

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

MAURO PENNISI, INC.,

Plaintiff,

Case No.:

v.

PHILIP MORRIS USA INC.,

Defendants.

**AFFIDAVIT OF RANDY LAWRENCE**

COMMONWEALTH OF VIRGINIA )

)

ss.:

HENRICO COUNTY )

)

Randy Lawrence, being duly sworn, deposes and says as follows:

1. **Background.** I am Vice President for Customer Service and Merchandising for Philip Morris USA Inc. ("PM USA"). PM USA manufactures and sells a variety of cigarette brands, including the Marlboro®, Parliament®, Virginia Slims® and Basic® brands, among others. PM USA does not sell cigarettes to consumers. Rather, PM USA sells cigarettes to direct customers, who then sell the cigarettes either to retailers that sell them directly to adult consumers, or to non-direct distributors who re-sell and distribute them to retailers. In my capacity as Vice President for Customer Service and Merchandising, I have responsibility for PM USA's contractual relationships with its direct customers.

2. **Wholesale Leaders Agreement.** PM USA contracts with its direct customers through a written agreement. The current contract is known as the "Wholesale Leaders 2008 Program Participation Agreement" ("the WL Agreement"). A true and correct copy of the WL Agreement is attached hereto as Exhibit A.

3. Pursuant to the WL Agreement, PM USA's direct customers are required, among other things, to report their sales of cigarettes to an independent company by the name of Management Science Associates Inc. ("MSA"). (WL Agreement Part II.A.) MSA compiles this sales data and provides it to PM USA. When providing their sales data to MSA, direct customers are required by the WL Agreement to classify their customers as either "MSA Retailer", "MSA Distributor", or "MSA Other".<sup>1</sup> (See WL Agreement Part II.A.2.d.)

4. **The 60% Payment-Eligible Volume Obligation.** The WL Agreement also requires that at least 60% of a direct customer's sales of PM USA cigarettes in any quarter be "Payment-Eligible." (WL Agreement Part X.C.) The WL Agreement clearly states those sales that are not considered "Payment-Eligible." (WL Agreement Part V.D.1.b.) Examples of sales that are not Payment-Eligible include, among others:

- \* Sales made "to any customer that has been classified as MSA Other" or to another distributor that sold to such a customer (WL Agreement Part V.D.1.b.(D));
  - \* Sales that exceed 10,400 cartons of PM USA cigarettes to a single retailer in the relevant quarter (subject to certain exceptions not applicable here) (WL Agreement Part V.D.1.b.(G));
- and,
- \* Sales made to any retailer who sells PM USA cigarettes over the Internet, telephone or by mail order in violation of PM USA's trade policies (WL Agreement Part V.D.1.b.(C)).

5. **Termination.** The WL Agreement includes specific provisions regarding termination of the agreement by the parties. PM USA may *immediately* terminate the WL Agreement if a

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<sup>1</sup> "MSA Retailer" is defined as an entity "that has a physical location that is open to the public and sells cigarettes to adult consumers in a face-to-face manner." "MSA Distributor" is defined as an entity "that buys cigarettes from manufacturers or other distributors and is in the business of re-selling those cigarettes to retailers or other Distributors." "MSA Other" is defined as an entity "that is classified neither as MSA Retailer or MSA Distributor." (WL Agreement Part I.)

Participant fails to meet certain of its obligations, including a failure to comply with the 60% Payment-Eligible Volume Obligation. (WL Agreement Part XI.D.1. & C.2.) The WL Agreement also expressly provides that either party may terminate the agreement *with or without cause* on 30-days notice. (WL Agreement Part XII.G.)

6. **Pennisi's Agreement and Non-Compliance.** Mauro Pennisi, Inc. ("Pennisi") is one of 497 PM USA direct customers nationwide, and one of 59 direct customers licensed by the State of New York. Pennisi purchases cigarettes from PM USA and then sells them to retailers, other distributors, and "MSA Other" accounts.

7. In the fourth quarter of 2007, PM USA offered Pennisi a Wholesale Leaders 2008 Program Participation Agreement, which Pennisi accepted. A true and correct copy of the executed signature page (signed by Pennisi on January 28, 2008) is attached as Exhibit B. Pursuant to the WL Agreement, PM USA agreed to sell cigarettes directly to Pennisi, and Pennisi agreed to comply with the terms of the Agreement, including, among others, the 60% Payment-Eligible Volume Obligation described above.

8. At the end of the first quarter of 2008, PM USA determined that Pennisi was not in compliance with the 60% Payment-Eligible Volume Obligation.

9. **PM USA's Warning Letter to Pennisi.** Accordingly, on May 22, 2008, PM USA informed Pennisi in writing that Pennisi had not met the 60% Payment-Eligible Volume Obligation for the first quarter of 2008. The letter also informed Pennisi that a subsequent failure to meet the Payment-Eligible Volume Obligation would result in termination of the WL Agreement and Pennisi's loss of the ability to buy PM USA products directly from PM USA. A true and correct copy of that letter is attached hereto as Exhibit C. Pennisi responded to that letter by returning to PM USA approximately \$800 in prior payments that PM USA had deemed

forfeited by Pennisi on account of its non-compliance with the 60% Payment-Eligible Volume Obligation in the first quarter of 2008.

10. **Pennisi's Continued Non-Compliance.** After the conclusion of the second quarter of 2008, PM USA determined that Pennisi had again failed to meet the 60% Payment-Eligible Volume Obligation. In fact, Pennisi fell far short. Of its entire sales volume of 574,451 cartons of PM USA cigarettes, only 34.9% of those cartons were Payment-Eligible. 60.2% of Pennisi's second quarter sales were to customers classified as "MSA Other", most by Pennisi itself. As such, these sales were not Payment-Eligible under the plain terms of the WL Agreement. An additional 3.1% of Pennisi's sales were not Payment-Eligible because they exceeded the 10,400 carton/retailer quarterly cap, and an additional 1.8% of Pennisi's sales were not Payment-Eligible because they were to retailers who sold cigarettes over the Internet, by telephone or mail order in violation of PM USA's trade policies. (WL Agreement Part V.D.1.b.(C), (D) & (G))

11. During the first half of 2008, Pennisi began to report to MSA that it was shipping PM USA cigarettes to dozens of new accounts in a several block area on Long Island, New York. For many of these new accounts, Pennisi reported sales volumes precisely at or near the 10,400 carton/quarter limitation set forth in the WL Agreement. Because PM USA was unfamiliar with these new accounts, PM USA retained a third party to visit the addresses supplied by Pennisi. These visits and photographs taken by the third party revealed that the vast majority of these new accounts were nothing more than trees, vacant lots, or residential locations that did not appear to operate retail cigarette sales businesses at all. In some cases, the addresses provided by Pennisi for these new accounts do not exist. During the second quarter of 2008, the majority of Pennisi's non-Payment-Eligible volume was reported by Pennisi as being sold to these fictitious and/or non-existent accounts.

12. The following chart lists the names and addresses of these accounts (as reported by Pennisi); a description of the site based on the photographs taken by PM USA's vendor (which are attached as Exhibit D); and Pennisi's self-reported sales volume for the second quarter of 2008.

| Name                           | Address               | Investigation Findings              | Total PM USA Carton Volume Q2 2008 |
|--------------------------------|-----------------------|-------------------------------------|------------------------------------|
| ANGELS SMOKE SHOP              | 144A SQUAW LANE       | Address does not exist              | 10,399                             |
| CALVINS SMOKES                 | 150 POOSPATUCK LANE   | Residential house, no signs         | 10,400                             |
| CORTNEY SMOKE SHOP             | 12A SQUAW LANE        | Sign on utility pole                | 20,875                             |
| DREAMCATCHER SMOKE SHOP        | 143 POOSPATUCK LANE   | Sign on tree                        | 10,410                             |
| FULL MOON SMOKE                | 15 SQUAW LANE         | Address does not exist              | 11,170                             |
| HAWK SMOKES                    | 141 POOSPATUCK LANE   | Residential house, no signs         | 10,429                             |
| JUSTIN'S SMOKE SHOP            | 143A POOSPATUCK LANE  | Sign on tree near residential house | 11,320                             |
| KIMBERLY SMOKE SHOP            | 144C SQUAW LANE       | Address does not exist              | 10,395                             |
| NATIVE PRIDE SMOKE SHOP        | 165A POOSPATUCK LANE  | Residential house, no signs         | 11,278                             |
| NATIVE SISTERS                 | 191 POOSPATUCK LANE   | Residential house, no signs         | 13,755                             |
| SMOKE HOUSE                    | 137A POOSPATUCK LANE  | Residential house, no signs         | 20,607                             |
| PEACHES SMOKE SHOP             | 18 ABBY LANE          | Sign on utility pole                | 21,765                             |
| PRINCESS WATER LILY SMOKE SHOP | 132 POOSPATUCK LANE   | Residential house, no signs         | 10,445                             |
| RUNNING BULL                   | 152B POOSPATUCK LANE  | Residential house, no signs         | 9,980                              |
| RUNNING DEER SMOKES            | 140 POOSPATUCK LANE   | Residential house, no signs         | 10,373                             |
| SHINE SMOKE SHOP               | 128 POOSPATUCK LANE   | Residential house, no signs         | 10,400                             |
| SUNSHINE SMOKES                | 138 POOSPATUCK LANE   | Address does not exist              | 10,368                             |
| TOBACCO'S RISING STAR          | 16 ABBY LANE          | Residential house, no signs         | 10,390                             |
| TOMAHAWK SMOKE SHOP            | 150 A POOSPATUCK LANE | Address does not exist              | 10,420                             |
| WOLF PACK SMOKE SHOP           | 10 SQUAW LANE         | One story building, no signs        | 10,421                             |

13. When Pennisi reported its sales to MSA, Pennisi itself classified all but a few of these accounts as "MSA Other". As such these sales were not Payment-Eligible and could not be counted towards the 60% Payment-Eligible Volume Obligation. (WL Agreement Part V.D.1.b.(D)). These accounts, moreover, cannot be appropriately classified as "MSA Retailer". Because they are trees, vacant lots, and private residences, they are not "physical location[s] that [are] open to the public and sell[ing] cigarettes to adult consumers in a face-to-face manner." (WL Agreement Part I ). Thus, sales to these accounts would not qualify as Payment-Eligible under any circumstances.

14. **Termination of Pennisi with 30-days Notice.** PM USA decided to terminate its WL Agreement with Pennisi *both with cause and without cause*, as follows.

15. PM USA terminated the Agreement *with cause* based on Pennisi's failure to comply with the 60% Payment-Eligible Volume Obligation for two quarters. (WL Agreement Part XI.D.1. & C.2)

16. Additionally and independently, PM USA terminated the WL Agreement with Pennisi *without cause* pursuant to the Agreement's 30-day notice provision. (WL Agreement Part XII.G.)

17. Accordingly, on August 5, 2008, PM USA sent a letter to Pennisi advising Pennisi that PM USA was terminating the WL Agreement and giving Pennisi 30-days notice of that termination, even though PM USA could have terminated the WL Agreement immediately. A true and correct copy of that letter is attached hereto as Exhibit E.

18. As a result of the termination, Pennisi's status as a direct customer of PM USA will cease and its WL Agreement will be terminated effective as of September 4, 2008.

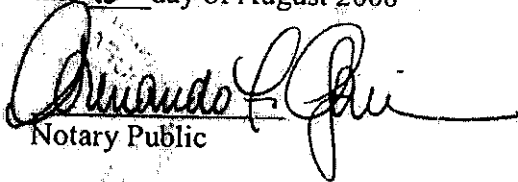
**19. Termination by PM USA Does Not Prevent Pennisi from Buying or Selling**

**Cigarettes.** Termination of the WL Agreement does not necessarily mean that Pennisi cannot continue to buy PM USA cigarettes and re-sell them to its customers. If Pennisi is otherwise in compliance with applicable state law, it may purchase cigarettes from other wholesalers, and re-sell those cigarettes to Pennisi's customers. Indeed, there are hundreds of such non-direct distributors who buy and sell PM USA product, including dozens in New York State.

20. Moreover, based on data provided by Pennisi to MSA, PM USA manufactured products constitute only a minority of its cigarette shipments. Specifically, during the first quarter of 2008, only 22.1% of Pennisi's cigarette shipments were of PM USA cigarettes. In the second quarter of 2008, only 17.2% of Pennisi's cigarette shipments were of PM USA cigarettes.

  
Randy Lawrence

Sworn to before me  
this 28 day of August 2008

  
Notary Public

Armando F. Garcia  
NOTARY PUBLIC  
Commonwealth of Virginia  
My Commission Expires  
October 31, 2011

ID # 7081138

# **EXHIBIT A**



**PHILIP MORRIS USA INC.  
WHOLESALE LEADERS 2008 PROGRAM  
PARTICIPATION AGREEMENT**

This Participation Agreement (the "Agreement"), by and between Philip Morris USA Inc., a Virginia corporation ("PM USA"), and the party identified below ("Participant"), sets forth the terms and conditions of the PM USA Wholesale Leaders 2008 Program (the "Program"). The following exhibits, which PM USA may amend at any time, are a part of the Agreement: (i) Exhibit A – Wholesale Leaders 2008 Measures, (ii) Exhibit B – Wholesale Leaders 2008 License Disclosure Form, (iii) Exhibit C – 2008 STARS Tobacco Products Reporting Package ("2008 STARS Reporting Package"), (iv) Exhibit D – 2008 Distributor Shipment Examples, and (v) Exhibit E – Accelerated Payment Option Election Form.

|                           |  |                  |  |
|---------------------------|--|------------------|--|
| Territory #:              |  | Participant Name |  |
| District #:               |  | Street Address:  |  |
| PM USA MA #:              |  | Payment Address: |  |
| Agreement Effective Date: |  | E-mail Address:  |  |

**Contacts.**

|                              |  |                                       |  |
|------------------------------|--|---------------------------------------|--|
| Contact for Data Compliance: |  | Contact for State License Compliance: |  |
| Data Contact Phone #:        |  | Contact Phone #:                      |  |
| Data Contact E-mail Address: |  | Contact E-mail Address:               |  |
| Data Contact Fax #:          |  | Contact Fax #:                        |  |

**Participant's Sites.** Please list each Site (location from which Participant ships cigarettes and/or PM USA non-cigarette products).

|                  |  |                  |  |
|------------------|--|------------------|--|
| Site 1           |  | Site 2           |  |
| Street Address:  |  | Street Address:  |  |
| Payment Address: |  | Payment Address: |  |

**Affiliated Distributors/Retailers.** Please list all Distributors or Retailers who are Affiliates of Participant or with whom Participant or Participant's principals has any other type of affiliation, including by way of a non-controlling interest, whether directly or indirectly (through another person or entity), and each location from which any such Affiliated or other Distributor ships cigarettes or non-cigarette products, as applicable. Describe the nature of the affiliation and indicate whether the Distributor is a Non-Direct Distributor.

Distributor  Retailer

Distributor  Retailer

|                                  |  |                                  |  |
|----------------------------------|--|----------------------------------|--|
| Name 1                           |  | Name 2                           |  |
| Address                          |  | Address                          |  |
| Nature of Relationship/Agreement |  | Nature of Relationship/Agreement |  |
| Owner/Partner                    |  | Owner/Partner                    |  |

**Distributors with Whom Participant has Agreements.** Please list all Distributors with whom Participant has any agreements directly or through any Affiliate (oral or written) regarding the tax stamping, ordering, billing, delivering, warehousing, receiving of returns, promotion assembling, or other handling of cigarettes or non-cigarette products, as applicable.

|                     |  |                     |  |
|---------------------|--|---------------------|--|
| Distributor Name 1  |  | Distributor Name 2  |  |
| Address             |  | Address             |  |
| Nature of Agreement |  | Nature of Agreement |  |
| Owner/Partner       |  | Owner/Partner       |  |

**Participant's Officers, Directors and Senior Managers.** Please list each of Participant's Officers and Directors, and Participant's Senior Managers principally responsible for Participant's performance under this Agreement.

|      |  |       |  |
|------|--|-------|--|
| Name |  | Title |  |
| Name |  | Title |  |
| Name |  | Title |  |
| Name |  | Title |  |
| Name |  | Title |  |

**Criminal Convictions.** If Participant, or any of its officers, principals, or owners with Control have been convicted, whether by trial or by plea agreement, of a criminal offense related to the sale or distribution of cigarettes or other tobacco products, between January 1, 2006 and the present, please list the following for each such conviction: Name of person/entity convicted, date of conviction, underlying criminal charge, convicting court and jurisdiction, case number, and resulting fine or sentence. Please indicate whether any conviction has been appealed, and if so the status or result of the appeal.

\_\_\_\_\_

\_\_\_\_\_

**Internet Sales of PM USA Products.** Please indicate whether Participant, any Affiliated Distributor or Retailer, or an officer, principal, or owner with Control of Participant or any Affiliated Distributor or Retailer is engaged in the sale or distribution of PM USA Products over the Internet or by telephone or mail order. For any such entity or person, please provide the name, physical address of the business and the Internet address, if applicable.

\_\_\_\_\_

\_\_\_\_\_

**By its signature below, Participant:**

- 1) represents that it has taken all action necessary to, and is authorized to, enter into and sign this Agreement;
- 2) acknowledges and agrees to the terms and conditions of this Agreement, including all Exhibits referenced in and attached to this Agreement;
- 3) agrees that this Agreement will not become binding on PM USA unless and until this Agreement is approved by PM USA management, as indicated by the signature of duly authorized PM USA representatives below; and
- 4) certifies that all employees that sell tobacco products to customers have viewed the "We Card" training video produced by the Coalition for Responsible Tobacco Retailing and have been trained on how to supply those customers a "We Card" order form within the 12 months before the Effective Date of this Agreement. Participant further agrees that all new employees will view the "We Card" training video within 90 days of their hire and that Participant will provide training to all employees at least once annually.

