UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. LAUDERDALE DIVISION

CASE NO. 04-61568-CIV-COHN/SNOW

VECTOR PRODUCTS, INC.,

Plaintiff,

vs.

SCHUMACHER ELECTRIC CORPORATION,

Defendants.
_____/

MOTION OF ASSOCIATION OF CORPORATE COUNSEL TO FILE MEMORANDUM AS AMICUS CURIAE IN SUPPORT OF DEFENDANT SCHUMACHER ELECTRIC CORPORATION'S APPEAL OF THE MAGISTRATE'S ORDER DENYING IN-HOUSE COUNSEL ACCESS TO DOCUMENTS PROVIDED TO ATTORNEYS IN LITIGATION

The Association of Corporate Counsel (ACC) respectfully moves this Court for the entry of an order permitting it to file a Memorandum as Amicus Curiae in Support of the Appeal by Defendant Schumacher Electric Corporation of the Magistrate's Order Denying In-House Counsel Access to Documents Provided to Attorneys in Litigation. ACC has consulted with counsel for Plaintiff Vector Products, Inc., which does not agree to this motion. The basis for this motion is contained in the following memorandum.

MEMORANDUM

The Association of Corporate Counsel (ACC), formerly known as the American Corporate Counsel Association or ACCA, is the in-house bar association serving the professional needs of attorneys who practice in the legal departments of corporations and other private sector organizations worldwide. Therefore, ACC is the one organization exclusively devoted to the rights and interests

of in-house counsel. ACC promotes the common interests of its members, contributes to their continuing education, seeks to improve understanding of the role of in-house attorneys, and encourages advancements in standards of corporate legal practice. Since its founding in 1982, the association has grown to over 17,500 members in 53 countries who represent 7,500 organizations, with 45 chapters and 12 practice area committees serving the membership.

In this capacity, ACC has studied, researched, and addressed the particular issue before the Court--the access of in-house counsel to documents provided to attorneys in litigation. Two examples are amicus briefs filed in *Brown Bag v. Symantec*, Case No. 89-16239 (9th Cir. 1990) and *Affymetrix, Inc. v. Illumina, Inc., C.A.*, Case No. 04-901-JJF (D. Del. 2004).

ACC believes that in-house lawyering is good for clients and society as a whole because in-house counsel both deliver high-quality legal services in a cost-effective manner, and are uniquely positioned to positively influence the creation of a more ethical and professional corporate culture. Simply because in-house lawyers are employed, rather than retained, by the client does not change their ethical, professional, or substantive roles in representing their clients, nor does it change the client's right to expect that its in-house counsel of choice should be afforded the same rights to practice as a counsel hired from an outside firm to offer retained services.

As the voice of the in-house bar, ACC regularly files amicus memos and briefs, provides testimony, offers commentary and otherwise advances the principle that the privileges and obligations of the legal profession must apply equally to all attorneys, regardless of their practice setting. When in-house lawyers are accorded disparate treatment by a court, as seems the case in this matter, ACC steps forward to argue against artificial or inappropriate fetters on the in-house counsel's ability to practice or represent the interests of the corporate client.

Although the Federal Rules of Civil Procedure do not specifically provide for amicus

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appearances, this Court has the inherent authority, in the exercise of its discretion, to permit this submission: "Inasmuch as an *amicus* is not a party and 'does not represent the parties but participates only for the benefit of the court, it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the *amicus*.'" *News and Sun-Sentinel Co. v. Cox*, 700 F. Supp. 30, 31 (S.D. Fla. 1988) (citations omitted), *quoted in Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1500-01 (S.D. Fla. 1991) ("inherent authority"). As a general proposition, "[d]istrict courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has 'unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 2005 WL 318646, *5 (N.D. Cal. Jan. 31, 2005), *quoting Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997), *also quoted in Cobell v. Norton*, 246 F. Supp.2d 59, 62 (D.D.C. 2003).[1/]

