UNDER THE ARBITRATION RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
THE NORTH AMERICAN FREE TRADE AGREEMENT

BETWEEN:

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

Claimants / Investors

- AND -

GOVERNMENT OF THE UNITED STATES OF AMERICA

Respondent / Party

STATEMENT OF CLAIMANTS' CLAIMS ARISING DIRECTLY OUT OF THE ADOPTION AND IMPLEMENTATION OF THE ALLOCABLE SHARE AMENDMENTS

INTRODUCTION

This arbitration is not about health protection or promotion. It is not about State rights to regulate in the interests of the public good. And it is not only about the anticompetitive measures being imposed at the behest of a few large companies in exchange for a share of their profits. This arbitration concerns and arises out of the Respondent's discrimination against a group of aboriginal investors, their traditions, businesses and livelihoods, and the expropriation of their markets, all in violation of their rights under international law. The deleterious effects of these measures have not only been suffered by Claimants; they have been borne by all of the members of the Six Nations whose livelihoods are dependent upon Claimants' business.

Long active in Iroquois business, Claimants – owners of the largest employer on the most populous aboriginal reserve in Canada – have each invested in all manner of aboriginal enterprises over the years. Claimants have invested tens of millions of dollars in the tobacco business – which is a traditional trade of the Six Nations peoples in which they have engaged for centuries. They invested in this business on the expectation that their traditional trading rights would be honoured by the United States and its state and local governments and, as described below, they modified their business model as necessary when the protection they deserved was not forthcoming. When Claimants' business began to prosper under the rules made available to them, rather than saluting their accomplishments, the state governments took all necessary steps to put Claimants out of business once and for all.

On July 20, 2006, the Tribunal issued its Decision on Objections to Jurisdiction, confirming that it possessed jurisdiction to hear two aspects of Claimants' case: those concerning sales of their products made on sovereign aboriginal territory ("on-reserve"); and those relating to all sales of Claimants' products subsequent to March

12, 2001. The Tribunal found that for products sold on-reserve, Claimants were entitled to demonstrate how all of the measures at issue in this case (particularly: the original Escrow Statutes) breached the NAFTA and caused loss or damage to them and/or their investments. The Tribunal found that for products distributed off-reserve, Claimants were entitled to demonstrate how the more recent and amended measures raised in the proceedings (i.e. the Contraband Laws and Allocable Share Amendments) breached the NAFTA and caused loss or damage to them and/or their investments.

On September 21, 2006, the Tribunal directed Claimants to submit a statement of their claims of breach of the NAFTA directly arising out of the adoption of the Allocable Share Amendments. Claimants were also permitted to include clarifications on the other claims over which the Tribunal has jurisdiction, arising from questions raised during the preliminary hearing or in the Tribunal's Decision on Jurisdiction.

The present submission takes into account the record established in the arbitration thus far, including Claimants' Particularized Statement of Claim, dated June 29, 2005, the hearing held on Respondent's objections to jurisdiction, and the Tribunal's Decision on Objections to Jurisdiction, dated July 20, 2006. This submission thus incorporates the prior pleadings and evidence previously submitted by Claimants. In the light of the Tribunal's directions, this submission also provides a further explanation of the claims over which the Tribunal has jurisdiction, in light of the questions raised at the March 2006 hearing and the Tribunal's Decision on Objections to Jurisdiction.

Claimants reserve the right to amend or supplement this submission, following the outcome of the documentary discovery process outlined by the Tribunal in its letter to the parties dated September 21, 2006.

FACTS GIVING RISE TO CLAIMANTS' CLAIMS

A. Claimants' Status as Investors under the NAFTA

1. A description of Claimants' status as Investors under the NAFTA, as well as the nature of their tobacco business and investments since 1992, was described at pages 3 to 9 of Claimants' Particularized Statement of Claim and described in further detail during the March 2006 hearing. A brief review of those facts is provided below.

2. The individual Claimants are members of the Six Nations of Native Americans that comprise the Iroquois Confederacy and are also nationals of Canada. Continuously and at all relevant times since 1992, Claimants and their business enterprises have been engaged in the distribution of tobacco products throughout the Free Trade Area defined under the NAFTA – specifically in the United States and Canada.

3. Claimants have invested substantial capital and resources to engage in the trade and business identified in paragraph 2, above. Such investment has included, among other things, funds and managerial and trade expertise to launch and sustain distribution channels and manufacturing facilities on sovereign aboriginal lands. These investments were made for the purpose of furthering their tobacco business in various local markets throughout the North American Free Trade Area.

4. By November 1998, when the Master Settlement Agreement ("MSA") between most U.S. states and territories was executed with the four largest tobacco companies in the United States, the value of Claimants' cumulative investment

in capital and resources for their business was in the tens of millions of dollars. Since September 1, 2002, a further $52 million was invested by Claimants to build better manufacturing facilities and improve distribution channels.

5. Claimants' investments have included financial outlays to launch and maintain tobacco manufacturing facilities located in Racket Point, New York, and Ohsweken, Ontario, as well as distribution facilities and systems headquartered on sovereign Six Nations territory located in Northern New York and Southern Ontario; and labour, capital, and trade know-how that was contributed both to their Six Nations-based enterprise and their joint venture with the Omaha Tribe in Nebraska.

B. Execution of Tobacco Master Settlement Agreement ("MSA") and Initial Efforts to Limit Competition from Manufacturers that did not Join the MSA.

6. Pages 9 to 16 of the Particularized Statement of Claim provide a detailed account of the events leading up to the negotiation and execution of the MSA in November 1998, by and among forty-six U.S. States and other territories, including the District of Columbia ("the MSA States") with the four largest tobacco product manufacturers in the United States ("Original Participating Manufacturers" or "OPMs"). At the March 2006 hearing, Claimants presented the Tribunal with an overview of those events, as well as the initial efforts undertaken by the MSA States to limit competition from tobacco product manufacturers – including Claimants – that did not join the MSA. A brief summary of those facts is presented below.

7. The MSA is a complex litigation settlement agreement that contains numerous provisions and multiple formulas that govern, in perpetuity, the relationship

between the OPMs and other manufacturers that joined the MSA, on the one hand, and the MSA States, on the other.

8. In light of concerns that their competitors would, subsequent to the MSA's execution, benefit from a "cost advantage" over the OPMs (who are bound to make annual settlement payments to the MSA States under the Agreement), the OPMs and MSA States drafted model legislation intended to "neutralize" these alleged cost advantages.

