



March 26, 2009

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The Honorable Donovan W. Frank
United States District Court
724 Federal Building
316 N. Robert Street
St. Paul, MN 55101

VIA MESSENGER & CM/ECF

RE: *State of Minnesota, et al. v. CMI of Kentucky, Inc.*
File No. 08-CV-603 (DWF/AJB)

Dear Judge Frank:

This firm represents Defendant CMI of Kentucky, Inc. ("CMI") in the above referenced matter. We write in response to Plaintiff State of Minnesota's letter to the Court of today's date. The State requests that the Court defer its decision on CMI's Motion to Dismiss Plaintiff-Intervenor Jacobsen, which has been under advisement for the past month. CMI opposes the State's request.

CMI served all parties with its Notice of Motion and Motion to Dismiss Mr. Jacobsen's claims on November 26, 2008. CMI thereafter served all parties with its Memorandum of Law in Support of Motion to Dismiss on January 6, 2009. Responsive briefs in opposition were due on February 6, 2009. Four days before its response in opposition was due, the State expressly advised the Court and counsel that it would not be participating in the Motion to Dismiss. (E-mail of E. Gratz to Gina Olson and counsel, dated Feb. 2, 2009, attached as Exhibit 1.) The State did not file a brief in opposition to CMI's Motion.

Notwithstanding the foregoing, two days before the hearing, the State reversed course, announcing its intent to appear and argue at the hearing. (E-mail of E. Gratz to Gina Olson and counsel, dated February 25, 2009, attached hereto as Exhibit 2.) Over CMI's objection, the State was permitted to argue in opposition to CMI's Motion. At the conclusion of the hearing, the Court took the matter under advisement and noted that a ruling would issue within approximately thirty days.

Apparently regretting its earlier decision not to brief the issues raised in CMI's Motion to Dismiss Mr. Jacobsen, the State now asks the Court to defer its ruling so that the State can submit the brief it purposely waived last February. The State asserts in its letter to the Court that "issues pertinent to the cross-motions substantially overlap with issues raised in CMI's pending

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motion regarding Intervenor Jacobsen.” That may be so, but it is no more true today than it was when the State opted not to brief the Motion to Dismiss.

As noted above, the State had more than ample notice of CMI’s Motion and it was served with CMI’s Memorandum of Law. To the extent the Motion implicated any of the State’s claims, it had every opportunity to file an opposition brief. What ever its reasons, the State chose not to file a brief. It also had an opportunity to argue in opposition, notwithstanding its failure to brief the issues.

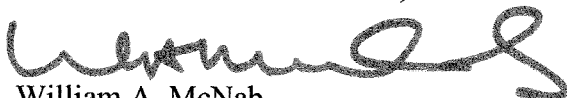
Importantly, this is not a motion that somehow “fell through the cracks.” The State acknowledged the Motion and affirmatively expressed its intent not to participate. Then, after choosing not to file a brief and telling the Court and parties it was not going to participate, the State did participate at oral argument. Therefore, the State has been heard on the issues.

This Court subsequently held a joint status conference with Magistrate Judge Boylan and the parties on March 4, 2009. At that time, both CMI and the State indicated their intent to file dispositive motions in accordance with the existing scheduling order. The State said nothing about a deferral of the Court’s ruling on the pending Motion against Mr. Jacobsen. Even after the Court mentioned the Motion that is under advisement and reiterated that an order would be forthcoming, the State still said nothing about a deferred ruling. Now, after it expressly waived its right to brief the Motion, after it nonetheless argued the Motion, and after the Motion has been under advisement for a full month, the State asks the Court to withhold its ruling so that it can attempt to brief the issue in its proposed Motion for Summary Judgment.

The issues before the Court on CMI’s Motion to Dismiss Mr. Jacobsen’s claim have been fully briefed and argued. CMI respectfully asks the Court to deny the State’s request, and issue its ruling on CMI’s Motion to Dismiss Plaintiff-Intervenor Jacobsen in the ordinary course. Thank you.

Very truly yours,

WINTHROP & WEINSTINE, P.A.



William A. McNab

Enclosures

cc: Alan Gilbert, Esq.
Emerald Gratz, Esq.
Charles Ramsay, Esq.
John Gores, Esq.
David Aafedt, Esq.

McNab, William

From: Gratz, Emerald [Emerald.Gratz@state.mn.us]
Sent: Monday, February 02, 2009 2:18 PM
To: Gina_Olsen@mnd.uscourts.gov; charles@ramsayresults.com; dan@ramsayresults.com; Aafedt, David; Emerald.Gratz@state.mn.us; Jeffrey.Lebowski@state.mn.us; gojnj@msn.com; gojnj@comcast.net; McNab, William; Magiera, Linda; Karich, Jessica; Nettleton Gwen; kimberly@ramsayresults.com; shelley@ramsayresults.com
Subject: RE: State of Minnesota v. CMI, Civil No. 08-603 (DWF/AJB)

Gina -

Thank you for the information. Counsel for the State will not be attending the motion hearing on February 27, 2009, since Defendant CMI's Motion to Dismiss Plaintiff-Intervenor Christopher Jacobsen relies on the third-party beneficiary contract claim in the Amended Complaint and does not involve any of the State's claims.

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445 Minnesota Street
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-----Original Message-----

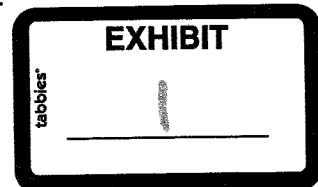
From: Gina_Olsen@mnd.uscourts.gov [mailto:Gina_Olsen@mnd.uscourts.gov]
Sent: Monday, February 02, 2009 2:12 PM
To: charles@ramsayresults.com; dan@ramsayresults.com; daafedt@winthrop.com; Emerald.Gratz@state.mn.us; Jeffrey.Lebowski@state.mn.us; gojnj@msn.com; gojnj@comcast.net; wmcnab@winthrop.com; lmagiera@winthrop.com; jkarich@winthrop.com; gnettleton@winthrop.com; kimberly@ramsayresults.com; shelley@ramsayresults.com
Subject: State of Minnesota v. CMI, Civil No. 08-603 (DWF/AJB)

Counsel

I have filed an amended notice of hearing on motion for the Friday, February 27, 2009, 8:30 AM hearing at Hamline University School of Law. Counsel attending the hearing should park in the visitor parking lot located in the White House lot on Hewitt Avenue at Pascal Street. Visitor parking is enforced Monday-Friday, 8 a.m. - 4 p.m. Visitor parking is enforced as signage indicates. A map is attached for your convenience. Driving directions can be found at <http://law.hamline.edu/directions>.

(See attached file: Hamline Law Campus Map.pdf)

Gina Olsen
Calendar Clerk to Judge Donovan W. Frank
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*

McNab, William

From: Gratz, Emerald [Emerald.Gratz@state.mn.us]
Sent: Wednesday, February 25, 2009 1:31 PM
To: Gina_Olsen@mnd.uscourts.gov
Cc: McNab, William; gojnj@msn.com; Aafedt, David
Subject: RE: State of Minnesota v. CMI, Civil No. 08-603 (DWF/AJB)

Gina -

Contrary to my previous email, the State will appear at the motion hearing on Friday, February 27, 2009, at 8:30 a.m. at the Hamline University School of Law. Upon review of the written arguments submitted for the motion, the State will be appearing in support of the Plaintiff-Intervenors' position.

Thanks,

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Emerald.Gratz@state.mn.us

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