No. 2019-104

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE AFFYMETRIX, INC. and LIFE TECHNOLOGIES CORP.,
Petitioners.

On Petition for a Writ of Mandamus to the United States District Court
for the Southern District of California
The Honorable Marilyn L. Huff
Case No. 17-CV-1394

BRIEF FOR ASSOCIATION OF CORPORATE COUNSEL, NATIONAL ASSOCIATION OF MANUFACTURERS, AND ILLUMINA, INC. AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF MANDAMUS

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for the Association of Corporate Counsel, the National Association of Manufacturers, and Illumina, Inc. certifies the following:

1. The full name of every party or amicus represented by me is: the Association of Corporate Counsel, the National Association of Manufacturers, and Illumina, Inc.

2. The names of the real parties in interest, if different from the parties named in the caption: Not applicable.

3. The names of all parent corporations and any publicly held companies that own 10% or more of the stock of the parties represented by me are: None.

4. The names of all law firms and the partners and associates that appeared for amici in the trial court or agency or are expected to appear in this Court are:

Bradley Arant Boult Cummings LLP: E. Todd Presnell, Edmund S. Sauer, and Kimberly M. Ingram

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal: None.

Dated November 5, 2018

/s/ E. Todd Presnell

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

STATEMENT OF INTEREST OF AMICI CURIAE

The Association of Corporate Counsel ("ACC") is the leading global bar association that promotes the common professional and business interests of in-house counsel. ACC has more than 44,000 members who practice in the legal departments of corporations, associations, and other organizations in the United States and abroad. For over 35 years, ACC has sought to aid courts, legislatures, regulators, and other law- or policy-making bodies in understanding the role and concerns of in-house counsel.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

Illumina, Inc., is the recognized global leader in next-generation DNA sequencing. It develops and manufactures sequencing and array technologies that fuel advancements in life-science research, translational and consumer genomics,

and molecular diagnostics. Illumina places particularly high value on collaborative ventures, which are critical to develop innovative technologies for analyzing genetic variation and function and improve human health.

Amici represent thousands of businesses across the United States and their in-house attorneys. These businesses—both large and small—are frequently involved in joint ventures, partnerships, and other common-interest arrangements that add tremendous value and innovation to the American economy. As a result, amici are very interested in the scope of the common-interest doctrine under federal law. Amici's unique perspective and experience with common-interest arrangements should assist the Court in resolving the issue presented here.

Amici are particularly concerned about the uncertainty regarding whether the common-interest doctrine requires all parties to be represented by counsel. If left undisturbed, the district court's opinion establishing a separate-representation requirement will further inconsistent development of the common-interest doctrine, chill the formation of collaborative initiatives and the sharing of important information, and require collaborators to assume the unnecessary expense of retaining separate counsel. Amici urge this Court to review the unresolved privilege

issue presented in this case and hold that the federal common-interest doctrine does not require all parties to be represented by counsel.[1]

ARGUMENT

I. The Petition Presents A Novel Privilege Issue That Has Divided District Courts And Warrants Mandamus Review.

The common-interest doctrine is an exception to the rule that the disclosure of a communication to a third party waives the attorney-client privilege. *Waymo LLC v. Uber Techs., Inc.*, 870 F.3d 1350, 1359 (Fed. Cir. 2017). The doctrine "conserves litigation resources and promotes fairness" by allowing parties with aligned interests to coordinate their strategies with respect to their mutual legal interest. Anne King, *The Common Interest Doctrine and Disclosures during Negotiations for Substantial Transactions*, 74 U. Chi. L. Rev. 1411, 1425 (2007).

Nearly all federal and state courts have adopted or apply some form of the common-interest doctrine. *See* William T. Barker, *The Attorney-Client Privilege, Common-Interest Arrangements, and Networks of Parties with Preexisting Obligations*, 53 Tort Trial & Ins. Prac. L.J. 1, 20–21 (2017). The doctrine has become increasingly prominent in federal litigation in recent years. After being

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici and their counsel made a monetary contribution to its preparation or submission.

addressed in only 35 published opinions before 1980, the doctrine was cited in 161 published opinions from 1980 to 2000 and 281 published opinions since 2000.

A. District Courts Are Divided Over Whether The Common-Interest Doctrine Requires All Parties To Be Represented By Counsel.

No federal circuit court has considered whether federal law restricts the common-interest doctrine to situations where all parties are represented by counsel. The district courts that have considered the issue have taken divergent approaches.

