

1 A. No, no. You're --

2 Q. And I don't want to have to be this
3 aggressive.

4 A. Listen, I'm trying to -- you know,
5 it's part of Needham, Stewart's is a part of
6 Needham. So when Needham buys a new tractor,
7 Stewart's gets the benefit, but the expense ain't
8 going to go all against Stewart's, is it?

9 Q. You're the guy who has got to get
10 up and testify. If you tell me I just can't
11 possibly understand the question, I can't
12 possibly talk --

13 A. No, no.

14 Q. -- about it, all I can tell you is
15 you'd better not get up at trial and then tell me
16 I've got an investment I haven't recouped, and
17 that's the way I'm going to present it to you.

18 A. I -- I don't know how to answer
19 your question. I suppose, you know -- and it's a
20 bookkeeping question. It's not a -- a moral
21 question.

22 Q. A what question?

23 A. You know, it's not -- it's not --
24 I'm not trying to avoid the question. I'm just
25 trying to put it in perspective of the whole

1 picture.

2 Q. Well, here's where I'm going to end
3 it, because it's not fruitful anymore. I'm
4 telling you, I came here to take your deposition.
5 One of the things I want to find out is whether
6 you have an investment that you have made by way
7 of expenses or cost to carry the Stewart's line
8 that you haven't been able to recoup?

9 You don't understand the question,
10 you can't respond. All I'm going to tell you is
11 if you get up at trial and all of a sudden you
12 understand it and you do testify that you have an
13 unrecouped investment, I'm going to object. Fair
14 enough?

15 A. Fair enough.

16 Q. Okay, let's go on.

17 How do the co-op programs work that
18 you were engaged in with Stewart's?

19 A. Well, to make it simple, that we'll
20 take a Rainbow, for example, the Rainbow chains,
21 and they want to feature Stewart's for a weekend,
22 and so the guy from Stewart's would go to Rainbow
23 and say, okay, we want an ad for this upcoming
24 week, you know, whenever, and so it would be a
25 50/50 co-op, half a dollar would be a quarter for

1 participate in these programs or could you say I
2 don't think I want to participate?

3 A. Okay. Let's, for example, say you
4 own a Cub store.

5 Q. No, that's not my question.

6 A. Okay.

7 Q. I don't want to know about whether
8 I own a Cub store.

9 A. Okay.

10 Q. I want to know, was the effort on
11 the part of Stewart's to get you to buy into a
12 program?

13 A. It was an industry standard to go
14 along with what they asked.

15 Q. No, that wasn't my question.

16 A. Okay.

17 Q. Was Stewart's trying to get you to
18 buy into a program?

19 A. Yeah, yeah.

20 Q. And they were trying to get your
21 consent to the program, correct?

22 A. Yeah.

23 Q. No one came and said this is what
24 you're going to do and I don't care what you got
25 to say, it's presented, I'd like to get by and so

1 do the distributors who are on board, is that a
2 fair statement?

3 A. Well, we got --

4 Q. Is it or isn't it?

5 A. Well, they never -- you know,
6 veiled threats. Everybody -- you know, you go
7 along with it.

8 Q. Sure. Well, that's fine.

9 A. Okay.

10 Q. But nobody said, unless you go
11 along with this program, you're going to be
12 terminated, true?

13 A. They don't spell it out that way.

14 Q. True or false?

15 A. True.

16 Q. And I've heard the other day,
17 yesterday, that sometimes some of the
18 distributors didn't want to go along with the
19 program and the program didn't go forward. Are
20 you familiar with that?

21 A. Well, there was some programs that
22 went along that I heard of that we were never
23 offered.

24 Q. That's not my question.

25 A. Okay.

1 Q. We heard yesterday that there were
2 programs that were identified by the folks at
3 Stewart's that the distributors didn't want to
4 participate in or do and, therefore, the programs
5 didn't go forward. Are you aware of something
6 like that?

7 A. Not to my knowledge.

8 Q. Did you ever decline to participate
9 in a program?

10 A. I don't know.

11 Q. Is it possible that you did?

12 A. It's possible, sure.

13 Q. Whose decision would it be not to
14 participate?

15 A. Oh, primarily, you know, mine, I
16 guess.

17 Q. And if Stewart's had come up with a
18 program that you thought was outrageous and would
19 cost you more than it could ever benefit you, you
20 could have said, I think I'll take a pass on this
21 one?

22 MR. DAHL: Objection, speculation.
23 Answer if you can.

24 BY MR. KILLION:

25 Q. You're starting to say yes and then

1 we get that objection. Is the answer to my
2 question yes?

3 A. Well, you know, you can't -- we're
4 not in this business to --

5 Q. How is it you're --

6 A. We got to make money.

7 Q. -- nodding yes, then you hear an
8 objection, and now you're not so sure you can say
9 yes? Let me try it again.

10 Is it true, sir, that if Stewart's
11 had come to you with a program that you thought
12 was not in your best interest, that would hurt
13 your sales, you could say that I choose not to
14 participate?

15 MR. DAHL: Objection, form. Go
16 ahead and answer if you can.

17 BY MR. KILLION:

18 Q. Yes or no?

19 A. Well, I suppose as an independent
20 businessman I can make a yes or no question, you
21 know, if you want to go along with it or not.

22 Q. That's not my question. As an
23 independent businessman, you could have said I
24 choose not to participate in that program,
25 correct?

1 A. Okay, let me --

2 Q. Yes or no?

3 A. No.

4 Q. Why couldn't you choose not to
5 participate?

6 A. Okay, okay. If they come up with a
7 dollar off on -- for the 4th of July weekend to
8 all the Rainbows and we say no, then they stop
9 payment for our invoices, Rainbow.

10 Q. So you're saying you have some
11 pressure maybe from Rainbow to participate in a
12 program?

13 A. Well, only because they will
14 promise something and we didn't give it to them,
15 then it don't work.

16 Q. Let me try it a different way.
17 Let's try to take out whether you would feel some
18 pressure from Rainbow if this program went
19 forward. I'm talking now about Stewart's.

20 If Stewart's came to you with a
21 program that up thought was foolish, didn't make
22 sense for your business, you could have said I
23 choose not to participate, right?

