11/23/72

Dear Mrs. Clapp,

Your letter of the 21st did not reach me until after 10 p.m. last night, by accident. I got to read it at about 11. It was quite some time before I could fall asleep and what sleep I had was short. Quite frankly, I am perplexed, more than I was. I solicited your candor about what perplexes me, and that is not what I find in your letter.

You open saying you don't have time "to respond to the charges and arguments" you allege to me. The only thing in my letter I would consider a "charge" was in response to your belief that any jury we could get would be dominated by federal employees from whom, presumeably, you think we could not get a fair shake. I told you I have copies of federal surveillance on me, a gross impropriety that could be taken as a charge, and am not easily intimidated. Once you began to represent us, it became improper for us to have any contact with the federal attorney. There was information I had asked of him when I was pro se that you repeatedly said you would get. I refer to the fact that you have not. Perhaps you take this as a charge. I refer to the fact that the Group Health records you got, whether or not they are exactly what you asked for, are incomplete and that four months ago you agreed you require all of them and would ask for all of them. You have not told me that you have either asked for or gotten our complete records. Those you have do not even cover the period for which we allege damage. Perhaps you refer to this as a charge. These are among the things indispensible for the preparation of a case, even for negotiating a settlement, that you do not have and that without your help I can't get for you. I have written you often about them and more.

What you describe as clarification strikes me more as the making of some kind of record. These things are set forth in seven numbered paragraphs.

In 1. you say you have "strongly advised" that we accept the government's offer of $5,000, also referred to in 5. explicitly and inherently in 6. You have so advised. What you have not done is to tell me that were we to consider this "offer" seriously, how much of it would be <u>net</u>. It is not, in fact, an "offer" to compensate us for the damages caused us and it does not, in fact, begin to cover our costs in attempting to litigate. We discussed a settlement with you. I then told you what I had told Davis, that I see no justice in making up a figure. You have not in a year addressed proof of loss. My wife and I talked this over in your presence and we told you the least we would accept is a <u>net</u> that would get us out of debt. Now for the <u>third</u> time you are asking me to settle for less than nothing, for less than it has cost us to try to get either a settlement or the case in court. You do this without having ever had any real discussion of evidence with us except in response to the government's interrogatories or having told me what to prepare for you by way of evidence of proof of loss. I addressed this one way in my letter and you designate it an argument. This was not by any means a complete representation, it related only to egg production and that only in part, but I believe it is a serious and tendable proof. It is our income-tax records and we have had a full-field Internal Revenue audit. Believe me, it was a very careful one, extending over a long period of time and for which we made all of our records available. Internal Revenue was satisfied. If these alone do not show a loss of 100% compared with the previous year, if that 100% is not <u>net</u> and about $15,000 a year, or if there is any deficiency in the tabulation I prepared for Taft and you have, you have yet to indicate it. Nor have you asked me to substantiate the tabulation or to prepare a defense of it against what you would expect to be the government's attempted refutation. On this basis alone, can you wonder that I am perplexed? You do say in 5. that you wonder about proof, but you have never gone over this with me, have never given me a list of what you want for proof, and I think you have never asked me what I would consider such proof. As of the time all of this began, I had a number of experts lined up. Whether or not they are today available. Thanks to my lawyers, 10 years have lapsed. Without them I have what I would regard as proof, and I am not aware of any successful refutation probable, although I can anticipate some of what might be attempted, such as flock sickness. To this there is what I believe is definitive answer: we had healthyflocks, with considerably less than normal health problems and no epidemics or anything of that nature.

In 2. you say I have a right to refuse the "offer" and to go to trial. We refused any such "offer" in advance, twice since it was made, and have been wanting to go to trial in the very long period since you agreed to represent us. I am not aware of any preparations for trial that you have made. Therefore, I do not believe we are prepared to go to trial.

