

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,
JERRY MONTOUR, KENNETH HILL AND ARTHUR
MONTOUR, JR.,

Claimants/Investors,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**REPLY ON JURISDICTION OF
RESPONDENT UNITED STATES OF AMERICA**

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CONTENTS

PRELIMINARY STATEMENT	1
ARGUMENT	4
I. THE ALLEGED BREACHES AND RESULTING LOSS OR DAMAGE ALL EMANATE FROM THE MSA AND THE ESCROW STATUTES	4
A. Claimants Allege Breaches And Resulting Loss Or Damage Arising From The MSA	5
B. Claimants’ Remaining Alleged Breaches And Losses All Arise From The Escrow Statutes.....	7
C. None Of The Other “Measures” Identified By Claimants Has Caused Them To Incur Loss Or Damage Different From That Caused By The Escrow Statutes	10
II. THE EVIDENCE DEMONSTRATES THAT CLAIMANTS FIRST KNEW OR SHOULD HAVE KNOWN OF THE ALLEGED BREACHES AND RESULTING DAMAGE BEFORE MARCH 2001	12
A. Claimants Must Be Deemed To Have Known Of Their Obligations Under The Law When The Law Was Enacted.....	13
B. Claimants Should Have Acquired Knowledge Of The Alleged Breaches And Their Resulting Loss Or Damage Through Publicly-Available Information.....	15
C. Claimants Should Also Have Acquired Knowledge Through Their Business Associates and Affiliates.....	17
D. Claimants Possessed Actual Knowledge Before March 2001	21
III. CLARIFICATION ON NATIONALITY	25
CONCLUSION.....	26

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In accordance with the schedule established by the Tribunal on October 26, 2005, respondent United States of America respectfully submits this Reply in support of its Objection to Jurisdiction on the ground that the claims are time-barred under Articles 1116(2) and 1117(2) of the NAFTA.

PRELIMINARY STATEMENT

In their “Reply to Respondent’s Objection to Jurisdiction” (“Response”), claimants provide neither evidence nor legal authority to support their claim that they first learned, or should have first learned, only after March 12, 2001 of the alleged breaches and any resulting losses of which they now complain. The Master Settlement Agreement (“MSA”), which is at the heart of claimants’ claims, represented a monumental effort to solve the multi-billion

dollar problem of paying for smoking-related medical costs in the United States.¹ The conclusion of the MSA signaled a sea change in the U.S. tobacco market. As participants in that market, it is not credible that claimants were unaware that the MSA regime would impact their businesses.

Claimants fault the MSA states for failing to notify them personally of the opportunity to join the MSA and receive a payment exemption.² Yet claimants do not even contend that they were manufacturing cigarettes for sale in the U.S. market at the time the MSA was concluded such that any of the MSA's negotiators would have been able to identify them.³ At the same time, claimants provide a multitude of excuses for not receiving notices that were sent to them or their business partners on several occasions prior to March 12, 2001, when authorities became aware that Grand River's cigarettes were being sold in their states. Claimants allege to have changed their address several times, yet disclaim any responsibility for informing anyone of this change, arranging to forward their mail, or retrieving mail sent to previous addresses. They claim to have no owner who could accept service of lawsuits filed against them. And while they tout their various affiliations with multiple distributors and business partners, they disavow the knowledge that these affiliates acquired before March 2001. Claimants' purported misperception that the MSA regime only

¹ *Smoking Costs US \$157 Billion Each Year*, AMERICAN CANCER SOCIETY, available at http://www.cancer.org/docroot/NWS/content/NWS_1_1x_Smoking_Costs_US_157_Billion_Each_Year.asp (Objection to Jurisdiction of Respondent United States of America (Dec. 5, 2005) ("Objection") Factual Appendix ("App.") tab 125). Contrary to claimants' assertions, the lawsuits settled by the MSA were not limited to claims of intentional deception, but were also premised on the theory that tobacco product manufacturers should be liable for the damage caused by their inherently dangerous products. See MSA at 1 (App. tab 1); *id.* Exh. T at T-1.

² Response at 16.

³ See *Grand River Enters. Six Nations Ltd. ("Grand River") v. United States of America*, Particularized Statement of Claim (June 30, 2005) ("Stmt. of Claim") Facts ¶¶ 6-28 (describing claimants' alleged businesses and investments); see also *Grand River v. Pryor*, No. 03-9179 (2d Cir.), Brief of Defendants-Appellees (Jan. 14, 2005) at 58 ("nor does the Complaint allege whether Grand River manufactured cigarettes in 1998.") (App. tab 37).

applied to manufacturers making direct sales in the MSA states – even when notices from the MSA states and the publicly available laws and media reports made clear that the MSA regime applied to them – is unavailing. Such chicanery does not constitute reasonable business practice and cannot excuse claimants from the constructive knowledge standard in NAFTA’s limitations provisions.

Claimants’ attempt to avoid the NAFTA’s limitations period – by insisting that they are not challenging the 1998 MSA as a measure, but, instead, are challenging other so-called measures that post-date March 2001 – is also unavailing. When claimants’ allegations are scrutinized, it is apparent that all of the alleged breaches and resulting loss or damage arose either at or shortly after the time the MSA was signed, or when the Escrow Statutes took effect. Claimants’ theory – that they cannot be deemed to have incurred any loss as a result of the payment obligations imposed by the Escrow Statutes until they were sued for failing to comply and court orders were issued against them – is contrary to well-established legal principles, flies in the face of reason, and would undermine one of the primary objectives of limitations periods. Although claimants’ alleged damage may recur and continue to increase, the *first* occasion on which they should have known they had incurred any loss clearly was more than three years before they submitted their claims to arbitration.

Claimants’ denials of knowledge on the part of Grand River, in the face of overwhelming evidence to the contrary, are not credible. Moreover, claimants avoid discussing the knowledge of Native Tobacco Direct, which received direct notice in advance of March 2001 of the Escrow Statutes and their effect on cigarette manufacturers. Even without any of the evidence of claimants’ actual knowledge, however, it is inescapable that claimants should have first known about the alleged

breaches and losses well before March 2001. They should have learned of the laws applicable to cigarette manufacturers like themselves. They cannot now be heard to complain about effects of those laws on their businesses that they should have recognized more than three years before submitting their claims to arbitration.

ARGUMENT

The United States demonstrates below that claimants' Response provides no basis for preventing Articles 1116(2) and 1117(2) from barring their claims as untimely. Confronted with the NAFTA's limitations provisions, claimants cannot discharge their burden of proving this Tribunal's jurisdiction over their claims. First, all of the alleged breaches that purportedly caused any loss or damage to claimants arose from the MSA and the Escrow Statutes. Claimants allege no loss or damage attributable to any of the other measures they have identified. Second, the evidence demonstrates that claimants should have first learned of the alleged breaches and that they had incurred a loss more than three years before they submitted their claims.⁴ Finally, compelling evidence demonstrates that claimants had actual knowledge of the alleged breaches and resulting damage well in advance of March 2001.

I. THE ALLEGED BREACHES AND RESULTING LOSS OR DAMAGE ALL EMANATE FROM THE MSA AND THE ESCROW STATUTES

In their Response, claimants attempt to circumvent the NAFTA's limitations period by asserting that they are not challenging the MSA.⁵ They also raise, for the first time, additional so-called measures that post-date March 2001 and argue that their claims

⁴ Throughout this submission, when referring to the time when claimants incurred loss or damage under Articles 1116(2) and 1117(2), the United States does not concede that claimants incurred any compensable loss or damage under NAFTA Chapter Eleven.

