In The United States Court of Appeals

For the Federal Circuit

MISC. No. 308

IN RE PPG INDUSTRIES, INC.,
Petitioner.

Response of Amicus Curiae American Corporate Counsel Association in Support of Petition for Writ of Mandamus

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CERTIFICATE OF INTEREST

Counsel for Amicus certifies the following:

1. The full name of every party or amicus represented by me is: American Corporate Counsel Association.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: See No. 1.

3. The parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are: none.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

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Dated: July , 1991

STATEMENT OF THE ISSUE ADDRESSED BY AMICUS CURIAE

WHETHER A COURT MAY DENY A PARTY'S COUNSEL ACCESS TO CONFIDENTIAL INFORMATION WHICH IS UNDER A PROTECTIVE ORDER BECAUSE COUNSEL IS AN EMPLOYEE OF THE PARTY?

STATEMENT OF THE CASE

This petition arises from an action for patent infringement pending in the United States District Court for the Northern District of Illinois, *PPG Industries, Inc. v. Libbey-Owens-Ford Company* (C.A. 90 C 6067), in which PPG has charged LOF with patent infringement. ACCA respectfully refers the Court to the briefs of the parties for a further statement of the relevant facts.

SUMMARY OF ARGUMENT

The decision below, which is based on an erroneous premise, creates an arbitrary standard with respect to the ability to select counsel of one's own choosing. Moreover, it bears no rational relationship to the perceived concern of the district court. It also casts unjustified aspersions on employed counsel.[1]

Similarly, Magistrate Gottschall's decision, which was adopted in its entirety by Judge Marovich of the district court, creates an unwarranted obstacle to the effective and economical provision of legal services to organizations and perpetuates arbitrary and artificial distinctions between employed and retained attorneys which have no factual or rational basis. Finally, the decision places any party, which consciously selects employed counsel as its counsel of record, at a distinct disadvantage, both economically and strategically, in litigation.

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[1] We use the term *employed counsel* to refer to lawyers who work exclusively for one client and do not hold themselves out to the public for the practice of law. We use the term *retained counsel* to signify those lawyers not on the client's payroll *and* who hold themselves out to the public for the practice of law.

Accordingly, ACCA urges the adoption of an objective standard which relates to the risk to be protected against and still accommodates the legitimate interests of both parties, to determine when a court will preclude counsel from access to confidential information. (*See infra* at 11-16)[2]

ARGUMENT

I. INTEREST OF AMICUS CURIAE

Amicus Curiae, the American Corporate Counsel Association ("ACCA"), is composed of members of the bar who do not hold themselves out to the public for the practice of law, but who are engaged in the active practice of law solely on behalf of corporations, partnerships, and other organizations in the private sector. ACCA, which was formed in March, 1982, is the only national bar association whose efforts are devoted exclusively to the professional needs of attorneys who are members of the legal staffs of organizations in the private sector. ACCA has approximately 8000 members who are employed as "corporate counsel" by over 3000 organizations.

Not only do attorneys practicing as members of the legal staffs of organizations make up an increasing portion of the bar, but they are doing an ever increasing percentage of the legal work of organizations which employ them. Some corporations have long had all or a large portion of their legal work performed by attorneys on their legal staffs. Many organizations have expanded and are continuing to expand the role of their law departments to include trial

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[2] ACCA does not argue that under these facts Mr. Levin should or should not be given access to the protected documents. Rather, ACCA's position is that an inappropriate standard was used in determining access and that in determining whether to issue a Writ of Mandamus, this Court should apply the objective standards proposed herein.

work as well.

Thus, that part of the decision which is the subject of the instant Petition for Writ of Mandamus, which denied counsel for PPG Industries ("PPG") access to confidential information because of his status as employed counsel, is of critical importance to the members of ACCA and the organizations they represent. The Court's decision effectively prohibited counsel from representing his client and denied PPG the counsel of its choice. This decision has a substantial adverse impact on the members of ACCA and the organizations they represent.