**This is an electronically executed agreement, which means that the electronically executed document is the original and legally binding agreement between PM USA and Participant. Any paper version, even if signed, should be regarded only as a courtesy copy. In case of a conflict between the electronically executed document and any paper version, the electronically executed document controls.**

**Participant (Must be signed by duly authorized officer)**

**Philip Morris USA Inc.**

By: \_\_\_\_\_

PM USA Account Manager: \_\_\_\_\_

Typed Name: \_\_\_\_\_

Typed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Approving Manager: \_\_\_\_\_

PM USA Section Sales Director

Typed Name: \_\_\_\_\_

Date: \_\_\_\_\_

## I. DEFINITIONS.

The following capitalized terms used in this Agreement are defined terms that have the following meanings:

**"Affiliate"** means a Person that for any purpose directly or indirectly Controls, is Controlled by, or is under common Control with, another Person.

**"Affiliation/Site Determination Date"** means the day of each Quarter designated by PM USA in Exhibit A under the heading "Affiliation/Site Determination Date." By the Affiliation/Site Determination Date, PM USA will identify Participant's Sites and Related Distributors for purposes of making PM USA Share and Payment calculations under Parts IV. and V. of this Agreement.

**"Carton Limit Verification Process"** means the process, as determined by PM USA in its sole discretion, by which a retailer demonstrates to PM USA that it is in compliance with transaction volume limits on the retail sale of PM USA Cigarettes.

**"Cents Per Cigarette Carton Rates"** means any of the rates at which Participant may earn Payments, as set forth in Part V.C. of this Agreement, and in the Payment Grid in Exhibit A under the heading "Base Cents Per Carton" (i.e., the Cents Per Cigarette Carton Rate for each Performance Level).

**"Cents Per Non-Cigarette Product Unit Rate"** means the rate at which Participant may earn Payments for PM USA Non-Cigarette Products, as set forth under Part V.E. of this Agreement, and in the Payment Grid in Exhibit A under the heading "PM USA Non-Cigarette Products".

**"Change in Control"** means with respect to a Person (i) a change in fifty percent (50%) or more of the membership of the Person's board of directors during any two-year period; (ii) a change in beneficial ownership by any Person or group of fifteen percent (15%) or more of the outstanding voting securities of the Person during any two-year period; (iii) a merger, consolidation, liquidation or dissolution of the Person in which the Person is not the survivor; or (iv) any other change in the Control of the Person by any other Person.

**"Classification"** means the identification of a Customer as an MSA Retailer, MSA Distributor, or MSA Other.

**"Control"** means possession of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities or partnership or limited liability company interests, by contract or otherwise. In the case of a corporation, any of the following items may be deemed to confer Control: (i) the direct or indirect ownership of fifteen percent (15%) or more of a corporation's outstanding voting securities, it being understood that the direct or indirect ownership of a lesser percentage of shares will not necessarily preclude the existence of Control; or (ii) the ability otherwise to elect a majority of the board of directors of the entity. An immediate family relationship (father, mother, brother, sister, husband, wife) may be deemed to create a relationship of Control between two individuals or between two entities Controlled by immediate family members. The terms "Controls," "Controlled" and "Controlling" have the corresponding meanings.

**"Control Totals"** means the sum of Outbound Shipments and the sum of Inventory, each as reported on the MSA Confirmation.

**"Customer"** means any Person or location (i) to which a Site or NDD ships cigarettes or PM USA Non-Cigarette Products; or (ii) for a Site or NDD that permits such cigarettes or such PM USA Non-Cigarette Products to be removed from its facility, the Person by which, or location to which, such cigarettes or such PM USA Non-Cigarette Products are removed.

**"Data"** means information relating to Outbound Shipments, Returns, Customers and Inventory required to be reported by Participant in accordance with Part II.A. of this Agreement.

**"Data Non-Compliant NDD"** means an NDD that (i) fails to submit Data (regarding shipments by such NDD to its Customers) with respect to a Quarter by the Resubmission Deadline for Reporting Week 13 of such Quarter, or (ii) four (4) or more times during a Quarter, either (a) submits Data for a Reporting Week after the Reporting Week Deadline or (b) submits Data inaccurately, and does not submit such late Data or correct such inaccurate Data, as the case may be, by the Resubmission Deadline for Reporting Week 13 of such Quarter.

**“Direct Distributor”** means any Distributor that purchases cigarettes or non-cigarette products directly from PM USA.

**“Distributor”** means any Person, including a Direct Distributor or NDD, that sells cigarettes or non-cigarette products to another Person for the purpose of resale.

**“Grace Period”** means the period of time allotted to Participants after a Participant begins supplying PM USA Products to a New Customer, as described in Part VIII.

**“Inventory”** means the quantity of all (i) Saleable Cigarettes; and (ii) Saleable non-cigarette products, each categorized by brand, Manufacturer, MSA Category Code and UPC/SKU, and in the possession or under the control of Participant, a Site or a Related NDD at the close of business on the last day of each Reporting Week.

**“Manufacturer”** means a manufacturer or importer of cigarettes or non-cigarette products.

**“Month”** means a STARS Calendar month, comprising Reporting Weeks 1 through 4, 5 through 8, or 9 through 13 of each Quarter.

**“MSA”** means Management Science Associates, Inc., PM USA’s designated representative for the receipt and processing of STARS Data submissions under this Agreement.

**“MSA Confirmation”** means MSA’s written confirmation to Participant of MSA’s receipt of Data with respect to any Reporting Week.

**“MSA Distributor”** means a Person that buys cigarettes from manufacturers or other distributors and is in the business of re-selling those cigarettes to retailers or other Distributors.

**“MSA Other”** means a Person that is classified neither as MSA Retailer nor MSA Distributor.

**“MSA Retailer”** means a Person that has a physical location that is open to the public and sells cigarettes to adult consumers in a face-to-face manner.

**“Multicat Non-Compliant NDD”** means a non-Related NDD that reports to MSA data specified in Part II.A.2.a.-c., and e. of this Agreement in a format acceptable to PM USA other than Multicat, and that is not otherwise a Data Non-Compliant NDD.

**“NDD”** means a non-Direct Distributor (*i.e.*, a Distributor that does not purchase cigarettes or PM USA Non-Cigarette Products directly from PM USA).

**“New Customer”** means a Customer to which Participant has not previously supplied PM USA Products.

**“New Participant”** means a Program participant that has not participated in PM USA’s Wholesale Leaders 2007 Program.

**“Non-Saleable PM USA Products”** means PM USA Products that are (i) damaged or (ii) have other attributes or characteristics designated by PM USA as rendering such PM USA Products unsuitable for sale.

**“Outbound Shipments”** means all cigarettes and non-cigarette products that a Distributor ships, or permits to be removed, from its facility, including Transshipments, regardless of whether such products are subsequently returned to the facility.

**“Payment”** means the amount payable to Participant under Part V. of this Agreement.

**“Payment-Eligible Outbound Shipments”** has the meaning set forth in Part V.D.1. and Part V.E.1. of this Agreement.

**“Payment Grid”** means the grid set forth in Exhibit A under the heading “2008 Program Payment Grid.”

**“Payment Terms”** means that, with respect to an order of PM USA Products, PM USA drafts (debits) payment for such order from Participant’s designated bank account a stated number of business days prior to the expected delivery date of such products. For example, -2 Day Payment Terms means PM USA drafts (debits) payment two business days prior to the expected delivery date. Payment Terms may be -2 Day, -3 Day, -4 Day or -5 Day.

**“Performance Level”** means either Performance Level 1, 2 or 3, as determined pursuant to Part V.B. of this Agreement.

**“Person”** means an individual, corporation, partnership, limited liability company, joint venture, association, trust or any other entity.

**“Physical Inventory”** means a physical count of Participant’s Inventory.

**“PM USA Cigarettes”** means cigarettes which are sold by PM USA and intended for resale in the United States domestic market or United States Military outlets, as specified by PM USA.

**“PM USA Non-Cigarette Products”** means the PM USA non-cigarette products identified in Exhibit A and which are sold by PM USA and intended for resale in the markets designated by PM USA.

**“PM USA Products”** mean PM USA Cigarettes and PM USA Non-Cigarette Products.

**“PM USA Share”** means the percentage of shipments of all cigarettes of all Manufacturers that comprises PM USA Cigarettes, as calculated pursuant to Part IV.A. of this Agreement.

**“PM USA Share Targets”** means, for each Section, the target PM USA Share, as designated by PM USA in the PM USA Share Targets Grid.

**“PM USA Share Targets Grid”** means the “Section Sales Boundaries and 2008 Section Targets” set forth in Exhibit A under the heading “2008 Program PM USA Share Targets Grid.”

**“PM USA Trade Policies”** means PM USA policies applicable to contraband PM USA Products, and remote sales (Internet, telephone and mail order) of such products, as such policies may be issued or modified by PM USA in its sole discretion.

**“Product Related Initiative”** means a Promotion or new product introduction for which PM USA specially allocates PM USA Products to retailers.

**“Promotion”** means any promotional program offered by PM USA in connection with the sale of PM USA Products.

**“Promotional Product”** means PM USA Products and other items used in connection with Product Related Initiatives, as designated by PM USA.

**“Promotional Product Retail Ship List”** means the list of retail Customers provided to Participant by PM USA that specifies the quantity of a particular Promotional Product to be shipped to each such retail Customer, as part of a Product Related Initiative.

**“Purchase Allowance”** means an allowance to be deducted from the list price of a PM USA Non-Cigarette Product in the dollar amount set forth for each PM USA Non-Cigarette Product on the Payment Grid in Exhibit A.

**“Quarter”** means a calendar quarter according to the STARS Calendar.

**“Related Direct Distributor”** means a Direct Distributor that is a Related Distributor.

**“Related Distributor”** means a Distributor that is (i) an Affiliate of Participant, or (ii) for purposes of calculating PM USA Share, is deemed to be related to Participant pursuant to a written notice delivered by PM USA under Part XII.B. of this Agreement.

**“Related NDD”** means an NDD that is a Related Distributor.

**“Reporting Week”** means the seven-day period commencing on Sunday and ending on Saturday.

**“Reporting Week Deadline”** means with respect to any Reporting Week, 5 p.m. (Eastern Time Zone) on the Wednesday immediately following such Reporting Week. For weeks including a Monday that is a PM USA holiday, the deadline is 12 p.m. (Eastern Time Zone) on the Thursday immediately following such Reporting Week.

**“Resubmission Deadline”** means with respect to any Reporting Week, 5 p.m. (Eastern Time Zone) on the date that is fourteen (14) days after the Reporting Week Deadline for such Reporting Week.

**“Returns”** means cigarettes and non-cigarette products returned to Participant or a Site from a Customer.

**“Saleable”** means with respect to cigarettes or non-cigarette products, products that are in a condition to be sold to Customers. Saleable products do not include (i) Non-Saleable PM USA Products; or (ii) cigarettes and non-cigarette products that are designated by the Manufacturer as unsuitable for sale.

**“Section”** means any of the numbered geographical areas designated by PM USA on the map set forth in Exhibit A. The boundaries of each Section as shown on the map are approximate boundaries and are subject to more detailed specifications as may be designated by PM USA from time to time.

**“Site”** means a location from which Participant ships cigarettes or non-cigarette products, as applicable, to another Person. Site does not include a location from which a Related Distributor ships cigarettes or non-cigarette products.

**“STARS”** means PM USA’s Store Tracking Analytical Reporting System. STARS is used to capture Data reported by Distributors to MSA.

**“STARS Calendar”** means the calendar used in connection with STARS, a copy of which is set forth in Exhibit A.

**“Terms Measurement Period”** means with respect to any Quarter, the period during which Program performance is measured to determine the Terms Rate or Volume-Weighted Terms Rate that will be applicable during such Quarter.

**“Terms Rate”** means an allowance from the list price of PM USA Cigarettes expressed as a percentage to be deducted from such price, in the amounts set forth on Exhibit A.

**“Test Market”** means a geographic area as designated by PM USA within which a new PM USA Product identified on Exhibit A may be resold.

**“Top Ten PM USA Packings”** means the top ten packings of PM USA Cigarettes as designated by PM USA and set forth in Exhibit A.

**“Transshipments”** means Outbound Shipments: (i) from one Site to another; (ii) from one Site to a Direct Distributor that is not a Related Distributor; or (iii) from a Related NDD to a Direct Distributor that is not a Related Distributor.

**“UPC/SKU”** means with respect to all brand and promotional packings, the Uniform Product Code and the Stock Keeping Unit.

**“Volume-Weighted Terms Rate”** means the effective Terms Rate for any Program participant that ships PM USA Cigarettes into more than one Section, as determined in accordance with Part VII.E. of this Agreement.

**“We Card”** means the program designed by the Coalition for Responsible Tobacco Retailing to educate and assist retailers in verifying the age of individuals who seek to purchase tobacco products and informing such individuals that the retailer does not sell to anyone who is not old enough to purchase tobacco products legally where the retailer’s store is located.

**"We Card Items"** means the We Card Minimum Age Calendar, the We Card Age of Purchase Stickers, the We Card Fake ID Tip Sheet, and additional items that may be produced by the Coalition for Responsible Tobacco Retailing and designed to assist the retailer with age verification.

**"We Card Signs"** means signs produced by the Coalition for Responsible Tobacco Retailing that inform customers that the retailer verifies the age of individuals who seek to purchase tobacco products and that the retailer does not sell tobacco products to anyone who is not old enough to purchase tobacco products legally where the retailer's store is located.

**"Year"** means a calendar year according to the STARS Calendar.

**"YTP"** means PM USA's Youth Tobacco Prevention initiative.

## II. DATA REPORTING

### A. Reporting Obligations.

1. **Weekly Reports.** Participant will submit on a weekly basis complete and accurate Data to PM USA with respect to each Reporting Week for each Site and Related NDD.

2. **Data.** Data includes the following and will be submitted in a Data file formatted in accordance with the instructions provided in the 2008 STARS Reporting Package:

a. All Outbound Shipments of (i) cigarettes of all Manufacturers and (ii) non-cigarette products of all Manufacturers as specified in the 2008 STARS Reporting Package;

b. All Returns of (i) cigarettes of all Manufacturers and (ii) non-cigarette products of all Manufacturers as specified in the 2008 STARS Reporting Package;

c. All Customers to which a Site or Related NDD makes Outbound Shipments of (i) cigarettes and (ii) non-cigarette products of all Manufacturers as specified in the 2008 STARS Reporting Package, or from which a Site or Related NDD accepts Returns of such products; and

d. Classification of each Customer as either: (i) MSA Retailer, (ii) MSA Distributor, or (iii) MSA Other. In the event of a disagreement between Participant and PM USA as to the Classification of any Customer, PM USA's determination will be final.

e. Inventory of all Saleable (i) cigarettes of all Manufacturers and (ii) non-cigarette products of all Manufacturers as specified more particularly in the 2008 STARS Reporting Package, as of the close of business on the last day of each Reporting Week. Participant will conduct a Physical Inventory as of the end of Reporting Week 13 in each Quarter, and will adjust each Site's, and cause each Related NDD's, internal Inventory records to reflect the results of the Physical Inventory prior to submission of the Data for Reporting Week 13.

3. **Means of Submission.** Participant will submit Data to MSA via one of the media types specified in the 2008 STARS Reporting Package.

4. **Time of Submission.** Data for each Reporting Week will be submitted to MSA no later than the Reporting Week Deadline.

### 5. Reconciliation of Data.

a. After each Reporting Week for which Data is submitted, Participant will reconcile such Data against its internal records, including records of Outbound Shipments, Returns, Customers and Inventory, of each Site and Related NDD. Participant will take immediate action to correct any missing, inaccurate, late, incomplete or duplicate Data.

b. Within forty-eight (48) hours after Participant's receipt of the MSA Confirmation, Participant will report to its MSA Help Desk representative any discrepancy between the Control Totals on the MSA Confirmation and (i) the Data on which such Control Totals are based and (ii) the Site's or Related NDD's internal Outbound Shipment, Return, Customer and Inventory records.

**B. Resubmission Deadline.** Participant will resubmit Data to correct any Data that previously was reported incorrectly, or submit complete and accurate Data for any Data not previously reported, no later than the Resubmission Deadline for the Data.

### III. PROMOTION EXECUTION OBLIGATION AND BONUSES

**A. Promotion Execution Obligation.** Participant will meet all execution requirements prescribed by PM USA for any Product Related Initiative, including without limitation, the following:

1. Participant will ship, net of returns, at least 75% of the applicable Promotional Product for each Product Related Initiative within the time frames designated by PM USA. If PM USA is late delivering the applicable product to a Site, the time frames and deadlines will be adjusted accordingly.

2. Participant will contact PM USA for subsequent delivery instructions if a Site has any Promotional Product remaining after delivery or attempted delivery of the Promotional Product. Participant will not deliver any such remaining Promotional Product to any Customer except as directed by PM USA.

