

1997

# McKay v. Smith's Food Store : Brief of Appellee

Utah Court of Appeals

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Robert G. Gilchrest, ESQ; Bastian K. Coeberg, Esq.; Richards, Brandt, Miller & Nelson.

Lyle W. Hillyard; Herm Olsen; Hillyard, Anderson & Olsen.

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## Recommended Citation

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IN THE UTAH COURT OF APPEALS

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STEPHANIE MCKAY,	*	
	*	Appellate No. 970312-CA
Plaintiff and	*	
Appellant,	*	
vs.	*	First District Court
	*	Civil No. 94-025-PI
SMITH'S FOOD STORE & DRUG	*	
CENTERS, INC. et al.,	*	
	*	Priority No. 15
Defendants and	*	
Appellees.	*	

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**BRIEF OF APPELLEE**  
**UNITED STATES ALUMINUM CORPORATION**

---

APPEAL FROM AN ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS  
DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT  
THE HONORABLE GORDON J. LOW

COUNSEL FOR APPELLANT:

Lyle W. Hillyard, Esq.  
#A1494  
Herm Olsen  
#A2463  
HILLYARD, ANDERSON & OLSEN  
175 East 100 North  
Logan, UT 84321  
Telephone: (801) 752-2610

COUNSEL FOR APPELLEE  
U.S. ALUMINUM CORPORATION:

Robert G. Gilchrist, Esq.  
#A3715  
Bastiaan K. Coebergh, Esq.  
#A7832  
RICHARDS, BRANDT, MILLER  
& NELSON  
P.O. Box 2465  
Salt Lake City, UT 84110-2465  
Telephone: (801) 531-2000

Stephen G. Morgan, Esq.  
MORGAN & HANSEN  
Attorneys for Smith's Food  
Store and Drug Centers, Inc.  
136 South Main Street  
Kearns Building, 8th Floor  
Salt Lake City UT 84101  
Telephone: (801) 531-7888

Karra J. Porter, Esq.  
CHRISTENSEN & JENSEN  
Attorneys for Lee Crittenden  
175 South West Temple #510  
Salt Lake City UT 84101  
Telephone: (801) 355-3431

Richard R. Medsker, Esq.  
FARR KAUFMAN SULLIVAN GORMAN  
JENSEN MEDSKER & PERKINS  
Attorneys for James O.  
Chamberlin  
205 26th Street #34  
Ogden UT 84401  
Telephone: (801) 394-5526

Michael W. Homer, Esq.  
SUITTER AXLAND ARMSTRONG &  
HANSEN  
Attorneys for R&O Construction  
Co.  
175 South West Temple  
Salt Lake City UT 84101  
Telephone: (801) 532-7300

**PARTIES TO THE PROCEEDING IN DISTRICT COURT**

The following parties and attorneys appeared in the proceeding in the District Court for the First Judicial District, Cache County, State of Utah:

1. Stephanie McKay, Plaintiff. Allegedly tripped and fell while entering Smith's Food Store & Drug Center in Logan. Represented by Lyle W. Hillyard and Herm Olsen, HILLYARD, ANDERSON & OLSEN.

2. Smith's Food Store & Drug Centers, Inc., Defendant. Owns and operates store in Logan where incident occurred. Represented by Stephen G. Morgan, MORGAN & HANSEN.

3. United States Aluminum Corporation, Defendant. Manufactured door and track on which Ms. McKay allegedly tripped and fell. Represented by Robert G. Gilchrist, RICHARDS, BRANDT, MILLER & NELSON.

4. James O. Chamberlin, Defendant. Architect of record on construction of Smith's store in Logan. Represented by Richard R. Medsker, FARR, KAUFMAN, SULLIVAN, GORMAN, JENSEN, MEDSKER & PERKINS.

5. R. & O. Construction Company, Defendant. General contractor on construction of Smith's store in Logan. Represented by Mike Homer, SUITTER, AXLAND, ARMSTRONG & HANSEN.

6. Crittenden Glass Company, Crittenden Paint and Glass Company, Defendants. Subcontractor who installed door and track on which Ms. McKay allegedly tripped and fell. Represented by Karra J. Porter, CHRISTENSEN & JENSEN.

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**JURISDICTION**

Jurisdiction is proper in this Court pursuant to Section 78-2a-3(2)(j) of the Utah Code Annotated, and Rules 3 and 4 of the Utah Rules of Appellate Procedure.

ISSUES PRESENTED

- I. NO ISSUE OF MATERIAL FACT EXISTS WHETHER UNITED STATES ALUMINUM CORPORATION'S WARNING ACCOMPANYING THE MODEL 2000 DOOR WAS ADEQUATE.
- II. NO ISSUE OF MATERIAL FACT EXISTS WHETHER THE MODEL 2000 DOOR WAS DEFECTIVE WHEN IT LEFT UNITED STATES ALUMINUM CORPORATION'S POSSESSION.

### STANDARD OF APPELLATE REVIEW

Summary judgment is appropriate only when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Glover By and Through Dyson v. Boy Scouts, 923 P.2d 1383, 1385 (Utah 1996). In reviewing the trial court's order granting summary judgment, this Court considers the evidence and the inferences fairly arising therefrom in the light most favorable to the losing party below. LMV Leasing, Inc. v. Conlin, 805 P.2d 189, 192 (Utah Ct. App. 1991); see also Doit, Inc. v. Touche, Ross & Co., 926 P.2d 835, 838-839 (Utah 1996).

Because entitlement to summary judgment is a question of law, this Court accords no deference to the trial court's resolution of the legal issues presented. Glover By and Through Dyson, 923 P.2d at 1385; Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989). This Court "determines only whether the trial court erred in applying the governing law and whether the trial court correctly held that there were no disputed issues of material fact." Id.; LMV Leasing, Inc., 805 P.2d at 192.

Ms. McKay has the ultimate burden of proving all the elements of her causes of action. Thayne v. Beneficial Utah, Inc., 874 P.2d 120, 124 (Utah 1994). If reasonable minds cannot differ on the adequacy of a warning, taking all disputed facts and inferences in a light most favorable to appellant, summary judgment is appropriate. House v. Armour of America, Inc., 886 P.2d 542, 551 (Utah Ct. App. 1994).

Issues not raised in appellant's main brief or the docketing statement generally are not considered by this Court on appeal. See Larson v. Overland Thrift and Loan, 818 P.2d 1316, 1320 (Utah Ct. App. 1991).

## STATEMENT OF THE CASE

### A. Nature of the Case.

This case involves a personal injury action instituted by Stephanie McKay in 1994 and the appeal is from the trial court's Memorandum Decision of May 7, 1996, (Addendum 17) R. 825 835, setting aside and re-affirming its earlier Memorandum Decision issued on April 2, 1996, (Addendum 16) R. 743-747, and granting summary judgment to all named Defendants in this case.

### B. Course of Proceedings and Disposition in the Court Below.

1. On February 14, 1994, Stephanie McKay filed her Complaint instituting a personal injury action for injuries allegedly sustained when she tripped and fell while entering a Smith's store in Logan, Utah. R. 1.

2. On March 29, 1994, Smith's Food & Drug Centers, Inc., filed its answer and brought various third-party claims against United States Aluminum Corporation, International Aluminum Corporation, James Chamberlin, and Crittenden Paint and Glass Company. R. 11.

3. On April 18, 1994, Stephanie McKay filed an Amended Complaint naming the third-party defendants as defendants to McKay's original personal injury action. R. 52.

4. McKay then filed her Second Amended Complaint on June 8, 1995, in which McKay included R. & O. Construction Company as defendant in her original personal injury action. R. 252.

5. Each of the defendants filed a motion for summary judgment, respectively: Crittenden Paint and Glass Company on August 17, 1995, R. 333; United States Aluminum Corporation on January 17, 1996, R. 434; Smith's Food and Drug Centers, Inc. on March 6, 1996, R. 525; R&O Construction Company on April 2, 1996, R. 656. For Chamberlin's motion for summary judgment, see infra ¶ 8.

6. The District Court of the First Judicial District held a hearing on these motions for summary judgment on March 25, 1996. R. 928.

7. The District Court issued a Memorandum Decision on April 2, 1996, in which it granted summary judgment to all named defendants in this action. (Addendum 16) R. 743-747. However, because the trial court had given Plaintiff additional time to file supplemental memoranda and affidavits, it set aside its earlier Memorandum Decision and issued a Memorandum Decision on May 7, 1996, in which all pleadings were considered. (Addendum 17) R. 825-835. In this decision, the court re-affirmed the April 2, 1996 decision granting summary judgment to all named defendants except Chamberlin. Id.

8. James Chamberlin thereupon filed his motion for summary judgment on October 28, 1996, R. 854. McKay did not respond to this Motion and her action against Chamberlin was dismissed by Memorandum Decision of December 5, 1996, R. 898, and Order of December 23, 1996, R. 900.

9. The trial court dismissed all named defendants by Final Order of April 3, 1997. (Addendum 18) R. 920-921.

10. McKay filed her Notice of Appeal on January 2, 1997. R. 903. This Court, upon its own Motion, transferred the appeal to the Utah Supreme Court by Order of January 27, 1997. R. 908. The Utah Supreme Court then transferred the appeal back to this Court on May 15, 1997. R. 926.

C. Statement of Facts.

1. Stephanie McKay ("Ms. McKay") was injured on April 18, 1992, when her right shoe allegedly caught on a stainless steel cap attached to an aluminum runner in the threshold in the entranceway to the Smith's Food & Drug Center ("Smith's") located at 442 North 175 East, Logan, Utah. (Second Amended Complaint ¶¶ 2 and 8). R. 252-253 and 254.

2. This Smith's store in Logan is one of approximately one hundred forty (140) stores in the Smith's chain. (Deposition Jonathan A. Ramras, at 55; Addendum 14) R. 1560. The doorway installed at the Smith's public entrance in Logan was a Model 2000 Slider P3X ("Model 2000") door manufactured by United States Aluminum Corporation ("USAC"). (Deposition of John R. Frey, at 8; Addendum 12; purchase orders dated 6/27/89) R. 1224; 1321-1322. The sliding glass doors ride on an aluminum track. On top of each of these tracks is a stainless steel cap. Ms. McKay attempted to enter the store using the left entrance door. (Deposition Stephanie McKay, at 126; Addendum 13) R. 1182. Ms. McKay allegedly tripped on a

portion of the stainless steel cap attached to the middle track of the rail of this door. (Deposition Stephanie McKay, at 27, 92, and 128) R. 1083, 1148, and 1184.

3. USAC is one of the divisions or subsidiaries of International Aluminum Corporation ("IAC"). (Deposition of John R. Frey, at 8; Addendum 12). R. 1224. USAC solely produces doors for interior application. (Deposition of John R. Frey, at 26) R. 1242.

4. Since 1967, the initial start date of the Model 2000 product line, USAC has designed this model as an interior application product. (Deposition of John R. Frey, at 26) R. 1242. The Model 2000 door falls into the so-called "mall slider category." (Deposition of John R. Frey at 11) R. 1227. This means that the product is commonly used as a door to go from a walkway in a mall into a department store in that same mall. (Deposition of John R. Frey at 25) R. 1241.

5. The USAC catalog and installation materials for the Model 2000 mall slider system contained a capitalized, bold-faced warning on the top of each page:

**# 2000 SLIDING DOORS  
FOR INTERIOR APPLICATIONS ONLY**

(Addendum 1; Exhibit 1 to Deposition of John R. Frey; Exhibit 3 to Deposition of Lee Crittenden; Appellant's Addendum 3) R. 1314-1319; 1733-1738. USAC's Installation Manual contained the same warning on the first page. (Addendum 3; Deposition John R. Frey at 53-55; Exhibit 10 to Deposition John R. Frey) R. 1269-1271;



1342-1345. This Manual is available with all the Model 2000 series and at USAC's dealerships. (Deposition John R. Frey at 55) R. 1271.

6. Notwithstanding that the Model 2000 doors are designed for interior use only, the panels are double weather-stripped. (Deposition of John R. Frey at 22) R. 1238. This is done to center the panel and to give a very quiet sound as it slides. Further, it eliminates dust and dirt from getting into the cavities around the track area. Id. The reason for the stainless steel track caps, on one of which Ms. McKay allegedly tripped, is to give longevity to the life of the track. (Deposition of John R. Frey at 23) R. 1239.

7. The Smith's store in Logan was constructed in 1988-1989 ("Logan project") (Deposition James O. Chamberlin, at 6; Addendum 10) R. 1352. Prior to the construction of the store, Smith's retained James Chamberlin as the architect of record on the Logan project. (Deposition James O. Chamberlin, at 5) R. 1351. "Architect of record" means that Chamberlin was the architect for that particular project and by giving his stamp of approval he represented that the Smith's store in Logan was a code complying facility. (Deposition Jonathan A. Ramras at 32) R. 1537. R. & O. Construction Company ("R&O") was the general contractor on the Logan project. (Deposition E.M. Whitmeyer at 26; Addendum 15) R. 1600[a]. Crittenden Paint & Glass Company ("Crittenden") was the subcontractor that installed the doors in

the entrance to the Smith's store in Logan. (Deposition E.M. Whitmeyer, at 26) R. 1600[a].

8. Crittenden was a dealer of USAC products. (Deposition of Lee Crittenden at 43; Addendum 11) R. 1700. As such, Crittenden had access to USAC catalogs and price books in its office. (Deposition of Lee Crittenden at 12) R. 1669. When Crittenden submitted its bid to R&O and Chamberlin, Crittenden copied the USAC catalog materials and left the warning "**# 2000 SLIDING DOORS FOR INTERIOR APPLICATIONS ONLY**" off each and every page. (Addendum 2; Exhibit 4 to Deposition of John R. Frey; Exhibit 2 to Deposition of Lee Crittenden; Appellant's Addendum 4) R. 1332-1337; 1726-1731. Thus, this warning was not included in Crittenden's submittal to R&O and Chamberlin and Chamberlin never received this warning at the time of the Logan project. (Deposition Lee Crittenden, at 21-22; Deposition James O. Chamberlin, at 59) R. 1678-1679; 1405.

9. Smith's provided Chamberlin with a fixture plan, a book of specifications and a set of architectural documents from another Smith's store constructed in Cottonwood, Arizona. (Deposition Jonathan Ramras, at 30-31, Deposition James O. Chamberlin, at 12-13). R. 1535-1536, 1358-1359. Section 08410 of these specifications, pertaining to "Aluminum Entrances and Store Fronts," stated, in relevant part:

SYSTEM PERFORMANCES:

General: Provide exterior entrance and storefront assemblies that have been assigned and fabricated to comply with requirements for system performance characteristics listed below . . .

QUALITY ASSURANCE:

Aluminum system standards shall be based on  
Kawneer 1010 Sliding Mall Front . . .

ACCEPTABLE MANUFACTURERS:

Available Manufacturers: Subject to  
compliance with requirements, manufacturers  
offering products which may be incorporated  
into the work include, but are not limited  
to, the following:

. . .

Kawneer Company, Inc.

. . .

United States Aluminum Corp., International  
Aluminum Corp.

(Addendum 5; Exhibit 1 to Deposition Jonathan A. Ramras; Exhibit 8 to Deposition James O. Chamberlin; Exhibit 1 to Deposition Lee Crittenden; Appellant's Addendum 2) R. 1568-1570; 1487-1489; 1717-1719. Chamberlin incorporated this section into his specifications for the Logan store in identical format.

(Deposition James O. Chamberlin, at 17) R. 1363.

10. The Kawneer 1010 door is similar to the USAC Model 2000 door, both are meant for interior use only. (Deposition John R. Frey at 60) R. 1276. The Kawneer 1010 door, as the USAC Model door, has stainless steel caps. (Deposition John R. Frey at 61) R. 1277. The Kawneer 1040 and 1070 doors are produced for exterior entrance ways. (Report Anthony A. Wegener at ¶ 4; Addendum 7) R. 454. USAC does not make any entrance systems meant for exterior use, and does not manufacture products similar or equivalent to the Kawneer 1040 and 1070. (Deposition John R. Frey at 61) R. 1277.

11. A difference between the USAC Model 2000 series and the Kawneer 1040 and 1070 series is that the USAC product

line (like the Kawneer 1010) is "bottom hung" (designed to run on rollers at the bottom of the door) whereas the Kawneer 1040 and 1070 series is a "top hung" product (designed to run with rollers at the head of the door). (Deposition John R. Frey at 67) R.

1283. The Kawneer 1040 and 1070 have a knife type guide at the bottom of the door which leads into a deep well in the sill of the track area. (Deposition John R. Frey at 67-68) R. 1283-1284. The sill is the bottom track portion of a sliding door.

(Deposition of John R. Frey at 30) R. 1246. This deep well construction (depth: 1.5-3.0 inches) provides a better escape for water or condensation than the Model 2000 or Kawneer 1010 construction (depth: .25 inches). (Deposition John R. Frey at 67-68) R. 1283-1284.

12. Chamberlin gave his official approval to use the USAC Model 2000 door as the exterior door to the Smith's store in Logan on May 17, 1989. (Exhibit 6 to Deposition James O. Chamberlin; Appellant's Addendum 4) R. 1475. Per invoices dated June 27, 1989, Crittenden ordered the Model 2000 doors, and installed them as the exterior entrance doorway of Smith's between May and August of 1989. (Invoices; Appellant's Addendum 10; Deposition of Lee Crittenden at 50) R. 1321-1322; 1707.

13. The architect of record, Chamberlin, conceded that even if the language "**#2000 SLIDING DOORS FOR INTERIOR APPLICATIONS ONLY**" had been included in the copies of the specifications submitted to him by Crittenden, this probably would not have affected his approval of the Model 2000.

(Deposition James O. Chamberlin, at 76) R. 1422. He further stated that the Model 2000 door had been successful on many occasions and that there was no reason not to go with the Kawneer 1010 or the USAC Model 2000 door. (Deposition James O. Chamberlin, at 55-56) R. 1401-1402.

14. The cause of the incident in which Ms. McKay was injured is unknown. Mr. Frey speculated that "heavy abuse, miscleaning [and] poor maintenance" could cause deterioration in the track that would prevent long life. (Deposition of John R. Frey at 23-24) R. 1239-40. Mr. Frey stated that, in his opinion, a prolonged usage of obstacles over 250 pounds, as well as ice or frost, could do damage to the sliding track of a Model 2000 door. (Deposition of John R. Frey at 24) R. 1240. The existence of these possibilities is part of the reason why USAC designated and classified its Model 2000 doors **"FOR INTERIOR APPLICATIONS ONLY."** (Deposition of John R. Frey at 25) R. 1241. According to Mr. Frey, USAC's Model 2000 door was improperly used at the Smith's entrance because the Model 2000 door is intended for interior use only. (Deposition John R. Frey at 88) R. 1304.

15. Ms. McKay's experts concluded that USAC's product has been misused by Smith's. Architect Anthony A. Wegener stated that he was "concerned that the US Aluminum sliding doors at the entrance to Smith's are not fit for the purpose intended." (Report Anthony A. Wegener; Addendum 7; Appellant's Addendum 6(a)) R. 454-455. Robert H. McEntire, a mechanical engineer, noted that USAC's warning that the Model 2000 door was **"FOR**

**INTERIOR APPLICATIONS ONLY**" was "crucial," (Engineering Report Robert H. McEntire, at 2; Addendum 8; Appellant's Addendum 7(a)) R. 689, and that "the use to which the threshold was subjected" was "inappropriate." (Affidavit of Robert H. McEntire, at ¶ 7; Addendum 9; Appellant's Addendum 7(b)) R. 730.

16. If put to its ordinary use, such as in a mall situation, only foot traffic would cross the sill whereas in an exterior door situation, heavy equipment would cross the sill. (Deposition of John R. Frey at 29) R. 1245. The 1989 USAC specifications, dated August 1989, show that the track is rated for 250 pounds concentrated. (Deposition of John R. Frey at 31) R. 1247.

Sliding panels shall be equipped with two tandem ball bearing rollers, each capable of supporting 250 pounds of moving weight.

(Addendum 4; Exhibit 1 to Deposition of John R. Frey; Exhibit 10 to Deposition of James O. Chamberlin) R. 1320; 1503.

17. It is unclear whether Chamberlin received this page containing this warning regarding the weight limitations before he approved this model because the doors were approved on May 17, 1989 and were installed in July/August of 1989 (Deposition of James O. Chamberlin at 69) R. 1415. Chamberlin designed the public entrance at Smith's for foot traffic and carts only. (Deposition James O. Chamberlin, at 50) R. 1396. Heavy loads of products or equipment were intended to be transported through the docking area. (Deposition James O. Chamberlin, at 50-51) R. 1396-1397.

18. USAC has been manufacturing tracks such as the Model 2000 door for more than twenty eight (28) years, totaling more than 3,100,000 linear feet of this track. (Deposition of John R. Frey at 36) R. 1252. During all of this time, USAC has never received any reports or allegations of any stainless steel cap or other parts of the track coming loose other than the allegation in this case. (Deposition of John R. Frey at 37) R. 1253.

### SUMMARY OF ARGUMENT

**I. NO ISSUE OF MATERIAL FACT EXISTS WHETHER UNITED STATES ALUMINUM CORPORATION'S WARNING ACCOMPANYING THE MODEL 2000 DOOR WAS ADEQUATE.**

Ms. McKay has failed to establish a *prima facie* case that USAC failed to adequately warn its target community regarding dangers latent in its Model 2000 series. USAC's duty to warn was limited to the duty to warn its consumers of the need to employ the Model 2000 door for interior use only. USAC fulfilled this duty by including an unambiguous, concise and conspicuous warning in its installation materials. Moreover, Ms. McKay has failed to show that any inadequacy in USAC's warning proximately caused the incident at issue. USAC could reasonably expect that its capitalized, bold-faced warning would be read and heeded. Furthermore, USAC was reasonably entitled to rely on Crittenden to convey its warning to the ultimate user. Therefore, this Court should affirm the trial court's summary judgment.

USAC's duty to warn was limited to the duty to apprise consumers of the need to employ its Model 2000 product for interior use only. Contrary to Ms. McKay's assertions, USAC did not have a duty to warn Smith's, or any other similarly situated consumer, regarding the need for regular maintenance and regarding the door's specific maximum weight-bearing capacity. The danger, or potentiality of danger, of not regularly maintaining entrances to commercial entities is generally known and recognized, especially to large grocery store chains such as



Smith's. Smith's is a sophisticated user with extensive expertise in operating commercial stores. Therefore, to Smith's or any similarly situated consumer it should have been obvious that regular maintenance of its entrance and exits doors where many people pass every business day was required, and that heavy loads of products or equipment should be loaded into and out of the store through its loading dock area rather than through the public entrance and exit. Consequently, USAC's duty to warn its target community was limited to the duty to apprise these consumers of the need to employ its Model 2000 product for interior use only.

Moreover, USAC's warning was adequate. First, USAC's warning was of the intensity justified by the magnitude of the risk by being printed in capitalized, bold-faced letters on the top of each page of USAC's installation materials. Second, USAC's warning is conspicuous, unambiguous, and can reasonably be expected to catch the attention of any consumer. Third, the warning is comprehensible and gives a fair warning of the risks involved with the product. The warning "for interior applications only" clearly means it should not, without more, be used for exterior purposes, as was done in this case. Any average user in this target community, but even every less experienced consumer, should reasonably be apprised of the risks inherent to the Model 2000 series after reading the warning "for interior applications only." Therefore, USAC fulfilled its duty to warn with an unambiguous, concise, and conspicuous warning.

Ms. McKay has not presented any evidence that any inadequacy in USAC's warning caused the incident in which Ms. McKay was injured. It is true that USAC's expert, Mr. Frey, speculated on possible causes for an incident such as the one at issue. However, mere speculation as to the possible cause of the accident is not sufficient to preclude summary judgment. Evidence, such as may, might, could or possibly, does not provide enough guidance to the jury to remove the decision making process from speculation and conjecture. Any conclusion regarding Smith's or Chamberlin's possible change in conduct had they been aware of the warning would necessarily be a product of speculation. No reasonable inference as to proximate causation can be drawn from the record before this Court and therefore this Court should affirm the summary judgment granted to USAC below.

In the case at hand, USAC did give a clear warning that the Model 2000 door was for interior applications only. Therefore, USAC could reasonably assume its warning would be read and heeded. If USAC's warning would have been followed, the incident injuring Ms. McKay probably would not have happened. USAC's product is safe for use if its warning is followed. If Smith's would have used a proper exterior door, it would have used a top hung door instead of a bottom hung door. By installing an interior door for exterior purposes, Smith's clearly did not heed USAC's warning.

Further, Crittenden, as a dealer of USAC products in Utah, is familiar with USAC's product. Consequently, USAC had a

reasonable basis to believe that Crittenden, as an intermediary between USAC and the ultimate consumer, would pass along the warning USAC carefully put on every page of its specifications to Chamberlin, R&O, or Smith's.

**II. NO ISSUE OF MATERIAL FACT EXISTS WHETHER THE MODEL 2000 DOOR WAS DEFECTIVE WHEN IT LEFT UNITED STATES ALUMINUM CORPORATION'S POSSESSION.**

Ms. McKay has failed to raise the defective product issue before this Court on appeal. Moreover, Ms. McKay has failed to show any fault on the part of USAC. USAC put a clear, concise, and conspicuous warning on top of each page of its catalogue. Further, it was not reasonably foreseeable to USAC that its business intermediary, Crittenden, would omit the otherwise conspicuous warning from its submittal to R&O and Chamberlin. Thus, the admitted misuse of the Model 2000 door constitutes a complete defense to any strict products liability claim in this case. Therefore, this Court should affirm the summary judgment granted below to USAC.

Ms. McKay has not raised the issue whether the Model 2000 door as produced by USAC was in a defective condition when it left the possession of USAC in her docketing statement or her main appellate brief. To the contrary, in her brief, Ms. McKay repeatedly admits that USAC's Model 2000 door was misused by Smith's. Since the design defect and manufacturing defect issues were not timely specified on appeal, and consideration of these issues is not necessary for a proper resolution of this appeal, this Court should not consider these issues.

However, even if this Court would consider these issues, Ms. McKay has not produced any evidence indicating that the Model 2000 door was defective at the time it left USAC's possession. Moreover, Ms. McKay has acknowledged that USAC's Model 2000 door was misused when it was installed as an exterior door in the Smith's store in Logan. In this case, the admitted misuse constitutes a complete defense to any products liability claim against USAC. USAC put a clear, concise, and conspicuous warning on top of each page of its catalogue. Further, it was not reasonably foreseeable to USAC that its business intermediary, Crittenden, would omit the otherwise conspicuous warning from its submittal to R&O and Chamberlin, that Chamberlin would approve an interior door for exterior use, and that Smith's subsequently would use the Model 2000 interior mall slider as an exterior grocery store entrance.

Since Ms. McKay or Smith's have failed to show any fault on the part of USAC, the admitted misuse of the Model 2000 door constitutes a complete defense to any strict products liability claim in this case. Therefore, this Court should affirm the summary judgment granted below to USAC.

## ARGUMENT

I. NO ISSUE OF MATERIAL FACT EXISTS WHETHER UNITED STATES ALUMINUM CORPORATION'S WARNING ACCOMPANYING THE MODEL 2000 DOOR WAS ADEQUATE.

A. USAC's Duty to Warn Was Limited to the Duty to Apprise Consumers of the Need to Employ its Model 2000 Product for Interior Use Only.

Ms. McKay has failed to establish a *prima facie* case that USAC failed to adequately warn its target community regarding dangers latent in its Model 2000 series. USAC's duty to warn was limited to the duty to warn its consumers of the need to employ the Model 2000 door for interior use only. USAC fulfilled this duty by including an unambiguous, concise and conspicuous warning in its installation materials. Moreover, Ms. McKay has failed to show that any inadequacy in USAC's warning proximately caused the incident at issue. USAC could reasonably expect that its capitalized, bold-faced warning would be read and heeded. Furthermore, USAC was reasonably entitled to rely on Crittenden to convey its warning to the ultimate user. Therefore, this Court should affirm the trial court's summary judgment.

USAC's duty to warn was limited to the duty to apprise consumers of the need to employ its Model 2000 product for interior use only. Ms. McKay alleges that United States Aluminum Corporation ("USAC"): (i) failed to warn regarding the need for regular maintenance; (ii) failed to warn that its door was susceptible to a frost wedge; and (iii) failed to warn that its door had only a 250 pound weight-bearing capacity. Appellant's

Brief at 18. However, despite Ms. McKay's attempts to create issues of material fact regarding the adequacy of USAC's warnings, summary judgment was properly granted in this case.

A product is defective or "unreasonably dangerous" to the user if:

[t]he product [is] dangerous to an extent beyond which would be contemplated by the ordinary and prudent buyer, consumer or user of that product in that community considering the product's characteristics, propensities, risks, dangers and uses together with any actual knowledge, training, or experience possessed by that particular buyer, user or consumer. Utah Code Ann. § 78-15-6(2).

A seller or manufacturer of a product *may* be required to provide directions or warnings to the consumer to prevent a product from being unreasonably dangerous. Restatement (Second) of Torts § 402A, cmt. (j) (1965). Inadequate warning regarding a product's use may render that product unreasonably dangerous, and a manufacturer who knows or should know of a risk associated with its product may be directly liable to the user if it fails to warn adequately of the danger. House v. Armour of America, Inc., 886 P.2d 542, 547 (Utah Ct. App. 1994) ("House I")<sup>1</sup> (citing Grundberg v. Upjohn Co., 813 P.2d 89, 97 (Utah 1991)). However, a manufacturer is not liable when: (i) it had no duty to warn; (ii) the warning given was adequate; or (iii) the inadequate warning, if any, did not proximately cause the harm.

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<sup>1</sup>The Utah Supreme Court adopted this Court's House I "failure to warn" analysis in House v. Armour of America, Inc., 929 P.2d 340, 346 (Utah 1996) ("House II").

