

1 The North Face Apparel Corp.,
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3 Plaintiff,
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5 vs.
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7 Williams Pharmacy, Inc., et al,
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9 Defendants
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11 Videotaped Deposition of
12 James Winkelmann, Sr.
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16 March 19, 2010
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5 The North Face Apparel Corp.,

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7 Plaintiff,

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9 vs. 4:09-cv-02029-RWS

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11 Williams Pharmacy, Inc., et al,

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13 Defendants

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15 IT IS STIPULATED AND AGREED by and
16 between counsel for Plaintiff and counsel for
17 Defendants that the deposition of James Winkelmann,
18 Sr., may be taken for discovery purposes on behalf
19 of the Plaintiff, pursuant to and in accordance with
20 the provisions and rules pertaining to such
21 depositions at the offices of Bryan Cave LLP, One
22 Metropolitan Square, Suite 3600, in the City of St.
23 Louis, State of Missouri, on the 19th day of March,
24 2010, before Mary L. Peppenhorst, Missouri Certified
25 Court Reporter (No. 545), Illinois Certified

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1 Shorthand Reporter (IL #084-003856), Registered
2 Professional Reporter (#804416) and Notary Public.

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1 APPEARANCES OF COUNSEL:

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3 FOR THE PLAINTIFF,

4 The North Face Apparel Corporation:

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6 Mr. David Roodman

7 and Mr. Nick Williamson

8 Bryan Cave LLP

9 One Metropolitan Square, Suite 3600

10 St. Louis, MO 63101

11 (314) 259-2000

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13 and

14

15 Ms. G. Roxanne Elings

16 Greenberg Traurig, LLP

17 Met Life Building

18 200 Park Avenue

19 New York, New York 10166

20 (212) 801-2148

21

22 Also present for Plaintiff: Ms. Barbara Kaplan

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1 FOR THE DEFENDANTS,

2 The South Butt and

3 James A. Winkelmann, Jr.:

4

5 Mr. Albert Watkins

6 and Mr. Michael D. Schwade

7 Kodner, Watkins, Muchnick, Weigley, L.C.

8 7800 Forsyth Blvd., Suite 700

9 Clayton, MO 63105

10 (314) 727-9111

11 mschwade@kwmwlaw.com

12

13 FOR THE DEFENDANTS,

14 Williams Pharmacies, et al:

15

16 Mr. Thomas M. Blumenthal

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17 and Mr. Jeffrey L. Michelman
18 Paule, Camazine & Blumenthal, P.C.
19 165 N. Meramec Avenue
20 St. Louis, MO 63105-3789
21 (314) 727-2266
22 tblumenthal@pcblawfirm.com
23
24
25

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1 ALSO PRESENT:
2 Curt Shaw, Legal Videographer
3 Gore Perry Reporting & Video
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7 (No exhibits were marked.)

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1 VIDEOGRAPHER: We're on the record at 9:57
2 a.m. Today's date is March 19th, 2010. We're at
3 the offices of Bryan Cave. The address is 211 North
4 Broadway, St. Louis, Missouri. I'm Curt Shaw, legal
5 video specialist, along with Mary Peppenhorst,
6 certified court reporter, here today for the
7 deposition of James Winkelmann, Sr. to be taken in
8 the matter of North Face Apparel Corporation versus
9 Williams Pharmacy, Inc. et al. At this time would
10 counsel please give their representations beginning
11 with Mr. Roodman.

12 MR. ROODMAN: David Roodman on behalf of the
13 North Face Apparel Corp.

14 MS. ELINGS: Roxanne Elings on behalf of The
15 North Face Apparel Corp.

16 MS. KAPLAN: Barbara Kaplan on behalf of The
17 North Face Apparel Corp.

18 MR. WILLIAMS: Nick Williamson on behalf of
19 the North Face Apparel Corp.

20 MR. MICHELMAN: Jeff Michelman on behalf of
21 Williams Pharmacy.

22 MR. BLUMENTHAL: Tom Blumenthal on behalf of
23 Williams Pharmacy, Inc.

24 MR. SCHWADE: Michael Schwade on behalf of
25 James A. Winkelmann, Jr. and The South Butt, LLC.

1 MR. WATKINS: Albert Watkins, the law firm
2 of Kodner, Watkins, Muchnick and Weigley, LC on

3 behalf of defendant James A. Winkelmann, Jr. and The
4 South Butt, LLC.

5 VIDEOGRAPHER: Very good. Mary, would you
6 please swear the witness?

7 JAMES WINKELMANN, SR.,
8 of lawful age, having been first duly sworn to
9 testify the truth, the whole truth, and nothing but
10 the truth in the case aforesaid, deposes and says in
11 reply to oral interrogatories propounded as follows,
12 to-wit:

13 MR. WATKINS: Counsel, before we commence,
14 there's just two housekeeping matters I want to take
15 care of. One is with respect to the issue that we
16 have had brought to our attention yesterday with
17 dealing with the inadvertent disclosure of what we
18 assert are privileged documents. In reviewing the
19 totality of the circumstances we are concerned that
20 there are other privileged documents that were not
21 brought to our attention that, if what we think
22 happened from a technology standpoint happened, then
23 there may be other correspondence that's privileged
24 and confidential. And as a matter of record, I
25 would request that until such time as we have the

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1 court's ruling on the issue that we're going to be
2 addressing Tuesday in informal matters, that Bryan
3 Cave not -- not inspect any further the documents
4 produced from the send box of the e-mail account for
5 Jimmie Winkelmann, Jr. you.

6 MR. SCHWADE: The Mizzou e-mail account.

7 MR. WATKINS: The Mizzou e-mail account with
Page 8

8 Jimmie Winkelmann, Jr. That is -- that is
9 requested. If there is inspection that is done
10 despite that request, we would like to note that
11 these documents all have, at least we believe all
12 have, privileged and confidential notations on them
13 and we would request that those specifically not
14 be -- not be reviewed. That obviously is a request
15 and you can do with it as you please and deem
16 appropriate.

