Civil No. A103055
San Francisco County Super. Ct. No. 307619

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

McKESSON HBOC, INC.,
Petitioner,

v.

THE SUPERIOR COURT OF SAN FRANCISCO COUNTY,
Respondent,

THE STATE OF OREGON, et al.,
Real Parties in Interest,

Appeal from the Superior Court for San Francisco County
Honorable Donald Mitchell Presiding
Superior Court Case No. 307619

APPLICATION OF THE SECURITIES INDUSTRY ASSOCIATION FOR PERMISSION TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF DEFENDANT/PETITIONER AND BRIEF OF *AMICUS CURIAE* IN SUPPORT THEREOF

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INTRODUCTION

Pursuant to Rule 13(c) of the California Rules of Court, Securities Industry Association respectfully requests leave to file the attached *amicus curiae* brief in support of the arguments of McKesson HBOC Inc., the Petitioner in this action.

INTERESTS OF THE *AMICUS CURIAE*

The members of the Securities Industry Association ("SIA") have a vital interest in the proper, balanced approach to the preservation of the work product doctrine when a corporation discloses confidential information, pursuant to written confidentiality orders, in cooperating with the Government to investigate potential improprieties. The SIA respectfully urges this Court to adopt a bright-line rule that will permit a company to cooperate with the Government to ferret out fraud without risking waiver of the work product privilege.

Established in 1972 through the merger of the Association of Stock Exchange Firms and the Investment Banker's Association, the SIA brings together and promotes the shared interests of more than 600 securities firms to accomplish common goals. Members of SIA include investment banks, broker-dealers, as well as mutual fund companies. SIA members are active in all facets of corporate and public finance.

The principles upon which the SIA guides its members include the adherence to ethical and professional standards, the commitment to the best interests of investors and the public, and the continued exercise of unquestioned integrity in the business and securities markets. Through those principles, the SIA seeks to inspire and maintain

the public's trust and confidence in the securities industry and the U.S. capital markets.[1]

NEED FOR FURTHER BRIEFING

The *amicus curiae* are familiar with the issues before this court in this case and the scope of their implications. The *amicus curiae* believe that further briefing is necessary to address a matter not fully addressed by the parties' briefs: that selective waiver of work product protection through voluntary disclosure to the Government is supported by California law and serves several important public policy goals.

For the foregoing reasons, *amicus curiae* respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: November 14, 2003

Respectfully submitted,

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[1] Additional information can be found at http://www.sia.com.

I. THE COURT SHOULD ADOPT A BRIGHT-LINE RULE FOR DISCLOSURES TO THE GOVERNMENT AND ENDORSE THE SELECTIVE WAIVER DOCTRINE

This Court should adopt a bright-line rule defining the precise parameters within which corporations can cooperate with the Government without suffering unintended, but draconian, results for such assistance. Rather than contribute to the ambiguity created by other courts in this area, this Court should embrace the "selective waiver doctrine" and hold that voluntary disclosure of confidential work product to assist the Government in its investigation does not waive the privilege, so long as: 1) the parties have a written confidentiality agreement; and 2) they share any objective common interest. The doctrine is so named because it permits a party to selectively waive work product privilege through disclosure to the Government without waiving the privilege as to other third parties.

The selective waiver rule as proposed here by the SIA is not a cataclysmic shift in the legal landscape regarding the work product doctrine. California courts already recognize that confidentiality is not waived when disclosure is pursuant to an agreement with the Government or made to an interested party.[2]

The selective waiver doctrine also promotes the goals of work product law as countenanced by California Code of Civil Procedure § 2018(a) through: 1) promoting the increasingly important public policy

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[2] The Eight Circuit also recognized the selective waiver doctrine, sitting *en banc*, in *Diversified Industries, Inc. v. Meredith* (8th Cir. 1978) 572 F.2d 596. The fundamental basis for the *Diversified* court's holding was the simple, yet important, policy goal of protecting public trust: "To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."

of assisting effective governmental investigations; 2) preserving the reasonable expectations of privacy that attorneys and clients rightly attach to the mental impressions prepared by counsel in anticipation of litigation; and 3) promoting fairness and economic efficiency by allowing parties to duly benefit from the fruits of their own efforts. Recognition of the doctrine would also improve judicial efficacy by delineating a clear standard for selective waiver.

