05-3577-cr(L), 05-3589-cr (CON)

United States Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

TIMOTHY J. RIGAS, JOHN J. RIGAS,

Defendants-Appellants.

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

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS

Stephanie A. Martz
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1150 18th Street, N.W., Suite 950
Washington, DC 20036
(202) 872-8600

Christopher J. Meade
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

Christopher Davies
Jaclyn Moyer
Lenora M. Rigby
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

September 21, 2005

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

The National Association of Criminal Defense Lawyers ("NACDL") is a professional bar association whose members include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. The NACDL files this amicus brief under Fed. R. App. P. 29 because it has an interest in ensuring that the government adheres to its constitutional duty to establish guilt by proof beyond a reasonable doubt of every fact necessary to constitute the crime with which a person has been charged. If this Circuit were to uphold a criminal conviction based on a jury's finding, uninformed by expert testimony, that a defendant failed to comply with a professional standard outside the jury's knowledge and experience, the due process rights accorded to the accused in our criminal justice system would be eroded.

SUMMARY OF ARGUMENT

The grand jury indicted and the jury convicted Timothy and John Rigas for securities fraud because they violated their duty, "pursuant to GAAP [or Generally Accepted Accounting Principles,] . . . to disclose the full amount of [Adelphia Communications Corporation's ("Adelphia")] joint and several liabilities" for its co-borrowed debt. (Indictment ¶ 67.) Because the proper method of accounting for that co-borrowed debt could not have been obvious to a lay juror, the

Government should have been required to present expert evidence concerning the applicable accounting standards and how Adelphia violated them. Not only did the Government opt to present no expert testimony on this topic, it did not even introduce into evidence the accounting standard Adelphia supposedly violated. The jury therefore had no basis to assess whether Adelphia's accounting was appropriate, and those portions of the Rigases' conviction that rely in any respect on Adelphia's alleged misaccounting for the co-borrowed debt should be vacated.

In most cases, assessing the propriety of a company's financial accounting is not black and white. Rather, according even to the chairman of the principal U.S. accounting standards setting agency, accounting rules can be "hard to understand and difficult to use." Robert H. Herz, Chairman, Financial Accounting Standards Board, Remarks at the Twenty-Fourth Annual SEC and Reporting Institute Conference at 5 (June 2, 2005).[1/] Thus, when the accounting rule in question is outside the understanding of a lay juror, the party with the burden of proof in a case alleging a misaccounting should be required to offer into evidence not only the accounting rule supposedly violated but expert testimony explaining the accounting convention in question, how the defendant's accounting violated that

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1/ *Available at* http://www.fasb.org/SEC_FRI_24th_Conference.pdf

convention, and when injury is alleged, how the putative misaccounting caused that alleged injury.

In general, expert testimony is appropriate in circumstances when "[a]n intelligent evaluation of facts is . . . difficult or impossible without the application of some . . . technical[] or other specialized knowledge." Fed. R. Evid. 702 advisory committee's note. Thus, many courts both within this Circuit and outside it require that civil plaintiffs present expert testimony in order to prove a defendant's noncompliance with a professional[2/] or accounting[3/] standard.

Given that courts routinely require that *civil* plaintiffs present expert testimony to prevail in suits alleging violations of accounting and other professional or technical standards, it necessarily follows that the Government should be held to at least as high a burden in a criminal case alleging a crime premised on noncompliance with an accounting standard. The Government's

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2/ *See, e.g., O'Shea v. Brennan*, No. 02 Civ. 3396 (KNF), 2004 WL 583766, at *14 (S.D.N.Y. Mar. 23, 2004); *Board of Trustees of Teamsters Local 918 Pension Fund v. Freeburg & Freeburg, C.P.A.*, No. 98 CV 4895, 1999 WL 803895, at *6 (E.D.N.Y. Sept. 28, 1999); *Donahue's Accounting & Tax Serv., S.C. v. Ryno*, No. 03-1891, 2003 WL 22956235, at *1 (Wis. Ct. App. Dec. 17, 2003); *Acosta v. City of New York*, 324 N.Y.S.2d 137, 140 (N.Y. Civ. Ct. 1971).

3/ *See, e.g., Danis v. USN Commc'ns, Inc.*, 121 F. Supp. 2d 1183, 1192 (N.D. Ill. 2000) (citing *Wikoff v. Vanderveld*, 897 F.2d 232, 235 (7th Cir. 1990) and *In re Discovery Zone Sec. Litig.*, 943 F. Supp. 924, 935 n.9 (N.D. Ill. 1996), *superseded by statute as stated in Chu v. Sabratek Corp.*, 100 F. Supp. 2d. 827, 836-837 (N.D. Ill. 2000).

failure in this criminal prosecution to introduce expert testimony concerning the accounting standard the Rigases allegedly violated means that they were convicted on the basis of evidence that plainly would *not* have sufficed in a civil case.