Some district courts have held that the federal common-interest doctrine does not require that each party be represented by an attorney. *See, e.g.*, *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 72 (S.D.N.Y. 2009). Others have adopted a so-called separate-representation rule, requiring each party to be represented for shared communications to remain privileged. *See, e.g.*, *Cavallaro v. United States*, 153 F. Supp. 2d 52, 61 (D. Mass 2001).

Recognizing the "divided" authority on this "emerging issue," the American Bar Association recently adopted Resolution 102C at its 2017 Annual Meeting. *See* ABA, Resolution 102C, at 2 (2017), available at www.americanbar.org/content/dam/aba/directories/policy/2017_am_102C.docx. Resolution 102C "urges" courts to reject an absolute separate-representation requirement. *Id.* at 1. According to the ABA, if the parties to a common-interest arrangement have a "preexisting relationship," courts should not require the parties

to be separately represented to prevent waiver of the attorney-client privilege. *Id.* § (5).

At least one legal commentator advocates for a similar rule, rejecting the uncompromising separate-representation requirement that some courts have adopted. *See* Barker, *supra*, 53 Tort Trial & Ins. Prac. L.J. at 5. He argues that parties whose "preexisting relationship . . . creates duties to respect one another's interests" and "rights to participate in decision-making" "should be free to share privileged communications about their common interests" without waiving privilege, "even if only one of them is represented by counsel." *Id.*

B. This Is An Important Legal Issue, Particularly In Intellectual Property Law.

"[F]or the attorney-client privilege to be effective, it must be predictable." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 183 (2011). "[T]he attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

If federal law remains unsettled regarding whether the common-interest doctrine requires that each party be represented by an attorney, parties simply would not know whether their collaborative communications are privileged and would incur the additional—and frequently substantial—expense of retaining separate counsel to protect against possible waiver. Many individuals and small businesses,

however, cannot afford separate counsel. Consequently, the mere risk of a court applying a separate-representation requirement chills the sharing of important information and the formation of collaborative initiatives that bolster all sectors of the U.S. economy.

This issue is particularly important in patent matters falling within this Court's special expertise. It is both common and cost-effective for parties collaborating on a patent to use one party's attorney to provide legal advice. The discoverability of these communications is often critical in a patent case because the communications relate to substantive patent-law issues—*e.g.*, validity, infringement, claim construction, and inequitable conduct. *See In re Queen's Univ. at Kingston*, 820 F.3d 1287, 1291–92 (Fed. Cir. 2016). The business community—particularly those businesses engaged in collaborative intellectual-property endeavors—need guidance regarding whether the federal common-interest doctrine requires separate representation.

C. This Court's Past Mandamus Precedents Demonstrate That Mandamus Relief Is Warranted.

The issue presented falls squarely within this Court's mandamus jurisprudence. This Court has repeatedly resolved analogous privilege issues on mandamus review, including whether communications between parties and patent agents are privileged, *In re Queen's Univ. at Kingston*, 820 F.3d at 1291–92, whether federal law recognizes a settlement-negotiations privilege, *In re MSTG, Inc.*, 675

F.3d 1337, 1342–43 (Fed. Cir. 2012), whether invention records are privileged, *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 804–05 (Fed. Cir. 2000), the scope of a corporate predecessor's privilege waiver, *In re Optuminsight, Inc*., No. 2017–116, 2017 WL 3096300, at *2–3 (Fed. Cir. July 20, 2017), and what type of shared common legal interest is necessary to trigger the attorney-client privilege, *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1386–91 (Fed. Cir. 1996).

Like these issues, whether the federal common-interest doctrine requires separate representation is an unsettled and important privilege issue warranting mandamus review. Denying immediate review would allow the separate-representation issue to continue to evade appellate review, inviting "further inconsistent development of this doctrine." *In re Queen's Univ. at Kingston*, 820 F.3d at 1292. Because it is "virtually certain that future district courts will be asked to address" this same unresolved legal issue, it is "important[]" that the Court provide litigants and lower courts with much-needed guidance. *Id.* at 1294.

The need for this Court to provide guidance is not diminished simply because Ninth Circuit law applies in this case. Even where regional circuit law applies, this Court has granted mandamus to resolve similar unsettled privilege issues. *See, e.g.*, *In re Pioneer Hi-Bred Int'l, Inc*., 238 F.3d 1370, 1374 (Fed. Cir. 2001) (Eighth Circuit law); *In re Regents of Univ. of Cal.*, 101 F.3d at 1390 (Seventh Circuit law).