24 MR. DAHL: Objection, form again.
25 Go ahead and answer if you can.

1 THE WITNESS: Yes.

2 BY MR. KILLION:

3 Q. And these POS materials, sometimes
4 they were free, correct?

5 A. The paper stuff normally was -- you
6 know, yes.

7 Q. And the exception to the material
8 being free was the wagons, for example, and
9 the --

10 A. End displays.

11 Q. And the buckets?

12 A. And end displays, and then they had
13 some, some -- buckets for picnics type deals, you
14 know. All that was a charge item.

15 Q. And these would typically be part
16 of a program?

17 A. Yes, but they had a catalog that --

18 Q. Of materials available for these
19 programs?

20 A. Right, right.

21 Q. Correct?

22 A. Right.

23 Q. And when it came to purchasing the
24 point of sale material, would you get it at a
25 discount?

1 A. No, no, whatever was on the -- you
2 know, a wagon costs 14 bucks in the book or --
3 that's what we paid.

4 Q. But if they were part of a program,
5 would you be reimbursed half of that under the
6 co-op arrangement?

7 A. No, no.

8 Q. So you'd purchase that at whatever
9 the going rate was?

10 A. Whatever they decide to sell it to
11 us at.

12 Q. Were you duty bound to purchase
13 these things independent of a program you might
14 choose to participate in?

15 A. Well, it's common sense, you know,
16 that you need some -- something to -- you know,
17 you need price cards, you need pole stackers, you
18 need static clings for the cooler. You know,
19 these are tools that, you know, we use every day.

20 Q. My point was, it would be your
21 choice to choose what you wanted to use as a part
22 of your programs?

23 A. Yeah.

24 Q. Nobody said you got to buy a dozen
25 wagons, for example, true?

1 A. Well, they'd suggest what you'd
2 buy, and I think most cases it was -- it was
3 reasonable.

4 Q. My only point is you made a
5 voluntary decision to purchase the POS materials
6 as a part of running your business, correct?

7 A. Yes.

8 Q. Did you carry any kind of insurance
9 that benefited Stewart's?

10 A. I'm going to have to look to see if
11 they were named carrier on our liability. I -- I
12 can't tell you that.

13 Q. Do you know if there's an added
14 cost to naming one of your suppliers as an
15 insurer?

16 A. It's marginal. It's 20, \$25. It's
17 nothing, really, just -- they used to give it to
18 us for free, but now they put a little -- a
19 little charge on it.

20 Q. Did anybody ask to have Stewart's
21 named as an insured?

22 A. If a request comes like that, we
23 just shoot it right over the agency to take care
24 of it.

25 Q. So I gather you're saying I don't

1 suggest that you're right, that's a concern about
2 losing space?

3 A. Correct.

4 Q. And, then, "6 VP3's Scheduled for
5 2006," what does that mean to you?

6 A. Some special programs of --

7 Q. VP stands for vendor program?

8 A. Right.

9 Q. Do you know what the three is?

10 A. That's partnership programs, I
11 believe, vendor partnership. So notice they had
12 three vendor partnerships scheduled for 2006, and
13 they were only -- they're only asking to co-op
14 two of them, and they're going to pick up all
15 the -- all the other fees.

16 Q. And do you know why it is that now
17 four of these are going to have to be or will be
18 picked up by Stewart's without requesting any
19 contribution?

20 A. I have -- I can't answer that. I
21 don't know what happened here.

22 Q. Would you be surprised to learn the
23 reason that Stewart's went ahead and picked up
24 the four without co-opting them is because they
25 could not get the distributors to buy into the

1 programs?

2 A. Speaking just for Needham, I don't
3 think we were offered it.

4 Q. So maybe it was that once Mark VII
5 nixed the deal it was no use bringing it around
6 to anybody else?

7 A. Correct.

8 Q. Is that what you understand to be
9 the case?

10 A. Yes.

11 Q. All other fees will be picked up
12 100% by Stewart's. Again, the same thing. Well,
13 now we see that what Stewart's is having to do is
14 pick up more of the cost of these programs,
15 correct?

16 A. It appears to be, yes, but --

17 Q. See anything else in any of this
18 exhibit that you think is reflective of any kind
19 of a payment that was made by Needham to
20 Stewart's?

21 A. This is a duplication here 2004.

22 Q. Which we talked about?

23 A. Huh?

24 Q. We already talked about that?

25 A. Well, you have two sets of 2004 in

1 BY MR. KILLION:

2 Q. Correct?

3 A. Nope.

4 Q. Wrong?

5 A. Wrong.

6 Q. You thought you would make money?

7 A. Okay, I've been selling beer for a
8 long time. I've been selling products for a long
9 time, and you can pick the winners from the
10 losers.

11 Q. So as you went into this, you
12 thought you'd make money because you thought you
13 were picking a winner?

14 A. Yes.

15 Q. Any other reason?

16 A. Money.

17 Q. You were willing to put the money
18 it took to do that into it?

19 A. We'd want to make some additional
20 gross dollars.

21 Q. Fair enough. But Stewart's never
22 said they were guaranteeing you you were going to
23 be successful in this business; isn't that
24 correct, sir?

25 A. They implied that it was -- it was

1 a basis for a foundation of a good -- the word
2 yuppie comes back to me, but it's an up-scaled
3 type product.

4 Q. I think I heard you say that
5 originally when you were describing it, the
6 yuppie context, and I can buy that. My only
7 question is yes or no. Did Stewart's guarantee
8 you that you'd be successful?

9 A. No.

10 MR. KILLION: That's all I have.
11 Thank you very much, sir.

12 MR. DAHL: We'll read and sign.

13 (Whereupon, the deposition of DAVID
14 E. NEEDHAM was concluded at 2:22 p.m.)

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UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Day Distributing Co., a Minnesota corporation; Mark VII Distributors, Inc., a Minnesota corporation; Sandstone Distributing Co., Inc., a Minnesota corporation; Needham Distributing Co., Inc., a Minnesota corporation; and Rohlffing of Duluth, Inc., a Minnesota corporation,

Plaintiffs,

vs. Civil File No. 0:07-cv-01132 (PJS/RLE)

Nantucket Allserve, Inc., f/k/a Stewart's Beverages, LLC, and d/b/a Cadbury Schweppes Americas Beverages, a Delaware corporation,

Defendants.

