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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

IN RE SILVER WHEATON CORP. SECURITIES LITIGATION

Master File No. 2:15-cv-05146-CAS (JEMx)
c/w: 2:15-cv-05173-CAS (JEMx)

CLASS ACTION

**[PROPOSED] AMICUS CURIAE BRIEF OF ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF DEFENDANTS' MOTION FOR REVIEW OF NON-DISPOSITIVE RULING OF MAGISTRATE JUDGE UNDER FRCP 72(A).**

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## MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to the Court's inherent authority and broad discretion, this proposed amicus curiae brief is filed with an accompanying Application for Leave to File which sets forth the interest of the Amicus in this matter. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), abrogated on other grounds by *Sandin v. Conner*, 515 U.S. 472 (1995); *Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008) ("district courts have inherent authority to appoint or deny amici which is derived from Rule 29 of the Federal Rules of Appellate Procedure").

The Association of Corporate Counsel ("ACC") is a global bar association that promotes the common professional and business interests of in-house counsel. ACC's members include more than 40,000 in-house lawyers working for more than 10,000 organizations in over 85 countries. One of the principal activities of ACC is advocacy on public policy matters affecting its members. ACC provides a unique and important perspective on public policy issues affecting the practice of foreign in-house lawyers working for foreign companies. Because ACC is the largest bar association in the world that is comprised solely of in-house attorneys, it offers a unique perspective on how the court should determine whether to apply the laws of a foreign jurisdiction or the laws of the United States on questions of privilege.

ACC urges this Court to reverse Magistrate Judge Patrick Walsh's ruling that United States law applied, and, as a result, the attorney-client privilege did not protect from disclosure approximately 86 legal opinions concerning Canadian law issued by Canadian lawyers and accountants retained by Defendants. The Magistrate Judge erred in the application of the "touch base" analysis to determine whether to apply the laws of a foreign jurisdiction (in this case, Canada) on questions of privilege, or whether United States law should apply. *See Cadence Pharmaceuticals, Inc. v. Fresenius Kabi USA, LLC*, 996 F. Supp. 2d 1015, 1018-

19 (S.D. Cal. 2015). This misapplication of the "touch base" test, especially Judge Walsh's emphasis on the Defendant's filing of financial statements with the United States Securities and Exchange Commission (SEC) as a reason to apply U.S. privilege law, sets a troubling privilege precedent from a policy standpoint.

## I. Judge Walsh Misapplied the "Touch Base" Test

As the Magistrate Court correctly noted, most federal courts apply the "touch base" analysis or test in deciding choice of law issues in cases where the privileged communications occurred in a foreign country, or involved foreign attorneys or proceedings. (Minute Order, Dkt. No. 250, at 3.) Under this approach, courts must first determine whether the communication at issue involved U.S. law or foreign law to decide the applicable laws/rules governing privilege. *See Cadence Pharmaceuticals, Inc.*, 996 F. Supp. 2d at 1019.

The principal purpose of this approach is to allow courts to apply the laws of the nation with the "predominant interest" in the communications that are at issue – *i.e.*, (1) the place where the allegedly privileged relationship was entered into, *or* (2) the place in which that relationship was centered at the time communication was sent. *Id.*; *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92, 98 (S.D.N.Y.2002). In other words, the focus of the inquiry is on whether the communications concerned U.S. law or U.S. legal proceedings, or foreign law or foreign legal proceedings. *Cadence*, 996 F. Supp. 2d at 1019. Thus, for example, in patent cases, courts often look "to the law of the country where legal advice was rendered or where the patent application is pending." *Id*. (*citing Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 520-21 (S.D.N.Y. 1992)).

It is important to note that the parties do not dispute the communications and legal opinions that are at issue are privileged under Canadian law. (Mot. at 14). Indeed, Judge Walsh noted that "[v]irtually all the documents at issue in this case are legal opinions on *Canadian law* written by *Canadian lawyers* on behalf of a *Canadian company* and given to *Canadian auditors and financial consultants*."