II. CALIFORNIA LAW SUPPORTS THE SELECTIVE WAIVER DOCTRINE

A. The Selective Waiver Doctrine Harmonizes California Case Law

Each prong of the selective waiver doctrine has already been endorsed by California case law. In *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, the court held a confidentiality agreement sufficient to protect information disclosed to the Government from discovery by third parties. Additionally, the courts in *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240 (*BP Alaska*) and *Armenta v. Superior Court* (2002) 101 Cal.App.4th 525 held that disclosure of work product to third parties with an objectively discernable common interest does not waive the privilege as to any other third party. The selective wavier doctrine simply combines these decisions under a single standard.

The court in *Kirkland* addressed the relationship between a confidentiality agreement with the Government and discovery by third parties. In the underlying cause of action, Kyle R. Kirkland and related financial services companies ("Kirkland") were sued by Guess?, Inc. for conduct relating to Kirkland's services to a Guess?, Inc. licensee. Kirkland's attorney claimed that information disclosed to the Securities and

Exchange Commission (the "SEC") in its related investigation was made pursuant to a request that the information be kept confidential. *Kirkland, supra*, 95 Cal.App.4th at p. 98.

While there was no confidentiality *agreement* between Kirkland and the SEC, the court nonetheless held that such an agreement would be sufficient to prevent disclosure of information to other third parties. *See Kirkland, supra*, 95 Cal.App.4th at p. 98 (citing *In re Leslie Fay Companies, Inc. v. Securities Lit.* (S.D.N.Y. 1993) 152 F.R.D. 42, 45-46 [holding that no general waiver of work product privilege occurred because of a confidentiality agreement]). This Court's recognition of the selective waiver doctrine would simply apply the *Kirkland* rule to protect work product confidentiality.

The second prong of the selective waiver doctrine, regarding parties with a common interest, was addressed in *Armenta v. Superior Court* (2002) 101 Cal.App.4th 525. In the underlying action, counsel for plaintiffs Armenta and the Los Angeles Department of Water and Power ("LADWP") worked with the same experts and signed a joint prosecution agreement recognizing plaintiffs' common interest in sharing results of the experts' findings. *Id.* at p. 529. The purpose of the agreement was to ensure the confidentiality of the experts' work product by preserving attorney-client and work-product privileges as to information shared between the plaintiffs.[3] *Id.* at pp. 529-530.

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[3] The Agreement stated in relevant part that its purpose is

> to ensure that the exchanges and disclosures of plaintiffs' materials contemplated by the Agreement do not diminish in any way the confidentiality of plaintiffs' materials and do not constitute a waiver of any privilege otherwise available. . . .

In spite of the confidentiality agreement, the lower court allowed LADWP to independently waive work product privilege on Armenta's behalf and share results of the experts' findings with defendants pursuant to a settlement agreement. *Armenta, supra*, 101 Cal.App.4th at pp. 532-533. The court in *Armenta*, however, ordered the lower court to set aside its order allowing LADWP to share the experts' findings. The court held that "parties with common interests may share confidential information without waiving work product protections" and found the confidentiality agreement as evidence of a common interest between Armenta and LADWP. *Id.* at p. 534. The court therefore found that LADWP "had no authority to waive the work product privilege on Armenta's behalf" and prohibited LADWP from sharing the experts' work product with the defendants. *Id.* Although the parties' interests subsequently became adverse, the court still permitted selective waiver because Armenta and LADWP had a common interest when the work product was shared. This Court's recognition of the selective waiver doctrine would merely extend the holding of *Armenta* to apply when a corporation discloses work product pursuant to a common interest with the Government, notwithstanding any subsequent adversity between the parties.

The relationship between selective waiver and parties with common interests was also addressed in *BP Alaska*. In the underlying action, BP Alaska Exploration ("BPAE") was sued by two energy companies alleging multiple causes of action relating to a large-scale oil-exploration venture. *BP Alaska, supra*, 199 Cal.App.3d at pp. 1247-48. The other companies sought and were granted discovery of BPAE's internal investigation of their claims. *Id.* at p. 1249.

Armenta, supra, 101 Cal.App.4th at p. 529.

