

February 2023 MPT-2 Item

B&B Inc. v. Happy Frocks Inc.

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B & B Inc. v. Happy Frocks Inc.

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FILE

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AZIZ & SHAPIRO LLP
Attorneys-at-Law
100 Austin Street
Franklin City, Franklin 33705

MEMORANDUM

To: Examinee
From: Hamid Aziz
Date: February 21, 2023
Re: B&B Inc. v. Happy Frocks Inc.

Our client, Happy Frocks Inc., was sued in the United States District Court by B&B Inc. for trademark infringement. At a post-trial hearing after a bench trial, the court announced its conclusion that our client was liable for trademark infringement in that it sold goods with an infringing mark, asked each party to brief its position on the remedies to be awarded, and stated that a full written opinion on both liability and remedies would be forthcoming after briefing.

Plaintiff B&B is seeking, among other things, actual damages, an injunction, and an award of that portion of the profits earned by our client from the sale of the infringing goods that was attributable to the infringement of the trademark. We believe that, whatever its liability for other remedies, our client is not liable for an award of profits.

Please draft the portion of our brief arguing that our client is not liable for an award of profits. (I have asked others in the firm to draft those portions of the brief dealing with other remedies or measures of damages, including their computation.) I am attaching the following materials:

- excerpts from the trial transcript, which provides the relevant factual record
- the transcript of the post-trial hearing, in which the court announced its conclusion as to liability only and requested briefs on remedies
- brief excerpts from the Supreme Court's decision in *Romag Fasteners, Inc. v. Fossil Group, Inc.*, on liability for profits in cases of trademark infringement
- the Franklin federal District Court's decision in *Spindriff Automotive v. Holt Enterprises*, setting forth the factors to consider in awarding profits in such cases

I am also attaching our firm's memorandum on the proper structure and content of a persuasive brief. Do not prepare a statement of facts, but be sure to incorporate relevant facts into your argument.

AZIZ & SHAPIRO LLP

MEMORANDUM

To: All Attorneys
Re: Guidelines for Persuasive Briefs in Trial Courts
Date: September 5, 2021

The following guidelines apply to persuasive briefs filed in trial courts.

I. Caption [omitted]

II. Statement of Facts (if applicable) [omitted]

III. Legal Argument

The body of each argument should analyze applicable legal authority and persuasively argue that both the facts and the law support our position. Supporting authority and facts should be emphasized, but contrary authority and facts should also be cited, addressed in the argument, and explained or distinguished. Courts are not persuaded by exaggerated, unsupported arguments.

We follow the practice of breaking the argument into its major components and writing carefully crafted subject headings that summarize the arguments they cover. A brief should not contain broad argument headings. Rather, the argument headings should be complete sentences that succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. Examples:

Improper: Setback requirements and removal of non-complying property

Proper: Because Defendant's garage sits only 15 feet from the curb, it fails to comply with the setback requirements of the homeowners' association and should be removed.

You need not prepare a table of contents, a table of cases, a summary of argument, or an index; these will be prepared, as required, after the draft is approved.

B&B Inc. v. Happy Frocks Inc.

United States District Court for the District of Franklin
EXCERPTS FROM THE TRIAL TRANSCRIPT, DECEMBER 16, 2022

Direct Examination of Vera Garcia, CEO of Plaintiff B&B Inc.

Plaintiff's Att'y Diane Berg: Please state your name and position for the record.

Garcia: Vera Garcia. I am Chief Executive Officer of B&B, Incorporated.

Berg: What is your firm's business?

Garcia: B&B makes buttons and other accessories for the fashion industry. Our buttons are well known in the trade, because they are uniquely styled and unlike any others in appearance. They are also made from high-quality materials, not just cheap plastic. Each button is stamped with our trademarked logo.

Berg: What was your firm's relationship with Happy Frocks?

