

JAN 31 2007

IN THE UNITED STATES DISTRICT COURT  
OR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION

JOHN F. CORCORAN, CLERK  
BY:  DEPUTY CLERK

UNITED STATES OF AMERICA :  
 :  
v. :  
 :  
APPALACHIAN OIL COMPANY INC. :

Case No. 1:07CR4

**PRETRIAL DIVERSION AGREEMENT**

APPALACHIAN OIL COMPANY INC. ("APPCO") has entered into a pretrial diversion agreement ("Agreement") with the United States of America. The terms and conditions of this Agreement are as follows:

**1. WAIVER OF INDICTMENT AND CONSENT TO THE FILING OF AN INFORMATION**

APPCO hereby waives its right to be proceeded against by indictment and consents to the filing of an Information charging it with conspiracy to commit wire fraud, in violation of Title 18, United States Code, Section 371.

**2. CHARGES FOR WHICH APPCO IS ACCEPTING RESPONSIBILITY AND WAIVER OF RIGHTS**

For purposes of this Agreement, APPCO does not contest and accepts responsibility for the conduct set out in Count One of the Information, charging it with conspiracy to commit wire fraud, in violation of Title 18, United States Code, Section 371. The maximum statutory penalty for Count One is probation for a period of 5 (five) years and/or a fine of \$500,000 or twice the gross gain from the offense. There is also a special assessments of \$400 per felony count of conviction. APPCO and the United States agree to defer prosecution on this charge for a period of 3 years from the date this Agreement is signed provided APPCO abides by the conditions and requirements set forth in this Agreement.

For purposes of this Agreement, APPCO does not contest and accepts responsibility for its conduct as set forth in the entire Information. The United States agrees that if APPCO complies with all of the terms of this Agreement, at the conclusion of the 3 year period of deferred prosecution, APPCO will not be prosecuted for the charge alleged in the Information and the Information will be dismissed with prejudice.

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APPCO hereby requests the United States Attorney for the Western District of Virginia to defer such prosecution. APPCO agrees and consents that any delay from the date of this Agreement to the date of initiation of prosecution, as provided for in the terms expressed herein, shall be deemed to be necessary delay at APPCO's request. APPCO waives any defense to such prosecution on the ground that such delay operated to deny their right, under Rule 48(b) of the Federal Rules of Criminal Procedure and the Sixth Amendment to the Constitution of the United States, to a speedy trial. In addition, APPCO waives, for a period of months equal to the period of this agreement, any defense based on the running of the statute of limitations. In addition, APPCO agrees that if it violates any part of this agreement that it will waive its right pursuant to Rule 7 of the Federal Rules of Criminal Procedure to be charged by indictment and will consent to the filing of an information on the charge listed above.

### 3. FINANCIAL OBLIGATIONS

a. APPCO agrees to the filing of a civil forfeiture complaint in the Western District of Virginia based upon the allegations in Count One and agrees to forfeit \$255,000 in cash in settlement of the forfeiture complaint ("settlement sum"). APPCO agrees to sign, concurrent with the signing of this Agreement, a settlement agreement acknowledging that the settlement sum represents proceeds of a violation of 18 U.S.C. §§ 371 and 1343, and/or are forfeitable in lieu of certain property that would be otherwise subject to forfeiture pursuant to 19 U.S.C. § 1613(c). APPCO agrees to forfeit all interest in these funds and to take whatever steps are necessary to pass clear title of this sum to the United States. These steps include but are not limited to making the sum available to the United States, as directed by the United States, immediately upon entry of this Agreement. APPCO agrees not to file a claim in any forfeiture proceeding or to contest, in any manner, the forfeiture of said assets.

APPCO understands and agrees that forfeiture of this property is proportionate to the degree and nature of the offense, and does not raise any of the concerns raised in *United States v. Austin*, 113 S.Ct. 2801 (1993). To the extent that such concerns are raised, APPCO freely and knowingly waives any and all right it may have to raise a defense of "excessive fines" under the Eighth Amendment to this forfeiture. APPCO further understands and agrees that this forfeiture is separate and distinct from, and is not in the nature of, or in lieu of, any monetary penalty.

b. APPCO agrees to make the following payment in accordance with the terms of the civil settlement made with R.J. Reynolds Tobacco Company, Inc. in *R.J. Reynolds Tobacco Company, Inc. v. Market Basket, Inc. et al.*: \$2,500,000.00 (two million, five hundred thousand dollars) representing the restitution due to R.J. Reynolds Tobacco Company for off-contract sales of discounted cigarettes by APPCO, to be paid over 3 (three) years.

c. APPCO agrees and understands that under no circumstances will any of the money paid pursuant to this Agreement be returned.