9. The model legislation, commonly known as the "Escrow Statute" or, collectively, the "Escrow Statutes," was annexed to the MSA. The Escrow Statutes require a cigarette manufacturer that sells cigarettes in MSA States to either join the MSA as a "Participating Manufacturer," or remain a "Non-Participating Manufacturer" ("NPM") and make annual payments into an escrow fund for the benefit of the MSA States in which its products are sold.

10. Participating Manufacturers (other than OPMs) that joined the MSA within ninety days of November 23, 1998, are known as "Exempt Subsequent Participating Manufacturers" or "Exempt SPMs." These manufacturers were given hundreds of millions of dollars in payment exemptions as an inducement to join the MSA. Thus, an Exempt SPM is required to make no MSA payments in any year, unless (and only to the extent) its sales in that year exceed 100% of its market share in the U.S. in 1998, or 125% of its market share in the U.S. in 1997.

11. As mentioned above, the Escrow Statutes were designed to impose a cost on Non-Participating Manufacturers ("NPMs"), which required them to raise their prices by an amount that would neutralize their alleged cost advantages and

prevent them from offering meaningful price competition with respect to the MSA's Participating Manufacturers – particularly the OPMs and Exempt SPMs.

12. As originally drafted and enacted, the Escrow Statutes also contained a refund provision commonly known as the "Allocable Share Release" provision. Pursuant to the Allocable Share Release provision, an NPM could receive an immediate refund of a substantial portion of the funds it was required to deposit into escrow each year under the Escrow Statutes. To obtain such a refund, the NPM needed to reduce the number of States in which its products were sold. Thus, by limiting the number of States in which its products were sold, an NPM could effectively reduce its cost of complying with the Escrow Statutes on a per unit basis, and in the aggregate.

13. By reducing its cost of complying with the Escrow Statutes, an NPM could, in turn, price its products at a level that would allow it to continue to compete with OPMs and Exempt SPMs, albeit only in a limited number of State markets.

14. In or about 2004, however, and in response to the demands of the OPMs and Exempt SPMs, the MSA States where Claimants' products were principally sold began to adopt legislation repealing the Allocable Share Release provisions of the Escrow Statutes, and replacing those provisions with language that effectively prevents NPMs from receiving any of the refunds they previously received under the original Escrow Statute.

15. Evidence of the impetus for adopting the Allocable Share Amendments is unequivocal: the MSA States adopted the Allocable Share Amendment to

completely foreclose competition from NPMs, including aboriginal producers such as Claimants, in their markets. The reason for the MSA States' taking this action was simple and similarly indisputable: payments that MSA States receive under the MSA decline as NPM cigarettes are sold in lieu of Participating Manufacturers' products. In the words of the MSA States' own officials: "Reductions in settlement payments resulting from the displacement of OPM sales by NPM sales confer no benefits on the States. NPM sales in any State reduce payments to every other State. All States have an interest in reducing NPM sales in every State."[1]

16. In their private memoranda to each other, MSA State officials made it abundantly clear that the Allocable Share Amendments were "measures designed to serve the interests of the States in avoiding reductions in tobacco settlement payments." As explained below, they are also measures that breach the NAFTA and have caused, and continue to cause, harm to Claimants and their business.

17. MSA payments are based on the sales volumes of OPMs and the relative market shares of the MSA's Participating Manufacturers – not the profits of these MSA manufacturers. Thus, as OPMs or Exempt SPMs raise prices and sell fewer tobacco products, thereby losing market share to NPMs, the payments that they are required to make pursuant to the MSA are reduced and the MSA States' revenues under the MSA decline. This is true no matter how high the MSA's Participating Manufacturers (i.e., OPMs and Exempt SPMs) raise their prices or how exorbitant the revenues they earn from these price

1 Excerpt from a memorandum from Vermont Attorney General William Sorrell, acting as Chairman of the National Association of Attorneys General, to all Member States, 12 September 2003; subsequently published by the Associated Press. See, also: Jennifer Lynd, "Is the MSA Unraveling?" Tobacco Business Online, May/June 2004, at: http://www.tobonline.com/ArticlePages/ArticlePagesVol73/vol73p32.htm, last visited 4 November 2006.

increases may be.

18. For example, between 1998 and 2003, the OPMs raised their prices by more than 300% above that which was necessary to fund their MSA payments to the MSA States. They each generated unprecedented revenues from these price increases, but they also lost sales volume and market share to smaller competitors, including the Claimants, as a result.[2]

19. It is reported that OPMs lost approximately 14-16% of their aggregate share of the markets in MSA States between 1998 and 2003 (from their 96-98% pre-MSA levels), due to the price increases mentioned above. It is also reported that the market share of Exempt SPMs increased during that same period to approximately 7.5%, and that market shares of NPMs increased to approximately 8.2%.

20. Because MSA payments are tied to sales volume and market share of Participating Manufacturers, the MSA States' revenues owing under the MSA were destined to decline as a result of the OPMs' losing market share, notwithstanding that the OPMs were earning record revenues from the very price increases that were the primary reason for the overall reductions in their sales.

21. As stated above, the MSA States adopted the Allocable Share Amendments to foreclose upon competition from the NPMs altogether. By raising the cost of complying with the Escrow Statutes to the extent required by the Allocable Share Amendments, the MSA States effectively ensured that NPMs could no

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[2] See, e.g.: Sloan, Mathews & Trogdon, "Impacts of the Master Settlement Agreement on the Tobacco Industry" at http://tc.bmjjournals.com/cgi/content/full/13/4/356, visited on 4 November 2006.

longer compete with OPMs and Exempt SPMs in the MSA States. In doing so, the MSA States protected and preserved the market shares of all of the Participating Manufacturers, upon which their MSA revenues relied.[3]

C. Direct Effect of Allocable Share Amendments on Claimants.

22. The Allocable Share Amendments have raised Claimants' cost of complying with the Escrow Statutes to levels at which they can no longer compete with the OPMs and Exempt SPMs.

23. To illustrate, whereas Claimants and the exclusive trademark licensee of their products for off-reserve distribution in the United States, Tobaccoville USA, Inc. ("Tobaccoville"), were paying approximately $0.33 - $0.50 per carton into escrow under the original Escrow Statutes for products sold in the MSA States, approximately $4.29 per carton must now be paid into escrow under the Allocable Share Amendments for sales in 2006 – a near 1,000% increase. These compliance costs rise each year.