Because, in the post-Enron era, there is substantial risk that juries may be improperly swayed by the wealth and notoriety of defendants in criminal trials involving allegations of corporate looting and accounting malfeasance, it is of particular importance that courts require that the Government present to the jury thorough and precise theories that explain both the relevant accounting convention and how the defendant's accounting was inconsistent with that convention. This Court should therefore adopt a rule mandating that, when the Government seeks to convict a person of a crime based on failure to comply with a professional standard that is difficult or impossible for lay jurors to understand, the Government must introduce expert testimony on the standard's requirements to prove its case beyond a reasonable doubt.

ARGUMENT

I. COURTS HAVE LONG REQUIRED THE USE OF EXPERT TESTIMONY IN CIVIL CASES WHEN COMPLEX OR SPECIALIZED KNOWLEDGE IS NEEDED FOR THE JURY TO DETERMINE A FACT IN ISSUE

In civil cases, courts typically require that plaintiffs present expert testimony in support of their claims in two circumstances: (1) when the defendant allegedly violated a professional standard or technical convention sufficiently complex or

specialized that its requirements are beyond the ken of an average lay person, and (2) when the nexus between the alleged misconduct and the plaintiff's supposed injury is apparent only after learned or specialized analysis. *See* 1 C.J.S. Accountants § 26. The usual rationale for this standard is that, in cases involving either the application of complex, vague, or ambiguous standards or difficult questions of causation, "a jury will often have no understanding of what constitutes reasonable behavior," (*Sitts v. United States*, 811 F.2d 736, 740 (2d Cir. 1987) (quoting *Paul v. Boschenstein*, 482 N.Y.S.2d 870, 870 (App. Div. 1984))), and will likely rely on its "untutored sympathies" in order to reach a verdict. 7 John Henry Wigmore, *Wigmore on Evidence* § 2090 (James H. Chadbourn ed., 1978).

As early as the 19th century, courts in this country required that plaintiffs in professional malpractice cases introduce expert testimony on the standard of care and causation. *See, e.g., Ewing v. Goode*, 78 F. 442, 444 (S.D. Ohio 1897); *Walsh v. Sayre*, 52 How. Pr. 334, 336 (N.Y. Gen. Term 1868). Courts have distinguished, of course, between situations in which lay jurors are capable of deciding based on common knowledge and experience and those in which they must interpret evidence and draw inferences by relying on information or expertise outside of common understanding. In the former situation, experts are not required. *See, e.g., Andrews v. Metro N. Commuter Ry. Co.*, 882 F.2d 705, 709 (2d Cir. 1989) (jury needed no special training or expertise to decide whether railroad

platform was safe after hearing testimony that it was covered with trash and ice). In the latter, they are essential: "[W]hen a case concerns [a] highly specialized art . . . with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence. There can be no other guide, and where, want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury." *Ewing*, 78 F. at 444 (holding expert testimony required on appropriate treatment for glaucoma).

Consistent with the rationales of those early cases, courts have since required expert testimony on such varied issues as whether an accountant should have filed a claim for "Innocent Spouse" status prior to filing a plaintiff's tax returns, (*Ryno*, 2003 WL 22956235, at *2), whether a doctor should have ordered an operation of dilation and curettage (*Acosta*, 324 N.Y.S.2d at 144), the extent to which an attorney was required to communicate with a trust beneficiary (*Barth v. Reagan*, 564 N.E.2d 1196, 1201 (Ill. 1990)), whether architects responded timely to the objections of a city's building department (*530 East 89 Corp. v. Unger*, 373 N.E.2d 276, 277 (N.Y. 1998)), and the tax consequences associated with Individual Retirement Accounts (*Jirkovsky v. Jirkovsky*, 525 N.W.2d 615, 620 (Neb. 1995)). In many instances, the court reached the conclusion that expert testimony was

needed with little or no discussion. For example, in *Unger*, New York's Court of Appeals noted simply:

> Whether the allegedly inordinate delays of defendants in complying with objections of the building department constituted architectural malpractice is not within the competence of an untutored layman to evaluate. Common experience and observation offer little guidance. Absent a standard of competent architectural practice based on expert testimony, it would be difficult, if not impossible, to form a reasoned opinion as to whether, given the nature and number of objections raised as well as other relevant attendant circumstances, a delay of two years constituted incompetent architectural practice.

