14-1965-cv

United States Court of Appeals

for the

Second Circuit

GEORG F.W. SCHAEFFLER, SCHAEFFLER HOLDING GMBH & CO. KG, INA-HOLDING SCHAEFFLER GMBH & CO. KG, SCHAEFFLER HOLDING, LP,

Petitioners-Appellants,

– v. –

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF PETITIONERS-APPELLANTS

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IDENTITY, INTEREST AND AUTHORITY OF AMICUS[1]

The Association of Corporate Counsel ("ACC") is a global bar association of over 35,000 "in-house" attorneys who practice in the legal departments of more than 10,000 organizations in over 85 countries. The entities that ACC's members represent vary greatly in size, sector, and geographic region, and include public and private corporations, public entities, partnerships, trusts, non-profits, and other types of organizations. The Association represents the unique perspective of in-house lawyers, who advise their corporate clients on the full range of legal issues that arise in the course of day-to-day business. For over 30 years, ACC has advocated to ensure that courts, legislatures, regulators, bar associations, and other law or policy-making bodies understand the role of in-house counsel and the legal departments where they work. In particular, ACC has worked hard to ensure that a robust privilege protects clients' confidential communications with in-house lawyers, as the Supreme Court recognized in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). To that end, ACC regularly files *amicus curiae*

[1] No person other than *amicus* and its counsel authored this brief in whole or in part. No party, no party's counsel and no other person – other than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief. Federal Rule of Appellate Procedure 29(a) authorizes this brief. All parties have consented to the filing of this brief.

briefs in courts throughout the nation, including this Court, in support of the attorney-client and work product privileges.

ACC has a strong interest in the outcome of this case. To assist their corporate clients and render full and effective legal advice, in-house counsel and other legal advisors must be able to perform investigations that uncover all the facts and analyze all of the litigation risks of proposed business transactions. The work product doctrine and attorney-client privilege both serve to protect that ability. Because the decision below poses a significant threat to the application of these doctrines to the detriment of ACC's in-house members and the clients for which they work, ACC respectfully offers its views on this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal involves a simple but extremely important question to corporate clients and their legal advisors: whether the work-product doctrine protects legal analyses of anticipated litigation over proposed business transactions. For several reasons, the answer to that question should be an unqualified yes.

To begin with, the work product doctrine is necessary to ensure that legal advisors have the ability to provide effective legal advice without fear that their work will be used against their clients. Modern corporations

constantly need and rely on their attorneys for preventive legal advice – that is, an evaluation of the litigation and regulatory risks of business transactions before they are undertaken. Corporations need such advice in order to make well-informed decisions to stop, continue, or alter a planned transaction consistent with the requirements of the law. Preventive legal advice benefits both individual companies as well as society as a whole by minimizing future litigation risk and promoting compliance with the law.

As this Court has recognized, both the text and the purposes of the work product doctrine support its application to documents "created because of the prospect of litigation, analyzing the likely outcome of that litigation" – even if the documents were "created in order to assist with a business decision." *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998). The court below fundamentally misapplied *Adlman* in holding that a 321-page Ernst & Young memo ("EY Memo") that evaluated the potential arguments and outcomes of anticipated litigation over the tax treatment of a refinancing and restructuring transaction was not protected by the work product doctrine. According to the court, the memo was not created "because of" anticipated litigation since the client had a duty to obtain, and its tax advisors had a duty to provide, a legal analysis of the tax consequences of the transaction regardless of any anticipated litigation. *Schaeffler v. United States*, No. 13

CIV. 4864 GWG, 2014 WL 2208057, at *19 (S.D.N.Y. May 28, 2014). The court's reasoning is wholly flawed. A memo that analyzes the strengths and weaknesses of various arguments in concededly anticipated tax litigation falls squarely within the ambit of the work-product doctrine. The fact that corporate clients have a need and duty to seek guidance on the law does not and should not strip such analyses of work product protection when done in anticipation of actual litigation.

At bottom, the IRS is seeking to obtain the defendant's assessment of the "legal vulnerabilities" of its litigation positions "in order to make sure it does not miss anything in crafting its legal case against the [defendant]." *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C. Cir. 1987). "This is precisely the type of discovery the [Supreme] Court refused to permit in *Hickman v. Taylor*." *Id*.; *see also Menasha Corp. v. U.S. Dept. of Justice*, 707 F.3d 846, 847 (7th Cir. 2013) (work product doctrine is based on the deeply felt notion that the opposing party "shouldn't be allowed to take a free ride on the other party's research, or get the inside dope on that party's strategy, or . . . invite the [trier of fact] to treat candid internal assessments of a party's legal vulnerabilities as admissions of guilt") (citation and internal quotation marks omitted).

