

1 William M. Symmes
2 Witherspoon, Kelley, Davenport & Toole, P.S.
3 1100 U.S. Bank Building
4 422 West Riverside Avenue
5 Spokane, Washington 99201-0300
6 Phone: 509-624-5265
7 Fax: 509-458-2717
8 Attorneys for Plaintiff Philip Morris USA Inc.

9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF WASHINGTON

11 PHILIP MORRIS USA INC.,

12 Plaintiff,

Case No. No. CV-06-3073-RHW

13 v.

14 KING MOUNTAIN TOBACCO COMPANY,
15 INC.; MOUNTAIN TOBACCO;
16 DELBERT L. WHEELER, SR., AND
17 RICHARD "KIP" RAMSEY,

18 Defendants.

19 MEMORANDUM IN SUPPORT OF MOTION
20 OF PLAINTIFF PHILIP MORRIS USA
21 INC. FOR A PRELIMINARY
22 INJUNCTION

23 **NATURE OF CASE / RELIEF SOUGHT**

24 This case involves an intentional infringement of Plaintiff's
25 famous MARLBORO® trademarks and corresponding trade dress (the
26 "MARLBORO® Marks and Trade Dress").¹ Defendants are selling discount

27 _____
28 ¹ PM USA's federally registered MARLBORO® trademarks will be referred
29 to as the "MARLBORO® Marks," its distinctive trade dress will be
30 referred to as the "MARLBORO® Trade Dress," and both the MARLBORO®
31 Marks and the MARLBORO® Trade Dress will be collectively referred to
32 as the "MARLBORO® Marks and Trade Dress."

1 cigarettes in packs and cartons that are clearly designed to look
2 like packs and cartons of Philip Morris USA Inc.'s ("PM USA's")
3 MARLBORO® brand cigarettes. The undisputed nature of Defendants'
4 infringement is demonstrated by the following picture of the parties'
5 cigarette cartons on a store shelf.
6



19
20 (Albanese Decl., Ex. A)² As this photograph depicts, Defendants have
21 appropriated numerous elements of the MARLBORO® Marks and Trade Dress
22 including a red design that is virtually identical to the "Red Roof"
23

24
25 ² Declaration of Nicholas D. Albanese. Other declarations filed in
26 support of this motion are referred in the text in a similar manner.

1 design used by PM USA for decades on MARLBORO® brand cigarettes.
2 Moreover, Defendants' individual packs of cigarettes incorporate
3 several additional elements of the MARLBORO® Marks and Trade Dress as
4 discussed below.

5
6 PM USA has spent billions of dollars over 50 years promoting the
7 famous MARLBORO® Marks and Trade Dress. As a result, MARLBORO® brand
8 cigarettes are the best selling cigarettes in the United States.
9 (Paoli Decl., ¶ 15.) Defendants' virtual wholesale adoption of PM
10 USA's MARLBORO® Marks and Trade Dress, which has already resulted in
11 consumer confusion, is a clear attempt to benefit from PM USA's
12 considerable success and goodwill in violation of 15 U.S.C. § 1114
13 (trademark infringement); (2) 15 U.S.C. § 1125(a) (trade dress
14 infringement and unfair competition); (3) 15 U.S.C. § 1125(c) and RCW
15 19.77.160 (trademark dilution); (4) RCW 19.86.10 et seq. (unfair
16 competition and unfair and deceptive acts); and (5) unfair
17 competition under Washington common law. Accordingly, this Court
18 should grant PM USA's motion and enjoin Defendants from committing
19 further violations.
20

21 STATEMENT OF FACTS

22 **A. The MARLBORO® Brand, Marks, and Trade Dress**

23 PM USA manufactures and sells cigarettes, including the famous
24 MARLBORO® brand, to wholesalers throughout the nation. MARLBORO®
25 brand cigarettes have been sold since 1883 and the MARLBORO® Marks
26

1 and Trade Dress have been in use for approximately 50 years. (Paoli
2 Decl., ¶¶ 4-7.) PM USA has spent approximately \$3 billion in
3 advertising and promoting the MARLBORO® brand. Today, MARLBORO®
4 brand cigarettes are the best selling cigarettes in United States.
5 (Paoli Decl., ¶ 15.)
6

