**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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| ANWAR, *et al.*,<br>Plaintiffs,<br>v.<br>FAIRFIELD GREENWICH LIMITED, *et al.*,<br>Defendants.<br>This Document Relates To: All Actions | Master File No. 09-cv-118 (VM) |

**DECLARATION OF**
**PROFESSOR DR. MARIELLE KOPPENOL-LAFORCE**

I, MARIELLE E. KOPPENOL-LAFORCE, under penalty of perjury, declare as follows:

1. I am a law professor at Leiden University Law School in the Netherlands and a partner at Houthoff Buruma, a 250 lawyer international law firm headquartered in Amsterdam, with offices in the Netherlands (Amsterdam, Rotterdam), Belgium (Brussels), the United Kingdom (London), and the United States (New York). I understand that this declaration is submitted in support of Plaintiffs' opposition to the Citco Defendants' appeal from Magistrate Judge Maas' decision rejecting the Citco Defendants' assertions of attorney-client privilege under Dutch and U.S. law. I make this declaration to inform the Court about the law of the Netherlands relating to document discovery and the attorney-client privilege, and to respond to the declarations of Mr. Michel Deckers ("Deckers Declaration") and Mr. Renger Boonstra ("Boonstra Declaration"), which I believe to be substantially incomplete and inaccurate statements of Dutch law and practice. I also respond to the declaration of Mr. Scott Case ("Case Declaration"). I make this declaration based on my personal knowledge, experience, and education. If sworn as a witness, I could and would testify competently to the matters referred to

below.

2. I am admitted to the Bar of Rotterdam, the Netherlands, and have practiced as an attorney in the Netherlands since 2000. I specialize in, *inter alia*, corporate, commercial and international dispute resolution. I have a law degree (JD equivalent) and a Ph.D. in Law from the Erasmus University in Rotterdam, the Netherlands. I have lectured on dispute resolution, conflict of laws, and international contracting at various Dutch universities since 1984. I am on the board of editors of two scholarly law journals in the Netherlands, and am a member of the Netherlands' Standing Committee for Private International Law, a think-tank and an official advisory body to the Government of the Netherlands on conflict of laws issues and an assisting body to the Hague Conference of Private International Law. I was a delegate for the Netherlands to the Special Commission of the Hague Conference on Private International Law for the 2012 Principles of Choice of Law project, and I have been a member of the working group for those Principles since 2011.

## A. THE DECLARATIONS OF MESSRS. DECKERS, BOONSTRA, AND CASE

### The Deckers Declaration

3. Mr. Deckers concedes in his declaration that "[t]he Netherlands does not recognize as privileged communications between a Dutch company and its unlicensed in-house counsel." Deckers Decl. ¶ 9. He posits, however, that "non-oral communications" are nevertheless protected from disclosure--apparently *not* because they are covered by some privilege but, as I understand the Deckers Declaration, because in the Netherlands there is, in his opinion, no document disclosure to speak of. *See id*. ("Under Dutch law, there is no obligation to disclose any non-oral communication . . . The reason for this is that there is no general

obligation for parties to disclose unspecified documents . . .").

4. Mr. Deckers' description of Dutch privilege law and the rules of document disclosure is inaccurate. There is, in fact, and was during the relevant 2000-2009 period, *substantial* document disclosure in the Netherlands. *See* below, ¶¶ 34, 36-47. But even if it were true (which it is not) that there is no obligation to *produce* documents, it would still not follow that written communications are "protected from disclosure" in the Netherlands. Precisely because, as Mr. Deckers concedes, no privilege applies to communications with in-house lawyers, Mr. Boonstra would have an obligation under Dutch law to testify fully about any and all matters that are relevant, including any written communications or advice he may have given as an in-house lawyer. Without a right to refuse to provide testimony, Mr. Boonstra would have to answer any questions about the content of any documents that he authored, sent, received, or reviewed (to the extent those documents are relevant to the litigation). If Mr. Boonstra's memory was fading, he would be required, in preparation for his testimony, to review any documents that may help refresh his recollection. Therefore, it is inaccurate for Mr. Deckers to state that non-oral communications are "protected from disclosure"; the obvious implication from Mr. Deckers' own admission is that they are not. *See Kilbarr Corp. v. Holland*, NJ 1995, 3 ¶¶ 3.1(v), 3.3, 3.5 (Neth. Sup. Ct. March 11, 1994) (finding that legal professional (*civil law notary*), who acted for both seller and buyer, was required to testify about various drafts of contract for sale of business); T.S. Jansen, *Verboden te vissen, maar vragen mag: Art. 843a Rv in de ondernemingsrechtprakijk*, 3 Tijdschrift voor de ondernemingsrechtpraktijk 89, 91 (2009) (stating that a party might also request the production of documents after a witness testified about their content) (citing *Interforce Den Haag B.V. v. Rosier's Beleggingsmaatschappij B.V.*,

NJ 1998, 459 (Neth. Sup. Ct. Jan. 30, 1998) (affirming finding that defendant sufficiently proved existence and date of contract of sale through witness testimony)).

5. Moreover, Mr. Deckers' present position contradicts the prior writings of himself and other members of his firm, which are published, in English, on his firm's website. On that website Mr. Deckers tells his firm's clients:

> The judge can order parties to explain certain positions or to submit certain documents concerning the case (Article 22, DCCP). It is also possible for parties involved to order inspection of, or identical copies of, certain documents concerning a legal relationship in which the party or his predecessors are involved (Article 843a DCCP).

Michiel Deckers & Berth Brouwer, The Netherlands, in: PLC Cross-Border Dispute Resolution Handbook, Vol. 1, 211, 214 (2008/2009), *available at* http://www.boekel.com/media/92762/plc%20dispute%20resolution%20handbook%202008-2009.pdf ("**Ex. A**"). The Managing Partner of Deckers' firm, Frederieke Leeflang, in an article published by Deckers' firm on its website, also confirms (in English) that:

> article 843a of the Dutch Code of Civil Proceedings (DCCP) *allows pretrial/third party discovery of documents*.