24. By way of further example, to comply with the Allocable Share Amendment, the wholesale price of Claimants' products must be increased to $12.05 per carton, for 2006 alone, whereas the wholesale price Claimants were able to charge under the original Escrow Statute was $8.05 per carton.

25. In contrast, the wholesale prices charged by Exempt SPMs (who benefit from the exemption noted above and are Claimants' principal competitors), as well as other Participating Manufacturers that have been given favourable terms to

[3] That only a tiny fraction of these billions of dollars in revenue was actually devoted to tobacco control demonstrates that while these revenues were crucial to state officials, health policy was – at best – an afterthought.

join the MSA, are materially lower than $12.05 per carton, and in some cases are as low as $8.50 per carton and even $8.00 per carton.

26. The results have been unsurprising. Compliance with the Allocable Share Amendments is resulting in a total foreclosure on the Claimants' off-reserve markets in the MSA States. This was the case in Oklahoma and Arkansas where, not long after the Allocable Share Amendments took effect in those States, Claimants' products were banned from sale because of Claimants' inability to make the increased escrow payments required by the Allocable Share Amendments.

27. Under "Contraband Laws" passed by the MSA States, if Claimants do not make the increased payments required by the Allocable Share Amendment, the MSA States have the power, and have exercised it, to ban the sale of Claimants' products – without a prior hearing or adjudication of Claimants' alleged non-compliance or an opportunity to present any defence or claim against the Escrow Statutes or Allocable Share Amendments.

28. For lack of a better description, the Contraband Laws evince, in essence, a "shoot first and ask questions later" approach, which has had devastating consequences for Claimants when combined with the amended Escrow Statutes.

29. Under the 11th Amendment of the United States Constitution, Claimants cannot sue the MSA States under U.S. law for damages or recompense in the event it is determined that the Escrow Statutes, Allocable Share Amendments, or Contraband Laws, or their enforcement or application as against Claimants, are

deemed unlawful or improper under U.S. or International Law.[4]

30. Thus, even if Claimants were ultimately successful in the U.S. courts of proving that these measures violate U.S. law, Claimants would be, at best, entitled to an injunction enjoining the MSA States from enforcing these measures at some future point in time. During the interim, Claimants goodwill and business remains (as has been the case) subject to complete destruction at the hands of the MSA States, acting at the behest of the OPMs and Exempt SPMs.

31. Given that the loss of goodwill and business suffered by the Claimants constitutes a type of injury that is irreversible and irretrievable to the extent previously enjoyed or possessed by an investor, Claimants thus lack an effective remedy under U.S. domestic law for claims arising from the foregoing measures – but for the recognition and enforcement of their rights under the NAFTA and the protections and guarantees available to aboriginal investors under international law.

APPLICATION OF MEASURES TO CLAIMANTS

A. Application of Original Escrow Statutes to Claimants

32. As canvassed during the March 2006 preliminary hearing, Claimants first received information regarding the potential application of the Escrow Statutes on or about March 14, 2001, via correspondence forwarded to the headquarters

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[4] The MSA States can only be sued for damages under the U.S. judicial system if they waive their sovereign immunity to be sued for such damages. The MSA States have not waived their sovereign immunity in respect of claims for damages under U.S. law that arise from their enforcement of the above-mentioned measures.

of Grand River Enterprises Six Nations, Ltd. ("Grand River"). This correspondence purported to state that Grand River could be subject to the Escrow Statute of the State of Oregon. Specifically, the notice stated that Grand River could be subject to the Escrow Statute if it "sold cigarettes to consumers in the State of Oregon." In fact, the Oregon Escrow Statute states that it applies to companies "selling cigarettes to consumers." This language appears in the Escrow Statute of every MSA State. For the reasons summarized below, Claimants reasonably believed that the purported notification in the letter was not applicable to them.

33. First, Claimants, including Grand River, have never sold their products to consumers in any State. Prior to their adoption of an allocable share strategy for off-reserve sales described below, Claimants only sold their products to wholesalers that purchased them on an F.O.B. basis, where title, risk of loss, and delivery of the products took place on Six Nations territory located in Southern Ontario and Northern New York. Any subsequent resale of tobacco products purchased from Claimants would have been undertaken by third-party distributors or wholesalers with neither the Claimants' direction nor their knowledge. Hence Claimants' reasonable understanding of the contents of the letter was that neither the Oregon Escrow Statute, nor any other Escrow Statute, was applicable to Claimants or to their investment.

34. Furthermore, the Iroquois Confederacy is an internationally-recognized confederacy of indigenous sovereigns, which long pre-dates the existence of the Colonial Americas or their governments and current borders. Accordingly, as aboriginal members of the Six Nations of the Iroquois Confederacy, Claimants reasonably believed that the Escrow Statutes could not apply to them or their business, because it was conducted solely on sovereign aboriginal

territory.

35. The Six Nations peoples benefit from two international treaties entered into by Respondent: *The Treaty of Amity, Commerce and Navigation of 1794 between the United States and Great Britain* (the "*Jay Treaty*");[5] and the *Treaty of Ghent of 1812*.[6] The Six Nations peoples are also parties to, and benefit from, other treaties entered into with Respondent, namely: the *Canandaigua (or Pickering) Treaty (also known as the Six Nations Treaty)* of 1794.[7]

36. In the *Pickering Treaty*, Respondent pledged never to disturb any "of the Six Nations, nor their Indian friends residing [on their land], and united with them, in the free use and enjoyment thereof." The Respondent also pledged "to promote the future welfare of the Six Nations, and of their Indian friends aforesaid." Finally, it was agreed that certain monies pledged to the Six Nations were "to be applied to the benefit of such of the Six Nations, and of their Indian friends united with them, as aforesaid, as do or shall reside within the boundaries of the United States; for the United States do not interfere with nations, tribes or families of Indians, elsewhere resident."

37. In respect of the Six Nations, Article 3 of the Jay Treaty provides:

> Agreed that it shall at all times be free . . . to the Indians dwelling on either side of the said [U.S.-Canada] boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of

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[5] *Treaty of Amity, Commerce, and Navigation, Between His Britannic Majesty and the United States of America*, November 19, 1794, U.S.-U.K., T.S. No. 105.

[6] *Treaty of Peace and Amity*, *Between His Britannic Majesty and the United States of America*, Art. 9, December 24, 1814, U.S.-U.K., T.S. No. 109.

[7] Text available at: http://canandaigua-treaty.org/The_Canandaigua_Treaty_of_1794.html, visited 4 November 2006.

