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NEW YORK OFFICE

October 20, 2000

VIA TELECOPIER AND FIRST CLASS MAIL

Hon. Nicholas G. Garaufis
United States District Court
Eastern District of New York
U.S. Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

Re: ***Department of Amazonas, et al. v. Philip Morris Companies, Inc., et al., 00 Civ. 2881 (NGG); Department of Antioquia v. Philip Morris Companies, Inc., et al., 00 Civ. 3857 (NGG); Department of Magdalena, et al. v. Philip Morris Companies, Inc., et al., 00 Civ. 4530 (NGG)***

Dear Judge Garaufis:

This letter responds to the letter of Irvin B. Nathan, Esq. (attorney for Philip Morris) dated October 12, 2000, and submitted to Your Honor by Mr. Nathan in open court on October 13, 2000. The undersigned is local counsel to Plaintiffs, the Departments of the Republic of Colombia.

Preliminary Statement

We appreciate the opportunity to respond to Mr. Nathan's letter. We remain troubled that Mr. Nathan chose to raise serious ethical allegations in open court, without any notice to the Court and with inadequate notice to Plaintiffs' counsel. As I pointed out on October 13, Mr. Nathan sent a letter to counsel during the afternoon of October 12, 2000, raising certain concerns about the retainer agreement and, less than 24 hours later and without waiting for any response, raised this matter in open court. It is obvious that Mr. Nathan had no interest in a constructive discussion of this matter; he never even placed a telephone call to alert counsel to his concerns. It is beneath the dignity of this Court for Mr. Nathan and Philip Morris to adopt a strategy of litigation by ambush.

We object to Mr. Nathan's efforts to use baseless ethical claims to gain tactical advantage in litigation. Courts have often recognized that such conduct is frequently used as an offensive tactic, inflicting hardship on the client and delay upon the courts. Although Mr. Nathan has a duty not to multiply proceedings (28 U.S.C. § 1927), he has needlessly created an issue that we are compelled to address. The Nathan letter is disruptive to Plaintiffs' counsel's efforts to litigate this matter on the merits, and it diverts resources from the overarching goal of representing Plaintiffs' interests. We make this response in accordance with the direction of the Court, without waiving any privilege, including the attorney-client, work product, and deliberative process privileges. The allegations are serious, and counsel's rebuttal to Mr. Nathan's false statements should not be deemed a waiver of any sort. Subject to these considerations, we hereby respond to Mr. Nathan's letter.

The Retainer Agreement Comports With Applicable Law

Louisiana Law Governs The Retainer Agreement

Mr. Nathan asserts that the retainer is bound by New York law and contains provisions that are contrary to New York's ethical guidelines. Mr. Nathan failed to disclose, however, that Louisiana law, not the law of New York, governs the retainer agreement. The terms of the retainer agreement are clear and unequivocal: "This contract shall be governed by and interpreted in accordance with the laws of the State of Louisiana, U.S.A., and any action to enforce or interpret this contract shall be brought in the courts of the State of Louisiana." In the face of this provision, it is astonishing that Mr. Nathan did not disclose to the Court that Louisiana law governed the retainer.[1]

Louisiana has a reasonable relationship to the agreement and parties. Sacks and Smith, L.L.C -- co-counsel for plaintiffs and signatory to the retainer -- is a Louisiana law firm. In addition, it was the preference of the clients to apply Louisiana law to the retainer because Louisiana, like Colombia, is a civil law jurisdiction governed by a civil code. Due to the clients' familiarity with civil law, the choice of Louisiana law was natural, logical and reasonable. A representative of the clients has prepared an affidavit attesting to these facts and, upon request of the Court, it will be submitted for in camera review.[2]

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[1] The retainer also contains a forum selection clause that designates the courts of Louisiana as the proper forum in which to enforce or interpret the retainer. Such clauses are routinely honored in this Circuit. Accordingly, in the event that Mr. Nathan or Philip Morris continues to press this matter, Plaintiffs will challenge his and his clients' standing to challenge the retainer outside of the courts of Louisiana.

[2] It is our position that nothing herein should be deemed to be a waiver of any privilege. We are prepared, at the Court's request, to submit the affidavit and opinions secured by counsel in this matter to Your Honor; however, such submission should only be made for in camera review. This is to protect Plaintiffs against any claim of waiver of privilege. In camera submissions, made at the direction of a court, do not constitute a waiver of any privilege.

Mr. Nathan's Objections Have No Substance Under Louisiana Law

Due to the seriousness of the allegations, counsel has consulted with a Louisiana ethics expert, and provided him with a copy of the retainer agreement and Mr. Nathan's letter. According to his opinion, which applies Louisiana law, Mr. Nathan's objections have no substance. At the request of the Court, we are willing to provide a copy of this opinion for in camera review. Mr. Nathan's letter, of course, makes no mention of Louisiana law and, in the event that there is a challenge to the retainer by Mr. Nathan or Philip Morris under the applicable law of Louisiana, it will be addressed in due course.

