



Gerald S. A. Perez

Division President

August 16, 1991

Honorable Senator  
Elizabeth Arriola  
Acting Chairperson  
Committee on Judiciary  
and Criminal Justice  
Twenty-first Guam Legislature  
155 Hesler Street  
Agana, Guam 96910

Re: Bill No. 524

Dear Senator Arriola:

This testimony is submitted in support of the passage of Bill No. 524, which was introduced by Senator John P. Aguon. Bill 524 would repeal and amend certain sections of Title 9 of the Guam Code Annotated, as they were recently enacted by Public Law 21-18, dealing with "touting".

I previously communicated to the Legislature my company's concerns with the language which would be affected by Bill 524. Suffice it to say that we feel the current statutory language is overbroad and could conceivably be construed to encompass a broad range of common business practices, the legitimacy of which has never been questioned.

We are aware of the concern that members of the Legislature and the general public have over certain business practices involving the tourism industry. We have worked in the past and we will continue to work with Senator Aguon and other members of the Legislature to develop legislation which will more specifically deal with any unfair and harmful practices in our industry. However, the language enacted by Public Law 21-18 is far too broad, in our opinion, and the corrections proposed by Senator Aguon will help eliminate possible confusion and uncertainty that might be caused by such language.

On the technical side, our lawyers have pointed out a couple of technical corrections they feel are necessary in the bill as drafted. First, the semicolon which follows the word "otherwise" in line eight of the bill should,



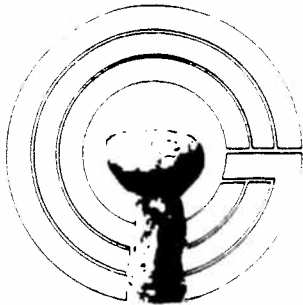
they advise me, be changed to a coma, so that there is no question that the clauses regarding injury to competitors and competition relate back to the first clause. Second, they suggest that a coma be added following the word "privilege" in line ten of the bill. This would eliminate any question that the clause beginning "not extended to all business consumers..." qualifies all the referenced practices and not just "special services or privilege."

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Gerald S.A. Perez".

GERALD S.A. PEREZ  
President, Guam Division  
DFS Group L.P.



**GUAM CHAMBER OF COMMERCE**  
**PARTNERS IN PROGRESS**

August 19, 1991

HAND DELIVER

OFFICE OF THE LEGISLATIVE SECRETARY  
ACKNOWLEDGMENT RECEIPT

Received By [Signature]

Time 10:40 A.M.

Date 8/19/91 001087

Senator Pilar Lujan  
Chairperson; Committee on  
Judiciary and Criminal Justice  
21ST GUAM LEGISLATURE  
163 Chalan Santo Papa Street  
Agana, Guam 96910

RE: WRITTEN TESTIMONY IN SUPPORT OF BILL NO. 524

Dear Senator Lujan:

Thank you for giving the Guam Chamber of Commerce the opportunity to submit written testimony in support of Bill No. 524. Bill No. 524 is an act to repeal Subparagraph (c) of §69.10, Title 9, Guam Code Annotated, and to amend Subsection (4) of §69.15 of said Title, relating to Touting. The minutes of the public hearing held this morning will reflect I appeared as a representative of the Chamber to testify in support of the Bill.

My first comment concerns minor drafting modifications necessary to avoid any confusion relative to the application of Subsection (4) of §69.15. I suggest that after the word "otherwise" appearing on line 3 of this particular subsection, the semicolon be changed to a comma. This change will specifically avoid any misunderstandings that the first part of the subsection can be construed separate from other parts of the subsection. Also, I would suggest placing a comma after the term "privilege" which appears on line 5 of Subsection (4). Thus, with the suggested modifications provided herein, Subsection (4) of §69.15, Title 9, Guam Code Annotated, would read as follows:

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Chairperson; Committee on  
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"(4) Secretly paying or allowing rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, [~~or touting for a commission or a kickback;~~] or secretly extending to certain business consumers special services or privilege, not extended to all business consumers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is unlawful; or"

The minor drafting modifications suggested above were also acknowledged as necessary by a representative of the Attorney General's Office who testified at the public hearing this morning.

My second and final comment concerns the effect Subparagraph (c) of §69.10, Title 9, GCA and Subsection (4) of §69.15, Title 9, GCA, would have if this particular section is not amended. Again, the minutes of the public hearing held this morning will reflect the representative of the Attorney General's Office appearing at the public hearing agrees with my position.

If the Bill is not amended, the Attorney General's Office would have a difficult time enforcing §69.15, Title 9, GCA. This stems from the definition of the term "Touting" which appears in §69.10 (c). Specifically, the term "Touting" in its current form under Chapter 69 is broad in its definition to include numerous legitimate and lawful business practices. For instance, any form of advertising or marketing would be a violation of the statute in its current form.

