the Clayton Act, the Federal Rules, or the cases requires the elaborate, expensive, and time-consuming procedure UST urges on the Court.

II. THE ATTORNEYS' FEES AND EXPENSES INCURRED BY CONWOOD IN THIS NATIONWIDE ANTITRUST CASE ARE REASONABLE

A. Conwood's Request for Attorneys' Fees in this Nationwide, Complex Antitrust Case is Reasonable as to Hourly Rates and Number of Hours.

Conwood incurred and paid hourly fees and related expenses to prosecute this case. The recovery of those out-of-pocket payments would in no sense be a "windfall." Opp. at 8, 11. It would merely "insulate [Conwood's] treble damages recovery from expenditures for legal fees, consistent with section 4's purpose to encourage private persons to undertake enforcement of antitrust laws." Twin City Sportservice, 676 F.2d at 1312. The very purpose of the Clayton Act's provision for the mandatory

[8] "In some cases, an evidentiary hearing may be needed, but this is not required in every case. . . . On rare occasion, the court may determine that discovery under Rules 26-37 would be useful to the parties." Fed. R. Civ. P. 54(d)(2)(C) advisory committee note (Amendments 1993) (emphasis added).

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award of fees and expenses is to shift the cost of counsel from plaintiff to the defendant.[9]

Of course, UST's New York and Louisville counsel argue that Conwood should have been limited in this high-stakes, complex, nationwide antitrust litigation to Memphis counsel, and therefore should recover only at Memphis rates. See Opp. at 12. No case so holds. The determination of the appropriate rate is "fact-intensive and is best guided by what attorneys earn from paying clients for similar services in similar circumstances." Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 175 (4th Cir. 1994).

This litigation was not a Paducah or even a Kentucky litigation. It was a complex, national antitrust litigation, involving parties, witnesses, experts and counsel from numerous states. Discovery was conducted throughout the country, because the case involved the actions of UST sales representatives and managers in nearly every state. While the Western District of Kentucky was the forum, it was by no means the only locus from which jurors heard testimony. Conwood brought witnesses to Paducah from such far-ranging places as Spokane, Washington, Worthing, South Dakota and Atlanta, Georgia. The case sought a recovery for UST misconduct that was truly nationwide.

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[9] E.g., Tic-X-Press, Inc., 815 F.2d at 1423-24 ("Section 4's purpose is three-fold: 1) to encourage private citizens to undertake enforcement of the antitrust laws; 2) to insure that the cost of doing so does not diminish the plaintiff's treble damages award; and 3) to require a losing defendant to pay the plaintiff's attorney's fees as part of the penalty for violating the antitrust laws.").

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Even in civil rights cases, where recovery of fees and expenses is discretionary and hence more narrowly cabined, the Sixth Circuit has held that "[d]istrict courts are free to look to a national market, an area of specialization market or any other market they believe appropriate to fairly compensate particular attorneys in individual cases." Louisville Black Police Officers Ass'n, Inc. v. City of Louisville, 700 F.2d 268, 278 (6th Cir. 1983); Sigley v. Kuhn, Nos. 98-3977, 99-3531, 2000 WL 145187, **7 (6th Cir. Jan. 21, 2000)(same).

In this case, both parties chose to use counsel with particular expertise in nationwide antitrust litigation. Courts in similar circumstances have rejected defendant efforts to cap fees at local rates rather than the rates actually used by the particular firm or firms that represented plaintiff. For example, in National Wildlife Federation v. Hanson, 859 F.2d 313 (4th Cir. 1988), the Fourth Circuit upheld a district court's decision to use Washington D.C. counsel's rates to compute the lodestar in a complex environmental litigation tried in Raleigh, N.C. The Fourth Circuit rejected defense counsel's argument that "the court should have used rates charged in Raleigh, North Carolina, because that is the community in which the court sat." Id. at 317. Here too, "where it is reasonable to retain attorneys from other communities. . . , the rates in those communities may also be considered." Rum Creek, 31 F.3d at 175.

UST cannot plausibly claim it was unreasonable for Conwood to retain Washington, D.C. antitrust counsel, at prevailing Washington, D.C. rates, when UST found it reasonable and

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necessary to employ as principal counsel a New York firm with rates substantially higher than those charged by Kellogg, Huber.[10] Conwood does not question UST's decision to retain Skadden Arps, its cost notwithstanding, given the enormous stakes for all parties in this case; neither should UST be permitted to question Conwood's choice of counsel. The Court should not penalize Conwood, by forcing it to abjure recovery of fees, because it chose counsel it reasonably believed was necessary to bring the case to successful conclusion against determined, skillful, well-financed opposition. No principle of law required Conwood to look no further than Memphis for its lawyers.[11]

B. Conwood Should be Awarded All of Its Expenses as Costs of Suit Under 15 U.S.C. § 15.

Numerous district courts view the Clayton Act's "costs of suit" as encompassing all expenses incurred in bringing an antitrust case to a successful conclusion:

> 15 U.S.C. § 15 does not award merely court costs to a successful antitrust plaintiff, but "the cost of suit". This is a more comprehensive term, evidently embracing

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[10]A recent article stated that "[n]ot surprisingly, larger firms tend to charge the higher rates. New York's Skadden, Arps, Slate, Meagher & Flom L.L.P. -- No. 2 on the NLJ 250, with 1,403 attorneys -- lists a range of $380 to $590 for partners and $190 to $365 for associates." Ruth Singleton, Rates Aren't Skyrocketing, But They Do Keep Going Up, Nat'l L.J., Dec. 27, 1999, at B11 (attached hereto as Exh. C).

[11]In Langenderfer, the district court determined that for a case involving only the Toledo area it was appropriate to cap fees at the prevailing Toledo rate; here, in contrast, the case was not localized to Memphis or any other area, and accordingly Langenderfer -- even if correct on its facts -- does not support the principle UST urges on the Court. Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 684 F. Supp. 953, 956 (N.D. Ohio 1988).

> "the expense of prosecuting the suit to a successful conclusion". The court costs in the technical sense are of course included in the "cost of suit", but other necessary and reasonable expenses are also included (except the attorney's fee, which is specified separately as an additional item to be paid to plaintiff).

Pitchford Scientific Instrument Corp. v. PEPI Inc., 440 F. Supp. 1175, 1178-79 (W.D. Pa. 1977), aff'd, 582 F.2d 1275 (3d Cir. 1978), cert. denied, 440 U.S. 981 (1979). Unlike discretionary fee award statutes, "the award of cost of suit and attorney fees in an antitrust case is designed to afford the plaintiff the relief to which he is entitled without any diminution by reason of the financial burden of making the judicial machinery work in his behalf." Id. at 1179 (emphasis added).

Similarly, in Refuse & Environmental Systems v. Industrial Services of America, 732 F. Supp. 1209 (D. Mass. 1990), aff'd in part, rev'd in part on other grounds, 932 F.2d 37 (1st Cir. 1991), the court based its decision "on case law in the first, fifth, eighth and eleventh circuits under both 15 U.S.C. § 15 and 42 U.S.C. § 1988" and held "that [successful antitrust] plaintiffs must be awarded the reasonable costs of bringing the antitrust lawsuit, beyond those costs allowed by Rule 54(d) and section 1920." Id. at 1220-21 (emphasis added).[12]

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[12]UST concedes that in Northcross v. Board of Educ., 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980) -- a civil rights action -- the Sixth Circuit held that photocopying, paralegal expenses, travel, and telephone costs were recoverable as part of the plaintiff's attorneys' fees. Opp. at 13. UST also concedes that the plaintiffs' docket fees, investigation expenses, deposition expenses, witness expenses, and charts and maps were also recoverable. Id. But it argues that this recovery was limited to civil rights actions. While a district court in Ohio 12 years ago found that "Northcross does provide

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C. Conwood Should Be Awarded the Fees and Expenses It Has Paid for Economic Experts.

UST cites to no decisions from this district or to the Sixth Circuit that restrict a prevailing antitrust plaintiff's economic experts to the statutory $40 per day witness fee provided in 28 U.S.C. § 1821 and expenses provided for by 28 U.S.C. § 1920. The two main cases cited by UST, West Virginia University Hospital, Inc. v. Casey, 499 U.S. 83 (1991) and Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987) both involved expert fee awards in civil rights cases under 42 U.S.C. § 1988.

At least one district court judge since West Virginia University Hospitals and Crawford has granted a successful antitrust plaintiff its request for expert fees and expenses and has explicitly held that Crawford did not apply.[13] In Automotive Products P.L.C. v. Tilton Engineering, Inc., 855 F. Supp. 1101, 1107 (C.D. Cal.), appeal dismissed, 36 F.3d 1109 (Fed. Cir. 1994), the district judge granted the successful plaintiff's request for expert fees, finding that the expert's testimony "was necessary to provide the jury with a factual basis from which to ascertain the damages." Id. The court also specifically held

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guidance for [an] award of attorney's fees in antitrust litigation," and read that case to support limits on recovery of expenses, Langenderfer, 684 F. Supp. 956, the weight of authority across the United States holds that the prevailing plaintiff in an antitrust case should recoup all expenses reasonably required to bring the case to judgment. See Memorandum in Support of Plaintiffs' Motion for Attorneys' Fees and Costs of Suit at 11-13.

[13]The plaintiffs in Litton also moved for recovery of their expert fees and expenses. See Exh. A at 19.

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that Crawford does not limit a prevailing antitrust plaintiff to statutory expert fees:

> Tilton has cited Ninth Circuit authority providing for the award of expert witness fees if the expert was necessary to the litigation and if the expert's fees are reasonable. . . . AP cites no contradictory Ninth Circuit cases limiting such an award to statutory damages only, and the Court has already held that Crawford does not specifically limit a prevailing antitrust *plaintiff* to statutory damages only.

Id.

Similarly, in Hasbrouck v. Texaco, Inc., 631 F. Supp. 258, 268 (E.D. Wash. 1986), aff'd in relevant part, rev'd in part, 879 F.2d 632 (9th Cir. 1989), the district court noted the defendant's "strident defense posture" and held that "the retention by plaintiffs of the experts . . . was necessary due to the defenses interposed by [defendant]." Id. at 268. The court went on to find that the plaintiffs' expert fees were "reasonable" and awarded plaintiffs their requested expert fees. Id.

The same holds true here. There can be no question that the testimony of the experts called by plaintiffs was necessary to overcome the defenses raised by defendants. Each such expert specifically addressed and refuted those defenses, and that proof was concededly of critical importance. Indeed UST has moved for a new trial based on its contention that, for at least one expert (Dr. Leftwich), the proof determined the outcome.

UST asks the Court to find that Conwood's expert expenses, like all of the other fees and expenses Conwood has claimed, were not reasonably necessary to the successful prosecution of this

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case. But Conwood chose to incur and pay all these costs, with no certainty of any recovery; that more than anything establishes that these costs were both reasonable and necessary. And UST has given the Court no valid basis for challenging Conwood's decisions. UST is hardly in a position to determine what was or was not required to win this case.[14]

[14]UST asks that the fee and expense award be stayed, but cites no authority for the stay of a mandatory award of attorneys' fees and expenses under 15 U.S.C. § 15. The two discretionary fee award cases to which UST cites in support of its argument for a stay are inapposite. Loudermill v. Cleveland Board. of Education, 844 F.2d 304 (6th Cir.), cert. denied, 488 U.S. 946 (1988), involved yet another discretionary award of attorneys' fees in a civil rights action under 42 U.S.C. § 1988. In Morgan v. Union Metal Manufacturing, 757 F.2d 792 (6th Cir. 1985), there was not even a trial on the merits in the underlying case; the court dismissed the plaintiff's complaint and "awarded attorneys' fees on the common law ground that [plaintiff's] suit had been maintained in bad faith" after dismissing plaintiff's complaint. Id. at 796. Conwood counsel are unaware of any support for postponing the mandatory award of fees and expenses under 15 U.S.C. § 15 until after all appeals have been exhausted.

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Conclusion

For the foregoing reasons, plaintiffs' request for attorneys' fees and expenses in the aggregate amount of $19,170,652.86 should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on this 13th day of May, 2000, a copy of the foregoing was sent via overnight delivery to:

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

LITTON SYSTEMS, INC. and LITTON SYSTEMS CANADA, LIMITED,

Plaintiffs,

v.

HONEYWELL, INC.,

Defendant.

Case No. CV 90-4823 MRP (Ex)

LITTON'S NOTICE OF MOTION AND MOTION FOR THE AWARD OF ATTORNEY'S FEES AND LITIGATION EXPENSES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[DECLARATIONS IN SUPPORT FILED SEPARATELY]

Date: May 3, 1999, or date set by the Court
Time: 10:00, or time set by the Court
Place: Courtroom of the Honorable Mariana R. Pfaelzer

FILED UNDER SEAL

3-9-99

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TO DEFENDANT HONEYWELL, INC., AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that as soon as this matter may be heard, in the Courtroom of the Honorable Mariana R. Pfaelzer, United States District Court for the Central District of California, 312 North Spring Street, Los Angeles, California, Plaintiffs Litton Systems, Inc. and Litton Systems Canada, Ltd. (collectively "Litton") will and hereby do move this court for the award of attorney's fees and costs of suit pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15(a) and Fed. R. Civ. P. 54(d). Litton respectfully submits this motion pursuant to the Court's January 27, 1998 Order Re Entry of Judgment, providing that plaintiffs may file and serve their bill of costs and motion for attorneys' fees within 40 days following the entry of judgment.

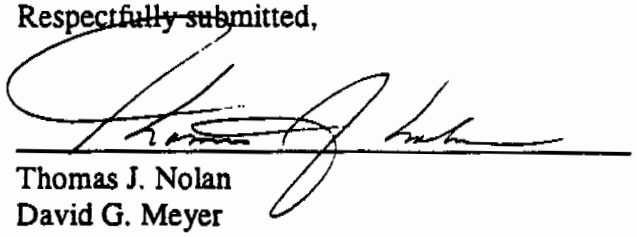
Litton's motion for attorney's fees and costs of suit is based on the ground that a federal jury has determined that Litton has suffered antitrust injury and damages by reason of Honeywell's unlawful monopolization and attempted monopolization of the global RLG-IRS market. *See* February 29, 1996 General Verdict Forms and December 9, 1998 General Verdict Forms. As such, Litton has been "injured in [its] business or property by reason of [conduct] forbidden in the antitrust laws," and is entitled to recover "the cost of suit, including a reasonable attorney's fee" under the Clayton Act. 15 U.S.C. § 15(a).

Litton's motion is based on this Notice of Motion and Motion, the attached Memorandum of Points and Authorities In Support Thereof, the Declarations of Thomas J. Nolan, Thomas N. Heyer, Frederick A. Lorig, Victoria T. McGhee, Theodore F.Craver, Newton D. Lesh II, Jeannie M. Crowley, William Christopher Black and Thomas E. Evans; all

pleadings, files and records in this action, material that may be judicially noticed by this Court, the arguments of counsel, if any, and such other matters that the Court may properly consider.

Dated: March 8, 1999

Respectfully submitted,



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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Litton's attorneys' fee petition follows the successful nine year prosecution of this complex, hard fought and immensely time-consuming litigation. As the jury's verdict reflects, the stakes were large. At issue was the illegal conduct of Honeywell, Inc. ("Honeywell") in a $6 billion worldwide market for a product line with only two competitors — Honeywell and Litton. Honeywell's determination to engage highly qualified counsel from at least four major law firms and to commit apparently limitless resources, brought with it the almost certain prospect that, should it not succeed in defending against Litton's antitrust claim, it would be responsible for payment of fees and expenses commensurate with the effort it was undertaking. After nearly a decade of litigation, Litton has prevailed on its antitrust complaint. In accordance with the jury verdict, the Court has entered judgment assessing treble damages in the aggregate amount of $750 million. As the Clayton Act provides, the Court also has entered judgment for attorneys' fees and costs and has retained jurisdiction to modify its final judgment to include the specific amount of such fees and costs.

Litton now petitions for an award of $ as a lodestar, adjusted upward for delay to). In addition, Litton petitions for an award of fees for work performed by in-house counsel of $. ; fees for contract paralegals and economic analysts of $ fees and expenses for Litton's expert witnesses of $ and litigation expenses of $ exclusive of amounts in Litton's bill of costs. The total award amounts to $, including an additional $ in reproduction costs that were alternatively included in taxable costs. *See* Exhibit A to the Declaration of Thomas J. Nolan in Support of Litton's Motion for the Award of Attorney's Fees and Litigation Expenses ("Nolan Decl.") filed under separate cover.

Consistent with the direction of the Supreme Court in this area, Litton has already approached Honeywell to attempt to reach agreement regarding Litton's reasonable fees and

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expenses and thereby avoid needless, full-scale litigation regarding the award of attorneys' fees. It is Litton's hope and expectation that the parties will be able to reach an agreement at least to narrow the issues, mindful of the Supreme Court's admonition that determination of the reasonable attorneys' fees should be something to which the parties can stipulate. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).

This Memorandum, along with the supporting declarations and exhibits, establishes that Litton is entitled to the full amount of its requested fees, expenses, and costs, including an enhancement as allowed under the statute and governing case law. Litton does not seek any compensation beyond that to which it is entitled. The prosecution of an antitrust action such as this is costly and time-consuming. Litton's requested reimbursement does not even include millions of dollars in unrecoverable out-of-pocket expenses and thousands of hours of management and employee time that were necessary to pursue this litigation over nine long years.

For Honeywell, the fees and expenses covered by this motion should come as no surprise. The breadth and scope of this litigation find few parallels in private antitrust litigation. Viewed in the context of the magnitude of this litigation, the hours expended and the rates charged by Litton's attorneys are eminently reasonable. Litton's counsel worked hard, efficiently and effectively. Litton should therefore be awarded the full amount of its fees, adjusted to account for delay of up to nine years.

The reasonableness of Litton's fees and expenses is shown by the observations of Honeywell's experienced counsel, Maxwell Blecher, who was recently quoted as stating that Litton's petition would be "monstrous" and would be in the range of $50 million or more.[1] Mr. Blecher is a knowledgeable antitrust plaintiff's counsel, and he is intimately familiar with the market conditions in Los Angeles and the effort required to bring a case of this type to a

---

[1] Mr. Blecher's statement about Litton's expected costs and attorney's fees appeared in a recent newspaper article. Mr. Blecher observed that "[w]e expect they'll be monstrous, in the medium-to-high eight figures." *The National Law Journal*, Special Suppl., Feb. 22, 1999.

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successful conclusion. As one of several lead counsel among Honeywell's four law firms, Mr. Blecher no doubt has a fair understanding of the fees and costs that Honeywell incurred in the course of defending itself (and that Honeywell will be required to disclose should Litton's petition be opposed). That Litton's fees are actually lower than those projected by Mr. Blecher is a testament to the disciplined and efficient work of Litton's counsel and provides support for an award of the full amount of fees and expenses that Litton requests.

This fee petition seeks reimbursement of Litton's fees and allowable expenses from the inception of the case in 1990 through December 31, 1998, with the exception of the work on the fee petition and cost bill in late 1998. Litton will continue to incur significant reimbursable attorney's fees through the post-trial phase, including its fees and expenses for this petition and the cost bill for the post-trial motions, and for the appeal. Litton will supplement this petition to cover fees and expenses incurred after December 31, 1998, either following entry of orders on the post-trial motions or at such time as the Court may direct.

II. THE LAW ENTITLES LITTON TO RECOVER ITS ATTORNEYS FEES AND LITIGATION EXPENSES INCURRED OVER THIS NINE YEAR LITIGATION

A. Statute and Its Purpose

Section 4 of the Clayton Act states that "any person . . . injured . . . by reason of anything forbidden in the antitrust laws . . . shall recover . . . the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). "An award of attorney's fees as part of the cost of a successful antitrust suit is mandatory. . . ." *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291, 1312 (9th Cir.), *cert. denied*, 459 U.S. 1009, 103 S. Ct. 364, 74 L. Ed. 2d 400 (1982) (citations omitted). The purpose of such a mandatory award is "to insulate treble damages recovery from expenditures for legal fees, consistent with Section 4's purpose to encourage private persons to undertake enforcement of antitrust laws." *Id. See also Perkins v. Standard Oil Co.*, 474 F.2d 549, 553 (9th Cir.) (citation omitted), *amended on other grounds*, 487 F.2d 672 (9th Cir. 1973), *cert. denied*, 412 U.S. 940, 93 S. Ct. 2778, 37 L. Ed. 2d 400

(1973); *see also Image Technical Services, Inc. v. Eastman Kodak Co.*, 136 F.3d 1354, 1357 (9th Cir. 1998).

B. The Lodestar Is Presumptively The Reasonable Attorney's Fee Recoverable Under The Clayton Act

The Supreme Court has adopted the lodestar as the "the guiding light of our fee-shifting jurisprudence. We have established a 'strong presumption' that the lodestar represents the 'reasonable' fee . . . ." *City of Burlington v. Dague*, 505 U.S. 557, 562, 112 S.Ct. 2638, 120 L.Ed. 2d 449 (1992) (citations omitted). The "lodestar" amount, *i.e.*, "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate," has been found to be the "most useful starting point for determining the amount of a reasonable fee." *Hensley v. Eckerhart*, 461 at 433.[2] The lodestar "is more than a mere 'rough guess' or initial approximation of the final award to be made. Instead . . . [it] *'is presumed* to be the reasonable fee to which counsel is entitled." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986) (citation omitted) (emphasis in original).

In all determinations of a reasonable fee, the amount involved in the lawsuit and the results obtained are important factors. *Hensley v. Eckerhart*, 461 U.S. at 434-36. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. *Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified.*" *Id.* at 435 (emphasis

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[2]Although *Hensley* and *Dague* were civil rights actions, the Court noted that the "standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " *Hensley*, 461 U.S. at 433, n.7; *see also Thorne v. City of El Segundo*, 802 F.2d 1131, 1141, n. 10 (9th Cir. 1986). While the standards set forth in *Hensley* and its progeny are generally applied in antitrust cases, the Ninth Circuit has also cautioned that "there should not be an automatic transference of rulings interpreting [the civil rights and other fee statutes]" to an antitrust case where this would lead to "an incorrect application of the philosophy of full recovery of attorney's fees for successful treble damages plaintiffs." *Twin City Sportservice*, 676 F.2d at 1314, 1316.

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added); *Blum v. Stenson*, 465 U.S. 886, 897, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984) (emphasis added).

The law also recognizes the need to account for delay in arriving at an award of reasonable fees. For example, *In Re Washington Public Power Supply Sys. Lit.*, 19 F.3d 1291, 1305 (9th Cir. 1994) involved a seven year delay between the time the prevailing party paid its attorneys and the time it was reimbursed. In that case, the Ninth Circuit held that it was an abuse of discretion for the district court to fail to include a delay adjustment calculated by using current rates or adding a prime rate adjustment. As discussed below, the delay present in this case similarly warrants an adjustment.

III. LITTON IS ENTITLED TO AN AWARD OF ATTORNEYS' FEES ADJUSTED FOR DELAY

Over the nine years of this litigation, Litton incurred more than $ in outside counsel attorneys' fees. This represents the largest component of Litton's cost of suit which it is entitled to recover. As described below, Litton has computed the attorneys' fee portion of its request using the lodestar method adjusted for delay by the prime interest rate method. Litton petitions for an award of $ as its lodestar, adusted upward for delay to $. The relevant computational tables are included as Exhibits B, D, E and Y of the Nolan Decl.

A. Litton's Modified Lodestar For Attorney's Fees Is Based On The Below Market Hourly Rates And Reasonable Hours Actually Charged To And Paid By Litton

The contemporaneous billing records maintained by counsel and submitted to Litton as the basis for payment provide a solid framework for computation of the lodestar.[3] In computing

[3] Litton is submitting with this petition actual billing statements for Howrey & Simon by month from the inception of the litigation, exclusive of the detailed diary entries. Nolan Decl., Ex. C. For ease of presentation, the information on rates, hours and expenses have been restated in spread sheet format and included as exhibits to Mr. Nolan's declaration. *Id.* at B. Litton has not included the detailed diary entries prepared by each timekeeper that are supplied with each statement. Provision of these unredacted diary entries to Honeywell's counsel at this state in the litigation is problematic, as there is a possibility of disclosure of confidential information that could be used to Honeywell's advantage in subsequent trial proceedings.

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the lodestar, Litton has used both the actual hours expended and the actual rates charged, as extracted from these records.[4] Through daily diary entries, Litton's counsel have kept accurate and complete records of the time expended on this matter. This time was billed to Litton and paid on an ongoing basis. In addition, Litton has used the actual rates it was charged — not the prevailing market rate in Los Angeles — because this results in lower fees. *See* Nolan Decl., Ex. B (summarizing the hours and fees of the Howrey & Simon attorneys); Ex. D (summarizing the hours and fees for the Bright & Lorig attorneys).

1. Litton Retained Experienced and Capable Counsel To Represent It In This Litigation

When Litton began investigating its antitrust claim against Honeywell, it realized the scope and complexity of the litigation with which it was faced. Litton wished to retain a leading law firm with specialized knowledge and experience in antitrust litigation that could effectively and efficiently present the case. Litton's choice of Howrey & Simon was reasonable. In addition to Howrey & Simon's experience litigating antitrust cases in general, the firm had previously represented Litton in antitrust and other matters and was therefore already familiar with Litton, its management and its employees.

Howrey & Simon's work began in May 1990. The firm has continued to represent Litton throughout comprehensive discovery and two trials spanning a nine-year period. Initially, the primary partners working on this matter were John Bodner and Thomas Heyer, assisted by several associates. In 1994-95 they were joined by Thomas Nolan of the Los Angeles office, along with various associates, some of whom later became partners. Litton also retained the law firm of Bright & Lorig to conduct an initial investigation of the claims in this matter, to assist in discovery and at trial, and to serve as local counsel before Howrey & Simon had a Los Angeles office. Bright & Lorig has also represented Litton in the patent case.

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[4] The hours covered by Litton's petition do not include time expended in connection with the related patent case.

Honeywell has been represented by four nationally-known law firms during the course of this litigation. Initially, the law firm of Sheppard, Mullin, Richter & Hampton was the principal firm representing Honeywell, led by attorneys Joseph Coyne and Carlton Varner. Sheppard, Mullin was then joined by Sullivan & Cromwell in New York, with Richard Carlton as the principal partner. Honeywell later added the firm of Gibson, Dunn & Crutcher, including partners Robert Cooper, Arthur Sherwood, J. Edd Stepp, Mark Weber, Mary Laura Davis and Daniel Swanson, and a large group of associates. Most recently, Honeywell engaged the law firm of Blecher & Collins, represented by partners Maxwell Blecher and Gary Joye. Also, as did Litton, Honeywell has from time to time used other law firms to provide assistance on particular issues over the long course of this litigation.

Litton's counsel were and are experienced antitrust litigators. At Howrey & Simon, Mr. Bodner is an experienced antitrust trial attorney who has represented Litton for over thirty years in various antitrust and commercial matters. Mr. Nolan is an experienced federal court litigator and a Fellow of the American College of Trial Lawyers. Mr. Lorig is also an experienced trial attorney who has represented Litton both in this matter and the related patent case.[5]

2. Counsel Charged Reasonable Rates

Litton calculated the lodestar using the rates that Howrey & Simon and Bright & Lorig actually charged and that Litton paid monthly over the course of the litigation. These rates easily satisfy the reasonability requirement. *Blum*, 465 U.S. at 888; *Hensley*, 461 U.S. at 434. A law firm's hourly rates are presumptively reasonable if equivalent to (or lower than) the market rate for comparable attorneys. *See Student Pub. Interest Research Group v. AT&T Bell Labs.*, 842 F.2d 1436, 1445 (3d Cir. 1988) ("in most cases, billing rates reflect market rates — they provide

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[5] Mr. Lorig submits a declaration in support of this motion that describes the qualifications of the attorneys from Bright & Lorig who worked on the case. This declaration has been filed concurrently under separate cover. *See* Notice of Filing Declarations of Frederick A. Lorig, Victoria T. McGhee, Theodore F. Craver, Newton D. Lesh II, Jeannie M. Crowley, William Christopher Black and Thomas E. Evans ("Notice of Filing").

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an efficient and fair shortcut for determining the market rate"); *In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 590-91 (3d Cir. 1984).

The reasonableness of the rates charged is also shown by a calculation of the overall rates for both Howrey & Simon and Bright & Lorig. The overall average charge per hour was $ for Howrey & Simon attorneys and $ for Bright & Lorig attorneys.

a. Counsel's Rates Actually Charged and Included In the Lodestar Were Discounted from Counsel's Normal Rates

Under its normal billing practices, Howrey & Simon charges clients hourly rates that differ by attorney depending on the attorney's experience and the office in which the attorney is resident. For associates, the rates generally are determined by the law school class year to which the associate belongs. For partners, the rates are based on a combination of experience, success, standing in the legal community and attractiveness to clients. These rates periodically are adjusted to account for greater attorney experience, inflation, and marketplace factors.

Initially, Howrey & Simon charged Litton its customary District of Columbia rates for all timekeepers. These rates were substantially lower than Los Angeles market rates. Negotiations over the period 1991-1993 led to the adoption of a discounted blended rate beginning in August 1994.

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b. The Rates Actually Paid By Litton and Included In The Lodestar Are Below Market Rates Charged By Comparable Firms and Attorneys

The reasonableness of Howrey & Simon's rates is demonstrated by a comparison of the hourly rates of other firms in Los Angeles. Available data for the going market rates in these cities show that counsel's rates are clearly within the market rate range and thus are reasonable. *See* Nolan Decl. at ¶ 38, 39, and Ex. Z attached thereto. For much of the litigation Litton paid fees based upon the Washington, D.C. legal market, where rates are lower than Los Angeles. In 1990, at the outset of the litigation, Howrey & Simon only had offices in the District of Columbia. It charged Litton hourly rates of $ for a relatively junior associate, $ for a junior partner and $ for a senior partner. During the 1998 trial, the rates for associates working out of the District of Columbia office ranged from $ to $. Howrey & Simon's blended partner rates were well within the market range for comparable national law firms in the District of Columbia. Because rates in the District of Columbia generally are substantially less than those in Los Angeles, Howrey & Simon's rates were substantially lower than Los Angeles market rates throughout the litigation (particularly prior to 1994).

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[6] This estimate of what Litton's fees would have been using regular fees has been calculated using District of Columbia rates where the attorney is or was based in that office; those rates are substantially lower than Los Angeles office rates. Thus, had the comparison used all Los Angeles rates, as the case law suggests, the difference would be greater.

Because counsel's hourly rates are within or below the range of market rates charged by other firms in the same geographic market with similar practices, counsel's rates are presumptively reasonable.

3. Litton's Counsel Expended A Reasonable Number of Hours Litigating This Case Over a Nine-Year Period.

This was and is a large complex case that required intensive and continuous effort over the course of the litigation, which has included two trials. The hours expended are entirely consistently with the effort required to bring this case to a successful close. In total, the actual billing records show that Litton's outside counsel worked over 97,000 hours since 1990. The total for Howrey & Simon is 95,127.5 hours. Bright & Lorig has worked 2,108.5 hours.

Counsel's pretrial and trial work was critical to Litton's success at trial. The declarations accompanying this Motion summarize the qualifications of Litton's counsel and describe the

work counsel performed. *See, e.g.*, Nolan Decl. ¶¶ 2, 11; Heyer Decl. ¶¶ 4-30; Lorig Decl. ¶ 2. These declarations attest to the facts that the hours billed were reasonably expended on the litigation or on closely-related matters where the work was useful and of a type ordinarily necessary to secure the final result.

Such work generally included fact investigation; preparation and filing of the Complaint and other initial pleadings, preparing and responding to numerous motions; conducting ongoing factual and legal research; reviewing hundreds of thousands of pages of documents; receiving, processing and organizing millions of pages of documents produced in discovery; creating and maintaining full-text document database and imaging systems; deposing and defending the depositions of hundreds of witnesses; requesting and responding to voluminous discovery; overseeing the work of expert witnesses; trying issues of liability and damages before two juries; and participating in out-of-court mediation.

For a case of this size, complexity and duration, the hours expended to accomplish these tasks were reasonable. Throughout, Honeywell mounted a vigorous defense, raising every available issue, both legal and factual, in an effort to defeat Litton's claims. Honeywell employed scores of highly capable, experienced lawyers from several major law firms. Litton's counsel ably, effectively, and expeditiously litigated this case to a successful conclusion.

In addition, Litton's representation was characterized by continuity. Litton benefited from the continuous representation of its lead counsel Messrs. Bodner, Nolan and Heyer, whose time jointly accounts for more than 30 percent of the hours included in this petition.

4. Litton Excluded Substantial Hours from the Fee Petition

In accordance with its billing practices, Litton's outside counsel excluded time that was unproductive, unnecessary, or duplicative. Counsel carefully reviewed each Howrey & Simon bill before it was sent to Litton, including each individual task entry and the time spent, as well as all expenses. Any entries deemed duplicative, unproductive or otherwise unnecessary were eliminated.

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. None of those hours are included here. Further, in-house counsel at Litton carefully reviewed the bills and, in some cases, further deleted time considered duplicative, excessive, unnecessary or otherwise objectionable. *See* the Declaration of Victoria T. McGhee, attached to Litton's Notice of Filing and filed concurrently herewith.

In summary, Litton has excluded from its petition timekeeper hours that come within the following categories: (1) time absorbed by Howrey & Simon and not included in the bill; (2) time written off by Howrey & Simon prior to billing; and (3) time written off by Litton after billing.[7]

The hours that Litton has excluded from its fee petition reinforce the conclusion that the attorneys' fees for which Litton is seeking reimbursement are only those which were reasonable and necessary. Accordingly, Litton is entitled to recover the entire amount of its fees set forth in this petition.

B. Litton Is Entitled to Upward Adjustments of the Modified Lodestar to Account For Delay

Once a petitioner establishes that counsel's hours and rates are reasonable, the lodestar is presumed to be correct and fully awardable. *See Blum*, 465 U.S. at 897. There is an additional step, however, where there has been substantial delay between the time a prevailing party pays

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[7] In addition to the attorney's fees included here, Litton incurred fees from other outside counsel in 1990 for which records have not been located. If and when Litton locates those records, it will supplement this petition to include them.

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the fees and expenses and the time it is reimbursed. *In re Washington Public Power Supply Sys. Lit.*, 19 F.3d at 1305 (holding it was an abuse of discretion for the district court to fail to include a delay adjustment where there was a seven year delay before recovery of fees and expenses). The Supreme Court has also recognized that "courts may adjust [the] lodestar calculation" if the lodestar does not reflect the reasonable worth of counsel's services. *Blanchard v. Bergeron*, 489 U.S. 87, 94, 109 S. Ct. 939, 103 L.Ed.2d 67 (1989). For example, under the fee-shifting provisions of the Civil Rights Act, 42 U.S.C. § 1988, the Court noted "[a]n adjustment for delay in payment is . . . an appropriate factor in the determination of what constitutes a reasonable attorney's fee...." *Missouri v. Jenkins*, 491 U.S. 274, 284, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989). Such adjustment may be "by the application of current rather than historic hourly rates or otherwise...." *Id.*

The Ninth Circuit has explained that there are two ways to account for delay in making an upward adjustment to the lodestar:

> (1) by applying the attorneys' current rates to all hours billed during the course of the litigation; or (2) by using the attorneys' historical rates and adding a prime rate enhancement.

In re Washington Pub. Power Supply Sys. Litig., 19 F.3d at 1305. In accordance with these suggested methodologies, Litton is requesting a delay adjustment of at least $.

An upward adjustment for delay is appropriate not only in contingency fee cases but also in cases where the attorneys' fees have been paid by the client on a regular basis. In *Gulfstream III Associates v. Gulfstream Aerospace Corp.*, 995 F.2d 414 (3d Cir. 1993), the Third Circuit explained:

> Although the principal justification for delay enhancements is to compensate attorneys who have had to wait for their fees, we believe this does not preclude such an award in every case where the attorneys are paid on time. The overriding purpose of a delay enhancement is to compensate for the lost use of money during the time before statutorily mandated attorneys' fees are awarded. The fact that the cost is borne by the client and not the attorney does not alleviate the hardship of waiting for attorneys' fees until the

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> end of the litigation. Any other result would create an incentive for plaintiffs not to pay their attorneys until the conclusion of the litigation.

Id. at 425 (awarding antitrust plaintiff a delay adjustment); *see also Brown v. Pro Football, Inc.*, 846 F. Supp. 108, 118 (D.D.C. 1994), ("Plaintiffs, if not their counsel, were deprived for three to four years of the use of the funds that they paid to counsel.")

Here, Litton has computed the delay adjustment under both methods and will seek Honeywell's agreement as to the most appropriate. Both methods yield a result that is fairly close when applied to the lodestar for Howrey & Simon fees and Bright & Lorig fees. Under the current rate method, the total adjustment comes to $ for Howrey & Simon fees and $ for Bright & Lorig fees. The computation of the lodestar fees at current rates is contained in Exhibits B and D of Mr. Nolan's declaration. Under the interest method using the Federal Reserve Average Prime Rate, the adjustment totals $. These analyses are presented in Exhibit Y to the Nolan Decl. Litton has not computed a delay adjustment for the amounts included in this petition for in-house attorneys, contract paralegals and economic analysts, or litigation expenses. Only those fees contained in the lodestar are the subject of adjustment. Litton would accept a delay adjustment under either method, but suggests that the prime rate approach may best compensate Litton for the lost use of money paid monthly over this nine year litigation.

Whichever method is chosen, Litton is entitled to a delay enhancement of at least $.

C. Litton Is Entitled to a Quality Adjustment of the Lodestar

The quality of the work of Litton's counsel and the degree of success also warrant a quality adjustment above the market rate lodestar. Litton submits that the amount of such an adjustment may be best be determined after Litton has fully briefed its responses to whatever challenges Honeywell may raise in its post-trial motions. Accordingly, Litton will address this item of recovery more fully.

IV. LITTON IS ENTITLED TO AN AWARD FOR TIME SPENT BY IN-HOUSE ATTORNEYS IN PROSECUTING THIS SUIT

Litton petititons for an award of $. for work performed by Litton's in-house counsel. Just as outside counsel's fees are compensable, so is the time of certain in-house counsel. *National Gypsum Co. v. Steel Sys. Int'l, Inc.*, 9 U.S.P.Q.2d (BNA) 2073 (D. Or. 1988); *Zacharias v. Shell Oil Co.*, 627 F. Supp. 31, 35 (E.D.N.Y. 1984); *see generally, Milgard Tempering, Inc. v. Selas Corp. of America*, 761 F.2d 553, 558 (9th Cir. 1985) (permitting district court, using Washington law, to examine modern trend toward providing fees for in-house counsel).

A court should award fees for work performed by in-house counsel when he or she actively participated in the case. *Milgard Tempering*, 761 F.2d at 558. In short, the Court should compensate Litton for the time of in-house counsel for all substantive work that was not client work, (*e.g.*, not monitoring the litigation and consulting with outside counsel). In this case, Litton's experienced in-house counsel took on various case responsibilities, including: the review and analysis of discovery materials, preparation of witnesses and defense of depositions, and the review and production of documents responsive to discovery demands. These tasks are properly compensable as part of the fee award.

In awarding attorneys' fees for work performed by in-house counsel, courts commonly use an hourly rate to determine the proper compensation. *Zacharias*, 627 F. Supp. at 34 (citing *Pittsburgh Plate Glass Co. v. Fidelity & Cas. Co.*, 281 F.2d 538, 542 (3d Cir. 1960) and *Brisbane v. Port Auth. of New York & New Jersey*, 550 F. Supp. 222, 224 (S.D.N.Y. 1982)). This practice is based on the rationale that "work performed by in-house counsel reduces the workload and, consequently, the fee of the [outside] counsel and '[t]here is no reason in law or in equity why the [losing party] should benefit from [the prevailing party's] choice to proceed with some of the work through its own legal department.'" *Id.* To determine a reasonable hourly rate for in-house counsel, courts often look to the going market rate. *In re Public Serv. Co.*, No. 91-0536M, 1992 U.S. Dist. LEXIS 16326, at *15 (S.D. Cal. 1992) ("Generally, the relevant

community is one in which the District Court sits.") (citing *Davis v. Mason County*, 927 F.2d 1473, 1488 (9th Cir. 1991)).

The declarations of Ms. McGhee, Mr. Craver, Mr. Lesh, Mr. Black, and Ms. Crowley describe the work each of these in-house attorneys performed and how they determined their reasonable hours. In addition, Exhibit L to the Nolan Decl. presents a summary of all of the in-house counsel time and fees calculated at the rates actually paid for comparable Howrey & Simon attorneys. The total hours expended are , and the requested fees are $.

V. LITTON SHOULD BE AWARDED FEES OF CONTRACT PARALEGALS AND OTHER NON-LAWYER LITIGATION ASSISTANTS

The fees award properly encompasses not only attorneys' fees, but also fees for all litigation-related work performed by counsel's non-lawyer staff. The term ["reasonable attorney's fee"] refers to a reasonable fee for the *work product* of an attorney, not just the fees for the attorney's work, thus, the fee must "take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit." *Missouri v. Jenkins*, 491 U.S. at 285. This is particularly so under the Clayton Act, which broadly provides for the recovery of "costs of suit."

Litton has incurred costs for both paralegals and accounting and economic analysts. The fees for paralegals employed by Howrey & Simon are in the lodestar computation above. The remaining fees of paralegals and analysts are a cost of suit not included in the lodestar. Litton requests that it be awarded the sum of $. for contract paralegals and $ for economic and accounting analysts.

A. Paralegal Fees

Attorneys on both sides have relied extensively on paralegals to perform substantive and case management tasks in this litigation. In addition to paralegals employed by Howrey & Simon (whose time is already in the lodestar), Litton engaged paralegals in three general

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categories: those who were (a) employed directly by Litton in Washington, D.C. as temporary paralegals ("Lit Temps") in the Howrey & Simon office and were paid only for the hours expensed on case-related tasks through the submission of daily time cards; (b) employed elsewhere as such temporary paralegals ("Lit Temps"); and (c) employed by third party temporary help agencies but worked under the direction of counsel either at a Litton site or at counsel's office.

These paralegals all assisted in the review, production and organization hundreds of thousands of documents; created and maintained document and deposition databases; prepared witness files and deposition digests; managed case files; checked citations and organized exhibits for court submissions; and assisted in the preparation and control of exhibits and pleadings during trial. These are the kinds of tasks the Supreme Court has described as appropriate paralegal work. *Missouri v. Jenkins*, 491 U.S. at 288. These tasks were performed more efficiently and more economically by delegating them to non-attorneys with lower billing rates and specialized expertise. These costs were further controlled by the extensive use of Litton temporary employees and contract paralegals whose time was billed directly to Litton. Also, Howrey & Simon used other litigation support personnel such as computer specialists, librarians and clerks to assist as necessary. Their time, which is not large, is included as litigation support within the Howrey & Simon paralegal time.

As with the attorneys, Litton has kept records of the time billed by these paralegals. These bills were submitted to and paid by Litton on an ongoing basis. The declarations of Thomas N. Heyer and Thomas E. Evans[8] describe the paralegals and litigation support staff and their qualifications, the work they did, how their time was kept and rates determined, and time that was excluded from this petition. *See* Heyer Decl. ¶ 38; Evans Decl. ¶ 5-8. The hours and rates of these paralegals are shown on Exhibits E, F, G, and H to the Nolan Decl. for Howrey &

[8] The declaration of Thomas E. Evans ("Evans Decl.") is attached to Litton's Notice of Filing, filed concurrently herewith; the Declaration of Thomas N. Heyer ("Heyer Decl.") in support has been filed under separate cover.

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Simon paralegals and litigation support personnel, for the Lit Temps that worked only in Howrey & Simon's District of Columbia office, and for Lit Temps and agency paralegals, respectively, that worked at Litton document sites in the Los Angeles area.

B. Accounting and Economic Analysts

As is necessary in a case of this type and magnitude, the attorneys have used the assistance of accounting and economic analysts for their specialized expertise. The support that these analysts have provided includes such tasks as assembling discovery materials relevant to the assessment of damages, analyzing the reports of Honeywell's expert witnesses, assisting the attorneys in preparing for depositions of those expert witnesses, assisting at the depositions, and assisting in preparing for cross-examination at trial of Honeywell's witnesses, both expert and otherwise.

All of the work was done at the instruction of and under the supervision of attorneys and was useful, necessary, not duplicative, and not excessive. These analysts were acting in support of Howrey & Simon attorneys in the same capacity as other litigation support staff including paralegals. For the same reasons as noted above for paralegals, their time is compensable.

VI. LITTON SHOULD BE AWARDED THE FEES AND EXPENSES IT HAS PAID FOR ECONOMIC EXPERTS

Litton also requests an award of the fees and expenses in the amount of $ for economic experts as part of its "cost of suit" under the Clayton Act. These experts were absolutely essential to the presentation of both liability and damages issues. Indeed, the second trial on damages revolved primarily around the testimony of these economic experts. Both sides recognized the importance of economic experts in this litigation and retained several such experts. Thus, Litton retained Dr. John Beyer, Dr. James Langenfeld, and Dr. Robert Hall to testify concerning market definition and damages. In addition, Litton retained Dr. Edward Leamer and Mr. Roger Schlonsky to provide consultation and possible testimony during the damages retrial. Moreover, both Dr. Leamer and Mr. Schlonsky were designated and prepared to

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testify as rebuttal witnesses. Honeywell retained Professor William Baumol, Dr. Joe Pace, Dr. Gary Dorman, Profession Richard Schmalensee, Professor Joseph Kalt, and accountant J. Duross O'Bryan to testify on liability and damages issues.

Recent antitrust decisions have awarded expert witness fees and expenses to prevailing antitrust plaintiffs as a component of the "costs of suit" pursuant to Section 4 of the Clayton Act. For example, in *Hasbrouck v. Texaco, Inc.*, 631 F. Supp. 258, 268 (E.D. Wash. 1986), *aff'd in relevant part, rev'd in part*, 879 F.2d 632, 639 (9th Cir. 1989), the district court awarded the plaintiffs all of their requested expert witness fees, ruling that "the retention by plaintiffs of the experts . . . was necessary due to the defenses interposed by [defendant]. *See also Automotive Products PLC v. Tilton Engineering, Inc.*, 855 F. Supp. 1101, 1107 (C.D. Cal. 1994) *appeal dismissed*, 36 F.3d 1109 (Fed. Cir. 1994) (court granted antitrust plaintiff's request for expert fees, finding that the expert's testimony "was necessary to provide the jury with a factual basis from which to ascertain the damages").

The testimony and advice of Litton's economic experts was necessary to the litigation of this case, and the fees and expenses that Litton has incurred in retaining these experts are reasonable. The experts submitted detailed reports and were the subject of extensive and costly deposition discovery. Furthermore, Litton's damages expert Dr. Beyer (as well as Honeywell's expert Dr. Pace) was the subject of a special evidentiary hearing before the trial commenced. The fees for this work were billed to and paid by Litton on an ongoing basis, and the detailed records of these bills have been maintained. These records fully support the amounts which Litton is seeking to recover, as set forth in the accompanying declarations and exhibits.

VII. LITTON'S OUT-OF-POCKET LITIGATION EXPENSES ARE EITHER COMPENSABLE AS PART OF ITS COST BILL, OR ARE COMPENSABLE AS PART OF ATTORNEY'S EXPENSES UNDER THE CLAYTON ACT

To the extent that the attorneys for the prevailing plaintiff incur out-of-pocket (such as travel, telephone, photocopying, and computerized research expenses) that are billed to the

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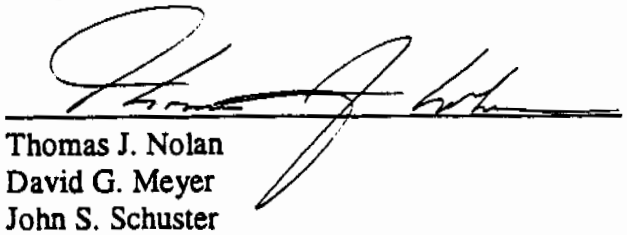
client, are not part of the general overhead of the office, and are not recoverable as part of the bill of costs, Litton is entitled to recover those litigation expenses as part of the mandatory costs and fees award under Section 4 of the Clayton Act. Recovery of these costs is necessary to give effect to the purpose of the statute, which is to ensure that a successful plaintiff's treble damage recovery is not diminished by the payment to the attorney, and thereby to encourage private enforcement of the antitrust laws. *See Perkins*, 474 F.2d at 553; *Image Technical*, 136 F.3d at 1357.

In accordance with this mandatory award of fees and costs, courts have routinely awarded the prevailing plaintiff its out-of-pocket litigation expenses. *See Automotive Products*, 855 F. Supp. at 1106 (prevailing antitrust plaintiff entitled to an award of reasonable "out-of-pocket" expenses such as "facsimile expenses, Lexis charges, long distance telephone charges, Federal Express charges, secretarial overtime charges, trial supply expenses, postage, messenger fees, hotel and travel expenses, parking expenses, teleconference expenses, and mock trial expenses"); *Brown v. Pro Football, Inc.*, 839 F. Supp. 905, 916 (D.D.C. 1993) ("[p]laintiffs' out-of-pocket costs for telephone, telecopier, air and local couriers, postage, photocopying, WESTLAW research, secretarial overtime, and counsels' travel expenses are routinely billed to fee-paying clients, and thus are all compensable as part of a reasonable attorney's fee" award under the antitrust laws).

Each of the categories of Litton's out-of-pocket litigation expenses are fully set forth in the supporting declarations submitted with this memorandum, along with the amount for each broken out separately. These litigation expenses include: LEXIS charges, photocopying not recoverable under the cost bill, database creation and management, travel expenses, courier charges, postage, long-distance telephone charges and expenses incurred in connection with Court-ordered mediation. The total amount of these expenses, exclusive of amounts included in the cost bill, are $6,035,141. All of these expenses are taken from monthly records of amounts billed to and paid by Litton. These expenses were reasonably and necessarily incurred for the preparation and presentation of this case and, as such, are fully recoverable.

Dated: March 8, 1999

Respectfully submitted,



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PROOF OF SERVICE

I, Marta Martin, declare as follows:

I am employed in the County of Los Angeles, California. I am over the age of eighteen years and not a party to the within action. My business address is 550 South Hope Street, 14th Floor, Los Angeles, California 90071. Upon this day, I served a copy of **LITTON'S NOTICE OF MOTION FOR THE AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF [DECLARATIONS IN SUPPORT FILED SEPARATELY]** on all interested parties through their attorneys of record listed below in the manner shown below:

☐ **VIA FIRST CLASS MAIL** (CCP §§ 1012, et seq.). I am readily familiar with the firm's practice of collection and processing for mailing. Under that practice it would be deposited with the U.S. postal service on that same day as shown on this declaration with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

☒ **VIA HAND DELIVERY/PERSONAL SERVICE** (CCP §§ 1011, et seq.). I directed a courier to personally deliver said document(s) to each addressee.

Maxwell M. Blecher, Esq.
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☐ **VIA FEDERAL EXPRESS OVERNIGHT/NEXT BUSINESS DAY DELIVERY SERVICE** (CCP §§ 1013). I placed in an envelope, properly labeled, and caused to be deposited into a Federal Express pick-up receptacle as per the regular practice of this office.

Executed on **MARCH 8, 1999** at Los Angeles, California.

☒ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I certify under penalty of perjury that the foregoing is true and correct

Marta Martin

Marta Martin

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEPAGE'S INCORPORATED, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	CIVIL ACTION NO. 97-CV-3983
	:	
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	:	
	:	
Defendant.	:	

PLAINTIFFS LEPAGE'S, INC. AND LEPAGE'S MANAGEMENT COMPANY, L.L.C.'s PETITION FOR ATTORNEYS' FEES INCLUDING EXPENSES NOT COVERED BY THE BILL OF COSTS

Plaintiffs LePage's, Inc. and LePage's Management Company, L.L.C. petition the Court for an award of attorneys' fees (including expenses not covered by the Bill of Costs) to Mayer Brown & Platt in the amount of $2,728,756.93; to Pepper Hamilton LLP in the amount of $2,179,151.67; and to Peter Hearn in the amount of $587,395.44.[1] In total, plaintiffs request $5,495,304.04. In support of this Petition, plaintiffs rely on the accompanying memorandum of law.

Respectfully submitted,

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[1]These amounts do not include fees and expenses incurred subsequent to the jury's verdict, including fees and costs incurred in connection with the preparation of this Petition.

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ATTORNEYS FOR PLAINTIFFS
LEPAGE'S INCORPORATED and
LEPAGE'S MANAGEMENT COMPANY, LLC

Date: November 23, 1999

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEPAGE'S INCORPORATED, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 97-CV-3983
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS LEPAGE'S, INC. AND LEPAGE'S MANAGEMENT COMPANY, L.L.C.'s PETITION FOR ATTORNEYS' FEES INCLUDING EXPENSES NOT COVERED BY THE BILL OF COSTS

I. INTRODUCTION.

Plaintiffs LePage's, Inc. and LePage's Management Company, L.L.C. (collectively referred to as "LePage's") petition the Court for an award of attorneys' fees under Section 4 of the Clayton Act, 15 U.S.C. § 15(a).[1] In total, plaintiffs seek $5,495,304.04 in attorneys' fees and recoverable expenses not covered by plaintiffs' Bill of Costs[2] broken down as follows: $2,728,756.93 for Mayer Brown & Platt ("Mayer Brown"); $2,179,151.67 for Pepper Hamilton LLP ("Pepper");and $587,395.44 for Peter Hearn, Esquire.[3]

[1] 15 U.S.C. § 15(a) provides, in pertinent part, that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[2]Plaintiffs' Bill of Costs will be filed with the Clerk of the Court in the near future.

