ACCA
American Corporate Counsel Association

the in-house bar association℠

No. S080201

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PLCM GROUP, INC.,

Plaintiff and Respondent,

vs.

DAVID DREXLER,

Defendant, Appellant and Petitioner,

AND RELATED CROSS-ACTION

BRIEF AMICUS CURIAE OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION (IN SUPPORT OF THE RESPONDENT)

After a Decision by the Court of Appeal
Second Appellate District, Division Three
[2nd Civil No. B110667]

For the American Corporate Counsel Association (ACCA)

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INTRODUCTION

IDENTIFICATION OF THE AMICUS CURIAE

Amicus Curiae, the American Corporate Counsel Association (ACCA), is the only national bar association exclusively serving the professional needs and interests of in-house counsel to corporations and other private sector organizations. Since its founding in 1982, ACCA has grown to represent over 11,000 individual in-house counsel members; these members work in over 4,000 separate business and not-for-profit organizations across the United States (and overseas). While there are more than 5,000 in-house counsel practicing in California, over 1,300 of them are ACCA members. ACCA's California members represent a great diversity of businesses -- over 640 separate corporations -- including huge conglomerates with large law departments, non-profit organizations such as California's finest universities, and small start-ups and family-owned businesses with only a single lawyer on staff.

ACCA has four active chapters in California (more than in any other state): San Francisco Bay Area ACCA, Sacramento ACCA, Southern California ACCA (Los Angeles environs), and San Diego ACCA. Like the national parent organization, each of these Chapters offers its local membership a full panoply of services, including networking, educational (CLE/MCLE) programming, online resources, and a wide variety of initiatives focused on such priorities as pro bono service, diversity in the legal profession and relationships with local law schools and their students.

While ACCA does not lobby or engage in significant efforts to influence government decision-making at either the local or national levels, ACCA is often solicited for its comments and expertise on matters involving in-house counsel and their practice environment. ACCA regularly files amicus briefs with courts across the country and provides testimony before legislatures, professional groups, licensing authorities and courts, when these entities are considering issues that would specifically affect in-house legal practice or corporate counsel as a subset of the legal profession.

ACCA was solicited by the District Court of Appeal from which this appeal is brought to provide our perspective on this case, which revolves around an issue of specific concern to and impact on in-house counsel and those clients who choose to employ them. We believe that a decision to overturn the lower courts' rulings would have a negative impact on in-house practice and on clients who choose to hire in-house counsel to represent their interests. ACCA files this brief in hopes that we may provide this Court with the perspective of the in-house bar on the issues before it.

SUMMARY OF AMICUS CURIAE'S CONTENTIONS

1. The practice of law on behalf of corporate clients is increasingly conducted by in-house counsel either directly or through the management of outside counsel. The legal marketplace has created a number of service options for clients to consider; outside law firms are only one of a number of service options available.

2. There is no sound legal or policy reason to force clients toward the continued use of outside firms alone. Clients should not be penalized for selecting the best counsel to meet their specific needs.

3. Public policy and the weight of judicial authority favor the adoption of a simple, single standard of compensation to the client for its legal costs regardless of method by which the client

chooses to pay its attorneys.

4. The costs to the corporate client of legal services rendered by in-house counsel are real, and are compensable by a court.

5. The question of what measure to apply in calculating those costs must be one reasonably applied by a court, providing fair compensation to the corporate client, and offering a predictable standard for the parties to an action. ACCA contends that the fair market value of those fees is the appropriate measure to use.

6. The "fully-loaded" cost of an in-house counsel's time is difficult to quantify, is rarely readily-available information, and is intrusive to calculate, thus further inconveniencing a party to whom the court already believes fees should be awarded as compensation for the inconvenience of defending a spurious claim.

7. A fair market value standard is appropriate for compensating clients for the costs incurred when using their counsel of choice, regardless of whether that counsel is an employee or a retained outside practitioner. In this case specifically, the in-house counsel's costs submitted by her client are not only reasonable, but are appropriately calculated at market value since she had no better, more accurate, or more equitable gauge by which to measure the cost of her services to her client. Accordingly, ACCA urges this Court to affirm the lower courts' decisions.