Frederieke J. Leeflang, Netherlands, in: Getting the Deal Through – Private Antitrust Litigation 86, 87 (2010), *available at* http://www.boekel.com/media/88792/getting%20the%20deal%20through%20def.pdf (emphasis added, MKL) ("**Ex. B**"). That same article also states that:

> [c]ommunications between in-house counsel and, for example, the board of directors of the company they work for, may have to be disclosed in civil proceedings.

*Id*. at 88. Accordingly, Mr. Deckers' statement that in the Netherlands written communications are protected from disclosure is inaccurate.

6. Mr. Deckers makes three additional statements in further support of his conclusion that Citco could not have expected the disclosure of Mr. Boonstra's documents. He

states that:

(1) compulsory document disclosure is available only through Article 162 of the Dutch Code of Civil Procedure (Deckers Decl. ¶ 10);

(2) "there is no general obligation for parties to disclose unspecified documents," "unidentified documents," "vast quantities" of documents, or documents "concerning a significant period of time" (*id*. ¶¶ 9, 11); and

(3) "there is no obligation to disclose any non-oral communication such as e-mails, letters, [or] notes" (*id*. ¶ 9).

As discussed in more detail below (¶¶ 20-47), each of these characterizations is inaccurate.

7. I discuss in ¶¶ 48-56 below Mr. Deckers' conclusion that "there is an expectation in the Netherlands that Dutch corporations will not be forced to disclose their written communications with their Dutch in-house counsel in which advice is requested or given, irrespective of whether that counsel is licensed or not." Deckers Decl. ¶ 12.

**The Boonstra Declaration**

8. Mr. Boonstra states in his declaration that Citco asked him to provide legal advice about various contracts, and that he expected his communications with Citco personnel to be protected from disclosure on the ground that written communications are generally not discoverable in the Netherlands. Boonstra Decl. ¶¶ 5, 7-8. As discussed more fully in ¶¶ 29-47 below, Mr. Boonstra's statements that contracts and in-house lawyers' communications are generally protected from disclosure are inaccurate.

**The Case Declaration**

9. Mr. Scott Case states in his declaration that he had no reason to think that his communications with Mr. Boonstra were not privileged. Case Decl. ¶ 7. As explained below (¶¶

57-60), this statement is not credible as it pertains to Citco.

## B. DOCUMENT DISCLOSURE IN THE NETHERLANDS

**The Right to Refuse to Produce Documents under Dutch law**

10. As a preliminary matter, there is and can be no dispute that communications with unlicensed Dutch in-house counsel are *not* protected by the attorney-client privilege. Deckers Decl. ¶ 9; *see also* Ex. B (Leeflang) at 88 ("Communications between in-house counsel and, for example, the board of directors of the company they work for, may have to be disclosed in civil proceedings."); M.J.C. Somsen & R. van Staden ten Brink, *Anti-corruptie: wat te doen als het mis gaat?*, Ondernemingsrecht (Dec. 20, 2012) n. 18 ("In the U.S., there is a privilege for in-house counsel. . . . In the Netherlands, no such privilege exists for in-house lawyers.") ("**Ex. C**"); R. van Otterlo, *De moderne balie in internationaal perspectief*, 35 Justitiële Verkenningen 72 (2009) (discussing lawyers in large multinationals, who "act on behalf of their internal clients, often in a global network" and stating that "contrary to [licensed] attorneys, such in-house lawyers do not have the rights and duties of a licensed attorney based on the Counsel Act") (my translation, MKL).

11. Privileges in the Netherlands are entirely a product of case law, which has recognized privileges for only limited categories of professionals, such as medical doctors, civil law notaries, and licensed attorneys in private practice, known as *advocaten* (singular: *advocaat*). Pursuant to the attorney-client privilege, an *advocaat* may refuse to produce documents or testify about matters entrusted to him in his professional capacity. This privilege serves the public interest and the interest of the legal profession, *not* primarily the interest of the client. Accordingly, under Dutch law, the attorney-client privilege is limited to *advocaten*

because only licensed attorneys are considered officers of the court, who owe independent duties to the court and the legal profession.

12. In accordance with this public interest rationale, the privilege not to testify or produce documents belongs to the *advocaat*, not to the client. *See X. v. Public Prosecution Service,* 2013:BZ0004 ¶ 3.4 (Neth. Sup. Ct. June 4, 2013); *De La v. Public Prosecution Service,* NJ 2002, 438 ¶ 5.2.1 (Neth. Sup. Ct. Nov. 30, 1999). This means that the *advocaat* may decide to invoke the privilege, even if the client does not want him to invoke it, and may decide to waive it, even if the client does not want him to. *See* F.A.W. Bannier *et al.,* Beroepsgeheim en Verschoningsrecht 15 (2008) ("Although the will of the client is important when deciding to invoke the privilege, it is not of overriding importance") (my translation, MKL).

13. The fact that an unlicensed lawyer may also be providing legal advice, just as licensed attorneys do, is therefore not a relevant factor in determining if the privilege applies, and it does not have the effect of extending the attorney-client privilege to such unlicensed legal professional. *See, e.g.*, *In re De Boer & Van Keulen Belastingsadviseurs*, NJ 1986, 814 ¶¶ 4.3-4.4 (Neth. Sup. Ct. May 6, 1986) ("**Ex. D**") (denying privilege to tax advisor who provided legal advice but was not an *advocaat*).

14. In order to be licensed, attorneys must be formally sworn in as members of the Bar in the district in which they have chosen to practice. They are then a member of and regulated by the Netherlands Bar Association ("NBA") and must abide by all NBA rules and regulations, as well as the Counsel Act (*Advocatenwet*). They incur certain continuing education obligations, have to maintain a Third Party Account, and must make yearly submissions to the NBA about financing issues, the operation of their practice, and whether all the rules of the NBA

have been strictly complied with.

