07-3042-cr

In the United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,

Appellant,

v.

JEFFREY STEIN, *ET AL.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* ASSOCATION OF CORPORATE COUNSEL AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES

SUSAN J. HACKETT
RENEE S. DANKNER
ASSOCIATION OF CORPORATE COUNSEL
1025 Connecticut Ave., N.W., Suite 200
Washington, DC 20036
(202) 293-4103
Counsel for Association of Corporate Counsel

MARK I. LEVY
Counsel of Record
SEAN M. GREEN
KILPATRICK STOCKTON LLP
607 14th St., N.W., Suite 900
Washington, DC 20005
(202) 824-1437
Counsel for Amici Curiae

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER
1615 H St., N.W.
Washington, DC 20062
(202) 463-5337
Counsel for Chamber of Commerce of the United States of America

RULE 26.1 CERTIFICATION

In compliance with Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus* the Association of Corporate Counsel ("ACC") is a not-for-profit bar association organized under the laws of the District of Columbia. ACC has no parent corporation, and no publicly held company owns 10% or more of its stock.

Amicus the Chamber of Commerce of the United States of America ("Chamber") is a not-for-profit business federation organized under the laws of the District of Columbia. The Chamber has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTEREST OF THE *AMICI CURIAE*

Amici represent the interests of the business community and corporate counsel. Each of them has a strong interest in preserving a company's ability, without exposing itself to federal indictment, to pay the legal fees of officers and employees in cases or investigations arising out of actions taken in the course of employment. They participated as *amici* in the district court.

The Association of Corporate Counsel ("ACC," formerly known as the American Association of Corporate Counsel or "ACCA") was formed in 1982 as the bar association for in-house counsel. It represents the professional interests of attorneys who practice in the legal departments of corporations and other private-sector for-profit and not-for-profit organizations worldwide. ACC has in excess of 23,800 members in over 75 countries who are employed by more than 10,000 organizations. Its members serve both large and small companies, public and private, including all of the Fortune 100 companies in the United States and 74 of the Global 100 companies. ACC frequently files *amicus* briefs in cases of significance to its members.

Among other activities, ACC serves as the voice of the in-house bar on matters that concern corporate legal practice and the ability of its members to fulfill their functions as in-house legal counsel to their corporate clients. In-house counsel regularly advise their clients about the decision to provide their officers,

directors, and employees with indemnification and advancement of legal fees incurred in litigation or investigations arising from their actions as agents of the business entity. Furthermore, ACC's members include corporate officers or employees who frequently have the right to indemnification or advancement of legal fees by the company.

The Chamber of Commerce of the United States of America ("Chamber") is the largest business federation in the world. It represents an underlying membership of more than three million companies and organizations of every size and in every industry sector nationwide, from Fortune 500 companies to home-based, one-person concerns; in fact, 96 percent of its membership consists of businesses with fewer than 100 employees. An important mission of the Chamber is to represent the interests of its members in the courts and, through the National Chamber Litigation Center ("NCLC"), it regularly files *amicus* briefs in cases of vital concern to the business community.

Both ACC and the Chamber have joined with other entities in a diverse coalition of interests – the Coalition to Preserve the Attorney-Client Privilege – that opposed the unfair and unconstitutional treatment of the business community by the Department of Justice in the Thompson Memo. *See* The Coalition to Preserve the Attorney-Client Privilege, *Statement Submitted to the S. Comm. on the Judiciary*, 109th Cong. 2nd Sess. (Sept. 12, 2006), *available at*

http://www.acc.com/public/attyclientpriv/coalitionsenjudtestimony.pdf (hereinafter "Coalition Statement").

ARGUMENT

THE THOMPSON MEMO AND ITS APPLICATION IN THIS CASE ARE CONTRARY TO THE IMPORTANT AND LEGITIMATE PUBLIC POLICIES SUPPORTING A COMPANY'S PAYMENT OF THE ATTORNEYS' FEES OF EMPLOYEES ARISING OUT OF ACTS WITHIN THE SCOPE OF EMPLOYMENT.

At issue in this case is the provision of the Thompson Memo that directed federal prosecutors to consider, as a factor favoring indictment of a company under investigation, whether the company has advanced payment of the attorneys' fees of employees who are being investigated for conduct within the scope of their employment.[1] As the district court summarized, the Thompson Memo treated such payments "as at least possibly indicative of an attempt to protect culpable employees and as a factor weighing in favor of indictment of the entity." *United States v. Stein*, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006) ("*Stein I*"). Moreover, this provision was "binding on all federal prosecutors." *Id*.

For the reasons stated by the district court and by defendants in their briefs to this Court, *amici* agree that the Thompson Memo violated both the Fifth and Sixth Amendments. As this case well illustrates, for the government to condition its evaluation of the cooperation of a company on the company's denial of payment

[1] For simplicity, unless otherwise indicated, "employees" encompasses directors, officers, partners, principals, and employees.

of employees' fees that otherwise would lawfully occur under corporate policies or practices was to force the company's cooperation at the expense of the employees' right to counsel. Moreover, such pressure and its impact on the ability of the employees to mount a defense to the government's allegations of complex fraud violated due process by radically skewing the "level playing field" that underlies the fundamental fairness – and the public's perception of the fairness – of the adversarial system of criminal justice.