17 Then with respect to this witness James A.
18 Winkelmann, Sr. is being proffered here today as a
19 managing agent or agent for South Butt, LLC pursuant
20 to Rule 30(b)6. And to the extent that he is being
21 questioned as an agent of The South Butt, LLC,
22 obviously my representation encompasses that scope.
23 I do not represent Mr. Winkelmann individually
24 within the context of this case and so I'm just
25 making sure that that is as a matter of record.

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1 MR. ROODMAN: In what context do you
2 represent this witness?

3 MR. WATKINS: I am not representing this
4 witness. He's not a party to this case. I
5 represent the parties to this case. I do represent
6 this individual in an individual capacity and in a
7 corporate capacity on a number of other matters.

8 MR. ROODMAN: Are you representing him here
9 today?

10 MR. WATKINS: I'm representing him as an
11 agent of The South Butt, LLC.

12 MR. ROODMAN: Okay. So to the extent that
13 there are questions directed to him as an individual
14 today are you representing him?

15 MR. WATKINS: Within the context and scope
16 of my representation of The South Butt, LLC and
17 James A. Winkelmann, Jr. I represent those two
18 parties.

19 MR. ROODMAN: Well, you either represent him
20 or you don't. To the extent I'm asking him
21 questions directly of him personally are you
22 representing him here today?

23 MR. WATKINS: No, but I am representing The
24 South Butt, LLC.

25 MR. ROODMAN: Okay.

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1 MR. WATKINS: That's not to say at some
2 point in the future I might not be representing him.

3 MR. ROODMAN: I just want to know what
4 you're doing now today, sir.

5 MR. WATKINS: I appreciate that.

6 MR. ROODMAN: So any objections you make to
7 individual personal questions of James Winkelman,
8 Sr. here today will be on behalf of The South Butt
9 but not Mr. Winkelmann; is that true?

10 MR. WATKINS: That is correct.

11 MR. ROODMAN: We understand your position on
12 the 30(b)6. I think Mr. Kahn clearly articulated
13 our position with respect to that last time and it
14 is what it is.

15 With respect to your request with respect to
16 documents that you are now belatedly and you haven't

17 identified asserting as privileged, I'm not sure
18 what those documents are. We are on a fast track
19 discovery schedule in this case. It was incumbent
20 upon The South Butt, Jimmie Winkelmann, Jr. and his
21 counsel to review the documents before they were
22 produced. If there are inadvertently produced
23 privileged documents, it's incumbent upon you to
24 direct us what those are and where they are.

25 MR. WATKINS: And we will -- we will make

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1 every effort to get that done today. We have been
2 on a fast track and at the outset of this matter we
3 did have an understanding and a protocol that we had
4 established with Mr. Kahn where he recognized that
5 we were moving quickly for the purposes of producing
6 as much of this very extensive documentation and
7 discovery that's been requested, that if there were
8 inadvertent disclosures that your firm had a very
9 strong policy about adhering to and respecting the
10 fundamental tenet of attorney-client privilege.
11 And that's something that we have been obviously
12 relying upon within the context of our undertakings
13 to act as expeditiously as possible to assist in
14 making sure that The North Face has a full
15 opportunity to get at whatever discovery they want
16 to which they're otherwise entitled.

17 MR. ROODMAN: Well, Mr. Kahn isn't here to
18 address your allegations with respect to whatever
19 representations you contend that he made. I will
20 represent that I and all of my colleagues adhere to

21 the rules of professional responsibility and to the
22 extent the documents are privileged, we do adhere to
23 it. On the other hand, when parties have waived
24 privilege or when parties don't have the privilege,
25 we zealously represent our clients. And if

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1 documents aren't privileged, they are treated as
2 such so I suggest we move on. We'll take under
3 consideration your request that we not review any
4 more documents from the send account.

5 MR. WATKINS: In the send box of the
6 Mizzou -- of the Mizzou e-mail.

7 MR. ROODMAN: But I will tell you there are
8 a lot of documents that have been reviewed that are
9 being used potentially here today. I don't --
10 they're commingled with other documents. I don't
11 know. You didn't go to the lengths of even marking
12 documents that you produced as to where they came
13 from. So I don't know right now working this
14 deposition today what documents came from where.
15 Jimmie Winkelmann's inbox, send box, Mr. Winkelmann,
16 Sr. who's sitting here, if you see a document that
17 you think is privileged here today, I would ask that
18 you identify it.

19 MR. WATKINS: Well, certainly. And one of
20 the things that is kind of the telltale and helpful
21 indicator is the privileged and confidential
22 language that's found on e-mail correspondence. And
23 obviously correspondence issued on our firm's
24 letterhead is pretty easy to identify as well.

25 MR. ROODMAN: So is it your position that

1 documents that are not marked as privileged and
2 confidential are not privileged and confidential?

3 MR. WATKINS: There may be e-mail exchange
4 or two that involve chain correspondence back and
5 forth that did not in every case have the privileged
6 and confidential language found on it. I think
7 there's one, but there may be two.

8 MR. ROODMAN: Are you able to identify that
9 right now?

10 MR. WATKINS: No.

11 MR. ROODMAN: Okay.

12 MR. WATKINS: No. But it would be -- I
13 don't think it will be an issue if we just follow
14 the same protocol we've been following with respect
15 to exhibits and other depositions.

16 MR. ROODMAN: Okay. We'll proceed. Mr.
17 Videographer, could you identify what time we are
18 actually starting the deposition. We're entitled to
19 seven hours with this witness and the issues that
20 Mr. Watkins raised, we've been dialoguing about
21 should not be assessed against our seven hours.