15. In-house lawyers are not required to be licensed. If they are not licensed, they are not regulated by the NBA, not subject to the Counsel Act, and not considered officers of the court. Because they are in the employment of their clients, they are generally not considered independent. *See* Case C-550/07, *Akzo Nobel Chemicals v. Commission*, 2010 E.C.R. I-8360 ¶ 44 (E.C.J. Sept. 14, 2010) ("[I]ndependence means the absence of any employment relationship between the lawyer and his client . . ."). Because in-house lawyers are not free to ignore their employers' commercial strategies or give priority to professional obligations when those obligations conflict with the aims of their employers/clients, they lack the independence that is crucial to the attorney-client privilege. *Id*. ¶¶ 44-45, 47.

16. Since 1997, in-house lawyers in the Netherlands may choose to become licensed attorneys with their local Dutch Bar by registering with the NBA pursuant to Article 1 of the Counsel Act. (Since 2002, similar registration rules apply to other European in-house lawyers who are already registered with their local Bars but work in the Netherlands.) If they choose to do so, they become subject to the same rules of professional conduct as licensed attorneys and may use the title of *advocaat*. The in-house lawyers must comply with the same requirements as other attorneys and they thus incur certain CLE obligations, have to maintain a Third Party Account or use the Third Party Account Foundation of the Dutch Association of In-House Counsel, and must make yearly submissions to the NBA. They must also obtain insurance coverage against professional liability towards third parties and the employer (unless the employer executes a written prospective waiver of liability). Art. 3 Verordening op de administratie en de financiële integriteit ("Administration and Financial Integrity Regulation"),

Stcrt. 2009, 118.

17. Once registered, NBA regulations protect these in-house *advocaten* by requiring their employers to respect their independence and sign a special professional charter that restricts the employer's ability to interfere with the in-house lawyer's strict compliance with the rules of professional conduct. *See* Arts. 2 and 3(3) Verordening op de praktijkuitoefening in dienstbetrekking ("Licensed In-House Counsel Regulation"), Stcrt. 1996, 239.

18. The Supreme Court of the Netherlands recently recognized that in-house lawyers who choose to submit themselves to the NBA licensing/registration process and are thus governed by its rules of professional conduct, also have the benefit of the attorney-client privilege, provided that such in-house *advocaten* obtain their employers' signed commitment to the professional charter. *X. v. Stichting H9 Invest*, LJN BY6101 ¶¶ 5.4-5.5 (Neth. Sup. Ct. Mar. 15, 2013); *see also* **Ex. A** (Deckers/Brouwer) at 214 ("Would documents written by an in-house lawyer (local or foreign) be privileged in any circumstances? . . . Communications between lawyers are privileged and cannot be introduced as evidence in proceedings *when the lawyer is registered at the Bar Association*.") (emphasis added, MKL); **Ex. B** (Leeflang) at 88 (while communications with in-house counsel are discoverable, "[i]n-house lawyers *that are admitted to the bar* have the same right of legal privilege as (external) counsel") (emphasis added, MKL).

19. To the best of my knowledge no Dutch court has ever recognized a privilege for in-house lawyers, who choose to remain unlicensed, do not wish to incur reporting duties, take out insurance, or be bound by the rules of professional conduct, including the taking of CLE courses, or whose employers fail to sign the professional charter that would guarantee the in-house lawyer's independence.

**Compulsory Disclosure Is Available through a Variety of Statutory Instruments**

20. Mr. Deckers asserts that compulsory document disclosure is not available in the Netherlands, except through Article 162 DCCP. Deckers Decl. ¶ 10. This is inaccurate and, in fact, contradicted by Mr. Deckers himself in the very next paragraph of his declaration. *Id*. ¶ 11 (stating that "a Dutch court is permitted *to order disclosure* of . . . documents" pursuant to "*Article 843a* of the Dutch Civil Procedure Code") (emphasis added, MKL); *see also* **Ex. A** (Deckers/Brouwer) at 214 ("The judge can order parties . . . to submit certain documents concerning the case (*Article 22,* DCCP).") (emphasis added, MKL).

21. In addition to Articles 22, 162 and 843a DCCP, compulsory document disclosure is also available through various other provisions of the DCCP, the Civil Code ("DCC"), and other legislation. For example, Article 85 DCCP requires the disclosure of all documents relied upon in any pleading. *See Philips Consumer Communications v. SCRL Altimex,* 2006:AW4335 ¶ 3.6.d (Ct. App. Den Bosch Apr. 4, 2006) (accounting evidence); *Cargill Fin. Markets & Citibank v. KPNQwest.,* 2008:BC9315 ¶ 5.3 (Dist. Ct. Amsterdam Apr. 2, 2008) (projections and documents specified in interim statement of Qwest).

22. Articles 2:345(2) and 2:351 DCC require corporations, upon a court order, to provide disclosure of relevant documents in court-ordered corporate investigations. *See, e.g., Osei Bonsu v. Global Green,* 2006:BG8502, ARO 2006, 43 ¶¶ 3.2, 4 (Ct. App. Amsterdam (Enterprise Chamber) Feb. 21, 2006) (all documents, records, and other data carriers); *VEB v. KPNQwest,* 2009:BI4771, ARO 2009, 46 ¶ 2.5 (Ct. App. Amsterdam (Enterprise Chamber) Feb. 27, 2009), upheld in JIN 2010, 75 (Neth. Sup. Ct. Nov. 20, 2009) (all documents, records, and other data carriers).