⁵ See Response at 29-30.

thus are not time-barred. Claimants' listing of certain measures, to the exclusion of others, as the subject of their claims cannot be viewed in isolation from their allegations as a whole. The timeliness of claimants' claims depends on the alleged breaches and resulting loss or damage, not on claimants' *post hoc* identification of the measures at issue.⁶ A claim is timely submitted to arbitration only if it has been submitted no later than three years after the time when the claimant or enterprise first knew, or first should have known, of the breach and that it has incurred resulting loss or damage.⁷ The only "loss or damage" relevant is that which has occurred as a result of the breach.⁸ Likewise, the loss or damage must arise out of the measure alleged to have breached the NAFTA.⁹ Without exception, the breaches and any resulting loss or damage alleged by claimants all arise out of the MSA and the Escrow Statutes.

A. Claimants Allege Breaches And Resulting Loss Or Damage Arising From The MSA

Claimants allege that the United States breached its NAFTA obligations when it concluded the MSA and that they have suffered loss or damage as a result of the MSA's conclusion. Claimants' allegations of a breach of Article 1105(1), for instance, concern their perception of a lack of transparency and notice in the way the MSA and its provisions relating to non-participating manufacturers ("NPMs") were negotiated and

⁶ A determination of whether the types of conduct identified by claimants qualify as measures under the NAFTA is unnecessary to the Tribunal's consideration of the United States' Objection to Jurisdiction. Accordingly, this Reply does not respond to claimants' discussion of this issue. *See* Response at 23-24.

⁷ NAFTA arts. 1116(2) & 1117(2).

⁸ *See Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award ¶ 87 (Oct. 11, 2002) ("*Mondev Awd.*") (finding that Articles 1116(2) and 1117(2) require that the "'loss or damage' refer to the loss or damage suffered by the investor as a result of the breach.").

⁹ *See Methanex Corp. v. United States of America*, Final Award of the Tribunal on Jurisdiction and Merits, at Part II, Ch. F, ¶ 26 (Aug. 3, 2005) ("Articles 1116 and 1117 [require] a claim of loss or damage that originates in the measure adopted or maintained by the NAFTA Party.").

established.¹⁰ Moreover, the payment exemption extended to subsequent participating manufacturers that joined the MSA within 90 days (“Grandfathered SPMs”) lies at the heart of claimants’ allegations of breach.¹¹ In addition, claimants’ damage calculations are based on an alleged diminution in value of claimants’ purported investments equivalent to the value of the payment exemption accorded by the MSA to Grandfathered SPMs.¹²

Any alleged loss or damage resulting from claimants’ failure to receive a payment exemption was incurred in February 1999, when the window for becoming a Grandfathered SPM closed. Claimants effectively concede this point by asserting that the loss or damage resulting from the alleged breach associated with the payment exemption occurred “simultaneously and effectively” with the grant of that exemption to the Grandfathered SPMs.¹³ As demonstrated in the United States’ Objection, the provisions granting that exemption are found in the MSA.¹⁴ Consequently, all the alleged breaches and resulting alleged loss or damage due to both the purported lack of transparency in negotiating the MSA and the grant of an exemption for Grandfathered SPMs arose at the

¹⁰ See, e.g., Stmt. of Claim Argument ¶ 145 (referring to lack of notice at time MSA was negotiated, and “surreptitious manner” in which smaller companies were invited to join); *id.* ¶ 148 (referring to “special back-room deals for smaller[] discounters connected to Big Tobacco” to join the MSA).

¹¹ See *id.* ¶ 69 (the “MSA regime . . . constitutes a prima facie breach of both Article 1102 and Article 1103 because it provides an exemption from payment obligations to both domestic and foreign-owned tobacco businesses, while providing no exemption whatsoever to the Investors or their investment.”); *id.* ¶ 75 (the “perpetual grand-fathered exemption” is one of two “types of more favorable treatment” alleged by claimants); *id.* Facts ¶ 50 (the so-called “Renegade Clause” was intended to “induce a group of smaller competitors . . . to join the MSA under a grant that effectively safeguarded their existing market share, while simultaneously and effectively taking the share held by other competitors, including the [claimants], for the benefit of these Exempt SPMs.”).

¹² *Id.* Exh. 24 at 2 (LECG, Preliminary Calculation of Losses).

¹³ See *id.*; see also Stmt. of Claim Argument ¶¶ 67, 70.

¹⁴ Objection at 34; MSA § IX(i)(1) & (4) (App. tab 1).

time the MSA was signed in November 1998 or within 90 days thereafter, when the time to join as a Grandfathered SPM expired.

B. Claimants' Remaining Alleged Breaches And Losses All Arise From The Escrow Statutes

The only other losses or damages identified by claimants resulted from alleged breaches associated with the enactment of the Escrow Statutes.¹⁵ Several states where Grand River's cigarettes were sold enacted Escrow Statutes in 1999.¹⁶ The remainder of the relevant jurisdictions enacted their Escrow Statutes in 2000.¹⁷ Since their enactment, the Escrow Statutes have required NPMs, like Grand River, to make annual payments into escrow based on the previous year's sales of the NPM's cigarettes in each MSA state.¹⁸

For purposes of the time bar analysis, claimants shift their focus to the penalties they incurred for ongoing non-compliance with the Escrow Statutes. Claimants assert that their claims are timely because, as of March 12, 2001, they had not yet incurred any penalties or out-of-pocket expenses as a result of their refusal to comply with the Escrow Statutes.¹⁹ This assertion is based on a contorted interpretation of the concept of loss or

¹⁵ See Stmt. of Claim Argument ¶ 76.

¹⁶ Approximately 43,000 cigarettes manufactured by Grand River were sold in Iowa in 1999 after its Escrow Statute took effect in May 1999. See *Iowa v. Grand River*, Equity No. CE43095, Pet. ¶ 9 (Nov. 28, 2001) (App. tab 45). Over 13 million Grand River cigarettes were sold in Missouri in 1999 after its Escrow Statute became effective in July 1999. See *Missouri v. Native Tobacco Direct Co.*, Case No. 00CV324140, Pet. for Prelim. and Permanent Injunctive Relief and Recovery of Civ. Penalties, Attorney's Fees and Costs ¶ 28 (June 13, 2000) (App. tab 48). And 7.5 million Grand River cigarettes were sold in Oklahoma during the period from June 1999 through December 1999, when Oklahoma's Escrow Statute was in effect. See *Oklahoma v. Grand River*, Case No. CJ2002-19814, Pet. ¶ 22 (Dec. 31, 2002) (App. tab 60).

¹⁷ See App. tab 6 (table listing citations and effective dates for Escrow Statutes in all MSA states with the texts of the Escrow Statutes attached).

¹⁸ MSA Exh. T at T-4 (App. tab 1).

¹⁹ See, e.g., Response at 32 ("There is no evidence that the Claimants hired attorneys, paid into escrow, or saw their products banned from any market until well after March 12, 2001."); see also *id.* at 2 (asserting

damage and is unsupported by any legal authorities. Moreover, if accepted, claimants' theory would render limitations provisions ineffective.

Claimants' theory that a court must enforce a law in order for it to take effect ignores the power of legislatures to enact laws.²⁰ Those laws are effective once enacted. A legal obligation to pay – such as the one established by the Escrow Statutes – is incurred irrespective of any enforcement action to collect the outstanding payment.²¹ A claimant incurs loss or damage as soon as it becomes legally obligated to make a payment. Claimants thus first incurred loss or damage when they first became legally obligated to make payments into escrow by directing their cigarettes for sale into states with Escrow Statutes, not when those states subsequently brought enforcement actions or ultimately obtained judgments against them.

