

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

JEFFREY STEIN, et al.,

Defendants.
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USDC SDNY
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S1 05 Crim. 0888 (LAK)

MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge.*

Certain defendants have moved to dismiss the indictment or for other relief on the ground, broadly stated, that the government, through the Thompson memorandum and perhaps otherwise, has violated defendants' right to counsel by improperly interfering with KPMG's ability to choose to advance to defendants legal fees and other defense costs and, in at least one case, with inducing KPMG to breach an alleged contractual obligation to advance such expenses. Defendants seek an evidentiary hearing and limited discovery on these issues.

In papers dated April 11, 2006, the government takes the position that no discovery or hearing is warranted because the prosecution team did not seek to persuade KPMG not to advance expenses. It has submitted a declaration that purports to disclose the substance of all discussions on the subject between the prosecution team and KPMG.

Assuming *arguendo* that the government's account of the discussions with KPMG is accurate, and the Court has no reason to suppose that it is not, the government's presentation may not be a sufficient response to the defendants' position. It ignores, among other things, the defendants' allegations that (1) the Thompson memorandum, insofar as it deals with advancement

of defense costs as a factor relevant to whether a prospective corporate defendant will be prosecuted, is an improper interference with the defendants' rights to obtain counsel of their choice and to mount a defense consistent with their means, and (2) KPMG's decision not to advance defense costs was influenced by the Thompson memorandum and KPMG's desire to avoid prosecution. Moreover, the government's declaration concedes that the lead prosecutor in this case inquired in February 2004 about KPMG's obligations and plans with respect to payment of legal fees of partners and employees. Against the background of the Thompson memorandum, the inquiry itself arguably was a signal to KPMG as to actions that would promote its chances of avoiding prosecution.

In the circumstances, limited discovery and an evidentiary hearing are appropriate for the proper resolution of this aspect of the motions. The hearing will begin at 11 a.m. on May 8, 2006. The issues for consideration are whether the government, through the Thompson memorandum or otherwise, affected KPMG's determination(s) with respect to the advancement of legal fees and other defense costs to present or former partners and employees with respect to the investigation and prosecution of this case and such subsidiary issues as relate thereto.

The Court urges the parties to reach stipulations as to the communications between the prosecution team and KPMG on this subject and KPMG's practice, if any, with respect to the advancement of legal fees and other defense costs. It seems likely that the latter is objectively determinable and that there should be no need to take testimony on it. In addition, the Court invites the submission of memoranda, on or before April 27, 2006, addressing the question whether defendants are obliged to establish prejudice and the appropriate remedy in the event the Court finds that defendants rights have been violated.

In preparation for the hearing, the government, in the absence of a stipulation with the defendants as to facts concerning the communications between the prosecution team and KPMG, shall respond, on or before May 1, 2006, to the questions set forth in Section A and produce the documents requested in Section B of the discovery requests in Mr. DePetris' April 5, 2006 letter. Defendants may serve a Rule 17(c) subpoena on KPMG seeking production, on or before April 21, 2006, of documents described in Section B, although this order is without prejudice to any objections that KPMG may interpose.

The parties shall notify the Court, on or before May 5, 2006, of the witnesses they intend to call at the hearing and of its anticipated length.

SO ORDERED.

Dated: April 12, 2006

A handwritten signature in black ink, appearing to read "Lewis A. Kaplan", written over a horizontal line.

Lewis A. Kaplan
United States District Judge