UNITED STATES COURT OF APPEALS
for the
THIRD CIRCUIT

Case No. 06-2915

IN RE: TELEGLOBE COMMUNICATIONS CORPORATION, et al.,

Debtor

TELEGLOBE USA INC.; OPTEL COMMUNICATIONS INC.; TELEGLOBE HOLDINGS (U.S.) CORPORATION; TELEGLOBE MARINE (U.S.) INC.; TELEGLOBE HOLDING CORP.; TELEGLOBE TELECOM CORPORATION; TELEGLOBE INVESTMENT CORP.; TELEGLOBE SUBMARINE; TELEGLOBE SUBMARINE INC.; OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF TELEGLOBE COMMUNICATIONS CORPORATION; TELEGLOBE COMMUNICATIONS CORPORATION; TELEGLOBE LUXEMBOURG, LLC; TELEGLOBE PUERTO RICO INC.

v.

BCE INC.; MICHAEL T. BOYCHUK; MARC A. BOUCHARD; SERGE FORTIN; TERENCE J. JARMAN; STEWART VERGE; JEAN C. MONTY; RICHARD J. CURRIE; THOMAS KIERANS; STEPHEN P. SKINNER; H. ARNOLD STEINBERG,

Appellants.

Defendants/Intervenor in District Court

Appeal from the United States District Court for the District of Delaware
Case No. 04-1266 (SLR)

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF POSITION OF APPELLANTS BCE INC., ET AL., FOR REVERSAL

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Amicus Curiae The Association of Corporate Counsel respectfully submits this brief in support of reversal of the order of June 2, 2006 of the district court.

INTEREST OF AMICUS CURIAE THE ASSOCIATION OF CORPORATE COUNSEL

The Association of Corporate Counsel, or "ACC," is a professional bar association of almost 20,000 in-house counsel worldwide who practice in the legal departments of corporations and other private sector entities. As an *amicus curiae*, ACC presents the perspective of in-house lawyers who advise their corporate clients – including both parent companies and their subsidiaries – on the full range of legal issues that arise in the course of day-to-day business. ACC members are employed by more than 8,000 private sector corporations, including public and private companies both large and small, and various non-profit organizations, a substantial number of which are affiliated with other separately-incorporated companies that are considered "family members." ACC's in-house counsel members work in a representative cross-section of the broad range of diverse businesses and industries that make up the corporate sector in the United States and Canada, as well as in 53 other countries worldwide.

ACC has long been the standard-bearer for protecting privilege in the in-house context, and thus is closely watching the issues presented in this case. Moreover, ACC members have a direct interest in the outcome of this appeal

because the order of the court below, unless reversed, would likely set a precedent that would make it more difficult for in-house counsel for sophisticated companies to facilitate and ensure cross-company compliance between related members of corporate families, and negatively impact their ability to represent their clients in a coordinated and effective manner.

Many ACC members work in organizations in which they regularly provide services to affiliated company clients as a part of their employer-client's efforts to ensure corporate and brand integrity throughout a group of affiliated businesses operating under a common interest. The order thus affects ACC's members in two ways. First, the order suggests that it is unusual and questionable for an in-house lawyer to advise more than one company in a corporate group on the same or related issues, which in our view is actually a best practice, consistent with professional regulation, and in the public's larger interests. Second, the holding of the district court suggests that in-house counsel engaged in that best practice of cross-company counseling do so at the risk of endangering their employer-client's privilege rights (on the grounds that privilege protections cannot be enforced against an affiliate if the counsel has advised the affiliate company on a related issue).

For these reasons, the district court's decision creates uncertainty, impairs the delivery of vital counsel to sophisticated clients who are fully aware of the co-

counseling issues, and puts at risk the legitimate privilege rights of the entity that has progressively shared its legal compliance resources with a less sophisticated subsidiary, in what is a perfectly normal and acceptable shared counseling practice. If allowed to stand, the forward-looking impact of this case is to deprive clients of their ability to choose the most experienced and affordable counsel that can best represent them, and limits clients who wish to coordinate legal services with affiliated entities where there is an open and knowing agreement that shared counsel serves their common business interests. In sum, we believe the reversal of the district court's privilege ruling is essential to the continued assurance of well-coordinated legal services and legally compliant operations of affiliated companies around the globe.

