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October 14, 2005

BY HAND

Hon. Charles E. Ramos
Justice of the Supreme Court
Supreme Court of the State of New York
60 Centre Street, Room 691
New York, New York 10007

Re: People v. American International Group, Inc., et al., Index No. 401720/05

Dear Justice Ramos:

Maurice "Hank" Greenberg has moved to require his former employer, American International Group, Inc. ("AIG"), to produce to him a report that the company directed its lawyers to prepare while the New York State Attorney General's Office (the "OAG"), the United States Department of Justice, and the Securities and Exchange Commission were investigating him for civil and criminal violations of law. During the investigation, Greenberg was examined under oath pursuant to Article 23-A of the General Business Law. Greenberg declined to answer questions 175 times on the ground that his answers might tend to incriminate him.

While the OAG takes no position on the ultimate outcome of this discovery dispute, and takes no position on whether the document at issue was ever privileged, it urges this Court to apply a rule with respect to the issue of waiver that has already been adopted by other jurisdictions: This Court should hold that a corporation that discloses otherwise privileged materials to a prosecutor's office conducting an investigation does not automatically waive that privilege as to third parties.

All privileges reflect a policy determination by the courts or the legislature that the public interest in promoting certain confidential relationships, or in encouraging the uninhibited sharing of information, outweighs the competing interest in liberal discovery. Thus, for example, the New York State Court of Appeals has recognized a common law privilege that protects "confidential communications . . . to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged." Cirale v. 80 Pine St. Corp., 35 N.Y.2d 113, 117 (1974) (quoting People v. Keating,

286 A.D. 150, 152-53 (1st Dep't 1955)). "The hallmark of this privilege," the Court of Appeals has explained, "is that it is applicable when the public interest would be harmed if the material were to lose its cloak of confidentiality." Id. Accord In re World Trade Ctr. Bombing Litig., 93 N.Y.2d 1, 8-9 (1999). Relying upon the "public interest" in "encourag[ing] the reporting of possible violations of the law," New York courts similarly shield the identities of government informants from disclosure in civil litigation. Klein v. Lake George Park Comm'n, 261 A.D.2d 774, 774 (3d Dep't 1999).

Just as public policy considerations inform the decision whether or not to recognize a privilege in the first place, they also play a critical role in defining the circumstances under which an established privilege, or other protection from disclosure, should be deemed to have been waived. Thus, two parties who share a "common interest" may exchange work product material between themselves without surrendering their rights to assert the work product doctrine vis-a-vis third parties because, as courts have held, preserving the work product protection in such cases furthers the truth-finding process, promotes efficient trial preparation, and eliminates duplication of effort. See, e.g., United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299-1300 (D.C. Cir. 1980) (finding that MCI's disclosure of its work product to the government did not waive protection over those materials because MCI and the government shared a "common adversary on the same issue or issues" and had "strong common interests in sharing the fruit of the trial preparation efforts"). Indeed, courts have recognized that no waiver results when those aligned against regulatory or prosecutorial agencies disclose privileged materials to each other. See, e.g., People v. Osorio, 75 N.Y.2d 80, 85 (1989) (privilege is not lost when protected communications are shared between codefendants who "are mounting a common defense"); United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) (joint defense privilege protects "the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel"). In short, certain disclosures – those that advance a public interest – have been held not to effect a waiver.

The public interest in encouraging corporate disclosure to prosecutors is enormous, and well-established. Corporations are now expected to investigate potential wrongdoing and then report it promptly to the authorities. This sound principle of corporate good citizenship is reinforced by prosecutorial guidelines. Federal guidelines, for example, direct that, in determining whether to bring criminal charges against a corporation, "the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives . . . to disclose the complete results of its internal investigation; and to waive the attorney-client and work product protection" as to the government. Memo from Larry D. Thompson, Deputy Attorney General, U.S. Department of Justice, Principles of Federal Prosecution of Business Organizations, at 6 (2003) (Aff. of Martin Flumenbaum, Exh. N); see also Interview with United States Attorney James B. Comey, United States Attorneys' Bulletin, Vol. 51, No. 6, at 2 (Nov. 2003) ("Comey Interview") ("When misconduct is discovered, the Department expects corporations to self-report to law enforcement, including any regulators, to investigate the misconduct, to discipline any wrongdoers, and to cooperate fully with government investigations"); Michael A. Simons, Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship, 76 St. John's L. Rev. 979, 980-81, 996-97 (2002) ("With increasing

frequency, prosecutors are demanding that corporations act as 'good corporate citizens' – which to prosecutors, means cooperating fully in any investigation" by, among other things, disclosing the results of any internal investigation).[1]