3. Participant will ship all Promotional Product, point of sale materials and any other materials as directed by PM USA.

**B. Promotion Accuracy Bonus.**

1. Participant may earn Promotion Accuracy Bonus cents per cigarette carton as set forth in Exhibit A for each Site during each Quarter in which the Site meets or exceeds the Promotion Accuracy Bonus Percentage set forth in Exhibit A, in accordance with the following calculation:

a. **Step One.** Determine the total number of retail Customers to which the Site shipped, net of returns, no less than the designated quantities of each Promotional Product set forth on each Promotional Product Retail Ship List for each such retail Customer within the designated time frame for all Product Related Initiatives during the applicable Quarter.

b. **Step Two.** Divide the result of **Step One** by the sum of all retail Customers listed on each Promotional Product Retail Ship List for all Product Related Initiatives during the applicable Quarter for the Site.

2. Participant's Sites whose Payments are reduced in accordance with Part VI.A. for the applicable Quarter are ineligible to earn the Promotion Accuracy Bonus.

**C. Promotion Speed to Market Bonus.**

1. Participants may earn Promotion Speed to Market Bonus cents per cigarette carton as set forth in Exhibit A for each Site during each Quarter in which the Site meets or exceeds the Promotion Speed to Market Bonus Percentage set forth in Exhibit A, in accordance with the following calculation:

a. **Step One.** Determine the total number of retail Customers to which the Site shipped, net of returns, no less than the designated quantities of each Promotional Product set forth on each Promotional Product Retail Ship List for each such retail Customer within the designated time frame set forth in Exhibit A for all Product Related Initiatives during the applicable Quarter.



b. **Step Two.** Divide the result of **Step One** by the sum of all retail Customers listed on each Promotional Product Retail Ship List for all Product Related Initiatives during the applicable Quarter for the Site.

2. Participant's Sites whose Payments are reduced in accordance with Part VI.A. for the applicable Quarter are ineligible to earn the Promotion Speed to Market Bonus.

#### IV. PM USA SHARE AND SHARE TARGETS FOR PM USA CIGARETTES

A. **PM USA Share.** PM USA will determine Participant's PM USA Share for each Section into which Participant ships PM USA Cigarettes by dividing the total of Participant's PM USA Qualified Shipments into such Section by Participant's Industry Qualified Shipments into such Section, during the relevant time period. If more than one of Participant's Sites ships into a Section, the calculation above will be based upon the aggregate of shipments of each Site into the Section, resulting in a single PM USA Share for all of Participant's Sites that ship into the Section.

1. **PM USA Qualified Shipments.** PM USA Qualified Shipments means the result of the following calculation:

a. **Step One.** Determine total Outbound Shipments of PM USA Cigarettes by Participant's Sites and Related Distributors into the Section during the relevant time period. Only those locations and Persons that satisfy the definition of "Site" or "Related Distributor" as of the Affiliation/Site Determination Date for such time period will be considered Sites or Related Distributors for purposes of this Part IV.A.1.

b. **Step Two.** Subtract from the result of **Step One** (i) Returns of PM USA Cigarettes from Customers in the Section during the relevant time period; and (ii) Outbound Shipments of PM USA Cigarettes into the Section during such time period that are:

- (A) Transshipments;
- (B) shipped in violation of PM USA Trade Policies;
- (C) shipped to any Customer engaged in the sale of PM USA Cigarettes in violation of the PM USA Remote Cigarette Sales Trade Policy related to Internet, telephone and mail order sales, or to an NDD that ships PM USA Cigarettes to any such Customer;
- (D) shipped to any Customer that has been classified as MSA Other or shipped to an NDD that shipped to any such Customer;
- (E) shipped to a Related NDD;
- (F) shipped to a Data Non-Compliant NDD;
- (G) shipped to a Multicat Non-Compliant NDD;
- (H) shipped to a Customer (i) if shipments of PM USA Cigarettes represent eighty percent (80%) or more of all cigarettes shipped to such Customer and (ii) such Customer receives shipments of 1,200 or more cartons of PM USA Cigarettes on average per week during the time period; or
- (I) shipped to a non-Related NDD if shipments of PM USA Cigarettes to such NDD represent eighty percent (80%) or more of all cigarettes shipped to such NDD.

2. **Industry Qualified Shipments.** Industry Qualified Shipments means the result of the following calculation:

a. **Step One.** Determine the total Outbound Shipments of all cigarettes of all Manufacturers by Participant's Sites and Related Distributors into the Section during the relevant time period. Only those locations and Persons that satisfy the definition of "Site" or "Related Distributor" as of the Affiliation/Site Determination Date for such time period will be considered Sites or Related Distributors for purposes of this Part IV.A.2.

b. **Step Two.** Subtract from the result of **Step One** (i) Returns from Customers in the Section during the relevant time period; and (ii) Outbound Shipments of cigarettes into the Section during such time period that are:

- (A) Transshipments of all cigarettes of all Manufacturers;
- (B) cigarettes of all Manufacturers shipped to a Related NDD;
- (C) shipped to any Customer that has been classified as MSA Other or shipped to an NDD that shipped to any such Customer;
- (D) shipped to a Multicat Non-Compliant NDD;
- (E) PM USA Cigarettes shipped to a Customer (i) if shipments of PM USA Cigarettes represent eighty percent (80%) or more of all cigarettes shipped to such Customer and (ii) such Customer receives shipments of 1,200 or more cartons of PM USA Cigarettes on average per week during the time period; or
- (F) PM USA Cigarettes shipped to a non-Related NDD if shipments of PM USA Cigarettes to such NDD represent eighty percent (80%) or more of all cigarettes shipped to such NDD.

**B. PM USA Share Targets.** For each Section, PM USA has established PM USA Share Targets. The PM USA Share Targets are indicated on the PM USA Share Targets Grid in Exhibit A.

**V. PM USA PAYMENTS.** During the term of this Agreement, PM USA will make a Payment to Participant following the close of each Quarter based on the performance of Participant's Sites during such Quarter. Only those locations that satisfy the definition of "Site" as of the Affiliation/Site Determination Date for such Quarter will be considered Sites for purposes of this Part V. Following each Quarter, PM USA will determine the amount of such Payment on a Site-by-Site and Section-by-Section basis as provided in this Part V.

**A. Determination of PM USA Share.** PM USA will calculate Participant's PM USA Share in each Section into which any of Participant's Sites shipped Outbound Shipments of PM USA Cigarettes during the Quarter pursuant to Part IV.A. of this Agreement. All of Participant's Sites will have the same PM USA Share in a single Section.

**B. Determination of Performance Level.** Using Participant's PM USA Share and the PM USA Share Targets, PM USA will determine the Performance Level for which Participant qualifies in each Section into which any of Participant's Sites shipped Outbound Shipments of PM USA Cigarettes during the Quarter as set forth in the Payment Grid in Exhibit A.

**C. Determination of Cents Per Cigarette Carton Rates.** Using Participant's Performance Level, PM USA will determine the Cents Per Cigarette Carton Rate for which each Site qualifies in each Section into which it shipped Outbound Shipments of PM USA Cigarettes during the Quarter as set forth in the Payment Grid in Exhibit A. If Participant qualifies for a particular Performance Level in such Section, all of its Sites will qualify for the same Level Cents Per Cigarette Carton Rate in such Section, as set forth in the Payment Grid in Exhibit A.

**D. Payment Calculation for PM USA Cigarettes.** PM USA will determine the Payment for PM USA Cigarettes attributable to each Site for the Quarter by performing the following set of calculations separately for each Section into which the Site shipped Outbound Shipments of PM USA Cigarettes during the Quarter:

1. **Step One.** Determine the Site's Payment-Eligible Outbound Shipments of PM USA Cigarettes into the Section during the Quarter as follows:

a. Determine the total Outbound Shipments of PM USA Cigarettes by the Site into the Section during the Quarter; and

b. Subtract from the result of subparagraph a. above: (i) Returns of PM USA Cigarettes from Customers in the Section during the Quarter; and (ii) Outbound Shipments of PM USA Cigarettes into the Section during the Quarter that are:

(A) Transshipments;

(B) shipped in violation of PM USA Trade Policies;

(C) shipped to any Customer engaged in the sale of PM USA Products in violation of the PM USA Remote Cigarette Sales Trade Policy related to Internet, telephone and mail order sales, or to an NDD that ships PM USA Products to any such Customer;

(D) shipped to any Customer that has been classified as MSA Other, or shipped to an NDD that shipped to any such Customer;

(E) shipped to a Data Non-Compliant NDD;

(F) shipped to a Multicat Non-Compliant NDD; or

(G) in excess of 10,400 cartons of PM USA Cigarettes shipped to a single MSA Retailer, or, for an MSA Retailer that is supplied by multiple Sites or Distributors, the Site's pro rata share of shipments of PM USA Cigarettes to that MSA Retailer in excess of 10,400 combined cartons. However, the subtraction set forth under this subparagraph (G) will not apply to shipments to MSA Retailers participating in PM USA's Retail Leaders Program and that participate in and comply with the Carton Limit Verification Process, as determined by PM USA in its sole discretion.

2. **Step Two.** Multiply the number of cartons of Payment-Eligible Outbound Shipments of PM USA Cigarettes shipped by the Site into each Section by the Cents Per Cigarette Carton Rate applicable to the Site in each Section.

3. **Step Three.** If the Site qualifies for the Promotion Accuracy and Promotion Speed to Market Bonuses, multiply the incremental cents per cigarette carton applicable for such bonuses (listed in Exhibit A) by the number of cartons of Payment-Eligible Outbound Shipments of PM USA Cigarettes shipped by the Site into each Section.

4. **Step Four.** Aggregate the results of **Steps Two** and **Three** for all Sections in which the Site has Payment-Eligible Outbound Shipments of PM USA Cigarettes.

5. **Step Five.** Subtract from the result of **Step Four**, the percentage payment reductions required to be made in accordance with Part VI.A.1. (for failures by the Site relating to Errors or Omissions in Weekly Data Submissions related to cigarettes); Part VI.A.2. (for failures by the Site relating to Data Resubmission Deadline related to cigarettes); Part VI.A.3. (for failures by the Site relating to Promotion Execution Obligations related to cigarettes); and Part VI.B. (for Purchase or Shipment of Top Ten PM USA Packings) of this Agreement.

PM USA will calculate the result of **Steps One** through **Five** for each Site to determine the total amount of the Payment due to Participant for PM USA Cigarettes with respect to the Site.

**E. Payment Calculation for PM USA Non-Cigarette Products.** PM USA will determine the Payment for each PM USA Non-Cigarette Product listed in Exhibit A attributable to each Site for the Quarter by performing the following set of calculations for which the Site shipped Outbound Shipments of PM USA Non-Cigarette Products during the Quarter:

1. **Step One.** Determine the Site's Payment-Eligible Outbound Shipments of such PM USA Non-Cigarette Product by the Site during the Quarter as follows:

a. Determine the total Outbound Shipments of such PM USA Non-Cigarette Product by the Site during the Quarter.

b. Subtract from the result of subparagraph a. above: (i) Returns of such PM USA Non-Cigarette Product from Customers during the Quarter; and (ii) Outbound Shipments of such PM USA Non-Cigarette Product during the Quarter that are:

(i) Transshipments of such PM USA Non-Cigarette Product;

(ii) shipped in violation of PM USA Trade Policies;

(iii) shipped to any Customer that has been classified as MSA Other or shipped to an NDD that shipped to such Customer;

(iv) shipped to any Customer engaged in the sale of PM USA Products in violation of the PM USA Remote Cigarette Sales Trade Policy related to Internet, telephone and mail order sales, or to an NDD that ships PM USA Products to any such Customer;

(v) shipped to a Data Non-Compliant NDD; or

(vi) shipped to a Multicat Non-Compliant NDD.

3. **Step Two.** Multiply the number of units of Payment-Eligible Outbound Shipments of such PM USA Non-Cigarette Product shipped by the Site by the Cents Per Non-Cigarette Product Unit Rate applicable to such product as specified on the Payment Grid in Exhibit A.

4. **Step Three.** Total the results of **Step Two** for each PM USA Non-Cigarette Product.

5. **Step Four.** Subtract from the result of **Step Three**, the percentage payment reductions required to be made in accordance with Part VI.A.1. (for failures by the Site relating to Errors or Omissions in Weekly Data Submissions related to non-cigarette products); Part VI.A.2. (for failures by the Site relating to Data Resubmission Deadline related to non-cigarette products); and Part VI.A.3. (for failures by the Site relating to Promotion Execution Obligations related to non-cigarette products) of this Agreement.

PM USA will calculate the result of **Steps One** through **Four** for each Site to determine the total amount of the Payment for all PM USA Non-Cigarette Products due to Participant with respect to the Site.

F. **Disbursement of Payments.** PM USA will disburse Payments as soon as practicable after the close of each Quarter for Payments earned in that Quarter.

G. **Delivery of Payments.** Payments, to the extent earned and payable, will be delivered by electronic funds transfer or by check, in accordance with the Participant's election, either (1) on a Site-by-Site basis to each Site's payment address listed on Page 1 of this Agreement, or (2) to Participant with respect to some or all Sites.

## **VI. PAYMENT REDUCTIONS.**

### **A. Data Errors and Omissions.**

1. **Errors or Omissions in Weekly Data Submissions.** The failure of Participant to submit complete and accurate Data with respect to a Site by the Reporting Week Deadline for that Data four (4) or more times during a Quarter will result in a payment reduction in an amount equal to five percent (5%) of the Payment due to Participant with respect to the Site for the Quarter in which such failures occur. However, a New Participant will not be subject to the payment reduction set forth in this paragraph for the first full Quarter in which such New Participant participates in the Program, if such New Participant submits complete and accurate Data for each Reporting Week in the first Quarter of participation in the Program by the Resubmission Deadline for Reporting Week 13 of such Quarter.

2. **Failure to Submit Complete and Accurate Data by Resubmission Deadline.** The failure of Participant to submit complete and accurate Data with respect to a Site by the Resubmission Deadline for any one (1) or more Reporting Weeks during a particular Month in a Quarter will result in payment reductions in an amount equal to five percent (5%) of the Payment due to Participant with respect to the Site for the Quarter in which such failure occurs. Additional five percent (5%) reductions will be incurred for each additional Month in which one (1) or more failures to submit complete and accurate Data by the Resubmission Deadline occur with respect to the same Site in the same Quarter, resulting in a maximum payment reduction of fifteen percent (15%) per Site per Quarter. If Participant submits no Data with respect to the thirteen (13) Reporting Weeks prior to the Resubmission Deadline for Reporting Week 13, Participant will receive no Payment with respect to such Quarter. However, if Participant provides all missing Data with respect to all thirteen (13) Reporting Weeks after the Resubmission Deadline for Reporting Week 13, Participant will receive a Payment based on (i) the share calculation of the Data reported for all thirteen (13) Reporting Weeks and (ii) the volume calculation based on the Data reported prior to the Resubmission Deadline for Reporting Week 13. A New Participant will not be subject to the payment reductions set forth in this paragraph for the first full Quarter in which such New Participant participates in the Program, if such New Participant submits complete and accurate Data for each Reporting Week in the first Quarter of participation in the Program by the Resubmission Deadline for Reporting Week 13 of such Quarter.

3. **Failure to Meet Promotion Execution Obligation of Part III.A.** The failure of Participant to meet the Promotion Execution Obligation with respect to two (2) or more Product Related Initiatives during a particular Quarter will result in a payment reduction in an amount equal to five percent (5%) of the Payment due to Participant with respect to the Site for the Quarter.

**B. Purchase or Shipment of Top Ten PM USA Packings (Part X.A.).** The failure to comply with the requirements of Part X.A. of this Agreement two (2) times in any 12-month period will result in a payment reduction in an amount equal to one-third ( $\frac{1}{3}$ ) of the Payment due to Participant with respect to the Site for the Quarter in which the second failure occurs. Each additional failure within the 12-month period after the first failure will result in a one-third ( $\frac{1}{3}$ ) reduction up to one hundred percent (100%) of the Payment due to Participant for the Quarter.

**C. Additional Consequences.** With respect to any failure of Participant to comply with the terms of this Agreement set forth in the foregoing paragraphs A. and B. of this Part VI., PM USA may invoke any one (1) or more remedies provided for under Part XI. of this Agreement that is applicable to such failure, in addition to making the applicable payment reductions provided for under Parts VI.A. and VI.B.

**VII. PM USA INVOICE TERMS.** During the term of this Agreement, each Site that is eligible to purchase PM USA Cigarettes from PM USA will be eligible to purchase such PM USA Cigarettes pursuant to a Terms Rate that PM USA will determine pursuant to this Part VII.

**A. Determination of PM USA Share.** PM USA will calculate Participant's PM USA Share in each Section into which any of Participant's Sites shipped Outbound Shipments of PM USA Cigarettes during the Terms Measurement Period pursuant to Part IV.A. All of Participant's Sites will have the same PM USA Share in a single Section.

**B. Determination of Performance Level.** Using Participant's PM USA Share in each Section, PM USA will determine the Performance Level for which Participant qualifies in each Section into which any of Participant's Sites shipped Outbound Shipments of PM USA Cigarettes during the Terms Measurement Period. All of Participant's Sites will have the same Performance Level in a single Section.

**C. Terms Measurement Period.** The Terms Measurement Period for any Quarter will be the second immediately preceding Quarter. For example, for the First Quarter of 2008, the Terms Measurement Period will be the Third Quarter of 2007.

**D. Determination of Terms Rate.**

1. Using Participant's Performance Level in each Section and the Payment Grid, PM USA will determine the Terms Rate for which Participant qualifies for the applicable Quarter for each Section into which Participant ships PM USA Cigarettes.

