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4 Counsel for Defendant,
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6
7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
9

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 vs.

13 KENNETH WILLIAMS,

14 Defendant.

) CR 97-57(B)-WDK

)
) DEFENDANT'S MEMORANDUM OF
) POINTS AND AUTHORITIES IN
) SUPPORT OF SUBPOENA
) DIRECTED AT WITNESS GONZALO
) FREIXES RE: OBJECTIONS BASED
) ON (1) ATTORNEY-CLIENT
) PRIVILEGE, (2) FIFTH
) AMENDMENT; REQUEST FOR
) GRANT OF JUDICIAL IMMUNITY

) Trial Date: April 27, 1999

) Time: 9:00 a.m.

) CTRM:

) HON: William D. Keller

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21 Defendant Kenneth Williams, by and through his court-appointed counsel of
22 record, Gregory Nicolaysen, hereby files this memorandum of points and authorities in
23 support of its subpoena directed at witness Gonzalo Freixes, specifically in regard to the
24 witness' assertions of the attorney-client and Fifth Amendment privileges.
25

26 DATED: April 26, 1999

Respectfully Submitted,

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28 GREGORY NICOLAYSEN
Counsel for Defendant,
Kenneth Williams

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 INTRODUCTION

4 In order to properly defend Kenneth Williams at trial, defense counsel needs to
5 call a material witness, Gonzalo Freixes, who served as in-house counsel at the IADE
6 American Schools during the time period at issue. An outline of direct examination of
7 Freixes, which had previously been provided by Williams' counsel to counsel for
8 Freixes, was also provided to the Court on April 22, during a hearing on Williams'
9 motion to continue the trial date.

10 In short, Freixes is material to establish the following key facts at the trial in
11 Williams' defense:

- 12 1. Williams' role at IADE as an advisor on matters of state and federal
13 regulatory compliance in regard to federal student financial aid.
- 14 2. Williams' discussions with Freixes at IADE on matters of state and
15 federal regulatory compliance, and Williams' ongoing concerns about
16 keeping the school in compliance.
- 17 3. Williams' role as spokesman for IADE vis-a-vis outside auditors from the
18 Department of Education (DOE), as well as state agencies, who
19 periodically examined the school's books and records and made
20 assessments as to whether the school was in compliance.
- 21 4. Williams' role as an advocate for IADE with the DOE when the school
22 was faced with sanctions for noncompliance – e.g., being taken off
23 Advance Payment Status and placed on Reimbursement Status. This
24 includes Williams' successful negotiation with the DOE in May / June
25 1994 to have the school taken off reimbursement.
- 26 5. Williams' frequent confrontations with Sergio Stoffenmacher in which
27 Williams expressed serious concerns about the school's outstanding
28 refund obligations to the DOE.

1 6. Williams’ practice of preparing and disseminating detailed memoranda
2 to the IADE staff on various compliance matters covering a wide
3 spectrum of state and federal rules/procedures. The purpose of these
4 memos was to keep school officials informed of their compliance-related
5 obligations, and to make changes in school policies and procedures when
6 necessary to ensure compliance.

7 7. The July 1994 memo from Williams to the Stoffenmachers and Freixes,
8 and the meeting conducted in regard to that memo. Freixes’ testimony
9 would be focused on the purpose of the meeting, Williams’ role at the
10 meeting, the nature of the presentation made by Williams at the meeting,
11 and Williams’ demeanor during the presentation.

12 In addition, defense counsel seeks to elicit testimony from Freixes that, while at
13 IADE, Williams did not say or do anything in his dealings with Freixes that caused
14 Freixes to believe that Williams was engaged in any conduct that was deceitful toward
15 the DOE, or that Williams was seeking to have IADE engage in deceitful conduct.

16 This testimony is central to the defense that Williams did not participate in any
17 conspiracy to defraud the DOE or knowingly file any false 272 reports but, rather, he
18 was always acting in a highly professional manner aimed at keeping IADE in
19 compliance with its regulatory obligations. Without this testimony, the defense will be
20 seriously prejudiced because there will no witness available to the defense through
21 whom to present this theory of defense and what is most important, no witness through
22 whom to present evidence regarding the circumstances surrounding the July 1994
23 memo and meeting.