DEPOSITION

The following is the deposition of GERALD J. SPEHAR, taken before Jean F. Soule, Notary Public, Registered Professional Reporter, pursuant to Notice of Taking Deposition, at the offices of Faegre & Benson, 2200 Wells Fargo Center, Conference Room 22K, 90 South Seventh Street, Minneapolis, Minnesota, commencing at 10:10 a.m., Wednesday, October 24, 2007.

* * *

1 what the status of Vietnam was there. Did you
2 have a tour there?

3 A. No. I was in flight training.

4 Q. Got out in '63, did you say?

5 A. Well, I got out of -- off of active
6 duty in 1963. I still remained in the Air Guard
7 until 1968.

8 Q. What did you do in terms of your
9 career once you were off active duty?

10 A. Just went into the wholesaling
11 business with my father-in-law.

12 Q. Wholesaling what?

13 A. Beer.

14 Q. Where?

15 A. Duluth, Minnesota.

16 Q. What was the name of the company?

17 A. Rohlfing, Incorporated.

18 Q. I take it you married one of the
19 Rohlfing daughters?

20 A. I did.

21 Q. How many were there?

22 A. Four girls, four boys.

23 Q. Did you get the prettiest of the
24 bunch?

25 A. I got the oldest and the prettiest.

1 Q. Good for you. What's her name?

2 MR. DAHL: Good answer. This is
3 under oath and we'll get a copy of this.

4 BY MR. KILLION:

5 Q. We'll send her one.

6 A. Kathy Louise.

7 Q. Any kids?

8 A. We have four.

9 Q. Grandkids, I'll bet, too?

10 A. Eight.

11 Q. Good for you.

12 So you go into your father-in-law's
13 business. What's your first position?

14 A. Just delivery driver.

15 Q. What's your father-in-law's name?

16 A. It was Fritz Rohlfing.

17 Q. Now deceased?

18 A. Deceased in 1975.

19 Q. Tell me the progression of your
20 history with Rohlfing. In other words, when did
21 you have a different position or a different
22 title?

23 A. Actually delivery driver until I
24 came back to Duluth and then went into
25 management.

1 Q. You were --

2 A. In a small business, we do a lot
3 of -- wear a lot of hats, you know. It's not
4 just one specific job description. We do a lot
5 of different -- so, I mean, between warehouse
6 work, delivery work, sales work, you know; and
7 then when he passed away in 1975, I just assumed
8 the duties.

9 Q. The duties being what?

10 A. Full management, general,
11 general --

12 Q. Did you have a title then in 1975?

13 A. Well, no title per se, but if you
14 want to say so, I was -- I was acting president
15 and general manager.

16 Q. And how long were you acting
17 president?

18 A. Till present.

19 Q. So you still just act as the
20 president?

21 A. No. I'm still -- I'm general
22 manager, too.

23 Q. Well, acting president strikes me
24 as somebody who has that role temporarily. Did
25 you acquire the role permanently in 1975?

1 A. For the most part, yes.

2 Q. Now, is Rohlfing a corporation?

3 A. Yes.

4 Q. And it's called Rohlfing of Duluth,
5 Inc.?

6 A. Yes.

7 Q. Who are its shareholders?

8 A. Myself and my wife, are the majors.

9 Q. Excuse me?

10 A. Are the major wholesalers -- or
11 stockholders.

12 Q. What percentage do you own
13 collectively?

14 A. About 60 percent right now.

15 Q. The remaining 40 percent are held
16 by whom?

17 A. Um, Kathy's sister and
18 brother-in-law; and my son and son-in-law,
19 they're getting more and more of the business all
20 the time.

21 Q. Your son and son-in-law?

22 A. Both. I have a daughter and son in
23 the business.

24 Q. Tell me how the 40 percent breaks
25 down at this point, then?

1 A. Twenty for the sister and
2 brother-in-law.

3 Q. Who are whom?

4 A. Margaret and Bradley Sager.

5 Q. Are they active in the business?

6 A. Yes.

7 Q. Saber?

8 A. Sager, S-a-g-e-r.

9 Q. Proceed.

10 A. That's -- they're 20 percent.
11 Fritz and Debbie Wrazidlo, W-r-a-z-i-d-l-o,
12 10 percent.

13 Q. And that's your daughter and
14 son-in-law?

15 A. Uh-huh.

16 Q. Yes?

17 A. Yes.

18 Q. Remember the rule? You're okay.

19 A. Brian and Sheryl Spehar,
20 10 percent.

21 Q. And I think you said something
22 about your children acquiring more and more of
23 the business?

24 A. Uh-huh.

25 Q. Would the following be true, that

1 over time you've allocated more shares of the
2 company to them?

3 A. That is correct.

4 Q. And is that your plan going forward
5 as a part of, perhaps, retiring at some point?

6 A. Yes.

7 Q. Now, you're at the top of the
8 organization, whether we say you're acting or
9 permanent, I suppose. Tell me what the
10 organization is today below you? In other words,
11 who reports to you within the corporation?

12 A. Warehouse manager, sales --
13 on-premise sales manager, off-premise sales
14 manager.

15 Q. Give me a second, I want to make
16 some notes.

17 A. Okay.

18 Q. Got it. Who else?

19 A. Then the drivers come underneath --
20 or we have four salesmen under those people, and
21 then we have --

22 Q. Four salesmen underneath the two --

23 A. Yeah.

24 Q. -- sales managers?

25 A. Correct.

1 Q. I interrupted you, go ahead.

2 A. And five drivers.

3 Q. To whom do they report?

4 A. To me or to some of the
5 salespeople.

6 If I knew you wanted that, I could
7 have brought you a family -- or a breakdown of
8 the company.

9 Q. You just do the best you can.

10 A. Okay.

11 Q. Do you think we have it captured,
12 in essence, at this point?

13 A. Yeah. I also have a draft beer
14 cleaning man, which would be somebody besides
15 that. Otherwise -- and one other -- oh, Debbie
16 Wrazidlo is a secretary, along with Kathy, my
17 wife.