7 In addition to the word mark MARLBORO®, one of the most
8 distinctive features of the MARLBORO® brand is the famous MARLBORO®
9 Trade Dress. The MARLBORO® Trade Dress includes a distinctive "Red
10 Roof" design under which the word "MARLBORO" appears, always in a
11 distinctive font against a white background. In addition, the
12 package displays: (1) a white banner superimposed over the Red Roof
13 containing the words "Filter Cigarettes" in red lettering; (2) the PM
14 USA "crest" design in gold and red; and (3) the phrase "20 CLASS A
15 CIGARETTES" at the bottom of the pack. A number of these elements
16 also appear on the back, top, bottom, and sides of each pack. (Paoli
17 Decl., ¶ 8.) PM USA uses almost exactly the same trade dress for
18 other types of MARLBORO® brand cigarettes, with the principal
19 variation being the color of the roof design. (Paoli Decl., ¶¶ 10-
20 12.)
21
22

23 PM USA has obtained several federal trademark registrations for
24 the MARLBORO® Marks. Specifically, Registration No. 938,510 covers
25 the mark that uses the color red; Registration. No. 1,544,782 covers
26 green; and Registration No 1,038,989 covers gold. (Paoli Decl., ¶ 13

1 and Exs. D-F.) The MARLBORO® Marks are "incontestable," i.e., PM USA
 2 presumptively has exclusive enforceable trademark rights in the marks
 3 under 15 U.S.C. §§ 1057(b), 1115(a).

4 **B. Defendants' Infringing Trade Dress**

5 Defendants recently began selling cigarettes in packaging that
 6 imitates the MARLBORO® Marks and Trade Dress:
 7



19 (Paoli Decl. at ¶ 16.) This picture demonstrates the striking
 20 similarity between the MARLBORO® Marks and Trade Dress and
 21 Defendants' trade dress (the "Infringing Trade Dress"). One of the
 22 most prominent elements of the Infringing Trade Dress is a white
 23 mountain set against a red background which provides the same
 24 commercial impression to consumers as does PM USA's well recognized
 25 Red Roof design. However, Defendants' copying of the MARLBORO® Marks
 26

1 and Trade Dress goes well beyond the Red Roof; in fact, Defendants
2 have misappropriated virtually every element of the MARLBORO® Marks
3 and Trade Dress. For example, although Defendants' brand name is
4 "King Mountain," the word "King" is in much smaller type than the
5 word "Mountain," whereas "Mountain" starts with a capital "M,"
6 contains the same number of letters as "Marlboro," is placed in the
7 same place on the pack as the word "Marlboro," and, perhaps most
8 importantly, appears in the same font and size as "Marlboro." Thus,
9 both the word "Mountain" and the way in which it is depicted are also
10 designed to evoke the MARLBORO® Marks and Trade Dress.
11

12 Defendants have also misappropriated every other element of the
13 MARLBORO® Marks and Trade Dress. For example, Defendants have placed
14 a white banner with lettering across the red portion of their pack.
15 Similarly, in the same place where the gold and red PM USA crest
16 design appears, Defendants have placed a similarly sized gold and red
17 design. In addition, Defendants have placed the phrase "20 CLASS A
18 CIGARETTES" near the bottom of the pack in the same spot where that
19 phrase appears on the MARLBORO® pack.³ Finally, Defendants have also
20 adopted the same colors that PM USA uses for different variations of
21
22

23
24
25 ³ Moreover, defendants' use a number of these elements on the back,
26 top, bottom, and sides of their packs. (Paoli Decl., ¶ 21, Ex. G.)

1 its MARLBORO® brand cigarettes: gold for "Lights" cigarettes and
2 green for menthol cigarettes. (Paoli Decl., Ex. G.)

3 **C. Defendants' Unsuccessful Attempt to Register Their Trademarks**

4 In August 2005, Defendant Mountain Tobacco applied to register
5 the red version of Defendants' Infringing Trade Dress. The Patent
6 and Trademark Office ("PTO"), however, rejected this application,
7 stating that the Infringing Trade Dress was likely to create
8 confusion with PM USA's registered marks:
9

10 The dominant portions of the marks, namely, the
11 appearance of the packaging, provide the same
12 commercial impression due to the similarity in
13 the mountain and the registrant's crest and the
14 color of the background of both products being
15 red. The applicant's mark and that of the
16 registrant are similar in appearance and
17 commercial impression, and therefore, are likely
18 to cause confusion as to the origin of the goods.

