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19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA

21 SAN FRANCISCO DIVISION

<p>22 UNITED STATES <i>ex rel.</i> STROM,</p> <p>23 Plaintiffs,</p> <p>24 v.</p> <p>25 SCIOS, INC. and</p> <p>26 JOHNSON & JOHNSON,</p> <p>27 Defendants.</p>	<p>) No. C 05-3004 CRB (JSC)</p> <p>)</p> <p>) STIPULATION REGARDING</p> <p>) WITHHELD AND REDACTED</p> <p>) DOCUMENTS; [PROPOSED] ORDER</p> <p>)</p> <p>)</p> <p>)</p>
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28 STIPULATION REGARDING WITHHELD AND REDACTED DOCUMENTS, No. C 05-3004 CRB (JSC)

1 WHEREAS Plaintiffs, the United States of America and Relator Joe Strom, and
2 Defendants, Scios, Inc. and Johnson & Johnson, (collectively the “Parties”) through their
3 undersigned counsel, have been continuing to meet and confer regarding the remaining discovery
4 disputes in this case, including, but not limited to:

5 (1) Whether Defendants Scios, Inc. and Johnson & Johnson (“Defendants”) should be
6 required to withdraw their assertions of the work product protection and attorney-client privilege
7 over communications between Jane Moffitt (Scios, Inc.’s VP of Regulatory Affairs) and other
8 employees and contractors, and over documents prepared, reviewed, sent, or received by Jane
9 Moffitt, and produce all documents withheld on these grounds. The United States recently
10 learned that Ms. Moffitt did not have active California Bar membership while she worked at
11 Scios, and thus was not engaged in the practice of law for the purpose of invoking the attorney-
12 client privilege. Defendants dispute the consequence of such a determination because they
13 contend the attorney-client privilege applies if the client reasonably believes that the confidential
14 communication was with an attorney. The United States disputes Defendants’ contention that
15 they or their employees and agents could have reasonably believed that Ms. Moffitt was
16 providing legal counsel to them.

17 (2) Whether Defendants should be required to produce in un-redacted form the
18 "to/from/cc/bc/subject and date" lines in emails and email chains embedded in the text of emails
19 otherwise identified as protected by the attorney-client privilege and work product doctrine; and

20 (3) Whether Defendants should be required to produce all portions of emails and other
21 documents redacted or withheld that their counsel received, but do not expressly request or relay
22 legal advice.

23 (4) Defendants contend they have produced over 9 million pages of documents in the
24 course of discovery in this matter, and identified thousands of documents over which it has
25 asserted claims of attorney-client privilege and work product protection. Defendants contend the
26 burden of re-reviewing documents in the manner and to the extent sought by the government
27 would be excessively burdensome.

28 IN ORDER TO RESOLVE ALL OF THESE DISPUTES, IT IS HEREBY STIPULATED

1 AND AGREED by the Parties, through their undersigned counsel of record, that:

2 (1) Defendants agree to withdraw their assertions of the work product protection and
3 attorney-client privilege over communications between Jane Moffitt and other employees and
4 contractors that were withheld solely based on Ms. Moffitt's participation as counsel, and
5 documents prepared, reviewed, sent, or received by Jane Moffitt that were withheld solely based
6 on Ms. Moffitt's participation as counsel. Further, Defendants will produce all documents
7 withheld on these grounds, and will not lodge an objection to the admissibility of
8 communications or documents based on an assertion that Ms. Moffitt was acting as an attorney
9 (though retain the right to assert objections on other grounds).

10 (2) Plaintiffs agree not to argue that Defendants' production of these documents
11 constitutes a subject matter waiver as to communications or documents over which Defendants
12 assert a privilege or protection independent of Ms. Moffitt's participation – i.e. communications
13 or documents otherwise privileged due to another attorney's participation.

14 (3) Plaintiffs further agree that they will not seek further reconsideration of this Court's
15 decision that Scios' communications with Dr. Raymond Lipicky during the March 2002
16 telephone call are privileged, provided another attorney participated in such communications, and
17 such showing shall be made to the government by declarations.

18 (4) In lieu of amending their privilege logs to include the to, from, cc, bc, subject, and
19 dates of all emails Defendants have redacted, Defendants will produce all emails and email
20 chains without redacting this information for any email embedded in an email chain otherwise
21 claimed as privileged. In the course of this un-redaction, Defendants also will review the content
22 of such emails and email chains to confirm that such chains are properly claimed as privileged
23 and, to the extent such communications are not properly protected by the attorney-client privilege
24 or work product doctrine, Defendants will produce them to Plaintiffs.

25 (5) Defendants agree to re-review all emails and other documents identified by
26 Defendants' privilege logs as "subject to ongoing legal and regulatory review," "pending legal
27 review," "awaiting legal review," "submitted to attorney," or "sent for legal review" to confirm
28 that communications are properly claimed as privileged and, to the extent such communications

1 are not properly protected by the attorney-client privilege or work product doctrine, Defendants
2 will produce them to Plaintiffs, subject to redaction of any portions of such emails and
3 documents that expressly request or relay legal advice, or that constitute the work product of an
4 attorney other than Jane Moffitt.

5 (6) Defendants agree that all of the documents that may be produced pursuant to this
6 Stipulation are authentic pursuant to Fed. R. Evid. 901 in that they are what they purport to be,
7 and that they will not challenge the authenticity of such documents in this action.

8 (7) All of the document productions that may be made pursuant to this Stipulation will be
9 made as soon as possible, and no later than December 1, 2011. If any additional discovery issues
10 arise regarding the productions pursuant to this Stipulation, the United States shall have three
11 weeks after the date all productions are complete to meet and confer with Defendants regarding
12 such issues and to provide its portion of any joint discovery letter(s) to the Court relating to such
13 issues. Defendants will then have seven days to provide their responsive portion, and the parties
14 will have an additional seven days to make any final revisions and file the joint letter(s).

15 (8) Based on the foregoing, the United States will not file the joint letter it sent
16 Defendants regarding the discovery disputes described above.

17 IT IS SO STIPULATED.

18 Respectfully submitted,

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20 Assistant Attorney General

21 JOSHUA B. EATON
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23 Under Authority Conferred by 28 U.S.C. §515

24 Dated: October 19, 2011 By: /S/
25 SARA WINSLOW
26 JULIE A. ARBUCKLE
27 THOMAS R. GREEN
28 Assistant United States Attorneys

Dated: October 19, 2011 By: /S/
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