18 Q. Is Kathy full time in the business?

19 A. Yes, and Margaret Sager is part
20 time.

21 Q. Is she otherwise a homemaker or
22 does she have another job?

23 A. She's a homemaker.

24 Q. Now, where does your son and
25 son-in-law fit within this, which are they?

1 A. I'm sorry, I don't understand.

2 Q. Your son-in-law is in the business,

3 right?

4 A. Correct.

5 Q. Which of these roles does he fill?

6 A. He's the on-premise sales manager.

7 Q. And that's Fritz?

8 A. Uh-huh.

9 Q. Yes?

10 A. Yes.

11 Q. And I thought you had a son in the

12 business?

13 A. Brian Spehar.

14 Q. And which of these roles does he

15 fit?

16 A. Off-premise sales manager.

17 Q. And who is your warehouse manager?

18 A. Bradley Sager.

19 Q. So this is pretty much a family run

20 business?

21 A. That is correct.

22 Q. Anyone else within the group that's

23 related?

24 A. No.

25 Q. So the ones that are nonfamily are

1 the five drivers?

2 A. Uh-huh, yes.

3 Q. The beer cleaning man?

4 A. Yes.

5 Q. How about the four salespersons,
6 any of those?

7 A. One -- one family, three nonfamily.

8 Q. Who is the family part?

9 A. Fritz.

10 Q. So he's not only the on-premise
11 sales manager, but he also makes sales?

12 A. That is correct, yes.

13 Q. Five drivers, then, three
14 salespeople and one beer cleaning person?

15 A. Yes.

16 Q. What's a beer cleaning person?

17 A. One that goes out and cleans draft
18 beer lines, because they have a tendency to get
19 dirty.

20 Q. How is the company doing
21 financially?

22 A. Excellent.

23 Q. And what lines do you carry?

24 A. Coors, Molson, Corona, Beck's, Sam
25 Adams, Summit, Red Bull. Let's see here, what

1 else have I got? Did I say New Castle?

2 Q. You did not.

3 A. That, in essence, is the -- takes
4 in the majority of the --

5 Q. Pretty impressive line, I'd have to
6 say.

7 A. Thank you.

8 Q. Who is your principal competitor up
9 in the Duluth area?

10 A. I would say probably
11 Anheuser-Busch.

12 Q. Who carries the Miller line?

13 A. Bernick's Pepsi-Cola now. They
14 just purchased it.

15 Q. And Busch, who carries that?

16 A. That is Superior Beverages LLC.

17 Q. Out of Superior, Wisconsin?

18 A. Correct, yes.

19 Q. Do you carry any soft drink lines
20 at this point?

21 A. Now we do.

22 Q. What do you carry?

23 A. We have a small line of Point
24 Sodas.

25 Q. That's a new word for me or a new

1 Q. Not initially?

2 A. No.

3 Q. How is it that you first took on
4 the Stewart's line? In other words, what led to
5 that?

6 A. Um, well, we needed -- we needed to
7 fill in a void in our 3.2 off-premise accounts,
8 like convenience stores, supermarkets and so
9 forth, and it helps --

10 Q. May I stop you just one moment to
11 get the phraseology down so I'm following you?

12 Off premises would mean other than
13 in a drinking establishment?

14 A. Yes.

15 Q. Go ahead.

16 A. And to help build the volume in
17 those accounts because the 3.2 beer business is
18 only about three-and-a-half to four percent of
19 the volume in the state. To help generate a
20 bigger ring, we needed something to go into these
21 stores and sell it, help make it more profitable.

22 Q. I'm familiar with the cities, I'm
23 not real familiar with Duluth, been there a
24 number of times, but I don't know much about the
25 grocery store business.

1 also something you could sell, you're not saying
2 it was an excess amount of a lot of inventory you
3 could never sell, are you?

4 A. No, I'm not saying that. What I'm
5 saying is it's tying up a lot of excess dollars
6 that I wouldn't normally have to inventory.

7 Q. Well, I'll tell you that if some
8 manufacturer required someone to purchase huge
9 amounts of inventory it could never dispose of,
10 that might constitute a franchise fee under some
11 set of circumstances. But here you could dispose
12 of the stuff, isn't that fair to say?

13 A. Yes.

14 Q. All right. Then, as it relates to
15 the concept of a franchise, take a look at
16 page 4, 6.C. Is this the part you were talking
17 about that surprised you when you read this last
18 night? And it reads, "No 'franchise fee' or
19 other fee of any kind has been paid to, and none
20 is payable by DISTRIBUTOR to, COMPANY for the
21 right to enter into this Agreement."

22 A. I understand.

23 Q. Did you make some sort of a payment
24 to Stewart's for the right to enter into the
25 agreement?

1 A. No.

2 Q. Did you make any kind of payment to
3 Stewart's for the right to continue with the
4 agreement?

5 A. No.

6 MR. DAHL: Objection.

7 BY MR. KILLION:

8 Q. Go ahead. You said no?

9 MR. DAHL: Objection, form.

10 THE WITNESS: No.

11 MR. DAHL: And I had an objection
12 to the prior question, as well, before he got the
13 answer out.

14 MR. KILLION: The record will so
15 reflect. I understood that.

16 BY MR. KILLION:

17 Q. Let's talk about the slotting fees.
18 Again, a franchise fee is something that's paid
19 to the alleged franchisor, as you say, directly
20 or indirectly. How is a slotting fee something
21 you are paying to Cadbury Schweppes?

22 A. I'm not paying it to Cadbury
23 Schweppes.

24 Q. You're paying it to the C store?

25 A. I am in the form of merchandise.

1 A. It's tough when you have a lot of
2 family in the business.

3 Q. How many kids did you say you had,
4 four?

5 A. I have four.

6 Q. I have four, too, but yours are a
7 little older than mine.

8 A. Are they?

9 Q. And I have no business to put them
10 into, heaven forbid.

11 A. Well, in today's world, I think
12 it's kind of a blessing in disguise the way
13 things are going, that they can succeed into the
14 business.

15 Q. Do you contend that somehow you
16 were forced to participate in these programs with
17 Cub?

18 A. Only if the retailer wanted --
19 wanted to participate in the -- in the process.
20 I mean, if they're not going to participate, you
21 certainly aren't going to give them the special
22 price.

