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1  
2 IN THE ARBITRATION UNDER CHAPTER ELEVEN  
3 OF THE NORTH AMERICAN FREE TRADE AGREEMENT  
4 AND THE UNCITRAL ARBITRATION RULES BETWEEN  
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7  
8 GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,  
9 JERRY MONTOUR, KENNETH HILL, AND ARTHUR  
10 MONTOUR, JR.,  
11  
12 CLAIMANTS/INVESTORS,  
13  
14 V.  
15  
16 UNITED STATES OF AMERICA,  
17  
18 RESPONDENT/PARTY.  
19 -----  
20

VOLUME I

21

ARBITRATION HEARING

22

23

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2 TRANSCRIPT of the stenographic  
3 notes of the proceedings in the  
4 above-entitled matter, as taken by and  
5 before TAB PREWETT, a Registered  
6 Professional Reporter, a Certified  
7 Shorthand Reporter of the State of New  
8 Jersey, and Notary Public of the State of  
9 New Jersey, held at the Offices of the  
10 INTERNATIONAL CENTRE FOR DISPUTE  
11 RESOLUTION, 1633 Broadway, New York, New  
12 York, on Thursday, March 23, 2006,  
13 commencing at 9:30 a.m.  
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2 A P P E A R A N C E S:

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MEMBERS OF THE Tribunal:

4  
MR. FALI S. NARIMAN, PRESIDENT  
5 PROFESSOR JAMES ANAYA  
MR. JOHN R. CROOK

6  
7 SECRETARY OF THE Tribunal:  
8 UCHEORA ONWUAMAEGBU, ICSID

9  
10 ATTENDING ON BEHALF OF Claimants:  
11 LEONARD VIOLI, ESQ.  
ROBERT J. LUDDY, ESQ.  
12 CHANTELL MACINNES MONTOUR, ESQ.

13  
STEVE WILLIAMS  
14 ARTHUR MONTOUR  
TODD WEILER, ESQ.

15  
16 ATTENDING ON BEHALF OF THE UNITED STATES:

17  
MARK A. CLODFELTER, ESQ.  
18 ANDREA T. MENAKER, ESQ.  
CARRIELYN D. GUYMON, ESQ.  
19 MARK E. FELDMAN, ESQ.  
WILLIAM LIEBLICH, ESQ.  
20 LEWIS POLISHOOK, ESQ.  
21 RENEE GARDNER

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Grand River Arbitration

PRESIDENT NARIMAN: Welcome to this jurisdictional hearing. And we all of us read your papers; and you have submitted them, and they have been quite numerous. And I think we can proceed with your objections to jurisdiction, if you just tell us what your case is.

MR. CLODFELTER: Mr. President, we would ask whether the tribunal would be interested in considering the issue that was raised recently, about the proposed introduction of new evidence.

PRESIDENT NARIMAN: I know; we saw that. But let's see whether it's relevant, not relevant. So I think let's get along, and you address us, of course, when you attempt to introduce that. You go first.

22 MR. CLODFELTER: Mr. President,  
23 let me introduce myself again first.  
24 I am Mark Clodfelter. I am assistant  
25 legal advisor for international claims

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1 Grand River Arbitration  
2 in investment disputes for the US  
3 State Department. It's a pleasure to  
4 appear before you again, and it's an  
5 honor to open the United States  
6 presentation.

7 PRESIDENT NARIMAN: Would you  
8 introduce your team so that -- and go  
9 on record, on both sides.

10 MR. CLODFELTER: I hope to do  
11 that now. To my left is Ms. Andrea  
12 Menaker, who is chief of the NAFTA  
13 Arbitration division of my office. To  
14 her left is CarrieLyn D. Guymon who  
15 will be presenting this morning, and  
16 Mark Feldman, both of whom are  
17 attorney advisors, who are members of  
18 that division.

19 We also have Renee Gardner from  
20 our office, who will be the legal  
21 assistant assisting us in presenting  
22 our argument. We also have to assist  
23 us Mr. Bill Lieblich from the National  
24 Association of Attorneys General, who  
25 you may remember from last year's

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1 Grand River Arbitration  
2 organizational meeting, and as well  
3 Lewis Polishook from the New York  
4 Attorney General's Office.

5 PRESIDENT NARIMAN: Good. And  
6 on this side would you like to --

7 MR. VIOLI: Yes. Good morning,  
8 Members of the Tribunal. My name is  
9 Leonard Violi. I will be presenting  
10 the presentation today. To my left is  
11 Robert Luddy with the law firm of  
12 Windels Marx Lane & Mittendorf. To my  
13 right is Todd Weiler. To his right is  
14 Chantell MacInnes Montour. To her  
15 right is Arthur Montour, one of the

16 claimants in this proceeding. And  
17 immediately to Mr. Montour's right is  
18 Steve Williams, who is the president  
19 of Grand River Enterprises Six Nations  
20 Limited, also one of the claimants in  
21 this proceeding.

22 PRESIDENT NARIMAN: Thanks.  
23 Welcome. All right.

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1 Grand River Arbitration  
2 OPENING PRESENTATION BY MR. CLODFELTER

3 MR. CLODFELTER: Mr. President,  
4 this morning I'll begin our  
5 presentation with a statement of the  
6 issues before you at this preliminary  
7 stage of the proceedings, and I will  
8 be followed by Ms. Menaker and  
9 Ms. Guymon. We anticipate our  
10 presentation will last about two hours  
11 this morning. I would suggest that,  
12 for the morning break, it might be  
13 appropriate to take it after  
14 Ms. Menaker's presentation.

15 Mr. President, under your  
16 decision of bifurcation, the task  
17 before you today is to determine  
18 whether the Claimants have established  
19 that this tribunal has jurisdiction  
20 over their claim, in the light of one  
21 of the five jurisdictional objections  
22 that the United States has raised  
23 that.

24 And that objection is, of  
25 course, that the claim as presented by

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1 Grand River Arbitration  
2 the Claimants in their notice of  
3 arbitration and statement of claim,  
4 was submitted outside of Chapter 11's  
5 limitations period.

6 As Claimants stated in both of  
7 those pleadings, the gravamen of the  
8 claim is the Tobacco Master Settlement  
9 Agreement concluded in November of

10 1998. The Master Settlement  
11 Agreement, or MSA for short, was the  
12 largest civil settlement in the United  
13 States and represented a monumental  
14 effort by the constituent states and  
15 territories of the United States to  
16 address the public health crisis  
17 presented by smoking-related deaths  
18 and illnesses.

19 Cigarettes, including the  
20 Claimants' cigarettes, are, like all  
21 tobacco products, inherently dangerous  
22 and cause serious illness and death.  
23 The health problems caused by  
24 cigarettes impose enormous costs on  
25 state and local governments.

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1 Grand River Arbitration  
2 The MSA was an effort to  
3 apportion responsibility for those  
4 costs among tobacco product  
5 manufacturers. All of the losses that  
6 Claimants complain about stem from  
7 changes in the tobacco market in the  
8 United States that resulted from the  
9 MSA, and the actions that it required  
10 to be taken, and which Claimants  
11 allege were in brief of NAFTA.

12 All of the breaches and the  
13 losses they allege -- and the Tribunal  
14 must take the allegations and a breach  
15 of loss as they were pled -- all of  
16 them derive from the MSA.

17 And the relief that they seek  
18 is aimed at undermining the MSA's  
19 carefully crafted scheme for  
20 apportioning responsibility among  
21 tobacco product manufacturers. In  
22 short, this case and the present  
23 jurisdictional issue before you today  
24 necessarily concerns the MSA.

25 But the Claimants have a

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1 Grand River Arbitration  
2 serious problem. And that problem is  
3 that the MSA was concluded over

4 five years before they submitted their  
5 claim to arbitration, and the  
6 opportunity afforded to them to be  
7 grandfathered into the MSA without  
8 having to make payments under the  
9 agreement expired over five years  
10 before they submitted their claim to  
11 arbitration.

12 And the escrow statutes enacted  
13 by all 46 of the MSA states, as the  
14 MSA required them to do, were all  
15 enacted at least three years and nine  
16 months before they submitted their  
17 claim to arbitration.

18 In short, the claim is time  
19 barred. As you can see on the screen,  
20 Articles 1116(2) and 1117(2) of NAFTA  
21 bar claims by an investor on its own  
22 behalf or on behalf of its enterprise,  
23 quote:

24 "If more than three years have  
25 elapsed from the date on which the

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1 Grand River Arbitration  
2 investor or enterprise first acquired  
3 or should have first acquired  
4 knowledge of the alleged breach, and  
5 knowledge that the investor or  
6 enterprise has incurred loss or  
7 damage." End of quote.

8 The United States' consent to  
9 arbitrate, and thereby this Tribunal's  
10 jurisdiction. Is confined to claims  
11 that are submitted within this time  
12 limitations period.

13 PRESIDENT NARIMAN: How do  
14 you -- what do you think is  
15 commencement of the claim according to  
16 you? Is it the arbitration notice, or  
17 is it the statement of claim?

18 MR. CLODFELTER: The  
19 arbitration notice.

20 PRESIDENT NARIMAN: Please go  
21 on.

22 MR. CLODFELTER: This time bar  
23 is jurisdictional in nature.

24 Claimants themselves have acknowledged  
25 this in their response to our

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1 Grand River Arbitration  
2 objection, as they had to do in the  
3 light of the overwhelming weight of  
4 authority supporting the principle  
5 that international tribunals lack  
6 jurisdiction over time-barred claims.

7 We cite a bunch of that  
8 authority to support that at note five  
9 in our request for bifurcation. This  
10 time bar is absolute.

11 As the NAFTA Chapter 11  
12 Tribunal in the Feldman case explained  
13 in its award, excerpted on the screen:

14 "NAFTA articles 1117(2) and  
15 1116(2) introduce a clear and rigid  
16 limitation defense, which, as such, is  
17 not subject to any suspension,  
18 prolongation, or other qualification."

19 Thus, the NAFTA legal system  
20 limits the ability of arbitration  
21 within the clear-cut period of three  
22 years.

23 PRESIDENT NARIMAN: I was just  
24 wondering -- pardon my interruption --  
25 that -- is there any wording with

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1 Grand River Arbitration  
2 regard -- with regard to this  
3 limitation provision inside NAFTA?  
4 Are you aware, because none of you  
5 have cited it? I just wanted to know.  
6 Is there anything in the wording which  
7 may assist us in some sort of a  
8 conclusion, because I would like you  
9 at some stage -- even though I don't  
10 want to interrupt your -- flow of your  
11 argument -- at some stage to address  
12 us in particularity about some general  
13 statements about limitation, on the  
14 wording of the article, if you don't  
15 mind at some stage, so that you claim  
16 breach, et cetera, so that we get very  
17 clear about this concept, what breach



18 is, alleged breach, such as and so on.  
19 I mean, if you could, just so  
20 our mind gets focused -- you see -- on  
21 this three-year period, which you say  
22 commences from the notice of  
23 arbitration.

24 Take your own time.

25 MR. CLODFELTER: The period

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1 Grand River Arbitration  
2 ends upon the filing of the notice of  
3 arbitration, three-year period prior  
4 to the filing of the notice of  
5 arbitration.

6 But if I might, with respect to  
7 the travaux, just to give you a  
8 general answer at this point, that is,  
9 the travaux relating to Chapter 11, is  
10 very sparse, essentially constitutes  
11 exchange -- agreed text during the  
12 negotiations that the parties  
13 exchange. And those have all been  
14 made available publicly.

15 We will consult during the  
16 break to make sure that we give a full  
17 and complete answer to your question  
18 as it regards specifically the time  
19 limitation language, but I don't think  
20 anything in the travaux helps.

21 With respect to the specific  
22 terms of the provisions, we will be  
23 addressing those during our  
24 presentation. Of course, please  
25 interrupt anytime if we are not.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: Please  
3 proceed, yes.

4 MR. CLODFELTER: The times  
5 limitation provisions are important.  
6 It is paramount that the Tribunal  
7 enforce this times limitation  
8 provision and enforce it strictly in  
9 order to uphold the sound rationales  
10 underlying its conclusion under the  
11 provisions of NAFTA.

12 Limitations period, such as  
13 this three-year limitation period,  
14 provide certainty and legal peace for  
15 respondents. The United States is  
16 entitled to know that, five years  
17 after the MSA was concluded, it does  
18 not have to defend against claims of  
19 international responsibility arising  
20 thereunder. Now, without this kind of  
21 legal certainty, governments could not  
22 continue to function effectively.

23 Limitations periods also  
24 prevent the airing of stale claims for  
25 which evidence may no longer be

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1 Grand River Arbitration  
2 available and the witness recollection  
3 may be infirm. I refer you to the  
4 authority cited at note 126 of our  
5 objection.

6 The United States has already  
7 encountered difficulty in obtaining  
8 evidence relevant to its defense of  
9 this case as a result of the passage  
10 of time. For example, the lead  
11 outside attorney for the MSA states  
12 responsible for liaison with small  
13 tobacco companies, Larry Loveland and  
14 the author of some of the documents  
15 that Claimants wish to introduce late,  
16 is now deceased.

17 In addition, the reporter for  
18 The Hamilton Spectator, Kate Barlow,  
19 who quoted Grand River's president in  
20 the article that we have submitted,  
21 has retired and left no contact  
22 information.

23 Now, the testimony of these  
24 witnesses is not necessary to sustain  
25 our defense. Indeed, the documents

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1 Grand River Arbitration  
2 submitted speak for themselves.  
3 Nevertheless, the fact that Claimants  
4 attempt to so doubt where none exist  
5 by citing the absence of testimony by

6 individuals like Ms. Barlow  
7 underscores the importance of the  
8 times limitation provision.

9 It is imperative that it be  
10 strictly honored.

11 Now, because times limitations  
12 provisions are jurisdictional,  
13 Claimants have the burden of proving  
14 that they have complied with the time  
15 limitation here just as they have the  
16 burden of proving that they meet all  
17 of the jurisdictional requirement for  
18 arbitration under NAFTA Chapter 11.

19 It is well established in  
20 international law that the burden of  
21 proving jurisdiction is on the  
22 claimant. Claimants, however, deny  
23 that they bear that burden on this  
24 issue. This is at page 23 of the  
25 rejoinder.

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1 Grand River Arbitration

2 Not only is this denial against  
3 all authority; it is also a strong  
4 indicator that they cannot meet that  
5 burden. For example, Claimants  
6 disavow any responsibility for  
7 Mr. Arthur Montour's failure to state  
8 this statement, when he first learned  
9 of the Missouri enforcement action, a  
10 key fact.

11 They also disavow  
12 responsibility for the absence of any  
13 testimony on behalf of Native  
14 Wholesale Supply or its predecessor,  
15 Native Tobacco Direct. The company  
16 files have been searched for notices  
17 to the Claimants, like the testimony  
18 provided today, in fact, by  
19 Mr. Williams on behalf of Grand River.

20 As another example, Claimants  
21 express outrage that the states did  
22 not extend to them a personalized  
23 direct invitation to join the MSA  
24 before the 90-day window for  
25 grandfathered treatment ended. But

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1 Grand River Arbitration  
2 when asked if Grand River even  
3 manufactured cigarettes for sale in  
4 the United States before the MSA, a  
5 simple question, they merely repeat,  
6 again, that Claimants, quote:

7 "Have been involved in the  
8 manufacture and distribution of  
9 tobacco products for sale in the  
10 United States since 1992," unquote.

11 This is at page eight of the  
12 rejoinder.

13 But they are evading rather  
14 than answering such a simple question.  
15 And their failure to correct such  
16 gaping holes in their presentation can  
17 not be excused on the ground that they  
18 don't have the burden of doing so.

19 This would turn the burden of  
20 proof on its head.

21 MR. CROOK: Mr. Clodfelter,  
22 excuse me. Maybe you are going to  
23 address this, but the Claimants, as I  
24 recall, quote Feldman for the  
25 proposition, essentially, that the

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1 Grand River Arbitration  
2 movant has the burden of going  
3 forward. And they say, here you are  
4 the movant. Therefore, you have the  
5 burden of proof.

6 Do you have a view on that?

7 MR. CLODFELTER: Yes, we do.  
8 We have a very strong view on it. The  
9 international authority is really not  
10 in question on the point of who bears  
11 the burden, as all burdens of proof.  
12 The burden of going forward shifts  
13 depending upon what is produced. Our  
14 position here is that the initial  
15 burden the Claimants bear has not been  
16 met.

17 PRESIDENT NARIMAN: Yes, but  
18 isn't their case, as far as I can see,  
19 is that they are not -- they say:

20 "We are not so much concerned  
21 with the MSA. We are not even so much  
22 concerned with the escrow statutes."

23 That is their case.

24 "We are concerned with the  
25 third stage," what they call the

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1 Grand River Arbitration  
2 enforcement of those escrow statutes.  
3 And that is where, according to them,  
4 their liability, if at all, arises. I  
5 mean, that is the sort of case that  
6 they make out.

7 MR. CLODFELTER: That's their  
8 latest case.

9 PRESIDENT NARIMAN: It doesn't  
10 matter.

11 MR. CLODFELTER: We will talk  
12 about that, but, obviously, these are  
13 important points.

14 PRESIDENT NARIMAN: Because  
15 they said that the MSA -- they talk  
16 all very well:

17 "But we had nothing to do with  
18 the MSA. It doesn't effect us."

19 That is how they put it.

20 MR. CLODFELTER: Mr. President,  
21 they say that now because they lose if  
22 they didn't, the gravamen of their  
23 case in the notice of arbitration.  
24 But in their notice of arbitration  
25 they made it clear the MSA was a

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1 Grand River Arbitration  
2 breach.

3 Last year in this meeting, they  
4 said the MSA was a breaching measure.  
5 And then in their statement of claim,  
6 they couldn't run fast enough away  
7 from the MSA because they knew its  
8 implication, once they knew we were  
9 challenging the time limitations of  
10 their claim.

11 PRESIDENT NARIMAN: You say the  
12 MSA is an integral part of their claim  
13 with regard to breach?

14 MR. CLODFELTER: Absolutely.  
15 And Ms. Menaker and Ms. Guymon will  
16 walk you through very carefully why we  
17 view that to be the case.

18 PRESIDENT NARIMAN: Please  
19 proceed.

20 PROFESSOR ANAYA: Sorry. You  
21 said they knew about the MSA's effect  
22 on them, the breach that the MSA  
23 represented -- they knew about it.

24 MR. CLODFELTER: We think the  
25 evidence shows that they knew about

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1 Grand River Arbitration  
2 it, and they knew its effect as well.

3 MR. ANAYA: But they have the  
4 burden of showing that they didn't  
5 know about that.

6 MR. CLODFELTER: They have the  
7 burden of showing it. They do. They  
8 do have the burden of showing that,  
9 and we will point out the  
10 incompleteness of that showing and why  
11 it does not constitute a -- we have  
12 gone beyond that burden, and we have  
13 discussed evidence and produced  
14 evidence to show that, in fact, they  
15 do.

16 MR. ANAYA: But -- all right.  
17 But you have shown that they did know  
18 about it, but you say you don't have  
19 the burden of showing that they did  
20 know about it. Is that right?

21 MR. CLODFELTER: That's right.  
22 We have gone beyond our responsibility  
23 to disprove the case.

24 PRESIDENT NARIMAN: What has  
25 been pointed out is that this burden

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1 Grand River Arbitration  
2 question fades into some sort of  
3 insignificant -- after everyone has  
4 said whatever they want to say on the  
5 subject, and then you have to assess  
6 whether this is proven or not proven.

7 MR. CLODFELTER: That's exactly

8 right. We agree with that, and, of  
9 course, in the exchange of views  
10 today, it does get lost, and it  
11 doesn't necessarily jump out as a key  
12 issue. But in your deliberation, of  
13 course, you have to weigh the evidence  
14 according to the respective burdens.

15 I was making the point that,  
16 when asked a simple question about  
17 whether Grand River had ever even  
18 produced cigarettes for sale in the  
19 United States before the MSA, they  
20 come back with an evasive answer that  
21 they have stated a number of times,  
22 that:

23 "We have been involved in  
24 manufacture and distribution since  
25 1992."

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1 Grand River Arbitration

2 But that type of evasion cannot  
3 avoid their burden of proof. Under  
4 the particular --

5 PRESIDENT NARIMAN: I didn't  
6 follow that. I'm sorry. I didn't  
7 follow that precise last part.

8 MR. CLODFELTER: They can't  
9 rest on blurring their activities for  
10 a period of time.

11 PRESIDENT NARIMAN: But how is  
12 it blurring?

13 MR. CLODFELTER: Because they  
14 say "manufacture and distribution."  
15 And we don't doubt that they were  
16 involved in the distribution of  
17 cigarettes before 1999. The question  
18 is: Did Grand River produce,  
19 manufacture cigarettes for sale in the  
20 United States before the MSA?

21 And the fact is that, as we  
22 will talk about -- I will mention it  
23 again -- that they did not.

24 PRESIDENT NARIMAN: And,  
25 therefore, and if they did not.

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1 Grand River Arbitration

2 MR. CLODFELTER: If they did  
3 not, it's two points to be drawn from  
4 that. One is, it goes to the very  
5 heart of their case -- their argument  
6 that they were entitled to  
7 individualized personal notice of the  
8 grandfather period and they were  
9 excluded from that period, and the  
10 point being, of course:

11 How could the MSA parties have  
12 known to notify them if they weren't  
13 even in the business at that time?

14 The second point, the point  
15 relevant here, is that they are not  
16 stepping up to the burden of proof.  
17 And if they didn't even enter the  
18 market, the business of manufacturing  
19 cigarettes until after the MSA,  
20 suggests strongly that they did so  
21 fully knowing the implications of the  
22 MSA regime.

23 In fact, the MSA regime may  
24 have been a key factor of their  
25 business plan. We don't know that.

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1 Grand River Arbitration  
2 Yet, the very fact that they didn't  
3 manufacture before the MSA is crucial  
4 on the merits, later on, if the  
5 jurisdictional objection is rejected;  
6 but, certainly, it's crucial on the  
7 issue of the time limitation because  
8 it suggests knowledge well in advance.

9 But there are lots of other  
10 indicators as well which we will be  
11 getting to.

12 So on this issue -- the issue  
13 of the time limitation, the Claimants  
14 have the burden of proving their  
15 assertion that they neither knew nor  
16 should have known until years after  
17 their occurrence of the breaches and  
18 losses that they allege. Of course,  
19 as I mentioned, we feel that they have  
20 failed to meet that burden.

21 This is not surprising because



22 the Claimants have built their case on  
23 a series of preposterous assertions,  
24 so much that they would have you  
25 believe that, despite the fact that

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1 Grand River Arbitration  
2 their primary business activities for  
3 many years has been in multi-million  
4 dollar cigarette enterprises:

5 One, they were completely  
6 unaware of the single-most important  
7 development in the history of their  
8 industry, the negotiation of the MSA.

9 Two, that they were so lacking  
10 in curiosity about the resulting  
11 agreement that they did not even  
12 bother to familiarize themselves with  
13 the publicly discussed opportunity to  
14 be grandfathered in.

15 Three, that they thought that  
16 the MSA-mandated escrow statutes,  
17 despite their clear terms, didn't  
18 apply to them because they were  
19 manufacturers -- you heard of that --  
20 instead of direct sellers to  
21 consumers.

22 And, four, that for the entire  
23 period from 1999 to 2001, they didn't  
24 realize that the incurred escrow  
25 payment obligation for every Grand

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1 Grand River Arbitration  
2 River cigarette that was sold in an  
3 MSA state on which excise taxes were  
4 paid -- in other words, that they were  
5 completely oblivious to the revolution  
6 taking place all around them in their  
7 very own industry.

8 These assertions are simply not  
9 credible. Perhaps sensing how empty  
10 these propositions sound when stated  
11 out loud, Claimants have had  
12 constantly to shift the focus of the  
13 claim. For example, they have  
14 continually changed the identification  
15 of the measures they are challenging,

16 as I mentioned and as you have  
17 mentioned, Mr. President.

18 In the notice of arbitration,  
19 they identify the MSA, the escrow  
20 statutes, and the complementary  
21 legislation as breaching measures. In  
22 their statement of claim, they  
23 impermissibly added a tax measure of  
24 the State of Minnesota, which is not  
25 even an MSA state, plus added a

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1 Grand River Arbitration  
2 Michigan tax measure, which they had  
3 previously cited only as related to  
4 their calculation of their damages.

5 And then, this past February  
6 for the first time, they alleged that  
7 they are challenging amendments to  
8 escrow statutes, the allocable share  
9 limits, as another example.

10 Claimants have continually  
11 changed the time at which they allege  
12 they first acquired knowledge of loss,  
13 shifting from pleading to pleading.  
14 The language of the notice of  
15 arbitration contemplates losses upon  
16 the breaching measures that they have  
17 challenged.

18 And in their statement of  
19 claim, they allege that they first  
20 incurred loss or damage as a result of  
21 the MSA regime in May of 2002 when  
22 they retained an attorney. And then  
23 in their rejoinder, they moved forward  
24 that time to October of 2002, when a  
25 default judgment was entered into

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1 Grand River Arbitration  
2 against them in Arizona.

3 But continually changing their  
4 case does not meet Claimants' burden  
5 of proving their case. And, in fact,  
6 the evidence in the record actually  
7 disproves their assertions, we will  
8 show. For example, while Claimants --  
9 and I explained this -- they were

10 evasive on the question of when Grand  
11 River began manufacturing. The  
12 evidence in the record shows that they  
13 didn't begin manufacturing until  
14 afterward. Their distributors -- the  
15 relation with -- the relationship with  
16 the two exclusive distributors that  
17 they had didn't begin until well after  
18 the MSA.

19 PRESIDENT NARIMAN: But is it  
20 your case that the MSA did not require  
21 any specific notice in order to  
22 grandfather -- to make them take  
23 advantage of the grandfather clause,  
24 if they were not manufacturers prior  
25 to the MSA?

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1 Grand River Arbitration

2 MR. CLODFELTER: You are  
3 assuming absolutely no requirement of  
4 the individual tobacco  
5 manufacturers --

6 PRESIDENT NARIMAN: That's what  
7 I thought.

8 MR. CLODFELTER: -- which were  
9 notified.

10 PRESIDENT NARIMAN: Yes.

11 MR. CLODFELTER: But the second  
12 point we are making is they weren't  
13 even an existing tobacco or a  
14 cigarette manufacturer.

15 PRESIDENT NARIMAN: I see.

16 MR. ANAYA: Are you saying that  
17 there is no argument that the MSA and  
18 the escrow statutes may not have  
19 applied to them in a way that  
20 ultimately they were applied, because  
21 it seems like their argument is that  
22 there was some ambiguity about how the  
23 MSA was affecting them, how the escrow  
24 statutes would affect them, and hence  
25 the damage didn't come until that was

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1 Grand River Arbitration

2 clear or there were --

3 MR. CLODFELTER: That is their

4 argument, because. You see -- the  
5 difficulty is they have to step away  
6 from these obvious requirements and  
7 the obvious impact of these  
8 requirements.

9 So one way is to say:

10 "No, we didn't know they  
11 applied to us. We are a cigarette  
12 manufacturer, the target of this  
13 entire regime, but we didn't know they  
14 did apply to us."

15 We will address why that  
16 doesn't hold later this morning, if I  
17 can refer to Ms. Menaker's  
18 presentation on that.

19 MR. ANAYA: Your position,  
20 basically, is that on the face is  
21 these measures are clear in their  
22 application.

23 MR. CLODFELTER: That is  
24 correct. And they had all the  
25 information they needed. Now, they

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1 Grand River Arbitration  
2 didn't present all of that information  
3 to you when they talked about what  
4 information they had. But we will  
5 walk you through why it's clear that  
6 they knew the information contained in  
7 these instruments.

8 So we don't have the burden.  
9 They have the burden. They have not  
10 met it, but we have summoned and  
11 marshaled and cited evidence which  
12 would disprove the assertions that  
13 they have made, and demonstrates they  
14 knew or should have known they had  
15 first incurred the loss or damage they  
16 allege as a result of the breaches  
17 they allege well before March 12,  
18 2001, the date three years before they  
19 filed their notice of arbitration, and  
20 thereby submitted their claim to  
21 arbitration.

22 PRESIDENT NARIMAN: I just want  
23 to know, how much knowledge is

24 requisite for this limitations clause.  
25 What use is knowledge -- I just want

0036

1 Grand River Arbitration  
2 to know from you. I mean, what is  
3 your case? Forget -- I mean, we will  
4 deal with this burden of proof and so  
5 on. But what sort of knowledge should  
6 be acquired in order that the  
7 limitation begins to run?

8 MR. CLODFELTER: Ms. Guymon  
9 will explain -- two things, one is  
10 that every participant in the market,  
11 including foreign participants, have a  
12 duty to know the law, and that the  
13 content of this law is clear,  
14 unambiguous, and they can't walk away  
15 from the duty borne by every other  
16 enterprise operator.

17 PRESIDENT NARIMAN: No, but  
18 this is on that argument of ignorance  
19 of law. But does it apply to a  
20 foreign trader or a foreign  
21 manufacturer? Does a foreign  
22 manufacturer have to necessarily know  
23 the law of the country where he's  
24 trading?

25 I just want to know what your

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1 Grand River Arbitration  
2 standing is.

3 MR. CLODFELTER: Our position  
4 is they have a duty to know the law.

5 PRESIDENT NARIMAN: The foreign  
6 trader?

7 MR. CLODFELTER: Especially the  
8 foreign trader entering the market of  
9 another country has a particular  
10 responsibility before doing so to  
11 understand its obligations under the  
12 law of that country, whether it be the  
13 United States, whether it be India,  
14 wherever in the world -- they have an  
15 obligation to understand their legal  
16 obligations.

17 PRESIDENT NARIMAN: It is some

18 sort moral obligation, yes. But a  
19 legal obligation, that is what we are  
20 on. We are only on the legal part  
21 here. Morally, you are quite right.  
22 I think there is no doubt about it  
23 that they are bound to -- that's an  
24 assumed thing.

25 But here we are not just now on  
0038

1 Grand River Arbitration  
2 assumptions. We are now on focusing  
3 strictly on this March deadline.

4 MR. CLODFELTER: Well, it's  
5 certainly more than a moral  
6 obligation, and Ms. Guymon will  
7 address why.

8 PRESIDENT NARIMAN: Yeah,  
9 because I would like to have something  
10 to suggest that it's a legal  
11 obligation arising out of such and  
12 such a statement of the law, because  
13 ignorance of law is no excuse. That  
14 is a very general sort of statement.  
15 You know, it applies -- but does it  
16 apply also to a foreigner, because  
17 ignorance of foreign law is certainly  
18 not a matter on which you can say that  
19 you must know what the foreign law is  
20 because for him it's foreign law --  
21 for them it's foreign law.

22 MR. CLODFELTER: I agree. I  
23 agree. No foreigner bears the  
24 responsibility for knowing the law of  
25 another country until they enter that

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1 Grand River Arbitration  
2 country and conduct business. And  
3 then they have a legal, not just a  
4 moral, but a legal obligation to  
5 understand the laws.

6 PRESIDENT NARIMAN: I would  
7 like to have some principle on which  
8 you base this assumption.

9 MR. CLODFELTER: We will  
10 address that. Let me cite the  
11 authorities that we have cited before.

12 Let me just read you an excerpt from  
13 the MTD Equities case against Chile.  
14 This is from last year, where the  
15 Tribunal found that, quote:  
16 "It is the responsibility of  
17 the investor to assure itself that it  
18 is properly advised regarding legal  
19 and regulatory requirements,  
20 particularly when investing abroad in  
21 an unfamiliar environment," unquote,  
22 and that the respondent Chile had,  
23 quote, "no obligation to inform  
24 Claimants, and that the Claimants  
25 should have found out by themselves

0040

1 Grand River Arbitration  
2 what regulations and policies of the  
3 country were."

4 And there are other authorities  
5 as well.

6 PRESIDENT NARIMAN: This is the  
7 Chile award.

8 MR. CLODFELTER: Yes.

9 PRESIDENT NARIMAN: 2005.

10 MR. CLODFELTER: I will just  
11 refer you to our notes in our  
12 objections at 173 and 174.

13 PRESIDENT NARIMAN: Notes.

14 MR. CLODFELTER: Yes,  
15 footnotes.

16 MR. CROOK: 173 and 174.

17 MR. CLODFELTER: Yes.

18 PRESIDENT NARIMAN: Thanks.  
19 Please. Proceed.

20 MR. CLODFELTER: Let me just  
21 close my opening, if I might,  
22 Mr. President. Our written  
23 submissions show this in many other  
24 ways that the evidence demonstrates  
25 that Claimants knew or should have

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1 Grand River Arbitration  
2 known that they had first incurred the  
3 loss of damage well before March 12,  
4 2000.

5 The rest of our presentation

6 will be divided into two. Ms. Menaker  
7 will walk you through the evidence  
8 that Claimants first actually incurred  
9 loss or damage as they allege before  
10 the beginning of the three-year  
11 limitations period.

12 Then Ms. Guymon will  
13 demonstrate how the evidence shows  
14 that the Claimants should also have  
15 known about these alleged breaches and  
16 losses before March 12, 2001, both  
17 because they had a duty to know, as we  
18 have just argued, and because of the  
19 publicity surrounding the regime  
20 itself. And she will show how that  
21 evidence demonstrates that, in  
22 addition to the fact that they should  
23 have known, they actually knew before  
24 that date. And then she will conclude  
25 our opening argument. And,

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1 Grand River Arbitration  
2 Mr. President, if it pleases you, I  
3 will you now then turn the floor over  
4 to Ms. Menaker.

5

6 OPENING PRESENTATION BY MS. MENAKER

7

8 MS. MENAKER: Thank you and  
9 good morning, Mr. President, and  
10 Members of the Tribunal.

11 As Mr. Clodfelter noted, I  
12 would now demonstrate that Claimants  
13 first incurred losses arising out of  
14 the breaches they allege well before  
15 the three-year time limitations period  
16 had expired. Throughout my  
17 presentation I will be referring to a  
18 time line and some other slides; and  
19 our legal assistant is going to be  
20 distributing hard copies of those  
21 slides to both members of the Tribunal  
22 and to Claimants' counsel, so you can  
23 look at the hard copies if you prefer.

24 (There was a discussion off the  
25 record.)



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1 Grand River Arbitration

2 MS. MENAKER: So now on the  
3 screen, you will now see a time line,  
4 and the first point that I have  
5 highlighted is March 12, 2004, which  
6 is the date that Claimants submitted  
7 their claims to arbitration. I have  
8 also highlighted March 12, 2001; and  
9 this is the date that is three years  
10 prior to the day that Claimants  
11 submitted their claims to arbitration.

12 All of the losses for which  
13 Claimants seek recovery first occurred  
14 prior to March 12, 2001, because they  
15 all arise out of the Master Settlement  
16 Agreement and the escrow statutes. I  
17 will first discuss the Master  
18 Settlement Agreement and the escrow  
19 statutes.

20 PRESIDENT NARIMAN: Before you  
21 come to that, would one of you deal  
22 with the question of breach.  
23 According to you, what is the  
24 Claimants' claim with regard to  
25 breach, according to you, according to

0044

1 Grand River Arbitration

2 the United States?

3 MS. MENAKER: Yes, I will be  
4 doing that.

5 PRESIDENT NARIMAN: Later,  
6 whenever you -- don't take yourself  
7 out of this, but a little later.

8 MS. MENAKER: I certainly will.  
9 And if I don't deal with that  
10 comprehensively, feel free to ask.

11 PRESIDENT NARIMAN: Thank you.

12 MS. MENAKER: Thank you.

13 I will begin by discussing the  
14 Master Settlement Agreement and the  
15 escrow statutes, and show that all of  
16 the losses for which Claimants seek to  
17 recover arise out of those instruments  
18 and were first incurred in 1999. I  
19 will then explain that Claimants'

20 complaints about the penalties that  
21 they have incurred for non-compliance  
22 with the escrow statutes and their  
23 challenges to the complementary  
24 legislation do not alter the fact that  
25 they first incurred loss or damage

0045

1 Grand River Arbitration  
2 arising out of the alleged breaches  
3 more than three years before the  
4 claims were submitted to arbitration.

5 And, finally, I will address  
6 Claimants' belated and improper  
7 challenges to the allocable share  
8 amendments and the Michigan and the  
9 Minnesota tax assessment laws and show  
10 why those challenges do not meet  
11 Claimants' claims timely, leaving  
12 aside their late introduction into the  
13 case.

14 So as you can see on the slide,  
15 the Master Settlement Agreement was  
16 concluded in November of 1998; and  
17 that agreement forms the centerpiece  
18 of Claimants' claims. The Claimants  
19 now contend that they are not  
20 challenging the MSA, since, as is  
21 apparent, doing so would be clearly  
22 time barred.

23 But the Tribunal has to look at  
24 the claims themselves. And it's clear  
25 from both the notice of arbitration

0046

1 Grand River Arbitration  
2 and the statement of claim that  
3 Claimants allege that the MSA itself  
4 breaches the NAFTA. So even if they  
5 now want to retract those allegations,  
6 it doesn't save their claims because  
7 many of the losses that they allege  
8 arise out of the MSA, and only out of  
9 the MSA. And those losses were first  
10 incurred shortly after the MSA was  
11 concluded.

12 So the MSA imposes payment  
13 obligations on Original Participating

14 Manufacturers, or OPMs. And those  
15 manufacturers must make significant  
16 payments to the state based on their  
17 national market share. As Claimants  
18 acknowledge in their notice of  
19 arbitration -- and I have put this  
20 quote on the screen, quote:

21 "The MSA's payment  
22 obligations" --

23 PRESIDENT NARIMAN: What is  
24 NOA?

25 MS. MENAKER: That is notice of  
0047

1 Grand River Arbitration  
2 arbitration.

3 PRESIDENT NARIMAN: Sorry.  
4 Thank you.

5 MS. MENAKER: "The MSA's  
6 payment obligations were drafted to  
7 apply and currently do apply not only  
8 to the Majors, but to all other  
9 competitors whose cigarettes are sold  
10 in the United States." End quote.

11 Payment obligations similar to  
12 those made by the OPMs are imposed on  
13 other cigarette manufacturers that  
14 join the MSA, and those manufacturers  
15 are known as Subsequent Participating  
16 Manufacturers, or SPMs.

17 By virtue of section nine of  
18 the MSA, however -- and I have also  
19 posted section nine on the screen --  
20 manufacturers that joined the MSA  
21 within 90 days received a payment  
22 exemption for sales that were not in  
23 excess of a certain amount, which was  
24 calculated by reference to their  
25 market share at or before the time

0048

1 Grand River Arbitration  
2 that the MSA was concluded.

3 Now, these SPMs that receive  
4 that exemption are known as  
5 grandfathered SPMs. Manufacturers  
6 that joined the MSA after the 90-day  
7 period are known as SPMs, but are not

8 grandfathered SPMs and do not receive  
9 a payment exemption.

10 Manufacturers that do not join  
11 the MSA at all are called  
12 Nonparticipating Manufacturers or  
13 NPMs, and they too are not entitled to  
14 the payment exemption.

15 PRESIDENT NARIMAN: What was  
16 the object of this? I mean, with  
17 regard to the MSA -- and I am a little  
18 blurred about this -- why was it  
19 drafted in this fashion, because  
20 shouldn't it have extended to each and  
21 every person who was a cigarette  
22 manufacturer selling cigarettes, I  
23 mean?

24 MS. MENAKER: It did, indeed.

25 PRESIDENT NARIMAN: I just want

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1 Grand River Arbitration  
2 to understand. I mean, why was this  
3 drafted in this way, that it's within  
4 90-days? They do make a mention of  
5 it. Then they fall within the  
6 exemption, but, if they miss the  
7 90-day period, then they drop out of  
8 the exemption. What was that  
9 structured on? I mean, why was that?

10 MS. MENAKER: Because the MSA  
11 was structured in order to enable the  
12 states to get payments to reimburse  
13 them for the medical costs that they  
14 were -- that they had to pay out for  
15 health-related expenses due to  
16 cigarette smoking.

17 Now, the attorneys general all  
18 realized that, if the only  
19 manufacturers that were affected by  
20 the Master Settlement Agreement were  
21 the four major tobacco companies,  
22 their prices for their cigarettes with  
23 would necessarily have to rise, and  
24 their payments that they had to make  
25 to the state was based on the amounts

0050

1 Grand River Arbitration

2 of cigarettes they held -- they sold.

3 So the entire object of the MSA  
4 would have been defeated because,  
5 ultimately, what would have happened  
6 was they would have been undercut by  
7 all of these new manufacturers who  
8 would have sold cigarettes into the  
9 states who would not be paying to  
10 reimburse the states for the medical  
11 expenses.

12 So they devised this means in  
13 order to enable as many cigarette  
14 manufacturers to sign onto the  
15 agreement as possible, and in order to  
16 incentivise them to do that, they  
17 granted them this payment exemption,  
18 so long as their market share stayed  
19 within certain bounds.

20 Now, that payment exemption --  
21 that 90-day period had to be limited  
22 in time because, otherwise, an NPM  
23 would simply not incur any expenses  
24 for reimbursing the states for the  
25 harm that its cigarettes were causing,

0051

1 Grand River Arbitration  
2 and then, you know, three years down  
3 the road, all of a sudden sign onto  
4 the agreement and limit its market  
5 share.

6 PRESIDENT NARIMAN: But this  
7 brings me to the second question,  
8 that:

9 Wasn't it in their interest --  
10 I mean, as they are traders making  
11 profits, they are not out to crook the  
12 United States government. That's not  
13 the object. They want to do business.

14 Now, wouldn't it be within  
15 their business interests, if they had  
16 knowledge, as you say, if they had  
17 knowledge, to have opted in, that is  
18 to say, to take the benefit of the  
19 exemption within the 90-day period?  
20 And what would be their object in  
21 staying out and then contesting and

22 making a big hoo-ha about this and  
23 incurring all of these costs?

24 MS. MENAKER: Well, certainly,  
25 it made a number of cigarette

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1 Grand River Arbitration  
2 manufacturers determine that it was in  
3 their business interests to opt in and  
4 to get the exemption.

5 Now, we don't know why a  
6 certain cigarette manufacturer would  
7 decide not to opt in. Perhaps, it  
8 decided that it would -- it did not  
9 want to be subject to the marketing  
10 and advertising restrictions that also  
11 you were obligated to abide by if you  
12 sign the agreement.

13 PRESIDENT NARIMAN: There is  
14 another restriction.

15 MS. MENAKER: That is another  
16 restriction that you had to abide by  
17 if you were an SPM.

18 PRESIDENT NARIMAN: It's  
19 another question. That's why I am  
20 first asking you.

21 MS. MENAKER: And also,  
22 perhaps, a manufacturer wanted to come  
23 in and did not want to make any  
24 payments, thought they could evade  
25 this as done by not keeping their

0053

1 Grand River Arbitration  
2 market share at a certain amount.  
3 They wanted to come in and undercut  
4 the Majors who were all going to be  
5 raising their prices.

6 MR. ANAYA: I thought they were  
7 exempt from payment.

8 MS. MENAKER: They were exempt  
9 up to a certain -- as long as their  
10 market share does not go up a certain  
11 amount.

12 PRESIDENT NARIMAN: The 1997 --

13 MS. MENAKER: Exactly, and  
14 after that then they became subject  
15 proportionally.

16 PRESIDENT NARIMAN: Yes.  
17 MS. MENAKER: So there are a  
18 whole host of reasons why any -- why  
19 any individual manufacturer did not do  
20 that. One doesn't know. And like --  
21 PRESIDENT NARIMAN: Generally  
22 speaking, it would be in the business  
23 interests of a subsequent participant  
24 in the venture to take advantage of  
25 the exemption clause unless they

0054

1 Grand River Arbitration  
2 wanted to challenge the whole thing as  
3 unconstitutional or something.

4 MS. MENAKER: Which, in fact,  
5 they did do.

6 PRESIDENT NARIMAN: Unless they  
7 did for their own business purposes,  
8 it sounds to me -- I mean, good  
9 business.

10 MS. MENAKER: Certainly, the  
11 state governments thought that it  
12 would be in a manufacturer's  
13 interests; and, in fact, over  
14 99 percent of the industry did sign on  
15 in one way or another. So when you  
16 look at --

17 MR. ANAYA: To the grandfather  
18 provision?

19 MS. MENAKER: To the  
20 grandfather provision, yes, if you  
21 count the --

22 PRESIDENT NARIMAN: Because the  
23 Majors had about 93 percent, you were  
24 saying.

25 MS. MENAKER: I think a little

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1 Grand River Arbitration  
2 more, around 97, and then you got  
3 another around 2 percent with the 99,  
4 it was --

5 PRESIDENT NARIMAN: The Majors  
6 are 97.

7 MR. LIEBLICH: The Majors had  
8 99 percent at that time.

9 PRESIDENT NARIMAN: At that

10 time. So this was that 1 percent  
11 where the Subsequent Participating  
12 Manufacturers had.

13 MS. MENAKER: I think the OPMs  
14 plus the grandfathered SPMs had  
15 99 percent of the market share at that  
16 time.

17 PRESIDENT NARIMAN: Not the  
18 Majors.

19 MR. CROOK: 2.6 percent at that  
20 time. So if you believe Claimants  
21 Exhibit 1, which I am perfectly  
22 prepared to do, let's see --  
23 Nonparticipating Manufacturers'  
24 share -- market share at that time was  
25 0.03 percent.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: Okay.  
3 Please carry on.

4 MS. MENAKER: So we  
5 certainly -- the states certainly  
6 thought it would be in the  
7 manufacturers' interest to sign on,  
8 but there could have been reasons why  
9 they did not.

10 But even if it were -- even if  
11 as we suspect, that it was in their  
12 interest, and the only reason for  
13 their not signing on was because they  
14 did not know, as Ms. Guymon will later  
15 show, they should have known.

16 And so that does not exempt  
17 them from the requirement that they  
18 sign on within the 90 days in order to  
19 get the exemption.

20 Now, it's this payment  
21 exemption that is granted by virtue of  
22 the Master Settlement Agreement that  
23 is at the heart of Claimants' claims.  
24 Grand River, as you know, is a  
25 manufacturer of cigarettes that did

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1 Grand River Arbitration  
2 not join the MSA within 90 days. And  
3 because it has not joined the MSA, it



4 is relegated to NPM status, and it has  
5 forever lost the chance to become a  
6 grandfathered SPM.

7 PRESIDENT NARIMAN: Isn't it  
8 the case that it is because they did  
9 not know about this, for any reason,  
10 whatever the reason, despite all the  
11 documents that you have shown,  
12 et cetera, that it would have been to  
13 their interests to join if they had  
14 known?

15 MS. MENAKER: We do not think  
16 that the evidence shows that. In  
17 fact, we think that the evidence  
18 demonstrates quite the contrary, that  
19 they did, in fact, know, that they did  
20 have actual knowledge.

21 And what was their motivation  
22 for not signing on? We don't know.  
23 We can't speak for them. We don't  
24 know if it was because they saw some  
25 advantage in not signing on. They did

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1 Grand River Arbitration  
2 not want to be subject to the  
3 marketing, advertising.

4 PRESIDENT NARIMAN: You say --  
5 it was difficult, perhaps.

6 MS. MENAKER: That is what the  
7 evidence shows, is that they did have  
8 actual knowledge. And in any event.  
9 It doesn't matter, because, if they  
10 should have known, that is sufficient.

11 PRESIDENT NARIMAN: No, no,  
12 that's okay. The limitations  
13 provision -- I just want to know, as a  
14 matter of business interests, if they  
15 had known, they would have joined.

16 Unless you are able to say  
17 that, "No, they studiously kept out,  
18 knowingly kept out in order to gain  
19 some advantage over their other  
20 competitors" -- I mean, if that is --  
21 you can address that.

22 MS. MENAKER: That just would  
23 be pure speculation on our part

24 because we don't know. We have no way  
25 of knowing what their motivation was.

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1 Grand River Arbitration

2 However, there were some perceived  
3 advantages to some manufacturers for  
4 not joining on. And whether it was  
5 because they did not want to --

6 PRESIDENT NARIMAN: Can you  
7 enumerate these perceived advantages  
8 of not joining on, if you could give  
9 us the clauses of the MSA of not  
10 joining on -- later on -- later on.

11 MS. MENAKER: Okay. Some of  
12 them, like I said.

13 PRESIDENT NARIMAN: No, but  
14 give it to us in detail, please.

15 MS. MENAKER: Okay. I will do  
16 that.

17 PRESIDENT NARIMAN: Thank you.  
18 Later.

19 MR. CROOK: Mr. Chairman, I  
20 need to correct myself. I gave the  
21 figure wrong. It's the Roger Parloff  
22 article, which was Exhibit 1 to the  
23 Claimants' later submission, which I  
24 found very interesting. And the  
25 figure was not 0.037. It was 0.37,

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1 Grand River Arbitration

2 not 0.037. It was essentially a third  
3 of a percent according to Mr. Parloff.

4 MS. MENAKER: I could just  
5 point the Tribunal to -- as well as to  
6 tab 31 of our factual materials, which  
7 contains the declaration of  
8 Patricia Tilton; and then in table one  
9 it shows market share as of 1998.

10 It shows that the Original  
11 Participating Manufacturers had just  
12 under 96 and a half percent of the  
13 national market share, that the  
14 Subsequent Participating Manufacturers  
15 had another 3 percent, and that the  
16 Nonparticipating Manufacturers had  
17 just slightly over half of a percent.

18 PRESIDENT NARIMAN: All right.

19 MS. MENAKER: The Claimants  
20 allege a breach of NAFTA on account of  
21 the fact they were purportedly denied  
22 the opportunity to become a  
23 grandfathered SPM. And they allege --  
24 and I put these quotes on the  
25 screen -- that they were not, quote:

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1 Grand River Arbitration

2 "Privy to the MSA negotiations,  
3 nor were they ever notified of the  
4 90-day deadline." End quote.

5 And that, quote: "The MSA  
6 states and Majors have been secretly  
7 negotiating with a select few of the  
8 Majors' competitors to join the MSA as  
9 SPMs within the 90-day deadline so  
10 that they would receive the benefit of  
11 the foregoing exemption and favorable  
12 treatment under the MSA." End quote.

13 And Claimants thus contend that  
14 they were, quote:

15 "Effectively precluded from  
16 joining the MSA on the same terms that  
17 have been made available to their  
18 competitors." End quote.

19 Now, this conduct, which  
20 Claimants contend breached the NAFTA,  
21 all occurred in 1998 when the MSA was  
22 being negotiated or in early 1999 when  
23 the opportunity to become a  
24 grandfathered SPM expired.

25 PRESIDENT NARIMAN: Pardon me

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1 Grand River Arbitration

2 for interrupting, again, but this  
3 90-day deadline -- was that according  
4 to you widely advertised throughout  
5 the United States, Canada, et cetera?