24 Of critical importance to the defense is Freixes’ role as a witness in putting the
25 memo and meeting into its proper perspective. The government will present the July
26 1994 memo as “smoking gun” display of Williams’ participation in the conspiracy to
27 defraud the DOE. The defense strongly disputes that theory, but it cannot possibly
28 present its position to the jury without Freixes, who is the only witness available to the

1 defense who was present at the July meeting when Williams presented his payment
2 proposal outlined in the memo. Freixes must be allowed by this Court to tell the jury
3 what happened at that meeting, so that the jury can clearly understand that Williams
4 was not seeking to have the school undermine the DOE, but indeed was proposing
5 viable solutions under difficult financial conditions, to bring the school back into
6 compliance with its refund obligations to the DOE.

7 Legal roadblocks stand in the way of defense counsel’s desire to call Freixes to
8 testify at trial. Freixes has been subpoenaed in a timely fashion as a trial witness, but
9 counsel for Freixes has advised Williams’ counsel that if called to testify at the trial,
10 Freixes will assert the attorney-client privilege and most probably, the Fifth
11 Amendment privilege against self-incrimination. The government has refused to
12 provide Freixes with use immunity in order to resolve the Fifth Amendment issue.

13 Accordingly, the privilege issues will have to be addressed in open court on the
14 day of trial, for which purpose this memorandum of points and authorities is being
15 submitted. The following sections discuss the legal standards applicable to the attorney-
16 client privilege claim, with a specific view towards Freixes’ position as in-house
17 corporate counsel for a now-defunct company. In addition, this memorandum briefs
18 the standards for a grant of judicial immunity, which the defense will be seeking in the
19 event the court overrules the attorney-client privilege assertion, and the government
20 persists in its refusal to grant use immunity.

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1 II.

2 **THE COURT SHOULD OVERRULE ATTORNEY-CLIENT PRIVILEGE**
3 **OBJECTIONS ASSERTED BY MR. FREIXES AND ENFORCE**
4 **THE DEFENSE SUBPOENA AT TRIAL**

5
6 A. **As Corporate Counsel, Mr. Freixes Cannot Assert The Attorney-Client Privilege**
7 **For His Own Benefit.**

8 The right to assert the attorney-client privilege belongs to the client, not the
9 lawyer. A lawyer may have a professional obligation to advise the client of the existence
10 of the privilege and to raise it on the client's behalf. In re Grand Jury Subpoena Duces
11 Tecum (Vesco), 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975). But if the attorney asserts the
12 privilege, it must be for the client's benefit, since the underlying purpose of the privilege
13 focuses on the protection of the client, not the attorney. Natta v. Hogan, 392 F.2d 686,
14 691 (10th Cir. 1968). Accordingly, an attorney may not invoke the privilege simply for
15 his own protection.

16 In the case at bar, IADE American schools went into bankruptcy in
17 approximately March 1995 and ceased operations at that time. There has been no
18 suggestion by the government or by Freixes' counsel that there is any corporate interest
19 that needs to be, or can be, protected at this point in time by way of a privilege
20 objection asserted by Freixes.

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22 B. **The Manner in Which Mr. Freixes Is Asserting Privilege Is Legally Insufficient**

23 Each element of the privilege must be affirmatively demonstrated for each
24 communication sought to be protected. Blanket assertions of privilege are not effective.
25 See generally, United States v. White (Daniel White), 970 F.2d 328, 334 (7th Cir. 1992);
26 see also United States v. First State Bank, 691 F.2d 332, 335 (7th Cir. 1982).

27 Here, the assertion of attorney-client privilege has been made in a general,
28 broad-based manner, without any focus on specific questions that might tend to elicit

1 testimony about privileged communications.

2
3 C. Even If Freixes Can Assert The Privilege, The Testimony At Issue Will Not Elicit
4 Privileged Communications

5 Four elements are required to establish the existence of the attorney-client
6 privilege:

7 (1) a communication;

8 (2) made between privileged persons;

9 (3) in confidence;

10 (4) for the purpose of seeking, obtaining, or providing legal assistance to the
11 client.

12 United States v. United Shoe Mach. Corp., 89 F.Supp. 357, 358-59 (D.Mass. 1950). Mr.
13 Freixes' claim of privilege fails to satisfy these requirements.