The penalties claimants incurred when the MSA states prosecuted them for violating the Escrow Statutes are merely an extension of the original loss or damage incurred by virtue of the payment obligation imposed by the Escrow Statutes.²² The

that claimants incurred no loss or damage “until the MSA states started imposing the Contraband Laws and obtained judgments under their Escrow Statutes banning the sales of Claimants' products”).

²⁰ Response at 33 (“the Escrow Statutes [] did not take effect until they were enforced against Claimants.”).

²¹ See, e.g., *Sandoz v. Fred Wilson Drilling Co. (In re Emerald Oil Co.)*, 695 F.2d 833, 837 (5th Cir. 1983) (approving the view of commentators that a debtor becomes liable for a debt “when a resource is consumed or a service performed”); *Barash v. Public Finance Corp.*, 658 F.2d 504, 509 (7th Cir. 1981) (“when a debtor uses a utility the debt is incurred at the time the resource is consumed rather than when the invoice is sent”) (internal quotations omitted); *Maybank Foods v. Provisioners Maritimes Ltd.*, [1989] A.C.W.S.3d 411 (Can.) at ¶ 75 (finding that a company's existing obligation to make severance payments in the future, even if not yet due and payable, constitutes an obligation of the company that a potential investor would have considered in assessing the financial health of the company).

²² See, e.g., IOWA CODE ANN. § 453C.2(2)(c) (1999) (App. tab 6); MO. ANN. STAT. § 196.1003(b)(3) (1999) (App. tab 6); OKLA. STAT. ANN. tit. 37, § 600.23(E) (1999) (App. tab 6); MSA Exh. T at T-5 (App. tab 1) (setting forth penalties for non-compliance); see also *Mondev Awd.* ¶ 87 (“A claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.”); Dept. of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in CANADA GAZETTE, 147, 153 (Jan. 1, 1994) (claims are barred “if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge of a loss or damage.”) (emphasis added); Draft Articles on

Escrow Statutes provide that an NPM found to be non-compliant with the Escrow Statutes must not only place the previously-owed money into escrow, but also must pay a penalty calculated “per day of the violation” accruing from the date the funds were supposed to have been deposited.²³ The fact that the loss is repeated or compounded due to claimants’ own action or inaction does not delay the date the loss was first incurred and cannot excuse an untimely claim.

Claimants’ theory not only conflicts with generally accepted legal principles, but it would also undermine one of the fundamental rationales for limitations provisions. Such provisions, including the NAFTA’s limitations provisions, are strictly enforced in international law.²⁴ They are not merely “technical” as suggested by claimants.²⁵ Among other purposes, limitations periods are intended to provide legal peace for potential respondents.²⁶ Claimants’ theory that a loss is not incurred until enforcement actions are completed would prevent respondents from achieving this legal certainty.²⁷ Indeed, claimants assert that the first time they sustained any damages was in 2002 when

Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, Int’l Law Comm’n, 53d Sess., art. 14(1), in U.N. Doc A/56/10 (2001) (breach occurs “at the moment when the act is performed, even if its effects continue.”); *Empresas Lucchetti v. Peru*, ICSID Case No. ARB/03/4, Award ¶¶ 53-56 (Feb. 7, 2005) (dismissing claim for lack of jurisdiction because later-in-time decrees “merely continued the earlier dispute . . .”); *Phosphates in Morocco*, 1938 P.C.I.J. (ser. A/B) No. 74, at 25-26 (June 14) (upholding objection to jurisdiction *ratione temporis* because the harm alleged resulted from a “régime instituted” prior to the treaty establishing consent to jurisdiction, and rejecting claimant’s argument that the tribunal had jurisdiction because that regime was still in operation after the treaty entered into force).

²³ See, e.g., IOWA CODE ANN. § 453C.2 (2)(c) (1999) (App. tab 6).

²⁴ See Objection 28 n.125 (collecting authorities).

²⁵ Response at 19. Claimants’ reliance on *Mondev* is misplaced. In the paragraph cited by claimants, the *Mondev* tribunal determined that a claim which had been filed pursuant to Article 1116 could be considered to have been submitted under Article 1117, without requiring re-submission of the claim. See *Mondev* Awd. ¶ 86. In the very next paragraph, the tribunal confirmed that Articles 1116 and 1117 operate to bar untimely claims. *Id.* ¶ 87.

²⁶ See Objection 28 n.126 (collecting authorities).

²⁷ Response at 4 (arguing that no loss or damage was incurred “until the MSA states enforced the Contraband Laws and obtained judgments purporting to mandate Claimants’ compliance with the Escrow Statutes”).

they decided to retain outside counsel to challenge the MSA regime and received notice of a default judgment against them in Arizona.²⁸ This view would reward scofflaws with an extended limitations period for evading enforcement: the initiation of the limitations period would be placed solely at a claimant's discretion, and would begin only when a claimant chose to recognize that it was aggrieved. As demonstrated above, claimants first incurred loss or damage as a result of the alleged breaches arising from the Escrow Statutes as soon as they became legally obligated to make payments in accordance with those statutes.

C. None Of The Other “Measures” Identified By Claimants Has Caused Them To Incur Loss Or Damage Different From That Caused By The Escrow Statutes

All of the alleged loss or damage pleaded by claimants was *first* incurred as a result of the MSA or Escrow Statutes more than three years before they submitted their claim. In their Statement of Claim, claimants identified the Escrow Statutes, the “Contraband Laws” and the “Equity Assessment Laws” as the measures at issue in this case.²⁹ Comparing the text of the Escrow Statutes with the text of the Complementary Legislation (which claimants call “Contraband Laws”), however, reveals that claimants could not have incurred any loss or damage as a result of the Complementary Legislation that they had not already first incurred as a result of the Escrow Statutes.³⁰ The Complementary Legislation prevents NPMs, like Grand River, from avoiding their payment obligations under the Escrow Statutes by improving and expediting enforcement efforts. Claimants themselves acknowledge that the impact of the Complementary

²⁸ Response at 7-8.

²⁹ Stmt. of Claim Argument ¶ 10.

³⁰ Compare MSA Exh. T (App. tab 1) with Model Complementary Legislation (Jan. 21, 2003) (App. tab 9).

Legislation was to make “more immediate” the harm already imposed on them by the Escrow Statutes.³¹

Nor does identifying the “Equity Assessment Laws” as challenged measures aid claimants in satisfying the requirements of Articles 1116(2) and 1117(2). Claimants have not alleged any loss or damage resulting from the Michigan or Minnesota equity assessment laws, which they identified belatedly as the subject of their claims.³²

Michigan’s law took effect recently, in January 2004, merely two months before claimants submitted their claims to arbitration.³³ Claimants do not allege that they have incurred any obligation in Michigan under that law. Claimants are also silent as to their involvement, if any, in the Minnesota market. Thus, the last-minute addition of the Michigan and Minnesota laws does not save claimants’ claims from being time-barred.

Finally, claimants identify for the first time in their Response the allocable share amendments as additional measures that they seek to challenge.³⁴ According to claimants, the allocable share provision in the Escrow Statutes as originally enacted provided them with a means of mitigating their damages.³⁵ Effectively removing these provisions by amendment may thus diminish claimants’ ability to mitigate damages, and potentially affect the amount of loss allegedly incurred. The time at which claimants first

³¹ Response at 9.

³² See Stmt. of Claim Facts ¶¶ 72-74 (making no allegation that claimants’ cigarettes were sold in Michigan or Minnesota after their equity assessment laws took effect).

³³ Accordingly, in the event the claims are not dismissed in their entirety at this stage, the United States reserves its right to object to the jurisdiction of the Tribunal over claims relating to the Michigan and Minnesota equity assessment laws on the ground that claimants have not complied with the jurisdictional prerequisites for submitting those claims to arbitration.

