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A LAW CORPORATION*

December 8, 1999

Steven Guttman, Esq.
 1132 Bishop Street, Suite 1404
 Honolulu, Hawaii 96813

Re: *Harmon v. Federal Insurance Company, et. al.*,
 Civil No. CV99-00304 DAE,
 U.S. District Court, District of Hawaii

Dear Mr. Guttman:

With the Settlement Conference in the above-referenced case approaching, and because of your recent involvement in the case, I wanted to convey to you, for your consideration, P & C Insurance Company's position concerning Plaintiff's claims asserted and attempted to be asserted against it. For your review, I have enclosed a copy of Bobby Harmon's Counterclaim (which was part of his Answer to Verified Complaint in *P & C Insurance, et. al. v. Harmon*, Civil No. 97-0512-02 in the First Circuit Court, State of Hawaii) filed on 2/18/97 and the Order Granting Plaintiffs' Motion for Summary Judgment on Harmon's Counterclaim filed on 3/31/99 in the underlying state court action. I assumed that you either had or had access to the Complaint filed by Harmon in federal court, which I have not reproduced for you because of its length, especially with the Exhibits.

It is P & C's position that the claims asserted by Harmon in the pending federal court action are subject to a motion to dismiss and/or motion for summary judgment. Generally, as it can be ascertained and understood, the claims set forth in Harmon's Complaint either duplicate claims brought by him in the underlying state court action, which were subject of a summary judgment against him, or were of a nature for which he lacks standing to bring against P & C and the other named Defendants. There are other viable defenses available to P & C, which could be asserted by KSBE and the individual Defendants, and while touching on some of them, I will not exhaustingly explain them in this letter.

Complaint. Harmon's original Complaint filed on 4/27/99 and subsequently served on P & C is voluminous and somewhat confusing. However, as best as I can ascertain, there are certain broad categories of claims asserted in it:

- RICO violations
- KSBE Trustee misconduct claims

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- Insurance "bad faith" claims
- Wrongful termination claims

There may be other specific allegations or asserted "causes of action" within the Complaint, but in reading the pleading as a whole, the allegations or causes of action appear to fall within at least one of the above-referenced categories.

At the outset, it is noted that Defendants Federal Insurance Company, Inc.; Marsh & McLennan Companies, Inc.; Pricewaterhousecoopers, LLP; John Mullen & Co., Inc.; and Torkildson Katz Fonseca Jaffe Moore & Hetherington were dismissed from the case per Judge Ezra's 8/9/99 Order. The remaining Defendants are P & C, the former Trustees of KSBE, Nathan Aipa, Louanne Kam, Rodney Park, William S. Richardson, Gilbert Tam, and Peter Lowe. Of the remaining Defendants, only P & C was served with the Complaint and Summons.

As demonstrated by Magistrate Judge Barry Kurren's denial of Harmon's Motion to Amend in this case, the claims asserting RICO violations and KSBE Trustee misconduct will not get past a motion to dismiss pursuant to Rule 12 FRCP. When Harmon attempted to amend his Complaint by asserting those types of claims, Magistrate Judge Kurren denied the attempt, noting in his Order that, among other things, Plaintiff lacked standing to bring such claims against P & C (and undoubtedly, the other remaining Defendants, too). Usually, under Rule 15 FRCP, motions to amend are freely granted. Arguably, to have such a motion denied means that there were very serious deficiencies with the proposed amended allegations and claims.

RICO claims. Plaintiff must have sustained an actual injury to have standing to file and prosecute RICO claims. *Imagineering, Inc. v. Kiewit Pacific Company*, 976 F.2d 1303, 1310 (9th Cir. 1992) (plaintiff has standing to prosecute a RICO claim only when he has sustained an actual injury to business or property); *Pharmacare v. Caremark*, 965 F. Supp. 1411, 1420-1421 (D. Haw. 1996). Standing to sue is an essential element for his RICO claims because RICO "does not expand to provide 'a federal cause of action and treble damages to every tort plaintiff.'" *Lui Ciro, Inc. v. Ciro, Inc.*, 895 F.Supp. 1365, 1379 (D. Haw. 1995).