### 4. OTHER OBLIGATIONS

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Page 2 of 10

- a. APPCO will not rehire Daniel Blackburn, former President of the Convenience Store Division.
- b. APPCO will comply in all material respects with all federal and state statutes and regulations.
- c. APPCO will comply in all material respects with all terms of this Agreement.
- d. APPCO agrees and understands that no entity or person shall derive any tax benefit (credit, deduction, etc.) based in whole or in part on the payment of \$255,000 in forfeiture made pursuant to this Agreement.

**5. COMPLIANCE PROGRAM**

Within 30 days of this filing of this Agreement, APPCO shall have in place and shall thereafter maintain a Compliance Program that includes the following elements:

a. APPCO shall employ or appoint an individual to serve as its Compliance Officer. The Compliance Officer shall be responsible for developing and implementing systems, processes, policies, and procedures to ensure compliance with state and federal requirements. The Compliance Officer shall make periodic (at least semi-annual) reports regarding compliance matters directly to the owners and Chief Executive Officer, and shall be authorized to report on such matters at any more frequent time. The Compliance Officer shall be responsible for monitoring the day-to-day compliance activities engaged in by APPCO as well as for any reporting obligations created under this Agreement.

b. APPCO will make knowledge of the following items an element in evaluating the performance of all salaried individuals and store managers:

- (1) federal, state, and local requirements applicable to APPCO operations including, but not limited to, laws and regulations of the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) relating to the sale of alcohol and tobacco products;
- (2) APPCO's Policies and Procedures (“Policies and Procedures”);
- (3) the terms of contracts entered into by APPCO related to the purchase and sale of all items, including, but not limited to, alcohol and tobacco products; and
- (4) this Agreement.

c. Policies and Procedures shall set forth, at a minimum, the following:

- (1) ATF requirements relating to the sale of alcohol and tobacco products;
- (2) this Agreement;
- (3) APPCO's commitment to full compliance with federal, state, and local requirements;
- (4) APPCO's requirement that all employees shall comply with ATF requirements, Policies and Procedures, and this Agreement;

Initials of Defendant's Authorized Representative



Page 3 of 10

- (5) the requirement that all of APPCO's employees shall report to the Compliance Officer suspected violations of federal, state, and local requirements, Policies and Procedures, and this Agreement;
- (6) the possible consequences for violating this Agreement or federal, state, and local requirements, to both APPCO and employees who fail to comply with this Agreement and federal, state, and local requirements, and the failure to report such noncompliance; and
- (7) the right of all individuals to use the Disclosure Program described herein and APPCO's commitment not to retaliate against such individuals;
- (8) methods for ensuring that all salaried employees and store managers are familiar with the terms and requirements of all contracts entered into by APPCO related to the purchase and sale of all items, including, but not limited to, alcohol and tobacco products;
- (9) disciplinary sanctions in place for violations of federal, state, and local requirements, Policies and Procedures, and this Agreement;

d. Annually, APPCO shall review its Policies and Procedures to determine whether revisions are appropriate and shall make any necessary revisions based on such review. Any materially revised Policies and Procedures shall be distributed within ten (10) days after any such revisions are finalized. Each Covered Person shall certify, in writing or electronically, that he or she has received, read, understood, and shall abide by the revised Policies and Procedures, within twenty (20) days after the distribution of the revised Policies and Procedures.

e. APPCO shall maintain a Disclosure Program that includes a mechanism (e.g., a toll-free compliance telephone line) to enable individuals to disclose to the Compliance Officer, or some other person who is not in the disclosing individual's chain of command, any issues or questions associated with this Agreement, or APPCO's policies, conduct, practices, or procedures with respect to federal, state, and local requirements believed by the individual to be a potential violation of criminal, civil, or administrative law, or a violation of this Agreement. APPCO shall continue to appropriately publicize the existence of the disclosure mechanism (e.g., via periodic e-mails to employees or by posting the information in prominent common areas).