The district court's ruling on attorney-client privilege in this case is equally troubling. The attorney-client privilege is critical to enable corporate clients to engage in the full and frank communication necessary to obtain effective legal advice and to encourage their compliance with the law. The common interest doctrine furthers those important interests by protecting the sharing of privileged communications among parties who share a common interest. *See United States v. Schwimmer*, 892 F.2d 237, 243–44 (2d Cir. 1989). In holding that the common interest doctrine did not apply to Schaeffler's sharing of the EY Memo with the Bank Consortium, the district court applied an unduly narrow construction of doctrine that is contrary to not only the interests of corporate clients but society as a whole.

ACC is deeply concerned about the precedent in this case for both its national and international membership. If allowed to stand, the decision will greatly reduce the ability of in-house counsel to provide the legal advice necessary to guide their clients' behavior and promote corporate compliance with the law. The decision will chill corporate lawyers from being as meticulous as they need to be, as well as deprive managers of the detailed legal assessment that they need to make good decisions upon which countless other stakeholders will rely. To ensure that business entities and their counsel are able to fully analyze the legal consequences and future

litigations risk of proposed transactions, ACC respectfully urges this Court to reverse the decision below and uphold the application of the work product and attorney-client privilege doctrines in this case.

ARGUMENT

I. The Work Product Doctrine Protects Legal Analyses Of Anticipated Litigation That Are Performed To Assist In The Making Of A Business Decision

A. Preventive Legal Analysis Of The Litigation Risks Of Proposed Business Transactions Is Necessary And Desirable In Today's Corporate World

Preventive legal advice is indispensable in the modern business world. Unlike individuals, corporations are constantly exposed to a wide range of litigation and regulatory risk. Even operational decisions made on a daily basis by small companies – *e.g.*, marketing, sales or purchases, employment policies, workplace-safety – can carry entity-threatening potential legal risks. And complex decisions taken by the largest companies – *e.g.*, mergers and acquisitions, stock or bond issuances, regulatory compliance (including tax treatment advice), entry into foreign markets – come with immense legal complications. When these transactions are mishandled, companies can face government investigations, civil and criminal penalties, and private lawsuits. These complexities are often amplified by legal uncertainty, because it may be unclear whether a certain course is legal or questionable, whether an

action taken will raise new legal concerns post hoc, or whether subsequent developments will unfold and affect the wisdom of the approach taken in unanticipated ways.

Because corporate managers act against this gray background, they must anticipate and plan to avoid litigation risks for practically every important decision they make. A deal might implicate antitrust or securities laws, a new technology might involve copyright or patent issues, an employment policy could have unintended impacts on a protected class, a new product might lead to tort liability – all of which could lead to costly litigation. *See In re Sealed Case*, 146 F.3d 881, 886 (D.C. Cir. 1998). To account for such contingencies, it is essential for corporate managers to understand all the legal risks of a proposed business transaction so that they can make an informed decision about whether and how to proceed.

Thus, in the modern corporate world, corporations and their legal advisors necessarily take a proactive approach to litigation through preventive counseling. Before initiating any important transaction, corporations now ask their attorneys for advice about the legal risks involved. Chayes & Chayes, *Corporate Counsel and the Elite Law Firm*, 37 Stan. L. Rev. 277, 283 (1985). Counsel can provide such advice only after thoroughly investigating the facts and candidly analyzing the legal issues.

This process enables companies to structure their business decisions to avoid or at least minimize future litigation risk.

The public-policy benefits of preventive legal advice and accurate financial risk assessment are substantial. Preventive legal advice helps companies follow the law, serves stakeholders who rely on the accuracy of companies' financial reporting, reduces litigation exposure and promotes accountability and responsibility in corporate governance. As scholars have generally observed, "[l]egal advice provided when individuals are deciding how to act will tend to be socially beneficial" because it leads them "to behave desirably." Kaplow & Shavell, *Legal Advice About Information to Present in Litigation*, 102 Harv. L. Rev. 565, 597 (1989). That is especially true in the corporate context, since preventive legal advice will help companies defuse potentially serious legal consequences. Such self-policing will surely pay broad dividends across the system: the company will avoid (or be better enabled to address) litigation; its shareholders will not suffer a diminution in the value of their investments; and the government is less likely to have to launch investigations or focus on expensive remedial actions.