> America . . . and freely to carry on trade and commerce with each other. . . . [N]or shall the Indians passing or repassing with their own proper goods and effect of whatever nature, pay for the same any impost or duty whatever.

38. Claimants also continue to benefit from the evolving rules of customary international law protecting the rights of indigenous peoples, as expressed in the norms found in various instruments for the protection of international human rights. For example, Article XVIII of the Proposed Inter-American Declaration on the Rights of Indigenous Peoples provides:

> Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.
>
> Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood…[8]

39. Notwithstanding the aforementioned treaties and international law rules promising non-disturbance of aboriginal commerce and industry, as early as March 2001 the MSA States began to threaten prosecution of Claimants under the Escrow Statutes for Escrow liability based on calculations that included tobacco products sold on reserve.

40. At the March 2006 hearings, Respondent presented evidence of two MSA States applying, or seeking to apply, the Escrow States to Claimants prior to March 2001 – namely, Iowa and Missouri. Subsequent to March 2001, multiple

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[8] Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session. O.A.S. Doc. OEA/Ser.L/V/II.95, Doc. 7, rev. (1996).

other MSA States began to similarly apply and prosecute Claimants under the Escrow Statutes.

41. The Claimants have sought information from the MSA States with which they have had contact concerning whether they have been including on-reserve sales in their Escrow Statute calculations. The response has often been that no matter how Claimants' products came to be found in a MSA State, or by whom they may have been distributed and eventually sold, Claimants would nonetheless be required to make payments under the Escrow Statutes. Few MSA States have been willing, however, to even reveal to Claimants exactly how their calculation of such obligations takes place – making unclear whether a tribal tax stamp is being treated as if was merely another state's tax stamp.

42. Thus, as Claimants would subsequently discover, the MSA States began to assert (and to this day still assert) that Grand River must make escrow payments under the Escrow Statutes, even if it was unrelated third parties who had apparently purchased products from the Claimants on sovereign aboriginal territory and subsequently resold them to wholesalers or consumers in the territory of MSA States or on other tribal lands.

43. For example, if independent company (X) purchases Claimants' products on Six Nations territory in Southern Ontario, or Seneca land in Northern New York, and resells the products in any State to wholesaler (Y), who then resells them to distributor (Z) in Illinois, when distributor (Z) sells those products to Kansas retailers who, in turn, sell them to consumers in Kansas, Grand River has been ordered to make escrow payments under the Kansas Escrow Statute for those products according to the enforcement positions taken by the MSA States.

44. In contrast, pursuant to commercial custom and domestic cigarette excise tax laws, if a State discovers that cigarettes are being sold within its territory without the proper excise tax stamps, it would be expected to prosecute the *seller* that actually sells those products in the State – not a remotely-situated producer.

B. Application of Contraband Law to Claimants

45. Midway through 2002, Claimants began to respond formally to the MSA States' enforcement of the Escrow Statutes outlined above. Specifically, through Grand River, Claimants sought to challenge the legality and propriety of the MSA States' enforcement of the Escrow Statutes under U.S. constitutional and domestic law theories. Grand River sought a declaration of its rights under the Escrow Statutes and an injunction to enjoin the MSA States from enforcing the Escrow Statutes as against Grand River.

46. Notably, the original Escrow Statutes required the MSA States to obtain a court order before they could ban the sale of Claimants' products for alleged non-compliance with the Escrow Statutes. Thus, while litigating the MSA States' demands and Claimants' defences to those demands under the original Escrow Statutes, Claimants were entitled to continue to sell their products throughout the U.S. until those demands and defences were judicially resolved.

47. Beginning in 2002, however, the MSA States began to adopt and enforce the Contraband Laws, which are discussed at pages 16-17 of the Particularized Statement of Claim. The Contraband Laws purported to allow an MSA State to ban immediately the sale of Claimants' products, if the Attorney General of

that State unilaterally deemed Claimants to be non-compliant with the Escrow Statutes. Thus, whereas the original Escrow Statutes required a court order and judicial determination before an MSA State could ban Claimants' products, the Contraband Laws gave the Attorney General of an MSA State the unilateral permission and power to implement such a ban without due process, or any judicial process whatsoever.[9]

48. The effect of each Contraband Law was to immediately ban the sale of Claimants' products in any MSA State where Claimants could not make the escrow payments demanded by the Attorney General or otherwise comply with the compliance demands imposed by that State official. Notwithstanding Claimants' efforts to challenge judicially the Escrow Statutes of each State that demanded escrow from Grand River, or that threatened enforcement of the Escrow Statutes against them, the MSA States adopted the Contraband Laws in order to circumvent judicial process and thereby immediately ban Claimants' products. Notably, this was in spite of the fact that the original Escrow Statutes' requirement that Claimants' products could be banned only after a judicial determination was made.

49. Claimants began to experience the effects of the Contraband Laws in 2003, when the MSA States began imposing bans on the sale of Claimants' products by reason of Grand River's alleged failure to pay the escrow demanded by these MSA States. Deemed failure to meet Escrow Statute obligations meant exclusion from the list of products approved for distribution in any given state.

50. The Contraband Laws currently remain in effect and are being enforced in all

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[9] Similarly, the Contraband Laws require a manufacturer to submit to the personal jurisdiction of an MSA State before the manufacturer's cigarettes can be sold in that MSA State.

of the MSA States.

C. Claimants Adopt and Follow a Business Plan and Strategy to Remain Competitive in Response to the MSA States' Enforcement Measures by Seeking Refunds of Escrow Payments under the Original Escrow Statute's Allocable Share Release Provisions

51. Faced with the Contraband Laws – and the prospect that their products *could no longer be sold* throughout the U.S. without meeting the escrow demands of MSA States wherever their products might eventually be found – Claimants adopted a strategy of meeting the compliance requirements of the original Escrow Statutes while remaining competitive with OPMs and Exempt SPMs in a limited number of markets.

52. This new strategy involved licensing an exclusive distributor, Tobaccoville, to sell their products off-reserve in five select, limited number of markets in the U.S. Under the Allocable Share Release provision of the original Escrow Statutes, if a manufacturer's cigarettes were sold in only a limited number MSA States, the manufacturer's escrow liability in those States could be effectively reduced on a per-carton basis and in the aggregate.