2. If Participant fails to submit all weeks of Data during a Terms Measurement Period by the Resubmission Deadline for the last Reporting Week in such Terms Measurement Period, Participant shall default to the Performance Level 1 Terms Rate.

**E. Determination of Volume-Weighted Terms Rate.** If Participant shipped PM USA Cigarettes into more than one Section during the Terms Measurement Period, PM USA will calculate a single Volume-Weighted Terms Rate for all of Participant's Sites for the applicable Quarter, as follows:

1. **Step One.** Divide the PM USA Qualified Shipments from all of Participant's Sites and Related Distributors into the Section during the Terms Measurement Period by the PM USA Qualified Shipments from all of Participant's Sites and Related Distributors to all Sections during such time period.

2. **Step Two.** For each Section into which Participant shipped PM USA Cigarettes, multiply the result of **Step One** above by the Terms Rate for PM USA Cigarettes applicable to the Section.

3. **Step Three.** Total the results of **Step Two** above for all Sections into which any of Participant's Sites or Related Distributors shipped Outbound Shipments of PM USA Cigarettes during the Terms Measurement Period. The total is equal to the Volume-Weighted Terms Rate applicable to all of Participant's Sites for the applicable Quarter.

**F. New Participant.** A New Participant will be assigned the Terms Rate for PM USA Cigarettes that corresponds to Performance Level 3 until the beginning of the first Quarter with respect to which the New Participant reports data for at least seven (7) weeks during the Terms Measurement Period corresponding to that Quarter, at which time Participant's Terms Rate for PM USA Cigarettes will be calculated based on that Terms Measurement Period. However, if the New Participant is an Affiliate of any Direct Distributor that participates in the Program, the New Participant will be assigned the same Volume-Weighted Terms Rate as its Related Direct Distributor until the beginning of the first Quarter with respect to which the New Participant reports data for at least seven (7) weeks during the Terms Measurement Period corresponding to that Quarter.

**G. Terms Effective Period.** Participant's Volume-Weighted Terms Rate for a Quarter will apply to orders for PM USA Cigarettes delivered during that Quarter.

**H. Payment Terms.** Standard Payment Terms for PM USA Products are -2 Days if Participant submits financial statements that are either audited or reviewed by an independent certified public accountant in accordance with Generally Accepted Accounting Principles, pursuant to Part X.E.4.a. of this Agreement. Standard payment terms are -3 Days if Participant submits compiled financial statements, certified by an officer of Participant pursuant to Part X.E.4.a. Notwithstanding the above, PM USA reserves the right to place Participant on Payment Terms of -3 Day, -4 Day, or -5 Day, or on wire in advance payment terms in its sole discretion based on PM USA's review of Participant's creditworthiness.

**I. Accelerated Payment Option.** A Participant that submits financial statements that are either audited or reviewed by an independent certified public accountant, in accordance with Generally Accepted Accounting Principles pursuant to Part X.E.4.a. of this Agreement, may earn an incremental terms discount equal to the APO Percentage set forth in Exhibit A, which will be added to Participant's Terms Rate or Volume-Weighted Terms Rate, for the Quarters during which Participant participates in the Accelerated Payment Option, as set forth below.

**1. Participation.** A Participant may earn the incremental terms discount if the Participant has completed and delivered to the PM USA Credit Department an Accelerated Payment Option Election Form, attached as Exhibit E, by the dates outlined in Exhibit A. Participation may begin only at the start of a Quarter, and such participation will be effective for orders placed for delivery on the first effective delivery date of the applicable Quarter.

**2. Terms and Conditions of Program.** A Participant with -2 Day Payment Terms that participates in the Accelerated Payment Option authorizes PM USA to initiate debit entries by electronic funds transfer from Participant's designated bank account for such debit entries three (3) business days prior to the scheduled day of delivery of PM USA products ordered by Participant or any of Participant's Sites. Exhibit A outlines the payment terms, incremental terms discount and the required order lead time. Participants that PM USA has placed on -3, -4 or -5 Day Payment Terms or wire in advance payment terms based on PM USA's review of Participant's creditworthiness pursuant to Part VII.H. and that participate in the Accelerated Payment Option will remain on such Payment Terms unless otherwise determined by PM USA.

**3. Termination.** A Participant deemed to be creditworthy by PM USA may terminate its participation in the Accelerated Payment Option by giving written notice to PM USA. The termination will become effective as of the first business day of the first Quarter following the date on which such written notice is received by PM USA, provided that if the written notice is received by PM USA fewer than five business days before the first day of a Quarter, the termination will become effective on the first business day of the following Quarter.

**J. PM USA Non-Cigarette Products.** Each Site that is eligible to purchase PM USA Non-Cigarette Products from PM USA may be eligible to purchase such PM USA Non-Cigarette Products pursuant to a Purchase Allowance that is set forth separately for each PM USA Non-Cigarette Product on the Payment Grid in Exhibit A.

**VIII. NEW BUSINESS RULE.** Participant may be entitled to a Grace Period if Participant qualifies as provided in Part VIII.A. and/or VIII.B below. Such Grace Periods will be granted on a Section-by-Section basis and will apply to Performance Level only.

**A. New Customers in a Section Currently Supplied.** If Participant experiences a reduction in PM USA Share which causes a reduction in the Performance Level for which any Site is eligible in a Section following the time Participant begins supplying one or more New Customer(s), Participant may be entitled to a Grace Period if Participant satisfies the requirements set forth below in Part VIII.A.1.

**1. Qualifications.** To qualify for a Grace Period, Participant must comply with PM USA's procedures for requesting a Grace Period as set forth herein as follows:

**a.** Participant must request a Grace Period in writing directed to the Section Sales Director for its respective headquarters Section and provide to PM USA documentation supporting such request to the satisfaction of PM USA, including but not limited to, documentation identifying the New Customer(s) supplied;

**b.** The request for a Grace Period must be made before the end of the Quarter following the Quarter in which the Performance Level reduction occurred;

**c.** Participant must be in compliance with the terms and conditions of this Agreement, as determined by PM USA;

d. Participant must have participated in the Program for at least one full Quarter prior to requesting a Grace Period;

e. Participant's Sites' Industry Qualified Shipments of all Manufacturers' cigarettes in the Section with respect to which a Grace Period is requested must have increased by at least five percent between (a) the Quarter immediately prior to the Quarter in which Participant began supplying the New Customer(s) and (b) either the Quarter during which the supplying of the New Customer(s) began or the immediately following Quarter; and

f. Participant's Performance Level for the Section with respect to which a Grace Period is requested must have declined between (a) the Quarter immediately prior to the Quarter in which Participant began supplying the New Customer(s) and (b) either the Quarter during which the supplying of the New Customer(s) began or the immediately following Quarter.

**2. Grace Period.** If PM USA grants Participant a Grace Period, then the following terms and conditions will apply:

a. Participant will be allowed a four-Quarter Grace Period to restore its previous Performance Level in the Section with respect to which the Grace Period is granted;

b. The Grace Period will start on the first day of the Quarter immediately following the Quarter in which Participant began supplying the New Customer(s);

c. During the Grace Period, Participant's PM USA Share as actually achieved will be used to calculate Participant's Performance Level for the applicable Section for each Quarter; provided, however, that if, in any Quarter during the Grace Period, Participant achieves the Performance Level in which it previously performed in the Section, then (a) PM USA will issue a retroactive payment to Participant such that, for all Quarters during the Grace Period and the Quarter in which Participant began supplying the New Customer, Participant will have earned for the Section an amount equal to the Payment it would have earned based on the Cents per Cigarette Carton Rate corresponding to the Level at which it performed in the Quarter immediately preceding the Quarter in which the Performance Level reduction occurred, subject to all payment reductions incurred during the applicable Quarters pursuant to Parts VI.A. and VI.B., and (b) PM USA will issue a retroactive payment to Participant such that Participant will be reimbursed the additional amount that would have been deducted from the list price of all PM USA Cigarettes purchased by Participant for any Quarter during the Grace Period and up to two Quarters following the end of the Grace Period in which the lower Terms Rate was applied.

d. If, during the Grace Period, Participant achieves the Performance Level in which they previously performed in the Section, the Grace Period will terminate; and

e. Participant will not be permitted to request changes to the terms and conditions set forth in this Part VIII.A. governing an ongoing Grace Period, nor will Participant be granted an additional Grace Period with respect to any acquisitions, affiliations or changes in business that occur during an ongoing Grace Period.

**B. New Customers in Section Not Previously Supplied.** If Participant begins supplying one or more New Customer(s) in a Section into which the Participant has not previously shipped PM USA Products, and Participant qualifies for Performance Level 1 or 2 in that Section for the Quarter during which the supplying of the New Customer(s) began, Participant may be entitled to a Grace Period if Participant satisfies the requirements set forth below in Part VIII.B.1.

**1. Qualifications.** To qualify for a Grace Period, Participant must comply with PM USA's procedures for requesting a Grace Period as set forth herein as follows:

a. Participant must request a Grace Period in writing directed to the Section Sales Director for its respective headquarters Section and provide to PM USA documentation supporting such request to the satisfaction of PM USA, including but not limited to, documentation identifying the New Customers supplied;



b. The request for a Grace Period must be made before the end of the Quarter following the Quarter in which the supplying of the New Customer(s) began;

c. Participant must be in compliance with the terms and conditions of this Agreement, as determined by PM USA;

d. Participant must have participated in the Program for at least one full Quarter prior to requesting a Grace Period;

e. Participant must not have shipped PM USA Products into the Section with respect to which a Grace Period is requested for the two Quarters prior to the Quarter during which the supplying of the New Customer(s) began;

f. Participant's Sites' Industry Qualified Shipments of all Manufacturers' must have increased by at least five percent between (a) the Quarter immediately prior to the Quarter in which Participant began supplying the New Customer(s) and (b) either the Quarter during which the supplying of the New Customer(s) began or the immediately following Quarter; and

g. Participant must qualify for Performance Level 1 or 2 in the Section with respect to which a Grace Period is requested for the Quarter during which the supplying of the New Customer(s) began.

**2. Grace Period.** If PM USA grants Participant a Grace Period, then the following terms and conditions will apply:

a. Participant will be allowed a four-Quarter Grace Period to achieve a Performance Level in the Section with respect to which the Grace Period is granted higher than the Participant's Performance Level in the Quarter in which the supplying of the New Customer(s) began;

b. The Grace Period will start on the first day of the Quarter immediately following the Quarter in which Participant began supplying the New Customer(s);

c. During the Grace Period, Participant's PM USA Share as actually achieved will be used to calculate Participant's Performance Level for the applicable Section for each Quarter; provided, however, that if, in the fourth Quarter of the Grace Period, Participant achieves a Performance Level higher than Participant's Performance Level in the Quarter during which the supplying of the New Customer(s) began, then (a) PM USA will issue a retroactive payment to Participant such that, for all Quarters during the Grace Period and the Quarter in which Participant began supplying the New Customer, Participant will have earned for the Section an amount equal to the Payment it would have earned based on the Cents per Cigarette Carton Rate corresponding to the higher Performance Level, subject to all payment reductions incurred during the applicable Quarters pursuant to Parts VI.A. and VI.B., and (b) PM USA will issue a retroactive payment to Participant such that Participant will be reimbursed the additional amount that would have been deducted from the list price of all PM USA Cigarettes purchased by Participant for any Quarter during the Grace Period and up to two Quarters following the end of the Grace Period in which a lower Volume-Weighted Terms Rate was applied;

d. If Participant achieves Performance Level 3 in the applicable Section during any Quarter of the Grace Period, the Grace Period will terminate and PM USA will issue retroactive payments as set forth in Part VIII.B.2.c. above; and

e. Participant will not be permitted to request changes to the terms and conditions set forth in this Part VIII.B. governing an ongoing Grace Period, nor will Participant be granted an additional Grace Period with respect to any acquisitions, affiliations or changes in business that occur during an ongoing Grace Period.

## **IX. ACQUISITIONS, SALES, AND CHANGES IN CONTROL.**

### **A. Acquisitions.**

1. **Assumption of Debt Owed to PM USA.** If Participant acquires all or a substantial part of the business or assets of any Person that is a Distributor or retailer of cigarettes, Participant automatically will be deemed to have assumed and will timely pay any and all outstanding debt and other financial obligations of that Person to PM USA.

2. **Prorating of Payments.** If Participant acquires all or a substantial part of the business or assets of a Direct Distributor that participates in the Program, PM USA may, in its sole discretion, prorate between Participant and the acquired Direct Distributor any Payments that may be due and payable to Participant or such Direct Distributor.

**B. Sales and Changes in Control.** In the event of a sale by Participant of all or a substantial part of Participant's business or assets or a Change in Control:

1. **No Assignment.** Participant may not assign any of its rights under this Agreement to any Person, including the purchaser or surviving entity of a Change in Control, without the prior written consent of PM USA. If the purchaser or surviving entity is not a Direct Distributor, then in order to be eligible to participate in the Program after the sale or Change In Control, the purchaser or surviving entity must first become a Direct Distributor, which is subject to the approval of PM USA in its sole discretion;

2. **Prorating of Payments.** If the purchaser or surviving entity of a Change in Control is a Direct Distributor that participates in the Program, PM USA may, in its sole discretion, prorate between Participant and such Direct Distributor any Payments that may be due and payable to each; and

3. **Immediate Termination.** If Participant has not obtained PM USA's written consent prior to the occurrence of a sale of all or a substantial part of Participant's business or assets or a Change in Control, PM USA will have the right to immediately terminate this Agreement pursuant to Part XI.D.6. of this Agreement.

## **X. GENERAL OBLIGATIONS OF PARTICIPANT UNDER THE PROGRAM.**

**A. Purchase or Shipment of Top Ten PM USA Packings.** Participant will not purchase the Top Ten PM USA Packings from any source except PM USA or an Affiliated Program participant, and Participant will not ship any such packings to any non-Affiliated Program participant. The Top Ten PM USA Packings are set forth in Exhibit A. A list of Program participants is available on [www.WEBUYPM.com](http://www.WEBUYPM.com).

**B. Returns of PM USA Packings for Resale.** Participant will not accept Returns of PM USA Products for the purpose of resale if (1) the PM USA Cigarettes consist of any packings listed on Exhibit A, or (2) PM USA otherwise prohibits the acceptance of such Returns.

**C. Payment-Eligible Volume Obligation.** A Participant's Payment-Eligible Outbound Shipments of PM USA Cigarettes for all Sites combined, will comprise no less than 60% of its Outbound Shipments of PM USA Cigarettes for all Sites combined in any Quarter.

**D. Value-Added Services Obligations.** Participant will provide to PM USA the following value-added services with respect to each of Participant's Sites and Related NDDs:

1. With respect to a Promotion pursuant to which PM USA reduces the price at which it sells specified PM USA Products by a specified off-invoice allowance (or temporary reduction in price) or offers such product at a special reduced list price, Participant will cause each Site and Related NDD to reduce the price at which such Site or Related NDD sells such specified PM USA Products by no less than the amount of the off-invoice allowance (or temporary reduction in price or difference in list prices) provided by PM USA on such PM

USA Products. Further, Participant will cause each Site and Related NDD to indicate its regular prices and all applicable off-invoice allowances on all invoices for such specified PM USA Products, except invoices for such PM USA Products delivered to Minnesota or wherever else prohibited by law. Participant acknowledges that PM USA reserves the right to modify or cancel any Promotion at any time.

2. Maintain distribution and inventory of PM USA Products, brands and packings in varieties and quantities appropriate to satisfy market demand.

3. Accept and distribute all new PM USA Products, brands, packings and Promotional Products in accordance with PM USA's terms and requirements communicated from time to time. For each new PM USA Non-Cigarette Product accepted by Participant, Participant will accept and distribute all Promotional Products associated with such PM USA Non-Cigarette Product in accordance with PM USA's terms and requirements for each such Promotional Product. Notwithstanding Parts XI.C. and D. of this Agreement, Participant's failure to accept and distribute such Promotional Products will result only in Participant's ineligibility to purchase or distribute such PM USA Non-Cigarette Product for such period of time as PM USA shall determine.

4. Maintain inventory in an amount designated by PM USA of each new PM USA Product, brand or packing launched by PM USA for a minimum of six (6) months from the date of initial receipt of such product, brand or packing from PM USA, or for such other period as PM USA may designate.

5. Include in the Site's and Related NDD's retail order materials all PM USA Products, brands and packings carried in the Site's and Related NDD's respective inventories.

6. Provide computer-generated invoices and receipts to all Customers for all Outbound Shipments shipped from the Site or Related NDD by UPC/SKU for (i) all cigarettes of all Manufacturers, and (ii) all products of all Manufacturers in each of the Product Categories for which Participant distributes a corresponding PM USA Non-Cigarette Product, and only for each Section where such corresponding PM USA Non-Cigarette Product is distributed.

7. Accept Returns of PM USA Products for delivery to PM USA when directed by PM USA in accordance with returned goods special initiatives or otherwise.

8. YTP Requirements:

a. Ensure that all personnel who meet with Customers that sell tobacco products view the We Card training video produced by the Coalition for Responsible Tobacco Retailing and are trained on how to supply those Customers a We Card order form at least once annually; provide a certification that all such personnel have received the training within the 12 months before the Effective Date of this Agreement.

b. Ensure that all new employees will view the We Card training video and are trained on how to supply Customers a We Card order form within 90 days of their hire.

c. Make WE CARD Items and We Card Signs available at each Site and each Related NDD.

d. Print the WE CARD logo and instructions for obtaining information regarding the WE CARD Program on every invoice for the sale of cigarettes and PM USA Non-Cigarette Products issued by each Site and Related NDD.

e. Comply with other WE CARD and YTP requirements, as specified by PM USA.