Amici urge this Court to take this opportunity to resolve whether the federal common-interest doctrine requires separate representation.

II. The Purposes Of The Attorney-Client Privilege And Common-Interest Doctrine Do Not Support A Separate-Representation Requirement.

In resolving this question, the Court should reject a separate-representation requirement because it would not promote the purposes of the attorney-client privilege. The attorney-client privilege "encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389. Without this privilege, "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher v. United States*, 425 U.S. 391, 403 (1976). Thus, the privilege ultimately assists the client in "mak[ing] well-informed legal decisions and conform[ing] his activities to the law." *In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1300–01 (Fed. Cir. 2006).

The common-interest doctrine prevents waiver of the attorney-client privilege where separate parties communicate to further "a matter of common legal interest." *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 578 (N.D. Cal. 2007). The doctrine "encourages parties with a shared legal interest to seek legal 'assistance in order to meet legal requirements and to plan their conduct' accordingly." *United States v. BDO Seidman, LLP*, 492 F.3d 806, 816 (7th Cir. 2007) (quoting *In re Regents of Univ. of Cal.*, 101 F.3d at 1390–91). "This planning serves the public

interest by advancing compliance with the law, facilitating the administration of justice and averting litigation." *BDO Seidman*, 492 F.3d at 816 (internal quotation omitted).

As explained below, however, a separate-representation requirement undermines these laudable objectives. The Court should reject it and apply a test that focuses on whether the communications occurred in the pursuit of a common legal interest.

A. The Common-Interest Doctrine Promotes The Free Flow Of Information Important To Legal Representation.

Like the attorney-client privilege itself, the common-interest doctrine ensures that the attorney has the information needed to provide effective representation. In *Upjohn*, the Supreme Court recognized that lower-level employees may possess the knowledge needed for an attorney to advise a corporate client. *See* 449 U.S. at 390–91. Similarly, non-clients in a collaborative relationship with a client may have information critical to an attorney's ability to provide adequate legal advice. Where the collaborator and the client's interests are aligned, counsel should be permitted to communicate freely with the collaborator to obtain the information needed for effective representation—just as corporate counsel may with respect to necessary lower-level employees within the client's organization.

As an example, consider a corporation that is collaborating with a smaller business on an invention and wishes to determine the patentability of their invention.

The corporation may have in-house counsel that it normally consults as to patentability. To give accurate legal advice, that counsel must "obtain[ ] relevant technical information from the inventors." *In re Spalding Sports Worldwide*, 203 F.3d at 806. That exchange of information is, of course, privileged when the inventors are employees of the client, *see id.*, but here, one inventor works for the smaller business rather than for the counsel's client. Because that inventor shares the same legal interest as the counsel's client (patenting the invention), the common-interest doctrine protects these communications as privileged.

That protection should not disappear merely because the smaller business has not engaged an attorney. Regardless of representation, the corporate attorney needs the information to provide legal advice that affects both businesses' common interest. Where the parties' legal interests are so aligned, it simply should not matter whether they have both engaged attorneys. Counsel should be free to pursue the most accurate information, and a collaborator should be free to contribute to the legal strategy affecting its interests without risking disclosure to third parties.

B. A Separate-Representation Requirement Would Heighten The Risk That Attorneys Will Receive Incomplete Information.

A separate-representation rule leaves an attorney with two options: do not seek information directly from the aligned party or risk direct communication. In such a scenario, consulting with the non-client risks both disclosing that specific legal advice to third parties *and* inviting battles over the scope of the waiver.

Because of these risks, many attorneys will choose not to communicate with the non-client collaborator. Perhaps at first glance this does not seem too great a sacrifice; there are, after all, many situations in which a non-client might have information that would be valuable to the attorney and the attorney still cannot have privileged communications with that party. But when the non-client is a party with a common legal interest, the disadvantages are too severe to justify such a result.

First, excluding non-client collaborators from communication with the attorney heightens the risk of misinformation. Where the attorney cannot seek information from a non-client, the attorney usually must rely solely upon the client's understanding. Depending on the arrangement between the client and the non-client, the client may convey incomplete or even inaccurate information, jeopardizing the reliability of the attorney's advice.

