

No. 09-30524

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

ASSET FUNDING GROUP, L.L.C., *et al.*,
Plaintiffs-Appellees,
v.
ADAMS AND REESE L.L.P.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
No. 2:07-CV-2965

**BRIEF FOR DRI—THE VOICE OF THE DEFENSE BAR; VINSON & ELKINS LLP;
ANDREWS KURTH LLP; O'MELVENY & MYERS LLP; MORRISON & FOERSTER
LLP; BINGHAM McCUTCHEN LLP; WILSON SONSINI GOODRICH & ROSATI
LLP; PAUL, HASTINGS, JANOFSKY & WALKER LLP; DECHERT LLP; DLA PIPER
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PC; KING & SPALDING LLP; HUGHES HUBBARD & REED LLP; GREENBERG
TRAURIG LLP; AND WEIL, GOTSHAL & MANGES LLP AS *AMICI CURIAE*
IN SUPPORT OF APPELLANT AND URGING REVERSAL**

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rules 26.1(a) and 29(c) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 28.2.1, *amici* state as follows:

The number and style of this case is No. 09-30524, *Asset Funding Group, L.L.C., et al. v. Adams and Reese L.L.P.* None of the *amici* has a parent corporation, and no publicly held company owns 10% or more of any of their stock. The following list of interested persons is based in part on the parties identified in Appellant's opening brief.

1. Plaintiffs-Appellees Asset Funding Group, LLC; AFG Investment Fund 2, LLC; Scobar Adventures, LLC; and HW Burbank, LLC; each a separate California limited liability company;
2. Jeffrey Hayden of Asset Funding Group, LLC;
3. Barry Beitler of Asset Funding Group, LLC;
4. The respective members of Plaintiffs-Appellees Asset Funding Group, LLC; AFG Investment Fund 2, LLC; Scobar Adventures, LLC; and HW Burbank, LLC;
5. Defendant-Appellant Adams and Reese LLP;
6. John M. Duck, Esq., of Adams and Reese LLP;
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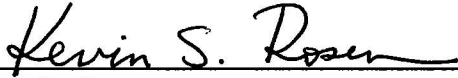
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10. Martin A. Stern, Esq., Claims Counsel for Adams and Reese LLP;
11. Don S. McKinney, Esq., Assistant Claims Counsel for Adams and Reese LLP;
12. The partners of Adams and Reese LLP;
13. Attorneys' Liability Assurance Society, Inc., the insurer of Defendant-Appellant Adams and Reese LLP;
14. L.J. Hymel, Jr.; Michael Reese Davis; and Tim P. Hartdegen of Hymel, Davis & Petersen, LLC, and Steven J. Katzman of Bienert, Miller, Weitzel & Katzman, LLC, attorneys for Plaintiffs-Appellees;
15. Daniel Lund, Ashley L. Belleau, and Ryan M. McCabe of Montgomery, Barnett, Brown, Read, Hammond & Mintz, LLP, attorneys for Defendant-Appellant;
16. Kevin S. Rosen, Thomas H. Dupree, Jr., Nikesh Jindal, and Thomas M. Johnson, Jr. of Gibson, Dunn & Crutcher LLP, attorneys for *amici*;
17. Honorable Ivan L.R. Lemelle, United States District Judge, United States District Court for the Eastern District of Louisiana;
18. Honorable Karen Wells Roby, United States Magistrate Judge, United States District Court for the Eastern District of Louisiana;
19. DRI—The Voice of the Defense Bar;

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24. Bingham McCutchen LLP;
25. Paul, Hastings, Janofsky & Walker LLP;
26. Dechert LLP;
27. DLA Piper US LLP;
28. Baker & McKenzie LLP;
29. Pillsbury Winthrop Shaw Pittman LLP;
30. Dykema Gossett PLLC;
31. K&L Gates LLP;
32. Wilson Sonsini Goodrich & Rosati LLP;
33. Sonnenschein Nath & Rosenthal LLP;
34. Dow Lohnes PLLC;
35. Bryan Cave LLP;
36. Clifford Chance US LLP;
37. Cadwalader, Wickersham & Taft LLP;
38. Boies, Schiller & Flexner LLP;
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- 42. King & Spalding LLP;
- 43. Hughes Hubbard & Reed LLP;
- 44. Greenberg Traurig LLP;
- 45. Weil, Gotshal & Manges LLP; and
- 46. Dewey & LeBoeuf LLP.



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INTEREST OF *AMICI CURIAE*

DRI—The Voice of the Defense Bar (“DRI”) is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of the defense attorney, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient and—where national issues are involved—consistent.

The *amici* law firms, as well as DRI’s members therein, represent some of the most diverse practitioners in the national legal community. Attorneys at law firms routinely advise clients on complex, sensitive legal issues relating to regulatory compliance, high-stakes litigation, and commercial transactions. These attorneys regularly consult in-house counsel at their respective firms to assist with legal and ethical compliance and to provide the best possible representation for their clients. Therefore, these firms have an interest in ensuring that the attorney-client privilege applies to communications between attorneys and in-house counsel—including matters relating to current clients.