9. Inventory Storage Requirements:

a. Store all PM USA Products available for sale (i) away from excessive heat and sunlight; (ii) away from excessive odors; (iii) above floor level; and (iv) in accordance with other detailed specifications that PM USA may provide from time to time.

b. Ship all PM USA Products on a first-in-first-out basis unless directed otherwise by PM USA.

c. Segregate from inventory available for sale all Non-Saleable PM USA Products.

10. Participant will limit the resale of all PM USA Products involved in a PM USA-designated Test Market to the geographical areas specified by PM USA.

**E. Disclosure Obligations.**

1. **Initial Disclosures.** At the time of execution of this Agreement, Participant will disclose to PM USA the following information:

a. All Sites (including payment addresses) from which Participant makes Outbound Shipments;

b. All Distributors or retailers that are Affiliates of Participant or with which Participant or Participant's principals have any other type of affiliation, including by way of a non-controlling interest, whether directly or indirectly (through another person or entity) and all locations from which any such Affiliates or other Distributors or retailers ship or sell cigarettes or non-cigarette products in Product Categories and in geographic locations specified in Exhibit A;

c. All Distributors with which Participant has an oral or written agreement directly or through any Affiliate regarding the tax stamping, ordering, purchasing, billing, delivering, warehousing, returns processing, promotion handling, or other handling of cigarettes or non-cigarette products in Product Categories and in geographic locations specified in Exhibit A;

d. Participant's officers and directors, and Participant's senior managers principally responsible for Participant's financial and operating performance under this Agreement;

e. All states in which Participant engages in the distribution of or wholesale business of selling cigarettes or PM USA Non-Cigarette Products, or into which Participant ships (or causes to be shipped) cigarettes or PM USA Non-Cigarette Products. For each such state, Participant must provide to PM USA a copy of Participant's license or permit to engage in the distribution of or wholesale business of selling cigarettes or PM USA Non-Cigarette Products in that state, or to ship cigarettes or PM USA Non-Cigarette Products within that state. Upon renewal of any such license or permit, Participant will promptly provide to PM USA any documents evidencing such renewal. If Participant does not have a license or permit for a particular state, Participant must provide documentation from that state demonstrating that Participant is exempt from the state's licensing or permitting requirements;

f. All convictions of Participant, its officers, principals or owners with Control for any criminal offense related to the sale or distribution of cigarettes or other tobacco products that occurred after January 1, 2006; and

g. Whether Participant, any Affiliated Distributor or Retailer, or an officer, principal or owner with Control of Participant or any Affiliated Distributor or Retailer is engaged in the sale or distribution of PM USA Cigarettes or PM USA Non-Cigarette Products over the Internet or by telephone or mail order.

2. **Obligation to Supplement Initial Disclosures.** Participant will supplement the information required to be disclosed pursuant to Part X.E.1. by completing the relevant sections of Pages 1 and 2 of this Agreement, or Exhibit B as soon as Participant becomes aware of, but no later than seven (7) days prior to, any change in the previously submitted information. Participant will supplement or correct in the same manner all information disclosed under Part X.E.1. or this Part X.E.2. if Participant becomes aware that any information disclosed is incomplete or incorrect. Notwithstanding the preceding two sentences, if disclosure no later than seven (7) days in advance is prohibited by law or impossible under the circumstances, the disclosure will be made as soon as the disclosure is no longer prohibited by law or as soon as possible.

**3. Disclosures Regarding Acquisitions, Sales and Changes in Control.** Participant will notify PM USA using the relevant sections of Pages 1 and 2 of this Agreement (or such form as PM USA may designate) and any necessary attachments thereto, no later than seven (7) days prior to the consummation of any (a) acquisition by Participant directly or indirectly of all or a substantial part of the business or assets of any Distributor or retailer of cigarettes, (b) sale by Participant of all or a substantial part of Participant's business or assets, or (c) Change in Control of Participant. Notwithstanding the preceding sentence, if disclosure no later than seven (7) days in advance is prohibited by law or impossible under the circumstances, the notice will be given as soon as it is no longer prohibited by law or as soon possible.

**4. Financial Records.**

**a. Annual Statements.** Participant must submit annual financial statements (including balance sheets, income statements, cash flow statements, opinion letters and the accompanying notes or supplementary schedules) that are either:

(i) reviewed or audited by an independent certified public accountant, in accordance with Generally Accepted Accounting Principles; or

(ii) in a compiled format and certified by an officer of Participant that the statements are correct to the best of their knowledge.

A Participant that submits compiled annual financial statements will be placed on Payment Terms set forth in Part VII.H. Furthermore, PM USA reserves the right to require such Participant to submit either audited or reviewed financial statements at any time in its sole discretion.

**b. Quarterly Statements.** Upon PM USA's request, Participant must submit quarterly financial statements (including balance sheets, income statements, cash flow statements and the accompanying notes or supplemental schedules) that have been prepared by a certified public accountant, consistent with Generally Accepted Accounting Principles.

**c. Timing of Disclosure.**

(i) The records specified in subparagraph a. must be provided to the PM USA Credit Department, Attn; Credit Manager, 2<sup>nd</sup> Floor, P.O. Box 26603, Richmond, VA 23261, no later than May 1 of each calendar year for the prior calendar year, or within four (4) months after the end of Participant's (or Related Distributor's) fiscal year if Participant's (or Related Distributor's) fiscal year-end is not the calendar year-end.

(ii) The records specified in subparagraph b. must be provided to the PM USA Credit Department, Attn; Credit Manager, 2<sup>nd</sup> Floor, P.O. Box 26603, Richmond, VA 23261, no later than ninety (90) days after the end of each calendar or fiscal quarter.

**5. Requests for Additional Disclosures.** Participant will timely comply with any requests by PM USA for additional information or documents regarding Participant's disclosures made pursuant to any subsection of this Part X.E. or Participant's satisfaction of its obligations under this Agreement. Participant also will timely comply with any requests by PM USA for books, records or documentation required to be maintained by Participant under Part X.G. of this Agreement.

**F. Obligation Not to Engage in Prohibited Conduct.** Participant will not engage, directly or indirectly, in any of the following activities and will ensure that its Related NDDs do not engage, directly or indirectly, in any of the following activities:

**1. Sales in Violation of the Law.** The sale, use or distribution of PM USA Products in a manner that violates federal, state, local or other applicable laws or regulations;

**2. Sales in Violation of PM USA Policies.** The sale, use or distribution of PM USA Products in violation of PM USA Trade Policies;

**3. Sales of Non-Saleable PM USA Products.** The sale, use or distribution of Non-Saleable PM USA Products;

**4. Exports.** The export of PM USA Products (or products manufactured by or for an Affiliate of PM USA) directly or indirectly to Persons located outside of the United States; and

**5. Imports.** The import of products manufactured by an entity other than PM USA bearing PM USA-owned or exclusively licensed trademarks.

**G. Document Retention.** Participant will, and will cause each of its Sites and Related NDDs to, maintain complete and accurate books and records and retain all documentation with respect to its performance under this Agreement for a minimum of three (3) calendar years after the date the documentation was created or for such longer period as required by law. Such documentation will include, without limitation, customer invoices; historical reports regarding Outbound Shipments, Returns, Customers and Inventory; MSA Confirmations; documents evidencing Participant's reconciliation of Data in accordance with Part II.A.5. of this Agreement; shipping logs; bills of lading; cash receipts; accounts receivable records; state excise or use tax returns as filed in any state and all supporting schedules; documents sufficient to evidence the payment of all applicable state and local taxes (including the purchase of tax stamps) for all products; filed federal and state income tax returns; financial statements and all supporting financial records, books of account, reports and data; documents evidencing that Participant has any required licenses to operate as a seller of tobacco products in the state(s) in which it distributes PM USA Products that contain tobacco; distribution licenses, tax stamping licenses, and all other licenses and permits; and historical records of Physical Inventories with corresponding adjustments (by UPC/SKU) to inventory systems and reconciliation reports.

**H. Audits and Inspections.** Upon PM USA's request, Participant will, and will cause each of its Sites and Related NDDs to, permit PM USA, or any PM USA designee, to audit, review and inspect, with or without notice, its books, records, documentation (including all documents required to be retained under Part X.G. of this Agreement), cigarette and non-cigarette product inventory (where applicable) and premises and to interview its officers and employees as necessary, in PM USA's sole discretion, to evaluate Participant's satisfaction of its obligations under this Agreement or Participant's right to receive any benefits under this Agreement. If PM USA requests, Participant will submit full and complete copies of documentation to PM USA or any PM USA designee in lieu of, or in addition to, PM USA or a PM USA designee conducting an on-site audit, review or inspection. Audits, reviews and inspections may include, or consist only of, physical inventories or physical inspections conducted by or on behalf of PM USA of all cigarettes and non-cigarette products (where applicable) in Participant's possession or under its control, and Participant will cause cigarettes and non-cigarette product inventory (where applicable) to be conveniently available for these purposes.

**I. Compliance with Laws.** Participant will comply with all applicable laws, regulations, and ordinances relating to this Agreement, Participant's performance of this Agreement, and the sale, use or distribution of PM USA Products. Participant represents and warrants that it has obtained all licenses, permits, consents and other authorizations necessary for the conduct of its business and that it will maintain all such licenses, permits, consents and other authorizations in full force and effect throughout the term of this Agreement. Participant further represents and warrants that it has taken appropriate steps to ensure that it has paid or will timely pay all applicable taxes on PM USA Products (excluding federal excise tax on cigarettes and non-cigarette products). Participant will comply with all federal, state, local or other laws, regulations and ordinances applicable to the sale of tobacco products, including the Federal Cigarette Labeling and Advertising Act (15 U.S.C. § 1331 et seq.) and state laws promulgated in connection with the Master Settlement Agreement.

**J. Compliance with PM USA Trade Policies.** Participant will comply with PM USA Trade Policies applicable to Participant as such policies may be issued or modified by PM USA from time to time.

**K. No Financial Harm to PM USA.** Participant will not be a party to, or otherwise participate in a commercial transaction that may result, directly or indirectly, in a financial loss to PM USA.

**L. Non-Disparagement.** Participant will not disparage PM USA or its products or brands.

**M. Retail Leaders Participation.** Each Affiliate of Participant that is a retailer of cigarettes will participate in, and be in compliance with the terms and conditions of, the PM USA Retail Leaders Program in effect during the term of this Agreement; provided however, that Affiliates of Participant that meet the eligibility

Participation Agreement

requirements for the PM USA Wholesale Club Program will participate in, and be in compliance with the terms and conditions of such program in effect during the term of this Agreement.

## **XI. PM USA REMEDIES**

**A. Withholding of Payments.** Notwithstanding anything to the contrary contained in this Agreement, PM USA reserves the right to withhold, delay or adjust any Payment if PM USA determines that Participant is in violation of any term or condition of this Agreement or if PM USA determines that there is a need to review, investigate or resolve issues relating to Participant or Participant's satisfaction of its obligations under this Agreement.

**B. Recovery of Payments Based on Incorrect Data.** If PM USA determines during or after the term of this Agreement that Participant has at any time submitted incorrect Data or other information relating to its performance in the Program or a prior Wholesale Leaders program, whether or not Participant knew such Data or information was incorrect, and PM USA further determines that based on such incorrect Data or information PM USA, in accordance with the terms of this Agreement, made Payments or granted other benefits (including but not limited to, Terms Rates) to Participant that were in excess of the Payments or benefits Participant would have received if the Data or information had been correct, Participant will be obligated to promptly repay to PM USA the amount of any such excess payments or benefits.

**C. Forfeiture of Payments.** Participant will forfeit all Payments that have not yet been delivered to Participant for any Quarter and will forfeit and be obligated to promptly (i) repay to PM USA the amount of all Payments for the Quarter(s) in which the failure(s) occurred; and (ii) if directed by PM USA, pay an amount equal to all Payments made to Participant for up to three (3) additional Quarters, under the following circumstances:

**1. Knowing Submission of Incorrect Data.** If Participant knowingly, as determined by PM USA, submits incorrect Data or other information relating to its or a Related NDD's performance in the Program;

**2. General Obligations of Participant under the Program.** If Participant fails to meet any one (1) or more of the General Obligations of Participant under the Program, as set forth in Part X. of this Agreement, other than its Value-Added Services Obligations set forth in Part X.D.; provided however, that Part XI.C.(ii). will not be applied for a failure to meet the Payment-Eligible Volume Obligation (Part X.C.); and

**3. Value-Added Services Obligations.** If Participant fails during any Quarter to meet any one of its Value-Added Services Obligations set forth in Part X.D. after having received two (2) prior written warnings from PM USA during that Quarter with respect to the same failure.

**D. Immediate Termination of this Agreement.** PM USA may terminate this Agreement immediately upon delivery of notice to Participant if any of the following events occur:

**1.** The failure of Participant to meet its obligations under this Agreement such that Participant is subject to the forfeiture of Payments under Part XI.C.;

**2.** The failure of Participant to place at least one order from PM USA during each Quarter that consists of at least 162,000 cigarettes, units of non-cigarette products, or any combination thereof (excluding Promotional Product).

**3.** The institution of proceedings, whether voluntary or involuntary, wherein Participant is adjudicated as bankrupt or insolvent, or the consent by Participant to institution of bankruptcy or insolvency proceedings against it or the filing by Participant of a petition or answer or consent seeking reorganization or release under the federal Bankruptcy Code, or any other applicable federal or state law, or the consent by Participant to the filing of any such petition or the appointment of a receiver, liquidator, assignee, trustee or other similar official, of Participant, or of any substantial part of Participant's property, or the making by Participant of an assignment for the benefit of creditors, or the taking of corporate action by Participant in furtherance of any such action;

4. The oral or written admission by Participant to one (1) or more of its secured or unsecured creditors that Participant is unable to pay its debts as they become due;

5. PM USA, in its sole discretion, deems itself insecure of Participant's ability to abide by the terms and conditions of this Agreement or any other oral or written agreement by and between PM USA and Participant, or of Participant's ability to pay any sums due or to become due to PM USA; or

6. The sale by Participant of all or a substantial part of Participant's business or assets or Change in Control of Participant.

**E. Remedies Cumulative, Not Exclusive.** The rights and remedies of PM USA under Parts VI, XI, and XII.G. of this Agreement are cumulative and not exclusive of one another or of any other remedies afforded to PM USA under this Agreement or applicable law. PM USA may, in its sole discretion, seek any applicable remedy under this Agreement or otherwise, even if another more specifically tailored or lesser remedy is provided for under this Agreement.

## **XII. GENERAL TERMS AND CONDITIONS**

**A. Effective Date of Agreement.** Eligibility for participation in the Program is limited to Persons who are Direct Distributors. Participation is effective upon (1) execution of this Agreement; (2) receipt by PM USA of all disclosures required of Participant by Part X.E.1.; and (3) acceptance of this Agreement by PM USA.

**B. Undisclosed Related Distributor.** Where PM USA deems it necessary and appropriate to maintain the integrity and purposes of the Program, PM USA may determine, in its sole discretion, that a Distributor that is not an Affiliate of Participant is nevertheless a Related Distributor for purposes of calculating PM USA Share and Payments under this Agreement. In the event that PM USA determines, in its sole discretion, that any Distributor not disclosed by Participant on Page 1 of this Agreement is a Related Distributor, PM USA will so notify Participant in writing.

**C. PM USA Determinations Final.** PM USA will make all calculations necessary to determine (1) when a Payment is earned and payable, the amount of such Payment, and when such Payment will be made (including the boundaries of any Section, the calculation of PM Qualified Shipments, Industry Qualified Shipments and Payment-Eligible Outbound Shipments used to determine such Payment), and (2) when a Terms Rate is available and the amount of any applicable Terms Rate. All such determinations and calculations by PM USA will be final.

**D. Resolution of Certain Issues.** In the event that (1) an issue arises with respect to the accuracy of Data submitted by Participant under Part II.A., Participant's compliance with this Agreement in any respect or Participant's rights to obtain benefits under this Agreement; (2) Participant cannot or does not timely produce, upon PM USA's request, books, records or documentation required to be maintained by Participant under Part X.G.; and (3) PM USA reasonably believes that such requested books, records or documentation contain information that would assist in the resolution of the issue, then, with respect to any dispute between PM USA and Participant in which such books, records and documentation would have been involved (as evidence or otherwise), Participant agrees that it will be precluded from relying on any such books, records or documentation if later produced by Participant and from asserting any position with respect to facts or circumstances that such missing books, records or documentation might have proven if they had been available.

**E. Modification/Termination of Program.** Notwithstanding anything contained in this Agreement to the contrary, PM USA reserves the right to alter, amend or modify the terms and conditions of this Agreement, or terminate the Program, at any time and for any reason, upon notice to all Program participants. PM USA may amend or modify this Agreement from time to time in its sole discretion by providing written notice to Participant. Participant's purchase of PM USA Products from PM USA after notice of such amendment or modification will constitute Participant's acknowledgement and acceptance of the terms of this Agreement as so amended or modified.



**F. Alteration of Terms.** No PM USA field sales force personnel have the authority to modify, amend or otherwise alter any terms or conditions of this Agreement.

**G. Termination of this Agreement upon Notice.** In addition to any other rights and remedies provided in this Agreement, either Participant or PM USA may terminate this Agreement, with or without cause, effective thirty (30) days after notice to the other in accordance with the notice requirements set forth herein.