Furthermore, the Thompson Memo threatened the common and legitimate business practice of fee advancement that serves important and well-established public policies. Contrary to the Thompson Memo, there is nothing improper or even inherently suspicious about the advancement of fees, and reputable and law-abiding companies engage in this practice every day in order to further their own lawful business interests and those of their employees. *See* American College of Trial Lawyers, *The Erosion of Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 335 (2003) ("the exercise of discretion to advance fees typically reflects sound corporate governance policy goals, rather than an effort not to cooperate with a government investigation"); Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 673 (2005) ("[t]he payment of attorney's fees by a corporation is not a failure of cooperation unless one views the presence of a lawyer for a corporate officer as an

impediment to an investigation"). Accordingly, the Thompson Memo's sweeping derogation of advancement is entirely unwarranted and deeply detrimental to a widespread and beneficial business practice.

I. ADVANCEMENT OF LEGAL FEES IS A LEGITIMATE AND ROUTINE BUSINESS PRACTICE.

Contrary to the animating spirit of the Thompson Memo that advancement of fees is somehow sinister, it is in fact a settled and routine business practice. "Rights to indemnification and advancement are deeply rooted in the public policy of … corporate law." *T.S. Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 509 (Del. 2005).

"Indemnification is the right to be reimbursed for all out of pocket expenses and losses caused by an underlying claim." *Majkowski v. American Imaging Management Services, LLC*, 913 A.2d 572, 586 (Del. Ch. 2006). Accordingly, indemnification does not arise until after the merits of the underlying dispute have been resolved. *Id*. "Advancement, by contrast, … [concerns an employee's] ability to force the company to pay his litigation expenses as they are incurred." *Id*. *See also T.S. Kaung*, 884 A.2d at 509 (by advancement, the corporation "shoulder[s] the[ ] interim costs"); *Homestore, Inc. v. Tafeen*, 886 A.2d 502, 505 (Del. 2005) ("*Homestore I*") ("to be of any value … advancement must be made promptly"), *subsequent opinion*, 888 A.2d 204, 211 (Del. 2005) ("*Homestore II*") ("[a]dvancement is … especially important … [by] provid[ing] corporate officials

with interim relief from the personal out-of-pocket financial burden of paying the significant ongoing expenses inevitably involved with investigations and legal proceedings"); 3A William Meade Fletcher, FLETCHER CYCLOPEDIA OF CORPORATIONS § 1344, at 98 (Cumm. Supp. 2007) ("[a]dvancement of expenses provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant ongoing expenses invariably involved with investigations and legal proceedings"). Thus, as Judge Kaplan explained, advancement "protects the ability [of the employee] to mount … a defense by safeguarding his ability to meet his expenses at the time they arise, and to secure counsel on the basis of such an assurance." *Stein I*, 435 F. Supp. 2d at 355 (citation omitted; omissions and bracketed material in original). In view of the unique and critically important function of advancement, "'most corporations advance litigation expenses whenever … [their employees] are potentially entitled to indemnification.'" Karl E. Stauss, Note, *Indemnification in Delaware: Balancing Policy Goals and Liabilities*, 29 DEL. J. CORP. L. 143, 163 (2004) (citation omitted).

State statutes reflect the universal legislative judgment that a company's payment of its employees' legal fees is appropriate and serves legitimate business and public purposes. All jurisdictions have statutes authorizing indemnification of attorneys' fees. *See* Joseph W. Bishop, LAW OF CORPORATE OFFICERS AND

DIRECTORS: INDEMNIFICATION AND INSURANCE § 6.3, at 6-9 (2006). In fact, nearly all jurisdictions mandate indemnification, at least for officers and directors, if the individual succeeds on the merits. *Id.*, §§ 6.42-6.91 (collecting indemnification and advancement statutes).

Moreover, all 50 states permit advancement of legal fees. *Id.*[2] Thus, the question whether to allow advancement of fees is entrusted to each company to decide under the usual "business judgment" rule. *See Majkowski,* 913 A.2d at 580. Of course, it is not the "province" of prosecutors, any more than it is of courts, "to second guess these policy determinations." *Ridder v. Cityfed Financial Corp.*, 47 F.3d 85, 87 (3d Cir. 1985).

Companies clearly understand that advancement serves their legitimate interest and have exercised their business judgment to allow it. "Most U.S. companies and partnerships habitually advance fees to current and former employees whose alleged crimes occurred in the course of their work." Julie Triedman, *Buried Alive*, CORPORATE FRAUD 80, 82 (Fall 2007 Supp. to the AMERICAN LAWYER and CORPORATE COUNSEL). Indeed, there is "a long tradition of paying such costs" based on "a widely held assumption that employees whose jobs were part of a company's business merited financial support if that business came under scrutiny." Lynnley Browning, *Judges Press Companies That Cut Off*

[2] The statute of the District of Columbia does not address the issue of advancement.

