GENERAL COUNSEL
A PROFESSIONAL CORPORATION

LOS ANGELES OFFICE
333 South Grand Avenue, 25th Floor
Los Angeles, California 90017
Telephone: (213) 233-9450
Facsimile: (213) 233-9451

ORANGE COUNTY OFFICE
620 Newport Center Drive, Suite 1100
Newport Beach, California 92660
Telephone: (949) 892-1080
Facsimile: (949) 892-1081

SAN DIEGO OFFICE
501 West Broadway, Suite 800
San Diego, California 92101
Telephone: (619) 727-5320
Facsimile: (619) 727-5321

WWW.GENERALCOUNSELPC.COM

REPLY TO: LOS ANGELES OFFICE

VIA eMAIL: client@clientemail.com

12 July 2008

Mr. John Doe, President
Client Company, Inc.
12345 Main Street
Anytown, California 90000

Re: CCCCCC v. NNNNNNNN
Our File No.: ABCD.122101.01

Dear Mr. Doe:

Please allow this letter to briefly update you on the status of this matter.

The short version is that nothing much has happened so far with the exception of new developments on the arbitration front. In sum, based on the status of the documents received to date and the lack of tangible benefit to be gained from moving to compel arbitration, we believe that the better course of action is to simply follow a regular litigation path with this matter.

Discovery

We propounded a full set of initial discovery to plaintiff sixty days ago. However, plaintiff's counsel and I stipulated to a 30-day continuance of this discovery so as to give us sufficient time to (1) gather the documents from the insured and (2) reach a decision concerning the merits of arbitration. In the interim, both of these goals have been accomplished (discussed below). Discovery is now due to be received from plaintiff next week. Our responses to plaintiff's discovery are due at the same time. Of course, upon receipt of these documents and responses, we will be able to further analyze this matter and provide you with a more in-depth report.

Insured's Documents

JJJJJJJJ has provided us with a banker's box worth of documents. For the most part, they are largely irrelevant, consisting of meeting minutes of the corporation or printouts of computer code (a sample page looks something like "090967465 767645 767 3449089 878354" repeated over and over again).

However, there are several documents which are of interest. Chronologically, these are:

1. September 16, 2006 Contract
2. October 7, 2006 Proposal
3. October 10, 2006 Proposal
4. October 13, 2006 Fax Coversheet
5. October 14, 2006 Contract
6. January 31, 2007 Analysis

Documents 1 and 2 (the initial contract and proposal) go together as a set, as do documents 3, 4 and 5 (the revised proposal and contract, along with the fax coversheet referring to them). Document 6 is NNNNNN's final report to CCCCCC and is the document in which CCCCCC claims NNNNNN gave the mistaken advice.

The two contracts are the key documents. They are fairly unremarkable, with three exceptions. First, both provide for mandatory, binding arbitration to resolve disputes. Secondly, both provide for a damages cap excluding "special and consequential" damages or, alternatively, for liquidated damages of $1,000.00. Finally, neither of them are signed. This last factor, of course, presents the most significant obstacle.

Mr. RRRR is in the process of searching through NNNNNN's records to determine if he can find a signed copy, but has told us that he believes it may have been thrown out in their recent move. Assuming that signed contracts are not found, we are then in the unenviable position of trying to infer that the unsigned contracts do indeed embody the agreement between CCCCCC and NNNNNN.

Enforceability of Unsigned Contract

While it is not impossible to infer the existence of a contract based on the performance of the parties, it is, of course, difficult. In essence, California law holds that we must establish an oral contract, which was immediately binding on the parties, and that the written contract accurately reflects the terms of that oral contract. Harper v. Goldschmidt (1909) 156 Cal. 245; Columbia Pictures Corp. v. DeToth (1948) 87 Cal.App.2d 620; Skirball v. RKO Radio Pictures, Inc. (1955) 134 Cal.App.2d 843; Schwartz v. Shapiro (1964) 229 Cal.App.2d 238; Arya Group v. Cher (2000) 77 Cal.App.4th 610. The problem with this argument is that CCCCCC's best (and frankly quite persuasive) argument against this is to claim that while the oral agreement did indeed include such essential terms as the scope of work and the conditions of payment, there was no "meeting of the minds" as to "peripheral" issues such as the arbitration or damages limitation clauses. Banner Entertainment, Inc. v. Superior Court (1998) 62 Cal.App.4th 348.

Arbitration vs. Litigation

Given these facts, we assess the chances of successfully moving to compel arbitration at slightly less than 50%. This, combined with the fact that the "benefits" of arbitration do not really outweigh those of litigation (particularly the loss of the right of appeal), leads us to conclude that attempting to move to compel arbitration is not the best course of action. As such, we recommend simply moving past this issue and continue with the active litigation of this case.

Damages Limitation

The chances of the contractual damages limitation clause being upheld is, of course, also dependant from a preliminary standpoint on a finding that the contract itself is valid, which relates back to the initial discussion above regarding issues of proof of the oral contract.

Assuming, *arguendo*, that the contract's existence is proven, then the issue becomes whether the damages limitation provision will be upheld. California Civil Code section 1671 provides that liquidated damages provisions are valid and enforceable. However, in order to be enforced, a liquidated damages provision must bear some relation to the actual damages of the aggrieved party; a mere recitation that damages are difficult to determine is insufficient. Vernon v. Southern California Edison Co. (1961) 191 Cal.App.2d 378. In contrast, a damages limitation clause has no such requirement. Wheeler v. Oppenheimer (1956) 140 Cal.App.2d 497.

Obviously, the better argument to make is that the clause contained in this contract is for damages limitation, rather than liquidated damages. However, the language of the clause makes this complicated, as it states:

> In no event shall Consultant be liable for special or consequential damages, either in contract or tort, and in the event that this limitation of damages is held unenforceable then the parties agree that by reason of the difficulty in foreseeing possible damages all liability to [CCCCCC] shall be limited to … $1,000.00 as liquidated damages and not as a penalty.

Here, there are two clauses spliced together. The first provides for a damages limitation, barring "special or consequential" damages. Conceivably then, this would limit the damages in this matter to the money received by NNNNNN from CCCCCC on an unjust enrichment theory. This would be approximately $24,000.00 - $30,000.00, depending on which option CCCCCC elected from NNNNNN's contract (we will know the answer to this question upon receipt of CCCCCC's documents and discovery responses). This damages limitation does not require that the damages be difficult to ascertain and is thus somewhat simpler to enforce. Wheeler, supra.

In the event that this portion of the contract is held unenforceable then the fallback provision would be the liquidated damages portion, limiting the claim here to $1,000.00. Of course, this portion does require that the limitation be somewhat related to the actual damages. Vernon, supra. As CCCCCC is at least claiming over $1 million, this may be difficult to prove.

As stated, all of this analysis is dependant on the initial hurdle being overcome, and convincing a court that the terms contained in the written contract should be entertained, notwithstanding the lack of signatures thereto.

I hope that this letter has been helpful in bringing you up to date on the latest developments in this case; as soon as we have received and analyzed plaintiff's responses to discovery, we will report to you again (most likely in the next two to three weeks). In the mean time, should you have any questions or comments, please feel free to contact me at your convenience. I look forward to speaking with you soon.

Best Regards,

John A. Safyurtlu
General Counsel