6 MS. MENAKER: Yes, it was.

7 PRESIDENT NARIMAN: Was it  
8 advertised by the proponents of this  
9 agreement?

10 MS. MENAKER: Yes, it was, and  
11 Ms. Guymon will go into detail as

12 to --

13 PRESIDENT NARIMAN: Please give  
14 me those tab numbers.

15 MS. MENAKER: We will certainly  
16 do that.

17 Now, according to their  
18 statement of claim -- and I quote:

19 "The MSA regime constitutes a  
20 prima facie breach of both articles  
21 1102 and 1103, because it provides an  
22 exemption from payment obligations to  
23 both domestic- and foreign-owned  
24 tobacco businesses, while providing no  
25 exemption whatsoever to the investors

0063

1 Grand River Arbitration  
2 or their investment." End quote.

3 PRESIDENT NARIMAN: Your  
4 argument is that this is basic to  
5 their claim.

6 MS. MENAKER: That's right.  
7 They are saying that it's the denial  
8 of this payment exemption -- they were  
9 foreclosed from gaining that payment  
10 exemption in early 1999, 90 days after  
11 the MSA was concluded.

12 And they are alleging that  
13 their inability to gain that payment  
14 exemption breached articles 1102 and  
15 1103.

16 Now, they similarly claim that  
17 it also breached article 1105(1)  
18 because -- and the next slide shows --  
19 it says:

20 "The surreptitious manner in  
21 which smaller discount manufacturers  
22 were invited to join the MSA in return  
23 for multi-million dollar exemptions in  
24 perpetuity fell below minimum  
25 standards of transparency and thus

0064

1 Grand River Arbitration  
2 breached article 1105(1)."

3 So, Again, that is activity or  
4 conduct that occurred in 1998 when the  
5 MSA was being negotiated, and during

6 the early months of 1999, that they  
7 are saying breached the MSA because  
8 they were not invited to join. They  
9 did not know about this opportunity.

10 They also claim that the  
11 exemption violated article 1110, the  
12 expropriation provision, because their  
13 market share was allegedly taken away  
14 from them by virtue of the payment  
15 exemption which they were denied.

16 Now, these purported breaches  
17 are the cause of many of the losses  
18 for which Claimants are trying to  
19 recover in this arbitration.. As  
20 Claimants acknowledge -- and I am  
21 quoting from paragraph 29 of their  
22 notice of arbitration -- quote:

23 "Any manufacturer that became  
24 an SPM subsequent to the 90-day  
25 deadline or which now becomes an SPM

0065

1 Grand River Arbitration  
2 must make MSA payments based on every  
3 cigarette it sells. No exemption  
4 applies." End quote.

5 PRESIDENT NARIMAN: I don't  
6 understand this -- the statement of  
7 claim on this. Their case is that the  
8 very intent and purpose of the  
9 exemption was to induce a group of  
10 smaller competitors to join under a  
11 grandfathered grant that safeguarded  
12 their existing -- and keeping them  
13 out. I don't understand. How would  
14 that --

15 MS. MENAKER: Well, it's their  
16 statement of claim.

17 PRESIDENT NARIMAN: -- because  
18 I thought we come down to about -- I  
19 mean, as just explained, we come down  
20 to about less than 1 percent.

21 MS. MENAKER: Right.

22 PRESIDENT NARIMAN: Why would  
23 there be this intent and purpose of  
24 the exemption, I mean?

25 MS. MENAKER: We believe there

0066

1 Grand River Arbitration  
2 was absolutely no intent and purpose  
3 of the exemption. The intent and  
4 purpose of the MSA negotiators --  
5 PRESIDENT NARIMAN: They said  
6 to induce a group of smaller  
7 competitors to join and keeping them  
8 out.

9 MS. MENAKER: And that  
10 certainly --

11 PRESIDENT NARIMAN: They are  
12 the larger competitors, according to  
13 them.

14 MS. MENAKER: And the evidence  
15 shows that was certainly not the  
16 intent or the purpose of the MSA  
17 negotiators.

18 In fact, when you look at the  
19 press conference that the negotiators  
20 held when they announced the MSA, they  
21 publicly invited -- that's right --  
22 they publicly invited all of the  
23 manufacturers to join. The intent --  
24 their intent and purpose certainly was  
25 not to exclude anyone from that public

0067

1 Grand River Arbitration  
2 invitation. They wanted as many --  
3 they said that:

4 "It is in our interests to get  
5 as many cigarette manufacturers as  
6 possible into the deal."

7 PRESIDENT NARIMAN: Was Mr.  
8 Montour also part of that -- so that  
9 Mr. Montour was also part of -- in  
10 that -- in this transcript?

11 MS. MENAKER: No, this is a  
12 transcript of the press conference  
13 that the attorneys general held on the  
14 day when the MSA was announced back in  
15 November of 1998.

16 PRESIDENT NARIMAN: There is no  
17 association applied by Mr. Montour.

18 MS. MENAKER: We believe that  
19 they could have been listening to it.

20 It was also broadcast.  
21 PRESIDENT NARIMAN: There is no  
22 evidence apart from --  
23 MS. MENAKER: No.  
24 PRESIDENT NARIMAN: -- the  
25 presumed knowledge?

0068

1 Grand River Arbitration  
2 Is it a problem today -- not --  
3 I take it not presumed knowledge, but  
4 actual knowledge. I mean, what is  
5 your case?  
6 MS. MENAKER: We have --  
7 PRESIDENT NARIMAN: Is a  
8 presumed knowledge enough? If a whole  
9 set of circumstances goes to show that  
10 these people must have known, is that  
11 enough? I just want to know from the  
12 United States.

13 MS. MENAKER: Yes, absolutely  
14 yes, because if you look at articles  
15 1116(2) and 1117(2), it says, "knew or  
16 should have known," and "should have  
17 known" is a constructive knowledge  
18 standard.

19 And so if a reasonable person  
20 in that situation would have known,  
21 then they are deemed to have known,  
22 and that is sufficient. One need not  
23 prove actual knowledge.

24 PRESIDENT NARIMAN: Okay.

25 MS. MENAKER: Now, as soon as

0069

1 Grand River Arbitration  
2 Grand River lost the ability to join  
3 the MSA as a grandfathered SPM --  
4 PRESIDENT NARIMAN: When should  
5 they have joined, 90 days --

6 MS. MENAKER: 90 days after the  
7 conclusion of the MSA, so they had  
8 until February 23, 1999, to join as a  
9 grandfathered SPM.

10 PRESIDENT NARIMAN: Yes. Yes.  
11 I see. Yes.

12 MS. MENAKER: So as soon as  
13 that date was passed, Claimants

14 suffered a loss to the extent that  
15 their cigarettes were sold in any MSA  
16 state because they did not have that  
17 payment exemption.

18 PRESIDENT NARIMAN: Right.

19 MS. MENAKER: So Claimants' own  
20 damages expert, which is LECG -- you  
21 will recall that LECG put in a  
22 preliminary report on damages that was  
23 attached to the statement of claim.

24 LECG acknowledges the fact that  
25 Claimants first incurred a loss as

0070

1 Grand River Arbitration  
2 soon as they were denied the  
3 opportunity to become a grandfathered  
4 SPM -- I shouldn't say "denied" -- as  
5 soon as they -- that opportunity  
6 existed no longer.

7 So in its expert report --

8 PRESIDENT NARIMAN: Please read  
9 that, if you don't mind.

10 MS. MENAKER: I certainly will.

11 In the expert report, LECG  
12 calculated damages using two  
13 alternative methods. One of the  
14 methods it used, which is on the  
15 screen, was to quantify the value of  
16 Grand River's lost exemption quota  
17 under the MSA based on estimated  
18 cigarette sales.

19 Okay. And that is what that  
20 paragraph says, is that:

21 "We will look at future losses  
22 by," quote, "quantification of the  
23 value of GRP's lost exemption quota  
24 under the MSA based on its current  
25 volume of sales into the 46 US states

0071

1 Grand River Arbitration  
2 that are party to the MSA."

3 So the way that it did this, it  
4 was -- it looked at mergers and  
5 take-overs, where the company at issue  
6 was a grandfathered SPM; and then it  
7 purportedly purported to identify the



8 value that was assigned to that  
9 payment exemption in the transaction.

10 And using this methodology, it  
11 concluded that the value to  
12 Grand River of its lost payment  
13 exemption is between 100 and  
14 \$452 million.

15 So Claimants' own expert report  
16 thus confirms that Grand River  
17 incurred a loss as a result of not  
18 having the payment exemption obtained  
19 by grandfathered SPM.

20 PRESIDENT NARIMAN: That is a  
21 distinct claim.

22 MS. MENAKER: That's right.  
23 It's a distinct loss.

24 PRESIDENT NARIMAN: It's a  
25 claim they are now making.

0072

1 Grand River Arbitration

2 MS. MENAKER: So the loss of  
3 the opportunity to obtain  
4 grandfathered SPM status was valued by  
5 Claimants at millions of dollars, and  
6 that loss was incurred as soon as the  
7 opportunity to obtain the payment  
8 exemption was foreclosed.

9 MR. CROOK: Just to be clear,  
10 again, this is Claimants' study -- but  
11 this number that you just quoted to us  
12 was derived from the assumption that  
13 their current volume of sales was  
14 their volume of sales in 1997. Is  
15 that how it worked?

16 MS. MENAKER: I don't believe  
17 that is how it worked.

18 MR. CROOK: It says, "based on  
19 current volume of sales."

20 MS. MENAKER: I think they also  
21 looked forward to anticipate what  
22 their future sales would be. I mean,  
23 taking into account --

24 MR. CROOK: I am just going to  
25 ask the question of whether they

0073

1 Grand River Arbitration

2 actually had sales in '97.  
3 MS. MENAKER: They did not have  
4 sales -- the manufacturing facility in  
5 Canada was not manufacturing  
6 cigarettes for sale into the  
7 United States until 1999, and we know  
8 that from a number of different  
9 sources.

10 But if you look at Claimants'  
11 own allegations, they say that -- that  
12 the only way that they have imported  
13 cigarettes into the states were  
14 through two distributors, Native  
15 Tobacco Direct or Native Wholesale  
16 Supply, which is their exclusive  
17 distributor for sales made on a  
18 reservation.

19 Now, that company was first  
20 established in 1999, and then they say  
21 that their exclusive importer for  
22 off-reservation sales is Tobaccoville  
23 USA. And their distributorship  
24 agreement with Tobaccoville USA wasn't  
25 concluded until 2002.

0074

1 Grand River Arbitration  
2 And, in addition, if the  
3 Tribunal -- when we get to this  
4 point -- we do have additional  
5 information that we would be prepared  
6 to introduce into evidence to  
7 establish definitively that Claimants  
8 did not import cigarettes for sale  
9 into the United States that were  
10 manufactured in their Canadian  
11 facility before 1999.

12 PRESIDENT NARIMAN: But your  
13 point in drawing attention to this is  
14 that they themselves, having  
15 quantified their -- the amount of the  
16 lost exemption, that 90-day period,  
17 then they were deliberately kept out,  
18 that that goes to show that they --  
19 that their loss, if at all, was  
20 incurred after -- as a direct result  
21 of the MSA.

22 MS. MENAKER: Exactly.  
23 PRESIDENT NARIMAN: That's your  
24 point?  
25 MS. MENAKER: That is my point.

0075

1 Grand River Arbitration  
2 And for this reason, this case  
3 is in stark contrast to the Feldman  
4 case that Claimants rely on. In the  
5 Feldman case, you will recall the  
6 Claimants challenged the fact they  
7 were denied rebates for that tax --  
8 back taxes that were paid in certain  
9 years.

10 And they were audited and sued  
11 for the return of rebates that had  
12 been granted to them in other years.  
13 And they complained and the Tribunal  
14 found that this constituted a national  
15 treatment violation because  
16 Mexican-owned companies that were in  
17 like circumstances with it, were  
18 granted rebates in years in which  
19 Claimants were denied the rebates.  
20 And those Mexican-owned companies were  
21 not audited for the return of the  
22 rebates.

23 Now, this difference in  
24 treatment, which formed the basis for  
25 the claim, did not arise until the

0076

1 Grand River Arbitration  
2 Mexican-owned company was granted the  
3 treatment that Claimants sought; and  
4 this was within the three-year  
5 limitations period. But by contrast  
6 here, the treatment of which Claimants  
7 complain was accorded -- was accorded  
8 long before March 12, 2001.

9 PRESIDENT NARIMAN: What is the  
10 date of this report? Do we have  
11 any --

12 MS. MENAKER: The LECG report,  
13 yes, it is --

14 PRESIDENT NARIMAN: And who was  
15 the author of this report?

16 MS. MENAKER: The author is --  
17 it says LECG, which is the name of the  
18 company.

19 PRESIDENT NARIMAN: What is  
20 LECG?

21 MS. MENAKER: It is -- I don't  
22 know exactly what the acronym stands  
23 for. It says LECG Canada, Limited.

24 PRESIDENT NARIMAN: LECG  
25 Canada, Limited.

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1 Grand River Arbitration

2 MS. MENAKER: Yes. And the  
3 person who signed the report Errol,  
4 E-r-r-o-l, middle initial D. Soriano.

5 PRESIDENT NARIMAN: Soriano.

6 MS. MENAKER: And I do not --

7 PRESIDENT NARIMAN: He signed  
8 as director. He's a director of  
9 something.

10 MS. MENAKER: He's a director.

11 That's right. And it is dated June  
12 28, 2005.

13 PRESIDENT NARIMAN: June 28,  
14 2005.

15 MS. MENAKER: Yes.

16 PRESIDENT NARIMAN: Thank you.

17 MS. MENAKER: Sure. Now, as I  
18 mentioned, the treatment that  
19 Claimants complain about in this case  
20 was accorded long before March 12,  
21 2001, because, as of February 23,  
22 1999, the door was closed to cigarette  
23 manufacturers to join the MSA and to  
24 get the payment exemption.

25 PRESIDENT NARIMAN: 23rd of

0078

1 Grand River Arbitration

2 February, 1999.

3 MS. MENAKER: 1999. Yes. And  
4 we can --

5 PRESIDENT NARIMAN: Exemption  
6 is closed.

7 MS. MENAKER: Yes. And you can  
8 see this on the time line as well.

9 PRESIDENT NARIMAN: Yes, yes.

10 MS. MENAKER: So there was no  
11 opportunity --

12 PRESIDENT NARIMAN: Yes, that's  
13 right.

14 MS. MENAKER: -- to become a  
15 grandfathered SPM after that time. So  
16 any loss that Grand River incurred as  
17 a result of not being granted the same  
18 treatment as a grandfathered SPM was  
19 incurred as of February 23, 1999,  
20 which was 90 days after the MSA was  
21 concluded.

22 PRESIDENT NARIMAN: Yes.

23 MS. MENAKER: So all of the  
24 losses for which Claimants seek to  
25 recover arise out of their obligation

0079

1 Grand River Arbitration  
2 to make payments into escrow in each  
3 MSA state in which their cigarettes  
4 are sold because they do not have this  
5 payment exemption as do the  
6 grandfathered SPMs.

7 So Claimants acknowledge in  
8 their notice of arbitration the MSA  
9 payment scheme is expressly made  
10 applicable to them through two  
11 interrelated provisions.

12 And the first of the provisions  
13 is section nine of the MSA, which I  
14 already talked about, which grants the  
15 grandfathered SPM treatment to those  
16 manufacturers that joined within the  
17 90 days.

18 And the second of the two  
19 provisions referred to by Claimants is  
20 the model legislation or the model  
21 statutes which formed the part of the  
22 MSA.

23 Now, in accordance with the MSA  
24 terms --

25 PRESIDENT NARIMAN: That is

0080

1 Grand River Arbitration  
2 like one of the exhibits.

3 MS. MENAKER: That's right,

4 Exhibit T.  
5 PRESIDENT NARIMAN: T.  
6 MS. MENAKER: That's right.  
7 Now, in accordance with the MSA  
8 terms, once the state signed the MSA,  
9 it was required to enact legislation  
10 in the form of the model statute  
11 without modification or addition or  
12 risk a reduction in its share of  
13 payments that it would otherwise  
14 receive under the MSA.

15 And as you can see on the  
16 slide, by June 2000, each of the 46  
17 MSA states had enacted an escrow  
18 statute as was required by the Master  
19 Settlement Agreement.

20 PRESIDENT NARIMAN: This is by  
21 June?

22 MS. MENAKER: By June. They  
23 started earlier. Some even had  
24 adopted their escrow statutes even  
25 before February -- or, no, I'm sorry,

0081

1 Grand River Arbitration  
2 by March 12, 1999.

3 PRESIDENT NARIMAN: 1999 to  
4 2000 --

5 MS. MENAKER: That's right.

6 PRESIDENT NARIMAN: Escrow  
7 statutes.

8 MS. MENAKER: That's right.

9 So each and every one of those  
10 escrow statutes was a qualifying  
11 statute within the terms of the MSA,  
12 and that means that they faithfully  
13 adhered to the model statute in all  
14 material respects as was required by  
15 the MSA.

16 And as you can see, again, the  
17 last of the statutes was enacted nine  
18 months prior to the time of the  
19 three-year period that precedes the  
20 submission of Claimants' claims to  
21 arbitration.

22 MR. CROOK: Ms. Menaker, as I  
23 understand Claimants' position, it is

24 that there is some ambiguity as to the  
25 application of the escrow statutes to  
0082

1 Grand River Arbitration  
2 them. Now, my question to you is a  
3 rather precise one.

4 Do you know -- is there any  
5 material variation among these  
6 statutes as to their application to  
7 manufacturers? Or do they all apply  
8 by their terms to manufacturers, or is  
9 there some material variance among  
10 them?

11 MS. MENAKER: There is  
12 absolutely no material variance among  
13 them. Each and every one of the  
14 escrow statutes applies to  
15 manufactures of cigarettes that  
16 sells -- whose cigarettes are sold in  
17 an MSA state, whether directly or  
18 indirectly.

19 So whether it's sold by the  
20 manufacturer directly or whether it's  
21 sold through an importer or  
22 distributor, each and every one is  
23 identical in that regard. And, in  
24 fact, in a few minutes, I have a slide  
25 showing, you know, just an example of

0083  
1 Grand River Arbitration  
2 just a few.

3 But we did submit all of the  
4 escrow statutes to you, which are  
5 exhibits. And I have the provisions  
6 that you can see on the slides that I  
7 have replicated, but --

8 MR. CROOK: We were conceivably  
9 too lazy to read them.

10 MR. ANAYA: How about any  
11 variance in the application, the  
12 enforcement of the statutes, which on  
13 their face --

14 MS. MENAKER: I will also talk  
15 about that. But, again, there is no  
16 variance in enforcement, per se.  
17 Certainly, perhaps, some states have

18 not sued for nonenforcement as of this  
19 time. Some states have.

20 But that does not mean that the  
21 statutes are effectively different in  
22 any regard just because one state is  
23 slower to prosecute offenders than  
24 another state. There is no material  
25 difference in the way in which those

0084

1 Grand River Arbitration  
2 statutes have been applied.

3 That's right. And even if a  
4 state, you know, for any reason -- one  
5 reason or another, has not brought a  
6 claim or prosecuted it, doesn't  
7 affect --

8 MR. ANAYA: How about  
9 Wisconsin?

10 MS. MENAKER: The Wisconsin  
11 decision, which I will talk about in  
12 more depth later, there what happened  
13 was the claim against Grand River was  
14 dismissed for lack of personal  
15 jurisdiction because the attorney --  
16 because the Court found that the  
17 evidence that the attorney general  
18 submitted to establish personal  
19 jurisdiction was hearsay.

20 And it was dismissed on that  
21 ground and that ground alone. The  
22 attorney general's office thinks that  
23 it was an erroneous decision. The  
24 amount at issue was so small that they  
25 determined not to appeal, even though

0085

1 Grand River Arbitration  
2 they think it's clearly wrong.

3 But in any event, that says  
4 nothing about the applicability of the  
5 escrow statutes to Grand River or to  
6 manufacturers generally.

7 The fact that the Court found  
8 that hearsay testimony could not be  
9 submitted and there was no other  
10 evidence to establish personal  
11 jurisdiction is really irrelevant to



12 the issue of the effect of that escrow  
13 statute.

14 PRESIDENT NARIMAN: Is there  
15 anything in Exhibit T to the MSA or in  
16 any of the escrow statutes which  
17 specifically make them applicable to  
18 manufacturers, foreign manufacturers,  
19 manufacturers of cigarettes abroad,  
20 outside of the United States? Is  
21 there anything specific either in  
22 Exhibit T or in any of the escrow  
23 statutes?

24 MS. MENAKER: Yes, the  
25 definition of a "tobacco product

0086

1 Grand River Arbitration  
2 manufacturer" that is in the MSA --

3 PRESIDENT NARIMAN: In the MSA?

4 MS. MENAKER: Yes.

5 PRESIDENT NARIMAN: Definition  
6 of "tobacco" --

7 MS. MENAKER: -- "product  
8 manufacturer," is an entity that,  
9 quote:

10 "Manufactures cigarettes  
11 anywhere that such manufacturer  
12 intends to be sold in the  
13 United States."

14 PRESIDENT NARIMAN: Okay.

15 MS. MENAKER: So, clearly, that  
16 applies to manufacturers -- like it  
17 says "anywhere," whether they are in  
18 the United States or outside of the  
19 United States, so long as they intend  
20 their cigarettes to be sold in the  
21 United States.

22 And then it goes on to say,  
23 "including cigarettes intended to be  
24 sold in the United States through an  
25 importer."

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1 Grand River Arbitration

2 So there it is clearly  
3 recognizing that, if you're a foreign  
4 manufacturer, this -- you are a  
5 "tobacco product manufacturer" within

6 the definition because they envision  
7 that you might be intending your  
8 cigarettes to be sold in the  
9 United States through an importer.

10 PRESIDENT NARIMAN: Yes. Yes.  
11 But there is no -- in the escrow  
12 statutes, there is nothing about this  
13 definition.

14 MS. MENAKER: There is.

15 PRESIDENT NARIMAN: -- or the  
16 document.

17 MS. MENAKER: It is adopted  
18 verbatim in each of the escrow  
19 statutes, yes.

20 PRESIDENT NARIMAN: Thank you.

21 MS. MENAKER: Now, the escrow  
22 statutes, like the model -- as the  
23 model statute envisions, they obligate  
24 NPMs to make payments into escrow.  
25 And the payments are calculated using

0088

1 Grand River Arbitration  
2 a per cigarette formula that is set  
3 out in the model statute and is  
4 adopted by each of the states in its  
5 escrow statute. And each cigarette  
6 that is subject to a state's excise  
7 taxes is calculated in making this  
8 payment.

9 PRESIDENT NARIMAN: But if they  
10 are not subject to excise, then they  
11 are exempt.

12 MS. MENAKER: That is correct.

13 PRESIDENT NARIMAN: That means  
14 the -- applies to -- as the  
15 reservation states are concerned.

16 MS. MENAKER: So far as  
17 New York is concerned --

18 PRESIDENT NARIMAN: Only  
19 New York.

20 MS. MENAKER: Well, not only  
21 New York. States vary in that regard.

22 New York, for instance, does  
23 not tax cigarettes that are sold on  
24 reservations. They are not subject to  
25 the state excise taxes. So therefore,

0089

1 Grand River Arbitration  
2 those cigarettes are not counted for  
3 purposes of determining escrow  
4 payments.

5 PRESIDENT NARIMAN: Only that  
6 share.

7 MS. MENAKER: That's right.  
8 The Claimants -- they argue that the  
9 requirement that Grand River make  
10 payments into escrow violates the  
11 NAFTA or breaches the NAFTA.

12 PRESIDENT NARIMAN: What,  
13 according to them.

14 MS. MENAKER: For three  
15 reasons, one for each of the  
16 provisions.

17 Insofar as their national  
18 treatment claim and most favored  
19 nation claim is concerned, articles  
20 1102 and 1103, they argue it violates  
21 national treatment, most favored  
22 nation treatment, but because they,  
23 but not grandfathered SPMs, have to  
24 make payment into escrow. So they say  
25 that that is an impermissible

0090

1 Grand River Arbitration  
2 discrimination in violation of those  
3 articles. They also contend that the  
4 escrow statutes --

5 PRESIDENT NARIMAN: How is that  
6 discrimination?

7 MS. MENAKER: In our view it is  
8 not at all discrimination --

9 PRESIDENT NARIMAN: Say that  
10 again.

11 MS. MENAKER: -- because they  
12 are not treated the same. They don't  
13 have the treatment that the  
14 grandfathered SPM have, so there is a  
15 difference in treatment there. In our  
16 view, that is not at all a national  
17 treatment violation because it is not  
18 a difference in treatment based on  
19 nationality. But this is their claim.

20 They said this they are entitled to  
21 the best treatment accorded to anyone  
22 in like circumstances.

23 PRESIDENT NARIMAN: If they had  
24 opted in, they would have been given  
25 the same treatment.

0091

1 Grand River Arbitration

2 MS. MENAKER: That's right. So  
3 they say that this difference in  
4 treatment constitutes a national  
5 treatment and a most favored nation  
6 treatment violation. They also say it  
7 constitutes a violation of article  
8 1105(1) because they have to make  
9 payments into escrow, even though they  
10 have not been found liable by a Court  
11 for any of the wrongdoing for which  
12 the Original Participating  
13 Manufacturers were originally sued.

14 So they say:

15 "Therefore, this requirement  
16 that we pay into escrow is a violation  
17 of article 1105."

18 They also say that the  
19 requirement --

20 PRESIDENT NARIMAN: That means  
21 they are questioning the MSA  
22 indirectly.

23 MS. MENAKER: Yes, that's  
24 right.

25 PRESIDENT NARIMAN: Because the

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1 Grand River Arbitration

2 MSA makes no distinction.

3 MS. MENAKER: Well, the MSA has  
4 the model statute as a part of it. It  
5 is all a whole, and that is the  
6 requirement that they have to pay into  
7 escrow; and, of course, as soon as the  
8 escrow statutes were enacted, that  
9 became, you know, a legal obligation  
10 for them by virtue of their NPM  
11 status.

12 They also argue that the escrow  
13 statutes violate article 1110, the

14 expropriation article, because they  
15 say the statutes have resulted in a  
16 complete destruction of their business  
17 and their investments, and therefore  
18 is an expropriation.

19 But it's clear that Claimants  
20 first suffered a loss or damage as a  
21 result of these alleged breaches as  
22 soon as their cigarettes were sold in  
23 any MSA state that had enacted an  
24 escrow statute. That is when they  
25 first incurred a legal obligation to

0093

1 Grand River Arbitration  
2 make payments into escrow.

3 PRESIDENT NARIMAN: Let's be  
4 clear, that, until the escrow statute  
5 was enacted in the state, there was no  
6 obligation.

7 MS. MENAKER: That's correct.

8 PRESIDENT NARIMAN: Am I right?

9 MS. MENAKER: That's correct.

10 PRESIDENT NARIMAN: Despite the  
11 model Exhibit T and so forth.

12 MS. MENAKER: That's right.  
13 But their status, it's connected  
14 insofar as a course their obligation  
15 is only on NPMs, and, you know, not  
16 grandfathered SPMs. And that was  
17 sealed as of 90 days after the MSA was  
18 concluded, but they had no legal  
19 obligation to make payments until the  
20 escrow statutes were enacted.

21 PRESIDENT NARIMAN: No, but  
22 does the escrow -- each of the escrow  
23 statutes say that the obligation  
24 commences from the date of the  
25 commencement of the statute, or does

0094

1 Grand River Arbitration  
2 it give some other future date?

3 MS. MENAKER: The escrow  
4 statutes were -- their effective date  
5 the escrow statutes were the date of  
6 enactment, so by June --

7 PRESIDENT NARIMAN: Therefore,

8 the obligation to pay is within what  
9 period of that?

10 MS. MENAKER: Well, they incur  
11 a legal obligation -- it accrues to --  
12 it's calculated by reference to each  
13 cigarette that it sells in the state.  
14 So every time it sells the cigarette,  
15 it incurs the legal obligation to make  
16 the statement.

17 It doesn't actually have to put  
18 that payment into escrow until  
19 April 15th of the year following that  
20 year's sales. But it incurs the legal  
21 obligation as soon as it makes the  
22 sale into the state.

23 It's much the same as if you  
24 purchase something on your credit  
25 card. As soon as you make the

0095

1 Grand River Arbitration  
2 purchase given on your credit card, at  
3 that time you have incurred a  
4 liability. You have incurred a loss,  
5 so to speak. You are legally  
6 obligated to pay. You may not be in  
7 default of that payment obligation  
8 until you get your credit card bill  
9 and you don't pay by the time it's  
10 due.

11 But as soon as you make that  
12 purchase, you have incurred that legal  
13 liability or that loss. And that's  
14 the same thing here. That's right,  
15 but the date that they became  
16 effective was the date of the  
17 enactment.

18 PRESIDENT NARIMAN: No, that's  
19 correct, the date of enactment.

20 MS. MENAKER: Yes.

21 PRESIDENT NARIMAN: But they  
22 had to pay into the escrow account by  
23 April 15th following the date of that  
24 enactment.

25 MS. MENAKER: Yes.

0096

1 Grand River Arbitration

2 MR. CROOK: Of the year  
3 following.

4 PRESIDENT NARIMAN: Of the year  
5 following.

6 MS. MENAKER: Yes.

7 PRESIDENT NARIMAN: Now, you  
8 have said here that, by June 30, 2000,  
9 all the escrow statutes were already  
10 enacted.

11 MS. MENAKER: Yes.

12 PRESIDENT NARIMAN: So how does  
13 that -- so if it was on the 30th of  
14 June, 2000, then the obligation to put  
15 into the -- is it April 2001?

16 MS. MENAKER: That is only for  
17 the last of the states that enacted  
18 the escrow statutes.

19 PRESIDENT NARIMAN: Can you  
20 give us, at least, that break-up --  
21 namely, which of the states --

22 MS. MENAKER: Yes.

23 PRESIDENT NARIMAN: A little  
24 later, which are the states?

25 MS. MENAKER: I can tell you

0097

1 Grand River Arbitration  
2 that it's Exhibit 6.

3 MR. CROOK: We have that. By  
4 my count it was approximately 38  
5 enacted in 1998.

6 PRESIDENT NARIMAN: 1999.

7 MR. VIOLI: Eight enacted --

8 PRESIDENT NARIMAN: 38 in 1999.

9 MR. VIOLI: And eight in 2000.

10 MS. MENAKER: Again,  
11 Mr. President, members of the  
12 Tribunal, I remind you that articles  
13 1116 and 1117 talk about the date on  
14 which they first incurred loss or  
15 damage as a result of the breach.

16 MR. ANAYA: When was that?

17 MS. MENAKER: The time that  
18 they first incurred loss of damage as  
19 a result of the escrow statutes --

20 PRESIDENT NARIMAN: No, is it  
21 possible to say that their first date

22 on which they incurred that loss or  
23 damage was the April -- that April  
24 date after the enactment of the  
25 statute. I mean, that would be

0098

1 Grand River Arbitration  
2 argued, so that is just -- I am asking  
3 you.

4 MS. MENAKER: No, we do not  
5 believe that that is correct.

6 PRESIDENT NARIMAN: But suppose  
7 that is correct. How many states  
8 would be excluded? How many states  
9 would be included?

10 MS. MENAKER: Claimants have  
11 never made the claim that each escrow  
12 statute gives rise to a separate  
13 breach, so to speak. They have not  
14 even delineated what sales they have  
15 made in certain states or whether --  
16 they have never even identified each  
17 of the states' escrow statutes.

18 They are challenging the  
19 escrow -- the MSA regime; and that MSA  
20 regime is the obligation that  
21 cigarette manufacturers that did not  
22 join within 90 days have lost the  
23 payment exemption and thus are subject  
24 to the requirement to place moneys  
25 into escrow.

0099

1 Grand River Arbitration

2 PRESIDENT NARIMAN: And that's  
3 the quantification of damages in the  
4 exhibit you pointed out.

5 MS. MENAKER: That's right.  
6 And those losses are twofold in our  
7 mind. The first type of loss is just  
8 the loss that they lost the  
9 opportunity to become a grandfathered  
10 SPM.

11 MR. ANAYA: That was the first  
12 thing.

13 MS. MENAKER: That was the  
14 first claim.

15 PROFESSOR ANAYA: So that the



16 earliest date that you would point to,  
17 the 90 days after the --

18 MS. MENAKER: Right, yes,  
19 right, which is the first loss that  
20 arises out of some of their  
21 allegations of breach.

22 As far as the first loss that  
23 arises out of their remaining  
24 allegations of breach, that occurred  
25 as soon as they became legally

0100

1 Grand River Arbitration  
2 obligated in any state to -- as they  
3 incurred a legal obligation under the  
4 escrow statute in any state. So as  
5 soon as they sold a cigarette in a  
6 state that had adopted an escrow  
7 statutes, which was back in 1999, they  
8 incurred a legal obligation or a loss;  
9 and that would be the first loss or  
10 damage that they incurred as a result.

11 PRESIDENT NARIMAN: Is that  
12 also computed by that --

13 MS. MENAKER: It is, indeed.

14 PRESIDENT NARIMAN: In that  
15 report?

16 MS. MENAKER: It is, indeed.

17 PRESIDENT NARIMAN: Which is  
18 what?

19 MS. MENAKER: That is in the  
20 LECG report, again, and I can show  
21 you -- if you go to, Renee, the slide.  
22 I believe it's 14.

23 If you see there, they, as I  
24 mentioned -- great, that is it.

25 LECG calculated losses based on

0101

1 Grand River Arbitration  
2 two alternative methods. One was the  
3 value of the lost payment exemption.  
4 The other method was this method up  
5 here, where they quantify the present  
6 value of the estimated money that  
7 Grand River would have to pay in the  
8 future, to be in compliance with the  
9 escrow statutes.

10 So they basically looked, and,  
11 as LECG recognized as their damage --  
12 recognized that this could be easily  
13 calculated because the amounts that  
14 they could --

15 PRESIDENT NARIMAN: What is the  
16 amount -- what is the figure that they  
17 put for this?

18 MS. MENAKER: They put a figure  
19 of --

20 PRESIDENT NARIMAN: -- in this  
21 LECG report, the second part, present  
22 value of estimated moneys that they  
23 would have to pay is how much  
24 according to them?

25 MS. MENAKER: This is anywhere

0102

1 Grand River Arbitration  
2 between --

3 PRESIDENT NARIMAN: You are  
4 reading from the report?

5 MS. MENAKER: I am reading from  
6 the report. I have it here someplace.  
7 It is between 212 and 443 million.

8 PRESIDENT NARIMAN: Just a  
9 minute, between 212 --

10 MS. MENAKER: And 443 million.

11 PRESIDENT NARIMAN: And then  
12 the first part, which you read  
13 earlier, the quantification of the  
14 lost exemption quota, how much do they  
15 value it at?

16 MR. CLODFELTER: If we can get  
17 a few minutes to find that out and get  
18 that to you in a minute, would that be  
19 all right? It's in the report  
20 somewhere; but, obviously, we need --  
21 we didn't anticipate the question.

22 MS. MENAKER: Let me make the  
23 additional point:

24 Even with respect to the date  
25 that they became -- that Claimants

0103

1 Grand River Arbitration  
2 first incurred a loss, under the last  
3 escrow statute that was enacted, which

4 was back in June of 2000 --  
5 PRESIDENT NARIMAN: No, I just  
6 wanted -- sorry -- we will come back  
7 to it. According to the report, how  
8 have they quantified it? How has the  
9 report quantified it?

10 MR. CROOK: Mr. Chairman, quite  
11 frankly, this is Claimants' report,  
12 and I didn't review it in anticipation  
13 of the hearing. If it's going to  
14 become material, maybe all of us ought  
15 to take the opportunity to look at it.  
16 I didn't study this particular  
17 Claimant exhibit in anticipation of  
18 this.

19 PRESIDENT NARIMAN: But I want  
20 to -- tell us later. It makes no  
21 difference.

22 MS. MENAKER: I believe it was  
23 it was between 212 and 443 million.

24 PRESIDENT NARIMAN: That is the  
25 second part.

0104

1 Grand River Arbitration

2 MS. MENAKER: That's correct,  
3 yes.

4 PRESIDENT NARIMAN: And the  
5 first part that you showed us earlier,  
6 that lost exemption quota that they  
7 lost the quota by reason of the MSA.

8 MS. MENAKER: Between 100 and  
9 452 million.

10 PRESIDENT NARIMAN: Between  
11 100 and --

12 MS. MENAKER: And 452 million,  
13 and these are alternative methods.

14 PRESIDENT NARIMAN: That's  
15 okay. That is the claim.

16 But have they analyzed how they  
17 will have to pay this, because they  
18 have said 212 and 443? And,  
19 therefore, have they said that the GRP  
20 will have to pay in the future? Now,  
21 future means after 2005, for the past  
22 period, I take it.

23 MS. MENAKER: No, in fact, what

24 they looked at was they calculated  
25 how -- based on estimated future

0105

1 Grand River Arbitration  
2 cigarette sales, how much they would  
3 have to place into escrow in order to  
4 comply with the escrow statutes. They  
5 did not, as far as I can tell, look  
6 at -- or, well, it's clear they did  
7 not take into account the penalties  
8 that had accrued because of  
9 non-compliance, or enforcement actions  
10 that were taken against them.

11 I mean, they simply looked at  
12 how much they would have to pay in  
13 order to bring themselves or to be in  
14 compliance with the escrow statutes.

15 And as LECG recognized, the  
16 amount of that calculation was  
17 relatively straightforward because the  
18 MSA, the model statute as Exhibit T,  
19 sets forth the precise amount per  
20 cigarette sold or per unit sold that  
21 needs to be placed in escrow. And  
22 that amount is incorporated into each  
23 and every one of the escrow statutes;  
24 so all you need to do is to do a  
25 projection to estimate what your

0106

1 Grand River Arbitration  
2 future sales are going to be and where  
3 they are going to be. And you can  
4 easily calculate how much you will  
5 need to be placed in escrow.

6 It's not anything that is  
7 surprising. As soon as the MSA was  
8 concluded, you could have figured that  
9 out.

10 And, again, I just return to  
11 the point that, even if you were  
12 looking at the very last state that  
13 enacted its escrow statute in June of  
14 2000 -- I just want to make two points  
15 about that.

16 And the first is, again, you  
17 need to look at their allegations of

18 breach, and then say:  
19 "When was the first time that  
20 they incurred a loss arising out of  
21 that breach?"  
22 And here we know that  
23 Grand River sold cigarettes into at  
24 least some states that had already  
25 adopted escrow statutes back in 1999.

0107

1 Grand River Arbitration  
2 So at the very latest, by the  
3 end of 1999, they had first incurred  
4 loss or damage or a legal liability to  
5 make a payment into escrow; and,  
6 therefore, that would be the date that  
7 we would say they first incurred loss  
8 or damage.

9 Now, even if you wanted to look  
10 at it, which we don't believe is at  
11 all warranted, you know, by state, and  
12 ignore the fact that they are just  
13 challenging this MSA regime as a  
14 complete whole, even if you look at  
15 the state that it adopted its escrow  
16 statutes at June 30, 2000, again, they  
17 incurred a legal liability in that  
18 state immediately thereafter.

19 That escrow statute was  
20 effective as of June 30, 2000; and,  
21 like the analogy I made to a credit  
22 card purchase, you don't only incur a  
23 loss or liability when the payment  
24 becomes due. You incur it as you  
25 incur the legal obligation. A future

0108

1 Grand River Arbitration  
2 obligation to make a certain payment  
3 is a legal liability or a loss that is  
4 accounted as such by businesses that  
5 would be a legal loss or liability  
6 that would have been incurred well  
7 before March 12, 2001.

8 PRESIDENT NARIMAN: Time, thank  
9 you.

10 MS. MENAKER: I would also just  
11 call the Tribunal's attention to the

12 case that Claimants cite in their  
13 rejoinder from the European Court of  
14 Justice. This is in a footnote, the  
15 Quiller case.

16 And there the Claimants  
17 challenged a regulation that failed to  
18 grant to certain -- a certain class of  
19 people the right to sell a specified  
20 quantity of milk tax-free.

21 And the Court there found that  
22 the Claimants incurred a loss as of  
23 the date that the regulation was  
24 enacted, because, as of that date,  
25 Claimants were denied the benefit of

0109

1 Grand River Arbitration  
2 that tax exemption. And that is  
3 really akin to what we have here,  
4 because here Claimants -- again, they  
5 first suffered a loss as soon as the  
6 escrow statutes were enacted.

7 MR. CROOK: Ms. Menaker, let me  
8 ask you about Quiller because, as I  
9 recall, the Court there did say, yes,  
10 they accrued the first loss, but they  
11 did allow for recovery during the  
12 period of following the time bar.  
13 Now, how is that -- is that the case  
14 we have here, or is the case we have  
15 here different?

16 MS. MENAKER: The case we have  
17 here is different, and I think it is  
18 different in two important respects,  
19 and they both go -- they are  
20 reflective of the differences in a  
21 limitations period at issue under the  
22 NAFTA and that was at issue before the  
23 European Court of Justice.

24 And the two significant  
25 differences that we see in the

0110

1 Grand River Arbitration  
2 limitations period are, first, under  
3 the ECJ's limitations period, it  
4 allows for a period of interruption of  
5 a limitations period. So in the NAFTA

6 it does not.

7 So under the ECJ regime, for  
8 example, if the Claimant takes certain  
9 steps -- it complains to an  
10 authority -- and this is well defined  
11 in everything -- it may actually stop  
12 the running of the limitations period.

13 But the NAFTA contains no such  
14 language. And as the Feldman Tribunal  
15 explicitly recognized, the NAFTA does  
16 not recognize any interruption in the  
17 limitations period.

18 The second distinguishing  
19 factor is that the limitations period  
20 in the Quiller case or in the ECJ ran  
21 from the event giving rise to the  
22 claim. Now, there, it is conceivable,  
23 as far as I can tell, because the  
24 Tribunal -- the Court in that case  
25 does not have a lot of analysis on

0111

1 Grand River Arbitration  
2 this point.

3 Basically, in one paragraph it  
4 says it's going to start the  
5 limitation period at date X, and then  
6 it basically looks back and counts  
7 back three years or five years prior  
8 to the date of the claim for  
9 establishing damages.

10 But, there, if your limitations  
11 period merely runs from the event, and  
12 you have a continuing event, so to  
13 speak, then it's conceivable, as in  
14 the ECJ -- what they did was to run it  
15 from, you know, each event. Each time  
16 they were denied the ability to sell  
17 their milk tax-free, that was a  
18 separate event.

19 But here the NAFTA limitations  
20 is quite different. The NAFTA's  
21 limitations has to start running at  
22 the first time that they incurred loss  
23 or damage arising out of the breach;  
24 and that is the significant  
25 distinguishing factor in our view.

0112

1 Grand River Arbitration

2 PRESIDENT NARIMAN: Yes. If  
3 you would like to break for coffee, we  
4 can do so now, or we can do so later.

5 MS. MENAKER: Yes, let me just  
6 say two more sentences, and then we  
7 can break.

8 Just to wrap it up, again, I  
9 just want to put on the time line, the  
10 next time line, where I have shown  
11 there -- and I have put on this time  
12 line you can see that we know that  
13 Grand River sold cigarettes in several  
14 MSA states back in 1999 when those  
15 states had enacted its escrow  
16 statutes.

17 So I have just highlighted that  
18 on the screen as well, because that is  
19 the date when Claimants would have  
20 first incurred loss or damage as a  
21 result of the escrow statutes. And  
22 the continuing or aggravating elements  
23 of that loss are all results of  
24 Claimants' non-compliance and do not  
25 extend the date on which they first

0113

1 Grand River Arbitration

2 incurred loss or damage arising out of  
3 the alleged breaches. And after our  
4 break, I can come back and discuss  
5 that.

6 PRESIDENT NARIMAN: Just one  
7 question, when you say Grand River  
8 cigarettes sold in several MSA states,  
9 on the record, do we know how many  
10 states?

11 MS. MENAKER: We don't. We  
12 only know what we have been able to  
13 find out. On the record, it is clear  
14 that they have sold cigarettes --

15 PRESIDENT NARIMAN: According  
16 to them, they sold cigarettes in how  
17 many states?

18 MS. MENAKER: They have not  
19 said. We know from losses that have



20 been filed against them for escrow  
21 payments that they failed to make, in  
22 those suits that the attorney generals  
23 brought they set forth the cigarettes  
24 that were sold by Grand River in their  
25 states in 1999, and thereby they are

0114

1 Grand River Arbitration  
2 assessing the liability against them  
3 based on those sales.

4 So that is how we have  
5 determined that in at least those  
6 handful of states they did make sales  
7 in 1999; and for all we know, it's in  
8 many other states, too, but we don't  
9 have that information.

10 PRESIDENT NARIMAN: Okay. So  
11 shall we break for 10 minutes.

12 (A recess is held.)

13 PRESIDENT NARIMAN: How long  
14 more will you take? You are entitled  
15 to take the whole day, but please tell  
16 us roughly.

17 (There was a discussion off  
18 the record.)

19 PRESIDENT NARIMAN: Please  
20 proceed.

21 MS. MENAKER: Before the break,  
22 I said that I was going to pick up  
23 talking about the enforcement efforts  
24 and why that does not postpone the  
25 running the limitations period.

0115

1 Grand River Arbitration  
2 Before I do that, I just wanted to  
3 clarify something in response to a  
4 question that you, Mr. President, had  
5 asked before, which was -- when you  
6 posed the question, why would a  
7 cigarette manufacturer not have joined  
8 the MSA within 90 days if it knew  
9 about it.

10 And I gave you one reason,  
11 which was, perhaps, they did not want  
12 to be restricted to the advertising  
13 and marketing restrictions that were

14 in the MSA.

15 But there is another additional  
16 reason why Grand River, in particular,  
17 would not have wanted to join within  
18 that 90-day period. And you will  
19 recall that, when you calculate the  
20 payment exemption, it is based on the  
21 cigarette manufacturer's sales at the  
22 time of the MSA's conclusion or their  
23 1997 sales.

24 And that is -- the payment  
25 exemption they received is, if their

0116

1 Grand River Arbitration  
2 sales stay at that level or, you know,  
3 increase by a little bit, and then  
4 anything over that increase they do  
5 have to make payments.

6 PRESIDENT NARIMAN: They do.

7 MS. MENAKER: Yes, if they  
8 increase over a certain amount -- it's  
9 market share -- sorry -- not sales.

10 Now, as we discussed earlier,  
11 we know that Grand River did not  
12 manufacture any cigarettes for sale in  
13 the United States before 1999. So,  
14 therefore, if they had joined the MSA  
15 within 90 days, their market share  
16 would have been zero; their payment  
17 exemption would have been zero.

18 Every cigarette they sold would  
19 have been an increase in that market  
20 share; and, thus, they would have been  
21 liable to make payments under the MSA  
22 scheme.

23 So the payment exemption was  
24 really, despite LECG's report where  
25 they are valuing the payment

0117

1 Grand River Arbitration  
2 exemption, to them it wasn't worth  
3 anything because they had no market  
4 share.

5 PRESIDENT NARIMAN: Because  
6 they were not manufacturers.

7 MS. MENAKER: Well, they are

8 manufacturers now.  
9 PRESIDENT NARIMAN: Because  
10 they were not manufacturers.  
11 MS. MENAKER: They were not  
12 manufacturers that sold cigarettes in  
13 the United States before 1999.  
14 MR. ANAYA: So under that view  
15 they did not incur a loss.  
16 MS. MENAKER: That's right. We  
17 do not -- what we think that they --  
18 they did not incur a loss. We would  
19 certainly disagree with LECG's report  
20 because what they did was they valued  
21 the payment exemption based on these  
22 mergers and transactions and looked at  
23 the cigarette sales made by those  
24 companies and tried to calculate what  
25 that per cigarette value was. And

0118

1 Grand River Arbitration  
2 then they applied it to Grand River.  
3 I believe it was their 2004 sales.  
4 But, no, they would not have  
5 gained an advantage in that respect;  
6 but they suffer a loss now from not  
7 having the payment exemption that an  
8 SPM has.

9 MR. ANAYA: By virtue of the  
10 escrow statute payments.

11 MS. MENAKER: Yes, by virtue of  
12 having a to make escrow payments.  
13 That explained in our view why  
14 Grand River did not join the MSA  
15 within 90 days. Right, it wasn't lack  
16 of knowledge; but, again, their loss  
17 at that time was the denial of any  
18 payment exemption.

19 MR. CROOK: But to be clear  
20 they could join as an SPM today.

21 MS. MENAKER: They could, but  
22 they are not entitled to payment  
23 exemptions. Yes, they could. In  
24 fact, other SPMs have done that after  
25 the 90 days. They have decided for a

0119

1 Grand River Arbitration

2 variety of reasons that it's in their  
3 interest to become an SPM and not  
4 remain an NPM.

5 PRESIDENT NARIMAN: So your  
6 point is that one of the possible  
7 reasons would be that Grand River did  
8 not join the MSA and get the payment  
9 exemption because they were not  
10 manufacturers of cigarettes.

11 MS. MENAKER: For sale in the  
12 United States.

13 PRESIDENT NARIMAN: For sale in  
14 the United States.

15 MS. MENAKER: As of that --

16 PRESIDENT NARIMAN: In 19 --

17 MS. MENAKER: -- as of the time  
18 the MSA was concluded, so they had  
19 zero market share at that time.

20 PRESIDENT NARIMAN: I see.

21 Your point is that, if they had zero  
22 market share, then what would be  
23 their -- if they had joined, what  
24 would be the position -- suppose they  
25 joined. All right. Some

0120

1 Grand River Arbitration  
2 misunderstanding, whatever it is --  
3 that the payment exemption -- then  
4 what would be their obligation?

5 MS. MENAKER: The exemption  
6 would be worth zero because it's set  
7 at their -- so that means that for --

8 PRESIDENT NARIMAN: But what  
9 is -- but what is -- but what is their  
10 that obligation that --

11 MS. MENAKER: It's a payment  
12 obligation.

13 PRESIDENT NARIMAN: -- makes  
14 them pay the escrow payment  
15 nonetheless?

16 MS. MENAKER: It's not the  
17 escrow payment.

18 PRESIDENT NARIMAN: That makes  
19 them pay --

20 MS. MENAKER: It's the payment  
21 under the MSA, and it's roughly

22 equivalent proportionately to what the  
23 OPMs pay under the MSA. So the SPMs,  
24 to the extent that their national  
25 market share rises above a certain

0121

1 Grand River Arbitration  
2 amount, they become subject to make  
3 payments that proportionately are the  
4 same as the payments --

5 PRESIDENT NARIMAN: Into --  
6 into what? Into an escrow fund?

7 MS. MENAKER: Not into the  
8 escrow fund, but into an MSA kind of  
9 settlement account, which is then  
10 disbursed to the various states based  
11 upon a calculation that they use.

12 PRESIDENT NARIMAN: Which  
13 clause is it in the MSA settlement?

14 MS. MENAKER: It's section  
15 nine, little "i," paragraph one. And,  
16 in fact, Renee, if we can go back to  
17 the slide of the section nine -- it's  
18 one of the first slides that we did  
19 earlier today -- there.