Second, allowing both the client and the collaborator to receive legal advice about their mutual interest encourages compliance with the law and an outcome that protects all parties' legal interests. If the collaborator never hears the attorney's advice, the collaborator may inadvertently jeopardize the client's legal position. Similarly, without the collaborator's input, the attorney may not be able to consider nuances of the collaborator's position in forming a legal strategy. This unnecessarily puts the collaborator at a disadvantage with respect to protecting its interest, and depending on the nature of the collaborator's position, the attorney's lack of

knowledge could jeopardize the client's legal interest as well. For these reasons, information possessed by a collaborator is often necessary to an attorney's effective representation.

C. The Nature Of The Common-Interest Doctrine Does Not Support A Separate-Representation Requirement.

The Federal Circuit and the Ninth Circuit do not require that both parties' attorneys actually be present for a communication to be protected under the common-interest doctrine. *See, e.g.*, *Evergreen Trading, LLC v. United States*, 80 Fed. Cl. 122, 143–44 (2007); *Waymo LLC v. Uber Techs., Inc.*, 319 F.R.D. 284, 289 (N.D. Cal. 2017). If the attorney need not be present for the communication, there is no logical reason why the attorney must have been engaged for the doctrine to apply. The second attorney's mere existence does not affect the content or purpose of the communication and therefore should not be relevant to the analysis of whether it is privileged.

* * *

Parties with aligned interests should be permitted to have privileged communications with an attorney regardless of whether they are each represented by counsel. The separate-representation requirement undermines the essential purposes of the attorney-client privilege and the common-interest doctrine. This Court should reject this artificial limitation on the privilege.

III. A Separate-Representation Requirement Is Inefficient And Would Unduly Burden And Deter Collaborative Efforts And Enterprises.

In addition to undermining the attorney-client privilege's purposes, the separate-representation requirement is impractical. Such a requirement does not recognize realities of the modern economy, in which "corporate counsel regularly find themselves advising sprawling multipartite enterprises working in tandem with others to achieve" innumerable goals. Jared S. Sunshine, *Seeking Common Sense for the Common Law of Common Interest in the D.C. Circuit*, 65 Cath. Univ. L. Rev. 833, 835 (2016). Corporate counsel often *must* share legal advice among collaborators to facilitate compliance with the law—particularly if those collaborators cannot afford separate counsel. As explained below, the separate-representation requirement thus has a chilling effect that can inhibit business ventures. And the rule has little upside; even applied robustly, the common-interest doctrine does not greatly inhibit discovery.

A. Reliance On A Single Attorney, Representing Only One Party, Is A Common Occurrence In Modern Business.

Modern business realities emphasize why separate representation should not be required. "In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations . . . constantly go to lawyers to find out how to obey the law." *Upjohn*, 449 U.S. at 392 (internal quotation omitted). Such consultations should be encouraged. *See id.* In multi-party business

arrangements, encouraging legal compliance requires sharing legal advice among cooperating entities. *See* Sunshine, *supra*, 65 Cath. Univ. L. Rev. at 837.

"Parties may wish to cooperate in literally innumerable legal situations outside of litigation: for example, ensuring that mutually beneficial advertising is not misleading, applying for patents, conducting due diligence, or avoiding any liability in the first place to prevent a lawsuit." *Id.* at 844. Manufacturing companies often have multiple joint ventures and subsidiaries in their supply chain and need to share privileged information to coordinate their operations. Indeed, *all* joint ventures may eventually need to share such information to ensure legal compliance.

In each of these situations, the parties' interests are clearly aligned. Yet, under the district court's rule, the parties' ability to safely share privileged information and legal advice would turn on whether they engaged their own counsel. Such a rule would chill the pursuit of the laudable goals described above. For example, imagine that a seller wanted to ensure that advertising was not misleading. The seller's counsel might want to contact the manufacturer for information relevant to whether the advertisement complies with applicable regulations. Under the common-interest doctrine that amici advocate, that communication could be privileged. But under the district court's rule, the communication would be discoverable, and a careful counsel may be concerned that merely asking such questions would imply wrongdoing. The

seller may therefore choose to evaluate the advertising in isolation, causing public dissemination of less accurate advertisements.

Rather than endorsing a rule that leads to such perverse outcomes, the Court should use the common-interest doctrine to *encourage* arrangements that facilitate compliance with the law by holding that federal law does not require separate representation. If a court lightly infers waiver in common-interest scenarios, it may deter the collaborative ventures themselves—a result that hurts both the parties and society as a whole by undermining a valuable source of innovation.

