IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE CITCO BANK NEDERLAND N.V. DUBLIN BRANCH	Docket No. 13-4773

MOTION OF ASSOCIATION OF CORPORATE COUNSEL TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF CITCO BANK NEDERLAND N.V. DUBLIN BRANCH'S PETITION FOR A WRIT OF MANDAMUS

Pursuant to Fed. R. App. P. 29(a) and Second Circuit Local Rule 29.1, the Association of Corporate Counsel (ACC) requests permission to appear as *amicus curiae* in this case, and to file the accompanying brief.

The issue before the court, whether the trial court properly held that confidential communications between a foreign in-house lawyer and his or her client can be disclosed in American courts, is a core focus for the Association of Corporate Counsel. In fact, participation in this case is the very reason why ACC exists. As the leading global bar association that promotes the common professional and business interests of in-house counsel, ACC has long advocated to ensure that courts, legislatures, regulators, bar associations, and other law or

policy-making bodies understand the role and concerns of in-house counsel and the legal departments where they work.[1]

To ensure that clients turn to their in-house counsel for advice, ACC has championed the importance of attorney-client privilege.[2] In the United States and around the world, ACC has pushed courts and agencies to adopt and appropriately expand the scope of the privilege. ACC has worked especially hard to ensure that a robust privilege applies to a client's confidential communications with in-house lawyers, as the Supreme Court recognized in *Upjohn* 449 U.S. at 390.[3]

ACC's brief would argue that the District Court opinion here did not sufficiently respect that different countries use different systems to authorize lawyers to provide legal advice to clients. Instead, the District Court imposed American views about the necessity of law licenses onto the Dutch legal system.

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[1] ACC has over 33,000 members who are in-house lawyers employed by over 10,000 organizations in more than 75 countries. About 13 percent of ACC's members are non-U.S. members. Some of these in-house lawyers do not possess a law license, but instead work as in-house counsel pursuant to clear authorization from their relevant jurisdiction. ACC is also a non-profit corporation registered under the laws of Washington, D.C. The organization is not publicly held and issues no stock.

[2] This motion uses "attorney-client privilege," the term common in the United States, and "legal professional privilege," the term common in Europe and elsewhere, as synonyms.

[3] *See* http://advocacy.acc.com/tags/privilege/ (listing recent briefs, letters, and meetings with regulators where ACC has advocated for stronger attorney-client privilege).

Doing so not only violates American privilege law, but it also ignores the realities of today's global legal profession.

Instead, the district court should have asked the simple question that the Supreme Court, Citco and ACC offer as dispositive: was the in-house counsel properly authorized, or reasonably believed by the client to be properly authorized, to provide legal advice in the relevant jurisdiction? If so, the communications should be privileged against disclosure in American courts. In addition to appropriately respecting the different types of professional regulations governing lawyers around the world, this rule reinforces the traditional principle animating American privilege law: by removing fear and uncertainty from the calculus, clients are more apt to turn to their lawyers, inside and outside, for necessary legal advice.

Therefore, ACC respectfully requests that this Court recognize it as *amicus curiae* in this case, and accept the accompanying *amicus* brief for filing.

Respectfully submitted,

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DATE: December 30, 2013

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2013, I caused to be served, by email, a copy of the foregoing motion upon the following: Andrew G. Gordon (agordon@paulweiss.com); Stuart H. Singer (ssinger@bsfllp.com); Mark G. Cunha (mcunha@stblaw.com); Timothy A. Duffy (tim.duffy@kirkland.com); Sarah L. Cave (cave@hugheshubbard.com); David McGill (david.mcgill@kobrekim.com); Glenn Kurtz (gkurtz@whitecase.com); Andrew J. Levander (andrew.levander@dechert.com); Daniel J. Fetterman (dfetterman@kasowitz.com); Sean F. O'Shea (soshea@osheapartners.com); Edward M. Spiro (espiro@magislaw.com); Mark P. Goodman (mpgoodman@debevoise.com); Bruce Allen Baird (bbaird@cov.com); David S. Hoffner (hoffnerpllc@gmail.com).