The Legislative Review Committee of the Guam Chamber of Commerce has researched the background of "Touting". It appears the only definition of Touting relates to activities at horse races. The term "Touting" in and of itself has not in any manner whatsoever been deemed to be an illegal or unlawful activity. Further, federal case authorities indicate that the payment of commissions to tour companies and tour guides to promote a particular store, was pro-competitive. Attached for your review

**HAND DELIVER**

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Chairperson; Committee on  
Judiciary and Criminal Justice  
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is a true copy of a written opinion signed by William Schwarzer, United States District Judge, in the case of Peter Harris v. Duty Free Shoppers Limited Partnership. The Ninth Circuit Court of Appeals subsequently affirmed Judge Schwarzer's decision.

Again, thank you very much for giving the Guam Chamber of Commerce the opportunity to submit written testimony in support of Bill No. 524.

Very truly yours,



Peter R. Sgro, Jr.

Board of Director and  
Chairman of Chamber's Legislative  
Review Committee

**Enclosure**

PRS/sss D#PL-08-19.91 A#7.5  
Y

cc: Senator John Aguon  
The Guam Chamber of Commerce  
Board of Directors

JUDGMENT IN A CIVIL CASE

<b>United States District Court</b>	DISTRICT <b>Northern District of California</b>
CASE TITLE  <b>Peter Harris, v. Duty Free Shoppers Limited Partnership.</b>	DOCKET NUMBER  <b>C 87-4843 WWS</b>
	NAME OF JUDGE OR MAGISTRATE  <b>William W Schwarzer</b>

Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED**

In accordance with the court's Order of July 17, 1989  
Duty Free Shoppers' motion for summary judgment is granted.

**FILED**  
JUL 13 1989  
RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ENTERED IN CIVIL DOCKET 7/19. 19 89

CLERK  <b>RICHARD W. WIEKING</b>		DATE  <b>7/18/89</b>
(BY) DEPUTY CLERK  <b>Wynette Bailey</b>	<b>COPIES MAILED TO PARTIES OF RECORD</b>	

ORIGINAL  
FILED

JUL 17 1989

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PETER HARRIS, an individual  
doing business as "Timely  
Graphics" and "Cable Car Gift  
Shop" and "Nikaido,"

Plaintiff,

vs.

DUTY FREE SHOPPERS LIMITED  
PARTNERSHIP, et al.,

Defendants.

No. C-87-4843-WWS

ORDER

ENTERED IN CIVIL DOCKET 7/19, 1989

Peter Harris brought this action under section 2(c) of the  
Robinson-Patman Act, 15 U.S.C. section 13(c), and under  
California unfair practices and unfair competition statutes  
against Duty Free Shoppers Limited Partnership ("Duty Free  
Shoppers") and various other travel companies catering  
especially to Japanese tourists. Duty Free Shoppers moves for  
summary judgment.<sup>1</sup>

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<sup>1</sup> Duty Free Shoppers also moves to strike most of the  
evidence offered by plaintiff in opposition to the summary  
judgment motion. The primary grounds for objection are lack of  
personal knowledge and hearsay. The Court does not rule on this  
motion because the contested evidence is not relevant to the  
decision of the underlying summary judgment motion.

1 I. FACTUAL BACKGROUND

2 The following facts are stipulated. (See Stipulation filed  
3 4/13/89.)

4 Duty Free Shoppers operates a duty free store in downtown  
5 San Francisco which caters especially to Japanese tourists.  
6 Plaintiff Harris operates a competing store.

7 Duty Free Shoppers pays lump sum amounts and commissions to  
8 tour companies and to tour guides to promote Duty Free Shoppers'  
9 downtown shop by scheduling stops of tour buses at the store,  
10 supplying Duty Free Shoppers with advance information about the  
11 number and characteristics of the tour group that will be  
12 stopping at the store, distributing promotional materials to the  
13 tourists, assisting the tourists in ordering items, and  
14 explaining the regulations covering duty free merchandise to the  
15 tourists.

16 The tourists are not required to buy from Duty Free  
17 Shoppers. They can and do purchase goods from other stores.

18 The payments to the tour companies and guides are less than  
19 Duty Free Shoppers would have to spend to gain the same  
20 promotional effect with other promotional devices.

21 This practice is common in the duty free merchandise  
22 business and plaintiff has been aware of it for some time.  
23 Plaintiff, however, chooses not to engage in this practice.

24 Duty Free Shoppers does not tell the tourists that are  
25 brought to its shop that it is paying the tour operators and  
26 guides to bring them to the store.

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## II. DISCUSSION

### A. Robinson-Patman Claim

Payment for services rendered is not forbidden by section 2(c) of the Robinson-Patman Act. E.g., Rangen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851, 859 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966). Duty Free Shoppers contends that it is entitled to summary judgment because the payments to the tour operators and guides are payments for services rendered, and therefore not illegal.