SUMMARY OF ARGUMENT

This appeal presents an issue of national impact and first impression for this or any other circuit—the extent to which the attorney-client privilege protects communications between a law firm and its in-house counsel regarding a current client. Those communications should be protected from discovery, especially where, as here, the law firm timely disclosed its conclusion that a conflict had arisen. Numerous courts, including the Ninth Circuit Court of Appeals, have held that internal law firm communications are protected by the attorney-client privilege.¹ Other courts have added that the privilege for internal law firm communications applies when invoked against former clients.² However, a handful of district courts, including the court below, have followed a judicially-created exception and ruled that a firm cannot assert the privilege against *current* clients, because in-house consultation “implicates or creates a conflict between the law firm’s fiduciary duties to itself and its duties to the client seeking to discover

¹ See *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996) (communications protected against United States in government investigation); *Hertzog, Calamari & Gleason v. Prudential Ins. Co. of Am.*, 850 F. Supp. 255 (S.D.N.Y. 1994) (communications protected against adversary in litigation).

² *Nesse v. Pittman*, 206 F.R.D. 325 (D.D.C. 2002); *Lama Holding Co. v. Shearman & Sterling*, No. 89 Civ. 3639, 1991 U.S. Dist. LEXIS 7987 (S.D.N.Y. June 14, 1991).

the communications.”³ These cases, however, undermine the longstanding objectives of the attorney-client privilege, ignore critical distinctions in the rules governing the existence and imputation of conflicts, impede a lawyer’s ability to obtain advice regarding ethical and other questions that may arise during the representation, and represent problematic judicial policy.

The purposes underlying the attorney-client privilege—to encourage open communication and full disclosure on sensitive legal issues—apply fully to internal law firm consultations regarding existing clients. Consultations with in-house counsel on matters affecting current clients often will be necessary to provide attorneys with guidance on complex legal and ethical compliance issues; to evaluate how best to remedy problems that arise during a representation; and to identify and respond to conflict-related questions. Without a well-defined privilege, attorneys will be deterred from seeking sound legal and ethical advice. The interests of clients (and our judicial system itself) will suffer as well, as attorneys inevitably choose to forego advice or withdraw from a matter rather than face uncertain exposure for malpractice or other sanctions based on their effort to comply with applicable rules by seeking legal advice.

³ Louisiana law applies to this case. However, because other courts have looked to different jurisdictions for guidance, this brief does so as well.

The district court cases that have found the privilege inapplicable against current clients have erred by importing a controversial “fiduciary exception” from other areas of the law. Those cases reason that a supposed “conflict” between a law firm’s duties to the client and duties to itself somehow “vitiat[e]s” the privilege.⁴ The cases, however, conflate the critical distinction between in-house counsel’s duties to the firm and a separate individual attorney’s duties to a client. The cases also conflict with many authorities that have concluded it is *not* a conflict for a firm’s lawyers to consult in-house counsel concerning current clients.

The district court’s rule also has many adverse policy consequences: future plaintiffs may seek—erroneously—to apply the holding to communications involving former clients and communications involving a law firm’s outside (as contrasted with in-house) counsel. The district court’s reasoning could leave law firms with no option but to withdraw from a representation irrespective of the client’s preferences. Its reasoning also disserves lawyers who seek to understand their disclosure obligations under laws like Sarbanes-Oxley.

As the first court of appeals to confront this issue, this Court should reject the district court’s blanket application of the “fiduciary exception” and hold that

⁴ *Koen Book Distributors v. Powell, Trachtman, Carrle, Bowman & Lombardo, P.C.*, 212 F.R.D. 283, 285 (E.D. Pa. 2002).

the attorney-client privilege generally applies to all internal law firm communications with the firm's counsel, even those concerning current clients.

STATEMENT OF FACTS

Asset Funding Group, LLC ("Asset") alleges that its attorneys at Adams and Reese LLP ("A&R") had a conflict of interest by simultaneously representing Asset and another client, Greif, Inc. and its wholly-owned subsidiary (collectively "Greif"), in certain bankruptcy proceedings. Asset had purchased and leased back several properties from the debtor, Evans Industries, Inc. ("Evans"), under the terms and conditions of a Master Lease Agreement. R. Doc. No. 213, Amended Complaint ¶ 9. Asset alleges that it was of "paramount importance" that any purchaser of Evans's assets in bankruptcy also assume the Master Lease. *Id.* ¶ 18.

A&R received a letter from Greif, dated September 6, 2006, indicating its intent to purchase the bankrupt's assets without assuming the Master Lease, thereby giving rise to a potential conflict of interest. R. Doc. No. 285, Amended Answer ¶ 24. A&R promptly informed Asset of the potential conflict, and Asset consented orally to a waiver. *Id.* On September 14, the waiver and consent were confirmed in writing. *See* R. Doc. 44, Ex. C. The waiver expressly encouraged Asset to consult with other counsel before agreeing to the waiver.

Asset asked A&R for documents relating to any conflict check that A&R performed concerning its simultaneous representation of Asset and Greif. *See* R.

Doc. No. 123-3. A&R responded in part by providing a privilege log claiming the attorney-client privilege as to communications between the firm and in-house counsel relating to the purported conflict. *See* R. Doc. No. 123-5. A&R's in-house counsel, pursuant to firm policy, "conduct their business generally in the same manner as that of the inside general counsel of a corporation or partnership," and any communications with those attorneys "are protected under the attorney-client privilege, confidentiality, work product and any other applicable rules." R. Doc. No. 137-2. A&R's in-house attorneys did not participate in the underlying representation of Asset or Greif in the Evans bankruptcy. R. Doc. No. 210-2, Affidavit of Martin A. Stern ¶¶ 8, 10.