Garcia: About nine years ago, we entered into a contract with Happy Frocks to supply them with our buttons, for their use in their high-end children's clothing. The contract provided that Happy Frocks would use our buttons exclusively and required that they instruct their authorized clothing manufacturers to purchase buttons directly from us.

Berg: How many manufacturers did Happy Frocks have that used your buttons?

Garcia: Four—they're all located overseas.

Berg: And how many buttons did Happy Frocks buy from you?

Garcia: On an annual basis, each manufacturer bought tens of thousands of our buttons. Our relationship with Happy Frocks was mutually beneficial for many years.

Berg: Then what happened?

Garcia: About two years ago, one of our employees was in a store and found some Happy Frocks children's clothes with buttons that looked like ours, contained our trademarked logo, but were made of cheap plastic and were clearly infringing. We knew that Quality Clothes, one of the overseas manufacturers they used, manufactured this line of clothing for Happy Frocks. We checked our records and found that, for the prior year, Quality Clothes had purchased only a few hundred of our buttons. We concluded that, for at least one year prior,

virtually all the clothing made by Quality Clothes that Happy Frocks was selling contained infringing buttons that looked exactly like ours, including our B&B logo, but were of inferior quality.

Berg: What did you do?

Garcia: We contacted you as our lawyer, and you sent Happy Frocks a letter telling them to cease and desist using the infringing buttons and demanding compensation.

Berg: What was the response from Happy Frocks?

Garcia: One of their managers called us and said they would look into it, but we didn't hear anything further from them, so we instructed you to bring this lawsuit.

Berg: What are you seeking by bringing this action?

Garcia: We want to be made whole for what we've lost, we want Happy Frocks to stop using the infringing buttons, and we want whatever profits they made that resulted from their use.

[Further direct testimony omitted.]

Cross-Examination of Vera Garcia, CEO of Plaintiff B&B Inc.

Defendant's Att'y Hamid Aziz: Ms. Garcia, are the allegedly infringing buttons dangerous?

Garcia: I'm not sure what you mean.

Aziz: Are they poisonous, for example?

Garcia: No, they're just cheap plastic.

Aziz: As these clothes are made for children, is it more likely that a child could swallow one of those buttons if it came loose than would be the case for one of your buttons if it came loose?

Garcia: No.

Aziz: Did any other clothing manufacturers besides Quality Clothes stop using your buttons because Happy Frocks sold the clothes manufactured by Quality Clothes?

Garcia: Not that I know of.

Aziz: To your knowledge, is Happy Frocks still selling clothes with the non-B&B buttons?

Garcia: No, they apparently made Quality Clothes stop doing so, but we want to make sure they don't start using them again.

Aziz: Did your overall sales decline during the period these buttons were used?

Garcia: No, our overall sales increased, but of course we lost the revenue from the sales of our buttons to Quality Clothes for the time that they used the infringing buttons until they stopped.

Aziz: To your knowledge, do customers who buy Happy Frocks clothing know who makes the buttons on the clothes?

Garcia: I hope they do from seeing B&B's logo on the buttons. I do think that customers know the difference between our high-quality buttons and the inferior-quality ones that were used.

Aziz: How long was it between the time you discovered the use of the non-B&B buttons and when you asked your lawyer to send the cease-and-desist letter?

Garcia: We did it almost immediately—maybe a week or two.

Aziz: And you say you got no response from Happy Frocks. The record will show that you did not file the complaint in this action, seeking an immediate injunction, until some nine months later, about a week before the so-called "Black Friday" sales in November. To your knowledge, is that the day with the largest sales of most retail goods like clothing?

Garcia: Yes, I believe it is.

Aziz: So would it be fair to say that you waited nine months to bring this lawsuit, until you could do so at a time when Happy Frocks would suffer the most damage from an injunction, and you could then put the most pressure on Happy Frocks to settle the case on your terms?

Garcia: I wouldn't put it that way.

Aziz: But with the belief that your trademark was being infringed, you still waited nine months from the date you learned of the allegedly infringing use until you brought suit to stop it, correct?