20 You can see here that it says  
21 that:

22 "The Subsequent Participating  
23 Manufacturers have payment obligations  
24 only in the event that their market  
25 share exceeds the greater of its 1998

0122

1 Grand River Arbitration  
2 market share or 125 percent of its  
3 1997 market share."

4 But for their other -- if their  
5 market share remains the same as their  
6 '98 market share or doesn't go up over  
7 125 percent over their '97 market  
8 share, then they get the grandfathered  
9 SPM status. They get that payment  
10 exemption.

11 PRESIDENT NARIMAN: No, but, in  
12 the example you gave of zero market  
13 share, they would fall under what?  
14 Which part? A subsequent -- they  
15 would be a Subsequent Participating

16 Manufacturer. They would have payment  
17 obligations under this agreement.

18 MS. MENAKER: Yes, because  
19 under --

20 PRESIDENT NARIMAN: Only in the  
21 event that its market share in any  
22 calendar year exceeds the greater --  
23 what -- I want to know what is this  
24 payment here.

25 MS. MENAKER: Well, the greater

0123

1 Grand River Arbitration  
2 of -- one, its '98 market share is  
3 zero and because its 1997 market share  
4 is zero, 125 percent of that is zero.  
5 So they would have --

6 PRESIDENT NARIMAN: I am saying  
7 where is the payment obligation.

8 MS. MENAKER: The payment  
9 obligations, it's right underneath  
10 that. It says here --

11 PRESIDENT NARIMAN: Please read  
12 that.

13 MS. MENAKER: Sure, I will  
14 quote from subparagraph two.

15 PRESIDENT NARIMAN:  
16 Subparagraph.

17 MS. MENAKER: Two.

18 PRESIDENT NARIMAN: Yes.

19 MS. MENAKER: "The base amount  
20 due from a Subsequent Participating  
21 Manufacturer on any given date shall  
22 be determined by multiplying" -- it's  
23 complicated.

24 MR. CROOK: To cut to the  
25 chase, Ms. Menaker, is it the case

0124

1 Grand River Arbitration  
2 that a Subsequent Participating  
3 Manufacturer, with respect to market  
4 share in excess of the 125 percent,  
5 would pay precisely the same amount  
6 per cigarette sold as any other  
7 participant in the system or not?

8 MS. MENAKER: As they pay  
9 roughly the same amount that the OPMs,

10 the Original Participating  
11 Manufacturers, would pay, and the NPM  
12 escrow obligations are calculated to  
13 also be proportional to be no more  
14 than what an SPM would be paying.

15 MR. CROOK: We are dealing here  
16 with a case where they come -- this is  
17 an SPM not entitled to a grandfathered  
18 grabbed exemption.

19 MS. MENAKER: Yes.

20 MR. CROOK: So they are coming  
21 in. They sell 100 units of  
22 cigarettes. Would they pay an amount  
23 the same as or different than the  
24 amount per cigarette paid by any of  
25 the original four participating

0125

1 Grand River Arbitration  
2 companies?

3 MR. VIOLI: It's different.  
4 The federal state reduction reduces it  
5 by 12.5 percent.

6 MR. CROOK: Say that again, Mr.  
7 Violi.

8 MR. VIOLI: Mr. Lieblich, for  
9 them -- there is a previously settled  
10 state's reduction in the MSA that  
11 gives the OPMs, the original four, a  
12 12 percent reduction in their  
13 payments.

14 So if it's \$4 a carton -- let's  
15 say -- they would get \$0.48 reduction  
16 that an SPM would not. The theory is  
17 that the OPMs settled with Minnesota,  
18 Florida, Mississippi, and Texas; and  
19 because payments are based on national  
20 market share and federal excise taxes  
21 paid throughout the country, the OPMs  
22 get the benefit of having settled with  
23 the four states -- other states that  
24 are not part of the agreement. So  
25 they essentially deduct \$0.48 per

0126

1 Grand River Arbitration  
2 carton for the OPM.

3 MR. CROOK: Okay. So is it

4 then the case that, were Grand River  
5 to become an SPM today, they would  
6 have to pay an amount per cigarette  
7 that would be slightly higher than  
8 Original Participating Manufacturers?

9 MR. VIOLI: Yes, under the MSA,  
10 if you look at the MSA.

11 MR. CROOK: The answer is -- so  
12 the answer to the question is yes.

13 MR. VIOLI: Yes.

14 MR. LIEBLICH: That is  
15 certainly not our view. The issues  
16 here are enormously complex. If you  
17 look at the payment provisions, you  
18 will see there is more than just one  
19 type of payment. There are several  
20 technical kinds of adjustments that  
21 are applied.

22 PRESIDENT NARIMAN: No, but the  
23 point being made is, if Grand River  
24 did become a subsequent participating  
25 manufacturer, not within the 90-day

0127

1 Grand River Arbitration  
2 period, no exemption, et cetera, what  
3 would be its payment obligations under  
4 the agreement.

5 MR. LIEBLICH: Approximately  
6 the same as those of the Original  
7 Participating Manufacturers.

8 PRESIDENT NARIMAN: Of the  
9 Original Participating --

10 MR. LIEBLICH: Yes.

11 PRESIDENT NARIMAN: That is  
12 more than the escrow or less than the  
13 escrow?

14 MR. LIEBLICH: Approximately  
15 the same as the escrow as well.

16 MR. CROOK: Is it the case  
17 then -- do I correctly understand it  
18 that -- is it common ground or not?  
19 And I don't want a big argument. Just  
20 yes or no will do.

21 Is it common ground that the  
22 amount of the escrow payments are  
23 roughly equivalent to what you would



24 pay if you were a participant in the  
25 scheme as an SPM or an OPM?

0128

1 Grand River Arbitration

2 MR. VIOLI: As an SPM, now --  
3 and we will talk about it -- I'm sure  
4 that Ms. Menaker mentioned it -- not  
5 when the escrow statutes were  
6 originally passed.

7 MR. CROOK: Understood.

8 MR. VIOLI: Now, the net escrow  
9 or the escrow requirement is -- it's  
10 intended or operates to equate an NPM  
11 to a non-exempt SPM.

12 MR. CROOK: Understood. So on  
13 that point there is basic --

14 MR. VIOLI: Not the OPM.

15 MR. CROOK: Understood. Thank  
16 you.

17 MR. VIOLI: If you want, we can  
18 look at the formula which shows the  
19 OPMs getting this previously settled  
20 state reduction. In early years OPMs  
21 did pay for -- did pay -- they had  
22 additional payments like upfront  
23 payments for three years, three or  
24 four years, that SPMs did not pay.  
25 But that is gone.

0129

1 Grand River Arbitration

2 MR. CROOK: I don't think we  
3 need to get that far into it on this  
4 point.

5 MR. LIEBLICH: Just to clarify  
6 the record, the reason for the  
7 adjustment that Mr. Violi is  
8 referring to is that the OPMs also  
9 entered into settlements with four  
10 states that are not parties to the  
11 Master Settlement Agreement that the  
12 SPMs do not make. That's a new one.

13 MR. CROOK: I think he made  
14 that clear.

15 PRESIDENT NARIMAN: That is the  
16 12 percent.

17 MS. MENAKER: But our point is

18 that Grand River would have had no  
19 incentive to join the MSA within  
20 90 days because they would be making  
21 the same payment if they joined within  
22 90 days or if they had not joined  
23 within 90 days.

24 PRESIDENT NARIMAN: You made  
25 that point.

0130

1 Grand River Arbitration

2 MS. MENAKER: Thank you. Now,  
3 Claimants' principal argument upon  
4 which really this entire case rests,  
5 and I am going to quote from their  
6 response at page four -- is that --  
7 and I quote:

8 "It was only when compliance  
9 with the escrow statutes was mandated  
10 by the aforementioned contraband  
11 laws" -- and I apologize. There is  
12 not a slide on this quote, so I am  
13 just quoting. It is the response at  
14 page four. So it's only --

15 PRESIDENT NARIMAN: The  
16 response where -- their response to  
17 your objection?

18 MS. MENAKER: Yes.

19 PRESIDENT NARIMAN: Right.

20 MS. MENAKER: It says:

21 "It was only when compliance  
22 with the escrow statutes was  
23 mentioned, mandated by the  
24 aforementioned contraband laws and  
25 judgments were obtained against the

0131

1 Grand River Arbitration

2 Claimants that they suffered loss or  
3 damage." End quote.

4 PRESIDENT NARIMAN: Read that  
5 again.

6 "It is only when compliance was  
7 mandated by the" -- and obtained that  
8 they suffered loss.

9 That doesn't fit in with that  
10 with that -- with that report which is  
11 annexed.

12 MS. MENAKER: That's exactly  
13 right. It does not. It is  
14 contradicted by their own Claimants'  
15 expert report.

16 And in our view, the time at  
17 which Claimants were prosecuted for  
18 violating the law and judgments were  
19 entered against them is immaterial for  
20 determining when Claimants first  
21 incurred loss or damage as a result of  
22 their NPM status.

23 PRESIDENT NARIMAN: Would you  
24 read the previous sentence. You read  
25 that page four. Read the previous

0132

1 Grand River Arbitration  
2 sentence:

3 "The MSA in and of itself does  
4 not require" -- that is the case -- "a  
5 tobacco company to join the MSA and  
6 experience the discrimination inherent  
7 in the MSA states' allotment of  
8 exemptions or its freezing of market  
9 share at the 1997 or 1998 production  
10 levels."

11 Is that correct according to  
12 you -- just read that previously --

13 MR. CLODFELTER: We just found  
14 it. Let's look at it again if we can.

15 PRESIDENT NARIMAN: Yes, "The  
16 MSA in and of itself," page four.

17 MS. MENAKER: What they are  
18 saying is it is true that, of course,  
19 the MSA in and of itself doesn't  
20 require anyone to join the MSA.

21 PRESIDENT NARIMAN: No, they  
22 can remain outside.

23 MS. MENAKER: They can remain  
24 outside.

25 PRESIDENT NARIMAN: Yes.

0133

1 Grand River Arbitration

2 MS. MENAKER: Of course, we  
3 disagree with the characterization of  
4 experiencing the discrimination that  
5 is inherent -- we will ignore all of

6 that.

7 So really all they are saying  
8 is that --

9 PRESIDENT NARIMAN: So do you  
10 agree with this other saying, next  
11 sentence that you read:

12 "It is only when compliance  
13 with escrow statutes was mandated by  
14 the contraband laws and judgments were  
15 obtained that they suffered loss and  
16 damage" -- damage?

17 MS. MENAKER: We absolutely do  
18 not agree with that sentence.

19 PRESIDENT NARIMAN: But you  
20 say, irrespective of that report, that  
21 they will suffer loss and damage if  
22 they don't join within the 90-day  
23 period of the date of the MSA  
24 settlement?

25 MS. MENAKER: They suffer loss  
0134

1 Grand River Arbitration  
2 or damage as soon as they incurred a  
3 legal liability to make the first of  
4 their payments into escrow as a result  
5 of the enactment of the escrow  
6 statutes.

7 PRESIDENT NARIMAN: So the mere  
8 enactment of the escrow statutes was  
9 sufficient to impart for them  
10 liability.

11 MS. MENAKER: Essentially, the  
12 enactment of the escrow statutes in a  
13 state in which they intended their  
14 cigarettes to be sold which brought  
15 about legal liability on their part  
16 was sufficient to establish a first  
17 loss as a result of the escrow  
18 statutes.

19 MR. ANAYA: The enactment or  
20 the selling of cigarettes within a  
21 state make the escrow statutes  
22 enacted.

23 MS. MENAKER: The selling of  
24 cigarettes in the state, because that  
25 is when they incurred that legal

0135

1 Grand River Arbitration  
2 obligation to pay.

3 PRESIDENT NARIMAN: No, but  
4 therefore -- therefore, we have to get  
5 to this, that -- in which of the  
6 states did they sell their cigarettes  
7 prior to the year 2001, March?

8 MS. MENAKER: You see, but,  
9 again, the articles 1116 and 1117 talk  
10 about when they first incurred loss or  
11 damage arising out the alleged breach.  
12 The alleged breach here is the  
13 requirement that NPMs pay -- make  
14 payments into escrow, which is  
15 mandated as part of the Master  
16 Settlement Agreement.

17 And every state that signed the  
18 Master Settlement Agreement was  
19 obligated to enact an escrow statute.  
20 They first incurred loss or damage as  
21 soon as they became obligated under  
22 those escrow statutes.

23 PRESIDENT NARIMAN: But if they  
24 had not enacted those statutes, they  
25 would not have been liable to pay.

0136

1 Grand River Arbitration

2 MS. MENAKER: Right, but they  
3 all were enacted before June of 2000.

4 PRESIDENT NARIMAN: No, no,  
5 that's not what I am saying.

6 If they had not --  
7 theoretically, the mere fact that they  
8 entered into or signed the MSA did not  
9 fasten liability on them. The escrow  
10 statute enacted -- read with the  
11 master agreement, then established  
12 their liability. It can't be that the  
13 master agreement on its own fastened  
14 liability on them.

15 MS. MENAKER: I think that, in  
16 some respects, it did; in other  
17 respects, I agree with your statement,  
18 because the requirement that they  
19 place money into escrow did not become

20 a legal obligation until those escrow  
21 statutes were enacted.

22 MR. ANAYA: Until they sold  
23 cigarettes.

24 MS. MENAKER: Right.

25 MR. ANAYA: I am just trying to

0137

1 Grand River Arbitration  
2 be clear on this. What you are  
3 saying, it's not when the statutes  
4 were enacted that they incur  
5 liability.

6 MS. MENAKER: It's when they  
7 first sold a cigarette in a state.

8 MR. ANAYA: Because you keep  
9 saying when the statutes are enacted  
10 and I am a little confused.

11 MS. MENAKER: Okay. It's just  
12 because they were all enacted within  
13 the three-year time period, to the  
14 extent that they were making sales  
15 anywhere in the United States.

16 MR. ANAYA: The point we are  
17 looking at precisely is the point  
18 where they are selling cigarettes; is  
19 that right?

20 MS. MENAKER: Yes, is when they  
21 first sold their first cigarette in  
22 any MSA state.

23 MR. ANAYA: Can we fix that  
24 date precisely?

25 MS. MENAKER: We cannot. I

0138

1 Grand River Arbitration  
2 mean, that information is not in our  
3 hand. But we do know that in a  
4 handful of states we know they were  
5 selling cigarettes in 1999, so that's  
6 why, on the last time line that I had  
7 put up here, I say no later than  
8 December 31, 1999.

9 MR. ANAYA: So we can fix a  
10 precise date before March 12, 2001  
11 when they were, in fact, selling  
12 cigarettes in certain states with  
13 escrow statutes and hence incurring

14 liability.

15 MS. MENAKER: Yes.

16 PRESIDENT NARIMAN: Which are  
17 those states, if you can just later  
18 tell us, according to the record.

19 MS. MENAKER: According to the  
20 record if you look at --

21 MR. CROOK: Missouri.

22 MS. MENAKER: Missouri,  
23 Oklahoma, and Iowa, for example, we  
24 know that they were making sales --

25 PRESIDENT NARIMAN: Wait a  
0139

1 Grand River Arbitration  
2 minute. Missouri. Yes.

3 MS. MENAKER: Missouri,  
4 Oklahoma, and Iowa, we know that they  
5 made sales in 1999.

6 PRESIDENT NARIMAN: Iowa. Yes.

7 MS. MENAKER: If you look at  
8 page 21 of our objection, we reference  
9 the petition that was filed against  
10 Grand River by Iowa.

11 PRESIDENT NARIMAN: That I will  
12 be asking you a little later because  
13 I'm a little confused. There are too  
14 many of these documents and so on.

15 So if you can just tell us  
16 which are -- which are the documents  
17 prior to March 2001 that would show  
18 that something had occurred prior to  
19 March 2001, which are on record,  
20 either submitted by you or by them,  
21 and which are the documents which are  
22 after March 2001 which we can ignore  
23 except according to your statements  
24 that you may make.

25 MR. CROOK: I suspect,

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1 Grand River Arbitration  
2 Mr. Chairman, that may be in the next  
3 presentation.

4 PRESIDENT NARIMAN: The next  
5 presentation -- that is what you are  
6 going to do? That's --

7 MS. MENAKER: Yes.

8           PRESIDENT NARIMAN: That's okay  
9 then. I didn't know that.

10          MR. CROOK: You are going to go  
11 into the actual indications in the  
12 record that lead you to believe --

13          PRESIDENT NARIMAN: Yeah, if  
14 you can give us the enumeration prior  
15 to March and subsequent to March, so  
16 that when we divide these into two  
17 periods of time, if you have that  
18 ready -- otherwise, we will have to do  
19 the calculation on that.

20          Okay.

21          MS. MENAKER: So the time when  
22 Claimants were prosecuted for having  
23 violated the law and judgments were  
24 entered against them doesn't affect  
25 the time at which they first incurred

0141

1           Grand River Arbitration  
2 loss or damage as a result of their  
3 NPM status, and we did introduce in  
4 some evidence of these enforcements,  
5 which, as we just mentioned,  
6 Ms. Guymon will discuss later.

7           We did that because some of  
8 those enforcement actions were  
9 commenced prior to March 12, 2001.  
10 Therefore, they provide further  
11 evidence that Claimants knew or should  
12 have known about the breaches and the  
13 losses of which they now complain.

14          But those enforcement efforts  
15 do not alter the date by which  
16 Claimants first incurred a loss or  
17 damage arising out of --

18          PRESIDENT NARIMAN: Sorry to  
19 interrupt.

20          But when you deal with that,  
21 will you please also tell us when were  
22 they served with that particular,  
23 because there is some problem about  
24 they were not served or their office  
25 had shifted and things of that sort.

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1           Grand River Arbitration



2 So address that.  
3 MS. GUYMON: I will.  
4 PRESIDENT NARIMAN: Thank you.  
5 MS. MENAKER: Okay. In their  
6 statement of claim -- and I have put  
7 this on the slide -- Claimants  
8 state -- and I quote:  
9 "The investors and their  
10 investments are forced to raise prices  
11 if they wish to comply with the escrow  
12 statutes. They cannot maintain  
13 pre-MSA price levels for their  
14 cigarettes and stay in business."  
15 PRESIDENT NARIMAN: But they  
16 are not bound to maintain pre-MSA  
17 prices; are they?  
18 MS. MENAKER: No.  
19 PRESIDENT NARIMAN: They can  
20 charge what they like, except they  
21 won't be competitive.  
22 MS. MENAKER: That is what they  
23 are saying. They say:  
24 "If they increase prices,  
25 however, their ability to offer

0143

1 Grand River Arbitration  
2 significant price competition to the  
3 Majors and SPMS, the exempt SPMs, is  
4 materially and adversely compromised,"  
5 end quote.  
6 PRESIDENT NARIMAN: How does  
7 this affect the point of jurisdiction?  
8 MS. MENAKER: Because our point  
9 is that compliance with the law is not  
10 optional, so Claimants do not have a  
11 choice whether they wish to comply  
12 with the escrow statutes.  
13 PRESIDENT NARIMAN: If they  
14 wish to comply.  
15 MS. MENAKER: By manufacturing  
16 cigarettes that are sold in the  
17 United States, Grand River became  
18 subject to the statutes and incurred a  
19 loss as soon as its cigarettes were  
20 sold in an MSA state that had enacted  
21 an escrow statute. And Claimants

22 recognized that, had they complied  
23 with the law, their ability to compete  
24 would have been, quote-unquote,  
25 "materially and adversely

0144

1 Grand River Arbitration  
2 compromised."

3 But their decision to ignore  
4 their legal obligation and attempt to  
5 evade enforcement for as long as  
6 possible does not postpone the time at  
7 which they first incurred loss or  
8 damage as a result of those laws.

9 So as I mentioned before,  
10 Claimants' contention that they didn't  
11 incur a loss until after they were  
12 prosecuted for having violated state  
13 law and judgments were entered against  
14 them and their cigarettes were banned  
15 or confiscated is also contradicted by  
16 their expert report authored by LECG,  
17 because, remember, LECG calculated  
18 damages using those two alternative  
19 methods.

20 First, it assigned a value to  
21 the loss payment exemption. Then it  
22 assigned a calculation -- it  
23 calculated damages by estimating the  
24 amounts that Claimants would have had  
25 to have placed into escrow to be in

0145

1 Grand River Arbitration  
2 compliance with the law.

3 But LECG didn't limit its  
4 accounting of losses to only those  
5 states where enforcement efforts had  
6 been brought, and -- nor did it incur  
7 include penalties for non-compliance  
8 with the escrow statutes in its  
9 calculation of damages.

10 So, really, you recognize what  
11 is really obvious, which is that the  
12 escrow statutes impose liability. And  
13 by virtue of the enactment of those  
14 escrow statutes and Grand River having  
15 sold cigarettes that were then sold in

16 MSA states, Grand River incurred a  
17 loss.

18 And so their own expert report  
19 confirms that they first incurred a  
20 loss as soon as their cigarettes were  
21 sold in an MSA state and not later  
22 when enforcement actions were taken  
23 against them.

24 Now, Claimants in their  
25 rejoinder, they also argue that any

0146

1 Grand River Arbitration  
2 liability that was incurred as a  
3 result of the escrow statutes was a  
4 contingent liability before  
5 enforcement proceedings were  
6 commenced, and now that we submit is  
7 incorrect.

8 Something is contingent if it's  
9 dependent upon some future and  
10 uncertain event. But a liability does  
11 not become contingent because there is  
12 uncertainty as to whether you will be  
13 caught and prosecuted for  
14 non-compliance with your legal  
15 obligations.

16 PRESIDENT NARIMAN: Isn't there  
17 some requirement in the escrow  
18 statutes in Exhibit T that, within one  
19 year, they have also to report to  
20 somebody, that somebody is controller  
21 or something -- do you agree with  
22 that?

23 MS. MENAKER: Are you talking  
24 about the requirement that the NPM has  
25 to verify in writing that they have

0147

1 Grand River Arbitration  
2 placed funds in escrow?

3 PRESIDENT NARIMAN: Yes, that  
4 is correct. They have to report it to  
5 somebody. Somebody has to verify it.  
6 Who that somebody is, I forget now,  
7 some statutory authority.

8 MS. MENAKER: Yes.

9 PRESIDENT NARIMAN: Okay.

10 MS. MENAKER: But our point is  
11 that a current obligation to make a  
12 future payment is not contingent  
13 liability. And Claimants also argue,  
14 as Professor Anaya alluded to earlier,  
15 that Claimants say their liability was  
16 contingent because there was some  
17 certainty as to their legal obligation  
18 to pay into escrow; and that we also  
19 submit is factually incorrect.

20 The Claimants essentially  
21 attempt to create doubt where none  
22 exists. And in the rejoinder they  
23 state -- for instance -- and I have  
24 put this on the screen:

25 "Some escrow statutes targeted  
0148

1 Grand River Arbitration  
2 the importer. Some only targeted the  
3 defined manufacturer. Some initially  
4 appeared to be concerned with direct  
5 sales in each state. Others and  
6 eventually all were focused on all  
7 sales in each state, direct or  
8 indirect." End quote.

9 PRESIDENT NARIMAN: Why are you  
10 citing this? How does it advance your  
11 case?

12 MS. MENAKER: I am citing it  
13 because it's just incorrect. They are  
14 trying to create uncertainty by  
15 stating that:

16 "Here, look at the differences  
17 in the escrow statutes. It was very  
18 unclear or uncertain that we had a  
19 legal liability before enforcement  
20 proceedings were based."

21 PRESIDENT NARIMAN: But is this  
22 correct, that some statutes targeted  
23 only the importer; some targeted only  
24 the manufacturer?

25 MS. MENAKER: It is absolutely  
0149

1 Grand River Arbitration  
2 incorrect.

3 PRESIDENT NARIMAN: Okay.

4 Against the manufacturer.  
5 MS. MENAKER: That's right. So  
6 one only had to have read the escrow  
7 statutes to ascertain that any  
8 Nonparticipating Manufacturer that  
9 intends for its cigarettes to be sold  
10 in an MSA state directly or indirectly  
11 has to make payments into escrow for  
12 each cigarette sold.  
13 PRESIDENT NARIMAN: Why do they  
14 say eventually all were?  
15 MS. MENAKER: I don't know why  
16 they say that. It is incorrect.  
17 PRESIDENT NARIMAN: Possibly  
18 with the amendment or something.  
19 MS. MENAKER: No, it has  
20 nothing to do with the amendment.  
21 None of the escrow statutes were  
22 changed in that regard, none of them.  
23 PRESIDENT NARIMAN: You say  
24 that the large part is correct. All  
25 were focused on all states in each

0150

1 Grand River Arbitration  
2 state, direct or indirect --  
3 MS. MENAKER: At all times.  
4 PRESIDENT NARIMAN: At all  
5 times.  
6 MS. MENAKER: So their  
7 statement that some statutes initially  
8 applied only to direct sales while  
9 others and eventually all apply to  
10 direct and indirect sales -- it's just  
11 plain wrong. Perhaps Claimants'  
12 comprehension changes over time. But  
13 the escrow statutes --  
14 MR. ANAYA: You are stalking  
15 about the enforcement of the statutes.  
16 Was there some variance in enforcement  
17 by the different states?  
18 MR. CROOK: This is Claimants'  
19 statement. I wonder if it would be  
20 more reasonable to ask them what they  
21 meant.  
22 MR. ANAYA: I want to see what  
23 they have to say, if there is -- maybe

24 I should ask the question a different  
25 way.

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1 Grand River Arbitration

2 Is there any variance; do you  
3 think --

4 MS. MENAKER: No.

5 MR. ANAYA: -- in the  
6 enforcement?

7 MS. MENAKER: No, the escrow  
8 statutes and the obligations they  
9 imposed did not change. As far as the  
10 enforcement efforts are concerned, as  
11 we mentioned earlier, there have been  
12 enforcement actions, I believe, in  
13 over 30 states now; but the fact that  
14 those enforcement actions -- you know,  
15 some states took longer to catch up --  
16 I mean, it's a -- it's a large  
17 settlement. A lot of money is  
18 involved.

19 It's very bureaucratically  
20 difficult. It was difficult for some  
21 states to get information that they  
22 needed to identify the manufacturer of  
23 cigarettes that are being sold. So  
24 the fact that some states brought  
25 enforcement actions right away, other

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1 Grand River Arbitration

2 states took longer, some still haven't  
3 done it, that does not create  
4 uncertainty about the legal  
5 obligation.

6 MR. ANAYA: I think that you  
7 said that New York has not enforced  
8 the statute. If -- is that correct?

9 MS. MENAKER: That is not  
10 correct. And, in fact, what Claimants  
11 do is they point to four different  
12 things that they say has led them to  
13 believe that either the escrow  
14 statutes are not all the same or, like  
15 you said, the enforcement efforts are  
16 different. Perhaps I can go through  
17 each of those, and New York is one of

18 those.

19 MR. ANAYA: All right.

20 MS. MENAKER: So the first  
21 thing that Claimants point to is a  
22 letter that they admittedly received  
23 from Oregon that was dated March 14,  
24 2001; and it's attached as tab eight  
25 to the Williams affidavit.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: Tab eight.

3 MS. MENAKER: And you don't  
4 need to pull it out. I mean, you can,  
5 of course, if you want; but I am going  
6 to put excerpts from it on the slide.

7 Claimants contend -- and this is --

8 PRESIDENT NARIMAN: This -- who  
9 has written this -- if you are subject  
10 to these statutory requirements -- I  
11 mean, who -- whose letter is this?

12 MS. MENAKER: This is a letter  
13 from the State of Oregon.

14 MR. CROOK: Ms. Menaker, can I  
15 just clarify -- and, again, we're  
16 giving you a very hard time, sorry  
17 about that -- but the date of this  
18 document was March 14, 2001. The  
19 magic date here is March 12, 2001.

20 MS. MENAKER: That's correct.

21 MR. CROOK: Do we need to go  
22 into this and if so why?

23 MS. MENAKER: This -- we are  
24 going into this not to show any sort  
25 of knowledge before March 12th, but

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1 Grand River Arbitration

2 rather because Claimants say that the  
3 escrow statutes were unclear or  
4 uncertain or varied to some extent;  
5 and, therefore, their liability was  
6 only contingent before enforcement  
7 actions were actually brought; that it  
8 took those enforcement actions to make  
9 clear what were the legal obligations.

10 And our view is that that is  
11 not at all the case, that the escrow

12 statutes were always clear.

13 And what Claimants have done is  
14 they have pointed to four different  
15 things that they say created this  
16 uncertainty. And one of the things --

17 MR. VIOLI: Mr. President, may  
18 I just interject here -- the bracket  
19 there where it says, "some escrow  
20 statutes," if we look at the  
21 rejoinder, the reference is not to the  
22 escrow statutes, but as  
23 Professor Anaya pointed out, the  
24 enforcement.

25 It says in the immediately

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1 Grand River Arbitration

2 preceding sentence:

3 "Even though prosecutions under  
4 each of them varied, sometimes  
5 dramatically from state to state, some  
6 targeted the importer" --

7 PRESIDENT NARIMAN: That means  
8 the --

9 MR. VIOLI: -- the prosecution,  
10 not the statutes. So just -- I didn't  
11 have it out quicker or sooner; but,  
12 when it was brought up, I hurried to  
13 get that. So -- and it's responsive  
14 to what you had brought up, and that's  
15 why I thought, for clarification for  
16 the record, as well as for the  
17 parties, that that be -- that that be  
18 made.

19 PRESIDENT NARIMAN: Yes.

20 MR. VIOLI: Excuse me. I am  
21 sorry.

22 MS. MENAKER: Our point is that  
23 it's Claimants -- and if they are  
24 referring to the fact that enforcement  
25 efforts were varied, whether it's the

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1 Grand River Arbitration

2 enforcement effort or the statutes,  
3 that is not belied by the evidence in  
4 the record and does not -- they have  
5 not pointed to anything to show that



6 there was uncertainty regarding their  
7 legal obligations under the escrow  
8 statutes.

9 If you look at the escrow  
10 statutes on their face, they all make  
11 clear that they all target the defined  
12 manufacturer; and the fact that some  
13 states took actions at different times  
14 or that some were concerned they say  
15 with direct sales that -- that maybe  
16 they looked at direct sales first and  
17 only brought actions against them and  
18 some did it later -- I mean, that's  
19 all immaterial.

20 The legal liability is what is  
21 on the face of the statute.

22 And, again, if I could just  
23 refer to these four things that  
24 Claimants cited here in support of  
25 this contention that this is somehow

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1 Grand River Arbitration  
2 so varied and uncertain that their  
3 legal liability couldn't be  
4 ascertained until enforcement  
5 proceedings were brought, I think that  
6 it will clear that that is certainly  
7 not the case.

8 The first of these is the  
9 Oregon letter. And Mr. Williams in  
10 his affidavit he states, and I quote  
11 here that -- he states that the  
12 letter, quote?

13 "... suggested that the escrow  
14 statutes only applied to tobacco  
15 manufacturers who were selling  
16 cigarettes to consumers within an MSA  
17 state."

18 I'm sorry. This is what  
19 Claimants say at page five of their  
20 response.

21 PRESIDENT NARIMAN: This Oregon  
22 business, letter three -- what is this  
23 Oregon letter three? Sorry.

24 MS. MENAKER: So  
25 Mr. Williams --

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: This is at  
3 tab A.

4 MS. MENAKER: Tab A to the  
5 Williams affidavit, which is tab 14 to  
6 the appendix to Claimants' response.

7 So in his affidavit  
8 Mr. Williams quotes a portion of the  
9 Oregon letter, and that states, quote:

10 "If you are subject to these  
11 statutory requirements as a result of  
12 having cigarettes sold to consumers in  
13 the state of Oregon, then you must  
14 comply with the law."

15 Mr. Williams then goes on to  
16 state that:

17 "Grand River has never sold  
18 cigarettes to consumers in Oregon,"  
19 and thus he had "no reason to believe  
20 that the law applied to Grand River."

21 PRESIDENT NARIMAN: Your point  
22 is the moment they enact the statute,  
23 then he is fixed with knowledge.

24 That's your case.

25 MS. MENAKER: That's correct.

0159

1 Grand River Arbitration

2 But I also want --

3 PRESIDENT NARIMAN: Therefore,  
4 your case is that a person with -- a  
5 manufacturer who sells cigarettes in a  
6 particular state ought to have  
7 cognizance of the laws operating in  
8 that state, apart from whether  
9 ignorance of the law is no excuse or  
10 not -- makes no difference; that he  
11 should be aware; and, therefore, you  
12 should treat him as having knowledge  
13 of that particular law; and that law  
14 itself casts a liability on the  
15 manufacturer, the law itself.

16 MS. MENAKER: And that's --

17 PRESIDENT NARIMAN: The law  
18 fastened that liability, whether  
19 liability was enforced later or not

20 enforced is of little consequence  
21 according to you.

22 MS. MENAKER: That's absolutely  
23 correct.

24 PRESIDENT NARIMAN: That's your  
25 case. I just want to know your case.

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1 Grand River Arbitration  
2 That's what -- the point on limitation  
3 is not -- is not whether anything is  
4 contingent or not. The point is  
5 whether they first acquired  
6 knowledge -- first acquired some  
7 knowledge that they would be liable  
8 for this consequence.

9 And that knowledge you fix with  
10 enactment of the statute itself.  
11 There is no statute itself, and that  
12 doesn't shift to a future date. That  
13 is your case.

14 MS. MENAKER: Yes.

15 MR. CROOK: You argue both the  
16 knew or should have known.

17 MS. MENAKER: That's correct.

18 MR. CROOK: So the chairman has  
19 addressed part of that argument, and  
20 you presumably will address the rest  
21 of it.

22 MS. MENAKER: Ms. Guymon is  
23 going to be really be addressing the  
24 knowledge part. The reason why I  
25 raise this now is because, if it were

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1 Grand River Arbitration  
2 the case that you had a law, but it  
3 was in its application -- or they had  
4 been given direct assurances that the  
5 law meant something else, that somehow  
6 could be binded on a state, then we  
7 would -- might have something to talk  
8 about.

9 And that in our view is what  
10 they have been trying to portray by  
11 casting the liability as so uncertain  
12 and making it appear that the escrow  
13 statutes did not apply to them or that

14 they somehow had been granted  
15 assurances that they were entitled to  
16 rely on, that it didn't apply to them  
17 and therefore --

18 MR. ANAYA: What do you make of  
19 the Oregon letter?

20 MS. MENAKER: So in the Oregon  
21 letter, if you look at the Oregon  
22 letter, the language that was omitted  
23 in the ellipsis, in the Williams  
24 affidavit, actually, says that, if you  
25 are subject to the requirement as a

0162

1 Grand River Arbitration  
2 result of having sold cigarettes to  
3 consumers in the State of Oregon as  
4 defined in that statute, you must  
5 comply with the law.

6 PRESIDENT NARIMAN: But that  
7 letter is dated what?

8 MS. MENAKER: March 14, 2001 --  
9 so two days after the limitations  
10 period in this case. But along with  
11 the letter, Oregon included general  
12 information, and that information  
13 sheet wasn't provided with Claimants,  
14 along with the Oregon letter. But the  
15 United States provided a copy to the  
16 Tribunal. It can be found at tab 131  
17 of our reply.

18 PRESIDENT NARIMAN: I didn't  
19 follow that. Sorry.

20 MS. MENAKER: There was  
21 attached to this letter -- there was  
22 an information sheet that Oregon sent.

23 PRESIDENT NARIMAN: Attached to  
24 tab eight.

25 MS. MENAKER: 131.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: 131 was  
3 attached to tab eight.

4 MS. MENAKER: Excuse me -- I  
5 don't think this is the time to --

6 MR. VIOLI: Yes, it is  
7 actually. You are saying this as if

8 it's a fact. It was -- you are saying  
9 that it was attached. We didn't  
10 say -- you are presuming a fact that  
11 that there was a statute attached to  
12 this.

13 MS. MENAKER: I am not  
14 presuming there was a statute  
15 attached. I am presuming that an  
16 informational sheet was attached.

17 MR. VIOLI: Had an attachment.

18 MS. MENAKER: That's correct.

19 MR. VIOLI: But please state  
20 the case that that is your position.

21 MS. MENAKER: It is our  
22 position that, in fact, it was  
23 attached and we have retrieved it from  
24 Oregon's file. There is a letter with  
25 an attachment, and that is the

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1 Grand River Arbitration  
2 attachment.

3 PRESIDENT NARIMAN: Including  
4 eight.

5 MS. MENAKER: Yes.

6 PRESIDENT NARIMAN: Eight has  
7 an attachment which is 131.

8 MS. MENAKER: 131.

9 PRESIDENT NARIMAN: They have  
10 only annexed tab eight.

11 MS. MENAKER: That's correct.

12 MR. CROOK: I think Mr. Violi's  
13 position is he does not understand  
14 that correctly, in that sense. So I  
15 take it the case is that the document  
16 in the Oregon attorney general's file  
17 had the attachment, and we will hear  
18 from Mr. Violi whether that document  
19 was in their file or not.

20 MS. MENAKER: Yes.

21 PRESIDENT NARIMAN: Excuse me.  
22 Did they say anywhere --

23 MS. MENAKER: Could I just note  
24 that the NAFTA letter itself refers to  
25 the attachment?

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1 Grand River Arbitration

2           PRESIDENT NARIMAN: Yes. Do  
3 they say anywhere that they were  
4 advised by a particular lawyer or set  
5 of lawyers that these statutes --  
6 these escrow statutes did not apply to  
7 them because of some uncertainty? Do  
8 they say anywhere?

9           MS. MENAKER: Not --

10          PRESIDENT NARIMAN: I have not  
11 seen it. That's why I am asking.

12          MR. ANAYA: They do point to  
13 the Oregon letter as one indication  
14 that this state may be taking the  
15 position that the statutes only apply  
16 to those who sell to consumers.

17          MS. MENAKER: Yes.

18          MR. ANAYA: So that is the  
19 uncertainty?

20          MS. MENAKER: Yes.

21          MR. ANAYA: And your response  
22 is there should be no uncertainty  
23 because of what was omitted.

24          MS. MENAKER: Exactly. What  
25 was omitted and the informational

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1           Grand River Arbitration  
2 sheet that was referenced in the  
3 letter and attached to the letter  
4 which we have put in tab 131, and if  
5 you look at that informational sheet.

6           MR. ANAYA: Which according to  
7 you was attached to the letter.

8           MS. MENAKER: Presumably it was  
9 because, again, the letter referenced  
10 the general information sheet, and the  
11 Oregon attorney general's office.

12          PRESIDENT NARIMAN: This is  
13 evidence in the letter itself, that it  
14 was attached.

15          MS. MENAKER: Yes. And it says  
16 here, in the letter:

17          "The purpose of this mailer is  
18 to remind you of the deadline for  
19 complying with the model statute.  
20 It's fast approaching. A copy of the  
21 certificate of compliance by the

22 nonparticipating manufacturers  
23 regarding escrow payment" --  
24 PRESIDENT NARIMAN: What is  
25 that deadline?

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1 Grand River Arbitration

2 MS. MENAKER: The deadline here  
3 was -- this letter was in March 2001,  
4 so the deadline for them to put  
5 payment into escrow for the next year  
6 was April 15th of 2001, for their  
7 prior year sales. But, again, it says  
8 that here they have attached these  
9 things to the letter. And --

10 PRESIDENT NARIMAN: No, I just  
11 want to know -- is it correct that --  
12 I didn't find anything -- that the  
13 Claimants have not stated anywhere  
14 that they were advised by their  
15 lawyers or advocates that the escrow  
16 statutes would not or may not apply to  
17 them. Have they stated that anywhere?  
18 As a matter of legal advice, have they  
19 stated that?

20 MS. MENAKER: I have not seen  
21 that.

22 PRESIDENT NARIMAN: I have not  
23 seen it. That's why I am asking you.

24 MR. CROOK: Ms. Menaker, you  
25 said there were four items that you

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1 Grand River Arbitration  
2 were going to cover. You have done  
3 one.

4 MS. MENAKER: We are not quite  
5 finished with one. I'm almost there.

6 MR. CROOK: All right.

7 MS. MENAKER: It's the  
8 information on this attachment that I  
9 wanted to refer to. And it says two  
10 things. First it says that:

11 "A certificate of compliance  
12 needs to be filed by every tobacco  
13 manufacturer that sells cigarettes  
14 within the State of Oregon, whether  
15 directly or through any distributor,

16 retailer, or similar intermediary."  
17 It also -- the second thing  
18 that it says of note is that:  
19 "A tobacco product  
20 manufacturer" is defined as, quote,  
21 "any entity that manufacturers  
22 cigarettes anywhere that such  
23 manufacturer intends to be sold in the  
24 United States, including cigarettes  
25 that are intended to be sold in the

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1 Grand River Arbitration  
2 United States through an importer,"  
3 end quote.

4 So this information makes clear  
5 that the Oregon letter provided no  
6 basis for Mr. Williams's or  
7 Grand River's purported belief that  
8 only manufacturers that sold directly  
9 to consumers in Oregon were subject to  
10 its escrow statutes.

11 Of course, I would also just  
12 say that this language that is quoted  
13 is from the statute, and the reference  
14 to the statute itself was made in the  
15 letter. So they could have also gone  
16 to the publicly available law of the  
17 statute and read it for themselves as  
18 well.

19 Now, the second thing that  
20 Claimants point to is the dismissal of  
21 the Wisconsin lawsuit, and we  
22 discussed that earlier. But,  
23 essentially, they say that the fact  
24 that that lawsuit was dismissed  
25 demonstrated that they had an initial

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1 Grand River Arbitration  
2 good faith belief and understanding  
3 that the escrow statutes didn't apply  
4 to them.

5 But as I discussed earlier,  
6 that was dismissed on the basis that  
7 the evidence that was introduced by  
8 the attorney general's office to  
9 establish personal jurisdiction was



10 hearsay. And so contrary to their  
11 assertions, that dismissal says  
12 absolutely nothing about the  
13 applicability of the escrow statutes  
14 to cigarette manufacturers like  
15 Grand River that intend for their  
16 cigarettes to be sold in an MSA state.

17 The third thing that Claimants  
18 have pointed to is the fact that  
19 certain defendants have been dismissed  
20 from lawsuits that have been brought  
21 for noncompliance with escrow  
22 obligations. And they seem to invite  
23 the Tribunal to draw the conclusion  
24 that this somehow evidences  
25 uncertainty concerning the effect of

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1 Grand River Arbitration  
2 the escrow statutes.

3 As we explained in our  
4 objection, in several cases, the  
5 states were not able to determine  
6 which entity was the manufacturer of  
7 the cigarettes, so that they named  
8 several entities.

9 And in the case of Grand River,  
10 for example, they often name or  
11 sometimes named Native Tobacco Direct,  
12 for instance, because they couldn't  
13 tell who was the actual manufacturer  
14 of cigarettes.

15 But when they learned that  
16 Grand River was indeed the  
17 manufacturer and therefore had the  
18 responsibility under the escrow  
19 statutes to make the payments, they  
20 dismissed those other defendants from  
21 the suit, and we provided an example  
22 of such a case where Native Tobacco  
23 Direct was dismissed.

24 But contrary to the Claimants'  
25 argument, the fact that the AG's

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1 Grand River Arbitration  
2 office had difficulty identifying the  
3 manufacturer of Claimants' cigarettes,

4 does nothing to bolster their view or  
5 their supposition that the  
6 applicability of the escrow statutes  
7 was somehow uncertain.

8 And the fourth thing --

9 MR. CROOK: I'm sorry. We keep  
10 hitting you with wild things. Answer  
11 now or later.

12 But in looking at the Missouri  
13 papers, I was struck that Arnold &  
14 Porter were appearing of record for  
15 somebody. Were they appearing for the  
16 Seneca Nation who were dismissed, or  
17 who were they appearing -- do we know,  
18 now or later?

19 MS. MENAKER: I think --

20 Ms. Guymon reminds me that she thinks  
21 it was Williams & Connolly for the  
22 Seneca Nation.

23 The last thing is that  
24 Professor Anaya referred to -- which  
25 are Claimants' arguments that New York

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1 Grand River Arbitration  
2 has not enforced its escrow statute,  
3 and that somehow leaves some  
4 uncertainty regarding its application.  
5 And that, too, we disagree with  
6 because, even if a state had done  
7 nothing to enforce its law --

8 PRESIDENT NARIMAN: That is  
9 your point. Your main point is that  
10 enactment of statute is sufficient to  
11 pass liability.

12 MS. MENAKER: Right.

13 But in any case their  
14 contention that New York has somehow  
15 not enforced its law creating  
16 uncertainty is not right.

17 As we explained earlier, the  
18 model statute in each of the escrow  
19 statutes provide that escrow payments  
20 are based on units sold, and you can  
21 see here that that definition of the  
22 model statute -- I have put up the  
23 definition of the New York statute

24 which is identical.

25 And units sold are the

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1 Grand River Arbitration  
2 cigarettes. Are -- it's calculated by  
3 those cigarettes that are subject to  
4 excise taxes that are collected by the  
5 state. And New York, like some other  
6 states, does not tax -- does not  
7 impose excise taxes on cigarettes that  
8 are sold on reservation.

9 So for cigarettes that  
10 Grand River manufactures that are  
11 exported for sale to New York to be  
12 sold on the reservation -- and I say  
13 most, if not all, of their cigarettes  
14 fall into that category -- we don't  
15 know, but I believe that is what they  
16 allege -- Grand River doesn't incur an  
17 obligation to make escrow payments for  
18 those cigarettes.

19 But this is not an instance of  
20 New York not enforcing its escrow  
21 statute. It's just an instance of  
22 New York enforcing its escrow statutes  
23 in accordance with its terms.

24 PRESIDENT NARIMAN: No, that --  
25 it's at variance with the model

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1 Grand River Arbitration  
2 statute.

3 MS. MENAKER: It is not at all  
4 at variance with the model statute.  
5 The model statute provides that units  
6 sold means the number of cigarettes  
7 that are measured by excise taxes  
8 collected by the state on tax. Each  
9 state has the ability to determine its  
10 tax laws, what it's going to tax.

11 And New York, like some other  
12 states, does not tax -- does not  
13 impose an excise tax on cigarettes  
14 that are sold on an Indian  
15 reservation. And because they are not  
16 subject to the excise tax, pursuant to  
17 the model statute, the New York state

18 statute, all of the other escrow  
19 statutes, they would not be subject to  
20 escrow payments.

21 But it's just a matter of  
22 enforcing the law in accordance with  
23 its terms. It does not demonstrate  
24 that the law is not being enforced.

25 MR. ANAYA: Doesn't it

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1 Grand River Arbitration  
2 demonstrate that they are not liable  
3 in New York?

4 MS. MENAKER: It demonstrates  
5 that -- to the extent that they don't  
6 have any escrow liability for those  
7 cigarettes that are not subject to  
8 excise taxes.

9 MR. ANAYA: How about other  
10 cigarettes?

11 MS. MENAKER: Well, if they  
12 intend for cigarettes to be sold and  
13 they are sold, whether directly or  
14 indirectly, and they -- off  
15 reservation when they are subject to  
16 excise taxes, then they incur an  
17 obligation with respect to those  
18 cigarettes.

19 MR. ANAYA: Do you know whether  
20 they are selling off the reservation  
21 in New York?

22 MS. MENAKER: I do not know.  
23 That is, I guess, information --

24 MR. ANAYA: It's not an issue,  
25 but you are not relying on that.

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1 Grand River Arbitration

2 MS. MENAKER: I don't know.  
3 That's information, obviously,  
4 Claimants would have; but New York  
5 people that monitor the escrow  
6 statutes for New York -- they  
7 certainly would know where the  
8 cigarettes are, if they were being  
9 distributed, you know, off  
10 reservation, being sold off  
11 reservation -- and if they were merely

12 being sold on reservation -- Native  
13 Tobacco Direct is certainly on  
14 reservation.

15 MR. ANAYA: Let's say they are  
16 being sold off reservation. New York  
17 is electing not to collect on those  
18 cigarettes under the escrow scheme.  
19 Would there be any significance to  
20 that?

21 MS. MENAKER: There is no  
22 significance to that.

23 MR. ANAYA: Is that not a  
24 failure to enforce?

25 MS. MENAKER: But it doesn't

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1 Grand River Arbitration  
2 affect your legal liability. What if  
3 I decide not to pay taxes this year?  
4 Chance are I won't be audited next  
5 year, that they won't catch up with me  
6 for quite a while.

7 That does not change the fact  
8 that I incurred a liability; and it's,  
9 you know, I will incur penalties, too,  
10 but that I had that liability at that  
11 time to make that payment. It doesn't  
12 make the tax law anymore uncertain  
13 because no one caught me. I can't  
14 say:

15 "Well, look, no one found me."

16 MR. ANAYA: A payment to the  
17 IRS -- would you get a payment to --  
18 by the AG New York --

19 MS. MENAKER: You have to get  
20 that -- that your cigarettes weren't  
21 subject to escrow payment.

22 MR. ANAYA: Is that the  
23 position of the AG's office -- that  
24 is, that off reservation sales by this  
25 company would be subject to the

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1 Grand River Arbitration  
2 escrow?

3 MR. CROOK: I wonder whether if  
4 we could ask the factual question of  
5 whether there are off reservation

6 sales in New York.  
7 MR. VIOLI: I don't think we --  
8 all of the sales by Grand River and  
9 Native Wholesale Supply take place on  
10 Indian reservation. The FOB --  
11 PRESIDENT NARIMAN: In New  
12 York?  
13 MR. VIOLI: Everywhere.  
14 Grand River, Native Wholesale Supply  
15 do not sell anywhere outside of an  
16 Indian reservation.  
17 MR. CROOK: Mr. Violi, do you  
18 know whether Native Wholesale Supply  
19 sells to any distributors that sell in  
20 New York?  
21 PRESIDENT NARIMAN: Okay.  
22 MR. ANAYA: Off reservation.  
23 MR. VIOLI: Off reservation, I  
24 don't -- I don't -- does anybody who  
25 buys from Native Wholesale Supply sell  
0180  
1 Grand River Arbitration  
2 in New York? Do you know.  
3 MR. WILLIAMS: There are no off  
4 reservation sales in New York.  
5 PRESIDENT NARIMAN: Are you  
6 finished?  
7 MR. CROOK: So just to clarify,  
8 Mr. Violi, it is the case that you  
9 believe there are no off reservation  
10 sales of Grand River Enterprise's  
11 product in the State of New York?  
12 MR. VIOLI: Let me caution. I  
13 don't know for certain, but I do know  
14 that I believe there may have been a  
15 letter -- and I can check and  
16 supplement if you like -- a letter  
17 from the New York AG, attorney  
18 general, and -- but it was never  
19 followed up. There was no  
20 enforcement.  
21 So if I don't -- if I see a  
22 letter from the New York attorney  
23 general, that must mean they are  
24 taking some kind of position that it  
25 does apply. And if they are saying it

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1 Grand River Arbitration  
2 only applies if there is tax, then  
3 that would mean they have information  
4 that there was a tax stamp affixed to  
5 a product manufactured by Grand River.  
6 I can check again to see if that is  
7 the case. But I don't know for  
8 certain.