23. Article 35 of the Data Protection Act ("DPA") requires anyone who processes personal data to produce various documents upon the request of affected persons. *See, e.g., Dexia Bank Nederland N.V. v. X*, 2006:AV0011 ¶¶ 4.7.3-8, 4.10.2, 4.10.5 (Ct. App. Den Bosch Jan. 16, 2006) (contract, correspondence, and transcriptions of phone conversations); *HBU v. X,* 2006:AY8858 ¶¶ 12, 14-18, 20, 30-32 (Ct. App. The Hague Aug. 22, 2006), upheld in 2007:BA3529, NJ 2007, 360 (Neth. Sup. Ct. June 29, 2007) (client profiles, inventories of creditworthiness, and notes and transcriptions of phone conversations); *X v. ABN Amro,* 2005:AU6428 ¶¶ 3.12, 3.19 (Dist. Ct. Amsterdam Nov. 10, 2005) (overview of processed personal data).

24. Article 4:78 DCC entitles disinherited children to demand the production of all documents needed to determine their statutory entitlements. *See, e.g., X v. Y,* 2011: BU9640 ¶¶ 3.6-3.8 (Ct. App. Arnhem Nov. 18, 2011) (overview of debts, life insurances, donations, copies of bank statements, and all other information relevant to the calculation of statutory share). There is a long list of similar statutory provisions.

25. The most general, and in practice most important, provision for compulsory document disclosure is Article 843a DCCP. This Article provides that a court may compel inspection or production of documents provided that the movant's request (i) concerns specified documents, (ii) the documents relate to the relationship (*i.e.*, the tort, contract, or other cause of action) at issue, and (iii) the movant has a legitimate (*i.e.*, evidentiary) interest in obtaining or inspecting the requested documents. *See* Art. 843a(1) DCCP ("Any person with a legitimate interest may demand inspection, copies or extracts of certain documents concerning a legal relationship in which he or his predecessors is involved from any person who has such

documents in his control or possession. The term documents includes electronically stored data.") (my translation, MLK); *see also* Deckers Decl. ¶ 11.

26. To the extent that the Deckers Declaration suggests that court orders to produce documents are not "compulsory" in that they are not backed by the threat of sanctions, it is again inaccurate. Article 22 DCCP specifically entitles courts to draw adverse inferences in the event of non-compliance with court-ordered productions, a potentially severe sanction that is also available when documents were ordered produced pursuant to Article 843a or other statutory provisions.

27. In addition, it is widely recognized in the Netherlands that any order may be enforced by a monetary penalty pursuant to Art. 611a DCCP, which may be set in advance to promote compliance and becomes payable if the party ordered to perform or refrain from any particular action ignores the order. *See, e.g., Modern Sign Solutions Pty Ltd. v. Ad-Board B.V.,* 2006:AY5717, ¶¶ 4.15, 5.4 (Dist. Ct. Zwolle-Lelystad May 15, 2006); *DB Schenker Rail N.V. v. ProRail B.V.,* 2010:BL3701 ¶¶ 5, 6 (Ct. App. Amsterdam Feb. 9, 2010); *Arcelor Mittal Fontaine S.A. v. Koolwijk Polsbroek B.V.,* 2010:BN0516 ¶¶ 3.11, 4 (Dist. Ct. The Hague July 5, 2010); *Jumbodiset B.V. v. KPMG,* 2010:BP3071 ¶ 5.2 (Dist. Ct. Amsterdam Dec. 16, 2010); *Blauwpark B.V. v. ABN Amro Bank N.V.*, 2012:BY0185 ¶¶ 4.17, 5.4 (Dist. Ct. Amsterdam Sept. 14, 2012).

28. The monetary penalty pursuant Art. 611a DCCP may be incurred per day or a part thereof, or for another time frame, or for a specific other action. The penalties may be quite significant. *See, e.g., Johnson & Johnson v. Stevens,* IEPT20080703, ¶¶ 4.9, 5.5 (Dist. Ct. Amsterdam July 3, 2008) (€50,000 (approx. $66,700) per day, up to a maximum of €2.5 million (approx. $3.4 million)), *Favory Convenience Food Group v. Leverdo Beheer B.V.,* 2009:

BL1071 ¶¶ 5.7, 6.2 (Dist. Ct. Amsterdam Sept. 23, 2009) (€5,000 (approx. $6,700) per day or part thereof, up to a maximum of €1 million (approx. $1.3 million)); *Cher v. Universal Int'l Music B.V.,* 2011:BR4420 ¶ 4.12 (Dist. Ct. Utrecht Aug. 2, 2011) (€100,000 (approx. $130,000) for late production, plus continually accruing €10,000 (approx. $13,000) for each *hour* of delay, for a maximum of €500,000 (approx. $750,000)).

**The Scope of Document Disclosure in the Netherlands**

29. Mr. Deckers concludes that in the Netherlands "there is no general obligation for parties to disclose unspecified documents for purposes of what is known in Common Law jurisdictions as *discovery*." *Id*. ¶ 9 (emphasis in original); *see also id*. ¶ 11 (no obligation to produce "vast quantities of unidentified documents concerning a significant period of time for the purposes of general discovery"). To the extent that these statements are meant to convey that "discovery" does not exist in the Netherlands or that document discovery is so limited that it is effectively non-existent, Mr. Deckers' statements are plainly inaccurate. Indeed, Mr. Deckers' own law firm publishes on its website its Managing Partner's article explaining, in English, that "article 843a of the Dutch Code of Civil Proceedings (DCCP) allows pretrial/third party discovery of documents." **Ex. B** (Leeflang). at 87.

30. Mr. Deckers bases his conclusion that there is nevertheless no discovery on the statutory requirement that document requests must pertain to *specified* documents, and cites in support the Netherlands' Supreme Court decision in *Kilbarr Corp. v. Holland*, a book by Johannes R. Sijmonsma, Het Inzagerecht ("The Right to Inspect Documents") (my translation, MKL), and the Netherlands' Article 23 reservation to The Hague Evidence Convention. Deckers Decl. ¶ 9. The Dutch Article 23 reservation provides that the Netherlands will not execute

Letters of Request issued for the purpose of obtaining "pre-trial discovery of documents as known in common law countries." *See id*.