19 (Paoli Decl., ¶ 24, Ex. H.)

20 **D. Defendants' Use of the Infringing Trade Dress**

21 PM USA recently learned that Defendants set up a booth and
22 tables at convenience stores at which free packs of cigarettes
23 bearing the Infringing Trade Dress were provided as consumer samples.
24 (Sardino Decl., ¶ 4, Ex. A.) Defendants also use a number of signs
25 to promote the Infringing Trade Dress, including a sign that
26 prominently displays the phrase "Like Marlboro?" to suggest that King
Mountain cigarettes are somehow connected, endorsed, or sponsored by
PM USA. (Sardino Decl., ¶¶ 5-6, Exs. B-C.) PM USA has also learned

1 that Defendants' cigarettes are being sold over the Internet. (Paoli
2 Decl., ¶ 25.)

3 **E. Actual Consumer Confusion Has Already Occurred**

4 PM USA has learned of actual confusion. One customer went to a
5 store in Washington state and asked for MARLBORO® brand cigarettes.
6 (Warriner Decl., ¶ 3.) The store clerk, however, gave her
7 Defendants' cigarettes. (Warriner Decl., ¶ 4.) The consumer was
8 also confused and did not realize that she had not been given
9 MARLBORO® brand cigarettes. (Warriner Decl., ¶¶ 4-7.) After smoking
10 Defendants' cigarettes, the consumer became ill. (Warriner Decl., ¶
11 7.)
12

13 **ARGUMENT**

14 **A. The Standards for Issuing a Preliminary Injunction**

15 To obtain a preliminary injunction, a plaintiff must show either
16 "(1) a combination of probable success on the merits and the
17 possibility of irreparable injury or (2) the existence of serious
18 questions going to the merits and that the balance of hardships tips
19 sharply in [plaintiff's] favor." *Brookfield Commc'ns, Inc. v. W.*
20 *Coast Entm't Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999) (citation
21 omitted). PM USA has an overwhelming likelihood of success on the
22 merits and the danger of irreparable harm is beyond dispute.
23
24
25
26

1 **B. PM USA Is Likely to Prevail on the Merits**

2 **1. Trademark Infringement of PM USA'S Registered MARLBORO®**
 3 **Marks**

4 Defendants' infringement of the MARLBORO® Marks is clear. As
 5 noted, PM USA has several federal registrations covering various
 6 aspects of the MARLBORO® Marks and Trade Dress. The unauthorized use
 7 of a trademark that is confusingly similar to a federally registered
 8 mark is prohibited under 15 U.S.C. § 1114.

9 The Ninth Circuit has stated that the "core element of trademark
 10 infringement is the likelihood of confusion, i.e., whether the
 11 similarity of the marks is likely to confuse consumers about the
 12 source of the products." *Brookfield*, 174 F.3d at 1053 (citation
 13 omitted), *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th
 14 Cir. 1979), abrogated on other grounds, *Mattel Inc. v. Walking*
 15 *Mountain Prods.*, 353 F.3d 792 (9th Cir. 2003). Courts in this
 16 Circuit look to the following "Sleekcraft factors" when assessing
 17 claims of trademark infringement: (1) strength of the plaintiff's
 18 mark; (2) proximity of the goods; (3) similarity of the marks; (4)
 19 evidence of actual confusion; (5) marketing channels used; (6) degree
 20 of care likely to be exercised by the purchaser; (7) defendant's
 21 intent in selecting the mark; and (8) likelihood of expansion of
 22
 23
 24
 25
 26

1 product lines.⁴ See *Brookfield*, 174 F.3d at 1053-54. The *Sleekcraft*
2 factors show that confusion here is extremely likely.