**H. Results of Termination - Termination of Direct-Buying Status.** If PM USA terminates this Agreement, other than as a result of the replacement of this Agreement or the termination of the Program with respect to all Direct Distributors, Participant will not be permitted to buy PM USA Products directly from PM USA.

**I. Ownership of Data.** All Data submitted by Participant will become the property of PM USA and will be subject to the confidentiality provisions of Part XII.J. of this Agreement.

**J. Confidentiality.**

1. Participant and its employees and agents will hold strictly confidential all information and materials provided by PM USA to Participant that are designated by PM USA as confidential. Participant will not use or disclose to any third party any such information or materials without the prior, written consent of PM USA; provided, however that Participant may disclose, after giving PM USA notice and an opportunity to seek a protective order or other relief, such information or materials as may be required by law, regulation, rule, order, or legal, judicial or administrative process, or in cooperation with requests of governmental authorities. Participant's obligation to maintain such confidentiality will survive the termination of this Agreement.

2. PM USA and its employees and agents will hold strictly confidential all information and materials provided by Participant to PM USA that are designated by Participant in writing as confidential. PM USA will not use or disclose to any third party any such information or materials without the prior written consent of Participant; provided, however, that (a) PM USA may include customer-specific Data in presentations to that particular customer, (b) PM USA may use and disclose Data for any purpose, provided that such Data is stripped of all information that would specifically identify Participant as the source of the Data; (c) PM USA may disclose any information or materials provided by Participant to PM USA's agents and independent contractors, including without limitation employees, attorneys, consultants and accountants, and (d) PM USA may disclose any information or materials provided by Participant as may be required by law, regulation, rule, order, or legal, judicial or administrative process, or in an effort to cooperate with governmental authorities. PM USA's obligation to maintain confidentiality will survive the termination of this Agreement.

**K. PM USA Brand Indicia.** Participant recognizes and acknowledges that the PM USA brand names and the designs, emblems, slogans and insignia of the PM USA brands, and the goodwill associated therewith ("PM USA Brand Indicia"), have great value and are the sole property of PM USA, and Participant agrees that it has and will claim no right, title or interest in or to any PM USA Brand Indicia or the right to use any PM USA Brand Indicia except in accordance with the terms and conditions of this Agreement. Participant also agrees that it will not use any PM USA Brand Indicia in its corporate or trade name and will not use any PM USA Brand Indicia in marketing its business except to promote the sale of PM USA Products to its Customers. Participant will advertise or communicate PM USA Brand Indicia accurately as of the time of such advertisement or communication, including with respect to price lists, invoices, or other similar documentation.

**L. Independent Status.** This Agreement will not be construed to create an association, partnership, joint venture, relation of principal and agent, or employer and employee between PM USA and Participant or its employees, agents or subcontractors, within the meaning of any federal, state or local law. Participant is not authorized to and will not enter into any agreement, oral or written, on behalf of PM USA or otherwise obligate PM USA without PM USA's advance, written approval.

**M. Indemnification.** Participant agrees to indemnify and hold harmless PM USA, its Affiliates and each of their respective officers, employees, directors and agents from all claims, liabilities, costs and expenses, including reasonable attorneys' fees that arise from, or may be attributable to any error, omission or fault of Participant. Participant's obligation to indemnify and hold harmless PM USA, its Affiliates and each of their respective officers, employees, directors and agents will survive the termination of this Agreement. PM USA will have primary control of the defense or settlement of any such claim; provided, however, that Participant will have

the right to participate at its own expense in the defense or settlement of any such claim that is asserted against Participant.

**N. Deductions or Setoff.** Participant agrees that it will not make any deduction from any amount due to PM USA at any time, whether under this Agreement or any other agreement between PM USA and Participant, and whether under a claim of offset, recoupment, dispute or otherwise. Participant agrees that PM USA, however, may, but is in no way obligated to, recoup, offset or otherwise reduce or withhold any Payment or payment under any other agreement between PM USA and Participant from or by any outstanding amount due to PM USA from Participant hereunder or there under (including amounts due to PM USA under the provisions of Parts XI.B. and XI.C. of this Agreement).

**O. Exercise of Rights; Non-Waiver.** Neither failure nor delay on the part of PM USA to exercise any right, power, or privilege hereunder will operate as a waiver or relinquishment thereof, nor will any single or partial exercise of any other right, power or privilege hereunder preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

**P. No Assignment.** This Agreement and all rights and obligations described in it are personal to Participant and PM USA, and may not be assigned in whole or in part, either directly or by operation of law.

**Q. Participation Costs.** Payments made by PM USA to Participant under this Agreement are made in full and complete consideration of Participant's strict compliance with the terms and conditions of this Agreement. Participant will bear its own costs and expenses in performing its obligations under this Agreement.

**R. Taxes.** Any tax liabilities, including but not limited to income, sales, transfer, use or excise taxes payable in connection with the Payments and other transactions contemplated by the Program, if any, are the sole responsibility of and will be paid by Participant.

**S. Attorneys' Fees.** In the event that PM USA is required to engage the services of any attorneys for the purpose of enforcing this Agreement, or any provision thereof, PM USA will be entitled to recover its reasonable expenses and costs in enforcing this Agreement or provision, including attorneys' fees.

**T. Construction.** The parties to this Agreement have had the opportunity to consult legal counsel regarding the terms hereof, and, therefore, this Agreement will not be construed for or against either party hereto.

**U. Governing Law.** This Agreement will be governed by and construed under the internal laws of the Commonwealth of Virginia as applied to agreements among Virginia residents entered into and to be performed entirely within Virginia, without reference to principles of conflict of laws or choice of laws.

**V. Dispute Resolution.**

**1. Scope.** Any dispute, controversy or claim arising out of or relating in any way, either directly or indirectly, to this Agreement or the applicability, breach, termination or validity thereof, including, but not limited to, (a) assertions as to the inducement of this Agreement by fraud or otherwise and (b) the applicability, interpretation, validity or enforceability of the provisions of this Agreement relating to arbitration and arbitration procedures (collectively, "Disputes") will be exclusively and finally resolved by arbitration administered by the American Arbitration Association (the "AAA") in accordance with the provisions of this Part XII.V. The parties agree that this Part XII.V. will apply even where there are third parties to or involved in a dispute, controversy or claim covered by this Part XII.V.

**2. Governing Rules; Location.** The arbitration will be conducted in accordance with the rules and procedures set forth in this Part XII.V. and the then-applicable Commercial Arbitration Rules of the AAA (the "AAA Rules"). In the event of a conflict, the rules and procedures set forth in this Agreement will control. The arbitration will take place in Richmond, Virginia.

**3. Notice.** The commencement of an arbitration proceeding will be triggered by the delivery by one party to the other of written notice demanding the commencement of arbitration.

**4. Arbitrators Number, Selection and Qualifications.** In any dispute in which the amount in controversy is less than \$1,000,000, there will be one arbitrator agreed to by the parties or, if the parties are unable to agree within thirty (30) days after demand for arbitration is made, selected in accordance with the AAA Rules. In all other cases there will be three (3) arbitrators, the first of whom will be selected by PM USA and the second of whom will be selected by Participant and any other parties opposing PM USA, if any, within thirty (30) days after delivery of the demand for arbitration. The remaining arbitrator will chair the panel, and be selected by the nominated arbitrators within thirty (30) days after their selection. If one (1) or more arbitrators are not selected within the permitted time periods, the missing arbitrators will be selected in accordance with the AAA Rules. The arbitrators must be neutral, independent, disinterested and impartial.

**5. Other Requirements.** The arbitrators will be bound by and required to apply the internal laws of the Commonwealth of Virginia, in accordance with Part XII.U. of this Agreement with respect to the dispute, controversy or claim that is the subject of the arbitration; provided, however, that the Federal Arbitration Act will govern the arbitration provisions of this Agreement and any arbitration procedures conducted under this Agreement. The arbitrators will have the authority to grant any remedy or relief the arbitrators deems just and equitable, including injunctive relief, specific performance, and reasonable costs and expenses of the arbitration and attorney's fees. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The arbitration proceeding and all materials, submissions and documents relating thereto will be treated as confidential in accordance with the provisions of Part XII.J. of this Agreement.

**6. Expenses.** Except as otherwise provided for in this paragraph, elsewhere in this Agreement or by the arbitrator's decision, each party will pay its own attorneys' fees and one-half (½) of the costs of arbitration. If any party breaches the provisions of this Part XII.V. by bringing an action in any forum not specifically provided for hereby, such party will pay the reasonable attorneys' fees and expenses incurred by the other party in connection with such proceedings.

**W. Submission to Jurisdiction.** Subject to Part XII.V. of this Agreement, each of the parties hereto hereby agrees that all actions, suits or other proceedings arising out of or relating in any way to this Agreement will be brought only in (i) the General District Court and Circuit Court of the Commonwealth of Virginia, Henrico County or (ii) the United States District Court for the Eastern District of Virginia, Richmond Division. Each of the parties hereto hereby knowingly, voluntarily, intelligently, absolutely and irrevocably waives and agrees not to assert any objection he, she or it may now or hereafter have to the laying of venue of all actions, suits or proceedings arising out of or relating in any way to this Agreement in such courts and irrevocably consents to the jurisdiction of such courts for such purposes. Each of the parties hereto hereby knowingly, voluntarily, intelligently, absolutely and irrevocably waives and agrees not to assert in any such action, suit or proceeding that he, she or it is not subject to the personal jurisdiction of such courts or that the action, suit or proceeding should be transferred to a different venue under forum non conveniens principles or statutes embodying such principles. The parties agree that this Part XII.W. will apply even where there are third parties to or involved in an action, suit or other proceeding covered by this Part XII.W.

**X. Waiver of Jury Trial.** Each of the parties hereto hereby knowingly, voluntarily and intelligently waives any rights he, she or it may have to a trial by jury with respect to any litigation based hereon, or arising out of, under, or in connection with, this Agreement or any course of conduct, course of dealing, oral or written statements or actions of any of the parties hereto in connection with this Agreement. This provision is a material inducement for PM USA to enter into this Agreement.

**Y. Severability.** If any provision of this Agreement is held invalid or unenforceable, the remaining provisions will remain in effect.

**Z. Notices.**

**1.** If at any time PM USA wishes to give any notice or other communication to all Program participants, including notices of alterations, amendments or modifications of this Agreement or the termination of the Program, PM USA may deliver such notice or other communication to Participant via electronic mail to the address listed on this Agreement.

**2.** Except as permitted by the preceding paragraph, all notices and other communications required or permitted hereunder will be in writing and will be deemed to have been duly given: (a) when received if personally delivered; (b) when transmitted if transmitted by facsimile, upon receipt of telephonic confirmation; (c)

the date after it is sent, if sent by next-day delivery to a domestic address by recognized overnight delivery service (e.g., FedEx, United Parcel Service); and (d) upon receipt, if sent by certified or registered mail, return receipt requested. In each case notice will be provided as follows:

To Participant: At the address, facsimile number or e-mail address listed on this Agreement.

To PM USA: By delivery of such Notice to the PM USA Section Sales Director for the Section in which Participant has its principal business office. Addresses of PM USA Section Sales Offices are available on [www.WEBUYPM.com](http://www.WEBUYPM.com).

**AA. Counterparts; Execution.** To facilitate execution, this Agreement may be executed in as many counterparts as may be required, and each such counterpart hereof will be deemed to be an original instrument, but all such counterparts together will constitute but a single agreement.

**BB. Titles and Headings.** The titles, headings and captions used in this Agreement are used for convenience only and are not to be considered in construing or interpreting this Agreement. All references in this Agreement to Parts, paragraphs, subparagraphs, and exhibits, if any, will, unless otherwise provided, refer to paragraphs and subparagraphs of this Agreement and the exhibits incorporated therein by reference.

**CC. Entire Agreement.** This Agreement constitutes the entire agreement between the parties hereto and supersedes all prior and contemporaneous proposals, discussions, understandings and agreements, whether oral or written, between the parties on this subject matter.

**DD.** This Agreement must be signed and accepted by a duly authorized officer of Participant.

**End of Document**

# **EXHIBIT B**

# PHILIP MORRIS USA INC. WHOLESALE LEADERS 2008 PROGRAM PARTICIPATION AGREEMENT

This Participation Agreement (the "Agreement"), by and between Philip Morris USA Inc., a Virginia corporation ("PM USA"), and the party identified below ("Participant"), sets forth the terms and conditions of the PM USA Wholesale Leaders 2008 Program (the "Program"). The following exhibits, which PM USA may amend at any time, are a part of the Agreement: (i) Exhibit A - Wholesale Leaders 2008 Measures, (ii) Exhibit B - Wholesale Leaders 2008 License Disclosure Form, (iii) Exhibit C - 2008 STARS Tobacco Products Reporting Package ("2008 STARS Reporting Package"), (iv) Exhibit D - 2008 Distributor Shipment Examples, and (v) Exhibit E - Accelerated Payment Option Election Form.

## Participant Information:

|   |   |
|---|---|
| Participant Name: <input type="text" value="Mauro Pennisi Inc."/>   |   |
| Street Address - Line 1: <input type="text" value="78 West Hoffman Ave"/>   | Payment Address - Line 1: <input type="text" value="78 West Hoffman Ave"/>  |
| Street Address - Line 2: <input type="text"/>   | Payment Address - Line 2: <input type="text"/>  |
| City: <input type="text" value="Lindenhurst"/> State: <input type="text" value="NY"/> Zip: <input type="text" value="11757"/> | City: <input type="text" value="Lindenhurst"/> State: <input type="text" value="NY"/> Zip: <input type="text" value="11757"/> |
| E-mail Address: <input type="text" value="Pennisi78@AOL.COM"/>  |   |
| PM USA MA #: <input type="text" value="38038"/>   |   |
| Territory #: <input type="text" value="132700"/>  | District #: <input type="text" value="137600"/>   |
| Agreement Effective Date: <input type="text" value="Q1 2008"/>  |   |

Complete all fields below. Attach Excel spreadsheets, if necessary, as follows: In Adobe Reader, click "Tools -> Commenting -> Attach File Tool". Navigate to the desired file and click "Select".

## Contacts:

|                              |  |
|------------------------------|--|
| Contact for Data Compliance: | <input type="text" value="Joe Rubal"/>         |
| Data Contact Phone #:        | <input type="text" value="631-226-0055"/>      |
| Data Contact E-mail Address: | <input type="text" value="Pennisi78@AOL.COM"/> |
| Data Contact Fax #:          | <input type="text" value="631-226-3133"/>      |

|                                       |  |
|---------------------------------------|--|
| Contact for State License Compliance: | <input type="text" value="Joe Rubal"/>         |
| Contact Phone #:                      | <input type="text" value="631-226-0055"/>      |
| Contact E-mail Address:               | <input type="text" value="Pennisi78@AOL.COM"/> |
| Contact Fax #:                        | <input type="text" value="631-226-3133"/>      |

## A. Participant's Sites. Please list each Site (location from which Participant ships cigarettes and/or PM USA non-cigarette products.)

|                           |   |
|---------------------------|---|
| Site:                     | <input type="text" value="Lindenhurst"/>  |
| Street Address - Line 1:  | <input type="text" value="78 West Hoffman Lane"/>   |
| Street Address - Line 2:  | <input type="text"/>  |
| City:                     | <input type="text" value="Lindenhurst"/> State: <input type="text" value="NY"/> Zip: <input type="text" value="11757"/> |
| Payment Address - Line 1: | <input type="text" value="78 West Hoffman Lane"/>   |
| Payment Address - Line 2: | <input type="text"/>  |
| City:                     | <input type="text" value="Lindenhurst"/> State: <input type="text" value="NY"/> Zip: <input type="text" value="11757"/> |

|                           |  |
|---------------------------|--|
| Site:                     | <input type="text"/>   |
| Street Address - Line 1:  | <input type="text"/>   |
| Street Address - Line 2:  | <input type="text"/>   |
| City:                     | <input type="text"/> State: <input type="text"/> Zip: <input type="text"/> |
| Payment Address - Line 1: | <input type="text"/>   |
| Payment Address - Line 2: | <input type="text"/>   |
| City:                     | <input type="text"/> State: <input type="text"/> Zip: <input type="text"/> |

B. **Affiliated Distributors/Retailers.** Please list all Distributors or Retailers who are Affiliates of Participant or with whom Participant or Participant's principals has any other type of affiliation, including by way of a non-controlling interest, whether directly or indirectly (through another person or entity), and each location from which any such Affiliated or other Distributor ships cigarettes or non-cigarette products, as applicable. Describe the nature of the affiliation and indicate whether the Distributor is a Non-Direct Distributor.

|   |                                   |
|---|-----------------------------------|
| <input type="checkbox"/> Distributor    | <input type="checkbox"/> Retailer |
| Name: _____                             |                                   |
| Street Address - Line 1: _____          |                                   |
| Street Address - Line 2: _____          |                                   |
| City: _____                             | State: _____ Zip: _____           |
| Nature of Relationship/Agreement: _____ |                                   |
| Owner/Partner: _____                    |                                   |

|   |                                   |
|---|-----------------------------------|
| <input type="checkbox"/> Distributor    | <input type="checkbox"/> Retailer |
| Name: _____                             |                                   |
| Street Address - Line 1: _____          |                                   |
| Street Address - Line 2: _____          |                                   |
| City: _____                             | State: _____ Zip: _____           |
| Nature of Relationship/Agreement: _____ |                                   |
| Owner/Partner: _____                    |                                   |

C. **Distributors with Whom Participant has Agreements.** Please list all Distributors with whom Participant has any agreements directly or through any Affiliate (oral or written) regarding the tax stamping, ordering, billing, delivering, warehousing, receiving of returns, promotion assembling, or other handling of cigarettes or non-cigarette products, as applicable.

|                                |                         |
|--------------------------------|-------------------------|
| Name: _____                    |                         |
| Street Address - Line 1: _____ |                         |
| Street Address - Line 2: _____ |                         |
| City: _____                    | State: _____ Zip: _____ |
| Nature of Agreement: _____     |                         |
| Owner/Partner: _____           |                         |

|                                |                         |
|--------------------------------|-------------------------|
| Name: _____                    |                         |
| Street Address - Line 1: _____ |                         |
| Street Address - Line 2: _____ |                         |
| City: _____                    | State: _____ Zip: _____ |
| Nature of Agreement: _____     |                         |
| Owner/Partner: _____           |                         |

D. **Participant's Officers, Directors and Senior Managers.** Please list each of Participant's Officers and Directors, and Participant's Senior Managers principally responsible for Participant's performance under this Agreement.

|       |             |        |                |
|-------|-------------|--------|----------------|
| Name: | Joe Pennisi | Title: | President      |
| Name: | Sal Pennisi | Title: | Vice President |
| Name: | _____       | Title: | _____          |
| Name: | _____       | Title: | _____          |
| Name: | _____       | Title: | _____          |

E. **Criminal Convictions.** If Participant, or any of its officers, principals, or owners with Control have been convicted, whether by trial or by plea agreement, of a criminal offense related to the sale or distribution of cigarettes or other tobacco products, between January 1, 2006 and the present, please list the following for each such conviction: Name of person/entity convicted, date of conviction, underlying criminal charge, convicting court and jurisdiction, case number, and resulting fine or sentence. Please indicate whether any conviction has been appealed, and if so the status or result of the appeal.