Plaintiff lacks the standing to bring the RICO violation claims because he has not personally sustained an actual injury as a proximate result of the alleged misconduct. In addition, there were no allegations that the alleged wrongful acts by the former Trustees of KSBE and others relate to his termination of employment.

In addition, proximate cause is an essential element of a RICO claim because damages under RICO are only recoverable when there is a proximate cause between the alleged misconduct and a plaintiff's damages. *Imagineering, Inc. v. Kiewit Pacific Company*, 976 F.2d at 1311. A proximate cause relationship exists only when there is "a direct relationship between the injury asserted and the injurious conduct alleged." *Id.* at 1311 (Quoting from *Holmes v. Securities Investor Protection Corp.*, 503 U. S. 258 (1992)).

The Ninth Circuit has stated that "a plaintiff seeking civil damages for a violation of [18 U.S.C.] §1962(a) must allege facts tending to show that he or she was injured by the use or investment of racketeering income" as opposed to showing that he or she was injured by the racketeering activity itself. *Nugget Hydroelectric, L. P. v. Pacific Gas and Electric Company*, 981 F.2d 429, 437 (9th Cir., 1992), *cert. den.* 113 S.Ct. 2336 (1993), *see also Neal v. Computer Career Institute, Inc.*, RICO Bus. Disp. Guide 8461, 1993 WL 508964 (9th Cir., 1993), *Schwartz v. The Upper Deck Company*, 956 F.Supp. 1552 (S.D.Ca., 1997).

To assert a §1962(b) claim, Harmon has to show that he was injured by reason of P & C acquiring or maintaining some interest or control in an enterprise. *See U.S. Concord, Inc. v. Harris Graphics Corporation*, 757 F.Supp. 1053, 1060 (N.D.Ca., 1991), *Schwartz v. The Upper Deck Company, supra.* at 1559. Harmon's allegation that P & C and other Defendants conspired to maintain and acquire markets in the insurance industry does not set forth a viable §1962(b) RICO claim. "Market share" and the "right to a level playing field" are not cognizable property rights under RICO. *Lancaster Community Hospital v. Antelope Valley Hospital*, 940 F.2d 397, 405 (9th Cir., 1991), *cert. den.* 502 U.S. 1094 (1992).

Trustee misconduct. Regarding the allegations relating to Trustee misconduct, Harmon lacks standing to assert claims against KSBE or P & C because he has not adequately asserted that he has a personal stake, actual injury, or damages resulting from the alleged misconduct. Harmon is not a beneficiary of KSBE; he does not have the status of the Office of the Attorney General to sue on behalf of the beneficiaries; and he does not have a legally protected interest with respect to alleged Trustee misconduct.

Insurance claims. The insurance "bad faith" claims were not premised on the insurance policy issued by P & C to KSBE. In fact, the claims for breach of contract, violation of insurance laws (§431:13-103 H.R.S.), fraud and bad faith, as asserted in the Complaint, pertained to the insurance policy issued by Federal Insurance Company. *See* Harmon's Complaint, IX. CAUSES OF ACTION at 191-200. Harmon claimed that *Federal* should have provided insurance coverage for him with respect to the defense of the underlying state court action, and that the denial of coverage *by Federal* was due, in part, to an endorsement containing an "insured vs. insured" exclusion that allegedly was "back dated." Certainly, P & C and KSBE cannot be held legally (or factually) responsible for the actions or coverage decisions made by Federal Insurance. For example, there cannot be a breach of contract (relating to the Federal insurance contract) claim against P & C and KSBE because they did not issue the Federal insurance contract. Of course, there is no private cause of action for an alleged violation of Chapter 431 H.R.S. (Hawaii's insurance laws). *See* §431:13-107 H.R.S. ("All remedies, penalties and proceedings set forth in this article are to be invoked solely and exclusively by the commissioner."), *Hunt v. First Insurance Co.*, 82 Haw. 363 (S.Ct., 1996).