23 Q. My question is, did anyone at
24 Stewart's or Cadbury Schweppes say you've got to
25 participate in these programs?

1 A. No, but the information went to
2 Cub.

3 Q. So you're saying it's kind of tough
4 not to participate if Cubs got the information
5 and you say, well, yes, it applies in the Cities,
6 but I'm not going to do it up here, is that what
7 you're saying?

8 A. Well, yes. In a way it's forced, I
9 mean, because the retailer -- you know, the
10 manager knows already that he can get that price,
11 and if he buys a quantity, he gets the price, and
12 you're not going to turn around and say, I'm
13 sorry, but I'm not going to give it to you. I
14 mean, it has repercussions down the road in other
15 products that you might have.

16 Q. With Cub?

17 A. Yes.

18 Q. But were you even reluctant to do
19 it?

20 A. No.

21 Q. So it never even comes up because
22 you're happy to participate in programs that
23 increase your sales?

24 A. Restate that, please.

25 Q. Sure, that was awkward.

1 Here's what I'm trying to cover
2 with you. These programs helped you, and you
3 were happy to participate in them?

4 MR. DAHL: Objection, form.

5 BY MR. KILLION:

6 Q. Is that fair to say?

7 A. Yes.

8 Q. And you never had occasion where
9 you wanted to go to Stewart's and say, I don't
10 like this program, I don't want to participate?

11 A. No.

12 Q. True what I said?

13 A. Yes.

14 Q. So whether it was obligatory or
15 discretionary really doesn't come up because you
16 never even have to cross that bridge, is that
17 kind of fair?

18 A. Yes. Can I elaborate on it?

19 Q. Oh, sure.

20 A. Well, the rep that we had with
21 Cadbury would show up maybe two -- maybe once a
22 year. So, I mean, there was -- unless I wanted
23 to get ahold of him by phone, there was,
24 basically, no other way I'd ever communicate with
25 him.

1 I'm not saying he wasn't a good rep
2 and all that, but he was kind of distant.

3 Q. Is this Mike?

4 A. Yes, and -- so rather than try to
5 do some stuff over the phone, we just normally
6 went along with what was going on.

7 Q. Well, do you remember him coming in
8 on a, more or less, yearly basis with programs
9 that were being proposed?

10 A. He would present programs, yes.

11 Q. And did you participate in those
12 presentations?

13 A. Yes.

14 Q. And who else?

15 A. My sales force.

16 Q. And when he would lay out these
17 programs, did you ever say I don't want to
18 participate?

19 A. No.

20 Q. Do you recall a time where some of
21 these programs were proposed but they didn't go
22 forward?

23 A. There's always a certain -- a
24 certain amount of programs that normally don't go
25 through just because of the lack of

1 participation.

2 Q. By whom?

3 A. By the sales force and by the
4 retailer, times where the retailers don't want to
5 participate.

6 Q. But what do you mean, sales force?

7 A. My sales force, my salespeople. I
8 call on different accounts.

9 Q. For example, I think the record
10 shows that in 2006 the number of programs that
11 were offered were decreased because the
12 distributors as a whole, may not have been you,
13 but as a whole didn't want to go forward with the
14 programs. Do you recall that?

15 A. No, I don't.

16 Q. The thing we've been hearing is
17 that it was Mark VII, in particular, that said it
18 didn't want to go along with programs, and,
19 therefore, the programs were ended or never put
20 forward. Did you ever hear anything like that?

21 A. No, I did not.

22 Q. We talked about slotting fees you
23 think may make your arrangement a franchise,
24 we've talked about the inventory purchases, we've
25 talked about programs. Anything else that you

1 be an excuse to get the different flavors in
2 there so you'd have a nice ribboning effect on
3 racking.

4 Q. So that might be, for example, if
5 there's limited shelf space somewhere, you say,
6 hey, I'll bring you in a whole new rack?

7 A. Yes. Also, consumer awareness is
8 another reason for it.

9 Q. I'll see if I have anything else.
10 Relative to the Point sodas you
11 carry, have you had any increased expenses to
12 handle that particular line of product?

13 A. Um, no.

14 Q. Do you have any kind of an
15 investment you made in carrying the Stewart's
16 line of products that you haven't already
17 recouped?

18 A. No.

19 Q. Have we covered all the promises
20 that were made to you of any kind by Stewart's?

21 MR. DAHL: Objection, form. Answer
22 if you can.

23 THE WITNESS: Based on what the
24 agreement says, no.

25 BY MR. KILLION:

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Day Distributing Co., a Minnesota corporation; Mark VII Distributors, Inc., a Minnesota corporation; Sandstone Distributing Co., Inc., a Minnesota corporation; Needham Distributing Co., Inc., a Minnesota corporation; and Rohlffing of Duluth, Inc., a Minnesota corporation,

Plaintiffs,

vs. Civil File No. 0:07-cv-01132 (PJS/RLE)

Nantucket Allserve, Inc., f/k/a Stewart's Beverages, LLC, and d/b/a Cadbury Schweppes Americas Beverages, a Delaware corporation,

Defendants.

DEPOSITION

The following is the deposition of DAVID WATRIN, taken before Jean F. Soule, Notary Public, Registered Professional Reporter, pursuant to Notice of Taking Deposition, at the offices of Faegre & Benson, 2200 Wells Fargo Center, Conference Room 22K, 90 South Seventh Street, Minneapolis, Minnesota, commencing at 10:06 a.m., Thursday, October 25, 2007.

* * *

1 in the Guard?

2 A. Yes.

3 Q. Working on the family farm?

4 A. Yes, for my dad.

5 Q. How long did you work on the family
6 farm?

7 A. A couple years. He was sick, so I
8 kind of run it for him. He couldn't do the work.

9 Q. Run it for him means doing the
10 work?

11 A. All of it, yeah, doing the work.

12 Q. What did you do when you left the
13 farm, then?

14 A. I started driving a route truck.

15 Q. At about 1966 or so?

16 A. Yeah, I would say in there
17 somewhere.

18 Q. Just give me your history, then, in
19 terms of your career beginning in 1966 or so?

20 A. Okay. I drove the route truck for
21 a period of I'd say two years, maybe, or so, and
22 then I bought the business in 1970.