It cannot be disputed that the services performed by the tour operators and guides are valuable to Duty Free Shoppers. The stipulated facts state that Duty Free Shoppers would incur additional expenses if the tour operators and guides did not provide these promotional services. Furthermore, plaintiff's complaint shows that the promotional services are valuable -- if they were not, plaintiff would not object to them.

Plaintiff contends that, notwithstanding that the payments are for valuable services rendered, they are illegal because the tour operators and guides are the agents of the tourists and that secret payments to a buyer's agent are illegal.

Plaintiff's contention that the payments were secret is based on the following facts: (1) the tourists are not told explicitly that the tour operators and guides who delivered them to the store were receiving payments from the store; and (2) the tour guides are paid out of sight of the customers.

This is not, however, sufficient to render the payments illegal "secret commercial bribes," as plaintiff characterizes

1 them. Companies in the tourist business routinely pay  
2 commissions to tour operators and guides who steer tourists to  
3 them. When a tour operator takes a busload of tourists to a  
4 particular store and otherwise promotes that store to the  
5 tourists, it is obvious to everyone involved that the tour  
6 operator is providing a valuable service to the store owner.  
7 Common sense tells one that if the tour operator were not paid  
8 by the store owner pay for this service he would take the  
9 tourists to another store that did pay him for this service.

10 Therefore, Duty Free Shoppers' motion for summary judgment  
11 on the Robinson-Patman claim is granted.

12 B. State-Law Claims

13 Plaintiff also brings state-law claims under California's  
14 Unfair Practices Act, Cal. Bus. & Prof. Code §§ 17045, 17048,  
15 and Unfair Competition Act, Cal. Bus. & Prof. Code §§ 17200, et  
16 seq.

17 1. Unfair Practices Claim

18 California's Unfair Practices Act prohibits "the secret  
19 payment or allowance of rebates, refunds, commissions, or  
20 unearned discounts . . . to the injury of a competitor and where  
21 such payment or allowance tends to destroy competition." Cal.  
22 Bus. & Prof. Code § 17045. Section 17048 prohibits conspiracies  
23 in violation of section 17045.

24 The payments do not violate section 17045 because they are  
25 not secret. Even if they were secret, there is no evidence that  
26 they injure plaintiff or destroy competition. Plaintiff has  
27 voluntarily chosen not to make such payments. His failure to  
28

1 receive valuable promotion services because he refuses to pay  
2 for them is not an actionable injury.

3 Plaintiff's section 17048 conspiracy claim must fail with  
4 his section 17045 claim.

5 2. Unfair Competition Claim

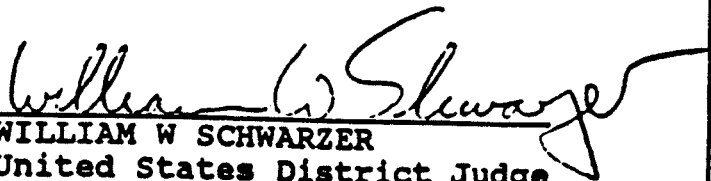
6 California's unfair competition act prohibits business  
7 practices that are unlawful, unfair, or fraudulent. However,  
8 the payments to tour operators and guides are pro-competitive.  
9 They are payments by one competitor, Duty Free Shoppers, for the  
10 valuable service of promoting that competitor's wares. Another  
11 competitor, plaintiff, cannot make those perfectly legal  
12 payments unfair simply by refusing to purchase the services  
13 supplied by the tour operators and guides.

14 III. CONCLUSION

15 For the reasons stated, Duty Free Shoppers' motion for  
16 summary judgment is granted.

17 IT IS SO ORDERED.

18 DATED: July 7, 1989

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21 WILLIAM W SCHWARZER  
22 United States District Judge  
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Introduced

AUG 27 '91

TWENTY-FIRST GUAM LEGISLATURE  
1991 (FIRST) Regular Session

Bill No. 524 (COR)

Introduced by:

J. P. Aguon *JPA*

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AN ACT TO REPEAL SUBPARAGRAPH (c) OF §69.10, TITLE 9, GUAM CODE ANNOTATED, AND TO AMEND SUBSECTION (4) OF §69.15 OF SAID TITLE, RELATING TO TOUTING.

**BE IT ENACTED BY THE PEOPLE OF THE TERRITORY OF GUAM:**

1           Section 1. Subparagraph (c) of §69.10, Title 9, Guam Code Annotated, is  
2 hereby repealed.  
3

4           Section 2. Subsection (4) of §69.15, Title 9, Guam Code Annotated, is  
5 hereby amended to read:

6           "(4) Secretly paying or allowing rebates, refunds,  
7 commissions, or unearned discounts, whether in the form of money  
8 or otherwise; [~~or touting for a commission or a kickback;~~] or  
9 secretly extending to certain business consumers special services  
10 or privilege not extended to all business consumers purchasing  
11 upon like terms and conditions, to the injury of a competitor and  
12 where such payment or allowance tends to destroy competition, is  
13 unlawful; or"