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## BEFORE THE NEVADA SENATE JUDICIARY COMMITTEE

### Testimony of Barton H. Freedman In Support of Senate Bill No. 66, as amended,

Mr. Chairman, members of the Committee:

I am an attorney from Louisville, Kentucky representing Brown & Williamson Tobacco Corporation. We support Senate Bill No. 66, as amended,, a bill designed to provide Nevada cigarette retailers with the freedom to manage their stores in the manner that they, rather than a cigarette manufacturer, decide is best suited to their needs and the needs of their customers. This freedom has been severely curtailed, if not eliminated, by various cigarette manufacturers' marketing programs that restrict, and at times prevent, the retailers' opportunity to display, advertise and promote the competitive cigarette brands of their choice. Before addressing the manner in which S.B. 66, as amended, redresses these practices, I will recount briefly the nature and seriousness of the problem, beginning with the importance of cigarette sales to retailers.

Cigarette sales are extremely important to retailers. With respect to convenience stores, for example, cigarette sales contribute approximately 40% of the retailer's true profit because of the customer traffic that cigarettes attract. Customers visit convenience stores to purchase cigarettes more often than they do to purchase any other product. When they visit the store, they purchase other high margin items 62% of the time. The ability to attract adult smokers, therefore, can be a make or break situation for the overwhelming majority of cigarette retailers, especially small retailers that compete with larger chains.

For these reasons, the competitiveness and success of the majority of retailers is dependent on their ability to offer cigarettes at competitive prices, especially the major brands with the largest market shares. For example, in Nevada, Marlboro, the largest brand by far, has a market share of about 45%, a share that is larger than the next fifteen cigarette brands

combined. If retailers are to survive in this intensively competitive retail climate, they must offer Marlboros and the other market share leaders at a competitive price. If they cannot, they lose not only the cigarette sales, but also the "market basket effect" that these sales engender, to their competitors across the street or down the block.

Cigarette sales from manufacturers to retailers to consumers are discount-oriented. Manufacturers, like Philip Morris, often offer discounts as high as \$7.50 per carton or higher. In order to offer competitive prices to their consumers, retailers must receive the same discounts from cigarette manufacturers as their competitors receive. Philip Morris and other manufacturers will offer these deep discounts to retailers only if they sign complicated contracts in which the retailer agrees to severely restrict (and often eliminate) the promotion, display, and advertisement of competing cigarette brands. For example, from time to time, Philip Morris' "Retail Leaders" program has required retailers to place competing brands in inconspicuous locations where they are not visible to consumers, severely restricted retailers' use of competitors' advertising and signage, blocked retailers from promoting competitive brands for three weeks out of every quarter, and forced retailers to give Philip Morris 50% or more of any additional space that they have added to accommodate competing products with no additional compensation for the space.

Moreover, PM and other manufacturers often require retailers to display and stock more of the manufacturer's brands than the retailers have determined is necessary to meet customer demand, thus limiting the retailers' ability to buy and stock competitive brands. At least one manufacturer has a program that causes retailers to raise prices on competitive brands and prevents retailers from offering lower priced brands that consumers want to purchase.

The impact of these restrictions can only be understood in the context of the pervasive regulatory scheme that limits cigarette advertising, display, and promotion. Due to existing government regulations, including the Master Settlement Agreement ("MSA") between the various states' attorneys general and cigarette manufacturers, the advertising and promotion of cigarettes is, for all intents and purposes, limited to in-store advertising and promotion. In many stores, especially convenience stores, the amount of retail space is limited due to space constraints. Thus, the dominant manufacturers have been able to leverage their vast and unequal bargaining power to require the retailer to exclude or reduce desired competitive offerings and to otherwise market this important product category in a manner that suits the dominant manufacturers' needs and not those of the retailer or consumer.

These programs are successful because convenience store owners and other retailers, especially small retailers, are dependent upon the deep discounts and programs offered by the market share leaders, without which they cannot compete. However, retailers are now rebelling against these coercive practices. Some 13,000 retailers nationwide have signed declarations supporting legislation to put an end to these practices, including 135 retailers in Nevada whose declarations are being provided to the Committee.

The objective of S.B. 66, as amended, is simple. Give the retailer back the keys to his/her store. While explicitly confirming that manufacturers and retailers may enter into traditional forms of merchandizing and promotional agreements, S.B. 66, as amended, prohibits any cigarette manufacturers from *conditioning* discounts and other promotional incentives on the retailer's agreement to restrict the display, advertising and promotion of competing cigarette brands.

If S.B. 66, as amended, is enacted, Nevada retailers will be free to decide whether, and to what extent, to display and stock any brand in their stores. If the retailer decides to give all

of its visible space to a single manufacturer, the retailer will be able to do so as a matter of choice and not as a requirement of receiving needed promotional assistance from the manufacturer. If the Bill is enacted, Nevada retailers will decide how, when, and where, within the requirements of Nevada law, to display competing products, and will be able to display them in a manner that suits their needs and the needs of their customers, not those of the cigarette manufacturer.

I will be happy to answer any questions you may have concerning the need for the Bill, its purposes and objectives, and how it deals with the problems addressed herein.

Thank you for the opportunity to testify before this Committee.