23 Q. Sandstone Distributing?

24 A. Yes.

25 Q. From whom did you purchase it?

1 A. My brother.

2 Q. Had your brother started it?

3 A. No. It was going prior to that. I
4 don't remember who he bought it from, but --

5 Q. And you've been in the distribution
6 business ever since?

7 A. Yes.

8 Q. What is your current title?

9 A. I'm president or owner of it.

10 Q. And the formal name of your company
11 is what, sir?

12 A. Sandstone Distributing.

13 Q. Incorporated?

14 A. Yes.

15 Q. Who are the shareholders of the
16 company?

17 A. Myself and my wife.

18 Q. Her name is what?

19 A. Alice.

20 Q. Fifty/fifty owners?

21 A. No. I believe it's a 90/10. I'd
22 have to look at it. I believe that's what it is.

23 Q. And she has 90 percent?

24 A. No. I have -- well.

25 Q. Maybe?

1 A. Maybe.

2 Q. Any children?

3 A. Yes. I have three.

4 Q. Are they in the business?

5 A. My son is at this time.

6 Q. His name is what?

7 A. Peter.

8 Q. What are your annual sales in terms
9 of dollars, typically?

10 A. They'll run anywhere between three
11 hundred -- well, I'd say that would be the --
12 well, between three hundred thousand and six
13 hundred, maybe, at the most.

14 Q. Annual sales?

15 A. Uh-huh.

16 Q. Yes?

17 A. Yes.

18 Q. And that's dollar volume?

19 A. Yes.

20 Q. What lines of product do you carry?

21 A. I carry beer, water, I carry
22 Snapple, I carry the Jones, and I -- I have
23 carried some salsa.

24 Q. The kind you put on --

25 A. Potato chips.

1 Q. -- chips?

2 A. And, basically, that's about it,
3 you know, different odds and ends, and Tampico
4 and Frostop root beer and stuff like that.

5 Q. What's Tampico?

6 A. Tampico is a -- it's -- actually,
7 it's -- it looks like a juice, but it has sugar
8 in it, so it's kind of --

9 Q. What lines of beer do you carry?

10 A. I carry Lost Lake, Pigs Eye, Blatz,
11 Moose Drool.

12 Q. What is that, again?

13 A. Moose Drool, it's called.

14 Q. Moose drill?

15 A. Drool.

16 Q. Drool. Is it good?

17 A. Well, yes.

18 Q. Others?

19 A. I carry Yellowstone Brewing
20 products, Blue Diamond, Brewers Cave. Am I
21 missing anything? I don't believe I'm missing
22 anything.

23 Q. Are these mostly microbrewers?

24 A. No. The Moose Drool would be a
25 micro, the Yellowstone and the Brewers Cave would

1 be --

2 Q. Obviously, Pigs Eye and Blatz, I
3 know of them.

4 A. Yeah, and universals -- and Lost
5 Lake is a lower end beer, or lower priced beer, I
6 should say.

7 Q. But it's bottled, a bottled beer?

8 A. It's cans, it all comes in cans,
9 the Lost Lake does.

10 Q. What area do you cover in your
11 distribution?

12 A. I carry part of Duluth, I have as
13 far south as Chisago City, and over to Isanti.

14 Q. To the west?

15 A. Yes, and then I have part of
16 St. Cloud and stuff just for the Frostop items.

17 Q. How far east?

18 A. We go into Wisconsin with Frostop.

19 Q. Otherwise to the border with most
20 of your --

21 A. Otherwise, yeah. The beer is all
22 inside of Minnesota.

23 Q. But Sandstone isn't that far from
24 Wisconsin border, is it?

25 A. No, it isn't. It's about three

1 A. Well, my son is going to have to
2 fill it in, or I'll have to pick it up.

3 Q. Bring your truck down with you so
4 you can drop some stuff off on the way home.

5 A. Well, I probably should have, but I
6 couldn't find my way in here this morning.
7 Sorry.

8 Q. So organizationally, I assume,
9 you're at the top, but you're working day by day,
10 and everybody pretty much knows what they need to
11 do, and you get on with it?

12 A. Yes.

13 Q. At some point in time you acquired
14 the Stewart's line of soda; is that correct?

15 A. Yes.

16 Q. And when did that happen?

17 A. I want to say it was back in 2002
18 that I started with that.

19 Q. How did you first get involved in
20 carrying the Stewart's line?

21 A. I was introduced to it by Needham
22 Distributing.

23 Q. Who at Needham?

24 A. Dave.

25 Q. That's what in South Dakota we used

1 to call the old man.

2 A. Okay.

3 Q. Do they do that anymore?

4 A. Well --

5 Q. The old man and the kids, do
6 they --

7 A. Yeah.

8 Q. Maybe they don't do that anymore.
9 Mr. Needham, the father?

10 A. Yes, sir.

11 Q. And how did he introduce it to you?

12 A. Um, I would pick up inventory from
13 him once in a while, and I just happened to be
14 down there.

15 Q. What kind of inventory would you
16 pick up from him?

17 A. Well, like beer.

18 Q. Some of these lines you've been
19 talking about?

20 A. Yes, uh-huh.

21 Q. Now, do you typically buy those
22 from the brewer?

23 A. Not -- yes, some of them I do, and
24 some of them I pick up through the wholesalers.

25 Q. And is Needham an ongoing supplier

1 Q. That was after you became a
2 licensee, isn't it?

3 A. Yes.

4 Q. I want to talk about the time you
5 entered into the relationship, not after you're
6 in the relationship, when you enter into it.

7 Did you pay any money, directly or
8 indirectly, to Stewart's for the right to enter
9 into the relationship?

10 MR. DAHL: Objection, form.

11 THE WITNESS: The question was
12 before -- before I did this contract, is that
13 what you're --

14 BY MR. KILLION:

15 Q. Let me see if I can help again.
16 I'm trying to find out if -- you paid a franchise
17 fee, I understand that.

18 A. Yes.

19 Q. Now, a franchise fee is typically
20 defined as a payment, direct or indirect, paid by
21 an alleged franchisee to an alleged franchiser
22 for the right to carry a particular product or
23 brand.