B. The Work Product Doctrine Is Necessary To Ensure Thorough And Accurate Preventive Legal Advice

The work product doctrine, which protects documents "prepared in anticipation of litigation" (Fed. R. Civ. P. 26(b)(3)), is crucial to ensure that corporate clients receive effective preventive legal advice regarding proposed business transactions. As this Court explained, the work product rule "preserve[s] a zone of privacy in which a lawyer can prepare and develop legal theories and strategies 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." *Adlman*, 134 F.3d at 1196 (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)). In particular, the doctrine enables attorneys to "assemble information, sift what [they] consider[ ] to be the relevant from the irrelevant facts, prepare [their] legal theories and plan [their] strateg[ies] without undue and needless interference." *Hickman*, 329 U.S. at 511. "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." *Id*. Hence, work product protection guards against the "[i]nefficiency, unfairness and sharp practices" that would otherwise "inevitably develop in the giving of legal advice." *Id*.; *see also In re Sealed Case*, 107 F.3d 46, 51 (D.C. Cir. 1997) ("[l]ike the attorney-client privilege, work product immunity promotes the rendering of effective legal services"); *Woodruff v. Am. Family Mut. Ins. Co.*, 291 F.R.D. 239, 247 (S.D.

Ind. 2013) (work product rule allows "counsel for both sides [to] fully prepare and present their clients' best case without the stifling self-editing that would be necessary if an attorney's work product were subject to unchecked discovery") (citation and internal quotation marks omitted). The work product doctrine also serves society as a whole by encouraging companies to comply with the law. *See In re Sealed Case*, 146 F.3d at 887 (applying work product rule to "pre-claim stage of anticipated litigation" encourages "voluntary compliance with the law").

Companies that employ or retain legal advisors to provide counsel regarding the litigation risks of planned business decisions need strong work product protection if their advisors' counsel is to be thorough and candid. Indeed, the need may be even greater in that context than in the trial setting because preventive lawyering presents unique challenges. There is usually no lawsuit to frame the preventive inquiry and no discovery to guide the factual investigation. Instead, when a company asks its attorney for preventive advice, the lawyer must piece together the necessary facts, laws, and issues from scratch, often under severe time and business pressure. To do this well, the lawyer needs complete confidence that she can prepare a thorough analysis without jeopardizing her client's interests – in particular, she needs to be sure that her work will not later end up in the hands of an

adverse party who could potentially use the analysis against her client. On the other hand, when a lawyer fears that her work product will not be protected, she will "not likely risk" being entirely candid and comprehensive, "thus severely limiting [her] ability to advise clients effectively." *In re Sealed Case*, 146 F.3d at 886.

Work product protection is particularly important to the work carried out by in-house attorneys, who are obligated as corporate gatekeepers to provide preventive legal advice. In-house attorneys are particularly well positioned to help their companies comply with the law. They are "intimately familiar" with the company's operations. Kim, *Dual Identities & Dueling Obligations*, 68 Tenn. L. Rev. 179, 199-200 (2001). Unlike outside counsel, who often are hired only after a crisis erupts, in-house lawyers tend to be involved in every stage of a company's decision-making process, as well as a wider range of transactions, many of which outside counsel never see or might not understand as fully because they are not integrated in the company's daily processes. *See* Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 St. Louis U. L.J. 989, 1006-1019 (2007). Equally important, in-house attorneys usually have a trusted relationship with corporate managers inside the company and a regular place at the table when business decisions are

being made. They have access not only to information transmitted through formal channels (such as board meetings) but also to "informal, back-channel information that flows around the company water cooler." Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 Emory L.J. 1011, 1019 (1997). Thus, when they provide preventive legal advice, in-house attorneys can and do bring to bear their full institutional expertise and knowledge. But if their work product will be discoverable, such thoroughness will not be in the company's best interests in terms of limiting risk or liability.

C. This Court Has Properly Applied The Work Product Doctrine To Analyses Of Anticipated Litigation That Are Prepared For A Business Purpose

Recognizing the work product doctrine's important role of protecting preventive legal advice, this Court specifically held that the doctrine covers documents "created because of the prospect of litigation, analyzing the likely outcome of that litigation" even if they were "created in order to assist with a business decision." *Adlman*, 134 F.3d at 1202. This Court explained that corporations will often ask counsel for legal advice on "whether to undertake [a] transaction and, if so, how to proceed with the transaction." *Id*. at 1199. To the extent such work "discusses the attorney's litigation strategies [and] appraisal of likelihood of success," it falls "squarely" within work product protection. *See id*. at 1200; *see also id*. ("Rule [26(b)(3)] takes pains to grant

special protection to . . . documents setting forth legal analysis"). Indeed, given that Federal Rule of Civil Procedure 26(b)(3) "has explicitly established a special level of protection against disclosure for documents revealing an attorney's (or other representative's) opinions and legal theories concerning litigation, it would oddly undermine its purposes if such documents were excluded from protection merely because they were prepared to assist in the making of a business decision expected to result in the litigation." *Id*.