3 **a. The Strength of PM USA's MARLBORO® Marks**

4 PM USA's MARLBORO® Marks are strong and entitled to protection.
5 PM USA has used these marks for decades and has spent over \$3 billion
6 promoting them. As a result, MARLBORO® brand cigarettes are the best
7 selling cigarettes in the United States and the MARLBORO® Marks are
8 among the most famous in the nation. Moreover, since the MARLBORO®
9 Marks are federally registered, they are presumed to be distinctive
10 and PM USA is presumed to own the rights to those marks. 15 U.S.C.
11 §§ 1057(b), 1115(a). Thus, the first *Sleekcraft* factor -- the
12 strength of the plaintiff's mark -- weighs heavily in favor of a
13 finding of infringement.
14

15 **b. The Proximity of the Goods**

16 Since the parties both sell cigarettes, this factor also
17 supports a claim of infringement.
18

19 **c. The Similarity of the Marks**

20 This factor also supports a claim of infringement. As shown
21 above, the Infringing Trade Dress is extremely similar to the
22 MARLBORO® Marks. Indeed, the PTO denied Defendants' application to
23

24
25 ⁴ Because the parties sell the same kind of products, expansion of
26 product lines is irrelevant. See *Brookfield*, 174 F.3d at 1060.

1 register their red mark because it is confusingly similar to PM USA's
2 MARLBORO® Marks.

3 **d. Evidence of Actual Confusion**

4 Although evidence of actual consumer confusion is not necessary
5 to show a likelihood of confusion,⁵ such confusion has already
6 occurred here. As described above, a consumer and apparently the
7 clerk from whom she purchased Defendants' cigarettes were both
8 confused by the Infringing Trade Dress. Indeed, as the Ninth Circuit
9 has emphasized, "evidence of actual confusion is persuasive proof
10 that future confusion is likely." *Fuddruckers, Inc. v. Doc's B.R.*
11 *Others, Inc.*, 826 F.2d 837, 845 (9th Cir. 1987).

12 **e. The Marketing Channels Used**

13 This factor also favors a finding of infringement because the
14 parties' products are marketed through the same channels of trade.
15 As depicted in the picture on page 2, Defendants' products are sold
16 at gas stations and convenience stores, where MARLBORO® brand
17 cigarettes are also sold. (Albanese Decl., ¶¶ 2-3; Sardino Decl., ¶¶
18 4-6.)

19 **f. The Type of Goods and the Degree of Care**
20 **Likely To Be Exercised by the Purchaser**

21 Public confusion due to similar trademarks is much greater when
22 the goods are inexpensive because buyers are likely to be most
23

24
25
26 ⁵ *Sleekcraft*, 599 F.2d at 352.

careful when making more expensive purchases. See *Sleekcraft*, 599 F.2d at 343. Since cigarettes are a relatively inexpensive product, this factor clearly favors a finding of likelihood of confusion.

g. Defendants' Intent in Selecting the Mark

Finally, Defendants intentionally designed the Infringing Trade Dress to benefit from the goodwill in the MARLBORO® Marks. In addition to virtually copying PM USA's MARLBORO® Marks, which in itself demonstrates Defendants' intent, Defendants are using a sign which displays the Infringing Trade Dress and prominently displays the phrase "LIKE MARLBORO?" As such, Defendants' use of the word "MARLBORO" makes their intent clear and undisputed.

* * *

In sum, PM USA prevails on all of the relevant *Sleekcraft* factors and therefore PM USA has established a likelihood of confusion and a probability of success on the merits.⁶

⁶ As noted above, a plaintiff is entitled to a preliminary injunction, even if it cannot show a probability of success on the merits, if it can show "serious questions going to the merits and that the balance of hardships tips sharply in [plaintiff's] favor." *Brookfield*, 174 F.3d at 1046 (citation omitted). Here, PM USA satisfies both formulations of the test because the harm resulting

2. **Federal and State Law Claims Of Unfair Competition**

Since PM USA is likely to succeed on its trademark infringement claims, the Court is not required to address the remaining causes of action. PM USA, however, is equally likely to prevail on those claims. For example, Defendants have clearly engaged in trade dress infringement and unfair competition under 15 U.S.C. § 1125(a) and Washington state law.

A. **Trade Dress Infringement**

Section 43(a) prohibits infringement of trade dress, which is the "total image, design, and appearance of a product and may include features such as size, shape, color, color combinations, texture or graphics." *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001) (citation omitted). The elements to this claim are: (1) plaintiff's trade dress has a source-identifying role either because it is inherently distinctive or has acquired secondary meaning; (2) defendant's trade dress creates a likelihood of confusion with plaintiff's trade dress;⁷ and (3) plaintiff's trade dress is nonfunctional. See *id.* at 1258.

from Defendants' infringement outweighs any burden imposed on Defendants to change their packaging.