USAC's duty to warn was more limited than Ms. McKay professes. A manufacturer's duty to warn can be limited by: (a) the open and obvious danger exception; and (b) the sophisticated user exception. House I, 886 P.2d at 548-549. "[A] seller is not required to warn with respect to products . . . when the danger, or potentiality of danger, is generally known and recognized." Restatement (Second) of Torts § 402A, cmt. (j). USAC did not have a duty to warn Smith's that the aluminum doors needed to be regularly maintained. Smith's is a large supermarket chain of more than one hundred forty (140) stores, and has extensive experience with operating and managing grocery stores. Entities such as Smith's are part of USAC's "target community," i.e. the consumers that ultimately use the manufacturer's product. See generally Guevara v. Dorsey Laboratories, Division of Sandoz, 845 F.2d 364, 367 (1st Cir. 1988). Smith's, as a reasonable user or consumer of USAC's product, could or should have realized the necessity of regularly maintaining areas, including entrance and exit doors, where large amounts of people pass through every business day. See House I, 886 P.2d at 548.

Moreover, USAC did not have to warn its target community regarding its product's specific maximum weight-bearing capacity. Smith's is not an average "man-in-the-street" consumer, but rather a consumer with extensive expertise in operating commercial stores. A manufacturer's duty to warn is limited "where the purchaser or the user has certain knowledge of

sophistication, professionally or otherwise, in regards to the product." House I, 886 P.2d 549 (quoting American Mutual Liability Ins. Co. v. Firestone & Rubber Co., 799 F.2d 993, 994 (5th Cir. 1986)); see also Pavlides v. Galveston Yacht Basin, Inc., 727 F.2d 330, 338 (5th Cir. 1984). The rationale behind the "sophisticated user" exception is that the user's knowledge of the danger is equivalent to prior notice. House I, 886 P.2d at 549 (citing Billiar v. Minnesota Mining & Manufacturing Co., 623 F.2d 240, 243 (2d Cir. 1980)). To a user or consumer such as Smith's, it should have been obvious that regular maintenance of its entrance and exit doors was required, and that heavy loads of products or equipment should be loaded into and out of the store through its loading dock area rather than through the public entrance and exit. The architect of record, Chamberlin, conceded that the public entrance area at Smith's in Logan was designed for foot traffic and carts only. Heavy loads of products or equipment were supposed to be transported through the docking area. (Deposition James O. Chamberlin at 50-51; Addendum 10) R. 1396-1397.

Consequently, USAC did not have a duty to warn Smith's, or any other similarly situated consumer, regarding the need for regular maintenance and regarding the door's specific maximum weight-bearing capacity. Hence, USAC's duty to warn its target community was limited to the duty to apprise these consumers of the need to employ its Model 2000 product for interior use only.



**B. USAC Fulfilled its Duty to Warn.**

USAC's warning was adequate to apprise any consumer, including less experienced consumers, of the Model 2000's inherent risks. This Court has recently held that, in order for a warning to be adequate, it must be:

- (1) designed so it can reasonably be expected to catch the attention of the consumer;
- (2) comprehensible and give a fair indication of the specific risks involved with the product; and (3) of an intensity justified by the magnitude of the risk.

House I, 886 P.2d at 551 (quoting Pavrides, 727 F.2d at 338).

If reasonable minds cannot differ on the adequacy of a warning, taking all disputed facts and inferences in a light most favorable to appellant, summary judgment is appropriate. House I, 886 P.2d at 551.

USAC's warning was designed to catch the attention of the consumer. The USAC catalog and installation materials for the Model 2000 mall slider system contained a capitalized, bold-faced warning on the top of each page:

**# 2000 SLIDING DOORS  
FOR INTERIOR APPLICATIONS ONLY**

(Addendum 1; Exhibit 1 to Deposition of John R. Frey; Exhibit 3 to Deposition of Lee Crittenden; Appellant's Addendum 3) R. 1314-1319; 1733-1738. USAC's Installation Manual contained the same warning on the first page. (Addendum 3; Deposition John R. Frey at 53-55; Exhibit 10 to Deposition John R. Frey) R. 1269-1271; 1342-1345. This Manual is available with all the Model 2000 series and at USAC's dealerships. (Deposition John R. Frey at

55; Addendum 12) R. 1271. This warning is conspicuous, unambiguous, and can reasonably be expected to catch the attention of any consumer. Further, it is of the intensity justified by the magnitude of the risk: it is printed in bold-faced, capitalized letters at the top of each and every page of the USAC catalog.

The warning certainly is also comprehensible and gives a fair warning of the risks involved with the product. The warning "for interior applications only" clearly means it should not, without more, be used for exterior purposes, as was done in this case. The adequacy of a manufacturer's warning is measured, for product liability purposes, against the general level of knowledge that exists in the target community. Guevara, 845 F.2d at 367. Since the warning is intended to be adequate for the "average user" of the product, the adequacy of the warning must be evaluated together with the knowledge of the ultimate users of the product. Pavlides, 727 F.2d at 338. Where, for example, a product is marketed solely to professionals experienced in using the product, the manufacturer may rely on the knowledge which a reasonable professional would apply in using the product. Id.

As noted *supra*, Smith's is a large grocery store chain with extensive experience in managing and operating commercial stores. USAC's target community generally consists of store owners or managers with more expertise than the man-in-the-street consumer as to consumer safety issues. Any average user in this target community, and even every ordinary, less experienced,

consumer, should reasonably be apprised of the risks inherent to the Model 2000 series after reading the warning "for interior applications only." Any consumer of the Model 2000 doors can reasonably be expected to be sufficiently careful so as not to install or approve the installment of such door as an exterior door without obtaining more information from the manufacturer or intermediary. Since USAC fulfilled its duty to warn with an unambiguous, concise, and conspicuous warning, USAC is entitled to summary judgment in its favor.

**C. Any Inadequacy in USAC's Warning Did Not Proximately Cause Ms. McKay's Injury.**

Even if this Court would find USAC's warning inadequate in any way, Ms. McKay has not presented any evidence whatsoever that any inadequacy in USAC's warning caused the incident in which Ms. McKay was injured. Moreover, any conclusion regarding Smith's or Chamberlin's possible change in conduct had they been aware of the warning would necessarily be a product of speculation.

Before strict liability will be imposed on a manufacturer for failure to warn adequately of latent dangers in the use of a product, the plaintiff must establish that the failure to warn adequately of such dangers was the cause-in-fact and proximate cause of his or her injuries. Conti v. Ford Motor Co., 743 F.2d 195, 197 (3d Cir. 1984). In Utah, proximate cause is generally defined as "that cause which, in natural and continuous sequence, (unbroken by an efficient intervening cause), produces the injury and without which the result would

not have occurred." Clark v. Farmers Insurance Exchange, 893 P.2d 598, 601 (Utah Ct. App. 1995).

Proximate cause is a factual issue that generally cannot be resolved as a matter of law. Butterfield v. Okubo, 831 P.2d 97, 106 (Utah 1992). However, courts may decide the proximate causation issue as a matter of law if:

(1) there is no evidence to establish a cause or connection, thus leaving causation to jury speculation, or (2) where reasonable persons could not differ on the inferences to be derived from the evidence on proximate causation. Clark, 893 P.2d at 601.

Ms. McKay has not proffered any evidence from which a reasonable jury could infer proximate causation. Cf. id. To the contrary, the cause of the incident in which Ms. McKay was injured is entirely unknown. It is true that USAC's expert, Mr. Frey, in his deposition, speculated on possible causes for an incident such as the one at issue. However, mere speculation as to the possible cause of the accident, as offered by Mr. Frey, is not sufficient to preclude summary judgment.

If reasonable inferences can be drawn from the evidence, then the matter should be put to the fact finder. However, [if] any evidence of causation would necessarily be the product of *speculation*, and the jury would have *no basis for drawing inferences* as to what occurred, [summary judgment is appropriate]. Clark, 893 P.2d at 601 n.5 (emphasis added).

See also Nauman v. Harold K. Beecher & Associates, 24 Utah 2d 172, 467 P.2d 610, 617 (Utah 1970). "[E]vidence, such as may, might, could or possibly, does not provide enough guidance to the jury to remove the decision making process from speculation and

conjecture." Bruns v. PACCAR, Inc., 890 P.2d 469, 477 (Wash. Ct. App. 1995).

According to the Utah Supreme Court, in order to state a products liability claim for failure to warn, the plaintiff must show that had warnings been provided, the injured party would have altered her use of the product or taken added precautions to avoid the injury. House II, 929 P.2d at 346 (citing Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 836-37 (Utah 1984)). Thus, Ms. McKay has to show that Smith's would have altered its use of the Model 2000 door to avoid injury to customers such as Ms. McKay.

In this case, there is no evidence that any added warning would have prevented this door from being installed or would have changed Smith's approach to maintenance of the door. Even if USAC's warning that the Model 2000 door was **"FOR INTERIOR APPLICATIONS ONLY"** would not have been omitted by Crittenden, the door probably still would have been installed in the Smith's door front in Logan. Even though Jonathan Ramras, Smith's director of store planning, stated that based on USAC's warning he would probably do more research to find out what this warning meant or not use the Model 2000 sliding doors series, (Deposition Jonathan A. Ramras, at 19; Addendum 14) R. 1524, the architect of record, Chamberlin, conceded that even if the language **"FOR INTERIOR USE ONLY"** had been included in the copies of the specs submitted to him by Crittenden, this probably would not have affected his approval of the Model 2000. (Deposition James O. Chamberlin, at

76) R. 1422. Chamberlin further stated that the Model 2000 door had been successful on many occasions and that there was no reason not to go with the Kawneer 1010 or the USAC Model 2000 door. (Deposition James O. Chamberlin, at 55-56) R. 1401-1402.

Where the theory of liability is failure to warn adequately, the evidence must be such as to support a reasonable inference, rather than a guess, that the existence of an adequate warning may have prevented the accident before the issue of causation may be submitted to the jury. Conti, 743 F.2d at 198 (emphasis added).

Any conclusion regarding Smith's or Chamberlin's possible change in conduct had they been aware of the warning would necessarily be a product of speculation. No reasonable inference as to proximate causation can be drawn from the record before this Court. Consequently, Ms. McKay has failed to state a cause of action for USAC's alleged failure to warn, and this Court should affirm the summary judgment granted by the court below.

**D. USAC Could Reasonably Assume its Warning Would Be Read and Heeded.**

USAC did give a clear warning that the Model 2000 door was "FOR INTERIOR APPLICATIONS ONLY." Where a seller or manufacturer gives a warning,

the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.

Restatement (Second) of Torts § 402A, cmt. (j). See House II, 929 P.2d at 347 n.6, House I, 886 P.2d at 552. In the case at hand, the incident where Ms. McKay was injured probably would not

have happened had USAC's warning been followed. USAC's Model 2000 door is safe when it is used for its intended purpose: interior use. USAC has produced this mall slider model for more than twenty eight (28) years, and has produced more than 3,100,000 linear feet of the track on which Ms. McKay allegedly tripped. (Deposition John R. Frey, at 36) R. 1252). Notwithstanding this large scale production, the incident involving Ms. McKay is the only incident involving this door ever reported to USAC. According to Mr. Frey, "we have never seen nor heard of [this cap] coming loose." (Deposition John R. Frey, at 37) R. 1253.

If Smith's would have used a proper exterior door, it would have used a top hung door instead of a bottom hung door and this incident would probably not have happened. By installing an interior door for exterior purposes, Smith's clearly did not heed USAC's warning. Therefore, USAC is not in any way responsible for the incident in which Ms. McKay was injured and this Court should affirm summary judgment for USAC.

**E. USAC Was Entitled to Rely on Crittenden as a Business Intermediary to Convey its Warning to the Ultimate User.**

USAC had a reasonable basis to believe that Crittenden, as an intermediary between USAC and the ultimate consumer, would pass along the warning it carefully put on every page of its specifications to Chamberlin, R&O, or Smith's. A circumstance which should be considered is the reliability of a third party, e.g., a business intermediary, to convey the warning to the ultimate user. Persons v. Salomon North America, Inc., 217 Cal.

App.3d 168, 265 Cal. Rptr. 773, 777 (Cal. Ct. App. 1990). Smith's never received USAC's warning because USAC's dealer, Crittenden, omitted this information when it submitted its bid to R&O and Chamberlin. In Persons, the California Court of Appeals discussed the situation in which a manufacturer negligently warned only the intermediate distributors of a product. Id. (citing Restatement (Second) of Torts § 388, cmt. (n)). The court drew an analogy to comment (n) of the Restatement (Second) of Torts § 388, and reasoned that "the touchstone of liability under a strict product liability cause of action for failure to warn is reasonableness[.]" Id.

Thus, the standard in this case should be whether USAC reasonably relied on Crittenden as its business intermediary to convey or pass on the warning to the ultimate consumers. USAC's technical manual stated the warning "**# 2000 SLIDING DOORS FOR INTERIOR APPLICATIONS ONLY,**" clearly and unequivocally, on every page. Crittenden, as a dealer of USAC products in Utah, is familiar with USAC's product. Consequently, USAC had a reasonable basis to believe that Crittenden, as an intermediary between USAC and the ultimate consumer, would pass along the warning it carefully put on every page of its specifications to Chamberlin, R&O, or Smith's. Accord Restatement (Second) of Torts § 388, cmt. (n); Lunt v. Mt. Spokane Skiing Corp., 814 P.2d 1189, 1194 (Wash. Ct. App. 1991).

Ms. McKay has failed to establish a *prima facie* case that USAC failed to adequately warn its target community



regarding dangers latent in its Model 2000 series. Moreover, Ms. McKay has failed to show that any inadequacy in USAC's warning proximately caused the incident at issue. Therefore, this Court should affirm the trial court's summary judgment.

**II. NO ISSUE OF MATERIAL FACT EXISTS WHETHER THE MODEL 2000 DOOR WAS DEFECTIVE WHEN IT LEFT UNITED STATES ALUMINUM CORPORATION'S POSSESSION.**

**A. Ms. McKay Has Not Preserved this Issue for Appeal.**

Ms. McKay has failed to raise the defective product issue before this Court on appeal. Moreover, Ms. McKay has failed to show any fault on the part of USAC. USAC put a clear, concise, and conspicuous warning on top of each page of its catalogue. Further, it was not reasonably foreseeable to USAC that its business intermediary, Crittenden, would omit the otherwise conspicuous warning from its submittal to R&O and Chamberlin. Thus, the admitted misuse of the Model 2000 door constitutes a complete defense to any strict products liability claim in this case. Therefore, this Court should affirm the summary judgment granted below to USAC.

At the trial level, Ms. McKay alleged that the Model 2000 door as produced by USAC was in a defective condition when it left the possession of USAC, *inter alia*, because of a design defect and a manufacturing defect. (Second Amended Complaint, first ¶ 18(a), (b)) R. 256. However, on the appellate level, Ms. McKay has not raised this issue in her Docketing Statement (Addendum 19) or her main appellate brief. To the contrary, in her brief, Ms. McKay repeatedly admits that USAC's Model 2000

door was misused by Smith's. Appellant's Brief, at 11-12 ¶¶ 26-27; 13 ¶ 33; 25 ¶ 4.

Generally, issues not raised in appellant's main brief or the docketing statement are not considered by this Court on appeal. See Larson v. Overland Thrift and Loan, 818 P.2d 1316, 1320 (Utah Ct. App. 1991). See also Estate of Justheim v. Ebert, 824 P.2d 432, 436-37 (Utah Ct. App. 1991). This Court, in its discretion, may decide a case upon any points that its proper disposition may require, even if first raised in a reply brief. Romrell v. Zions First National Bank, 611 P.2d 392, 395 (Utah 1980). However, in this case, the defective product issue was not timely specified on appeal pursuant to Rules 9, 11 and 24 of the Utah Rules of Appellate Procedure. Moreover, consideration of this issue is not necessary for a proper resolution of this appeal. Therefore, this Court should not consider the design defect or manufacturing defect issue.

**B. No Issue of Material Fact Exists Whether the Model 2000 Door Was Defective at the Time it Left USAC's Possession Because Ms. McKay Concedes the Product Was Misused by Smith's.**

However, should this Court decide to consider the defective product issue, USAC wishes to apprise the Court of its position thereon. Ms. McKay has not produced any evidence indicating that the Model 2000 door was defective at the time it left USAC's possession and before it was installed in the Smith's store in Logan. Therefore, Ms. McKay has failed to meet her burden to establish a *prima facie* case that the Model 2000 door was unreasonably dangerous at the time it left USAC's hands.

Accord, Ernest W. Hahn, Inc. v. ARMC Steel Co., 601 P.2d 152, 158 n.5 (Utah 1979).<sup>2</sup>

Moreover, no issue of material fact exists whether the Model 2000 door was defective at the time it left USAC's possession because Ms. McKay has acknowledged that USAC's Model 2000 door was misused when it was installed as an exterior door in the Smith's store in Logan. "Misuse" of a product has been described as "abnormal or unintended use of the product in question if such use was not reasonably foreseeable." Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1303 n.6 (Utah 1981). In her Second Amended Complaint, Ms. McKay alleged that the USAC Model 2000 entranceway "is not intended for exterior use." (Second Amended Complaint at ¶ 11. (A)) R. 254. Further, the two experts employed by Ms. McKay, Mr. McEntire and Mr. Wegener, concluded that the door at the store in Logan has been misused. Architect Anthony A. Wegener stated that he was "concerned that the US Aluminum sliding doors at the entrance to Smith's are not fit for the purpose intended." (Report Anthony A. Wegener; Addendum 7) R. 454-455. Further, Robert H. McEntire, a mechanical engineer, noted that USAC's warning that the Model 2000 door was "**FOR INTERIOR APPLICATIONS ONLY**" was "crucial," (Report Robert H. McEntire, at 2; Addendum 8) R. 689, and that "the use to which the threshold was subjected" was

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<sup>2</sup>In this situation, because no defect has been shown, misuse "does not appear to be a true affirmative defense." Hahn, 601 P.2d at 158 n.5. However, USAC at all times has affirmatively alleged that the Model 2000 door was improperly used. (Defendant USAC's Answer to Plaintiff's Second Amended Complaint, at ¶ 25) R. 283.

"inappropriate." (Affidavit of Robert H. McEntire, at ¶ 7; Addendum 9) R. 730. Finally, Mr. McEntire stated that, in his opinion, this inappropriate use of the Model 2000 door was a contributing factor to its failure. (Affidavit Robert H. McEntire at ¶ 7) R. 730. Therefore, Ms. McKay has unequivocally admitted that USAC's Model 2000 door was misused when it was installed as an exterior door in the Smith's store in Logan.

**C. Misuse of the Model 2000 Door Constitutes a Complete Defense to Any Product Liability Claim in this Case.**

Misuse constitutes a defense to strict products liability. Ernest W. Hahn, Inc., 601 P.2d at 158 (citing Restatement (Second) of Torts § 402A, cmt. (g)). The defense of misuse is not, by itself, a complete bar to any recovery from defendant on the basis of strict liability, and is applied according to comparative fault principles. According to the Utah Supreme Court, the policy behind the defense of misuse is to excuse "manufacturers or sellers from liability for injuries attributable to the fault of the user rather than the deficiency of the product." Mulherin, 628 P.2d at 1303.

Since Ms. McKay has failed to show any fault on the part of USAC, the admitted misuse of the Model 2000 door constitutes a complete defense to any strict products liability claim in this case. USAC put a clear, concise, and conspicuous warning on top of each page of the catalog accompanying its Model 2000 product that this doorway was to be used "for interior applications only." The Model 2000 mall slider is commonly used as an entrance to a mall store from the mall hallways. It was

not reasonably foreseeable to USAC that its business intermediary, Crittenden, would omit the otherwise conspicuous warning from its submittal to R&O and Chamberlin, that Chamberlin would approve an interior door for exterior use, and that Smith's subsequently would use USAC's Model 2000 interior mall slider as an exterior grocery store entrance. Although the cause of the incident involving Ms. McKay is not known, this misuse is "at least a concurrent proximate cause of the accident." Beacham v. Lee-Norse, 714 F.2d 1010, 1015 (10th Cir. 1983). Thus, in this case, the admitted misuse constitutes a complete defense to any products liability claim against USAC.

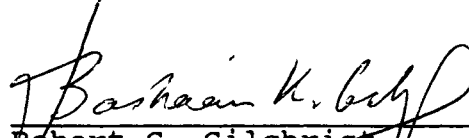
Ms. McKay failed to effectively raise the defective product issue before this Court. Moreover, since Ms. McKay has failed to show any fault on the part of USAC, the admitted misuse of the Model 2000 door constitutes a complete defense to any strict products liability claim in this case. Therefore, this Court should affirm the summary judgment granted below to USAC.

#### **CONCLUSION**

For the reasons stated and authority cited *supra*, Appellee United States Aluminum Corporation respectfully requests this Court to affirm the summary judgment granted to it by the trial court below.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of November, 1997.

RICHARDS, BRANDT, MILLER & NELSON

A handwritten signature in dark ink, appearing to read "Bastiaan K. Coebergh", is written over a horizontal line.

Robert G. Gilchrist

Bastiaan K. Coebergh

Attorneys for Defendants and  
Appellees

United States Aluminum Corporation  
and International Aluminum  
Corporation

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was mailed, first-class, postage prepaid, on this 24<sup>th</sup> day of November, 1997, to the following counsel of record:

Stephen G. Morgan  
MORGAN & HANSEN  
Attorneys for Smith's Food  
Store and Drug Centers, Inc.  
136 South Main Street  
Kearns Building, 8th Floor  
Salt Lake City UT 84101

Herm Olsen  
HILLYARD ANDERSON & OLSEN  
Attorneys for Stephanie McKay  
175 East 100 North  
Logan UT 84321

Karra J. Porter  
CHRISTENSEN & JENSEN  
Attorneys for Crittenden  
175 South West Temple #510  
Salt Lake City UT 84101

Richard R. Medsker  
FARR KAUFMAN SULLIVAN GORMAN  
JENSEN MEDSKER & PERKINS  
Attorneys for James O.  
Chamberlin  
205 26th Street #34  
Ogden UT 84401

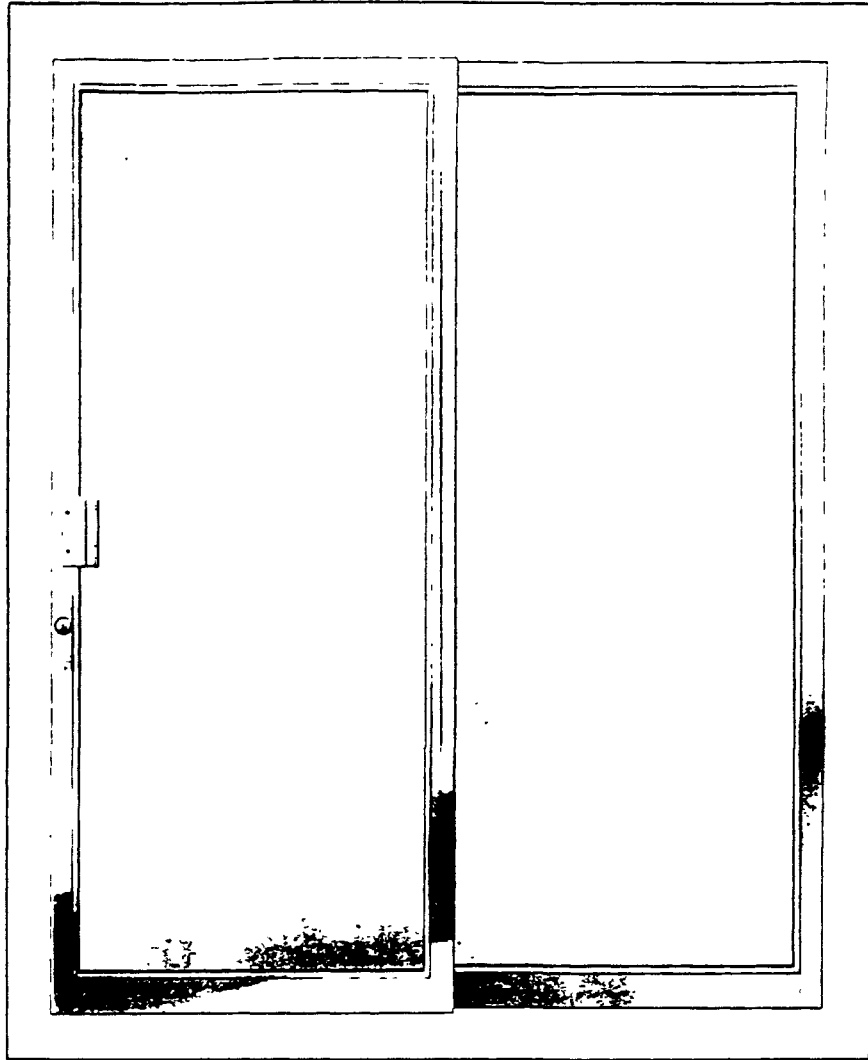
Mike Homer  
SUITTER AXLAND ARMSTRONG &  
HANSEN  
175 South West Temple  
Salt Lake City UT 84101



Tab 1



**#2000 SLIDING DOORS**  
**FOR INTERIOR APPLICATIONS ONLY**

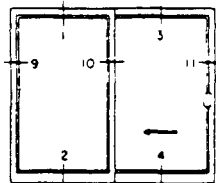


**Stiles 2-1/6" — Top Rail 2-1/8" — Bottom Rail 3-3/16"**  
**(plus 1/2" for glass stops)**

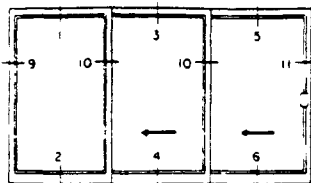
Engineered with stacking head channels and bottom tracks, they allow unlimited design possibilities. Rugged overall construction coupled with heavy wall stiles and interlocks meet all requirements for a truly monumental sliding unit. Panels are double weatherstripped and equipped with flush finger pulls. Maximum security locks, adjustable tandem steel rollers and stainless steel track caps are additional features. Individual sliding panels exceeding 288" perimeter should have a horizontal muntin installed.