³⁴ Response at 30. To the extent claimants’ claims are not dismissed in their entirety at this phase of the proceedings, the United States reserves its right to object to the jurisdiction of the Tribunal to decide any claim relating to the allocable share amendments on the basis that claimants have not complied with the jurisdictional prerequisites for submitting that claim to arbitration.

³⁵ *Id.* at 13.

incurred loss or damage, however, occurred when the Escrow Statutes were enacted in states where Grand River's cigarettes were sold. This date is not altered by the subsequent amendment to the Escrow Statutes, which merely affects the amount of those payments.³⁶

All of the breaches alleged by claimants arose, and the first resulting alleged loss or damage was incurred, more than three years before claimants submitted their claims to arbitration. These breaches and resulting losses arise solely from the MSA and the Escrow Statutes that implemented the MSA. Claimants' desire to avoid identifying the MSA as a challenged measure and to identify laws or changes that took effect after the enactment of the Escrow Statutes does not save their claims from being time-barred.

II. THE EVIDENCE DEMONSTRATES THAT CLAIMANTS FIRST KNEW OR SHOULD HAVE KNOWN OF THE ALLEGED BREACHES AND RESULTING DAMAGE BEFORE MARCH 2001

Claimants' Response presents a variety of explanations for why, against all logic, Grand River purportedly did not know about the impact of the MSA and the Escrow Statutes until several years after the MSA regime was established. Claimants, however, have failed to meet their burden to show that their claims fall within the Tribunal's jurisdiction.³⁷ They argue, in effect, that the limitations period should be tolled from the time the MSA and Escrow Statutes took effect until such time as claimants fully appreciated their operation and application. Notably, U.S. and Canadian courts place the burden on parties seeking to delay the running of a statutory limitations period due to a

³⁶ See *Mondev Awd.* ¶ 87.

³⁷ See, e.g., *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction ¶ 192 (Nov. 14, 2005) (finding that claimant "has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction"); *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction ¶ 79 (Apr. 22, 2005) (acknowledging claimant had to satisfy the burden of proof "required at the jurisdictional phase").

failure to discover a loss or a cause of action. That party must demonstrate that it could not have gained such knowledge by “exercising reasonable diligence.”³⁸ Claimants cannot meet that burden here.

To the contrary, the United States has demonstrated that claimants first acquired, or should have first acquired, knowledge of the alleged breaches and that they had incurred a resulting loss more than three years before submitting their claims. That the United States has uncovered evidence of claimants’ actual knowledge, without having even engaged in discovery, highlights the strength of the time bar defense in this case. That defense, nevertheless, is adequately sustained on the basis of constructive knowledge alone.

A. Claimants Must Be Deemed To Have Known Of Their Obligations Under The Law When The Law Was Enacted

Claimants cannot preserve their time-barred claims through willful ignorance of the law. Claimants’ contention that the three-year limitations period could not begin to run until they were informed either by the MSA states or by their own lawyer that the Escrow Statutes applied to them ignores the widely-accepted principle that ignorance of the law is no excuse.³⁹

³⁸ See, e.g., *Soper v. Southcott* [1998] 39 O.R.3d 737, 737 (Can.) (“Where a defendant pleads a statutory limitation period, the plaintiff has the burden of proving that the cause of action arose within the limitation period.”); *Dilworth v. Metropolitan Life Ins. Co.*, 418 F.3d 345, 349 (3d Cir. 2005) (“[A] party seeking to benefit from the discovery rule to delay the running of the statute of limitations has the burden of establishing that she was unable to know of her injury and could not ascertain that knowledge exercising reasonable diligence.”); *John Q. Hammons Hotels, Inc. v. Acorn Window Systems, Inc.*, 394 F.3d 607, 610 (8th Cir. 2005) (“The discovery rule prevents the statute of limitations from commencing to run until such time as a plaintiff knows, or should have known through the exercise of reasonable diligence, of the injury sustained.”); *Zamboni v. Aladan Corp.*, 304 F.Supp.2d 218, 224 (D.Mass. 2004) (“When the discovery rule is at issue, the plaintiff bears the burden of proving both an actual lack of causal knowledge and the objective reasonableness of that lack of knowledge.”) (citation omitted); *Albert v. Victoria Hospital Corp.*, [2001] O.T.C. 48 at ¶ 19 (Can.) (“The onus is on the plaintiff to show that the limitation period should be extended by the doctrine of discoverability.”).

³⁹ See Objection 42 nn.173 & 174 (collecting authorities).

Before directing their cigarettes into the United States market, claimants bore a responsibility to familiarize themselves with applicable laws in the states where their products would be sold. Especially in a highly-regulated area like the tobacco market, claimants should have been aware that there are a multitude of laws concerning their industry and should have kept abreast of new developments to ensure that their cigarettes were being sold in compliance with the law.⁴⁰ Claimants should have first known that they had incurred loss or damage caused by the Escrow Statutes as soon as their payment obligation arose under those statutes, and not when they claim to have eventually recognized the need to comply with those laws.⁴¹

If claimants had not already learned about the Model Statute attached at Exhibit T to the MSA, they should have learned about the Escrow Statutes when several states where their cigarettes were sold enacted them in 1999.⁴² They could easily have read the

⁴⁰ Indeed, Grand River's in-house counsel demonstrated this awareness of the need to ensure compliance with state and federal laws in letters provided to several MSA states in 1999 on behalf of White River Distributors. In letters dated March 8, 1999, April 21, 1999, and September 16, 1999, Ms. Montour, in-house counsel for Grand River, wrote on behalf of White River Distributors, to assist in its "efforts to obtain various state and federal tobacco licenses." Letter from Chantell MacInnes Montour, In house counsel for Grand River Enterprises, to Brian Teeter, White River Distributor, LLC (Mar. 8, 1999; received by Missouri) (Reply on Jurisdiction of Respondent United States of America ("Reply") Factual Appendix ("Reply App.") tab 133); Letter from Chantell MacInnes Montour, In house counsel for Grand River Enterprises, to Brian Teeter, White River Distributor, LLC (Mar. 8, 1999; received by Iowa) (Reply App. tab 132C); Letter from Chantell MacInnes Montour, In house counsel for Grand River Enterprises, to Brian Teeter, White River Distributor, LLC (Apr. 21, 1999) (Reply App. tab 134); Letter from Chantell MacInnes Montour, In house counsel for Grand River Enterprises, to Janice Campbell, Tobacco Control Board (Sept. 16, 1999) (Reply App. tab 135). The letters identify White River as a distributor of Grand River's products in Missouri, Iowa, and Arkansas and were provided to each of those states either by White River or by Grand River directly.

⁴¹ Claimants are mistaken in their belief that the Escrow Statutes in MSA states like New York have not yet become effective because they allegedly have not been applied to them. *See* Response at 3, 5. The New York Escrow Statute has applied to Grand River since it took effect. By definition, payments are only required under the Escrow Statutes for sales on which state excise tax is imposed. *See* MSA Ex. T at T-3 (App. tab 1). New York has not subjected on-reservation sales to excise tax requirements, so Grand River's on-reservation sales in New York have enjoyed an exemption under the terms of the Escrow Statute. *See* Objection at 12.

⁴² The provisions of the Escrow Statutes should have come as no surprise to claimants. Before the MSA was concluded, there had been an earlier, failed attempt to achieve a nationwide tobacco settlement. Reports on the negotiations surrounding that attempt discussed the likelihood that obligations would be

text either of the Model Statute or the individual states' Escrow Statutes (which faithfully adhere to the Model) to ascertain each of the aspects of that legislation that now form the basis of their claims. Although claimants have insisted on several occasions that they had no reason to believe that the Escrow Statutes applied to Grand River because Grand River made no direct sales to consumers, simply reading the text of the Model Statute or any of the Escrow Statutes would have made clear that the payment obligation applies whether the manufacturer's products are sold "directly or through a distributor, retailer or similar intermediary or intermediaries."⁴³ Claimants' purported misunderstanding as to the proper interpretation of the law does not excuse their violation of that law. Nor does it toll the limitations period.