22 VIDEOGRAPHER: Very good. The time on the
23 video monitor is 10:05 am.

24 EXAMINATION

25 Examination By Mr. Roodman:

1 Q Could you please state your full legal name
2 for the record?

3 A James A. Winkelmann.

4 Q Mr. Winkelmann, what is your address of your
5 residence?

6 A 23 Glen Abby Drive in Frontenac, Missouri.

7 Q How long have you resided at that address?

8 A Since 2002.

9 Q What is your business address?

10 A I have two offices.

11 Q Why don't you start with the first one and
12 then we'll go to the second one.

13 A 21 North Meramec, Clayton, second floor,
14 63105.

15 Q And what business is associated with 21
16 North Meramec?

17 A Blue Ocean ATM, LLC; Longrow Holdings, Inc,
18 L-O-N-G-R-O-W, Holdings, Inc; Huntleigh Financial
19 Services, Inc; Huntleigh Capital Management, Inc;
20 HFI Securities, Inc., Moses.com Securities, Inc.,
21 and Longrow Insurance Agency, Inc.

22 Q How many employees are there located at 21
23 North Meramec associated with the 3, 4, 5, 7
24 businesses you've just identified?

25 A Just myself.

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17

1 Q No other employees?

2 A No.

3 Q Have there ever been any other employees
4 associated with those companies?

5 A Oh, yeah. Plenty.

6 Q When was the last time you had employees
7 associated with those seven companies?

8 A I would believe July of 2009.

9 Q How many employees were employed by you in
10 July of 2009 in association --

11 A One.

12 Q -- with the seven companies?

13 A One. One additional.

14 Q All right. Let me just go over some ground
15 rules. Have you been deposed before?

16 A Sure.

17 Q How many times have you been deposed?

18 A At least a half dozen.

19 Q When was the last time you were deposed?

20 A 2008.

21 Q All right. I'll ask some questions about
22 that in a minute. I just want to make sure that
23 we've got some ground rules with respect to how the
24 deposition is being taken down. Unfortunately, the
25 court reporter can only take down one of us at a

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1 time. So I will do my best to respect you --

2 A I understand.

3 Q Again, I'll do my best to respect you today
4 and wait for you to finish an answer before I
5 interrupt and if you could try to do the same. It's
6 very easy to get into a conversational tone, Mr.
7 winkelmann, which is fine, except we both can't talk
8 at the same time; is that understood?

9 A I understand.

10 Q Another point to keep in mind is that the
11 court reporter can't take down nodes of the head of

12 yes or no or shrugs of the shoulder. So we ask that
13 all of your answers today be audible, do you
14 understand that?

15 A I understand.

16 Q Also it's very important that your answers
17 be accurate and truthful today and I want to make
18 sure that you fully understand any questions that
19 are posed to you. So can I ask you to agree that if
20 I ask you a question, you don't understand it or you
21 find it vague, you'll ask me to clarify it?

22 A I'll do the best that I can.

23 Q Okay. How many employees were employed by
24 you? And you may have answered this and I may have
25 missed it back in July of 2009?

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19.

1 A One.

2 Q And who was that?

3 A Kelly Christanell.

4 Q And is Miss Christanell still employed by
5 you in any manner?

6 A No.

7 Q why did she leave your employment?

8 A The business revenue was shrinking to a
9 point that I couldn't afford any employees.

10 Q Do you know where she's employed now?

11 A She's an independent contractor doing work
12 for some of these companies on like a project by
13 project basis.

14 Q Do you have a written agreement with Miss
15 Christanell?

16 A No.

17 Q How do you spell her last name?

18 A I'm pretty sure it's C-H-R-I-S-T-A-N-E-L-L.

19 Q And how long was she employed by you before
20 she left your employment in July of 2009?

21 A Since 1996.

22 Q So you indicated that you've been deposed at
23 least a half dozen times, the last time in 2008, is
24 that correct?

25 A Yes.

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1 Q What was the occasion that you were deposed
2 in 2008?

3 A I was a party in a landlord dispute.

4 Q Who was the dispute with?

5 A Company called 8000 Maryland was -- filed a
6 claim against Huntleigh Financial Services and
7 Longrow Holdings.

8 Q Is that lawsuit resolved?

9 A Yes.

10 Q Did you enter into a consent judgment in
11 connection with that case?

12 A In what capacity?

13 Q In any capacity?

14 A Huntleigh Financial Services entered into a
15 consent judgment.

16 Q And do you recall what the terms of that
17 consent judgment were?

18 A You know, I'm -- I'm very concerned because
19 Bryan Cave represented Huntleigh Financial Services
20 in this initial lease and I believe that you have

21 information about this already.

22 Q Can you answer the question please?

23 A I'm concerned.

24 Q Are you refusing to answer?

25 A No. I'm not refusing to answer. Why don't

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21

1 you state it again, but why -- shouldn't you have
2 the answer already if you represented Huntleigh
3 Financial Services.

4 Q Mr. Winkelmann, the deposition is of you,
5 not of me today. And I did not represent you and I
6 don't have any information in connection with any --

7 A I sit here today and I'm telling you that
8 Bryan Cave, your law firm, represented Huntleigh
9 Financial Services in that lease negotiation and
10 that is the truth.

11 Q That's -- That's all fine. Would you please
12 read back the question.

13 (Whereupon, the requested
14 portion of the record was read
15 by the reporter.)

16 A Are you using this information that you have
17 obtained from representing Huntleigh Financial
18 Services in conjunction with your other client?

19 Q (By Mr. Roodman) Mr. Winkelmann, I'm not
20 using any information in connection with any prior
21 representation.

22 A Look, you do understand that Bryan Cave,
23 your law firm represented me, my family, at least 6
24 businesses in at least 15 matters over the course of
25 eight years. You understand that?

