IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Docket No. 03-10511

UNITED STATES OF AMERICA
Plaintiff

and

McKESSON CORPORATION
Intervenor-Appellant

vs.

CHARLES W. McCALL; JAY M. LAPINE
Defendants-Appellees

On Appeal from an Order of the
United States District Court for the
Northern District of California

AMICUS CURIAE BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION IN SUPPORT OF INTERVENOR-APPELLANT, McKESSON CORPORATION

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STATEMENT OF CONSENT

The Securities Industry Association respectfully submits this brief as *amicus curiae* in support of Intervenor-Appellant McKesson Corporation. Plaintiff United States of America and Intervenor-Appellant McKesson Corporation have granted their consent to the submission of this *amicus curiae* brief.

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ISSUE PRESENTED BY *AMICUS CURIAE*

Why this Court should adopt a bright-line rule endorsing the "selective waiver doctrine," that would allow a party to cooperate with a Government investigation by voluntarily disclosing work product without waiving the immunity[1] as to other third parties. This selective waiver would only apply when: 1) the party making the disclosure and the Government can articulate an objectively discernible interest not inimical to the other, *i.e.*, they have a "common interest" such as preventing employee malfeasance; and 2) the disclosure is made pursuant to a written confidentiality agreement with the Government.

STATEMENT OF INTEREST

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 immunity.

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

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[1] *Amicus curiae* SIA recognizes that the work product doctrine is not an evidentiary "privilege" per se, *see* Fed. R. Civ. Proc. 26(b)(3); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1989) ("The work-product rule is not a privilege but a qualified immunity protecting from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation."), but will refer to it from time to time herein as such to comport with the language of the cases cited.

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.[2]

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

ARGUMENT

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

The 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 the other Circuits 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 immunity, so long as the parties share any objective common interest and they have a written confidentiality agreement.

Such a rule would serve important dual, interrelated purposes: 1) to preserve the reasonable expectations of privacy that attorneys and clients rightly attach to the mental impressions prepared by counsel in anticipation of litigation; and 2) to promote an increasingly important public policy of assisting efficient governmental investigations.

The selective waiver rule as proposed here by the SIA is not a cataclysmic shift in the legal landscape regarding the work-product doctrine. In fact, this very principle was recognized and adopted by the Eight Circuit, sitting *en banc*, in *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1978) (en banc). 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." Those words ring with a prescient truth even today, some 25 years later.

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. Indeed, legislation recently introduced in Congress at the behest of the SEC (H.R. 2179)[3] would preserve the work product immunity (as well as the attorney-client privilege) in those instances where a disclosure of confidential information is made pursuant to a protective order. *See* Section III.A., *infra.*

In addition to its indisputable policy and social benefits, the selective waiver doctrine has virtually no costs. Contrary to the assertions of the defendants-appellees, who are attempting to extract a tactical advantage from McKesson Corporation's cooperative efforts, protection of the work-product doctrine in these circumstances will not impair fair resolution of any criminal or civil action. *See, e.g., United States v. Fernandez*, 231 F.3d 1240, 1247 (9th Cir. 2000) (work product doctrine does not protect evidence or facts). 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*, 951 F.2d 1414, 1426 n.13 (3d Cir. 1991).

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

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[3] The full title of H.R. 2179 is the following: The Securities Fraud Deterrence and Investor Restitution Act of 2003, H.R. 2179, 108th Cong. (1st Sess. 2003). *See also* Section III.A., *infra.*

evidentiary record, interview the same witnesses and conduct their own legal research from that fact-finding process. *See, e.g., Maertin v. Armstrong World Indus., Inc.*, 172 F.R.D. 143, 150-51 (D. N.J. 1997) ("although the work product doctrine protects the physical documents, it 'does not protect disclosure of the underlying facts in the documents'") (*quoting Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981)).

The selective waiver doctrine would not scuttle away those facts, or even hinder that deliberative mental process. 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." *In re Grand Jury Subpoena*, 274 F.3d 563, 574 (1st Cir. 2002) (*citing Hickman v. Taylor*, 329 U.S. 495, 511 (1947)). Thus, adopting the selective waiver doctrine would not only support governmental investigations, it would also protect the integrity of the justice system. *See JumpSport, Inc. v. Jumpking, Inc.*, 213 F.R.D. 329, 335 (N.D. Cal. 2003) ("the ultimate purpose of the work product doctrine is to help protect the quality of the truth finding process – and, thereby, the integrity of our system of justice").

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*, 892 F.2d 237, 243-244 (2d Cir. 1989) (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.*, 200 F.R.D. 213, 217-221 (S.D.N.Y 2001) (work-product and attorney-client privileges protected communications between corporation and public relations firm).