THE ORDER APPEALED FROM

The June 2, 2006 order of the district court (the "Order") held that in-house counsel of BCE Inc. ("BCE") jointly represented BCE and its wholly owned subsidiary, Teleglobe Inc. ("Teleglobe") and as a result BCE lost its right to claim the attorney-client privilege as against Teleglobe. The court held that involvement by in-house counsel of BCE on behalf of both BCE and Teleglobe caused BCE to lose the privilege even with respect to privileged communications and attorney work-product done solely for BCE. Moreover, the advice of BCE's outside counsel intended solely for BCE was held to be unprotected, because the

documents reflecting such advice were reviewed by or passed through BCE's in-house counsel who had also advised Teleglobe. The district court stated that although this result seemed harsh, BCE could have avoided it by "walling off" its in-house lawyers from communications with BCE's outside counsel, or by "clearly terminat[ing]" the attorney-client relationship between its in-house counsel and Teleglobe. (Order at 6.)

ACC takes no position with respect to the factual assertions and findings and any disputes on these points between the parties; a position on these matters is immaterial to our interest in ensuring the Court understands the larger public policy issues presented in this case.

ARGUMENT

ACC urges the Court to resolve what will otherwise be an unhealthy uncertainty regarding the appropriate role and responsibilities of in-house counsel working in companies with affiliated businesses they are requested to help advise. In deciding this case, it is appropriate for the Court to consider the important public policy goals that are served by promoting the practice of coordinated legal counsel between related entities. We urge the reversal of the Order, which if allowed to stand as a precedent, would discourage parent corporations and their in-house counsel from involvement in assuring corporate family members' legal health, make it more difficult for parent companies to avoid unnecessary reputational risk

due to a subsidiary's failures, and undercut counsel's ability to help establish a common and positive culture of corporate compliance and responsibility across related entities.

I. It Is a Normal, Useful, and Desirable Practice for In-House Counsel To Advise Affiliated Companies.

One of the premises of the Order appears to be that there is something questionable and possibly improper about in-house counsel providing advice to both a parent and a subsidiary that are informed and agree to receipt of such services. The Order suggests that such a co-counseling situation is fraught with risk: professional risks for the co-counseling lawyer and unnecessary endangerment of the parent company's privilege rights. This view is misguided and mistaken.

It is normal practice for in-house lawyers to advise (often multiple) affiliated companies within the corporate group, because this practice is a wise and economical husbanding of resources, because it assures coordinated counseling and increased compliance between related entities, and because it almost always enhances the quality (and in some cases, the very existence) of legal services provided to subsidiaries that otherwise might not have the resources or experience with complex regulation and business practices to afford their own counsel. *See, e.g.*, *United States v. AT&T*, 86 F.R.D. 603, 616-617 (D.D.C. 1979) (noting that the

client in a corporate context includes the parent company, its wholly-owned subsidiaries, and often partially owned affiliates); JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES § 1:22[c] (2005) (discussing the common occurrence of corporate counsel advising representatives of both parents and subsidiaries, and the application of the privilege to their communications); *see generally,* RICHARD WEISE, REPRESENTING THE CORPORATION: STRATEGIES FOR LEGAL COUNSEL, Ch. 6 (2d ed. 1997); CAROLE BASRI AND IRVING KAGAN, CORPORATE LAW DEPARTMENTS (3d ed. 1997); ROBERT L. GELTZER AND HELEN C. TRAINOR, GUIDELINES FOR A CORPORATE LAW DEPARTMENT MANUAL 9-25 (American Bar Association 1980); SUCCESSFUL PARTNERING BETWEEN IN-HOUSE AND OUTSIDE COUNSEL (Thompson/West, Robert Haig, ed. 2006) (discussing strategies for coordinating the work of both in-house and outside counsel retained by an entity and providing services across internal departments and affiliates in the corporate family, in particular Ch. 47:12 regarding coordinated compliance across divisions and affiliates).