Legal Fees, N.Y. TIMES, Apr. 17, 2006. Thus, businesses "routinely pay the legal bills of directors and employees in civil or criminal proceedings arising out of their employment." John R. Emshwiller & Kara Scannell, *Merrill Faces Issue of Enron Legal Fees: To Pay or Not to Pay?*, WALL ST. J., May 11, 2005, at C1. *See also, e.g.*, John Power, *Show Me the Money: The Thompson Memo, Stein, and an Employee's Right to the Advancement of Legal Fees under the McNulty Memo*, 64 WASH. & LEE L. REV. 1205, 1240 (2007) ("[a]dvancement of legal fees is a crucial part of the modern business world"); Stauss, 29 DEL. J. CORP. L. at 156 ("virtually every public corporation has implemented [some form of indemnification]") (citation omitted; bracketed material in original); American Bar Ass'n, Recommendation 302B and Related Report (adopted by the House of Delegates on Aug. 7-8, 2006), *available at* http://www.abanet.org/crimjust/policy/am06302b.pdf (payment of employees' legal fees is "taken pursuant to well-established corporate governance practices," and "[t]his system has worked well").[3]

This practice is ubiquitous. In the court below, *amici* undertook a survey, submitted to the district court, of publicly available data on corporate advancement policies. *See* Brief for the Securities Industry Ass'n, Association of Corporate Counsel, Bond Market Ass'n, and Chamber of Commerce of the United States of America as *Amici Curiae* at 4, *United States v. Stein*, 435 F. Supp. 2d 330

[3] Even the Department of Justice pays the fees of government officials represented by private counsel. *See* 28 C.F.R. §§ 50.15(a)(7), 50.16 (2007).

(S.D.N.Y. 2006) (No. 05 cr-0888) (filed May 3, 2006). According to that survey, 48 of the nation's 50 largest companies (in terms of annual revenue) provide for fee advancement in their articles of incorporation, by-laws, or other corporate documents. Nor is advancement limited to large companies; for example, nine of FORBES' "Ten Best Small Companies" also have adopted such provisions.

Likewise, advancement is not confined to upper management of a company. Rather, as Judge Kaplan correctly observed:

> [Advancement] is very much a part of American life. Persons in jobs big and small, private and public, rely on it every day. Bus drivers sued for accidents, cops sued for allegedly wrongful arrests, nurses named in malpractice cases, news reporters sued in libel cases, and corporate chieftains embroiled in securities litigation generally have similar rights to have their employers pay their legal expenses if they are sued as a result of doing their jobs.

Stein I, 435 F. Supp. 2d at 335. *See also* Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 916 (advancement is particularly important with respect to lower-level employees).

II. ADVANCEMENT OF LEGAL FEES SERVES IMPORTANT AND LEGITIMATE BUSINESS AND PUBLIC PURPOSES.

A. The advancement of attorneys' fees serves a number of important and legitimate business and public policies. *See T.S. Kaung*, 884 A.2d at 509 (advancement is "deeply rooted in the public policy of … corporate law"). In this

way, advancement is "viewed less as an individual benefit arising from a person's employment and more as … [a means to promote] greater corporate benefits." *Id*.

To begin with, advancement is necessary for companies to recruit and retain highly-qualified and highly-motivated employees. Advancement promotes "'the strong [state] policy of encouraging able persons to become directors and officers.'" *Homestore I,* 886 A.2d at 503 *subsequent opinion, Homestore II,* 888 A.2d at 211, 218 (advancement furthers the "salutary public policy" of "attracting the most capable people into corporate service"). *See also Stifel Financial Corp. v. Cochran*, 809 A.2d 555, 561 (Del. 2002) (the "larger purpose is to encourage capable men to serve as corporate directors, secure in the knowledge that expenses incurred by them in upholding their honesty and integrity as directors will be borne by the corporation they serve") (citation omitted); *Majkowski*, 913 A.2d at 592 & n.54; *Ridder*, 47 F.3d at 87 (advancement is necessary "to avoid deterring qualified persons from accepting responsible positions … for fear of incurring liabilities greatly in excess of their means"); Kurt A. Mayr, II, Note, *Indemnification of Directors and Officers: The "Double Whammy" of Mandatory Indemnification under Delaware Law in Waltuch v. Contcommodity Services, Inc.*, 42 VILL. L. REV. 223, 231 (1997) ("[S]ome individuals have determined that the risks of office outweigh the benefits and have decided not to serve as officers and directors. Consequently, in order to attract and retain qualified individuals to serve as

directors and officers, corporations have been forced to provide an efficient and comprehensive shield against personal liability. Indemnification has proven to be an indispensable component of this shield"). The prospect that an employee, if sued or investigated for acts within the scope of employment, would be left to his own devices to defray the high costs of the resulting legal fees understandably would deter employees from accepting or remaining in a position with that company.