31. As set forth below, these sources do not support a conclusion that broad document discovery is unknown to the Netherlands.

***(a) The Netherlands' Article 23 Reservation***

32. It is well documented that the Article 23 reservations of many governments, including the Netherlands, arose in part from a misunderstanding of U.S. discovery rules, in particular a misreading of "pre-trial" discovery as *pre-action* or *pre-filing* discovery, which these governments considered incompatible with their local civil procedure laws. *See* Official Commentary to Ratification of Hague Evidence Convention, 15 660 (R 1123), no. 3, Second Chamber (1978-1979) at 15-16, 19 (stating that "pre-trial discovery" refers to a procedure to obtain access to documents "before the actual case has commenced" in order to prepare for one's case, and that the Article 23 reservation is necessary because the DCCP "has no comparable procedure") (my translation, MKL); B.J. van het Kaar, IPR-bewijsrecht en bewijsverkrijging 160 (2008) (stating that the reservation of Article 23 was surrounded by misunderstandings, and that "people saw 'pre-trial discovery' mainly as a preliminary procedure to collect evidence for the benefit of future litigation") (my translation, MKL); *see, generally*, Marissa L.P. Caylor, *Modernizing the Hague Evidence Convention: A Proposed Solution to Cross-Border Discovery Conflicts During Civil and Commercial Litigation*, 28 B.U. Int'l L.J. 341, 366 (2010) (stating that "procedural differences have led several civil law jurisdictions to misconstrue the words 'pre-trial' as referring to the period before a claim is filed" and that "[m]any states making reservations and declarations under Article 23 'mistakenly believed that they [were] only

objecting to evidence requests submitted prior to the opening of a proceeding'"). Indeed, the belief that "pre-trial" discovery in the United States means "pre-action" discovery continues to be a common error among Dutch commentators. *See, e.g.*, Sijmonsma, The Right to Inspect Documents, at 80-81 (describing the "Anglo-American" pre-trial disclosure system as disclosure requests "where there is not yet a procedure") (my translation, MKL).

33. The very case from the Dutch Supreme Court that Mr. Deckers cites, *Kilbarr Corp. v. Holland*, confirms that the real concern behind the Netherlands' Article 23 reservation was to preclude pre-action discovery:

> As far as concerns the listing and production of documents that a person has in his possession, it is also of significance that the Netherlands has made a reservation pursuant to Article 23 of the Convention, *which means, in essence, that it is not possible to request a listing or a production of documents* ***for the purpose of commencing a procedure*** *on the basis of those documents*.

*Kilbarr Corp. v. Holland*, NJ 1995, 3 ¶ 3.4 (my translation, MKL; emphasis added).

34. In accordance with this reading of the Netherlands' Article 23 reservation, several Dutch courts have, in fact, ordered the production of documents in response to Hague Requests originating from the United States, even though those requests were obviously issued for the purpose of obtaining "pre-trial discovery" in U.S. proceedings. *See, e.g.*, *Cher*, 2011:BR4420 ¶ 2.7 (granting Hague request of Superior Court of California (L.A. County), and ordering production of agreements, amendments, profit statements, annual statements, and royalty statements for use in California proceeding); *Arcalon B.V. v. U.S. Bankr. Court for the Southern Dist. Of Cal.*, NJ 1987, 149 ¶¶ 3.4, 3.5 (Neth. Sup. Ct. Feb. 21, 1986); *see also Abu Dhabi Islamic Bank v. ABN Amro Bank N.V.*, 2012:BV8510 ¶¶ 3.2.2, 3.5 (Neth. Sup. Ct. June 8, 2012) (holding that document discovery pursuant to Art. 843a DCCP is permissible, even if it is solely

for the purpose of litigation in the United States and Bahrain, not the Netherlands); *accord X v. Stichting Y*, 2012:BX4521 ¶ 5.5 (Dist. Ct. Rotterdam Aug. 14, 2012) (stating that the Netherlands Supreme Court in *Abu Dhabi Islamic Bank* approved document disclosure for use, in all likelihood, in U.S. litigation).

35. Therefore, it is not accurate to portray Dutch law as adverse to pre-trial document discovery.

***(b) Article 843a's Specificity Requirement***

36. Neither the specificity requirement of Article 843a, as applied, nor Mr. Deckers' selective citation to Sijmonsma in any way suggest that document disclosure is so severely limited that Dutch corporations would expect never to be compelled to produce any internal communications at all. To the contrary, as Sijmonsma explains on the very page 142 that Mr. Deckers cites:

> The words 'specific documents' are not meant to express that each document must be described with full name details and dates. It is about the request providing sufficient clarity as to which documents are being requested and why they are important, and that the duty to allow inspection is not extended further than necessary.

Sijmonsma, The Right to Inspect Documents, at 142 (my translation, MKL); *see id*. at 254 ("The word 'specific' . . . precludes requests for random access.") (my translation, MKL). Apparently, Mr. Deckers' law partner agrees. *See* **Ex. B** (Leeflang) at 88 (movant only has to identify the documents "with a reasonable degree of precision").