As this Court observed, failure to protect legal analyses of anticipated litigation over proposed business transactions would "impose[] an untenable choice upon a company": "[i]f the company declines to make such analysis or scrimps on candor and completeness to avoid prejudicing its litigation prospects, it subjects itself and its co-venturers to ill-informed decisionmaking." *Id*. "On the other hand, a study reflecting the company's litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in the litigation." *Id*. This Court held that it "perceive[d] nothing in the policies underlying the work-product doctrine or the text of the Rule itself that would justify subjecting a litigant to this array of undesirable choices." *Id*.; *see also id*. ("We see no basis for adopting a

test under which an attorney's assessment of the likely outcome of litigation is freely available to his litigation adversary merely because the document was created for a business purpose rather than for litigation assistance.").

Other courts have similarly recognized that work product protection "reach[es] documents prepared 'because of litigation' even if they were prepared in connection with a business transaction or also served a business purpose." *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1082 (N.D. Cal. 2002). The *Chevron* court elegantly explained why that is and should be the case:

> An attorney's (or a party's) reasoning or research (factual or legal) about anticipated litigation should not be discoverable simply because the work also had to be undertaken to facilitate or consider a business transaction. The expectation of litigation is either real or it is not. Whether the party prepared for that litigation before conducting a transaction (to inform its business affairs) or implemented the transaction "in the dark" and then prepared for the litigation that would surely arise from it does not alter the imminence or "realness" of the expectation of litigation. Additionally, refusing to protect litigation analyses prepared prior to implementing a transaction will discourage parties from making every effort to structure their deals in unobjectionable ways (to the extent possible) and could needlessly increase litigation.

Id.; *accord United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010); *United States v. Roxworthy*, 457 F.3d 590, 598-99 (6th Cir. 2006); *Kellogg USA, Inc. v. B. Fernandez Hermanos, Inc.*, 269 F.R.D. 95, 100 (D. Puerto Rico 2009); *Commissioner of Revenue v. Comcast Corp.*, 901 N.E.2d

1185, 1203–1205 (Mass. 2009); *Wells Dairy, Inc. v. American Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 47-48 (Iowa 2004); 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE, § 2024 (2d ed. 2009) ("'[d]ual purpose' documents created because of the prospect of litigation are protected even though they were also prepared for a business purpose").

D. The District Court's Decision Conflicts With Adlman And The Purposes Of The Work Product Doctrine

The documents at issue in this case fall directly within the work product doctrine set forth in *Adlman*. As the district court assumed, "Schaeffler believed that litigation was highly probable in light of the significant and difficult tax issues that were raised by the planned refinancing and restructuring." *Schaeffler*, 2014 WL 2208057, at *16. The EY Memo "provide[d] detailed legal analysis of the federal tax issues implicated by each step [of the proposed restructuring transaction]," making "reference to statutes, IRS regulations, IRS private letter rulings, other administrative materials, and case law." *Id*. Additionally, "in explaining its recommendations for handling particular aspects of the restructuring and refinancing measures, the memorandum considers at great length the arguments and counter-arguments that could be made by Schaeffler and the IRS with regard to the appropriate tax treatment of these measures." *Id*.

Thus, the EY Memo "may be characterized as providing an 'opinion of the risks and probable outcome of litigation or other adversarial proceedings against the IRS in relation to the 2009 and 2010 refinancing and reorganization.'" *Id.* at *18 (citation omitted).

Given that the EY Memo reveals Schaeffler's legal strategies and analyzes the likelihood of success of various legal positions in prospective litigation, it falls within the most protected category of work product. Both the Supreme Court and this Court have "made clear that documents that 'tend[ ] to reveal the attorney's mental process' – described by commentators as 'opinion work product,'. . . – receive special protection not accorded to factual material." *Adlman*, 134 F.3d at 1197 (citing *Upjohn*, 449 U.S. at 399). "Special treatment for opinion work product is justified because, '[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case.'" *Adlman*, 134 F.3d at 1197 (citation omitted). Thus, permitting discovery of the EY Memo in this case would undermine the central purpose of the work product doctrine – to protect documents that reveal an attorney's opinions and legal theories about potential litigation.