373 N.E.2d at 278.

Even in some cases where liability might initially appear to be so apparent that it should be within the grasp of lay jurors, when a defendant can proffer *any* evidence that he or she adhered to the proper standard of care, the plaintiff cannot prevail without introducing expert testimony. *See Sitts*, 811 F.2d at 740-741 (2d Cir. 1987) (holding expert testimony was required to determine whether it was negligent for a surgeon to have operated on the wrong part of plaintiff's spine because "the standard method of locating the various vertebrae" was neither "visual nor simple"). Similarly, although the issue of negligence may sometimes be within a lay juror's knowledge and hence properly provable without reference to expert testimony, expert testimony may be required to prove that the defendant's negligence was the proximate cause of the plaintiff's injury. *See, e.g.*, *De Falco v. Long Island Coll. Hosp.*, 393 N.Y.S.2d 859, 862 (App. Div. 1977)

(holding that expert testimony was not needed to prove negligence where a soiled bandage had been applied to plaintiff's eye following an operation but that expert testimony was needed to establish the bandage caused the plaintiff's subsequent infection).

The requirement that plaintiffs introduce expert testimony in professional malpractice cases exists both because "without expert assistance a jury will often have no understanding of what constitutes reasonable behavior in a complex and technical profession" (*Paul*, 482 N.Y.S.2d at 870) and because, in the absence of record facts, the jury could render a verdict based on unreasoned emotion (7 *Wigmore on Evidence* § 2090), often to the particular detriment of defendants. *See, e.g., Taylor v. DeLosso*, 725 A.2d 51, 56 (N.J. Super. Ct. App. Div. 1999) (reversing jury verdict for plaintiff due to lack of expert testimony).

II. EXPERT TESTIMONY SHOULD BE REQUIRED IN CRIMINAL CASES WHEN THE GOVERNMENT HAS ALLEGED A CRIME BASED ON FAILURE TO COMPLY WITH A PROFESSIONAL STANDARD OUTSIDE THE KNOWLEDGE AND EXPERIENCE OF LAY JURORS

When the Government seeks to convict a person of a crime based on failure to comply with a standard in a "complex or technical profession" that is outside of the average juror's knowledge and experience, the Government—like the civil plaintiff—must introduce expert testimony on the professional standard. Expert testimony is all the more critical in criminal cases, where the reasonable-doubt

standard requires that juries reach "a subjective state of certitude" on the facts in issue before reaching a guilty verdict. The Supreme Court has held that "a person accused of a crime would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case." *In re Winship*, 397 U.S. 358, 363-364 (1970) (internal quotation marks omitted). It goes without saying that a defendant would be subject to even more substantial injustice if he or she could be convicted and imprisoned on the strength of evidence that would *not* suffice for a plaintiff to prevail in a civil case.

When the jury convicted the Rigases of conspiracy to commit securities fraud on the basis of Adelphia's alleged failure to properly account for and disclose co-borrowed debt in its financial statements, however, it imposed a lower standard of proof on the Government than will be required of the plaintiffs in the myriad civil actions arising from the facts at issue in the indictment. In the indictment, the grand jury alleged that Adelphia was required "*pursuant to GAAP* . . . to disclose the full amount of its joint and several liabilities" for its co-borrowed debt in the notes accompanying its financial statements. (Indictment ¶ 67 (emphasis added).) GAAP refers to the "conventions, rules, and procedures that define accepted accounting practices." *SEC v. Casserta*, 75 F. Supp. 2d 79, 90 (E.D.N.Y. 1999) (citing *United States v. Arthur Young & Co.*, 465 U.S. 805, 811 n.7 (1984)). It

consists of a vast array of official pronouncements, speeches, and comments from the Financial Accounting Standards Board ("FASB"), the Accounting Principles Board, the Committee on Accounting Procedure, the FASB Emerging Issues Task Force ("EITF"), and the Accounting Standards Executive Committee ("AcSEC") of the American Association of Certified Public Accountants ("AICPA"), as well as the rules, regulations, and informal guidance promulgated by the SEC and its Staff. Together, these conventions determine the methods public companies must use in preparing their accounts and financial statements. *See Statement of Policy on the Establishment and Improvement of Accounting Principles and Standards*, SEC Release No. AS-150, 1973 WL 149263, at *1 (Dec. 20, 1973); *Ganino v. Citizens Util. Co.*, 228 F.3d 154, 160 n.4 (2d Cir. 2000).