Garcia: That was the timeline, yes.

[Further cross-examination omitted.]

Direct Examination of Samuel Harris, CEO of Defendant Happy Frocks Inc.

Defendant's Att'y Aziz: Would you state your name and position for the record?

Harris: Samuel Harris. I am Chief Executive Officer of Happy Frocks Inc.

Aziz: Did you receive a so-called cease-and-desist letter from B&B's attorney about 22 months ago?

Harris: Yes, it said that some of our children's clothes contained infringing buttons, rather than buttons made by B&B. They demanded that we immediately stop the manufacture and sale of these clothes and said that we owed them a considerable amount of money.

Aziz: What did you do?

Harris: Well, their letter didn't specify which clothes from which of our overseas manufacturers contained these allegedly infringing buttons, so we had to investigate. It took us several weeks to get current samples from all our overseas manufacturers. When we finally did, we learned that Quality Clothes was indeed using buttons that didn't come from B&B. So we contacted Quality Clothes, told them to stop immediately, and, pursuant to the terms of our contract with them, terminated the relationship with them. We stopped selling our inventory of clothing that Quality Clothes had manufactured.

Aziz: Did you inform B&B of that fact?

Harris: No, we figured that stopping it was enough.

Aziz: Did Happy Frocks suffer any monetary loss as a result of all this?

Harris: Yes. You see, Quality Clothes, like all our manufacturers, was supposed to purchase the buttons directly from B&B and then bill us for the cost of the buttons. We found that, although they were using cheaper buttons, they were still billing us and we were still paying them for the cost of buttons from B&B. And we lost the value of our on-hand inventory. That all cost us a lot of money—I don't know if we'll be able to recover it from them, given their overseas location.

[Further direct testimony omitted.]

Cross-Examination of Samuel Harris, CEO of Defendant Happy Frocks Inc.

Plaintiff's Att'y Berg: Mr. Harris, what quality controls does Happy Frocks have over its overseas manufacturers regarding the clothing that they make for you?

Harris: We specify the quality levels of all the aspects of our clothing in our contracts with our manufacturers.

Berg: And what do you do to make sure that those levels of quality are adhered to?

Harris: We sample the goods that are manufactured to see if they are up to the quality standards we require.

Berg: How often are those samples examined?

Harris: Every time we get a new shipment from a manufacturer.

Berg: Referring to the time period beginning one year before you terminated your relationship with them, how many shipments of clothes did you receive from Quality Clothes?

Harris: Four.

Berg: And given your prior testimony, is it correct to say that you didn't notice the use of non-B&B buttons until the last—that is, the fourth—of those shipments?

Harris: Yes.

Berg: Have you since gone back and checked to see if the previous three shipments also contained buttons that were not made by B&B?

Harris: Yes, and they did.

Berg: So, despite your alleged application of quality controls for each shipment of clothing from each manufacturer, you didn't notice that the quality of at least those three previous shipments did not meet your standards, in that they contained these non-B&B buttons?

Harris: Yes. Simply put, we missed it.

Berg: You were negligent in maintaining that quality control, weren't you?

Aziz (Defendant's att'y): Objection—the question calls for a legal conclusion by the witness.

The Court: Sustained.

Berg: Let me put it another way—don't you think that you were lax, to say the least, in maintaining that quality control in this case?

Harris: In hindsight, of course I wish we had noticed the problem sooner, but we did our best.

Berg: Now let's address the question of why you missed it, as you put it. During the year when the non-B&B buttons were used, did you see an increase in the demand for the line of clothes made by Quality Clothes?

Harris: Yes, the retailers were clamoring for these designs—they were flying off the shelves.

Berg: And what did you do to meet that demand?

Harris: We accelerated our processing of the shipments we received from Quality Clothes so we could get them out the door faster.

Berg: How did that "acceleration" come about?

Harris: We instructed our employees to get their jobs done as quickly as possible to meet the demand.