⁷ *Vision Sports, Inc. v. Melville Corp.*, 888 F.2d 609, 612 (9th Cir. 1989).

PM USA satisfies each of the these elements. *First*, the MARLBORO® Trade Dress has acquired secondary meaning, which means that customers view the trade dress as a source identifier for the trade dress owner. As a result of several billion dollars spent promoting the MARLBORO® Trade Dress, the relevant market has come to associate the MARLBORO® Trade Dress with PM USA.⁸ *Second*, for the reasons discussed earlier, the Infringing Trade Dress is likely to and has caused confusion with the MARLBORO® Trade Dress. *Third*, the MARLBORO® Trade Dress is not "functional." As the Supreme Court has explained, "[a] product feature is functional and cannot serve as a trademark if the product feature is essential to the use or purpose of the article or if it affects the cost or quality of the article, that is, if exclusive use of the feature would put competitors at a significant, non-reputation-related disadvantage." See *Qualitex Co. v. Jacobson Prods. Co., Inc.*, 514 U.S. 159, 165 (1995). Nothing about the MARLBORO® Trade Dress is "essential" to the use of cigarettes or affects their quality or the cost of manufacture. PM

⁸ While a showing of secondary meaning will suffice to establish the first element of trade dress infringement, the MARLBORO® Trade Dress is also inherently distinctive. The MARLBORO® Trade Dress is arbitrary and fanciful and bears no relation to the product.

1 USA is thus likely to prevail on the merits of its claim of trade
 2 dress infringement under 15 U.S.C. § 1125(a).⁹

3 **3. Trademark Dilution**

4 PM USA likely will succeed on its claims of trademark dilution
 5 under 15 U.S.C. § 1125(c) and RCW 19.77.160. The federal statute
 6 protects famous marks from dilution, which has been defined as "the
 7 lessening of the capacity of a famous mark to identify and
 8 distinguish goods or services regardless of the presence or absence
 9 of (1) competition between the owner of the famous mark and other
 10 parties, or (2) likelihood of confusion, mistake or deception."
 11 *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1326 (9th Cir.
 12 1998).

13
 14
 15 To show dilution under 15 U.S.C. § 1125(c), a plaintiff must
 16 establish that: (1) its mark is famous; (2) the defendant has used

17
 18 ⁹ PM USA will also prevail on its Washington state law claims.
 19 Common law unfair competition is subject to the same likelihood of
 20 confusion analysis as is the Lanham Act. See *Eacceleration Corp. v.*
 21 *Trend Micro, Inc.* 408 F. Supp. 2d 1110, 1114 (W.D. Wash. 2006).
 22 Furthermore, plaintiffs can prevail under the Washington Consumer
 23 Protection Act, RCW 19.86.010 et seq., when trademark infringement
 24 has been proven. See *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735
 25 (1987).
 26

1 the mark commercially; (3) the defendant's use of the mark post-dated
 2 plaintiff's use of the mark; and (4) the defendant's use of the mark
 3 has diluted and otherwise diminished the capacity of the mark to
 4 distinguish the relevant goods and/or services. See *Am. Honda Motor*
 5 *Co. Inc. v. Pro-Line Protoform*, 325 F. Supp. 2d 1081, 1084-85 (C.D.
 6 Cal. 2004).¹⁰

8 Each dilution factor is satisfied here. First, the MARLBORO®
 9 Marks and Trade Dress are famous as that term is defined in the
 10 Lanham Act.¹¹ The MARLBORO® Marks and Trade Dress are among the most
 11 famous trademarks in the nation and are exactly the kind of marks
 12 that merit protection under the federal anti-dilution statute.
 13 (Paoli Decl. at ¶¶ 4-15.) Second, there is no doubt that Defendants
 14

15
 16 ¹⁰ The same is true of the Washington state anti-dilution statute,
 17 which is almost identical to the federal statute. RCW 19.77.160.