Revised August 1987

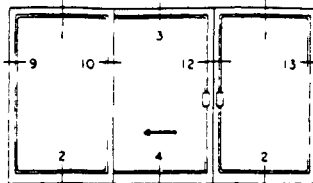
# **"2000" SLIDING DOORS** **FOR INTERIOR APPLICATIONS ONLY**



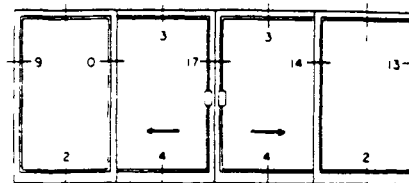
OX  
XO REVERSED



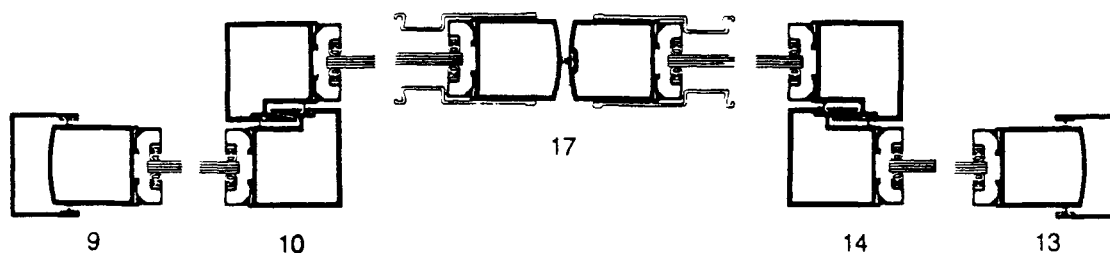
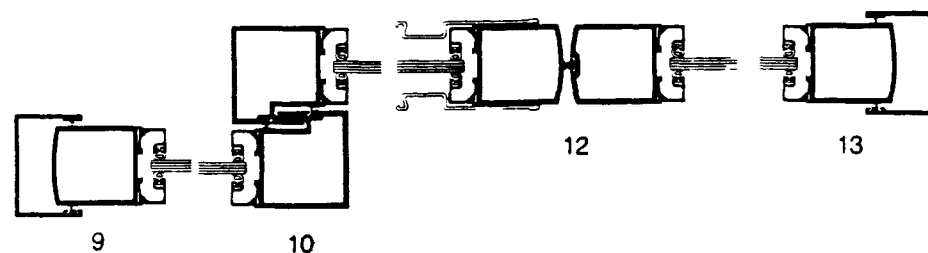
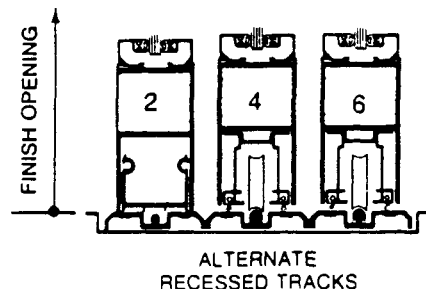
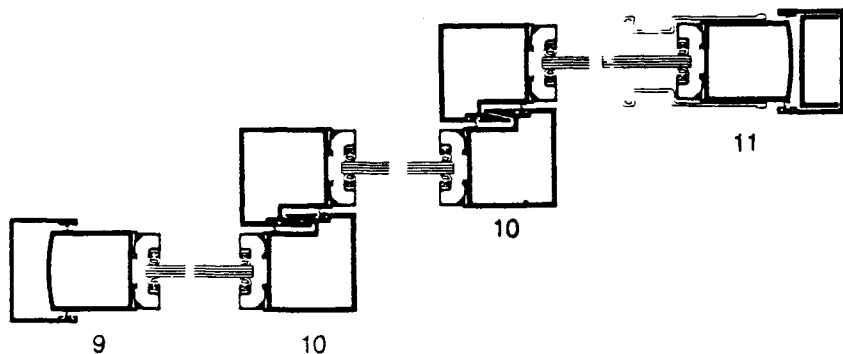
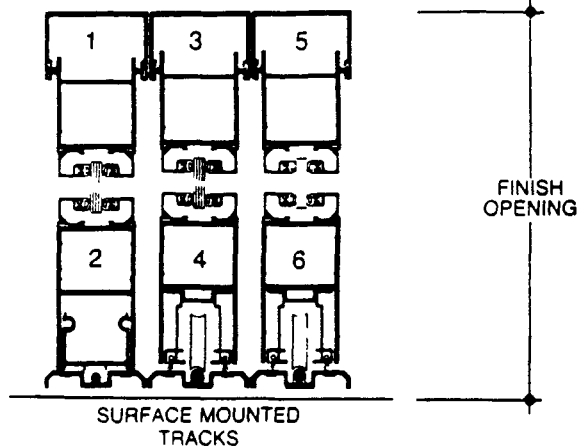
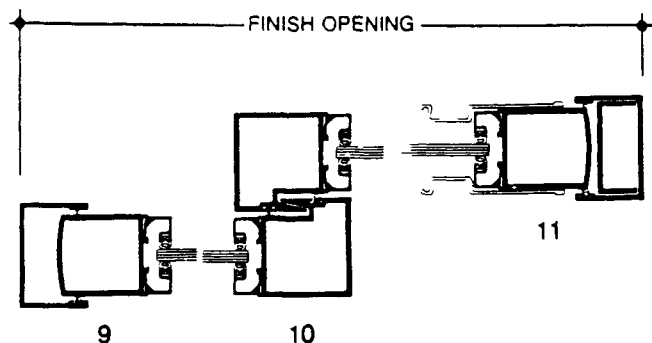
OXX  
XXO REVERSED



OXO-L  
OXO-R REVERSED



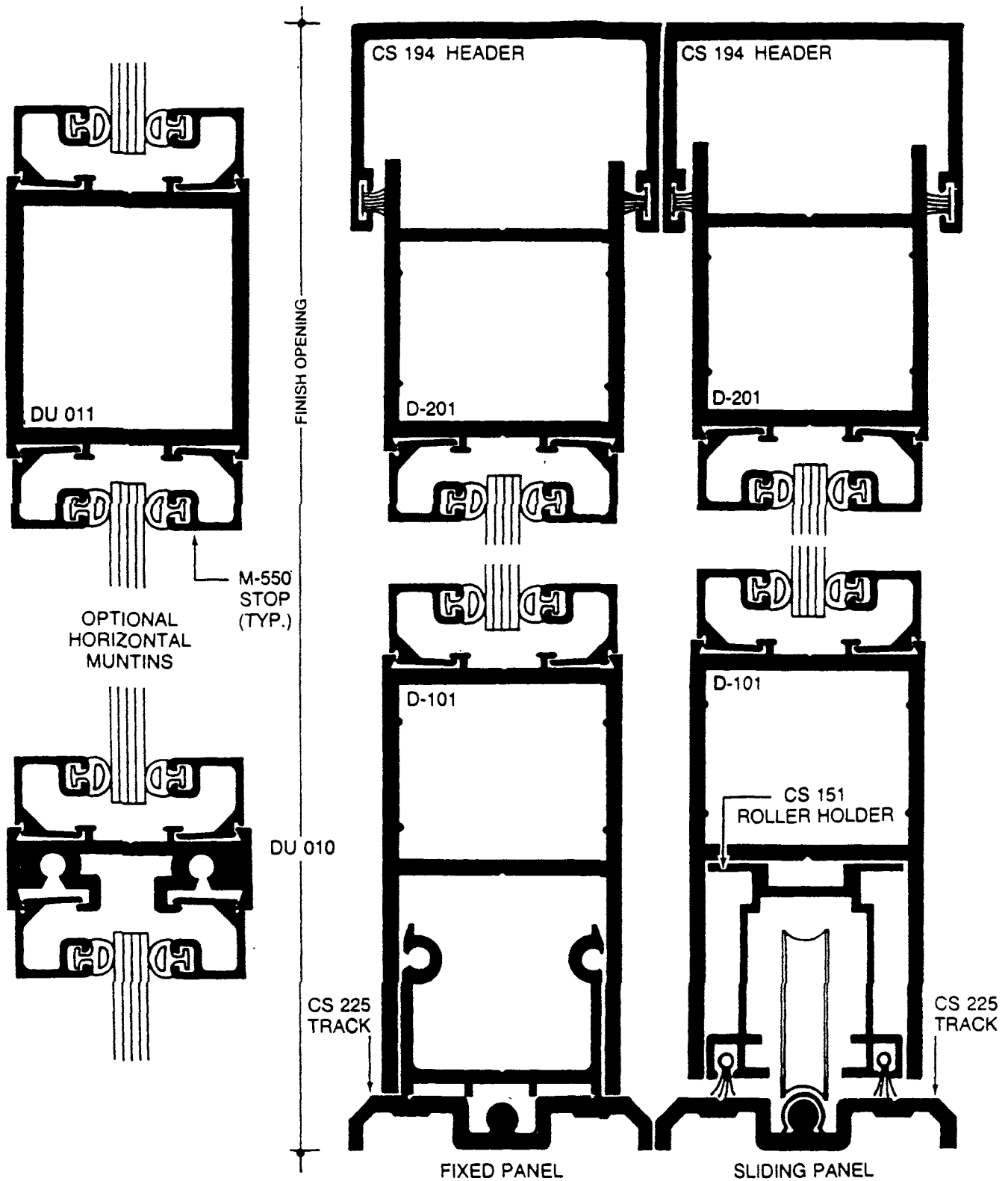
OXO  
XOOX ALSO AVAILABLE



**QUARTER SIZE DETAILS**

# #2000 SLIDING DOORS FOR INTERIOR APPLICATIONS ONLY

## VERTICAL SECTIONS



## FULL SIZE DETAILS

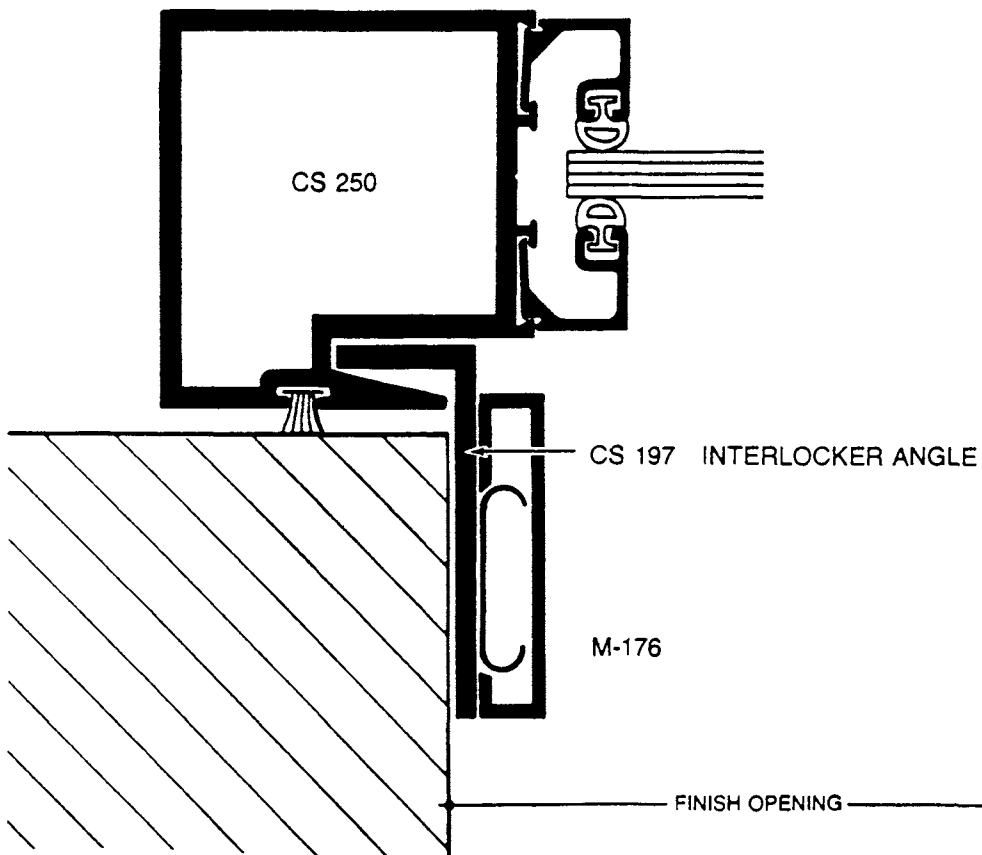
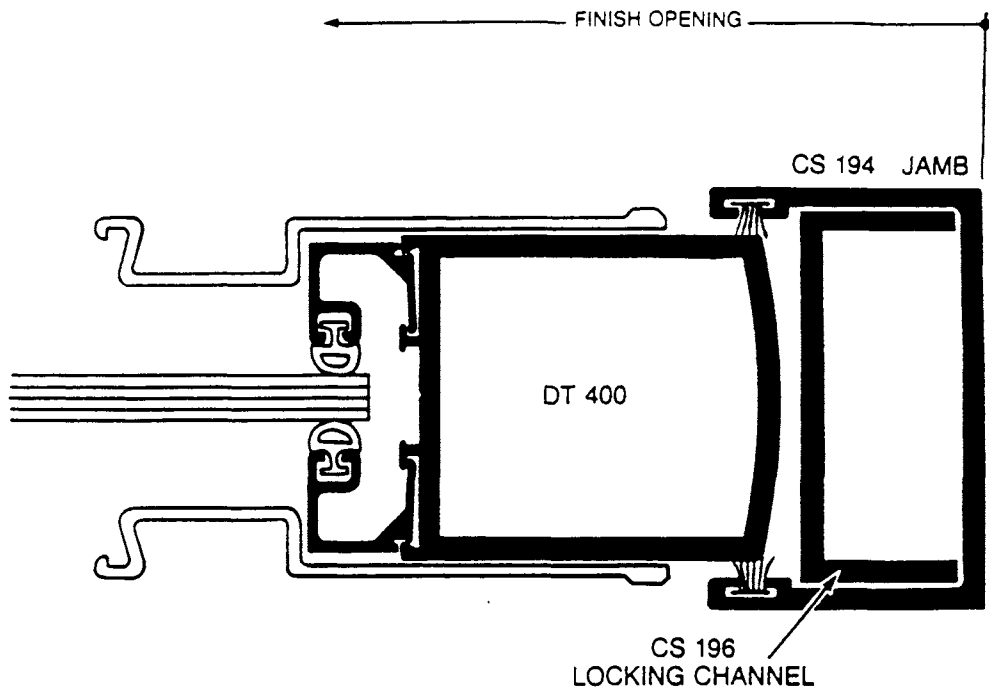
Revised August 1987

1-5

1316

# "2000" SLIDING DOORS FOR INTERIOR APPLICATIONS ONLY

## HORIZONTAL SECTIONS



## FULL SIZE DETAILS

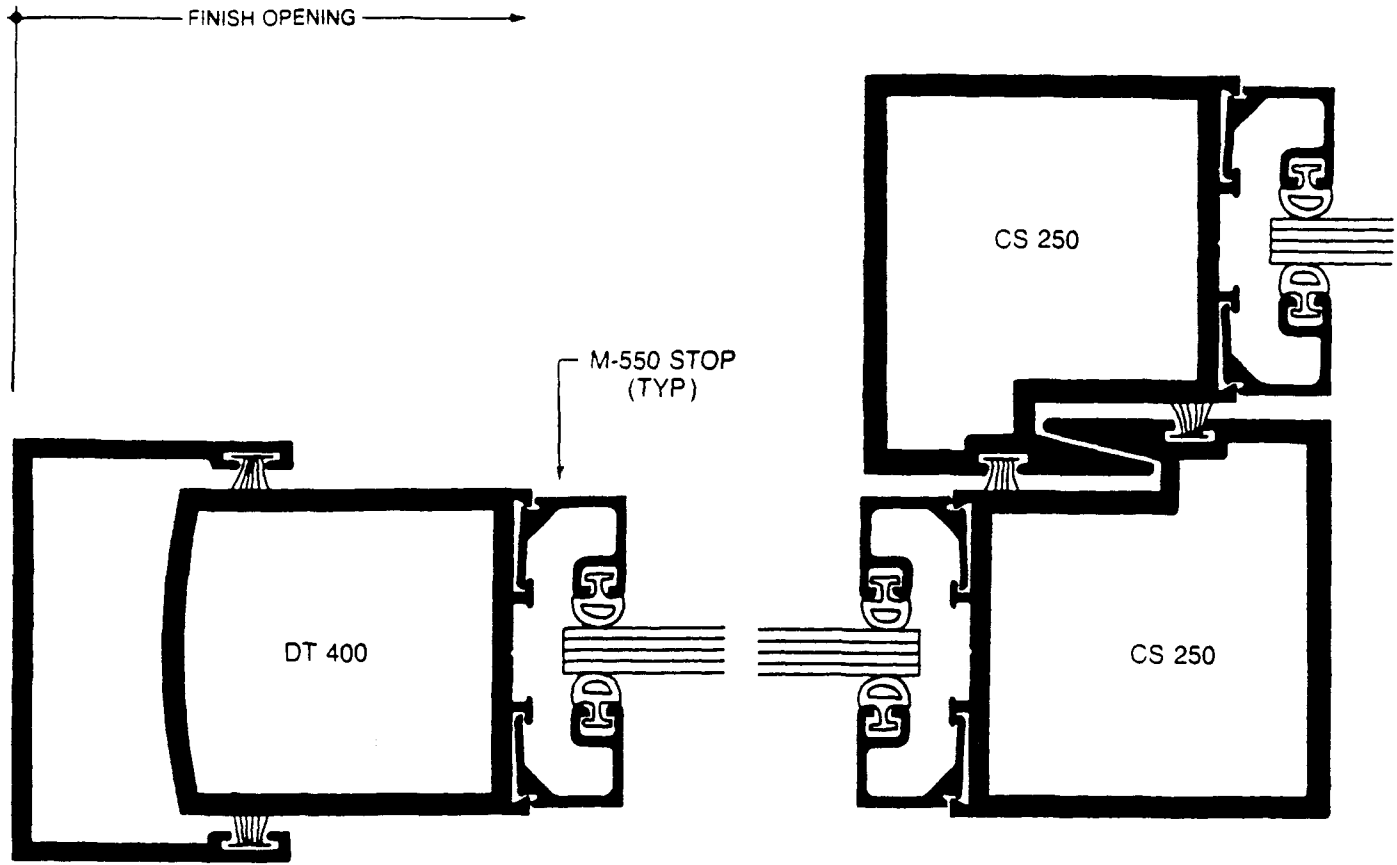
Revised August 1987

1-6

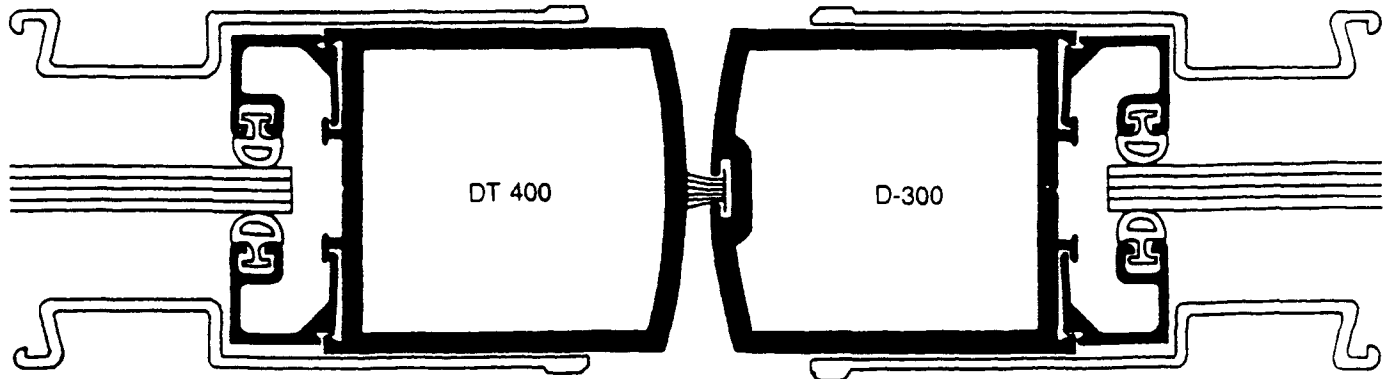
1217

**"2000" SLIDING DOORS**  
**FOR INTERIOR APPLICATIONS ONLY**

**HORIZONTAL SECTIONS**



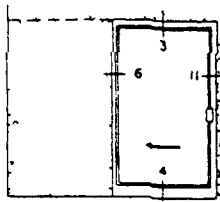
CS 194 JAMB



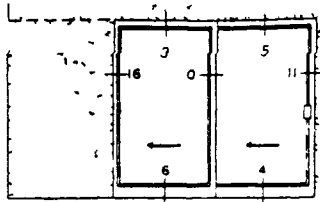
**FULL SIZE DETAILS**

Revised August 1987

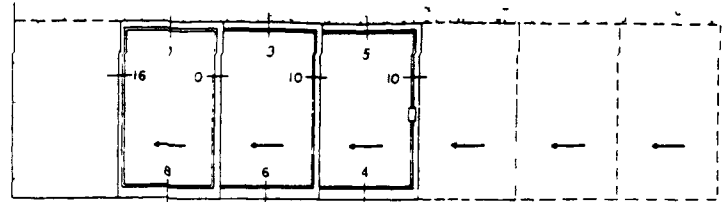
# "2000" SLIDING POCKET DOORS FOR INTERIOR APPLICATIONS ONLY



PX  
XP IS REVERSED

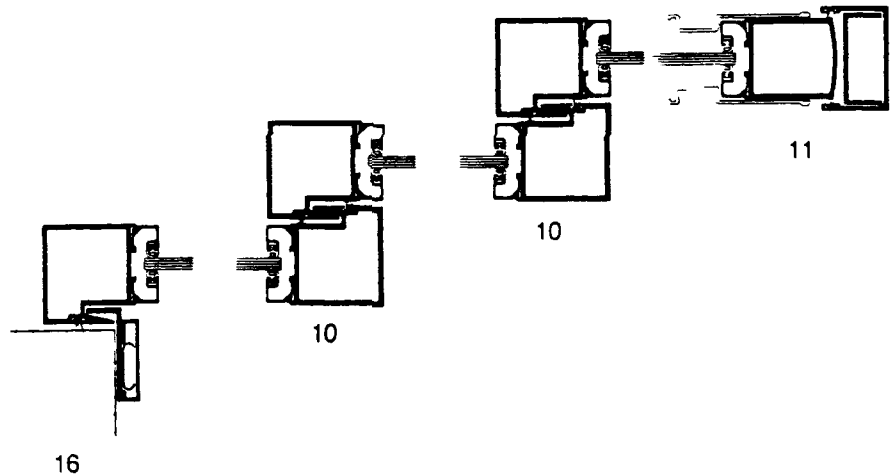
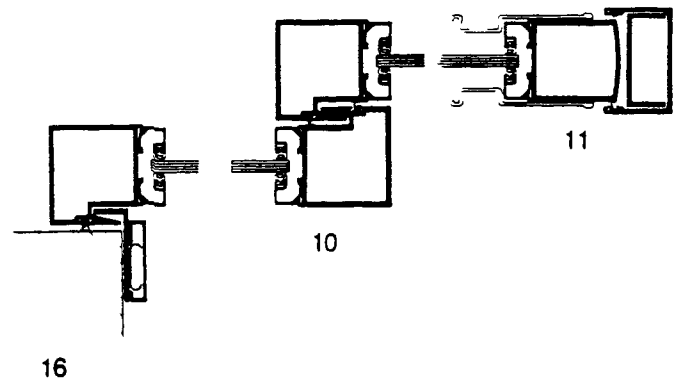
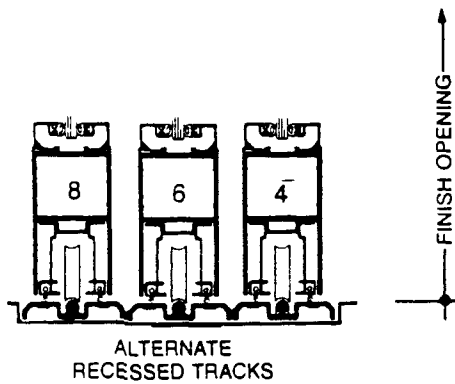
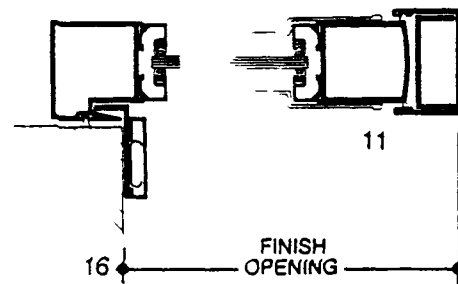
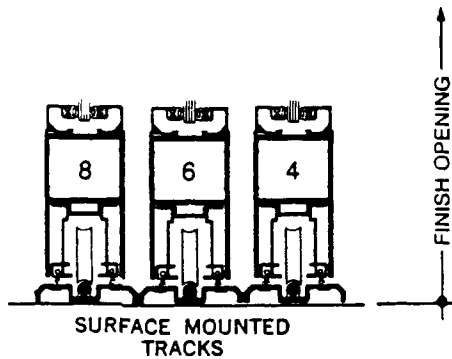


P2X  
2XP IS REVERSED



P3X  
3XP IS REVERSED

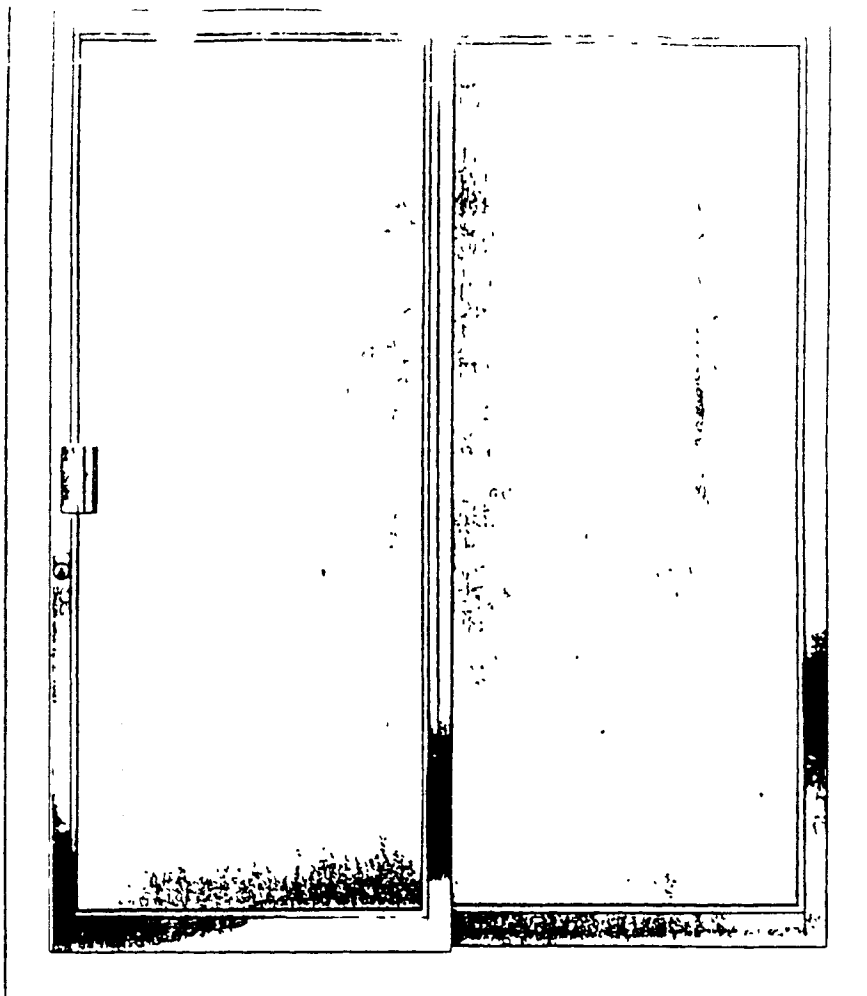
P4X P5X P6X  
4, 5, 6XP ARE REVERSED



QUARTER SIZE DETAILS

Revised August 1987

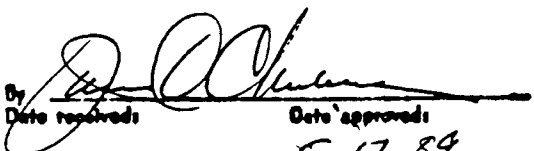
Tab 2



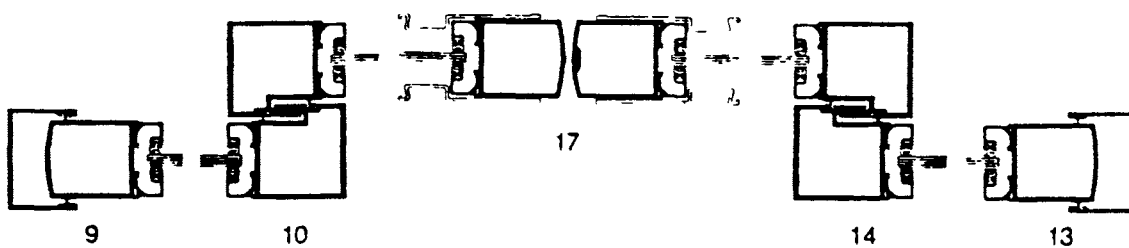
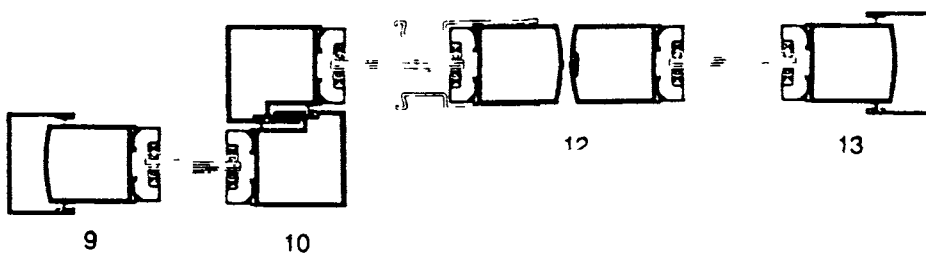
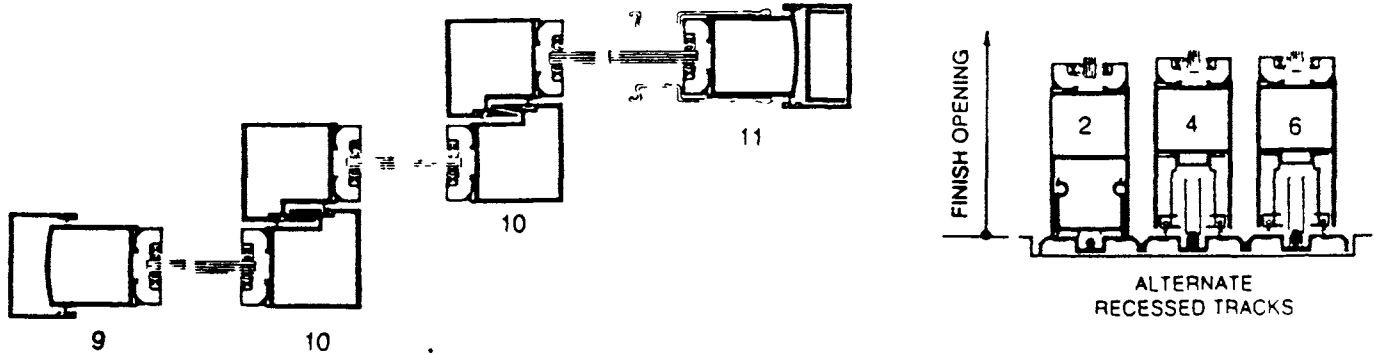
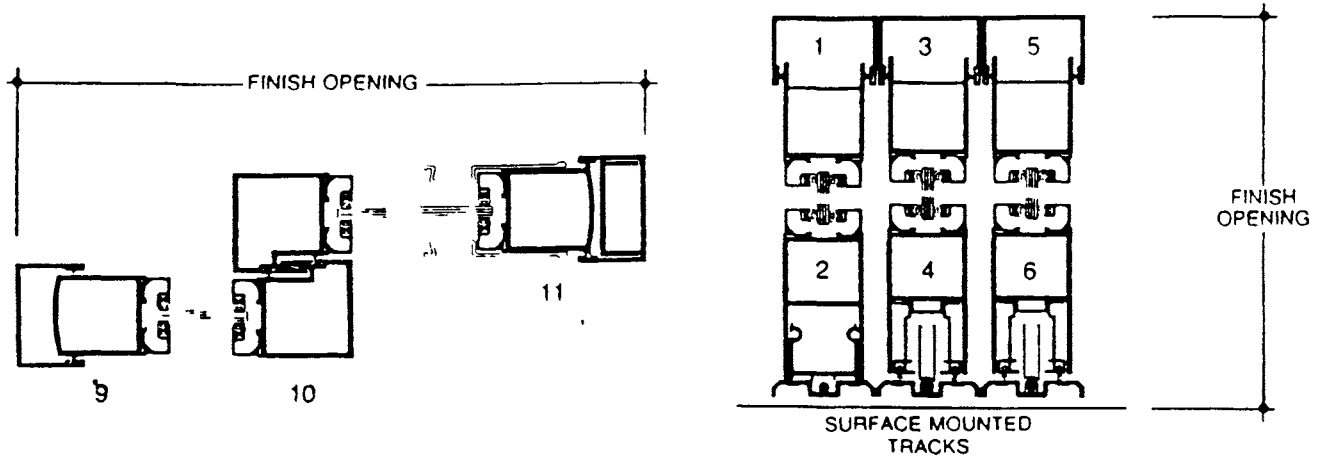
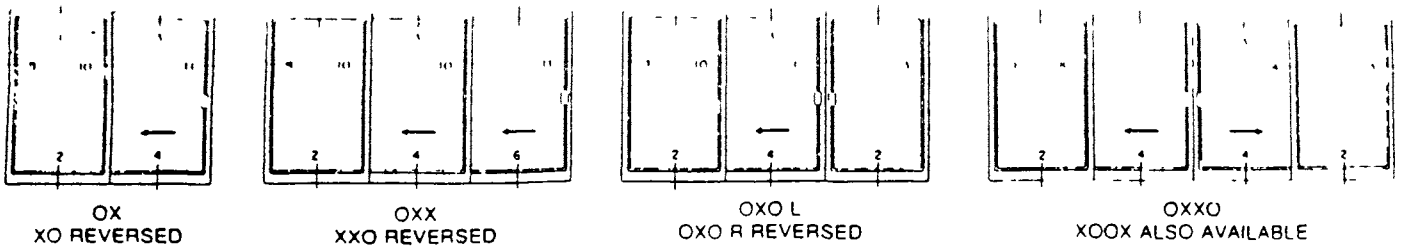
Stiles 2-1/6" — Top Rail 2-1/8" — Bottom Rail 3-3/16"  
(plus 1/2" for glass stops)

Engineered with stacking head channels and bottom tracks, they allow unlimited design possibilities. Rugged overall construction coupled with heavy wall stiles and interlocks meet all requirements for a truly monumental sliding unit. Panels are double weatherstripped and equipped with flush finger pulls. Maximum security locks, adjustable tandem steel rollers and stainless steel track caps are additional features. Individual sliding panels exceeding 288" perimeter should have a horizontal muntin installed.