Berg: And did that instruction extend to your quality control officer?

Harris: The instruction went to all our employees.

Berg: Wouldn't that have put pressure on the quality control officer to cut corners, and so lead to missing the use of the infringing buttons?

Harris: We would never do anything to cut corners on quality control. Your speculation is flatly wrong.

Berg: You say you stopped selling the inventory you had of goods manufactured by Quality Clothes. Did you recall any of those clothes that were out in the marketplace?

Harris: No, that would have been an impossible task, as we sell to over 900 retailers.

Berg: Have you ever recalled clothing from your retailers?

Harris: Yes, a few years ago we had a problem with some children's pajamas that had been made by one of our manufacturers with defective fabric.

Berg: How did that recall work?

Harris: We contacted the retailers and had them return the shipments with the defective fabric.

Berg: So you could have recalled the clothing with the infringing buttons, couldn't you?

Harris: That was a very different situation—the pajamas with the defective fabric had been shipped to about 600 of our retailers, and so the recall was manageable, unlike the situation with the buttons, where they had been shipped to over 900 retailers.

Berg: A recall from 900 retailers as opposed to 600 is actually quite possible, isn't it?

Harris: Well . . . I don't think it is.

Berg: Let's move on. What is your total cost per piece for the infringing clothing manufactured by Quality Clothes, and how many did you sell to your retailers?

Harris: Including everything, about \$50 per piece. We sold about 18,000.

Berg: And how much did you charge your retailers per piece?

Harris: \$75.

Berg: So you made a profit of \$25 on each piece sold, or a total profit of \$450,000 on the clothes with the non-B&B buttons?

Harris: Yes.

[Further cross-examination omitted.]

Direct Examination of Tiffany Chen, Defendant Happy Frocks's Expert Witness

Defendant's Att'y Aziz: Please state your name and position.

Chen: I am Tiffany Chen, Chief Executive Officer of TM Surveys, Ltd.

Aziz: I note for the record that Ms. Chen has previously been qualified as an expert witness on the construction and conduct of trademark surveys. Ms. Chen, were you commissioned by Happy Frocks to conduct a consumer survey of customers in relation to the use of B&B Inc.'s buttons on Happy Frocks clothing?

Chen: Yes. We conducted such a survey using standard scientific survey procedures.

Aziz: Please summarize the findings of your survey.

Chen: We conducted a survey of 839 consumers of Happy Frocks clothes manufactured by Quality Clothes. We found that the use of B&B's logo on the buttons played a minimal role in the clothing purchase: 3% of the respondents said that they noticed the logo and thought it added to the desirability of the clothes. We conducted another survey of 997 consumers of children's clothes

generally. We found that only 6% stated that whether there was a brand name printed on the buttons of clothes was one reason, among others, for purchasing one item of clothing instead of another, and less than 1% said that the appearance of a brand name on a button was the only reason for purchasing a particular item of clothing over another.

[Further direct examination and cross-examination omitted.]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF FRANKLIN

B&B, INC.)
Plaintiff,)
v.) Post-Trial Hearing Transcript
HAPPY FROCKS, INC.) Case No. 22 CV 1658
Defendant.)

February 17, 2023

Post-Trial Hearing Before Hon. Patricia James, U.S.D.J.

Present: Diane Berg, attorney for Plaintiff B&B, Inc., and Hamid Aziz, attorney for Defendant Happy Frocks, Inc.

The Court: Good afternoon. As you know, after the bench trial in this matter I asked both sides for post-trial briefs on the question of liability only. I did so because, if I found no liability, there would be no point in wasting the court's and the parties' time in addressing remedies. I have now read those briefs on liability and reviewed the trial transcript. As is my practice in cases of this sort, I am having this hearing to let counsel know my conclusion as to defendant's liability. I have concluded that defendant is liable for trademark infringement, as defendant sold goods that infringed plaintiff's trademark. I realize that defendant did not initiate the infringement, but the fact is that it sold infringing goods, and that is enough to establish liability.