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 a quarter century ago that was, and is, intended to promote important public policy goals of justice and fairness.

II. CASE LAW ALREADY SUPPORTS THE "SELECTIVE WAIVER DOCTRINE" WHEN A CORPORATION VOLUNTARILY DISCLOSES CONFIDENTIAL INFORMATION TO ASSIST A GOVERNMENT INVESTIGATION

A. Nearly All Of The Circuits Support The "Selective Waiver Doctrine" Proposed By *Amicus Curiae*

1. The Eighth Circuit's Seminal Decision: *Diversified Industries, Inc. v. Meredith*

The selective waiver doctrine takes its roots from the Eighth Circuit's well-reasoned decision in *Diversified*, *supra*. The Eighth Circuit in that case, sitting *en banc*, held that selective waiver was permissible; it essentially invoked a Government investigation exception to the third-party waiver rule, even in the absence of any confidentiality agreement.

Diversified arose out of an official SEC investigation of Diversified's business practices. *See id.*, 572 F.2d at 611. The company had retained outside counsel to prepare a confidential report on those practices. *See id.* at 607-8. In response to an SEC subpoena, Diversified voluntarily produced to the agency a copy of the confidential report. *See id.* at 611. A third-party corporation, in an unrelated civil action, subsequently sought production of that same report. Diversified objected on the grounds that the report was protected by both the attorney-client privilege and the work product doctrine. *See id.*

On rehearing *en banc*, the Eighth Circuit held that the third-party was not entitled to the confidential report, even though Diversified had already

disclosed the same report to the SEC. Even though Diversified did not execute a confidentiality agreement the Eighth Circuit found that Diversified took steps to restrict access to the privileged material. *See id.*, 572 F.2d at 611. The court emphasized that the initial disclosure was made in the context of a "separate and non-public" investigation, and to allow that SEC disclosure to constitute an absolute waiver would "thwart the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers." *Id.*

The selective waiver principle announced in *Diversified* was essentially ratified by the U.S. Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383, 387 (1981), the most recent Supreme Court case to address these privilege issues. *See Upjohn Co.*, 449 U.S. at 387 (holding by implication that the company did not waive the corporate attorney-client privilege merely by voluntarily disclosing to the SEC and the IRS information regarding its foreign payments). Selective waiver also remains the law in the Eighth Circuit. *See, e.g., United States v. Shyres*, 898 F.2d 647, 657 (8th Cir. 1990) (holding that communications contained in an outside report were protected by the privilege even though company voluntarily disclosed it to the Government in connection with a grand jury investigation); *McDonnell Douglas Corp. v. United States EEOC*, 922 F. Supp. 235, 242-43 (E.D. Mo. 1996) (privilege is not waived when party produces materials "to a governmental agency for a limited purpose"); *see also In re Commercial Financial Services, Inc.*, 247 B.R. 828, 853 n.3 (Bankr. N.D. Okla. 2000) (confidentiality agreement may "preserve work-product immunity").

2. The Seventh and D.C. Circuits (And Others) Have Adopted The *Diversified* Holding

In several post-*Diversified* decisions, other circuits, most notably the Seventh and the District of Columbia, have adopted the *Diversified* holding. In *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122 (7th Cir. 1997), which the Seventh Circuit described as "a selective waiver case," *id.* at 1126, the court held that the Government did not waive its governmental investigative privilege as to a third party by providing privileged materials to a party under investigation. *See id.* at 1127. The court observed that the Government should have secured a confidentiality agreement prior to disclosure. *See id.* The *Dellwood Farms* court, with Chief Justice Posner writing, held, that the Government's failure to secure a written agreement before disclosure was not fatal to its claim of privilege. *See id.* While the factual situation was slightly different than the case presently (the Government producing confidential information to a private party), the rationale holds true regardless: disclosure in limited circumstances does not automatically constitute a waiver of certain privileges or immunities.

Likewise, in *United States v. Am. Tel. and Tel. Co.* ("*AT&T*"), 642 F.2d 1285 (D.C. Cir. 1980), there were two closely related antitrust law suits pending against AT&T; one filed by MCI in the Northern District of Illinois, and another filed by the Government in the District of the District of Columbia. To assist the Government in its investigation and case, MCI agreed to provide certain information. This was done pursuant to a modification of a protective order that stood in MCI's case against AT&T in the Northern District of Illinois. *See id.* at 1288. Under the modification, MCI made available to the Government all discovery materials it acquired from AT&T. *See id.* Among the materials MCI furnished were documents relating to a database of computerized abstracts of documents, deposition transcripts and other exhibits – in other words, work

product. *See id.* at 1289. The exchange of information was governed by a confidentiality provision in the protective order. *See id.*

Shortly thereafter, AT&T served a discovery request on the Government asking for the documents MCI had furnished. *See AT&T*, 642 F.2d at 1289. The court in *AT&T* noted that the information would make AT&T able to determine which documents plaintiff's counsel would consider important and why; it would intrude upon work product. *See id.* Because of this wrinkle, the court subsequently addressed the question of whether the work product immunity is waived when the party that created documents in anticipation of litigation provides those documents to another party. *See id.* at 1298.