II. COUNSEL'S STATUS, WHETHER AS AN EMPLOYED OR RETAINED COUNSEL, SHOULD NOT BE THE BASIS FOR DETERMINING ACCESS TO CONFIDENTIAL INFORMATION CRUCIAL TO PROSECUTING AN ACTION.

A. The Court's Decision Ignores the Changing Nature of the Law

Attorneys practicing law as members of corporate legal departments constitute the fastest growing segment of the legal profession. It has become increasingly common to find corporations performing all their own legal work, including litigation, exclusively using employed counsel.[3] The growth of the corporate legal department and its increasing visibility in the legal community, particularly in litigation practice, is explained in large part by the fact that corporate managers have come to recognize that high quality legal services can be delivered on a more cost-effective basis by employed attorneys rather than by retained counsel.

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[3] A 1990 survey of 700 corporate law departments found in larger law departments 46% to 60% of the general legal work is done by employed counsel, while in departments of 1 to 5 attorneys, about 51% of the work is done by employed counsel. Thirteenth Annual National Survey of Corporate Law Department's Compensation and Organization Practices, Report of Ernst & Young to the Association of the Bar of the City of New York (Oct. 1990).

In fact, because the employed counsel deals exclusively with the client's legal problems on a daily basis, the attorney develops an in-depth knowledge of the client and its particular legal problems that is difficult, if not impossible, for the company to replicate when dealing with a law firm on a contract basis. To the extent "outside" or retained counsel can acquire this in-depth knowledge, it is only because they are effectively functioning as inside counsel.

The rationale used by the court below in denying employed counsel access to confidential information ignores the fact that retained counsel often has a close relationship with the client. In some situations, all of a corporation's legal work is performed by only one firm, and often times by only one or two individuals who devote themselves exclusively to that client and may also serve as corporate officers or members of the company's Board while retaining "outside" counsel status. Indeed, ACCA is aware of many instances in which law firm partners serve as corporate general counsel and spend a majority of their time on one client. In fact, our experience is that in situations where retained counsel is the alter ego of or a substitute for employed counsel, retained counsel may in fact be more intimately involved in the business operations of the client than employed counsel.

Moreover, in recent years there has been a blurring of any distinction between retained and employed counsel. Given the high rate of attrition among attorneys in law firms and the increasingly transient nature of today's legal community, it is not at all unusual for employed counsel to join private law firms, for retained counsel to become members of corporate law departments, and (as previously noted) for lawyers to be members of law firms and serve as corporate counsel simultaneously.[4] Thus, the assumed greater intimacy between employed

[4] One need read any of the numerous legal newspapers and magazines to find innumerable examples of retained counsel moving to the internal staff of its clients and vice-versa.

counsel and their non-legal corporate peers and/or superiors, and the perceived risk that employed counsel would be somehow inclined to "relax" their separate legal role in this interactive setting, as expressed by the court below, is not a rational basis on which to deny employed counsel access to confidential information. The fact is that the district court's groundless apprehension, which formed the rationale for denying disclosure, created a false and arbitrary standard which bears no rational relationship to the protectible interest.

B. All Counsel Are Officers Of The Court And Thus Subject To The Same Ethical Obligations

The Code of Professional Responsibility applies with equal force to all attorneys, without regard to their employment status.[5] Thus, all attorneys, regardless of whether they are employed or retained by their client are subject to the same standards of professional conduct and are subject to disciplinary measures for breaches of those rules. That lawyers are governed by a code of professional conduct is well-known and understood by corporate clients.

Given the fact that attorneys in corporate legal departments perform the same work and are held to the same professional and ethical standards as are their counterparts in law firms, it is difficult to advance a logical argument for denying employed counsel access to the confidential information necessary to adequately represent their clients solely on the basis of their employment status,

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[5] It is axiomatic that there is no distinction between lawyers based on their employment status:

> The type of service performed by a house counsel is substantially like that performed by many members of large urban law firms. The distinction is chiefly that house counsel gives advice to one regular client, the outside counsel to several regular clients.

United States v. United Shoe Machinery Corporation, 89 F. Supp. 357 (D. Mass. 1950). ACCA submits that even this distinction lacks force in today's legal practice, where it is common for some attorneys in large law firms in effect to handle only *one* client's matters.

while willingly granting "outside" counsel access to the same information.