In reviewing the trial court's order, the *BP Alaska* court considered whether work product protection continues to apply when the contents of a writing are delivered to a client in confidence. *BP Alaska*, *supra*, 199 Cal.App.3d at pp. 1255-56. In the course of its analysis, the court in *BP Alaska* favorably cited to *United States v. Am. Tel. and Tel. Co.* (D.C. Cir 1980) 642 F.2d 1285 *(AT&T)*, which held that where parties have "common interests," work product may be disclosed without waiver of privilege. *See AT&T, supra*, 642 F.2d at p. 1299. *BP Alaska* held that "the delivery of work product documents to interested third parties does not constitute a waiver," including the situation in *AT&T* where the interested third party was the Government. *BP Alaska, supra*, 199 Cal.App.3d at pp. 1255-56 (internal quotation omitted).

The court in *BP Alaska* concluded that work product protection is not lost when delivered to an interested third party, even where "protection precludes [other] third parties not representing the client from discovery of the writing." *Id.* at pp. 1252-53, 1260. Indeed, the court broadly held that "the mere showing of a voluntary disclosure to a third person...should not suffice in itself for waiver of the work product privilege." *Id.* at p. 1256 (internal citation omitted). The selective waiver doctrine is merely an application of these principles where a corporation and the Government are the parties sharing a common interest.

In both *Armenta* and *BP Alaska*, the courts found that a common interest was sufficient to maintain work product confidentiality even in light of subsequent adversity between the parties. These cases suggest that despite the ever present risk of governmental enforcement or future action by or against the Government, such potential adversity is not sufficient to undermine a confidentiality agreement where an objectively discernable common interest exists at the time that work product is shared.

B. The Selective Waiver Doctrine is Supported By California and Federal Statutes

The selective waiver doctrine is directly supported by California statute. California Code of Civil Procedure § 2018(a)(2) holds that the work product privilege "prevent[s] attorneys from taking undue advantage of their adversary's industry and efforts." The court in *Dowden v. Superior Court* (1999) 73 Cal.App.4th 126, 133 explained that "[s]ection 2018's stated purpose and the underlying reasons for its creation emphasize the need to limit discovery so that the stupid or lazy practitioner may not take undue advantage of his adversary's efforts" (internal quotations omitted). Accordingly, the selective waiver doctrine prevents adversaries from unduly benefiting from the diligence of a party who conducts an investigation and discloses the work product to the Government.

California also contains a statutory provision analogous to the selective waiver doctrine. California Code of Civil Procedure § 2018(e) allows the State Bar to "discover the work product of an attorney against whom disciplinary charges are pending when it is relevant to issues of breach of duty by the lawyer," and provides that such work product will be "subject to a protective order. . .to ensure confidentiality." Section 2018(e) thus endorses selective waiver of work product protection to the State Bar per a confidentiality agreement (i.e. the protective order).

The selective waiver doctrine merely extends the logic of § 2018(e) from legal malpractice to corporate malfeasance issues. Whereas section 2018(e) aids in the investigation of fraud and breach of fiduciary duties by attorneys, the selective waiver doctrine would aid in the investigation of fraud and breaches of fiduciary duties by corporate insiders

by encouraging corporations to conduct independent investigations and disclose the results to the Government.

The Sarbanes-Oxley Act similarly underscores the need for such confidentiality, stating that information and documents received through the consensual inspections of accounting firms will be kept confidential:

> [A]ll documents and information prepared or received by or specifically for the Board, and deliberations of the Board and its employees and agents, in connection with an inspection under section 104 or with an investigation under this section, *shall be confidential and privileged as an evidentiary matter (and shall not be subject to civil discovery or other legal process) in any proceeding in any Federal or State court or administrative agency, and shall be exempt from disclosure*, in the hands of an agency or establishment of the Federal Government, under the Freedom of Information Act (5 U.S.C. 552a), or otherwise . . .

Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7215(b)(5)(A) (italics added).

Likewise, legislation on this very issue has been introduced in Congress at the behest of the SEC, with the primary sponsors being the Chairman of the House Financial Services Committee (Michael G. Oxley) and the Chairman of the Capital Markets Subcommittee of the House Financial Services Committee (Richard H. Baker). *See* The Securities Fraud Deterrence and Investor Restitution Act of 2003, H.R. 2179, 108th

Cong., 1st Sess. (2003) p. 17;[4] *see also* Testimony Concerning Returning Funds to Defrauded Investors Before the House Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, Committee on Financial Services (statement of Stephen M. Cutler, Director, Division of Enforcement, U.S. Securities & Exchange Commission) ("Voluntary production of information that is protected by . . . the attorney work product doctrine greatly enhances the Commission's investigative efforts, and in some cases makes them more efficient.").[5]

The selective waiver doctrine is thus nothing more than the recognition of existing California law on the matter. Endorsement of the doctrine would merely integrate previous decisions regarding selective waiver under one rule and extend the current statutory framework to evolve with the changing dynamics of the relationship between attorney, client, and the Government.

