UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DR. REDDY'S LABORATORIES, LIMITED; DR. REDDY'S LABORATORIES, INC.; and REDDY PHARMACEUTICALS, INC., Plaintiffs, v. NORDION INC., formerly known as MDS INC.; MDS PHARMA SERVICES (US), INC.; and MDS PHARMA SERVICES (CANADA), INC., Defendants.	Civil Action No. CV-09-02398 (AET) Return Date: May 7, 2012

BRIEF *AMICI CURIAE* OF THE ASSOCIATION OF CORPORATE COUNSEL AND ASSOCIATION OF CORPORATE COUNSEL -- NEW JERSEY CHAPTER IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION

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THE IDENTITY AND INTEREST OF *AMICI CURIAE*

Association of Corporate Counsel ("ACC") and Association of Corporate Counsel – New Jersey Chapter ("NJCCA") (together, the "Associations") seek to appear as *amici curiae* in this matter in order to offer the Court the benefit of the Associations' views on the very important, and timely, issue regarding the application of the attorney-client privilege in the modern corporate setting, which the Court considered in its Memorandum Order entered March 27, 2012 (the "Order"). The Associations believe that their participation as *amici curiae* will assist in the Court's reconsideration of the Order.

The Associations bring to this case the unique experience of their membership and the knowledge gained as part of their missions. Moreover, the Associations' members have a direct and immediate interest in the issues being considered in plaintiffs' motion for reconsideration. The Associations respectfully submit that this brief will assist in apprising the Court of the broad-based legal implications of its decision and the unintended consequences affecting a group not before the Court.

ACC is a bar association for attorneys employed in the legal departments of corporations and private sector organizations worldwide. ACC has more than 29,000 members employed by over 10,000 organizations in more than 75 countries. ACC members are involved day-to-day in counseling and providing

legal advice to their client corporations and the men and women engaged in managing and carrying out the work of those businesses. ACC is devoted to the process of sharing and learning from the collective knowledge gained by its membership on the legal "front line" of corporate business, as well as legal developments in federal and state courts, legislatures and agencies. NJCCA has more than 1,200 in-house counsel members representing over 350 local, national and international companies in northern and central New Jersey.

ACC regularly files *amici curiae* briefs and provides testimony and commentary in matters of special interest to in-house counsel and corporate legal practice. This is such a case. Simply put, the failure to apply the attorney-client privilege to the communication at issue ignores the reality facing corporations with far-flung operations and limited legal budgets.

ARGUMENT

The Associations respectfully believe that the Order was incorrectly decided for a number of reasons. First, the Court failed to consider the legal precedent with respect to the precise privilege issue before the Court. The plaintiffs have discussed this in their submissions to the Court, and this brief will not repeat those arguments. Second, the situation presented to the Court accurately reflects how legal advice often is sought and given in modern corporations, many of which are international in scope with offices in multiple countries, each with different cultural and business practices. Most employees in a corporation – other than a localized, relatively small-scale company – have little or no contact with the corporation's lawyers, whether they be in-house or outside counsel. Requiring direct contact between an employee and a corporation's outside or in-house lawyers before the attorney-client privilege can apply ignores the realities of the corporate structure. Third, affording the privilege to the communication in question here would be fully consistent with the rationale underlying the attorney-client privilege.

A. Any Rigid Requirement for Direct Communication from One Employee to the Corporation's Lawyer is Inconsistent with Modern Corporate Life

The Court's Order and reasoning fail to fully appreciate life in modern corporations. Large corporations are stratified – more so the bigger they are.

Depending on its size, a corporation may have several levels of senior management below the chief executive. Likewise, there will be several levels of middle management and then levels above, between and below other levels. Important questions – business and even legal – work their way up the corporate "ladder." Managers and employees, such as Mr. Mohan here, often may not have or think they do not have, at least without more senior management approval, access to the corporation's lawyers. There are chain of command issues. There may be budgetary and resource issues, as the corporation may believe that its lawyers should not be barraged with questions that are not truly legal in nature or are not legal questions of the corporation. Requiring a direct communication between the corporate employee who thinks he or she has a legal question and the corporation's lawyer in order for the privilege to apply is an artificial requirement that is not feasible in the modern corporate world.

It must be emphasized that it is the corporation that is the client. New Jersey Rule of Professional Conduct (RPC) 1.13(a) provides that "a lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents." Nevertheless, legal questions from the corporate client to its lawyer are developed by those constituents.

A corporation can act only through its officers and employees. This is true generally, and it is true with a corporation's communications with its lawyers. "[T]he corporate client consists of corporate employees, acting at the direction of their corporate superiors, who communicate to counsel that which is needed to supply the basis for legal advice." *Cuno, Inc. v. Pall Corp.*, 121 F.R.D. 198, 203 (E.D.N.Y. 1988) (finding that certain intra-corporate emails leading to communications with counsel were privileged because "the communication from one employee to another was for the purpose of" seeking legal advice from counsel). Corporate employees all serve the same employer. The corporation's legal interest is a common one, at least after a collaborative process of determining it. *U.S. v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1077 (N.D. Cal. 2002) (holding that "internal communications that reflect matters about which the client intends to seek legal advice are protected").

The legal question posed to Dr. Reddy's lawyers was a question by the corporation. The legal problem was that of the corporation. The benefit of legal counsel would be to the corporation. The privilege should not be declared unavailable to the corporation simply because the question was sent by an employee to his or her boss, essentially "up the chain of command," and then communicated by the corporation to its lawyer.