3. "elates to our right to have a jury. Like our previous lawyers, you have never discussed this. In writing you have made the one reference cited above. Frankly, I do not know which would be better for us. I assumed from John Silard's decision in the first case that a jury was not, as I did from what you wrote. I do have considerable respect for Judge Thomsen and consider that the nasty cracks he made about me were justified not by me or my testimony but by the total lack of preparation of the case. The income-tax business is but one example. Silard interviewed no single witness before trial and I learned the phrase "proof of loss" for the first time on the witness stand. I would expect the same thing to happen were you also not to prepare the case, and with worse consequences. You carry this further in 4., where you describe as "a very unwise decision" one we have not made and you have not asked us to. All I have ever done is attempt to respond to you comment about federal domination of the jury, in effect that we would have to take our chances. If the jury "did not understand the issues in the case", that would be the fault of the lawyer and the preparation because the "issue", according to the judge himself, is already decided and the sole question is proving the alleged damages. You have no legal complexities beyond the understanding of the average person. That has already been ruled upon. The judge told Davis this in my presence. Without that, I would think it is obvious.

5., which I have partly addressed above and which also overlaps into 6., is inadequate. Aside from complete disagreement with your representation, I note that you have restricted yourself, here and elsewhere, to "economic losses". There is much that relates to this for which you have never asked and some that you declined when I suggested that you take it. As you refer to the overflights, there are the extensive logs, also contemporaneously furnished to the government, records of phone calls to the government about the overflights at the moment they occurred, correspondence from the Defense Department that actually says the helicopters were routed over our farm by accident, and the passing of several regulation to prevent them, one printed in the manuals and in our possession. Can a layman be more than perplexed, can he expect there could be better proof that admission and regulation to end the trespasses? And there are many other things, including a long series of sworn statements. There remains what could be learned by what you have not addressed while you talk of going to court, what you could learn on this by interrogatories. I have discussed this with you.

In 6(a) you ignore what I regard as very serious. The base year in all of this is one in which our business was ruined by these overflights and the fact is legal fact. We won the case. So, the base year for income begins with an inordinately low figure. However, my wife prepared for you a statement of our income from our books. Comparing it with this year in which we were already extensively damaged, the net loss is $15,000 per year thereafter. This is a net figure because all the costs were already taken care of. And it is in comparison with a year of reduced income because of damage the judge has already ruled on. I have considerable difficulty seeing how this is not more than merely credible evidence. I see no reasonable refutation. There cannot even be the allegation that we had no market, for these figures show extensive purchases to attempt to hold the market we already had. And I don't think there are many farmers who can show the international reputation we had, whose produce were part of their country's foreign policy, who have fan mail from the White House, who had won the prizes we won, whose eggs at a dollar a dozen were carried to New York weekly for the President of the United Nations General Assembly or an infinite list of such things, not forgetting cover stories about us in the trade press. (b) is grossly in error. You have a tabulation that I believe comes to about $35,000. I dare not now ask my wife to get it. The income records referred to above are a total refutation. Your saying it and drawing the conclusions that $5,000 "is a fair settlement" leaves me quite bewildered.

I am likewise bewildered at your drawing conclusions without serious exploration of proof of loss. If there is evidence you want, you haven't told me what it is. You spent

some time discussing the value of the business by traditional means the one time you were here, in connection with the government's interrogatories.

Q. refers to a xerox of testimony by Mrs. Jane Giffen Maxwell in an EPA proceeding. In it she details what perfectly coincides with what happened to my wife but not to all of what happened to my wife. It will find exact duplication in the records you have never seen or asked for, although I told you about them, my contemporaneous notes of these things made beginning after the lessons I learned in the first case. The volume of EPA hearings in which it is contained was mailed to me long ago but had not reached me. That xerox was made from the EPA file copy. I held onto it long enough to show to a psychologist. It was mailed here in Frederick two weeks ago yesterday. I will undertake to get another xerox for you, as I will to get another copy of that complete volume. As I told you, I have been collecting such studies and proceedings. Without exception, what I have is at least consistent. I do have the EPA's official proceedings titled "Vol.VII - Physiological and Psychological Effects", hearings on noise, more than 350 printed pages of expert testimony. I began to go over it yesterday to extract information from it for your information. I have not gotten far into it but have noted countless expert opinions that are exactly what I told you. I give you a simple illustration of what I think you can use to establish damage. The witness is a doctor and an expert in the field."...the psychological effects can be extremely important when they contribute to anxiety or emotional problems of one kind or another..."(pp. 248-9) and "can cause anxiety and many would conceive that anxiety of a chronic sort is the first step to certain types of mental illness."(p. 250). You are aware that such a diagnosis was made of both of us, in neither case until long after the overflights began. I do not offer this as the living end, but I do think it is enough to show you probability. More you cannot know until you do what you have not done, get into this. You asked me to do this kind of thing. I can understand that you do not have the time to locate expert witnesses or to do all the research necessary. Thus I am also marking up what I get and read, to save you time.