Wrongful termination claim. Harmon's wrongful termination claims and all the derivative claims are subject to the doctrine of res judicata given the disposition of his Counterclaim in the underlying state court action. Res judicata will bar relitigation where (1) the

issue decided in the prior adjudication is identical with the one presented in the action in question, (2) there was a final judgment on the merits, and (3) the party against whom res judicata is asserted was a party or in privity with a party to the prior adjudication. *Citizens For The Protection Of The North Kohala Co. v. County of Hawaii*, 91 Haw. 94, 979 P.2d 1120 (S. Ct. 1999), citing *Dorrance v. Lee*, 90 Haw. 143, 149, 976 P.2d 904, 909 (1999) (citing *Foytik v. Chandler*, 88 Haw. 307, 315, 966 P.2d 619, 627 (1998)).

The Counterclaim in the underlying state court action set forth claims of wrongful termination; violation of the Hawaii Whistleblowers Act; breach of contract (relating to the wrongful termination), violation of Chapter 480 (relating to the wrongful termination), and negligent and/or intentional infliction of emotional distress. See Harmon's Counterclaim. As evidenced by the enclosed Order, summary judgment was granted against Harmon and in favor of P & C and KSBE with respect to his Counterclaim. Thus, there has been a prior adjudication on issues/claims identical to the ones brought again by Harmon in the federal court action.

Pleading problems. In addition to the foregoing, Harmon's Complaint is subject to dismissal because of the inadequate manner in which he pled his allegations and causes of action. Both the Federal Rules of Civil Procedure and the Local Rules of the District Court, District of Hawaii require a plain and concise pleading. Certainly, the courts provide leeway for litigants to set forth their allegations and claims. Magistrate Judge Kurren's Order denying Harmon's Motion to Amend is significant to the extent he noted the improper and unacceptable pleading by Harmon of the proposed Amended Complaint, which was a smaller version of the Complaint. If the proposed Amended Complaint failed to pass the pleading requirements, you can imagine how the Complaint fares under the requirements.

The proposed Amended Complaint that was rejected by the Court narrowed the allegations and causes of action. Essentially, it plead claims based on RICO violations and Trustee misconduct. Continued efforts to pursue those claims will meet with the same result, and if he tries to reallege his wrongful termination and/or whistleblower claims, he will run into the defenses referenced in this letter, e.g., statute of limitations, res judicata doctrine, etc.

Statute of limitations. There also is a viable statute of limitations defense. To the extent claims accrued as of the time Harmon was terminated in 1996, if not before, and his Complaint in the federal court was filed in 4/99, claims tied to a two year statute of limitations would be time barred. Without considering the res judicata doctrine, Harmon's emotional distress claims and Whistleblower's claim are time barred.

From P & C's perspective, Harmon's federal court suit is fraught with problems adverse to him. There are sizeable legal hurdles for him, making the suit one of dubious value. As indicated, this letter has not set forth all of the defenses available to P & C and/or the other Defendants. However, the defenses and points noted are formidable enough to show the futility in proceeding further with the prosecution of the lawsuit.

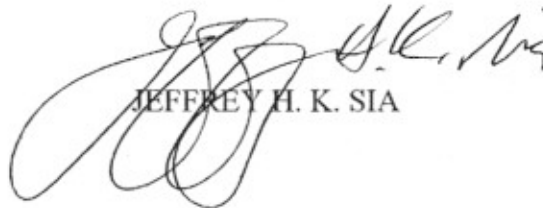
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Please contact me if you have any questions about these matters, or if there is any other information that you need in considering the claims and a settlement position. Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read "J.H.K. Sia", is written over the typed name. The signature is stylized and somewhat cursive.

JEFFREY H. K. SIA

Enclosures

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