Moreover, advancement helps to ensure that employees discharge their responsibilities in the best interest of the company and not with an eye to the threat of personal liability for attorneys' fees arising out of their employment-related conduct. By removing such an understandable concern about the employee's self-interest, advancement serves the ultimate interests of the company. *See Homestore II*, 888 A.2d at 218; *T.S. Kaung*, 884 A.2d at 509; *Scharf v. Edgecomb Corp.*, No. 15224, 1997 WL 762656, at 4 (Del. Ch. Dec. 2, 1997), *appeal refused*, 705 A.2d 243 (Del. 1998); Power, 64 WASH. & LEE L. REV. at 1210-11.[4]

In addition, advancement encourages employees to resist unfounded suits and charges against them and (because such claims grow out of acts within the scope of their employment) the company itself. Otherwise, employees might adopt

[4] Similar policy considerations underlie the doctrine of immunity for government officials. *See, e.g., Barr v. Matteo*, 360 U.S. 564, 571 (1959) ("officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of their duties").

litigation strategies, including settlements and admissions, in order to protect themselves from the expense of litigation rather than to further the best interests of the company. Advancement therefore "'promote[s] the desirable end that corporate officials will resist what they consider unjustified suits and claims, secure in the knowledge that their reasonable expenses will be borne by the corporation they have served.'" *Stifel Financial Corp.*, 809 A.2d at 561. As the Delaware Supreme Court recently explained, "the failure to advance fees affects the counsel the director may choose and litigation strategy that the executive or director will be able to afford" and could "force [employees] … to compromise their own litigations in the face of cost concerns." *Homestore I*, 886 A.2d at 505.

This is not an idle concern. In some cases, employees denied advancement of fees have pled guilty notwithstanding the chance that they could be acquitted if able to present an adequately funded defense. *See* Noah D. Stein, Note, *Prosecutorial Ethics and the McNulty Memo: Should the Government Scrutinize an Organization's Payment of Its Employees' Attorneys' Fees*, 75 FORDHAM L. REV. 3245, 3273 (2007). For example, Richard Scrushy, the only one of 16 executives not to plead guilty in the HealthSouth Corp. prosecution, paid for his own defense and was ultimately acquitted of criminal fraud charges. Nathan Koppel, *U.S. Pressures Firms Not to Pay Staff Legal Fees*, WALL ST. J., Mar. 28, 2006, at B1. Likewise, former Chief Justice of Delaware E. Norman Veasey told

the Senate Judiciary Committee about the prosecution of an employee who was acquitted after being provided last-minute corporate funds for counsel: "On the eve of the Motion for an Evidentiary Hearing, and just days before Judge Kaplan's first decision in *Stein*, the government agreed to permit the corporation to pay the individual's legal fees. The individual's criminal prosecution proceeded and resulted in a defense verdict of 'not guilty.'" Norman Veasey, *Report to the S. Comm. on the Judiciary*, 110th Cong. 1st. Sess., 12 (Sept. 13, 2007), *available at* http://acc.com/public/veasey.pdf.

Finally, advancement "enhance[s] the reliability of litigation–outcomes involving directors and officers of corporations by assuring a level playing field." *Ridder*, 47 F.3d at 87. Without the support of the company to pay for attorneys' fees as they are incurred, individual employees would be outmatched – to the company's as well as the employee's detriment – by the superior resources of the corporation or government entity that typically is on the other side of the case.

In some respects, advancement of attorneys' fees functions like Directors and Officers (D&O) insurance: it shifts the cost from the individual and thereby protects the employee from the economic burden attendant to his performance of his corporate duties. *See Heffernan v. Pacific Dunlop GNB Corp.*, 965 F.2d 369, 370 (7th Cir. 1992) (indemnification shifts the cost from the individual to the company); Sean J. Griffith, *Uncovering a Gatekeeper: Why the SEC Should*

Mandate Disclosure of Details Concerning Directors' and Officers' Liability Insurance Policies, 154 U. PA. L. REV. 1147, 1171 (2006). In contrast to D&O insurance, however, advancement of fees effectively allows the company to self-insure, which is more efficient for the company since it pays the costs only when they actually occur rather than making ongoing payments to the insurance company even when no claims are filed.

B. These considerations have especial force in the context of government prosecutions and investigations that have come to characterize the modern corporate world.

"Prior to the 1960s, … criminal prosecution of major corporations and other entities was unusual; even civil enforcement proceedings rarely resulted in the severe penalties common today." Duggin, 2003 COLUM. BUS. L. REV. at 868-69. Thus, "[f]or many years, corporate managers had little reason to fear criminal or civil sanctions for either themselves or the entities they managed." *Id*. at 871. Today, however, "significant civil enforcement proceedings and criminal prosecutions of companies and individual officers, directors, and employees have become *commonplace*." *Id*. at 870 (emphasis added). *See also Heffernan*, 965 F.2d at 370 ("[l]itigation is an occupational hazard for corporate directors"). In this setting, the legitimate policy justifications for advancement are self-evident and compelling.

Furthermore, not only are employees much more likely to be enmeshed in prosecutions and investigations, but "[t]he sort of litigation in which corporate executives are involved … is likely to be protracted, complex, and expensive." Bishop, § 6:30, at 6-60. Nowhere is this more true than in criminal investigations and prosecutions brought by the United States.