/s/ Amar D. Sarwal
Amar D. Sarwal

EXHIBIT A

13-4773

United States Court of Appeals

for the

Second Circuit

CITCO BANK NEDERLAND N.V. DUBLIN BRANCH,

Petitioner,

– v. –

SECURITIES & INVESTMENT COMPANY BAHRAIN, HAREL INSURANCE COMPANY, LTD., AXA PRIVATE MANAGEMENT, ST. STEPHEN'S SCHOOL, PACIFIC WEST HEALTH MEDICAL CENTER INC. EMPLOYEES RETIREMENT TRUST, PASHA S. ANWAR, on behalf of themselves and all others similarly situated investores in the Greenwich Sentry, L.P. private investment limited partnership, JULIA ANWAR, on behalf of

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* OF ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF CITCO BANK NEDERLAND N.V. DUBLIN BRANCH'S PETITION FOR A WRIT OF MANDAMUS

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themselves and all others similarly situated investors in the Greenwich Sentry, L.P. private investment limited partnership, INTER-AMERICAN TRUST, ELVIRA 1950 TRUST, BONAIRE LIMITED, CARLOS GAUCH, LOANA LTD., WALL STREET SECURITES, S.A., BANCO GENERAL, S.A., HARVEST DAWN INTERNATIONAL INC., EL PRADO TRADING, OMAWA INVESTMENT CORPORATION, CARMEL VENTURES LTD., TRACONCORP, BLYTHEL ASSOCIATED CORP., MARREKESH RESOURCES, CENTRO INSPECTION AGENCY, KALANDAR INTERNATIONAL, LANDVILLE CAPITAL MANAGEMENT S.A., 20/20 INVESTMENTS, DIVERSIFIED INVESTMENTS ASSOCIATES CLASS A UNITS, ABR CAPITAL FIXED OPTION/INCOME STRATEGIC FUND LP, HAREL INVESTMENT AND FINANCIAL SERVICES LTD., MIGUEL LOMELI, MORNING MIST HOLDINGS LIMITED, JITENDRA BHATIA, GOPAL BHATIA, KISHANCHAND BHATIA, JAYSHREE BHATIA, MANDAKINI GAJARIA, ABN AMRO LIFE S.A., BAHIA DEL RIO S.A., BEVINGTON MANAGEMENT, LTD., CALWELL INVESTMENT S.A., DIAMOND HILLS INC., HEDGE STRATEGY FUND LLC, KIVORY CORPORATION, NORTH CLUB, INC., PFA PENSION A/S, TAURUS THE FOURTH LTD., ZENN ASSETS HOLDING, LTD., CARLOS MATTOS, CHANDRASHEKAR GUPTA, DEEPA GUPTA, ULRICH BLASS, ROBERTO CIOCI, SANDRA MARCHI CIOCI, JOHN PAUL DOUGHERTY, E. THOMAS DOUGHERTY NOVELLA, MUNIANDY NALAIAH, LILA NEEMBERRY, PETER A. & RITA M. CARFAGNA IRREVOCABLE CHARITABLE REMAINDER UNITRUST, MOSHE PODHORZER, R. WICKNESWARI V. RATNAM, ENRIQUE SANTOS, ENRIQUE SANTOS CALDERON, JACQUELINE URZOLA, JOSEFINA SANTOS URZOLA, FELIPE J. BENAVIDES, FUNDACION VIRGILIO BARCO, DAVID HOPKINS, CATALINA MEJIA, CESAR MEJIA, R.M. RADEMAKER, ALPHA AND OMEGA PARTNERSHIP, LP, RICHMON COMPANY LTD., POSITANO INVESTMENT LTD., PACIFIC WEST HEALTH MEDICAL CENTER INC. EMPLOYEES RETIREMENT TRUST, on behalf of itself and all others similarly situated, SHIMON LAOR, DAVID I. FERBER, KNIGHT SERVICES HOLDINGS LIMITED, on behalf of itself and all others similarly situated, FRANK E. PIERCE, FRANK E. PIERCE IRA, NADAV ZOHAR, on behalf of themselves and all others similarly situated, RONIT ZOHAR, on behalf of themselves and all others similarly situated, FAIRFIELD SENTRY LTD., HEADWAY INVESTMENT CORP., BPV FINANCE (INTERNATIONAL) LTD., JOSE ANTONIO PUJALS, individually and in their representative capacities for all those similarly situated, ROSA JULIETA A DE PUJALS, individually and in their representative capacities for all those similarly situated, MARIDOM LIMITED, a Foreign Corporation, RICHARDO LOPEZ, STANDARD CHARTERED BANK INTERNATIONAL (AMERICAS) LIMITED, STANCHART SECURITIES INTERNATIONAL, INC., MARIA AKRIBY VALLADOLID, RICARDO RODRIGUEZ CASO, WONG YUK HING DE LOU, MOISES LOU MARTINEZ, JOAQUINA TERESA BARBACHA HERRERO, SAND OVERSEAS LIMITED, BLOCKBEND LTD., BAYMALL INVESTMENTS LTD, EASTFORK ASSETS LTD, GERICO INVESTMENTS, INC., ALICIA GAVIRIA RIVERA, EDUARDO CHILD ESCOBAR, MAILAND INVESTMENT INC., ARJAN MOHANDAS BHATIA, TRADWAVES, LTD.,