- (1) The Disclosure Program shall emphasize a clear non-retribution, non-retaliation policy, and shall include a reporting mechanism for anonymous communications for which appropriate confidentiality shall be maintained. Upon receipt of a disclosure, the Compliance Officer (or designee) shall gather all relevant information from the disclosing individual(s). The Compliance Officer (or designee) shall make a preliminary, good faith inquiry into the allegations set forth in every disclosure to ensure that he or she has obtained all of the information necessary to determine whether a further review should be conducted. For any disclosure that is sufficiently specific so that it reasonably permits a determination of the appropriateness of the alleged improper practice or provides an opportunity for taking corrective action, APPCO shall conduct

Initials of Defendant's Authorized Representative:



Page 4 of 10

an internal review of the allegations set forth in the disclosure and ensure that proper follow-up is conducted.

- (2) The Compliance Officer (or designee) shall maintain a disclosure log, which shall include a detailed record of each report received (whether anonymous or not), the date(s) of the report, the status of the respective internal reviews, the identities of all individuals who participated in the review(s), all documentation relating to the report, and all corrective action taken in response to the internal reviews.

f. If APPCO determines (after a reasonable opportunity to conduct an appropriate review or investigation of the allegations) through any means that there is a Reportable Event, APPCO shall notify the U.S. Attorney's Office, in writing, within ten (10) days after making the determination that the Reportable Event exists. For purposes of this Agreement, a "Reportable Event" means any alleged conduct or event that involves a matter, brought to the attention of APPCO's Compliance Office, Compliance Committee, senior management, or store managers, that a reasonable person would consider a possible violation of criminal, civil, or administrative laws and which involves a potential felony or other violation related to health, safety, fraud, false statement, tobacco, or alcohol. A Reportable Event may be the result of an isolated event or a series of occurrences. The written report to the U.S. Attorney's Office shall include the following information:

- (1) a complete description of the Reportable Event, including the relevant facts, persons involved, and legal authorities implicated;
- (2) a description of APPCO's actions taken to correct the Reportable Event;
- (3) any further steps APPCO plans to take to address the Reportable Event and prevent it from recurring; and
- (4) a copy of the disclosure log entry required by this Agreement, if any, related to the Reportable Event.

The written report should be sent to **United States Attorney's Office, 180 West Main Street, Abingdon, Virginia 24210**. It may be sent via facsimile to (276) 628-7399. It shall be clearly marked "re: APPCO compliance."

g. Within ten (10) days of the entry of this Agreement, APPCO shall provide a copy of this Agreement to all of its owners, directors and salaried employees. All recipients of this Agreement must certify that they have received, read, understood, and shall abide by this Agreement. Within thirty (30) days after the entry of this Agreement, the Compliance Officer shall advise the U.S. Attorney's Office in writing that all owners, directors, and salaried employees have certified, in writing or electronically, that they have received, read, understood, and shall abide by this Agreement. Newly employed persons shall receive this Agreement and Policies and Procedures. All newly employed persons must certify that they have received, read, understood, and shall abide by this Agreement, and shall complete the required certification within thirty (30) days after

Initials of Defendant's Authorized Representative:



Page 5 of 10

becoming a salaried employee or store manager. APPCO shall maintain a written record of certification by newly employed persons.

h. In addition to any other rights ATF may have by statute, regulation, or contract, ATF or its duly authorized representative(s) may examine and request copies of APPCO's books, records, and other documents and supporting materials and/or conduct on-site reviews of any of APPCO's locations for the purpose of verifying and evaluating: APPCO's compliance with this Agreement and ATF requirements. Furthermore, for purposes of this Agreement, ATF or its duly authorized representative(s) may interview any of APPCO's employees, contractors, or agents at the individual's place of business during normal business hours or at such other place and time as may be mutually agreed upon between the individual and ATF.

i. APPCO shall maintain for inspection all documents and records relating to its products and compliance with this Agreement and ATF requirements for the term of this Agreement (or longer if otherwise required by law).

j. APPCO shall serve a copy of this Agreement on any prospective purchaser or assignee at least thirty (30) days prior to such an assignment or change in ownership. APPCO shall furnish the U.S. Attorney's Office with an affidavit of compliance with this Paragraph sworn to by the Chief Executive Officer no later than fifteen (15) days prior to such assignment or change in ownership.

k. APPCO shall notify the U.S. Attorney's Office in writing at least fifteen (15) days before any of the following events, if the event may affect APPCO's obligations arising out of this Agreement:

- (1) reorganization, bankruptcy, dissolution, or assignment or sale resulting in the emergence of a successor;
- (2) the creation of subsidiaries; or
- (3) any other change of the corporate structure.

l. This Agreement shall be binding on any successor, assigns, and transferees of APPCO.

m. The undersigned APPCO signatory represents and warrants that he is fully authorized to execute this Agreement on behalf of APPCO and that the owners of APPCO have approved entry into this Agreement.