53. The Allocable Share Release provision operated essentially as follows: if sales of a manufacturer's cigarettes were distributed proportionally throughout all of the MSA States, the manufacturer was entitled to no immediate refund or release of the escrow payments it made to any given MSA State. However, as sales of those products were distributed in correspondingly fewer MSA States, the manufacturer was entitled to correspondingly greater refunds or releases of the escrow payments it made for any given MSA State. The result was that a

manufacturer could maximize its refunds under the original Escrow Statutes (and thereby reduce its net, effective escrow payment burden) by limiting the number of States in which its products were sold.[10]

54. In line with the foregoing, Claimants adopted a strategy at the end of 2002 to ensure that their products would only be sold in a limited number of MSA States. In this way, they could obtain refunds under the original Escrow Statutes to the extent necessary to remain competitive in the MSA States with OPMs, and particularly with Exempt SPMs who were paying $0 per carton under the MSA for billions of dollars of tobacco products they were selling in the MSA States.

55. The Allocable Share Release provisions of the original Escrow Statutes thus entitled Claimants to an immediate refund of a substantial portion of the escrow payments made in respect of their products sold off-reserve by Tobaccoville, so long as they were sold in only a small number of MSA States. The business plan implemented by Claimants in late 2002 accordingly led to the off-reserve sale of their products in the following MSA States: Georgia, North Carolina, South Carolina, Oklahoma and Arkansas.

56. By reducing the number of States in which their products could be sold off-reserve, Claimants reduced their effective, net escrow payment obligations each year from an amount that was ultimately over $4.00 per carton, to approximately $0.33 to $0.50 per carton in those states.

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[10] For example, the State of Oklahoma possesses an Allocable Share under the MSA of approximately 1% (i.e. Oklahoma receives 1% of all the MSA payments that are made by the MSA's Participating Manufacturers). Under the original Escrow Statute, if an NPM were to sell all of its products only in Oklahoma in a given year, and the "base" rate under the Escrow Statute was $4.00 per carton in that year, then the NPM would have to pay $4.00 into escrow for each carton of cigarettes sold in Oklahoma, but it would receive an immediate refund of $4.00 – (1% x $4.00) = $3.96 per carton.

57. The foregoing business plan and strategy thus allowed Claimants to compete effectively in the U.S. – albeit in a limited number of States – both with Exempt SPMs, who benefited from hundreds of millions of dollars in payment exemptions under the MSA each year, and with the OPMs, who had significantly raised their prices to maximize profits without the fear of losing market share.

58. Notwithstanding the limitation of off-reserve sales to the five MSA States mentioned above, the number of cigarettes produced by Grand River and sold in the U.S. market increased, from approximately 78 million units in 1999, to approximately 2.2 billion units in 2004.

59. In addition, the foregoing strategy permitted Claimants to pursue a plan of resolving the escrow disputes with other MSA States, even though Claimants' products were not principally sold in those States and such obligations were likely the result of third parties re-selling products in these territories both on and off reserve. By the end of 2005, Claimants reached settlements and accords with the additional States of Kansas, Louisiana, Nebraska and Tennessee.

60. By 2005, Claimants' business plans and strategy succeeded in establishing a profitable enterprise in which Claimants could continue to compete in the MSA States, protect their investments serving those States, and obtain reasonable returns on those investments. Nearly $5 million in the aggregate was being held (net of refunds) in escrow accounts for the benefit of nine of the forty-six MSA States, and Claimants' products were being sold off-reserve, without incident or further disturbance, in the five MSA States mentioned above.

61. Indeed, as Claimants continued to compete and obtain and protect their market share in select state markets under the original Escrow Statutes, they continued to invest millions of dollars in state-of-the-art equipment to serve the U.S. market.[12]

62. By December 31, 2005, however, the MSA States had again changed the regulatory climate in which they required Claimants to compete. They did so, this time, by adopting measures intended to effectively prohibit Claimants from competing in the U.S. altogether, even in the limited number of markets in which the Claimants had endeavoured to focus, and soon thereafter prospered, during the previous three years.

D. Adoption of the Allocable Share Amendments

63. For the reasons explained during the March 2006 hearing and outlined above, in 2004 and 2005, the MSA States and OPMs set out to change the Escrow Statutes, so that NPMs could no longer receive the refunds they had been receiving under the original Escrow Statutes.

64. The Allocable Share Amendment was drafted by the OPMs and MSA States to stop NPMs from competing with OPMs and SPMs. It prevents Claimants from competing with OPMs and Exempt SPMs, by preventing Claimants from receiving the refunds they were originally receiving, thus increasing their net, effective escrow payment burdens under the original Escrow Statutes.

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[12] The expansion of Claimants' business in the U.S. between 1999 and 2004, and the fact that Claimants could continue to compete and expand under the original Escrow Statutes, made it economically viable for Claimants to invest further funds into serving the U.S. market. Thus, Claimants set out to and did invest tens of millions of dollars in high-tech, efficient tobacco production equipment for that purpose.

65. For 2005, alone, the Allocable Share Amendments increased Claimants' escrow payment obligations under the Escrow Statutes on average from $0.33 to $0.50 per carton, to over $4.00 per carton – again, a near 1000% increase.

66. Of the five MSA States where Claimants' products were sold off-reserve, the Allocable Share Amendment first took effect in Georgia, in 2004.[13] Although Oklahoma passed the Allocable Share Amendment in 2003, it did not take effect until January 1st of the year after twenty-five (25) other MSA States passed a similar amendment. Thus, twenty-five States had passed the Allocable Share Amendment by the end of 2004, and Oklahoma's Allocable Share Amendment took effect on January 1, 2005.

67. In 2005, Arkansas passed the Allocable Share Amendment, as did North Carolina and South Carolina.

68. With the exception of Missouri, all of the MSA States have now passed the Allocable Share Amendment.

69. The Allocable Share Amendment requires the price of Claimants' products in MSA States to be increased by approximately $4.00 per carton, from pre-Amendment levels. The effect of the Allocable Share Amendments has been devastating to Claimants' business in the five states in which it was previously receiving allocable share refunds, as well as in those states in which it was able to reach settlements with the proceeds from their allocable share refunds.

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[13] Georgia's adoption of the Allocable Share Amendment did not have as substantial an effect on the Claimants' business, however, as would amendments to other States' Statutes described below, because the majority of Claimants' cigarettes being sold off-reserve were being sold in the other four MSA States. Georgia, however, is also one of the few States that has admitted, albeit only recently, to counting on-reserve sales towards the Escrow Statute obligations it has imposed upon Claimants.