Asset moved to compel A&R to produce the withheld documents. *See* R. Doc. No. 123. The district court ordered A&R to disclose the communications, reasoning that the privilege did not apply because the in-house consultation created a conflict between A&R's duty to Asset and the firm's duty to itself.

ARGUMENT

The district court held that the attorney-client privilege does not apply to consultations between a firm's attorneys and in-house counsel when invoked against current clients, *i.e.*, parties who were clients of the firm at the time of the in-house communication. Because the weight of authority and the objectives underlying the attorney-client privilege support its application to protect such

communications from discovery by current clients, the district court's order should be reversed.

I. INTERNAL COMMUNICATIONS BETWEEN FIRM ATTORNEYS AND IN-HOUSE COUNSEL ARE PROTECTED FROM DISCLOSURE TO CURRENT CLIENTS.

A. It Is Well-Established That The Attorney-Client Privilege Applies To Communications Between Firm Lawyers And In-House Counsel.

The attorney-client privilege exists “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *see also Smith v. Kavanaugh, Pierson & Talley*, 513 So. 2d 1138, 1142 (La. 1987) (“Full disclosure will be promoted if the client knows that what he tells his lawyer cannot, over his objection, be extorted in court from his lawyer’s lips.”). “[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.” *Upjohn*, 449 U.S. at 390.

To further these ends, the Supreme Court recognized that the privilege must extend to communications between an in-house lawyer, acting as counsel for a corporation, and individual corporate employees. *See id.* at 394. Indeed, the Supreme Court recognized that the privilege was particularly important in the

corporate context, in light of the corporation's need to comply with a "vast and complicated array of regulatory legislation." *Id.* at 392.

As many courts have similarly recognized, communications between attorneys for a law firm and in-house counsel are privileged. In *United States v. Rowe*, 96 F.3d 1294 (9th Cir. 1996), for example, the only federal court of appeals decision to address the internal law firm privilege, the Ninth Circuit held that attorneys at a law firm may function as "in-house counsel," and that their communications are protected by the privilege. *Id.* at 1296. As another court succinctly stated, "[n]o principled reason appears for denying [the] attorney-client privilege to a law partnership which elects to use a partner or associate as counsel of record[.]" *Hertzog*, 850 F. Supp. at 255.

Several courts have recognized that a law firm can invoke the attorney-client privilege against former clients. For example, in *Nesse*, the district court held that a former client could not discover internal attorneys' notes, because when an attorney "is talking to a lawyer for the organization, who has an obligation to represent that organization competently, the privilege [applies] so as to encourage that client to be as candid as possible when she speaks to the lawyer." 206 F.R.D. at 331. Similarly, in *Lama Holding*, the court held that because "[i]t is undisputed that an attorney-client relationship can exist within a law firm," a firm need not produce timesheets to a former client that reflected conversations between the

firm's attorneys and in-house counsel. 1991 U.S. Dist. LEXIS 7987, at *3. The reasoning of these cases applies equally to the communications that A&R has withheld from Asset in this case.

B. The Existence Of A Purported "Conflict" With A Current Client Does Not Vitate The Privilege.

"Although law firms' ability to assert the attorney-client privilege with respect to communications with firm lawyers serving as loss prevention counsel or general counsel is well-settled, courts recently have taken aggressive and misguided approaches to finding that the privilege has been waived in cases where the firm is adverse to a current client." D. Richmond & W. Freivogel, *The Attorney-Client Privilege and Work Product in the Post-Enron Era*, at 23 (2001), at <http://www.abanet.org/buslaw/newsletter/0027/materials/11.pdf>. Asset takes the same "aggressive and misguided" approach here. Asset claims that the reasoning of cases like *Rowe*, *Hertzog*, and the "former client" cases should not apply when a law firm asserts the privilege against the current client of a small subset of the firm's attorneys.

Asset is mistaken. Under *Upjohn*, *Rowe*, and similar cases, there is no reason why the existence of the privilege should turn on the identity of the party who may request the information in future litigation. Rather, as the Supreme Court noted in *Upjohn*,

if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

449 U.S. at 393. Similarly, in *Nesse*, the court stated that “[t]he privilege depends on the certainty that the more likely the disclosure, the less likely the candor. If the privilege turns on the subsequent use made of the information, however, that certainty disappears[.]” 206 F.R.D. at 331.

Despite this weight of authority, the district court ordered A&R to disclose its in-house privileged communications to Asset. The district court reasoned that “a law firm’s communication with in house counsel is not protected by the attorney client privilege if the communication implicates or creates a conflict between the law firm’s fiduciary duties to itself and its duties to the client seeking to discover the communication.” *Asset Funding Group, LLC v. Adams & Reese, LLP*, No. 07-2965, 2009 U.S. Dist. LEXIS 48420, at *4 (E.D. La. June 4, 2009) (quoting *In re Sunrise Secs. Litig.*, 130 F.R.D. 560, 597 (E.D. Pa. 1989)). This “fiduciary exception” to the attorney-client privilege, which *In re Sunrise* uncritically imported from the shareholder/corporation context, has subsequently been adopted

without meaningful analysis by a handful of other district courts.⁵ Applying a “fiduciary exception” here, however, would undermine the purposes of the in-house privilege recognized in cases like *Rowe*, and would confuse the distinct roles of in-house counsel and the attorneys at a law firm who actually represent the client. This Court should reject the reasoning of *In re Sunrise* and its progeny.