The Court below apparently believed that affording access to corporate counsel will increase the dangers of inadvertent disclosure, due to its perception that "house counsel are subject to pressures different from those which outside counsel face." (*See Petitioner's Appendix, p. A4)* The court admittedly did not make this finding based on any facts,[6] but instead apparently relied on an unjustifiable, purely personal perception of the practice of law in a corporate legal department. The court's reasoning is difficult to comprehend, unless it is suggesting that employed attorneys, as a class,[7] cannot be trusted to exercise the same degree of restraint with respect to safeguarding confidential information that is required of all attorneys.

This argument, impugning the professionalism of all corporate attorneys, was soundly rejected by this Court in *U.S. Steel Corporation v. United States*, 730 F.2d 1465 (Fed. Cir., 1984). There this Court reversed and remanded the district court's refusal to grant inside counsel access to confidential documents critical to prosecution of a case, rejecting the *per se* rule fashioned by the lower court:

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6 To the contrary, the Court noted it had "no reservations about Mr. Levin's commitment to abide strictly by the terms of the protective order." (*See Petitioner's Appendix, p. A4)*

7 To the extent the lower court's decision is predicated on the assumption that employed counsel constitute a class of attorneys distinct from retained counsel, it arguably runs afoul of constitutional constraints, in that state action which results in different treatment of classes of individuals is prohibited by the Fifth Amendment unless there is a rational basis for that disparate treatment. *See U.S. v. Kras*, 409 U.S. 434 (1973). *See also, Fleming v. Nestor*, 363 U.S. 603 (1960). Here, the district court's discriminatory treatment of employed counsel lacks any rational basis whatsoever.

> Like retained counsel . . . in-house [employed] counsel are officers of the court, are bound by the same Code of Professional Responsibility, and are subject to the same sanctions . . . The problem and importance of avoiding inadvertent disclosure is the same for both. Inadvertence, like the thief-in-the-night, is no respecter of its victims.

Id. at 1468.

The lower court's decision in this case is simply an anachronism. It not only grants unwarranted "protection" to the practice of retained law firms, but also impugns the professionalism of employed counsel without justification. The decision is squarely at odds with the burgeoning practice of corporate legal departments and with the increasingly accepted notion within the business community that the interests of a corporation are best served and protected by the development of a high quality, internal legal department.

The court below apparently clings to an unfounded notion that somehow employed counsel are fundamentally different from other lawyers and that a distinction in their ability to maintain high professional standards can be drawn based on this perceived difference. This idea is not supported either by the record in this case or by reality. For this reason, the district court's action was both erroneous and an abuse of discretion, warranting this Court's intervention by Writ of Mandamus.

III. THE LOWER COURT'S RULING EFFECTIVELY DENIES PPG THE RIGHT TO USE COUNSEL OF ITS CHOICE

There is no question that the district courts have the primary responsibility for controlling the ethical activities of the attorneys who practice before them. *Securities Investor Protection Corp. v. Vigman*, 587 F. Supp. 1358, 1362 (C.D. Cal. 1984). This power includes the authority to order disqualification. *Id.* The right of a party to be represented by its counsel of choice is an equally important tenet of

this country's legal system, and one with which the courts have traditionally been very reluctant to interfere.

These competing interests must be balanced, particularly where, as here, the district court's decision was effectively to disqualify PPG's employed counsel and was based on a purely speculative belief, unsubstantiated by any evidence in the record, that counsel would be unable to resist the temptation to disclose protected, confidential information to his non-legal corporate peers and superiors.

PPG has clearly expressed a strong interest in having employed counsel assume an active role in this litigation. By prohibiting Mr. Levin from reviewing and digesting confidential documents which are, without question, critical to the prosecution of this action, the lower court has made it virtually impossible for him to effectively represent his client. PPG's employed counsel will be unable to communicate with and question PPG's retained counsel with regard to the contents of those documents, and he will not be able to fully participate with retained counsel in formulating discovery and trial strategies. Moreover, lacking direct access to crucial information, PPG's employed counsel will be severely handicapped, at the very least, in terms of his ability to participate in and make the strategic decisions which PPG apparently counts on him to make, and will be greatly hampered in his ability to advise his client on whether to proceed with the action or settle.