A rule that creates a per se waiver of the attorney-client privilege and/or the work product doctrine every time that a corporation produces protected materials to the People during the course of cooperation would harm the public interest because corporations will be less inclined to disclose those materials to law enforcement agencies in the future. See American Tel. & Tel. Co., 642 F.2d at 1300 (a finding of waiver "[i]n the long run . . . would discourage any party from turning over work product to the government"); In re Grand Jury Subpoena, 478 F. Supp. 368, 372-73 (E.D. Wis. 1979) ("voluntary cooperation . . . would be substantially curtailed if such cooperation were deemed to be a waiver of a corporation's attorney-client privilege"); Saito v. McKesson HBOC, Inc., No. Civ. A. 18553, 2002 WL 31657622, at *8 (Del. Ch. Nov. 13, 2002) ("When courts amplify the risk of disclosure to include future private plaintiffs, the scales begin to tip further in favor of corporate noncompliance with investigative agencies"); cf. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (finding that corporation's disclosure of privileged internal investigation to SEC did not result in a waiver because any other rule "may have the effect of thwarting the developing procedures of

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The public pays a heavy price for this resistance. First, the results of any internal corporate investigation help prosecutors and regulators to streamline their investigation and uncover the truth in the most efficient and expeditious manner. See In re McKesson HBOC, Inc. Secs. Litig., No. C-99-20743, 2005 U.S. Dist. LEXIS 7098, at *47 (N.D. Cal. Mar. 31, 2005) (corporation's disclosure of work product to the SEC "resulted in significant benefits to the government" by "permitting the government to focus its investigation on the primary wrongdoers," "filter[]" out the significant documents, and "deploy fewer employees to investigate [the corporation]"). Aside from the obvious benefit that comes from saving the government time and resources, this increased efficiency also benefits the public by permitting law enforcement agencies, like the OAG, to resolve a higher volume of cases, which, in turn, provides greater protection to the public from corporate fraud. See Saito, 2002 WL 31657622, at *8 (encouraging a corporation to share its work product with the government benefits the public "because the integrity of the capital markets is preserved at a lower cost to society"); see also Comey Interview at 3-4 (corporate internal investigations – some of which cost millions of

[1] Greenberg argues that AIG and the OAG should be treated as adversaries for the purposes of determining whether or not there has been a waiver but, at the same time, seeks to characterize AIG as the OAG's "agent." Greenberg Reply Br. at 28-29. Greenberg's confusion only underscores the point that a corporation that is cooperating with prosecutors or regulators occupies a unique position: Even while providing vital information to the People, the cooperator remains at risk. Any waiver rule should accommodate, not penalize, these competing features of the cooperator/regulator relationship.

dollars and, thus, could not be replicated by the government – help prosecutors to uncover crime in a timely fashion, "minimize additional losses and maximize restitution").

The public interest is also harmed by corporate reluctance to share its privileged and/or work product materials because those materials often provide the government with essential information that it simply cannot obtain from any other source. For example, an internal investigation by counsel for a corporation is generally conducted closer in time to the relevant events than a government investigation. For this reason, an internal investigation may contain the most complete and reliable witness accounts available because memories are still fresh and less likely to have been influenced by external factors, such as the publicity that often accompanies a government investigation. An internal investigation may also be met with a greater degree of candor than a government inquiry because corporate employees may be more willing to talk openly to corporate counsel than to a prosecutor or other law enforcement official. See Comey Interview at 2 (having access to internal corporate investigations helps law enforcement when "critical witnesses won't consent to interviews and, therefore, the government cannot fully reconstruct the crime, or gather sufficient evidence to prosecute those who are culpable").