The present case exemplifies the crippling burdens and exorbitant costs of defending against a federal criminal prosecution. "It has been described as the largest tax fraud case in United States history." *Stein I*, 435 F. Supp. 2d at 362. As Judge Kaplan summarized, by November 11, 2006, the government had turned over more than 22-million pages of documents (in either electronic or paper form), and it produced another 1-million pages between June 1 and July 16, 2007 – even though the discovery cutoff was October 2005. *See United States v. Stein*, 495 F. Supp. 2d 390, 417 (S.D.N.Y. 2007) ("*Stein IV*").

By April 2006, the proceeding had spawned 26 motions supported by legal memoranda totaling some 1,100 pages. *Id*. at 418 & n.137. And the district court had rendered at least 24 written decisions in the case. *Id*.

All of this, of course, pertains only to the *pretrial* phase of the case. In terms of the trial, as of July 2007, the government had designated 70 witnesses and 2,000 exhibits (150,000 pages) for its case in chief. The government's case is estimated to take four months, and the entire trial six to eight months. *Id*.

The cost of defense counsel has been staggering. Through July 2007, the cost for each defendant ranged from $500,000 to $3.6 million, or an average of $1.7 million per defendant. *Id*. at 423. As the district court noted, "the most expensive part of the case – a six to eight month trial – lies ahead." *Id*. at 424. *See also id*. (government concedes that $3.3 million, which was actually expended in another and shorter case, is a "very conservative estimate" of the cost of defending this case).

Moreover, these enormous costs have been incurred despite the fact that some defendants were forced to forgo the more expensive counsel originally retained in the case and despite the fact that defendants and their present counsel were forced to trim their strategies and limit their efforts in order to save money. *See* Triedman, CORPORATE FRAUD, *supra*. One attorney "estimated that the cost of defending his client in this case as he would have defended him were KPMG paying the bills would have been more than $10 million. Other defense attorneys put that figure in the range of $7 to $24 million each, with the average figure being around $13 million." *Stein IV*, 495 F. Supp. 2d at 423. Notably, the government did not take issue with these figures. *Id*. at 424.

Without the financial support of the advancement of attorneys' fees, defendants have been forced to rely on their personal assets. One defendant is insolvent. Another defendant has assets of $80,000, has no regular source of

income, and owes his lawyers $1 million. And a third defendant has assets of less than $300,000 and owes more than $600,000 to his lawyers (who have threatened to file a motion to withdraw from the case). *Id*. at 423. To pay legal fees, these defendants had to, *inter alia*, raid their children's college funds, deplete retirement savings, sell their homes and liquidate other assets, and borrow money from their parents. *See* Triedman, CORPORATE FRAUD, *supra*; Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees*, WALL ST. J., June 4, 2004, at A1 . Even the more solvent defendants could not afford from their own pocket "to defend [the] case as they would have defended it [if KPMG had advanced the fees]." *Stein IV*, 495 F. Supp. 2d at 423.

The magnitude of these costs is typical of complex white-collar defenses today. As the district court commented, a number of other cases – involving fewer defendants, fewer documents, and shorter trials – reportedly have cost between $14.9 million and $70 million:

> [B]oth defendants and the government have pointed to press reports concerning defense costs in a number of recent high profile white collar prosecutions, all of which involved far fewer documents and far fewer defendants and most of which involved far shorter trials than this case will require. These have included costs of $14.9 million (Kumar-Computer Associates), $17.7 million and $8 million for each of two trials (Kozlowski-Tyco), $24 million (Shelton-Cendant), $25 million (Rigases-Adelphia), $32 million (Scrushy-HealthSouth), and $25 and $70 million (Lay and Skilling, respectively-Enron).

Id. at 424. Once again, the government did not dispute these published reports. *Id*.

III. THE THOMPSON MEMO IS CONTRARY TO LEGITIMATE BUSINESS PRACTICE AND SOUND PUBLIC POLICY.

A. As explained above, advancement of attorneys' fees is a legitimate and widespread business practice that serves important corporate and public policies. The Thompson Memo, by treating advancement as suspect and a ground supporting indictment of the company, was antithetical to these practices and policies. "The DOJ's corporate cooperation guidelines undermine the very policies that corporate laws attempt to promote through their indemnification and fee advancement provisions." Duggin, 2003 COLUM. BUS. L. REV. at 916.

The Thompson Memo penalized and therefore discouraged the valid practice of fee advancement. In this way, and as this case illustrates, it upset a common and necessary business procedure. The severe burdens imposed on the business community as well as on individual employees were unjustified and unwarranted.

What is more, the Thompson Memo imposed these burdens based on the government's determination of an employee's culpability made at the early stages of an investigation. Deputy Attorney General Thompson explained the Memo in part on the ground that it is not in the interests of a company's shareholders to protect employees who have hurt the business. *See* Cohen, WALL ST. J., June 4, 2004, at A1. However, not only is it not the responsibility of the government rather than of the corporation to protect the interests of stockholders, but the government's belief about an employee's wrongdoing reached before the

conclusion of the investigation (and indeed before final resolution of any criminal charges) is both highly unreliable and fundamentally unfair to the employee. Thus, the Thompson Memo wrongly "treat[ed] virtually any employee who might be involved in misconduct as culpable well before the investigation is complete." Henning, 54 AM. U. L. REV. at 699. As the American Bar Association testified before Congress, prosecutors pursuant to the Thompson Memo took "the position that certain employees and other agents suspected of wrongdoing are 'culpable' long before their guilt has been proven or the company has had a chance to complete its own internal investigation." *Statement of Karen J. Mathis, President of the American Bar Association, Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary on the McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations*, 110th Cong. 1st Sess. 14 (Mar. 8, 2007), *available at* http://www.abanet.org/poladv/letters/attyclient/2007mar08_privwaivh_t.pdf (hereinafter "Mathis Testimony"). *See also* The Coalition to Protect the Attorney-Client Privilege, *Why Congress Should Act to Protect the Attorney Client Privilege, available at* http://www.acc.com/public/policy/attyclient/attyclientcoalitionmcnultyrebuttal.pdf.