14
15 D. The Communications At Issue Are Not Privileged

16 In the seminal case of Upjohn Co. v. United States, 449 U.S. 383 (1981), the
17 Supreme Court held that when a corporation is the client, the privilege applies to an
18 employee if the communications fall within the compass of that employee's corporate
19 duties. This does not mean that the privilege covers any and all communications
20 between lower-level employees and in-house counsel. There must be a general showing
21 that the employee making the communication did so at the direction of his corporate
22 superiors *so that counsel could render a legal opinion*.

23 In Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir.), *rev'd on*
24 *reh'g en banc*, 572 F.2d 609 (8th Cir. 1978), a case cited with approval by the majority in
25 Upjohn, the court held that the privilege applies if:

26 (1) the communication was made for the purpose of
27 securing legal advice; (2) the employee making the

28 communication did so at the direction of his corporate

1 superior; (3) the superior made the request so that the
2 corporation could secure legal advice; (4) the subject
3 matter of the communication is within the scope of the
4 employee's corporate duties; and (5) the communication is
5 not disseminated beyond those persons who, because of the
6 corporate structure, need to know its contents.

7 *See also, Independent Petrochemical Corp. v. Aetna Casualty & Sur. Co.*, 654 F.Supp.
8 1334, 1365 (D.D.C. 1986)(“Without showing that such communications are part of the
9 control group's effort to secure legal advice, every memorandum and conversation
10 between a corporate employee and corporate counsel would be confidential, which
11 would expand the privilege far beyond its bounds and unnecessarily frustrate the efforts
12 of others to discover corporate activity.”).

13 Moreover, facts that are merely observed by the lawyer and not directly
14 conveyed by the client are not necessarily privileged. The lawyer may be called upon to
15 give evidence connecting the client to matters observed by the lawyer in the context of
16 the attorney-client relationship. *In re Walsh*, 623 F.2d 489, 494 (7th Cir.), *cert. denied*,
17 449 U.S. 994 (1980); *United States v. Pape*, 144 F.2d 778, 782 (2nd Cir.), *cert. denied*, 323
18 U.S. 752 (1944).

19 In the case at bar, the focus of the proposed direct examination of Freixes
20 operates outside the parameters of privileged communications, within the legal
21 standards cited above. Questions regarding Ken Williams' role at the school as an
22 advisor on regulatory compliance; his role as an advocate for the school with the DOE;
23 his efforts to keep the school in compliance and his concerns about noncompliance; and
24 his presentation at the July 1994 meeting regarding his effort to propose a solution to
25 the refund problem, do not invite testimony about communications made at the
26 direction of corporate counsel for the purpose of seeking legal advice. At most, these
27 are matters observed by Freixes in his capacity as corporate counsel, and thus do not
28 constitute protected communications.

1 **Thus, the privilege objection is entirely misplaced.**

2 **Consequently, Freixes' assertion of the attorney-client privilege should be**
3 **overruled.**

4

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III.

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THIS COURT SHOULD GRANT FREIXES

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JUDICIAL IMMUNITY IF THE GOVERNMENT

8

PERSISTS IN ITS REFUSAL TO EXTEND USE IMMUNITY

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A defendant in a criminal case has the right to present testimony on his own
11 **behalf without the undue influence of the government. Washington vs. Texas, 388 U.S.**
12 **14 (1967).**

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As a general rule, a defendant is not entitled to compel the government to grant
15 **immunity to a witness. U.S. vs. Westerdahl, 945 F.2d 1083, 1086 (9th Cir. 1991). There**
16 **is an exception: where the government's conduct distorts the fact-finding process and**
17 **the defendant is thereby denied a fair trial. U.S. vs. Young, 86 F.3d 944 (9th Cir. 1996).**

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In the case at bar, the government clearly does not want Gonzalo Freixes to
18 **testify, and thus refuses to grant him use immunity. The government is not considering**
19 **principles of justice or fairness. It's about winning this case. Despite the government's**
20 **lack of any intention to prosecute Freixes, and the fact that Freixes is not a target or**
21 **subject of a criminal investigation, the government simply does not want the jury to**
22 **hear from him. Plain and simple. The government knows that Freixes, who will be a**
23 **credible witness in light of his professional status as corporate counsel, has percipient**
24 **knowledge of Williams' efforts to keep IADE in compliance with the DOE**
25 **requirements; and the government knows that Freixes' attendance at the July 1994**
26 **meeting is crucial to the jury's assessment as to whether Williams was seeking to**
27 **further a conspiratorial plan of deceit when he wrote the famous July 1994 memo. It is**
28 **reasonable to infer that by keeping Freixes off the stand, the government is hopeful that**