Although there are a variety of contexts in which amicus participation may be of assistance to the court, one of them is the amicus participation of a specialized organization whose members have an interest in the general subject matter, beyond the interests of the litigants themselves. Thus, for example, in *Resort Timeshare Resales, Inc. v. Stuart, Inc.*, 764 F. Supp. at 1500-01, in which a timeshare company challenged the constitutionality of a Florida Statute requiring advertisers of timeshare units to obtain a real estate broker's license, this Court permitted amicus participation by the American Resort and Residential Development Association, which had publicly lobbied for the statute, and therefore could discuss its underlying legislative purposes. And in *Alliance of*

[1/] *See generally In Re Desilets*, 247 B.R. 660, 664 n. 3 (W.D. Mich. 2000); *Russell v. Board of Plumbing Examiners of County of Westchester*, 74 F. Supp.2d 349 (S.D.N.Y. 1999), *aff'd*, 1 Fed. Appx. 38, 2001 WL 15628 (2nd Cir. 2001); *Waste Management of Philadelphia, Inc. v. City of New York*, 162 F.R.D. 34 (M.D. Pa. 1995); *United States v. State of Michigan*, 116 F.R.D. 655, 661 (W.D. Mich. 2000).

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Automobile Manufacturers v. Gwadowsky, 297 F. Supp.2d 305, 307 (D. Me. 2003), in which an organization representing automobile manufacturers sued the Maine Secretary of State and Attorney General to enjoin enforcement of a statute prohibiting motor-vehicle manufacturers from recovering the costs of reimbursing franchisees in Maine for parts and labor, the court permitted amicus status to the Maine Auto Dealers Association, which the court agreed "has a unique and special interest in the outcome of this litigation, is in a position to offer the court guidance on the implications of the legislation from an industry viewpoint, and will be able to supply the court with witnesses to supplement the court's knowledge base and inform its judgment." It is respectfully submitted that ACC likewise would be of assistance to the Court in the instant case.

In light of the foregoing, ACC is uniquely situated to assist the Court in addressing the issue of in-house counsel's access to documents provided to attorneys in litigation. ACC is the single organization devoted to the rights and interests of in-house counsel, and ACC has addressed this issue in a variety of prior contexts, including as amicus. Accordingly, ACC respectfully moves this Court for the entry of an order permitting it to appear as amicus curiae in support of Defendant Schumacher Electric Corporation's position in appealing the Magistrate's order. Attached to this motion is a copy of ACC's proposed memorandum as amicus.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on March 8, 2005, to all counsel of record on the attached service list.

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vs.

SCHUMACHER ELECTRIC CORPORATION, an Illinois corporation,

Defendants.
_____/

MEMORANDUM OF ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF SCHUMACHER ELECTRIC CORPORATION'S APPEAL OF MAGISTRATE'S ORDER DENYING IN-HOUSE COUNSEL ACCESS TO DOCUMENTS PROVIDED TO ATTORNEYS IN LITIGATION

The Association of Corporate Counsel (ACC) respectfully offers the following memorandum in support of Defendant Schumacher Electric Corporation's appeal of the above-captioned order of the Magistrate:

I
INTRODUCTION

The unintended consequence of the Magistrate's ruling is to discriminate against clients or their in-house counsel when a qualified in-house lawyer acts as the litigator of record on behalf of the employer-client. The ACC respectfully submits that if any litigators in a case have access to documents produced to the other side, that access should be available to all litigators in the case who are properly licensed and admitted. The fact that a litigator is in-house counsel should not prevent that counsel from reviewing sensitive or protected information that is available to all other attorneys for the parties. Indeed, a counsel denied access to documents available to other lawyers is at an

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inherent and unfair disadvantage in preparing, presenting, and directing the execution of the client's strategy.

Any order that an in-house counsel who is an attorney of record is not eligible to appropriately handle such access to documents provided to other litigators necessarily is assuming two things--first, that the in-house lawyer is somehow incapable of behaving ethically, and will inappropriately share confidential files with clients who will take an unfair business advantage of the information; and second, that an outside lawyer for a client for some reason is less likely to do so, or even immune from such temptations.