Numerous courts have recognized that GAAP standards are usually beyond the knowledge and experience of lay jurors. For example, the district court in *In re Campbell Soup Co. Securities Litigation* held that determining which accounting practices comprise GAAP is a question of fact best addressed through expert testimony. 145 F. Supp. 2d 574, 593 (D.N.J. 2001) (citing *Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1421 (3d Cir. 1997) and *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 709 n.9 (3d Cir. 1996)). Similarly, the *Casserta* court also noted that whether GAAP has been violated is a fact-specific issue that frequently turns on expert testimony. 75 F. Supp. 2d at 91 (citing *Burlington*, 114 F.3d at

1421; *Provenz v. Miller*, 102 F.3d 1478, 1490 (9th Cir. 1996)); *see also Danis*, 121 F. Supp. 2d at 1192 (violations of GAAP standards are established through expert testimony); *In re Discovery Zone Securities Litigation*, 943 F. Supp. 924, 935 n.9 (1996), *superseded by statute as stated in Chu v. Sabratek Corp.*, 100 F. Supp. 2d 827 (N.D. Ill. 2000) (disputes over whether GAAP was violated best resolved through expert testimony); *Fine v. Am. Solar King Corp.*, 919 F.2d 290, 298 (5th Cir. 1990); *SEC v. Chester Holdings, Ltd.*, 41 F. Supp. 2d 505, 519-522 (D.N.J. 1999); *In re Reach, McClinton & Co.*, 102 B.R. 381, 392 (D.N.J. 1989), *aff'd sub nom. Bernheom v. J.H. Cohn & Co.*, 893 F.2d 1331 (3d Cir. 1989) (holding litigants in bankruptcy court action failed to establish professional malpractice against accountant because they had not proffered expert testimony). Other courts have taken into account the cost of expert testimony in determining the fairness of proposed settlements in securities class action cases because such testimony was deemed necessary to the plaintiff's case. In *Neuberger v. Shapiro*, for example, the district court noted "extensive expert testimony would certainly be required on the nature of the accounting practices, the significance of various decisions in relation to GAAP, and the effect that those practices ultimately had on plaintiffs' certificates." 110 F. Supp. 2d 373, 378 (E.D. Pa. 2000) (citing *In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 178 (E.D. Pa. 2000)). The Supreme Court itself has noted that "[f]inancial accounting is not a science" and that GAAP "addresses

many questions to which the answers are uncertain and is a process [involving] continuous judgments and estimates." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995) (citation omitted).

As the Appellants note in their brief, the crux of the Government's case against the Rigases depended on whether Adelphia was required, "pursuant to GAAP," to disclose the amount of its co-borrowed debt in the notes accompanying its financial statements. (Indictment ¶ 67.) The first fraud alleged in the indictment—indeed, the fraud that the Government alleges led to Adelphia's bankruptcy (Tr. 11197-98)—was Adelphia's supposed misaccounting for its liabilities under the co-borrowing agreements. The Government argued the Rigases had caused Adelphia to make or omit false or misleading statements of material fact when it did not report portions of its liabilities under the co-borrowing agreements on the consolidated balance sheets contained in its financial statements despite the fact that it allegedly was required to do so "pursuant to GAAP." (Indictment ¶¶ 64-72.) Only after it had failed to introduce *any* evidence of what GAAP required—whether by introduction of the standard itself or through expert testimony—did the Government attempt to remove the word "GAAP" from the indictment. (Tr. 10527-28.)

As the wording of the indictment demonstrates, GAAP's requirements were at the heart of the Government's case against the Rigases. In essence, the

Government alleged that GAAP required the Rigases to disclose certain information and that their failure to disclose that information was fraudulent; at trial, however, the Government introduced no evidence indicating what GAAP required. Thus, during its deliberations, the jury was necessarily ignorant of both which GAAP provision Adelphia allegedly violated and how Adelphia's financial statements failed to comply with that provision. The burden was on the Government to prove beyond a reasonable doubt that the Rigases' alleged failure to disclose the co-borrowed debt was improper and fraudulent, and it could do neither without introducing both the GAAP provision Adelphia allegedly violated and expert testimony explaining why Adelphia's accounting was inconsistent with applicable standards.