The court began by stating that "the work product privilege does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent." *See AT&T*, 642 F.2d at 1299. With that concept in mind, the court concluded that "while the mere showing of a voluntary disclosure to a third person will generally suffice to show wavier of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege." *Id.*

The *AT&T* court went on to expound that it would allow confidential disclosure to any person without waiver of the work product immunity only where the transferor or transferee had "common interests." *See AT&T*, 642 F.2d at 1299. The concept of "common interests,"[4] so said the court, "should not be construed as

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[4] The holding in *AT&T* only addressed the "common interest" doctrine in the context of the work product doctrine. It is possible to read the decision to suggest that the common interest rule is inapplicable to situations where information protected by the attorney-client privilege is disclosed to a third party because any such disclosure (even to an individual or entity with a common interest) would be inconsistent with the confidential nature inherent in the attorney-client relationship. There is authority in other

narrowly limited to co-parties." *Id.* "So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts." *Id.*

The *AT&T* court ultimately held that MCI and the Government shared such a common interest, and denied AT&T access to the information MCI and the Government had exchanged. *See AT&T*, 642 F.2d. at 1300-01. Moreover, the disclosure by MCI was made pursuant to a protective order and "an assurance of confidentiality" from the Government. *Id.* at 1289. This was telling for the court because "[w]hen the transfer to a party with such common interests is conducted under a ***guarantee of confidentiality, the case against waiver is even stronger***." *Id.* at 1300 (emphasis own).

One year later, the District of Columbia Circuit came to the same type of analysis in *Permian Corp. v. United States*, 665 F.2d 1214, 1220 (D.C. Cir. 1981). In *Permian Corp.*, the court was determining whether the voluntary disclosure of documents to the SEC by Occidental Petroleum (Permian's parent company) destroyed the confidential status of the documents when another government agency sought disclosure of the same documents from the SEC. While the *Permian Corp.* case is directed to waiver vis-à-vis the attorney-client privilege, *see id.* at 1219 n.9, the court's rationale is nevertheless instructive for purposes here.[5]

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jurisdictions, however, to suggest that the common interest rule applies to both privileges. *See, e.g., Western Fuels Ass'n v. Burlington N.R.R.*, 102 F.R.D. 201, 203 (D. Wyo. 1984) (collecting cases). While not critical here, the precise scope of the common interest doctrine will most likely vary depending on the facts of each case.

[5] In fact, the District of Columbia and Third Circuits have applied similar reasoning to work product waiver issues in *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982), and *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3rd Cir. 1991).

Prior to the disclosure in *Permian Corp.*, the SEC and Occidental Petroleum had reached an agreement that the information would be held confidential prior to its disclosure by the petroleum company. *See id.* at 1216-18. The agreement with the SEC, however, was limited; it only provided that the SEC would not disclose the documents "to any third party unless prior notice of such proposed disclosure has been given to Occidental."[6] *Id.* at 1216. Put another way, the agreement did exempt disclosure of Occidental's privileged information.

Faced with those facts, the court in *Permian Corp.* held that the privileged status of the attorney-client communications was destroyed when they were voluntarily disclosed to the SEC: "***Under these circumstances*** 'it is clear that the mantle of confidentiality which once protected the documents has been so irretrievably breached that an effective waiver of the privilege has been accomplished.' (citations omitted)." *Id.* at 1220 (emphasis own).

Again, as before with *AT&T*, the *Permian* court simply found that there was no "assurance of confidentiality" provided by the Government agency when the information was disclosed. Indeed, the court in *Permian* took careful note of the fact that

> there is no evidence in the record suggesting attempts to prevent their [the document's] use by the SEC staff in the processing of Occidental's registration statement. Even after Occidental was specifically informed by Mead that

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[6] Specifically, the agreement with the SEC was that the "SEC agreed not to deliver any of the Documents to any person other than a member of the Commission or the Staff or any other government agencies, offices or bodies or to the Congress for a reasonable period of time after notice to Occidental of the Staff's intention to deliver the Documents to such person." *Permian Corp.*, 665 F.2d at 1216. And, indeed, as evidenced by the record with the district court, there was also considerable ambiguity as to what exactly was agreed to between the SEC and Occidental Petroleum. *See id.* ("The nature of the resulting agreement was disputed in the district court.").