37. In accordance with this flexible approach (*i.e.*, that a movant must merely describe the requested documents with sufficient clarity), it is not necessary for the movant to describe, or even know, the content of the requested document in advance. *See Allianz Nederland Schadeverzekering N.V. v. Aannemings- en Bemiddelingsbedrijf 'De Langstraat*

*Verhuur' B.V.*, BC:9695 ¶ 2.8 (Dist. Ct. Den Bosch April 16, 2008) ("Nor does unawareness of the content of, in this case, the Completion Report preclude granting the request. . . . [I]f Art. 843a DCCP only related to documents of which the content is in principle already known, the practical application of Art. 843a would not amount to much. That would run counter to the intent of the Legislature . . .") (my translation, MKL); *X. v. Ernst & Young Participaties B.V.*, BR:5970 ¶ 4.16 (Dist. Ct. Rotterdam Aug. 26, 2011) ("The case law is settled that the content of the requested documents need not be known beforehand.") (my translation, MKL); *Arcelor Mittal Fontaine S.A. v. Koolwijk Polsbroek B.V.*, BN:0516 ¶ 3.4 (Dist. Ct. July 5, 2010) ("Art. 843 also does not require that the precise content of the documents is known to the requesting party.") (my translation, MKL).

38. Also consistently with this flexible approach, Dutch courts have long permitted broad disclosure of documents in numerous instances where document requests failed to identify each individual document with specificity. For example, in 1996, the District Court of Rotterdam ordered Center Parcs N.V., a Dutch corporation, to make available to former investors the minutes of various board meetings, without placing any limitation on the documents as to subject matter or otherwise. *Pyrford Inv. v. Center Parcs N.V.*, JOR 1996, 122 ¶¶ 5.10-5.11 (Dist. Ct. Rotterdam Oct. 3, 1996).

39. Similarly, in a 2002 case, where the defendant had damaged a telecom company's fiber optic cable (which caused the heat warning system in plaintiff's chicken farm to fail, resulting in the loss of plaintiff's chicken livestock), the District Court of Groningen ordered that all documents regarding plaintiff's contractual relations with the telecom company, suppliers, or the defendant, as well as all relevant correspondence between them, needed to be produced.

*Jonkman v. Dekker*, NJ 2003, 102 ¶ 6 (Dist. Ct. Groningen Nov. 22, 2002).

40. In a 2003 wrongful foreclosure case, the District Court of Zutphen held that because plaintiff's allegations concerned the steps that Rabobank took in preparing for the foreclosure at issue, as well as prior meetings that Rabobank had with a third party, the bank was obligated to produce its "entire correspondence" regarding the foreclosure at issue. *Leisureplan v. Rabobank*, Jbpr 2003, 66 (Dist. Ct. Zutphen May 7, 2003).

41. In another 2003 matter concerning negligent investment advice, the advising bank was ordered to produce all correspondence, all transactions records, and all investment account statements regarding its investor. *Santema & Blonz B.V. v. F. Van Lanschot Bankiers N.V.*, 2003:AI0663 ¶¶ 3.1, 4.5 (Dist. Ct. Den Bosch July 29, 2003).

42. In a 2005 matter (cited in W.P. Wijers & A.J. Haasjes, *Exhibitie in het (ondernemings)recht*, O&F 2006, 71 at 54) ("*Project X*"), the Maastricht District Court found sufficiently specific, and ordered inspection of, "the entire financial affairs of Project X under [defendant's] supervision, including the production of bank statements . . . and supporting documents, such as contracts, invoices, due diligence records, progress reports *etcetera*."

43. As these examples show, Dutch courts can, do, and did during 2000-2009, compel disclosure of non-specific categories of documents like "all correspondence," the "entire financial affairs" and "all documents regarding plaintiff's contractual relations" with third parties.

44. A recent decision by the Supreme Court of the Netherlands confirms the liberal reading of specificity in the lower courts. In *Theodoor Gilissen Bankiers*, the movant had requested in the most general terms "all correspondence" with financial regulators concerning

the matter at issue. *Theodoor Gilissen Bankiers*, 2012:BW9244, NJ 2013, 220 ¶ 3.8.2 (Neth. Sup. Ct. Oct. 26, 2012). The Supreme Court held that where a movant does not know, and therefore cannot describe, the documents individually, the request will be considered sufficiently specific if the documents may reasonably be expected to exist and their subject matter is circumscribed either by reference to the persons or regulatory bodies involved or otherwise. *Id*. ¶ 3.8.2. *See also Trientalis Invs. B.V. v. Promocean The Netherlands B.V.*, 2011:BU3647 ¶ 2.5 (Ct. App. Arnhem Nov. 8, 2011) (holding that a request for a full copy of all email correspondence during 2005-2009 between a board member and his secretary previously provided to forensic consultants was sufficiently specific because it is impossible to require movant to point to specific emails); *X. v. Shetland Pony Park Slagharen B.V.*, 2011:BT7211 ¶ 2.9 (Dist. Ct. Almelo Oct. 15, 2011) (unnecessary "to sum up and/or describe individually" the emails to defendant's email accounts). These cases provide further evidence that Dutch courts have repeatedly ordered the production of broadly described categories of documents, notwithstanding Mr. Deckers' narrower reading of the specificity requirement.

**No Rule Against Large Productions**

45. Mr. Deckers is also incorrect in his statement that no order from a Dutch court will "contain the obligation to produce vast quantities of unidentified documents concerning a significant period of time." Deckers Decl. ¶ 11. There is no per se rule against the production of "vast quantities." *See, e.g.*, Sijmonsma, The Right to Inspect Documents, at 142 ("The word 'specific' prevents fishing expeditions, but it remains possible to request, as a matter of speaking, 'truckloads of paper.'") (my translation, MKL). Dutch courts have, in fact, repeatedly recognized that large batches of emails or entire correspondence files are fully discoverable

under Dutch law. *See, e.g.*, *Jonkman*, NJ 2003, 102 ¶ 6 (all documents regarding relations with telecom company, suppliers, or defendant, and all relevant correspondence between them); *Trientalis*, 2011:BU3647 ¶ 2.5 (all email correspondence during 2005-2009 between director and secretary); *Project X*, *see* above, ¶ 42 (entire financial affairs of Project X, bank statements, supporting documents, contracts, invoices, due diligence records, progress reports).