In today's world, as this case again illustrates, the government's threat of indictment is nothing less than a loaded and cocked gun pointed at the head of a

company. Few if any responsible businesses could ignore the threat that the government would pull the trigger, and few if any could survive the shot. As stated by Christopher Wray, then-Assistant Attorney General for the Criminal Division, "[t]he message we're sending to Corporate America is … you'll get a lot of credit if you cooperate, and that credit will sometimes *make the difference between life and death for a corporation*." Christopher A. Wray, *Remarks to the Association of Certified Fraud Examiners, Mid-South Chapter* (Sept. 2, 2004) (emphasis added), quoted in Robert R. Stauffer & Thomas P. Monroe, *Internal Investigations: Conducting Employee Interviews After Stein and the McNulty Memorandum*, 5 BNA CORPORATE ACCOUNTABILITY REPORT 363 (Apr. 6, 2007). *See also* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World*, 43 AM. CRIM. L. REV. 1095, 1137 (2006) (referring to the "catastrophic consequences" of corporate criminal prosecution). The well-known example of Arthur Andersen & Co. – which effectively was put out of business by an indictment even though the ensuing conviction was later unanimously overturned by the Supreme Court (*Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005)) – graphically demonstrates this concern. Indeed, "[i]n the 212-year history of the U.S. financial markets, no major financial services firm has ever survived a criminal indictment." Ken Brownet, *et al., Called to Account:*

Indictment of Andersen in Shredding Case Puts Its Future in Question, WALL ST. J., Mar. 15, 2002, at A1.

B. The Thompson Memo also adversely affected businesses in other ways that were perhaps less visible but no less detrimental. A company under government investigation is subject to enormous pressure to try to put the blame on a small number of "rogue" employees. As a former federal prosecutor stated, "[c]ompanies naturally heap scorn, fairly or unfairly, on one or a few employees in order to satisfy the government's need to punish responsible persons and deflect responsibility away from itself." David Pitofsky, *Has the Government Gone Too Far in Its War on Corporate Crime?*, WALL. ST. J., Nov. 1, 2006, at B11. The Thompson Memo institutionalized and "exacerbate[d] this natural tension. It [took] what was previously an ad hoc corporate strategy – find someone to 'throw under the bus' – and codified it as an essential step to corporate survival." *Id*.

The Thompson Memo thus drove a wedge between a company and its employees and denied the employees the financial support they rightfully expected from the company when ensnared in litigation or investigations arising out of their employment. For obvious reasons, this undermined the morale and loyalty of the company's employees. *See* ABA, Recommendation 302B and Related Report ("depriv[ing] Employees of the support and resources they need to defend themselves . . . undermines the relationship of trust and confidence that should

exist between an organization and its Employees"; "individuals employed by the organization may justifiably expect their employer to support them in connection with lawful actions they have taken on the organization's behalf rather than abandoning them at the first suspicion of wrongdoing"). Employee morale and loyalty are crucial to a company's core mission and play a critical role in productivity, efficiency, customer service, and employee retention. *See, e.g.*, Duggin, 2003 COLUM. BUS. L. REV. at 913.

In addition, the Thompson Memo undermined not only the company's business operations but also in the end its compliance with the law. *See* Mathis Testimony 7. *See also* Coalition Statement at 1, 11; Letter from Former DOJ Attorneys to Alberto Gonzalez, Attorney General (Sept. 5, 2006), *available at* http://www.acc.com/public/attyclient priv/agsept52006.pdf. Most corporate compliance results from counseling by lawyers and from voluntary internal investigations. Today, companies no longer wait to learn of a government investigation before they inquire into alleged corporate wrong-doing. Instead, companies conduct their own investigations to assure legal compliance and often self-report violations to the government to avoid indictment. *See, e.g., U.S. v. Stolt-Nielsen*, No. 06-cr-466, 2007 WL 4225664 (E.D. Pa. Nov. 30, 2007) (describing a corporate internal investigation into a criminal antitrust violation followed by self-reporting to the DOJ Antitrust Division). In fact, the number of

in-house counsel employed by Fortune 500 companies has grown immensely in recent years along with the vital role they play in assuring legal compliance. *See* Chad R. Brown, *In-House Counsel Responsibilities in the Post-Enron Environment*, ACCA DOCKET 92 (May 2003), *available at* http://www.acc.com/protected/pubs/docket/mjo3/inhouse1.php.