1 Q You're telling me that.

2 A I'm telling you that this is the truth and
3 now you're sitting here today trying to get
4 information from me to prosecute my son.

5 Q Sir, this is a lawsuit between The South
6 Butt, LLC and your son.

7 A Look Bryan Cave represented me.

8 Q I understand.

9 A They represented Huntleigh Financial
10 Services, David.

11 Q Sir, please get control of yourself.

12 A No. I am out of control.

13 MR. WATKINS: Why don't we take a break for
14 a second. I want to talk to -- I need to find
15 something out.

16 A This is really outrageous. It really is
17 outrageous.

18 Q (By Mr. Roodman) No, it is not, sir.

19 A We paid your firm over a half a million
20 dollars, sir, and you're taking that information to
21 prosecute my son.

22 Q I will represent to you, again, I am not
23 using any information that was obtained in a prior
24 representation.

25 A How do you know -- How am I supposed to know

1 that?

2 Q Cause I just told you.

3 A You represented Huntleigh Financial
4 Services.

5 Q I did not, sir.

6 A You're asking me questions about a dispute.
7 This is really outrageous. What kind of -- all the
8 whole --

9 MR. WATKINS: Mr. Winkelmann --

10 THE WITNESS: Look, you don't represent me
11 either.

12 MR. WATKINS: Hang on a second. It might be
13 worthwhile for us to take a short break here so I
14 can find out a little bit of information.

15 MR. ROODMAN: You might share with him --
16 that's fine.

17 Q (By Mr. Roodman) Cause I do think you need
18 to get control of yourself.

19 A Oh, you get control of yourself David.

20 Q I have control of myself.

21 A No. Your law firm is out of control
22 because, obviously, we can't trust you after
23 representing --

24 Q Sir, I'm asking you questions. I'm not --
25 I'm using only publicly available information. I'm

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24

1 asking you questions about your businesses.

2 A You already have the answers to these.

3 Q No, I don't.

4 A You represented Huntleigh Financial
5 Services.

6 Q I don't --

7 A Did Bryan Cave represent --

8 Q I have -- I have no idea.

9 A Oh, come on.

10 Q Sir, we have 1200 lawyers. I don't know who
11 represented you.

12 A You know what --

13 MR. WATKINS: Mr. Winkelmann --

14 Mr. Winkelmann, would you join me please for a
15 break?

16 THE WITNESS: Can I take a break or is that
17 against the rules?

18 MR. ROODMAN: Well, usually when there's a
19 pending question you can't, but this time we'll make
20 an exception.

21 VIDEOGRAPHER: We are off the record at
22 10:15 a.m.

23 (Whereupon, there was a break in
24 the proceedings. The testimony
25 resumes as follows:)

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1 VIDEOGRAPHER: We're back on the record at
2 10:21 a.m. Please proceed.

3 MR. WATKINS: I've just had an opportunity
4 to meet briefly during this break with Mr.
5 Winkelmann, James A. Winkelmann, Sr, and there's an
6 issue and a concern that he has that I would like to
7 share with you and then tell you what -- what he's
8 doing.

9 Evidently, over the course of the recent
10 past, Bryan Cave has represented James A.
11 Winkelmann, Sr. in connection with the very

12 litigation that you had just raised the issue on,
13 Huntleigh represented -- Bryan Cave represented
14 Huntleigh Financial Services in the case against
15 8000 Maryland, which was a civil cause of action, as
16 I understand it, a landlord/tenant type of dispute,
17 but it involved allegations of fraudulent transfers
18 that were being made. That Mr. Winkelmann is
19 concerned because Huntleigh -- or Bryan Cave also
20 represented his company Huntleigh Capital Management
21 and Huntleigh Financial Services and Huntleigh
22 Securities Corporation and Longrow Insurance Agency
23 and Huntleigh Fund -- was it distributors?

24 THE WITNESS: Yes.

25 MR. WATKINS: Moses.com, Huntleigh Fund

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1 Distributors, Huntleigh Securities Corporation, that
2 you represented Mr. Winkelmann in an individual
3 capacity as a guarantor in connection with some
4 federal regulatory matter which involved a great
5 deal of information about his personal assets, his
6 personal life, his background. That the scope of
7 the representation also encompassed representation
8 of Huntleigh Financial Services and Huntleigh
9 Services in a wrongful termination claim and
10 personnel matters involving some significant
11 intimate familiarity and knowledge of Mr. Winkelmann
12 and Mr. Winkelmann's practices.

13 And there is concern on the part of Mr.
14 Winkelmann that you're going to be utilizing
15 information garnered during the scope of your
16 representation of him and his companies to further

17 the interests of The North Face visa vie the current
18 litigation which only includes Jimmie Winkelmann,
19 Jr. and The South Butt, LLC, but which I believe all
20 counsel here can envision possibly encompassing Mr.
21 Winkelmann as well at some time prospectively.

22 And there is concern that that intimate
23 familiarity with Mr. Winkelmann is -- that was
24 garnered during the course and scope of an
25 attorney-client relationship is being used for

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1 improper purposes. I have instructed Mr. Winkelmann
2 to seek and procure independent counsel to advise
3 him as to what he should or should not do within the
4 context of this issue and that counsel was contacted
5 approximately five minutes, ten minutes ago whenever
6 we were in the other room and he has advised that he
7 will be on his way over to meet with Mr. Winkelmann
8 immediately. He was getting into his car.

9 MR. ROODMAN: Who is that attorney?

10 MR. WATKINS: That's Robert Horan,
11 H-O-R-A-N, and I think --

12 Q (By Mr. Roodman) So are you -- Mr.
13 Winkelmann, are you uncomfortable going forward with
14 the deposition until you have your counsel?