To require any corporation to rely exclusively upon outside counsel for the purpose of reviewing and digesting confidential documents will deny the corporate entity its counsel of choice for not only that important task, but will effectively deprive it of its right to effective representation by counsel of its choice generally throughout the course of litigation, by putting employed counsel at a severe disadvantage.

IV. THE COURT SHOULD FORMULATE AN OBJECTIVE STANDARD TO USE IN DETERMINING WHO SHOULD HAVE ACCESS TO CONFIDENTIAL INFORMATION

Notwithstanding the foregoing, ACCA does recognize that there may be some circumstances where counsel -- whether employed or retained -- would be properly precluded from having access to the protected material. However, such limitations should only be imposed based on an objective standard -- not because someone has speculated there may be a risk of disclosure. In *U.S. Steel v. United States*, 730 F.2d 1465 (Fed. Cir. 1984) this Court directed the I.T.C. to adopt just such an objective standard for determining counsel's access to confidential information. Toward that end, the Court in *U.S. Steel* noted that

> Whether an unacceptable opportunity for inadvertent disclosure exists . . . must be determined . . . by the facts on a counsel-by-counsel basis, and cannot be determined solely by giving controlling weight to the classification of counsel as in-house rather than retained.

Id. at 1468 (emphasis added). *See also, Matsushita Electric Industrial Co., Ltd. v. United States*, 929 F.2d 1577, 1579-80 (Fed. Cir. 1991).

Accordingly, ACCA proposes that this Court direct that an objective standard which bases access to confidential material on a "need to know" basis without regard to employment status be applied here. In deciding when access will be granted or denied, we suggest the following criteria should be considered in determining a counsel's access to confidential information:

- Does counsel have a non-legal role with the client? If counsel has a non-legal role, does the confidential information at issue relate to the non-legal role?
- Does counsel maintain independent files and records? If not, is it feasible to implement such a system to safeguard confidential materials?
- Is the client represented by both employed and retained counsel? If so, which attorneys are best suited, by specialty and function, to review and analyze the confidential information at issue?

Moreover, in recent years there has been a blurring of any distinction between retained and employed counsel. Given the high rate of attrition among attorneys in law firms and the increasingly transient nature of today's legal community, it is not at all unusual for employed counsel to join private law firms, for retained counsel to become members of corporate law departments, and (as previously noted) for lawyers to be members of law firms and serve as corporate counsel simultaneously.[5] Thus, the assumed greater intimacy and resultant danger of "inadvertent disclosure" expressed by the court below for employed attorneys is not a rational basis on which to deny them access to confidential information. The fact is that the district court's groundless apprehension, which formed the rationale for denying disclosure, created a false and arbitrary standard which bears no rational relationship to the protectible interest.

B. All Counsel Are Officers Of The Court And Thus Subject To The Same Ethical Obligations

The Code of Professional Responsibility applies with equal force to all attorneys, without regard to their employment status.[6] Thus, all attorneys, regardless of whether they are employed or retained by their client are subject to the same standards of professional conduct and are subject to disciplinary

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measures for breaches of those rules. That lawyers are governed by a code of professional conduct is well-known and understood by corporate clients.

Given the fact that attorneys in corporate legal departments perform the same work and are held to the same professional and ethical standards as are their counterparts in law firms, it is difficult to advance a logical argument for denying employed counsel access to the confidential information necessary to adequately represent their clients solely on the basis of their employment status, while willingly granting "outside" counsel access to the same information.

The Court below believed that affording access to corporate counsel will increase the "dangers of inadvertent disclosure". The court admittedly did not make this finding based on any facts,[7] but instead apparently relied on an unjustifiable, purely personal perception of the practice of law in a corporate legal department. The court's reasoning is difficult to comprehend, unless it is suggesting that employed attorneys, as a class,[8] cannot be trusted to exercise the same degree of restraint with respect to safeguarding confidential information that is required of all attorneys.