9 MR. CROOK: It's not a point  
10 worth pursuing now in terms of the  
11 time. I was just trying to clarify  
12 whether there was, in fact, a factual  
13 predicate for Professor Anaya's  
14 questioning. And it sounds like the  
15 factual predicate is at least in  
16 question.

17 PRESIDENT NARIMAN: No, but you  
18 made -- you made a blanket statement  
19 that there are no sales outside  
20 reservations in any of the states.

21 MR. ANAYA: By Grand River.

22 MR. VIOLI: By these Claimants.

23 PRESIDENT NARIMAN: Of course,  
24 only the Claimants here concern me.

25 MR. VIOLI: Well, the statute

0182

1 Grand River Arbitration  
2 doesn't apply that way, Mr. President.

3 If someone comes on the  
4 reservation and buys products from  
5 these Native Americans and takes it  
6 off the reservation, then the escrow  
7 statutes in the states make the Native  
8 Americans pay escrow for it.

9 PRESIDENT NARIMAN: But  
10 shouldn't that be your defense in all  
11 of those actions, that -- forget  
12 limitations now.

13 MR. VIOLI: They don't -- yeah,  
14 it is our defense, but they rejected  
15 it, and they say, if you make a  
16 cigarette in -- and I have a  
17 manufacturer in India -- if you make a  
18 cigarette in India, in Singapore, in  
19 Canada, and it ends up being sold in

20 Tennessee, Oklahoma, Oregon, as the  
21 case -- none of these Claimants sold  
22 in Oregon, have nothing to do with  
23 Oregon -- if you manufacture a  
24 cigarette and it ends up in that  
25 state, you are responsible for escrow.

0183

1 Grand River Arbitration

2 PRESIDENT NARIMAN: But is your  
3 cigarette package to be sold only on  
4 reservation?

5 MR. VIOLI: I don't think so,  
6 but there is packaging for  
7 on-reservation sales. But it doesn't  
8 say --

9 PRESIDENT NARIMAN: No, no --  
10 because that would fix the excise part  
11 of it. That means it's subject --

12 MR. VIOLI: Yes, in Oklahoma,  
13 yes. In Oklahoma, there is a Native  
14 American tax stamp that is affixed.  
15 It's a payment in lieu of a tax. We  
16 will get to it. But Oklahoma still  
17 requires escrow even for cigarettes  
18 sold on reservation having the tribal  
19 stamp.

20 When I went to the Oklahoma  
21 attorney general, he said it doesn't  
22 matter; it doesn't matter. They made  
23 us pay escrow.

24 So to answer your question,  
25 even if it's sold on reservation, even

0184

1 Grand River Arbitration

2 if it has a tribal stamp, there are  
3 states that still make you pay escrow.

4 MR. CROOK: Mr. Chairman, as I  
5 recall, we were on the question of  
6 whether there was variability of  
7 enforcement, and I --

8 MR. ANAYA: I apologize for  
9 getting too far afield.

10 MR. CROOK: -- and a reasonable  
11 argument on Claimants' part. And I'd  
12 like to hear the continuation on that  
13 point.



14 MR. ANAYA: I was just trying  
15 to get at how New York might be doing  
16 something that might be different from  
17 others that might create some question  
18 of ambiguity.

19 MS. MENAKER: It creates no  
20 ambiguity insofar as the enforcement  
21 of the escrow statutes are concerned  
22 in accordance with their terms.

23 Now, I don't know what the case  
24 is with Oklahoma, but, if Oklahoma  
25 chooses to subject on-reservation

0185

1 Grand River Arbitration  
2 sales of cigarettes to excise taxes,  
3 then, pursuant to the model statute  
4 and pursuant to the Oklahoma escrow  
5 statutes, those state's sales would be  
6 subject to escrow requirements.

7 That, again, is not a  
8 variability. That is clear from the  
9 MSA itself, from the language in each  
10 and every one of the escrow statutes,  
11 that your escrow obligation only  
12 attaches to sales of cigarettes that  
13 are subject to excise taxes; and how  
14 states choose which cigarettes to  
15 tax -- to impose the excise tax upon  
16 and which not to may vary.

17 But that is not spoken to in  
18 terms of the escrow statutes.  
19 New York is enforcing its escrow  
20 statutes in accordance with its terms  
21 because it does not tax on-reservation  
22 sales of cigarettes.

23 It does not impose escrow  
24 obligations on them. If other states  
25 do it differently, they do it

0186

1 Grand River Arbitration  
2 differently. They all link to the  
3 excise tax, which is very clear; and  
4 the model statute is clear in each one  
5 of those escrow statutes.

6 MR. ANAYA: It would be clear  
7 if the states -- if it were absolutely

8 clear if the states could choose  
9 whether or not to tax on-reservation  
10 sales. Is that clear, that states can  
11 do that? Or is there some ambiguity  
12 of that under US law?

13 MS. MENAKER: I mean, there is  
14 no challenge to state excise tax laws  
15 here. I mean, that is not what we are  
16 talking about.

17 So we have to take the excise  
18 tax laws as they exist, and I am not  
19 an expert in that field; nor am I an  
20 expert in Indian law and the taxation  
21 powers of the state, you know,  
22 vis-a-vis the reservation. So I don't  
23 know.

24 MR. ANAYA: It was unclear.  
25 Say some states took the position that

0187

1 Grand River Arbitration  
2 they could under federal law tax  
3 on-reservation sales, and other states  
4 say, "Maybe we can't." That was a  
5 legal ambiguity itself.

6 MS. MENAKER: But that doesn't  
7 create -- that doesn't create legal  
8 ambiguity as to the validity of a  
9 state's excise tax. It does not  
10 create any legal ambiguity with  
11 respect to the escrow statute  
12 obligation, which is tied to the  
13 excise tax laws as they are on their  
14 books, as they exist at that time.

15 So the fact that, you know,  
16 Claimants don't like one state's  
17 excise tax laws, well, they can  
18 challenge that in court if they want.  
19 But that doesn't create any legal  
20 uncertainty with respect to their  
21 escrow obligation, unless and until  
22 one of those laws is overturned, or is  
23 invalid for some reason.

24 And as far as we know, they are  
25 not; but that is a whole different

0188

1 Grand River Arbitration

2 issue. That is just not something  
3 that is implicated by this here.

4 As far as Mr. Violi's statement  
5 regarding, again, sales in Oregon, I  
6 would just, again, point you to the  
7 provision in the model statute which  
8 is, again, in every single state's  
9 escrow statute, that shows -- if you  
10 go to slide 23, please -- that shows  
11 that the obligation to pay into escrow  
12 statutes is imposed on tobacco product  
13 manufacturers, again, whether they  
14 sell directly or through a  
15 distributor, retail, or similar  
16 intermediary, or intermediaries.

17 So the fact that they did not  
18 sell to a consumer in Oregon is just  
19 immaterial under the definition that  
20 is in the MSA, that is in each and  
21 every one of the escrow statutes. If  
22 their cigarette are sold in an MSA  
23 state, that -- and those sales are  
24 subject to excise taxes, the  
25 obligation to make those escrow

0189

1 Grand River Arbitration  
2 payments is placed on the  
3 manufacturer.

4 PRESIDENT NARIMAN: I want to  
5 know what is the case of the  
6 United States. Forget what the states  
7 may say. What is the state of the  
8 respondent in the present case?

9 MR. CROOK: Sorry, with respect  
10 to what, Mr. Chairman?

11 PRESIDENT NARIMAN: I have -- I  
12 am asking -- just one minute.

13 With regard to the obligation  
14 of the case of the United States, with  
15 regard to the escrow statutes, do they  
16 apply to sales on reservation,  
17 whatever they are? Do they apply, or  
18 do they not apply?

19 MS. MENAKER: I think it would  
20 depend upon whether the state in  
21 question exempts those cigarette sales

22 from excise taxes.

23 PRESIDENT NARIMAN: Only if  
24 they do exempt from excise taxes, then  
25 they would not be.

0190

1 Grand River Arbitration

2 MS. MENAKER: That's right,  
3 because, if you look at the obligation  
4 to make the escrow payments, it's only  
5 an obligation on what they call units  
6 sold. And the definition of "units  
7 sold" is tied to those cigarettes for  
8 which there are excise taxes paid. So  
9 like I said, some states like New York  
10 do not impose excise taxes on sales of  
11 cigarette that are made in that  
12 reservation.

13 PRESIDENT NARIMAN: In some  
14 states. Is that the only state that  
15 does not exempt, or are there other  
16 states, because there are 47 of them?

17 MR. VIOLI: To the extent we  
18 know, Nebraska, Mr. President. If you  
19 would like to know, Washington --  
20 state of Washington. This is to the  
21 extent I know so far.

22 MS. MENAKER: I believe --

23 PRESIDENT NARIMAN: That's not  
24 enough. It must be all of the 46  
25 states.

0191

1 Grand River Arbitration

2 MS. MENAKER: Well, no, no, it  
3 does not, because it does not create  
4 any uncertainty with respect to the  
5 regime, because here the regime is  
6 very clear, that you have an escrow  
7 obligation if your cigarettes are sold  
8 in an MSA state and if those  
9 cigarettes are subject to excise  
10 taxes.

11 MR. ANAYA: On its face, the  
12 regime is clear. Let's assume that.

13 But there still is the question  
14 about whether or not under federal  
15 law, outside of the statute, the

16 statute applies on any reservation.  
17 MS. MENAKER: The excise tax  
18 statute, is that what you are talking  
19 about?  
20 MR. ANAYA: The statute, the  
21 operation of the statute.  
22 MS. MENAKER: The escrow  
23 statute or excise tax law?  
24 MR. ANAYA: The escrow statute  
25 of the states.

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1 Grand River Arbitration  
2 MS. MENAKER: I don't believe  
3 that that is -- that -- I don't  
4 think -- I mean, if you have a law  
5 that is enforced, that imposes a legal  
6 obligation on you.  
7 MR. ANAYA: I understand.  
8 MS. MENAKER: You have that  
9 obligation. If you want to challenge  
10 the law for, you know,  
11 unconstitutionality, there are  
12 challenges to the MSA right now.  
13 There are challenges to escrow  
14 statutes based on, you know, antitrust  
15 issues, for instance.  
16 That does not create  
17 uncertainty as to your legal  
18 obligation or as to your liability, so  
19 to speak.  
20 I mean, you don't wait until  
21 that suit, you know, or hope that  
22 someone else might bring a suit and  
23 wait until that is resolved. It does  
24 not limit your liability up until that  
25 time. It does not give you a free

0193

1 Grand River Arbitration  
2 pass to ignore the law because you  
3 think it might be challenged  
4 successfully later, is what I am  
5 saying.  
6 If I think that a tax law is  
7 somehow unconstitutional, if I can go  
8 to a court, and if I can gain an  
9 injunction or something like that,

10 that's one thing. If not, I need to  
11 comply with that law. And if I  
12 challenge it, my legal liability may  
13 change later. It doesn't create  
14 uncertainty, certainly with respect to  
15 the enforcement or the application.

16 I don't think that by merely  
17 stating that they don't like the  
18 escrow statutes or they think that  
19 they somehow breach, whether it's  
20 international law or whether it's  
21 federal law, that somehow that that  
22 tolls the limitations period because  
23 you can't say that they suffered a  
24 loss under that law until all of their  
25 challenges were resolved.

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1 Grand River Arbitration

2 I mean, that kind of stands the  
3 limitations period on its head, right.  
4 It would never start to run until -- I  
5 mean, until your challenge was --

6 PRESIDENT NARIMAN: The way I  
7 look it is, through the escrow  
8 statutes -- on their own, the escrow  
9 statutes themselves, do they exclude  
10 sales on reservation? According to  
11 your case, do they exclude -- the  
12 escrow statutes, which are enacted in  
13 all of the 46 states, as a matter of  
14 law, as a matter of constitutional  
15 law, as a matter of federal law, are  
16 they -- are they excluded?

17 That means they don't extend to  
18 tribal reservations?

19 MS. MENAKER: Again, that's  
20 not --

21 PRESIDENT NARIMAN: That's  
22 nobody's case at the moment. But, I  
23 mean, when you are putting it in this  
24 form, and since it's mentioned that  
25 sales on reservation -- everything

0195

1 Grand River Arbitration

2 that is sold on the reservation,  
3 because it may be exempt, may not be

4 exempt -- are they exempt?  
5 MR. CROOK: Mr. Violi -- Mr.  
6 Chairman, perhaps we can ask Mr. Violi  
7 to help us here. He's familiar with  
8 the situation at Grand River.

9 Are you -- do you know, sir,  
10 whether you are now engaged in  
11 litigation with any state on the  
12 ground that it unlawfully applies the  
13 escrow statutes to on-reservation  
14 sales? Are we -- is your present  
15 litigation solely dealing with --

16 MR. VIOLI: No -- yes. We  
17 raised what is called the Indian  
18 Commerce Clause claim for the grounds  
19 that I mentioned.

20 MR. CROOK: Right. I  
21 understand that. My question  
22 precisely is:

23 Are any states now applying the  
24 escrow statutes with respect to  
25 on-reservation sales?

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1 Grand River Arbitration

2 MR. VIOLI: Yes. The State of  
3 Oklahoma, I know for certain, is,  
4 because I sat across the table from  
5 the attorney general. And I said:

6 "You do not affix the state  
7 excise tax stamp on these cigarettes.  
8 How can you charge" --

9 MR. CROOK: Okay. So we know  
10 one state.

11 MR. VIOLI: Yes, and they said  
12 it doesn't matter. It's a unit sold.  
13 Even though it says that, it doesn't  
14 matter. It was sold in this state.

15 The excise tax stamp collection  
16 doesn't matter. So I know that for  
17 certain in Oklahoma. I know the  
18 Squatson Tribe in Washington had some  
19 litigation, and that was resolved.

20 MR. CROOK: All right. You  
21 gave us an exhibit on that.

22 MR. VIOLI: Yes.

23 MR. CROOK: Right.

24 MR. VIOLI: So you have that.  
25 There was litigation there, and it was  
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1 Grand River Arbitration  
2 resolved. It shouldn't apply.

3 MR. ANAYA: Did not apply.

4 MR. VIOLI: Well, the  
5 attorney -- see, they don't -- they  
6 won't come out and say, everyone  
7 together, "Yes, it does not apply."  
8 They don't want to take that position.

9 MR. ANAYA: No, but in  
10 Washington --

11 MR. VIOLI: They did. In  
12 Washington, the attorney general of  
13 Washington entered into an agreement  
14 that said:

15 "We won't charge you escrow for  
16 on-reservation sales."

17 In New York, they haven't thus  
18 far, although the attorney general is  
19 taking a different position now as of  
20 two weeks ago. So --

21 MR. CROOK: Well, you have  
22 answered the question. There is at  
23 least one state where escrow laws are  
24 being applied with respect to sales on  
25 reservation.

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1 Grand River Arbitration

2 MR. VIOLI: Yes.

3 MR. CROOK: Okay.

4 MR. CLODFELTER: He says that  
5 that here at this hearing, but none of  
6 this is on the record.

7 PRESIDENT NARIMAN: It's  
8 nobody's case on the record that -- it  
9 does not apply in this record.

10 In fact, we are really straying  
11 from the point. The point is whether  
12 they knew or ought to have known  
13 before March 2001. They don't say  
14 that they did not know within the  
15 three-year limitation period.

16 MR. CLODFELTER: They are  
17 saying, "We were uncertain."



18           And we are saying, none of the  
19 examples of uncertainty hold water.  
20           PRESIDENT NARIMAN: Okay.  
21           MS. MENAKER: Right, just in  
22 response to something that Mr. Violi  
23 said with respect to the  
24 Squatson Tribe, when he said that, you  
25 know, the issue was resolved there, I  
0199

1           Grand River Arbitration  
2 would note that some of their  
3 cigarettes are, indeed, subject to  
4 escrow requirements, and they  
5 recognize that fact.  
6           And if you look closely at the  
7 exhibit which Claimants put in with  
8 respect to the Squatson Tribe, you  
9 will see that they acknowledge they  
10 are making escrow payments. They are  
11 subject to the escrow statutes with  
12 respect to certain sales of their  
13 cigarettes.

14           And we happen to know that they  
15 are actually contemplating becoming an  
16 SPM, not a grandfathered SPM --  
17 because it's too late -- but an SPM to  
18 the MSA.

19           So they obviously recognize  
20 that they have incurred and will  
21 continue to incur obligations under  
22 the escrow statutes.

23           But the main point really is  
24 that -- the fact that there may be  
25 variation among states with respect to

0200  
1           Grand River Arbitration  
2 how they implement their excise taxes,  
3 whether they tax on sale -- sales of  
4 cigarettes on reservation or not, does  
5 not create uncertainty with respect to  
6 the escrow statutes themselves.

7           They are under an obligation to  
8 find out what the law is, to know the  
9 law, and to find out what the excise  
10 tax law is in every state in which  
11 their cigarettes are being sold, in

12 which they intend for their cigarettes  
13 to be imported into the stream of  
14 commerce.

15 So there that uncertainty or  
16 variation among the state excise tax  
17 laws doesn't create uncertainty with  
18 respect to the escrow statute regime.  
19 And, certainly, there has been no  
20 argument, nor could there be one, that  
21 there is any uncertainty with respect  
22 to off-reservation sales. And we know  
23 that Grand River's cigarette are  
24 imported into the United States for  
25 off-reservation sales as well.

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1 Grand River Arbitration

2 They have Tobacoville, which  
3 they say is their exclusive  
4 distributor for off-reservation sales.  
5 So, certainly, the sales that  
6 Tobacoville is making are going to be  
7 subject to escrow statute liability,  
8 and there is no uncertainty in that  
9 respect either.

10 Now, Claimants also reference  
11 the penalties that they have suffered  
12 as a result of non-compliance with the  
13 escrow laws. And as they acknowledge  
14 in their notice of arbitration, they  
15 state, and I quote:

16 "If an NPM does not make the  
17 payment required under a state'S  
18 escrow statutes, the NPM is subject to  
19 civil penalties and its products" -- I  
20 don't have a slide on this; I'm  
21 sorry -- "its products will be  
22 prohibited from being sold in the  
23 state."

24 Now, without exception, the  
25 model statute provides that a

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1 Grand River Arbitration

2 manufacturer can be enjoined from  
3 selling cigarette in an MSA state if  
4 it fails to make required payments for  
5 two years.

6           And so the penalties that  
7 Claimants incurred for failing to make  
8 timely payments into escrow do not  
9 postpone the date that Claimants first  
10 incurred a loss or damage as a result  
11 of the escrow statutes.

12           And, similarly, the enforcement  
13 of the escrow obligations undertaken  
14 pursuant to the complementary  
15 legislation also do not postpone the  
16 date that Claimants first incurred  
17 loss or damage arising out of the  
18 escrow statutes.

19           PRESIDENT NARIMAN: What is  
20 this complementary legislation?

21           MS. MENAKER: Well, the  
22 complementary legislation prohibits  
23 the stamping and sale of an NPM  
24 cigarette if the NPM is not in  
25 compliance with its escrow obligation,

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1           Grand River Arbitration  
2 but it imposes no new payment  
3 obligations on cigarette  
4 manufacturers.

5           Their obligations remain  
6 exactly the same; and a measure that  
7 causes no loss or damage to a claimant  
8 can't serve as the basis for a claim  
9 and can't postpone the date on which  
10 the Claimants first incurred a loss or  
11 damage arising out of an alleged  
12 breach.

13           And if you will indulge me for  
14 just a new minutes, I want to discuss  
15 the Methanex case, because the  
16 Tribunal in that case was faced with a  
17 somewhat similar situation, albeit in  
18 a different procedural context, and I  
19 think analogous to this case. But  
20 it -- I think it may take me a few  
21 minutes to give you the relevant  
22 background to place it in context.

23           The Claimants in that case  
24 produced methanol, which, among other  
25 things, is an ingredient in MTBE and

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1 Grand River Arbitration

2 is a gasoline additive.

3 And Claimants challenge

4 regulations that ban the use of MTBE

5 in California gasoline. Those

6 regulations also conditionally ban the

7 use of all other oxygenates, other

8 than ethanol. And that's ethanol, not

9 methanol.

10 Now, the Claimants later sought

11 to amend the claim to challenge the

12 amended regulations, which kind of

13 changed the effective date of the

14 original regulation, but what for --

15 what was important for these purposes,

16 is that the amended regulations

17 identified a list of oxygenates

18 including methanol, that were

19 conditionally banned from use in

20 gasoline.

21 So I think there were two

22 analogies to be drawn here.

23 The first thing is the Tribunal

24 denied the Claimants' leave to amend

25 and found that, even if it had

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1 Grand River Arbitration

2 permitted it to amend its claim, it

3 would not have had jurisdiction over

4 the amended claim.

5 And it found this because the

6 Claimants could not -- have not and

7 could not credibly allege that it had

8 suffered any additional or different

9 loss or damage as a result of the

10 amendment to the regulations.

11 The original regulations

12 conditionally banned all oxygenates

13 other than ethanol. The amended

14 regulations merely listed a number of

15 oxygenates that were conditionally

16 banned; so but the effect on the

17 Claimants was unchanged.

18 All right. So nothing changes

19 as far as the Claimants are concerned.

20 The effect of the regulation was  
21 exactly the same. And the same is  
22 true here, because the complementary  
23 legislation imposes no new payment  
24 obligation on Claimants or on  
25 cigarette manufacturers.

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1 Grand River Arbitration

2 Their obligations under the  
3 escrow statutes remain unchanged.

4 MR. CROOK: Let me ask you two  
5 questions, Ms. Menaker. First, we  
6 have the theological question of  
7 whether this is complementary  
8 legislation or contraband laws.

9 Does it matter what  
10 nomenclature the Tribunal uses? And  
11 maybe clear that up for us.

12 Secondly, I mean, I assume  
13 Claimants would respond to the  
14 argument you just made, essentially:

15 "Hey, wait a minute. In fact,  
16 we are in the real world in a much  
17 worse position because we can no  
18 longer sell cigarettes in these  
19 markets, and that, while perhaps our  
20 antecedent legal responsibilities are  
21 the same, the sanctions to which we  
22 are now subject are much greater."

23 Now, is that the Methanex case,  
24 or is that different from the Methanex  
25 case?

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1 Grand River Arbitration

2 MS. MENAKER: It is the  
3 Methanex case, I believe, for two  
4 reasons. First, the sanctions are not  
5 much greater. It is -- what has  
6 changed is the enforce mechanism. The  
7 sanctions are the same that exist  
8 under, you know, the model statutes  
9 and in each escrow statute, which is  
10 that your cigarettes can be banned if  
11 you don't comply with the obligation  
12 to make payments into escrow.

13 What the complementary

14 legislation did is it made it easier  
15 for the states to identify those NPMs  
16 that were in breach of their legal  
17 obligation.

18 MR. CROOK: So under the escrow  
19 statutes there, if you did not make  
20 the escrow payments, you were not  
21 legally authorized to sell in that  
22 jurisdiction.

23 MS. MENAKER: After -- yes --  
24 if you were in breach for two years, I  
25 believe it was.

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1 Grand River Arbitration

2 MR. CROOK: A period of time.

3 So in that sense the  
4 complementary legislation, contraband  
5 law, whatever you call it, did not  
6 change that underlying prohibition.  
7 It just simply changed the mechanism  
8 by which it was enforced.

9 MS. MENAKER: I changed -- it  
10 did two things. It made it easier for  
11 the states to recognize when the NPM  
12 was not complying with its escrow  
13 obligation. But that is not a new  
14 additional obligation on the cigarette  
15 manufacturer because you don't have  
16 any --

17 MR. CROOK: Let's focus on the  
18 issues --

19 MS. MENAKER: And then the  
20 other thing that it did is it  
21 changed -- under the complementary  
22 legislation, the attorney general,  
23 rather than a court, can ban the  
24 cigarettes for sale for  
25 non-compliance, or it can seize

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1 Grand River Arbitration

2 contraband cigarettes. But there is  
3 no justification or rationale for  
4 Claimants' willingness to recognize an  
5 obligation when it's imposed by the  
6 judiciary, but to fail to recognize  
7 that same obligation when it's imposed

8 by the executive or the legislative  
9 branch.

10 So the complementary  
11 legislation, essentially, it changed  
12 the mode of enforcement of a  
13 preexisting obligation. So the  
14 penalty, which was the ban on the sale  
15 of cigarette, was the same under the  
16 escrow statutes and under the  
17 complementary legislation.

18 And the only difference is  
19 that, under the former, the  
20 obligations were enforced by a court,  
21 while, under the latter, they are  
22 enforced by the executive branch.

23 And Claimants concede in their  
24 response that the complementary  
25 legislation merely made quote-unquote

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1 Grand River Arbitration  
2 more immediate the harm that was  
3 already imposed on them by the escrow  
4 statutes. But it did not impose any  
5 new obligations on them.

6 And so any loss that they  
7 incurred as a result of their escrow  
8 payment obligations were incurred  
9 first when they became legally  
10 obligated to make the payment under  
11 those statutes and not when they  
12 incurred penalties for noncompliance  
13 or when enforcement actions were taken  
14 against them under either the escrow  
15 statutes or under the complementary  
16 legislation.

17 PRESIDENT NARIMAN: Is that  
18 complementary legislation in all --  
19 what is it -- the states?

20 MS. MENAKER: No.

21 PRESIDENT NARIMAN: Only some  
22 states have complementary legislation.

23 MS. MENAKER: Yes.

24 PRESIDENT NARIMAN: And the  
25 others.

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1 Grand River Arbitration

2 MS. MENAKER: The others are  
3 still -- it's the same still  
4 obligation, so they are just  
5 continuing to just enforce their  
6 obligations under the escrow statutes  
7 as they have been doing.

8 MR. VIOLI: I think it has been  
9 enforced in all states now.

10 MS. MENAKER: I have just been  
11 informed that I think it's up to about  
12 45 that have some sort of  
13 complementary legislation. Some  
14 states have essentially done the same  
15 steering through different means, so  
16 it may not be the exact complementary  
17 legislation, but essentially  
18 accomplishes the same purpose.

19 But, again, the point is that  
20 it doesn't impose any different  
21 obligation. The penalties are still  
22 the same, too. It's just the mode of  
23 enforcement and whether your legal  
24 obligation is being enforced initially  
25 by the executive branch or whether

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1 Grand River Arbitration  
2 it's enforced through the judicial  
3 branch. It doesn't make any  
4 difference as far as identifying the  
5 time at which you first incurred loss  
6 or damage as a result of that legal  
7 liability.

8 PRESIDENT NARIMAN: Right.

9 MS. MENAKER: Again, to sum on  
10 the Methanex case, the Tribunal there  
11 didn't permit the Claimants to  
12 basically get around what was a fatal  
13 jurisdictional defect in their claim  
14 by focusing on an additional measure,  
15 the amendments in that case to the  
16 regulation.

17 When -- the amendments in a  
18 superficial manner appear to correct  
19 the defect, but under scrutiny it was  
20 clear that it didn't. And in that  
21 respect -- again, here, the Claimants'



22 claim is fatally defective because  
23 it's time barred, and Claimants can't  
24 correct this defect by identifying the  
25 complementary legislation which is a

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1 Grand River Arbitration  
2 later in time measure because the  
3 measure did not and cannot be deemed  
4 the cause of any different loss or  
5 harm.

6 And so their challenge to the  
7 complementary legislation can't make  
8 their claims timely because it cannot  
9 change the date on which they first  
10 incurred a loss or damage arising out  
11 the breaches which they allege.

12 Now, there are only two more  
13 point that I was going to make today.  
14 One is to discuss briefly Claimants'  
15 challenge to the allocable share  
16 amendments and then to discuss their  
17 challenges to the Michigan and  
18 Minnesota tax assessment laws.

19 Now, Claimants also try to get  
20 around the time limitations periods by  
21 challenging the allocable share  
22 amendments. Again, what is necessary  
23 is not to merely identify a  
24 later-in-time measure; but you have to  
25 that show a breach in the loss arising

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1 Grand River Arbitration  
2 therefrom first arose within or  
3 outside of the limitations -- within  
4 the limitation period. And so let me  
5 turn to that.

6 And let me just say, as a  
7 preliminary matter, that the Tribunal,  
8 as you well know, you gave clear  
9 instructions at the first procedural  
10 meeting that the Claimants should  
11 identify with particularity and  
12 specificity the measures that they  
13 were challenging and to set forth the  
14 facts in support thereof in their  
15 particularized statement of claim.

16 And, yet, the allocable share  
17 amendments were mentioned by the  
18 Claimants for the very first time in  
19 their response, and they were only  
20 identified as a measure that breached  
21 the NAFTA in their rejoinder.

22 And there is no mention of them  
23 at all in their notice of  
24 arbitration -- notice of intent, their  
25 notice of arbitration, or in their

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1 Grand River Arbitration  
2 particularized statement of claim.

3 So for this reason alone, their  
4 claims challenging these amendments  
5 should be dismissed. But I will go on  
6 to discuss them to the extent that the  
7 Tribunal considers them,  
8 notwithstanding their untimeliness.

9 PRESIDENT NARIMAN: What do you  
10 mean by challenges to the amendments?

11 MS. MENAKER: That they, for  
12 the first time in their rejoinder,  
13 they actually list the allocable share  
14 amendment as a measure that breaches  
15 the NAFTA.

16 So, now, they have said:

17 "Look, those amendments were  
18 only made recently, and therefore our  
19 claim is timely."

20 And in our submission, the  
21 Tribunal ought not to even consider  
22 that claim because it was not properly  
23 brought before you. It is not  
24 properly before you.

25 But in the event that you do

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1 Grand River Arbitration  
2 consider it, I feel compelled to  
3 address it; so I was going to do that  
4 now, and to explain why, even if you  
5 do consider that claim, it should be  
6 dismissed because it does not make  
7 their claim timely.

8 So as I have mentioned before,  
9 by virtue of Claimants' NPM status and

10 the mandate that states impose escrow  
11 requirements on NPMs, Grand River  
12 suffered a loss by becoming legally  
13 obligated to make escrow payments.

14 According to Claimants the  
15 provision at issue, which is the  
16 allocable share provision, permits  
17 them to mitigate the damages that they  
18 incurred under the MSA regime.

19 PRESIDENT NARIMAN: This is  
20 done by all 46 states.

21 MS. MENAKER: I do not believe  
22 so. No. No. I don't have that  
23 count, but not all of them.

24 MR. LIEBLICH: Practically all,  
25 but not all.

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1 Grand River Arbitration

2 MR. VIOLI: 44 on the last  
3 count.

4 PRESIDENT NARIMAN: Thank you.

5 MS. MENAKER: Now, Claimants,  
6 like I mention, their response at page  
7 13, they say that the allocable share  
8 provision -- this is the provision  
9 that was in the original escrow  
10 statute -- allowed them to mitigate  
11 their damages that they incurred under  
12 the MSA regime, because, under that  
13 provision, they were able to secure a  
14 release of some of the funds that they  
15 were required to place in escrow.

16 And Claimants say that this  
17 allowed them to better compete with  
18 the SPMs, especially those that had  
19 the grandfathered SPM status.

20 But, now, more recently, the  
21 states have amended their escrow  
22 statutes to close a loophole that had  
23 permitted the NPMs to obtain a release  
24 of some of the amounts that they had  
25 already made into escrow.

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1 Grand River Arbitration

2 So the amendments are intended  
3 to close a loophole that had allowed

4 the NPMs to obtain a release of some  
5 of the amounts that they were required  
6 to place into escrow by consolidating  
7 their sales in only a few states.

8 So after the amendments were  
9 enacted, Claimants were under the same  
10 obligations to make payments into  
11 escrow. But they lost the opportunity  
12 to mitigate these losses by obtaining  
13 the release of some of the required  
14 payments.

15 And the amendments according to  
16 Claimants made it more difficult for  
17 them to then compete with the  
18 grandfathered SPMs.

19 But Claimants first suffered a  
20 loss or damage by having to make the  
21 payments for which the grandfathered  
22 SPMs were exempt. That the amendments  
23 were adopted after March 12, 2001  
24 doesn't changes the fact that the  
25 Claimants first incurred losses as a

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1 Grand River Arbitration  
2 result of the alleged breaches well  
3 before that date. And that the  
4 allocable share amendments may change  
5 the effect -- or may affect the amount  
6 of the loss is immaterial.

7 And, again, the Monduff case,  
8 which we cited in our written  
9 submissions, is instructive on this  
10 point. And in that case the Tribunal  
11 rejected Claimants' argument that it  
12 couldn't be certain that it had  
13 suffered a loss until the court  
14 proceedings were concluded and the  
15 Claimants knew if and how much it had  
16 recovered for the damage that it had  
17 allegedly sustained.

18 But the Monduff Tribunal  
19 correctly determined that the loss at  
20 issue predated the court proceeding  
21 and that the Claimants had first  
22 suffered a loss before it filed that  
23 proceeding, even if the quantification

24 of the loss was uncertain at that  
25 time.

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1 Grand River Arbitration

2 And earlier, Mr. President, I  
3 know you referred to the travaux and  
4 asked if there was anything in the  
5 travaux that sheds light on the issue  
6 of when someone first incurred a loss  
7 or damage. And although this is  
8 not -- what I am referring to is not  
9 the travaux, I would direct your  
10 attention to Canada's statement on  
11 implementation, which is a document  
12 that was -- that Canada submitted to  
13 its legislature signed concurrently  
14 with the implementation of the NAFTA.

15 And in that statement of  
16 implementation, it says that, under  
17 article 1116:

18 "A claim may be submitted if an  
19 investor has incurred a loss or damage  
20 as a result of the breach."

21 So, again, it doesn't say all  
22 of the loss or damage. It just talks  
23 about a loss or damage, which I think  
24 also confirms that -- it just  
25 emphasizes that what we are looking at

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1 Grand River Arbitration

2 here is we are looking at when they  
3 first incurred a loss or damage, one  
4 loss or damage, that the full extent  
5 of your loss and damage need not be  
6 known in order to trigger the  
7 beginning of the limitations period.

8 And so, here, the claim is  
9 Claimants first suffered a loss or  
10 damage as soon as they incurred the  
11 legal obligation to make the escrow  
12 payments. Now, the fact that  
13 penalties were later assessed in  
14 accordance with the escrow statutes  
15 doesn't change that fact.

16 And the fact that their  
17 cigarettes were banned from sale

18 either pursuant to court judgments  
19 that were rendered under the escrow  
20 statutes or pursuant to the  
21 complementary legislation, when they  
22 failed to comply with their escrow  
23 obligations, also doesn't change the  
24 fact that they first incurred a loss  
25 or damage as a result of the escrow

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1 Grand River Arbitration  
2 requirements earlier.

3 And, similarly, the fact that  
4 the amounts that were released from  
5 escrow pursuant to the allocable share  
6 provision, the fact that that changed  
7 over time does not change the fact  
8 that Claimants first incurred a loss  
9 or damage as a result of having to  
10 make escrow payments imposed by the  
11 MSA regime well before March 12, 2001.

12 PRESIDENT NARIMAN: Is it your  
13 case that they could now make a claim  
14 apart from this claim, based on the  
15 allocable share provision amendment?

16 MS. MENAKER: No, they could  
17 not in our view, and that is because,  
18 if they would now bring a claim for  
19 their loss or damage arising out of  
20 the allocable share amendments, we  
21 would say that that is time barred  
22 because they first incurred a loss or  
23 damage arising out of the breaches  
24 that they would be alleging as a  
25 result of their legal liability to

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1 Grand River Arbitration  
2 make payments into escrow, which arose  
3 more than three years before they had  
4 submitted that claim to arbitration;  
5 that all the allocable share  
6 amendments did was to change the  
7 amounts that were released from  
8 escrow.

9 And, thereby, it may have  
10 exacerbated their loss. It may have  
11 increased their loss. But you first

12 incur a loss or damage before the full  
13 extent of your damage is known. And  
14 the Monduff Tribunal addresses this  
15 point head on because there they found  
16 that some of the claims were time  
17 barred. And that was because, even  
18 though the Claimants did not know the  
19 full extent of its losses until a  
20 later in point time, it knew that it  
21 had first incurred a loss or damage  
22 that arose out of the alleged breach  
23 much earlier in time.

24 PRESIDENT NARIMAN: But 1116  
25 doesn't that first. It says "first

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1 Grand River Arbitration  
2 acquired." That means knowledge first  
3 acquired, the date on which you first  
4 acquired knowledge of the alleged  
5 breach, not the investor has first  
6 incurred loss or damage.

7 MR. CROOK: The first relates  
8 to the acquisition. Am I correct that  
9 the first relates to acquisition of  
10 knowledge. But there is -- your  
11 position is essentially that any  
12 damage, even if it may be  
13 inconsequential in amount, is  
14 sufficient to trigger the running of  
15 the three-year period.

16 MS. MENAKER: That's correct.

17 MR. CROOK: That in order for  
18 you to prevail all that is required is  
19 that you show that the Claimants  
20 suffered any damage and had or either  
21 had the requisite knowledge or should  
22 have had the requisite knowledge. If  
23 those requirements are met, then the  
24 door slams down on all claims.

25 Is that your position?

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1 Grand River Arbitration

2 MS. MENAKER: That's correct,  
3 that you need to have incurred a loss  
4 or damage arising from the breach at  
5 that time and have knowledge thereof,

6 instructive or actual. And at that  
7 time the limitations period begins.  
8 And it is not extended by mere virtue  
9 of the fact that your damages  
10 accumulate over time.

11 MR. CROOK: So what was  
12 different in the Monduff case is that  
13 you had subsequent -- events  
14 subsequent to the three-year bar; you  
15 had a new event happening. And that  
16 Tribunal said you could claim with  
17 respect to that, but you couldn't  
18 claim with respect to that which went  
19 before.

20 MS. MENAKER: Absolutely,  
21 absolutely.

22 PRESIDENT NARIMAN: Could they  
23 now not claim -- make a claim, because  
24 article says an investor may not make  
25 a claim -- a claim has been made with  
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1 Grand River Arbitration  
2 regard to various aspects that have  
3 taken place, the MSA, the statutes, et  
4 cetera. But there is no claim made  
5 with regard to this aspect.

6 MS. MENAKER: But it arises out  
7 of the same breach. You see the  
8 difference different in the Monduff  
9 case, Monduff complained about conduct  
10 of -- it was the Boston Redevelopment  
11 Authority, basically a city agency --  
12 and they complained -- they had an  
13 option to purchase a certain amount.

14 And they complained that the  
15 city or the BRA breached the NAFTA by  
16 not -- by doing -- engaging in sorts  
17 of conduct that didn't allow them to  
18 exercise on that option.

19 And then they also claimed that  
20 they had tortuously interfered with  
21 their contractual relations with other  
22 parties so that breach -- let us  
23 say -- the conduct occurred at day  
24 one.

25 Then what happened is Monduff



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1 Grand River Arbitration  
2 sued in court. It was going through  
3 the court process to see if it could  
4 recover on this loss. And then at  
5 some later point in time, it brought  
6 the NAFTA claim. The Tribunal found  
7 that the earlier in time events, all  
8 of the conduct that was by the city,  
9 was too early in time. It was out of  
10 time.

11 Some of it even predated the  
12 entry into force of the treaty. They  
13 said:

14 "No, you can't bring a claim  
15 with respect to any of that conduct."

16 They said: "But, look, we  
17 don't know that we suffered a loss  
18 until we" -- "we, you know, if maybe  
19 we lose our -- the court proceeding."

20 And, in fact, by the end of the  
21 day, they had lost the court  
22 proceeding; and it wasn't until that  
23 time that "we knew we had suffered a  
24 loss."

25 The Tribunal disagreed and

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1 Grand River Arbitration  
2 said:

3 "No, you knew you suffered a  
4 loss arising out the alleged breach  
5 which was conduct of the city  
6 officials way back earlier when that  
7 conduct first took place."

8 That is when that claim arose  
9 that is time barred. The only conduct  
10 that took place within the three-year  
11 period was this court proceeding. And  
12 they said the only claim that they  
13 had --

14 PRESIDENT NARIMAN: That's  
15 right.

16 MS. MENAKER: -- that we had to  
17 consider, but they did not consider  
18 the conduct. The only claim that they  
19 had was an entirely different claim,

20 which was, if the court had denied  
21 them justice, if, during the  
22 prosecution of their claim, they had  
23 been denied justice -- if they could  
24 have made out a claim for that,  
25 ultimately, they failed. That was a  
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1 Grand River Arbitration  
2 different loss and damage arising out  
3 of an entirely different breach. It  
4 had nothing to do with the conduct of  
5 the city officials, entirely separate.

6 This was whether the court had  
7 procedurally denied them justice.  
8 That was the only claim they  
9 considered. And so that is here.

10 This is different because Claimants,  
11 if they brought a claim, say -- hard  
12 to think of something -- but if they  
13 claimed an entirely new claim that  
14 they had in a court --

15 PRESIDENT NARIMAN: I would  
16 have thought the matter -- your answer  
17 would be that this is not the claim.

18 MS. MENAKER: This is not.

19 PRESIDENT NARIMAN: That's all.  
20 I don't know why all of this is  
21 necessary. If they want to make a  
22 claim, they will make a claim. How  
23 does that affect your position because  
24 if -- that's the problem. You say:  
25 "Oh, no, they can't make a

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1 Grand River Arbitration  
2 claim now."

3 Why can't they make a claim.  
4 Suppose they make a claim by saying,  
5 by reason of the allocable share  
6 provision, they have suffered loss.  
7 They can make that claim.

8 This is not that claim. That's  
9 all. That's not the opposition. I  
10 don't know why you want to argue, even  
11 that claim they cannot now make. But  
12 they can. If they want to, they can  
13 make it, and we will judge it on its

14 merits.

15 MS. MENAKER: That is the  
16 problem, is that that should not be  
17 dealt with on the merits because that  
18 claim too is time barred, so they  
19 should not be permitted to amend now  
20 add this claim because it is time  
21 barred.

22 PRESIDENT NARIMAN: They are  
23 not asking for any amendment.

24 MS. MENAKER: Well, if the  
25 Tribunal --

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: They are  
3 not asking for any amendment. I have  
4 not read any amendment. I have not  
5 read any amendment application.

6 MS. MENAKER: If the Tribunal  
7 is inclined to dismiss --

8 PRESIDENT NARIMAN: I don't  
9 know about the Tribunal. I have not  
10 read any amendment applications.  
11 That's all I am saying.

12 The Tribunal is not accepting  
13 your point. I am only saying that  
14 there is no amendment application, not  
15 at all.

16 They have made a claim.  
17 There -- a claim is made in either the  
18 statement of claim or the earlier  
19 notice of arbitration. If that  
20 contains something, it contains it.

21 MR. CROOK: I think, if I  
22 understand correctly, Claimants'  
23 point, neither the notice nor the  
24 preliminary statement of claim  
25 contained this particular element.

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1 Grand River Arbitration

2 This is all brand new.

3 PRESIDENT NARIMAN: That's what  
4 I am saying. Then why go into this  
5 question about whether they can make a  
6 claim in the future arguing from a  
7 particular case which had an entirely

8 different set of facts because I find  
9 it very difficult to argue from -- by  
10 analogy.

11 MR. CROOK: I believe, in  
12 fairness, Mr. Chairman, Ms. Menaker  
13 basically invited us to rule on that  
14 issue, and not hearing anything back  
15 felt she needed to go on to address  
16 the merits. We can look at the  
17 transcript, but I think she did make  
18 that point.

19 MS. MENAKER: Like we said, we  
20 are more than happy if you want to  
21 dismiss the claim, because it's not  
22 properly before you -- that would be  
23 fine. This is only in the event that  
24 you were so inclined to consider it  
25 that we wanted to explain to you why

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1 Grand River Arbitration  
2 it is time barred.

3 PRESIDENT NARIMAN: Thank you.

4 MS. MENAKER: Now, for my very  
5 last point, I will address the  
6 Michigan and Minnesota tax assessment  
7 laws.

8 PRESIDENT NARIMAN: What is  
9 that? I don't know. It's beyond --  
10 just explain what it is. What is the  
11 point made by them?

12 MS. MENAKER: Well, the  
13 Claimants brought these claims again  
14 in an untimely manner. They were not  
15 properly noticed, so, again, if the  
16 Tribunal is not going --

17 PRESIDENT NARIMAN: Please tell  
18 us what the claim is.

19 MS. MENAKER: The Michigan --  
20 it's a challenge to two tax laws. One  
21 is a Michigan tax law. The other is a  
22 tax law of the State of Minnesota.  
23 They both impose taxes on sales of  
24 cigarette that are made by NPMs in  
25 their state.

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1 Grand River Arbitration

2           PRESIDENT NARIMAN: That's not  
3 in the claim either.

4           MS. MENAKER: We believe that  
5 it is not properly in the claim. So  
6 if the Tribunal is not going to  
7 consider their challenges to those  
8 claims, I do not need to discuss it.

9           PRESIDENT NARIMAN: How do we  
10 have jurisdiction to determine the  
11 challenge to the claim?

12          MS. MENAKER: I believe that  
13 the Tribunal does not have  
14 jurisdiction to determine the  
15 challenge.

16          PRESIDENT NARIMAN: Because the  
17 state of whoever has enacted the law  
18 will have to respond.

19          MR. CROOK: Ms. Menaker, let me  
20 be clear here. Your position that  
21 this is not properly before us is  
22 because the separate procedure for pre  
23 vetting of tax measures was not taken.  
24 This was one of your original  
25 jurisdictional objections, which the

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1           Grand River Arbitration  
2 Tribunal said would be joined on  
3 merits. So in that sense your  
4 argument now, to the extent you are  
5 going to the merits, is out of order.

6           But are you making a different  
7 argument that they brought this into  
8 the case too late, or is it the  
9 argument that they did not comply with  
10 the procedural requirements of NAFTA  
11 applicable to tax matters.

12          MS. MENAKER: I was not -- I  
13 just simply wanted to remind the  
14 Tribunal that we had those  
15 jurisdictional objections. But,  
16 again, being aware that you did not  
17 bifurcate on those, I also wanted to  
18 argue that, you know, it is our view  
19 that the entire case should be  
20 dismissed for failure to abide by  
21 articles 1116, 1117, and that the

22 addition -- as we would say, the  
23 improper addition of these measures,  
24 the Michigan and Minnesota tax  
25 assessment laws, does not make their

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1 Grand River Arbitration  
2 claim timely, that this piece of their  
3 claim should not be left over, so to  
4 speak.

5 And that is the issue that I  
6 wanted to address. I will not, unless  
7 the Tribunal is interested, address  
8 those other reasons why we believe the  
9 Tribunal lacks jurisdiction because  
10 it's not properly before you, because  
11 they didn't go through the tax code,  
12 et cetera, so is that --

13 PRESIDENT NARIMAN: So your  
14 case is that the challenge to these --  
15 the Michigan, Minnesota laws does not  
16 make the claim timely.

17 MS. MENAKER: That's correct.  
18 And it is for a similar reason -- a  
19 reason similar to the reason that  
20 their challenge to the complementary  
21 legislation does not change the date  
22 on which they first incurred a loss or  
23 damage arising out of the measures,  
24 with one slight difference.

25 And Claimants in their

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1 Grand River Arbitration  
2 statement of claim, they allege that  
3 the obligations imposed by the escrow  
4 statutes have made it impossible for  
5 them to stay in business.

6 And I have put up a slide here  
7 where they say, quote:

8 "The effective compliance with  
9 these MSA implementation measures is  
10 the complete destruction of the  
11 investor's business and their  
12 investments."

13 Now, this is in the portion of  
14 their statement of claim when they  
15 discuss the escrow statutes before

16 they discuss the complementary  
17 legislation, or have any reference to  
18 the Michigan or Minnesota tax laws.  
19 Now, they go on to say:  
20 "The effect of noncompliance  
21 accordingly is a complete prohibition  
22 against the operation of the  
23 investor's business and their  
24 investments within the territory  
25 claimed by the USA, again resulting in

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1 Grand River Arbitration  
2 its complete destruction," end quote.  
3 So Claimants thus contend that  
4 the effect of the escrow statutes  
5 themselves have completely destroyed  
6 their business.  
7 PRESIDENT NARIMAN: Well, they  
8 can't be more than "complete  
9 destruction."

10 MS. MENAKER: Exactly.  
11 If that is really the case,  
12 then these Michigan and Minnesota  
13 laws, which were only recently  
14 enacted, could not have caused them  
15 any losses or damage.

16 And, again, this is confirmed  
17 by their expert report on damages  
18 created by LECG. I noted earlier that  
19 LECG calculated Claimants' damages  
20 using two alternative methods.

21 One was to value the lost  
22 payment exemption, and the other was  
23 to quantify the amount that  
24 Grand River would have to pay into  
25 escrow in order to be compliant with

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1 Grand River Arbitration  
2 its escrow obligations.  
3 But nowhere does LECG calculate  
4 or take into account any loss or  
5 damage allegedly sustained by  
6 Claimants by virtue of Michigan or  
7 Minnesota's tax assessment laws.

8 So as I discussed earlier, the  
9 Methanex Tribunal did not allow the

10 Claimants to challenge the amended  
11 regulation in an attempt to get around  
12 its ruling that it lacked jurisdiction  
13 over Claimants' claim, because the  
14 Claimants had not alleged that it  
15 suffered any loss or damage as a  
16 result of the measure.

17 And likewise Claimants here  
18 should not be permitted to rely on the  
19 Michigan and Minnesota tax assessment  
20 laws as a means to get around the  
21 jurisdictional time bar, when they  
22 have not alleged any loss or damage as  
23 a result of those tax measures. And,  
24 indeed, any such allegation belatedly  
25 made would directly contradict the

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1 Grand River Arbitration  
2 allegations which they have made in  
3 their statement of claim.

4 So, now, to just sum up very  
5 briefly, I want to refer again to the  
6 time line. You will see that here we  
7 have shown the Claimants first  
8 incurred a loss or damage as a result  
9 of the breaches they allege well  
10 before March 12, 2001.

11 They first incurred loss or  
12 damage arising out of the breaches  
13 they allege regarding the MSA  
14 negotiation and their not having  
15 obtained a grandfathered SPM status in  
16 February of 1999 when the opportunity  
17 to become a grandfathered SPM expired.

18 MR. ANAYA: Let me ask you  
19 about that because when we came back  
20 after the break you said that they  
21 didn't -- they weren't a manufacturer  
22 prior to the MSA and hence that was --  
23 that is why they didn't join it. They  
24 had no incentive to, so the suggestion  
25 is that they did -- in fact, didn't

0241

1 Grand River Arbitration  
2 suffer a loss.

3 MS. MENAKER: Again, we are



4 taking their allegation as pled for --  
5 we are not just -- in the same way,  
6 that by saying they first suffered a  
7 loss or damage as a result of the  
8 breach, we are not conceding that  
9 there was a breach.