15 A Mr. Roodman, I'm not certain what my rights
16 are and I need representation right now. To me, I'm
17 just absolutely flabbergasted at this whole
18 unbelievable unfairness at least and I don't even
19 know what my rights are. Do you know how much money
20 I paid your law firm?

21 Q You knew before you came here today that you
22 were going to be deposed.

23 A You knew. You knew that you represented me.
24 Your law firm represented me. That's what you knew.

25 Q Calm down and wait for your counsel because

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1 I think you are losing your temper here.

2 A Justifiably.

3 MR. BLUMENTHAL: Can I ask the collective
4 crowd, is the position at the moment that we want to
5 recess until additional counsel get here? Or is the
6 position that we can go on and discuss other
7 subjects and then return to this subject when
8 additional counsel get here?

9 MR. ROODMAN: I'm perfectly comfortable
10 doing that. Are you comfortable doing that, sir.

11 THE WITNESS: I'm going to wait for my
12 attorney. That's what I'm going to do.

13 MR. BLUMENTHAL: So the deponent's request
14 is that we recess until his counsel get here, is
15 that correct?

16 THE WITNESS: Absolutely.

17 MR. BLUMENTHAL: All right. Mr. Roodman,
18 it's your deposition. It's up to you.

19 MR. ROODMAN: Well, I would like to proceed
20 but, if the witness refuses, I'm not sure that I
21 have an option.

22 THE WITNESS: I don't know what my rights
23 are.

24 MR. ROODMAN: Are you refusing to proceed?

25 THE WITNESS: I don't know what my rights
Page 24

1 are.

2 MR. WATKINS: There's a certain degree of
3 sensitivity that I think exists on the part of all
4 counsel through this situation and a high degree of
5 respect exists, at least certainly on my part, with
6 respect to Bryan Cave and its operations. There --
7 there is and does appear to be an issue here that
8 from an appearance standpoint is problematic.

9 MR. ROODMAN: Well, I couldn't disagree with
10 you more. And I placed on the record as an officer
11 of the court I have not used any information that
12 this firm may have in connection with questions I'm
13 asking or in connection with this lawsuit. I know
14 absolutely nothing about any of these other cases or
15 any of your background with alleged attorneys at
16 Bryan Cave whatsoever other than what I've seen on
17 the internet. Period. And if you want to question
18 that, Mr. Watkins, bring it on. But there's
19 absolutely no -- there's no impropriety whatsoever.
20 If this witness is demanding that he has counsel
21 present because he doesn't understand his rights and
22 elected to come to this deposition today without
23 counsel, that's his issue. That's not mine.

24 MR. BLUMENTHAL: And my only concern is that
25 we don't gain much my demeaning this among ourselves

1 cause we're not going to agree. I have a position I
2 haven't stated yet, but I'm not sure that anybody

3 cares about it. I just think we ought to either go
4 on with other questioning so we maximize the time we
5 have or recess the deposition and wait for whoever
6 this is that --

7 MR. WATKINS: I understand that he was not
8 more than 15 minutes away when I -- when I called
9 him.

10 MR. ROODMAN: I'm happy to go forward with
11 you serving as a witness on behalf of your
12 knowledge. We can skip over this issue and come
13 back to it if you like, if your attorney so advises
14 you. We can go on to issues -- all these issues
15 actually are germane to the and relevant to this
16 case, but we can move on to more issues with respect
17 to your involvement in the South Butt.

18 THE WITNESS: It's my understanding I was
19 deposed here today to discuss The South Butt.

20 MR. ROODMAN: That's correct.

21 THE WITNESS: That's my understanding. Not
22 my relationship with Bryan Cave.

23 MR. ROODMAN: I didn't ask you anything
24 about your relationship.

25 THE WITNESS: Well, there is a relationship

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1 with Bryan Cave, David.

2 MR. ROODMAN: You brought that up, sir, I
3 did not.

4 THE WITNESS: I'm not making this up.

5 MR. ROODMAN: I didn't accuse you of making
6 it up.

7 THE WITNESS: You're absurd. It's
 Page 26

8 absolutely absurd for you to sit here and tell me
9 there's no relationship between Bryan Cave and
10 myself.

11 MR. ROODMAN: I did not say that. I said I
12 did not bring it up.

13 THE WITNESS: So I don't want to bring it
14 up? I can't bring it up?

15 MR. ROODMAN: I didn't say you can't bring
16 it up.

17 THE WITNESS: You talk about unfairness and
18 conflicts of interest. I mean, I don't know what my
19 rights are. I came here to try to help this case
20 with The South Butt. You want to start driving into
21 stuff that you have full knowledge Bryan Cave
22 represented on.

23 MR. ROODMAN: You don't know what I know,
24 sir.

25 THE WITNESS: I don't know what anybody

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1 knows.

2 MR. MICHELMAN: Mr. Winkelmann, you have
3 counsel representing you in your capacity as an
4 agent of The South Butt. Are you willing to testify
5 as to those things so, frankly, we are not wasting
6 our time here and our client's money cause we didn't
7 come -- I respect your opinions and your concern,
8 but there are questions I'm quite sure that Mr.
9 Roodman with direct to The South Butt specifically
10 for whom you have counsel. And if you're willing to
11 do that, I would prefer to do that than sit around

12 and wait for some new lawyer who's obviously going
13 to want to take some time to talk to you, so we're
14 going to blow a half hour or more.

15 THE WITNESS: I didn't decide to go into
16 none South Butt specific issues here.

17 MR. MICHELMAN: I understand that. I'm not
18 talking about that at all. It's my suggestion that
19 we talk about South Butt issues alone and that we go
20 forward so that we're not wasting our time and our
21 client's money.