[3]The supporting documentation for the fee and expense requests is being submitted in

(continued...)

In another series of motions, 3M moved to dismiss LePage's as a plaintiff, to require joinder of LePage's Management's members to the case as plaintiffs, and (twice) to eliminate LePage's right to a jury trial. None of these attempts were successful.

3M's insistence that it could not understand LePage's theory of the case prompted this Court to order LePage's to prepare and file a statement of its claims, which required LePage's attorneys to conduct an extensive review of the discovery that was available to date, and to prepare a comprehensive paper explaining LePage's theories of the case. Preparation of this statement of claims consumed numerous hours of partners, associates, legal assistants and secretaries alike.

On February 1, 1999, 3M again sought dismissal of plaintiffs' claims with a motion for summary judgment backed by numerous exhibits and affidavits, and again requiring a comprehensive response. In preparation for trial, 3M listed 83 witnesses whom it expected to call, thereby requiring plaintiffs to prepare for that possibility. Together, the parties filed 22 motions in limine addressed to trial evidence. Trial itself consumed 33 days, many of which were committed to defendant's cross-examination.

III. DISCUSSION.

A. Plaintiffs Have Met the Threshold Requirements for An Attorneys' Fee Award.

In order to qualify for an attorneys' fee award under Section 4 of the Clayton Act, the Third Circuit requires only that plaintiffs prove a violation of the antitrust laws and that as a result, plaintiffs suffered damages. If these two requirements are satisfied, a plaintiff is entitled to a mandatory award of attorneys' fees. Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp., 995 F.2d 414, 418-19 (3d Cir. 1993) ("[a]n antitrust plaintiff who has proven to the satisfaction of the factfinder that

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defendant violated the antitrust laws and has established the fact of damage has established the prerequisites for defendant's liability and its own entitlement to attorneys' fees.").

There can be no doubt that plaintiffs qualify for an attorneys' fees award. The jury's responses to Questions 1 through 3.1 of the Jury Verdict Form indicate that the jury found that 3M unlawfully maintained monopoly power and attempted to unlawfully maintain monopoly power in the market consisting of invisible and transparent tape for home and office use in the United States. The jury then assessed damages in the amount of $22,828,899 for monopolization, and for attempted monopolization. Since the jury found that 3M violated the antitrust laws and that LePage's suffered damages as a result, plaintiffs are entitled to an award of attorneys fees.

B. Plaintiffs' Attorneys' Fees are Reasonable.

Once a plaintiff establishes entitlement to an attorneys' fees award, "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). This figure is referred to as the "lodestar," which is "strongly presumed to yield a reasonable fee." Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1035 (3d Cir. 1996)(citing City of Burlington v. Dague, 505 U.S. 557 (1992)). Once the lodestar amount of attorneys' fees is determined, the district court has discretion to make upward or downward adjustments. U.S. ex rel. John Doe I v. Pennsylvania Blue Shield, 54 F.Supp.2d 410 (M.D. Pa. 1999). The lodestar in this case is calculated in the sections immediately below.[4]

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[4]The lodestar approach is the "only reasonably objective basis for valuing an attorney's services," Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d Cir. 1973), judgment vacated on other grounds, 540 F.2d 102 (3d Cir. 1976), and has become the standard method for calculating attorney fee awards. Gulfstream III, (continued...)

1. Plaintiffs' lodestar calculation is based only on hours reasonably expended on the case.

The first step in calculating the lodestar is to determine the number of hours reasonably expended by plaintiffs' attorneys in pursuing the litigation to judgment. To ensure claims are made only for time "reasonably expended," the Hensley decision requires counsel to make "a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary." Hensley, 461 U.S. at 434.

This has been done. Counsel has carefully reviewed all of the time records to arrive at the number of hours that can reasonably be charged for the work performed. Time has been eliminated for education time of lawyers assigned to the case because of associate turnover. The records have been reviewed to eliminate time spent on particular tasks which proved irrelevant to the case as tried. See Declarations of Barbara Mather, Peter Hearn and Mark Ryan, attached as Exhibits "B," "C," and "D," respectively. In light of these reductions, the total hours claimed to have been reasonably expended are not excessive.

The second and final step in determining the lodestar is to determine the reasonable billing rate of the attorneys involved in the litigation. The Third Circuit has stated that a reasonable hourly rate "generally is reflected in [an individual attorney's] normal billing rate." Lindy Bros., 487 F.2d at 167. Additionally, the Supreme Court has directed that "'reasonable fees' ... are to be calculated according to the prevailing market rates in the relevant community...." Blum v. Stenson, 465 U.S. 886, 895 (1984).

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[4](...continued)
995 F.2d at 421.

16diii006001

Mayer Brown and Pepper partner rates range from $250 per hour to $350 per hour, associate rates range from $125 per hour to $285 per hour, and legal assistant rates range from $50 per hour to $130 per hour. Peter Hearn's fee ranged from $300 per hour to $350 per hour. The hourly rates claimed by plaintiffs' counsel are their usual rates and are consistent with the rates normally charged by counsel in this district. Plaintiffs have attached the declaration of William T. Hangley, Esquire as Exhibit "E" attesting that the rates of the Pepper and Mayer Brown attorneys and legal assistants, as well as Peter Hearn's rates, are reasonable in light of the character and complexity of the issues presented in this case.[5] Mr. Hangley states that Ms. Mather's, Mr. Ryan's and Mr. Hearn's billing rates are in line with those prevailing in Philadelphia for antitrust litigation services by lawyers of comparable skill, experience and reputation.

2. Calculation of the lodestars.

Calculating the lodestar figure "requires multiplying the number of hours reasonably expended by the reasonable hourly rate." Pennsylvania Environmental Defense Foundation v. Canon-McMillan School Dist., 152 F.3d 228, 231 (3d Cir. 1998). The total counsel fees claimed in this case, including expenses, are $5,480,703.23. Each firm has performed its lodestar calculation by multiplying the number of hours claimed per attorney or legal assistant by that person's billing rate. The calculations are attached to the front of the supporting documentation volumes being submitted with this fee petition. See Volume IA for Mayer Brown, Volume IIA for Pepper, and Volume III for Peter Hearn.

---

[5]Mr. Hangley's declaration comports with the rule in the Third Circuit that, "[t]he plaintiff bears the burden of producing sufficient evidence of what constitutes a reasonable market rate for the essential character and complexity of the legal services rendered...." Hurley v. Atlantic City Police Department, 174 F.3d 95, 131 (3d Cir. 1999) (citing Smith v. Philadelphia Housing Authority, 107 F.3d 223, 225 (3d Cir. 1997)).

16diii006002

3. No downward adjustments to the lodestars are warranted.

LePage's was successful in proving that 3M violated the antitrust laws in two respects. First, LePage's proved that 3M unlawfully maintained monopoly power in violation of Section 2 of the Sherman Act. Second, LePage's proved that 3M unlawfully attempted to maintain monopoly power, also in violation of Section 2 of the Sherman Act.

Notwithstanding LePage's lack of success in proving the Section 1 (unlawful restraint of trade) and Section 3 (exclusive dealing) claims, no downward adjustment to the lodestar is warranted. In Hensley, the Supreme Court was asked to decide whether a partially prevailing plaintiff may recover attorneys' fees for services performed with respect to unsuccessful claims. Two rules were effectively established by the Court: one governing loss of a claim related to the winning claim; and another rule governing the loss of a claim that is unrelated or wholly independent of the winning claim. See Dobbs, *Reducing Attorneys' Fees for Partial Success: A Comment on Hensley and Blum*, 1986 Wis. L. Rev. 835, 838-89. The first rule (related claims rule) will apply if the plaintiffs' claims for relief involve a common core of facts or are based on related legal theories. See id. at 839. In effect, the related claims should be treated as a single unit so that the plaintiff is entitled to recover all of its attorneys' fees regardless of whether one of the related claims was ultimately unsuccessful at trial. The second rule will apply only if a plaintiff presents two unrelated claims and loses on one of them, for example, where an antitrust plaintiff's claims included a count under the RICO statute. See id. at 839-40.

In the present case, LePage's four antitrust claims were all based on a common core set of facts. LePage's theories were also legally interrelated, for example, all of plaintiffs' claims required plaintiffs to prove the existence of a relevant market, the market for invisible and transparent tape for

16diii006003

plaintiffs to prove the existence of a relevant market, the market for invisible and transparent tape for home and office use in the United States. That common element was proved, as indicated by the jury's response to Question 1 of the Verdict Form. It makes no difference that plaintiffs did not prevail on every theory, or for the full amount of the damages sought. What does matter is that plaintiffs prevailed on their central claims – that 3M monopolized and attempted to monopolize the market for invisible and transparent tape for home and office use in the United States – both of which are inimical to the antitrust laws. Since plaintiffs prevailed on the litigation as a whole and the claims involved many overlapping issues of fact and law, the fee award should not be reduced.

C. Plaintiffs are Permitted To Add Costs Not Covered in the Bill of Costs.

LePage's has claimed total expenses of $302,193.64 in the lodestar amounts to account for costs not recoverable under 28 U.S.C. § 1920, but which are properly included in the attorney fee petition as having been necessarily incurred in the litigation of the action.[6] See, e.g., Abrams v. Lightolier, Inc., 50 F.3d 1204, 1225 (3d Cir. 1995) (reproduction expenses, travel time and expenses, and postage recoverable under § 1988 if attorneys in the community bill separately for these charges); Planned Parenthood of Southeastern Pennsylvania v. Casey, 869 F.Supp. 1190, 1202 n. 9 (E.D. Pa. 1994) (charges for court liason, electronic research services, messengers, report services, faxes and transportation allowed); Midnight Sessions, Ltd. v. City of Phila., 755 F.Supp. 652, 663 (E.D. Pa.) (payment for meals and travel allowed when indication of to whom various expenses are attributable is provided), rev'd and vacated on other grounds, 945 F.2d 667 (3d Cir. 1991), cert. denied, 503 U.S. 984

[6]These costs include charges for: electronic legal research; delivery service, including FedEx, UPS and other courier charges; business meals; postage; supplies, such as binders and tabs; facsimile transmissions (labeled "telecopy" charges on Pepper's supporting documentation); telephone calls; and attorney travel and local transportation, including airfare, taxi cabs, parking, tolls and mileage.

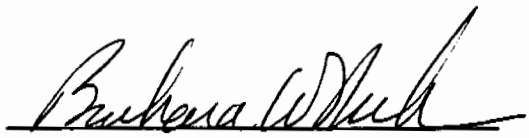
16diii006004

(1992); Rank v. Balsky, 590 F.Supp. 787, 803 (E.D. Pa. 1984) (transportation and food expenses allowed "to the extent that such expenses were reasonably and necessarily incurred"). As with the lodestars, the expenses have been carefully reviewed to ensure that only proper items are claimed.[7]

IV. CONCLUSION.

For all of the foregoing reasons, plaintiffs LePage's, Inc. and LePage's Management Company, L.L.C. request an award of attorneys' fees (including expenses not covered by the Bill of Costs) to Mayer Brown & Platt in the amount of $2,728,756.93; to Pepper Hamilton in the amount of $2,179,151.67; and to Peter Hearn in the amount of $587,395.44.

Respectfully submitted,



Barbara W. Mather (04509)
Elizabeth A. Duffy (75761)
PEPPER HAMILTON LLP
3000 Two Logan Square
18th and Arch Streets
Philadelphia, PA 19103-2799
(215) 981-4000

Peter Hearn (04447)
PETER HEARN, P.C.
123 S. Broad Street, Suite 1827
Philadelphia, PA 19109-1097
(215) 545-1400

[7] For example, all word processing fees have been eliminated. Planned Parenthood, 869 F.Supp. at 1202 (word processing fees are normal part of attorneys' overhead costs).

16diii006005

Mark W. Ryan
Kerry Lynn Edwards
MAYER, BROWN & PLATT
1909 K Street, N.W.
Washington, D.C. 20006-1101
(202) 263-3211

ATTORNEYS FOR PLAINTIFFS
LEPAGE'S INCORPORATED and
LEPAGE'S MANAGEMENT COMPANY, LLC

Date: November 23, 1999

16diii006006

EXHIBIT A

Attorney Fee Petition Summary Sheet				
Fee Category	**Peter Hearn, P.C.**	**Mayer, Brown & Platt**	**Pepper Hamilton LLP**	**Category Total**
Attorney Fees	557,612.50	2,598,948.45	2,036,549.45	5,193,110.40
Electronic Research	-	10,062.42	55,268.89	65,331.31
Delivery Services	781.52	-	8,828.22	9,609.74
Meals	818.28	7,074.13	5,954.15	13,846.56
Other Disbursements	-	5,105.71	-	5,105.71
Other Professional Services	-	-	14,600.81	14,600.81
Postage	-	73.02	720.33	793.35
Supplies	-	-	5,792.35	5,792.35
Telecopy	45.00	9,983.01	12,461.00	22,489.01
Telephone	7,529.78	4,223.33	2,748.19	14,501.30
Travel/Local Transportation	20,608.36	93,286.86	36,228.28	150,123.50
	Peter Hearn P.C. Total Fees:	**Mayer, Brown & Platt Total Fees:**	**Pepper Hamilton LLP Total Fees:**	**Total Attorney Fee Amount:**
	$ 587,395.44	$ 2,728,756.93	$ 2,179,151.67	$ 5,495,304.04

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEPAGE'S INCORPORATED, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 97-CV-3983
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	:	
Defendant.	:	

DECLARATION OF BARBARA W. MATHER

I, Barbara W. Mather, certify as follows in support of Plaintiffs' Petition for Attorneys' Fees Including Expenses Not Covered By the Bill of Costs:

1. I am a 1968 graduate of the University of Chicago Law School, and a partner in the law firm of Pepper Hamilton LLP since 1973. Throughout my years with the Firm, my practice has included a substantial volume of antitrust litigation.

2. A partial list of the major cases in which I have served as counsel includes:

- Massachusetts School of Law at Andover, Inc. v. American Bar Association, Civil Action No. 93-6206 (E.D. PA.) (co-counsel)
- John J. Wallace v. Systems & Computer Technology Corporation, et al., Civil Action No. 95-CV-6303 (E.D. PA)
- Blanche Road Corporation, et. al v. Bensalem Township, et al., Civil Action No. 89-9040 (E.D. PA)

3. Within Pepper, I have served as Executive Partner of the firm (1993-94) and as Chair of the Litigation and Dispute Resolution Department (1998-present).

4. I am a Fellow in the American College of Trial Lawyers.

5. I serve as a Lecturer in Law for Antitrust at The Law School of the University of Pennsylvania (1995-96, 1998-present).

6. I am admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Third Circuit, and the U.S. District Courts for the Eastern and Middle Districts of Pennsylvania.

7. Pepper's partner rates range from $270-$350; associates' rates range from $125-$195; and legal assistants' rates range frm $50-$110. These rates represent the customary billing rates charged for their time during the relevant years.

8. My firm devoted a total of 14,556 hours to its representation of the plaintiffs. Summaries of the activities conducted by the firm's lawyers and legal assistants and the hours spent by each attorney and legal assistant on this matter are set forth in Volume IIA of this submission.

9. Based upon the rates identified above, multiplied by the hours attributable to each firm member, plaintiffs' total fee request for Pepper Hamilton is $2,036,549.45. As explained more fully in the Memorandum, I have reviewed the time records for this matter and attest that the time was reasonably expended in support of plaintiffs' case.

10. In addition, my firm incurred expenses which are not accounted for in the bill of costs in the amount of $142,602.22. An itemization of these expenses is set forth in Volume IIB of this submission and discussed at pages 8 and 9 of the Memorandum.

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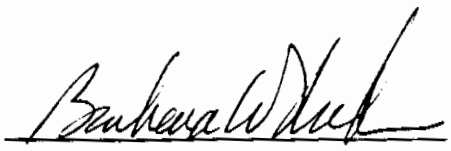
11. Accordingly, the total request for Pepper Hamilton's fees and expenses in this matter is $2,179,151.67.



Barbara W. Mather

Date: November 23, 1999

16diii006012

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEPAGE'S INCORPORATED, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 97-CV-3983
3M (MINNESOTA MINING AND MANUFACTURING COMPANY),	:	
Defendant.	:	

DECLARATION OF PETER HEARN

I, Peter Hearn, declare as follows in support of Plaintiffs' Petition for Attorneys' Fees Including Expenses Not Covered By the Bill of Costs:

1. I am a graduate of Cornell University (1956) and the University of Pennsylvania Law School (1961).

2. I joined the law firm of Pepper Hamilton in 1961 and was elected partner in 1968. I was a member of the Pepper firm until 1996.

3. In April, 1996, I established the Philadelphia firm of Peter Hearn, P.C. I continue to practice with this firm.

4. Throughout my years of practice, I have specialized in litigation. Included in this work has been a substantial volume of antitrust matters.

5. Attached hereto is a current copy of my personal biography.

6. I am admitted to practice before the Supreme Court of the United States, the Courts of Appeals for the Third and Eleventh Circuits, and the District Court for the Eastern District of

Pennsylvania. I am also admitted to practice before the trial and appellate courts of the Commonwealth of Pennsylvania.

7. I devoted a total of 1674.5 hours representing the plaintiffs in the above-captioned action. My activities are described in a narrative summary located at Volume III of this submission.

8. My hourly rate was $300 for the period through December 31, 1997, $325 for the 1998 calendar year, and $350 for the 1999 calendar year.

9. Based on the above rates multiplied by the number of hours attributable to my representation, plaintiffs' total fee request for my services is $557,612.50. As explained more fully in the Memorandum of Law in Support of Plaintiffs' Petition for Attorneys' Fees, these billing memoranda have been extensively edited to eliminate any time not directly related to the representation.

10. In addition, my firm incurred expenses which are not accounted for in the bill of costs in the amount of $29,782.94. An itemization of these expenses and services is located at Volume III of this submission.

11. Accordingly, my firm's portion of the total request for plaintiff's fees and expenses in this matter is $587,395.44.

Peter Hearn

Date: November 23, 1999

PETER HEARN
Peter Hearn, PC
123 South Broad Street
Suite 1827
Philadelphia, PA 19109-1097

Biography

Background: Cornell University (AB, 1956); U.S. Army (Captain, 1956-58); University of Pennsylvania Law School (LLB, 1961); Pepper, Hamilton & Scheetz (Associate 1962-68, partner 1968-96; twice elected to firm's executive committee; four years as chair of firm's finance committee); Chancellor of Philadelphia Bar Association (1989); President of Philadelphia Bar Foundation (1985); Trustee, Philadelphia Foundation (1980-90); candidate for mayor of Philadelphia (1991); Co-chair of Free Library of Philadelphia $60 million (public and private funds) capital campaign (1995-97); Co-Chair of Third Circuit Judicial Conference; Fellow, American College of Trial Lawyers; member, American Law Institute; member American, Pennsylvania and Philadelphia Bar Associations.

Awards: University of Pennsylvania Law School Award of Merit (1989); American Jewish Committee Judge Learned Hand Award (1990).

Selected litigation matters:

- Currently representing LePage's Incorporated in a suit brought under Section 2 of the Sherman Act against 3M.

- Represented John Labatt, Ltd. of Canada in its antitrust work (both litigation and advice) in the United States.

- Represented American Safety Razor Company in a federal court against action brought by U.S. Department of Justice for violation of Section 7 of the Clayton Act.

- Defended Time Magazine in a federal court libel action: Medico v. Time Incorporated.

- Appeared three times (two oral arguments) before the Supreme Court of the United States.

- Represented family patriarch G. Stockton Strawbridge in connection with his opposition to the 1996 sale of Strawbridge & Clothier of Philadelphia to the May Company.

Selected non-litigation matters:

- Currently representing FastShip Incorporated, an ocean transport logistics firm, seeking to initiate container service between Philadelphia and Cherbourg. This representation has involved negotiating a contract with the Delaware River Port Authority for the Authority to construct an $80 million intermodal terminal in South Philadelphia.

- Represented Browning-Ferris, Inc. in obtaining and negotiating a multi-year contract beginning in 1993 for the disposal of Philadelphia's solid waste.

- Served as consultant to the German shipbuilder Jos. L. Meyer GmBH & Co. in its attempts to open a shipbuilding facility at the Philadelphia Naval Shipyard.

- Represented a board member of a Philadelphia hospital (now part of the Temple System) in connection with an internal investigation of claimed misuse of hospital funds. Representation was carried out in parallel with the State Attorney General's office.

16diii006017

- Served as a mediator in a sexual harassment claim against a major Philadelphia law firm.

- Served as an arbitrator in a 1997 dispute between the University of Pennsylvania Health System and Medical Professional Liability Catastrophe Loss Fund.

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EXHIBIT D

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

LEPAGE'S INCORPORATED and LEPAGE'S MANAGEMENT COMPANY, LLC, Plaintiffs, v. 3M (MINNESOTA MINING AND MANUFACTURING COMPANY), Defendant.	CIVIL ACTION NO. 97-CV-3983

DECLARATION OF MARK W. RYAN

I, Mark W. Ryan, declare as follows in support of Plaintiffs' Petition for Attorneys' Fees Including Expenses Not Covered By the Bill of Costs:

1. I am a 1977 graduate of Syracuse University, a 1981 graduate of Duke University Law School and a partner in the law firm of Mayer, Brown & Platt.

2. I joined Mayer, Brown & Platt in 1981 and, throughout my career, antitrust law has been the principal focus of my practice. This work has included both litigation and non-litigation antitrust matters.

3. A partial list of the cases in which I have served as counsel includes:

- In re Citric Acid Antitrust Litigation, MDL Dkt. 1092 (N.D. Cal.)
- In re High Fructose Corn Syrup Antitrust Litigation, MDL No. 1087 (C.D. Il.)

- In re Airline Ticket Commission Antitrust Litigation, MDL No. 1058, (D. Minn.)
- Cooter & Gell v. Hartmarx, 396 U.S. 384 (1990) (and related litigation)

4. I am admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the D.C. Circuit and various other federal and state courts. I have been admitted pro hac vice in the Eastern District of Pennsylvania for purposes of this case.

5. The other Mayer, Brown & Platt attorney who was principally responsible for our representation of the plaintiffs in these proceedings is Kerry Edwards. Ms. Edwards is a graduate of Georgetown University Law School. She joined Mayer, Brown & Platt in 1986 and became a partner in 1995. Her practice focuses on antitrust and litigation.

6. Mayer, Brown & Platt is seeking payment for 17,219.15 hours of representation of the plaintiffs. This include the time of attorneys, legal assistants and document clerks for the period March 1, 1997 through October 8, 1999. Detailed billing records describing the firm's activities are set forth in Volume IA of this submission, with a summary of the hours spent by each Mayer, Brown & Platt attorney and legal assistant attached to the front of the volume.

7. Mayer, Brown & Platt annually reviews and adjusts attorney billing rates as of each July 1st. During the period March 1, 1997 through October 8, 1999, my hourly rate ranged from $300-$350 and Ms. Edwards' rate ranged from $250-$325. Associate hourly rates ranged from $135-$285. Legal assistant rates ranged from $75-$130. These rates represent the customary billing rates charged for their time during the relevant time period.

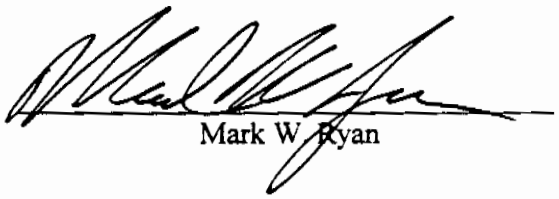
8. Based upon the above rates multiplied by the hours attributable to each firm member, the total fee request relating to work performed by Mayer, Brown & Platt is $2,598,948.45. As explained more fully in the Memorandum of Law in Support of Plaintiffs' LePage's, Inc. and LePage's Management Company, L.L.C.'s Petition for Attorneys' Fees, these billing records have been edited to eliminate unreasonable and duplicative time.

9. In addition, Mayer, Brown & Platt incurred expenses which are not accounted for in the bill of costs in the amount of $129,808.48. An itemization of these expenses is located at Volume IB of this submission.

10. Accordingly, the total request for Mayer, Brown & Platt related fees and costs in this matter is $2,728,756.93.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 22, 1999



Mark W. Ryan

EXHIBIT E

IN THE UNITED STATE DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LePAGE'S INCORPORATED, et al	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	NO. 97-CV-3983
v.	:	
	:	
3M (MINNESOTA MINING AND MANUFACTURING CO.)	:	
	:	
Defendant	:	

DECLARATION OF WILLIAM T. HANGLEY

I, William T. Hangley, declare as follows in support of Plaintiff's Motion for Attorneys' Fees and Costs:

1. I am a 1966 graduate of The Law School of the University of Pennsylvania.

2. I have practiced law in Philadelphia, primarily as a trial lawyer, since my graduation from law school, and the majority of my work has been in federal court. I am a member of the Pennsylvania Bar and am admitted to practice before the United States Court of Appeals for the Third Circuit and Federal Circuit and the United States District Court for the Eastern District of Pennsylvania and other districts. I am Chairman of the law firm of Hangley Aronchick Segal & Pudlin, which I co-founded in 1994. My areas of specialty include antitrust litigation.

3. I am a Fellow of the American College of Trial Lawyers and the American Bar Foundation, a Master of the Bench of the University of Pennsylvania Inn of Court, and a member of the American Law Institute. My memberships in bar associations include the American Bar Association (Co-Chair of the ABA Litigation Section Task Force on the Merit Selection of Judges, 1995-1997; Co-Chair of the Section's Federal Procedure Committee, 1990-1995; and Member of the Section's Task Forces on Discovery, 1997-1998 and on the Judiciary, 1998-present), the Philadelphia Bar Association and the Pennsylvania Bar Association (Member of the House of Delegates 1989-1992). I am also a Member of the Advisory Board for the Public Interest Law Center of Philadelphia, and served on its Board of Directors from 1982-1988.

4. I am familiar with rates customarily charged by attorneys in litigation in the federal courts and particularly with rates typically charged by partners and associates in the major firms in Philadelphia. Rates for senior lawyers range from $300 to $435, depending on experience and reputation, and rates for associates typically range from $100 to $200.

5. I have reviewed the rates charged by Pepper Hamilton LLP, Peter Hearn, P.C. and Mayer, Brown & Platt in their Motion for Attorneys' Fees and Costs.

6. Pepper's partner rates range from $270-$350; associates' rates range from $125-$195, and legal assistants' rates range from $50-$110. Peter Hearn's rates range from $300-$350. Mayer, Brown & Platt's partner rates range from $250-$350, associates' rates range from $135-$285, and legal assistants' rates range from $75-$130. The rates claimed by Pepper Hamilton LLP, Peter Hearn, P.C. and Mayer, Brown & Platt are reasonable given the attorneys' experience and background, and are in line with rates usually and customarily charged by comparable law firms in this geographic area and, I believe, nationally.

7. I state under penalty of perjury that the foregoing information is true and correct to the best of my knowledge, information and belief.

William T. Hangley

Dated: November 23, 1999

16diii006027

CERTIFICATE OF SERVICE

I hereby certify that, on this 23rd day of November, 1999, a true and correct copy of Plaintiffs' Petition for Attorneys' Fees Including Expenses Not Covered by the Bill of Costs, was served as follows:

Via Facsimile (brief only) and Hand Delivery (11/24/99)
John G. Harkins, Jr., Esquire
Harkins Cunningham
2800 One Commerce Square
2005 Market Street
Philadelphia, PA 19103

Via Facsimile (brief only) and Federal Express
William Daniel Sullivan, Esquire
Collier, Shannon, Rill & Scott, PLLC
3050 K Street, N.W.
Washington, D.C. 20007

Elizabeth A. Duffy

EXHIBIT C

Rates aren't skyrocketing, but they do keep going up

Many corporate clients are willing to pay the increasing hourly cost of top legal talent, especially in hot practice areas.

BY RUTH SINGLETON

NATIONAL LAW JOURNAL STAFF REPORTER

The National Law Journal (p. B11)
Monday, December 27, 1999

As the economy continues to flourish, law firm billing rates keep climbing. Information provided by law firms responding to the billing portion of The National Law Journal's 1999 survey of the nation's 250 largest law firms indicates that the increases were somewhat more substantial this year than last.

At the high end, Hollywood has beaten out the Beltway. Bertram Fields, a partner who practices entertainment law at Los Angeles' Greenberg Glusker Fields Claman & Machtinger L.L.P., charges a rate of $750 an hour, $140 more than the $610 charged by lobbying partner Thomas Hale Boggs, of Washington, D.C.'s Patton Boggs L.L.P., frequently a top-biller in past NLJ surveys. Houston's Andrews & Kurth L.L.P., whose highest rate is $650, came in second. Twenty firms list partners who charge $500 an hour or more.

There were 141 law firms that provided a range of billing rates for partners and associates, 111 of which responded to last year's survey. Of these 111 firms, 105 raised rates for at least some attorneys, but many held the line on some parameters of their billing rates. For example, 25 firms kept their high rates for partners the same. At the same time, 20 raised them by $5 to $10; seven by $15 to $20; 13 by $25; 21 by $26 to $50; seven by $51 to $99; and four by $100 or more. (Of course, some large jumps can be attributed to the arrival of one high-priced partner.) Only 14 firms lowered their highest rates. Thus 72 firms, or about 65%, of the responding firms raised their highest rates.

The low rates for associates also showed a general upward trend. Although 31 out of the 111 law firms, or 28%, kept their entry-level associate rate the same, 19 firms raised their low-associate rates by $5; 22 by $10; nine by $15; nine by $20; 10 by between $20 and $50; and three by more than $50. Only eight firms lowered their lowest associate rates. Thus, 72 out of 111 firms, or about 65%, raised their entry-level associate rates.

Only 26 of the 141 responding firms now offer an associate rate under $100. Firms charging the lower rates were mostly located in the Midwest (Detroit; Grand Rapids, Mich.; Louisville, Ky.; Kansas City, Mo.; St. Louis) or smaller municipalities (Baltimore; Buffalo, N.Y.; Norfolk, Va.; Uniondale, N.Y.; Woodbridge, N.J.), although lower rates could also be found at a few Chicago, Philadelphia, New Orleans and Seattle firms.

Not surprisingly, larger firms tend to charge the higher rates. New York's Skadden, Arps, Slate, Meagher & Flom L.L.P.--No. 2 on the NLJ 250, with 1,403 attorneys--lists a range of $380 to $590 for partners and $190 to $365 for associates. In contrast, St. Louis' Husch & Eppenberger L.L.C. charges $140 to $275 for partners, a lower range than Skadden's associate rate. The firm--No. 199 on the NLJ 250, with 183 attorneys--charges

$85 to $160 for associates. The lowest reported high rate for partners is $180, at Clarksburg, W.Va.'s Steptoe & Johnson.

Joseph Altonji, a director in the Chicago office of Somerset, N.J.'s Hildebrandt International, a management consulting firm, is not surprised by the increases. "Demand for legal services remains very strong," he says. "Firms are very busy, and costs are rising very dramatically. At the end of the day, you've got to recover your costs." He notes that firms must compensate for the rising salaries of associates, the best of whom are in great demand.

Mr. Altonji also says that corporate clients are willing to pay the rising rates because "there is a pretty good market; you have to pay the going rate." In addition, he notes that "in-house legal talent is not necessarily a bargain....Corporations are paying more for people they're hiring." He says that corporations are willing to pay higher rates for outside law firms because these companies might actually save over hiring more in-house attorneys and because "people recognize there is a shortage of good, available people out there." He adds, "As long as the economy is good and there is a demand for legal time, you see rates continue to bump."

Another trend that Mr. Altonji has observed is a decrease in discounting. The rate a law firm charges "is getting closer to the standard rate...the rate on the actual sheet," he says.

Rates take a hike in the Rockies

At Denver's Davis, Graham & Stubbs L.L.P., rates rose to $195 to $280 for partners and $125 to $200 for associates, from $175 to $275 for partners and $115 to $160 for associates last year. Ronald R. Levine, a partner and member of the firm's executive committee, attributed the increase to several factors.

"Part of what we're experiencing in Colorado, particularly in popular areas like IP, securities and M&A, is a little bit of...elasticity as a result of how busy everyone is and how hot the Colorado economy is," he says. He also observes that there have been "significant out-of-town incursions into our market," referring to IP specialty firms such as Cooley Godward L.L.P. "Out-of town firms are more pricey than we are....We're still a reasonable cost provider, particularly compared to the out-of-town firms," he says, even if one factors in the firm's most recent rate increases.

Mr. Levine says that at his firm, rates are "typically set by department heads in consultation with partners. [There is] discussion with each individual partner as to whether they think [their] practice will support that rate. [There is] also a fair amount of flexibility that most of our partners have for setting rates for any particular transaction." He says that his firm does make use of volume discounting: "The type of discounting we're doing is over a substantial amount of annual billing." The firm uses a "sliding scale of 1% to 5% as you go up the totem pole," meaning that the discount increases with the volume of business.

Uniondale's Rivkin Radler & Kremer is one firm that opted not to raise rates for either partners or associates at the top and bottom end, although Executive Director Paul Czeladnicki notes that "within those broad categories, people move up." He adds, "We felt that there was latitude within our rate structure without having to raise [rates]." He also says that the firm set its rates based on "being sensitive to our client base and our client needs."

There's always an alternative

Alternative billing methods continue to be popular, but they still don't pose a threat to the billable hour. Firms that generate sizable percentages of their income from alternative billing methods include Brooklyn, N.Y.'s Cullen & Dykman (50%); Woodbridge, N.J.'s Wilentz, Goldman & Spitzer (47%); Chicago's D'Ancona & Pflaum (40%); Buffalo, N.Y.'s Hodgson, Russ, Andrews, Woods & Goodyear L.L.P. (40%); Hunton & Williams (40%); Philadelphia's Schnader Harrison Segal & Lewis L.L.P. (39%); Philadelphia's Saul, Ewing, Remick & Saul L.L.P. (36%); Detroit's Butzel Long (30%); and Holland & Knight L.L.P. (30%).

The alternative billing methods such firms listed include task-based billing, contingency fees, fixed fees and blended rates. Mr. Altonji observed that many firms use "value-based billing for the bigger stuff....For a lot of basic things, such as loans, a lot of [law firms use] fixed fees."

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

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CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

Civil Action No.
5:98CV-108-R

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PERMANENT INJUNCTIVE RELIEF

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CONWOOD'S REPLY IN SUPPORT OF MOTION FOR PERMANENT INJUNCTIVE RELIEF

Defendants (collectively, "UST") suggest that injunctive relief is discretionary and unnecessary. It is neither. After the jury's finding of unlawful monopolization by UST, the Court "has the *duty* to compel action by [UST] that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." United States v. United States Gypsum Co., 340 U.S. 76, 88 (1950) (reversing with order to strengthen decree) (emphasis added).[1] Conwood need not show "irreparable injury," only that UST's misconduct is likely to continue. And that is conceded: UST has announced that it will persist in the misconduct that caused hundreds of millions of dollars in damages to Conwood and higher prices for consumers. While UST invites Conwood to file further lawsuits as

[1] Accord United States v. Glaxo Group, Ltd., 410 U.S. 52, 64 (1973); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128-29 (1948); International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947); International Distrib. Ctrs., Inc. v. Walsh Trucking Co., No. 82 Civ. 8709, 1986 U.S. Dist. LEXIS 30701 (S.D.N.Y. Feb. 8, 1986).

UST's new violations mount, that is no answer. Conwood and the public are entitled to have UST's unlawful conduct *stopped*; that is the very purpose of the Clayton Act's provision for injunctive relief. (Point I).

The proposed injunction is simple and straightforward, and neither impermissibly vague nor overbroad. It requires UST to concern itself with its own products, advertising, and displays, and to leave competitors alone. Thus, it addresses only conduct that is indefensible, and proscribes nothing that is even arguably procompetitive. Only by ignoring the actual language of the proposed injunction -- which, tellingly, it never cites -- can it even attempt to argue vagueness or overbreadth. (Points II and III).

Nor is there substance to UST's complaint about the injunction's supposedly undue "intrusion" into its affairs. The prohibition against manipulation of competitors' products, displays, and advertising intrudes not at all, and the modest requirement of board of directors oversight is both commonplace and highly deferential to UST's self-governance; the Court would be fully justified in going much farther. (Point IV).

Finally, UST does not (and cannot) cite any valid basis for denying needed relief during the 2 to 3 years it expects to consume in the pursuit of appeals. Indeed, UST does not even try to meet the Sixth Circuit standard for a stay pending appeal. It has not demonstrated likelihood of success on the merits of its appeal, irreparable injury, the absence of any harm to third persons if the stay is granted, or a public interest favoring the entry of a stay. Under controlling law it must establish all of

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the above. UST's alternative request for a 30-day stay so that it can attempt at leisure to find grounds for a stay to present to the Sixth Circuit should be rejected out of hand. (Point V).

I. CONWOOD HAS MET THE STANDARD FOR INJUNCTIVE RELIEF

UST's central argument is that the Court has the discretion to "deny relief for lack of irreparable harm alone." UST Mem. at 7. This is simply wrong. The Sixth Circuit has held that "irreparable harm" is not a required element for permanent (as opposed to temporary) injunctive relief in antitrust cases. Instead, a plaintiff may obtain permanent injunctive relief "simply by demonstrating that a 'significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.'" Stone v. William Beaumont Hosp., 782 F.2d 609, 617 (6th Cir. 1986) (quoting Bender v. Southland Corp., 748 F.2d 1205, 1214 (6th Cir. 1984)).[2]

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[2]Accord Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 132 (1969) ("A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may be fairly anticipated from the defendant's conduct in the past." (internal quotation marks omitted)); ABA, Antitrust Law Developments (Fourth) 799 (1997) ("By the permanent relief phase of the proceeding, the court has already determined that an antitrust violation occurred and there is no need to apply the preliminary injunction standard of 'likelihood of success on the merits.' Rather, the only material issue that remains is whether the plaintiff can show that it is threatened with loss or damage arising out of the illegal conduct or a cognizable danger that past or existing violations will continue or recur." (footnotes omitted)).

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There is no question that UST's antitrust violations are likely to continue. It has admitted as much, in its defiance of the verdict[3] and in its public pronouncements that it plans to continue all of the practices at issue.[4] That alone would be sufficient showing for the requested injunction.[5] But there is more; Conwood has evidence that UST has made good on its post-trial threats, and continues to use the very same pernicious tactics the jury found unlawful. See, e.g., Williams Decl. ¶ 3 (Exh. B); Conwood Sales Force Decls. (Exh. C). In these circumstances, it would be an abuse of discretion to fail to provide injunctive relief.[6]

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[3]"As this Court is fully aware, U.S. Tobacco continues to hold firm to the position that *none* of its conduct violates Section 2 of the Sherman Act." UST Mem. at 18.

[4]See Exh. A (compiling post-trial public comments, including statement that UST did nothing more than "engage[] in ordinary marketing practices," that "the actions complained of by Conwood are nothing more than . . . normal," and that, despite judgment, UST "will continue to provide you with the same level of service . . . and the same fine programs").

[5]See, e.g., Blue Cross & Blue Shield United v. Marshfield Clinic, 883 F. Supp. 1247, 1263 (W.D. Wis. 1995) (defendants' continued denials of wrongdoing after trial give rise to "threat that the defendants will continue to violate the antitrust laws"); Wilk v. American Med. Ass'n, 895 F.2d 352, 367 (7th Cir. 1990) (same).

[6]Defendants' only authority demonstrates as much. In Barrett v. Fields, 941 F. Supp. 980, 983 (D. Kan. 1996), a Kansas trial court case concerning a conspiracy to divide the county car-towing business, it was undisputed that a "new 1995 policy" implemented by the Sheriff (rotating towing assignments) put an end to the illegal practices. Accordingly, the court there found *no* threat of future harm to the plaintiff and entered no injunction. Id. at 983, 984. But the court also made plain that the existence of evidence of a threatened recurrence would warrant an injunction. Id. at 984 & n.5.

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The possibility of an endless cycle of Conwood damages actions is likewise no valid reason to deny the injunctive relief required by the Clayton Act. Were that sufficient, there would never be injunctive relief in antitrust cases. But that is not the law.[7] Moreover, Conwood damages actions provide no relief for consumers and competition. Yet, the Court is expressly obligated to consider "the high purpose of enforcing the antitrust laws" in preventing harm to consumers and competition. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. at 131. Indeed, the Court has "the duty" to issue an injunction that "cure[s] the ill effects of the illegal conduct, and assure[s] the public freedom from its continuance." United States Gypsum, 340 U.S. at 88. See also note 1, supra (citing additional cases).

UST's unlawful monopolization has resulted in higher prices,[8] reduced output available to consumers,[9] reduced brand choice,[10]

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[7]The only case cited by UST in its effort to suggest that future damages actions might be sufficient, Bennett, was in fact decided on a different basis: the court declined to issue an injunction because it found no evidence of likely recurrence, a finding simply not possible here. 941 F. Supp. at 983, 984. The Kansas court's dicta about future damages suits should carry little weight in light of the squarely contrary Supreme Court holdings. See note 1, supra.

[8]See, e.g., 3/21/00 Tr. at 131 (Gierer admitting that the company has increased prices for moist snuff every year for the last decade); PX 33 ("[we] don't deal on our product's prices, we don't have to"); id. ("UST is the pricing leader in the market - others will follow."); PX 326.4 (graph showing increased consumer prices where UST succeeds in excluding rival facings); 2/29/00 Tr. at 256-57 (Kamien discussing correlation between UST misconduct and higher consumer prices).

[9]See, e.g., PX 326.2 (Wal-Mart), PX 326.3 (7-Eleven) (showing output effects of UST's illegal acts at Wal-Mart and 7-Eleven); 3/13/00 Tr. at 218-22, 238-39 (Blattberg testifying to

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the creation and maintenance of high barriers to entry that have kept out new competition for more than a decade,[11] and direct injury to other companies in the market.[12] Without injunctive relief, these harms will go unremedied.

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output restrictions resulting from UST abuses); 2/29/00 Tr. at 256-57 (Kamien testimony to same effect); PX 19 ("We discontinued 10 competitive products. This will eliminate a total of 5,500 competitive facings nationwide."); PX 61 ("It is imperative that we continue with this Category Management Action Plan to eliminate competitive products."); PX 104 ("Try to cut down on the number of competitive brands a retailer may be carrying."); PX 268 ("I have exclusive vending rights and have eliminated most all of any serious distribution of Conwood brands. I should be well under 10% of competitive distribution in my chains.").

[10]See, e.g., Renfro Dep. at 19 (testifying to reduction in consumer choice as a result of UST's Wal-Mart contract); Borrowdale Dep. at 16, 20-21, 32-33 (former UST employee admitting that UST seeks to eliminate rival brands, especially price-value brands); Hart Dep. at 13-16, 18-21 (to same effect); 3/13/00 Tr. at 243-44 (Blattberg to same effect); PX 94 ("[L]everage our market share toward improved merchandising presence. This will come at the expense of slow moving competitive products."); PX 32 ("We believe that if we can continue to be the Category Captains in these stores...we may be able to control the number of Price Value product introductions."); PX 37 ("fact-based selling" used in "accomplishing blocking of competitive price value distribution").

[11]See, e.g., 3/23/00 Tr. at 161-62 (Scheffman admitting that there has been no new entrant in the moist snuff market since 1990 and that Brown & Williamson and R.J. Reynolds attempted to enter the market and failed); PX 33 (stating goal to "[p]rotect our market share by creating barriers to competition"); PX 45 (agreed goal: "limit the growth of the price-value market segment").

[12]3/13/00 Tr. at 37-38 (McClure: UST came "closer than they know" to knocking Timberwolf out of the market); 3/7/00 Tr. at 244-45, 247-48, 250-51 (Price: UST abuses harm all competitors in market, suppress price competition, and result in reduced Swedish Match output, fewer consumer choices, and higher consumer prices).

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II. THE PROPOSED INJUNCTION PROPERLY DEFINES WHAT IS PROHIBITED, AND IS NOT "IMPERMISSIBLY VAGUE"

Conwood has proposed an injunction that, in essence, prohibits the abuses proved at trial by placing competitors' products, displays, and advertising off limits to the monopolist. Specifically, Conwood has proposed that UST shall not (a) "manipulate any competitor's smokeless tobacco products, vending systems, [or] . . . 'point of sale' advertising," or (b) "induce . . . other persons" to do the same. Proposed Order § I.

Tellingly, UST argues that the proposed injunction is "vague" without once citing its actual terms. Thus, it suggests it is "unclear" from Section I.A of the proposed injunction whether retailers may make "their own, independent decisions to use a U.S. Tobacco rack to house all moist snuff." UST Mem. at 10. In fact, there is no fair reading of the injunction that could conceivably prohibit such *independent* decisions. By its plain terms, the proposed injunction bars only *UST* -- not the independent retailer -- from manipulating rival companies' property without permission.[13] UST has not offered a single genuine ambiguity; while it does not agree with the restrictions on *its* conduct, including restrictions on its manipulation of

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[13]Similarly, UST complains that Section I.B of the injunction is "so patently vague" that it might even preclude UST representatives from designing or commenting on a suggested plan-o-gram. UST Mem. at 11. But *nothing* in Section I.B's language remotely restricts UST personnel from designing or commenting on suggested plan-o-grams for *its own products*. It does, however, plainly prevent UST from influencing retailers to *delete rival* products. Again, there is nothing vague here, and UST's complaint seems to be more about the substance of the restriction on its ability to continue its proven anticompetitive conduct.

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rivals' property, it cannot validly argue that it is in the dark about the scope of those restrictions.

The proposed injunction is therefore appropriately drafted. In crafting an injunction, "elaborate detail is unnecessary and even may be undesirable . . . . [T]he court should be specific, direct, and to the point" so that reasonable persons can understand the Court's directive. 11A Charles Alan Wright, et al., Federal Practice and Procedure § 2955, at 312-13 (2d ed. 1995). Injunctions far more succinct than Conwood's proposal routinely pass judicial scrutiny.[14] Indeed, not one of the cases cited by UST suggests that the proposed injunction is inappropriate; each stands at most for the unremarkable proposition that a trial court may not rotely repeat broad statutory commands in the form of an injunction -- something that is indisputably not the case here.[15]

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[14]See, e.g., United States v. V-1 Oil Co., 63 F.3d 909 (9th Cir. 1995) (rejecting vagueness challenge and upholding sweeping injunction requiring defendant to accede to warrantless searches "for the purpose of enforcing the [Hazardous Material Transportation Act]," and explaining that injunctions will not be overturned on appeal "unless they are so vague that they have no reasonably specific meaning" (internal quotation marks omitted)).

[15]See City of Mishawaka v. American Elec. Power Co., 616 F.2d 976, 991-92 (7th Cir. 1980) (rejecting injunction provision that merely restated "the broad language of Section 2 of the Sherman Act" and provision that simply required defendant to "treat all its customers fairly, equitably, and on a nondiscriminatory basis"); Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, ¶ 18 (E.D. Ark. Oct. 16, 1998) (rejecting injunction that would bar "any policy or program the purpose or intent of which is to create artificial barriers to entry or expansion"); Hartford-Empire Co. v. United States, 323 U.S. 386, 410 (1945) (explaining that "[t]he decree must not be so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt; [or] enjoin all possible breaches of the law" (internal quotation marks omitted)).

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III. THE PROPOSED INJUNCTION PROPERLY ADDRESSES UST'S UNLAWFUL CONDUCT AND IS NOT "OVERBROAD"

After first professing inability to understand what the proposed injunction prohibits, UST does an about face and claims that it understands perfectly and objects because the injunction covers too much. But under the Sherman Act the Court must completely eliminate the unlawful conduct -- even if that does mean incidentally foreclosing related lawful conduct. See, e.g., United States v. Paramount Pictures, Inc., 334 U.S. 131, 148 (1948) ("equity has the power to uproot all parts of an illegal scheme -- the valid as well as the invalid -- in order to rid the trade or commerce of all taint" of the illegal conduct); National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 698 (1978) (otherwise lawful conduct may be enjoined if it "represents a reasonable method of eliminating the consequences of the illegal conduct" or its resumption); United States Gypsum Co., 340 U.S. at 89 (relief may "range broadly through practices connected with acts actually found to be illegal").[16]

Accordingly, the Court can and should prohibit otherwise lawful conduct if it "represents a reasonable method of eliminating the consequences of the illegal conduct" or

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[16] See also International Salt, 332 U.S. at 400-01 ("When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention."); United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 327 (1961) (In choosing "among two or more effective [antitrust] remedies[,] [i]f the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences. This proposition is not novel; it is deeply rooted in antitrust law and has never been successfully challenged.").

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preventing its resumption. National Soc'y of Prof'l Eng'rs, 435 U.S. at 698. Accord United States v. National Lead Co., 332 U.S. 319, 335 (1947) ("The essential consideration is that the remedy shall be effective and fair as possible in preventing continued or future violations of the Antitrust Act in the light of the facts of the particular case."); International Salt, 334 U.S. at 400; DuPont, 366 U.S. at 327; United States v. Loew's, Inc., 371 U.S. 38, 53 (1962) ("When [a party] has won the lawsuit, it is entitled to win the cause as well.").[17]

Here, however, the proposed injunction is far narrower than is required, and does nothing to restrain or impede *legitimate* competition by UST or anyone else.

A. UST asserts that the development of new racks, POS, products, and incentive programs "could easily fit within the proposed injunction." UST Mem. at 13-14. But UST never explains how and never points to any language in the proposed injunction

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[17]Defendants' overbreadth claims are undermined by the cases they cite. For example, in Bigelow v. RKO Radio Pictures, Inc., 162 F.2d 520 (7th Cir. 1947), the court of appeals went out of its way to explain that trial courts may impose restraints not only on "acts committed under the conspiracy," but also "impose such further restraints as would prevent an evasion. All doubts [are to be] resolved in favor of the plaintiff." Id. at 523. A decree may enjoin not only illegal conduct, but other conduct that "became tainted by illegality," given the way defendants employed it. Id. A decree "may very properly be used to destroy the [illegal conduct] root, branch, and all its evil fruits." Id. at 524. The only thing an injunction may not do, the court held, is impose on a defendant competitive restraints unrelated to the conspiracy that simply "preserve the evil in the interest of the plaintiff." Id. Likewise, in Loew's, the Supreme Court *expanded* the injunction issued by lower courts to cover facially lawful, but potentially abusive, conduct in order "to ensure . . . that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined." 371 U.S. at 53.

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that could be so construed. In fact, nothing in the proposed injunction affects UST's ability to develop and support its own products, POS, and racks.[18] Likewise, nothing prevents UST from developing incentive programs to secure the placement of its *own* products, POS, and racks (like the programs implemented by Swisher and Conwood), as opposed to programs used to restrain or exclude competition.[19]

B. UST complains that the proposed injunction would preclude "perfectly normal" conduct like (i) exclusive vending, (ii) SOF=SOM, and (iii) making "recommendations" to exclude rival products. UST Mem. at 14-15. There is, of course, nothing "perfectly normal" about any of these practices. Indeed, Gary Milano, UST's Vice President of Sales, testified that exclusive vending was *improper*: "It wouldn't be proper for [a] representative to try and have exclusive vending in the stores." 3/7/00 Tr. at 25. Mr. Milano likewise admitted that UST had no legitimate need for SOF=SOM. 3/6/00 Tr. at 81-82. And he conceded that it was not appropriate for UST employees to recommend the deletion of competitive brands. 3/6/00 Tr. at 113. Understandably, the properly instructed jury rejected defense counsel's subsequent argument that such conduct is "normal." The proposed injunction is carefully tailored to prevent recurrence

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[18]The injunction proscribes only efforts by UST to manhandle *other* companies' property and induce retailers to limit rival distribution -- actions that lack any procompetitive virtue and that the record showed UST plainly abused to exclude competition.

[19]See, e.g., 3/9/00 Tr. at 98-99 (Gundlach testifying that UST's Customer Alliance Program ("CAP") contains a variety of "exclusionary feature[s]," such as exclusion of competitive POS and reduced visibility of competitive brands.); PXs 112C, 112D, 112F, 112O (expressly conditioning CAP payments on exclusion).

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of these abusive practices while leaving ample room for UST to compete fairly.

(i) Given the extensive record at trial showing how UST used exclusive vending to restrict competitive distribution, thwart price-value brand introductions, and eliminate rival POS,[20] it would be entirely permissible for the Court to ban exclusive vending entirely as the most "effective" remedy to prevent "continued or future violations" of the antitrust laws. National Lead, 332 U.S. at 335.