1. Consultation With In-House Counsel Does Not Create A Conflict Of Interest.

In re Sunrise and its progeny were wrongly decided because those cases assumed, incorrectly, that consulting in-house attorneys about matters affecting client representation “implicates or creates a conflict” between the law firm’s duties to the client and the firm’s duties to itself. *In re Sunrise*, 130 F.R.D. at 597. On the contrary, consultation initiated by an attorney seeking a greater

⁵ See *Koen Book*, 212 F.R.D. at 284-85 (quoting *In re Sunrise*); *Bank Brussels Lambert v. Credit Lyonnais (Suisse)*, 220 F. Supp. 2d 283, 287 (S.D.N.Y. 2002) (same); *Burns v. Hale & Dorr LLP*, 242 F.R.D. 170, 172 (D. Mass. 2007) (relying on *Bank Brussels* and *Koen Book*). Two other cases that Asset relies on leave open the possibility that some in-house consultations, even when relating to the representation of current clients, could remain privileged. See *Thelen Reid & Priest LLP v. Marland*, No. C 06-2071 VRW, 2007 WL 578989, at *7 (N.D. Cal. Feb. 21, 2007); *SonicBlue Claims LLC v. Portside Growth & Opportunity Fund (In re SonicBlue Inc.)*, Adv. No. 07-5082, 2008 Bankr. LEXIS 181, at *31, 34 (Bankr. N.D. Cal. Jan. 18, 2008). One state appellate court also has addressed the issue without ruling on it; instead, the court remanded the issue to the trial court with minimal guidance. See *VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866, 878-79 (Wash. Ct. App. 2005).

understanding of his or her professional obligations causes no inherent conflict with the duties that the attorney owes to the client.

The New York State Bar Association issued a meticulously crafted opinion that rejected the premise of those cases that consultation with in-house counsel creates a conflict of interest. *See* N.Y. Ethics Op. 789, 2005 WL 3046319, at ¶ 4 (Oct. 26, 2005). The Bar Association reasoned that

[a] lawyer's interest in carrying out the ethical obligations imposed by the Code is not an interest extraneous to the representation of the client. It is inherent in that representation and a required part of the work in carrying out the representation. . . . It is too much a part of the fabric and tradition of legal practice to require specific disclosure and consent.

Id. ¶ 12. Therefore, “[a] law firm may form an attorney-client relationship with one or more of its own lawyers to receive advice on matters of professional responsibility concerning ongoing client representation(s), including on matters implicating the client’s interests, without thereby creating an impermissible conflict between the law firm and the affected client(s).” *See id.* at p. 1 (Digest). This is a fundamental principle that bears repeating: the procurement of legal advice from other lawyers within the law firm does not automatically create a conflict with the representation of the existing client. Rather, the “carrying out [of] ethical obligations” by the attorney seeking the advice actually benefits the interests of the client and therefore should not be discouraged by the courts.

Similarly, the Restatement (Third) of the Law Governing Lawyers rejects the “conflict” theory by concluding that a law firm ought to be able to assert the attorney-client privilege against existing clients:

[a] lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing . . . the firm’s possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved.

Restatement (Third) of the Law Governing Lawyers § 46 cmt. c; *see also* Ill. Advisory Ethics Op. 94-13, 1995 WL 874715, at *4 (Jan. 1995) (quoting the Restatement).

The district court cases that have recognized a “fiduciary exception” in this context simply assumed that in-house consultation concerning existing clients creates a conflict of interest. Because that premise is mistaken, the conclusion in those cases that the conflict vitiates the privilege is mistaken as well.

2. Even Assuming A Conflict Existed, One Attorney’s Conflict Should Not Automatically Be Imputed To The Law Firm As A Whole.

Even if it were true that in-house consultation creates a conflict between individual attorneys and their client, it does not follow that the conflict should be imputed to the firm as a whole—the holder of the privilege. The court in *In re Sunrise*, after acknowledging that there was no prior on-point authority concerning

the privilege's application regarding current clients, relied heavily on *Valente v. PepsiCo, Inc.*, 68 F.R.D. 361 (D. Del. 1975)—a case denying the privilege to corporations in suits brought by minority shareholders. In *Valente*, the court held that Pepsi's general counsel could not assert the privilege against the shareholders because "he owed separate fiduciary obligations to two separate entities and their interests," *i.e.*, the corporation and the shareholders. 68 F.R.D. at 368 (relying on *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970)).

Garner and *Valente* are inapplicable here. *Valente* involved a conflict between a fiduciary's duty to a third party (*i.e.*, a shareholder), and the *same* fiduciary's duty to the corporation. By contrast, in-house counsel at A&R, who represented the firm, were *not the same* attorneys who represented Asset or Greif; rather, in-house counsel functioned solely as attorneys for the firm and played no role in the underlying bankruptcy proceedings. See R. Doc. No. 210-2, Affidavit of Martin A. Stern ¶¶ 8, 10. Indeed, this critical fact distinguishes this case from *In re Sunrise*, where there was overlap between the individuals acting as in-house counsel and attorneys for the outside client. *In re Sunrise*, 130 F.R.D. at 572 n.35. Because the attorneys who represented A&R did not represent—and owed no direct duties to—Asset, this Court should not import the *Garner/Valente* "fiduciary exception" here. See William T. Barker, *Law Firm In-House Attorney-Client Privilege Vis-à-Vis Current Clients*, 70 Def. Couns. J. 467 (2003).