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[4] H.R. 2179 would amend Section 24 of the Securities Exchange Act of 1934 (15 U.S.C. 78x) to add a new subsection (e) to preserve the work product privilege when a disclosure of confidential information is made to assist the Government:

> (e) AUTHORITY TO ACCEPT PRIVILEGED AND PROTECTED INFORMATION. – Notwithstanding any other provision of law, whenever the Commission and any person agree in writing to terms pursuant to which such person will produce or disclose to the Commission any document or information that is subject to any Federal or State law privilege, or to the protection provided by the work product doctrine, such production or disclosure shall not constitute a waiver of the privilege or protection as to any person other than the Commission.

The full text of H.R. 2179 may be found at the following location: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h2179ih.txt.pdf.

[5] The full text of this testimony by Director Cutler of the SEC can be found at the following location: http://www.sec.gov/news/testimony/022603tssmc.htm.

III. FUNDAMENTAL POLICY GOALS SUPPORT THE SELECTIVE WAIVER DOCTRINE

A. Avoids Judicial Line Drawing and Second-Guessing

The selective waiver doctrine advocated here by SIA would avoid unnecessary judicial line-drawing and second guessing. This is so because the rule proposed – no waiver of work product where there is both an objectively discernible common interest *and* a written protective order in place – would leave courts free of trying to extract what exactly constitutes a sufficient "common interest" to invoke the waiver exception to the work product doctrine. *See, e.g., BP Alaska, supra,* 199 Cal.App.3d at p. 1254 (holding that the only exception to absolute work product protection is an attorney's 'voluntary disclosure to a party lacking a common interest in maintaining confidentiality).

Under SIA's proposal no such futile exercise would be needed. If the parties can articulate one common interest (*e.g.*, ferreting out fraud) that is objectively discernible from the circumstances (*e.g.*, warnings by auditors), then the selective waiver doctrine would apply. Unless the parties are objectively adverse, judicial piercing into their relationship would create an unworkable factual situation finding no room for selective waiver since potential adversity usually exists between all parties to a suit. As *Armenta* and *BP Alaska* demonstrated, courts should not attempt to discover whether the parties interests are "truly" adverse if there already exists any discernable common interest. *See supra* II.A.

Adoption of the selective wavier doctrine as proposed by SIA would avoid the messy process of having a court attempt to determine the subjective intent of a party's mind regarding whether or not disclosure was actually made to further a common interest. A bright-line rule would serve

not only this Court's administration of justice, but a company's ability to perform its role in preserving public trust.

B. Promotes Fact Finding

The selective waiver doctrine promotes the critical role that corporations and Government agencies each undertake to investigate and prosecute cases of corporate fraud and malfeasance. Having realized that there may have been internal problems, McKesson conducted an internal investigation and then decided, in the interests of justice and fairness, to cooperate with the Government in its investigation. This was a situation of full cooperation that benefited not only the corporate-party (McKesson), but the interests of the regulatory bodies (the SEC and the U.S. Attorney's Office) and the general public (the shareholders).

California Code of Civil Procedure § 2018(a)(2) recognizes that one of the policy goals of the work product privilege is to encourage attorneys "to investigate not only the favorable but the unfavorable aspects of [their] cases." Similarly, California courts also recognize that work product privilege provides an incentive for attorneys to investigate and prepare their cases thoroughly. *See, e.g., National Steel Products Co. v. Superior Court* (1985) 164 Cal.App.3d 476, 487-488.

Additionally, it is almost the norm with federal securities laws that self-policing and reporting be required of publicly held companies. *See, e.g.*, Section 10A of the Securities Exchange Act of 1934, 15 U.S.C. § 78j-1 (requiring issuers and auditors to report certain illegal conduct to the SEC); *In the Matter of John Gutfreund*, Exchange Act Release No. 31554 (Dec. 3, 1992) (sanctions imposed against supervisors at broker-dealer for failing to promptly to bring misconduct to the attention of the Government); *see also* U.S.S.G. § 8c2.5(f) & (g) ("culpability score"

decreases if organization has an effective program to prevent and detect violations of law).