Revised August 1987

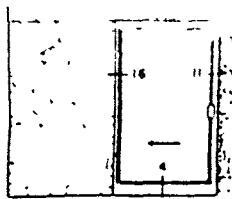
ARCHITECT'S APPROVAL	
These shop drawings or documents are approved to the extent required by the Contract Documents. Responsibility and liability for the function, performance and dimensional fit of the items described in accordance with the requirements of the Contract Documents are with the Contractor.	
By 	Date approved: <u>5-17-84</u>
Date received: _____	



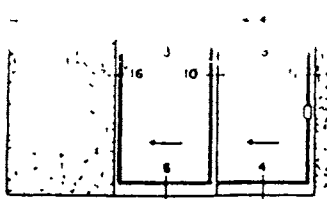


Revised August 1987

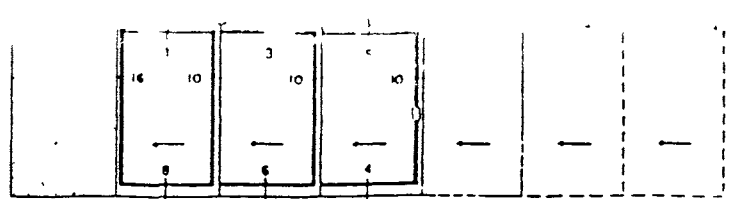
# QUARTER SIZE DETAILS



PX  
XP IS REVERSED

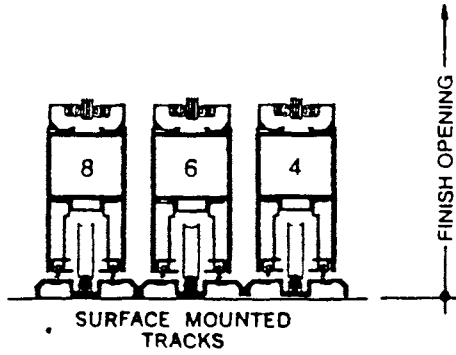


P2X  
2XP IS REVERSED

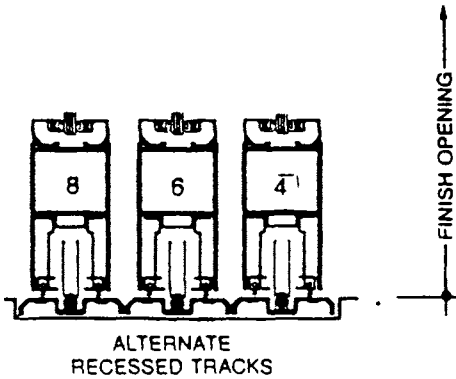
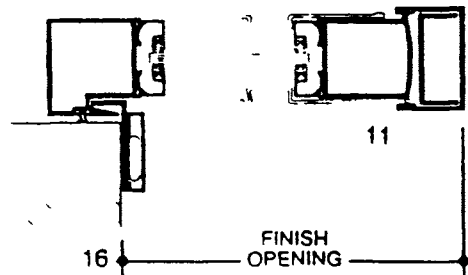


P3X  
3XP IS REVERSED

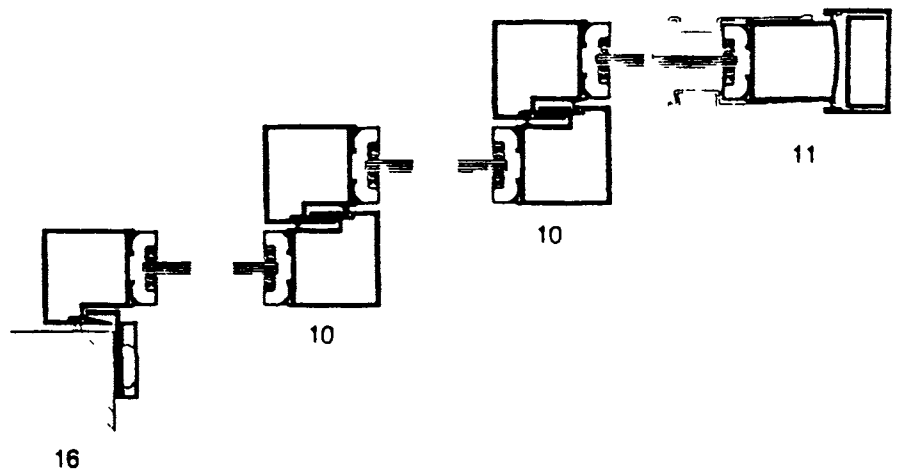
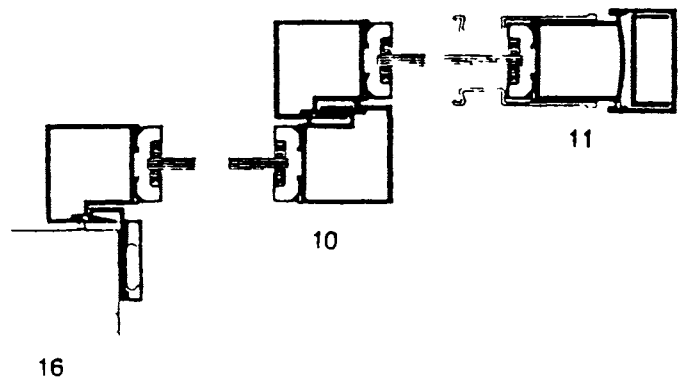
P4X P5X P6X  
4, 5, 6XP ARE REVERSED



SURFACE MOUNTED  
TRACKS

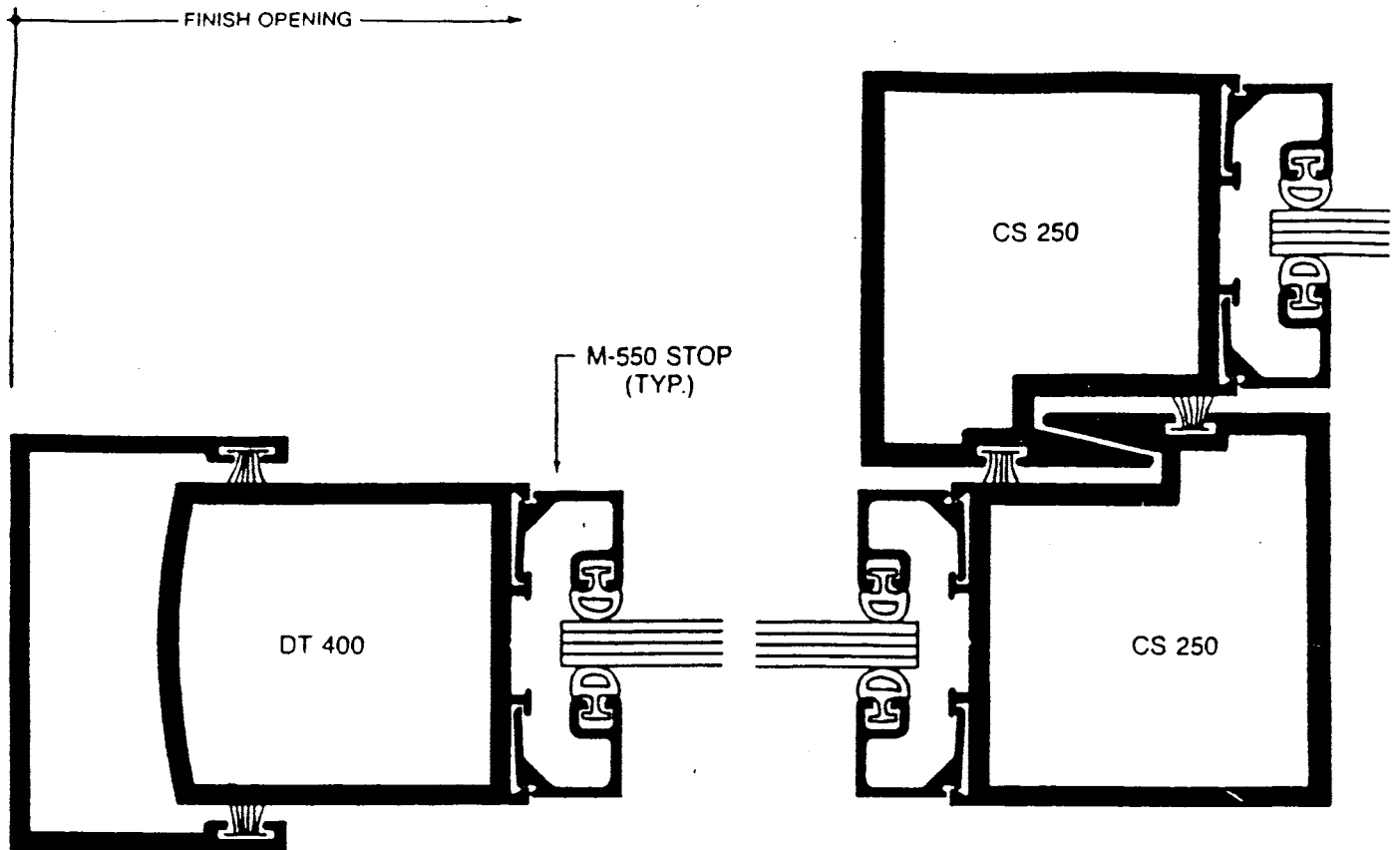


ALTERNATE  
RECESSED TRACKS

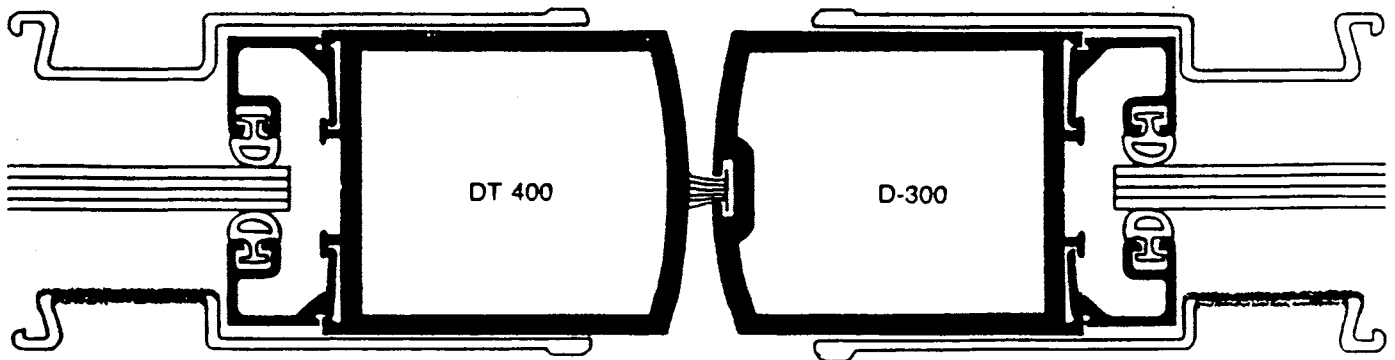


# QUARTER SIZE DETAILS

Revised August 1987



CS 194 JAMB

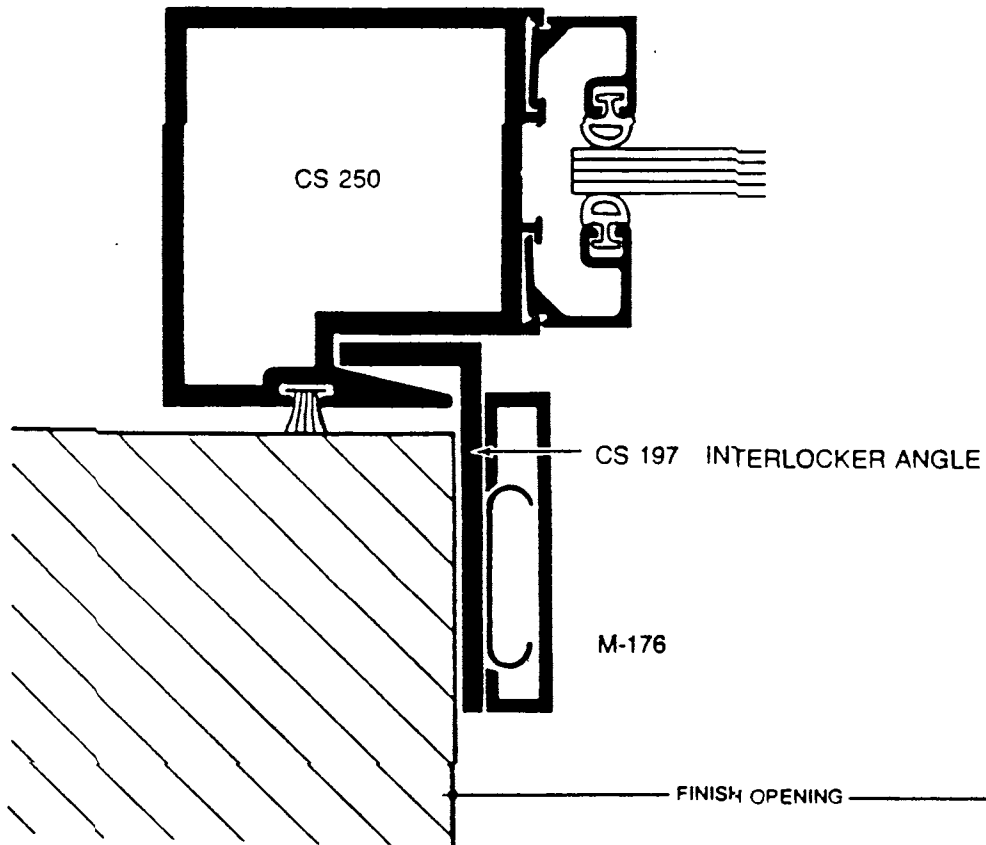
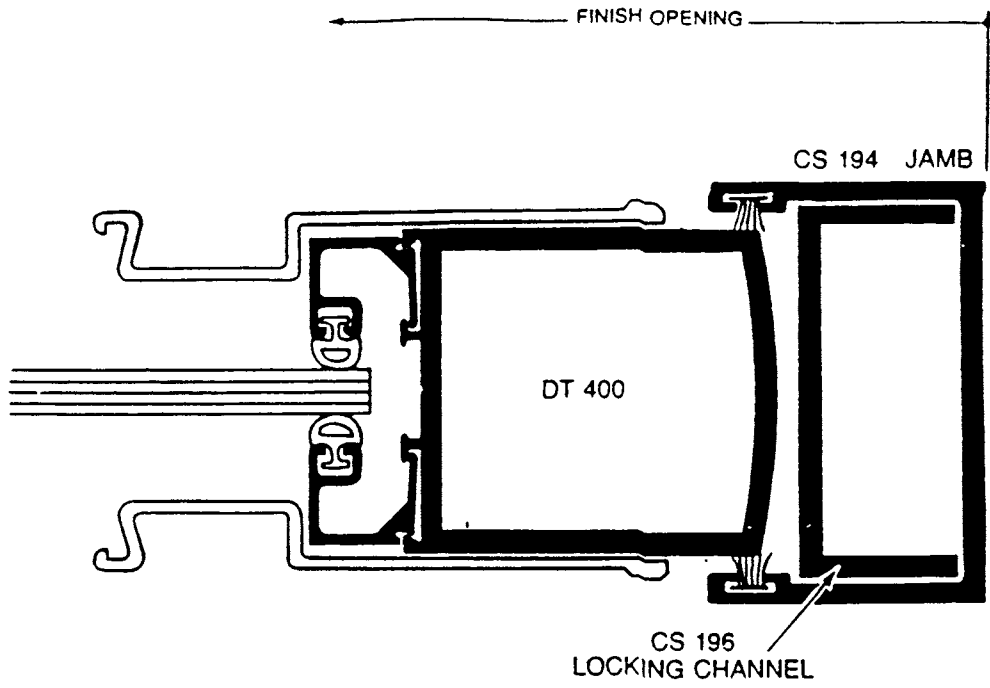


FULL SIZE DETAILS

Revised August 1987

4-5  
1235

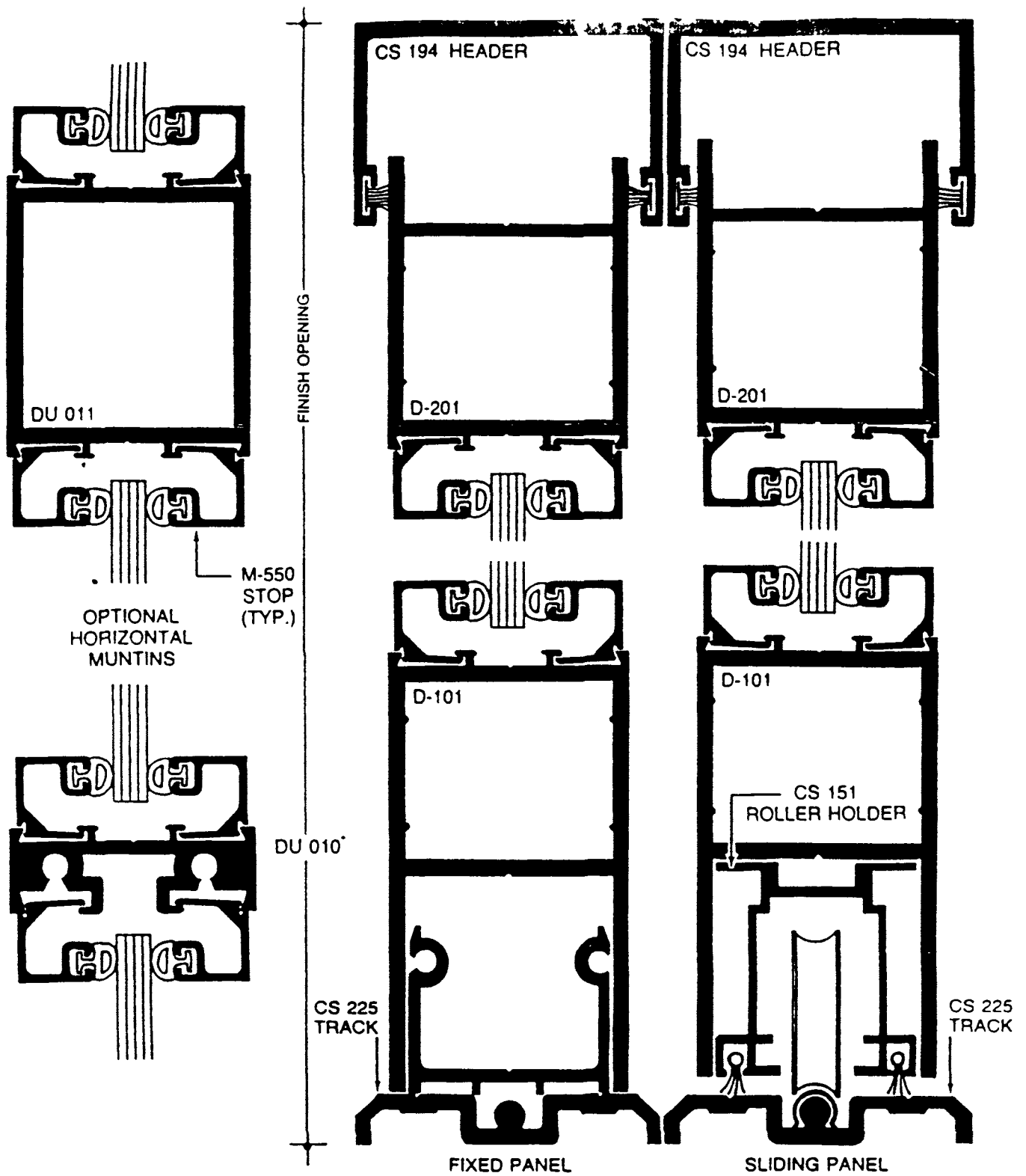
# HORIZONTAL SECTIONS



## FULL SIZE DETAILS

Revised August 1987

46  
1336



FULL SIZE DETAILS

Revised August 1987

Tab 3

# 2000 SERIES SLIDING DOORS

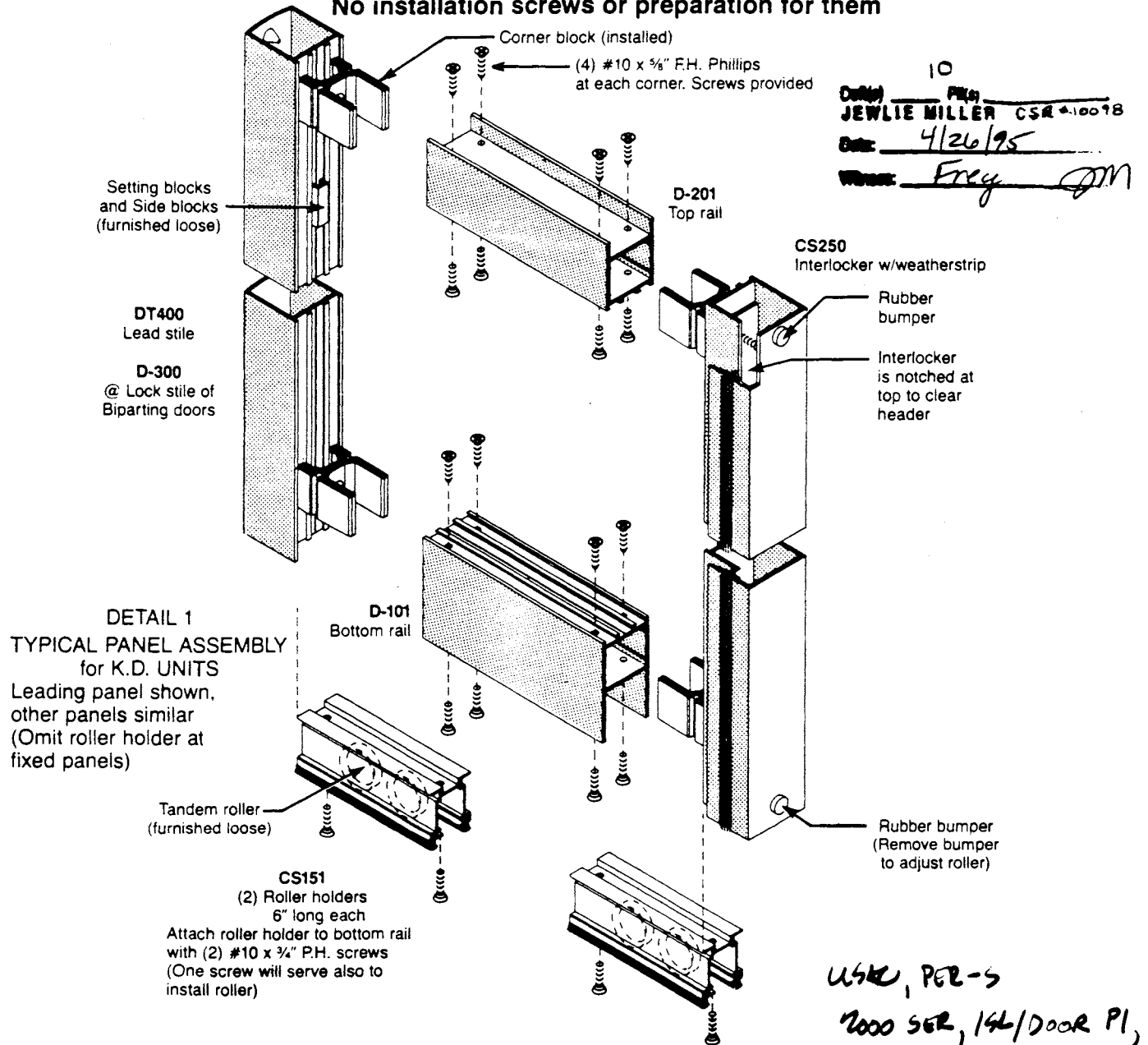
## FOR INTERIOR APPLICATIONS ONLY

MULTI SLIDE AND POCKET DOOR PACKAGES INCLUDE:

**Fabricated items:** Door panels or K.D. door components with M.S. hooklock with two cylinders and flush finger pulls installed. Tandem rollers and roller holders furnished loose with K.D. units. Locking channel with lock cut out.

**Non-fabricated items:** Headers and Jambs with weatherstrip, Tracks with S.S. cap and Interlocker angle and Trim for pocket doors. Sizes to be adjusted at job site.

**No installation screws or preparation for them**



For complete information call 1 (800) 627-6440, Fax 1 (800) 289-6440, or write

# United States Aluminum Corporation

## Manufacturing Facilities

3663 Bandini Blvd.  
 Vernon, California 90023  
 Telephone (213) 268-4230

200 Singleton Drive  
 Waxahachie, Texas 75165  
 Telephone (214) 937-9651

6969 West 73rd Street  
 Chicago, Illinois 60638  
 Telephone (708) 458-9070

720 Cel-River Road  
 Rock Hill, South Carolina 29730  
 Telephone (803) 366-8326

750 Cardinal Dr., P.O. Box 333  
 Bridgeport, New Jersey 08014-0333  
 Telephone (609) 467-5700

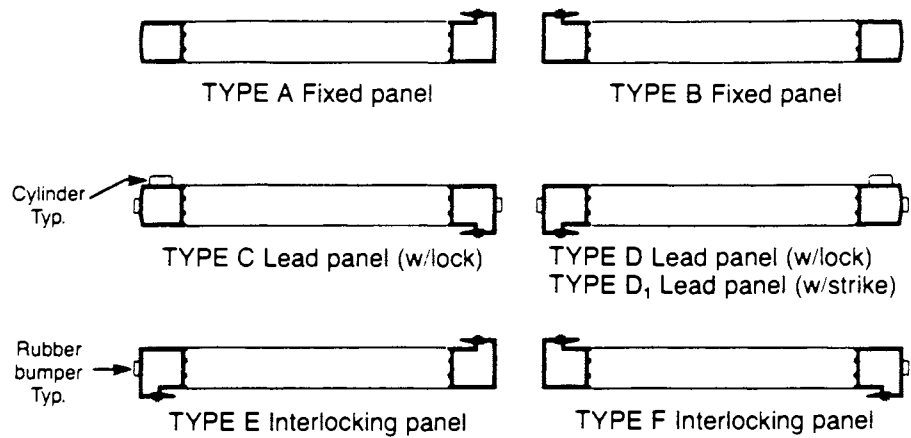
**PANELS ASSEMBLY (for K.D. UNITS)**

STILES and RAILS are cut to size and ready for assembly. Corner blocks, lock and flush finger pulls are factory installed.

**Identify panels as shown:**

i.e. An oxxx slider requires

- (1) TYPE A panel
- (2) TYPE E panels
- and (1) TYPE D panel



DETAIL 2

**NOTE: STILES for fixed panels do not have rubber bumpers at top and bottom.**  
**INTERLOCKERS are notched at top.**

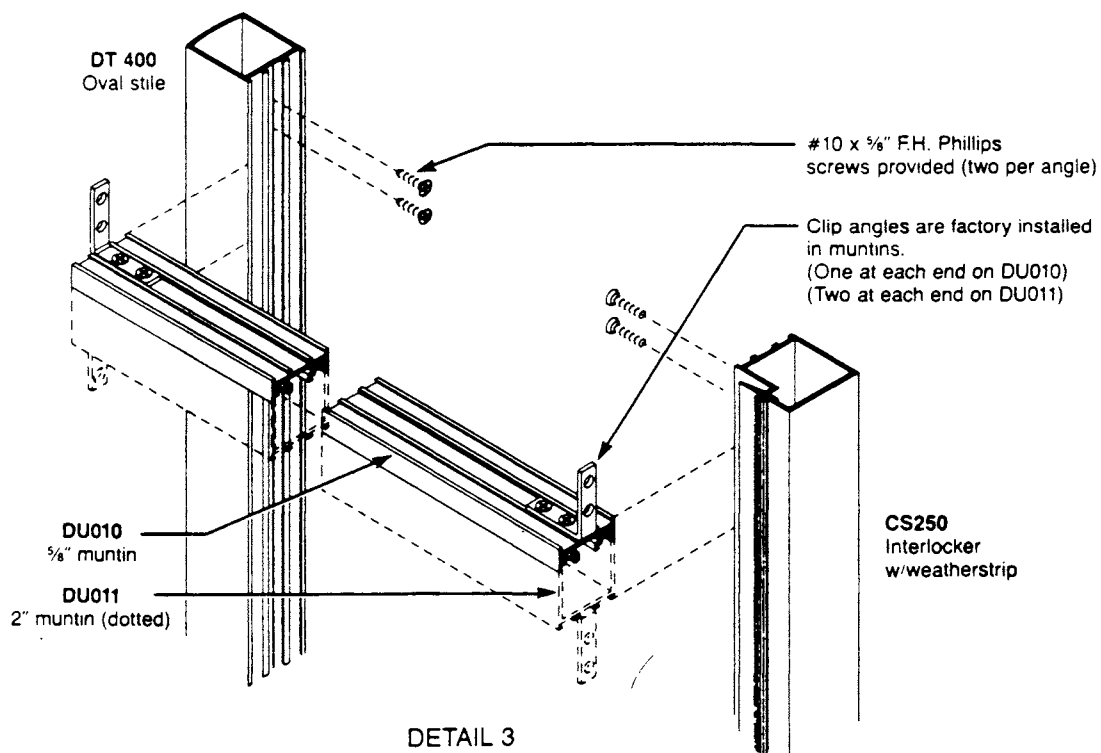
Assemble panels as shown. See DETAIL 1 on cover page.