70. In North Carolina and South Carolina, for example, the price of Claimants' products was increased as of January 1, 2006, by the amount necessary to comply with the Allocable Share Amendment. At that price level, all previous wholesale buyers of Claimants' products were lost in North Carolina and South Carolina. Wholesalers and retailers faced with the substantial increase in Claimants' products have simply substituted the lower-priced products of Exempt SPMs for Claimants' products.

71. In Arkansas, the Allocable Share Amendment increased Claimants' escrow payment burdens from approximately $600,000, to nearly $7 million for 2005 sales, alone. Grand River offered to pay Arkansas the $600,000 outright, and informed Arkansas that it could not pay the $7 million, nor continue to compete in Arkansas if it had to raise its price by the amounts required by the Allocable Share Amendment. In May 2006, Arkansas rejected Grand River's proffer and banned Claimants' products from being sold in Arkansas.

72. Similarly, Oklahoma demanded over $4 million from Grand River under the Allocable Share Amendment, for sales alleged by the Oklahoma Attorney General to have taken place in Oklahoma during 2005, failing to distinguish the significance between on- and off-reserve sales. If the Attorney General's sales figures were correct, then Grand River's escrow liability under the original Escrow Statute would have only been approximately $450,000 for those sales.

73. Oklahoma similarly banned Claimants' products from being sold in Oklahoma, because of Grand River's inability and failure to comply with the Allocable Share Amendment.

74. Claimants entered into settlements of escrow demands from Tennessee and Kansas. Claimants face the same result in Tennessee and Kansas that they already have experienced in states such as Arkansas and Oklahoma.

75. The same is true for all of the limited MSA States in which Claimants' products are now sold – which make increased payments due, as a result of passage of their Allocable Share Amendments, on April 15, 2007.

76. The effect of the Allocable Share Amendment has been to foreclose Claimants from competing in the MSA States altogether, and to expropriate Claimants' investments in those markets for the benefit of the MSA States and the favoured manufacturers with whom they have collaborated to share the benefits of that expropriation. This result is not only the logical result of the operation of the Allocable Share Amendment; it was the intended purpose of its drafters.

ARGUMENT

A. NAFTA Party Liability for Measures Imposed by States and Provinces

77. The NAFTA Parties have extended the obligations of the NAFTA to measures imposed by state or local governments. Under the customary international law of State responsibility and the NAFTA itself, a state or provincial government steps into the place of the NAFTA Party of which it forms a part when its measures are the subject of an international claim, rather than those of the NAFTA Party itself. It is also presumed that the measures of a sub-national government only apply to the territory over which such government has

jurisdiction, rather than over the national territory as a whole.[14]

B. The Measures and Their Application to the Claimants

(i) Off-Reserve Sales

78. Starting in 2003, Claimants licensed their products to be distributed off-reserve exclusively by Tobaccoville. This license extended to the MSA States of Georgia, Oklahoma, South Carolina, North Carolina and Arkansas. The purpose of this limited license was to ensure that the pricing of Claimants' products would benefit from allocable share refunds and, in turn, sustain their profitability and ability to compete in the U.S. market, albeit in a limited number of States..

79. Observing the Tribunal's Decision on Objections to Jurisdiction, sales of Claimants' products in these five states by Tobaccoville, which takes place off reserve, cannot be the subject of a NAFTA claim in respect of the original Escrow Statutes. However, because Claimants were able to establish a profitable business in these five states after 2002, under the original Escrow Statutes, there would be no reason to make a claim in respect of these particular markets, in any event.

80. Unfortunately, Claimants now have reason to bring a claim in respect of off-reserve sales in these five states, because the Escrow Statutes in each of these states have been amended to remove their allocable share refund provisions, and because the Contraband Laws have been, and will be, used to immediately

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[14] Thus, for example, when the MSA States impose measures that deprive an investor of its market within their respective territories, the character and definition of the investment being taken is informed by the territorial boundaries of the state market in question.

and effectively bar Claimants' products from distribution in each of them. The result has been, and will be, a total loss of Claimants' market share in each of these markets.

(ii) On-Reserve Sales

81. At page 24 of the Particularized Statement of Claim, Claimants stated that they had, and were continuing to, suffer loss and damage due to the imposition of three types of legislation by the MSA States

(i) The Escrow Statutes;
(ii) The Contraband Laws; and
(iii) The Equity Assessment Laws.

82. The Respondent objected to submission of this claim on the basis that it was time-barred. At paragraph 72 of its Decision on Objections to Jurisdiction, the Tribunal determined that all of these measures remained relevant to the claim in respect – but only in respect – of products distributed by Claimants through their sales on sovereign aboriginal territory. The Tribunal has determined that Claimants could not have been expected to know that the Escrow Statutes, as originally drafted, would be applied to their products sold on-reserve.

83. Prior to changing their business model (in the latter half of 2002), in order to respond to the introduction of the Contraband Laws and enforcement of the Escrow Statutes against them, Claimants sold their entire production, at wholesale, on reserve. Even after their change of strategy, all of Claimants' products were still sold by them on sovereign aboriginal territory – although their subsequent distribution became the subject of an exclusive license to Tobaccoville that permitted the latter to distribute these products off-reserve in

five selected MSA States.

84. As Claimants' sales have always been made at wholesale, on-reserve, the onus falls upon each MSA State to demonstrate that calculations leading to the imposition of an escrow obligation upon Claimants does not arise from sales by Claimants taking place solely on sovereign aboriginal territory. Only the MSA States themselves have full knowledge of whether or how on-reserve sales have been treated in this regard.[15]

85. Thus far, Claimants have been able to determine that the States of Wisconsin and Oklahoma have included sales to consumers made on sovereign aboriginal territory, in their calculations of the Claimants' Escrow Statute liability. However, because of the inconsistent and non-transparent manner in which the Escrow States have been enforced, the Claimants have not been able to fully gauge the extent to which their on-reserve sales have been used by other MSA States to establish Claimants' alleged liability under these measures.

C. National Treatment and Most-Favoured-Nation Treatment

86. As explained at pages 28 to 38 of the Particularized Statement of Claim, Article 1102 requires each State, operating independently or in concert with another state, to provide treatment no less favourable to the Claimants than that which it has provided, in like circumstances, to their domestic competitors. In other words, no state government may employ measures that provide better treatment, in result, to the Claimants' U.S.-based competitors, than that which has been made available to Claimants, without a reasonable justification for

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[15] Claimants thus have reason to believe that the States have likely included on-reserve sales in their calculation of Claimants' alleged Escrow Statute liabilities. Claimants, accordingly, will be seeking documentary production on this issue.

doing so.