It is with this backdrop that the selective waiver doctrine rings with greatest clarity and resonance. Cooperation with the Government's efforts to maintain a fair and honest economy are not inconsistent with a corporation's ability to investigate and defend itself in other forums. The selective waiver doctrine is simply another progression in that series – a logical and needed one. To consider the situation any other way would put the lawyer in that oft-spoken Hobbesian dilemma – either conceal information from the Government or be paralyzed in other litigation through forced disclosure of work product to "true" adversaries. Forced disclosure would severely undercut the fact-finding process by virtually ensuring that internal investigations would not be disclosed to the Government.

In addition to its indisputable policy and social benefits, the selective waiver doctrine imposes virtually no costs upon the fact-finding process. As the Third Circuit has recognized: "when a client discloses privileged information to a government agency, the private litigant . . . is no worse off than it would have been had the disclosure to the agency not occurred." *Westinghouse Elec. Corp. v. Republic of Philippines* (3d Cir. 1991) 95 F.2d 1414, 1426 fn.13.

The mental impressions and opinions contained in the reports of McKesson Corporation are not evidentiary. That is, the same underlying facts are available to subsequent litigants. Those litigants are at liberty to review the evidentiary record, interview the same witnesses and conduct their own legal research from that fact-finding process. *See Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 214, 217-218

(witness statements are not privileged, but attorney mental impressions are); *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 647 (witnesses' statements are not protected by the work product while attorney impressions and observations are).

The selective waiver doctrine would not scuttle away those facts, or hinder others' factual investigation. Rather, it only "facilitates zealous advocacy in the context of an adversarial system of justice by ensuring that the sweat of an attorney's brow is not appropriated by the opposing party." *Hickman v. Taylor* (1947) 329 U.S. 495, 511. *See also* Code Civ. Proc., § 2018(a)(2) (stating that work product policy "prevent[s] attorneys from taking undue advantage of their adversary's industry and efforts.").

Thus, adopting the selective waiver doctrine would not only support governmental investigations, it would also protect the integrity of the justice system. *See BP Alaska, supra*, 199 Cal.App.3d at p. 1256 (holding that work product privilege exists "to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent.") (citation omitted). All corporations share the SEC's interest in maintaining a legitimate business community and markets. Just as with any other entity, corporations should be free to share privileged materials with the Government to advance that common interest. This is done routinely. *See United States v. Schwimmer* (2d Cir. 1989) 892 F.2d 237, 243-244 (one defendant's communications with the other defendant's accountant were privileged because of the parties' joint defense/common interest); *In re Copper Market Antitrust Litig.* (S.D.N.Y 2001) 200 F.R.D. 213, 217-221 (work-product and attorney-client privileges protected communications between corporation and public relations firm).

C. Preserves Expectation of Privacy

The selective waiver doctrine will preserve reasonable expectations of privacy by allowing corporations and the Government to rely on the confidentiality agreements that they sign. The United States Supreme Court noted the importance of enabling parties and their counsel to restrict work product from their adversaries:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, *supra*, 329 U.S. at p. 511.

California law similarly justifies the work product privilege on the basis of attorney privacy. California Code of Civil Procedure § 2018(a)(1) states that the work product privilege in California "preserve[s] the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly." *See also Armenta*, *supra*, 101 Cal.App.4th at p. 535 (agreement not to waive work product privilege as to information shared with a co-party sufficient to create a "reasonable expectation" of privacy).

Unnecessary judicial piercing of the work product doctrine would essentially make lawyers unwitting Government informants, and thus unable to effectively perform their jobs to promote fact finding and the search for truth.

D. Promotes Fairness and Efficiency

Although California provides that certain types of work product are discoverable by an adversary, it will only permit their discovery when lack of disclosure will "*unfairly* prejudice the party seeking discovery. . .or will result in an *injustice*." Code Civ. Proc., § 2018(b) (establishing a qualified privilege for work product not consisting of an attorney's impressions, conclusions, opinions, or legal theories) (emphasis added). As noted above, preventing a party from discovering an adversary's work product disclosed to the Government does *not* unfairly prejudice the party seeking discovery. *See supra* III.B. The selective waiver doctrine would therefore further the policy of § 2018(b) to the extent an internal investigation yields discoverable work product.

Another policy underlying California work product law is to "prevent attorneys from taking undue advantage of their adversary's industry and efforts." Code Civ. Proc., § 2018(a)(2). *See supra* II.B. This statute can be understood as prohibiting attorneys from taking an "economically inefficient advantage" of their adversary's efforts. Generating work product requires scarce resources (*i.e.*, an attorney's time and effort) so it likely has tremendous economic value which would provide an inefficient advantage to opponents if subject to wholesale intrusion by those who not authorized to receive it.