Install horizontal muntins (as required). See DETAIL 3

Locate setting blocks and side blocks, two on bottom rail and two on each stile, at approximately 6" from corners.

Install glass stops with glazing gaskets on one side of the door. Vertical stops always go first.

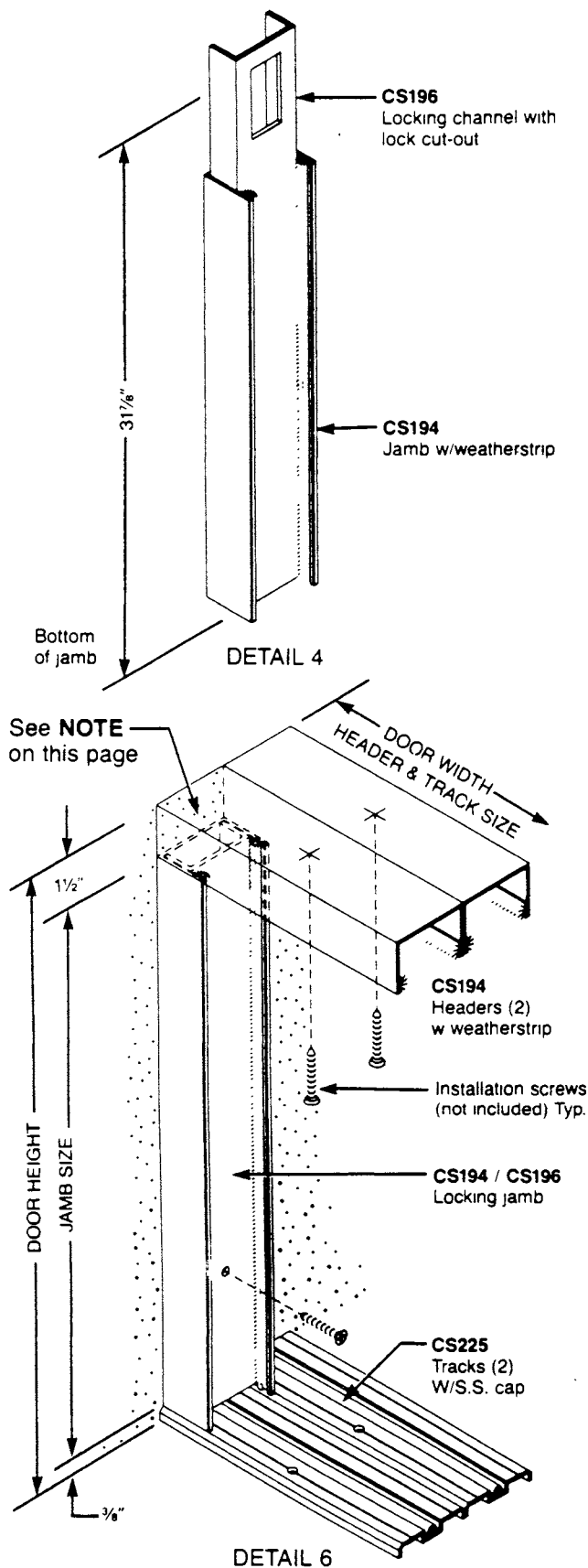
Center glass in opening, resting on setting blocks. Snap-in remaining glass stops.



DETAIL 3



## MULTISLIDE DOORS – FRAME INSTALLATION



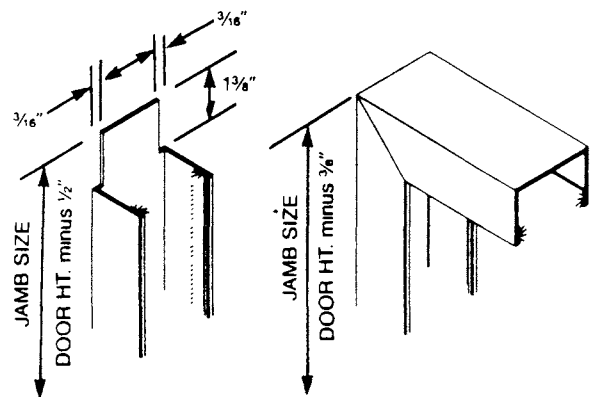
## Determine DOOR SIZE.

Shimming of HEADERS and JAMBS is not required to assure door operation, but may be necessary for out of square or irregular job conditions.

HEADERS and TRACKS run continuous. Cut them to DOOR WIDTH dimension.

JAMBS and LOCKING CHANNEL run between header and Track. Cut them to DOOR HEIGHT minus 1 7/8".

**NOTE:** HEADER and JAMB straight cuts leave an opening against the wall. see DETAIL 6. When this installation is unacceptable notch top of JAMB or miter JAMB and HEADER at corner. See DETAIL 5. In either case JAMB should be cut longer as shown on DETAIL 5. (JAMB always seats in top of TRACK)

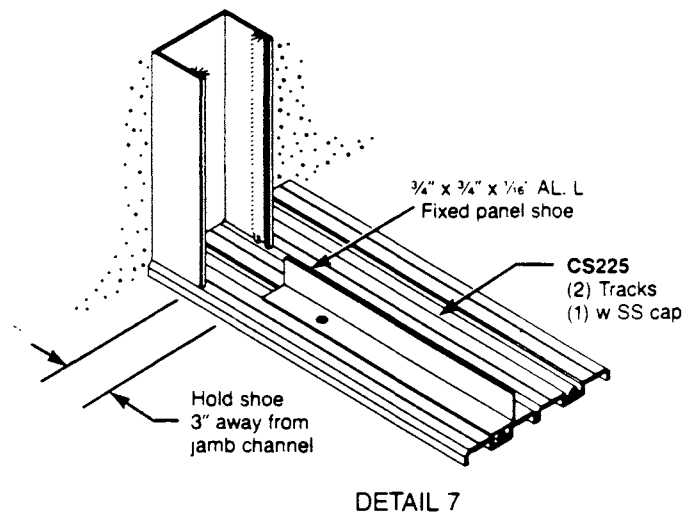


DETAIL 5

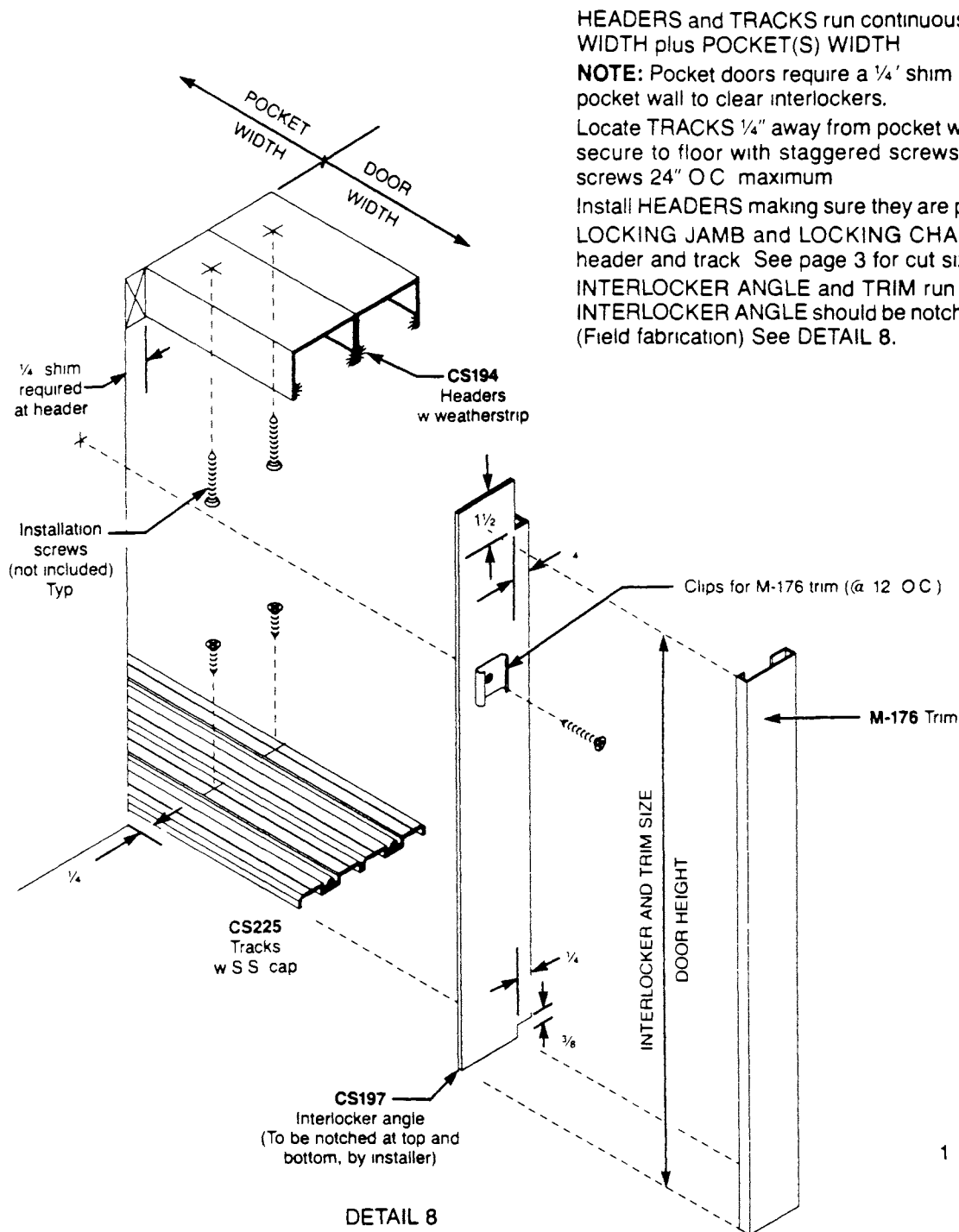
Locate TRACKS in place. Shim to level as required and anchor to floor with staggered screws. Space installation screws 24" O.C. maximum. (Screws not included.)

Install HEADERS making sure they are plumb with TRACKS. Slide LOCKING CHANNEL into JAMB before installing. See DETAIL 4. Fasten JAMBS to wall.

On doors with fixed panels mount DOOR SHOE on track. See DETAIL 7.



## POCKET DOORS – FRAME INSTALLATION

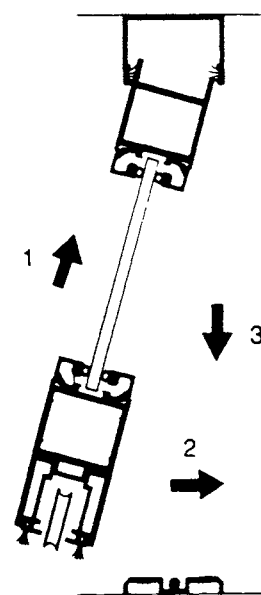


HEADERS and TRACKS run continuous. Cut them to DOOR WIDTH plus POCKET(S) WIDTH

**NOTE:** Pocket doors require a 1/4" shim between header and pocket wall to clear interlockers.

Locate TRACKS 1/4" away from pocket wall; shim to level and secure to floor with staggered screws. Locate installation screws 24" O C maximum

Install HEADERS making sure they are plumb with TRACKS. LOCKING JAMB and LOCKING CHANNEL run between header and track. See page 3 for cut size and installation. INTERLOCKER ANGLE and TRIM run full DOOR HEIGHT. INTERLOCKER ANGLE should be notched at top and bottom (Field fabrication) See DETAIL 8.



## DOOR INSTALLATION

**FIXED PANELS** Push panel into header in an angle, swing bottom to vertical plane and over the panel shoe, lower onto sill and push into jamb

**OPERATING PANELS.** Working in sequence install remaining panels as shown. See DETAIL 9

Remove rubber bumpers from bottom of stiles and adjust rollers to align panels and to insure proper engagement of hook bolt. Turn adjusting screws clockwise to raise panel and counterclockwise to lower

Secure fixed panel to shoe from inside.

1345 10-4

Tab 4

# UNITED STATES ALUMINUM CORPORATION

## SERIES 2000 SLIDING DOORS SPECIFICATIONS

### I. GENERAL

#### DESCRIPTION

**Work Included** The glazing contractor shall furnish all necessary materials, labor, and equipment for the complete installation of aluminum sliding doors as detailed on the drawings and specified herein.

**Work Not Included** Structural support of the framing system, wood framing, structural steel, masonry, final cleaning.

#### QUALITY ASSURANCE

For purposes of designating type and quality for work in this section, drawings and specifications are based on United States Aluminum Corporation Series 2000 sliding doors.

When substitute products are to be considered, supporting technical literature, samples and drawings must be submitted ten (10) days prior to bid date in order to make a valid comparison of the products involved.

#### PERFORMANCE REQUIREMENTS

Series 2000 sliding doors are designed for interior application. They can be used at exterior only when water penetration, air infiltration and structural performance are not critical.

### II. PRODUCTS

#### MATERIALS

Door and frame members shall be extruded architectural aluminum 6063-T5 alloy and temper. Major portion of all door sections, except glazing beads shall be nominal .125

inch. Wall thickness of frame members shall be nominal .093 inch. Screws, nuts, washers, bolts, rivets, and other fastening devices shall be aluminum, stainless steel or other non-corrosive materials. Sliding door floor track shall have stainless steel cover cap. Perimeter fasteners shall be aluminum or steel providing that the steel is properly isolated from the aluminum.

#### DOOR CONSTRUCTION

Fixed and sliding panels shall be 1 3/4" deep. Stiles and rails shall be tubular sections, accurately joined at corners with heavy concealed reinforcement brackets secured with bolts and screws.

Doors shall have snap-in stops with bulb glazing gaskets on both sides of glass. No exposed screws shall be permitted. A hard-backed poly-pile weatherstrip shall be installed in all interlockers and in meeting stiles of biparting doors. Sliding panels shall be equipped with two tandem ball bearing rollers, each capable of supporting 250 pounds of moving weight.

#### HARDWARE

Hardware for Series 2000 sliding doors shall be the manufacturer's standard Maximum Security hook lock with two five pin cylinders, flush finger pulls and adjustable tandem steel rollers.

If custom hardware is to be furnished by others, template and physical hardware must be submitted prior to any fabrication.

#### FINISH

All exposed framing surfaces shall be free of scratches and other serious blemishes.

Aluminum extrusions shall be given a caustic etch followed by an anodic oxide treatment to obtain (Specify one of the following)

\_\_\_\_\_ an Architectural Class I anodic coating conforming to Aluminum Association Standard AA-M12 C22 A44. Specify #125 Dark Bronze or #130 Black.

\_\_\_\_\_ A #100 Clear anodic coating conforming to Aluminum Association Standard AA-M12 C22 A31.

### III. EXECUTION

#### INSTALLATION

All items under this heading shall be set in their correct locations as shown in the details and shall be level, square, plumb, and at proper elevation and in alignment with other work in accordance with the manufacturer's installation instructions and approved shop drawings.

Upon completion of the installation of the entrances, it shall be this contractor's responsibility to make all necessary final adjustments to attain normal operation of each door and its mechanical hardware.

#### PROTECTION AND CLEANING

After installation, the General Contractor shall adequately protect exposed portions of the aluminum entrance work from damage by grinding and polishing compounds, plaster, lime, acid, cement, or other contaminants. The General Contractor shall be responsible for final cleaning.

Tab 5

SMITH'S

SECTION 08410 - ALUMINUM ENTRANCES AND STOREFRONTS

PART 1 - GENERAL

RELATED DOCUMENTS:

Drawings and general provisions of Contract, including General and Supplementary Conditions and Division-1 Specification sections, apply to work of this section.

DESCRIPTION OF WORK:

Extent of aluminum entrances and storefronts is shown on drawings and schedules.

Types of aluminum entrances and storefronts required include the following:

- Aluminum window frames at Pharmacy.
- Sliding exterior entrance doors.
- Vestibule doors matching entrance doors.
- Interior doors.
- Frames for exterior entrances.
- Frames for interior doors.
- Storefront type framing system, cut down aluminum/glass doors and accessories.

Glazing: Refer to "Glass and Glazing" section of Division 8 for glazing requirements for aluminum entrances and storefronts, including doors specified herein to be factory preglazed.

SYSTEM PERFORMANCES:

General: Provide exterior entrance and storefront assemblies that have been designed and fabricated to comply with requirements for system performance characteristics listed below as demonstrated by testing manufacturer's corresponding stock systems according to test methods designated.

Thermal Movement: Allow for expansion and contraction resulting from ambient temperature range of 120°F (49°C).

Wind Loading: Provide capacity to withstand loading indicated below, tested per ASTM E 330.

Uniform pressure of 20 psf inward and 20- psf outward.

Transmission Characteristics of Fixed Framing: Comply with requirements indicated below for transmission characteristics and test methods.

SMITH'S

Air and Water Leakages: Air infiltration of not more than 0.06 CFM per sq. ft. of fixed area per ASTM E 283 and no uncontrolled water penetration per ASTM E 331 at pressure differential of 6.24 psf (excluding operable door edges).

QUALITY ASSURANCE:

Drawings are based on one manufacturer's standard aluminum sliding entrance and storefront system. Another standard system of a similar and equivalent nature will be acceptable when differences do not materially detract from design concept or intended performances, as judged solely by Architect. Aluminum system standards shall be based on Kawneer 1010 Sliding Mail Front and Kawneer Trifab 450/451 framing system.

SUBMITTALS:

Product Data: Submit manufacturer's specifications, standard details, and installation recommendations for components of aluminum entrances and storefronts required for project, including test reports certifying that products have been tested and comply with performance requirements.

Shop Drawings: Submit shop drawings for fabrication and installation including elevations, detail sections of typical composite members, hardware mounting heights, anchorages, reinforcement, expansion provisions, and glazing. Completely describe all hardware.

Final Fabrication shall be made from field verified dimensions.

SPECIAL PROJECT WARRANTY:

Provide written warranty signed by Manufacturer, Installer, and Contractor, agreeing to replace aluminum entrances and storefronts which fail in materials or workmanship within time period indicated below of acceptance. Failure of materials or workmanship includes excessive leakage or air infiltration, excessive deflections, faulty operation of entrances, deterioration of finish or construction in excess of normal weathering, and defects in hardware, weatherstripping, and other component of the work.

Time Period: 1 year from date of store opening. Submit completed warranty to Owner's representative after completion of work.

SMITH'S

PART 2 - PRODUCTS

ACCEPTABLE MANUFACTURERS:

Available Manufacturers: Subject to compliance with requirements, manufacturers offering products which may be incorporated in the work include, but are not limited to, the following:

Amarlite/Arco Metals Co.  
Arcadia, Northrop Architectural Systems.  
Kawneer Company, Inc.  
Tubelite Div., Indal Inc.  
United States Aluminum Corp., International Alum. Corp.

MATERIALS AND ACCESSORIES:

Aluminum Members: Alloy and temper recommended by manufacturer for strength, corrosion resistance, and application of required finish; ASTM B 221 for extrusions, ASTM B 209 for sheet/plate. (Major sections; 0.125" min. - molding, trim and stops; 0.050" min.)

Fasteners: Aluminum, non-magnetic stainless steel, or other materials warranted by manufacturer to be noncorrosive and compatible with aluminum components.

Do not use exposed fasteners except where unavoidable for application of hardware. Match finish of adjoining metal.

Provide Phillips flat-head machine screws for exposed fasteners.

Concealed Flashing: Dead-soft stainless steel, 26 gage minimum, or extruded aluminum, 0.062" minimum, of an alloy and type selected by manufacturer for compatibility with other components.

Brackets and Reinforcements: Manufacturer's high-strength aluminum units where feasible; otherwise, nonmagnetic stainless steel or hot-dip galvanized steel complying with ASTM A 386.

Concrete/Masonry Inserts: Cast iron, malleable iron, or hot-dip galvanized steel complying with ASTM A 386.

Sliding Weatherstripping: Manufacturer's standard replaceable stripping of wool, polypropylene, or nylon woven pile, with nylon fabric or aluminum strip backing, complying with AAMA 701.2.

Glass and Glazing Materials: Provide glass and glazing materials which comply with requirements of "Glass and Glazing" section of these specifications.



Tab 6

HARDWARE:

Provide all hardware and labor necessary for complete installation of Mall-type sliding aluminum entrance doors. Provide all required labor and hardware for "cut-down" swinging aluminum/glass and sliding aluminum/glass applied to store front system at Pharmacy; including aluminum tracks, aluminum continuous hinges, etc.

FABRICATION:

General:

Sizes and Profiles: Required sizes for door and frame units, including profile requirements, are indicated on drawings. Any variable dimensions are indicated, together with maximum and minimum dimensions required to achieve design requirements and coordination with other work.

Prefabrication: To greatest extent possible, complete fabrication, assembly, finishing, hardware application, and other work before shipment to project site. Disassemble components only as necessary for shipment and installation.

Preglaze door and frame units to greatest extent possible, in coordination with installation and hardware requirements.

Do not drill and tap for surface-mounted hardware items until time of installation at project site.

Perform fabrication operations, including cutting, fitting, forming, drilling and grinding of metal work in manner which prevents damage to exposed finish surfaces. For hardware, perform these operations prior to application of finishes.

Sequence: Complete cutting, fitting, forming, drilling, and grinding of metal work prior to cleaning, finishing, surface treatment, and application of finishes. Remove arrises from cut edges and ease edges and corners to radius of approximately 1/64".

Welding: Comply with AWS recommendations to avoid discoloration; grind exposed welds smooth and restore mechanical finish.

Reinforcing: Install reinforcing as necessary for performance requirements; separate dissimilar metals with bituminous paint or other separator which will prevent corrosion.

Continuity: Maintain accurate relation of planes and angles,

with hairline fit of contacting members.

Fasteners: Conceal fasteners wherever possible.

Weatherstripping: For exterior doors, provide sliding weatherstripping retained in adjustable strip mortised into door edge.

STOREFRONT FRAMING SYSTEM:

Provide inside-outside matched resilient flush-glazed system, system with provisions for glass replacement. Shop-fabricate and preassemble frame components where possible.

SLIDING EXTERIOR ENTRANCE DOORS:

Provide aluminum sliding glass entrance doors as identified on drawings, and as follows:

Quality Assurance: Drawings and specifications are based upon the 1010 Sliding Mall Front system as manufactured by the Kawneer Company, Inc. Whenever substitute products are to be considered, supporting technical literature, samples, drawings and performance data must be submitted ten (10) days prior to bid in order to make a valid comparison of the products involved.

Materials: Extrusions shall be 6063-T5 alloy and temper (ASTM B 221 alloy G.S. 10A-T5). Fasteners, where exposed, shall be aluminum stainless steel or plated steel in accordance with ASTM A 164. Perimeter anchors shall be aluminum or steel, providing the steel is properly isolated from the aluminum. Glazing gaskets shall be vinyl extrusions. Track inserts shall be 22 gauge, roll formed stainless steel.

Fabrication: Sliding panels shall have a nominal depth of 1-1/2" (38.1 mm) each to insure rigidity and prevent racking. The weight of each panel shall be supported by the base tracks. Sliding panels shall be equipped with two center pivoted spring loaded, tandem wheel assemblies, each capable of supporting a moving weight of 275 pounds (4664.7 Kg) and shall be equipped with two self-contained, steel ball bearing rollers. Sliding panels shall not be removable when in a locked position.

FINISHES:

Anodized Aluminum Finishes:

## SMITH'S

Class I Color Anodized Finish: AA-M12C22A31/A44 (non-specular as fabricated mechanical finish; chemical etch, medium matte; 0.7 mil min. thick integrally or electrolytically deposited colored anodic coating). Dark Bronze.

### PART 3 - EXECUTION

#### PREPARATION:

Field Measurement: Wherever possible, take field measurements prior to preparation of shop drawings and fabrication, to ensure proper fitting of work. However, proceed with fabrication and coordinate installation tolerances as necessary when field measurements might delay work.

#### INSTALLATION:

Comply with manufacturer's instructions and recommendations for installation of aluminum entrances and storefronts.

Set units plumb, level, and true to line, without warp or rack of framing members, doors, or panels. Anchor securely in place, separating aluminum and other corrodible metal surfaces from sources of corrosion or electrolytic action at points of contact with other materials.

Drill and tap frames and doors and apply surface-mounted hardware items, complying with hardware manufacturer's instructions and template requirements. Use concealed fasteners wherever possible.

Set sill members and other members in bed of sealant as indicated, or with joint fillers or gaskets as shown to provide weathertight construction. Comply with requirements of Division 7 for sealants, fillers, and gaskets.

Refer to "Glass and Glazing" section of Division 8 for installation of glass and other panels shown to be glazed into doors and framing, and not preglazed by manufacturer.

#### ADJUST AND CLEAN:

Adjust operating hardware to function properly, without binding, and to provide tight fit at contact points and weatherstripping.

Clean completed system, inside and out, promptly after erection.

SMITH'S

and installation of glass and sealants. Remove excess glazing and joint sealant, dirt, and other substances from aluminum surfaces.

Institute protective measures and other precautions required to assure that aluminum entrances and storefronts will be without damage or deterioration, other than normal weathering, at time of acceptance.

END OF SECTION 08410

Tab 7



DESIGN WEST ARCHITECTS INC  
ARCHITECTS ENGINEERS PLANNERS  
98 WEST CENTER  
LOGAN UTAH 84321 TEL 801-752-7031

January 13, 1993

Lyle Hillyard, Attorney  
Hillyard Anderson and Olsen  
175 East 100 North  
Logan, UT 84321

Dear Lyle:

RE: Smiths Entrance, Logan, UT

I inspected the sliding aluminum entrance doors at Smiths, as requested, and offer the following report:

#### OBSERVATIONS

1. The doors are manufactured by US Aluminum Corporation, a division of International Aluminum Corporation.
2. I could not find a model number on the doors, but they appear to be Series 2000 sliding doors by US Aluminum.
3. Product literature on the Series 2000 door system, copied from Sweet's Catalog, is enclosed. There was no other sliding door product by US Aluminum, identified in the catalog. You will note that we have highlighted two items: The Series 2000 door is designed for "interior applications" and the floor tracks are equipped with "stainless steel caps".
4. Product literature by Kawneer, a competitor of US Aluminum, is also enclosed. Kawneer manufactures three Sliding Mall Fronts under Models 1010, 1040 and 1070. Please note the following highlighted information:  
  
1010 is for "interior applications"  
1040 is for "interior and exterior applications"  
1070 is for "entrances to shopping malls"
5. The architectural details for US Aluminum's Series 2000 door and Kawneer's 1010 door are essentially the same. Both doors are designed for interior use

Lyle Hillyard  
January 13, 1993  
Page Two

only and both doors are equipped with stainless steel caps over the bottom guide to make the rolling action of the doors more smooth. The stainless steel cap appears to snap into place in both door systems.

6. The stainless steel caps on the north sliding door unit at Smiths have been partially removed. The stainless steel caps on the south sliding door unit have been severely damaged. One section has been flattened and is loose; the ends of this stainless steel section are still snapped in place; nothing else is preventing the stainless steel cap from raising.

### CONCLUSIONS

1. I am concerned that the US Aluminum sliding doors at the entrance to Smiths are not fit for the purpose intended. The US Aluminum Product literature clearly states that the Series 2000 door is intended for interior applications; it is not intended to withstand the traffic volumes and weather conditions to which the Smiths entrance is subject. I do not know if US Aluminum manufactures sliding doors for exterior use similar to the Kawneer Models.
2. As demonstrated by the Kawneer Catalog enclosures two of the three Kawneer sliding door systems are fit for exterior applications, but only one is specifically designed for entrances to shopping malls. You will note that neither of the exterior applications have a snap-in stainless steel cap; both systems roll on a flat aluminum surface. Please note also that a draining track for exterior applications is designed for both exterior systems. These are significant design considerations.
3. The stainless steel caps at the Smiths entrance are still a hazard to the public; those that are now loose should be removed before they catch someone unawares. There would in fact, be no way for the public to be aware that this hazard exists.

If you have any questions, please do not hesitate to call.

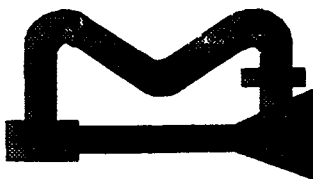
Sincerely,

A handwritten signature in black ink, appearing to read 'Anthony A. Wegener', with a long, sweeping horizontal line extending to the right.

Anthony A. Wegener, FRAIA, AIA  
President



Tab 8



(801)  
753-0515

**MECHTECH  
ENGINEERING** 506 South Main  
Logan, Utah 84321

March 28, 1996

Mr. Herm Olsen, Attorney  
Hillyard, Anderson, & Olsen.  
175 East 100 North  
Logan, Utah 84321

Re: Engineering Report: McKay vs. Smith's Food Store & Drug Centers, et. al.

Dear Mr. Olsen:

Relative to this case, I have visited the site at Smith's Food Store on 4th North in Logan four times. Two times several years ago and once yesterday and again today. Shortly after the accident, in the company of Stephanie McKay, I went to the accident site to view the "air door" heating system. I soon discovered that it wasn't the air door that she had been injured on but the mechanical sliding door. At that time the center track cap was missing and there didn't seem to be anything else protruding upwards on which to catch or trip pedestrians. On my own, I visited the site a few days later and found one of the south track caps loose and up far enough that it might indeed be a stumbling point.