I now require briefing from both sides on the question of remedies. Specifically, plaintiff has demanded a permanent injunction against sale of goods that infringed its mark, damages caused by defendant's sale of such goods, and an accounting of that portion of the defendant's profits attributable to the sale of such goods. Please submit your briefs two weeks from today. I will in due course render my decision on those points and issue a written opinion. Are there any questions? No? Then thank you, and this hearing is adjourned.

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Excerpts from Romag Fasteners, Inc. v. Fossil Group, Inc.,

140 S.Ct. 1492 (2020)

JUSTICE GORSUCH delivered the opinion of the Court [joined by four other Justices].

When it comes to remedies for trademark infringement, the Lanham Act [the federal trademark statute] authorizes many. A district court may award a winning plaintiff injunctive relief, damages, or the defendant's ill-gotten profits. Without question, a defendant's state of mind may have a bearing on what relief a plaintiff should receive. An innocent trademark violator often stands in very different shoes than an intentional one. But some circuits have gone further. These courts hold a plaintiff can win a profits remedy, in particular, only after showing the defendant *willfully* infringed its trademark. The question before us is whether that categorical rule can be reconciled with the statute's plain language [regarding the false or misleading use of trademarks].

[The Court reviewed the specific statutory language and structure, the argument that "principles of equity" include a willfulness requirement, and the history of trademark case law regarding the award of profits.]

. . . [W]e do not doubt that a trademark defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate. But acknowledging that much is a far cry from insisting on the inflexible precondition to recovery Fossil advances. . . . The judgment of the court of appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

JUSTICE ALITO [joined by two other Justices] concurring.

We took this case to decide whether willful infringement is a prerequisite to an award of profits under [the Lanham Act]. The decision below held that willfulness is such a prerequisite. [Citation omitted.] That is incorrect. The relevant authorities, particularly pre-Lanham Act case law, show that willfulness is a highly important consideration in awarding profits under [the Lanham Act], but not an absolute precondition. I would so hold and concur on that ground.

[JUSTICE SOTOMAYOR issued a separate concurrence, omitted.]

Spindrift Automotive Accessories, Inc. v. Holt Enterprises, Ltd.

United States District Court for the District of Franklin (2021)

In this trademark infringement action, defendant Holt Enterprises has been found liable to plaintiff Spindrift Automotive Accessories. The question before the court is the determination of damages for that infringement. There are generally three remedies for trademark infringement: (1) the actual damages suffered by the plaintiff (for example, due to lost sales); (2) injunctive relief, barring future infringements; and (3) that portion of the defendant's profits that are attributable to the infringement. As to the latter, the court must determine, as best it can, what portion of the defendant's profits are attributable to the infringement, and what portion are attributable to non-infringing aspects.

One of Spindrift's demands here is that Holt disgorge its profits gained from the infringement. Spindrift argues that the Lanham Act allows for an award of profits based on the facts of the case. Holt counters that, based on those very facts, no award of profits is merited because it has been proven that the infringement was not "willful."

Willfulness Need Not Be Found to Justify an Award of Profits

Before reviewing the legal standard for making an award of profits in cases such as this, the court must consider the effect of the Supreme Court's recent decision in *Romag Fasteners, Inc. v. Fossil Group, Inc.*, 140 S.Ct. 1492 (2020). There, the Supreme Court concluded that, in cases brought under the relevant provisions of the Lanham Act at issue here, proving willfulness was *not* a prerequisite to an award of profits. Rather, the Supreme Court explained that willfulness is not "an inflexible precondition to recovery" of a defendant's profits under the Act. Instead, "a defendant's mental state is a highly important *consideration* in determining whether an award of profits is appropriate." *Id.* (emphasis added). Hence, in light of the Supreme Court's holding, in this case Holt cannot avoid an award of profits solely because its actions were not willful. Accordingly, the court will now proceed to a discussion of the factors that justify an award of profits to determine whether an award of profits is justified here.