In-house lawyers are equally tied to their ethical obligations, and should be presumed to be, and equally ethical in their performance of their duties, and should be presumed to be, unless and until (as in the case of any other lawyer) someone is able to prove they have acted inappropriately and unethically. In-house lawyers are not ethically inferior to their outside counterparts and must be treated equally by the court.

II
ARGUMENT

A. The In-House Counsel's "Unique" Relationship with the Client. In-house counsel do share a very close relationship with their clients, as do outside lawyers. For in-house counsel, this relationship is characterized by their proximity and access to the client's daily operations, their knowledge of corporate policy, and their integration into the business functions of the client company. Of course, the obligation of in-house counsel is no different *in a particular* case than the obligation of outside counsel in the same case. Both are bound to the highest standard of professional loyalty and attention.

Nevertheless, the intimate access of in-house counsel often is the excuse of those outside of the relationship to question the objectivity and independence of lawyers who work in such close

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proximity to their clients. Such critics often presume that because a lawyer works closely with a client, the lawyer is no longer professionally capable of maintaining independence. But no lawyer--inside or outside--is *supposed* to be "objective" or "independent" of his client. To the contrary, the lawyer--inside or outside--is required to be a zealous partisan. The right of access to discovery can hardly be based on "objective" status.

Moreover, and ironically, these are the same critics who argue that in-house lawyers carry a special responsibility to play a more aggressive role in policing client behavior and ensuring legal compliance. They miss the inconsistency: if it is inherently suspect for a lawyer to gain the confidence of the client to such a degree that the client "invites" the lawyer to participate in even the most sensitive and strategic business discussions within the corporate structure, then why are courts and regulators across the country encouraging in-house counsel to do more to insert themselves into every aspect of the company's work, to allow them to better preventively counsel their companies?

We suggest to this Court that the close proximity of an in-house counsel to his client is no basis for questioning the lawyer's ability to abide by the ethical standards and obligations we expect all lawyers to shoulder. Proximity makes it more likely that a client will seek a lawyer's regular input and that the lawyer will be present to counsel on a wider variety of issues at earlier phases of his or her evolution in the company's business cycle. Proximity does not make it less likely that the lawyer will behave ethically, nor does it change the lawyer's obligations as an officer of the court when representing the client before a tribunal.

Indeed, if anything, it might be argued that in-house lawyers are more consciously aware of how they must behave to maintain objectivity than their outside peers, who often are brought into the case after the decision to litigate has been made. The in-house counsel are in essence members of the client organization as well as counsel, and in this sense have a *greater* obligation of

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"objectivity" in advising the client.

If it were true in general that both inside and outside counsel are potentially vulnerable in their objectivity and independence (and therefore, one group is not inherently susceptible while another is inherently insusceptible), and given that proximity and intimate engagement in a client's work in no way connotes that a lawyer will act unethically, there is no reason that any lawyers representing their clients in the litigation context should be presumed to act differently or warrant different treatment.

B. The In-House Litigator and His Ethical Obligations. Some corporate clients with regular, repetitive or highly specialized litigation needs find that outside firm litigators can be ill-adapted to their needs and that an in-house litigation team is an obvious solution to many of their representational concerns. While in-house litigators (as opposed to in-house lawyers who don't litigate, but who simply manage outside litigators' appearances) are a minority of the in-house profession, they are nonetheless commonplace in a variety of industries: with manufacturers that have repetitive class-action or product-liability matters, in publishing entities that face regular First Amendment or related cases, or in certain high-tech industries concerned with issues which not many lawyers are capable of easily grasping, because of the technical complexities.

As in this case, for example, in-house litigation teams are a common choice for clients with large patent litigation portfolios (in bio-technology, cutting edge tech start-ups, business process manufacturers, and so on), and are popular in no small part due to the often repetitive and very complex nature of the underlying litigations, as well as the difficulty "climbing the learning curve" necessary to lawyers who often lack technical expertise in the client's business, but must defend what can often be "bet-the-company" litigation contests. All of these factors combine to convince some clients that it is preferable to assemble an in-house litigation team than to waste time, money,

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and possibly adverse outcomes on outside lawyers who don't carry the necessary qualifications.