Recently I was called on to make a further investigation into the reasons for the failure of the stainless steel caps on the sliding door systems. I visited the site on March 27, 1996, to review the current condition of the doorway. I discovered that four of the six tracks had been modified with the removal of the stainless steel cap (all three on the south door and the center track on the north door). I found that the inner track cap on the north entry was indeed distorted out of proper shape and elevated in much the same manner as Mrs. McKay had reported tripping. I decided to take photographs (24 photographs are attached, with a descriptive listing by negative number).

Photographs 3, 7, 8, 9, 10, 11, 13, 15, 16, 17, and 24 clearly show that there is a present danger. The distorted track cap was measured to be a full 3/16" up above the general level of the rest of the entry. Certainly a sufficient distance to grab the front end of someone's shoe. Photograph 24 is especially instructive as it shows a distorted edge pointed toward the entering traffic which is not only high enough to have it interact with traffic but also sharp enough to cause a hooking effect on someone's shoe. What is insidious about this is that the oncoming person has no warning of the trap. To the customer, this threshold looks flat.

On closer examination of the track I found it extremely dirty from debris, dirt, rocks, etc. This is documented in some of the close up photographs (7, 8, 9, 10, 11, 16, & 18). I also found that the deformation of the east track cap (the one that was loose) appeared to be a result of interaction with the door rollers, and all the debris and rocks in the track. In short, the track was deformed and lifting up as a result of high stresses caused by

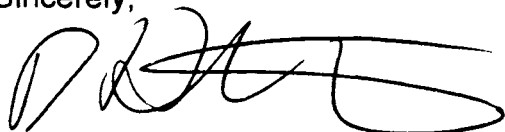
opening/closing the door with a dirty track. Although there was no ice involved on the days I visited, the track is exposed to freezing temperatures (especially when they close the doors in winter). Freezing of water (expansion due to freezing) mixed with all the dirt from people's feet and shopping carts is a contributor to the deformation. The design of this sliding door system is not appropriate for conditions of water, dirt and ice. There is no where for the debris to fall or drain to move out of the way of the track and rollers. The stainless steel track cap is only .024 inch thick. That thickness is sufficiently pliable that improperly applied forces such as interaction with traffic and/or door rollers and dirt will deform the cap. Heavy traffic, dirt and rocks and ice is the reason for the failed stainless steel track cap.

I reviewed specifications which show that this particular door system is not intended to be used for external installation. I also reviewed the testimony of the architect who "site adapted" the "standard set" of Smith's plans for this building. He did not modify the doorway but used the type of door specified by those "standard set" plans. In interest of saving professional fee costs, it is not uncommon for owners to re-use "standard plans" at several sites. In doing this, the "reduced fee and scope" architect is not expected to change anything more on "standard plans" than is required to adapt it to the site. In fact if the architect starts changing doors, etc, it is likely to cause other changes in the design such as structural, electrical and mechanical. Under such an arrangement the "reduced fee and scope" architect is reticent to make any changes he was not contracted to make. He is obligated to simply adapt the "standard plan" to the site and not to make detailed review of all the other aspects of the design. It was further indicated that the submittal information for these doors which was conveyed to the architect was modified by the glazing contractor to omit the warning that these doors not be used on external applications. This is a misrepresentation of the manufacturer's submittal information. The architect seeing that the submitted doors comply with the "standard plans" is again likely to approve the submittal, especially if the crucial information about "not for external use" has been omitted.

In summary, in my professional opinion, there are at least three reasons for the failure of this product as it is applied at Smith's Food Store in Logan, Utah. (1) It was a result of re-using a "standard plan" that called for the installation of "interior only" doors at an exterior location. (2) It was a result of not carefully keeping the tracks and grooves of these doors clean at all times which allowed rock, ice, water, and debris to interact with the traffic and door rollers creating deformation of the product. (3) It was a result of permitting loads larger than approved by the manufacturer to cross the threshold causing failure of the track.

Let me know if you need more information,

Sincerely,

A handwritten signature in black ink, appearing to read 'R. McEntire', with a stylized, flowing script.

Robert H. McEntire, Ph.D., P.E., President

Attached: List of Photographs and 24 prints identified by number

Photographs taken 3-27-96 at Smith's Food Store at 4th North, Logan, Utah

PHOTO (BY NEGATIVE #)      DESCRIPTION

- |    |  |
|----|--|
| 0  | FRONT ENTRIES LOOKING EAST   |
| 1  | NORTH ENTRY (LOOSE TRACK CAP SLIGHTLY VISIBLE) LOOKING EAST            |
| 2  | NORTH ENTRY (LOOSE TRACK CAP SLIGHTLY VISIBLE) LOOKING EAST            |
| 3  | NORTH PORTION OF NORTH ENTRY (LOOSE CAP VISIBLE) LOOKING EAST          |
| 4  | CENTER PORTION OF NORTH ENTRY LOOKING EAST                             |
| 5  | SOUTH PORTION OF NORTH ENTRY LOOKING EAST                              |
| 6  | NORTH PORTION OF NORTH ENTRY LOOKING EAST                              |
| 7  | CLOSE VIEW OF LOOSE TRACK CAP NORTH ENTRY LOOKING EAST                 |
| 8  | CLOSE VIEW OF LOOSE TRACK CAP NORTH ENTRY (WITH RULER) LOOKING EAST    |
| 9  | CLOSE IN VIEW OF LOOSE TRACK CAP NORTH ENTRY (WITH RULER) LOOKING EAST |
| 10 | MAGNIFIED VIEW OF TRACK CAP NORTH ENTRY (WITH RULER) LOOKING EAST      |
| 11 | MAGNIFIED VIEW OF TRACK CAP NORTH ENTRY LOOKING EAST                   |
| 12 | NORTH ENTRY (RISE OF LOOSE TRACK CAP SLIGHTLY VISIBLE) LOOKING WEST    |
| 13 | CLOSE VIEW OF LOOSE TRACK CAP NORTH ENTRY LOOKING WEST                 |
| 14 | (PROCESSING DIDN'T PRINT THIS NEGATIVE)                                |
| 15 | CLOSE VIEW OF LOOSE TRACK CAP NORTH ENTRY LOOKING WEST                 |
| 16 | METHOD OF MEASURING HEIGHT OF UPLIFTED TRACK CAP                       |
| 17 | NORTH ENTRY (RISE OF LOOSE TRACK CAP VISIBLE) LOOKING WEST             |
| 18 | CLOSE VIEW OF LOOSE TRACK CAP (WITH RULER) LOOKING WEST                |
| 19 | CLOSE VIEW OF LOOSE TRACK CAP (WITH RULER) LOOKING WEST                |
| 20 | MAGNIFIED VIEW OF TRACK DEFORMATION (WITH RULER) LOOKING WEST          |
| 21 | MAGNIFIED VIEW OF TRACK DEFORMATION (WITH RULER) LOOKING WEST          |
| 22 | MAGNIFIED VIEW OF TRACK DEFORMATION (WITH RULER) LOOKING WEST          |
| 23 | ATTEMPT AT GROUND VIEW OF UPLIFTED TRACK CAP LOOKING WEST              |
| 24 | GROUND VIEW OF UPLIFTED TRACK CAP LOOKING EAST                         |

Tab 9

IN THE FIRST JUDICIAL DISTRICT COURT  
IN AND FOR CACHE COUNTY, STATE OF UTAH

---

STEPHANIE MCKAY,	:	
	:	AFFIDAVIT OF
Plaintiff,	:	ROBERT H. MCENTIRE
	:	
vs.	:	
	:	
SMITH'S FOOD STORE &	:	
DRUG CENTERS, INC., AND	:	Civil No. 940000025 PI
JOHN DOES 1 THRU V,	:	Judge Gordon J. Low
	:	
Defendants.	:	

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SMITH'S FOOD STORE &	:	
DRUG CENTERS, INC.,	:	
	:	
Third-Party Plaintiff,	:	
	:	
vs.	:	
	:	
UNITED STATES ALUMINUM	:	
CORPORATION, JAMES	:	
O. CHAMBERLIN, CRITTENDEN	:	
GLASS COMPANY and CRITTENDEN	:	
PAINT AND GLASS COMPANY,	:	
	:	
Third Party Defendants.	:	

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STATE OF UTAH	)
	: ss.
County of Cache	)

ROBERT H. MCENTIRE, being first duly sworn,  
deposes and states as follows:

1. That Affiant is president of Mechtech Engineering and a licensed mechanical engineer with a doctorate degree in engineering.

2. That Affiant is familiar with the entryway and threshold of the Smith's Food Store located at 442 North 175 East, Logan, Utah. That he inspected the premises shortly after the incident in which Plaintiff in the above-entitled matter was injured and has inspected the premises as recently as March 27, 1996. Based upon those inspections, photographic evidence, manual measurements, the sworn deposition of John Frey (the chief design engineer for International Aluminum Corporation), the report attached hereto, and other factors, this Affiant concludes as follows:

(a) The middle stainless steel cap over the aluminum track on the north entryway of Smith's Food & Drug was missing upon inspection by this Affiant shortly after the injury to Stephanie McKay.

(b) The other five caps (the extreme interior and extreme exterior on the north and all three on the south doors) were still in place, but were not all intact in that various of the five remaining tracks were loose to the touch and could be manually raised or lowered by depression with a finger.

(c) That as of March 27, 1996, all three tracks on the southern portal of the threshold had been removed.

(d) That a customer's toe would not normally catch on the underlying aluminum track within the threshold, but could do so if the stainless steel cap covering the track had been raised above the floor plane.

(e) That on both the initial inspection shortly after the fall by Stephanie McKay and myself, and as recently as March 27, 1996, this Affiant saw a cap raised above the aluminum track.

(f) That as of March 27, 1996, the extreme interior stainless steel cap on the north portal was deformed on the northern portion of the track.

(g) That substantial debris was present within the grooves of the threshold during both inspections referenced above.

(h) That the glass doors on the north portal was closed on March 27, 1996, to replace the light bulbs in the entry way.

(i) That this affiant has personally observed the sections of the doors have been closed on multiple occasions, throughout the year, especially during inclement weather.



3. That weights substantially in excess of the 250-pound threshold weight-bearing capacity of the threshold have been transported across the door frame, upon information and belief.

4. That the accumulation of debris has lead to the deformation of the track observed on each occasion.

5. That failure to adequately clean the track grooves of accumulated rocks, dirt and debris directly leads to failure of the stainless steel cap.

6. That transport of weights in excess of 250 pounds has also contributed to the deformation of the caps, causing the failure of the cap.

7. That Smith's adoption of specifications of doors for "interior application only" was inappropriate for the traffic patterns, weather and the use to which the threshold was subjected. It should have been anticipated and was a contributing factor to the failure.

Further, Affiant saith not.

  
ROBERT H. MCENTIRE

STATE OF UTAH

County of Cache, to wit:

Before me, a Notary Public for the State of Utah, personally appeared the above-named Robert H. McEntire and

upon oath, subscribed and sworn to before me this 28<sup>th</sup> day  
of March, 1996, acknowledged the foregoing  
instrument to be true and accurate to the best of his  
knowledge and belief.



Rebecca L. Hanson  
NOTARY PUBLIC

Tab 10

IN THE FIRST JUDICIAL DISTRICT COURT IN AND FOR  
CACHE COUNTY, STATE OF UTAH

\* \* \* \* \*

STEPHANIE MCKAY,  
Plaintiff,  
vs.

SMITH'S FOOD STORE & DRUG  
CENTERS, INC., UNITED STATES  
ALUMINUM CORPORATION, JAMES  
O. CHAMBERLAIN, CRITTENDEN  
GLASS COMPANY, CRITTENDEN  
PAINT AND GLASS COMPANY,  
and R&O CONSTRUCTION COMPANY,  
Defendants,

DEPOSITION OF:

JAMES O. CHAMBERLAIN

\* \* \* \* \*

ORIGINAL

BE IT REMEMBERED that on the 13th day of July, 1995, the deposition of JAMES O. CHAMBERLAIN, produced as a witness herein, at the instance of the Defendant, Smith's Food Store & Drug Centers, Inc., herein, in the above-entitled action now pending in the above-named court, was taken before DEBRA A. DIBBLE, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, commencing at the hour of 1:00 p.m., of said day, at the offices of HILLYARD, ANDERSON & OLSEN, 175 East First North, Logan, Utah.

That said deposition was taken pursuant to notice.



**REPORTING SERVICES, LLC**

525 FIRST INTERSTATE PLAZA  
170 SOUTH MAIN STREET  
SALT LAKE CITY, UTAH 84101  
(801) 328-1188 / 1-800-DEPOMAX  
FAX 328-1189

1 your background and experience, does it not?

2 A. Sure.

3 Q. Were you the architect on a project in Logan,  
4 Utah, involving the Smith's store?

5 A. Yes, I was.

6 Q. When were you first contacted relative to  
7 that project?

8 A. I'm not sure. I don't have the date  
9 background. It was probably about three or four months  
10 prior to the date I had on the drawing. Something like  
11 that.

12 Q. Let me show you what has been marked as  
13 Exhibit No. 1. Can you identify that document?

14 A. Yeah. That's a standard -- AIA standard form  
15 agreement between the owner and architect.

16 Q. Was that the one that related to the project  
17 in Logan, Utah involving the Smith's store?

18 A. Yes, it is.

19 Q. Does that help you datewise as to when you  
20 were first contacted concerning this project?

21 A. Somewhat. Like I said, it would probably be  
22 maybe four months prior to that. I don't know exactly,  
23 but it's about in that neighborhood, I'm sure.

24 Q. When you say four months prior to the  
25 execution of that agreement --

1           A.     Well, it takes me about four months to put  
2 together documents, but this could have been -- you  
3 know, we normally sign this before we get started, so  
4 that's probably about the time I was -- I'd say that's  
5 real close to the time I was approached by Smith's.

6           Q.     What is the date of the document?

7           A.     The 22nd day of November, 1988.

8           Q.     Who was your first contact with anyone from  
9 Smith's?

10          A.     It was either Jonathan Ramras or Fred  
11 Urbanek. He's the vice president for Smith's, in the  
12 engineering department.

13          Q.     Prior to this project had you done any other  
14 projects as the architect for Smith's?

15          A.     Yes, I have.

16          Q.     Where?

17          A.     Well, I did phase one on this job. I had  
18 done several remodeling jobs prior to that. I don't  
19 remember.

20                 It's been so long I don't remember the  
21 sequence of which job I did where, prior to this.

22                 I've done some remodeling work, I think, in  
23 Vernal, and I'd done some remodeling work in Payson. I  
24 could find that information for you, if it's  
25 important. I don't know, maybe six projects. That's a

1 MR. MEDSKER: That's the specs for this one,  
2 and the specs for another one here.

3 MR. MORGAN: Let's go off the record.

4 (Whereupon, Exhibit Nos.  
5 4 and 5 were marked  
6 for identification.)

7 Q. (BY MR. MORGAN) Let me show what you has  
8 been marked as Deposition Exhibit 4. Can you identify  
9 this?

10 A. That's the specification for store number 87  
11 for the Smith's Food and Drug Center, phase two.

12 Q. And who prepared that?

13 A. I did.

14 Q. On the very first page it does say James O.  
15 Chamberlain, architect, right?

16 A. Yes, it does.

17 Q. So do you take responsibility for what's in  
18 Deposition Exhibit No. 4?

19 A. Yes.

20 Q. Let me show you what has been marked as  
21 Deposition Exhibit 5. Can you identify that?

22 A. I can.

23 Q. What is it?

24 A. It's a specification booklet for Smith's  
25 store number 303 in Cottonwood, Arizona, dated August  
9th, 1988, furnished to me by Smith's to use as a

1 guide.

2 Q. And who's the architect on Deposition Exhibit  
3 5?

4 A. Niels Valentiner.

5 Q. Is he a Utah architect?

6 A. Yes, he is.

7 Q. And as you understand the field of  
8 architecture, is Mr. Valentiner responsible, then, for  
9 Deposition Exhibit 5?

10 A. Yes.

11 Q. Just like you're responsible for Deposition  
12 Exhibit 4?

13 A. Yes.

14 Q. And you received Deposition Exhibit 5, which  
15 is Mr. Valentiner's architectural plans and specs?

16 A. Yes, it's a spec.

17 Q. From Smith's?

18 A. Yes.

19 Q. Was that helpful to you in preparing your set  
20 of specs, Deposition Exhibit 4?

21 A. It was helpful, yes, because I was instructed  
22 to get the project done as fast as I could, and to use  
23 everything that was already been prepared so as not to  
24 waste time.

25 Q. Now, although you were instructed to do it



1           Q.     (BY MR. MORGAN) Generally how did you  
2 approach the preparation of Deposition Exhibit 4, the  
3 specifications, from the standpoint of using what Mr.  
4 Valentiner had previously done on the Arizona store?

5           A.     Well, I reviewed it. I went through the  
6 spec.

7           Q.     Did you take verbatim some things that  
8 Mr. Valentiner had done and incorporate it right into  
9 your own specifications?

10          A.     Yes.

11          Q.     With regards to the section entitled aluminum  
12 entrances and store fronts, do you have a recollection  
13 of having made any changes or additions or deletions to  
14 what Mr. Valentiner had done in his specifications for  
15 the Arizona store?

16          A.     I don't think so.

17          Q.     So you think that they're identical?

18          A.     I do.

19          Q.     Is it fair to say that you reviewed the  
20 section involving aluminum entrances and store fronts  
21 of the Arizona store and made a determination of your  
22 own that whatever was done in the Arizona store would  
23 be appropriate for the Logan store?

24          A.     Yes. And it also had been done many --  
25 several times in Salt Lake, and Utah, the same store.

1 Q. That's blowing hot air all the time?

2 A. Yes.

3 Q. And it's inside in the sense that there's an  
4 overhang over it?

5 A. I would say so.

6 Q. Were those factors you considered?

7 A. I wasn't worried about the threshold.

8 Q. So were you --

9 A. It was designed for foot traffic, however.

10 Q. And what did you understand, other than foot  
11 traffic, it would be subjected to? Carts?

12 A. Carts.

13 Q. Anything else?

14 A. No.

15 Q. What about taking products such as rock salt  
16 and other items out to be displayed at the front of the  
17 store, that people would see as they are coming to the  
18 store?

19 A. Well, the store has a loading dock in the  
20 back, and how they get the salt out in front should be  
21 their -- should be Smith's responsibility I would  
22 think. They shouldn't be driving fork lifts across  
23 that threshold.

24 Q. Did they tell you they weren't going to be  
25 driving fork lifts across the threshold?

1           A.     The threshold wasn't designed for forklift  
2 traffic. I'm sure of that.

3           Q.     Well, did you consider how much weight would  
4 be appropriate to go across that threshold?

5           A.     We considered -- we considered foot traffic  
6 and grocery cart traffic. It had been used many, many  
7 times in previous applications that I had reviewed.

8           Q.     Did you ever have a discussion with Smith's,  
9 warning them that anything other than foot traffic and  
10 carts would not be appropriate for this particular  
11 track?

12          A.     I don't recall that conversation.

13          Q.     Were you aware that this product cannot  
14 handle weights in excess of 250 pounds?

15          A.     I don't know that I was aware of that.

16          Q.     The manufacturer never warned you with  
17 regards to that?

18          A.     No.

19          Q.     You were not aware of any warnings --

20          A.     I don't know. Is it in this literature?

21          Q.     Well, you're looking at Exhibit 6-2, and I'll  
22 represent to you there's nothing in Exhibit 6-2. My  
23 only question to you is did you ever see any literature  
24 on the U.S. Aluminum sliding glass door other than what  
25 is set forth in Exhibit 6-1?

1           A.     We were instructed to go ahead and use the  
2 details that were furnished to us by Valentiner.

3           Q.     But my question was, did you have a  
4 discussion with him about the uses to which that track  
5 or threshold was going to be put?

6           A.     Well, I was told to use that track, and that  
7 it would be adequate by Smith's.

8           Q.     So Mr. Ramras told you to use the Kawneer  
9 track, or the U.S. Aluminum track?

10          A.     Whichever came in to -- they were going to  
11 furnish the doors, in any event, so I wasn't concerned  
12 about it.

13          Q.     So why did you even have the section aluminum  
14 entrances and store fronts, if they were going to  
15 provide it?

16          A.     Because they told me to do it that way, and  
17 it was later -- well, I can't remember the sequence.  
18 While I was preparing the documents, this was after we  
19 had put together the specification, that they would  
20 furnish the door. That doesn't mean you take the spec  
21 out.

22          Q.     And as an architect, I take it, you felt that  
23 either the Kawneer 1010 or the U.S. Aluminum 2000  
24 series were both sufficient to meet the purposes for  
25 which the store would be used.

1           A.     I felt like it had proved -- it had proved  
2 successful on many applications, and Smith's were happy  
3 with it. I saw no reason not to go with it.

4           Q.     And you were not aware that it could not  
5 withstand weights in excess of 250 pounds, were you?

6           A.     I wasn't aware of that. Grocery carts  
7 normally wouldn't, and foot traffic normally wouldn't  
8 exceed that. Neither would grocery carts. Normally  
9 they don't exceed 250 pounds.

10          Q.     But my question was, you weren't aware that  
11 it could not withstand weights of over 250 pounds, were  
12 you?

13          A.     No, I wasn't.

14          Q.     Calling your attention to Deposition  
15 Exhibit 1, if you could turn to page six under Use of  
16 Architect's Drawings, Specifications and Other  
17 Documents, Article six.

18          A.     Okay.

19          Q.     It states, "The Drawings, Specifications and  
20 other documents prepared by the Architect for this  
21 Project are instruments of the Architect's service for  
22 use solely with respect to this Project and, unless  
23 otherwise provided, the Architect shall be deemed the  
24 author of these documents and shall retain all common  
25 law, statutory and other reserved rights, including the

1 only have the page, absent the one inch at the top that  
2 says #2000 sliding glass doors for interior application  
3 only?

4 A. That's what it -- that's what it indicates.

5 Q. Now, as you move on through these documents,  
6 it appears that the top of the page, "#2000 sliding  
7 doors for interior application only," is also absent on  
8 the documents that you were provided; is that correct?

9 A. Yes.

10 (Whereupon, Exhibit #10  
11 was marked  
12 for identification)

12 Q. (BY MR. MORGAN) Let me show you what has  
13 been marked as Deposition Exhibit 10, and I'll ask you,  
14 have you ever seen that document before? It's a copy  
15 of a page from U.S. Aluminum Corporation.

16 A. I was furnished a copy of this. When I was  
17 furnished this other information by Crittendens, I  
18 asked for a copy of it.

19 Q. You mean two months ago?

20 A. Yeah.

21 Q. Prior to that had you ever seen it before?

22 A. I couldn't tell you yes or no.

23 Q. Now, as an architect, how do you get  
24 information on various company's products for use as an  
25 architect?

1 all that I looked at.

2 MR. MORGAN: 6-2?

3 MR. GILCHRIST: Six. All of those I think  
4 he's stamped. Maybe not.

5 Q. (BY MR. GILCHRIST) Did you have to stamp  
6 6-3?

7 A. Do I have to?

8 Q. Yes. Would you stamp that?

9 A. No. I just stamp it once on the front.

10 Q. Did you get Exhibit 6-3, do you know?

11 A. I'm sure I did, if that was what was in the  
12 approval package.

13 Q. And you don't remember whether you received  
14 Exhibit 10, or you know you did not?

15 A. I don't remember.

16 Q. Further along in the page we're looking at,  
17 under fabrication, the fourth line from the bottom.

18 A. We're talking about the sliding panels.

19 Q. Yes, sir.

20 A. These are the sliding panels.

21 Q. And you're pointing to 6.2?

22 A. No, the door itself.

23 Q. On 6.2?

24 A. Right.

25 Q. It says there, The tandem wheel assemblies

1 believe you were discussing the language at the top of  
2 Exhibit 9 that says #2000 sliding doors for interior  
3 applications only. Do you see where that does not  
4 appear to be at the top of some of the pages on  
5 Exhibit 6?

6 A. Correct.

7 Q. Given your understanding of the circumstances  
8 of the door that was -- or the system that was placed  
9 in the Logan store, would it have affected your  
10 approval of Exhibit 6, at all, if the additional  
11 typewritten text had been on the top of the pages on  
12 Exhibit 6?

13 MR. GILCHRIST: Objection, calls for  
14 speculation.

15 MS. PORTER: Go ahead.

16 THE WITNESS: I don't think it would. Going  
17 back through, this assembly had already been approved  
18 in the specification, and the door is used once a  
19 year. To me it's not really a door, as such.

20 The air door is the door, is the front door  
21 to the store. This -- this is just used to close off  
22 the door once a year. The important part of the  
23 assembly is the threshold, so I don't think this would  
24 have been a problem for me in approving it. Does that  
25 answer your question?



Tab 11

IN THE FIRST JUDICIAL DISTRICT COURT  
IN AND FOR CACHE COUNTY, STATE OF UTAH

STEPHANIE McKAY,  
Plaintiff,

vs.

SMITH'S FOOD STORE & DRUG  
CENTERS, INC., AND JOHN  
DOES I THROUGH V,

Defendants.

CIVIL NO. 940000025

DEPOSITION OF:  
LEE CRITTENDEN

Held October 25, 1995

REPORTED BY:  
RENEE L. STACY, CSR, RPR

SMITH'S FOOD STORE & DRUG  
CENTERS, INC.,

Third-Party Plaintiff,

vs.

UNITED STATES ALUMINUM  
CORPORATION, INTERNATIONAL  
ALUMINUM CORPORATION,  
JAMES O. CHAMBERLIN,  
CRITTENDEN PAINT AND GLASS  
COMPANY,

Third-Party Defendants.

ORIGINAL

Deposition of LEE CRITTENDEN, taken on behalf of  
the Defendant, Smith's, at 205 26th Street, Suite 34,  
Ogden, Utah, commencing at 11:00 a.m. on October 25,  
1995, before RENEE L. STACY, Certified Shorthand  
Reporter, Registered Professional Reporter and Notary  
Public in and for the State of Utah, pursuant to  
Notice.



**REPORTING SERVICES, LLC**

525 FIRST INTERSTATE PLAZA  
170 SOUTH MAIN STREET  
SALT LAKE CITY UTAH 84101  
(801) 328-1188 / 1-800-DEPOMAX  
FAX 328-1189

1           Q     And it being six years ago, you don't  
2 recall in the Smith's Logan store case what you did?

3           A     I don't. I'm sorry.

4           Q     And these calculation and price books,  
5 where would you go to read the product and the prices  
6 quoted therein?

7           A     Where would I go?

8           Q     Yeah.

9           A     Where would I be when I did that, do you  
10 mean?

11          Q     Where do you go to look at the catalogs or  
12 price books?

13          A     Well, I have copies in my office.

14          Q     At the time of your bid on the Logan  
15 store, did you have available to you U.S. Aluminum  
16 books?

17          A     I did.

18          Q     Did you have --

19          A     I'm sure.

20          Q     -- available Kawneer books?

21          A     No, I did not.

22          Q     How is it you had U.S. Aluminum but not  
23 Kawneer?

24          A     We're not a Kawneer dealer. Certain  
25 companies contract with dealers or distributors to

1           A     Although there are additional pages.

2           Q     Right. The three that are identified, the  
3 last page and the contents and the cover page,  
4 correct?

5           A     Correct.

6           Q     You would agree, in comparing the pages in  
7 Exhibit 2 to your deposition, with the exception of  
8 the first page, starting at the second page of  
9 Exhibit 3 and the first page of Exhibit 2, they are  
10 identical, with the exception of the architect's  
11 approval on the first page and on each page it does  
12 not have the language at the top which says "2000  
13 sliding doors for interior application only"; is that  
14 correct?

15          A     Uh-huh. Except for those two items, they  
16 appear to be the same.

17          Q     The next page does not have that language  
18 at the top; is that correct?

19          A     That's correct.

20          Q     As you go through each one of the pages,  
21 the language "2000 sliding doors for interior use  
22 only" does not appear at the top of those marked in  
23 Exhibit 2, but they do appear at the top in those  
24 pages marked in Exhibit 3; is that correct?

25          A     That's correct.

1           Q     Now, when you sent in your bid to R&O  
2     Construction Company, did any of the pages that you  
3     copied and sent to R&O out of the catalog, did any of  
4     those pages include the language at the top, "2000  
5     sliding doors for interior application only"?

6           A     You know, I honestly can't tell you, but I  
7     could suspect not, because typically we would only  
8     provide submittals one time.

9           Q     Did you know that what you were being asked  
10    to provide as part of the plans and specifications in  
11    Exhibit 1 was a sliding exterior entrance door for  
12    the Smith's in Logan?

13          A     We knew that we were asked to provide a  
14    door for that opening which would be used as a  
15    supplemental or auxiliary door, and we knew what we  
16    were providing, yes.

17          Q     Well, did you know that it was a sliding  
18    exterior entrance door as identified in the plans and  
19    specifications, Deposition Exhibit 1?

20          A     We knew that we were providing a door as  
21    per that requirement, yes, as per that.

22          Q     How is it, then, that you provided, in your  
23    bid, a U.S. Aluminum door that was for interior use  
24    only?

25          A     We were confident that the door we were

1 Exhibit 3 of your deposition, that document comes  
2 from the USA catalog; is that correct?

3 A U.S. Aluminum catalog, yes.

4 Q And you are a dealer for U.S. Aluminum?  
5 Is that what you described yourself as?

6 A Yes.

7 Q And is that an exclusive dealership?

8 A No, it's not.

9 Q Where is the next closest U.S. Aluminum  
10 dealer?

11 A Oh, there are probably two in Ogden that  
12 can buy from U.S. Aluminum and others up and down the  
13 Wasatch front.

14 Q Okay. So you don't have a geographic area  
15 that you're entitled to sell all U.S. Aluminum --

16 A No. No exclusive relationship at all.

17 Q Is one required to be an exclusive dealer  
18 with Kawneer?

19 A Pretty much. They're a little more --  
20 uh-huh. Pretty much.

21 Q So if you sold Kawneer doors, would that  
22 preclude you from selling U.S. Aluminum doors?

23 A Well, they couldn't control that entirely  
24 but they would certainly frown on you using other  
25 products if they knew about it.