What happened in this case is typical of how corporations act, especially corporations with dozens or even hundreds of corporate locations, and tens or hundreds of thousands of employees, around the world. Whether the communication is recognized as a direct communication because it was by the corporation -- the client -- or because the intervention by higher management, specialists or others is a recognized exception to any direct communication rule, the communication should be afforded protection from disclosure. A court always retains the right to examine circumstances in determining whether a communication is eligible to be privileged (*e.g.,* no disclosure to third parties), but that is true whether the communication is made by one employee to a lawyer or whether the communication was the result of a collective corporate effort.

In the facts presented in the case before the Court, the manner in which Dr. Reddy's chose to communicate with counsel regarding the request for legal advice presents a good example of how, in modern corporate life, a legal question is developed and communicated by the corporation to its lawyer. Mr. Mohan stated in his Supplemental Certification that:

> Because Andy Miller [Dr. Reddy's outside counsel] is located in the United States, when advice was sought from him it was typically Dr. Reddy's executives located in the United States who consulted with him, even if the advice was sought by executives in India, and then the advice was relayed to the appropriate persons in India. Given this corporate practice, and given my (and Dr. Reddy's) Indian culture of "civility," the statement in my email of May 26, 2006, that "[m]ay be Andy should" look at the legal issue, was my way of

> requesting/directing that the legal issue be referred to Andy Miller by the appropriate executive in the United States.

Mohan Suppl. Cert., ¶ 4; Plaintiffs' Brief in Support of Motion for Reconsideration, at p. 7.

This method of ultimately requesting legal advice from outside counsel (or even in-house counsel) is both realistic and practical given the way in which large corporations operate. As correctly pointed out in Plaintiffs' Brief (at p. 7), it would be unworkable for large corporations to require each and every employee, when the employee believes that he or she has a question that requires legal advice, to directly contact outside counsel without first determining whether the corporation requires or desires such advice. The scenario of in-house or outside counsel being sent dozens, or even hundreds, of emails a day from employees around the world is simply unworkable, unnecessary and outside the realm of corporate realities.

B. The Court's Order is Inconsistent with the Strong Policy Behind the Attorney-Client Privilege

The attorney-client privilege was established and has been developed in light of the policy that clients should be encouraged to consult with their lawyers so that they can be guided to do the right and legal thing. The underlying principle of the privilege is to provide for "sound legal advice [and] advocacy." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Fellerman v. Bradley,* 99 N.J. 493, 498 (1985) ("[T]he attorney-client privilege is recognized as one of 'the oldest of the

privileges for confidential communications.'") (quoting 8 J. Wigmore, *Evidence* § 2290, at 542 (McNaughton rev. 1961)). The primary rationale behind the privilege is to encourage "free and full disclosure of information from the client to the attorney." *Id.* That, in turn, benefits the public, which "is well served by sound legal counsel" based on full, candid and confidential exchanges. *Id.*

The attorney-client privilege should, therefore, be construed and applied in a sensible manner to foster the policy underlying it. In considering its applications to corporations, the realities of the modern corporate business structure needs to be taken into account. Any rigid requirement that a privileged communication must be directly communicated by the employee who initially conceived the question or pondered the need for legal advice likewise is not consistent with the policy behind the attorney-client privilege. Although corporations act - often collaboratively - through their officers and employees, in the end, it is the corporation that acts.

Respectfully, the Court's Order does not recognize that legal questions for corporate lawyers often are not the results of the thoughts and actions of just one of its constituents. The Order's holding would greatly inhibit the ability of corporations to obtain the advice that they need and should get. The only way under the Order to realistically protect what should be privileged would be to drastically increase legal budgets or to create contrived, artificial structures that pay homage to rigid letter, but not the spirit, of the rule. There would be

requirements out of touch with how corporations operate and, more so, out of touch with the policy underlying the rule.

An example might best illustrate the fallacy of such a rigid rule. Suppose, for instance, an employee is faced with what turns out to be a difficult legal question. That employee is in a quandary: Is what is being done or contemplated legal or illegal? Is there a legal way to proceed in order to keep the corporate objective moving while doing the correct, legal thing? Are there other legal questions? The employee likely would not have direct access to the company's outside lawyer or, perhaps, even the in-house lawyers. In that instance, the employee not surprisingly would check with his or her manager. The manager, after hearing the questions, may conclude on behalf of the corporation that these are questions for the corporation's lawyers. The manager then gets the lawyers involved. Are the questions posed to the boss and then relayed to the corporation's lawyers not privileged simply because they went through the manager? That would make little sense and should not be the result.

The policy behind the privilege should foster the employee's ability to seek legal advice in the corporation's interest so that the correct decision can be made and implemented with the advice and reasoning of the corporation's counsel. A rigid, artificial rule inhibiting the natural course of human behavior within the corporation that holds the privilege would be out of step with both modern

corporate life and the rationale underlying the privilege. As plaintiffs have discussed in their submissions, there is no requirement in the New Jersey law of attorney-client privilege that requires a "direct" communication in the circumstances of this case. There also is nothing in the policy underlying the rule that supports such a harsh result.

CONCLUSION

The Associations, as *amici curiae*, hope that this brief will be helpful to the Court in its consideration of the issues presented. Based upon the foregoing, the Associations respectfully submit that the Court should reconsider its Order and find that the communication at issue is protected by the attorney-client privilege.

Dated: April 13, 2012

Respectfully submitted,

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