B. The Separate-Representation Requirement Is Inefficient And Unnecessarily Burdens Small Businesses.

It is wasteful and unnecessary to require a collaborator to hire separate counsel merely so that the other business's counsel may communicate freely without waiving the attorney-client privilege. Such a restrictive view of the common-interest doctrine "leads to unnecessary costs because it requires parties to unnecessarily duplicate work." Nell Neary, *Last Man Standing: Kansas's Failure to Recognize the Common Interest Doctrine*, 65 U. Kan. L. Rev. 795, 821 (2017).

The entire point of the common-interest doctrine is that the parties' interests are aligned. This "alignment of interests . . . can allow an unrepresented party to treat the advice of lawyers for other parties regarding the common interests as if those lawyers represented it, even though the lawyers owe the unrepresented party

no special duties." ABA Resolution 102C, *supra*. Therefore, no separate representation is necessary.

A rule requiring separate representation would particularly prejudice collaborators without resources to hire separate counsel. *See, e.g.*, *In re Queen's Univ. at Kingston*, 820 F.3d at 1300 n.7 (recognizing that the privilege rules should not prejudice "independent inventors who may not have the resources to hire a patent attorney"). For example, 247,961 of the 251,774 firms in the manufacturing sector in the United States in 2015 were considered small (*i.e.*, had fewer than 500 employees); three-quarters of those firms had fewer than 20 employees. National Association of Manufacturers, *Top 20 Facts About Manufacturing*, http://www.nam.org/Newsroom/Top-20-Facts-About-Manufacturing/ (last accessed Oct. 28, 2018) (citing U.S. Census Bureau, Statistics of U.S. Businesses). As explained above, manufacturers commonly rely on supply chains that require collaboration as to legal issues. It is disproportionately burdensome to expect such small businesses to hire separate counsel for every scenario calling for legal advice—especially when there is already counsel involved who can adequately advise the business on the legal issue at hand.

In determining whether the common-interest doctrine applies, the focus should be on "whether a 'sufficient commonality of interests' exists between the parties such that the privilege may be asserted." *In re Imperial Corp. of Am.*, 179

F.R.D. 286, 289 (S.D. Cal. 1998). The focus should *not* be on whether the parties went through a particular procedural hoop and engaged separate counsel. *See, e.g.*, *United States v. DiFrancesco*, 449 U.S. 117, 142 (1980) ("The exaltation of form over substance is to be avoided.").

C. A Lack Of A Separate-Representation Requirement Will Not Inhibit The Receipt Of Relevant Evidence.

Recognizing the common-interest doctrine without requiring separate representation does not unduly expand the attorney-client privilege. In any event, "[a]pplication of the attorney-client privilege . . . puts the adversary in no worse position than if the communications had never taken place." *Upjohn*, 449 U.S. at 395. "In this sense, the privileged communications kept from the court do not really represent a 'loss' of evidence since the client presumably would not have written or uttered the words in the first place had there been no attorney-client privilege." Paul R. Rice, et al., 1 Attorney-Client Privilege in the U.S. § 2:3 (updated Dec. 2017).

More importantly, the privilege does not greatly inhibit discovery of evidence because "it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn*, 449 U.S. at 395. Indeed, a majority of judges surveyed in one study acknowledged that the current attorney-client privilege "rarely" or "never" inhibited discovery in their courts, explaining, *inter alia*, that "the adversary usually can discover the facts directly from the employees or from other nonprivileged sources." Vincent C. Alexander, *The Corporate Attorney-Client*

Privilege: A Study of the Participants, 63 St. John's L. Rev. 191, 313–14 (1989). Thus, applying the privilege to communications between aligned parties with at least one attorney results only in legal advice and strategy being withheld—the same effect as the attorney-client privilege itself.

In the district court, Respondent relied primarily on case law that derives from state rules of evidence and the *Restatement (Third) of the Law Governing Lawyers* § 76, both of which stem from the 1974 edition of Uniform Rules of Evidence and do not reflect modern realities. Moreover, the Uniform Rules provide no reasoning or legal basis for the separate-representation requirement. As explained above, requiring separate representation is not a natural interpretation of the attorney-client privilege, would not promote the purposes of the privilege, and would unduly burden and deter important multi-business endeavors.

CONCLUSION

For these reasons, the Court should grant the mandamus petition and hold that the federal common-interest doctrine does not require separate representation.

Respectfully submitted,

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November 5, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a), I certify that this brief complies with the applicable type-volume limitation. According to the word count in Microsoft Word, there are 3,891 words in this brief.

/s/ E. Todd Presnell

Counsel for Association of Corporate Counsel, National Association of Manufacturers, and Illumina, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ E. Todd Presnell