24 Did you make any payment, directly
25 or indirectly, for the right to carry the brand?

1 MR. DAHL: Objection, form.

2 THE WITNESS: I'll say no.

3 BY MR. KILLION:

4 Q. Now, a fee can also be defined as a
5 payment for the right to continue to carry the
6 brand or the product.

7 Did you pay any kind of fee, in
8 your view, directly or indirectly, for the right
9 to continue to sell the Stewart's product?

10 MR. DAHL: Objection, form.

11 BY MR. KILLION:

12 Q. Here's where I think you say I
13 think the marketing program was an indirect fee,
14 right?

15 A. It would be an indirect fee, yes.

16 Q. But not for the right to enter into
17 the relationship, but for the right to continue,
18 you would say; is that fair?

19 I'm trying to help you out here a
20 little bit.

21 A. Yes.

22 Q. Any other indirect fee for the
23 right to continue the relationship?

24 A. We participated in some programs,
25 like for deal -- dealer loaders, in other words,

1 to -- like tubs and -- we purchased the tubs and
2 the -- I think there was an ice cream float
3 thing, and there was one other program, too. Now
4 I can't remember what it was.

5 Q. We can put it in a more broad
6 category. You participated in some programs,
7 correct? That may be discount programs, it may
8 be tubs, it may be something else, but it's a
9 broad category --

10 A. Yes.

11 Q. -- of participating in programs?
12 Any indirect payment that you made
13 to Stewart's for the right to continue to carry
14 the brand other than possibly your participation
15 in programs?

16 MR. DAHL: Objection, form. Go
17 ahead and answer, if you can.

18 THE WITNESS: Sir, could you
19 restate that question?

20 BY MR. KILLION:

21 Q. I'm going to give you a chance to
22 tell me the about the programs --

23 A. Okay.

24 Q. -- that you participated in. I'm
25 not trying to foreclose that. I'm merely trying

1 to narrow the scope here of things I need to
2 inquire into.

3 So far I've heard you tell me,
4 Mr. Killion, the indirect franchise fee for the
5 right to continue to carry the Stewart's product
6 was my participation in programs, and then I'm
7 asking you, well, is there any other indirect fee
8 that you paid for the right to continue the brand
9 other than participating in programs?

10 MR. DAHL: Objection to form. Go
11 ahead and answer if you can.

12 THE WITNESS: Not that I recall,
13 sir.

14 BY MR. KILLION:

15 Q. Let's get into the programs, then.
16 What programs do you contend
17 constituted an indirect franchise fee?

18 A. Well, participating in the ads with
19 Cub.

20 Q. Anything else?

21 A. And I also -- with the -- the deal,
22 the dealer loaders, the --

23 Q. I'll cover each of those.

24 A. Okay.

25 Q. Any others?

1 A. Let's see, I -- I do not recall any
2 others at this point. I don't recall anything
3 else at this point.

4 Q. What was the Cub program?

5 A. The Cub program, it was a flier
6 that we would get from -- directly from Cadbury
7 Schweppes or our rep, or whoever did that, and
8 they would send us out a flier, and on there it
9 would say this will be in your -- in the Cud ad
10 such and such a date and that the pricing would
11 be such and such a price, which we -- we would
12 discount that price down to meet their suggested
13 retail pricing.

14 Q. Which Cub did you serve?

15 A. I served the one in Cambridge.

16 Q. Any others?

17 A. No, sir.

18 Q. And how often did you participate
19 in a program for Cub?

20 A. I believe we participated in every
21 one that was sent to us from -- from our reps.

22 Q. And do you have recollection of how
23 many that was?

24 A. I would say it was two or three.

25 Q. Fair enough. Tell me if I'm

1 getting this right, and I'll explain what I
2 understand the program to be.

3 Normally, by way of an example, the
4 Stewart's product might sell for \$15 a case to
5 the grocer, Cub, but you'd run a program where
6 the price was \$13 a case, by way of an example?

7 A. Yes.

8 Q. So there would be a \$2 per case
9 discount?

10 A. Yes.

11 Q. And how would that discount be
12 passed on to Cub?

13 A. I would go in and lower the price
14 on the product to whatever their suggested
15 pricing was to me to sell it to Cub.

16 Q. So, whereas, you might normally
17 sell it at \$15, now you would sell it at \$13?

18 A. Correct.

19 Q. And this promotion would run during
20 a specific period of time, correct?

21 A. Yes, sir.

22 Q. And then, at the end of that
23 period, you'd go back up to your normal price?

24 A. Yes, sir.

25 Q. Now, let's take that \$2 a case.

1 Were you out that \$2 a case, or were you
2 reimbursed some part of that?

3 A. I think we were reimbursed. I
4 believe we were reimbursed part of that, I
5 believe we were.

6 Q. My understanding is there was a
7 co-op program --

8 A. Right.

9 Q. -- where Stewart's would pick up
10 half the cost of the program by reimbursing you
11 half the amount of the discount. Is that
12 consistent with your understanding?

13 A. Yes, sir.

14 Q. Any other parts of the Cub program
15 that you think constituted an indirect franchise
16 fee?

17 MR. DAHL: Objection, form. Go
18 ahead and answer if you can.

19 THE WITNESS: Maybe outside that we
20 had to provide the racks for?

21 BY MR. KILLION:

22 Q. Anything else?

23 A. No, sir.

24 Q. And as it relates to the discount
25 program, in fact, it wasn't you that made a

1 payment to Stewart's, it was Stewart's that made
2 a payment to you; is that correct?

3 MR. DAHL: Objection, form.

4 THE WITNESS: Rephrase that again,
5 sir?

6 BY MR. KILLION:

7 Q. Sure. My question is this, how did
8 you make a payment to Stewart's as a part of the
9 Cub's program? It seems to me it was Stewart's
10 that made a payment to you?

11 A. Well, we had to take part of the
12 co-op, I mean, or take part -- we had to discount
13 the price 50/50.

14 Q. How did that constitute a payment
15 to Stewart's?

16 A. Well, it didn't probably in writing
17 them a check, no.

18 Q. In fact, the check was written to
19 you?

20 A. For their half of their co-op, yes.

21 Q. And as it relates to whatever
22 discount you were given after being reimbursed by
23 Stewart's, did you still make a margin off of the
24 sale?