Respondents.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Appellate Rules 26.1 and 29(c)(1), *amicus* Association of Corporate Counsel states that it is a non-profit corporation registered under the laws of Washington, D.C. The Association further states that it is not publicly held and issues no stock; therefore, no other organization owns 10 percent or more of its stock.

INTRODUCTION AND STATEMENT OF INTEREST[1]

In-house counsel around the world are watching this case to see whether this Court will disrupt relationships with their corporate clients by refusing to protect confidential legal communications in cases that cross national borders. The District Court opinion here did not sufficiently respect that different countries use different systems to authorize lawyers to provide legal advice to clients. Instead, the District Court imposed American views about the necessity of law licenses onto the Dutch legal system. Doing so not only violates American privilege law, but it also ignores the realities of today's global legal profession.

Instead, the district court should have asked the simple question that the Supreme Court, Citco and ACC offer as dispositive: was the in-house counsel properly authorized, or reasonably believed by the client to be properly authorized, to provide legal advice in the relevant jurisdiction? If so, the communications should be privileged against disclosure in American

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[1] Pursuant to Fed. R. App. P. 29(c)(5)(A)-(C), and Second Circuit Rule 29.1(b), *amicus* Association of Corporate Counsel certifies that no party's counsel authored this brief in whole or in part, that no party's counsel contributed money that was intended to fund preparing or submitting the brief, and that no person – other than the Association of Corporate Counsel, its members, or its counsel – contributed money that was intended to fund preparing or submitting this brief.

Pursuant to Fed. R. App. P. 29(a), *amicus* Association of Corporate Counsel requests permission to file in the motion accompanying this brief.

courts. In addition to appropriately respecting the different types of professional regulations governing lawyers around the world, this rule reinforces the traditional principle animating American privilege law: by removing fear and uncertainty from the calculus, clients are more apt to turn to their lawyers, inside and outside, for necessary legal advice.

By contrast, the District Court's rule stacks the deck against lawyers whose authority to give confidential legal advice comes from outside the United States. A privilege rule that requires foreign law to precisely parallel our system of professional regulation for lawyers will routinely deny confidentiality and privilege to communications with foreign lawyers. And, given the global reach of so many companies, this rule – the one that the District Court incorrectly imposed – places a special and unwarranted burden on in-house counsel. Under it, they and their clients can never be sure whether the advice in-house lawyers offer will stay confidential. And as the Supreme Court has held, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981); *see also In re Sims*, 534 F.3d 117, 129 (2d Cir. 2008).

Further, mandamus is the only route available that can correct the mistaken opinion below that the Dutch company would need to surrender its

confidential legal communications and that would avoid a citation for contempt of court. Indeed, it is the only route to provide assurance to the global in-house bar that confidential legal communications with their clients will be protected in American courts.

Protecting the privilege is not a minor issue for the Association of Corporate Counsel. In fact, participation in this case is the very reason why ACC exists. As the leading global bar association that promotes the common professional and business interests of in-house counsel, ACC has long advocated to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role and concerns of in-house counsel and the legal departments where they work.[2]

To ensure that clients turn to their in-house counsel for advice, ACC has championed the importance of attorney-client privilege.[3] In the United States and around the world, ACC has pushed courts and agencies to adopt and appropriately expand the scope of the privilege. ACC has worked especially hard to ensure that a robust privilege applies to a client's

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[2] ACC has over 33,000 members who are in-house lawyers employed by over 10,000 organizations in more than 75 countries. About 13 percent of ACC's members are non-U.S. members. Some of these in-house lawyers do not possess a law license, but instead work as in-house counsel pursuant to clear authorization from their relevant jurisdiction.

[3] This brief uses "attorney-client privilege," the term common in the United States, and "legal professional privilege," the term common in Europe and elsewhere, as synonyms.

confidential communications with in-house lawyers, as the Supreme Court recognized in *Upjohn* 449 U.S. at 390.[4]

For the reasons that follow, this Court should grant the petition and reverse, to help secure the confidentiality that in-house lawyers around the world rely on to give full and frank legal advice to their clients.