In the instant case, the in-house litigator in a patent matter has been denied access to documents by the Magistrate on the sole ground that he is an in-house lawyer, while access has been granted, without any other justification, to all lawyers in the case who are outside counsel. While we are not knowledgeable about, nor do we wish to become entangled in, the complicated issues in the instant case, the ACC respectfully urges this Court to not create two classes of lawyers in this matter: those who will be presumed ethical (outside counsel) and those who will be presumed unethical (the in-house lawyer). The Court should not treat counsel of record who are qualified to appear in a disparate fashion solely on the basis of their status as employed versus retained counsel.

Denying in-house counsel access to confidential documents casts unjustified aspersions on an employed litigator, pre-judging him as ethically incapable. It sends a message to the corporate client that the playing field on which all lawyers in the case are expected to operate is not level in regard to their representational interests.

To suggest that such a client is not disadvantaged so long as some of his or her counsel (outside counsel) can review the files exhibits a misplaced assumption of how litigation is conducted, especially when the in-house lawyer is a lead counsel who has hired an outside firm for assistance or to meet local admission requirements, but not to act as a substitute for the in-house lawyer's representational skills. It is unrealistic to expect an in-house lawyer whom the client has decided should be in charge of the case to supervise and direct the efforts of the outside counsel and the overall litigation strategy if the in-house lawyer is not allowed access to the information offered to all other lawyers on the case.

Is there any reason to believe that in-house lawyers are not qualified to live up to their responsibilities in litigation? No. In-house positions are highly coveted in the profession. Lawyers

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who are tapped to go in-house are not those who cannot find employment elsewhere or whose credentials are in some way suspect. On the contrary, they are chosen from a highly competitive pool of applicants who generally have excellent credentials, established reputations, and long years of experience in top law firms or the highest levels of government service. They are known for their professional accomplishments. It is irrational and without factual basis to assume that this segment of the legal profession is somehow more likely to abandon its professional obligations when performing in-house representation, whether as in-house litigators, executive counselors, compliance experts, or transactional specialists. Indeed, the in-house segment of the profession is the least likely to commit ethical violations of their professional obligations of any kind, according to the National Organization for Bar Counsel (NOBC).

III
CONCLUSION

Allowing the Magistrate's ruling to stand in this case (denying the in-house counsel access to documents) would create an unwarranted obstacle to the client's choice of qualified and economically efficient counsel, and perpetuate arbitrary and artificial distinctions between employed and retained attorneys which have no factual basis. Such decisions place organizations that consciously select employed counsel as their counsel of record at a distinct disadvantage in conducting litigation, both economically and strategically.

Since employed counsel are subject to the same rules of professional conduct (and sanctions for violations) as outside lawyers who are retained to litigate for the client, they should be afforded the same presumption of professional competence and character until it is proved that such confidence in their capacities is unfounded. To deny employed counsel access to confidential documents because the other side fears they might treat confidential information in a less than professional fashion is inappropriate and insulting to the hard-earned reputation of the in-house

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lawyer. It suggests that a large and growing segment of the bar are inherently unqualified to conduct litigation. It denies clients the right to select and retain in-house counsel as their litigators if they so choose. It implies that the in-house lawyer is ethically unable to perform to professional standards simply by virtue of the location of his office and his focus on a single client's service. And it presumes that outside counsel are not subject to many of the same ethical concerns, when the opposite is in fact true.

The Association of Corporate Counsel respectfully requests that the Court protect the freedom of organizational clients to choose the counsel of their choice, rejecting any assertions that employed counsel should be denied access to confidential information based solely on their status as in-house lawyers.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on March 8th, 2005, to all counsel of record on the attached service list.

Respectfully submitted,

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