## 6. AGREEMENT TO BE TRUTHFUL AND COOPERATE

APPCO agrees to (a) cooperate fully with law enforcement agents; (b) disclose to law enforcement agents knowledge of any criminal activity; (c) completely and truthfully disclose all information as may be requested by the United States with respect to the activities of APPCO and its affiliates, its present and former owners, officers, agents, and employees; (d) identify witnesses

Initials of Defendant's Authorized Representative



Page 6 of 10

who, to APPCO's knowledge, may have material information regarding any matters under investigation; (e) use its best efforts to make available present and former owners, officers, agents, and employees to provide information and/or testimony as requested, including sworn testimony before a federal grand jury or in federal trials, as well as interviews with federal law enforcement authorities; (e) provide testimony and other information deemed necessary by the United States or a court to identify or establish the original location, authenticity, or other evidentiary foundation necessary to admit into evidence documents in any criminal or other proceeding as requested by United States.

APPCO understands that any statements or records obtained pursuant to this Agreement may be used against APPCO in this or any other proceeding. APPCO knowingly waives any right it may have under the Constitution, any statute, rule or other source of law to have such statements, or evidence derived from such statements, suppressed or excluded from being admitted into evidence.

APPCO's attorneys and APPCO expressly waive the presence of counsel at any meetings and/or interviews between the United States and any individual. The United States may contact APPCO's present and former owners, officers, agents, and employees without the prior approval of APPCO's attorney. At any time during such meetings or contacts with government agents and attorneys, the person contacted may request the presence of APPCO's attorneys and the meeting will be suspended until the attorney arrives or gives consent for the meeting to continue. If requested by the person contacted, the meeting will also be suspended to allow them a reasonable opportunity to obtain the presence of their personal attorney.

#### **7. INFORMATION ACCESS WAIVER**

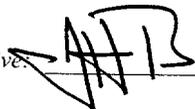
APPCO and its owners knowingly and voluntarily waives its/their rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. §552, or the Privacy Act of 1974, 5 U.S.C. §552a.

#### **8. COMPLETION OF PROSECUTION**

APPCO understands that except as provided for in this Agreement, so long as it complies with all of its obligations under the Agreement, there will be no further prosecution of it in the Western District of Virginia for any matters which occurred prior to the date this Agreement is signed by the government attorney and about which the government attorney whose name appears on this document had specific knowledge, prior to the date on which this Agreement, gained from the investigation that gave rise to the charges contained in the Information in this case. The undersigned government attorney acknowledges that she is unaware of any other government attorney in the Western District of Virginia who is actively working on this matter.

#### **9. WAIVER OF STATUTE OF LIMITATIONS & AGREEMENT TO ALLOW GOVERNMENT TO PROCEED BY INFORMATION**

*Initials of Defendant's Authorized Representative:*



*Page 7 of 10*

APPCO agrees that if, for any reason, it fails to comply with any obligation under this Agreement, the United States may file, by indictment or information, any charges against it which were filed and/or could have been filed concerning the matters involved in the instant investigation. APPCO hereby waives its right under Federal Rule of Criminal Procedure 7 to be proceeded against by indictment and consents to the filing of an information against it concerning any such charges. APPCO hereby waives any statute of limitations argument as to any such charges.

#### **10. LIMITATION OF AGREEMENT**

This agreement is limited to the Western Judicial District of Virginia and does not bind other federal judicial districts, nor does it bind any state or local authorities.

#### **11. EFFECT OF SIGNATURE**

APPCO understands that its signature on this Agreement constitutes a binding offer by it to enter into this Agreement. APPCO understands that the United States has not accepted its offer until the United States signs the Agreement.