ARGUMENT

I. Companies across the globe rely on in-house lawyers authorized to provide necessary legal advice.

As the Supreme Court held in *Upjohn*, attorney-client privilege's "purpose is to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. U.S. policy therefore seeks to create an environment that encourages clients to follow the law, by seeking legal advice from authorized lawyers in a confidential context. That goal should animate this Court's overall approach to this case.

Protecting confidential legal advice is especially important for in-house counsel, both here and across the globe. Organizations consult their in-house lawyers for all imaginable legal assignments. These include helping

[4] *See* http://advocacy.acc.com/tags/privilege/ (listing recent briefs, letters, and meetings with regulators where ACC has advocated for stronger attorney-client privilege).

to litigate bet-the-company cases, writing and enforcing contracts that ensure necessary revenue and resources, restructuring businesses to better serve consumers and shareholders, ensuring compliance with complex laws and regulations, and even conducting internal investigations to try to find potential wrongdoing when something may be wrong, to name just a few examples.

These legal issues are profoundly sensitive. Companies need accurate legal advice from their authorized in-house lawyers. But by communicating, the companies might make themselves vulnerable to investigations or litigation. Confidentiality ensures that companies can receive the advice they need to follow the law without risking unwarranted repercussions from competitors, governments, or the public.

II. Many countries outside the U.S. use methods other than law licenses to authorize in-house lawyers to practice law.

In the United States, states and other jurisdictions authorize attorneys to practice law by granting them licenses, or membership in bar associations. Once a U.S. lawyer has a license, she or he can offer confidential legal advice to clients. The same rules applies to in-house lawyers – a law license, often even one that comes from a state different from where the in-house lawyer works, authorizes the in-house lawyer to practice law (sometimes without even registering in the local jurisdiction).

But other countries do not link authority to practice law so closely together with holding a law license. In the Netherlands, as Citco's brief to this Court describes, in-house lawyers have authority from the government to practice law and offer confidential legal advice, even when they never receive law licenses. Other countries have their own variations. In China, for instance, in-house lawyers also do not need to hold law licenses. *Wultz v. Bank of China Ltd.,* No. 11 Civ. 1266, 2013 WL 5797114, at *7, *8 (S.D.N.Y. Oct. 25, 2013). Companies doing business in Japan are also permitted to retain in-house counsel without law licenses. *See* Masamichi Yamamoto, *How can Japanese Corporations Protect Confidential Information in U.S. Courts? Recognition of the Attorney-Client Privilege for Japanese Non-Begoshi In-House Lawyers in the Development of a New Legal System*, 40 Vand. J. Transnat'l L. 503, 516 n.94 (Mar. 2007).

And in France, the system actually *prohibits* in-house lawyers from belonging to a bar association. Instead, in-house lawyers must *give up* their law licenses to work for companies or organizations. *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442, 444 (D. Del. 1982). "[A]n individual who is employed by a corporation is not permitted by law to be on the list of 'avocats' or 'conseils juridiques.' Nevertheless, these individuals are not prohibited from giving legal advice." *Id.*

The system that the U.S. uses to authorize lawyers works just fine. But this Court must recognize that it is not the only one.

III. The district court erred when it focused on licensing, not authorization to practice as in-house counsel.

The district court clearly erred when it examined the case through a purely American lens of authorization and licensing. Instead, the district court should have applied the simple test offered by the Supreme Court[5] and proposed in this case by Citco and ACC: was the lawyer properly authorized, or reasonably believed by the client to be properly authorized, to provide legal counsel in the relevant jurisdiction?

That is precisely the approach that the court took in *Renfield*, 98 F.R.D. at 442. There, the court granted U.S. privilege to confidential legal communications involving a French in-house lawyer, who according to French law could not join the bar. The *Renfield* court openly acknowledged the differences between the legal systems in the U.S. and in France. But it did not allow those surface differences to prevent recognition of the authorization to practice law that French law clearly offered. As *Renfield*

[5] In 1973, the Supreme Court issued Supreme Court Standard 503, which articulated the same rule as reflected in the text accompanying this footnote. Supreme Court Standard 503(a)(2), *reprinted in* 56 F.R.D. 183, 235-36 (1973). While it was not adopted by Congress, the standard has been relied upon by courts and commentators as an accurate reflection of federal privilege law. *See generally* Petition of Citco Bank Nederland N.V. Dublin Branch for Writ of Mandamus, at pp. 24-26.

states, "in this context membership in a 'bar' cannot be the relevant criterion for whether the attorney-client privilege is available." *Id.* at 444.