Although the court below acknowledged that Schaeffler and his advisors in fact anticipated litigation over the tax treatment of the restructuring transaction, the court denied work product protection to the EY Memo on the ground that it was not created "because of" that litigation. *See Schaeffler*, 2014 WL 2208057, at *13, *19. The court explained that "any sophisticated businessperson engaging in a complex financial transaction will naturally wish to obtain advice on the relevant tax laws so that the transaction can be structured in such a way as to receive the most favorable tax treatment possible. " *Id*. at 17. Given the "assumption that Schaeffler is a rational businessperson who routinely makes efforts to comply with the law, . . . even had he not anticipated an audit or litigation with the IRS, he still would have had to obtain the type of legal assistance provided by Ernst & Young to carry out the refinancing and restructuring transactions in an appropriate manner." *Id*. The court further emphasized that Treasury regulations imposed on Ernst & Young "a responsibility to consider in full the relevant legal issues regardless of whether they anticipated an audit and ensuing litigation with the IRS." *Id*. at *18. In view of Schaeffler's duty to obtain and his legal advisor's duty to opine on whether the restructuring transaction complied with the tax laws, the court found that the memo "would have been produced in the same form irrespective of any concern

about litigation." *Schaeffler*, 2014 WL 2208057, at *19; *see also id*. ("had Schaeffler's tax advisors been asked to opine on the legal implications of the transactions with the knowledge that an audit or litigation would not occur, they 'would have' used the same methodology to render tax advice: that is, a close analysis of the relevant legal authorities to determine how various tax positions would be tested in the crucible of litigation").

The district court's reasoning is fundamentally misguided both as a matter of precedent and public policy. As this Court explained in *Adlman*, documents "created because of the prospect of litigation, analyzing the likely outcome of that litigation" are protected even if they were "*created in order to assist with a business decision*." 134 F.3d at 1202 (emphasis added). To be sure, this Court acknowledged that the "'because of' formulation . . . withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Id*. But as cases subsequent to *Adlman* have made clear, this statement was meant to distinguish documents prepared with "an eye toward litigation" (and thus protected under *Hickman*, 329 U.S. at 511) from documents prepared primarily for business or for other non-litigation purposes. The "similar form" inquiry does not and should not exclude core opinion work product that reveals a party's legal

theories and analyses regarding expected litigation. *See Gruss v. Zwirn*, 276 F.R.D. 115, 129 (S.D.N.Y. 2011), *rev'd in part on other grounds*, 2013 WL 3481350 (S.D.N.Y. Jul. 10, 2013) ("[t]he cases dealing with the 'essentially similar form' inquiry deal primarily with documents containing factual statements"; the inquiry does not apply to interview notes that "reveal some focus on litigation strategy"); *Chevron*, 241 F. Supp. 2d at 1084 (work product doctrine protected dual purpose documents that discussed "alternative ways to structure the transaction where those alternatives reflect thinking about the IRS' expected reaction to and treatment of the deal").

Indeed, it is difficult to imagine how a memo analyzing potential claims, defenses and strategies in anticipated litigation would have been prepared in the same form absent any concern about litigation. *See Assured Guar. Mun. Corp. v. UBS Real Estate Securities Inc.*, Nos. 12 Civ. 1579(HB)(JCF), 12 Civ. 7322(HB)(JCF), 2013 WL 1195545, at*8 (S.D.N.Y. Mar. 25, 2013) ("If UBS can point to any documents authored by William & Connolly or its agents that were 'specifically directed to litigation strategy or possible litigation defenses[,] under *Adlman*, these [documents] would fall within work product protection, because they would not have been produced in the form irrespective of the threat of litigation'") (citation omitted); *United States v. Textron, Inc.*, 577 F.3d 21, 42 (1st Cir. 2009)

(Torruella, J., dissenting) (tax accrual workpapers that "anticipate[d] and analyze[d] the consequences of possible litigation" clearly would not have "be[en] the same at all had Textron not anticipated litigation" and thus "under the 'because of' test, as applied in *Adlman* and the many circuit courts that have followed it, these documents were not prepared "irrespective" of the prospect of litigation"). While there may be a question of whether a party in fact really anticipated litigation, so long as it did (as the district court assumed here), an analysis of that litigation should be protected. Contrary to the district court's view, it is an inappropriate and illogical question to ask whether a legal analysis of anticipated litigation "would have been produced in the same form irrespective of any concern about litigation." *Schaeffler*, 2014 WL 2208057, at *19.