> the privileged documents had been submitted, Occidental did not request that they be returned unread.

Permian, 665 F.2d at 1220-21. Had Occidental Petroleum taken the time to negotiate the proper confidentiality agreement, it is more than likely the District of Columbia Circuit would have recognized a selective waiver rule. Certainly, nothing in *Permian* suggests otherwise and all indications from *AT&T* would support such a rule.

Other cases echo the wisdom and reasoning of *Dellwood Farms* and *AT&T*. For example, in *In re Grand Jury Subpoena Dated July 13, 1979*, 478 F. Supp. 368 (E.D. Wis. 1979), the district court held that a law firm's disclosure of an internal investigative report to the IRS, the SEC and a grand jury did not waive the attorney-client privilege for related interview notes when the U.S. Attorney's Office later sought access to the same notes in connection with a separate investigation. *See id.* at 372-73.

Similarly, in *Jobin v. Bank of Boulder (In re M&L Bus. Mach. Co.)*, 161 B.R. 689, 696-97 (D. Colo. 1993), the district court accepted the selective waiver doctrine advocated here by *amicus curiae* SIA. In *Jobin*, the Bank of Boulder had disclosed to the U.S. Attorney's Office several documents protected by the attorney-client privilege and the work-product doctrine, pursuant to an agreement with the U.S. Attorney that the Bank's disclosures would be kept confidential and that the disclosures would not constitute a general waiver. *See id.* at 696. The court considered the case law on the subject, and on the facts before it held that no general waiver had occurred. *Id.* at 696-97.[7]

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[7] See also *Schnell v. Schnall*, 550 F. Supp. 650, 653 (S.D.N.Y. 1982) and *Teachers Ins. & Annuity Ass'n of America v. Shamrock Broad. Co.*, 521 F. Supp. 638, 646 (S.D.N.Y. 1981), for further examples of where the selective waiver doctrine, and its important policy goals, have been discussed.

3. Other Circuits Implicitly, If Not Explicitly, Recognize The "Selective Waiver Doctrine"

The selective waiver doctrine, as advocated here by *amicus curiae* SIA, would limit the waiver of the immunity only as to the Government if and only if there is a prior, written confidentiality agreement in place to recognize and preserve the sensitive nature of the information. SIA is not suggesting that a party, corporate or otherwise, may flaunt the traditional notions and safeguards of the work product doctrine. Rather, courts should recognize, and in fact encourage, full and efficient factual investigation and development while still preserving the immunity. The best way to counterbalance these dual important goals is to limit the waiver to those special circumstances where the party and the Government share an objectively discernible common interest and have executed a confidentiality agreement explicitly recognizing both the confidential nature of the information exchanged and that the disclosure is only as to the Government.[8]

While most courts outside the Seventh, Eighth and the District of Columbia have not squarely addressed the issue, the courts have all discussed or recognized that voluntary disclosure of work product information should not constitute a general waiver when it is done pursuant to a written confidentiality agreement with the Government.

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[8] Perhaps this is why legislation was recently introduced in the House of Representatives at the behest of the SEC on this very issue. H.R. 2179 would encourage private parties, including corporations, to cooperate with SEC investigations by preserving the work-product immunity when there is a voluntary disclosure of confidential information pursuant to a written agreement. *See* The Securities Fraud Deterrence and Investor Restitution Act of 2003, H.R. 2179, 108th Cong. (1st Sess. 2003); *see also* Section III.A., *infra.*

This is the situation in the Second Circuit.[9] In *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993), the Second Circuit explicitly rejected a *per se* rule against selective waivers because, *inter alia*, such a rule "would fail to anticipate . . . situations in which the [Government] and the disclosing party have entered into an explicit agreement that the [Government] will maintain the confidentiality of the disclosed materials." *Id.* at 236. The *Steinhardt* court tethered that statement on *Diversified*'s well-spoken policy rationale:

> [M]uch of the reasoning in *Diversified* has equal, if not greater, applicability in the context of the work product doctrine.
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> The *Diversified* opinion based its "selective waiver" theory on the policy consideration that if voluntary disclosure to the SEC waives privilege as to subsequent private litigants, parties might be discouraged from cooperating with governmental investigations.

Id. at 235.

This language indicates that the Second Circuit is inclined to preserve the immunity where (as here with McKesson Corporation) confidential materials have been disclosed to the Government under a confidentiality agreement.[10] At least one court in the Second Circuit has read *Steinhardt* in precisely that manner.