10 We are also not conceding any  
11 loss per se. If we were at a  
12 liability stage and into a damages  
13 stage, we would have a different view  
14 of damages.

15 But according to their own  
16 allegations, they allege certain  
17 breaches and certain losses arising  
18 therefrom. And certainly if you look  
19 at their claim, they are alleging that  
20 they suffered a loss as a result of  
21 not having obtained that status as  
22 grandfathered SPM.

23 MR. ANAYA: When you say that  
24 you are referring to the damages  
25 assessment report.

0242

1 Grand River Arbitration

2 MS. MENAKER: The damages  
3 assessment. And, also, it permeates  
4 throughout their submissions -- their  
5 submissions. They always are  
6 comparing themselves to the  
7 grandfathered SPMs and saying they  
8 should have been afforded that same  
9 treatment, that that is what they  
10 want. They want the payment  
11 exemption.

12 We are saying, as a matter of  
13 fact, we think that, because they  
14 didn't have any market share, it would  
15 have been zero.

16 By the same token, we think  
17 from their calculation of the damages  
18 that are estimated by virtue of their  
19 having to comply with the escrow  
20 obligations is entirely incorrect,  
21 that that methodology is entirely  
22 incorrect. So that is something that  
23 is not before you now -- so is that

24 clear?

25 Also, as you can see, Claimants

0243

1 Grand River Arbitration  
2 first incur loss or damage arising out  
3 of the escrow statutes as soon as  
4 their cigarettes were sold in any MSA  
5 state that had enacted an escrow  
6 statute. We have also said that this  
7 occurred in 1999 because we know that  
8 Grand River cigarettes were sold in at  
9 least Iowa, Missouri, and Oklahoma  
10 during that time.

11 All of the remaining losses  
12 claimed by Claimants are merely  
13 extensions of the losses that were  
14 first incurred as of these earlier  
15 dates. They do not change the date on  
16 which Claimants first incurred losses  
17 arising out of the alleged breaches.  
18 So if this is a good time to pause, I  
19 will gladly do so.

20 PRESIDENT NARIMAN: So your  
21 claim in short is -- I mean, your  
22 contention in short is that the  
23 Claimants cannot make a claim because  
24 the breaches and the losses allegedly  
25 suffered arose prior to March 2001,

0244

1 Grand River Arbitration  
2 first by reason of the MSA having been  
3 concluded with the model statute, and  
4 thereafter the 46 settling states  
5 enacting the escrow statutes.

6 MS. MENAKER: Yes, and now we  
7 will show that they knew or should  
8 have known of those things.

9 MR. CROOK: Let me just  
10 clarify. The chairman said the  
11 losses. I take it your position is  
12 not the totality of the losses, but  
13 any loss is sufficient to bring down  
14 the -- to open the three-year time bar  
15 period.

16 MS. MENAKER: Thank you. Yes.  
17 It's loss, any loss arising out of the

18 alleged breach.  
19 PRESIDENT NARIMAN: Okay.  
20 Should we break for lunch now, if  
21 that's okay. You have one more person  
22 to address us.  
23 MR. CLODFELTER: Ms. Guymon  
24 will be addressing the issue of  
25 knowledge.

0245

1 Grand River Arbitration  
2 PRESIDENT NARIMAN: That will  
3 be about an hour, I suppose,  
4 however -- it is good.  
5 MS. GUYMON: It's about  
6 40 minutes with no questions.  
7 PRESIDENT NARIMAN: I'm a very  
8 free-speaking man. I'm sorry I  
9 interrupt and so on. I know it may  
10 upset you if you are a lawyer.  
11 MS. GUYMON: I welcome the  
12 interruption.  
13 PRESIDENT NARIMAN: I have been  
14 used to it for 55 years.  
15 MR. CROOK: It would appear,  
16 Mr. Chairman, that we are almost  
17 certainly going to go into day two.  
18 PRESIDENT NARIMAN: How long  
19 will you have if she finishes by  
20 about, say, 3:30 or 4?  
21 MR. VIOLI: I would expect an  
22 hour and a half to two hours.  
23 PRESIDENT NARIMAN: Therefore,  
24 I mean, you will certainly go into  
25 tomorrow then.

0246

1 Grand River Arbitration  
2 MR. VIOLI: I don't think  
3 it's -- I don't know what that their  
4 proof is. I know what mine is. I  
5 don't see the need to go into  
6 tomorrow. If it goes on, that's fine.  
7 PRESIDENT NARIMAN: We may have  
8 some real questions for you.  
9 MR. VIOLI: Sure.  
10 MR. CROOK: Mr. Chairman, I  
11 don't know what your practice is, but

12 did you envision a point at which the  
13 members of the panel might ask  
14 questions that are of interest to them  
15 that might not have been and then do  
16 that before the final final round.

17 PRESIDENT NARIMAN: Yes,  
18 because we have to be clear, have some  
19 clarity in our mind. Whatever you may  
20 address, we have to be certain about.  
21 So I think we can break for lunch, and  
22 how long one hour. Is 45 minutes  
23 enough? One hour, yes. Shall we meet  
24 at quarter past 2, 2:15? Is that all  
25 right.

0247

1 Grand River Arbitration  
2 (A lunch recess was taken.)  
3 PRESIDENT NARIMAN: Ready.  
4 MR. CLODFELTER: Mr. President,  
5 Ms. Guymon will present our arguments  
6 at this time on real and constructive  
7 knowledge.

8

9 OPENING PRESENTATION OF MS. GUYMON

10

11 MS. GUYMON: Mr. President,  
12 Members of the Tribunal, it has been  
13 an honor to appear before you today.  
14 My name is CarrieLyn Guymon, and I  
15 will now demonstrate that Claimants  
16 first acquired or should have first  
17 acquired knowledge that they had first  
18 incurred a loss arising from the  
19 alleged breach prior to the  
20 jurisdictional cut-off date, March 12,  
21 2001.

22 I thought, before I started, I  
23 would just return to the screen a  
24 slide that was from Mr. Clodfelter's  
25 presentation which gave us the texts

0248

1 Grand River Arbitration  
2 of article 1116(2) and 1117(2), which  
3 are essentially the same, which 1116  
4 relates to the investor, and 1117  
5 relates to its enterprise.

6 This sets up a standard by  
7 which the limitation period is  
8 determined to run, and the period is  
9 determined to run. And that standard  
10 is at the first point in time when  
11 investor first acquired or should have  
12 first acquired knowledge of the  
13 alleged breach, and knowledge that the  
14 investor has incurred loss or damage.

15 And we can we read -- we read  
16 "the first acquired or should have  
17 first acquired" in combination with  
18 both pieces of knowledge, knowledge of  
19 the alleged breach and knowledge that  
20 the investor has incurred loss or  
21 damage.

22 And that's why in Ms. Menaker's  
23 demonstration she often said they  
24 first acquired a loss because it's the  
25 time -- point in time at which they

0249

1 Grand River Arbitration  
2 first acquired or should have first  
3 acquired knowledge of the loss as well  
4 as knowledge of the breach.

5 Now, I will be talking about  
6 that knowledge. This limitations  
7 provision in NAFTA Chapter 11 uses an  
8 objective standard for assessing  
9 knowledge. The Tribunal thus must  
10 consider the earlier of Claimants'  
11 actual knowledge, when they first  
12 acquired knowledge, or constructive  
13 knowledge, when they should have first  
14 acquired knowledge.

15 Thus, even if Claimants were  
16 slow to recognize that the MSA  
17 impacted their businesses, and that  
18 the escrow statutes impose payment  
19 obligations on them, that blindness  
20 would be irrelevant.

21 If they should have understood  
22 the application of the law to them at  
23 an earlier point in time, then that  
24 point in time starts the limitations  
25 period, not the much later point in

0250

1 Grand River Arbitration  
2 time when Claimants allege that they  
3 first sensed their loss.

4 United States has demonstrated  
5 in its written submissions that  
6 Claimants should have known about the  
7 breaches and losses that they now  
8 allege more than three years prior to  
9 submitting their claim to arbitration.

10 The Claimants have not  
11 adequately explained how they could  
12 possibly have been unaware of the  
13 obvious impact of the MSA regime on  
14 their businesses. Thus, their claims  
15 are not timely.

16 Moreover the evidence also  
17 shows, beyond what we would need to  
18 satisfy the 1116 standard, that  
19 Claimants actually knew they first  
20 incurred losses under the MSA regime  
21 well in advance of March 12, 2001.  
22 They had both actual and constructive  
23 knowledge.

24 My presentation today will be  
25 divided into two parts. First, I will

0251

1 Grand River Arbitration  
2 demonstrate the constructive knowledge  
3 that Claimants should have first  
4 acquired knowledge that they had  
5 incurred losses by reading the  
6 publicly available MSA and escrow  
7 statutes well in advance of March 12,  
8 2001.

9 Then I will show that there is  
10 overwhelming evidence as well that  
11 Claimants actually knew about their  
12 first losses arising out of the MSA  
13 and escrow statutes before the  
14 jurisdictional cut-off date.

15 First, their constructive  
16 knowledge about the MSA:

17 Claimants should have known  
18 about the MSA's impact on their  
19 businesses well before March 12, 2001.

20 Even before the MSA was concluded,  
21 major newspapers reported on the  
22 negotiators' discussion that bringing  
23 smaller tobacco product manufacturers  
24 into this payment system, paying the  
25 states for the cost of tobacco-related

0252

1 Grand River Arbitration  
2 illnesses, would be a part of the  
3 deal.

4 On the screen is a quote from  
5 the Financial Times on November 12,  
6 1998, before the MSA was concluded,  
7 that the draft agreement, quote:

8 "Proposes that the tobacco  
9 company payouts should fall to the  
10 extent that they lose market share to  
11 nonparticipants in the agreement.

12 Alternatively, the states may impose  
13 quote-unquote license fees on  
14 nonparticipating companies."

15 PRESIDENT NARIMAN: Is this an  
16 exhibit?

17 MS. GUYMON: Yes, it is. This  
18 can be found at US tab 81.

19 Thus, Claimants and the public  
20 were on notice that the MSA would have  
21 an industry-wide impact on everyone,  
22 nonparticipating and participating  
23 manufacturers, even before the MSA was  
24 concluded. We are again using our  
25 time line.

0253

1 Grand River Arbitration

2 The points on the time line  
3 that were discussed by Ms. Menaker  
4 still appear down at the bottom in  
5 blue, and the points that I will be  
6 discussing will appear in green as I  
7 discuss them.

8 So the first point in time that  
9 I'll be discussing that is now on the  
10 time line is that, on November 16,  
11 '98, the lead negotiators of the MSA  
12 held press conferences.

13 PRESIDENT NARIMAN: Sorry to

14 take you back, this Financial Times --  
15 tab 81 is it a half sheet or --

16 MS. MENAKER: It's the entire  
17 article from the Financial Times.

18 PRESIDENT NARIMAN: Right. I  
19 mean, how does it look? It occupies  
20 the entire sheet or half sheet of the  
21 Financial Times? Do we have it here?

22 MS. MENAKER: We do. I still  
23 don't think -- I'm sorry. I don't  
24 understand.

25 PRESIDENT NARIMAN: Is it  
0254

1 Grand River Arbitration  
2 prominent in the newspaper, or a  
3 little headline, or something like  
4 that?

5 MS. GUYMON: I think it was on  
6 page two of the Financial Times. I  
7 don't know for sure if we always can  
8 tell from the electronic databases.  
9 But it did have -- it had the  
10 headline:

11 "Smoke signals say relief is in  
12 sight for tobacco companies.  
13 Settlement of states' lawsuits may  
14 cost \$220 billion, but Congress is the  
15 big loser," writes Richard Thomas.

16 And it's two and a half pages  
17 of printed eight and a half by 11  
18 paper. I don't know how much it took  
19 up in the newspaper.

20 PRESIDENT NARIMAN: I just  
21 wanted to see what it looked like in  
22 the newspaper. That's not possible.  
23 It's okay. That's all right. What is  
24 this? This is tab 81.

25 MS. GUYMON: Tab 81. Yes. So  
0255

1 Grand River Arbitration  
2 if we return to our time line, this  
3 March -- or I'm sorry.

4 PRESIDENT NARIMAN: I just want  
5 to know, sorry, if -- I thought it was  
6 concluded. There must have been  
7 several other articles.



8 MS. GUYMON: There were. There  
9 were.

10 PRESIDENT NARIMAN: That's not  
11 put on in your exhibits.

12 MS. GUYMON: We did not provide  
13 in our exhibits every article that  
14 mentioned the MSA and its negotiation.  
15 There were many. There were leaks and  
16 other reporting during the  
17 negotiations.

18 PRESIDENT NARIMAN: Since you  
19 are speaking of constructive knowledge  
20 and the constructive knowledge always  
21 postulates a pattern. You see one  
22 issue of the Financial Times, I mean,  
23 I may subscribe to it. I may not read  
24 it, or the company may not read it so  
25 that it may -- that doesn't make

0256

1 Grand River Arbitration  
2 much --

3 MS. GUYMON: Right. I am going  
4 to walk through that pattern. This is  
5 just representative of the earliest of  
6 the articles. There are over 30  
7 articles in our submission, and I will  
8 discuss some of the later ones in time  
9 as I march through.

10 But this Financial Times  
11 article is just a representative  
12 sample of articles that existed  
13 pre-conclusion of the MSA. There are  
14 articles post-conclusion of the MSA,  
15 and we just thought this was one to  
16 highlight for the Tribunal's purposes  
17 that showed that the negotiations  
18 themselves were being reported on in  
19 the media, including in the  
20 Financial Times.

21 On November 16, 1998, as  
22 indicated on our time line, the  
23 negotiators of the MSA held press  
24 conferences to announce it. And at  
25 Exhibit 15 to the Claimants' statement

0257

1 Grand River Arbitration

2 of claim is the full transcript of  
3 this media briefing held in  
4 Washington, DC, by attorneys general  
5 from seven states.

6 Other attorneys general also  
7 held press conferences on that same  
8 date to announce the agreement in  
9 their own states. At the Washington,  
10 DC press conference, Christine  
11 Gregoire, attorney general for the  
12 State of Washington, and one of the  
13 lead negotiators for the MSA,  
14 disclosed the opportunity for all  
15 tobacco product manufacturers to join  
16 the MSA. And a quote from  
17 Ms. Gregoire is now projected on the  
18 screen:

19 "We are hopeful that we will be  
20 able to get many -- many, if not all,  
21 of the tobacco manufacturers in  
22 America to sign onto the MSA."

23 PRESIDENT NARIMAN: What is  
24 this tab number?

25 MS. GUYMON: This is in the

0258

1 Grand River Arbitration  
2 Claimants' statement of claim, Exhibit  
3 15.

4 PRESIDENT NARIMAN: Yes.

5 MS. GUYMON: Also, at that same  
6 press briefing, there was a question  
7 from a member of the press that was in  
8 attendance. And attorney general  
9 Heidi Highcamp from North Dakota  
10 answered that question repeating what  
11 Christine Gregoire had said, that it  
12 there was a desire and invitation for  
13 all manufacturers to join the  
14 agreement.

15 The question was:

16 "Are there protections for the  
17 tobacco companies that sign on against  
18 the so-called rogue tobacco companies  
19 that do not sign on, and thus can sell  
20 their products at a cheaper price?"

21 Attorney General Highcamp

22 answered:  
23 "Within the payment section of  
24 the documents is something called the  
25 Nonparticipating Manufacturers. We

0259

1 Grand River Arbitration  
2 are deeply concerned about so-called  
3 renegade or rogue manufacturers, who  
4 are not subject to these same  
5 restrictions, and so, consequently,  
6 there are incentives built into this  
7 deal all around for us to bring as  
8 many of those folks in as what we  
9 can."

10 PRESIDENT NARIMAN: This is  
11 exhibit --

12 MS. GUYMON: It is still in the  
13 same exhibit, tab 15 to the statement  
14 of claim. It's a fairly lengthy  
15 transcript. Both of these statements  
16 are found within it.

17 The reference there to  
18 incentives, Ms. Menaker and the  
19 President -- you were discussing  
20 earlier why would someone join, and  
21 there was that incentive to get the  
22 grandfathered SPM exemptions. So she  
23 is directly referencing that  
24 incentive:

25 "Why would you want to join?"

0260

1 Grand River Arbitration  
2 "Well, here is what you can get  
3 if you join."

4 PRESIDENT NARIMAN: Do the  
5 Claimants say when they came to know  
6 since this is their document?

7 MS. GUYMON: It's their  
8 document. They insist that they did  
9 not know of it until recently.

10 PRESIDENT NARIMAN: No, no, but  
11 where is that statement they did not  
12 know.

13 MS. GUYMON: Where is their  
14 statement that they did not know of  
15 it?

16 PRESIDENT NARIMAN: Did not  
17 know of it until recently. I mean,  
18 where do they say that -- this  
19 document which they have annexed and  
20 put as part of their documents -- was  
21 not known to them. Where is that  
22 statement?

23 MR. CROOK: I don't believe  
24 there is such a statement.

25 PRESIDENT NARIMAN: That's what  
0261

1 Grand River Arbitration  
2 I want to know.

3 MR. VIOLI: There is.

4 MS. GUYMON: I think Claimants  
5 have denied seeing this.

6 PRESIDENT NARIMAN: No, please,  
7 if you don't mind, just give it to me.  
8 On tab 15, let's have a look where  
9 they say they didn't.

10 MR. VIOLI: In addition -- this  
11 is paragraph 18 of the Williams  
12 affidavit, which is tab 14 to  
13 Claimants' factual materials in  
14 opposition to the objections, volume  
15 two of two. Mr. Williams states  
16 here -- and he's here to state it if  
17 need be:

18 "In addition in its memorial  
19 the Respondent refers to various  
20 newspaper and other media articles  
21 about the MSA and the alleged  
22 opportunity to join the MSA. The  
23 Tribunal should be advised that the  
24 Claimants are not and never were  
25 subscribers to any of the periodicals

0262

1 Grand River Arbitration  
2 mentioned in Respondent's memorial,  
3 and they did not see, nor were they  
4 ever provided with copies of these  
5 articles."

6 That is the first proof that  
7 Claimants did not see these -- this  
8 press release, which is in printed  
9 form, or these other articles that are

10 mentioned.

11 MS. GUYMON: Can I ask that  
12 Mr. Violi hold off his argument, his  
13 presentation. He answered the  
14 Tribunal's question, I think.

15 MR. VIOLI: The second point, I  
16 submitted an affidavit. I -- you  
17 notice that this is -- this article  
18 that they are referring to was  
19 submitted by Claimants. I submitted  
20 it attached to the particularized  
21 statement of claim. It was a  
22 documents that I found in 2002.

23 PRESIDENT NARIMAN: Where is  
24 that stated?

25 MR. VIOLI: Okay. Let's get

0263

1 Grand River Arbitration  
2 that.

3 PRESIDENT NARIMAN: All right.  
4 You answer it when it's your turn,  
5 right. Sorry.

6 MS. GUYMON: I remind the  
7 Tribunal, also, that, right now, I am  
8 addressing their constructive  
9 knowledge, so I am not asserting that  
10 Claimants actually saw this article.

11 PRESIDENT NARIMAN: No, it was  
12 my fault. I wanted to know whether  
13 they had asserted that they came to  
14 know of this on a particular date.  
15 That's all. They will deal with it.  
16 Okay. Go ahead. Please.

17 MS. GUYMON: These  
18 announcements by the attorneys general  
19 that are transcribed in the exhibit  
20 that Claimants provided, the  
21 United States also provided documents  
22 that show that the attorneys general's  
23 announcements were broadcast by the  
24 broadcast media.

25 CNN carried excerpts of the

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1 Grand River Arbitration  
2 Washington press briefing on the same  
3 day it was held. The Public

4 Broadcasting System's News Hour, with  
5 Jim Lehrer carried an interview that  
6 night with Washington Attorney General  
7 Gregoire. The text of the MSA was  
8 readily accessible.

9 At the Washington press  
10 briefing, Attorney General Gregoire  
11 announced that the entire text of the  
12 MSA would be posted on the web site of  
13 the National Association of Attorneys  
14 General, or NAAG.

15 Mealy's Litigation Report on  
16 Tobacco and other sources also made  
17 the full text of the MSA publicly  
18 available. Anyone including the  
19 smallest tobacco company or companies  
20 not even yet present in the US market  
21 could have read the provisions of the  
22 MSA shortly after it was announced.

23 It would have been unreasonable  
24 for anyone in the tobacco industry not  
25 to read and analyze the MSA, the

0265

1 Grand River Arbitration  
2 largest civil settlement in US  
3 history, with a monumental impact on  
4 the industry.

5 PRESIDENT NARIMAN: How many  
6 articles are there that you refer to  
7 apart from saying there were many?  
8 Can you tell us how many?

9 MS. GUYMON: We have supplied  
10 over 30 articles to the Tribunal. We  
11 did not supply to the Tribunal every  
12 article out there about the MSA.  
13 There are, I know for a fact, more  
14 than just the ones we submitted. We  
15 tried to present a representative  
16 sample for the Tribunal's review.

17 MR. CROOK: Would it be  
18 accurate to say that all of your  
19 exhibits, 80 through 120, are articles  
20 dealing with the MSA?

21 MS. GUYMON: Yes, beginning at  
22 tab 80. Then there are some  
23 additional exhibits that we have

24 provided as exhibits to our rejoinder,  
25 a few additional there.

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1 Grand River Arbitration

2 MR. CROOK: So there are a few  
3 in addition to the 40.

4 MS. GUYMON: Yes.

5 MR. ANAYA: You say it will be  
6 unreasonable for a tobacco  
7 manufacturer not be aware. Is there  
8 any difference in the standard of  
9 "reasonableness" between -- from the  
10 standpoint of the US manufacturer and  
11 a foreign manufacturer?

12 MS. GUYMON: I think anyone who  
13 had an interest in the US market,  
14 whether they were a foreign  
15 manufacturer manufacturing abroad for  
16 import into the US or a US  
17 manufacturer manufacturing for sale in  
18 the US, they would still have that  
19 same interest.

20 PRESIDENT NARIMAN: Were the  
21 articles in the Canadian newspapers?

22 MS. GUYMON: There were.

23 PRESIDENT NARIMAN: Have they  
24 been put in?

25 MS. GUYMON: Yes they have in

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1 Grand River Arbitration

2 that same range that Mr. Crook  
3 referred to.

4 MR. ANAYA: You say the same  
5 standard of reasonableness would  
6 apply. You wouldn't say that you  
7 would need more information out there,  
8 more press releases, more press  
9 releases in the foreign press of the  
10 investor -- of the country of the  
11 investor.

12 MS. GUYMON: If the investor  
13 has the interest in the US market,  
14 then they should be investing -- they  
15 should be investigating where they are  
16 making their investments.

17 MR. ANAYA: I understand that.

18 Is the standard of reasonableness that  
19 you keep referring to, implicit in  
20 your argument, is it the same?

21 MS. GUYMON: I believe it is,  
22 although, when we were talking about  
23 article 1116, we are automatically  
24 only talking about the foreign  
25 company. So it really is a standard

0268

1 Grand River Arbitration  
2 that applies to a foreign investor  
3 only. We wouldn't be --

4 MR. ANAYA: Yes, that's what  
5 the statute applies -- but the NAFTA  
6 provision applies to. You are talking  
7 about -- in your argument you are  
8 talking about, it would be  
9 unreasonable for a tobacco  
10 manufacturer. When you say that, you  
11 know, what comes to my mind is an  
12 American manufacturer. I might say,  
13 yeah, that might be the case.

14 But when I think about a  
15 foreign manufacturer, which is what  
16 the NAFTA provision addresses, as you  
17 point out, I just want to know is your  
18 argument the same standard of  
19 reasonableness?

20 MS. GUYMON: My argument is  
21 that it is the same. In the footnotes  
22 that we cited at 173 and 174 in our  
23 objections to jurisdiction, we cited  
24 the MTD versus Chile case that we have  
25 already discussed as well as other

0269

1 Grand River Arbitration  
2 cases that the Tribunal found that it  
3 was the responsibility of the investor  
4 to find out about the market they were  
5 investing in, that the investors bore  
6 that responsibility.

7 It wasn't the responsibility of  
8 the state to send out additional  
9 notices or to directly inform the  
10 investor. It was up to the investor  
11 to take that step of learning how to.



12 PRESIDENT NARIMAN: Toronto  
13 Star and Toronto Sun, they are  
14 Canadian newspapers.

15 MS. GUYMON: They are.

16 PRESIDENT NARIMAN: They  
17 circulate where, Toronto?

18 MS. GUYMON: I believe that  
19 those newspapers are equivalent to  
20 some of our major mass market media  
21 newspapers in the US where the  
22 circulation would be broader than just  
23 Toronto. I am not Canadian. I can't  
24 say for sure.

25 MR. CROOK: I notice there are

0270

1 Grand River Arbitration  
2 a number of items here from the  
3 Buffalo News. Is that the media  
4 market for the Six Nations?

5 MS. GUYMON: Well, we included  
6 the Buffalo News and the Omaha  
7 newspaper because Claimants'  
8 allegations indicate that that's where  
9 they were residing at the time, or  
10 close to Buffalo and close to Omaha.

11 Some of the Claimants were  
12 working with the Omaha Nation Tribe in  
13 1998 at the time the MSA was  
14 announced. And others of the  
15 Claimants with residing in upstate  
16 New York where Buffalo would be the  
17 major media market. So we included  
18 those articles to show that regional  
19 papers in the area where Claimants  
20 resided also reported on the MSA.

21 PRESIDENT NARIMAN: This is --  
22 Buffalo is US.

23 MS. GUYMON: Buffalo, New York,  
24 yes.

25 MR. ANAYA: Do you know if

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1 Grand River Arbitration  
2 there is anything in the Global Mail?

3 MS. GUYMON: I don't believe --  
4 I don't recall that we put anything in  
5 from Global Mail. The other paper

6 from Canada, Hamilton Spectator.  
7 Hamilton is --  
8 PRESIDENT NARIMAN: That's that  
9 Kathleen lady --  
10 MS. GUYMON: I'm sorry, Kate  
11 Barlow.  
12 PRESIDENT NARIMAN: The lady  
13 Kate Barlow.  
14 MS. GUYMON: Yes, Kate Barlow  
15 who Mr. Clodfelter referred to in his  
16 opening.  
17 The Hamilton Spectator, that is  
18 a newspaper that reports on  
19 Grand River territory news and their  
20 events frequently.  
21 If I can just summarize all the  
22 articles we have, we have put in  
23 reports from major US national  
24 newspapers, like the New York Times,  
25 the Washington Post, the LA Times, and  
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1 Grand River Arbitration  
2 the Chicago Tribune -- major media  
3 market papers that get a nationwide  
4 circulation.  
5 We also included these regional  
6 newspaper that I mentioned, the  
7 Buffalo News and the Omaha World  
8 Herald; then we included Canadian and  
9 international media. Some of the  
10 Canadian reports that we included were  
11 broadcast as well as newspaper  
12 reports.  
13 And then, finally, the other  
14 category, if I can just summarize them  
15 in categories that we included, are  
16 tobacco industry publications.  
17 So there is Smoke Shop, for  
18 example, that is specifically geared  
19 toward that industry, to report on  
20 events of import to members of that  
21 industry.  
22 All of those different  
23 categories of media and press and  
24 broadcast outlets reported on the MSA  
25 and its impact.

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1 Grand River Arbitration

2 But the availability of the MSA  
3 as a publicly available document is  
4 also key. Anyone would have -- could  
5 have access to the document and read  
6 it for themselves. They need not have  
7 relied on the media reports of it.  
8 The document itself, the primary  
9 source, was available.

10 Thus, Claimants should have  
11 known about and read the MSA  
12 provisions shortly after it was made  
13 public.

14 And if we apply this objective  
15 standard, should they have known in  
16 articles 1116(2) and 1117(2), it's  
17 clear they should have known. Anyone  
18 in the tobacco industry at the time  
19 should have known, not only of the  
20 MSA's existence, but of its actual  
21 terms and of its impact on the market.

22 This knowledge of the MSA  
23 should have caused Claimants to  
24 acquire knowledge with regard to many  
25 of their allegations of breach and

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1 Grand River Arbitration

2 damage that Ms. Menaker has already  
3 discussed, including knowledge that  
4 the MSA was allegedly negotiated in a  
5 non-transparent way; knowledge that  
6 states would enact legislation  
7 following the model statute --  
8 Exhibit T to the MSA -- imposing  
9 payment obligations on tobacco product  
10 manufacturers with US sales that were  
11 not party in the MSA, including  
12 Claimants themselves; knowledge that  
13 certain tobacco product  
14 manufacturers -- the grandfathered  
15 SPMs -- were granted an exemption, a  
16 payment exemption for joining the MSA  
17 in the first few months after it was  
18 conclude; and knowledge that cigarette  
19 sales, for which no excise tax is

20 paid, do not give rise to any  
21 obligations to make payments into  
22 escrow.

23 All of those things could have  
24 been determined and known simply by  
25 reading the MSA.

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2 As Ms. Menaker explained, the  
3 breaches alleged by Claimants relating  
4 to their denial of grandfathered SPM  
5 status caused Claimants to incur their  
6 alleged loss shortly after the MSA was  
7 concluded.

8 In other words, their national  
9 treatment, and their Most Favored  
10 Nation treatment claims, which have to  
11 assert a differentiation, that there  
12 was some group of people given  
13 treatment that they were denied --  
14 that claim had to arise as soon as  
15 that differentiation was established.

16 That differentiation was  
17 established when the MSA was concluded  
18 and when the 90-day period passed.  
19 And Claimants should have known at  
20 that time simply by reading publicly  
21 available documents that that should  
22 have occurred.

23 MR. ANAYA: Are you saying --  
24 you are saying they should have known.  
25 It's not actually on the record what

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1 Grand River Arbitration

2 that means. I'm assuming -- they  
3 should be reading publicly available  
4 documents? They had some kind of duty  
5 to be reading publicly available  
6 documents, so that they could have --  
7 just because you are speculating that  
8 everybody reads them.

9 MS. GUYMON: As you were asking  
10 with your previous question, what  
11 would it be reasonable for them to do.

12 Would someone who is in the  
13 business of investing in an enterprise

14 that is going to have sales in the --  
15 cigarette sales in the US market, what  
16 would -- what would they do?

17 Would they want to know about  
18 this monumental development impacting  
19 the US cigarette market? It's  
20 reasonable.

21 MR. ANAYA: It seems like that  
22 doesn't then to depend upon someone  
23 being a avid newspaper reader.

24 MS. GUYMON: It does not.

25 MR. ANAYA: I am trying to

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1 Grand River Arbitration  
2 figure out why we are concerned with  
3 the quantity of newspaper articles out  
4 there.

5 MS. GUYMON: That is just one  
6 means by which they could have been  
7 alerted to the fact.

8 MR. ANAYA: You say "could."  
9 That is my confusion, is that they  
10 could have -- by probability they  
11 could have, because of the amount of  
12 newspaper articles.

13 If it's they should have, then  
14 maybe you are saying they should be  
15 out there reading newspapers or they  
16 should be discovering these facts  
17 regardless of how many newspaper  
18 accounts there are.

19 MS. GUYMON: Right. Our  
20 assertion is that they should have  
21 known about developments in their  
22 industry. They need not have learned  
23 about those by reading these newspaper  
24 articles. They could have gone about  
25 acquiring their knowledge in some

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1 Grand River Arbitration  
2 other way. But they should have known  
3 this monumental development in the  
4 industry in which they were making an  
5 investment.

6 MR. ANAYA: So the relevance of  
7 the quantity of newspaper articles is

8 then --  
9 MS. GUYMON: It's just a  
10 demonstration that it was very easy to  
11 know about this and very hard not to  
12 know about this. It was everywhere.  
13 It was -- it was announced everywhere.  
14 There was enough out there to make  
15 anyone interested in this industry  
16 want to know more.

17 MR. ANAYA: That seems to me  
18 that that goes more to the actual  
19 knowledge, the probability that they  
20 actually were on notice, that it was  
21 out there -- or, no, maybe I am --

22 MS. GUYMON: We are not  
23 asserting that they read any one of  
24 these articles. And that would be  
25 actual knowledge, I believe. We are

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1 Grand River Arbitration  
2 arguing that --

3 MR. ANAYA: They don't have a  
4 duty to read these articles. They  
5 don't have a duty to read the  
6 Toronto Star.

7 You are not saying that.

8 MS. GUYMON: They do not. We  
9 are not trying to --

10 PRESIDENT NARIMAN: Your  
11 case -- your case is that all of this  
12 news was in the public domain. And  
13 being in the public domain, it is a  
14 reasonable assumption that they knew  
15 about it.

16 MS. GUYMON: Yes.

17 MR. CROOK: Is that your case?  
18 Is your case that -- we are talking  
19 about the meaning of the word "should"  
20 here, and how do you give content to  
21 that word.

22 And what I am hearing, I think,  
23 is the proposition that we assess that  
24 in terms of a hypothetical reasonable  
25 investor, that a reasonably prudent

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2 business person looking to go into the  
3 US market as a consequence or  
4 corollary of that reasonable prudence,  
5 should have done certain things. And  
6 that is the standard of assessing  
7 "shouldness" that is being advanced?

8 Have I understood it correctly  
9 or not?

10 PRESIDENT NARIMAN: Is there  
11 any difference between "could" and  
12 "should" -- "could have" first or  
13 "should have."

14 MR. ANAYA: I keep hearing both  
15 words.

16 MR. CROOK: Let's hear the  
17 answer to this, and I have got a  
18 follow-up to this.

19 (There was a discussion off  
20 the record.)

21 MS. GUYMON: I think there is a  
22 difference between "could" and  
23 "should." Our argument is that they  
24 should have known because it was  
25 publicly available, because it was

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1 Grand River Arbitration  
2 easy to find out.

3 It's also that they should have  
4 known, because, as an investor making  
5 an investment in this market, they  
6 should have investigated the market.  
7 They had an obligation as the entity  
8 to know what they were getting into,  
9 to know what they were jumping into.

10 And they could have found that  
11 out because of all of this news. They  
12 could have found that out by pulling  
13 down that little computer and doing an  
14 Internet search.

15 We are not asserting that they  
16 had to have to find it out by any  
17 particular means. We are pointing out  
18 that it was readily available. They  
19 could have found it out by hearing the  
20 news. They should have found it out  
21 by some means or another.

22           The massive media coverage is  
23 just an indication that it would be  
24 very difficult, and it's impossible to  
25 believe that they were not on notice  
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1           Grand River Arbitration  
2 about the MSA.

3           MR. CROOK: Is it that, or is  
4 it that, had they carried out that  
5 investigation which you maintain an  
6 prudent investigator should have  
7 carried out, it would have been easy  
8 for them to ascertain these things?

9           MS. GUYMON: That's also true.  
10 It's both. I think it's both. I  
11 think it's both.

12          MR. CROOK: So just so -- I'm  
13 sorry to be slow here -- just so I am  
14 clear, the panel should be applying  
15 essentially -- or at least it is open  
16 to the panel to apply a standard of a  
17 hypothetical prudent foreign investor  
18 in applying what it means to say that  
19 they should have known something.

20          MS. GUYMON: Yes. We believe  
21 the "should have inquired knowledge"  
22 language suggests constructive  
23 knowledge. And that constructive  
24 knowledge is that concept of what a  
25 reasonable person would have known in  
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1           Grand River Arbitration  
2 in these circumstances.

3           MR. CROOK: I am just wondering  
4 whether we are talking about one thing  
5 or two. You will clarify, I guess.

6           MS. GUYMON: I think it's two.  
7 It's "should have known" because they  
8 had an -- had -- as the investor  
9 making this investment, they had an  
10 obligation to look into what they were  
11 getting into. And it also should have  
12 known because it was readily known.

13          MR. CROOK: The nature of the  
14 thing, it was readily knowable. So  
15 there are two tests.



16 MS. GUYMON: Yes, it was  
17 readily knowable. It was everywhere  
18 to be found. But those are not tests.  
19 Those are demonstrations that we have  
20 made.

21 MR. CROOK: They are two modes  
22 of analysis or inquiry that the  
23 Tribunal might make.

24 MS. GUYMON: They should have  
25 known both because a reasonable

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1 Grand River Arbitration  
2 investor in this market would have  
3 done this investigation; and  
4 furthermore they should have known  
5 because the news about it was  
6 everywhere.

7 The talk about this was on the  
8 street, in the markets, and in the  
9 industry, in the newspaper, on the  
10 Internet. It was everywhere to be  
11 heard.

12 So it is both. I think it's  
13 both of those two reasons, Mr. Crook,  
14 that you have identified.

15 Claimants cannot show and have  
16 not shown that it was reasonable for  
17 them to remain ignorant of the MSA's  
18 terms for over two years after it was  
19 concluded. Given the importance of  
20 the MSA to everyone in the industry,  
21 and the publicity surrounding it  
22 Claimants must have known. They  
23 should have known.

24 Now, I am going to talk about  
25 constructive knowledge as to the

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1 Grand River Arbitration  
2 escrow statutes.

3 Claimants likewise should have  
4 first acquired knowledge that the  
5 escrow statutes caused them to incur  
6 loss before March 12, 2001, simply by  
7 reading the escrow statutes enacted by  
8 all the MSA states.

9 Whether or not Claimants had

10 actual knowledge of the application of  
11 the escrow statutes prior to March 12,  
12 2001, is immaterial. It is well  
13 accepted, as the Chair has mentioned  
14 already, in both municipal and  
15 international law, that ignorance of  
16 the law is no excuse.

17 And our authorities in the  
18 objection at notes at 173 and 174,  
19 including the MTD versus Chile case,  
20 discuss this principle of ignorance of  
21 the law being no excuse in the  
22 municipal law context as well as the  
23 international investment law context.

24 Claimants, like everyone else,  
25 are presumed to know the law. All 46

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1 Grand River Arbitration  
2 MSA states had enacted their escrow  
3 statutes before the jurisdictional  
4 cut-off date, as Ms. Menaker has  
5 shown.

6 PRESIDENT NARIMAN: What you  
7 are saying is that they should have  
8 known the law in a trade that they  
9 were engaged in.

10 MS. GUYMON: Precisely.

11 PRESIDENT NARIMAN: The law was  
12 in connection with this -- this  
13 business that they were in, not any  
14 law that a state may enact. They are  
15 not supposed to read every single law,  
16 but something that pertained to their  
17 own business and therefore vitally  
18 affected by it.

19 MS. GUYMON: Precisely.

20 Claimants have admitted it was  
21 there intent for their products, their  
22 cigarettes to be sold in various  
23 states within the United States. And  
24 that's what make those laws, as the  
25 Chair was mentioning, applicable to

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1 Grand River Arbitration  
2 them, because these laws apply to  
3 cigarette manufacturers who intend

4 their sales of cigarettes to have been  
5 in the United States.

6 They were therefore responsible  
7 for ensuring awareness of and  
8 compliance with all applicable laws to  
9 what they were doing, to the sale of  
10 cigarettes.

11 Claimants' suggestion that they  
12 had to be directly notified by state  
13 governments that the escrow statutes  
14 applied to them is without support and  
15 represents an assault to the orderly  
16 functioning of government.

17 Market participants are  
18 expected to ensure knowledge of and  
19 compliance with applicable laws and  
20 are not entitled to direct,  
21 individualized notice of any and all  
22 legislation that might impact them.

23 Claimants' insistence that they  
24 should have received direct  
25 individualized notice of the MSA and

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1 Grand River Arbitration  
2 the MSA regime is somewhat ironic,  
3 given the evidence showing that no MSA  
4 state could possibly have identified  
5 Grand River as a manufacturer of  
6 cigarettes for sale into the US market  
7 prior to its 1999 or subsequent entry  
8 into that market.

9 In any event, Claimants'  
10 contention that they remained unaware  
11 of legislation passed in nearly every  
12 state in the United States, that  
13 significantly affected the sale of  
14 cigarettes, the business they were in,  
15 defies logic.

16 There was widespread media  
17 coverage of the MSA states' enactment  
18 of the escrow statutes. The  
19 United States has provided beginning  
20 at tab 103 of its factual appendices  
21 sever newspaper articles reporting on  
22 the state legislature's bill to enact  
23 the model statute, all published

24 before this jurisdictional cut-off  
25 date.

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1 Grand River Arbitration

2 For example, the Associated  
3 Press reported on the South Dakota  
4 legislature's consideration of a bill  
5 to enact the model statute on January  
6 21, 1999.

7 As shown on the slide, this  
8 article reported:

9 "The legislation proposed to  
10 the Senate judiciary committee is  
11 being introduced in all of the states.  
12 The nonparticipating companies could  
13 agree to the terms of the master  
14 agreement or pay into the escrow  
15 account subject to the conditions of  
16 the bill."

17 PRESIDENT NARIMAN: Where does  
18 this operate? Is this American news?

19 MS. GUYMON: This is  
20 South Dakota.

21 MR. ANAYA: It's a fairly small  
22 market. Aberdeen is a pretty small  
23 town.

24 MS. GUYMON: We have provided  
25 other examples from Georgia, which is

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1 Grand River Arbitration  
2 a state that Claimants have purported  
3 to be interested in doing business.  
4 It's just again a sampling.

5 MR. ANAYA: Those stories also  
6 go a level of detail about the  
7 character of the MSA?

8 MS. GUYMON: It's not  
9 verbatim -- it's not as if this  
10 Associated Press article in Aberdeen  
11 was carried word for word in Georgia.  
12 The Georgia article is different.

13 PRESIDENT NARIMAN: What tab is  
14 this?

15 MS. GUYMON: The South Dakota  
16 article is --

17 MR. VIOLI: 103.

18 MS. GUYMON: Well, 103 is where  
19 we have -- it may be 103. At 103,  
20 104, and 105 we have several of these  
21 articles reporting on state  
22 legislatures' actions to enact the  
23 model statute. So there is -- the  
24 South Dakota legislature is at 103.

25 PRESIDENT NARIMAN: No, the  
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1 Grand River Arbitration  
2 point that the professor made was that  
3 that latter part, the nonparticipating  
4 companies would agree to the terms of  
5 the master agreement of pay into  
6 escrow accounts subject to the  
7 conditions of the bill, not verbatim.

8 Is that sort of the sense of it  
9 repeated in several articles?

10 MS. GUYMON: Yes, these  
11 articles were each reporting on the  
12 fact that state legislators were  
13 enacting the model statute, and the  
14 model statute presents this choice of  
15 either joining the agreement or paying  
16 into escrow accounts.

17 So these articles are all  
18 reporting on state legislatures'  
19 consideration of and enactment of the  
20 Master Statement Agreement's model  
21 statute, which presents precisely the  
22 choice described here in the South  
23 Dakota -- in the article reporting on  
24 South Dakota's legislators.

25 PRESIDENT NARIMAN: What about  
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1 Grand River Arbitration  
2 Georgia where they do operate, because  
3 South Dakota they don't.

4 MR. CROOK: 96.

5 PRESIDENT NARIMAN: Let's see  
6 96.

7 MS. GUYMON: It's 107,  
8 actually. It's one from the Investors  
9 Chronicle.

10 It says:

11 "House approves tobacco

12 measure. Georgia lawmakers Monday  
13 overwhelmingly approve legislation  
14 that will set the stage for the state  
15 to begin collecting its share of a  
16 \$206 billion national tobacco  
17 settlement. The state house voted 153  
18 to 9 to require small tobacco  
19 companies that are not part of the  
20 national settlement to establish  
21 escrow accounts to pay legal claims  
22 brought by the state or individual  
23 smokers."  
24 PRESIDENT NARIMAN: Roughly the  
25 same, yes. Is that 107?

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1 Grand River Arbitration  
2 MS. GUYMON: That is tab 107.  
3 PRESIDENT NARIMAN: And where  
4 do you get the fact that they are  
5 selling cigarettes in that state?

6 MS. GUYMON: In their own  
7 statement of claim, they relate that  
8 Tobaccoville, I believe, their  
9 distributor for the southern  
10 United States, is making sales into  
11 Georgia.

12 PRESIDENT NARIMAN: Right.

13 MS. GUYMON: As I had mentioned  
14 earlier, the trade press also reported  
15 on the implementation of the MSA's  
16 model statute. And so we have  
17 provided as one example of this, an  
18 article -- an article from Smoke Shop.

19 PRESIDENT NARIMAN: What is  
20 this Smoke Shop?

21 MS. GUYMON: Smoke Shop is a  
22 trade industry publication that is  
23 addressed to retailers of the  
24 cigarette and tobacco products.

25 PRESIDENT NARIMAN: And where

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1 Grand River Arbitration  
2 does it -- it's circulated where?  
3 Where is it published, any idea?

4 MS. GUYMON: It's tab 109 in  
5 our appendices.

6 PRESIDENT NARIMAN: Tab 109,  
7 yes. Where does it circulate?

8 MS. GUYMON: I'm afraid I don't  
9 know precisely its circulation. It is  
10 also an online publication, so it can  
11 be accessed on the Internet. I don't  
12 know as far as the publication of the  
13 hard copy, if it's by subscriber.  
14 Often, trade publications work that  
15 way, that everyone in the industry  
16 will sign up to receive a publication  
17 that is geared to their particular  
18 business.

19 PRESIDENT NARIMAN: No, I mean,  
20 where is this published, the  
21 Smoke Shop -- it's a journal?

22 MS. GUYMON: It's a trade  
23 publication.

24 PRESIDENT NARIMAN: No, is it a  
25 monthly, a weekly?

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2 MS. GUYMON: I think it's less  
3 than a monthly because this issue was  
4 February and March of 2000. It may be  
5 more akin to a newsletter than a  
6 journal. I don't subscribe to it, but  
7 it is available online. It is  
8 available to the public and to its  
9 audience which is the --

10 PRESIDENT NARIMAN: See, it's a  
11 bit of a far cry to say that whatever  
12 is online they should have known. I  
13 mean, it's difficult to say that.

14 That's why I am asking you these  
15 pointed questions, that where does  
16 this Smoke Shop newspaper or  
17 newsletter or whatever you call it,  
18 circulate? I mean, which part of  
19 America or Canada?

20 Since you are speaking of  
21 constructive knowledge, then you must  
22 be able to tell you us where this is  
23 published.

24 MS. GUYMON: Our argument as to  
25 constructive knowledge is not that

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1 Grand River Arbitration  
2 they saw this particular publication.

3 PRESIDENT NARIMAN: We are not  
4 saying that that is your case. But  
5 when you are propounding something and  
6 you are saying, look at Smoke Shop, we  
7 want to look at Smoke Shop.

8 But we don't know where this  
9 thing is, whether it's in the air,  
10 online, whether it's a newsletter,  
11 whether it's a journal. At least, let  
12 us know that if it's monthly journal,  
13 a weekly journal, a quarterly journal,  
14 something.

15 MS. GUYMON: Our assertion as  
16 to Smoke Shop is that someone in this  
17 industry might not read the New York  
18 Times, the Financial Times. Perhaps  
19 instead they might --

20 PRESIDENT NARIMAN: I'm sorry.  
21 My question is different. I am not  
22 saying whether they read or do not  
23 read. We will come to conclusion a  
24 later. I am only asking you a simple  
25 question.

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1 Grand River Arbitration  
2 Do you know where it is  
3 published and where it circulates, and  
4 whether it's a journal? You should  
5 find out. You are relying on it.

6 MS. GUYMON: I will try to find  
7 out more about the publication. What  
8 I wanted to reiterate is the purpose  
9 for which we are using it.

10 PRESIDENT NARIMAN: That we  
11 follow.

12 MS. GUYMON: This is another  
13 direction in which the information  
14 could be obtained, is another avenue.

15 PRESIDENT NARIMAN: But  
16 Smoke Shop may be in one little corner  
17 of the United States which they may  
18 not read, because -- forget just now  
19 who has to prove what. We will come



20 to all that later.

21 This is a very good statement  
22 that you have shown us, but kindly  
23 assist us by telling us where this  
24 Smoke Shop is published. Is it a  
25 journal? Is it a weekly? Your

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1 Grand River Arbitration  
2 document doesn't show it, doesn't show  
3 where it's published, whether it's a  
4 weekly, whether it's a monthly, and  
5 whether people do subscribe to it.

6 Then we can say that, yes, this  
7 is a trade journal. But when you  
8 characterize it as a trade journal, it  
9 doesn't appear to be so because there  
10 is no indication in the annex that you  
11 have given in tab 109, although it  
12 contains what you are attempting to  
13 tell us, no doubt about that.

14 MS. GUYMON: We will endeavor  
15 to find out more about the  
16 publication.

17 PRESIDENT NARIMAN: Yeah.

18 MS. GUYMON: The statement from  
19 the publication though -- you probably  
20 already had a chance to read it -- but  
21 it did let readers know that:

22 "All 37 states as of that time  
23 had approved model statute legislation  
24 which required manufacturers not  
25 participating in the MSA agreement to

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1 Grand River Arbitration  
2 establish and maintain escrow accounts  
3 for any potential state Medicaid  
4 related recovery claims.  
5 Manufacturers pay into the escrow  
6 accounts bases on their volume of  
7 cigarette sales in each state."

8 PRESIDENT NARIMAN: Speaking  
9 for myself, I find this very  
10 important. That's why I am pursuing  
11 it, and I am requesting you to assist  
12 us. But you are not in a position to  
13 assist us. You don't know whether

14 it's a newsletter, whether it's a  
15 journal.

16 MR. CROOK: Unless I am much  
17 mistaken, Mr. Chairman, one of the  
18 attorneys for the Claimants appears to  
19 have left the room and perhaps is  
20 going to attempt to answer your  
21 question.

22 PRESIDENT NARIMAN: You are  
23 more prescient than I am.

24 MR. CROOK: I noticed there was  
25 an Internet terminal outside the room.

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1 Grand River Arbitration  
2 Perhaps they will be spending some  
3 time on that.

4 PRESIDENT NARIMAN: This is  
5 useful information. We are not saying  
6 it's not.

7 MR. CROOK: I don't think this  
8 information is any different from any  
9 information that appears elsewhere in  
10 the record, Mr. Chairman.

11 PRESIDENT NARIMAN: No, but I  
12 think it's important. That's why I  
13 would like to know whether this is --  
14 what sort of a publication it is.

15 MR. CLODFELTER: We will find  
16 out everything we can about it.

17 MS. GUYMON: We did,  
18 Mr. Chairman, just for the background  
19 and the rest of the Tribunal, before  
20 putting this in evidence, we did  
21 investigate what Smoke Shop is. And  
22 Smoke Shop describes itself at least  
23 as one being one of the major -- and  
24 called itself the "superlative" trade  
25 publication for the industry.

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2 PRESIDENT NARIMAN: Where is  
3 that?

4 MS. GUYMON: We did not provide  
5 that, but we certainly would be happy  
6 to. We did do that at the preliminary  
7 step -- we can make sure.