Thus, most courts have properly recognized that legal analyses of prospective litigation prepared for both litigation and business purposes are entitled to work product protection. *See, e.g.*, *Deloitte LLP*, 610 F.3d at 139 (work product rule applied to memo that contained "thoughts and analyses by legal counsel" regarding likely litigation over a corporate transaction); *Roxworthy*, 457 F.3d at 594 (corporation's internal memoranda concerning tax treatment of certain transactions was work product where it concerned IRS's likely legal challenges to treatment, possible defenses, and likely

outcomes); *Chevron*, 241 F.Supp.2d at 1084 ("documents that consist of legal analyses by Chevron, its attorneys or another representative with respect to anticipated litigation by the IRS are clearly protected by the work product doctrine"); *compare Allied Irish Banks v. Bank of America, N.A.*, 240 F.R.D. 96, 109 (S.D.N.Y. 2007) (noting that "if AIB could point to any particular documents authored by Wachtell that were 'specifically directed to litigation strategy or possible litigation defenses[,] under *Adlman*, these [documents] would fall within work product protection, because they would not have been produced in the same form irrespective of the threat of litigation'") (citation omitted). Because the EY Memo provides a legal analysis of the likelihood of success of various positions in anticipated litigation, it constitutes core opinion work product and is entitled to full protection as such.

In this connection, the district court went significantly astray in concluding that the EY Memo "would have been produced in the same form irrespective of any concern about litigation" because the client had a duty to seek, and its legal advisors had a duty to give, legal guidance regardless of whether any actual litigation was anticipated. *Schaeffler*, 2014 WL 2208057, at *18-*19. To begin with, neither the Treasury Regulations relied on by the district court, nor any other authority, required the detailed written analysis

provided by Schaeffler's legal advisors of the various possible arguments and outcomes of future litigation with the IRS. What is more, drawing a distinction between materials prepared "to comply with the law" and those prepared "with an eye toward litigation" is an unworkable and nonsensical task. *Cf. In re Kellogg Brown & Root, Inc.*, No. 14–5055, 2014 WL 2895939, at *4 (D.C. Cir. Jun. 27, 2014) (explaining that for purposes of the attorney-client privilege, distinction between a purpose to comply with regulatory requirements and a purpose to provide or obtain legal advice is "a false dichotomy"). Making such a distinction would also undermine one of the salutary purposes of the work product doctrine – *i.e.*, to promote compliance with the law.

Finally, given that all companies have a duty to comply with the law, the district court's rationale would effectively gut work product protection for all dual-purpose documents. As one federal judge explained, "correctly formulated, [the 'similar form'] exception should be understood as simply clarifying the rule that dual purpose documents are protected, though 'there is no work-product immunity for documents prepared in the regular course of business *rather than* for purposes of the litigation.'" *Textron*, 577 F.3d at 42 (Torruella, J., dissenting) (citation omitted) (emphasis added). If the law

were otherwise, the exception would "swallow[] the rule protecting dual purpose documents." *Id*.

E. Unless Reversed, The Decision Below Will Significantly Impair The Ability Of Corporate Clients To Obtain Effective Legal Advice And Assess Future Litigation Risks

If allowed to stand, the decision below will undermine the ability of legal advisors to assess and give effective legal advice regarding the litigation risks of business decisions. In particular, clients will be prevented from obtaining thorough and necessary legal advice and candid legal assessments in writing. *See In re Sealed Case*, 146 F.3d at 886 (failure to accord work product protection will discourage legal advisors from "engaging in the writing, note-taking, and communications so critical to effective legal thinking"). And that perverse incentive will plainly disadvantage corporate clients and their stakeholders by diminishing clients' ability to make informed decisions and increasing their exposure to litigation. Deterring legal advisors from reducing their thought processes and analysis to writing virtually ensures that the advice ultimately given to the client will not be as thorough as it should be. No company should suffer the consequences of this chilled relationship - especially since improved

corporate governance is one of the central public-policy objectives of the day.[2]

The logical extension of the decision below is that documents created by legal advisors in complex transactions are never protected work product, because taxpayers always have an independent duty to take efforts to comply with the federal tax laws independent of any anticipation of litigation. The inability to protect mental impressions, conclusions, opinions and theories concerning potential IRS examinations and litigation will create significant uncertainty for businesses and compromises the ability of companies to make informed decisions and comply with the tax laws. If affirmed, the lower court's misguided construction of the work product doctrine is likely to impair the ability of companies to obtain effective legal advice not only on the tax aspects of proposed transactions but other legal aspects of transactions well.