On the other hand, the harm to the public interest will be minimal if the Court finds that cooperating with law enforcement does not waive the attorney-client privilege and/or the work product doctrine with respect to private civil litigants. Because private litigants are ordinarily precluded from discovering documents that are protected by the attorney-client privilege and/or the work product doctrine, see CPLR §§ 3101(b), (c) (privileged and work product material "shall not be obtainable"), preserving the corporation's privilege would leave private litigants in exactly the same position that they would have been in if the corporation had never cooperated with the government at all. See Westinghouse Elec. Corp. v. Republic of Philippines, 951 F.2d 1414, 1426 n.14 (3d Cir. 1991) ("when a client discloses privileged information to a government agency, the private litigant in subsequent proceedings is no worse off than it would have been had the disclosure to the agency not occurred"); In re McKesson HBOC, Inc., 2005 U.S. Dist. LEXIS 7098, at *49-50 ("Fairness is not a consideration . . . where the issue is whether disclosure of work product to one party waives protection of that material to other adversaries"); Saito, 2002 WL 31657622, at *10 (permitting cooperating corporation to assert privilege in subsequent civil litigation "does not disadvantage private plaintiffs – they are in the exact same position they would have been if no disclosure had been made").

In this respect, the "sword and shield" analogy that other courts have relied upon to justify a finding of waiver has no application in this case. AIG has, thus far, not sought to defend itself in this litigation by partially disclosing only those portions of its internal investigation that it believes are favorable while, at the same time, asserting the privilege with respect to those that it believes are harmful. See AIG's Br. at 25. Unless and until it does, Greenberg is not unfairly disadvantaged if he does not have access to the results of AIG's internal investigation. See In re McKesson HBOC, Inc., 2005 U.S. Dist. LEXIS 7098, at *50 (finding that preserving defendant corporation's privilege over internal investigation did not result in any unfairness to plaintiff where defendant had not placed some of the contents of the investigation at issue in the litigation).

At least one court has held that the balancing of the public interests always tips in favor of preserving the privilege when a corporation has shared privileged materials while cooperating with law enforcement authorities. See Diversified, 572 F.2d at 611. In Diversified, an en banc panel of the Eighth Circuit sustained a corporation's assertion of the attorney-client privilege with respect to an internal investigation that it had disclosed to the SEC. The Eighth Circuit explained that, "[t]o 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." Id. Other courts have opted instead to address the waiver question on a case-by-case basis. See, e.g., In re Steinhardt Partners, 9 F.3d 230, 236 (2d Cir. 1993) (declining to adopt a "rigid" waiver rule that "would fail to anticipate situations in which the disclosing party and government may share a common interest in developing legal theories and analyzing information, or situations in which the [government] and the disclosing party have entered into" a confidentiality agreement); In re McKesson HBOC, 2005 U.S. Dist. LEXIS 7098, at *45-51 (using a case-by-case analysis, court held that corporation did not waive work product protection by producing attorney investigation to SEC where SEC agreed not to disclose investigation except as required by law or to discharge its law enforcement duties); cf. People v. Calandra, 120 Misc.2d 1059, 1060 (Sup. Ct. N.Y. Co. 1983) (finding corporation waived privilege by disclosing documents to District Attorney because it did not reserve its right to assert the privilege as to third parties).[2]

Whichever approach this Court takes, it is vital for the waiver rule to support, rather than undermine, the great strides made in recent years in the sphere of corporate responsibility. The watchword for the 2000s is greater corporate transparency to regulators, and the waiver rules should encourage – and certainly not impede – this historic trend.[3]

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[2] To the extent that the Court opts to take a case-by-case approach, plaintiffs agree with AIG that the Court may properly consider the corporation's efforts to protect the confidentiality of its internal investigation. In this case, AIG produced the results of its internal investigation to the OAG along with a cover letter in which it reserved its right to assert the attorney-client privilege and/or the work product doctrine with respect to third parties. See Aff. of Martin Flumenbaum, Exh. H. Although that letter does not constitute an "agreement," as AIG contends (see AIG Br. at 6, 18-20), and the OAG specifically reserves its right to use the results of AIG's internal investigation consistent with its enforcement duties or as otherwise required by law, that distinction does not warrant a finding of waiver. See In re McKesson HBOC, Inc., 2005 U.S. Dist. LEXIS 7098, at *47-48 (finding no waiver even though government retained right to disclose corporation's privileged materials "pursuant to [its] regulatory duties and as otherwise required by law").

[3] This Court faced a similar waiver issue in People v. Grasso, et al., Index No. 401620/04. In that case, the Court ultimately held that the report of an internal investigation was not privileged because it did not contain legal advice or analysis; the Court's statements with respect to the issue of waiver were, therefore, not essential to the holding. In any event, we urge the Court to adopt the reasoning set forth herein instead.

We respectfully request that this letter be made a part of the record on Greenberg's motion.

Thank you for your consideration.

Respectfully submitted,

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