46. Nor is there a rule against document productions that span several years. *See Blauwpark B.V. v. ABN Amro Bank N.V.*, 2012:BY0185 ¶¶ 3.1, 4.6, 4.9 (ordering ABN Amro Bank to produce digital and hard-copy correspondence, memos, minutes, and notes from 2001 through 2011 in fraud matter); *Daniëls v. KPMG Accountants N.V.*, 2012:BW0075 ¶¶ 3.1, 5.26 (Dist. Ct. Amsterdam March 27, 2012) (ordering production of KPMG's entire audit files over 2000-2009 in accounting fraud matter); *Cher*, 2011:BR4420 ¶ 4.8.2-4, 4.8.6, 4.8.8 (agreements, financials and royalty statements over 12 years (1999-2011)); *Trientalis*, 2011:BU3647 ¶ 2.5 (emails from 2005-2009); *X v. Y*, 2008:BD7632 ¶¶ 2.10-2.11 (Dist. Ct. Haarlem July 16, 2008) (bank statements from 2004 through 2006).

**No Rule Against Disclosure of Emails, Letters, Notes, or Contracts**

47. The case law also makes clear that emails, correspondence, notes, or contracts are *not* excluded from disclosure. *See Shetland Pony Park*, 2011:BT7211 ¶ 2.9 (emails); *Trientalis*, 2011:BU3647 ¶ 2.5 (emails); *OPG Groothandel v. Quigley,* JOR 2007, 265 ¶ 3.15 (Dist. Ct. Utrecht Nov. 17, 2007) (reports, emails and correspondence); *Theodoor Gilissen Bankiers*, 2012:BW9244, NJ 2013, 220 ¶ 3.8.2 (correspondence); *Jonkman*, NJ 2003, 102 ¶ 6 (correspondence and contracts with telecom company, suppliers, and defendant); *F.G. Detectietechnieken v. L.G.H. Verhuur Hijsmateriaal,* 2007:BC0225 ¶ 3.3 (Dist. Ct. Rotterdam

Dec. 5, 2007) (insurance contracts); *Dexia Bank Nederland*, 2006:AV0011 ¶¶ 4.10.2, 4.10.11 (contract, notes); *Project X*, *see* above, ¶ 42 (contracts); *Pyrford*, JOR 1996 ¶¶ 5.10-5.11 (meeting notes).

## C. CITCO'S EXPECTATION OF IMMUNITY FROM DISCLOSURE OF COMMUNICATIONS WITH IN-HOUSE COUNSEL

48. Messrs. Deckers, Boonstra, and Case all claim that Citco reasonably expected immunity from disclosure during the 2000-2009 period. According to Messrs. Deckers and Boonstra, the basis for such expectations is the belief that documents are generally protected from disclosure in the Netherlands. Deckers Decl. ¶¶ 9-12; Boonstra Decl. ¶¶ 7-8. Mr. Case claims to have expected his communications with Mr. Boonstra to be privileged in the Netherlands, and bases his expectation on the fact that he asked and received legal advice from a lawyer. Case Decl. ¶¶ 6-7. I address each of these expectations, and their reasonableness, below.

**No Presumption of Immunity from Disclosure under Dutch Law**

49. Mr. Deckers speculates that because Dutch courts will not order parties to produce vast quantities of unidentified documents concerning a significant period of time, "there is an expectation in The Netherlands that Dutch corporations will not be forced to disclose their written communications with their Dutch in-house counsel in which advice is requested or given, irrespective of whether that counsel is licensed or not." *Id*. ¶¶ 11-12; *see also* Boonstra Decl. ¶ (immunity from disclosure was "undoubtedly, the expectation of [Citco]").

50. I do not believe that there is any basis for such a speculation about Dutch corporations' expectations, which is clearly a *non-sequitur*. Even if it were true that documents are generally protected from disclosure (which they are not, *see* ¶¶ 20-44) or that there is a

restriction on producing "vast quantities of unidentified documents" (which there is not, *see* ¶¶ 45-46), it still does not follow that there is a *total absence* of disclosure of documents. Only if there was no document disclosure *at all* could in-house lawyers and their Dutch employers have had an expectation that none of their communications could be disclosed. For the reasons discussed above (¶¶ 20-47), this is clearly not the law in the Netherlands.

51. The professed expectations also make no sense for a second reason. If Messrs. Deckers' and Boonstra's characterizations of document disclosure in the Netherlands as essentially non-existent were true, it would not matter whether the communication at issue was with an in-house lawyer or any other employee. If there was no document disclosure, no Dutch corporation would *ever* expect any document to be disclosed, whether or not it involved an in-house lawyer. Not only would that make Mr. Boonstra's status as an in-house lawyer entirely irrelevant and Citco's position inconsistent with the fact that it produced, as I understand it, millions of documents in this litigation; it is also simply not true. As a practicing attorney with nearly 13 years of experience representing corporations in litigation, I can say with confidence that corporations are well aware of what they tend to consider ever-increasing disclosure obligations in Dutch civil litigation.

52. A third reason why the predictions of Messrs. Deckers and Boonstra about the expectations of Citco and other Dutch companies cannot be accurate is that Dutch enterprises would have had to be willfully blind during the 2000-2009 period to the vast number of judicial decisions enforcing document discovery. While the Netherlands is but a small jurisdiction, by November 1, 2009 there were literally hundreds of court opinions involving document requests pursuant to Article 843a, and 181 over the period from 2002 through July 1, 2008, according to a

study of Dutch document discovery practices, which largely coincided with the period at issue here. *See* Sijmonsma, The Right to Inspect Documents, at V, 83; *see id*. at 82 (describing extensive use during 2002-2006 of motions to compel document discovery of which courts granted "a substantial portion" in whole or in part).