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[9] As noted in footnote 7, *supra*, district courts in the Second Circuit have found in favor of the selective waiver doctrine.

[10] The *Steinhardt* court also found that Steinhardt and the Government were adverse – a situation exempted by the selective waiver doctrine advocated by *amicus curiae*. *See Steinhardt*, 9 F.3d at 236 ("the SEC and Steinhardt stood in an adversarial position"). The rule proposed by *amicus curiae* would apply when the parties share a "common interest."

See In re Leslie Fay Cos. Sec. Litig., 161 F.R.D. 274, 284 (S.D.N.Y. 1995) (holding that no general waiver of privilege occurred because of confidentiality agreement).

Similarly, in *United States v. MIT*, 129 F.3d 681, 683 (1st Cir. 1997), the First Circuit was asked to decide whether disclosure of confidential information to a Government audit agency constituted a waiver of the privileges. While the court found that it did, the decision in *MIT* left open the possibility that selective waiver may still be the better rule. In that case, MIT was audited by the Defense Contract Audit Agency ("DCCA") to determine whether MIT had overcharged the Government under certain government contracts. The First Circuit found that such a waiver was a general one because the DCCA "had made no unconditional promise to keep the documents secret." *Id.* at 683. *MIT* is unlike the case *sub judice*; McKesson and the Government have executed several confidentiality agreements preserving the sensitive nature of the information disclosed. Moreover, the *MIT* court was adamant in its holding that MIT and the DCCA held no "common interest":

> But this is not the kind of common interest to which the cases refer in recognizing that allied lawyers and clients--who are working together in prosecuting or defending a lawsuit or in certain other legal transactions--can exchange information among themselves without loss of the privilege.

Id. at 686. Thus, the First Circuit, as evidenced by the *MIT* decision, has implicitly recognized that there may in fact be situations where a selective waiver rule, as advocated by *amicus curiae* SIA, would be beneficial. The facts in *MIT* simply did not allow it to fully address or recognize such a doctrine because as the court in *MIT* explained so clearly, the parties in that case were adverse. There was no

common interest between MIT and the DCCA to even invoke the selective waiver doctrine.

Finally, the Third Circuit, like the First and Second, similarly endorses the selective waiver doctrine as proposed here by *amicus curiae* SIA. In *Westinghouse*, *supra*, the Republic of the Philippines (the "Republic") sued Westinghouse claiming that it had bribed Government officials. The SEC and the Department of Justice also initiated similar investigations. *See Westinghouse,* 951 F.2d at 1417. Westinghouse retained a law firm to conduct an internal investigation and prepared two letters as a result. Those letters were turned over to the Government agencies – once to the SEC and then to the DOJ pursuant to a subpoena. In its disclosure to the SEC, Westinghouse relied upon the confidentiality regulations of the SEC, but did not have an express written agreement to maintain the privileged nature of the documents. While Westinghouse did sign a separate confidentiality agreement with the DOJ, that agreement was flawed and only "preserved Westinghouse's right to invoke the attorney-client privilege only as to the DOJ – and [did] not ***appear in any way to have purported to preserve Westinghouse's right to invoke the privilege against a different entity in an unrelated civil proceeding such as the instant case.***" *Id.* at 1428 (emphasis own). On those facts, the Third Circuit found that Westinghouse had waived its privileges.[11]

Nothing in *Westinghouse* suggests that the Third Circuit would not endorse the selective waiver doctrine as proposed here by *amicus curiae* if the issue arose in the proper factual context. In the absence of an agreement to

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[11] The *Westinghouse* court also focused upon the adversarial nature of the relationship between Westinghouse and the Government agencies and stated that a different conclusion may have been reached had the parties not been adversaries. *See id.*, 951 F.2d at 1430-31.

maintain confidentiality, the Third Circuit would not maintain the work-product immunity that the parties, themselves, had failed to preserve.

As explained by the court in *Westinghouse*:

> Moreover, even if Westinghouse could preserve the privilege by conditioning its disclosure upon a promise to maintain confidentiality, no such promise was made here regarding the information disclosed to the SEC.

Id. at 1427. And, as already noted above, the agreement with DOJ was a non-event with respect to waivers of the privilege and immunity for third parties – the DOJ agreement was only as to DOJ itself. Thus, as with the First and Second Circuits, the Third appears to have recognized, at least implicitly, the need for a selective waiver doctrine under the right factual situation. This is that situation.