In part, this is simply because many legal issues require an understanding of the business and operations of the entire corporate organization and thus some degree of centralized legal management. For example, many corporate functions or legal areas benefit from centralized legal management because they require broad knowledge and cross-company information concerning the parent

corporation and all its subsidiaries. These areas include, among others, litigation, outside counsel coordination, antitrust, mergers and acquisitions, patents, trademarks, trade secrets, trade and commerce with foreign nations, securities law, disclosure and news releases, document management, labor and employee relations, employee health and safety, real estate, tax, and communications with federal and state agencies.

In addition, the nature of the relationship between a parent company and a subsidiary makes it inevitable that the parent and its counsel will have some involvement in the legal affairs of the subsidiary. Companies that spin off or acquire businesses as subsidiaries in order to pursue a new or expanded line of business are usually creating sub-entities that are sufficiently related to the business interests of the parent company that a very strong tie exists between the two, notwithstanding their separate incorporation and natural differences in focus or industry. Often, employees of the parent are shifted or temporarily assigned to the subsidiary when it is founded or acquired, financing and investment may come from common sources, and suppliers and customers are often shared.

Parents and subsidiaries thus often share a common culture based on collective practices, mutual goals, and joint business relationships. Over long periods of time, a few subsidiaries that grow with great success may become increasingly removed from some of these ties and exert greater independence in

action and practices, even if business goals remain allied. With an increase in size and financial success, such a subsidiary may be able to establish its own legal department with in-house and outside counsel who focus almost exclusively on the business of that subsidiary. But regardless of how successful it becomes, no subsidiary will ever be completely autonomous or independent of the parent:

> A situation of total subsidiary autonomy is impossible because it is incompatible with the centralization imperatives imposed by the existence of unified management – the distinctive feature of any corporate group – which in turn entails, by definition, a minimum level of encroachment on the autonomy of each group affiliate derived from headquarters intervention on certain managerial topics which are fundamental for the group's internal coordination and long-term survival as a global economic unity.

JOSE E. ANTUNES, LIABILITY OF CORPORATE GROUPS: AUTONOMY AND CONTROL IN PARENT-SUBSIDIARY RELATIONSHIPS IN US, GERMAN AND EU LAW: AN INTERNATIONAL AND COMPARATIVE PERSPECTIVE 192 (1994).

The use of the term "family of companies" is thus no coincidence; it would be unthinkable to almost anyone affiliated with either the parent or subsidiary of a family of companies to suggest that their interests are divorced by virtue of their separate incorporation. Certainly many affiliated companies find that the larger community of stakeholders with whom they work see the successes and failures of corporate family members as directly related to the successes and failures of the individual companies as well. A major corporate failure at a subsidiary of a large and sophisticated parent could not help but tarnish the reputation of parent and

their related brands, thus likely leading to scrutiny of the parent company for disregarding for the now-obvious shortcomings of its subsidiary. The parent company would be pilloried if its in-house lawyers purposely ignored real, developing, or potential legal problems in related entities. Commentators, especially with the advantage of with 20/20 hindsight, clearly would fault the parent company for adopting an "it's not our problem" attitude to problems at a subsidiary. A responsible company operating with a sound sense of accountability seeks to remedy, not neglect, legal problems that could hurt its own stakeholders' interests or the company's reputational value. Thus, some level of shared legal services and coordination of counsel between parents and subsidiaries is not only good business, but a best practice that courts should hold up as a model for counsel to emulate.

It is therefore natural for parent company counsel to be asked (and independently to seek out opportunities) to counsel subsidiaries on legal issues that are beyond the reach, finances or expertise of the subsidiary, including on issues that may not even be on the radar for the subsidiary's management. This kind of preventive counseling is exactly what we wish responsible parent companies to offer to affiliates in an effort to ensure the success of the group. It serves the best interests of both the parent and subsidiary entities, which both want the subsidiary to succeed and prosper and both want to ensure that the family's brand and

integrity are safeguarded. It is also further in the interests of the subsidiary, which gains access to skilled and experienced legal representation it might not have afforded.

Affiliated companies that share lawyers not only protect against failures in compliance, but also enjoy cost efficiencies, especially given the soaring costs of retaining outside counsel or training new lawyers on staff up an internal corporate learning curve. In addition to cost inefficiencies of hiring separate counsel for each entity when it is not needed, the coordination and communication concerns between layers of lawyers segregated within each family entity might make cross-company compliance less likely and problems with privilege protections amongst the group even more troublesome.