22 THE WITNESS: I guess you're ignoring the
23 half a million dollars I paid Bryan Cave?

24 MR. MICHELMAN: No. Frankly, I'm not
25 ignoring it and I don't think anyone here is

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1 ignoring it. I just suggesting a way. I'm quite
2 comfortable that Mr. Roodman can competently ask you
3 questions that relate to The South Butt directly and
4 then you can talk with your counsel. But I don't
5 feel like sitting around here, it's a very nice
6 place, but there's no reason why you can't answer
7 questions related to The South Butt since you have
8 counsel for The South Butt.

9 THE WITNESS: Well, that's what we came here
10 to talk about. Obviously, Mr. Roodman wants to talk
11 about other matters.

12 Q (By Mr. Roodman) Mr. Winkelmann, how did
13 The South Butt, LLC come about?

14 MR. MICHELMAN: Should we go back on the
15 record?

16 MR. WATKINS: We've been on the record the
Page 28

17 whole time. I have a -- I have a fairly significant
18 amount of sensitivity to the circumstances here and
19 a strong desire, as a matter of record, to make it
20 clear that Mr. Winkelmann I think should garner some
21 semblance of comfort with what's going on through
22 his independent legal counsel before being -- having
23 any further questions commence.

24 I have not inquired in detail about the
25 scope and nature of Mr -- Mr. Winkelmann's

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1 interaction with Bryan Cave by design at this point
2 so that his counsel can get in and find out what, if
3 anything, truly is an issue. But it -- it appears
4 to me there's an issue, at least from an appearance
5 standpoint, that's problematic and potentially even
6 more problematic given the co-counsel relationship
7 with Greenberg Traurig and whether or not this case
8 is taking a turn which is going to involve naming
9 Mr. Winkelmann individually as a -- as a defendant.

10 MR. BLUMENTHAL: Okay. I would like to go
11 off the record, that Mr. Winkelmann go to another
12 room and recess his deposition until his attorney
13 gets here because A., I don't particularly feel like
14 listening to a discussion about ethics among the
15 people in the room; and B, I don't particularly feel
16 like paying for the deposition transcript for it.
17 So if that's where we are, can I suggest we recess
18 and go off the record?

19 MS. ELINGS: I would just like to put one
20 other thing on the record.

21 MR. BLUMENTHAL: Sure.
22 MS. ELINGS: And that is that Mr. Winkelmann
23 came here today to -- as the managing agent and
24 30(b)6 witness for The South Butt, LLC. We are
25 prepared to go forward with those questions now. To

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1 the extent that we are delayed, there are a lot
2 of -- there's a lot of attorneys here that need to
3 be paid and we will reserve all our rights to seek
4 the repayment from the court.

5 I assume that Mr. Watkins, as attorney for
6 South Butt, LLC and representing that you are 30(b)6
7 witness for The South Butt, LLC, properly prepared
8 you and you would have had all of this knowledge, if
9 not personally, before you came in today. So I just
10 want to, for the record, we reserve all rights as to
11 what we will seek from the court on costs.

12 THE WITNESS: At least you know what your
13 rights are.

14 MR. BLUMENTHAL: So are we in agreement
15 we're going to go off the record?

16 MR. ROODMAN: We'll take a recess. It's
17 been represented Mr. Horan is on his way here and,
18 hopefully, we'll start again shortly.

19 VIDEOGRAPHER: Very good. We are off the
20 record at 10:34 a.m.

21 (Whereupon, there was a break in
22 the proceedings. The testimony
23 resumes as follows:)

24 VIDEOGRAPHER: We're back on the record at
25 11:22. Please proceed.

1 MR. ROODMAN: Counsel, why don't you
2 introduce yourself for the record.

3 MR. HORAN: My name is Bob Horan. I've been
4 called in by Mr. Winkelmann Sr. to advise him
5 concerning a possible ethical issue involving this
6 case. He's informed me that -- that he's been
7 previously represented by the counsel in this case
8 that represents the defendant North Face. He's also
9 told me that the nature of the case, and I've
10 discussed the nature of the case with the defense
11 counsel, and since it is a product -- since it is a
12 copyright infringement case.

13 MR. BLUMENTHAL: Wait a minute.

14 MR. HORAN: Or is it trademark?

15 MR. MICHELMAN: Counsel for the plaintiff.

16 MR. HORAN: Counsel for the plaintiff, okay.
17 I hadn't even seen any -- I found out about this
18 this morning. Basically, the counsel for the
19 plaintiff has acknowledged that they knew Jim was a
20 client of theirs, that they had a broad
21 representation of them including civil and
22 apparently examining some criminal matters of his in
23 the past. The matters involved hundreds of
24 thousands of dollars, that the matters involved
25 including the IP department here at Bryan Cave, the

1 same department that's now prosecuting this case.
2 Jim, I've talked to Jim and I told him that he could

3 waive his rights and proceed and he's told me that
4 he does not want to waive his rights. I've also
5 advised him that he needs to seek counsel with
6 somebody who is an expert in this kind of an ethical
7 area, that he needs a specific opinion on this
8 matter because of the nature of this case. And I've
9 explained it to the counsel for the plaintiffs why I
10 think there's a huge problem. The problem
11 essentially is this, this is a case of intent. I
12 don't know, but I'm just saying it is a case of
13 intent. The intent at the beginning of this case
14 was to basically steal and steal from North Face,
15 then his character is in question and the kind of
16 person he is is in question. If they've represented
17 him for matters involving criminal, than that is a
18 specific -- then he could specifically be cross
19 examined on that and basically have his character
20 assailed based on their representation and the fact
21 that they represented him in those matters.

22 MR. ROODMAN: So let me -- there's a lot of
23 misstatements here.

24 MR. BLUMENTHAL: I understand but before he
25 finished I want to understand are you instructing

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1 your client not to proceed today?