In turn, the most critical element of an internal investigation is the employee interview. Colin P. Marks, *Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the "Deputized" Counsel*, 38 ST. MARY'S L.J. 1065, 1069 (2007) ("the most insightful and pivotal step in any internal investigation is the interviewing of employees"); Duggin, 2003 COLUM. BUS. L. REV. at 892 ("[d]ocuments are the bare bones, but interviews are the heart and soul of an internal investigation"). Indeed, "executives rarely decline to answer questions from corporate investigators who may appear less threatening" than government prosecutors. Theodore L. Banks, *et al.*, *Recent Trends in Internal Investigations*, ACC DOCKET 24, 31 (Apr. 2007), *available at* http://www.acc.com/resource/getfile.php?id=8312.

Where employee morale and loyalty have suffered and employees believe that their company will not stand behind them, employees' cooperation is jeopardized. For example, their statements in internal investigations, even if made, are likely to be less complete and thorough. Furthermore, they are less likely to

report possible violations of law that could involve them in subsequent government litigation or investigations. *See Statement of Richard T. White, Chairman of the Board of Directors of the Association of Corporate Counsel, Before the H. Comm. on Judiciary*, 110th Cong. 1st Sess. 8 (Mar. 8, 2007), *available at* http://www.acc.com/public/policy/attyclient/richardwhitemcnultytestimony.pdf ("employees who are concerned about protecting their individual rights will perceive a DIS-incentive [to] stepping forward and alerting in-house counsel to potentially illegal conduct occurring within the company … which further undermines corporate compliance programs"). And employees also are likely to seek to point blame at the company in order to divert attention and responsibility from themselves, thereby impeding the investigation and requiring the company to bear the costs of responding to such accusations. In the long run, therefore, the Thompson Memo perversely tended to reduce the overall level of corporate legal compliance.

C. Finally, the Thompson Memo was inconsistent with the principles that underlie the fairness of the federal criminal justice system and the public's confidence in that system. As Alexander Hamilton observed at the founding of our nation, "the ordinary administration of criminal and civil justice … contributes … more than any other circumstance, to impressing upon the minds of the people affection, esteem, and reverence toward the government." FEDERALIST PAPERS No.

78, at 103 (Alexander Hamilton) (1st Modern Library 1941), quoted in *T.S. Kaung*, 884 A.2d at 507.

At the heart of our adversarial system of criminal justice is the right to counsel (including, although certainly not limited to, the right to counsel of the defendant's choice). *See United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006). Our criminal process "is premised on the well-tested principle that truth – as well as fairness – is 'best discovered by powerful statements on both sides of the question.'" *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (citation omitted). *See also Herring v. New York*, 422 U.S. 853, 862 (1975) ("partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free").

> It bears emphasis that the right to counsel is among the most fundamental of rights. We have long recognized that "lawyers in criminal courts are necessities, not luxuries." As a general matter, it is through counsel that all other rights of the accused are protected: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." The paramount importance of vigorous representation follows from the nature of our adversarial system of justice.

Penson, 488 U.S. at 84 (citations omitted). Given the overwhelming importance of the right to counsel, "there are few defendants … who fail to hire the best lawyer they can get." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

The Thompson Memo turned its back on these settled and essential principles. As Deputy Attorney General Thompson starkly stated: "if employees really don't believe they acted with criminal intent, 'they don't need fancy legal representation' to defend themselves." Cohen, WALL ST. J., June 4, 2004, at A1. Judge Kaplan soundly rejected that view, explaining that it was "misguided, to say the least. The innocent need able legal representation in criminal matters perhaps even more than the guilty," and in complex cases like this one "the innocent need substantial resources to minimize the chance of an unjust indictment and conviction." *Stein I*, 435 F. Supp. 2d at 338 n.13.

The Thompson Memo also turned its back on the bedrock presumption of innocence. *See Coffin v. United States*, 156 U.S. 432, 453 (1895); Mathis Testimony 13. Employees under investigation or indictment are entitled to this legal presumption. However, the Thompson Memo demanded that a company accept, even at the preliminary stages of an investigation, the government's view that specified employees were culpable and therefore advancement of their fees was assisting wrongdoers and interfering with the government's investigation. *See* ABA, Recommendation 302B and Related Report 7; Stauffer & Monroe, 5 BNA CORPORATE ACCOUNTABILITY REPORT 363. In the advancement context no less than in others, defendants are presumed innocent. *See United States v. Wittig*, 333 F. Supp. 2d 1048, 1054 (D. Kan. 2004).

In the end, the government, which continues to defend the Thompson Memo before this Court, has forgotten the bedrock principle of the prosecutorial system. The government's "interest … in a criminal prosecution is not that it should win a case, but that justice shall be done. … It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).

> [O]ur system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly under the federal domain: "The United States wins a point whenever justice is done its citizens in the courts."