B. Claimants Should Have Acquired Knowledge Of The Alleged Breaches And Their Resulting Loss Or Damage Through Publicly-Available Information

Claimants should have been apprised of the alleged breaches and losses of which they now complain well before March 2001 by virtue of several other publicly available sources, in addition to the laws themselves. The text of the MSA was made publicly available as soon as it was concluded.⁴⁴ There was widespread media coverage of the MSA and its provisions, as evidenced by the numerous news reports on the establishment of the MSA regime

imposed on smaller tobacco companies that did not join the settlement. *See, e.g.*, Interview by Ray Suarez with Bennett LeBow, CEO, Liggett Group, *Talk of the Nation* (National Public Radio, July 30, 1997) (Reply App. tab 137) (Liggett president Bennett LeBow explaining that "in the global settlement, there's a whole page devoted to something called a non-participating manufacturer. . . . And a non-participating manufacturer has to pay 150 percent what we would normally pay, not tax deductible, into escrow for 35 years . . .").

⁴³ *See, e.g.*, IOWA CODE ANN. § 453C.1(10) (1999) (App. tab 6); MO. ANN. STAT. § 196.1000(j) (1999) (App. tab 6); OKLA. STAT. ANN. tit. 37, § 600.22(10) (1999) (App. tab 6); MSA Exh. T at T-3 (App. tab 1).

⁴⁴ As the United States previously indicated, the full text of the MSA could be found on NAAG's website during the 90-day window for tobacco product manufacturers to join as Grandfathered SPMs. Objection at 14; *see* Response at 17 (stating that the United States has failed to disclose when the full text of the MSA appeared on NAAG's website).

submitted by the United States with its Objection. These reports – all pre-dating March 12, 2001 – discussed the negotiation of the MSA, its impact on all cigarette manufacturers with sales in the U.S. market, and the opportunity for manufacturers other than the original participating manufacturers (“OPMs”) to join and receive an exemption from payment.⁴⁵ Similarly, media coverage pre-dating March 12, 2001 reported on the enactment of the Escrow Statutes and MSA states’ enforcement efforts, including enforcement against Grand River.⁴⁶

Claimants’ assertion that the MSA and information pertaining to its effects was not publicly available because some sources of this information could be accessed only via subscription must be rejected.⁴⁷ Information contained in newspapers and magazines, as well as information conveyed on the internet and via cable television, is properly considered publicly available. Reports about the MSA, in any event, were also carried on public radio, public television, and other broadcast media, and included accounts of the MSA’s impact on cigarette manufacturers other than the OPMs.⁴⁸ The reasonable step for a market participant

⁴⁵ See App. tabs 80-116; see also Response Factual Appendix (“Response App.”) tab. 2 (Alison Frankel, *After the Smoke Cleared*, AMERICAN LAWYER, Jan/Feb 1999) (revealing that “tiny tobacco companies” had an opportunity to agree to the terms of the MSA).

⁴⁶ See App. tabs 80-116.

⁴⁷ See Response at 17 (justifying claimants’ failure to access the MSA’s text because, other than NAAG’s website, the United States identified “two subscription-based services upon which the text was apparently available, neither of which were subscribed to by any of the Claimants.”).

⁴⁸ See *Morning Edition: National Tobacco Settlement Still Full of Surprises Two Years After It Was Signed* (National Public Radio, Nov. 10, 2000) (Reply App. tab 141) (reporting on the provisions in the MSA that require smaller tobacco companies either to sign the agreement and pay if they increase their market share or refrain from signing and pay money into escrow; including statement from Mr. Leonard Violi asserting that the MSA is illegal); *All Things Considered: Tobacco Settlement Between Eight States and the Tobacco Industry* (National Public Radio, Nov. 16, 1998) (Reply App. tab 139) (reporting on the MSA the day that the Attorneys General announced it); *State Attorneys General Announce \$206 Billion Tobacco Settlement* (CNN television broadcast, Nov. 16, 1998) (Reply App. tab 138) (broadcast of press briefing held by Attorneys General); Elizabeth Farnsworth, *The NewsHour with Jim Lehrer* (PBS television broadcast, Nov. 16, 1998) (Reply App. tab 140) (reporting that after five months of negotiation, the largest tobacco companies had reached a deal with the attorneys general in lieu of the national tobacco settlement that had failed to receive congressional approval in 1997).

to have taken upon hearing even a “passing reference” to a development as monumental as the MSA would have been to review its publicly available text and determine what its impact would be, either with or without the assistance of counsel.⁴⁹ Doing so would have led claimants to know in 1998 and 1999 about the breaches and resulting losses and damage they now allege.

C. Claimants Should Also Have Acquired Knowledge Through Their Business Associates and Affiliates

Claimants tout their various affiliations, partnerships and contacts within the tobacco manufacturing and distribution businesses – particularly those of Arthur Montour, Jr. – as crucial to the success of their businesses.⁵⁰ According to claimants, they have, over time, operated as, or been associated with, the following entities: the Seneca Nation, Native American Wholesale, Native Tobacco Direct, Native Wholesale Supply, Traditional Trading, Grand River Enterprises (without the “Six Nations, Ltd.”), Turtle Island, the Omaha Nation, Star Tobacco, and Tobaccoville.⁵¹ Claimants, however, assiduously avoid discussing the

⁴⁹ In fact, many other tobacco product manufacturers – both U.S.- and foreign-owned – took these logical and reasonable steps and learned of the MSA and the opportunity to obtain an exemption as a Grandfathered SPM within the 90-day window. By the end of the ninety-day period, participating manufacturers – including OPMs and SPMs – represented more than ninety-nine percent of the U.S. tobacco market. See *Freedom Holdings v. Spitzer*, Case No. 02 Civ. 2939, Declaration of Patricia Tilton (May 28, 2004), Tables 1 & 2 (App. tab 31) (market share of OPMs in 1998 was 96.41866%; market share of Grandfathered SPMs in 1998 was 3.03285%; total of market shares for OPMs and Grandfathered SPMs is therefore 99.45151%). Claimants err in asserting that two of the five foreign Grandfathered SPMs identified by the United States are affiliated in an unspecified way with the OPMs and, therefore, evidence of their knowledge should be discounted. Response at 17. If any kind of affiliation with the OPMs, even one short of any actual ownership interest, should be deemed to impute knowledge held by the OPMs, claimants would likewise be imputed with such knowledge. Claimants have admitted that they served for many years as distributors of the OPMs’ tobacco products. Stmt. of Claim Facts ¶¶ 12, 14.

⁵⁰ Statement of Claim Facts ¶ 8 (Arthur Montour, Jr. “brought [to the relationship with Jerry Montour and Kenneth Hill] business contacts and distribution expertise”); *id.* ¶ 13 (“[I]t became apparent that the Investors could and would capitalize on Arthur Montour, Jr.’s distribution skills and contacts to distribute products that the Investors would manufacture in their own right.”).