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(Minute Order at 3 (emphasis added).) And under Canadian law, a company does not waive the attorney-client privilege (termed "solicitor-client privilege" under Canadian law) by disclosing privileged materials to certain retained third parties, including professional advisors and accountants. (Minute Order at 2.) As such, the legal opinions and communications at issue would have been protected from disclosure *if* Canadian law is applied.

Although the Magistrate Judge correctly relied on *Cadence*, *Astra Aktiebolag*, and *Golden Trade* for the frame-work of the "touch base" analysis, Judge Walsh erred in applying this analysis because instead of focusing on the content of the documents themselves, Judge Walsh focused on Defendant's status as a Form 40-F filer and the documents' relevance to that status and the instant legal proceeding.

The court's opinion in *Cadence* is directly on point. There, the defendant corporation sought to protect a series of emails between its employees and a non-attorney, patent manager who worked for a German company affiliated with the defendant. *Cadence Pharmaceuticals, Inc.*, 996 F. Supp. 2d at 1018. These emails reflected legal advice the Defendant sought regarding the filing of a European patent application, the result of a patent search, and the applicability of German law. *Id*. The *Cadence* court determined that, "[b]ecause the legal advice in this case was rendered in Germany and related to the prosecution of European patent applications, as well as the application of a German statute, the connection to the U.S. is incidental." *Id*. at 1021. Therefore, the court in *Cadence* held that "[it] should, as a matter of comity, look to the law of Germany to determine whether the disputed communications are privileged, unless the applicable German law is clearly inconsistent with important policies embodied in federal law." *Id*.

In finding that the documents at issue "plainly have 'more than incidental' connection with the U.S.," Judge Walsh erred by over-relying on the fact that Defendants in this matter needed to file certain disclosures with the SEC. Judge

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Walsh considered "the issue before this court," i.e., whether or not Defendants' financial statements were false and misleading, to determine that the documents touch base with the United States. However, the correct inquiry does not focus on the nature of the proceeding before the court, but whether the communications themselves concern U.S. law or U.S. legal proceedings. *Cadence*, 996 F. Supp. 2d at 1019. As discussed above, Judge Walsh concluded that the communications and legal opinions at issue concerned *foreign law and proceedings*. This meant that, at the time of the subject documents' creation, Defendants were primarily concerned with their obligations and duties under *Canadian laws and regulations*. The fact that Defendants had to make separate filings in the United States was incidental to why the Defendants obtained the legal opinions in question. As such, Judge Walsh erred by focusing almost exclusively on the relation of the documents to the current legal proceeding.

*Astra* is instructive. 208 F.R.D. 92 (S.D.N.Y. 2002). *Astra* involved communications between the defendant company's employees, in-house counsel and outside counsel across several jurisdictions. *Id*. at 98. The focus of the court's inquiry was on whether the challenged communications touched on U.S. laws or foreign laws. *Id.* at 98-99. Thus, for the communications that concerned legal advice given to the defendant company about German or Korean law, the *Astra* court applied either the German or Korean law on privilege. *Id*. And for communications that concerned legal advice given to the defendant company about U.S. law, the court applied U.S. law. *Id*. at 99. (applying U.S. laws to "communications between Astra employees, including in-house counsel, and Astra's outside American counsel or between Astra's in-house counsel and other Astra employees relating to the prosecution of patent applications or the conduct of litigation in the United States").

Here, all of the challenged communications concerned "*Canadian law* written by *Canadian lawyers* on behalf of a *Canadian company* and given to

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*Canadian auditors and financial consultants*." (Minute Order at 3 (emphasis added).) The logical conclusion is that Canadian law should apply because Canada has the most direct and compelling interest. *Astra*, 208 F.R.D. at 98.