18 ¹¹ There are several statutory factors to determine fame including:
 19 amount of inherent or acquired distinctiveness; duration and extent
 20 of use of the mark; the duration and extent of advertising and
 21 publicity; the geographical trading area; the channels of trade; the
 22 degree of recognition of the mark in the trading areas and channels
 23 of trade used by the marks' owner and the person against whom the
 24 injunction is sought; third party use of same or similar marks; and
 25 whether the mark is federally registered. 15 U.S.C § 1125(c)(1).
 26

1 are using infringing marks commercially and that Defendants'
2 commercial use postdates PM USA's use its marks and trade dress.
3 (Paoli Decl., ¶¶ 4-12, 14, 16; Sardino Decl., ¶¶ 4-6.) Third,
4 Defendants have diluted the MARLBORO® Marks and Trade Dress by
5 whittling away their distinctiveness and ability to identify PM USA
6 as the source of MARLBORO® brand cigarettes.
7

8 **C. PM USA Will Suffer Irreparable Harm Without an Injunction**

9 In addition to showing a probability that it will succeed on the
10 merits, PM USA can also show the possibility of irreparable harm if
11 an injunction is not granted. It is well established in trademark
12 cases that irreparable harm is presumed by a showing that the
13 defendant's mark creates a likelihood of confusion. In *GoTo.com,*
14 *Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000), the
15 Ninth Circuit held that, in trademark cases, the irreparable harm
16 "prong" of the traditional two-part test for granting a preliminary
17 injunction is automatically satisfied by showing a likelihood of
18 success on the merits:
19

20 In a trademark infringement claim, "irreparable
21 injury may be presumed from a showing of
22 likelihood of success on the merits." This
23 presumption effectively conflates the dual
24 inquiries of this prong into the single question
25 of whether the plaintiff has shown a likelihood
26 of success on the merits.

27 *Id.* at 1205 n.4 (citations omitted).

28 As described above, the danger of confusion here is not
29 hypothetical; it has already occurred. Moreover, the danger of

1 irreparable harm is particularly acute where, as here, Defendants'
2 goods are of lower quality than the plaintiffs' goods. See *Omega*
3 *Importing Corp. v. Petrikine Camera Co., Inc.*, 451 F.2d 1190, 1195
4 (2d Cir. 1971); see also J. Thomas McCarthy, *McCarthy on Trademarks*
5 *and Unfair Competition* § 30:4 (4th ed. 2006). As noted above, at
6 least one consumer became ill when she smoked Defendants' cigarettes,
7 creating a danger that PM USA's reputation will be damaged because of
8 the poor quality of Defendants' goods.

10 Since Defendants' marks are likely to cause confusion, PM USA
11 has satisfied the "irreparable harm" test for a preliminary
12 injunction and there is no need for this Court to consider the
13 alternative preliminary injunction test of whether "the balance of
14 hardships tips sharply in [plaintiff's] favor." *Brookfield*, 174 F.3d
15 at 1046. In any event, there is no danger of irreparable harm to
16 Defendants. PM USA does not question Defendants' right to sell
17 cigarettes; the only issue is Defendants' use of confusingly similar
18 trademarks and trade dress. Since Defendants have been using the
19 Infringing Trade Dress for only a short time, requiring them to
20 change their packaging will not cause Defendants significant harm.¹²

23
24 ¹² Numerous decisions granting preliminary injunctions have noted the
25 relative lack of harm to a defendant using a confusing mark. See,
26 e.g., *NBBJ E. Ltd. P'Ship v. The NBBJ Training Acad., Inc.*, 201 F.

1 Thus, whatever test is applied, PM USA has established the
2 possibility of irreparable harm sufficient for a preliminary
3 injunction.
4

5 CONCLUSION

6 For the reasons set forth above, this Court should grant PM
7 USA's motion for a preliminary injunction.

8 Respectfully submitted, this 3 day of October, 2006.

9
10 WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.

11
12 By: 

13 William M. Symmes
14 Attorneys for Philip Morris USA Inc.
15
16
17
18
19
20
21
22
23
24

25 Supp. 2d 800, 809 (S.D. Ohio 2001); Ark. Best Corp. v. Carolina
26 Freight Corp., 60 F. Supp. 2d 513, 516 (W.D.N.C. 1999).