⁵¹ *Id.* ¶¶ 5, 9, 14, 18, 19, 24.

knowledge possessed prior to March 2001 by any of these entities, the individual claimants or their enterprises.⁵²

Grand River, however, has acknowledged that its distributors relayed their knowledge of enforcement actions to it on later occasions.⁵³ Claimants' proffered evidence demonstrates that distributors transmitted to Grand River notices from state officials shortly after they were received.⁵⁴ Claimants offer no reason why their distributors and affiliates would have shared with them information concerning enforcement actions in 2002, yet did not share similar information with them on earlier occasions. As demonstrated below, claimants first knew or should have known about the impact of the MSA regime on NPMs by virtue of the knowledge acquired by their business contacts and partners.

First, it is reasonable to assume that Grand River's business partners in Missouri would have imparted to Grand River their knowledge prior to March 2001 of Missouri's enforcement of the escrow requirements if, as Grand River insists, it had not already acquired such knowledge itself.⁵⁵ Missouri filed its original petition against Native Tobacco Direct,

⁵² This omission is suspect considering that claimants' admissions in their Response advance significantly the timing of their earliest purported knowledge of the Escrow Statutes. *Compare* Stmt. of Claim Argument ¶ 15 ("The first time that any of the Claimants became aware that any individual state intended to enforce its MSA laws against them was March 2002 . . .) with Response at 7 (admitting that Grand River "received [a] communication regarding the terms and requirements of the Escrow Statutes" from Oregon dated March 14, 2001) and *id.* at 10 (admitting receipt of a copy of the Missouri action against Grand River on April 10, 2001, but disputing whether formal service of process was made).

⁵³ *See* Response at 11 (claiming that Grand River learned from its Missouri distributors about the Complementary Legislation).

⁵⁴ *See, e.g.*, Letter from Douglas E. Lau, Assistant Attorney General, Arizona Office of the Attorney General, to Samuel E. Poole, Ward and Smith, P.A. (counsel for Tobaccoville) (Nov. 5, 2002) (Response App. tab 14B) (fax imprint along the top of the copy of the letter shows that it was faxed to Grand River on November 15, 2002). Thus, contrary to Mr. Williams's vague statement that he was "informed that a similar letter was sent to [Grand River's] off-reserve distributor, Tobaccoville USA," (Response App. tab 14 ¶ 5 (Williams Aff.)), the document shows that Tobaccoville sent the Arizona letter to Grand River within days after Tobaccoville received it.

⁵⁵ As discussed in Section D, *infra*, the evidence demonstrates that Grand River had acquired knowledge prior to March 2001 that Missouri was enforcing its escrow requirements with regard to sales of Grand River's cigarettes in Missouri.

the Seneca Nation of Indians, Iroquois Tobacco Direct, Native American Wholesaler, Seneca Smoke, Ross L. John, and Grand River Enterprises, Six Nations Ltd., due to the difficulty in ascertaining which entity was the cigarette manufacturer.⁵⁶ The Missouri petition alleged that each of these entities was engaged in some manner in selling and profiting from the sale of cigarettes that, as it was ultimately determined, were manufactured by Grand River.⁵⁷ Claimants have acknowledged their relationship with most of these other defendants.⁵⁸ Moreover, Grand River has suggested that notice to the Seneca Nation would have put it on notice that the MSA regime applied to “Aboriginal tobacco producers” like itself.⁵⁹ In fact, the Seneca Nation was formally served with the Missouri petition on July 12, 2000 in Salamanca, New York, in close proximity to the location where Native Tobacco Direct operated at the time.⁶⁰ The State of Missouri also notified Grand River’s co-defendants of the need to comply with the payment obligations imposed by Missouri’s Escrow Statutes by

⁵⁶ *Missouri v. Native Tobacco Direct Co.*, Case No. 00CV324140, Pet. for Prelim. and Permanent Injunctive Relief and Recovery of Civ. Penalties, Attorney’s Fees and Costs (June 13, 2000) (App. tab 48) (“Missouri Petition”).

⁵⁷ *See id.* ¶¶ 10-16, 29.

⁵⁸ Kate Barlow, *Six Nations’ cigarettes in lawsuit; Missouri launches bid to recoup health costs*, HAMILTON SPECTATOR, July 31, 2000 (App. tab. 112) (“*Six Nations’ cigarettes in lawsuit*”) (Steve Williams admitting that Grand River’s cigarettes were sold to Ross John); Stmt. of Claim Facts ¶ 2 (Arthur Montour, Jr. “resides on the Seneca Nation Territory”); *see also* Letter from Arthur A. Montour to the State of Missouri, Dept. of Revenue (Nov. 3, 1999) (App. tab 15) (“Montour Letter”) (return address for Native Tobacco Direct is “Cattaraugus Territory of the Seneca Nation”); Stmt. of Claim Facts ¶ 5 (Arthur Montour, Jr. previously operated under the name Native American Wholesale); Cigarette Manufacturing Agreement, Mar. 15, 1999, Grand River Enterprises Six Nations Ltd.–Native Tobacco Company, at 1 (Reply App. tab 142) (identifying Native Tobacco as distributor for, among others, “Iroquois Tobacco (Brands)”).

⁵⁹ Stmt. of Claim Facts ¶ 49.

⁶⁰ *Missouri v. Native Tobacco Direct Co.*, Case No. 00CV324140, Return of Service upon defendant The Seneca Nation of Indians, Inc. (July 27, 2000, court stamp date) (Reply App. tab 136) (indicating service in Salamanca, New York). *See also* Missouri Petition ¶¶ 3-9 (providing addresses in Salamanca, New York for defendants Native Tobacco Direct, Seneca Smoke, Seneca Nation, Iroquois Tobacco Direct, and Native American Tobacco Wholesaler). The address known to the Missouri Attorney General for defendant Ross L. John is the same address used by Arthur Montour, Jr. in his correspondence to the state. *Compare id.* ¶ 5 (address for Ross L. John 14411 Four Level Mile Road in Gowanda, New York 14070) with Montour Letter (App. tab 15) (return address shown is 14411 Four Mile Level Rd., Cattaraugus Territory of the Seneca Nation via Gowanda, NY 14070).

letter dated May 4, 2000.⁶¹ Given Grand River's own allegations regarding the close ties among these various entities, it is reasonable to infer that Grand River would have acquired knowledge from them of Missouri's actions well before March 2001, if it did not already possess such knowledge.

Second, claimants also should have learned about enforcement of the Escrow Statutes by virtue of notices sent to their former business partners, Star Tobacco and Omaha Nation Tobacco. Star Tobacco received direct notice of the obligations imposed by the Escrow Statutes in 1999, the same year that Grand River allegedly began exclusively producing its own cigarettes and presumably ceased operating under its production agreement with Star.⁶² Star was very vocal about its objections to the MSA regime, making statements to the press in that regard even before filing a constitutional challenge to the escrow provisions.⁶³ Omaha Nation Tobacco, a business that claimants helped establish and run for several years,⁶⁴ received multiple notices of manufacturers' obligations under the Escrow Statutes. In addition to the May 17, 2000 notice Nebraska sent to Omaha Nation Tobacco, Iowa's Department of Revenue also sent letters dated April 7, 2000 and October 11, 2000 to Omaha Nation Tobacco.⁶⁵ The Iowa notice refers to letters sent previously to distributors in the state

⁶¹ Missouri Petition ¶ 34.

⁶² Stmt. of Claim Facts ¶ 14 (describing relationship with Star); Letter from John Quinlan, Compliance Officer, North Dakota Office of State Tax Commissioner, to NPMs (July 8, 1999) (App. tab 14); Stmt. of Claim Facts ¶ 22 (Grand River only began exclusively producing its own brands in 1999).

⁶³ See *Star Threatens Court Action Over Settlement*, WORLD TOBACCO, Sept. 1, 2000 (App. tab 116); *Star Scientific, Inc. v. Earley*, Civ. Action No. 3:00CV835, Compl. (Dec. 15, 2000) (App. tab 67); John Reid Blackwell, *Star Suit Dismissal Sought*, RICHMOND TIMES DISPATCH, Mar. 13, 2001 (App. tab 117).