Brady v. Maryland, 373 U.S. 83, 87 (1963).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Mark I. Levy

SUSAN J. HACKETT
RENEE S. DANKNER
ASSOCIATION OF CORPORATE COUNSEL
1025 Connecticut Ave., N.W.
Suite 200
Washington, DC 20036
(202) 293-4103
Counsel for Association of Corporate Counsel

MARK I. LEVY
Counsel of Record
SEAN M. GREEN
KILPATRICK STOCKTON LLP
607 14th Street, N.W.
Suite 900
Washington, DC 20005
(202) 824-1437
Counsel for Amici Curiae

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER
1615 H St., N.W.
Washington, DC 20062
(202) 463-5337
Counsel for Chamber of Commerce of the United States of America

January 22, 2008

CERTIFICATE OF SERVICE

I hereby certify that an original and 10 copies of the foregoing *Brief for Amici Curiae Association of Corporate Counsel and Chamber of Commerce of the United States of America in Support of Defendants-Appellees* was dispatched to FedEx for Priority Overnight delivery to the clerk for delivery on January 23, 2008 and a PDF version of the Brief was submitted via electronic mail to briefs@ca2.uscourts.gov on January 22, 2008. In addition, 2 paper copies of the Brief were dispatched to FedEx Priority Overnight delivery and a PDF version was served via electronic mail to the below-listed counsel on January 22, 2008.

Michael J. Garcia, Esq.
Karl Metzner, Esq.
United States Attorney's Office for the
Southern District of New York
Attorney for the Appellant
One St. Andrew's Plaza
New York, New York 10007
(212) 637-2200
michael.garcia@usdoj.gov
karl.metzner@usdoj.gov

Seth P. Waxman, Esq.
Danielle Spinelli, Esq.
WilmerHale
Attorneys for Defendants Jeffrey Stein, John Lanning, Richard Rosenthal, Richard Smith
1875 Pennsylvania Avenue, N.W.
Washington, D. C. 20006
(202) 663-6800
seth.waxman@wilmerhale.com

danielle.spinelli@wilmerhale.com

David Spears, Esq.
Spears & Imes LLP
Attorneys for Defendant Jeffrey Stein
51 Madison Avenue
New York, New York 10010
(212) 313-6996
dspears@spearsimes.com

Michael J. Madigan, Esq.
Robert H. Hotz, Jr., Esq.
Akin Gump Strauss Hauer & Feld LLP
Attorneys for Defendant John Lanning
590 Madison Avenue
New York, New York 10022
(212 872-1000
mmadigan@akingump.com
rhotz@akingump.com

Robert S. Fink, Esq.
Caroline Rule, Esq.
Fran Obeid, Esq.
Kostelanetz & Fink, LLP
Attorneys for Defendant Richard Smith
530 Fifth Avenue
New York, New York 10036
(212) 808-8100
rfink@kflaw.com
crule@kflaw.com
fobeid@kflaw.com

Stanley S. Arkin, Esq.
Joseph V. DiBlasi, Esq.
Elizabeth A. Fitzwater, Esq.
Arkin Kaplan Rice LLP
Attorneys for Defendant Jeffrey Eischeid
590 Madison Avenue
New York, New York 10022
(212) 333-0200

sarkin@arkin-law.com
jdiblasi@arkin-law.com
efitzwater@arkin-law.com

George D. Niespolo, Esq.
Duane Morris LLP
Attorneys for Defendant Randy Bickham
One Market, Speak Tower, 20th Floor
San Francisco, CA 94105
(415) 957-3000
gdniespolo@duanemorris.com

Michael S. Kim, Esq.
Kobre & Kim LLP
Attorneys for Defendant Mark Watson
800 Third Avenue
New York, New York 10022
(212) 488-1200
michael.kim@kobrekim.com

Russell M. Gioiella, Esq.
Litman, Asche & Gioiella, LLP
Attorneys for Defendant Cari Hasting
45 Broadway
New York, New York 10006
(212) 809-4500
rmg@lagnyc.com

Susan R. Necheles, Esq.
Hafetz & Necheles
Attorneys for Defendant Richard Rosenthal
500 Fifth Avenue
New York, New York 10110
(212) 997-7595
susan@hafetzlaw.com

John S. Martin
Otto G. Obermaier
Martin & Obermaier, LLC
565 Fifth Avenure, 8th Floor

New York, NY 10017
Attorneys for Philip Wiesner, Larry DeLap, Carol G. Warley, and Steven Gremminger
jsm@martinobermaierlaw.com
ogo@martinobermaierlaw.com

Cristina C. Arguedas
Ted W. Cassman
Raphael M. Goldman
Arguedas, Cassman & Headley LLP
803 Hearst Avenue
Berkeley, CA 94710
Attorneys for Gregg Ritchie
arguedas@achlaw.com
cassman@achlaw.com
goldman@achlaw.com

/s/ Mark I. Levy
Mark I. Levy
Counsel for *Amici Curiae*

Dated: January 22, 2008

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 6,195 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Times New Roman.

/s/ Mark I. Levy
Mark I. Levy
Counsel for *Amici Curiae*

Dated: January 22, 2008

ANTI-VIRUS CERTIFICATION

I hereby certify that I scanned the PDF version of this Brief for Amici Curiae that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov> and that no viruses were detected. The anti-virus detector used was Sophos, version 6.5.10.

/s/ Mark I. Levy
Mark I. Levy
Counsel for *Amici Curiae*

Dated: January 22, 2008