1           A       We're talking a time frame of 5-17 and this  
2 wasn't printed, evidently, until 8 of '87, so --

3           MR. MORGAN: Could we just go off the  
4 record a minute and mark this exhibit?

5                   (Whereupon Deposition Exhibit No. 4 was  
6 marked for identification.)

7           THE WITNESS: I believe I said the first  
8 time 5 and 8 of '87. What we're talking about is an  
9 architect's approval of May of '89 and a  
10 specification sheet printed August of '89.

11           MR. MORGAN: And that specification sheet  
12 is marked as Exhibit 4 to your deposition, correct?

13           THE WITNESS: Correct.

14           Q       (BY MR. GILCHRIST) Do you know when the  
15 first time was that you read this specification sheet  
16 that's marked as Exhibit 4 to your deposition?

17           A       No, I don't.

18           Q       Do you know if you'd read it prior to when  
19 this litigation was commenced, this lawsuit?

20           A       Probably not. Probably not. I don't  
21 believe we've installed one of these doors. Although  
22 we've sold some, I don't believe we've installed one  
23 since the Logan store. Well, I guess Stop & Shop was  
24 after the Logan store, but not too far beyond the  
25 Logan store.

Tab 12



IN THE FIRST JUDICIAL DISTRICT COURT  
CACHE COUNTY, STATE OF UTAH

STEPHANIE MCKAY, )  
 )  
 PLAINTIFF, ) CIVIL NO.  
 )  
 VS. ) 940000023  
 )  
 SMITH'S FOOD STORE & )  
 )  
 DRUG CENTERS, INC., and )  
 )  
 JOHN DOES 1 THRU V, )  
 )  
 DEFENDANTS. )

-----  
-- CAPTION CONTINUED ON THE NEXT PAGE --

DEPOSITION OF:

JOHN R. FREY

WEDNESDAY, APRIL 26, 1995

11:12 A.M.

DUPLICATE

ORIGINAL

LOGAN DISTRICT  
AUG 28 12 59 PM '97

FILE NO. LLD52038

REPORTED BY JEWELIE MILLER

C.S.R. NO. 10098

310-556-1136

KERNS & GRADILLAS

CERTIFIED COURT REPORTERS



1 Q. How long have you held that position?

2 A. I have been employed for 32 and  
3 roughly a half years.

4 Q. What are your job duties?

5 A. Full design, research testing of all  
6 products that we manufacture.

7 Q. How does U.S. Aluminum relate to  
8 International Aluminum?

9 A. U.S. Aluminum is one of the divisions  
10 or subsidiaries of International Aluminum  
11 Corporation.

12 Q. With regard to a store owned by  
13 Smith's in Logan Utah, does U.S. Aluminum have any  
14 documents that in any way relate to that store?

15 A. Yes, sir.

16 Q. What documents do you have that relate  
17 to that store?

18 A. I have two purchase orders, both dated  
19 6-27-89.

20 Q. I wonder if we could have copies of  
21 those marked as exhibits to your deposition.

22 A. Yes, sir.

23 MR. MORGAN: First of all, because you  
24 have the originals here, I will refer to them by  
25 exhibit number, and then we can substitute copies.

1 Aluminum's order desk.

2 Q. Do you have any information as to  
3 whether or not Crittenden provided U.S. Aluminum  
4 with any information as to where these doors were to  
5 be installed?

6 A. No, sir.

7 Q. I take it you've never seen any plans  
8 and specifications for the project in question in  
9 Logan, Utah?

10 A. No, sir.

11 Q. Do you have any other documents that  
12 relate to the project in Logan, Utah, at the Smith's  
13 store other than Exhibits 2 and 3?

14 A. No, sir.

15 Q. Let me show you what has been marked  
16 as Deposition Exhibit No. 1. Can you identify that?

17 A. Yes, sir.

18 Q. What is it?

19 A. The first page is the tab section of  
20 what's called an architectural catalog that calls  
21 out the section in which the product is listed  
22 under. It would be entrance doors and mall  
23 sliders. This particular product, who falls into  
24 the mall slider category.

25 The second page is the Table of

1 be a work order from Crittenden to R & O  
2 Construction?

3 A. No, sir.

4 Q. So it would appear that Exhibits 4-3,  
5 4-4, 4-5, 4-6, and 4-7 are copies of U.S. Aluminum  
6 Corporation documents with the exception that the  
7 top one inch of those documents stating "2000  
8 Sliding Doors For Interior Applications Only," and  
9 typically the name "U.S. Aluminum Corporation" does  
10 not appear?

11 A. Yes, sir.

12 Q. With regard to Exhibit 1-3, it  
13 indicates that the panels are double  
14 weather-stripped, correct?

15 A. Yes, sir.

16 Q. If it's for interior use only, why are  
17 the panels double weather-stripped?

18 A. First of all, the head has double  
19 weather strip to center the panel and to give a very  
20 quiet sound as it slides. At the bottom rail, it  
21 has two swipes hanging down of wool pile that  
22 eliminates dust and dirt from getting into the  
23 cavities around the track area.

24 Q. So what prevents dust and dirt from  
25 getting into the track itself?

1           A.       Is the sweeps. When the doors are  
2 open and closed, it just prevents dust from blowing  
3 underneath.

4           Q.       So every time the door is open or  
5 closed, there is a dusting mechanism that operates?

6           A.       Yes, sir.

7           Q.       And that helps keep the track clean?

8           A.       Yes, sir.

9           Q.       And is there some importance of  
10 keeping the track clean?

11          A.       The importance of keeping the track  
12 clean is to be able to have your longevity for your  
13 rollers, so that there's no jumping effect in the  
14 panel if it does fill up.

15          Q.       What is the reason for the stainless  
16 steel track caps that are indicated as additional  
17 features on Exhibit 1-3?

18          A.       The purpose of a stainless steel cap  
19 is to give longevity to the life of the track. The  
20 door itself does not need to have a stainless steel  
21 track. It can roll on aluminum. It's just to give  
22 a prolonged life of that track.

23          Q.       What would cause deterioration in the  
24 track that would prevent long life?

25          A.       I would say heavy abuse, miscleaning.

1                   MR. OLSEN: I'm sorry. I didn't hear  
2 that.

3                   MR. HENNING: Miscleaning.

4                   MR. OLSEN: Miscleaning?

5                   THE WITNESS: Poor maintenance.

6 BY MR. MORGAN:

7           Q.       And what would constitute heavy abuse,  
8 in your opinion?

9           A.       Well, the track is designed for a  
10 250-pound concentrated load as we state in our  
11 specifications. So a prolonged usage of obstacles  
12 over 250 pounds can do damage to that truck.

13          Q.       What about miscleaning? What do you  
14 contemplate by that?

15          A.       In this territory I would look at the  
16 fact of ice, frost. Could do damage.

17          Q.       How could ice or frost do damage?

18          A.       There's a term that's called a frost  
19 wedge effect where if ice or frost is built up, that  
20 it can separate concrete asphalt.

21          Q.       What damage can be done by ice or  
22 frost to the track, including the stainless steel  
23 caps?

24          A.       Well, as far as our track, there's not  
25 a lot of damage. But between the track and the roll

1 form stainless steel cap, I would assume that that  
2 could try to pop that up.

3 Q. So you say there's nothing you really  
4 contemplate in the track itself but with regard to  
5 the stainless steel cap that fits over the -- what  
6 is it, an aluminum runner?

7 A. Yes, sir.

8 Q. If ice or frost was to get in there,  
9 you are contemplating it could pop it up?

10 A. Yes, sir.

11 Q. Do any of your documents warn with  
12 regard to that potential?

13 A. No, sir.

14 Q. Any reason why not?

15 A. Well, it's designed for interior  
16 applications.

17 Q. And you don't contemplate ice or frost  
18 in interior applications?

19 A. No, sir.

20 Q. And what do you contemplate by the use  
21 of the term "interior applications"?

22 A. Well, the product is classified as a  
23 mall slider. The product is used throughout a --  
24 let's just assume going from a walkway in a mall  
25 into a JC Penney's or a Broadway department store.

1 This is where mall slider -- the term "mall" means  
2 an interior use.

3 Q. Do you make -- and by "you," I mean  
4 U.S. Aluminum sliders for exterior applications?

5 A. No, sir.

6 Q. You don't?

7 A. No, sir.

8 MR. GILCHRIST: That's correct.

9 BY MR. MORGAN:

10 Q. That is correct, right?

11 A. That is correct.

12 Q. So the only product you have is for an  
13 interior mall slider application?

14 A. Yes, sir.

15 Q. How long has U.S. Aluminum designated  
16 their Series 2000 for interior use only?

17 A. Since 1967.

18 Q. And what happened in 1967 that caused  
19 U.S. Aluminum to designate their Series 2000 for  
20 interior use only?

21 A. That was the initial start date of the  
22 product line. So ever since day one, it has been  
23 designed as an interior application product.

24 Q. And U.S. Aluminum has never designed a  
25 product for exterior use application, a sliding



1           A.       That is correct, sir.

2           Q.       And that deals specifically with what,  
3 an avenue of escape for the water if its gets in?

4           A.       It has to do with an avenue for water,  
5 also, for the usage. When you start talking about  
6 an exterior door, you're talking about a totally  
7 different usage of heavy equipment compared to a  
8 mall that basically just has foot traffic.

9           Q.       With regard to the usage that an  
10 exterior door would have as compared with the usage  
11 that an interior door would have, how does the usage  
12 vary?

13          A.       If you look at a mall condition, you  
14 may have a high volume of people walking over the  
15 threshold daily, but you do not have the high  
16 equipment going over the sill daily.

17          Q.       So in the interior mall situation, you  
18 may have a lot of people walking over, but not  
19 equipment?

20          A.       That is correct, sir.

21          Q.       Whereas in the exterior door  
22 situation, you have not only the people walking over  
23 it, but equipment?

24          A.       Well, you may have anywhere from  
25 forklifts to pallet jacks to heavy carts. And this

1 can destroy that sill.

2 Q. And define for me what you mean again  
3 by "sill"?

4 A. The sill is the bottom track portion  
5 of a sliding door.

6 Q. So the sill is synonymous with the  
7 track?

8 A. Yes, sir.

9 Q. And you're saying that if water gets  
10 into the track or the sill, there's no avenue for  
11 escape in your design?

12 A. Yes, sir.

13 Q. Hence, it's not an exterior use type  
14 application?

15 A. Yes, sir.

16 Q. If the U.S. Aluminum Door 2000 Series  
17 for interior use only was placed in a location where  
18 water didn't get in, even though it was an exterior  
19 location, should there be any problem that you would  
20 contemplate?

21 MR. GILCHRIST: And you've ruled out  
22 the usage to heavy equipment?

23 MR. MORGAN: Yes, for the moment.

24 THE WITNESS: If we're just talking  
25 about foot traffic, yes, sir.

1 MR. HENNING: Yes, there would be a  
2 problem?

3 THE WITNESS: No, there would not be a  
4 problem.

5 BY MR. MORGAN:

6 Q. So if we're talking about foot  
7 traffic, and water doesn't get in, there wouldn't be  
8 a problem?

9 A. That's correct, sir.

10 Q. But if we're talking about heavy  
11 equipment, there could be a problem?

12 A. Yes, sir.

13 Q. And what problems could develop with  
14 the equipment, then?

15 A. Well, first of all, we show in our  
16 specifications that the track is rated for 250  
17 pounds concentrated. That is the limit on the  
18 track. If you're talking about a 4,000-pound  
19 forklift with another 6,000 pounds of pallets of  
20 something on top of it, you divide that by four and  
21 you're talking about a tremendous concentrated --  
22 it's only rated for 250 pounds.

23 Q. First of all, can you show me in  
24 Exhibit No. 1 where it talks about the 250-pound  
25 limitation?

1           Q.       From a design standpoint, if all you  
2 have is the aluminum runner, it may wear out over  
3 time, correct?

4           A.       Yes, sir.

5           Q.       But it will never come loose, will it?

6           A.       No, sir.

7           Q.       But by adding the stainless steel cap  
8 over the aluminum runner, you get longevity?

9           A.       Yes, sir.

10          Q.       But you also take the risk that the  
11 stainless steel cap may come loose, correct?

12                   MR. GILCHRIST: I'll object. I think  
13 it calls for speculation and assumes facts not in  
14 evidence and improperly used.

15                   Go ahead and answer.

16                   MR. MORGAN: Let me just rephrase it.

17          Q.       By adding the stainless steel cap from  
18 a design standpoint, does it create any additional  
19 risk that simply using the aluminum runner itself  
20 would not create?

21                   MR. GILCHRIST: Same objections. Go  
22 ahead. You can answer.

23                   THE WITNESS: In the 28 years that  
24 we've been manufacturing this, we have shipped in  
25 excess of over 3,100,000 linear feet of this track.

1 And to my best knowledge we have never had this come  
2 loose. Now, saying whether or not it could come  
3 loose or could not, we have never seen nor heard of  
4 it coming loose.

5 BY MR. MORGAN:

6 Q. Tell me about the manufacturing  
7 process in terms of how the stainless steel cap is  
8 placed over the aluminum runner itself with regard  
9 to these millions of lineage feet of this product.

10 A. It goes through a rolling process that  
11 will snap the part in place. Similar to being very  
12 simplistic, a wringer machine.

13 MR. HENNING: A what?

14 THE WITNESS: Like a Ringer. An old  
15 wringer washing machine where you have opposed  
16 rolls, and it just --

17 MR. GILCHRIST: Goes through.

18 BY MR. MORGAN:

19 Q. Has any human labor involved in the  
20 snapping of the stainless steel cap will be on the  
21 runner itself?

22 A. No, sir.

23 Q. It's all machine?

24 A. Yes, sir.

25 Q. What quality control is there to make

1 the contractor, depending on what the substrate is,  
2 whether they have to go in with plugs or whether  
3 they have to go in with sheet metal screws to make  
4 the determination of what kind of screw and what  
5 size, due to the loading on the product they use.  
6 Since we basically sell doors, and we have no idea  
7 where that door goes, we cannot tell you to use a  
8 No. 8 screw, if load-wise you must have a No. 10 or  
9 a No. 12 screw. But we do tell you where to fasten  
10 it.

11 Q. And is that in a document that's been  
12 marked as an exhibit today?

13 A. No, sir.

14 Q. Do you have that document here with  
15 you?

16 A. Yes, sir.

17 Q. Could you get it for us?

18 A. United States Aluminum Supplies. And  
19 for the sake of argument, we'll just call it the red  
20 insulation instruction manual. It's a manual that  
21 is approximately an inch and a half thick that has  
22 the insulation instructions for every product line  
23 that we manufacturer.

24 Q. When you say "insulation," do you mean  
25 installation?

1           A.       Excuse me.   Installation.

2                   MR. GILCHRIST:   Installation.

3 BY MR. MORGAN:

4           Q.       So it's an installation manual?

5           A.       Yes, sir.

6           Q.       So what is there in the red  
7 installation manual that would advise a contractor  
8 on how to install the 2000 Series Sliding Glass  
9 Door?

10          A.       In the blue tab section, which is  
11 again marked "entrance doors," we have a four-page  
12 brochure that is called out as the Series 2000  
13 Sliding Doors for Interior Applications Only. It  
14 tells you how to assemble the door. It tells you  
15 how to assemble the frame, how to notch the frame,  
16 the track location, the dimensions on what the  
17 verticals should be, and the horizontals, and the  
18 head. It tells you about where to fasten the jam  
19 and the sills in places as long as the head. It  
20 gives you instructions on how to tuck the panels up  
21 and place them in place. It tells you how to deal  
22 with the pocket conditions for pocket doors, where  
23 you have an angle on the jam, and exactly where to  
24 snap covers and where to make those notches.

25          Q.       And will this red installation manual

1 be available to a contractor?

2 A. Yes, sir.

3 Q. And how would it be available?

4 A. Right along with the architectural  
5 catalog that our glass shops and dealers have, the  
6 installation instructions with all of our product.

7 Q. And if they don't have it, they could  
8 obtain it from U.S. Aluminum?

9 A. Yes, sir.

10 MR. MORGAN: Could we have marked as  
11 Exhibit No. 10 the document to which you have  
12 referred out of the red installation manual.

13 (The document referred to was  
14 marked by the C.S.R. as Deposition  
15 Exhibit 10 for identification and  
16 attached to and made a part of this  
17 deposition.)

18 MR. HENNING: Could I see those  
19 photographs, Steve, please?

20 MR. MORGAN: Yes.

21 Let's go off the record for a minute.

22 (Discussion held off the record.)

23 MR. MORGAN: Back on the record.

24 Q. On Page 103, it indicates that the  
25 installation screws are not included; is that



1 Q. What knowledge of any do you have with  
2 regard to that at all?

3 A. Nothing.

4 Q. Who at U.S. Aluminum would have that  
5 information, if anybody?

6 A. I would assume the general manager,  
7 John Kinas.

8 Q. And why would he have that  
9 information, if it exists?

10 A. If it would exist, he may have it.  
11 MR. GILCHRIST: Or have access to it.  
12 Is that what you're saying? Not on the top of his  
13 head.

14 BY MR. MORGAN:

15 Q. Is Kawneer one of your competitors?

16 A. Yes, sir.

17 Q. Are you familiar with the Kawneer  
18 10-10 Sliding Glass Door unit?

19 A. Yes, sir.

20 Q. How does that compare with the U.S.  
21 Aluminum 2000 Sliding Glass Door and track?

22 A. It's basically the same usage product  
23 line.

24 Q. Meaning interior?

25 A. Yes, sir. We're both rated for

1 interior use only.

2 Q. Rated by whom?

3 A. Just inner-company.

4 Q. The company itself rates it for  
5 interior use only?

6 A. Yes, sir.

7 Q. Does the Kawneer 10-10 have stainless  
8 steel caps?

9 A. Yes, sir.

10 Q. Are you familiar with the Kawneer  
11 10-40?

12 A. Yes, sir.

13 Q. And the Kawneer 10-70?

14 A. Yes, sir.

15 Q. Does U.S. Aluminum have any product of  
16 a similar nature?

17 A. No, sir.

18 Q. Is the Kawneer 10-10, to your  
19 knowledge, more expensive to buy than the U.S.  
20 Aluminum 2000 Series Sliding Glass Door?

21 A. I have no knowledge of that.

22 Q. With regards to Deposition Exhibits 2  
23 and 3, the U.S. Aluminum 2000 Series Sliding Glass  
24 Door, one for the one side and one for the other  
25 side, mirror images on the other, apparently both

1 residential door being an exterior door. You could  
2 have an extremely strong three-sixteenths wall  
3 thickness product line that would be used in an  
4 interior door for theaters. So there's a complete  
5 wide range of different products that could be used  
6 for both interior and exterior.

7 Q. Would you briefly describe the  
8 difference between the U.S.A. 2000 door and the  
9 Kawneer 10-40?

10 A. Yes, sir. The panels itself are  
11 basically the same. The design of the products are  
12 completely different. If we look at the United  
13 States Aluminum product line, the product is  
14 designed to run on rollers on the bottom and have  
15 the guides, being the wall pile or the weather  
16 stripping, at the head. This would be similar to  
17 that of what you would have for a mirror door or  
18 closet door. The theory on the Kawneer 10-40, 10-70  
19 Series is a top hung product.

20 MR. HENNING: A what? I'm sorry.

21 THE WITNESS: Top hung, where the  
22 rollers are at the head. They have an extremely  
23 deep well in the sill or the track area to allow for  
24 water, condensation, whatever, to be able to weep  
25 itself out. And I'm talking in the range of

1 anywhere between an inch and a half to three inches  
2 of depth compared to roughly a quarter of an inch  
3 that we have on a 2000 Series U.S. Aluminum Door.

4               The 10-40 and the 10-70, they formally  
5 have a knife type of a guide at the bottom to be  
6 able to guide the doors. They use a very flat  
7 roller running on aluminum track, so that the weight  
8 is really hung from the head, where the guide and  
9 the rollers at the bottom are taking very little  
10 load; where on the U.S. Aluminum door, we're taking  
11 the full load on the track at the bottom and have  
12 absolutely no provisions to hang the door at the  
13 head.

14 BY MR. OLSEN:

15               Q.       And the head means the overhead track  
16 on the 10-40?

17               A.       Yes, sir. The 10-40 does not have a  
18 stainless industrial track, nor their 10-70. But  
19 they do have that on their 10-10. So as soon as  
20 they start to top hang something, the track is  
21 removed, and they take the full load of the door at  
22 the head.

23               Q.       Does the Kawneer 10-10 door with the  
24 aluminum cap, or rather stainless steel cap, is it a  
25 floor-bearing track similar to the U.S.A. 2000 door,

1 photographs, that shows that there's very minimal  
2 overhang. I would assume that you would get some  
3 foul weather coming onto these doors.

4 Q. Mr. Morgan asked you if you knew the  
5 price differential between the U.S.A. 2000 and the  
6 Kawneer 10-10, and you indicated you were unaware of  
7 that comparison; is that accurate?

8 A. I have no knowledge of pricing.

9 Q. Including the Kawneer 10-40?

10 A. That is correct, sir.

11 Q. Do you have an opinion as to whether  
12 the U.S. Aluminum 2000 door was inappropriate for an  
13 exterior use like the one we're describing?

14 A. Yes, sir, I do have an opinion.

15 Q. What is that opinion?

16 A. It's misuse. We state on every piece  
17 of literature that this is for interior use. And  
18 you do not put an interior nor would you put a  
19 Kawneer 10-10 on an exterior-use product.

20 Q. Do you have an opinion as to whether  
21 U.S. Aluminum gave users adequate warning of the  
22 nature and extent of the danger resulting from the  
23 use of this door in such a circumstance?

24 A. Yes, sir.

25 MR. GILCHRIST: I'll object to the

Tab 13

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY

STATE OF UTAH

-o0o-

STEPHANIE MCKAY,

Plaintiff,

vs.

SMITH'S FOOD STORE &  
DRUG CENTERS, INC., and  
JOHN DOES I Through V,

Defendants.

Civil No. 94 0000025  
Judge: Gordon J. Low

Deposition of:  
STEPHANIE MCKAY

ORIGINAL

SMITH'S FOOD STORE &  
DRUG CENTERS, INC.,

Third-Party Plaintiff,

vs.

UNITED STATES ALUMINUM  
CORPORATION, INTERNATIONAL  
ALUMINUM CORPORATION, JAMES  
O. CHAMBERLIN, CRITTENDEN  
GLASS COMPANY and CRITTENDEN  
PAINT and GLASS COMPANY,

Third-Party Defendants.)

-o0o-

BE IT REMEMBERED that on the 27th day of September, 1994, the deposition of STEPHANIE MCKAY, produced as a witness herein at the instance of Smith's Food Store in the above-entitled action now pending in the above-named court, was taken before Ann Love Calder, a Certified Shorthand Reporter and Notary Public in and for the State of Utah, commencing at the hour of 10:25 a.m. of said day at the office of HILLYARD, ANDERSON & OLSEN, 175 East 100 North, Logan, Cache County, State of Utah.

That said deposition was taken pursuant to Amended Notice.

ANN LOVE CALDER  
CSR No. 139

INDEPENDENT REPORTING  
SERVICE

Certified Shorthand Reporters

1710 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
(801) 538-2333

1 Q. And so did this gentleman help you up before any  
2 employees of Smith's were able to get to you?

3 A. Well, they were busy ripping up the cable that  
4 was sticking up in the doorway.

5 Q. While you were still sitting on the floor?

6 A. Yes.

7 Q. Why don't you tell me what you observed  
8 immediately after falling to the floor and righting yourself  
9 on the floor, so you could make observations?

10 A. I turned around and there were people walking  
11 over the top of the part that was sticking up. I turned  
12 around to see what I tripped on because I couldn't imagine  
13 that I had tripped on anything.

14 Q. What did you observe?

15 A. It was sticking up approximately knee high, in a  
16 bow -- or in a circular manner.

17 Q. How high off the ground at its highest level?

18 A. Approximately my knee level. I was sitting down,  
19 so I would say close to knee level.

20 Q. You are how tall?

21 A. I am five seven.

22 Q. So knee level would be about how high off the  
23 floor?

24 A. What, about a foot and a half.

25 Q. Was this piece still connected at each end of the



1           Q.     You've stepped with your left foot, so your left  
2 foot is in front; right?

3           A.     Yes.

4           Q.     And your right toe catches as you try to pick it  
5 up?

6           A.     Uh-huh.

7           Q.     You need to say yes.

8           A.     Yes, I'm sorry.

9           Q.     And then it came free -- that's what I don't  
10 understand. Right toe is caught, your left foot is forward?

11          A.     I didn't realize that it was caught until I was  
12 in the motion of going forward with the other foot. So it  
13 put me into a forward -- trying to catch my balance type  
14 thing so I wouldn't fall.

15          Q.     Sure. Then I understand you are on the ground.  
16 I still don't understand what part of this door or whatever  
17 mechanism caught you. Can you help me understand that, what  
18 it was that actually caught your foot?

19          A.     I thought that it was a cable, it looked like a  
20 cable.

21          Q.     A cable from what, what did you think it was  
22 from?

23          A.     It looked like -- well, just the entrance.

24          Q.     Did you think maybe they had a cable strung  
25 across on the ground?

1 Q. And you say your mother is helping you more with  
2 your children?

3 A. Yes.

4 Q. You are not paying her, she is doing that; is  
5 that right?

6 A. I'm not paying her.

7 Q. Jump around a couple more times. I think I've  
8 been to this Smith's. Are there two entrances with cement in  
9 between, column in between, bricks in between?

10 A. Bricks in between, from what I can remember.

11 Q. As you are facing in, was it the right one or the  
12 left one where you fell?

13 A. As facing it, the left.

14 Q. As you were facing in?

15 A. As you are facing the outside of the store.

16 Q. Looking in the store?

17 A. Yes.

18 MR. HENNING: It's the left side?

19 THE WITNESS: Yes, as you are facing.

20 Q. (By Mr. Gilchrist) Right. Did you see what the  
21 person did with the cable when they pulled it up?

22 A. Other than he was pulling it up and then that was  
23 when I --

24 Q. You didn't see him throw it away or put it in his  
25 pocket or anything like that?

1           A.     I think runway, you walk on.

2           Q.     How about track, that the doors move on?

3           A.     Okay.

4           Q.     Did you notice that when you were there with

5 Mr. McIntire or Mr. Wagner?

6           A.     Yes.

7           Q.     I'm trying to figure out, I assume when you were

8 there you tried to point out to them which track it was when

9 the cable was up, was that part of what you were doing?

10          A.     Yes, that's correct.

11          Q.     And do you remember which one it was?

12          A.     Yes.

13          Q.     Which one? The middle one?

14          A.     The middle one, the best that I can remember.

15          Q.     Did you, when you were there, did you actually

16 pull the doors out either time?

17          A.     I can't recall that.

18          Q.     How about when we look at the middle track, if I

19 was to go and try to find the exact point, and I'm right in

20 the middle, would it be more one side or the other looking

21 in?

22          A.     More to the right side, but it was the middle

23 right side.

24          Q.     Okay. And when you went back with Mr. McIntire

25 do you remember what color the track was, what color it was?

Tab 14

IN THE FIRST JUDICIAL DISTRICT COURT  
IN AND FOR CACHE COUNTY, STATE OF UTAH

STEPHANIE McKAY,

Plaintiff,

vs.

SMITH'S FOOD STORE & DRUG  
CENTERS, INC., AND JOHN  
DOES I THROUGH V,

Defendants.

CIVIL NO. 940000025

DEPOSITION OF:

JONATHAN A. RAMRAS

Held October 25, 1995

REPORTED BY:

RENEE L. STACY, CSR, RPR

SMITH'S FOOD STORE & DRUG  
CENTERS, INC.,

Third-Party Plaintiff,

vs.

UNITED STATES ALUMINUM  
CORPORATION, INTERNATIONAL  
ALUMINUM CORPORATION,  
JAMES O. CHAMBERLIN,  
CRITTENDEN PAINT AND GLASS  
COMPANY,

Third-Party Defendants.)

ORIGINAL

Deposition of JONATHAN A. RAMRAS, taken on  
behalf of the Defendant, Chamberlin, at 205 26th  
Street, Suite 34, Ogden, Utah, commencing at 1:05  
p.m. on October 25, 1995, before RENEE L. STACY,  
Certified Shorthand Reporter, Registered Professional  
Reporter and Notary Public in and for the State of  
Utah, pursuant to Notice.



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1 sliding glass door series? Just that language?

2 MR. OLSEN: Yes.

3 MS. PORTER: And I wanted to lodge my  
4 objection that it calls for speculation and lacks  
5 definition of words in the question.

6 Q (BY MR. OLSEN) You may answer.

7 A I agree with what those guys said.

8 Q Do you remember the question?

9 A Yeah, I do. Based on this language only, I  
10 would probably do further research to find out what  
11 it was or not use it.

12 Q Have you done any investigation yourself as  
13 to the propriety of using the U.S. Aluminum 2000 door  
14 as an exterior entrance?

15 A No, I haven't.

16 Q Do you have an opinion as to whether or not  
17 there should be a cause of concern about the  
18 continued use of the U.S. Aluminum 2000 door for an  
19 exterior entrance if it's already in place?

20 A From discussions that I have had,  
21 understanding that there are other doors in place  
22 that have given us absolutely no problem and this  
23 particular problem at this one location, it may have  
24 been a fluke. I'm not sure. I'm not sure I have a  
25 specific opinion. I think if there's a problem

1     when you were preparing the fixture plan for the  
2     Logan store, or was that done before he even came  
3     into the scene?

4             A     Typically we prepare a fixture plan first  
5     and then give it to the architect to make it site  
6     specific, review codes, et cetera.

7             Q     That would be your best memory for the  
8     Logan job, that you did -- followed that typical  
9     scenario?