87. The purpose of the national treatment standard is to ensure equality of competitive opportunity amongst local investors and investors from another NAFTA Party. The most favoured nation treatment standard works in exactly the same manner, ensuring equality of competitive opportunity as between foreign investors and investors from another NAFTA Party.

88. NAFTA Article 1103 accordingly prohibits states from employing measures that provide better treatment, in result, to the Claimants' foreign-based competitors, than that which has been made available to the Claimants, without a reasonable justification for doing so.

(i) Off-Reserve Sales

89. As described above, the MSA States made a deal with the OPMs that entitled the MSA States to receive perpetual, significant payments in exchange for protecting their markets from competition from smaller competitors such as Claimants. Under their agreement, the outcome of failing to protect those markets would be payment reductions.

90. Protecting the markets of the OPMs and Exempt SPMs, and their promised payments, led the MSA States to enact the Contraband Laws. The same motive led the States to draft and enact the Allocable Share Amendments.

91. The purpose of the Allocable Share Amendments was simple: to raise the per-carton compliance costs of small, discount tobacco companies, such as Claimants, thereby preventing them from competing successfully with the

OPMs and Exempt SPMs. The function of the MFN and national treatment obligations is equally simple; they provide that no domestic or foreign competitor shall receive better treatment as a result of a measure than that received by a NAFTA investor. By eliminating the allocable share refund mechanism in their Escrow Statutes, the MSA States have provided more favourable treatment to both the OPMs and the Exempt SPMs than that which has been made available to the Claimants.

92. The amended Escrow Statutes have significantly increased the Claimants' per carton compliance costs, thus altering the equality of competitive opportunity that is required to exist under the NAFTA between them and both the OPMs and the SPMs who enjoy exemptions for grandfathered market shares. This competitive imbalance is exacerbated because, as compared to Claimants, the OPMs are able to take advantage of their economies of scale and entrenched (now protected) market share in achieving compliance and remaining profitable in such a regulatory environment.

93. Whereas Claimants primarily compete on price with the Exempt SPMs, there is little incentive under the amended Escrow Statutes for the OPMs to compete with Claimants on prices other than that artificially inflated and propped up by the Allocable Share Amendments. Their premium brands are still universally recognized by consumers, and billions of dollars are still spent each year by the OPMs in promoting them. At the discount end of the market, where margins have always been thin, Exempt SPMs have taken advantage of their significantly lower compliance costs to effectively crush competitors, such as Claimants, who have been forced to pay escrow fees – now without the prospect of a refund – on every single cigarette they sell.

94. Had the OPMs been treated like any other alleged corporate wrongdoer, they would have been left to their own devices by the MSA States after they agreed to a settlement of the States' tort claims against them. They would have been forced to raise their prices, or to suffer lower profits, in order to meet their payment obligations. Instead, they received legislative protection that has allowed them to significantly raise their profit margins, in cooperation with a select group of smaller competitors who received their own benefits from the States in return for participating in the scheme in each market.

(ii) On-Reserve Sales

95. With respect to on-reserve sales, the conditions of competition have similarly been altered with the original Escrow Statutes, favouring the interests of certain tobacco companies over those of the Claimants. Better treatment is obtained by both the OPMs and Exempt SPMs, by virtue of the very fact that these measures are being applied to on-reserve sales. Enforcement of the Escrow Statutes upon Claimants – both in terms of imposing compliance costs upon them, and wrongfully requiring escrow payments of them – makes Claimants' products much less competitive than they otherwise would be.

96. Also receiving better treatment than Claimants under the Escrow Statutes are other aboriginal tobacco enterprises whose on-reserve sales are not being included in the calculation of Escrow Statute obligations, including the business recently established by the Squaxin Tribe, mentioned at pages 40 to 41 of the Particularized Statement of Claim. These enterprises have neither faced being forced to make payments into escrow nor been forced to bare the same costs of litigation and/or compliance as those borne by Claimants.

D. Treatment in Accordance with International Law

97. As explained at pages 42 to 58 of the Particularized Statement of Claim, treatment in accordance with international law is both a requirement of NAFTA Article 1105 and of customary international law. In any given case, the standard of treatment owed by a government will be informed by all sources of international law, including treaties, general principles and customary international law. In a case involving the rights and interests of indigenous peoples, the standard is also informed by the rights enjoyed by those investors under international human rights conventions; treaties concerning and involving sovereign indigenous peoples; and customary international law.

98. In all circumstances, a State treats investments in accordance with international law when it acts in a reasonable, non-discriminatory and procedurally fair manner. It fails to act in accordance with international law when its administrative, legislative and judicial processes are not based on principles of transparency or due process or when its measures lead to an arbitrary or capricious result. The standard of protection is exemplified in the text of Article 1105, which refers to "fair and equitable treatment" and "full protection and security" for investments in the territory of a NAFTA Party.

99. In circumstances where members of a sovereign aboriginal nation qualify as investors, "treatment in accordance with international law" under Article 1105 means honouring a NAFTA Party's treaty commitments made in the interests of those investors, and to their nation, in good faith. It similarly requires treatment in accordance with customary international law norms that protect the investors and their investments because of their aboriginal identity.

(i) Off-Reserve Sales

100. Claimants have never even been accused of the wrongdoing that was the subject of the lawsuits brought by the States against the OPMs. They were never afforded the opportunity to defend themselves against such claims before a court of law. Nonetheless, under the amended Escrow Statutes, Claimants have been arbitrarily forced to make onerous payments into the coffers of Georgia, South Carolina, North Carolina, Oklahoma and Arkansas without the benefit of refunds previously available to mitigate the harm these measures are intended to cause small tobacco companies.

101. The withdrawal of Claimants' entitlement to the allocable share refunds in respect of their off-reserve sales was as arbitrary as the original imposition of the Escrow Statute obligations had been upon the Claimants. Such arbitrary conduct is contrary to the international law minimum standard of fair and equitable treatment.

(ii) On-Reserve Sales

102. The Escrow Statutes have been enforced by many MSA States in a wholly non-transparent fashion. In most cases, Claimants have simply been told by an Attorney General what their escrow obligation is with a demand for payment. Most have generally refused requests for elaboration as to exactly how such obligations have been calculated. Under applicable standards of international law, these MSA State officials are required to conduct themselves in a more transparent manner, divulging exactly how they have calculated Claimants' obligations, allowing them to confirm whether on-reserve sales have been included in them. The MSA States have hidden behind this lack of

transparency in order to subject Claimants' on-reserve sales to escrow obligations, contrary to both domestic and international law.