LOWER COURTS' RULINGS AND CASE SUMMARY: MATERIAL FACTS AND PROCEDURAL HISTORY

Since ACCA is not a party to this case, for purposes of this argument, ACCA assumes the following facts from the lower courts' records:

- The Appellant owed the Respondent an unpaid deductible on a malpractice insurance policy after the Respondent provided the Appellant with legal counsel pursuant to a malpractice claim made against the Appellant.

- The Appellant refused to pay the deductible and Respondent was forced to sue for its collection, utilizing the services of an in-house attorney.

- The Appellant zealously pursued a counter-suit against the Respondent and refused all attempts to settle the matter at minimum expense.

- The Respondent was awarded (by both the trial and appellate courts) the insurance policy's deductible and its legal fees pursuant to the policy's provisions, California case

precedent, and California Code § 1717.

ACCA asserts that the issue of importance on appeal before the Supreme Court is whether the trial and appellate courts erred in awarding the Respondent the value of its in-house counsel's litigation costs calculated by a "fair market value" standard.

DISCUSSION

I. This case is set against a background of the increasing importance of the role of the law departments and in-house counsel in the United States and California.

ACCA is founded on the principle that the interests of corporate clients, the legal profession, the legal system and society at large are all well-served by encouraging the use of in-house counsel. In-house counsel have the rare advantage of operating with a full-time focus on and a deep understanding of their client's business and legal needs. The presence of a trusted counsel on staff within the company helps to remove impediments that might otherwise deter corporate clients from seeking and implementing legal advice before problems arise. In addition to solving complex legal problems with high-quality service (in both transactional and litigation matters), in-house counsel also provide unique value to their clients by focusing on preventive and compliance-oriented practice, keeping their clients out of trouble and, often, out of litigation.

A. In-house counsel and law departments provide top-notch services to an increasing number of corporate clients.

Today's in-house counsel is a likely a "graduate" of a top law firm, where he likely provided highly sought-after services to the client which hired him or to other clients with similar legal requirements. Some in-house counsel were solicited to join their client's company after serving in a high-level position in government. Most practitioners hired to go in-house have at least seven years of post-law school legal experience; a significant number have much more. *1998 Member Assessment Survey* (considered statistically significant), prepared for the American Corporate Counsel Association by AWP Research, May 1998.

Today's in-house law department is a sophisticated law office, offering the latest innovations in technology (usually years ahead of their outside firm peers), and providing clients with the functional equivalent of law firm expertise at the partner level. *1998 Member Assessment Survey, id.*

The primary difference between the average corporate law firm practice and the average in-house practice is that the in-house

lawyer strives to provide her services in a manner that is more attuned to the unique needs of the client which employs her. She is hired because she has just the right mix of experience and legal knowledge to offer her particular client.

As in-house counsel and their legal department become an institutionalized and important part of the company, they take on more responsibilities for the management of legal risk and budgeting for legal problems. In-house counsel who perform their functions well earn the implicit trust of their clients since they exhibit their commitment to participate as a valuable part of a corporate team working together in the best interests of the client.

Most legal departments provide legal risk management through a mix of in-house legal services and outside counsel who are supervised by in-house counsel. It is extremely rare for a department (whether it has 1 or 500 attorneys) to staff itself to handle all of the client's legal work. *1998 Member Assessment Survey, id.* It is not efficient or cost-effective for the company to employ certain kinds of micro-specialists whose services are only episodically required or to keep a large transactional or litigation team when these are not the "core" legal services the company regularly requires. Today, in-house counsel are responsible for providing high quality and efficient legal services, while simultaneously engaging in sophisticated legal risk management with outside counsel.

In this setting, in-house counsel do everything that outside counsel do - and more - to serve their clients. More importantly, in-house attorneys are subject to the same ethical obligations as outside counsel: professionally, there is no functional difference between the two. (*See generally*, Villa, John K., *Corporate Counsel Guidelines*, West Group/ACCA: 1999.)

The Appellant in this case asks this Court to mandate disparate treatment between corporate clients, arguing that clients who employ a qualified, fully-licensed in-house counsel should be subject to a more rigorous and inconvenient standard than those who choose to retain an outside firm to conduct the same work. This is a distinction without merit. Any decision that replaces parity with disparate treatment will strongly impact the client's decision whether to employ in-house counsel or retain an outside attorney to provide legal services.