8           PRESIDENT NARIMAN: Yes,  
9 because is Smoke Shop circulating  
10 among five people, 50 people? We  
11 don't know.  
12           MS. GUYMON: No, it is not.  
13           PRESIDENT NARIMAN: Then you  
14 must tell us.  
15           MS. GUYMON: We will provide  
16 that document that shows that it  
17 describes itself as being a major  
18 industry publication.  
19           PRESIDENT NARIMAN: Major, even  
20 the claim that it's major, okay.  
21           MS. GUYMON: Regardless though  
22 of any of this media coverage of the  
23 escrow statutes, the escrow statutes  
24 themselves were enacted into law and  
25 as such were publicly available as

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1           Grand River Arbitration  
2 laws applicable to Claimants because  
3 they were in this industry.  
4           As those laws were made  
5 available, it was readily discernible  
6 that they were all following a  
7 pattern. They were all following the  
8 model statute. They were not  
9 different in any material respect.  
10           MR. CROOK: Mr. Chairman, do I  
11 observe the secretary just pulled up  
12 information on Smoke Shop?  
13           PRESIDENT NARIMAN: You are  
14 remarkably prescient.  
15           MS. GUYMON: It may be the same  
16 information that we also just pulled  
17 up, that says that Smoke Shop is  
18 published by:  
19           "Lockwood Trade Journals,  
20 publishers of Smoke, Pipe Smoke,  
21 Tobacco International, Tobacco Asia,  
22 and the TM Copy Trade Journal. With a  
23 30-year history of serving the tobacco  
24 industry, Smoke Shop has become one of  
25 the oldest and most respected trade

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1           Grand River Arbitration

2 journals in the industry. Our mission  
3 is to provide in-depth information to  
4 our readers concerning the  
5 ever-changing tobacco industry,  
6 including cigars, pipes, cigarettes,  
7 accessories, and other tobacco  
8 products."

9 And the address of the  
10 Smoke Shop magazine is 26 Broadway,  
11 New York, New York.

12 PRESIDENT NARIMAN: Would you  
13 give us a copy of this?

14 MS. GUYMON: Yes, we would be  
15 happy to.

16 PRESIDENT NARIMAN: It's not on  
17 the record. Okay.

18 MS. GUYMON: Reading the model  
19 statute, though, or the escrow  
20 statutes enacted in any of the states  
21 should have imparted knowledge to the  
22 Claimants that they were incurring the  
23 losses they now allege and that  
24 Ms. Menaker has discussed; namely, the  
25 Claimants should have read the escrow

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1 Grand River Arbitration  
2 statutes in states where their  
3 cigarette were intended for sale and  
4 acquired the following knowledge prior  
5 to March 12, 2001:

6 Knowledge that Grand River, as  
7 the manufacturer of cigarettes sold in  
8 the US, was required to make annual  
9 payments into escrow for US sales of  
10 its cigarettes beginning in 1999;  
11 knowledge that Grand River was  
12 responsible for making payments,  
13 whether its cigarette were sold  
14 directly to consumers or indirectly  
15 through any number of intermediaries,  
16 because that language is in the plain  
17 text of the escrow statutes; knowledge  
18 that the amount of the escrow payment  
19 was calculated using the volume of  
20 sales subject to excise taxes -- that  
21 was clear on the face of the statute;

22 knowledge that failure to place funds  
23 into escrow subjected the manufacturer  
24 to penalties up to three times the  
25 amount owed in escrow and a ban on

0305

1 Grand River Arbitration  
2 further cigarette sales.

3 Claimants deny acquiring such  
4 knowledge, insisting that they did not  
5 understand that the escrow obligation  
6 applied to them. As Ms. Menaker  
7 explained, Claimants cannot be excused  
8 for allegedly believing that they were  
9 not subject to the escrow statutes  
10 because they did not make sales  
11 directly to consumers.

12 Claimants' suggestion that they  
13 were unaware and therefore not  
14 accountable for the subsequent resales  
15 of their cigarettes that were subject  
16 to excise taxes and, therefore, the  
17 escrow obligation that arose, must  
18 also be rejected.

19 The evidence shows that  
20 Grand River was aware in early 1999  
21 that its products were being sold  
22 through distributors in MSA states,  
23 and that at least some of these sales  
24 were subject to excise taxes, giving  
25 rise to the escrow obligations.

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1 Grand River Arbitration

2 On the screen is one of several  
3 letters that were sent in March, April  
4 and September of 1999. And the one on  
5 the screen is tab 133 in our  
6 appendices.

7 Chantell Macinnes Montour,  
8 in-house counsel for Grand River  
9 Enterprises, sent these letters in  
10 support of White River Distributors'  
11 application for state and federal  
12 tobacco licenses in various states.

13 The letter on the screen, as I  
14 mentioned, is the earliest of these,  
15 the March 1999 letter.

16 PRESIDENT NARIMAN: What does  
17 it show?

18 MS. GUYMON: This shows -- as  
19 you can see, it's a letter from the  
20 in-house counsel for Grand River. It  
21 shows that Grand River is supporting  
22 the efforts of a distributor called  
23 White River Distributors to obtain  
24 state and federal tobacco licenses.  
25 As the letter indicates, White River

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1 Grand River Arbitration  
2 Distributors is being authorized to  
3 sell Grand River cigarettes, and  
4 Grand River is thereby aware that its  
5 authorized distributor is being  
6 subject to state and federal tobacco  
7 licenses, which carry with them state  
8 and federal obligations to comply with  
9 laws such as excise tax requirements.

10 Therefore, Grand River knew  
11 that its sales of cigarettes through  
12 its distributors were going to give  
13 rise to tax obligations, to excise tax  
14 obligations. And it is those excise  
15 taxes which make the definition of  
16 units sold in the model statute and  
17 escrow statutes applicable to  
18 Grand River as the manufacturer.

19 PRESIDENT NARIMAN: That's a  
20 long jump --

21 MS. GUYMON: Because it's a  
22 two-step jump. It combines their  
23 actual knowledge as shown in this  
24 letter that their cigarettes were  
25 being sold under conditions that would

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1 Grand River Arbitration  
2 give rise to excise tax obligations.

3 And all you have to do is add  
4 the second step, which is what I have  
5 already discussed -- they should have  
6 known the law. They should have read  
7 the escrow statutes that applied to  
8 them.

9 They knew, for example, that in

10 the State of Missouri, where this  
11 letter on behalf of White River  
12 Distributors was sent, that someone  
13 was selling their cigarettes and that  
14 those cigarettes were giving rise to  
15 excise taxes, and because they should  
16 have read the law, they also should  
17 have known that those excise taxes  
18 triggered an escrow tax obligation.

19 PRESIDENT NARIMAN: But this  
20 doesn't show any knowledge of the law,  
21 the fact that they knew the law is not  
22 shown by these letters.

23 MS. GUYMON: This shows they  
24 knew the excise tax law. They knew  
25 the federal and state legal

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1 Grand River Arbitration  
2 requirements.

3 MR. ANAYA: I'm sorry. I  
4 didn't quite see that.

5 MS. GUYMON: There is another  
6 letter that shows it more clearly. I  
7 will switch to that letter now. And  
8 this letter -- you are right; it  
9 doesn't say "excise tax" anywhere in  
10 the letter. But it says "various  
11 state and federal tobacco licenses."

12 Requiring -- a state tobacco  
13 license carries with it the  
14 requirement to comply with state laws,  
15 including state excise tax laws.

16 But we have another letter  
17 which is now on the screen that Native  
18 Tobacco Direct, Mr. Montour sent, to  
19 the State of Missouri, reporting on  
20 sales of Grand River cigarettes  
21 through that same distributor, White  
22 River Distributors, and reporting, as  
23 it was obligated to do, that there  
24 were no sales for a certain period of  
25 time, the month of October, and,

0310

1 Grand River Arbitration  
2 therefore, there was no tax paid.

3 PRESIDENT NARIMAN: Yet, again,

4 there is no reference to the escrow  
5 laws.

6 MS. GUYMON: You are correct.  
7 This is a two-step showing. They  
8 knew -- this letter shows they knew  
9 about the tax requirement. Their  
10 constructive knowledge of the escrow  
11 laws should have caused them to  
12 acquire knowledge that, if excise tax  
13 was paid, escrow obligations followed.

14 PRESIDENT NARIMAN: That is  
15 what tab number?

16 MS. GUYMON: This is tab 15.

17 PRESIDENT NARIMAN: 15.

18 MS. GUYMON: 15 in the US  
19 appendices.

20 MR. CROOK: Can I interrupt  
21 with a question -- or answer now --  
22 you may be getting to this later in  
23 your argument. But I notice that this  
24 particular letter uses the 14 -- 14411  
25 Four Mile Level Road address. And one

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1 Grand River Arbitration  
2 of the issues is whether that was an  
3 appropriate address at varying times  
4 for communications. And will you be  
5 addressing that?

6 MS. GUYMON: I will be  
7 addressing that when I talk about  
8 actual knowledge.

9 MR. CROOK: Thank you.

10 MS. GUYMON: Claimants thus  
11 knew well before March 12, 2001, that  
12 Grand River cigarettes sold through  
13 distributors were subject to excise  
14 taxes. They also should have known  
15 from reading the escrow statutes that  
16 any such sales caused Grand River to  
17 incur an obligation to make payments  
18 into escrow.

19 Even if Claimants at this point  
20 had not read the model statute or the  
21 MSA or any of the escrow statutes,  
22 they had a legal obligation -- or they  
23 should have known and complied with



24 those laws in the places where their  
25 products were being sold.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: May I just  
3 interrupt you. Is there any evidence  
4 on record -- because I am not quite  
5 sure -- that they paid any sums of  
6 money into escrow accounts before  
7 March of 2001? Is there any document  
8 on record?

9 MS. GUYMON: I don't believe  
10 there is in the record any evidence  
11 that shows there were actually paying.  
12 There is record evidence that shows  
13 they should have been paying.

14 PRESIDENT NARIMAN: Yes.

15 MS. GUYMON: Claimants thus  
16 first should have acquired knowledge  
17 of the MSA regime and the escrow  
18 statutes in particular well in advance  
19 of March 12, 2001. Claimants had a  
20 responsibility to know the law, and  
21 they had the ability to know the law,  
22 to access and read the MSA and the  
23 escrow statutes.

24 Claimants must be presumed to  
25 have known the law and the application

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1 Grand River Arbitration

2 to them at the time they became  
3 subject to those laws.

4 MR. ANAYA: And you are saying  
5 there is no ambiguity in the law -- if  
6 they go and read it, they did this, if  
7 they do what you say they should have  
8 done, read the law, there is no  
9 ambiguity in it?

10 MS. GUYMON: There is no  
11 ambiguity.

12 MR. ANAYA: One kind of  
13 potential ambiguity --

14 MS. GUYMON: And that's the  
15 discussion, I think, that was engaged  
16 in earlier, was about the excise taxes  
17 and how that law may vary from state

18 to state.

19 MR. ANAYA: That was one kind  
20 of potential ambiguity.

21 MS. GUYMON: And that is not an  
22 ambiguity in this law. That is not an  
23 ambiguity in the escrow statutes. And  
24 it's not really an ambiguity. It's a  
25 variation. Some states do it one way.

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1 Grand River Arbitration  
2 Other states do it another way.

3 That also was knowable at the  
4 time the escrow statutes were enacted.  
5 A reasonable cigarette manufacturer  
6 with sales in the state would have  
7 inquired into the legal obligation  
8 under the escrow statutes, would have  
9 inquired into what the excise tax  
10 regime was in that state, because  
11 their sales of cigarettes were being  
12 made in that state.

13 And so those things were  
14 knowable and actually should have been  
15 known by the Claimants at the time  
16 that their sales were being made.

17 As Ms. Menaker explained,  
18 Claimants' first losses were incurred  
19 as soon as the MSA and escrow statutes  
20 were in effect. Thus, the knowledge  
21 they should have acquired of the MSA  
22 and the escrow statutes carried with  
23 it knowledge that Claimants had first  
24 incurred loss or damage.

25 Even in the absence of any

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1 Grand River Arbitration  
2 additional evidence therefore, their  
3 entire claim is time barred. The  
4 constructive knowledge showing alone  
5 is enough to bar their claims without  
6 any evidence of actual knowledge. But  
7 I will turn now to that evidence of  
8 Claimants' actual knowledge.

9 MR. ANAYA: Wait. Are you  
10 saying that they are time barred by  
11 constructive knowledge about the

12 breach, apart from any knowledge or  
13 about a loss? I mean, they make this  
14 big difference between the two. And  
15 are you saying the two -- one of those  
16 two will suffice to --

17 MS. GUYMON: No, both are  
18 required. But constructive knowledge  
19 as to both is sufficient. So  
20 constructive knowledge that they had  
21 incurred a loss, that they had first  
22 incurred a loss is sufficient.

23 So in other words, the escrow  
24 statutes were in place. They had a  
25 legal obligation to make a payment

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1 Grand River Arbitration  
2 under that escrow statute.

3 Even if they say they didn't  
4 know that, they had -- they should  
5 have first acquired knowledge that  
6 they had incurred that loss because  
7 they should have known the law. The  
8 law applied to them. They took the  
9 step by making the sales of their  
10 cigarettes in those states. That made  
11 the law applicable and be in force as  
12 to them and cause them a loss, and  
13 they should have known about that.  
14 They should have known.

15 MR. ANAYA: As of the time they  
16 began selling cigarettes.

17 MS. GUYMON: As of the time  
18 they began selling -- of both, the  
19 breach and the loss.

20 MR. ANAYA: Right.

21 MS. GUYMON: I turn now to  
22 their actual knowledge.

23 The United States has uncovered  
24 evidence that reveals that Claimants  
25 most certainly did know that they had

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1 Grand River Arbitration  
2 incurred losses about which they now  
3 complain more than three years prior  
4 to submitting their claim to  
5 arbitration.

6           It's important to keep in mind  
7 as I just mentioned that this evidence  
8 is additional and extra. It goes  
9 beyond the necessary showing of  
10 constructive knowledge and shows that  
11 they, in fact, should have known and  
12 did know about the breaches and the  
13 losses they now allege more than years  
14 before submitting their claim.

15           The evidence of actual  
16 knowledge that I will discuss falls  
17 into three categories: One, knowledge  
18 acquired through direct notices to  
19 Claimants from MSA states --

20           PRESIDENT NARIMAN: Just a  
21 little slowly please.

22           MS. GUYMON: So the first  
23 category, knowledge acquired through  
24 direct notices to Claimants from MSA  
25 states advising them of their payment

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1           Grand River Arbitration  
2 obligations.

3           The second category --

4           PRESIDENT NARIMAN: One second.

5           Yes.

6           MS. GUYMON: -- knowledge  
7 acquired through similar notices that  
8 were sent to Claimants' business  
9 affiliates.

10           And the third category --

11           PRESIDENT NARIMAN: One second.

12           Yes.

13           MR. ANAYA: They say these were  
14 prior.

15           MS. GUYMON: They do. I will  
16 discuss that in turn. I am setting  
17 out my road map here. Then I will  
18 discuss each of the three categories  
19 in much greater detail.

20           The third category that I will  
21 review is knowledge -- Claimants  
22 knowledge that Missouri had filed a  
23 lawsuit against them for their failure  
24 to make escrow payments.

25           PRESIDENT NARIMAN: Missouri

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1 Grand River Arbitration  
2 had filed a lawsuit. That's one of  
3 the documents against them -- for not  
4 making payments.

5 MS. GUYMON: For their failure  
6 to make escrow payments.

7 PRESIDENT NARIMAN: Okay.

8 MS. GUYMON: So although the  
9 states were under no obligation to do  
10 this -- they were not required to  
11 directly notify Claimants of their  
12 obligations to comply with state  
13 laws -- as I already mentioned, it was  
14 Claimants' obligation to find out  
15 about the law and comply with them --  
16 nonetheless, several states did send  
17 notices to cigarette manufacturers,  
18 including Grand River, and its  
19 distributors and affiliates, reminding  
20 them of the operation of the escrow  
21 statutes.

22 Three letters to Claimants  
23 predating March 12th, 2001 --

24 PRESIDENT NARIMAN: One second.  
25 Three letters, dated --

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1 Grand River Arbitration

2 MS. GUYMON: Predating March  
3 12, 2001.

4 PRESIDENT NARIMAN: You don't  
5 have the date of the letter.

6 MS. GUYMON: I am about to show  
7 them on our time line. So there are  
8 three letters. Each of these letters  
9 has been noted in our time line.

10 PRESIDENT NARIMAN: Can you  
11 just give us the dates, please.

12 MS. GUYMON: As shown, there is  
13 an Iowa letter from April 7, 2000.

14 PRESIDENT NARIMAN: This one is  
15 Iowa. That is April 7th.

16 MS. GUYMON: April 7th, 2000  
17 from Iowa.

18 PRESIDENT NARIMAN: And this  
19 what is tab, please?

20 MS. GUYMON: I am actually  
21 going to discuss the letter in great  
22 detail.

23 PRESIDENT NARIMAN: What tab is  
24 it?

25 MS. GUYMON: The Iowa letter is

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1 Grand River Arbitration  
2 132B.

3 PRESIDENT NARIMAN: B.

4 MS. GUYMON: Yes. The Missouri  
5 letter, April 25, 2000.

6 PRESIDENT NARIMAN: A letter  
7 dated April 25, 2000.

8 MS. GUYMON: At tab 16.

9 PRESIDENT NARIMAN: Tab 16 US.

10 MS. GUYMON: Yes.

11 And the third letter I'm going  
12 to discuss is an October 11, 2000  
13 letter from Iowa, this one to Native  
14 Tobacco Direct.

15 PRESIDENT NARIMAN: To Native  
16 Tobacco Direct. That comes in your  
17 second category, affiliates.

18 MS. GUYMON: No, Native Tobacco  
19 Direct is a Claimant.

20 PRESIDENT NARIMAN: Yes. Okay.

21 MR. CROOK: That's tab 132 as  
22 well.

23 PRESIDENT NARIMAN: That's tab  
24 132.

25 MS. GUYMON: No, that is -- I'm

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1 Grand River Arbitration  
2 going to discuss it in a moment, but I  
3 believe it is tab 129.

4 PRESIDENT NARIMAN: Tab 129.  
5 Okay.

6 MS. GUYMON: For now I want to  
7 briefly note them, so you can place  
8 them in the chronology on our time  
9 line, but I would like to discuss each  
10 of them in turn. Claimants do not  
11 deny by the way receiving the two  
12 letters from Iowa.

13 PRESIDENT NARIMAN: Wait a

14 minute.

15 Where do you get that, that  
16 they don't deny.

17 MS. GUYMON: They put in an  
18 affidavit by Mr. Williams that  
19 protests that the Missouri letter is  
20 not currently in the company files.  
21 But that affidavit does not address  
22 the Iowa letters directly.

23 PRESIDENT NARIMAN: Not in  
24 company files, and no mention of Iowa  
25 in their reply.

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1 Grand River Arbitration

2 MS. GUYMON: There is no  
3 mention in -- in their rejoinder, in  
4 responding to the Iowa letters, they  
5 refer back to the Williams affidavit.  
6 However, the Williams affidavit was  
7 provided with their response, and  
8 directly addresses only the Missouri  
9 letter.

10 PRESIDENT NARIMAN: That's it.

11 MS. GUYMON: If the Tribunal is  
12 ready, I will turn to each of these  
13 letters, and we will look at each one  
14 of them individually.

15 PRESIDENT NARIMAN: Please.

16 MS. GUYMON: So starting with  
17 Iowa's revenue department, their  
18 letter -- their reminder letter -- so,  
19 again, in reminding them -- tab  
20 132B -- reminding them of what they  
21 already should have known, they sent a  
22 letter to Grand River, dated April 7,  
23 2000. And that letter is projected on  
24 the screen. It --

25 MR. ANAYA: "To whom it may

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1 Grand River Arbitration  
2 concern"? Can you help me figure out  
3 how --

4 MS. GUYMON: In tab 132, there  
5 is an affidavit from a Dale Feedy of  
6 the Missouri Department -- or I'm  
7 sorry -- of the Iowa Department of

8 Revenue. He explains the various  
9 exhibits including this letter at  
10 132B. He explained who it was sent  
11 to. He provides a spreadsheet that  
12 lists everyone who received it from  
13 the state.

14 PRESIDENT NARIMAN: Received  
15 it.

16 MS. GUYMON: The spreadsheet  
17 indicates addresses to which it was  
18 sent, dates on which it was sent,  
19 whether or not it was returned.

20 PRESIDENT NARIMAN: Can you  
21 just tell us from 132, if you don't  
22 mind, when was it sent, and when was  
23 it according to the spreadsheet  
24 received.

25 MS. GUYMON: It was sent -- the  
0325

1 Grand River Arbitration  
2 spreadsheet doesn't show when it was  
3 received. The spreadsheet shows that  
4 it was sent April 7, 2000, and shows  
5 that it was not subsequently returned.

6 PRESIDENT NARIMAN: April 7,  
7 2000.

8 MS. GUYMON: As undelivered.

9 PRESIDENT NARIMAN: Sent  
10 April 7, 2000, to Grand River.

11 MS. GUYMON: To Grand River.

12 PRESIDENT NARIMAN: At which  
13 address?

14 MS. GUYMON: I'm going to talk  
15 about that --

16 PRESIDENT NARIMAN: That's  
17 later.

18 MS. GUYMON: If you will permit  
19 me to --

20 PRESIDENT NARIMAN: No.

21 MS. GUYMON: I thought first we  
22 would take about what the letter says.

23 PRESIDENT NARIMAN: No  
24 difficulty.

25 MS. GUYMON: Just to be clear,  
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1 Grand River Arbitration



2 that this letter did notify Claimants  
3 of all of their obligations. The  
4 letter enclosed a copy of the statute,  
5 so the statute was enclosed for them  
6 to read.

7 But the letter also outlined  
8 the obligations in that statute, the  
9 steps that manufacturer must take if  
10 its cigarettes are sold in Iowa,  
11 quote: "Whether through a  
12 distributor, retailer, or similar  
13 intermediary or intermediaries."

14 PRESIDENT NARIMAN: Pardon me.  
15 But tab 132 is an affidavit.

16 MS. GUYMON: It is of  
17 Dale Feedy.

18 MR. CROOK: The gentleman at --

19 PRESIDENT NARIMAN: The  
20 gentlemen -- that's right.

21 MS. GUYMON: He's the sender of  
22 the letter, and his affidavit explains  
23 the methodology and process by which  
24 these letters were sent to numerous  
25 listed recipients. And the

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1 Grand River Arbitration  
2 spreadsheet that is also in Exhibit 2,  
3 his affidavit lists all of those  
4 recipients, including Grand River, for  
5 the April 7, 2000 letter.

6 PRESIDENT NARIMAN: Neither  
7 responded to nor returned.

8 MS. GUYMON: Precisely.

9 You may recall, when we were  
10 discussing the Oregon letter,  
11 Claimants suggested some ambiguity as  
12 to their obligation to make payments.  
13 This letter clearly states that the  
14 payments had to be made whether sales  
15 were made directly or indirectly.  
16 It's clearly set forth in the letter  
17 as it is clearly set forth in the  
18 statute.

19 PRESIDENT NARIMAN: It's units  
20 sold and all of that.

21 MS. GUYMON: It does -- it

22 reported that the manufacturer was the  
23 one that had the responsibility to  
24 establish an escrow account, deposit  
25 funds into the escrow account based on

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1 Grand River Arbitration  
2 the number of cigarettes sold, and  
3 verify in writing that it has done so.

4 The Missouri letter is very  
5 similar. The Missouri letter was sent  
6 on April 25, 2000, and is shown on the  
7 screen. This letter from Missouri's  
8 Department of Revenue enclosed a copy  
9 of Missouri's escrow statute and again  
10 reminded Grand River of the  
11 requirements to establish and fund an  
12 escrow account if any cigarettes it  
13 manufactured were sold in Missouri.

14 PRESIDENT NARIMAN: And where  
15 do you get the Quinton Wilson  
16 affidavit?

17 MS. GUYMON: We did not provide  
18 an affidavit from Quinton Wilson. But  
19 as you can see, this letter actually  
20 shows Grand River's address on the  
21 face of the letter: Grand River  
22 Enterprises, RR Number Two, Oshweken,  
23 Ontario, Canada.

24 PRESIDENT NARIMAN: And then  
25 the reply is that it is not in the

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1 Grand River Arbitration  
2 company files.

3 MS. GUYMON: Yes, I will get to  
4 that in one minute if you will permit  
5 me. Unlike the Iowa letter, because  
6 Grand River is identified, we did not  
7 find it necessary to seek an affidavit  
8 from Missouri, because the address is  
9 on the letter.

10 PRESIDENT NARIMAN: There is  
11 another letter of Iowa.

12 MS. GUYMON: There is another  
13 letter of Iowa which I will get to in  
14 a minute. So these are the two  
15 letters that we put in to Grand River.

16 And as you mentioned Steve Williams in  
17 his affidavit attests that the  
18 Missouri letter cannot be found  
19 currently in Grand River's files. But  
20 he says nothing about the Iowa letter.

21 PRESIDENT NARIMAN: But he  
22 doesn't deny the receipt of this  
23 letter. Does he say --

24 MS. GUYMON: He says it cannot  
25 be found currently in the company

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1 Grand River Arbitration  
2 files.

3 PRESIDENT NARIMAN: Does he  
4 deny receipt of the letter?

5 MS. GUYMON: I do not think he  
6 does directly deny receipt of the  
7 letter.

8 PRESIDENT NARIMAN: Not what  
9 you think. Let's see. Please go  
10 through this.

11 MR. CROOK: I think Mr. Violi  
12 may have the affidavit.

13 PRESIDENT NARIMAN: I can  
14 interrupt -- let her deal with it.

15 MS. GUYMON: I believe  
16 Mr. Williams in his affidavit says:

17 "After extensive review of the  
18 books and record of Grand River, I can  
19 state with absolute certainty that the  
20 first communication that Grand River  
21 received concerning any of the  
22 measures at issue is correspondence  
23 dated March 14, 2001," which is a  
24 reference to the Oregon letter.

25 The correspondence is addressed

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1 Grand River Arbitration  
2 to Grand River Enterprises and so on.  
3 It describes the Oregon letter.

4 So the implication there is  
5 that the first communication  
6 Grand River admits receiving is not  
7 until Oregon's --

8 PRESIDENT NARIMAN: He doesn't  
9 deal with these three letters.

10 MS. GUYMON: He doesn't deal  
11 specifically with the Iowa letter.  
12 The Iowa letter was not in evidence at  
13 that point.

14 PRESIDENT NARIMAN: Iowa was  
15 not in evidence, but your Missouri  
16 letter was in evidence?

17 MS. GUYMON: Our Missouri  
18 lettered was in evidence at that point  
19 so his affidavit --

20 PRESIDENT NARIMAN: Williams's  
21 affidavit is what date, please.

22 MS. GUYMON: Williams's  
23 affidavit is --

24 PRESIDENT NARIMAN: Can you  
25 give us the date, please

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1 Grand River Arbitration

2 MS. GUYMON: January 13, 2006.

3 PRESIDENT NARIMAN: He says  
4 it's not -- he didn't say not in the  
5 company files. He said the first  
6 letter.

7 MS. GUYMON: He says that  
8 "after reviewing the books and records  
9 of Grand River." So the implication  
10 is that he went searching through  
11 their records to find letters.

12 PRESIDENT NARIMAN: This is in  
13 answer to that tab 16. That is the  
14 April 25th, 2001.

15 MR. CROOK: I think it was more  
16 in the nature of a generic statement,  
17 Mr. Chairman. He was not addressing  
18 this particular document, but  
19 generally.

20 MS. GUYMON: The important  
21 point is that both of those letters  
22 were sent to Grand River in April of  
23 2000, and the direct response --

24 PRESIDENT NARIMAN: No,  
25 please -- I'm sorry. I'd like to get

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1 Grand River Arbitration

2 this clear if you don't mind. I just  
3 want to know.

4           Where did you rely upon this in  
5 your affidavit, in your statement at  
6 this tab 16?  
7           MS. GUYMON: Where did we rely  
8 upon it?  
9           PRESIDENT NARIMAN: Yes,  
10 because this is supposed to be an  
11 answer of the Claimants.  
12           MS. GUYMON: It's in our  
13 objection to jurisdiction in our  
14 appendices at tab 16.  
15           PRESIDENT NARIMAN: In the  
16 appendices?  
17           MS. GUYMON: Yes, it is in the  
18 objection itself.  
19           PRESIDENT NARIMAN: Can you  
20 just give me the background.  
21           MS. GUYMON: Yes, we discuss it  
22 in our statement of facts earlier, but  
23 in our legal argument we discuss it on  
24 page 43.  
25           PRESIDENT NARIMAN: Page 43.

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1           Grand River Arbitration  
2           MS. GUYMON: Of the objection  
3 to jurisdiction.  
4           PRESIDENT NARIMAN: No --  
5 Missouri Department of Revenue, for  
6 instance, mailed a letter to  
7 Grand River on 25 April, 2000. I see.  
8           MS. GUYMON: So both the  
9 Missouri letter and the Iowa letter  
10 were sent to Grand River in April of  
11 2000. Claimants say that they moved  
12 to a new address on March 15, 2000,  
13 mere weeks before these letters were  
14 sent, and suggest therefore that they  
15 did not receive them. Claimants'  
16 excuse for not having received these  
17 letters are not credible. First --  
18           PRESIDENT NARIMAN: No, but  
19 one minute, this Missouri letter is  
20 sent to number 2 -- what is that.  
21           MS. GUYMON: RR Number Two.  
22           PRESIDENT NARIMAN: Oshweken.  
23           MS. GUYMON: Yes. The Iowa

24 letter is also to the same address as  
25 Dale Feedy's affidavit has.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: You are not  
3 dealing with the Iowa letter. See,  
4 it's not in your objections to  
5 jurisdiction, the two Iowa letters.

6 MS. GUYMON: You are correct.

7 PRESIDENT NARIMAN: Let's  
8 please -- if you don't mind, first  
9 give us Missouri. Then go back to  
10 Iowa. Don't say all three together  
11 because otherwise it's very confusing  
12 because you are relying on the fact  
13 that the Claimants has not  
14 specifically dealt with it in his  
15 reply to your objections to  
16 jurisdiction.

17 MS. GUYMON: But their  
18 justification for not receiving the  
19 letter is the same. It's that they  
20 moved to a different address.

21 PRESIDENT NARIMAN: You deal  
22 with Missouri first. Then we can have  
23 the same justification for Iowa.

24 Address, Rural Route Two, Oshweken.

25 MS. GUYMON: Sure.

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1 Grand River Arbitration

2 Yes, even if Claimants did move  
3 in mid March, they should have either  
4 arranged to forward their mail, or  
5 periodically gone back and retrieved  
6 their mail from that address from  
7 which they had just moved weeks  
8 before.

9 PRESIDENT NARIMAN: But you are  
10 not a position to say that they did  
11 not move.

12 MS. GUYMON: No.

13 MR. ANAYA: Is that what you  
14 just say -- does that go to  
15 constructive knowledge?

16 MS. GUYMON: It's again an  
17 intermingling of constructive

18 knowledge because the standard is what  
19 they should have known. A reasonable  
20 business should have arranged to  
21 retrieve its mail or forward its mail  
22 a few weeks after it had moved.

23 Claimants should therefore be  
24 deemed to have known about these  
25 letters because any reasonable

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1 Grand River Arbitration  
2 business person would have followed  
3 these steps.

4 PRESIDENT NARIMAN: Don't mix  
5 up the Iowa with the -- if you don't  
6 mind, deal with it separately. Then I  
7 can understand it. Otherwise I  
8 cannot. You have --

9 MR. CROOK: I believe she is  
10 discussing Missouri.

11 PRESIDENT NARIMAN: Only  
12 Missouri.

13 So in the Missouri your point  
14 is that there was a letter which was  
15 addressed -- there was a letter --  
16 because this is specific knowledge  
17 which you are alleging. That is why  
18 we have to go through a little  
19 carefully, please.

20 And this is a Missouri letter  
21 sent as recorded, and in tab number  
22 16. And the answer given is that in  
23 their searching their files, when the  
24 first letter happened to be, the  
25 March 21 or something, 2001, not

0338

1 Grand River Arbitration  
2 earlier. And because -- and the  
3 further statement is that they had  
4 already shifted.

5 Now, the shifting you don't  
6 deny, and I mean, you are not in a  
7 position to deny.

8 MS. GUYMON: Actually, I  
9 believe Claimants themselves have  
10 denied it in their own allegation. I  
11 was going to march through that.

12           PRESIDENT NARIMAN: Whichever  
13 way you want to deal with it.

14           MS. GUYMON: Okay. There are  
15 three reasons why it's not credible to  
16 believe that they didn't receive this  
17 letter despite their have moved.

18           PRESIDENT NARIMAN: So you say  
19 the two Iowa letters are also of the  
20 same --

21           MS. GUYMON: Just one, the one  
22 that is April 25, 2000, that is  
23 addressed to Grand River.

24           PRESIDENT NARIMAN: Only one.

25           MS. GUYMON: Yes, the other

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1           Grand River Arbitration  
2 Iowa letter.

3           PRESIDENT NARIMAN: No, that's  
4 Missouri.

5           MR. VIOLI: April 7th, you  
6 mean.

7           PRESIDENT NARIMAN: April 7th,  
8 you mean.

9           MS. GUYMON: April 7 of 2000  
10 and April 25 of 2000 are the two  
11 letters to Grand River. One is from  
12 Iowa to Missouri.

13           PRESIDENT NARIMAN: And they  
14 are both addressed to this RR-2,  
15 Oshweken.

16           MS. GUYMON: Correct, yes,  
17 April 7th from Iowa, April 25th from  
18 Missouri, both addressed to RR-2  
19 Oshweken, Ontario.

20           PRESIDENT NARIMAN: And what do  
21 they say precisely, if you don't  
22 mind -- what do the Claimants say in  
23 their reply about the address?

24           MS. GUYMON: Claimants say  
25 that, in paragraph 17 of

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1           Grand River Arbitration  
2 Mr. Williams's affidavit, Claimants  
3 say:

4           "Grand River ceased operations  
5 at RR Number Two, Oshweken, on March



6 15, 2000."  
7 So less than a month before.  
8 PRESIDENT NARIMAN: On  
9 March 2nd.  
10 MS. GUYMON: March 15th.  
11 PRESIDENT NARIMAN: 2000,  
12 right. Okay. AND you have a comment  
13 on that.  
14 MS. GUYMON: Yes, I have three  
15 comments on that.  
16 First, what the reasonable  
17 business person would have done, which  
18 is either arrange for forwarding,  
19 which you can do through Canada Post,  
20 or just go back to your old address  
21 and periodically pick up your mail.  
22 It's just not reasonable business  
23 practice to abandon your place of  
24 address without making any other  
25 arrangement to continue to receive  
0341

1 Grand River Arbitration  
2 crucial mailings.  
3 Second, the evidence shows that  
4 Grand River did receive the letter  
5 from Iowa. Now, we are talking about  
6 Iowa only. As I mentioned there is an  
7 affidavit at tab 132 from Mr. Feedy of  
8 the Iowa Department of Revenue, and  
9 the United States provided this in an  
10 appendix to its reply.  
11 PRESIDENT NARIMAN: No, but 132  
12 is addressed to whom?  
13 MS. GUYMON: 132B is addressed  
14 to Grand River, I believe.  
15 PRESIDENT NARIMAN: At what  
16 address?  
17 MS. GUYMON: The same address,  
18 RR Number Two.  
19 PRESIDENT NARIMAN: 132,  
20 addressed to Grand River.  
21 MS. GUYMON: In tab 132, the  
22 actual affidavit from Mr. Feedy, he  
23 explains that Iowa kept a record of  
24 which letters were returned to it, as  
25 undelivered. And this Iowa letter to

0342

1 Grand River Arbitration  
2 Grand River was not returned as  
3 undelivered.

4 My third point as to --  
5 PRESIDENT NARIMAN: On this,  
6 the Claimant says nothing on the  
7 affidavit of Feedy.

8 MS. GUYMON: They refer -- the  
9 Claimants -- in response to the Iowa  
10 letter that we presented in our reply,  
11 Claimants come back in their reminder  
12 and refer back to the Williams  
13 affidavit that they had previously  
14 provided.

15 PRESIDENT NARIMAN: Like  
16 that --

17 MS. GUYMON: Yes.

18 PRESIDENT NARIMAN: They only  
19 restate what was stated.

20 MR. CROOK: Let me see if I  
21 have got the sequence.

22 MS. GUYMON: What was it as to  
23 Missouri --

24 MR. CROOK: The Williams  
25 affidavit is sometime in January. You

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1 Grand River Arbitration  
2 come back with your final pleading in  
3 early February, which has tab 132,  
4 which is the Feedy affidavit and the  
5 documents from Iowa. So there is then  
6 the final closing Claimants pleading,  
7 the precise date of which I have now  
8 forgotten.

9 But in that final pleading,  
10 they did not specifically address the  
11 Iowa documents which you had put in  
12 the first time in your previous  
13 pleading, but instead referred  
14 generally back to Mr. Williams's  
15 statement that he -- after reviewing  
16 the record, he can attest that the  
17 first time they learned was at a  
18 certain time.

19 Is that the sequence?

20 MS. GUYMON: Yes, in their  
21 rejoinder, they refer directly back to  
22 paragraph two, the paragraph that I  
23 read earlier that says that:

24 "After extensive review of the  
25 books and records, I can state with

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1 Grand River Arbitration  
2 absolutely certainty that the first  
3 communication that Grand River  
4 received was this Oregon letter."

5 They felt that was sufficient  
6 to address the Iowa as well as the  
7 Missouri letter, apparently. I don't  
8 know for sure what they thought.

9 My third point, as to these two  
10 letters sent to the RR Number Two  
11 address in April of 2000, is that,  
12 even if Grand River had moved, the  
13 evidence suggests that it would still  
14 have received mail that was sent to  
15 the RR Number Two address.

16 This is an address on the  
17 reservation; and in the Williams  
18 affidavit and in Claimants' response,  
19 they admit receiving the Oregon letter  
20 that Ms. Menaker discussed earlier.  
21 If we look at the address for the  
22 Oregon letter, it simply says  
23 Grand River Enterprises, Six Nations  
24 of the Grand River Territory Oshweken,  
25 Ontario, Canada -- with no street or

0345

1 Grand River Arbitration  
2 RR number whatsoever.

3 PRESIDENT NARIMAN: What is  
4 this exhibit?

5 MS. GUYMON: This was in  
6 Claimants' exhibits -- I believe it  
7 was tab A as in "apple" to the  
8 Williams affidavit, where he  
9 identified this as the first letter  
10 that they allegedly ever received.

11 And I am just pointing out the  
12 address on that letter, which didn't  
13 include any kind of a street address

14 or a rural route number of any kind,  
15 rather simply directed it to the Six  
16 Nations of the Grand River Territory  
17 in Oshweken, Ontario.

18 PRESIDENT NARIMAN: It's only  
19 addressed to Grand River -- will you  
20 just spell that out.

21 MS. GUYMON: Sure, Grand River  
22 Enterprises, Six Nations of the  
23 Grand River Territory, Oshweken,  
24 Ontario, Canada, without even a postal  
25 code.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: But where  
3 did that shift to? From Oshweken  
4 where did they go --

5 MS. GUYMON: According to them  
6 they moved --

7 PRESIDENT NARIMAN -- in March  
8 when they said that they had moved  
9 earlier -- where did they go to? Did  
10 they go to Oshweken or somewhere else?

11 MR. CROOK: They went to  
12 highway number --

13 MS. GUYMON: It's paragraph 17  
14 of the Williams affidavit, they state  
15 that -- Mr. Williams states that on  
16 March 15, 2000, quote:

17 "We moved to 1001 Highway  
18 Number Six, Caledonia."

19 However. In their statement of  
20 claim, Grand River alleged a couple of  
21 things. They alleged, one, that they  
22 are the, quote, "largest employer on  
23 the Grand River Reserve," unquote and  
24 they represented that they, quote,  
25 "maintained a principal office and

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1 Grand River Arbitration

2 tobacco products production facility  
3 located on the Grand River Reserve in  
4 Oshweken, Ontario, at all relevant  
5 times since incorporation."

6 They represented that they  
7 remained a presence on the

8 reservation.  
9 PRESIDENT NARIMAN: Read that,  
10 again.  
11 MS. GUYMON: Sure, I will refer  
12 you -- it's in their statement of  
13 claim in the very first paragraph of  
14 the factual allegations where they  
15 state, quote: "Maintained a principal  
16 office."  
17 PRESIDENT NARIMAN: Grand River  
18 maintained a principal office.  
19 MS. GUYMON: And tobacco  
20 products production facility.  
21 PRESIDENT NARIMAN: And tobacco  
22 what?  
23 MS. GUYMON: Products  
24 production facility located on the  
25 Grand River Reserve.

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1 Grand River Arbitration  
2 And I would note something that  
3 I believe we learned from this case.  
4 "Reserve" I believe is the Canadian  
5 term for "reservation." So in the  
6 United States we typically refer to it  
7 as a "reservation"; in Canada they  
8 typically refer to it as "reserve."  
9 PRESIDENT NARIMAN: Finish  
10 that.  
11 MS. GUYMON: Grand River  
12 Reserve in Oshweken, Ontario. And  
13 they say they did so and maintained  
14 these offices and production  
15 facilities, quote, "at all relevant  
16 times since incorporation."  
17 And I believe their allegation  
18 is that they were incorporated in  
19 1996.  
20 MR. CROOK: What paragraph is  
21 that, please?  
22 MS. GUYMON: That's paragraph  
23 one of the statement of claim.  
24 PRESIDENT NARIMAN: Where does  
25 that lead us to? I mean, what is your

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1 Grand River Arbitration

2 submission on that? Therefore, that  
3 what they say -- that they ceased  
4 operations in Oshweken is not correct,  
5 or what is your conclusion?

6 MS. GUYMON: It's directly  
7 contradicted by their own prior  
8 allegation which leads to doubt as to  
9 the credibility that they did not  
10 receive this letter.

11 PRESIDENT NARIMAN: Where is  
12 that address? Where is that located?

13 MS. GUYMON: Where is the other  
14 address?

15 PRESIDENT NARIMAN: Where they  
16 moved to.

17 MS. GUYMON: Where they moved  
18 to. They have moved twice actually  
19 according to the paragraph that I  
20 cited before. They briefly were in  
21 Caledonia --

22 PRESIDENT NARIMAN: Where is  
23 that?

24 MS. GUYMON: Paragraph 17 of  
25 the Williams affidavit.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: Moved to  
3 Caledonia.

4 MS. GUYMON: From March 2000  
5 until November of 2000.

6 PRESIDENT NARIMAN: One minute.  
7 From March to November of 2000. Yes.  
8 Yes.

9 MS. GUYMON: And then it says:

10 "When we then moved to our  
11 current facility located at 2176  
12 Chiefs Wood Road, Oshweken, Ontario.

13 PRESIDENT NARIMAN: What road?

14 MS. GUYMON: Chiefs Wood Road.

15 PRESIDENT NARIMAN: They went  
16 back to Oshweken.

17 MS. GUYMON: They went back to  
18 Oshweken after what they allege to be  
19 a short absence. However, that's  
20 contradicted --

21 PRESIDENT NARIMAN: Where is

22 Caledonia?  
23 MR. VIOLI: On the Reserve.  
24 MS. GUYMON: About 20 miles  
25 south of Oshweken from our attempt to

0351

1 Grand River Arbitration  
2 locate it on the Internet map.

3 MR. VIOLI: It's on the  
4 Reserve.

5 PRESIDENT NARIMAN: Thank you.  
6 This is from one part of the Reserve  
7 to another.

8 MR. WILLIAMS: It's not  
9 20 Miles.

10 MR. VIOLI: 45,000 acres, it's  
11 not 20 Miles.

12 MS. GUYMON: Our point here, to  
13 sum up:

14 As the largest employer here on  
15 the reservation, a move from one  
16 location to another location on the  
17 reservation shouldn't have prevented  
18 them from getting their mail. They  
19 were able to get mail that was  
20 addressed merely to them on the  
21 reservation on March 14, 2001, just  
22 days after the cut-off.

23 But they would like us to  
24 believe that they weren't able to  
25 receive mail on the reservation before

0352

1 Grand River Arbitration  
2 the cut-off date. And we simply are  
3 finding out that that is not credible,  
4 that there is a contradiction between  
5 their own allegations and their  
6 subsequent claims and explanations.

7 PRESIDENT NARIMAN: What about  
8 this letter from Iowa to Native  
9 Tobacco Direct?

10 MS. GUYMON: That's my -- what  
11 I would like to discuss next.

12 PRESIDENT NARIMAN: Sorry.  
13 Please.

14 MS. GUYMON: Native Tobacco  
15 Direct also received notice by mail of

16 the application of the escrow statutes  
17 prior to March of 2001.

18 PRESIDENT NARIMAN: This is on  
19 October 11, 2000.

20 MS. GUYMON: October 11, 2000,  
21 the letter we are now showing on the  
22 screen, that is at US tab 129.

23 (There was a discussion off the  
24 record.)

25 PRESIDENT NARIMAN: October 11,  
0353

1 Grand River Arbitration  
2 2000.

3 MS. GUYMON: Again, Iowa  
4 Department of Revenue, they sent the  
5 letter to Native Tobacco Direct on  
6 October 11th. Iowa's letter informed  
7 Native Tobacco Direct not only of the  
8 obligations imposed on manufacturers  
9 by the escrow statutes, but also  
10 requested that, if Native Tobacco  
11 Direct was not the manufacturer --  
12 here, again, as Ms. Menaker explained,  
13 there was somewhat uncertainty and  
14 doubt as to who the manufacturer  
15 was -- so Iowa asked Native Tobacco  
16 Direct, if it was not the  
17 manufacturer, to identify the  
18 manufacturer of the cigarettes that it  
19 was selling, using reporting forms  
20 that were enclosed with the letter.

21 PRESIDENT NARIMAN: This is  
22 supported by the affidavit of  
23 Dale Feedy.

24 MS. GUYMON: It is. Contrary  
25 to the misstatement in Claimants'

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1 Grand River Arbitration  
2 rejoinder, the affidavit submitted by  
3 Arthur Montour, Junior, does not deny  
4 that the Iowa letter to Native Tobacco  
5 Direct was received. It merely echoes  
6 the excuse presented by Grand River  
7 for not receiving its notices, that  
8 Native Tobacco Direct also moved on  
9 June 4, 2000.



10 PRESIDENT NARIMAN: Not denied  
11 by.

12 MS. GUYMON: Does not deny  
13 receiving the letter.

14 PRESIDENT NARIMAN: Who does  
15 not.

16 MS. GUYMON: Arthur Montour,  
17 Junior, presented an affidavit  
18 responding to this Iowa letter.

19 PRESIDENT NARIMAN: What date  
20 is that affidavit?

21 MR. VIOLI: February 23rd.

22 PRESIDENT NARIMAN: Thank you.

23 MS. GUYMON: Our copy of his  
24 affidavit is just blank day of  
25 February of 2006, but their rejoinder,

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1 Grand River Arbitration  
2 I believe, was provided on  
3 February 23rd.

4 PRESIDENT NARIMAN: So he  
5 doesn't deal with this at all.

6 MS. GUYMON: He deals with the  
7 issue of the address, which I will  
8 discuss; but he does not directly  
9 deal --

10 PRESIDENT NARIMAN: The address  
11 of 14411 Four Mile?

12 MS. GUYMON: Precisely. He  
13 does not deny receiving the letter,  
14 however.

15 PRESIDENT NARIMAN: Okay.

16 MS. GUYMON: For -- again, I  
17 have -- I have several points that  
18 show that it's fair to deduce that  
19 Native Tobacco Direct did, in fact,  
20 receive the Iowa letter dated October  
21 11, 2000. First, if it did --

22 PRESIDENT NARIMAN: One second.  
23 Iowa letter of October 11th, I'm  
24 sorry. That is tab --

25 MS. GUYMON: That is tab 129.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: Yes,  
3 thanks.

4 MS. GUYMON: And the next slide  
5 I have is a summary of the reasons why  
6 this letter -- it's reasonable to  
7 deduce that Native Tobacco Direct did,  
8 in fact, receive this letter. First,  
9 like Grand River, if Native Tobacco  
10 Direct did move, it should have either  
11 arranged for forwarding --

12 PRESIDENT NARIMAN: Where do  
13 they say it moved, moved from where to  
14 where.

15 MS. GUYMON: I believe it's  
16 137 -- I am remembering -- Main Street  
17 Salamanca, New York. That is  
18 paragraph nine.

19 PRESIDENT NARIMAN: Moved from  
20 14411 Four Mile.

21 MS. GUYMON: No, let me -- they  
22 do not concede that 14411 Four Mile  
23 Level Road was ever an address of the  
24 company. Instead, the Montour  
25 affidavit says that that address was

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1 Grand River Arbitration  
2 actually the address -- a home address  
3 of the company's president.

4 PRESIDENT NARIMAN: This is a  
5 company that is registered under the  
6 company, or is it a --

7 MS. GUYMON: Native Tobacco  
8 Direct is incorporated under the  
9 charter of the Sac and Fox nation of  
10 Oklahoma.

11 PRESIDENT NARIMAN: Do they  
12 have a register of companies in the  
13 register of companies and reservations  
14 as well, like you have some corporate  
15 offices here? You can go to the  
16 company's law office and find out  
17 where the address of the company is  
18 for any other corporation -- I don't  
19 know whether reservations have that.

20 MR. ANAYA: Some do.

21 PRESIDENT NARIMAN: Some do.  
22 Some don't.

23 Anyway, sorry. Otherwise.

24 Carry on.  
25 So they don't say they moved

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1 Grand River Arbitration  
2 from?

3 MS. GUYMON: No, but even if  
4 they had moved, they again should have  
5 arranged to forward their mail.

6 PRESIDENT NARIMAN: No, no, but  
7 what is according to them their  
8 address? They don't say.

9 MR. VIOLI: 137 South Main,  
10 Salamanca.

11 PRESIDENT NARIMAN: According  
12 to Claimants.

13 MR. VIOLI: Yes, the Montour  
14 affidavit, I believe.

15 MS. GUYMON: I believe, though,  
16 they do not provide what was their  
17 admitted prior address. They say that  
18 the operations of Native Tobacco  
19 Direct were carried out at 137 Main  
20 Street, Salamanca, New York.

21 PRESIDENT NARIMAN: Where is  
22 the registered office? Is there such  
23 a thing as a registered office on the  
24 Reserve?

25 MS. GUYMON: Grand River has

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1 Grand River Arbitration  
2 not identified what their registered  
3 office on the Reserve is.

4 PRESIDENT NARIMAN: They use  
5 their office on the Reserve -- do they  
6 call it a registered office? They  
7 don't.

8 MS. GUYMON: I don't know. I  
9 don't know. Again, we are taking --  
10 we are taking the allegations as they  
11 have been made by Claimants and  
12 assessing them.