## II. Applying Canadian Privilege Law in this Case Makes Good Policy Sense

The Magistrate Judge's order upsets common sense expectations around how privilege works in international disputes in U.S. Courts. When a corporation (1) retains attorneys in *its own jurisdiction*, (2) for purposes of obtaining confidential legal advice on the laws of *that jurisdiction*, and (3) then discloses that advice pursuant to the contours of limited privilege waiver as defined by the laws of *that jurisdiction*, the corporation has every reason to expect the materials so disclosed would remain privileged and would be protected from disclosure in a later-filed lawsuit in the United States. Judge Walsh's finding that U.S. privilege law should apply because the Defendant files financial statements with the SEC (Minute Order at 3) has broad policy implications that extend beyond this case.

The "touch base" analysis or test is meant to be an application of international comity, in which U.S. courts respect the laws, judicial decisions, and institutions of another country. Both U.S. and Canadian courts broadly recognize the importance of privilege in the corporate context, and corporations rely on this bedrock principle to ensure free communication with counsel. This open communication between corporations and their retained attorneys allows corporations to conduct their business and comply with their legal obligations. *Cadence*, 996 F. Supp. 2d at 1021 ("Courts have also recognized that the attorney-client privilege encourages clients to be forthcoming and candid with their counsel, and ensures that the counsel is sufficiently well-informed to provide sound legal advice"); *Astra*, 208 F.R.D. at 103; *Golden Trade*, 143 F.R.D. at 522.

The instant case represents a common fact pattern among Canadian companies, including those who file a Form 40-F with the SEC. Obtaining legal

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advice on tax positions is a routine corporate occurrence. From time to time, a company's auditors may request review of documents that are subject to attorney-client privilege, including such tax opinions. While a U.S. company might grapple with the potential consequences of making this disclosure to its auditor – that privilege would be waived in any subsequent litigation – in Canada, courts have recognized that disclosure to a company's auditor is only a limited waiver of privilege, thereby keeping the privilege intact in any subsequent litigation. Canada has determined that this limited exception to privilege waiver promotes good public policy by facilitating access to otherwise privileged information needed to complete accurate audits of companies' financial records.

Taken to its logical conclusion, Judge Walsh's reasoning leads to troubling policy results. As of May 2018, there were more than 500 foreign companies listed on the New York Stock Exchange. While being listed on a U.S. exchange generally subjects a company to some jurisdiction by the U.S. courts, it does not follow that a foreign corporation should be forced to disclose confidential and privileged materials that do not touch on U.S. law or proceedings, merely because it is the subject of a U.S. securities case. This offends basic principles of international comity and upsets the expectations of foreign companies doing business in the United States – a jurisdiction known for its strong protections around attorney-client privilege.

The need for certainty in privilege law is even more critical in the context of a question of intentional privilege waiver, as presented here. Although common law jurisdictions tend to have similar rules regarding privilege, they can vary significantly in the application of waiver rules. In addition to Canada's rules regarding disclosures to auditors, the United Kingdom has more liberal rules around limited privilege waiver than the United States. In the United Kingdom, a party may disclose privileged information to a third party without waiving the privilege, subject to an express agreement that privilege is not waived, or on the

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basis that the documents will be used for only limited purposes. *See*, *e.g.*, *B v Auckland District Law Society [2003] UKPC 38; Berezovsky v Hine & Ors [2011] EWCA Civ 1089*. Companies do not intentionally disclose privileged documents without consideration of the consequences. When there has been a judicial determination that allows for limited disclosure of privileged documents without waiver, companies rightfully rely on those determinations when considering their course of action. These foreign judicial determinations that limited disclosure of documents without waiver is acceptable are pronouncements of foreign public policy that U.S. courts should not overturn, both on grounds of international comity as well as our legal system's recognition of the importance of attorney-client privilege.

## III. CONCLUSION

For the foregoing reasons, ACC respectfully requests that the Court grant Defendants' Motion for Reconsideration and correct the Magistrate Judge's ruling. In so doing, the Court would help to provide clarity on the application of the "touch base" analysis, and provide guidance in this critical area to corporations around the world, including the more than 10,000 organizations in over 85 countries which are members of ACC.

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DATED: June 14, 2018

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