In short, *In re Sunrise* is both distinguishable on its facts and analytically flawed. Because it ignored the separate roles played by in-house counsel and individual attorneys for an outside client, it is unpersuasive, as are the cases that rely on it. In effect, those cases operate from the unsupported premise that whenever a conflict affects a particular attorney at a law firm, that conflict should be imputed to the entire firm.

The imputation of conflicts, however, is not always automatic, and there are sound reasons not to impute a conflict here. First, imputation would unduly penalize A&R, the holder of the privilege, for the putative failure of individual attorneys to avoid a conflict of interest. The case of *Eureka Investment Corp., N.V. v. Chicago Title Insurance Co.*, 743 F.2d 932 (D.C. Cir. 1984), provides a useful comparison.

In *Eureka*, a law firm represented an insured concerning a potential claim against its insurer, even though the firm was, at the same time, jointly defending both parties against third-party claims. Despite the existence of a potential conflict, the court denied the insured access to the insurer's privileged communications, because "counsel's failure to avoid a conflict of interest should not deprive the client of the privilege." *Id.* at 938. In reaching its conclusion, the court cited Wigmore's principle that "[t]he privilege, being the client's, should not

be defeated solely because the attorney's conduct was ethically questionable." *See id.* (relying on 8 J. Wigmore, Evidence § 2312 at 608).

By analogy, this principle ought to apply here, where individual attorneys consult in-house counsel concerning potential conflicts of interest that arise during the attorneys' practice. As in *Eureka*, a particular attorney's role in representing a client should not prevent the firm from obtaining privileged advice concerning, for example, the existence and extent of a conflict, the firm's potential liability (e.g., where prompt insurance notification obligations are implicated),⁶ or the firm's disclosure obligations to third parties based on the client's conduct.

Second, imputation could disserve the client when a law firm consults in-house counsel concerning issues of possible legal or ethical violations by an individual lawyer. Absent the availability of privileged advice, law firms will be faced with uncertain exposure in malpractice claims or other professional discipline, and as a result may be forced to forego needed advice. In some instances, this may lead lawyers and firms to withdraw from representations altogether to permit this internal dialogue. *See* Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 Notre Dame L. Rev. 1721, 1747 (2005). In addition, an

⁶ *See generally Travelers Ins. Co. v. Superior Court*, 143 Cal. App. 3d 436 (1983).

attorney's duty of loyalty is not typically implicated when a law firm seeks advice about actual or potential claims that a client may have against the firm or with respect to disclosure obligations. *See id.* at 1748.

Third, imputation is not necessary to protect clients from the dangers posed by potential conflicts of interest. Rather, clients will be adequately protected as long as in-house counsel do not participate in the underlying representation, and attorneys comply with their duty of candor by promptly disclosing the existence of the conflict, once it becomes apparent. In this case, for example, A&R's in-house counsel did not participate in the representation of either Asset or Greif, and A&R promptly disclosed the potential conflict to Asset once it received a letter from Greif taking a position potentially adverse to Asset.

To be sure, one attorney's conflict may be imputed to other attorneys at the firm, absent client consent. *See* La. Rules of Prof'l Conduct R. 1.10. But this rule is not absolute, and should not be applied in situations based on a judicially-crafted "fiduciary exception" like the one *sub judice*. For example, former government attorneys entering private practice may be screened from representations that otherwise present a potential conflict. *See id.* R. 1.11(b). Likewise, at least sixteen other states have adopted an additional exception that allows for screening in cases of lateral transfers between law firms. *See* Chambliss, *Scope of In-Firm Privilege, supra*, at 1746-47 (collecting authorities). A conflicts-imputation

doctrine that blindly and categorically vitiates the attorney-client privilege would not serve the interests of either attorneys or clients in this context.

3. This Court Should Not Recognize A Controversial
“Fiduciary Exception.”

Finally, the principle underlying the *In re Sunrise* line of cases—that in-house consultation involving a current client creates a conflict of interest, and that conflict “vitiates” the privilege, *Koen Book*, 212 F.R.D. at 285—derives from a controversial “fiduciary exception” to the attorney-client privilege that has been applied inconsistently in other areas of the law. It should not extend to “sacred” communications between a law firm and its in-house counsel. *See United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997).

It is true that some courts have refused to apply the attorney-client privilege when a fiduciary’s assertion of the privilege would violate its duties to a beneficiary.⁷ Other courts, however—including the highest court of Louisiana’s neighbor, Texas—have refused to recognize such an exception, in part because to do so would undermine the policies of the attorney-client privilege. *See, e.g., Huie*

⁷ Compare *In re Long Island Lighting Co.*, 129 F.3d 268, 271-72 (2d Cir. 1997) (“an employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration”) with *Wachtel v. Health Net, Inc.*, 482 F.3d 225, 233 (3d Cir. 2007) (refusing to apply “fiduciary exception” to insurance company sued under ERISA) and *Fortier v. Principal Life Ins. Co.*, No. 5:08-CV-5-D(3), 2008 U.S. Dist. LEXIS 43108 (E.D.N.C. June 2, 2008) (same).

v. *DeShazo*, 922 S.W.2d 920, 924 (Tex. 1995) (“The attorney-client privilege serves the same important purpose in the trustee-attorney relationship as it does in other attorney-client relationships.”); *Wells Fargo v. Superior Court*, 990 P.2d 591, 595-97 (Cal. 1997).⁸ As the Texas Supreme Court held in *Huie*:

A trustee must be able to consult freely with his or her attorney to obtain the best possible legal guidance. Without the privilege, trustees might be inclined to forsake legal advice, thus adversely affecting the trust, as disappointed beneficiaries could later pore over the attorney-client communications in second-guessing the trustee’s actions. Alternatively, trustees might feel compelled to blindly follow counsel’s advice, ignoring their own judgment and experience.