Conwood's proposal is, however, far more modest. Under the proposed injunction a retailer remains free to make an *independent* decision to implement exclusive vending. UST is even free to place the new vendor, as well as its own POS and product. The proposed injunction (§ I.A) simply provides that, if rival products and POS are to be incorporated into the UST vendor, the retailer or the rival should perform this function rather than UST. In fact, the proposed injunction even permits UST to perform this service too -- with the permission of the rival, and

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[20] See, e.g., PX 4 ("Our objective with exclusive vending rights . . . is to control expanded competitive distribution and competitive P.O.S."); PX 268 ("I have exclusive vending rights and have eliminated most all of any serious distribution of Conwood brands. I should be well under 10% of competitive distribution in my chains."); Hart Dep. at 15-16 (former UST rep testifying that his supervisors told him to persuade stores to use UST racks exclusively and to remove or reduce Conwood facings because, "if we didn't keep control . . . they would get a higher percent of the market share"); Marconi Dep. at 11-13 (same); Borrowdale Dep. at 16 (same); Ulizio Dep. at 23-24 ("[t]he program was to go through every account, pull out every display, whether it was good or bad," leaving Conwood, "a slot or two, or possibly three, connected to ours"); Naifeh Dep. at 30-32 (engaged in same conduct at supervisor's behest); Keil Dep. at 15-17 (same).

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such permission may not be unreasonably withheld.[21] The proposed injunction is thus narrowly drafted to address the specific abuses proved at trial, and does not in any way stifle legitimate competitive activity.[22]

(ii) "SOF=SOM" is one of the means UST used to "control competition," according to its own documents. PX 9. UST's counsel now protests that SOF=SOM is legitimate and procompetitive. But at trial UST's executives conceded that

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[21]In the past, UST and other manufacturers have performed rack resets in this fashion -- working cooperatively to conform a rival's display to the independent retailer's request. 3/3/00 Tr. at 111-12 (Willding); 3/9/00 Tr. at 218-19 (Hettinger); 3/14/00 Tr. at 104 (Luckett); see also Williams Decl. ¶¶ 5-7 (Exh. B). UST's passing suggestion that "cooperation" to conform a rack to the retailer's independent mandate may constitute an antitrust violation is specious and unsupported by a single authority. Moreover, if there were any genuine concerns along these lines, the proper course would not be to drop the injunction altogether but simply to bar UST outright from tampering with rival property, excising from Section I.A the language beginning with "except with the prior written permission . . . ."

[22]While UST complains that it will be unable to discard rivals' "damaged or shopworn racks and/or POS" and "out-of-date or stale products," UST Mem. at 10, nothing in the injunction prevents retailers from removing these items. Rival manufacturers have every incentive to do the same. Williams Decl. ¶¶ 6-7 (Exh. B). And UST may even discard rivals' property with their advance permission. Once again, UST does not (and cannot) explain why *it* needs to have the unilateral right to remove and tamper with *other* companies' property without permission. And the record shows that UST has used and continues to use these tactics to exclude. See, e.g., 3/9/00 Tr. at 189-94 (Hettinger testifying that UST bagged up hundreds of fresh cans of Conwood product and removed thousands of racks); 3/8/00 Tr. at 200-04 (Hynek: same); id. at 155-59 (Dring: same); 3/10/00 Tr. at 53-54, 84 (Williams: same); PX 16 ("better for [Conwood] to be lost in our vending than to have their own and no point of sale on the vendor"); PX 27 (Conwood products deleted and factings removed. "All competitors' vendors have been replaced by UST vendors.").

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policy has literally "no effect" on its sales.[23] And UST's documents and former sales representatives revealed that the company used the tactic solely to exclude competition, especially nascent price-value brands.[24] However legitimate when employed by other companies in other industries -- and there is no evidence that it is legitimate anywhere by anyone -- there is no question that UST used SOF=SOM as an unlawful exclusionary tactic and, accordingly, should be enjoined. See Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972) (means a court uses to restore competition depends on "the special needs of the individual case").

(iii) UST complains that it will not be allowed to "recommend" the deletion of rival products. UST Mem. at 15. But it has no credible argument -- much less authority -- for the notion that an 80% monopolist should be permitted to use its power to "recommend" deletion of competitors. The evidence at trial proved that UST used its market "clout," its position as category captain (which it alone can secure because of its dominant market power[25]), and related "incentives" to encourage

---

[23]See, e.g., 3/6/00 Tr. at 81-82 (Milano).

[24]See, e.g., 3/13/00 Tr. at 256-59 (Blattberg); 3/1/00 Tr. at 30-31, 103-04 (Kamien); Hart Dep. at 15-16; Borrowdale Dep. at 26-27; PX 65 (practice "basically buys out the competition's involvement"); 3/13/00 Tr. at 53-55 (McClure); PXs 63, 104; PX 9 ("We have effectively, because of the competitive deletes/and roll sale vendor introduction, made our share of fixture more equal to our share of sales"); PX 45 (price value strategy: "utilize category management to control SOF plus assortment"); PX 139 (regarding price-value brands, "we control the merchandising and the POS placements, which will make the consumer awareness of the price differential difficult").

[25]PX 39; 3/13/00 Tr. at 210-11 (Blattberg); Carlson Dep. at 32-33; 3/15/00 Tr. at 120-21 (Biddy); 3/10/00 Tr. at 70, 78

retail stores to eliminate facings and advertising opportunities for rivals.[26] In making its "recommendations," UST even resorted on a systematic basis to using false and misleading information.[27] And its "recommendations" were often intentionally targeted at stunting price-value competition.[28]

While UST should be permitted to promote its own products, and to recommend additions (or deletions) of those products, even where such additions lead to deletions of competitive products, the monopolist should not be permitted -- independent of any efforts to promote its products -- deliberately and specifically to impair the opportunities of rivals. That is all the proposed injunction prohibits. Conwood's restriction is, thus, appropriately and narrowly tailored to the needs of this case.

(Williams); 3/6/00 Tr. at 76 (Milano).

[26] See, e.g., PX 61 ("[i]t is imperative that we continue with this Category Management action plan to eliminate competitive products"); PX 59 (UST seeking discontinuation of slow-selling competitive products, yet maintaining its own slow-selling flavor-paks); 3/13/00 Tr. at 288 (Blattberg testifying that for the purpose of excluding competitors, UST created artificial scarcity in a market that it knew had the potential to grow). Accord PXs 24, 72, 79, 84.

[27] 3/13/00 Tr. at 245-49 (Blattberg reciting example after example); PX 9 (teaching UST sales force to manipulate artificially Conwood ranking in sales velocity reports); PX 59 (gerrymandered data); Waller Dep. at 11 (testifying that UST used "skewed information" to distort rankings); 3/13/00 Tr. at 247-51 (Blattberg describing UST's efforts to gerrrymander the data presented to retailers in their presentations). Accord PXs 173, 208, 215; 3/8/00 Tr. at 219-21 (Hynek: listing examples); 3/10/00 Tr. at 63 (Williams: same).

[28] See, e.g., 3/7/00 Tr. at 237-38 (Price); 3/13/00 Tr. at 250-62 (Blattberg); PXs 45, 139; PX 138 ("Only our long time relationship [with Circle-K] has held off the distribution of [Timberwolf.]".

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C. UST asserts that issuing an injunction would insulate Conwood from normal competition. UST Mem. at 16. But normal competition is exactly what Conwood seeks, and the "examples" UST cites belie its claim. UST complains, for instance, that the proposed injunction would preclude retailers from being able to obtain category management services. To the contrary, nothing in the injunction bars UST from performing such services.[29]

D. UST asserts that the proposed injunction "binds" independent retailers and treats their decisions as "conspiratorial." UST Mem. at 17-18. Tellingly, however, defendants point to no language in the proposed injunction that would so operate. Nor can they. The proposed injunction is expressly "enforceable against all defendants in this lawsuit." Proposed Order at 4. The proposed injunction does also apply to "other persons, affiliated or acting in concert with" defendants. Id. But this language is designed to cover defendants' agents, in order to ensure that UST does not attempt to pursue indirectly illegal acts that it is forbidden to pursue directly.[30]

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[29]UST is not precluded from performing any of the central functions of a category captain: making product selection recommendations about its own products or the addition of rival products, from offering category displays for its products and even rival products, from promoting its products or the entire category, or from providing labor to perform resets. 3/13/00 Tr. at 209-10 (Blattberg enumerating category captain functions). UST is forbidden only from seeking to delete rival products and handling their property -- neither of which are essential to category captain functions. Id. at 223, 246 (Blattberg describing UST's behavior on both scores as "abuses" of category management).

[30]For example, manufacturers sometimes pay independent "manufacturer representatives" to represent them with retailers in certain areas, rather than endure the expense of maintaining a sales force there. Williams Decl. ¶ 4 (Exh. B). UST should not be encouraged to use such agents as a way around the Court's

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Indeed, Conwood's proposed language is drawn from other injunctions proposed and approved in analogous circumstances. See, e.g., International Distrib. Ctrs., 1986 U.S. Dist. LEXIS 30701, at *24 (proscribing conduct by defendant and "all persons acting in aid of, or in concert with, them"); Plaintiffs' Proposed Final Judgment, United States v. Microsoft Corp., Civ. Action Nos. 98-1232, 98-1233 (D.D.C. filed Apr. 28, 2000), available at http://www.usdoj.gov/atr/cases/f4600/4639.htm (Exh. D) (¶ 6b: order applies to "all other persons in active concert or participation with any of" defendants).

IV. THE PROPOSED INJUNCTION IS NOT "UNDULY INTRUSIVE"

Finally, UST objects to the proposed injunction on the ground that it would unreasonably intrude into its operations. But it can point to no such intrusion.

While UST complains that it would have to obtain permission from rivals before manipulating their products, displays or advertising, it gives no sound reason why that is burdensome or inappropriate. The alternative, obviously, is flat prohibition. But Conwood has sought to tailor the request to allow for flexibility, and the requirement of consent is both commonsense and commonplace. Williams Decl. ¶ 5 (Exh. B). It was UST's legerdemain over the property of its rivals that, in large measure, provided the mechanism through which UST unlawfully monopolized the moist snuff market. It cannot credibly argue that it should have the *right* to exercise such dominion. It should do so only with permission. Accordingly, there is no

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injunction. Nothing in this language is designed to, or would, cover "independent, uncoerced retailers" that, by definition, are not acting in concert with it.

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basis for thinking this procedure to be "unduly intrusive" on anyone.

UST also protests the creation of a new Board of Directors committee to enforce internal compliance with the Court's order, as well as the mandate that it produce annual compliance reports, maintain relevant corporate records, and provide notice to customers and training to employees. UST Mem. at 20. But UST nowhere explains why any of these provisions would be unduly onerous. Neither does (or can) UST dispute that each of these provisions would materially further compliance by an (admittedly) recalcitrant and unrepentant UST.

Significantly, UST cites no court that has rejected such modest measures as "unduly intrusive"; in fact, the proposed injunction is far less "intrusive" than injunctions entered by courts in cases where the conduct was far less pervasive than the exclusion proved at trial in this case. See, e.g., International Distrib. Ctrs., Inc., 1986 U.S. Dist. LEXIS 30701, at *32 (ordering defendant to file *quarterly* reports and affidavits with the court; to generate and send to plaintiff internal accounting statements on a quarterly basis; to notify plaintiff in advance of any planned sale or transfer; to inform its employees of the terms of the injunction and develop a compliance training program; to provide annual accounts of "all steps" taken in the preceding year to "discharge its obligations" under the court's order); Coleman v. Cannon Oil Co., 911 F. Supp. 510, 512 (M.D. Ala. 1995) (approving "affirmative steps" including the "educat[ion] [of defendants'] employees about the Sherman Act's" requirements and the "adopti[on] [of] personnel policies and

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procedures"); Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 684 F. Supp. 950, 953 (N.D. Ohio 1987) (court retaining jurisdiction "for such further orders or directions as may be necessary" and "for the enforcement of compliance herewith, and for the punishment of any violation"); Image Technical Servs., Inc. v. Eastman Kodak Co., No. 87-1686, 1996 U.S. Dist. LEXIS 2386 (N.D. Cal. Feb. 26, 1996) (notice to all customers and antitrust training).[31]

V. UST HAS NOT MET (AND CANNOT MEET) THE STANDARDS REQUIRED FOR A TEMPORARY STAY

Defendants ask the Court for a stay pending appeal. But they cite no similar antitrust case in which a court has denied effective and timely injunctive relief so that a defendant can continue the misconduct while the case is on appeal. Besides, under Sixth Circuit law, the party seeking a stay is obligated to show that it is *likely* (1) to prevail on the merits of the appeal; (2) to be irreparably harmed absent a stay; (3) other parties will not be harmed if the court grants the stay; (4) the public interest will be advanced by a stay. Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991); Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n, 812 F.2d 288, 290 (6th Cir. 1987). UST has shown none of these things, much less all of them.

First, while granting that UST believes it will win on appeal, its appellate issues are mere retreads of arguments

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[31] See also Plaintiffs' Proposed Final Judgment, Microsoft (Exh. D) (Government's proposed injunction requiring, inter alia, creation of a "compliance committee" of Microsoft's board of directors (§ 4); development of internal programs to ensure compliance with Section 2 (id.); and maintenance and access to relevant records (§ 5)).

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soundly rejected by the Court many times -- on summary judgment, on two directed verdict motions, and in pre-trial *in limine* motions practice. The Court conducted an error-free trial, and, as fully discussed elsewhere, UST's familiar arguments do not come close to demonstrating otherwise. See Pls.' Opp. to Defs' Mot. for Judgment, New Trial, or Remittitur (Apr. 30, 2000).

Second, UST makes no effort to present *any* evidence that it would be irreparably harmed by the proposed injunction. Instead, it rests on the bare assertion that its "foregoing discussion" somehow "demonstrates" impending irreparable injury. UST Mem. at 22. That "discussion" is no substitute for the evidence UST bears the burden of producing. See Ohio ex rel. Celebrezze, 812 F.2d at 290 (in evaluating the claimed harm, court looks to "the adequacy of the proof provided" and will not award relief when harm is "speculative or theoretical"). More fundamentally, UST's only imaginable "harm" in this case is some (unspecified) reduction in its $1 billion annual profits. The Sixth Circuit has repeatedly held that such financial injury cannot qualify as "irreparable harm." Id.; see Griepentrog, 945 F.2d at 154 ("[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough").

UST does not even *address* the two remaining prongs on which it bears the burden of proof: showing that a stay would cause no harm to other persons and that a stay is in the public interest. In fact, a stay *would* harm other persons and grossly offend the public interest. UST has confirmed again and again that it will not change its unlawful conduct absent a direct court order. If

a stay is granted, both competition and consumers will be harmed through the continuation of conduct already adjudged to offend the antitrust laws -- conduct that has resulted in higher consumer prices, lower output, reduced brand choice, harm to other existing competitors (not just Conwood), and increased barriers to entry. It is beyond argument, therefore, that a stay *would* harm Conwood, other moist snuff competitors, consumers, and the public interest as well.

Absent a stay pending appeal, UST asks the Court to issue at least a 30-day stay so that it can prepare "affidavits and any other supporting documents" at its leisure for a second try before the Sixth Circuit. UST cites no authority for the procedure it contemplates. What it seeks, in substance, is a temporary restraining order without having to make *any* of the legal showings necessary to obtain one. In any event, UST had ample time to prepare its case; it is telling that it cannot identify for *this* Court any of the materials it now says it needs 30 days to assemble for the Sixth Circuit. The issue of injunctive relief has been present in this case from the outset. See Prayer for Relief, Conwood Complaint (Apr. 22, 1998) (seeking permanent injunctive relief). If the Court determines that injunctive relief is necessary and appropriate -- as it should, given the evidence before it -- the Court should move forthwith to restore fair competition to the moist snuff market.

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Conclusion

Conwood's motion for permanent injunctive relief should be granted.

Respectfully submitted,

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May 13, 2000

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CERTIFICATE OF SERVICE

I certify that, on this 13th day of May, 2000, a copy of the foregoing was sent via overnight delivery to:

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EXHIBIT A

UST

UST REPORTS FIRST QUARTER 2000 RESULTS

GREENWICH, Conn., April 20, 2000 – UST Inc. (NYSE:UST) today announced that first quarter 2000 net sales increased 5% to $368.3 million, net earnings declined 6% to $102.0 million and earnings per share of $.62 increased 3% compared to the corresponding 1999 period.

UST Chairman and Chief Executive Officer Vincent A. Gierer, Jr., stated: "The fundamentals of our core businesses are on track. During the quarter we experienced higher than anticipated costs for legal fees, interest expense and a hedging loss related to the recent debt issuance. Without these charges, our earnings would have come in better than originally targeted."

Gierer continued, "Despite the continuing difficult environment for tobacco equities, we continue to be encouraged by the performance of our principal business, smokeless tobacco, which posted a net unit volume gain of 2% and, most importantly, the overall category continued to post solid growth. Looking forward to the remainder of the year, we expect the operations to continue to perform in accordance with our original plan. However, in light of the present uncertainty associated with the Conwood litigation, the Company's stated 2000 EPS growth target of 10% may not be achievable."

During the quarter, the Company repurchased 4.7 million shares at a cost of $97.5 million. The Company has suspended its share repurchase program pending further review after the post-trial motions in the Conwood litigation in Kentucky are decided.

Tobacco Segment

Tobacco segment revenue increased 4% to $324.2 million as a result of higher prices and a 2% increase in net smokeless tobacco unit volume to 152.5 million cans. Premium can sales were off slightly, while non-premium products contributed an additional 4.4 million cans in the quarter. Operating profit remained stable at $179.6 million, as the Company continued its accelerated spending plan started in the third quarter of 1999 in an effort to increase category growth.

Impacting Tobacco segment performance were legal expenses associated with the Conwood litigation. In addition, cost of sales increased over 12%, a result of higher federal excise taxes and higher leaf costs associated with the increased weight for Skoal Long Cut products.

Wine Segment

Wine segment revenue increased 15% to $37.1 million primarily due to a 12% increase in premium case sales, while operating profit increased 19% to $2.5 million.

The closing of the announced Guenoc acquisition has been delayed, pending the results of post-trial matters in the Conwood litigation. Costs associated with the acquisition in the amount of $.8 million were expensed during the quarter and negatively impacted the growth in operating profit.

Significant Developments

As previously announced, a jury in Paducah, Kentucky recently found that the Company's subsidiary, U.S. Tobacco Company, had violated the antitrust laws and awarded $350 million in damages to

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Conwood Company, L.P. As required by the antitrust laws, the award was trebled and a judgment in the amount of $1.05 billion was entered on March 29, 2000. The enforcement of the judgment is presently stayed while the court hears arguments as to the timing and amount of any bond to be required, as well as arguments on other matters relating to the case.

The Company strongly believes that the evidence presented at trial was insufficient to support the jury's findings and intends to take all actions necessary to vacate or reverse the judgment. The Company recently filed motions with the District Court seeking to have the court vacate the judgment as a matter of law or, in the alternative, order a new trial or reduce significantly the amount of the judgment. If the judgment is not vacated, or a new trial not ordered, the Company intends to appeal the judgment to the court of appeals.

The Company believes that the verdict should be vacated on the following grounds:

1. U.S. Tobacco lacks "monopoly power" under the instructions given to the jury;

2. U.S. Tobacco did not "use" or wield monopoly power in the marketplace, but rather engaged in ordinary marketing practices either used by or available to all competitors;

3. The moist snuff "market" was not harmed by any of U.S. Tobacco's alleged misconduct, and in fact was characterized by significantly increased competition during the 1990's under all relevant measures;

4. Conwood prospered in terms of sales and profits during the same time period; and

5. Conwood did not offer evidence, beyond mere "beliefs" and speculation of its own employees, that U.S. Tobacco's "exclusionary" conduct was a material cause of it "not doing better." In fact, the overwhelming evidence shows that the actual sources of Conwood's share stagnation were (a) the independent, uncoerced decisions of retailers, (b) competition from other competitors and new brands, and © Conwood's own decisions not to compete in the ways desired by retailers.

In light of the Company's belief as to the merits of its case, the uncertainties associated with the post-trial process and the Company's belief that the amount of damages, if any, which may ultimately be imposed can not be reasonably estimated at this time, no charge relating to the judgment is reflected in the Company's financial statements.

For further information on post-trial motions filed by the Company with the court, please refer to our website at www.ustobacco.com.

UST, through its subsidiaries, is a leading producer and marketer of moist smokeless tobacco products including Copenhagen, Copenhagen Long Cut, Skoal, Skoal Long Cut, Skoal Bandits, Rooster and Red Seal. Other consumer products marketed by UST subsidiaries include premium wines sold nationally through the Chateau Ste. Michelle, Columbia Crest and Villa Mt. Eden wineries as well as sparkling wine produced under the Domaine Ste. Michelle label and premium cigars including Don Tomas, Don Tomas Special Edition, Astral and Habano Primero.

All statements, other than statements of historical facts, which address activities, or actions that the Company expects or anticipates will or may occur in the future, and other such matters are forward-looking statements. To take advantage of the safe harbor provided by the Private Securities Litigation Reform Act of 1995, the Company is identifying certain factors that could cause actual results to differ materially from those expressed in any forward-looking statements made by the Company.

Any one, or a combination, of these factors could materially affect the results of the Company's operations. These factors include competitive pressures, changes in consumer preferences, wholesaler

ordering patterns, consumer acceptance of new product introductions and other marketing initiatives, uncertainties associated with ongoing and future litigation, legal and regulatory initiatives (including those described under Items 1 and 3 of the Company's Annual Report on Form 10-K and Form 8-K), and conditions in the capital markets. Forward-looking statements made by the Company are based on knowledge of its business and the environment in which it operates, but because of the factors listed above, as well as other factors beyond the control of the Company, actual results may differ from those in the forward-looking statements.

UST
CONSOLIDATED SALES AND EARNINGS
(In thousands, except per share amounts)
(Unaudited)

	First Quarter		
	2000	1999	% Change
Net sales	$368,295	$350,085	+ 5.2
Costs and expenses			
Costs of products sold	75,371	67,018	+12.5
Selling, advertising and administrative	119,509	105,673	+13.1
Total costs and expenses	194,880	172,691	+12.8
Operating income	173,415	177,394	- 2.2
Interest, net	7,527	1,065	-
Earnings before income taxes	165,888	176,329	- 5.9
Income taxes	63,924	67,869	- 5.8
Net earnings	$101,964	$108,460	- 6.0
Net earnings per share:			
Basic	$.62	$.60	+ 3.3
Diluted	$.62	$.60	+ 3.3
Cash dividends per common share	$.44	$.42	+ 4.8
Shares outstanding:			
Basic	164,961	179,763	
Diluted	165,123	180,650	

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UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC.
100 WEST PUTNAM AVENUE, GREENWICH, CONNECTICUT 06830

March 30, 2000

TO OUR CUSTOMERS:

As many of you may already know, on Tuesday, March 28, 2000, a Kentucky jury rendered a verdict against United States Tobacco and awarded $350 million to the plaintiff, Conwood Company, L.P., for its claims under federal antitrust laws. The verdict, as required by the antitrust laws, has been trebled, resulting in a total award of over $1 billion.

United States Tobacco believes strongly that our moist snuff marketing and promotion programs do not violate the antitrust laws and we have already begun the steps necessary to have the award overturned or reversed on appeal. We believe that United States Tobacco, Conwood and other companies in the moist snuff business compete in a highly competitive marketplace, and that the actions complained of by Conwood are nothing more than part of normal, lawful, competitive conduct. In light of the evidence of this presented at trial, we believe the award was completely unjustified.

As this process continues, we will continue to provide you with the same level of service, the same fine products, and the same fine programs that you have come to expect of us. We appreciate your continued support, and will provide you with additional information as it becomes available.

EXHIBIT B

DECLARATION OF TERRY WILLIAMS

1. I, Terry Williams, am over the age of 18. I am currently employed by Conwood Sales Co., L.P. ("Conwood") as the National Sales Manager. I have been employed by Conwood for the past 20 years as a sales representative, district sales supervisor, district manager, regional manager and assistant national sales manager prior to holding my current position.

2. In March, 2000, I gave sworn testimony in Paducah, KY concerning, among other things, the various sales and marketing problems encountered by Conwood everyday because of defendants ("UST").

3. After trial, I have continued to receive multiple reports every week of unauthorized rack removals by UST. In fact, there has been no significant reduction in the number of these reports since the trial concluded and I see no indication that UST has any intention of changing its conduct absent an injunction.

4. UST currently employs independent agents or brokers throughout the country to supplement its direct sales force. For example, UST uses military brokers to promote the sale of its products on military bases. UST also provides payments to distributors who will, in turn, have their employees represent the interests of UST when calling on retail stores. Further, manufacturers in other retail industries frequently hire independent brokers instead of incurring the expense of a sales force to sell and market their products. Conwood is concerned that UST could side-step any injunction directed only to its direct employees by using independent agents to continue its anti-competitive behavior.

5. In the moist snuff industry, it is possible for competing companies to work together and respect the property rights of one another. For example, when the buyer for a large retailer *independently* decides to reset the moist snuff section, all companies are sometimes notified and asked to attend the reset together. In such cases, the moist snuff companies then work side by side installing their own products, racks and point of sale

advertising to ensure compliance with the buyer's instructions. Failure to act in a cordial and professional manner would reflect poorly on the respective companies and potentially jeopardize future business opportunities with the retailer.

6. Retailers are perfectly capable of handling, and do handle, problems with shopworn or broken racks, POS, and out-of-date product without relying on UST. For example, retailers can and do call the appropriate company's local sales representative, the manufacturer's headquarters, the local distributor, or their own chain's headquarters. All of these options are available for providing unbiased assistance with any problems the retailer encounters. In fact, Conwood maintains a customer service department and a consumer relations department for handling such problems.

7. Conwood has every incentive and desire to assist retailers in removing and replacing shopworn or damaged Conwood racks, POS, or out-of-date product. It is one of the central reasons Conwood maintains a large national sales force. Failure to assist retailers with such issues only jeopardizes our ability to maximize the sale of our own products, as well as retailer good will.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 05/12/00

Terry Williams

Terry Williams

EXHIBIT C

DECLARATION OF LOU MARANO

1. I, Lou Marano, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a sales representative for the Philadelphia, PA territory. I have been employed in this position for the past 11 years. On February 28th, 2000, I gave sworn testimony in Paducah, KY concerning my problems with U.S. Tobacco ("UST") during my tenure with Conwood.

3. For the past six months, UST has been placing their extra-wide, green rack in stores throughout the Philadelphia metropolitan area. This practice continues today.

4. These green racks have individual slots which are larger than necessary to hold an individual can of moist snuff. As a result, each slot on the green rack takes up more counter space than is necessary to vend a moist snuff can. When 10 or 15 of these UST green rack slots are placed side by side on a counter or shelf, a significant amount of space is wasted.

5. With UST wasting space by using this green rack, I am finding it increasingly difficult to merchandise Conwood products in the space designated by stores for moist snuff sales. I believe UST is attempting to artificially limit the amount of space available to vend moist snuff to the detriment of its competitors.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 5/12/00

Lou Marano

Lou Marano

DECLARATION OF BARTEN GREEN

1. I, Barten Green, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a sales representative for the Tulsa, OK territory. I have held this position for the past 3 1/2 years.

3. Since the verdict against U.S. Tobacco ("UST"), I have had my racks and point of sale ("POS") advertising removed by UST at the Food-4-Less store in Tahlequah, OK. Furthermore, Conwood's products have been placed in a UST rack and beneath UST POS.

4. According to the UST planogram left behind at the store, UST will be the only moist snuff company allowed to place any racks or POS in the store due to its C.A.P. contract with the retailer. (see attached)

5. This situation has occurred at several other retail stores in my territory since the verdict.

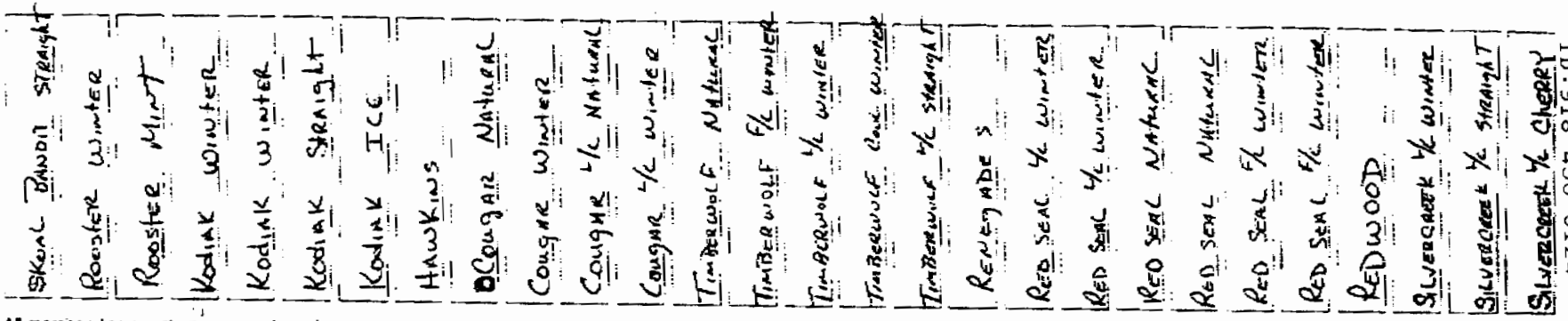
I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 5/12/00

Barton Green

MOIST SMOKELESS

Plan-O-Gram



ID:918-458-0124

All merchandising system changes have been approved by store management.
This decal is for use by United States Tobacco Sales & Marketing Co., Inc. personnel and authorized store management.

U.S.T. WILL PROVIDE RACK, P.O.S. & SHELVING UNIT PER THE C.A.P. CONTRACT

STORE NAME Food-4-Less PAR #

SIGNATURE Bryan Morgan

TITLE Store Mgr

DATE 3/31

16diii006072

MOIST SMOKELESS
Plan-O-Gram

(Conwood PLEASE Do not TAKE Anything Down or put ANYTHING UP THAT BRIAN HAS not OKED

COPENHAGEN	COPENHAGEN	COPENHAGEN	COPENHAGEN	COPENHAGEN	COPENHAGEN	SKOAL	SKOAL	SKOAL	SKOAL	SKOAL	SKOAL	SKOAL F/C STRAIGHT	COPENHAGEN 1-/C	SKOAL 1/C WINTER	SKOAL 1/C WINTER	SKOAL 1/C WINTER	SKOAL 1/C WINTER	SKOAL 1/C STRAIGHT	SKOAL 1/C STRAIGHT	SKOAL 1/C STRAIGHT	SKOAL 1/C MINT	SKOAL 1/C MINT	SKOAL 1/C CLASSIC	SKOAL 1/C CHERRY	SKOAL 1/C CHERRY	SKOAL BANDIT WINTER	SKOAL BANDIT MINT

All merchandising system changes have been approved by store management.
This decal is for use by United States Tobacco Sales & Marketing Co., Inc. personnel and authorized store management.

U.S.T. will provide Rack, P.O.S. & Shelving unit PER THE C.D.P. Contract.

STORE NAME Food-4-Less PAR # _____

SIGNATURE Bryan Mogan

TITLE Store Mgr

DATE 3/31

05609

16diii006073

DECLARATION OF PAUL STICKLEY

1. I, Paul Stickley, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a sales representative in Des Moines, IA. I have held this position for the past 6 1/2 years

3. Recently, I know of two separate occasions where U.S. Tobacco ("UST") has removed Conwood's rack from a store and eliminated its point of sale ("POS") advertising.

4. On May 1, 2000, I entered Sparky's One Stop convenience store in Stanhope, IA and discovered that Conwood's rack had been removed. I learned from the store manager that a UST representative had been in the store just one hour prior and had removed the rack himself.

5. As a result of UST removing Conwood's racks, I lost distribution on 2 Conwood products and had the number of Kodiak wintergreen facings reduced from 2 to 1. Further, Conwood's POS material was discarded along with the rack.

6. On May 9, 2000, I learned that Conwood's rack had been removed from the Swift Stop in Ames, IA in mid-March. During that time, UST had installed its own tobacco shelving unit which housed all moist snuff products. On one of the shelves, UST used one of its racks to merchandise all competitive moist products even though the existing Conwood rack was perfectly capable of fitting into the new UST shelving system. As a result of UST's conduct, Conwood lost a facing for Kodiak and all its POS advertising. Finally, the store manager allowed me to install another rack.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on 5-12-00

Paul Stickley

DECLARATION OF JEFF CAMPBELL

1. I, Jeff Campbell, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a sales representative in Gaylord, Michigan. I have been employed in this position for the past two years.

3. I have experienced frequent unethical activity in my district. There has been no change in the level of unethical activity since the judgment in the lawsuit.

4. On April 6th, 2000, I called on the Sunrise Convenience Store in Houghton Lake, Michigan, a high volume account. I discovered that all of Conwood's racks had been removed and its product was placed in UST's green rack. Conwood previously had ten racks with eight brands in the store, with a full compliment of POS.

5. On April 26th, 2000, I called on the 4 Corners BP in Petoskey, Michigan. I discovered that all three Conwood racks had been removed, and the Conwood brands were placed in a UST rack without Conwood POS

6. The Conwood racks were out of the store for at least a month before I could replace them. The rack removals from this store resulted in substantial lost sales for Conwood.

7. On May, 10th, 2000, I called on the Holiday Gas Station in Sault Ste. Marie, Michigan. I discovered that the UST representative had recently removed all of Conwood's racks and POS, and placed our product into a UST rack.

Executed on 5-11-00

Jeff Campbell

Jeff Campbell

DECLARATION OF JOHN CARANO

1. I, John Carano, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a sales representative in McAlester, OK. I have held this position for the past 19 years.

3. In April of 2000, I had my moist snuff racks removed from two stores by U.S. Tobacco ("UST").

4. On April 13, 2000, I personally witnessed a UST sales representative's van parked at Wetumka Indian Smoke Shop store in Wetumka, OK. When Marty Stover, the UST representative exited the store, he informed me that he had removed Conwood's racks.

5. When I entered the store I received permission from the store manager to replace the removed Conwood rack immediately. In fact, the store manager stated that she didn't think it was right for Mr. Stover to have removed Conwood's rack in the first place.

6. In mid-April of 2000, Conwood's rack was removed from the Iron Post Smoke Shop in Sallisaw, OK. Prior to UST visiting the store in mid-April, all moist snuff companies had tall-profile style racks in the store. UST visited the store in April and then placed each company's products in the UST rack in a manner determined by UST . In addition to losing racks in this store, all Conwood point of sale ("POS") was removed from the moist section.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on 5-11-00

John Carano

John Carano

DECLARATION OF BO RICHEY

1. I, Bo Richey, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a sales representative in Lufkin, Texas. I have been employed in this position for the past 23 years.

3. Since the judgment in the lawsuit, I have personally seen Conwood's racks moved to less desirable position in at least five stores in Lufkin and Nacogdoches, Texas. I am also aware that this has occurred in all 65 Brookshire Brothers stores in the chain. I believe that UST is responsible for rearranging the moist smokeless tobacco section in all of these stores.

4. Mike Due, the tobacco buyer for Brookshire Brothers grocery told me that the position changing by UST was not authorized by the chain.

5. I have received permission from Mike Due to return Conwood to the number one position all Brookshire Brothers grocery stores.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 5-11-00

Bo Richey

Bo Richey

DECLARATION OF KIRK GLENN

1. I, Kirk Glenn, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a district supervisor/key account manager for the Houston district. I have been employed in this position for the past 14 years.

3. Since the judgment in the lawsuit, I have continued to experience significant levels of unethical activity on military bases in my district.

4. The UST broker for military bases in the San Antonio area has been telling commissary and exchange managers that UST would be providing them a new rack.

5. At the Randolph Air Force Base Exchange all 12 Conwood racks were removed and replaced in a UST rack.

6. At the Randolph Air Force Base Commissary all four Conwood racks containing two Conwood brands were removed and replaced with two facings for two products in UST racks.

7. At the Kelly Air Force Base gas station, Conwood had nine racks holding six of its brands in the account. All nine racks were removed by UST, and its product was placed in four UST slots for only four brands. This resulted in five lost facings for Conwood. The remaining Conwood product was placed behind the racks.

8. At the Kelly Air Force Base Shoppette, Conwood had approximately 12 racks, for six of its brands placed in the account. UST removed the Conwood racks and placed the product in eight slots for six brands in a UST rack, a loss of four Conwood facings.

9. At the Lackland Air Force Base Commissary, Conwood had four racks for two of its brands placed in the account. UST removed Conwood's racks from the store and placed Conwood's product in two slots for two brands in a UST rack. This resulted in the loss of two

Conwood facings.

10. In all instances UST placed the Conwood product into its new wide "green racks."

11. All of Conwood's POS was removed with its racks in each case.

12. On these military bases, Conwood's brand, Cougar sells for $1.00 per can, so POS is a necessity to make customers aware of its value price. This price information was printed on the header cards that were removed with Conwood's racks.

13. I was told by a UST broker that they were "cleaning up" the moist smokeless tobacco sections on the bases because UST personnel would be coming around soon to check on the sections.

14. Conwood racks were replaced in each account after receiving permission from the various managers involved. Two full working days were spent replacing racks in these accounts. Replacing racks in military accounts is more time consuming than ordinary retail accounts due to the high level of security on military bases.

15. Military bases are very high volume, and it is a large detriment to Conwood when its racks are out of the accounts.

16. All of this activity occurred on or around April 9, 2000, and was discovered by me between Arpil 11th and April 13th, 2000.

Executed on 5/11/00

Kirk Glenn

Kirk Glenn

DECLARATION OF JERRY MCKEON

1. I, Jerry McKeon, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a district manager for the Pittsburgh, PA district. I have held this position with Conwood since 1993.

3. On May 5, 2000, I learned that the Giant Eagle supermarket in Pittsburgh, PA had accepted U S Tobacco's ("UST") proposal to use one of UST's racks exclusively in all 165 stores.

4 As a result of UST's proposal, Conwood has lost distribution on 5 brands and is not allowed to place their own racks for the remaining Conwood products By losing the ability to place its rack, Conwood also loses the ability to place important point of sale ("POS") advertising.

5. During the first week of May, 2000, I also received reports from one of my salespersons that UST is continuing to remove Conwood racks from a variety of retail stores in Washington County, PA. As a result, Conwood loses its ability to vend its products in a professional manner and loses valuable POS advertising.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on 5/11/00

Jerry McKeon

DECLARATION OF RICK WOODALL

1. I, Rick Woodall, am over the age of 18.

2. I am currently employed as a sales representative for Conwood Sales Co., L.P. in Lawton, OK. I have held this position for the past 12 years.

3. For the month of April, 2000, I have documented 98 Conwood racks "disappearing" from retail stores and being replaced by U.S. Tobacco ("UST") racks. In addition to the racks being removed, point of sale ("POS") advertising is also missing and 90% of the time only UST POS remains.

4. Along with Conwood racks disappearing in April, other companies such as Swedish-Match and Swisher also have their racks removed from stores by UST.

6. I have had similar problems with UST for years. I have not noticed any change in their behavior since the verdict this past March.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on 5/12/00

Rick Woodall

Rick Woodall

DECLARATION OF GENE ROGERS

1. I, Gene Rogers, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a district manager for south Georgia. I have held this position for the past 11 years.

3. Recently, a 48 store chain in Douglass, GA called Quick Change was approached by U.S. Tobacco ("UST") and, I believe, presented with a schematic which would house all moist snuff products in a UST rack.. As a result of UST's efforts, Conwood lost products.

4. When this plan was implemented in April of 2000, Conwood lost distribution on 2 Cougar brands and Hawken, and lost 2 of 3 facings for Kodiak wintergreen.

5. Kodiak is the number 2 selling brand at this chain but was reduced from 3 to 1 facings for its merchandising. UST's Skoal fine cut, however, is the number 4 selling brand in the chain but UST dedicated 2 facings for its merchandising.

6. Also included in the UST recommended schematic was UST's Rooster brand which has not sold as well in the past as some of the deleted Conwood brands such as Hawken and Cougar fine cut wintergreen.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on 5-12-2000

Gene Rogers

Gene Rogers

DECLARATION OF DOUG HYNEK

1. I, Doug Hynek, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a district sales manager for the Minneapolis, MN district. I have held this position since 1993.

3. In March of 2000, I testified in Paducah, KY to the extensive problems my district has had with U.S. Tobacco ("UST") limiting the sale of Conwood products through various means. Since I've testified, the problems in my district with UST have continued.

4. For example, two weeks ago in Coon Rapids, MN, Conwood placed a six-facing rack in a Super America convenience store. By May 9, 2000, 2 of the 6 facings had been removed from Conwood's rack and all 4 of Conwood's premium products had been placed in a UST rack. In the remaining 4 slots of Conwood's rack were 2 Conwood products and Swisher products. Further, all Conwood point of sale ("POS") advertising was removed. The manager of the store reported that UST did not get permission for any of these changes.

5. At an Amoco gas station in Woodruff, WI, UST removed Conwood's moist snuff rack from the store sometime in the past six weeks. In addition, all 6 of Conwood's moist products were placed in a UST rack.

6. At the Amoco gas station in Mercer, WI, UST placed all moist snuff products in one UST rack. Conwood's rack was removed from the store by UST and all accompanying POS was missing.

7. At the Cenex convenience store in Morris, MN, Conwood installed a 7-facing rack to house its moist snuff products in February of 2000. Since that time, UST discontinued Conwood's Kodiak Ice brand, removed 1 slot from Conwood's rack and removed Conwood's

header card (POS). This allowed UST to introduce 2 new products and install its extra-wide slot green rack which unnecessarily takes up more shelf space in the moist snuff section. The manager was unaware that these events had taken place.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on 5-12-00

Doug Hynek

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK *ex rel.* Attorney General ELIOT SPITZER, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ)

PLAINTIFFS' PROPOSED FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on May 18, 1998;

Plaintiff States, having filed their complaint herein on the same day;

Defendant Microsoft Corporation ("Microsoft") having appeared and filed its answer to such complaints;

The Court having jurisdiction of the parties hereto and of the subject matter hereof and having conducted a trial thereon and entered Findings of Fact on November 5, 1999, and Conclusions of Law on April 3, 2000;

The Court having entered judgment in accordance with the Findings of Fact and the Conclusions of Law on April 3, 2000, that Microsoft has violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, as well as the following state law provisions: Cal Bus. & Prof. Code §§ 16720, 16726, 17200; Conn. Gen. Stat. §§ 35-26, 35-27, 35-29; D.C. Code §§ 28-4502, 28-4503; Fla. Stat. chs. 501.204(1), 542.18, 542.19; 740 Ill. Comp. Stat. ch. 10/3; Iowa Code §§ 553.4, 553.5; Kan. Stat. §§ 50-101 et seq.; Ky. Rev. Stat. §§ 367.170, 367.175; La. Rev. Stat. §§ 51:122, 51:123, 51:1405; Md. Com. Law II Code Ann. § 11-204; Mass. Gen. Laws ch. 93A, § 2; Mich. Comp. Laws §§ 445.772, 445.773; Minn. Stat. § 325D.52; N.M. Stat. §§ 57-1-1, 57-1-2; N.Y. Gen. Bus. Law §

340; N.C. Gen. Stat. §§ 75-1.1, 75-2.1; Ohio Rev. Code §§ 1331.01, 1331.02; Utah Code § 76-10-914; W.Va. Code §§ 47-18-3, 47-18-4; Wis. Stat. § 133.03(1)-(2); and

The Court having conducted further proceedings on appropriate relief, it is this _____ day of _____, 2000, hereby:

ORDERED, ADJUDGED, AND DECREED as follows:

1. Reorganization

a. Not later than four months after entry of this Final Judgment, Microsoft shall submit to the Court and the Plaintiffs a proposed plan of reorganization. The Plaintiffs shall submit any objections to the proposed plan of reorganization to the Court within 60 days of receipt of the plan, and Microsoft shall submit its response within 30 days of receipt of the plaintiffs' objections.

b. Following approval of a final plan of reorganization by the Court (the "Plan")[1] (and the expiration of the stay pending appeal set forth in section 6.a.), Microsoft shall implement such Plan.

c. The Plan shall provide for the completion, within 12 months of the expiration of the stay pending appeal set forth in section 6.a., of the following steps:

i. The separation of the Operating Systems Business from the Applications Business, and the transfer of the assets of one of them (the "Separated Business") to a separate entity along with (a) all personnel, systems, and other tangible and intangible assets (including Intellectual Property) used to develop, produce, distribute, market, promote, sell, license and support the products and services of the Separated Business, and (b) such other assets as are necessary to operate the Separated Business as an independent and economically viable entity.

ii. Intellectual Property that is used both in a product developed, distributed, or sold by the Applications Business and in a product developed, distributed, or sold by the Operating Systems Business as of April 27, 2000, shall be assigned to the Applications Business, and the Operating Systems Business shall be granted a perpetual, royalty-free license to license and distribute such Intellectual Property in its products, and, except with respect to such

[1] Definitions of capitalized terms are set forth in section 7, below.

Intellectual Property related to the Internet browser, to develop, license and distribute modified or derivative versions of such Intellectual Property provided that the Operating Systems Business does not grant rights to such versions to the Applications Business. In the case of such Intellectual Property that is related to the Internet browser, the license shall not grant the Operating System Business any right to develop, license, or distribute modified or derivative versions of the Internet browser.

iii. The transfer of ownership of the Separated Business by means of a spin-off of stock of the Separated Business to Non-Covered Shareholders of Microsoft, or by other disposition that does not result in a Covered Shareholder owning stock in both the Separated Business and the Remaining Business.

d. Until Implementation of the Plan, Microsoft shall

i. preserve, maintain, and operate the Operating Systems Business and the Applications Business as ongoing, economically viable businesses, with management, sales, products, and operations of each business held as separate, distinct and apart from one another as they were on April 27, 2000, except to provide the accounting, management, and information services or other necessary support functions provided by Microsoft prior to the entry of this Final Judgment.

ii. use all reasonable efforts to maintain and increase the sales and revenues of both the products produced or sold by the Operating Systems Business and those produced or sold by the Applications Business prior to the Implementation of the Plan and to support research and development and business development efforts of both the Operating Systems Business and the Applications Business;

iii. take no action that undermines, frustrates, interferes with, or makes more difficult the reorganization required by this Final Judgment without the prior approval of the Court; and

iv. file a report with the Court sixty days after entry of this Final Judgment on the steps Microsoft has taken to comply with the requirements of this section 1.d.

2. Provisions Implementing Reorganization

a. After Implementation of the Plan, and throughout the term of this Final Judgment, neither the Operating Systems Business nor the Applications Business, nor any member

of their respective Boards of Directors, shall acquire any securities or assets of the other Business; no Covered Shareholder holding securities of either the Operating Systems Business or the Applications Business shall acquire any securities or assets of or shall be an officer, director, or employee of the other Business; and no person who is an officer, director, or employee of the Operating Systems Business or the Applications Business shall be an officer, director, or employee of the other Business.

b. After Implementation of the Plan and throughout the term of the Final Judgment, the Operating Systems Business and the Applications Business shall be prohibited from:

i. merging or otherwise recombining, or entering into any joint venture with one another;

ii. entering into any Agreement under which one of the Businesses develops, sells, licenses for sale or distribution, or distributes products or services developed, sold, licensed, or distributed by the other Business;

iii. providing to the other any APIs, Technical Information, Communications Interfaces, or technical information that is not simultaneously published, disclosed, or made readily available to ISVs, IHVs, and OEMs; and

iv. licensing, selling or otherwise providing to the other Business any product or service on terms more favorable than those available to any similarly situated third party.

c. After Implementation of the Plan and throughout the term of this Final Judgment, the Operating Systems Business and the Applications Business shall file with the Plaintiffs a copy of each Agreement (and a memorandum describing each oral Agreement) entered into between them.

d. Throughout the term of this Final Judgment, Microsoft, the Operating Systems Business and the Applications Business shall be prohibited from taking adverse action against any person or entity in whole or in part because such person or entity provided evidence in this case.

e. The obligations and restrictions set forth in sections 3 and 4 herein concerning Microsoft shall, after the Implementation of the Plan, apply only to the Operating Systems Business.

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3. Provisions In Effect Until Full Implementation of the Plan of Reorganization. The provisions in this section 3 shall remain in effect until the earlier of three years after the Implementation of the Plan or the expiration of the term of this Final Judgment.

a. OEM Relations.

i. Ban on Adverse Actions for Supporting Competing Products. Microsoft shall not take or threaten any action adversely affecting any OEM (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales support; enabling programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos) based directly or indirectly, in whole or in part, on any actual or contemplated action by that OEM:

(1) to use, distribute, promote, license, develop, produce or sell any product or service that competes with any Microsoft product or service; or

(2) to exercise any of the options or alternatives provided under this Final Judgment.

ii. Uniform Terms for Windows Operating System Products Licensed to Covered OEMs. Microsoft shall license Windows Operating System Products to Covered OEMs pursuant to uniform license agreements with uniform terms and conditions and shall not employ market development allowances or discounts in connection with Windows Operating System Products. Without limiting the foregoing, Microsoft shall charge each Covered OEM the applicable royalty for Windows Operating System Products as set forth on a schedule, to be established by Microsoft and published on its web site, that provides for uniform royalties for Windows Operating System Products, except that

(1) the schedule may specify different royalties for different language versions, and

(2) the schedule may specify reasonable volume discounts based upon actual volume of total shipments of Windows Operating System Products.

Without limiting the foregoing, Microsoft shall afford Covered OEMs equal access to licensing terms; discounts; technical, marketing, and sales support;

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product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos. The foregoing requirement insofar as it relates to access to technical information and information about future plans shall not apply to any bona fide joint development effort by Microsoft and a Covered OEM with respect to confidential matters within the scope of that effort. Microsoft shall not terminate a Covered OEM's license for a Windows Operating System Product without having first given the Covered OEM written notice of the reason for proposed termination and not less than thirty days' opportunity to cure. Microsoft shall not enforce any provision in any Agreement with a Covered OEM that is inconsistent with this Final Judgment

iii. OEM Flexibility in Product Configuration. Microsoft shall not restrict (by contract or otherwise, including but not limited to granting or withholding consideration) an OEM from modifying the boot sequence, startup folder, internet connection wizard, desktop, preferences, favorites, start page, first screen, or other aspect of a Windows Operating System Product to--

(1) include a registration sequence to obtain subscription or other information from the user;

(2) display icons of or otherwise feature other products or services, regardless of the size or shape of such icons or features, or to remove the icons, folders, start menu entries, or favorites of Microsoft products or services;

(3) display any user interfaces, provided that an icon is also displayed that allows the user to access the Windows user interface; or

(4) launch automatically any non-Microsoft Middleware, Operating System or application, offer its own Internet access provider or other start-up sequence, or offer an option to make non-Microsoft Middleware the Default Middleware and to remove the means of End-User Access for Microsoft's Middleware Product.

b. Disclosure of APIs, Interfaces and Technical Information. Microsoft shall disclose to ISVs, IHVs, and OEMs in a Timely Manner, in whatever media Microsoft disseminates such information to its own personnel, all APIs, Technical Information and Communications Interfaces that Microsoft employs to enable--

i. Microsoft applications to interoperate with Microsoft Platform Software installed on the same Personal Computer, or

ii. a Microsoft Middleware Product to interoperate with Windows Operating System software (or Middleware distributed with such Operating System) installed on the same Personal Computer, or

iii. any Microsoft software installed on one computer (including but not limited to server Operating Systems and operating systems for handheld devices) to interoperate with a Windows Operating System (or Middleware distributed with such Operating System) installed on a Personal Computer.

To facilitate compliance, and monitoring of compliance, with the foregoing, Microsoft shall create a secure facility where qualified representatives of OEMs, ISVs, and IHVs shall be permitted to study, interrogate and interact with relevant and necessary portions of the source code and any related documentation of Microsoft Platform Software for the sole purpose of enabling their products to interoperate effectively with Microsoft Platform Software (including exercising any of the options in section 3.a.iii).

c. Knowing Interference with Performance. Microsoft shall not take any action that it knows will interfere with or degrade the performance of any non-Microsoft Middleware when interoperating with any Windows Operating System Product without notifying the supplier of such non-Microsoft Middleware in writing that Microsoft intends to take such action, Microsoft's reasons for taking the action, and any ways known to Microsoft for the supplier to avoid or reduce interference with, or the degrading of, the performance of the supplier's Middleware.

d. Developer Relations. Microsoft shall not take or threaten any action affecting any ISV or IHV (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales support; enabling programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos) based directly or indirectly, in whole or in part, on any actual or contemplated action by that ISV or IHV to --

i. use, distribute, promote, or support any Microsoft product or service, or

ii. develop, use, distribute, promote or support software that runs on non-Microsoft Middleware or a non-Microsoft Operating System or that competes with any Microsoft product or service, or

iii. exercise any of the options or alternatives provided under this Final Judgment.

e. Ban on Exclusive Dealing. Microsoft shall not enter into or enforce any agreement in which a third party agrees, or is offered or granted consideration, to

i. limit its development, production, distribution, promotion or use of, or payment for, any non-Microsoft Platform Software,

ii. distribute, promote or use any Microsoft Platform Software exclusively,

iii. degrade the performance of any non-Microsoft Platform Software, or

iv. in the case of an agreement with an Internet access provider or Internet content provider, distribute, promote or use Microsoft software in exchange for placement with respect to any aspect of a Windows Operating System Product.

f. Ban on Contractual Tying. Microsoft shall not condition the granting of a Windows Operating System Product license, or the terms or administration of such license, on an OEM or other licensee agreeing to license, promote, or distribute any other Microsoft software product that Microsoft distributes separately from the Windows Operating System Product in the retail channel or through Internet access providers, Internet content providers, ISVs or OEMs, whether or not for a separate or positive price.

g. Restriction on Binding Middleware Products to Operating System Products. Microsoft shall not, in any Operating System Product distributed six or more months after the effective date of this Final Judgment, Bind any Middleware Product to a Windows Operating System unless:

i. Microsoft also offers an otherwise identical version of that Operating System Product in which all means of End-User Access to that Middleware Product can readily be removed (a) by OEMs as part of standard OEM preinstallation kits and (b) by end users using add-remove utilities readily accessible in the initial boot process and from the Windows desktop; and

ii. when an OEM removes End-User Access to a Middleware Product from any Personal Computer on which Windows is preinstalled, the royalty paid by that OEM for that copy of Windows is reduced in an amount not less than the product of the otherwise applicable royalty and the ratio of the number of amount in bytes of binary code of (a) the Middleware Product as distributed

separately from a Windows Operating System Product to (b) the applicable version of Windows.

h. Agreements Limiting Competition. Microsoft shall not offer, agree to provide, or provide any consideration to any actual or potential Platform Software competitor in exchange for such competitor's agreeing to refrain or refraining in whole or in part from developing, licensing, promoting or distributing any Operating System Product or Middleware Product competitive with any Windows Operating System Product or Middleware Product.

i. Continued Licensing of Predecessor Version. Microsoft shall, when it makes a major Windows Operating System Product release (such as Windows 95, OSR 2.0, OSR 2.5, Windows 98, Windows 2000 Professional, Windows "Millennium," "Whistler," "Blackcomb," and successors to these), continue for three years after said release to license on the same terms and conditions the previous Windows Operating System Product to any OEM that desires such a license. The net royalty rate for the previous Windows Operating System Product shall be no more than the average royalty paid by the OEM for such Product prior to the release. The OEM shall be free to market Personal Computers in which it preinstalls such an Operating System Product in the same manner in which it markets Personal Computers preinstalled with other Windows Operating System Products.