25 A. A very little margin.

1 Q. I think I asked did you make a
2 margin, I didn't say a huge one. You made a
3 margin, right?

4 A. Yes.

5 Q. And it's good for business, isn't
6 it?

7 MR. DAHL: Objection, form.

8 THE WITNESS: If you can make a big
9 enough profit.

10 BY MR. KILLION:

11 Q. Over time it's an investment, isn't
12 it? You take a little less margin today in hopes
13 of building up sales into the future; isn't that
14 fair?

15 MR. DAHL: Objection, form.

16 THE WITNESS: I -- I don't know if
17 I would say it would be good for business as far
18 as building up sales. I mean, if I didn't
19 participate in it, I'd have lost my customer.

20 BY MR. KILLION:

21 Q. Did you ever refuse to participate
22 in any of these programs?

23 A. No.

24 Q. Did you ever say to anybody you
25 didn't want to participate?

1 A. No.

2 Q. Was your participation voluntary?

3 MR. DAHL: Objection, form.

4 THE WITNESS: If I would not have
5 participated in this, I would have lost that
6 customer.

7 BY MR. KILLION:

8 Q. How do you know?

9 A. How do I know? Because I believe
10 that it's -- if that -- it was set up -- these
11 ads were set up at whoever set them up, and had I
12 not participated in it, I'd have been hurting.

13 Q. The program?

14 A. The program and myself.

15 Q. In other words, if the program is
16 going to go forward, it almost has to be to all
17 the Cub stores, if one of you pops out of it,
18 then it hurts the program, right?

19 MR. DAHL: Objection, form.

20 THE WITNESS: I would say it
21 wouldn't be -- it wouldn't look good.

22 BY MR. KILLION:

23 Q. Well, did anybody at Stewart's ever
24 say, if you don't participate in this program,
25 we're going to take away your distribution

1 agreement?

2 A. No.

3 Q. And, in fact, later on you recall
4 that Stewart's had trouble getting all of the
5 distributors to go along with some of these
6 programs and ended up having to cancel them?

7 A. I did not -- I did not know that.

8 Q. If, in fact, that's true, this is
9 the first you've heard of it, is here today?

10 A. Yes.

11 Q. Do you know the number of programs
12 went down from roughly five a year to three
13 because Mark VII refused to participate?

14 A. No.

15 Q. Do you remember the number of
16 programs going down for Cub?

17 A. No.

18 Q. All right. And then you mentioned
19 the end rack; is that correct?

20 A. It was a freestanding rack.

21 Q. And that is simply a matter if
22 you're going to have this program, you've got to
23 have a rack there to put the product on?

24 A. Yes. They --

25 Q. If you go into a Cub, most of the

1 space is pretty much taken up, isn't it, by the
2 various soda distributors?

3 A. Yes.

4 Q. So if you're going to get some more
5 space to put this program on, you're going to
6 have to have a rack, right?

7 A. Correct.

8 Q. What do they cost?

9 A. I don't recall right off the top of
10 my head, but I would say \$10 to \$25. I'm not
11 sure.

12 Q. Are you saying that \$10 to \$25 is a
13 franchise fee?

14 A. Well, it would be in -- I wouldn't
15 have the customer if I didn't provide the rack
16 for it.

17 Q. Because where are you going to put
18 the soda, right?

19 A. Right.

20 Q. Now, did you get increased sales
21 when you'd do these programs?

22 A. Increased sales in what aspect are
23 you asking? Increased --

24 Q. Well, you got a program, you bought
25 a rack for 10 to 25 bucks, you put the soda out

1 there. Did more consumers purchase the product,
2 in your experience, in response to the promotion?

3 A. During that ad, yes.

4 Q. And, obviously, the more volume the
5 more profits, maybe the margin isn't the same,
6 but you've got more product you're selling,
7 right?

8 A. Somewhat, yes.

9 Q. And you hope that people get in the
10 habit of buying Stewart's product, they like it,
11 they come back, they buy more, it increases
12 sales, is that fair?

13 A. That's your hope.

14 Q. What would you do with the rack
15 once the program was over?

16 A. If Cub wanted it out of the store,
17 I would have to pick it up and take it back.

18 Q. What would you do with it then?

19 A. Put it back into my rack inventory.

20 Q. Until the next program?

21 A. Correct.

22 Q. And where is the rack today?

23 A. I don't have racks, because I don't
24 have Stewart's.

25 Q. What did you do with the racks?

1 How many racks were there?

2 A. I don't recall how many we had.

3 I --

4 Q. Two or three?

5 A. For different customers I probably
6 had, roughly -- I probably had ten.

7 Q. How about for Cub?

8 A. We put in either one or two of
9 them, if I recall right.

10 Q. So you had one or two racks devoted
11 to the Cub program, and each time the program ran
12 you'd bring the racks back, as far as you know?

13 A. Correct.

14 Q. And you don't know where the racks
15 are today?

16 A. Well, they were plastic racks. I
17 mean, they wear out, whatever.

18 Q. So they were not big, heavy metal
19 racks?

20 A. No, sir.

21 Q. Just plastic?

22 Then you mentioned indirect
23 franchise fee in the form of dealer loaders?

24 A. Yes.

25 Q. Or dealer loads, or what's it

1 called?

2 A. We called them dealer loaders.

3 Q. Like an end loader?

4 A. Well, no. Like you try to secure
5 an end for the product, I guess, is how I would
6 put it.

7 Q. And I think I'm following you now.
8 So, for example, you're at a C
9 store and all the space were taken, if you're
10 going to get your product into the store, you're
11 going to have to provide additional space?

12 A. Correct.

13 Q. And that additional space comes in
14 the form of an end loader?

15 A. In a -- in a C store, you've got
16 X amount of space, okay. Most C stores won't let
17 you put in an extra rack, okay. You've got
18 X amount of space shelf in that C store that
19 you've got, and they only let you put in what
20 they decide they're going to put into that store,
21 and it may be Mountain Dew, it might be whatever
22 they devote their thing to.

23 Q. Bad example, it sounds like. Where
24 would you use an end loader?

25 A. Probably in a grocery market.