10            A     Yes.

11            Q     Who would initially approach Mr. Chamberlin  
12     to get involved with the Logan store?

13            A     It could have been myself or Fred Urbanek,  
14     my boss.

15            Q     What's Fred's title?

16            A     He is now senior vice-president, facilities  
17     engineering.

18            Q     Do you know what Mr. Chamberlin was asked  
19     to do?

20            A     I don't know exactly, but I'm assuming that  
21     he was asked to be the architect of record for that  
22     particular building.

23            Q     And as architect of record for that  
24     particular building, what materials was he given by  
25     Smith's?

1           A     A fixture plan and a specification and  
2 possibly some previous documents that we used so that  
3 we'd have a consistency in our buildings.

4           Q     When you say previous documents, what do  
5 you mean? Like what?

6           A     Another set of architectural documents from  
7 a previous store.

8           Q     Okay. And you said he was given a book of  
9 specifications or a single specification?

10          A     The entire book. The entire book.

11          Q     And was that something that Smith's  
12 prepared in house or was that done by someone else  
13 for another job?

14          A     It was done outside by another architect  
15 for other Smith's stores.

16          Q     For a prior construction?

17          A     Correct.

18          Q     Okay. I know you said Mr. Chamberlin was  
19 asked to be architect of record, but was he given  
20 more direction as to what he was supposed to do,  
21 other than just be the architect of record?

22          A     We discuss many things when he comes --  
23 when he has a question about something, he might call  
24 me or somebody else in the department and ask a  
25 question, and at that time we would discuss



1 something, but specifically the job of being  
2 architect of record defines what it is he's supposed  
3 to do.

4 Q And I'm sorry. I'm not an architect.

5 MR. MORGAN: Of record.

6 MR. GILCHRIST: Period. Of record or  
7 nonrecord. So I don't really know what that means.

8 THE WITNESS: Architect of record means  
9 that he's the architect for that particular job and  
10 he's the one who has his stamp on it and says that  
11 this is a code complying facility.

12 Q (BY MR. GILCHRIST) Okay. Was he given any  
13 kind of direction as to whether or not to deviate  
14 from the specification he was given from the prior  
15 job, whether he was allowed to deviate from that?

16 A He wasn't given any specific instructions  
17 whether he could or could not. He's supposed to read  
18 them and make them compliant and site specific.  
19 There are a number of sections in the specifications  
20 that he might have to change because of a site  
21 specific condition.

22 Q Was it your expectation he would go through  
23 each section of the specifications to make sure they  
24 were -- they would fit for this job or meet code?

25 A Yes.

1 don't think there was any studies done, no.

2 Q There's no studies and no selling point by  
3 this air door manufacturer about the air door will  
4 avoid the potential of freezing on the ground  
5 immediately in front of the air door, that you know  
6 of?

7 A Not that I know of.

8 MR. DRAKE: That's all I have.

9 FURTHER EXAMINATION

10 BY MR. MEDSKER:

11 Q First of all, how many stores does Smith's  
12 have, say in Utah?

13 A I don't know how many we have in Utah. We  
14 have about 140 stores all together.

15 Q 140?

16 A 140 something.

17 Q Okay. In response to one of Mr.  
18 Gilchrist's questions, to what you -- what was  
19 provided to Mr. Chamberlin or what would have been  
20 provided to Mr. Chamberlin, you indicated the  
21 specifications and then some other documents. Among  
22 those, would it be possible that you had received  
23 sepias with designs similar to these plans that I  
24 have here?

25 A Yes, it would have been possible.

Tab 15

IN THE FIRST JUDICIAL DISTRICT COURT  
IN AND FOR CACHE COUNTY, STATE OF UTAH

STEPHANIE MCKAY,

Plaintiff,

vs.

SMITH'S FOOD STORE & DRUG  
CENTERS, INC., AND JOHN  
DOES I THROUGH V,

Defendants.

CIVIL NO. 940000025

DEPOSITION OF:  
E. M. WHITMEYER

Held October 25, 1995

REPORTED BY:  
RENEE L. STACY, CSR, RPR

SMITH'S FOOD STORE & DRUG  
CENTERS, INC.,

Third-Party Plaintiff,

vs.

UNITED STATES ALUMINUM  
CORPORATION, INTERNATIONAL  
ALUMINUM CORPORATION,  
JAMES O. CHAMBERLIN,  
CRITTENDEN PAINT AND GLASS  
COMPANY,

Third-Party Defendants.)

ORIGINAL

Deposition of E. M. WHITMEYER, taken on behalf of the Defendant, Smith's, at 205 26th Street, Suite 34, Ogden, Utah, commencing at 9:40 a.m. on October 25, 1995, before RENEE L. STACY, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public in and for the State of Utah, pursuant to Notice.



**REPORTING SERVICES, LLC**

525 FIRST INTERSTATE PLAZA  
170 SOUTH MAIN STREET  
SALT LAKE CITY, UTAH 84101  
(801) 328-1188 / 1-800-DEPOMAX  
FAX 328-1189

1 drawing. Do you have --

2 A That's true.

3 Q -- any recollection of having reviewed such  
4 a document?

5 A The drawings?

6 Q The larger drawing.

7 A Yes. I go through the drawings when I bid  
8 the job.

9 Q And the drawings, are they prepared by the  
10 architect?

11 A Yes.

12 Q Let me ask you a question with regard to  
13 Deposition Exhibit No. 5. You'll note down here  
14 towards the bottom it says "Glazed aluminum sliding  
15 doors by owner." Do you see that?

16 A Yes.

17 Q Were the sliding doors at the Logan store  
18 provided by the owner, Smith's?

19 A No.

20 Q They were provided by Crittenden?

21 A Correct.

22 Q So that statement would be an error,  
23 correct?

24 A That was probably corrected by an addendum  
25 or a telephone call prior to bid to the architect,

Tab 16



architectural specifications and instructions. The evidence is unquestioned that it has been used successfully without notice of any defect in many other instances. There is an issue relative to whether Crittenden changed the specifications as submitted to the architect for this door as opposed to a comparable door, but there is no question that this door, and the comparable door by another manufacturer, was essentially identical.

A party such as Crittenden had a duty to provide a threshold (with the door) free of defects that were known or should have reasonably been known, and where compliance is shown to exist with the plans and specifications, the defect must be obvious and apparent to the supplier. There is no evidence that Crittenden breached its duty.

This case does not present issues of fact relative to negligence on the part of Crittenden nor liability relative to its supplying the door. The Motion, therefore, is granted.

This matter is also before the Court on Defendant United States Aluminum Corporation's Motion for Summary Judgment. On the basis that reasonable minds could not differ that the Defendant supplied the door requested and that it was sufficient for the use described. The argument of the Plaintiff is that the door provided was not sufficient for the use described and was not designed for that. Whether reasonable minds could differ is not the standard



under Rule 56 but the standard under Rule 50. Nevertheless, it is apparent from all the evidence before the Court that this product was safe for intended use. There is no issue of fact that goes between this Defendant and the Plaintiff. This Motion is against the Plaintiff and the Plaintiff is unable to present an issue of fact which could go to the jury as to the negligence of this supplier or on the issue relative to strict liability of the supplier. The Motion is therefore granted.

The final Motion is brought by Smith's Food and Drug for Summary Judgment against the Plaintiff. The facts, which are not in issue, are that the stainless steel cap became raised, that the Plaintiff apparently tripped or otherwise came into contact with it, resulting in her injuries. There is also no dispute that the Defendant Smith's had no notice of the defective condition or any notice of prior defects or knowledge that the door was insufficient for the purposes for which it was designed. There is evidence that Smith's did not regularly maintain or inspect the door, and that it had no maintenance and inspection policy. On the other hand, there is no evidence that lack of a policy for maintenance and inspection was a causative factor in the injuries suffered by the Plaintiff. The issues before the Court was whether the condition was known or should have been known by the exercise of reasonable care on the

MCKAY v. SMITHS et al  
#940000025  
Page 4

part of Defendant Smith's. Smith's is not an insurer of its business invitees. In order for an action to be successful against Smith's, the Plaintiff must show that Smith's was, in some fashion, negligent. There is no fact before the Court to suggest that Smith's could have or should have known of the defective condition. In fact, it is not even shown or known what caused the cap to raise. There has been speculation that was from excess weight, an exterior location exposed to salt, water, and ice wedging but the Court has little before it other than speculation and that cannot go before the jury on that issue. Certainly had Smith's known, or reasonably could or should have known through ordinary and prudent care, of the defect it did have a duty to warn. The burden on the Plaintiff is to show that Smith's was negligent, not that there was a defect as that is acknowledged, but that Smith's was negligent in allowing the defect to be created or to continue and the Court is without evidence to that issue. Therefore, there is no material issue of fact thereon to go before the jury. The Motion is granted.

DATED this 2 day of <sup>April</sup>~~March~~, 1996.

BY THE COURT:



JUDGE GORDON J. LOW  
FIRST DISTRICT COURT

MCKAY v. SMITH'S FOOD STORE et al  
#940000025  
Page 5

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION, Stephanie McKay v. Smith's Food Store and Drug Centers Inc., et al, Case No. 940000025, postage prepaid, this 2 day of ~~March~~<sup>April</sup>, 1996, to the following:

**STEPHEN G. MORGAN, ESQ.**  
136 South Main Street  
Kearns Bldg., 8th Floor  
Salt Lake City, UT 84101

**LYLE W. HILLYARD, ESQ.**  
175 East First North  
Logan, Utah 84321

**LEE C. HENNING, ESQ.**  
175 South West Temple  
510 Clark Leaming Office  
Salt Lake City, UT 84101

**RICHARD F. MEDSKER, ESQ.**  
205 - 26th Street  
Suite 34  
Ogden, Utah 84401

**HERM OLSEN, ESQ.**  
175 East First North  
Logan, Utah 84321

**ROBERT G. GILCHRIST, ESQ.**  
50 South Main #700  
P.O. Box 2465  
Salt Lake City, UT 84110

**KARRA J. PORTER, ESQ.**  
175 SW Temple Suite 510  
Salt Lake City, UT 84101

  
\_\_\_\_\_  
Deputy Court Clerk

Tab 17

IN THE FIRST DISTRICT COURT, COUNTY OF CACHE

STATE OF UTAH

-----  
STEPHANIE MCKAY,

Plaintiff,

vs.

SMITH'S FOOD STORE AND DRUG  
CENTERS INC., et al

Defendant.  
-----

\*  
\*  
\*  
\*  
\*  
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\*  
\*  
\*  
\*

MEMORANDUM DECISION

Case No. 940000025

THIS MATTER IS BEFORE THE COURT upon a Motion for Summary Judgment. The hearing was conducted on March 25, 1996, and the Court allowed additional time for filing of supplemental memoranda and affidavits. However, the Court forgot that additional time was allowed for such filing and had taken the matter under advisement and issued a Memorandum Decision prior to Plaintiff's counsel having the opportunity to supplement the record. Upon realizing the error, the Memorandum Decision then was set aside and the matter thereafter reviewed afresh considering the supplemental memoranda, affidavits, and documents supplied by the parties. Having done so, the Court now reaffirms its earlier Memorandum Decision.

In order to block a Motion for Summary Judgment, the party against whom the Motion is brought must show that there exists

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May 7, 1996

-24-

material issues of fact. The pleadings, memoranda, and affidavits filed in this case including the supplemental documentation does not demonstrate a substantial issue of material fact. To the contrary, the facts appear to be undisputed, at least those which are pertinent to addressing of the Motion. The argumentation on both sides of the Motion do not go so much to the facts or to issues of fact but rather to the standard of law to be applied to the otherwise undisputed facts.

Both parties in support of their arguments have referenced the Restatement of Torts and also recent case law. The Court opined earlier in its Memorandum Decision that in order for the Plaintiff to prevail on the merits, she must show that the actions by Smith's, either in selecting the track or allowing it to be installed, or failing to maintain the same, involved an unreasonable risk of harm to her as an invitee. Under any reading of the Restatement or the case law as cited by both sides, the store owner, Smith's, is not an insurer of the Plaintiff, nor held to a standard of strict liability for a person who is injured on its premises. More particularly, the Plaintiff must show that there was a duty owed by Smith's, that it breached that duty owed to her, and that the breach resulted in her harm before liability can be found, before she can be awarded damages, and in order to avoid a summary judgment under Rule 56.

There is no showing from the Plaintiff that in Smith's ordering and installing of the door, even though it was perhaps not specifically designed by the manufacturer for outdoor use, contributed to the injury. More specifically, there is no showing that Smith's was aware or had any reason to become aware of the fact that the door was not designated for outdoor use or more importantly, that its use in the location in the store was a breach of duty to the Plaintiff. What the Plaintiff has shown by expert opinion is the mechanism by which, or how, the door track failed and why it failed.

The Plaintiff has suggested that the Defendant had a duty of ordinary care toward her in selecting, installing, and maintaining the door track in question. That is true, but there is nothing to indicate that ordering and installing a door, even if it was designed for inside use only, was in fact a negligent act. It must be shown that the duty was one that could or should have been known to the Defendant and that the duty was breached. There is nothing herein to indicate that the Defendant should have known that the door was an inappropriate door or even if Defendant did, that it was subject to the type of problems experienced. There was nothing to show if in fact the raising of the stainless steel cap was caused by an ice wedge and that the Defendant knew or should have known that would result. There is no showing that, if in fact the

track was raised as a result of dirt or heavy use, the Defendant knew or should have known that would result. Moreover, there is no showing that in fact Defendant could or should have been aware of the fact that the track had actually raised as it seems to be a fact undisputed that it had not raised to a point that anyone should take notice of the same.

Plaintiff has suggested that failure by the Defendant to have an inspection policy and inspect and maintain the track on a regular basis is an error and omission and therefore should result of a finding of liability. It may be an omission, but an omission does not always equate to an error or a failure in the Defendant's duty toward the Plaintiff. Was the alleged negligence of the Defendant its failure to have a policy or its failure to follow a policy? Moreover, in order for either of those to be negligence, it must be shown that in fact the Defendant had a duty to establish a policy and had a duty to maintain the door other than it did so. The testimony is uncontested that it did have a cleaning and maintenance program, though not specifically focused on the track of the door, but there is no reason shown for anyone to believe that such was necessary in order to avoid the problem which resulted.

The landowner is liable for damages resulting in physical harm caused to invitees by a condition of the land only if he knows or



by the exercise of reasonable care would discover the condition and realizes that it involves unreasonable risk or harm to invitees. The undisputed facts contain no evidence that the Defendant knew, should have known, or by reasonable care could have discovered the condition which apparently caused the injury to the Plaintiff.

The Defendant has cited both English v. Kienke 848 P.2d 153 (Utah 1993) and Laws v. Blanding City, 893 P.2d 1083 (Utah Ct. App. 1995) (cited?). It is settled that the Defendant, though it may have a high duty of care to invitees, is not strictly liable to injuries occurring to the invitee. Additionally, Plaintiff distinguishes slip and fall cases such as related to food or things of that nature on a floor caused by third parties as opposed to dangerous conditions under the exclusive control of, or caused or created by, the Defendant as to the issue of negligence and the standard to be applied. Here, there is no question that the door in question was under the control of the Defendant. That does not, however, indicate in and of itself, that in fact a dangerous condition came into existence for which the Defendant is liable. Strict liability is not the standard for possessors or owners of land in Utah. The issue is still before the Court as to whether the unsafe condition was known or should have been known by exercise of reasonable care on the part of Defendant Smith's and

nothing supplied by Plaintiff's newly submitted memorandum and documentation demonstrate otherwise.

Courts are reluctant to award summary disposition and especially in negligence cases because parties should have an opportunity to have their cases heard by the trier of fact on the merits. But the merits of the Plaintiff's case must include a showing of the duty, breach of that duty, and causation. There certainly is a duty shown and the duty is one of exercise of reasonable care for the benefit of the business invitee. Nothing, however, herein has been shown that Smith's failed to meet that standard of reasonable care. The fact that the accident occurred does not indicate a breach of that duty. It indicates that the track became damaged likely through the mechanism described by Plaintiff's expert and that the Plaintiff sustained an injury as a result thereof. Those facts are not an issue. What is an issue is whether Defendant Smith's had an obligation to do anything other than what it did in order to be aware of or remedy the situation. But nothing has been shown to indicate to the Court that a jury could reasonably consider as what Smith's did, or failed to do, was in breach of its duty. To suggest, as Plaintiff's expert did, that the failure was a result of using the standard plan calling for installation of an interior door is not a showing of negligence on behalf of Smith's. His conclusory statement that "It should have

been anticipated and was a contributing factor in its failure", is insufficient to refer the matter to a jury. That, if the Defendant did not carefully keep the tracks or grooves of the doors clean at all times which may have allowed rocks, ice, and debris to interact with the traffic of the doors resulting in deformation of the product, does not demonstrate negligence. Plaintiff must show that failure to do so should have suggested to Smith's that the same involved unreasonable risk and harm to the invitees. There simply is no evidence that if the door was designed for interior use only that Smith's knew of that fact or that installing such door in an exterior location would involve unreasonable risk or harm to invitees.

More specifically, with respect to whether the door failed as a result of dirt, ice or other contaminants, though that may be the underlying cause of the door's failure, there is not a showing that Smith's was or could have been reasonably aware of, or reasonably foreseen, that risk. No warning was provided to Smith's nor has there been any reason shown that a reasonable person should understand that ice, dirt, debris or heavy loads would cause the type of damage to the door which occurred. Under the facts here shown, Smith's had no reason to know of the existence of a steel cap much less that it might fail under conditions of dirt, ice, debris or heavy loads. Again, the burden is on the Plaintiff to

demonstrate in such a case an unreasonable (foreseeable) risk of harm would occur to the business invitees.

The Plaintiff's expert's Affidavit, though informative, was lacking with respect to the occurrence on the day in question or circumstantial evidence as to the condition of the track on the day of the accident. As to that, and as cited by the Defendant, the Plaintiff herself supplied the only information before the Court on that issue and testified that the cap was not raised high enough to be noticeable.

Neither having nor enforcing a maintenance plan is the issue. The Defendant's Answers to Interrogatories which, despite arguments to the contrary by the Plaintiff, are admissible for this Motion indicate that the employees of Smith's were directed to inspect the floors and entryway at least hourly. But again the evidence before the Court is the condition which ultimately resulted in the Plaintiff's injury was not noticeable on the day in question. There is no evidence to the contrary. In fact the evidence is that the door system has been used for many years without the type of damage experienced as shown in this case. If the Plaintiff had any evidence to the contrary, it has not been forthcoming.

There has been no basis for the conclusion that the Defendant should have known that any of its actions would cause the cap to

become loose and cause a hazard to the Plaintiff. The Court can only conclude that accepting the Plaintiff's theory in this matter would seek to hold the Defendant liable for any defect on the premise regardless whether Smith's had any reason to know of the actual hazard or that its activity may contribute to the hazard and would in fact require the store owner to be strictly liable and place the store owner in a position of insurer. That is not the standard. If it were the standard, then Plaintiff would be entitled to summary judgment in her favor on the issue of liability and there would be no issue except for damages for the trier of fact. Plaintiff is not entitled under the case law to a summary judgment because this is not a strict liability case, it is one of negligence and the Plaintiff is unable to show that her injuries, as severe as they may be, were caused by negligent acts of the Defendant. Liability can only be imposed when there is some evidence that the Defendant knew or should have known of the condition and realized that it posed an unreasonable risk of harm to its patrons. Because there is no evidence that Smith's knew of the cap coming free or it should have known of the dangers of the cap coming free, summary judgment for Smith's is appropriate. As pointed out by the Defendant's Memorandum, to submit this matter to the jury would require the jury to speculate that the Defendant

should have known of the hazard when there is no evidence to support that assertion.

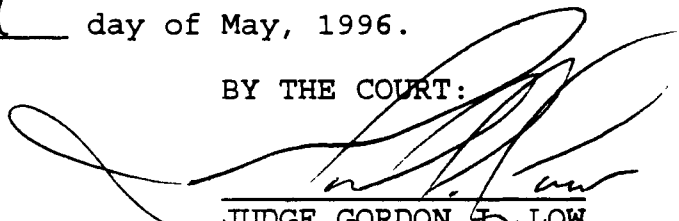
Crittenden Paint and Glass Company and R & O Construction have also filed Motions for Summary Judgment on the basis that again the facts are not in dispute and the sole issue of law to be determined by the Court is whether the door track called for in the specifications of Logan's Smith's store was so obviously dangerous that no reasonable person would have installed it. Largely for reasons above stated and for reasons set forth in the Memoranda by Crittenden Paint and Glass Company and R & O Construction in support of their Motions for Summary Judgment, the same are granted.

United States Aluminum Corporation likewise filed a Motion for Summary Judgment and for reasons set forth in its Memorandum and for the reasons set forth in the foregoing which has application to United States Aluminum Corporation's Motion for Summary Judgment, the same is granted.

Based on the foregoing, the Memorandum Decision earlier issued is reaffirmed, and counsel for Defendant Smith's Food Store is directed to prepare a formal Order and Judgment in conformance herewith.

DATED this 7 day of May, 1996.

BY THE COURT:



JUDGE GORDON F. LOW  
FIRST DISTRICT COURT

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION, Stephanie McKay v. Smith's Food Store and Drug Centers Inc., et al, Case No. 940000025, postage prepaid, this 7 day of May, 1996, to the following:

**STEPHEN G. MORGAN, ESQ.**  
136 South Main Street  
Kearns Bldg., 8th Floor  
Salt Lake City, UT 84101

**LYLE W. HILLYARD, ESQ.**  
175 East First North  
Logan, Utah 84321

**LEE C. HENNING, ESQ.**  
175 South West Temple  
510 Clark Leaming Office  
Salt Lake City, UT 84101

**RICHARD F. MEDSKER, ESQ.**  
205 - 26th Street  
Suite 34  
Ogden, Utah 84401

**HERM OLSEN, ESQ.**  
175 East First North  
Logan, Utah 84321

**ROBERT G. GILCHRIST, ESQ.**  
50 South Main #700  
P.O. Box 2465  
Salt Lake City, UT 84110

**KARRA J. PORTER, ESQ.**  
175 SW Temple Suite 510  
Salt Lake City, UT 84101

  
\_\_\_\_\_  
Deputy Court Clerk

Tab 18



Herm OLS  
HILLYARD, ANDERS  
A PROFESSIONAL CORPORATION  
ATTORNEYS AT LAW  
175 EAST FIRST NORTH  
LOGAN, UTAH 84321  
TELEPHONE (801) 752-2610

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY  
STATE OF UTAH

STEPHANIE MCKAY,

Plaintiff,

vs.

SMITH'S FOOD STORE &  
DRUG CENTERS, INC., and  
JOHN DOES I thru V,

Defendants.

FINAL ORDER

Civil No. 94-025-PI

Judge Gordon J. Low

SMITH'S FOOD STORE &  
DRUG CENTERS, INC.,

Third-Party Plaintiffs,

vs.

UNITED STATES ALUMINUM,  
CORPORATION, JAMES O.  
CHAMBERLIN, CRITTENDEN GLASS  
COMPANY and CRITTENDEN PAINT  
AND GLASS COMPANY,

Third-Party Defendants.

The Court entered a Memorandum Decision granting summary judgment to Smith's Food Store & Drug Centers, Inc., Crittenden Paint and Glass Company, R&O Construction, and U.S. Aluminum Corporation, on April 2, 1996 and on May 7, 1996. The Order and Judgment was signed on or about the May 23, 1996. The Plaintiff filed a Rule 54(b) motion to certify the Order and Judgment as a final order on or about June 13, 1996. The Court entered a Memorandum Decision on August 15, 1996, granting the Plaintiff's motion, absent any objection by Defendants, requiring Plaintiff's counsel to submit a final order approved as to form by opposing counsel. Based upon the previous Memorandum Decision issued by this Court, this Court hereby enters a Final Order granting Plaintiff's Rule 54(b) motions dismissing each of the Defendants pursuant to their respective Motions for

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DATE

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68

94-025  
#145

April 3, 1997

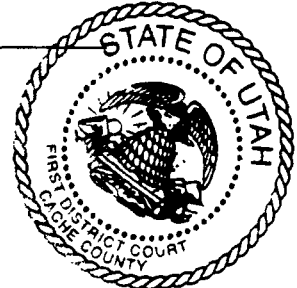
9.27

LAW OFFICES, HILLYARD, ANDERSON & OLSEN, 175 EAST FIRST NORTH, LOGAN, UTAH 84321

Summary Judgment previously filed as stated in the Order and Judgment dated May 23, 1996.

Dated this 3 day of April, 1997.

JUDGE



APPROVED AS TO FORM:

\_\_\_\_\_  
Stephen G. Morgan, Esquire  
Counsel for Smith's Food Store

\_\_\_\_\_  
Karra Porter, Esquire  
Counsel for Crittenden Paint and Glass

\_\_\_\_\_  
Richard R. Medsker, Esquire  
Counsel for James O. Chamberlin

\_\_\_\_\_  
Robert G. Gilchrist, Esquire  
Counsel for U.S. Aluminum

\_\_\_\_\_  
Mike Homer  
Counsel for R&O Construction

Tab 19

IN THE UTAH COURT OF APPEALS

---

STEPHANIE MCKAY,	:	
	:	DOCKETING STATEMENT
Plaintiff/Appellant,	:	
	:	
vs.	:	
	:	Case No. 970016-CA
SMITH'S FOOD STORE AND	:	
DRUG CENTERS, INC.,	:	
ET AL.,	:	
	:	
Defendant/Respondent.	:	

---

COMES NOW the above-named Plaintiff/Appellant, Stephanie McKay, by and through her attorney, Herm Olsen of Hillyard, Anderson & Olsen, and submits this Docketing Statement as required by Rule 9 of R. Utah Ct. App.

1. Date of Judgment and Date of Notice of Appeal. The judgment from which this appeal is taken was signed by the Court on December 23, 1996, by Judge Gordon J. Low of the First Judicial District Court of Cache County, State of Utah. The Notice of Appeal was filed with the First Judicial District Court on December 23, 1996, and received by the Court of Appeals on January 8, 1997.

2. Authority for Appeal. This Court has jurisdiction over the appeal in this matter by virtue of the Constitution of Utah, Article VIII, Sections 1 et seq., Sections 78-2A-1 et seq. Utah Code Ann. (1953 as amended), and Rule 3 R. Utah Ct. App.

3. Nature of Proceeding. This appeal is from a summary judgment signed and entered by Judge Gordon J. Low of the First Judicial District Court of Cache County, State of Utah.

4. Statement of Facts. On or about the 18th day of April, 1992, Plaintiff/Appellant Stephanie McKay was returning previously rented videos to Smith's Food King Store #87 in Logan, Utah.

As Stephanie entered the store, her foot caught on a stainless steel pre-formed metal strip which had apparently popped off an aluminum track imbedded in the threshold of the sliding glass door frame of the only entrance to the Smith's store.

Stephanie's fall to the ground resulted in severe injury to her knee, requiring surgery and now suffering from a permanent partial impairment.

The various defendants include the architect who signed off on the design work presented to him by Smith's Food King, the general contractor and the subcontractor who installed the door in question, together with the manufacturer of the door who formed the stainless steel molding over the aluminum track which molding failed.

5. Issues Presented.

(1) Whether the court correctly interpreted Utah law in granting summary judgment against the Plaintiff when the instrumentality of injury to the plaintiff was under the exclusive control of defendants.

(2) Whether the court correctly interpreted Utah law in granting summary judgment wherein it is acknowledged that defendant Smith's had no prior knowledge of the failure of the threshold, but which threshold was under the exclusive care, custody, maintenance and control of defendant Smith's.

6. Citation of Cases.

Koer v. Mayfair Markets, 431 P.2d 566 (Utah)

Long v. Smith's Food King Store, 531 P.2d 360 (Utah 1973)

Canfield v. Albertson, 841 P.2d 1225 (Utah)

DeWeese v. J.C. Penney Co., 5 Utah 2d 116, 121, 297 P2d 898, 901 (1956)

Laws v. Blanding city, 893 P.2d 1083, 1085 (Utah App. 1995)

Otero v. Jordan Restaurant Enterprises, 895 P.2d 243 (1995)

English v. Kienke, 206 Utah Adv. Rep. 3 (Utah, filed February 4, 1993)

Erickson v. Walgreen, 232 P.2d 210

Kleinert v. Kimball Elevator Co., 275 Utah Adv. Rep. 44 (filed October 19, 1995)

Hill v. Seattle First National Bank, 827 P.2d 241, 246 (Utah 1992)

Rawls v. Hochschild, kohn & Co., 113 a @ND 405, 410 (Md. 1955)

G.C. Murphy Co. v. Greer, 541 A 2nd 996 (Md. Ct. Spec1 App. 1988)

7. Prior Appeals. There are no related or prior appeals in this case.

8. Attachments. See Exhibit "A" attached hereto and by this reference incorporated herein.

Dated this 22<sup>nd</sup> day of January, 1997.

HILLYARD, ANDERSON & OLSEN



Herm Olsen  
Attorney for Plaintiff/  
Appellant

MAILING CERTIFICATE

I hereby certify that I mailed on this 23<sup>rd</sup> day of January, 1997, postage prepaid, a true and correct copy of the foregoing DOCKETING STATEMENT to:

Stephen G. Morgan, Esquire  
MORGAN & HANSEN  
136 S. Main Street  
Kearns Building, 8th Floor  
Salt Lake City, UT 84101

Karra Porter, Esquire  
CHRISTENSEN, JENSEN & POWELL  
175 S. West Temple, Suite 510  
Salt Lake City, UT 84101

Richard R. Medsker, Esquire  
FARR, KAUFMAN, SULLIVAN, GORMAN,  
JENSEN, MEDSKER & PERKINS  
Bamberger Square Building  
205 26th Street, Suite 34  
Ogden, UT 84401

Robert G. Gilchrist, Esquire  
RICHARDS, BRANDT, MILLER & NELSON  
50 S. Main Street, Suite 700  
P.O. Box 2465  
Salt Lake City, UT 84110

Mike Homer, Esquire  
SUTTER, AXLAND, ARMSTRONG & HANSEN  
175 S. West Temple  
Salt Lake City, UT 84101



Herm Olsen