⁶⁴ Stmt. of Claim Facts ¶¶ 18-19.

⁶⁵ Letter from Steve Grasz, Deputy Attorney General, Nebraska Office of the Attorney General, to Omaha Nation Tobacco (May 17, 2000) (App. tab 17); Letter from Dale Thede, Program Manager, Iowa Dept. of Revenue and Finance, to Omaha Nation Tobacco (Oct. 11, 2000) (Reply App. tab 130); Letter from Dale Thede, Program Manager, Iowa Dept. of Revenue and Finance, to Tobacco Product Manufacturers (Apr. 7, 2000) ("Letter from Dale Thede (Apr. 7, 2000)") (Reply App. tab 132B) & Excel spreadsheet listing

asking them to identify NPMs from which they were obtaining cigarettes for sale in the state.⁶⁶

It strains credulity to assert that none of these business associates, affiliates, or distributors – whether former or current – relayed to claimants information from the MSA states that directly concerned claimants’ businesses.

D. Claimants Possessed Actual Knowledge Before March 2001

Although not necessary to sustain its time bar defense, the United States demonstrated in its Objection and further demonstrates herein that claimants first acquired knowledge of the alleged breaches and their damages prior to March 12, 2001. Claimants’ quibbles with the evidence in the record do not diminish the force of the United States’ proof.

First, Native Tobacco Direct received direct notice of the Escrow Statutes in the year 2000. While Steve Williams purports to have reviewed the records of Grand River – and conveniently identified a March 14, 2001 letter from Oregon as the first notice Grand River allegedly received from any state – claimants’ Response assiduously avoids discussing when Native Tobacco Direct first acquired knowledge of any alleged breach and resulting damage.⁶⁷ Neither Mr. Williams nor anyone else purports to have conducted a review of the records of Native Tobacco Direct or Native Wholesale Supply.

recipients of notice letters from Iowa Dept. of Revenue and Finance to tobacco manufacturers and distributors (Apr. 7, 2000) (“Spreadsheet listing recipients”) (Reply App. tab 132A) at line 10.

⁶⁶ *Id.*

⁶⁷ Response App. tab 14 ¶ 2 (Williams Aff.). As soon as either Native Tobacco Direct or Native Wholesale Supply first acquired knowledge of the obligations imposed by the Escrow Statutes, Grand River and the other claimants must be deemed to have acquired that knowledge as well. Claimants’ discussion of the Oregon letter also reveals their error. Mr. Williams quotes a single paragraph in the letter to support his alleged impression that Oregon’s Escrow Statute only applied to direct sellers of cigarettes, when the very subject of the letter and the context surrounding this paragraph clearly reveal that the Oregon Escrow Statute was directed at manufacturers. *See id.* and Response App. tab 14(A). Moreover, while criticizing Oregon’s failure to “provide a copy of the statute to which [the letter] refers,” Mr. Williams fails to include in the copy provided to the Tribunal the attachments that were sent by Oregon. These attachments provide the definition of a tobacco product manufacturer, general information about an NPM’s duties under the

In fact, however, the Iowa Department of Revenue and Finance sent a letter to Native Tobacco Direct on October 11, 2000.⁶⁸ The letter instructs Native Tobacco Direct to either identify the manufacturer of the cigarettes it sold to distributors in Iowa, or, if it was the manufacturer, to establish and fund an escrow account in accordance with Iowa's Escrow Statute.⁶⁹ The letter was not returned to Iowa as undeliverable.⁷⁰ Thus, the evidence shows that Native Tobacco Direct, claimants' purported enterprise, received direct notification of the Escrow Statutes' requirements in October 2000, well over three years before claimants submitted their claims to arbitration.

Second, Grand River knew of the alleged breaches and that it had incurred a loss in advance of March 2001. Missouri's letter "reminding" Grand River of its responsibilities under the Escrow Statutes, attaching the text of Missouri's Escrow Statute and clearly indicating that a cigarette manufacturer bears the responsibility for making escrow payments even if sales in the state are made through a distributor, demonstrates that claimants had actual knowledge of the Escrow Statutes and their obligations under those statutes more than three years before they submitted their claims.⁷¹ That letter was sent to Grand River on April 25, 2000 – almost four years before claimants submitted their claims to arbitration.

Escrow Statute and specific instructions on how to ensure compliance with the Escrow Statute. *See* Certificate of Compliance by Non-Participating Manufacturer Regarding Escrow Payment, State of Oregon (Mar. 14, 2001) (Reply App. tab 131).

⁶⁸ Affidavit of Dale Thede, Program Manager, Iowa Dept. of Revenue and Finance (Feb. 3, 2006) ¶ 6 ("Affidavit of Dale Thede") (Reply App. tab 132); Letter from Dale Thede, Program Manager, Iowa Dept. of Revenue and Finance, to Native Tobacco Direct Co. (Oct. 11, 2000) (Reply App. tab 129). The address to which this letter was sent is the same as the address used by Arthur Montour, Jr. in corresponding with the State of Missouri. *See* Montour Letter (App. tab 15).

⁶⁹ Letter from Dale Thede to Native Tobacco Direct Co. (Oct. 11, 2000) (Reply App. tab 129) at 2.

⁷⁰ Affidavit of Dale Thede ¶ 6 (Reply App. tab 132); Spreadsheet listing recipients (Reply App. tab 132A) at line 212.

⁷¹ Letter from Quentin Wilson, Director of Revenue, Missouri Dept. of Revenue, to Grand River Enterprises (Apr. 25, 2000) (App. tab 16).

Claimants' contention that Grand River did not receive and should not be charged with knowledge of Missouri's letter should be disregarded. Missouri's Department of Revenue sent its April 25, 2000 letter to the address that, claimants admit, was the correct address for Grand River until March 15, 2000.⁷² A little over one month after Grand River moved, Grand River would have continued to receive its mail, either by arranging for forwarding of mail to its new address, or by periodically checking the old address.⁷³

In addition, Iowa sent a letter, dated April 7, 2000, to a large number of NPMs and their distributors, including Grand River.⁷⁴ The letter enclosed a copy of Iowa's Escrow Statute and clearly identified the need for tobacco product manufacturers to comply with the obligation to place funds in escrow whether their products were sold "directly or through a distributor."⁷⁵ Iowa used the address for Grand River that had previously been provided to it on Grand River's letterhead, R.R. 2, Ohsweken, Ontario.⁷⁶ Iowa's Revenue Department

⁷² Response App. tab 14 ¶ 17 (Williams Aff.). According to Mr. Williams, Grand River had three different addresses in the course of a single year: RR#2, River Range Road, Ohsweken, Ontario until March 15, 2000; 1001 Highway #6, Caledonia from March 2000 to November 2000; and 2176 Chiefswood Road, Ohsweken, Ontario after November 2000. Response App. tab 14 ¶ 17 (Williams Aff.). Grand River used yet another, different address, in its September 26, 2000 "Cigarette Distribution Agreement" with White River Distributing: P.O. Box 750, Ohsweken, Ontario. Cigarette Manufacturing Agreement, Sept. 26, 2000, Grand River Enterprises Six Nations Ltd.–White River Distributing, L.L.C. (Reply App. tab 143). Certainly aware that it had three or four different addresses in the course of a single year, Grand River should have pursued at least one of a number of reasonable courses for an operating business entity: either notifying authorities of its change of address, arranging for forwarding of its mail, or periodically checking for mail at its prior addresses.