53. A fourth reason why Dutch corporations cannot have expected protection from disclosure for their internal communications with unlicensed in-house lawyers is that, as Mr. Deckers concedes, such communications are not privileged. Thus, when called to testify in the Netherlands, unlicensed in-house lawyers are obligated to disclose the content of such communications in any event. Because the use of witness examinations is widespread in the Netherlands and their frequency is well-known (*see, e.g.*, **Ex. B** (Leeflang) at 87 ("It is within the court's discretion to allow a preliminary hearing of witnesses. A request is generally allowed.")), it would be unrealistic for Dutch corporations to nevertheless expect their communications with unlicensed lawyers to enjoy absolute protection from disclosure.

54. A fifth reason, and perhaps the best evidence that expecting protection from disclosure would not be reasonable, is that on the website of Mr. Deckers' law firm, he and his firm advise their clients that document disclosure exists in the Netherlands. **Ex. A** (Deckers/Brouwer) at 214 (stating that judge can order document production pursuant to Art. 22 DCCP and parties can request them pursuant to Art. 843a DCCP); **Ex. B** (Leeflang) at 87. The firm even specifically warns that:

> Communications between in-house counsel and, for example, the board of directors of the company they work for, may have to be disclosed in civil proceedings.

*Id*. at 88. This fact was well known among in-house lawyers during the 2000-2009 period. *See, e.g.,* A. Mouritz, *Carrière en Opleiding: In-house advocatuur*, 54 Ars Aequi 971 (2005) ("I

always continued my registration as licensed attorney. That was not necessary in the exercise of my job . . . [but] I value professional secrecy. I believe an internal client should be free to tell his legal advisor everything.") (my translation, MKL); Elsen, *WID- en MOT-perikelen: een antwoord op een aantal identificatie- en meldingsvragen*, OR (June 23, 2005), at 3.2 ("A benefit [of licensing] can be that a licensed in-house lawyer has a privilege.") (my translation, MKL).

55. Finally, it is doubtful that anyone could ever have an expectation that documents are protected from disclosure in the Netherlands, even where a privilege applies. It has been settled law since 1985 that privileges do not provide absolute protection under Dutch law; the importance of finding the truth may override the interest that persons be able to speak with their lawyers in confidence. *Notaris Maas*, NJ 1986, 173 ¶ 3.6 (Neth. Sup. Ct. March 1, 1985).

56. Accordingly, in my experience it is not the understanding of Dutch corporations that communications about legal advice they have with their in-house lawyers are going to be immune from disclosure; and even if they had such expectation, it would certainly not be a *reasonable* belief, as it runs counter to decades of Dutch case law ordering documents produced when no privilege applies. *See* above, ¶¶ 37-47.

**No Reasons to Expect Communications with In-House Counsel to Be Privileged**.

57. Mr. Case states that *he* had no reason to believe that his requests for legal advice was not privileged (Case Decl. ¶ 7), and I understand Citco to argue the same for Citco personnel in general. From a Dutch law perspective, this is not persuasive.

58. Dutch law does *not* protect clients who mistakenly believed their requests for legal advice would be privileged. It has been common ground in the Netherlands, at least since the Supreme Court's 1986 decision in *De Boer & Van Keulen* (**Ex. D**) that the rendition of legal

advice is *not* what triggers the attorney-client privilege. *See* above, ¶ 13. During the 2000-2009 period (and before), no court had ever held communications with in-house lawyers to be privileged. *See* above, ¶ 19. It was not until after 2009 that the Dutch Supreme Court carved out a limited exception for *licensed* in-house lawyers. *See* above, ¶ 18. As one commentator described the state of Dutch law in May 2009:

> The question is now whether the interest in transparency should also give way *in case the opponent turned to an advisor whose communications are not privileged*, such as a certified public accountant or a tax advisor. This is not so. The Supreme Court has determined that such advisors have no right to refuse evidence. It held in those cases that the interest of truth-finding weighs heavier than the interest that everyone should be free to consult with such advisors. Applying this balancing of interests in the context of Art. 843a DCCP, it means that *the interest of being able to consult with such an advisor freely and without fear of disclosure does not constitute an overriding interest. After all, the interest in transparency – and therefore in applying Art. 843a DCCP – must prevail*.

Jansen, *Verboden te vissen*, at 93 (citations omitted and emphasis added) (my translation, MKL).

59. Moreover, Messrs. Boonstra and Case have it backwards. They do not need a reason to doubt that any privilege applies; what they need is a reason to assume a privilege exists in the first place. Dutch law is clear that no one may assume a person to be licensed as an *advocaat*. To the contrary: *advocaten*, whether in private practice or in-house, have an affirmative duty to identify themselves as *advocaat* to ensure that there is no confusion about their status. *See, e.g.*, Prof'l Conduct Rule 29 (requiring an attorney "to avoid misunderstanding about the capacity in which he acts") (my translation, MKL); Art. 3(7) Licensed In-House Counsel Regulation 1996 (a licensed attorney who practices both independently and in-house must take care "that there can be no confusion regarding the capacity in which he acts") (my translation, MKL); G.J.K. Elsen, *WID- en MOT-perikelen: een antwoord op een aantal identificatie- en meldingsvragen*, OR (June 23, 2005), at 3.2 ("A licensed in-house lawyer

continues to act in his capacity as *advocaat* during all the tasks of his employment, and he must at all times make that capacity clearly known to third parties.) (my translation, MKL); *accord* Comment 14, Licensed In-House Counsel Regulation 1996, Stcrt. 1996, 239.

60. In this case, it is entirely unreasonable that Citco thought Mr. Boonstra was an *advocaat* whose legal advice is privileged. After all, for the privilege to apply, Citco would have had to affirmatively take action and sign the requisite professional charter discussed above (¶¶ 16). It is unlikely that Citco could be confused about whether it did or did not sign the charter.

61. I am fluent in English and a native speaker of Dutch, and I use both languages professionally. The translations that I provided in the above are accurate.

62. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on: August 25, 2013
Rotterdam, the Netherlands

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Marielle Koppenol-Laforce