**U.S. Department of Justice**

*United States Attorney*
*Southern District of New York*

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*New York, New York 10007*



July 9, 2007



**By Hand**
The Honorable Lewis A. Kaplan
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

**Re: United States v. Stein, *et al.*,**
**S1 05 Cr. 888 (LAK)**

Dear Judge Kaplan:

At the July 2, 2007, oral argument Your Honor asked the Government to tell the Court "what the Government thinks a reasonable, privately-funded defense would cost in this case." (Transcript of July 2, 2007, conference ("Tr.") at 134). The Court also wanted "to know from the Government what you think the minimum cost of a competent, privately retained defense for an individual in this case would be." (Tr. at 58). On July 3, 2007, the Court issued an order requesting that the Government provide the Court with "the Government's estimate of the reasonable cost to each defendant of properly defending this action with privately retained counsel and the basis for those estimates." After considering the Court's questions at some length, and after discussing the matter thoroughly with our supervisors, for the reasons set forth below the Government respectfully submits that it is not in a position to answer the questions posed by the Court.

The Government is not aware of any court decision or other authorities discussing how to determine, in advance of trial, what level of legal fees and expenditures would be "reasonable" in a criminal case. The United States Attorney's Office is particularly ill suited to making judgments about what actions by defense counsel would be "reasonable" (and hence what possible actions would be "unreasonable") and has essentially no experience with questions of what such a "reasonable" defense ought to cost a given defendant. For example, what criminal defense counsel typically do to prepare a defense (except in open court) is something to

which we are not generally privy; what defense counsel *charge* for preparing a defense is something to which we are almost never privy. We similarly lack institutional experience in assessing the "reasonableness" of legal expenditures post-trial, something that courts do in any number of contexts, but that criminal prosecutors generally do not. *See generally Johnson* v. *Westhoff Sand Co.*, 135 P.3d 1127, 1135 (Kan. 2006) ("A district court is considered an expert on the issue of attorney fees. It may apply its own knowledge and professional experience in determining the value of services rendered."). The only area in which this Office participates in any way whatever in an analysis of defense counsels' efforts and the like is the context of ineffective assistance of counsel claims.

The questions posed by Your Honor require analysis of a number of factors on which the Government cannot reasonably opine, including: how many co-counsel, associates, and/or staffers are reasonably required to assist in the defense;[1] whether a defense lawyer should charge a flat fee versus an hourly fee, and the amount of a reasonable hourly fee;[2] whether it is reasonable to retain a lawyer from another state who would relocate to New York for trial; and the like. These factors do not even begin to approach the complexity of assessing, in advance, the reasonableness of various different possible approaches to a myriad of strategic and tactical decisions, both pre-trial and during trial, regarding aspects as diverse as how to approach the discovery in this case (*e.g.*, whether certain huge categories of documents are worth reviewing in detail or not),

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[1] It has been reported that, in connection with the defense of former Enron Chief Executive Jeffrey Skilling, the defense had "a team of 12 lawyers, 5 paralegals, and a number of temporary staffers to try Skilling's case." *(See* June 8, 2007, Spears Decl. Ex. FF (*Business Week* article)). That trial lasted approximately 4 months, and Skilling's defense purportedly cost approximately $70 million. It has similarly been reported that former HealthSouth CEO Richard Scrushy paid approximately $21 million for his defense. (*See* June 8, 2007, Spears Decl. Ex. DD).

[2] For example, the principal attorney who defended Skilling reportedly billed his services "at nearly $800 per hour." Spears Decl. Ex. FF. In *Stein I,* this Court used an attorney hourly rate of $400 in estimating the minimal cost of a defense in this case. *United States* v. *Stein*, 435 F. Supp. 2d 330, 362 n.163 (S.D.N.Y. 2006). By contrast, the standard rate for CJA attorneys (who represent a large proportion of the criminal defendants in this District) is $92 to $94 per hour in non-capital cases. *(See* Defs. Reply Mem. In Support of Motion to Dismiss at 13 n.21).

whether to retain and present expert witnesses,[3] and many more, as to each of which the analysis necessarily differs to some degree from defendant to defendant. There are many avenues of legal work some defense counsel have indicated (formally or informally) they are considering pursuing which the Government believes will be fruitless and, in any event, likely to lead to results that are completely irrelevant and inadmissible. But what work a defense attorney should actually do to provide a "reasonable" defense, and what those services would reasonably cost, does not strike us as something on which we could appropriately express an opinion that would be helpful to the Court.

The Court stated at oral argument that, using the benchmark of a defense cost of $3.3 million for a six-week trial involving 2 million documents, "it seems reasonable for me to assume that if you had a deep pocket paying for the defense, individual defenses in this case would be . . . high seven figure, low eight figure tabs . . . . And probably closer to the high seven figure." (Tr. at 40-41). Yet the defense has put forward other widely varying figures for the cost of defending a complex fraud case involving a lengthy trial. (*See* Defs. Mem. In Support of Dismissal at 27 n.35).[4] Moreover, it is far from clear that there is a relationship between the availability of unlimited resources and the reasonableness, quality, or effectiveness of expenditures or representation. In other words, being willing and able to spend "deep pocket" funds does not necessarily set the standard for what "reasonable" defense costs may be. Indeed, we have little doubt that highly effective trial counsel who regularly appear in this Court might well take on this matter for substantially less than the sums many defense counsel have already received in this case and expect that there would be a wide range of costs quoted by prospective defense counsel. But determining what that range would be depends on so many factors about which the Government cannot be expected to have a

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[3] It has been reported that, in connection with Skilling's defense, "[s]ome expert witnesses and consultants got fees as high as $600 per hour." (June 8, 2007, Spears Decl. Ex. FF).

[4] Some defense cost figures cited in the defendants' brief in support of dismissal include: an estimated cost of $25 million for the defense of the Rigases in the Adelphia case; $21 million for the defense of Richard Scrushy in the HealthSouth case; and $26 million for the defense of Dennis Kozlowski in two trials. (Defs. Mem. In Support of Dismissal at 27 n.35). As noted above, Skilling's defense in the Enron trial, which lasted approximately four months, purportedly cost approximately $70 million. (June 8, 2007, Spears Decl. Ex. FF).

nuanced understanding — including the overhead of a given defense firm, the profit margin sought by prospective counsel, and similar variables (in addition to those discussed above) — that it would be very difficult to narrow this broad range so as to provide a helpful answer to the Court. More to the point, where within this wide range of costs any possible floor of "reasonableness" would be is a number which, given the lack of any standards with which to assess that issue before trial, we have no meaningful way of calculating. As mentioned above, the Government's only real experience in this area is in addressing claims of ineffective assistance of counsel, in which context we are able to apply well-developed standards and principles in an after-the-fact manner. For all of these reasons, given the number of factors involved in an analysis of the cost of a defense here, and the lack of institutional experience in these matters for the Government — which is in the business of prosecuting cases, not defending them — the Government cannot give any meaningful estimate of the cost of a "reasonable" defense in this case. Finally, as a matter of Office policy, we do not feel that it would be appropriate to offer such an opinion even were we to believe that we had an acceptable yardstick by which to arrive at an amount of money needed for a "reasonable" defense.

Accordingly, we respectfully believe that it would be inappropriate for the Government to opine on the questions posed by the Court.

Respectfully submitted,

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cc: All defense counsel (by e-mail)