2 MR. HORAN: I'm advising him to seek another
3 opinion.

4 MR. BLUMENTHAL: So to recess?

5 MR. HORAN: Recess and seek another opinion.

6 MR. BLUMENTHAL: I just want that
7 specifically on the record.

8 MR. HORAN: Cause I'm very uncomfortable
9 with it.

10 MR. BLUMENTHAL: I understand and we
11 appreciate your position.

12 MR. HORAN: I'm sure there are some
13 misstatements since I've been brought up to speed in
14 oh, about a half an hour.

15 MR. ROODMAN: Well, most of -- many of the
16 material statements that you just made are entirely
17 inaccurate. I've never conceded, nor has anybody at
18 Bryan Cave conceded that we ever represented Mr.
19 Winkelmann in his individual capacity. The first
20 time I heard that was today. And recently I learned
21 that it was mentioned that we had represented a
22 Huntleigh entity in the past. I have no knowledge
23 with respect to what Bryan Cave's represent -- let
24 me finish.

25 MR. HORAN: Okay. You said that I --

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1 MR. ROODMAN: I respected you and I didn't
2 interrupt you. I had no knowledge whatsoever with
3 respect to any previous representations we've ever
4 had of -- or alleged representations we've ever had
5 with respect to Mr. Winkelmann, nor anything
6 regarding any lawsuits regarding any of his
7 companies other than a couple of pieces of
8 information that were obtained over the internet
9 that are publicly available.

10 He himself adjourned the deposition today or
11 recessed the deposition when we asked a question

12 regarding a consent judgment that's a matter of
13 public record.

14 You indicated that the IP Department has
15 represented Mr. Winkelmann in the past. I've never
16 represented Mr. Winkelmann to my knowledge. I don't
17 know -- this is the first I've heard when it came
18 out of your mouth, Mr. Horan, that the IP department
19 represented Mr. Winkelmann or one of his companies
20 sometime in the past. And we object but it's
21 entirely up to you if you want to direct your client
22 not to answer any questions and recess this
23 deposition, but we noticed this deposition a long
24 time ago. This case has been pending a long time.
25 Mr. Winkelmann has known his involvement in the

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1 case. We haven't learned very much about his
2 involvement with respect to The South Butt until
3 documents that were just recently produced and are
4 still being produced and this is the first time he's
5 raised the issue. He waived it until today until he
6 sat down in the seat to raise the issue which we
7 think is entirely inappropriate. We don't believe
8 that there's a conflict of interest here and we will
9 raise it with the court.

10 MR. HORAN: What I was going to say is
11 you're right, I didn't mention the IP department
12 earlier. He mentioned it to me when I went and
13 talked to him. I'm sorry I didn't mention it to you
14 prior to this hearing -- prior to discussing it,
15 but -- and I've only known about this for an hour or
16 so. I think I represented his son's friends or

17 something for some speeding ticket or something I'm
18 sure and -- but the problem still is that even
19 though you weren't aware, and I understand all that,
20 still he was a client and he is in your conflict
21 system and is his name and his son has the same
22 exact name. If you ran his son's name in your
23 conflict system, I'm sure his name would appear and
24 at least it would send off some sort of knowledge
25 that you -- that this name Winkelmann is here. It

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1 doesn't mean it can't be cured.

2 MR. ROODMAN: He's not a party to this
3 lawsuit, sir.

4 MR. HORAN: But his son is and his son has
5 the same name. So you ran his son. The son is.
6 Didn't you run his son's name?

7 MR. ROODMAN: His son is a party to this
8 case. He is not.

9 MR. HORAN: I understand. But you would
10 have found out -- like I said, going back, and the
11 reason I have a problem with it is and since it is
12 an infringement case and it does -- and as we
13 discussed, it does involve the intent of the parties
14 of the formation of the company and what the intent
15 was. An intent can be a character issue in which
16 you can --

17 MR. ROODMAN: Not -- not for the purposes of
18 the upcoming preliminary injunction hearing.

19 MR. HORAN: well, that's possible, but still
20 any information that you have -- I just think

21 there's a problem. I've only been in here for an
22 hour or so.

23 MS. ELINGS: In fact, the preliminary --
24 these depositions can be geared solely to the
25 preliminary injunction issue. We don't need to get

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1 into knowledge for purposes of preliminary
2 injunction hearing, at least to the extent that
3 you're claiming we need to get into it. And we --
4 our stance is that we can and should go forward with
5 this. Again, he's known about his own involvement
6 in this much longer than we've known about it and
7 continue to know about it.

8 MR. HORAN: I understand. I acknowledge and
9 understand what you're saying. I just can't advise
10 him to go forward.

11 MR. MICHELMAN: well, in all fairness --

12 MR. BLUMENTHAL: wait. Hold on a second.
13 Why don't we wait till David comes back in the room
14 unless he's not coming back in the room.

15 MS. KAPLAN: Should we go off the record?

16 MR. BLUMENTHAL: No, because I do want to
17 make a statement on the record.

18 MR. ROODMAN: We're not off the record, are
19 we?

20 MR. BLUMENTHAL: No. We were trying to
21 figure whether you were -- we wanted to wait until
22 you came back. I just want to say this and I say
23 this in all deference to everyone in the room, but I
24 do have an obligation as someone suggested before to
25 my client, and the statement I want to make is this:

1 I'm not taking a position on any of this. I totally
2 represent the fact that Mr. Horan has known about
3 this for an hour or less and is doing what he can
4 given that limited knowledge. Here's my problem on
5 behalf of my client. It is 11:30. We started this
6 about 5 minutes to 10:00. This deposition was
7 originally scheduled on the 8th of March. It was
8 then continued to the 12th of March. It was then
9 continued to today, if I'm not mistaken. Somebody
10 or everybody in the room except Mr. Michelman and I
11 had access to this information before today and I am
12 a little troubled by the fact that nobody raised it.