B. The decision to hire or retain legal counsel.

The so-called "make or buy" decision often revolves around issues of cost, in addition to other, less tangible factors.

It is not possible to plan for and budget accurately all the legal exigencies that a company might encounter over the course of the

fiscal year. As stated earlier, the vast majority of corporate law departments -- regardless of their size -- presume that at least some, if not a majority of their work, will be provided by outside counsel. In choosing which work to send out and which to staff internally, a company or its general counsel must continually make a fundamental decision based on an assessment of their presumed risks versus predictable costs. Some kinds of costs can be predicted and budgeted; other kinds of costs -- most notably, litigation costs -- are much harder to accurately predict.

The impact of hiring an in-house counsel or retaining a firm is greatest on companies with the smallest law departments. The leaner the internal resources to cover legal needs, the more important the decision on how to allocate those dollars and risks. The Respondent in this case is a good example: her client's resources are limited, and her client decided it could best afford to avail itself of the services of an outstanding litigator to handle its regular litigation load only by hiring one in-house.

This client's business judgment should not be replaced by a rule which encourages the client's selection of one qualified lawyer over another. To deny equitable compensation to a client which uses its in-house staff to defend a claim is the functional equivalent of denying that client the right to use the counsel of its choice.

II. The cost of legal services rendered by in-house counsel to a corporate client are real and compensable.

The District Court of Appeal affirmed the trial court's holding that the cost of legal services rendered by an in-house counsel to a corporate client are real and compensable under California law. The Respondent's brief thoroughly argues and provides California, federal and state caselaw and other legal references on this issue. The following cases show the widespread acceptance of the principle adopted by the courts below:

See, e.g. Garfield Bank v. Folb, 25 Cal.App.4th 1804 (1994), [overturned as re *pro se* representation only by *Trope v. Katz*, 11 Cal.4th 274 (1995)]; *Pittsburgh Plate Glass Co. v. Fidelity and Casualty Co.*, 281 F.2d 538, 542 (3d Cir. 1960); *United States v. Meyers*, 363 F.2d 615 (5th Cir. 1966) (affirming the award of attorneys fees to the government even though it was represented by its employee/salaried lawyers); *United States v. State Farm Mutual Automobile Association Insurance, Inc.*, 245 F. Supp. 58 (D. Ore. 1965) (*dictum* to the effect that fees for in-house legal services are entitled to an award); *In re International Systems & Controls Corporation Securities Litigation*, 94 F.R.D. 640 (S.D. Tex. 1982) (inside counsel fees awarded on sanction motion); *Scott Paper Co. v. Moore Business Forms, Inc.*, 604 F. Supp. 835

(D. De. 1984) (court acknowledged value of awarding in-house counsel fees); *Textor v. Board of Regents of Northern Illinois University*, 711 F. 2d 1387 (7th Cir. 1983); (rejecting distinction between in-house attorneys and outside counsel for the purpose of awarding fees); *Tesoro Petroleum Corp. v. Coastal Refining & Marketing, Inc.*, 754 S.W.2d 764 (Tex.App. 1988) (awarding a reasonable fee for in-house counsel because the corporation should be compensated for time that such counsel could have spent on other corporate matters); *Dale Electronics, Inc. v. Federal Ins. Co.*, 205 Neb. 115, 286 N.W.2d 437 (Neb. 1979) (holding that a successful litigant is entitled to receive a reasonable attorney's fee for in-house counsel who engaged in the preparation and trial of the litigation to the same extent as outside counsel); *Holmes v. NBC/GE*, 168 F.R.D. 481 (S.D.N.Y. 1996) (stating "it is well settled that attorney's fees may be awarded for in-house attorneys" and citing additional cases in support); *Grace v. Center for Auto Safety*, 155 F.R.D. 591 (E.D. Mich. 1994), *rev'd on other grounds*, 72 F.3d 1236 (6th Cir, 1996) (finding that "[n]othing suggests GM's in-house counsel are working for free or that GM should not be compensated for their expense").