After sending you Mrs. Maxwell's testimony I got in touch with her. Mrs. Maxwell was subjected to noise below the level considered intolerable. She has sent me a copy of her doctor's letter to her lawyer, dated October 16,1972. In it the doctor said he had read the psychiatrist's report and "I completely concur...that Mrs. Maxwell has a severe psychoneurosis related to noise factors...permanently disabled. I have seen this patient's mental condition deteriorate to the point where I now consider her to be dangerously depressed; I must emphasize 'dangerously depressed'." (Emphasis in original). For all their faults and incompleteness, this parallels the CHA records, incomplete as those you have are. As a matter of fact, if you were to credit the diagnoses in the record you have, you have a medical case in the absence of any other cause to which they can be attributed and in the presence of the diagnosis of "phobic to aviation". They are attributable tho this cause. The testimony cited above says they are predictable consequences. But you have not looked into this, have had no evaluation of us made independently, don't even have our complete medical records that are available on request, and have failed to respond to my many inquiries. Thus if I can arrange an evaluation, you lack the most elemental information any expert would require, and you have foreclosed me from providing you with an expert evaluation or an expert witness. Simultaneously you complete ignore medical damages, making no reference to them, while assuring me that if we were to have as a net settlement a figure that does not equal our cost in attempting to litigate,"I think this is a fair settlement."

We do have serious emotional troubles as a consequence of this, as I have told you earlier and as you would know is inevitable if you had made any inquiry at all. I can keep at this kind of thing only so long without reacting. Therefore, I will read the enclosed copy of the government's answers to interrogatories filed six and a half years ago and sent you five weeks before you sent them to me as soon as I feel up to it. I have a carbon of Taft's interrogatories headed "Part I" and presume these are the questions. Without reading them I am without doubt about your comment about them.

You conclude by bracketing two things I regard as entirely unrelated,"If you wish I will tell Mr. Davis that you reject his offer and would like to put this in for trial immediately." Our rejection should by now be clear enough. But what is not clear is that you are ready for trial. I certainly do not want to go to court again without adequate

preparation. Not only have we never discussed the presentation of the case or have you told me the proofs you want prepared, even the beginning of the preparation of the medical part remains impossible after all this time and all the letters I have written. In the preceeding paragraph you acknowledge the need for further interrogatories. Until they are prepared, filed and responded to, I do not see how we can begin to have a date for trial. Moreover, as you know, the one time of the year we have any income is at hand. My wife is now taking refresher course to update her on tax law. In a little more than a month she will be working until after April 15 and as you may remember, she will then be utterly exhausted. On all counts "immediately" is impossible.

You have nevertold me of the offer of help from the Environmental Defense Fund. They phoned you three weeks ago today. They also asked copies of certain things of me. I do not have them. One is the complaint Taft filed. In the course of trying to locate in my files what they asked of me, I find that I have in excess of two full file drawers of files I have collected for this purpose. I have no way of knowing what you would consider relevant. If I had not considered them relevant I would not have gone to this enormous effort. This is aside from the Taft file through which you only skimmed, aside from the suitcase full of records I laid aside after my first conference with the federal attorneys, aside from the records of the first trial, which I do not have (not even the decision) because Allard never gave them to me, aside from the thousands of pictures I have. If you have evolved a theory of the case, it is unknown to me. So, I don't know what you consider that you have to prove or in what detail, how much you will rely on the precedent and things like that. I am aware that merely reading takes time, and the last thing I want to do is waste your time. My concern is that you will not be able to read what you feel you must. I am confident this is less than I would want you to. So, carrying all these things to Baltimore does not seem to be a constructive beginning after all this lapse of time. However, I will go to Baltimore for any discussion of any length that you want. Until after the end of the tax school it will have to be on a Monday or a Friday. I can, of course, put the mass of material in my car and take it to you. We would then require a cart inside your building. However, I fear it would overwhelm you. If you do not want to go over it here, if you will let me know the kinds of information you want, I will select it. It can still be extensive. For example, if you feel you will have to show the genetic capacity of the stock I used and its established performance at various universities in tests, I have much on this. As soon as the first trial was over and I learned that bitter lesson, I started collecting this kind of information first for Allard and then for Taft. No lawyer ever told me what he wanted, as I was forced to do this on my own. I recognize this probably means I have more than you will want. But I was faced with the poor choice between too much and not enough. I can't give you what does not exist, but I can give you what I have and I can undertake to get anything else you might want. If you let me know what it is.

