ARNOLD & PORTER
555 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20004-1206

(202) 942-5000
FACSIMILE: (202) 942-5999

NEW YORK
DENVER
LOS ANGELES
LONDON
CENTURY CITY

March 27, 2001

BY HAND AND ELECTRONIC FILING

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

Re: *European Community v. RJR., et al.,* 00 Civ. 6617 (NGG); *Department of Amazonas, et al. v. Philip Morris Companies Inc., et al.,* 00 Civ. 2881 (Consolidated)

Dear Judge Garaufis:

In order to preserve the record and to answer a question from the Court that we had until now lacked the information to answer, we are today filing on behalf of the Philip Morris defendant companies the attached short motion to disqualify plaintiff's counsel in the EC case. This motion is timely filed based on new information that we recently received regarding plaintiff's counsel's pecuniary interest in the litigation.

We recognize that this Court may well consider the proposed motion to disqualify to be governed by its March 9 order. Accordingly, we do not request briefing, oral argument or a reference to the Magistrate of this motion. We simply request that the Court dispose of it promptly so that there will be a clear record of the extent of our request for disqualification for any possible appellate review.

As more fully discussed in the attached motion, we recently became aware of a transcript of a debate in the Spanish Parliament held on February 14, 2001 concerning the European Community case before this Court. In the debate, the General Director of the State agency for tax administration describes publicly the terms of the retainer agreement between the European Community and the U.S. lawyers for the EC. According to our reading of the transcript, the General Director discloses that if the plaintiff's attorneys are successful, they not only will collect a fee representing a percentage of the damages awarded and reimbursement of expenses, but also will collect 12.5% of the increase in future taxes resulting from anticipated enhanced tax collection processes. (We are attaching to our motion the original Spanish transcript and a certified English translation of the Spanish Parliament testimony.) In our view, assuming that the Spanish transcript contains an accurate report of the retainer agreement, which we have not seen, the

plaintiff's attorneys have acquired a financial interest in this case by extracting a promise for a percentage of future governmental revenues. We believe that such a fee provision violates New York DR 5-103, which prohibits acquiring an interest in litigation.

We are raising this issue for the first time now because we have not had access to the EC retainer agreement, despite our numerous requests. Furthermore, plaintiff's counsel failed to give any indication, when asked by the Court about the EC agreement, that it contained these provisions. It also appears from the Parliamentary account that the EC retainer agreement includes one of the key provisions challenged in the Colombian matter, *i.e.*, the provision that there is no obligation by the client to reimburse the attorneys' costs and expenses in the event that there is no recovery in the action. We had understood Mr. Malone to advise the Court that none of the provisions challenged in the Colombian agreements was contained in the EC retainer agreement. (11/27/00 Tr. at 21.)

As the Court will recall, this colloquy occurred because the Court asked the defendants whether our motion to disqualify in the Colombian case extended to the EC case. (11/27/00 Tr. at 20.) At that time, we said that we were unable to answer that question until we had seen the terms of the EC agreement. (*Id.* at 21-22.) While we still have not seen the agreement, based on the official Spanish report to its Parliament, we believe we have enough information to answer the Court's question to the effect that our motion extends to the EC case.

In light of the fact that one of the Member States – a nonparty to the retainer agreement – has publicly disclosed its contents, we can see no conceivable continued justification for the EC's refusal to disclose the entire agreement to the defendants. Obviously, our ability to set forth all of our objections to it is significantly impaired by our lack of access to it. We urge the Court to reconsider its ruling on that disclosure issue in light of these developments.

Thank you for your attention to this matter.

Respectfully submitted,

/s/ Irvin B. Nathan

Irvin B. Nathan
Counsel for Philip Morris Companies Defendants

Enclosure
cc: All Counsel of Record