In addition to alleging that Adelphia's accounting for the co-borrowed debt violated GAAP, the Government also argued that the alleged misaccounting led to Adelphia's bankruptcy (Tr. 652, 11197-98) but offered no expert testimony in support of its claim. Courts have required the use of expert testimony in professional malpractice cases to prove causation even in situations when the appropriate standard of care is within a layman's grasp: "Almost every person who receives the services of a physician is sick or disabled when he first goes to the physician. Thus there lurks the ever present possibility that it was the patient's original affliction rather than the physician's negligence which caused the ultimate

damage." *Sitts*, 811 F.2d at 740 (quoting 1 Louisell & Williams, *Medical Malpractice* at 213). Although causation is not an element of criminal securities fraud, the Government's unsupported contention that the misaccounting for the co-borrowed debt "caused the ultimate damage" to Adelphia almost certainly had a prejudicial impact on the jury's verdict and could have affected the Rigases' subsequent sentencing. *See* U.S.S.G. 2B1.1 (2005) (varying offense level for fraud convictions depending on amount of loss); *United States v. Booker*, 125 S. Ct. 738, 756 (2005) ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by . . . a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."). In the absence of expert testimony, the Government could not prove to a jury beyond a reasonable doubt that Adelphia's accounting for the co-borrowed debt complied with GAAP, much less that the alleged non-compliance contributed to the company's filing for bankruptcy.

Ironically, in an action for accounting malpractice on these same facts, a court would dismiss the plaintiff's claim if he or she did not present expert testimony on the relevant accounting standards for co-borrowed debt. *Ris v. Finkle*, 561 N.Y.S.2d 499, 502 (N.Y. App. Div. 1989) ("conspicuous by its absence is any affidavit by an accountant or other similar expert sufficient to raise a triable issue as to whether defendants' conduct departed from the level of care

required of an accountant"). Although the common knowledge exception might apply to a malpractice action where, for example, a company records revenue for computers it sold and shipped when it was in fact shipping only boxes of bricks (*see, e.g., In re M&L Business Mach. Co.*, 198 B.R. 800, 804 (D. Colo. 1996)), this is not such a case. Whether Adelphia had to carry the entire amount of the co-borrowed debt on its books is plainly not within the knowledge or experience of a lay juror. As in *Sitts*, there was evidence at trial showing that Adelphia's auditors approved of its accounting for and disclosure of the co-borrowed debt (Tr. 6844-45, 6854-55, 7000-03, 7070-73), yet the Government never introduced expert testimony demonstrating that the accounting and disclosure were inconsistent with GAAP, notwithstanding that the indictment itself alleged that GAAP determined Adelphia's disclosure obligations. (Indictment ¶ 67.)

The Government's failure to introduce expert testimony or even the standard it accused the Rigases of violating is reversible error. The Government cannot meet its burden of proving beyond a reasonable doubt the existence of every fact necessary to establish the offense when it alleges that a crime has been committed based on failure to comply with GAAP but then fails to introduce expert testimony concerning what GAAP requires. A jury ignorant of GAAP in those circumstances is likely to rely on its "untutored sympathies" when assessing the Rigases' responsibility for Adelphia's bankruptcy and corresponding investor losses in the

billions of dollars. The Government's failure to present expert testimony would have been fatal to its case had it been a civil plaintiff. Because it would be unjust to permit conviction of the Rigases on evidence that would not even satisfy a civil plaintiff's burden of proof, this Court should adopt the rule that, when the essential elements of an indictment turn on "what constitutes reasonable behavior in a complex or technical profession," the Government must present expert testimony in support of its allegations.

CONCLUSION

For the reasons set forth above, as well as those set forth in the Appellants' Brief, this Court should vacate the convictions of Timothy and John Rigas and remand their cases to the district court for further proceedings.

Respectfully submitted,

Stephanie A. Martz
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
1150 18th Street, N.W., Suite 950
Washington, DC 20036
(202) 872-8600

Christopher J. Meade
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
(212) 230-8800

Christopher Davies
Jaclyn Moyer
Lenora M. Rigby
WILMER CUTLER PICKERING
HALE AND DORR LLP
2445 M Street, N.W.
Washington, DC 20037
(202) 663-6000

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3,769 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2000 in 14-point Times New Roman.

Christopher J. Meade

Christopher J. Meade
Counsel for Amicus Curiae

Dated: September 21, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on this 21st day of September, 2005, I have caused two copies of the foregoing Brief for The National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Defendants-Appellants and accompanying Motion for Leave to Appear as Amicus Curiae to be sent, via first-class mail, to each of the following:

Timothy J. Coleman
U.S. Attorneys Office, Southern District
1 St. Andrews Plaza
New York, NY 10007

John W. Nields, Jr.
Howrey LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004

Peter E. Fleming, Jr.
Curtis Mallet-Prevost Colt and Mosle LLP
101 Park Avenue
New York, NY 10178

Paul Shechtman
Stillman & Friedman, P.C.
425 Park Avenue
New York, NY 10022

Christopher J. Meade

Christopher J. Meade
Counsel for Amicus Curiae

Dated: September 21, 2005