Analysis of Factors That Determine Whether an Award of Profits Is Justified

As a general matter, an award of profits is justified by three rationales: (1) to deter a wrongdoer from doing so again, (2) to prevent the defendant's unjust enrichment, and

(3) to compensate the plaintiff for harms caused by the infringement. In determining whether to award an infringer's profits as part of a recovery, a court must balance many factors. Certainly the defendant infringer's mental state—whether willful or otherwise—must be considered in this analysis. It is important to note that these various factors are not assigned equal weight, as the district court's discretion lies in assessing the relative importance of these factors in a particular factual situation and determining whether, on the whole, the equities weigh in favor of an accounting for profits. Thus, the court should consider the following:

1. The infringer's mental state. The court must consider the infringer's mental state in light of the harm to the trademark owner and to consumers, for particularly culpable defendants should be more likely to be subjected to an award of profits. On the one hand, in addition to willfulness, factors such as recklessness, callous disregard for the plaintiff's rights, willful blindness, and a specific intent to deceive should be taken into account; on the other, mere negligence, or an innocent nature to the infringement, would argue against an award of profits. Here, defendant Holt knowingly and deliberately sold automotive parts not made by Spindrifft but containing Spindrifft's trademark, and it continued to do so when Spindrifft so notified it. This conduct by Holt was hardly innocent. This factor justifies an award of profits.

2. The connection between the infringer's profits and the infringement. Was the trademark owner harmed by lost or diverted sales due to the infringement (beyond those sales lost by the infringement itself, which would be accounted for by actual damages)? Do the infringer's profits flow directly from, or were they caused by, the infringement? If so, an award of profits would be justified. Were consumers confused by the infringement, in thinking that the trademark owner authorized the infringing acts? Again, this would argue for an award of profits. What is the certainty that the infringer benefited from the infringement? A certain benefit would also argue for an award of profits. Here, Holt sold infringing parts that cost it but 25% of the cost it would have paid for the genuine Spindrifft parts. Holt then charged the public the full amount that the genuine parts would have cost. Holt obviously benefited economically from the infringement. Hence, this factor favors an award of profits.

3. The adequacy of other remedies. Will the trademark owner be made whole by other available remedies, such as actual damages and injunctive relief? If so, there would be no basis for an award of profits. Spindrift alleges that the infringing parts are inferior to its genuine parts, and that consumers buying the infringing parts will lose confidence in its products. There is nothing in the factual record to support plaintiff's claim, and so this factor does not justify an award of profits.

4. Equitable defenses. Does the defendant have a claim of equitable defenses such as laches (i.e., unreasonable delay in pursuing a legal remedy) or failure to timely act on the part of the plaintiff, acquiescence by the plaintiff in the infringement, or unclean hands? Such defenses would argue against an award of profits. Here, as soon as Spindrift learned of the sale of the infringing parts, it took action to stop their sale, including filing this lawsuit and seeking and obtaining a preliminary injunction. The defendant has no claim of an equitable defense. Accordingly, this factor justifies an award of profits.

5. The public interest. Is there a public interest in making an award of profits, such as preserving public safety or deterring other infringements? For example, an infringing medicine containing an ingredient that would cause harm to the consumer would raise significant concerns for the public interest. Such a compelling public interest would argue for an award of profits. Such is not the case here. Given the existence of the injunction (which the attached order will make permanent) and the lack of evidence that the infringing parts cause a danger to the public, an award of profits cannot be justified based on this factor.

Having considered all five factors, the court concludes that, while some would not justify an award of profits, on balance, those factors that do justify an award of profits are more significant in this case, and so an award of that portion of the defendant's profits attributable to the infringement of Spindrift's trademark will be made.

[Court's determination of the amount of damages and profits to be awarded omitted.]

MULTISTATE PERFORMANCE TEST DIRECTIONS

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

Do not include your actual name anywhere in the work product required by the task memorandum.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.