At the same time, the Appellant has not provided any evidence to contradict the Respondent's position that her client did indeed "incur" costs in defense of its contractual rights and the Appellant's spurious counter-suits. ACCA believes that the fact that corporate clients do incur costs for their in-house counsel's services which can be compensated is not only undisputed in the law, but is certainly just plain common sense.

Therefore, it appears that the only substantive issue before this Court is: by what method should the in-house counsel's fees be calculated?

III. A fair market value standard is the right standard to adopt.

ACCA believes that in-house counsel representing their clients who are legally entitled to an award of fees should have their costs subjected to the same scrutiny as the court would apply to an outside practitioner's fees. The fee request should be examined for its relation to the going rate in the local marketplace for a counsel with similar experience, practice specialty and value to the client. Counsel should be required to submit evidence of the hours and other expenses spent on the matter, and then a simple calculation is performed, multiplying the hours by the market rate for those services and adding appropriate expenses as allowed.

Why should this Court adopt this standard in this case? Not because it is perfect, for it does not divine the exact calculation of the exact cost of that representation to client, just as is the case

when such fees are awarded to a client to pay an outside firm for their representation. Rather, fair market value fees are appropriate in this case and as a standard generally because:

- fair market value fees are the very definition of reasonable costs, and,
- beyond fair market value fees, there exists no better means of calculation.

Courts across the country, including California's courts, have adopted a fair market value standard for the compensation of fees for outside counsel retained by the prevailing client which is awarded its costs. *See, e.g., Margolin v. Regional Planning Com.*, 134 Cal.App. 3d 999 (1982); *Rodrigues v. Taylor*, 569 F.2d 1231 (3rd Cir. 1977); *Sierra Club v. Gorsush*, 684 F.2d 972 (D.C. Cir. 1982), *rev'd. on other grounds by Ruckelshaus v. Sierra Club*, 463 U.S. 680, 103 S.Ct. 3274, 77 L. Ed. 2d 938 (1983); *Environmental Defense Fund v. EPA*, 672 F.2d 42 (D.C. Cir. 1982); *Mid-Hudson Legal Services, Inc. v. G &U, Inc.*, 465 F.Supp. 261 (S.D.N.Y. 1987); *National Trust for Historic Preservation v. Corps of Engineers*, 570 F. Supp. 465 (S.D. Ohio 1983); *Delaware Valley Citizens Counsel v. Commonwealth of Pennsylvania*, 762 F.2d 272 (3rd Cir. 1985); *Cottman Transmission Sys. v. Martino*, Nos. CIV.A.92-7245, CIV.A.92-2131, CIV.A.92-2253, 1993 W.L. 541680 (E.D. Pa. 1993), *vacated on other grounds*, 36 F.3d 291 (3rd. Cir. 1994); *Central States, Southeast and Southwest Areas Pension Fund v. Central Cartage Company*, 76 F.3d 114 (7th Cir. 1996), *cert. denied*, 136 L. Ed.2d 19 (1996).

Such fees are readily determined and are accepted as the norm (only in extreme cases do courts insert a more "appropriate" standard). If fair market value fees are clearly the regular and legal standard for outside counsel fee compensation, there is no sound legal or policy reason not to apply the same standard to awards granted to clients who use in-house practitioners.

> A. Fully-loaded costs provide no predictable measure, are not readily available, and unduly subject the prevailing party to yet another round of frivolous hassle.

"Fully-loaded" costs calculated to show the exact dollar value of an hour of an in-house counsel's time are difficult to quantify. Consider, for instance, the long list of items considered by the top consulting firms when they examine law department costs in order to publish benchmarks.

- share of rent and building maintenance/facilities;
- secretarial, administrative, paralegal and staff attorney support;
- share of utilities, furnishings, and other office supplies;
- copiers, computers, printers, desktop software,

internet/intranet/extranet costs, scanners, network hardware and software, telephones, fax machines, and other office equipment;
- legal research facilities and services;
- bar and professional affiliations, as well as continuing legal educational costs;
- travel and "entertainment" expenses;
- corporate training and education provided to all employees;
- malpractice, general liability, and other forms of insurance not a part of the compensation package;
- a share of accounting, human resources, MIS, security, and other "corporate" services used by all corporate employees; and, of course,
- salaries, benefits, vacation and sick leave, disability and life insurance policies, and other corporate prerequisites (golden parachutes, stock options, etc.)