4. Internal Antitrust Compliance. This section shall remain in effect throughout the term of this Final Judgment.

a. Within 30 days after the effective date of this Final Judgment, Microsoft shall establish a Compliance Committee of its corporate Board of Directors, consisting of not fewer than three members of the Board of Directors who are not present or former employees of Microsoft.

b. The Compliance Committee shall hire a Chief Compliance Officer, who shall report directly to the Compliance Committee and to the Chief Executive Officer of Microsoft.

c. The Chief Compliance Officer shall be responsible for development and supervision of Microsoft's internal programs to ensure compliance with the antitrust laws and this Final Judgment.

d. Microsoft shall give the Chief Compliance Officer sufficient authority and resources to discharge the responsibilities listed herein.

e. The Chief Compliance Officer shall

i. within 30 days after entry of this Final Judgment, cause to be delivered to each Microsoft officer, director, and manager, and each platform software developer and employee involved in relations with OEMs, ISVs, or IHVs, a copy of this Final Judgment together with additional informational materials describing the conduct prohibited and required by this Final Judgment;

ii. distribute in a timely manner a copy of this Final Judgment and such additional informational materials to any person who succeeds to a position of officer, director, or manager, or platform software developer or employee involved in relations with OEMs, ISVs, or IHVs;

iii. obtain from each officer, director, and manager, and each platform software developer and employee involved in relations with OEMs, ISVs, or IHVs, within 60 days of entry of this Final Judgment, and for each person thereafter succeeding to such a position within 5 days of such succession, a written certification that he or she:

(1) has read, understands, and agrees to abide by the terms of this Final Judgment; and

(2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

iv. maintain a record of persons to whom this Final Judgment has been distributed and from whom, pursuant to Section 4(e)(iii), such certifications have been obtained;

v. establish and maintain a means by which employees can report potential violations on a confidential basis; and

vi. report immediately to Plaintiffs and the Court any violation of this Final Judgment.

f. The Chief Compliance Officer may be removed only by the Chief Executive Officer with the concurrence of the Compliance Committee.

g. Microsoft shall, with the supervision of the Chief Compliance Officer, maintain for a period of at least four years the e-mail of all Microsoft officers, directors and managers

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engaged in software development, marketing, sales and developer relations related to Platform Software.

5. Compliance Inspection. This section shall remain in effect throughout the term of this Final Judgment.

a. For purposes of determining or securing implementation of or compliance with this Final Judgment, including the provisions requiring a plan of reorganization, or determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time:

i. Duly authorized representatives of a Plaintiff, upon the written request of the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice, or the Attorney General of a Plaintiff State, as the case may be, and on reasonable notice to Microsoft made to its principal office, shall be permitted:

(1) Access during office hours to inspect and copy or, at Plaintiffs' option, demand Microsoft provide copies of all books, ledgers, accounts, correspondence, memoranda, source code, and other records and documents in the possession or under the control of Microsoft (which may have counsel present), relating to the matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of Microsoft and without restraint or interference from it, to interview, either informally or on the record, its officers, employees, and agents, who may have their individual counsel present, regarding any such matters.

ii. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice, or the Attorney General of a Plaintiff State, as the case may be, made to Microsoft at its principal offices, Microsoft shall submit such written reports, under oath if requested, as may be requested with respect to any matter contained in this Final Judgment.

iii. No information or documents obtained by the means provided in this Article shall be divulged by a representative of a Plaintiff to any person other than a duly authorized representative of a Plaintiff, except in the course of legal proceedings to which the Plaintiff is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

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iv. If at the time information or documents are furnished by Microsoft to a Plaintiff, Microsoft represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Microsoft marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) calendar days notice shall be given by a Plaintiff to Microsoft prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Microsoft is not a party.

6. Effective Date, Term, Retention of Jurisdiction, Modification

a. This Final Judgment shall take effect 30 days after the date on which it is entered; provided, however that sections 1.b and 2 (except 2.d) shall be stayed pending completion of any appeals from this Final Judgment.

b. Except as provided in section 2.d., the provisions of this Final Judgment apply to Microsoft, the Separated Business, the Remaining Business, their successors and assigns (including any transferee or assignee of any ownership rights to, control of, or ability to license the patents referred to in this Final Judgment), their subsidiaries, affiliates, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

c. This Final Judgment shall expire at the end of ten years from the date on which it takes effect.

d. The Court may act *sua sponte* to issue orders or directions for the construction or carrying out of this Final Judgment, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

e. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

f. In accordance with the Court's Conclusions of Law, the plaintiff States shall submit a motion for costs and fees, with supporting documents as necessary, no later than 45 days after the entry of this Final Judgment.

7. Definitions.

a. "Agreement" means any agreement, arrangement, alliance, understanding, or joint venture, whether written or oral.

b. "Application Programming Interfaces (APIs)" means the interfaces, service provider interfaces, and protocols that enable a hardware device or an application, Middleware, or server Operating System to obtain services from (or provide services in response to requests from) Platform Software in a Personal Computer and to use, benefit from, and rely on the resources, facilities, and capabilities of such Platform Software.

c. "Applications Business" means all businesses carried on by Microsoft Corporation on the effective date of this Final Judgment except the Operating Systems Business. Applications Business includes but is not limited to the development, licensing, promotion, and support of client and server applications and Middleware (*e.g.*, Office, BackOffice, Internet Information Server, SQL Server, etc.), Internet Explorer, Mobile Explorer and other web browsers, Streaming Audio and Video client and server software, Mobile Explorer, transaction server software, SNA server software, indexing server software, XML servers and parsers, Microsoft Management Server, Java virtual machines, Frontpage Express (and other web authoring tools), Outlook Express (and other e-mail clients), Media player, voice recognition software, Net Meeting (and other collaboration software), developer tools, hardware, MSN, MSNBC, Slate, Expedia, and all investments owned by Microsoft in partners or joint venturers, or in ISVs, IHVs, OEMs or other distributors, developers, and promoters of Microsoft products, or in other information technology or communications businesses.

d. "Bind" means to include a product in an Operating System Product in such a way that either an OEM or an end user cannot readily remove or uninstall the product.

e. "Business" means the Operating Systems Business or the Applications Business.

f. "Communications Interfaces" means the interfaces and protocols that enable software installed on other computers (including servers and handheld devices) to interoperate with the Microsoft Platform Software on a Personal Computer.

g. "Covered OEM" means the 20 OEMs with the highest volume of sales of Personal Computers in the United States in the previous 12 months.

h. "Covered Shareholder" means a shareholder of Microsoft on the date of entry of this Final Judgment who is a present or former employee, officer or director of Microsoft

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and who owns directly or beneficially more than 3 percent of the voting stock of the firm.

i. "Default Middleware" means Middleware configured to launch automatically (that is, by "default") to provide particular functionality when other Middleware has not been selected for this purpose. For example, a default browser is Middleware configured to launch automatically to display Web pages transmitted over the Internet or an intranet that bear the .htm extension, when other software has not been selected for this purpose.

j. "End-User Access" means the invocation of Middleware directly or indirectly by an end user of a Personal Computer or the ability of such an end user to invoke Middleware. "End-User access" includes invocation of Middleware by end users which is compelled by the design of the Operating System Product.

k. "IHV" means an independent hardware vendor that develops hardware to be included in or used with a personal computer.

l. "Implementation of the Plan" means full completion of all of the steps described in section 1.c.

m. "Intellectual Property" means copyrights, patents, trademarks and trade secrets used by Microsoft or licensed by Microsoft to third parties.

n. "ISV" means any entity other than Microsoft (or any subsidiary, division, or other operating unit of any such other entity) that is engaged in the development and licensing (or other marketing) of software products intended to interoperate with Microsoft Platform Software.

o. "Middleware" means software that operates, directly or through other software, between an Operating System and another type of software (such as an application, a server Operating System, or a database management system) by offering services via APIs or Communications Interfaces to such other software, and could, if ported to or interoperable with multiple Operating Systems, enable software products written for that Middleware to be run on multiple Operating System Products. Examples of Middleware within the meaning of this Final Judgment include Internet browsers, e-mail client software, multimedia viewing software, Office, and the Java Virtual Machine. Examples of software that are not Middleware within the meaning of this Final Judgment are disk compression and memory management.

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p. "Middleware Product" means

i. Internet browsers, e-mail client software, multimedia viewing software, instant messaging software, and voice recognition software, or

ii. software distributed by Microsoft that

(1) is, or has in the applicable preceding year been, distributed separately from an Operating System Product in the retail channel or through Internet access providers, Internet content providers, ISVs or OEMs, and

(2) provides functionality similar to that provided by Middleware offered by a competitor to Microsoft.

q. "Non-Covered Shareholder" means a shareholder of Microsoft who is not a Covered Shareholder on the date of entry of this Final Judgment.

r. "OEM" means the manufacturer or assembler of a personal computer.

s. "Operating System" means the software that controls the allocation and usage of hardware resources (such as memory, central processing unit time, disk space, and peripheral devices) of a computer, providing a "platform" by exposing APIs that applications use to "call upon" the Operating System's underlying software routines in order to perform functions.

t. "Operating System Product" means an Operating System and additional software shipped with the Operating System, whether or not such additional software is marketed for a positive price. An Operating System Product includes Operating System Product upgrades that may be distributed separately from the Operating System Product.

u. "Operating Systems Business" means the development, licensing, promotion, and support of Operating System Products for computing devices including but not limited to (i) Personal Computers, (ii) other computers based on Intel x-86 or competitive microprocessors, such as servers, (iii) handheld devices such as personal digital assistants and cellular telephones, and (iv) television set-top boxes.

v. "Personal Computer" means any computer configured so that its primary purpose is to be used by one person at a time, that uses a video display and keyboard (whether or not the video display and keyboard are actually included), and that contains an Intel

x86, successor, or competitive microprocessor, and computers that are commercial substitutes for such computers.

w. "Plaintiff" means the United States or any of the plaintiff States in this action.

x. "Plan" means the final plan of reorganization approved by the Court.

y. "Platform Software" means an Operating System or Middleware or a combination of an Operating System and Middleware.

z. "Remaining Business" means whichever of the Operating Systems Business and the Applications Businesses is not transferred to a separate entity pursuant to the Plan.

aa. "Separated Business" means whichever of the Operating Systems Business and the Applications Businesses is transferred to a separate entity pursuant to the Plan.

bb. "Technical Information" means all information, regarding the identification and means of using APIs and Communications Interfaces, that competent software developers require to make their products running on any computer interoperate effectively with Microsoft Platform Software running on a Personal Computer. Technical information includes but is not limited to reference implementations, communications protocols, file formats, data formats, syntaxes and grammars, data structure definitions and layouts, error codes, memory allocation and deallocation conventions, threading and synchronization conventions, functional specifications and descriptions, algorithms for data translation or reformatting (including compression/ decompression algorithms and encryption/decryption algorithms), registry settings, and field contents.

cc. "Timely Manner": disclosure of APIs, Technical Information and Communications Interfaces in a timely manner means, at a minimum, publication on a web site accessible by ISVs, IHVs, and OEMs at the earliest of the time that such APIs, Technical Information, or Communications Interfaces are (1) disclosed to Microsoft's applications developers, (2) used by Microsoft's own Platform Software developers in software released by Microsoft in alpha, beta, release candidate, final or other form, (3) disclosed to any third party, or (4) within 90 days of a final release of a Windows Operating System Product, no less than 5 days after a material change is made between the most recent beta or release candidate version and the final release.

dd. "Windows Operating System Product" means software code (including source code and binary code, and any other form in which Microsoft distributes its Windows Operating Systems for Personal Computers) of Windows 95, Windows 98, Windows 2000 Professional, and their successors, including the Windows Operating Systems for

Personal Computers codenamed "Millennium," "Whistler," and "Blackcomb," and their successors.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

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CONWOOD COMPANY, L.P.,
CONWOOD SALES COMPANY, L.P.,

Plaintiffs,

v.

UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC.,

Defendants.

Civil Action No.
5:98CV-108-R

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PERMANENT INJUNCTIVE RELIEF

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY, INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

CONWOOD'S REPLY IN SUPPORT OF MOTION FOR PERMANENT INJUNCTIVE RELIEF

Defendants (collectively, "UST") suggest that injunctive relief is discretionary and unnecessary. It is neither. After the jury's finding of unlawful monopolization by UST, the Court "has the *duty* to compel action by [UST] that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." United States v. United States Gypsum Co., 340 U.S. 76, 88 (1950) (reversing with order to strengthen decree) (emphasis added).[1] Conwood need not show "irreparable injury," only that UST's misconduct is likely to continue. And that is conceded: UST has announced that it will persist in the misconduct that caused hundreds of millions of dollars in damages to Conwood and higher prices for consumers. While UST invites Conwood to file further lawsuits as

[1] Accord United States v. Glaxo Group, Ltd., 410 U.S. 52, 64 (1973); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128-29 (1948); International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947); International Distrib. Ctrs., Inc. v. Walsh Trucking Co., No. 82 Civ. 8709, 1986 U.S. Dist. LEXIS 30701 (S.D.N.Y. Feb. 8, 1986).

UST's new violations mount, that is no answer. Conwood and the public are entitled to have UST's unlawful conduct *stopped*; that is the very purpose of the Clayton Act's provision for injunctive relief. (Point I).

The proposed injunction is simple and straightforward, and neither impermissibly vague nor overbroad. It requires UST to concern itself with its own products, advertising, and displays, and to leave competitors alone. Thus, it addresses only conduct that is indefensible, and proscribes nothing that is even arguably procompetitive. Only by ignoring the actual language of the proposed injunction -- which, tellingly, it never cites -- can it even attempt to argue vagueness or overbreadth. (Points II and III).

Nor is there substance to UST's complaint about the injunction's supposedly undue "intrusion" into its affairs. The prohibition against manipulation of competitors' products, displays, and advertising intrudes not at all, and the modest requirement of board of directors oversight is both commonplace and highly deferential to UST's self-governance; the Court would be fully justified in going much farther. (Point IV).

Finally, UST does not (and cannot) cite any valid basis for denying needed relief during the 2 to 3 years it expects to consume in the pursuit of appeals. Indeed, UST does not even try to meet the Sixth Circuit standard for a stay pending appeal. It has not demonstrated likelihood of success on the merits of its appeal, irreparable injury, the absence of any harm to third persons if the stay is granted, or a public interest favoring the entry of a stay. Under controlling law it must establish all of

the above. UST's alternative request for a 30-day stay so that it can attempt at leisure to find grounds for a stay to present to the Sixth Circuit should be rejected out of hand. (Point V).

I. CONWOOD HAS MET THE STANDARD FOR INJUNCTIVE RELIEF

UST's central argument is that the Court has the discretion to "deny relief for lack of irreparable harm alone." UST Mem. at 7. This is simply wrong. The Sixth Circuit has held that "irreparable harm" is not a required element for permanent (as opposed to temporary) injunctive relief in antitrust cases. Instead, a plaintiff may obtain permanent injunctive relief "simply by demonstrating that a 'significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.'" Stone v. William Beaumont Hosp., 782 F.2d 609, 617 (6th Cir. 1986) (quoting Bender v. Southland Corp., 748 F.2d 1205, 1214 (6th Cir. 1984)).[2]

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[2]Accord Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 132 (1969) ("A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may be fairly anticipated from the defendant's conduct in the past." (internal quotation marks omitted)); ABA, Antitrust Law Developments (Fourth) 799 (1997) ("By the permanent relief phase of the proceeding, the court has already determined that an antitrust violation occurred and there is no need to apply the preliminary injunction standard of 'likelihood of success on the merits.' Rather, the only material issue that remains is whether the plaintiff can show that it is threatened with loss or damage arising out of the illegal conduct or a cognizable danger that past or existing violations will continue or recur." (footnotes omitted)).

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There is no question that UST's antitrust violations are likely to continue. It has admitted as much, in its defiance of the verdict[3] and in its public pronouncements that it plans to continue all of the practices at issue.[4] That alone would be sufficient showing for the requested injunction.[5] But there is more; Conwood has evidence that UST has made good on its post-trial threats, and continues to use the very same pernicious tactics the jury found unlawful. See, e.g., Williams Decl. ¶ 3 (Exh. B); Conwood Sales Force Decls. (Exh. C). In these circumstances, it would be an abuse of discretion to fail to provide injunctive relief.[6]

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[3]"As this Court is fully aware, U.S. Tobacco continues to hold firm to the position that *none* of its conduct violates Section 2 of the Sherman Act." UST Mem. at 18.

[4]See Exh. A (compiling post-trial public comments, including statement that UST did nothing more than "engage[] in ordinary marketing practices," that "the actions complained of by Conwood are nothing more than . . . normal," and that, despite judgment, UST "will continue to provide you with the same level of service . . . and the same fine programs").

[5]See, e.g., Blue Cross & Blue Shield United v. Marshfield Clinic, 883 F. Supp. 1247, 1263 (W.D. Wis. 1995) (defendants' continued denials of wrongdoing after trial give rise to "threat that the defendants will continue to violate the antitrust laws"); Wilk v. American Med. Ass'n, 895 F.2d 352, 367 (7th Cir. 1990) (same).

[6]Defendants' only authority demonstrates as much. In Barrett v. Fields, 941 F. Supp. 980, 983 (D. Kan. 1996), a Kansas trial court case concerning a conspiracy to divide the county car-towing business, it was undisputed that a "new 1995 policy" implemented by the Sheriff (rotating towing assignments) put an end to the illegal practices. Accordingly, the court there found *no* threat of future harm to the plaintiff and entered no injunction. Id. at 983, 984. But the court also made plain that the existence of evidence of a threatened recurrence would warrant an injunction. Id. at 984 & n.5.

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The possibility of an endless cycle of Conwood damages actions is likewise no valid reason to deny the injunctive relief required by the Clayton Act. Were that sufficient, there would never be injunctive relief in antitrust cases. But that is not the law.[7] Moreover, Conwood damages actions provide no relief for consumers and competition. Yet, the Court is expressly obligated to consider "the high purpose of enforcing the antitrust laws" in preventing harm to consumers and competition. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. at 131. Indeed, the Court has "the duty" to issue an injunction that "cure[s] the ill effects of the illegal conduct, and assure[s] the public freedom from its continuance." United States Gypsum, 340 U.S. at 88. See also note 1, supra (citing additional cases).

UST's unlawful monopolization has resulted in higher prices,[8] reduced output available to consumers,[9] reduced brand choice,[10]

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[7]The only case cited by UST in its effort to suggest that future damages actions might be sufficient, Bennett, was in fact decided on a different basis: the court declined to issue an injunction because it found no evidence of likely recurrence, a finding simply not possible here. 941 F. Supp. at 983, 984. The Kansas court's dicta about future damages suits should carry little weight in light of the squarely contrary Supreme Court holdings. See note 1, supra.

[8]See, e.g., 3/21/00 Tr. at 131 (Gierer admitting that the company has increased prices for moist snuff every year for the last decade); PX 33 ("[we] don't deal on our product's prices, we don't have to"); id. ("UST is the pricing leader in the market - others will follow."); PX 326.4 (graph showing increased consumer prices where UST succeeds in excluding rival facings); 2/29/00 Tr. at 256-57 (Kamien discussing correlation between UST misconduct and higher consumer prices).

[9]See, e.g., PX 326.2 (Wal-Mart), PX 326.3 (7-Eleven) (showing output effects of UST's illegal acts at Wal-Mart and 7-Eleven); 3/13/00 Tr. at 218-22, 238-39 (Blattberg testifying to

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the creation and maintenance of high barriers to entry that have kept out new competition for more than a decade,[11] and direct injury to other companies in the market.[12] Without injunctive relief, these harms will go unremedied.

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output restrictions resulting from UST abuses); 2/29/00 Tr. at 256-57 (Kamien testimony to same effect); PX 19 ("We discontinued 10 competitive products. This will eliminate a total of 5,500 competitive facings nationwide."); PX 61 ("It is imperative that we continue with this Category Management Action Plan to eliminate competitive products."); PX 104 ("Try to cut down on the number of competitive brands a retailer may be carrying."); PX 268 ("I have exclusive vending rights and have eliminated most all of any serious distribution of Conwood brands. I should be well under 10% of competitive distribution in my chains.").

[10]See, e.g., Renfro Dep. at 19 (testifying to reduction in consumer choice as a result of UST's Wal-Mart contract); Borrowdale Dep. at 16, 20-21, 32-33 (former UST employee admitting that UST seeks to eliminate rival brands, especially price-value brands); Hart Dep. at 13-16, 18-21 (to same effect); 3/13/00 Tr. at 243-44 (Blattberg to same effect); PX 94 ("[L]everage our market share toward improved merchandising presence. This will come at the expense of slow moving competitive products."); PX 32 ("We believe that if we can continue to be the Category Captains in these stores...we may be able to control the number of Price Value product introductions."); PX 37 ("fact-based selling" used in "accomplishing blocking of competitive price value distribution").

[11]See, e.g., 3/23/00 Tr. at 161-62 (Scheffman admitting that there has been no new entrant in the moist snuff market since 1990 and that Brown & Williamson and R.J. Reynolds attempted to enter the market and failed); PX 33 (stating goal to "[p]rotect our market share by creating barriers to competition"); PX 45 (agreed goal: "limit the growth of the price-value market segment").

[12]3/13/00 Tr. at 37-38 (McClure: UST came "closer than they know" to knocking Timberwolf out of the market); 3/7/00 Tr. at 244-45, 247-48, 250-51 (Price: UST abuses harm all competitors in market, suppress price competition, and result in reduced Swedish Match output, fewer consumer choices, and higher consumer prices).

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II. THE PROPOSED INJUNCTION PROPERLY DEFINES WHAT IS PROHIBITED, AND IS NOT "IMPERMISSIBLY VAGUE"

Conwood has proposed an injunction that, in essence, prohibits the abuses proved at trial by placing competitors' products, displays, and advertising off limits to the monopolist. Specifically, Conwood has proposed that UST shall not (a) "manipulate any competitor's smokeless tobacco products, vending systems, [or] . . . 'point of sale' advertising," or (b) "induce . . . other persons" to do the same. Proposed Order § I.

Tellingly, UST argues that the proposed injunction is "vague" without once citing its actual terms. Thus, it suggests it is "unclear" from Section I.A of the proposed injunction whether retailers may make "their own, independent decisions to use a U.S. Tobacco rack to house all moist snuff." UST Mem. at 10. In fact, there is no fair reading of the injunction that could conceivably prohibit such *independent* decisions. By its plain terms, the proposed injunction bars only *UST* -- not the independent retailer -- from manipulating rival companies' property without permission.[13] UST has not offered a single genuine ambiguity; while it does not agree with the restrictions on *its* conduct, including restrictions on its manipulation of

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[13]Similarly, UST complains that Section I.B of the injunction is "so patently vague" that it might even preclude UST representatives from designing or commenting on a suggested plan-o-gram. UST Mem. at 11. But *nothing* in Section I.B's language remotely restricts UST personnel from designing or commenting on suggested plan-o-grams for *its own products*. It does, however, plainly prevent UST from influencing retailers to *delete rival* products. Again, there is nothing vague here, and UST's complaint seems to be more about the substance of the restriction on its ability to continue its proven anticompetitive conduct.

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rivals' property, it cannot validly argue that it is in the dark about the scope of those restrictions.

The proposed injunction is therefore appropriately drafted. In crafting an injunction, "elaborate detail is unnecessary and even may be undesirable . . . . [T]he court should be specific, direct, and to the point" so that reasonable persons can understand the Court's directive. 11A Charles Alan Wright, et al., Federal Practice and Procedure § 2955, at 312-13 (2d ed. 1995). Injunctions far more succinct than Conwood's proposal routinely pass judicial scrutiny.[14] Indeed, not one of the cases cited by UST suggests that the proposed injunction is inappropriate; each stands at most for the unremarkable proposition that a trial court may not rotely repeat broad statutory commands in the form of an injunction -- something that is indisputably not the case here.[15]

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[14]See, e.g., United States v. V-1 Oil Co., 63 F.3d 909 (9th Cir. 1995) (rejecting vagueness challenge and upholding sweeping injunction requiring defendant to accede to warrantless searches "for the purpose of enforcing the [Hazardous Material Transportation Act]," and explaining that injunctions will not be overturned on appeal "unless they are so vague that they have no reasonably specific meaning" (internal quotation marks omitted)).

[15]See City of Mishawaka v. American Elec. Power Co., 616 F.2d 976, 991-92 (7th Cir. 1980) (rejecting injunction provision that merely restated "the broad language of Section 2 of the Sherman Act" and provision that simply required defendant to "treat all its customers fairly, equitably, and on a nondiscriminatory basis"); Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, ¶ 18 (E.D. Ark. Oct. 16, 1998) (rejecting injunction that would bar "any policy or program the purpose or intent of which is to create artificial barriers to entry or expansion"); Hartford-Empire Co. v. United States, 323 U.S. 386, 410 (1945) (explaining that "[t]he decree must not be so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt; [or] enjoin all possible breaches of the law" (internal quotation marks omitted)).

III. THE PROPOSED INJUNCTION PROPERLY ADDRESSES UST'S UNLAWFUL CONDUCT AND IS NOT "OVERBROAD"

After first professing inability to understand what the proposed injunction prohibits, UST does an about face and claims that it understands perfectly and objects because the injunction covers too much. But under the Sherman Act the Court must completely eliminate the unlawful conduct -- even if that does mean incidentally foreclosing related lawful conduct. See, e.g., United States v. Paramount Pictures, Inc., 334 U.S. 131, 148 (1948) ("equity has the power to uproot all parts of an illegal scheme -- the valid as well as the invalid -- in order to rid the trade or commerce of all taint" of the illegal conduct); National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 698 (1978) (otherwise lawful conduct may be enjoined if it "represents a reasonable method of eliminating the consequences of the illegal conduct" or its resumption); United States Gypsum Co., 340 U.S. at 89 (relief may "range broadly through practices connected with acts actually found to be illegal").[16]

Accordingly, the Court can and should prohibit otherwise lawful conduct if it "represents a reasonable method of eliminating the consequences of the illegal conduct" or

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[16] See also International Salt, 332 U.S. at 400-01 ("When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention."); United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 327 (1961) (In choosing "among two or more effective [antitrust] remedies[,] [i]f the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences. This proposition is not novel; it is deeply rooted in antitrust law and has never been successfully challenged.").

preventing its resumption. National Soc'y of Prof'l Eng'rs, 435 U.S. at 698. Accord United States v. National Lead Co., 332 U.S. 319, 335 (1947) ("The essential consideration is that the remedy shall be effective and fair as possible in preventing continued or future violations of the Antitrust Act in the light of the facts of the particular case."); International Salt, 334 U.S. at 400; DuPont, 366 U.S. at 327; United States v. Loew's, Inc., 371 U.S. 38, 53 (1962) ("When [a party] has won the lawsuit, it is entitled to win the cause as well.").[17]

Here, however, the proposed injunction is far narrower than is required, and does nothing to restrain or impede *legitimate* competition by UST or anyone else.

A. UST asserts that the development of new racks, POS, products, and incentive programs "could easily fit within the proposed injunction." UST Mem. at 13-14. But UST never explains how and never points to any language in the proposed injunction

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[17]Defendants' overbreadth claims are undermined by the cases they cite. For example, in Bigelow v. RKO Radio Pictures, Inc., 162 F.2d 520 (7th Cir. 1947), the court of appeals went out of its way to explain that trial courts may impose restraints not only on "acts committed under the conspiracy," but also "impose such further restraints as would prevent an evasion. All doubts [are to be] resolved in favor of the plaintiff." Id. at 523. A decree may enjoin not only illegal conduct, but other conduct that "became tainted by illegality," given the way defendants employed it. Id. A decree "may very properly be used to destroy the [illegal conduct] root, branch, and all its evil fruits." Id. at 524. The only thing an injunction may not do, the court held, is impose on a defendant competitive restraints unrelated to the conspiracy that simply "preserve the evil in the interest of the plaintiff." Id. Likewise, in Loew's, the Supreme Court *expanded* the injunction issued by lower courts to cover facially lawful, but potentially abusive, conduct in order "to ensure . . . that relief is effectual, otherwise permissible practices connected with the acts found to be illegal must sometimes be enjoined." 371 U.S. at 53.

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that could be so construed. In fact, nothing in the proposed injunction affects UST's ability to develop and support its own products, POS, and racks.[18] Likewise, nothing prevents UST from developing incentive programs to secure the placement of its *own* products, POS, and racks (like the programs implemented by Swisher and Conwood), as opposed to programs used to restrain or exclude competition.[19]

B. UST complains that the proposed injunction would preclude "perfectly normal" conduct like (i) exclusive vending, (ii) SOF=SOM, and (iii) making "recommendations" to exclude rival products. UST Mem. at 14-15. There is, of course, nothing "perfectly normal" about any of these practices. Indeed, Gary Milano, UST's Vice President of Sales, testified that exclusive vending was *improper*: "It wouldn't be proper for [a] representative to try and have exclusive vending in the stores." 3/7/00 Tr. at 25. Mr. Milano likewise admitted that UST had no legitimate need for SOF=SOM. 3/6/00 Tr. at 81-82. And he conceded that it was not appropriate for UST employees to recommend the deletion of competitive brands. 3/6/00 Tr. at 113. Understandably, the properly instructed jury rejected defense counsel's subsequent argument that such conduct is "normal." The proposed injunction is carefully tailored to prevent recurrence

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[18]The injunction proscribes only efforts by UST to manhandle *other* companies' property and induce retailers to limit rival distribution -- actions that lack any procompetitive virtue and that the record showed UST plainly abused to exclude competition.

[19]See, e.g., 3/9/00 Tr. at 98-99 (Gundlach testifying that UST's Customer Alliance Program ("CAP") contains a variety of "exclusionary feature[s]," such as exclusion of competitive POS and reduced visibility of competitive brands.); PXs 112C, 112D, 112F, 112O (expressly conditioning CAP payments on exclusion).

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of these abusive practices while leaving ample room for UST to compete fairly.

(i) Given the extensive record at trial showing how UST used exclusive vending to restrict competitive distribution, thwart price-value brand introductions, and eliminate rival POS,[20] it would be entirely permissible for the Court to ban exclusive vending entirely as the most "effective" remedy to prevent "continued or future violations" of the antitrust laws. National Lead, 332 U.S. at 335.

Conwood's proposal is, however, far more modest. Under the proposed injunction a retailer remains free to make an *independent* decision to implement exclusive vending. UST is even free to place the new vendor, as well as its own POS and product. The proposed injunction (§ I.A) simply provides that, if rival products and POS are to be incorporated into the UST vendor, the retailer or the rival should perform this function rather than UST. In fact, the proposed injunction even permits UST to perform this service too -- with the permission of the rival, and

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[20] See, e.g., PX 4 ("Our objective with exclusive vending rights . . . is to control expanded competitive distribution and competitive P.O.S."); PX 268 ("I have exclusive vending rights and have eliminated most all of any serious distribution of Conwood brands. I should be well under 10% of competitive distribution in my chains."); Hart Dep. at 15-16 (former UST rep testifying that his supervisors told him to persuade stores to use UST racks exclusively and to remove or reduce Conwood facings because, "if we didn't keep control . . . they would get a higher percent of the market share"); Marconi Dep. at 11-13 (same); Borrowdale Dep. at 16 (same); Ulizio Dep. at 23-24 ("[t]he program was to go through every account, pull out every display, whether it was good or bad," leaving Conwood, "a slot or two, or possibly three, connected to ours"); Naifeh Dep. at 30-32 (engaged in same conduct at supervisor's behest); Keil Dep. at 15-17 (same).

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such permission may not be unreasonably withheld.[21] The proposed injunction is thus narrowly drafted to address the specific abuses proved at trial, and does not in any way stifle legitimate competitive activity.[22]

(ii) "SOF=SOM" is one of the means UST used to "control competition," according to its own documents. PX 9. UST's counsel now protests that SOF=SOM is legitimate and procompetitive. But at trial UST's executives conceded that

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[21]In the past, UST and other manufacturers have performed rack resets in this fashion -- working cooperatively to conform a rival's display to the independent retailer's request. 3/3/00 Tr. at 111-12 (Willding); 3/9/00 Tr. at 218-19 (Hettinger); 3/14/00 Tr. at 104 (Luckett); see also Williams Decl. ¶¶ 5-7 (Exh. B). UST's passing suggestion that "cooperation" to conform a rack to the retailer's independent mandate may constitute an antitrust violation is specious and unsupported by a single authority. Moreover, if there were any genuine concerns along these lines, the proper course would not be to drop the injunction altogether but simply to bar UST outright from tampering with rival property, excising from Section I.A the language beginning with "except with the prior written permission . . . ."

[22]While UST complains that it will be unable to discard rivals' "damaged or shopworn racks and/or POS" and "out-of-date or stale products," UST Mem. at 10, nothing in the injunction prevents retailers from removing these items. Rival manufacturers have every incentive to do the same. Williams Decl. ¶¶ 6-7 (Exh. B). And UST may even discard rivals' property with their advance permission. Once again, UST does not (and cannot) explain why *it* needs to have the unilateral right to remove and tamper with *other* companies' property without permission. And the record shows that UST has used and continues to use these tactics to exclude. See, e.g., 3/9/00 Tr. at 189-94 (Hettinger testifying that UST bagged up hundreds of fresh cans of Conwood product and removed thousands of racks); 3/8/00 Tr. at 200-04 (Hynek: same); id. at 155-59 (Dring: same); 3/10/00 Tr. at 53-54, 84 (Williams: same); PX 16 ("better for [Conwood] to be lost in our vending than to have their own and no point of sale on the vendor"); PX 27 (Conwood products deleted and factings removed. "All competitors' vendors have been replaced by UST vendors.").

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policy has literally "no effect" on its sales.[23] And UST's documents and former sales representatives revealed that the company used the tactic solely to exclude competition, especially nascent price-value brands.[24] However legitimate when employed by other companies in other industries -- and there is no evidence that it is legitimate anywhere by anyone -- there is no question that UST used SOF=SOM as an unlawful exclusionary tactic and, accordingly, should be enjoined. See Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972) (means a court uses to restore competition depends on "the special needs of the individual case").

(iii) UST complains that it will not be allowed to "recommend" the deletion of rival products. UST Mem. at 15. But it has no credible argument -- much less authority -- for the notion that an 80% monopolist should be permitted to use its power to "recommend" deletion of competitors. The evidence at trial proved that UST used its market "clout," its position as category captain (which it alone can secure because of its dominant market power[25]), and related "incentives" to encourage

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[23]See, e.g., 3/6/00 Tr. at 81-82 (Milano).

[24]See, e.g., 3/13/00 Tr. at 256-59 (Blattberg); 3/1/00 Tr. at 30-31, 103-04 (Kamien); Hart Dep. at 15-16; Borrowdale Dep. at 26-27; PX 65 (practice "basically buys out the competition's involvement"); 3/13/00 Tr. at 53-55 (McClure); PXs 63, 104; PX 9 ("We have effectively, because of the competitive deletes/and roll sale vendor introduction, made our share of fixture more equal to our share of sales"); PX 45 (price value strategy: "utilize category management to control SOF plus assortment"); PX 139 (regarding price-value brands, "we control the merchandising and the POS placements, which will make the consumer awareness of the price differential difficult").

[25]PX 39; 3/13/00 Tr. at 210-11 (Blattberg); Carlson Dep. at 32-33; 3/15/00 Tr. at 120-21 (Biddy); 3/10/00 Tr. at 70, 78

retail stores to eliminate facings and advertising opportunities for rivals.[26] In making its "recommendations," UST even resorted on a systematic basis to using false and misleading information.[27] And its "recommendations" were often intentionally targeted at stunting price-value competition.[28]

While UST should be permitted to promote its own products, and to recommend additions (or deletions) of those products, even where such additions lead to deletions of competitive products, the monopolist should not be permitted -- independent of any efforts to promote its products -- deliberately and specifically to impair the opportunities of rivals. That is all the proposed injunction prohibits. Conwood's restriction is, thus, appropriately and narrowly tailored to the needs of this case.

(Williams); 3/6/00 Tr. at 76 (Milano).

[26]See, e.g., PX 61 ("[i]t is imperative that we continue with this Category Management action plan to eliminate competitive products"); PX 59 (UST seeking discontinuation of slow-selling competitive products, yet maintaining its own slow-selling flavor-paks); 3/13/00 Tr. at 288 (Blattberg testifying that for the purpose of excluding competitors, UST created artificial scarcity in a market that it knew had the potential to grow). Accord PXs 24, 72, 79, 84.

[27]3/13/00 Tr. at 245-49 (Blattberg reciting example after example); PX 9 (teaching UST sales force to manipulate artificially Conwood ranking in sales velocity reports); PX 59 (gerrymandered data); Waller Dep. at 11 (testifying that UST used "skewed information" to distort rankings); 3/13/00 Tr. at 247-51 (Blattberg describing UST's efforts to gerrrymander the data presented to retailers in their presentations). Accord PXs 173, 208, 215; 3/8/00 Tr. at 219-21 (Hynek: listing examples); 3/10/00 Tr. at 63 (Williams: same).

[28]See, e.g., 3/7/00 Tr. at 237-38 (Price); 3/13/00 Tr. at 250-62 (Blattberg); PXs 45, 139; PX 138 ("Only our long time relationship [with Circle-K] has held off the distribution of [Timberwolf.]".

C. UST asserts that issuing an injunction would insulate Conwood from normal competition. UST Mem. at 16. But normal competition is exactly what Conwood seeks, and the "examples" UST cites belie its claim. UST complains, for instance, that the proposed injunction would preclude retailers from being able to obtain category management services. To the contrary, nothing in the injunction bars UST from performing such services.[29]

D. UST asserts that the proposed injunction "binds" independent retailers and treats their decisions as "conspiratorial." UST Mem. at 17-18. Tellingly, however, defendants point to no language in the proposed injunction that would so operate. Nor can they. The proposed injunction is expressly "enforceable against all defendants in this lawsuit." Proposed Order at 4. The proposed injunction does also apply to "other persons, affiliated or acting in concert with" defendants. Id. But this language is designed to cover defendants' agents, in order to ensure that UST does not attempt to pursue indirectly illegal acts that it is forbidden to pursue directly.[30]

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[29]UST is not precluded from performing any of the central functions of a category captain: making product selection recommendations about its own products or the addition of rival products, from offering category displays for its products and even rival products, from promoting its products or the entire category, or from providing labor to perform resets. 3/13/00 Tr. at 209-10 (Blattberg enumerating category captain functions). UST is forbidden only from seeking to delete rival products and handling their property -- neither of which are essential to category captain functions. Id. at 223, 246 (Blattberg describing UST's behavior on both scores as "abuses" of category management).

[30]For example, manufacturers sometimes pay independent "manufacturer representatives" to represent them with retailers in certain areas, rather than endure the expense of maintaining a sales force there. Williams Decl. ¶ 4 (Exh. B). UST should not be encouraged to use such agents as a way around the Court's

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Indeed, Conwood's proposed language is drawn from other injunctions proposed and approved in analogous circumstances. See, e.g., International Distrib. Ctrs., 1986 U.S. Dist. LEXIS 30701, at *24 (proscribing conduct by defendant and "all persons acting in aid of, or in concert with, them"); Plaintiffs' Proposed Final Judgment, United States v. Microsoft Corp., Civ. Action Nos. 98-1232, 98-1233 (D.D.C. filed Apr. 28, 2000), available at http://www.usdoj.gov/atr/cases/f4600/4639.htm (Exh. D) (¶ 6b: order applies to "all other persons in active concert or participation with any of" defendants).

IV. THE PROPOSED INJUNCTION IS NOT "UNDULY INTRUSIVE"

Finally, UST objects to the proposed injunction on the ground that it would unreasonably intrude into its operations. But it can point to no such intrusion.

While UST complains that it would have to obtain permission from rivals before manipulating their products, displays or advertising, it gives no sound reason why that is burdensome or inappropriate. The alternative, obviously, is flat prohibition. But Conwood has sought to tailor the request to allow for flexibility, and the requirement of consent is both commonsense and commonplace. Williams Decl. ¶ 5 (Exh. B). It was UST's legerdemain over the property of its rivals that, in large measure, provided the mechanism through which UST unlawfully monopolized the moist snuff market. It cannot credibly argue that it should have the *right* to exercise such dominion. It should do so only with permission. Accordingly, there is no

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injunction. Nothing in this language is designed to, or would, cover "independent, uncoerced retailers" that, by definition, are not acting in concert with it.

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basis for thinking this procedure to be "unduly intrusive" on anyone.

UST also protests the creation of a new Board of Directors committee to enforce internal compliance with the Court's order, as well as the mandate that it produce annual compliance reports, maintain relevant corporate records, and provide notice to customers and training to employees. UST Mem. at 20. But UST nowhere explains why any of these provisions would be unduly onerous. Neither does (or can) UST dispute that each of these provisions would materially further compliance by an (admittedly) recalcitrant and unrepentant UST.

Significantly, UST cites no court that has rejected such modest measures as "unduly intrusive"; in fact, the proposed injunction is far less "intrusive" than injunctions entered by courts in cases where the conduct was far less pervasive than the exclusion proved at trial in this case. See, e.g., International Distrib. Ctrs., Inc., 1986 U.S. Dist. LEXIS 30701, at *32 (ordering defendant to file *quarterly* reports and affidavits with the court; to generate and send to plaintiff internal accounting statements on a quarterly basis; to notify plaintiff in advance of any planned sale or transfer; to inform its employees of the terms of the injunction and develop a compliance training program; to provide annual accounts of "all steps" taken in the preceding year to "discharge its obligations" under the court's order); Coleman v. Cannon Oil Co., 911 F. Supp. 510, 512 (M.D. Ala. 1995) (approving "affirmative steps" including the "educat[ion] [of defendants'] employees about the Sherman Act's" requirements and the "adopti[on] [of] personnel policies and

procedures"); Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 684 F. Supp. 950, 953 (N.D. Ohio 1987) (court retaining jurisdiction "for such further orders or directions as may be necessary" and "for the enforcement of compliance herewith, and for the punishment of any violation"); Image Technical Servs., Inc. v. Eastman Kodak Co., No. 87-1686, 1996 U.S. Dist. LEXIS 2386 (N.D. Cal. Feb. 26, 1996) (notice to all customers and antitrust training).[31]

V. UST HAS NOT MET (AND CANNOT MEET) THE STANDARDS REQUIRED FOR A TEMPORARY STAY

Defendants ask the Court for a stay pending appeal. But they cite no similar antitrust case in which a court has denied effective and timely injunctive relief so that a defendant can continue the misconduct while the case is on appeal. Besides, under Sixth Circuit law, the party seeking a stay is obligated to show that it is *likely* (1) to prevail on the merits of the appeal; (2) to be irreparably harmed absent a stay; (3) other parties will not be harmed if the court grants the stay; (4) the public interest will be advanced by a stay. Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991); Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n, 812 F.2d 288, 290 (6th Cir. 1987). UST has shown none of these things, much less all of them.

First, while granting that UST believes it will win on appeal, its appellate issues are mere retreads of arguments

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[31] See also Plaintiffs' Proposed Final Judgment, Microsoft (Exh. D) (Government's proposed injunction requiring, inter alia, creation of a "compliance committee" of Microsoft's board of directors (§ 4); development of internal programs to ensure compliance with Section 2 (id.); and maintenance and access to relevant records (§ 5)).

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soundly rejected by the Court many times -- on summary judgment, on two directed verdict motions, and in pre-trial *in limine* motions practice. The Court conducted an error-free trial, and, as fully discussed elsewhere, UST's familiar arguments do not come close to demonstrating otherwise. See Pls.' Opp. to Defs' Mot. for Judgment, New Trial, or Remittitur (Apr. 30, 2000).

Second, UST makes no effort to present *any* evidence that it would be irreparably harmed by the proposed injunction. Instead, it rests on the bare assertion that its "foregoing discussion" somehow "demonstrates" impending irreparable injury. UST Mem. at 22. That "discussion" is no substitute for the evidence UST bears the burden of producing. See Ohio ex rel. Celebrezze, 812 F.2d at 290 (in evaluating the claimed harm, court looks to "the adequacy of the proof provided" and will not award relief when harm is "speculative or theoretical"). More fundamentally, UST's only imaginable "harm" in this case is some (unspecified) reduction in its $1 billion annual profits. The Sixth Circuit has repeatedly held that such financial injury cannot qualify as "irreparable harm." Id.; see Griepentrog, 945 F.2d at 154 ("[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough").

UST does not even *address* the two remaining prongs on which it bears the burden of proof: showing that a stay would cause no harm to other persons and that a stay is in the public interest. In fact, a stay *would* harm other persons and grossly offend the public interest. UST has confirmed again and again that it will not change its unlawful conduct absent a direct court order. If

a stay is granted, both competition and consumers will be harmed through the continuation of conduct already adjudged to offend the antitrust laws -- conduct that has resulted in higher consumer prices, lower output, reduced brand choice, harm to other existing competitors (not just Conwood), and increased barriers to entry. It is beyond argument, therefore, that a stay *would* harm Conwood, other moist snuff competitors, consumers, and the public interest as well.

Absent a stay pending appeal, UST asks the Court to issue at least a 30-day stay so that it can prepare "affidavits and any other supporting documents" at its leisure for a second try before the Sixth Circuit. UST cites no authority for the procedure it contemplates. What it seeks, in substance, is a temporary restraining order without having to make *any* of the legal showings necessary to obtain one. In any event, UST had ample time to prepare its case; it is telling that it cannot identify for *this* Court any of the materials it now says it needs 30 days to assemble for the Sixth Circuit. The issue of injunctive relief has been present in this case from the outset. See Prayer for Relief, Conwood Complaint (Apr. 22, 1998) (seeking permanent injunctive relief). If the Court determines that injunctive relief is necessary and appropriate -- as it should, given the evidence before it -- the Court should move forthwith to restore fair competition to the moist snuff market.

16diii006127

Conclusion

Conwood's motion for permanent injunctive relief should be granted.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

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Counsel for Plaintiffs

May 13, 2000

16diii006128

CERTIFICATE OF SERVICE

I certify that, on this 13th day of May, 2000, a copy of the foregoing was sent via overnight delivery to:

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James A. Keyte
Chris T. Athanasia
Skadden, Arps, Slate, Meagher
& Flom, L.L.P.
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New York, NY 10036

John S. Reed
Ridley M. Sandidge
Reed Weitkamp Schell Cox & Vice
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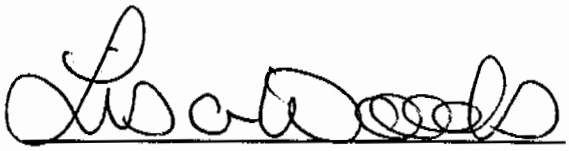

EXHIBIT A

UST

UST REPORTS FIRST QUARTER 2000 RESULTS

GREENWICH, Conn., April 20, 2000 – UST Inc. (NYSE:UST) today announced that first quarter 2000 net sales increased 5% to $368.3 million, net earnings declined 6% to $102.0 million and earnings per share of $.62 increased 3% compared to the corresponding 1999 period.

UST Chairman and Chief Executive Officer Vincent A. Gierer, Jr., stated: "The fundamentals of our core businesses are on track. During the quarter we experienced higher than anticipated costs for legal fees, interest expense and a hedging loss related to the recent debt issuance. Without these charges, our earnings would have come in better than originally targeted."

Gierer continued, "Despite the continuing difficult environment for tobacco equities, we continue to be encouraged by the performance of our principal business, smokeless tobacco, which posted a net unit volume gain of 2% and, most importantly, the overall category continued to post solid growth. Looking forward to the remainder of the year, we expect the operations to continue to perform in accordance with our original plan. However, in light of the present uncertainty associated with the Conwood litigation, the Company's stated 2000 EPS growth target of 10% may not be achievable."

During the quarter, the Company repurchased 4.7 million shares at a cost of $97.5 million. The Company has suspended its share repurchase program pending further review after the post-trial motions in the Conwood litigation in Kentucky are decided.

Tobacco Segment

Tobacco segment revenue increased 4% to $324.2 million as a result of higher prices and a 2% increase in net smokeless tobacco unit volume to 152.5 million cans. Premium can sales were off slightly, while non-premium products contributed an additional 4.4 million cans in the quarter. Operating profit remained stable at $179.6 million, as the Company continued its accelerated spending plan started in the third quarter of 1999 in an effort to increase category growth.

Impacting Tobacco segment performance were legal expenses associated with the Conwood litigation. In addition, cost of sales increased over 12%, a result of higher federal excise taxes and higher leaf costs associated with the increased weight for Skoal Long Cut products.

Wine Segment

Wine segment revenue increased 15% to $37.1 million primarily due to a 12% increase in premium case sales, while operating profit increased 19% to $2.5 million.

The closing of the announced Guenoc acquisition has been delayed, pending the results of post-trial matters in the Conwood litigation. Costs associated with the acquisition in the amount of $.8 million were expensed during the quarter and negatively impacted the growth in operating profit.

Significant Developments

As previously announced, a jury in Paducah, Kentucky recently found that the Company's subsidiary, U.S. Tobacco Company, had violated the antitrust laws and awarded $350 million in damages to

Conwood Company, L.P. As required by the antitrust laws, the award was trebled and a judgment in the amount of $1.05 billion was entered on March 29, 2000. The enforcement of the judgment is presently stayed while the court hears arguments as to the timing and amount of any bond to be required, as well as arguments on other matters relating to the case.

The Company strongly believes that the evidence presented at trial was insufficient to support the jury's findings and intends to take all actions necessary to vacate or reverse the judgment. The Company recently filed motions with the District Court seeking to have the court vacate the judgment as a matter of law or, in the alternative, order a new trial or reduce significantly the amount of the judgment. If the judgment is not vacated, or a new trial not ordered, the Company intends to appeal the judgment to the court of appeals.

The Company believes that the verdict should be vacated on the following grounds:

1. U.S. Tobacco lacks "monopoly power" under the instructions given to the jury;

2. U.S. Tobacco did not "use" or wield monopoly power in the marketplace, but rather engaged in ordinary marketing practices either used by or available to all competitors;

3. The moist snuff "market" was not harmed by any of U.S. Tobacco's alleged misconduct, and in fact was characterized by significantly increased competition during the 1990's under all relevant measures;

4. Conwood prospered in terms of sales and profits during the same time period; and

5. Conwood did not offer evidence, beyond mere "beliefs" and speculation of its own employees, that U.S. Tobacco's "exclusionary" conduct was a material cause of it "not doing better." In fact, the overwhelming evidence shows that the actual sources of Conwood's share stagnation were (a) the independent, uncoerced decisions of retailers, (b) competition from other competitors and new brands, and © Conwood's own decisions not to compete in the ways desired by retailers.

In light of the Company's belief as to the merits of its case, the uncertainties associated with the post-trial process and the Company's belief that the amount of damages, if any, which may ultimately be imposed can not be reasonably estimated at this time, no charge relating to the judgment is reflected in the Company's financial statements.

For further information on post-trial motions filed by the Company with the court, please refer to our website at www.ustobacco.com.

UST, through its subsidiaries, is a leading producer and marketer of moist smokeless tobacco products including Copenhagen, Copenhagen Long Cut, Skoal, Skoal Long Cut, Skoal Bandits, Rooster and Red Seal. Other consumer products marketed by UST subsidiaries include premium wines sold nationally through the Chateau Ste. Michelle, Columbia Crest and Villa Mt. Eden wineries as well as sparkling wine produced under the Domaine Ste. Michelle label and premium cigars including Don Tomas, Don Tomas Special Edition, Astral and Habano Primero.