F. **Internet Sales of PM USA Products.** Please indicate whether Participant, any Affiliated Distributor or Retailer, or an officer, principal, or owner with Control of Participant or any Affiliated Distributor or Retailer is engaged in the sale or distribution of PM USA Products over the Internet or by telephone or mail order. For any such entity or person, please provide the name, physical address of the business and the Internet address, if applicable.


By its signature below, Participant:

- 1) represents that it has taken all action necessary to, and is authorized to, enter into and sign this Agreement;
- 2) acknowledges and agrees to the terms and conditions of this Agreement, including all Exhibits referenced in and attached to this Agreement;
- 3) agrees that this Agreement will not become binding on PM USA unless and until this Agreement is approved by PM USA management, as indicated by the signature of duly authorized PM USA representatives below; and
- 4) certifies that all employees that sell tobacco products to customers have viewed the "We Card" training video produced by the Coalition for Responsible Tobacco Retailing and have been trained on how to supply those customers a "We Card" order form within the 12 months before the Effective Date of this Agreement. Participant further agrees that all new employees will view the "We Card" training video within 90 days of their hire and that Participant will provide training to all employees at least once annually.

This is an electronically executed agreement, which means that the electronically executed document is the original and legally binding agreement between PM USA and Participant. Any paper version, even if signed, should be regarded only as a courtesy copy. In case of a conflict between the electronically executed document and any paper version, the electronically executed document controls.

Participant (Must be signed by duly authorized officer)

By:



01/28/08


Typed Name: Joe Pennisi

Date:

Title: President

Philip Morris USA Inc.

PM USA Account Manager:




01/28/08

Date:

Typed Name: Jerry Galante

Approving Manager:



01/28/08

Date:

Typed Name: Nick Bahou

PM USA Section Sales Director



**PARTICIPANT MUST SUBMIT THE WHOLESALE LEADERS 2008 LICENSE DISCLOSURE FORM (EXHIBIT B) SEPARATELY.**



# **EXHIBIT C**

**2 Crossroads Drive, Bldg. B  
Bedminster, NJ 07921  
908-781-6000**

May 22, 2008

Joe Pennisi  
Mauro Pennisi Inc.  
78 West Hoffman Avenue  
Lindenhurst, NY 11757

Dear Mr. Pennisi:

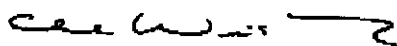
As you know, the Philip Morris USA Inc. ("PM USA") Wholesale Leaders 2008 Program Participation Agreement ("Agreement") provides that no less than 60% of Participant's Outbound Shipments of PM USA Cigarettes must be "Payment-Eligible" each Quarter. See Agreement, Sections V.D.1, X.C. We have reviewed Mauro Pennisi Inc.'s ("Pennisi") Outbound Shipments of PM USA Cigarettes for the First Quarter of 2008, and its percentage of Payment-Eligible Outbound Shipments was only 49.1%. As a result, Pennisi has failed to meet its obligations under the Agreement.

In light of Pennisi's failure to comply with the Agreement, PM USA is hereby exercising its rights under Section XI.C.2 of the Agreement. Specifically, Pennisi will forfeit all Payments that have not yet been delivered to it for the First Quarter of 2008 and will forfeit and be obligated to promptly repay to PM USA the amount of all Payments for the First Quarter of 2008. The amount that Pennisi is required to repay PM USA for First Quarter 2008 Payments is \$874.33. Payment is due no later than 30 days from the date of this letter, June 21, 2008. Failure to pay the amount due by June 21, 2008 will result in termination of the Agreement and Pennisi's loss of the ability to buy PM USA products directly from PM USA.

In addition, PM USA hereby notifies you that a subsequent failure to meet the Payment Eligible volume requirement found in the Agreement at Section X.C will result in termination of the Agreement and Pennisi's loss of the ability to buy PM USA products directly from PM USA.

If you have any questions regarding this communication, please contact me at 908-781-6000.

Sincerely,



Chad Weisberg  
Vice President Northeast Region Sales

15723

50-781/214

DATE 6-10-08

\$ 874.33



MAURO PENNISI INC.  
OPERATING ACCOUNT  
78 W. HOFFMAN AVE.  
LINDENHURST, NY 11757

PAY TO THE ORDER OF

*Philip Mauro USA*

*Eight Hundred Seventy Five 53/100*

**Capital One Bank**

Capital One, N.A.