922 S.W.2d at 924; see also *Spinner v. Nutt*, 631 N.E.2d 542, 544-45 (Mass. 1994) (holding that attorneys for a trustee do not represent or owe fiduciary duties to beneficiaries of the trust). The Ninth Circuit has recognized as well that the attorney-client privilege is not subordinate to an expansive view of the fiduciary exception: “where a fiduciary seeks legal advice for her own protection, the core purposes of the attorney-client privilege are seriously implicated and should trump

⁸ See also *In re Beville, Bresler, et al.*, 805 F.2d 120 (3d Cir. 1986) (rejecting claim for privileged documents in fiduciary context of director/corporation); *In re Grand Jury Proceedings*, 156 F.3d 1038 (10th Cir. 1998) (same); *Travelers Ins. Co. v. Superior Court*, 143 Cal. App. 3d 436 (1983) (rejecting client’s demand for privileged documents between attorney and malpractice carrier); *Aetna Casualty & Surety Co. v. Superior Court*, 153 Cal. App. 3d 467 (1984) (rejecting client/insured’s demand for privileged documents between insured’s counsel and carrier).

the beneficiaries' general right to inspect documents relating to plan administration." *United States v. Mett*, 178 F.3d 1058, 1065 (9th Cir. 1999).

The same reasoning applies to circumstances involving attorneys and existing clients. The ability of in-house counsel to provide guidance on difficult legal and ethical issues concerning current clients, under the protective shield of the attorney-client privilege, ultimately ensures that the attorney provides the client with the best possible representation, upholds the integrity of the judicial process, and complies with applicable law. Confidentiality ensures that in-house counsel receives all information necessary to render the best possible advice. A "fiduciary exception" would make effective consultation very difficult, if not impossible.⁹

Even if a "fiduciary exception" did apply, the case law confirms that the exception does not extend to every document created by a fiduciary. Documents relating to fiduciary acts, such as the administration of a trust, may be discoverable, but documents relating to a fiduciary's actual or potential liability to a beneficiary are not. *See, e.g., Wachtel*, 482 F.3d at 233 ("a fiduciary, seeking the

⁹ Compare *Thelen Reid*, 2007 WL 578989, at *7 (noting that "[a] rule requiring disclosure of all communications relating to a client would dissuade attorneys from referring ethical problems to other lawyers, thereby undermining conformity with ethical obligations") with *Bank Brussels*, 220 F. Supp. 2d at 288 (concluding (impractically and unrealistically) that a law firm "can still perform its responsibilities under the Code of Professional Responsibility—it just is not protected by the attorney-client privilege").

advice of counsel for its own personal defense in contemplation of adversarial proceedings against its beneficiaries, retains the attorney-client privilege”); *Wells Fargo*, 990 P.2d at 595-97.

For these reasons, this Court should decline the invitation to recognize or apply a “fiduciary exception” here. *See Mett*, 178 F.3d at 1065 (noting that “where attorney-client privilege is concerned, [even] hard cases should be resolved in favor of the privilege, not in favor of disclosure”).

C. *The “Common Interest” Doctrine, Which Is A Critical Analytical Foundation To The “Fiduciary Exception” Theory, Is Inapplicable To Cases Involving An Alleged Conflict Of Interest.*

The other doctrine often invoked in this context, the “common interest” doctrine, likewise is inapplicable to situations such as the one presented here. Invoking the “common interest” doctrine, the court in *Koen Book* stated:

It is a common, universally recognized exception to the attorney-client privilege, that where an attorney serves two clients having common interest and each party communicates to the attorney, the communications are not privileged in a subsequent controversy between the two.

212 F.R.D. at 285 (internal quotation marks omitted).

First, analytically, to state the argument is to refute it. It is simply inaccurate to suggest that the law firm and the current client, with respect to the communications claimed to be privileged, simultaneously have both a conflict and a common interest. This alleged conflict is irreconcilable with any theory that

Asset and A&R shared a “common interest” with respect to the requested documents.¹⁰

Second, “a law firm’s in-house general counsel or ethics counsel should have as his sole client the law firm, unless he is also responsible for the representation of the firm’s client that has turned against it.” Douglas R. Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 Syracuse L. Rev. 69, 100 (2004). As already noted, A&R’s in-house counsel represented only A&R in this case, not Asset. *See supra* p. 6. Therefore, “[t]here is no co-client or joint client relationship on which to premise a common interest exception.” Richmond, *supra*, at 100.

Third, the common-interest doctrine is technically not an “exception” to the attorney-client privilege, as *Koen Book* and other authorities sometimes refer to it. Rather, it is a defense to a waiver argument, *i.e.*, when a party seeking documents claims that the privilege has been waived by disclosure to third parties, the putative

¹⁰ *Koen Book* committed precisely this error. After discussing the “common interest” doctrine (erroneously referred to as an “exception”), the district court proceeded to conduct a *conflicts* analysis to determine whether in-house communications should be disclosed to an outside client. *See* 212 F.R.D. at 285. The district court did not acknowledge the contradiction between the two theories or explain how two clients that supposedly share a “common interest” can also simultaneously be in conflict. *See id.* For that reason alone, this Court should reject its reasoning.

privilege-holder can respond that it shares a “common interest” with the third parties, and therefore no waiver occurred. *See, e.g., In re Sealed Case*, 676 F.2d 793, 817 (D.C. Cir. 1982) (internal quotation marks omitted); La. Code Evid. Ann. Art. 506(B)(3) (2009). The “common interest” doctrine is *not* an independent basis for demanding that a party produce documents in the possession of another party.