#### **12. REMEDIES FOR FAILURE TO COMPLY WITH ANY PROVISION OF THE AGREEMENT**

APPCO understands that if it fails to materially comply with any provision of this Agreement, at any time, the United States Attorney's Office may, at its election, pursue any or all of the following remedies: (a) declare this Agreement void; (b) initiate prosecution for the offense alleged in the Information; (c) initiate prosecution on additional offenses; (d) refuse to abide by any stipulations and/or recommendations contained in this Agreement; (e) take any other action provided for under this Agreement or by statute, regulation or court rule. The remedies set forth above are cumulative and not mutually exclusive.

#### **13. EFFECTIVE REPRESENTATION**

APPCO has discussed the terms of the foregoing Agreement and all matters pertaining to the charges against it with its attorney and is fully satisfied with its attorney and its attorneys' advice. At this time, APPCO acknowledges that it has no dissatisfaction or complaint with its attorneys' representation.

#### **14. GENERAL UNDERSTANDINGS**

For the purposes of this Agreement, APPCO does not contest that there is a sufficient factual basis to support each and every material factual allegation contained within the charging document.

APPCO understands that this Agreement does not apply to any crimes or charges not addressed in this Agreement.

*Initials of Defendant's Authorized Representative:*



*Page 8 of 10*

APPCO has not been coerced, threatened, or promised anything other than the terms of this Agreement.

APPCO agrees that all determinations of materiality are within the sole discretion of the United States.

APPCO agrees that the United States may, upon request of APPCO, APPCO's attorneys, or in its own discretion, bring the cooperation of APPCO and its compliance with its other obligations under this Agreement to the attention of any individual, entity, or office.

This writing sets forth the entire understanding between the parties and constitutes the complete Agreement between the United States and APPCO, and no other additional terms or Agreements shall be entered except and unless those other terms or Agreements are in writing and signed by the parties. This Agreement supersedes all prior understandings, promises, Agreements, or conditions, if any, between the United States and APPCO.

APPCO has consulted with its attorneys and fully understands all of its rights with respect to the offenses charged in the Information. APPCO has read this Agreement and carefully reviewed every part of it with its attorneys. APPCO understands this Agreement and voluntarily agrees to it. Being aware of all of the possible consequences of this Agreement, APPCO has independently decided to enter into this Agreement of its own free will and is affirming that Agreement on this date by the signature of its authorized representative below.

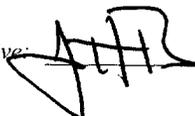
The authorized representative, by his signature below, hereby certifies to the following:

- (1) He has read the entire Agreement and discussed it with APPCO's owners, and is duly authorized to enter into this Agreement on behalf of APPCO;
- (2) APPCO understands all the terms of the Agreement and those terms correctly reflect the results of negotiations between the United States Attorney's Office and APPCO;
- (3) APPCO is fully satisfied with APPCO's attorneys' representation during all phases of this case;
- (4) APPCO is freely and voluntarily entering into this Agreement.

Date: 1-29-07

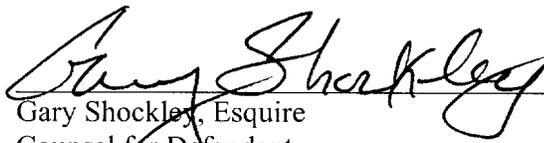
  
\_\_\_\_\_  
Jeffrey Benedict  
Authorized Representative for Appalachian Oil  
Company, Inc.

We have discussed with and fully explained to the owners of APPCO the facts and circumstances of the case; all rights with respect to the offenses charged in the Information; possible defenses to the offenses charged in the Information; and all of the consequences of entering into this Agreement. We have reviewed the entire Agreement with our client, through its authorized representative. In our judgment, APPCO, through its authorized representative, understands the

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terms and conditions of the Agreement, and we believe APPCO's decision to enter into the Agreement is knowing and voluntary. APPCO's execution of and entry into the Agreement is done with our consent. The authorized representative is duly authorized to enter into the Agreement on behalf of APPCO.

Date: 1/26/07

  
\_\_\_\_\_  
Gary Shockley, Esquire  
Counsel for Defendant

Date: 1/30/2007

  
\_\_\_\_\_  
Jennifer R. Bockhorst  
Assistant United States Attorney  
Tennessee State Bar No. 021395

Initials of Defendant's Authorized Representative



Page 10 of 10