[2] The attorney-client privilege is not sufficient to protect preventive legal analysis. Although the attorney-client privilege and the work product doctrine sometimes overlap, the two are not substitutes. The work product doctrine "actually differs dramatically from the [attorney-client] privilege in nearly every respect." 2 Spahn, *The Work Product Doctrine: A Practitioner's Guide* § 8.1, at 423 (2007). The attorney-client privilege protects communications between attorneys and clients, but the legal and factual analysis that supports preventive advice will often derive from a legal advisor's own thinking (and not his communications). Further, the attorney-client privilege often does not apply because "there was some good reason to show it" to third parties. *Adlman*, 134 F.3d at 1200 n.4. Because "[t]he attorney-client privilege and the work product rule serve different objectives[,] [t]he fact that a document does not come within the attorney-client privilege should not result in the deprivation of the protection accorded by Rule 26(b)(3)." *Id*.

* * *

This Court can and should make clear that companies are not required to turn over legal analyses that reveal opinions, analyses, and impressions regarding anticipated litigation over a proposed business transaction. Analyses of potential claims, defenses and strategies in future litigation lie at the heart of the work product doctrine. Allowing the IRS to discover such analyses would put in the hands of the agency a roadmap of the thoughts and opinions of legal advisors for the corporation, which the agency can then unfairly use against the company. The public-policy concerns of encouraging effective legal advice and compliance with the law far outweigh the policy concern of "finding the truth" – particularly since the truth is discoverable in any event through the underlying facts of the transaction.

II. The Common Interest Doctrine Extends To Parties To A Business Transaction That Have A Common Interest In Anticipated Litigation

A. The Attorney-Client Privilege Serves Important Societal Interests In The Corporate Context

The attorney-client privilege is "the oldest of the privileges for confidential communications known to the common law." *Upjohn*, 449 U.S. at 389. The privilege is based on the recognition that "sound legal advice or advocacy . . . depends upon the lawyer's being fully informed by the client." *Id*. By ensuring confidentiality, "the privilege encourages clients to make

'full and frank' disclosures to their attorneys, who are then better able to provide candid advice and effective representation." *See Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 108 (2009) (citing *Upjohn*, 449 U.S. at 389).

Significantly, the privilege not only helps clients obtain higher quality legal assistance, but "promote[s] broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S. at 389; "In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential." *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) (internal quotations omitted). Thus, the privilege serves society as a whole by promoting compliance with the law through effective counseling. *See Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 621 (7th Cir. 2009) ("Confidential legal advising promotes the public interest 'by advising clients to conform their conduct to the law and by addressing legal concerns that may inhibit clients from engaging in otherwise lawful and socially beneficial activities.'") (citation omitted); *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1036–37 (2d Cir.1984) ("The availability of sound legal advice inures to the benefit not only of the client who wishes to know his options and responsibilities in given circumstances,

but also of the public which is entitled to compliance with the ever growing and increasingly complex body of public law.").

The need to protect open communication between corporations and their counsel is more critical for corporations now than ever before. We are at a time when legislatures and regulators, not to mention the public generally, place increasing emphasis on corporate accountability, transparency, and compliance with both the letter and the spirit of the law. Corporations are subject to an ever-increasing array of securities, tax, labor, financial, health care, environmental, trade and other regulations. Publicly traded companies are also required to comply with the complex corporate governance and reporting standards imposed by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) and the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). In order to comply with all of these regulations, corporations must be able to communicate fully and candidly with their attorneys.

B. The Common Interest Doctrine Applies To Parties That Share A Common Interest About A Legal Matter Even If They Cannot Be Directly Sued

ACC fully agrees with Schaeffler's position that the court below erroneously held that the documents at issue were not protected by the common interest exception to the attorney-client privilege. Although

disclosure of privileged communications to a third party typically waives the privilege, the common interest doctrine protects the sharing of privileged communications among parties who share a common interest about a legal matter and work jointly to further that interest. As this Court explained, "[t]he need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter." *Schwimmer*, 892 F.2d at 243 (citations and internal quotation marks omitted). Thus, the common interest doctrine affords parties "a safe harbor in which they can openly share privileged information without risking the wider dissemination of that information." *United States Fire Ins. Co. v. Bunge North America*, No. 05–2192 JWL–DJW, 2006 WL 3715927, at *1 (D. Kan. Dec. 12, 2006).