Fourth, the case law confirms that the “common interest” doctrine cannot support the “fiduciary exception.” In *Eureka Savings*, as described above, an insurer sought privileged documents created in the course of a law firm’s representation of its insured, relating to a potential claim that the insured had against the insurer. 743 F.2d at 936. Besides arguing a “conflicts” theory, the insurer separately argued that it had a “common interest” with the insured because the firm was jointly representing both parties in related claims brought by third parties. *Id.* The D.C. Circuit found there was no “common interest” with respect to the requested documents, because the doctrine “does not apply to matters known at the time of communication not to be in the common interest of the attorney’s two clients.” *Id.* at 937.

Similarly, in *Wells Fargo*, the California Supreme Court upheld the applicability of the attorney-client privilege between a trustee and his counsel, in response to a potential claim by the beneficiary, *even though* the Court recognized

“the distinction between a trustee consulting an attorney as trustee to further the beneficiaries’ interests, and a trustee consulting an attorney in his personal capacity to defend against a claim by the beneficiaries.” 990 P.2d at 597.

Under *Eureka Savings* and *Wells Fargo*, such communications do not relate to a matter on which Asset and A&R share a “common interest.” The “common interest” doctrine therefore is inapplicable; and hence its foundational support for the “fiduciary exception” likewise is inapplicable.

II. ASSET’S PROPOSED RULE WOULD UNDERMINE THE POLICIES OF THE ATTORNEY-CLIENT PRIVILEGE.

To deny the attorney-client privilege where a firm’s lawyers consult with in-house counsel regarding a current client not only would run counter to the weight of legal authority and create bad law; it also would promote bad policy for attorneys, clients, and the legal system as a whole.

In recent years, attorneys have faced an increasingly complex array of legal and ethical duties arising from complicated regulatory regimes, changes in rules of professional conduct, and heightened disclosure obligations under Sarbanes-Oxley and similar legislation. In order to guide attorneys on complex ethical issues and assist them in reaching the right decision, in-house counsel have become fixtures at

law firms.¹¹ Indeed, many law firms have created general counsel positions and formed professional responsibility committees. Specialization among attorneys has only increased the importance of these outlets, especially with the growth of law firms and the increasingly complex representations they undertake. As a result, the attorney-client privilege is critical to ensuring that attorneys receive the best possible advice on complicated legal and ethical issues.

In-house counsel offer attorneys and clients multiple advantages. For example, in-house attorneys can help advise a firm's attorneys on legal and ethical compliance in response to client behavior, assist firms to correct any mistakes that may occur in a timely fashion to alleviate harm to clients, and help firms navigate and reconcile a complex web of client and public disclosure obligations. *See generally* Chambliss, *Scope of In-Firm Privilege, supra*, at 1722-24. In-house counsel also can benefit clients by providing attorneys with ready access to advice concerning the permissibility of attorneys' fees arrangements and the existence of potential conflicts. *See id.*

¹¹ *See* Chambliss, *Scope of In-Firm Privilege, supra*, at 1721 (“[L]aw firms increasingly are hiring their own in-house counsel to provide day-to-day ethics advice, monitor internal policies and procedures, and respond to potential and actual malpractice claims against the firm.”).

Asset's proposed rule, however, which would eviscerate the in-house counsel privilege with respect to current clients, could seriously compromise the benefits that in-house counsel provide to both clients and law firms. If the attorney-client privilege were unavailable in existing-client cases, firms may stop seeking legal advice, or else blindly rely on it without the benefit of internal dialogue, knowing that the in-house communications would be discoverable (and the firm's judgment second-guessed) in any future litigation. *See id.* at 1747; *Huie*, 922 S.W.2d at 924. Given trends of increased specialization, internal consultations are even more useful. As a result, the proposed rule not only disserves attorneys, but also clients, who may find themselves relying on incomplete (or no) legal advice concerning complex ethical issues, or find that their attorneys must cease representation rather than risk uncertain liability.

Furthermore, because Asset's rule lacks meaningful limits, it also could lead to undesirable results in future cases. First, future plaintiffs may try to argue that the rule could be applied equally to former clients—a result at odds with well-established precedent. The district court's ruling essentially is that the existence of a conflict of interest vitiates the attorney-client privilege. The Louisiana Rules, however, provide that a conflict may arise with a *former* client if a matter is “substantially related” to the former representation. *See* La. Rules of Prof'l Conduct R. 1.9.

Accordingly, under Asset's theory, plaintiffs may try to claim—erroneously—that a law firm may be prevented from protecting privileged information from discovery even in conflicts with *former* clients (a result that cases such as *Nesse* and *Lama Holding* explicitly reject). Their argument could be that a legal malpractice action arguably meets the definition of a “substantially related” representation. *In re Sunrise* and its progeny failed to grapple with this serious aspect of the reliance on conflicts doctrine as the *sine qua non* of whether the privilege is available.