B. The Sixth Circuit's Decision In *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation* Was Incorrectly Decided – The Sixth Circuit Ignored Its Own Precedent

Recently, the Sixth Circuit in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002), *petition for cert. filed*, No. 02-888, 71 U.S.L.W. 3429 (Dec. 9, 2002), flatly rejected any notion of a selective waiver doctrine. There, the Government sought "internal audits" prepared by Columbia/HCA in response to or in anticipation of a government fraud investigation, and the company complied. *See id.* at 292. Subsequent civil cases were filed against Columbia/HCA and the same internal audits were sought as part of discovery. After reviewing the prior case on the subject, the court rejected all concepts of a selective waiver, even when there was a written confidentiality agreement in place. *See id.* at 302.

Judge Bogg, in a well-reasoned dissent in *In re Columbia/HCA Healthcare Corp.*, decried the majority's decision. He explained that production of

work-product to Government agencies should not waive the work-product immunity because of the "important public policy interest in easing governmental investigations." *Id.*, 293 F.3d. at 311 (Boggs, J., dissenting). "Without the exception, much otherwise disclosed material would stay completely in the dark, under the absolute cover of privilege." *Id.*, 293 F.3d at 312 (Boggs, J., dissenting).

Judge Bogg's dissenting words were not the echo of a single, isolated clap. Prior to *In re Columbia/HCA Healthcare Corp.*, the Sixth Circuit had always adopted a tempered, equitable approach to waivers. This suggests a strong inclination for the policy rationales and legal analyses set forth by those jurisdictions that recognize the selective waiver doctrine.

For example, in *In re Grand Jury Proceedings October 12, 1995*, 178 F.3d 251 (6th Cir. 1996), the Sixth Circuit was faced with the question of whether the disclosure of certain points of a marketing plan constituted a waiver of the privilege afforded the entire plan. *See id.* at 255. The Sixth Circuit noted "the line of cases that try to make prudential distinctions between what was revealed and what remains privileged" and instructed the district court to limit the subject-matter waiver to the points "truly" revealed. *Id.* In fact, the court ensconced its opinion with this explicit recognition of the importance of the privilege: "Too broad an application of the rule of waiver . . . might tend to destroy the salutary purpose of the privilege." *Id.* at 255-56; *see also In re Perrigo Co.*, 128 F.3d 430, 439-41 (6th Cir. 1997) (in derivative suit, court noted concern that finding waiver in that context would "discourage independent directors from working candidly with counsel in charging their [statutory] duties.").

In light of the above, the Sixth Circuit incorrectly decided the *In re Columbia/HCA Healthcare Corp.* decision.

III. FUNDAMENTAL POLICY GOALS SUPPORT THE "SELECTIVE WAIVER DOCTRINE"

A. 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).

Indeed, it has become 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).

Relatedly, the SEC issued a report of investigation outlining some of the criteria that it will consider when assessing a company's self-policing and cooperation efforts pursuant to Section 21(a) of the Securities Exchange Act of 1934. *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exch. Act Rel. No. 44969 (Oct.

23, 2001) (the "Report").[12] The upshot of the Report was that the SEC was encouraging companies to self-report potential improprieties.[13] *See also Byrnes v. IDS Realty Trust*, 85 F.R.D. 679, 688 (S.D.N.Y. 1980) ("voluntary disclosures to agencies should be encouraged rather than requiring that agency requests or subpoenas be fought to the hilt").

The need for maintaining confidentiality to assist the Government to stamp out corporate fraud is not mere rhetoric – the Federal Government has essentially acknowledged this need in the Sarbanes-Oxley Act. The Act states 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 . . . .

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[12] The Report can be found at http://www.sec.gov/litigation/investreport/34- 44969.htm.

[13] Attorney General John Ashcroft echoed the same sentiment in a speech presented at the Corporate Fraud/Responsibility Conference on September 17, 2002:

> But those corporations that choose to prolong the damage to the public by refusing to cooperate with investigators should be forewarned: if you obstruct, if you impede -- you leave your company vulnerable to public indictment, prosecution, and conviction.

The full text of the speech can be found at the following location: http://www.usdoj.gov/ag/speeches/2002/092702agremarkscorporatefraudconference.htm.

Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7215(b)(5)(A) (emphasis own); *see also Premium Service Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1975) (recognizing an analogous public policy supports the privilege governing tax records: "a public policy against unnecessary public disclosure arises from the need, if the tax laws are to function properly, to encourage taxpayers to file complete and accurate returns").

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), at § 4, page 17;[14] *see also Testimony Concerning Returning Funds to Defrauded Investors Before the House Subcommittee on Capital Markets, Insurance, and Government* Sponsored

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[14] 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 immunity 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/useftp.cgi?IPaddress=162.140.64.88&filename=h2179ih.pdf&directory=/diskb/wais/data/108_cong_bills

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.").[15] Specifically, H.R. 2179 would encourage parties to provide the SEC with information helpful to Government investigations.