The selective waiver doctrine would promote the efficient production and allocation of attorney work product because it is a method

of exclusion, *i.e.*, of dealing with the "free-rider" problem. *See Dowden, supra*, 73 Cal.App.4th at p. 133 ("discovery [of work product] may be limited or denied when the facts indicate that...there is an abusive attempt to 'ride free' on the opponent's industry.") (citation omitted). The phenomenon of free-riding leads to the underproduction of a good (work product) when a consumer (the legal adversary) may capture its benefit without bearing any cost. *See, e.g.*, Paul Milgrom and John Roberts, Economics, Organization & Management (1992) pages 294-298.

Without the selective waiver doctrine, adversarial free-riding would result in the production of significantly less (in terms of quality and quantity) work product consisting of attorney investigations. If a party was forced to share work product with an adversary when voluntarily disclosed to the Government, less investigations and disclosure would occur because their value is in large part derived from confidentiality. *See Dowden, supra*, 73 Cal.App.4th at p. 133 ("[a] litigant needs the...opportunity to research relevant law and to prepare his or her case without then having to give that research to an adversary making a discovery request.").

Without the selective waiver doctrine resources otherwise expended to produce work product would be employed elsewhere and thereby result in an inefficiency: a party would rather expend those resources to produce work product but for the fact that it would have to be shared with an adversary. The selective waiver doctrine is thus wealth maximizing because parties obtain greater value from their resources with the rule than without it.

This Court's endorsement of the selective waiver doctrine is thus required in order to give a party the incentive to bear the costs of attorney investigations and subsequently disclose the results to the

Government. Failure to adopt the selective waiver doctrine would result in less attorney investigations of corporations and less disclosures to the Government. It would stymie Government inquiries and affect precisely the opposite public policy needing to be encouraged.

IV. CONCLUSION

With the recent passage of the Sarbanes-Oxley Act, the awareness of, and the need for, full corporate disclosure and cooperation with the Government is unquestioned. An explicit recognition by this Court of a selective waiver doctrine with respect to Government investigations addresses squarely the public's recognition that full disclosure is not only necessary to ferret out possible corporate improprieties, but essential to reestablishing the public trust in the securities market. Adoption of the selective waiver doctrine would not be tantamount to creating "new law" or altering the current law concerning work product doctrine. It would simply be an explicit, and overdue, recognition of a legal principle countenanced by California case and statutory law, and promoting the important public policy goals of fairness, privacy, and the effective functioning of the adversarial system.

Dated: November 14, 2003

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court Rule 14(c)(1) this brief consists of 4981 words as counted by the Microsoft Word Version 2000 processing program used to generate the brief.

Dated: November 14, 2003

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is Latham & Watkins LLP, 633 West Fifth Street, Suite 4000, Los Angeles, CA 90071-2007.

On **November 14, 2003**, I served the following document described as:

APPLICATION OF THE SECURITIES INDUSTRY ASSOCIATION FOR PERMISSION TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANT/PETITIONER AND BRIEF OF AMICUS CURIAE IN SUPPORT THEREOF

by serving a true copy of the above-described document in the following manner:

BY U.S. MAIL

I am familiar with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service. Under that practice, documents are deposited with the Latham & Watkins LLP personnel responsible for depositing documents with the United States Postal Service; such documents are delivered to the United States Postal Service on that same day in the ordinary course of business, with postage thereon fully prepaid. I deposited in Latham & Watkins LLP' interoffice mail a sealed envelope or package containing the above-described document and addressed as set forth below in accordance with the office practice of Latham & Watkins LLP for collecting and processing documents for mailing with the United States Postal Service:

See Attached Service List

The proof of service attached to the brief was an error as we neglected to deposit the brief in the mail that day. This proof of service is a replacement for the proof of service dated November 5, 2003.

I declare that I am employed in the office of a member of the Bar of, or permitted to practice before, this Court at whose direction the service was made and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **November 14, 2003**, at Los Angeles, California.

Donna Brittenham

SERVICE LIST FOR

Court of Appeal – First Appellate District

McKesson HBOC, Inc. v.

The Superior Court of San Francisco County

Case No. A103055
San Francisco County Sup. Ct. No. 307619

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