All statements, other than statements of historical facts, which address activities, or actions that the Company expects or anticipates will or may occur in the future, and other such matters are forward-looking statements. To take advantage of the safe harbor provided by the Private Securities Litigation Reform Act of 1995, the Company is identifying certain factors that could cause actual results to differ materially from those expressed in any forward-looking statements made by the Company.

Any one, or a combination, of these factors could materially affect the results of the Company's operations. These factors include competitive pressures, changes in consumer preferences, wholesaler

ordering patterns, consumer acceptance of new product introductions and other marketing initiatives, uncertainties associated with ongoing and future litigation, legal and regulatory initiatives (including those described under Items 1 and 3 of the Company's Annual Report on Form 10-K and Form 8-K), and conditions in the capital markets. Forward-looking statements made by the Company are based on knowledge of its business and the environment in which it operates, but because of the factors listed above, as well as other factors beyond the control of the Company, actual results may differ from those in the forward-looking statements.

UST
CONSOLIDATED SALES AND EARNINGS
(In thousands, except per share amounts)
(Unaudited)

	First Quarter		
	2000	1999	% Change
Net sales	$368,295	$350,085	+ 5.2
Costs and expenses			
Costs of products sold	75,371	67,018	+12.5
Selling, advertising and administrative	119,509	105,673	+13.1
Total costs and expenses	194,880	172,691	+12.8
Operating income	173,415	177,394	- 2.2
Interest, net	7,527	1,065	-
Earnings before income taxes	165,888	176,329	- 5.9
Income taxes	63,924	67,869	- 5.8
Net earnings	$101,964	$108,460	- 6.0
Net earnings per share:			
Basic	$.62	$.60	+ 3.3
Diluted	$.62	$.60	+ 3.3
Cash dividends per common share	$.44	$.42	+ 4.8
Shares outstanding:			
Basic	164,961	179,763	
Diluted	165,123	180,650	

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Copenhagen, Skoal, Skoal Long Cut, Skoal Bandits, Rooster and Red Seal are trademarks of United States Tobacco Company or its affiliated companies.

Return to UST News Index

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16diii006134

UNITED STATES TOBACCO
SALES and MARKETING COMPANY INC.
100 WEST PUTNAM AVENUE, GREENWICH, CONNECTICUT 06830

March 30, 2000

TO OUR CUSTOMERS:

As many of you may already know, on Tuesday, March 28, 2000, a Kentucky jury rendered a verdict against United States Tobacco and awarded $350 million to the plaintiff, Conwood Company, L.P., for its claims under federal antitrust laws. The verdict, as required by the antitrust laws, has been trebled, resulting in a total award of over $1 billion.

United States Tobacco believes strongly that our moist snuff marketing and promotion programs do not violate the antitrust laws and we have already begun the steps necessary to have the award overturned or reversed on appeal. We believe that United States Tobacco, Conwood and other companies in the moist snuff business compete in a highly competitive marketplace, and that the actions complained of by Conwood are nothing more than part of normal, lawful, competitive conduct. In light of the evidence of this presented at trial, we believe the award was completely unjustified.

As this process continues, we will continue to provide you with the same level of service, the same fine products, and the same fine programs that you have come to expect of us. We appreciate your continued support, and will provide you with additional information as it becomes available.

EXHIBIT B

DECLARATION OF TERRY WILLIAMS

1. I, Terry Williams, am over the age of 18. I am currently employed by Conwood Sales Co., L.P. ("Conwood") as the National Sales Manager. I have been employed by Conwood for the past 20 years as a sales representative, district sales supervisor, district manager, regional manager and assistant national sales manager prior to holding my current position.

2. In March, 2000, I gave sworn testimony in Paducah, KY concerning, among other things, the various sales and marketing problems encountered by Conwood everyday because of defendants ("UST").

3. After trial, I have continued to receive multiple reports every week of unauthorized rack removals by UST. In fact, there has been no significant reduction in the number of these reports since the trial concluded and I see no indication that UST has any intention of changing its conduct absent an injunction.

4. UST currently employs independent agents or brokers throughout the country to supplement its direct sales force. For example, UST uses military brokers to promote the sale of its products on military bases. UST also provides payments to distributors who will, in turn, have their employees represent the interests of UST when calling on retail stores. Further, manufacturers in other retail industries frequently hire independent brokers instead of incurring the expense of a sales force to sell and market their products. Conwood is concerned that UST could side-step any injunction directed only to its direct employees by using independent agents to continue its anti-competitive behavior.

5. In the moist snuff industry, it is possible for competing companies to work together and respect the property rights of one another. For example, when the buyer for a large retailer *independently* decides to reset the moist snuff section, all companies are sometimes notified and asked to attend the reset together. In such cases, the moist snuff companies then work side by side installing their own products, racks and point of sale

advertising to ensure compliance with the buyer's instructions. Failure to act in a cordial and professional manner would reflect poorly on the respective companies and potentially jeopardize future business opportunities with the retailer.

6. Retailers are perfectly capable of handling, and do handle, problems with shopworn or broken racks, POS, and out-of-date product without relying on UST. For example, retailers can and do call the appropriate company's local sales representative, the manufacturer's headquarters, the local distributor, or their own chain's headquarters. All of these options are available for providing unbiased assistance with any problems the retailer encounters. In fact, Conwood maintains a customer service department and a consumer relations department for handling such problems.

7. Conwood has every incentive and desire to assist retailers in removing and replacing shopworn or damaged Conwood racks, POS, or out-of-date product. It is one of the central reasons Conwood maintains a large national sales force. Failure to assist retailers with such issues only jeopardizes our ability to maximize the sale of our own products, as well as retailer good will.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 05/12/00

Terry Williams

Terry Williams

EXHIBIT C

DECLARATION OF LOU MARANO

1. I, Lou Marano, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a sales representative for the Philadelphia, PA territory. I have been employed in this position for the past 11 years. On February 28th, 2000, I gave sworn testimony in Paducah, KY concerning my problems with U.S. Tobacco ("UST") during my tenure with Conwood.

3. For the past six months, UST has been placing their extra-wide, green rack in stores throughout the Philadelphia metropolitan area. This practice continues today.

4. These green racks have individual slots which are larger than necessary to hold an individual can of moist snuff. As a result, each slot on the green rack takes up more counter space than is necessary to vend a moist snuff can. When 10 or 15 of these UST green rack slots are placed side by side on a counter or shelf, a significant amount of space is wasted.

5. With UST wasting space by using this green rack, I am finding it increasingly difficult to merchandise Conwood products in the space designated by stores for moist snuff sales. I believe UST is attempting to artificially limit the amount of space available to vend moist snuff to the detriment of its competitors.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 5/12/00

Lou Marano

Lou Marano

DECLARATION OF BARTEN GREEN

1. I, Barten Green, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a sales representative for the Tulsa, OK territory. I have held this position for the past 3 1/2 years.

3. Since the verdict against U.S. Tobacco ("UST"), I have had my racks and point of sale ("POS") advertising removed by UST at the Food-4-Less store in Tahlequah, OK. Furthermore, Conwood's products have been placed in a UST rack and beneath UST POS.

4. According to the UST planogram left behind at the store, UST will be the only moist snuff company allowed to place any racks or POS in the store due to its C.A.P. contract with the retailer. (see attached)

5. This situation has occurred at several other retail stores in my territory since the verdict.

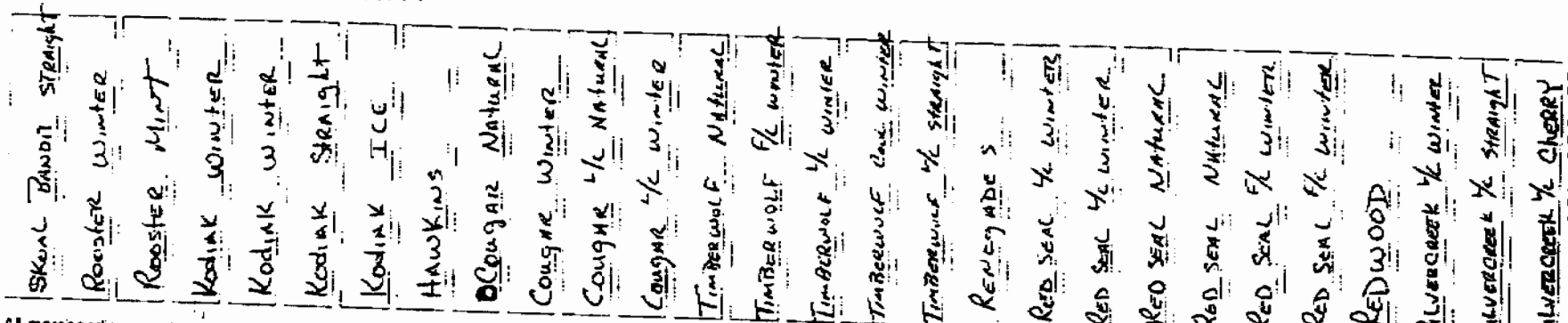
I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 5/12/00

Barton Green

MOIST SMOKELESS

Plan-O-Gram



ID:918-458-0124

All merchandising system changes have been approved by store management.
This decal is for use by United States Tobacco Sales & Marketing Co., Inc. personnel and authorized store management.

U.S.T. WILL PROVIDE RACK, P.O.S. & SHELVING UNIT PER THE C.A.P. CONTRACT

STORE NAME Food-4-Less PAR #

SIGNATURE Bryan Morgan

TITLE Store Mgr

DATE 3/31

16diii006142

MOIST SMOKELESS
Plan-O-Gram

(Conwood PLEASE Do not TAKE Anything Down or put ANYTHING UP THAT BRIAN HAS NOT OKED

COPENHAGEN
COPENHAGEN
COPENHAGEN
COPENHAGEN
COPENHAGEN
COPENHAGEN
SKOAL
SKOAL
SKOAL
SKOAL
SKOAL
SKOAL F/C STRAIGHT
COPENHAGEN L/C
SKOAL L/C WINTER
SKOAL L/C WINTER
SKOAL L/C WINTER
SKOAL L/C WINTER
SKOAL L/C STRAIGHT
SKOAL L/C STRAIGHT
SKOAL L/C STRAIGHT
SKOAL L/C MINT
SKOAL L/C MINT
SKOAL L/C CLASSIC
SKOAL L/C CHERRY
SKOAL L/C CHERRY
SKOAL Bandit WINTER
SKOAL Bandit MINT

All merchandising system changes have been approved by store management.
This decal is for use by United States Tobacco Sales & Marketing Co., Inc. personnel and authorized store management.

U.S.T. will provide Rack, P.O.S. & Shelving unit PER THE C.D.P. Contract.

STORE NAME Food-4-Less PAR #

SIGNATURE Bryan Morgan

TITLE Store Mgr

DATE 3/31

05829

16diii006143

DECLARATION OF PAUL STICKLEY

1. I, Paul Stickley, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a sales representative in Des Moines, IA. I have held this position for the past 6 1/2 years

3. Recently, I know of two separate occasions where U.S. Tobacco ("UST") has removed Conwood's rack from a store and eliminated its point of sale ("POS") advertising.

4. On May 1, 2000, I entered Sparky's One Stop convenience store in Stanhope, IA and discovered that Conwood's rack had been removed. I learned from the store manager that a UST representative had been in the store just one hour prior and had removed the rack himself.

5. As a result of UST removing Conwood's racks, I lost distribution on 2 Conwood products and had the number of Kodiak wintergreen facings reduced from 2 to 1. Further, Conwood's POS material was discarded along with the rack.

6. On May 9, 2000, I learned that Conwood's rack had been removed from the Swift Stop in Ames, IA in mid-March. During that time, UST had installed its own tobacco shelving unit which housed all moist snuff products. On one of the shelves, UST used one of its racks to merchandise all competitive moist products even though the existing Conwood rack was perfectly capable of fitting into the new UST shelving system. As a result of UST's conduct, Conwood lost a facing for Kodiak and all its POS advertising. Finally, the store manager allowed me to install another rack.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on 5-12-00

Paul Stickley

DECLARATION OF JEFF CAMPBELL

1. I, Jeff Campbell, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a sales representative in Gaylord, Michigan. I have been employed in this position for the past two years.

3. I have experienced frequent unethical activity in my district. There has been no change in the level of unethical activity since the judgment in the lawsuit.

4. On April 6th, 2000, I called on the Sunrise Convenience Store in Houghton Lake, Michigan, a high volume account. I discovered that all of Conwood's racks had been removed and its product was placed in UST's green rack. Conwood previously had ten racks with eight brands in the store, with a full compliment of POS.

5. On April 26th, 2000, I called on the 4 Corners BP in Petoskey, Michigan. I discovered that all three Conwood racks had been removed, and the Conwood brands were placed in a UST rack without Conwood POS

6. The Conwood racks were out of the store for at least a month before I could replace them. The rack removals from this store resulted in substantial lost sales for Conwood.

7. On May, 10th, 2000, I called on the Holiday Gas Station in Sault Ste. Marie, Michigan. I discovered that the UST representative had recently removed all of Conwood's racks and POS, and placed our product into a UST rack.

Executed on 5-11-00

Jeff Campbell

Jeff Campbell

DECLARATION OF JOHN CARANO

1. I, John Carano, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a sales representative in McAlester, OK. I have held this position for the past 19 years.

3. In April of 2000, I had my moist snuff racks removed from two stores by U.S. Tobacco ("UST").

4. On April 13, 2000, I personally witnessed a UST sales representative's van parked at Wetumka Indian Smoke Shop store in Wetumka, OK. When Marty Stover, the UST representative exited the store, he informed me that he had removed Conwood's racks.

5. When I entered the store I received permission from the store manager to replace the removed Conwood rack immediately. In fact, the store manager stated that she didn't think it was right for Mr. Stover to have removed Conwood's rack in the first place.

6. In mid-April of 2000, Conwood's rack was removed from the Iron Post Smoke Shop in Sallisaw, OK. Prior to UST visiting the store in mid-April, all moist snuff companies had tall-profile style racks in the store. UST visited the store in April and then placed each company's products in the UST rack in a manner determined by UST . In addition to losing racks in this store, all Conwood point of sale ("POS") was removed from the moist section.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on 5-11-00

John Carano

John Carano

DECLARATION OF BO RICHEY

1. I, Bo Richey, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a sales representative in Lufkin, Texas. I have been employed in this position for the past 23 years.

3. Since the judgment in the lawsuit, I have personally seen Conwood's racks moved to less desirable position in at least five stores in Lufkin and Nacogdoches, Texas. I am also aware that this has occurred in all 65 Brookshire Brothers stores in the chain. I believe that UST is responsible for rearranging the moist smokeless tobacco section in all of these stores.

4. Mike Due, the tobacco buyer for Brookshire Brothers grocery told me that the position changing by UST was not authorized by the chain.

5. I have received permission from Mike Due to return Conwood to the number one position all Brookshire Brothers grocery stores.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Executed on 5-11-00

Bo Richey

Bo Richey

DECLARATION OF KIRK GLENN

1. I, Kirk Glenn, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a district supervisor/key account manager for the Houston district. I have been employed in this position for the past 14 years.

3. Since the judgment in the lawsuit, I have continued to experience significant levels of unethical activity on military bases in my district.

4. The UST broker for military bases in the San Antonio area has been telling commissary and exchange managers that UST would be providing them a new rack.

5. At the Randolph Air Force Base Exchange all 12 Conwood racks were removed and replaced in a UST rack.

6. At the Randolph Air Force Base Commissary all four Conwood racks containing two Conwood brands were removed and replaced with two facings for two products in UST racks.

7. At the Kelly Air Force Base gas station, Conwood had nine racks holding six of its brands in the account. All nine racks were removed by UST, and its product was placed in four UST slots for only four brands. This resulted in five lost facings for Conwood. The remaining Conwood product was placed behind the racks.

8. At the Kelly Air Force Base Shoppette, Conwood had approximately 12 racks, for six of its brands placed in the account. UST removed the Conwood racks and placed the product in eight slots for six brands in a UST rack, a loss of four Conwood facings.

9. At the Lackland Air Force Base Commissary, Conwood had four racks for two of its brands placed in the account. UST removed Conwood's racks from the store and placed Conwood's product in two slots for two brands in a UST rack. This resulted in the loss of two

Conwood facings.

10. In all instances UST placed the Conwood product into its new wide "green racks."

11. All of Conwood's POS was removed with its racks in each case.

12. On these military bases, Conwood's brand, Cougar sells for $1.00 per can, so POS is a necessity to make customers aware of its value price. This price information was printed on the header cards that were removed with Conwood's racks.

13. I was told by a UST broker that they were "cleaning up" the moist smokeless tobacco sections on the bases because UST personnel would be coming around soon to check on the sections.

14. Conwood racks were replaced in each account after receiving permission from the various managers involved. Two full working days were spent replacing racks in these accounts. Replacing racks in military accounts is more time consuming than ordinary retail accounts due to the high level of security on military bases.

15. Military bases are very high volume, and it is a large detriment to Conwood when its racks are out of the accounts.

16. All of this activity occurred on or around April 9, 2000, and was discovered by me between Arpil 11th and April 13th, 2000.

Executed on 5/11/00

Kirk Glenn

DECLARATION OF JERRY MCKEON

1. I, Jerry McKeon, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a district manager for the Pittsburgh, PA district. I have held this position with Conwood since 1993.

3. On May 5, 2000, I learned that the Giant Eagle supermarket in Pittsburgh, PA had accepted U S Tobacco's ("UST") proposal to use one of UST's racks exclusively in all 165 stores.

4 As a result of UST's proposal, Conwood has lost distribution on 5 brands and is not allowed to place their own racks for the remaining Conwood products By losing the ability to place its rack, Conwood also loses the ability to place important point of sale ("POS") advertising.

5. During the first week of May, 2000, I also received reports from one of my salespersons that UST is continuing to remove Conwood racks from a variety of retail stores in Washington County, PA. As a result, Conwood loses its ability to vend its products in a professional manner and loses valuable POS advertising.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on 5/11/00

Jerry McKeon

DECLARATION OF RICK WOODALL

1. I, Rick Woodall, am over the age of 18.

2. I am currently employed as a sales representative for Conwood Sales Co., L.P. in Lawton, OK. I have held this position for the past 12 years.

3. For the month of April, 2000, I have documented 98 Conwood racks "disappearing" from retail stores and being replaced by U.S. Tobacco ("UST") racks. In addition to the racks being removed, point of sale ("POS") advertising is also missing and 90% of the time only UST POS remains.

4. Along with Conwood racks disappearing in April, other companies such as Swedish-Match and Swisher also have their racks removed from stores by UST.

6. I have had similar problems with UST for years. I have not noticed any change in their behavior since the verdict this past March.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on 5/12/00

Rick Woodall

Rick Woodall

DECLARATION OF GENE ROGERS

1. I, Gene Rogers, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a district manager for south Georgia. I have held this position for the past 11 years.

3. Recently, a 48 store chain in Douglass, GA called Quick Change was approached by U.S. Tobacco ("UST") and, I believe, presented with a schematic which would house all moist snuff products in a UST rack.. As a result of UST's efforts, Conwood lost products.

4. When this plan was implemented in April of 2000, Conwood lost distribution on 2 Cougar brands and Hawken, and lost 2 of 3 facings for Kodiak wintergreen.

5. Kodiak is the number 2 selling brand at this chain but was reduced from 3 to 1 facings for its merchandising. UST's Skoal fine cut, however, is the number 4 selling brand in the chain but UST dedicated 2 facings for its merchandising.

6. Also included in the UST recommended schematic was UST's Rooster brand which has not sold as well in the past as some of the deleted Conwood brands such as Hawken and Cougar fine cut wintergreen.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on 5-12-2000

Gene Rogers

Gene Rogers

DECLARATION OF DOUG HYNEK

1. I, Doug Hynek, am over the age of 18.

2. I am currently employed by Conwood Sales Co., L.P. as a district sales manager for the Minneapolis, MN district. I have held this position since 1993.

3. In March of 2000, I testified in Paducah, KY to the extensive problems my district has had with U.S. Tobacco ("UST") limiting the sale of Conwood products through various means. Since I've testified, the problems in my district with UST have continued.

4. For example, two weeks ago in Coon Rapids, MN, Conwood placed a six-facing rack in a Super America convenience store. By May 9, 2000, 2 of the 6 facings had been removed from Conwood's rack and all 4 of Conwood's premium products had been placed in a UST rack. In the remaining 4 slots of Conwood's rack were 2 Conwood products and Swisher products. Further, all Conwood point of sale ("POS") advertising was removed. The manager of the store reported that UST did not get permission for any of these changes.

5. At an Amoco gas station in Woodruff, WI, UST removed Conwood's moist snuff rack from the store sometime in the past six weeks. In addition, all 6 of Conwood's moist products were placed in a UST rack.

6. At the Amoco gas station in Mercer, WI, UST placed all moist snuff products in one UST rack. Conwood's rack was removed from the store by UST and all accompanying POS was missing.

7. At the Cenex convenience store in Morris, MN, Conwood installed a 7-facing rack to house its moist snuff products in February of 2000. Since that time, UST discontinued Conwood's Kodiak Ice brand, removed 1 slot from Conwood's rack and removed Conwood's

header card (POS). This allowed UST to introduce 2 new products and install its extra-wide slot green rack which unnecessarily takes up more shelf space in the moist snuff section. The manager was unaware that these events had taken place.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on 5-12-00

Doug Hynek

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (TPJ)
STATE OF NEW YORK *ex rel.* Attorney General ELIOT SPITZER, *et al.*, Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ)

PLAINTIFFS' PROPOSED FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on May 18, 1998;

Plaintiff States, having filed their complaint herein on the same day;

Defendant Microsoft Corporation ("Microsoft") having appeared and filed its answer to such complaints;

The Court having jurisdiction of the parties hereto and of the subject matter hereof and having conducted a trial thereon and entered Findings of Fact on November 5, 1999, and Conclusions of Law on April 3, 2000;

The Court having entered judgment in accordance with the Findings of Fact and the Conclusions of Law on April 3, 2000, that Microsoft has violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, as well as the following state law provisions: Cal Bus. & Prof. Code §§ 16720, 16726, 17200; Conn. Gen. Stat. §§ 35-26, 35-27, 35-29; D.C. Code §§ 28-4502, 28-4503; Fla. Stat. chs. 501.204(1), 542.18, 542.19; 740 Ill. Comp. Stat. ch. 10/3; Iowa Code §§ 553.4, 553.5; Kan. Stat. §§ 50-101 et seq.; Ky. Rev. Stat. §§ 367.170, 367.175; La. Rev. Stat. §§ 51:122, 51:123, 51:1405; Md. Com. Law II Code Ann. § 11-204; Mass. Gen. Laws ch. 93A, § 2; Mich. Comp. Laws §§ 445.772, 445.773; Minn. Stat. § 325D.52; N.M. Stat. §§ 57-1-1, 57-1-2; N.Y. Gen. Bus. Law §

340; N.C. Gen. Stat. §§ 75-1.1, 75-2.1; Ohio Rev. Code §§ 1331.01, 1331.02; Utah Code § 76-10-914; W.Va. Code §§ 47-18-3, 47-18-4; Wis. Stat. § 133.03(1)-(2); and

The Court having conducted further proceedings on appropriate relief, it is this _____ day of _____, 2000, hereby:

ORDERED, ADJUDGED, AND DECREED as follows:

1. Reorganization

a. Not later than four months after entry of this Final Judgment, Microsoft shall submit to the Court and the Plaintiffs a proposed plan of reorganization. The Plaintiffs shall submit any objections to the proposed plan of reorganization to the Court within 60 days of receipt of the plan, and Microsoft shall submit its response within 30 days of receipt of the plaintiffs' objections.

b. Following approval of a final plan of reorganization by the Court (the "Plan")[1] (and the expiration of the stay pending appeal set forth in section 6.a.), Microsoft shall implement such Plan.

c. The Plan shall provide for the completion, within 12 months of the expiration of the stay pending appeal set forth in section 6.a., of the following steps:

i. The separation of the Operating Systems Business from the Applications Business, and the transfer of the assets of one of them (the "Separated Business") to a separate entity along with (a) all personnel, systems, and other tangible and intangible assets (including Intellectual Property) used to develop, produce, distribute, market, promote, sell, license and support the products and services of the Separated Business, and (b) such other assets as are necessary to operate the Separated Business as an independent and economically viable entity.

ii. Intellectual Property that is used both in a product developed, distributed, or sold by the Applications Business and in a product developed, distributed, or sold by the Operating Systems Business as of April 27, 2000, shall be assigned to the Applications Business, and the Operating Systems Business shall be granted a perpetual, royalty-free license to license and distribute such Intellectual Property in its products, and, except with respect to such

[1] Definitions of capitalized terms are set forth in section 7, below.

Intellectual Property related to the Internet browser, to develop, license and distribute modified or derivative versions of such Intellectual Property provided that the Operating Systems Business does not grant rights to such versions to the Applications Business. In the case of such Intellectual Property that is related to the Internet browser, the license shall not grant the Operating System Business any right to develop, license, or distribute modified or derivative versions of the Internet browser.

iii. The transfer of ownership of the Separated Business by means of a spin-off of stock of the Separated Business to Non-Covered Shareholders of Microsoft, or by other disposition that does not result in a Covered Shareholder owning stock in both the Separated Business and the Remaining Business.

d. Until Implementation of the Plan, Microsoft shall

i. preserve, maintain, and operate the Operating Systems Business and the Applications Business as ongoing, economically viable businesses, with management, sales, products, and operations of each business held as separate, distinct and apart from one another as they were on April 27, 2000, except to provide the accounting, management, and information services or other necessary support functions provided by Microsoft prior to the entry of this Final Judgment.

ii. use all reasonable efforts to maintain and increase the sales and revenues of both the products produced or sold by the Operating Systems Business and those produced or sold by the Applications Business prior to the Implementation of the Plan and to support research and development and business development efforts of both the Operating Systems Business and the Applications Business;

iii. take no action that undermines, frustrates, interferes with, or makes more difficult the reorganization required by this Final Judgment without the prior approval of the Court; and

iv. file a report with the Court sixty days after entry of this Final Judgment on the steps Microsoft has taken to comply with the requirements of this section 1.d.

2. Provisions Implementing Reorganization

a. After Implementation of the Plan, and throughout the term of this Final Judgment, neither the Operating Systems Business nor the Applications Business, nor any member

of their respective Boards of Directors, shall acquire any securities or assets of the other Business; no Covered Shareholder holding securities of either the Operating Systems Business or the Applications Business shall acquire any securities or assets of or shall be an officer, director, or employee of the other Business; and no person who is an officer, director, or employee of the Operating Systems Business or the Applications Business shall be an officer, director, or employee of the other Business.

b. After Implementation of the Plan and throughout the term of the Final Judgment, the Operating Systems Business and the Applications Business shall be prohibited from:

i. merging or otherwise recombining, or entering into any joint venture with one another;

ii. entering into any Agreement under which one of the Businesses develops, sells, licenses for sale or distribution, or distributes products or services developed, sold, licensed, or distributed by the other Business;

iii. providing to the other any APIs, Technical Information, Communications Interfaces, or technical information that is not simultaneously published, disclosed, or made readily available to ISVs, IHVs, and OEMs; and

iv. licensing, selling or otherwise providing to the other Business any product or service on terms more favorable than those available to any similarly situated third party.

c. After Implementation of the Plan and throughout the term of this Final Judgment, the Operating Systems Business and the Applications Business shall file with the Plaintiffs a copy of each Agreement (and a memorandum describing each oral Agreement) entered into between them.

d. Throughout the term of this Final Judgment, Microsoft, the Operating Systems Business and the Applications Business shall be prohibited from taking adverse action against any person or entity in whole or in part because such person or entity provided evidence in this case.

e. The obligations and restrictions set forth in sections 3 and 4 herein concerning Microsoft shall, after the Implementation of the Plan, apply only to the Operating Systems Business.

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3. Provisions In Effect Until Full Implementation of the Plan of Reorganization. The provisions in this section 3 shall remain in effect until the earlier of three years after the Implementation of the Plan or the expiration of the term of this Final Judgment.

a. OEM Relations.

i. Ban on Adverse Actions for Supporting Competing Products. Microsoft shall not take or threaten any action adversely affecting any OEM (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales support; enabling programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos) based directly or indirectly, in whole or in part, on any actual or contemplated action by that OEM:

(1) to use, distribute, promote, license, develop, produce or sell any product or service that competes with any Microsoft product or service; or

(2) to exercise any of the options or alternatives provided under this Final Judgment.

ii. Uniform Terms for Windows Operating System Products Licensed to Covered OEMs. Microsoft shall license Windows Operating System Products to Covered OEMs pursuant to uniform license agreements with uniform terms and conditions and shall not employ market development allowances or discounts in connection with Windows Operating System Products. Without limiting the foregoing, Microsoft shall charge each Covered OEM the applicable royalty for Windows Operating System Products as set forth on a schedule, to be established by Microsoft and published on its web site, that provides for uniform royalties for Windows Operating System Products, except that

(1) the schedule may specify different royalties for different language versions, and

(2) the schedule may specify reasonable volume discounts based upon actual volume of total shipments of Windows Operating System Products.

Without limiting the foregoing, Microsoft shall afford Covered OEMs equal access to licensing terms; discounts; technical, marketing, and sales support;

product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos. The foregoing requirement insofar as it relates to access to technical information and information about future plans shall not apply to any bona fide joint development effort by Microsoft and a Covered OEM with respect to confidential matters within the scope of that effort. Microsoft shall not terminate a Covered OEM's license for a Windows Operating System Product without having first given the Covered OEM written notice of the reason for proposed termination and not less than thirty days' opportunity to cure. Microsoft shall not enforce any provision in any Agreement with a Covered OEM that is inconsistent with this Final Judgment

iii. OEM Flexibility in Product Configuration. Microsoft shall not restrict (by contract or otherwise, including but not limited to granting or withholding consideration) an OEM from modifying the boot sequence, startup folder, internet connection wizard, desktop, preferences, favorites, start page, first screen, or other aspect of a Windows Operating System Product to--

(1) include a registration sequence to obtain subscription or other information from the user;

(2) display icons of or otherwise feature other products or services, regardless of the size or shape of such icons or features, or to remove the icons, folders, start menu entries, or favorites of Microsoft products or services;

(3) display any user interfaces, provided that an icon is also displayed that allows the user to access the Windows user interface; or

(4) launch automatically any non-Microsoft Middleware, Operating System or application, offer its own Internet access provider or other start-up sequence, or offer an option to make non-Microsoft Middleware the Default Middleware and to remove the means of End-User Access for Microsoft's Middleware Product.

b. Disclosure of APIs, Interfaces and Technical Information. Microsoft shall disclose to ISVs, IHVs, and OEMs in a Timely Manner, in whatever media Microsoft disseminates such information to its own personnel, all APIs, Technical Information and Communications Interfaces that Microsoft employs to enable--

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i. Microsoft applications to interoperate with Microsoft Platform Software installed on the same Personal Computer, or

ii. a Microsoft Middleware Product to interoperate with Windows Operating System software (or Middleware distributed with such Operating System) installed on the same Personal Computer, or

iii. any Microsoft software installed on one computer (including but not limited to server Operating Systems and operating systems for handheld devices) to interoperate with a Windows Operating System (or Middleware distributed with such Operating System) installed on a Personal Computer.

To facilitate compliance, and monitoring of compliance, with the foregoing, Microsoft shall create a secure facility where qualified representatives of OEMs, ISVs, and IHVs shall be permitted to study, interrogate and interact with relevant and necessary portions of the source code and any related documentation of Microsoft Platform Software for the sole purpose of enabling their products to interoperate effectively with Microsoft Platform Software (including exercising any of the options in section 3.a.iii).

c. Knowing Interference with Performance. Microsoft shall not take any action that it knows will interfere with or degrade the performance of any non-Microsoft Middleware when interoperating with any Windows Operating System Product without notifying the supplier of such non-Microsoft Middleware in writing that Microsoft intends to take such action, Microsoft's reasons for taking the action, and any ways known to Microsoft for the supplier to avoid or reduce interference with, or the degrading of, the performance of the supplier's Middleware.

d. Developer Relations. Microsoft shall not take or threaten any action affecting any ISV or IHV (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales support; enabling programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos) based directly or indirectly, in whole or in part, on any actual or contemplated action by that ISV or IHV to --

i. use, distribute, promote, or support any Microsoft product or service, or

ii. develop, use, distribute, promote or support software that runs on non-Microsoft Middleware or a non-Microsoft Operating System or that competes with any Microsoft product or service, or

iii. exercise any of the options or alternatives provided under this Final Judgment.

e. Ban on Exclusive Dealing. Microsoft shall not enter into or enforce any agreement in which a third party agrees, or is offered or granted consideration, to

i. limit its development, production, distribution, promotion or use of, or payment for, any non-Microsoft Platform Software,

ii. distribute, promote or use any Microsoft Platform Software exclusively,

iii. degrade the performance of any non-Microsoft Platform Software, or

iv. in the case of an agreement with an Internet access provider or Internet content provider, distribute, promote or use Microsoft software in exchange for placement with respect to any aspect of a Windows Operating System Product.

f. Ban on Contractual Tying. Microsoft shall not condition the granting of a Windows Operating System Product license, or the terms or administration of such license, on an OEM or other licensee agreeing to license, promote, or distribute any other Microsoft software product that Microsoft distributes separately from the Windows Operating System Product in the retail channel or through Internet access providers, Internet content providers, ISVs or OEMs, whether or not for a separate or positive price.

g. Restriction on Binding Middleware Products to Operating System Products. Microsoft shall not, in any Operating System Product distributed six or more months after the effective date of this Final Judgment, Bind any Middleware Product to a Windows Operating System unless:

i. Microsoft also offers an otherwise identical version of that Operating System Product in which all means of End-User Access to that Middleware Product can readily be removed (a) by OEMs as part of standard OEM preinstallation kits and (b) by end users using add-remove utilities readily accessible in the initial boot process and from the Windows desktop; and

ii. when an OEM removes End-User Access to a Middleware Product from any Personal Computer on which Windows is preinstalled, the royalty paid by that OEM for that copy of Windows is reduced in an amount not less than the product of the otherwise applicable royalty and the ratio of the number of amount in bytes of binary code of (a) the Middleware Product as distributed

separately from a Windows Operating System Product to (b) the applicable version of Windows.

h. Agreements Limiting Competition. Microsoft shall not offer, agree to provide, or provide any consideration to any actual or potential Platform Software competitor in exchange for such competitor's agreeing to refrain or refraining in whole or in part from developing, licensing, promoting or distributing any Operating System Product or Middleware Product competitive with any Windows Operating System Product or Middleware Product.

i. Continued Licensing of Predecessor Version. Microsoft shall, when it makes a major Windows Operating System Product release (such as Windows 95, OSR 2.0, OSR 2.5, Windows 98, Windows 2000 Professional, Windows "Millennium," "Whistler," "Blackcomb," and successors to these), continue for three years after said release to license on the same terms and conditions the previous Windows Operating System Product to any OEM that desires such a license. The net royalty rate for the previous Windows Operating System Product shall be no more than the average royalty paid by the OEM for such Product prior to the release. The OEM shall be free to market Personal Computers in which it preinstalls such an Operating System Product in the same manner in which it markets Personal Computers preinstalled with other Windows Operating System Products.

4. Internal Antitrust Compliance. This section shall remain in effect throughout the term of this Final Judgment.

a. Within 30 days after the effective date of this Final Judgment, Microsoft shall establish a Compliance Committee of its corporate Board of Directors, consisting of not fewer than three members of the Board of Directors who are not present or former employees of Microsoft.

b. The Compliance Committee shall hire a Chief Compliance Officer, who shall report directly to the Compliance Committee and to the Chief Executive Officer of Microsoft.

c. The Chief Compliance Officer shall be responsible for development and supervision of Microsoft's internal programs to ensure compliance with the antitrust laws and this Final Judgment.

d. Microsoft shall give the Chief Compliance Officer sufficient authority and resources to discharge the responsibilities listed herein.

e. The Chief Compliance Officer shall

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i. within 30 days after entry of this Final Judgment, cause to be delivered to each Microsoft officer, director, and manager, and each platform software developer and employee involved in relations with OEMs, ISVs, or IHVs, a copy of this Final Judgment together with additional informational materials describing the conduct prohibited and required by this Final Judgment;

ii. distribute in a timely manner a copy of this Final Judgment and such additional informational materials to any person who succeeds to a position of officer, director, or manager, or platform software developer or employee involved in relations with OEMs, ISVs, or IHVs;

iii. obtain from each officer, director, and manager, and each platform software developer and employee involved in relations with OEMs, ISVs, or IHVs, within 60 days of entry of this Final Judgment, and for each person thereafter succeeding to such a position within 5 days of such succession, a written certification that he or she:

(1) has read, understands, and agrees to abide by the terms of this Final Judgment; and

(2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

iv. maintain a record of persons to whom this Final Judgment has been distributed and from whom, pursuant to Section 4(e)(iii), such certifications have been obtained;

v. establish and maintain a means by which employees can report potential violations on a confidential basis; and

vi. report immediately to Plaintiffs and the Court any violation of this Final Judgment.

f. The Chief Compliance Officer may be removed only by the Chief Executive Officer with the concurrence of the Compliance Committee.

g. Microsoft shall, with the supervision of the Chief Compliance Officer, maintain for a period of at least four years the e-mail of all Microsoft officers, directors and managers

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engaged in software development, marketing, sales and developer relations related to Platform Software.

5. Compliance Inspection. This section shall remain in effect throughout the term of this Final Judgment.

a. For purposes of determining or securing implementation of or compliance with this Final Judgment, including the provisions requiring a plan of reorganization, or determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time:

i. Duly authorized representatives of a Plaintiff, upon the written request of the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice, or the Attorney General of a Plaintiff State, as the case may be, and on reasonable notice to Microsoft made to its principal office, shall be permitted:

(1) Access during office hours to inspect and copy or, at Plaintiffs' option, demand Microsoft provide copies of all books, ledgers, accounts, correspondence, memoranda, source code, and other records and documents in the possession or under the control of Microsoft (which may have counsel present), relating to the matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of Microsoft and without restraint or interference from it, to interview, either informally or on the record, its officers, employees, and agents, who may have their individual counsel present, regarding any such matters.

ii. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice, or the Attorney General of a Plaintiff State, as the case may be, made to Microsoft at its principal offices, Microsoft shall submit such written reports, under oath if requested, as may be requested with respect to any matter contained in this Final Judgment.

iii. No information or documents obtained by the means provided in this Article shall be divulged by a representative of a Plaintiff to any person other than a duly authorized representative of a Plaintiff, except in the course of legal proceedings to which the Plaintiff is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

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iv. If at the time information or documents are furnished by Microsoft to a Plaintiff, Microsoft represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Microsoft marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then ten (10) calendar days notice shall be given by a Plaintiff to Microsoft prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Microsoft is not a party.

6. Effective Date, Term, Retention of Jurisdiction, Modification

a. This Final Judgment shall take effect 30 days after the date on which it is entered; provided, however that sections 1.b and 2 (except 2.d) shall be stayed pending completion of any appeals from this Final Judgment.

b. Except as provided in section 2.d., the provisions of this Final Judgment apply to Microsoft, the Separated Business, the Remaining Business, their successors and assigns (including any transferee or assignee of any ownership rights to, control of, or ability to license the patents referred to in this Final Judgment), their subsidiaries, affiliates, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

c. This Final Judgment shall expire at the end of ten years from the date on which it takes effect.

d. The Court may act *sua sponte* to issue orders or directions for the construction or carrying out of this Final Judgment, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

e. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

f. In accordance with the Court's Conclusions of Law, the plaintiff States shall submit a motion for costs and fees, with supporting documents as necessary, no later than 45 days after the entry of this Final Judgment.

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7. Definitions.

a. "Agreement" means any agreement, arrangement, alliance, understanding, or joint venture, whether written or oral.

b. "Application Programming Interfaces (APIs)" means the interfaces, service provider interfaces, and protocols that enable a hardware device or an application, Middleware, or server Operating System to obtain services from (or provide services in response to requests from) Platform Software in a Personal Computer and to use, benefit from, and rely on the resources, facilities, and capabilities of such Platform Software.

c. "Applications Business" means all businesses carried on by Microsoft Corporation on the effective date of this Final Judgment except the Operating Systems Business. Applications Business includes but is not limited to the development, licensing, promotion, and support of client and server applications and Middleware (*e.g.*, Office, BackOffice, Internet Information Server, SQL Server, etc.), Internet Explorer, Mobile Explorer and other web browsers, Streaming Audio and Video client and server software, Mobile Explorer, transaction server software, SNA server software, indexing server software, XML servers and parsers, Microsoft Management Server, Java virtual machines, Frontpage Express (and other web authoring tools), Outlook Express (and other e-mail clients), Media player, voice recognition software, Net Meeting (and other collaboration software), developer tools, hardware, MSN, MSNBC, Slate, Expedia, and all investments owned by Microsoft in partners or joint venturers, or in ISVs, IHVs, OEMs or other distributors, developers, and promoters of Microsoft products, or in other information technology or communications businesses.

d. "Bind" means to include a product in an Operating System Product in such a way that either an OEM or an end user cannot readily remove or uninstall the product.

e. "Business" means the Operating Systems Business or the Applications Business.

f. "Communications Interfaces" means the interfaces and protocols that enable software installed on other computers (including servers and handheld devices) to interoperate with the Microsoft Platform Software on a Personal Computer.

g. "Covered OEM" means the 20 OEMs with the highest volume of sales of Personal Computers in the United States in the previous 12 months.

h. "Covered Shareholder" means a shareholder of Microsoft on the date of entry of this Final Judgment who is a present or former employee, officer or director of Microsoft

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and who owns directly or beneficially more than 3 percent of the voting stock of the firm.

i. "Default Middleware" means Middleware configured to launch automatically (that is, by "default") to provide particular functionality when other Middleware has not been selected for this purpose. For example, a default browser is Middleware configured to launch automatically to display Web pages transmitted over the Internet or an intranet that bear the .htm extension, when other software has not been selected for this purpose.

j. "End-User Access" means the invocation of Middleware directly or indirectly by an end user of a Personal Computer or the ability of such an end user to invoke Middleware. "End-User access" includes invocation of Middleware by end users which is compelled by the design of the Operating System Product.

k. "IHV" means an independent hardware vendor that develops hardware to be included in or used with a personal computer.

l. "Implementation of the Plan" means full completion of all of the steps described in section 1.c.

m. "Intellectual Property" means copyrights, patents, trademarks and trade secrets used by Microsoft or licensed by Microsoft to third parties.

n. "ISV" means any entity other than Microsoft (or any subsidiary, division, or other operating unit of any such other entity) that is engaged in the development and licensing (or other marketing) of software products intended to interoperate with Microsoft Platform Software.

o. "Middleware" means software that operates, directly or through other software, between an Operating System and another type of software (such as an application, a server Operating System, or a database management system) by offering services via APIs or Communications Interfaces to such other software, and could, if ported to or interoperable with multiple Operating Systems, enable software products written for that Middleware to be run on multiple Operating System Products. Examples of Middleware within the meaning of this Final Judgment include Internet browsers, e-mail client software, multimedia viewing software, Office, and the Java Virtual Machine. Examples of software that are not Middleware within the meaning of this Final Judgment are disk compression and memory management.

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p. "Middleware Product" means

i. Internet browsers, e-mail client software, multimedia viewing software, instant messaging software, and voice recognition software, or

ii. software distributed by Microsoft that

(1) is, or has in the applicable preceding year been, distributed separately from an Operating System Product in the retail channel or through Internet access providers, Internet content providers, ISVs or OEMs, and

(2) provides functionality similar to that provided by Middleware offered by a competitor to Microsoft.

q. "Non-Covered Shareholder" means a shareholder of Microsoft who is not a Covered Shareholder on the date of entry of this Final Judgment.

r. "OEM" means the manufacturer or assembler of a personal computer.

s. "Operating System" means the software that controls the allocation and usage of hardware resources (such as memory, central processing unit time, disk space, and peripheral devices) of a computer, providing a "platform" by exposing APIs that applications use to "call upon" the Operating System's underlying software routines in order to perform functions.

t. "Operating System Product" means an Operating System and additional software shipped with the Operating System, whether or not such additional software is marketed for a positive price. An Operating System Product includes Operating System Product upgrades that may be distributed separately from the Operating System Product.

u. "Operating Systems Business" means the development, licensing, promotion, and support of Operating System Products for computing devices including but not limited to (i) Personal Computers, (ii) other computers based on Intel x-86 or competitive microprocessors, such as servers, (iii) handheld devices such as personal digital assistants and cellular telephones, and (iv) television set-top boxes.

v. "Personal Computer" means any computer configured so that its primary purpose is to be used by one person at a time, that uses a video display and keyboard (whether or not the video display and keyboard are actually included), and that contains an Intel

x86, successor, or competitive microprocessor, and computers that are commercial substitutes for such computers.

w. "Plaintiff" means the United States or any of the plaintiff States in this action.

x. "Plan" means the final plan of reorganization approved by the Court.

y. "Platform Software" means an Operating System or Middleware or a combination of an Operating System and Middleware.

z. "Remaining Business" means whichever of the Operating Systems Business and the Applications Businesses is not transferred to a separate entity pursuant to the Plan.

aa. "Separated Business" means whichever of the Operating Systems Business and the Applications Businesses is transferred to a separate entity pursuant to the Plan.

bb. "Technical Information" means all information, regarding the identification and means of using APIs and Communications Interfaces, that competent software developers require to make their products running on any computer interoperate effectively with Microsoft Platform Software running on a Personal Computer. Technical information includes but is not limited to reference implementations, communications protocols, file formats, data formats, syntaxes and grammars, data structure definitions and layouts, error codes, memory allocation and deallocation conventions, threading and synchronization conventions, functional specifications and descriptions, algorithms for data translation or reformatting (including compression/ decompression algorithms and encryption/decryption algorithms), registry settings, and field contents.

cc. "Timely Manner": disclosure of APIs, Technical Information and Communications Interfaces in a timely manner means, at a minimum, publication on a web site accessible by ISVs, IHVs, and OEMs at the earliest of the time that such APIs, Technical Information, or Communications Interfaces are (1) disclosed to Microsoft's applications developers, (2) used by Microsoft's own Platform Software developers in software released by Microsoft in alpha, beta, release candidate, final or other form, (3) disclosed to any third party, or (4) within 90 days of a final release of a Windows Operating System Product, no less than 5 days after a material change is made between the most recent beta or release candidate version and the final release.

dd. "Windows Operating System Product" means software code (including source code and binary code, and any other form in which Microsoft distributes its Windows Operating Systems for Personal Computers) of Windows 95, Windows 98, Windows 2000 Professional, and their successors, including the Windows Operating Systems for

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Personal Computers codenamed "Millennium," "Whistler," and "Blackcomb," and their successors.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS REPLY MEMORANDUM IN SUPPORT OF MOTION TO AUTHORIZE A SUPERSEDEAS BOND AND OTHER CONDITIONS FOR SECURITY OF THE JUDGMENT

HIGHLY CONFIDENTIAL TIER 1 INFORMATION UNDER PROTECTIVE ORDER

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FILED UNDER SEAL

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO AUTHORIZE A SUPERSEDEAS BOND AND OTHER CONDITIONS FOR SECURITY OF THE JUDGMENT

Conwood acknowledges, as it is compelled to do, that courts have waived the supersedeas bond requirement, or have allowed a substantially reduced bond, where either the judgment debtor is a financially stable company with sufficient funds to pay the ultimate judgment against it or where the full bond would irreparably harm the judgment debtor. U.S. Tobacco has shown that both of these circumstances exist in this case. Accordingly, a full supersedeas bond is neither necessary nor appropriate pending the outcome of U.S. Tobacco's post-trial motions and any appeal of the final judgment in this case.

U.S. Tobacco does not request that the Court waive the bond requirement entirely. To the contrary, U.S. Tobacco proposes a bond in the amount of the jury's verdict, $350 million, or the

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amount of any reduced award of compensatory damages entered by the Court, plus additional conditions, which, together, are more than adequate to protect Conwood's interest as a judgment creditor. Any suggestion that this is not an "extraordinary" case, or that an approximately $100 million fee for a bond is simply the "cost of doing business" to secure appellate review, is just not credible. Under the unique set of facts in this case, a reduced supersedeas bond would not be extraordinary; it would be perfectly reasonable to protect the interests of all parties. The bond proposed by U.S. Tobacco should therefore be authorized.

ARGUMENT

Pursuant to Fed. R. Civ. P. 62(d), an appellant may obtain a stay of a judgment pending appeal "by giving a supersedeas bond." While an appellant's posting of a supersedeas bond for the full amount of the judgment, interest and costs automatically results in a stay under Rule 62(d), courts have the inherent power to grant a stay of enforcement based upon a bond in a lesser amount or no bond at all, with or without security other than a bond. 11 Charles A. Wright, Arthur R. Miller & Mary K. Kane, FEDERAL PRACTICE AND PROCEDURE, Section 2905, at 518-22 (2d ed. 1995).

In its memorandum in opposition to U.S. Tobacco's motion to authorize a supersedeas bond and other conditions for security of the judgment, Conwood begrudgingly acknowledges, as it is compelled by an abundance of case law to do, that courts have the discretion to provide for the form and amount of security for a stay pending appeal other than a full supersedeas bond. Applying that discretion, courts have waived or modified the supersedeas bond requirement where the judgment debtor demonstrates either its financial ability to pay the money judgment or where the judgment debtor's financial condition is such that posting a full bond would impose an undue financial burden. See, e.g., Poplar Grove Planting and Ref. Co. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1191 (5th

Cir. 1979). In determining an appropriate bond, courts "look to general equitable principles. Accordingly, when setting supersedeas bonds courts seek to protect judgment creditors as fully as possible without irreparably injuring judgment debtors." Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1154 (2nd Cir. 1986), rev'd on other grounds, 481 U.S. 1 (1987).

Here, the bottom line is that U.S. Tobacco has more than adequately demonstrated both (a) UST Inc.'s financial ability to pay the money judgment, and (b) that requiring a supersedeas bond in an amount materially more than $350 million would pose a serious and substantial risk of irreparable harm to UST Inc.'s business operations and financial value. In extraordinary cases such as this, equitable principles compel granting the relief U.S. Tobacco requests regarding the supersedeas bond.

A. Conwood Cannot Dispute UST Inc.'s Financial Ability To Pay The Judgment.

In its memorandum in support of its motion to authorize a supersedeas bond, U.S. Tobacco provided solid proof of its financial ability to pay the judgment against it. As demonstrated in the report of American Appraisal Associates, Inc. – the oldest and largest independent valuation firm in the world, operating 60 offices worldwide and an industry leader since 1894 – the current fair value of UST Inc.'s assets, net of liabilities (except for the judgment in this case) is approximately $3.9 billion, or well over three times the anticipated after-tax cost of the judgment. (See Defendants' Memorandum, D'Alessandro Decl., ¶ 3, Ex. A.) Conwood does not dispute this analysis or any of the additional proof of financial integrity provided by U.S. Tobacco in support of its motion – which, alone, should decide the issue. Nor does Conwood dispute that, on a cash flow basis, the most relevant indication of an ability to pay any judgment, U.S. Tobacco makes before-tax profits of one-half to two-thirds of the existing judgment every year.

Instead, in an attempt to direct the Court's attention away from this solid proof of U.S. Tobacco's indisputable ability to satisfy any judgment in this case, Conwood points to irrelevant figures and facts, including for example, the equity of U.S. Tobacco's stockholders ($200 million) or a purported "fair market value" based on what buyers are currently willing to pay for shares of UST Inc. stock – even then without accounting for the dip in stock price following the judgment. None of these purported facts and figures, however, do anything to refute, or even challenge, the report of the leading professional business appraiser in the world, which concluded that the current fair value of UST Inc.'s net assets is $3.9 billion.

As an initial matter, U.S. Tobacco vehemently disputes that the judgment debt is likely to approach $1.3 billion after all appeals have been resolved. To the contrary, U.S. Tobacco's post-trial motions raise serious legal issues for the Court to consider and resolve before any review of this case on appeal, and the outcome of these motions or any appeal may be that Conwood is entitled to no recovery at all. Even if the judgment is allowed to stand, Conwood is definitely putting the cart before the horse by concluding that the final judgment will include an award of attorney fees and expenses based upon the patently inadequate request it has filed. In any event, even if the final award were $1.3 billion, UST Inc.'s $3.9 billion in net assets is obviously sufficient to cover it.

The other figures thrown out by Conwood are equally irrelevant. U.S. Tobacco's after-tax income in 1999, the shareholders' equity of $200 million, and the price of UST Inc. stock are consistent with, and certainly do not refute, the report of a professional business appraiser that the current value of UST Inc.'s assets is $3.9 billion.[1]

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[1] As to pending lawsuits, obviously, it is pure speculation that any of them will result in damages against the company. Conwood admits that no one can assess with certainty whether (continued...)

Conwood's reliance upon U.S. Tobacco's own representation that it would have to accept potentially onerous collateralization requirements and restrictive covenants (or excessive fees) in order to obtain a full bond does not change the analysis. Conwood concludes that this fact necessarily means that U.S. Tobacco's lenders believe that UST may not be able to pay off the bond and insist upon a panoply of protections in order to limit the risk. (Conwood's Memorandum, pp. 9-10) In the circumstances of securing funds for non-operating purposes and under a particularly tight time frame, the commercial credit market, i.e., banks, typically would require nearly full collateralization for all loans or bonds without regard to any specific risk analysis. A collateralization requirement, however, does not suggest that the banks are concerned about U.S. Tobacco's ability to pay, if necessary; otherwise, they would never lend the funds at all.