To penalize the parent for seeking to coordinate its legal work with the subsidiary's through shared use of parent company counsel, or to suggest that conflicts rules prevent sophisticated corporate affiliates who understand the nature of shared counsel relationships from sharing counsel to move joint initiatives forward, is both bad business and bad law for defining ethical responsibilities or the proper regulation of lawyers.

The need for involvement of the parent's counsel in issues relating to legal compliance by all companies within a corporate group was illustrated in the Supreme Court case *Upjohn Co. v. United States*, 449 U.S. 383 (1981). *Upjohn*

involved an internal investigation conducted by Upjohn's general counsel and outside counsel into any questionable payments by it or its numerous foreign subsidiaries to foreign officials, and the privileged documents at issue were communications between the parent's counsel and personnel at the subsidiaries generated in the course of the internal investigation. In holding that these communications were privileged, the Court observed that counsel need to be able to obtain information from such sources in order to advise the corporation:

> Middle-level - and indeed lower-level - employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.

Id. at 391.

II. Unless Reversed, the Order Would Make It Unduly Difficult and Risky for an In-House Lawyer To Advise Affiliated Companies Within a Corporate Group.

As discussed above, there is nothing unusual or improper about an in-house lawyer at a parent company providing legal advice and representation to an affiliated corporation that consents to such counseling. On the contrary, this normal and universal practice serves important and socially desirable goals.

In representing their clients, in-house counsel must of course comply with the applicable ethical rules regarding conflicts, confidentiality, and identification of

clients. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6, 1.7, 1.13 (2002); (*see also* Declaration of Stephen Gillers (Mar. 20, 2006) (___A. ___)). In addition, in-house counsel must make sure to take the steps necessary to preserve the attorney-client privilege for their employer client, at least with respect to the carefully defined and limited area of the lawyer's legal work for its client that should remain subject to privilege protections.

It is likely that in-house lawyers reading the Order will be unable to discern a clear path that allows them to balance the professional standards they are obligated to heed, the interests of their client in protecting their privileges, and the practical realities of joint parent-subsidiary representation. If left to stand, the Order has the unfortunate effect of confusing and undermining shared counseling between related entities by suggesting that lawyers who engage in joint representation of aligned and related clients are tainted and may inadvertently waive the attorney-client privilege if those interests or relationships change in the future, even if they have sought to properly sever the joint counseling relationship when a conflict arises. And, of course, it is virtually inevitable that in some way and at some time, the common interests of parents and subsidiaries may diverge in minor or significant ways; but the message of the Order is clear on one point: the in-house counsel that ignores the district court's holding does so at her client's peril.

If left to stand, the Order will move affiliated entities toward the complete and unhealthy segregation of legal counsel for each entity. The likely impact of this will be that some of these entities – in most cases, the subsidiaries –will not receive the sophisticated and expert legal advice necessary to ensure compliant and safe operations that the public and stakeholders of all kinds demand and rely upon. Parent companies will suffer, as will stakeholders, when legal needs and preventive compliance concerns at subsidiaries are unanswered. And the economies and coordination of effective legal counsel working across parent and subsidiary businesses will be lost in a triumph of form over practicality. To suggest that the parent company's privilege protections vanish because the parent company – at one time – allowed its lawyers to act in a joint representation capacity with its affiliated subsidiaries is not only a misreading of privilege law, but a disservice to public policy goals encouraging responsible corporate legal compliance and general corporate accountability.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* Association of Corporate Counsel urges the reversal of the Order.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 28.3(d), I, Mark I. Levy, hereby certify that I am a member of the bar of this Court.

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CERTIFICATE OF ELECTRONIC FILING AND VIRUS SCAN

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I hereby certify that on July 26, 2006, I caused a copy of the foregoing document to be filed electronically with the Clerk of the United States Court of Appeals for the Third Circuit by e-mail to electronic_briefs@ca3.uscourts.gov and ten (10) copies of the foregoing document to be submitted to the Clerk of the United States Court of Appeals for the Third Circuit utilizing the United Parcel Service's Next Day Air service.

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