1 Williams might be forced to waive his right not to testify and get up on the stand to
2 testify about his role as a compliance advisor / advocate at IADE and his role at the July
3 1994 meeting – the very subject matters as to which Freixes, as a percipient witness,
4 would testify.

5 In short, any trial without Freixes’ testimony for the defense would be
6 fundamentally unfair.

7 In certain cases, courts have required the government to grant immunity to
8 defense witnesses when a defendant’s case would be severely prejudiced without the
9 witness’ testimony. U.S. vs. Baker, 10 F.3d 1373, 1414-15 (9th Cir. 1993) (court may
10 grant immunity when prosecution selectively grants immunity to witnesses who support
11 its case while withholding it from witnesses who support defendant’s case).

12 The scenario in Baker is cause for concern in this case. Here, there are three
13 former IADE employees who will testify for the government, each of whom has criminal
14 exposure. The government has chosen not to immunize them, which is rather odd given
15 the exposure these witnesses have. Knowing that it will not be prosecuting these former
16 employees in the future, the government has perhaps withheld a grant of immunity for
17 these three employees so that the disparity between their grants of immunity, and the
18 government’s refusal to immunize Freixes, would not be an issue in this case.

19 The Second and Fourth Circuits have held that judicial use immunity should be
20 ordered when the prosecutor has engaged in misconduct and overreaching and the
21 witness’ testimony is material, exculpatory and otherwise unavailable. U.S. vs.
22 Bahadar, 954 F.2d 821, 826 (2d Cir. 1992); U.S. vs. Abbas, 74 F.3d 506, 512 (4th Cir.
23 1996).

24 These standards are amply met by the circumstances here. Freixes testimony is
25 material and exculpatory, as it serves to offset the government’s presentation of
26 Williams as someone who arrogantly disregarded reporting requirements to the DOE,
27 engaged in blatant falsification of student data, and sought to distort the 272 reporting
28 process. Freixes’ contribution as a witness would directly contradict the government’s

1 characterization of the defendant. Moreover, no other witness is available. On April
2 23, in open court when this matter was addressed, the government made the absurd
3 suggestion that Sergio Stoffenmacher was available to the defense. Ridiculous.
4 Stoffenmacher pleaded guilty pursuant to a plea agreement that is under seal; neither
5 his attorney nor the AUSA will discuss the terms of the plea agreement with defense
6 counsel. Obviously, it's a cooperation deal. To suggest that the defense has an
7 alternative to Freixes in Stoffenmacher, a cooperating defendant under contract with
8 the government to be available pursuant to an under-seal plea agreement, flies in the
9 face of any common sense. Thus, the only conclusion to draw here is that there is no
10 other available witness to testify about the subjects that Freixes would testify to.

11 For the reasons stated, the Court should grant Freixes judicial immunity of the
12 government persists in its refusal to do so.

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DATED: April 26, 1999

Respectfully Submitted,

GREGORY NICOLAYSEN
Counsel for Defendant,
Kenneth Williams

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PROOF OF SERVICE

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

I am a licensed, practicing attorney in the State of California, a member of the California State Bar and am admitted in the Central District of California and the Ninth Circuit Court of Appeals. My business address is 2450 Broadway, Suite 550, Santa Monica, California 90404. My telephone number is (310) 273-2236.

On April 26, 1999, I served the foregoing document described as Defendant's Memorandum Of Points And Authorities In Support Of Subpoena Directed At Witness Gonzalo Freixes Re: Objections Based On (1) Attorney-client Privilege, (2) Fifth Amendment; Request For Grant Of Judicial Immunity, by delivering a true copy to:

**Mary Carter Andruess
Ass't U.S. Attorney
312 No. Spring St.
13th floor
Los Angeles, Ca. 90012**

Executed on April 26, 1999, at Santa Monica, CA. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

DOMINIC CANTALUPO