This argument, impugning the professionalism of all corporate attorneys, was soundly rejected by the Court of Appeals for the Federal Circuit in *U.S. Steel Corporation v. United States*, 730 F.2d 1465 (Fed. Cir., 1984). There the Court reversed and remanded the district court's refusal to grant inside counsel access

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[7] To the contrary, the Court expressly noted the unquestionable "good faith and integrity" of Brown Bag's counsel.

[8] To the extent the lower court's decision is predicated on the assumption that employed counsel constitute a class of attorneys distinct from retained counsel, it arguably runs afoul of constitutional constraints, in that state action which results in different treatment of classes of individuals is prohibited by the Fifth Amendment unless there is a rational basis for that disparate treatment. *See U.S. v. Kras*, 409 U.S. 434 (1973). *See also. Fleming v. Nestor*, 363 U.S. 603 (1960). Here, the district court's discriminatory treatment of employed counsel lacks any rational basis whatsoever.

These proposed criteria should be applied to *all* counsel -- whether retained or employed.

A. Counsel's Role

As noted in Part II of this Amicus brief, attorneys -- whether employed or retained -- often fill a variety of roles for a client. In determining access to confidential information, the Court should consider the responsibilities, if any, aside from the provision of legal services, of the attorneys who are to review the information. The Court should then determine whether a relationship exists between the confidential information to be imparted and counsel's other responsibilities, and if so, whether revealing such information to counsel would confer a direct competitive advantage on the client because it would be usable by counsel when wearing his/her other hat.

Applying this test to the facts here, ACCA suggests that relevant considerations for the district court would be:

- Does counsel (Levin) have responsibility for product research and development, product and process design or other technical, non-legal responsibilities for the client (PPG)?
- Does counsel have business decision-making responsibilities or authority for the client, other than those decisions attendant to legal representation?
- Does counsel participate in the competitive process of the client with respect to pricing, marketing or other similar decisions?

If Mr. Levin's functional role is limited to legal representation of his client, so that he is not involved in product research and development or marketing, it would appear that contrary to the lower court's fears, revealing defendant's confidential information to Mr. Levin would not confer any competitive advantage on his employer.

Recently, in *Boehringer Ingleheim Pharmaceuticals Inc. v. Hercon Laboratories Corp.*, 1990 U.S. Dist. LEXIS 14075, 18 U.S.P.Q. 2d (BNA) 1166 (October 12, 1990), another patent-related lawsuit, the federal district court for the District of Delaware utilized just this factual approach in disclosing confidential technological information to six employed counsel of one party who were major decision makers in the litigation, while declining to disclose the same information to the in-house technical personnel of both parties, who were responsible for product research and development. Similarly, in *Safe Flight Instrument Corporation v. Sunstrand Data Control, Inc.*, 682 F. Supp. 20 (D. Del. 1988), the court disclosed confidential technological information to the employed counsel of one party and declined to disclose the same information to the president of the other party, questioning the "human ability" of the president (who also functioned as chief scientist) to separate the information extrapolated from the confidential documents from his own ideas and future projects, but recognizing that inside counsel was not so intimately involved in the party's business. In both *Boehringer* and *Safe Flight*, the court further justified disclosure of the confidential materials to employed counsel on the grounds that counsel was ethically barred both by his status as an officer of the court and by the Code of Professional Responsibility from disclosing the information to his client.

B. Structure of Legal Department

The internal structure and information processing systems of a corporate legal department is another important factor to be considered in determining whether to disclose confidential information to counsel. Clearly, the more segregated the legal department is from the remaining corporate departments, the less danger there will be of inadvertent disclosure. Segregation, however, is by no means solely (or even primarily) a function of either the physical size of the

legal department or of the distance between the legal department and other departments.

Of far greater significance than the physical size of the legal department or its degree of isolation from other departments is the manner in which information received by and generated by the legal department is processed and distributed. A court should therefore inquire into the means by which information received by employed counsel is safeguarded from the non-legal staff. A key consideration in this regard is whether the legal department maintains independent files and records; or, at the very least, whether such an independent system can feasibly be established to protect incoming confidential materials.