The common interest rule furthers the important policies underlying the attorney-client privilege by fostering the full and open communication necessary for attorneys to provide effective legal counsel to business clients and for clients to conform their actions to the law. As the Seventh Circuit explained,

> Applying the common interest doctrine . . . encourages parties with a shared legal interest to seek legal assistance in order to meet legal requirements and to plan their conduct accordingly. This planning serves the public interest by advancing compliance with the law, facilitating the administration of justice and averting litigation. Reason and experience

> demonstrate that joint venturers, no less than individuals, benefit from planning their activities based on sound legal advice predicated upon open communication.

United States v. BDO Seidman, LLP, 492 F.3d 806, 816 (7th Cir. (Ill. 2007) (citations and internal quotation marks omitted).

The district court ruled that the common interest rule did not protect the sharing of information between Schaeffler and the Bank Consortium principally because the Consortium itself was not at risk for being sued by the IRS. That ruling lacks basis in the law. It is undisputed that the parties had a joint interest in structuring the refinancing transaction to avoid or minimize tax liability in anticipated future litigation. That is all that is required to apply the common interest doctrine. *See BDO Seidman*, 492 F.3d at 815-16 (common interest doctrine applies "where the parties undertake a joint effort with respect to a common legal interest"); *United States v. United Technologies Corp.*, 979 F. Supp. 108, 112 (D. Conn. 1997) (common interest doctrine applied where parties "shared a common legal interest in structuring [a joint venture] in such a way as to minimize their tax liability" and where "nearly all the documents pertain to the development of a common legal strategy regarding the tax structure of [the joint venture]").

That the Bank Consortium could not be individually sued by the IRS for Schaeffler's tax liabilities does not negate the application of the common

interest rule. As one court recently recognized, the common interest doctrine should apply so long as the "communications between attorneys for different parties" are "made due to actual or anticipated litigation for the purpose of furthering a common interest." *O'Boyle v. Borough of Longport*, 94 A.3d 299, 317 (N.J. Jul. 21, 2014) (citation omitted). In other words, the doctrine should apply so long as the parties have a common interest *about* a legal matter; there should be no requirement that "the common interest [actually] be legal rather than purely commercial." *Id*.; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76(1) cmt. e (2000) (common interest may be "legal, factual, or strategic in character").

What is more and in any event, the Consortium in fact had a "legal" as opposed to a purely commercial interest in the outcome of the anticipated litigation with the IRS insofar as it effectively subordinated its own claims for debt repayment to the resolution of Schaeffler's U.S. tax liabilities, and retained the power to consent to major decisions in any IRS proceedings like payment, filing suit for refund, or settlement. As Appellant's brief demonstrates, numerous federal courts have recognized that an insurer shares a common legal interest with the insured in the outcome of litigation, even when the insurer is not a party to the litigation and solely has an interest in funding the defense or in the potential ultimate liability subject to

litigation. *See* Appellant's Brief at 49-50 (citing cases). Moreover, federal courts have repeatedly held that entities whose sole interest in a case is to fund the litigation (e.g., commercial claim funders or patent monetization consultants) can be subject to the common legal interest rule. *See id*. at 50 (citing cases). The reasoning of these cases applies with equal force to protect the sharing of the communications at issue here.

In sum, the district court's crabbed interpretation of the common interest doctrine fails both as a matter of law and policy. The fact that the Bank Consortium was not at risk of being directly sued by the IRS for the tax liabilities at issue does not vitiate the reality that it and Schaeffler "share[d] a common interest about a legal matter" and worked jointly to further it. *Schwimmer*, 892 F.2d at 243 (citation omitted). By hampering the ability of parties to business transactions to communicate with each other regarding anticipated litigation risks, the district court's decision "restricts communication between [parties to business transactions], erects barriers to business deals, and increases the risk that [parties] will not have access to important information." *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308, 311 (N.D. Cal. 1987) (application of common interest rule is necessary to "create an environment in which businesses can share more freely information that is relevant to their transactions"; "[t]his policy

lubricates business deals and encourages more openness in transactions of this nature"). Because the decision below significantly erodes the benefits provided by the attorney-client privilege in the business context, it should be reversed as a matter of law.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because this Brief contains 6,987 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), as counted by the Microsoft Word processing system used to produce this Brief.

I further certify that this Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this Brief has been prepared in a proportionally spaced typeface using Garamond in 14 points.

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