Second, future plaintiffs may argue (erroneously) that Asset's proposed rule could apply equally to outside counsel engaged by a law firm, rather than being limited to in-house counsel. As noted above, under Asset's proposed rule, a conflict affecting one attorney at a firm may be imputed to the firm as a whole. Therefore, whether A&R employed in-house or outside counsel, the firm, as the holder of the privilege, if erroneously argued by plaintiffs, might be prevented from asserting the privilege against Asset.

Third, Asset's proposed rule could result in law firms prematurely withdrawing from representations under certain circumstances when the threat of a potential conflict arises—rather than seeking informed advice about the extent of potential liability and attempting to remediate the problem—regardless of the impact that withdrawal has on the client. For example, in *Koen Book*, the client

threatened its lawyers with malpractice two weeks before a critical court hearing—a situation that even the district court described as “unenviable.” 212 F.R.D. at 286. Nonetheless, the court reasoned that if the attorneys wanted to maintain the privilege following the threat of litigation, the attorneys either could have withdrawn from representation or sought client consent to continue it. *Id.*

Immediate withdrawal, however, is not always an available option. The Louisiana Rules do not permit withdrawal where it could have a “material adverse effect” on a client’s interests. *See* La. Rules of Prof’l Conduct R. 1.16. It is not always possible to locate new counsel and bring them up to speed in time to make withdrawal a viable option. And district courts have disparate views regarding their dockets and thus when they will permit withdrawal. Therefore, in cases where clients refuse to consent, Asset’s proposed rule puts law firms in the untenable position of having to forego needed legal advice or else to withdraw immediately from representation and risk additional claims of malpractice or client abandonment, as well as the wrath of the court.

Fourth, Asset’s proposed rule would inhibit a law firm from complying with applicable ethical rules. Clients often come to lawyers with complex problems related to compliance with substantive or ethical regulations and guidelines and strong views about a desired course of action. In many cases, there is no bright-line rule for guidance, and the firm must seek professional advice for itself,

separate from the advice to be provided by other firm lawyers to their client. Without the assurance of confidentiality guaranteed by the attorney-client privilege, attorneys will be encouraged to make uninformed decisions, which can only be harmful to clients. By vitiating the privilege, Asset's proposed rule discourages attorneys from obtaining experienced advice on ethical issues concerning their existing clients. *See, e.g.,* Benjamin P. Cooper, *The Lawyer's Duty to Inform His Client of His Own Malpractice*, 61 Baylor L. Rev. 174, 207 (2009); Richmond, *Principles and Perils, supra*, at 101. If anything, attorneys should be given incentives to obtain advice concerning their obligations with respect to clients, as this advice benefits the clients' interests by mitigating the risk for error or other harmful consequences.

Fifth, Asset's proposed rule would inhibit a law firm from complying with applicable disclosure rules, such as those contained in the professional rules or statutes like Sarbanes-Oxley. The policy underlying such disclosure requirements suggests that attorneys should serve a greater public function by reporting illegal or unethical practices that occur in the corporate arena.¹² The complicated nuances of those reporting obligations, including issues associated with "noisy withdrawals"

¹² *See generally* S. Fraidin & L. Muttperl, *Advice for Lawyers: Navigating the New Realm of Federal Regulation of Legal Ethics*, 72 U. Cin. L. Rev. 609 (2003).

and whistleblower obligations, require skilled advice from experienced counsel.¹³ By creating a substantial disincentive for attorneys to obtain legal advice in these areas, Asset's proposed rule undermines the goals of the legislation, is detrimental to clients, and is unfair to lawyers.

* * *

These negative policy implications reinforce the conclusion that Asset's proposed rule is analytically flawed and should not be applied here. The proposed "fiduciary exception" ignores critical distinctions in rules governing privileges, fiduciary duties, conflicts and imputation, and professional responsibility. It would also deprive and isolate lawyers—among all businesses and professions in the country—of the right to consult in-house counsel of their choice. By rejecting Asset's proposed sweeping exception to the attorney-client privilege, this Court can avert these harmful consequences, while continuing to provide reasonable protections to clients, and thereby halt the proliferation of district court cases that improperly have undermined the "sacred" attorney-client privilege.


¹³ See generally *id.*; D. Robertson & A. Tortora, *Reporting Requirements for Lawyers Under Sarbanes-Oxley: Has Congress Really Changed Anything?*, 16 Geo. J. Legal Ethics 785 (2003).

CONCLUSION

For all of the foregoing reasons, the district court's order granting Asset's motion to compel should be reversed.

Date: September 17, 2009

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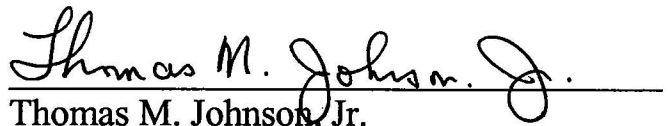
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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(a)(7)

I hereby certify the following:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,927 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in Times New Roman 14-point font.



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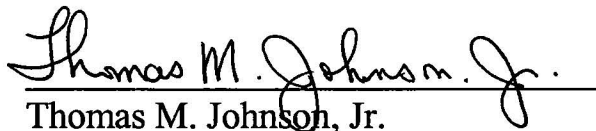
CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of September 2009, I caused to be served an original and seven copies of the foregoing amicus brief on the Clerk of Court, and two copies of the foregoing amicus brief on all counsel of record for this proceeding, in paper and electronic form, by overnight commercial carrier, properly addressed as follows:

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