103. Subjecting Claimants' on-reserve sales to any form of statutory payment obligation is a breech of Respondent's solemn treaty promise to the Six Nations to refrain from interference with their trade and commerce (see: e.g. Article II of the 1794 *Jay Treaty*). Subjecting Claimants' on-reserve sales to any of the measures at issue in this claim accordingly violates the customary international law principle of good faith. Claimants were entitled to hold a reasonable, investment-backed expectation of freedom to conduct their trade and commerce unfettered on sovereign aboriginal territory.

E. Expropriation

(i) Off-Reserve Sales

104. As explained at pages 63 to 68 of the Particularized Statement of Claim, NAFTA Article 1110 requires that when a State, or local government, imposes a measure that substantially interferes with an investment in its territory, full fair and effective compensation shall be paid for such interference. Such interference need not be total for the obligation to require the payment of compensation to be found.

105. The market for a product or service offered by an investor in the territory of another NAFTA Party constitutes an intangible form of property that is recognized as an investment under Articles 1110 and 1139 of the NAFTA, as does the trademark and good will associated with that product. An investor builds such markets and good will through the commitment of capital and/or

other resources by that investor in that territory. Such business activity also constitutes an "investment" as defined in the NAFTA.

106. With their on-reserve sales being subjected to the original Escrow Statutes, Claimants adapted their business to make use of the allocable share mechanisms contained within them to establish profitable markets in five states: Georgia, North Carolina, South Carolina, Oklahoma and Arkansas. Those markets have been systematically taken from Claimants, through the removal of their entitlement to the allocable share refunds that had allowed Claimants to maintain a profitable business in them, while bringing themselves into compliance in other states.

107. Without access to the refunds that lowered their compliance costs on a per-carton basis in these five States, Claimants and their products are effectively foreclosed from continuing to compete in those markets.

108. The test of indirect expropriation is whether a measure has substantially interfered with the investments of NAFTA investors. Claimants have witnessed the destruction of the markets they managed to build in Georgia, Oklahoma, South Carolina, North Carolina and Arkansas. They are entitled to compensation for the loss of those markets, where they demonstrated how they could build a profitable business even under difficult regulatory circumstances.

F. Damages

109. As explained at pages 69 to 75 of the Particularized Statement of Claim, the basic principle of damages in international law is equally applicable under the NAFTA: that compensation must be sufficient to place the aggrieved party in

the position it would have enjoyed, but for the breach. Where an investor has been deprived of its enjoyment of a market that was demonstrably profitable, compensation should equal the fair market value of the investment immediately prior to the occurrence of deprivation.

110. Where an investor suffers from the imposition of a measure that is unfair or inequitable, compensation must make the investor 'whole' by calculating how its business would have faired had the measures never been imposed. Where an investor receives less favourable treatment than that which has been enjoyed by a competitor, it is entitled to be made 'whole' by receiving damages equivalent to the profits it would have enjoyed had it received such treatment itself.

(i) Off-Reserve Sales

111. With respect to off-reserve sales, Claimants can be compensated for breaches of the standards contained within Articles 1102, 1103, 1105 and/or 1110, by an award of damages that is equivalent to the fair market value of the markets the Claimants had established in Georgia, North Carolina, South Carolina, Oklahoma and Arkansas, immediately prior to when the Allocable Share Amendments took effect in the MSA States where Claimants' products were principally sold.

(ii) On-Reserve Sales

112. With respect to the on-reserve sales to consumers, Claimants can be placed back in the position they would have been in, but for the breaches of the standards contained within Articles 1102, 1103 and/or 1105, by an award of

damages that accounts for: (1) any escrow contributions paid in any state for tribal-tax-stamped cigarettes wrongfully included by a State in its Escrow Statute calculations; (2) the compliance costs of fighting such wrongful imposition; (3) any declines in sales suffered in respect of on-reserve markets affected by such wrongful imposition; and (4) the administrative and financing costs of contributing such resources to fighting, or complying with, escrow obligations wrongly imposed.

113. In the event the Tribunal finds that Claimants' wholesales sales (all of which took place and continue to take place on reserve) have been improperly subjected to the Escrow Statute's requirements by the MSA States, then Claimants can be placed back in the position they would have been in, but for the breaches of the standards contained within Articles 1102, 1103 and/or 1105, by an award of damages that accounts for: (1) any escrow contributions paid in any state by or for Claimants; (2) the compliance costs of fighting such wrongful imposition; (3) any declines in sales suffered in respect of on-reserve markets affected by such wrongful imposition; and (4) the administrative and financing costs of contributing such resources to fighting, or complying with, escrow obligations wrongly imposed.

114. Claimants also maintain their prayer for relief, found at page 77 of the Particularized Statement of Claim, which – in addition to the foregoing – includes the costs associated with these proceedings, including all professional fees and disbursements; pre-award and post-award interest at a rate to be fixed by the Tribunal; payment of a sum of compensation equal to any tax consequences of the award, in order to maintain the award's integrity; and such further relief as counsel may advise and that this Tribunal may deem appropriate.

All of which is respectfully submitted.

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By: ______________________

Todd Grierson Weiler
2317 Erlton Street SW
Calgary, Alberta T2S 2V7

Chantell MacInnes Mountor.
Inch Hammond Professional Corporation
1 King Street, West Suite 1500
Hamilton, Ontario L8P 4X8

Leonard Violi
Law Offices of Leonard Violi, LLC
910 East Boston Post Road
Mamaroneck, New York 10543

Robert J. Luddy
Windels Marx Lane & Mittendorf, LLP
156 West 56th Street
New York, New York 10019

Arif Hyder Ali
Partner, International Arbitration Group
Fulbright & Jaworski LLP
801 Pennsylvania Ave. NW
Washington DC 20004

Counsel to Grand River Enterprises Six Nations, Ltd., Jerry Montour, Kenneth Hill And Arthur Montour, Jr.

Served To:

Mr. Mark A. Clodfelter, Assistant Legal Advisor
Ms. Andrea Menaker, Chief, NAFTA Arbitration Division
Office of International Claims and Investment Disputes
Department of State
United States of America
2430 E Street, NW
Suite 203, South Building
Washington, D.C. 20037-2800

And To:

Mr. Ucheora Onwuamaegbu, Counsel
International Centre for Settlement of Investment Disputes
World Bank
1818 H Street, N.W.
Washington, D.C. 20433