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PLEASE REPLY TO
NEW YORK OFFICE

January 10, 2001

**BY HAND**

Honorable Viktor V. Pohorelsky
United States District Court
Eastern District of New York
Brooklyn Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

***Re: European Community, et al. v. RJR Nabisco, Inc., et. al.***
***Case number: 00 Civ 06617 (NGG)***

Dear Judge Pohorelsky:

We are in receipt of the letter of Irvin B. Nathan, Esq., on behalf of all defendants, dated January 9, 2001, to Your Honor. For the reasons set forth below, Defendants' effort to further delay and obstruct proceedings should be summarily rejected.

On December 21, 2000, Your Honor denied Defendants' motion to disqualify, and rejected Defendants' claims related to alleged deficiencies in the Colombian retainer agreement, finding that there was no risk of taint to the trial. That should be the end of the matter, as nothing else was referred to Your Honor. For tactical reasons, and to circumvent Judge Garaufis' order staying discovery, Defendants had sought production of a wide array of documents, through a procedurally improper, oral motion in open court. Counsel for Plaintiffs offered to make a response on the record, and this Court said one was not necessary. The discovery request was denied, except in limited part as discussed below, and Plaintiffs' counsel understand that this Court did not order the retainer agreements relating to the Departments of the Republic of Colombia to be produced for in camera review. This conclusion is supported by the fact that the motion to disqualify has been decided, no other motion is pending before Your Honor, and Defendants' interest in the Colombian retainer agreements is, or should be, moot.

Defendants assert that the Colombian retainer agreements are not privileged, and this sweeping conclusion is unsupportable. The retainer agreements reflect attorney-client communications and the deliberative process of governments. Those communications, as well as the retainer itself, are privileged and are not relevant to any issue before the court. The authorities relied upon by Defendants are totally inapposite. Defendants rely upon Lefcourt v. United States, 125 F.3d 79 (2d Cir. 1997), which affirmed the imposition of a civil penalty upon an attorney for failing to comply with currency reporting requirements imposed by the IRS. No issue of cash payments to counsel has been raised herein, and no civil penalty has been imposed for such a failure. The relevance of the case remains a mystery. Defendants also rely on In Re Two Grand Jury Subpoenae Duces Tecum Dated August 21, 1985, 793 F.2d 69 (2d Cir. 1986), in which the Court of Appeals addressed grand jury subpoenae directed to law firms in connection with possible criminal tax violations. No grand jury subpoena has been served herein and there is no pending criminal tax inquiry. The cases relied upon by Defendants are factually inapposite and are not remotely relevant to any matter that may be before the Court.

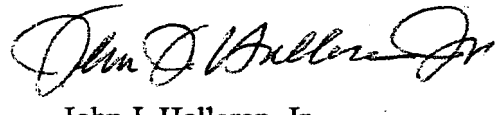
Nor does any New York court rule provide a basis for disclosing any retainer agreement. 22 N.Y.C.R.R. Part 691 governs the conduct of lawyers in the Second Department, and Section 691.20 identifies certain requirements for the filing of a "statement of retainer" in specific types of contingency cases. The rule does not require the filing of a contingency fee agreement. On the face of the rule, it does not specifically govern retainers in actions in federal district court, nor does it specifically govern RICO actions. Importantly, even if applicable to this type of case, the rule does not require the filing of the actual retainer agreement; it requires the filing of a "Retainer Statement" on a form prescribed by the New York State courts. In any event, the rule makes it plain that the Retainer Statement must be kept confidential. Rule 691.20(c)(1) provides that "[a]ll statements of retainer or closing statements filed shall be deemed to be confidential and the information therein contained shall not be divulged or made available for inspection or examination except upon written order of the presiding justice of the Appellate Division." Under these circumstances, New York court rules confirm the confidential treatment accorded to retainer information.

This Court did request counsel to The European Community to submit the retainer agreement relating to The European Community to the Court for in camera review. Even though there is no motion pending before Your Honor relating to The European Community, and the retainer agreement is not relevant to any issue before the Court, The European Community has authorized the submission of the retainer agreement to Your Honor under very specific conditions of confidentiality. The retainer is highly confidential, implicates a variety of privileges and national security concerns, and should not be disclosed to adversaries in litigation.

The request for disclosure of The European Community retainer was improper at its inception. There is no motion pending relating to the attorney-client relationship in the case of The European Community. Nor is there a proper discovery request or motion; no motion was made and the discovery request submitted to Your Honor was not properly served. In fact, Judge Garaufis has stayed discovery pending the outcome of the motion to dismiss. Nonetheless, out of respect to the Court and in deference to Your Honor, The European Community authorized submission of the retainer to Your Honor alone. Out of an abundance of caution, Plaintiff submitted a memorandum to Your Honor in a sealed envelope. If the Court is considering disclosing the retainer to Defendants, the memorandum should be reviewed by the Court because The European Community objects, in the strongest possible terms, to disclosure of the retainer agreement to adversaries in litigation. If, however, this Court is not considering disclosing the retainer to Defendants, the envelope should not be opened and the Court may disregard the sealed submission. Accordingly, if this Court decides, upon review of the retainer with The European Community, that there is no need for further action, Defendants' request for the memorandum would be academic.

Defendants complain about the in camera submission of the memorandum, but it was Defendants' conduct in this entire matter that has necessitated the filing in this manner. Rather than addressing the alleged deficiencies of the Boyaca retainer in a confidential manner, counsel for Philip Morris opted to air baseless allegations in open court without advance notice to Judge Garaufis. Coupled with this tactic, Defendants made a wholly improper, open court request for discovery on December 21 (again without advance notice to anyone). Plaintiff had no choice but to defend itself, but as this Court made very clear on December 21, the Court was not inviting a defense that would include the violation or waiver of any privilege. As a matter of common sense, Plaintiff should not be required to waive a privilege in order to protect a privilege. Plaintiff will not waive its privileges in order to protect its privileged confidences, communications and deliberations. As Defendants well know, in camera proceedings are not uncommon in cases where privileges, governmental or otherwise, are at stake. This is true here given that the retainer agreement, and the memorandum that addresses it, implicate the deliberative process of The European Community, the attorney-client and work product privileges, as well as other protections under law. The submission was therefore proper in all respects.

Very truly yours,



John J. Halloran, Jr.

JJH:mlc

cc: All counsel (via electronic filing and U.S. First Class Mail)