Conwood's legal analysis is equally off the point. Conwood argues that the cases cited by U.S. Tobacco involve circumstances in which the net worth of the judgment debtor was many times the amount of the damage award and that other factors supporting the waiver of a bond were present. See, e.g., Fed. Prescription Serv., Inc. v. Am. Pharmaceutical Assoc., 636 F.2d 755 (D.C. Cir. 1980) (the net worth of the judgment debtor was 47 times the amount of the damage award and the judgment debtor was a long-time resident of the district). Conwood is, of course, simply ignoring

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[1] (...continued)
lawsuits will impair U.S. Tobacco's ability to satisfy Conwood's judgment, but boldly and incorrectly asserts that "Rule 62(d) mandates that Conwood should not have to take *any* risk in this regard." (Conwood's Memorandum, p. 9) To the contrary, as many of the cases cited by U.S. Tobacco in support of its motion clearly explain, "when setting supersedeas bonds courts seek to protect judgment creditors as fully as possible without irreparably injuring judgment debtors . . . ." Texaco, Inc., 784 F.2d at 1154. Accordingly, an inflexible bond requirement would be inappropriate in two circumstances, both of which are clearly present in this case. See Olympia Equip. Leasing Co. v. Western Union Tel. Co., 786 F.2d 794, 796 (7th Cir. 1986).

the general principle to be gleaned from those cases, which is that a full supersedeas bond is not necessary where, as here, the judgment debtor is a financially stable company with sufficient funds to pay the ultimate judgment against it. No court has set out a bright line rule that the judgment debtor's net worth must be a specified amount or percentage in excess of the final award; instead, the bond has been waived where courts are convinced that the judgment debtor's financial integrity is such that the judgment creditor's rights will be protected. The proof provided by U.S. Tobacco is more than adequate to accomplish this result.

In any event, U.S. Tobacco does not request a complete waiver of the bond requirement, but is proposing a $350 million cash bond, plus other conditions for the security of Conwood.[2] Instead of recognizing these conditions as those imposed by courts under similar circumstances for the protection of a judgment creditor, Conwood makes the untenable suggestion that these conditions would somehow result in the Court being required to engage in "day-to-day supervision of UST's business activities." (Conwood's Memorandum, p. 11) Conwood's "concern" for the Court is patently unfounded and, not surprisingly, was never raised by the courts in any of the cases which have imposed the very conditions proposed by U.S. Tobacco. (See U.S. Tobacco's Memorandum, p. 8)

Finally, Conwood completely ignores probably the most analogous case, at least in terms of unprecedented magnitude, Texaco, 784 F.2d 1113, wherein a $12 billion judgment was entered in

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[2] U.S. Tobacco asks the Court to continue the stay of the judgment subject to UST Inc. posting a cash bond of $350 million (or any reduced damages award entered by the Court), which is the amount of the jury's verdict, UST Inc. providing its financial statements, UST Inc. not entering into or conducting any corporate transactions that would jeopardize any security responsible for the judgment and giving notice to the Court and Conwood of any extraordinary dividend or other distribution, other than regular quarterly dividends to UST Inc.'s shareholders.

favor of Pennzoil. The court concluded that Pennzoil's interest in protecting the full amount of its judgment during an appellate process was reasonably secure because Texaco's net worth, appraised at over $22 billion, was almost twice the amount of Pennzoil's judgment ($12 billion). U.S. Tobacco's appraised net worth is over three times the amount of the judgment. Moreover, Texaco was required to post $1 billion as security, which, proportionally, is substantially less than the amount which U.S. Tobacco proposes in this case. Id. at 1157.

As the Texaco circumstances illustrate, Conwood's arguments are insufficient to rebut U.S. Tobacco's valid proof that it is a financially stable company with sufficient funds to pay the ultimate judgment against it, and that a full supersedeas bond is therefore not necessary to protect Conwood's interest pending the outcome of post-trial motions and an appeal, if any. Moreover, if any changed circumstances were to come to light that result in a reasonable belief by Conwood that its judgment is not adequately protected, Conwood would be free to ask the Court to increase the cash bond or to impose other conditions necessary to protect and secure its judgment during the stay.

B. UST Inc. Cannot Post A Bond Materially Greater Than The Proposed $350 Million Without Incurring Irreparable Harm

As amply explained in its memorandum in support of its motion to authorize supersedeas bond, requiring a supersedeas bond in an amount materially more than $350 million would pose a serious and substantial risk of irreparably harming UST Inc.'s business operations and financial value. More specifically, the potential collateralization conditions and restrictive covenants of such a bond would seriously encumber the business operations and growth strategies of the company. (U.S. Tobacco's Memorandum, pp. 14-18)

In an attempt to minimize the potential severity and irreparable nature of the consequences described in U.S. Tobacco's memorandum, Conwood argues that the fact that U.S. Tobacco "is financially able to post a supersedeas bond requires that it must do so." (Conwood's Memorandum, p. 12) Conwood then attempts to distinguish the cases cited by U.S. Tobacco by arguing that, in those cases, the judgment debtors were not able to post the full bond. Conwood's view of irreparable harm, especially in the circumstances of this case, is, however, much too narrow.

The law is clear, for example, that U.S. Tobacco is not required to demonstrate its inability to post the bond (although there is always a risk of not obtaining a bond in such a short time frame), but rather to show that a full bond would impose an undue financial burden or irreparable injury. See Poplar Grove, 600 F.2d at 1191 ("[I]f the judgment debtor's present financial condition is such that the posting of a full bond would impose an undue financial burden, the court similarly is free to exercise a discretion to fashion some other arrangement for substitute security through an appropriate restraint on the judgment debtor's financial dealings, which would furnish equal protection to the judgment creditor."); Texaco, 784 F.2d 1154055 (in setting supersedeas bonds courts seek to protect judgment creditors as fully as possible without irreparably injuring judgment debtors . . . .").

Under the appropriate standard for assessing irreparable harm, Conwood's persistent focus on U.S. Tobacco's ability to post a full bond does nothing to refute U.S. Tobacco's proof of irreparable harm and runs directly contrary to Conwood's argument that its judgment would be in jeopardy during the two-to-three year appeal process. Conwood's argument, if anything, provides further support for the obvious fact that UST Inc. is financially able to pay the judgment and, on this basis, the proposed bond should be authorized. Conwood is wrong in its suggestion that the alleged

harmful consequences of a full supersedeas bond are mere "inconveniences" which have never been found to justify waiver or partial waiver of the supersedeas bond requirement. (Conwood's Memorandum, p. 14) To the contrary, many of the damaging and costly consequences of requiring a full bond for a "titanic" judgment were set out in Texaco, 784 F.2d at 1133. It is true that, due to the size of the $12 billion judgment at issue, Texaco could not meet the mandatory bond requirement. Nevertheless, the focus of the Second Circuit was not the inability of Texaco to post a bond for the full amount of the judgment, but the catastrophic consequences of requiring it. See Id. at 1138. The same principle applies in this case. While posting a full bond may not render U.S. Tobacco insolvent, requiring substantially more than the proposed $350 million bond would clearly result in an undue and unnecessary financial burden and irreparable harm to its business.

In the end, Conwood is forced to fall back on an argument that, if accepted, would fully displace the Court's discretion, i.e., that having to pay costs and fees in order to obtain a bond can never amount to irreparable harm because this is simply the "cost of doing business." (Conwood's Memorandum, pp. 15-16) While the courts in the cases cited by Conwood might have been willing to set out that proposition based on the specific facts in those cases, the judgments in those cases were far smaller than the amount of the judgment in this case. See, e.g., Maharan v. Berkshire Life Ins. Co., 948 F. Supp. 261 (W.D.N.Y. 1996) (judgment in the amount of $445,095).

More importantly, in those cases, the controlling factor for the court, in requiring a full bond, was the judgment debtor's total failure to show any resulting harm. Id. at 263 ("defendant has not given the court any reason to believe that incurring this cost will harm it or the public interest."); Liberty Mutual Ins. Co. v. Arbogast, 769 F. Supp. 130 (S.D.N.Y. 1991) (full bond required, no harm shown); Grand Union Co. v. Food Employers Labor Relations Ass'n, 637 F. Supp. 356 (D.D.C.

1986)(requiring a full bond where the responsible party failed to show hardship as a result of posting a full bond and where the party may have left the jurisdiction).

Here, the "cost of doing business" simply to seek an appeal – approximately $100 million, if not more – would itself constitute one of the larger antitrust verdicts in recent years. Contrary to Conwood's suggestion, this is, indeed, a unique case in which rote application of contrived standards will not work, and the Court's considered discretion and judgment is required.

C. The Validity Of U.S. Tobacco's Post-trial Motions Are A Factor To Be Considered.

Conwood argues that the fact that U.S. Tobacco has raised highly meritorious issues in its post-trial motions is irrelevant to the Court's consideration of the supersedeas bond requirement. While this fact alone would not be a sufficient basis for waiving or modifying the bond requirement, courts clearly have considered the existence of such arguments in making the supersedeas bond determination. See Morgan Guar. Trust Co. of New York v. Republic of Palau, 702 F. Supp. 60 (S.D.N.Y. 1988) (citing difficult legal questions); Texaco, 784 F.2d at 1153 (the issue before the Second Circuit was "not whether Texaco should have prevailed on the merits in the Texas action but whether its Texas appeal presents non-frivolous issues for resolution.").

CONCLUSION

For the reasons stated in its two briefs, U.S. Tobacco asks the Court to authorize UST Inc. to post a cash bond in the amount of $350 million, or in the amount of any reduced award for compensatory damages entered by the Court, and to abide by the other stated conditions for the security of Plaintiffs with respect to the judgment in their favor pending the Court's ruling on U.S. Tobacco's post-trial motions and the outcome of any appeal by U.S. Tobacco. To the extent that the

Court would consider requiring greater security for the judgment or different conditions which might adversely impact U.S. Tobacco's business, U.S. Tobacco respectfully requests a hearing to discuss the matter with the Court.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
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CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

REPLY MEMORANDUM IN SUPPORT OF
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UNITED STATES DISTRICT COURT
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REPLY MEMORANDUM IN SUPPORT OF
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Conwood's response to U.S. Tobacco's motion for judgment as a matter of law confirms that this Court can uphold the jury's verdict only by revolutionizing Section 2 of the Sherman Act in direct contravention of long-established Sixth Circuit and Supreme Court precedents. Specifically, Conwood is asking this Court to be the first court to hold:

- that monopoly power may be inferred solely from a high sales share coupled with high prices and profit margins, even though all other marketplace factors indicate a lack of monopoly power and smaller competitors (including Conwood) have similar prices and margins for these heterogeneous products;

- that it can be an unlawful "use" of monopoly power for a company simply to influence customer decisions without engaging in coercion of any kind and without entering into agreements that preclude customers – here, retailers – from choosing whatever products, racks, or POS they desire at any time for any reason;

- that it can be an unlawful "use" of monopoly power to engage in a variety of marketing practices that are desired by retail customers, are commonly used by even the smallest moist snuff competitors, and are an essential aspect of the efficient operation of the retail industry in all product categories;

- that, ultimately, it can be an unlawful "use" of monopoly power to engage in sporadic acts of unfair competition – e.g., making an allegedly "misleading" suggestion to a retailer or removing a competitor's rack without retailer approval – even though such conduct, to the extent it occurs, is common among all competitors in the industry;

- that "harm to competition" can be established even where it is undisputed that market output has increased, the number of brands has more than quadrupled since 1990 and price and non-price competition has significantly increased, including the creation and rapid growth of a new price-value segment in the marketplace;

- that a manufacturer can be held liable under Section 2 for the direct effects of the lawful, independent, and uncoerced decisions of retail customers regarding their choices of products, racks, and POS for their stores;

- that antitrust damages may be based on the assumption that any reduction in Conwood's sales or sales share (in actuality no loss at all, but an alleged slowing of growth) was caused by the unlawful conduct of U.S. Tobacco (whatever that is found to be) and not by numerous other factors that indisputably affected Conwood's sales and share;

- that antitrust damages of over $1 billion can stand and remain unalterable no matter what conduct the Court determines may or may not be considered "exclusionary" as a matter of law, and no matter what conduct a reasonable jury could determine to be "exclusionary" as a matter of fact; and

- that, just in case the damages analysis of a plaintiff's expert is ultimately found to be defective (as it should be here), plaintiff may still recover over $1 billion simply by placing its senior executive on the stand to assert – in direct contradiction of market reality – that absent defendants' misconduct (again, whatever that turns out to be) the plaintiff would have approximately doubled its sales share from 1990 to 1998.

Each and every one of these principles must be accepted in order to uphold the jury's verdict, yet each of them has long been rejected as a viable legal basis to find Section 2 liability and damages.

Conwood's overarching response to these and other critical legal questions – which now must be applied to a full trial record – is twofold. First, Conwood claims that, because the Court denied U.S. Tobacco's motions for summary judgment and to exclude Dr. Leftwich's testimony under Daubert, the Court's role is over as a matter of "law of the case." Pl. Mem. at 3-5.

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That position, of course, is baseless in law; moreover, it ignores the stated qualifications contained in the Court's rulings on those motions. Second, Conwood relies on the equally specious suggestion that if the jury was "properly instructed," this Court is now precluded from determining, under Fed. R. Civ. P. 50(a)(1), that Conwood failed to present a legally sufficient evidentiary basis for a reasonable jury to find for Conwood on each element of its Section 2 monopolization claim. The Court's role on a motion for judgment as a matter of law, however, is not so easily abrogated.

Conwood's concern that the Court will now assess the sufficiency of the evidence on a full trial record is understandable. In sharp contrast to what Conwood's counsel constantly suggested to the jury, the Court will not find evidence of "coercion" or any "use" of monopoly power simply by accepting the analogy of U.S. Tobacco to a large man walking down the street who thus intimidates a short economist who happens to be standing nearby, Tr. 3/3 at 76-77 (Kamien), or Conwood's repeated characterization of U.S. Tobacco as an "800 pound gorilla."

Likewise, in contrast to what Conwood's counsel repeatedly suggested to the jury, the Court should not define competition "on the merits" as a process that somehow magically skips over the needs and desires of retailers. On the contrary, the full trial record confirmed that the competition among moist snuff suppliers to influence the decisions of retailers – to purchase products, to choose display racks, and to choose POS materials – is the very competition that is at issue in this case. Thus, the views of retailers regarding what constitutes competition "on the merits" – including their desire for category management assistance and rack innovation – are not just relevant; they define the very process that the antitrust laws are designed to protect. Seen in this proper light, Conwood's attack on U.S. Tobacco's marketing practices as "exclusionary" is itself an anticompetitive attempt to insulate Conwood from that competitive process. Indeed, if the Court

were to find that U.S. Tobacco violated Section 2 of the Sherman Act simply by influencing retailers' decisions (or attempting to do so), then the Court would have held that an alleged monopolist, especially a supplier to retail customers, is not allowed to compete at all. But that view of Section 2 was rejected by the Supreme Court many decades ago.

Finally, Conwood understandably does not want the Court to make its own assessment, under Rule 50(a), of Conwood's damages evidence, including its foundational "assumptions" that the Court earlier held must be proven at trial. See Feb. 23, 2000 Order at 4. Where, for example, is the evidence regarding why Conwood could not achieve what its damages expert called a "foothold" in 46 out of 49 states prior to 1990? There was none. Where is the evidence regarding how and why, "but for" some undefined U.S. Tobacco misconduct, Conwood's share would have increased by 500%, 600%, 700% in many of those states, even though competitive conditions had greatly intensified? Again, there was none. Where is the evidence that Conwood's sales and sales share were not, in fact, being affected by the great influx of new competitive products in the 1990's and the resulting decisions of retailers – for example, the decisions of many retailers to carry Timberwolf instead of Cougar, or their decisions to carry a limited selection of products rather than every moist snuff product being offered by manufacturers? Again, there was none. Neither Mr. Rosson – Conwood's newly declared damages expert – nor Dr. Leftwich even attempted to deal with these and other inherent defects in Conwood's damages theory and analysis. Indeed, the recently rejected damages study in Concord Boat appears rigorous compared to what Dr. Leftwich did in this case. This Court has a continuing obligation under Rule 50 and Daubert to reject the fundamentally deficient model and opinion presented by Dr. Leftwich at trial.

In sum, Conwood's response to U.S. Tobacco's motion for judgment as a matter of law confirms that Conwood's case is, indeed, paper thin. It is a story strung together solely from what Conwood's counsel and its parade of experts could read into a selection of U.S. Tobacco documents. But it is a story that, in Conwood's own words, "fails to grapple with" the economic reality of what retailers desire in the marketplace, what U.S. Tobacco and other competitors provide to retailers, and what is or is not actually affecting Conwood's success with retail customers. Accordingly, if this Court truly considers the undisputed facts on the whole record, the inescapable conclusion is that the moist snuff marketplace is highly competitive, the competitive process is free and open to all manufacturers, consumer choices and product output have increased substantially, and any harm that Conwood claims to have suffered since 1990 is the result of intense competition, not the lack of it. No reasonable jury could have found otherwise.

ARGUMENT

I. THE COURT'S PRIOR RULINGS ARE NOT LAW OF THE CASE

Conwood's first argument in opposition to U.S. Tobacco's motion for judgment as a matter of law is that because, at the summary judgment stage, the Court found that there were genuine issues of material fact to be decided at trial, it cannot now grant judgment as a matter of law. Conwood's argument, unsupported and unsupportable by any case law, is plainly wrong. First, judgment as a matter of law pursuant to Fed. R. Civ. P. 50 is not precluded by the denial of summary judgment under Fed. R. Civ. P. 56. It is well settled that "it is 'perfectly appropriate' for a single judge to deny preverdict motions and then enter judgment as a matter of law on a postverdict motion." 13 Charles A. Wright, et al., Federal Practice and Procedure § 4478 (2000) (citing Flibotte v. Pennsylvania Truck Lines, 131 F.3d 21, 24- 25 (1st Cir. 1997), cert. denied, 523 U.S. 1123

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(1998)); see also St. Louis Convention & Visitors Comm'n v. National Football League, 154 F.3d 851, 860 (8th Cir. 1998) (denying summary judgment "did not control the outcome of the Rule 50 motion," which was "made and considered after the court had had the benefit of over four weeks of trial").

Second, the Court's earlier ruling on summary judgment was limited to its determination that there existed genuine issues of material fact, on which Conwood had the burden of proof at trial; it is not, as the Court itself recognized, a finding in advance of trial that Conwood had already met that burden of proof. See, e.g., Feb. 17, 2000 Order at 9-10. For example, the Court expressly held that Conwood had the burden of proving that product, rack, and POS selections were something other than the independent, uncoerced decisions of retailers. Id. at 10. At trial, however, Conwood failed to present any evidence whatsoever of coercion. And, in fact, all retailer testimony was specifically to the contrary. See, e.g., Tr. 3/14 at 117-18 (Luckett) (U.S. Tobacco never dictated, coerced, or made threats with respect to racks, P.O.S., or products). Likewise, in its Daubert opinion, the Court highlighted, among other things, that Dr. Leftwich's analysis would still be defective if "there is no basis for critical assumptions or the assumptions are shown to be false," Feb. 23, 2000 Order at 4 – again, defects that were starkly revealed at trial. See infra Section VIII.

Accordingly, Conwood cannot avoid judicial scrutiny of the verdict by asserting "law of the case."

II. U.S. TOBACCO DOES NOT POSSESS MONOPOLY POWER

Conwood does not dispute that, to establish that a defendant possesses monopoly power, a plaintiff must establish that the defendant had the ability to control prices or exclude competition. Nor does Conwood even attempt to address the numerous cases cited by U.S. Tobacco

granting summary judgment or judgment as a matter of law based on market factors, also present on this record, that precluded a finding of monopoly power, see Def. Mem. at 7-10, including Tarrant Service Agency, Inc. v. American Standard, Inc., 12 F.3d 609, 615-16 (6th Cir. 1993) (affirming grant of judgment as a matter of law after adverse jury verdict because plaintiff did not demonstrate that defendant had the power to control prices or exclude competition in a relevant market).[1] Instead, Conwood argues that it offered sufficient "direct" and "indirect" evidence for a reasonable jury to conclude that U.S. Tobacco had the ability to control prices and exclude competition, relying particularly on proof of U.S. Tobacco's sales share, price increases and "eye-popping" profit margins. Pl. Opp. at 11. As a matter of law, however, none of these factors – alone or combined – can support a jury finding of monopoly power.

With respect to U.S. Tobacco's sales share, for example, Conwood simply ignores the applicable case law cited by U.S. Tobacco in its moving papers. See Def. Mem. at 8 n.3 (citing Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826-27 (6th Cir. 1982) ("Market share alone . . . is not enough to determine a firm's capacity to achieve monopoly. The real test is whether [defendant] possessed sufficient market power to achieve its aims.")). Nor may Conwood rely on the Sixth Circuit's factual observations in PSI Repair Services, Inc. v. Honeywell, Inc., 104 F.3d 811, 821 (6th Cir. 1997); PSI does not create a rule of law that a 74% sales share equates to monopoly power. See id. ("there is no magical percentage of market power that will qualify as monopoly power under § 2").

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[1] Conwood also does not dispute that it did not offer sufficient evidence to meet its burden of proof that the relevant market in this case included only moist snuff products. See Def. Mem. at 7 n.2.

Similarly, Conwood's suggestion that high prices and margins can suffice to establish monopoly power has long been rejected as a matter of law in markets involving the sale of differentiated products – for example, as here, where different product types and specific brands command high degrees of consumer loyalty. As the Seventh Circuit explained in Blue Cross & Blue Shield United v. Marshfield Clinic, 65 F.3d 1406 (7th Cir. 1995):

> [Plaintiff] also asked the jury to infer monopoly power from [defendant's] high prices and high rate of return, relative to the prices and rates of return of its competitors. But when dealing with a heterogeneous product or service . . . a reasonable finder of fact cannot infer monopoly power just from higher prices – the difference may reflect a higher quality more costly to provide – and its always treacherous to try to infer monopoly power from a high rate of return . . . . [T]here is not even a good economic theory that associates monopoly power with a high rate of return.

Id. at 1411-12 (citation omitted). The evidence here is undisputed that Conwood's prices and margins are substantially similar to U.S. Tobacco's. Tr. 3/23 at 59-60 (Scheffman) (evidence demonstrates that Conwood historically chose to follow U.S. Tobacco price increases, rather than compete on price). Thus, even more so than in Marshfield Clinic, the factors relied on by Conwood – especially in light of the full trial record – cannot be a reasonable basis for a jury to infer that U.S. Tobacco possesses monopoly power.

The law remains, in the Sixth Circuit and elsewhere, that the existence of price competition, a declining market share, and entry and expansion are all indicative of a competitive market in which no firm has the power to control prices or exclude competition. The undisputed evidence establishing all of these factors defeats any finding that U.S. Tobacco has monopoly power.[2]

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[2] U.S. Tobacco does not argue, as Conwood contends, that each marketplace factor must be proven as if it were a separate element. U.S. Tobacco does vehemently dispute Conwood's theory (continued...)

A. There Is No Evidence That U.S. Tobacco Had the Ability To Control Prices

There is no evidence – "direct" or "indirect" – that U.S. Tobacco has the ability to control market prices. In its opposition papers, Conwood sets forth the evidence that it believes establishes this critical element of a Section 2 claim. See Pl. Opp. at 9, 14. Conwood points to the testimony of Vincent Gierer that U.S. Tobacco and Conwood raised wholesale prices and that U.S. Tobacco's and Conwood's profit margins on its premium products are high. These facts, parroted by Conwood's economic expert, are undisputed. See Pl. Opp. at 9 (collecting transcript cites). They cannot, however, provide the basis for a jury to conclude that U.S. Tobacco possesses monopoly power. See Marshfield Clinic, 65 F.3d at 1411-12 (high rate of return cannot support finding of monopoly power as a matter of law).

Conwood also cites to a U.S. Tobacco document that reads, in part: "UST does not 'deal' on its product's prices, we don't have to," PX33 at 052113, as evidence of U.S. Tobacco's ability to control prices. Pl. Mem. at 9. As a threshold point, it is significant that PX33 is an issue outline prepared by U.S. Tobacco's "DCS II team," an information systems group responsible for the planning and maintenance of software systems to support U.S. Tobacco's distribution and invoicing functions. See PX33 at 052102. There is no evidence whatsoever that the DCS II team has anything to do with developing U.S. Tobacco's pricing policies. Moreover, the same document makes it clear that the statement pertained only to U.S. Tobacco's "current pricing strategy of nation-

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[2] (...continued)
that it need only offer some evidence in support of one or two factors to satisfy its burden of proof on the issue of monopoly power. That is not the law. See, e.g., Magnus Petroleum Co. v. Skelly Oil Co., 599 F.2d 196, 201-02 (7th Cir. 1979) (a marketplace characterized by numerous price wars and evidence that defendant's share of the market decreased during the relevant period confirmed that defendant's "competitors were not foreclosed significantly from the retail market").

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wide delivered pricing" as opposed to differential pricing for individual states or wholesale customers – it did not pertain to overall pricing strategies in the marketplace at all. See PX33 at 052112. Indeed, the very same document, dated in February 1996, also makes clear that retail price competition in the marketplace was increasing: "However, with the advent of greater competition in the market, our pricing strategy has become more sensitive to overall price-to-consumer and elasticity of demand considerations." See id. No reasonable jury could have concluded from the snippet of this document to which Conwood referred that U.S. Tobacco has the ability to control prices in the marketplace.

In sharp contrast to the innuendo Conwood hopes to create, the actual evidence of marketplace facts demonstrates, consistent with the observations contained in PX33 itself, a highly competitive marketplace in which U.S. Tobacco has had to compete aggressively on price through promotional activities targeted at the retail price to consumers, irrespective of the wholesale price of moist snuff products. For example:

- Douglas Hynek, a Conwood District Manager, testified that U.S. Tobacco's price promotions were more generous than Conwood's, causing Conwood to lose sales to U.S. Tobacco products. Tr. 3/9 at 11-12 (Hynek).

- Mr. Hynek also testified that U.S. Tobacco and Swisher were undercutting the price of Conwood's Cougar brands. Id. at 12 (Hynek).

- The evidence is undisputed that U.S. Tobacco developed the only mid-tier priced products under the brand name Rooster, offering 25% more tobacco than any competitive product at a reduced price. Tr. 3/21 at 73 (Gierer).

- U.S. Tobacco introduced Red Seal, a price-value product, again offering 25% more tobacco than any competitive product at an even lower price. Id. at 73-74 (Gierer).

- Harold Price, Swedish Match's head of sales, testified that the price of U.S. Tobacco's Red Seal product undercut Timberwolf, forcing Swedish Match to lower

its prices to consumers. Tr. 3/7 at 279-80 (Price); see also Tr. 3/13 at 36-37 (McClure).

- Mr. McClure, Swedish Match's former Chief Operating Officer and current consultant, testified that Swedish Match was hurt most by the price wars with U.S. Tobacco's Red Seal brand. Tr. 3/13 at 37-39 (McClure).

- According to Mr. Price, with Red Seal, U.S. Tobacco accelerated (not restricted) the growth of the entire price-value segment. See Tr. 3/7 at 278-79 (Price).

All of these activities represent the aggressive pricing strategies of a firm responding to intense price competition (and still losing sales share to its rivals), not of a "monopolist" that "does not have to deal on its prices."

Finally, any suggestion that U.S. Tobacco had the ability to control prices is belied by U.S. Tobacco's obvious inability to prevent the creation and growth of the moist snuff price value segment, even when Conwood claims this "800 pound gorilla" had a well-conceived corporate plan to do so. In reality, price value products, where desired by retailers because of consumer demand, have readily gained distribution; moreover, sales of price value brands – particularly Timberwolf – have grown dramatically. See Tr. 3/7 at 281 (Price). Thus, while U.S. Tobacco has no obligation under Section 2 to encourage retailers to accept lower-priced products, the evidence is undisputed that U.S. Tobacco did not and could not stop the introduction and growth of the price value segment. Instead, it joined the price-value fray and competed on price against its competitors – hardly conduct that is indicative of the power to control prices and exclude competition.

B. There Is No Evidence That U.S. Tobacco Had the Ability To Exclude Competition

Conwood's evidence of U.S. Tobacco's purported ability to exclude competitors is equally deficient as a matter of law. Conwood points to U.S. Tobacco documents referring to

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"barriers to entry," but again fails to point to any evidence of actual barriers to entry in the alleged moist snuff market.[3] Of course, this would be difficult to do considering every moist snuff company has introduced numerous new products into the marketplace, U.S. Tobacco's competitors have successfully expanded sales, and U.S. Tobacco's sales share alone has declined.[4] Indeed, the quadrupling of the number of brands in the moist snuff marketplace in the 1990s is staggering even when compared with cases holding, as a matter of law, that evidence of new competition precluded a finding of market power. See Def. Mem. at 8-9. It is no answer to suggest that the entry of new brands does not count, but only the entry of new "competitors," Pl. Mem. at 13 – new entry by "competitors," as a matter of law, includes the expansion of existing competitors. See Def. Mem. at 38-39 n.12.[5]

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[3] Conwood's attempt to elevate simple words in documents to the status of economic evidence of market conditions is without support in the law. Conwood's reliance on Cassidy v. Spectrum Rents, 959 F. Supp. 823 (E.D. Tenn. 1997), is misplaced. There, the court relied in part on documents that resolved a simple question of fact by providing "clear and convincing evidence" that the defendant knew plaintiff was injured at the time he was fired. Id. at 828. Here, in sharp contrast, Conwood is asking this Court to sustain a jury verdict on the issue of monopoly power – a complex legal issue – based on words in documents created by employees not shown to have any knowledge of economics or antitrust law.

[4] A declining market share and the ability to exclude competition cannot coexist. See Def. Mem. at 9 n.5; see Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 (6th Cir. 1982) (declining market share "belies whatever inference of capacity to monopolize that may be drawn from the size of [defendant's] market share"). It is preposterous for Conwood to suggest that U.S. Tobacco's decline in share of over 10% since 1990 was insignificant, relying solely on the opinion testimony of Dr. Kamien, who concluded, without any analysis whatsoever, that U.S. Tobacco's share should have declined like IBM's in the personal computer market. Pl. Opp. at 12.

[5] Conwood also relies on the fact that "two of the largest tobacco companies in the world tried and failed" to enter the market. Pl. Opp. at 10. Conwood, however, did not seek to discover or present to the jury any evidence concerning why these companies supposedly "failed" in their efforts to enter the market. The fact that these companies did not continue to offer moist snuff products,
(continued...)

Conwood also suggests that its own growth and the growth of Swedish Match was "restricted." Id. (again citing the testimony of Mr. Rosson and Mr. McClure). That type of self-serving opinion testimony from competitors could be offered in every antitrust case to avoid a plaintiff's burden of proving the elements of monopoly power. The antitrust laws, however, require more reliable proof of actual market factors. Conwood's reliance on the "we could have done even better" opinions of competitors cannot overcome the undisputed record evidence of the successful expansion of all of U.S. Tobacco's competitors – evidence that, as a matter of law, precludes a finding of any barriers to entry. See, e.g., Omega Envt'l., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1164 (9th Cir. 1997) (fact that new competitor grew from a 6% to 8% market share precluded finding that exclusive dealing contracts were an entry barrier that foreclosed competition); see also Def. Mem. at 8-9.

For example, it is undisputed that the sales share of Swedish Match grew from less than 1% to over 7% from its introduction in 1994 through 1999. Tr. 3/7 at 281 (Price) (Mr. Price testified that, in the first months of 1999, the Timberwolf brand grew in sales volume by approximately 49%); see id. (Mr. Price also testified that from 1994-1998, Timberwolf grew by over 700%). In fact, despite Conwood's and Swedish Match's claims of being "restricted," Swedish Match's rate of growth exceeds the rate of growth that Conwood achieved prior to 1990 (i.e., Swedish Match's 7 share points in 5 years compared to Conwood's 10 share points in 10 years). See Tr. 2/29 at 103 (Rosson) (Mr. Rosson testified that, prior to 1990, Conwood experienced the ideal

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[5] (...continued)
standing alone, is not probative of anything.

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growth rate).[6] Swedish Match's rate of growth even exceeds Dr. Leftwich's most aggressive damages "scenario." Tr. 3/8 at 35 (Leftwich) (Dr. Leftwich assumes Conwood's share would have grown by 8.1% in 8 years). Conwood does not even attempt to address this and other record evidence cited by U.S. Tobacco that clearly and unequivocally demonstrates that U.S. Tobacco had no power to exclude competition in the alleged market. See Def. Mem. at 9-10 (demonstrating that each moist snuff company successfully introduced new products and gained both in sales and in sales share during the relevant time period).

For all of these reasons, no reasonable jury could have concluded that U.S. Tobacco had the power to control prices or exclude competition in the moist snuff "market."

III. U.S. TOBACCO DID NOT "USE" MONOPOLY POWER

Conwood does not dispute the fact that a Section 2 plaintiff must prove that the alleged monopolist used its purported monopoly power in the marketplace to harm competition. Pl. Opp. at 16-17 (simply stating that the jury was properly instructed "on this score."). Nor does Conwood dispute that, in order to prove this element of a Section 2 claim, the Sixth Circuit requires proof of conduct that is "'possible or effective only if taken by a firm that dominates its smaller rivals.'" Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1428 (6th Cir. 1990) (citation omitted). Thus, a plaintiff must prove that the conduct lacks any legitimate business justification. See Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 588-95, 605-611 (1985); see also Def. Mem. at 14-15 (distinguishing cases such as R.J. Reynolds Tobacco Co.

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[6] It also is ironic that this growth of Swedish Match's price-value Timberwolf brand, characterized by Mr. Price as growing "by leaps and bounds," Tr. 3/7 at 271 (Price), occurred despite U.S. Tobacco's alleged intent to eliminate the distribution, and restrict the growth, of the price-value segment. See Pl. Opp. at 15-29.

v. Philip Morris Inc., 60 F. Supp. 2d 502 (M.D.N.C. 1999), in which retailers complained of a coercive incentive program).

Moreover, it is clear from this Court's summary judgment opinion that the Court permitted Conwood to try to prove at trial that U.S. Tobacco in fact "controlled" the types and number of competitive products in the store; that U.S. Tobacco "required" exclusive U.S. Tobacco header cards on U.S. Tobacco-provided racks; and that U.S. Tobacco in fact "imposed" restrictions on retailers in terms of what products, racks or POS could be obtained from competing moist snuff suppliers. See Feb. 17, 2000 Order at 3-4, 8-9.

As it turned out, Conwood did not prove that U.S. Tobacco "controlled," "required," or "imposed" anything. After four weeks of trial, Conwood has marshaled what evidence it believes supports U.S. Tobacco's "use" of monopoly power into one paragraph. See Pl. Opp. at 17. Rather than citing evidence that proves U.S. Tobacco actually coerced retailers in any manner, Conwood argues that U.S. Tobacco used monopoly power because (1) "only" U.S. Tobacco can act as category captain; (2) "only" U.S. Tobacco can offer "exclusive" display racks; and (3) "only" U.S. Tobacco can engage in "tortious" conduct. As described below, Conwood's evidence falls well short of that required by the Sixth Circuit and the Supreme Court. Indeed, Conwood's cited evidence falls squarely within the axiom that an alleged monopolist cannot be held liable "as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

Acting as Category Captain. Conwood's expert witness, Dr. Blattberg, testified that "only UST can credibly become category captain because of its market power." Pl. Opp. at 17. Conwood also cites PX39, a 6-page U.S. Tobacco document describing the category management

process which states, in part, that "most retailers want the 'top dog' running things." PX39 at 932901. Whatever inferences can be drawn from Dr. Blattberg's opinion, or the oft-quoted document, have nothing to do with the "use" of market power.

First, even if it were true that U.S. Tobacco, because of its size and resources, were the only "credible" category captain, that designation by a retailer cannot be a "use" of monopoly power as a matter of law. Indeed, it is the classic example of a firm having a legitimate advantage because of its past success and current business acumen. See Grinnell, 384 U.S. at 570-71; Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir. 1991).

Further, on the record evidence, Dr. Blattberg's naked assertion that U.S. Tobacco is selected by retailers as category captain "because of its market power" is absurd. It cannot be a "use" of monopoly power to make one's self an attractive candidate for category captain: for example, by subscribing to sales data services (Conwood finally subscribes to McLane's in January, 2000, Tr. 3/10 at 111 (Williams)); investing in a data base (Conwood considers it, but fails to include collection of data in its "Retail Incentive Program," Tr. 3/10 at 127-28 (Williams)); equipping a sales force with computers with access to information (Conwood sales force requests computers; Conwood finally invests in computers in January 2000, Tr. 3/10 at 112-14 (Williams)); investing in field offices with regionalized sales analysts (Conwood has no field offices and only two sales analysts for entire sales force, Tr. 3/10 at 106-07 (Williams)); increasing the size of a sales force to provide better retail coverage (Conwood has two times and four times the sales of Swedish Match and Swisher respectively, but same size sales force, Tr. 3/10 at 103-05 (Williams)). Indeed, the very document Conwood relies on, PX39, describes the time, effort, and expense that a company must

expend to become an effective and sought-after category captain.[7] And, of course, no retailer testified that he or she chose U.S. Tobacco as category captain because of "market power" as opposed to U.S. Tobacco's willingness to dedicate the time and resources to offer that service. See Tr. 3/16 at Carlson, p. 32 (Swisher, Swedish Match and U.S. Tobacco selected as category captains based on sales force, resources, access to sales information, P.O.S. capabilities, rack capabilities, and availability of representatives.).

Second, Dr. Blattberg's opinion testimony that "only UST can credibly become category captain" is completely belied by the undisputed record evidence. Smaller moist snuff manufacturers have been chosen as category captain, including for large retail chains. See Tr. 2/29 at 218-20 (Rosson); DX 856 (Swisher, the smallest of the moist snuff competitors, is selected as category captain for K-Mart, one of the largest retailers in the country). Moreover, smaller manufacturers often act as category captain in other packaged-goods product categories. Tr. 3/16 at 18-19 (Weber); Tr. 3/14 at 115-16, 120-21 (Luckett) (category captain not always category leader; depends on capability and confidence with product category). The evidence also was undisputed that firms like Conwood, Swedish Match and Swisher – all of whom do business in multiple smokeless tobacco categories – are well positioned to offer category management services. See Tr. 3/16 at Carlson, p. 31 (Swisher, Swedish Match and U.S. Tobacco selected as category captain by Wal-Mart); Tr. 3/10 at 99-100 (Williams) (Swisher recognized as an exemplary category captain by

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[7] See PX39 at 932901 (category management "is a long term commitment"; "failure [to acquire knowledge] will result in our being left behind"); at 932902 ("[w]e must be flexible and be able to adapt to the specific needs of each customer"; "important element of Category Management is the development of trust and rapport"; "all of our efforts on the chain's behalf;" "[a] Category Management project takes a tremendous amount of effort on the part of the Chain Managers, Sales Analysts, and some Division Managers"); at 932903 ("work will provide many benefits to the chain").

Convenience Store News trade publication); Tr. 3/7 at 286-87 (Price) (Swedish Match uses sales information to "pinpoint" products that don't deserve to be on the shelf); Tr. 3/16 at 32-33 (Weber) (Conwood is well-positioned to be category captain because of its participation in different product categories). Dr. Blattberg's bald assertion to the contrary cannot support the jury's verdict as a matter of law. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242 (1993) (jury verdict cannot stand when plaintiff's "expert opinion is not supported by sufficient facts . . . or when indisputable record facts contradict or otherwise render [the] opinion unreasonable"); SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 968-69 (10th Cir. 1994) (same).

In short, Conwood's focus at trial on attempting to cast category management – or U.S. Tobacco's status as "category captain" – as a "use" of monopoly power runs squarely into Grinnell's admonition not to condemn a firm's business acumen; it is precisely the type of procompetitive conduct that retailers desire from all manufacturers, and to the extent U.S. Tobacco is in a better position than other competitors to offer those services, that is an economic reality that the antitrust laws applaud rather than condemn.

"Exclusive Vending." The Court correctly observed, at the summary judgment stage, that U.S. Tobacco framed the issues in a way that did not raise the question of whether there were legitimate business reasons for U.S. Tobacco to offer racks that would house all moist snuff products – so-called "exclusive racks." Feb. 17 Op. at 8-9 And this Court held that whether exclusive rack arrangements served a "legitimate purpose" would be an issue for trial. Id. Conwood now argues that it proved at trial that any time a retailer used only U.S. Tobacco racks, it was the result of an unlawful "use" of monopoly power. Apparently, Conwood's position is that "only UST, by virtue

of its market power, could obtain permission to house all competitive products." Pl. Opp. at 17 (emphasis added).[8]

Contrary to Conwood's contention, however, the undisputed evidence at trial confirmed that every U.S. Tobacco "exclusive" rack arrangement was because of a retailer's desire to house all moist snuff products in one rack. Indeed, every retailer who was asked (by U.S. Tobacco or Conwood) confirmed that he or she made the independent decision to use only a U.S. Tobacco rack (or, in the case of Marti Stevens, a Conwood rack, see Tr. 3/10 at Stevens, pp. 48-49) whether for purposes of "uniformity," avoidance of "clutter," better use of space or just ensuring compliance by all competitors with a chain-wide planogram. See, e.g., Tr. 3/16 at Carlson, pp. 17-18; Tr. 3/14 at 104-05 (Luckett); Tr. 3/16 at Gagnon, pp. 11-12; Tr. 3/22 at Laessig, p. 22. Conwood's own witnesses also confirmed that many retailers preferred exclusive racks. See Tr. 3/9 at 204-06 (Hettinger); Tr. 3/24 at Balk, pp. 177-78; Tr. 3/10 at 31-32 (Jeffrey); Tr. 3/8 at 138-39 (Ryan); Tr. 3/7 at 261 (Price); Tr. 3/10 at 13 (Falevsky) (Conwood employee frustrated that retailers wanted to use U.S. Tobacco rack).

Moreover, smaller competitors (including Conwood) compete with U.S. Tobacco to meet the particular rack needs that many retailers demand. Swisher, for example, provides all the moist snuff racks at K-Mart and Tom Thumb, two very large retail chains. Tr. 2/29 at 218-20 (Rosson), DX 856. And Conwood itself had exclusive racks in retail stores – e.g., at 7-Eleven, see DX 554, and several other chains. Tr. 3/24 at Balk, pp. 177-78; Tr. 3/10 at 31-32 (Jeffery) (Conwood sales representative naming two chains in territory with U.S. Tobacco racks only, and

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[8] Even the contention that it could possibly be a "use" of monopoly power for U.S. Tobacco to "obtain permission" demonstrates vividly that there is no evidence whatsoever of conduct indicative of a monopolist wielding its economic power.

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three chains in territory with Conwood racks only). Again, whether it was Swisher at K-Mart or U.S. Tobacco at WalMart, the demands of retailers for "exclusive" racks is what justifies U.S. Tobacco's legitimate business responses as a matter of law.

Equally important, Conwood has no basis to claim after trial that U.S. Tobacco "imposed" any terms on retail customers in relation to rack placement that could even theoretically be characterized as a "use" of monopoly power. Retailers of all types and sizes provided consistent and undisputed testimony that they were free at any time to use another competitor's exclusive rack or to return to multiple rack set ups. See, e.g., Tr. 3/16 at Carlson, pp. 24-25; Tr. 3/16 at Jones, p. 13; Tr. 3/22 at Laessig, p. 22. Nor did any retailer have any agreement with U.S. Tobacco by which the retailer was required to use only U.S. Tobacco header cards or other POS; that, too, was a voluntary placement by the retailer that could be changed at any time. There is no evidence to the contrary. Thus, the opportunity for rivals to seek alternative rack arrangements with retail stores could not have been less "impaired" – absent a holding by this Court that, as a matter of law, retailers are never allowed to choose "exclusive" U.S. Tobacco racks or header cards, no matter what their reasons for that decision and no matter what their ability to change their decision at any time.

Tortious Conduct. Finally, in what can only be seen as a desperate and improper attempt to equate tortious conduct with a "use" of monopoly power, Conwood cites the testimony of Leroy Keil, a former U.S. Tobacco sales representative who had not worked for the company since 1987. Pl. Opp. at 17. After searching the trial record for some evidence that tortious conduct could in any way relate to monopoly power, Conwood claims that Mr. Keil testified that "UST [is] able to engage in systematic tortious conduct because it was the big dog and let everyone know it." Id. Mr. Keil's actual testimony is worth quoting in full because it is indicative of the smoke screen that

is Conwood's entire case, and of what Conwood wishes to characterize as unlawful and anticompetitive conduct:

> Q. Could you read that sentence into the record, please?
> A. ["]UST saw itself as the big dog in the industry, and let everyone else know it."
> Q. Is that a true statement?
> A. Sure, yes.
> Q. And, in your understanding, how did UST let everyone know that UST saw itself as the big dog in the industry?
> A. Well, in the moist snuff department, they controlled 74 to 78 percent share of the market, which does make them the big dog of the industry.
> Q. How did they let people know it?
> A. Through their advertising, through telling, and just through the sales of their product. I mean, everyone knew it.

Tr. 3/13 at Keil, pp. 22-23. That testimony apparently is Conwood's best shot at arguing, in law and from the record evidence, that "tortious conduct" is a use of monopoly power.

While Conwood offers no evidence that any tortious conduct by U.S. Tobacco derived from its alleged market power, numerous witnesses confirmed that any instances of misconduct in the field were not limited to U.S. Tobacco, but were the natural result of large, competitive sales forces. See, e.g., Tr. 3/7 at 285 (Price) (Mr. Price testified: "that's what happens when big sales forces get a little aggressive."); see also Tr. 3/8 at 141-42 (Ryan); Tr. 3/10 at 135, 142-44 (Williams); Tr. 3/8 at 246-47 (Hynek). Moreover, any retailer who was asked – again, no matter what the type or size of organization – testified that he or she controls what goes on in the stores and would never permit any systematic, unauthorized conduct from any supplier, including U.S. Tobacco. See, e.g., Tr. 3/2 at Rusk, p. 81; Tr. 3/14 at 116-17 (Luckett); Tr. 3/22 at 26 (Overby).

In short, there is not one shred of evidence in the trial record that suggests a "use" of monopoly power by U.S. Tobacco. There is no coercion of any kind; there are no threatened refusals

to deal; and there are not even any long term arrangements with retailers regarding "exclusive" racks or header cards (let alone products). This is not the posture of an "800 pound gorilla," which perhaps is why Conwood referred to U.S. Tobacco as an "800 pound gorilla" twenty-eight times during opening and closing, but not once in its opposition papers. On this basis alone, judgment as a matter of law is warranted.

IV. ORDINARY MARKETING PRACTICES CANNOT BE "EXCLUSIONARY" AS A MATTER OF LAW

In its moving papers, U.S. Tobacco established that in assessing evidence of "exclusionary" conduct, this Court must look beyond mere evidence of an intent to maintain share or dominate the marketplace. The law is clear, for example, that a monopolist is free, as a matter of law, to devise strategies and programs specifically aimed at maintaining its monopoly as long as they are practices that smaller competitors can or do use as well. See Def. Mem. at 14-33. Indeed, it is well settled that even where there is evidence of anticompetitive intent, a plaintiff must make a separate showing of predatory conduct. See Morgan v. Ponder, 892 F.2d 1355, 1359 (8th Cir. 1989). And contrary to Conwood's suggestion, that principle applies equally in cases where ordinary competitive conduct is not limited to price competition. See Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 524-26, 536 (5th Cir. 1999).[9]

Strikingly, but predictably, Conwood's primary response to this core post-trial issue is to ask this Court to regress back to its summary judgement analysis and refuse to assess what

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[9] Rather than take this argument head on, Conwood chose to mischaracterize it in the extreme and then call it extreme. See Pl. Opp. at 17-18, n.19 & 20 U.S. Tobacco's argument is not, as Conwood claims, that intent is "irrelevant." U.S. Tobacco's argument, well supported by an abundance of case law, is that intent to be successful at the expense of a rival is normal, typical, expected and not at all unlawful. The pertinent question, however, is what conduct a business firm uses to carry out that intent – hard-nosed competitive conduct or predatory use of monopoly power.

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conduct on the full trial record – whether viewed in strands or as a "whole" – cannot be considered exclusionary as a matter of law. The Court should decline Conwood's invitation. Indeed, now that the Court has been shown the entire "forest" at trial, it is undisputed that U.S. Tobacco's conduct in this case is not only practiced by just about every manufacturer of consumer packaged goods sold at retail, Def. Mem. at 14-18, it is essential to the efficient operation of the retail marketplace itself. Alternatively, Conwood asks this Court to defer to the "properly instructed" jury no matter what the evidence actually demonstrated at trial. See Pl. Opp. at 18-19. Neither attempt to have this Court abdicate its Rule 50 role is appropriate.

As a threshold matter, Conwood apparently concedes that, under Section 2, ordinary commercial conduct cannot be considered exclusionary as a matter of law. Thus, Conwood makes no attempt to distinguish cases cited by U.S. Tobacco, such as Trace X Chemical Inc. v. Canadian Industries, Ltd., 738 F.2d 261, 265-67 (8th Cir. 1984) ("ordinary business practices" and "ordinary commercial conduct" cannot support Section 2 liability even assuming express anticompetitive intent); or Telex Corp. v. IBM Corp., 510 F.2d 894, 904, 926-28 (10th Cir. 1975) (same). Nor does Conwood even address Stearns Airport, 170 F.3d at 526, which clearly confirmed that "competition on the merits" is to be defined as broadly as the market realities dictate, and is not to be limited to price competition alone.

Moreover, Conwood's attempted distinction of Langenderfer, 917 F.2d at 1422, precisely frames the issue. See Pl. Opp. at 18 n.20. Conwood points out that despite an "objective [] to 'injure its rivals,'" the defendant's practices were entirely lawful, ordinary competition. Id. Like the defendant in that case, U.S. Tobacco arguably had an intent to "'injure' its rivals," but its

conduct was ordinary commercial conduct and entirely lawful.[10] Such conduct does not become unlawful – or "exclusionary" – simply because U.S. Tobacco has a large sales share or because Conwood suffered the consequences of lagging behind in an increasingly competitive marketplace. It is the inherent nature of the competitive process that "'at some point there are winners and losers, and losers are excluded.'" See Balaklaw v. Lovell, 14 F.3d 793, 801 (2d Cir. 1994) (citation omitted). It is Conwood, not U.S. Tobacco, that cannot come to "grips" with that market reality. As described below, Conwood does not dispute that U.S. Tobacco's conduct, as shown at trial, is a standard part of the competitive process whether viewed as "separate strands of evidence" or as a collective whole. Morevoer, as the Eighth Circuit recently held, ordinary competitive conduct cannot violate Section 2 of the Sherman Act regardless of the jury's verdict. See Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000). There, as here, what conduct is lawful under the antitrust laws is a question of law for the Court, not a question of fact for the jury.

A. Product Assortment Recommendations/Category Management

Conwood does not dispute that no court has ever found that it can constitute "exclusionary" conduct to make recommendations to retailers, including in the context of a category management collaboration. This Court would be the first. Instead, Conwood attempts to distinguish each case cited by U.S. Tobacco on procedural grounds, even though the fundamental inquiry of each court was the same one required here – Was the conduct at issue normal competitive behavior available to all in the marketplace? See Trace X, 738 F.2d at 265-67; Telex, 510 F.2d at 904, 926-

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[10] Conwood's attempt to distinguish Byars v. Bluff City News Co., 609 F.2d 843, 860 (6th Cir. 1979) also highlights the relative simplicity of this case. As Conwood points out, the conduct in that case was tortious conduct coupled with an unlawful refusal to deal, a well-recognized use of monopoly power not at issue here. See Pl. Opp. at 18 n.20.

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28. Without exception, each court that has considered the varied attempts of product manufacturers to gain and preserve shelf space in the retail industry has found that, absent coercion, such practices are, at most, "hard-nosed" competition, see Jays Foods, Inc. v. Frito-Lay, Inc., 664 F. Supp. 364 (N.D. Ill. 1987), aff'd mem., 860 F.2d 1082 (7th Cir. 1988), but more typically, procompetitive behavior well accepted in the retail industry. See In re Kellogg Co., 99 F.T.C. 8, 144, 277 (1982); see also Def. Mem. at 17-22.[11]

The evidence presented at trial established that the moist snuff industry is no different. As with other product categories, recommendations regarding product assortment are the rule, not the exception, for each manufacturer's sales force. Without taking testimonial snippets out of context, and without having a paid expert "interpret" selected documents, the record evidence speaks for itself:

- Swedish Match, a company with half the sales share of Conwood, attempts to convince retailers to carry its Timberwolf products over Conwood's Cougar products or U.S. Tobacco's Red Seal products. Tr. 3/7 at 274-75 (Price).

- Swedish Match targets competitors' products that don't deserve to be on the shelf, and such products get eliminated as part of everyday business. Tr. 3/7 at 286-87 (Price).