13 So I'm going to reserve the right to do two
14 things on behalf of Williams Pharmacy. One is ask
15 for fees for today from either the deponent or the
16 parties. And two is if this continues in the way
17 it's going, ask the court to continue the hearing on
18 the 12th of April because it's getting to the point
19 where we're pushing everything up to a wall that's
20 going to make it very difficult to be prepared for
21 that hearing.

22 MR. ROODMAN: Are you finished?

23 MR. BLUMENTHAL: Yeah.

24 MR. ROODMAN: I want to put this on the
25 record. We just had a conflict check run with

1 respect to James Winkelmann, Sr. He does not appear
2 anywhere within our conflict system as ever having

3 been a client. You going to continue with your
4 instructions counsel?

5 THE WITNESS: I think you're wrong.

6 MR. ROODMAN: I'm telling you what -- the
7 facts that I just received.

8 THE WITNESS: No. The facts are --

9 MR. ROODMAN: When did we represent you in
10 an individual capacity?

11 THE WITNESS: You represented me on personal
12 matters in approximately 1996, 1997. You
13 represented Huntleigh Capital Management --

14 MR. ROODMAN: No. You in a personal
15 capacity is the question. When did --

16 THE WITNESS: 1996 or 197. John Dalton,
17 your former partner, represented me.

18 MR. BLUMENTHAL: We don't need to belabor
19 the facts. Mr. Horan's instructions are staying.

20 MR. HORAN: Yes.

21 MR. BLUMENTHAL: I think we can address this
22 in some other form.

23 MR. ROODMAN: Well, on the record, we're
24 going to seek sanctions as well. So it's plain and
25 clear. So proceed at your own will.

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1 MR. MICHELMAN: I just wanted to say that
2 the issue of intent is relevant to the damages that
3 have been sought in this case because of the
4 trademark statute and hence damages and attorneys
5 fees relate to the intent of the parties. So from
6 that point of view, there is a potential for
7 conflict.

8 MS. ELINGS: But the preliminary injunction
9 issue -- preliminary injunction hearing does not
10 address the issue of damages.

11 MR. MICHELMAN: That's true but those -- I
12 mean --

13 MS. ELINGS: I understand.

14 MR. MICHELMAN: You have to work your way
15 through very carefully the questions.

16 MS. ELINGS: That assumes the stance he
17 takes to begin with.

18 MR. ROODMAN: First involves conflict.
19 Second it goes to whether the likely of the success
20 on the merits. It doesn't have anything to do with
21 damages or willfulness at that juncture. But look,
22 I think Tom is right. We've wasted enough time on
23 this. We're not happy that you came in today and
24 didn't raise this issue earlier and wasted
25 everybody's time.

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1 THE WITNESS: I raised this issue at the
2 scheduling conference David. I approached Mr. Kahn.
3 I said you know, you guys used to represent me. He
4 goes yes, I know. I approached him at the
5 scheduling conference.

6 MR. ROODMAN: It's nice to accuse somebody's
7 who's not here today.

8 THE WITNESS: I'm not accusing anybody.
9 It's a reality.

10 MR. ROODMAN: Anybody else have to anything
11 they want to add to the record?

12 MR. BLUMENTHAL: I'd just like everybody to
13 figure out how to address this sooner rather than
14 later because our time is withering quickly.
15 MR. ROODMAN: Yeah. We're going to prepare
16 a motion and address it with the court immediately.
17 MR. WATKINS: My suggestion would be we
18 throw this on Tuesday morning as well.
19 MR. ROODMAN: We can go off the record, I
20 believe. Mr. Horan, to confirm, you are instructing
21 your client not to answer questions.
22 MR. HORAN: Yes.
23 MR. ROODMAN: And you're terminating this
24 deposition?
25 MR. HORAN: Yes.

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1 MR. ROODMAN: Anything else anybody else
2 wants to put on the record? Okay. We can go off
3 the record.
4 VIDEOGRAPHER: Very good. This does end
5 today's session of deposition of James Winkelmann,
6 Sr. We are off the record at 11:40 or excuse me
7 11:34 a.m.
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9 (Whereupon, the proceedings were adjourned and the
10 signature was not waived.)
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1 State of Missouri
2 SS.
3 County of St. Louis
4 I, Mary L. Peppenhorst, a Notary Public in
5 and for the State of Missouri, duly commissioned,
6 qualified and authorized to administer oaths and to
7 certify to depositions, do hereby certify that
8 pursuant to Notice in the civil cause now pending
9 and undetermined in the United States District
10 Court, State of Missouri, to be used in the trial of
11 said cause in said court, I was attended at the
12 offices of Bryan Cave LLP, One Metropolitan Square,
13 suite 3600, in the City of St. Louis, State of
14 Missouri, by the aforesaid attorneys; on the 19th
15 day of March, 2010.

16 The said witness, being of sound mind and
17 being by me first carefully examined and duly
18 cautioned and sworn to testify the truth, the whole
19 truth, and nothing but the truth in the case
20 aforesaid, thereupon testified as is shown in the

21 foregoing transcript, said testimony being by me
22 reported in shorthand and caused to be transcribed
23 into typewriting, and that the foregoing page
24 correctly set forth the testimony of the
25 aforementioned witness, together with the questions

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1 propounded by counsel and remarks and objections of
2 counsel thereto, and is in all respects a full,
3 true, correct and complete transcript of the
4 questions propounded to and the answers given by
5 said witness; that signature of the deponent was not
6 waived by agreement of counsel.

7 I further certify that I am not of counsel
8 or attorney for either of the parties to said suit,
9 not related to nor interested in any of the parties
10 or their attorneys.

11 Witness my hand and notarial seal at St.
12 Louis, Missouri, this 19th day of March, 2010.

13 My Commission expires February 24, 2010.

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17 Notary Public in and for the
18 State of Missouri

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