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. Indeed, courts have already come to the conclusion that antiquated rules on work product and waiver lose relevance in light of changing social and legal needs. *See Trammel v. United States*, 445 U.S. 40, 47 (1980) (courts can "develop rules of privilege on a case-by-case basis . . . and . . . leave the door open to change"); *In re Grand Jury Witnesses*, 979 F.2d 939, 944 (2d Cir. 1992) (work product doctrine must be applied in a "common sense" manner in light of reason and experience as determined on a case-by-case basis).

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.

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[15] The full text of this February 26, 2003 testimony by Director Cutler of the SEC can be found at the following location: http://www.sec.gov/news/testimony/022603tssmc.htm.

B. Preserves Expectations 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 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, 329 U.S. 495, 511 (1947).

The notion that parties and their counsel have an expectation of privacy in their work-product is even stronger where they use a written confidentiality agreement to document and preserve that expectation. *See AT&T*, 642 F.2d 1285, 1299-1300 ("under a guarantee of confidentiality, the case against waiver is even stronger"); *Dellwood*, 128 F.3d 1122, 1127 (suggesting that no waiver occurs where steps are taken to preserve the work product privilege, such entering a confidentiality agreement).

The selective waiver doctrine also fosters the privacy interests of the corporate employees – without whom no efficient internal investigation can take place. For example, the internal investigations conducted by companies serve a critical and vital role to ferret out potential wrongdoing, as was the case with McKesson Corporation. A company cannot efficiently and fully evaluate the potential scope of wrongdoing (or its potential liability) without undertaking a full

and thorough investigation. Companies know their own business operations, employees and records far better than the Government.

> The availability of the attorney-client and work-product protections are indispensable tools in counsel's war chest .... [E]xperience teaches that corporate employees and officers do gain a measure of assurance from the corporate attorney-client and work-product protections that their internal, confidential conversations will not immediately fall into prosecutorial hands, and are willing to cooperate.

Judson W. Starr & Joshua N. Schopf, AMERICAN LAW INSTITUTE - AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION, COOPERATING WITH THE GOVERNMENT'S INVESTIGATION: THE NEW DILEMMA, SE72 ALI-ABA 353, 361 (May 11, 2000 Criminal Enforcement of Environmental Laws).

When corporate employees provide information and assist in the internal investigative process they do so with the laudable goal of assisting the fact finding process and with the reasonable expectation of a certain modicum of privacy. If, in fact later, the company decides to share that confidential information with the Government to further the same fact finding process, that expectation of privacy should not be automatically dashed. *See Fisher v. United States*, 425 U.S. 391, 403 (1976) ("if the client knows that damaging information could . . . be obtained from the attorney following disclosure . . . the client would be reluctant to confide in his lawyer"). "This valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants." *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996). Said differently, internal investigations would lose their inherent efficacy if counsel's only means of inducing relevant information from employees was the threat of discipline or termination.

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. This would not chill cooperative cooperate conduct. It would freeze it – rendering corporate altruism to a cryogenic purgatory.

C. Avoids Judicial Line-Drawing And Second Guessing By Courts

The selective waiver doctrine advocated here by *amicus curiae* SIA would avoid the unnecessary judicial line-drawing and second guessing engaged by the district court in this instance. This is so because the rule proposed here – 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. Under *amicus curiae* 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.

This rule makes sense for a variety of reasons. The standard for waiver of work-product differs from the standard for waiver of attorney-client privilege because the two principles serve different purposes. *See AT&T*, 642 F.2d at 1298-99. The majority rule is that disclosure of work product to a third party does not automatically waive work-product protection. *See* 8 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE, § 2024 at p. 369 (1994).

As such, the work-product doctrine comports with the selective waiver doctrine as advocated here by *amicus curiae* SIA. "The purposes of the

work product privilege are . . . complex, and they are not inconsistent with selective disclosure – even in some circumstances to an adversary." *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982). This is so because "[n]either the interests of clients nor the cause of justice would be served . . . if work product were freely discoverable." *E.g. United States v. Adlman*, 134 F.3d 1194, 1197 (2d Cir. 1998).