⁷³ Indeed, Canada Post offers a "Mail Redirection Service" for a six-month period for businesses that have permanently moved, a service that can be extended for an unlimited number of additional six-month periods. See *Mail Redirection - Permanent*, CANADA POST POSTAL SERVICES, available at <https://ssl/postescanada-canadapost.ca/smartmoves/coa/permanent/default-e.aspx> (Reply App. tab 145). When the Permanent Mail Redirection Service expires, mail is returned to the sender if a return address has been provided. *Id.*

⁷⁴ Affidavit of Dale Thede ¶¶ 3-5 (Reply App. tab 132); Letter from Dale Thede (Apr. 7, 2000) (Reply App. tab 132B); Spreadsheet listing recipients (Reply App. tab 132A).

⁷⁵ Letter from Dale Thede (Apr. 7, 2000) (Reply App. tab 132B).

⁷⁶ Affidavit of Dale Thede ¶ 5 (Reply App. tab 132); Spreadsheet listing recipients (Reply App. tab 132A) at line 82; Application of White River Distributing for Iowa Cigarette / Tobacco Tax Permit (Oct. 7, 1999), attaching Letter from Chantell MacInnes Montour, In house counsel for Grand River Enterprises, to Brian Teeter, White River Distributor, LLC (Mar. 8, 1999) (received by Iowa) (Reply App. tab 132C).

maintained a database of the responses it received to the April 7, 2005 letter, also recording any letters that were returned as undelivered.⁷⁷ Grand River's letter was not returned to Iowa's Revenue Department.⁷⁸

Grand River's knowledge is further demonstrated by the statements Mr. Williams made to the press in July 2000. Mr. Williams's strained reading of the *Hamilton Spectator* article and his attempt to disavow the knowledge that he clearly possessed at the time cannot stand. The article in the *Hamilton Spectator* is one of several reports featured in the print and broadcast media in upstate New York and Canada in July and August 2000 describing the Missouri lawsuit.⁷⁹ Each of these sources reported that the Missouri lawsuit implicated Grand River.⁸⁰ The *Spectator* article also reported that Escrow Statutes had been enacted in more than thirty states.⁸¹

Steve Williams, president of Grand River, was quoted in the articles, acknowledging his awareness of the lawsuit, and opining that Grand River was exempt from having to make

⁷⁷ Affidavit of Dale Thede ¶ 4 (Reply App. tab 132); Spreadsheet listing recipients (Reply App. tab 132A).

⁷⁸ Affidavit of Dale Thede ¶ 5 (Reply App. tab 132); Spreadsheet listing recipients (Reply App. tab 132A) at line 82.

⁷⁹ See App. tabs 110-115. Among the sources of these reports is Canada's national public broadcast service. See *Prep-Business Report*, BROADCAST NEWS (Canada), Aug. 1, 2000 (App. tab 115) (reporting that "Grand River Enterprises Six Nations is accused of not paying into an account to help offset potential health problems from tobacco").

⁸⁰ Claimants err in arguing that Grand River can only be deemed to have knowledge of the Missouri lawsuit as of the date on which formal service of the Missouri petition was made. Response at 10; Response App. tab 14 ¶ 9 (Williams Aff.). A defendant who is improperly served under the formal rules for service of process, for example, will not be subject to the court's jurisdiction even if that defendant has actual knowledge of the lawsuit at issue. See, e.g., *Broughton v. Chrysler Corp.*, 144 F.R.D. 23, 26 (W.D.N.Y. 1992), *aff'd*, 992 F.2d 319 (2d Cir. 1993); *Printed Media Servs., Inc. v. Solna Web, Inc.*, 11 F.3d 838, 843 (8th Cir. 1993); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE, § 1062 & n.14. Accordingly, the formal requirements entailed in service of process, particularly for a foreign corporation, are irrelevant to the knowledge standard in Articles 1116(2) and 1117(2).

⁸¹ *Six Nations' cigarettes in lawsuit* (App. tab 112).

escrow payments.⁸² Mr. Williams's statements in this arbitration that he never read the published article and did not understand the full context of what was being discussed therein should be disregarded.⁸³ Mr. Williams's statements evidence actual knowledge on his part and on the part of Grand River in 2000 that Missouri had filed a lawsuit based on the failure to make payments into escrow for sales of Grand River's cigarettes in that state.

Claimants first knew or should have known that they had incurred loss or damage as a result of the alleged breaches presented by the MSA and Escrow Statutes in advance of March 12, 2001, the date that is three years prior to their submission of their claims to arbitration. The loss and damage alleged by claimants resulted from the MSA and Escrow Statutes and were first incurred in 1999. Claimants should have known they were incurring those losses at that time. The Tribunal accordingly lacks jurisdiction over claimants' claims.

III. CLARIFICATION ON NATIONALITY

NAFTA Chapter Eleven requires that a claimant demonstrate that it possesses the nationality of a NAFTA Party other than the one against which it is submitting a claim.⁸⁴ Claimants' reluctance to present sufficient evidence of Arthur Montour, Jr.'s nationality, combined with the allegations in their Statement of Claim, justified the United States' concern that Arthur Montour Jr. might not possess Canadian nationality. Until their most recent submission, claimants had not provided any official Canadian government documentation in support of their assertion that Arthur Montour, Jr. possesses the requisite Canadian nationality.⁸⁵

⁸² *Id.*

⁸³ Response App. tab 14 ¶¶ 7, 8, 18 (Williams Aff.).

⁸⁴ See NAFTA art. 1101(1).

⁸⁵ Claimants had submitted official government documents demonstrating Canadian nationality for Jerry Montour and Kenneth Hill. Stmt. of Claim. Exhs. 2 & 3 (copies of Canadian passports for Jerry Montour

The United States provided a section captioned “Clarification” in its Objection to Jurisdiction in accordance with the Tribunal’s October 26, 2005 letter. That letter directed the parties to provide such a “Clarification” section in their pleadings on jurisdiction indicating “the evidence proposed to be led as to Mr. Arthur Montour’s nationality . . . and whether this is disputed and if so why.”⁸⁶ The Tribunal specifically stated that the issue of nationality was not to be determined at the preliminary phase. It is therefore regrettable that the claimants have responded to the Tribunal’s order not only by belatedly supplying a copy of Arthur Montour Jr.’s birth certificate,⁸⁷ but with a three-page letter that unfairly and unnecessarily attacks the United States for what they deem “ignorance and bias.”⁸⁸ The United States justifiably raised questions concerning Mr. Montour’s nationality, given the allegations made in the Statement of Claim and the evidence – or lack thereof – submitted by claimants.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Tribunal render an award: (a) in favor of the United States and against claimants, dismissing claimants’ claims in their entirety and with prejudice; and (b) pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, ordering that

and Kenneth Hill). The only document purportedly showing Arthur Montour, Jr.’s nationality was a letter dated March 16, 2005, signed by the Membership Registrar for the Mohawk Council of Kahnawake, not a Canadian government entity. *Id.* Exh. 4.

⁸⁶ Letter from Ucheora Onwuamaegbu, Secretary of the Tribunal, to the parties (Oct. 26, 2005) at 2.

⁸⁷ Although a Canadian birth certificate may be sufficient to establish Canadian citizenship, a Canadian living abroad may confirm Canadian status by applying for a Canadian citizenship certificate. *See Canadian Citizenship*, CITIZENSHIP AND IMMIGRATION CANADA, available at <http://www.cic.gc.ca/english/pub/citizenship.html> (Reply App. tab 144).

⁸⁸ Statement of Clarification re: Evidence of Arthur Montour’s Nationality (Jan. 16, 2006) at 3.

claimants bear the costs of this arbitration, including the United States' costs for legal representation and assistance.

Respectfully submitted,

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