Altman Weil Pensa: *Law Department/Law Firm Functions and Expenditures Report* (published annually); *Price Waterhouse Coopers: Law Department/Law Firm Spending Survey* (published annually): *Ernst & Young's Law Department Compensation and Expenditures Survey* (last published in 1994).

The vast majority of corporate clients (and law firms), do not have an accurate measure of what the fully-loaded costs of an hour of an attorney's time might cost them. Corporations are not (and cannot be) in the business of selling their legal department's services, and therefore do not calculate these costs at this level of detail. Yet that kind of detail should be required if the point is to truly calculate the most accurate measure of costs incurred.

The cost of salary plus one or two other items would not provide an accurate gauge of costs, thus providing no more (or less) relation to reality than would fair market value fees; to adopt such a middle-ground standard, however, would miss the point of establishing a more formal evaluation to most accurately calculate the exact costs "incurred" by the client.

If the fully-loaded cost calculation is adopted and clients are required to compile an exhaustive laundry list of costs they "incurred," three adverse impacts will be imposed on the clients who choose to hire in-house counsel.

- First, because the prevailing party won an award of fees, often as a result of defending a frivolous action, the court will now require it to bear the burden of not only calculating and presenting the summary of hours and activities undertaken by its counsel, but also the additional burden of calculating an hourly fee which is properly representative of its actual costs. Unless this Court lays out exactly which costs are includable and which are not, a company and an awarding

court are likely to waste time trying to establish the proper calculation. It is not a good use of judicial resources or expertise to ask courts to create that list or to re-invent a proper list of includable items for each case in which the need arises.

- Second, having presented a list of its costs by its own calculations, as well as the resulting "fees," expenses and hours spent on the case, the client would be subjected to the strenuous objection of the non-prevailing party, who (being unhappy about the award in the first place) will likely now dispute the resulting calculation, the veracity of the costs, the reasonableness of the company's procedures, the inclusion of this item or that, and, at times, why the resulting fee exceeds the fair market rate.

- Third, costs vary widely from corporation to corporation, often exceeding the market rate, and thus removing any sense of predictability of risk borne by the non-prevailing party to an action. Whenever this situation arises, the corporate client is virtually guaranteed to be subjected to a full-blown ancillary litigation over the calculation of its fees, completely divorced from the "merits" of the already-adjudged "meritless" case.

- Finally, the client will be subjected to the non-prevailing litigant's requests for information to verify his contentions that the fees are not appropriate: the litigant will demand to examine the company's books, practices, and procedures, in addition to creating additional costs in the judicial proceedings. Such invasions of corporate privacy are not welcome intrusions.

This is hardly the way to treat a party which is supposed to be receiving an award for its lost costs defending a meritless suit. Indeed, as articulated by a California court in *Shaffer v. Superior Court*, 33 Cal. App. 4th 993 (1995), courts should not focus on the accumulated total cost of a long list of complex cost factors. Trying to calculate the exact costs incurred by a client absent a clearly defined fee creates a "specter of a monumental inquiry on an issue wholly ancillary to the substance of the lawsuit." *Shaffer*, citing *Copeland v. Marshall, 641 F.2d 880, 896 (D.C. Cir. 1980).*

B. When in-house counsel are forced to pursue warrantless litigation, the client bears a loss which is directly related to the fair market value of the counsel's services.

Since corporate law departments are not staffed to handle all of the legal work of a company, outside counsel are needed to cover not only routine matters, but also matters from which the in-house counsel is drawn, thus forcing the corporate client to either go

without services it paid an attorney to provide or to incur the cost of hiring an outside counsel to make up for its corresponding shortage of in-house staff. When replacement services are purchased from an outside firm, they are likely to be priced at market rates for the value of a counsel with similar expertise. The value of the client's loss, even if it went without services rather than retain another lawyer to do the work, is nonetheless the "replacement" cost of the in-house counsel's services.