The court continued with an explanation that applies with full force to this case:

> Rather, the requirement is a *functional* one of whether the individual is competent to render legal advice and is permitted by law to do so. French "in-house counsel" certainly meet this test; like their American counterparts, they have legal training and are employed to give legal advice to corporate officials on matters of legal significance to the corporation.

Id. (emphasis added.)

In light of *Renfield*'s practical approach, the District Court here was wrong to focus on whether Citco's in-house lawyer was licensed. That is besides the point. Just like in *Renfield*, Citco's briefs establish that Dutch law authorizes the company's counsel to work as an in-house lawyer even without belonging to a bar. Citco also makes clear that the Dutch legal system in practice respects as confidential the legal advice that this Dutch in-house lawyer dispenses.

Otherwise, the District Court's rule would perversely encourage plaintiffs to forum shop to dodge other countries' confidentiality protections. This is an obvious point, but a crucial one. By applying such a crabbed interpretation of privilege law, the opinion below ensures that the full array

of legal confidences from many other countries would fail to qualify for U.S. privilege.

This dynamic creates a strong temptation for plaintiffs. Why should they sue in their own countries, which will keep the communications private? Instead, they'll sue in the U.S. and walk away with their opponents' legal treasures. This violates the spirit of international comity, by depriving companies of their reasonable expectations of confidentiality under other countries' systems. It also weakens the rule of law, as companies around the world, fearing disclosure of confidences in U.S. courts, may hesitate to seek necessary legal advice from in-house counsel.

More importantly, the district court's rule makes no sense in today's interconnected, global legal world. As discussed above, in-house counsel routinely juggle matters and clients in different countries. Each of those countries has its own unique mix of laws, and its own system to govern authorization of lawyers. The District Court instead should have asked the same simple question that the employers of in-house counsel ask: does the lawyer have authorization from her or his country to practice law and offer legal advice? When, as here, the answer is yes, U.S. courts should protect the relevant communications as privileged.

IV. Only mandamus will keep the Dutch party's legal communications confidential.

Citco's briefing to this Court describes why this case fits well within the requirements for mandamus. Here, we make two points of profound concern to the in-house bar.

First, this Circuit has not addressed how its courts should approach confidential legal communications between authorized in-house counsel and their clients. As mentioned above, the District Court's privilege discussion does not cite to a single case from this Court. The *Wultz* opinion, which explicitly refused to adopt a functional equivalent test, also cited no Second Circuit law in the relevant discussion.

Without guidance from this Court, lower courts within the Circuit are stumbling through an echo chamber: *Wultz* cited to the magistrate's opinion in this case, and then the District Court in this case relied on the district court's opinion in *Wultz*. But the issue demands close attention to first principles, such as the purposes animating U.S. rules on privilege and authorization to practice law. Only this Court can provide that, by granting the mandamus petition. On the other hand, if this Court rejects the petition, it will no doubt see this issue arise in many more cases, as plaintiffs seek to exploit the end-run around foreign confidentiality that the District Court opinion here helped to create.

Second, mandamus is the only route available to the Dutch company in this case that will allow it to keep its confidential legal communications private and avoid sanctions for contempt of court. *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (U.S. 2009). And, it is the *only* way for the global in-house bar to gain the certainty that the purposes underlying the attorney-client privilege demand. *See Upjohn*, 449 U.S. at 393 ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."). This Court should not let this opportunity pass.

CONCLUSION

Letting the decision below stand would violate this country's profound commitment to protecting confidential attorney-client communications, and the legal observance that flows from it. Today's practice of law is inherently global for all lawyers, including in-house lawyers. Clients "routinely encounter legal issues that implicate foreign or international law and want the advice of trusted lawyers from other jurisdictions."[6] When faced with a privilege dispute arising from advice provided in these jurisdictions, American courts should ask a simple

[6] Am. Bar Ass'n, Comm'n on Ethics 20/20, "Resolution and Report: Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law)," Report at 1, *available at* http://tinyurl.com/kpyqz77.

question: was the in-house counsel properly authorized, or did the client reasonably believe the lawyer to be properly authorized, to provide legal advice in the relevant jurisdiction?

As the district court asked and answered the wrong question, ACC respectfully requests that this Court grant the mandamus petition and reverse the district court's privilege decision.

Respectfully submitted,

_/s/ Amar D. Sarwal_____

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DATE: December 30, 2013

CERTIFICATE OF SERVICE

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