- Swisher, a company with one-fourth the sales of Conwood, makes product mix and shelf space recommendations to one of the largest national retailers in the country – K-

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[11] Again, Conwood's tactic of legal argument seems to be to mischaracterize U.S. Tobacco's arguments in the extreme and then criticize them for being extreme. Pl. Opp. at 21 n.23. U.S. Tobacco does not argue, as Conwood contends, that any conduct at issue is "lawful per se." Rather, U.S. Tobacco argues that the evidence presented by Conwood in this case does not prove anything more than conduct that has been found to be lawful and procompetitive. See Def. Mem. at 17-22. Moreover, Conwood's suggestion that the court in Frito-Lay, Inc. v. Bachman Co., 659 F. Supp. 1129 (S.D.N.Y. 1986), "approved" plaintiff's Section 2 claim, even though the court dismissed plaintiff's Section 1 claim, id. at 1133, is a misstatement of the case. See Pl. Mem. at 21. What Conwood fails to disclose to this Court is that Frito-Lay did not move for summary judgment on the Section 2 claim on the basis of lawful conduct, but instead only challenged market definition and market power, issues upon which it eventually prevailed on summary judgment.

Mart. Tr. 2/29 at 218-20 (Rosson). The results are the same for Conwood: Swisher obtains exclusive vending, and Conwood facings are reduced to 1 facing of Kodiak only. DX 856.

- Conwood makes planogram suggestions and recommendations to retailers about competitive products. Tr. 3/8 at 260-61; 273-74 (Hynek).

- Conwood targets Timberwolf and Helme products for elimination in its presentations. Tr. 2/29 at 159-65 (Rosson), DX 808, DX 888.

- Conwood seeks to eliminate private label brands that don't sell well. Tr. 2/29 at 159-65 (Rosson), DX 688.

- Mr. Rosson testified that the elimination of competitors' products as part of the competitive process "happens every day." Tr. 2/29 at 159-65 (Rosson).

Further, the fact that this competition for shelf space may take place in the context of a category management relationship between U.S. Tobacco and a retailer does not make it any less ordinary. On the contrary, the undisputed record is that category management recommendations by leading manufacturers in every consumer product category are now an essential part of the efficient operation of the marketplace. See Tr. 3/14 at 52-54, 56-57, 57-58 (Blattberg); Tr. 3/16 at 9-11 (Weber). In this ordinary competitive process, the marketplace itself weeds out those manufacturers who "abuse" that relationship. See, e.g., Tr. 3/14 at 116-17 (Luckett) (ousting Proctor and Gamble, a manufacturer many times the size of U.S. Tobacco, for making misleading presentations). This is especially the case where, as here, no manufacturers are foreclosed from making their own suggestions or commenting on those of the category leader. See Tr. 3/9 at 10 (Hynek) (Conwood employee testifies it was part of his job to recommend Cougar over Timberwolf); Tr. 2/29 at 159-65 (Rosson) (Conwood's chairman recognized that Conwood has access to retailers and recommends deletion of competitive products; "That's competition, I presume."); Tr. 3/7 at 171-75 (Milano), PX 23 (document indicates that Conwood had equal access to present its brands); Tr. 3/9 at 137-39

(Gundlach) (Conwood expert recognizes that all companies had access to Wal-Mart); Tr. 3/7 at 264-66 (Price) (Mr. Price testifies that it is part of the competitive process to make presentations regarding racks and products); id. at 267 (U.S. Tobacco, Swisher and Swedish Match all had access to Wal-Mart).

The evidence also established that for the relatively few retailers that had category management relationships with U.S. Tobacco, no retailer testified that U.S. Tobacco "abused" category management principles.[12] Moreover, notwithstanding all of his work on this case, Dr. Blattberg could point to only one instance when he believed U.S. Tobacco affirmatively misrepresented facts in a category management presentation, and that was where he simply disagreed with U.S. Tobacco's method of calculating inventory costs. Tr. 3/14 at 69-72 (Blattberg). It is not for the antitrust laws, Dr. Blattberg or juries to regulate this relatively new, but now standard, form of competition in the retail industry.

Conwood also attacks the concept of SOF=SOM, but offers no legal authority whatsoever that seeking SOF=SOM could be unlawful under the antitrust laws.[13] Conwood indicates that U.S. Tobacco did not "need" SOF=SOM in order to sell its product "adequately," see Pl. Opp. at 22, and that "there was no legitimate reason" for U.S. Tobacco to seek SOF=SOM. Id. (improperly citing testimony of Gary Milano that had nothing to do with SOF=SOM); see also Tr.

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[12] In fact, all retailer testimony was to the contrary. See, e.g., Tr. 3/14 at 117-18 (Luckett); id. at 169 ("manufacturer would ultimately be committing suicide if it gave misleading numbers."); Tr. 3/15 at Walden, pp. 29-30 ("no misleading data has ever been provided"); Tr. 3/16 at Carlson, p. 34 (U.S. Tobacco provides unbiased information).

[13] All law is to the contrary. For example, in Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300 (5th Cir. 1984), the court held that a plaintiff could not complain of a defendant seeking and obtaining SOF=SOM, as a matter of antitrust injury, a concept that is equally applicable to claims under Section 1, Section 2, and any state antitrust laws modeled after the Sherman and Clayton Acts.

3/6 at 99-100 (Milano). The observation that U.S. Tobacco did not "need" SOF=SOM, in Conwood's view, does not alter the fact that, if U.S. Tobacco wished to, it would be ordinary competitive activity to seek or even obtain SOF=SOM. Retailers testified that this was a common marketing practice in numerous product categories, see, e.g., Tr. 3/14 at 122 (Luckett) (retailer testifies that he starts with SOF=SOM as the basis of the plan-o-gram), and even Dr. Blattberg begrudgingly conceded that SOF=SOM is a proper factor in determining shelf allocation. Tr. 3/14 at 16-18, 32-33 (Blattberg) (Dr. Blattberg concedes that U.S. Tobacco's SOF is less than its SOM in the overall marketplace).

Further, Conwood's economic expert conceded that U.S. Tobacco did not obtain SOF=SOM, even in the retail chains used by Dr. Kamien to perform his dubious shelf space/retail price study. Tr. 3/3 at 57-65 (Kamien); see also Tr. 3/14 at 32-33 (Blattberg) (Conwood's category management expert testified about U.S. Tobacco's share of shelf space: "Oh, I know its below its share of sales."). And, as Mr. Milano actually testified, U.S. Tobacco presents information on SOF and SOM in order to improve its overall product shelf-space representation in retail stores. Mr. Milano's actual testimony on the subject of SOF=SOM is, to the letter, consistent with Dr. Blattberg's:

> Q. Does U.S. Tobacco, as part of category management, ever use the share of fixture versus – equals share of sales formulation to the stores that the stores have a certain number of facings allocated to U.S. Tobacco based on its share of sales?
> A. Yes. We show them share of fixture and share of sales.
> Q. And you suggest to them that they should give you as many fixtures as your share of sales approximates, right?
> A. No. Our recommendation wouldn't be always that we get exactly the same amount of facings to equal our share of sales.
> Q. Well, isn't it true that you tell stores that the number of facings you should have equal or be close to your share of sales?

A. Closer to it would be a recommendation and information for a retailer to make a decision.

Tr. 3/6 at 79-80 (Milano); see also id. at 84 (U.S. Tobacco should get fair share of shelf space).

In light of this evidence, Conwood's reliance on testimony by U.S. Tobacco's executives that product mix and space allocation recommendations to retailers are somehow "inappropriate" is not only a gross mischaracterization, it is legally irrelevant. For example, U.S. Tobacco's Vice President of Sales, Gary Milano, testified no fewer than seven times that, although seeking to eliminate a competitor's product with no justification may be inappropriate, making fact-based presentations that result in the elimination of competitive products is exactly what a sales force is supposed to do. Tr. 3/6 at 112, 115-16, 116-17 (Milano); Tr. 3/7 at 11-13, 22, 23, 23-26 (Milano). Similarly, not one of the citations to Mr. Gierer's testimony in Conwood's opposition papers has anything to do with the appropriateness of any conduct in the field. See Pl. Opp. at 19-20 (citing testimony that Mr. Gierer was disappointed with the testimony of certain U.S. Tobacco personnel). But even assuming U.S. Tobacco executives found certain examples of conduct to be "inappropriate," that does not convert conduct that is prevalent in the marketplace and practiced by all manufacturers into an "exclusionary" use of monopoly power violative of Section 2.

At bottom, U.S. Tobacco's marketing practices are entirely consistent with established case law holding such conduct to be perfectly lawful competition available to all participants in the retail industry.

B. Offering And Providing Exclusive Product Display Racks

U.S. Tobacco established at trial that the competition among manufacturers to innovate product display racks and to offer and provide them to retailers is an ordinary and important aspect

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of competition in the retail environment. See Def. Mem. at 23-27. U.S. Tobacco established that many retailers – usually large chains – often do not want to use multiple racks for merchandising moist snuff and other products. See id. at 25; see also Tr. 3/7 at 262-63 (Price). U.S. Tobacco also established that the manufacturer that wins the competition to provide a uniform rack to a retailer may gain an advantage in terms of product and POS placement. See Def. Mem. at 26-27. And U.S. Tobacco established that all moist snuff manufacturers participate in this competition with varying degrees of skill and effort, and correspondingly, with varying degrees of success. See id. at 25-26; see also Tr. 2/29 at 218-20 (Rosson), DX 856; Tr. 3/24 at Balk, pp. 177-78; Tr. 3/10 at 31-32 (Jeffery) (Conwood sales representative naming two chains in territory with U.S. Tobacco racks only, and three chains in territory with Conwood racks only). Finally, U.S. Tobacco established that all manufacturers are able to try to persuade any retailer to use multiple racks. See Def. Mem. at 26-27.

Conwood does not dispute any of these facts; nor could it. As U.S. Tobacco demonstrated in its moving papers, there is absolutely no evidence in the record that U.S. Tobacco does anything to exclude competitors from the competitive process with respect to the development or placement of moist snuff racks. There is no evidence that U.S. Tobacco coerces retailers into rack selection in any manner. There is no evidence that U.S. Tobacco enters any agreements that preclude retailers from choosing another competitor's racks or using multiple racks at any time. See supra Section III. Again, Conwood does not and cannot dispute any of these facts.

Instead, Conwood argues that U.S. Tobacco used exclusive vending "as a platform" to reduce competitive facings through category management "abuses." Pl. Opp. at 24-25. Conwood, however, cites no evidence whatsoever that the product mix and space allocation strategy chosen by

any retailer had anything to do with that retailer's rack selection. Pl. Opp. at 23-26. Indeed, the undisputed evidence confirms the exact opposite – planograms are designed first, rack selection follows. See, e.g., Tr. 3/14 at 99, 104-05 (Luckett); Tr. 3/9 at Renfro, pp. 62-64; Tr. 3/14 at 18 (Blattberg). But even if there were evidence that planograms were somehow linked to rack selection, to the extent a manufacturer – whether it be U.S. Tobacco, Swisher, Swedish Match, or Conwood – gained some advantage by persuading a retailer to use its rack, that advantage would be the result of competition, not the exclusion from competition. See Def. Mem. at 25 (citing Stearns Airport Equip. Co. v. F.C. Corp., 170 F.3d 518, 524 (5th Cir. 1999)).[14]

The critical material facts regarding "exclusive" racks remain unchallenged by Conwood. Many retailers want them, and all moist snuff manufacturers are free to try to persuade a retailer to use that company's display racks, either exclusively or alongside other racks. Further, every single retailer in this country may choose, at any time, to use single or multiple racks, and may choose, at any time, to use the rack of any moist snuff company. Some retailers have selected multiple racks; some have selected racks from U.S. Tobacco; some retailers have selected racks from Swisher; and some retailers have selected racks from Conwood. The competition is playing out as it should. But whatever the results of that competition, no reasonable jury could have found that so-called "exclusive vending" is anything but an ordinary marketing practice used by all competitors in the moist snuff and other industries.

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[14] Conwood does not even address the fact that its own expert concluded that U.S. Tobacco had "exclusive rack agreements" with only 7% of the retail locations in the alleged market. This concession, together with Conwood's admission that "[w]here each competitor had its own rack, there was no such choke point [against competitive distribution]," Pl. Opp. at 24 n.27, confirms that there could have been no market-wide harm to competition as a result of either "exclusive rack agreements" (over 90% of retail locations unaffected) or from category management "abuses" (no "choke point" in over 90% of retail locations).

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C. CAP and Other Incentive/Promotional Programs

In its moving papers, U.S. Tobacco established three significant points with respect to the Customer Alliance Program. First, the maximum payment under CAP – 8 cents per 10-can roll (3 cents for merchandising component; 2 cents for product handling component; and 3 cents for display component) – is not coercive and has not been shown to have affected any retailer's decisions with respect to racks, POS, or products. See Def. Mem. at 31-33. Second, payment under any component of the CAP program does not require "exclusive vending," "exclusive POS," or the elimination of products. See id. at 28-31. Third, any retailer participating in the CAP program is completely free to end that participation at any time, either by terminating the contract at will, or by simply forgoing payments for any given quarter. See Def. Mem. at 27-28, 31-33.

Conwood's response is to point to the same handful of CAP worksheets that, at most, indicate situations in which a retailer has chosen to use a U.S. Tobacco rack for all moist snuff products or has chosen to use a single U.S. Tobacco header card. Pl. Opp. at 27 n.31. What Conwood did not and cannot do, however, is to point to any evidence: (1) that any retailer was required under the CAP program to use a U.S. Tobacco rack or a U.S. Tobacco header card exclusively; (2) that the retailers who signed the cited worksheets made their decisions because of the CAP program; (3) that any retailer was, or even could be, coerced by an 8-cent rebate on a $27 purchase; (4) that any retailer was "locked in" and could not change his decisions, or terminate the program, at any time; or (5) that Conwood and every other moist snuff manufacturer was not free and able to offer a program identical to CAP. Without such evidence, no reasonable jury could find that U.S. Tobacco's CAP program was an unlawful use of monopoly power.

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Conwood's reliance on R.J. Reynolds and on LePage's Inc. v. 3M is clearly misplaced, and its attempt to distinguish Beverage Management, Inc. v. Coca-Cola Bottling Corp., 653 F. Supp. 1144 (S.D. Ohio 1986), a case that is right on point, cannot be well-taken. First, in sharp contrast to U.S. Tobacco's CAP program, the incentive programs in R.J. Reynolds and LePage's were economically coercive according to retailers that testified in those case. See R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 60 F. Supp. 2d 502 (M.D.N.C. 1999) (preliminary injunction issued where retailers testified that Philip Morris incentive program was coercive and left them with no alternative but to comply in order to receive large conditional promotional monies); LePage's Inc. v. 3M, No. Civ. A. 97-3983, 1999 WL 346223 (E.D. Pa. May 14, 1999) (economically coercive program requiring the complete exclusion of competitive products).

Second, Conwood's statement that the court in Beverage Management determined that Coca-Cola's CMA program "did nothing more than promote the sale of one competitor's products without any exclusion of other competitors" is a gross misstatement of that case. Pl. Opp. at 27 n.33. In Beverage Management, the plaintiff, like Conwood does here, complained that Coca-Cola's CMA program called for exclusive advertising and prevented plaintiff from promoting its products resulting in lost sales. The court rejected plaintiff's Section 2 claim because, among other things: (1) the sliding-scale rebate program was not coercive; (2) retail participants were free to terminate the program at any time; and (3) plaintiff could have offered a similar rebate program. Accordingly, Beverage Management is right on point.

Finally, the Eighth Circuit recently determined that even an optional incentive program that offered rebates directly linked to increasing an alleged monopolist's market share could not, as a matter of law, violate Section 2 of the Sherman Act. See Concord Boat, 207 F.3d at 1059 (where

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customers are not "locked in" and are free to deal with other suppliers, Section 2 cannot be violated as a matter of law). It would be an inexplicable juxtaposition to have this Court condemn CAP, while the Eighth Circuit upheld an incentive program directly linked to market share that the district court found to be de facto exclusive dealing arrangements.

In proper context, CAP is the most ordinary of incentive programs, even if it results in preferential product display for U.S. Tobacco.

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In sum, the evidence at trial established without question that all of these "strands" of competition – including U.S. Tobacco's attempt to influence decisions concerning product assortment, racks or POS – are integral parts of the efficient operation of the marketplace. See Tr. 3/16 at Carlson, p. 96; Tr. 3/16 at Dill, pp. 10-11, 21, 34-35; Tr. 3/16 at Gagnon, p. 11; Tr. 3/16 at Jones, p. 9; Tr. 3/22 at Laessig, pp. 61-62. And to condemn that type of competition from U.S. Tobacco simply because of its large sales share would stifle the competitive process, condemn U.S. Tobacco simply because of its size, and contravene every Section 2 case decided to date regarding the meaning of ordinary competitive activity.

D. Alleged Tortious Conduct Is Not Exclusionary Under Section 2

Finally, with respect to the removal of racks, Conwood's tactic, as at trial, continues to be to blur the critical distinction between authorized and unauthorized activity. See, e.g., Pl. Opp. at 29 n.35 (citing testimony of authorized activity as examples of "tortious theft of competitors' products, racks, and/or POS from stores"). Activity that is authorized by a retailer that owns, operates, or manages a store or group of stores, however, is not "tortious" and cannot form the basis of any antitrust liability. See Def. Mem. at 33-37. In fact, it is undisputed that conducting a store

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reset and removing a competitor's rack is an ordinary and common part of doing business. See Tr. 3/10 at 135-36 (Williams) (Conwood's National Sales Manager); Tr. 3/7 at 285-86 (Price) (Swedish Match's head of sales).

Conwood's evidence of truly unauthorized activity by U.S. Tobacco included the testimony of only four single-store retailers, only one of which testified to anything more than a single incident. See Def. Mem. at 36. As U.S. Tobacco demonstrated in its moving papers, if Conwood's claim of pervasive and widespread "tortious theft of competitors' products, racks and/or POS" were true, retailers would have taken notice and there would have been substantial retailer testimony of repeated instances of misconduct. See Tr. 3/16 at Carlson, pp. 59-60. That was not the case. As it stands, there is no legally sufficient evidentiary basis for a reasonable jury to have concluded that the sporadic misconduct foreclosed competition and violated Section 2 of the Sherman Act.

V. CONWOOD DID NOT ESTABLISH HARM TO COMPETITION

U.S. Tobacco demonstrated that Conwood failed to prove overall harm to competition in the alleged market. Conwood's response essentially is to argue that because its claims include an intent to injure competition, competition was necessarily injured. Pl. Opp. at 29-34. Under this theory, again unsupported and unsupportable by any case law, every Section 2 plaintiff could prove harm to competition merely by bringing its claim and asserting that, absent the complained-of conduct, it would have done better and then trotting a few executives into court to say so. The antitrust laws, however, require more.

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A. Conwood Did Not Prove Harm To The Competitive Process

The antitrust laws are concerned with protecting the competitive process, not individual competitors. See Def. Mem. at 37-41. Conwood complains that U.S. Tobacco reduced distribution and exposure of competitive products by dealing with retailers, yet Conwood does not even address the undisputed record evidence that all doors are open; retailers want recommendations from all manufacturers; and any company willing to make the effort may participate in the competitive process to influence retailer decisions.

Indeed, literally every retailer witness who testified confirmed that the door is always open for all competitors to make their best pitch on product selection and assortment, racks and POS. See, e.g., Tr. 3/9 at Renfro, pp. 43, 66-67, 74-75; Tr. 3/15 at 121 (Luckett); Tr. 3/15 at McGuire, pp. 8-9; Tr. 3/16 at Dill, pp. 10-11, 34-35; Tr. 3/16 at Jones, p. 9. Competitors such as Swedish Match confirmed this as well, see Tr. 3/7 at 264-67 (Price), as did Conwood executives and employees. See, e.g., Tr. 2/29 at 159-65 (Rosson). The evidence also was undisputed that any retailer can change product assortment, racks or POS (including header cards) at any time. See Tr. 3/9 at Renfro, pp. 66-67; Tr. 3/14 at 109 (Luckett); Tr. 3/15 at McGuire, pp. 25-26; Tr. 3/15 at Walden, pp. 25-26, 110; Tr. 3/16 at Carlson, pp. 17-18, 24-25; Tr. 3/16 at Gagnon, pp. 10-11, 15, 17; Tr. 3/16 at Jones, p. 13; Tr. 3/22 at Laessig, p. 25. And, again, U.S. Tobacco's competitors, including Conwood, do not and cannot disagree with these undisputed facts. See Tr. 3/7 at 264-67 (Price); Tr. 2/29 at 105, 159-65, 181-83, 186-87 (Rosson).

Conwood, however, chose to sit on its hands in the marketplace rather than participate in the competition like all the other moist snuff manufacturers. See, e.g., Tr. 2/29 at 181-83 (Rosson) (Rosson testified that Conwood made no attempt to compete at Wal-Mart); Tr. 3/10 at 111

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(Williams) (Conwood waited until January, 2000 even to purchase sales data from McLane in order to make factual presentations to retailers); Tr. 3/7 at 267-68 (Price) (Mr. Price testified that Conwood was only company that did not participate in the Wal-Mart reset). Conwood then complained that the participation of other companies in the competitive process is anticompetitive and exclusionary. But see Tr. 3/14 at 72-74 (Blattberg) (Blattberg testified that the investment in sales information was too "expensive"). That is not proof of harm to competition in any respect recognized by the antitrust laws.

Accordingly, whatever the Court finds regarding U.S. Tobacco's alleged misconduct, there was no basis for the jury to conclude that the competitive process was adversely affected as it must be to violate Section 2. See Def. Mem. at 37-41.

B. Conwood Did Not Prove Actual Harm To The Overall Marketplace

U.S. Tobacco also established that Conwood did not demonstrate any harm to the overall market. Indeed, Conwood could not prove this essential element of antitrust injury given the overwhelming and undisputed evidence that the marketplace has witnessed unprecedented growth and sales, unprecedented breadth in product selection, unprecedented price competition through promotions and the introduction of price-value products, and – in this allegedly restricted period – unprecedented distribution of competitive products. See Def. Mem. at 37-41.

Conwood's response to these straight-forward, undisputed facts is again to tout the opinion testimony of Mr. Rosson and Mr. McClure, both of whom believed their companies would have done better. Pl. Opp. at 30. Conwood also offers the opinion testimony of Dr. Kamien's shelf space/price study, a "price" study that used average retail prices and therefore did not account for promotions or for the lowest price option – i.e., price-value products – available to consumers in a

particular store. Id. at 31.[15] Finally, Conwood claims that overall sales were reduced in WalMart and 7-Eleven. Id. at 33. Notwithstanding that this latter assertion is factually inaccurate (it is undisputed that overall sales increased in both WalMart and 7-Eleven, see Tr. 3/1 at 53, 59 (Kamien)), it says nothing about output in the overall moist snuff "market" – the proper inquiry of any economic study. See Tr. 3/1 at 49-50 (Kamien) (Dr. Kamien concedes that more product being sold in the overall market is "a symptom that consumers are benefitting.") None of Conwood's "evidence" is sufficient to support the jury's verdict on this element of Section 2.

Like any antitrust plaintiff, Conwood can put its chairman on the stand to opine that Conwood would have done better, and can find another competitor to make the same assertion. But these bald assertions do not and cannot dispute the economic reality of the moist snuff "market": (1) two companies besides U.S. Tobacco and Conwood entered the moist snuff segment prior to 1990, each of which continued to gain sales share, actual sales and profits during the 1990's; (2) all moist snuff companies have successfully introduced new products and gained distribution throughout the country in the 1990's; (3) overall sales of moist snuff have increased steadily throughout the 1990's; (4) price competition and promotional activities have increased during the time period; and (5) all moist snuff companies have introduced price-value products. See Def. Mem. at 39-40.

Under established case law, all of these facts are dispositive of a competitive market, and Conwood's attempt to use a footnote summarily to dismiss the cases cited by U.S. Tobacco cannot change the law. For example, there can be no doubt that the plaintiff in Western Parcel Express v. United Parcel Service of America, Inc., 190 F.3d 974 (9th Cir. 1999), claimed that it

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[15] It also should be noted that not a single one of the hand-picked stores Dr. Kamien used in his "price" study allocated shelf space to U.S. Tobacco products in relation to U.S. Tobacco's share of sales. Tr. 3/3 at 58-65 (Kamien).

"could have done better" in the absence of the complained-of exclusive dealing and volume discounts. Thus, Conwood's attempt to distinguish Western Parcel by claiming that, in that case, the defendant offered "uncontradicted evidence" is no distinction at all. There, like here, the evidence offered by the defendant was of overall market expansion, entry and expansion of competitors, and a plaintiff that experienced increases in profits during the relevant time period. Id. at 976. There, like here, the inevitable conclusion was that, as a matter of law, there was no harm to overall competition. Similarly, in R.W. International Corp. v. Welch Food, Inc., 13 F.3d 478, 486-88 (1st Cir. 1994), plaintiff could not overcome evidence that its products were in over 80% of the stores, demonstrating successful entry. Again, there can be no doubt that the plaintiff claimed it "could have done better." That was not enough.

Similarly, Dr. Kamien's "study" of average retail prices, at best, confirms only that U.S. Tobacco has a broader selection of premium-priced products than everyone else; accordingly, and unremarkably, the more U.S. Tobacco products were chosen by retailers, the higher the average price. Moreover, even Dr. Kamien agreed that retailers should be allowed to choose a premium-priced product strategy, see Tr. 3/1 at 62 (Kamien), and the record confirmed that many retailers do not want to carry a broad selection of price-value brands (or any at all). See, e.g., Tr. 3/7 at 30, 165-66 (Milano) (citing examples). The resulting "market" price from these routine retailer decisions can hardly be called harm to competition.

In short, these cases relied on by U.S. Tobacco are not so easily discarded, and any application of the law to the undisputed facts of this case confirms that no reasonable jury could find that Conwood proved harm to the overall moist snuff "market."

VI. CONWOOD DID NOT PROVE HARM TO ITSELF

Conwood's "proof" concerning antitrust injury to itself is equally, if not more, deficient. In 1982, Conwood introduced Kodiak, its most successful moist snuff product. Tr. 2/29 at 72-73 (Rosson). Mr. Rosson testified that the Kodiak was successful because it was unique – a long cut wintergreen product. Id. Since the introduction of Kodiak, Conwood has not developed or introduced any other product that is unique in any way. Tr. 3/8 at 71 (Leftwich). Conwood's "secondary brands" – as they are called by Conwood itself – were all "me too" products in terms of cut, flavor and price. Id. According to Conwood's own Vice President of Marketing, Conwood stopped promoting it secondary products because, in his view, they had topped out. Tr. 3/20 at W. Cothren, pp. 124-26. With no growth expected from its secondary brands, Conwood's only promotional effort was with its flagship Kodiak product – Conwood offered biannual 40-cent Kodiak buy down promotions. Tr. 3/10 at 139 (Williams). By the mid-1990's, however, that product had been on the market for over 12 years, and many competitive long cut wintergreen products were, by then, available to consumers, including price-value products. Tr. 3/7 at 123-24 (Milano) (approximately 40 wintergreen moist snuff products being offered today).

Nevertheless, without innovating new products, without innovating display racks, and without any other new business development efforts, Conwood maintained a steady growth rate throughout the 1990's – exactly the same growth rate it experienced in the 1980's. See Tr. 3/8 at 68-71 (Leftwich) (Dr. Leftwich concedes that Conwood's sales growth is consistent and uninterrupted from 1984 to 1997). Each year, Conwood increased sales and profits. See Tr. 3/23 at 41-43 (Scheffman), DX 40, DX 57.

Dispositively, there is no discernable point in time at which Conwood's sales growth slows commensurate with its theory of harm in this case. Tr. 3/8 at 68-71 (Leftwich).[16] This comes as no surprise: (1) Conwood's Kodiak brand is in over 80% of the stores (only slightly under U.S. Tobacco's distribution of Copenhagen); (2) Conwood's secondary brands, according to its marketing department, have "too much distribution"; and (3) Conwood's display racks and POS materials are in 70%-90% of stores. See Def. Mem. at 41-42. Conwood does not dispute any of these facts about what the marketplace actually looks like. The long and short of the story is that Conwood's products are available to any consumer who wishes to buy them.

Thus, the only factor Conwood can point to claim any injury to itself is the fact that its sales share did not grow as fast as it grew in the 1980's (it still grew, just not at the same rate). Pl. Opp. at 33-34.[17] Conwood's only attempt to establish that its share should have grown at the same rate is, again, to elicit the testimony of its own employees that "we could have done better." See Pl. Opp. at 30. As U.S. Tobacco demonstrated in its moving papers, this "evidence" is not sufficient to establish injury in fact. Accordingly, judgment as a matter of law should be entered.

VII. CONWOOD DID NOT PROVE CAUSATION

In its moving papers, U.S. Tobacco demonstrated that Conwood did not prove that a single lost sale was caused by the allegedly unlawful conduct. In response, Conwood does not offer

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[16] Contrary to what Conwood stated, U.S. Tobacco does not argue that a plaintiff must show "that its sales decreased in absolute terms" or that Conwood had to go "bankrupt." Pl. Opp. at 30 n. 36 and 34. Rather, U.S. Tobacco argues that a plaintiff, at the very minimum, must show that its actual sales changed in some way attributable to the complained-of conduct. Here, Conwood's sales grew steadily and without interruption.

[17] Conwood intentionally ignores the fact that, unlike in the 1980's, two new companies, Swisher and Swedish Match, were introducing products and gaining share in the alleged market. Tr. 3/23 at 51-53 (Scheffman), DX 14, DX 15, DX 18; see also Section VII, infra.

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any evidence that demonstrates with the requisite "reasonable certainty" that its alleged harm – the slowing of its growth in share despite its continuous and uninterrupted growth in sales – was caused by U.S. Tobacco's alleged misconduct as opposed to other marketplace factors. Pl. Opp. at 34-36. Indeed, rather than offer any such evidence, Conwood would have this Court shift the burden to U.S. Tobacco to demonstrate that all of Conwood's claimed injury was caused by other factors in the marketplace. Pl. Opp. at 35-36.

For example, in a perverse twist of Sixth Circuit law, Conwood contends that the "necessary predicate" requirement of Valley Products Co. v. Landmark, 128 F.3d 398 (6th Cir. 1997), Axis, S.p.A v. Micafil, Inc., 870 F.2d 1105 (6th Cir.1989), and Baum Research & Development Co. v. Hillerich & Bradsby Co., 31 F. Supp. 2d 1016 (E.D. Mich. 1998), shifts the burden of proof to the defendant to demonstrate that all of a plaintiff's claimed injury was caused by "lawful acts of exclusion." See Pl. Opp. at 36 n.42. The result of Conwood's theory, of course, would be to hold U.S. Tobacco liable for any and all factors that may have affected Conwood's sales during the 1990's.[18]

Thus, for every lost sale that resulted from a retailer's decision not to carry Kodiak Straight, U.S. Tobacco must foot the bill. For every lost sale of Kodiak that resulted from products being displayed behind the counter out of the reach of consumers because of state regulations, U.S. Tobacco must foot the bill. For every lost sale that resulted from a consumer trying the new Timberwolf products, U.S. Tobacco must foot the bill. For every lost sale that resulted from a

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[18] At the same time, however, Conwood claims that the "jury determined that Conwood's actual damages 'only' from UST's antitrust violation amounted to $350,000,000." Pl. Opp. at 37. Conwood does not offer any insight as to how the jury had any basis to make that determination.

consumer switching to another product because of a generous coupon offer, U.S. Tobacco must foot the bill. The list goes on.

In its moving papers, U.S. Tobacco demonstrated – with undisputed record evidence – that all of these marketplace factors, and others, affected Conwood's ability to maintain its share growth. See Def. Mem. at 42-49. And, as described below, Conwood does not dispute any of this evidence; nor does it attempt to demonstrate – with record evidence of its own – a single lost sale that can be attributed with any fair degree of certainty to U.S. Tobacco's alleged misconduct.

A. Independent, Uncoerced Decisions of Retailers

On summary judgment, this Court held that Conwood must prove that its claimed injury was not caused by the independent, uncoerced decisions of retailers. Feb. 17, 2000 Order at 10. Conwood made no attempt to meet this burden of proof at trial, see Tr. 3/28 at 51 (Closing Argument) ("this case isn't about the stores"), and makes no attempt now to present evidence in its opposition papers to support any finding that its claimed injury was the result of anything but the uncoerced choices of retailers. See Pl. Opp. at 34-336. It is no answer for Conwood to continue in its position – declared forcefully numerous times for the jury – that no retailer even can make a decision independent of U.S. Tobacco because U.S. Tobacco's seeks to "influence" those decisions. Tr. 3/13 at 24 (McClure). Under that theory, no retailer that communicates with a manufacturer at any time can ever make "independent" decisions; that is not the law under the Sixth Circuit's "necessary predicate" line of cases and this Court's prior ruling. Moreover, the issue is not whether the retailers' decisions were influenced by U.S. Tobacco, but whether Conwood's alleged harm flowed directly from the decisions that retailers had the lawful right to make. See Def. Mem. at 45. Conwood's refusal to recognize that its problems stem from the lawful decisions of retailers –

whether or not influenced by competition by U.S. Tobacco – and not from unlawful conduct of U.S. Tobacco, is also at the root of Conwood's request for an injunction that would take away the rights of retailers to run their stores the way they see fit. See Memorandum in Opposition to Plaintiffs' Request for Permanent Injunctive Relief at 17-18.

Ultimately, and contrary to Conwood's assertion, this case is all about retailers, especially on the issue of causation. As this Court held in its February 17, 2000 Order, Conwood cannot recover damages for claimed lost sales that may have been caused by the independent, uncoerced decisions of retailers. The overwhelming and uncontroverted evidence in this case is that retailers make their own uncoerced decisions about products, racks and POS at the end of a competitive process in which all suppliers do their best to influence those decisions. In fact, there is no evidence that retailers' ultimate decisions are anything but their own: they own, operate, and manage the stores; they serve their own self interest to maximize profits; and they determine their own success in their own sphere of competition – i.e., competition against other retailers to win consumer sales. See Def. Mem. at 44-46. Conwood should not be allowed to by-pass the Sixth Circuit's "necessary predicate" standard and not only ignore, but contradict, the sworn testimony of every retailer in this case, simply by asserting – without proving – that some loss may be attributable to U.S. Tobacco's alleged misconduct.

B. Other Factors in the Marketplace

Conwood also continues simply to ignore the undisputed evidence that, in the 1990's, Conwood faced more competition from all of its competitors in terms of new products, in terms of promotional activity, in terms of meeting the needs and desires of retail customers, and in terms of price competition. See Def. Mem. at 46-49. In the face of this new competition, Conwood lagged

behind all of its competitors, failing to introduce a premium natural product, introducing several brands that were withdrawn from the marketplace because of no consumer demand, failing to offer an incentive program to incent retailers to carry its racks and products, and failing to develop and provide new display racks to meet the changing retail environment. See Def. Mem. at 49.

Because Conwood still does not attempt to account for these marketplace factors – nor could it at this stage on the record – no reasonable jury could have concluded "with reasonable certainty" that U.S. Tobacco's alleged misconduct was a "material cause" of Conwood's claimed injury. Accordingly, the Court should enter judgment as a matter of law.

VIII. CONWOOD DID NOT PROVE DAMAGES BEYOND MERE SPECULATION AND GUESSWORK

Finally, U.S. Tobacco demonstrated that Dr. Leftwich's damages analysis did not meet well-established standards for proving antitrust damages beyond mere speculation and guesswork. See Def. Mem. at 50-60. In response, Conwood argues first, that "the jury verdict is fully supported even in the absence of evidence from Dr. Leftwich," see Pl. Opp. at 44, and second, that Dr. Leftwich's analysis is a "plausible economic model" and "alternative causal explanations . . . are for the jury to decide." Pl. Opp. at 43. Contrary to Conwood's contentions, however, neither the speculative opinion of Conwood's chairman nor the foundationless theoretical construct offered by Dr. Leftwich can support the jury's verdict.

A. The Testimony of Conwood's "Supplemental Damages Expert" – Mr. Rosson – Cannot Support the Jury's Damages Award

Conwood's claim that the jury's award of $350 million is fully supported by the oversimplistic testimony of Mr. Rosson that Conwood's share would have been "in the mid-20s but for UST's misconduct," Pl. Opp. at 37, if accepted, would fully eradicate the well-established rule

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of law that antitrust damages must be proven by a fair and reasonable estimate beyond mere speculation and guesswork. It also would open wide the gate to excessive damages awards based on little more than the conjecture of a plaintiff's executives – antitrust plaintiffs would no longer even have to bother with damages experts at all. Here, a review of Mr. Rosson's testimony reveals why the Court should not elevate Mr. Rosson from "a piece of the puzzle that [Conwood] need[ed] to have fit," Tr. 2/29 at 116 (Rosson), to a self-contained basis for a $350 million damages award.[19]

In its opposition papers, Conwood states that Mr. Rosson's testimony was based on "45 years of experience in the tobacco business, Conwood's historical performance in moist snuff, and Conwood's performance in adjacent smokeless markets." Pl. Opp. at 37. Taking each one of these factors, it becomes readily apparent that Mr. Rosson's damages testimony, in fact, has no basis at all. First, Mr. Rosson's 45 years of experience does not qualify Mr. Rosson to offer the jury a back-of-the-envelope projection that could measure and account for the effects of various factors on Conwood's sales share. Second, simply observing Conwood's historical performance in the moist snuff industry does not and cannot predict how Conwood would have fared in the 1990's "but for UST's misconduct." Critically, Mr. Rosson testified that he did not know what factors affected Conwood's sales such that Conwood's sales share differed from state to state prior to 1990. Tr. 2/29 at 201-05 (Rosson) ("there are too many variables for me to give you a sensible answer to that question"). That concession not only disqualifies Mr. Rosson's newly announced status as a damages expert, it also disqualifies Mr. Rosson even as the "piece" of Dr. Leftwich's puzzle that

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[19] Despite the fact that Mr. Rosson was not disclosed as an expert witness under Fed. R. Civ P. 26(a), the Court allowed Mr. Rosson, over U.S. Tobacco's objection, to offer what can only be classified – now, even by Conwood – as expert testimony (however flawed) on the issue of damages. See Memorandum In Support of Defendants' Motion For A New Trial.

plaintiff's counsel said Conwood so desperately needed. See infra Section VIII.B. There also is no reason to believe that Mr. Rosson had any better understanding of the various factors affecting Conwood's sales after 1990; nor was any reason offered at trial.

Finally, any true assessment of Conwood's performance in adjacent smokeless markets (such as loose leaf) would predict that Conwood's share in moist snuff sales would have declined and that Conwood's actual sales would have declined. In loose leaf, Conwood was passed by Swedish Match as the number one supplier, and Conwood's actual sales have experienced a steady decline throughout the 1990's. If Mr. Rosson truly did assess adjacent smokeless markets, he would have predicted that Conwood's moist share was doing exceedingly well by comparison. The truth is that Mr. Rosson did not assess adjacent smokeless markets at all.

Conwood's attempt to prop Mr. Rosson up as a supplemental damages expert comes, no doubt, from its realization that Dr. Leftwich's analysis completely lacked foundation and was replete with methodological errors. But Mr. Rosson's testimony lends no support to Dr. Leftwich's fatally flawed analysis, and it is not sufficient under the antitrust laws simply to pile speculation on speculation.

B. Dr. Leftwich Did No Better

Dr. Leftwich's damages analysis added little to the speculation of Conwood personnel such as Mr. Rosson. Thus, Dr. Leftwich was hired in July of 1999, made assumptions based on two telephone calls with Conwood personnel, put together a regression analysis that did not "test" any alternative theories aside from the one he heard on the phone, and submitted his expert report on August 2, 1999. As U.S. Tobacco demonstrated in its moving papers, Dr. Leftwich did not measure any lost sales; Dr. Leftwich relied on assumptions that are not supported by record evidence; Dr.

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Leftwich did not attribute damages to specific acts of defendants; and Dr. Leftwich relied on faulty data and Conwood surveys created solely for purposes of litigation. Conwood disputes none of this.

Instead, Conwood's principal argument in response is that because Dr. Leftwich cleared the Daubert hurdle before trial, there is no legal basis for the Court to now review his damages estimates based on the full trial record. But, as the Court indicated in its Daubert opinion, Dr. Leftwich's damages testimony is deficient as a matter of law if (1) there is no evidentiary basis for critical assumptions; or (2) the assumptions are shown to be false. See Feb. 23, 2000 Order at 4.

1. There Is No Basis For Critical Assumptions

At the very outset of Dr. Leftwich's study in this case, he made assumptions based on telephone calls with Conwood personnel. These assumptions led Dr. Leftwich to conclude that, absent U.S. Tobacco's misconduct (whatever it may be): (1) Conwood's sales share would grow equally in all states, and (2) regardless of Conwood's share in any state as of 1990, Conwood's share would grow 8.1% or 6.5%, depending on the "scenario." Tr. 3/8 at 35 (Leftwich). For example, if Conwood's share in a given state was 1.4% as of 1990, Dr. Leftwich's model assumes that Conwood's share would be 9.5% (1.4% + 8.1%) in that state in 1997. Nowhere in this record – and Conwood does not even attempt to point to any record evidence – is there any basis for these assumptions.

The evidence is as follows: Conwood successfully entered the moist snuff "market" in 1979 with the introduction of Hawken. Tr. 2/29 at 67-69 (Rosson). In 1982, Conwood introduced Kodiak. Tr. 2/29 at 72-73 (Rosson). By 1990, Conwood had grown its national sales share to 11%, but Conwood's share in 1990 varied from state to state – the lowest being 1.4%, the highest being 24.2%. See Leftwich Supp. Rep., Table 1. This variation, according to Conwood's own theory, had

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nothing to do with U.S. Tobacco's alleged misconduct because the "commencement of UST's concerted exclusion" did not occur until 1990. See Pl. Opp. at 33 n.39. Yet, despite Conwood's state-by-state success rates in an "unrestricted market," Dr. Leftwich's model assumes (1) a suddenly uniform growth in all of these states after 1990; and (2) an actual growth in share of 6.5-8.1% in all of these states by 1997, despite the fact that 21 states did not reach an 8.1% share in the entire unaffected period prior to 1990. Tr. 3/8 at 35 (Leftwich); see also Leftwich Supp. Rep., Table 1.[20]

Conwood has not and cannot support these assumptions with any record evidence. Instead, it is clear that Dr. Leftwich was used by Conwood simply to assume causation and plug in numbers that, in varying degrees, essentially equalized Conwood's sales share across all states. This is not rigorous antitrust damages analysis; it is a rather pointless math exercise. But as the Seventh Circuit has explained:

> For years we have been saying, without much visible effect, that people who want damages have to prove them, using methodologies that need not be intellectually sophisticated but must not insult the intelligence. Post hoc ergo propter hoc will not do; nor the enduing of simplistic extrapolation and childish arithmetic with the appearance of authority by hiring a professor to mouth damages theories that make a joke of the concept of expert knowledge.

See Blue Cross & Blue Shield United v. Marshfield Clinic, 883 F. Supp. 1247, 1262 (W.D. Wis. 1995) (quoting Schiller & Schmidt, Inc. v. Nordisco Corp, 969 F.2d 410, 415-416 (7th Cir. 1992)), aff'd in part, rev'd in part, 65 F.3d 1406 (7th Cir. 1995). That is all Dr. Leftwich did here.

2. Dr. Leftwich's Assumptions Were Shown To Be False

Dr. Leftwich also made assumptions that were shown to be false at trial. Primary among these was his failure to measure or account in any way for the effects of other factors clearly

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[20] In several states, Dr. Leftwich's model inexplicably predicts a 700% increase in share without any basis whatsoever. See Leftwich Supp. Rep., Table 3.

at work in the marketplace.[21] Dr. Leftwich conceded that it was important to his analysis to test the effects of other "confounding variables." See Pl. Opp. at 41; Tr. 3/8 at 22-30 (Leftwich). Accordingly, Dr. Leftwich tested the effects of per capita income, age, racial composition, educational levels, and unemployment. Id. None of these factors has anything to do with the differences in growth rates of competitors in the moist snuff industry. Thus, it was not surprising, as Conwood pointed out, that "none of these factors could explain Conwood's different level of share growth between 1990 and 1997." Pl. Opp. at 41.[22] But the list of factors that Dr. Leftwich did not test, or account for in any way, demonstrates vividly that Dr. Leftwich's assumptions about what did explain Conwood's different level of share growth were demonstrably false in light of the trial record.

For example, Dr. Leftwich (1) could not "disentangle" the procompetitive aspects of Category Management from any allegedly anticompetitive aspects of Category Management. Tr. 3/8 at 81-82 (Leftwich); (2) did not measure the effects of increased promotional activity and pricing strategies of Conwood's competitors; id. at 85-86; (3) did not study the effects of new product introductions, although he admitted that new product introductions such as Timberwolf affected

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[21] Dr. Leftwich did not even "test," as Conwood claims, the assumption that U.S. Tobacco's misconduct began in 1990. Dr. Leftwich did not run regressions for other years, including 1989, see Tr. 3/8 at 49-52, 61-63 (Leftwich), to test counter-hypotheses. Dr. Leftwich found an economic model that was consistent with what he heard and he stuck with it, closing his eyes and ears to all else.

[22] Presumably, none of these factors would explain Conwood's different level of share growth prior to 1990 either. The questions remain: What factors do explain Conwood's different levels of share growth prior to 1990? How did these same factors affect Conwood's share after 1990? What basis is there to support an assumption of uniform growth after 1990? Mr. Rosson could not answer these questions. Dr. Leftwich could not answer these questions. There is no way a reasonable jury could have answered these questions.

Conwood's sales, id. at 86-87; (3) did not have the data to measure the effects of advertising restrictions, although he admitted that such restrictions vary across states, id. at 89-90; (4) did not measure the effects of the introduction of products by Conwood, or the marketplace failure of products such as Kodiak Choice, id. at 90-91; and (5) did not measure the factors causing the decline in Conwood's loose leaf sales and sales share during the 1990's, id. at 91-92. Indeed, Mr. McClure of Swedish Match testified that the U.S. Tobacco conduct that had the greatest effect on Timberwolf was a "price war" that U.S. Tobacco started when it introduced Real Seal in 1997. Tr. 3/13 at 37-39 (McClure).

Based on these same events, Conwood had originally made a predatory pricing claim, which it has since abandoned. How U.S. Tobacco's lawful price competition must have affected Cougar, when according to Mr. McClure it nearly killed Timberwolf, is something Dr. Leftwich obviously did not consider. That lawful conduct, too, was something Dr. Leftwich just rolled up in one "ball of wax" with no means for the jury to "disaggregate" even if they wanted to do so. See Def. Mem. at 55-58.

There is a simple question to be answered here: rather than advance a self-constrained, one-variable model, why didn't Dr. Leftwich construct a model to measure any of the alternative factors that indisputably affected Conwood's sales? Dr. Leftwich's explanation, like Dr. Hall's explanation in Concord Boat, cannot pass the requisite judicial scrutiny under Daubert, and now under Fed. R. Civ. P. 50(a). Dr. Hall explained:

> I did not numerically attribute – in other words, it wasn't some specific adjustment that you'll see in my computer spread sheet saying, "Here's what I did because of OMC." And that's because of the framework that I was working in. Remember, I was stepping back and saying, "What's a reasonable benchmark for what a free market would have been?"

Concord Boat, 207 F.3d at 1056-57. Similarly, at trial, for the first time, Dr. Leftwich attempted to explain away these omissions by testifying that it was not necessary to account for any other factors that did not occur in the same "pattern" predicted by his regression model. Tr. 3/8 at 87-88 (Leftwich).[23] But this explanation, even if accepted as true, is not consistent with Dr. Leftwich's own theory that it was the effects that varied across different states (based on Conwood's "foothold"), not the degree or intensity of the alleged misconduct. Tr. 3/8 at 20-22 (Leftwich). There was no reason for Dr. Leftwich to assume that new product introductions, or any other factor he failed to measure, would not likewise have affected Conwood more where Conwood had not established a foothold -- the same assumption he was willing to make and did make with respect to the alleged misconduct of U.S. Tobacco. His decision to ignore these market realities also renders his damages opinions speculative as a matter of law:

> [The] expert opinion should not have been admitted because it did not incorporate all aspects of the economic reality of the [relevant] market and because it did not separate lawful from unlawful conduct. Because of the deficiencies in the foundation of the opinion, the expert's resulting conclusions were "mere speculation."

Concord Boat, 207 F.3d at 1057.

The evidence at trial established that these other lawful factors in the marketplace were, indeed, a market reality for Conwood, but Dr. Leftwich never even attempted to incorporate those factors into his model. Accordingly, Dr. Leftwich's opinion, like Mr. Rosson's, did not separate unlawful from lawful conduct, and that makes his damages opinion "mere speculation" as a matter of law. Id.

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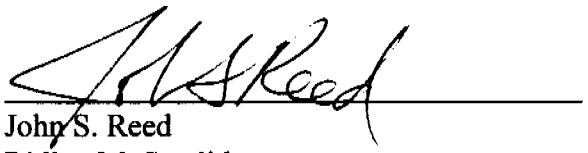
[23] Dr. Leftwich, however, offered no explanation of how he reasonably excluded any factors when he didn't even determine the "patterns" of the factors that indisputably affected Conwood's sales, such as promotional activities, introductions of new products, or advertising restrictions, all of which vary in intensity from state to state.

CONCLUSION

For the foregoing reasons, U.S. Tobacco respectfully requests that the Court direct entry of judgment as a matter of law for Defendants.

Dated: May 12, 2000

Respectfully submitted,



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I certify that copies of the foregoing were sent by overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, on the 12th day of May, 2000.

/s/ J. V. Reed

Counsel for Defendants

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR A NEW TRIAL, OR, IN THE ALTERNATIVE, A REDUCED DAMAGES AWARD

Conwood's response to U.S. Tobacco's motion for a new trial, or alternatively, for a reduced damages award ("Def. Mem."), is an obsequious attempt to have this Court simply overlook an extremely excessive and unsupported damages award, which followed on the heels of what unfortunately became an extremely unfair trial. While Conwood would have this Court find that U.S. Tobacco's objections to the verdict and the course of the trial are mere "quibbles," the applicable law and the events at trial prove otherwise.

I. THE VERDICT WAS AGAINST THE GREAT WEIGHT OF THE EVIDENCE

As a threshold matter, Conwood's argument regarding the weight of the evidence is simply – and erroneously – this: because Conwood used a lot of documents and witnesses, there is nothing for the Court to weigh. Conwood, however, mistakes the quantity of evidence for the quality of evidence, in terms of what facts the evidence actually proved. It is clear that Conwood's evidence focused on U.S. Tobacco's intent and had little to do with the conduct that actually took place in the retail environment or the results of that conduct. Accordingly, despite the volume of evidence offered at trial, Conwood did not prove by a preponderance of the evidence that U.S. Tobacco (1)

possessed monopoly power in any relevant market; or (2) engaged in exclusionary conduct violative of Section 2 of the Sherman Act. See Memorandum In Support of Defendants' Motion For Judgment As a Matter of Law ("Def. Mem. JMOL"). Because the jury reached a "seriously erroneous result," see Pl. Opp. at 47, a new trial is warranted.

II. THE DAMAGES AWARD WAS EXCESSIVE AND UNSUPPORTED BY THE EVIDENCE

Attempting to defend the amount of the jury's damages award as "eminently reasonable," Conwood asks this Court to uphold the jury's award solely because it was within the range of damages offered by Dr. Leftwich. Conwood also claims that Dr. Leftwich's range, even at its maximum of $488 million, was somehow "conservative" because Conwood's chairman, Mr. Rosson, got on the stand and asked for over $500 million. Conwood, however, misstates the law and the factual circumstances governing the jury's verdict.

Conwood simply avoids U.S. Tobacco's central point – and dispositive case law – as to why the jury's verdict was excessive. As set forth in U.S. Tobacco's moving papers, new trials are routinely granted in antitrust cases where a plaintiff's damages analysis (including belated proffers of company executives) do not disaggregate the effects of lawful and unlawful conduct. See Def. Mem. at 3-4. There can be no doubt that the jury's $350 million verdict included damages caused by lawful conduct as well as factors wholly unrelated to U.S. Tobacco.

Conwood does not disagree with the law cited by U.S. Tobacco. See Pl. Opp. at 50, but instead attempts to limit the application of those cases to instances where a court expressly finds certain conduct to be lawful. See Pl. Opp. at 50 n.51. Conwood must concede, however, that to the extent Dr. Leftwich's damages analysis includes, inter alia, the effects on Conwood sales of the introduction of Timberwolf, of the independent, uncoerced decisions of retailers, of lawful promotional activities by Conwood's competitors, and/or of increased competition through the

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number of brands and price offerings, Dr. Leftwich's damages estimates are indeed excessive. See Def. Mem. at 3-5. Conwood's cited authority stands only for the proposition that damages awards are appropriate if supported by the damages evidence offered at trial; it does not permit a jury to award damages based on damages analyses that are themselves speculative and unsupported by record facts. Here, Dr. Leftwich's damages estimates do not and cannot support the jury's verdict.

III. ULTIMATELY, THE TRIAL WAS NOT FAIR TO U.S. TOBACCO

As expected, Conwood applauds the Court for running a trial that it characterizes as the "model of efficiency and fairness." See Pl. Opp. at 51. While U.S. Tobacco agrees that this was the Court's objective throughout, the trial did not turn out that way. Indeed, Conwood does not and cannot seriously dispute that the Court's in limine decisions and its rulings throughout the trial, together with Conwood's calculated overreaching of certain of the Court's rulings, eventually enabled the jury to find U.S. Tobacco liable under Section 2 for reasons having nothing to do with "exclusionary" conduct, and to award damages to Conwood for reasons having nothing to do with relevant proof of lost sales and profits caused solely by any such conduct.