C. The microscope of judicial scrutiny should be applied equally.

If it is reasonable for a court to award fair market value fees to a client for its outside lawyers to cover their costs without asking the law firm to quantify its exact costs in conducting the litigation, why is the same standard not reasonable when the litigating counsel happens to be in-house? ACCA, the lower courts, and Respondent have already established that courts regularly grant market value fees to clients with outside counsel without regard for whether that award might present a windfall or loss to the law firm in terms of its actual costs. Indeed, the fair market value standard has been adopted and is accepted by both courts and lawyers because it equitably and predictably estimates the most "reasonable" fee.

If courts generally favor the assumption that the marketplace for legal services is an appropriate determinant of equitable and fair costs, why is not that standard applicable to in-house counsel fees? There is no question that costs are incurred, and in-house counsel are not *pro se* attorneys as representatives of their clients. It is inconsistent and bad public policy to suddenly find fault with the "inexact" nature of this calculation of costs simply because it is applied to a prevailing client who happens to be represented by its in-house counsel.

Fair market value fees are the definition of reasonable fees. To treat in-house counsel to a harsher standard for calculating the costs incurred by their clients than is required of their outside peers who need only to show their log of hours creates a disparity without any justification. To subject in-house counsel fees to this kind of disparate treatment unfairly punishes clients who are fully entitled to (and ACCA argues, very well served by) their choice of counsel. To mandate a separate (and non-equal) standard for in-house counsel by not applying the fair market value standard will create two classes of lawyers representing corporate clients: those whose fees are not questioned, and those whose fees are subjected to desultory, highly-detailed, and intrusive scrutiny.

CONCLUSION

In-house counsel and outside counsel both provide valuable services to corporate clients. Fully-loaded in-house counsel costs, just like fully-loaded outside counsel costs, are not predictably or easily defined by courts or clients. The most reasonable and equitable method of defining the cost of in-house counsel's services should be to price them based on comparably valued services on the marketplace. Considerations in this equation should include the counsel's expertise, specialty, and the type of services rendered, just as would be the case for the award of similar fees to an outside counsel. The courts are already familiar with this analysis.

The Respondent has met its burden by showing that the fees Respondent requested and which were awarded by the lower courts are consistent with the market value of the services she provided.

This Court should apply the consistent standard adopted and endorsed by jurisdictions across the country. This Court should not send a message to clients that they will recoup their costs from an award of fees without a strenuous second battle only if they retain an outside firm to pursue the litigation.

The District Court of Appeal's succinct conclusion is dispositive:

> [Use of t]he prevailing market rate method relieves the court and the litigants from the specter of wasteful and prolonged litigation over a matter ancillary to the primary case. Courts have extensive experience in awarding attorney fees based on the local market rate for similarly situated lawyers. Based upon these considerations, we find the prevailing market rate is the most reasonable, equitable, and predictable method of calculating reasonable attorney fees for in-house counsel.

ACCA cannot say it better. We respectfully urge this Court to affirm the decision of the District Court of Appeal.

Dated: December 2, 1999

Respectfully Submitted:

John H. McGuckin, Jr.

Attorney of Record for
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PROOF OF SERVICE

WASHINGTON, DISTRICT OF COLUMBIA

I, the undersigned declare:

I am employed in the District of Columbia. I am over the age of 18 and not a party to the within action: my business address is 1025 Connecticut Avenue, N.W., Suite 200, Washington, DC 20036. I am readily familiar with the practices of my office for collection and processing of correspondence for delivery by Federal Express. Such correspondence is deposited into the designated drop box placed by Federal Express in my office's building lobby and retrieved by a Federal Express employee each evening in the ordinary course of business.

On December 2, 1999, I served the document described as AMICUS CURIAE BRIEF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION on Thomas L. Watters, Laurie Falik, the Los Angeles County Superior Court, and the California Court of Appeal - Second Appellate District, by placing true copies thereof enclosed in sealed envelopes and addressed as noted on the attached Service List. I placed such envelopes, with shipping charges billed to the sender, into the designated Federal Express drop box for overnight delivery by that carrier.

I also caused five copies of the document to be delivered to the California Supreme Court by Federal Express overnight delivery, shipping charges billed to sender.

I declare under penalty of perjury under the laws of the District of Columbia which licenses me as an attorney that the foregoing is true and correct. Executed at Washington, DC, on December 2, 1999.

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Susan J. Hackett

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