13 PRESIDENT NARIMAN: Operations  
14 were carried out at 137 Main Street,  
15 Salamanca, New York. There must be  
16 then an address because Salamanca, New  
17 York is not -- is it a reservation,

18 137 South Main Street?  
19 MR. VIOLI: Yes, that is.  
20 PRESIDENT NARIMAN: That's  
21 again a reservation.  
22 MR. CROOK: It's a town inside  
23 the reservation.  
24 PRESIDENT NARIMAN: Thank you.  
25 Right.

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1 Grand River Arbitration  
2 MS. GUYMON: So all we know --  
3 these are not our businesses -- we  
4 know what Mr. Montour told us in his  
5 affidavit, which is that, on June 4,  
6 2000, they located at this 137  
7 address.  
8 They don't tell us what their  
9 prior address was. However, the  
10 address to which the Iowa letter was  
11 sent is the same address that was used  
12 on the previous correspondence. So if  
13 they had moved --  
14 PRESIDENT NARIMAN: Which  
15 previous correspondence?  
16 MS. GUYMON: I guess I will  
17 mention that first and then go  
18 backwards.  
19 PRESIDENT NARIMAN: Native  
20 Tobacco Direct addresses letter to  
21 this address in which correspondence.  
22 MS. GUYMON: In the Missouri  
23 letter which we previously showed, a  
24 November 3, 1999 letter from Arthur  
25 Montour, to the State of Missouri.

0361

1 Grand River Arbitration  
2 That is tab 15 in the US appendices.  
3 PRESIDENT NARIMAN: I don't  
4 have that; do I? It's not in this  
5 compilation.  
6 MS. GUYMON: It is.  
7 PRESIDENT NARIMAN: It is. Go  
8 on. Tab 15, oh, I see. Yes.  
9 MS. GUYMON: So this letter  
10 shows that Arthur Montour used this  
11 address 14411 Four Mile Level Road on

12 the territory of the Seneca Nation as  
13 the address of the company, Native  
14 Tobacco Direct, in correspondence with  
15 the State of Missouri.

16 PRESIDENT NARIMAN: Just one  
17 minute. Montour is vice president of  
18 what -- Arthur Montour?

19 MS. GUYMON: Native Tobacco  
20 Direct. The president by the way of  
21 Native Tobacco Direct is one Ross  
22 John, of Native Tobacco Direct. So at  
23 this time Arthur Montour is the  
24 vice president, apparently. Ross John  
25 is the president. We find out from

0362

1 Grand River Arbitration  
2 Arthur Montour's affidavit provided  
3 with Claimants rejoinder.

4 PRESIDENT NARIMAN: So when you  
5 say that November 3, 1999, the address  
6 according to Montour himself was 14411  
7 Four Mile Level Road.

8 MS. GUYMON: Well, according to  
9 this letter, Arthur Montour used that  
10 address. According to his affidavit  
11 provided in the rejoinder, that  
12 address is just the home address of  
13 the company president, Ross John.

14 PRESIDENT NARIMAN: According  
15 to affidavit of Montour, home address,  
16 Ross John. So this letter of October  
17 11, 2000, Iowa letter should have gone  
18 to Ross John?

19 MS. GUYMON: It went apparently  
20 to what Arthur Montour of late  
21 identifies as the home address of Ross  
22 John, the company president.

23 Now, even if the letter did  
24 just go to the home address of the  
25 company president, that is enough to

0363

1 Grand River Arbitration  
2 show that it went to the company. The  
3 home address of the company president  
4 is certainly a way for a letter to get  
5 to the company. If it got to the

6 company's president, it got to the  
7 company.

8 But, furthermore, this now  
9 identified as home address was  
10 actually a business address, at least  
11 according to this November 1999  
12 letter, when Arthur Montour, as  
13 vice president, was addressing  
14 correspondence to the State of  
15 Missouri.

16 And there is another letter  
17 where Grand River identified this  
18 14411 Four Mile Level address as the  
19 company address for Native Tobacco  
20 Direct. This is a September 16, 1999  
21 letter. It's tab 135 in our  
22 appendices.

23 And it's a letter from  
24 Ms. Montour, representing herself as  
25 the in-house counsel for Grand River  
0364

1 Grand River Arbitration  
2 Enterprises, where she explains to the  
3 State of Arkansas that Grand River is  
4 operating by sending its products into  
5 the US to Native Tobacco Direct and  
6 providing this address 14441.

7 PRESIDENT NARIMAN: This is tab  
8 what?

9 MS. GUYMON: This is tab 135.  
10 This letter is similar to the March  
11 1999 letter we looked at earlier.  
12 It's one of these letters where  
13 Ms. Montour is representing on behalf  
14 of the distributor, White River  
15 Distributors, that it is authorizing  
16 that distributor to sell its products.

17 PRESIDENT NARIMAN: Just a  
18 minute.

19 (There was a discussion off the  
20 record.)

21 MS. GUYMON: You will notice --  
22 it's approximately right in the middle  
23 of the letter, where the address for  
24 Native Tobacco Direct is identified as  
25 14411 Four Mile Level, Gowanda,

0365

1 Grand River Arbitration  
2 New York 14070.  
3 PRESIDENT NARIMAN: All right.  
4 MS. GUYMON: That is the same  
5 address to which Iowa's October 2000  
6 letter was sent.  
7 PRESIDENT NARIMAN: Same  
8 address as Iowa -- as Ohio --  
9 MR. CROOK: Iowa. There is  
10 just Iowa and Missouri, Mr. Chairman.  
11 PRESIDENT NARIMAN: Iowa.  
12 Right. Same address as Iowa of  
13 October 11th -- what does this letter  
14 of October 11, 2000 say?  
15 MS. GUYMON: The October 11th  
16 letter -- go back to it.  
17 PRESIDENT NARIMAN: 123.  
18 MS. GUYMON: Yes. It does a  
19 couple of things.  
20 PRESIDENT NARIMAN: Yes.  
21 MS. GUYMON: On the first page,  
22 it asks Native Tobacco Direct  
23 basically whether it's the  
24 manufacturer or the distributor. And  
25 if it's not manufacturer, please

0366

1 Grand River Arbitration  
2 identify the manufacturer.  
3 On the second page, it sets out  
4 very much like the earlier letters we  
5 looked at a summary or an outline of  
6 what the responsibilities of the  
7 manufacturer are, that a manufacturer  
8 has to establish an escrow account,  
9 place funds into escrow --  
10 MR. ANAYA: Is that the one?  
11 MS. GUYMON: It should just be  
12 probably two or three pages back from  
13 the --  
14 MR. CROOK: It looks like that.  
15 MS. GUYMON: -- from the  
16 Arkansas letter.  
17 MR. ANAYA: It doesn't have  
18 those lines? There it is. Okay.  
19 PRESIDENT NARIMAN: Omaha

20 Nation Tobacco. That's the wrong one.  
21 MS. GUYMON: Sorry. Go back  
22 probably about four slides, I think.  
23 PRESIDENT NARIMAN: And Native  
24 Tobacco Direct Company is a Claimant.  
25 MS. GUYMON: Yes.

0367

1 Grand River Arbitration  
2 MR. VIOLI: Actually, no.  
3 MS. GUYMON: It's Claimants'  
4 investment, purported investment.  
5 PRESIDENT NARIMAN: No? He's  
6 saying no.  
7 MR. CROOK: I think the  
8 Respondent just elaborated on that.  
9 MS. GUYMON: You recall that we  
10 showed both 1116 and 1117 on the  
11 screen. The knowledge of the  
12 investors gives rise to the  
13 limitations period. Likewise,  
14 alternatively, the knowledge of the  
15 enterprise, the investors' investment,  
16 triggers the knowledge. And so Native  
17 Tobacco Direct is purportedly owned by  
18 Claimants.  
19 PRESIDENT NARIMAN: Owned by  
20 Grand River.  
21 MS. GUYMON: It's their  
22 purported investment. The knowledge  
23 that that investment acquired or  
24 should have acquired triggers the  
25 three-year period.

0368

1 Grand River Arbitration  
2 PRESIDENT NARIMAN: That is  
3 1117.  
4 MS. GUYMON: Yes. 1117 or 1117  
5 of NAFTA Chapter 11.  
6 MR. CROOK: Just so I am clear,  
7 the position is that Mr. Arthur  
8 Montour is the owner of Native Tobacco  
9 Direct.  
10 MR. VIOLI: That's correct.  
11 MS. GUYMON: Is that letter  
12 clear now?  
13 PRESIDENT NARIMAN: Yes.



14 MS. GUYMON: This October 11,  
15 2000 letter we have stated should be  
16 presumed to have been received by  
17 Grand River, and there were four  
18 reasons if I can just recap and just  
19 make sure that we hit them all.

20 We did them somewhat out of the  
21 order. But on this slide, it was  
22 reasonable for them to forward their  
23 mail if they had moved from their  
24 previous address.

25 PRESIDENT NARIMAN: No, but, in  
0369

1 Grand River Arbitration  
2 fact, your first point would be that  
3 it was the address.

4 MS. GUYMON: That was how we  
5 wound up going about it, yes.

6 PRESIDENT NARIMAN: That is  
7 your point, that you made by pointing  
8 out all of these three letters.

9 MS. GUYMON: Except that they  
10 do say --

11 PRESIDENT NARIMAN: Nobody says  
12 they have shifted.

13 MS. GUYMON: The Arthur Montour  
14 affidavit does say that, in June of  
15 2000, Native Tobacco Direct re -- I  
16 forget what the word is they used --  
17 were combine, that the operations of  
18 Native Tobacco Direct --

19 PRESIDENT NARIMAN: Were  
20 carried out in Salamanca.

21 MS. GUYMON: Were carried out  
22 in Salamanca.

23 PRESIDENT NARIMAN: From  
24 June 1, 2000.

25 MS. GUYMON: June 4, 2000.

0370

1 Grand River Arbitration

2 So they allege that they have  
3 moved away from an address without  
4 telling us what address they moved  
5 away from.

6 Then their other explanation is  
7 that the address to which the letter

8 was sent, this 14411 address, was  
9 actually the home address for the  
10 company president. And we have said,  
11 well, even sending it to the home  
12 address of the company president is  
13 good enough to get it to the  
14 president.

15 PRESIDENT NARIMAN: Right.

16 MS. GUYMON: And we have also  
17 shown that that supposed home  
18 address --

19 PRESIDENT NARIMAN: Is  
20 really --

21 MS. GUYMON: -- was really used  
22 as a company address, both by  
23 Grand River in identifying Native  
24 Tobacco Direct's address, and by  
25 Arthur Montour on behalf of Native

0371

1 Grand River Arbitration  
2 Tobacco Direct. And as with the  
3 previous Iowa letter, the Iowa letter  
4 to Grand River Enterprises, this Iowa  
5 letter is also listed in Dale Feedy's  
6 affidavit with the attachment of the  
7 database listing all the letters that  
8 were sent and whether the letter was  
9 returned as undelivered. And the Iowa  
10 letter from October 2000 to Native  
11 Tobacco Direct also was not returned  
12 as undelivered.

13 PRESIDENT NARIMAN: So this is  
14 all on your first point, namely by  
15 direct notices to the Claimants.

16 MS. GUYMON: Yes, we are still  
17 in the first category.

18 PRESIDENT NARIMAN: All of  
19 these three letters, according to  
20 you --

21 MS. GUYMON: Yes.

22 PRESIDENT NARIMAN: -- are  
23 actual knowledge.

24 MS. GUYMON: Correct.

25 MR. CROOK: Mr. Chairman,

0372

1 Grand River Arbitration

2 before we move on, I would just like  
3 to note so that the Claimants can deal  
4 with it if they want. There is other  
5 correspondence showing the 14411  
6 address as a business address. There  
7 is the trademark registration for  
8 Seneca, which was one of the  
9 Claimants' original exhibits, which  
10 uses that address. So that will be  
11 part of what the commission -- the  
12 Tribunal would consider in connection  
13 with that issue.

14 PRESIDENT NARIMAN: Yes, let's  
15 make a note of it, yes. Please  
16 proceed -- as part of the trademark.

17 MR. CROOK: It is the  
18 registered address for the trademark.

19 MS. GUYMON: The evidence thus  
20 clearly demonstrates that, despite  
21 Claimants' denials, they had received  
22 actual notice, not only of the fact of  
23 the escrow statutes' enactment, but of  
24 the fact that cigarette manufacturers,  
25 including Grand River, were required

0373

1 Grand River Arbitration  
2 to make payments into escrow if their  
3 cigarettes were being sold directly or  
4 indirectly in any MSA state. All of  
5 that was made plain in these notices.

6 In addition, moving to our second --

7 PRESIDENT NARIMAN: Your point  
8 is that any one notice suffices  
9 because it says "first acquired"?

10 MS. GUYMON: Yes, precisely.

11 PRESIDENT NARIMAN: Any one  
12 notice?

13 MS. GUYMON: Exactly. And  
14 that's part of the reason why  
15 initially we put in the Missouri  
16 letter, because that Missouri letter  
17 alone was sufficient.

18 Claimants responded with their  
19 excuse that they've moved. We then  
20 put in, as we later discovered, there  
21 were additional letters. We may be

22 unaware of other letters that are out  
23 there. These are the letters that we  
24 have been able to uncover having had  
25 no discovery in the case and having

0374

1 Grand River Arbitration  
2 had only limited knowledge as to  
3 Claimants' actual operations that they  
4 were dealing with White River  
5 Distributors.

6 We did not have that knowledge  
7 at our disposal, so we did the best we  
8 could to come across the notices that  
9 we could learn about. And these are  
10 the three that we have been able to  
11 uncover and that we have provided to  
12 the Tribunal.

13 MR. ANAYA: The Claimants were  
14 actually already selling tobacco, or  
15 their tobacco products had already  
16 been sold in these states?

17 MS. GUYMON: In Missouri and  
18 Iowa in 1999, yes, in both of those  
19 states.

20 MR. ANAYA: Under the theory  
21 you discussed earlier, they were  
22 incurring losses.

23 MS. GUYMON: They were  
24 incurring loss in those states. The  
25 obligation to make payment into escrow

0375

1 Grand River Arbitration  
2 arose in 1999. Missouri had enacted  
3 an escrow statute in 1999 and  
4 Grand River's cigarette were being  
5 sold at that point.

6 MR. ANAYA: So these letters  
7 provide evidence of their knowledge?

8 MS. GUYMON: Yes.

9 PRESIDENT NARIMAN: So  
10 cigarettes were being sold.

11 MS. GUYMON: No, Missouri and  
12 in Iowa in 1999, and both Missouri and  
13 Iowa had enacted escrow statutes in  
14 1999.

15 PRESIDENT NARIMAN: Yes.

16 Right. That's your first point.  
17 MS. GUYMON: So if the Tribunal  
18 is ready, I would like to move on to  
19 the second category of notices that  
20 were sent to affiliates and business  
21 partners.

22 PRESIDENT NARIMAN: Oh,  
23 business affiliates, who are these  
24 business affiliates?

25 MS. GUYMON: There are two that  
0376

1 Grand River Arbitration  
2 I will discuss. We have indicated on  
3 our time line notices sent to  
4 Star Tobacco; that is the July 8,  
5 1999.

6 PRESIDENT NARIMAN: Just one  
7 minute. Let me see.

8 MS. GUYMON: It should be right  
9 after the September 16th letter from  
10 Ms. Montour, if you remember where  
11 that was. It should be the very next  
12 slide after that.

13 MR. VIOLI: Actually, that's a  
14 return of service, at least in my  
15 book.

16 MS. GUYMON: I'm in the slides,  
17 not in the book.

18 (There was a discussion off the  
19 record.)

20 PRESIDENT NARIMAN: Where did  
21 you say it was?

22 MS. GUYMON: The Chantell  
23 Montour letter from September 16,  
24 1999, if you can find that in the  
25 slide -- we were looking at that

0377

1 Grand River Arbitration  
2 previously -- if you can see that, it  
3 should be the next slide after that.

4 PRESIDENT NARIMAN: Okay.

5 MR. VIOLI: It's after the  
6 October 11, 2000 letter, but it  
7 says to the Omaha Nation -- is that  
8 the one that says "to whom it may  
9 concern"? Does it have an address on

10 it? Does it have an addressee?  
11 PRESIDENT NARIMAN: No, no, she  
12 is referring to the September 16, 1999  
13 letter from Chantell Montour --

14 MS. GUYMON: Letter from  
15 Chantell Montour --

16 PRESIDENT NARIMAN: -- to  
17 Janice Campbell.

18 MS. GUYMON: -- to Janice  
19 Campbell, the very next slide after  
20 that -- is the time line that is  
21 currently up on the screen, this one.

22 PRESIDENT NARIMAN: This one.

23 MS. GUYMON: Yes. That time  
24 line indicates the notices to  
25 Claimants affiliates that I'll be

0378

1 Grand River Arbitration  
2 discussing. There are notices several  
3 notices to Omaha Nation Tobacco that  
4 are shown.

5 PRESIDENT NARIMAN: Where?

6 MS. GUYMON: On April 7, 2000,  
7 a notice from Iowa, that is the same  
8 notice that went to Grand River; it  
9 also went to Omaha Nation Tobacco.

10 There is a Nebraska letter, May 17,  
11 2000, that went to Omaha Nation  
12 Tobacco. And there is another  
13 October 11, 2000 letter, the same date  
14 as the letter to Native Tobacco  
15 Direct, also, on the date a letter was  
16 sent to Omaha Nation Tobacco.

17 PRESIDENT NARIMAN: Can you  
18 just give us the tabs if you don't  
19 mind.

20 MS. GUYMON: Sure, as before I  
21 will go through these each in turn. I  
22 wanted to give you the overview.

23 PRESIDENT NARIMAN: Okay.

24 MS. GUYMON: So we have three  
25 notices to Omaha Nation Tobacco --

0379

1 Grand River Arbitration  
2 Direct. We also have one notice, July  
3 8, 1999, to Star Tobacco. And I will

4 start with Omaha Nation Tobacco.  
5 PRESIDENT NARIMAN: Omaha  
6 Nation Tobacco, that is Omaha -- who  
7 says it's an affiliate?  
8 MS. GUYMON: Claimants do.  
9 PRESIDENT NARIMAN: Okay.  
10 MS. GUYMON: In 1998 when the  
11 MSA was being negotiated, Claimants  
12 were allegedly operating Omaha Nation  
13 Tobacco. That's what they were doing  
14 in 1998.

15 They allege that they helped  
16 the Omaha Tribe launch its tobacco  
17 manufacturing facility and resided  
18 there helping them with that  
19 production facility in 1998. That  
20 manufacturer that they helped launch  
21 Omaha Nation Tobacco received these  
22 three notices that are on our time  
23 line.

24 PRESIDENT NARIMAN: Received  
25 three notices dated -- could you just

0380

1 Grand River Arbitration  
2 say?

3 MS. GUYMON: April 7, 2000,  
4 from Iowa, and you may -- this may  
5 look familiar to you because it is the  
6 same April 7, 2000 letter that was  
7 sent to Grand River.

8 PRESIDENT NARIMAN: Tab number.

9 MS. GUYMON: And that is --  
10 I'll tell you in a minute. I didn't  
11 note it for this slide. I apologize.  
12 This is 132B, so it is part of the  
13 Dale Feedy affidavit.

14 PRESIDENT NARIMAN: Second  
15 notice. Then second notice.

16 MS. GUYMON: The April 7, 2000  
17 letter from Iowa, that's the second  
18 notice.

19 PRESIDENT NARIMAN: Omaha.

20 MS. GUYMON: To Omaha Nation  
21 Tobacco, is 17.

22 PRESIDENT NARIMAN: No,  
23 April 7, 2000 is tab 132B.

24 MS. GUYMON: No. Yes, I am  
25 sorry. Nebraska is May 17, 2000  
0381  
1 Grand River Arbitration  
2 letter -- is tab 17.  
3 PRESIDENT NARIMAN: May 17,  
4 2000 from Nebraska.  
5 MS. GUYMON: Yes.  
6 PRESIDENT NARIMAN: Yes. Is  
7 what tab, please?  
8 MS. GUYMON: 17.  
9 PRESIDENT NARIMAN: 17.  
10 MS. GUYMON: Yes.  
11 PRESIDENT NARIMAN: US. The  
12 third?  
13 MS. GUYMON: The third is  
14 Iowa's October 11, 2000 letter. It's  
15 the same content as the October 11,  
16 2000 letter to Native Tobacco Direct.  
17 And it's tab 130 in the US appendices.  
18 PRESIDENT NARIMAN: So these  
19 are all -- I see -- Omaha Nation  
20 Tobacco -- what do they say about  
21 Omaha Nation Tobacco?  
22 MS. GUYMON: They say that  
23 they --  
24 PRESIDENT NARIMAN: Where do  
25 they say that, the claim?

0382  
1 Grand River Arbitration  
2 MS. GUYMON: The Claimants  
3 explanation for these is that they  
4 were no longer actually working with  
5 Omaha Nation Tobacco.  
6 PRESIDENT NARIMAN: No, I mean,  
7 what did they say about they started  
8 or conducted Omaha tobacco? Where?  
9 MS. GUYMON: In their statement  
10 of claim.  
11 PRESIDENT NARIMAN: What do  
12 they say exactly?  
13 MS. GUYMON: Actually, in their  
14 statement of claim and in the  
15 affidavit of Jerry Montour, which was  
16 attached to their statement of claim,  
17 in paragraph six of that affidavit.



18 PRESIDENT NARIMAN: Yes.  
19 MS. GUYMON: They say that, in  
20 1998, they were -- some of the  
21 Claimants were living on the Omaha  
22 Tribe Reservation, and were partners  
23 in and were helping to run this  
24 tobacco production facility.

25 PRESIDENT NARIMAN: What is the  
0383

1 Grand River Arbitration  
2 exact language they used about  
3 partners? What do they say, statement  
4 of claim?

5 MS. GUYMON: In paragraph six  
6 of Montour's affidavit --

7 PRESIDENT NARIMAN: Montour's  
8 affidavit --

9 MS. GUYMON: And this is Jerry  
10 Montour's affidavit.

11 PRESIDENT NARIMAN: Right.

12 MS. GUYMON: Which is attached  
13 to their particularized statement of  
14 claim. Tab five, to the  
15 particularized statement of claim,  
16 says:

17 "In 1996, I" -- meaning Jerry  
18 Montour, one of the Claimants in this  
19 case -- "entered into a partnership  
20 with an Omaha Tribe where, in return  
21 for capital and management expertise,  
22 I would receive 50 percent of the net  
23 profits of a tobacco manufacturing  
24 facility. I resided in the Omaha area  
25 in 1997 and 1998 and operated the

0384

1 Grand River Arbitration  
2 tribe's tobacco manufacturing  
3 facility. Both Mr. Hill and Mr.  
4 Arthur Montour were partners with me  
5 in that venture."

6 PRESIDENT NARIMAN: Yes. Okay.

7 MS. GUYMON: So the thinking  
8 here was, if this is what Grand River  
9 was doing, or -- I'm sorry -- this is  
10 what the Claimants were doing in 1998  
11 when the MSA was negotiated -- then

12 perhaps as Grand River, they at that  
13 time might not have heard about the  
14 MSA. But as the Omaha Nation Tobacco  
15 company they might have heard about  
16 the MSA.

17 And, indeed, Omaha Nation  
18 Tobacco received these same kinds of  
19 notices. The same notices that were  
20 sent to Native Tobacco Direct and to  
21 Grand River itself were also sent to  
22 Omaha Nation Tobacco.

23 Claimants have provided no  
24 specific explanation for severing  
25 contact with Omaha Nation Tobacco, an

0385

1 Grand River Arbitration  
2 enterprise which they helped launch  
3 and had a significant stake in. So  
4 it's reasonable to think that they  
5 would have heard from Omaha Nation  
6 Tobacco about these obligations to  
7 make payments into escrow.

8 MR. ANAYA: So you are saying  
9 they still have a relationship with  
10 Omaha Nation, when Omaha Nation  
11 received these letters.

12 MS. GUYMON: No, they, in fact,  
13 deny that. They say they did not have  
14 a relation. We are saying it's  
15 reasonable that, having had such a  
16 stake in its operation, they would  
17 still have maintained some contact.

18 PRESIDENT NARIMAN: But who  
19 conducted Omaha Tobacco after they  
20 left?

21 MS. GUYMON: Presumably, the  
22 tribe, the Omaha Tribe.

23 PRESIDENT NARIMAN: They don't  
24 say that?

25 MR. ANAYA: They had -- they no

0386

1 Grand River Arbitration  
2 longer had some relation with them,  
3 you are saying they said.

4 MS. GUYMON: They no longer  
5 were running their facility. They

6 were no longer -- they say they were  
7 just residing there in '97 and '98.  
8 But having established such a major  
9 stake in their enterprise, it's  
10 unreasonable, absent some explanation  
11 to assume they severed contacts  
12 completely.

13 MR. ANAYA: How is that  
14 unreasonable if they left? Maybe they  
15 had a falling out. I am not saying  
16 they did. I am just saying, who knows  
17 why they left. Why are we to assume  
18 that they had this ongoing  
19 relationship?

20 MS. GUYMON: I would put this  
21 evidence more in the category of  
22 constructive knowledge, that this  
23 doesn't show that Grand River actually  
24 learned. But it shows another avenue  
25 by which they should have found out,  
0387

1 Grand River Arbitration  
2 if they didn't find out by the other  
3 avenues, which we believe they did.  
4 It shows another avenue by which they  
5 should have acquired knowledge.

6 MR. ANAYA: So they should have  
7 maintained contact with Omaha Nation  
8 to find out whatever Omaha nation was  
9 finding out.

10 MS. GUYMON: Their own evidence  
11 shows that they do monitor what  
12 happens to other companies in the  
13 industry and other tribal companies --  
14 the Omaha Nation -- the Omaha Tribe  
15 company in which they had a take would  
16 be a logical company for them to keep  
17 tabs on.

18 MR. ANAYA: Well, that is more  
19 like the "could"; isn't it -- that we  
20 were talking about before -- they  
21 "could" have found out?

22 MS. GUYMON: It's they should  
23 have. They should have acquired the  
24 knowledge by some means. They should  
25 have acquired it because they got

0388

1 Grand River Arbitration  
2 these direct notices. They should  
3 have acquired it by taking the steps  
4 to investigate. This is yet another  
5 way that they could have acquired it,  
6 and because of that, because of the  
7 multiple avenues by which they could  
8 have acquired it, that amounts to  
9 should have acquired the knowledge.

10 PRESIDENT NARIMAN: That means  
11 notices to Claimants' erstwhile  
12 affiliates.

13 MS. GUYMON: Former affiliates,  
14 former business partners.

15 PRESIDENT NARIMAN: That is  
16 your point.

17 MS. GUYMON: Yes.

18 PRESIDENT NARIMAN: May not  
19 fall in your actual knowledge  
20 category.

21 MS. GUYMON: Correct, it's a  
22 notice that was actually sent, but it  
23 was actually sent in the same way --

24 PRESIDENT NARIMAN: Actual  
25 knowledge of their -- okay.

0389

1 Grand River Arbitration

2 MR. ANAYA: Now, Omaha Nation  
3 is a tribal enterprise, right?

4 MS. GUYMON: Correct.

5 MR. ANAYA: Okay. And do we  
6 know if they ever actually -- have  
7 come to this escrow payment  
8 requirement?

9 MS. GUYMON: Omaha Nation  
10 Tobacco, I believe, was sued in  
11 enforcement proceedings just like  
12 Grand River has been, and I don't  
13 believe that they have continued in  
14 operation.

15 PRESIDENT NARIMAN: Did any of  
16 their affiliates pay into an escrow  
17 account before March of 2001, not --  
18 they didn't -- Grand River didn't --  
19 but did any of their affiliates pay

20 into any escrow accounts?

21 MS. GUYMON: They have not  
22 disclosed that to us, so we don't  
23 know. The two affiliates that I am  
24 talking about here, neither of them  
25 made payments into escrow. They were

0390

1 Grand River Arbitration  
2 sued. The Omaha Nation Tobacco was  
3 sued for failure to make payments into  
4 escrow.

5 MR. ANAYA: Do we know what  
6 happened to Omaha Nation?

7 MS. GUYMON: They lost the  
8 lawsuit. Enforcement proceedings were  
9 found -- you know, the judgments were  
10 entered against them. They were found  
11 to be --

12 PRESIDENT NARIMAN: Yeah, but  
13 in those --

14 MR. VIOLI: Actually, I think  
15 they sued in Federal Court. They sued  
16 in Federal Court on Indian Commerce  
17 Claus grounds, and lost. There was an  
18 enforcement proceeding. They entered  
19 into a settlement with the State of  
20 Nebraska and the State of Iowa.

21 There were no judgments. But  
22 then they had to go out of business  
23 because they couldn't -- they couldn't  
24 afford the escrow. They are no longer  
25 in business. That is correct.

0391

1 Grand River Arbitration

2 MS. GUYMON: Well, I think this  
3 suggests that they were monitoring the  
4 Omaha Nation tribe, and what was  
5 happening to it.

6 MR. VIOLI: No, I was. I was,  
7 and in conferring with counsel, Indian  
8 law counsel in Minnesota, on some  
9 Indian affairs.

10 MS. GUYMON: At any rate, it  
11 shows what was happening to Omaha  
12 Nation Tobacco should have been of  
13 interest to them.

14 Turning to the second former  
15 business partner, Star Tobacco,  
16 Claimants described in their statement  
17 of claim that they had a production  
18 sharing agreement with Star Tobacco by  
19 which Star actually manufactured  
20 Claimants own brand.

21 They don't specify -- this is  
22 in their statement of claim at  
23 paragraph 14 -- they don't specify or  
24 disclose to us the period during which  
25 they maintained that production

0392

1 Grand River Arbitration  
2 sharing agreement. So we don't know  
3 when exactly it ceased. But  
4 Star Tobacco received very early  
5 notice directly of the application of  
6 North Dakota's escrow statutes.

7 PRESIDENT NARIMAN: Received  
8 notice from North Dakota, that is.

9 MS. GUYMON: That is tab 14 in  
10 our appendices. It's the next slide  
11 in your packet actually. Yes.

12 PRESIDENT NARIMAN: Yes.

13 MS. GUYMON: I'm sorry. You  
14 are now looking at the Iowa letter.

15 PRESIDENT NARIMAN: That goes  
16 to Omaha Nation.

17 MS. GUYMON: Okay. So flip  
18 past Omaha. There are three Omaha  
19 Nation Tobacco letters. Then you will  
20 get to a letter from North Dakota,  
21 Office of the State Tax Commissioner,  
22 July 8, 1999.

23 PRESIDENT NARIMAN: That is the  
24 one.

25 MS. GUYMON: That is the one.

0393

1 Grand River Arbitration  
2 That is tab 14 in the US appendices.

3 In this July 8, 1999 letter  
4 sent to Star and other NPMs, North  
5 Dakota's Office of State Tax  
6 Commissioners explained that:

7 "Manufacturers of cigarettes

8 sold in the state were required to  
9 establish and fund escrow accounts and  
10 verify in writing to the State that  
11 they had done so."  
12 PRESIDENT NARIMAN: Yeah, but  
13 this is: "To whom it may concern."  
14 MS. GUYMON: Yes, it was a mail  
15 merge, and we attached in our  
16 exhibit -- if you look at tab 14, you  
17 will see the list of the recipients;  
18 and Star Tobacco is on that list.  
19 PRESIDENT NARIMAN: Addressees.  
20 MS. GUYMON: Of addressees,  
21 yes.  
22 PRESIDENT NARIMAN: There is no  
23 affidavit of anybody here --  
24 MS. GUYMON: No.  
25 PRESIDENT NARIMAN: John

0394

1 Grand River Arbitration  
2 Quinlan.  
3 MS. GUYMON: No, no.  
4 PRESIDENT NARIMAN: This letter  
5 of John Quinlan, I remember his name.  
6 It's mentioned in one of the -- one of  
7 the items of notices sent in petition  
8 or claim or something.  
9 MS. GUYMON: In Iowa, yes.  
10 PRESIDENT NARIMAN: No, but I  
11 just wanted to know:  
12 Did you respond to that? Was  
13 there a response because that response  
14 is not on record?  
15 MS. GUYMON: Yes, there is a  
16 response.  
17 PRESIDENT NARIMAN: There is an  
18 allegation that these are the three  
19 items which are sent. One of them is  
20 Quinlan's letter.  
21 MR. VIOLI: Yes. In the  
22 Missouri -- apparently, Missouri sued  
23 Grand River and a number of companies  
24 in 2000. In the petition, the  
25 Missouri attorney general said that

0395

1 Grand River Arbitration

2 you can find that that these  
3 companies, Grand River, Native Tobacco  
4 Direct, willfully and knowingly  
5 violated the escrow statutes because,  
6 among other things, back in March  
7 of -- or back in July of 1999, John  
8 Quinlan had wrote a letter to them  
9 notifying these companies that there  
10 was -- that they were bound by the  
11 escrow statutes.

12 And that attorney general made  
13 that representation in the lawsuit you  
14 are talking about as a basis for  
15 penalties and banning the product.

16 I have never seen that letter  
17 before they submitted the materials.  
18 When they submitted the materials, we  
19 see that the letter that the Missouri  
20 attorney general said was sent to  
21 Grand River, in fact, was never sent  
22 to Grand River. The attachment which  
23 has the spreadsheet of all of the  
24 companies that this letter was  
25 allegedly mailed to did not include

0396

1 Grand River Arbitration  
2 Grand River, did not include Native  
3 Tobacco Direct, or any of the  
4 Claimants.

5 So the Missouri attorney  
6 general is making a representation to  
7 the Court that John Quinlan sent this  
8 letter to eventually Claimants, and,  
9 therefore, they knew about it and you  
10 should impose penalties on them and  
11 ban their product. The fact is that  
12 that was an outright misrepresentation  
13 to the court made by the attorney  
14 general.

15 MR. CLODFELTER: This has  
16 nothing to do with the case.

17 MR. VIOLI: It's in the record.  
18 It's on the rejoinder.

19 MR. CLODFELTER: Nothing to do  
20 with our argument.

21 MR. VIOLI: It has to do with



22 notice. You pointed it out. Anyway,  
23 I am sorry I got animated,  
24 Mr. President.

25 MS. GUYMON: First of all, the  
0397

1 Grand River Arbitration  
2 United States has not represented in  
3 this arbitration that this July 8,  
4 1999 letter was sent to Grand River.

5 PRESIDENT NARIMAN: My question  
6 was different than yours when you  
7 started to argue. I wanted to know  
8 whether, to that Missouri attorney  
9 general's complaint, did you  
10 Grand River file a response, like you  
11 have a written statement to a  
12 complaint? Did you file a response?

13 MR. VIOLI: Actually, there  
14 were several.

15 PRESIDENT NARIMAN: Yes or no.

16 MR. VIOLI: That particular one  
17 we never received, we did not. We  
18 subsequently received a complaint.

19 PRESIDENT NARIMAN: They are  
20 not on record.

21 MR. VIOLI: What is that?

22 PRESIDENT NARIMAN: The  
23 responses are not on record.

24 MR. VIOLI: Right, because we  
25 did not receive them. That's

0398

1 Grand River Arbitration  
2 absolutely correct.

3 MR. CROOK: Have you filed  
4 responsive pleadings in any litigation  
5 in Missouri?

6 MR. VIOLI: Yes.

7 PRESIDENT NARIMAN: They are  
8 not on record, unfortunately.

9 MR. CROOK: Those are not in  
10 the record before this proceeding.

11 MR. VIOLI: No, because those  
12 proceedings postdated March 2001. I  
13 think the litigation was filed in  
14 2002. We filed --

15 MR. CROOK: I just wanted to be

16 clear that we got an accurate answer  
17 to the question.

18 PRESIDENT NARIMAN: Yes, yes,  
19 there the same sort of allegation was  
20 made. I want to know what you said  
21 about it in your response, not what  
22 you are saying today.

23 MR. VIOLI: Actually, in the  
24 2002 complaint, the Missouri attorney  
25 general did not say that again. He

0399

1 Grand River Arbitration  
2 did not say you received notice of  
3 this letter that was sent in July of  
4 1999. He did do it in the earlier  
5 complaints that he we never received  
6 and never responded to. But in the  
7 later complaint that we did respond  
8 to, he never made that allegation.

9 PRESIDENT NARIMAN: You never  
10 received those earlier complaints.

11 MR. VIOLI: That's correct. So  
12 we did not respond to them.

13 PRESIDENT NARIMAN: There was  
14 no judgment on those complaints.

15 MR. VIOLI: Yes, there was.

16 PRESIDENT NARIMAN: There was a  
17 default judgment.

18 MR. VIOLI: There was a default  
19 judgment on the earlier.

20 PRESIDENT NARIMAN: You were  
21 served. How can they make a default  
22 judgment?

23 MR. VIOLI: Because in the  
24 United States that's what -- a court  
25 can enter a default judgment even if

0400

1 Grand River Arbitration  
2 you are not properly served or not --

3 PRESIDENT NARIMAN: Properly is  
4 different. Were you served?

5 MR. VIOLI: No, we were not  
6 served.

7 PRESIDENT NARIMAN: Not --

8 MR. VIOLI: Right. We were not  
9 served, and if there is no

10 jurisdiction, they can still impose a  
11 default judgment. That's why we  
12 opened it --

13 MR. CLODFELTER: This is not  
14 accurate. If there is no  
15 jurisdiction, they can't impose -- if  
16 there is no jurisdiction, you can't  
17 impose anything.

18 MR. VIOLI: You can get a  
19 default judgment.

20 MR. CLODFELTER: You can't get  
21 a default judgment without -- without  
22 service being established by a court.  
23 Maybe they didn't think it was proper  
24 service, but the Missouri government  
25 thought it was proper and took a

0401

1 Grand River Arbitration  
2 judgment. The Court agreed.

3 MR. CROOK: Mr. Chairman, it's  
4 4:30. It strikes me we may be sort of  
5 wandering off of the path.

6 MS. GUYMON: Can I close out  
7 this loop because there is an  
8 explanation for the Missouri attorney  
9 general's representation that the --

10 PRESIDENT NARIMAN: You are  
11 still to come to that?

12 MS. GUYMON: That the July --

13 PRESIDENT NARIMAN: You are  
14 still to come to the Missouri part.  
15 That is your third point.

16 MS. GUYMON: I haven't yet  
17 gotten into Missouri. But I would  
18 like to respond right now to  
19 Mr. Violi's statement about the  
20 representations made by the Missouri  
21 attorney general.

22 As you know now, because we  
23 have discussed it, the Iowa attorney  
24 general's office maintained this  
25 database of letters to which it sent

0402

1 Grand River Arbitration  
2 notices. And Iowa got its information  
3 from another state, which had sent

4 notices, mainly South Dakota --  
5 this -- I'm sorry -- North Dakota,  
6 this very state that sent the notice  
7 to Star.

8 Iowa mistakenly thought that  
9 all of the addresses in its database  
10 had been given to it by North Dakota,  
11 when, in fact, Iowa obtained the  
12 addresses for Grand River and Native  
13 Tobacco Direct because Ms. Montour had  
14 sent notices to the State of Iowa on  
15 behalf of White River Distributors.  
16 So they had acquired that address from  
17 a separate source, but put it into the  
18 same database, with all of the  
19 addresses they got from North Dakota.

20 Missouri then learned from Iowa  
21 about these addresses and identities  
22 of these individuals and had that same  
23 mistaken impression, that all of those  
24 addresses came from North Dakota, from  
25 its database.

0403

1 Grand River Arbitration

2 So it was sharing among the  
3 states of this information which was  
4 hard to obtain, who the manufacturer  
5 was and who their distributors were --  
6 was hard for them to ascertain. But  
7 they were doing their best to find  
8 that out so they could enforce their  
9 laws and so that they could actually  
10 send notices to these companies and  
11 inform them of their obligation, of  
12 which they should have already known.

13 That's where the mistake  
14 occurred. That's why the United  
15 States in this arbitration has not  
16 claimed that the July 8, 1999 letter  
17 went to Grand River. And that's why  
18 Missouri's attorney general did not  
19 make that representation again because  
20 the mistake was disclosed, but it was  
21 an honest mistake.

22 PRESIDENT NARIMAN: You say  
23 that this was sent to Star Tobacco?

24 MS. GUYMON: We are only using  
25 this to show notice to Star Tobacco,

0404

1 Grand River Arbitration  
2 but Star Tobacco significantly was a  
3 producer, a manufacturer of Claimants'  
4 own brands. They had a significant  
5 production sharing arrangement.

6 PRESIDENT NARIMAN: Then what  
7 is their reply to this?

8 MS. GUYMON: That they were no  
9 longer in that arrangement by the time  
10 this notice was sent, a fact which  
11 they did not disclose previously in  
12 their statement of claim.

13 But Star Tobacco also was very  
14 vocal about its unhappiness with the  
15 regime. It spoke to the press and in  
16 September 2000 stated its intention to  
17 bring a lawsuit, challenging the MSA  
18 and challenging the escrow  
19 requirements, and, in fact, followed  
20 through in December of 2000 filed that  
21 lawsuit. So this is their former  
22 production sharing partner.

23 PRESIDENT NARIMAN: Where is  
24 all of that?

25 MS. GUYMON: That is in our

0405

1 Grand River Arbitration  
2 tobacco 116, the September 2000  
3 article, where Star is threatening to  
4 sue.

5 PRESIDENT NARIMAN: One second.  
6 Tab 116. The other one.

7 MS. GUYMON: The other is tab  
8 67, where we have provided a copy of  
9 the complaint that Star filed,  
10 December 15, 2000.

11 PRESIDENT NARIMAN: Complaint  
12 of December 15, 2000.

13 MS. GUYMON: So here they're --

14 PRESIDENT NARIMAN: From Star.

15 MS. GUYMON: Of Star Tobacco.

16 PRESIDENT NARIMAN: Against the  
17 MSA.

18 MS. GUYMON: Yes.  
19 PRESIDENT NARIMAN: And --  
20 MS. GUYMON: So here, again, we  
21 have another company in which they had  
22 a large stake.  
23 PRESIDENT NARIMAN: Sorry, tab  
24 116 is what date?  
25 MS. GUYMON: 116 is a

0406

1 Grand River Arbitration  
2 September 1, 2000 article in which  
3 Star Tobacco states its intent to  
4 bring a lawsuit.  
5 PRESIDENT NARIMAN: This  
6 complaint, however, is of -- tab 67 is  
7 of Star Tobacco itself.  
8 MS. GUYMON: Yes.  
9 PRESIDENT NARIMAN: Suing  
10 Missouri.  
11 MS. GUYMON: No, they are in  
12 Virginia.  
13 PRESIDENT NARIMAN: Suing their  
14 state.  
15 MS. GUYMON: Yes.  
16 PRESIDENT NARIMAN: Okay.  
17 Right.  
18 MS. GUYMON: So it's again  
19 incredible to believe that they  
20 wouldn't have heard about the MSA and  
21 escrow obligations because their  
22 former production sharing partner,  
23 shortly after allegedly ending their  
24 production sharing agreement, was  
25 vocally complaining about it, was

0407

1 Grand River Arbitration  
2 receiving notices itself, and actually  
3 brought a lawsuit, all within the --  
4 all before the jurisdictional cut-off  
5 date.  
6 PRESIDENT NARIMAN: Right.  
7 Okay.  
8 MS. GUYMON: And one final  
9 point I would like to make and then it  
10 might be a good time to take a break,  
11 is that, in other instances later on,

12 Claimants' own allegation suggest that  
13 they did receive notice quickly from  
14 their business partners and  
15 affiliates.

16 They say, for example, that  
17 they learned of Missouri's  
18 implementation of its version of  
19 complementary legislation through  
20 their Missouri distributors very  
21 quickly. They also present  
22 evidence --

23 PRESIDENT NARIMAN: Which is  
24 that paragraph?

25 MS. GUYMON: In their response

0408

1 Grand River Arbitration  
2 at page 11.

3 PRESIDENT NARIMAN: That's  
4 February --

5 MS. GUYMON: That response is  
6 from January 16, 2005 in their  
7 response.

8 PRESIDENT NARIMAN: 2006 --  
9 2005.

10 MS. GUYMON: They say that they  
11 did learn about notices sent to  
12 Missouri's distributors, informing  
13 them that products by Grand River were  
14 deemed contraband.

15 PRESIDENT NARIMAN: That's  
16 where?

17 MS. GUYMON: It's not in  
18 numbered paragraphs. It's their  
19 argument, page 11. So they do have  
20 knowledge on post cut-off date  
21 occasions that their affiliates sent  
22 them word about notices they received.  
23 But they want us to believe that pre  
24 the jurisdictional cut-off they never  
25 heard anything from these affiliates.

0409

1 Grand River Arbitration

2 PRESIDENT NARIMAN: Okay.

3 MS. GUYMON: Claimants, also,  
4 in what -- the evidence that they  
5 would like to submit to you, indicate

6 that they are monitoring enforcements  
7 against others besides themselves.

8 Mr. Violi's own statements  
9 about the Omaha Nation Tribe suggest  
10 that it is of interest to the tobacco  
11 industry to monitor what is happening  
12 to these other companies; so even if  
13 they were not business affiliates it  
14 would be another avenue for them to  
15 learn about how the law is being  
16 applied.

17 It's unreasonable to accept  
18 that Claimants learned about only the  
19 later events from their business  
20 partners, but never heard  
21 contemporaneously through any of their  
22 business partners that the escrow  
23 statutes applied to sales of  
24 Nonparticipating Manufacturer's  
25 cigarettes before March 12, 2001. And  
0410

1 Grand River Arbitration  
2 I can leave the third category of the  
3 month lawsuit for after a break, if  
4 you would like or I can move through  
5 that.

6 (There was a discussion off the  
7 record.)

8 MR. VIOLI: The Nebraska -- I  
9 would like to say something about the  
10 Omaha. I received --

11 MR. CLODFELTER: This is our  
12 presentation. This is gratuitous. He  
13 has plenty of time to rebut our case.

14 MR. VIOLI: Well, it's really  
15 relevant while it's being presented.  
16 I was approached by the counsel for  
17 Omaha Nation in 2002 and asked to give  
18 some cases or some insight into the --  
19 into the -- you know, the escrow  
20 statutes and the MSA.

21 And it had nothing to do with  
22 the Claimants. This lawyer in  
23 Minneapolis called me and said:

24 "We are bringing a lawsuit  
25 against the State of Nebraska and



0411

1 Grand River Arbitration

2 Iowa."

3 They didn't monitor or Omaha  
4 didn't -- this has to do with counsel  
5 calling me in 2002 -- I didn't even  
6 know about the Omaha Nation, or their  
7 issues before -- I think it was March  
8 of 2002. So, you know, about  
9 monitoring --

10 PRESIDENT NARIMAN: We will go  
11 by what is on the record.

12 (There was a discussion off the  
13 record.)

14 MS. GUYMON: So the third  
15 category is Claimants also knew that  
16 the escrow statutes were being  
17 judicially enforced against them prior  
18 to March 12, 2001.

19 The first of many such  
20 proceedings against Claimants for  
21 their failure to place funds into  
22 escrow was filed by Missouri.  
23 Returning to our time line as we have  
24 shown, Missouri filed its petition  
25 against Grand River on June 13th.

0412

1 Grand River Arbitration

2 PRESIDENT NARIMAN: Where is  
3 this?

4 MS. GUYMON: It should be --  
5 are you looking at the North Dakota  
6 letter, the very next slide -- it's a  
7 little difficult to see on the paper  
8 version. On the screen it's the items  
9 that are in the darker green.

10 You will see the first of those  
11 Missouri filed petitions against  
12 Grand River Enterprises. That was on  
13 June 13, 2000. Missouri filed its  
14 lawsuit against Grand River, Native  
15 Tobacco Direct, Ross John -- Native  
16 Tobacco Direct's president -- and  
17 several other entities that Missouri  
18 thought were involved.

19 PRESIDENT NARIMAN: That's

20 June 13th.  
21 MS. GUYMON: June 13, 2000.  
22 And the lawsuit was against several  
23 defendants, all of whom Missouri  
24 thought to be involved in the sale of  
25 Grand River's cigarettes in the State

0413

1 Grand River Arbitration  
2 of Missouri.

3 Claimants clearly knew about  
4 this lawsuit shortly after it was  
5 filed. As indicated on our time line,  
6 there are three indications that they  
7 had knowledge about this lawsuit.

8 First of all, the company  
9 president, Mr. Williams, is quoted in  
10 the newspaper article about the  
11 lawsuit discussing the lawsuit.

12 Second, there was service on  
13 some of these co-defendants of the  
14 Claimants, and I'll discuss each of  
15 these point -- these evidentiary  
16 points in turn demonstrating that  
17 Claimants certainly knew about the  
18 Missouri lawsuit before the  
19 jurisdictional cut-off date.

20 Among several articles  
21 reporting on the Missouri lawsuit, is  
22 a July 31, 2000 article by Kate Barlow  
23 in the Hamilton Spectator. Now, the  
24 United States has shown with several  
25 exhibits at tabs 118 through 120 that

0414

1 Grand River Arbitration  
2 the Hamilton Spectator is the local  
3 newspaper closest to the Six Nations  
4 Reservation in Oshweken. And it  
5 frequently reports on Six Nations news  
6 and on Grand River, specifically.  
7 This July 31, 2000, article, which is  
8 tab 112 in our appendices --

9 PRESIDENT NARIMAN: Not 118.

10 MS. GUYMON: 118 and 120 are  
11 just other articles from the  
12 Hamilton Spectator -- that it does  
13 report on the Six Nations and is the

14 closest newspaper.

15 PRESIDENT NARIMAN: This  
16 article is what tab?

17 MS. GUYMON: Tab 112.

18 PRESIDENT NARIMAN: Right.  
19 Yes.

20 MS. GUYMON: That article, the  
21 July 31st Kate Barlow article,  
22 reported that Grand River was named in  
23 the lawsuit filed by the State of  
24 Missouri for failure to make escrow  
25 payments.

0415

1 Grand River Arbitration

2 The article also explained that  
3 over 30 states had passed laws like  
4 Missouri's, requiring NPMs like  
5 Grand River, to make payments into  
6 escrow accounts. Most significantly,  
7 the article quotes Grand River's  
8 president, Steve Williams, several  
9 times.

10 Mr. Williams is quoted  
11 criticizing the MSA states for  
12 requiring payments from small  
13 manufacturers in a very similar vein  
14 to the arguments that are being made  
15 by Claimants in this arbitration.  
16 Excerpts from this article are shown  
17 on the screen and would be in the next  
18 slide in your packet after the time  
19 line we were just looking at.

20 This is quoting Steve Williams:

21 "It doesn't make a lot of  
22 sense. It's the big tobacco companies  
23 that got into this problem, and now  
24 they are making everyone else do it.  
25 To me, that is totally ridiculous."