*FOR FIRST QUARTER 2008 / Cust 38038*

*[Signature]*

⑆015723⑆ ⑆021407912⑆292 40 18514⑆

# **EXHIBIT D**

**Angels Smoke Shop**  
**144A Squaw Lane**

No picture available

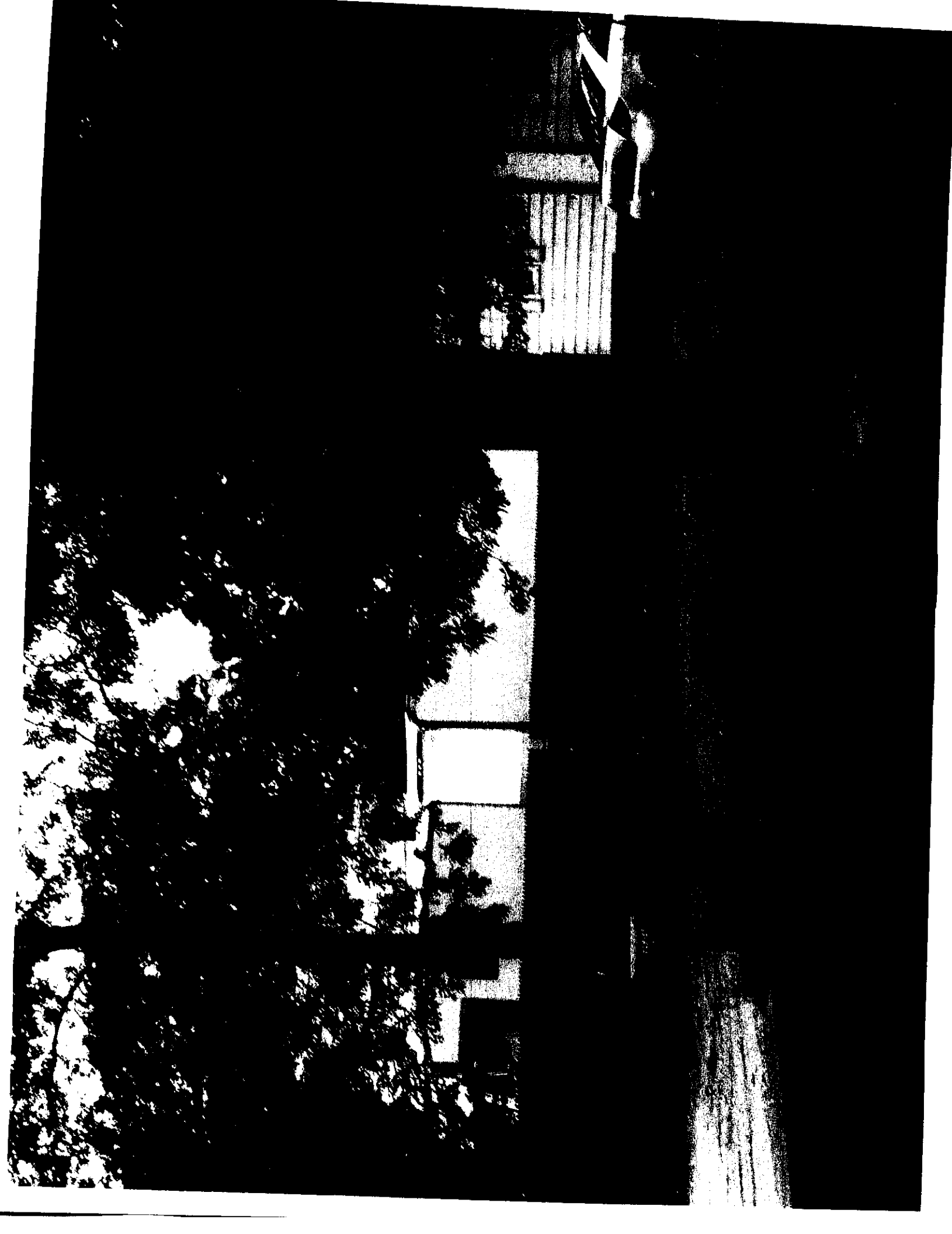


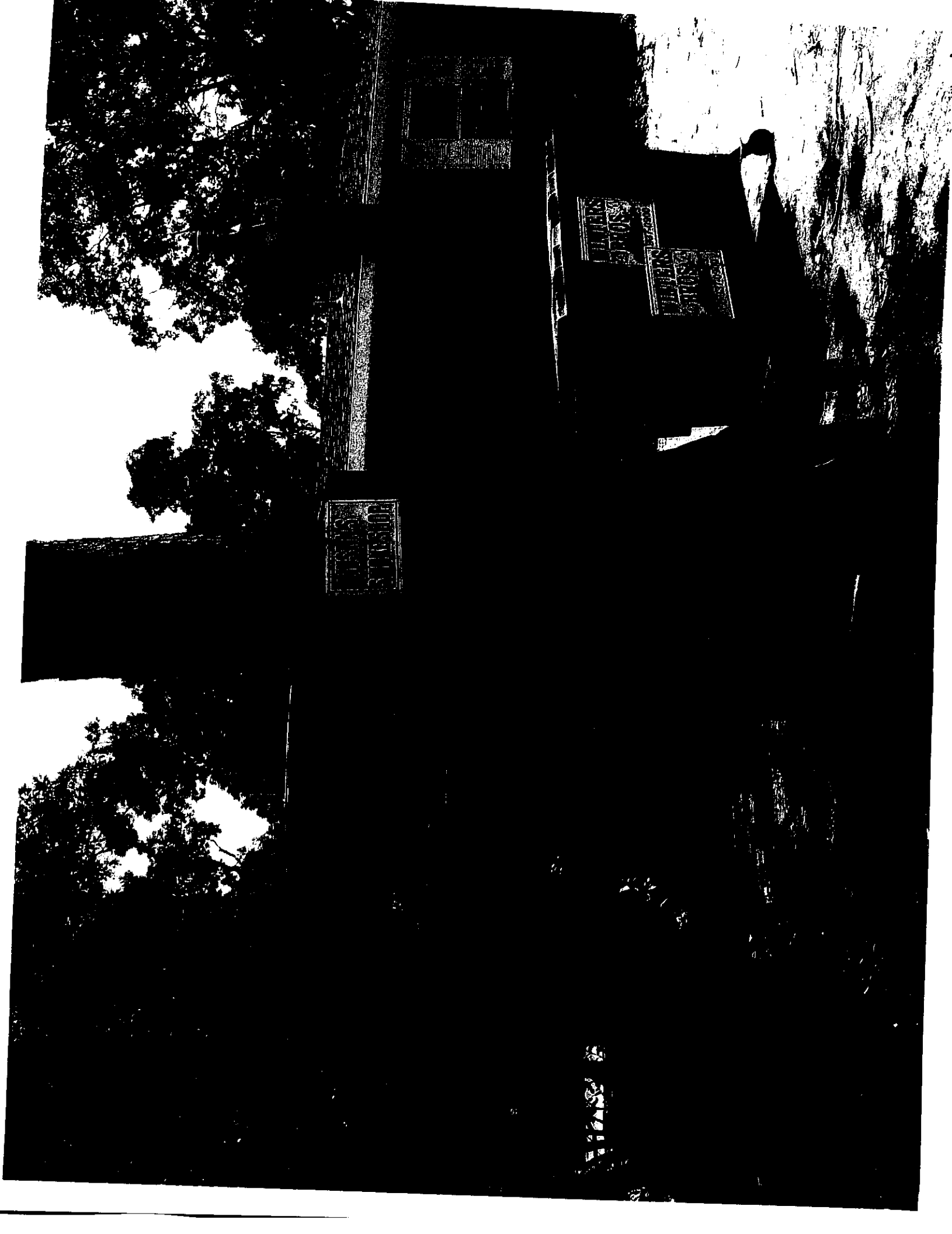
COUNTY JONES  
SNOW SHOP







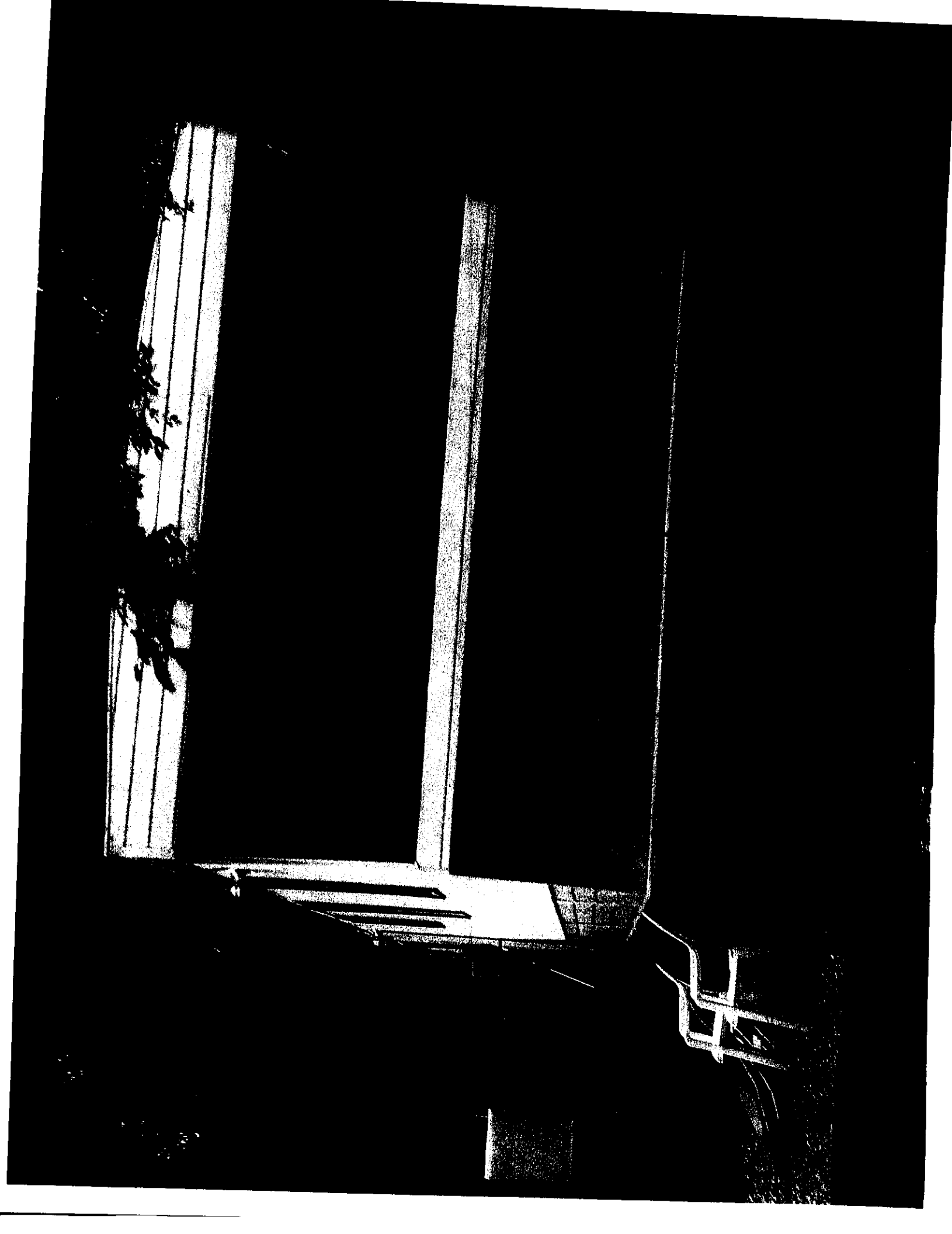






165A





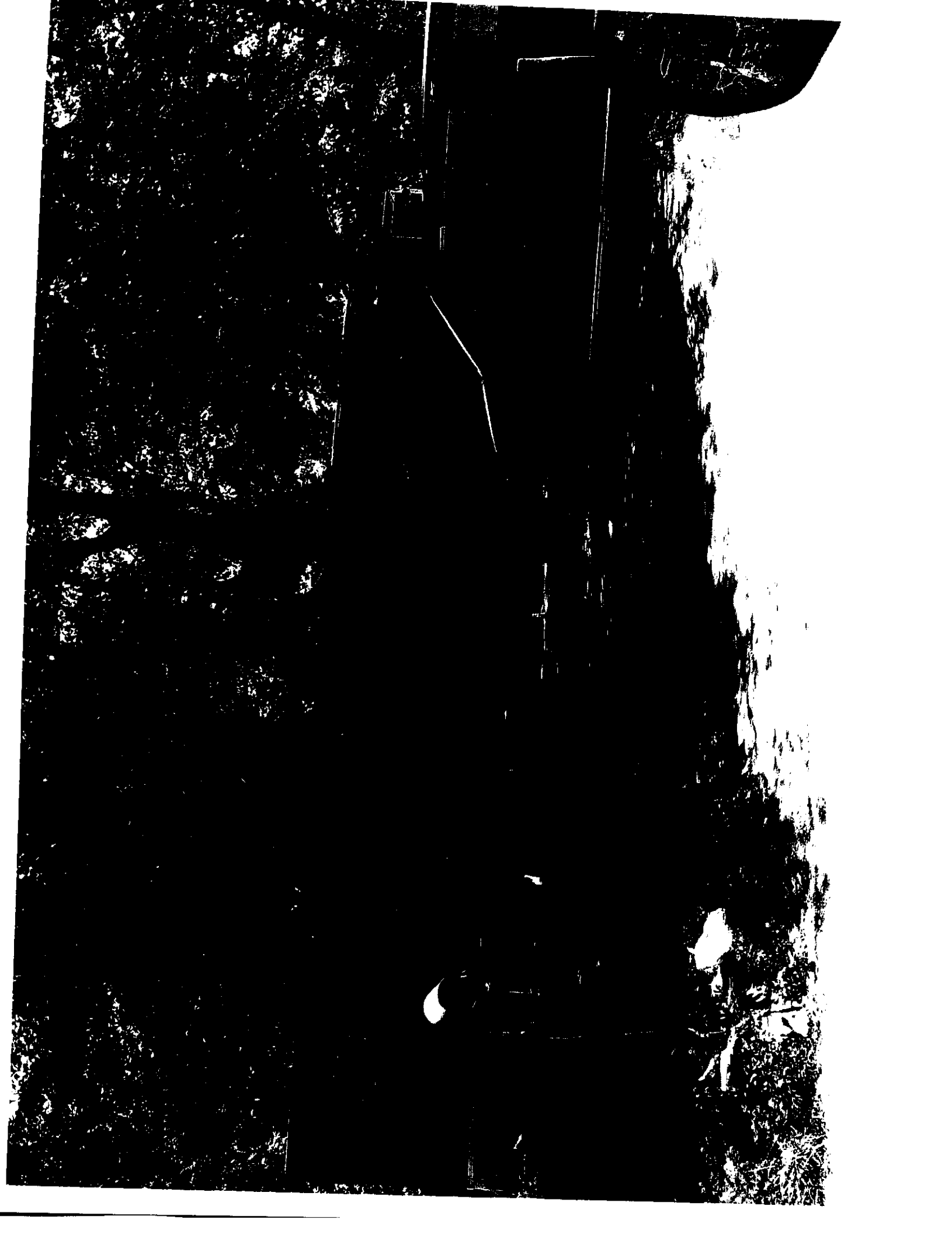


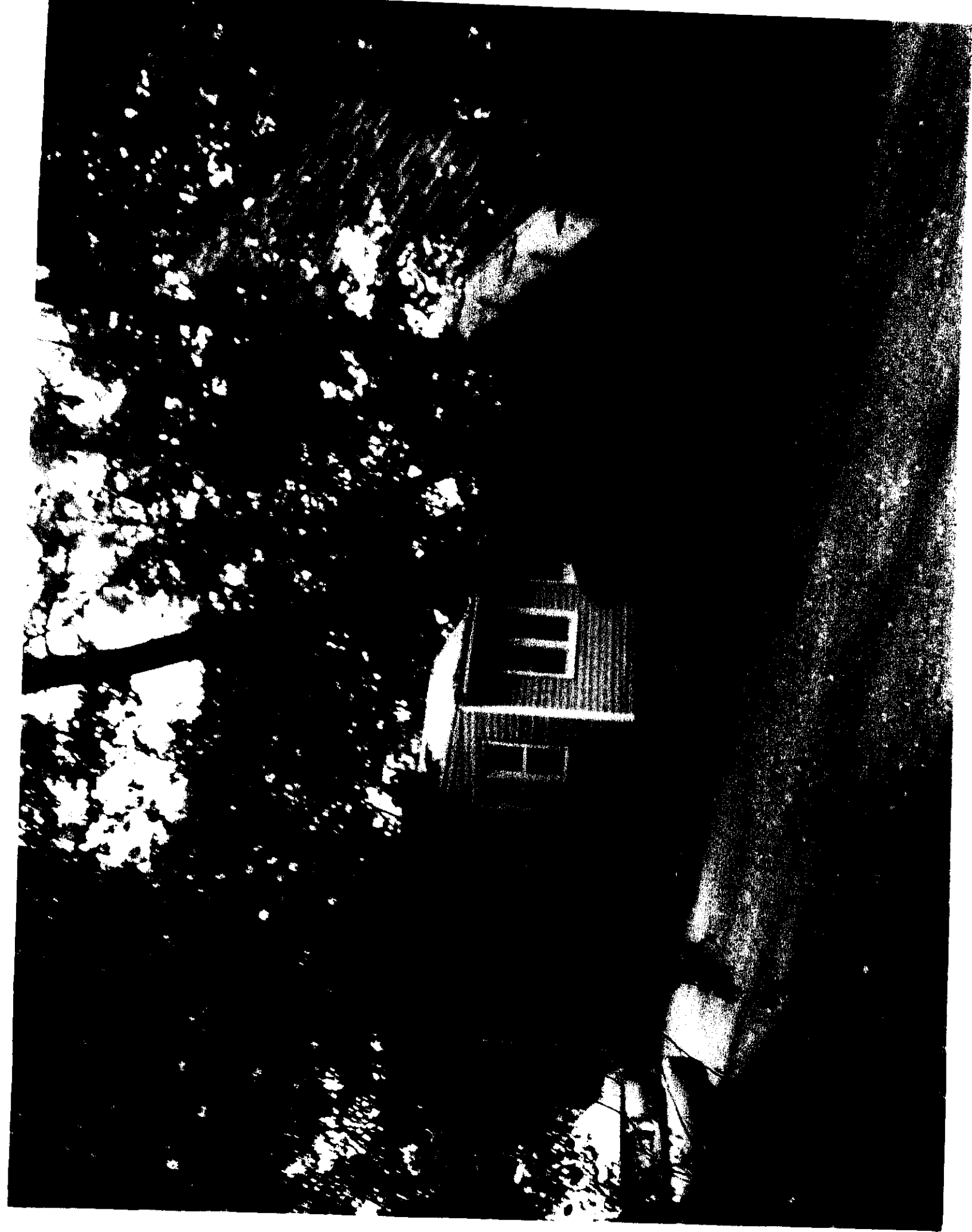
PEACHES  
SMOKE SHOP





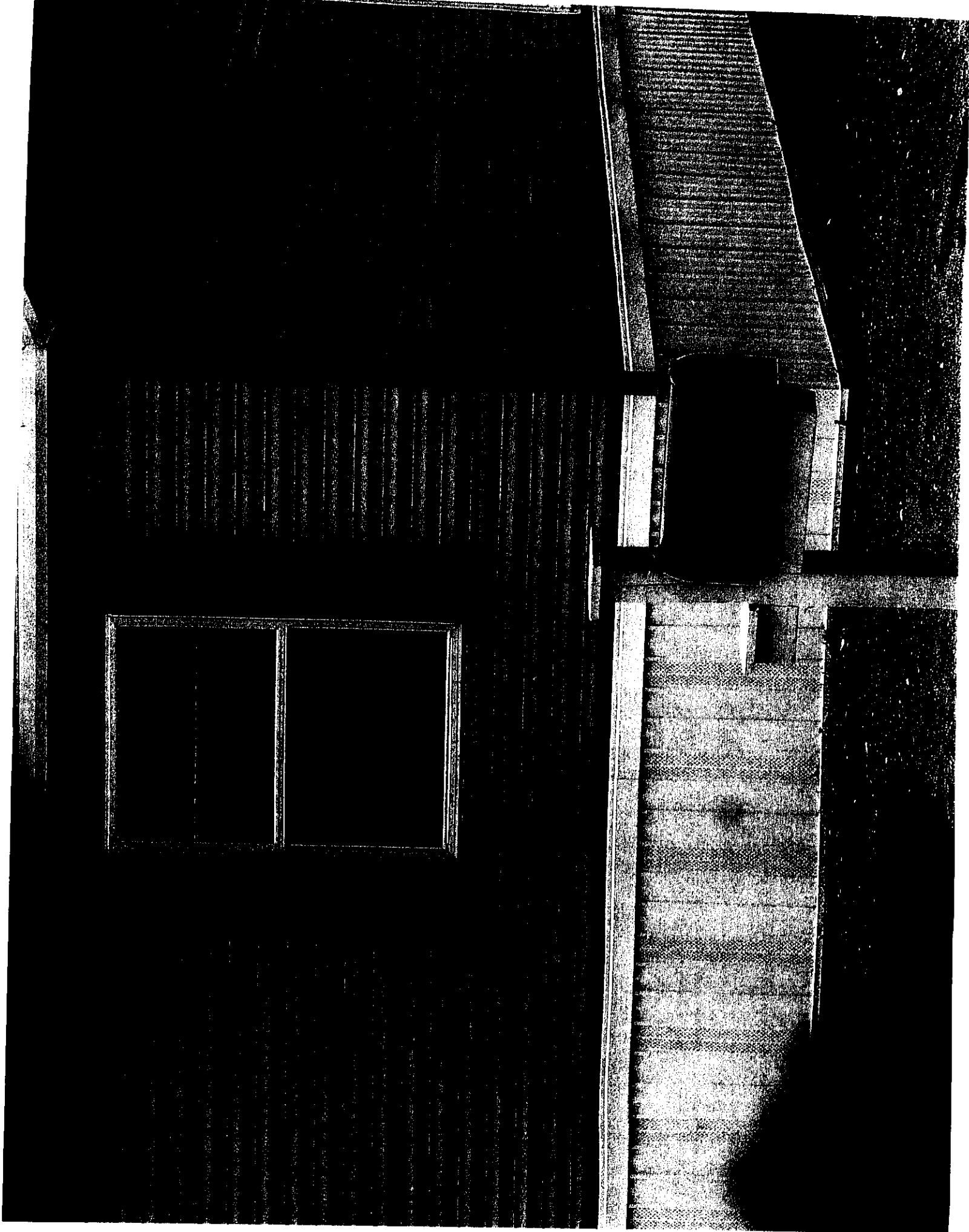




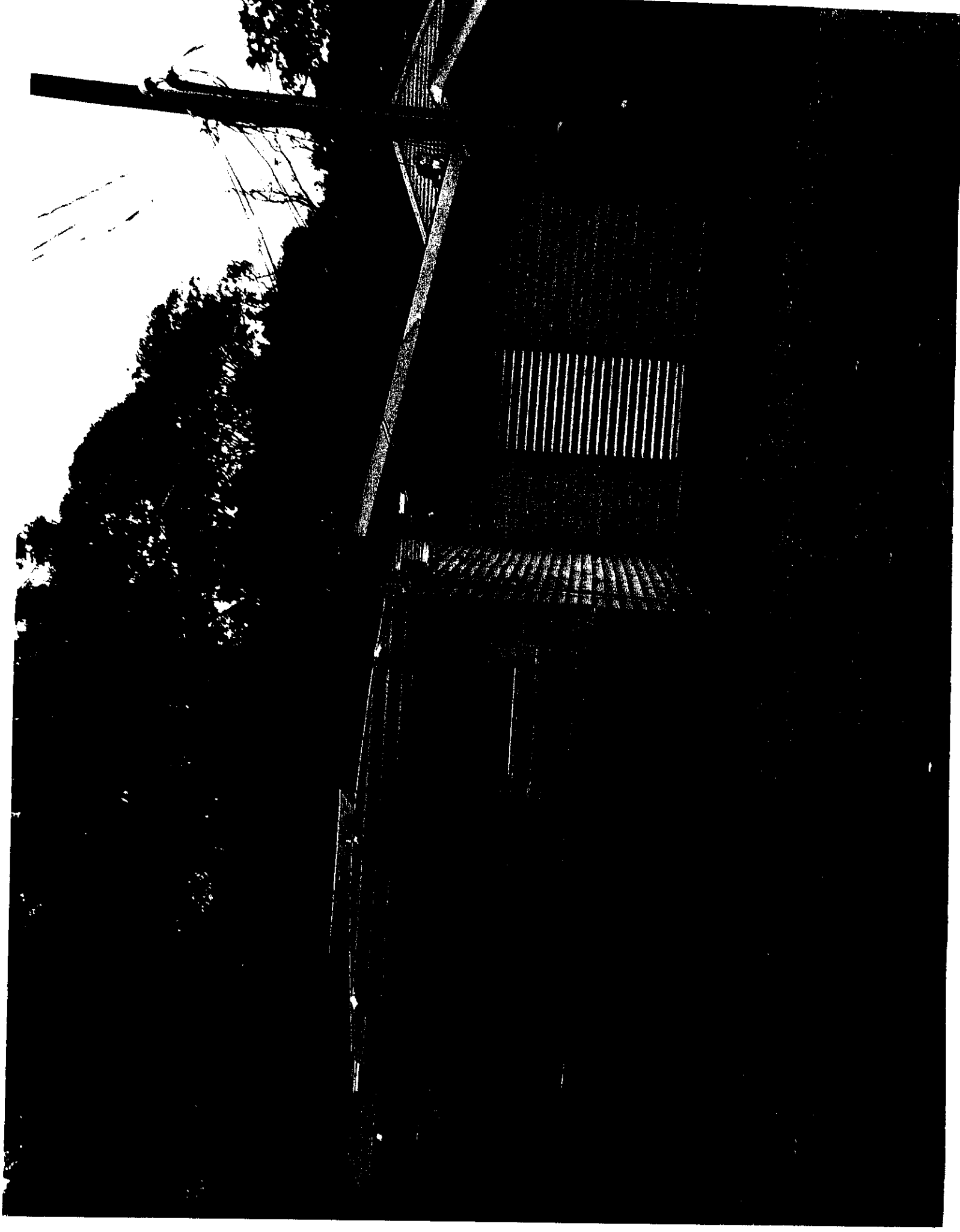














# **EXHIBIT E**

# Philip Morris USA

an Altria Company

Chad Wrisberg  
Northeast Region Vice President

Tel: 908 781-6000  
August 5, 2008

**VIA OVERNIGHT DELIVERY**

Mr. Joe Pennisi  
Mauro Pennisi Inc.  
78 West Hoffman Avenue  
Lindenhurst, NY 11757

Dear Mr. Pennisi:

As you know, the Philip Morris USA Inc. ("PM USA") Wholesale Leaders 2008 Program Participation Agreement ("Agreement"), effective January 1, 2008, provides that no less than 60% of Mauro Pennisi Inc.'s ("Pennisi") Outbound Shipments of PM USA Cigarettes must be "Payment-Eligible" each Quarter. See Agreement, Sections V.D.1, X.C.

In a letter dated May 22, 2008, PM USA notified you that Pennisi had failed to meet the Payment-Eligible Volume Obligation for the First Quarter of 2008. You were also informed that a subsequent failure to meet the Agreement's Payment-Eligible Volume Obligation would result in termination of the Agreement and Pennisi's loss of the ability to buy PM USA products directly from PM USA.

A review of Pennisi's Outbound Shipments of PM USA Cigarettes for the Second Quarter of 2008 reveals that its percentage of Payment-Eligible Outbound Shipments was 34.9%. As a result, Pennisi has failed again to meet the Agreement's requirement that no less than 60% of its Outbound Shipments be Payment-Eligible in any Quarter.

In light of Pennisi's failure to meet the Payment-Eligible Volume Obligation, PM USA hereby exercises its rights under Section XI.C.2. of the Agreement. Specifically, Pennisi will forfeit all Payments that have not yet been delivered to it for the Second Quarter of 2008.

Additionally, PM USA hereby exercises its right to terminate the Agreement and Pennisi's status as a direct-buying distributor of PM USA Products pursuant to Sections XI.D, XII.G and H of the Agreement. Although PM USA has the right to terminate the Agreement effective immediately, PM USA is providing thirty (30) days' notice that the Agreement and Pennisi's direct-buying status will terminate on **September 4, 2008**.

Effective immediately, Pennisi's payment terms will be changed to -3 Day Payment Terms. This means that PM USA will draft payment three business days prior to the expected delivery date.

If you have any questions regarding this communication, please contact me at 908-781-6000.

Sincerely,



Chad Wrisberg  
Vice President, Region 1 Sales