This case stands as a perfect example of the perils that may arise by ignoring the selective waiver doctrine and why this Court, now, should embrace this very rule. Here, in the original January 10, 2003 order requiring the production of McKesson's privileged material, the district court conceded that McKesson "may have had a 'common interest' in the investigation of the alleged securities fraud committed by its officers." [Excerpts of Record ("ER") at 193.] And, yet, the trial court cast that finding aside, concluding that this common interest between McKesson and the Government not "a true common goal" because their interests could potentially diverge. [*Id.*]

Such an exercise by the courts strains the role of the judiciary and upsets the balance of expectancy that every litigant and judicial officer should have. The district court conceded that there was a "common interest" in this instance between McKesson and the Government. Indeed there was, and it was both articulated and objectively discernible from the circumstances. The interest was articulated in the protective order between McKesson and the Government: "the desire to analyze and gather information relating to the Restatement." [ER at 081.] Likewise, the facts make this common interest objectively discernible. McKesson anticipated legal recourse against the individuals responsible for the intentional misstatements associated with the merger and the Government, meanwhile, sought to investigate the source of the accounting irregularities – those are the same goals (and ultimately the same individuals).

Despite those tell-tale signs, the district court nonetheless engaged in an inherently uncertain exercise of trying to discern, almost in abstract, the mental state of McKesson Corporation: "McKesson HBOC disclosed the Report and Back-up Materials to the Government despite the fact that the Government was investigating the Company." [*Id.* at 195.] But that makes no sense, logically or analytically. There may be a variety, if not an infinite number, of reasons why a party might voluntarily disclose information to the Government. That is not what animates the "common interest" exception to the waiver of the work product doctrine. Rather, it should be enough that McKesson Corporation and the Government may articulate one objectively discernible interest that both share. Here, that unitary common interest is clear: to ferret out potential fraud.

The district court's strained and inherently flawed approach of searching for any possibility of adversity is not only logically undesirable, it is inconsistent with the very notion of the work-product doctrine. The work-product immunity arises only when litigation is anticipated, but courts do not embark on a fact-finding mission to determine the parties' subjective intent. *See United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) ("The fact that the materials serve other functions apart from litigation does not mean that they should not be protected by work-product immunity if they reveal directly or indirectly the mental impressions or opinions of the attorney who prepared them.").

The district court essentially eviscerates the work product privilege by concluding that it collapses if there is merely the possibility of adversity. In routine application, the work product privilege allows parties to an action (co-defendants or co-plaintiffs) to share materials and present a united front, without risk that the attorneys' work product will be shared with the opposing party. But in every such application there is an analogous "potential" adversity that the district court concluded destroyed the privilege. All defendants have the potential

incentive to allocate liability to their co-defendants, and all plaintiffs have an incentive to maximize their individual recovery at the expense of the other plaintiffs. But such "potential" adversity does not disturb the privilege – it is not even part of the analysis, so long as the co-parties have an objectively discernable common interest. A divergence of interests between such parties would prevent such cooperation and further reliance on the work product privilege – but not until that divergence arises. *See In re United Mine Workers of America Employee Ben. Plans Litigation*, 159 F.R.D. 307, 315 (D.C.C. 1994) (the common interest rule, as an exception to the general rule of wavier, is concerned with the relationship between the parties at the time the confidential information is disclosed – the mere fact that the parties' interest may diverge, later, over the course of litigation does not negate the applicability of the common interest rule); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 603-04 (N.D. Tex. 1981) (corporation and its accountants allowed to protect prior shared confidences from shared disclosure to third parties where communications made on issues involving common interests, even though parties might later become antagonists in litigation). And such a divergence would not be sufficient to undermine the privilege retroactively; the privilege would continue to protect work product exchanged prior to the divergence. *See, e.g., Griffith v. Davis*, 161 F.R.D. 687, 698 n.6 (C.D. Cal. 1995) ("the interest of the parties involved in a common defense need not be identical" and "may even be adverse in some respects" thereafter); *see also U.S. v. ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554 (C.D. Cal. 2003) (relators who file suit under FCA do not waive work product protection for their disclosure when they provide statements to the government, even though interests may subsequently diverge).

The adoption of the selective wavier doctrine as proposed here by *amicus curiae* SIA would avoid the unworkable process of having a court try and figure out what is "inside" a party's mind. Adopting a bright-line that says if the

parties have articulated a common interest and that same common interest is objectively apparent from the facts of the case would serve not only this Court's administration of justice, but a company's ability to perform its role in preserving public trust.

IV. CONCLUSION

For the foregoing reasons, this Court should adopt a bright-line rule and endorse the selective waiver doctrine as advocated here by *amicus curiae* Securities Industry Association.

Dated: January 30, 2004

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, counsel for *amicus curiae* Securities Industry Association hereby certifies that this brief is proportionately spaced, has a typeface of 14 points or more, and contains less than 7,000 words.

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Maria Rubino

Maria Rubino

SERVICE LIST

UNITED STATES OF AMERICA, Plaintiff
and
MCKESSON CORPORATION, Intervenor-Appellant
v.
CHARLES W. MCCALL; JAY M. LAPINE

IN THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
Docket No. 03-10511

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