0416

1 Grand River Arbitration

2 PRESIDENT NARIMAN: Is this tab  
3 number?

4 MS. GUYMON: 112.

5 PRESIDENT NARIMAN: Yeah.

6 MS. GUYMON: Also, in the  
7 article, Mr. Williams disclaimed any

8 responsibility for making escrow  
9 payments, explaining that the  
10 cigarettes manufactured by Grand River  
11 had been sold to Ross John. He said  
12 from then on --

13 PRESIDENT NARIMAN: Ross John  
14 is the president of --

15 MS. GUYMON: Of Native Tobacco  
16 Direct. Yep. So this is what  
17 Mr. Williams said about those sales to  
18 Ross John:

19 "From then on, it's his  
20 responsibility," disclaiming  
21 responsibility for the manufacturer  
22 for making these payments. Steve  
23 Williams is contorted --

24 PRESIDENT NARIMAN: Is that  
25 correct, legally?

0417

1 Grand River Arbitration

2 MS. GUYMON: No, it is not  
3 legally correct.

4 PRESIDENT NARIMAN: Isn't the  
5 seller responsible --

6 MS. GUYMON: The manufacturer  
7 is responsible.

8 PRESIDENT NARIMAN: Also.

9 MS. GUYMON: It shows -- what  
10 this quote shows is the attitude of  
11 the Claimants.

12 PRESIDENT NARIMAN: I know  
13 that's your point.

14 MS. GUYMON: They were trying  
15 to ignore --

16 PRESIDENT NARIMAN: I just want  
17 to know -- the statute says the  
18 manufacturer or the seller?

19 MS. GUYMON: The manufacturer.  
20 The manufacturer.

21 The states called on the  
22 distributors, like Native Tobacco  
23 Direct, to disclose to them who the  
24 manufacturer was; but it was the  
25 manufacturer who bore the

0418

1 Grand River Arbitration

2 responsibility under the plain  
3 language of the statute to place the  
4 funds into the escrow.

5 PRESIDENT NARIMAN: I see.

6 MS. GUYMON: So Steve Williams  
7 has given us a contorted post hoc  
8 explanation, that he never read the  
9 article, and that the reporter never  
10 explained the lawsuit to him.

11 This cannot be accepted. The  
12 Hamilton Spectator article proves that  
13 Claimants had actual knowledge that  
14 the escrow statutes were being  
15 judicially enforced as to cigarettes  
16 manufactured by Grand River.

17 PRESIDENT NARIMAN: But does he  
18 dispute the statements attributed to  
19 him in the article?

20 MS. GUYMON: He says that he  
21 did not know that the lawsuit named  
22 Grand River, that he thought there was  
23 a lawsuit --

24 PRESIDENT NARIMAN: No, there  
25 are quotes. There is a quote that

0419

1 Grand River Arbitration  
2 said so and so. Does he dispute the  
3 statements attributed to him?

4 MS. GUYMON: I don't believe  
5 that he argues that those are  
6 misquotes, no. I think that the  
7 assertion in his affidavit is that he  
8 didn't really understand, when the  
9 reporter was talking to him, precisely  
10 what she was referring to, that it was  
11 a lawsuit against Grand River. He  
12 claims not to have understood that and  
13 not to have read the article when it  
14 came out.

15 PRESIDENT NARIMAN: You said  
16 something about Kate Barlow. She's no  
17 longer available.

18 MR. CLODFELTER: She's retired,  
19 and she's not available. We have not  
20 had luck with her.

21 PRESIDENT NARIMAN: Right.

22 MS. GUYMON: But rather than  
23 remaining willfully ignorant of this  
24 lawsuit and saying, "That is not our  
25 responsibility," Claimants should have

0420

1 Grand River Arbitration  
2 obtained a copy. They should have  
3 read it if they hadn't already  
4 received. They should have understood  
5 already that the escrow statutes  
6 imposed an obligation upon cigarette  
7 manufacturers, even if their sales  
8 were made indirectly.

9 Casting off responsibility onto  
10 Ross John, who we know now from Arthur  
11 Montour's affidavit was the president  
12 of Native Tobacco Direct, which is the  
13 Claimants' purported investment, at  
14 issue in this arbitration, does not  
15 remove responsibility or knowledge  
16 from Claimants. If Ross John had a  
17 responsibility, that is a  
18 responsibility of Native Tobacco  
19 Direct -- that is a responsibility of  
20 Claimants as well.

21 Even if that were true, even if  
22 that was their understanding, they had  
23 knowledge that the Claimants were  
24 incurring liability.

25 Claimants' principal excuse for

0421

1 Grand River Arbitration  
2 ignoring the Missouri lawsuit is that  
3 it was not properly served on them  
4 prior to March 2001.

5 PRESIDENT NARIMAN: No, was not  
6 served or not properly served.

7 MS. GUYMON: Not properly  
8 served.

9 PRESIDENT NARIMAN: That is  
10 their case.

11 MS. GUYMON: Yes.

12 PRESIDENT NARIMAN: Where is  
13 that case?

14 MS. GUYMON: In the response at  
15 page ten.

16 PRESIDENT NARIMAN: The words  
17 are not properly served.

18 MR. VIOLI: We say they never  
19 received a copy.

20 PRESIDENT NARIMAN: What did  
21 you say? Sorry.

22 MR. VIOLI: They never received  
23 a copy of the complaint.

24 PRESIDENT NARIMAN: No, no. I  
25 don't know whether you received -- I

0422

1 Grand River Arbitration  
2 don't know your laws of service.

3 MR. VIOLI: No, they never  
4 received the complaint -- they never  
5 received it.

6 PRESIDENT NARIMAN: Is that  
7 correct?

8 MS. GUYMON: What the  
9 Respondents argue -- or the Claimants  
10 -- sorry -- what the Claimants argue  
11 on page ten of their response is  
12 that --

13 PRESIDENT NARIMAN: Grand River  
14 has no record of ever having received  
15 service in respect of that action.  
16 No, but that is no record of ever  
17 having received it is not enough.  
18 What I want to know is, does the court  
19 record show that -- that Grand River  
20 was served? It doesn't matter whether  
21 they have a record.

22 MR. VIOLI: April 10, 2001.

23 MS. GUYMON: Yes, the Missouri  
24 court entered a default judgment based  
25 on findings that Grand River had been

0423

1 Grand River Arbitration  
2 served.

3 PRESIDENT NARIMAN: Just one  
4 second, let's go slowly.

5 MR. CROOK: Not wishing to  
6 interrupt, but going slowly, this is  
7 after --

8 PRESIDENT NARIMAN: I know. I  
9 know.

10 MS. GUYMON: The default  
11 judgment was after the jurisdictional  
12 cut-off date. That is true. But the  
13 findings made in some of these  
14 later-in-time documents reflect  
15 earlier events, and this is one such  
16 instance.

17 PRESIDENT NARIMAN: No, but  
18 that's not -- the default judgment --  
19 is this one of the default judgments  
20 which says that that "knowingly  
21 violated"?

22 MS. GUYMON: Yes.

23 PRESIDENT NARIMAN: Because I  
24 want to know what is the significance  
25 of "knowingly."

0424

1 Grand River Arbitration

2 MS. GUYMON: Under the language  
3 of the escrow statutes themselves --

4 PRESIDENT NARIMAN: That means  
5 having knowledge that you are required  
6 to make payment, you violated.

7 MS. GUYMON: Yes.

8 PRESIDENT NARIMAN: That's what  
9 I understand as "knowingly  
10 violated" --

11 MS. GUYMON: Yes.

12 PRESIDENT NARIMAN: But does  
13 that default judgment say "knowingly  
14 violated"?

15 MS. GUYMON: It does. The  
16 predicate under the escrow statutes  
17 for finding a violation and for  
18 imposing penalties, including the ban,  
19 the injunction against further sales,  
20 is, in the case of a knowing  
21 violation, penalties may be imposed;  
22 in the case of a second knowing  
23 violation, they may be prohibited.

24 So in order for that judgment  
25 to be entered, the court had to make a

0425

1 Grand River Arbitration

2 finding first that it was a knowing  
3 violation.



4           PRESIDENT NARIMAN: So this  
5 petition is what tab number?  
6           MS. GUYMON: The Missouri  
7 petition.  
8           PRESIDENT NARIMAN: Yes.  
9           MS. GUYMON: 48.  
10          PRESIDENT NARIMAN: 48. Yes.  
11 I see.  
12          MS. GUYMON: And the default  
13 judgment.  
14          PRESIDENT NARIMAN: And the  
15 default judgment.  
16          MR. ANAYA: As a default  
17 judgment, the court didn't make a  
18 finding of knowing violation. It  
19 simply accepted the pleadings of the  
20 government, right?  
21          MS. GUYMON: Right, but the  
22 Claimants here, who were defendants in  
23 that case made no appearance; so it  
24 was a default judgment. It was not a  
25 judgment.  
0426  
1           Grand River Arbitration  
2           PRESIDENT NARIMAN: Where is  
3 that recorded that they were served?  
4 That's what I want -- default judgment  
5 is what date, please?  
6           MR. VIOLI: July 26, 2002.  
7           PRESIDENT NARIMAN: Thanks.  
8 July 26, 2002 -- that is tab number --  
9           MS. GUYMON: That is, I  
10 believe, in Claimants' evidence.  
11          MR. VIOLI: It's in the Arthur  
12 Montour --  
13          PRESIDENT NARIMAN: No, there  
14 is no -- default judgment is not on  
15 record.  
16          MR. VIOLI: Yes. It's in the  
17 Arthur Montour affidavit, I think.  
18          PRESIDENT NARIMAN: I saw  
19 something, default judgment.  
20          MS. GUYMON: Yes, I am sorry,  
21 Mr. Chairman. I recall what the  
22 evidence was here.  
23          In tab 50 in the United States

24 appendices, there is a default -- a  
25 later default judgment, from July 26,

0427

1 Grand River Arbitration  
2 2002. That default judgment  
3 references the earlier default  
4 judgment.

5 PRESIDENT NARIMAN: Default  
6 judgment, I see -- of a later  
7 petition.

8 MS. GUYMON: Yes.

9 PRESIDENT NARIMAN: Of a later  
10 petition.

11 MS. GUYMON: Precisely.

12 PRESIDENT NARIMAN: And it  
13 recites earlier default judgment.

14 MS. GUYMON: Yes.

15 PRESIDENT NARIMAN: That's why  
16 the second penalty. I see.

17 MS. GUYMON: So the order of  
18 July 26, 2002, which is tab 50,  
19 includes a finding by the Court that:

20 "Respondent Grand River  
21 Enterprises was previously held to  
22 have knowingly violated the escrow  
23 statutes by failing to escrow for  
24 cigarette sales in Missouri during  
25 1999, by the Honorable Byron Kinder,

0428

1 Grand River Arbitration  
2 of the Circuit Court of Cole County,  
3 Missouri."

4 PRESIDENT NARIMAN: Yeah, but  
5 can't you get these judgments --  
6 earlier default judgment, rather than  
7 going in this circuitous way of later  
8 reports. There must be an earlier  
9 default judgment which presumably says  
10 that there was some --

11 MR. CROOK: Well, I believe we  
12 do have on record, Mr. Chairman, in  
13 the Claimants' materials, at the  
14 attachment to -- I'm sorry -- the  
15 gentleman from Missouri -- right -- we  
16 have there the docket sheet which sets  
17 out when all of these things took

18 place.

19 PRESIDENT NARIMAN: Okay.

20 MS. GUYMON: Can I interject,

21 though, that our argument is actually

22 that service is totally unnecessary.

23 MR. CROOK: Right.

24 MS. GUYMON: That knowledge is

25 the trigger here, not service. So

0429

1 Grand River Arbitration

2 it's not relevant to our argument when

3 precisely Grand River was served.

4 PRESIDENT NARIMAN: No, but we

5 would like to know.

6 MS. GUYMON: We would like to

7 satisfy your curiosity nonetheless.

8 MR. VIOLI: April 10, 2001,

9 Exhibit 14 -- 14, cc to Mr. Williams'

10 affidavit. We retrieved the court

11 file from Missouri, and it shows a

12 return of service on Grand River

13 April 10th -- allegedly April 10,

14 2001.

15 PRESIDENT NARIMAN: April 10th.

16 MR. VIOLI: Yes.

17 PRESIDENT NARIMAN: 2001.

18 MR. VIOLI: That's when the

19 complaint was allegedly served on

20 Grand River.

21 PRESIDENT NARIMAN: That is the

22 Missouri complaint.

23 MR. VIOLI: Correct.

24 MS. GUYMON: Our assertion,

25 however, is that service as I said is

0430

1 Grand River Arbitration

2 irrelevant. And the service on

3 Grand River by then they surely

4 already knew about the lawsuit.

5 PRESIDENT NARIMAN: No --

6 pardon me -- but if you were served,

7 on April 10th, then you must have

8 filed a reply to this?

9 MR. VIOLI: No. We were not --

10 the affidavit in the court file says

11 we were served on April 10th, 2001.

12 PRESIDENT NARIMAN: You have to  
13 take that as service.

14 MR. VIOLI: No.

15 PRESIDENT NARIMAN: Which is a  
16 more authoritative, the court file or  
17 what?

18 MR. VIOLI: They served someone  
19 who said he was an -- he was the owner  
20 of Grand River. We don't know who he  
21 served. The sheriff didn't get an  
22 affidavit -- the identity of the  
23 person he served, his status or his  
24 capacity.

25 He apparently gave it to

0431

1 Grand River Arbitration  
2 someone, if he did this at all, a  
3 sheriff in Ontario, and didn't ask any  
4 kind of, you know, questions as to  
5 what the company was. It wasn't done  
6 at the -- at the business address of  
7 the company. It was -- that's all it  
8 says. It's a very --

9 MS. GUYMON: We don't dispute  
10 that service on Grand River occurred  
11 after the cut-off date. We don't  
12 dispute that.

13 PRESIDENT NARIMAN: He's not  
14 saying that. He's saying -- he says  
15 there is no service at all -- just  
16 hand it over to someone.

17 MR. CROOK: Mr. Chairman, as I  
18 understand it, none of this  
19 conversation matter for purposes of  
20 establishing knowledge prior to the  
21 March the 12th. We are arguing an  
22 event that happened after March 12th.  
23 Therefore, I don't see relevance of  
24 the discussion.

25 PRESIDENT NARIMAN: No, no, no,

0432

1 Grand River Arbitration  
2 the relevance of the discussion is  
3 this -- I tell you.

4 I want to -- if they were  
5 properly served, then they were --

6 then had to file a response whenever  
7 they filed it. And I want to know  
8 what they said in that response in  
9 reference to the petition. That is  
10 the relevance.

11 Please tell us tomorrow. I  
12 hope you are following. You may say  
13 what you like with regard to the court  
14 record, but the court record says that  
15 you were served.

16 Now, if -- you can dispute it,  
17 but, if we are to proceed on the  
18 footing that you were served, then you  
19 have to file a response, obviously,  
20 within the time stipulated. You did  
21 not file a response, so there was a  
22 default judgment.

23 MR. VIOLI: Correct.

24 PRESIDENT NARIMAN: That is the  
25 scenario. Therefore, the allegations

0433

1 Grand River Arbitration  
2 which are made in the petition, if you  
3 were properly served, were not denied  
4 by you. That is the sequence of  
5 events.

6 MR. VIOLI: Yes.

7 PRESIDENT NARIMAN: That's the  
8 relevance, yes. So it is relevant.  
9 So I just want to know from -- I know  
10 it's after the date, et cetera, but I  
11 just want to know what was said there.  
12 And, therefore, you say that there was  
13 no response because you were not  
14 properly served.

15 MR. VIOLI: That's in this one  
16 lawsuit, right.

17 PRESIDENT NARIMAN: In this one  
18 lawsuit that we are talking about --  
19 this is also --

20 MR. VIOLI: We have no record  
21 of this.

22 PRESIDENT NARIMAN: Okay.  
23 That's all right. Okay.

24 MS. GUYMON: Despite Claimants'  
25 protestations that they were not

0434

1 Grand River Arbitration  
2 served, we have three evidentiary  
3 points that show they knew. And  
4 knowledge, again, is the trigger, not  
5 service.

6 PRESIDENT NARIMAN: Yes.

7 MS. GUYMON: As I mentioned,  
8 the Kate Barlow article that we  
9 already discussed was the first. The  
10 second is service on others of the  
11 defendants. The Missouri lawsuit was  
12 served on Holly John, the wife of  
13 Native Tobacco Direct's president,  
14 Ross John, and on the Seneca Nation,  
15 both prior to March 12, 2001.

16 PRESIDENT NARIMAN: Ross John  
17 and --

18 MS. GUYMON: And the Seneca  
19 Nation. I'll discuss each of those  
20 two in turn.

21 PRESIDENT NARIMAN: On what  
22 date?

23 MS. GUYMON: The notice -- I'm  
24 sorry -- service on Holly John was  
25 February 20, 2001, and this is stated

0435

1 Grand River Arbitration  
2 in Arthur Montour's affidavit at  
3 paragraph six.

4 PRESIDENT NARIMAN: Yes. Yes.  
5 And Seneca Nation were the --

6 MS. GUYMON: The service on the  
7 Seneca Nation was July 12, 2000.

8 PRESIDENT NARIMAN: What is the  
9 connection between Seneca Nation?

10 MS. GUYMON: Okay. I will  
11 start with Holly John.

12 PRESIDENT NARIMAN: Please.  
13 What is her name, Holly?

14 MS. GUYMON: Holly.

15 PRESIDENT NARIMAN: H-o-l-l-y?

16 MS. GUYMON: Yes, and John,  
17 J-o-h-n, the wife of Ross John who at  
18 the time was the president of Native  
19 Tobacco Direct, Claimants' investment,

20 that this service was not technically  
21 perfect for purposes of Missouri law,  
22 which is Claimants' argument, is  
23 irrelevant.

24 The affidavit of Mr. Schock,  
25 which Mr. Crook referenced, would be  
0436

1 Grand River Arbitration  
2 entitled to no weight because it's  
3 irrelevant, even if it were entitled  
4 to less weight, because Mr. Schock did  
5 not disclose in that affidavit that he  
6 currently serves as counsel for  
7 Grand River in ongoing Missouri  
8 proceedings.

9 PRESIDENT NARIMAN: I didn't  
10 follow this.

11 MS. GUYMON: Mr. Schock,  
12 S-c-h-o-c-k, provided an affidavit  
13 attached to Claimants' rejoinder in  
14 which he chronicled his arguments for  
15 why service process was improper.

16 All of that we assert is  
17 irrelevant, is entitled to no weight,  
18 because the technical service  
19 requirements do not matter for  
20 purposes of the time bar in article  
21 1116 and article 1117.

22 It doesn't require service. It  
23 only requires knowledge, constructive  
24 or actual. Service of a lawsuit in  
25 accordance with the state's technical

0437

1 Grand River Arbitration  
2 requirements is not required.

3 PRESIDENT NARIMAN: Yes, okay.

4 MS. GUYMON: The further point  
5 we were making about Mr. Schock's  
6 affidavit is that he does not  
7 disclose, in making that statement on  
8 behalf of Claimants, that he is their  
9 counsel. He is currently serving as  
10 their counsel in ongoing Missouri  
11 proceedings in which Claimants are  
12 participating now.

13 PRESIDENT NARIMAN: So let

14 me --

15 MS. GUYMON: So that affidavit  
16 is entitled to no weight, is our  
17 point, that the service on Holly John,  
18 which is admitted in the Arthur  
19 Montour affidavit, shows knowledge by  
20 Claimants' investment, Native Tobacco  
21 Direct. Surely, Holly John would have  
22 informed Ross John, her husband, of  
23 service of the lawsuit against him and  
24 his company.

25 PRESIDENT NARIMAN: What makes  
0438

1 Grand River Arbitration  
2 you say that this service document is  
3 on record?

4 MS. GUYMON: Mr. Montour,  
5 Claimant in the case, admits --

6 PRESIDENT NARIMAN: He says  
7 that.

8 MS. GUYMON: Yes, he admits  
9 that Holly John was served with a  
10 lawsuit on February 20, 2001.

11 MR. VIOLI: That's not right.  
12 It's the court record.

13 MS. GUYMON: Excuse me.

14 MR. VIOLI: Mr. President --

15 MR. CLODFELTER: We are putting  
16 on our case here. He is going to have  
17 a chance to rebut it.

18 MR. VIOLI: No, you're not. We  
19 are trying to establish a clear  
20 record.

21 MR. CLODFELTER: That is the  
22 point of rebuttal. We don't go point  
23 by point. Come on.

24 MR. VIOLI: We cannot stand for  
25 the record getting cluttered with, you

0439

1 Grand River Arbitration  
2 know, inaccurate information.

3 MR. CLODFELTER: Well, it's our  
4 time to present our case.

5 MR. VIOLI: It's after 5 p.m.

6 MS. GUYMON: And that's because  
7 you keep interrupting.



8 MR. VIOLI: No, it's because  
9 you can't get the facts straight.

10 MR. CLODFELTER: He's being  
11 disrespectful to Ms. Guymon. She's  
12 trying to give her presentation. He's  
13 going to have plenty of time to  
14 respond tomorrow.

15 MR. VIOLI: No, I won't, if we  
16 are going to go through each one of  
17 these.

18 MR. CLODFELTER: You have got  
19 all day tomorrow, Lynn.

20 MR. VIOLI: We will see.

21 PRESIDENT NARIMAN: Okay.

22 MS. GUYMON: Paragraph six of  
23 the Arthur Montour affidavit -- I'll  
24 let the Tribunal read it for  
25 themselves -- but it does say that the

0440

1 Grand River Arbitration  
2 summons and complaint were served on  
3 Native Tobacco Direct by serving Holly  
4 John and refers to the affidavit of  
5 service that is attached. And the  
6 date on that affidavit of service is  
7 February 20, 2001. The location for  
8 that service was, again, this 14411  
9 Four Mile Level Road, Gowanda,  
10 New York, that we discussed  
11 previously.

12 PRESIDENT NARIMAN: We come  
13 back to that.

14 MS. GUYMON: We come back to  
15 that.

16 PRESIDENT NARIMAN: Okay. So  
17 one point is service on wife of Ross  
18 John.

19 MS. GUYMON: Right.

20 So their dispute with the  
21 service on Holly John is that she  
22 wasn't an officer of the company. She  
23 was just a wife of the officer of the  
24 company, and so, therefore, it didn't  
25 satisfy technical requirements of

0441

1 Grand River Arbitration

2 service process.  
3 Our point is those technical  
4 requirements don't matter. Surely,  
5 she would have told her husband. They  
6 don't allege that she didn't tell her  
7 husband. They simply attempt to hide  
8 behind these technical requirements.

9 That issue has no bearing on  
10 the knowledge requirement in 1116 and  
11 1117.

12 Now, I will discuss the Seneca  
13 Nation. The Seneca Nation was also  
14 served with the Missouri party on  
15 July 12, 2000, even before Holly John  
16 was served. And at tab 136 of the  
17 United States's evidence, we provide  
18 that proof of service.

19 Native Tobacco Direct's then  
20 president, Ross John, is a member of  
21 the Seneca Nation. Claimant Arthur  
22 Montour, Junior, resides on the  
23 territory of the Seneca Nation. Each  
24 of the purported investments --

25 PRESIDENT NARIMAN: What is the  
0442

1 Grand River Arbitration  
2 status of Seneca Nation? Is it an  
3 entity or what is it?

4 MS. GUYMON: It's a  
5 recognized -- federally recognized  
6 tribe.

7 PRESIDENT NARIMAN: It's a  
8 tribe.

9 MS. GUYMON: Yes, it's a tribe.

10 PRESIDENT NARIMAN: I see.

11 MS. GUYMON: And to answer  
12 Mr. Crook's question, this is probably  
13 a fitting time to do it. The Seneca  
14 Nation did bring a notion to dismiss  
15 the Missouri lawsuit, and they were  
16 represented by Williams & Connolly.  
17 And I think that is tab E.

18 PRESIDENT NARIMAN: By who.

19 MS. GUYMON: Williams &  
20 Connolly, which is like Arnold &  
21 Porter, a prominent Washington, DC law

22 firm.

23 PRESIDENT NARIMAN: What  
24 relevance does that have?

25 MS. GUYMON: Mr. Crook asked  
0443

1 Grand River Arbitration  
2 the question earlier.

3 MR. CROOK: I simply was  
4 curious.

5 PRESIDENT NARIMAN: I thought  
6 you were making a point.

7 MS. GUYMON: No, I thought it  
8 was a fitting time to answer your  
9 question, that the Seneca Nation was  
10 represented by Williams & Connolly.

11 Tab E to the Williams affidavit  
12 is their motion to dismiss that they  
13 brought on behalf of the Seneca  
14 Nation.

15 PRESIDENT NARIMAN: What  
16 happened to that motion?

17 MS. GUYMON: They were  
18 dismissed from the case voluntarily,  
19 because, as Ms. Menaker explained,  
20 that Missouri petition was brought  
21 against everyone. Missouri was unsure  
22 at that point who was really  
23 responsible for these cigarettes.

24 And because they are called  
25 Senecas and because Native Tobacco

0444

1 Grand River Arbitration  
2 Direct is on Seneca territory and Ross  
3 John is a member of the Seneca Nation,  
4 they thought the Seneca Nation had  
5 something to do with.

6 PRESIDENT NARIMAN: Which are  
7 the Six Nations then?

8 MS. GUYMON: The Six Nations of  
9 the Grand River -- this is like a  
10 test. I don't remember. I am sure  
11 Claimants can tell us.

12 PRESIDENT NARIMAN: No, is  
13 Seneca Nation one of them?

14 MS. GUYMON: It is -- Seneca  
15 Cayuga, Mohawk, Iroquois.

16 MR. ANAYA: No, Iroquois is the  
17 whole thing.

18 MS. GUYMON: Iroquois is the  
19 whole thing.

20 PRESIDENT NARIMAN: But Seneca  
21 is --

22 MS. GUYMON: Seneca is.

23 MR. CROOK: Just to be clear  
24 then, the Seneca Nation did not  
25 contest service. They entered in the

0445

1 Grand River Arbitration  
2 litigation, contested on the merits,  
3 and were dismissed.

4 MS. GUYMON: Correct.

5 MR. ANAYA: What is the  
6 significance of that?

7 MS. GUYMON: Here is the  
8 significance of that -- because each  
9 of these purported investments, Native  
10 Tobacco Direct and Native Wholesale  
11 Supply, and Claimant Arthur Montour,  
12 Junior, and Ross John, president, all  
13 reside on the Seneca Nation territory.  
14 It's reasonable to expect that the  
15 Seneca Nation, having received service  
16 of a lawsuit which it didn't feel was  
17 probably brought against it, would  
18 have mentioned that to the residents  
19 on its territory, which it knew to  
20 actually be the ones in this business  
21 of selling cigarettes.

22 PRESIDENT NARIMAN: So this --

23 MR. ANAYA: So if New York gets  
24 sued, it's reasonable to assume that  
25 all the citizens of New York know that

0446

1 Grand River Arbitration  
2 New York gets sued, just because they  
3 live here and they are citizens of  
4 New York? Is that it?

5 PRESIDENT NARIMAN: That's why  
6 I wanted to know what is the Seneca  
7 Nation -- I mean, it is --

8 MR. ANAYA: It's a  
9 government -- it's a government

10 entity. Is there anything more? Is  
11 it just because they are residents?

12 MR. CLODFELTER: They are being  
13 sued for this activity. It's a  
14 specific activity which is being  
15 conducted by a known company there,  
16 and they were mistakenly sued.

17 So if the State of New York got  
18 served for a defective submarine and  
19 there is one submarine manufacturer in  
20 the State of New York, they might  
21 contact that submarine manufacturer.  
22 That's the suggestion.

23 MR. ANAYA: Okay.

24 MS. GUYMON: And the Holly John  
25 service is enough by itself as well.

0447

1 Grand River Arbitration  
2 Holly John was the wife of the  
3 president was company.

4 The point here is that other  
5 people who were involved knew, and  
6 it's unreasonable to believe that  
7 Grand River did not therefore know,  
8 especially given the combination, the  
9 accumulation of this evidence, the  
10 Kate Barlow article quoting  
11 Grand River's president, the service  
12 on the Seneca Nation, the service on  
13 Holly John.

14 That overwhelming evidence  
15 accumulated flatly contradicts  
16 Claimants' asserted ignorance or  
17 misapprehension. They knew about this  
18 lawsuit. Before they were served. It  
19 doesn't matter, it doesn't matter.  
20 They knew. They had the knowledge  
21 that is required for article 1116 and  
22 1117.

23 This overwhelming evidence  
24 flatly contradicts Claimants' asserted  
25 ignorance or misapprehension of the

0448

1 Grand River Arbitration  
2 MSA regime. Claimants received  
3 multiple notices directly from the

4 states that they were required to make  
5 payments into escrow.

6 Claimants' business partners  
7 and affiliates received similar  
8 notices, and Claimants were sued and  
9 were aware they had been sued for  
10 failure to make payments into escrow.

11 PRESIDENT NARIMAN: Excuse me  
12 for interrupting you, but this earlier  
13 default judgment during 1999, which is  
14 recited in the default judgment of tab  
15 50 -- you told us earlier of 2002 --  
16 that earlier default judgment is in  
17 connection with another petition.  
18 Presumably, it can't be of 13/6/2000.

19 MS. GUYMON: I'm not sure if I  
20 misunderstood you, but there wasn't a  
21 default judgment in 1999. Let me just  
22 correct that.

23 PRESIDENT NARIMAN: Oh, but I  
24 thought that you said that the default  
25 of 26 July 2002, which is at tab 50,

0449

1 Grand River Arbitration  
2 is a default judgment of a later  
3 petition, which, again, recites the  
4 earlier default judgment. Now, which  
5 is that earlier default judgment?

6 MS. GUYMON: That earlier  
7 default judgment was in -- was for  
8 sales made by Missouri in 1999, but  
9 the default judgment wasn't in 1999.  
10 The petition involving sales made by  
11 Missouri in 1999 is the petition we  
12 have provided that was filed in 2000;  
13 and so a default judgment was entered  
14 on that petition.

15 PRESIDENT NARIMAN: I don't  
16 understand sales -- what sales?

17 MS. GUYMON: The sales in  
18 Missouri in 1999.

19 PRESIDENT NARIMAN: Sales in  
20 Missouri, sales by Grand River?

21 MS. GUYMON: Well, sales  
22 directly or indirectly by Grand River.

23 PRESIDENT NARIMAN: By that

24 group, by all of that group of  
25 defendants?

0450

1 Grand River Arbitration

2 MS. GUYMON: Yes.

3 PRESIDENT NARIMAN: I see. No,  
4 we don't have that earlier default  
5 judgment?

6 MS. GUYMON: We do not have it  
7 in the record.

8 PRESIDENT NARIMAN: Do we have  
9 the date of that judgment?

10 MS. GUYMON: I don't believe we  
11 do in the record.

12 MR. VIOLI: It's referenced in  
13 the --

14 MR. CROOK: Is that the  
15 judgment of March 25, 2002? Is that  
16 the earlier one?

17 MR. VIOLI: The July 26th  
18 default judgment references the  
19 earlier one.

20 MR. CROOK: Okay. I am looking  
21 at page eight of the court's docket  
22 sheet at the bottom, and that appears  
23 to be the reference to the first  
24 default judgment. You are correct,  
25 the interlocutory order of default.

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1 Grand River Arbitration

2 MR. VIOLI: Yes, if you pull  
3 the July 26, 2002 default judgment, I  
4 think it reference the judgment --  
5 earlier default judgment by  
6 Judge Kentay [phonetic].

7 PRESIDENT NARIMAN: That  
8 earlier default judgment must have  
9 been of an earlier petition?

10 MR. VIOLI: The earlier default  
11 judgment was in a petition filed that  
12 they're referencing -- that is July of  
13 2000 -- June of 2000.

14 PRESIDENT NARIMAN: That's June  
15 of --

16 MR. VIOLI: June of 2000.  
17 There was a default judgment, I think,

18 entered in that case in June of 2002  
19 or somewhere thereabouts.

20 MS. MENAKER: Mr. President, we  
21 can make inquiry this evening and  
22 hopefully get you an answer tomorrow.

23 PRESIDENT NARIMAN: Right.  
24 Please proceed.

25 MS. GUYMON: Okay. Just to

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1 Grand River Arbitration  
2 summarize then, all of these  
3 occurrences were before the  
4 jurisdictional cut-off date, March 12,  
5 2001. Claimants should have known  
6 about all applicable laws governing  
7 their participation in the US before  
8 entering into the US cigarette market.

9 That is their constructive  
10 knowledge. They should have known,  
11 and they had the ease and ability to  
12 know about these laws. States are  
13 entitled to expect compliance with  
14 their laws. Contrary to Claimants'  
15 suggestion, compliance is not  
16 optional.

17 Accordingly, they can be  
18 presumed to have known that the escrow  
19 statutes applied to them causing them  
20 to incur losses as soon as their  
21 cigarettes were sold in any MSA state  
22 with an escrow statute.

23 That showing of constructive  
24 knowledge is sufficient, but we have  
25 shown -- and, again, I would just

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1 Grand River Arbitration  
2 refer to our final time line, the last  
3 slide in your packet -- we have shown  
4 by overwhelming evidence that  
5 Claimants did first know that they had  
6 incurred a loss as a result of the  
7 escrow statutes well before March 12,  
8 2001. And, therefore, they had first  
9 acquired knowledge that they had  
10 incurred a loss as a result of their  
11 alleged breaches.



12           The final time line summarizes  
13 each -- all of this evidence, before  
14 March 12, 2001. Accordingly, more  
15 than three years elapsed between the  
16 time of Claimants' first knowledge and  
17 submission of their claim to  
18 arbitration. Mr. Williams himself was  
19 complaining vocally to the press about  
20 the very same things in 2000 that they  
21 are claiming now in their lawsuit.

22           They knew. They knew that they  
23 had a grievance and a loss; and they  
24 waited past the limitations period in  
25 order to bring this.

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1           Grand River Arbitration

2           In conclusion, the Tribunal  
3 lacks jurisdiction over all of these  
4 claims. As Ms. Menaker demonstrated,  
5 the alleged breaches and the losses  
6 resulting from those breaches -- the  
7 first loss resulting from those  
8 breaches of which Claimants complain  
9 first occurred more than three years  
10 prior to the submission of their claim  
11 to arbitration.

12           And as I have just summarized,  
13 Claimants first acquired knowledge or  
14 should have first acquired knowledge  
15 of those breaches and that they had  
16 incurred a loss before March 12, 2001.

17           Claimants' attempt to  
18 side-track the Tribunal from the  
19 jurisdictional bar by identifying  
20 later developments that repeated or  
21 increased their loss should be  
22 rejected. Furthermore, Claimants'  
23 excuses in the face of the evidence  
24 that they actually knew that the MSA  
25 regime was causing them to incur

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1           Grand River Arbitration

2 losses do not withstand scrutiny for  
3 the reasons that I have demonstrated.

4           Their claims are time barred,  
5 and must be dismissed in their

6 entirety. And that is the conclusion  
7 of my presentation, unless there is  
8 anything further -- any questions.  
9 That is all for today.

10 PRESIDENT NARIMAN: Thank you  
11 very much. All right. We start  
12 tomorrow --

13 MR. VIOLI: Yes, can I just  
14 raise one thing, Mr. President. We  
15 also have a presentation, slide  
16 presentation with exhibits. And one  
17 of the -- some of the items in there  
18 and some of them that we will bring up  
19 tomorrow are the matters that were  
20 addressed in the correspondence.

21 The events that post-dated our  
22 rejoinder in this case, the seizure  
23 that took place in Missouri two weeks  
24 ago, and the -- our receipt of  
25 documents in a case that a specific

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1 Grand River Arbitration  
2 judgment was just entered into in  
3 Kansas about -- I guess -- about three  
4 weeks ago, or a month ago -- those  
5 documents were served last week and  
6 provided to the secretary and  
7 forwarded by E-Mail as soon as we had  
8 them available to us and learned of  
9 them.

10 And so we will be referring to  
11 those tomorrow if we can. And I think  
12 we need to address that issue,  
13 hopefully, this evening. It won't  
14 take time out of the presentation  
15 tomorrow.

16 We have these very important  
17 documents which sort of give more  
18 facts of the case in some of these  
19 notice issues and some of the issues  
20 that Respondent has raised today. And  
21 we did learn of them only in the past  
22 three weeks.

23 PRESIDENT NARIMAN: How is that  
24 relevant on the limitation?

25 MR. VIOLI: Well, there are a

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1 Grand River Arbitration  
2 number of documents which speak to who  
3 was a tobacco product manufacturer  
4 under the statute. In fact, in most  
5 cases, it's not the manufacturer --  
6 could be -- it would be an importer or  
7 someone who first sells in the  
8 United States.

9 And they show that it's really  
10 not as clear as we have heard for  
11 about two or three hours today --  
12 "Absolutely Grand River -- no question  
13 about it, it's the manufacturer" --  
14 they will show that the first lawsuit,  
15 apparently, that was brought -- this  
16 Missouri lawsuit in 2000 -- sued the  
17 importer, Native Tobacco Direct.

18 That was voluntarily dismissed,  
19 and we have that in the record. That  
20 case was voluntarily dismissed against  
21 the importer.

22 The last lawsuit to be brought  
23 against any of these Claimants which  
24 was three months ago in December 2005,  
25 was brought against the importer, not

0458

1 Grand River Arbitration  
2 even against Grand River. There is  
3 absolutely no clarity with respect --  
4 PRESIDENT NARIMAN: But you  
5 have to remember all of that may be  
6 so -- but you have to address the  
7 principal point that is raised by  
8 them, that the MSA together with the  
9 escrow statutes established liability  
10 against you.

11 That is your principal point.  
12 It doesn't matter whether the state  
13 impleaded XYZ, the importer, et  
14 cetera. Did it or did it not -- that  
15 is the principal point -- establish  
16 liability against Grand River in every  
17 single state where Grand River was  
18 selling cigarettes? No, that's the  
19 point you have to meet. That is all

20 I'm saying.

21 MR. VIOLI: I have these  
22 exhibits which prove that point, is  
23 what I am telling you, that I have  
24 come into possession with -- the  
25 seizure -- first, the seizure that

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1 Grand River Arbitration  
2 happened under the contraband law that  
3 happened two weeks ago.

4 PRESIDENT NARIMAN: It's not  
5 what they did under the statute. It's  
6 by virtue of the statute, were you or  
7 were you not liable for -- in respect  
8 of the escrow statutes for all the  
9 sales of cigarettes you made.

10 That is all. There is -- they  
11 may have sequestered your property.  
12 They may have done anything. One  
13 state may have done it. Another state  
14 may not have done it under some  
15 apprehension or whatever.

16 The argument against you that  
17 is made -- the principal argument,  
18 apart from all of these documents, is  
19 that the statute, the very passing of  
20 the statute makes you liable and you  
21 are fixed with knowledge of that  
22 statute. That is the point you have  
23 to meet. That is all I am trying to  
24 tell you.

25 MR. VIOLI: Okay. Should we

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1 Grand River Arbitration  
2 deal with the exhibits on a one-by-one  
3 basis?

4 PRESIDENT NARIMAN: Whatever  
5 you have -- however you are prepared  
6 to deal with it.

7 MR. CLODFELTER: Mr. President,  
8 I think we have to have something to  
9 say about that. As you know we  
10 objected to each of those documents.  
11 You know, it wasn't done properly.  
12 The documents shouldn't have been  
13 before you before they had permission

14 to put them before you.  
15 But they sent them, obviously,  
16 to try to color your thinking before  
17 they even had a chance to debate  
18 whether they should be introduced or  
19 not.

20 We oppose their introduction  
21 because they are late, and there is no  
22 justification shown in the record for  
23 why they couldn't have been submitted  
24 earlier.

25 On the other hand, our position  
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1 Grand River Arbitration  
2 is that the Tribunal should be  
3 informed as possible. And we have  
4 indicated that we have a document --  
5 documents as well that we would like  
6 to put in, in rebuttal to their case.  
7 And so that has to be taken into  
8 consideration.

9 We have also asked whether or  
10 not they would be willing to allow us  
11 to put in yet another document.

12 Do you want to discuss that,  
13 Andrea?

14 MS. MENAKER: Sure. There is a  
15 document that we have in our  
16 possession that was generated by  
17 Claimants, specifically by Mr. Arthur  
18 Montour. Yes, we can't talk  
19 specifically about what the  
20 application is or what the document  
21 is, because there are protections for  
22 taxpayer information, so we asked  
23 for --

24 MR. VIOLI: That's fine. If  
25 what you -- they wrote a letter saying

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1 Grand River Arbitration  
2 that they would like to submit these  
3 documents to the Tribunal. I have  
4 copies of those. This is -- now, we  
5 are talking about the letters that you  
6 wrote -- the documents that were in  
7 your letter dealing with the ATF

8 permit, right?  
9 MS. MENAKER: That's correct.  
10 MR. VIOLI: Okay. The reason  
11 why I didn't address it before now is  
12 because it was said that we were going  
13 to address it before the Tribunal.  
14 We have no problems with those  
15 documents coming in. However, the  
16 only question I have is that they do  
17 contain confidential tax information.  
18 That's what Respondent is speaking to.  
19 PRESIDENT NARIMAN: Just give  
20 me a minute.  
21 (There was a discussion off the  
22 record.)  
23 PRESIDENT NARIMAN: It might  
24 cut short tomorrow's program, that --  
25 if anybody -- my personal view is --

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1 Grand River Arbitration  
2 and this is -- I don't know -- my  
3 colleagues will tell you what their  
4 view is -- my personal view is I don't  
5 wish to shut out anybody from putting  
6 in any document.

7 The relevance, et cetera, we  
8 all decide when arguments are made.  
9 We don't know what this document  
10 means. We have not read them either.

11 Now, if they object, naturally,  
12 and they have a right to object and  
13 say that you were supposed to put in  
14 much earlier; you put it in later --  
15 if we overrule that objection and say  
16 very well, we put this in. You answer  
17 whatever you want to say, say you  
18 again answer. It may involve another  
19 hearing.

20 But I don't like to shut out  
21 anybody from putting in any particular  
22 document in support of this question  
23 of jurisdiction. Am I making that  
24 very plain?

25 MR. CROOK: Mr. Chairman, if I

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1 Grand River Arbitration

2 can say, I would like to be clear. I  
3 haven't read these documents on either  
4 side, none. I don't know what is in  
5 them.

6 PRESIDENT NARIMAN: But if  
7 counsel says that, "I wish to rely,"  
8 which he says today or yesterday or  
9 the day before, that, "I wish to rely  
10 on documents one through seven in  
11 support of the case, and I will  
12 explain them all to you a little later  
13 when I expound on them," I don't like  
14 to shut it out.

15 I can't say, no, no, you first  
16 tell me why these documents are  
17 relevant and then all the others  
18 permitted.

19 MR. CROOK: Mr. Chairman, if I  
20 could, my second point is I don't like  
21 submissions coming in close to a  
22 hearing. We -- I understand Mr. Violi  
23 may have just been able to get these  
24 documents. I don't know what the  
25 circumstances are.

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1 Grand River Arbitration

2 But I must say, in principle, I  
3 am not happy about having material  
4 come in close to a hearing --

5 PRESIDENT NARIMAN: Nor am I  
6 happy either.

7 MR. CROOK: -- or at a hearing,  
8 and whatever -- if we were to make an  
9 exceptional ruling here to allow these  
10 materials in, I hope neither party  
11 would take it as a precedent for  
12 further proceedings, because I think  
13 we have to have a disciplined process  
14 for both parties on notice, and where  
15 at the conclusion of the proceedings,  
16 the Tribunal can deliberate and  
17 doesn't have to sit around waiting for  
18 post-hearing submissions.

19 PRESIDENT NARIMAN: Okay. It  
20 can be done by consent as well. That  
21 all depends on how you look at it. Do

22 you want to put in some documents?  
23 That is why I am mentioning all of  
24 this. They want to put in some  
25 documents. You want to put in some

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1 Grand River Arbitration  
2 documents.

3 He says he don't object to  
4 yours. If you wish to respond to  
5 their material which they submitted,  
6 we rather think -- what do we  
7 propose -- what do you propose to do?  
8 You decide. As he rightly says, we  
9 don't want a further hearing and  
10 someone or two to object that we  
11 admitted these document at the end to  
12 our prejudice.

13 MR. ANAYA: We have a decision  
14 here that we are going to admit all  
15 the documents here or that are  
16 submitted -- allow the Claimants to  
17 submit as they give their  
18 presentation, the documents that  
19 tomorrow they deem particularly  
20 relevant. And then we can make an  
21 assessment at that point.

22 MR. CLODFELTER: Yes,  
23 Mr. President. As I say, we are  
24 inclined also to allow the Tribunal to  
25 have all the information that is

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1 Grand River Arbitration  
2 available. We also have concerns  
3 about orderly process as well. That's  
4 why we objected.

5 As long as both sides are  
6 treated fairly in the matter, we would  
7 want to have the right to submit some  
8 rebuttal documents if we need to.

9 We also need to reserve our  
10 right on post-hearing submissions  
11 until we hear the case, obviously, and  
12 rebuttal is done tomorrow, to see  
13 whether anything more is necessary.

14 We also take the permission to  
15 use this one document. We also



16 understand it's a tax document. It  
17 has to be protected, which means it  
18 can't be part of the public record at  
19 all. I think we have to get written  
20 permission. We need the letter  
21 signed.

22 But on that basis, except, you  
23 know, reserving the right with regard  
24 to particular documents, I think we  
25 can proceed this way.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: And what do  
3 you propose to do to their documents,  
4 I mean.

5 MR. CLODFELTER: That's what I  
6 mean.

7 PRESIDENT NARIMAN: They are  
8 out of time. In the sense --

9 MR. CLODFELTER: To allow  
10 Mr. -- to allow them to proceed with  
11 the documents, is what I am  
12 suggesting.

13 PRESIDENT NARIMAN: That's what  
14 I thought. Yes -- allow them to  
15 proceed with the documents.

16 MR. CLODFELTER: We will  
17 reserve with any particular documents,  
18 because we don't know what they have  
19 proffered them for. We will make the  
20 argument at the time.

21 PRESIDENT NARIMAN: Okay. So  
22 you have agreement in that sense.

23 MR. CLODFELTER: Yes, as long  
24 as both sides are treated the same  
25 way.

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1 Grand River Arbitration

2 PRESIDENT NARIMAN: Yes, that's  
3 right. I don't propose to shut out  
4 either party. I agree that there is a  
5 point of time at which we can cut off  
6 things. We can't go on like this.  
7 But if somebody feels that it's very  
8 important on the jurisdiction issue,  
9 that some documents which they had

10 omitted to furnish before, that they  
11 could not furnish before -- it's all  
12 in the realm of speculation -- is that  
13 it is important, and I think we  
14 would -- I would prefer to hear  
15 whatever you want -- the parties want  
16 to say on these documents.

17 Either you say, "I don't admit  
18 this document," which is a separate  
19 topic. But if they are admitting  
20 documents or they are not relevant,  
21 but we -- I mean, to say that, "No,  
22 you are not entitled to refer to these  
23 documents at all," is something which  
24 I don't take personally at this point  
25 of time -- I mean, once the hearing is

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1 Grand River Arbitration  
2 proceeding on the issue of  
3 jurisdiction.

4 If the hearing had concluded  
5 and you were -- said that, "No, we now  
6 want to admit additional evidence," I  
7 would be against it, totally against  
8 it. And I join with Mr. Crook there.

9 But since we are still at the  
10 stage of not having concluded the  
11 hearing, somebody has some genuine  
12 grievance, that "I have some document  
13 in my possession which is extremely  
14 important on this issue," I will not  
15 shut it out. I may rule that it's an  
16 irrelevant document, but I won't shut  
17 it out.

18 MR. VIOLI: Do we need -- you  
19 sent -- you have it. Okay.

20 PRESIDENT NARIMAN: So tomorrow  
21 decide on this, if you like, at the  
22 beginning.

23 MR. CLODFELTER: With the  
24 understanding that we have to reserve  
25 for the possibility of post-hearing

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1 Grand River Arbitration  
2 submissions, because we haven't heard  
3 the case yet. That's all.

4           PRESIDENT NARIMAN: Absolutely,  
5 absolutely. That's your entitlement.

6           MR. CROOK: A simple,  
7 mechanical question, how are we going  
8 to get these documents and when? You  
9 have them physically available?

10          MR. ONWUAMAEGBU: Yes, they  
11 have also been submitted by E-Mail.

12          MR. VIOLI: There should be  
13 three, one for each panel member.

14          PRESIDENT NARIMAN: All right.  
15 We will address it tomorrow.

16          MR. CROOK: Would there be any  
17 objection if the Tribunal perused  
18 these documents tonight?

19          MR. CLODFELTER: Well, we can  
20 clear up --

21          MS. MENAKER: We may ask  
22 Mr. Violi -- do you intend to rely on  
23 each and everyone of the documents you  
24 submitted?

25          MR. VIOLI: It depends on the

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1           Grand River Arbitration  
2 questioning, so I don't know what -- I  
3 have a Powerpoint much like yourself,  
4 and I have culled it only to documents  
5 which I think are critical. For  
6 example, the forfeiture petition in  
7 Missouri that followed the seizure or  
8 seizures, I am not going to refer to  
9 that.

10          MS. MENAKER: I am just saying,  
11 though, would it make sense to  
12 identify the documents which you are  
13 planning to use.

14          PRESIDENT NARIMAN: May I  
15 suggest that you two sit here just  
16 now, and you sort out and you tick off  
17 whatever you think is absolutely  
18 necessary to support your case. And  
19 let's hear them tomorrow and find out  
20 whether they accept that.

21          MR. CROOK: Do it quickly so  
22 the commission knows which to read  
23 tonight.

24 PRESIDENT NARIMAN: It doesn't  
25 matter what we are reading. We will

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1 Grand River Arbitration  
2 read it with you if you want, read it  
3 with you.

4 (There was a discussion off the  
5 record.)

6 PRESIDENT NARIMAN: I would ask  
7 that both you sit down and decide  
8 which of those documents you think is  
9 absolutely necessary for the case.  
10 You decide what is absolutely  
11 necessary. We won't waste your time  
12 whether it's necessary or not. Only  
13 go to whether it's relevant on this  
14 issue or not, but you decide.

15 (The arbitration adjourned for  
16 the day.)

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## CERTIFICATE

3

4 I, TAB PREWETT, A Registered  
5 Professional Reporter, Notary Public and  
6 Certified Shorthand Reporter of the State  
7 of New Jersey, License No. XI01828, do  
8 hereby certify that the foregoing is a true  
9 and accurate transcript of the arbitration  
10 proceedings as taken stenographically by  
11 and before me at the time, place and on the  
12 date hereinbefore set forth.

13 I DO FURTHER CERTIFY that I am  
14 neither a relative nor employee nor  
15 attorney nor counsel of any of the parties  
16 to this action, and that I am neither a  
17 relative nor employee of such attorney or

18 counsel, and that I am not financially  
19 interested in the action.

20

21

22 \_\_\_\_\_  
23 Notary Public of the State of New Jersey

24 My Commission expires August 30th, 2007

25 Dated: April 7, 2006

26