A. The Court's Rulings On Summary Judgment

There should never have been a trial in the first place. In its moving papers, U.S. Tobacco established that the Court erred when it denied U.S. Tobacco's motion for summary judgment because the practices challenged by Conwood were, under well-established case law, ordinary, procompetitive business practices available to all participants in the alleged moist snuff market – including Conwood – and used by just about every manufacturer of consumer goods doing business with retailers in this country. U.S. Tobacco established that practices such as product mix and space allocation suggestions were ordinary and procompetitive; that seeking and even obtaining SOF=SOM promoted efficiency and was commonly used by retailers to achieve efficient space allocation; that offering and providing exclusive display racks – even to obtain a promotional

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advantage over one's competitors – was ordinary and procompetitive; and that U.S. Tobacco's CAP program was an ordinary incentive program of the type offered by hundreds of manufacturers in all different product categories. See Def. Mem. at 5-8.

These arguments were rejected by the Court on summary judgment with apparent disregard of cases cited by U.S. Tobacco holding each specific "species of conduct" to be lawful and procompetitive, even when practiced by a monopolist, see Beverage Management, Inc. v. Coca-Cola Bottling Corp., 653 F. Supp. 1144, 1146, 1155-56 (S.D. Ohio 1986) (exclusive advertising arrangement could not violate Sections 1 or 2 where plaintiffs were free to use same ordinary marketing methods; Sections 1 and 2 of the Sherman Act do not equate "business frustrations stemming from rival's competitive practices with violations of the antitrust laws"), and even when carried out by an alleged conspiracy of manufacturers see Kellogg Co., 99 F.T.C. 8 (1982) (manufacturers seeking SOF=SOM was lawful, procompetitive conduct). Conwood's contention that whether or not the complained-of conduct was ordinary and not exclusionary was properly held to be a question of fact for the jury is simply wrong. Based on the undisputed material facts, U.S. Tobacco's alleged misconduct involves marketing practices that courts have long held to be procompetitive and lawful. Accordingly, this Court should have found, as a matter of law, that the practices cannot be "exclusionary" under Section 2; there should have been no role for the jury.

Similarly, Conwood's mischaracterization of Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000), as a decision limited to above-cost price-cutting under the Clayton Act is disingenuous at best. In Concord Boat, plaintiffs challenged the market-share-based incentive programs of a boat manufacturer, arguing that rebates offered to retailers for purchasing motors up to the defendant's market share unlawfully excluded competitors and therefore violated Section 2 of the Sherman Act. Id. at 1043-46. The Eighth Circuit rejected plaintiffs' claim, vacating the jury's verdict and reversed the district court's failure to grant judgment as a matter of law. See

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id. at 1063. Whether or not the incentive program, or any other allegedly anticompetitive conduct, was "ordinary" conduct was not a question of fact for the jury – there, or here.

B. The Court's In Limine Rulings

U.S. Tobacco also demonstrated that certain of the Court's in limine rulings were in error and affected the outcome of the trial, unfairly and inappropriately leading to the jury's verdict in favor of Conwood.

1. Evidence of the Pritzker Organization

U.S. Tobacco was unfairly prejudiced by the Court's ruling not to allow the jury to know that this was not a case of big company versus small company, a "sideshow" created and exploited by Conwood's counsel under cover of the Court's "Pritzker" ruling. The Court ultimately recognized the inequity it had permitted by first ruling the way it did on the in limine motion, but then allowing Conwood's counsel to "play on big" throughout the trial "for purposes of other advocacy." Tr. 2/29 at 128 (Rosson). Even if the original in limine ruling had arguable been appropriate, Conwood repeatedly opened wide the door to all the evidence about the financial capacities of its owners, but the Court repeatedly closed it again. There can be no doubt that the false impression created for the jury – that Conwood did not have the resources to compete long term with U.S. Tobacco – went a long way in the jury's determination of liability and damages. Accordingly, a new trial is warranted.

2. Dr. Leftwich's Damages Analysis

As discussed in Section II above, U.S. Tobacco established that Dr. Leftwich's damages analysis was insufficient as a matter of law and should have been excluded under Daubert. In addition, U.S. Tobacco established that allowing Dr. Leftwich to submit an expert report on January 28, 2000, six months after the August 2, 1999 deadline for expert reports, was a violation of Fed. R. Civ. P. 26(a)(2), resulting in all of the harm and unfair prejudice meant to be prevented

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by that Rule.[1] Based on the Court's rulings in this case, a party has every incentive to file a "place holder" expert report on the due date and then "supplement" that report with a completely new opinion on the eve of trial. Such conduct, however, warrants a new trial.

3. Professor Gundlach's "Study"

U.S. Tobacco established that, under Sixth Circuit authority, it was reversible error to allow Dr. Gundlach simply to read documents to the jury that he then characterized as "exclusive agreements." Contrary to Conwood's attempt to distinguish the case, the Sixth Circuit adjudicated this precise issue in Berry v. City of Detroit, 25 F.3d 1342, 1352, 1356 (6th Cir. 1994) (reversing jury verdict for plaintiff based, in part, on the testimony of an expert witness who reviewed reports, but without reviewing the underlying facts to make relevant determinations). In Berry, the expert reviewed "shots fired" police reports and then, without investigating the underlying facts, made determinations about whether the incidents were justified by "self-defense." Id. at 1352.[2] Here, Dr. Gundlach made no investigation of the facts underlying the documents he read. In fact, he did not interview a single retailer on his "exclusive agreement" list. Tr. 3/9 at 129-31 (Gundlach). The only fact that distinguishes Berry from the instant case is that the expert in Berry did not testify quite plainly that he "was not interested in the specific deliberations that went on in the [police officer's] mind." Tr. 3/9 at 148 (Gundlach). Using these words, Dr. Gundlach admitted he didn't care or consider what retailers thought. Accordingly, as U.S. Tobacco established in its moving papers, Dr.

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[1] Conwood's argument that U.S. Tobacco made no motion for a continuance ignores the fact that U.S. Tobacco objected to the admission of Dr. Leftwich's new testimony and was denied by the Court. U.S. Tobacco's objection, therefore, is fully preserved.

[2] The expert witness in Berry was also allowed by the district court to offer opinions that encompassed legal conclusions. For example, the expert opined that the police department was grossly negligent. Id. at 1354. Here, Dr. Gundlach testified that the documents he reviewed constituted "exclusive agreements."

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Gundlach offered no expertise beyond reading documents; his testimony was improper expert testimony under Fed. R. Evid. 702 and should have been excluded.

4. Proving Fact Of Injury At Specific Retail Stores

With full knowledge of what Conwood was trying to present to the jury in terms of "damages" estimates, U.S. Tobacco foresaw that Conwood was attempting to circumvent completely its obligation under Sixth Circuit and other applicable law to prove injury in fact with "reasonable certainty." Accordingly, U.S. Tobacco moved the Court in limine to require Conwood to make some showing of lost sales caused by U.S. Tobacco's alleged misconduct. The Court denied U.S. Tobacco's motion based on the faulty premise that Conwood would have to prove lost sales at over 300,000 retail locations.

In its motion for a new trial, U.S. Tobacco pointed out that the Court could have required Conwood – at a minimum – to make some showing of lost sales short of requiring Conwood to prove lost sales at every one of the 300,000 retail locations. See Def. Mem. at 13-14. In any event, as U.S. Tobacco established in its moving papers, the Court's denial in full of U.S. Tobacco's motion in limine completely relieved Conwood of its obligation to prove fact of injury and causation. Accordingly, a new trial is warranted to require Conwood to meet its burden of proving fact of injury "with a fair degree of certainty."

5. Motion To Preclude Certain Trial Exhibits

U.S. Tobacco established that Conwood used expert witnesses improperly to present otherwise inadmissible and highly prejudicial hearsay evidence to the jury. In denying U.S. Tobacco's motion in limine, the Court relied on Trepel v. Roadway Express, Inc., 194 F.3d 708, 717 (6th Cir. 1999), and allowed Conwood to present hearsay evidence, while recognizing U.S. Tobacco's "key concern" of not being able to cross-examine the declarants (for example, any of the 226 Conwood employees who signed "sworn declarations" of purportedly unethical activity). See

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Feb. 23 Op. at 2. The Trepel court, however, which allowed the introduction of a single document reasonably relied on by an appraiser, did not contemplate the introduction en masse of Conwood employee surveys, "unethical activity reports," and retailer statements under the guise that they were the type of documents that could be reasonably relied on by an economist as a basis of his opinions. See Tr. 3/1 at 35-37 (Kamien); see also Tr. 3/23 at 164-83 (Scheffman).

C. The Court's Evidentiary Rulings During Trial

1. Improper Use of Expert Witnesses

U.S. Tobacco demonstrated that Conwood's use of experts simply to read documents to the jury and to channel in otherwise inadmissible hearsay was highly improper under Fed. R. Evid. 702, 703, and 403. See Def. Mem. at 16-21. In its opposition papers, Conwood makes several misstatements.

First, Conwood argues that Drs. Kamien, Gundlach and Blattberg each read scores of documents to the jury merely "to explain the bases of their opinions." Pl. Opp. at 61. The trial record, however, indicates that Conwood's entire strategy was to present documents to the jury through its expert witnesses:

> MR. HANSEN: Your Honor, the reason I have to read documents is U.S. Tobacco will not bring the witnesses who wrote the documents here. I have two options. I can do it this way or take seven hours of deposition.

Tr. 3/1 146-47 (bench conference during the direct examination of Dr. Kamien). Mr. Hansen's statement to the Court reveals that, for two years, Conwood neglected to take proper discovery, all the while planning to introduce documents – complete with convenient interpretations – through its"experts" at trial in violation of the Federal Rules of Evidence and the Sixth Circuit's opinion in Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994).

Second, with respect to the presentation of inadmissible hearsay, Conwood argues that because U.S. Tobacco agreed to a limiting instruction, it waived its objection. Conwood fails

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to point out that U.S. Tobacco agreed to a limiting instruction only after its objection was denied by the Court. See Tr. 2/29 at 8. Accordingly, contrary to Conwood's representation, U.S. Tobacco's objection is preserved. Allowing Conwood to use experts to act as factual surrogates and to channel in otherwise inadmissible hearsay was in error and warrants a new trial.[3]

2. Conwood's Use of "Fact" Witnesses as Expert Witnesses

Over U.S. Tobacco's objection, Conwood's Chairman, Mr. Rosson, was allowed to offer opinions derived from studies prepared by "staff" and, according to Conwood's counsel at side bar, by Kellogg Huber attorneys. Tr. 2/28 at 236-46 (Kamien). In its opposition papers, Conwood is quick to point out that the cited trial record was a discussion among counsel, but that does not change the fact that, according to Mr. Hansen's own judicial admission, Mr. Rosson's testimony derived from materials prepared by counsel; it was not "opinions and inferences rationally based on [his] perception" as Conwood asserts is allowed by Fed. R. Evid. 701. Pl. Opp. at 65 n.66. Rather, Mr. Rosson's testimony concerning product market and comparative advertising expenditures was patent expert testimony.

Likewise, Mr. Hansen represented to the Court that Mr. Rosson's testimony regarding "but for" sales share was "a piece of the [damages] puzzle that we need to have fit." Tr. 2/29 at 116 (Rosson). Thus, what Dr. Leftwich failed to assess by January 28, 2000 (or ever), Conwood's counsel simply prepared for Mr. Rosson to parrot to the jury. Together, Conwood succeeded in presenting all pieces of the puzzle – defective as it was – without regard to the Rules. In its opposition papers, Conwood cites cases involving the proper admission of lay opinion testimony.

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[3] Moreover, Conwood's excuse for slamming three binders of inadmissible Conwood employee surveys on the witness stand during the cross-examination of Dr. Scheffman demonstrates the lengths to which Conwood went in order to present inadmissible testimony to the jury. See Pl. Opp. at 62-63. Questions about the bases of an expert opinion are proper cross-examination. See id. B-movie theatrics for the sole purpose of circumventing the Federal Rules of Evidence are not. U.S. Tobacco respectfully suggests that it would be error to minimize the impact upon the jury of this calculated disregard for the Rules.

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They have no relevance, however, where a witness' testimony was based on materials prepared by staff and by attorneys rather than on the witness' own perception. The Court's decision to allow Conwood to present such opinion evidence was in error and requires a new trial.

In any event, the testimony of Mr. McClure from Swedish Match also exceeded the bounds of lay opinion testimony admissible under Fed. R. Evid. 701. As U.S. Tobacco demonstrated in its moving papers, Mr. Rosson and Mr. McClure were allowed to guesstimate what Conwood's and Swedish Match's sales shares would have been, respectively, "in the absence of UST tactics." Tr. 3/13 at 41-43 (McClure). U.S. Tobacco objected, and the Court sustained the objection at the time of Mr. McClure's testimony. Tr. 3/13 at 42. Undaunted, counsel for Conwood proceeded to elicit the objectionable testimony anyway. Tr. 3/13 at 42-43 (McClure). The Court allowed counsel to do so, and in fact, overruled U.S. Tobacco's immediate motion to strike. Tr. 3/13 at 43. The Court's decision to allow this testimony over its own ruling was in error and warrants a new trial.

3. Conwood's Comments and Questions Concerning The "Availability" of U.S. Tobacco Employee Witnesses

U.S. Tobacco demonstrated that it was highly prejudicial for the Court to allow counsel for Conwood to question and comment about the availability of U.S. Tobacco employee witnesses. Contrary to Conwood's suggestion, see Pl. Opp. at 67 n.68, such questioning was not limited to questioning Mr. Gierer about Gary Smith and David Untiedt. As demonstrated in U.S. Tobacco's moving papers, counsel for Conwood asked about the availability of many witnesses during the course of trial, and argued to the jury that U.S. Tobacco witnesses were "hiding" in Greenwich. See Def. Mem. at 21-22; see also Tr. 3/6 at 47-48 (Milano) (Days before Mr. Gierer took the stand, counsel for Conwood asked Mr. Milano about the availability of U.S. Tobacco employees who were never requested by Conwood to appear at trial or to be deposed.) Moreover,

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this was not a situation in which U.S. Tobacco's objection was overruled.[4] The Court expressly ruled that it would be improper to make such inquiries. See Tr. 2/28 at 16 ("[I]t would be improper to say that we asked them to bring them here and they didn't bring them."). Conwood did it anyway and then reinforced the forbidden questions by scrolling as background during its closing argument the names of innumerable U.S. Tobacco employees, most of whom it never sought to depose.

D. The Court's Jury Instructions

1. Removal of "Predatory"

Conwood cannot deny or minimize the import of the change in the Court's jury instruction from "predatory" to "restrictive." Indeed, Conwood lobbied persistently for this change in the jury instructions – and with good reason. Throughout this case, Conwood relied on blurring the distinction between competitive conduct that may have caused Conwood to lose business (e.g., promotions and/or incentive programs) and conduct that was actually anticompetitive. By persuading the Court to eliminate the word "predatory," Conwood eliminated the element of irrational economic behavior and was able to argue effectively that normal competitive business activity was "restrictive" to Conwood's business.

Even the Supreme Court and Sixth Circuit precedent cited by Conwood makes clear that the word "restrictive" is insufficient. See Pl. Opp. at 67; see also Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 694 (1962)(defining violative conduct as "monopolistic and

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[4] Conwood's reliance on Downriver Internists v. Harris Corp., 929 F.2d 1147, 1151 (6th Cir. 1991) is misplaced. In that case, and cases cited therein, it was held to be permissible to comment on the failure of a party to call an available witness who would ordinarily be expected to testify, such as a hired consultant. Id. at 1151. Here, Conwood did not simply comment that certain witnesses had not appeared, but instead made it a central theme of their case that U.S. Tobacco was hiding numerous employee witnesses – all of whom were available to be deposed at any time – outside the jurisdiction of the court. Therefore, Conwood's tactic falls squarely within that category of cases where the Sixth Circuit has held "it would be improper for counsel to comment to a jury about the failure of a witness to testify because such inferences that are raised would be mere speculation not subject to ay cross examination." Boulter v. Chesapeake and Ohio Railroad Co., 442 F.2d 335, 336 (6th Cir. 1971).

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restrictive"); Potters Med. Ctr. v. City Hosp. Ass'n, 800 F.2d 568, 575 (6th Cir. 1986) (defining violative conduct as "unnecessarily restrictive"). Thus, as U.S. Tobacco argued at trial and demonstrated in its moving papers, the omission of the word predatory was far more than a word change; it changed the substance of the entire jury instruction on the critical behavioral element. Accordingly, Conwood's claim that U.S. Tobacco has no right "to select particular wording" is off the mark. The Court's omission of the word "predatory," done at Conwood's persistent request, was in error and warrants a new trial.

2. Instruction On Nominal Damages

The Court's refusal to include an instruction on nominal damages was in error because it deprived the jury of the opportunity to find for Conwood on liability, but to reject the damages estimates proffered by Conwood and its damages expert, Dr. Leftwich. Conwood is correct to point out that the Court properly instructed the jury that the Court's damages instruction should not imply that Conwood should win its case. But the Court did not present the jury with the option of finding for Conwood on liability and awarding only nominal damages. Conwood is wrong to argue that a nominal damages instruction was not necessary because U.S. Tobacco did not offer an alternative damages calculation.[5] In an antitrust case, a plaintiff has the burden of proving damages beyond mere speculation and guesswork. If it does not meet that burden, a court should enter judgment as a matter of law. See Def. Mem. JMOL. At most, the jury should have awarded nominal damages. Accordingly, the Court's refusal to instruct the jury on nominal damages, even after

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[5] Conwood's reliance on Portis v. Grand Trunk Western Railroad, No. 93-1721, 1994 WL 362110 (6th Cir. July 12, 1994), is absurd. Portis was a personal injury case, in which the plaintiff offered direct evidence of lost wages. Id. at *2. Here, Conwood offered no evidence of lost sales. Moreover, in that case, the defendant did not offer any evidence of other causal factors, and did not dispute the calculation of lost wages offered by plaintiff. Even if personal injury case law could be extended to antitrust cases (where a specific standard for proving damages has been articulated by numerous federal courts), Portis would not support Conwood's argument.

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recognizing that proof of damages was a weakness in Conwood's case, see Tr. 3/14 at 95, was in error and warrants a new trial.

IV. AT A MINIMUM, REMITTITUR IS REQUIRED

Even if the Court does not order a new trial, at a minimum, the factual record of this case strongly warrants the entry of a remittitur of the jury's damages award. In its opposition papers, Conwood cites a number of cases that hold that a jury's damages award may not be set aside or reduced unless it exceeds the maximum amount of damages "that the jury reasonably could find to be compensatory for a party's loss." See Pl. Opp. at 70 (emphasis added). U.S. Tobacco does not dispute this case law; rather, it contends that the jury's verdict is far in excess of any amount that could be said to be reasonably supported by the record evidence of this case.

As demonstrated in U.S. Tobacco's moving papers, Conwood's damages award is a windfall that includes "lost" profits based on an astronomical "but for" projection of Conwood's sales share in the moist snuff industry. It awards Conwood damages for the effects of perfectly legitimate conduct, whether by U.S. Tobacco, by Swisher and Swedish Match, or by retailers. While U.S. Tobacco continues to maintain that entire damages evidence is defective and should be thrown out, at a minimum, it is unfair, unsupported by evidence and should therefore be reduced.

Finally, Conwood misinterprets damages cases to suggest that no remittitur is warranted, as a matter of law, if the damages award is within the range offered by plaintiff's expert witness. Conwood, however, confuses damages evidence with the speculation and exercises in fantasy of its own expert witness.[6] Further, Conwood's suggestion that this Court may not reduce

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[6] Similarly, Conwood's reliance on personal injury, age discrimination, sex discrimination, and civil rights cases, see Pl. Opp. at 70-71, is a transparent attempt to mislead the Court, but it actually highlights the fact that never in the history of the antitrust laws has a jury award been upheld where it was based on pure speculation and guesswork offered in the guise of expert testimony. See Def. Mem. at 4 (citing numerous antitrust cases resulting in remittitur or judgment as a matter of law based on failure to prove damages). Moreover, in each non-antitrust case cited by Conwood, the (continued...)

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damages unless U.S. Tobacco had presented the proposed adjustments to the jury, see Pl. Mem. at 2-3, is completely baseless. Conwood cites no case that conditions remittitur on the defendant having offered an alternative damages analysis. Moreover, the remittitur cases cited in U.S. Tobacco's moving papers, see Def. Mem. at 25-26, reduced damages based on the evidence at trial regarding causation and other factors, not on an alternative damages presentation.

Accordingly, as U.S. Tobacco demonstrated in its moving papers, this Court should enter a remittitur, reducing what now stands as the largest verdict in the history of the antitrust laws to an amount more consistent with the record evidence of other causal factors in the marketplace shown to have affected Conwood's sales.

---

[6] (...continued)
plaintiff offered real evidence of lost wages. Here, Conwood offered absolutely no evidence of any lost sales. Even if applicable, the cases cited by Conwood, on their facts, further illustrate the deficiencies in Conwood's damages evidence. See also n.5, supra.

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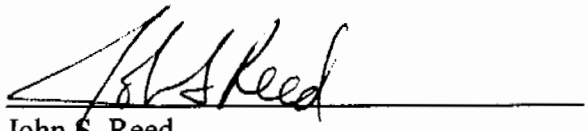
CONCLUSION

For the foregoing reasons, U.S. Tobacco respectfully requests that as an alternative to granting judgment as a matter of law, the Court order a new trial, or in the alternative, enter a remittitur, reducing the damages award.

Dated: May 12, 2000

Respectfully submitted,



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Certificate of Service

I certify that copies of the foregoing were sent by overnight delivery to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway Street, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, on the 12th day of May, 2000.

Counsel for Defendants

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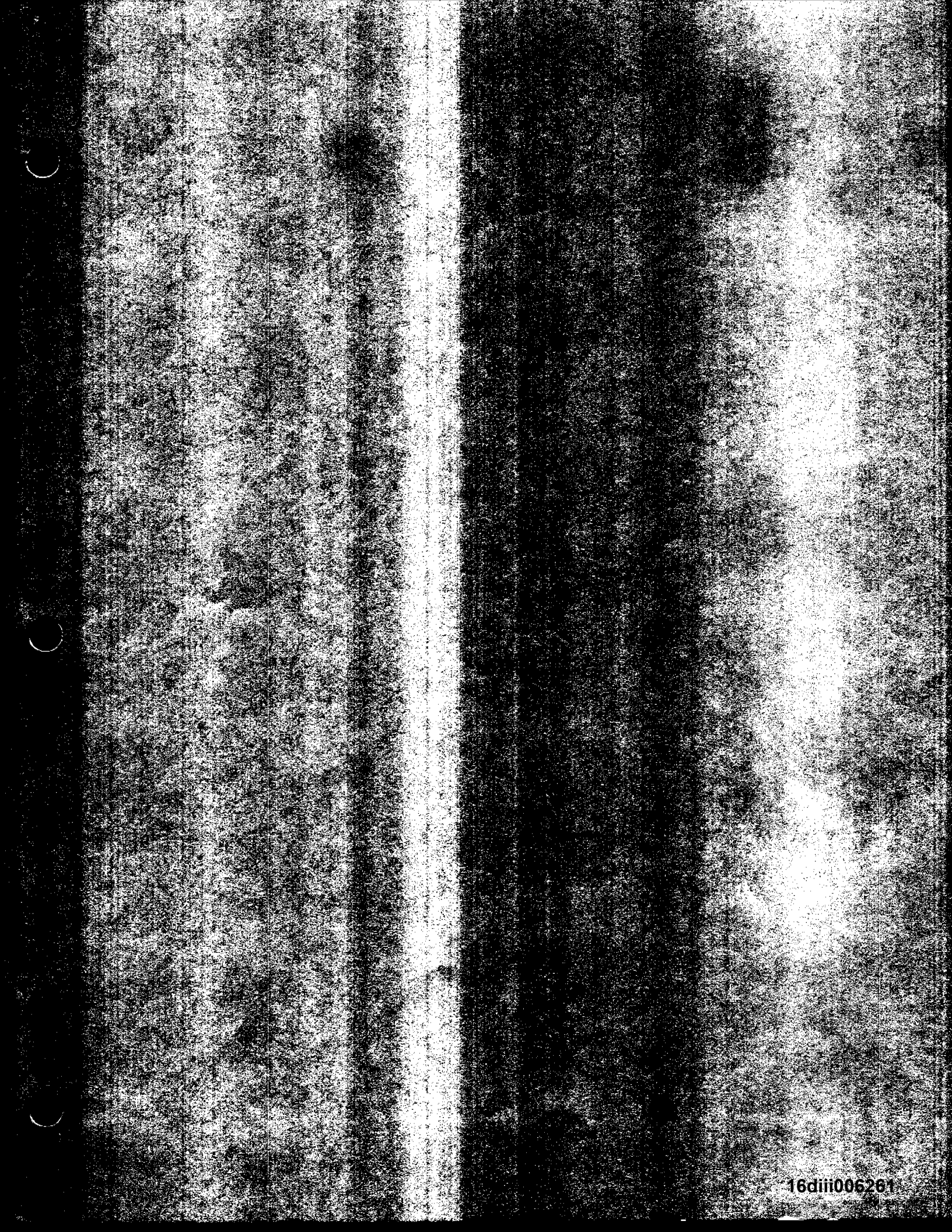

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(Cite as: 28 F.3d 1214, 1994 WL 362110 (6th Cir.(Mich.)))

NOTICE: THIS IS AN UNPUBLISHED OPINION.

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA6 Rule 28 and FI CTA6 IOP 206 for rules regarding the publication and citation of unpublished opinions.)

Richard PORTIS, Plaintiff-Appellee,
v.
GRAND TRUNK WESTERN RAILROAD COMPANY, a Michigan corporation, Defendant-Appellant.

No. 93-1721.

United States Court of Appeals, Sixth Circuit.

July 12, 1994.

On Appeal from the United States District Court for the Eastern District of Michigan, No. 91-74840; Zatkoff, D.J.

E.D.Mich.

AFFIRMED.

Before MILBURN and BATCHELDER, Circuit Judges, and CONTIE, Senior Circuit Judge.

PER CURIAM.

**1 Defendant appeals a jury verdict for plaintiff Richard Portis in the amount of $500,000. The issues are (1) whether the jury verdict was excessive, (2) whether the district court erred by failing to instruct the jury on plaintiff's duty to mitigate damages, and (3) whether the district court erred by refusing to allow a doctor to testify about reports and opinions of other doctors. For the reasons that follow, we affirm.

I.

On March 25, 1991, while working at Grand Trunk Western Railroad Company's Port Huron Car Shop, plaintiff Richard Portis, a railroad carman, was injured when he had to suddenly twist and duck out of the way of an oncoming, airborne wrench. The wrench had been knocked loose from a piece of equipment by a co- worker's hammering at the wrench. Plaintiff sustained a back and neck injury from his efforts in dodging the flying wrench.

Plaintiff Portis brought this action under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., [FN1] alleging that the injuries he received were proximately caused by defendant Grand Trunk's negligence. The jury found defendant negligent and awarded plaintiff $500,000 in damages. On appeal, defendant contests the damage award only; it does not contest the jury's finding of negligence. Defendant filed a motion for a new trial or remittitur arguing the same issues it raises on appeal. In its memorandum opinion and order, the district court addressed each of defendant's arguments and denied the motion. This timely appeal followed.

The parties presented extensive medical evidence at trial. Plaintiff was examined by several doctors, including Dr. Yull, one of defendant's company doctors; Dr. Gallant, defendant's Chief Medical Advisor; and Dr. Sutton, an orthopedic surgeon in Port Huron who was plaintiff's primary treating physician. Additionally, plaintiff was examined by a second orthopedic surgeon, Dr. Roy, apparently at defendant's request. Even though Dr. Sutton was plaintiff's primary treating physician, plaintiff was periodically examined by Drs. Gallant and Yull. Dr. Roy examined plaintiff one time and prepared a report that was sent to Dr. Gallant. Neither Dr. Yull nor Dr. Roy testified at the trial.

At the trial, the parties disputed plaintiff's ability to return to work. Defendant's medical expert, Dr. Gallant, testified that both he and Dr. Yull released plaintiff to return to work without restrictions. Although Dr. Roy's report was not admitted into evidence, Dr. Gallant testified that Dr. Roy's conclusions regarding plaintiff's condition substantiated Dr. Gallant and Dr. Yull's evaluations. Plaintiff's medical expert, Dr. Sutton, testified that plaintiff could return to work provided that plaintiff did not lift more than ten to fifteen pounds, and Dr. Sutton indicated that the ten to fifteen pound restriction was permanent.

After being cleared by all four doctors, plaintiff Portis reported to work and presented Dr. Sutton's

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orders to defendant. Plaintiff was subsequently sent home because no light duty work existed at Grand Trunk. Plaintiff did not seek alternative employment while restricted to light duty work. However, he was still considered a Grand Trunk employee and continued to be examined periodically by Dr. Gallant. At the time of the trial, plaintiff had been injured for less than nineteen months and was still an employee of Grand Trunk. Both plaintiff and Dr. Sutton testified that plaintiff was experiencing constant pain and frequent muscle spasm. Dr. Sutton indicated that plaintiff would permanently experience pain and muscle spasm.

**2 In his closing argument, plaintiff's counsel suggested a total damage award of $800,000. Plaintiff had testified that he was making approximately $30,000 annually at the time of the accident. Because he had been off work for approximately nineteen months at the time of the trial, his lost wages were approximately $45,000-$50,000. Plaintiff also testified that he was 40 years old and had planned to work until he reached the age of 62. He indicated, however, that because of his injuries, any job that he would be able to perform would require him to accept a decrease in pay. Specifically, plaintiff's attorney indicated that, including fringe benefits, plaintiff would lose approximately $20,000 per year. Multiplying $20,000 by 22 years (plaintiff's estimated work life), plaintiff's attorney suggested that reasonable compensation for lost wages would be $440,000 plus the $50,000 plaintiff had already lost. Thus, plaintiff's counsel argued that plaintiff's economic damages were $490,000. In addition to these economic damages, plaintiff requested damages for pain and suffering and calculated the total damage award at $800,000. Defendant chose to defend on the ground that plaintiff's claim was fraudulent and, thus, presented no evidence regarding plaintiff's lost wages or failure to mitigate damages. Defendant's closing argument made no mention of damages, nor did it give any alternative figure for the jury to consider. The jury did not indicate how much of the $500,000 verdict it awarded was for economic loss and how much was for pain and suffering.

II.

A.

Defendant contends that it should be granted a new trial because the jury's damage award of $500,000 was excessive. In support of this contention, defendant argues (1) the $500,000 award was so large "as to shock the judicial conscience," (2) the jury disregarded the court's instructions on damage awards, (3) the award was based on "speculation and conjecture," and (4) plaintiff counsel's comments during closing argument were "improper and prejudicial" and "designed to influence the jury" to base their verdict on "passion, prejudice and sympathy." The district court rejected all of these arguments and held that the jury's award of damages was not excessive. "[A]bsent abuse of discretion or clear mistake, the judgment of the judge who presided at the trial that a verdict was not excessive will control." Hoskins v. Blalock, 384 F.2d 169, 170 (6th Cir.1967). A damage award should not be set aside as excessive unless it was based on prejudice, passion, or sympathy, or was so large as to be shocking to the conscience of the court. E.g., Farber v. Massillon Bd. of Educ., 917 F.2d 1391, 1395 (6th Cir.1990), cert. denied, 111 S.Ct. 952 and 2851 (1991).

The damage award of $500,000 was within the range permitted by the evidence presented at trial, and therefore was not so large as to shock the conscience of the court. As a general rule, "a jury verdict will not be set aside or reduced as excessive unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss." Id. (quotations and citation omitted). In this case, plaintiff testified about his salary and fringe benefits, the length of time he had planned to continue working, and the reduction in salary he could expect from accepting employment with the medical restrictions caused by the accident. In his closing argument, plaintiff's counsel showed the jury how these numbers should be calculated and arrived at a sum of $490,000 for economic damages. Plaintiff also testified that he had constant pain in his back and neck and experienced frequent muscle spasm. Dr. Sutton indicated that this was a permanent condition. For this pain and suffering, plaintiff asked the jury for approximately $310,000. We do not know how the jury arrived at its final $500,000 figure, but we do know that $500,000 was not beyond the maximum damages that the jury reasonably could find to be compensatory for plaintiff's loss. See Kokesh v. American S.S. Co., 747 F.2d 1092, 1095 (6th Cir.1984) (upholding $500,000 award where plaintiff had back injury permanently impairing earning capacity and causing pain).

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**3 Defendant's reliance on Nairn v. National Railroad Passenger Corp., 837 F.2d 565 (2d Cir.1988), is misplaced. In Nairn, the court held that a $765,000 verdict awarded to an injured railroad employee was excessive. The injuries suffered by the Nairn employee were similar to those suffered by plaintiff in this case. However, the reason the court found the verdict excessive was that at least $400,000 of the award was for pain and suffering. In the present case, the award for pain and suffering could have been as low as $10,000. Therefore, Nairn is no support for defendant's position.

Defendant also argues that the jury disregarded the court's instructions on the non taxability of the damage award and reduction of award for loss of future earnings to present value. However, a jury is presumed to have followed the instructions given by the court. Clarksville-Montgomery County Sch. Sys. v. United States Gypsum Co., 925 F.2d 993, 1003 (6th Cir.1991). The only argument defendant advances to overcome this presumption is: "It is abundantly clear based on the extremely short duration of time that the jury deliberated (one hour and forty minutes) that it did not take into account either the non taxability of the damage award or the reduction to present worth as required by law." Brief for Defendant at 18 (emphasis omitted). We see nothing "abundantly clear" about it. A reasonable jury could make the needed calculations in one hour and forty minutes, particularly where it has no evidence of economic loss to consider except that presented by the plaintiff. Therefore, defendant has not overcome the presumption that the jury followed the court's instructions.

Defendant contends that any award for future loss of income in this case could only be based on speculation because "there was no basis for the jury to have concluded that plaintiff's condition would be disabling in the future and/or to what extent." Brief for Defendant at 19. However, Dr. Sutton testified that plaintiff could not perform work requiring him to lift more than 10-15 pounds and that this weight restriction was permanent. This testimony provided the jury a basis from which the jury could conclude that plaintiff would remain partially disabled in the future. Therefore, defendant has not shown that the jury's conclusion was based on speculation.

Defendant also complains that three comments made by plaintiff's counsel during closing argument, taken as a whole, constitute reversible error because they were "improper and prejudicial comments designed to influence the jury so that their verdict would be based in whole or in substantial part on passion, prejudice and sympathy." Brief for Defendant at 20 (emphasis omitted). A new trial may be granted if "improper closing argument irreparably prejudices a jury verdict." Nissho-Iwai Co. v. Occidental Crude Sales, Inc., 848 F.2d 613, 619 (5th Cir.1988); see also Rommel-McFerran Co. v. Local Union No. 369, Int'l Bhd. of Elec. Workers, 361 F.2d 658, 661-62 (6th Cir.1966). However, defendant did not object to these comments at any time before the jury retired to deliberate. After the jury returned the unfavorable verdict, defendant for the first time called the alleged improprieties to the court's attention. At that point it was too late for the court to cure any possible problems caused by plaintiff counsel's comments. "[I]n a civil action, '[a] principle that strikes very deep is that a new trial will not be granted on grounds not called to the court's attention during the trial unless the error was so fundamental that gross injustice would result.' " United States v. Walton, 909 F.2d 915, 924 (6th Cir.1990) (quoting 11 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2805, at 39 (1973)); see also Carmel v. Clapp & Eisenberg, P.C., 960 F.2d 698, 704 (7th Cir.1992); Nissho-Iwai Co., 848 F.2d at 619; Computer Sys. Eng'g, Inc. v. Qantel Corp., 740 F.2d 59, 69 (1st Cir.1984). Defendant has not shown that any gross injustice resulted from plaintiff counsel's statements in closing argument. Therefore, a new trial could not be granted on these grounds even if plaintiff counsel's statements were improper.

**4 Defense counsel explains that she did not object at trial "because she believed that plaintiff's counsels, being experienced trial attorneys, knew or should have known that 'extraneous matters' that had not been introduced and admitted into evidence should not have been put before a jury." Reply Brief for Defendant at 7. What plaintiff's counsel knew or should have known is irrelevant. The fact is that defendant did not bring the alleged improprieties to the court's attention at a time when the court could take corrective measures. If we excused defendant's failure to object because the opposing attorneys should have known what they were doing was improper, then all errors made at trial would be subject to review even if not objected

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to, because all attorneys should be competent and know the rules of trial procedure. Allowing defendant's proffered reason to excuse the failure to object would encourage some lawyers to plant error for appeal. This we refuse to do.

Relying on United States v. Bess, 593 F.2d 749, 757 n. 11 (6th Cir.1979), defendant argues that it did not have to object to plaintiff counsel's comments on extraneous matters. Bess is inapposite. Bess merely held that there is one circumstance where statements of personal belief in closing argument are proper. Where criminal defense counsel has impugned the integrity or motivation of the prosecutor, the prosecutor has the right to reply. That curative admissibility rule simply has nothing to do with this case.

In sum, defendant has not satisfied its burden of showing that the jury's verdict was excessive or influenced by passion, prejudice, or sympathy. Therefore, a new trial cannot be granted on this basis.

B.

Under the Federal Employers' Liability Act a plaintiff has a duty to mitigate his damages. Jones v. Consolidated Rail Corp., 800 F.2d 590, 593 (6th Cir.1986); Baker v. Baltimore & Ohio R.R. Co., 502 F.2d 638, 644 (6th Cir.1974). The district court did not instruct the jury on plaintiff's duty to mitigate. On appeal, defendant contends that this omission was reversible error, but at the trial defendant did not object to the omission. Rather, defendant raised its objection for the first time in its motion for a new trial. [FN2] Federal Rule of Civil Procedure 51 provides: "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict...." Because defendant did not object before the jury retired, we may only review the district court's failure to instruct the jury on mitigation principles for plain error, error that is so obvious and prejudicial that a failure to correct it would result in a manifest miscarriage of justice. See Thompson v. Paasche, 950 F.2d 306, 314 (6th Cir.1991); Gomez v. Great Lakes Steel Div. Nat'l Steel Corp., 803 F.2d 250, 256 (6th Cir.1986); O'Brien v. Willys Motors, Inc., 385 F.2d 163, 166 (6th Cir.1967). Defendant offers no argument as to why the omission of the mitigation instruction was plain error other than to say that it is the law that a plaintiff must mitigate his damages and failing to give the instruction "may have affected the award of damages." Brief for Defendant-Appellant at 45 (emphasis in original).

**5 In denying defendant's motion for a new trial, the district court held that the omission of the mitigation instruction was not prejudicial to defendant because the jury verdict appeared to have taken the mitigation principle into account. Without accounting for the duty to mitigate, plaintiff's economic damages would have been $660,000, that is, plaintiff's $30,000 salary multiplied by his expected work life of 22 years. The district court concluded that the jury had to have taken mitigation principles into account because it only awarded $500,000, which was the total of economic damages and pain and suffering. We agree that defendant has not satisfied its burden of showing that the failure to instruct the jury on mitigation principles resulted in a manifest miscarriage of justice. Therefore, the failure to give such an instruction was not plain error.

C.

Defendant's final complaint is that the district court committed reversible error by prohibiting Dr. Gallant from testifying about the medical opinions of Dr. Yull and Dr. Roy, which were contained in the medical file maintained by Dr. Gallant. [FN3] Plaintiff objected to the introduction of these opinions because the opinions constituted hearsay. Defendant argued that the opinions fell within the hearsay exceptions for statements made for purposes of medical diagnosis or treatment, Fed.R.Evid. 803(4), and for records of regularly conducted activity, Fed.R.Evid. 803(6). We review the district court's rulings on admission of evidence only for an abuse of discretion. Nida v. Plant Protection Assoc. Nat'l, 7 F.3d 522, 527 (6th Cir.1993). "In the context of an evidentiary ruling, abuse of discretion exists when the reviewing court is firmly convinced that a mistake has been made regarding admission of evidence. However, even if a mistake has been made, a new trial will not be granted unless the evidence would have caused a different outcome at trial." Polk v. Yellow Freight Sys., Inc., 876 F.2d 527, 532 (6th Cir.1989) (citation omitted).

The medical opinions of Dr. Yull and Dr. Roy that plaintiff was fit to return to regular work do not fall within the hearsay exception provided by

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Fed.R.Evid. 803(4). "The rationale underlying the Rule 803(4) exception for statements made for purposes of treatment is that the declarant's motive guarantees their trustworthiness, since he has a motive to disclose the truth because his treatment will depend in part upon what he says." 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 803(4)[01], at 803-144 (1993) (citing Meaney v. United States, 112 F.2d 538 (2d Cir.1940)). In this case, defendant was not trying to admit statements made by plaintiff for the purposes of treatment or diagnosis but rather was trying to admit the medical opinions and diagnoses of doctors who had examined plaintiff. Because these opinions were not statements made for the purposes of diagnosis or treatment, they do not fall within the hearsay exception of Rule 803(4).

**6 Furthermore, the medical reports were not admissible under Fed.R.Evid. 803(6) because Dr. Gallant was unable to lay a proper foundation. A "qualified witness" under Rule 803(6) need not have participated in the making of the record, but he must be "familiar with the record keeping system." United States v. Hathaway, 798 F.2d 902, 906 (6th Cir.1986). Here, Dr. Gallant could not testify as to the record keeping procedures of Drs. Yull and Roy or if it was the regular practice of those doctors to make such records. Because Dr. Gallant was not familiar with the record keeping system under which these reports were made, he was not qualified to a lay a foundation for the reports to be admitted or read into evidence. Furthermore, the fact that Dr. Gallant regularly kept reports of other doctors in his records does not cure this foundation deficiency. Rule 803(6) requires not only that the witness show that the report was "kept in the course of a regularly conducted business activity" but also that "it was the regular practice of that business activity to make the ... report." Dr. Gallant and defendant Grand Trunk may have regularly kept such reports, but it was not their regular practice to make such reports. In other words, Dr. Gallant's custody of Dr. Yull's and Dr. Roy's medical reports does not make the reports admissible as Dr. Gallant's business records. See Belber v. Lipson, 905 F.2d 549, 552 (1st Cir.1990).

Moreover, although Dr. Gallant was not permitted to read the opinion of Dr. Roy into evidence, he nevertheless advised the jury of the conclusions reached by Dr. Roy by testifying that Dr. Roy's opinion "reinforces my opinion that this man is not disabled." J.A. 601. Therefore, even if it were error to disallow the medical report, defendant was not substantially prejudiced by the error because the jury was aware of the basic content of the report and that the other doctor's findings bolstered Dr. Gallant's conclusion.

The district court did not abuse its discretion in refusing to allow the medical reports of Dr. Roy and Dr. Yull to be admitted into evidence. We are not firmly convinced that the district court made a mistake in not allowing the evidence. Rule 803(4) is inapplicable, and defendant did not lay a proper foundation to admit the reports under Rule 803(6). Additionally, even if the reports should have been admitted, we cannot say that it would have made a difference in the outcome of the trial, because the jury was aware that the reports agreed with Dr. Gallant's conclusion.

III.

For the reasons stated, the district court is AFFIRMED in all respects.

FN1. 45 U.S.C. § 51 provides in relevant part:
Every common carrier by railroad while engaging in [interstate] commerce ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce ... for such injury ... resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier....

FN2. The district court required the parties to submit joint proposed jury instructions. No proposed instruction on the duty to mitigate was included in the joint instructions submitted by the parties. After the trial was complete and the verdict rendered, defendant filed a motion to amend the record to add defendant's individual set of proposed instructions. A mitigation instruction was included in defendant's proposed instructions.
Defendant seems to argue that the failure to object should be excused because the district court gave the attorneys only an hour to review the jury instructions before closing arguments. Even if an hour was insufficient time, which we do not mean to imply, this excuse would not aid defendant here because not only were the attorneys given an hour to review the actual jury instructions, but the attorneys also had the joint proposed jury instructions well beforehand. There was no mitigation instruction in the joint proposal, and therefore defendant should have been aware of the possibility that such an instruction would not be given.

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FN3. Dr. Yull and Dr. Roy were not called as witnesses at trial. Defendant contends that they were not called because there was an agreement between counsel that the reports could be admitted into evidence. However, no such agreement appears in the record of this case, and plaintiff's counsel states that no such agreement was ever made.

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May 12, 2000

John S. Reed

Via Federal Express

Hon. Thomas B. Russell
United States District Judge
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Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., United States District Court, Western District of Kentucky at Paducah, Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed are courtesy copies of the following documents:

1. Reply Memorandum in Support of Defendants' Motion for a New Trial, or, in the Alternative, a Reduced Damages Award;

2. Motion of Defendants for Leave to File Memorandum in Excess of Fifteen Pages with a tendered order;

3. Reply Memorandum in Support of Defendants' Motion for Judgment as a Matter of Law; and

4. An Appendix to Defendants' Reply Memorandum in Support of Defendants' Motion for Judgment as a Matter of Law and Reply Memorandum in Support of Defendants' Motion for a New Trial, Or, in the Alternative, a Reduced Damages Award.

Respectfully,

John S. Reed

JSR/kmc
Enclosures
cc: Neil M. Gorsuch
Richard C. Roberts
James A. Keyte

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

MOTION OF DEFENDANTS FOR LEAVE TO FILE MEMORANDUM IN EXCESS OF FIFTEEN PAGES

Pursuant to LR 7.1(d), Defendants seek leave to file the attached reply memorandum in support of their motion for judgment as a matter of law. A reply memorandum in excess of the fifteen-page limit is necessary to enable Defendants to address the points in Plaintiffs' response.

A tendered order directing the Clerk to accept the attached reply memorandum for filing is attached hereto.

Respectfully submitted,

Dated: May 12, 2000

John S. Reed
Ridley M. Sandidge, Jr.
Lynn K. Fieldhouse
REED WEITKAMP SCHELL & VICE PLLC
2400 Citizens Plaza
Louisville, Kentucky 40202
(502) 589-1000

Neal R. Stoll
James A. Keyte
Chris T. Athanasia
Jed Goldfarb
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
4 Times Square
New York, New York 10036
(212) 735-3000

Counsel for Defendants

Certificate of Service

I certify that copies of the foregoing were sent by overnight delivery service to Richard C. Roberts, Whitlow, Roberts, Houston & Straub, Old National Bank Building, 300 Broadway, Paducah, KY 42002-0995, and to Mark C. Hansen, Neil M. Gorsuch, Steven F. Benz, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., 1301 K Street, N.W., Suite 1000 West, Washington, D.C., 20005, counsel for Plaintiffs, this 12th day of May, 2000.

Counsel for Defendants

16diii006273

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P. and CONWOOD SALES COMPANY, L.P. Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC., and UST INC., Defendants.	)	Civil Action No. 5:98-CV-108-R

ORDER

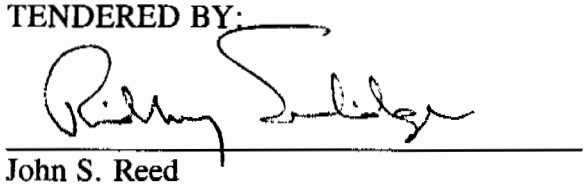
Defendants having moved the Court for leave to file a reply memorandum in support of their motion for judgment as a matter of law in excess of fifteen pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that Defendants' motion is hereby granted and the Clerk is instructed to file the reply memorandum tendered by the Defendants with their motion for leave.

Entered this _____ day of _____, 2000.

_____
Thomas B. Russell, Judge
United States District Court

TENDERED BY:



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4 Times Square
New York, New York 10036
(212) 735-3000

Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'00 MAY 15 A10:15

FILED
U.S. DISTRICT COURT
WESTN DIST. KENTUCKY

MOTION OF PLAINTIFFS FOR LEAVE TO FILE MEMORANDUM IN EXCESS OF FIFTEEN PAGES

Pursuant to LR 7.1(d), plaintiffs seek leave to file Plaintiffs' Reply in Support of Motion for Permanent Injunctive Relief. The memorandum is in excess of the fifteen-page limit because additional pages are necessary to enable plaintiffs to address fully and to set forth adequately the law and facts in reply to defendants' Memorandum in Opposition to Plaintiffs' Request for Permanent Injunctive Relief.

A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts
Whitlow, Roberts,
Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
FAX - (502) 443-4571

Mark C. Hansen
Neil M. Gorsuch
Steven F. Benz
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on this 13th day of May, 2000, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., Four Times Square, New York, NY 10036.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Lisa Woods

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

'00 MAY 15 A10:15

FILED
WESTERN DIST. KENTUCKY

MOTION OF PLAINTIFFS FOR LEAVE TO FILE MEMORANDUM IN EXCESS OF FIFTEEN PAGES

Pursuant to LR 7.1(d), plaintiffs seek leave to file Plaintiffs' Reply in Support of Motion for Permanent Injunctive Relief. The memorandum is in excess of the fifteen-page limit because additional pages are necessary to enable plaintiffs to address fully and to set forth adequately the law and facts in reply to defendants' Memorandum in Opposition to Plaintiffs' Request for Permanent Injunctive Relief.

A proposed order is attached.

Respectfully submitted,

CONWOOD COMPANY, L.P.
CONWOOD SALES COMPANY, L.P.

Richard C. Roberts
Whitlow, Roberts,
Houston & Straub
Old National Bank Building
300 Broadway
Paducah, KY 42002
(502) 443-4516
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1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
FAX - (202) 326-7999

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on this 13th day of May, 2000, a copy of the foregoing was sent by overnight delivery service to:

Neal R. Stoll, James A. Keyte, and Chris T. Athanasia, Skadden, Arps, Slate, Meagher & Flom, L.L.P., Four Times Square, New York, NY 10036.

John S. Reed and Ridley M. Sandidge, Reed Weitkamp Schell Cox & Vice, 2400 Citizens Plaza, Louisville, KY 40202.

Lisa Woods

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CONWOOD COMPANY, L.P., CONWOOD SALES COMPANY, L.P., Plaintiffs, v. UNITED STATES TOBACCO COMPANY, UNITED STATES TOBACCO SALES AND MARKETING COMPANY INC., UNITED STATES TOBACCO MANUFACTURING COMPANY INC. and UST INC., Defendants.	Civil Action No. 5:98CV-108-R

ORDER

Plaintiffs having moved the Court for leave to file Plaintiffs' Reply in Support of Motion for Permanent Injunctive Relief in excess of fifteen pages, and the Court being otherwise well and sufficiently advised,

IT IS HEREBY ORDERED that plaintiffs' motion is hereby granted and the Clerk is instructed to file the memorandum tendered by the plaintiffs with their motion for leave.

Entered this ___ day of May, 2000.

THOMAS B. RUSSELL, JUDGE
UNITED STATES DISTRICT COURT

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1301 K STREET, N.W.
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AUSTIN C. SCHLICK
STEVEN F. BENZ

NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD
EVAN T. LEO

May 13, 2000

Honorable James D. Moyer
208 Snyder U.S. Courthouse
601 W. Broadway
Louisville, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Magistrate Judge Moyer:

Enclosed are courtesy copies of (i) Conwood's Reply in Support of Motion for Permanent Injunctive Relief; (ii) Plaintiffs' Reply in Support of Motion for Attorneys' Fees and Costs; and (iii) Motion of Plaintiffs for Leave to File Memorandum in Excess of Fifteen Pages. Each has been filed with the Clerk.

Respectfully,

Steven F. Benz

Enclosure

cc: Neal R. Stoll, Esq.
John S. Reed, Esq.

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
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GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD
EVAN T. LEO

May 13, 2000

Honorable Thomas B. Russell
United States District Court
Western District of Kentucky
307 Federal Building
501 Broadway
Paducah, KY 42001

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Judge Russell:

Enclosed are courtesy copies of (i) Conwood's Reply in Support of Motion for Permanent Injunctive Relief; (ii) Plaintiffs' Reply in Support of Motion for Attorneys' Fees and Costs; and (iii) Motion of Plaintiffs for Leave to File Memorandum in Excess of Fifteen Pages. Each has been filed with the Clerk.

Respectfully,

Steven F. Benz

Enclosure

cc: Neal R. Stoll, Esq.
John S. Reed, Esq.

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SEAN A. LEV
COURTNEY SIMMONS ELWOOD
EVAN T. LEO

May 13, 2000

Via Hand Delivery

Jeffery A. Apperson
Clerk of the Court
322 Federal Building
501 Broadway
Paducah, KY 40202

Re: Conwood Company, L.P., et al. v. United States Tobacco Company, et al., Civil Action No. 5:98-CV-108-R

Dear Mr. Apperson:

Enclosed for filing please find an original and one copy of Conwood's Reply in Support of Motion for Permanent Injunctive Relief, Plaintiffs' Reply in Support of Motion for Attorneys' Fees and Costs and Motion of Plaintiffs for Leave to File Memorandum in Excess of Fifteen Pages.

I have also enclosed an additional copy of each. Please date stamp and return these copies in the attached self-addressed, postage pre-paid envelope.

Thank you for your attention to this matter.

Respectfully,

Steven F. Benz

Enclosures