I do not intend this as "charges and arguments". I do not hide my concern at all this added lost time. We are 60. This damage is ten years and more old. There is nothing we have done to delay anything. At this point I wondered how long it has been since you have represented us. My wife got ill as soon as she knew I'd heard from you. She spent a sleepless night and had been awake a long time when I got her sedication at 5 a.m. I do not want to trouble her further with any of this by asking her for her files. However, I have found enough to indicate that it has been about a year. It is nine and a half months since we signed medical releases for <u>all</u> our records and we do not know as of today that you have or have, as you said in July you would, asked for all when I discovered that those you have begin <u>after</u> the end of our farming. I also found your letter of ~~March~~ February 1, 1972 to Davis. It is entirely inconsistent with what you now tell me, even if I discount a certain amount as advocacy. (If you ever got an answer, I have no carbon.) You begin by saying, after "reviewing" my records, that "It appears that he has a much more substantial case than I originally thought." You conclude by ticking off a list of the evidence I have, a whole paragraph of it, specific in description and positive in evaluation ("little doubt that he can prove"). Please try to switch roles with me and ask yourself if you would not be at least perplexed, at not being able to reconcile February with November and at no preparation in all this time, ending with considerable pressure to accept a settlement

of a kind we have ruled out completely to begin with. Thenadd to this that the offer is inferior to a complete abandonment of any effort to collect for further damages after the precedent was established. And to that the judge's statement that the sole questions that would be before him would be proof of loss, in turn to be evaluated with your February evaluation of that and the evaluatuon was based on incomplete proof.

Because I know much better than you what the drain of going to court will be, I am ready and willing to negotiate. In 1962 the government agreed to do this and to the basis for it. One of the things you were to have gotten from Davis for me is the present location of the lawyer who was given this function by the Secretary of Defense. When you did not and did not respond to my letters, I found him. His recollection is clear. He then and now regarded and regards the basis as fair to the government. In fact, he actually thought it had reached a successful conclusion. I made the same offer to Baron and his successors, Brocato and Davis. In addition, to Davis I offered to submit to the equivalent of arbitration. I have done all these things with the full realization that they will require compromise by us. As you know, Davis never had any intentions of negotiating. His sole purpose was to stall. I think the government hopes the judge will die or go into full retirement, another reason for my concern about the long delay in preparation, at our not yet having filed or even prepared interrogatories.

I don't think the knowledge that we are going to trial will make any difference. If it does, we are prepared to abide by the 1962 agreement. And if you do talk to them about this, I do hope you will believe me, they are really worried about the precedent if we collect only a single cent in personal damages. Because it is th their advantage to stall, they will not disclose this to you. The EPA bill that was enacted in the last days of the past Congress was already watered down by official effort. It was then further vitinted by enormous pressure, with the aviation provisions eliminated and left up to the FAA for standards that will, in effect, be the aviation industry's. There is nobody to whom I have talked in the field that did not exist at the time of our successful suit, noise ecology, who does not agree with what I am telling you. With effort and understanding, I feel it can be a powerful lever in getting them to agree to a reasonable settlement. There are now pending suits that total billions. Incalculable sums can be involved for the government if we go to court and win. They know it, if you do not seem to believe it. Neither Brocato nor Davis even demurred when I noted it in getting them to agree to "negotiate". The most recent case of which I know is a suit for a half billion filed two months ago in San Jose, Calif. It is insignificant to the suit filed in Los Angeles.

I have the feeling there is something you want to say that you haven't.Is it that you do not want to put in the time adequate preparation requires? We discussed this at the outset, a year ago, but if your mind has changed, we should know.

Sincerely,

Harold Weisberg