Although retained counsel by their absence of physical proximity to a client would presumptively meet these criteria, the considerations suggested here are nevertheless equally applicable to them.

C. Counsel's "Need To Know" Where Client Is Represented By More Than One Attorney

In the event that a corporation is represented by both employed counsel and retained counsel, the court should determine access to confidential information strictly on a "need to know" basis. Some of the relevant criteria in ascertaining "need to know" include counsel's expertise in a particular area and the nature of counsel's role with respect to the protected matter -- rather than on the basis of counsel's employment status. For example, if the corporate attorney is a generalist and retained counsel specializes in patent and trademark law, then retained counsel would be best suited to review confidential materials regarding those issues in a case. If, on the other hand, a retained attorney is hired as trial counsel and the employed attorney is the specialist, the same reasoning would compel the conclusion that the employed attorney is best suited to review the

documents in question. (However, trial counsel would still need to review the materials and consult with the specialist.) In this manner, the issue of access is determined, as it should be, purely on the basis of an attorney's qualifications and need for access rather than resting on arbitrary distinctions between employed and retained counsel.

Thus, in determining access to confidential information, a court should consider the following factors to insure that the attorney reviewing the confidential documents is the attorney who needs to know that information in order to fulfill his role in the litigation:

- Will the lawyer be trial counsel?
- Is the lawyer/consultant a specialist in the area that the confidential materials relate to?
- Is counsel an active participant in the litigation or merely "listed" on the pleadings?
- Is there any other reason that counsel would need to know the information in order to fulfill his/her *legal* responsibilities?

V. THE PROTECTIVE ORDER CAN BE STRUCTURED TO GUARD AGAINST INADVERTENT DISCLOSURE.

The lower court's assumption that there is a greater risk of disclosure of confidential information by corporate attorneys than by retained attorneys is purely speculative. In reality there is no greater risk, because the current protective order can be modified to incorporate the following additional precautionary measures.

A. Limitations on Counsel

The court may require that while in the possession of PPG's counsel, the confidential materials be kept in segregated, locked files. These files would only

be accessible to Mr. Levin, other members of the legal staff or legal support staff with direct responsibility for this case. The court may further require that the confidential documents not be removed from counsel's offices and that the documents be marked appropriately to indicate this restriction. Finally, the court may choose to impose a "gag" order on counsel, prohibiting counsel from communicating with management with respect to the contents of the confidential materials.

B. Limitations on Management

Insofar as the court requires assurances that management is willing to abide by the terms of the protective order, it may require management to execute an express written acknowledgement to that effect. In substance, this statement would constitute an acknowledgment by management that the confidential documents are subject to a protective order and that management agrees not to seek access to the information so classified. The acknowledgment could be appended as an amendment to the protective order.

C. Sanctions

All attorneys, whether employed or retained, as officers of the court, are subject to the full panoply of measures available to a court to effectively enforce protective orders. An attorney who violates a protective order by disclosing confidential information can be held in civil or criminal contempt. The district court can also impose sanctions for violation of a protective order. The availability of these precautionary measures and sanctions should provide adequate assurances, aside from counsels' independent ethical and professional obligations, that neither the confidential documents nor any of the information contained therein will be even inadvertently disclosed.

CONCLUSION

The decision below denying counsel for PPG access to confidential documents solely on the grounds that counsel is a full time employee of PPG's legal staff is an arbitrary abuse of judicial authority, without rational basis. The necessary effect of this decision is to severely restrict the ability of corporate law departments to provide high quality, cost-effective professional services to their clients. Accordingly, *Amicus Curiae*, the American Corporate Counsel Association respectfully requests that this Court adopt an objective standard without regard to counsel's employment status in determining whether to issue a Writ of Mandamus directing that Mr. Levin be included as Qualified Counsel under the otherwise agreed upon Protective Order below.

Date: July 15, 1991

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of the foregoing Response of Amicus Curiae ACCA were served upon the following attorneys of record for the parties to this action by Federal Express:

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this 15th day of July, 1991.

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