New York Will Honor The Contractual Choice of Law Provision

Again, due to the seriousness of the allegations, counsel has sought and obtained an opinion from a highly regarded New York law professor to the effect that the Courts of New York will honor the contractual choice of law provision in the retainer. That conclusion is hardly surprising inasmuch as it is well settled that where a contract contains a provision embodying "an explicit and unambiguous choice of law," that provision "must be given effect." Hackett v. Milbank, Tweed, Hadley & McCloy, 86 N.Y.2d 146, 154 (1995). See also Hawes Office Systems, Inc. v. Wang Laboratories, Inc., 537 F. Supp. 939 (E.D.N.Y. 1982) (contractual choice of law provision applied by the court; Massachusetts had strong connections to the transaction). This is a time-honored principle in New York. Thompson v. Ketchum, 8 Johns. 189, 193 (1811) (Kent, Ch.) (where parties had an "express view" to apply the law of another jurisdiction, that law is to be applied). At the request of the Court, we are willing to provide a copy of the legal opinion for in camera review.

There Is No Basis For Disqualification or Dismissal

The remedy sought in Mr. Nathan's letter for the alleged ethics violation is disqualification of counsel or dismissal of the action. Neither remedy is available.

First, the retainer is valid under applicable ethical principles, and this is confirmed by opinions of Louisiana and New York law professors. Even assuming that this is the proper forum to air these kinds of allegations (which Plaintiffs do not concede), a motion to challenge the retainer would be time-consuming, futile, and constitute an unreasonable and vexatious multiplication of proceedings. 28 U.S.C. § 1927.

Second, even if the retainer were found to be deficient in some way, the remedy is to allow the parties to the contract to cure the deficiency. See, e.g., Waldman v. Waldman, 118 A.D.2d 577 (2d Dep't 1986) (attorney's advance of money to client violated DR 5-103(B), and court allowed the client to reimburse the attorney for the funds advanced in lieu of disqualification). If there is a problem, the parties to the retainer (which do not include the undersigned or Speiser Krause), should be permitted to correct it. A representative of the clients has provided an affidavit to the effect that: (1) the allegedly offensive provisions in the retainer were not an inducement or condition to retain counsel; and (2) if the provisions were found to be problematic in any sense, it would be possible for the provisions to be deleted from the contracts. This affidavit is available for in camera review. See fn. 2, supra. It is important to bear in mind that while the contracts could be modified, such modification would pose a significant burden on counsel and clients because there are numerous plaintiffs, located across a broad geographic region, that would need to review this matter and consult with their respective legal services. Any determination that a retainer needs to be modified should be made in light of these considerations. Accordingly, there is no basis to seek disqualification or dismissal.

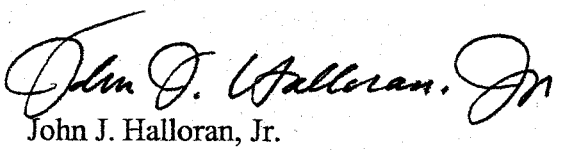
Third, it is frivolous for Mr. Nathan to even suggest that Speiser Krause be disqualified. In his unrestrained zeal to find a ground, any ground, to derail this action, Mr. Nathan impugned the integrity of Speiser Krause. He asserted in his letter to Speiser Krause and Krupnick Campbell that the retainer agreement was "between plaintiffs and your firms" and that it violated New York ethical guidelines. In fact, however, Speiser Krause is not a signatory to the retainer agreement, and it has acted in consummate good faith.

It is a very serious matter to allege that a New York firm has entered into a contract in violation of a New York criminal statute and the N.Y. Code of Professional Responsibility. Even though he was in possession of the retainer agreement, and knew that Speiser Krause was not a party to the contract, Mr. Nathan nonetheless represented that Speiser Krause was a party to the contract. This error was pointed out in Court on October 13, but Mr. Nathan nonetheless submitted his letter to the Court without acting to correct the record or retract his factually inaccurate statement. It is readily apparent that Speiser Krause was not a signatory to the retainer agreement and, for that reason among others, cannot possibly be faulted for a contract to which it was not a party.

Conclusion

Philip Morris cannot, consistent with the dictates of Rule 11, assert that the retainer agreement is contrary to the applicable ethical guidelines. Having misinformed this Court about the law governing the retainer agreement, the actual parties to the retainer agreement, and the available remedies for an allegedly deficient retainer agreement, Philip Morris is in no position to point an accusing finger at counsel for Plaintiffs.

Respectfully submitted,



John J. Halloran, Jr.

JJH:mlc

cc: Kevin A. Malone, Esq.
Andrew Sacks, Esq.
Ronald S. Rolfe, Esq.
David Bernick, Esq.
Craig A. Stewart, Esq.
Irvin B. Nathan, Esq.

(Via Telecopier and First Class Mail)